No. 23-______

In the Supreme Court of the United States

KLAMATH IRRIGATION DISTRICT,
Petitioner,

v.

UNITED STATES BUREAU OF RECLAMATION; OREGON WATER RESOURCES DEPARTMENT; UNITED STATES DISTRICT COURT FOR THE DISTRICT OF OREGON, MEDFORD,
Respondents,

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

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

This is the second petition for certiorari arising from related cases in the Ninth Circuit, both of which concern water rights in Oregon's Klamath River Basin and the continued vitality of the federal McCarran Amendment. The first petition seeks review of a ruling granting Native American tribes veto power over any *federal* proceeding to enforce state-adjudicated water rights. Pet. for Writ of Cert., *Klamath Irrigation District v. U.S. Bureau of Reclamation et al.*, Sup. Ct. Case No. 22-1116 ("*Klamath I*"). This second petition seeks review of a parallel ruling denying *state* courts prior exclusive jurisdiction to enforce water rights they have determined in ongoing *in rem* McCarran Amendment adjudication proceedings, if the federal government seeks removal based on its "federal obligations."

The federal government has innumerable obligations that intersect with adjudicated water rights. Thus, under the ruling here, general stream adjudications no longer comprehensively determine all state and federal "rights to the use of water" from a water source, and the federal government can remove virtually any water-rights enforcement proceeding to federal court. Once the proceeding reaches federal court, *Klamath I* allows any Native American tribe with an interest in the litigation to shut it down. Consequently, the combined effect of the Ninth Circuit's rulings leaves water users in the American West no reliable forum to comprehensively determine and administer their water rights. This eviscerates the McCarran Amendment's purpose of enabling water to be allocated in accordance with

judicially enforceable water rights determined in comprehensive general stream adjudications. The result is a lawless frontier in which water is allocated by unelected federal agency officials whose decisions cannot be judicially reviewed.

"[N]o problem" in the American West is "more critical than the scarcity of water." *Colo. River Water Conservation Dist. v. United States*, 424 U.S. 800, 804 (1976). Allowing unelected federal agency officials to reallocate water that state courts have adjudicated to others, while denying thousands of affected water rights holders judicial recourse in either state or federal court, not only undermines the McCarran Amendment—it fundamentally undermines the rule of law on a massive scale. The Court should consider this petition together with *Klamath I*, grant certiorari in both, and reverse the Ninth Circuit's erroneous rulings to ameliorate their drastic consequences.

The question presented is:

> Whether the federal government can avoid the doctrine of prior exclusive jurisdiction in an ongoing, comprehensive water adjudication under the McCarran Amendment by asserting defenses based on federal law.

PARTIES TO THE PROCEEDINGS

Petitioner Klamath Irrigation District moved for a preliminary injunction in Oregon's Klamath County Circuit Court against Respondent the United States Bureau of Reclamation ("Reclamation"). Petitioner sought to compel Reclamation's compliance with a prior state law adjudication of the parties' competing water rights in the Klamath Water Basin by Respondent the Oregon Water Resources Department (the "Department"). Reclamation removed the motion (but not the case) to the United States District Court for the District of Oregon, which denied Petitioner's motion to remand. Petitioner filed a petition for mandamus before the United States Court of Appeals for the Ninth Circuit, but that court denied relief. Petitioner was plaintiff in the district court and petitioner in the Ninth Circuit. Reclamation was defendant in the district court and a real party in interest in the Ninth Circuit. The Department was an intervenor-defendant in the district court and a real party in interest in the Ninth Circuit. The district court was respondent in the Ninth Circuit.

RELATED PROCEEDINGS

This case arises from the following proceedings:

- *Klamath Irrigation District v. United States Bureau of Reclamation and Oregon Water Resources Department*, No. 1:21-cv-00504-AA (D. Or.) (Order denying Petitioner's motion for remand, App. 52).

- *Klamath Irrigation District v. United States District Court for the District of Oregon, Medford Division, Respondent, and United States Bureau of Reclamation and Oregon Water Resources Department*, *Real Parties in Interest* No. 22-70143 (9th Cir. 2023) (Opinion denying mandamus petition, App. 1).

There are no other proceedings in state or federal trial or appellate courts, or in this Court, directly related to this case within the meaning of this Court's Rule 14.1(b)(iii).

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OPINIONS BELOW

The Ninth Circuit's opinion is reported at 69 F.4th 934 (App. 1). The District of Oregon's opinion is unreported but can be found at 2022 WL 1210946 (App. 52).

JURISDICTION

The court of appeals entered its opinion and judgment on June 5, 2023. App. 1. Petitioner's petition for a writ of certiorari is due by September 5, 2023. This Court has jurisdiction under 28 U.S.C. § 1254(1).

CONSTITUTIONAL, STATUTORY, AND RULES PROVISIONS INVOLVED

This case involves a number of constitutional, statutory, and rules provisions:

- 16 U.S.C. § 1536;
- 28 U.S.C. § 1442;
- 43 U.S.C. §§ 383, 421, 666;
- Federal Rule of Civil Procedure 19;
- ORS §§ 539.010, 539.100, 539.130, 539.150, 539.180, 539.210.

For ease of reference, these provisions are excerpted in full in the Appendix. App. 67-106; *see also* Sup. Ct. R. 14.1(f), (i).

INTRODUCTION

Especially in light of the parallel question raised in *Klamath I*, this case presents an enormously important question regarding the adjudication and administration of water rights in the American West, where "no problem" is "more critical than that of scarcity of water." *Colo. River*, 424 U.S. at 804. The McCarran Amendment empowers a state court to adjudicate and administer *all* "rights to the use of water" within a basin or river system in a single, comprehensive proceeding so that all state and federal water rights in a source may be administered together. This way, parties may safely rely on their adjudicated water rights and enforce them against others without fear of some other court issuing a conflicting ruling.

This case undermines this long-settled regime. According to the Ninth Circuit, the federal government has power to remove a motion to enforce state-adjudicated water rights from the state court that is currently adjudicating those rights to federal court, if enforcement of the adjudicated rights may affect (1) out-of-state parties that never filed claims or contests in the adjudication or (2) how the federal government meets obligations imposed by federal law. But these circumstances are features of virtually every state water administration proceeding. In effect, therefore, the Ninth Circuit's ruling enables the federal government to prevent the state courts that are empowered to conduct general stream adjudications from administering and enforcing the very water rights they are adjudicating.

The Ninth Circuit's ruling here also exacerbates the problems from *Klamath I*. That case granted Native American tribes veto power over any federal administrative suit against the United States (including in a case centering on state-adjudicated water rights) if the tribe "claims an interest relating to the subject of the action" within the broad meaning of Federal Rule of Civil Procedure 19. By granting tribes this unique veto power, the Ninth Circuit enabled them to close the federal courthouse doors to other water rights holders. Through its ruling here, the Ninth Circuit now permits the federal government to close the *state* courthouse doors to these water users. Thus, even after a comprehensive McCarran Amendment adjudication, private water users are left with no reliable means of enforcing their adjudicated water rights against those of the federal government. Given their combined effect on water rights in the West, the Court should consider the petitions in this case and *Klamath I* together.

The consequences of these cases are drastic. The power to remove a water rights administration proceeding to federal court (under the ruling here) rests with the federal government, and the power to shut down the removed proceeding (under *Klamath I*) rests with Native American tribes. As a result, the rights of every other water user turn on the tactical litigation decisions of parties who compete with them for access to this limited resource. Collectively, those parties now have the power to insulate agency water rights actions from judicial review.

This case provides a powerful example of the dangers of this power. The Oregon Water Resources Department (the "Department") began adjudicating all state and federal rights in the Klamath Basin in 1975, almost 50 years ago. It took nearly 40 years for the Department to adjudicate those rights, finding in 2014 that Reclamation has no rights to *use* water from Upper Klamath Lake ("UKL") (only to store it), that Petitioner possesses *usage* rights, and that anyone who failed to assert claims in the adjudication forfeited their claims to the waters in the Klamath Basin. Those findings—now before the Klamath County Circuit Court for final approval—will be rendered a nullity, regardless of their merits, if the Ninth Circuit's ruling is allowed to stand. Under that ruling, Reclamation can collaterally attack the results of the Department's adjudication by removing any proceedings to enforce it to federal court where it will face dismissal under *Klamath I*.

This ruling imperils the 48-year-long effort to comprehensively determine all state and federal "rights to the use of water" in Oregon's Klamath Basin in accordance with the McCarran Amendment. It allows the United States to claim rights to use water in the Klamath Basin arising from its "federal obligations"—even though the United States has neither claimed such usage rights nor contested the rights of others in the Klamath Adjudication based on these purported obligations, and even though the time for doing so has long passed. Thus, any usage right the United States now claims is not limited to those determined in the Klamath Adjudication, allowing the United States to divert and use water that has been

adjudicated to *others* in the Klamath Adjudication. Because water in a given source is finite, and all water rights in that source are interrelated, the Ninth Circuit's ruling fatally undermines the 48-year-long Klamath Adjudication.

What is true in this case will be true for most, if not all, water administration proceedings in the West. Virtually every action to hold the federal government to its adjudicated water rights will implicate either the interests of out-of-state parties or the federal government's legal obligations—including its duties under the Endangered Species Act ("ESA") and responsibilities toward Native American tribes. Thus, virtually all water rights actions are now subject to removal, at which point any of the 574 Native American tribes in the United States[1] can obtain dismissal so long as a tribe can claim an interest in the relevant water source. Combined with *Klamath I*, therefore, the ruling below grants tribes and the federal government the power to shut down an enormous number of state *and* federal suits implicating water rights in this vast region. The imbalance and disruption these two cases create in the Klamath Basin cannot be overstated, and these erroneous precedents will, if allowed to stand, destabilize Congress's comprehensive regime for the allocation of water throughout the West, jeopardizing the rights of millions of water users.

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[1] Mainon A. Schwartz, Cong. Research Serv., R47414, *The 574 Federally Recognized Indian Tribes in the United States* (2023).

STATEMENT

1. "[N]o problem" is "more critical" in the American West "than that of scarcity of water." *Colo. River*, 424 U.S. at 804. To address this problem, Western States "have established elaborate procedures for allocation of water and adjudication of conflicting claims to that resource." *Id.* In 1902, the federal government joined the effort to combat water scarcity when Congress passed the Reclamation Act, thereby "set[ting] forth on a massive program to construct and operate dams, reservoirs, and canals for the reclamation of the arid lands in 17 Western States." *California v. United States*, 438 U.S. 645, 650 (1978). But the Reclamation Act still contemplates that States are the primary adjudicators and administrators of water rights, *see id.* at 650-51, and therefore compels the federal government to "appropriate, purchase, or condemn necessary water rights in strict conformity with state law" when implementing water reclamation projects, *id.* at 665. *See also* 43 U.S.C. § 383.

To ensure compliance, Congress passed the McCarran Amendment in 1952, waiving the federal government's sovereign immunity for proceedings to adjudicate or administer water rights and enabling state courts to join the federal government to such proceedings. 43 U.S.C. § 666; *see Arizona v. San Carlos Apache Tribe of Ariz.*, 463 U.S. 545, 548-49 (1983). This waiver extends beyond rights the government holds for itself to include "federal water rights reserved on behalf of Indians," *Colo. River*, 424 U.S. at 810-11, thus advancing "the important federal interest in allowing all water rights on a river system

to be adjudicated in a single comprehensive state proceeding." *Arizona*, 463 U.S. at 551.

In the same vein, this Court also recognized that the doctrine of prior exclusive jurisdiction applies to water rights proceedings. *See Colo. River*, 424 U.S. at 818. This foundational doctrine of property law holds that "the court first assuming jurisdiction over property may exercise that jurisdiction to the exclusion of other courts." *Id. Colorado River* relied on the principles animating this doctrine to affirm dismissal of a water rights suit in federal court that covered rights a State was adjudicating. *Id.* at 804-06, 821. The Court reasoned that "[t]he clear federal policy evinced by" the McCarran Amendment—"the avoidance of piecemeal adjudication of water rights in a river system"—"*is akin to that underlying the rule requiring that jurisdiction be yielded to the court first acquiring control of property*, for the concern in such instances is with avoiding the generation of additional litigation through permitting inconsistent dispositions of property." *Id.* at 819 (emphasis added). "This concern," the Court continued, "*is heightened with respect to water rights*." *Id.* (emphasis added). Because "actions seeking the allocation of water essentially involve the disposition of property," the Court concluded, they "are best conducted in unified proceedings" before a single court, which made dismissal of the federal action appropriate. *Id.*[2]

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[2] Faithful to *Colorado River*, lower courts have "consistently applied" the prior exclusive jurisdiction doctrine "in the water rights context as a mandatory jurisdictional limitation" (at least

2. Consistent with the McCarran Amendment's "all-inclusive" regime for adjudicating and administering water rights, *United States v. Dist. Ct. In & For Eagle Cnty., Colo.*, 401 U.S. 520, 524 (1971), the State of Oregon has adopted its own system for adjudicating all state and federal water rights within its borders. *E.g.*, ORS § 539.010(7); ORS § 539.100; ORS § 539.210.

Oregon adjudications proceed in two steps. First, the Department determines the parties' water rights in a given system based on its investigation of the water source and the claims and contests asserted. *See* App. 10. Second, a court reviews that determination. *See* ORS §§ 539.130(1)-(2), 539.150. While this second judicial stage is ongoing, the initial, administrative determination of water rights is valid, binding, and enforceable, absent a stay from the court. ORS § 539.130(4); *United States v. State of Or.*, 44 F.3d 758, 764 (9th Cir. 1994); App. 10.

From 1975 to 2013, the Department conducted the initial adjudication of all state and federal rights to divert or use water from Oregon's UKL and other waters of the Klamath Basin within Oregon's territorial jurisdiction (the "Klamath Adjudication"). App. 9-10. Petitioner—an irrigation district that operates and maintains irrigation works within the Klamath Basin—filed claims in the Klamath

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before this case). *Baker Ranches, Inc. v. Haaland*, No. 3:21-CV-00150-GMN-CSD, 2022 WL 867267, at *3 (D. Nev. Mar. 22, 2022) (collecting cases).

Adjudication for itself and its members. App. 11-12. As manager of the Klamath River Basin Reclamation Project (the "Klamath Project"), Reclamation also filed claims and contested the claims of others in the adjudication for itself and various Native American tribes. App. 7-8, 10-11. Reclamation did not, however, assert claims or contests for the Yurok and Hoopa Valley Tribes (the "Tribes") in California, App. 10, even though the Department specifically gave the United States notice that it would adjudicate claims from "*all parties* claiming rights to the use of waters of the Klamath River or any of its tributaries," *including* tribes based in California, App. 27 n.1 (Baker, J., dissenting) (emphasis added). Neither of the Tribes directly appeared in the adjudication. App. 10.

The Klamath Adjudication resulted in the Amended Corrected Findings of Fact and Order of Determination to the Klamath County Court (Feb. 28, 2014) (the "Amended Findings and Order"), which preliminarily resolved the competing claims and contests of thousands of water users and are presently before the Klamath County Circuit Court for final approval.[3] The Department concluded that Petitioner

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[3] The Amended Findings and Order can be found at https://www.oregon.gov/owrd/programs/waterrights/adjudications/klamathriverbasinadj/pages/acffod.aspx. They span over 7,500 pages, but the Department created an index and search feature for ease of navigation. The Ninth Circuit referred to the Amended Findings and Order as "ACFFOD" below, and references to its pages within this petition are formatted as "KBA_ACFFOD_00001," consistent with the Department's index.

and other irrigation districts own rights to *use* water from UKL. KBA_ACFFOD_07155. Reclamation, however, holds only the right to *store* water in that lake. KBA_ACFFOD_07084. The Department did not recognize Reclamation's asserted right to use stored water in UKL to augment instream flows in the Klamath River for the benefit of endangered species or tribes in California. KBA_ACFFOD_07060, 07084. And importantly, the Adjudicator found that

> any potential claimant who has failed to timely file a claim in the Adjudication shall be barred and estopped from subsequently asserting any rights theretofore acquired upon the stream or other body of water embraced in the proceedings, and shall be held to have forfeited all rights to the use of the water theretofore claimed by the claimant.

KBA_ACFFOD_00014. This finding is consistent with Oregon law, which compels claimants to assert their claims in a water rights adjudication or forfeit them. ORS §§ 539.100, 539.210. It is also consistent with the very nature of *in rem* proceedings, which are designed to "determine all claims that anyone, whether named in the action or not, has to the property or thing in question. The proceeding is one against the world." *Tennessee Student Assistance Corp. v. Hood*, 541 U.S. 440, 448 (2004).

Notably, though the Amended Findings and Order limited Reclamation's rights in UKL to storage, they do not prohibit Reclamation from using its stored

water to meet its legal obligations, provided it follows the proper process. As such, while the adjudication denied Reclamation a right to divert and use stored water, Reclamation may seek a stay of those determinations from the state court, *see* ORS § 539.180 and, if granted, use stored water to meet its legal obligations. Additionally, Reclamation could meet its legal obligations by purchasing, leasing, or condemning other holders' water rights through judicial process. *See* 43 U.S.C. § 421 (authorizing these actions).

3. Reclamation did not follow these processes. Instead, in 2019, it published an operations plan under which it would continue using water in UKL adjudicated to Petitioner for Reclamation's instream purposes without obtaining a stay of the water rights determinations in the adjudication or buying, leasing, or judicially condemning Petitioner's water rights. *Klamath Irrigation Dist. v. United States Bureau of Reclamation*, 48 F.4th 934, 941 (9th Cir. 2022) ("*Klamath I*"). Reclamation did this even though "[t]he right to the use of water constitutes a vested property interest which cannot be divested without due process." *Skinner v. Jordan Valley Irr. Dist.*, 300 P. 499, 503 (1931).

In response, Petitioner challenged the operations plan under the Administrative Procedure Act in the District of Oregon, seeking to compel Reclamation's compliance with the Amended Findings and Order. *Id.* at 942. Several Native American tribes intervened in that federal proceeding and obtained dismissal for inability to join a necessary party based on the tribes'

sovereign immunity. *Id.* The Ninth Circuit affirmed, citing problematic precedent that even the federal government refuses to defend. *Id.* at 938. Petitioner has filed a petition for a writ of certiorari to seek review of that ruling. *See* Sup. Ct. Case No. 22-1116.

Meanwhile, Reclamation moved forward with its plan, diverting more than 123,000 acre-feet of water for its own purposes in 2020. Notice of Removal, Ex. 1, Emergency Mot. for Prelim. Inj., *Klamath Irrigation Dist. v. United States Bureau of Reclamation*, No. 1:21-cv-00504-AA, Dkt. No. 1-1 at 11-12,[4] 2021 WL 1308313 (D. Or. Apr. 5, 2021). It also indicated it planned to make similar diversions in 2021 to the detriment of Petitioner and its members. *Id.* Indeed, those diversions have occurred in every subsequent year and continue today.

The damage from Reclamation's actions has been (and will be) enormous. Farming requires significant up-front costs, with minimal income for months or years before crop production renders a return. *Id.* at 32, 37, 43. Thus, before Reclamation announced its 2021 operations plan, Petitioner's farmers took on significant costs and debts, such as land rental obligations, mortgage payments, operating and equipment loans, and expenditures for farming supplies. *Id.* at 32, 40. Many farmers typically operate with thin profit margins. *Id.* at 32, 37, 40, 43. So when Reclamation seizes water in violation of Petitioner's

[4] Page number references to this document are to the ECF Page Number, *e.g.*, 11-12 of 292.

water rights and denies its farmers the water needed to produce crops, it leaves them no way to pay their debts. *Id.* at 33, 40, 243. Crop shortages also force farmers' customers to take their business elsewhere, and, once gone, they can be nearly impossible to get back. *Id.* at 32-33. All these problems can compound year-to-year because many crops grow on a multi-year rotation such that the effects of a single-year shortage will last much longer. *Id.* at 32, 43, 246. The ultimate outcome for many farmers' is bankruptcy. *Id.* at 33, 37-38, 41, 43.[5]

4. On March 29, 2021, Petitioner filed an emergency motion for a preliminary injunction in the Klamath Adjudication before the Klamath County Circuit Court to prevent Reclamation from diverting and using stored water contrary to the water rights determined in the Klamath Adjudication without obtaining a stay of those determinations. *Id.* at 1-29. Before the state court could rule, however, Reclamation removed the case to the District of Oregon under 28 U.S.C. § 1442(a)(1). App. 11-12.

Petitioner moved to remand, arguing that the state court had prior exclusive jurisdiction over the rights determined in the Amended Findings and Order, so the district court lacked jurisdiction over Petitioner's

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[5] These dangers have materialized. Reclamation's actions prevented Petitioner's members from receiving *any* water under the rights they sought to enforce in 2021, and they received only a small fraction of the water to which their rights entitle them in 2022 and 2023 due to federal water diversions. Consequently, since Petitioner filed this case, many of its members have been forced to stop farming.

motion. App. 12. The district court declined to remand the case, and Petitioner sought mandamus before the Ninth Circuit. *Id.*

The Ninth Circuit denied relief in a split decision resting entirely on the legal question of whether the Klamath County Circuit Court had prior exclusive jurisdiction over the Klamath Basin. App. 12-22. So, while the Ninth Circuit also examined some other factors relevant to whether mandamus is warranted, it expressly recognized that its resolution of the prior exclusive jurisdiction issue was dispositive. App. 22-23.

On this question, the court did not dispute that the Klamath Adjudication is *in rem* or that, after over 40 years of litigation, it "determined claims to water rights in UKL and portions of the Klamath River within Oregon." App. 10, 17-21; *see also* App. 35 (Baker, J., dissenting) ("It's undisputed that the Klamath County Circuit Court has *in rem* jurisdiction over rights to the stored water (the *res*) of UKL in Oregon."). And the majority acknowledged that the Klamath Adjudication is ongoing and the Klamath County Circuit Court currently has jurisdiction to finalize the adjudication. App. 9-10.

Yet, despite all this, the Ninth Circuit held that "[t]he doctrine of prior exclusive jurisdiction does not apply here" because the Klamath Adjudication "did not adjudicate Reclamation's ESA obligations or the Tribes' senior rights, so the Klamath County Circuit Court did not have jurisdiction over the rights challenged by [Petitioner's] motion." App. 14. Thus,

the court concluded removal was proper. App. 21- 22. It reached this conclusion even though (1) *in rem* proceedings, by their nature, resolve *all* competing claims to a single property, (2) Oregon law required everyone claiming an interest in the Klamath Basin to assert that claim in the Klamath Adjudication, and (3) the Department explicitly held that any party who failed to assert a claim forfeited it. App. 26-27 (Baker, J., dissenting); KBA_ACFFOD_00014.

Judge Baker dissented.[6] He concluded that the state court "has prior exclusive jurisdiction over the order that [Petitioner's] motion [sought] to enforce," so "the district court necessarily committed a clear error of law in failing to remand." App. 26. Petitioner, Judge Baker explained, brought its motion "to enforce a decree—the [Amended Findings and Order]—over a *res*—i.e., the rights to the stored waters of UKL," and "[g]iven the zero-sum nature of the resource, any party's unlawful diversion of water from the lake necessarily affects other users." App. 35 (cleaned up). It was therefore impossible for the district court to "adjudicate [Petitioner's] and Reclamation's personal claims to the property without disturbing the first court's jurisdiction over the *res*." App. 35 (cleaned up). Because the parties' competing "interests in the property … serve as the basis for jurisdiction," Judge Baker concluded, "the motion is *quasi in rem*, and the

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[6] Judge Baker, of the United States Court of International Trade, was sitting by designation.

doctrine of prior exclusive jurisdiction fully applies." App. 35-36.

Based on this error, Judge Baker determined that Petitioner's "right to mandamus relief … is clear and indisputable." App. 49. It "necessarily follow[ed] that [Petitioner] has no other adequate means, such as a direct appeal, to obtain the relief it seeks" because Petitioner's "irrigator members would suffer loss of their water rights" and their corresponding "opportunities to *use* water rights" before any "appeal in the ordinary course" could provide relief. App. 50. Judge Baker also repeatedly noted that the majority's decision exposes Petitioner to dismissal for failure to join a necessary party under *Klamath I*, App. 29-30 n.6, 43 n.18, underscoring his conclusion that Petitioner lacks any adequate remedy outside mandamus. For all these reasons, Judge Baker would have "grant[ed] the mandamus petition and sen[t] [Petitioner's] motion back to state court where it belongs." App. 26.

REASONS TO GRANT THE PETITION

I. The question presented is exceptionally important because it severely undercuts state court *in rem* jurisdiction over water rights proceedings.

No one disputes the Oregon circuit court currently has exclusive *in rem* jurisdiction over rights to stored water in UKL. Indeed, the federal government conceded below that "numerous significant federal reserved rights and state appropriative rights for a national park, national forests, wilderness areas, wild

and scenic rivers, wildlife refuges, Indian reservations, and the Klamath Reclamation Project … in southern Oregon *and northern California*" are subject to the state court's jurisdiction. App. 28-29 n.5 (Baker, J., dissenting).

The Ninth Circuit, however, has granted the federal government the power to evade state court jurisdiction and remove proceedings to enforce adjudicated water rights to federal court if the United States asserts rights to use water arising from its federal obligations under federal law or its tribal trust obligations, which have not been asserted in an adjudication. Under those circumstances, the Ninth Circuit says the state court lacks prior exclusive jurisdiction and the government can remove the matter. At that point, if the case affects their rights under Rule 19, Native American tribes can obtain dismissal under *Klamath I* before the case reaches the merits.

Given the "the ubiquitous nature of Indian water rights in the [American West]," *Colo. River*, 424 U.S. at 811, under the Ninth Circuit's ruling here, water users' rights will depend entirely on the litigation decisions of the federal government and Native American tribes—not the merits. By choosing not to assert claims on behalf of Tribes in a general stream adjudication but later asserting that trust obligations to these tribes authorize the government to divert and use water from this source, the government can defeat the comprehensiveness and finality of general stream adjudications under the McCarran Amendment. Worse, it can also close the state courthouse doors to

other water users adversely affected while tribes can do the same in federal court. This result leaves other water rights holders *no* reliable forum to administer their water rights. The availability of this one-sided power imperils the comprehensive statutory adjudication system Congress created to administer state and federal water rights in the American West and prevents millions of users from protecting their adjudicated water rights.

A. The Ninth Circuit's ruling enables the federal government to remove any water rights case that affects an interstate water system or unasserted federal obligations.

The implications of the Ninth Circuit's ruling stem from its holding that "[t]he doctrine of prior exclusive jurisdiction does not apply here." App. 14. As noted, this crucial, long-established doctrine provides that "the court first assuming jurisdiction over property may exercise that jurisdiction to the exclusion of other courts." *Colo. River*, 424 U.S. at 818. It is a foundational doctrine of property law that goes back well over a century and has been affirmed by this Court time and again. *See Princess Lida of Thurn & Taxis v. Thompson*, 305 U.S. 456, 466 (1939); *Kline v. Burke Constr. Co.*, 260 U.S. 226, 229 (1922); *Palmer v. Texas*, 212 U.S. 118, 129 (1909) (citing cases as early as 1849). It is meant to prevent "the generation of additional litigation through permitting inconsistent dispositions of property," a "concern [that] is heightened with respect to water rights" whose relationships "are highly interdependent." *Colo. River*, 424 U.S. at 819.

The Ninth Circuit refused to apply this centuries-old, foundational doctrine because the Klamath Adjudication supposedly "did not adjudicate Reclamation's ESA obligations or the Tribes' senior rights." App.14. On the latter point, the court elaborated that "the Tribes' rights at issue" in Petitioner's motion for a preliminary injunction "were not governed by Oregon law and were not subject to the [Klamath Adjudication]" because "neither [that adjudication] nor the Klamath County Circuit Court exercised jurisdiction over the Tribes' rights." App. 15-16 & n.3. According to the Ninth Circuit, the McCarran Amendment does not "expand a state court's subject matter jurisdiction or empower a state to adjudicate rights beyond its jurisdiction," even when an out-of-state party claims an interest in an in-state water source encompassed within an ongoing *in rem* adjudication. App. 17.

The Ninth Circuit's (erroneous) ruling is sweeping and creates serious perverse incentives for out-of-state claimants and the federal government. At the most extreme, the opinion can be read as holding that a state court can *never* exercise jurisdiction over out-of-state claimants who have an interest in an in-state water source. *See* App. 17 ("Nor does [the McCarran Amendment] expand a state court's subject matter jurisdiction or empower a state to adjudicate rights beyond its jurisdiction."). But almost all U.S. water systems cross state borders and thus implicate the interests of out-of-state parties. *See infra* at 24. For this reason, the Ninth Circuit's rationale has the potential to deny states the ability to *comprehensively* adjudicate rights to in-state waters, thereby

eviscerating the entire state-and-federal regime for water allocation in the West.

A more modest reading of the opinion does little to avoid this result. By denying the state court prior exclusive jurisdiction based on the Department's supposed failure to adjudicate the California Tribes' rights,[7] the Ninth Circuit effectively adopted a rule that requires the adjudicating state entity to *expressly* address *all* claims to a water source—from both in-state and out-of-state claimants and regardless of whether those claims were actually asserted in the adjudication—before the adjudicating court can have prior exclusive jurisdiction. A catchall ruling like the Department's, KBA_ACFFOD_00014, which invokes the nature of *in rem* proceedings and thereby addresses all claims to the *res* (including those not expressly raised), is not enough. Nor is it enough for the forum state's law to require potential claimants to assert their claims or forfeit them. *See* ORS § 539.210; App. 13-15.

Thus, at minimum, the Ninth Circuit now requires a water rights adjudication for a water source that extends into another state to *specifically and expressly* address all claims, including unasserted ones from absent, out-of-state claimants, for the adjudicating

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[7] As explained below and in Judge Baker's dissent, this holding is incorrect; the Klamath Adjudication *necessarily* adjudicated the Tribes' rights. *Infra* at 35-36; App. 26-30 & nn. 3, 5 (Baker, J., dissenting). That is the very nature of *in rem* proceeding—to settle the rights of anyone (present or absent) who does or could claim a right in the *res*. *Hood*, 541 U.S. at 448.

court to have prior exclusive jurisdiction that will prevent removal—even though doing so is logically impossible and directly at odds with the nature of an *in rem* proceeding. Otherwise, the federal government can assert that the adjudication did not adjudicate all claimants' rights, and, therefore, the relevant state court does "not have jurisdiction over the rights challenged." App. 15. With this argument, the government can remove all actions that seek to enforce adjudicated water rights in an interstate water source so long as the adjudication did not expressly address at least one claimant's claims, whether asserted or not.

This holding gives out-of-state claimants a serious perverse incentive. By refusing to join a proceeding, these claimants can drastically lower the likelihood that the state adjudicator will expressly address their claims—as needed to acquire prior exclusive jurisdiction—thereby facilitating removal of any enforcement proceeding to federal court where the government can collaterally assert rights to use water adjudicated to others. This incentive will arise for everyone who holds interests in water sources and views federal court as the superior option, such as out-of-state tribes who can veto adverse litigation under *Klamath I*.

Equally problematic is the Ninth Circuit's mistaken conclusion that the state court lacked prior exclusive jurisdiction because the Klamath Adjudication "did not adjudicate Reclamation's ESA obligations." App. 14; *see also infra* at 35-36 (explaining court's error). This reasoning, which is not

limited to the government's ESA obligations, means that any time a state adjudicator does not expressly address unasserted rights to the use of water the federal government believes arise from its federal obligations, the adjudicator lacks prior exclusive jurisdiction, and the case is removable.

This holding creates a perverse incentive too. It gives the government a reason to avoid raising obligations it has under federal law in a given water rights adjudication that may affect those obligations. Here, for example, by declining to present its federal defenses in the Klamath Adjudication, Reclamation *prevented* the Department from "adjudicate[ing] [its] ESA obligations." App. 14. This, in turn, deprived the state court of prior exclusive jurisdiction and enabled Reclamation to remove the case and collaterally challenge the Amended Findings and Order.

Employed more broadly, this strategy will give the government multiple bites at the adjudicatory apple. If an adjudication goes against it on claims it asserted, as it did here in material respects, the government can insist in any subsequent state court enforcement proceeding that the adjudication did not cover other obligations it refused to assert, thereby denying the state court prior exclusive jurisdiction, permitting removal, and allowing the federal government to have a second court (this time, a federal court) adjudicate its rights. This contradicts the McCarran Amendment, which is meant to "allow[] all water rights on a river system to be adjudicated in a single comprehensive state proceeding," *Arizona*, 463 U.S. at 551, and prevent the "inconsistent dispositions of property"

that result from multiple adjudications, *Colo. River*, 424 U.S. at 819.

B. Contrary to the purpose of the McCarran Amendment, the Ninth Circuit's ruling enables the federal government to remove virtually any water rights enforcement proceeding.

Congress passed the McCarran Amendment to subject the United States to the *state* legal systems that existed "for allocation of water and adjudication of conflicting claims to that resource." *Colo. River*, 424 U.S. at 804. While the McCarran Amendment may not divest federal courts of the power to hear water rights cases, it still "bespeaks a policy that recognizes the availability of comprehensive state systems for adjudication of water rights as the means for achieving these goals," *id.* at 809, 819, and "articulates the policy of the federal government to make state courts the primary forum for water rights adjudications," *United States v. City of Las Cruces*, 289 F.3d 1170, 1177 (10th Cir. 2002); *see also Arizona*, 463 U.S. at 564 ("[T]he Amendment was designed to deal with a general problem arising out of the limitations that federal sovereign immunity placed on the ability *of the States* to adjudicate water rights.") (emphasis added).

The holding below undermines this regime. Even if it did not deprive state courts of jurisdiction over out-of-state claimants outright, the Ninth Circuit's ruling still allows the federal government to remove virtually *all* water rights administration proceedings involving

it to federal court.[8] Each prong of the court's holding covers a vast quantity of water rights cases. Considering them together, it is difficult to imagine a water rights case not subject to removal.

Begin with the court's holding that the state court lacked prior exclusive jurisdiction because it did not expressly adjudicate the California-based Tribes' rights, which effectively requires adjudicators to expressly decide *all* out-of-state claimants' claims, regardless of whether those claimants appear in the adjudication. *Supra* at 18-21. The breadth of this holding is staggering. Like the Klamath Basin, "[o]ver 95% of the available freshwater resources in the United States are interstate in nature." Noah D. Hall, *Interstate Water Compacts and Climate Change Adaptation*, 5 ENVT'L & ENERGY L. & POL'Y J. 237, 239 (2010).[9] According to the Ninth Circuit, every adjudication proceeding for waters in these systems must explicitly determine the rights of all out-of-state claimants; if it does not, the government can remove

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[8] The federal government will be a party to a significant number of water rights proceedings. Reclamation alone is the single largest wholesale water supplier in the country and supplies 10 trillion gallons of water to millions of people each year, to say nothing of other agencies. Bureau of Reclamation, About Us—Fact Sheet, https://www.usbr.gov/main/about/fact.html (Feb. 23, 2023).

[9] *See also, e.g.*, Sarah B. Van De Wetering, Robert W. Adler, *New Directions in Western Water Law: Conflict or Collaboration?*, 20 J. LAND RESOURCES & ENVTL. L. 15, 37 (2000) ("[M]ost of the major western river systems are largely interstate.").

the case. *Supra* at 18-21. Given the sheer number of interstate water systems, this part of the court's holding subjects an enormous swath of water rights cases to removal.

The court's holding allowing the federal government to remove proceedings that implicate its unasserted obligations is even more sweeping. *Supra* at 21-23. For one, the federal government owes tribal trust obligations to Native American tribes across all States. *See United States v. Jicarilla Apache Nation*, 564 U.S. 162, 176 (2011). Thus, if the court fails to address the rights of *any* interested tribe, in-state or out-of-state, the federal government can now remove the case.

Beyond its tribal trust obligations, the federal government has many other obligations that may implicate water rights in a given system. The most important of these comes from the ESA, the statute the Ninth Circuit cited, which "requires federal agencies to consult with specified federal fish and wildlife agencies to ensure that 'any action authorized, funded, or carried out by such agency … 'is not likely to jeopardize the continued existence' of any species listed for protection under the Act 'or result in the destruction or adverse modification of' the species' critical habitat." *Klamath I*, 48 F.4th at 940 (quoting 16 U.S.C. § 1536(a)(2)).

This obligation to avoid endangering listed species will arise in most, if not all, water rights cases involving the federal government. "[M]ost waters in the U.S. that are important sources of water supply …

contain ESA-listed species," which "depend for habitat on the same water humans want to consume." Robin Kundis Craig, *Does the Endangered Species Act Preempt State Water Law?*, 62 U. KAN. L. REV. 851, 852 (2014). Correspondingly, "water management in a number of water basins in the U.S., both East and West, depends at least in part on the ESA." *Id.* at 875.[10] Therefore, if the government can choose *not* to assert its ESA obligations in a water rights adjudication that purportedly affects its ability to meet them, as the Ninth Circuit says, almost no water rights proceeding will be safe from removal.

Besides the ESA, federal agencies are subject to innumerable other obligations under federal law, many of which may also be implicated in a water rights proceeding. *See* D. Craig Bell, Norman K. Johnson, *State Water Laws and Federal Water Uses: The History of Conflict, the Prospects for Accommodation*, 21 ENVTL. L. 1, 29-55 (1991) (collecting examples of federal statutes that water rights adjudications may implicate).[11] The Ninth Circuit says the government can always remove such

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[10] *See also* Roderick E. Walston, *2006 Water Law Symposium: Keynote Address*, 12 HASTINGS W.-N.W. J. ENVTL. L. & POL'Y 125, 131 (2006) ("The ESA has a major impact on state water laws and private rights….").

[11] *See also* Walston, *supra* n.10, at 129 (similar); Bennett W. Raley, *Chaos in the Making: The Consequences of Failure to Integrate Federal Environmental Statutes with McCarran Amendment Water Adjudications*, 41 RMMLF-INST 24 (1995) (similar).

a proceeding based on these obligations so long as they were not expressly addressed in the underlying adjudication. By this logic, the government can remove practically all water rights administration cases to federal court and collaterally assert those obligations to relitigate its water rights on a piecemeal basis in a different forum.

C. Combined with *Klamath I*, the Ninth Circuit's ruling denies water rights holders a safe forum to enforce their adjudicated rights and insulates federal agency action from review.

In conjunction with *Klamath I*, this broad removal power creates an even bigger problem: it insulates Reclamation's water usage actions from judicial review and denies water rights holders *any* reliable forum in which to administer their water rights, putting those rights in the hands of competing water users. But the whole point of the McCarran Amendment is to facilitate state adjudication and administration proceedings. *See Eagle Cnty.*, 401 U.S. at 524. By enabling the federal government to remove the vast majority of administration cases (via the ruling here) and allowing tribes to obtain dismissal once those cases reach federal court (via *Klamath I*), the Ninth Circuit's ruling endangers this regime.

The breadth of this danger stems from "the ubiquitous nature of Indian water rights." *Colo. River*, 424 U.S. at 811. With "more than 300 land areas in the United States administered as federal Indian reservations, any of which theoretically includes an implied right to sufficient water to satisfy the purpose

of the reservation," tribes can claim an interest in an enormous number of water systems throughout the West. Christian Termyn, *Federal Indian Reserved Water Rights and the No Harm Rule*, 43 COLUM. J. ENVTL. L. 533, 545 (2018). *Klamath I* allows these tribes to shut down any federal administration proceeding for rights in a given water system by claiming "indispensable party" status under Rule 19 and moving to dismiss for inability to join based on their sovereign immunity. *See Klamath I*, 48 F.4th at 943-50.

In this way, *Klamath I* gives Native American tribes the power to close the *federal* courthouse doors to other water rights holders. And given the broad removal power the Ninth Circuit granted the federal government here, state courts are no longer a safe alternative forum for these water rights holders. Their ability to enforce their rights depends entirely on the federal government and Native American tribes, who, through these tactics, can shield the government's water usage and allocation decisions from judicial review. This is not the system the McCarran Amendment contemplates.

II. This case is an appropriate vehicle to answer the question presented.

This case is an appropriate vehicle to address the issues presented. It involves purely legal questions of the district court's subject matter jurisdiction, the Ninth Circuit having held that "[t]he doctrine of prior exclusive jurisdiction does not apply" if a water rights adjudication "did not adjudicate Reclamation's [legal] obligations or [out-of-state claimants'] rights." App.

14. And because this holding derives from the Ninth Circuit's conclusion regarding the district court's jurisdiction, as all the judges below acknowledged, App. 22, (majority), 49-51 (Baker, J.), the mandamus posture of this proceeding is irrelevant.

The lack of a circuit split is no barrier to certiorari. For one, the Ninth Circuit's holding conflicts with *Colorado River*, which acknowledged that the first court to adjudicate or administer water rights in a given system *does* acquire prior exclusive jurisdiction over that system. *See* 424 U.S. at 819-21; *supra* at 7. The Ninth Circuit's decision cannot be squared with this reasoning.

For another, the question presented is exceptionally important. With respect to the Klamath Adjudication alone, this case and *Klamath I* threaten to undo half a century of time, expense, and effort to adjudicate all competing state and federal rights in the Klamath Basin. If the federal government can remove an action to enforce those rights (as occurred here), and tribal sovereign immunity can then be used to procure dismissal of those actions (as occurred in *Klamath I*), the adjudicated rights mean nothing, and the immense resources and 48 years spent so far adjudicating them will be for naught. App. 29-30 n.6, 43 n.18 (Baker, J., dissenting). This same problem will arise any time a water-rights holder attempts to enforce a right adjudicated in any adjudication proceeding that has occurred since the passage of the McCarran Amendment in 1952, making the harm from the Ninth Circuit's rulings in these two cases astronomical.

The issues presented here and in *Klamath I*, moreover, are likely to arise in only two circuits. As the citing references for the McCarran Amendment and Reclamation Act demonstrate, the vast majority of water rights adjudications occur in the American West. *See* 43 U.S.C. § 666 (42 of 75 circuit-level Westlaw citing references and 68 of 102 district-level Westlaw citing references originate from Ninth and Tenth Circuits); 43 U.S.C. § 383 (42 of 49 circuit cases and 57 of 61 district cases); 43 U.S.C. § 421 (six of nine circuit cases and 13 of 16 district cases) (last accessed August 7, 2023). Likewise, nearly all Native American land is located in this region,[12] meaning that few circuits other than the Ninth and Tenth will face the important issues this case and *Klamath I* raise. It will be years before a circuit split arises, and the damage likely to occur in the interim is substantial.

The Ninth Circuit's ruling also merits review based on the size of that circuit, the immense importance of water rights across its vast expanse, and the sweeping effects of the lower court's rulings. The Ninth Circuit covers seven Western States and has a combined population of over 65 million. *See* Quick Facts: Population Estimates, July 1, 2022, U.S. Census Bureau, https://www.census.gov/quickfacts/geo/chart/US/PST045222 (indicating population for each State,

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[12] *See* U.S. Dept. of Agric., *Forest Service National Resource Guide to American Indian and Alaska Native Relations* 6, D-3 Table D.2 (Apr. 1997), https://www.fs.usda.gov/spf/tribalrelations/documents/publications/national-resource-guide-ver2.pdf.

with those within the Ninth Circuit totaling over 65 million out of 333 million). If water rights cannot be enforced in state *or* federal court across this region, it places access to this scarce resource in even further jeopardy for approximately a fifth of the country.

Finally, the mandamus posture of this proceeding is no bar to certiorari because the district court's error is jurisdictional. The Klamath County Circuit Court's prior exclusive jurisdiction over the waters deprived the District of Oregon of its very power to rule on Petitioner's motion for a preliminary injunction. *See Palmer*, 212 U.S. at 125 ("If a court of competent jurisdiction, Federal or state, has taken possession of property, or by its procedure has obtained jurisdiction over the same, such property is withdrawn from the jurisdiction of the courts of the other authority.") *Kline*, 260 U.S. at 229-30 (similar). This "is no mere discretionary abstention rule. Rather, it is a mandatory jurisdictional limitation" that requires remand. *State Eng'r of State of Nevada v. S Fork Band of Te-Moak Tribe of W. Shoshone Indians of Nevada*, 339 F.3d 804, 810 (9th Cir. 2003) (citing *Palmer*, 212 U.S. at 125; *Hagan v. Lucas*, 35 U.S. 400, 403 (1836)).

The classic function of mandamus relief is "to confine an inferior court to a lawful exercise of its prescribed jurisdiction." *Roche v. Evaporated Milk Ass'n*, 319 U.S. 21, 26 (1943); *see also In re Chicago, R.I. & P. Ry. Co.*, 255 U.S. 273, 275 (1921) (Brandeis, J.) (similar). So while "only exceptional circumstances amounting to a judicial usurpation of power or a clear abuse of discretion will justify the invocation of this extraordinary remedy," overstepping on jurisdiction

so qualifies. *Cheney v. U.S. Dist. Ct. for D.C.*, 542 U.S. 367, 380 (2004) (cleaned up). This is particularly true where, as here, the district court's exercise of jurisdiction "result[s] in the intrusion by the federal judiciary on a delicate area of federal-state relations." *Id.* at 381.

Accordingly, this Court need not consider the Ninth Circuit's unnecessary analysis of the other circuit-level factors it considers when deciding whether to grant mandamus relief. *See* App. 22-23;[13] *Chicago*, 255 U.S. at 275 ("If the lower court is clearly without jurisdiction, the writ will ordinarily be granted to one who at the outset objected to the jurisdiction, has preserved his rights by appropriate procedure and has no other remedy."). The district court's refusal to remand a motion that it plainly has no jurisdiction to decide is a textbook case for mandamus relief. *See* C. Wright & A. Miller, *Traditional Views of Discretion—Jurisdiction*, 16 Fed. Prac. & Proc. Juris. § 3933.1 (3d ed.) ("Removal from state court invokes the traditional use of mandamus to control an unauthorized assertion of jurisdiction when a refusal to remand is challenged.") (collecting cases).

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[13] The Ninth Circuit's analysis of these factors is dicta, as the court itself acknowledged that its holding on the prior exclusive jurisdiction issue was dispositive. *See* App. 22. And the court's conclusions with respect to each factor are wrong in any event. *See* App. 49-51 (Baker, J., dissenting).

III. The Ninth Circuit's holding is wrong.

The consequences of the Ninth Circuit's ruling are entirely unwarranted because the court fundamentally erred in its legal conclusion. Under the McCarran Amendment, the Klamath County Circuit Court *does* have prior exclusive jurisdiction over all state and federal "rights to the use of water" in the Klamath Basin, and the Ninth Circuit was wrong to affirm removal.

The doctrine of prior exclusive jurisdiction applies when two courts attempt to exercise *in rem* or *quasi in rem* jurisdiction over the same *res*. *Princess Lida*, 305 U.S. at 466; *Penn Gen. Cas. Co. v. Pennsylvania ex rel. Schnader*, 294 U.S. 189, 195 (1935). An action is "in rem" if it "affects the interests of all persons in designated property" and "*quasi in rem*" if it "affects the interests of particular persons in designated property." *Hanson v. Denckla*, 357 U.S. 235, 246 n.12 (1958); *see also Linn Cnty. v. Rozelle*, 162 P.2d 150, 156 (Or. 1945) (similar under Oregon law). Where one court has exercised either form of jurisdiction over a *res*, "a second court will not assume *in rem* [or *quasi in rem*] jurisdiction over the same *res*." *Marshall v. Marshall*, 547 U.S. 293, 311 (2006); *see also Colo. River*, 424 U.S. at 818; *Princess Lida*, 305 U.S. at 466; *Penn Gen.*, 294 U.S. at 195.

There is no serious dispute that the Klamath Adjudication constitutes an *in rem* proceeding, as any "proceedings adjudicating the rights of the waters" in the state, such as the Klamath Basin, "[are] *in rem*" under state law. *Masterson v. Pac. Live Stock Co.*, 24 P.2d 1046, 1048 (Or. 1933); *see also In re Waters of*

Willow Creek, 239 P. 123, 124 (1925) (similar). Accordingly, anyone "claim[ing] legal title to a water right" in the Klamath Basin based on either state or federal law was required to "file a claim in the adjudication or lose the right." *Klamath Irrigation Dist v. United States*, 227 P.3d 1145, 1166 (Or. 2010); *see also* ORS § 539.210.

The only question, then, is whether the motion the federal government removed is *in rem* or *quasi in rem*; if it was, the federal district court's consideration of that motion impermissibly encroaches on the state court's prior exclusive jurisdiction. *Princess Lida*, 305 U.S. at 466. This, too, is an easy issue. The Department awarded Petitioner the right to use water in UKL and limited Reclamation's rights to storage. KBA_ACFFOD_07084, 07155. Reclamation *does not* have a right to divert and use the stored water to satisfy its other obligations. KBA_ACFFOD_07060, 07084. Yet that is what Reclamation did. *See Klamath I*, 48 F.4th at 941. As Reclamation itself admitted, Petitioner's motion sought to hold Reclamation to the rights adjudicated to it in a specific *res*: the waters in the Klamath Basin. *See* App. 11-12; Notice of Removal, *Klamath Irrigation Dist. v. United States Bureau of Reclamation*, No. 1:21-cv-00504-AA, Dkt. No. 1 ¶¶ 4-5, 8, 2021 WL 1308313 (D. Or. Apr. 5, 2021).

Petitioner's motion thus "deal[t] with [the] specific property" at issue in the Klamath Adjudication and sought to "adjudicate a controversy between the particular parties to [that] proceeding," making the motion *quasi in rem*. *Rozelle*, 162 P.2d at 156; *see also*

Hanson, 357 U.S. at 246 n.12 (one type of *quasi in rem* action "seek[s] to secure a pre-existing claim in the subject property and to extinguish … similar interests of particular persons"). The federal district court thus had no power to exercise jurisdiction over the motion. *See Princess Lida*, 305 U.S. at 466; *Penn Gen.*, 294 U.S. at 195.

The Ninth Circuit did not reject any of this reasoning. Instead, the court cursorily concluded that "[t]he doctrine of prior exclusive jurisdiction does not apply" because the Klamath Adjudication "did not adjudicate Reclamation's ESA obligations or the Tribes' senior rights," meaning "the Klamath County Circuit Court did not have jurisdiction over the rights challenged by [Petitioner's] motion." App. 14. The Ninth Circuit is mistaken.

First, the Ninth Circuit was wrong that the Klamath Adjudication did not adjudicate the California Tribes' rights in UKL. To the contrary, the Department expressly held that anyone who did not assert claims to the waters of UKL in the adjudication forfeited any claims they might have. KBA_ACFFOD_00014. The California Tribes never asserted claims in the Klamath Adjudication, they did not appear in that proceeding, and the federal government did not assert claims or contests on their behalf. App. 10. Under the plain terms of the Department's order, therefore, any such claims to water in UKL are forfeited. In this way, the Klamath Adjudication *did* adjudicate the Tribes' rights to divert and use stored water from UKL in Oregon.

The Ninth Circuit's assertion that "the Klamath County Circuit Court did not have jurisdiction over the Tribes' rights," App. 14, is similarly unavailing. It has long been settled that a "state possesse[s] the power to provide for the adjudication of titles to [in-state property] not only as against residents, *but as against nonresidents*" as well. *Am. Land Co. v. Zeiss*, 219 U.S. 47, 61 (1911) (emphasis added). This would include claims the California-based Tribes could have asserted to the in-state water source here.[14] In addition, *Colorado River* expressly holds that the McCarran Amendment's immunity waiver extends to rights the federal government holds in trust for Native American tribes. *Colo. River*, 424 U.S. at 810-11. Nothing prevented the federal government from asserting those rights for the Tribes here.

Second, the Ninth Circuit was wrong to hold that the Klamath Adjudication did not "adjudicate Reclamation's ESA obligations" insofar as Reclamation is claiming these obligations allow it to divert and use stored water that has been adjudicated to others. App. 14. Because "in administering water rights the State is compelled to respect federal law regarding federal reserved rights," *State of Or.*, 44 F.3d at 770 (citing *Eagle Cnty.*, 401 U.S. at 525-26), the Amended Findings and Order necessarily addressed Reclamation's other federal law obligations,

[14] The possibility that the Klamath County Circuit Court may not be able to exercise *in personam* jurisdiction over the California Tribes "is irrelevant [because] the court has jurisdiction over the property." *Hood*, 541 U.S. at 453 (citing 4A C. Wright & A. Miller, Federal Practice and Procedure § 1070, pp. 280-281 (3d ed. 2002)).

implicitly at the very least. To comply with 43 U.S.C. § 421, the Department's conclusion that Reclamation has the right to store water in UKL and the rights to divert and use it belong to Petitioner and others only means that Reclamation must purchase, lease, or judicially condemn others' rights before Reclamation may use this water to fulfill its legal obligations.

Further, the fact that the Department did not *expressly* address Reclamation's ESA obligations is irrelevant. Fundamentally, Reclamation raises its federal obligations as a defense to Petitioner's claims. Reclamation argues that its ESA and tribal obligations grant it a right to use water that takes precedence over Petitioner's adjudicated rights, and, for that reason, Reclamation cannot be precluded from releasing water from UKL for instream purposes, regardless of what the Amended Findings and Order say. This is a merits defense, however, not a jurisdictional one. Prior exclusive jurisdiction turns on "the nature of the jurisdiction asserted by conflicting courts, and the identity of the subject matter of the suits," not the defenses a defendant might raise. C. Wright & A. Miller, *In Rem and Quasi-in-Rem Actions*, Federal Practice and Procedure § 3631 (3d. ed.) (Apr. 2023 Update). As explained, the Klamath Adjudication is indisputably an *in rem* proceeding, and Petitioner's motion seeking to enforce the rights and limitations adjudicated in that proceeding is *quasi in rem*. *Supra* at 33-35. Accordingly, the state court has prior exclusive jurisdiction, *id.*, irrespective of Reclamation's federal defenses. The Ninth Circuit's erred in concluding otherwise.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

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