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11 **UNITED STATES DISTRICT COURT**
12 **DISTRICT OF OREGON, EUGENE DIVISION**

13 **In re: WATERS OF THE KLAMATH**
14 **RIVER BASIN**

15 KLAMATH IRRIGATION DISTRICT,

16 Movant,

17 v.

18 UNITED STATES BUREAU OF
19 RECLAMATION,

20 Respondent.

Case Nos. 1:21-cv-00504-AA

**NOTICE OF MOTION AND MOTION
TO REMAND MOTION FOR
PRELIMINARY INJUNCTION TO
STATE COURT**

REQUEST FOR ORAL ARGUMENT

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1 **MOTION TO REMAND**

2 **TO ALL PARTIES AND THEIR ATTORNEYS OF RECORD:**

3 Please take notice that Klamath Irrigation District (“KID”) hereby moves this Court to remand
4 to Klamath County Circuit Court the motion for preliminary injunction removed here by the Bureau of
5 Reclamation. KID certifies that the parties have made a good faith effort via telephone conference to
6 resolve the issue of whether the motion should be remanded, and have been unable to do so. KID bases
7 this motion on the accompanying Memorandum of Law, the Notice of Removal, the exhibits attached
8 to the Notice of Removal, any arguments submitted in this matter, other documents filed on the Court’s
9 docket in this matter, and any further memoranda or evidence that the Court accepts.

10 The motion for preliminary injunction should be remanded to the Klamath County Circuit Court,
11 which has prior exclusive jurisdiction over the *res* at issue in the motion for preliminary injunction, *i.e.*,
12 the water rights determined in the Amended and Corrected Findings of Fact and Order of Determination
13 (“ACFFOD”) in the Klamath River Basin Adjudication. Under the doctrine of prior exclusive
14 jurisdiction, courts do not accept jurisdiction over a matter that may invade the *res* that is the subject of
15 a previously-filed and concurrently proceeding matter *in rem*. This doctrine is not discretionary; it is
16 mandatory, and requires remand when it applies. The doctrine applies here, as the Klamath River Basin
17 Adjudication is clearly an *in rem* proceeding, and ruling on this motion for preliminary injunction will
18 plainly affect the *res* at the heart of that proceeding. The only recourse is for this Court to remand the
19 matter to the Klamath County Circuit Court, where the rest of the Klamath River Basin Adjudication
20 remains pending.

1 **MEMORANDUM OF LAW IN SUPPORT OF MOTION TO REMAND**

2 **I. INTRODUCTION**

3 KID’s motion for a preliminary injunction must be remanded to the Klamath County Circuit
4 Court. Under the doctrine of prior exclusive jurisdiction, federal courts must refuse to exercise their
5 jurisdiction when there is a concurrent state proceeding either *in rem* or *quasi in rem* which is at the
6 heart of the federal proceeding. This doctrine—whether described as a matter of comity, a prudential
7 doctrine, or a limitation on subject matter jurisdiction—is mandatory for federal courts, and when a
8 proceeding falls within its bounds, the only recourse is to remand the proceeding to state court.

9 The motion removed here is precisely such a proceeding. It was filed in and is entirely based
10 upon the Amended and Corrected Findings of Fact and Order of Determination (“ACFFOD”) issued by
11 the Oregon Water Resources Department (“OWRD”) in the Klamath River Basin adjudication
12 (“Klamath Adjudication”), which has been under judicial review in the Klamath County Circuit Court
13 for more than seven (7) years. When Reclamation removed this motion to federal court, it did not
14 purport to remove—and could not have removed—the entirety of the Klamath Adjudication to federal
15 court. Instead, it removed *only* this motion. Therefore, the state court proceeding remains ongoing.

16 Resolution of this motion relates to the enforcement of the water rights determined in the
17 ACFFOD. The motion concerns Reclamation’s unlawful discharge of stored water from Upper Klamath
18 Lake (“UKL”), despite having only a right to *store* water, and no right to use or discharge that stored
19 water. Under Oregon law, those two rights are separate. Only KID and other Klamath Project irrigators
20 have the right to the beneficial use of that stored water. Oregon law provides that these rights are fully
21 enforceable pending resolution of the judicial review process of the Klamath Adjudication. Any
22 claimant—including the United States—that wishes to stay the enforcement of those rights may do so
23 by filing a motion for stay and posting a bond to cover all damages that may result from such a stay.
24 Reclamation has not filed a motion to stay or posted any bond. And yet Reclamation has released and
25 continues to release stored water from UKL to satisfy its own obligations under the ESA in California
26 and its own obligations to provide water to Native American tribes in California. This violates the
27 ACFFOD, and amounts to Reclamation awarding itself a stay of those proceedings, rather than
28 following a lawful process of acquiring the water it needs from water rights holders.

1 Resolving this motion will necessarily involve review of the meaning and scope of the ACFFOD.
2 Adverse decisions about what the ACFFOD means by this Court will impermissibly invade the *res*
3 which is currently the subject of litigation in the Klamath County Circuit Court. Under well-established
4 Ninth Circuit precedent, this necessitates remanding the matter to Klamath County Circuit Court.

5 **II. BACKGROUND**

6 The underlying motion for a preliminary injunction was filed within the context of a long-
7 running general water rights adjudication occurring under state law within Oregon. In 1975, the State
8 of Oregon commenced a general stream adjudication of the waters of the Klamath Basin pursuant to
9 ORS in Chapter 539. (*See* Doc. 1-1, Declaration of Nathan Rietmann (“Rietmann Dec.”), at ¶ 2.) The
10 purpose of a general stream adjudication is to quantify and determine all state and federal reserved water
11 rights vested prior to the adoption of Oregon’s 1909 water code. ORS 539.010.

12 Oregon law specifically grants OWRD the authority to adjudicate federal reserved water rights,
13 in addition to water rights arising under state law. ORS 539.010(7) (“[T]he Water Resources
14 Department may adjudicate federal reserved rights.”). The State of Oregon’s power to adjudicate federal
15 reserved water rights in the Klamath Adjudication has also been specifically confirmed by the Ninth
16 Circuit Court of Appeals, including rights held in trust on behalf of Native American tribes. *United*
17 *States v. Oregon*, 44 F.3d 758, 770 (9th Cir. 1994) (“We hold that the Klamath Basin adjudication is in
18 fact the sort of adjudication Congress meant to require the United States to participate in when it passed
19 the McCarran Amendment.”); *see also White Mountain Apache Tribe v. Hodel*, 784 F.2d 921, 924 (9th
20 Cir. 1986) (“The state court does have the authority to adjudicate tribal water rights. The Congress has
21 said so . . . the United States Supreme Court has said so . . . the Arizona Supreme Court has said so . . .
22 and we have said so. It is time that the Tribe accept the proposition as true.”). This ability to adjudicate
23 federal water rights is consistent with the U.S. Supreme Court’s recognition that the purpose of Oregon’s
24 general stream adjudication process is to obtain “a complete ascertainment of *all existing rights*.” *Pac.*
25 *Live Stock Co. v. Lewis*, 241 U.S. 440, 447–48 (1916) (emphasis added). It is also consistent with the
26 U.S. Supreme Court’s recognition that in Oregon’s water adjudication process, “[a]ll claimants are
27 required to appear and prove their claims; *no one can refuse without forfeiting his claim*, and all have
28 the same relation to the proceeding.” *Id.* (emphasis added); *see also* ORS 539.210 (“Any claimant who

1 fails to appear in the proceedings and submit proof of the claims of the claimant shall be barred and
2 estopped from subsequently asserting any rights theretofore acquired upon the stream or other body of
3 water embraced in the proceedings, and shall be held to have forfeited all rights to the use of the water
4 theretofore claimed by the claimant.”).

5 On March 6, 2013, thirty-eight (38) years after the State of Oregon initiated the Klamath
6 Adjudication, the OWRD filed its Findings of Fact and Final Order of Determination in Klamath County
7 Circuit Court. (Doc. 1-1, Rietmann Dec. at ¶ 3.) Subsequently, on February 28, 2014, the State of
8 Oregon entered an Amended and Corrected Findings of Fact and Final Order of Determination
9 (“ACFFOD”) with the Klamath County Circuit Court.¹ (*Id.* at ¶ 4.) Once the ACFFOD was entered,
10 the state and federal water rights comprehensively determined therein became fully enforceable,
11 pursuant to ORS 537.130(4).

12 The entry of the ACFFOD fundamentally changed the legal paradigm governing the distribution
13 of water in the Klamath Basin from that which existed at the time prior cases such as *Kandra v. United*
14 *States*, 145 F.Supp.2d 1192 (D. Or. 2001) arose. Before the issuance of the ACFFOD, the State of
15 Oregon did not control the use or distribution of pre-1909 state or federal water rights because doing so
16 would predetermine the water rights claims then pending in the Klamath River Basin without due
17 process. *See* Corrected Findings of Fact and Order of Determination, Klamath River Basin General
18 Stream Adjudication, at KBA_ACFFOD_00002, Feb. 28, 2014² (“Until the issuance of the Findings of
19 Fact and Order of Determination, the water right claims at issue in the Adjudication have remained
20 outside the prior appropriation system. OWRD has not had the authority to regulate either in favor of
21 or against these claims. . . . With the entry of the Findings of Fact and Order of Determination in
22 OWRD’s records, OWRD now has regulatory authority over the claims.”). Therefore, prior to the
23 issuance of the ACFFOD on February 28, 2014, Reclamation had unfettered discretion to allocate
24 available water supply in UKL as it deemed fit for many years without regard to water rights, as no
25 Oregon water rights in the Klamath Basin were enforceable before that time.

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¹ <https://www.oregon.gov/OWRD/programs/WaterRights/Adjudications/KlamathRiverBasinAdj/Pages/default.aspx>

28 ² <https://www.oregon.gov/owrd/programs/WaterRights/Adjudications/KlamathRiverBasinAdj/Pages/ACFFOD.aspx>

1 But once the ACFFOD was entered, all pre-1909 state and federal water rights in UKL were
2 comprehensively determined and Reclamation’s discretion to store and use water in any manner it
3 deemed fit was eliminated. *See* KBA_ACFFOD_00002. Under Section 8 of the Reclamation Act,
4 Reclamation is required to comply with state law in the “control, appropriation, use, or distribution of
5 water.” *See California v. United States*, 438 U.S. 645, 675 (1978). This means that the State may impose
6 various conditions on Reclamation’s use of water. *See id.* at 652–53, n.8 (noting California’s imposition
7 of 25 separate conditions to Reclamation’s impoundment of water at the New Melones Dam, and
8 ultimately concluding that Reclamation must follow these conditions).

9 Now that the ACFFOD is entered, and the judicial phase of the Klamath Adjudication is pending,
10 water in UKL may only be distributed in accordance with the water rights determined in the ACFFOD.
11 *See* ORS 539.170 (“While the hearing of the order of the Water Resources Director is pending in the
12 circuit court, and until a certified copy of the judgment, order or decree of the court is transmitted to the
13 director, the division of water from the stream involved in the appeal ***shall be made in accordance with***
14 ***the order of the director.***”) (emphasis added). This requirement that water be distributed in accordance
15 with OWRD’s order pending completion of judicial review has been specifically affirmed by the U.S.
16 Supreme Court. *Pac. Live Stock Co.*, 241 U.S. at 447–48 (“[I]t is within the power of the [State of
17 Oregon] to require that, pending the final adjudication, the water shall be distributed according to the
18 board’s order [i.e. Final Order of Determination], unless a suitable bond be given to stay its operation.”).

19 Any party to the Klamath Adjudication may seek a stay from the Klamath County Circuit Court,
20 contingent upon judicial approval and the posting of “a bond or an irrevocable letter of credit issued by
21 an insured institution as defined in ORS 706.008, . . . in such amount as the judge may prescribe,
22 conditioned that the party will pay ***all damages*** that may accrue by reason of the determination not being
23 enforced.” ORS 539.180. To date, Reclamation has not moved to stay the ACFFOD’s determination
24 of either its or KID’s rights. Nor has Reclamation posted any bond to cover the damages that would be
25 caused by such a stay. As such, the rights set forth in the ACFFOD are fully enforceable, and include a
26 determination of *all* federal reserved water rights in Oregon.

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1 **III. APPLICABLE LAW**

2 The prior exclusive jurisdiction doctrine “holds that ‘when one court is exercising *in rem*
3 jurisdiction over a *res*, a second court will not assume *in rem* jurisdiction over the same *res*.”
4 *Chapman v. Deutsche Bank Nat’l Trust Co.*, 651 F.3d 1039, 1043 (9th Cir. 2011) (quoting *Marshall v.*
5 *Marshall*, 547 U.S. 293, 311 (2006)). Put another way, “if a state or federal court ‘has taken possession
6 of property, or by its procedure has obtained jurisdiction over the same,’ then the property under that
7 court’s jurisdiction ‘is withdrawn from the jurisdiction of the courts of the other authority as effectually
8 as if the property had been entirely removed to the territory of another sovereign.” *Sexton v. NDEX*
9 *West, LLC*, 713 F.3d 533, 536 (9th Cir. 2013) (quoting *State Engineer v. S. Fork Band of Te-Moak Tribe*
10 *of W. Shoshone Indians*, 339 F.3d 804, 809 (9th Cir. 2003)).

11 The prior exclusive jurisdiction doctrine does not apply only to strict, *in rem* proceedings
12 wherein another court has formally seized control of particular property: it also applies “where suits are
13 brought to marshal assets, administer trusts, or liquidate estates, and in suits of a similar nature, where,
14 to give effect to its jurisdiction, the court must control the property.” *Goncalves by and through*
15 *Goncalves v. Rady Children’s Hosp. San Diego*, 865 F.3d 1237, 1253–54 (9th Cir. 2017) (quoting
16 *United States v. Bank of N.Y. & Tr. Co.*, 296 U.S. 463, 477 (1936)). Thus, in applying the doctrine in a
17 particular case, “courts should not ‘exalt form over necessity,’ but instead should ‘look behind the form
18 of the action to the gravamen of a complaint and the nature of the right sued on.” *Chapman*, 651 F.3d
19 at 1044 (quoting *State Eng’r*, 339 F.3d at 810). Thus, “[i]f the action is not ‘strictly in personam’—that
20 is, if the action is *in rem* or *quasi in rem*—then the doctrine ordinarily applies.” *Id.*

21 An action qualifies as *in rem* “when it ‘determine[s] interests in specific property as against the
22 whole world.’” *Goncalves*, 865 F.3d at 1254 (quoting *State Eng’r*, 339 F.3d at 811). A *quasi in rem*
23 action is one in which “‘the parties’ interests in the property . . . serve as the basis of the jurisdiction’
24 for the parallel proceedings.” *Chapman*, 651 F.3d at 1044 (quoting *State Eng’r*, 339 F.3d at 810). In
25 particular, the Ninth Circuit has “applied the doctrine of prior exclusive jurisdiction in the water rights
26 context.” *State Eng’r*, 339 F.3d at 810. Specifically, where a court has determined or is determining
27 the water rights of an entire stream system, the exercise of prior exclusive jurisdiction has been

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1 maintained throughout later attempts to administer those rights. *See State Eng'r*, 339 F.3d at 810
2 (discussing *United States v. Alpine Land & Reservoir Co.*, 174 F.3d 1007 (9th Cir. 1999)).

3 “Although the doctrine is based at least in part on considerations of comity, and prudential
4 policies of avoiding piecemeal litigation, it is no mere discretionary abstention rule. Rather, it is a
5 mandatory jurisdictional limitation.” *State Engineer*, 339 F.3d at 810 (internal citations and quotations
6 omitted).

7 “The doctrine of prior exclusive jurisdiction applies to a federal court’s jurisdiction over property
8 only if a state court has previously exercised jurisdiction over that same property and retains that
9 jurisdiction in a separate, concurrent proceeding.” *Sexton*, 713 F.3d at 537. Thus, where a defendant
10 has removed the entirety of a case to federal court, there is no separate, concurrent proceeding, and the
11 prior exclusive jurisdiction doctrine does not apply. *Id.*

12 **IV. ARGUMENT**

13 *A. The Klamath County Circuit Court Is Exercising Jurisdiction Over the Waters of the* 14 *Klamath Basin in an In Rem Proceeding*

15 The Klamath Adjudication, currently pending in the Klamath County Circuit Court, is clearly an
16 *in rem* proceeding. An *in rem* proceeding is one in which the action seeks to “determine interests in
17 specific property as against the whole world.” *State Eng'r*, 339 F.3d at 811 (quoting Black’s Law
18 Dictionary 1245 (6th ed. 1990)). This is, by nature, what a proceeding under the McCarran Amendment
19 is.

20 Western water law is a unique area of property law involving a complicated mix of both federal
21 and state considerations. *See California v. United States*, 438 U.S. 645, 650 (1978) (“If the term
22 ‘cooperative federalism’ had been in vogue in 1902, the Reclamation Act of that year would surely have
23 qualified as a leading example of it.”). The scarcity of water in many arid Western states and the many
24 competing demands on that resource led those states to adopt comprehensive schemes to resolve these
25 claims over access to water. *See, e.g., Colorado River Water Conservation Dist. v. United States*,
26 424 U.S. 800, 804 (1976) (“*Colorado River*”) (noting Western states had “established elaborate
27 procedures for allocation of water and adjudication of conflicting claims to that resource”). Western
28 water law generally follows the doctrine of prior appropriation. *See, e.g., Mineral County v. Walker*

1 *River Irr. Dist.*, 900 F.3d 1027, 1029 n.2 (9th Cir. 2018) (“Under the doctrine of prior appropriation,
2 ‘[t]he first appropriator of the water of a stream passing through the public lands . . . has the right to
3 insist that the water shall be subject to his use and enjoyment to the extent of his original appropriation,
4 and that its quality shall not be impaired so as to defeat the purpose of its appropriation.’”) (quoting
5 *Lobdell v. Simpson*, 2 Nev. 274, 277–78 (1866)).

6 Much of the water development in the West, including the Klamath Project, occurred pursuant
7 to projects originally financed by Reclamation, and subsequently paid off by the farmers within the
8 project. *California*, 438 U.S. at 650 (“In [the Reclamation Act of 1902], Congress set forth on a massive
9 program to construct and operate dams, reservoirs, and canals for the reclamation of the arid lands in
10 17 Western States.”). In authorizing these projects, Congress commanded that Reclamation abide by
11 state law regarding water rights unless expressly overcome by Congressional enactment. *Id.* at 675
12 (noting Section 8 of the Reclamation Act “does, of course, provide for the protection of vested water
13 rights, but it also requires the Secretary to comply with state law in the ‘control, appropriation, use, or
14 distribution of water’”); *id.* at 678 (“While later Congresses have indeed issued new directives to the
15 Secretary, they have consistently reaffirmed that the Secretary should follow state law in all respects not
16 directly inconsistent with these directives.”). Therefore, Section 8 of the Reclamation Act states that,
17 “[n]othing in this Act shall be construed as affecting or intended to affect or to in any way interfere with
18 the laws of any State or Territory relating to the control, appropriation, use, or distribution of water used
19 in irrigation, or any vested right acquired thereunder.” 43 U.S.C. § 383. It also commands the Secretary
20 of the Interior to “proceed in conformity with such laws” when acting under the Reclamation Act. *Id.*

21 Consistent with these authorities, Congress required Reclamation to acquire water rights in
22 accordance with state law, either through direct applications for water rights under state law for
23 appropriation of unappropriated water, or through purchase or condemnation of vested water rights
24 under judicial process. *See* 43 U.S.C. § 421. Therefore, water rights within a Reclamation Project,
25 including any water rights held by Reclamation, are generally creatures of state law, not federal law.
26 While federal reserved rights are created by operation of the federal government withholding certain
27 rights for federal lands, those rights must be submitted to and determined in comprehensive state water
28 rights adjudications in the same manner as any other water right. *See United States v. Oregon*, 44 F.3d

1 758, 770 (9th Cir. 1994) (concluding that the federal government was required to submit any federal
2 reserved rights it claimed to OWRD in the Klamath Adjudication). Consequently, ownership of water
3 rights within a Reclamation project, and the existence and priority of such rights, is an issue of state law.
4 *See* 43 U.S.C. § 383; *see also California*, 438 U.S. at 647, 666–76 (holding that California could impose
5 conditions on the water rights granted to Reclamation, and Reclamation was required to abide by those
6 state law-based conditions).

7 Because of the central role states play in regulating water distribution, Congress passed the
8 McCarran Amendment, which waived the United States’ sovereign immunity in relation to
9 comprehensive water rights adjudications. *See United States v. District Court In and For Eagle County*,
10 401 U.S. 520, 525 (1971) (quoting Senator McCarran as saying the amendment was necessary “because
11 unless all of the parties owning or in the process of acquiring water rights on a particular stream can be
12 joined as parties defendant, any subsequent decree would be of little value”). The Supreme Court has
13 described the McCarran Amendment as “an all-inclusive statute concerning ‘the adjudication of rights
14 to the use of water of a river system’ which in § 666(a)(1) has no exceptions and which, as we read it,
15 includes appropriate rights, riparian rights, and reserved rights.” *Eagle County*, 401 U.S. at 524;
16 *Arizona v. San Carlos Apache Tribe*, 463 U.S. 545, 564 (1983) (“[T]he Amendment was designed to
17 deal with a general problem arising out of the limitations that federal sovereign immunity placed on the
18 ability of the States to adjudicate water rights.”).

19 The Klamath Adjudication is a comprehensive water rights adjudication falling within the
20 McCarran Amendment. In fact, the United States previously argued the Klamath Adjudication was not
21 sufficiently comprehensive so as to fall within the McCarran Amendment, which the Ninth Circuit
22 expressly rejected when it determined that the Klamath Adjudication “is in fact the sort of adjudication
23 Congress meant to require the United States to participate in when it passed the McCarran Amendment.”
24 *Oregon*, 44 F.3d at 770. Because it is a proceeding to determine the rights and interests in the waters of
25 the Klamath River Basin for *all* water rights holders against any other claimants in the world, it is an *in*
26 *rem* proceeding.

27 Moreover, Oregon law reaffirms that the Klamath Adjudication is an *in rem* proceeding. The
28 Oregon Supreme Court has expressly noted that comprehensive stream adjudications such as this one,

1 which are “the adjudication of the inchoate water rights” in a river stream or system, are “in the nature
2 of a proceeding *in rem*.” *In re Waters of Willow Creek*, 119 Or. 155, 175 (1925); *see also Masterson v.*
3 *Pac. Live Stock Co.*, 144 Or. 396, 402 (1933) (“The proceedings adjudicating the rights of the waters of
4 Malheur river were *in rem*.”); *Abel v. Mack*, 131 Or. 586, 595 (1929) (“The conclusiveness and effect
5 of a judgment is alike applicable to a proceeding *in rem*, of which a proceeding under the laws of Oregon
6 to procure a right from the state of Oregon for the use of its waters is one.”); *Alexander v. Central*
7 *Oregon Irr. Dist.*, 19 Or.App. 452, 469 (1974) (noting “a water rights adjudication is an *in rem*
8 proceedings [sic]”). Determinations of pre-1909 water rights under this law “shall be conclusive as to
9 **all** prior rights and the rights of **all** existing claimants upon the stream or other body of water.”
10 ORS 539.200 (emphasis added). In these general stream adjudications, “it shall be the duty of all
11 claimants interested therein to appear and submit proof of their respective claims,” and “[a]ny claimant
12 who fails to appear in the proceedings and submit proof of the claims of the claimant shall be barred and
13 estopped from subsequently asserting any rights theretofore acquired upon the stream or other body of
14 water embraced in the proceedings, and shall be held to have forfeited all rights to the use of the water.”
15 ORS 539.210. Simply put, these general stream adjudications resolve *all* claims by *any* party as to
16 particular property rights—*i.e.*, the right to use water from a particular river or stream system in Oregon.
17 These proceedings are clearly *in rem*.

18 *B. There Is a Concurrently Pending State Proceeding Involving the Very Rights at Issue in*
19 *This Motion*

20 As noted above, the doctrine of prior exclusive jurisdiction only applies where “a state court has
21 previously exercised jurisdiction over that same property and retains that jurisdiction in a separate,
22 concurrent proceeding.” *Sexton*, 713 F.3d at 537. In the majority of cases, the removing party removes
23 the entirety of a case to federal court, thereby terminating the state court’s jurisdiction. *See id.* When
24 this happens, there is no separate, concurrent proceeding, and the prior exclusive jurisdiction doctrine
25 does not apply. *Id.*

26 This did not happen here. As Reclamation’s Notice of Removal expressly states, “this removal
27 is limited to the Motion and proceedings related to it, and not the Adjudication as a whole.” (Doc. No. 1
28 at ¶ 9.) Indeed, there is no basis to remove the entirety of the Klamath Adjudication to federal court.

1 But because the Klamath Adjudication remains pending in state court, there is a separate, concurrent
2 proceeding concerning the same *res—i.e.*, the water rights in the Klamath Basin—in a state court that
3 previously obtained jurisdiction.

4 KID brought the underlying motion because Reclamation has flouted and continues to flout the
5 water rights determined under the ACFFOD. As noted above, the ACFFOD is the culmination of a
6 multi-decade investigation and determination of *all* water rights—including federal reserved water
7 rights—to the waters of the Klamath River Basin. *See Pac. Live Stock Co.*, 241 U.S. at 447–48
8 (recognizing that Oregon’s general stream adjudication process seeks to obtain “a complete
9 ascertainment of all existing rights”); *United States v. Oregon*, 44 F.3d at 770 (affirming that the federal
10 government and the Klamath Tribe, although claiming federal reserved water rights, were required to
11 submit those claims to the Klamath Adjudication); ORS 539.200 (noting a general stream adjudication
12 “shall be conclusive as to *all* prior rights and the rights of *all* existing claimants upon the stream or other
13 body of water”) (emphasis added); ORS 539.210 (“Any claimant who fails to appear in the proceedings
14 and submit proof of the claims of the claimant shall be barred and estopped from subsequently asserting
15 any rights theretofore acquired upon the stream or other body of water embraced in the proceedings, and
16 shall be held to have forfeited all rights to the use of the water.”). The ACFFOD fundamentally changed
17 the legal paradigm under which the Klamath Project had historically operated, by fully determining
18 claims which OWRD would now regulate and water rights which are now enforceable.

19 The rights in the Klamath River Basin having been determined by Oregon’s water regulator, the
20 OWRD, they are now fully enforceable pending judicial review by the Klamath County Circuit Court.
21 *See* ORS 539.170 (“While the hearing of the order of the Water Resources Director is pending in the
22 circuit court, and until a certified copy of the judgment, order or decree of the court is transmitted to the
23 director, the division of water from the stream involved in the appeal ***shall be made in accordance with***
24 ***the order of the director.***”) (emphasis added); *see also Pac. Live Stock Co.*, 241 U.S. at 447–48
25 (affirming that “it is within the power of the [State of Oregon] to require that, pending the final
26 adjudication, the water shall be distributed according to the board’s order [i.e. Final Order of
27 Determination], unless a suitable bond be given to stay its operation”). Any party to the Klamath
28 Adjudication, including Reclamation, may seek a stay from the Klamath County Circuit Court,

1 contingent upon judicial approval and the posting of “a bond or an irrevocable letter of credit issued by
2 an insured institution as defined in ORS 706.008, . . . in such amount as the judge may prescribe,
3 conditioned that the party will pay *all damages* that may accrue by reason of the determination not being
4 enforced.” ORS 539.180. To date, Respondent Reclamation has not moved to stay the ACFFOD’s
5 determination of either its or KID’s rights, and has not posted any bond to cover the damages that would
6 be caused by such a stay. As such, the rights set forth in the ACFFOD are fully enforceable, and include
7 a determination of *all* federal reserved water rights in Oregon.

8 Notably, under the ACFFOD, Reclamation has a right to store water, but not a secondary right
9 to *use* stored water, which is required by Oregon water law. The ACFFOD determined that “[t]he United
10 States is the owner of a right to store water in Upper Klamath Lake to benefit the separate irrigation
11 rights for the Klamath Reclamation Project.” This storage right authorizes Reclamation to store up to
12 486,828 acre-feet per year in UKL reservoir between the elevations of 4,143’ and 4,136’ “for agricultural
13 irrigation, stockwater and domestic uses.” (Doc. 1-1, Rietmann Dec. at Ex. A at
14 KBA_ACFFOD_07060.) The storage right does not give Reclamation the right to use the water that
15 it stores for purposes of enhancing instream flows in the Klamath River. *Cookinham v. Lewis*, 58 Or.
16 484, 492 (1911) (holding that a primary storage right “does not include the right to divert and use stored
17 water, which must be the subject of the secondary permit”); *see also* Doc. 1-1, Rietmann Dec., Ex. A at
18 KBA_ACFFOD_07083–84 (explaining the principle that “the right to store water is distinct from the
19 right to use stored water”).

20 Accordingly, while the right store water in UKL reservoir is owned by Reclamation, the
21 secondary right to beneficially use the stored water is owned by KID and other water right holders within
22 the Klamath Project. (Doc. 1-1, Rietmann Dec. at Ex. A at KBA_ACFFOD_07083–84.) The ACFFOD
23 provides that “[b]eneficial users within the Klamath Project hold a 1905 water right to beneficially use
24 the water that the United States stores in Upper Klamath Lake reservoir for “irrigation, domestic and
25 incidental stock watering uses.” (Doc. 1-1, Rietmann Dec., Ex. A, at KBA_ACFFOD_007058, 007061,
26 007075–82.) The ACFFOD also recognizes that KID, and other irrigation districts within the Klamath
27 Project, “represent the beneficial users’ interests with respect to the beneficial use component of the
28 water rights recognized in [the ACFFOD].” (*Id.* at KBA_ACFFOD_007045, 007082.)

1 KID’s secondary water rights to *stored water* in UKL reservoir cannot be “called” or curtailed
2 by any water rights—even senior water rights—in *the Klamath River*. “Once water from a natural source
3 has been legally stored, use of the stored water is subject only to the terms of the secondary permit that
4 grants the right to use of stored water.” Op. Att’y Gen. OP-6308 (1989); *see also* ORS 540.210(3) (“The
5 distribution and division of water shall be made according to the relative and respective rights of the
6 various users *from the ditch or Reservoir*.”) (emphasis added); OAR 690-250-0150(4) (“Use of legally
7 stored water is governed by the water rights, if any, which call on that source of water.”); *Tudor v. Jaca*,
8 178 Or. 126, 147–148 (1945) (impounded water may only be used to satisfy the secondary right).
9 Because of this, “legally stored water *is not subject to call by senior rights to natural flow, even if the*
10 *stored water originated in that stream*.” Op. Att’y Gen. OP-6308 (1989) (emphasis added).

11 Whether or not Reclamation is violating the terms of the ACFFOD by releasing stored water for
12 its own purposes—whether to satisfy tribal trust rights or its own obligations under the ESA—inherently
13 involves a decision that will invade the *res* currently being considered by the Klamath County Circuit
14 Court. If this Court were to decide that Reclamation is *not* violating the ACFFOD, it would remove
15 important decisions about the scope, meaning, and effect of the ACFFOD from the Klamath County
16 Circuit Court. This would necessarily inhibit the Klamath County Circuit Court, which acquired prior
17 exclusive jurisdiction over these property rights, from making orders to effectively resolve or dispose
18 of those rights. This is the very heart of the prior exclusive jurisdiction doctrine. *See Marshall*, 547 U.S.
19 at 311 (observing “the general principle that, when one court is exercising *in rem* jurisdiction over a *res*,
20 a second court will not assume *in rem* jurisdiction over the same *res*”); *Goncalves*, 865 F.3d at 1253–54
21 (noting “the [original] court must control the property”); *Lefkowitz v. Bank of New York*, 528 F.3d 102,
22 107 (2d Cir. 2007) (noting the doctrine is violated where a federal court “would have to assert control
23 over property that remains under the control of the state courts”).

24 The prior exclusive jurisdiction doctrine has been expressly and repeatedly upheld in the context
25 of water rights. *See State Eng’r*, 339 F.3d at 811 (noting the doctrine applied whether the proceeding
26 was *in rem* or *quasi in rem*, and would only not apply if the proceeding was “*strictly in personam*”)
27 (quoting *Penn. Gen. Cas. Co. v. Pennsylvania ex rel. Schnader*, 294 U.S. 189, 195 (1935)); *United*
28 *States v. Walker River Irr. Dist.*, 890 F.3d 1161, 1165 (9th Cir. 2018) (noting that state court proceedings

1 were enjoined where federal court had first acquired jurisdiction of the water rights at issue); *cf. Gila*
2 *River Indian Comm. v. Cranford*, 459 F.Supp.3d 1246, 1256 (D. Ariz. 2020) (concluding doctrine did
3 not apply where the suits concerned a different *res*, i.e., where the state court action had jurisdiction
4 over water rights in tributaries to the Gila River but the federal court had previously exercised
5 jurisdiction over the water rights in the main stem of the Gila River).

6 In sum, this Court cannot determine whether KID’s motion should be granted without
7 determining the extent and effect of the rights found in the ACFFOD, which is the very same *res* over
8 which the Klamath County Circuit Court is now exercising jurisdiction.

9 *C. Remand Is Not Discretionary; It Is Mandatory*

10 While the doctrine of prior exclusive jurisdiction has its roots in both comity considerations and
11 prudential policies of efficient jurisprudence, “it is no mere discretionary abstention rule. Rather, it is a
12 mandatory jurisdictional limitation.” *State Engineer*, 339 F.3d at 810 (internal citations and quotations
13 omitted). As the Ninth Circuit has stated, “[w]hether the doctrine is described as a rule of comity or
14 subject matter jurisdiction, courts in this circuit are bound to treat the doctrine as a mandatory rule, not
15 a matter of judicial discretion. If the doctrine applies, federal courts may not exercise jurisdiction.”
16 *Chapman*, 651 F.3d at 1044 (internal citations and quotations omitted); *see also Goncalves*, 865 F.3d at
17 1255 (“[T]he prior exclusive jurisdiction doctrine is a mandatory rule applicable not just in matters with
18 a relationship to probate but in all cases.”); *Sexton*, 713 F.3d at 536 n.5 (noting that the rule is better
19 described “as a prudential (although mandatory) common law rule of judicial abstention”); *State Eng’r*,
20 339 F.3d at 814 (noting the rule “predates [even] our dual federal-state court system”) (quoting *Wright*
21 *& Miller*, 14 Fed. Practice & Proc. § 3631, at 15). It is clear that, if the rule applies, the case must be
22 remanded.

23 As set forth above, there is a concurrently pending state court proceeding that involves the same
24 *res*—the respective property rights of KID and Reclamation—that KID is attempting to enforce through
25 its motion. In determining the motion Reclamation has removed to this Court, this Court will necessarily
26 be called upon to interpret the ACFFOD and determine issues related to whether, how, and when it
27 should be enforced. Such a determination impacts the rights decided in the ACFFOD, which are
28

1 currently under the exclusive jurisdiction of the Klamath County Circuit Court. The motion must be
2 remanded.

3 Lastly, it bears noting that *Reclamation itself* has made the exact argument KID now advances—
4 that the Klamath County Circuit Court has exclusive jurisdiction of this matter—in the Oregon Court of
5 Appeals. Reclamation argued in an amicus brief in the matter of *TPC, LLC v. Oregon Water Resources*
6 *Department*, Case No. CA A167380, filed on December 7, 2018, that the Klamath County Circuit Court,
7 and *only* the Klamath County Circuit Court, may exercise jurisdiction over any aspect of the *res* at issue
8 in the Klamath Adjudication. (*See* Request for Judicial Notice (“RJN”), Ex. A.) Specifically, the United
9 States said:

10 Here, the Klamath County Circuit Court has properly assumed jurisdiction
11 over the water rights claims in the Klamath Basin Adjudication . . . and it
12 assumed that jurisdiction first. By doing so, it withdrew those issues from
13 any possible jurisdiction of other courts of concurrent jurisdiction “as
effectually as if the property had been entirely removed to the territory of
another sovereignty.” *State Engineer*, 339 F.3d at 809. Two courts cannot
have jurisdiction to decide these issues at the same time.

14 (RJN, Ex. A, at 16.) Reclamation itself therefore recognizes that this matter should be remanded to state
15 court.

16 **V. CONCLUSION**

17 For the reasons set forth above, KID requests that this Court remand the motion removed by
18 Reclamation to the Klamath County Circuit Court.

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21 Dated: April 20, 2021

WANGER JONES HELSLEY PC

22 By: _____
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CERTIFICATE OF COMPLIANCE

This brief complies with the applicable word-count limitation under LR 7-2(b) because it contains 6,051 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.

Dated: April 20, 2021

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