No. 19-1134

In The
Supreme Court of the United States

LONNY E. BALEY, et al.,
Petitioners,

v.

UNITED STATES; PACIFIC COAST FEDERATION OF FISHERMEN'S ASSOCIATIONS,
Respondents.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Federal Circuit

BRIEF AMICI CURIAE OF PACIFIC LEGAL FOUNDATION, ET AL., IN SUPPORT OF PETITIONERS

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Question Presented

Whether, against the legal backdrop of Congress's and this Court's recognition of the primacy of state law to determine, quantify, and administer water rights, a federal court may deem federal agency regulatory action under the Endangered Species Act to constitute the adjudication and administration of water rights for tribal purposes.

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Interest of Amici Curiae

Pursuant to Supreme Court Rule 37.2,[1] Pacific Legal Foundation (PLF), Siskiyou County and Modoc County, California, Klamath County, Oregon, and a coalition of Upper Klamath Basin water users[2] respectfully submit this brief amici curiae in support of Petitioners Lonny E. Baley, *et al.*

PLF is the nation's oldest public interest legal foundation that fights, in state and federal courts

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[1] All parties have consented to the filing of this brief, and counsel of record for all parties received timely notice of the intention to file the brief. No counsel for any party authored this brief in whole or in part, and no counsel or party made a monetary contribution intended to fund its preparation or submission. No person other than Amici Curiae, their members, or their counsel made a monetary contribution to the brief's preparation or submission.

[2] Specifically: Gerald H. Hawkins, individually and as trustee of the CN Hawkins Trust and Gerald H. Hawkins and Carol H. Hawkins Trust; John B. Owens, as trustee of the John and Candace Owens Family Trust; Harlowe Ranch, LLC; Goose Nest Ranches, LLC; Agri Water, LLC; NBCC, LLC; Roger Nicholson; Nicholson Investments, LLC; Mary Nicholson, as co-trustee of the Nicholson Living Trust; Martin Nicholson, individually and as co-trustee of the Nicholson Loving Trust; Randall Kizer; Rascal Ranch, LLC; Jacox Ranches, LLC; E. Martin Kerns; Troy Brooks; Tracey Brooks; Barbara A. Duarte and Eric Lee Duarte, as trustees of the Duarte Family Trust, UTD January 17, 2002; Kevin Newman; Jennifer Newman; Duane Martin Ranches, L.P.; Geoffrey T. Miller and Catherine A. Miller, as co-trustees of The Geoff and Catherine Miller Family Trust, UTD February 6, 2017; Casey Lee Miller, as trustee of The Casey Miller Trust, UTD January 9, 2017; Margaret Jacobs; Darrell W. Jacobs; Franklin J. Melness; Janet G. Melness; Barnes Lake County, LLC; David Cowan; Theresa Cowan; and Chet Vogt, as trustee of the C & A Vogt Community Property Trust.

throughout the nation, for limited government and the protection of individual liberties. To that end, PLF attorneys have regularly appeared before this Court to defend property rights against overreaching government. *E.g.*, *Knick v. Township of Scott*, 139 S. Ct. 2162 (2019) (counsel of record for petitioner); *U.S. Army Corps of Eng'rs v. Hawkes Co.*, 136 S. Ct. 1807 (2016) (counsel of record for respondent); *Koontz v. St. Johns River Water Mgmt. Dist.*, 570 U.S. 595 (2013) (counsel of record for petitioner); *Sackett v. EPA*, 566 U.S. 120 (2012) (counsel of record for petitioners).

Siskiyou County is a political subdivision of the State of California. The County's economic driving force is its farmers. Many of them receive water from the Klamath Project to service highly productive, irrigable farmland. For example, crops such as potatoes, onions, and horseradish that are harvested from the Tulelake portion of the Klamath Basin within the County are valued at approximately $23 million. In addition to significant tax revenues from irrigated land in the Tulelake area, the County receives approximately $300,000 to $400,000 annually through the federal government's lease lands program for that area, pursuant to the Kuchel Act, 16 U.S.C. §§ 695k-695r.

Modoc County is a political subdivision of the State of California. The Tulelake Basin, portions of which are within the County, is the primary economic driver of the County's private and public sectors. Irrigated lands in the Tulelake Basin, which receive water from the Klamath Project, comprise 27.5% of the total personal property tax roll, and over 18% of

the total assessed land value for the entire County. Core public safety and health and human services for the entire County depend on tax and Kuchel Act revenue from the Tulelake Basin.

Klamath County is a political subdivision of the State of Oregon. Agriculture comprises more than 10% of the County's gross domestic product. A large portion of Klamath County farmers receive their water from the Klamath Project. Crops that comprise the County's approximately $100 million in annual agricultural sales include potatoes, onions, horseradish, wheat, berry root stocks, barley, mint, garlic, and hay.

The Upper Klamath water users are landowners and ranchers in the Upper Klamath Basin who have off-Project water rights to the Wood, Williamson, and Sprague Rivers, three of the main tributaries to Upper Klamath Lake. Over the last several years, their water deliveries have been sharply curtailed, and often eliminated entirely, to satisfy the same federal reserved water rights at issue in the petition. They are appellants in an action pending in the United States Court of Appeals for the D.C. Circuit challenging an agreement between the federal government and the Klamath Indian Tribes over the administration and enforcement of those reserved water rights.

The petition seeks review of a decision of the United States Court of Appeals for the Federal Circuit, which purports to exempt federal reserved water rights from the otherwise applicable state systems of water rights regulation. The ruling's upshot is to unsettle state water rights regimes and portend large-scale—and uncompensated—water cut-

offs. Amici are therefore concerned about the harmful impacts that the decision may have on the water rights of farmers and other landowners throughout the western United States.

Introduction and Summary of Reason for Granting the Petition

A fundamental principle of federal water policy is that state law usually governs how federal water rights are acquired and administered. 43 U.S.C. §§ 383, 666(a). This does not mean that state law necessarily trumps, or can frustrate, federal objectives. *See California v. United States*, 438 U.S. 645, 668 n.21 (1978) ("Congress did not intend to relinquish total control of the actual distribution of the reclamation water to the States."). But it does mean that, generally, state water policy *is* federal water policy. *United States v. New Mexico*, 438 U.S. 696, 702 (1978) ("Where Congress has expressly addressed the question of whether federal entities must abide by state water law, it has almost invariably deferred to the state law."). And a critical component of state water policy, especially in the sere lands of the western United States, is the doctrine of prior appropriation, along with its special rules of adjudication and enforcement. *See generally Colorado v. New Mexico*, 459 U.S. 176, 179 n.4 (1982) ("Under the prior appropriation doctrine, recognized in most of the western states, water rights are acquired by diverting water and applying it for a beneficial purpose. A distinctive feature of the prior appropriation doctrine is the *rule of priority*, under which the relative rights of water users are ranked in the order of their seniority.").

Below, the Federal Circuit held that Petitioners are entitled to no compensation for the taking of their water rights because the water that the Bureau of Reclamation refused to deliver to them (a cut-off necessary to comply with the consultation provisions of the Endangered Species Act, 16 U.S.C. § 1536(a)(2), (b)) happens to be at least the amount of water necessary to satisfy reserved water rights held in trust by the federal government for the Klamath Tribes. App. 50. Yet, at the time of the water cut-off, no court had quantified or qualified the Tribes' rights, much less had any call been placed with a state water master for the enforcement of those rights as against junior water users like Petitioners.

Because no other water right could be enforced in like circumstances under state law, the Federal Circuit's ruling effectively erases a more than century-long federal practice of deference to state water regulatory systems. The decision thus threatens to undercut the security of privately held water rights throughout the country, especially in the West where federal reserved rights are common.

This Court's review is merited.

Factual and Legal Background

Shortly after the turn of the last century, Congress enacted the Reclamation Act, Pub. L. No. 57-161, 32 Stat. 388 (June 17, 1902), which "set in motion a massive program to provide federal financing, construction, and operation of water storage and distribution projects to reclaim arid lands in many Western States." *Orff v. United States*, 545 U.S. 596, 598 (2005). That program's interaction with state

water law is governed by two key principles. First, the Reclamation Act itself provides that, unless inconsistent with federal law, state law governs how the federal government acquires water rights under the Act. 43 U.S.C. § 383. Second, according to the so-called McCarran Amendment, state tribunals are authorized to adjudicate the quantity and priority of federal water rights, as well as to administer those rights. *Id.* § 666(a).

The water rights at issue in this case operate under the doctrine of prior appropriation. App. 14. According to that doctrine—to which most of the arid lands of the western United States are subject—a person "whose appropriation is first in time (the prior appropriator) has the highest priority and hence a right to make beneficial use of water superior to all others." David H. Getches, *Water Law in a Nutshell*, 101 (3d ed. 1997). If there is insufficient water to satisfy all needs, "the doctrine of priority allows the full senior right to be exercised before the junior can use any water." *Id.* Priority is enforced through the senior user's placement of a "call" with the pertinent state water official. *Id.* at 103 ("A senior appropriator seeking to enforce rights as against a junior 'calls the river.' It is usually the job of the state engineer or some other official to ensure that appropriators do not take water out of priority.").

"The Klamath Project, one of the oldest federal reclamation schemes, is a series of lakes, rivers, dams, and irrigation canals in northern California and southern Oregon." *Bennett v. Spear*, 520 U.S. 154, 158 (1997). In 1905, the federal government established the Klamath Project by submitting a request to the

State of Oregon to appropriate all theretofore unappropriated waters of the Klamath Basin. App. 15-16.

In 2001, the Bureau of Reclamation (the federal agency that runs the Klamath Project) consulted with the United States Fish and Wildlife Service as to the project's impact on several populations of fish protected under the Endangered Species Act. The consultation resulted in a biological opinion that recommended, among other things, the maintenance of certain minimum water levels in Upper Klamath Lake. To comply with the opinion in that drought year, the Bureau shut off irrigation deliveries to project farmers from April to July, resulting in the denial of about 70,000 acre-feet of water. App. 22-27. *See* Reed D. Benson, *Avoiding Jeopardy, Without the Questions: Recovery Implementation Programs for Endangered Species in Western River Basins*, 2 Mich. J. Envtl. & Admin. L. 473, 495 (2013) ("By early 2001, the [Bureau] was facing both a historic drought in the Klamath Basin, and a court order to complete consultation before delivering irrigation water from the project. The resulting [biological opinions] divided nearly all of the year's limited water supplies between the lake (for suckers) and the river (for salmon), leaving none for most Project irrigators.").

Coalitions of water districts and farmers who use project water thereupon filed, in the United States Court of Federal Claims, claims under the Constitution's Fifth Amendment seeking just compensation for the taking of their water rights. Fifteen years of litigation then followed, involving appeals to the Federal Circuit and certified questions

to the Oregon Supreme Court. App. 27-29. Ultimately, following a ten-day trial, the Court of Federal Claims ruled that Petitioners had water rights that were protected under the Just Compensation Clause. Nevertheless, the court held that no taking of property had occurred because the water cut-offs were necessary to satisfy not just the Bureau's Endangered Species Act obligations, but also the federal government's trust obligation to the Klamath Tribes. And those latter obligations, in the form of instream reserved water rights, took priority over Petitioners' water rights, because they were recognized by treaty or executive order prior to the Klamath Project's creation. App. 226-27. *See generally Cappaert v. United States*, 426 U.S. 128, 138 (1976) ("In [withdrawing land from the public domain] the United States acquires a reserved right in unappropriated water which vests on the date of the reservation and is superior to the rights of future appropriators.").

On appeal, the Federal Circuit affirmed. That court ruled that the amount of water necessary to satisfy the Klamath Tribes' instream water rights was at least as much as that required to satisfy the federal government's Endangered Species Act obligations. App. 50. Further, the court held that the absence of any state adjudication or administration of the Tribes' water rights did not preclude the Bureau's reliance on them to defend the agency's withholding of project water. Given that "tribal water rights arising from federal reservations are federal water rights not governed by state law," the court concluded that "there is no need for a state adjudication to occur before federal reserved rights are recognized." App. 59 (citing, inter alia, *Agua Caliente Band of Cahuilla*

Indians v. Coachella Valley Water Dist., 849 F.3d 1262, 1272 (9th Cir. 2017)).

Reason for Granting the Petition

The Petition Presents the Significant National Issue of Whether, in the Absence of Express Congressional Direction, a Federal Reserved Water Right Can Trump State Rules for the Administration and Enforcement of Water Rights

Federal reserved water rights are, by federal law, treated to no more solicitude in their administration than water rights held by private parties. The Federal Circuit's decision to the contrary conflicts with the longstanding tradition of federal deference to state water law systems, thereby threatening significant disruption of those systems and injury to privately held water rights.

A. The decision below fundamentally misunderstands the relationship between federal water rights and state law

The key error in the Federal Circuit's decision is its preemption analysis. It is undisputed that federal water law trumps state water law. But what the Federal Circuit critically missed is that, *as a matter of federal law*, federal reserved water rights—including those held in trust for Indians tribes—are subject to state rules of quantification and administration. *See Colo. River Water Conserv. Dist. v. United States*, 424 U.S. 800, 809-10 (1976) ("We conclude that the state

court had jurisdiction over Indian water rights under the [McCarran] Amendment."); *Arizona v. San Carlos Apache Tribe of Ariz.*, 463 U.S. 545, 569 (1983) ("The McCarran Amendment . . . allows and encourages state courts to undertake the task of quantifying Indian water rights in the course of comprehensive water adjudications."). *See generally In re Gen. Adj. of All Rights to Use Water in the Big Horn River Sys.*, 753 P.2d 76, 114-15 (Wyo. 1988) (observing that "Federal law has not preempted state oversight of reserved water rights" and discussing pertinent authorities); John D. Leshy, *The Interaction of U.S. Public Lands, Water, and State Sovereignty in the West: A Reassessment and Celebration*, 41 Pub. Land & Resources L. Rev. 1, 20 (2019) ("The [McCarran] Amendment . . . expressed a general preference for state court adjudication and administration of all water rights [which] has given states some control, if they choose to exercise it, over water rights connected with public lands and Indian reservations.").

The Klamath Tribes' instream water rights are not exempt from this key principle of federal water law. *See United States v. Oregon*, 44 F.3d 758, 770-71 (9th Cir. 1994) (the McCarran Amendment requires the federal government and the Tribes to participate in Oregon's Klamath Basin Adjudication); *United States v. Adair*, 723 F.2d 1394, 1403 n.7 (9th Cir. 1983) (commending the district court's decision to leave "quantification and administration of the[] [Klamath Tribes'] rights to later proceedings to be conducted by the [Oregon] State Water Resources Director," thereby "harmoniz[ing] the concurrent federal and state jurisdiction mandated by the McCarran Amendment"); *id.* at 1411 n.19 (rejecting

the contention that "the Tribe's rights are unaffected by state law" and emphasizing that they are governed "in accordance with state techniques and procedures").

And as a matter of state law (thus also federal law), the mere fact that one water use is senior to another does not inevitably mean that the junior use will be curtailed; a non-futile call for the senior water right must be made. *See* Jennie L. Bricker, *Entitlement, Water Resources, and the Common Good*, 18 Willamette J. Int'l L. & Disp. Resol. 143, 144 n.6 (2010) ("Under the prior appropriation system, senior water rights holders can 'call the river' in times of shortage . . . ."); Or. Admin. R. 690-250-0020(2) ("Upon the judgement that water will not reach its destination, or that an inadequate amount of water will reach its destination, the watermaster may disregard the call of the senior downstream appropriator."). The absence in 2001 of any Bureau effort to seek enforcement of the Tribes' instream right through the State of Oregon's apparatus set up for that very purpose precludes the federal government from invoking such a right to deprive water users of what they are otherwise entitled to under state law. The Federal Circuit's conclusion to the contrary thus sharply breaks from both Congress' and this Court's well-established practice of deference to state water law rules.

B. The decision below threatens water users' due process rights to a fair and open adjudication of their water rights

In addition to undercutting state water law, the decision below threatens the due process rights of

water users. Here, the Bureau quantified the Tribes' instream water rights through Endangered Species Act Section 7 consultation (an internal agency administrative process), and then prevailed on the Court of Federal Claims and the Federal Circuit to accept this black-box calculation as a legally enforceable determination of those rights. *See* App. 52 ("At the bare minimum, the Tribes' rights entitle them to the government's compliance with the [Endangered Species Act] . . . ."). This gets the proper quantification of water rights backwards. The courts (usually state, but in appropriate cases federal) are supposed to neutrally adjudicate the competing claims of contesting parties to the ownership and quantity of water rights. *See, e.g.*, *Hage v. United States*, 51 Fed. Cl. 570, 578 (2002) (determining the scope of contested water rights after both parties presented evidence at trial). Serious due process problems are raised when a federal court allows a federal agency—which in the context of water rights administration is *at most* first among equals—to (i) "determine" the quantity of flow desired to satisfy wildlife conservation needs in a non-public process that includes none of the minimum due process elements rehearsed in *Goldberg v. Kelly*, 397 U.S. 254 (1970), and then (ii) put that determination to a federal court as a valid proxy for traditional quantification of a water right. *Cf. Pac. Live Stock Co. v. Lewis*, 241 U.S. 440, 451 (1916) (reliance on an administrative ruling to inform water rights determinations under Oregon law comports with due process because, in part, it is an "advisory report" which just "paves the way for an adjudication by the court").

It is doubtful that the Section 7 consultation that led here to the water cut-off provided water rights holders in the Klamath Basin adequate notice that the results of the consultation would later be advanced as a *de facto* quantification of the Tribes' instream rights. *Cf.* 50 C.F.R. §§ 402.10-402.17 (consultation procedures, which do not require public notice). Even if such notice was provided, consultation remains a "private" process between federal agencies. Travis O. Brandon, *Fearful Asymmetry: How the Absence of Public Participation in Section 7 of the ESA Can Make the "Best Available Science" Unavailable for Judicial Review*, 39 Harv. Envtl. L. Rev. 311, 313-14 (2015) ("Unlike every other substantive provision of the [Endangered Species Act]—and unlike many structurally similar environmental review and permitting processes—section 7 consultations do not include a public notice-and-comment procedure.") (footnote omitted). Water rights claimants like Petitioners thus have no right to know the "evidence against them," *i.e.*, the information that agencies like the Bureau and the Fish and Wildlife Service are considering in developing a biological opinion and "reasonable and prudent alternatives," and therefore have no meaningful opportunity to participate in the process. *Cf. Goldberg*, 397 U.S. at 268-70. And notably, such consultation lacks a neutral decision maker, *cf. id.* at 271, instead being directed by the self-interested and (at least for the duration of the consultation) secret work of the agencies. Thus, the Federal Circuit's approval of endangered species consultation as a substitute for state procedure to adjudicate water rights threatens the due process rights of non-federal water users.

C. The errors of the decision below are not unique to the Federal Circuit

Underscoring the need for this Court's review is the fact that the Federal Circuit's flub on the interplay of federal reserved water rights and state law is not unique among the courts of appeals. In fact, the chief circuit authority that the Federal Circuit cited—the Ninth Circuit's decision in *Agua Caliente*, upholding federal reserved water rights to groundwater—is itself based on very questionable reasoning. *See* Hannes D. Zetzsche, Comment, *Not All Agua Is Caliente: Proposing the* Winters *Groundwater Test*, 98 Neb. L. Rev. 220, 222 (2019) ("Although the court reached the appropriate conclusion, it did so by an always-never approach . . . that is out of step with Supreme Court doctrine.").

A similar miff on federal reserved water rights, also from the Ninth Circuit but thankfully corrected just last Term by this Court, is *Sturgeon v. Frost*, 139 S. Ct. 1066 (2019). In that case, the Ninth Circuit had ruled that federal reserved water rights could be used as the means to impose a federal hovercraft regulation on Alaska's Nation River. This Court unanimously rejected the Ninth Circuit's overbroad understanding, explaining that a federal reserved water right, "by its nature, is limited," and cannot justify an expansive federal power over waters otherwise subject to state control. *Id.* at 1079-80. *See* Matthew Sanders, *Sizing Up* Sturgeon v. Frost, ABA Trends (May/June 2019) ("Reserving a specific quantity of water does not give rise to plenary authority . . . ."). By the same token, such a right cannot justify—particularly in the absence of express Congressional authorization—the

circumvention of well-established state rules for the administration and enforcement of water rights.

Despite *Sturgeon*, this Court has declined too many opportunities to clarify both the basis and the functioning of federal reserved water rights, as well as the interplay between federal agencies and state water law generally. *See, e.g.*, *Alaska v. Babbitt*, 72 F.3d 698 (9th Cir. 1995), *cert. den.* 516 U.S. 1036 (1996) (Ninth Circuit improperly deferring to Interior Department interpretation of vague statute to quantify federal reserved water rights); *John v. United States*, 720 F.3d 1214 (9th Cir. 2013), *cert. den.* 572 U.S. 1042 (2014) (same); *Tehama-Colusa Canal Authority*, 721 F.3d 1086 (9th Cir. 2013), *cert. den.* 572 U.S. 1016 (2014) (Ninth Circuit improperly deferring to Bureau of Reclamation interpretation of state water law in administering federal water delivery contracts); *Agua Caliente*, 849 F.3d 1262, *cert. den.* 138 S. Ct. 468 (2017) (Ninth Circuit incorrectly extending federal reserved water rights to groundwater). The Federal Circuit's adoption of the Ninth Circuit's reasoning on federal reserved water rights nationalizes the latter's aberrant jurisprudence. The Court should not pass up the opportunity, presented by the petition, to arrest this misdirected development.

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The Federal Circuit's decision is not just wrong, it is wrong in a way that promises to upset otherwise settled expectations as to how water rights, including those held by the federal government, are to be administered and enforced. The Federal Circuit's ruling therefore portends more than the insecurity

that always follows from such a sudden and unjustified shift in law. It also, as this case amply displays, promises to undercut the property rights of farmers, ranchers, and other landowners, thereby threatening the reliability of water in areas where predictability of that resource is critical. *See generally* Robert A. Pulver, Comment, *Liability Rules as a Solution to the Problem of Waste in Western Water Law: An Economic Analysis*, 76 Cal. L. Rev. 671, 717 (1988) ("Most . . . authorities suggest that appropriators' ownership control over their appropriations be increased . . . ."). *Cf.* Lynda L. Butler, *The Governance Function of Constitutional Property*, 48 U.C. Davis L. Rev. 1687, 1699 (2015) ("Mainstream economics . . . explain[s] how private property rights promote an efficient allocation of interests in resources and lead to greater social utility.").

This Court's review is merited.

Conclusion

The petition for writ of certiorari should be granted.

DATED: April 2020.

Respectfully submitted,

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