No. 19-1134

In the Supreme Court of the United States

LONNY E. BALEY, *et al.*,

Petitioners,

v.

UNITED STATES *and* PACIFIC COAST FEDERATION OF FISHERMAN'S ASSOCIATIONS,

Respondents.

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

BRIEF OF THE AMERICAN FARM BUREAU FEDERATION AND THE STATE FARM BUREAU ORGANIZATIONS OF ARIZONA, CALIFORNIA, COLORADO, IDAHO, HAWAII, MONTANA, NEVADA, NEW MEXICO, OREGON, UTAH, WASHINGTON, AND WYOMING AS *AMICI CURIAE* IN SUPPORT OF PETITIONERS

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INTRODUCTION AND INTEREST OF THE *AMICI CURIAE**

This is a case about water and its importance to agriculture, particularly in the American West.

Agriculture is essential to modern American life. It is a critical sector of the national economy: More than two million farms and ranches stretch across the American landscape, accounting for roughly $200 billion in annual economic output and employing millions of hard-working men and women. Agriculture is also critical to the nation's abundant, safe, and affordable food supply—the importance of which is especially apparent today.

But even more than that, agriculture is for millions of Americans a way of life. Their farms and ranches are not only their places of business, where they earn their livings; their farms and ranches are also their homes, where they raise their families and live their lives.

Water, in turn, is the lifeblood of agriculture. Without it, crops cannot grow and livestock cannot thrive. Particularly in the American West, therefore, access to a reliable supply of water for irrigation is essential to the survival of family farms and ranches.

To encourage development and meet the water needs of farmers, ranchers, and other users, States throughout the West long ago adopted the doctrine of prior appropriation as their method of allocating water rights. This carefully calibrated system is more than a century old, and it ensures that water is apportioned efficiently, fairly, and predictably. Western water users

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* No counsel for a party authored this brief in whole or part, and no party other than *amici* or their counsel made a monetary contribution to the preparation or submission of the brief. All parties were informed of *amici*'s intent to file this brief 10 days or more before its filing, and all have given consent.

have come to rely on it (and others' adherence to it) for their way of life.

Against this background, *amici* have a profound interest in the Court's decision whether or not to grant the petition.

The American Farm Bureau Federation is a voluntary general farm organization established in 1919 to protect, promote, and represent the economic, social, and educational interests of American farmers and ranchers. AFBF has member organizations in all 50 States and Puerto Rico, representing nearly six million member families. Its mission is to enhance and strengthen the lives of rural Americans and to build strong and prosperous agricultural communities throughout the Nation.

AFBF is joined on this brief by twelve of its Western State member organizations—those from Arizona, California, Colorado, Idaho, Hawaii, Montana, Nevada, New Mexico, Oregon, Utah, Washington, and Wyoming. Like AFBF, each of these organizations was established to promote and protect the interests of farmers and ranchers within its respective State.

Amici recognize that the Federal Circuit's decision in this case, if allowed to stand, would upend farmers' and ranchers' settled reliance interests on state-law determinations of water rights. In practical effect, the lower court held that federal agencies are free to conduct their own allocations of water rights, entirely outside settled state-law frameworks that are supposed to govern under the McCarran Amendment. If that truly were the law, it would mark a startling departure from a century of settled practice. It also would constitute an unprecedented power grab by federal agencies over State-administered water resources. Because the practical consequences of the decision below cannot be

overstated, it is imperative that the Court grant the petition and correct the Federal Circuit's errors.

SUMMARY OF ARGUMENT

The court below misapplied several bedrock principles of water law. If those errors are allowed to stand, the practical repercussions will be far-reaching.

First, the Federal Circuit disregarded federal law requiring that water rights reserved on behalf of Indian tribes be asserted and adjudicated in state water-rights proceedings. Rights to use water are governed by state law, and the federal McCarran Amendment accordingly makes state water administrators and courts the primary arbiters of competing claims to water rights. The Federal Circuit declined to respect Oregon's adjudication of water rights in the Klamath River Basin, as the McCarran Amendment requires.

Second, in a prior-appropriation State like Oregon, water rights must be administered in order of priority, with the most junior rights being curtailed first. But the court of appeals saw no problem with the Bureau of Reclamation's decision to curtail petitioners' water rights before first curtailing junior users. The prior appropriation doctrine does not allow for such disregard of senior users' priority.

Finally, the Court of Federal Claims held below that certain petitioners who had signed water delivery contracts with the Bureau of Reclamation could not assert a takings claim. The court reasoned that these petitioners' contracts with the government had "altered" their water rights. Pet. App. 168. But that holding conflated petitioners' water *delivery* rights (which are based on contract) and their rights to *use* water (which are property rights under state water law). Petitioners' use rights are independent of, and cannot be limited by, their delivery contracts with the government.

Each of these serious errors of law is a threat to the livelihoods of farmers and ranchers across the West. Enforceable water rights are essential to the survival of Western agriculture, which depends on reliable sources of water. Farmers and ranchers count on those rights being respected in the event of a dispute with other water users. The lower courts' decisions substantially erode their reliance interests by authorizing federal agencies to bypass farmers' state-law water rights with no more than the say-so of federal bureaucrats—and without paying farmers and ranchers just compensation, as the Takings Clause requires. This Court should not allow those decisions to stand.

ARGUMENT

I. THE DECISION BELOW OVERLOOKED FUNDAMENTAL PRINCIPLES OF WATER LAW

In holding that the government did not take petitioners' state-law rights to use water in the Klamath Basin, the court of appeals brushed aside bedrock principles of water law that Congress and this Court have long recognized. In doing so, the court has imperiled the livelihood of American farmers and ranchers throughout the West, where reliable access to water is critical.

A. The court of appeals impermissibly allowed a federal agency, rather than state courts, to determine water rights

Water rights in the United States have historically been the province of state law. They "are primarily state-created property rights," because "water law was, and still is to a large extent, an incident of land ownership." A. Dan Tarlock & Jason Robinson, Law of Water Rights & Resources § 1:1 (2019 ed.). States have accordingly developed both judge-made and statutory rules to govern water resources. And state administra-

tors and courts have developed expertise administering these rules and adjudicating the claims of different water users.

States resolve competing claims to water rights in comprehensive adjudications, according to which the rights of all users in a water system are decided at once. These comprehensive proceedings provide every interested party with notice and an opportunity to assert a claim, in compliance with due process standards. See Tarlock, *supra*, §§ 7:10, 7:12. The resulting determinations establish the extent and priority of all parties' water rights. See *id.* § 7:2.

In many water adjudications, private parties are not the only ones with interests at stake—rights belonging to the federal government may also be involved. This is particularly common in the West, where the federal government holds a number of lands either in its own right or in trust for Indian tribes with water rights appurtenant to their tribal lands. See Tarlock, *supra*, § 7:3.

Even where federal interests are implicated, States have plenary power to allocate those interests along with those of other uses in the system. The so-called McCarran Amendment, enacted in 1952, waives the United States' sovereign immunity and gives consent to "join the United States as a defendant in" any state "adjudication of rights to the use of water of a river system or other source." 43 U.S.C. § 666(a). The Amendment waives any argument "that the State laws are inapplicable" and provides that the United States "shall be subject to the judgments, orders, and decrees of" the state court "to the same extent as a private individual." *Ibid.*

As this Court previously has explained, the McCarran Amendment sets a national policy "recogniz[ing]

the availability of comprehensive state systems for adjudication of water rights as the means" of assigning water rights efficiently. *Colorado River Water Conservation Dist.* v. *United States*, 424 U.S. 800, 819 (1976). In *Colorado River*, the Court held that this policy ordinarily requires federal courts to abstain from water rights disputes in favor of state water adjudications. *Ibid.* Thus, under the McCarran Amendment, state courts have the near-exclusive power to adjudicate all water rights within a State (including federal reserved rights) according to state law.

Nonetheless, the federal court below purported to determine certain parties' respective rights in vast water resources in Oregon and California. At the same time, it barely mentioned the McCarran Amendment. That is not defensible.

Oregon had the duty and authority under the McCarren Amendment to determine which users have rights and priority to the water in the Klamath Basin according to Oregon law—*and it did so*, issuing a comprehensive administrative determination for the Klamath Basin in 2014. See Pet. 13. The California tribes whose interests drove the decision below were afforded no rights in that determination because they (and the United States on their behalf) declined to participate in it. *Id.* at 14. It was not for a lack of notice. The Ninth Circuit had expressly declared, years earlier, that "the Klamath Basin adjudication is in fact the sort of adjudication Congress meant to require the United States to participate in when it passed the McCarran Amendment." *United States* v. *Oregon*, 44 F.3d 758, 770 (9th Cir. 1994).

The Federal Circuit nevertheless treated the state adjudication as irrelevant and afforded the tribes vast water rights anyway, on the ground that those tribes'

rights "are federal reserved water rights not governed by state law." Pet. App. 61.

That holding cannot be squared with the McCarran Amendment or this Court's precedent interpreting it. To be sure, tribal water rights are federal in nature. But as this Court explained in *Colorado River*, the McCarran Amendment "provided consent to determine federal reserved [water] rights," including those "held on behalf of Indians[,] in state court," according to state water-rights regimes. 424 U.S. at 809. Thus, to obtain enforceable water rights, the tribes were required to participate in the state adjudication. The Federal Circuit's decision to ignore the California tribes' forfeiture flouted the requirements of the McCarran Amendment and effectively trammeled Oregon's authority and the other parties' rights and reasonable reliance interests. It should not stand.

B. The court of appeals misapplied the doctrine of prior appropriation

In addition to ignoring the primacy of Oregon's water-rights adjudication, the court of appeals misapplied Oregon water law. According to the Federal Circuit, federal agencies with no particular expertise in water law are entitled to pick and choose which users' rights to curtail without regard for priority.

Oregon follows the doctrine of prior appropriation in allocating water rights. It is not alone on this score. Among the contiguous 48 States, all seventeen west of Missouri have adopted the prior appropriation doctrine "as either a complete replacement for or addition to traditional common law riparian rights," which is the governing approach in Eastern States. Andrew P. Morriss, *Lessons from the Development of Western Water Law for Emerging Water Markets: Common Law vs. Central Planning*, 80 Or. L. Rev. 861, 865 (2000).

Unlike the common-law doctrine of riparian rights, which allocates an equal right to use water to every owner of land along the watercourse (Tarlock, *supra*, § 3:10), the prior appropriation doctrine awards rights to use water in the order in which users make beneficial use of the water. Each user's water right is defined by the extent of its beneficial use, and earlier-in-time rights have priority over later-in-time rights.

The prior appropriation doctrine was adopted throughout the West because it was uniquely well suited to the challenges of settling and developing arid Western lands. "It was a pragmatic and workable frontier system [that] provided security of right to those who had invested" in making use of water, while giving "notice to later entrants of what water remained available for their use." Robert Haskell Abrams, *Prior Appropriation and the Commons*, 37 UCLA J. Envt'l L. & Pol'y 141, 150 (2019).

In a prior-appropriation system, users with valid water rights who are not receiving water may affirmatively exercise their rights to receive water in dry periods, by making a "call" on the water source. The priority of a senior user who fails to make a call "is temporarily suspended and the right goes to the next right in order of priority until the senior again makes a call." Tarlock, *supra*, § 5:34. Once a call has been made, state officials administer water rights in reverse order of priority. When there is insufficient water to satisfy all rights on the system and there is a call, the State curtails water diversions for the junior-most user, and then the second most junior, and so on, as needed until the calling rights have received their water. Under Oregon law, therefore, petitioners had the right to have their relatively senior water rights filled in full until all rights of water users junior to petitioners had been curtailed to satisfy any valid senior claims.

Petitioners argued below that the government deprived them of this right by cutting off their water without curtailing the water of junior users and determining whether that curtailment was sufficient to preserve the needed water levels. The Federal Circuit simply ignored this problem. Rather than address whether the government had denied petitioners their rightful priorities, the court punted, stating that it was not the court's "purview" to figure out priority issues, and that in any event, it saw "no reason for the Bureau to have curtailed junior users' water" first. Pet. App. 60 n.30.

That analysis (or, more precisely, lack of analysis) shows a shocking disregard for the doctrine of prior appropriation and the manner in which States traditionally administer it. The order of priorities in a prior appropriation system is strict. Even if petitioners' rights were deemed junior to the tribal rights that the court of appeals had recognized, petitioners' rights could not be curtailed to satisfy those tribal rights until all rights junior to petitioners' had first been curtailed. By allowing the Bureau of Reclamation to curtail water rights without consideration of users' respective priorities, the Federal Circuit broke with more than a century of Western water law.

C. Reclamation Act delivery contracts do not override state-law rights to use water

If, as we and petitioners contend, the Federal Circuit erred by ignoring the McCarran Amendment and water users' priorities, then farmers and ranchers all across northern California and Oregon are entitled to compensation for the taking of their water rights and the resulting refusal to deliver water in 2001.

The Court of Federal Claims disagreed on alternative grounds. It concluded (Pet. App. 168) that certain

petitioners' water rights had been "altered" by *force majeure* provisions in their delivery contracts with the Bureau of Reclamation, immunizing the government from liability for taking water on account of "drought, inaccuracy in distribution or other cause" (*id.* at 165). In light of this language, the court concluded, petitioners were "barred from seeking compensation" for a taking of their water rights. Pet. App. 168-169.

This conclusion, too, was manifestly wrong. The Bureau's protection from contractual liability for failing to *deliver* water from Upper Klamath Lake says nothing about farmers' and ranchers' independent state-law property rights to *use* the water from the Klamath River. The use right is appurtenant to the land and exists regardless whether the Bureau bears a contractual duty to deliver.[2]

Federal project water users who have delivery contracts with the Bureau of Reclamation have two distinct kinds of water rights: rights to *use* water (determined by state water law) and rights to *receive the delivery* of water (determined by contract). See, *e.g.*, *East Ridge of Fort Collins, LLC* v. *Larimer and Weld Irrigation Co.*, 109 P.3d 969, 971 (Colo. 2005) (en banc) (distinguishing "water rights" in the "traditional sense" from "contractual water delivery rights").

As we have just discussed, state-law use rights are acquired under the doctrine of prior appropriation through actual beneficial use of water and "reside[] in the owners of the land." *Klamath Irrigation Dist.* v. *United States*, 227 P.3d 1145, 1162 (Or. 2010) (quoting *Nevada* v. *United States*, 463 U.S. 110, 126 (1983)).

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[2] The Federal Circuit did not reach this issue because its holding that tribal rights had priority over *all* petitioners' rights was "dispositive of the case." Pet. App. 63.

That remains true even when the water is provided by a federal reclamation project: In that situation, the government is "simply a carrier and distributor of the water" (*California* v. *United States*, 438 U.S. 645, 677 (1978)), and its "ownership of the water rights [is] at most nominal" (*Klamath Irrigation Dist.*, 227 P.3d at 1162 (quoting *Nevada,* 463 U.S. at 126)). The landowner retains the "beneficial interest" in the use right. *Ibid.* (internal quotation marks omitted).

Use rights are separate from the contract rights of federal project users to have water delivered via federal water works. Users obtain delivery rights in their contracts with the Bureau of Reclamation, and they in turn pay "sums stipulated in the contracts as reimbursement for the cost of construction and annual charges for operation and maintenance of the works." See *Ickes* v. *Fox*, 300 U.S. 82, 95 (1937); *Nebraska* v. *Wyoming*, 325 U.S. 589, 614 (1945).

The upshot of the distinct natures of these rights is that, in prior-appropriation states, "the entity that applies [federal project] water to beneficial use has a right that is *more* than a contractual right." *United States* v. *Pioneer Irrigation Dist.*, 157 P.3d 600, 609 (Idaho 2007) (emphasis added). When a water user's beneficial use is greater in scope or quantity than its contractual right to receive under the terms of a Bureau of Reclamation delivery contract, the user's *use* right is not limited by contract provisions, but by the amount of water actually used. See *United States* v. *Alpine Land & Reservoir Co.*, 697 F.2d 851, 853 (9th Cir. 1983) (actual beneficial use determined farmers' water rights, rather than federal contracts "which purport to limit the water duty"); *Fox* v. *Ickes*, 137 F.2d 30, 33 (D.C. Cir. 1943) ("The water-rights of [users] are not determined by contract but by beneficial use.").

The Court of Federal Claims thus erred when it held that *force majeure* provisions limiting the government's liability for failing to *deliver* water went further by limiting petitioners' rights to *use* water. Pet. App. 168. The right to use water and the right to receive a delivery are separate. Accordingly, if petitioners are correct that their use rights were improperly curtailed, they are entitled to compensation for the taking of those rights—even supposing their contracts with the government authorized the government not to deliver water under the circumstances.

II. THE QUESTION PRESENTED IS EXCEPTIONALLY IMPORTANT TO AMERICAN FARMERS AND RANCHERS

The issues raised in this petition are of vital importance to farmers and ranchers throughout the American West. They depend for their livelihoods on a reliable supply of water to irrigate their lands. According to the Federal Circuit, the federal government has the power to override State-determined water rights and seize water for federal purposes—all without paying compensation. If that is the law, it should be this Court that says so.

A. Water is essential to Western farmers and ranchers

The question presented in the petition is not a mere abstraction. Its resolution will have an immeasurable practical impact on farmers and ranchers—not only in northern California and Oregon, but throughout the entire American West.

Irrigation is essential to productive and sustainable agriculture. According to the World Bank, "irrigated agriculture is, on average, at least twice as productive per unit of land, provides an important buffer against increasing climate variability, and al-

lows for more secure crop diversification." The World Bank, *Water in Agriculture*, perma.cc/R7PH-AZP8. Irrigation has played a particularly critical role in making agriculture possible in the West, which has "a fragile geography marked by climate extremes, particularly in water supply." John H. Davidson, *Sustainable Development and Agriculture in the United States*, 32 Envt'l L. Rep. 10543, 10546 (2002).

Indeed, the harsh conditions of the West make farming and ranching virtually impossible without irrigation. The continental American West comprises 11 States; in six of those States, including California, irrigated farms account for 97-99% of the market value of all crops sold. Cong. Research Serv., *Irrigation in U.S. Agriculture: On-Farm Technologies and Best Management Practices* 2 (Oct. 17, 2016), perma.cc/2942-LFJX. In the remaining five States, Hawaii, and Alaska, irrigated farms account for a significant majority of the market value of all crops sold. *Ibid.*

What is more, agricultural irrigation accounts for "approximately 80 percent of the Nation's consumptive water use and over 90 percent in many Western States." U.S. Dep't of Agriculture, Econ. Research Serv., *Irrigation and Water Use*, perma.cc/3DDA-FMSD. And it should go without saying that when water is in short supply, irrigation is far less effective. Lyndon Kelley et al., Mich. State Univ., *Adequate water supply is the heart of an irrigation system* (Mar. 4, 2019), perma.cc/QHF5-S7K6 (noting the "importance of an adequate and dependable irrigation water supply" for proper irrigation). American farmers and ranchers thus depend upon a reliable supply of water.

Unsurprisingly, therefore, water shortages can be devastating for Western farmers. For example, when California experienced a severe statewide drought between 2012 and 2016, some $45 billion in crop revenue

was lost, and more than 27,000 farm and ranch employees lost their jobs. Nat'l Geographic, *The California Drought*, perma.cc/LQ6Z-K2YT. By 2015, 15 percent of the farmland in California was lying fallow due to the lack of adequate water. *Ibid.*

The manmade water shortage that the Bureau of Reclamation caused when it refused to recognize petitioners' water rights had a similarly disastrous impact. As a result of the Bureau's action, some 1,200 farms in the Klamath Basin area received roughly a third of the water in 2001 that they otherwise would, causing "well over $100 million in" immediate economic damage (Blake Hurst, *Calamity in Klamath*, The Am. Enter., Oct./Nov. 2002, at 28) and threatening the area with crop damage and decreased land value for years to come (Cong. Research Serv., *Klamath River Basin Issues: An Overview of Water Use Conflicts* 13 (June 13, 2002), perma.cc/KLE5-YB9U).

Under the rule announced by the Federal Circuit, farmers and ranchers in the arid West operate under the constant threat that federal bureaucrats will unilaterally override their water rights in service of federal interests once more, just as they did in 2001. That is not a tenable position, and the stakes for farmers and ranchers thus could not be higher.

B. The decision below eviscerated farmers' and ranchers' reasonable reliance interests

Just as farmers depend upon a reliable supply of water for their livelihoods, they also depend on having a clear understanding of what their water rights are, and what priority those rights have vis-à-vis other users, so that they can make informed decisions when planning for the future. State-law water adjudications provide this clarity. These adjudications establish a single hierarchy of priorities that encompasses every

user in a water system. And because an adjudication is conclusive as to all parties, "including parties with a duty to participate in the adjudication," it purports to settle rights once and for all, without the possibility that absent parties will come forward to assert claims later. See Tarlock, *supra*, § 7:22.

But comprehensive state adjudications are of little use to farmers if there is no assurance that the results of these adjudications will be respected. The court of appeals' decision denies farmers that assurance. The comprehensive adjudication that Oregon conducted here gave petitioners the right to use water from the Klamath Project. But the court of appeals allowed the Bureau of Reclamation to deny petitioners their rights, by holding that the Bureau was permitted to withhold water to satisfy tribal rights that had never been asserted in the state adjudication. And if future water disputes arise in the Klamath Basin, the court of appeals' decision will serve as precedent for allowing the Bureau to nullify petitioners' rights again.

The impact of the decision below will not be limited to the Klamath Basin. As we have noted, every State in the West applies some form of the prior appropriation doctrine (see *supra*, page 7), and many are home to a number of Indian reservations, scores of which are scattered throughout the landscape. Indeed, "[i]n the 11 Western[most continental] States, Indian lands total about 43 million acres or about 6 percent of all land." U.S. Gen. Accounting Office, *Reserved Water Rights for Federal and Indian Reservations: A Growing Controversy in Need of Resolution* 18 (Nov. 16, 1978), www.gao.gov/assets/130/124667.pdf.

The court of appeals' analysis would allow the government to invoke federal interests, including tribes' interests that are asserted to be coterminous with the requirements of the Endangered Species Act, even

where state authorities and courts have determined that farmers' rights have priority. A clearer example of a government taking would be difficult to conceive. Without just compensation for such takings, farmers would be profoundly discouraged from making productive investments in agriculture.

In short, petitioners and other farmers have strong reliance interests in water rights that they have been granted in state adjudications—water rights essential to the system of American agriculture that provides food and fiber to the Nation. If the government wishes to override those reliance interests and take farmers' water rights for some public purpose, it must provide just compensation. Taking these rights *without* compensation, as the government did here, is a clear violation of the Fifth Amendment. This Court should grant review and reverse the Federal Circuit, reaffirming that federal agencies may not undo state water-rights adjudications by fiat.

CONCLUSION

The petition for certiorari should be granted and the decision below should be reversed.

Respectfully submitted.

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APRIL 2020