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No. 19-1134

IN THE

Supreme Court of the United States

LONNY E. BALEY, *et al.*,

Petitioners,

v.

UNITED STATES, *et al.*,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FEDERAL CIRCUIT

BRIEF OF *AMICI CURIAE* PROFESSORS RONALD A. CASS, DAVID F. FORTE, JAMES L. HUFFMAN, DONALD J. KOCHAN, JESSE J. RICHARDSON AND REED WATSON IN SUPPORT OF PETITIONERS

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INTEREST OF *AMICI CURIAE*[1]

Amici are teachers and scholars with extensive engagement with constitutional, administrative and water law. They have written and taught on subjects central to the resolution of this case. *Amici* respectfully submit this brief to convey their understanding of the law as it relates to the administration and adjudication of water rights. *Amici* have no interest in the outcome of this case beyond a keen interest in the correct interpretation and optimal development of the law.

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1. No counsel for a party authored this brief in whole or in part, and no such counsel or party made a monetary contribution intended to fund the preparation or submission of this brief. No person made a monetary contribution to its preparation or submission except Cal-Ore. Properties has paid printing costs. All parties have been given the required notice of Amici's intention to file this brief and all have consented.

ARGUMENT

I. The Federal Circuit Court of Appeals and the Court of Federal Claims have misconstrued the requirements of constitutional federalism in the adjudication and administration of water rights. Preserving the federal/state balance in this area of concurrent state and federal power is essential to the maintenance and survival of our federal structure of government.

The Court of Federal Claims ruled that the Klamath, Yurok and Hoopa (hereafter Tribes) reserved water rights in the Klamath River Basin are of a volume at least equal to the amount of water the Environmental Protection Agency has determined to be necessary to trigger endangered species protection. In the absence of an adjudication in state or federal court and contrary to the long history of federal deference (both by Congressional enactment and judicial precedent) to state adjudication of water rights, the Federal Circuit affirmed and thus preempted, without the participation of affected parties including petitioners, the State of Oregon's ongoing adjudication of Klamath Basin water rights.

Independent of the 5th Amendment takings issue at the root of this case, the Federal Circuit's decision raises serious federalism issues that this Court should address. Few matters are of more importance to western states like Oregon than the allocation of scarce water resources. For a century and a half this Court and Congress have mandated federal court deference to the states' administration and adjudication of water rights. Deference is particularly important to the wise administration of

this scarce resource where there is an ongoing state court adjudication and where no federal interest will be compromised. As with asserting any reserved rights claims of its own, the federal government has every opportunity to exercise its role as trustee for the Tribes in the state court adjudication.

A. Constitutional federalism demands a balance between federal and state powers.

The Federal Circuit opinion in this case fails to address the obvious and fundamental question of constitutional federalism that warrants this Court's consideration and review. A basic challenge from the founding of the Nation has been the maintaining of a proper balance in the powers of the state and federal governments. The federal balance is important for two reasons explained by Justice Kennedy in *Bond v. United States,* 564 U.S. 211, 221 (2011): (1) "The federal balance is, in part, an end in itself, to ensure that States function as political entities in their own right." (2) "'[F]ederalism secures to citizens the liberties that derive from the diffusion of sovereign power.' " (quoting from *New York v. United States*, 505 U.S. 144, 181 (1992)). It provides, in the words of Publius, "a double security" to "the rights of the people." Federalist 51 (Madison). The liberties at issue in this case – the rights to due process and compensation when property is taken for a public use – are among those the framers sought to protect by a vertical separation of powers in our "compound republic." Id. The Federal Circuit's failure to respect the longstanding federal court deference to state adjudication and administration of water rights not only puts the liberties of water rights claimants at risk but also undermines the critical balance of state and federal powers.

While preserving the federal balance is important to protecting American liberties, it poses other important challenges for the judiciary. In explaining the "longstanding public policy against federal court interference with state court proceedings," this Court identified "the notion of 'comity,' that is, a proper respect for state functions, a recognition of the fact that the entire country is made up of a Union of separate state governments . . . ." "[A]nxious though the . . . [National Government may be to vindicate and protect federal rights and federal interests, [it] always endeavors to do so in ways that will not unduly interfere with the legitimate activities of the States." *Younger v. Harris*, 401 U.S. 37,44-45 (1971). This principle was reiterated more recently in *Quackenbush v. Allstate Ins. Co.*, 517 U.S. 706, 723, (1996): "Federal courts abstain out of deference to the paramount interests of another sovereign, and the concern is with principles of comity and federalism."

Certainly, federal deference is not required where federal interests or federal rights would be compromised. But this is not such a case. In *Arizona v. San Carlos Apache Tribe of Arizona*, 463 U.S. 545, 571 (1983), this Court identified three circumstances in which federal courts "need not defer to the state proceedings:" Where (1) "state courts expressly agree to stay their own consideration of the issues," (2) the "federal suit at issue is well enough along that its dismissal would itself constitute a waste of judicial resources and an invitation to duplicative effort," and (3) the "federal suit was brought by Indians on their own behalf and sought only to adjudicate Indian rights." None of these circumstances exist in this case. There is nothing in this case that threatens the Tribes' rights or any other federal right or interest. The Tribes have not

sought to adjudicate their rights in federal court, and nowhere in the lengthy proceedings in this case has there been anything resembling an adjudication of their rights. If they are not satisfied with the state court's ultimate adjudication of their rights they "can expect to receive, if brought for review before this Court," as this Court said in *San Carlos,* "a particularized and exacting scrutiny commensurate with the powerful federal interest in safeguarding those rights from state encroachment." Id.

B. Water Rights Defined by Federal Law Are Governed (Administered) under State Law.

The Federal Circuit dismisses the petitioner's takings claim on the grounds "that appellant's water rights were subordinate to the Tribes' federal reserved water rights." 942 F.3d 1312, 1341 (App.63). Petitioners do not challenge the Court's recognition of the existence of the Tribes' senior water rights, nor do they challenge the government's conclusion that the Endangered Species Act required curtailment of water deliveries. Rather they challenge the Court's affirmance, in the absence of an adjudication of Klamath Basin water rights, of the trial court's ruling that there was no unconstitutional taking because the "Tribes' water rights were at least co-extensive to the amount of water that was required by defendant to satisfy its obligations under the [ESA] . . . ." *Baley v. United States*, 134 Fed.Cl. 619, 679 (2017).

The Federal Circuit conflates two distinct legal questions: (1) the law governing the acquisition, volume and scope of a water right and (2) the law governing the administration of water rights in general. The Court is correct that that "tribal water rights arising from federal

reservations are federal water rights." 942 F.3d at 1340 (App. 59). However, the Court is mistaken in concluding that those rights are therefore "not governed by state law." Id. In support of that conclusion the Court cites *Arizona v. California,* 373 U.S. 546, 597 (1963). But that case says nothing about the states' role in administering federal water rights. It merely confirms "the power of the United States . . . to reserve water rights for its reservations and its property." The Federal Circuit also cites *Cappaert v. United States*, 426 U.S. 128, 145–46 (1976) in which this Court reiterates that "Federal water rights are not dependent upon state law or state procedures" but recognizes that they can be adjudicated in state as well as federal court. Thus, the fact that the volume and scope of federal water rights are defined by federal law does not diminish the role of state courts in adjudicating those rights along with all other rights claimed in a particular watershed.

The Federal Circuit again confuses these two distinct issues in stating: "As the 'volume and scope of particular reserved rights ... are federal questions,' *Colorado River Water Conservation District v. United States*, 424 U.S. 800, 813, 96 S.Ct. 1236, 47 L.Ed.2d 483 (1976), there is no need for a state adjudication to occur before federal reserved rights are recognized." 942 F.3d at 1340 (App. 59). Recognition of the existence of a right is not the same thing as adjudication of the volume and scope of that right which can only be done in a general adjudication of all rights claims in a particular basin.

The court below then quotes from *Agua Caliente Band of Cahuilla Indians v. Coachella Valley Water Dist.*, 849 F.3d 1262, 1272 (9th Cir. 2017): "[S]tate water rights

are preempted by federal reserved rights." 942 F.3d at 1340 (App. 59). It is correct that tribal reserved rights vest on the date of the reservation and are superior to later appropriated rights, but the *Aqua Caliente* court's use of the term 'preempt' is misleading. Once federal reserved rights are recognized, generally well after the establishment of the reservation to which they are appurtenant, all existing rights with priority dates later than the date of the reservation become junior to those reserved rights. That is not a preemption of state law but rather in conformance with the law in every prior appropriation state. The case cited in *Aqua Caliente* in support of the Court of Appeal's suggestion that federal reserved rights preempt state law, *Colville Confederated Tribes v. Walton*, 752 F.2d 397, 400 (9th Cir. 1985), actually states an exception to the general principle of deference to state law because the waters at issue "have no impact on state water rights off the reservation." That exception does not apply in this case or in most general adjudications of water rights.

The Federal Circuit also reads more than this Court intended into its statement in *United States v. New Mexico*, 438 U.S. 696, 715 (1978), that "the 'reserved rights doctrine' is a doctrine built on implication and is an exception to Congress' explicit deference to state water law in other areas." The exception, described earlier in the *New Mexico* opinion is to the states allocation of "unappropriated water in the future," not to state administration of vested water rights. An exception, cautioned this Court, that is to be narrowly understood because "claims to water for use on federal reservations inescapably vie with other public and private claims for the limited quantities to be found in the rivers and streams." Id. at 698-699

C. Recognition of tribal water rights does not constitute an adjudication.

In *Cappaert* this Court noted that "federal courts have jurisdiction under 28 U.S.C. s 1345 to adjudicate the water rights claims of the United States." 426 U.S. at 145. The same is true of tribal reserved rights claims. But there has been no federal court adjudication of the tribal claims at issue in this case. Absent an adjudication in either state of federal court there was no way for the Federal Circuit to know the volume and scope of the tribal rights. The Court stated that "given the facts of record in this case, it was not necessary for the Tribes' rights to have been adjudicated before the Bureau acted." 942 F.3d at 1340 (App. 59). But absent from those facts, yet necessary to the Court's decision, is the very extent and volume of the Tribes' rights. Extrapolating from a scientific determination of the water requirements of an endangered species under the Endangered Species Act, in a case to which affected water rights claimants are not party, does not constitute an adjudication of rights adequate to assure due process to the petitioners. As the Arizona Supreme Court stated in *In re General Adjudication of All Rights to Use Water in Gila River System and Source*, 989 P.2d 739, 748 (1999): "To determine the purpose of a reservation and to determine the waters necessary to accomplish that purpose are inevitably fact-intensive inquiries that must be made on a reservation-by-reservation basis." The Arizona Court quoted from this Court's statement in *United States v. New Mexico*, 438 U.S. 696, 701-702 (1978): "This careful examination is required both because the reservation is implied, rather than expressed, and because of the history of congressional intent in the field of federal-state jurisdiction with respect to allocation of water."

That there has been no adjudication of the Tribe's rights in federal court is not surprising given this longstanding federal deference to state water law administration. "The history of the relationship between the Federal Government and the States in the reclamation of the arid lands of the Western States is both long and involved, but through it runs the consistent thread of purposeful and continued deference to state water law by Congress." *California v. United States*, 438 U.S. 645, 653 (1978) (*California*). That deference, rooted both in case law and statute, is greatest "for general stream adjudications." Reed D. Benson, *Deflating the Deference Myth: National Interests vs. State Authority Under Federal Laws Affecting Water Use*, 2006 Utah L. Rev. 241, 274 (2006). The reason was stated by this Court in *United States v. New Mexico*, 438 U.S. at 705: "The quantification of reserved water rights . . . is of critical importance to the West, where . . . water is scarce . . . . When . . . a river is fully appropriated, federal reserved water rights will frequently require a gallon-for-gallon reduction in the amount of water available for water-needy state and private appropriators." Where, as here, there is an ongoing state adjudication for the waters in issue, the case for federal deference could not be more convincing.

D. A History of Federal Deference to State Administration of Water Rights

Federal deference to state adjudication and administration of water rights has a long history. In 1866 Congress declared "that whenever, by priority of possession, rights to the use of water for mining, agricultural, manufacturing, or other purposes, have vested and accrued, and the same are recognized and

acknowledged by the local customs, laws, and decisions of courts, the possessors and owners of such vested rights shall be maintained and protected in the same." 14 Stat. 253, ch. 262, § 9, Rev. Stat. § 2339, U. S. Comp. Stat. 1901, p. 1437 (codified as amended at 43 U.S.C. § 661). In *Broder v. Water Co.*, 101 U.S. 274, 276 (1879), this Court stated that the rights recognized in the 1866 statute were "rights which the government had, by its conduct, recognized and encouraged and was bound to protect, before the passage of the act of 1866."

In the Desert Land Act of 1877, 19 Stat. 377, 44 Cong. Ch. 107, Congress again affirmed that "[t]he right to use water [in the arid western states and territories) . . . depend[s] upon bona fide prior appropriation . . . and all surplus water over and above such actual appropriation and use . . . shall remain and be held free for the appropriation and use of the public . . . ." By the Act of February 26, 1897, 29 Stat. 599, 44 Cong. Ch. 335 (1897 Act), Congress authorized state improvement and occupation of reservoir sites under rules established by the Secretary of Interior "subject to the control and regulation of the respective States and Territories in which such reservoirs are in whole or part situate."

Section 8 of the Reclamation Act of 1902, 57 Pub. Law. No. 161, ch. 1093, 32 Stat. 388 (codified as amended in scattered sections of 43 U.S.C. § 372 *et seq.*) (Reclamation Act of 1902), pursuant to which the Klamath Project was established, declared in no uncertain terms Congress' deference to the states on matters of water rights adjudication and administration: "That nothing in this act shall be construed as affecting or intended to affect or to in any way interfere with the laws of any state or

territory relating to the control, appropriation, use, or distribution of water used in irrigation, or any vested right acquired thereunder, and the Secretary of the Interior, in carrying out the provisions of this act, shall proceed in conformity with such laws . . . ." *Id.* at ch. 1093, § 8, 32 Stat. 390 (codified as amended at 43 U.S.C. § 383). Four decades later in *California v. United States*, 438 U.S. 645 (1978), this Court noted that the legislative history of the Reclamation Act of 1902 makes clear that "state law was expected to control in two important respects." *Id.* at 665 First, acquisition of water rights by the United States must be accomplished "in strict conformity with state law." *Id.* at 665 Second, distribution of waters released from Reclamation facilities are to be "controlled by state law." *Id.* at 667

In *California Oregon Power Co. v. Beaver Portland Cement Co.*, 295 U.S. 142 (1935), this Court observed in a footnote that "since the passage of the Desert Land Act, [Congress] has repeatedly recognized the supremacy of state law in respect of the acquisition of water for the reclamation of public lands of the United States *and lands of its Indian wards*." *Id.* at 164.

Congress reaffirmed federal deference to state water law and procedure, including with respect to Indian reserved rights, in the McCarran Amendment, 66 Stat. 560 (1952) (codified as 43 U.S.C. § 666), which provides that "consent is hereby 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." It is thus a waiver of sovereign immunity in cases implicating federal water rights or federal acquisition of water rights. It is not, as noted above, an exception to federal court jurisdiction in such cases

In *United States v. District Court for Eagle County*, 401 U.S. 520, 524 (1971) this Court ruled that McCarran Amendment waiver of federal sovereign immunity applies in cases involving federal water rights acquired under state law as well as to reserved water rights. In *Colorado River*, 424 U.S. at 810, this Court ruled that the Amendment also allows state courts to adjudicate Indian reserved water rights. "[B]earing in mind the ubiquitous nature of Indian water rights in the Southwest, it is clear that a construction of the Amendment excluding those rights from its coverage would enervate the Amendment's objective." Thus there is also concurrent federal and state jurisdiction over Indian reserved water rights, but federal court deference in all water rights cases is appropriate because concurrent proceedings "are likely to be duplicative and wasteful, generating 'additional litigation through permitting inconsistent dispositions of property.'" *Arizona v. San Carlos Apache Tribe of Arizona*, 463 U.S. 545, 566–68 (1983) (quoting *Colorado River*, 424 U.S. at 819).

While the McCarran Amendment establishes concurrent jurisdiction over water rights disputes to which the United States is a defendant, the long-standing federal court deference to state courts, established before the Desert Land Act, has continued under the McCarran Amendment. In its opinion in *Colorado River* this Court

identified "a number of factors . . . [that] counsel against concurrent federal proceedings[;]" Those factors include "avoidance of piecemeal adjudication of water rights in a river system," "avoiding the generation of additional litigation through permitting inconsistent dispositions of property[,]" [a concern] "heightened with respect to water rights, the relationships among which are highly interdependent", a recognition "that actions seeking the allocation of water essentially involve the disposition of property and are best conducted in unified proceedings," and "the availability of comprehensive state systems for adjudication of water rights as the means to achieving these goals." *Colorado River*, 424 U.S. at 819.

It is not disputed that the federal courts have jurisdiction to adjudicate tribal water rights. But the Federal Circuit's recognition of tribal reserved rights in the Klamath Basin is not an adjudication. Although tribal reserved water rights are defined by federal law, due process requires that the volume and scope of those rights be adjudicated in relation to the other rights claims on the same water. As the United States Court of Claims declared in a case affirmed by the Federal Circuit: "[T]he quantity of water available to the Indians is determined by the Arizona state court." *Grey v. United States*, 21 Cl. Ct. 285, 290 (1990), aff'd, 935 F.2d 281 (Fed. Cir. 1991), and aff'd sub nom. *Abel v. United States*, 935 F.2d 281 (Fed. Cir. 1991).

CONCLUSION

The Framers of the United States Constitution believed that a vertical separation of powers, balanced between the national and state governments, would constrain abuses of power and thus help preserve the liberties of the people. It is among the judiciary's responsibilities in exercising its constitutional power of judicial review to enforce a balance of powers in our federal system. Where national and state powers are concurrent, as they are in the adjudication of water rights, the constitution's federal structure, the principle of comity and a long history of Congressional direction culminating in the McCarran Amendment, require that federal courts defer to the state adjudication and administration of water rights unless federal adjudication will have no effect on state adjudication. That this case arises from a takings claim underscores that the waters in issue do affect Oregon's ongoing Klamath River Basin adjudication. Notwithstanding that the Tribe's water rights arise from federal law, they should be adjudicated in the State's courts before it is possible to assess the merits of petitioners' takings claims.

Respectfully submitted,

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