No. 22-2141

UNITED STATES COURT OF APPEALS
FOR THE TENTH CIRCUIT

GUY CLARK; LINDA CORWIN; CRAIG CORWIN; RICHARD JONES; WESLEY HANCHETT; and MICHAEL WRIGHT,
Plaintiffs-Appellants,

v.

DEB HAALAND, in her official capacity as Secretary of Interior; CAMILLE C. TOUTON, in her official capacity as Deputy Commissioner, United States Bureau of Reclamation; MARTHA WILLIAMS, in her official capacity as Principal Deputy Director, U.S. Fish & Wildlife Service; RUDY SHEBALA, in his official capacity as Executive Director, Navajo Nation Division of Natural Resources; DAVID ZELLER, in his official capacity as head of Navajo Nation Indian Agricultural Product Industries; MIKE HAMMAN, in his official capacity as State Engineer of the State of New Mexico; ROLF SCHMIDT-PETERSEN, in his official capacity as Director of New Mexico Interstate Stream Commission,
Defendants-Appellees.

Appeal from the United States District Court for the District of New Mexico
No. 1:21-cv-01091 (Hon. Kenneth J. Gonzales)

CORRECTED ANSWERING BRIEF OF FEDERAL DEFENDANTS-APPELLEES

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Oral argument is not requested.

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PRIOR OR RELATED APPEALS

Counsel for Federal Defendants-Appellees is unaware of any prior appeals from this underlying federal lawsuit that have been taken in this Court and is unaware of any related appeals in this Court. Counsel for Federal Defendants-Appellees is also unaware of any related appeals in other federal courts of appeals. As this brief discusses, there have been several state-court appeals in the underlying New Mexico state-court water-rights proceeding and related proceedings, which have involved some U.S. Supreme Court certiorari petition practice.

GLOSSARY

APA	Administrative Procedure Act

INTRODUCTION

Plaintiffs-Appellants ("Plaintiffs") are various New Mexico residents, some residing in and some outside the San Juan River basin, who profess concern about use of water from the basin. In 2021, they filed suit in the federal district court in New Mexico to collaterally challenge and relitigate the outcome and procedures of a New Mexico state-court adjudication of water rights. Their suit seeks to upset a settlement reached by the United States, the Navajo Nation, and the State of New Mexico; approved by Congress and by the state adjudication court; and affirmed on appeal by the state appellate courts. The state courts have repeatedly rejected the allegations that comprise this complaint, which center on years-old conduct not of federal officials, but instead of particular state-court judges. Yet the complaint does not name those judges as defendants, instead listing federal officials, tribal officials, and other state officials as the three sets of Defendant-Appellees.

Particularly with respect to Federal Defendants-Appellees ("Federal Defendants"), on which this brief focuses, the complaint does not allege violations of a type and under circumstances as to which the United States has waived its sovereign immunity. And, also with respect to those Federal Defendants, the complaint does not establish or even explain the connection between any conduct by them and the purported violations of which Plaintiffs complain.

Upon motions by each set of Defendants, the district court dismissed Plaintiffs' claims for lack of jurisdiction. Those claims, the district court reasoned, are barred by federal, state, and tribal sovereign immunity. For the reasons stated herein, the district court's dismissal of the complaint—and in particular, its dismissal of the claims against Federal Defendants—was correct. Plaintiffs have not identified any basis for excepting this case from the general requirement for an express and applicable waiver of sovereign immunity, and they have failed to establish any applicable waiver of federal sovereign immunity. The only express waivers to which they allude—under the Administrative Procedure Act and the McCarran Amendment—do not apply. Accordingly, the district court's dismissal should be affirmed on its well-reasoned grounds.

This Court may alternatively affirm the district court's dismissal of all of Plaintiffs' claims under the *Rooker-Feldman* doctrine. That doctrine bars all their claims because those claims, properly understood, seek to relitigate issues already rejected by the state court in its judgments approving of a settlement and entering partial final decrees of water rights in what is essentially an *in rem* or *quasi in rem* action. On this ground, this Court may and should affirm the dismissal of Plaintiffs' claims against all the Defendants.

STATEMENT OF JURISDICTION

The district court lacked subject matter jurisdiction over Plaintiffs' claims. As explained in the Argument, the United States has not waived its sovereign immunity in any applicable respect, and the *Rooker-Feldman* doctrine generally forecloses this suit. *See* Appellant's Appendix Volume 2 ("2 App. __") at 195-197; *infra* Argument, Sections I.A-I.D, II.A-II.C. The district court entered final judgment and issued an opinion and order dismissing all claims on September 28, 2022. 2 App. 182-203. Plaintiffs timely filed their notice of appeal on November 22, 2022. 2 App. 204; *see* 28 U.S.C. § 2107(b); Fed. R. App. P. 4(a)(1)(B). This Court has jurisdiction under 28 U.S.C. § 1291.

STATEMENT OF THE ISSUES

Federal Defendants address the following issues in this brief:

1. Whether the district court correctly determined that it lacked jurisdiction over Plaintiffs' claims against Federal Defendants, due to Plaintiffs' failure to identify any applicable waiver of federal sovereign immunity or exception to the unequivocally expressed waiver requirement.
2. Alternatively, whether the district court's dismissal of Plaintiffs' complaint should be affirmed as to all Defendants under the *Rooker-Feldman* doctrine, given that Plaintiffs' claims, properly understood, are all collateral attacks

on the state court's adjudication of water rights in the San Juan River basin in an *in rem* or *quasi in rem* proceeding with broadly binding effect.

STATUTES

This brief's Addendum sets forth a pertinent statutory provision. Add.1a.

STATEMENT OF THE CASE

A. Background

1. The Navajo Nation's Water Rights

In 1868, the United States executed a treaty with the Navajo Nation and began reserving land in northwest New Mexico and northeast Arizona to be the Nation's permanent home. Treaty of June 1, 1868, 15 Stat. 667. Subsequent statutes and executive orders expanded the Navajo Reservation, which now covers more than 17 million acres in New Mexico, Arizona, and Utah, and is the largest Indian reservation in the country. *See* Boundary Extension Act of 1934, 48 Stat. 960; *Navajo Nation v. Department of Interior*, 876 F.3d 1144, 1152 (9th Cir. 2017). The San Juan River runs roughly along the reservation's northern border in New Mexico.

In New Mexico and most western states, the doctrine of prior appropriation governs water rights for agricultural, municipal, or other purposes. *Navajo Nation*, 876 F.3d at 1155 n.11. Under this doctrine, the first person to divert and beneficially use water from a water source obtains a priority of right over all

subsequently developed uses from that source (*Cappaert v. United States*, 426 U.S. 128, 139 n.5 (1976)), subject to an important exception. Under federal law, the establishment of an Indian reservation, national forest, or similar area impliedly reserves "previously unappropriated waters . . . necessary to accomplish the purposes" of the reservation. *Id.* at 139 (citing *Arizona v. California*, 373 U.S. 546, 599-601 (1963); *Winters v. United States*, 207 U.S. 564, 576 (1908)). These *Winters* rights vest no later than the date of a reservation, are not lost by nonuse, and are superior in right to all subsequent appropriations under state law. *See, e.g.*, *Cappaert*, 426 U.S. at 138; *Hackford v. Babbitt*, 14 F.3d 1457, 1461 n.3 (10th Cir. 1994); *Arizona v. San Carlos Apache Tribe*, 463 U.S. 545, 574 (1983) (Stevens, J., dissenting).

2. The San Juan Basin General Stream Adjudication and Initiation of a Navajo Nation Water Rights Subproceeding

The McCarran Amendment—which has been invoked by Plaintiffs in this federal suit against federal, state, and tribal officials based on state-court judges' conduct and rulings—provides a limited waiver of federal sovereign immunity to join the United States itself as a defendant in a suit either "for the adjudication of rights to the use of water of a river system or other source" or "for the administration of such rights," under certain circumstances. 43 U.S.C. § 666(a). That statute provides for state court determination of 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 Water Conservation Dist. v. United States*, 424 U.S. 800, 809-813 (1976).

In 1975, pursuant to authority granted by state statute, the New Mexico State Engineer initiated a general stream adjudication ("the San Juan Adjudication") in the New Mexico District Court of the Eleventh Judicial District ("state adjudication court" or "N.M. D.Ct.") to determine all rights to the use of water in the San Juan River Basin in New Mexico. *See State ex rel. State Engineer v. United States*, 425 P.3d 723, 727-728 736 n.9 (N.M. Ct. App. 2018) (referencing the general stream adjudication, N.M. D.Ct. 11th Jud. Dist. No. CV-75-184).

The United States is a party to that general stream adjudication, and the federal reserved water rights for the Navajo Nation were subject to determination therein. *See Colorado River*, 424 U.S. at 809-813 (citing the McCarran Amendment). Ultimately, the water rights claims asserted by and on behalf of the Navajo Nation were the subject of a single, contested subproceeding in the general stream adjudication. *See* No. AB-070-1 (N.M. D.Ct. 11th Jud. Dist.) (Claims of the Navajo Nation) ("the state-court water-rights proceeding"). That subproceeding culminated in a final settlement agreement in 2010, as described below.

3. The Settlement Agreement

In 2005, the Navajo Nation and the State of New Mexico reached a settlement agreement to resolve the water rights of the Navajo Nation in the San Juan River Basin of New Mexico as asserted in the San Juan Adjudication. San Juan River Basin in New Mexico, Navajo Nation Water Rights Settlement Agreement (Apr. 19, 2005) ("2005 Agreement"), *available at* https://www.ose.state.nm.us/Legal/settlements/NNWRS/ (click "San Juan Basin/Navajo Nation Water Rights Settlement Agreement" link under "Settlement Documents" heading); *see State ex rel. State Eng'r*, 425 P.3d at 728. By its terms, the 2005 settlement agreement was subject to congressional approval and approval by the adjudication court. 2005 Agreement at 9, 5-7.

The Navajo Nation and New Mexico approached Congress to approve the settlement agreement. In 2009, Congress enacted the Northwestern New Mexico Rural Water Projects Act ("Settlement Act"), authorizing the United States to compromise water rights claims by and on behalf of the Navajo Nation in the San Juan River basin and to commit to other settlement terms consistent with the Settlement Act. *See* Northwestern New Mexico Rural Water Projects Act, Title X, Subtitle B of the Omnibus Public Land Management Act of 2009, Public Law 111-11, 123 Stat. 991, 1367-1405; *id.* § 10701, 123 Stat. at 1396-1401; Order Establishing Initial Procedures for Entry of a Partial Final Judgment and Decree of

the Water Rights of the Navajo Nation, at 2, No. AB-07-01 (N.M. D.Ct. Aug. 19, 2010) ("2010 N.M. D.Ct. Order");[1] *State ex rel. State Eng'r*, 425 P.3d at 728.

In 2010, the United States, the Navajo Nation, and the State of New Mexico executed the final settlement agreement ("the Settlement Agreement"), pursuant to and conforming to the terms of the Settlement Act. Attachment A ("Settlement Agreement") to Settlement Motion of United States, Navajo Nation, and State of New Mexico for Entry of Partial Final Decrees, at 1-36, No. AB-07-01 (N.M. D.Ct. Jan. 3, 2011). Under the Settlement Agreement, the Navajo Nation agreed to limit the exercise of its federal reserved water rights in certain ways, in exchange for commitments of federal funding for water projects and a guarantee of water from specified projects. *See* Settlement Agreement at 1-2, 11-36. The Settlement Agreement called for the entry of stipulated final decrees in the general adjudication to provide for the determination of Navajo Reservation rights against all claimants. Settlement Agreement §§ 3.0, 2.13, at 4-6. One or more supplemental partial final decrees were to be adopted to lay out the Navajo Nation's water rights associated with the ephemeral tributary streams throughout the San Juan River Basin. Settlement Agreement §§ 4.0, 2.18, at 5, 7-9.

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[1] Public access to filings in the state-court water-rights proceeding, No. AB-07-01 (N.M. D.Ct. 11th Jud. Dist.), can be found at the following website: New Mexico Courts, San Juan River Basin Adjudication: Navajo Inter-Se (AB-07-1), https://sjrbadjudication.nmcourts.gov/san-juan-river-basin-adjudication/navajo-inter-se-ab-07-1/.

4. State-Court Proceedings on the Settlement Agreement

Starting in 2009, the settling parties (the United States, the Navajo Nation, and the State of New Mexico) filed motions in the state adjudication court, requesting various steps that would culminate in that court's entry of the partial and supplemental decrees contemplated under the Settlement Agreement and the Settlement Act. *E.g.*, Joint Motion for Order Governing Initial Procedures for Entry of a Partial Final Judgment and Decree of the Water Rights of the Navajo Nation, No. AB-07-01 (N.M. D.Ct. Sept. 2, 2009); *see* 2010 N.M. D.Ct. Order at 1. In 2010, the state adjudication court, upon the settling parties' joint motion, established procedures to afford "all claimants in the San Juan River Basin an opportunity to fully and fairly participate in the adjudication of the water rights of the Navajo Nation." 2010 N.M. D.Ct. Order at 1.

The procedures established by the state adjudication court's 2010 order were extensive, including detailed disclosure requirements for the settling parties, notice requirements with respect to potential water rights claimants through multiple methods including public meetings, a scheduling and planning conference, and an extensive discovery process. 2010 N.M. D.Ct. Order at 6, 9-10, 12-20. Consistent with these procedures, the settling parties provided notice of the proceedings to over 19,000 potential water rights holders throughout the Basin. *See* Special Master's Order Following July 19, 2011 Scheduling Conference at 3, No. AB-07-

01 (N.M. D.Ct. July 28, 2011); *see also* Joint Certification of Fulfillment of Service of Notice of Navajo Expedited Inter Se Proceeding and Compliance with Court Order (pages 1-794), No. AB-07-01 (N.M. D.Ct. July 15, 2011). At least two of the Plaintiffs in this federal suit appear to have filed a notice of participation in the proceedings. Notice of Intent to Participate in Navajo *Inter Se* Proceeding by Craig and Linda Corwin, No. AB-07-01 (N.M. D.Ct. Aug. 16, 2011) (also available at 2 App. 153); *see* 2 App. 171; 2 App. 155. The settling parties moved for approval and entry of the settlement in 2011. Settlement Motion of United States, Navajo Nation, and State of New Mexico for Entry of Partial Final Decrees, No. AB-07-01 (N.M. D.Ct. Jan. 3, 2011).

After briefing and oral argument, the state adjudication court issued an order requiring the settling parties to demonstrate that the settlement is "fair, adequate, and reasonable, and consistent with the public interest and applicable law." Amended Order Establishing the Legal Standards for Evaluating the Proposed Decrees and Respective Burdens of Proof at 1-2, No. AB-07-01 (N.M. D.Ct. Apr. 19, 2012) (citing orders regarding the Jicarilla Apache Tribe Partial Final Decree[2] and *New Mexico ex rel. State Eng'r v. Aamodt*, 582 F. Supp. 2d 1313 (D.N.M.

[2] Partial Final Judgment and Decree of the Water Rights of the Jicarilla Apache Tribe (Feb. 24, 1999), *available at* https://www.ose.state.nm.us/Legal/settlements/NNWRS/InitialDisclosures/Court%20Filings/Partial%20Final%20Judgment%20and%20Decree%20of%20the%20Jicarilla%20Apache%20Tribe.pdf.

2007)). Extensive discovery in the state-court proceeding continued for a year, ending in March 2013. *See* Order Granting the Settlement Motion for Entry of Partial Final Decrees Describing the Water Rights of the Navajo Nation at 5, No. AB-07-01 (N.M. D.Ct. Aug. 16, 2013) ("Aug. 2013 N.M. D.Ct. Order"). The settling parties produced numerous documents, expert reports, and witnesses. *See, e.g.*, *id.*; United States' Notice of Response to Discovery Requests at 2, 4-5, No. AB-07-01 (N.M. D.Ct. Aug. 20, 2012); Technical Reports and Disclosures Supporting the United States' Statement of Claims of Water Rights, at 5-14, No. AB-07-01 (N.M D.Ct. Jan. 30, 2012). Throughout the extensive discovery process, the non-settling parties deposed only a single witness—an employee of Navajo Agricultural Products Industries—on whose deposition they ultimately did not rely. *See id.* at 5; Revised Notice of Deposition of Lionel Haskie, No. AB-07-01 (N.M. D.Ct. Mar. 22, 2013).

Upon completion of discovery, the state adjudication court considered the settlement motion and other related filings. Among other things, the community-ditch non-settling parties filed a motion and counterclaim. Motion To Amend and Supplement Answer, Objections, and Counterclaim of Community Ditch Defendants-Counterclaimants, No. AB-07-01 (N.M. D.Ct. Oct. 30, 2013) ("N.M. D.Ct. Mot. & Counterclaim"). Their filing argued, as Plaintiffs' federal complaint in this case now also does (DE1 at 1-2, 7-9, 13, 19, 21), that the Settlement

Agreement violates various provisions of federal law, such as the McCarran Amendment, the 1902 Reclamation Act, and the reserved water rights doctrine under *Winters*, 207 U.S. 564. N.M. D.Ct. Mot. & Counterclaim at 4-10, 16-19, 37-40. Counsel Victor Marshall represented those non-settling parties, including on that state-court filing (N.M. D.Ct. Mot. & Counterclaim at 44), and also represented Plaintiffs for portions of this case, including signing their federal complaint (DE1 at 43).

The state adjudication court held in 2013 that "[w]ith respect to each element, the Settling Parties have made a *prima facie* showing [that the settlement was fair, adequate, and reasonable, and consistent with the public interest and applicable law], which the Non-Settling Parties have not rebutted" in the requisite manner. Aug. 2013 N.M. D.Ct. Order at 64. In August 2013, the state adjudication court entered its order granting the motion to decree the Navajo Nation's water rights in accordance with the Settlement Agreement. Aug. 2013 N.M. D.Ct. Order at 1-2, 64-65. That order expressly rejected the claims of federal violation—including under the McCarran Amendment, the Reclamation Act, and the *Winters* doctrine—that were made by the community ditch defendants-counterclaimants in their filing signed by counsel Victor Marshall. *See id.* at 5-6, 49-58.

In November 2013, the state adjudication court entered its decrees. Partial Final Judgment and Decree of the Water Rights of the Navajo Nation, No. AB-07-01 (N.M. D.Ct. Nov. 1, 2013); Supplemental Partial Final Judgment and Decree of the Water Rights of the Navajo Nation, No. AB-07-01 (N.M. D.Ct. Nov. 1, 2013).

Various non-settling parties appealed the state adjudication court's grant of the settlement motion for entry of the partial final judgments to the New Mexico Court of Appeals. *See State ex rel. State Eng'r*, 425 P.3d at 728; *State ex rel. State Eng'r v. United States*, No. A-1-CA-33437, 2018 WL 2214597, at *2 (N.M. Ct. App. Apr. 3, 2018) (unpublished); *State ex rel. State Eng'r v. United States*, Nos. A-1-CA-33439 & A-1-CA-33534, 2018 WL 2213477, at *1 (N.M. Ct. App. Apr. 3, 2018) (unpublished). The New Mexico Court of Appeals rejected those challenges, ruling that the state adjudication court had properly sustained the settlement and had not violated various doctrines identified by those appellants, including the *Winters* doctrine and the "practicably irrigable acreage" standard with respect to the water rights reserved to the Navajo Nation, and due-process protections with respect to the state-court adjudication proceedings approving the Settlement Agreement. *See, e.g.*, *State ex rel. State Eng'r*, 425 P.3d at 731-734; *State ex rel. State Eng'r*, 2018 WL 2213477, at *1-2.

The New Mexico Supreme Court initially granted certiorari in appeals from the state-court adjudication. *State Eng'r v. United States*, No. S-1-SC-37068, 2018

WL 11274210 (N.M. Aug. 13, 2018) (unpublished); *State Eng'r v. United States*, No. S-1-SC-37076, 2018 WL 11274211 (N.M. Aug. 13, 2018) (unpublished); *State Eng'r v. United States*, No. S-1-SC-37075, 2018 WL 11274213 (N.M. Aug. 13, 2018) (unpublished); *State Eng'r v. United States*, No. S-1-SC-37070, 2018 WL 11274246 (N.M. Aug. 13, 2018) (unpublished); *State Eng'r v. United States*, No. S-1-SC-37065 (N.M. Aug. 13, 2018) (unpublished). However, the state supreme court later quashed the writs of certiorari as improvidently granted. *State Eng'r v. United States*, No. S-1-SC-37068, 504 P.3d 533 tbl. (N.M. Mar. 29, 2021). That court also denied all motions to reconsider that decision. Order, Nos. S-1-SC-37068, -37065, -37070, -37075, -37076 (N.M. Dec. 6, 2021) (unpublished); *see* Mandate, Nos. S-1-SC-37068, -37065, -37070, -37075, -37076 (N.M. Dec. 15, 2021) (remanding the cause for further proceedings, if any).

B. Proceedings Below

Plaintiffs-Appellants ("Plaintiffs") are six individual New Mexico residents who profess concern about water use from the San Juan River Basin. Appellant's Appendix Volume 1 ("1 App. __") at 18. At least some of them, by their own description, live in Albuquerque or Corrales (outside of the San Juan River's hydrologic basin) and depend on a different river for water. 1 App. 18 ¶¶13, 15-16; *see* 2 App. 170.

On November 12, 2021, Plaintiffs filed a complaint in the United States District Court for the District of New Mexico. 1 App. 15-60.[3] The complaint challenges procedures and legal rulings made by the state adjudication court in the San Juan Adjudication in determining the Navajo Nation's water rights in the San Juan River Basin pursuant to the Settlement Agreement. *See* 2 App. 191. In particular, the complaint alleges that the outcome and proceedings in the state-court water-rights proceeding violate the Reclamation Act of 1902, the *Winters* doctrine of reserved water rights, and constitutional due-process protections. *See, e.g.*, 1 App. 19-24, 41-54. Plaintiffs allege that the state adjudication court and state appellate courts wrongly determined and affirmed, respectively, the Navajo Nation's water rights. *See, e.g.*, 1 App. 33-36 ¶¶62-69; *compare with, e.g.*, N.M. D.Ct. Mot. & Counterclaim at 4-10, 16-19, 37-40; Aug. 2013 N.M. D.Ct. Order at 5-6, 49-58. Plaintiffs' claims rest substantially on the complaint's description of purported misconduct by Judges Wechsler and Black in the course of the state-court water-rights proceeding. The complaint's allegations on this point resemble those that the New Mexico Court of Appeals has disciplined Plaintiffs' former

[3] A seventh plaintiff—an association of community ditches—co-filed the complaint. 1 App. 15, 18 ¶1. But that plaintiff was dismissed from this suit and its claims were struck from the complaint in an order prior to the dismissal order under review here. *See* 1 App. 12 (District Court Docket Entry 51). That plaintiff has not appealed, and no plaintiff has challenged that prior order in this appeal. *See* 2 App. 204.

counsel for raising without "objectively reasonable factual basis" in the state-court water-rights proceeding and related disciplinary proceedings. 1 App. 38-54.[4]

The complaint also asserts violation of certain environmental laws. 1 App. 31-32. The complaint does not, however, provide any factual allegations illustrating how Federal Defendants violated any of those laws. Rather, the complaint implies that the state courts erred in failing to consider certain environmental effects in the course of determining, declaring, and affirming the Navajo Nation's water rights in the state-court adjudication. 1 App. 31-33. The complaint does not identify any particular provisions of the listed environmental laws that require such state-court consideration in the course of determining water rights.

To the extent the complaint mentions any conduct by federal officials, it describes particular projects constructed by the Bureau of Reclamation (such as the Navajo Dam and the Navajo Indian Irrigation Project). 1 App. 27-30. The complaint does not explain how the construction or operation of those projects is connected, if at all, to any likely impact on Plaintiffs or their rights to or use of water.

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[4] *See* Opinion at 2-8, 20-25, *In re Marshall*, No. S-1-SC-37698 (N.M. Mar. 13, 2023) (per curiam) (slip op.), *available at* https://turtletalk.blog/2023/03/14/new-mexico-sct-suspends-lawyer-for-18-months-for-criticizing-judge-in-navajo-water-rights-case/ (describing the disciplinary proceedings' history and findings).

In the context of complaining about these "state court rulings," Plaintiffs seek declaratory judgment on various points of federal law—specifically, that particular Navajo dam and irrigation projects are subject to the Reclamation Act of 1902; that those projects are subject to the "practicably irrigable acreage" standard; and that, when adjudicating claims to an interstate river, a state court must consider "global warming, lack of available water, endangered species, and other federal reserved water rights." 1 App. 34-36 ¶¶62-69, 56 ¶¶(A)-(B), 15-16; *see* 1 App. 19-38, 41-54. Plaintiffs also seek injunctive relief under the Declaratory Judgment Act, 28 U.S.C. § 2202, "to implement and enforce the Court's declaratory judgments." 1 App. 57 ¶(C). And Plaintiffs sought costs and attorney fees under various federal laws. 1 App. 56 ¶151, 43 ¶(E).

In January 2022, the Defendant-Appellees (officials for the United States, the State, and the Navajo Nation entities) filed three separate motions to dismiss. 2 App. 66-88. Each motion focused on lack of jurisdiction under Federal Rule of Civil Procedure 12(b)(1) based on the Defendant entities' respective sovereign immunities (federal, state, and tribal). 2 App. 66-88. The motions left other grounds for potential development through later motions if necessary. 2 App. 66-88.

Addressing federal sovereign immunity, Federal Defendants explained that Plaintiffs had failed to allege any waiver of sovereign immunity and that no

relevant waiver could be identified. 2 App. 79. Federal Defendants explained that the McCarran Amendment and the Declaratory Judgment Act, on which Plaintiffs had relied, contain no federal sovereign immunity waiver that is applicable here. 2 App. 79-80. Federal Defendants expressly reserved, "without waiving[,] any other defenses" to this suit. 2 App. 77 n.1. When Plaintiffs invoked for the first time in response the Administrative Procedure Act (2 App. 101-103), which their complaint had not mentioned, Federal Defendants explained reasons why that statute is inapplicable (2 App. 134-136).

In July 2022, the district court ordered supplemental briefing on whether the *Rooker-Feldman* doctrine—which generally prohibits "a state-court loser[]" from challenging the state-court judgment in a federal proceeding (*Exxon Mobil Corp. v. Saudi Basic Indus. Corp*, 544 U.S. 280, 284 (2005))—applies to this case. 2 App. 144-146. In response, Federal Defendants explained that Plaintiffs in this case collaterally attack the now-final judgment of the New Mexico Court of Appeals in the underlying state-court water-rights adjudication. 2 App. 148; *see State ex rel. State Eng'r*, 425 P.3d 723; *State ex rel. State Eng'r v. United States*, No. A-1-CA-33437, 2018 WL 2214597 (N.M. Ct. App. Apr. 3, 2018) (unpublished). Federal Defendants highlighted that the state court's decision is binding on Plaintiffs to the extent they have any interest in the underlying settlement or water rights, because the state-court adjudication was of an *in rem* or *quasi in rem* nature and decisions

in it are "binding on the *entire* San Juan River Basin of New Mexico, including on those who failed to file objections or subsequently acquired rights." 2 App. 154 & nn.16-17. Federal Defendants also noted that the United States had determined that "at least two of the remaining six named Plaintiffs were also active litigants in the underlying Navajo subproceeding"—namely, the two Corwin plaintiffs. 2 App. 148. Accordingly, Federal Defendants reasoned, the *Rooker-Feldman* doctrine precludes the federal district court from exercising jurisdiction over Plaintiffs' federal complaint, particularly as to those two identified Plaintiffs. 2 App. 148-149. Other Defendants joined Federal Defendants' *Rooker-Feldman* supplemental brief. *See* 2 App. 160-168. Plaintiffs' supplemental response brief regarding the *Rooker-Feldman* doctrine claimed that three of Plaintiffs live in the Albuquerque area and depend on the Rio Grande for water, not the "San Juan hydrologic basin." 2 App. 170.

In September 2022, the district court granted all three motions to dismiss and entered final judgment of dismissal in this appeal. 2 App. 182-203. With respect to Plaintiffs' claims against the Federal Defendants, the district court reasoned that none of the statutory or constitutional provisions invoked by Plaintiffs waive the United States' sovereign immunity in a manner implicated by this case. 2 App. 195. The district court also concluded that Plaintiffs had not explained, let alone established, how the requested injunctive relief against Federal Defendants would

redress their claimed injury, which concerns the conduct of state-court judges, including in a state-court proceeding. 2 App. 196-197. The district court found state and tribal sovereign immunity not to have been waived under *Ex Parte Young*, 209 U.S. 123 (1908), or the McCarran Amendment with respect to Plaintiffs' claims. 2 App. 191-195, 197-200. Accordingly, the district court dismissed Plaintiffs' claims for lack of subject matter jurisdiction. 2 App. 201-203.

This appeal followed.

SUMMARY OF ARGUMENT

The district court correctly dismissed this case for lack of subject-matter jurisdiction. Plaintiffs have identified no waiver of federal sovereign immunity that would permit their claims to proceed against Federal Defendants. The claims against federal officials for purported federal constitutional and statutory violations do not allege—as governing Supreme Court precedent requires absent an unequivocally expressed waiver—that any action of a federal official is beyond the terms of that official's valid statutory authority. The Administrative Procedure Act does not apply, as Plaintiffs have identified no action or inaction by a *federal* agency as the basis for their challenge, instead directing their complaint to the conduct of state-court judges in a manner already addressed in the state-court proceedings. And the McCarran Amendment does not apply to waive federal

sovereign immunity here, as this collateral attack on the state-court proceeding is not itself seeking adjudication or administration of water rights and does not include all claimants.

In the alternative, the *Rooker-Feldman* doctrine and the doctrine of prior exclusive jurisdiction bar Plaintiffs' complaint. That federal complaint seeks to relitigate issues already rejected by the state court's judgments approving of a settlement and entering partial final decrees of water rights in what is essentially an *in rem* or *quasi in rem* action. Such relitigation is foreclosed.

Accordingly, this Court should affirm dismissal of this matter. Alternatively, if the Court were not persuaded by Federal Defendants' sovereign immunity and *Rooker-Feldman* arguments, the Court should do no more than remand for Federal Defendants to brief the reserved alternative grounds for dismissal based on the deficiencies in Plaintiffs' complaint.

STANDARD OF REVIEW

This Court "reviews de novo a dismissal for lack of subject matter jurisdiction," including based on sovereign immunity or the *Rooker-Feldman* doctrine. *Kline v. Biles*, 861 F.3d 1177, 1180 (10th Cir. 2017); *Mojsilovic v. Okla. ex rel. Bd. of Regents for Univ. of Okla.*, 841 F.3d 1129, 1131 (10th Cir. 2016).

ARGUMENT

THE DISTRICT COURT CORRECTLY DISMISSED THIS CASE FOR LACK OF SUBJECT-MATTER JURISDICTION.

I. Plaintiffs Have Established No Federal Sovereign Immunity Waiver That Would Permit Claims Against Federal Defendants To Proceed.

Subject-matter jurisdiction over this suit against the Federal Defendants is lacking because Plaintiffs have established no waiver of federal sovereign immunity that would permit this case to proceed. Contrary to Plaintiffs' suggestion (Br. 19-24), federal sovereign immunity generally can be waived only by an unequivocal statutory provision to that effect. *See United States v. Mitchell*, 445 U.S. 535, 538 (1980) ("A waiver of sovereign immunity 'cannot be implied but must be unequivocally expressed.'" (quoting *United States v. King*, 395 U.S. 1, 4 (1969)); *Flute v. United States*, 808 F.3d 1234, 1239 (10th Cir. 2015) (same). This Court has confirmed that the waiver must be "unequivocal from the [statutory] text," not supplied by legislative history or some other nontextual indication. *Flute*, 808 F.3d at 1239. And the statutory text purporting to waive governmental immunity is "strictly construed 'in favor of the sovereign.'" *Id.* (quoting *United States v. Nordic Village*, 503 U.S. 30, 34 (1992)).

The only statutes that Plaintiffs have identified on appeal that contain such unequivocal waivers are the Administrative Procedure Act and the McCarran Amendment (Br. 24-26, 31), whose provisions do not apply here. And Plaintiffs

have not established any exception to the requirement for an unequivocal sovereign immunity waiver under the various "doctrines" that they invoke. Thus, the district court's jurisdiction is lacking over this collateral attempt to relitigate in federal court the issues as to which Plaintiffs objected in the state-court water-rights proceeding that have already been fully decided in the state courts.

A. Plaintiffs have established no applicable exception to the requirement for an unequivocal statutory waiver.

None of Plaintiffs' invoked "doctrine[s]" (Br. 24) contradict the basic proposition that a waiver of sovereign immunity must be unequivocally expressed in a statute. Plaintiffs reference the Supreme Court's decisions in *Ex Parte Young*, 209 U.S. 123 (1908); *Armstrong v. Exceptional Child Center, Inc.*, 575 U.S. 320 (2015); and *Marbury v. Madison*, 5 U.S. (1 Cranch) 137 (1803); as well as this Court's decisions in *Jicarilla Apache Tribe v. United States*, 657 F.2d 1126 (10th Cir. 1981), and *Elephant Butte Irrigation District v. Department of the Interior*, 160 F.3d 602 (10th Cir. 1998). Br. 19-24. But they misunderstand these decisions and any doctrines resting on them.

To begin, Plaintiffs appear to recognize that *Ex Parte Young*, 209 U.S. at 157-164, 168, itself applies only to actions against *state* officials and, by analogy, to actions against *tribal* officials, but not to actions against *federal* officials. Br. 15-19. *But see* Br. 24 (referencing *Ex Parte Young* without explaining how it applies to federal officials).

As for federal officials, Plaintiffs rely on the "doctrine expressed in *Armstrong*." Br. 24. Plaintiffs allude, by quoting discussion from *Armstrong*, to certain early Supreme Court decisions regarding claims for injunctive relief against them. Br. 23-24. But the Supreme Court's decision in *Larson v. Domestic & Foreign Commerce Corp.*, 337 U.S. 682, 691 (1949), establishes the strict conditions under which such claims may proceed despite federal sovereign immunity, which—like those early decisions—require establishing ultra vires or unconstitutional action of a particular type by federal officials. *See, e.g.*, *United Tribe of Shawnee Indians v. United States*, 253 F.3d 543, 547-548 (10th Cir. 2001); *Am. Sch. of Magnetic Healing v. McAnnulty*, 187 U.S. 94, 109-110 (1902) (cited in Br. 23).

Larson, which Plaintiffs have failed to invoke or acknowledge, undercuts Plaintiffs' arguments. *Larson* delineates the cases "in which a restraint may be obtained against the conduct of [federal] officials," absent some unequivocally expressed sovereign immunity waiver to enjoin the sovereign itself. 337 U.S. at 689-691. Those cases, *Larson* indicates, are only those presenting a claim that the federal official was "acting unconstitutionally or pursuant to an unconstitutional grant of power" or was acting ultra vires in "lack of delegated power." *Id.* Plaintiffs have made no such allegation regarding the conduct of the federal officials that they named as defendants in this case. Their limited claims of

unconstitutional action have been directed at state-court judges. *See* Br. 8-10, 29 (citing 1 App. 35, 41-44, 51-52); *infra* Argument, Section I.D. And *Larson* rules that a mere "claim of error in the exercise of [delegated] power" by the officer is "not sufficient" to support such relief. 337 U.S. at 690. Plaintiffs' complaint claims at most such error, and claims it only at the hands of state-court judges, not any of the defendant officials here. *See, e.g.*, 1 App. 33 ¶¶62-63; 1 App. 34-35 ¶¶66, 68.

The Supreme Court's *Armstrong* decision itself ruled that the Supremacy Clause does *not* create a cause of action for claims to enjoin the enforcement of state laws that are alleged to violate federal law. *Armstrong*, 575 U.S. at 327. And even to the extent that *Armstrong* recognizes that "federal courts may in some circumstances grant injunctive relief … with respect to violations of federal law by federal officials," as pertains to the Federal Defendants here, *Armstrong* did not purport to supplant *Larson*'s restriction of those circumstances. *Id.* at 326-327, 327 (addressing "[t]he ability to sue to *enjoin unconstitutional actions* by state and federal officers" recognized in those pre-*Larson* decisions (emphasis added)). Moreover, *Armstrong* recognizes that "[t]he power of federal courts in equity to enjoin unlawful executive action is subject to express and implied statutory limitations" on the cause of action for the particular remedy, even beyond the requirement for a waiver of sovereign immunity. *Id.* at 327-328 (citing *Seminole*

Tribe of Florida v. Florida, 517 U.S. 44, 74 (1996)); *see also United States v. Jicarilla Apache Nation*, 564 U.S. 162, 174 (2011) (the federal government, in light of its "unique position … as sovereign," must "consent[] to be liable to private parties 'and may yield this consent upon such terms and under such restrictions as it may think just'" (quoting *Murray's Lessee v. Hoboken Land & Improvement Co.*, 59 U.S. (18 How.) 272, 283 (1856))). And, in any event, Plaintiffs have proffered no reason why *Armstrong* would apply here as to federal officials with respect not to violations committed *by them*, but instead to purported violations by the state court adjudicating water rights (*see, e.g.*, 1 App. 43-53).

To the extent Plaintiffs direct their attention to declaratory relief, they do not articulate any viable theory of sovereign immunity waiver or exception. The "doctrine of *Marbury v. Madison*"—which Plaintiffs base only on that decision's statement that the judiciary interprets the law (Br. 24)—does not obviate the need to establish jurisdiction, including a federal sovereign immunity waiver, in order to grant relief. To the contrary, the Supreme Court in *Marbury*, 5 U.S. (1 Cranch) at 176, expressly declined to order a remedy because it determined through its interpretation of the Constitution and the law that jurisdiction was lacking.

Plaintiffs also misplace reliance on this Court's decisions in *Jicarilla Apache Tribe*, 657 F.2d 1126, and *Elephant Butte*, 160 F.3d 602. Br. 19-23. Plaintiffs argue that this case is analogous to those ones, and so infers that there must not be

need for an unequivocal sovereign immunity waiver here, because none was cited in those decisions where federal officials were listed in the case captions. Br. 20-21. But Plaintiffs' cited opinion in *Jicarilla Apache Tribe* did not address whether there was an applicable sovereign immunity waiver or an exception to the requirement for one. Thus, that decision has no precedential value on such an issue. *See Steel Co. v. Citizens for a Better Env't*, 523 U.S. 83, 91 (1998) ("no precedential effect" of rulings that assume the answer on a jurisdictional issue, such as that jurisdictional prerequisites to suit have been met). Likewise, the *Elephant Butte* opinion concerns *state* sovereign immunity under the Eleventh Amendment and contains no holding on *federal* sovereign immunity. 160 F.3d at 605. Its quoted reasoning under *Ex Parte Young* (Br. 21-23) is inapposite in the context of federal officials, as discussed above.

In any event, those decisions of this Court concern meaningfully distinct circumstances from this case. While *Jicarilla* involved an action for "a declaratory judgment that the agreement between the Bureau and the City was void and contrary to law," the opinion reveals that the challenged action of federal officials concerned whether the Bureau was "stor[ing] water in violation of congressional directives." 657 F.2d at 1131-1132, 1145. And, although federal action was not at issue on appeal in *Elephant Butte*, the Court noted that the dispute with federal officials had concerned their "illegally retaining net profits under a recreational

land lease." *Id.* at 605. Plaintiffs here have not challenged, however, any action by the named federal officials, and particularly not any action of those types, instead bringing collateral attacks to a state-court judgment.

B. The Administrative Procedure Act's waiver of federal sovereign immunity does not apply.

Plaintiffs invoke (Br. 25) the Administrative Procedure Act ("APA") waiver of federal sovereign immunity (5 U.S.C. § 702), although not the APA's accompanying cause of action or the terms on which it may be pursued (*see* 5 U.S.C. §§ 702, 704, 706). Section 702 waives sovereign immunity only with respect to certain actions for non-monetary relief that "stat[e] a claim that an agency or an officer or employee thereof acted or failed to act in an official capacity or under legal authority." 5 U.S.C. § 702. Here, however, Plaintiffs have challenged only a state court's adjudication of water rights and, to some extent, a state court's disciplinary proceedings. *See, e.g.*, Br. 10, 29; 1 App. 34-35 ¶¶ 64-68, 40 ¶91, 44 ¶101, 45-54 ¶¶105-139; *supra* note 4. Their complaint did not even mention the Administrative Procedure Act, let alone state a claim that a *federal* agency or its employee acted or failed to act in the manner described by the APA's federal sovereign immunity waiver. *See* 5 U.S.C. § 701(b)(1) ("agency" in 5 U.S.C. § 702 "means each authority of the Government of the *United States*" (emphasis added)). Absent a challenge to a federal agency action, the federal sovereign immunity waiver in the APA's 5 U.S.C § 702 does not apply. *See, e.g.*,

Coalition for Underground Expansion v. Mineta, 333 F.3d 193, 197-198 (D.C. Cir. 2003) (challenge to action of "*local* government bodies," that "identified no *federal* agency action" for challenge, cannot proceed under the APA).

Plaintiffs observe that a suit need not be brought pursuant to the APA cause of action in order for the APA's waiver of sovereign immunity to apply. Br. 25-26 (citing *Z Street v. Koskinen*, 791 F.3d 24, 32 (D.C. Cir. 2015)). But that authority does not purport to authorize Plaintiffs' disregard of the APA's sovereign immunity waiver's own express terms. *See Z Street*, 791 F.3d at 32. Most fundamentally, Plaintiffs failed to state a claim based on "act[ion] or failure to act" by an "agency" (*id.* § 702). The APA expressly defines "agency" to be only a *federal* agency. 5 U.S.C. § 701(b)(1). Plaintiffs' attempt to contratextually read Section 701's defined term out of the APA's Section 702 waiver should not be credited.

Plaintiffs cannot prevail by suggesting that their complaint should be understood—at odds with the complaint's own limited terms and focus—to implicitly present a theory that what is at issue is federal conduct in the ongoing operation of certain federal projects. To the extent that Plaintiffs' brief now attempts to suggest such a theory (Br. 5), that theory is forfeited because it was neither argued in their district-court briefing nor proffered in their complaint. *See, e.g.*, 1 App. 95-100 (complaining about the actions of the state court in issuing its

opinion); 1 App. 182 (district court's decision that "[t]he thrust of Plaintiffs' Complaint is disagreement with the state court's opinion in [the state-court water-rights proceeding]").

Any preserved claim based on such a theory purporting federal action would have failed in any event. As this Court has explained, even if it were assumed that Section 702 provides an applicable waiver of sovereign immunity, a plaintiff must still identify a source of authority, such as a "federal statute other than the APA itself," that "provides an express or implied cause of action in its favor." *United Tribe of Shawnee Indians*, 253 F.3d at 550. Plaintiffs here have not done so. They did not invoke the Administrative Procedure Act's cause of action in either their complaint or their briefing (1 App. 15-57; 2 App. 101-103; Br. 25-26), nor does their complaint appear to meet the APA's terms (*see* 2 App. 135 n.6 (noting lack of final agency action and reserving the right to raise other APA deficiencies)). And they have identified no other source of a cause of action. Their reference to the Declaratory Judgment Act (Br. 10-11) overlooks that it only provides a form of relief, not a cause of action. *Aetna Life Ins. Co. v. Haworth*, 300 U.S. 227, 239-240 (1937); *Nero v. Oklahoma*, No. 22-6121, 2022 WL 14423872, at *2 (10th Cir. 2022) (unpublished) ("[T]he Declaratory Judgment Act does not provide an independent federal cause of action.").

Plaintiffs' procedural challenges to the state-court water-rights proceeding pose these same problems under the APA. As the district court emphasized, Plaintiffs challenge actions that, at bottom, "the federal Defendants do not and cannot control." 2 App. 197. The state-court water-rights proceeding was conducted by state-court judges, not the federal officials who are listed as Federal Defendants on the complaint. Accordingly, Plaintiffs have not established "any way in which injunctive relief vis-à-vis the Federal Defendants would rectify the alleged ills," let alone that those ills trace to the Federal Defendants' conduct in any way. 2 App. 196-197 (explaining that Plaintiffs' "due process right to a meaningful hearing at a meaningful time" is not something for which the Federal Defendants are responsible in a state proceeding). Among other things, the claims do not meet the APA's terms requiring that a *federal* agency or its officer or employee have "acted or failed to act" in the applicable manner. 5 U.S.C. §§ 701(b)(1), 702; *see also id.* §§ 704, 706. They do not suffice under the APA.

Plaintiffs' environmental-law claims amount to only another category of challenges that are deficient under the APA. Those claims allege, at most, that *state-court judges* failed to consider endangered species or other environmental impacts in rendering their decisions approving the Settlement Agreement. 1 App. 33-34. In any event, such claims fail for more fundamental reasons. Plaintiffs never identified any basis in the Endangered Species Act or any environmental

statute or other source of law for contending that state-court judges were required to consider endangered species or any other mentioned environmental impact, as would be needed to support their claim to proceed under any statute, including the APA. And even if they were proceeding under the Endangered Species Act or Clean Water Act, Plaintiffs have failed to establish that they provided pre-litigation notice as required to invoke federal jurisdiction over claims brought under those statutes' citizen-suit provisions. *See, e.g.*, 16 U.S.C. § 1540(g)(2)(C); 2 App. 133-134; *N.M. Citizens for Clean Air & Water v. Espanola Mercantile Co.*, 72 F.3d 830, 832-833 (10th Cir. 1996) (applying the analogous Clean Water Act requirement (citing *Hallstrom v. Tillamook Cnty.*, 493 U.S. 20, 26-27, 31, 33 (1989)).

C. The McCarran Amendment's waiver of federal sovereign immunity does not apply.

The district court correctly concluded that any waiver of federal sovereign immunity in the McCarran Amendment does not apply. 2 App. 196. As to certain "suit[s]," the McCarran Amendment deems the United States "to have waived any right to plead … that [it] is not amenable[,] … by reason of its sovereignty." 43 U.S.C. § 666(a). This is not such a suit.

McCarran Amendment suits must be not merely related to, but "*for*," particular types of water rights adjudication or administration. *Id.* (emphasis

added);[5] *see Klamath Irrigation Dist. v. U.S. Bur. of Reclamation*, 48 F.4th 934, 946 (9th Cir. 2022) ("The [McCarran] Amendment does not waive sovereign immunity in every case that implicates water rights."); *see also United States v. Idaho ex rel. Director, Idaho Dep't of Water Res.*, 508 U.S. 1, 6-7 (1993) (McCarran Act waiver "must be strictly construed in favor of the United States"). This federal suit does not meet the McCarran Amendment's description. Plaintiffs do not even purport, through their federal complaint, to seek water rights adjudication or administration. Instead, Plaintiffs' complaint challenges the judgment of the *state adjudication court* that has authority to comprehensively adjudicate all claims in the San Juan River basin. And the nature of Plaintiffs' complaint focuses on concerns about state-court judges, including based on some allegations that resemble those previously rejected in state proceedings. *See* 1 App. 34, 38-40, 43-53; 2 App. 185-187; *see supra* note 4 and accompanying text.

As this Court has explained, "any waiver of immunity pursuant to the [McCarran] [A]mendment is limited to comprehensive actions involving the determination of *all* rights in a particular water system." *Wagoner Cnty. Rural*

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[5] The McCarran Amendment provision applies only to a "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 or is in the process of acquiring water rights by appropriation under State law, by purchase, exchange, or otherwise, and the United States is a necessary party to such suit." 43 U.S.C. § 666(a).

Water Dist. No. 2 v. Grand River Dam Auth., 577 F.3d 1255, 1260 (10th Cir. 2009). That is, "the United States has not consented to suits in which fewer than all claimants to water rights are made parties." *Id.* (citing *Dugan v. Rank*, 372 U.S. 609, 618-619 (1963)). Here, Plaintiffs on appeal are only six individuals who now purport to be particular "water consumers in various parts of New Mexico." Br. 4. By contrast, the New Mexico Court of Appeals noted that there were thousands of claimants in the state-court water-rights proceeding. *State ex rel. State Eng'r*, 425 P.3d at 737, 726; *see also* 2 App. 77-78. To the extent that Plaintiffs even reference water of the San Juan River (Br. 20), Plaintiffs have not attempted to establish that they and Defendants are the only ones with any potential claim of right with respect to it. Thus, nothing in their argument shows that this suit invokes the kind of comprehensive adjudication of water rights in a river system that could qualify for the McCarran Amendment's federal sovereign immunity waiver.

Thus, the United States has not consented to this suit, particularly because all potential claimants to any relevant river water system have not been made parties to this case. *See Wagoner*, 577 F.3d at 1261 (affirming dismissal of a case that "involve[d] only four water districts, a non-profit corporation, and a private nursery" as being "far from the comprehensive suit contemplated by the McCarran Amendment"); *Garner v. Stager*, 103 F.3d 886, 888 (9th Cir. 1996) (affirming

dismissal of a complaint of two individual cattle ranchers because "[t]he McCarran Amendment does not authorize private suits to adjudicate water rights between particular claimants and the United States").

D. Plaintiffs identify no other basis for permitting their claims to proceed despite federal sovereign immunity.

As the foregoing demonstrates, federal sovereign immunity bars Plaintiffs' claims against Federal Defendants. Plaintiffs have identified no other basis for permitting those claims to proceed. Plaintiffs make only a relatively undeveloped allusion to statutory "sue and be sued" clauses. Br. 27-28. That point, in addition to being unpreserved, is inapposite, as Plaintiffs have identified no such statute containing such language that would apply here. Plaintiffs' own cited authority (Br. 28) indicates that "the United States cannot be sued without its consent," where the consent to "be sued" is that "given by Congress." *Fed. Housing Admin., Region No. 4 v. Burr*, 309 U.S. 242, 244 (1940). Moreover, the United States did not initiate the general stream adjudication as Plaintiffs suggest (Br. 27). *See State ex rel. State Eng'r*, 425 P.3d at 727-728 (describing the general stream adjudication as having been initiated by the State of New Mexico).

Plaintiffs also attempt to escape the requirement for a waiver of federal sovereign immunity by highlighting the constitutional nature of some of their claims. Br. 29. But none of Plaintiffs' constitutional claims are directed at the Federal Defendants. *See supra* Section I.A, I.B. To the extent that Plaintiffs

invoke the Fourteenth Amendment (*e.g.*, Br. 29; 1 App. 16), that provision—which concerns restrictions on States, not the federal government—does not waive or authorize abrogation of federal sovereign immunity, let alone for liability as to non-federal action. *See* U.S. Const. amend. XIV; 2 App. 196. And Plaintiffs' general invocation of "due process" and "First Amendment rights" is directed toward conduct that they attribute not to any official acting on behalf of the federal government, but to the state-court judges who adjudicated the state-court water-rights proceeding, in allegations resembling those found to have been made without factual basis in the state-court disciplinary proceedings. *See* Br. 10, 29 (citing 1 App. 41-44 ¶¶92-102); Br. 10 (citing 1 App. 51-52 ¶¶130-133); *supra* note 4.

Accordingly, Plaintiffs' claims against Federal Defendants may not proceed, and their dismissal should be affirmed.

II. The *Rooker-Feldman* and Prior Exclusive Jurisdiction Doctrines Bar This Suit.

The Supreme Court has developed a doctrine requiring dismissal of certain actions for lack of subject-matter jurisdiction that traces to that Court's decisions in *Rooker v. Fidelity Trust Co.*, 263 U.S. 413 (1923), and *D.C. Court of Appeals v. Feldman*, 460 U.S. 462 (1983). Although the district court ultimately did not rest its dismissal of the claims against Federal Defendants-Appellees upon the *Rooker-Feldman* doctrine, the issue was fully briefed and preserved by Federal Defendants

in the district court (*see, e.g.*, 2 App. 147-158). And a suit's foreclosure under the *Rooker-Feldman* doctrine is an issue of jurisdiction that may be decided by this Court at any time, even if not preserved. *See Millard v. Camper*, 971 F.3d 1174 (10th Cir. 2020); *Zapata-Chacon v. Garland*, 51 F.4th 1191 (10th Cir. 2022). The doctrine provides an alternative ground for affirmance in this appeal, and one that operates to bar claims against all the Defendants (whether federal, state, or tribal).

A. Under the *Rooker-Feldman* Doctrine, Plaintiffs Are Bound by the State-Court *In Rem* or *Quasi In Rem* Proceedings.

The *Rooker-Feldman* doctrine applies to bar "cases brought by state-court losers complaining of injuries from state-court judgments rendered before the district court proceedings commenced and inviting district court review and rejection of those judgments." *Exxon Mobil Corp. v. Saudi Basic Indus. Corp*, 544 U.S. 280, 284 (2005). This Court and others have held that even a claimant who was not a party to the complained-of state-court judgment may be barred under the *Rooker-Feldman* doctrine, particularly if the claimant is one bound by the state-court judgment and who could have sought to undo it in state court, such as when the state-court judgment issued from *in rem* or *quasi in rem* proceedings. *See Bruce v. City & County of Denver*, 57 F.4th 738, 748-749 (10th Cir. 2023); *see, e.g.*, *Dorce v. City of N.Y.*, 2 F.4th 82, 92, 102-103 (2d Cir. 2021).

The doctrine thus applies to cases like this one. The state-court water-rights proceeding was an action *in rem* or *quasi in rem*. As this Court has explained, an

action *in rem* is one "founded upon the rights in or to property." *Tooele County v. United States*, 820 F.3d 1183, 1188 (10th Cir. 2016). An action is *in rem* when it "affect[s] the interests of all persons in the property" and is *quasi in rem* when it "affects the interests of only some persons in the property." *Id.* The Supreme Court and this Court have on several occasions described an action to adjudicate water rights—like the state-court water-rights proceeding here—as being *in rem* or *quasi in rem*. *See, e.g.*, *Nevada v. United States*, 463 U.S. 110, 144 (1983) ("[W]ater adjudications are more in the nature of *in rem* proceedings."); *United States v. Akin*, 504 F.2d 115, 122 n.5 (10th Cir. 1974), *rev'd on other grounds*, *Colorado River*, 424 U.S. 800.

Reinforcing this understanding, the McCarran Amendment—which concerns "the adjudication of rights to the use of water of a river system or other source" (43 U.S.C. § 666(a))—has been understood by this Court to be "limited to comprehensive actions involving the determination of *all* rights in a particular water system." *Wagoner*, 577 F.3d at 1260; *see supra* Argument, Section I.C. Such a global disposition of water rights is consistent with an understanding that the type of adjudication at issue is *in rem* and binds those who purport to have an interest in the water rights adjudicated.

In addition, Plaintiffs' claims in this case prompt the concerns that motivate the *Rooker-Feldman* doctrine. To the extent that Plaintiffs even have standing

based on water rights claims here, they generally could have sought to submit such claims for adjudication through the state-court adjudication and settlement approval proceedings. *See Bruce*, 57 F.4th at 748. Indeed, in this federal suit in essence, Plaintiffs seek to raise the same claims of federal violation, based on the same purported improper conduct of state-court judges, that their former counsel unsuccessfully raised in the state-court proceedings. *See, e.g.*, 1 App. 19-24, 41-54; N.M. D.Ct. Mot. & Counterclaim at 4-10, 16-19, 37-40; Aug. 2013 N.M. D.Ct. Order at 5-6, 49-58; *see supra* Statement of the Case, Sections A.4, B; *supra* Argument, Sections I.B, I.D. As such, Plaintiffs effectively seek to circumvent the terms of 28 U.S.C. § 1257(a), which provides for only the U.S. Supreme Court—not lower federal courts—to review judgments from the highest available state court.

Plaintiffs cannot succeed in fending off *Rooker-Feldman* foreclosure of their suit. Plaintiffs did not contest that the state-court water-rights proceeding's *in rem* or *quasi in rem* status signifies that Plaintiffs are all bound by the state court's judgment therein, regardless of whether they participated in that action. That proposition and its import that *Rooker-Feldman* doctrine forecloses this suit, as noted, is supported by circuit precedent and consistent with decisions in other federal courts of appeals. *See Bruce*, 57 F.4th at 748-749; *see, e.g.*, *Dorce*, 2 F.4th at 92, 102-103. As such, Plaintiffs' suggestion in the district court that *Rooker-*

Feldman only applies to those who were "participants in the earlier litigation" (2 App. 170) is mistaken.

The cases that Plaintiffs cite (2 App. 170) are each distinguishable on that same basis: none involved a state-court *in rem* or *quasi in rem* action. *See Lance v. Dennis*, 546 U.S. 459, 460-462 (2006); *Mo's Express LLC v. Sopkin*, 441 F.3d 1229, 1231-1233 (10th Cir. 2006); *Rooker*, 263 U.S. at 414-415; *Feldman*, 460 U.S. at 463-472. And the Supreme Court's decision in *Lance*, for example, expressly acknowledged that its holding (which rejected a *Rooker-Feldman* bar for state-court non-parties in the particular case) was not an unyielding rule for all circumstances. 546 U.S. at 466 n.2. *Lance* instead appears to suggest that a state-court *in rem* or *quasi in rem* action might provide "circumstances … in which *Rooker-Feldman* may be applied against a party not named in an earlier state proceeding." *Id.* *Lance* referenced as an example the situation "where an estate takes a *de facto* appeal in a district court of an earlier state decision involving the decedent." *Id.* Such a situation is one in which the party seeking review (the estate) is one that was *bound* by the original judgment, as that party succeeds to the interest of the named party (the decedent). *See also Mo's Express*, 441 F.3d at 1236 (emphasizing that certain parties there "were *not* bound by the judgment" and thus concluding that the *Rooker-Feldman* doctrine did not foreclose their suit).

Thus, Plaintiffs cannot invoke claimed non-participant status in the state court—let alone such status only for some Plaintiffs, based on assertions that call in question how they are cognizably affected by the challenged state-court proceedings or by Federal Defendants (2 App. 170-171)—to evade *Rooker-Feldman* foreclosure of their suit. The *Rooker-Feldman* doctrine bars Plaintiffs' federal complaint against all Defendants.

B. Plaintiffs Have Not Established Any Basis to Avoid the *Rooker-Feldman* Bar.

Plaintiffs' four remaining points in the district court do not assist them in evading *Rooker-Feldman* foreclosure of their suit. First, contrary to Plaintiffs' suggestion, their complaint asserts violations based on the state-court judgment and proceedings, rather than asserting violations by federal or state officials for their failure to enforce water laws prior to the state-court adjudication. *See, e.g.*, 1 App. 33-34; *contra* 2 App. 172. Plaintiffs' contrary suggestion is based on barebones allegations that there is pressure not to enforce federal laws, without alleging a failure to enforce federal laws that is entirely independent of the state-court adjudication. 2 App. 172 (citing 1 App. 26 ¶36, 32 ¶¶58-59).

Second, under the *Rooker-Feldman* doctrine, the New Mexico Supreme Court's disposition of the petitions for certiorari from the state-court water-rights proceeding appeals foreclose the new federal suit. *See, e.g.*, *Guttman v. Khalsa*, 446 F.3d 1027, 1032 n.2 (10th Cir. 2006); *contra* 2 App. 173-176. This circuit,

like others, adopts an approach under which *Rooker-Feldman* may foreclose a federal suit where "the issue plaintiff sought to relitigate in federal court" has been finally resolved. *Robins v. Ritchie*, 631 F.3d 919, 926-927 (8th Cir. 2011); *Mothershed v. Justices of the Sup. Ct.*, 410 F.3d 602, 604 n.1 (9th Cir. 2005); *see Guttman*, 446 F.3d at 1032 n.2 (adopting, for this circuit, the First Circuit's approach in *Federacion de Maestros de Puerto Rico v. Junta de Relaciones del Trabajo de Puerto Rico*, 410 F.3d 17 (1st Cir. 2005), which applies *Rooker-Feldman* doctrine to foreclose a federal suit where the state-court proceedings have finally resolved the federal questions in that litigation (*id.* at 24-27)). Plaintiffs themselves have asserted that this condition is met. *See* 2 App. 176 (arguing that "all state district courts are now obligated to obey the [New Mexico Court of Appeals] rulings" on beneficial use); 1 App. 33-34 ¶63, 35 ¶68 (asserting that the "state court rulings overthrow the first principles of water law" and that "[a]n irreconcilable conflict between state and federal law now exists" because of them, "so they must be corrected by the federal courts").

Accordingly, Plaintiffs cannot now evade the consequences of their own assertions by contending that the motions requesting reconsideration of the disposition of the certiorari petitions by the New Mexico Supreme Court prevent application of *Rooker-Feldman* doctrine to bar their federal suit. *See* 2 App. 174-175. Those motions were not appeals as of right; they were filed after the New

Mexico Supreme Court declined to exercise review on certiorari; and Plaintiffs have not shown that the motions were filed under any rule expressly permitting reconsideration of a decision to decline certiorari. Thus, the motions should not be seen as having any effect on the finality of the state adjudication court's judgments on the Navajo Nation's claims. Regardless, the motions were denied well before the federal court dismissed this case. And those motions appear to have focused on issues that are *not* the focus of this federal lawsuit. *See, e.g.*, Albuquerque Bernalillo County Water Utility Authority's and City of Gallup's Motion for Reconsideration at 2 ¶5, Nos. S-1-SC-37068, S-1-SC-37065, S-1-SC-37070, S-1-SC-37075, S-1-SC-37076 (Apr. 13, 2021); State of New Mexico's Motion To Reconsider Order Quashing Writ of *Certiorari* at 1, Nos. S-1-SC-37068, S-1-SC-37065, -37070, -37075, -37076 (Apr. 13, 2023). Although the general stream adjudication continues, the Navajo water rights subproceeding (No. AB-07-01) has concluded with the state court's approval of the Settlement Agreement and entry of partial final decrees.

Third, *Rooker-Feldman* foreclosure of this suit does not turn on whether or not state law would afford preclusive effect to the Settlement Agreement by itself, because here there was a state-court judgment approving the settlement and because the *Rooker-Feldman* doctrine is a distinct matter of federal law. *See Adams v. EMC Mortg. Corp.*, 549 F. App'x 718, 720-721 (10th Cir. 2013); *Harpin*

v. Oakley Custom Homes, Inc., Nos. 99-1553 & 99-1596, 2000 WL 1531819, at *2 (10th Cir. 2000) (unpublished) (citing *4901 Corp. v. Town of Cicero*, 220 F.3d 522, 524-525, 527-528 (7th Cir. 2000)); *contra* 2 App. 176.

Fourth, "[a]ttempts to recast state court losses as deprivations of constitutional rights do not overcome the *Rooker-Feldman* jurisdictional bar." *Bruce*, 57 F.4th at 749; *contra* 2 App. 177. Plaintiffs' cited cases (2 App. 177-178) are inapposite, as the plaintiffs in those cases sought relief independent from any judgment rendered by the state courts. *See PJ ex rel. Jensen v. Wagner*, 603 F.3d 1182, 1194 (10th Cir. 2010); *Behr v. Campbell*, 8 F.4th 1206, 1213 (11th Cir. 2021); *Mo's Express*, 441 F.3d at 1237-1238. To the extent Plaintiffs suggest that they do the same here (2 App. 177-178), they are mistaken. The declaratory judgment they seek, and the injunctive relief to enforce it, was expressly framed as declaring the state-court judgment to have been incorrect in its various rulings regarding the determination of water rights. 1 App. 35-36, 56-57 (asserting that, through the sought declaratory and injunctive relief concerning water rights standards, the state court rulings "must be corrected by the federal courts"). And Plaintiffs have not established that their assertions of "confusion and water shortages," or their complaints that the state adjudication court denied some of their motions or requests, amount to a legal basis for overriding the *Rooker-Feldman* doctrine. 2 App. 176-177.

C. Alternatively, Prior Exclusive Jurisdiction of the State Adjudication Court Bars This Suit.

Much like the *Rooker-Feldman* doctrine, the doctrine of prior exclusive jurisdiction provides another alternative ground for affirmance in this case, to the extent that Plaintiffs seek to readjudicate the water rights that were at issue in the state-court adjudication. Wright & Miller, Fed. Practice & Procedure § 3631 (2023). The doctrine of prior exclusive jurisdiction is jurisdictional, so it is a ground on which this Court may rest its decision despite its not having been briefed in the district court. *See, e.g.*, *id.* § 3631 n.19 (noting that this doctrine has been treated as a jurisdictional limitation (citing *Covell v. Heyman*, 111 U.S. 176, 184 (1884); *Hagan v. Lucas*, 35 U.S. 400, 400 (1836)); *Chapman v. Deutsche Bank Nat'l Tr. Co.*, 651 F.3d 1039, 1043 (9th Cir. 2011) (calling the rule of prior exclusive jurisdiction a "mandatory jurisdictional limitation").

The doctrine of prior exclusive jurisdiction provides that, where a second suit is pursued that is *in rem* or *quasi in rem* with respect to the same property in essentially the same type of action, "the jurisdiction of the [second] court must yield to that of the other." *Princess Lida of Thurn & Taxis v. Thompson*, 305 U.S. 456, 466 (1939); *Penn Gen. Casualty Co. v. Cwth. of Pa. ex rel. Schnader*, 294 U.S. 189, 195 (1935); *see United States v. One Parcel Property Located at Lot 85, County Ridge*, 100 F.3d 740, 742 (10th Cir. 1996). The Supreme Court has reasoned that in such *in rem* or *quasi in rem* proceedings, it must be that only one

court has control of the property which is the subject of the litigation in order to adjudicate the case and grant the relief sought. *Princess Lida*, 305 U.S. at 466. And federal courts of appeals have applied the prior exclusive jurisdiction doctrine in the water rights context. *See, e.g.*, *United States v. Alpine Land & Reservoir Co.*, 174 F.3d 1007, 1013-1014 (9th Cir. 1999).

Plaintiffs here seek to overturn the state-court judgment approving the Settlement Agreement by challenging its water-rights rulings in federal court. *See, e.g.*, 1 App. 35, 21-24; 2 App. 182. In essence, then, they seek readjudication by a different court of the same water rights that were at issue in the state-court water-rights proceeding. The relief they seek—declaration that those state-court rulings with respect to the ownership of those water rights were incorrect (*see, e.g.*, 1 App. 35)—could not be granted consistently with the state court's control over the determination of those water rights. Thus, prior exclusive jurisdiction provides a ground to affirm dismissal of this federal complaint as against all Defendants.

Even Plaintiffs' procedural and environmental challenges, to the extent developed at all, were presented as pertaining to how the state court was required to adjudicate water rights. *See, e.g.*, 1 App. 33 ¶62, 16 ¶1, 40-54. Thus, they should be considered to be subsumed within the state court's *in rem* jurisdiction over that *res*. *See Marshall v. Marshall*, 547 U.S. 293, 311-312 (2006). To the extent that those challenges would instead be considered to be "outside those

confines" of the property at issue in the state court and "otherwise within federal jurisdiction" (*id.* at 312), dismissal of those challenges should and may be affirmed on any of the several other applicable grounds recounted above.

* * *

If this Court were to determine that affirmance is not warranted by any of the many grounds for dismissal addressed in this brief, at most this Court should remand for the district court to consider, upon full briefing, some or all of the remaining grounds for dismissal. But no additional briefing or round of litigation is necessary, as this case—and its long, convoluted background history of litigation on substantially the same issues—would be well concluded by an affirmance on this appeal.

CONCLUSION

For the foregoing reasons, the district court's judgment dismissing Plaintiffs' claims against Federal Defendants should be affirmed.

Respectfully submitted,

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STATEMENT REGARDING ORAL ARGUMENT

Federal Defendants concur with Plaintiffs in not requesting oral argument, but are prepared to present oral argument should the Court determine it helpful for addressing the issues presented.

CERTIFICATE STATING REASONS WHY FEDERAL DEFENDANTS' SEPARATE ANSWERING BRIEF IS NECESSARY

Defendants-Appellees are named officials of United States agencies, named officials of the State of New Mexico, and named officials of Navajo Nation tribal entities. They are all official representatives of various separate sovereigns. Separate, although overlapping and similar, bodies of law govern the sovereignty and sovereign immunity of Defendants-Appellees. Accordingly, consistent with Tenth Circuit Rule 31.3(B) and (D), this separate answering brief for Federal Defendants-Appellees is necessary to articulate Federal Defendants-Appellees' particular grounds for affirmance of the district court's dismissal order.

/s/ Dina B. Mishra
DINA B. MISHRA

Counsel for Federal Defendants-Appellees

CERTIFICATE OF COMPLIANCE

The foregoing Answering Brief of Federal Defendants-Appellees complies with the type-volume limitation of Federal Rule of Appellate Procedure 32(a)(7)(B) because it contains 10,880 words, excluding the parts of the brief exempted under Federal Rule of Appellate Procedure 32(f) and Tenth Circuit Rule 32(B).

The foregoing Answering Brief of Federal Defendants-Appellees complies with the typeface requirements of Federal Rule of Appellate Procedure 32(a)(5) and the type-style requirements of Federal Rule of Appellate Procedure 32(a)(6) because it has been prepared in a proportionally spaced typeface (14-point Times New Roman font) using Microsoft Word 2016.

/s/ Dina B. Mishra
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Counsel for Federal Defendants-Appellees

CERTIFICATE OF SERVICE

I hereby certify that on March 30, 2023, I electronically filed this Answering Brief of Federal Defendants-Appellees with the Clerk of the Court for the United States Court of Appeals for the Tenth Circuit by using the appellate CM/ECF system. I certify that counsel for the participants in the case are registered CM/ECF users and that service will be accomplished by the appellate CM/ECF system.

/s/ Dina B. Mishra
DINA B. MISHRA

Counsel for Federal Defendants-Appellees

ADDENDUM

McCarran Amendment, 43 U.S.C. § 666(a)

§ 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.