No. 19-1134

In The
Supreme Court of the United States

LONNY E. BALEY, ET AL.,

Petitioners,

v.

UNITED STATES, PACIFIC COAST FEDERATION OF FISHERMEN'S ASSOCIATIONS,

Respondents.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Federal Circuit

BRIEF *AMICUS CURIAE* OF THE MIDDLE RIO GRANDE CONSERVANCY DISTRICT IN SUPPORT OF PETITIONERS

CHARLES T. DUMARS, ESQ.
Counsel of Record
TANYA L. SCOTT, ESQ.
LAW & RESOURCE PLANNING ASSOCIATES, P.C.
201 Third Street NW, Suite 1750
Albuquerque, NM 87102
Phone: (505) 346-0998
ctd@lrpa-usa.com
tls@lrpa-usa.com

PAULA I. FORNEY, ESQ.
WIGGINS, WILLIAMS & WIGGINS, P.C.
1803 Rio Grande NW
Albuquerque, NM 87104
Phone: (505) 764-8400
pforney@wwwlaw.us

Attorneys for Amicus Curiae

COCKLE LEGAL BRIEFS (800) 225-6964
WWW.COCKLELEGALBRIEFS.COM

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INTERESTS OF THE *AMICUS CURIAE*

As *Amicus Curiae* in support of Petitioners Lonny E. Baley, *et al.*, the Middle Rio Grande Conservancy District's ("MRGCD")[1] interest in the present appeal derives from its experience with endangered species litigation and its understanding of potential negative consequences if the federal government bureaucracy can act unilaterally and mismanage water resources contrary to state and federal laws. Water mismanagement can be disastrous to farmers and fatal to endangered species.

The Federal Circuit's decision is contrary to both law and the Prior Appropriation Doctrine embedded in Western water law. Its decision rests upon acceptance of a federal agency decision quantifying tribal water rights completely outside the mechanisms of Western water rights law. If allowed to stand, it will disrupt hundreds of ongoing settlement negotiations in water rights adjudication suits and have devastating effects on endangered species, Indian tribes, and non-Indian water users across the nation. And, as argued below, there was an actual taking of water from the farmers in this case and they are entitled to compensation.

The MRGCD is a political subdivision of the State of New Mexico. It delivers water to irrigators within

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[1] Counsel for MRGCD authored the Brief in whole and no other parties contributed monetarily to preparation of the Brief. *See* Sup. Ct. R. 37.6. All parties have been timely notified of the submission of this Brief. All parties have provided written consent for MRGCD's filing of this Brief. *See* Sup. Ct. R. 37.2(a).

the Middle Rio Grande Valley stretching over 160 river miles, through 1,200 miles of ditches. It coordinates closely with the United States Bureau of Reclamation ("USBOR") in releasing water to irrigators. Its boundaries encompass six Indian Pueblos who work closely with the MRGCD in water deliveries. The water rights of its Indian irrigators were quantified by Congress under the equivalent of the Federal Reserved Water Rights Doctrine. Non-Indian irrigators and the MRGCD itself hold water rights under New Mexico state law.

The Rio Grande is the source of the irrigation water delivered by the MRGCD. It provides habitat to the endangered Rio Grande silvery minnow ("RGSM"), which is protected through a Biological Opinion issued by the United States Fish and Wildlife Service ("USFWS"). Through the Biological Opinion, the MRGCD has assisted in regulation of flow releases and development of instream and bank morphology and other actions that avoid jeopardy for the RGSM.

At approximately the same time that USBOR denied water to the Klamath River irrigators ("Klamath Irrigators") pursuant to a USFWS Biological Opinion, the MRGCD faced a similar challenge. MRGCD irrigators were on the verge of having their headgates closed and their crops lost to protect the RGSM pursuant to the Endangered Species Act, 16 U.S.C. ch. 35, § 1531 *et seq*. ("ESA"). This conflict was repeated across the western United States in the early 2000s. However, the outcome in the Rio Grande Valley was different because the focus was on transparency and collaboration rather than unilateral action.

In the Rio Grande Valley, the first area of conflict and resolution occurred with the designation of critical habitat. The designation was made by the USFWS without evaluation under the National Environmental Policy Act of 1969, 42 U.S.C. § 4321 *et seq*., ("NEPA"). After initiation of litigation, the United States District Court ruled for the irrigators, holding that a NEPA evaluation should have been conducted. The Tenth Circuit Court of Appeals affirmed that a critical habitat designation required a NEPA evaluation, in part, because of effects on irrigation diversions.

The following year, 2002, was extraordinarily dry, leading to the USFWS' announcement that it intended to close the headgates of MRGCD farmers. The MRGCD intervened as a defendant on behalf of its irrigators and the matter was referred to mediation. *See generally Rio Grande Silvery Minnow v. Keys*, 356 F.Supp.2d 1222 (D.N.M. 2002). After initial mediation efforts failed, the trial court ruled that the USBOR had authority to close diversions to avoid injury to the species, based, *inter alia*, on a finding that the USBOR owned the works of the MRGCD.

Finally, in contrast to the Klamath situation, the USBOR conceded that even though it claimed ownership of MRGCD works, it could not deny irrigators use of their water rights. The issue was ultimately dismissed as moot, all prior decisions were vacated, and the City of Albuquerque stepped in to protect the RGSM *pendente lite* with a loan of San Juan-Chama Project water until a more permanent solution could be reached.

In 2003, the USFWS issued a new Biological Opinion. Congress took the unusual step of adding a "Minnow Rider" to other federal legislation, determining that the 2003 Biological Opinion would be adequate to meet the species' needs for ten years. Congress concluded that the parties needed time to engage in collaborative efforts to assess the needs of the species and develop a science-based solution for avoiding extirpation. While the ensuing discussions were long and arduous and debates over the scientific needs of the RGSM were intense, the result was mutual respect among all federal and local interests and a shared understanding of the RGSM's needs.

Collaboration worked in the Middle Rio Grande Valley, resulting in a 2016 Biological Opinion that finds no jeopardy to the species so long as those with control over the infrastructure on the river engage in activities that support the RGSM's survival. Providing water for the RGSM is not based upon a water right for the species, but on recognition of the extensive benefits of species preservation to the Middle Rio Grande Valley—much like the obvious benefits of the Bosque forest along the Rio Grande, birds in the flyway supported by farmers growing crops, and the extensive recreational interests that all enjoy along the river. All agree that species survival is an obligation shared by all water users within the ecosystem.

There has been an increase in institutional knowledge of the species' needs among the USFWS, the USBOR, and irrigation and conservancy districts. Through collaboration and cooperation, the MRGCD

was fortunate in avoiding an outcome like what occurred on the Klamath.

Importantly, in the Middle Rio Grande Valley, senior Pueblo water rights have been quantified based upon legal principles of federal water rights, unlike the rights of the Yurok and Hoopa tribes ("Tribes") that have been deemed in an *ad hoc* fashion to equal the quantity needed by an endangered species. The exercise of the Pueblos' senior rights in times of shortage could directly affect the non-Indian irrigators. But, a situation comparable to the Klamath Irrigators has never arisen because the Pueblos have not made a call on their rights that would shut non-Indian headgates. Rather, the Pueblos and the MRGCD work closely on a collaborative basis.[2] Even though there was federal legislation in 1928 that quantified the Pueblo water rights, there will be other issues that will need to be addressed among the MRGCD and the Pueblos through negotiations. These include, *inter alia*, Pueblos' claims to the right to access to groundwater and, for example, whether other principles of the Pueblo Water Rights Doctrine may supplement Pueblo water

[2] Similarly, collaborative partnerships to share shortages are more effective and beneficial when rights have been quantified. For example, the Jicarilla Apache Nation's water rights to the Colorado River were quantified in the 1992 Jicarilla Apache Tribe Water Rights Settlement Act. The Jicarilla Apache Nation, located in northern New Mexico and southern Colorado, is a respected leader in collaboration on the Colorado River as part of the Ten Tribes Partnership that works to advocate for tribal water rights issues in negotiations for drought contingency plans and other issues on the Colorado River.

use for other purposes. However, there is little doubt that these issues can be resolved through collaborative efforts as has been done in the past.

As noted, in the early 2000s, the USBOR was poised to close MRGCD irrigators' headgates under the authority of the ESA, exactly as occurred on the Klamath. Not for a millisecond did the U.S. District Court even consider the possibility that federal Indian water rights, unsupported by a Pueblo "call" for their water, would result in a denial of compensation to the irrigators. The issue turned on the ESA and nothing more. The U.S. District Court ruled in 2002 that if the irrigators were deprived of the use of their water, they must be compensated. *See Rio Grande Silvery Minnow v. Keys*, 356 F.Supp.2d 1222 (D.N.M. 2002), *appeal dismissed by and remanded to vacate sub nom. Rio Grande Silvery Minnow v. U.S. Bureau of Reclamation*, 601 F.3d 1096 (10th Cir. 2010). That same result should have been the outcome in the Klamath proceedings below.

SUMMARY OF ARGUMENT

Water rights in the Western United States are real property rights. Their value is determined by the right to use water in the priority assigned to them. Irrigators can only be forced to cease using this property right when, for example, there has been a determination in a water rights adjudication that irrigators must cease diverting water in favor of rights holders, including *inter alia*, Indian tribes, that have been adjudicated to

have senior rights. In this case, the USBOR closed the diversion headgates of the Klamath Irrigators without an adjudication order. In private offices, the USBOR conducted its own adjudication of flow rates necessary to protect endangered fish. The USBOR then denied water to the Klamath Irrigators, finding that their water use would decrease the river flow at the Yurok and Hoopa Reservations below the amount the USBOR had administratively adjudicated should be delivered for the endangered fish.

The Federal Circuit committed reversible error when it denied the "takings" claim of the Klamath Irrigators by holding that: a) the mere existence of Indian Tribes downstream on the river system destroyed the water rights of the Klamath Irrigators; and b) the USBOR has authority to administratively adjudicate the quantity of water required to be delivered to the Yurok and Hoopa reservations 200 miles downstream to sustain their fisheries.

ARGUMENT

I. DEEMING THE USBOR ESA DECISION A QUANTIFICATION OF TRIBAL WATER RIGHTS WILL HAVE NEGATIVE PRACTICAL EFFECTS AND STIFLES OPPORTUNITIES FOR COLLABORATIVE SOLUTIONS.

A. USBOR Quantification of Indian Federal Reserved Water Rights Without Review by a Neutral Judicial Officer Violates Due Process; Furthermore, Allowing Such a Quantification Could Severely Reduce the Reserved Water Rights Available to Indian Tribes.

Implicit in the Federal Circuit's decision is the assumption that the USBOR would be fair to the Tribes because of its trust duty. *Baley v. United States*, 943 F.3d 1312 (Fed. Cir. 2019). Therefore, allowing the USBOR to adjudicate tribal rights would necessarily result in a fair outcome for them. Case law demonstrates that this assumption is not necessarily correct.

One need look no further than the recent Ninth Circuit decision in *Navajo Nation v. U.S. Dep't of the Interior*, 876 F.3d 1144 (9th Cir. 2017). The Navajo Nation ("Nation"), in the early 1960s, attempted to assert a claim for federal reserved water rights on the mainstem of the Colorado River. The extent of the federal reserved water rights was being adjudicated by the Supreme Court in *Arizona v California*, 373 U.S. 546 (1963). The Nation's trustee, the United States Department of Interior ("USDOI"), refused to file such a claim

on the Nation's behalf. *Navajo Nation*, 876 F.3d at 1156, n.13 (describing that the USDOI limited its claim on behalf of the Nation to a tributary, which the Court declined to reach in *Arizona v. California*, 373 U.S. 546 (1963) (No. 8, Original)). The Nation attempted to file its own claim for water rights on the mainstem and USDOI successfully opposed the attempt. *Id*. No claim was filed by the Nation as a direct result of the action of its trustee. *Id*.

The Nation was of the view that the "in-house" decision of USDOI cut clearly against the interests of the Nation. *Id*. Years later, the opportunity arose to litigate the correctness of the decision in an environmental context as discussed below. *See Navajo Nation*, 876 F.3d 1144 (9th Cir. 2017).

In 2007, in the face of severe drought, USDOI and the Colorado Basin states agreed to a mechanism for sharing water shortages in the event of declining water elevations in Lake Mead. *See* Colorado River Interim Guidelines for Lower Basin Shortages and Coordinated Operations for Lake Powell and Lake Mead, 73 Fed. Reg. 19783-19892 (Apr. 11, 2008) ("Lake Mead Shortage Guidelines").

A NEPA evaluation of the Nation's federal reserved water rights claims on the Colorado was not included because the Nation had not received a specific allocation of water under the *Arizona v. California* decree. *Navajo Nation*, 876 F.3d 1144. While USDOI recognized that the Nation could receive an allocation at some point, there could be no environmental analysis

because their water rights had not yet been quantified by a court. For many years there have been attempts to settle the issue of the United States' alleged breach of trust because it did not include a claim for the Nation on the Colorado River mainstem.

However, when negotiations broke down, the Nation filed suit in federal court against the United States alleging that the Environmental Impact Statement was flawed because it did not include an analysis of their federal reserved water rights claims. *Id*. The Complaint also alleged that there had been bad faith by USDOI when it unilaterally decided not to raise any federal reserved water rights claims on the tribe's behalf in *Arizona v. California*. *Id.* at 1152.

The Arizona U.S. District Court dismissed the Complaint holding that the suit could not be brought because there had been no waiver of sovereign immunity. The Ninth Circuit affirmed in part and reversed in part. *Id.* at 1174. As to the Lake Mead Shortage Guidelines, it recited the somewhat difficult facts regarding the steadfast failure of USDOI (as trustee) to include a claim on the Colorado mainstem, but nevertheless ruled that the Nation could not challenge the Lake Mead Shortage Guidelines because its federal reserved water rights had not been adjudicated in *Arizona v. California* and remain unadjudicated. Because the amount had not yet been adjudicated their quantity was speculative and the case was not "ripe" for decision, therefore, dismissal was proper.

The case was remanded to allow the filing of a Third Amended Complaint. The Nation moved to file its Third Amended Complaint, which was opposed by USDOI. *See* Motion for Leave to File Third Amended Complaint, *Navajo Nation v. U.S. Dep't of the Interio*r, No. 3:03-cv-00507-GMS (D. Ariz. April 13, 2018) [ECF 335]. The Nation's Motion was denied by the District Court judge and the denial is currently being appealed in the Ninth Circuit. *Navajo Nation v. U.S. Dep't of the Interior*, 2019 WL 3997370 (Aug. 23, 2019) (Order denying the Nation's Motion); *Navajo Nation v. U.S. Dep't of the Interior*, No. 19-17088 (9th Cir. Feb. 26, 2020) [ECF 12].

There is no doubt that, at least from the Nation's perspective, the unilateral decision of the federal agency to refuse to assert the Nation's claim for water on the Colorado River mainstem was a breach of the trust duty owed to them. This failure to assert a claim had and continues to have a direct and significant negative impact on the Nation. While there is the possibility that the Nation could seek to reopen the decree in *Arizona v. California*, this would be a complex task.[3]

Thus, it is not axiomatic that conferring authority on the USBOR to quantify the rights of Indian tribes without due process will be to a tribe's benefit. As the

[3] All of the Colorado River water users within California argued that the United States District Court was not the proper forum, and the case, if properly brought at all, would need to be brought in the United States Supreme Court through an attempt to reopen the Decree in *Arizona v. California*, 547 U.S. 150 (2006) (consolidating prior decrees).

Navajo Nation case teaches us, there can be no assurance that the USBOR, when exercising unlimited discretion to quantify the water rights of Indian tribes and endangered species, will do so in a manner that supports the best interests of the tribes or the species.

B. Allowing USBOR Quantification of Indian Reserved Water Rights Will Have a "Chilling Effect" on Future Settlement of Indian Water Rights Claims.

Equitable settlement of Indian tribes' claims for water under a federal reserved water right is clearly preferable to litigation. Virtually all treatises and articles acknowledge this fact. The *Big Horn* cases[4] and those in Arizona[5] reflect the complexity of these processes. *See* John E. Thorson et al., *Dividing Western Waters: A Century of Adjudicating Rivers and Streams*, 8 U. DENV. WATER L. REV. 355 (2005); John E. Thorson et al., *Dividing Western Waters: A Century of Adjudicating Rivers and Streams*, Part II, 9 U. DENV. WATER

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[4] *In re Gen. Adjudication of All Rights to Use Water in the Big Horn River Sys.*, 753 P.2d 76 (Wyo. 1988), *aff'd sub nom. Wyoming v. United States*, 492 U.S. 406 (1989), *and abrogated by Vaughn v. State*, 962 P.2d 149 (Wyo. 1998); *Big Horn II*, 803 P.2d 61 (Wyo. 1990); *Big Horn III*, 835 P.2d 273 (Wyo. 1992); *Big Horn IV*, Wyoming Supreme Court Docket No. 93-48, 93-49 (Wyo. 1993); *Big Horn V*, 899 P.2d 848, 849 (Wyo. 1995); *Big Horn VI*, 48 P.3d 1040, 1043 (Wyo. 2002); *Big Horn VII*, 85 P.3d 981 (Wyo. 2004).

[5] *In re Gen. Adjudication of All Rights to Use Water in the Gila River Sys. & Source*, No. W-1, W-2, W-3, W-4 (Consolidated) (Ariz. Super. Ct. Maricopa Cty. filed Jan. 22, 2001); *In re Gen. Adjudication of All Rights to Use Water in the Little Colorado River System and Source*, CV6417 (Ariz. Super. Ct. Apache County).

L. REV. 299 (2006). The longest pending case on the federal docket is an Indian water rights case involving less than 3,000 acre-feet of water, otherwise known as the *Aamodt* Adjudication.[6] But, settlement only works if due process is afforded all parties and only if the parties themselves reach the settlement, not where a federal agency has discretion to make the decision for them.

Virtually all water adjudication cases are referred to mediation. In the negotiation process, the parties can work collaboratively and arrive at a result that optimizes the result for tribal and non-tribal water users.[7]

The water rights of the Hoopa and Yurok Tribes must be determined based upon their actual needs. *See Washington v. Washington State Commercial Passenger Fishing Vessel Assoc.*, 443 U.S. 658, 685 (1979); *Winters v. United States*, 207 U.S. 564, 575-77 (1908); *Arizona v. California*, 373 U.S. 546, 549 (1963). Conversely, the Federal Circuit concluded that the USBOR had discretion to quantify the Tribes' water rights, even though they were not parties to the case, basing

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[6] *New Mexico v. Aamodt*, No. 66-cv-06639 (D.N.M. Apr 20, 1966).

[7] According to the Congressional Research Service, settlements have been approved by Congress in 32 cases, resulting in payment of funds, development of projects and infrastructure sharing. *See* Charles Stern, Cong. Research Serv., R44148, *Indian Water Rights Settlement* (2017). The best example is the Navajo Indian Irrigation Project Settlement. *See State ex rel. State Eng'r v. United States*, No. A-1-CA-33535, 2018 WL 1616612 (N.M. Ct. App. Apr. 3, 2018).

the determination upon the flow rate required by an endangered species, rather than tribal needs. This is plain error as well as a very slippery slope. Indeed, there is no indication that the Hoopa and the Yurok concurred with this quantification. Does the decision below mean that the USBOR has discretion to quantify the rights of these tribes at a flow rate that is no more than the minimum? If the Hoopa and the Yurok seek a greater amount of flow than the USBOR concludes would harm the endangered species, are the Hoopa and Yurok capped by this decision? This Court should accept this case, if for no other reason than to answer this question.

The discretion granted the USBOR by the Federal Circuit gives the USBOR leverage that should be considered unacceptable to not only tribes and non-Indian irrigators, but also to those who seek protection of species. Most importantly, allowing the USBOR to place its thumb on the scale, whether in favor of tribes, non-Indian irrigators, or endangered species, is an unacceptable outcome, and will make balanced settlements among all these interests difficult, if not impossible, to achieve. This alone would be reason enough to reverse the decision.

C. Because the Tribes Declined to Join the Adjudication or Seek an Injunction Against Upstream Diversions 18 Years Ago, the Court of Federal Claims and Federal Circuit Had No Authority to Grant Them Relief in This Case.

The Court of Federal Claims and the affirming Federal Circuit relied on only one case, *Cappaert v. United States*, 426 U.S. 128 (1976), for the proposition that the United States had jurisdiction to quantify the Tribes' federal reserved water rights. *See Baley v. United States*, 134 Fed. Cl. 619, 670 (Fed. Cl. 2017). Ironically, that case supports the Klamath Irrigators. It holds that in an emergency, holders of federal reserved water rights can seek immediate injunctive relief in the United States District Court. The Tribes did not utilize this readily available remedy.

Cappaert illustrates that, had they acted 18 years ago, the USBOR and/or the Tribes could have protected the Tribes from diversions by the Klamath Irrigators. The record is silent as to why the Tribes and the USBOR chose not to utilize this remedy. Having waived their right to seek injunctive relief then, there is no basis for the Federal Circuit to now rely on *Cappaert* to award the Tribes injunctive relief *ex post facto*.

Cappaert was an injunctive action by the National Park Service ("NPS") against irrigators who were pumping from an aquifer hydraulically connected to a water body within an Antiquities Act site. The Supreme Court found that the Executive Order setting

aside the site had reserved sufficient water to protect the needs of the desert pupfish found in a small cavern called "Devil's Hole." The conflict arose because pumping from the aquifer was lowering water levels in Devil's Hole and the pupfish could not spawn if the level fell too much. NPS sought an injunction directly against the groundwater pumpers. The Supreme Court ruled NPS had the right to seek an injunction and ruled for it on the merits.

Unlike the USBOR in Klamath, NPS did not take the position that it could unilaterally quantify rights reserved for the pupfish. Nor did it exercise self-help by going onto the irrigators' private property to shut off their pumps. Rather, NPS complied with due process requirements and sought an injunction in federal court against the off-reservation groundwater pumping. A judge decided the merits of the case, not NPS, and only after a full trial on the pupfish's federally reserved water requirements. *Cappaert*, 426 U.S. at 141.

In *Cappaert* there was a trial. On one side was NPS representing the pupfish and on the other side were the groundwater pumpers represented by counsel. Actual proven facts were determined as to: a) the purposes of the reservation; b) the water requirements to protect the species and the purposes of the reservation; and finally c) a balancing of the equities to determine how much reduction in groundwater pumping would be required to protect the species, while protecting the livelihoods of the irrigators.

In contrast, there was no due process hearing for the Klamath Irrigators within the private offices of the USBOR. There was no burden of proof and no opportunity to contest the USBOR's unilateral decision. The USBOR forced the closing of the headgates, without any due process hearing, while threatening criminal prosecution under the ESA for those who refused. There was no trial in which either the Tribes or the non-Indian irrigators had an opportunity to present evidence as to the Tribes' Indian reserved water rights. Because there was no record made in the USBOR's offices, there is no record as to the quantity of water that would have even arrived at the reservations given the flow rate at a location more than 200 miles upstream. Nor is there evidence whether the amount that actually arrived was sufficient to support the tribal fisheries. To force the Tribes to default to a flow rate unsupported by evidence is unfair not only to the Tribes, but also to the non-Indian irrigators.

Under *Cappaert*, the Tribes and the USBOR could have sought an injunction. Had they done so, the Klamath Irrigators could have defended themselves, could have questioned the quantity allocated to the Tribes, could have argued there could have been no injury to the Tribes because of the 200 river miles between their place of use and the reservations, and could have raised all of the factual defenses available to them, including that the amount of water actually arriving at the reservation was essentially unmeasurable. More importantly, had they sought an injunction, the parties could have worked out a settlement. The remedy of

injunction was available to the Tribes, but, neither they nor their federal trustee chose to seek the injunction. This failure is fatal to the case of the United States.

The trial court conceded that no claim for violation of the Prior Appropriation Doctrine had ever been raised by the Tribes. *Baley v. United States*, 134 Fed. Cl. 619, 678 n.28 (Fed. Cl. 2017). This is because they have never been parties to any case in this matter. Yet, the "trial" within the offices of the USBOR made them "parties" and the USBOR ruled in their favor. Without any ongoing case, the actions of the USBOR in shutting headgates was not pursuant to a live case or controversy in a court, and even if it were, the matter was not "ripe," because the Tribes had not sought relief in any judicial forum against the Klamath Irrigators. The USBOR took the water from the Klamath Irrigators because they could.

D. Upholding the USBOR's Authority to Quantify Indian Reserved Water Rights Will Force Irrigators to File Suit Against the USBOR Before the USBOR Takes Unilateral Action and Closes Their Headgates. If This Remedy is Not Available to the Irrigators, They Will Have No Remedy Against the USBOR.

If the decision of the Federal Circuit is affirmed, the USBOR, even without joinder of Indian tribes, will have the absolute discretion to quantify the rights of tribes and close the headgates of non-Indian users.

Irrigators will have no choice but to "strike first" and bring injunctive actions against the USBOR to prevent the closing of headgates. However, under the McCarran Amendment, the United States is immune from suit unless suit is brought as a system-wide adjudication suit. State water administrators and tribes are both likely to oppose an adjudication. They view settlement as the best remedy. *See* C. DuMars & H. Ingram, *Congressional Quantification of Indian Reserved Water Rights: A Definitive Solution or Mirage?*, 20 NAT. RESOURCES J. 17 (1980) (arguing that a full explication of arguments on both sides of an Indian reserved water rights issue yields the best compromise result).

But, a small group of irrigators cannot sustain the cost of a multimillion-dollar stream system wide adjudication suit. The irrigators' lawsuits will likely be dismissed based upon sovereign immunity. Under this scenario, the irrigators will have no remedy and their headgates will be closed at the sole discretion of the USBOR.

This horrific scenario of a race to the courthouse, forcing water rights adjudications, or alternatively, leaving irrigators with no remedy, can only be avoided if this Court overturns the decision below and rejects the *post hoc* rationale applied by the trial court and affirmed by the Federal Circuit.

II. A COMPREHENSIVE PROCESS IS REQUIRED TO ADJUDICATE FEDERAL WATER RIGHTS AND STATE LAW GOVERNS ENFORCEMENT OF FEDERAL WATER RIGHTS.

In virtually every Western state, Indian tribes residing on lands set aside by treaty or Executive Order hold federal reserved water rights established at the time the reservation was created. Others hold rights as a function of possession of their lands from time immemorial. *Winters v. United States*, 207 U.S. 564 (1908). Created by federal law, the scope of these rights is determined based upon the intent of the United States when the reservation was created. *Arizona v California*, 373 U.S. 546, 598 (1963), *judgment entered sub nom. Arizona v. California*, 376 U.S. 340 (1964), *amended sub nom. Arizona v. California*, 383 U.S. 268 (1966), and *amended sub nom. Arizona v. California*, 466 U.S. 144 (1984). Thus, state law rules requiring beneficial use do not apply to these water rights; the quantity is determined by evaluating the intent of the federal government when the reservation was created.

However, state law procedural rules do apply to these rights. The first procedural rule is that these federal water rights are to be enforced only through the application of the Prior Appropriation Doctrine. Second, state procedural rules for enforcement of these federal rights must be followed. *See Nevada v. United States*, 463 U.S. 110, 122-25 (1983). Previous attempts to adjudicate federal reserved water rights exclusively in federal courts were cut short when Congress passed

laws establishing state courts as the first forum of choice, and, in so doing, waived the sovereign immunity of the United States in water rights adjudications. 43 U.S.C. § 666; *see also Colorado River Water Conservation Dist. v. United States*, 424 U.S. 800, 806-09 (1976); Dylan Hedden-Nicely, *The Legislative History of the McCarran Amendment: An Effort to Determine Whether Congress Intended for State Court Jurisdiction to Extend to Indian Reserved Water Rights* 46 ENVTL. L. 4 (2016). Mindful that both state substantive and procedural law should apply to water allocation, Section 8 of the Reclamation Act of 1902 states specifically that water allocation under reclamation projects shall proceed under state law. *See* 43 U.S.C. § 383.

The water rights adjudication process, whether by judicial officer or in an administrative proceeding, is comprehensive in scope. *Arizona v. California* is the most analogous to this case. *Arizona v. California*, 373 U.S. 546 (1963). There, quantification of tribal water rights along the Colorado River was pivotal. The scope of the tribes' water rights was quantified by a Special Master, and that decision was affirmed by the Supreme Court. Because these were irrigation water rights, the amount quantified was enough water to irrigate all the "practicably irrigable acres" on the reservations for current as well as future agricultural needs. *Arizona v. California*, 373 U.S. at 599. The measure of water for federal treaty reservations for fishing purposes was described in *Washington v. Washington State Commercial Passenger Fishing Vessel Association*:

> . . . the central principle here must be that Indian treaty rights to a natural resource that once was thoroughly and exclusively exploited by the Indians *secures so much as, but no more than, is necessary to provide the Indians with a livelihood—that is to say, a moderate living.*

443 U.S. 658, 679-89 (1979), *modified sub nom. Washington v. United States*, 444 U.S. 816 (1979) (emphasis added). Whether, or how, the above principles apply to the Hoopa and Yurok tribes for their water rights is not before the Court because the USBOR, in private offices, made the unilateral decision that if the flow rate was enough for the species, it was enough for these Tribes.

Every quantification of a federal reserved water right has a direct effect on all others on the stream. In *United States v. New Mexico*, 438 U.S. 696, 705 (1978), regarding federally reserved rights for national forests, Justice Rehnquist concluded that every drop of water for the federal reservation results in a gallon-for-gallon reduction for the non-reservation water users. Similarly, the amount awarded to tribes has a direct effect on all non-federal water users using the same stream and the adjudication of that amount is a sophisticated calculation where all parties must be joined and provided due process.

Water flowing in the Klamath River is a mobile resource benefitting all those along its banks as well as those who divert it for consumptive use. It is inconceivable that a court without a factual basis could find that the Tribes' entitlement is equal to that necessary for

an endangered species, and furthermore, that *any* water diversions by Klamath Irrigators 200 miles upstream would impair that federal entitlement. What is worse, it imposes the fulfillment of this quantified amount onto a single set of users, the Klamath Irrigators, and leaves the thousands of other users between the Klamath Irrigators and the Tribes with no obligation to curtail. A more arbitrary and unfair outcome can hardly be imagined.

The federal water rights of the Hoopa and Yurok Tribes are important, and, when quantified, must be protected from upstream junior diversions that do not allow water to arrive at their place of use. But, diversions by whom? No rational court would single out the Klamath Irrigators as the sole water users to be enjoined as a means of delivering water downstream to two specific senior priority users.

The inefficiency of this solution is staggering. Furthermore, the record contains no evidence as to carriage loss and evaporation over the 200 miles between the Klamath Irrigators and the reservations, and those losses may be as much as 80%.

In the Western states, senior downstream water right holders often seek to force an upstream junior user to release water. These complex fact patterns require a sophisticated analysis of evaporation rates, plant transpiration, and irretrievable seepage losses. If the release to the senior downstream Tribes would not generate any usable water, would the court order such a release? *See*, *e.g.*, *State ex rel. Cary v. Cochran*,

292 N.W. 239, 247 (1940) ("After determination that a given quantity of water passing a certain point on the river would not, even if uninterrupted, reach the headgate of the Kearney Canal in usable quantities, the administrative officers of the State may lawfully permit junior appropriators to divert it for irrigation purposes.").

The record is devoid of any evidence that: a) there had been a judicial proceeding to enforce the Tribes' priority; and b) even had these rights been quantified, that the amount released would ever reach the reservations in "usable quantities." The absence of any evidence that the Tribes would be benefitted by denying the Plaintiffs their water demonstrates that the Court's ruling serves the interests of the species and not the Tribes' interests.

Rather, a workable solution would have been shortage sharing among junior users supervised by an adjudicating court. *See*, *e.g.*, San Juan River Basin in New Mexico Navajo Nation Water Rights Settlement Agreement (April 19, 2005).[8] Alternatively, there could have been a program for augmentation from some other source of water such as groundwater. This would have been much more efficient than the Federal Circuit's solution of singling out the Klamath Irrigators as the sole source of water for delivery 200 miles

[8] *Available at* http://www.ose.state.nm.us/Legal/settlements/NNWRS/NavajoSettlement/NavajoSettlement.pdf (last visited Mar. 27, 2020).

downstream, while allowing all other users to continue diversions and pumping.

There is no evidence as to the flow rates required, the times of year that flow was required, or the consequences of the failure to receive the water. Nor was there evidence of actions that could be taken to optimize the flow that was available. The Federal Circuit should not have affirmed the USBOR's adjudication of the Tribes' water rights and should not have validated the closure by the USBOR of the Klamath farmers' headgates. The closure of their headgates caused the farmers' massive financial losses for which they are entitled to just compensation.

CONCLUSION

For the foregoing reasons and those in the Petition, the Petition for Certiorari should be granted.

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Respectfully submitted,

LAW & RESOURCE PLANNING ASSOCIATES, P.C.

CHARLES T. DUMARS
Counsel of Record
TANYA L. SCOTT
201 Third Street NW,
Suite 1750
Albuquerque, NM 87102
Phone: (505) 346-0998
ctd@lrpa-usa.com

PAULA I. FORNEY, ESQ.
WIGGINS, WILLIAMS &
WIGGINS, P.C.
1803 Rio Grande NW
Albuquerque, NM 87104
Phone: (505) 764-8400
pforney@wwwlaw.us

Counsel for the Middle Rio Grande Conservancy District