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

REPLY BRIEF FOR PETITIONERS

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REPLY BRIEF FOR PETITIONERS

Through the twentieth century, Petitioners and their predecessors irrigated their land with water delivered through Klamath Project facilities. That changed dramatically in 2001 due to the application of the Endangered Species Act (ESA), which caused the re-allocation of Petitioners' water rights to other uses. But for the ESA, Petitioners would have diverted and used water that year. Respondent United States (U.S.) contends that the severe ESA-based injury was not injury at all because the lower courts determined, more than 15 years after the fact, that Petitioners had no right to the water to begin with.

The lower courts' post-hoc conclusion rests on fundamental distortions of western water law. The U.S. concedes there was no water right "call" by or on behalf of tribes in the Klamath Basin, but identifies no authority to support that federal reserved tribal water rights have forever been self-executing such that Petitioners never actually had the right to irrigate.

The U.S. does not dispute that the issues in this case are important (Pet.32-34), a fact underscored by the tide of public and private *amici* who urge that the petition be granted. The Federal Circuit's decision upends western water law and the established principles of cooperative federalism and deference to state law that underlie the successful development of the west. In the meantime, *this year*, Petitioners are experiencing the same, ESA-based water re-allocation that

occasioned this case, and will experience extreme hardship due to the ESA.

1. The Federal Circuit's decision squarely conflicts with decisions of this Court and applicable state decisions.

a. The U.S. claims (at 18) that the Federal Circuit's decision does not conflict "with the McCarran Amendment . . . this Court's interpretation of it, [or] Oregon's efforts to adjudicate Klamath Basin rights pursuant to the Amendment." But in response to Petitioners' argument that the California tribes were obliged to claim a right in the Klamath Basin Adjudication (KBA) to use water physically stored *in* Oregon (see pp. 8-9, *infra*), the Federal Circuit stated: "tribal water rights arising from federal reservations are federal water rights not governed by state law." Pet.App.59. That ruling is in direct conflict with this Court's holding in *Colo. River*, 424 U.S. at 809, that the McCarran Amendment waives sovereign immunity for state court jurisdiction to adjudicate federal reserved water rights held in trust for tribes. Contrary to the government's suggestion (at 23), *Gila River Pima-Maricopa Indian Cmty.* v. *United States*, 695 F.2d 559, 561-562 (Fed. Cir. 1982), does not hold that non-party water rights may be adjudicated in Tucker Act proceedings. It specifically avoided whether the tribal rights at issue were *Winters* rights, and did not adjudicate competing claims of other water users. *Ibid*.

b. The Federal Circuit's holding that tribes have rights to water at locations outside of their reservation

boundaries (Pet.App.56) is also in conflict with relevant authority. The existence and nature of federal reserved water rights are questions of federal law. However, it is state courts, in McCarran adjudications, that apply federal law and fit federal rights into state systems.

In *United States* v. *State*, 448 P.3d 322, 355-356 (Idaho 2019), the Idaho Supreme Court held that federal reserved water rights to support tribal fisheries do not include rights to water at locations outside the reservation. The KBA Adjudicator reached the same conclusion, denying Klamath Tribes' claims for water rights to flows at locations outside the former reservation, Pet.14. Thus in Idaho and in the Klamath River under the current KBA,[1] there are no off-reservation rights, but in the Klamath River in the Federal Circuit, there are. This renders rational water rights administration impossible.

Respondents and the Federal Circuit cite this Court's decisions where a downstream on-reservation reserved right holder took action to curtail water use at an upstream, off-reservation location. Pacific Coast Federation of Fishermen's Associations (PCFFA) Br.inOpp.15-17; U.S.Br.inOpp.25. That is quite different from saying that the federal right exists *at* the upstream location. Rather, under application of the

[1] The Federal Circuit refers to a "moderate standard of living" for quantification of tribal water rights in Upper Klamath Lake and the Klamath River. Pet.App.50. Oregon rejected that metric. See https://www.oregon.gov/owrd/programs/WaterRights/Adjudications/KlamathAdj/ KBA_ACFFOD_04947.PDF, 04964.

appropriation doctrine, downstream seniors may take action—a call or bilateral litigation—to curtail the junior so water will be present at the senior's place of use. That did not occur here.

2. The U.S. points to no authority that supports the proposition that any senior water right is self-executing such that its mere existence renders junior uses unlawful. There is no such authority. All water rights are relative to all others, but the mere existence of a senior water right does not exclude others from the use of water. Pet.21. There are three ways to exercise a water right and thereby exclude others from using water out of priority. First, an upstream senior can divert water, in which case the downstream junior has no cause for concern. If the upstream senior does not divert, the junior has an absolute right to the water reaching his or her property. *Ibid*. Second, a downstream senior can pursue injunctive relief in bilateral litigation. Pet.31. Third, if the downstream senior's right was adjudicated, the senior exercises the right by calling the system. Pet.23. If no call has been placed, the junior has an absolute right to divert and use water. Pet.21-22. In each situation where junior use is curtailed, an adjudicatory proceeding, characterized by due process, precedes curtailment. Respondents do not dispute these settled principles.

The U.S. acknowledges that it took none of these courses. Instead, it asserts (at 23) that it did not need to because federal water rights "are not dependent upon state law or state procedures and they need not be adjudicated in state courts." The U.S. argues (at 25)

that the Bureau of Reclamation (Reclamation) had no need or mechanism to place a call on the system before re-allocating Petitioners' water because it was "merely adjusting its own Project operations in conformity with [unspecified] federal law." To the extent this suggests that the "adjustment" had any basis in water law, it is factually and legally incorrect, and violates state law deference that Congress and this Court require. All water rights in any stream system are relative and the western adjudication statutes seek to tabulate the priorities, to achieve finality with dual goals of comprehensiveness and due process. The McCarran Amendment so dictates. Pet.7. Reclamation has no authority to determine or administer water rights, and its operations are expressly subject to applicable state procedures for adjudication and administration of water rights. See Pet.App.510-511.

The U.S. nevertheless contends (at 26) that Petitioners were obliged at trial to prove, 16 years after the fact, the existence or non-existence of potential senior rights in the basin, the location and quantities of such rights, and the location and quantities of all rights junior to Petitioners. That principle would create a new federal common law standard that does not comply with state prior appropriation principles, giving federal rights a *super* status over any other state law prior appropriation principles. There is no federal common law of prior appropriation. Prior appropriation was affirmatively adopted by western territories and states. Robin Kundis Craig, et al., *Water Law: Concepts & Insights*, 57-60 (Foundation Press 2017). Securing a

senior water right only has value in the context of a state appropriation system. *Maritrans Inc.* v. *United States*, 342 F.3d 1344, 1352 (Fed. Cir. 2003) (cited at U.S.Br.inOpp.26), a regulatory takings decision determining ripeness, does not place the burden on a junior user to demonstrate water is available.

Even if federal water rights administration were proper, the administrator must curtail all juniors in reverse order of priority. Pet.4. Here, immediately upon receiving biological opinions (BiOps) from regulatory agencies that provided ESA-based river flows and Upper Klamath Lake elevations, Reclamation adopted those provisions as operational requirements for the Klamath Project alone. Pet.App.24-25. Unlike the necessary approach to priority-based regulation, it did not consider whether there were juniors who must be regulated off before the Project. The action was an ESA regulatory action, and nothing else.

3. While asserting that the federal agencies did *not* determine the existence or scope of tribal rights, the U.S. claims (at 26) that the Court of Federal Claims (CFC) did so, "de novo, without deference to Reclamation's actions" (citing Pet.App.195-227).

Adjudicating a water right to support fish involves determining the source, authorized place and time of use, and quantity. The quantity may be different at different times of year. Quantification involves issues of biology, hydrology, and other disciplines. Those topics will be considered in the KBA regarding tribal claims in Upper Klamath Lake. At the CFC, there was no

expert testimony on fish biology or related topics.[2] Rather, the CFC found the 2001 BiOps' flow and lake levels to be "reasoned and credible" 16 years later, on an entirely different evidentiary record, so water levels were good enough as a surrogate for unadjudicated tribal claims. Pet.App.218.

Even if BiOps implementing the ESA were an appropriate basis to quantify tribal rights, the CFC improperly considered BiOps that were outdated. The 2001 BiOps were in effect for one year only. By the time of trial, there had been at least three subsequent ESA consultations, each with differing consequences for river flows and lake elevations.[3] A water right is fixed; it is not ever-changing like agency staff.

4. The U.S. does not contend that there are federal reserved water rights to water in Upper Klamath Lake that has the legal character of *stored* water. Instead, it asserts (at 27) that Petitioners did not preserve the issue that any California tribes' rights would not include the right to release of stored water. That is not correct.

In western water law, water may have the legal character of "live flow" or "stored" water. The two are legally distinct, and one may have a right to either or

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[2] See Joint Witness List, Doc. 491, Case No. 1:01-cv-00591, *Klamath Irrigation Dist. et al.* v. *United States*, Fed. Cl. (Jan. 5, 2017).

[3] United States Bureau of Reclamation: Final Biological Assessment, Klamath Project, https://www.usbr.gov/mp/kbao/ docs/ klamath-2020-ba.pdf, at 15.

to both. See *Cookinham* v. *Lewis*, 115 P. 342, 343-344 (1911); see also Pet.13. Live flow means the flow rate present without any human interference: the amount naturally passing in a stream or through a lake or reservoir. Pet.8.[4] Because most run-off and snowmelt occurs in winter or early spring, when it is not needed for crops, dams impound water during times of abundant flow, storing it until needed. The stored water may be diverted from the reservoir itself, or may be released to be diverted or used for some other authorized purpose downstream. Thus, there are water rights to divert water to storage, filling up a reservoir, and rights to use the stored water (sometimes called secondary rights), which result in reservoir drawdown. Pet.26-27.

Upper Klamath Lake is a natural lake, but engineers constructed a large concrete dam at its outlet a century ago. Pet.App.16. This resulted in an ability to store water and manage it in a controlled way. As a result, there is approximately six feet of operable storage from the dam that did not exist prior to the dam's construction, amounting to nearly 500,000 acre-feet of water having the legal character of stored water.[5] There was no such source under natural conditions.

The U.S. asserts (at 28) that there was little or no stored water in Upper Klamath Lake when Petitioners' water was re-allocated in 2001. The record shows

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[4] See also Or. Atty. Gen. OP-6423, 1992 Ore. AG LEXIS 32 (explaining how stored water is identified).

[5] https://www.oregon.gov/owrd/programs/WaterRights/Adjudications/KlamathAdj/KBA_ACFFOD_07017.PDF, 07117 (right for storage of 486,828 acre-feet per year).

otherwise. At the beginning of the 2001 irrigation season, Upper Klamath Lake was full, meaning there was nearly 500,000 acre-feet of stored water physically available for irrigation. See C.A.J.A. Appx313-314. That water was re-allocated. It was released to the Klamath River below Iron Gate Dam, artificially increasing the amount of flow above what would have naturally occurred. Pet.12. Petitioners' hydrology expert at trial submitted a report establishing that water stored in Upper Klamath Lake was released in 2001 and but for the release, the water could have been diverted and used by water users in the Klamath Project. See Report of Marc E. Van Camp, at Tr.Ex.PX1040, *Klamath Irrigation Dist. et al.* v. *United States*, No. 1:01-cv-005910-MBH (Fed. Cl. Jan. 21, 2015).

Even if the government has authority under the ESA to require the release of stored water, there is no tribal water right to have Link River Dam operated to release stored water to augment flows. If any such rights ever existed, the failure to claim them in the KBA is fatal to their recognition. Pet.14. Upper Klamath Lake is in Oregon, and one may only divert water to storage for a specific purpose. In the Klamath Project, that authorized purpose is irrigation, both as claimed by the government and as the KBA confirmed. Pet.13. Similarly, the only water right to use stored water is for irrigation. *Ibid.* Thus, a holder of the use right may call to request that the watermaster assert control over the dam to divide the stored water among those entitled. See, e.g., Or. Rev. Stat. § 540.210. There is no right to have the dam operated to augment Klamath

River flow for fish, let alone to the detriment of use right holders. Pet.27.

The U.S. does not dispute any of these principles and the U.S. is not correct in contending that the issue was not preserved. See Pet.App.43 (Federal Circuit discusses argument that any tribal rights do not extend to stored Klamath Project water); Plaintiffs' Posttrial Reply Brief, Doc. 551 at 24-35, *Klamath Irrigation Dist. et al.* v. *United States*, No. 1:01-cv-00591-MBH (Fed. Cl. May 1, 2017) (arguing that any tribal rights do not include the right to water stored for irrigation purposes in Upper Klamath Lake); Opening Brief of Plaintiffs-Appellants, Doc. 27 at 85-86, *Baley, et al.* v. *United States*, No. 18-1323 (Fed. Cir. May 23, 2018).

5. Completing the KBA is not a prerequisite to Petitioners' takings case. The U.S. points to its motion, early in the case, to stay the litigation pending KBA completion. U.S.Br.inOpp.13. The U.S. also offers that since Petitioners' own water rights had not been adjudicated in 2001, perhaps Petitioners' water rights were not proper for takings claims.

A general stream adjudication does not create water rights; it determines relative rights for priority administration. Both Petitioners and the U.S. agree that, as of 2001 and today, there are water rights appurtenant to Petitioners' land. As of 2001, those rights were "undetermined vested" rights that all parties agree existed. *Or., Water Res. Dep't*, 44 F.3d at 764, citing Or. Rev. Stat. § 536.007(11).

The U.S.'s motion to stay was premised largely on the fact that in the KBA there are competing claims to water rights ownership that are appurtenant to Petitioners' land. The U.S. asserted that it could not be known whether Petitioners held any property interest until the state decided whether the U.S. or the irrigation districts' claims to ownership (legal title) of the water rights appurtenant to Petitioners' land would be recognized. This motion was properly denied, as made clear in the Oregon Supreme Court's referral opinion. Pet.App.122-124. As this Court held, "[o]nce these lands were acquired by settlers in the Project, the Government's 'ownership' of the water rights was at most nominal; the beneficial interest in the rights confirmed to the Government resided in the owners of the land within the Project to which these water rights became appurtenant." *Nevada*, 463 U.S. at 126. Oregon law is in accord. Pet.App.355. The Oregon Supreme Court clarified that this beneficial interest is not a matter that must be claimed in the KBA, which determines legal title. Pet.App.375.

Of course, if Petitioners were required to wait, they would still be waiting: the KBA is not completed. If, however, one considers the KBA Adjudicator's order, any water right of the Klamath Tribes is subordinate to the Project's 1905 water right, and cannot be exercised to curtail Petitioners' water use. Pet.13-14.

6. The issues are not stale. The U.S. and Intervenor note that there was serious drought in 2001, and that 2001 was a "unique" occurrence. PCFFA Br.inOpp.23; U.S.Br.inOpp.12. In fact, there were more severe

droughts in the decade before 2001. In those years, Petitioners had sufficient water to meet their needs. Pet.App.108. The only difference between past dry years and 2001 was that in 2001 the ESA re-allocated water formerly used by the Petitioners. Since then, there have been other ESA-induced shortages, mostly to a lesser degree. 2020 is comparable to 2001, with a severe shortage that would not occur but for the ESA. See B. DuVal, Commentary, Irrational Klamath Water Management a Formula for Failure, *The Capital Press* (May 14, 2020).[6]

7. The U.S. points (at 32) to independent grounds that it contends support denial of Petitioners' takings claims. Those issues were never adjudicated below: the Federal Circuit addressed only the tribal water rights issue. Unadjudicated defenses that Petitioners believe are baseless provide no ground on which to deny certiorari to correct the Federal Circuit's gross distortion of western water law, but will be addressed on remand. The question presented concerns the lower courts' upending of the law and state authority that control in

[6] https://www.capitalpress.com/opinion/columns/commentary-irrational-klamath-water-management-a-formula-for-failure/article_5f589f3e-95fc-11ea-9449-835d92f28b02.html.

the western states and their economies and, as numerous *amici* attest, cries out for prompt resolution. The petition should be granted.

Respectfully submitted,

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MAY 2020