Case No. 22-70052

IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

In re: KLAMATH IRRIGATION DISTRICT,

Petitioner,

v.

U.S. DISTRICT COURT FOR THE DISTRICT OF OREGON,

Respondent,

U.S. BUREAU OF RECLAMATION and OREGON DEPARTMENT OF WATER RESOURCES,

Real parties in interest.

Request for a writ of mandamus to issue to the U.S. District Court for the District of Oregon, Eugene Division, Case No. 1:21-cv-00504-AA, to direct the District Court to remand the pending motion for preliminary injunction to state court

Petition for Writ of Mandamus to U.S. District Court for the District of Oregon

Rietmann Law P.C.
1270 Chemeketa St. NE
Salem, Oregon 97301
Phone: (503) 551-2740
Fax: (888) 700-0192

Nathan R. Rietmann
(Or. Bar No. 053630)
nathan@rietmannlaw.com

Wanger Jones Helsley P.C.
265 E. River Park Circle, Suite 310
Fresno, California 93720
Phone: (559) 233-4800
Fax: (559) 233-9330

John P. Kinsey
(Cal. Bar No. 215916)
jkinsey@wjhattorneys.com

Christopher A. Lisieski
(Cal. Bar No. 321862)
clisieski@wjhattorneys.com

Attorneys for Petitioner Klamath Irrigation District

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INTRODUCTION

Petitioner Klamath Irrigation District ("KID" or "Petitioner") seeks a writ of mandamus from this Court to correct the clear error the District Court made in denying the motion to remand this matter to Klamath County Circuit Court. The error is clear, as the doctrine of prior exclusive jurisdiction clearly applies. Moreover, because this doctrine is mandatory in its application, the question is essentially jurisdictional, and dictates which court should decide questions related to the scope and extent of water rights in UKL in the first instance. This question should be resolved now, since further proceedings in this matter will be rendered meaningless—regardless of the substantive outcome—if they are issued by a court that lacks authority to conduct them in the first place.

Particularly when considered in combination with related case *Klamath Irrigation District v. Reclamation*, Case No. 20-36009, these cases raise a fundamental question: what court may the owner of water rights pursuant to a McCarran Amendment adjudication under 43 U.S.C. § 666(a)(1) turn to in order to enforce those rights against the United States under 43 U.S.C. § 666(a)(2)? In Case No. 20-36009, the District Court found, in essence, that a water rights owner may not come to federal court to enforce such rights, at least not where a Native American tribe's interest may be implicated and the tribe does not agree to waive

sovereign immunity.[1] In this case, the District Court found that there is no right for such a proceeding to move forward in state court either, and that the United States may remove such proceedings, including component motions seeking to enforce water rights, to federal court. This sets up a perpetual circle of procedural roadblocks, effectively denying enforcement actions against the United States.

Clearly, this is *not* what the McCarran Amendment was designed to do. The McCarran Amendment was designed to allow: (1) comprehensive water rights adjudications of all the rights to a given stream system; and (2) enforcement or administration of those rights. A right that has no means of enforcement is no right at all. To compel the United States to participate in comprehensive water rights adjudications, and then effectively insulate the United States from enforcement actions related to those same water rights, effectively voids the McCarran Amendment. Enforcement or administration actions must be allowed to proceed in some court, and under the law of prior exclusive jurisdiction, they *at least* must be able to proceed in the court holding jurisdiction over the *res*. In this case, this is the Klamath County Circuit Court.

This Court should issue a writ directing the District Court to remand the underlying motion for preliminary injunction to the Klamath County Circuit Court.

[1] Because of the large number of federally recognized Native American tribes in the Western United States, tribal interests are nearly ubiquitous in water rights disputes. *See* Search Federally Recognized Tribes | Indian Affairs (bia.gov), accessed on June 9, 2022.

STATEMENT OF JURISDICTION

This Court has jurisdiction over this petition for a writ of mandamus pursuant to 28 U.S.C. § 1651.

RELIEF REQUESTED

Klamath Irrigation District ("KID") seeks an alternative writ of mandamus compelling the U.S. District Court for the District of Oregon, Eugene Division to remand the matter to the Klamath County Circuit Court.

STATEMENT OF ISSUES

Whether the U.S. District Court committed clear error in deciding that an "enforcement" action is not included within the wavier of sovereign immunity in the McCarran Amendment permitting courts to "administer" water rights under 43 U.S.C. § 666(a)(2).

BACKGROUND

In 1975, the State of Oregon commenced a general stream adjudication of the waters of the Klamath Basin pursuant to ORS in Chapter 539. (*See* Ex. 1 at 45, ¶ 2.) The purpose of a general stream adjudication is to quantify and determine all state and federal reserved water rights vested prior to the adoption of Oregon's 1909 water code. ORS 539.010.

On March 6, 2013, thirty-eight (38) years after the State of Oregon initiated the KBA, OWRD filed its Findings of Fact and Final Order of Determination in

Klamath County Circuit Court. (*Id.* at 45, ¶ 3.) Subsequently, on February 28, 2014, the State of Oregon entered an Amended and Corrected Findings of Fact and Final Order of Determination ("ACFFOD") with the Klamath County Circuit Court. (*Id.* at 45, ¶ 4.) Once the ACFFOD was entered, the state and federal water rights comprehensively determined therein became fully enforceable, pursuant to ORS 537.130(4). The KBA is fully compliant with the McCarran Amendment—which waives sovereign immunity for the federal government in comprehensive state water rights adjudications—and thus necessarily includes all federal water rights in UKL within its ambit. Reclamation specifically challenged whether it was required to participate in the KBA under the McCarran Amendment, and was specifically ordered to do so by the Ninth Circuit nearly 30 years ago. *United States v. Oregon*, 44 F.3d 758, 770 (9th Cir. 1994) (holding "the Klamath Basin adjudication is in fact the sort of adjudication Congress meant to require the United States to participate in").

While the judicial phase of the Klamath Adjudication is pending, water in UKL must be distributed in accordance with the ACFFOD. *See* ORS 539.170 ("While the hearing of the order of the Water Resources Director is pending in the circuit court, and until a certified copy of the judgment, order or decree of the court is transmitted to the director, ***the division of water from the stream involved in the appeal shall be made in accordance with the order of the director***.") (Emphasis

added.) This requirement that water be distributed in accordance with OWRD's order pending completion of judicial review has been specifically affirmed by the U.S. Supreme Court. *Pac. Live Stock Co. v. Lewis*, 241 U.S. 440, 447–48 (1916) ("[I]t is within the power of the [State of Oregon] to require that, pending the final adjudication, the water shall be distributed according to the board's order [i.e. Final Order of Determination], unless a suitable bond be given to stay its operation.")

The ACFFOD determined that "[t]he United States is the owner of a right to store water in Upper Klamath Lake to benefit the separate irrigation rights for the Klamath Reclamation Project." This storage right authorizes Reclamation to store up to 486,828 acre-feet per year in UKL reservoir between the elevations of 4,143' and 4,136' "for agricultural irrigation, stockwater and domestic uses." (Ex. 1 at 48–66, at KBA_ACFFFOD_07060.) The storage right does not give Reclamation the right to use the water that it stores for purposes of enhancing instream flows in the Klamath River. *Cookinham v. Lewis*, 58 Or. 484, 492 (1911) (holding that a primary storage right "does not include the right to divert and use stored water, which must be the subject of the secondary permit"); *see also* Ex. 1 at 48–66, at KBA_ACFFOD_07083–84 (explaining the principle that "the right to store water is distinct from the right to use stored water").

This matter arose because of the Bureau of Reclamation's flagrant and repeated disregard for the water rights found in the ACFFOD. Despite having no

right to use or release stored water from UKL, Reclamation released more than 123,000 acre-feet of water in 2020 for its own purposes, without any attempt to obtain the associated water rights. (Ex. 1 at 252, ¶¶ 7–8.) Reclamation indicated that it intended to conduct similar water releases again during the 2021 irrigation season. Therefore, on March 29, 2021, KID filed an Emergency Motion for Preliminary Injunction in the KBA, which is captioned *In the Matter of the Waters of the Klamath River Basin* and is currently being conducted in the Klamath County Circuit Court, Case No. WA1300001 (the "Preliminary Injunction Motion"). (Ex. 1 at 2–29.)

On April 5, 2021, Reclamation filed a Notice of Removal of the Preliminary Injunction Motion only—not the entirety of the KBA—to the U.S. District Court for the District of Oregon. (Ex. 2.) On April 8, 2021, the Court held a scheduling conference and set an expedited briefing schedule on the Preliminary Injunction Motion. (Case No. 1:21-cv-00504-AA, Doc. No. 6.) On April 12, 2021, Reclamation filed an opposition to the Preliminary Injunction Motion. (Ex. 3.)

On April 12, 2021, OWRD filed an unopposed motion to intervene. (Ex. 4.) That motion was granted on April 13, 2021. (Case No. 1:21-cv-00504-AA, Doc. No. 10.) On April 13, 2021, OWRD filed a response to the Preliminary Injunction Motion. (Ex. 5.)

On April 20, 2021, the Court held a status conference. (*See* Case No. 1:21-cv-00504-AA, Doc. No. 18.) KID indicated that it intended to file a motion to remand, and the Court directed expedited briefing on the matter, with KID to file its motion that same day, a response to be due by May 4, 2021, a reply on May 11, 2021, and oral argument set for May 20, 2021. (*Id.*)

As directed, KID filed its motion to remand on April 20, 2021. (Ex. 6.) This motion was based solely on the doctrine of prior exclusive jurisdiction: because the proceeding from which the motion was removed was a proceeding *in rem*, that court has full jurisdiction over the *res* at issue in the suit—i.e., the property rights in the waters of the Klamath River Basin—and another court cannot exercise jurisdiction over the same body of property. (*Id.*) Therefore, the only suitable recourse is remand. (*Id.*) An amended version of the motion to remand was filed on April 28, 2021. (Ex. 7.)

The United States filed its opposition to the motion to remand the Emergency Motion on May 4, 2021. (Ex. 8.) KID filed a reply on May 11, 2021. (Ex. 9.) Oral argument was held on May 20, 2021, as directed by the Court. (Ex. 10.) No opinion or order was then issued for almost a year. KID submitted letters to the court requesting a ruling or a status conference on September 24, 2021 and December 30, 2021. (Exs. 11, 12.) No response was received. Finally, KID sought a writ from this Court merely to obtain a ruling from the District Court

on March 24, 2022. (*See* Ex. 13.) This Court denied the prior petition on April 19, 2022 "without prejudice to the filing of a new mandamus petition if the district court has not ruled on petitioner's motion for remand within 21 days of the date of this order. (Ex. 14.) The District Court issued an order denying petitioner's motion to remand on April 25, 2022. KID now moves this Court for a writ of mandamus directing the District Court to remand this case to the Klamath County Circuit Court pursuant to the doctrine of prior exclusive jurisdiction.

ARGUMENT

Mandamus is a remedy to be issued only in extraordinary situations. This Court has set out five specific guidelines for issuing a writ in a particular case: (1) "The party seeking the writ has no other adequate means, such as a direct appeal, to attain the relief he or she desires"; (2) "The petitioner will be damaged or prejudiced in a way not correctable on appeal"; (3) "The district court's order is clearly erroneous as a matter of law"; (4) "The district court's order is an oft-repeated error, or manifests a persistent disregard of the federal rules"; and (5) "The district court's order raises new and important problems, or issues of law of first impression." *Bauman v. U.S. District Court for the Northern District of California*, 557 F.2d 650, 654–55 (9th Cir. 1977); *see also Miller v. Gammie*, 335 F.3d 889, 895 (9th Cir. 2003) (*en banc*) (noting the *Bauman* guidelines "'often raise questions of degree[,]' and '[t]he considerations are cumulative and proper

disposition will often require a balancing of conflicting indicators'") (quoting *Bauman*, 557 F.2d at 655). These factors are not a list of elements, and the Ninth Circuit balances the five factors to determine whether such relief is warranted in each individual case. *Calderon v. U.S. District Court for the Northern District of California*, 98 F.3d 1102, 1105 (9th Cir. 1996); *see also In re City of San Diego*, 291 Fed.App'x 798 (9th Cir. 2008).[2] The circumstances here present a case in which mandamus relief is warranted.

Courts, including this Court, have granted relief in cases denying a motion to remand to state court where there were particular jurisdictional or federalism concerns. *See, e.g.*, *People of State of California v. Mesa*, 813 F.2d 960, 962–63 (9th Cir. 1987) (granting mandamus review of denial of motion to remand criminal actions against U.S. mail carriers to state court, because "federalism concerns justify review by mandamus"); *cf. Estate of Bishop by and through Bishop v. Bechtel Power Corp.*, 905 F.2d 1272, 1275 (9th Cir. 1990) (concluding that, in most cases, denial of a motion to remand can be reviewed on appeal). In fact, the Fifth Circuit has noted that the "unlawful assertion of federal power over a matter of state sovereignty qualifies as another such special situation" that justifies the extraordinary remedy of mandamus. *In re Gee*, 941 F.3d 153, 166 (5th Cir. 2019).

[2] Citation to this unpublished case and other unpublished cases cited herein is appropriate under Circuit Rule 36-3.

Indeed, the doctrine under which KID moved for remand to the state court is a mandatory rule, not a discretionary one: if it applies, remand is required under Ninth Circuit precedent. Further, the doctrine of prior exclusive jurisdiction is expressly based on the concepts of comity and federalism, because of the need to respect the sovereignty of other courts, particularly the courts of a component sovereign, such as an individual state. *See, e.g., United States v. One 1985 Cadillac Seville*, 866 F.2d 1142, 1145 (9th Cir. 1989) ("The purpose of the rule is the maintenance of comity between courts; such harmony is especially compromised by state and federal judicial systems attempting to assert concurrent control over the *res* upon which jurisdiction of each depends."); *see also United States v. Sid-Mars Rest. & Lounge, Inc.*, 644 F.3d 270, 283–84 (5th Cir. 2011) ("Although the prior-exclusive-jurisdiction rule is based at least in part on considerations of judicial comity, it very often is referred to as a jurisdictional limitation, and *has been applied even when the United States is a party*.") (internal quotations omitted) (emphasis original); *United States v. $79,123.49 in U.S. Cash*, 830 F.2d 94, 98 (7th Cir. 1987) (noting the doctrine is based on a "principle of mutual respect").

The District Court's analysis of the motion was fatally flawed, and failed to consider the most important authority on the point in question. Instead, the District Court somehow concluded that an "enforcement" action is not an action to

administer water rights under 43 U.S.C. § 666(a)(2). The District Court came to this conclusion without citing any authority supporting such a distinction. Further, the District Court ignored Ninth Circuit precedent expressly remanding water rights motions in such contexts to state courts, and came to this decision despite Ninth Circuit authority expressly defining an action to "administer" a water rights decree as one "to ***enforce*** its provisions." *South Delta Water Agency v. United States*, 767 F.2d 531, 541 (9th Cir. 1985) (emphasis added). The decision is inexplicable, and clear error. Further, the question of whether this case must be remanded goes to the very heart of the central issue here and in related matter *Klamath Irrigation District v. Reclamation*, Case No. 20-36009, also pending in this Court: which court has authority to issue decisions concerning the ambit of water rights determined in the Klamath Basin Adjudication?

A. The First and Second Bauman *Factors Weigh in Favor of Granting Mandamus Relief*

The first and second *Bauman* factors are frequently related, because the availability of adequate relief on appeal runs parallel to whether the party seeking mandamus review will be irreparably injured by delay, and as such are often addressed together. *See, e.g., In re Henson*, 869 F.3d 1052, 1058 (9th Cir. 2017) ("We generally examine the first and second factors together because the second is closely related to the first."); *Douglas v. U.S. Dist. Court for Cent. Dist. of Cal.*,

495 F.3d 1062, 1068 n.3 (9th Cir. 2007) ("We generally examine the first and second factors together."); *Bauman*, 557 F.2d at 654 (noting the second factor "is closely related to the first").

Under Oregon law, KID holds the right to use water stored in Upper Klamath Lake, pursuant to the water rights determined in the ACFFOD, which is presently enforceable against Reclamation. (Ex. 1, at 55–59, at KBA_ACFFOD_07075.) KID is being affirmatively prevented from using those water rights, because Reclamation is discharging stored water from UKL—which it holds no water rights to use—in order to meet its own independent obligations under the ESA and tribal trust responsibilities.

Water is a finite resource in the Klamath Basin, and one which is in short supply due to successive years of drought. *See, e.g.*, 2022 Annual Operations Plan, Bureau of Reclamation, at 3 (April 2022) (noting "ongoing extreme drought conditions for the third consecutive year afflicting the Klamath Basin") (*available at* https://www.usbr.gov/mp/kbao/docs/annual-operations-plan-2022-04-11.pdf). KID's primary complaint here is that Reclamation is releasing water through the Link River Dam which it lacks any water right to release. (Ex. 1, at 65–66, at KBA_ACFFOD_07083.) KID and its constituent members already lost all of its water rights in the 2021 irrigation season, due to the District Court's inexplicable delay in ruling on a fairly straightforward motion to remand for almost an entire

year. (Ex. 6; Ex. 15.) Now, in 2022, Reclamation has again indicated it intends to release stored water—without any indication that it will acquire a water right to that stored water—throughout the irrigation season for its own purposes. (2022 Annual Operations Plan, Bureau of Reclamation, at 5.)

KID's primary point of diversion is above the Link River Dam. (Ex. 1 at 250, ¶ 3.) Therefore, once Reclamation has released water through the Link River Dam, KID has no means of recapturing it. The water is simply gone, and with it, KID's rights to use that water. Every day water is unlawfully discharged, KID's property rights are harmed in a manner that cannot be corrected on appeal.

Moreover, as discussed further below, the Klamath County Circuit Court is clearly the court best suited to resolve this dispute. The underlying motion for a preliminary injunction is clearly directed at KID and Reclamation's respective water rights, which are an integral part of the Klamath Basin Adjudication, now pending in the Klamath County Circuit Court. That court has prior exclusive jurisdiction over the *res* at issue here, i.e., the water rights of the respective parties. Even if KID could obtain a prompt ruling on the motion for preliminary injunction—which seems unlikely, given this case's history—and even if KID *prevailed* on the motion for preliminary injunction, the United States would inevitably appeal the injunction. At that point, it is virtually certain this Court would conclude that the motion was in the wrong court in the first place. *See*

Part B, *infra*. The doctrine of prior exclusive jurisdiction is mandatory, not discretionary. *State Engineer v. S. Fork Band of Te-Moak Tribe of W. Shoshone Indians*, 339 F.3d 804, 809 (9th Cir. 2003). The frank reality is that, if KID is not immediately returned to the proper court and able to obtain a prompt ruling, its constituent members will likely lose out on the bulk of their water rights for the 2022 irrigation season as well.

Further, if this matter proceeds in the federal court, there is a substantial chance that the procedural chicanery of a prior case, *Klamath Irrigation District v. United States Bureau of Reclamation, et al.*, District Court Case No. 1:19-cv-00451-CL,[3] will be repeated here. In that case, KID brought suit on a similar issue, alleging Reclamation had violated the APA by disregarding the mandate of the Reclamation Act and acting in a manner contrary to their water rights, as determined under Oregon law. *See Klamath Irrigation District v. Bureau of Reclamation*, Case No. 20-36009, Doc. No. 9, at 14–19.[4] Two different Native American tribes—one in California, one in Oregon—intervened in the lawsuit for the limited purpose of moving to dismiss due to the absence of a necessary party—i.e., themselves—because they asserted that they could not be joined due to sovereign immunity. *Id.* While KID maintained in that case, as it would in this

[3] This case is currently on appeal in this Court under Case No. 20-36009.

[4] All citations to the Court's docket are to the pagination of the Docket Entry, not the internal pagination of the documents.

case, both that the Tribes were not necessary parties and that the McCarran Amendment waived any claims of sovereign immunity, it is highly likely the same procedural motion would have the same outcome here. If such a motion were successful, KID would effectively be barred from defending its water rights in both state *and* federal court.

B. The District Court's Decision Is Clearly Erroneous as a Matter of Law

1. The Prior Exclusive Jurisdiction Doctrine Is a Mandatory Rule Designed to Preserve Comity, Federalism, and Respect for Other Courts

The prior exclusive jurisdiction doctrine "holds that 'when one court is exercising *in rem* jurisdiction over a *res*, a second court will not assume *in rem* jurisdiction over the same *res*." *Chapman v. Deutsche Bank Nat'l Trust Co.*, 651 F.3d 1039, 1043 (9th Cir. 2011) (quoting *Marshall v. Marshall*, 547 U.S. 293, 311 (2006)). Put another way, "if a state or federal court 'has taken possession of property, or by its procedure has obtained jurisdiction over the same,' then the property under that court's jurisdiction 'is withdrawn from the jurisdiction of the courts of the other authority as effectually as if the property had been entirely removed to the territory of another sovereign.'" *Sexton v. NDEX West, LLC*, 713 F.3d 533, 536 (9th Cir. 2013) (quoting *State Engineer v. S. Fork Band of Te-Moak Tribe of W. Shoshone Indians*, 339 F.3d 804, 809 (9th Cir. 2003)).

The prior exclusive jurisdiction doctrine does not apply only to strict, *in rem* proceedings wherein another court has formally seized control of particular property: it also applies "where suits are brought to marshal assets, administer trusts, or liquidate estates, and in suits of a similar nature, where, to give effect to its jurisdiction, the court must control the property." *Goncalves by and through Goncalves v. Rady Children's Hosp. San Diego*, 865 F.3d 1237, 1253–54 (9th Cir. 2017) (quoting *United States v. Bank of N.Y. & Tr. Co.*, 296 U.S. 463, 477 (1936)). Thus, in applying the doctrine in a particular case, "courts should not 'exalt form over necessity,' but instead should 'look behind the form of the action to the gravamen of a complaint and the nature of the right sued on.'" *Chapman*, 651 F.3d at 1044 (quoting *State Eng'r*, 339 F.3d at 810). Thus, "[i]f the action is not 'strictly in personam'—that is, if the action is *in rem* or quasi *in rem*—then the doctrine ordinarily applies." *Id.*

An action qualifies as *in rem* "when it 'determine[s] interests in specific property as against the whole world.'" *Goncalves*, 865 F.3d at 1254 (quoting *State Eng'r*, 339 F.3d at 811). A quasi *in rem* action is one in which "'the parties' interests in the property . . . serve as the basis of the jurisdiction' for the parallel proceedings." *Chapman*, 651 F.3d at 1044 (quoting *State Eng'r*, 339 F.3d at 810). In particular, the Ninth Circuit has "applied the doctrine of prior exclusive jurisdiction in the water rights context." *State Eng'r*, 339 F.3d at 810.

Specifically, where a court has determined or is determining the water rights of an entire stream system, the exercise of prior exclusive jurisdiction has been maintained throughout later attempts to administer those rights. *See State Eng'r*, 339 F.3d at 810 (discussing *United States v. Alpine Land & Reservoir Co.*, 174 F.3d 1007 (9th Cir. 1999)).

"Although the doctrine is based at least in part on considerations of comity, and prudential policies of avoiding piecemeal litigation, it is no mere discretionary abstention rule. Rather, it is a mandatory jurisdictional limitation." *State Engineer*, 339 F.3d at 810 (internal citations and quotations omitted).

"The doctrine of prior exclusive jurisdiction applies to a federal court's jurisdiction over property only if a state court has previously exercised jurisdiction over that same property and retains that jurisdiction in a separate, concurrent proceeding." *Sexton*, 713 F.3d at 537. Thus, where a defendant has removed the entirety of a case to federal court, there is no separate, concurrent proceeding, and the prior exclusive jurisdiction doctrine does not apply. *Id.*

2. The Klamath County Circuit Court Is Exercising Jurisdiction Over the Waters of the Klamath Basin in an *In Rem* Proceeding

The Klamath Adjudication, currently pending in the Klamath County Circuit Court, is clearly an *in rem* proceeding. An *in rem* proceeding is one in which the action seeks to "determine interests in specific property as against the whole

world." *State Eng'r*, 339 F.3d at 811 (quoting Black's Law Dictionary 1245 (6th ed. 1990)). This is, by nature, what a proceeding under the McCarran Amendment is.

Western water law is a unique area of property law involving a complicated mix of both federal and state considerations. *See California v. United States*, 438 U.S. 645, 650 (1978) ("If the term 'cooperative federalism' had been in vogue in 1902, the Reclamation Act of that year would surely have qualified as a leading example of it."). The scarcity of water in many arid Western states and the many competing demands on that resource led those states to adopt comprehensive schemes to resolve these claims over access to water. *See, e.g., Colorado River Water Conservation Dist. v. United States*, 424 U.S. 800, 804 (1976) ("*Colorado River*") (noting Western states had "established elaborate procedures for allocation of water and adjudication of conflicting claims to that resource"). Western water law generally follows the doctrine of prior appropriation. *See, e.g., Mineral County v. Walker River Irr. Dist.*, 900 F.3d 1027, 1029 n.2 (9th Cir. 2018) ("Under the doctrine of prior appropriation, '[t]he first appropriator of the water of a stream passing through the public lands . . . has the right to insist that the water shall be subject to his use and enjoyment to the extent of his original appropriation, and that its quality shall not be impaired so as to defeat the purpose of its appropriation.'") (quoting *Lobdell v. Simpson*, 2 Nev. 274, 277–78 (1866)).

Much of the water development in the West, including the Klamath Project, occurred pursuant to projects originally financed by Reclamation, and subsequently paid off by the farmers within the project. *California*, 438 U.S. at 650 ("In [the Reclamation Act of 1902], Congress set forth on a massive program to construct and operate dams, reservoirs, and canals for the reclamation of the arid lands in 17 Western States."). In authorizing these projects, Congress commanded that Reclamation abide by state law regarding water rights unless expressly overcome by Congressional enactment. *Id.* at 675 (noting Section 8 of the Reclamation Act "does, of course, provide for the protection of vested water rights, but it also requires the Secretary to comply with state law in the 'control, appropriation, use, or distribution of water'"); *id.* at 678 ("While later Congresses have indeed issued new directives to the Secretary, they have consistently reaffirmed that the Secretary should follow state law in all respects not directly inconsistent with these directives."). Therefore, Section 8 of the Reclamation Act states that, "[n]othing in this Act shall be construed as affecting or intended to affect or to in any way interfere with the laws of any State or Territory relating to the control, appropriation, use, or distribution of water used in irrigation, or any vested right acquired thereunder." 43 U.S.C. § 383. It also commands the Secretary of the Interior to "proceed in conformity with such laws" when acting under the Reclamation Act. *Id.*

Consistent with these authorities, Congress required Reclamation to acquire water rights in accordance with state law, either through direct applications for water rights under state law for appropriation of unappropriated water, or through purchase or condemnation of vested water rights under judicial process. *See* 43 U.S.C. § 421. Therefore, water rights within a Reclamation Project, including any water rights held by Reclamation, are generally creatures of state law, not federal law. While federal reserved rights are created by operation of the federal government withholding certain rights for federal lands, those rights must be submitted to and determined in comprehensive state water rights adjudications in the same manner as any other water right. *See United States v. Oregon*, 44 F.3d 758, 770 (9th Cir. 1994) (concluding that the federal government was required to submit any federal reserved rights it claimed to OWRD in the Klamath Adjudication). Consequently, ownership of water rights within a Reclamation project, and the existence and priority of such rights, is an issue of state law. *See* 43 U.S.C. § 383; *see also California*, 438 U.S. at 647, 666–76 (holding that California could impose conditions on the water rights granted to Reclamation, and Reclamation was required to abide by those state law-based conditions).

Because of the central role states play in regulating water distribution, Congress passed the McCarran Amendment, which waived the United States' sovereign immunity in relation to comprehensive water rights adjudications. *See*

United States v. District Court In and For Eagle County, 401 U.S. 520, 525 (1971) (quoting Senator McCarran as saying the amendment was necessary "because unless all of the parties owning or in the process of acquiring water rights on a particular stream can be joined as parties defendant, any subsequent decree would be of little value"). The Supreme Court has described the McCarran Amendment as "an all-inclusive statute concerning 'the adjudication of rights to the use of water of a river system' which in § 666(a)(1) has no exceptions and which, as we read it, includes appropriate rights, riparian rights, and reserved rights." *Eagle County*, 401 U.S. at 524; *Arizona v. San Carlos Apache Tribe*, 463 U.S. 545, 564 (1983) ("[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.").

The Klamath Adjudication is a comprehensive water rights adjudication falling within the McCarran Amendment. In fact, the United States previously argued the Klamath Adjudication was not sufficiently comprehensive so as to fall within the McCarran Amendment, which the Ninth Circuit expressly rejected, determining the Klamath Adjudication "is in fact the sort of adjudication Congress meant to require the United States to participate in when it passed the McCarran Amendment." *Oregon*, 44 F.3d at 770. Because it is a proceeding to determine the

rights and interests in the waters of the Klamath River Basin for all water rights holders against any other claimants in the world, it is an *in rem* proceeding.

Moreover, Oregon law reaffirms the Klamath Adjudication is an *in rem* proceeding. The Oregon Supreme Court has expressly noted comprehensive stream adjudications such as this one, which are "the adjudication of the inchoate water rights" in a river stream or system, are "in the nature of a proceeding *in rem*." *In re Waters of Willow Creek*, 119 Or. 155, 175 (1925); *see also Masterson v. Pac. Live Stock Co.*, 144 Or. 396, 402 (1933) ("The proceedings adjudicating the rights of the waters of Malheur river were *in rem*."); *Abel v. Mack*, 131 Or. 586, 595 (1929) ("The conclusiveness and effect of a judgment is alike applicable to a proceeding *in rem*, of which a proceeding under the laws of Oregon to procure a right from the state of Oregon for the use of its waters is one."); *Alexander v. Central Oregon Irr. Dist.*, 19 Or.App. 452, 469 (1974) (noting "a water rights adjudication is an in rem proceedings [sic]"). Determinations of pre-1909 water rights under the statute providing for comprehensive proceedings "shall be conclusive as to all prior rights and the rights of all existing claimants upon the stream or other body of water." ORS 539.200 (emphasis added). In these general stream adjudications, "it shall be the duty of all claimants interested therein to appear and submit proof of their respective claims," and "[a]ny claimant who fails to appear in the proceedings and submit proof of the claims of the claimant shall be

barred and estopped from subsequently asserting any rights theretofore acquired upon the stream or other body of water embraced in the proceedings, and shall be held to have forfeited all rights to the use of the water." ORS 539.210. Simply put, these general stream adjudications resolve all claims by any party as to particular property rights—i.e., the right to use water from a particular river or stream system in Oregon. These proceedings are clearly *in rem*.

3. There Is a Concurrently Pending State Proceeding Involving the Very Rights at Issue in This Motion

As noted above, the doctrine of prior exclusive jurisdiction only applies where "a state court has previously exercised jurisdiction over that same property and retains that jurisdiction in a separate, concurrent proceeding." *Sexton*, 713 F.3d at 537. In the majority of cases, the removing party removes the entirety of a case to federal court, thereby terminating the state court's jurisdiction. *See id*. When this happens, there is no separate, concurrent proceeding, and the prior exclusive jurisdiction doctrine does not apply. *Id*.

This did not happen here. As Reclamation's Notice of Removal expressly states, "this removal is limited to the Motion and proceedings related to it, and not the Adjudication as a whole." (Ex. 2 at 5–6, ¶ 9.) Indeed, there is no basis to remove the entirety of the Klamath Adjudication to federal court. But because the Klamath Adjudication remains pending in state court, there is a separate,

concurrent proceeding concerning the same *res*—i.e., the water rights in the Klamath Basin—in a state court that previously obtained jurisdiction.

KID brought the underlying motion because Reclamation has flouted and continues to flout the water rights determined under the ACFFOD. As noted above, the ACFFOD is the culmination of a multi-decade investigation and determination of all water rights—including federal reserved water rights—to the waters of the Klamath River Basin. *See Pac. Live Stock Co.*, 241 U.S. at 447–48 (recognizing that Oregon's general stream adjudication process seeks to obtain "a complete ascertainment of all existing rights"); *United States v. Oregon*, 44 F.3d at 770 (affirming that the federal government and a Native American tribe, although claiming *federal* reserved water rights to water in UKL, were required to submit those claims to the Klamath Adjudication); ORS 539.200 (noting a general stream adjudication "shall be conclusive as to all prior rights and the rights of all existing claimants upon the stream or other body of water") (emphasis added); ORS 539.210 ("Any claimant who fails to appear in the proceedings and submit proof of the claims of the claimant shall be barred and estopped from subsequently asserting any rights theretofore acquired upon the stream or other body of water embraced in the proceedings, and shall be held to have forfeited all rights to the use of the water."). The ACFFOD fundamentally changed the legal paradigm under which the Klamath Project had historically operated, by fully determining

claims which OWRD would now regulate and water rights which are now enforceable.

The rights in the Klamath River Basin having been determined by Oregon's water regulator, the OWRD, they are now fully enforceable pending judicial review by the Klamath County Circuit Court. *See* ORS 539.170 ("While the hearing of the order of the Water Resources Director is pending in the circuit court, and until a certified copy of the judgment, order or decree of the court is transmitted to the director, the division of water from the stream involved in the appeal *shall be made in accordance with the order* of the director.") (emphasis added); *see also Pac. Live Stock Co.*, 241 U.S. at 447–48 (affirming that "it is within the power of the [State of Oregon] to require that, pending the final adjudication, the water shall be distributed according to the board's order [i.e. Final Order of Determination], unless a suitable bond be given to stay its operation").

Any party to the Klamath Adjudication, including Reclamation, may seek a stay from the Klamath County Circuit Court, contingent upon judicial approval and the posting of "a bond or an irrevocable letter of credit issued by an insured institution as defined in ORS 706.008, . . . in such amount as the judge may prescribe, conditioned that the party will pay all damages that may accrue by reason of the determination not being enforced." ORS 539.180. To date, Reclamation has not moved to stay the ACFFOD's determination of either its or

KID's rights, and has not posted any bond to cover the damages that would be caused by such a stay. As such, the rights set forth in the ACFFOD are fully enforceable, and include a determination of all federal reserved water rights in Oregon.

Notably, under the ACFFOD, Reclamation has a right to store water, but not a secondary right to *use* stored water, which is required by Oregon water law. The ACFFOD determined "[t]he United States is the owner of a right to store water in Upper Klamath Lake to benefit the separate irrigation rights for the Klamath Reclamation Project." This storage right authorizes Reclamation to store up to 486,828 acre-feet per year in UKL reservoir between the elevations of 4,143' and 4,136' "for agricultural irrigation, stockwater and domestic uses." (Ex. 1 at 53–55, at KBA_ACFFFOD_07060.) The storage right does not give Reclamation the right to use the water that it stores for purposes of enhancing instream flows in the Klamath River. *Cookinham v. Lewis*, 58 Or. 484, 492 (1911) (holding that a primary storage right "does not include the right to divert and use stored water, which must be the subject of the secondary permit"); *see also* Ex. 1 at 65–66, KBA_ACFFOD_07083–84 (explaining the principle that "the right to store water is distinct from the right to use stored water").

Accordingly, while the right to store water in UKL reservoir is owned by Reclamation, the secondary right to beneficially use the stored water is owned by

KID and other water right holders within the Klamath Project. (Ex. 1 at 57–59, at KBA_ACFFOD_07075–77; 65–66, at KBA_ACFFOD_07083–84.) The ACFFOD provides that "[b]eneficial users within the Klamath Project hold a 1905 water right to beneficially use the water that the United States stores in Upper Klamath Lake reservoir" for "irrigation, domestic and incidental stock watering uses." (Ex. 1 at 51–64, at KBA_ACFFOD_007058, 007061, 007075–82.) The ACFFOD also recognizes that KID, and other irrigation districts within the Klamath Project, "represent the beneficial users' interests with respect to the beneficial use component of the water rights recognized in [the ACFFOD]." (Ex. 1 at 50, 64, at KBA_ACFFOD_007045, 007082.)

KID's secondary water rights to stored water in UKL reservoir cannot be "called" or curtailed by any water rights—even senior water rights—in the Klamath River. "Once water from a natural source has been legally stored, use of the stored water is subject only to the terms of the secondary permit that grants the right to use of stored water." Op. Att'y Gen. OP-6308 (1989); see also ORS 540.210(3) ("The distribution and division of water shall be made according to the relative and respective rights of the various users from the ditch or Reservoir.") (emphasis added); OAR 690-250-0150(4) ("Use of legally stored water is governed by the water rights, if any, which call on that source of water."); *Tudor v. Jaca*, 178 Or. 126, 147–148 (1945) (impounded water may only be used

to satisfy the secondary right). Because of this, "legally stored water is not subject to call by senior rights to natural flow, even if the stored water originated in that stream." Op. Att'y Gen. OP-6308 (1989) (emphasis added).

Whether or not Reclamation is violating the terms of the ACFFOD by releasing stored water for its own purposes—whether to satisfy tribal trust rights or its own obligations under the ESA—inherently involves a decision that will invade the *res* currently being considered by the Klamath County Circuit Court. If the federal District Court decides that Reclamation is not violating the ACFFOD, it must conclude that Reclamation has additional water rights in UKL that were previously unknown, and that those rights permit Reclamation to invade KID's rights. Such a determination would remove important decisions about the scope, meaning, and effect of the ACFFOD from the Klamath County Circuit Court. This would necessarily inhibit the Klamath County Circuit Court, which acquired prior exclusive jurisdiction over these property rights, from making orders to effectively resolve or dispose of those rights. This is the very heart of the prior exclusive jurisdiction doctrine. *See Marshall*, 547 U.S. at 311 (observing "the general principle that, when one court is exercising *in rem* jurisdiction over a *res*, a second court will not assume *in rem* jurisdiction over the same *res*"); *Goncalves*, 865 F.3d at 1253–54 (noting "the [original] court must control the property"); *Lefkowitz v. Bank of New York*, 528 F.3d 102, 107 (2d Cir. 2007) (noting the doctrine is

violated where a federal court "would have to assert control over property that remains under the control of the state courts").

The prior exclusive jurisdiction doctrine has been expressly and repeatedly upheld in the context of water rights. *See State Eng'r*, 339 F.3d at 811 (noting the doctrine applied whether the proceeding was *in rem* or quasi *in rem*, and would only not apply if the proceeding was "strictly in personam") (quoting *Penn. Gen. Cas. Co. v. Pennsylvania ex rel. Schnader*, 294 U.S. 189, 195 (1935)); *United States v. Walker River Irr. Dist.*, 890 F.3d 1161, 1165 (9th Cir. 2018) (noting that state court proceedings were enjoined where federal court had first acquired jurisdiction of the water rights at issue); *cf. Gila River Indian Comm. v. Cranford*, 459 F.Supp.3d 1246, 1256 (D. Ariz. 2020) (concluding doctrine did not apply where the suits concerned a different *res*, i.e., where the state court action had jurisdiction over water rights in tributaries to the Gila River but the federal court had previously exercised jurisdiction over the water rights in the main stem of the Gila River).

The District Court cannot determine whether KID's motion should be granted without determining the extent and effect of the rights found in the ACFFOD, which is the very same *res* over which the Klamath County Circuit Court is now exercising jurisdiction.

4. Remand Is Not Discretionary; It Is Mandatory

While the doctrine of prior exclusive jurisdiction has its roots in both comity considerations and prudential policies of efficient jurisprudence, "it is no mere discretionary abstention rule. Rather, it is a mandatory jurisdictional limitation." *State Engineer*, 339 F.3d at 810 (internal citations and quotations omitted). As the Ninth Circuit has stated, "[w]hether the doctrine is described as a rule of comity or subject matter jurisdiction, courts in this circuit are bound to treat the doctrine as a mandatory rule, not a matter of judicial discretion. If the doctrine applies, federal courts may not exercise jurisdiction." *Chapman*, 651 F.3d at 1044 (internal citations and quotations omitted); *see also Goncalves*, 865 F.3d at 1255 ("[T]he prior exclusive jurisdiction doctrine is a mandatory rule applicable not just in matters with a relationship to probate but in all cases."); *Sexton*, 713 F.3d at 536 n.5 (noting that the rule is better described "as a prudential (although mandatory) common law rule of judicial abstention"); *State Eng'r*, 339 F.3d at 814 (noting the rule "predates [even] our dual federal-state court system") (quoting Wright & Miller, 14 Fed. Practice & Proc. § 3631, at 15). It is clear that, if the rule applies, the case must be remanded.

As set forth above, there is a concurrently pending state court proceeding that involves the same *res*—the respective property rights of KID and Reclamation—that KID is attempting to enforce through its motion. In

determining the motion Reclamation has removed to the District Court, the District Court will necessarily be called upon to interpret the ACFFOD and determine issues related to whether, how, and when it should be enforced. Such a determination impacts the rights decided in the ACFFOD, which are currently under the exclusive jurisdiction of the Klamath County Circuit Court. The motion should clearly be remanded.

Lastly, it bears noting Reclamation itself made the exact argument KID now advances—that the Klamath County Circuit Court has exclusive jurisdiction of this matter—in the Oregon Court of Appeals. Reclamation argued in an amicus brief in the matter of *TPC, LLC v. Oregon Water Resources Department*, Case No. CA A167380, filed on December 7, 2018, that the Klamath County Circuit Court, and only the Klamath County Circuit Court, may exercise jurisdiction over any aspect of the res at issue in the Klamath Adjudication. (*See* Ex. 16 at 16–24.) Specifically, the United States said:

> Here, the Klamath County Circuit Court has properly assumed jurisdiction over the water rights claims in the Klamath Basin Adjudication . . . and it assumed that jurisdiction first. By doing so, it withdrew those issues from any possible jurisdiction of other courts of concurrent jurisdiction "as effectually as if the property had been entirely removed to the territory of another sovereignty." *State Engineer*, 339 F.3d at 809. Two courts cannot have jurisdiction to decide these issues at the same time.

(RJN, Ex. A, at 16.) Reclamation itself therefore recognizes that this matter should be remanded to state court.

5. The District Court Committed Clear Error in Denying the Motion to Remand

The District Court failed to address the issue of prior exclusive jurisdiction in its order in this case. The doctrine, in fact, is *only* referenced in the District Court's opinion where it explains what the parties' respective arguments are. (Ex. 15, at 6–7.) In its discussion and analysis of the motion, the District Court did not reference the doctrine of prior exclusive jurisdiction even once. The District Court did not address any of the elements of the doctrine of prior exclusive jurisdiction. The District Court did not determine whether this motion and the KBA concern the same *res*, even though only one conclusion can be reached there. The District Court did not determine whether a concurrent state proceeding is pending that involves the same *res*, even though again, only one answer could be reached on that. And the District Court provided no analysis as to why, although a concurrent state proceeding is pending which concerns the same *res* at issue here, the doctrine of prior exclusive jurisdiction nevertheless does not apply.

Instead, the District Court's analysis examined whether the United States had waived sovereign immunity under the McCarran Amendment for the type of motion brought by KID. The District Court concluded that it did not, because the

McCarran Amendment waives sovereign immunity only for suits for the "administration" of water rights, whereas the present underlying motion was one for "enforcement." (Ex. 15, at 9–10.) This is a distinction without a difference.

As discussed above, the McCarran Amendment, waives the sovereign immunity of the United States to permit its joinder in two types of suits: (1) those brought "for the adjudication of rights to the use of water of a river system or other source"; and (2) those brought "***for the administration of such rights***." 43 U.S.C. § 666 (emphasis added).

Suits falling under subsection (a)(1) of the McCarran Amendment are the comprehensive water rights adjudications discussed in such cases as *Eagle County*, *Colorado River*, and *San Carlos Apache*.

The motion for preliminary injunction in this case falls under subsection § 666(a)(2), i.e., a suit for the "administration of such rights." A matter involves the "administration" of water rights within the meaning of 43 U.S.C. § 666(a)(2) if there has first been a "prior adjudication of relative general stream water rights." *See South Delta Water Agency v. United States*, 767 F.2d 531, 541 (9th Cir. 1985); *see also Eagle County*, 401 U.S. at 524 ("'[T]he administration of such rights' in § 666(a)(2) must refer to the rights described in (1) for they are the only ones which in this context 'such' could mean."); *San Luis Obispo Coastkeeper v. Dep't of Interior*, 394 F.Supp.3d 984, 994 (N.D. Cal. 2019) ("[S]ubsection (a)(2) pertains

to the administration of adjudicated rights under subsection (a)(1)."); *United States v. Hennen*, 300 F. Supp. 256, 263 (D. Nev. 1968) ("Once there has been such an adjudication and a decree entered, then one or more persons who hold adjudicated water rights can, within the framework of § 666(a)(2), commence among others such actions as described above, subjecting the United States, in a proper case, to the judgments, orders and decrees of the court having jurisdiction.").

It is undisputed that the Klamath Adjudication is the type of proceeding contemplated in § 666(a)(1) of the McCarran Amendment. This Court has specifically said so. *See United States v. Oregon*, 44 F.3d 758, 770 (9th Cir. 1994) ("[W]e hold that the Klamath Basin adjudication is in fact the sort of adjudication Congress meant to require the United States to participate in when it passed the McCarran Amendment."). The Supreme Court has also noted that, in Oregon water rights adjudications such as the Klamath Adjudication, "[a]ll claimants are required to appear and prove their claims; no one can refuse without forfeiting his claim." *Pac. Live Stock Co. v. Lewis*, 241 U.S. 440, 447–48 (1916).

Moreover, the rights determined by the OWRD in the Klamath Adjudication are fully enforceable, even while the judicial phase of the Adjudication is proceeding. ORS 539.170 ("While the hearing of the order of the Water Resources Director is pending in the circuit court, and until a certified copy of the judgment,

order or decree of the court is transmitted to the director, the division of water from the stream involved in the appeal shall be made in accordance with the order of the director."). The Supreme Court has also upheld this specific provision of Oregon law: "[W]e think it is within the power of the state to require that, pending the final adjudication, the water shall be distributed according to the board's order, unless a suitable bond be given to stay its operation." *Pac. Live Stock Co.*, 241 U.S. at 455.

KID's motion for preliminary injunction *expressly* seeks administration of the rights determined in the Klamath Adjudication. KID's entire argument in the motion is that Reclamation is unlawfully discharging stored water from UKL without possessing a water right permitting it to do so. (Ex. 1 at 2–5.) Reclamation is well aware of the fact that water from UKL must be distributed in accordance with the ACFFOD, unless and until a stay is obtained from the Klamath County Circuit Court, having specifically opposed such requests by other water users. (Ex. 1 at 6–9.) The motion argues that Reclamation has no water right permitting it to use stored water in UKL for instream purposes under the ACFFOD, whether those are for the provision of ESA flows,[5] or for tribal trust

[5] As this and other circuits have noted, the ESA does not create new rights or otherwise expand the authority of agencies beyond their authorizing statutes. "[The ESA] directs agencies to 'utilize their authorities' to carry out the ESA's objectives; it does not expand the powers conferred on an agency by its enabling act.'" *See Sierra Club v. Babbitt*, 65 F.3d 1502, 1510 (9th Cir. 1995) (quoting

purposes,[6] and Reclamation has not leased, licensed, purchased, condemned, or otherwise acquired any of the current owners' water rights to use stored water. (Ex. 1 at 9–12.) The specific relief requested by KID is to enjoin Reclamation from releasing stored water without a corresponding water right during the pendency of the Klamath Basin Adjudication, unless and until it seeks and obtains a stay from the Klamath County Circuit Court. (*Id.* at 28.)

Platte River Whooping Crane v. FERC, 962 F.2d 27, 34 (D.C. Cir. 1992)). The D.C. Circuit described as "far-fetched" the argument that the general consultation requirements of the ESA expand agencies' authority to act beyond their enabling acts. *See Platte River Whooping Crane*, 962 F.2d at 34. This principle has not only been upheld by the Ninth and D.C. Circuits, but also the Fifth Circuit. *See Am. Forest & Paper Ass'n v. U.S. EPA*, 137 F.3d 291, 299 (5th Cir. 1998) ("We agree that the ESA serves not as a font of new authority, but as something far more modest: a directive to agencies to channel their existing authority in a particular direction.")

[6] The allocation of water between interstate parties is not susceptible of a straightforward priority analysis, but rather requires application of the law of "equitable apportionment." Moreover, this is not a determination made by federal agency fiat, but rather a matter to be determined amongst the states, who are the only proper parties to an equitable apportionment action. *See South Carolina v. North Carolina*, 558 U.S. 256, 280 (2010) ("A State's citizens also need not be made parties to an equitable apportionment action because the Court's judgment in such an action does not determine the water rights of any individual citizen."). Once the waters of an interstate water source are equitably apportioned between the states, *then* state law divides whatever water that state is entitled to amongst its citizens. *See Nebraska v. Wyoming*, 325 U.S. 589, 627 (1945) ("The equitable share of a State may be determined in this litigation with such limitations as the equity of the situation requires and irrespective of the indirect effect which that determination may have on individual rights within the State."); *Hinderlider v. La Plata River & Cherry Creek Ditch Co.*, 304 U.S. 92, 106–08 (1938) (noting that once an equitable apportionment has occurred, "the apportionment is binding upon the citizens of each State and all water claimants, even where the State had granted the water rights before it entered into the compact").

Inexplicably, the District Court here nonetheless found that this motion was somehow *not* for the administration of water rights. The sole explanation offered by the District Court was as follows: "Nor is [KID's motion] in the nature of an action to administer such rights, but *is instead an enforcement action* to block the release of water to satisfy the rights of California tribes which were not adjudicated in the KBA."[7] (Ex. 15 at 10 [emphasis added].) The Court later reiterated this distinction between an "enforcement" action and an action to administer rights, saying, "This is an enforcement action, not an action to adjudicate or administer rights." (Ex. 15 at 13.)

This holding borders on incomprehensible, and is clearly erroneous. The Court cited no authority distinguishing between an enforcement action on the one hand and an action to "administer" water rights on the other. The Court could not have cited such authority, because no authority for this proposition exists.

[7] This statement is also in error to the extent that it suggests that *none* of the California tribes' rights were adjudicated in the KBA. Again, the KBA is an *in rem* proceeding, which means it determines *all* of the rights in the subject property as against the entire world. *See* Part (B)(2), above. Numerous California residents who claimed water rights in UKL—including a number of California governmental entities such as irrigation districts—in fact participated in the KBA. To the extent that certain tribes in California elected not to participate in the KBA, the KBA still adjudicated their rights *as to water stored in UKL*. Whether they have rights that exist outside of UKL and outside of Oregon is wholly immaterial, as UKL is located entirely within Oregon and is the sole body of water about which this matter is concerned.

Moreover, this holding clearly contravenes Ninth Circuit law. In *South Delta Water Agency v. Reclamation*, this Court considered what subsection (2) of the McCarran Amendment meant. In doing so, it noted, "[w]e agree with the conclusion of United States District Judge Roger D. Foley expressed in *United States v. Hennen*, 300 F.Supp. 256 (D. Nev. 1968), that Congress intended a waiver of immunity under subsection (2) only after a general stream determination under subsection (1)." *South Delta Water Agency v. Reclamation*, 767 F.2d 531, 541 (9th Cir. 1985). This Court then went on to quote approvingly from Judge Foley's opinion, stating:

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

Id. (quoting *Hennen*, 300 F. Supp. at 263) (emphasis added).

This is also why the District Court's analogy to *San Luis Obispo Coastkeeper* makes no sense and is entirely inapposite. In *San Luis Obispo Coastkeeper*, there was no doubt that there *had not been a McCarran Amendment proceeding under § 666(a)(1)*. 394 F.Supp.3d at 994–95 (explaining that the United States was not a party to the *Santa Maria Valley Groundwater Litigation*,

because it claimed no groundwater rights; therefore, that action could not have constituted an "adjudication" under § 666(a)(1)). Because there had not been a prior adjudication of water rights under § 666(a)(1), the petitioners in *San Luis Obispo Coastkeeper* could not seek an administration of "such rights" under § 666(a)(2).

Here, there expressly *has* been a McCarran Amendment-compliant adjudication under § 666(a)(1). This Court decided that issue almost thirty years ago, concluding that "the Klamath Basin adjudication is in fact the sort of adjudication Congress meant to require the United States to participate in" under § 666(a)(1). *United States v. Oregon*, 44 F.3d 758, 770 (9th Cir. 1994). That issue has been put to rest, and under Oregon law, the findings of the ACFFOD are fully enforceable, absent a stay and the posting of a bond, pending the final judicial resolution.

There simply is no difference between an action seeking to *enforce* water rights under a McCarran Amendment-compliant adjudication, and an action seeking to *administer* such rights. The former term "enforce" is encapsulated within the term administer. The District Court invented this distinction out of whole cloth. This constitutes "clear error," and requires a writ be issued directing the District Court to remand this matter to the Klamath County Circuit Court, to allow that Court to adjudicate such claims.

C. The District Court's Error Is Compounded by Its Earlier Error

The fourth prong of the *Bauman* test looks to whether "[t]he district court's order is an oft-repeated error, or manifests a persistent disregard of the federal rules." *Bauman*, 557 F.2d at 654–55. The effect of this order, when combined with another order of the District Court for the District of Oregon, which is currently on review and is listed as a related case below, is to utterly eviscerate the McCarran Amendment.

In the prior case brought by KID, *Klamath Irrigation District v. Bureau of Reclamation, et al.*, District Court Case No. 1:19-cv-00451-CL, in the District Court of the District of Oregon—now pending in this Court under Case No. 20-36009—KID sought to enforce the findings of the OWRD's ACFFOD through a suit against Reclamation. *See Klamath Irrigation District v. Reclamation*, Case No. 20-36009, Doc. No. 9, at 14–19. Two Native American tribes intervened, claiming that they were necessary and indispensable parties who could nevertheless not be joined due to sovereign immunity. *See id.* The Tribes claimed that, in their absence, the suit must be dismissed. *See id.* The District Court agreed, and found that that proceeding was "clearly not a McCarran Amendment case," without further explanation. *See id.* at 22, 26–31.

If that case is not a McCarran Amendment case under § 666(a)(2), then this action *must* qualify. The underlying motion here specifically seeks to enforce and

administer the rights found in the Klamath Basin Adjudication. It was even brought as *part of* the Klamath Basin Adjudication itself. If neither a proceeding brought in state court as part of a McCarran Amendment adjudication, nor a proceeding brought in federal court ancillary to a McCarran Amendment adjudication—both of which clearly invoked the McCarran Amendment proceeding—are suitable to proceed under § 666(a)(2), then KID is utterly without a remedy to enforce its water rights.

Such a decision would have dire consequences, as it would entirely negate the purpose of such water rights proceedings. Determination of rights without a means to enforce them is utterly worthless. This factor weighs in favor of the Court granting writ review, because KID and other litigants in McCarran Amendment-adjudications must know where and how they may seek to enforce those rights. The District Court decision in this case risks leaving the many participants to such water rights proceedings without any venue in which to enforce those rights against the federal government.

D. The District Court's Error Does Not Raise Issues of First Impression

The District Court's error here does not raise new or novel issues of law. Indeed, the Ninth Circuit has already approved of the notion that seeking to "administer such rights" within the scope of § 666(a)(2) specifically means seeking to "enforce" those rights. *South Delta Water Agency*, 767 F.2d at 541. However,

this fact simply highlights the "clear error" committed by the District Court, which supports the issuance of a writ in this instance.

E. Considered Together, the Writ of Mandamus Should Issue

Weighing the factors together, it is clear that a writ should issue in this case to correct the District Court's clear error in concluding that, because this is an "enforcement" action, it does not fall under § 666(a)(2) of the McCarran Amendment. Such a decision is plainly wrong, and violates language that this Court has cited with express approval in the past. Moreover, this holding threatens to entirely negate the McCarran Amendment. What would be the purpose of adjudicating water rights if no action could be brought to enforce those rights?

Further, this issue should be resolved now, as it is a question of jurisdiction-level significance. Once a prior court assumed jurisdiction over the *res* of the water rights in UKL, Ninth Circuit law prohibits the federal district courts from exercising jurisdiction over components of that *res* in *in rem* or quasi *in rem* proceedings. This rule is mandatory, not discretionary. To allow this case to proceed in what is clearly the wrong court would do great harm to KID, and be a wasteful and inefficient use of judicial resources. Regardless of the District Court's decision on the underlying motion for preliminary injunction—the substantive action before the federal court here—the decision will be necessarily infirm and subject to challenge, because it will have been made by the wrong

court. Resolving issues of jurisdiction and the proper locus for a case is the traditional role of mandamus, and such a writ should issue here to correct this manifest violation of law from the District Court.

CONCLUSION

For the reasons set forth above, KID requests that this Court grant this petition and issue a writ of mandamus to the U.S. District Court for the District of Oregon directing that it immediately remand the motion for preliminary injunction to state court under the doctrine of prior exclusive jurisdiction.

Dated: June 13, 2022

WANGER JONES HELSLEY PC

By: __/s/ Christopher A. Lisieski _____

John Kinsey and Christopher A. Lisieski, Attorneys for Petitioner

Dated: June 13, 2022

RIETMANN LAW, P.C.

By: __/s/ Nathan Rietmann _____

Nathan Rietmann, Attorney for Petitioner

STATEMENT OF RELATED CASE

The matter *Klamath Irrigation District v. Reclamation, et al.*, Case No. 20-36009. This case is related because it raises the same or closely related issues, including: application of the McCarran Amendment, 43 U.S.C. § 666(a)(2) to proceedings seeking to administer or enforce water rights determined under § 666(a)(1) within the Klamath Basin Adjudication.

Dated: June 13, 2022

WANGER JONES HELSLEY PC

By: /s/ Christopher A. Lisieski

John Kinsey and Christopher A. Lisieski, Attorneys for Petitioner

CERTIFICATE OF COMPLIANCE

I certify that this brief complies with the type-volume limitation set forth in Rule 32(a)(7)(B) of the Federal Rules of Appellate Procedure. This brief uses a proportional typeface and 14-point font, and contains 10,610 words.

Dated: June 13, 2022

WANGER JONES HELSLEY PC

By: /s/ Christopher A. Lisieski

John Kinsey and Christopher A. Lisieski, Attorneys for Petitioner

CERTIFICATE OF SERVICE

I am a citizen of the United States and employed in Fresno County, California. I am over the age of eighteen years and not a party to the within-entitled action. My business address is Wanger Jones Helsley PC, 265 E. River Park Circle, Suite 310, Fresno, CA 93720.

On June 13, 2022, I served the foregoing document(s) described as:

- **Petition for Writ of Mandamus to U.S. District Court for the District of Oregon**

on all interested parties in this action as follows:

__X__ **(BY CM/ECF)** Upon the filing of the foregoing document with the Clerk of the Court using the CM/ECF system, a notification of such filing (NEF) will be transmitted to the following:

Jeanne Nicole DeFever
Nicole.defever@doj.state.or.us; Julie.a.cohen@doj.state.or.us; marian.mohamed@doj.state.or.us
Nathan R. Rietmann
nathan@rietmannlaw.com
Thomas K. Snodgrass
Thomas.snodgrass@usdoj.gov; efile_nrs.enrd@usdoj.gov; seth.allison@usdoj.gov; Carla.valentino@usdoj.gov
Robert P. Williams
Robert.p.williams@usdoj.gov; katrina.tomecek@sol.doi.gov; EFILE_WMRS.ENRD@usdoj.gov; Luke.Miller@sol.doi.gov; Michael.gheleta@sol.doi.gov; Kerry.OHara@sol.doi.gov

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U.S. District Court of Oregon
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X____ (FEDERAL) I declare that I am employed in this office of a member of the bar of this court at whose direction this service was made. Executed on June 13, 2022, at Fresno, California.

_____/s/Kimberley Dodd_____
Kimberley Dodd