

Nos. 23-15499 and 23-15521 (Consolidated)

**UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT**

YUROK TRIBE; PACIFIC COAST FEDERATION OF FISHERMEN'S ASSOCIATIONS;
INSTITUTE FOR FISHERIES RESOURCES,
Plaintiffs/Joined Cross-Claimants/Appellees,

and

HOOPA VALLEY TRIBE,
Joined Cross-Claimant/Appellee,

and

UNITED STATES BUREAU OF RECLAMATION, ET AL.,
Defendants-Cross-Claimants/Counterclaim-Defendants/Appellees,

and

KLAMATH TRIBES,
Intervenor-Defendant-Appellee,

v.

KLAMATH WATER USERS ASSOCIATION,
Intervenor-Crossclaim-Defendant/Counter-Claimant/Appellant,

and

KLAMATH IRRIGATION DISTRICT,
Intervenor Crossclaim-Defendant/Appellant,

and

OREGON WATER RESOURCE DEPARTMENT,
Crossclaim-Defendant-Appellee.

On Appeal from the U.S. District Court for the Northern District of California
Case No. 3:19-cv-04405-WHO (Hon. William H. Orrick)

ANSWERING BRIEF FOR APPELLEES YUROK TRIBE, ET AL.

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TABLE OF CONTENTS

QUESTIONS PRESENTED	1
INTRODUCTION	1
BACKGROUND	3
I. THE KLAMATH PROJECT AND ITS IMPACTS ON KLAMATH RIVER SALMON.....	3
1. Salmon Declines and ESA Listings.....	4
2. Klamath Project’s ESA Compliance.....	5
II. OREGON WATER RIGHTS PROCEEDINGS	6
III. THE PROCEEDINGS BELOW	9
SUMMARY OF ARGUMENT.....	11
ARGUMENT	14
I. THE DISTRICT COURT PROPERLY HELD THAT THE ESA PREEMPTS OREGON’S ADMINISTRATION OF STATE-ADJUDICATED WATER RIGHTS TO PRECLUDE ESA-REQUIRED FLOWS.	14
II. KWUA PRESSES CERTAIN ARGUMENTS THAT GO BEYOND THE CASE OR CONTROVERSY THAT REMAINS AFTER THE DEMISE OF THE OWRD ORDER.....	16
III. THE ESA APPLIES TO RECLAMATION’S OPERATION OF THE KLAMATH PROJECT.	18
A. This Court Held Decades Ago that Reclamation Must Ensure That Its Operation of the Klamath Project Complies with Section 7.	19
B. Nothing in <i>Home Builders</i> and its Progeny Undermines <i>Patterson</i>	20
C. The Reclamation Act Gives Reclamation Authority to Operate the Klamath Project to Benefit Klamath River Salmon.	24
1. Reclamation Has Broad Authority to Take all Necessary and Proper Actions.....	24
2. No Statute Confines Reclamation’s Operational Authority to Irrigation...	26
3. No Separate Law Authorizing Operating the Klamath Project to Protect Fish is Needed.	32

D. Section 8 of the Reclamation Act Does Not Constrain Reclamation’s Authority to Provide Instream Flows to Comply with the ESA.	34
IV. THE KLAMATH IRRIGATION CONTRACTS IN NO WAY PRECLUDE RECLAMATION’S COMPLIANCE WITH SECTION 7.....	38
A. The ESA Modifies the Klamath Contracts Under the Unmistakable Terms Doctrine.	39
B. The Klamath Irrigation Contracts Confirm, Rather than Surrender, Reclamation’s Ability to Comply with the ESA.	41
C. Reclamation Retains Authority Under the Contracts Over Water Withdrawals by Irrigation Districts.	45
D. KWUA’s Plea for This Court to Craft a Different Klamath Project Operations Plan is Barred by Circuit Precedent.	48
V. KID’S ARGUMENTS FAIL BECAUSE THIS CASE IS NOT ESTABLISHING OR ENFORCING A WATER RIGHT AND NO STATUTE ELEVATES STATE WATER RIGHTS OVER RECLAMATION’S ESA OBLIGATIONS.	53
A. KID Improperly Seeks to Turn This Case into a Water Rights Determination.	53
B. KID’s Water Rights Arguments Fail.	57
1. The Doctrine of Prior Exclusive Jurisdiction Is Inapplicable.	57
2. The McCarran Amendment Does Not Authorize Enforcement of Oregon-Based Water Rights to Preclude ESA Compliance.	58
3. The District Court Did Not Abuse Its Discretion in Declining to Abstain.	59
4. KID’s Fifth Amendment Taking is Procedurally and Substantively Specious.	59
5. The District Court Did Not Abuse Its Discretion in Denying KID’s Rule 56(d) Motion.	62
VI. THE DISTRICT COURT DID NOT ABUSE ITS DISCRETION IN STRIKING KWUA’S TRIBAL WATER RIGHTS ARGUMENTS.	63
CONCLUSION	65

TABLE OF AUTHORITIES

	Page(s)
Cases	
<i>Am. Rivers v. FERC</i> , 895 F.3d 32 (D.C. Cir. 2018).....	23
<i>Arizona v. United States</i> , 567 U.S. 387 (2012).....	14
<i>Audubon Soc’y of Portland v. Haaland</i> , 40 F.4th 917 (9th Cir. 2022)	31
<i>Baley v. United States</i> , 134 Fed. Cl. 619 (Ct. Cl. 2017)	30, 41, 42
<i>Baley v. United States</i> , 942 F.3d 1312 (Fed. Cir. 2019)	3, 41, 53, 61
<i>Barcellos & Wolfsen, Inc. v. Westlands Water Dist.</i> , 849 F. Supp. 717 (E.D. Cal. 1993)	29, 37
<i>Bean v. Morris</i> , 221 U.S. 485 (1911).....	38
<i>Bennett v. Spear</i> , 520 U.S. 154 (1997).....	6, 18
<i>Blake v. Arnett</i> , 663 F.2d 906 (9th Cir. 1981)	3
<i>Bowen v. Pub. Agencies Opposed to Soc. Sec. Entrapment</i> , 477 U.S. 41 (1986).....	39
<i>Cal. Sportfishing Prot. All. v. Fed. Energy Regul. Comm’n</i> , 472 F.3d 593 (9th Cir. 2006)	23
<i>California v. United States</i> , 438 U.S. 645 (1978).....	12, 35
<i>Carson-Truckee Water Conservancy Dist. v. Clark</i> , 741 F.2d 257 (9th Cir. 1984)	24

<i>Cisneros v. Alpine Ridge Grp.</i> , 508 U.S. 10 (1993).....	63
<i>Colorado River Water Conservation Dist. v. United States</i> , 424 U.S. 800 (1976).....	59
<i>Cottonwood Env’t Law Ctr. v. U.S. Forest Serv.</i> , 789 F.3d 1075 (9th Cir. 2015)	14, 46
<i>Env’t Def. Ctr. v. Bureau of Ocean Energy Mgmt.</i> , 36 F.4th 850 (9th Cir. 2022)	47
<i>Env’t Prot. Info. Ctr. v. Simpson Timber Co.</i> , 255 F.3d 1073 (9th Cir. 2001)	47
<i>Gulf Fishermens Ass’n v. Nat’l Marine Fisheries Serv.</i> , 968 F.3d 454 (5th Cir. 2020)	26
<i>Hinderlider v. La Plata River & Cherry Creek Ditch Co.</i> , 304 U.S. 92 (1938).....	34
<i>Kandra v. United States</i> , 145 F. Supp. 2d 1192 (D. Or. 2001).....	30, 40, 53
<i>Karuk Tribe v. U.S. Forest Serv.</i> , 681 F.3d 1006 (9th Cir. 2012) (en banc)	21
<i>In re Klamath Irrigation Dist.</i> , 69 F.4th 934 (9th Cir. 2023)	30, 56, 57, 59
<i>Klamath Irrigation Dist. v. Bureau of Reclamation</i> , 48 F.4th 934 (9th Cir. 2022)	56, 57, 58, 59
<i>Klamath Irrigation Dist. v. Bureau of Reclamation</i> , No. 1:21-cv-00504-AA, 2022 WL 1210946 (D. Or. Apr. 25, 2022)	56
<i>Klamath Irrigation Dist. v. Or. Water Res. Dep’t</i> , 321 Or.App. 581, 518 P.3d 970 (Or. Ct. App. Sept. 8, 2022)	7, 8, 9, 56
<i>Klamath Irrigation Dist. v. United States</i> , 67 Fed. Cl. 504 (Ct. Cl. 2005)	41

<i>Klamath Irrigation Dist. v. United States</i> , 75 Fed. Cl. 677 (Ct. Cl. 2007)	63
<i>Klamath Water Users Protective Ass’n v. Patterson</i> , 15 F. Supp. 2d 990 (D. Or. 1998)	31
<i>Klamath Water Users Protective Ass’n v. Patterson</i> , 204 F.3d 1206 (9th Cir. 1999)	<i>passim</i>
<i>Madera Irrigation Dist. v. Hancock</i> , 985 F.2d 1397 (9th Cir. 1993)	33, 39
<i>MedImmune, Inc. v. Genentech, Inc.</i> , 549 U.S. 118 (2007).....	17
<i>Nat. Res. Def. Council v. Houston</i> , 146 F.3d 1118 (9th Cir. 1998)	33, 40, 43, 52
<i>Nat. Res. Def. Council v. Jewell</i> , 749 F.3d 776 (9th Cir. 2014) (en banc)	21, 44, 49
<i>Nat. Res. Def. Council v. Norton</i> , 236 F. Supp. 3d 1198 (E.D. Cal. 2017)	44, 45
<i>Nat. Res. Def. Council v. Patterson</i> , 791 F. Supp. 1425 (E.D. Cal. 1992)	36
<i>Nat’l Ass’n of Home Builders v. Defs. of Wildlife</i> , 551 U.S. 644 (2007).....	<i>passim</i>
<i>Nat’l Wildlife Fed’n v. Nat’l Marine Fisheries Serv.</i> , 422 F.3d 782 (9th Cir. 2005)	15
<i>Nat’l Wildlife Fed’n v. Nat’l Marine Fisheries Serv.</i> , 524 F.3d 917 (9th Cir. 2008)	<i>passim</i>
<i>O’Neill v. United States</i> , 50 F.3d 677 (9th Cir. 1995)	<i>passim</i>
<i>In re Operation of Mo. River System Litig.</i> , 421 F.3d 618 (8th Cir. 2005)	22

<i>Pac. Coast Fed'n of Fisherman's Ass'ns v. Reclamation</i> , 138 F. Supp. 2d 1228 (N.D. Cal. 2001).....	30
<i>Pac. Coast Fed'n of Fishermen's Ass'ns v. Bureau of Reclamation</i> , 426 F.3d 1082 (9th Cir. 2005)	6, 52
<i>Pac. Rivers Council v. Thomas</i> , 30 F.3d 1050 (9th Cir. 1994)	46
<i>Parravano v. Babbit</i> , 70 F.3d 539 (9th Cir. 1995)	3
<i>Peterson v. Dep't of Interior</i> , 899 F.2d 799 (9th Cir. 1990)	39
<i>Platte River Whooping Crane Critical Habitat Maint. Trust v. Fed. Regul. Energy Comm'n</i> , 962 F.2d 27 (D.C. Cir. 1992).....	23
<i>Pub. Serv. Comm'n of Utah v. Wycoff Co.</i> , 344 U.S. 237 (1952).....	18
<i>Rio Grande Silvery Minnow v. Keys</i> , 333 F.3d 1109 (10th Cir. 2003)	52
<i>San Luis & Delta-Mendota Water Auth. v. United States</i> , 672 F.3d 636 (9th Cir. 2012)	23, 24, 33
<i>San Luis & Delta-Mendota Water Auth. v. Jewell</i> , 747 F.3d 581 (9th Cir. 2014)	<i>passim</i>
<i>San Luis & Delta-Mendota Water Auth. v. Locke</i> , 776 F.3d 971 (9th Cir. 2014)	50
<i>San Luis Obispo Coastkeeper v. Santa Maria Valley Water Conservation Dist.</i> , 49 F.4th 1242 (9th Cir. 2022)	26, 32
<i>San Luis United Food Producers v. United States</i> , 709 F.3d 798 (9th Cir. 2013)	22, 27, 29
<i>Sierra Club v. Babbitt</i> , 65 F.3d 1502 (9th Cir. 1995)	46, 47

<i>Sporhase v. Nebraska, ex rel. Douglas</i> , 458 U.S. 941 (1982).....	35
<i>Stand Up for California! v. Dep’t of the Interior</i> , 959 F.3d 1154 (9th Cir. 2020)	26
<i>Stockton E. Water Dist. v. United States</i> , 583 F.3d 1344 (Fed. Cir. 2009)	62
<i>Stop the Beach Renourishment, Inc. v. Fla. Dep’t of Env’t Prot.</i> , 560 U.S. 702 (2010).....	61
<i>Sturgeon v. Frost</i> , 139 S. Ct. 1066 (2019).....	7
<i>Tahoe-Sierra Pres. Council, Inc. v. Tahoe Reg’l Plan. Agency</i> , 322 F.3d 1064 (9th Cir. 2003)	30
<i>Tenn. Valley Auth. v. Hill</i> , 437 U.S. 153, 184 (1978).....	14, 15
<i>Truckee-Carson Irrigation Dist. v. Sec’y of Dep’t of Interior</i> , 742 F.2d 527 (9th Cir. 1984)	25
<i>Tulare Lake Basin Water Storage Dist. v. United States</i> , 49 Fed. Cl. 313 (Ct. Cl. 2001)	62
<i>Turtle Island Restoration Network v. Nat’l Marine Fisheries Serv.</i> , 340 F.3d 969 (9th Cir. 2003)	47
<i>United States v. Alpine Land & Reservoir Co.</i> , 887 F.2d 207 (9th Cir. 1989)	25
<i>United States v. Cal. Water Res. Control Bd.</i> , 694 F.2d 1171 (9th Cir. 1982)	35, 36, 37
<i>United States v. Dist. Ct. for Eagle Cnty., Colo.</i> , 401 U.S. 520 (1971).....	38
<i>United States v. Glenn-Colusa Irrigation Dist.</i> , 788 F. Supp. 1126 (E.D. Cal. 1992)	37
<i>United States v. Klamath Drainage Dist.</i> , 2023 WL 5899910 (D. Or. Sept. 11, 2023)	42, 44

<i>United States v. Weems</i> , 49 F.3d 528 (9th Cir. 1995)	30
<i>In re Volkswagen “Clean Diesel” Mktg., Sales Pracs. & Prods. Liab. Litig.</i> , 959 F.3d 1201 (9th Cir. 2020)	14
<i>Westlands Water Dist. v. Dep’t of Interior</i> , 805 F. Supp. 1503 (E.D. Cal. 1992)	25, 28
<i>WildEarth Guardians v. Army Corps of Eng’rs</i> , 947 F.3d 635 (10th Cir. 2020)	51, 52
<i>Wyoming v. Colorado</i> , 259 U.S. 419 (1922).....	38
<i>Yurok Tribe v. Bureau of Reclamation</i> , 231 F. Supp. 3d 450 (N.D. Cal. 2017).....	6
<i>Yurok Tribe v. Bureau of Reclamation</i> , 654 F. Supp. 3d 941 (N.D. Cal. 2023).....	<i>passim</i>

Statutes

28 U.S.C. § 1442(a)(1).....	56
28 U.S.C. § 1491	61
33 U.S.C. § 1361(a)	26
Act of Feb. 9, 1905, ch. 567, 33 Stat. 714	27
Central Valley Project Improvement Act of 1992, Pub. L. No. 102-575, 106 Stat. 4706 <i>et seq.</i>	32, 33
Declaratory Judgment Act, 28 U.S.C. § 2201	17
Endangered Species Act	
16 U.S.C. § 1535(f).....	16
16 U.S.C. § 1536(a)(2), (b).....	5
16 U.S.C. § 1536(b)(3)(A).....	5

16 U.S.C. § 1536(b)(4)	5
16 U.S.C. § 1536(o).....	5
16 U.S.C. § 1539.....	5
Fish and Wildlife Coordination Act, 16 U.S.C. §§ 661-666c	32
Kuchel Act of 1964, 16 U.S.C. § 6951	31
McCarran Amendment, 43 U.S.C. § 666(a)	58
Or. Rev. Stat. ch. 537	7
Or. Rev. Stat. § 539.130(4).....	8
Or. Rev. Stat. § 539.170.....	8
Reclamation Act of 1902, 43 U.S.C. §§ 372, <i>et seq.</i> , Act of June 17, 1902, ch. 1093, 32 Stat. 388	<i>passim</i>
43 U.S.C. § 372.....	28
43 U.S.C. § 373.....	24
43 U.S.C. § 383.....	<i>passim</i>
Refuge Act, 16 U.S.C. § 668dd	31
Warren Act of 1911, 43 U.S.C. §§ 523-525	41
Other Authorities	
50 C.F.R. § 402.02	51
50 C.F.R. § 402.03	21
53 Fed. Reg. 27,130 (July 18, 1988).....	4
62 Fed. Reg. 24,588 (May 6, 1997).....	4
64 Fed. Reg. 24,049 (May 5, 1999).....	4
70 Fed. Reg. 69,903 (Nov. 18, 2005).....	4

84 Fed. Reg. 44,976 (Sept. 26, 2019)	51
88 Fed. Reg. 40,753 (June 22, 2023)	51
1909 Op. Att’y Gen. 360 (1909), 1909 U.S. LEXIS 61	29
Tarlock, <i>Law of Water Rights & Resources</i> § 9:24	35

QUESTIONS PRESENTED

1. Whether the Endangered Species Act preempts enforcement of Oregon-adjudicated water rights for irrigation to preclude ESA-required flows?
2. Whether the irrigators are impermissibly seeking an advisory opinion as to how the Bureau of Reclamation should craft its next Klamath Project operations plan?
3. Whether Reclamation has some discretion to operate the Klamath Project to benefit listed salmon in the Klamath River?
4. Whether Klamath Irrigation District’s water rights arguments—exclusive jurisdiction, McCarran Amendment, abstention, Fifth Amendment taking, and Rule 56(d)—fail because they are beyond the scope of the limited waiver of sovereign immunity and no federal statute elevates state water rights over Reclamation’s ESA obligations.
5. Whether the district court abused its discretion in striking Klamath Water User Association’s arguments seeking to diminish the Yurok Tribe’s federally reserved water rights?

INTRODUCTION

No party disputes that Appellee Bureau of Reclamation (“Reclamation”) must comply with the Endangered Species Act (“ESA”) in operating the massive federal reclamation project known as the Klamath Project. Appellee Oregon Water

Resources Department (“OWRD”), which is tasked with adjudicating and administering Klamath Basin water rights in Oregon, concedes it lacks authority to prevent Reclamation from complying with the ESA, and it has not appealed the district court’s ruling that the ESA preempts OWRD’s Order prohibiting Reclamation’s releases of ESA-required salmon flows without a state water right. While Appellants Klamath Water Users Association (“KWUA”) and Klamath Irrigation District (“KID”) acknowledge the ESA preempts OWRD’s authority in the event of a conflict, they have devised ways to argue there is no conflict and the ESA can be violated. KWUA argues Reclamation must operate the Klamath Project solely for irrigation, but no federal statute imposes such a limitation, nor do any of Reclamation’s contracts with irrigation districts. KID argues Reclamation must buy water rights to provide ESA-mandated flows for Klamath River salmon, but its argument fails under the Reclamation Act. This Court has long rejected these arguments, holding the ESA takes precedence over irrigators’ rights to water. The district court properly held that the ESA preempts enforcement of state water rights to preclude ESA-mandated water deliveries. Appellees Yurok Tribe, Pacific Coast Federation of Fishermen’s Associations (“PCFFA”), and Institute for Fisheries Resources respectfully ask this Court to affirm.

BACKGROUND

I. THE KLAMATH PROJECT AND ITS IMPACTS ON KLAMATH RIVER SALMON.

The Klamath River was once the third most productive salmon-producing river in the continental United States. Declaration of Glen Spain (“Spain Decl.”) ¶¶ 7, 12-13 (May 20, 2022) (PCFFA Regional Director), Supplemental Excerpts of Record (“SER”)-20-21. The Klamath River originates in the arid desert in Oregon, flowing out of Upper Klamath Lake (“UKL”) into California and through the Yurok Reservation to the Pacific Ocean.

Since time immemorial, the Yurok Tribe has lived and fished on the Lower Klamath River in northern California. It has federally reserved water rights that include sufficient water to support its fishery. Declaration of Yurok Tribal Chairman Joseph L. James (“James Decl.”) ¶¶ 18-25 (May 25, 2022), SER-10-13; *see Parravano v. Babbitt*, 70 F.3d 539, 541 (9th Cir. 1995); *Baley v. United States*, 942 F.3d 1312, 1337, 1340-41 (Fed. Cir. 2019). The Klamath River and its fishery are “not much less necessary to the existence of the [Yurok] than the atmosphere they breathe[.]” *Blake v. Arnett*, 663 F.2d 906, 909 (9th Cir. 1981) (quoting *United States v. Winans*, 198 U.S. 371, 381 (1905)).

The Klamath Project was one of the first reclamation projects authorized under the Reclamation Act of 1902, 43 U.S.C. §§ 372, *et seq.* The Project’s construction entailed chiseling down a rock reef and building Link River Dam at

the southern end of UKL to allow Reclamation to control the release of water from the lake. Because UKL is very shallow, it has limited capacity to store water from one year to the next. Various facilities, including dams, diversions, canals, pumping stations, and a hydroelectric project were built between 1906 and 1966.

1. Salmon Declines and ESA Listings

The Klamath Project led to precipitous declines in Klamath River salmon. In 1997, the National Marine Fisheries Service (“NMFS”) listed Southern Oregon/Northern California Coast Coho salmon as threatened under the ESA, in large part due to agricultural development and water withdrawals for irrigation. 62 Fed. Reg. 24,588, 24,592-93 (May 6, 1997); *see also* 64 Fed. Reg. 24,049 (May 5, 1999) (designating most of Klamath River as critical habitat). Klamath River Chinook salmon, which have also declined, are preferred prey for endangered Southern Resident Killer Whales that feed along the west coast, including at the mouth of the Klamath River. 70 Fed. Reg. 69,903 (Nov. 18, 2005); 2019 Biological Opinion, SER-104; *see also* 53 Fed. Reg. 27,130 (July 18, 1988) (ESA listing of two fish species that inhabit UKL and its tributaries).

The plummeting salmon populations have caused hardship to the Yurok Tribe and commercial fishing families that depend on salmon for their sustenance and well-being. In 2002, Klamath Project irrigation deliveries caused the spread of a deadly fish disease and the largest reported adult fish kill on American soil. As

many as 78,000 dead salmon washed up on the Yurok Reservation before they could spawn. James Decl. ¶ 11, SER-06. In 2021, a massive outbreak of another fish disease led to mass mortalities of outmigrating juvenile salmon. James Decl. ¶ 14, SER-08. These fishery disasters led to closures of Yurok’s and commercial fisheries. James Decl. ¶¶ 11, 18-24, SER-10-13; Spain Decl. ¶¶ 10, 14-19, SER-19, 21-24.

2. Klamath Project’s ESA Compliance

Section 7 of the ESA imposes obligations on federal agencies to ensure their actions will avoid jeopardizing the survival and recovery of listed species or adversely modifying their critical habitat (hereinafter collectively called “jeopardy”). Action agencies, like Reclamation, must discharge this obligation in consultation with the appropriate fish and wildlife agency, NMFS for salmon, which must issue a biological opinion determining whether the action agency’s proposed action is likely to cause jeopardy. 16 U.S.C. § 1536(a)(2), (b). If NMFS make a jeopardy finding, it must offer a reasonable and prudent alternative that will avoid jeopardy. 16 U.S.C. § 1536(b)(3)(A). If NMFS make a no-jeopardy call, it must issue an incidental take statement ensuring that any take of listed species will not violate Section 7. 16 U.S.C. § 1536(b)(4). An incidental take statement insulates any taking in compliance with its terms and conditions from the ESA’s Section 9 prohibition on the take of members of a listed species. 16 U.S.C. §§

1536(o), 1539. Biological opinions have a “virtually determinative effect” because ignoring them exposes the agency to civil and criminal liability for the take of endangered species. *Bennett v. Spear*, 520 U.S. 154, 170 (1997).

To comply with this mandate, Reclamation developed its 2019-2024 Klamath Project operations plan, informed by decades of ESA litigation holding that the best available science requires minimum year-round flows and targeted disease management flows are necessary to avoid jeopardizing salmon survival and recovery. See *Pac. Coast Fed’n of Fishermen’s Ass’ns v. Bureau of Reclamation (PCFFA)*, 426 F.3d 1082 (9th Cir. 2005) (minimum flows required to provide salmon habitat); *Yurok Tribe v. Bureau of Reclamation*, 231 F. Supp. 3d 450 (N.D. Cal. 2017) (flushing flows required to reduce juvenile salmon mortalities from disease). NMFS issued a no-jeopardy biological opinion and incorporated the flows into the binding conditions in its incidental take statement. SER-130-31, 219, 222-24, 235-36, 248-49.¹

II. OREGON WATER RIGHTS PROCEEDINGS

In 1905, Reclamation filed a notice of appropriation with the Oregon State Engineer of unappropriated waters in the Klamath Basin for the Klamath Project. Under Oregon law, all state waters belong to the public and pre-1909 rights must

¹ For unexplained reasons, KID features the superseded 2013 biological opinion and plan, not the controlling ones.

be determined in subsequent proceedings. Or. Rev. Stat. ch. 537. Consistent with western water law, Oregon water rights are not possessory, but usufructuary, conferring a right to use available water from a designated source in order of priority. *See Sturgeon v. Frost*, 139 S. Ct. 1066, 1079 (2019).

In the 1970s OWRD initiated the Klamath Basin Adjudication (“KBA”) to determine claims to water rights in UKL in Oregon. *Klamath Irrigation Dist. v. Or. Water Res. Dep’t (KID v. OWRD)*, 321 Or.App. 581, 518 P.3d 970, 973 (Or. Ct. App. Sept. 8, 2022). In 2014, OWRD entered the Amended and Corrected Findings of Fact and Final Order of Determination (“ACFFOD”), provisionally determining the priority and scope of water rights. The ACFFOD determined that Reclamation holds a right to store water in UKL, while irrigation districts have rights to use “stored” water for irrigation and domestic use. Excerpts of Record (“KWUA_ER” and “KID_ER”) 9-KWUA_ER-2247, 2252, 2254-63. It set the maximum amount of water that may be diverted, stored, or beneficially used under Project water rights, but did not require the total amount be diverted, stored, or used. Nor did it determine the relative rights of Reclamation and irrigation districts, which are instead governed by contracts between Reclamation and the districts. 9-KID_ER-01895-96. The ACFFOD is currently under judicial review in the Klamath County Circuit Court, but can be implemented by OWRD unless

enforcement is stayed by the court upon posting a bond to cover harm to water rights holders. *See* Or. Rev. Stat. §§ 539.130(4), 539.170; 539.180.

KID brought litigation in state court seeking to compel OWRD to enforce the ACFFOD against Reclamation.² In 2018, KID obtained a state-court writ of mandamus directing OWRD to take exclusive charge of UKL for the purpose of distributing the water in accordance with the ACFFOD. 13-KID_ER-002941-45. In 2020, KID obtained a state-court injunction ordering OWRD to immediately stop Reclamation’s release of “stored” water from UKL without first determining it is authorized by the ACFFOD. 19-KID_ER-004567-68. This ruling led OWRD to issue an Order prohibiting Reclamation from releasing “stored” water to the Klamath River without an Oregon-based water right, although the Order stated it did not alter any Reclamation federal law or contractual obligations. 8-KWUA_ER-1884-93. OWRD subsequently issued notices of violation directing Reclamation to cease releasing “stored” water or face sanctions. 8-KWUA_ER-1801-09; 8-KWUA_ER-1790-800. The Oregon Court of Appeals reversed and directed the trial court to dismiss the case for failing to join Reclamation and Klamath Basin Tribes as indispensable parties who could not be joined due to their sovereign immunity. *KID v. OWRD*, 321 Or. App. 581, 518 P.3d 970 (2022). The

² The Court should disregard KID’s lengthy footnote (KID Br., ECF 22-1 at 30 n.2) referring to a dispute between Yurok and OWRD because it is based on emails and a draft document subject to KID’s withdrawn request for judicial notice.

court recognized that precluding Reclamation's releases would impair its ability to provide instream flows required by the ESA and federal court rulings. *Id.* at 586-88, 590, 592. After the Oregon Supreme Court denied review, 371 Or. 21 (2023), OWRD withdrew the OWRD Order. 1-KWUA_ER-0005 n.3.

III. THE PROCEEDINGS BELOW

This case originated as a challenge by the Yurok Tribe to Reclamation's 2019 operations plan and the associated biological opinion because they reduced springtime flows needed to make side channels and tributaries accessible to juvenile salmon. To resolve Yurok's motion for a preliminary injunction, the parties negotiated an interim operations plan requiring augmented spring flows, although not in drought years, and the district court entered a stipulated stay. SER-66-75; 9-KWUA_ER-2061-65; 9-KWUA_ER-2066-73. Successive years of extreme drought have plagued the Basin, precluding the full spring augmentation flows in 2020-2022. *E.g.*, 18-KID_ER-4545.

The district court lifted the stay to allow the United States to file a crossclaim challenging the OWRD Order on Supremacy Clause grounds, expressly incorporating the limitations on waiver of sovereign immunity by Reclamation and the Yurok and Klamath Tribes. 8-KWUA_ER-1772. Specifically:

[n]either the United States nor the Tribes have waived sovereign immunity in this forum for the purpose of adjudicating or quantifying water rights, including the sources from which such adjudicated or quantified rights may be satisfied. . . . Accordingly, the lifting of the stay

shall not allow or result in an adjudication or quantification of the Tribes' water rights, including the sources from which such adjudicated or quantified rights may be satisfied.

8-KWUA_ER-1776 ¶ 7; *see also* 8-KWUA_ER-1737 ¶ 26; SER-270-71 ¶ 21. The court also bifurcated litigation of the crossclaim with phase 1 addressing ESA-based preemption arguments and phase 2 addressing water-rights preemption claims if necessary. 8-KWUA_ER-1772; 8-KWUWA_ER-1781-82 ¶ 9.

The court denied OWRD's motion to dismiss on standing grounds, construed Yurok's supplemental complaint as a request for joinder, which it granted, allowed KID to intervene, granted Hoopa Valley Tribe joinder as to the first cause of action subject to the limited waiver of sovereign immunity, and established procedures governing discovery procedures. 7-KWUA_ER-1669-1683; SER-263-305; 1-KID_ER-000054-55; 2-KWUA_ER-0234-36.

On February 6, 2023, in addition to ruling on procedural and jurisdictional arguments, the court held that the ESA preempts OWRD's Order and enjoined enforcement of the Order. *Yurok Tribe v. Bureau of Reclamation (Yurok)*, 654 F. Supp. 3d 941 (N.D. Cal. 2023). It denied OWRD's counterclaim seeking to compel Reclamation to provide information about water releases for lack of standing and denied KWUA's counterclaim upon holding that the ESA applies to Reclamation's operation of the Klamath Project. This appeal by KWUA and KID followed. 12-KWUA_ER-2837-43; 19-KID_ER-004723-26.

SUMMARY OF ARGUMENT

The ESA preempts OWRD's enforcement of state-based water rights where the two conflict. OWRD concedes as much. Indeed, no party seriously disputes this controlling principle. Instead, KWUA and KID seek to avoid such a conflict by claiming the ESA does not apply to Reclamation's release of what Oregon water law defines as "stored" water to meet its ESA's obligation to ensure that the Klamath Project will avoid jeopardy to Klamath River salmon.

This Court held more than two decades ago that Reclamation's ESA obligations override irrigators' use of water. *Klamath Water Users Protective Ass'n v. Patterson*, 204 F.3d 1206, 1213 (9th Cir. 1999). *Patterson* also rejected KWUA's argument that the Klamath Project must be managed only for irrigation, finding instead that Reclamation must operate the Project to achieve multiple purposes, including protection of fish and wildlife. These holdings withstand the test of time.

While the Supreme Court has held that a statute can be so prescriptive that it leaves an agency without any discretion to ensure its actions will avoid jeopardizing listed species, *see National Association of Home Builders v. Defenders of Wildlife (Home Builders)*, 551 U.S. 644 (2007), no such statute confines Reclamation's authority in operating the Klamath Project. The Reclamation Act gives Reclamation broad authority, including to take "any and all

acts” that “may be necessary and proper” for operating reclamation projects, which includes adopting operations criteria that affect the availability of water for irrigation. Congress further authorized Reclamation to raise or lower UKL levels as may be necessary, without imposing any limitations.

Section 8 of the Reclamation Act requires Reclamation to appropriate water for irrigation from reclamation projects in accordance with state water law, but this direction gives way when inconsistent with other congressional directives.

California v. United States, 438 U.S. 645 (1978). The Supremacy Clause and conflict preemption principles control. Because the ESA requires certain flows to prevent extinction of Klamath River salmon, it overrides state water law that might be read to preclude such flows. Section 8 cannot be read to direct Reclamation to obtain an Oregon water right to release ESA-mandated salmon flows, which are based on the habitat and biological needs of the salmon. Instead, the ESA determines how much water is available to state water rights holders to be used in accordance with the relative priorities and terms of their water rights.

While Reclamation has entered into contracts with irrigation districts, those contracts are expressly subject to later congressional enactments and contain water shortage provisions that limit the amount of water available for irrigation when necessary to comply with the ESA. This Court has held that such contract provisions make it clear Reclamation retains authority to curtail irrigation

deliveries to comply with the ESA. *Patterson*, 204 F.3d at 1213; *O'Neill v. United States*, 50 F.3d 677, 683-84, 686 (9th Cir. 1995). Reclamation has ample discretionary control over Klamath Project operations to trigger the ESA's mandate to ensure such operations will avoid jeopardizing salmon survival.

Insisting that Reclamation must obtain a water right to release water to the Klamath River for ESA flows, KID presses water rights arguments based on Oregon law. It goes so far as to claim the district court granted Reclamation a water right and violated the Fifth Amendment by taking KID's water rights without providing just compensation. KID's meritless water rights arguments cannot be heard in this case. First, they are beyond the scope of this proceeding given the limited waiver of sovereign immunity, which precludes water rights determinations, and the bifurcation order. Second, KID starts from the premise that KID's water rights override the ESA, when that is the question presented. Under settled preemption principles, incorporated into Section 8, state water rights yield to Reclamation's ESA obligations. Finally, because this is a preemption case, not a water rights determination, KID's exclusive jurisdiction, McCarran Amendment, abstention, Fifth Amendment takings, and Rule 56(d) arguments fail, and the district court properly struck KWUA's arguments seeking to diminish the Yurok Tribes' water rights.

ARGUMENT

I. THE DISTRICT COURT PROPERLY HELD THAT THE ESA PREEMPTS OREGON’S ADMINISTRATION OF STATE-ADJUDICATED WATER RIGHTS TO PRECLUDE ESA-REQUIRED FLOWS.

Conflict preemption exists where it is impossible to comply with both the federal statute and state action, or when the state action “stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress.” *See Arizona v. United States*, 567 U.S. 387, 399-400 (2012), quoting *Hines v. Davidowitz*, 312 U.S. 52, 67 (1941). The ultimate touchstone is the purpose of Congress as evidenced by statute’s text and structure. *In re Volkswagen “Clean Diesel” Mktg., Sales Pracs. & Prods. Liab. Litig.*, 959 F.3d 1201, 1211 (9th Cir. 2020).

The district court properly held “[t]he OWRD Order is preempted by the ESA because it stands as an obstacle to the accomplishment and execution of Congress’s purpose and objective in enacting in ESA: protecting and restoring endangered species.” *Yurok*, 654 F. Supp. 3d at 949. The court looked to *Tennessee Valley Authority v. Hill*, 437 U.S. 153, 184 (1978), which described the ESA’s objective “to halt and reverse the trend toward species extinction, whatever the cost.”³ This objective is reflected in Section 9’s prohibition on the take of

³ KID is mistaken in asserting that the direction to avoid extinction whatever the cost is limited to the costs to the federal government. *Cottonwood Env’t Law Ctr. v.*

listed species by any person, including federal agencies, and in Section 7's mandates to federal agencies to afford the highest priority to protecting listed species. *Yurok*, 654 F. Supp. 3d at 964. The Section 7 no-jeopardy mandate "admits of no exception":

One would be hard pressed to find a statutory provision whose terms were any plainer than those in § 7 of the Endangered Species Act. Its very words affirmatively command all federal agencies "to *insure* that actions *authorized, funded, or carried out* by them do not *jeopardize* the continued existence" of an endangered species or "*result* in the destruction or modification of habitat of such species

Tennessee Valley Authority, 437 U.S. at 173. The district court found preemption because "[a]t the least, the Order poses an obstacle to the accomplishment and execution of Congress's purpose and objective in enacting the ESA" of preserving and restoring endangered species. *Yurok*, 654 F. Supp. 3d at 968. It also described the conflict:

If the Bureau complies with the Order, it cannot release downstream flows, jeopardizing the coho salmon and Southern Resident Killer Whale and violating either section 7(a)(2) or section (9) of the ESA. If the Bureau carries out its obligations under the ESA, then it violates the Order.

U.S. Forest Serv., 789 F.3d 1075, 1090-91 (9th Cir. 2015) (ESA predetermines that equities and public interest favor protecting endangered species over economic interests); *Nat'l Wildlife Fed'n v. Nat'l Marine Fisheries Serv.*, 422 F.3d 782, 793-94 (9th Cir. 2005) (same).

Id. The district court properly held that the Order interferes with Reclamation’s compliance with its Section 7 and 9 obligations and is preempted. *Yurok*, 654 F. Supp. 3d at 968-69.⁴

II. KWUA PRESSES CERTAIN ARGUMENTS THAT GO BEYOND THE CASE OR CONTROVERSY THAT REMAINS AFTER THE DEMISE OF THE OWRD ORDER.

The catalyst for lifting the stay and the federal crossclaim was OWRD’s Order prohibiting Reclamation from releasing stored water to the Klamath River without an Oregon-based water right. OWRD’s withdrawal of the Order renders Reclamation’s request for injunctive relief targeting the OWRD Order moot.

The crossclaim also seeks a declaration that the OWRD Order is preempted by the ESA. Sandwiched in between declaratory relief targeting the OWRD Order, the crossclaim seeks a declaration that the ESA applies to the Klamath Project, specifically to Reclamation’s release of “stored” water from UKL to provide salmon flows. Linked to the crossclaim, KWUA’s counterclaim seeks a declaration that the ESA is inapplicable to “stored” water. The district court reached this issue because the preemption question “necessarily entails a determination of whether

⁴ KID has wisely abandoned its reliance on the ESA’s express preemption provision, 16 U.S.C. § 1535(f), which allows stronger state regulation as part of conservation programs, but bars states from authorizing any take of endangered species not expressly authorized by the federal fish and wildlife agencies.

the Bureau's operation of the Klamath Project is subject to compliance with the ESA." *Yurok*, 654 F. Supp. 3d at 961.

The Declaratory Judgment Act gives courts the power to issue declaratory relief only "[i]n a case of actual controversy within its jurisdiction." 28 U.S.C. § 2201. The Supreme Court has instructed that the dispute must "be 'real and substantial' and 'admi[t] of specific relief through a decree of a conclusive character, as distinguished from an opinion advising what the law would be upon a hypothetical state of facts.'" *MedImmune, Inc. v. Genentech, Inc.*, 549 U.S. 118, 127-28 (2007) (quoting *Aetna Life Ins. Co. v. Haworth*, 300 U.S. 227, 240-41 (1937)).

The numerous lawsuits brought by KWUA and KID, including the state court litigation leading to the OWRD Order and federal court challenges against Reclamation, show that KWUA and KID dispute the applicability of the ESA to Reclamation's operation of the Klamath Project. *See supra* at 8-9; *infra* at 55-56, 58-59. To the extent the dispute focuses on whether Reclamation has "some discretion" to release flows to comply with the ESA, making Section 7 applicable, it is amenable to specific relief of a concrete character. However, KWUA goes beyond this threshold question and urges the Court to opine as to how Reclamation should craft a future operations plan to segregate out various actions based on KWUA's reading of each of the Klamath contracts and the ACFFOD. This is not

the province of Article III courts. *See Pub. Serv. Comm'n of Utah v. Wycoff Co.*, 344 U.S. 237, 246-47 (1952) (declaratory judgment cannot be used to transfer “[r]esponsibility for effective functioning of the administrative process . . . from the bodies in which Congress has placed it to the courts”). Reclamation is tasked with developing its operations plans and NMFS with issuing biological opinions on those plans. Challenges to those plans and biological opinions must be brought under the Administrative Procedure Act. *See Bennett*, 520 U.S. at 177-78. To the extent KWUA goes beyond the threshold ESA applicability question and asks the Court to micromanage how Reclamation will develop future operations plans, KWUA is improperly seeking an advisory opinion.

III. THE ESA APPLIES TO RECLAMATION’S OPERATION OF THE KLAMATH PROJECT.

The ESA applies to the Klamath Project developed, owned, and operated under the direction of Reclamation. As explained below: (1) more than two decades ago, this Court held that Reclamation’s ESA obligations over-ride irrigators’ water rights and it has consistently reiterated this holding; (2) nothing in the Supreme Court’s *Home Builders* decision necessitates a different outcome; (3) the Reclamation Act gives Reclamation broad authority to take any and all acts necessary and proper to operate the Klamath Project, which includes ESA compliance, the Klamath Project is not strictly confined to irrigation, but rather must be operated to achieve multiple purposes, including fish and wildlife

protection, and the direction in Reclamation Act Section 8 to adhere to state water law gives way when there is an inconsistent congressional directive, as there is in the ESA; and (4) Reclamation's contracts with Klamath irrigation districts confirm, rather than constrain, Reclamation's discretion to operate the Klamath Project to comply with the ESA.

A. This Court Held Decades Ago that Reclamation Must Ensure That Its Operation of the Klamath Project Complies with Section 7.

In *Patterson*, 204 F.3d at 1213, this Court held that Reclamation must comply with Section 7 in operating the Klamath Project, holding:

Because Reclamation retains authority to manage the Dam, and because it remains the owner in fee simple of the Dam, it has responsibilities under the ESA as a federal agency. These responsibilities include taking control of the Dam when necessary to meet the requirements of the ESA, requirements that override the water rights of the Irrigators. Accordingly, we hold that the district court did not err in concluding that Reclamation has the authority to direct Dam operations to comply with the ESA.

Patterson upheld Reclamation's authority to direct PaciCorp, which operated the dam under a federal contract, to release flows to the river to meet Reclamation's ESA obligations.

KWUA tries to characterize this language as *dicta*, but the decision states: “*we hold* that . . . Reclamation has the authority to direct Dam operations to comply with the ESA.” *Id.* (emphasis added). This statement was an essential part of the Ninth Circuit's resolution of the counterclaim in that case and KWUA's

futile attempt to defeat it. KWUA argued that ESA Section 7 is inapplicable to the pre-ESA contract because Reclamation could direct dam operations only to protect irrigation and not to benefit listed species. 5-KWUA_ER-1131, 1136-37.

Specifically, KWUA claimed that “the stored water in Upper Klamath Lake cannot lawfully be used for purposes other than irrigation and power.” SER-48. This Court disagreed, finding that Reclamation had authority to direct PacifiCorp to release water to meet Reclamation’s federal ESA obligations based on Reclamation’s ownership of the dam and its authority to manage the Klamath Project. *Patterson*, 204 F.3d at 1212-13. Nothing that has happened since undermines this holding.

B. Nothing in *Home Builders* and its Progeny Undermines *Patterson*.

KWUA tries to depict *Home Builders* as a game changer. *Home Builders* addressed a concrete situation where an agency could not simultaneously obey Section 7(a)(2) and competing statutory commands. 551 U.S. at 666. Specifically, the Clean Water Act mandates that the Environmental Protection Agency (“EPA”) transfer water permitting authority to states when nine exclusive statutory criteria are met. None of the criteria leaves EPA room to ensure the transfer will avoid jeopardizing endangered species. *Id.* at 662-64.

The Supreme Court avoided an irreconcilable conflict between the two statutes by applying the ESA discretionary control regulation to harmonize them.

Id. at 665; *see also id.* at 666 (harmonizing statutes by applying Section 7(a)(2) “to guide agencies’ existing discretionary authority, but not reading it to override express statutory mandates”). Under that regulation, 50 C.F.R. § 402.03, Section 7 applies “to all actions in which there is discretionary Federal involvement or control” that can be exercised to benefit endangered species, but not where a statute mandates that the agency take a specific action that leaves it no power to avoid jeopardizing endangered species. *Id.* at 665, 667, 669.

Since *Home Builders*, this Court has confirmed, including in two *en banc* decisions, that federal agencies are subject to Section 7(a)(2) when they have “some discretion to influence or change the activity for the benefit of a protected species.” *Karuk Tribe v. U.S. Forest Serv.*, 681 F.3d 1006, 1021 (9th Cir. 2012) (*en banc*). In *Karuk Tribe*, this Court held that the Forest Service is subject to Section 7 because it has some discretion to protect endangered species in approving mining activities. In *Natural Resources Defense Council v. Jewell (Jewell I)*, 749 F.3d 776, 779, 783 (9th Cir. 2014) (*en banc*), this Court held that Section 7(a)(2) applies whenever an agency has “some discretion” to benefit protected species; another legal obligation must “strip” the agency of all discretion to benefit the listed species. *Id.* at 785.

In *National Wildlife Federation v. National Marine Fisheries Service (NWF)*, 524 F.3d 917, 928 (9th Cir. 2008), this Court held that Section 7 applies to

operation of the Federal Columbia River Power System because no statute mandates specific, immutable actions. The statutes established broad goals with respect to flood control, irrigation, and power production, but they left the agencies considerable discretion in crafting specific actions to meet those goals. *Id.* at 928-29. In contrast to the statutory conflict at issue in *Home Builders*, the statutes gave the agencies room to simultaneously obey the ESA and their other statutory direction. *See also In re Operation of Mo. River System Litig.*, 421 F.3d 618, 630-31 (8th Cir. 2005) (Section 7 compliance would not prevent Army Corps from meeting statutory mandates to operate the Missouri River System to preserve downstream navigation). Neither KWUA nor KID addresses *NWF*.

Similarly, *San Luis & Delta-Mendota Water Authority v. Jewell (Jewell II)*, 747 F.3d 581, 640 (9th Cir. 2014) held that no statute imposed mandatory obligations on Reclamation inconsistent with complying with Section 7(a)(2) in operating the Central Valley Project. Of particular relevance, the Court construed the Reclamation Act to establish broad direction for Reclamation's operation of reclamation projects without mandating specific actions. *Id.*; *see also San Luis United Food Producers v. United States*, 709 F.3d 798, 807, 808 (9th Cir. 2013) (Reclamation Act vests Reclamation with discretion as to how to achieve broad and general irrigation purposes). KWUA argues that any ESA obligations for the Central Valley Project come from other statutes imposing specific additional

wildlife protection obligations, but *Jewell II* applied the ESA, *Home Builders*, and *NWF* to hold that Reclamation has broad authority that is subject to Section 7. *Jewell II*, 747 F.3d at 639-40. A subsequent statute imposes specific fish and wildlife obligations, but those obligations are in addition to Reclamation's ESA obligations, which apply independently. *See San Luis & Delta-Mendota Water Auth. v. United States (San Luis)*, 672 F.3d 636, 704-07 (9th Cir. 2012) (distinguishing between ESA and subsequent statutory obligations).⁵

Home Builders and its progeny confirm *Patterson* got it right in holding Reclamation must operate the Klamath Project to comply with Section 7. No statute makes it impossible for Reclamation to operate the Klamath Project to benefit listed salmon.

⁵ KID's Brief (at 68-89) cites *Platte River Whooping Crane Critical Habitat Maintenance Trust v. Federal Regulatory Energy Commission*, 962 F.2d 27, 32-34 (D.C. Cir. 1992), for the proposition that the ESA does not expand the agency's authority. In that case, the D.C. Circuit determined that FERC lacked authority to impose new wildlife protection requirements in annual extensions of expired licenses because the annual extensions had to conform to the original license terms in the absence of the licensee's agreement. *See also Cal. Sportfishing Prot. All. v. Fed. Energy Regul. Comm'n*, 472 F.3d 593, 597-99 (9th Cir. 2006) (no requirement to consult on last few years under 30-year FERC license because FERC took no action). These cases recognized that Section 7 applies to any replacement license because FERC has expansive statutory authority when it issues such licenses. *See, e.g., Am. Rivers v. FERC*, 895 F.3d 32, 46-50 (D.C. Cir. 2018) (vacating 30-year license renewal based on legally insufficient biological opinion).

C. The Reclamation Act Gives Reclamation Authority to Operate the Klamath Project to Benefit Klamath River Salmon.

1. *Reclamation Has Broad Authority to Take all Necessary and Proper Actions.*

Managing a massive federal water project is highly complex, requiring Reclamation to predict water supply availability in changing climate conditions, allocate available water supplies to meet various demands and legal obligations, minimize harm in flood conditions, and ensure the integrity of the public works. To rise to this challenge, Section 10 of the Reclamation Act gives Reclamation authority “to perform any and all acts and to make such rules and regulations as may be necessary and proper for the purpose of carrying out the provisions of this Act into full force and effect.” 43 U.S.C. § 373. This Court has repeatedly recognized the substantial discretion Section 10 gives Reclamation over operational decisions. *See, e.g., Jewell II*, 747 F.3d at 639-40 (discretion to comply with ESA); *San Luis*, 672 F.3d at 692, 704-07 (discretion to determine how to comply with ESA and fish habitat restoration mandates); *Carson-Truckee Water Conservancy Dist. v. Clark*, 741 F.2d 257, 260-62 (9th Cir. 1984) (discretion to prioritize endangered species over municipal and industrial uses).

As the district court recognized (*Yurok*, 654 F. Supp. 3d at 967), Reclamation’s Klamath Project operations plans fall squarely within Section 10’s authorization for Reclamation to take “any and all acts” that “may be necessary

and proper” for operating the project.⁶ This ruling is correct as evidenced by two inter-related Ninth Circuit cases upholding Reclamation’s Section 10 authority to adopt operational criteria classifying land, which, in turn, affected water availability for state water rights. *Truckee-Carson Irrigation Dist. v. Sec’y of Dep’t of Interior*, 742 F.2d 527 (9th Cir. 1984); *United States v. Alpine Land & Reservoir Co.*, 887 F.2d 207 (9th Cir. 1989) (sequel to *Truckee-Carson*). In addition, in *Westlands Water District v. Department of Interior*, 805 F. Supp. 1503, 1507 (E.D. Cal. 1992), *aff’d sub nom. Westlands Water District v. Firebaugh Canal*, 10 F.3d 667 (9th Cir. 1993), the court rejected a challenge to a water allocation plan in drought conditions, holding that Section 10’s “broad grant of authority gives wide discretion to the Secretary over water management under the 1902 Reclamation Act.”

Ignoring Section 10’s “any and all acts” language and this precedent, KWUA focuses myopically on Section 10’s authorization to promulgate rules and regulations. However, the district court relied on Section 10’s authorization of “any and all acts” in operating reclamation projects, not Reclamation’s general rulemaking authority, in holding that Congress gave Reclamation broad authority to achieve particular goals without mandating any specific nondiscretionary

⁶Secondarily, the district court relied on Section 6, which authorizes Reclamation to use the reclamation fund to operate and maintain reservoirs, like UKL. *Id.* 967.

actions. *Yurok*, 654 F. Supp. 3d at 967. Based on its erroneous assertion that the district court relied on Reclamation's general rulemaking authority, KWUA argues that the Clean Water Act's general rulemaking authority did not give EPA discretion to implement Section 7 in transferring permitting authority to a state and change the outcome in *Home Builders*. KWUA Br. at 34-35. The Clean Water Act, however, does not authorize any and all acts as may be necessary and proper, but only implementing regulations. 33 U.S.C. § 1361(a) (authorizing regulations).⁷ Section 10's broad grant of authority confirms this Court's holding in *Patterson* that Section 7 applies to the Klamath Project.

2. *No Statute Confines Reclamation's Operational Authority to Irrigation.*

KWUA argues that Reclamation cannot operate the Klamath Project for any purpose other than irrigation, but a party arguing that one statute displaces another statute bears a heavy burden of showing Congress clearly intended that result. *See Stand Up for California! v. Dep't of the Interior*, 959 F.3d 1154, 1163-65 (9th Cir. 2020) (nothing in the Indian Gaming Regulatory Act clearly precluded compliance with National Environmental Policy Act); *see also San Luis Obispo Coastkeeper v.*

⁷ Equally inapposite is the non-ESA Fifth Circuit case, cited by KWUA, erroneously as a 9th Circuit case (KWUA Br. at 35), that refused to construe a general rulemaking provision in a statute authorizing regulation of fisheries to expand the agency's authority to encompass a new program regulating marine aquaculture. *Gulf Fishermens Ass'n v. Nat'l Marine Fisheries Serv.*, 968 F.3d 454, 465 (5th Cir. 2020).

Santa Maria Valley Water Conservation Dist., 49 F.4th 1242 (9th Cir. 2022)

(authorizing statute gave Reclamation discretion to release waters from Twitchell Dam to avoid the take of endangered steelhead).

KWUA cannot meet this heavy burden of showing Congress intended to preclude Reclamation’s compliance with the ESA. Two federal statutes are relevant to this inquiry: the Reclamation Act of 1902, which authorizes “any and all acts” necessary in operating the project, and the 1905 Act of Congress authorizing Reclamation “to raise or lower the level of said lakes as may be necessary and to dispose of any lands” that may be ceded to the United States from Oregon and California. Act of June 17, 1902, ch. 1093, 32 Stat. 388; Act of Feb. 9, 1905, ch. 567, 33 Stat. 714.⁸ Neither confines the Klamath Project to irrigation.

KWUA is trying to find a single purpose for the Klamath Project by implication because it was developed to divert water for irrigation, but this is too thin a reed to support clear statutory constraints, precluding management of the Klamath Project for any other purpose. Indeed, in *San Luis United Food Producers*, 709 F.3d at 806-08, this Court held that the Reclamation Act established no mandatory duty to operate reclamation projects solely for irrigation and associated purposes, but instead gave the agency broad discretion to achieve

⁸ KWUA’s Brief (at 11) omits “and,” misleadingly suggesting that the Act imposed some limits on Reclamation’s authority over lake levels.

general irrigation goals. Moreover, in a decision affirmed by this Court, a district court rejected attempts to prohibit management of reclamation projects for multiple purposes merely because the Reclamation Act sought to create opportunities for irrigated agriculture. *Westlands* held that Section 10's broad grant of authority gives Reclamation wide discretion over water management, including to divert water stored in one reservoir to benefit lands outside that reservoir unit. 805 F. Supp. at 1507. *Westlands* properly framed the question as whether another statute has circumscribed Reclamation's authority and upheld Reclamation's broad authority because the authorizing statute "contains no express limitation on either the Bureau's authority to manage water . . . or to use the storage capacity of its various reservoirs." 805 F. Supp. at 1508. The court acknowledged that Congress intended the project "to primarily benefit agricultural lands," but a "principal purpose' does not, without more, prohibit its use for other purposes." *Id.* This Court affirmed, holding a primary purpose alone did not confine Reclamation's allocation of water to irrigation. *Westlands*, 10 F.3d at 671 (refusing to add a substantive limitation not in the statute's plain language).

Similarly, the Reclamation Act directs that the use of water shall be appurtenant to the land irrigated and beneficial use shall be the basis, measure, and limit of the right, 43 U.S.C. § 372, but this Court has held that this language fails to create a nondiscretionary duty to operate reclamation projects for irrigation over

other purposes. *San Luis United Food Producers*, 709 F.3d at 807. In addition, in *Barcellos & Wolfsen, Inc. v. Westlands Water Dist.*, 849 F. Supp. 717, 732 & n.5 (E.D. Cal. 1993), *aff'd sub nom. O'Neill*, 50 F.3d 677, the court rejected the argument that this statutory provision exempts state water rights from compliance with environmental statutes, specifically the ESA.⁹

KWUA's single-purpose argument finds no textual support in the underlying statutes and implying such a purpose collides with the above Circuit precedent. It is, therefore, unsurprising that *Patterson* rejected KWUA's argument that Reclamation could operate the Klamath Project only for irrigation. This ruling came in the course of affirming the district court's declaration that PacifiCorp had no liability to KWUA and other irrigators for implementing Reclamation's ESA-based water management decisions. PacifiCorp sought this declaration because KWUA had claimed Reclamation could control the dam only to protect irrigation. 7-KWUA_ER-1563 ¶ 13; 5-KWUA_ER-1130-31. The pertinent contract provided that no Klamath Project water shall be used for hydropower "when it may be

⁹ KWUA's Brief (at 34) quotes out of context a statement from a pre-ESA Attorney General opinion determining specific agency regulations departed from the Reclamation Act's specifications for a fund for construction and maintenance of irrigation works. *See* 1909 Op. Att'y Gen. 360 (1909), 1909 U.S. LEXIS 61. Subsequent events over the last century are far more relevant, including the cases holding that Reclamation must comply with the ESA in operating reclamation projects. *See supra* at 19, 22-23, 30, 33.

needed or required by the United States,” which Reclamation argued included releases needed to comply with the ESA. *Patterson*, 204 F.3d at 1211.

This Court rejected KWUA’s depiction of Reclamation’s authority as confined to irrigation, recognizing the Klamath Project serves other purposes, including supporting wildlife refuges and protecting fish and wildlife as required by the ESA and other laws. *Patterson*, 204 F.3d at 1209, 1213. PacifiCorp was immune from suit for implementing the ESA measures because the United States retained overall authority over control of the dam and use of Project water, including to meet Reclamation’s ESA obligations. *Id.* at 1212-13.¹⁰ *See Kandra v. United States*, 145 F. Supp. 2d 1192, 1207 (D. Or. 2001) (rejecting irrigators’ argument that Klamath Project’s sole purpose is irrigation, precluding actions to benefit fish); *see also Baley v. United States*, 134 Fed. Cl. 619, 636 (Ct. Cl. 2017), *aff’d*, 942 F.3d 1312 (Fed. Cir. 2019) (Klamath Project purposes include fish and wildlife); *Pac. Coast Fed’n of Fisherman’s Ass’ns v. Reclamation*, 138 F. Supp. 2d

¹⁰ The doctrine of collateral estoppel may preclude relitigation of this issue because whether Reclamation must operate the Klamath Project to comply with the ESA was actually litigated and necessary to the resolution of PaciCorp’s counterclaim. *See United States v. Weems*, 49 F.3d 528, 532 (9th Cir. 1995) (collateral estoppel applies to issues actually litigated and necessarily decided in a prior case). *See In re Klamath Irrigation Dist. (In re KID)*, 69 F.4th 934, 943 n.9 (9th Cir. 2023), *cert. denied* (KWUA, and KID as a member of KWUA, failed to prevail in same arguments in *Patterson*); *see also Tahoe-Sierra Pres. Council, Inc. v. Tahoe Reg’l Plan. Agency*, 322 F.3d 1064, 1082 (9th Cir. 2003) (members can be bound by prior litigation).

1228, 1230-31 (N.D. Cal. 2001) (same). Indeed, at the time of *Patterson*, Reclamation had long been subject to mandatory minimum instream flow requirements to support salmon downstream of Link River Dam required by the FERC license. *Klamath Water Users Protective Ass'n v. Patterson*, 15 F. Supp. 2d 990, 992 (D. Or. 1998). In addition, the Klamath Project is geographically intermixed with several National Wildlife Refuges, originally established by Executive Orders, but subject to subsequently passed statutes requiring refuge management to promote conservation of wetland habitat for waterfowl and migratory birds. *See* Kuchel Act of 1964, 16 U.S.C. § 6951 (applying to Klamath Refuges); Refuge Act, 16 U.S.C. § 668dd (applying generally to National Wildlife Refuge System); *see generally Audubon Soc'y of Portland v. Haaland*, 40 F.4th 917, 925-27 (9th Cir. 2022) (upholding Reclamation's exercise of discretion in balancing wildlife conservation and agricultural leasing in refuges).¹¹

¹¹ In an argument never made below and joined by none of the parties, Amicus Klamath, Modoc, and Siskiyou Counties contend the Kuchel Act ties Reclamation's hands by calling for the continuation of leasing in the wildlife refuges. Br. of Amici Curiae, ECF 33-1 at 15-16. The ensuing leases, however, are subject to the availability of water after satisfying the ESA's requirements and the contractual rights of KID and other more senior water rights holders. *See infra* at 41-42. Moreover, the fact that OWRD administratively denied Reclamation water rights for refuge wetland plants in a ruling currently under review does not constitute a *federal statutory* limitation on Reclamation's authority and says nothing about Reclamation's ESA obligations to provide flows to sustain salmon. *See* 9-KID_ER-001868.

3. *No Separate Law Authorizing Operating the Klamath Project to Protect Fish is Needed.*

Unable to show Congress expressly precluded the release of flows for anything other than irrigation, KWUA insists that a separate statute must specifically authorize operating a reclamation project for fish and wildlife protection. Contrary to KWUA's suggestion, *Home Builders* does not hold that the ESA applies only where Congress has passed another law specifically directing an agency to comply with the ESA. While *Home Builders* held that the ESA is not an independent grant of authority, Section 7 obligations attach to an agency's existing authority where it leaves discretion to benefit listed species. The question is whether statutes governing the Klamath Project displaced the ESA by clearly precluding release of water for endangered fish. See *San Luis Obispo Coastkeeper*, 49 F.4th at 1249-50.¹²

As support for requiring an additional congressional authorization, KWUA cites the fact that Congress has enacted laws requiring fish and wildlife protection for some other reclamation projects. It focuses on the Central Valley Project Improvement Act of 1992 ("CVPIA"), Pub. L. No. 102-575, 106 Stat. 4706 *et seq.*,

¹² KWUA's Brief (at 33) argues that the Fish and Wildlife Coordination Act, 16 U.S.C. §§ 661-666c, specifies how Reclamation is to handle fish and wildlife issues related to reclamation projects in the absence of specific statutory directives. Because the Coordination Act applies prospectively only to projects constructed after its passage in 1934, *id.* § 662(g), it says nothing about the applicability of the ESA to the Klamath Project constructed before that date.

which established new programs addressing fish habitat restoration, fish passage, and unscreened diversions that cause fish mortalities. *Id.* § 3406(b). It dedicated 800,000 acre-feet of Central Valley Project water to be managed for fish habitat restoration purposes. *Id.* § 3406(b)(2). Even though these dedicated restoration flows were designed to help meet “additional obligations” imposed under the ESA, *id.*, this Court held that Reclamation had independent obligations to comply with the ESA, quite apart from its CVPIA restoration obligations. *San Luis*, 672 F.3d at 636, 692, 704-07; *see also Nat. Res. Def. Council v. Houston*, 146 F.3d 1118, 1132 (9th Cir. 1998) (CVPIA precluded use of certain water to fulfill the CVPIA’s mandate to re-establish fish below a dam, but did not expressly bar release of that water to meet other federal or state legal obligations). Moreover, Reclamation’s ESA obligations for the Central Valley Project predate the CVPIA. *Madera Irrigation Dist. v. Hancock*, 985 F.2d 1397, 1405-06 (9th Cir. 1993) (upholding pre-CVPIA contract provision requiring compliance with conditions imposed in ESA consultation). It is, therefore, unsurprising that *O’Neill*, 50 F.3d at 683, held that Reclamation had authority to reduce CVP irrigation deliveries to meet its federal legal obligations, which included “mandatory compliance with ESA and CVPIA.”

D. Section 8 of the Reclamation Act Does Not Constrain Reclamation’s Authority to Provide Instream Flows to Comply with the ESA.

When Congress enacted the Reclamation Act of 1902, it did not establish a federal system to administer water rights for reclamation projects. Instead, Section 8 infused into the Reclamation Act cooperative federalism principles requiring Reclamation to appropriate and distribute water for reclamation projects in conformity with each state’s laws. Section 8 provides: “[n]othing in this Act shall be construed as affecting . . . or to in any way interfere with the laws of any State . . . relating to the control, appropriation, use, or distribution of water used in irrigation, or any vested right acquired thereunder, and the Secretary of the Interior, in carrying out the provisions of this Act, shall proceed in conformity with such laws.” 43 U.S.C. § 383.

Section 8’s direction for Reclamation to act in conformity with state water law does not apply when inconsistent with other federal statutes, like the ESA. It is black letter law that state water rights remain subject to retroactive application of subsequently enacted federal laws. *See Hinderlider v. La Plata River & Cherry Creek Ditch Co.*, 304 U.S. 92, 108-09 (1938) (congressional legislation approving an interstate compact can retroactively affect the exercise of previously vested state water rights). As the leading water rights treatise explains: “[s]tate water rights are not immune from the retroactive application of state police powers or federal constitutional authority” and federal regulation of water rights “should be treated

no different from the exercise of any other constitutional power.” Tarlock, *Law of Water Rights & Resources* § 9:24. Section 8 reflects “the fact that Congress has chosen not to create a federal water law to govern water rights involved in federal projects,” but it does not insulate state water rights from subsequent congressional legislation, nor does it authorize states to impose otherwise impermissible conditions on water use. *See Sporhase v. Nebraska, ex rel. Douglas*, 458 U.S. 941, 957-58, 960 (1982) (dormant Commerce Clause applies to state water use regulations).

In *California v. United States*, 438 U.S. at 676, the Supreme Court explained that Section 8’s direction to act in conformity with state water law applies only when the state law is not “inconsistent with congressional directive.” Reclamation had argued that California could impose no conditions on its use of water once the state determined that unappropriated water was available for the project. The Supreme Court rejected this contention, holding states could apply their laws to both the appropriation and distribution of water, unless inconsistent with congressional directives.

On remand, the Ninth Circuit, through then-Judge Kennedy, rejected California’s argument that Section 8 “was intended to require any later Congress to tolerate state laws whose operation would otherwise be curtailed by the Supremacy Clause.” *United States v. Cal. Water Res. Control Bd. (California)*, 694 F.2d 1171,

1176 (9th Cir. 1982). Instead, *California* requires “that the United States follow state water law absent a pre-empting federal statute,” which it had to do because no federal law preempted the conditions imposed by California, including those designed to protect fisheries and water quality. *Id.*, quoting *United States v. Tulare Lake Canal Co.*, 677 F.2d 713, 717 (9th Cir. 1982).

KID is wrong in asserting (at 73) that Section 8 requires operation of the Klamath Project in accordance with its reading of the ACFFOD, even if doing so would violate the ESA. It cites *Nat. Res. Def. Council v. Patterson*, 791 F. Supp. 1425, 1435 (E.D. Cal. 1992), *affirmed sub nom. NRDC v. Houston*, 146 F.3d 1118, but nothing in *Patterson* addressed preemption or suggested that Section 8 makes the ESA subservient to state water rights. Instead, *Patterson* held that Section 8 required that Reclamation had to comply with a state law requiring the passage of sufficient water through a dam to sustain downstream fisheries, which reinforced, rather than conflicted with, the ESA.

As *California* confirms, Section 8 is subject to the retroactive application of duly enacted federal laws. The ESA is such a preemptive enactment. Section 8 yields to the congressional direction in the ESA that federal agencies must ensure that their actions will avoid jeopardizing listed species’ survival, including by releasing biologically required flows for salmon. Applying Oregon water rights to constrain Reclamation’s ability to do so “clashes” with the ESA and “works at

cross-purposes with an important federal interest,” which Oregon law decidedly cannot do. *See California*, 694 F.2d at 1177.

In keeping with this direction, Oregon adopted laws allowing Reclamation to appropriate water for the Project, and Reclamation appropriated all water available in 1905 for the Project. 9-KID_ER-001865. Section 8 allows OWRD to determine the relative priority of state-based water rights to water distributed for Project irrigation, and Reclamation must conform to these priorities when it distributes Project water. Reclamation’s ESA compliance, however, determines how much water is available for Project irrigation. Once Reclamation meets its ESA obligations by releasing water to provide instream flows for salmon, OWRD may, under Section 8, apply its water laws to the distribution of the available water for irrigation.

Nothing in Section 8 requires Reclamation to obtain state water rights to provide instream flows for Klamath River salmon to meet its ESA obligations. “The [Endangered Species] Act provides no exemption from compliance to persons possessing state water rights,” and such rights provide no “special privilege to ignore the Endangered Species Act.” *United States v. Glenn-Colusa Irrigation Dist.*, 788 F. Supp. 1126, 1134 (E.D. Cal. 1992). Nor do state water rights provide a basis for compelling Reclamation to disobey the ESA. *See Barcellos*, 849 F. Supp. at 732.

Section 8 carves out a role for OWRD to apply state water law when water is available for Project irrigation. It gives OWRD no license to dictate whether and how Reclamation will meet its ESA obligations.¹³

IV. THE KLAMATH IRRIGATION CONTRACTS IN NO WAY PRECLUDE RECLAMATION’S COMPLIANCE WITH SECTION 7.

Nothing in Reclamation’s contracts with Klamath irrigation districts removes Reclamation’s discretion to operate the Klamath Project to comply with the ESA; to the contrary, the contracts expressly confirm such discretion. In trying to refute the plain terms of the contracts, KWUA sidesteps the pertinent legal

¹³ Section 8 provides “nothing herein shall in any way affect any right” of the federal government or others in “any interstate stream or the waters thereof.” 43 U.S.C. § 383. This provision leaves in place existing laws applicable to interstate waters, including limits on a state’s territorial jurisdiction to regulate waters outside their borders, *see United States v. Dist. Ct. for Eagle Cnty., Colo.*, 401 U.S. 520, 523 (1971) (states can adjudicate water rights only to waters within their jurisdiction), and the doctrine of equitable apportionment. *See Wyoming v. Colorado*, 259 U.S. 419, 463-65 (1922) (precluding state control over interstate waters that inequitably harms downstream states); *see also Bean v. Morris*, 221 U.S. 485 (1911) (suit in equity to enjoin withdrawals in upstream state that infringe water rights in downstream state).

The Klamath River Basin is an interstate water, originating in Oregon and traveling hundreds of miles through California to the Pacific Ocean. Section 8’s interstate waters provision prevents Reclamation from being in the untenable position where complying with one state’s orders could force it to violate laws of a downstream state or its own federal legal obligations. This limitation further supports the inapplicability of Oregon-water rights to Reclamation’s ESA compliance in California, but the Court should not rely on this provision because it brings in the Yurok Tribe’s senior water rights, which are not at issue until phase 2, if at all.

standard and highlights select contract terms, while ignoring others that limit water deliveries due to Reclamation's compliance with the ESA, as confirmed by Circuit precedent.

A. The ESA Modifies the Klamath Contracts Under the Unmistakable Terms Doctrine.

It has been the law of this Circuit for more than 30 years that federal contracts remain subject to subsequent legislation unless that authority is surrendered in unmistakable terms. See *Peterson v. Dep't of Interior*, 899 F.2d 799, 808-09, 811 (9th Cir. 1990) (contracts must have clear language to “seriously impair Congress’s sovereign power to pass laws for the public welfare”); *Hancock*, 985 F.2d at 1406 (contract made obligations subject to compliance with ESA and other environmental laws); *O’Neill*, 50 F.3d at 680, 686 (Reclamation could reduce water deliveries to comply with ESA because contracts failed to surrender sovereign power to adopt laws affecting contracts); *Patterson*, 204 F.3d at 1213 (contract did not preclude ESA from altering contract as subsequent legislation). Under this doctrine, a contract need not have a modification clause for its implementation to be subject to Section 7. See *Bowen v. Pub. Agencies Opposed to Soc. Sec. Entrapment*, 477 U.S. 41, 52-53 (1986) (contracts remain subject to subsequent legislation, even where there is no express reservation of right to modify the contract).

O'Neill, 50 F.3d at 686 upheld Reclamation's reduction in water deliveries to comply with the ESA because the pertinent contracts failed to surrender sovereign power to adopt laws affecting the contracts. Even though the contracts specified water delivery amounts, this Court held that Reclamation could not deliver the full amounts of water when doing so would jeopardize the survival of listed fish in violation of the ESA. *See also Houston*, 146 F.3d at 1126 (amount of water available for deliveries pursuant to contracts can be reduced where necessary to comply with ESA).

The Ninth Circuit followed *O'Neill* in upholding modification of Reclamation's contract with PacifiCorp to require provision of Klamath River flows to comply with the ESA. Noting that "[i]t is well settled that contractual arrangements can be altered by subsequent Congressional legislation," it found nothing in the contract to preclude Reclamation's ESA actions. *Patterson*, 204 F.3d at 1213. To the contrary, the contract "evinces the unmistakable intent that Reclamation controls the Dam . . . [and] makes clear that the United States retains overall authority over decisions on use of Project water," including to meet ESA requirements. *Id.* at 1212-13; *see also Kandra*, 145 F. Supp. 2d at 1201 (KID and other irrigation district's contractual rights to irrigation water "are subservient to

[the] ESA”). Under *O’Neill* and *Patterson*, the Klamath contracts are subject to the ESA, ending the inquiry.¹⁴

B. The Klamath Irrigation Contracts Confirm, Rather than Surrender, Reclamation’s Ability to Comply with the ESA.

Despite Circuit precedent holding that the Klamath contracts are subject to the ESA, KWUA invites the Court to opine as to the discretion remaining under each of the contract’s various terms. Because Reclamation retains “some discretion” to release water to benefit salmon, it would go beyond the threshold question of whether Section 7 applies for the Court to embark on a contract-by-contract analysis, particularly when KWUA’s lengthy discourse is not tied to any challenged agency action.

Reclamation determines how much water is available for irrigation after it meets its ESA obligations and looks to the contracts to determine which irrigators have priority to that amount of water. The critical contracts are, therefore, those with the KID and Tulelake Irrigation District (“TID”), the largest irrigation districts that have priority to deliver water within the original Project boundaries. Their contracts give KID and TID priority over the contracts authorized under the Warren

¹⁴ This is true for all the Klamath contracts, even the 1943 Van Brimmer Ditch Company contract (11-KWUA_ER-2753-69), which was the only contract at issue in *Baley* with a fixed delivery amount and no water shortage provision. *Klamath Irrigation Dist. v. United States*, 67 Fed. Cl. 504, 511, 527-28, 540 (Ct. Cl. 2005); *Baley*, 134 Fed. Cl. at 632.

Act of 1911, 43 U.S.C. §§ 523-525, under which Reclamation can enter into contracts for delivery of excess water after satisfaction of senior water rights. 1956 TID Contract ¶ 33(b), 11-KWUA_ER-2631; 1954 KID Contract ¶ 13(f), 11-KWUA_ER-2652. Any rights under Warren contracts or lease land contracts are subservient to the KID and TID contracts. *See, e.g.*, 1922 Malin Irrigation District Contract ¶ 7, 10-KWUA_ER-2486-87; 1922 Shasta View Irrigation District Contract ¶ 7, 11-KWUA_ER-2790; 1962 Klamath Basin Improvement District Contract ¶¶ 1(j), 2(a), 11-KWUA_ER-2547-48, 2551-52; 1943 Klamath Drainage District Contract ¶ 14(a), 11-KWUA_ER-2730-31. Courts have recognized that the KID and TID contracts have priority over the Warren contracts. *See Baley*, 134 Fed. Cl. at 630-31, *aff'd*, 942 F.3d (Fed. Cir. 2019); *United States v. Klamath Drainage Dist. (KDD)*, 2023 WL 5899910, *3, 15 (D. Or. Sept. 11, 2023) (appeal pending No. 23-3404).

The KID and TID contracts are expressly subject to modification to conform to the Reclamation Act “and all acts amendatory thereof or supplementary thereto.” 1956 TID Contract ¶ 1, 11-KWUA_ER-2597; *see* 1954 KID Contract ¶ 1(c), ¶ 6, 11-KWUA_ER-2641-42, 2646. *O’Neill* read similar language to contemplate changes in the law occasioned by the ESA’s passage. *O’Neill*, 50 F.3d at 683-84. While the ESA altered the amount of water available for irrigation under the contracts, “[t]here is nothing in the contract that precludes such a shift.” *Id.* at 686.

The identical water shortage clause in the KID and TID contracts further confirms that the contracts are subject to ESA compliance. The clause, entitled “United States Not Liable for Water Shortage,” provides:

On account of drought or other causes, there may occur at times a shortage in the quantity of water available in Project reservoirs and, while the United States will use all reasonable means to guard against such shortage, in no event shall any liability accrue against the United States or any of its officers, agents, or employees for any damage, direct or indirect, arising therefrom and the payments to the United States provided for herein shall not be reduced because of any such shortages.

11-KWUA_ER-2666 ¶ 26; 11-KWUA_ER-2627 ¶ 26. *O’Neill* held that the phrase “drought, or any other causes” in a similar shortage clause unambiguously “contemplates the effects of subsequent Congressional mandates,” including the ESA, and “an unavailability of water resulting from the mandates of valid legislation constitutes a shortage by reason of “any other causes.” *O’Neill*, 50 F.3d at 683-84. Under Circuit precedent, the KID and TID contracts unambiguously contemplate the unavailability of water due to ESA compliance.

In contrast to the KID and TID contracts, the water service contracts at issue in *O’Neill* called for delivery of a specified amount of water, but Reclamation still retained authority to limit water deliveries because ESA compliance diminished the amount of water available for irrigation. *O’Neill*, 50 F.3d at 683-84; *see also Houston*, 146 F.3d at 1126. The 1956 TID contract makes this explicit in its apportionment clause, which provides that Reclamation “may apportion that

available supply” of water “[i]n the event a shortage of water available from the Klamath Project arises as a result of drought or other unavoidable causes.” 1956 TID Contract ¶ 33(c), 11-KWUA_ER-2631; *see KDD*, WL 5899910 at *15 (Reclamation had authority to deliver no water in times of shortage).

Steering clear of *O’Neill*, KWUA seizes upon a district court case, currently on appeal, that addressed a very different contract and legal issue—*Nat. Res. Def. Council v. Norton*, 236 F. Supp. 3d 1198 (E.D. Cal. 2017), *appeal pending* on final judgment in *Nat Res. Def. Council v. Bernhardt*, 2020 WL 8361921 (E.D. Cal. Dec. 29, 2020), No. 21-15163 (appeal filed Jan. 28, 2021). *Norton* concerned Reclamation’s renewal of long-term contracts for Central Valley Project water, after this Court held in *Jewell I* that Section 7(a)(2) applied to the renewals. The plaintiffs added a challenge to Reclamation’s refusal to reinitiate consultation with NMFS on already-renewed water settlement contracts after NMFS issued a jeopardy biological opinion on Reclamation’s operation plan for the Central Valley Project and a mass mortality event. Nothing in *Norton* remotely questioned Section 7’s applicability to the Central Valley Project. Indeed, the reinitiation claim was predicated on a jeopardy biological opinion. Instead, the district court framed the question as whether Reclamation had discretion to benefit salmon in implementing the contracts. The court believed Reclamation lacked such discretion under a shortage clause immunizing the United States from liability “if

there is a shortage of Project Water because of actions taken by the Contracting Officer to meet legal obligations.” The court read that clause to allow reduced water deliveries only as necessary to meet legal obligations due to unanticipated circumstances beyond the parties’ control because the provision did not extend to shortages due to “other causes,” in contrast to the shortage provision construed in *O’Neill* and in the KID and TID contracts. *Id.* at 1219-20 & n.10.

Norton has no bearing on the Klamath contracts, which have shortage clauses that allow reduced irrigation deliveries when necessary to comply with the ESA, as this Court held in *O’Neill*, 50 F.3d at 682-84. Regardless of how the Ninth Circuit decides the *Norton* appeal, the holdings in *O’Neill* and *Patterson* establish that Reclamation has authority to direct contractors to conform to its plans for complying with Section 7.

C. Reclamation Retains Authority Under the Contracts Over Water Withdrawals by Irrigation Districts.

Ignoring the unmistakable terms doctrine and pertinent contract terms, KWUA claims Reclamation lacks control because irrigation districts operate many of the facilities that divert and deliver water for irrigation. KWUA tries to analogize the contracts to Ninth Circuit cases applying the ESA discretionary control regulation to determine whether one-time federal approvals of private activities retained federal discretionary control. These cases are inapposite given Reclamation’s overall management of the Project and the substantial federal

authority retained in the Klamath contracts, which make the actions of irrigation districts in operating and maintaining transferred irrigation works subject to subsequent laws, like the ESA, that limit water availability in times of shortage. The ESA cases KWUA embraces have little resemblance to Reclamation's authority over the Klamath Project and the Klamath contracts.

In *Sierra Club v. Babbitt*, 65 F.3d 1502, 1508-09 (9th Cir. 1995), this Court held that Section 7(a)(2) did not apply to a timber company's construction of a logging road on a 1962 right-of-way crossing federal lands. The right-of-way agreement specified limited reasons the federal government could limit the road that left no room to do so to conserve the threatened spotted owl. The court contrasted the one-time issuance of the right-of-way with Reclamation's annual actions to supply water at issue in *O'Neill* and with the Forest Service's plans that governed future and ongoing management of national forests. *Id.* at 1508-10 (distinguishing one-time right-of-way with ongoing management of reclamation project and national forests at issue in *O'Neill* and *Pac. Rivers Council v. Thomas*, 30 F.3d 1050 (9th Cir. 1994)). *Babbitt* further noted that private entities are subject to Section 9's prohibition on taking endangered species; its holding pertained only to the greater Section 7 obligations imposed on federal agencies. *Id.* at 1512. *See also Cottonwood Env't Law Ctr.*, 789 F.3d 1075 (Forest Service has discretion in implementing forest plans requiring reinitiation of consultation based on newly

designated critical habitat); *Env't Def. Ctr. v. Bureau of Ocean Energy Mgmt.*, 36 F.4th 850, 884-85 (9th Cir. 2022) (decision allowing unregulated fracking techniques in oil drilling subject to Section 7 because agency had discretion to change criteria for future private activities); *Turtle Island Restoration Network v. Nat'l Marine Fisheries Serv.*, 340 F.3d 969, 975-96 (9th Cir. 2003) (agency retained discretion to impose conditions on fishing permits to conform to international conservation agreement).

In *Environmental Protection Information Center v. Simpson Timber Co.* (*EPIC*), 255 F.3d 1073 (9th Cir. 2001), this Court held that the Fish and Wildlife Service ("FWS") did not need to reinitiate consultation, after the ESA listing of additional species, on a 30-year incidental take permit authorizing a private logging company's take of threatened northern spotted owls subject to mitigation measures. In contrast to the Forest Service's plenary control over national forests, FWS had no power to impose measures to protect newly listed species on the private company. *Id.* at 1080. Instead, the ESA's prohibition on take would apply to such species; the permit granted the company a safe harbor for the take of owls, but not other species. *Id.* at 1082-83.

The Klamath contracts are in sharp contrast to the one-time approvals at issue in *Babbitt* and *EPIC*. They make the irrigation districts' actions expressly subject to Reclamation's direction, later congressional enactments, and provisions

limiting water availability due to ESA compliance. The contracts confirm, rather than undermine, Reclamation's broad authority to operate the Klamath Project to satisfy ESA requirements.

D. KWUA's Plea for This Court to Craft a Different Klamath Project Operations Plan is Barred by Circuit Precedent.

Acknowledging that Section 7 applies to Reclamation's operation of the Klamath Project, KWUA contends (at 25) the Court must delve deeper into "what exactly does the ESA require?" It claims the Court "must" engage in an analysis that goes beyond determining whether the agency has "some discretion" to benefit listed species and specifically define the scope of that discretion. KWUA Br. at 26 (urging application of a 4-part test that has not grounding in precedent).

Specifically, KWUA urges the Court to apply a since-withdrawn 2021 Reclamation reassessment and craft a new operations plan segregating out "stored" water as defined and determined under Oregon law and what KWUA inaccurately depicts as "nondiscretionary" Klamath contracts obligations.

The 2021 reassessment provided a framework, in response to advocacy by KWUA and other irrigation districts, to potentially exclude "nondiscretionary" actions from a future proposed operations plan. KWUA Br. at 19-21; Reassessment (8-KWUA_ER-1894-935). The reassessment did not alter Reclamation's ESA compliance, as embodied in the 2019 operations plans, but envisioned placing "nondiscretionary" actions in the environmental baseline in a

future consultation. 8-KWUA_ER-1896-97. Before that happened, however, the Secretary of Interior withdrew the reassessment because it did not go through government-to-government consultation with Klamath Basin Tribes, and it conflicted with longstanding Department interpretations of the governing law. 8-KWUA_ER-1882-83 (directing that it “not be relied upon for any purpose”). KWUA is essentially asking this Court to direct Reclamation to craft a new proposed operations plan conforming to the approach floated in the withdrawn reassessment. Doing so would go beyond the appropriate role for a reviewing court and render an advisory opinion. *See supra* at 16-17.

KWUA’s desire for the Court to compartmentalize Klamath Project operations in this manner also collides with Circuit precedent. Ironically, KWUA cites *Jewell I* as support for its preferred approach, but *Jewell I* reversed a decision holding Section 7(a)(2) inapplicable because the contracts at issue “substantially constrained” Reclamation’s discretion. The *en banc* Court held that “consultation is required whenever the agency has ‘some discretion’ to take action for the benefit of a protected species.” 749 F.3d at 784. More specifically, “[w]hether an agency must consult does not turn on the *degree* of discretion that the agency exercises regarding the action in question, but on whether the agency has any discretion to act in a manner beneficial to a protected species or its habitat.” *Id.* The Klamath Project more than meets the “any discretion” threshold.

This Court has twice rejected the fine-tuned parsing of discretionary and nondiscretionary actions that KWUA asks this Court to undertake. In *NWF*, 524 F.3d at 928, the Court held that NMFS erred in deeming actions implemented for flood control, irrigation, and power production to be immutable statutory obligations outside the agency’s discretion and therefore part of the environmental baseline rather than the agency action reviewed under Section 7. This Court held that the agency could not “sweep so-called ‘nondiscretionary’ operations into the environmental baseline, thereby excluding them from the requisite ESA jeopardy analysis.” *Id.* at 929.

This Court reached the same conclusion with respect to Reclamation’s operation of the Central Valley Project in *Jewell II*, 747 F.3d at 639-40, cited by KWUA for the opposite proposition, and in *San Luis & Delta-Mendota Water Authority v. Locke*, 776 F.3d 971, 1008 (9th Cir. 2014), following *Jewell II*. In both cases, the court rejected the water authority’s argument that FWS had to distinguish between discretionary and nondiscretionary actions within a larger project so that only discretionary ones would be considered effects of the action.

KWUA (at 26) recites the following quote from *Jewell II*, 747 F.3d at 639: “[t]he real question after *Home Builders* is what counts as a non-discretionary action, to which § 7(a)(2) does not apply.” Immediately preceding this quote, however, *Jewell II* stated: “*Home Builders* does not require the agency to segregate

discretionary from non-discretionary actions when it considers the environmental baseline. *Home Builders* dealt only with whether Section 7(a)(2) applies,” which it unquestionably does for the Central Valley Project. *Jewell II* and *NWF* closed the door to the approach KWUA urges the Court to impose on Reclamation.¹⁵

KWUA contends that the Tenth Circuit upheld an approach similar to the reassessment in *WildEarth Guardians v. Army Corps of Engineers*, 947 F.3d 635, 637-40 (10th Cir. 2020), but the Tenth Circuit held that a different federal agency—the Army Corps of Engineers—operated dams in the Middle Rio Grande under a statute authorizing operations “solely for flood control and sediment control” and therefore had no discretion to comply with Section 7. Notably, the court contrasted the Corps’ limited authority under this particular statute with Reclamation’s broader discretion in operating an associated reclamation project.

¹⁵ Under longstanding ESA regulations applicable to the biological opinion originally challenged in this case, a consultation considers the “effects of the action” added to the “environmental baseline,” which includes the past and present impacts of all federal, state, and private actions and the anticipated impacts of all proposed federal actions in the area. 50 C.F.R. § 402.02. In 2019, the regulatory definition of environmental baseline was changed to exclude existing federal facilities and activities the agency could not modify. The 2019 regulatory package explained that this modification was aimed at physical structures the agency lacked discretion to remove, and that the baseline remained critical in determining whether the proposed action will cause jeopardy. *See* 84 Fed. Reg. 44,976, 44,978-80 (Sept. 26, 2019) (final rule). A subsequent proposed modification explains that this definition codifies past agency practice, which would include the Klamath consultations and the consultations conforming to *NWF* and *Jewell II*. 88 Fed. Reg. 40,753, 40,755-56 (June 22, 2023) (proposed rule).

Indeed, the Tenth Circuit referenced its prior decision, *Rio Grande Silvery Minnow v. Keys*, 333 F.3d 1109, 1128-31 (10th Cir. 2003), *vacated as moot*, 355 F.3d 1215 (10th Cir. 2004), holding that Reclamation had discretion to reduce water deliveries under its contracts with irrigation districts and cities to comply with the ESA. Consistent with *O'Neill*, *Houston*, and *Patterson*, the Tenth Circuit held in the prior case that Reclamation “retained the discretion to determine the ‘available water’ from which allocations would be made” to the districts and how much available water could be allocated. *Rio Grande Silvery Minnow*, 333 F.3d at 1129. *WildEarth Guardians* in no way undermines *Patterson*.

KWUA’s preferred approach would also infuse into Reclamation’s ESA compliance a state law concept that is foreign to the ESA. Section 7 focuses on the real-world impacts of an agency action on endangered species against the backdrop of the current plight of the species, habitat conditions, and effects of other actions. *See PCFFA*, 426 F.3d at 1092-93 (Klamath Project consultation must address whether “jeopardy might result from the agency’s proposed actions in the present and future human and natural contexts,” not Reclamation’s proportional share of responsibility). The mandated science-based assessment is in no way cabined in by how state law classifies water. NMFS conducted such a science-based assessment bringing its salmon expertise to bear, culminating in the 2019 biological opinion’s minimum and disease management flow requirements.

Overlaying a “stored” water legal concept onto Reclamation’s ESA compliance would upend the statutorily mandated process for making jeopardy determinations based on real-world conditions and species’ needs. Courts have appropriately refused to exclude “stored” water from Reclamation’s ESA compliance for the Klamath Project. *See Baley*, 942 F.3d at 1341 (rejecting argument that “stored” water is unavailable for Klamath Project’s ESA compliance); *Kandra*, 145 F. Supp. 2d at 1207 (same). Because Reclamation has far more than merely “some discretion” in operating the Project, Section 7 applies, and the Court should reject KWUA’s invitation to go further and opine on the parameters of future operations plans.

V. KID’S ARGUMENTS FAIL BECAUSE THIS CASE IS NOT ESTABLISHING OR ENFORCING A WATER RIGHT AND NO STATUTE ELEVATES STATE WATER RIGHTS OVER RECLAMATION’S ESA OBLIGATIONS.

A. KID Improperly Seeks to Turn This Case into a Water Rights Determination.

KID depicts this case as seeking to establish a water right for Reclamation’s ESA compliance, but the district court properly found this characterization belied by the express conditions imposed on lifting the stay and the limited waiver of sovereign immunity, stating: “This is not a water rights adjudication or quantification case.” *Yurok*, 654 F. Supp. 3d at 958. In lifting the stay, the court provided: “[t]o protect tribal sovereignty and avoid the adjudication of tribal water

rights, this litigation will not exceed the parameters proposed by the federal defendants, plaintiffs, and Klamath Tribes” and incorporated by reference their limitations on the waiver sovereign immunity. 8-KWUA_ER-1772. The limited waiver of sovereign immunity provides: “This is not a water rights adjudication or quantification case . . . Neither the United States nor the Tribes have waived sovereign immunity in this forum for the purpose of adjudicating or quantifying water rights, including the sources from which such adjudicated or quantified rights may be satisfied . . . Accordingly, the lifting of the stay shall not allow or result in an adjudication or quantification of the Tribes’ water rights, including the sources from which such adjudicated or quantified rights may be satisfied.” 8-KWUA_ER-1776. The Court also bifurcated litigation of the crossclaim so “ESA-related questions were litigated prior to any discussion of water rights.” *Yurok*, 654 F. Supp. 3d at 956, 960; 8-KWUA_ER-1772; 8-KWUA_ER-1781-82 ¶ 9. As the district court made clear, “No matter how KID attempts to cast the crossclaim, it does not seek an adjudication or quantification of water rights.” *Yurok*, 654 F. Supp. 3d at 961.

KID’s arguments presuppose the supremacy of its water rights over federal law obligations. It contends provisions of the Oregon water code defining adjudicated water rights constrain Reclamation’s ESA compliance and portrays the ACFFOD as the sole determinant of whether Reclamation can release water to

avoid extinction of Klamath River salmon. Without an Oregon-adjudicated water right to release ESA flows, KID claims Reclamation must buy or lease rights or seek a stay of the ACCFOD pending judicial review with a bond to cover harm to KID's water rights. By focusing myopically on Oregon water law, KID begs the question—whether the ESA or Oregon water rights are controlling in the event of conflict.

What the ESA requires and whether it preempts Oregon water rights are federal questions, determined as a matter of federal, not state, law. Notably, OWRD conceded that the Supremacy Clause makes federal law the rule of decision when state and federal law directly conflict and that it lacks authority to prevent Reclamation from complying with the ESA. *Id.* at 968.

KID's over-reach is laid bare in its new, prominently featured claim that the district court's ruling constitutes a Fifth Amendment taking of KID's water rights. Not only does that takings claim entirely lack merits, as explained below, but the claim has no place in this case because this case is not a water adjudication.

This Court has rebuffed KID's recurring argument that the ACCFOD is the sole determinant of whether Reclamation can release water to the Klamath River to meet its ESA obligations. It has refused to draw from Oregon law to determine what the ESA requires. A recent case is directly on point. In 2021, KID filed a preliminary injunction motion asking the state court reviewing the ACCFOD to

stop Reclamation from releasing ESA flows. After Reclamation removed the action to federal district court pursuant to 28 U.S.C. § 1442(a)(1), KID moved for remand, claiming the Klamath County Circuit Court had prior exclusive jurisdiction. The district court declined to remand, holding that the McCarran Amendment's waiver of sovereign immunity did not apply because KID sought to litigate Reclamation's federal ESA obligations. *Klamath Irrigation Dist. v. Bureau of Reclamation*, No. 1:21-cv-00504-AA, 2022 WL 1210946, at *4-5 (D. Or. Apr. 25, 2022). This Court denied KID's petition for a writ of mandamus seeking remand because, as OWRD attested, the ACFFOD did not address Reclamation's ESA obligations, which are governed by federal, not state, law, and the Klamath County Circuit Court lacks jurisdiction to address such federal issues, which are independent of the rights determined in the ACFFOD. *In re KID* 69 F.4th at 941-42, 944. *See also Klamath Irrigation Dist. v. Bureau of Reclamation*, 48 F.4th 934, 947 (9th Cir. 2022), *cert. denied*, 144 S.Ct. 342 (Oct. 30, 2023) (Reclamation's ESA compliance falls outside the scope of the ACFFOD); *KID v. OWRD*, 321 Or. App. at 586-88, 590 (reversing decision precipitating OWRD Order because KID's requested remedy would cause Reclamation to violate the ESA and federal court rulings and could not be determined solely based on the ACFFOD). KID is making another run at having its view of the ACFFOD trump the ESA, but again it comes up short.

B. KID's Water Rights Arguments Fail.

It is beyond the purview of this conflict preemption case to construe and administer Oregon-adjudicated water rights. Accordingly, KID's exclusive jurisdiction, McCarran Amendment, abstention, Fifth Amendment Takings, and Rule 56(d) arguments fail.

1. *The Doctrine of Prior Exclusive Jurisdiction Is Inapplicable.*

KID is mistaken that Klamath County Circuit Court has exercised prior exclusive *in rem* jurisdiction over whether Reclamation needs a water right for its ESA obligations when the crossclaim alleged instead that Oregon lacks authority to regulate Reclamation's release of water to comply with the ESA and the ESA preempts Oregon's enforcement of the ACFFOD. These federal questions are beyond the purview of the ACFFOD and the state court reviewing it.

This Court recently rejected KID's analogous exclusive jurisdiction argument in finding no error in the district court's refusal to remand such KID claims to the KBA court. This Court held that "[t]he doctrine of prior exclusive jurisdiction does not apply" because "[t]he KBA did not adjudicate Reclamation's ESA obligations" and therefore lacks jurisdiction over such claims. *In re KID*, 69 F.4th at 941. It further rejected the characterization of KID's ESA challenge as seeking enforcement of rights determined in the ACFFOD, *id.* at 944, agreeing with this Court's similar rejection in *KID v. Bureau of Reclamation*, 48 F.4th at 947

(APA challenge to Reclamation’s release of water for ESA compliance is not administration of ACFFOD-determined rights).

2. *The McCarran Amendment Does Not Authorize Enforcement of Oregon-Based Water Rights to Preclude ESA Compliance.*

The McCarran Amendment waives sovereign immunity for the United States to participate in comprehensive water rights adjudications, like the KBA, and for administration of water rights determined in such adjudications. 43 U.S.C. § 666(a). Nothing in the ACFFOD addressed Reclamation's ESA compliance, nor could it since OWRD has no authority to oversee ESA compliance. The ACFFOD, therefore, cannot be “administered” to constrain Reclamation's ESA compliance.

This Court definitively rejected KID’s analogous McCarran Amendment argument in *KID v. Bureau of Reclamation*, 48 F.4th 934, an APA case challenging Reclamation 2019 operations plan because it used water for instream purposes without an Oregon water right. This Court upheld dismissal of KID’s suit under Rule 19 for failure to join the Hoopa Valley Tribe and Klamath Tribes as indispensable parties. While the ACFFOD adjudicated water rights, KID’s lawsuit “is not an administration of previously determined rights but is instead an APA challenge to federal agency action—specifically, [] Reclamation’s authority to release water from Upper Klamath Lake consistent with the ESA and the downstream [Tribal] rights.” *Id.* at 947. Judge Bumatay concurred, noting that the McCarran Amendment could waive sovereign immunity to construe the

adjudicated rights of the Klamath Tribes in an APA case, but could not for California-based Tribes whose rights were not adjudicated in the ACFFOD. *Id.* at 949; *see also In re KID*, 69 F.4th at 941-42, 944 (state court reviewing ACFFOD lacks jurisdiction to determine Reclamation’s ESA obligations).

3. *The District Court Did Not Abuse Its Discretion in Declining to Abstain.*

The district court did not abuse its discretion in declining to abstain under *Colorado River Water Conservation District v. United States*, 424 U.S. 800, 817-18 (1976), because abstention is inappropriate where the state court proceeding will not resolve the entire federal case. Given that the McCarran Amendment does not waive sovereign immunity for the state court reviewing the ACFFOD to decide whether the ESA preempts state water rights, the state court proceeding will not—and cannot—resolve the issues in this case. *Yurok*, 654 F. Supp. 3d at 958, 960; *see also KID v. Bureau of Reclamation*, 48 F.4th at 946-47 (McCarran Amendment does not waive sovereign immunity for ESA claims); *In re KID*, 69 F.4th at 941-42, 944 (same).

4. *KID’s Fifth Amendment Taking is Procedurally and Substantively Specious.*

KID asserts a novel Fifth Amendment claim that the district court ruling constitutes a taking of its property rights without just compensation. This claim is jurisdictionally foreclosed and substantively baseless.

KID's Fifth Amendment claim is jurisdictionally improper for two reasons. First, it asks the Court to rule on ownership of water rights, which falls outside the limited waiver of sovereign immunity defining the scope of this case. KID's argument is predicated on its view that the ACFFOD determined all rights to water in the Klamath Basin, including in California, that Reclamation lacks required water rights to release flows to the Klamath River, KID Brief at 35-37, and that KID's water rights cannot be curtailed by any senior water rights in the Klamath River. *Id.* at 41-42 (U.S. does not hold water rights for any Tribe other than Klamath Tribes; KID's water rights cannot be curtailed by senior water rights in the Klamath River). KID seeks to have this Court delve into an adjudication of the Yurok Tribe's water rights, but the limited waiver makes clear "[t]his is not a water rights adjudication or quantification case." 8-KWUA_ER-1776 ¶ 7. KID's taking claim is barred by sovereign immunity because "[n]either the United States nor the Tribes have waived sovereign immunity in this forum for the purpose of adjudicating or quantifying water rights, including the sources from which such adjudicated or quantified rights may be satisfied." 8-KWUA_ER-1776 ¶ 7.

Second, KID cannot present a takings case in this proceeding. The Tucker Act waives sovereign immunity and gives the Court of Federal Claims exclusive jurisdiction over claims for any substantial money damages resulting from takings.

28 U.S.C. § 1491. KID is well aware of this jurisdictional bar, having previously brought an unsuccessful takings claim in the proper court in *Baley*.

KID's taking claim also entirely lacks merit. It is predicated on statements in a plurality opinion that lacks precedential value. In *Stop the Beach Renourishment, Inc. v. Florida Department of Environmental Protection*, 560 U.S. 702, 715 (2010), an opinion joined by only four Justices suggested that a state court ruling might constitute a judicial taking if the "court declares that what was once an established right of private property no longer exists." In the ensuing years, neither the Supreme Court nor the Ninth Circuit has held that a court ruling can constitute a taking. Even if the doctrine were recognized, it would not apply to a federal court ruling holding that a federal statute preempts state law. Instead, the theory is premised on a court recharacterizing as public property what state law previously recognized as private property. *Id.* at 713.

No such recharacterization of KID's rights has occurred here. KID previously brought a Fifth Amendment takings case based on Reclamation's 2001 ESA-based limitations on irrigation, but failed to prove an unconstitutional taking. *Baley*, 942 F.3d at 1337 (rejecting takings claim because: "[a]t the bare minimum, the Tribes' rights entitle them to the government's compliance with the ESA in order to avoid placing the existence of their important tribal resources in jeopardy"). *Baley* undermines KID's assertion Reclamation's ESA compliance is a

taking of KID's usufructuary rights to water. It also demonstrates that KID's taking claim is a water right claim that is far beyond the scope of this case.¹⁶

5. *The District Court Did Not Abuse Its Discretion in Denying KID's Rule 56(d) Motion.*

KID cannot show that the district court abused its discretion in denying KID's Rule 56(d) motion seeking a delay for it to pursue expansive depositions, interrogatories, admissions, and document production exploring alternative ways to comply with state-based water rights and the ESA, including changing Project operations and acquiring additional water rights or licenses. The court appropriately denied KID's request because preemption is predominantly a legal question rarely aided by development of a more complete factual record. *Yurok*, 654 F. Supp 3d at 963, citing *Atay v. Cnty. of Maui*, 842 F.3d 688, 698 (9th Cir. 2016). In addition, KID could have made arguments about alternatives for

¹⁶ Oddly, given that KID claims the Klamath contracts are irrelevant, it relies on two takings cases involving reclamation contracts, but those cases turned on a provision, lacking in KID's contract, that insulates the government from liability "if a shortage does occur during any year because of drought, or other causes which, in the opinion of the Contracting Officer are beyond the control of the United States," construed by the court to limit such shortages in *force majeure* situations. *Stockton E. Water Dist. v. United States*, 583 F.3d 1344, 1361-63 (Fed. Cir. 2009) (distinguishing *O'Neill* because it lacked "beyond the control" qualification); *Tulare Lake Basin Water Storage Dist. v. United States*, 49 Fed. Cl. 313, 320-21 (Ct. Cl. 2001) (same). In contrast, the KID and TID contracts contain water shortage clauses that extend to other causes, which preclude takings liability under *O'Neill*; they also have separate *force majeure* provisions. 1954 KID Contract ¶ 27, 11-KWUA_ER-2666-67; 1956 TID Contract ¶ 27, 11-KWUA_ER-2627.

compliance through expert testimony, some of the discovery pertained to Tribal water rights not at issue in phase 1, and KID failed to pursue discovery diligently, in a timely fashion, and in accordance with the procedure laid out by the court.

Yurok, 654 F. Supp. 3d at 963.¹⁷

VI. THE DISTRICT COURT DID NOT ABUSE ITS DISCRETION IN STRIKING KWUA'S TRIBAL WATER RIGHTS ARGUMENTS.

The district court appropriately struck KWUA's arguments urging the Court to make adjudication-type rulings on fundamental aspects of the Yurok Tribe's senior federal reserved water rights to support its fishery. After KWUA sought an open-ended lifting of the stay and lodged a motion for summary judgment that included attacks on Yurok Tribe's water rights, SER-306-64, the United States, the Yurok Tribe, and Klamath Tribes asked the Court to impose conditions on lifting the stay to protect sovereign immunity, making what the Court called "compelling arguments about the need to protect sovereign immunity." 8-KWUA_ER-1771. The Court agreed: "[t]o protect tribal sovereignty and avoid the adjudication of tribal water rights, this litigation will not exceed the parameters proposed by the

¹⁷ To the extent that KID is challenging how Reclamation met its ESA obligation to avoid jeopardy to salmon, it is making the type of arguments that must be presented in APA challenge. *Cisneros v. Alpine Ridge Grp.*, 508 U.S. 10, 20-21 (1993) (challenge to agency's compliance with its statutory obligations must be presented in administrative law challenge); *Klamath Irrigation Dist. v. United States*, 75 Fed. Cl. 677, 687-88 (Ct. Cl. 2007) (court refused to turn a takings case into a vehicle for challenging validity of Reclamation actions).

federal defendants, plaintiffs, and Klamath Tribes,” and incorporated by reference their limitations on the waiver sovereign immunity and request for bifurcation. 8-KWUA_ER-1772.

Flouting these constraints, KWUA’s motion for summary judgment strayed into aspects of the Tribe’s water rights that would be addressed in an adjudication, including the priority date of the right, source of water, quantity, and location of the right. 7-KWUA_ER-1549 (claiming irrigation rights are senior to Yurok’s water rights); *id.* at 7-KWUA_ER-1549-50 (questioning whether Yurok’s water rights extend to UKL based on the ACFFOD’s denial of Klamath Tribes’ asserted rights to off-reservation Klamath River flows); *id.* at 7-KWUA_ER-1550-51 (asserting that Yurok’s water rights are limited to natural flow and do not extend to “stored” water because the ACFFOD gave irrigators’ rights to use “stored” water). The Yurok Tribe’s motion to strike demonstrated how KWUA had ignored controlling federal reserved water law precedent and sidestepped the extensive fact finding, expert testimony, and thorough review of the Tribe’s history and Executive Orders necessary to rule on the basis and nature of the Tribe’s water rights. 4-KWUA_ER-0624-25. While the United States had relied on Tribal rights as a source of discretion for its ESA compliance, the Tribe’s motion urged the court, consistent with its bifurcation order, to refrain from opining on the federal argument until the second phase of this litigation to avoid unnecessary litigation of

the Tribe's water rights. In response, the court appropriately struck KWUA's arguments and evidence that went beyond the Tribe's limited waiver of sovereign immunity and the Court's bifurcation order. *Yurok*, 654 F. Supp. 3d at 961 n.7. KWUA and other parties will have the ability to address Tribal water rights arguments that do not exceed the limited waiver of sovereign immunity if this case is not fully resolved and proceeds to phase 2.

CONCLUSION

The district court ruling should be affirmed.

Dated: January 16, 2024

s/ Patti A. Goldman

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