

In the
Supreme Court of the United States

LONNY E. BALEY ET AL.,

Petitioners,

v.

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

Respondents.

On Petition for a Writ of Certiorari to the
United States Court of Appeals for the Federal Circuit

**BRIEF IN OPPOSITION OF RESPONDENT
PACIFIC COAST FEDERATION
OF FISHERMEN'S ASSOCIATIONS**

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QUESTION PRESENTED

Whether the Court of Appeals for the Federal Circuit correctly held there was no Fifth Amendment taking of Petitioners' junior water rights when the Bureau of Reclamation limited delivery of water to them during the drought year of 2001 in order to protect the senior federal reserved water rights of Indian Tribes in the Klamath Basin and thus Petitioners were not legally entitled to receive the water?

RULE 29.6 STATEMENT

Respondent, Pacific Coast Federation of Fishermen's Associations ("PCFFA"), is a non-profit organization that has no parent corporations, and no publicly held company has any ownership interest in it.

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INTRODUCTION

Petitioners, Lonny Baley, *et al.*, seek review of a unanimous panel decision of the Court of Appeals for the Federal Circuit holding that: (1) the reserved water rights of the Klamath Tribes, Hoopa Valley Tribe, and Yurok Tribe (collectively “Klamath Basin Tribes” or “Tribes”) in the Klamath Basin have priority over Petitioners’ water rights; and, (2) given this priority and the extreme drought conditions in 2001, much of the water available that year was required to protect the Tribes’ senior reserved rights, and thus Petitioners’ Fifth Amendment takings claim with respect to their junior water rights failed.

The Federal Circuit’s determination that Petitioners were not entitled to receive all of the water they might have usually received to meet their junior water rights rests on a straightforward application of principles of tribal reserved water rights that have been settled since *Winters v. United States*, 207 U.S. 564 (1908). The Federal Circuit correctly applied these principles to the unique circumstances in the Klamath Basin in 2001, a year of extreme drought and limited water availability, when it concluded that most of the water available that year was required to protect the Tribes’ senior rights from encroachment. Consequently, the Petitioners were not entitled to the water deliveries they claimed, and thus were not entitled to any compensation from the United States resulting from reduced water deliveries in 2001. The Federal Circuit’s decision does not conflict with any decision of this Court or any circuit on any issue, let alone an important one. Nor does the Federal Circuit’s decision depart from decisions of this Court or any circuit on an

important question of federal law, decide a new and important issue of federal law, or in any other way call for this Court's exercise of its supervisory powers.

Petitioners do not dispute that the Tribes' water rights in the Klamath Basin are senior to theirs. (Pet.29). Petitioners instead raise alarmist claims that are not based in law or the facts as they existed in 2001. Petitioners' request for review mischaracterizes the Bureau of Reclamation's actions and the Federal Circuit's decision affirming denial of the Petitioner's Fifth Amendment takings claim. Rather than "upend[ing] longstanding principles of western water rights administration," (Pet.21), the Federal Circuit's decision faithfully applies decades of decisions from this Court and circuit courts affirming the way in which federal agencies and lower courts must recognize and protect reserved tribal water rights held in trust for them by the United States.

STATEMENT OF THE CASE

I. Tribal Reserved Water Rights

The Klamath Tribes, the Yurok Tribe, and the Hoopa Valley Tribe have all resided in the Klamath Basin since time immemorial. Each Tribe has longstanding rights in the Klamath Basin to fish and to the federally reserved water rights necessary to support tribal fisheries.

The Klamath Tribes are a federally recognized Tribe which has hunted, fished, and foraged in the Klamath Basin for over a thousand years. (Pet.App.18). In 1864, the Klamath Tribes entered into a treaty with the United States. This treaty guaranteed to them hunting and fishing rights that have existed since

time immemorial. (Pet.App.18-19), citing *United States v. Adair*, 723 F.2d 1394, 1397-98 (9th Cir. 1983), *cert. denied*, 467 U.S. 1252 (1984). Consequently, the Klamath Tribes' water rights that support their fishing rights "necessarily carry a priority date of time immemorial" because "the rights were not created by the 1864 Treaty, rather, the treaty confirmed the continued existence of these rights." (Pet.App.19) (citing *Adair*, 723 F.2d at 1414); *See also Washington v. Washington State Commercial Passenger Fishing Vessel Ass'n*, 443 U.S. 658, 678-81 (1979). Courts have repeatedly and consistently recognized the seniority of these reserved water rights. *See Klamath Water Users Protective Ass'n v. Patterson*, 204 F.3d 1206, 1214 (9th Cir. 1999), *cert. denied*, 532 U.S. 812 (2000); *Adair*, 723 F.2d at 1414; *Kandra v. United States*, 145 F.Supp.2d 1192, 1204 (D. Or. 2001).

The Klamath Tribes' reservation, established in the 1864 Treaty, spanned approximately 800,000 acres and included land that abutted Upper Klamath Lake and encompassed its tributaries. (Pet.App.18-19). "[O]ne of the 'very purposes' of establishing the Klamath Reservation was to secure to the Tribe a continuation of its traditional hunting and fishing lifestyle." (Pet.App. 19), citing *Adair*, 723 F.2d at 1408-09. In 1954, Congress passed the Klamath Termination Act, providing for the termination of federal supervision of the Klamath Tribes and for the disposition of Reservation lands. 68 Stat. 718 (1954) (codified at 25 U.S.C. § 564, now omitted). The Klamath Termination Act did not, however, extinguish the Klamath Tribes' treaty right to hunt, fish, trap, and gather within the former Reservation; nor did it abrogate these rights or the right to water sufficient to support these rights. Rather, the

Act expressly recognized the continued existence of the Tribes' treaty rights. *Id.* at 722 (“[n]othing in this Act shall abrogate any water rights of the tribe and its members” and “[n]othing in this Act shall abrogate any fishing rights or privileges of the tribe or the members thereof enjoyed under Federal treaty.”); *see also Adair*, 723 F.2d at 1408, 1412 (stating same); *Kimball v. Callahan*, 493 F.2d 564, 567-70 (9th Cir. 1974) (holding that the Klamath Tribes have treaty-reserved hunting, fishing, trapping, and gathering rights that were not affected by the Klamath Termination Act). Thus, the Klamath Tribes' water rights have priority and “take precedence over any alleged rights of the [Klamath Project] Irrigators.” *Patterson*, 204 F.3d at 1214.

The Yurok Tribe and the Hoopa Valley Tribe are federally recognized Tribes in Northern California that have relied on the fish and water resources of the Klamath River since time immemorial. The United States set aside land for the Yurok people by executive order in 1855 in what was then known as “the Klamath River Reservation.” This area included territory one mile in width along each side of the Klamath River. *Mattz v. Arnett*, 412 U.S. 481, 483 (1973). The United States established the Hoopa Valley Indian Reservation in 1864 as a homeland for the Hoopa people. *Id.* at 490 n.9. In 1876, President Grant issued an executive order setting aside the reservation for “Indian purposes.” *Short v. United States*, 486 F.2d 561, 563 (Ct. Cl. 1973). In 1891, President Harrison issued an executive order extending the Hoopa Valley Reservation to include the “Klamath River Reservation.” *Parravano v. Matsen*, 70 F.3d 539, 542 (9th Cir. 1995) (citing *Mattz*, 412 U.S. at 493-94). Congress enacted the Hoopa-Yurok

Settlement Act in 1988 to divide the extended reservation into the Yurok Reservation and the Hoopa Valley Reservation. *Parravano*, 70 F.3d at 542. The present-day Hoopa Reservation is a 12-mile square north of the confluence of the Klamath River and the Trinity River, through which the Klamath River flows. *Karuk Tribe of California v. Ammon*, 209 F.3d 1366, 1370-71 (Fed. Cir. 2000). The present-day Yurok Reservation extends for one mile on each side of the Klamath River, for a length of approximately 45 miles, from above the confluence of the Klamath and Trinity Rivers to the Pacific Ocean. *Mattz*, 412 U.S. at 485-94.

Both the Hoopa Valley Tribe and the Yurok Tribe rely on their fisheries for subsistence, and for economic and cultural survival. For both the Hoopa and Yurok Tribes, the salmon fishery is “not much less necessary to [their existence] than the atmosphere they breathed.” *Parravano*, 70 F.3d at 542, citing *United States v. Winans*, 198 U.S. 371, 381 (1905). Federal courts have repeatedly “recognized that the right of the Yurok and Hoopa Valley Tribes to take fish from the Klamath River for ceremonial, subsistence, and commercial purposes was reserved when the Hoopa Valley reservation was created.” (Pet.App.21). See *Parravano*, 70 F.3d at 547 (upholding federal agency action to limit private commercial offshore salmon fishing because “allowing ocean fishing to take all the chinook available for harvest before the salmon run can migrate upstream to the Tribes’ waters would offer no protection to the Indians’ fishing rights” and “that the Tribes’ federally reserved fishing rights are accompanied by corresponding duty on the part of the government to preserve those rights.”); *United States v. Eberhardt*, 789 F.2d 1354, 1359 (9th Cir. 1986) (“The right to take fish

from the Klamath River was reserved to the Indians when the reservation was created.”). These rights have not been abrogated and carry a priority date of time immemorial, or at least 1891, the date of the last executive order creating the Yurok and Hoopa Valley reservations. (Pet.App.33).

II. The Klamath Basin and Klamath Project

The Klamath Project is a federal irrigation project authorized in 1905 pursuant to the Reclamation Act of 1902. *Klamath Irrigation Dist. v. United States*, 635 F.3d 505, 508 (Fed. Cir. 2011); *Patterson*, 204 F.3d at 1209. The Project is located in southern Oregon and northern California and provides irrigation for over 200,000 acres of croplands, as well as water to national wildlife refuges. *Klamath Irrigation Dist.*, 635 F.3d at 508. The Project consists of various diversions, canals, and pumping stations. The Bureau of Reclamation operates the Klamath Project and, as a federal agency, its operation of the Project is subject to the requirements of federal law, including the Endangered Species Act. *Patterson*, 204 F.3d at 1213 (finding that the Bureau, as owner and operator of the Link River Dam in the Klamath Project, must meet its responsibilities under the ESA).

As a federal agency, the Bureau of Reclamation also has a duty to protect the federally reserved water rights held by the Klamath Basin Tribes. *Patterson*, 204 F.3d at 1213-14. *See also Joint Bd. of Control v. United States*, 832 F.2d 1127, 1131-32 (9th Cir. 1987), *cert. denied*, 486 U.S. 1007 (1988) (finding the Bureau of Indian Affairs had a duty to operate the Flathead Irrigation Project “to protect [the Confederated Salish and Kootenai Tribes’] prior and paramount fishing

water rights”). Courts have repeatedly affirmed that the Klamath Tribes, the Hoopa Valley Tribe, and the Yurok Tribe have federally reserved rights to water in Upper Klamath Lake and the Klamath River, key features of the Klamath Project, sufficient to support their fishing rights. *Patterson*, 204 F.3d at 1213-14 (holding “[b]ecause Reclamation maintains control of the Dam, it has a responsibility to divert the water and resources needed to fulfill the Tribes’ rights, rights that take precedence over any alleged rights of the Irrigators”). See also *Pacific Coast Federation of Fishermen’s Associations v. U.S. Bureau of Reclamation* (“PCFFA”), 138 F.Supp.2d 1228, 1231 (N.D. Cal. 2001) (in operating the Klamath Project, the Bureau has an obligation to protect the tribal trust resources of the Klamath, Yurok, and Hoopa Valley Tribes); *Kandra*, 145 F.Supp. 2d at 1197 and 1204 (“Reclamation must also consider the rights of Indian tribes, including defendants-intervenors Klamath and Yurok Tribes, who hold fishing and water treaty rights in the Klamath River Basin” and “Reclamation [] has a responsibility to divert the water and resources needed to fulfill the Tribes’ rights.”); *Criteria and Procedures for the Participation of the Federal Government in Negotiations for the Settlement of Indian Water Rights Claims*, 55 Fed. Reg. 9223 (March 12, 1990) (“Indian water rights are vested property rights for which the United States has a trust responsibility, with the United States holding legal title to such water in trust for the benefit of the Indians.”).

III. The Endangered Species Act and the Klamath Project

A. The Endangered Species Act

Section 7 of the Endangered Species Act (“ESA”) prohibits any federal agency action that is likely to jeopardize the survival and recovery of a threatened or endangered species or adversely modify its critical habitat. 16 U.S.C. § 1536(a)(2); (Res.App.22a). The Act defines agency action broadly to encompass “all activities or programs of any kind authorized, funded, or carried out, in whole or in part, by Federal agencies,” including “actions directly or indirectly causing modifications to the land [or] water.” 50 C.F.R. § 402.02; (Res.App.42a). It defines “jeopardize” as an action that “reduce[s] appreciably the likelihood of both the survival and recovery of a listed species.” *Id.*; (Res.App.46a). Destruction or adverse modification of critical habitat is “a direct or indirect alteration that appreciably diminishes the value of critical habitat as a whole for the conservation of a listed species.” *Id.*; (Res.App.44a). In order to ensure compliance with this standard, the ESA requires agencies to consult with the appropriate expert agency for actions that may adversely affect a listed species. This consultation results in a biological opinion (“BiOp”) determining whether the action is likely to jeopardize the continued existence of the species or adversely modify its critical habitat and, if so, offering a reasonable and prudent alternative that will avoid jeopardy and adverse modification. 16 U.S.C. § 1536(b)(3)(A) (Res. App.24a-25a); 50 C.F.R. § 402.14(g)-(h) (Res.App.53a-56a). Federal agencies must use “the best scientific and commercial data available” in this consultation and in fulfilling their obligations to avoid jeopardy

and adverse modification of habitat. 16 U.S.C. 1536(a)(2) (Res.App.22a).

B. The Role of the ESA in the Klamath Basin

The U.S. National Marine Fisheries Service (“NMFS”) listed Southern Oregon/Northern California Coast (“SONCC”) coho salmon as threatened under the ESA in 1997. 62 Fed. Reg. 24,588, 24,592 (May 6, 1997). SONCC coho salmon spawn and rear in the Klamath River and its tributaries below Iron Gate Dam, among other streams. The U.S. Fish and Wildlife Service (“FWS”) listed the Lost River and shortnose suckers as endangered under the ESA in 1988. 53 Fed. Reg. 27,130, 27,131-32 (July 18, 1988). These two species inhabit Upper Klamath Lake and its tributaries above the Link River Dam. The treaty and congressionally protected rights of the Klamath Basin Tribes to fish encompass all three of these species as well as the reserved water rights necessary to sustain these species. *Adair*, 723 F.2d at 1417-18, *Parravano*, 70 F.3d at 546, *PCFFA*, 138 F.Supp.2d at 1231.

The Bureau conducted its first consultation and NMFS completed its first BiOp addressing the effects of the Bureau’s operation of the Klamath Project on SONCC coho salmon in 1999. *PCFFA*, 138 F.Supp.2d at 1233. The BiOp concluded that the 1999 Operations Plan for the Project would adversely affect SONCC coho and that the operations in that year were not likely to jeopardize the continued existence of the species. Separately, following formal consultation, FWS also concluded that avoiding jeopardy to the Lost River and shortnose suckers required maintaining specific water levels in Upper Klamath Lake. The Department of Interior subsequently commissioned a scientific

review from Dr. Thomas Hardy of the status of anadromous fish, including the SONCC coho, which depend on streams in the Klamath Basin for survival. *Id.* at 1232. Dr. Hardy released this review in phases, with Phase I intended “to supply initial recommendations for use in developing annual operations plans,” based on a literature review, while Phase II was underway. *Id.* Phase I of the report included interim recommendations on river flow levels necessary to avoid jeopardy to SONCC coho and other species. *Id.* at 1232-33. The 1999 Operations Plan only covered operations for that year, and the BiOp only covered the effects of the plan for that period. *Id.* at 1233.

In 2000, the Bureau of Reclamation implemented its 2000 Annual Operations Plan for the Klamath Project without consulting NMFS or FWS. In 2001, a U.S. District Court concluded that this failure violated the ESA. *Id.* at 1245. The court enjoined the agency from delivering Klamath Project water for irrigation whenever the Klamath River flows dropped below the Phase I flow levels identified in Dr. Hardy’s report until NMFS completed a BiOp on the Bureau’s proposed action and until the Bureau complied with the terms of the BiOp. *Id.* at 1248-49. In imposing this injunction, the district court specifically concluded that the Phase I report was “the best science currently available.” *Id.* at 1250.

As the Bureau developed its operating plan for 2001 and consulted with FWS and NMFS, the agencies received forecasts that 2001 would be a “critical dry” year. *Kandra*, 145 F.Supp.2d at 1197-98. In a draft BiOp, FWS concluded that the Lost River and shortnose suckers were at risk from loss of their aquatic habitat from the proposed 2001 Project operations and proposed

minimum water levels for Upper Klamath Lake to avoid adverse modification of this habitat. *Id.* at 1198. NMFS similarly concluded in its draft BiOp that the proposed 2001 Project operations would jeopardize coho salmon and proposed minimum water flows in the Klamath River necessary to avoid jeopardy. *Id.* In final BiOps for 2001 Project operations, FWS and NMFS adjusted their initial recommended lake levels and river flows in light of updated forecasts of extreme drought conditions that year and concluded that these lower flows still would be minimally sufficient to avoid jeopardy under the ESA. *Id.* at 1198-99. The Bureau then released its final operations plan for 2001, which adopted the lake levels and flow requirements set out in the BiOps in order to comply with the ESA. *Id.* at 1199.

In the 2001 Operations Plan, the Bureau of Reclamation also recognized that it had a “trust responsibility to protect rights reserved by or for federally recognized Indian tribes by treaties, statutes and executive orders,” and that it “must operate the Project consistent with its trust obligations to the tribes in the Klamath River Basin.” (Pet.App.25-26). The 2001 Plan then concluded that “[f]ishery and other resources in the Klamath River, Upper Klamath Lake . . . and nearby lakes and streams are important tribal trust resources to the Klamath Basin tribes. Reclamation’s [2001] Plan provides flow regimes and lake levels for protection of tribal trust resources within the limitations of the available water supply.” (Pet.App.26).

As a result of the critically dry conditions, the requirements of the ESA and the 2001 BiOps, and the obligation to satisfy the Klamath Basin Tribes’ senior reserved water rights, the 2001 Operations Plan

for the Klamath Project limited deliveries of Project water for irrigation for several months. (Pet.App.27). This Plan was a one-year decision to address the particular facts in 2001 when water was extremely scarce. It affected delivery of irrigation water to Petitioners for a part of that year. (Pet.App.117). A group of plaintiffs, which encompassed many of the Petitioners, challenged the 2001 Operations Plan in federal court in Oregon and sought an injunction requiring the Bureau to deliver the full amount of water for irrigation to which they believed they were entitled. Their legal challenge failed because the district court held that, under the drought circumstances present in 2001, the Bureau's obligations under the ESA and its duty to protect tribal trust resources precluded delivery of a significant portion of the water the plaintiffs claimed. *Kandra*, 145 F.Supp.2d at 1211. There was no appeal.

IV. Proceedings Below

This case began in 2001, and as the Petition notes, has resulted in several decisions from the Court of Federal Claims and from the Court of Appeals for the Federal Circuit. (Pet.1). In 2005, the Court of Federal Claims granted PCFFA's motion to intervene as a defendant. *Klamath Irrigation Dist. v. United States*, 64 Fed. Cl. 328, 336 (2005) (Res.App.20a-21a) (explaining the basis for its decision). Petitioners' list of judicial opinions spanning the entirety of the litigation is accurate but only two of these opinions directly address issues raised in the Petition.

In 2017, the Court of Federal Claims ruled that the Bureau of Reclamation's actions in 2001 did not take any property interest of the Petitioners. The

court explained that “the government’s decision in 2001 to withhold water from plaintiffs in order to satisfy its Endangered Species Act and tribal trust obligations did not constitute an improper taking of plaintiffs’ water rights or an impairment of plaintiffs’ water rights because plaintiffs’ junior water rights did not entitle them to receive any Klamath Project water in 2001.” (Pet.App.227).

Petitioners appealed that decision to the Federal Circuit. In 2019, the Federal Circuit affirmed the Court of Claims’ finding that the Petitioners’ water rights were junior to the reserved water rights of the Klamath Tribes, Yurok Tribe, and Hoopa Valley Tribe. It also ruled that the Bureau’s duty to protect the Tribes’ senior rights from encroachment under the facts and circumstances in 2001 required the Bureau to limit irrigation deliveries to Petitioners. The Bureau’s actions, the court concluded, did not constitute a taking because protecting the Tribes’ senior rights required water that might have been delivered to satisfy Petitioners’ junior rights in 2001 and thus Petitioners held no property interest that could be taken. (Pet.App.63).

In affirming the Court of Federal Claims’ decision, the Federal Circuit relied on three key conclusions. First, the Federal Circuit agreed that, as established in numerous appellate decisions, the Tribes hold federal reserved water rights in Upper Klamath Lake and/or the Klamath River and that these rights are senior to any of the water rights held by Petitioners. (Pet.App.58). Second, it concluded that, as a matter of fact, these rights “entitle [the Tribes] to the government’s compliance with the ESA in order to avoid placing the existence of their important tribal

resources in jeopardy,” and that, in 2001, the amount of water necessary to protect these tribal reserved rights from encroachment was at least as much as that required to comply with the ESA. (Pet.App.52). Third, it held that “the federal reserved rights of the Tribes need not have been adjudicated or quantified before they were asserted to protect the Tribes’ fishing rights.” (Pet.App.62).

REASONS FOR DENYING THE WRIT

The Federal Circuit, in unanimously affirming the Court of Federal Claims, upheld long-standing principles that ensure protection of federally reserved tribal water rights. None of the Petitioners’ arguments identify a conflict with this Court’s precedent, decisions of other federal circuits, or federal law. Additionally, the Federal Circuit’s decision is grounded in the unique facts that existed in the Klamath Basin in 2001. As the Federal Circuit correctly stated:

The parties state, and we agree, that we must affirm the judgment of the Court of Federal Claims if we conclude the court did not err in holding that, in 2001, the superior water rights of the Tribes required that the Bureau temporarily halt deliveries of water to appellants.

(Pet.App.40). The Federal Circuit correctly concluded that the Court of Federal Claims did not err in its holding and thus the Petition does not warrant this Court’s review.

I. THE COURT'S DECISION IN *WINTERS V. UNITED STATES* PROVIDES THE LEGAL PRINCIPLES THAT GOVERN THIS CASE.

The Federal Circuit's decision rests on a straightforward application of the *Winters* Doctrine. This Court long ago established that tribes have federally reserved rights to enough water to fulfill the purposes of their reservations. *Winters, v. United States*, 207 U.S. 564 (1908). In *Winters*, the Court recognized that when Congress approved an agreement between the United States and the tribes to establish the Fort Belknap Reservation as a homeland with an agrarian economy, the tribes did not surrender prior rights to water necessary to make the reservation livable. *Id.* at 576 ("The Indians had command of the lands and the waters,—command of all their beneficial use, whether kept for hunting, 'and grazing roving herds of stock,' or turned to agriculture and the arts of civilization, Did they give up all this?"). The Court ruled that when Congress ratified the agreement with the Tribes, it included an implied reserved water right to fulfill the agricultural purposes of the reservation. *Id.* at 577. In *Arizona v. California*, 373 U.S. 546, 600 (1963), this Court continued to uphold the doctrine set forth in *Winters* and found that five tribal reservations in Arizona, California, and Nevada had reserved water rights effective at the time the United States created these reservations. The federally reserved rights affirmed in *Winters* and *Arizona* vest, at the latest, on the date of the federal reservation, are senior to subsequent appropriations of water for other uses, and are sufficient to fulfill the purposes of the reservation. *Arizona*, 373 U.S. at 595-600; *see also Washington State Commercial Passenger Fishing Vessel Ass'n*, 443

U.S. at 684; *Cappaert v. United States*, 426 U.S. 128, 138 (1976); *Agua Caliente Band of Cahuilla Indians v. Coachella Valley Water Dist.*, 849 F.3d 1262, 1268 (9th Cir. 2017), *cert. denied*, 138 S.Ct. 469 (2017). Once these rights are established at the time of, and by the purposes for, the reservation, they continue to exist, *Arizona*, 373 U.S. at 600, whether or not they have been historically accessed or used, *Agua Caliente*, 849 F.3d at 1272. *See Cohen's Handbook of Federal Indian Law* § 19.01[1] (2012) (Indian reserved water rights “are not lost to non-use”).

Both the Federal Circuit and the Court of Federal Claims correctly found that each of the Klamath Basin Tribes has federally reserved water rights pursuant to the *Winters* doctrine, and that those rights are senior to the rights of Petitioners. (Pet.App.55-56) and (Pet.App.195-207). Indeed, “[a]s the Court of Federal Claims noted, it is well-established that the creation of a tribal reservation carries an implied right to unappropriated water ‘to the extent needed to accomplish the purpose of the reservation.’” (Pet. App.49) (emphasis added). The Federal Circuit, like other federal courts, also concluded that the “purposes of the [Klamath Basin] Tribes’ reservations were to secure to the Tribes a continuation of their traditional hunting and fishing lifestyle.” (Pet.App.49), citing *Adair*, 723 F.2d at 1408-09, *Parravano*, 70 F.3d at 546.

Based on the *Winters* Doctrine, and the decisions of other federal courts over the years, the Federal Circuit recognized that the Tribes’ reserved rights to hunt and fish, and to enough water to support those rights, include the ability to restrain others who might interfere with those rights. In *Winters*, the

action at issue was to restrain upstream irrigators from constructing or maintaining dams on the Milk River, or otherwise preventing the river or its tributaries from flowing to the reservation. *Winters*, 207 U.S. at 565; *see also Adair*, 723 F.2d at 1410-11; *Hopi Tribe v. United States*, 782 F.3d 662, 669 (Fed. Cir. 2015). The Federal Circuit recognized that the aquatic habitat that supports the survival of both the Lost River and shortnose suckers and the salmon, which the Klamath Basin Tribes have relied on since time immemorial, necessarily encompasses at least enough water to ensure the continued survival of these species in their habitat both upstream and downstream from the Tribes' reservations, including in the Klamath Project. (Pet.App.56-57). Protecting these senior tribal water rights from encroachment or invasion by others is fundamental to the reserved right itself and an unremarkable application of the *Winters* Doctrine.

II. THE FEDERAL CIRCUIT'S DECISION IS CONSISTENT WITH FEDERAL LAW AND THE DECISIONS OF THIS COURT.

A. The Federal Circuit's Decision Is Consistent with This Court's Decision in *Colorado River Water Conservation Dist. v. United States* and with the McCarran Amendment.

In *Colorado River Conservation Dist. v. United States*, 424 U.S. 800 (1976), the Court held that the McCarran Amendment, 43 U.S.C. § 666, did not diminish the jurisdiction of federal district courts to determine federal water rights, 424 U.S. at 809, and that the Amendment also authorized state courts to adjudicate these reserved water rights through a general stream adjudication that includes all water

users on a river system, *id.* 819-20. The Federal Circuit's decision is consistent with both *Colorado River* and the McCarran Amendment.

The Federal Circuit's decision merely recognizes the existence of the Tribes' senior federal reserved water rights and affirms that those rights did not need to be adjudicated or quantified in 2001 before the United States could protect them from encroachment or usurpation by a third party, in this case the Petitioners. Petitioners attempt to mischaracterize the decision as a re-allocation of water, and thus an adjudication of their water rights. (Pet.24-25; 32). As of 2001, however, the adjudication of some water rights in the Klamath Basin in Oregon was ongoing in Oregon state court but none of the Petitioners' or any other claimants' rights actually had been fully adjudicated, or even administratively identified. *Kandra*, 145 F.Supp.2d at 1201-02. Petitioners, therefore, presented to the courts below a Fifth Amendment takings claim in the absence of any actual adjudication of water rights. Under these circumstances, the Federal Circuit logically determined that, given the facts in the Klamath Basin in 2001, protecting the Tribes' reserved water rights from encroachment required at least as much water as was necessary that year to avoid jeopardy to tribal trust species as required by the ESA. (Pet.App.52) ("At the bare minimum, the Tribes' rights entitle them to the government's compliance with the ESA in order to avoid placing the existence of their important tribal resources in jeopardy"). Thus, water was not available to fulfill all of the Petitioners' junior rights in that critically-dry year. This conclusion poses no conflict with *Colorado River*.

It also poses no conflict with the McCarran Amendment. The Amendment does not eliminate federal court jurisdiction of claims regarding federal reserved water rights or relieve the United States of responsibility to protect these rights. *Colorado River*, 424 U.S. at 809, 810. In *Arizona v. San Carlos Apache Tribe of Arizona*, 463 U.S. 545 (1983), the Court reviewed the question of whether the federal court claims of several tribes to actually quantify and adjudicate tribal reserved water rights should be dismissed in favor of a pending comprehensive state adjudication under the McCarran Amendment. The Court ruled that the federal claims should be dismissed under the *Colorado River* abstention doctrine, but only on the “assum[ption] that the state adjudications are adequate to quantify the rights at issue in the federal suits.” *San Carlos Apache*, 463 U.S. at 570. In reaching its conclusion, however, the Court in *San Carlos Apache* reaffirmed its decision in *Colorado River* that the McCarran Amendment did not eliminate federal jurisdiction to decide questions involving federal reserved water rights. *Id.* at 559, n.10. The Court also determined that tribal water rights are federal rights and must be determined in accordance with federal law. *Id.* at 571 (“We also emphasize, as we did in *Colorado River*, that our decision in no way changes the substantive law by which Indian rights in state water adjudications must be judged. State courts, as much as federal courts, have a solemn obligation to follow federal law.”).

The Federal Circuit, following other federal courts and breaking no new ground, recognized that “tribal water rights arising from federal reservations are federal water rights not governed by state law.” Slip op at 50, citing *Arizona*, 373 U.S. at 597; *see also*

Colville Confederated Tribes v. Walton, 752 F.2d 397, 400 (9th Cir. 1985). This Court has specifically upheld the assertion and protection of federal reserved water rights in federal court. *Cappaert*, 426 U.S. at 145-46. In *Cappaert*, the Court affirmed an injunction to limit pumping water from specific wells near the Devil's Hole Monument because continued pumping would lower the water levels and threaten survival of the endangered Devil's Hole desert pupfish. *Id.* at 135-38. The Court found that conservation of the endangered pupfish, which was protected by the ESA, was necessary to meet the purposes of the federal withdrawal for the Devil's Hole Monument. *Id.* at 141. In reaching its conclusion, the Court relied on the principle that "Federal reserved rights are not dependent upon state law or state procedures and they need not be adjudicated only in state courts[.]" *Id.* at 145.

The Federal Circuit's decision is a straightforward recognition of the nature of federal reserved water rights in the context of both tribal reserved rights and the ESA. The circuit court correctly concluded that the scope of the Tribes' reserved water rights in 2001, and the minimum amount of water necessary to protect those rights from encroachment by others for that year, were federal questions that could be addressed and determined without a complete or formal state adjudication quantifying those rights. (Pet.App.59) (citing *Colorado River*, 424 U.S. at 813 and *Agua Caliente*, 849 F.3d at 1272). Indeed, other federal courts, including this Court in *Winters*, have upheld and protected the existence of tribal water rights without a state adjudication or quantification of those rights. *Winters*, 207 U.S. at 564 (enjoining off-reservation irrigation in favor of tribe's unquantified rights); *Joint Bd. of Control*, 832

F.2d at 1131-32 (upholding Bureau of Indian Affairs water management of an irrigation project to protect unquantified tribal water rights); *Kittitas Reclamation Dist. v. Sunnyside Valley Irrigation Dist.*, 763 F.2d 1032, 1035 (9th Cir. 1985), *cert. denied* 474 U.S. 1032 (1985) (ordering release of reservoir water to protect unquantified tribal fishing and water rights). As the Federal Circuit correctly concluded, “given the facts of record in this case,” it “was not necessary for the Tribes’ rights to have been adjudicated before the Bureau acted.” (Pet.App.59) (emphasis added). Nothing in the Federal Circuit’s decision conflicts with the terms or operation of the McCarran Amendment or jurisdictional issues resolved by this Court in *Colorado River*.

B. The Federal Circuit’s Decision Is Consistent with This Court’s Decision in *United States v. Dist. Court for Eagle County, Colo.*

In *United States v. Dist. Court for Eagle County, Colo.*, 401 U.S. 520, 523 (1971), the Court rejected the proposition that a state adjudication of water rights could be all encompassing: “No suit by any State could possibly encompass all of the water rights in the entire Colorado River which runs through or touches many states. The ‘river system’ must be read as embracing one within the particular State’s jurisdiction.” *Eagle County*, 401 U.S. at 523. The Federal Circuit correctly relied on this decision to conclude that the Yurok Tribe and the Hoopa Valley Tribe, as Tribes located in California, did not forfeit their reserved water rights by not participating in Oregon’s then-ongoing adjudication of Oregon water rights. (Pet.App.60-61) (citing *Eagle County*, 401 U.S. at 523).

In an attempt to create the appearance of a conflict, Petitioners cite *Nevada v. United States*, 463 U.S. 110 (1983). The Court's decision in *Nevada*, however, focused on whether or not res judicata prevented the federal government from reopening a final consent decree determining water rights in order to assert additional claims on behalf of the Pyramid Lake Paiute Tribe 30 years after the adjudication of those rights had concluded. *Nevada*, 463 U.S. at 113. The Court ruled that the United States could not bring additional claims it could have asserted in the original action. *Id.* at 134. The legal and factual circumstances in the Klamath Basin in 2001, on which the Federal Circuit based its decision, do not come within the scope of the Court's decision in *Nevada*. In *Nevada*, a 1944 consent decree fully and finally resolved the water rights at issue. *Id.* at 118. However, in the Klamath Basin in 2001, no water rights had been quantified in the Klamath Basin Adjudication. *Kandra*, 145 F.Supp.2d at 1201-02. Nothing in the Federal Circuit's limited decision threatens to upset a long-settled and final state water adjudication proceeding. Nor did *Nevada* involve an interstate body of water where downstream tribes held reserved water rights that were at issue and required protection from encroachment for a year in light of a specific set of facts. Petitioners' reliance on *California v. United States*, 438 U.S. 645 (1978), is similarly misplaced. In *California* the question was whether the Bureau of Reclamation was required to comply with certain provisions of state law when it applied for permits to construct the New Melones Dam and distribute water pursuant to the Reclamation Act. *California*, 438 U.S. at 672. The Court ruled that Section 8 of the Reclamation Act required conformity with state law unless

the conditions actually imposed by the state were inconsistent with other federal law. There was no issue related to the intersection of tribal or federal reserved rights and state law. In sum, Petitioners have not identified any decision of this Court that conflicts with the Federal Circuit's decision.

CONCLUSION

The Federal Circuit's decision simply confirmed long-standing precedent that the Klamath Basin Tribes' reserved water rights exist, are senior to other rights in the Klamath Basin, and can be protected prior to a final adjudication of those rights. It also found that under the unique circumstances that existed in the Klamath Basin in 2001, most of the water available in that historic drought year was required for these senior tribal rights. Petitioners may have junior rights, but they were not entitled to receive water that belonged to the Tribes in 2001. Based on long-standing precedent and these findings, the Federal Circuit correctly held that the United States did not take any compensable property interest in Petitioners' water rights in 2001.

For the foregoing reasons, the Court should deny the Petition for Writ of Certiorari.

Respectfully submitted,

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