APPENDIX

APPENDIX

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APPENDIX A

FOR PUBLICATION

UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

No. 22-70143
D.C. No. 1:21-cv-00504-AA

[Filed June 5, 2023]

In re: KLAMATH IRRIGATION DISTRICT,

KLAMATH IRRIGATION DISTRICT,
Petitioner,

v.

UNITED STATES DISTRICT COURT FOR THE DISTRICT OF OREGON, MEDFORD,
Respondent,

U.S. BUREAU OF RECLAMATION; OREGON WATER RESOURCES DEPARTMENT,
Real Parties in Interest.

OPINION

Petition for a Writ of Mandamus

Argued and Submitted November 18, 2022
San Francisco, California

Filed June 5, 2023

Before: Richard R. Clifton and Bridget S. Bade,
Circuit Judges, and M. Miller Baker,[*] Judge.

Opinion by Judge Clifton;
Dissent by Judge Baker

SUMMARY[**]

Mandamus / Water Rights

The panel denied a petition for writ of mandamus brought by Klamath Irrigation District ("KID") to compel the district court to remand KID's motion for a preliminary injunction to the Klamath County Circuit Court in Oregon in a case involving a dispute over the allocation of water within the Klamath Basin.

In 1975, Oregon began the Klamath Basin Adjudication ("KBA"), a general stream adjudication comprising both administrative and judicial phases. During the administrative phase, the Oregon Water Resources Department determined claims to water

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[*] The Honorable M. Miller Baker, Judge for the United States Court of International Trade, sitting by designation.

[**] This summary constitutes no part of the opinion of the court. It has been prepared by court staff for the convenience of the reader.

rights in Upper Klamath Lake and portions of the Klamath River within Oregon. Nearly forty years later, the Oregon Water Resources Department entered an Amended and Corrected Findings of Fact and Final Order of Determination ("ACFFOD"), which provisionally recognized the determined claims, in the Klamath County Circuit Court for confirmation. The Yurok and the Hoopa Valley Tribes of California (the "Tribes") did not participate in the KBA, but the Federal Circuit in related litigation concluded that their rights were protected even though they were not adjudicated.

In 2021, KID filed a motion for a preliminary injunction in state court seeking to stop the Bureau of Reclamation from releasing water from Upper Klamath Lake in accordance with its Endangered Species Act ("ESA") responsibilities and the Tribes' rights. Reclamation removed the case to federal district court under the federal officer removal statute, and KID moved to remand. The district court declined to remand, reasoning that the McCarran Amendment's waiver of sovereign immunity did not apply because KID's motion for a preliminary injunction did not seek to adjudicate or administer ACFFOD rights; rather, it sought to re-litigate federal issues—namely, Reclamation's authority to release water in compliance with the ESA and tribal rights.

The panel considered the five factors in *Bauman v. U.S. District Court*, 557 F.3d 813, 817 (9th Cir. 2004), in determining whether mandamus was warranted. The panel began with the third factor—clear error as a matter of law—because it was a necessary condition for

granting the writ of mandamus. KID alleged that the district court's remand denial was clearly erroneous under the doctrine of prior exclusive jurisdiction, which provides that when a court is exercising *in rem*, or *quasi in rem*, jurisdiction over a *res*, a second court will not assume *in rem*, or *quasi in rem*, jurisdiction over the same *res*. The panel held that the doctrine of prior exclusive jurisdiction did not apply here. The KBA did not adjudicate Reclamation's ESA obligations or the Tribes' senior rights, so the Klamath County Circuit Court did not have jurisdiction over the rights challenged by KID's motion. The panel held that KID's other assertion—that the Klamath County Circuit Court had prior exclusive jurisdiction because its motion seeks to enforce rights determined in the ACFFOD—was undermined by *Klamath Irrigation District v. U.S. Bureau of Reclamation* (*KID II*), 48 F.4th 934 (9th Cir. 2022). The panel rejected KID's attempt to circumvent *KID II*, the Tribes' rights, and the effect of the ESA by characterizing the relief it sought as an application of the ACFFOD. The panel expressed no views on the merits of KID's underlying motion for preliminary injunction, and concluded only that the district court did not err in declining to remand the motion for preliminary injunction to the state court.

The panel held that it need not consider the remaining *Bauman* factors because the third factor was dispositive, but that KID's petition did not satisfy them in any event.

Dissenting, Judge Baker wrote that the mandamus petition filed by KID presented an important question

involving jurisdictional first principles: Does a comprehensive state court *in rem* water-rights proceeding have prior exclusive jurisdiction over a *quasi in rem* motion to enforce a decree governing rights to *in-state* water when the Bureau of Reclamation asserts defenses based on the reserved rights of *out-of-state* Indian tribes and the preemptive effect of ESA? He would hold that because the Klamath County Circuit Court had prior exclusive jurisdiction over the order that KID's motion sought to enforce, the district court necessarily committed a clear error of law in failing to remand. He would grant the mandamus petition and send KID's motion back to state court.

COUNSEL

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OPINION

CLIFTON, Circuit Judge:

Disputes over the allocation of water within the Klamath Basin in southern Oregon and northern California, particularly during the recent period of severe and prolonged drought, have prompted many lawsuits in this and other courts. In this episode, Klamath Irrigation District ("KID") petitions for a writ of mandamus to compel the district court to remand KID's motion for preliminary injunction to the Klamath County Circuit Court in Oregon. The motion had originally been filed by KID in that Oregon court but was removed to federal district court by the U.S. Bureau of Reclamation ("Reclamation"), a federal agency within the U.S. Department of Interior. Reclamation was identified by KID as the respondent for KID's motion.

A requirement for obtaining mandamus relief is a determination by us that the district court's order was clearly erroneous as a matter of law. We conclude that the district court's order was not clearly erroneous. As a result, we deny the petition and decline to issue the writ.

I. Background

A. The Klamath Basin and Klamath Project

The Klamath Basin encompasses approximately 12,000 square miles of "interconnected rivers, canals,

lakes, marshes, dams, diversions, wildlife refuges, and wilderness areas" in southern Oregon and northern California. *Klamath Irrigation Dist. v. U.S. Bureau of Reclamation* (*KID II*), 48 F.4th 934, 938 (9th Cir. 2022). Upper Klamath Lake is a large freshwater lake in the Klamath Basin in Oregon that drains into the Link River. *Klamath Irrigation Dist. v. Or. Water Res. Dep't (Or. Water Res. Dep't)*, 518 P.3d 970, 973 (Or. Ct. App. 2022). From there, water flows into and through Lake Ewauna to the Klamath River, which then proceeds southwest into California and eventually joins the Trinity River near the Pacific coast.

Since time immemorial, Indigenous Peoples, including the Yurok and the Hoopa Valley Tribes of California (the "Tribes"), have depended upon the waters of the Klamath Basin and the traditional fisheries therein. *Id.*; *see also KID II*, 48 F.4th at 939–40 (citing *United States v. Adair*, 723 F.2d 1394, 1414 (9th Cir. 1983); *Parravano v. Babbitt*, 70 F.3d 539, 541–43 (9th Cir. 1995)); *Baley v. United States*, 942 F.3d 1312, 1321–22 (Fed. Cir. 2019), *cert. denied*, 141 S. Ct. 133 (2020).

Pursuant to the Reclamation Act of 1902, 43 U.S.C. §§ 371–390h, Reclamation operates the Klamath River Basin Project (the "Klamath Project"), a series of complex irrigation works in the region, in accordance with state[1] and federal law, except where state law

[1] Both Oregon and California follow the doctrine of prior appropriation. *See Irwin v. Phillips*, 5 Cal. 140, 146 (1855) (California); *Teel Irrigation Dist. v. Or. Water Res. Dep't*, 919 P.2d 1172, 1174 (Or. 1996) (Oregon). The doctrine provides that water rights are "perfected and enforced in order of seniority, starting

conflicts with superseding federal law. 43 U.S.C. § 383; *KID II*, 48 F. 4th at 940–41. In doing so, Reclamation balances various interests, three of which are relevant to the instant motion.

First, under the Endangered Species Act ("ESA"), 16 U.S.C. §§ 1531–1544, Reclamation must maintain specific water levels in Upper Klamath Lake and instream flows in the Klamath River. *KID II*, 48 F.4th at 940–41; *Klamath Water Users Protective Ass'n v. Patterson*, 204 F.3d 1206, 1213 (9th Cir. 1999), *cert. denied*, 531 U.S. 812 (2000); *Yurok Tribe v. U.S. Bureau of Reclamation*, No. 19-cv-04405-WHO, 2023 WL 1785278, at *5–6 (N.D. Cal. Feb. 6, 2023); *Baley*, 942 F.3d at 1323–25 (explaining the obligations).

Second, the Tribes' senior, non-consumptive rights compel Reclamation to maintain specific instream flows in the Klamath-Trinity River in California. *Patterson*, 204 F.3d at 1213–14; *KID II*, 48 F.4th at 941. The river and its fisheries are integral to the Tribes' existence. *E.g.*, *KID II*, 48 F.4th at 940 (citing *Parravano*, 70 F.3d at 542); *Yurok Tribe*, 2023 WL 1785278, at *6. Indeed, "one of the central purposes" behind the establishment of the Tribes' reservations was protecting the

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with the first person to divert water from a natural stream and apply it to a beneficial use (or to begin such a project, if diligently completed)." *Montana v. Wyoming*, 563 U.S. 368, 375–76 (2011) (citing *Hinderlider v. La Plata River & Cherry Creek Ditch Co.*, 304 U.S. 92, 98 (1938); *Arizona v. California*, 298 U.S. 558, 565–66 (1936); Wyo. Const. art. 8, § 3). "Once such a water right is perfected, it is senior to any later appropriators' rights and may be fulfilled entirely before those junior appropriators get any water at all." *Id.* at 376.

traditional fisheries. *KID II*, 48 F.4th at 940 (citing *Parravano*, 70 F.3d at 542, 546); *see also* S. Rep. No. 100-564, at 14–15 (1988). "At the bare minimum," the Tribes hold rights to an amount of water that is at least equal, but not limited to, the amount necessary to fulfill Reclamation's ESA responsibilities. *Baley*, 942 F.3d at 1336–37; *Yurok Tribe*, 2023 WL 1785278, at *6; *Or. Water Res. Dep't*, 518 P.3d at 973–974.

Finally, Reclamation also contracts with KID, a quasi-municipal Oregon irrigation district, to supply water "subject to [its] availability" to KID's irrigators. *KID II*, 48 F.4th at 940 (citation omitted); *Or. Water Res. Dep't*, 518 P.3d at 972. Delayed access to or decreased amounts of water cause "long-reaching damages" to the irrigators' businesses.

KID and other irrigation districts in the region are members of the Klamath Water Users Association ("KWUA"), a non-profit organization that represents irrigation districts within the Klamath Project. *See Klamath Irrigation Dist. v. United States*, 75 Fed. Cl. 677, 687 (2007), *vacated on other grounds*, 635 F.3d 505 (Fed. Cir. 2011); *see also Member Districts*, Klamath Water Users Ass'n, https://kwua.org/member-districts/ (last visited March 17, 2023).

B. The Klamath Basin Adjudication

In 1909, Oregon enacted the Water Rights Act, Or. Rev. Stat. ch. 537, which provided that all waters of the state belong to the public and rights existing before the Act's effective date must be determined. In 1975, Oregon began the Klamath Basin Adjudication ("KBA"), a general stream adjudication comprising both

administrative and judicial phases. *Baley*, 942 F.3d at 1321. During the lengthy administrative phase, the Oregon Water Resources Department ("OWRD") determined claims to water rights in Upper Klamath Lake and portions of the Klamath River within Oregon. *Or. Water Res. Dep't*, 518 P.3d at 973. Nearly forty years later, the agency entered an Amended and Corrected Findings of Fact and Final Order of Determination ("ACFFOD"), which provisionally recognized the determined claims, in the Klamath County Circuit Court for confirmation. *Id.* While the judicial phase of the KBA is pending, the ACFFOD rights are enforceable. *See* Or. Rev. Stat. §§ 539.130, 539.170.

The Tribes did not participate in the KBA, but the Federal Circuit concluded in related litigation that their rights are protected even though they were not adjudicated because "there is no need for a state adjudication to occur before federal reserved rights are recognized[.]" *Baley*, 942 F.3d at 1340–41 (citing *Agua Caliente Band of Cahuilla Indians v. Coachella Valley Water Dist.*, 849 F.3d 1262, 1272 (9th Cir. 2017)). Under the ACFFOD, Reclamation has the right to store water in Upper Klamath Lake, and KID has the right to use a specific amount of water for irrigation. However, KID's rights are subservient to the Tribes' rights and Reclamation's ESA responsibilities. *Patterson*, 204 F.3d at 1213 (the Tribes' senior rights "carry a priority date of time immemorial"); *Baley*, 942 F.3d at 1340 (quoting *Agua Caliente Band*, 849 F.3d at 1272) ("[S]tate water rights are preempted by federal reserved rights."). Because "Reclamation cannot distribute water that it does not have[,]" water may not

be available to KID, "for example, due to drought, a need to forego diversions to satisfy prior existing rights, or compliance with other federal laws such as the Endangered Species Act." *KID II*, 48 F.4th at 940 (citation omitted).

C. The Present Dispute

A severe, prolonged drought has reduced the amount of water available in southern Oregon and northern California, saddling Reclamation with the "'nearly impossible' task of balancing multiple competing interests in the Klamath Basin." *Id.* at 938–40 (quoting *Klamath Irrigation Dist. v. U.S. Bureau of Reclamation* (*KID I*), 489 F. Supp. 3d 1168, 1173 (D. Or. 2020)). In several federal lawsuits, KID and similarly situated parties have repeatedly and unsuccessfully challenged Reclamation's authority to release water to satisfy tribal rights and comply with the ESA. *See, e.g.*, *KID I*, 489 F. Supp. 3d 1168, *aff'd*, *KID II*, 48 F.4th 934; *Patterson*, 204 F.3d 1206; *Baley*, 942 F.3d 1312; *Yurok Tribe*, 2023 WL 1785278; *Kandra v. United States*, 145 F. Supp. 2d 1192 (D. Or. 2001).

In 2021, KID filed a motion for a preliminary injunction in the Klamath County Circuit Court seeking to stop Reclamation from releasing water from Upper Klamath Lake in accordance with its ESA responsibilities and the Tribes' rights. Due to the drought, such releases could delay access to, or limit the amount of, water available to satisfy KID's ACFFOD-determined allotment. Reclamation subsequently removed the action to federal district court under the federal officer removal statute, 28 U.S.C. § 1442(a)(1), on the grounds that KID's motion

implicated issues of federal law and Reclamation planned to assert federal defenses. KID moved for remand on the basis that the Klamath County Circuit Court had prior exclusive jurisdiction over the rights determined in the ACFFOD. The district court declined to remand, reasoning that the McCarran Amendment's waiver of sovereign immunity did not apply because KID's motion for preliminary injunction did not seek to adjudicate or administer ACCFOD rights; rather, it sought to re-litigate federal issues—namely, Reclamation's authority to release water in compliance with the ESA and tribal rights. *Klamath Irrigation Dist. v. U.S. Bureau of Reclamation*, No. 1:21-cv-00504-AA, 2022 WL 1210946, at *4–5 (D. Or. Apr. 25, 2022). KID then filed a petition for writ of mandamus in this court, seeking to compel the district court to remand its motion for preliminary injunction to the Klamath County Circuit Court.

II. Discussion

We have authority to issue a writ of mandamus under 28 U.S.C. § 1651. Mandamus is an "extraordinary" remedy limited to "extraordinary causes." *Cheney v. U.S. Dist. Ct.*, 542 U.S. 367, 380 (2004) (quoting *Ex parte Fahey*, 332 U.S. 258, 259–60 (1947)).

Our court has long considered the following factors, commonly called *Bauman* factors, in determining whether mandamus is warranted: (1) whether the petitioner has "no other adequate means, such as a direct appeal," to attain the desired relief, (2) whether "[t]he petitioner will be damaged or prejudiced in a way not correctable on appeal," (3) whether the "district

court's order is clearly erroneous as a matter of law," (4) whether the order makes an "oft-repeated error, or manifests a persistent disregard of the federal rules," and (5) whether the order raises "new and important problems" or legal issues of first impression. *Bauman v. U.S. Dist. Ct.*, 557 F.2d 650, 654–55 (9th Cir. 1977). We do not mechanically apply the *Bauman* factors. *Cole v. U.S. Dist. Ct.*, 366 F.3d 813, 817 (9th Cir. 2004). As such, "[a] showing of only one factor does not mean the writ must be denied, nor does a showing of all factors mean that the writ must be granted." *In re Mersho*, 6 F.4th 891, 898 (9th Cir. 2021). "Mandamus review is at bottom discretionary—even where the *Bauman* factors are satisfied, the court may deny the petition." *San Jose Mercury News, Inc. v. U.S. Dist. Ct.*, 187 F.3d 1096, 1099 (9th Cir. 1999).

A. Clear Error

We begin with the third factor—clear error as a matter of law—because it is "a necessary condition for granting a writ of mandamus." *In re Van Dusen*, 654 F.3d 838, 841 (9th Cir. 2011). Clear error is a deferential standard, requiring a "firm conviction" that the district court "misinterpreted the law" or "committed a clear abuse of discretion." *In re Perez*, 749 F.3d 849, 855 (9th Cir. 2014).

Here, KID contends that the district court's denial of its motion to remand was clearly erroneous under the doctrine of prior exclusive jurisdiction, which "holds that when one court is exercising *in rem* [or *quasi in rem*] jurisdiction over a *res*, a second court will not assume *in rem* [or *quasi in rem*] jurisdiction over the same *res*." *Chapman v. Deutsche Bank Nat'l Trust Co.*,

651 F.3d 1039, 1043 (9th Cir. 2011) (citation and internal quotations omitted); *State Engineer v. South Fork Band of the Te-Moak Tribe*, 339 F.3d 804, 811, 814 (9th Cir. 2003) (establishing that *quasi in rem* jurisdiction is sufficient for the doctrine of prior exclusive jurisdiction to bar concurrent state and federal proceedings). According to KID, the Klamath County Circuit Court had *in rem* jurisdiction over the ACFFOD (the *res*), and KID's motion for preliminary injunction could not be adjudicated "without determining the extent and effect of the rights" in that order.

The doctrine of prior exclusive jurisdiction does not apply here, however. The KBA did not adjudicate Reclamation's ESA obligations or the Tribes' senior rights, *Baley*, 942 F.3d at 1323, 1340–41, so the Klamath County Circuit Court did not have jurisdiction over the rights challenged by KID's motion. *Cf. United States v. Orr Water Ditch Co.*, 600 F.3d 1152, 1160–61 (9th Cir. 2010) (noting that the doctrine of prior exclusive jurisdiction did not bar a state court from exercising jurisdiction over an appeal of a state engineer's grant of water rights in a river, even though a federal district court had previously adjudicated rights in the same river, because the engineer's ruling was based on state law and did not affect the federally adjudicated rights). OWRD has affirmatively taken the position in this matter that the ACFFOD does not adjudicate the challenges presented by KID's motion and the Klamath County Circuit Court's jurisdiction does not extend to those issues. It so stated in the

answering brief that it filed in this case.[2] As noted above, *supra* page 9, it was OWRD that determined claims and prepared the ACFFOD that remains in effect while the judicial phase proceeds in Klamath County Circuit Court.

Reliance by the dissent on *State Engineer*, 339 F.3d 804, is misplaced. Dissent at 32–34. There, we determined that a removed action was *quasi in rem* because the parties' rights in the *res* (a river) served as the basis of jurisdiction, even though the action was brought against the defendants personally. *State Engineer*, 339 F.3d at 811. Because the action was *quasi in rem*, the doctrine of prior exclusive jurisdiction applied to bar concurrent state and federal actions, and remand to the state court was thus necessary. *Id.* at 811, 814. The state court in *State Engineer* had jurisdiction over the tribe's rights because the rights were governed by state law and subject to the state's general stream adjudication. *Id.* at 807–08.

Here, however, the Klamath County Circuit Court did not have jurisdiction over the Tribes' rights implicated by KID's motion because the Tribes' rights at issue were not governed by Oregon law and were not subject to the KBA.[3] [4] *See Baley*, 942 F.3d at 1323,

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[2] OWRD's different stance before the Federal Circuit in *Baley*, 942 F.3d 1312, is irrelevant. The Federal Circuit rejected the agency's arguments. *Baley*, 942 F.3d at 1340–41. Before our court, the agency has reconsidered that losing position.

[3] The fact that, as the dissent notes, Dissent at 36–37, state courts *can* have jurisdiction to adjudicate federal reserved water rights is irrelevant here because neither the KBA nor the Klamath County

1340–41. The McCarran Amendment, 43 U.S.C. § 666, "waives the United States' sovereign immunity for the limited purpose of allowing the Government to be joined as a defendant in a state adjudication [or administration] of water rights." *United States v. Adair*, 723 F.2d 1394, 1400 n.2 (9th Cir. 1983). It does not "authorize private suits to decide priorities between the United States and particular claimants[.]" *Metro. Water Dist. v. United States*, 830 F.2d 139, 144 (9th Cir.

Circuit Court exercised jurisdiction over the Tribes' rights. *Baley*, 942 F.3d at 1321, 1341 (observing that the Yurok and Hoopa Valley Tribes "did not participate in the Klamath Adjudication" in Oregon state court). A fair reading of *United States v. Oregon*, 44 F.3d at 770—and all other relevant federal litigation regarding the KBA to date—belies the dissent's assertion that we held "the McCarran Amendment 'required' Reclamation to submit federal water-rights claims to the jurisdiction of the Klamath County Circuit Court [on behalf of the Yurok and Hoopa Valley Tribes, both of which are located outside of Oregon's borders.]" Dissent at 25–26. Rather, we held simply that the KBA is "the sort of adjudication Congress meant to require the United States to participate in when it passed the McCarran Amendment." *Oregon*, 44 F.3d at 770. That case did not involve out-of-state parties.

[4] The dissent's observation, Dissent at 28–29, 29 n.9, that Reclamation acknowledged in an internal assessment that the ACFFOD barred water releases "to augment or otherwise produce instream flows in the Klamath River," which would preclude compliance with the ESA and the Tribes' rights, is irrelevant. As the Northern District of California recently explained in response to OWRD's attempt to stop Reclamation's water releases for non-ACFFOD rights and obligations, Reclamation *must* comply with the ESA. *Yurok Tribe*, 2023 WL 1785278, at *14–19. The court also held that OWRD's order, which directed Reclamation to stop releasing water for non-ACFFOD-determined rights, was preempted by the ESA and therefore violated the Supremacy Clause. *Id.*

1987), *aff'd sub nom. California v. United States*, 490 U.S. 920 (1988). Nor does it expand a state court's subject matter jurisdiction or empower a state to adjudicate rights beyond its jurisdiction, which, at bottom, is what KID's motion for a preliminary injunction seeks to do. *See United States v. Dist. Ct. for Eagle Cnty.*, 401 U.S. 520, 523 (1971); *Baley*, 942 F.3d at 1341 (explaining that the Tribes' "rights are federal reserved water rights not governed by state law" and that "states have the ability to adjudicate rights in a water or river within their jurisdiction, but they cannot adjudicate water rights in another state").

The dissent's focus on *in rem* jurisdiction because the water is stored in Upper Klamath Lake is not entirely misplaced, Dissent at 32–38, but it seems myopic for two reasons.[5]

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[5] The dissent cites OWRD and U.S. Department of Justice documents indicating that OWRD noticed and adjudicated federal reserved rights for federal properties in northern California as part of the KBA. *E.g.*, Dissent at 25 n.1, 26 n.5, 35. However, neither party entered these documents into the record, nor discussed them in the briefs. As a general rule, "we rely on the parties to frame the issues for decision[.]" *United States v. Sineneng-Smith*, 140 S. Ct. 1575, 1579 (2020). This "rule reflects our limited role as neutral arbiters of legal contentions presented to us, and it avoids the potential for prejudice to parties who might otherwise find themselves losing a case on the basis of an argument to which they had no chance to respond." *United States v. Yates*, 16 F.4th 256, 270–71 (9th Cir. 2021).

Nevertheless, even if these documents were in the record, the fact remains that the KBA did not adjudicate the Tribes' rights—nor did it need to. *Baley*, 942 F.3d at 1323, 1340–41 ("[T]here is no need for a state adjudication to occur before federal reserved rights are recognized[.]"). The Tribes' rights take

First, under the dissent's logic, Dissent at 34–35, a state could control all surface water within its borders by damming outflows, thereby attaining *in rem* jurisdiction over the pooled resource, which is essentially the position KID takes here.[6] Such a result is antithetical to the Supreme Court's interpretation of the term "river system" within the McCarran Amendment to mean one "within the particular State's jurisdiction[,]" which confines a state's adjudication to its own borders.[7] [8] *See Eagle Cnty.*, 401 U.S. at 523.

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precedence over KID's ACFFOD rights under both the doctrine of prior appropriation, *Patterson*, 204 F.3d at 1213 (providing that the Tribes' senior rights "carry a priority date of time immemorial"), and as federal reserved rights, *Baley*, 942 F.3d at 1340 (quoting *Agua Caliente Band*, 849 F.3d at 1272) ("[S]tate water rights are preempted by federal reserved rights.").

[6] KID advanced this position at oral argument. *See* United States Court of Appeals for the Ninth Circuit, *22-70143 Klamath Irrigation District v. USDC-ORM*, YouTube (Nov. 18, 2022), https://youtu.be/EAVWqqxVTy4 (view minutes 14:18–16:16).

[7] Caselaw does not support the dissent's interpretation of the McCarran Amendment as geographically indifferent "to the location or nature of federal interests with asserted 'water rights' to an in-state 'river system or other source.'" Dissent at 45 n.23. We have never held that a state's adjudication could operate extraterritorially without the participation of impacted parties hundreds of miles away entirely within another state.

[8] The dissent's conclusion that Reclamation should have asserted the Tribes' reserved rights in an out-of-state proceeding because it holds their rights in trust, Dissent at 25–26, 26 n.3, ignores this limit on the McCarran Amendment's waiver of sovereign immunity. As the Supreme Court explained in relation to the Colorado River in *Eagle County*, 401 U.S. at 523, "[n]o suit by any State could possibly encompass all of the water rights in the entire

Second, the dissent overlooks the forum shopping at the heart of KID's petition. KID and other similarly situated parties have not succeeded in previous federal lawsuits. *See, e.g.*, *KID I*, 489 F. Supp. 3d 1168, *aff'd*, *KID II*, 48 F.4th 934, 947; *Patterson*, 204 F.3d 1206, 1213–14;[9] *Baley*, 942 F.3d 1312;[10] *Yurok Tribe*, 2023 WL 1785278, at *6; *Kandra*, 145 F. Supp. 2d 1192.

By filing its underlying motion in state court, KID sought to litigate in a new forum, one it presumably hoped would be less concerned with the commands of

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Colorado River which runs through or touches many States." The dissent ignores the Supreme Court's admonition and instead advocates for such an all-encompassing interpretation of the KBA here. But a "river system" within the McCarran Amendment "must be read as embracing one within the particular State's jurisdiction." *Id*. at 523.

[9] Based on tax records, *Kandra*, 145 F. Supp. at 1201, and other litigation documents, we infer that the *Patterson* plaintiff—the Klamath Water Users Protective Association ("KWUPA")—is the same entity as KWUA, which is the business name of the Klamath Basin Water Users Protective Association ("KBWUPA"). KID is a member of KBWUPA/KWUA. *See supra* page 9.

Regardless of whether KWUPA is the same entity as KBWUPA/KWUA, the fact remains that, in *Patterson*, the plaintiff invoked its state contract rights to challenge Reclamation's authority to manage the Klamath Project in accordance with the ESA and tribal trust obligations. This legal theory sounds familiar to us.

[10] KID was a party in *Baley* until, following the trial and post-trial briefing, KID and the other irrigation districts voluntarily dismissed their claims before the court ruled against the remaining individual plaintiffs. *Baley*, 942 F.3d at 1318.

the ESA and the rights of parties not before the court.[11] With this perspective, it might fairly be said that KID seeks to deny other affected entities a meaningful forum and remedy. The dissent does not alleviate these concerns, offering only the possibility of eventual review by the Supreme Court, after years of misdirection of the water that is the subject of these claims. Dissent at 39–40.

KID's other assertion—that the Klamath County Circuit Court had prior exclusive jurisdiction because its motion seeks to enforce rights determined in the ACFFOD—is undermined by *Klamath Irrigation District v. U.S. Bureau of Reclamation* (*KID II*), 48 F.4th 934 (9th Cir. 2022).[12] There, we rejected KID's characterization of its suit as an administration of ACFFOD-determined rights and concluded that it was instead an Administrative Procedure Act challenge to Reclamation's authority to release water in compliance with the ESA and federal reserved water rights. *Id.* at 947. Here, we similarly reject KID's attempt to circumvent our prior decision, the Tribes' rights, and

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[11] To be clear, we do not insinuate that the Klamath County Circuit Court would necessarily rule in KID's favor. Rather, we mean only that KID seems to be seeking a new umpire because it has repeatedly struck out in multiple federal courts.

[12] We do not cite *KID II* for a preclusive effect, as the dissent alleges. Dissent at 40 n.19, 42 n.21. As we explain, that case illustrates KID's framing of its legal theory as a McCarran Amendment "administration," when it actually sought to outmaneuver the force of the ESA and the Tribes' rights through an enforcement of the ACFFOD. Here, KID attempts another end-run around the same federal rights under the guise of the McCarran Amendment.

the effect of the ESA by characterizing the relief it seeks as an application of the ACFFOD.[13]

We do not reach the merits of KID's motion for preliminary injunction, as the dissent charges. Dissent at 39–40, 43. "We recognize that, at times, 'jurisdiction is so intertwined with the merits that its resolution depends on the resolution of the merits.'" *Orff v. United States*, 358 F.3d 1137, 1150 (9th Cir. 2004) (quoting *Careau Grp. v. United Farm Workers*, 940 F.2d 1291, 1293 (9th Cir. 1991)). "But that is not the case here." *Id.* Our determination that the Klamath County Circuit Court did not have prior exclusive jurisdiction over the rights KID seeks to re-litigate does not depend on the merits of KID's motion for preliminary injunction "as the resolution of one does not depend on the resolution of the other." *Id.*

Further, we have never held that *any* issue implicating federal reserved water rights *always* goes to the merits of such issue and precludes a jurisdictional analysis. The dissent relies on inapposite cases to support this proposition. Dissent at 23, 39–40 (citing *United States v. Oregon*, 44 F.3d 758, 770 (9th

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[13] We are not persuaded by the dissent's proposal to apply removal precedent to determine whether KID's petition is an "administration" under the McCarran Amendment. Dissent at 43 (citing *Bell v. Hood*, 327 U.S. 678 (1946) (nonexistence of a cause of action is not a proper basis for a jurisdictional dismissal); *Jefferson County v. Acker*, 527 U.S. 423 (1999) (colorable federal defense is sufficient to invoke federal question jurisdiction under the federal officer removal statute)). Both cases are inapposite as neither deal with the McCarran Amendment, stream adjudications, or any analogous issues to those before our Court.

Cir. 1984); *Eagle Cnty.*, 401 U.S. at 526; *Colo. River Water Conservation Dist. v. United States*, 424 U.S. 800, 813 (1976)). These cases merely note that properly preserved issues implicating the amount and scope of federal reserved rights in state adjudications are reviewable by the Supreme Court after final judgment from the state court. *See Eagle Cnty.*, 401 U.S. at 525–26; *Colo. River*, 424 U.S. at 813; *Oregon*, 44 F.3d at 768–70.

Again, we express no views on the merits of KID's underlying motion for preliminary injunction. We only conclude that the Klamath County Circuit Court did not have prior exclusive jurisdiction over the rights KID seeks to re-litigate. As such, the district court did not err in declining to remand the motion for preliminary injunction to the state court.

B. Remaining Bauman *Factors*

We need not consider the remaining *Bauman* factors because "the absence of the third factor, clear error, is dispositive." *Burlington N. & Santa Fe Railway v. Dist. Ct.*, 408 F.3d 1142, 1146 (9th Cir. 2005). KID's petition does not satisfy them, in any event. The district court's order did not "manifest[] a persistent disregard of the federal rules," nor did it raise legal issues of first impression. *Bauman*, 557 F.2d at 655.

KID has "other adequate means" to attain its desired relief, *id. at* 654, as its underlying motion for preliminary injunction has simply been removed to the district court. Nothing prevents KID from seeking substantive relief before the district court, because,

contrary to the dissent's characterization, Dissent at 39–40, 43, we neither adjudicate the merits of KID's motion, nor direct the district court on the merits. KID may also seek interim injunctive relief from the district court.

Finally, KID will not be "damaged or prejudiced in a way not correctable on appeal" by litigating the underlying motion before the district court. *Bauman*, 557 F.2d at 654. KID's lack of success in previous federal lawsuits and related litigation does not make the Klamath County Circuit Court the proper forum by default. While the dissent expresses concern that any eventual appellate relief would be inadequate because KID's members may suffer a loss of water rights in the interim, Dissent at 46, the dissent's approach would threaten to impose exactly the same deprivation on the Tribes, whose rights take precedence under both federal and state law over those asserted by KID. *See Patterson*, 204 F.3d at 1209, 1214; *Baley*, 942 F.3d at 1340; *Kandra*, 145 F. Supp. 2d at 1197, 1204; *Parravano*, 70 F.3d at 541–42, 545; *see also Agua Caliente Band*, 849 F.3d at 1272.

Accordingly, we do not conclude that this is an "exceptional" situation "amounting to a judicial usurpation of power or a clear abuse of discretion" that would justify the "extraordinary remedy" of mandamus. *See In re Holl*, 925 F.3d 1076, 1082 (9th Cir. 2019).

KID's petition for a writ of mandamus is **DENIED**.

BAKER, Judge, dissenting:

"[B]earing in mind the ubiquitous nature of Indian water rights in the [W]est," *Colo. River Water Conservation Dist. v. United States*, 424 U.S. 800, 811 (1976), and that "in stream adjudications . . . each water rights claim by its very nature raises issues *inter se* as to all such parties for the determination of one claim necessarily affects the amount available for the other claims," *Nevada v. United States*, 463 U.S. 110, 140 (1983) (cleaned up), the mandamus petition filed by the Klamath Irrigation District (KID) presents an important question involving jurisdictional first principles: Does a comprehensive state court *in rem* water-rights proceeding have prior exclusive jurisdiction over a *quasi in rem* motion to enforce a decree governing rights to *in-state* water when the United States Bureau of Reclamation asserts defenses based on the reserved rights of *out-of-state* Indian tribes and the preemptive effect of the Endangered Species Act (ESA)?

In holding that the Klamath County (Oregon) Circuit Court lacks such prior exclusive jurisdiction, the majority gives four reasons. I respectfully disagree as to each.

First, the majority contends that because the Yurok and Hoopa Valley Tribes (the Tribes) are California-based, the Oregon state court lacks authority to adjudicate their rights to in-state water in the first instance. Opinion at 16–17. But as explained below, Oregon unquestionably has the power to adjudicate the rights of the Tribes and other out-of-state claimants to water within its borders

through *in rem* proceedings, even as its exercise of such authority must respect federal reserved rights and interstate water rights. The irony of today's decision is that *we* may not pass judgment on the Klamath County Circuit Court's jurisdiction as a matter of *state* law.

Second, the majority observes that the decree governing the *res* (rights to stored water in Upper Klamath Lake in Oregon) did not adjudicate Reclamation's federal law defenses. *Id.* at 13–14. But what matters here is that KID's *quasi in rem* motion asserts rights under that decree, over which the state court has prior exclusive jurisdiction. The Bureau's defenses are irrelevant.

Third, the majority concludes that Reclamation's defenses defeat KID's motion. *Id.* at 14–15, 15 n.4, 16 n.5, 22. It's settled law, however, that questions concerning tribal reserved rights and other federal defenses in comprehensive water-rights proceedings "go to the merits," *United States v. Oregon*, 44 F.3d 758, 770 (9th Cir. 1994), and that state courts are presumptively competent to adjudicate those "federal questions which, if preserved, can be reviewed" in the Supreme Court "after final judgment by the [state] court." *United States v. Dist. Ct. in and for County of Eagle*, 401 U.S. 520, 526 (1971). Even if the Bureau's defenses are well-founded as the majority contends, that has no bearing on the state court's jurisdiction, which we must presume exists as a matter of state law.

Finally, the majority holds that the federal sovereign immunity waiver of the McCarran Amendment, 43 U.S.C. § 666(a), does not apply here because permitting KID to obtain relief under the

decree would interfere with "the Tribes' rights" and the preemptive "effect of the ESA." Opinion at 19. Once again, the majority conflates the merits with jurisdiction. We should instead hold that KID's assertion of a *colorable* claim to enforce the decree governing the *res* suffices to trigger the Amendment's waiver under the test applied by the Supreme Court in analogous jurisdictional contexts. *Cf. Bell v. Hood*, 327 U.S. 678, 682–83 (1946).

Because the Klamath County Circuit Court has prior exclusive jurisdiction over the order that KID's motion seeks to enforce, the district court necessarily committed a clear error of law in failing to remand. We should grant the mandamus petition and send KID's motion back to state court where it belongs.

I

In 1975, the Oregon Water Resources Department (OWRD) commenced a general stream adjudication (the Klamath Basin Adjudication, or KBA). *See United States v. Oregon*, 44 F.3d at 762. In so doing, OWRD sought to ascertain "the relative rights of the various claimants to the waters" of the Klamath Basin. ORS § 539.021(1). Under Oregon law, a general stream adjudication determines all water rights vested or initiated before February 24, 1909, including—of critical importance here—reserved federal rights. *See* ORS § 539.010(7) (authorizing OWRD to "adjudicate federal reserved rights for the water necessary to fulfill the primary purpose of the reservation").

"[P]roceedings adjudicating" water rights in Oregon are "in rem," *Masterson v. Pac. Live Stock Co.*, 24 P.2d

1046, 1048 (Or. 1933), meaning that the KBA is "directly against the property"—in this instance, water rights in Upper Klamath Lake—"and [involves] an adjudication against all mankind equally binding upon everyone," *Linn County v. Rozelle*, 162 P.2d 150, 156 (Or. 1945). And because the KBA is against the world, "person[s] . . . claim[ing] legal title to a water right [were required to] file a claim in the adjudication or lose the right." *Klamath Irrigation Dist. v. United States*, 227 P.3d 1145, 1166 (Or. 2010); *see also* ORS § 539.210 (same); *Pac. Live Stock Co. v. Lewis*, 241 U.S. 440, 447–48 (1916) (same). Accordingly, OWRD provided notice of the KBA to federal users in both Oregon *and* California.[1]

Even though we held that the McCarran Amendment "required" Reclamation to submit federal water-rights claims to the jurisdiction of the Klamath County Circuit Court, *United States v. Oregon*, 44 F.3d

[1] In 1996, OWRD gave notice "to the United States Attorney General claiming a federal reserved right or a right to the use of the waters of the Klamath River and its tributaries, diverted in Oregon and used within Klamath, Jackson, and Lake Counties, Oregon[,] *and Modoc and Siskiyou Counties, California*," that it would receive proofs of claim between October 1, 1996, and January 31, 1997, from "all parties claiming rights to the use of waters of the Klamath River or any of its tributaries." KBA order at Appendix H-2 (emphasis added), *available at* https://www.oregon.gov/owrd/programs/WaterRights/Adjudications/KlamathAdj/KBA_APP_133626.PDF. Reclamation "uses" water by releasing it from Upper Klamath Lake for the benefit of the California-based Tribes.

at 770, the Bureau[2] failed to file any such claim on behalf of the Tribes, to whom the government owes trust obligations. *See Arizona v. San Carlos Apache Tribe of Ariz.*, 463 U.S. 545, 549 (1983);[3] *cf. Nevada v. United States*, 463 U.S. at 143–44 (explaining that an Indian tribe's water rights were lost because the government failed to assert them in "a comprehensive adjudication of water rights intended to settle once and for all the question of how much of the Truckee River each of the litigants was entitled to," as "water adjudications are more in the nature of *in rem* proceedings").

In 2014, OWRD filed a decree (the KBA order)[4] that provisionally governs water rights in Upper Klamath Lake, including the rights of federal properties in California,[5] pending a final adjudication by the state

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[2] Under the Reclamation Act, absent superseding federal law, the Bureau must "comply with state law in the 'control, appropriation, use, or distribution of water.' " *California v. United States*, 438 U.S. 645, 674–75 (1978) (quoting 43 U.S.C. § 383); *see also id.* at 675 ("The legislative history of the Reclamation Act of 1902 makes it abundantly clear that Congress intended to defer to the substance, as well as the form, of state water law.").

[3] Thus, the majority's contention that the "Tribes' rights at issue . . . were not subject to the KBA," Opinion at 14–15, is incorrect. *Reclamation* is subject to the KBA and holds the Tribes' rights in trust.

[4] The parties call the KBA order the "ACFFOD," shorthand for "Amended and Corrected Findings of Fact and Final Order of Determination."

[5] The Justice Department explains that "[i]f the administrative findings and conclusions [in the KBA order] are ultimately

court. *See* ORS § 539.170; *see also Lewis*, 241 U.S. at 455 ("[I]t is within the power of the state to require that, pending the final adjudication, the water shall be distributed according to [OWRD]'s order, unless a suitable bond be given to stay its operation."). Under Oregon law, the "Klamath County Circuit Court has exclusive subject matter jurisdiction to review the KBA order." *TPC, LLC v. Or. Water Res. Dep't*, 482 P.3d 121, 129 (Or. App. 2020).

On March 29, 2021, KID moved for a preliminary injunction in the Klamath County Circuit Court,[6]

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sustained by the state circuit court, they will approve numerous significant federal reserved rights and state appropriative rights for a national park, national forests, wilderness areas, wild and scenic rivers, wildlife refuges, Indian reservations, and the Klamath Reclamation Project encompassing 200,000 acres in southern Oregon *and northern California*." U.S. Dep't of Justice, Environment & Natural Resources Division, *ENRD Accomplishments Report Fiscal Year 2013*, at 74 (emphasis added), https://www.justice.gov/sites/default/files/enrd/legacy/2015/04/13/ENRD_Accomplishments_Report_2013_2.pdf. One of the national wildlife refuges that DOJ referred to is the Tule Lake National Wildlife Refuge, located entirely in Northern California. *See Kandra v. United States*, 145 F. Supp. 2d 1192, 1196 (D. Or. 2001) ("Two national wildlife refuges, the Lower Klamath and Tule Lake National Wildlife Refuges, depend on the [Klamath Reclamation] Project for water and receive large quantities of return irrigation flows and other Project waters.").

[6] Earlier, KID sued Reclamation in Oregon district court seeking relief under the Administrative Procedure Act (APA). *See Klamath Irrigation Dist. v. Bureau of Reclamation*, No. 1:19-cv-451-CL, Dkt. No. 70 (D. Or.) (KID's second amended complaint for declaratory and injunctive relief). After the Klamath and Hoopa Tribes then intervened to seek dismissal, the district court dismissed the suit in 2020 for lack of jurisdiction. The court reasoned that the Tribes

arguing that Reclamation's ongoing water releases violate the KBA order, which provides that the United States only owns the right to *store* water. Pet. 66[7] (citing KBA order, Pet. 109); *see also* KBA order, Pet. 121 (providing that "[t]he United States also holds a separate right for storage of water in Upper Klamath Lake *for the benefit of the irrigation rights recognized in this Partial Order of Determination*") (emphasis added).[8]

KID's motion also contends that Reclamation's right to store water does not give the Bureau any right to *use* that water, quoting *Cookinham v. Lewis*, 114 P. 88, 91 (Or. 1911), for the proposition that a primary storage right "does not include the right to divert and use [. . .] stored water, which must be the subject of the secondary permit." Pet. 66; *see also* KBA order, Pet. 122 ("[T]he right to store water is distinct from the

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were required parties, *Klamath Irrigation Dist. v. U.S. Bureau of Reclamation*, 489 F. Supp. 3d 1168, 1176–81 (D. Or. 2020) (*KID I*), and that sovereign immunity—which they did not waive—prevented their joinder, *id.* at 1181–82. While its appeal to our Court was pending, KID filed its motion in the Klamath County Circuit Court. We later affirmed the district court's dismissal. *Klamath Irrigation Dist. v. U.S. Bureau of Reclamation*, 48 F.4th 934 (9th Cir. 2022) (*KID II*).

[7] This citation, and others in the same form, refers to the ECF page number in the upper right corner of KID's mandamus petition and attached exhibits, e.g., "(66 of 1311)."

[8] I recount KID's allegations in some detail because, as discussed below, these allegations are highly relevant to whether it has asserted a *colorable* claim that Reclamation water distributions violate the KBA order.

right to use stored water . . . ."). The motion asserts that the KBA order instead grants "KID and other water right holders" the "secondary right to beneficially use" the water stored by the Bureau. Pet. 66 (citing KBA order, Pet. 121–22).

The motion further argues that KID's "secondary water rights to *stored water* in [Upper Klamath Lake] reservoir cannot be 'called' or curtailed by any water rights—even senior water rights—[downstream] *in the Klamath River*." Pet. 67 (emphasis in original and citing various Oregon statutes and authorities). Indeed, the motion explains that Reclamation *admits* that the KBA order bars the Bureau from "releas[ing] water previously stored in priority and otherwise required for beneficial use by Klamath Project beneficiaries from Upper Klamath Lake for the specific purposes of producing instream flows in the Klamath River either in Oregon or California." Pet. 64 (quoting Bureau of Reclamation, *Reassessment of U.S. Bureau of Reclamation Klamath Project Operations to Facilitate Compliance with Section 7(a)(2) of the Endangered Species Act*, Jan. 2021, Pet. 174).[9] Nevertheless, the motion claims that the agency is distributing "vast quantities of stored water" out of the lake "to provide enhanced instream flows in the Klamath River in California." *Id.* at 67.

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[9] That same statement from Reclamation explains that the KBA order "*preclude[s] releases of water previously stored in priority in Upper Klamath Lake for satisfying the Yurok and Hoopa Tribes' federally reserved water right*." Pet. 175 (emphasis added).

Anticipating defenses likely to be raised by Reclamation, KID's motion asserts that the Bureau's trust obligations to the Tribes "afford no water rights to use stored water in [Upper Klamath Lake], *as neither Tribe (nor Reclamation on their behalf) has ever claimed a water right in [Upper Klamath Lake] in the Klamath Adjudication*." Pet. 60 (emphasis added).[10] Similarly, the motion argues that the ESA does not override the agency's Reclamation Act obligation to comply with state law in distributing water from Upper Klamath Lake. Pet. 77–80.[11]

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[10] If Reclamation forfeited the Tribes' rights by not filing a claim on their behalf in the KBA, they would not lack a remedy for the government's breach of its trust obligations. *See* 28 U.S.C. § 1505 (Indian Tucker Act providing for jurisdiction in the Court of Federal Claims for claims by tribes against the United States); *cf. Nevada v. United States*, 463 U.S. at 144 n.16 ("In this case, the Tribe, through the Government as their representative, was given adequate notice and a full and fair opportunity to be heard. If, in carrying out their role as representative, the Government violated its obligations to the Tribe, then the Tribe's remedy is against the Government, not against third parties."); *see also id.* at 145 (Brennan, J., concurring) ("I join the Court's opinion on the understanding that it reaffirms that the Pyramid Lake Paiute Tribe has a remedy against the United States for the breach of duty that the United States has admitted.").

[11] The majority contends that "KID's rights are subservient to the Tribes' rights and Reclamation's ESA responsibilities." Opinion at 10 (citing *Klamath Water Users Protective Ass'n v. Patterson*, 204 F.3d 1206, 1213 (9th Cir. 1999)). But the administrative adjudication phase of the KBA was then ongoing, prompting us to qualify our holding: The KBA "*will* . . . *decide*[]" "questions of relative amounts and priorities, at least within the State of Oregon . . . . Our decision in this case . . . relate[s] only to questions involving the Bureau's operation and management of the [Klamath

Finally, KID's motion includes declarations from several of its farmer and rancher members, irrigators who depend on the water of Upper Klamath Lake. One explains that "[f]arming involves significant up-front costs with long delays before the crops actually result in revenue." Pet. 294. All the declarants assert that they face the risk of bankruptcy or liquidating assets because of Reclamation-induced water shortages. Pet. 86–100; Pet. 293–310. For example, one states that "[w]ithout the water KID and I own rights to, I cannot grow crops, and therefore cannot generate revenue to pay debt and maintain the business." Pet. 93. The effects from "water shortages in a particular year can impact not only year-to-year crops, but crops that require a longer-term investment and commitment." Pet. 294.

Citing the federal officer removal statute, 28 U.S.C. § 1442(a)(1), the Bureau removed KID's motion to the district court. Reclamation's removal notice admits that KID's motion seeks to bar the Bureau's releases of water from Upper Klamath Lake to the extent such releases "*conflict with state-based water rights determined in the* [*KBA order*]." Pet. 353 (emphasis

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Basin] Project, *and not to the relative rights of others not before the court to the use of the waters of the Basin*." *Patterson*, 204 F.3d at 1214 n.3 (emphasis added). KID was not a party to *Patterson*, and to what extent its rights under the KBA order are "subservient" to the Tribes' rights and Reclamation's ESA responsibilities when the Bureau failed to assert a claim on the Tribes' behalf is precisely the question raised by KID's motion. In any event, even if KID were bound by *Patterson*, it could not have asserted any claim in that action to enforce the KBA order, which OWRD only first issued in 2013 (some 14 years after our ruling in *Patterson*).

added). The notice expressly identifies two federal "defenses" to KID's claims, "senior federal reserved Tribal fishing and water rights" and "sovereign immunity." Pet. 354.

KID then moved to remand, arguing that the prior exclusive jurisdiction doctrine applies here. Under that doctrine, even if removal were otherwise proper,[12] the district court nevertheless lacked jurisdiction if KID's motion is *in rem* or *quasi in rem*, because the state court proceeding is *in rem*. *See Goncalves ex rel. Goncalves v. Rady Child.'s Hosp. San Diego*, 865 F.3d 1237, 1253 (9th Cir. 2017) ("If both courts exercise either *in rem* or *quasi in rem* jurisdiction, then the courts may be simultaneously exercising jurisdiction over the same property, in which case the prior exclusive jurisdiction doctrine applies and the district court is precluded from exercising jurisdiction over the *res*.").

The district court denied the remand motion, reasoning that "KID seeks to reach beyond the limited waiver of the McCarran Amendment to litigate federal issues, most notably Reclamation's release of water to satisfy the instream water rights of the Yurok and Hoopa Valley Tribes and the co-extensive demands of the ESA." Pet. 1263. Because "KID's motion for preliminary injunction does not come within the McCarran Amendment's waiver . . . the KBA [does not]

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[12] *See State Eng'r of State of Nev. v. S. Fork Band of Te-Moak Tribe of W. Shoshone Indians of Nev.*, 339 F.3d 804, 809 (9th Cir. 2003) ("Section 1442 . . . merely allows the federal government to remove a case to federal district court; it does not determine whether the court has jurisdiction to hear it.").

possess exclusive jurisdiction over the claim." *Id*. KID then filed its mandamus petition.

II

It's undisputed that the Klamath County Circuit Court has *in rem* jurisdiction over rights to the stored water (the *res*) of Upper Klamath Lake in Oregon. It's similarly undisputed that the KBA order provisionally governs Reclamation's distributions from that *res* pending a final adjudication by the state court. As described above, and as the Bureau admitted in its notice of removal, *see* Pet. 353, KID's motion manifestly seeks to enforce that order.

This case is therefore much like *State Engineer*, where we held that to determine whether a removed action encroached upon prior exclusive jurisdiction of a state court, a district court must "look behind the form of the action to the gravamen of a complaint and the nature of the right sued on." 339 F.3d at 810 (cleaned up). As in *State Engineer*, "[t]here can be no serious dispute that [KID's motion] was brought to enforce a decree"—the KBA order—"over a res"—i.e., the rights to the stored waters of Upper Klamath Lake. *Id*. at 811. "Given the zero-sum nature of the resource, any party's unlawful diversion of water from the [lake] necessarily affects other users." *Id.* Thus, the district court cannot adjudicate KID's and Reclamation's "personal claims to [the] property without disturbing the first court's jurisdiction over the res." *Id*. While KID's motion "is brought only against the [Bureau] personally," because "the parties' interests in the property"—the KBA order—"serve as the basis [for] jurisdiction," the motion "is *quasi in rem*, and the

doctrine of prior exclusive jurisdiction fully applies." *Id.* (cleaned up); *see also Hanson v. Denckla*, 357 U.S. 235, 246 n.12 (1958) (defining *quasi in rem* actions as including those in which "the plaintiff [seeks] to secure a pre-existing claim in the subject property and to extinguish or establish the nonexistence of similar interests of particular persons");[13] *Penn Gen. Cas. Co. v. Pennsylvania ex rel. Schnader*, 294 U.S. 189, 195 (1935) (if "two suits are in rem or quasi in rem, . . . the court first assuming jurisdiction over the property may maintain and exercise that jurisdiction to the exclusion of the other").

The majority, however, offers in essence four reasons why the prior exclusive jurisdiction doctrine does not apply here. I consider each in turn.

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[13] In a *quasi in rem* action, "the basis of jurisdiction is the defendant's interest in property, real or personal, which is within the court's power, as distinguished from in rem jurisdiction in which the court exercises power over the property itself, not simply the defendant's interest therein." *Black's Law Dictionary* 794 (6th ed. 1990). Applied here, the basis of jurisdiction over KID's *quasi in rem* motion is the KBA order, which adjudicated the parties' interests and over which the Klamath County Circuit Court has continuing exclusive jurisdiction. *See TPC*, 482 P.3d at 129; *cf. United States v. Alpine Land & Reservoir Co.*, 174 F.3d 1007, 1013, 1014 (9th Cir. 1999) (a federal district court had prior exclusive jurisdiction "over the water rights in question when it adjudicated the Alpine and Orr Ditch Decrees and . . . continued to retain such jurisdiction," and "to construe these Decrees so that the district court does not retain exclusive jurisdiction would render the retention of jurisdiction a nullity").

A

Although not expressed as such, the majority implies that the Klamath County Circuit Court lacks jurisdiction *ab initio* insofar as Reclamation defends its water distributions based on the reserved rights of the California-based Tribes. Opinion at 16 (averring that a state may not "adjudicate rights beyond its jurisdiction, which, at bottom, is what KID's motion for a preliminary injunction seeks to do") (citing *Eagle County*, 401 U.S. at 523, and *Baley v. United States*, 942 F.3d 1312, 1341 (Fed. Cir. 2019)). *Eagle County* observed that the term "river system" in the McCarran Amendment "must be read as embracing one *within the particular State's jurisdiction*," for "[n]o suit by any State could possibly encompass all of the water rights" in an entire interstate river system such as the Colorado River. 401 U.S. at 523 (emphasis added).[14]

The Klamath County Circuit Court's exercise of jurisdiction over the Tribes' claims is consistent with *Eagle County*, however, because the water in question is inside Oregon. As to " 'property within its limits,' " a state "possess[es] the *power* to provide for the adjudication of titles to [property] not only as against residents, *but as against nonresidents*, who might be brought into court by publication." *Am. Land Co. v. Zeiss*, 219 U.S. 47, 61 (1911) (emphasis added) (quoting *Arndt v. Griggs*, 134 U.S. 316, 320 (1890)). Such an *in*

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[14] Citing this observation, in *Baley* the Federal Circuit simply asserted—with no analysis to speak of—that the Klamath County Circuit Court lacked the power to adjudicate the rights of the California-based Tribes to water stored in Oregon. *See* 942 F.3d at 1341.

rem "procedure established by the state . . . is binding upon the federal courts." *Arndt*, 134 U.S. at 321. Oregon has established such a procedure for water rights, and it specifically confers jurisdiction to "adjudicate federal reserved rights." ORS § 539.010(7).

That Oregon cannot subject the Tribes to *in personam* jurisdiction is irrelevant because the KBA is *in rem*. *See* 4A C. Wright & A. Miller, *Federal Practice & Procedure* § 1070 (4th ed. 2022 update) ("The fact that the court cannot obtain jurisdiction over the person of all defendants or claimants to the property is considered irrelevant to whether in rem or quasi-in-rem jurisdiction is constitutionally permissible."); *see also Tenn. Student Assistance Corp. v. Hood*, 541 U.S. 440, 453 (2004) (same); *Arndt*, 134 U.S. at 320–21 (same). And because the KBA is *in rem*, as described above, OWRD—after giving notice—exercised its authority under state law to adjudicate the reserved rights of federal properties in *both* Oregon and California in the KBA order.[15]

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[15] Invoking the party-presentation rule, *see United States v. Sineneng-Smith*, 140 S. Ct. 1575, 1579 (2020), the majority contends that because KID did not cite OWRD's notice to federal users in California or the Justice Department's public acknowledgment that the KBA order governs water rights of federal properties in California, we should ignore those documents, Opinion at 16 n.5, even though they bear directly on KID's contention that the order adjudicated water rights, including federal reserved rights, "as against the whole world," Pet. 25 (quoting *Goncalves*, 865 F.3d at 1254); *see also* Pet. Reply at 21 n.2 (arguing "Reclamation's suggestion that California tribes who did not participate in the [KBA] may still claim water rights in [Upper Klamath Lake] is wrong" because an "in rem proceeding . . . determines rights in particular property against the entire world").

That a state court's exercise of *in rem* jurisdiction in the context of water rights requires it to respect federal reserved rights and other limits on its authority such as interstate compacts does not mean that it lacks *power* in the first instance to determine those constraints. The Supreme Court has repeatedly emphasized that states have "plenary control" over water within their borders, *California v. United States*, 438 U.S. at 657–58 (quoting *Cal. Or. Power Co. v. Beaver Portland Cement Co.*, 295 U.S. 142, 163–64 (1935)), even as this "total authority" is subject to "the reserved rights or navigation servitude of the United States," *id.* at 662; *cf. Santa Fe Trail Ranches Prop. Owners Ass'n v. Simpson*, 990 P.2d 46, 54 n.12 (Colo. 1999) ("The availability of water arising in Colorado for beneficial use in Colorado is limited by the delivery requirements of the interstate compacts and equitable

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Post-*Sineneng-Smith*, however, we have recognized that "when an issue or claim is properly before the court, the court is not limited to the particular legal theories advanced by the parties, but rather retains the independent power to identify and apply the proper construction of governing law." *Does v. Wasden*, 982 F.3d 784, 793 (9th Cir. 2020) (quoting *Kamen v. Kemper Fin. Servs., Inc.*, 500 U.S. 90, 99 (1991)). KID's mandamus petition squarely raises the *issue* of whether the KBA order is effective against the world, and just as we may consider cases not cited by the parties bearing on that issue, we may also sua sponte take judicial notice of relevant public records. *See Khoja v. Orexigen Therapeutics, Inc.*, 899 F.3d 988, 999 (9th Cir. 2018) ("[A] court may take judicial notice of matters of public record . . . .") (cleaned up); *Where Do We Go Berkeley v. Cal. Dep't of Transp.*, 32 F.4th 852, 858 n.2 (9th Cir. 2022) (sua sponte taking judicial notice). Thus, the majority sua sponte takes judicial notice of a public document in an attempt to link KID to the Klamath Water Users Association. Opinion at 9, 18 n.9.

apportionment decrees to which Colorado is a party."); *Mississippi v. Tennessee*, 142 S. Ct. 31, 41 (2021) ("When a water resource is shared between several States, each one has an interest which should be respected by the other.") (cleaned up).[16]

Not only does the Klamath County Circuit Court have the power to adjudicate *inter se* the water rights of all claimants to the waters of Upper Klamath Lake, but *we* also lack the prerogative to opine on the state-law limits of that court's exercise of such authority. *See San Carlos Apache Tribe*, 463 U.S. at 561 (stating that whether state courts have jurisdiction over Indian water-rights issues "is a question . . . over which the state courts have binding authority" and that where, as here, a state court has taken jurisdiction, federal courts "must assume, until informed otherwise, that—at least insofar as state law is concerned—such jurisdiction exists"). As far as we are concerned, the only relevant question is "whether there is a federal bar to the assertion of state jurisdiction" by the Klamath County Circuit Court. *Id.* The only such bar raised here by Reclamation is sovereign immunity, discussed below.

B

According to the majority, the second reason the Klamath County Circuit Court lacks prior exclusive

[16] The Klamath River Basin Compact governs the equitable apportionment of water between Oregon and California users in the Klamath Basin. *See* ORS § 542.620. That compact, while otherwise binding in the KBA, *see id.* Art. XII.A., expressly excludes reserved federal rights, including tribal rights, from its scope. *See id.* Arts. X, XI.

jurisdiction over KID's motion is because "[t]he KBA [order] did not adjudicate Reclamation's ESA obligations or the Tribes' senior rights . . . ." Opinion at 13 (citing *United States v. Orr Water Ditch Co.*, 600 F.3d 1152, 1160–61 (9th Cir. 2010)). Along the same lines, the majority attempts to distinguish *State Engineer*, contending that while the state court there "had jurisdiction over the tribe's rights because the rights were governed by state law and subject to the state's general stream adjudication," here the Klamath County Circuit Court "did not have jurisdiction over the Tribes' rights implicated by KID's motion because the Tribes' rights at issue were not governed by Oregon law and were not subject to the KBA." *Id.* at 14–15.

Whether the KBA order adjudicated the Bureau's federal *defenses*, however, is irrelevant because the prior exclusive jurisdiction doctrine turns on "*the nature of the right sued on*." *State Eng'r*, 339 F.3d at 810 (emphasis added); *cf. Hanson*, 357 U.S. at 246 n.12 (noting that in a *quasi in rem* action "the plaintiff [seeks] to secure a pre-existing *claim* in the subject property and to extinguish or establish the nonexistence of similar interests of particular persons") (emphasis added). The *KBA order* is the source of KID's asserted water rights, and under state law the Klamath County Circuit Court has prior exclusive jurisdiction to enforce and interpret it. *TPC*, 482 P.3d at 129.

The majority's reliance on *Orr Water Ditch* is therefore misplaced. In that case, we held that the district court with prior exclusive jurisdiction over a Nevada water-rights decree lacked jurisdiction over an

Indian tribe's attempt to enforce water rights based on "state law" *rather than* "the Tribe's rights under the [federal] decree." 600 F.3d at 1160. Here, by contrast, KID's motion asserts rights under the KBA order, over which the state court does have jurisdiction, and prior exclusive jurisdiction to boot. Moreover, whereas we had authority in *Orr Water Ditch* to opine on the district court's jurisdiction, we have no such authority as to the Klamath County Circuit Court.

C

The majority's third reason for holding that the state court lacks jurisdiction over KID's motion is that Reclamation did not "need" to assert any claim on behalf of the Tribes in the KBA to avoid forfeiture because their rights are "not governed by Oregon law" and "take precedence over KID's." Opinion at 14–15, 16 n.5, 22. Similarly, the majority contends that the Bureau's ESA obligations preempt the KBA order that KID seeks to enforce. *Id.* at 15 n.4.

In so holding, the majority errs by putting "the merits cart before the jurisdictional horse." *Bean v. Matteucci*, 986 F.3d 1128, 1137 (9th Cir. 2021) (Rawlinson, J., dissenting). In *United States v. Oregon*, we held that "concerns" over "federal reserve[d] water rights" "*go to the merits*." 44 F.3d at 770 (emphasis added). We explained that "in administering water rights the State is compelled to respect federal law regarding federal reserved rights and to the extent it does not, its judgments are reviewable by the Supreme Court." *Id.* (citing *Eagle County*, 401 U.S. at 525–26); *see also Eagle County*, 401 U.S. at 526 ("All . . . questions" in state water rights adjudications "going to

the merits," "including the volume and scope of particular reserved rights, are federal questions which, if preserved, can be reviewed here after final judgment by the [state] court."); *Colo. River*, 424 U.S. at 813 (same).[17] Thus, the majority's determination that Reclamation's federal defenses are meritorious[18] is irrelevant to whether the state court has *jurisdiction* to decide KID's motion to enforce the decree, including those defenses.[19] As a matter of *state* law, we must

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[17] The majority hints that Oregon courts might tolerate "years of misdirection of the water" before the Supreme Court could step in. Opinion at 19. But under Our Federalism, *cf. Younger v. Harris*, 401 U.S. 37, 44 (1971), "[s]tate courts are adequate forums for the vindication of federal rights," *Burt v. Titlow*, 571 U.S. 12, 19 (2013), for they, "as much as federal courts, have a solemn obligation to follow federal law," *San Carlos Apache Tribe*, 463 U.S. at 571. In any event, "[a]ny state court decision alleged to abridge Indian water rights protected by federal law can expect to receive, if brought for review before this Court, a particularized and exacting scrutiny commensurate with the powerful federal interest in safeguarding those rights from state encroachment." *Id.*

[18] In the face of the majority's blanket endorsement of Reclamation's defenses, the only thing left for the district court to do on remand is to enter summary judgment for the Bureau—if it doesn't first dismiss for lack of jurisdiction if the Tribes intervene, as in *KID I*.

[19] The majority's charge that KID is guilty of forum shopping is similarly irrelevant to the actual issue before us, as there is no "forum shopping exception" to the prior exclusive jurisdiction doctrine. Insofar as the majority applies preclusion by another name, *see* Opinion at 11, 20, and 21 (characterizing KID's motion as an attempt to "re-litigate" Reclamation's federal defenses), it fails to explain—putting aside the failure of the government to even raise that defense, *cf. Sineneng-Smith*, 140 S. Ct. at 1579—how the requirements of preclusion are satisfied here.

presume that "such jurisdiction exists." *San Carlos Apache Tribe*, 463 U.S. at 561.

D

Finally, the majority contends that the Klamath County Circuit Court lacks prior exclusive jurisdiction as a matter of *federal* law because the McCarran Amendment does not apply to KID's motion. Opinion at 14–15, 19. That statute waives federal sovereign immunity as to "any suit (1) for the adjudication" or "(2) for the administration" "of rights to the use of water of a river system or other source . . . ." 43 U.S.C. § 666(a).

To begin with, it is undisputed that the KBA order is an "adjudication" of water rights as to Upper Klamath Lake under the McCarran Amendment, as the order provisionally determined "all of the rights of various owners on a given stream," *Dugan v. Rank*, 372 U.S. 609, 618 (1963) (quoting S. Rep. No. 755, 82d Cong., 1st Sess. 9 (1951)), including the relative rights of KID and the United States. We have held that where, as here, "there has been such an adjudication and a decree entered, then one or more persons who hold adjudicated water rights can" sue to "administer" such rights under the statute. *S. Delta Water Agency v. United States*, 767 F.2d 531, 541 (9th Cir. 1985) (quoting *United States v. Hennen*, 300 F. Supp. 256, 263 (D. Nev. 1968)).

Finally, even if preclusion might otherwise operate as a *merits* bar to KID's motion to enforce the KBA order, that would still not deprive the Klamath County Circuit Court of its prior exclusive *jurisdiction* to adjudicate the merits, including any preclusion defense asserted by the Bureau.

So the question is whether KID's motion is a McCarran Amendment "administration." We have held that "[t]o administer a decree is to execute it, to enforce its provisions, to resolve conflicts as to its meaning, to construe and to interpret its language." *Id.* (quoting *Hennen*, 300 F. Supp. at 263). As detailed above, KID's motion manifestly seeks to enforce the KBA order, resolve conflicts as to its meaning, and construe and interpret its provisions. Indeed, Reclamation's notice of removal expressly acknowledges that KID's motion alleges that the Bureau's ongoing water releases "*conflict with state-based water rights determined in the* [*KBA order*]," Pet. 353 (emphasis added), and thereby tacitly admits that KID's motion is a McCarran Amendment "administration."[20]

[20] Because KID's motion seeks to enforce the KBA order, the majority's assertion that KID's motion is a mere "private suit[] to decide priorities between the United States and particular claimants" (and thus outside the McCarran Amendment), Opinion at 15 (quoting *Metro. Water Dist. of S. Cal. v. United States*, 830 F.2d 139, 144 (9th Cir. 1983)), misses the mark. In *Metropolitan Water District*, a water district brought an APA action challenging the Interior Department's enlargement of the boundaries of an Indian reservation that resulted in the tribe's assertion of increased water rights in a then-ongoing water rights adjudication between Arizona and California under the Supreme Court's original jurisdiction. 830 F.2d at 140–42. We held that the McCarran Amendment was inapplicable because the water district's APA action was not a "general adjudication" to determine "the rights of all claimants on a stream." *Id.* at 144 (citing *Dugan*, 372 U.S. at 617–18). The KBA, however, *is* indisputably such a general adjudication, and KID's motion seeks to enforce its rights under the order provisionally governing that adjudication.

For its part, the majority "reject[s]" what it portrays as KID's "characteriz[ation] [of] the relief it seeks as an application of the [KBA order]" because that characterization "circumvent[s] our prior decision [in *KID II*], the Tribes' rights, and the effect of the ESA." Opinion at 19.[21] In substance, my colleagues appear to conclude that KID's motion is not a McCarran Amendment "administration" because Reclamation's federal defenses are meritorious.[22]

In so reasoning, the majority requires KID to "win [its] case before [it] can" litigate its motion in state court. *Willingham v. Morgan*, 395 U.S. 402, 407 (1969). But in analogous contexts, the Supreme Court applies a simple test that we should employ here: If the party invoking jurisdiction asserts (as applicable) a colorable claim or defense on the merits, that suffices for

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[21] In *KID II*, we held that KID's separate APA suit in the district court challenging Reclamation's water releases was not a McCarran Amendment "administration" and thus was outside the scope of the sovereign immunity waiver. 48 F.4th at 947. We expressly recognized, however, that the KBA "*was* a McCarran Amendment case." *Id.* at 946 (emphasis in original). *KID II* therefore does not control whether KID's motion—which seeks no relief under the APA and was originally filed in the KBA—is an "administration" for purposes of the Amendment. Tellingly, Reclamation does not argue that *KID II* is issue preclusive here.

[22] Insofar as the majority also implies that the McCarran Amendment does not apply merely because Reclamation's federal defenses are "not governed by Oregon law," Opinion at 14–15, that interpretation renders the Amendment useless as such defenses by definition are *never* "governed by state law," *id.* at 14. The entire point of the statute is to allow state courts "to determine federal reserved rights . . . ." *Colo. River*, 424 U.S. at 809.

jurisdiction to attach, even if the merits claim or defense ultimately fails. *See, e.g.*, *Bell*, 327 U.S. at 682–83 (holding that an asserted federal claim triggers federal question jurisdiction unless the claim "clearly appears to be immaterial and made solely for the purpose of obtaining jurisdiction or where such a claim is wholly insubstantial and frivolous"); *Jefferson County, Ala. v. Acker*, 527 U.S. 423, 431 (1999) ("To qualify for removal" under the federal officer removal statute, a removing officer need only "raise a colorable federal defense," as the official need not "win his case before he can have it removed.") (quoting *Willingham*, 395 U.S. at 407).

Thus, a valid *defense* does not oust a district court of federal question jurisdiction if a complaint asserts a colorable federal claim. *See, e.g.*, *S. New England Tel. Co. v. Glob. NAPs Inc.*, 624 F.3d 123, 132 (2d Cir. 2010) ("[W]hether a plaintiff has pled a jurisdiction-conferring claim is a wholly separate issue from whether the complaint adequately states a legally cognizable claim for relief on the merits."); 13D Wright & Miller, *Federal Practice & Procedure: Jurisdiction* § 3564 (3d ed. Apr. 2022 update) ("Jurisdiction is not lost because the court ultimately concludes that the federal claim is without merit.").

Rather than asking whether KID's motion can *prevail* against the government's ESA and reserved water rights defenses as the majority does, we should ask—consistent with the Supreme Court's approach in other jurisdictional contexts—whether KID's motion asserts a *colorable* McCarran Amendment administration claim. Just as Reclamation's assertion

of "colorable" federal defenses in its notice of removal permitted the Bureau to invoke the federal officer removal statute here, *Acker*, 527 U.S. at 431, I would correspondingly hold that KID's assertion of a colorable motion to enforce the KBA order is an "administration" that implicates the Amendment's waiver of sovereign immunity—whether or not that motion states a legally cognizable claim for relief on the merits.

Because "jurisdictional rules should be clear," *Lapides v. Bd. of Regents of Univ. Sys. of Ga.*, 535 U.S. 613, 621 (2002), we should adopt the easily administered, bright-line test of *Bell v. Hood* for McCarran Amendment purposes. Doing so would allow the Amendment to perform its function of clearing the way for state courts to adjudicate the merits of "collision[s]" between "private [water] rights and [the] reserved rights of the United States" "in unified proceedings" that avoid "piecemeal adjudication of water rights in a river system." *Colo. River*, 424 U.S. at 813 (quoting *Eagle County*, 401 U.S. at 526).[23]

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[23] Reclamation also argues (essentially in the alternative) that the McCarran Amendment's waiver does not extend to the Bureau's defenses to KID's motion based on the reserved rights held in trust for the out-of-state Tribes. Reclamation Response at 27–37. Reclamation characterizes KID's claims implicating those defenses as "interstate disputes." *Id*. at 27.

The McCarran Amendment, however, is facially indifferent to the location or nature of federal interests with asserted "water rights" to an in-state "river system or other source" subject to a comprehensive state court adjudication. *See* 43 U.S.C. § 666(a). For that reason, the KBA order adjudicated water rights in Upper Klamath Lake as to federal properties in Oregon *and* California. *See above* notes 1, 15 and accompanying text, and 16.

III

For the reasons explained above, the Klamath County Circuit Court has prior exclusive jurisdiction to decide KID's motion. The district court therefore committed a clear error of law in failing to remand that motion. *See Chapman v. Deutsche Bank Nat'l Tr. Co.*, 651 F.3d 1039, 1044 n.1 (9th Cir. 2011) (stating that "if the [prior exclusive jurisdiction] doctrine applies, it is legal error for a district court not to remand, dismiss, or stay federal proceedings on account of the state court's prior exercise of jurisdiction").

KID's right to mandamus relief based on this error "is clear and indisputable," *Cheney v. U.S. Dist. Ct. for Dist. of Columbia*, 542 U.S. 367, 381 (2004) (cleaned up), satisfying a prerequisite for mandamus relief set forth by both the Supreme Court and this Court. *See id.*; *see also Bauman v. U.S. Dist. Ct. for N. Dist. of Cal.*, 557 F.2d 650, 654–55 (9th Cir. 1977) (outlining "five specific guidelines" governing mandamus relief, the third of which is that the "district court's order is clearly erroneous as a matter of law"); *In re Walsh*, 15 F.4th 1005, 1008 (9th Cir. 2021) (characterizing the third *Bauman* factor, clear error as a matter of law, as "a necessary condition for granting a writ of mandamus") (quoting *In re Van Dusen*, 654 F.3d 838, 841 (9th Cir. 2011)).

From that error, it also necessarily follows that KID has "no other adequate means," such as a direct appeal, to obtain the relief it seeks. *Cheney*, 542 U.S. at 380; *Bauman*, 557 F.2d at 654 (identifying this factor as the first mandamus consideration). Because the Klamath County Circuit Court has prior exclusive jurisdiction,

no other forum can provide relief. Although an appeal in the ordinary course could eventually provide relief, it would be inadequate, because in the meantime KID's irrigator members would suffer loss of their water rights. *See* Pet. 86–100; Pet. 293–310. And apart from the injuries identified by KID's declarants described above, loss of opportunities to *use* water rights by its nature is akin to environmental injuries that we have characterized as irreparable. *All. for the Wild Rockies v. Cottrell*, 632 F.3d 1127, 1135 (9th Cir. 2011) (loss of opportunities to "view, experience, and utilize" undisturbed areas of a national forest was irreparable injury). KID's petition thereby satisfies *Bauman*'s second mandamus consideration: that "[t]he petitioner will be damaged or prejudiced in a way not correctable on appeal." 557 F.2d at 654.

KID has therefore shown its entitlement to mandamus relief under the first three factors of the *Bauman* balancing test. *See In re Williams-Sonoma, Inc.*, 947 F.3d 535, 538–40 (9th Cir. 2020) (granting writ of mandamus when first three *Bauman* factors were satisfied but fourth and fifth factors were not and explaining that "[t]he balance of the factors weighs in favor of granting the writ of mandamus"); *United States v. Tillman*, 756 F.3d 1144, 1153 (9th Cir. 2014) (same); *Hernandez v. Tanninen*, 604 F.3d 1095, 1101–02 (9th Cir. 2010) (same, and noting that district court order was "particularly injurious" to petitioner's interests); *cf. Miller v. Gammie*, 335 F.3d 889, 895 (9th Cir. 2003) (en banc) (finding third factor dispositive

where first two factors supported mandamus and last two did not).[24]

As "[n]ot every factor is needed for granting a writ of mandamus," *Walsh*, 15 F.4th at 1008, and "rarely if ever will a case arise where all the guidelines point in the same direction or even where each guideline is relevant or applicable," *Hernandez*, 604 F.3d at 1099, I would grant KID's petition based on its showing that the district court clearly erred as a matter of law and that KID has no other adequate remedy in view of the irreparable injury its irrigator members will suffer from the delay occasioned by an appeal in the ordinary course.

As the district court usurped the prior exclusive jurisdiction of the Klamath County Circuit Court to resolve *all* questions regarding the scope of the KBA order that KID seeks to enforce, including whether Reclamation forfeited the reserved rights of the Tribes by not asserting a claim on their behalf and whether the ESA preempts that order, this is a textbook case warranting mandamus relief. *Cf. Cheney*, 542 U.S. at 380 (mandamus is reserved for "exceptional circumstances amounting to a judicial usurpation of power") (cleaned up). I therefore respectfully dissent from the denial of the writ.

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[24] The last two *Bauman* factors are "(4) [t]he district court's order is an oft-repeated error, or manifests a persistent disregard of the federal rules"; and "(5) [t]he district court's order raises new and important problems, or issues of law of first impression." 557 F.2d at 655.

APPENDIX B

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF OREGON
MEDFORD DIVISION

Civ. No. 1:21-cv-00504-AA

[Filed April 25, 2022]

KLAMATH IRRIGATION DISTRICT,)
Plaintiff,)
)
v.)
)
U.S. BUREAU OF RECLAMATION,)
Defendant,)
)
and)
)
OREGON WATER RESOURCES)
DEPARTMENT,)
Intervenor Defendant.)
)

OPINION & ORDER

AIKEN, District Judge.

This case comes before the Court on an Amended Motion to Remand filed by Plaintiff Klamath Irrigation District ("KID"). ECF No. 19. For the reasons set forth below, KID's motion is DENIED.

LEGAL STANDARD

Federal courts are courts of limited jurisdiction and only have subject-matter jurisdiction over matters authorized by the United States Constitution and Congress. *Bender v. Willamsport Area Sch. Dist.*, 475 U.S. 534, 541 (1986); *Couch v. Telescope, Inc.*, 611 F.3d 629, 632 (9th Cir. 2010). "Challenges to the existence of removal jurisdiction should be resolved within [the] same framework" as that applicable to motions to dismiss for lack of subject-matter jurisdiction due to "the parallel nature of the inquiry." *Leite v. Crane Co.*, 749 F.3d 1117, 1121-22 (9th Cir. 2014).

A motion to remand is the proper procedural vehicle for challenging removal. *Babasa v. LensCrafters, Inc.*, 498 F.3d 972, 974 (9th Cir. 2007). Removal is authorized when the state court action is against "[t]he United States or any agency thereof or any officer (or any person acting under that officer) of the United State or of any agency thereof sued in an official or individual capacity for or relating to any act under color of such office." 28 U.S.C. § 1442(a)(1). Section 1442(a)(1) is interpreted "broadly in favor of removal." *Durham v. Lockheed Martin Corp.*, 445 F.3d 1247, 1252 (9th Cir. 2006).

The party seeking removal bears the burden of establishing by a preponderance of the evidence that all removal requirements have been met. *Serrano v. 180 Connect, Inc.*, 478 F.3d 1018, 1021 (9th Cir. 2007); *Valdez v. Allstate Ins. Co.*, 372 F.3d 1115, 1117 (9th Cir. 2004). Thus, if a plaintiff challenges the defendant's removal of a case, the defendant bears the burden of establishing the propriety of the removal.

Geographic Expeditions, Inc. v. Estate of Lhotka ex rel. Lhotka, 599 F.3d 1102, 1107 (9th Cir. 2010).

BACKGROUND

The United States Bureau of Reclamation ("Reclamation") operates the Klamath Project (the "Project") to deliver water from Upper Klamath Lake ("UKL") and its tributaries to water users in southern Oregon and northern California. As part of the Project, Reclamation operates dams controlling the flow of water from the UKL. Reclamation holds water rights for the Project acquired in conformity with the requirements of state law. Reclamation also holds federal reserved water rights for the Klamath Tribes for instream fisheries purposes in UKL and the tributaries above UKL in Oregon.

These rights are subject to the jurisdiction of the Klamath Basin Adjudication ("KBA"), a comprehensive general stream adjudication in Oregon state court. The comprehensive stream adjudication for the Klamath Basin began in 1975. In February 2014, Oregon entered an Amended and Corrected Findings of Fact and Final Order of Determination ("ACFFOD") in the Klamath County Circuit Court and the determination of rights entered the judicial phase of adjudication, which remains ongoing. While the KBA is pending, the status quo of water rights found in the ACFFOD is enforceable.

Reclamation also operates in accordance with the requirements of the Endangered Species Act ("ESA"), 16 U.S.C. §§ 1531-44. The ESA applies with respect to (1) two species of endangered sucker fish with critical

habitat in UKL; (2) threated Southern Oregon/North California Coast ("SONCC") coho salmon with critical habitat in the Klamath River, downstream of the Project; and (3) endangered killer whales in the Pacific Ocean that prey on Chinook salmon which, although not listed under the ESA, inhabit the Klamath River downstream of the Project. Biological opinions issued by the U.S. Fish and Wildlife Service and the National Marine Fisheries Service have determined that certain water levels are necessary in UKL to maintain critical habitat for the endangered sucker fish and that certain flow levels are necessary in the Klamath River to maintain critical habitat for the salmon.

Reclamation also operates the Project in accordance with the senior downstream federal tribal reserved water rights of the Yurok and Hoopa Valley Tribes in California. Unlike the reserved water rights of the Klamath Tribes of Oregon, the reserved water rights of the Yurok and Hoopa Valley Tribes of California have not been adjudicated in the KBA. However, the Federal Circuit has determined that the water rights of the Yurok and Hoopa Valley Tribes for instream fisheries purposes are senior to the Project's water rights and, although not yet determined in California, are "[a]t a minimum" equal to the amount of water needed under the ESA to avoid jeopardy to the salmon in the Klamath River. *Baley v. United States*, 942 F.3d 1312, 1337 (Fed. Cir. 2019).

This arrangement is complicated by a severe and prolonged drought in the Klamath Basin, which has reduced the amount of water available in the Project area. Reclamation has continued to release water from

UKL into the Klamath River to preserve the salmon and satisfy the water rights of the Yurok and Hoopa Valley Tribes while limiting the amount of water released for irrigation by the Project water users.

KID is a contractor for the Klamath Project and a participant in the KBA. KID asserts that Reclamation has the right to store water in UKL, but that the agency has no authority to release water from UKL for instream uses, such as meeting Reclamation's obligations under the ESA or satisfying the reserved water rights of the Yurok and Hoopa Valley Tribes unless Reclamation first seeks a stay of the ACFFOD and posts a bond. KID filed a motion for a preliminary injunction in the KBA seeking to enjoin Reclamation from releasing any water stored in the UKL under the Project's storage water rights except to satisfy the irrigation demands of the Project's water users under the Project's state law-based water rights held for beneficial use. Notice of Removal Ex. 1, at 4. ECF No. 1-1.

Such an injunction would prevent Reclamation from releasing water from UKL to meet its obligations under the ESA or to satisfy the senior downstream rights held by the Yurok and Hoopa Valley Tribes. Reclamation takes the position that operations in accordance with its federal obligations—to the downstream tribes and under the ESA—are beyond the jurisdiction of the KBA and so removed the motion for preliminary injunction from the Klamath County Circuit Court to this Court.

DISCUSSION

As noted, Reclamation removed KID's preliminary injunction motion from the KBA to this Court. Federal law permits the removal of a civil action commenced in state court "that is against or directed to" the "United States or any agency thereof." 28 U.S.C. § 1442(a)(1). For purposes of removal, the agency need only "allege a colorable defense under federal law." *Mesa v. California*, 489 U.S. 121, 129 (1989). "[T]he right of removal under § 1442(a)(1) is made absolute whenever a suit in a state court is for any act 'under color' of federal office regardless of whether the suit could originally have been brought in a federal court." *Willingham v. Morgan*, 395 U.S. 402, 406 (1969). "Federal jurisdiction rests on a federal interest in the matter." *Id.* (internal quotation marks and citation omitted).

In this case, KID seeks to remand consideration of its motion for preliminary injunction to the KBA on the basis that the KBA has prior exclusive jurisdiction over the issues raised in the motion for preliminary injunction. The doctrine of prior exclusive jurisdiction provides that "when a court of competent jurisdiction has obtained possession, custody, or control of particular property, that possession may not be disturbed by any other court." *State Eng'r of State of Nevada v. South Fork Band of the Te-Moak Tribe of Western Shoshone Indians of Nevada*, 339 F.3d 804, 809 (9th Cir. 2003). The doctrine is "no mere abstention rule," but "a mandatory jurisdictional limitation." *Id.* at 810. The doctrine of prior exclusive jurisdiction applies in the context of water rights. *Id.* Here, KID contends

that the doctrine applies to give the KBA exclusive jurisdiction over the water in the Klamath Basin and the Project.

In its Response, Reclamation contends that the KBA entirely lacks jurisdiction over the issues raised in KID's motion for preliminary injunction, due to sovereign immunity, and so the KBA does not possess prior exclusive jurisdiction over the motion. "The basic rule of federal sovereign immunity is that the United States cannot be sued at all without the consent of Congress." *Block v. North Dakota ex rel. Bd. of Univ. & Sch. Lands*, 461 U.S. 273, 287 (1983); *United States v. Mitchell*, 463 U.S. 206, 212 (1983) ("It is axiomatic that the United States may not be sued without its consent and that the existence of consent is a prerequisite for jurisdiction."). "Sovereign immunity is jurisdictional in nature" and "the terms of the United States' consent to be sued in any court define that court's jurisdiction to entertain the suit." *F.D.I.C. v. Meyer*, 510 U.S. 471, 475 (1994) (internal quotation marks and citation omitted, alterations normalized). "The Supreme Court has frequently held that a waiver of sovereign immunity is to be strictly construed, in terms of its scope, in favor of the sovereign." *Dunn & Black P.S. v. United States*, 492 F.3d 1084, 1088 (9th Cir. 2007) (internal quotation marks and citation omitted, alterations normalized). "As the contours of any such waiver define a court's authority to entertain a suit against the government, each claim against the government must rest upon an applicable waiver of immunity." *Navajo Nation v. Dep't of the Interior*, 876 F.3d 1144, 1167-68 (9th Cir. 2017) (internal citation omitted).

In this case, KID contends that the United States has waived sovereign immunity under the McCarran Amendment, 43 U.S.C. § 666(a). The McCarran Amendment provides:

> Consent is given to join the United States as a defendant in any suit (1) for the adjudication of rights to the use of water of a river system or other source, or (2) for the administration of such rights, where it appears that the United States is the owner of or is in the process of acquiring water rights by appropriation under State law, by purchase, by exchange, or otherwise, and the United States is a necessary party to such suit. The United States, when a party to any such suit, shall (1) be deemed to have waived any right to plead that the State laws are inapplicable or that the United States is not amendable thereto by reason of its sovereignty, and (2) shall be subject to the judgments, orders, and decrees of the court having jurisdiction, and may obtain review thereof, in the same manner and to the same extent as a private individual under like circumstances: *Provided*, That no judgment for costs shall be entered against the United States in any such suit.

43 U.S.C. § 666(a).

The Supreme Court has held that, for purposes of the McCarran Amendment, a "river system" is to be "read as one within the particular State's jurisdiction," because "[n]o suit by any State could possibly encompass all of the water rights in the entire Colorado

river which runs through or touches many States." *United States v. District Court in and for Eagle Cnty., Colo.*, 401 U.S. 520, 523 (1971); *Baley*, 942 F.3d at 1341 ("Moreover, states have the ability to adjudicate rights in a water or river system within their jurisdiction, but they cannot adjudicate water rights in another state.").

The McCarran Amendment is "not intended . . . to be used for any other purpose than to allow the United States to be joined in a suit wherein it is necessary to adjudicate all of the rights of various owners on a given stream. This is so because unless all of the parties owning or in the process or acquiring water rights on a particular stream can be joined as parties defendant, any subsequent decree would be of little value." *District Court in and for Eagle Cnty.*, 401 U.S. at 525 (internal quotation marks and citation omitted). The "administration of such rights" in § 666(a)(2) refers to the rights described in § 666(a)(1) "for they are the only ones which in this context 'such' could mean; and as we have seen they are all-inclusive, in terms at least." *Id.* at 524.

> The "administration" of such rights means "to execute it, to enforce its provisions, to resolve conflicts as to its meaning, to construe and to interpret its language. Once there has been such an adjudication and a decree entered, then one or more persons who hold adjudicated water rights can, within the framework of § 666(a)(2), commence among other such actions described above, subjecting the United States, in a proper case, to the judgments, orders, and decrees of the court having jurisdiction."

San Luis Obispo Coastkeeper v. U.S. Dep't of the Interior, 394 F. Supp.3d 984, 994 (N.D. Cal. 2019) (quoting *United States v. Hennen*, 300 F. Supp. 256, 263 (D. Nev. 1968).

In determining whether the McCarran Amendment's waiver of immunity applies, courts must examine whether the case before them is the type of adjudication described in the McCarran Amendment —that is, either a suit for adjudication of rights to the use of a water or for the administration of such rights. *United States v. Oregon*, 44 F.3d 758, 765-66 (9th Cir. 1994); *see also Fent v. Oklahoma Water Res. Bd.*, 235 F.3d 553, 555-57 (10th Cir. 2000) (holding that an action for damages and to recover funds paid pursuant to an allegedly illegal contract "cannot by any stretch of the legal imagination be characterized as an effort to obtain a comprehensive adjudication of all water rights in a water system."). As the district court observed in *San Luis Obispo Coastkeeper*, "the purpose of the McCarran Amendment is not to waive sovereign immunity whenever litigation may incidentally relate to water rights administered by the United States. It is for determining substantive water rights by giving courts the ability to enforce those determinations and to permit joinder of the United States where necessary to effectively adjudicate competing claims thereto." *San Luis Obispo Coastkeeper*, 394 F. Supp.3d at 995.

In *San Luis Obispo Coastkeeper*, the court found that the McCarran Amendment did not apply where the petitioners sought "to enforce state environmental laws requiring sufficient flows of water for Steelhead," because the action was not one to adjudicate or

administer a comprehensive state court stream adjudication. *San Luis Obispo Coastkeeper*, 394 F. Supp.3d at 995. Here, KID's motion for preliminary injunction is clearly not a seeking the adjudication of competing water rights under § 666(a)(1). Nor is it in the nature of an action to administer such rights, but is instead an enforcement action to block the release of water to satisfy the rights of California tribes which were not adjudicated in the KBA.

KID has attempted to litigate this issue in the past without success. In *Baley v. United States*, the Federal Circuit held that, in the specific case of the Hoopa Valley and Yurok Tribes, that "federal courts have consistently held that tribal water rights arising from federal reservations are federal water rights not governed by state law," and that "the volume and scope of particular reserved rights are federal questions." *Baley*, 942 F.3d at 1340 (internal quotation marks and citation omitted, alterations normalized). As noted, the Federal Circuit determined that the Tribes' right to water was at least coextensive with the requirements of the ESA to maintain the salmon in the Klamath River. *Id.* at 1337. And this right is not altered by the fact that the Tribes did not participate in the KBA. *See Id.*, at 1341 ("Nor do we believe that the Yurok and Hoopa Valley Tribes waived their rights because they did not participate in the Klamath Adjudication . . . their rights are federal reserved water rights not governed by state law . . . Thus, the Yurok and Hoopa Valley Tribes' lack of participation in the state of Oregon's Klamath Adjudication did not preclude their

entitlement to water that flows in the Klamath River below the Iron Gate Dam in California.").[1]

In *Klamath Irrigation District v. United States Bureau of Reclamation*, 489 F. Supp.3d 1168 (D. Or. 2020), KID brought an action alleging "in essence, that Reclamation lacks statutory or other authority to comply with the ESA, or to protect tribal reserved water rights held for tribal fishery needs, by reducing the amount of water to be delivered to Project irrigators pursuant to their state water rights and their contracts with Reclamation." *Id.* at 1177. In that case, KID sought a declaration "that Defendants must maintain, operate, and direct operations of the Project and Project-related facilities in accordance with the requirements of the Reclamation Act and that Defendants authorization of collection and retention and use of stored water for ESA-listed species, and use of stored water for ESA-listed species in the Klamath River, are not activities authorized by any applicable law." *Id.* at 1178 (internal quotation marks and citation omitted, alterations normalized). The court observed that "[c]ourts, including the Ninths Circuit, have held that Tribes' federal reserved treaty water and fishing rights are at least co-extensive with the government's obligations to provide sufficient water under the ESA

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[1] In rejecting the argument that the Tribes' water rights must be submitted to the KBA, the Federal Circuit cast doubt on the power of the KBA to adjudicate the water rights of the Hoopa Valley and Yurok Tribes, noting that "their rights are federal reserved water rights not governed by state law," and "[m]oreover, states have the ability to adjudicate rights in a water or river system within their jurisdiction, but they cannot adjudicate water rights in another state." *Baley v. United States*, 942 F.3d 1312, 1341 (Fed. Cir. 2019).

for species survival and environmental purposes." *Id.* at 1178-79 (citing *Baley*, 942 F.3d at 1337; *Klamath Water Users Ass'n v. Paterson*, 204 F.3d 1206, 1214 (9th Cir. 2000)). "In addition, courts have repeated[ly] held and affirmed the priority that these federally reserved water rights have over competing irrigation rights." *Id.* at 1179. As a result, the court concluded that KID's primary contention, "that Reclamation has no discretion to fulfill ESA or other instream obligations prior to fulfilling water delivery obligations to Plaintiffs, as determined by the State of Oregon's Klamath Basin Adjudication and the ACFFOD," would, if successful, "ultimately either extinguish or conflict with Reclamation's obligations to provide water instream" to satisfy ESA obligations, which were coextensive with the senior water rights of the Yurok and Hoopa Valley Tribes. *Id.* at 1178.

In *Klamath Irrigation District*, the core question was whether the Tribes were necessary parties to such an action and the court concluded that they were. *Klamath Irrigation District*, 489 F. Supp.3d at 1177-81. In addition, the court concluded that sovereign immunity prevented the Tribes from being joined in the action, necessitating dismissal. *Id.* at 1181-82. In making this determination, the court considered the application of the McCarran Amendment, concluding:

> The Oregon Klamath Basin Adjudication was certainly a McCarran Amendment case. Plaintiffs argue that, by extension, the case at bar could be considered an "enforcement action" of the ACFFOD; indeed KID's Second Amended Complaint states that the defendants' sovereign

> immunity is waived "pursuant to 43 U.S.C. § 666(a), as this is a suit for the administration of rights to the use of the water of the Klamath River system." However, this is not a "state general stream adjudication case." Even if it were, the McCarran Amendment waives the sovereign immunity of the Indian rights at issue, not the sovereign immunity of the Tribes themselves. The distinction is unnecessary here, however, as this is clearly not a McCarran Amendment case.

Id. at 1181 (internal citation omitted).

Here, KID has attempted to evade the force of that ruling by bringing essentially the same challenge in Klamath County Circuit Court as part of the KBA, but the fact that they have attempted to bring their claim by filing in it within the general stream adjudication does not automatically extend the waiver of sovereign immunity to cover KID's motion for preliminary injunction. KID's motion does not seek to adjudicate rights within a stream system, nor does it seek to administer rights already adjudicated. Rather, KID seeks to reach beyond the limited waiver of the McCarran Amendment to litigate federal issues, most notably Reclamation's release of water to satisfy the instream water rights of the Yurok and Hoopa Valley Tribes and the co-extensive demands of the ESA. As the court observed in *Klamath Irrigation District*, this is an enforcement action, not an action to adjudicate or administer rights.

Waivers of sovereign immunity are strictly construed in favor of the sovereign and the Court

concludes the KID's motion for preliminary injunction does not come within the McCarran Amendment's waiver, such that the KBA would possess exclusive jurisdiction over the claim. At the very least, Reclamation has demonstrated that it possesses a colorable federal defense, sufficient to permit removal of the preliminary injunction motion to federal court. Accordingly, the Court DENIES KID's motion to remand this case.

CONCLUSION

For the reasons set forth above, KID's Amended Motion to Remand to State Court, ECF No. 19, is DENIED.

It is so ORDERED and DATED this 25th day of April, 2022.

/s/ Ann Aiken
Ann Aiken
United States District Judge

APPENDIX C

STATUTES, RULES, AND REGULATIONS

16 U.S.C. § 1536 - Interagency cooperation

(a) Federal agency actions and consultations

(1) The Secretary shall review other programs administered by him and utilize such programs in furtherance of the purposes of this chapter. All other Federal agencies shall, in consultation with and with the assistance of the Secretary, utilize their authorities in furtherance of the purposes of this chapter by carrying out programs for the conservation of endangered species and threatened species listed pursuant to section 1533 of this title.

(2) Each Federal agency shall, in consultation with and with the assistance of the Secretary, insure that any action authorized, funded, or carried out by such agency (hereinafter in this section referred to as an "agency action") is not likely to jeopardize the continued existence of any endangered species or threatened species or result in the destruction or adverse modification of habitat of such species which is determined by the Secretary, after consultation as appropriate with affected States, to be critical, unless such agency has been granted an exemption for such action by the Committee pursuant to subsection (h) of this section. In fulfilling the requirements of this paragraph each

agency shall use the best scientific and commercial data available.

(3) Subject to such guidelines as the Secretary may establish, a Federal agency shall consult with the Secretary on any prospective agency action at the request of, and in cooperation with, the prospective permit or license applicant if the applicant has reason to believe that an endangered species or a threatened species may be present in the area affected by his project and that implementation of such action will likely affect such species.

(4) Each Federal agency shall confer with the Secretary on any agency action which is likely to jeopardize the continued existence of any species proposed to be listed under section 1533 of this title or result in the destruction or adverse modification of critical habitat proposed to be designated for such species. This paragraph does not require a limitation on the commitment of resources as described in subsection (d).

(b) Opinion of Secretary

(1)

(A) Consultation under subsection (a)(2) with respect to any agency action shall be concluded within the 90-day period beginning on the date on which initiated or, subject to subparagraph (B), within such other period of time as is mutually agreeable to the Secretary and the Federal agency.

(B) In the case of an agency action involving a permit or license applicant, the Secretary and the Federal agency may not mutually agree to conclude consultation within a period exceeding 90 days unless the Secretary, before the close of the 90th day referred to in subparagraph (A)—

(i) if the consultation period proposed to be agreed to will end before the 150th day after the date on which consultation was initiated, submits to the applicant a written statement setting forth—

(I) the reasons why a longer period is required,

(II) the information that is required to complete the consultation, and

(III) the estimated date on which consultation will be completed; or

(ii) if the consultation period proposed to be agreed to will end 150 or more days after the date on which consultation was initiated, obtains the consent of the applicant to such period.

The Secretary and the Federal agency may mutually agree to extend a consultation period established under the preceding sentence if the Secretary, before the close of such period, obtains the consent of the applicant to the extension.

(2) Consultation under subsection (a)(3) shall be concluded within such period as is agreeable to the Secretary, the Federal agency, and the applicant concerned.

(3)

(A) Promptly after conclusion of consultation under paragraph (2) or (3) of subsection (a), the Secretary shall provide to the Federal agency and the applicant, if any, a written statement setting forth the Secretary's opinion, and a summary of the information on which the opinion is based, detailing how the agency action affects the species or its critical habitat. If jeopardy or adverse modification is found, the Secretary shall suggest those reasonable and prudent alternatives which he believes would not violate subsection (a)(2) and can be taken by the Federal agency or applicant in implementing the agency action.

(B) Consultation under subsection (a)(3), and an opinion issued by the Secretary incident to such consultation, regarding an agency action shall be treated respectively as a consultation under subsection (a)(2), and as an opinion issued after consultation under such subsection, regarding that action if the Secretary reviews the action before it is commenced by the Federal agency and finds, and notifies such agency, that no significant changes have been made with respect to the action and that no significant change has occurred regarding the information used during the initial consultation.

(4) If after consultation under subsection (a)(2), the Secretary concludes that—

(A) the agency action will not violate such subsection, or offers reasonable and prudent alternatives which the Secretary believes would not violate such subsection;

(B) the taking of an endangered species or a threatened species incidental to the agency action will not violate such subsection; and

(C) if an endangered species or threatened species of a marine mammal is involved, the taking is authorized pursuant to section 1371(a)(5) of this title;

the Secretary shall provide the Federal agency and the applicant concerned, if any, with a written statement that—

(i) specifies the impact of such incidental taking on the species,

(ii) specifies those reasonable and prudent measures that the Secretary considers necessary or appropriate to minimize such impact,

(iii) in the case of marine mammals, specifies those measures that are necessary to comply with section 1371(a)(5) of this title with regard to such taking, and

(iv) sets forth the terms and conditions (including, but not limited to, reporting requirements) that must be complied with by

the Federal agency or applicant (if any), or both, to implement the measures specified under clauses (ii) and (iii).

(c) Biological assessment

(1) To facilitate compliance with the requirements of subsection (a)(2), each Federal agency shall, with respect to any agency action of such agency for which no contract for construction has been entered into and for which no construction has begun on November 10, 1978, request of the Secretary information whether any species which is listed or proposed to be listed may be present in the area of such proposed action. If the Secretary advises, based on the best scientific and commercial data available, that such species may be present, such agency shall conduct a biological assessment for the purpose of identifying any endangered species or threatened species which is likely to be affected by such action. Such assessment shall be completed within 180 days after the date on which initiated (or within such other period as is mutually agreed to by the Secretary and such agency, except that if a permit or license applicant is involved, the 180-day period may not be extended unless such agency provides the applicant, before the close of such period, with a written statement setting forth the estimated length of the proposed extension and the reasons therefor) and, before any contract for construction is entered into and before construction is begun with respect to such action. Such assessment may be undertaken as part of a Federal agency's compliance with the requirements of

section 102 of the National Environmental Policy Act of 1969 (42 U.S.C. 4332).

(2) Any person who may wish to apply for an exemption under subsection (g) of this section for that action may conduct a biological assessment to identify any endangered species or threatened species which is likely to be affected by such action. Any such biological assessment must, however, be conducted in cooperation with the Secretary and under the supervision of the appropriate Federal agency.

(d) Limitation on commitment of resources

After initiation of consultation required under subsection (a)(2), the Federal agency and the permit or license applicant shall not make any irreversible or irretrievable commitment of resources with respect to the agency action which has the effect of foreclosing the formulation or implementation of any reasonable and prudent alternative measures which would not violate subsection (a)(2) of this section.

(e) Endangered Species Committee

(1) There is established a committee to be known as the Endangered Species Committee (hereinafter in this section referred to as the "Committee").

(2) The Committee shall review any application submitted to it pursuant to this section and determine in accordance with subsection (h) of this section whether or not to grant an exemption from the requirements of subsection (a)(2) of this section for the action set forth in such application.

(3) The Committee shall be composed of seven members as follows:

(A) The Secretary of Agriculture.

(B) The Secretary of the Army.

(C) The Chairman of the Council of Economic Advisors.

(D) The Administrator of the Environmental Protection Agency.

(E) The Secretary of the Interior.

(F) The Administrator of the National Oceanic and Atmospheric Administration.

(G) The President, after consideration of any recommendations received pursuant to subsection (g)(2)(B) shall appoint one individual from each affected State, as determined by the Secretary, to be a member of the Committee for the consideration of the application for exemption for an agency action with respect to which such recommendations are made, not later than 30 days after an application is submitted pursuant to this section.

(4)

(A) Members of the Committee shall receive no additional pay on account of their service on the Committee.

(B) While away from their homes or regular places of business in the performance of services for the Committee, members of the Committee

shall be allowed travel expenses, including per diem in lieu of subsistence, in the same manner as persons employed intermittently in the Government service are allowed expenses under section 5703 of title 5.

(5)

(A) Five members of the Committee or their representatives shall constitute a quorum for the transaction of any function of the Committee, except that, in no case shall any representative be considered in determining the existence of a quorum for the transaction of any function of the Committee if that function involves a vote by the Committee on any matter before the Committee.

(B) The Secretary of the Interior shall be the Chairman of the Committee.

(C) The Committee shall meet at the call of the Chairman or five of its members.

(D) All meetings and records of the Committee shall be open to the public.

(6) Upon request of the Committee, the head of any Federal agency is authorized to detail, on a nonreimbursable basis, any of the personnel of such agency to the Committee to assist it in carrying out its duties under this section.

(7)

(A) The Committee may for the purpose of carrying out its duties under this section hold such hearings, sit and act at such times and

places, take such testimony, and receive such evidence, as the Committee deems advisable.

(B) When so authorized by the Committee, any member or agent of the Committee may take any action which the Committee is authorized to take by this paragraph.

(C) Subject to the Privacy Act [5 U.S.C. 552a], the Committee may secure directly from any Federal agency information necessary to enable it to carry out its duties under this section. Upon request of the Chairman of the Committee, the head of such Federal agency shall furnish such information to the Committee.

(D) The Committee may use the United States mails in the same manner and upon the same conditions as a Federal agency.

(E) The Administrator of General Services shall provide to the Committee on a reimbursable basis such administrative support services as the Committee may request.

(8) In carrying out its duties under this section, the Committee may promulgate and amend such rules, regulations, and procedures, and issue and amend such orders as it deems necessary.

(9) For the purpose of obtaining information necessary for the consideration of an application for an exemption under this section the Committee may issue subpenas for the attendance and testimony of witnesses and the production of relevant papers, books, and documents.

(10) In no case shall any representative, including a representative of a member designated pursuant to paragraph (3)(G) of this subsection, be eligible to cast a vote on behalf of any member.

(f) Promulgation of regulations; form and contents of exemption application

Not later than 90 days after November 10, 1978, the Secretary shall promulgate regulations which set forth the form and manner in which applications for exemption shall be submitted to the Secretary and the information to be contained in such applications. Such regulations shall require that information submitted in an application by the head of any Federal agency with respect to any agency action include, but not be limited to—

(1) a description of the consultation process carried out pursuant to subsection (a)(2) of this section between the head of the Federal agency and the Secretary; and

(2) a statement describing why such action cannot be altered or modified to conform with the requirements of subsection (a)(2) of this section.

(g) Application for exemption; report to Committee

(1) A Federal agency, the Governor of the State in which an agency action will occur, if any, or a permit or license applicant may apply to the Secretary for an exemption for an agency action of such agency if, after consultation under subsection (a)(2), the Secretary's opinion under subsection (b) indicates that the agency action

would violate subsection (a)(2). An application for an exemption shall be considered initially by the Secretary in the manner provided for in this subsection, and shall be considered by the Committee for a final determination under subsection (h) after a report is made pursuant to paragraph (5). The applicant for an exemption shall be referred to as the "exemption applicant" in this section.

(2)

(A) An exemption applicant shall submit a written application to the Secretary, in a form prescribed under subsection (f), not later than 90 days after the completion of the consultation process; except that, in the case of any agency action involving a permit or license applicant, such application shall be submitted not later than 90 days after the date on which the Federal agency concerned takes final agency action with respect to the issuance of the permit or license. For purposes of the preceding sentence, the term "final agency action" means (i) a disposition by an agency with respect to the issuance of a permit or license that is subject to administrative review, whether or not such disposition is subject to judicial review; or (ii) if administrative review is sought with respect to such disposition, the decision resulting after such review. Such application shall set forth the reasons why the exemption applicant considers that the agency action meets the requirements for an exemption under this subsection.

(B) Upon receipt of an application for exemption for an agency action under paragraph (1), the Secretary shall promptly (i) notify the Governor of each affected State, if any, as determined by the Secretary, and request the Governors so notified to recommend individuals to be appointed to the Endangered Species Committee for consideration of such application; and (ii) publish notice of receipt of the application in the Federal Register, including a summary of the information contained in the application and a description of the agency action with respect to which the application for exemption has been filed.

(3) The Secretary shall within 20 days after the receipt of an application for exemption, or within such other period of time as is mutually agreeable to the exemption applicant and the Secretary—

(A) determine that the Federal agency concerned and the exemption applicant have—

(i) carried out the consultation responsibilities described in subsection (a) in good faith and made a reasonable and responsible effort to develop and fairly consider modifications or reasonable and prudent alternatives to the proposed agency action which would not violate subsection (a)(2);

(ii) conducted any biological assessment required by subsection (c); and

(iii) to the extent determinable within the time provided herein, refrained from making any irreversible or irretrievable commitment of resources prohibited by subsection (d); or

(B) deny the application for exemption because the Federal agency concerned or the exemption applicant have not met the requirements set forth in subparagraph (A)(i), (ii), and (iii).

The denial of an application under subparagraph (B) shall be considered final agency action for purposes of chapter 7 of title 5.

(4) If the Secretary determines that the Federal agency concerned and the exemption applicant have met the requirements set forth in paragraph (3)(A)(i), (ii), and (iii) he shall, in consultation with the Members of the Committee, hold a hearing on the application for exemption in accordance with sections 554, 555, and 556 (other than subsection (b)(1) and (2) thereof) of title 5 and prepare the report to be submitted pursuant to paragraph (5).

(5) Within 140 days after making the determinations under paragraph (3) or within such other period of time as is mutually agreeable to the exemption applicant and the Secretary, the Secretary shall submit to the Committee a report discussing—

(A) the availability of reasonable and prudent alternatives to the agency action, and the nature and extent of the benefits of the agency action and of alternative courses of action consistent

with conserving the species or the critical habitat;

(B) a summary of the evidence concerning whether or not the agency action is in the public interest and is of national or regional significance;

(C) appropriate reasonable mitigation and enhancement measures which should be considered by the Committee; and

(D) whether the Federal agency concerned and the exemption applicant refrained from making any irreversible or irretrievable commitment of resources prohibited by subsection (d).

(6) To the extent practicable within the time required for action under subsection (g) of this section, and except to the extent inconsistent with the requirements of this section, the consideration of any application for an exemption under this section and the conduct of any hearing under this subsection shall be in accordance with sections 554, 555, and 556 (other than subsection (b)(3) of section 556) of title 5.

(7) Upon request of the Secretary, the head of any Federal agency is authorized to detail, on a nonreimbursable basis, any of the personnel of such agency to the Secretary to assist him in carrying out his duties under this section.

(8) All meetings and records resulting from activities pursuant to this subsection shall be open to the public.

(h) Grant of exemption

(1) The Committee shall make a final determination whether or not to grant an exemption within 30 days after receiving the report of the Secretary pursuant to subsection (g)(5). The Committee shall grant an exemption from the requirements of subsection (a)(2) for an agency action if, by a vote of not less than five of its members voting in person—

(A) it determines on the record, based on the report of the Secretary, the record of the hearing held under subsection (g)(4) and on such other testimony or evidence as it may receive, that—

(i) there are no reasonable and prudent alternatives to the agency action;

(ii) the benefits of such action clearly outweigh the benefits of alternative courses of action consistent with conserving the species or its critical habitat, and such action is in the public interest;

(iii) the action is of regional or national significance; and

(iv) neither the Federal agency concerned nor the exemption applicant made any irreversible or irretrievable commitment of resources prohibited by subsection (d); and

(B) it establishes such reasonable mitigation and enhancement measures, including, but not limited to, live propagation, transplantation, and habitat acquisition and improvement, as are

necessary and appropriate to minimize the adverse effects of the agency action upon the endangered species, threatened species, or critical habitat concerned.

Any final determination by the Committee under this subsection shall be considered final agency action for purposes of chapter 7 of title 5.

(2)

(A) Except as provided in subparagraph (B), an exemption for an agency action granted under paragraph (1) shall constitute a permanent exemption with respect to all endangered or threatened species for the purposes of completing such agency action—

(i) regardless whether the species was identified in the biological assessment; and

(ii) only if a biological assessment has been conducted under subsection (c) with respect to such agency action.

(B) An exemption shall be permanent under subparagraph (A) unless—

(i) the Secretary finds, based on the best scientific and commercial data available, that such exemption would result in the extinction of a species that was not the subject of consultation under subsection (a)(2) or was not identified in any biological assessment conducted under subsection (c), and

(ii) the Committee determines within 60 days after the date of the Secretary's finding that the exemption should not be permanent.

If the Secretary makes a finding described in clause (i), the Committee shall meet with respect to the matter within 30 days after the date of the finding.

(i) Review by Secretary of State; violation of international treaty or other international obligation of United States

Notwithstanding any other provision of this chapter, the Committee shall be prohibited from considering for exemption any application made to it, if the Secretary of State, after a review of the proposed agency action and its potential implications, and after hearing, certifies, in writing, to the Committee within 60 days of any application made under this section that the granting of any such exemption and the carrying out of such action would be in violation of an international treaty obligation or other international obligation of the United States. The Secretary of State shall, at the time of such certification, publish a copy thereof in the Federal Register.

(j) Exemption for national security reasons

Notwithstanding any other provision of this chapter, the Committee shall grant an exemption for any agency action if the Secretary of Defense finds that such exemption is necessary for reasons of national security.

(k) Exemption decision not considered major Federal action; environmental impact statement

An exemption decision by the Committee under this section shall not be a major Federal action for purposes of the National Environmental Policy Act of 1969 [42 U.S.C. 4321 et seq.]: Provided, That an environmental impact statement which discusses the impacts upon endangered species or threatened species or their critical habitats shall have been previously prepared with respect to any agency action exempted by such order.

(l) Committee order granting exemption; cost of mitigation and enhancement measures; report by applicant to Council on Environmental Quality

(1) If the Committee determines under subsection (h) that an exemption should be granted with respect to any agency action, the Committee shall issue an order granting the exemption and specifying the mitigation and enhancement measures established pursuant to subsection (h) which shall be carried out and paid for by the exemption applicant in implementing the agency action. All necessary mitigation and enhancement measures shall be authorized prior to the implementing of the agency action and funded concurrently with all other project features.

(2) The applicant receiving such exemption shall include the costs of such mitigation and enhancement measures within the overall costs of continuing the proposed action. Notwithstanding the preceding sentence the costs of such measures

shall not be treated as project costs for the purpose of computing benefit-cost or other ratios for the proposed action. Any applicant may request the Secretary to carry out such mitigation and enhancement measures. The costs incurred by the Secretary in carrying out any such measures shall be paid by the applicant receiving the exemption. No later than one year after the granting of an exemption, the exemption applicant shall submit to the Council on Environmental Quality a report describing its compliance with the mitigation and enhancement measures prescribed by this section. Such a report shall be submitted annually until all such mitigation and enhancement measures have been completed. Notice of the public availability of such reports shall be published in the Federal Register by the Council on Environmental Quality.

(m) Notice requirement for citizen suits not applicable

The 60-day notice requirement of section 1540(g) of this title shall not apply with respect to review of any final determination of the Committee under subsection (h) of this section granting an exemption from the requirements of subsection (a)(2) of this section.

(n) Judicial review

Any person, as defined by section 1532(13) of this title, may obtain judicial review, under chapter 7 of title 5, of any decision of the Endangered Species Committee under subsection (h) in the United States Court of Appeals for (1) any circuit wherein the agency action concerned will be, or is being, carried out, or (2) in any case in which the agency action will be, or is being,

carried out outside of any circuit, the District of Columbia, by filing in such court within 90 days after the date of issuance of the decision, a written petition for review. A copy of such petition shall be transmitted by the clerk of the court to the Committee and the Committee shall file in the court the record in the proceeding, as provided in section 2112 of title 28. Attorneys designated by the Endangered Species Committee may appear for, and represent the Committee in any action for review under this subsection.

(o) Exemption as providing exception on taking of endangered species

Notwithstanding sections 1533(d) and 1538(a)(1)(B) and (C) of this title, sections 1371 and 1372 of this title, or any regulation promulgated to implement any such section—

(1) any action for which an exemption is granted under subsection (h) shall not be considered to be a taking of any endangered species or threatened species with respect to any activity which is necessary to carry out such action; and

(2) any taking that is in compliance with the terms and conditions specified in a written statement provided under subsection (b)(4)(iv) shall not be considered to be a prohibited taking of the species concerned.

(p) Exemptions in Presidentially declared disaster areas

In any area which has been declared by the President to be a major disaster area under the Disaster Relief and Emergency Assistance Act [42 U.S.C. 5121 et seq.], the President is authorized to make the determinations required by subsections (g) and (h) of this section for any project for the repair or replacement of a public facility substantially as it existed prior to the disaster under section 405 or 406 of the Disaster Relief and Emergency Assistance Act [42 U.S.C. 5171 or 5172], and which the President determines (1) is necessary to prevent the recurrence of such a natural disaster and to reduce the potential loss of human life, and (2) to involve an emergency situation which does not allow the ordinary procedures of this section to be followed. Notwithstanding any other provision of this section, the Committee shall accept the determinations of the President under this subsection.

28 U.S.C. § 1442 - Federal officers or agencies sued or prosecuted

(a) A civil action or criminal prosecution that is commenced in a State court and that is against or directed to any of the following may be removed by them to the district court of the United States for the district and division embracing the place wherein it is pending:

(1) The United States or any agency thereof or any officer (or any person acting under that officer) of the United States or of any agency thereof, in an official or individual capacity, for or relating to any act under color of such office or on account of any right, title or authority claimed under any Act of Congress for the apprehension or punishment of criminals or the collection of the revenue.

(2) A property holder whose title is derived from any such officer, where such action or prosecution affects the validity of any law of the United States.

(3) Any officer of the courts of the United States, for or relating to any act under color of office or in the performance of his duties;

(4) Any officer of either House of Congress, for or relating to any act in the discharge of his official duty under an order of such House.

(b) A personal action commenced in any State court by an alien against any citizen of a State who is, or at the time the alleged action accrued was, a civil officer of the United States and is a nonresident of such State, wherein jurisdiction is obtained by the State court by

personal service of process, may be removed by the defendant to the district court of the United States for the district and division in which the defendant was served with process.

(c) Solely for purposes of determining the propriety of removal under subsection (a), a law enforcement officer, who is the defendant in a criminal prosecution, shall be deemed to have been acting under the color of his office if the officer—

(1) protected an individual in the presence of the officer from a crime of violence;

(2) provided immediate assistance to an individual who suffered, or who was threatened with, bodily harm; or

(3) prevented the escape of any individual who the officer reasonably believed to have committed, or was about to commit, in the presence of the officer, a crime of violence that resulted in, or was likely to result in, death or serious bodily injury.

(d) In this section, the following definitions apply:

(1) The terms "civil action" and "criminal prosecution" include any proceeding (whether or not ancillary to another proceeding) to the extent that in such proceeding a judicial order, including a subpoena for testimony or documents, is sought or issued. If removal is sought for a proceeding described in the previous sentence, and there is no other basis for removal, only that proceeding may be removed to the district court.

(2) The term "crime of violence" has the meaning given that term in section 16 of title 18.

(3) The term "law enforcement officer" means any employee described in subparagraph (A), (B), or (C) of section 8401(17) of title 5 and any special agent in the Diplomatic Security Service of the Department of State.

(4) The term "serious bodily injury" has the meaning given that term in section 1365 of title 18.

(5) The term "State" includes the District of Columbia, United States territories and insular possessions, and Indian country (as defined in section 1151 of title 18).

(6) The term "State court" includes the Superior Court of the District of Columbia, a court of a United States territory or insular possession, and a tribal court.

43 U.S.C. § 383 - Vested rights and State laws unaffected

Nothing in this Act shall be construed as affecting or intended to affect or to in any way interfere with the laws of any State or Territory relating to the control, appropriation, use, or distribution of water used in irrigation, or any vested right acquired thereunder, and the Secretary of the Interior, in carrying out the provisions of this Act, shall proceed in conformity with such laws, and nothing herein shall in any way affect any right of any State or of the Federal Government or of any landowner, appropriator, or user of water in, to, or from any interstate stream or the waters thereof.

43 U.S.C. § 421 - Acquisition of lands for irrigation project; eminent domain

Where, in carrying out the provisions of this Act, it becomes necessary to acquire any rights or property, the Secretary of the Interior is authorized to acquire the same for the United States by purchase or by condemnation under judicial process, and to pay from the reclamation fund the sums which may be needed for that purpose, and it shall be the duty of the Attorney General of the United States upon every application of the Secretary of the Interior, under this Act, to cause proceedings to be commenced for condemnation within thirty days from the receipt of the application at the Department of Justice.

43 U.S.C. § 666 - Suits for adjudication of water rights

(a) Joinder of United States as defendant; costs

Consent is given to join the United States as a defendant in any suit (1) for the adjudication of rights to the use of water of a river system or other source, or (2) for the administration of such rights, where it appears that the United States is the owner of or is in the process of acquiring water rights by appropriation under State law, by purchase, by exchange, or otherwise, and the United States is a necessary party to such suit. The United States, when a party to any such suit, shall (1) be deemed to have waived any right to plead that the State laws are inapplicable or that the United States is not amenable thereto by reason of its sovereignty, and (2) shall be subject to the judgments, orders, and decrees of the court having jurisdiction, and may obtain review thereof, in the same manner and to the same extent as a private individual under like circumstances: Provided, That no judgment for costs shall be entered against the United States in any such suit.

(b) Service of summons

Summons or other process in any such suit shall be served upon the Attorney General or his designated representative.

(c) Joinder in suits involving use of interstate streams by State

Nothing in this section shall be construed as authorizing the joinder of the United States in any suit

or controversy in the Supreme Court of the United States involving the right of States to the use of the water of any interstate stream.

Federal Rule of Civil Procedure 19 - Required Joinder of Parties

(a) Persons Required to Be Joined if Feasible.

(1) Required Party. A person who is subject to service of process and whose joinder will not deprive the court of subject-matter jurisdiction must be joined as a party if:

(A) in that person's absence, the court cannot accord complete relief among existing parties; or

(B) that person claims an interest relating to the subject of the action and is so situated that disposing of the action in the person's absence may:

(i) as a practical matter impair or impede the person's ability to protect the interest; or

(ii) leave an existing party subject to a substantial risk of incurring double, multiple, or otherwise inconsistent obligations because of the interest.

(2) Joinder by Court Order. If a person has not been joined as required, the court must order that the person be made a party. A person who refuses to join as a plaintiff may be made either a defendant or, in a proper case, an involuntary plaintiff.

(3) Venue. If a joined party objects to venue and the joinder would make venue improper, the court must dismiss that party.

(b) When Joinder Is Not Feasible. If a person who is required to be joined if feasible cannot be joined, the court must determine whether, in equity and good conscience, the action should proceed among the existing parties or should be dismissed. The factors for the court to consider include:

(1) the extent to which a judgment rendered in the person's absence might prejudice that person or the existing parties;

(2) the extent to which any prejudice could be lessened or avoided by:

(A) protective provisions in the judgment;

(B) shaping the relief; or

(C) other measures;

(3) whether a judgment rendered in the person's absence would be adequate; and

(4) whether the plaintiff would have an adequate remedy if the action were dismissed for nonjoinder.

(c) Pleading the Reasons for Nonjoinder. When asserting a claim for relief, a party must state:

(1) the name, if known, of any person who is required to be joined if feasible but is not joined; and

(2) the reasons for not joining that person.

(d) Exception for Class Actions. This rule is subject to Rule 23.

ORS § 539.010 Protection of water rights vested or initiated prior to February 24, 1909.

(1) Actual application of water to beneficial use prior to February 24, 1909, by or under authority of any riparian proprietor or the predecessors in interest of the riparian proprietor, shall be deemed to create in the riparian proprietor a vested right to the extent of the actual application to beneficial use, provided such use has not been abandoned for a continuous period of two years.

(2) Where any riparian proprietor, or any person under authority of any riparian proprietor or the predecessor in interest of the riparian proprietor, was, on February 24, 1909, engaged in good faith in the construction of works for the application of water to a beneficial use, the right to take and use such water shall be deemed vested in the riparian proprietor, provided that the works were completed and the water devoted to a beneficial use within a reasonable time after February 24, 1909. The Water Resources Director, in the manner provided in subsection (5) of this section, may determine the time within which the water shall be devoted to a beneficial use. The right to water shall be limited to the quantity actually applied to a beneficial use within the time so fixed by the director.

(3) Nothing contained in the Water Rights Act, as defined in ORS 537.010, shall affect relative priorities to the use of water among parties to any decree of the courts rendered in causes determined or pending prior to February 24, 1909.

(4) The right of any person to take and use water may not be impaired or affected by any provisions of the Water Rights Act, as defined in ORS 537.010, where appropriations were initiated prior to February 24, 1909, and such appropriators, their heirs, successors or assigns did, in good faith and in compliance with the laws then existing, commence the construction of works for the application of the water so appropriated to a beneficial use, and thereafter prosecuted such work diligently and continuously to completion. However, all such rights shall be adjudicated in the manner provided in this chapter.

(5) The director shall, for good cause shown upon the application of any appropriator or user of water under an appropriation of water made prior to February 24, 1909, or in the cases mentioned in subsections (2) and (4) of this section, where actual construction work was commenced prior to that time or within the time provided in law then existing, prescribe the time within which the full amount of the water appropriated shall be applied to a beneficial use. In determining said time the director shall grant a reasonable time after the construction of the works or canal or ditch used for the diversion of the water, and in doing so, the director shall take into consideration the cost of the appropriation and application of the water to a beneficial purpose, the good faith of the appropriator, the market for water or power to be supplied, the present demands therefor and the income or use that may be required to provide fair and reasonable returns upon the investment. For good cause shown the director may extend the time.

(6) Where appropriations of water attempted before February 24, 1909, were undertaken in good faith, and the work of construction or improvement thereunder was in good faith commenced and diligently prosecuted, such appropriations may not be set aside or voided in proceedings under this chapter because of any irregularity or insufficiency of the notice by law, or in the manner of posting, recording or publication thereof.

(7) In any proceeding to adjudicate water rights under this chapter, the Water Resources Department may adjudicate federal reserved rights for the water necessary to fulfill the primary purpose of the reservation or any federal water right not acquired under ORS chapter 537 or ORS 540.510 to 540.530.

(8) All rights granted or declared by the Water Rights Act, as defined in ORS 537.010, shall be adjudicated and determined in the manner and by the tribunals provided therein. The Water Rights Act may not be held to bestow upon any person any riparian rights where no such rights existed prior to February 24, 1909. [Amended by 1989 c.691 §6; 1993 c.157 §1; 2021 c.97 §65]

ORS § 539.100 Contest of claims submitted to director; notice by contestant; service on contestee.

Any person owning any irrigation works, or claiming any interest in the stream involved in the determination shall be a party to, and bound by, the adjudication. Any party who desires to contest any of the rights of the persons who have submitted their

evidence to the Water Resources Director as provided in ORS 539.021 to 539.090 shall, within 15 days after the expiration of the period fixed in the notice for public inspection, or within such extension of the period, not exceeding 20 days, as the director may allow, notify the director in writing, stating with reasonable certainty the grounds of the proposed contest, which statement shall be verified by the affidavit of the contestant, the agent or attorney of the contestant. A party not claiming an undetermined vested right under this chapter or not contesting the claim of another need not participate further in the proceeding, nor be served with further notices or documents regarding the adjudication. Upon the filing of a statement of contest, service thereof shall be made by the contestant upon the contestee by mailing a copy by registered mail or by certified mail, return receipt requested, addressed to the contestee or to the authorized agent or attorney of the contestee at the post-office address of the contestee as stated in the statement and proof of claim of the contestee. Proof of service shall be made and filed with the Water Resources Department by the contestant as soon as possible after serving the copy of statement of contest. [Amended by 1989 c.691 §10; 1991 c.102 §5; 1991 c.249 §47]

ORS § 539.130 - Findings of fact and determination of director; certification of proceedings; filing in court; fixing time for hearing by court; notice; force of director's determination

(1) As soon as practicable after the compilation of the data the Water Resources Director shall make and cause to be entered of record in the Water Resources Department findings of fact and an order of determination determining and establishing the several rights to the waters of the stream. The original evidence gathered by the director, and certified copies of the observations and measurements and maps of record, in connection with the determination, as provided for by ORS 539.120 (Examination by director of stream and diversions in contest), together with a copy of the order of determination and findings of fact of the director as they appear of record in the Water Resources Department, shall be certified to by the director and filed with the clerk of the circuit court wherein the determination is to be heard. A certified copy of the order of determination and findings shall be filed with the county clerk of every other county in which the stream or any portion of a tributary is situated.

(2) Upon the filing of the evidence and order with the court the director shall procure an order from the court, or any judge thereof, fixing the time at which the determination shall be heard in the court, which hearing shall be at least 40 days subsequent to the date of the order. The clerk of the court shall, upon the making of the order, forthwith forward a certified copy

to the department by registered mail or by certified mail with return receipt.

(3) The department shall immediately upon receipt thereof notify by registered mail or by certified mail with return receipt each claimant or owner who has appeared in the proceeding of the time and place for hearing. Service of the notice shall be deemed complete upon depositing it in the post office as registered or certified mail, addressed to the claimant or owner at the post-office address of the claimant or owner, as set forth in the proof of the claimant or owner theretofore filed in the proceeding. Proof of service shall be made and filed with the circuit court by the department as soon as possible after mailing the notices.

(4) The determination of the department shall be in full force and effect from the date of its entry in the records of the department, unless and until its operation shall be stayed by a stay bond as provided by ORS 539.180 (Bond or irrevocable letter of credit to stay operation of director's determination). [Amended by 1991 c.102 §7; 1991 c.249 §49]

ORS § 539.150 - Court proceedings to review determination of director

(1) From and after the filing of the evidence and order of determination in the circuit court, the proceedings shall be like those in an action not triable by right to a jury, except that any proceedings, including the entry of a judgment, may be had in vacation with the same force and effect as in term time. At any time prior to the hearing provided for in ORS 539.130 (Findings of

fact and determination of director), any party or parties jointly interested may file exceptions in writing to the findings and order of determination, or any part thereof, which exceptions shall state with reasonable certainty the grounds and shall specify the particular paragraphs or parts of the findings and order excepted to.

(2) A copy of the exceptions, verified by the exceptor or certified to by the attorney for the exceptor, shall be served upon each claimant who was an adverse party to any contest wherein the exceptor was a party in the proceedings, prior to the hearing. Service shall be made by the exceptor or the attorney for the exceptor upon each such adverse party in person, or upon the attorney if the adverse party has appeared by attorney, or upon the agent of the adverse party. If the adverse party is a nonresident of the county or state, the service may be made by mailing a copy to that party by registered mail or by certified mail with return receipt, addressed to the place of residence of that party, as set forth in the proof filed in the proceedings.

(3) If no exceptions are filed the court shall, on the day set for the hearing, enter a judgment affirming the determination of the Water Resources Director. If exceptions are filed, upon the day set for the hearing the court shall fix a time, not less than 30 days thereafter, unless for good cause shown the time be extended by the court, when a hearing will be had upon the exceptions. All parties may be heard upon the consideration of the exceptions, and the director may appear on behalf of the state, either in person or by the Attorney General. The court may, if necessary, remand

the case for further testimony, to be taken by the director or by a referee appointed by the court for that purpose. Upon completion of the testimony and its report to the director, the director may be required to make a further determination.

(4) After final hearing the court shall enter a judgment affirming or modifying the order of the director as the court considers proper, and may assess such costs as it may consider just except that a judgment for costs may not be rendered against the United States. An appeal may be taken to the Court of Appeals from the judgment in the same manner and with the same effect as in other cases in equity, except that notice of appeal must be served and filed within 60 days from the entry of the judgment. [Amended by 1979 c.284 §165; 1989 c.691 §12; 1991 c.249 §50]

ORS § 539.180 Bond or irrevocable letter of credit to stay operation of director's determination; notice to watermaster.

At any time after the determination of the Water Resources Director has been entered of record, the operation thereof may be stayed in whole or in part by any party by filing a bond or an irrevocable letter of credit issued by an insured institution as defined in ORS 706.008 in the circuit court wherein the determination is pending, in such amount as the judge may prescribe, conditioned that the party will pay all damages that may accrue by reason of the determination not being enforced. Upon the filing and approval of the bond or letter of credit, the clerk of the circuit court shall transmit to the Water Resources

Department a certified copy of the bond or letter of credit, which shall be recorded in the department records, and the department shall give notice thereof to the watermaster of the proper district. [Amended by 1991 c.102 §10; 1991 c.331 §79; 1997 c.631 §486]

ORS § 539.210 - Duty of claimants to appear and submit proof; nonappearance as forfeiture; intervention in proceedings

Whenever proceedings are instituted for determination of rights to the use of any water, it shall be the duty of all claimants interested therein to appear and submit proof of their respective claims, at the time and in the manner required by law. Any claimant who fails to appear in the proceedings and submit proof of the claims of the claimant shall be barred and estopped from subsequently asserting any rights theretofore acquired upon the stream or other body of water embraced in the proceedings, and shall be held to have forfeited all rights to the use of the water theretofore claimed by the claimant. Any person interested in the water of any stream upon whom no service of notice has been had of the pendency of proceedings for determination of the rights to the use of water of the stream, and who has had no actual knowledge or notice of the pendency of the proceedings may, at any time prior to the expiration of one year after entry of the determination of the Water Resources Director, file a petition to intervene in the proceedings. The petition shall contain, among other things, all matters required by this chapter of claimants who have been duly served with notice of the proceedings, and also a statement that the intervenor had no actual knowledge or notice

of the pendency of the proceedings. Upon the filing of the petition in intervention, the petitioner shall be allowed to intervene upon such terms as may be equitable and thereafter shall have all rights vouchsafed by this chapter to claimants who have been duly served.