No. 19-1134

In the Supreme Court of the United States

LONNY E. BALEY, ET AL., PETITIONERS

v.

UNITED STATES, ET AL.

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

BRIEF FOR THE UNITED STATES IN OPPOSITION

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QUESTION PRESENTED

In 2001, due to severe drought, the United States Bureau of Reclamation directed petitioners, farmers within the Klamath Irrigation Project, to curtail their use of water for irrigation. The temporary curtailment was required to maintain stream flows and lake levels necessary to protect fish listed under the Endangered Species Act of 1973 (ESA), 16 U.S.C. 1531 *et seq.*, that are vital to Klamath Basin Tribes in Oregon and California. Petitioners alleged a taking of their beneficial interests in project water rights. The court of appeals affirmed the Court of Federal Claims' rejection of that claim, on the ground that the water needed under the ESA was within federal reserved instream water rights for the Tribes, which are senior to Klamath Irrigation Project water rights. The question presented is:

Whether the court of appeals, in adjudicating petitioners' takings claims, erred in considering the reserved water rights of the Klamath Basin Tribes relative to Klamath Irrigation Project water rights.

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1-63) is reported at 942 F.3d 1312. The opinion of the Court of Federal Claims (Pet. App. 72-229) is reported at 134 Fed. Cl. 619. A prior opinion of the court of appeals (Pet. App. 269-314) is reported at 635 F.3d 505. A prior opinion of the Court of Federal Claims (Pet. App. 230-267) is reported at 129 Fed. Cl. 722.

JURISDICTION

The judgment of the court of appeals was entered on November 14, 2019. On January 29, 2020, the Chief Justice extended the time within which to file a petition for a writ of certiorari to and including March 13, 2020, and the petition was filed on that date. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

Petitioners are farmers who receive irrigation water from the Klamath Irrigation Project (Klamath Project or Project), a federal reclamation project operated by the U.S. Bureau of Reclamation (Reclamation), an agency within the Department of the Interior. In 2001, a year of severe drought, Reclamation directed petitioners to curtail their diversion of water from the Klamath River and Upper Klamath Lake, to avoid jeopardy to fish species listed under the Endangered Species Act of 1973 (ESA), 16 U.S.C. 1531 *et seq.*, and to protect the fisheries of Klamath Basin Indian Tribes. Petitioners alleged a taking of their water rights, without just compensation, in violation of the Fifth Amendment. After 18 years of litigation, the court of appeals affirmed the Court of Federal Claims' (CFC) determination that no taking occurred, on the ground that water unavailable for irrigation in 2001 was within the scope of senior federal reserved water rights for the tribal fisheries.

A. Legal And Factual Background

1. The Klamath Project and related contracts

a. Congress enacted the Reclamation Act (Act), ch. 1093, 32 Stat. 388, to enable the "massive projects" needed to reclaim arid and semi-arid lands in the western States that otherwise could not be settled. *California* v. *United States*, 438 U.S. 645, 649 (1978). The Act authorized and directed the Secretary of the Interior (Secretary) (a) to identify suitable project locations; (b) to withdraw necessary lands from public entry; (c) to construct project works; (d) to reopen project lands to homesteading, subject to water charges and other terms; (e) to designate any private lands to be served by a project; and (f) to impose charges upon

homesteaders and private landowners, equitably apportioned, to recover project construction and operation and maintenance costs. Ch. 1093, §§ 2-4, 32 Stat. 388-389. Congress directed the Secretary to "proceed in conformity with [state] laws" when appropriating waters for such projects. 43 U.S.C. 383.

In 1905, Congress authorized the Klamath Project on the Oregon-California border. Pet. App. 75. The same year, the United States Reclamation Service—the predecessor to the current Bureau of Reclamation—provided notice under Oregon law of the United States' intent to appropriate "[a]ll of the waters of the Klamath Basin in Oregon, constituting the entire drainage basin[] of the Klamath River" for the Project. *Id.* at 15 (citation omitted; first set of brackets in original); see *id.* at 76-77. The United States posted a similar notice under California law. C.A. App. 2722.

The Klamath Project is located in the upper basin of the Klamath River east of the Cascade Range. The project straddles the southern Oregon and northern California borders. Pet. App. 6. Although the climate is mostly semi-arid, basin lands receive substantial surface flows from the Cascades and from uplands to the east. See U.S. Geological Survey, Dep't of the Interior, *Groundwater Hydrology of the Upper Klamath Basin, Oregon and California* 1-2 (2010), https://pubs.usgs.gov/sir/2007/5050/. Prior to construction, the Project area was dominated by three large, shallow lakes—Upper Klamath Lake, Lower Klamath Lake, and Tule Lake—and by a network of wetlands that covered hundreds of square miles. *Ibid.*

In most Reclamation projects, rivers are dammed to create large reservoirs and diversion works for the storage and delivery of water to arid or semi-arid lands. By

contrast, the Klamath Project was a massive undertaking to drain lands that were flooded on a regular basis, and to regulate surface flows to deliver water to these and other lands for agricultural purposes. C.A. App. 611, 2067, 2078.

The principal storage feature of the Klamath Project is Upper Klamath Lake in Oregon. C.A. App. 2813-2814; see Pet. App. 6, 16. Reclamation notched a 100-foot wide channel through the reef that forms the naturally occurring lake and constructed the Link River Dam just downstream, enabling Project operators to regulate lake levels, including to drain the lake below natural levels. C.A. App. 2712, 2813-2814. Between 1906 and 1966, Reclamation constructed other Project works, which divert water from Upper Klamath Lake and from downstream locations on the Klamath River and convey it through canals and laterals to individual users in Oregon and California. Pet. App. 16; see C.A. App. 2701-2720.

Today, the Klamath Project includes a vast drainage and distribution system, delivering water from Upper Klamath Lake and other diversion points on the Klamath River to approximately 1400 farms on more than 200,000 acres of irrigated lands, as well as to the Lower Klamath and Tule Lake National Wildlife Refuges. C.A. App. 2496, 3183 (map); see Pet. App. 16. In an average year, 1.3 million acre-feet of water flow into Upper Klamath Lake. C.A. App. 613. Because this average inflow far exceeds the lake's usable storage capacity (approximately 500,000 acre-feet), the Klamath Project has little carryover storage from one irrigation season to the next. *Id.* at 1976. Instead, the supply of water for irrigation and for fish and wildlife is generally limited to annual stream production. *Ibid.*

b. Before delivering water through any Project works, Reclamation entered contracts to govern delivery terms and repayment charges. See C.A. App. 10-17; Pet. App. 78-84. In 1905, Reclamation contracted with the Klamath Water Users Association (KWUA), an entity organized to represent all Project water users. Pet. App. 83-84. Reclamation also entered contracts with individual users, utilizing standard form applications. *Id.* at 79-83. Under "Form A," homesteaders on public lands applied for a "permanent water right" to be "appurtenan[t]" to the "irrigable lands" of their homestead tracts. *Id.* at 79-82 (capitalization omitted). Under "Form B," private landowners applied for a right to receive up to a specified per-acre amount of water for irrigation. *Id.* at 82-83. In describing the "water right" to be received by Project water users, Form A stated that in times of "shortage," users would receive an "equitable proportionate share" to be determined by the Project manager. *Id.* at 80. Form A further stated:

> On account of drought, inaccuracy in distribution, or other cause, there may occur at times a shortage in the water supply, and while the United States will use all reasonable means to guard against such shortages, in no event shall any liability accrue against the United States, its officers, agents, or employees, for any damage direct or indirect arising therefrom.

Ibid.

KWUA later reorganized under Oregon law as the Klamath Irrigation District (KID); Project homesteaders in California organized under California law as the Tulelake Irrigation District (TID). Pet. App. 85-87. In the 1950s, KID and TID entered amendatory repayment contracts with Reclamation, which reiterated the

shortage provision. *Id.* at 86-88. Those contracts remained in force in 2001. *Ibid.*[1]

In 1911, Congress enacted the Warren Act, ch. 141, 36 Stat. 925 (43 U.S.C. 523 *et seq.*), which authorized Reclamation to construct additional works to deliver project water to irrigators outside of designated project lands, if a project had "excess" "storage or carrying capacity." 36 Stat. 925 (43 U.S.C. 523); see § 2, 36 Stat. 926 (43 U.S.C. 524). Between 1915 and 1953, Reclamation entered into Warren Act contracts with irrigation districts and individuals for the delivery of Klamath Project water. Pet. App. 88-93. Most of these contracts contain provisions virtually identical to the Form A provision disclaiming federal liability for water shortages caused by drought or "other cause." *Id.* at 91; see *id.* at 90. The remaining Warren Act contracts provide that "[t]he United States shall not be liable for failure to supply water under this contract caused by hostile diversion, unusual drought, interruption of service made necessary by repairs, damages caused by floods, unlawful acts or unavoidable accidents." *Id.* at 91.

Reclamation also leases approximately 23,000 acres of land within the Lower Klamath and Tule Lake National Wildlife Refuges to farmers for agricultural use. C.A. App. 15. The "basic contract" lease provides that the "United States, its officers, agents and employees * * * shall not be held liable for damages because irrigation water is not available." *Id.* at 3170.

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[1] Although Form B did not include the no-liability provision found in Form A, landowners utilizing Form B were required to be part of the KWUA, which later became KID; they were thus subject to the amended repayment contract between KID and Reclamation, which contained the no-liability provision. See Gov't C.A. Br. 61-64.

2. Klamath Basin Tribes and tribal fisheries

Reclamation must operate the Klamath Project in conformity with the tribal trust resources of the Klamath Tribes in Oregon and the Hoopa Valley Tribe and Yurok Tribe in California, each of which holds instream water rights for tribal fisheries in the Klamath Basin. Pet. App. 6, 18.

a. i. In the early 19th Century, the Klamath and Modoc Tribes and the Yahooskin Band of Snake Indians (collectively, the Klamath Tribes) occupied 22 million acres of territory in southern Oregon. *Oregon Dep't of Fish & Wildlife* v. *Klamath Indian Tribe*, 473 U.S. 753, 755 (1985) (*ODFW*). In the Treaty of Oct. 14, 1864 (1864 Treaty), U.S.-Klamath and Moadoc Tribes and Yahooshkin Band of Snake Indians, 16 Stat. 707, the Klamath Tribes ceded their aboriginal territory in exchange for a reservation of approximately 1.9 million acres, art. I, 16 Stat. 707. Upper Klamath Lake formed the southwestern boundary of the reservation under the Treaty. *Klamath & Moadoc Tribes* v. *United States*, 86 Ct. Cl. 614, 617 (1938). The 1864 Treaty gave the Klamath Tribes "the exclusive right of taking fish in the streams and lakes" of the reservation. *ODFW*, 473 U.S. at 755 (quoting 1864 Treaty, art. I, 16 Stat. 708); see Pet. App. 18-19. In addition, under the "so-called '*Winters* doctrine,'" *Gila River Pima-Maricopa Indian Cmty.* v. *United States*, 695 F.2d 559, 561 (Fed. Cir. 1982) (citing *Winters* v. *United States*, 207 U.S. 564 (1908)), the establishment of the reservation impliedly reserved "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).

In 1954, Congress passed the Klamath Termination Act, ch. 732, 68 Stat. 718 (25 U.S.C. 564 *et seq.* (2012)),

which terminated federal supervision of the Klamath Tribes. See *ODFW*, 473 U.S. at 761-762; Pet. App. 19-20. The Termination Act stated, however, that it did not "abrogate any fishing rights or privileges of the tribe or the members thereof enjoyed under Federal treaty." 25 U.S.C. 564m(b) (2012); see Pet. App. 20; *ODFW*, 473 U.S. at 768; *Kimball* v. *Callahan*, 493 F.2d 564, 567-570 (9th Cir.), cert. denied, 419 U.S. 1019 (1974); see also *United States* v. *Winans*, 198 U.S. 371, 381 (1905).

In 1975, the United States filed suit in federal district court to obtain a declaration of federal water rights in the upper Williamson River in Oregon, which flows through the former Klamath Reservation and into Upper Klamath Lake. *United States* v. *Adair*, 723 F.2d 1394, 1397-1399 (9th Cir.), cert. denied, 467 U.S. 1252 (1984); see C.A. App. 3181-3182 (maps). The Klamath Tribes intervened to assert federal treaty rights and reserved rights for tribal hunting and fishing. *Adair*, 723 F.2d at 1397-1399. The court of appeals held that the Klamath Tribes' fishing rights survived the Termination Act and that the Tribes possess non-consumptive federal reserved water rights, "with a priority date of immemorial use, sufficient to support exercise of treaty hunting and fishing rights" on former reservation lands. *Id.* at 1415; see *id.* at 1408-1415. In 1986, Congress restored the Klamath Tribes to federal recognition. Klamath Indian Tribe Restoration Act, Pub. L. No. 99-398, 100 Stat. 849 (25 U.S.C. 566 *et seq.* (2012)).

ii. Although federal reserved water rights for an Indian Tribe derive from and are defined by federal law, the quantification of such reserved water rights may take place in the context of a general stream adjudication in state court, pursuant to the waiver of the United

States' sovereign immunity in the McCarran Amendment, 43 U.S.C. 666. The State of Oregon has established a statutory procedure for the mass adjudication of water rights; in 1975, the Oregon Water Resources Department invoked that procedure to determine the surface water rights of all claimants in the Klamath River Basin in Oregon, in a proceeding known as the Klamath Basin Adjudication (KBA). See *United States* v. *Oregon*, 44 F.3d 758, 762 (9th Cir. 1994), cert. denied, 516 U.S. 943 (1995). The Ninth Circuit subsequently held that the McCarran Amendment's waiver of federal sovereign immunity applies to the KBA. *Id.* at 763-770.

The United States therefore filed water rights claims on behalf of the Klamath Tribes in the KBA, including claims for reserved water rights in Upper Klamath Lake, in the form of lake levels necessary to sustain harvestable levels of two fish species of longstanding significance to the Klamath Tribes: the Lost River sucker and shortnose sucker. See Amended and Corrected Findings of Fact and Order of Determination (Feb. 28, 2014), KBA_ACFFOD_04938-04946.[2] The two suckerfish, which are listed as endangered under the ESA, are freshwater species endemic to the upper Klamath Basin and were "staples in the diet of the Klamath Indians for thousands of years." 53 Fed. Reg. 27,130, 27,131 (July 18, 1988). In 2014, the KBA adjudicator issued an order confirming the Upper Klamath Lake water right, with a priority date of "time immemorial." KBA_ACFFOD_04946 (capitalization omitted); see KBA_ACFFOD_04947-04997. That order remains subject to judicial review. Or. Rev. Stat. § 539.150 (2019).

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[2] The cited KBA documents are available at https://www.oregon.gov/OWRD/programs/WaterRights/Adjudications/KlamathRiverBasinAdj/Pages/ACFFOD.aspx.

b. The Hoopa Valley Tribe and the Yurok Tribe (the California Tribes) are federally recognized Indian tribes with reservations in the lower Klamath Basin in California. *Karuk Tribe of California* v. *Ammon*, 209 F.3d 1366, 1370-1372 (Fed. Cir. 2000), cert. denied, 532 U.S. 941 (2001); see Pet. App. 21. The Hoopa Valley Reservation is a nearly 12-by-12 mile square at the point where the Trinity River joins the Klamath River. Pet. App. 21. The Yurok Reservation is a roughly 45-mile strip (one mile on each side of the Klamath River) extending from the Hoopa Valley Reservation downstream to the Pacific Ocean. *Ibid.*; see *Mattz* v. *Superior Court*, 758 P.2d 606, 610 (Cal. 1988); C.A. App. 3182. The reservations were established by Executive Orders between 1855 and 1891. See *Mattz* v. *Arnett*, 412 U.S. 481, 485-494 (1973); see also Hoopa-Yurok Settlement Act, 25 U.S.C. 1300i *et seq.* (2012) (partitioning lands into two separate reservations).

Historically, and for generations since the reservations were established, the California Tribes have depended on Klamath River salmon for their nourishment and economic livelihood. *Parravano* v. *Babbitt*, 70 F.3d 539, 542 (9th Cir. 1995), cert. denied, 518 U.S. 1016 (1996). The United States reserved the Yurok and Hoopa Valley lands to preserve the Tribes' traditional homelands and fishing rights. *Id.* at 542, 545-546. The Southern Oregon/Northern California Coast (SONCC) coho salmon, which is listed as threatened under the ESA, is an ecologically significant unit of coho salmon, an anadromous species that spawns in the Klamath River. 62 Fed. Reg. 24,588 (May 6, 1997). SONCC coho salmon are a traditional staple of the California Tribes, and significant to Yurok and Hoopa Valley subsistence fisheries. *Id.* at 24,593; see Pet. App. 21.

3. ESA requirements and the 2001 water shortages

Section 7 of the ESA requires federal agencies, in consultation with the Fish and Wildlife Service (FWS) and the National Marine Fisheries Service of the Department of Commerce (NMFS), to "insure that any action authorized, funded, or carried out by [the] agency * * * is not likely to jeopardize the continued existence of any endangered species or threatened species or result in the destruction or adverse modification of [critical] habitat." 16 U.S.C. 1536(a)(2). In 1999, the Ninth Circuit held that the Klamath Project is subject to that requirement, as well as to senior federal reserved rights for tribal fisheries. *Klamath Water Users Protective Ass'n* v. *Patterson*, 204 F.3d 1206, 1213-1214, cert. denied, 531 U.S. 812 (2000).

In 2001, due to severe drought, Project operators predicted a "critical dry" year and record-low inflows to Upper Klamath Lake. Pet. App. 22 (citation omitted); C.A. App. 2054. In formal consultation pursuant to ESA Section 7 concerning Reclamation's proposed 2001 operations, FWS and NMFS issued biological opinions (BiOps) that determined that proposed diversions from Upper Klamath Lake and the Klamath River for irrigation were likely to jeopardize the continued existence of the suckerfish and SONCC coho salmon, and to adversely modify their critical habitat. Pet. App. 24-25. As required by the ESA, 16 U.S.C. 1536(b)(3)(A), the BiOps identified "reasonable and prudent alternatives" (here, operating conditions) that would enable Reclamation to comply with the statute. Pet. App. 25 (citation omitted). These conditions included minimum lake levels in Upper Klamath Lake to protect suckerfish habi-

tat and minimum stream flows in the Klamath River below Iron Gate Dam to protect SONCC coho habitat. *Ibid.*

In April 2001, Reclamation issued a final 2001 Operations Plan for the Klamath Project, which adopted the minimum water levels dictated by the reasonable and prudent alternatives in the BiOps issued by FWS and NMFS. Pet. App. 25. Reclamation announced that such action would both meet the requirements of the ESA and protect tribal trust fisheries. *Id.* at 25-26. The Operating Plan stated that "only limited deliveries of Project water will be made for irrigation," *id.* at 25 (citation omitted), and Reclamation notified all contractors that "no Project water shall be diverted or used in 2001 unless expressly authorized by Reclamation," *id.* at 110 (emphasis omitted).[3]

As forecast, from April through July 2001, there was insufficient water in the upper Klamath Basin to meet the minimum lake levels and stream flows and provide diversions for irrigation. Pet. App. 276-277. Reclamation authorized agricultural diversions in late July, and released approximately 70,000 acre-feet of water to Project irrigators for the 2001 irrigation season. *Id.* at 27.

B. Procedural History

1. Petitioners are a consolidated class of water users who receive water from the Klamath Project under individual contracts with the United States or contracts between 14 irrigation districts or organizations and the United States. Pet. App. 6. Petitioners initiated this

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[3] A group of Klamath Project farmers sought to enjoin the 2001 Operations Plan, but they voluntarily dismissed the action after the district court denied a preliminary injunction. See Pet. App. 27 n.15.

action in the Court of Federal Claims (CFC) in October 2001, alleging that the 2001 curtailment of Project water deliveries for irrigation constituted a taking of their water rights without just compensation in violation of the Fifth Amendment. *Id.* at 6-7.[4]

The United States moved to stay the action in light of the ongoing KBA. Pet. App. 120. The United States argued that petitioners' takings claims related to Project water rights that remained subject to adjudication in the KBA. *Ibid.* Petitioners responded that their water rights did "not depend upon the adjudication for recognition," and subsequently sought partial summary judgment on the ground that they did not claim "title" to Project water rights, but instead claimed a taking of their "beneficial interests" in such rights. *Id.* at 120-121. Based on those representations, the CFC denied a stay. *Id.* at 121-122. The CFC subsequently granted the United States' motion for summary judgment, holding that the United States held all property interests in Project water rights and that petitioners' remedies sounded only in contract. *Id.* at 282-288.

Petitioners appealed, and the court of appeals certified several questions of Oregon law to the Oregon Supreme Court, including whether Oregon law recognizes

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[4] The case was originally brought by the irrigation organizations and 13 individual Project water users. Pet. App. 6-7. In 2007, a separate group of 21 Project water users filed a similar action; the CFC ultimately consolidated the cases for trial. *Id.* at 125-127. Before trial, the CFC also granted a motion for class certification to include, as opt-in plaintiffs, all persons who own or lease lands within or receive water from the 14 irrigation organizations, who claim an appurtenant right to Project water, and who allege a Fifth Amendment taking resulting from the 2001 Project operations. *Id.* at 10, 65-71. After trial, all organizational plaintiffs voluntarily dismissed their claims. *Id.* at 11.

"beneficial * * * interest[s]" in water rights and whether Klamath Project users held such interests. Pet. App. 402-405; see *id.* at 27 & n.16. As relevant here, the Oregon Supreme Court determined that a water user could acquire a beneficial interest in the water appropriated by another entity if (1) the water was appropriated for the user's benefit, (2) the water right became appurtenant to the user's land, and (3) the user's interest was not modified by contract. *Id.* at 375. The court declined to determine the effect of the Klamath Project contracts on Project water rights, because "all the agreements between the parties [we]re not before [the court]." *Ibid.*; see *id.* at 28 n.2.

Following receipt of the Oregon Supreme Court's decision, the court of appeals vacated the CFC's prior decision and remanded. See Pet. App. 29. The court of appeals instructed the CFC to determine on remand "whether [petitioners] have asserted cognizable property interests," which would depend on "whether contractual agreements between [petitioners] and the government have clarified, redefined, or altered the * * * beneficial relationship so as to deprive [petitioners] of cognizable property interests for purposes of their takings * * * claims." *Ibid.* (quoting *id.* at 299-300).

2. On remand, the CFC addressed three sets of questions. First, in a pretrial ruling, the CFC held that petitioners' claims should be analyzed as potential physical—rather than regulatory—takings, notwithstanding the lack of any physical intrusion by the federal government on petitioners' lands. Pet. App. 230-267; see *id.* at 173-178.

Second, following a ten-day trial, the CFC issued findings of fact and conclusions of law regarding the impact of the Project contracts on the users' water rights.

Pet. App. 150-170. The CFC held that two groups of Project users were contractually barred from seeking compensation for the 2001 water shortages: (1) users who receive Project water under Warren Act contracts that disclaim federal liability on account of drought or "other cause"; and (2) refuge lessees whose Project water rights are subject to a materially similar disclaimer. *Id.* at 168; see *id.* at 168-170. By contrast, the CFC determined that the takings claims of Project water users within KID and TID were not contractually precluded. Although the KID, TID, and Form A contracts contain a materially similar disclaimer of liability, the CFC determined that individual users within KID and TID are not bound by the KID and TID contracts, and that the Form A disclaimer was superseded by homestead patents. *Id.* at 154-161. The CFC likewise held that the takings claims of users who receive water under Warren Act contracts that do not contain a broad disclaimer of liability were not barred. *Id.* at 161-169.

Third, the CFC addressed the impact of tribal reserved water rights. Pet. App. 195-227. Although the water rights of the Klamath, Yurok, and Hoopa Valley Tribes for tribal fisheries in the Klamath River had not then been adjudicated, the CFC observed that "[r]eserved rights 'need not be adjudicated only in state courts'"; rather, "'federal courts have jurisdiction * * * to adjudicate the water rights claims of the United States.'" *Id.* at 199 (quoting *Cappaert*, 426 U.S. at 145); see *id.* at 196-199, 207-208, 224-225.[5]

The CFC then held that the Klamath Basin Tribes have federal reserved rights in the form of minimum

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[5] As noted above, the Ninth Circuit had partially adjudicated the rights of the Klamath Tribes in *Adair*, 723 F.2d at 1408-1415.

lake levels and stream flows necessary for tribal fisheries, and that such rights are senior to Klamath Project rights. Pet. App. 200-208. The CFC observed that "[a]n implied reservation of water for an Indian reservation will be found where it is necessary to fulfill the purposes of the reservation." *Id.* at 200 (citation omitted). The CFC cited "uncontested evidence" that the Lost River sucker and short nose sucker played an important role in the Klamath Tribes' history, and that the Klamath Reservation was established in part to preserve the Tribes' livelihood in fishing. *Id.* at 202. The CFC likewise observed that when the Yurok and Hoopa Valley reservations were created, the salmon fisheries were "not much less necessary" to the Tribes' existence "than the atmosphere they breathed," and the reservations were established to preserve the Tribes' livelihood in the salmon fishery. *Id.* at 203; see *id.* at 203-205 (citation omitted).

The CFC determined that it did not need to quantify the tribal water rights because such rights were not less than the amount necessary to avoid jeopardy to the subject fish species. Pet. App. 205-219. In making that determination, the CFC relied on the BiOps prepared by FWS and NMFS. *Ibid.* Because petitioners took the view that tribal water rights were irrelevant to their takings claims, they did not introduce evidence concerning the Tribes' water rights. *Id.* at 218 n.27.

The CFC ultimately held that Reclamation's operational decisions in 2001 to maintain minimum lake levels and downstream flows, as required by the ESA, were within the scope of senior reserved water rights for tribal fisheries. Pet. App. 226-227. The court therefore determined that the United States did not engage in a taking of petitioners' water rights. *Ibid.*

3. The court of appeals affirmed. Pet. App. 1-63. The parties agreed that affirmance was required if the CFC "did not err in holding that, in 2001, the superior water rights of the Tribes required that [Reclamation] temporarily halt deliveries of water to [petitioners]." *Id.* at 40. The court therefore addressed only the question of tribal water rights. *Ibid.*

The court of appeals rejected a number of challenges (which petitioners do not renew in this Court) to the scope of tribal water rights. Pet. App. 49-58. The court then rejected petitioners' argument that "it was contrary to Oregon law, * * * and thus the Reclamation Act, for Klamath Project water to be 'delivered' to anyone other than the Klamath farmers without there first being a final adjudication and quantification" of water rights in state court. *Id.* at 58 (citation omitted). The court of appeals explained that under decisions of this Court and the courts of appeals, "there is no need for a state adjudication to occur before federal reserved rights are recognized." *Id.* at 59 (citing *Arizona* v. *California*, 373 U.S. 546, 597 (1963); *Cappaert*, 426 U.S. at 145; *Colville Confederated Tribes* v. *Walton*, 752 F.2d 397, 400 (9th Cir. 1985), cert. denied, 475 U.S. 1010 (1986)); see *id.* at 62. The court also rejected petitioners' argument that the California Tribes had waived their rights by not participating in the Oregon KBA. *Id.* at 61. The court observed that while "states have the ability to adjudicate rights in a water or river system within their jurisdiction, * * * they cannot adjudicate water rights in another state." *Ibid.* The court concluded that petitioners' water rights were "subordinate to the Tribes' federal reserved water rights," and thus that Reclamation's actions in 2001 "did not constitute a taking of [petitioners'] property." *Id.* at 63.

ARGUMENT

Petitioners contend (Pet. 16-34) that the court of appeals erred in holding that their water rights were subordinate to the Tribes' water rights, absent a final state adjudication of such rights. Petitioners' arguments lack merit, and the decision below does not conflict with any decision of this Court or another court of appeals. The petition for a writ of certiorari should be denied.

1. The court of appeals correctly determined that in order to adjudicate petitioners' takings claims, federal courts could evaluate the scope of the Tribes' water rights, even though those rights had not been subject to a final adjudication in state court. As the court of appeals observed, because the "'volume and scope of particular reserved rights . . . are federal questions,' * * * there is no need for a state adjudication to occur before federal reserved rights are recognized." Pet. App. 59a (quoting *Colorado River Water Conservation Dist.* v. *United States*, 424 U.S. 800, 813 (1976)).

Petitioners' contrary arguments lack merit. To begin, petitioners arguably waived the contention that federal courts could not adjudicate their claims until the KBA proceeding was complete by opposing the government's motion in the CFC for a stay pending that proceeding. See p. 13, *supra*.

In any event, petitioners are incorrect to assert (Pet. 17-21) that the court of appeals' decision conflicts with the McCarran Amendment, 43 U.S.C. 666, this Court's interpretation of it, and Oregon's effort to adjudicate Klamath Basin rights pursuant to the Amendment. The McCarran Amendment waives federal sovereign immunity and consents to the joinder of the United States in "any suit (1) for the adjudication of rights to the use of water of a river system or other source, or (2) for the

administration of such rights." 43 U.S.C. 666(a); see *Colorado River*, 424 U.S. at 802-803. The waiver includes consent for the determination of federal reserved rights for Indians. *Colorado River*, 424 U.S. at 809-813. As this Court has held, however, the McCarran Amendment "in no way diminished" federal courts' jurisdiction to adjudicate suits regarding "claimed federal water rights," including those reserved for Indians. *Id.* at 807-809 (addressing jurisdiction under 28 U.S.C. 1345).

The KBA is a suit for the adjudication of all pre-1909 state-law rights and federal reserved rights to the use of the Klamath River system in Oregon, see Or. Rev. Stat. § 539.010 (2019), and has been held to fall within the McCarran Amendment's waiver of sovereign immunity, *United States* v. *Oregon*, 44 F.3d 758, 762-764, 770-771 (9th Cir. 1994), cert. denied, 516 U.S. 943 (1995).[6] Accordingly, the United States filed claims in the KBA for its pre-1909 state-law water rights and its federal reserved water rights in Oregon, including claims on behalf of the Klamath Tribes. Pet. App. 17-18, 103-104. In 2014, the KBA adjudicator determined that the United States holds reserved water rights in Upper Klamath Lake on behalf of the Klamath Tribes, in the form of minimum lake levels necessary for protecting suckerfish, with a priority date of "time immemorial." KBA_ACFFOD_04946 (capitalization omitted); see KBA_ACFFOD_04947-04997. The court of appeals in this case agreed. Pet. App. 52-56. Although the KBA adjudicator's determinations are now subject to

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[6] In 1909, Oregon enacted a Water Rights Act requiring prospective appropriators to apply for permits to obtain state-law water rights. See *Oregon*, 44 F.3d at 764. Preexisting "undetermined vested rights" were protected, subject to general adjudication. *Ibid.* (citation omitted).

judicial review, Or. Rev. Stat. § 539.150 (2019); see *Oregon*, 44 F.3d at 764, petitioners do not allege (Pet. 17-21) any conflict between the KBA adjudicator's determination of the Klamath Tribes' rights and the court of appeals' decision.

Instead, petitioners contend (Pet. 17-21) that because the United States did not assert the federal reserved rights of the California Tribes in Oregon's KBA, those rights are forever forfeited, and the United States was barred from asserting them in defense of petitioners' takings claims. That is incorrect. Oregon law authorizes general stream adjudications to determine the relative rights of all claimants "from any natural watercourse *in this state*," Or. Rev. Stat. § 539.021 (2019) (emphasis added), and provides for the forfeiture of water rights not timely asserted in such adjudications, *id.* § 539.210. But Oregon does not possess authority to compel California water users—*i.e.*, persons who divert Klamath River water downstream in California or have instream water rights in California—to adjudicate their rights in Oregon courts, upon penalty of forfeiture. See *Shaffer* v. *Heitner*, 433 U.S. 186, 197 (1977) ("[A]ny attempt 'directly' to assert extraterritorial jurisdiction over persons or property would offend sister States and exceed the inherent limits of the State's power.").

Nor is there any sound basis for construing the McCarran Amendment as expanding Oregon's territorial jurisdiction. Given the interstate nature of many river systems and the territorial limits on state jurisdiction, this Court has held that the McCarran Amendment "must be read as embracing" those parts of an interstate system "within [a] particular State's jurisdiction." *United States* v. *District Court in and for the Cnty. of Eagle*, 401 U.S. 520, 523 (1971). Thus, when

Colorado initiated a general adjudication of all water rights in the Eagle River, a tributary of the Colorado River in Colorado, the United States was required to join the suit to adjudicate its federal reserved rights in that part of the Colorado River system. *Id.* at 525. But this Court did not suggest that the United States needed to assert in the Colorado adjudication *all* federal reserved rights in the Colorado River system, including those in downstream States. *Ibid.* Such an interpretation would contravene the territorial limits of state jurisdiction and the rule that waivers of sovereign immunity must be narrowly construed. See, *e.g.*, *United States* v. *Idaho*, 508 U.S. 1, 6-7 (1993).

In an effort to show that the federal reserved rights of the California Tribes should be deemed Oregon water rights for purposes of the McCarran Amendment, petitioners assert (Pet. 19) that the federal reserved water rights of the California Tribes depend upon the recognition of a right to "store[d]" water in Oregon that "supplies" the river flow in California.[7] That is incorrect. Unlike irrigation rights served by the Project (including some Project irrigation rights in California), the federal reserved rights of the California Tribes preexisted the Project and do not depend for their existence upon Project storage or other diversion works. To be sure, due to the construction of Link River Dam, Project operators now control downstream flows from Upper Klamath Lake and must bypass or release lake water to the river channel (as opposed to Project canals)

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[7] As discussed below, see p. 28, *infra*, in the lower courts, petitioners did not present evidence that the minimum lake levels and stream flows prescribed in Reclamation's 2001 Operations Plan affected flows that had already been stored for Project use. See Pet. App. 218 n.27.

to satisfy downstream water rights and environmental compliance obligations. But that does not make senior downstream federal reserved rights in California dependent on Project rights for Oregon diversions.

Petitioners also err in asserting (Pet. 18, 20, 28) that the decision below conflicts with *Nevada* v. *United States*, 463 U.S. 110 (1983). *Nevada* was not a McCarran Amendment adjudication; it was a water-rights adjudication initiated by the United States in federal district court. *Id.* at 113. *Nevada* held that as a matter of res judicata, the United States could not reopen a completed water adjudication to assert new claims. *Ibid.* But the KBA does not cover claims to federal reserved water rights in California, and it is not complete (despite more than four decades of litigation).

2. Petitioners next offer a series of arguments (Pet. 21) that the court of appeals' decision "destroys the utility of [state] adjudications." See Pet. 21-32. None of petitioners' contentions suggests that the decision below conflicts with a decision of this Court or another court of appeals. And petitioners' arguments fail. By enabling the joinder of the United States, the McCarran Amendment makes possible state proceedings to comprehensively adjudicate all rights to a river system or source within a State. *Colorado River*, 424 U.S. at 819. But as noted above, the McCarran Amendment does not mandate state-court adjudication and administration of federal reserved rights, or foreclose federal-court adjudication and administration of the water rights on a stream system. *Id.* at 806-809 (federal jurisdiction under 28 U.S.C. 1345 unaffected); see *Nevada*, 463 U.S. at 113 (federal-court adjudication of Nevada stream); *United States* v. *Adair*, 723 F.2d 1394, 1408-1415

(9th Cir.), cert. denied, 467 U.S. 1252 (1984) (partial adjudication of Klamath Tribes' federal reserved right). Nor does the McCarran Amendment preclude federal courts from determining water-rights issues that arise in the course of other proceedings, such as petitioners' action under the Tucker Act, 28 U.S.C. 1491. See *Gila River Pima-Maricopa Indian Cmty.* v. *United States*, 695 F.2d 559, 561-562 (Fed. Cir. 1982).

a. Petitioners first contend (Pet. 21-24) that the court of appeals' decision conflicts with an asserted "principle that federal reserved rights are not self-executing." Pet. 21 (capitalization and emphasis omitted). If state law prescribes a particular mechanism for water-rights adjudication and administration, a water right might not be enforceable through the state administrative scheme until relative water rights are adjudicated. See, *e.g.*, *Shirola* v. *Turkey Cañon Ranch Ltd. Liab. Co.*, 937 P.2d 739, 748-749 (Colo. 1997) (en banc). For example, in Oregon, state-appointed water masters must "[r]egulate the distribution of water * * * in accordance with * * * existing water rights of record," which are defined as water rights confirmed in administrative permits, licenses, and certificates, or determined in "court decrees." Or. Rev. Stat. §§ 540.045(1)(a) and (4) (2019). But nothing in the McCarran Amendment makes the existence or recognition of federal rights dependent on a prior state adjudication. To the contrary, this Court has explained that "[f]ederal water rights are not dependent upon state law or state procedures and they need not be adjudicated only in state courts"; nor must such rights be "'perfect[ed] * * * in

the state forum.'" *Cappaert* v. *United States*, 426 U.S. 128, 145-146 (1976) (citation omitted).[8]

In fact, petitioners' contention that all water rights must be adjudicated in a state-court general adjudication before they can be recognized in another proceeding would be fatal to their claims. Petitioners' Klamath Project water rights are state-law rights that vested before 1909; on petitioners' theory, they too must be decreed in the KBA to be "existing rights of record." Or. Rev. Stat. § 540.045(4) (2019). But in 2001, when the water shortages in this case occurred and when petitioners brought their takings claims, *no* rights at issue in this case had been decreed in state court. If prior state adjudication is a prerequisite to the enforcement of water rights in federal court, petitioners' takings claims were foreclosed from the outset.

Petitioners also mistakenly posit (Pet. 22-23) that water rights cannot be exercised without a "call." Under the rules of prior appropriation, an upstream water user generally may divert and use water within the scope of a vested water right, without regard to stream conditions and the existence of senior downstream rights, unless senior downstream users affirmatively "call" on the upstream right. See *Worley* v. *United States Borax & Chem. Corp.*, 428 P.2d 651, 653-655 (N.M. 1967); *United States* v. *Gila Valley Irrigation Dist.*, 804 F. Supp. 1, 13 (D. Ariz. 1992). As explained by the Special Master in *Montana* v. *Wyoming*, 138 S. Ct. 758 (2018), that is because upstream users otherwise may "have no way to

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[8] In addition, as already explained, see pp. 20-22, *supra*, Oregon lacks jurisdiction to adjudicate the federal reserved rights of the Yurok and Hoopa Valley Tribes in California. The exercise of federal reserved rights cannot depend upon a state adjudication for which there is no jurisdiction.

know when they need to reduce diversions to protect the rights of downstream seniors," and because, "[a]t any particular point in time, * * * seniors may not need all the water to which they have a right." Second Interim Report of the Special Master at 50, *Montana* v. *Wyoming*, *supra* (No. 137, Original). It does not follow, however, that federal reserved rights (or any other water rights) necessarily "must be asserted by making calls." Pet. 23. Here, Reclamation had no need (or mechanism, see p. 27, *infra*) to make a "call" in 2001 because it was merely adjusting its own Project operations in conformity with federal law.

b. Petitioners next assert (Pet. 24-25) that the court of appeals' decision authorized Reclamation to informally determine water rights, in violation of Section 8 of the Reclamation Act, 32 Stat. 390, and petitioners' due process rights. That is incorrect.

In adopting the 2001 Operations Plan for the Klamath Project, Reclamation set minimum lake levels and minimum stream flows based on the requirements of the ESA, and it further recognized federal trust obligations and the need to protect tribal fisheries. Pet. App. 25-27. Reclamation did not, however, determine any particular attributes of tribal water rights. *Ibid.*

Instead, the courts below determined such issues as necessary to resolve petitioners' takings claims. As petitioners acknowledge (Pet. 3, 25-26), water rights under western water law are "usufructuary," not possessory, *Sturgeon* v. *Frost*, 139 S. Ct. 1066, 1079 (2019)—*i.e.*, holders of water rights do not own the water itself, but instead hold rights to use water from a designated source in order of priority. See *Montana* v. *Wyoming*, 563 U.S. 368, 375-376 (2011); *Colorado* v. *New Mexico*, 459 U.S. 176, 179 n.4 (1982); *Crow Creek Sioux Tribe* v.

United States, 900 F.3d 1350, 1357 (Fed. Cir. 2018). Thus, to establish the taking of a cognizable property interest, petitioners had to demonstrate that Klamath Basin water was available in priority for Klamath Project use. See, *e.g.*, *Maritrans Inc.* v. *United States*, 342 F.3d 1344, 1352 (Fed. Cir. 2003).

The CFC informed petitioners of the need to address the role of tribal water rights to resolve takings liability, Pet. App. 218-219 n.27, and it determined the relevant water-rights issues de novo, without deference to Reclamation's actions, *id.* at 195-227. The CFC determined that federal reserved rights exist in Upper Klamath Lake and the Klamath River for the Klamath Basin Tribes, that the federal reserved rights are senior in priority to Klamath Project rights, and that the minimum lake levels and stream flows prescribed under the ESA were no more extensive than the federal reserved rights. *Ibid.* Petitioners do not contend that they were denied due process in the CFC proceedings. Pet. 24-25.

Because Reclamation did not determine tribal water rights, petitioner's assertion (Pet. 24) that "section 8 of the Reclamation Act precludes the Bureau from determining water rights" is irrelevant. In any event, Section 8 merely directs Reclamation to "proceed in conformity" with state law when appropriating water for reclamation projects and distributing water so appropriated. 43 U.S.C. 383. Nothing in Section 8 precludes Reclamation from acknowledging the existence of preexisting federal reserved rights for purposes of ensuring that federal projects are operated in conformity with senior rights. See *Klamath Water Users Protection Ass'n* v. *Patterson*, 204 F.3d 1206, 1214 (9th Cir.), cert. denied, 531 U.S. 812 (2000).

c. Petitioners next contend that the court of appeals applied the "prior appropriation concept" "selectively." Pet. 25 (capitalization and emphasis omitted); see Pet. 25-26. Petitioners assert, without record citation (*ibid.*), that Klamath Project water shortages in 2001 would have been mitigated had water use by junior upstream irrigators been curtailed. The court of appeals properly rejected that argument because petitioners failed to cite admissible evidence presented to and considered by the CFC. Pet. App. 59 n.30. As the court of appeals further observed, because Klamath Project rights had not been administratively determined or judicially decreed, there was no mechanism for making an administrative call on upstream rights, even assuming, arguendo, that the failure to do so would give rise to a taking claim. Nor was it clear that doing so "would have been sufficient to satisfy the Tribes' reserved water rights." *Id.* at 60 n.30. The court's determination that "given the facts of record in this case," *id.* at 59, no call on junior, upstream users was required does not warrant further review.

d. Petitioners next argue (Pet. 26-28) that the court of appeals erred in recognizing tribal rights to water in Upper Klamath Lake. Specifically, petitioners assert that the Lake functions as an "artificial[]" "storage tank," and that "[e]ven 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." Pet. 26-27. Petitioners rely (Pet. 27) on this Court's decree in *Montana* v. *Wyoming*, *supra*, which determined that the

State of Wyoming may lawfully store water in its reservoirs when there is no senior downstream call in effect by Montana, and that water thus stored "can be subsequently used" by Wyoming at any time, notwithstanding Montana's later needs and senior rights. 138 S. Ct. at 760; see Second Interim Report of the Special Master at 188, *Montana* v. *Wyoming*, *supra* (No. 137, Original) (When "[w]ater * * * is stored 'in priority' (i.e., when there is no call by a senior appropriator)," it "can be subsequently used at any point, even if it is used when senior appropriators need water.").

Petitioners' argument regarding artificial storage is not properly before the Court. In the CFC, petitioners presented no evidence and did not argue that the minimum lake levels and stream flows prescribed in Reclamation's 2001 Operations Plan affected what they now term "artificial" storage, *i.e.*, flows that had already been impounded for or were available in priority for exclusive Project use. See Pet. App. 218 n.27. Similarly, in holding that Reclamation's 2001 operations conformed to federal reserved rights, neither the CFC nor the court of appeals held that the Tribes possess reserved rights in storage made possible only by the Klamath Project. *Id.* at 6, 49-63. This Court should not be the first to consider petitioners' argument. See, *e.g.*, *Cutter* v. *Wilkinson*, 544 U.S. 709, 718 n.7 (2005) (This Court is "a court of review, not of first view.").

Petitioners' argument also misconstrues the record. As noted above, see pp. 3-4, *supra*, unlike other reclamation projects, the Klamath Project did not create an artificial reservoir that otherwise would not exist. Rather, the Klamath Project re-engineered the outlet of Upper Klamath Lake—an existing shallow alpine lake—to enable Project users to regulate lake drainage and

better use lake waters. C.A. App. 2712, 2813-2814. And the Project drained two other lakes and hundreds of square miles of surrounding wetlands to reclaim lands and redirect natural flows for irrigation purposes. *Id.* at 2067, 2078, 2701-2702.

Upper Klamath Lake provides little artificial or carryover storage from one irrigation season to the next. C.A. App. 1976, 2067, 2078, 2701-2702, 2712, 2813-2814. And in 2001, natural inflows to Upper Klamath Lake were a small fraction of the norm. *Id.* at 2054. As already discussed, see pp. 21-22, *supra*, the federal reserved rights of the California Tribes and the Klamath Tribes are rights to stream flows and lake levels that preexisted the Project and would continue to exist but for Klamath Project diversions and the massive reengineering of the Klamath Basin. See Pet. App. 41. The court of appeals therefore did not err in holding that the water released for fisheries in 2001 was not available in priority for satisfying Project water rights.[9]

e. Petitioners further assert (Pet. 29) "case-specific" reasons why, on their view, the court of appeals should have deferred to the not-yet-complete KBA proceeding. In particular, petitioners allege (Pet. 29 & n.15) a conflict between the court of appeals' decision regarding the California Tribes and a determination by the KBA adjudicator on certain off-reservation water rights claimed for the Klamath Tribes that are not at issue

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[9] Even if petitioners had demonstrated that water "artificially" stored in the Project was necessary to satisfy the Tribes' preexisting rights, review would not be warranted. This Court has determined that water stored in lakes or reservoirs controlled by a later-constructed Reclamation project may be used to satisfy reserved water rights in order to meet reservation purposes. See *Arizona* v. *California*, 373 U.S. 546, 598-600 (1963).

here. But while petitioners suggest (Pet. 29) that the lower courts erred in finding instream flow rights on behalf of the California Tribes, petitioners do not challenge the lower courts' determinations (1) that the Klamath River is appurtenant to the Yurok and Hoopa Valley Reservations; (2) that the reservations were established in their present locations to protect the Tribes' ability to maintain their livelihood in salmon fishing on the river; and (3) that minimum stream flows to preserve upstream spawning habitat are necessary to preserve salmon runs through the reservations. Pet. App. 56-58, 203-205. Petitioners thus fail to show any error on the part of the court of appeals—much less an error warranting this Court's review.

Nor are petitioners correct (Pet. 29) that the court of appeals merely "assumed the existence" of tribal water rights in light of the "United States' trust obligations." Instead, the court decided tribal water rights issues as necessary to adjudicate petitioners' takings claims. Pet. App. 49-63. As petitioners acknowledge, Reclamation's 2001 Operations Plan incorporated minimum lake levels and stream flows determined by "reasonable and prudent alternatives" developed under the ESA. Pet. 20 (citation omitted). The question before the lower courts was simply whether those minimum lake levels and stream flows were within the scope of the senior tribal water rights; the CFC resolved that issue de novo and the court of appeals affirmed. Pet. App. 49-63, 195-227. Neither court held that the United States' trust duties give it "the authority to unilaterally determine where and in what quantities [tribal] water rights may exist." Pet. 29. Nor did the lower courts determine whether the Klamath Basin Tribes could have brought

a breach-of-trust claim against the United States if Reclamation had not acted to preserve minimum water levels under the ESA. Petitioners' citations (Pet. 30) to cases concerning the United States' enforceable trust duties are therefore inapposite.

f. Finally, petitioners are incorrect to suggest (Pet. 30-32) that the United States should have filed an action for injunctive relief to protect the Klamath Basin Tribes' federal reserved rights. Nothing requires Reclamation to seek injunctive relief against the beneficiaries of a federal irrigation project in order to operate the project in compliance with federal law. See *Patterson*, 204 F.3d at 1213-1214. Indeed, petitioners concede (Pet. 20) that Reclamation acted lawfully when, in 2001, it ordered a curtailment in water deliveries to ensure compliance with the ESA. The relevant question here is whether the United States was permitted to raise its senior reserved water rights for the Klamath Basin Tribes in defense of petitioners' subsequent takings claims. Contrary to petitioners' argument (Pet. 32), the court of appeals did not enter "unchartered territory" in concluding that Reclamation's actions did not result in a taking of petitioners' beneficial interests in junior Project water rights. Instead, the court simply applied well-established first-in-time principles at the heart of the *Winters* doctrine and western water law.

3. This case does not warrant the Court's review. The court of appeals' decision does not conflict with any decision of this Court or another court of appeals, and it is consistent with all relevant interim determinations made by the KBA adjudicator (namely, the determination that the Klamath Tribes possess reserved rights, from time immemorial, in minimum lake levels in Upper Klamath Lake).

Moreover, petitioners successfully opposed the United States' request for a stay of their takings claims pending a final decree in the still-ongoing KBA. They can hardly object to the lower courts' deciding relevant issues concerning the Klamath Tribes' water rights in response to petitioners' takings claims.

In addition, the courts' rejection of petitioners' takings claims is sustainable on independent grounds. First, petitioners lack viable takings claims because their beneficial interests in Project rights are defined by Reclamation Act contracts that foreclose federal liability for water shortages like those that occurred in 2001. See pp. 5-6, *supra*. Second, petitioners lack viable claims for per se physical takings because the relevant government conduct was limited to ESA regulatory restrictions on water use; there was no government invasion or occupation of petitioners' property. Although the court of appeals declined to address these issues in light of its ruling on tribal water rights, Pet. App. 63, the United States fully preserved them below, see *id.* at 39, 63 n.31; Gov't C.A. Br. 52-68, 70-77, and they would foreclose judgment in favor of petitioners.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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