No. 23-216

In the Supreme Court of the United States

KLAMATH IRRIGATION DISTRICT,
Petitioner,

v.

UNITED STATES BUREAU OF RECLAMATION; OREGON WATER RESOURCES DEPARTMENT; UNITED STATES DISTRICT COURT FOR THE DISTRICT OF OREGON, MEDFORD,
Respondents,

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

REPLY BRIEF FOR PETITIONER

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I. The government claims it can opt out of a state water adjudication whenever it wishes, by invoking obligations under federal law.

Certiorari is necessary because the ruling below threatens the viability of state court *in rem* jurisdiction over water proceedings. The government, the most important water-rights holder in the Klamath Basin (and the most important water-rights holder in many western water systems) claims certiorari is unnecessary because the ruling below is insignificant. This is based on a recapitulation of its merits argument—namely, that a "state court does not exercise prior exclusive jurisdiction to adjudicate questions concerning [its] responsibilities under the ESA and out-of-state tribal water rights." BIO 17; *see also id.* at 24–25. The government claims the Klamath Adjudication has a "geographical limitation" and that while the adjudication governs rights in Oregon, it does not extend to "the rest of the [Upper Klamath] river system existing within other States." *Id.* at 22.

This strawman argument misses the point of the Petition, misrepresents the underlying dispute, and ignores the nature of the Klamath Adjudication. The federal government is correct that the Klamath Adjudication does not adjudicate water rights in California. But the McCarran Amendment creates an "all-inclusive" regime for adjudicating and administering water rights. *United States v. Dist. Ct. In & For Eagle Cnty., Colo.*, 401 U.S. 520, 524 (1971). The Klamath Adjudication—a McCarran Amendment proceeding—thus *does* encompass all rights to use,

store, or divert water from the Klamath River and Upper Klamath Lake *in Oregon*, including rights necessary to allow diversions of water in Oregon for use in California. This is why, 30 years ago, the Ninth Circuit held that the Klamath Adjudication is a comprehensive McCarran Amendment proceeding, requiring participation from both the United States and the Klamath Tribes. *United States v. State of Or.*, 44 F.3d 758, 768 (9th Cir. 1994). The Klamath Adjudication thus cannot be limited to state-law water rights for Oregon-based users. *See id.*; *see also Eagle County*, 401 U.S. at 525–26 (recognizing federal water rights fall within a "comprehensive" McCarran Act proceeding). Its purpose is to determine *all* state and federal rights in Oregon's Upper Klamath Lake. It cannot perform that task if a federal agency ignores rights determined in the proceeding, claims additional rights based on federal law that were never raised in the proceeding, and exercises those rights to the injury of rights actually determined in the adjudication.

The Klamath Adjudication's comprehensive nature has been a consistent feature over its nearly 50-year history—a feature the federal government itself acknowledged through its own actions. For example, the Fish and Wildlife Service asserted claims in the Klamath Adjudication to protect California fisheries. KBA_ACFFOD_7068 & n.21 (discussing duty determined for Tule Lake Wildlife Refuge in California); BIO 20–21 (acknowledging federal claims for water use in California, including for a wildlife

refuge).[1] Private parties likewise asserted rights in the Klamath Adjudication for the benefit of California farmers. KBA_ACFFOD_7068 (recognizing right for Tule Lake Irrigation District, located in California, which participates in the Klamath Adjudication because it diverts water in Oregon). The notion that the Klamath Adjudication is confined to state-law rights, and only for users in Oregon, is a fiction.

Petitioner is not, as the government claims, attempting to "adjudicate property rights of nonresidents." BIO 20. The Klamath Adjudication determines interests in property *in Oregon*, irrespective of where rights-holders are located. Petitioner seeks to protect its own rights *in Oregon*, against the federal government's actions *in Oregon*, which harm Petitioner's rights. By using stored water in Upper Klamath Lake to augment flows in the Klamath River for endangered species or tribes in California, the government is diverting and using stored water that Petitioner and others have the right to divert and use. Moreover, it is doing so without any use right of its own and without following proper procedures—for example, obtaining a stay of water rights determined in the Klamath Adjudication from the presiding state court, in accordance with ORS

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[1] Indeed, the government conceded the Klamath Adjudication encompasses "numerous significant federal reserved rights and state appropriative rights for a national park, national forests, wilderness areas, wild and scenic rivers, wildlife refuges, Indian reservations, and the Klamath Reclamation Project … in southern Oregon *and northern California*." App. 28–29 n.5 (Baker, J., dissenting).

§ 539.180. The government is usurping the state court's jurisdiction to decide whether water may be used contrary to determinations in the adjudication itself, while judicial review remains pending and jurisdiction remains with the state court.

The question here is whether the federal government has the right to usurp the jurisdiction of the Klamath Adjudication, grant itself rights not recognized in the adjudication, and nullify rights determined for others in the adjudication, simply because the government asserts that its diversions of water in Oregon are necessary to fulfill obligations under federal law that the government did not assert in the adjudication. The McCarran Amendment precludes that practice. Congress enacted the McCarran Amendment to subject the United States to state legal systems that exist "for allocation of water and adjudication of conflicting claims to that resource." *Colo. River Water Conservation Dist. v. United States*, 424 U.S. 800, 804 (1976); *United States v. City of Las Cruces*, 289 F.3d 1170, 1177 (10th Cir. 2002) (McCarran Amendment "make[s] state courts the primary forum for water rights adjudications"); *see also Arizona v. San Carlos Apache Tribe of Ariz.*, 463 U.S. 545, 564 (1983). ("[T]he Amendment was designed to deal with a general problem arising out of the limitations that federal sovereign immunity placed on the ability *of the States* to adjudicate water rights.") (emphasis added).

Petitioner is not disputing the United States' obligations under the ESA or to Native American tribes. But the McCarran Amendment requires the

government to participate in the Klamath Adjudication, makes it a necessary party to that adjudication, and subjects the government "to the judgments, orders, and decrees of the court having jurisdiction" over the adjudication. 43 U.S.C. § 666(a). To the extent the federal government believes that, to satisfy its ESA and tribal obligations, it must use or divert water from the Klamath River and Upper Klamath Lake, the federal government *must* assert any claimed rights to that water in the Klamath Adjudication—either affirmatively or by contesting the rights of others. Otherwise, the adjudication is meaningless.[2] The Reclamation Act ensures States are the primary adjudicators and administrators of water, *California v. United States*, 438 U.S. 645, 650 (1978), and compels the federal government to "appropriate, purchase, or condemn necessary water rights in strict conformity with state law" when implementing water reclamation projects, *id.* at 665; *see* 43 U.S.C. § 383. By arguing the "state court does not exercise prior exclusive jurisdiction to adjudicate questions concerning [the federal government's] responsibilities under the ESA and out-of-state tribal water rights," BIO 17, the government misunderstands the nature of *in rem* proceedings and the doctrine of prior exclusive jurisdiction. That doctrine is not tied to "responsibilities" under

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[2] If the government disagrees with rulings made in the Klamath Adjudication, it "may obtain review thereof … in the same manner and to the same extent as" other participants. 43 U.S.C. § 666(1); *Eagle County*, 401 U.S. at 526 (water rights based on federal obligations "are federal questions which, if preserved, can be reviewed here").

particular bodies of law (for example, the ESA). It is tied to *property*. *Tennessee Student Assistance Corp. v. Hood*, 541 U.S. 440, 448 (2004) (*in rem* proceedings "determine all claims that anyone … has to the property or thing in question").

Thus, all claims and defenses relating to the property must be adjudicated by the court exercising *in rem* jurisdiction over the property. Here, that bedrock principle of law means that if the federal government wishes to injure water rights subject to the Klamath Adjudication—like Petitioner's rights here—it must adhere to the procedures that govern the *in rem* proceeding. Oregon law provides a remedy to address precisely the situation here. The government could seek a stay from the Oregon court that would allow it to release water from the Upper Klamath Lake to fulfill its federal obligations to the detriment of other users, while ensuring that those with competing rights are not left unprotected. Oregon law currently treats the Klamath Adjudication's initial determination of water rights as valid, binding, and enforceable "unless and until its operation shall be stayed by a stay bond." ORS § 539.130(4); *United States v. State of Or.*, 44 F.3d 758, 764 (9th Cir. 1994). The purpose is to ensure "that the party will pay all damages that may accrue by reason of the determination not being enforced." ORS § 539.180.

Rather than complying with state law procedure and water-rights determinations in the Klamath Adjudication, the government simply released water from Upper Klamath Lake, harming Petitioner and other Oregon water users. The government claims,

without citing any authority, that its "obligation to comply with the ESA does not depend upon acquisition of state-law water rights determined by OWRD and pending before the state court." BIO 18. That is precisely the question this Court needs to answer. If the government is correct—and it can sidestep the Klamath Adjudication by pointing to its federal obligations—the adjudication is not "comprehensive" and does not protect the rights of water users subject to it.

The federal government has innumerable obligations that intersect with adjudicated water rights. Virtually every action to hold the federal government to its adjudicated water rights will implicate either the interests of out-of-state parties or the federal government's legal obligations—including its duties under the ESA and responsibilities toward Native American tribes. Under the ruling below, however, general stream adjudications no longer comprehensively determine all state and federal "rights to the use of water" because the federal government can remove virtually any water-rights enforcement proceeding to federal court. In the context of a nearly 50-year adjudication process, the majority below held that federal rights stand outside the adjudication and thus supersede the sovereignty of Oregon to comprehensively determine rights to water in Oregon. The federal government has effectively obtained "super water rights" by failing to assert those rights in an adjudication the government is expressly required to participate in and be bound

by.[3] The Court should grant certiorari to determine whether this grave threat to state water adjudications is correct as a matter of law.

II. The decision below contravenes precedent of this Court and undermines water-rights adjudication in the West.

Although the government does not dispute the *in rem* nature of the Klamath Adjudication, it claims the decision below is correct and the government can avoid participation in the Klamath Adjudication (or any other state water adjudication) based on *Colorado River*. BIO 23–24. According to the federal government, "removal to federal court of a motion for a preliminary injunction filed in state-court McCarran Amendment proceedings seeking relief with respect to out-of-state rights and independent obligations of a federal agency does not conflict" with *Colorado River*. *Id.* at 24. This argument is incorrect and only highlights the need for certiorari.

As an initial matter, the government admits the present case is part of a pending "state-court McCarran Amendment proceeding[ ]." *Id.* This admission is crucial. It means this dispute falls

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[3] Even more problematic, under *Klamath I*, a tribe can obtain dismissal of the removed *federal* action so long as the tribe can claim an interest in an interconnected out-of-state water source. Combined with *Klamath I*, therefore, the ruling below grants tribes and the federal government power to shut down *any* suit seeking to enforce rights granted in an ongoing state water adjudication—rendering those rights unenforceable against the federal government.

squarely within the "federal policy evinced by [the McCarran Amendment]," which is "the avoidance of piecemeal adjudication of water rights in a river system." *Colorado River*, 424 U.S. at 819. The purpose of the McCarran Amendment is to facilitate state water adjudication and administrative proceedings. The inability to administer adjudicated water rights against even one rights holder "materially interfere[s] with the lawful and equitable use of water for beneficial use by the other water users." *Id.* at 811; *see also Eagle Cnty.*, 401 U.S. at 525. That is why this Court, in *Colorado River*, construed the McCarran Amendment to cover reserved tribal water rights in the first place. 424 U.S. at 810–11, 819. *Colorado River* makes clear that the circumstances here—where the federal government attempted to create ancillary federal litigation involving the same rights subject to ongoing adjudication in state court—directly harm the policy embodied by the McCarran Amendment.

The problem is, while the decision below conflicts with *Colorado River*, neither that case—nor any other decision of this Court—directly addresses the gambit the federal government has employed here. In *Colorado River*, the Court dismissed a *new, separate* proceeding the federal government initiated that attempted to undermine an ongoing state water proceeding. 424 U.S. at 803. Here, in contrast, the federal government seeks to cleave off a motion filed *within the scope of* an ongoing state adjudication by removing that motion to federal court. The government cites no case allowing it to avoid the state court's jurisdiction through this gambit. The notion that *Colorado River* resolves the present dispute, as

the government claims, is therefore incorrect. Indeed, at the heart of the question presented is whether *Colorado River* can be read to extend as far as the federal government claims.

Congress enacted the McCarran Amendment to subject the United States to the *state* legal systems that exist "for allocation of water and adjudication of conflicting claims to that resource." *Colo. River*, 424 U.S. at 804. While the McCarran Amendment does not preclude federal courts from hearing cases involving water rights, it "bespeaks a policy that recognizes the availability of comprehensive state systems for adjudication of water rights as the means for achieving these goals." *Id.* at 809, 819. It also "articulates the policy of the federal government to make state courts the primary forum for water rights adjudications." *City of Las Cruces*, 289 F.3d at 1177; *see also Arizona*, 463 U.S. at 564. Thus, once the federal government is a party to a state adjudication, as here, it "waive[s] any right to plead that the State laws are inapplicable or that the United States is not amenable thereto by reason of its sovereignty, and shall be subject to the judgment, orders, and decrees of the court having jurisdiction." 43 U.S.C. § 666.

The government does not dispute that *Colorado River* endorsed prior exclusive jurisdiction, but it claims it is "incorrect" to assume the doctrine prevents the government from removing a portion of a state *in rem* water adjudication to a new proceeding in federal court. But this Court expressly recognized that the doctrine of prior exclusive jurisdiction applies to state water adjudications. *Colo. River*, 424 U.S. at 818. The

Court did not do so lightly; the doctrine was the key reason the Court dismissed a federal lawsuit filed by the government seeking to avoid state adjudication of federal water rights. *Id.* at 818–19.

Despite the centrality of prior exclusive jurisdiction to *Colorado River*, the Ninth Circuit casually held that "[t]he doctrine of prior exclusive jurisdiction does not apply here." App. 14. The federal government agrees. BIO at 23. Yet prior exclusive jurisdiction is a bedrock doctrine of property law. *See Princess Lida of Thurn & Taxis v. Thompson*, 305 U.S. 456, 466 (1939); *Kline v. Burke Constr. Co.*, 260 U.S. 226, 229 (1922); *Palmer v. Texas*, 212 U.S. 118, 129 (1909) (citing cases as early as 1849). It prevents exactly what the federal government seeks to accomplish here—"the generation of additional litigation through permitting inconsistent dispositions of property," a "concern [that] is heightened with respect to water rights" whose relationships "are highly interdependent." *Colo. River*, 424 U.S. at 819. Certiorari is necessary to determine whether the government is correct that the doctrine simply does not apply to a pending "state-court McCarran Amendment proceeding." BIO at 23–24.

III. The government's vehicle arguments are meritless.

The government asserts that "this case would not be a suitable vehicle for the Court's review," focusing on the fact that this is a mandamus proceeding. BIO at 26–29. These arguments are incorrect, as the dissent below explained in detail. App. 49–51.

The government's assertion that the Petition does not present "the merits of [the Ninth Circuit's] decision declining to remand to state court" is transparently inaccurate. The Ninth Circuit itself acknowledged its holding on prior exclusive jurisdiction was dispositive. *See* App. 8, 22. Indeed, the majority of the decision below is devoted to addressing that issue; the majority reserved just a few paragraphs of its analysis to the other mandamus factors. App. 22–23. Moreover, this case is a textbook example of mandamus to review of an erroneous lower court decision. *See* C. Wright & A. Miller, *Traditional Views of Discretion—Jurisdiction*, 16 Fed. Prac. & Proc. Juris. § 3933.1 (3d ed.). A central function of mandamus is "to confine an inferior court to a lawful exercise of its prescribed jurisdiction." *Roche v. Evaporated Milk Ass'n*, 319 U.S. 21, 26 (1943).

Nor is the Ninth Circuit's cursory conclusion that Petitioner "has 'other adequate means' to attain its desired relief" a barrier to certiorari. App. 22; BIO 27. Being forced to litigate in the wrong forum is not another "adequate means" to address the jurisdictional question presented by the Petition. This is particularly true here. Petitioner's members—who now face severe hardship and bankruptcy, Pet. 12–13—have been consistently denied rights adjudicated to them in state court, the forum guaranteed to them by the McCarran Amendment. The question here is whether Petitioner can be forced out of the ongoing Klamath Adjudication and into a federal forum. If, as Petitioner contends, the government has no removal right, mandamus must be granted "as a matter of

course." *E.g.*, *In re Hot-Hed Inc.*, 477 F.3d 320, 323 (5th Cir. 2007).

CONCLUSION

The Court should grant certiorari.

Respectfully submitted,

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