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UNITED STATES DISTRICT COURT
DISTRICT OF OREGON
MEDFORD DIVISION

KLAMATH IRRIGATION DISTRICT,

Movant,

v.

UNITED STATES BUREAU OF RECLAMATION,

Respondent.

Case No.: 1:21-cv-00504-AA

UNITED STATES OF AMERICA'S RESPONSE IN OPPOSITION TO MOTION TO REMAND MOTION FOR PRELIMINARY INJUNCTION TO STATE COURT

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The United States Bureau of Reclamation ("Reclamation") hereby submits its Response in Opposition to the Klamath Irrigation District's ("KID") Amended Motion to Remand Motion for Preliminary Injunction to State Court (ECF No. 19) ("Remand Motion"). The Remand Motion requests the remand of KID's motion for preliminary injunction ("PI Motion") (ECF No. 1-1), originally filed in state court but removed to federal court, back to state court for consideration as part of the Klamath Basin Adjudication ("KBA"), which KID alleges has "prior exclusive jurisdiction" over the issues presented. *See*, *e.g*., ECF No. 19 at 6-7. Because the federal law issues presented by the PI Motion are beyond the jurisdiction of the state court, KID's assertions of "prior exclusive jurisdiction" fail, and remand should be denied.

MEMORANDUM OF POINTS AND AUTHORITIES

INTRODUCTION

Reclamation operates the Klamath Project to deliver water from Upper Klamath Lake ("UKL") and its tributaries to Project water users for the irrigation of approximately 200,000 acres in southern Oregon and northern California. Water rights for the Project, including a right for the storage of water in UKL held by Reclamation, were acquired in conformance with the requirements of state law. Those water rights, as well as federal reserved water rights held for the Klamath Tribes for instream fisheries purposes in UKL and tributaries above the lake in Oregon, are subject to the jurisdiction of the KBA, a comprehensive, general stream adjudication in Oregon state court. The KBA is in the process of determining the existence, priority, and elements of competing water rights claims in the portion of the Klamath Basin located in Oregon. The elements of the water rights include the purposes of use, places of use, points of diversion, priority dates, and the amounts of water that may be diverted, stored, or otherwise beneficially used when water is physically and legally available.

Reclamation also operates the Klamath Project in accordance with the requirements of the Endangered Species Act ("ESA"), 16 U.S.C. §§ 1531-1544, federal contracts, and senior downstream federal tribal reserved water rights of the Yurok and Hoopa Valley Tribes in California. The ESA applies to the Project by virtue of: (1) two species of "endangered" suckers that inhabit UKL, which has been designated as critical habitat for the suckers; (2) "threatened" Southern Oregon/North California Coast ("SONCC") coho salmon that inhabit the Klamath River downstream of the Project, which has been designated as critical habitat for the coho; and (3) "endangered" killer whales that inhabit the Pacific Ocean and rely on Chinook salmon, which are not listed under the ESA but inhabit the Klamath River downstream of the Project and are the killer whales' primary prey species. Biological opinions on Project operations issued by the U.S. Fish and Wildlife Service and National Marine Fisheries Service have determined that certain water levels in UKL are necessary to avoid jeopardy to listed suckers and adverse modification of their critical habitat and that certain flows in the Klamath River downstream of the Project are necessary to avoid jeopardy to SONCC coho and adverse modification of its critical habitat.

The federal contracts between Reclamation and the Project water users specify the terms upon which water is to be delivered to Project contractors in the exercise of the water rights held for the Project. The senior reserved rights of the Yurok and Hoopa Valley Tribes for instream fisheries purposes are senior to the Project's water rights and, although not yet determined in an adjudication in California, "[a]t the bare minimum" require the amount of water determined necessary under the ESA to avoid jeopardy to listed salmon. *Baley v. United States*, 942 F.3d 1312, 1337 (Fed. Cir. 2019), *cert. denied*, 141 S. Ct. 133 (2020); *see also Klamath Water Users Protective Ass'n v. Patterson*, 204 F.3d 1206, 1213 (9th Cir. 1999), *amended on other grounds on denial of reh'g,* 203 F.3d 1175 (9th Cir. 2000). Operations in accordance with these

requirements of federal law—the ESA, the Project contracts, and the downstream tribal reserved rights of the Yurok and Hoopa Valley Tribes in California—are not subject to the jurisdiction of the KBA.

Against this backdrop, KID, a Klamath Project contractor, has moved for a preliminary injunction in the KBA. The PI Motion seeks to enjoin Reclamation from releasing any water deemed to be "stored" in UKL under the Project's storage water right held by Reclamation, except to satisfy the irrigation demands of the Project's water users under the Project's state-law based water rights held for beneficial use. If granted, the PI Motion would preclude Reclamation from releasing any stored water from UKL to meet its ESA compliance obligations or based upon the senior downstream federal reserved water rights of the Yurok and Hoopa Valley Tribes. The United States duly removed the PI Motion to this Court in accordance with 28 U.S.C. § 1442(a)(1) and subsequently filed an opposition to the PI Motion asserting, among other defenses, that the issues of federal law raised by the motion are outside the jurisdiction of the KBA. *See* Defs.' Mem. in Opp'n to Mot. for Prelim. Inj., ECF No. 9 at 17-23.[1]

On April 22, KID moved to remand the PI Motion back to state court based on its sole assertion that, not only does the KBA have jurisdiction over these issues of federal law, but that it has "prior exclusive jurisdiction" over their resolution. The Remand Motion raises a single issue—does the KBA state court have prior exclusive jurisdiction over the issues raised by the PI Motion? If it does, remand may be granted; if it does not, remand must be denied. Here, the jurisdiction of the state court over the United States in the KBA is based on the McCarran Amendment ("McCarran"), 43 U.S.C. § 666(a). McCarran waives the United States' sovereign

[1] Citations herein to documents filed on the Court's ECF system will refer to the ECF pagination in the top margin of the cited document rather than to a document's internal pagination.

immunity for the limited purposes of allowing its joinder to comprehensive general stream adjudications, such as the KBA, to adjudicate competing water rights claims within a river basin of a state and the subsequent administration of such water rights once determined. Because the PI Motion implicates a number of significant issues of federal law that are outside the waiver of sovereign immunity under McCarran, the state court lacks jurisdiction, and the sole basis for the Remand Motion fails. The KBA simply does not have exclusive jurisdiction over all issues of federal law relating to the operation of the Klamath Project consistent with Reclamation's ESA obligations, Project contracts, and the senior downstream reserved rights of the California tribes in California. Remand must be denied.

LEGAL BACKGROUND

I. KID has the burden of establishing the subject matter jurisdiction of the state court and a waiver of the United States' sovereign immunity.

As a sovereign, the United States may only be sued when it has consented to suit. *United States v. Bormes*, 568 U.S. 6, 9 (2012) (citation omitted); *United States v. Navajo Nation*, 537 U.S. 488, 502 (2003); *Dep't of Army v. Blue Fox, Inc.*, 525 U.S. 255, 260 (1999). "It is axiomatic that the United States may not be sued without its consent and that the existence of consent is a prerequisite for jurisdiction." *Navajo Nation*, 537 U.S. at 502 (quoting *United States v. Mitchell*, 463 U.S. 206, 212 (1983)). "Absent a waiver, sovereign immunity shields the Federal Government and its agencies from suit." *Fed. Deposit Ins. Corp. v. Meyer*, 510 U.S. 471, 475 (1994). "Sovereign immunity is jurisdictional in nature . . . [and] the 'terms of [the United States'] consent to be sued in any court define that court's jurisdiction to entertain the suit.'" *Id.* (third alteration in original) (quoting *United States v. Sherwood,* 312 U.S. 584, 586 (1941)).

The terms of any waiver of federal sovereign immunity are for Congress to determine. *See United States v. Shaw*, 309 U.S. 495, 503 (1940). The United States Supreme Court has

frequently held that waivers of sovereign immunity must be strictly construed in the government's favor, and must be unequivocally expressed in statutory text. *Fed. Aviation Admin. v. Cooper*, 566 U.S. 284, 290 (2012); *Orff v. United States*, 545 U.S. 595, 601-02 (2005); *Blue Fox*, 525 U.S. at 261 (citation omitted) (citing cases). A waiver of sovereign immunity cannot be implied. *Lane v. Pena*, 518 U.S. 187, 192 (1996); *Munns v. Kerry*, 782 F.3d 402, 412-13 (9th Cir. 2015).

When subject matter jurisdiction is challenged, the party bringing the action has the burden of proving jurisdiction, *Thornhill Publ'g Co. v. Gen. Tel. & Elec. Corp.*, 594 F.2d 730, 733 (9th Cir. 1979), and establishing that a specific waiver of sovereign immunity exists. *United States v. Park Place Assocs., Ltd.*, 563 F.3d 907, 924 (9th Cir. 2009). Thus, "[j]urisdiction over any suit against the Government requires a clear statement from the United States waiving sovereign immunity . . . , together with a claim falling within the terms of the waiver." *United States v. White Mountain Apache Tribe*, 537 U.S. 465, 472 (2003) (citations omitted); *see also Navajo Nation v. Dep't of the Interior*, 876 F.3d 1144, 1167-68 (9th Cir. 2017) ("As the contours of any such waiver define a court's authority to entertain a suit against the government . . ., each claim against the government must rest upon an applicable waiver of immunity." (citation omitted)).

Moreover, "[i]t is unquestioned that the Federal Government retains its . . . immunity from suit . . . in state tribunals . . . ," absent a waiver of sovereign immunity. *Alden v. Maine*, 527 U.S. 706, 749 (1999). The courts have held that the Supremacy Clause of the United States Constitution is violated where state courts attempt to exercise jurisdiction over federal agencies or employees. *See United States v. City of Arcata*, 629 F.3d 986, 991 (9th Cir. 2010) (citing *Blackburn v. United States*, 100 F.3d 1426 (9th Cir. 1996)).

II. The McCarran Amendment waives the United States' sovereign immunity for the limited purposes of joinder to the determination of competing water rights claims in comprehensive general stream adjudications within a state and the subsequent administration of such water rights once determined.

The McCarran Amendment provides in pertinent part:

> (a) Consent is given to join the United States as a defendant in any suit (1) for the adjudication of rights to the use of water of a river system or other source, or (2) for the administration of such rights, where it appears that the United States is the owner of or is in the process of acquiring water rights by appropriation under State law, by purchase, by exchange, or otherwise, and the United States is a necessary party to such suit. The United States, when a party to any such suit, shall (1) be deemed to have waived any right to plead that the State laws are inapplicable or that the United States is not amenable thereto by reason of its sovereignty, and (2) shall be subject to the judgments, orders, and decrees of the court having jurisdiction, and may obtain review thereof, in the same manner and to the same extent as a private individual under like circumstances: *Provided,* That no judgment for costs shall be entered against the United States in any such suit.

43 U.S.C. § 666(a).

By these terms, the waiver of sovereign immunity under the statute applies for the limited purpose of allowing the joinder of the United States to comprehensive general stream adjudications for the determination of competing water rights claims within a river system in a state and the subsequent administration of the rights determined in the adjudication. *See United States v. District Court In and For the County of Eagle and State of Colorado*, 401 U.S. 520, 524 (1971); *Dugan v. Rank*, 372 U.S. 609, 618 (1963); *Metro. Water Dist. of S. Cal. v. United States*, 830 F.2d 139, 144 (9th Cir. 1987) (per curiam) ("The McCarran Amendment, however, does not authorize private suits to decide priorities between the United States and particular claimants, only suits to adjudicate the rights of all claimants on a stream."), *aff'd sub nom.*, *California v. United States*, 490 U.S. 920 (1989) (per curiam), and *abrogated in irrelevant part by Match-E-Be-Nash-She-Wish Band of Pottawatomi Indians v. Patchak*, 567 U.S. 209 (2012); *Baley*, 942 F.3d at 1341 ("Moreover, states have the ability to adjudicate rights in a water or river system

within their jurisdiction*, but they cannot adjudicate water rights in another state*. *United States v. Dist. Court for Eagle County, Colo.*, 401 U.S. 520, 523, 91 S. Ct. 998, 28 L.Ed.2d 278 (1971) ('No suit by any State could possibly encompass all of the water rights in the entire Colorado River which runs through or touches many states. The "river system" must be read as embracing one within the particular State's jurisdiction.')." (emphasis added)); *S. Delta Water Agency v. U.S. Dep't of Interior, Bureau of Reclamation*, 767 F.2d 531, 541 (9th Cir. 1985) ("Congress intended a waiver of immunity under subsection (2) only after a general stream determination under subsection (1) has been made. . . .").

ARGUMENT

The United States removed the PI Motion from the Klamath County Circuit Court, which is presiding over the adjudication of competing water rights claims in the KBA. Removal was proper because the PI Motion qualifies as a "civil action" directed against an "agency" of the United States, Reclamation, within the terms of 28 U.S. C. § 1442(a)(1). *See* Notice of Removal, ECF No. 1 at 4-5. Further, the United States has "colorable" federal defenses to the PI Motion, as it must in order to properly remove an action under this statute. *See Mesa v. California*, 489 U.S. 121, 129 (1989) ("[F]ederal officer removal must be predicated on the allegation of a colorable federal defense."). These defenses include, among other grounds, that the PI Motion raises issues of federal law that are beyond the waiver of sovereign immunity under McCarran, pursuant to which the United States was joined to the KBA. *See* ECF No. 9 at 17-23. This defense qualifies as a "colorable federal immunity defense" supporting removal under Section 1442(a)(1) and dismissal of a claim against the United States rather than remand. *Fent v. Okla. Water Res. Bd.*, 235 F.3d 553, 555-57 (10th Cir. 2000) (citation omitted).

Notwithstanding the limitations on the waiver of sovereign immunity under McCarran, KID moves to remand the PI Motion back to state court. KID does not dispute that the United States satisfies the criteria for removal under 28 U.S.C. § 1442(a)(1)—or even mention the federal statutes governing removal in its Remand Motion. Rather, KID contends that the KBA court has "prior exclusive jurisdiction" over the matters raised by the PI Motion. *See*, *e.g.*, ECF No. 19 at 6-7. But this argument fails because the issues of federal law raised by the PI Motion—including issues concerning the interplay between KID's state-law based water rights and the ESA, its contracts with Reclamation, and whether Reclamation may release "stored water" from UKL consistent with senior downstream tribal reserved rights in California—are far outside McCarran's waiver of sovereign immunity. Therefore, not only does the state court not have "prior exclusive jurisdiction," it altogether lacks jurisdiction. Remand should be denied.

I. KID has failed in its burden of establishing the prior exclusive jurisdiction of the state court in the KBA.

KID has not carried its burden of establishing that the state court in the KBA has "prior exclusive jurisdiction" over the issues of federal law raised by the PI Motion. McCarran's narrow waiver of sovereign immunity does not apply to any and all disputes involving the waters of a particular stream system, but is limited to the adjudication and subsequent administration of water rights in comprehensive general stream adjudications within a state. This waiver has no applicability to lawsuits seeking declaratory and injunctive relief on complex questions of federal law concerning how a federal reclamation project must be operated in order to comply with the requirements of a federal environmental statute, such as the ESA, and be consistent with senior downstream tribal reserved rights in another state. *See*, *e.g.*, *State of Nevada ex rel. Shamberger v. United States*, 279 F.2d 699, 701 (9th Cir. 1960) (suit "brought by the state against the United States to secure a decree establishing that the underground waters are the property of the State of

Nevada, subject to the right of appropriation by the United States upon compliance with the laws of the state[,]" held not to be a general stream adjudication); *Miller v. Jennings*, 243 F.2d 157, 159 (5th Cir. 1957) ("The United States has not given its consent to be joined as a defendant in every suit involving water rights. It may be made a party only in suits 'for the adjudication of rights to the use of water of a river system or other source.'" (quoting 43 U.S.C. § 666(a))); *San Luis Obispo Coastkeeper v. U.S. Dep't of the Interior*, 394 F. Supp. 3d 984, 995 (N.D. Cal. 2019), *aff'd*, 827 F. App'x 744 (9th Cir. 2020).

Here, this action is just such an improper suit that exceeds the waiver under McCarran. The PI Motion turns on such issues of federal law as the discretion held by Reclamation in its Project operations, the degree to which that discretion is sufficient to trigger the requirements of ESA Section 7, whether federal law requires Reclamation to purchase or condemn water when needed to meet ESA obligations, and whether Reclamation may release water deemed to be in storage from UKL consistent with senior tribal reserved rights in California. *See* ECF No. 9 at 20 (citing PI Mot. at 3, 20-23). For instance, KID contends "the ESA does not entitle Reclamation to use stored water in UKL reservoir without a water right; rather it creates an obligation that Reclamation use its discretionary powers to avoid jeopardy to endangered species." PI Mot. at 23. A ruling on Reclamation's discretion in Project operations and whether the ESA requires Reclamation to release water from UKL to avoid jeopardy to SONCC coho and killer whales would require a determination of issues of federal law that are far outside the waiver of sovereign immunity under McCarran; indeed, these questions implicate much more than the adjudication and administration of Oregon water rights in the Klamath Basin.

Likewise, as the Oregon Water Resources Department ("OWRD") correctly recognizes in its response to the PI Motion (ECF No. 11 at 6-9), the motion raises issues of federal contract

law that are also beyond the jurisdiction of the state court in the KBA. OWRD is the Oregon state agency that: (1) presided over the administrative phase of the KBA; (2) issued the Amended and Corrected Findings of Fact and Order of Determination ("ACFFOD") that KID now purportedly seeks to enforce; and (3) is responsible for the administration of Oregon water rights, including those determined in the ACCFOD. Although OWRD agrees that "KID may divert and use water for the identified purposes and in the authorized locations described" up to the amount described in the ACFFOD under the use right held by the water users, OWRD also recognizes that this right "does not relieve KID of any obligations from other sources of law such as federal law or contracts." ECF No. 11 at 5. In other words, the ACFFOD sets a maximum amount that KID may divert under the Project's state-law based water right, but it does not require such diversion, nor does it determine whether KID's diversion is permitted under federal law, including under KID's contracts with Reclamation. As OWRD further explains:

> The ACFFOD does not set a mandatory maximum right that must be achieved nor provide a guarantee that any water at all will, in fact, be available for storage or for use. The determined claims may not guarantee that sufficient precipitation will fill Upper Klamath Lake to support the maximum specified rate or duty, nor do the determined claims govern or instruct the contractual relationship between the Bureau and KID. *To the extent the PI Motion depends on the argument that state-recognized rights must take precedence over federal obligations in an enforcement context, such issues have been reviewed by federal courts before and are not appropriately reviewed by the adjudication court as part of its general stream adjudication*.

Id. at 8 (emphasis added). Accordingly, the ACFFOD does not control the issues of contract and other federal law raised by the PI Motion, and those issues are not appropriately the subject of the KBA.

At a minimum, the presence of these issues of federal law in this lawsuit requires an initial, threshold determination of whether these issues fall outside the waiver of McCarran. This determination should be made in federal, not state, court. One of the primary purposes of

removal under 28 U.S.C. § 1442(a)(1) is to allow federal defenses, such as sovereign immunity, to be tried in federal court. *See Jefferson Cnty., Ala. v. Acker*, 527 U.S. 423, 431 (1999); *Willingham v. Morgan,* 395 U.S. 402, 409 (1969), *abrogated on other grounds by Osborn v. Haley,* 549 U.S. 225 (2007). As explained in *City of Jacksonville v. Department of Navy*, 348 F.3d 1307 (11th Cir. 2003):

> With regard to the merits of this case, the Navy has claimed the defense of sovereign immunity, and thus it is exactly the type of action that Congress intended to be resolved in federal court. In enacting the 1996 amendments to § 1442(a)(1), Congress recognized that "federal agencies have had to defend themselves in state court, despite important and complex federal issues such as preemption and sovereign immunity." H.R.Rep. No. 104–798, at 20 (1996). Congress' purpose was clearly to provide a federal forum for the sovereign immunity issue at the heart of this case. *See* S.Rep. No. 104–366, at 30–31 (1996), *reprinted in* 1996 U.S.C.C.A.N. 4202, 4210–11 ("This section fulfills Congress' intent that questions concerning the ... scope of Federal immunity ... be adjudicated in Federal Court.").

Id. at 1310-11 (alterations in original). Remand here would entirely defeat this objective.

Nor can KID credibly contend that the state court is the sole arbiter of the scope of the waiver under McCarran. As evidenced by the litigation in *United States v. Oregon*, 44 F.3d 758 (9th Cir. 1994), the federal courts have jurisdiction to consider what type of state court litigation qualifies as a comprehensive, general stream adjudication allowing the United States' joinder pursuant to McCarran. If KID were correct, only the KBA state court would have jurisdiction to address such issues, and the exercise of jurisdiction by the Ninth Circuit would be a nullity. This is plainly not the case, as KID acknowledges through its repeated reliance upon *United States v. Oregon*. *See* Remand Mot. at 8, 13-14, 16. In fact, the Tenth Circuit in *Fent* expressly held that this threshold question of sovereign immunity under McCarran provided the "requisite federal defense" under 28 U.S.C. § 1442(a)(1) that allowed the removal of a claim pled against the United States and the basis for dismissing that claim rather than remanding it back to state court.

Fent, 235 F.3d at 555, 556-57. KID's prior exclusive jurisdiction argument cannot be reconciled with this precedent.

Finally, Reclamation need not prove at this point that federal sovereign immunity bars the state court action. For purposes of removal, only a "colorable" defense under federal law need be alleged, *Mesa*, 489 U.S. at 129, and the existence of such a defense is construed generously in favor of the removing party. *See Durham v. Lockheed Martin Corp.*, 445 F.3d 1247, 1252 (9th Cir. 2006) (statute to be "liberally construed to give full effect to the purposes for which [it was] enacted" (quoting *Colorado v. Symes*, 286 U.S. 510, 517 (1932)). The Supreme Court has specifically "rejected a 'narrow, grudging interpretation' of the statute, recognizing that 'one of the most important reasons for removal is to have the validity of the defense of official immunity tried in a federal court.'" *Jefferson Cnty.*, 527 U.S. at 431 (quoting *Willingham v. Morgan,* 395 U.S. at 407). Reclamation's sovereign immunity defense under McCarran readily meets this generous standard for asserting a colorable federal defense and defeating remand.[2]

KID itself previously recognized the futility of the Remand Motion in the objections it filed to the magistrate's recommendation of dismissal of its prior case filed against Reclamation in *Klamath Irrigation District v. U.S. Bureau of Reclamation*, 489 F. Supp. 3d 1168 (D. Or. 2020), *appeal filed,* No. 20-36009 (9th Cir. Nov. 19, 2020) and *appeal filed sub nom. Shasta View Irrigation Dist. v. United States,* No. 20-36020 (9th Cir. Nov. 24, 2020). In that case, as here, KID challenged Reclamation's limitation of water diversions by Project water users and its alleged use of water in UKL for instream flow purposes (both in UKL and downstream of the

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[2] If the Court eventually decides that federal sovereign immunity has not been waived, the proper course is dismissal of the complaint. *See Fent*, 235 F.3d at 556-57; *Cox v. U.S. Dep't of Agric.*, 800 F.3d 1031 (9th Cir. 2015) (per curiam) (where state court lacks jurisdiction based on federal sovereign immunity, remand improper and petition should be dismissed); *San Luis Obispo Coastkeeper*, 394 F. Supp. 3d at 993-95.

Project in the Klamath River) in connection with ESA requirements and senior reserved water rights held for the Tribes. *Id.* at 1177-78. On the motions of the Hoopa Valley Tribe and the Klamath Tribes, Magistrate Clarke recommended dismissal of that lawsuit for failure to join those Tribes as necessary and indispensable parties. *Id*. at 1176-84. In its objections to the recommendation of dismissal, KID recognized that a motion filed in the KBA seeking to raise these same issues would inevitably be removed and subsequently dismissed under McCarran:

> If KID is foreclosed from pursuing this suit in this forum, the only possible avenue left is to bring state court litigation in Oregon against Reclamation to attempt to enforce the ACFFOD. *Bringing a lawsuit in state court against Reclamation and its officers would almost certainly be a fruitless endeavor. Reclamation and its officers can always remove a suit brought in state court back to federal court*. *See* 28 U.S.C. § 1442(a)(1); *Willingham v. Morgan*, 395 U.S. 402, 406 (1969) ("[T]he right of removal under § 1442(a)(1) is made absolute whenever a suit in a state court is for any act 'under color' of federal office, regardless of whether the suit could originally have been brought in a federal court. Federal jurisdiction rests on a 'federal interest in the matter.'") (quoting *Poss v. Lieberman*, 299 F.2d 358, 359 (2d Cir. 1962)). Once back in federal court, the Tribes could once again seek to intervene for the limited purpose of seeking dismissal for inability to join them as parties, much as the court is now facing. This cycle exacerbates the dilemma the McCarran Amendment was intended to solve and utterly neuters its efficacy.

Objections to Findings & Recommendations of Magistrate Judge Recommending Granting Motions to Dismiss at 32, *Klamath Irrigation District v. U.S. Bureau of Reclamation,* No. 1:19-cv-00451-CL (D. Or. June 29, 2020), ECF No. 93 (emphasis added). The Remand Motion is squarely at odds with KID's previous acknowledgment of the futility of filing such a motion and should be denied.[3]

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[3] The Remand Motion also conflicts with KID's state court lawsuit filed in Marion County Circuit Court against OWRD in which it seeks to compel OWRD to prevent Reclamation from releasing water from storage for any purposes other than satisfaction of the Project's water rights, as determined in the ACFFOD. KID's present contention that the Klamath County Circuit Court has exclusive jurisdiction in the KBA over the administration of the water rights determined in the ACFFOD—as well as all ancillary issues—cannot be reconciled with KID's filing of its lawsuit against OWRD in a different court.

II. The KBA state court does not have exclusive jurisdiction over all issues concerning the waters of the Klamath River or Reclamation's operation of the Project in conformance with the requirements of federal law.

KID nonetheless now contends that the state court has "prior exclusive jurisdiction" over the issues raised by the PI Motion based on its theory that the KBA is an *in rem* action that necessarily divests all other courts of jurisdiction over the waters of the Klamath River. *See*, *e.g*., Remand Mot. at 6-7. KID's basic argument is that, because the KBA is an *in rem* action involving water rights, the KBA court has jurisdiction over all ancillary issues that may in any manner relate or pertain to the use of water, or operation of federal facilities affecting such use, in the Klamath Basin. *See*, *e.g*., *id*. at 18 ("Whether or not Reclamation is violating the terms of the ACFFOD by releasing stored water for its own purposes—whether to satisfy tribal trust rights or its own obligations under the ESA—inherently involves a decision that will invade the *res* currently being considered by the Klamath County Circuit Court.").

In support of this argument, KID cites *State Eng'r of State of Nevada v. S. Fork Band of Te-Moak Tribe of W. Shoshone Indians of Nevada*, 339 F.3d 804 (9th Cir. 2003), Remand Mot. at 18-19, in which the Ninth Circuit remanded a general stream adjudication removed by the United States back to state court. In considering the propriety of remand, the Court described the doctrine of prior exclusive jurisdiction as follows:

> The most obvious jurisdictional hurdle is the "ancient and oft-repeated ... doctrine of prior exclusive jurisdiction—that when a court of competent jurisdiction has obtained possession, custody, or control of particular property, that possession may not be disturbed by any other court." 14 Charles Alan Wright, Arthur R. Miller, Edward H. Cooper, *Federal Practice and Procedure* § 3631, at 8 (3d ed.1998).

State Eng'r, 339 F.3d at 809 (alteration in original). The Court ultimately determined that remand was proper because the state court had acquired prior exclusive jurisdiction over both the determination of water rights in the adjudication and their subsequent administration under

McCarran, and the federal court could not divest the state court of its prior jurisdiction over the subject water rights. *Id*. at 810-14.

The present case is wholly distinguishable from *State Engineer*. Whereas *State Engineer* involved an action for the "administration" of water rights previously-adjudicated under McCarran, the PI Motion raises issues of federal law concerning the interplay between the ESA and state-law based water rights, downstream tribal reserved water rights in another state, and the interpretation of federal contracts. In other words, KID seeks to litigate the supremacy of state-law based water rights relative to federal interests that are well beyond the rights at issue in the KBA. These issues are not in the nature of a dispute between Oregon water right holders over the enforcement of their rights under the ACFFOD; in fact, these issues are not addressed by the ACFFOD at all.[4] The Court should reject KID's attempts to use the term "*res*" to expand the jurisdiction of the KBA to encompass all state and federal law issues relating to the operation of the Klamath Project consistent with Reclamation's ESA obligations, Project contracts, and the senior downstream reserved rights of the California tribes. Consideration of these issues would in no way disturb the state court's jurisdiction over the "*res*" that is the subject of the KBA.

The simple fact is that the mere filing of the PI Motion in the KBA does not mean that it raises issues that can be properly considered in a general stream adjudication. As the district court explained in *San Luis Obispo Coastkeeper*, 394 F. Supp. 3d at 995, a general stream

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[4] The ACFFOD specifically disclaims authority over contract disputes between the United States and Project water users. *See* Corrected Partial Order of Determination (OAH Case 003) at KBA_ACFFOD_07085-86, excerpts attached as Ex. 1 (stating that the ACFFOD does not determine "the relative rights of the KPWU entities and the United States to control or operate diversion and distribution works, including headgates, pumps, canals and other structures . . . and does not alter in any way the relative rights of the United States and the irrigation entities to control or operate the irrigation works.").

adjudication's jurisdiction does not encompass all issues that may in any way relate or pertain to the waters of a particular basin that are being considered in the adjudication:

> In sum, the purpose of the McCarran Amendment is not to waive sovereign immunity whenever litigation may incidentally relate to water rights administered by the United States. It is for determining substantive water rights by giving courts the ability to enforce those determinations and to permit joinder of the United States where necessary to effectively adjudicate competing claims thereto.

Based on this rule, the court determined that petitioners' attempted joinder of Reclamation to the case—which sought to enforce compliance with minimum streamflow requirements under state law rather than to adjudicate or administer water rights—fell outside the limited waiver under McCarran. The court accordingly dismissed Reclamation as a defendant on the grounds that petitioners sought "to enforce state environmental laws requiring sufficient flows of water for Steelhead, not to administer adjudicated water rights in the ground water litigation." *Id.*

So, too, here, the Court should reject KID's attempts to characterize its action as solely implicating the adjudication or administration of water rights determined in the KBA when, in fact, the PI Motion goes far beyond that. Again, the PI Motion raises complex issues of federal law concerning the ESA's requirements, senior downstream tribal reserved rights in California, and federal contracts between Reclamation and the Project's water users. Because these issues are far outside the scope of McCarran's waiver of sovereign immunity, the state court, like the state court in *San Luis Obispo Coastkeeper*, altogether lacks jurisdiction, not to mention "prior exclusive jurisdiction." KID's contentions that the KBA state court alone may consider any and all issues pertaining to the waters of the Klamath Basin, whether under state or federal law, make far too much of the prior exclusive jurisdiction doctrine.

Taken to its logical conclusion, KID's argument would potentially deprive federal courts of jurisdiction over all manner of water-related litigation, whether brought under the ESA,

Project contracts, or other federal laws. For instance, KID's prior lawsuit in *Klamath Irrigation Dist. v. U.S. Bureau of Reclamation*, now on appeal, would be improper because it raises issues concerning whether Reclamation needs a state-law based water right, confirmed in the KBA for instream flow purposes, in order to meet the ESA requirements applicable to the Klamath Project and operate the Project consistent with downstream, tribal reserved rights in California. *See* 489 F. Supp. 3d at 1177–78 (describing causes of action at issue). Likewise, the Yurok Tribe's ESA lawsuit filed in the Northern District of California and the Klamath Water User Association's prospective defenses to that litigation concerning "whether Reclamation has an obligation to release water from Project storage for the benefit or purported benefit of ESA-listed species" would exceed the court's jurisdiction. ECF No. 9 at 30 (describing litigation and prospective motion to lift stay).

KID itself endorses, at least in part, these potential ramifications of its prior exclusive jurisdiction argument in a recently-filed ESA lawsuit brought by the Klamath Tribes against Reclamation in which KID intervened. *See Klamath Tribes v. U.S. Bureau of Reclamation*, No. 1:21-cv-00556-CL (D. Or. *filed* Apr. 13, 2021). In that lawsuit, the Klamath Tribes seek a preliminary injunction that would require Reclamation to release less water from UKL for the benefit of SONCC coho downstream of the Project and killer whales in the ocean in order to retain more water in the lake for the benefit of suckers. In partially opposing that requested relief, KID argued that the prior exclusive jurisdiction of the KBA court effectively deprives the federal court of jurisdiction to order Reclamation to release—or not release—water from the Project for ESA compliance purposes. *See* Memorandum in Partial Opposition to Klamath Tribe's Motion for Temporary Restraining Order at 9-11, 18-22, *Klamath Tribes v. U.S. Bureau of Reclamation,* No. 1:21-cv-00556-CL (D. Or. Apr. 23, 2001), ECF No. 28. As KID concluded,

the Court "may only issue an injunction compelling Reclamation to acquire the water rights necessary to meet Reclamation's obligations under the ESA." *Id*. at 10.

But, at the same time, KID also asked the Court in that lawsuit to rule upon the very issues that are raised by its PI Motion as grounds for denying the Klamath Tribes' requested injunctive relief—namely, whether the ESA can require Reclamation to retain or release water from UKL, whether KID's contracts with Reclamation deprive Reclamation of discretion to comply with ESA Section 7, and the like. *Id*. at 7-11, 13-18. As KID stated, "[j]udicial recognition of the fundamental argument KID is advancing is the key to resolving the protracted water resources conflicts in the Klamath Basin." *Id*. at 10. KID cannot have it both ways. The federal courts either have jurisdiction to reach these issues, or they do not. The Court should reject KID's attempt to dramatically restrict the scope of federal jurisdiction to reach these important questions of federal law and preserve the federal courts' ability to address these issues in a properly-pled action, rather than in an action improperly filed in state court under McCarran.

III. Each of KID's remaining arguments mischaracterize the matters at issue under the PI Motion.

The remaining contentions presented by the Remand Motion are all variations on the arguments addressed above that misstate the nature of the matters at issue under the PI Motion and that seek to impermissibly expand the jurisdiction of the KBA. None of these arguments provide a basis for this Court to remand this matter to state court.

KID asserts that "[t]he purpose of a general stream adjudication is to quantify and determine all state and federal reserved water rights vested prior to the adoption of Oregon's 1909 water code. ORS 539.010." Remand Mot. at 8 (emphasis omitted). This contention is correct insofar as it goes, but it does not support remand. To be sure, the KBA is a comprehensive, general stream adjudication of surface water rights in the Klamath Basin in

Oregon that the Ninth Circuit has determined satisfies the requirements of McCarran. *United States v. Oregon*, 44 F.3d 758 (9th Cir. 1994). Accordingly, with the issuance of the ACFFOD, the KBA now has jurisdiction over the enforcement of the water rights determined therein as among competing water right claimants in Oregon. But the issues of federal law raised by the PI Motion are not the subject of the KBA, but instead implicate questions concerning the interpretation of the ESA, senior tribal reserved rights in California, and issues of federal contract. The state court in the KBA does not have exclusive jurisdiction, or any jurisdiction for that matter, to adjudicate these questions.

KID argues that "[u]nder the doctrine of prior exclusive jurisdiction, courts do not accept jurisdiction over a matter that may invade the *res* that is the subject of a previously-filed and concurrently proceeding matter *in rem*." Remand Mot. at 6. Here, there is no such risk of "invading the *res*" that is being addressed in the KBA, as there is no concurrent proceeding in state court addressing the issues of federal law raised by the PI Motion; no waiver of sovereign immunity under McCarran for the state court to consider them; and no point to remanding those issues of federal law to a state court that lacks jurisdiction to consider them. Rather, the federal court can and should resolve these issues concerning the existence of jurisdiction. *See Cnty. of San Mateo v. Chevron Corp.*, 960 F.3d 586, 594 (9th Cir. 2020) ("[W]e have jurisdiction to determine whether we have jurisdiction to hear [a] case." (alterations in original) (quoting *Atl. Nat'l Tr. LLC v. Mt. Hawley Ins. Co.*, 621 F.3d 931, 933 (9th Cir. 2010))), *petition for cert. docketed,* No. 20-884 (U.S. Jan. 4, 2021); *Fent*, 235 F.3d at 555-57 (dismissing rather than remanding claim against the United States that exceeded waiver under McCarran).

KID asserts that "[a]n *in rem* proceeding is one in which the action seeks to 'determine interests in specific property as against the whole world.' *State Eng'r*, 339 F.3d at 811 (quoting Black's Law Dictionary 1245 (6th ed. 1990))." Remand Mot. at 12. But KID's action initiated

through its PI Motion is not such a proceeding. Rather, KID seeks an injunction solely against Reclamation based upon disputed issues of federal law concerning whether the ESA can require water to be released from storage in UKL and whether such water can be released to be consistent with senior tribal reserved water rights in California without a state-based water right determined in the KBA. That action is entirely beyond the jurisdiction of the KBA.

KID argues that, "[i]n determining the motion Reclamation has removed to this Court, this Court will necessarily be called upon to interpret the ACFFOD and determine issues related to whether, how, and when it should be enforced." *Id*. at 19. But here, there is no dispute over the interpretation of the ACFFOD. Reclamation acknowledges that, by its terms, the ACFFOD does not grant it a water right for instream ESA purposes in Oregon. But that does not resolve the present dispute, which instead concerns whether the ESA nonetheless requires Reclamation to release water from UKL and whether such releases are consistent with the Project contracts and the senior tribal reserved water rights of the Yurok and Hoopa Valley Tribes. These are questions of federal law that the ACFFOD does not address and over which the KBA lacks jurisdiction.

KID cites an amicus brief of the United States in the matter of *TPC, LLC v. Oregon Water Resources Department*, Case No. CA A167380, filed on December 7, 2018, in which it argued "the Klamath County Circuit Court has properly assumed jurisdiction over the water rights claims in the Klamath Basin Adjudication . . . and it assumed that jurisdiction first. By doing so, it withdrew those issues from any possible jurisdiction of other courts of concurrent jurisdiction." Remand Mot. at 19 (alteration in original) (quoting ECF No. 17-1 at 26 (United States' amicus brief from Case No. CA A167380, Or. Ct. App.)). But the United States' position in that brief merely affirmed, as the United States acknowledges here, the exclusive jurisdiction

of the KBA over water right claims filed in the Klamath Basin in Oregon. Indeed, that case dealt with an attempt by the Upper Basin irrigators (*i.e.*, those who divert water for irrigation above UKL) who had junior water rights under the ACFFOD, to stay the ACFFOD's enforcement, and whether the irrigators could continue taking water out of priority under state law. It had nothing to do with competing federal law obligations arising under the ESA, the senior federal reserved tribal fishing and water rights in California, or the relationship between state-law based water rights in the ACFFOD and Reclamation's contracts.

The bottom line is the doctrine of "prior exclusive jurisdiction" only applies to matters over which a court first exercises proper jurisdiction and has no applicability to matters that exceed a court's jurisdiction. In the present context, that means the doctrine applies to matters within the scope of the KBA and McCarran's waiver of sovereign immunity—namely, determinations of the existence, elements, and priority of water rights claimed in the adjudication and the subsequent administration of those rights. But the doctrine does not apply to the issues of federal law raised by the PI Motion—including questions concerning applicability of the ESA's requirements, downstream tribal reserved water rights in California, and federal contracts—as the KBA altogether lacks jurisdiction over these issues.

CONCLUSION

For all the foregoing reasons, the Remand Motion should be denied.

Respectfully submitted this 4th day of May, 2021.

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CERTIFICATE OF COMPLIANCE

This brief complies with the applicable word-count limitation under LR 7-2(b), because it contains 7,300 words, including headings, footnotes, and quotations, but excluding the caption, table of contents, table of cases and authorities, signature block, exhibits, and any certificates of counsel.

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CERTIFICATE OF SERVICE

I certify that on May 4, 2021, the foregoing was electronically filed with the Court's electronic filing system.

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