No. 22-70143

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,
v.
U.S. BUREAU OF RECLAMATION and
OREGON WATER RESOURCES DEPARTMENT,
Real Parties in Interest.

Petition for a writ of mandamus to issue to the
United States District Court for the District of Oregon, No. 1:21-cv-00504-AA

RESPONSE IN OPPOSITION FOR THE UNITED STATES BUREAU OF RECLAMATION

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GLOSSARY OF ACRONYMS AND ABBREVIATIONS

ACFFOD..... Amended and Corrected Findings of Fact and Order of Determination (in the KBA)

APA..... Administrative Procedure Act

ESA..... Endangered Species Act

FWS .....U.S. Fish and Wildlife Service

KBA .....Klamath Basin Adjudication

KID ..... Klamath Irrigation District

KWUA.....Klamath Water Users Association

NMFS.....National Marine Fisheries Service

OWRD..... Oregon Water Resources Department

PE..... Petitioner's Exhibits

Project..... Klamath Project

Reclamation..... United States Bureau of Reclamation

SONCC coho salmon.....Southern Oregon/Northern California Coast coho salmon

INTRODUCTION

Petitioner Klamath Irrigation District ("KID") seeks a writ of mandamus to compel the district court to remand this case back to the Oregon state court from which it was removed under 28 U.S.C. § 1442(a)(1). On the merits, KID seeks to enjoin the Bureau of Reclamation ("Reclamation") from operating the Klamath Project in accordance with the Endangered Species Act ("ESA") and the federal reserved water rights of downstream tribes in California. KID sought such relief in the Klamath Basin Adjudication ("KBA"), a general stream adjudication in Oregon. KID does not dispute that the standards for removal were met. Rather, KID asserts that its claim is within the McCarran Amendment's waiver of sovereign immunity for the "administration" of water rights determined in a general stream adjudication, 43 U.S.C. § 666(a)(2), and subject to the "prior exclusive jurisdiction" of the court presiding over the KBA.

KID's petition should be denied. KID does not seek to enforce water rights provisionally determined in the KBA against other Oregon water users. Rather, KID's claim is effectively a challenge to Reclamation's operations plan, raising issues of federal law concerning the applicability of the ESA and the senior rights of California tribes that have not been addressed in and are not properly part of the KBA. The district court did not err, much less clearly err, in denying remand. Nor has KID met the other requirements for the extraordinary remedy of mandamus.

STATEMENT OF THE ISSUES

Whether KID has demonstrated a clear and indisputable right to a writ of mandamus to remand this action back to the state court hearing the KBA, where KID has failed to show (and cannot show) that the state court has jurisdiction under the McCarran Amendment and has not met the other requirements for mandamus relief.

RELEVANT LAW AND FACTS

A. Klamath Project and KID

The Klamath Project (hereinafter, the "Project") is a federal reclamation project that straddles the Oregon and California border at the headwaters of the Klamath River. *See Baley v. United States*, 942 F.3d 1312, 1316 (Fed. Cir. 2019); *see also id.* at 1342 (map). The Project area once included three large lakes and an extensive network of wetlands covering hundreds of square miles. *See* USGS, Groundwater Hydrology of the Upper Klamath Basin, Oregon and California 1-2 (2010), available at: https://pubs.usgs.gov/sir/2007/5050/. The Project permanently drained most of the wetlands and two of the lakes to create agricultural lands, and altered the third lake, Upper Klamath Lake in Oregon, to access its storage capacity for irrigation use. *Id.* at 2-7. A broad channel was cut in the basalt-lava reef that forms the lake, and the Link River Dam was constructed just below this outlet, allowing Reclamation to regulate surface flows, including to

drain the lake below natural levels. *Id.* at 4, 34; *see also* https://klamathid.org/home-01/history/. Upper Klamath Lake is now the principal storage feature of the Project. *See Baley*, 942 F.3d at 1316, 1321. Water is diverted from the lake and from diversion dams on the Klamath River to provide irrigation for up to 200,000 acres of land in Oregon and California. *Id.* at 1321.

Reclamation constructed the Project under the Reclamation Act of 1902, which authorized Reclamation to develop large-scale irrigation projects and to enter into contracts with beneficiaries to recoup specified project costs. *See California v. United States*, 438 U.S. 645, 663 (1978); *Peterson v. Department of the Interior*, 899 F.2d 799, 802-04 (9th Cir. 1990). Section 8 of the Act directed the Secretary of the Interior to "proceed in conformity with [state] laws" when appropriating waters for such projects. 43 U.S.C. § 383. In 1905, Reclamation provided notice under Oregon law of its intent to appropriate for the Project "[a]ll of the waters of the Klamath Basin in Oregon." *Baley*, 942 F.3d at 1320.

KID is a quasi-municipal corporation organized under Oregon law for the purposes of contracting with Reclamation for the use of Project water and for the repayment of Project costs. *See Klamath County v. Colonial Realty Co.*, 7 P.2d 976, 977, 139 Or. 311, 312 (1932). KID holds a contract for the receipt of Project water and for the operation and maintenance of specified Project works, including the "A Canal," which diverts water from Upper Klamath Lake. *See Baley v.*

United States, 134 Fed. Cl. 619, 626-27, 663 (2017). Reclamation provides water to KID and other irrigation districts, entities, and individual irrigators under state-law water rights, subject to water availability and the requirements of federal law, including requirements pertaining to the ESA and the senior water rights of Indian tribes. *See Baley,* 942 F.3d at 1321-25; *Klamath Water Users Association v. Patterson*, 204 F.3d 1206, 1212-14 (9th Cir. 1999).

B. Water Rights

In Oregon and most western states, state-based water rights are governed by the law of prior appropriation. *See McCall v. Porter*, 42 Or. 49, 57, 70 P. 820, 823 (Or. 1902). Under this doctrine, water rights are acquired by diverting and applying water to a specific beneficial use, and a water user who maintains such use holds a priority of right over subsequent appropriators. *See Colorado River Water Conservation District v. United States*, 424 U.S. 800, 805 (1976). In addition, under federal law, the establishment of an Indian or other federal reservation impliedly reserves "then unappropriated" water "to the extent needed to accomplish the purpose of the reservation." *Cappaert v. United States*, 426 U.S. 128, 138 (1976) (citing *Winters v. United States,* 207 U.S. 564, 576-77 (1908)). These federal-reserved or "*Winters*" rights vest "no later than" than the date of the reservation, do not require use to be maintained, and are "superior in right to all subsequent appropriations under state law." *Arizona v. San Carlos Apache Tribe*,

463 U.S. 545, 574 (1983). Although held in trust by the United States, *Winters* rights belong to the tribes and are subject to their control. *United States v. Washington*, 853 F.3d 946, 967 (9th Cir. 2017); *Hawkins v. Haaland*, 991 F.3d 216, 227 (D.C. Cir. 2021) (citing *United States v. Adair*, 723 F.2d 1394, 1418 (9th Cir. 1984)).

The Project water rights at issue here have a priority date of 1905 and are held subject to the *Winters* rights of several Klamath Basin tribes. *Patterson*, 204 F.3d at 1214; *Baley*, 942 F.3d at 1328 n.27, 1335-41. In an 1864 treaty, the Klamath Tribes ceded approximately 22 million acres of land in southern Oregon to the United States, in exchange for a reservation of approximately 1.9 million acres bordering Upper Klamath Lake. *See Oregon Department of Fish & Wildlife v. Klamath Indian Tribe*, 473 U.S. 753, 755 (1985). Decades later, Congress provided for the dissolution of the reservation, but did not terminate the Tribes' fishing or water rights, *Adair*, 723 F.2d at 1408-15, and Congress has since restored the Klamath Tribes to federal recognition, Pub. L. No. 99-398, 100 Stat. 849 (1986). Under *Winters*, the Klamath Tribes hold a water right, with a priority date of "time immemorial," to lake levels in Upper Klamath Lake and stream flows in upstream tributaries, as necessary to sustain two sucker species (Lost River Sucker and Shortnose Sucker) that are endemic to these waters. *Hawkins*, 991 F.3d at 216, 221-23; *Baley*, 942 F.3d at 1335-38.

In addition, in a series of acts and executive orders between 1855 and 1891, the United States established reservations in California for the Yurok and Hoopa Valley Tribes on the Klamath River downstream from the Project. *See Mattz v. Arnett*, 412 U.S. 481, 485-94 (1973). For many generations, the Yurok and Hoopa Valley Tribes have depended on salmon that spawn in the Klamath River—namely, chinook salmon and the Southern Oregon/Northern California Coast ("SONCC") coho salmon—as food staples, for economic livelihood, and for ceremonial purposes. *Parravano v. Babbitt*, 70 F.3d 539, 542 (9th Cir. 1995); *United States v. Eberhardt*, 789 F.2d 1354, 1359 (9th Cir. 1986). The United States established the reservations to preserve the tribes' rights to a sustainable harvest in these fisheries. *Parravano*, 70 F.3d at 542, 545-46. The Yurok and Hoopa Valley Tribes hold *Winters* rights, with a priority date no later than the establishment of their reservations, to stream flows sufficient to maintain these fisheries. *Baley*, 942 F.3d at 1336-37.

C. ESA Consultation

The suckers in Upper Klamath Lake and SONCC coho salmon in the Klamath River are also subject to protection under the ESA. The ESA is jointly administered by the U.S. Fish and Wildlife Service ("FWS") and by the National Marine Fisheries Service ("NMFS"), depending on the species involved. *See* 50 C.F.R. § 402.01. FWS (which regulates freshwater fish) has listed the Lost River

Sucker and Shortnose Sucker as endangered, 53 Fed. Reg. 27,130 (July 18, 1988), and has designated Upper Klamath Lake as critical habitat for both species, 77 Fed. Reg. 73,740, 73,764, 73,767 (Dec. 11, 2012). NMFS (which regulates ocean and anadromous fish) has listed the SONCC coho salmon as threatened, 62 Fed. Reg. 24,588 (May 6, 1997), and designated portions of the Klamath River in California as its critical habitat, 64 FR 24049, 25059 (May 5, 1999).

Section 7 of the ESA requires federal agencies, in consultation with FWS and 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 or threatened species or result in the destruction or adverse modification of [critical] habitat." 16 U.S.C. § 1536(a)(2). Under Section 9 of the Act and ESA regulations, no person may "take" an endangered or threatened species except as authorized under the Act. *See* 16 U.S.C. §§ 1533(d), 1538(a)(1)(B); 50 C.F.R. §§ 17.21(c), 17.31(a). To "take" includes to "harm" by "significant habitat modification or degradation" that "actually kills or injures wildlife by significantly impairing essential behavioral patterns, including breeding, feeding or sheltering." 50 C.F.R. § 17.3.

Whenever a proposed agency action is likely to "adversely affect" a listed species or its critical habitat, formal consultation is required, during which FWS or NMFS (as relevant) must prepare a biological opinion. 16 U.S.C. § 1536(b)(3); 50

C.F.R. § 402.14. If the biological opinion determines that a proposed action is likely to jeopardize a listed species or to adversely modify its critical habitat, FWS or NMFS must specify "reasonable and prudent" alternatives (if available) for avoiding jeopardy or adverse habitat modification and complying with Section 7. *See* 16 U.S.C. § 1536(b)(3)(A). If a biological opinion determines that a proposed action or reasonable and prudent alternative is not likely to result in jeopardy, the opinion must include an "incidental take statement" specifying the anticipated take, along with "reasonable and prudent measures" necessary or appropriate to minimize the take. 16 U.S.C. § 1536(b)(4); 50 C.F.R. § 402.14(i). An action in compliance with such measures is exempt from the ESA's take prohibition. 16 U.S.C. § 1536(o)(2).

In 1999, this Court held that Reclamation must operate the Project in conformity with these requirements. *Patterson*, 204 F.3d at 1213. In consultations shortly thereafter, FWS and NMFS determined that proposed Project operations were likely to cause takes and to jeopardize the continued existence of the Shortnose and Lost River Suckers and SONCC coho salmon. *See Baley*, 942 F.3d at 1324-25. Since that time and in continued consultation with FWS and NMFS, Reclamation has either adopted reasonable and prudent alternatives or has tailored Project operations: (1) to maintain sufficient levels within Upper Klamath Lake to avoid jeopardizing the suckers or adversely modifying their critical habitat, and

(2) to maintain sufficient flows downstream in the Klamath River to avoid jeopardizing SONCC coho salmon or adversely modifying its critical habitat. *Id.* In so doing, Reclamation has also determined that the ESA-prescribed water releases from Upper Klamath Lake serve the downstream fishing and water rights of the Yurok and Hoopa Valley Tribes. *Id.*

D. McCarran Amendment and KBA

In 1952, Congress enacted the "McCarran Amendment," which waives federal sovereign immunity and grants consent to join the United States "as a defendant in any suit (1) for the adjudication of rights to the use of a river system or other source, or (2) for the administration of such rights." 43 U.S.C. § 666(a). This waiver authorizes state courts to determine federal water rights, including *Winters* rights for Indian tribes, as part of comprehensive suits to determine all rights in a specified river system or source. *Colorado River*, 424 U.S. at 809-13.

In 1975, the Oregon Water Resources Department ("OWRD") initiated the KBA to determine pre-1909 water rights in Oregon's Klamath River basin. *See United States v. Oregon*, 44 F.3d 758, 762-64 (9th Cir. 1994).[1] The United States challenged OWRD's jurisdiction over federal claims, arguing that Oregon's general adjudication statute established an administrative adjudication that was not

[1] Later state-law appropriations were governed by a permit system. *See id.* at 764.

a McCarran Amendment "suit." *Id*. at 765-770. This Court disagreed in light of the judicial review proceedings provided in Oregon law. *Id.* at 765-70. Thereafter, the United States filed claims in the KBA for the Project, the Klamath Tribes, and various federal lands. *United States v. Braren*, 338 F.3d 971, 973 (9th Cir. 2003). The United States did not file claims for the downstream Yurok and Hoopa Valley Tribes whose reservations are in California, or for other federal lands in California that are outside of Oregon's territorial jurisdiction. *See Baley*, 942 F.3d at 1341.[2]

In February 2014, OWRD issued an "Amended and Corrected Findings of Fact and [an] Order of Determination" ("ACFFOD"), completing the administrative phase of the KBA. *Baley*, 942 F.3d at 1321; *see also* Or. Admin. R. 690-025-0020(1).[3] The ACFFOD provisionally confirmed the United States' right to store up to 486,830 acre feet of water in Upper Klamath Lake for irrigation and other beneficial use, *see* PE at 108 (KBA_ACFFOD_07060-63), and declared the Project irrigators to be beneficial owners of the rights to use such water, *see* PE at 119 (KBA_ACFFOD_07075-82). The ACFFOD also confirmed instream water rights asserted on behalf of the Klamath Tribes in Oregon, including necessary lake

[2] The United States did claim Project rights for Project irrigators in California who divert water from points in Oregon. *See Baley*, 942 F.3d at 1342 (map).

[3] The ACFFOD is available at: https://www.oregon.gov/owrd/programs/WaterRights/Adjudications/KlamathRiverBasinAdj/Pages/ACFFOD.aspx

levels in Upper Klamath Lake. *See Hawkins*, 991 F.3d at 222. The ACFFOD is subject to judicial review proceedings in the Klamath County Circuit Court ("KBA Court"), Case No. WA1300001, which are ongoing. *See* Or. Rev. Stat. §§ 539.130(1), 539.150. Pending the completion of judicial review, the ACFFOD is in "full force and effect." Or. Rev. Stat. § 539.130(4); *see also* Or. Rev. Stat. § 539.170.

Oregon law empowers "watermasters" to enforce relative rights on adjudicated streams through a "call" system. *See Hawkins*, 991 F.3d at 222; *see also* Or. Rev. Stat. §§ 540.020, 540.045(1), 540.145. Pending a final judgment, OWRD operates the call system for the Klamath Basin in Oregon. *See* Or. Admin. R. 690-025-0025(1). Under this system, the holder of any provisionally-adjudicated or permitted water right may make a priority "call" on junior water rights. *See* Or. Admin. R. 690-025-0020. Following a records review and field inspection as warranted, OWRD may direct junior users to cease diversions that it determines are interfering with any senior right. *See* Or. Admin. R. 690-025-0025(1); Or. Admin. R. 690-250-0100; *Hawkins*, 991 F.3d at 222.

E. Present Action

1. KBA Court Filing

On March 29, 2021, KID filed a motion in the KBA Court for an emergency preliminary injunction to prevent Reclamation from releasing stored water from

Upper Klamath Lake for any purpose other than Project irrigation. Petitioner's Exhibits ("PE") 56-84.[4] Because Reclamation holds a provisionally-adjudicated right to store water for beneficial use by Project irrigators, KID argued that Reclamation may not release stored water from Upper Klamath Lake except for Project irrigation. PE 65-68. KID acknowledged that Reclamation makes the challenged releases to comply with the ESA and to serve the water rights of downstream California tribes. But KID argued—contrary to this Court's ruling in *Patterson*, 204 F.3d at 1213-14—that the ESA does not apply to the subject releases, PE 59, 75-79, and that Reclamation may not release stored water to serve any senior downstream rights, PE 66.

2. Removal Proceedings

On April 5, 2021, the United States filed a notice removing KID's preliminary injunction motion to the federal district court in Oregon pursuant to 28 U.S.C. § 1442(a). PE 349-55. On April 12, 2021, Reclamation substantively responded to the motion, arguing that the McCarran Amendment's waiver of federal sovereign immunity does not apply, and that KID is unlikely to succeed on the merits. PE 357-93. The district court permitted OWRD to intervene. *See* PE 396-401; *see also* D.Ct. Doc. 10.

[4] Citations to KID's exhibits are to the page numbers in the upper right corner of the exhibits assigned electronically upon filing.

On April 20, 2021, KID moved to remand this case back to the KBA Court, arguing that the KBA Court has "prior exclusive jurisdiction" over the matter. PE 413-32; *see also* PE 435-54 (Apr. 28, 2021) (amended motion). On May 4, 2021, the United States responded to the remand motion, again arguing that the McCarran Amendment does not waive federal sovereign immunity for KID's claim. PE 457-83. KID filed a reply on May 11, 2021, PE 487-513, and the district court held a hearing on May 20, 2021. PE 516-63 (transcript).

On March 24, 2022, KID filed a petition for writ of mandamus in this Court, seeking an order to compel the district court to decide and grant its motion for remand. PE 570-602. This Court denied the motion without prejudice, pending action by the district court within 30 days. PE 1248. On April 25, 2022, the district court issued a memorandum order denying KID's motion for remand, holding that the KBA Court lacks jurisdiction under the McCarran Amendment over KID's motion for preliminary injunction. PE 1250-62. KID subsequently filed the present petition for writ of mandamus, asking this Court to review and reverse the district court's order denying remand.

F. Related Actions

1. KID v. Reclamation, 1:19-cv-00451 (D. Oregon)

In 2019, before filing the present motion for preliminary injunction in the KBA Court, KID sought similar injunctive relief against Reclamation in federal

district court in Oregon. *See Klamath Irrigation District v. Bureau of Reclamation*, 489 F. Supp. 3d 1168 (D. Or. 2020). The Klamath Tribes and the Yurok Tribe moved to intervene for the limited purpose of moving to dismiss under Federal Rule of Civil Procedure 19(b). *Id.* at 1176. The tribes asserted that they were necessary parties that could not be joined due to tribal sovereign immunity, and that the case could not proceed "in equity and good conscience" in their absence. *Id.* (quoting Fed. R. Civ. P. 19(b)). The district court agreed and granted dismissal. *Id.* at 1172, 1184. KID's appeal to this Court (Ninth Cir. No. 20-36009) was argued on December 7, 2021 and remains pending.

2. Yurok Tribe v. Reclamation, 3:19-cv-04405 (N.D. Cal.)

In 2019, the Yurok Tribe filed suit for injunctive relief against Reclamation and NMFS, alleging that the 2019 Project operations plan and the associated biological opinion issued by NMFS were insufficiently protective of SONCC coho salmon. *See Yurok Tribe v. U.S. Bureau of Reclamation*, --- F. Supp. 3d ---, 2022 WL 875646 at *2 (N.D. Cal. 2022). The case was stayed by agreement. *Id.* In 2021, the district court lifted the stay solely to permit Reclamation to file a cross-claim against OWRD and the Klamath Water Users Association ("KWUA"). *Id.* The cross-claim challenges an OWRD order issued on April 20, 2021, which purports to prohibit the release of stored water from Upper Klamath Lake except for beneficial use by Project users. *Id.* Reclamation seeks to enjoin the order's

enforcement and to obtain a declaration that it exceeds OWRD's authority and is contrary to the Supremacy Clause and the ESA or, alternatively, to the federal reserved rights of the Yurok and Hoopa Valley Tribes. *Id.* at *3. KID is a member of KWUA. The district court also permitted KID to intervene. *See id.* at *9.

STANDARD OF REVIEW

"[A] writ of mandamus is an extraordinary remedy, to be reserved for extraordinary situations." *Gulfstream Aerospace Corp. v. Mayacamas Corp.*, 485 U.S. 271, 289 (1988). The Supreme Court has explained that "three conditions must be satisfied" before a court may issue the writ: (1) the petitioner must have "no other adequate means to attain the [desired] relief," (2) the petitioner's right to relief must be "clear and indisputable," and (3) the court must be satisfied that mandamus relief is "appropriate under the circumstances." *Cheney v. U.S. District Court for the District of Columbia*, 542 U.S. 367, 380-81 (2004).

This Court has articulated an expanded list of five factors to consider in determining whether to issue a writ of mandamus: (1) whether the petitioner has another "adequate way to obtain the relief sought," (2) whether the petitioner "will suffer damage or prejudice that cannot be corrected on appeal," (3) whether "the district court clearly erred as a matter of law," (4) whether the error "is often repeated or shows the district court's persistent disregard for the federal rules," and (5) whether "there are new and important issues at stake." *In re U.S. Department*

of Education, 25 F.4th 692, 697-98 (9th Cir. 2022) (citing *Bauman v. U.S. District Court*, 557 F.2d 650, 654-55 (9th Cir. 1977)). Although these so-called "*Bauman* factors" are not "exhaustive" and every factor need not be satisfied, *id.*, this Court has emphasized that the third factor—a demonstration that the district court made a "clear error of law"—is a "necessary condition" for issuing a writ. *In re Walsh*, 15 F.4th 1005, 1008 (9th Cir. 2021); *In re Van Dusen*, 654 F.3d 838, 841 (9th Cir. 2011); *accord In re Boon Global*, 923 F.3d 643, 649 (9th Cir. 2019) (absence of "clear error" is "dispositive"); *but see In re U.S. Department of Education*, 25 F.4th at 698 (clear error "almost always" a necessary condition).

REASONS THE PETITION SHOULD BE DENIED

KID seeks a writ of mandamus to compel *procedural* relief—a remand to the KBA Court—for purposes of having that Oregon state court hear its *substantive* claim against Reclamation, in which KID seeks to compel Reclamation to operate the Project in disregard of the ESA and the senior water rights of the Yurok and Hoopa Valley Tribes in California. KID's petition should be denied because KID has not demonstrated (and cannot show) a "clear and indisputable" right to a remand. KID's present action is indisputably a "civil action" against a federal agency "relating to" actions "under color of . . . office" and thus was properly removed under the terms of the removal statute, 28 U.S.C. § 1442(a). KID does not argue otherwise. Instead, KID asserts that the KBA Court had "prior

exclusive jurisdiction" over its claim under the McCarran Amendment, 43 U.S.C. § 666(a)(2). But KID's construction of the McCarran Amendment is in error. The KBA Court has no jurisdiction over the present claim. At a minimum, the district court made no clear error of law. Nor has KID demonstrated that the other *Bauman* factors support remand.

I. KID fails to show a clear and indisputable right to a remand.

A. The KBA Court lacks jurisdiction to review Reclamation's ESA compliance.

KID's claim for injunctive relief is fundamentally a challenge to final agency action under the ESA, namely, Reclamation's decision—in consultation with NMFS—to adopt a Project operations plan that calls for specified releases of water from Upper Klamath Lake into the Klamath River, to avoid jeopardy to SONCC coho salmon and destruction or adverse modification of its critical habitat. KID concedes (Pet. 41) that it may not bring such a suit against Reclamation or the United States without an applicable waiver of federal sovereign immunity. *See United States v. Bormes*, 568 U.S. 6, 9 (2012). Far from showing clear error, KID's argument (Pet. 40-47) that the McCarran Amendment provides the requisite waiver is mistaken.

1. "Administration" in the McCarran Amendment means the priority administration of decreed rights.

The McCarran Amendment waives federal sovereign immunity in two circumstances: (1) with respect to a suit "for the adjudication of rights to the use of a river system or other source," and (2) with respect to a suit "for the administration of such rights." 43 U.S.C. § 666(a). It is undisputed that the KBA Court has jurisdiction under the first clause to adjudicate the United States' water-rights claims in the Klamath River Basin in Oregon as against all other claimants in Oregon. *See Oregon*, 44 F.3d at 765-70. Nor is there any dispute that Project rights have been provisionally adjudicated in the KBA and are enforceable under Oregon law. Or. Rev. Stat. §§ 539.130(4), 539.170; *Hawkins*, 991 F.3d at 222. The relevant question here is whether KID's present action—to compel Reclamation to operate the Project in disregard of the ESA and senior tribal rights in California—is a suit "for the administration of . . . rights" that were provisionally adjudicated in the KBA. *See* 43 U.S.C. § 666(a)(2). It is not.

As a threshold matter, the McCarran Amendment is a waiver of sovereign immunity and must be strictly construed in favor of the United States. *United States v. Idaho*, 508 U.S. 1, 6-7 (1993); *see also Orff v. United States*, 545 U.S. 596, 602 (2005); *Plaskett v. Wormuth*, 18 F.4th 1072, 1087 (9th Cir. 2021). A waiver of federal sovereign immunity may not be implied; it must be "unequivocally expressed." *Idaho*, 508 U.S. at 6-7 (quoting multiple cases).

In addition, Section 666(a)(2) must be construed in light of the "whole statutory text, considering the purpose and context of the statute." *Invesco High Yield Fund v. Jecklin*, 10 F.4th 900, 903 (9th Cir. 2021) (quoting *Dolan v. U.S. Postal Service*, 546 U.S. 481, 486 (2006)). In this light, the term "administration" plainly means *priority* administration; i.e., the enforcement of water rights in accordance with their relative priorities under the law of prior appropriation. Western states adopted statutory proceedings for the comprehensive adjudication of the scope and priority of water rights to provide for the comprehensive regulation of such rights among water users. *See Colorado River*, 424 U.S. at 804; *Oregon*, 44 F.3d at 763-64. Given the early priority and large scope of federal reserved water rights—including rights for Indian reservations—the absence of federal claims due to sovereign immunity presented a serious obstacle to these state regulatory efforts. *Colorado River*, 424 U.S. at 809-12. Congress adopted the McCarran Amendment to enable the joinder of the United States in such suits, so that federal rights could be determined and administered along with all other claims to state water resources. *Id.*

Section 666(a)(2) of the McCarran Amendment waives federal sovereign immunity to the administration of "such rights," i.e., the rights determined in a general adjudication under § 666(a)(1). *United States v. District Court in and for Eagle County, Colorado*, 401 U.S. 520, 524 (1971) (noting that § 666(a)(2) "must

refer to the rights described in" § 666(a)(1)); *accord Orff v. United States*, 358 F.3d 1143, 1143-44 n.3 (9th Cir. 2004). These rights are "inter se" rights, i.e., rights held in relation to all other parties to the suit. *See Nevada v. United States*, 463 U.S. 110, 140 (1983). To "administer" such rights means to enforce their relative priorities of use. *Cf. State Engineer of Nevada v. South Fork Band of Te-Moak Tribe of Western Shoshone Indians of Nevada*, 339 F.3d 804, 807, 813-14 (9th Cir. 2003) (suit to compel a tribe to participate in the state statutory scheme for the priority enforcement of water rights decreed in general adjudication).

Thus, as KID observes (Pet. 41), an enforceable decree in a McCarran Amendment adjudication is a prerequisite for a suit to administer the decreed rights. *South Delta Water Agency v. United States*, 767 F.2d 531, 541 (9th Cir. 1985). But it does not follow that any suit impacting the exercise of a decreed or provisionally-determined right is a suit to "administer" that right. *See*, *e.g.*, *San Luis Obispo Coastkeeper v. U.S. Dep't of the Interior*, 394 F. Supp. 3d 984, 995 (N.D. Cal. 2019), *aff'd*, 827 Fed. Appx. 744 (9th Cir. 2020) (suit "incidentally" impacting decreed right not within McCarran Amendment). For example, if KID were to sue Reclamation to compel water deliveries that Reclamation withheld due to KID's failure to meet contract repayment obligations or that Reclamation was unable to deliver due to a lack of appropriations for operations and maintenance,

such a suit plainly would not be a suit to "administer" ACFFOD rights and would not be within the jurisdiction of the KBA Court. 43 U.S.C. § 666(a)(2).

2. KID does not seek to enforce ACFFOD rights in priority.

Likewise, KID's claims here are not claims for the priority administration of rights provisionally determined in the ACFFOD. Specifically, KID does not seek to enforce its members' Project water rights as against junior appropriators; nor does KID seek to limit any competing appropriator's use to an adjudicated amount. *Cf. Hawkins*, 991 F.3d at 222. Rather, KID seeks to adjudicate a dispute with Reclamation over the application of the ESA and other federal law to the exercise of Project water rights. This dispute: (1) has not been determined in the ACFFOD, (2) has no bearing on the ongoing KBA proceeding to review the ACFFOD, and (3) does not concern the "administration" (priority enforcement) of provisionally-determined rights. *See* 43 U.S.C. § 666(a)(2).

In an effort to show that its suit does seek to enforce water rights provisionally determined in the ACFFOD, KID argues that Project water users are the owners of the "secondary right to use stored water," Pet. 34, and that Reclamation has no right to "use" the water for "its own purposes," Pet. 14, 21, 36. But this argument misconstrues the nature of the Project rights and the ESA's impact on Project operations.

Under the ACFFOD, the United States possesses a 1905 priority right to store up to 486,830 acre feet of water for beneficial use by Project irrigators, PE 108-09 (KBA_ACFFOD_07060-61), and the Project irrigators possess the right to use such water under the same priority through federally-owned Project works, PE 112-19 (KBA_ACFFOD_07075-82). These rights were perfected by virtue of a joint appropriation (the concerted efforts of Reclamation and water users) and are exercised and enforced against junior appropriators in tandem under the same priority.

Adjudicated water rights are not obligations. In determining that Reclamation *may* store water for Project use and that Project beneficiaries *may* use such water for irrigation, the ACFFOD did not determine whether or when Reclamation *must* exercise its storage rights for the benefit of Project irrigators. Nor did the ACFFOD determine the relative water rights of the various irrigation districts and entities that use Project water, or the rights that Project users hold against Reclamation with respect to Project operations. To the contrary, the ACFFOD specifically recognizes that the "determination of the relative rights" of Project water users and of the United States to "control or operate diversion or distribution works, including headgates, pumps, canals, and other structures, *is not within the scope of the Adjudication.*" *See* KBA-ACFFOD_07085-86 (emphasis added). This is so because the duties that Reclamation owes as Project operator to

Project users are not governed by priority of right, but instead are governed by the contracts between Reclamation and the irrigation districts under the Reclamation Act, and by other applicable federal statutes like the ESA. *See generally Klamath Irrigation District v. United States*, 635 F.3d 505, 517 (Fed. Cir. 2011). That Project water users have a provisionally adjudicated *right* to divert water from Upper Klamath Lake in conjunction with Reclamation's *right* to store water in the lake does not mean that the ACFFOD obligates Reclamation to store water, to retain stored water, or to operate the Project in ways that would violate the ESA or other federal law.

Moreover, releasing water from Upper Klamath Lake in accordance with ESA requirements is not a "use" of water for purposes of water-rights administration. The ESA precludes Project irrigators and Reclamation from operating the Project in a manner that causes a take of SONCC coho salmon, 16 U.S.C. §§ 1533(d), 1538(a)(1)(B); 50 C.F.R. §§ 17.21(c), 17.31(a), except as provided in an incidental take statement issued in a biological opinion, 16 U.S.C. § 1536(b)(4); 50 C.F.R. § 402.14(i)(5). And Reclamation must ensure in consultation with NMFS that Project operations do not jeopardize SONCC coho salmon or adversely modify its critical habitat. 16 U.S.C. § 1536(a)(2); 50 C.F.R. § 402.14(i). But water releases prescribed by the ESA pursuant to these

requirements are not "uses" requiring water rights; they are conditions on the exercise of Project water rights.

To be sure, as Reclamation determined, ESA-prescribed water releases that provide flows necessary for SONCC coho salmon habitat are consistent with the *Winters* rights held by the Yurok and Hoopa Valley tribes. *See Baley*, 942 F.3d at 1325. But the ESA provides an independent legal regime that conditions Project operations. Contrary to KID's argument (Pet. 32-34), Reclamation does not impliedly use water or "flout" the ACFFOD's provisional adjudication of water rights when releasing water to comply with the ESA.

KID also argues that Reclamation erred in determining that the ESA applies to Project operations. *See* PE 76-79. According to KID, the Reclamation Act contracts give Reclamation insufficient discretion over Project water use to trigger consultation obligations under ESA Section 7. *Id.*; *see also* Pet. 43-44, n.5. But this Court has held that the ESA does apply to Project operations—and in particular to releases from Link River Dam—based on federal ownership and Reclamation's operational authorities. *Patterson*, 204 F.3d at 1213; *see also Baley*, 942 F.3d at 1323. And KID's substantive ESA arguments prove that its jurisdictional claims lack merit. At its core, KID's challenge to Reclamation's Project operations is a dispute over the application of *federal* law, requiring interpretation of the Reclamation Act, the Project contracts, and the ESA. These

matters properly were not resolved by OWRD in the ACFFOD; nor are they before the KBA Court that is reviewing the exceptions to the findings of fact and determinations of law made in the ACFFOD.

3. KID's arguments are unsupported.

For the above reasons, there is no merit to KID's argument (Pet. 21) that removal of its action from the KBA Court took from that court matters that are "an integral part of the [KBA]." Nor did the removal raise "comity" and "federalism" concerns. *See* Pet. 17-18, 23-25. In so arguing, KID relies on *People of State of California v. Mesa*, 813 F.2d 960 (9th Cir. 1987) (Pet. 17), a case in which two federal post office workers sought to remove state criminal prosecutions to federal court. *Id.* at 961. This court granted writs of mandamus to remand those prosecutions back to state court because the defendants sought removal solely on the grounds that they committed the offenses while on duty. *Id.* Unlike the present case, the *Mesa* defendants had "no colorable claim of federal immunity or other federal defense" and the prosecutions depended "completely on issues of state law." *Id.* at 965.

KID also relies heavily on this Court's holding in *Te-Moak* that the rule of "prior exclusive jurisdiction" is not simply a matter of comity, but "mandatory." Pet. 25 (quoting *Te-Moak*, 339 F.3d at 810). But *Te-Moak* is also inapposite. It concerned a motion to hold a tribe in contempt for refusing to allow state officials

access to tribal land, refusing to pay assessments, and otherwise declining to participate in Nevada's statutory scheme for the priority administration of water rights determined in a general adjudication. *See* 339 F.3d at 807-08. Describing the action as a "suit to enforce a decree over a *res*," this Court stressed that the McCarran Amendment's waiver for the "administration" of water right should be construed in conjunction with statutory text stating that the United States "shall be subject to the judgments, orders, and decrees of the court having jurisdiction" over the original adjudication. *Id*. at 811, 814 (quoting 43 U.S.C. § 666(a)).

In contrast, in seeking to enjoin Reclamation from conducting water releases called for in the Project operations plan, KID does not seek to invoke Oregon's administrative call system for the priority enforcement of rights set out in the ACFFOD. *See Hawkins*, 991 F.3d at 222; *see also* p. 11, *supra.* Nor does KID seek to compel Reclamation's participation in that call system. *Cf. Te-Moak*, 339 F.3d at 811-14. Instead, KID seeks to compel Reclamation to operate the Project in disregard of the ESA, raising issues of federal law that were not resolved in the ACFFOD and that do not involve priority administration of water rights that were determined in the ACFFOD. *See* 43 U.S.C. § 666(a)(2). For these reasons, KID's claims are not within the KBA Court's prior exclusive jurisdiction over the KBA, nor are they within the McCarran Amendment's waiver of sovereign immunity.

B. The KBA Court lacks jurisdiction to adjudicate or administer *Winters* rights held by California tribes.

1. The McCarran Amendment does not apply to interstate disputes.

The district court did not err, let alone clearly, for an additional reason: the McCarran Amendment does not authorize the KBA Court to adjudicate or administer federal reserved water rights in California, including those belonging to the Yurok and Hoopa Valley Tribes. Because the United States did not claim such rights in the KBA, they were not provisionally adjudicated in the ACFFOD. Nor have these rights been fully adjudicated or quantified in any McCarran Amendment proceeding in California or in any other suit. Nonetheless, this Court has held that the Yurok and Hoopa Valley Tribes have instream water rights sufficient to maintain their salmon fisheries within the Klamath River in California. *Patterson*, 204 F.3d at 1214. And the Federal Circuit has held that such water rights, at "the bare minimum," are coextensive with the stream flows needed to ensure Reclamation's "compliance with the ESA in order to avoid placing the existence of their important tribal resources in jeopardy." *Baley*, 942 F.3d at 1337. Consistent with these rulings, when adopting operations plans for the Project in consultation with NMFS under ESA Section 7, Reclamation has cited its trust responsibilities with respect to downstream tribal water rights in addition to its ESA obligations. *Id.* at 1325.

In other words, as KID observes (Pet. 20, 36, 43), Reclamation's Project operations plan calls for the release of water from Upper Klamath Lake both to comply with the ESA and in recognition of federal "tribal trust responsibilities." KID errs in concluding, however, that such releases are contrary to the ACFFOD or implicate the KBA Court's jurisdiction. As already explained (*supra*, pp. 23-24), Reclamation makes the releases to comply with the ESA and thus without the need for a water right.

Moreover, even if Reclamation hypothetically were to release water from Upper Klamath Lake *solely* for the purpose of satisfying senior downstream water rights and not to meet any ESA obligation, such releases still would not be contrary to the ACFFOD or to the KBA Court's McCarran Amendment jurisdiction. This is so because the KBA Court's jurisdiction is limited to the determination and administration of relative water rights *in Oregon*. Oregon's general adjudication statute authorizes and directs OWRD to determine water rights within the "natural watercourse in this state," i.e., in Oregon. Or. Rev. Stat. § 539.021. And Oregon has no constitutional authority to compel California water users to assert, in the Oregon proceedings, water rights in stream flows within California. *See Shaffer v. Heitner*, 433 U.S. 186, 197 (1977) ("Any 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 can the McCarran Amendment be construed as somehow expanding the state-law jurisdiction of the KBA Court to include California claims or interstate disputes. Given the interstate nature of many river systems and territorial limits on state jurisdiction, the McCarran Amendment's waiver of sovereign immunity cannot be limited to river systems that physically exist wholly within a state, but instead "must be read as embracing" those parts of an interstate system "within [a] particular State's jurisdiction." *Eagle County*, 401 U.S. at 523. But nothing in the McCarran Amendment "unequivocally express[es]" or suggests an intent by Congress to empower any state with jurisdiction over any part of an interstate stream system to assert jurisdiction over all claims to the system as a whole. *See Idaho*, 508 U.S. at 6-7; *Plaskett*, 18 F.4th at 1087.

Indeed, the Federal Circuit has already held—in a case involving KID irrigators—that the KBA Court lacks jurisdiction to adjudicate the senior rights of the Yurok and Hoopa Valley tribes in relation to Project rights. *Baley*, 942 F.3d at 1341. *Baley* involved takings claims brought by Project users in response to a suspension of water deliveries for irrigation during a year of extreme drought. *Id.* at 1316. Reclamation ordered deliveries suspended to retain water in Upper Klamath Lake and to maintain stream flows in the Klamath River to avoid jeopardy to the listed suckers and SONCC coho salmon. *Id.* In that suit, the

Project water users accepted the ESA's applicability, but argued that the ESA-prescribed moratorium on irrigation use resulted in a taking of water rights. *Id.*

The Federal Circuit held that there was no taking because the requirements imposed by the ESA for maintaining lake levels and downstream flows were within the senior rights of Klamath Basin tribes, including those of the California tribes. *Id.* at 1335-41. In so holding, the Federal Circuit rejected the Project water users' argument that the *Winters* rights of the California tribes had been forfeited because they were not asserted in the KBA. *Id.* at 1341. The Federal Circuit held that the forfeiture provision of Oregon's general adjudication statute (Or. Rev. Stat. § 539.210) did not apply, because the KBA Court lacked jurisdiction under state law and the McCarran Amendment to adjudicate the water rights of the California tribes. *Id.*

The KBA Court's jurisdiction to review and administer the water rights set out in the ACFFOD is no broader than the authority that OWRD exercised in provisionally adjudicating those rights. Given *Baley*'s holding that OWRD lacked authority to adjudicate the water rights of the Yurok and Hoopa Valley Tribes as against Project water rights, KID cannot now argue—on behalf of its members who were parties in *Baley*[5]—that the KBA Court has "prior exclusive jurisdiction"

[5] KID was the lead plaintiff in *Baley*, but withdrew along with all irrigation districts after the districts withdrew their breach-of-contract claims, leaving only

to administer these relative rights. *See Paulo v. Holder,* 669 F.3d 911, 917 (9th Cir. 2011) (party or person in privity with such party may not re-litigate an issue actually decided in a final judgment).

2. KID's stored-water argument does not alter the jurisdictional analysis.

Consistent with the Federal Circuit's holding in *Baley*, KID does not now argue that the federal reserved water rights of the Yurok and Hoopa Valley Tribes may never be asserted against Project water rights due to forfeiture (failure to assert such claims in the KBA). Rather, KID narrows its argument to address the California tribes' right in the "stored" water of Upper Klamath Lake. KID cites an opinion by the Oregon Attorney General for the general proposition that waters stored in priority (i.e., when not needed for the satisfaction of senior rights) are not subject to call by senior appropriators if natural flows later become insufficient to satisfy the senior rights. *See* Pet. 35-36 (citing Or. Op. Att'y Gen. OP-6308 (1989)). And KID observes (Pet. 36) that the ACFFOD provisionally adjudicated Reclamation's storage right in Upper Klamath Lake, as well as the right of Project users to stored waters, without adjudicating any right in stored waters for the downstream California tribes. From these propositions, KID argues (Pet. 36) that

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the takings claims of the individual water users who beneficially own the water rights. *See Baley*, 942 F.3d at 1316-18.

if the federal district court were to resolve any issue regarding the release of water from Upper Klamath Lake, the federal court would thus "invade the *res* being considered" by the KBA Court.

In so arguing, KID erroneously presumes that the *interstate* dispute—as to whether and when Upper Klamath Lake waters may be released to serve the senior rights of the California tribes—concerns priority administration of water rights in Oregon (the subject matter of the KBA). To the contrary, the stored-water issue raised by KID with respect to the rights of the California tribes is not within the jurisdiction of the KBA.

As adopted by some western states, the stored-water rule is based on the view: (1) that water rights are perfected in natural flows, and (2) that waters stored by a junior appropriator without injury to senior rights thereafter belong to the junior appropriator. *See*, *e.g.*, *Granite County Board of Commissioners v. McDonald*, 385 Mont. 262, 267-69, 383 P.3d 740, 743-45 (Mont. 2016). The application of this rule (assuming it applies) is not necessarily straightforward.

For example, the Project might be said to be storing water in Upper Klamath Lake whenever inflows from upstream tributaries exceed outflows through Link River Dam, and to be releasing stored water whenever outflows exceed inflows. But these calculations are of limited (if any) relevance for determining the natural flows relevant to the senior *Winters* rights of the downstream California tribes.

This is so because the tribes' federal reserved rights are based on pre-Project flows, i.e., the natural stream conditions that existed when the water rights were reserved. *See Baley*, 942 F.3d at 1336-37; *see also Granite County,* 385 Mont. at 267, 383 P.3d at 743 ("downstream appropriators . . . are entitled to the natural flow of a stream *as it existed at the time of appropriation*") (emphasis added) (quoting water court). Over the course of its construction, the Project extensively reengineered the hydrology of the Klamath River Basin at and below Upper Klamath Lake, without significantly altering the lake's natural storage capacity, *see supra*, pp. 2-3, rendering it difficult (if not impossible) to discern the natural flows that would occur in the basin and that would be available to serve downstream water rights in the absence of the Project.

In addition, as explained in the United States' response in opposition to KID's motion for preliminary injunction, courts have consistently rejected the argument that tribal water rights for fish are limited to "natural flow" as opposed to "stored water" from subsequently constructed Reclamation projects. *See*, *e.g.*, *Carson-Truckee Water Conservancy Dist. v. Clark*, 741 F.2d 257, 261, 262 (9th Cir. 1984), *cert. denied sub nom. Nevada v. Hodel*, 470 U.S. 1083 (1985) (authorized project purposes may be superseded by tribal rights and ESA obligations for the use of Reclamation project stored water); *Washington Dep't of Ecology v. Acquavella*, No. 77-2-01484-5, Memorandum Opinion Re: Motion to

Limit Treaty Water Right For Fish for Natural Flow, No. 77-2-01484-5, slip op. at 32 (Wash. Super. Ct. Apr. 2, 1996) (holding that in times of shortage, and when the project superintendent so determines, "storage water may be released" to satisfy treaty-reserved fishing right).

More to the point for present purposes, whether and how the stored-water rule applies to Upper Klamath Lake for purposes of adjudicating and administering the California tribes' senior downstream rights is a matter outside of Oregon's jurisdiction. Even if OWRD or the KBA Court might have occasion to distinguish stored water from natural flows from Upper Klamath Lake for purposes of administering relative rights determined in the ACFFOD—a matter KID has not demonstrated—it does not follow that OWRD or the KBA Court have jurisdiction to reach this issue for purposes of administering the rights of the California tribes, or for purposes of reviewing agency action by Reclamation in consideration of those downstream rights.

Significantly, in its motion for preliminary injunction, KID did not ask the KBA Court to administer a stored-water determination already made in the ACFFOD, *because there is no such determination.*[6] Instead, as with the ESA issue

[6] As noted (pp. 14-15, *supra*), OWRD issued an order in April 2021 that purports to determine when water is lawfully stored in Upper Klamath Lake as against all downstream uses, and to preclude Reclamation from releasing stored water from Upper Klamath Lake for any purpose other than beneficial use under rights

(*see supra*, pp. 21-25), KID again introduced a new issue that was *not* resolved in the ACFFOD—whether and when water stored in Upper Klamath Lake may be released to serve the senior downstream rights of the California tribes—and asked the KBA Court to adjudicate that issue in the first instance. The ACFFOD did not address that issue and it is not within the KBA Court's McCarran Amendment jurisdiction for the reason stated in *Baley*: the KBA Court "cannot adjudicate water rights in another state." 942 F.3d at 1341.

3. The KBA Court's "in rem" jurisdiction is limited to Oregon water rights.

For the reason stated above, KID's argument (Pet. 25-31) that the KBA is an "in rem" adjudication is beside the point. Although remand would be required for matters within the KBA Court's "in rem" jurisdiction, *see Te-Moak*, 339 F.3d at 810, the KBA Court's "prior exclusive jurisdiction" for McCarran Amendment purposes is limited to those parts of the Klamath River system "within [Oregon's] jurisdiction." *Eagle County*, 401 U.S. at 523; *see also Baley*, 942 F.3d at 1341.

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provisionally determined in the ACFFOD. Reclamation has challenged that order as contrary to federal law and outside OWRD's authority. *See Yurok Tribe*, 2022 WL 875646 at *3. OWRD issued the order after a Marion County Circuit Court directed it to do so, in a suit brought by KID (Case No. 20CV17922), in which Reclamation is not a party. OWRD's appeal to the Oregon Court of Appeals (CA A76270) is pending. KID's Marion County suit contradicts its present claim that the KBA Court has prior exclusive jurisdiction over these matters.

Stated differently, the KBA Court's prior exclusive jurisdiction is limited to the claimed water rights in Oregon that were actually adjudicated in the ACFFOD.

Contrary to KID's argument (Pet. 39-40), the United States did not take a different position in its 2018 amicus brief in *TPC, LLC v. OWRD*, CA A1677380 (Or. Ct. App.) (PE 1267-1307). In *TPC*, a group of Oregon water users challenged an OWRD order to enforce a senior water-rights call by the Klamath Tribes. PE 1274-76. The Klamath Tribes' rights and the challengers' rights were all in Oregon and were all provisionally determined in the ACFFOD. *Id.* In its amicus brief, the United States argued that OWRD's enforcement order could not be collaterally attacked in an Oregon Administrative Procedure Act suit in a different state court (in Marion County), given the KBA Court's ongoing review of the ACFFOD and its "prior exclusive jurisdiction" over the adjudication and priority administration of the subject rights. PE at 1279-90; *accord Te-Moak*, 339 F.3d at 810-14.

In contrast, in its motion for preliminary injunction, KID challenges provisions of the Project operations plan that call on Reclamation to release water from Upper Klamath Lake to meet its ESA obligations and to serve downstream water rights in California. Those rights and obligations were not determined in the ACFFOD nor could they have been, because they are not subject to the KBA Court's jurisdiction. *Baley*, 942 F.3d at 1341. Accordingly, KID's present

challenge does not impugn or interfere with the KBA Court's ongoing review of rights determined in the ACFFOD or with the priority administration of such rights. Nor is it a suit to enforce any terms of the provisional ACFFOD decree. *Cf. Te-Moak*, 339 F.3d at 811-814. For these reasons, neither the McCarran Amendment nor the doctrine of "prior exclusive jurisdiction" are applicable.

II. KID has not demonstrated that the *Bauman* factors favor mandamus relief.

For the above reasons, KID cannot show a "clear and indisputable" right to a remand to the KBA Court, because KID cannot show that the KBA Court has jurisdiction over its claim (which is effectively a challenge to the Project operations plan). This failure is fatal to KID's petition. *Cheney*, 542 U.S. at 381. Under this Court's precedents, the existence of a "clear error" by a district court is a "necessary condition" for the issuance of a writ, *In re Walsh*, 15 F.4th at 1008 (quoting *In re Van Dusen*, 654 F.3d at 841)), and its absence is "dispositive," *In re Boon Global*, 923 F.3d at 649.

Conversely, demonstration of a clear error is never *sufficient* for the issuance of a writ. *See Cheney*, 542 U.S. at 380-81. The remaining factors are relevant not as alternatives to a clear-error showing, but to determine if a writ of mandamus would be inappropriate notwithstanding a showing of clear error; e.g., when a petitioner readily may obtain relief from that error without prejudice via direct appeal. *Douglas v. U.S. District Court for Central District of California*, 495 F.3d

1062, 1066 (9th Cir. 2007); *see also United States v. Hetrick*, 644 F.2d 752, 755 (9th Cir. 1980). Here, the remaining *Bauman* factors also do not support KID's petition.

A. KID has alternative remedies (factors one and two).

As to the first and second *Bauman* factors—the existence of a direct appeal or other adequate remedy and the potential prejudice that might occur in pursuing such a course, 557 F.2d at 654—there is no right of direct appeal from an order denying a motion to remand a matter to the state court from which it was removed, unless the order "effectively sends a party out of court." *See City & County of San Francisco v. PG & E Corp.*, 433 F.3d 1115, 1120 (9th Cir. 2006). In denying remand, the district court did not determine its own jurisdiction to hear KID's substantive claim for injunctive relief or resolve that claim on the merits. PE 1254-62. Thus, KID may not bring a direct appeal. *Id.* at 1120.

Nonetheless, as KID itself recognizes (Pet. 20-23), its petition for writ of mandamus is merely a procedural vehicle in an effort to get its substantive claim heard. Enjoining Reclamation from releasing water stored in Upper Klamath Lake is KID's ultimate goal. With respect to that objective, KID does not demonstrate that Reclamation has acted contrary to law (a matter the district court has not reached), or that a writ of mandamus to compel a remand to the KBA Court is the "only adequate way" to get Reclamation's action reviewed. *See In re U.S.*

Department of Education, 25 F.4th at 697. To begin with, KID's substantive motion remains pending before the district court. If the district court has jurisdiction to hear KID's challenge to Reclamation's operations plan and rules in KID's favor, KID will have achieved its desired result in the present action.

KID speculates (Pet. 21) that a prompt ruling from the district court on its motion for preliminary injunction "seems unlikely, given this case's history." But KID gives this Court no reason to believe that it will be able to obtain a swifter resolution of its substantive claim in the KBA Court, which lacks any familiarity with challenges to agency action or the substance of the ESA issues. And any adverse ruling on KID's motion for preliminary injunction in the federal district court would be subject to appeal to this Court. *See* 28 U.S.C. § 1292(a)(1).

KID further speculates (*id.*) that if it *prevails* in district court on its motion for preliminary injunction, the "United States would inevitably appeal," and that in any such appeal, this Court "would conclude that [its] motion was in the wrong court in the first place." This argument assumes that in any appeal by the United States this Court would: (1) *sua sponte* take up KID's "prior exclusive jurisdiction" argument, with which the United States does not agree; (2) determine that the federal court lacked jurisdiction to hear the merits, and (3) vacate any merits ruling in KID's favor. KID cites no authority to show that such result would be mandated, even if its jurisdictional argument were deemed correct. *See In re Boon*

Global, 923 F.3d at 649 (petitioner bears burden of establishing right to mandamus relief).

As KID further observes (Pet. 22-23), there are also substantial questions about the district court's jurisdiction to hear KID's challenge to the Project operations plan. As explained (pp.13-14, *supra*), before filing the present action (initially in the KBA Court), KID sought similar relief against Reclamation in federal district court. The district court dismissed that action under Federal Rule of Civil Procedure 19, on the grounds that the Klamath Tribes and Yurok Tribe were necessary parties who could not be joined due to tribal sovereign immunity. *See Klamath Irrigation District*, 489 F. Supp. 3d at 1172, 1184.

Reclamation did not join the tribes' Rule 19 motions. But Reclamation observed that Rule 19 dismissal appeared to be dictated by this Court's decision in *Diné Citizens Against Ruining Our Environment v. Bureau of Indian Affairs*, 932 F.3d 843 (9th Cir. 2019). *See* Federal Appellees' Answering Brief at 2, 18-23, Ninth Cir. Nos. 20-36009, 20-36020 (consolidated) (July 1, 2021). In addition, after removing the present action to federal district court, Reclamation argued: (1) that the McCarran Amendment's waiver of sovereign immunity does not apply to provide jurisdiction over KID's claim in state or federal court, and (2) that KID's motion was an improper collateral attack on the judgment in KID's 2019 action in federal district court (now on appeal to this Court). PE 372-81. For these

reasons, Reclamation does not (and cannot) contend that the present district court proceedings will be adequate to provide KID the procedural relief it requests (a hearing of its substantive claims).

Nonetheless, it does not follow, as KID suggests (Pet. 22-23, 48-49) that the KBA Court is the proper forum by default. As explained (pp. 21-25, *supra*), KID's action is not an action for priority enforcement of water rights provisionally determined in the ACFFOD. It is effectively a challenge to agency action under federal law, which would be properly asserted in district court under the Administrative Procedure Act ("APA"), 5 U.S.C. §§ 702 & 706, but for the obstacle presented by Rule 19 as interpreted in *Diné Citizens*. While recognizing it as the law of this Circuit, Reclamation does not concede that *Diné Citizens* was correctly decided. And KID has appealed the district court's Rule 19 judgment. *See* Ninth Cir. No. 20-36009 (argued December 7, 2021). Indeed, KID's argument in that appeal—that the district court had jurisdiction over its APA claim—contradicts its argument here that the KBA Court had prior *exclusive* jurisdiction.

Moreover, as further explained (pp. 14-15, *supra*), there is an action currently pending against Reclamation in the Northern District of California, in which KID's concerns are being heard. *See Yurok Tribe*, 2022 WL 875646 at *1-*3. In that action, Reclamation joined and filed a cross-claim against OWRD, seeking declaratory relief as to Reclamation's authority to release stored water

from Upper Klamath Lake consistent with its ESA obligations and the federal reserved rights of the Yurok and Hoopa Valley Tribes. *Id.* at *3.[7] KID was granted intervention, *see id.* at *9, and has filed a summary judgment brief raising essentially the same claim it asserts in this case. *See* N.D. Cal. No. 3:19-cv-04405, Doc. 1041 (July 29, 2022).[8] Thus, while uncertainties remain, KID has paths forward in federal court.

B. KID finds no support in the other *Bauman* factors.

1. Bauman factor four does not apply.

As for *Bauman* factor four—whether the district court's error is "oft repeated" or shows a "persistent disregard for federal rules," 557 F.2d at 655—KID argues (Pet. 48) that in denying remand to the KBA Court, the district court "compounded" the error that it made in *Klamath Irrigation District* by dismissing that case under Fed. R. Civ. P. 19(b). *See* 489 F. Supp. 3d at 1172, 1184. But these are entirely different legal issues. Even if both rulings were in error, KID does not show an "oft repeated" error. *See Bauman*, 557 F.2d at 655.

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[7] The district court allowed the Yurok Tribe to permissively join Reclamation's cross-claim. *Id.* at *6-*9 (citing Fed. R. Civ. P. 20(a)). No tribe has sought dismissal under Fed. R. Civ. P. 19(b).

[8] KID also moved the district court to abstain from hearing Reclamation's cross-claim in deference to proceedings in the KBA. *See id.* Doc. 1040 (July 29, 2022) (citing *Colorado River*, 424 U.S. at 817-18). That motion presumes that KID's present action should (and will) be remanded to the KBA Court.

KID also asserts (Pet. 49) that a denial of mandamus relief in this case would have "dire consequences" by leaving KID "utterly without a remedy" and "negat[ing] the purpose of water rights proceedings." But this argument does not address *Bauman* factor four; it is a reiteration of KID's argument under factors one and two. And it misstates those issues. The purpose of the "water rights proceedings" in the KBA is to determine relative water rights in Oregon, *see* Or. Rev. Stat. § 539.021, not to review Reclamation's contractual obligations or compliance with the ESA, or to determine the water rights of Project users as against the downstream rights of the California tribes. And KID has possible paths forward in federal court, either in the present case or in *Yurok Tribe v. Bureau of Reclamation*. *See* pp. 39-42, *supra*.

Moreover, setting aside whether *Diné Citizens* was correctly decided, the obstacle to judicial review presented by Rule 19 does not provide grounds for an expansive interpretation of the McCarran Amendment. Whether the McCarran Amendment's waiver of federal sovereign immunity applies to KID's present claim must be resolved in accordance with controlling precedent dictating a narrow construction of that statute, *Idaho*, 508 U.S. at 6-7, and without regard to the potential unavailability of judicial review under the APA (due to Rule 19(b)). *Cf. E.V. v. Robinson*, 906 F.3d 1082, 1094 (9th Cir. 2018) (noting that APA waiver of sovereign immunity is "expansive").

2. Bauman factor five does not apply.

KID acknowledges (Pet. 49-50) that the district court's denial of remand "does not raise new or novel issues of law" that would support mandamus under *Bauman* factor five. *See Bauman*, 557 F.2d at 655. In particular, *Bauman* cited cases where mandamus review was sought to restrain an alleged ultra vires exercise of jurisdiction by a district court, as evidenced by the absence of statutory authority or precedent. *See id.* (citing *Schlagenhauf v. Holder*, 379 U.S. 104, 111 (1964); *Pan Am. World Airways, Inc. v. U.S. Dist. Court for Central Dist. of California*, 523 F.2d 1073, 1076 (9th Cir. 1975)). Here, the district court's order denying remand was in accord with McCarran Amendment precedent. *See* pp. 18-21, *supra*. Conversely, a remand to allow the KBA Court to review federal agency action for compliance with the ESA would be unprecedented and would sanction an ultra vires exercise of state-court jurisdiction.

KID's reliance (Pet. 49) on *South Delta Water Agency* is misplaced. Unlike that case, there is a provisional water rights decree here (the ACFFOD) that is subject to enforcement. *See id.*, 767 F.2d at 541. But despite KID's arguments, its present claim is not an effort to enforce the ACFFOD, but a run-of-the-mill challenge to federal agency action that belongs (if anywhere) in district court.

CONCLUSION

For the foregoing reasons, the petition for writ of mandamus should be denied.

Respectfully submitted,

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DJ # 90-8-6-08462/1

Form 8. Certificate of Compliance for Briefs
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I am the attorney or self-represented party.

This brief contains **10,551** words, excluding the items exempted by Fed. R. App. P. 32(f). The brief's type size and typeface comply with Fed. R. App. P. 32(a)(5) and (6).

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[9] The word limit for a petition for writ of mandamus and for an answer is 8,400 words. *See* Ninth Cir. Rule. 21-2(c), 32-3(2). This answer is within the stated word count of the petition (10,610 words), which the Court accepted for filing without a motion for additional words.

ADDENDUM

28 U.S.C. § 1442. Federal officers or agencies sued or prosecuted

(a) A civil action or criminal prosecution that is commenced in a State court and that is against or directed to any of the following may be removed by them to the district court of the United States for the district and division embracing the place wherein it is pending:

(1) The United States or any agency thereof or any officer (or any person acting under that officer) of the United States or of any agency thereof, in an official or individual capacity, for or relating to any act under color of such office or on account of any right, title or authority claimed under any Act of Congress for the apprehension or punishment of criminals or the collection of the revenue.

(2) A property holder whose title is derived from any such officer, where such action or prosecution affects the validity of any law of the United States.

(3) Any officer of the courts of the United States, for or relating to any act under color of office or in the performance of his duties;

(4) Any officer of either House of Congress, for or relating to any act in the discharge of his official duty under an order of such House.

(b) A personal action commenced in any State court by an alien against any citizen of a State who is, or at the time the alleged action accrued was, a civil officer of the United States and is a nonresident of such State, wherein jurisdiction is obtained by the State court by personal service of process, may be removed by the defendant to the district court of the United States for the district and division in which the defendant was served with process.

(c) Solely for purposes of determining the propriety of removal under subsection (a), a law enforcement officer, who is the defendant in a criminal prosecution, shall be deemed to have been acting under the color of his office if the officer--

(1) protected an individual in the presence of the officer from a crime of violence;

(2) provided immediate assistance to an individual who suffered, or who was threatened with, bodily harm; or

(3) prevented the escape of any individual who the officer reasonably believed to have committed, or was about to commit, in the presence of the officer, a crime of violence that resulted in, or was likely to result in, death or serious bodily injury.

(d) In this section, the following definitions apply:

(1) The terms "civil action" and "criminal prosecution" include any proceeding (whether or not ancillary to another proceeding) to the extent that in such proceeding a judicial order, including a subpoena for testimony or documents, is sought or issued. If removal is sought for a proceeding described in the previous sentence, and there is no other basis for removal, only that proceeding may be removed to the district court.

(2) The term "crime of violence" has the meaning given that term in section 16 of title 18.

(3) The term "law enforcement officer" means any employee described in subparagraph (A), (B), or (C) of section 8401(17) of title 5 and any special agent in the Diplomatic Security Service of the Department of State.

(4) The term "serious bodily injury" has the meaning given that term in section 1365 of title 18.

(5) The term "State" includes the District of Columbia, United States territories and insular possessions, and Indian country (as defined in section 1151 of title 18).

(6) The term "State court" includes the Superior Court of the District of Columbia, a court of a United States territory or insular possession, and a tribal court.

43 U.S.C. § 666. Suits for adjudication of water rights

(a) Joinder of United States as defendant; costs

Consent is given to join the United States as a defendant 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, where it appears that the United States is the owner of or is in the process of acquiring water rights by appropriation under State law, by purchase, by exchange, or otherwise, and the United States is a necessary party to such suit. The United States, when a party to any such suit, shall (1) be deemed to have waived any right to plead that the State laws are inapplicable or that the United States is not amenable thereto by reason of its sovereignty, and (2) shall be subject to the judgments, orders, and decrees of the court having jurisdiction, and may obtain review thereof, in the same manner and to the same extent as a private individual under like circumstances: Provided, That no judgment for costs shall be entered against the United States in any such suit.