

No. 23-216

In the Supreme Court of the United States

KLAMATH IRRIGATION DISTRICT, PETITIONER

v.

UNITED STATES BUREAU OF RECLAMATION, ET AL.

*ON PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT*

**BRIEF FOR THE FEDERAL RESPONDENT
IN OPPOSITION**

ELIZABETH B. PRELOGAR
*Solicitor General
Counsel of Record*

TODD KIM
Assistant Attorney General

WILLIAM B. LAZARUS
JOHN L. SMELTZER
Attorneys

*Department of Justice
Washington, D.C. 20530-0001
SupremeCtBriefs@usdoj.gov
(202) 514-2217*

QUESTION PRESENTED

Whether the court of appeals abused its discretion in denying petitioner's petition for a writ of mandamus to direct the district court to remand to state court this proceeding for an injunction against a federal agency—where the issues implicated by the proceeding concern the agency's compliance with the Endangered Species Act of 1973, 16 U.S.C. 1531 *et seq.*, and the out-of-state water rights of Indian tribes—based on petitioner's contention that those issues were within the prior exclusive jurisdiction of the state court conducting a general stream adjudication.

ADDITIONAL RELATED PROCEEDINGS

Oregon Circuit Court (Klamath County):

In re Waters of the Klamath River Basin, No. WA1300001 (preliminary-injunction proceeding removed to federal district court on Apr. 5, 2021)

United States District Court (D. Or.):

Klamath Irrigation District v. U.S. Bureau of Reclamation, No. 1:21-cv-504 (Apr. 25, 2022) (interlocutory order denying motion to remand)

United States Court of Appeals (9th Cir.):

In re Klamath Irrigation District, No. 22-70052 (Apr. 19, 2022) (mandamus petition)

In re Klamath Irrigation District, No. 22-70143 (June 5, 2023) (mandamus petition concerning denial of remand)

TABLE OF CONTENTS

	Page
Opinions below	1
Jurisdiction.....	1
Statement	1
Argument.....	15
Conclusion	29

TABLE OF AUTHORITIES

Cases:

<i>Arizona v. Navajo Nation</i> , 599 U.S. 555 (2023).....	5
<i>Baley v. United States</i> :	
134 Fed. Cl. 619 (2017), aff’d, 942 F.3d 1312 (Fed. Cir. 2019), cert. denied, 141 S. Ct. 133 (2020)	19
942 F.3d 1312 (Fed. Cir. 2019), cert. denied, 141 S. Ct. 133 (2020)	3, 5, 9, 19, 23
<i>Bennett v. Spear</i> , 520 U.S. 154 (1997).....	2, 3
<i>Cappaert v. United States</i> , 426 U.S. 128 (1976).....	4
<i>Cheney v. United States Dist. Ct.</i> , 542 U.S. 367 (2004).....	16, 17, 26, 28
<i>Colorado River Water Conservation Dist. v.</i> <i>United States</i> , 424 U.S. 800 (1976).....	6, 8, 23, 24
<i>Dugan v. Rank</i> , 372 U.S. 609 (1963).....	7
<i>Kerr v. United States Dist. Ct.</i> , 426 U.S. 394 (1976).....	16
<i>Klamath Cnty. v. Colonial Realty Co.</i> , 7 P.2d 976 (Or. 1932).....	9
<i>Klamath Irrigation Dist. v. United States Bureau of</i> <i>Reclamation</i> :	
489 F. Supp. 3d 1168 (D. Or. 2020), aff’d, 48 F.4th 934 (9th Cir. 2022), cert. denied, 2023 WL 7117010 (Oct. 30, 2023)	10

IV

Cases—Continued:	Page
48 F.4th 934 (9th Cir. 2022), cert. denied, 2023 WL 7117010 (Oct. 30, 2023).....	2-5, 7, 10, 25
<i>McCall v. Porter</i> , 70 P. 820 (Or. 1902).....	6
<i>Moses H. Cone Mem'l Hosp. v. Mercury Constr. Corp.</i> , 460 U.S. 1 (1983).....	24
<i>Richmond Screw Anchor Co. v. United States</i> , 275 U.S. 331 (1928).....	29
<i>Roche v. Evaporated Milk Ass'n</i> , 319 U.S. 21 (1943)	27
<i>United States v. Adair</i> , 723 F.2d 1394 (9th Cir. 1983), cert. denied, 467 U.S. 1252 (1984)	6
<i>United States v. District Ct. in & for the Cnty. of Eagle</i> , 401 U.S. 520 (1971).....	8, 12, 14, 22, 24
<i>United States v. Title Ins. & Trust Co.</i> , 265 U.S. 472 (1924).....	28
<i>Winters v. United States</i> , 207 U.S. 564 (1908).....	4
<i>Woods v. Interstate Realty Co.</i> , 337 U.S. 535 (1949).....	28
<i>Yurok Tribe v. U.S. Bureau of Reclamation</i> , No. 3:19-cv-4405, 2023 WL 1785278 (N.D. Cal. Feb. 6, 2023), appeal pending, Nos. 23-15499, 23-15521 (9th Cir. filed Apr. 5, 2023 and Apr. 7, 2023).....	27, 28
 Constitution, statutes, and rule:	
U.S. Const. Amend. V, Taking Clause	19
Administrative Procedure Act, 5 U.S.C. 551 <i>et seq.</i> , 701 <i>et seq.</i> :	
5 U.S.C. 701 <i>et seq.</i>	10

Statutes and rule—Continued:	Page
Endangered Species Act of 1973, 16 U.S.C. 1531 <i>et seq.</i>	2
16 U.S.C. 1536(a)(2).....	17
Klamath River Basin Compact between California and Oregon, Act of Aug. 30, 1957, Pub. L. No. 85- 222, 71 Stat. 497	5, 20
Art. I, Subdiv. B, 71 Stat. 497	5
Art. III, Subdiv. A, 71 Stat. 498.....	5
Art. X.A.2, 71 Stat. 505	6
Art. XI.A, 71 Stat. 505.....	6
McCarran Amendment, 43 U.S.C. 666.....	7
43 U.S.C. 666(a)	7, 21
Tucker Act, 28 U.S.C. 1491.....	19
28 U.S.C. 1442	11
28 U.S.C. 1442(a)(1).....	11
28 U.S.C. 1442(d)(1).....	11
Or. Rev. Stat. (2021):	
§§ 539.005 <i>et seq.</i>	6
§ 539.005	6
§ 539.021(1).....	2, 6, 20, 24
§ 539.140	7, 24
§ 539.170	7
Fed. R. Civ. P. 19.....	10, 25

Miscellaneous:

Oregon Water Resources Department:

Corrected Partial Order of Determination, Water
Right Claim 194 et al., *In re Claim of Ady
Dist. Improvement Co.* (Feb. 28, 2014),
[https://www.oregon.gov/OWRD/programs/
WaterRights/Adjudications/KlamathAdj/
KBA_ACFOD_07017.pdf](https://www.oregon.gov/OWRD/programs/WaterRights/Adjudications/KlamathAdj/KBA_ACFOD_07017.pdf)..... 8, 21

Corrected Partial Order of Determination, Water
Right Claim 622, *In re Claim of the Klamath
Tribes* (Feb. 28, 2014), [https://www.oregon.
gov/OWRD/programs/WaterRights/
Adjudications/KlamathAdj/KBA_ACFOD_
04938.pdf](https://www.oregon.gov/OWRD/programs/WaterRights/Adjudications/KlamathAdj/KBA_ACFOD_04938.pdf)..... 9

U.S. Fish & Wildlife Serv., Tule Lake Trails Map,
<https://www.fws.gov/media/tule-lake-trails-map>..... 21

In the Supreme Court of the United States

No. 23-216

KLAMATH IRRIGATION DISTRICT, PETITIONER

v.

UNITED STATES BUREAU OF RECLAMATION, ET AL.

*ON PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT*

**BRIEF FOR THE FEDERAL RESPONDENT
IN OPPOSITION**

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1-51) is reported at 69 F.4th 934. The opinion of the district court (Pet. App. 52-66) is not published in the Federal Supplement but is available at 2022 WL 1210946.

JURISDICTION

The judgment of the court of appeals was entered on June 5, 2023. The petition for a writ of certiorari was filed on September 5, 2023 (the Tuesday after a Monday holiday). The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

This case concerns the federal government's removal to district court of a proceeding for a preliminary injunction that petitioner originally filed in Oregon state

court against the Bureau of Reclamation (Bureau) to enjoin certain aspects of the Bureau's operation of a federal irrigation project known as the Klamath Project. The state court is conducting judicial review of a determination by the Oregon Water Resources Department (OWRD) of "the relative rights of the various claimants to waters" of a "natural watercourse in th[e] state," Or. Rev. Stat. § 539.021(1) (2021), specifically, "the Klamath River and its tributaries" in Oregon. *Klamath Irrigation District v. United States Bureau of Reclamation*, 48 F.4th 934, 941 (9th Cir. 2022) (*KID*), cert. denied, 2023 WL 7117010 (Oct. 30, 2023) (No. 22-1116).

Petitioner moved the district court to remand the preliminary-injunction proceeding back to Oregon state court on the theory that the state court has prior exclusive jurisdiction over the issues raised in petitioner's motion for a preliminary injunction, namely, the Bureau's compliance with federal-law requirements imposed by the Endangered Species Act of 1973 (ESA), 16 U.S.C. 1531 *et seq.*, and the reserved rights of the Hoopa Valley Tribe and Yurok Tribe, which have reservations in California, to water for the support of fisheries in the Klamath River in California. After the district court denied petitioner's request, Pet. App. 52-66, petitioner petitioned the court of appeals for a writ of mandamus, which the court of appeals denied, *id.* at 1-51.

1. The Klamath Project is a federal irrigation project composed of "a series of lakes, rivers, dams, and irrigation canals in northern California and southern Oregon." *Bennett v. Spear*, 520 U.S. 154, 158 (1997); see Pet. App. 8. "Key features of the Project" include Upper Klamath Lake in Oregon; the nearby Link River

Dam (which controls the Lake's water level); and the Klamath River, which rises at the dam's spillway and "flows from Oregon into California" before "enter[ing] the Pacific Ocean." *Baley v. United States*, 942 F.3d 1312, 1316, 1321 (Fed. Cir. 2019), cert. denied, 141 S. Ct. 133 (2020); see Pet. App. 7-8.

This Court in *Bennett v. Spear*, *supra*, addressed an earlier suit concerning the Bureau's compliance with the ESA in its operation of the Project. *Bennett*, 520 U.S. at 157, 174-175. In that case, after the Bureau consulted the Fish and Wildlife Service (FWS), FWS issued a "Biological Opinion" under the ESA in which FWS determined that the Bureau's proposed operation of the Project was likely to jeopardize the continued existence of two endangered sucker fish species. *Id.* at 158-159, 170. FWS then identified alternatives the Bureau could adopt that would avoid jeopardy to those two species, "includ[ing] the maintenance of minimum water levels" in the Project. *Id.* at 159.

Since that time, the Bureau has adopted "operating conditions developed through [ESA] consultation" to prevent jeopardy to the two endangered sucker species as well as a threatened coho salmon species in the Klamath River in California, downstream of Upper Klamath Lake. *KID*, 48 F.4th at 940-941. Those ESA-required operating conditions call for the maintenance of, among other things, certain "minimum stream flows in the Klamath River" where the threatened salmon have critical habitat. *Id.* at 941; see *Baley*, 942 F.3d at 1324 n.13 (explaining that "[t]he Klamath River downstream of the Iron Gate Dam in California has been designated a 'critical habitat' for the SONCC coho salmon") (citation omitted).

In 2019, after more recent consultations by the Bureau with FWS and the National Marine Fisheries Service (NMFS), those agencies issued Biological Opinions under the ESA addressing, respectively, the two endangered sucker species and the threatened salmon species. *KID*, 48 F.4th at 941.¹ In accordance with those Biological Opinions, the Bureau adopted its 2019-2024 operating procedures, as relevant here, “to maintain” certain “instream flows to comply with the [ESA]” by allowing “water in [Upper Klamath Lake]” to flow into “the Klamath River downstream from the lake to benefit the [threatened salmon].” *Id.* at 938, 941. As explained below, the operations plan, though developed to ensure compliance with the ESA, also has the effect of protecting (at least in part) the tribal fishing-based water rights in California discussed below.

2. In addition to ESA-based requirements, the Bureau’s operation of the Project accounts for other “competing interests in the Klamath Basin,” including the interests of Indian tribes holding reserved water rights, as well as the interests of various water users with which the Bureau has contracted to supply water under the reclamation laws “subject to the availability of water.” *KID*, 48 F.4th at 940 (citation omitted); Pet. App. 8-9.

a. Under the doctrine of *Winters v. United States*, 207 U.S. 564 (1908), the establishment of an Indian reservation or other federal reservation, “by implication, reserves appurtenant water then unappropriated to the extent needed to accomplish the purpose of the reservation.” *Cappaert v. United States*, 426 U.S. 128, 138

¹ NMFS is responsible for anadromous species like coho salmon.

(1976). The establishment of an Indian reservation therefore results in a federal reserved water right in unappropriated water which vests no later than the date of the reservation and is “superior to the rights of future appropriators.” *Ibid.*; see *Arizona v. Navajo Nation*, 599 U.S. 555, 561, 583 (2023).

As relevant here, the Hoopa Valley Tribe and Yurok Tribe—both in California—“each hold rights to take fish from water sources” connected to their reservations. *Baley*, 942 F.3d at 1321-1323 (rejecting prior appeal by Project water users). Those fishing rights and associated water rights include a “non-consumptive” right to Klamath Basin water that allows each Tribe “to prevent other appropriators from depleting the [relevant] waters below a protected level,” *i.e.*, the level needed to support the relevant fish populations. *Ibid.* (citation omitted). The Hoopa Valley and Yurok Tribes’ federal reserved water rights cover the “Klamath River and the [water] flows therein.” *Id.* at 1339. Those tribal rights are “senior to those of the [Project’s water users].” *Id.* at 1322, 1328, 1333 (concluding that the California tribes’ rights have priority dates of “at least 1891”); see Pet. App. 8-9; *KID*, 48 F.4th at 941 (tribal rights “predated the Project”).

b. Other entities possess rights to use water from the Klamath Basin in both Oregon and California. As an initial matter, in 1957, Congress approved the Klamath River Basin Compact between California and Oregon, Act of Aug. 30, 1957, Pub. L. No. 85-222, 71 Stat. 497, one purpose of which is to provide an “equitable distribution and use of water among the two States and the Federal Government,” Art. I, Subdiv. B, 71 Stat. 497. The Compact recognizes “vested rights to the use

of waters originating in the Upper Klamath River Basin” that were “validly established and subsisting” under the “laws of the state in which the use or diversion is made.” Art. III, Subdiv. A, 71 Stat. 498. The Compact also provides that it does not “deprive any * * * tribe, band or community of Indians of any rights, privileges, or immunities afforded under Federal treaty, agreement or statute” or “impair or affect any rights, powers or jurisdiction in the United States” or “its agencies * * * in, over and to the waters of the Klamath River Basin.” Arts. X.A.2, XI.A, 71 Stat. 505; see *United States v. Adair*, 723 F.2d 1394, 1419 (9th Cir. 1983) (construing compact to preserve “all federal rights” including federal reserved rights of tribes), cert. denied, 467 U.S. 1252 (1984).

The existence and extent of rights in Oregon may be determined under a state statute, Or. Rev. Stat. §§ 539.005 *et seq.* (2021), that establishes “procedures for carrying out a general stream adjudication in Oregon.” *Id.* § 539.005. Oregon applies “the doctrine of prior appropriation” to govern water rights within the State. *McCall v. Porter*, 70 P. 820, 822-823 (Or. 1902). Under that doctrine, a water user that has “divert[ed] [water] from its natural source and appl[ied] it to some beneficial use” obtains a water right superior to subsequent appropriators so long as it maintains that diversion and use. *Colorado River Water Conservation Dist. v. United States*, 424 U.S. 800, 805 (1976); see Pet. App. 7 n.1. Oregon’s adjudicatory process accordingly produces a determination of “the relative rights of the various claimants to the waters” of a “natural watercourse in th[e] state,” Or. Rev. Stat. § 539.021(1) (2021), which

establishes a “priority” date for each in-state water right and defines its scope, *id.* § 539.140.

In 1975, Oregon convened the Klamath Basin Adjudication under its stream-adjudication statute “to adjudicate the relative rights of use of the Klamath River and its tributaries.” *KID*, 48 F.4th at 941; see Pet. App. 9-10. Nearly 40 years later, in 2013 and 2014, OWRD issued administrative determinations (totaling more than 7500 pages in length) in those proceedings, which are still pending on judicial review in Oregon state court. Pet. App. 10; see Pet. 9 & n.3.² While that judicial review remains pending, Oregon law provides that “the division of water from the stream involved * * * shall be made in accordance with the [agency’s] order.” Or. Rev. Stat. § 539.170 (2021).

c. The McCarran Amendment, 43 U.S.C. 666, makes the United States subject to certain state-law processes for determining, and subsequently administering, water rights. The Amendment waives the United States’ immunity from suit “(1) for the adjudication of rights to the use of water of a river system or other source,” and “(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 in the river or other source and is a necessary party to such suit. 43 U.S.C. 666(a). That statutory waiver of sovereign immunity is limited to state proceedings that (i) provide for a “general adjudication of ‘all of the rights of various owners on a given [river system],’” *Dugan v. Rank*, 372

² The Oregon agency’s relevant determinations are available at <https://www.oregon.gov/owrd/programs/waterrights/adjudications/klamathriverbasinadj/pages/acffod.aspx>.

U.S. 609, 618 (1963) (citation and emphasis omitted), “within the particular State’s jurisdiction,” *United States v. District Ct. in & for the Cnty. of Eagle*, 401 U.S. 520, 523 (1971) (*Eagle Cnty.*), and (ii) the subsequent administration of those rights. The McCarran Amendment’s waiver of the United States’ immunity extends to circumstances in which the United States is the nominal “owner” of water rights as the “trustee[]” of “federal water rights reserved for Indian reservations.” *Colorado River*, 424 U.S. at 810; see *id.* at 809-813.

In 1996, in Oregon’s Klamath Basin Adjudication, OWRD provided notice that it would receive proof of the federal government’s claims asserting rights—including “federal reserved right[s]”—to “the use of the waters of the Klamath River and its tributaries,” where those waters are “diverted in Oregon” from the river system and then used either in Oregon or in “Modoc and Siskiyou Counties, California.” Pet. App. 27 n.1 (quoting notice) (citation and emphasis omitted). Consistent with the McCarran Amendment, the United States subsequently filed a series of water-right claims for OWRD’s adjudication. See, *e.g.*, Corrected Partial Order of Determination, Water Right Claim 194 et al., at 2-3, *In re Claim of Ady Dist. Improvement Co.* (Or. Water Res. Dep’t Feb. 28, 2014) (OWRD Order) (listing some of the federal claims).³

The United States, in its capacity as trustee holding the federal reserved water rights of Indian tribes, submitted to OWRD water-rights claims on behalf of the Klamath Tribes in Oregon based on their treaty-based

³ https://www.oregon.gov/OWRD/programs/WaterRights/Adjudications/KlamathAdj/KBA_ACFOD_07017.pdf.

fishing rights in Klamath Basin water in Oregon. See, e.g., Corrected Partial Order of Determination, Water Right Claim 622, at 8-9, *In re Claim of the Klamath Tribes* (Or. Water Res. Dep't Feb. 28, 2014) (confirming water rights of the Klamath Tribes to minimum water levels in the Upper Klamath Lake that preserve the tribes' fishing rights).⁴

The California-based Hoopa Valley Tribe and Yurok Tribe—which hold water rights in the Klamath River to support their downstream reserved fishing rights in California—and the United States as trustee of those tribal rights did not file claims asserting those rights in the Klamath Basin Adjudication, which involved only Oregon water rights. Pet. App. 10; see *Baley*, 942 F.3d at 1341 (explaining that Oregon's Klamath Basin Adjudication “cannot adjudicate water rights in another state” and rejecting the contention that “the Yurok and Hoopa Valley Tribes waived their rights because they did not participate in [that Oregon adjudication]”).

3. Petitioner is a special irrigation district in Oregon that was formed under state law to deliver irrigation water to its members and that has contracted with the Bureau to operate and maintain certain Klamath Project irrigation works owned by the United States. See Pet. App. 9, 56; see also *Baley*, 942 F.3d at 1321 & n.9; *Klamath Cnty. v. Colonial Realty Co.*, 7 P.2d 976, 977 (Or. 1932).

a. In 2019, before initiating this case, petitioner filed a separate suit in federal district court against the Bureau and other federal defendants under the judicial-

⁴ https://www.oregon.gov/OWRD/programs/WaterRights/Adjudications/KlamathAdj/KBA_ACFOD_04938.pdf.

review provisions of the Administrative Procedure Act (APA), 5 U.S.C. 701 *et seq.*, in which petitioner sought to prevent the Bureau from releasing water from Upper Klamath Lake “for instream purposes” “to comply with the ESA.” *KID*, 48 F.4th at 942. Petitioner alleged that the Bureau’s 2019-2024 operating procedures for the Project “based on [FWS’s and NMFS’s] biological [opinions] w[ere] unlawful.” *Ibid.*

In September 2020, the district court dismissed that APA action on the ground that dismissal was required under Federal Rule of Civil Procedure 19, because the Klamath Tribes and the Hoopa Valley Tribe, which could not be joined as parties in the APA action due to their tribal sovereign immunity, were indispensable parties to the suit. *Klamath Irrigation District v. United States Bureau of Reclamation*, 489 F. Supp. 3d 1168, 1172, 1176-1183 (D. Or. 2020), *aff’d*, 48 F.4th 934 (9th Cir. 2022), *cert. denied*, 2023 WL 7117010 (Oct. 30, 2023). The court determined that petitioner’s ESA-based challenge, which implicated the fishing-based water rights of those tribes, was “clearly not a McCarran Amendment case” for the administration of water rights following “a ‘state general stream adjudication,’” for which the McCarran Amendment might waive the immunity of the tribes. *Id.* at 1181. The Ninth Circuit affirmed the district court’s decision, *KID*, 48 F.4th at 943-948, and this Court recently denied petitioner’s petition for a writ of certiorari seeking review of the Ninth Circuit’s decision in that case, 2023 WL 7117010 (Oct. 30, 2023) (No. 22-1116).

b. In March 2021, while petitioner’s appeal of the dismissal of its 2019 APA action was pending, petitioner filed a motion for a preliminary injunction against the

Bureau in the Oregon state court that is conducting judicial review of OWRD's Klamath Basin Adjudication determinations. D. Ct. Doc. 1-1, at 2-29 (Apr. 5, 2021) (petitioner's motion). Petitioner again sought with that motion to prevent the Bureau from releasing water stored in Upper Klamath Lake to flow "down the Klamath River" for purposes other than irrigation. *Id.* at 4, 28. Petitioner argued that the Bureau had to acquire a water right approved in Oregon's Klamath Basin Adjudication to take such action and that the Bureau's operations plan could not be justified by the Bureau's explanation that the water flows were required to "fulfill its obligations under the ESA." *Id.* at 4, 23; see *id.* at 21-24. Petitioner also argued that "the Hoopa Valley and Yurok Tribes, both of which are located in California," lacked any "water rights" to the resulting flows in the Klamath River in California because those tribes had failed to file water-right claims in Oregon's Klamath Basin Adjudication. *Id.* at 4.

In April 2020, the Bureau removed the proceeding for a preliminary injunction to federal district court under the federal-officer removal statute, 28 U.S.C. 1442. See D. Ct. Doc. 1 (Apr. 5, 2021); see also 28 U.S.C. 1442(a)(1) and (d)(1). After the district court established a briefing schedule on petitioner's motion, D. Ct. Doc. 6 (Apr. 8, 2021), the government and OWRD (as intervenor) filed responses. D. Ct. Docs. 9, 11 (Apr. 12 and 13, 2023). Petitioner did not file a reply to support its injunction request. Instead, petitioner moved to remand the proceeding to state court on the ground that the state court had prior exclusive jurisdiction over the matter. D. Ct. Doc. 19 (Apr. 28, 2021) (amended motion).

The district court denied petitioner’s remand motion, concluding that the Oregon state court conducting judicial review of the Klamath Basin Adjudication does not “possess exclusive jurisdiction over [petitioner’s injunctive] claim.” Pet. App. 66; see *id.* at 52-66. The district court rejected petitioner’s contention that the McCarran Amendment waived the United States’ sovereign immunity from suit in the state court on petitioner’s contentions concerning the ESA and the related fishing-based California water rights of the Hoopa Valley and Yurok Tribes. *Id.* at 59-62. The court explained that the McCarran Amendment simply permits state-court suits against the United States involving the adjudication of water rights in “a ‘river system * * * within the particular States’s jurisdiction,” *id.* at 59-60 (quoting *Eagle Cnty.*, 401 U.S. at 523), not other matters such as water rights in the same river system within a different State, *id.* at 60-62. The court added that “the Tribes’ right to water was at least coextensive with the requirements of the ESA” with respect to protected “salmon in the Klamath River.” *Id.* at 62.

The district court observed that its decision tracked the earlier ruling in petitioner’s 2019 APA action, discussed above, which had determined that petitioner’s challenge to the Bureau’s ESA-based operating conditions that had the effect of protecting the downstream fishing-based water rights of the Hoopa Valley and Yurok Tribes was not a McCarran Amendment case. Pet. App. 62, 65; see *id.* at 62-65. The court observed that petitioner’s filing of its preliminary-injunction motion in state court was an “attempt[] to evade the force of [that] ruling.” *Id.* at 65.

4. Rather than continuing to litigate its motion for a preliminary injunction, or litigating its underlying claim to final judgment, and then appeal if the district court's decision was adverse, petitioner petitioned the court of appeals for a writ of mandamus to direct the district court to remand the proceeding to state court.⁵ The court of appeals denied that petition. Pet. App. 1-51. The court held that mandamus relief was unwarranted for two independent reasons: The district court's decision not to remand was not clearly erroneous, *id.* at 13-22; and petitioner failed to show that it had no other adequate means to obtain relief, *id.* at 22-23.

a. The court of appeals determined that the district court did not clearly err in concluding that the Oregon state court did not have prior exclusive jurisdiction over the matters relevant to petitioner's motion for a preliminary injunction. Pet. App. 13-22. The court explained that petitioner's theory that the Oregon state court reviewing OWRD's Klamath Basin Adjudication decision "had *in rem* jurisdiction" over the water-rights in that determination was not applicable here, because the Klamath Basin Adjudication "did not adjudicate Reclamation's ESA obligations or the [Hoopa Valley and Yurok] Tribes' senior rights" to water from the Klamath River downstream in California. *Id.* at 14. The court noted that OWRD's own response to petitioner's mandamus petition explained that OWRD's water-rights determination did "not adjudicate the challenges presented by [petitioner's] motion [for a preliminary injunction]" and

⁵ The district court has not ruled on petitioner's motion for a preliminary injunction while a final disposition on petitioner's mandamus petition remains pending.

that the jurisdiction of the state court reviewing that determination “does not extend to those issues.” *Ibid.*

The court of appeals therefore rejected petitioner’s argument that the Oregon state court should be viewed as having jurisdiction over all the “rights in [a] *res* (a river),” including “jurisdiction over the [Hoopa Valley and Yurok] Tribes’ rights” to water from the Klamath River in California that were “implicated by [petitioner’s] motion.” Pet. App. 15. The court concluded that “the Tribes’ rights at issue were not governed by Oregon law and were not subject to the [Klamath Basin Adjudication],” *ibid.*, and that the McCarran Amendment did not suggest otherwise, *id.* at 16-18. The court explained that, as construed by this Court, “the term ‘river system’ within the McCarran Amendment” refers to a river system “‘within the particular State’s jurisdiction.’” *Id.* at 18 & n.8 (quoting *Eagle Cnty.*, 401 U.S. at 523). The court accordingly determined that the McCarran Amendment does not “expand a state court’s subject matter jurisdiction or empower a state to adjudicate rights beyond its jurisdiction.” *Id.* at 17.

b. The court of appeals stated that the absence of clear error was dispositive in rejecting petitioner’s request for mandamus relief, but that, “in any event,” mandamus relief was also unwarranted because petitioner failed to establish that it had no “‘other adequate means’ to attain its desired relief.” Pet. App. 22-23 (citation omitted). The court stated that petitioner could pursue its motion for injunctive “relief before the district court” and that petitioner would “not be ‘damaged or prejudiced in a way not correctable on appeal’ by litigating [its] motion before the district court.” *Ibid.* (citation omitted). The court noted the contention that

appellate relief after final judgment would be inadequate because “[petitioner’s] members may suffer a loss of water rights in the interim,” but further noted that the approach suggested by Judge Baker in dissent “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 [petitioner].” *Id.* at 23.

c. Judge Baker of the United States Court of International Trade, sitting by designation, dissented. Pet. App. 24-51. Judge Baker was of the view that the Oregon state court could adjudicate the Bureau’s ESA-based defense, *id.* at 41, and concluded that Oregon’s Klamath Basin Adjudication was an “*in rem*” proceeding that could adjudicate the Hoopa Valley and Yurok Tribes’ water rights in the Klamath River in California, because “the water in question is inside Oregon” before it travels to California, *id.* at 37-38.

ARGUMENT

Petitioner contends (Pet. 33-37) that the court of appeals erred in declining to grant a writ of mandamus directing the district court to remand its request for injunctive relief to Oregon state court on the ground that the state court had prior exclusive jurisdiction to adjudicate the Bureau’s obligations under the ESA and the out-of-state water rights of the California Indian Tribes. This Court’s review of that case-specific ruling is not warranted. The court of appeals did not abuse its discretion in denying mandamus relief; its decision does not conflict with any decision of this Court; petitioner acknowledges (Pet. 29) the absence of any relevant “circuit split”; and petitioner does not present any excep-

tionally important question warranting review. Furthermore, the mandamus posture of this case would make it a poor candidate for considering the underlying question that petitioner presents, and petitioner does not seek this Court's review of the court of appeals' determination that mandamus was unwarranted because petitioner could raise its jurisdictional argument if the district court denies a preliminary injunction or rejects petitioner's claims in a final judgment. The petition for a writ of certiorari should be denied.

1. The court of appeals properly exercised its discretion in denying mandamus relief. It is settled that a "writ [of mandamus] will issue only in extraordinary circumstances." *Kerr v. United States Dist. Ct.*, 426 U.S. 394, 403 (1976). This Court has recognized three "conditions" that must be present to warrant such relief. *Cheney v. United States Dist. Ct.*, 542 U.S. 367, 380 (2004). First, the party seeking a writ of mandamus must demonstrate "that [its] right to issuance of the writ is clear and indisputable." *Id.* at 381 (citation, brackets, and internal quotation marks omitted). Second, that party must show that it has "no other adequate means to attain the relief [it] desires." *Id.* at 380 (citation omitted). And third, the party must additionally demonstrate that issuance of the writ is "appropriate under the circumstances," by pointing to "exceptional circumstances amounting to a judicial usurpation of power, or a clear abuse of discretion." *Id.* at 380-381 (citations and internal quotation marks omitted). In this case, the court of appeals rested its denial of mandamus relief principally on two independent grounds: Petitioner failed to establish that it was clearly erroneous for the district court to decline to remand the pro-

ceeding to state court, Pet. App. 13-22, and, “in any event,” petitioner failed to show that it lacked “other adequate means” to obtain appropriate relief, *id.* at 22-23 (citation omitted).

Petitioner seeks (Pet. 33-37) review only on the court of appeals’ first ground for denying mandamus, disclaiming (Pet. 32 & n.13) any “need [to] consider” the court’s second ground. On that first ground, however, the court of appeals correctly concluded that the district court did not clearly err in denying petitioner’s motion to remand, because the state court does not exercise prior exclusive jurisdiction to adjudicate questions concerning the Bureau’s responsibilities under the ESA and out-of-state tribal water rights. Pet. App. 13-22. Petitioner has thus failed to establish a “clear and indisputable” right to mandamus relief. *Cheney*, 542 U.S. at 381 (citation omitted).

a. *ESA*. The ESA provides that each federal agency, including the Bureau, must insure that 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 [its critical] habitat,” unless the agency has obtained an exemption from that statutory requirement. 16 U.S.C. 1536(a)(2). The Bureau’s relevant operating conditions, which were designed to avoid such jeopardy to a threatened coho salmon species, provide for certain water flows in the species’ critical habitat in the Klamath River in California downstream of Upper Klamath Lake. See pp. 3-4, *supra*.

Petitioner does not contend that the Oregon state court reviewing OWRD’s Klamath Basin Adjudication determination generally has exclusive jurisdiction to

adjudicate disputes over federal ESA questions. And petitioner acknowledges (Pet. 37) that OWRD “did not *expressly* address [the Bureau’s] ESA obligations” in its water-rights determination. But petitioner contends (Pet. 36-37) that that OWRD’s water-rights decision “implicitly” requires that the Bureau “purchase, lease, or judicially condemn others’ rights before [it] may use” water in Upper Klamath Lake “to fulfill its [ESA] obligations,” Pet. 37. On that basis, petitioner contends that the state court reviewing OWRD’s water-rights determination has exclusive jurisdiction to consider petitioner’s motion to enjoin the Bureau from releasing water in Upper Klamath Lake for downstream non-irrigation purposes. That is incorrect.

Petitioner does not appear to contend that the Bureau need not comply with the ESA requirements relevant to this case. The Bureau’s obligation to comply with the ESA does not depend upon acquisition of state-law water rights determined by OWRD and pending before the state court. Nor does the Bureau need such rights in order to operate the Project to release water stored in Upper Klamath Lake to flow downstream to the Klamath River consistent with the senior water rights of the Hoopa Valley and Yurok Tribes in California.

Petitioner’s theory that the Bureau was required to obtain water rights held by others, Pet. 37, would not give the state court reviewing OWRD’s water-rights determination exclusive jurisdiction over petitioner’s motion for a preliminary injunction. And to the extent petitioner’s theory is that the Bureau took water to which others claim a right without providing compensation, that is a theory that the Bureau’s actions violate the Takings Clause.

Indeed, petitioner previously brought such a takings claim under the Tucker Act, 28 U.S.C. 1491. Petitioner was the “lead plaintiff” in a takings case alleging that the Bureau’s temporary termination of the Project’s water deliveries to water users in 2001 “in order to meet the requirements of the [ESA]” constituted a Fifth Amendment taking without just compensation of the users’ “rights to use Klamath Project water.” *Baley v. United States*, 134 Fed. Cl. 619, 625, 645 (2017), *aff’d*, 942 F.3d 1312 (Fed. Cir. 2019), *cert. denied*, 141 S. Ct. 133 (2020). Petitioner voluntarily dismissed its own separate claims in that case, *id.* at 645, but the case continued as a class action including all landowners claiming a right to irrigation water from the Project in 2001, including the water-user members of the “Klamath Irrigation District” (*i.e.*, petitioner). *Id.* at 644. The Federal Circuit, like the Court of Federal Claims, rejected those claims, holding that the Bureau’s ESA-based actions did not impair the class’s water rights because, as relevant here, the California-based Hoopa Valley Tribe and Yurok Tribe had “rights to an amount of water that was at least equal to what was needed to satisfy the Bureau of Reclamation’s ESA obligations,” and those tribal rights to water in “the Klamath River [in California] and the flows therein” were senior to the upstream water rights of the class members. *Baley*, 942 F.3d at 1337, 1339; see *id.* at 1333-1334, 1337-1341.

b. *Tribal water rights.* With respect to the senior water-rights of the Hoopa Valley Tribe and Yurok Tribe, petitioner contends (Pet. 35-36) that the United States and those California Tribes “forfeited” their federal reserved rights by failing to file a claim in Oregon’s Klamath Basin Adjudication. That too is incorrect. The

question is not whether a State may adjudicate property rights of nonresidents where the property is in the State. Pet. 36. The question is whether Oregon’s Klamath Basin Adjudication could properly adjudicate (and extinguish) the federal reserved rights of Indian tribes to downstream water flows in the Klamath River *in California*. OWRD and the Oregon state court have no authority to do so.

Oregon’s general stream-adjudication statute provides for an adjudication of “the relative rights of the various claimants to the waters” of a “natural watercourse *in th[e] state*.” Or. Rev. Stat. § 539.021(1) (2021) (emphasis added). OWRD accordingly provided notice that it was accepting federal-government claims to “the waters of the Klamath River and its tributaries” that are “*diverted in Oregon*” and then used either in Oregon or in two California counties along the California-Oregon border. Pet. App. 27 n.1 (quoting notice) (emphasis added; citation omitted). That authority to adjudicate claims to water diverted or used in Oregon is consistent with the Klamath River Basin Compact between Oregon and California, Act of Aug. 30, 1957, Pub. L. No. 85-222, 71 Stat. 497, in which the States agreed to recognize “vested rights to the use of waters originating in the Upper Klamath River Basin” that were validly established and subsisting under the laws of “the *state in which the use or diversion is made*.” Art. III, Subdiv. A, 71 Stat. 498 (emphasis added).

The government accordingly submitted to OWRD claims to water diverted in Oregon from the Klamath River or its tributaries, including where the diverted water is then transported across the border into adjacent counties in northern California. For example, the

government submitted a claim reflecting the government's right to divert water near Upper Klamath Lake and from the Klamath River within Oregon for transportation through the Project's works (including the Lost River Diversion Channel) to the Tule Lake National Wildlife Refuge, which is located a few miles south of the Oregon-California border in California's Modoc and Siskiyou Counties. See Corrected Partial Order of Determination, Water Right Claim 194 et al., at 17-18, 46-47, 111, *In re Claim of Ady Dist. Improvement Co.* (Or. Water Res. Dep't Feb. 28, 2014) (OWRD Order) (discussing the refuge and Claim 317);⁶ see also *id.* at 14-15; cf. U.S. Fish & Wildlife Serv., *Tule Lake Trails Map*, <https://www.fws.gov/media/tule-lake-trails-map> (map showing the refuge's location). Petitioner, like the dissenting judge below, notes that the government filed those claims in the Oregon proceeding. Pet. 16-17 (citing Pet. App. 28 n.5); see Pet. 9 (discussing OWRD notice quoted at Pet. App. 27 n.1). But those claims for water diverted in Oregon provide no basis for petitioner's position that Oregon's adjudicative authority extends to rights to water in the river itself in California, which is not diverted from the river system in Oregon.

Nor does the McCarran Amendment support such expansive state adjudicatory authority. The McCarran Amendment waives the United States' immunity from suit for a State's adjudication and subsequent administration of rights to the use of water of a "river system or other source." 43 U.S.C. 666(a). This Court has

⁶ https://www.oregon.gov/OWRD/programs/WaterRights/Adjudications/KlamathAdj/KBA_ACFOD_07017.pdf.

determined that the term ““river system”” in that provision refers only to a river system “within the particular State’s jurisdiction,” not to the rest of the river system existing within other States. *United States v. District Ct. in & for the Cnty. of Eagle*, 401 U.S. 520, 523 (1971). The Court explained that geographical limitation on the water-rights proceedings contemplated by the McCarran Amendment by observing that “[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.” *Ibid.* The court of appeals followed that interpretation of the McCarran Amendment by this Court, Pet. App. 18 & n.8, which petitioner does not discuss.

Moreover, if petitioner were correct that a single State could unilaterally assume exclusive authority to adjudicate all the water rights in a river system that flows through other States, the consequences would be profound. Petitioner’s theory could operate to circumscribe the federal reserved rights of out-of-state Indian tribes to water in an interstate river system in another State, or even extinguish such rights if the United States or the tribes failed to submit claims for adjudication in an upstream State (here, Oregon). Indeed, it could have such effects on other persons holding out-of-state water rights. One would expect judicial decisions to have addressed that startling outcome if it were correct. And petitioner has identified no such decision.

Quite the contrary, the Federal Circuit’s decision in the takings case that petitioner previously initiated squarely rejected petitioner’s position. In rejecting the contention that “the Yurok and Hoopa Valley Tribes waived their rights because they did not participate in

[Oregon’s] Klamath Adjudication,” the court explained that “states [like Oregon] 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*, 942 F.3d at 1341.

2. Petitioner acknowledges (Pet. 29) that the decision of the court of appeals does not implicate any “circuit split.” And no other reason warrants this Court’s review.

Petitioner contends (Pet. 29) that the court of appeals’ decision conflicts with *Colorado River Water Conservation District v. United States*, 424 U.S. 800 (1976), which petitioner describes (Pet. 29) as ruling that “the first court to adjudicate or administer water rights in a given [river] system * * * acquire[s] prior exclusive jurisdiction over that system.” That is incorrect. In discussing whether a district court should abstain from exercising jurisdiction over a federal suit filed by the United States to declare the government’s rights to water in a river system in Colorado that was already the subject of ongoing proceedings in Colorado state court, *Colorado River* noted the general principle that “the court first assuming jurisdiction over property may exercise that jurisdiction to the exclusion of other courts.” 424 U.S. at 818; see *id.* at 804-806, 817. But the Court did not hold that the state court had prior exclusive jurisdiction over the matter. The Court instead stated that when considering whether to dismiss a federal action “in the event of an exercise of concurrent jurisdiction” (not exclusive jurisdiction) by a state court, a federal court may consider several factors, one of which is “the order in which jurisdiction was obtained by the concurrent forums”; “[n]o one factor is necessarily deter-

minative” in that decision; and “[o]nly the clearest of justifications will warrant dismissal” of the federal suit. *Id.* at 818-819.

This Court has since emphasized that *Colorado River* teaches that such abstention requires “a careful balancing of the important factors as they apply in a given case, with the balance heavily weighted in favor of the exercise of [federal] jurisdiction.” *Moses H. Cone Mem’l Hosp. v. Mercury Constr. Corp.*, 460 U.S. 1, 16 (1983). The court of appeals’ decision in this context of the removal to federal court of a motion for a preliminary injunction filed in state-court McCarran Amendment proceedings seeking relief with respect to out-of-state rights and independent obligations of a federal agency does not conflict with that doctrine. And in any event, the Court’s decision in *Eagle County* makes clear that the McCarran Amendment provides for jurisdiction in a state court to adjudicate only water rights within that State. *Eagle Cnty.*, 401 U.S. at 523.

Petitioner also incorrectly contends (Pet. 29-31) that review is warranted because the question presented is exceptionally important. The removal of petitioner’s preliminary-injunction proceeding to federal court does not “threaten to undo half a century” of the Klamath Basin Adjudication. Pet. 29. That state adjudication is determining “the relative rights of the various claimants to the waters” of a “natural watercourse in th[e] state,” Or. Rev. Stat. § 539.021(1) (2021), by establishing a “priority” date for, and defining the scope of, each in-state water right to the Klamath River and its tributaries, *id.* § 539.140. To the extent petitioner complains that Oregon’s Klamath Basin Adjudication cannot adjudicate every right to the use of water in the Kamath

River, including rights to water in California, that inherent limitation reflects the traditional scope of state authority. Although the McCarran Amendment facilitates a State's adjudication of the relative rights to water in a river system within the State by allowing the United States' rights to be determined in the adjudication, it does not expand the State's authority to determine water rights arising in other States.

Petitioner argues (Pet. 3-5, 17, 27-28) that review in this case is warranted because the Ninth Circuit, in the separate case in which this Court recently denied certiorari, affirmed the Rule 19 dismissal of petitioner's related APA challenge to the Bureau's ESA-based operating conditions on the ground that several Indian tribes, which the Ninth Circuit held could not be joined as parties due to their tribal sovereign immunity, were indispensable parties to the suit. See *KID*, 48 F.4th at 943-948. As the government informed this Court in its brief in opposition to petitioner's certiorari petition in that case, it is the government's position that the Ninth Circuit erred in affirming the dismissal of that APA action on Rule 19 grounds. Gov't Br. in Opp. at 12-13, 17-23, *Klamath Irrigation Dist. v. United States Bureau of Reclamation*, No. 22-1116 (Sept. 27, 2023). The government argued, however, that review by this Court in that case was unwarranted for other reasons, *id.* at 23-29, and the Court denied certiorari, 2023 WL 7117010 (Oct. 30, 2023). Petitioner appears to be concerned that a tribe might similarly seek to intervene and move for dismissal of this proceeding on Rule 19 grounds. But no tribe has done so in the two and a half years that this proceeding has been pending in district court. And if the district court were later to dismiss on Rule 19

grounds, petitioner would be entitled to appeal the dismissal, seek en banc determination of any relevant Rule 19 questions resolved by the panel in *KID*, and seek this Court’s review of any adverse decision by the court of appeals. The mere possibility of such a future non-merits dismissal in this case does not warrant review of the Ninth Circuit’s separate—and correct—decision to deny petitioner’s request for a writ of mandamus directing the district court to remand this injunctive proceeding against the Bureau to state court.

3. Finally, this case would not be a suitable vehicle for the Court’s review for several reasons.

First, because of the mandamus posture in which the case comes to this Court, the Court is not presented with the question whether the district court erred on the merits of its decision declining to remand to state court. The question before the Court would be whether petitioner has established a “clear and indisputable” right to have its motion for a preliminary injunction decided in state court. See *Cheney*, 542 U.S. at 381 (citation omitted). Thus, even if this Court were to conclude that petitioner’s theory of prior exclusive jurisdiction in this water-rights context might otherwise warrant review on direct appeal on some future occasion, petitioner’s interlocutory certiorari petition in this mandamus posture would not provide the Court with a suitable vehicle to consider those contentions.

This Court’s review of the denial of mandamus relief would also be limited to determining whether the court of appeals “abused its discretion by failing to issue the writ,” “[b]ecause the issuance of [an extraordinary] writ is a matter vested in the discretion of the court to which the petition [for that writ] is made.” *Cheney*, 542 U.S.

at 391; see *Roche v. Evaporated Milk Ass'n*, 319 U.S. 21, 25-26 (1943) (stating that a reviewing court determines whether “the case was an appropriate one for the exercise” of a subordinate court’s “discretion[ary]” power to “grant[] or withh[o]ld” the writ). That deferential standard of review underscores that this case is not a suitable candidate for review by this Court.

Second, petitioner has not sought review of the court of appeals’ second basis for denying mandamus relief. After the court of appeals noted that mandamus relief was unavailable because of petitioner’s failure to show that it was clearly erroneous to decline to remand to state court, the court proceeded to hold that, “in any event,” petitioner also failed to show that it lacked “other adequate means” to attain appropriate relief. Pet. App. 22 (citation omitted). The court explained that petitioner would “not be ‘damaged or prejudiced in a way not correctable on appeal’” after “litigating the underlying motion [for an injunction] before the district court.” *Id.* at 23 (citation omitted).⁷ And because that

⁷ In addition, petitioner is currently litigating its underlying contentions in a separate appeal from a district court judgment that concerns the Bureau’s 2020 decision during severe drought conditions to “release water from [Upper Klamath Lake] in an effort to comply with the ESA” with respect to the same threatened salmon species downstream in the Klamath River, and a subsequent 2021 order by OWRD that purported to restrict the Bureau’s operations. See *Yurok Tribe v. U.S. Bureau of Reclamation*, No. 3:19-cv-4405, 2023 WL 1785278, at *5-*6 (N.D. Cal. Feb. 6, 2023), appeal pending, Nos. 23-15499, 23-15521 (9th Cir.); see *id.* at *4. OWRD ordered the Bureau to stop the “distribution, use or release” of stored water from Upper Klamath Lake except for “amounts that may be put to beneficial use” under a water right held for irrigators. *Id.* at *6 (citation omitted); see *id.* at *5 & n.4 (discussing the “KA 1000” water

additional holding provides an independent basis for the court's denial of mandamus, see *Cheney*, 542 U.S. at 380 (requiring that the party seeking mandamus relief show that it has “no other adequate means to attain the relief [it] desires”) (citation omitted), this Court's resolution of the question petitioner presents would not warrant reversing the mandamus judgment of the court of appeals.

Petitioner contends (Pet. 32 n.13) that that independent basis for the court of appeals' decision was “dicta” because the court “acknowledged that its holding on the prior exclusive jurisdiction issue was dispositive.” But it has long been established that when a court provides “a second ground for its decision which [i]s broad enough to sustain it independently of the first ground,” “neither is *obiter dictum*, but each is the judgment of the court and of equal validity with the other.” *United States v. Title Ins. & Trust Co.*, 265 U.S. 472, 486 (1924) (citation omitted); see *Woods v. Interstate Realty Co.*, 337 U.S. 535, 537 (1949) (“[W]here a decision rests on two or more grounds, none can be relegated to the category of *obiter dictum*.”). That holds true even if “the other reason was more dwelt

right). The district court, however, held that the “Bureau must comply with the ESA in operating the Klamath Project,” and that the ESA accordingly preempted the contrary state-law order. *Id.* at *19. Petitioner continues to argue in its pending appeal from the district court's judgment in that case that the state-law order properly prohibited the Bureau from releasing stored water from the Project unless the Bureau acquires irrigators' water rights and that the Oregon state court has prior exclusive jurisdiction over the matter. See Pet. C.A. Br. at 34-79, *Klamath Irrigation Dist. v. Yurok Tribe*, No. 23-15499 (9th Cir. Oct. 16, 2023).

upon and perhaps * * * more fully argued and considered.” *Richmond Screw Anchor Co. v. United States*, 275 U.S. 331, 340 (1928). As a result, given petitioner’s failure to seek certiorari to reverse the court of appeals’ alternative basis for denying mandamus relief, no further review is warranted.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

ELIZABETH B. PRELOGAR
Solicitor General

TODD KIM
Assistant Attorney General

WILLIAM B. LAZARUS

JOHN L. SMELTZER
Attorneys

NOVEMBER 2023