No. _____

In the Supreme Court of the United States

LONNY E. BALEY, ET AL.,

Petitioners,

v.

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

Respondents.

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

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

Petitioners are a plaintiff class of Oregon and California farmers and ranchers who depend on their water rights in the Klamath River basin to irrigate their land. When the U.S. Bureau of Reclamation cut off their water supplies to protect endangered fish, petitioners sued the United States alleging a Fifth Amendment physical taking.

Congress and this Court have determined that federal entities must defer to state water law for a comprehensive approach to quantify and administer water rights. By contrast, the Federal Circuit held that the Bureau did not take petitioners' property interests in their water rights because state law did not apply. Instead, and in the absence of any state adjudicatory determination of water rights, the Federal Circuit concluded that there exist senior tribal water rights to quantities of water at least as great as the water the Bureau determined was required for fish under the Endangered Species Act.

Petitioners and the State of Oregon explained below that this decision upends a century of western water law and destroys the efficacy of Oregon's adjudication of state-based and federal reserved water rights, which Congress endorsed in the McCarran Amendment, 43 U.S.C. 666, and Reclamation Act, 43 U.S.C. 372, 383. The question presented is:

Whether, against the legal backdrop of Congress's and this Court's recognition of the primacy of state law to determine, quantify, and administer water rights, a federal court may deem federal agency regulatory action under the Endangered Species Act to constitute the adjudication and administration of water rights for tribal purposes.

PARTIES TO THE PROCEEDINGS BELOW

Plaintiffs below, petitioners here, are the class representatives of a certified opt-in class action, which consolidated two cases, as listed below:

Baley v. *United States*

Baley Trotman Farms
Baley, Lonny E.
Byrne Brothers
Byrne, Michael J.
Chin, Daniel G.
Chin, Deloris D.
Moore, Cheryl L.
Moore, James L.
Trotman, Mark R.
Wong Potatoes, Inc.

John Anderson Farms, Inc. v. *United States*

Buckingham Family Trust
Buckingham, Eileen
Buckingham, Keith
Buckingham, Shelly
Frank, John and Constance
Hill Land & Cattle Co., Inc.
Hunter, Jeff and Sandra
John Anderson Farms, Inc.
McVay Farms, Inc.
McVay, Barbara
McVay, Matthew K.
McVay, Michael
McVay, Ronald
McVay, Suzan
McVay, Tatiana V.

O'Keeffe, Henry and Patricia
Shasta View Produce, Inc.
Stastny, Edwin, Jr.

Defendant below, respondent here, is the United States.

Defendant-intervenor below, respondent here, is the Pacific Coast Federation of Fishermen's Associations.

RELATED PROCEEDINGS

Klamath Irrigation, et al v. *United States and Pacific Coast Federation of Fishermen's Associations*, United States Court of Federal Claims, No. 01-591L (August 31, 2005).

John Anderson Farms, Inc., et al. v. *United States*, United States Court of Federal Claims, No. 1:07-cv-00194-MBH (March 16, 2007).

Klamath Irrigation, et al. v. *United States and Pacific Coast Federation of Fishermen's Associations*, United States Court of Appeals for the Federal Circuit, No. 2007-5115 (July 6, 2008).

Klamath Irrigation, et al. v. *United States and Pacific Coast Federation of Fishermen's Associations*, Supreme Court of the State of Oregon, Federal CC No. 2007-515; SC S056275 (Referral, January 29, 2009).

Klamath Irrigation, et al, and John Anderson Farms, et al. v. *United States and Pacific Coast Federation of Fishermen's Associations*, United States Court of Federal Claims, Nos. 1-591L; 7-194C; 7-19401C; 7-19402C; 7-19403C; 7-19404C; 7-19405C; 7-19406C; 7-19407C; 7-19408C; 7-19409C; 7-19410C; 7-19411C; 7-19412C; 7-19413C; 7-19414C; 7-19415C; 7-19416C; 7-19417C; 7-19418C; 7-19419C; 7-19420C (December 21, 2016).

CORPORATE DISCLOSURE STATEMENT

Among the petitioners, there are five corporations: Hill Land & Cattle Co., Inc., John Anderson Farms, Inc., McVay Farms, Inc., Shasta View Produce, Inc., and Wong Potatoes, Inc. Each of these petitioners has confirmed to the undersigned that it has no parent companies and that no publicly held corporation owns 10 percent or more of its stock.

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B. Hurst, *Calamity in Klamath*, The American Enterprise, Oct. 2002, at 28, https://www.unz. com/print/AmEnterprise2002oct00028/ 12, 25

Oregon Water Resources Department, Water Rights, https://www.oregon.gov/OWRD/programs/WaterRights/ 13

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PETITION FOR WRIT OF CERTIORARI

Petitioners respectfully petition for a writ of certiorari to review the judgment of the United States Court of Appeals for the Federal Circuit.

OPINIONS BELOW

The Federal Circuit's decision (App.1-64) is reported at 943 F.3d 1312.

This case began in 2001. The initial opinions of the United States Court of Federal Claims (COFC) on summary judgment are reported at 67 Fed. Cl. 504 (App.413-509) and 75 Fed. Cl. 677 (C.A.J.A. Appx3788, Dkt. 295). An appeal followed. The Federal Circuit's order certifying three questions to the Oregon Supreme Court is reported at 532 F.3d 1376 (App.400-412). The Supreme Court of Oregon's decision accepting the case for certification is reported at 202 P.3d 159 (App.383-399), and its opinion resolving the certified questions is reported at 227 P.3d 1145 (App.315-382). The Federal Circuit's decision vacating the COFC's summary judgment rulings and remanding for further proceedings is reported at 635 F.3d 505 (App.269-314). The COFC's opinions following remand are reported at 113 Fed. Cl. 688 (C.A.J.A. Appx3783, Dkt. 331), 129 Fed. Cl. 722 (App.230-267), and, following a trial, at 134 Fed. Cl. 619 (App.72-229), and 116 Fed. Cl. 117 (C.A.J.A. Appx3782-3783, Dkt. 341). Decisions of the COFC dismissing various claims (C.A.J.A. Appx3780, Dkt. 370), and plaintiffs' voluntary dismissals (C.A.J.A. Appx3782, Dkt. 343) are unreported, as is the COFC's consolidation order (App.268), and ruling certifying an opt-in class (App.65-71).

JURISDICTION

The COFC's judgment following a bench trial was entered on September 29, 2017. App.72-229. Petitioners timely appealed. C.A.J.A. Appx64, Dkt. 160. The judgment of the Federal Circuit was entered on November 14, 2019. On January 29, 2020, Chief Justice Roberts extended the time to file a petition for certiorari to March 13, 2020. Jurisdiction rests on 28 U.S.C. 1254(1).

STATUTES AND REGULATIONS INVOLVED

Relevant statutory and regulatory provisions are set forth in the appendix. App.510-550.

STATEMENT

A. The Western System of Water Rights

In the arid west, water for irrigation is necessary for crop production. States own the water in their lakes and rivers and, beginning in the mid-nineteenth century, developed the appropriation doctrine under which rights to use water were created and protected. States also developed systems for the comprehensive adjudication and administration of water based on temporal priorities of rights.

A water right is a right to use water from the source from which it is diverted and applied to a beneficial use. *Colo. River Water Conservation Dist.* v. *United States*, 424 U.S. 800, 805 (1976) (*Colo. River*). A water right is a valuable property right. *Nevada* v. *United States*, 463 U.S. 110, 126 (1983) (*Nevada*).

1. *The Appropriation Doctrine*

In the western states, water rights are acquired by appropriation. See A. Dan Tarlock *et al.*, *Law of Water Rights and Resources* § 5.1 (2019) (Tarlock). Courts recognize rights based on when there has been a manifestation of intent to apply water to beneficial

use, a diversion from the natural channel, and use of water within a reasonable time. *Colo. River*, 424 U.S. at 805. The beneficial use of the water defines the scope of the right. *Ibid.* Water rights are appurtenant to the irrigated lands and pass with transfer of title to the land. *Nevada*, 463 U.S. at 126.

A key element of a state water right is its priority date, which is the date of appropriation. *Colo. River*, 424 U.S. at 805. That date is important because, in times of shortage, the holder of a senior right can require curtailment of junior right holders. *Montana* v. *Wyoming*, 563 U.S. 368, 375-376 (2011).

2. *State Adjudication and Administration*

Until the early twentieth century, the relative rights of claimants to water from a river system were determined piecemeal in lawsuits in equity. *Colo. River*, 424 U.S. at 804. As demands for water grew, so did conflicts over water rights. Equity litigation joining hundreds of claimants to a river system became unwieldy, while less comprehensive adjudications were of little value. As this Court observed in *Pac. Live Stock Co.* v. *Lewis*, 241 U.S. 440, 449 (1916), "the rights of the several claimants are so closely related that the presence of all is essential to the accomplishment of its purposes." To address this dilemma, western states developed statutory adjudication systems for the mass determination of the rights of all claimants in a river system. See Tarlock § 7.2.

Once water rights are determined, the allocation and use of water based on priority is possible.[1]

[1] Beginning in the early twentieth century, western states developed administrative requirements under which those seeking to appropriate a water right under state law must apply

Western states generally provide for administrative "watermasters" or "commissioners" to administer water rights. Tarlock § 5.34. Watermasters regulate the distribution of water among users, respond to user requests for water (water right "calls"), and divide water among diversions and from storage facilities "according to the users' relative entitlements to water." Or. Rev. Stat. § 540.045(1)(c) (App.548); see Tarlock § 5.34.

Once a call is placed, state officials verify and administer the call and curtail junior water rights as necessary in the stream system. Administration occurs in reverse order of priority, curtailing the most junior water right first and continuing to curtail juniors in order of priority until the senior right receives its water. See *Second Interim Report of the Special Master (Liability Issues)* at 19 (*Second Interim Report*),[2] *Montana* v. *Wyoming*, 138 S. Ct. 758 (2018) (No. 137, Orig.) (*Montana*). Watermasters thus ensure that water is used in priority, in lawful amounts, and for lawful purposes.[3]

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for a permit. Tarlock §§ 5.46-5.47. A permit may issue if there is unappropriated water available. When water is put to beneficial use, the right vests and the owner receives a certificate evidencing the right. However, water rights initiated before enactment of comprehensive water codes remained valid, as "undetermined vested rights" that are subject to determination in comprehensive State adjudications. See Tarlock § 7.2.

[2] http://web.stanford.edu/dept/law/mvn/pdf/No_137_Original_Report_Dec_2014.pdf.

[3] Water users in states that lack water administrators obtain compliance with adjudicated priorities, amounts, and purposes through injunctive relief. *E.g.*, Okla. Stat. tit. 82, § 105.5 (2018).

3. *The Incorporation of Federal Interests into State Adjudication Systems*

The incorporation of federal interests into state-based prior appropriation systems was a challenge, but state systems can accommodate those interests and federal law has deferred to state water law. "The history of the relationship between the Federal Government and the States in the reclamation of the arid lands of the Western States is both long and involved, but through it runs the consistent thread of purposeful and continued deference to state water law by Congress." *California* v. *United States*, 438 U.S. 645, 653 (1978) (*California*).

a. *Federal Reclamation Projects Are Subject to State Water Law*

The Reclamation Act of 1902, 43 U.S.C. 372, 383 (App.510-511) (Reclamation Act), provided for federal financing and construction of dams and canal systems for large-scale irrigation projects. The Bureau of Reclamation (Bureau) was to contract with water users and irrigation districts for the payment of construction and operation costs with the goal of eventually turning over title to the contractors. *California*, 438 U.S. at 677.

The Reclamation Act embodies the principle of "cooperative federalism." *California*, 438 U.S. at 650. It requires the Secretary of the Interior to comply with state law regarding the control, appropriation, use, and distribution of water. 43 U.S.C. 383 (App.511). And it provides, consistent with state law, that rights to use water acquired under the Act are appurtenant to the irrigated land, and that beneficial use is the basis and measure of water rights. 43 U.S.C. 372.

b. *The McCarran Amendment Made Federal Agencies and Reserved Rights Subject to State Adjudication and Administration*

"Federal reserved water rights" arise under federal law. McCarran Amendment, 43 U.S.C. 666 (App.512-513). As this Court has explained, "when the Federal Government withdraws its land from the public domain and reserves it for a federal purpose," including for "Indian reservations," "by implication, it reserves appurtenant water then unappropriated to the extent needed to accomplish the purpose of the reservation." *Cappaert* v. *United States*, 426 U.S. 128, 138 (1976) (*Cappaert*).

These federal reserved water rights are not determined based on state law principles, but are instead based on the minimum amount of water needed for the primary purpose of the federal reservation. *Cappaert*, 426 U.S. at 145; *United States* v. *New Mexico*, 438 U.S. 696, 700 (1978) (*New Mexico*). Like state law-based rights, federal reserved rights have a priority date: for such rights, the priority date is the date of the reservation of the land from the public domain. *Cappaert*, 426 U.S. at 138.

Thus, water rights for federal reclamation projects and reservations were consistent with state priority-based systems in that they were based upon priority date, amount of water, and lawful purpose of use. Before 1952, however, there was no legal process to integrate priorities for federal projects and federal reserved rights with priorities for state-based water rights. The United States claimed sovereign immunity from participation in states' comprehensive adjudications, which significantly diminished their

value. See *United States* v. *Dist. Court of Cty. of Eagle*, 401 U.S. 520, 522 (1971).

The 1952 McCarran Amendment solved that problem by waiving sovereign immunity of the United States, allowing it to be joined in comprehensive state court proceedings for the adjudication of water rights. See 43 U.S.C. 666(a) (App.512) (consenting to the United States being joined as a defendant "in any suit" for the "adjudication" or "administration" of "rights to the use of water of a river system or other source * * * where it appears that the United States is the owner of or is in the process of acquiring water rights by appropriation under State law" and "is a necessary party to such suit"). The McCarran Amendment deemed the United States "to have waived any right to plead that the State laws are inapplicable" in such a suit, and made it "subject to the judgments, orders, and decrees of the court having jurisdiction." *Ibid.* And, it provides "consent to determine federal reserved rights held on behalf of Indians in state court." *Colo. River* 424 U.S. at 809.

While the McCarran Amendment does not preclude water rights litigation in federal court, the *Colorado River* abstention doctrine directs federal courts to abstain from adjudicating water rights in favor of state proceedings when possible. *Colo. River* 424 U.S. at 819-820. *Colorado River* abstention rests on a clear federal policy to avoid "piecemeal" adjudications in both state and federal courts. *Ibid.*

B. The Klamath Basin and Klamath Project

The Klamath Basin occupies 10 million acres in south-central Oregon and northern California. In the uppermost watershed, rain- and snowmelt-fed streams flow into Upper Klamath Lake at the city of Klamath Falls, Oregon. App.64. Upper Klamath Lake

stores water during higher runoff periods, impounded by Link River Dam at its outlet. App.16. During periods when natural runoff has diminished, water held behind Link River Dam can be released to flow downstream in order then to be diverted for irrigation or otherwise used. *Ibid*.

The Klamath River begins downstream of Link River Dam and flows 240 miles to the Pacific Ocean, being joined by over 100 tributaries along the way. Salmon in the Klamath River cannot move upstream beyond Iron Gate Dam, 60 miles downstream of Link River Dam. App.16, 64.

The Klamath Project is a federal reclamation project authorized in 1905 under the Reclamation Act. App.14-15. The Project diverts water from Upper Klamath Lake and from Klamath River just downstream of Link River Dam. The diverted water includes both live flow (i.e., water at the rate flowing at a specific time) and stored water that has been collected in Upper Klamath Lake, behind Link River Dam, for subsequent use. The Project irrigates about 200,000 acres of land. App.6.

The Bureau has entered into contracts with local irrigation districts providing for the districts' payment of federal construction and operation costs and their delivery of water to their customers, like petitioners. The districts have responsibility for operation and maintenance of Project infrastructure. App.16 n.9, 78-79.

C. Klamath Basin Tribes

The United States holds fishing rights in trust for three federally-recognized tribes in the Klamath Basin. App.18.

The Yurok and Hoopa Valley Tribes' reservations are in California, 200 miles downriver of the Klamath

Project. Their reservations were established by executive orders in the nineteenth century and the reserved land portioned into distinct reservations in 1988. The Yurok reservation straddles the lowermost 44 miles of the Klamath River. The Hoopa Valley reservation is bisected by the Trinity River, a tributary of the Klamath River, and touches the Klamath River. App.21. These California tribes have federally-protected rights to fish on their reservations. See *Parravano* v. *Masten*, 70 F.3d 539 (9th Cir. 1995). In 1997, a Regional Solicitor of the Department of the Interior opined that they have water rights to support their on-reservation fishery, with a priority of "not later than 1891." App.21, 99. Neither the United States nor either Tribe has ever sought an adjudicatory determination of the existence, location, quantity, or priority date of any such rights. App.99.

The former Klamath Indian Reservation lays upstream of Upper Klamath Lake and the Klamath Project in Oregon. App.64. In 1864, the Klamath Tribes and the United States entered into a treaty that reserved to the Tribes the right to hunt and fish on the reservation. App.18-19. The reservation was terminated in 1954, but the Tribes' rights to hunt and fish continue. App.20.

The determination of water rights associated with hunting and fishing on the former reservation has been the subject of extensive litigation. In *United States* v. *Adair*, 723 F.2d 1394 (9th Cir. 1983), the United States and Klamath Tribes sued landowners within the former reservation lands (none of the plaintiffs in this case) seeking a determination of water rights within the former reservation boundary. *Id*. at 1397. The Ninth Circuit held that it was proper for the federal court to adjudicate the existence and priority of tribal rights, and held that water rights

with a priority of "time immemorial" existed sufficient to support hunting and fishing on the prior reservation. *Id.* at 1414. But it specifically left the quantification of those rights to Oregon's ongoing adjudication proceeding. *Id.* at 1407.

The United States and Klamath Tribes subsequently alleged that Oregon's adjudication procedures do not meet the conditions necessary for waiver of sovereign immunity under the McCarran Amendment, but the Ninth Circuit rejected that argument and required federal parties to participate. *United States* v. *Or., Water Res. Dep't*, 44 F.3d 758 (9th Cir. 1994) (*Or., Water Res. Dep't*). As a result, the federal parties were required to participate in order to preserve any claim. When Oregon later produced "preliminary evaluations" of tribal water rights claims that had been filed in the state adjudication, the United States and Klamath Tribes obtained a ruling from the District of Oregon that the state's evaluation did not use proper quantification standards. *United States* v. *Adair*, 187 F. Supp. 2d 1273, 1279 (D. Or. 2002). On appeal, the Ninth Circuit vacated that decision and ordered the lower court not to intervene in the state proceeding prior to its conclusion. *United States* v. *Braren,* 338 F.3d 971, 975 (9th Cir. 2003) (*Braren*).

D. Oregon's Adjudication of the Klamath River

In 1975, Oregon commenced a general stream adjudication to determine the relative rights of use of the Klamath River and its tributaries in accordance with state law. App.17. Following delays caused by federal court litigation and other factors, parties who assert water rights were required to file water rights claims, and contested claims were subject to trial-type

proceedings before the Oregon Water Resources Department "Adjudicator." App.523-525. After a decade of administrative litigation, the Adjudicator issued findings of fact and an order of determination, which were submitted to the Klamath County Circuit Court. App.17-18, see Amended and Corrected Findings of Fact and Order of Determination, *In the Matter of the Determination of the Relative Rights to the Use of the Water of Klamath River and Its Tributaries*, Oregon Water Resources Department, Klamath River Basin General Stream Adjudication (No. KBA-ACFFOD-00001) (Feb. 28, 2014) (ACFFOD).[4] The Klamath County, Oregon Circuit Court is currently managing court hearings to affirm or modify the ACFFOD consistent with state law. App.17.

E. The Bureau's Re-allocation of Water Under the Endangered Species Act

Section 7(a)(2) of the Endangered Species Act of 1973 (ESA) requires that federal agencies ensure that their actions not jeopardize threatened or endangered species or cause the destruction or adverse modification of designated critical habitat. 16 U.S.C. 1536(a)(2). To satisfy that obligation, federal action agencies must consult with, and obtain the biological opinion of, federal wildlife agencies as to whether an action is likely to cause jeopardy. 16 U.S.C. 1536(b). Upper Klamath Lake, the Klamath Project's major water storage reservoir, provides habitat for the Lost River sucker and shortnose sucker, two species listed as "endangered" since 1998. App.24. And a threatened

[4] The following url is the webpage on which all subsequent references to ACFFOD documents can be located: https://www.oregon.gov/OWRD/programs/WaterRights/Adjudications/KlamathRiverBasinAdj/Pages/ACFFOD.aspx.

species of coho salmon makes use of the Klamath River below Iron Gate Dam. App.23.

In 2001, the Bureau proposed that Project facilities be operated for storage, diversion, and delivery of water, consistent with practices over the preceding 95 years. The U.S. Fish and Wildlife Service opined that doing so would lower Upper Klamath Lake elevations to a degree that would jeopardize the sucker species. It identified "reasonable and prudent alternatives" (RPAs) that it believed would avoid jeopardy (App.24-25), including the maintenance of specific lake surface elevations in Upper Klamath Lake. Similarly, the National Marine Fisheries Service opined that the intended action would jeopardize listed coho salmon and identified RPAs including the maintenance of specified river flows immediately below Iron Gate Dam, to be achieved by releases from Link River Dam. App.25. The Bureau adopted these RPAs. *Ibid*. Water required to be held in the reservoir to maintain water levels for suckers is not available for irrigation, nor is water released to the Klamath River to maintain river flows.

Given the hydrologic conditions of that year, on April 6, 2001, the Bureau announced in its April 6, 2001 News Release, "[b]ased on those [biological] opinions and the requirement of the [ESA], * * * no water will be available from Upper Klamath Lake to supply the farmers of the Klamath Project," and the Bureau delivered zero water to the Project for months. C.A.J.A. Appx3026. The economic, social, and psychological consequences for those who rely on water from the lake and river were severe. See B. Hurst, *Calamity in Klamath*, The American Enterprise, Oct. 2002, at 28, https://www.unz.com/print/AmEnterprise-2002oct-00028/ (Hurst, *Calamity in Klamath*).

F. Rulings in the Klamath Basin Adjudication

At the time of the 2001 events giving rise to this case, the Klamath Basin Adjudication was in its administrative litigation phase. App.17-18. In 2014, before the trial below, the State issued the ACFFOD determining the merits of water rights claims. Those determinations are binding and enforceable, unless and until modified by the Klamath County Circuit Court in its final judgment reviewing the ACFFOD. App.528-533. Or. Rev. Stat. §§ 539.130(4), 539.170.

The ACFFOD confirmed rights with priority for all Klamath Project lands, including lands owned by petitioners, with priority dates as early as 1883 and as late as 1905.[5] These irrigation use rights extend to both live flow and water stored in Upper Klamath Lake.[6]

All of the claims filed by the Klamath Tribes were denied in the ACFFOD, with rights for tribal purposes being recognized only in the name of the United States.[7] The Adjudicator approved the United States' claim for water levels in Upper Klamath Lake but, until the judicial phase of the Klamath Basin Adjudication is complete, that right may not be used as a basis for a senior priority call against any water rights, including petitioners' rights that have priority

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[5] https://www.oregon.gov/OWRD/programs/WaterRights/Adjudications/KlamathAdj/KBA_ACFFOD_07017.PDF, 07140, 07155.

[6] https://www.oregon.gov/OWRD/programs/WaterRights/Adjudications/KlamathAdj/KBA_ACFFOD_07017.PDF, 07083-07084, 07153.

[7] https://www.oregon.gov/OWRD/programs/WaterRights/Adjudications/KlamathAdj/KBA_ACFFOD_04908.PDF, 04909.

earlier than August 1908, and the claim itself can be contested in the state court proceeding.[8]

The Adjudicator denied tribal claims for instream flow for tribal fisheries in the Klamath River and tributaries outside the former Klamath Reservation,[9] but approved tribal claims for flows in tributaries to Upper Klamath Lake that are on the former reservation, with a priority of time immemorial.[10] As a result, the Klamath County Watermaster has enforced senior Klamath Tribes' water right calls, curtailing uses upstream of Upper Klamath Lake and the Klamath Project. Klamath Project rights have not been called or curtailed by a call from Klamath Tribes or the United States.

As Oregon's amicus brief notes below, neither the Yurok nor Hoopa Valley Tribes, nor the United States as their trustee, filed claims in the adjudication. C.A. Oregon Amicus Br. 3, 22-23 (Dkt. 93). Accordingly, and in contrast to the Federal Circuit decision, Oregon does not recognize any rights in Upper Klamath Lake for the benefit of the California tribes; such claims were waived. App.26, see C.A. Oregon Amicus Br. 3, 22-23.

G. The Relevant Decisions in this Case

This case has a lengthy and complex procedural history, which is described at App.6-13.

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[8] https://www.oregon.gov/OWRD/programs/WaterRights/Adjudications/KlamathAdj/KBA_ACFFOD_04938.PDF, 04943-04944.

[9] https://www.oregon.gov/OWRD/programs/WaterRights/Adjudications/KlamathAdj/KBA_ACFFOD_05375.PDF, 05379.

[10] https://www.oregon.gov/OWRD/programs/WaterRights/Adjudications/KlamathAdj/KBA_ACFFOD_05245.PDF, 05258.

Two cases were filed in the Court of Federal Claims in 2001 seeking just compensation for the Bureau's taking of petitioners' water for federal purposes. For the first 16 years of their pendency, nearly all proceedings occurred in *Klamath Irrigation District* v. *United States* (*KID*), a suit brought by irrigation districts and individual farmers. App.6-8. In 2016, *KID* was consolidated with *John Anderson Farms* v. *United States*, a suit by individual water users. App.9. In 2017, the claims of water delivery agencies in the *KID* matter were voluntarily dismissed, and the court certified a class of landowners and users of water in the Klamath Project whose water had been re-allocated. App.9-10.

Previously, in 2005, the Court of Federal Claims had dismissed the *KID* action, holding that plaintiffs had no property interest in the water rights under Oregon law. On appeal, the Federal Circuit referred three questions of Oregon law to the Oregon Supreme Court. App.400-412. After the Oregon Supreme Court explained that petitioners hold property interests in water rights appropriated by the United States (App.343-352), the Federal Circuit reversed and remanded. App.269-314.

On remand, the COFC conducted a bench trial and in September 2017, it denied relief. App.72-229. It agreed that plaintiffs in the largest districts own compensable property interests in the water rights that were permanently taken. App.150-161, 170-195. It found that, based on a 2003 order, plaintiffs served by one water delivery agency were precluded from pursuing their claims. App.145-149. It also found that some plaintiffs served by districts having certain contracts, or those in possession of certain public land, have no property interest in the water rights. Those

issues were subjects of appeal to the Federal Circuit. App.161-170.

The trial court also concluded that regardless of plaintiffs' specific compensable interests, *all* of the plaintiffs' claims should be denied, because there exist senior tribal water rights to amounts of water in Upper Klamath Lake and the Klamath River at least equal to the volumes that were required under the ESA in 2001. It found that, because of the existence of the senior tribal water rights, plaintiffs were not entitled to any water in 2001, and therefore there could be no taking. App.195-229.

The Federal Circuit affirmed, addressing only the tribal water rights issue that the trial court found barred all plaintiffs' claims. App.1-64. The Federal Circuit found that there are senior tribal water rights in Upper Klamath Lake, the Klamath River, and to Klamath Project water (App.52, 54, 56, 58), that those rights need not be adjudicated to be enforced (App.58-62), and thus there was no taking of petitioners' property. It upheld the trial court's ruling that justified denying the takings claims because it found tribal water rights existed. App.63.

REASONS FOR GRANTING THE PETITION

This Court should grant certiorari to restore important principles of western water law that have been discarded by the Federal Circuit's erroneous decision. The Federal Circuit deemed the Bureau's regulatory action under the ESA to constitute adjudication and administration of water rights for tribal purposes, and thereby sidelined Oregon's adjudication and administration of water rights in the Klamath Basin. Additionally, the Federal Circuit's ruling upends the McCarran Amendment, the most basic principles of western water law, and conflicts

with this Court's decisions. The adverse practical consequences of undermining the previously settled relationship between federal reserved rights and state administration of water rights in the West, where so many users of the land depend on those rights for their families' livelihoods, cannot be overstated and warrant this Court's immediate attention.

I. The Federal Circuit's Decision Conflicts with Rulings of this Court in *Colorado River* and *Nevada*, with the McCarran Amendment, and with Applicable Oregon Law Requiring Participation in Its Adjudication

In *Colorado River*, this Court squarely held that the McCarran Amendment waives sovereign immunity for state court jurisdiction to adjudicate federal reserved water rights held in trust for tribes, and created a federal abstention doctrine. 424 U.S. at 809. The Federal Circuit here reached the opposite conclusion.

As to the Yurok Tribe and Hoopa Valley Tribes (collectively, "Tribes"), the Federal Circuit found that their failure and their trustee's failure to submit any claims in Oregon's Klamath Basin Adjudication did not affect the existence or nature of their federal reserved rights. See App.61 (Tribes' "lack of participation" in "Oregon's Klamath Adjudication" did not preclude their claims to Klamath River flow in California because their "federal reserved water rights [are] not governed by state law"). That holding is flatly inconsistent with applicable Oregon law, made applicable by the McCarran Amendment and this Court's decisions.

Oregon's adjudication law is clear in requiring participation in its proceedings by all who wish to assert water rights. It states that, "[w]henever" state

proceedings are instituted to determine "the use of any water," "it shall be the duty of all claimants interested therein to appear and submit proof of their respective claims, at the time and in the manner required by law." App.534-535. And "[a]ny claimant" who fails to do so "shall be barred and estopped from subsequently asserting any rights" in the water being adjudicated, "and shall be held to have forfeited all rights to the use of the water theretofore claimed by the claimant." *Ibid*.

In finding that tribal claims are not subject to state adjudication, the Federal Circuit relied upon *Cappaert*, 426 U.S. at 145, for the proposition that "[f]ederal water rights are not dependent upon state law or state procedures and they need not be adjudicated only in state courts." But, in doing so, it failed to distinguish between the *existence* of a federal reserved right and the *adjudication and administration* of such rights. As Oregon observed in its amicus brief below, "*Cappaert* says nothing" about cases like this, "where a comprehensive stream adjudication, in which federal courts have held that the United States must participate, is actually taking place." C.A. Oregon Amicus Br. 25.

Where a state adjudication "is actually taking place," failure to file a claim in an adjudication—including a claim based on federal reserved rights—is fatal to the ability to assert the water right, as the Oregon statute provides and this Court's decision in *Nevada* confirms. 463 U.S. 110 (1983). In *Nevada*, the United States sought to re-open an adjudication decree in order to assert tribal water rights for fisheries that it had not claimed in the original proceeding. The Court held that those claims were barred by res judicata because the United States had the opportunity to present the tribe's fishery claims in

the earlier proceeding. *Id.* at 113. That ruling recognized the finality of adjudications, and that failure to make one's claim in an adjudication precludes future attempts. The Federal Circuit's contrary decision that the Tribes' reserved rights need not be asserted in the Oregon adjudication conflicts with, and seriously destabilizes, this important principle.

The Federal Circuit also held that because the Yurok and Hoopa Valley reservations are in California, the Oregon state court could not adjudicate their rights. App.61 ("states * * * cannot adjudicate water rights in another state"). But that ruling misses the mark. To recognize rights of the Tribes to flow in the Klamath River is to recognize of a right to water *in Oregon* that supplies that flow. And allowing the Tribes to preclude the diversion of water *in Oregon* is to grant the Tribes a right to that water that is superior to upstream rights holders *in Oregon*. Those are issues for Oregon's adjudication. See, *e.g.*, *California,* 438 U.S. at 678 ("the right to the use [of water] is to be acquired from the State in which it is found, which State is vested with the primary control thereof").

The legally disruptive effect of this ruling is especially clear with regard to the Klamath Project's water storage reservoir, the Upper Klamath Lake. That lake lies entirely in Oregon. The water that it stores for the Project is legally distinct from the water in the Klamath River. Any assertion of a right to impound water in Upper Klamath Lake in Oregon, or to have stored water released by a dam in Oregon, is a matter wholly distinct from the location of the entity

asserting the right.[11] For example, in the Klamath Basin Adjudication, rights have been claimed and recognized to divert water in Oregon for use in California and to store water in Oregon for use in California[12]—these are water rights under Oregon law and adjudication of those rights are the province of the state of Oregon.

Petitioners concede for purposes of this case that the ESA dictates that the Bureau release petitioners' previously stored water from Upper Klamath Lake to augment flow in the Klamath River in California. But that obligation does not resolve the separate question, decided by the courts below, of who had property rights to that water. In holding that the California tribes had superior rights to petitioners in at least the amount of water that the ESA required to be retained in Upper Klamath Lake and provided below Link River Dam, the Federal Circuit overrode the mandate of Oregon law—and federal law affirming state law primacy—that water rights must be claimed in Oregon's adjudication. Neither the Tribes nor the United States as their trustee ever claimed rights in that adjudication, and that conclusively means that no such rights exist.

This Court should review the Federal Circuit's decision because it conflicts with the primacy and finality of state adjudication and administration of water rights, explained in *Colo. River* and *Nevada* and

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[11] Water rights to store water in one state and to use the stored water in another state are commonplace, and can be asserted to compel a dam operator to release stored water for downstream use. See, *e.g.*, *Nebraska* v. *Wyoming*, 325 U.S. 589, 596 (1945).

[12] https://www.oregon.gov/OWRD/programs/WaterRights/Adjudications/KlamathAdj/KBA_ACFFOD_07017.PDF, 07161, 07280.

codified in Oregon law that applies as a result of the McCarran Amendment.

II. The Federal Circuit's Decision Upends Longstanding Principles of Western Water Rights Administration

As explained in part I, it is a basic principle of western water law that while federal law may determine if a federal reserved water right exists, state law determines the contours and administration of federal reserved rights. As this Court has stated, "the second sentence of the McCarran Amendment submits the United States generally to state adjective law, as well as to state substantive law of water rights." *United States* v. *Idaho*, 508 U.S. 1, 8 (1993); see also *Or., Water Res. Dep't*, 44 F.3d at 767 (refusing to make McCarran Amendment's waiver of sovereign immunity "inapplicable to the comprehensive adjudication schemes of so many Western States"). The Federal Circuit's decision that federal reserved rights for tribal purposes operate entirely outside of and override state adjudications, however, destroys the utility of those adjudications.

A. Review Is Necessary to Restore the Principle that Federal Reserved Rights Are Not Self-Executing

The seniority of a water right is not an abstract concept that passively curtails junior water use. Western supreme courts have clearly articulated that "[a]bsent an adjudication under [state law], water rights are generally incapable of being enforced." *Shirola* v. *Turkey Canon Ranch Ltd. Liab. Co.*, 937 P.2d 739, 749 (Colo. 1997); *e.g.*, *Empire Lodge Homeowners' Ass'n* v. *Moyer,* 39 P.3d 1139 (Colo. 2001); *Worley* v. *United States Borax & Chem. Corp.*, 428 P.2d 651, 654 (NM 1967) (junior users "cannot be

liable for plaintiff's shortage of water unless plaintiff demanded that water[.] * * *. The absence of such a demand was decisive"). To enforce its right, a holder that is not receiving all the water to which it is entitled makes a "call." See Statement A.2, *supra*. If the senior water right holder validly calls the system, then and only then does water right administration and a potential for shutoff of junior holders occur. A junior right holder is free to divert and use water unless a valid call has been made by a senior right holder. See *United States* v. *Gila Valley Irrigation Dist.*, 804 F.Supp. 1, 13 (D. Ariz. 1992); Tarlock § 5.34.

The critical role of calls under the western prior appropriation doctrine was recently explained by this Court's Special Master Barton Thompson in *Montana. Second Interim Report* at 19, *Montana*, 138 S. Ct. 758. That case involved claims by Montana against Wyoming for, among other things, damages resulting from Wyoming's alleged diversion of water in violation of the Yellowstone River Compact. See *Montana* v. *Wyoming*, 563 U.S. at 372-373 (providing overview of the case midway through its long history). The evidence showed that Wyoming diverted water in possible violation of the Compact for several years, but the Special Master held that Wyoming could only be liable for its diversions during years when Montana placed a call. *Second Interim Report* at 49-51, 138 S. Ct. at 759. The Special Master explained that because "'[c]alls'" ensure that water is not wasted," they are "central to the prior appropriation doctrine." *Ibid.* And, "[a]bsent a call, a senior appropriator cannot maintain an action for damages against a junior appropriator for failing to reduce his or her diversion." *Ibid.* The Special Master elaborated on why calls are so central to the western water rights regime:

> Upstream junior appropriators often have no way to know when they need to reduce diversions to protect the rights of downstream seniors, unless the seniors tell them. The impact of junior diversions on downstream senior rights can depend on overall stream flow. At any particular point in time, moreover, downstream seniors may not need all the water to which they have a right. Because of these uncertainties, western states generally require senior appropriators who are short of water to give notice of that fact by calling the river. Before the river is called, juniors may continue to divert their full water rights without concern for liability; once the river is called, however, juniors must reduce their diversions.

Second Interim Report at 50, *Montana* at 759. This call requirement thus "serves the important function of avoiding the possibility that water will be wasted," ensuring that "senior appropriators are not entitled to water that they do not need." *Ibid*. This Court adopted the Special Master's analysis of the call requirement. *Ibid.*

Until the Federal Circuit's decision here, it was well-understood that water rights, which include senior federal reserved rights, are not self-executing but are encompassed within this adjudication system and must be asserted by making calls. *Montana*, 138 S. Ct. 758; see also Rachael Osborn, *Native American Winters Doctrine and Stevens Treaty Water Rights: Recognition, Quantification, Management*, 2 Am. Indian L. J. 76, 85 (2013).

This Court should review the Federal Circuit's decision to address whether, instead, there is an

exemption from the basic operation of western water law, and the system of calls in particular, for federal reserved water rights.

B. Water Rights Are to Be Determined in Adjudicatory Proceedings that Afford Due Process, Not by Informal Federal Agency Staff Decision-making

Although the Bureau has an obligation to comply with the ESA, nothing in that or any other statute authorizes the Bureau to determine the existence, location, or quantity of asserted tribal water rights, or to curtail a specific junior right to satisfy a senior right. To the contrary, section 8 of the Reclamation Act precludes the Bureau from determining water rights. See *California*, 438 U.S. at 675 (it is "abundantly clear that Congress intended to defer to the substance, as well as the form, of state water law"). The Bureau's obligation to comply with the ESA does not constitute the establishment of and compliance with an alternative, Bureau-determined system of water law: it simply constitutes compliance with the ESA.

Under the McCarran Amendment and decisions of this Court, water rights (which the parties here agree are property rights, App.40) are determined in state adjudicatory proceedings that afford due process. See 43 U.S.C. 666 (waiving sovereign immunity for "suits" for the adjudication of water rights); *Colo. River*, 424 U.S. at 802-803; *Or., Water Res. Dep't*, 44 F.3d at 764-767.

Here, the Bureau's re-allocation of petitioners' water was based on its wholesale adoption of RPAs in biological opinions that were issued the same day as the Bureau's decision. There was no public process, let alone any adjudicatory process, required for the

development of the biological opinion. See 16 U.S.C. 1536(a), (c). This Court has recognized the risk, in that opaque process, of "economic dislocation produced by agency officials zealously but unintelligently pursuing their environmental objectives." *Bennett* v. *Spear*, 520 U.S. 154, 176-177 (1997); see Hurst, *Calamity in Klamath*, at 32 (National Research Council subsequently found there to be a lack of scientific justification for the flow and lake elevation requirements imposed by federal agencies in 2001). Of course, there was no determination, triggered by a call, of how water flows required by the RPAs would be satisfied relative to other water rights holders, including petitioners. The agency determination, endorsed by the Federal Circuit, denied petitioners all the due process that adjudications provide to protect property interests.

C. Prior Appropriation Does Not Apply Piecemeal or Selectively

The Federal Circuit applied the prior appropriation concept to recognize the priority of the Tribes' water rights, but otherwise failed to apply the law of prior appropriation. Its highly selective adoption of prior appropriation principles is inconsistent with western water law.

Prior appropriation is often characterized as "first in time is prior in right." *Arizona* v. *California*, 298 U.S. 558, 565-566 (1936). The enforcement of the senior's water right proceeds by first curtailing the most junior on the system, then the next most junior, and so on, until the senior's entitlement is met. See pp. 3-4, *supra*. Thus, a given junior may or may not need to be curtailed in order to satisfy a given senior, and the relative rights of all parties are maintained and respected.

Here, however, parties who have water rights that are junior to the Klamath Project irrigated freely in 2001. The Federal Circuit did not address these priorities, expressing uncertainty about the number and nature of parties junior to Project rights. App.59, n.30. But the court's failure to fit tribal water rights into the western water law system of priorities undermines otherwise settled law and abandons the prior appropriation doctrine on which western water rights have long been based. It introduces and endorses a concept of selective application of water rights priorities that is entirely foreign to the law of the western states.

D. Any Tribal Instream Rights Do Not Extend to a Right to Water Lawfully Stored in Upper Klamath Lake

The Federal Circuit's decision recognizes tribal rights to water that is stored in Upper Klamath Lake, a source of water legally distinct from the Klamath River. App.6. Water storage reservoirs like the Lake impound water at times of relatively high run-off, when water is in surplus. That results in a new source of water, physically and legally distinct from the natural flow of a stream. See Tarlock § 5.39.

The Upper Klamath Lake stored water source is functionally and legally the same as if there were water storage tanks on each farm in the Project area. During the high run-off period of spring, water could be stored in the tanks so that later in the summer, when natural flow of the river is scarce, the stored water could be released for irrigation. In this case, the storage tank is Upper Klamath Lake itself: the dam at the Lake's outlet (Link River Dam) impounds water during periods of high inflow to the Lake, raising the

water level behind the dam, and establishing a new source (the stored water) for later use.

Even if the California tribes have rights to flows of water in the Klamath River, they have no right to have the Lake-stored water released to the river such that river flows are higher than they would be if water merely flowed into and through Upper Klamath Lake without any dam operation. *E.g.*, *Montana*, 138 S. Ct. at 760 (decreed water legally stored when a call is not in effect can be subsequently used at any time, including when downstream seniors unsatisfied).

The Federal Circuit's decision otherwise contradicts settled law. Notably, water rights to store water include a purpose of use that must be honored in any water right administration. Thus, the State of Oregon is empowered to distribute the stored water in Upper Klamath Lake among those that hold water rights to use impounded water—rights holders that include petitioners, but not the Tribes or their trustee.

Even if there were a legal theory to support tribal claims to the artificially-created stored water sources in the lake, the assertion of those claims is precluded because they were not timely filed in the Klamath Basin Adjudication. See p. 14, *supra*. In that adjudication, the United States and irrigators filed water rights claims to store and use water in the Lake. The exclusive purpose for those water rights, both as claimed and as determined by the State of Oregon, is irrigation.[13] The authorized place of use of the stored

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[13] https://www.oregon.gov/OWRD/programs/WaterRights/Adjudications/KlamathAdj/KBA_ACFFOD_07017.PDF, 07117 (recognizing, and limiting, the Bureau's right to storage of water in Upper Klamath Lake for appropriation and use for irrigation by beneficial users in the Klamath Project).

water is on irrigated land in Oregon and California.[14] There are *no* claims, and thus no rights can be recognized and enforced, for using stored water in the Upper Klamath Lake for instream enhancement of tribal fisheries.

As in *Nevada*, 463 U.S. 110, neither the Tribes nor the United States as trustee claimed and secured determined rights to stored water in Upper Klamath Lake in the Klamath adjudication. In *Nevada*, this Court concluded that "the Government is completely mistaken if it believes that the water rights confirmed to it by the Orr Ditch decree" for "use in irrigating lands within the Newlands Reclamation Project were like so many bushels of wheat, to be bartered, sold, or shifted about as the Government might see fit." 463 U.S. at 126. The Federal Circuit's decision amounts to just the type of "shift" in use of a determined water right that is forbidden by *Nevada*.

No water right was ever claimed in the Klamath adjudication for the purpose of instream fisheries enhancement in California or elsewhere. Thus, the Federal Circuit's decision recognizing such rights, affording them priority over petitioners' irrigation rights, and doing so without regard to relative priorities among other rights holders is not only mistaken under this Court's precedents and the McCarran Amendment but also undermines the entire western water law construct.

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[14] https://www.oregon.gov/OWRD/programs/WaterRights/Adjudications/KlamathAdj/KBA_ACFFOD_07017.PDF, 07161, 07280.

E. The Federal Circuit Incorrectly Determined the Bureau's Tribal Trust Obligations or Authorities

The Federal Circuit's decision does violence to western water law for reasons previously discussed. Further, case-specific, practical reality underscores the wisdom of Congressional and judicial deference to comprehensive state proceedings for determination and administration of water rights. For example, in the Klamath Basin Adjudication, Oregon has determined that there are no tribal water rights in waters (including the Klamath River) that are not within or bordering the reservation.[15] The Federal Circuit, by contrast—acting outside any adjudicatory process—assumed the existence of rights of the Yurok and Hoopa Valley Tribes to waters hundreds of miles upstream of their reservations, including waters in Oregon. App.56-58.

The Federal Circuit's frequent references to the United States' trust obligations do not resolve this conflict. It is undisputed that the United States holds tribal fishing rights in trust. It is undisputed too that any water rights that exist to support these fisheries are held in trust. That, however, is not the same as saying that the United States has the authority to unilaterally determine where and in what quantities such water rights may exist, or to implement any such rights by selectively regulating parties that may be junior.

It does not. "The Government assumes Indian trust responsibilities only to the extent it expressly

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[15] https://www.oregon.gov/OWRD/programs/WaterRights/Adjudications/KlamathAdj/KBA_ACFFOD_05375.PDF, 05388; https://www.oregon.gov/OWRD/programs/WaterRights/Adjudications/KlamathAdj/KBA_ACFFOD_05063.PDF, 05070.

accepts those responsibilities by statute." *United States* v. *Jicarilla Apache Nation,* 564 U.S. 162, 177 (2011). And there is neither statutory authority nor any independent trust power that authorizes the United States to quantify and administer water rights. See *Morongo Band of Mission Indians* v. *FAA*, 161 F.3d 569, 574 (9th Cir. 1998) (agency must exercise trust responsibility within the context of its authorizing statute); Opinion and Order, *Pac. Coast Fed'n of Fishermen's Ass'ns* v. *United States Bureau of Reclamation*, No. C 02-2006 SBA, 2005 U.S. Dist. LEXIS 36035, at *41 (N.D. Cal. Mar. 7, 2005) (trust responsibility to Yurok Tribe is discharged by compliance with generally applicable statutes and regulations).

F. The United States Has Available Other Procedures to Protect Tribal Water Rights

The United States cannot assert that deference to state adjudications leaves it incapable of carrying out its trust obligations to protect tribal rights. The United States can of course participate (and does so throughout the western states) in state adjudications as trustee. And notwithstanding Congress's command in the McCarran Amendment, controlling decisions from this Court and other circuits, and policy considerations that all point to comprehensive adjudication of water rights and deference to the state laws and procedures for conducting such an adjudication, the United States also can pursue judicial remedies to protect tribal interests outside an adjudication when circumstances so require.

For example, in *Kittitas Reclamation Dist.* v. *Sunnyside Valley Irrigation Dist.*, 763 F.2d 1032 (9th Cir. 1985) (*Kittitas*), and *Confederated Salish &*

Kootenai Tribes of Flathead Reservation v. *Flathead Irrigation & Power Project*, 616 F.Supp. 1292 (D. Mont. 1985) (*Confederated Salish*), federal courts granted requests for injunctive relief to protect unadjudicated tribal water rights during emergency situations that arose while a state court general adjudication was pending. Before assuming jurisdiction, the federal courts in both cases applied the *Colorado River* doctrine to determine whether to abstain or accept jurisdiction over the case. After considering the facts alleged by the tribes, the *Kittitas* and *Confederated Salish* courts held that the emergency situations facing the unadjudicated tribal water rights outweighed the legal and policy reasons for deferring to the pending state adjudications. Faced with claims for emergency relief in other cases, courts have decided that an emergency situation did not exist and declined jurisdiction in deference to the state adjudicatory process. See, *e.g., Gila Valley Irrigation Dist.*, 804 F.Supp. at 13; *Braren*, 338 F.3d at 971.

Seeking injunctive relief in accordance with *Kittitas* and *Confederated Salish* to obtain water for tribal water rights in unadjudicated basins during emergency circumstances is consistent with the "call requirement" of the prior appropriation doctrine and affords due process. It provides the opportunity for "real time" constraint upon the right of senior tribal priorities to curtail juniors by ensuring that senior tribal priorities actually need water at that point in time, by determining whether overall streamflow at that point in time can instead satisfy the seniors' needs, and by curtailing junior water rights in order of their priorities. See *Second Interim Report* at 49-53, *Montana*, 138 S. Ct. at 759.

Here, petitioners' water rights were reallocated to tribal priorities without reference to either a state adjudication or the established injunctive relief procedure that separately affords judicial due process. Petitioners were deprived of their irrigation water by federal agency fiat under the ESA, and their takings claims dismissed by subordinating their rights to tribal rights that had never been adjudicated or administered according to the law. The Federal Circuit's sharp turn from previously settled western water law principles into uncharted territory in which agencies and courts make up rights and administer them according to their own conceptions threatens havoc and deserves immediate review.

III. The Question Presented Is of Enormous Practical Importance to All Western Water Rights Holders and States that Administer Those Rights

The western system of water rights adjudication and administration provides predictability and security. Planning and investment can rationally take into account variable hydrologic conditions when it is known how the water resource is allocated in times of shortage. Western states' prior appropriation doctrine accomplishes that purpose.

The Bureau is the largest wholesaler of water in the United States. The water supplied by the Bureau supports more than 31 million people, providing "one out of five Western farmers (140,000) with irrigation water for 10 million acres of farmland that produce 60% of the nation's vegetables and 25% of its fruits and nuts."[16] With the enactment of the Reclamation Act, Congress required that Bureau projects operate

[16] https://www.usbr.gov/main/about/.

under state water law, thus maintaining the order and predictability of *the state systems*.

This Court has long acknowledged the potentially disruptive effect of federal reserved water rights claims on state water rights, which "inescapably vie with other public and private claims for the limited quantities to be found in the rivers and streams. This competition is compounded by the sheer quantity of reserved lands in the Western States." *New Mexico*, 438 U.S. at 699. Congress and this Court have addressed this problem by giving deference to state law and state systems for adjudication and administration, effectively fitting the federal rights into the state system, a policy of continuing importance in all western states. See Western Governors' Association Policy Resolution 2018-08 at 2 ("nothing in any act of Congress or Executive Branch regulatory action should be construed as affecting or intending to affect states' primacy over the allocation and administration of their water resources"), https://westgov.org/images/editor/WGA_PR_2018-08_Water_Resource_Management.pdf.

Re-allocation of water resources under the ESA or other regulatory statutes imposes a new disruption to the lives of water-reliant enterprise and communities and to the system of cooperative federalism that solidified over the last century. The underlying principle of petitioners' action is that if society chooses to re-allocate their property to another purpose, the Fifth Amendment requires just compensation.

The courts below sidestepped adjudication of the takings issue by retroactively concluding that agency staffs had determined and administered water rights wholly outside any adjudicatory process and out of conformity with the mechanisms of the west's water

rights system. The Federal Circuit's decision upsets the security, flexibility, and finality provided by western state general stream adjudications, and threatens to wreak havoc in the future.[17] Federal reserved rights should be administered through state law processes, not in piecemeal fashion to avoid a takings claim. This Court should grant this petition to review the question presented, and remand to determine whether water rights were taken from petitioners.

CONCLUSION

The petition for certiorari should be granted.

Respectfully submitted.

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[17] The Court of Federal Claims and Federal Circuit have been called upon to address western water issues in other recent cases. *E.g.*, *Casitas Mun. Water Dist.* v. *United States*, 543 F.3d 1276 (Fed Cir. 2008); *Stockton E. Water Dist.* v. *United States*, 583 F.3d 1344 (Fed. Cir. 2009).