No. 19-1134

In The Supreme Court of the United States

LONNY E. BALEY, ET AL.,

Petitioners,

v.

UNITED STATES, PACIFIC COAST FEDERATION OF FISHERMEN'S ASSOCIATION,

Respondents.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Federal Circuit

BRIEF OF OREGON WATER RESOURCES CONGRESS, NATIONAL WATER RESOURCES ASSOCIATION, FAMILY FARM ALLIANCE, IDAHO WATER USERS ASSOCIATION, WASHINGTON STATE WATER RESOURCES ASSOCIATION, IRRIGATION & ELECTRICAL DISTRICTS ASSOCIATION OF ARIZONA, AGRIBUSINESS & WATER COUNCIL OF ARIZONA, AND YUMA COUNTY AGRICULTURE WATER COALITION, ET AL. AS *AMICI CURIAE* IN SUPPORT OF PETITIONERS

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Pursuant to Supreme Court Rule 37, Oregon Water Resources Congress; National Water Resources Association; Family Farm Alliance; Idaho Water Users Association; Washington State Water Resources Association; Irrigation & Electrical Districts Association of Arizona; Agribusiness & Water Council of Arizona; Yuma County Agriculture Water Coalition; North Gila Valley Irrigation and Drainage District; Wellton-Mohawk Irrigation and Drainage District; Unit B Irrigation and Drainage District; Yuma County Water Users' Association; and Yuma Mesa Irrigation and Drainage District respectfully submit this brief as *amici curiae* in support of Petitioners.[1]

IDENTITY AND INTERESTS OF *AMICI CURIAE*

Amici represent water suppliers who provide irrigation water in 17 western states, where there are approximately 40.4 million irrigated acres. That irrigated area is larger than the combined area of the District of Columbia, Maryland, Delaware, and Pennsylvania. Without irrigation, it is impossible to grow most crops in the West. The Federal Circuit's decision jeopardizes agricultural production on that land, which annually accounts for more than $172 billion in direct economic

[1] Rule 37 statement: All counsel of record received timely notice before the due date of *amici*'s intent to file this brief. All parties provided written consent to filing of the brief. *See* Sup. Ct. R. 37.2(a). No party's counsel authored this brief in whole or part; *amici* alone funded its preparation and submission. *See* Sup. Ct. R. 37.6.

contribution to the United States' gross domestic product.

Amici include state and national associations whose members rely on the consistent and predictable application of state and federal water law to make water deliveries to farms they serve. For nearly 150 years, this Court has deferred to well-established state processes to resolve competing claims to water and regulate water distribution during times of shortage. Similarly, Congress has recognized the important role played by these state processes by waiving the United States' sovereign immunity in general stream adjudications—requiring the United States to participate in state court proceedings to resolve competing claims for water rights, including federal reserved water rights. The Federal Circuit's decision threatens the very foundation of these state processes.

Oregon Water Resources Congress (OWRC) is an Oregon nonprofit corporation and trade association founded in 1912 to protect water rights and encourage water conservation and stewardship throughout Oregon. OWRC's members include irrigation districts and other entities directly involved in the collection, storage, transfer, delivery, and use of water for agriculture. OWRC's members serve nearly 575,000 irrigated acres, supporting Oregon's annual $5.32 billion agricultural industry. Most OWRC members operate in areas that are impacted by federal reserved water rights. In addition, OWRC members are impacted by both ongoing and completed Indian water rights settlements.

National Water Resources Association (NWRA), established in 1932, is a nonprofit federation of state water resources associations and related interest groups whose members include irrigation districts, water conservation and conservancy districts, municipal water districts, farmers, ranchers, and others with an interest in water issues in the western United States. With roots back to the 1890s, NWRA is the oldest national association concerned with water resources policy and development. NWRA has member entities in Arizona, California, Colorado, Idaho, Kansas, Montana, Nebraska, Nevada, New Mexico, North Dakota, Oregon, Texas, Utah, and Washington. NWRA members provide water to approximately 50 million Americans, help irrigate millions of acres of farmland, and deliver hydroelectric power to over four million people.

Family Farm Alliance (FFA) is a grassroots, nonprofit corporation founded in 1991, composed of family farmers, ranchers, irrigation districts, and allied industries in 17 western states. Ten of the states with FFA membership in 2012 accounted for 64.5 percent of all irrigated acres in the country, according to USDA's Economic Research Service. FFA's mission is to ensure the availability of reliable and affordable irrigation water supplies to western farmers and ranchers.

Idaho Water Users Association (IWUA) is a nonprofit corporation founded in 1937, representing approximately 300 canal companies, irrigation districts, ground water districts, municipal and public water suppliers, hydroelectric companies, aquaculture

interests, agribusiness, professional firms, and individuals throughout Idaho. IWUA members provide water to nearly three million acres of farm and livestock operations, supporting Idaho's annual $8.3 billion agricultural industry.

Washington State Water Resources Association is a public trade association founded in 1947, representing irrigation districts and companies in Washington state. More than 100 member irrigation districts and companies provide water to over 1.2 million acres of irrigated land, supporting Washington's annual $9.67 billion agricultural industry.

Irrigation & Electrical Districts Association of Arizona (IEDA) is a nonprofit association founded in 1962, whose members provide water and power to over 60 percent of Arizona's citizens, businesses, and farms, including nearly three-fourths of the state's irrigated agriculture. IEDA's 24 members include a federal irrigation project serving an Indian reservation, as well as small municipalities and special districts whose water and power service areas abut or are otherwise influenced by Indian and other federal reservations.

Agribusiness & Water Council of Arizona is a nonprofit association founded in 1978, whose members are responsible for annually providing 2.5 million acre feet of water to 500,000 acres of Arizona farmland, supporting Arizona's annual $5 billion agricultural industry.

Yuma County Agriculture Water Coalition (YCAWC) is an Arizona nonprofit corporation founded in 2016, whose members annually divert over 1.1 million acre feet of Colorado River water, under contracts with the Secretary of the Interior, to irrigate more than 165,000 acres of land in the Yuma County, Arizona area. Members of the Coalition are 70- to 100-year-old entities including Bard Water District and the following members, who are also parties to this brief: **North Gila Valley Irrigation and Drainage District**, **Unit B Irrigation and Drainage District**, **Wellton-Mohawk Irrigation and Drainage District**, **Yuma County Water Users' Association**, **Yuma Irrigation District**, and **Yuma Mesa Irrigation and Drainage District**. YCAWC estimates that crops grown within the Coalition area deliver the winter produce for 85 percent of the United States and Canada.

SUMMARY OF ARGUMENT

When the U.S. Bureau of Reclamation (Reclamation) terminated water deliveries to Klamath Project irrigators in 2001, crops died, farmers were powerless to produce food, and an entire agricultural region was laid to waste. *See Baley v. United States*, 134 Fed. Cl. 619, 640–41 (2017), *aff'd*, 942 F.3d 1312 (Fed. Cir. 2019). Reclamation took its unilateral action in the midst of Oregon's state water rights adjudication process, which was initiated to comprehensively identify and quantify all vested state and federal water rights in the Klamath Basin. The state adjudication,

underway since 1975, involves more than 700 competing claims to water in the Klamath Basin and more than 5,000 challenges to those claims.

Despite the ongoing state adjudication, the Federal Circuit concluded in 2019 that Reclamation's action was not an unconstitutional taking, because Reclamation had a legal obligation to take water regulation into its own hands in order to deliver water for an unadjudicated federal reserved water right[2] held on behalf of the Yurok and Hoopa Valley Tribes (California Tribes). *Baley v. United States*, 942 F.3d 1312, 1335–37 (Fed. Cir. 2019). The Federal Circuit reached that conclusion 44 years after the state adjudication began, notwithstanding that neither the California Tribes nor the United States (on the California Tribes' behalf) had filed claims for federal reserved water rights in the state adjudication. In so concluding, the Federal Circuit undermined decades of work invested in the adjudication, while turning its back on this Court's precedents, the McCarran Amendment, and principles of finality, certainty, and due process.

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[2] A federal reserved water right arises when the federal government withdraws land from the public domain and reserves it for a federal purpose, reserving by implication appurtenant water then unappropriated to the extent needed to accomplish the purpose of the reservation. *Cappaert v. United States*, 426 U.S. 128, 138 (1976) (citing, *inter alia*, *Winters v. United States*, 207 U.S. 564, 575–78 (1908)); *see also United States v. New Mexico*, 438 U.S. 696, 700 (1978). This implied right is neither quantified nor is its relative priority determined until adjudicated either through a state adjudication or by a federal court. *See Cappaert*, 426 U.S. at 145–46.

The Federal Circuit effectively held that federal agency staff have the power to confirm, quantify, and enforce federal reserved water rights on an ad hoc basis, upending century-old state processes to adjudicate and administer water rights. Millions of water users across the western United States rely on those processes and the certainty that they provide. The Federal Circuit's decision directly conflicts with the precedents of this Court. The disruption the decision will cause to the predictable adjudication and administration of water rights in the West cannot be overstated.

First, the Federal Circuit's decision fundamentally destabilizes western water law and wholly undermines states' management of their own water resources. The Federal Circuit's decision directly contradicts time-honored principles of prior appropriation, the McCarran Amendment, 43 U.S.C. § 666(a), and this Court's consistent precedents deferring to state water law, including *Cappaert*, 426 U.S. 128, and *Colorado River Water Conservation District v. United States*, 424 U.S. 800 (1976). The decision creates enormous uncertainty for all western water users, including *amici* and their members, who rely on the predictable adjudication and administration of water rights in their states.

Second, the Federal Circuit's decision radically alters the federal government's role in managing federal reserved water rights, by enabling federal agencies to unilaterally shut off any (and in some cases all) other water users within a river basin that includes any unadjudicated federal reserved water rights—without warning and without recourse. In this way, the impacts

of the Federal Circuit's decision are not limited to Oregon or even state water right adjudications generally. Rather, the decision will affect river basins across the West, which include millions of acres of agricultural land irrigated from water supplies that could now be subject to curtailment to satisfy previously unadjudicated federal reserved water rights. The lack of certainty not only affects crops already in the ground that have an available water supply one day but not the next, but also affects the overall investment in and long-term viability of irrigated farming operations. This directly endangers the nation's food supply.

Third, the Federal Circuit's decision undermines long-term, comprehensive water resources planning by states, local governments, and water delivery entities like *amici* and their members, by enabling federal agencies to unilaterally and unpredictably assert and manage their own water rights outside the state processes that bind all water users. Those efforts are increasingly essential to meet water shortages in the West, as climate change and population growth further limit scarce water supplies. The Federal Circuit's decision wrests from states the ability to effectively manage limited water resources throughout the West.

The resolution of the question presented in this case will have a direct impact on water and food security, which are issues of significant national strategic importance, particularly in times of national upheaval. These concerns should weigh heavily in favor of this Court granting the petition for certiorari.

REASONS FOR GRANTING THE PETITION

I. The Federal Circuit's Decision Directly Conflicts with This Court's Longstanding Precedents Deferring to State Adjudication and Administration of Water Rights, Eliminating the Predictability and Certainty upon Which All Water Users Rely.

As this Court has explained, "[t]he 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). Over the past century and a half, western states have established comprehensive processes to "adjudicate" water rights—*i.e.*, identify, quantify, and determine the relative priority of all vested water rights in a river basin—and to "administer" water rights—*i.e.*, regulate water delivery and enforce water rights in relative priority once they have been adjudicated. This Court has consistently afforded deference to those state adjudications and state administrative processes. *See, e.g.*, *Colorado River*, 424 U.S. at 819–20 (explaining "clear federal policy" to avoid "piecemeal adjudication of water rights in a river system" and defer to state adjudications); *California*, 438 U.S. at 675 (explaining that, in authorizing federal irrigation projects, Congress made "abundantly clear" its intent "to defer to the substance, as well as the form, of state water law"); *United States v. District Court for Eagle County*, 401 U.S. 520,

524 (1971) (rejecting United States' argument that federal reserved water rights are not subject to state suits regarding water rights adjudication and administration); *Cal. Or. Power Co. v. Beaver Portland Cement Co.*, 295 U.S. 142, 164 n.2 (1935) (observing that 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"); *Atchison v. Peterson*, 87 U.S. 507 (1874) (deferring to state law to define the scope and limits of vested water rights).

The Court's deference to state water law is grounded in the need for certainty and predictability. Development in the West "would not have been possible without adequate water supplies in an otherwise water-scarce part of the country. The doctrine of prior appropriation—the prevailing law in the Western States—is itself largely a product of the compelling need for certainty in the holding and use of water rights." *Arizona v. California*, 460 U.S. 605, 620 (1983) (citing *Colorado River*, 424 U.S. at 804). Because of that need, individual states have primary jurisdiction and control over water resources within their borders, and bodies of state and federal law have developed in reliance on this Court's deference to state jurisdiction. To reliably deliver water to the West's farmland, *amici* depend on the certainty of prior appropriation and the state statutes and regulations that implement it.

The Federal Circuit's decision turns all of that on its head. Despite this Court's precedents, the Federal Circuit has concluded that the federal government's

unadjudicated reserved water rights are not subject to state adjudication or administration at all. *See Baley*, 942 F.3d at 1339–41. In so concluding, the Federal Circuit announced numerous principles that destabilize the predictable state systems upon which all western water users rely. Those holdings include:

- Federal reserved water right holders do not waive their rights by failing to participate in state adjudication procedures, even when the United States has consented to suit. *Id.* at 1341 ("Nor do we believe that the [California Tribes] waived their rights because they did not participate in the Klamath Adjudication."). Instead, federal reserved water right holders may assert, adjudge, and enforce their own rights decades later, regardless of the resulting deep disruptions to state processes.

- Federal reserved water right holders may confirm and quantify their own water rights, without the oversight of any administrative or judicial body. *Id.* at 1339–40 ("[I]t was not necessary for the Tribes' rights to have been adjudicated before the Bureau acted."); *id.* at 1341 (holding that, with respect to all tribes claiming federal reserved water rights to Klamath Project water, "none of these rights had to be quantified").

- Federal reserved water right holders may ignore the rules of prior appropriation and may unilaterally shut off other water users without regard to their seniority, also known as "priority." *Id.* at 1340 n.30 ("[G]iven the ongoing, unfinished status of the Klamath

Adjudication in 2001, we see no reason for the Bureau to have curtailed junior users' water before curtailing [senior irrigators'] water.").

- Federal reserved water right holders may enforce their own water rights however they choose, outside of state administrative processes and without due process to other water users. *See id.* at 1339–40 (upholding Reclamation's unilateral action to terminate water to irrigators).

As discussed in greater detail below, the Federal Circuit's holdings, both individually and collectively, fracture the foundations of western water law.

A. The Decision Directly Contradicts the McCarran Amendment and This Court's Precedent in *Cappaert* and *Colorado River*, Producing Irreconcilable Decisions by State and Federal Courts.

Recognizing the significant role that federal reserved water rights play in river systems across the West, Congress passed the McCarran Amendment in 1952, consenting to the joinder of the United States in state adjudications. 43 U.S.C. § 666(a). This Congressional recognition of the importance of state court jurisdiction, and the need to meld federal reserved water rights into state administration, is a cornerstone of western water law.

Furthermore, although federal courts have jurisdiction under 28 U.S.C. § 1345 or 28 U.S.C. § 1362 to

adjudicate federal water rights claims, the *Colorado River* abstention doctrine establishes a strong preference *against* federal courts asserting jurisdiction over issues traditionally left to state courts when such jurisdiction would result in duplicative and piecemeal litigation. *Colorado River*, 424 U.S. at 819–20. This Court affirmed that principle in *Arizona v. San Carlos Apache Tribe of Arizona*, holding that federal courts should avoid exercising jurisdiction over disputes pending in state water rights adjudications when the exercise of federal jurisdiction would create "the possibility of duplicative litigation, tension and controversy between the federal and state forums, hurried and pressured decision making, and confusion over the disposition of property rights." 463 U.S. 545, 569 (1983).

Despite that clear body of law, the Federal Circuit has now held that federal agencies do not have to participate in state adjudications to confirm and quantify their water rights—even when the United States has undisputedly been joined as a party. The Ninth Circuit has twice concluded 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); *see also United States v. Adair*, 723 F.2d 1394, 1406 (9th Cir. 1983) (requiring quantification of tribal water rights in Klamath Basin Adjudication). Nevertheless, the Federal Circuit relied on this Court's statement in *Cappaert* that "[f]ederal water rights are not dependent upon state law or state procedures" to make the incorrect

and illogical leap that federal water rights are not subject to state adjudications—and, in fact, need not be adjudicated by a neutral third party at all. *See Baley*, 942 F.3d at 1340 (citing *Arizona v. California*, 373 U.S. 546, 597 (1963); *Cappaert*, 426 U.S. at 145).

The Federal Circuit's holding is directly contrary to this Court's holding in *Cappaert*, which instructs that "[t]he McCarran Amendment waives United States' sovereign immunity should the United States be joined as a party in state-court general water rights' adjudication. *Colorado River* and the policy evinced by the Amendment may, in the appropriate case, require the United States to adjudicate its water rights in state forums." 426 U.S. at 146 (citation omitted). The Federal Circuit compounded the lack of deference by upholding Reclamation's self-enforcement of the federal reserved water right at issue. This lack of deference upends the western water law system on which *amici* depend.

The Federal Circuit's decision is also directly at odds with this Court's precedent in *Colorado River*, 424 U.S. at 819–20. Rather than abstaining from jurisdiction, the Federal Circuit proceeded to enter a judgment that is inconsistent with the pending state adjudication in this case, underscoring this Court's very reasons for federal abstention. When Reclamation terminated irrigation deliveries in 2001, the state adjudication was still in process. The California Tribes did not participate in the adjudication, nor did the United States participate on their behalf, despite its joinder to assert and defend myriad other federal

reserved rights, including those of the Klamath Tribes. In 2014, the state adjudication concluded its administrative phase, resulting in an administrative order comprehensively and finally adjudicating the hundreds of competing claims to water in the Klamath Basin. An Oregon state court is now reviewing that order. Because the California Tribes did not participate in the adjudication, the administrative order identified no federal reserved water rights on their behalf. Nonetheless, four decades after the adjudication began, the Federal Circuit issued its decision, concluding that the federal government holds federal reserved water rights in the Klamath Basin on behalf of the California Tribes.

The Federal Circuit's decision throws the results of the entire Klamath adjudication into question, based on an operational decision by Reclamation's technical and policy staff. The court effectively allowed the United States to avoid participating in the adjudication on behalf of the California Tribes, yet granted a senior priority federal reserved water right for the benefit of the California Tribes. This end-run around the state not only eliminates the certainty of the adjudication's result, it also deprives all other parties in the basin of the opportunity to participate in a judicial determination of the California Tribes' rights. The decision has real and serious implications for nonfederal water users in the Klamath Basin, who have relied on the adjudication's promise of certainty and finality.

B. The Decision Allows Federal Agencies to Determine the Existence, Scope, and Priority of Federal Reserved Water Rights in Isolation, Depriving Other Water Users of Due Process, Finality, and Certainty.

As a prerequisite to enforcement, water rights must be confirmed and quantified by the state. *See, e.g.*, Or. Rev. Stat. § 540.045(1)(a) (state enforces "water rights of record").[3] River systems and the associated water rights are "highly interdependent," *San Carlos Apache Tribe*, 463 U.S. at 552, and water availability in one part of the river affects all other users on the river. Because of those interconnected relationships, states have developed adjudication procedures to determine water rights with due process and finality. As this Court has explained:

> Each claimant [in an adjudication] is . . . directly and vitally interested, not only in establishing the validity and extent of his own claim, but in having determined *all of the other claims*. . . . In such a proceeding the rights of the several claimants are so closely related that *the presence of all is essential* to

[3] Citations to Oregon law illustrate the basic principles of water law across the West. The *amicus* briefs filed before the Federal Circuit by the State of Oregon and OWRC further explain how the State of Oregon administers water rights in Oregon. *See generally* Amicus Curiae Brief of the State of Oregon, Dkt. 94 (June 29, 2018); Brief Amicus Curiae of Oregon Water Resources Congress, Dkt. 62 (May 30, 2018). Oregon's approach is typical of western states' processes based on prior appropriation, though each state's approach varies based on its own development history.

> the accomplishment of its purposes, and it hardly needs statement that these cannot be attained by mere private suits in which only a few of the claimants are present, for only their rights as between themselves could be determined.

Pac. Live Stock Co. v. Lewis, 241 U.S. 440, 449 (1916) (emphasis added; citation omitted).

State adjudication procedures require notice and numerous opportunities to appear and present evidence before, during, and after the adjudication proceedings. *See, e.g.*, Or. Rev. Stat. §§ 539.005–.240. Those procedures are not surprising; state judicial proceedings to determine rights to property must comply with procedural due process requirements. *See Bd. of Regents of State Colls. v. Roth*, 408 U.S. 564 (1972); *see also Nevada v. United States*, 463 U.S. 110, 144–45 (1983) (applying due process principles to state stream adjudication and barring the United States from subsequently relitigating the adjudication to expand tribal rights).

Despite those constitutional requirements, the Federal Circuit has now concluded that federal agencies need not have their water rights adjudicated or quantified by a court of competent jurisdiction before they engage in self-help to enforce those rights. *See Baley*, 942 F.3d at 1339–40. Instead, federal agencies may confirm the existence, quantity, and priority of their own water rights with no prior notice to other affected water users; no opportunity for other water users to present legal challenges, evidence, or otherwise be

heard; no neutral decisionmaker; and no clear avenue to challenge the agency's decision. *See id.*

C. The Decision Allows Federal Agencies to Enforce Their Own Water Rights, Undermining the Basic Rules of Prior Appropriation and State Water Right Administration.

In western states, water is owned by the state, and water users obtain property rights to use water on a first-come, first-served basis according to the doctrine of prior appropriation. *See Montana v. Wyoming*, 563 U.S. 368, 375–76 (2011). The right to use water belongs to the first person to put it to beneficial use. *Id.* at 376. As new users come to the same water source, they are considered "junior" to the prior "senior" appropriators. *Id.* During times of shortage, a senior user has the right to demand enforcement from the state to limit the use of water by junior users and fully satisfy the senior right. *Id.* The state enforces water rights in order of "priority," meaning that the state must fully shut off the most junior user first before proceeding up the line. *See* Or. Rev. Stat. § 540.045(1). Senior water users do *not* have rights of self-enforcement. *See* Or. Rev. Stat. §§ 536.037(1)(c), 540.030 (only the state has authority to enforce water rights according to specific administrative procedures). A senior water right holder may obtain enforcement only by having *the state* shut off junior water users. *See, e.g.*, Or. Rev. Stat. § 540.045(1). *See generally* David H. Getches, *Water Law in a Nutshell* 103–04 (3d ed. 1997).

Because states have the power to deny the use of water—a property right—to those who rely on it, western water users depend on predictable state processes that provide due process. States do not automatically shut off junior appropriators whenever seniors call for satisfaction of their water rights. *See, e.g.*, Or. Admin. R. 690-250-0020 (enumerating factors that state will evaluate before shutting off junior users). States begin enforcement only after streamflow has been measured and all other vested water rights in the system have been identified. *See, e.g.*, Or. Admin. R. 690-250-0100. States must also evaluate whether shutting off junior users would actually generate a supply of water that could satisfy the senior user. *See, e.g.*, Or. Admin. R. 690-250-0020 (defining "futile call" doctrine). States also provide procedures to appeal regulatory actions that deprive water users of their property rights. *See, e.g.*, Or. Admin. R. 137-004-0080 (judicial review procedures for regulatory orders by the Oregon Water Resources Department).

Ignoring this Court's history of deference to those well-established state processes, the Federal Circuit has now determined that a federal agency may perform a regulatory function historically reserved to the states—namely, to confirm, quantify, and enforce its own water rights—while completely disregarding the rules of prior appropriation. *See Baley*, 942 F.3d at 1339–41. This lack of deference to state rules governing the administration of water rights is wholly inconsistent with the McCarran Amendment, which provides for the waiver of sovereign immunity for suits

related to both the "adjudication" *and "administration"* of federal reserved water rights. 43 U.S.C. § 666(a) (emphasis added).

II. The Decision Threatens Water Supplies for Irrigated Agriculture Across the West.

If allowed to stand, the Federal Circuit's decision will eliminate the comprehensive nature of adjudications and water rights administration in western states, undermining the certainty upon which *amici* and all water users rely. For decades, federal, state, tribal, and private stakeholders have invested millions of dollars in large-scale, basin-wide adjudications of water rights and Indian water right settlements, in response to the uncertainty posed by federal reserved water rights. *See* John E. Thorson et al., *Dividing Western Waters: A Century of Adjudicating Rivers and Streams, Part II*, 9 U. Denv. Water L. Rev. 299, 324 (2006). State water right adjudications involving federal reserved water rights and tribal water right settlement negotiations remain pending in Arizona, California, Colorado, Idaho, Montana, Nevada, New Mexico, Oregon, Utah, and Washington. Those efforts have proceeded based on this Court's consistent holdings and Congress's direction that states have primary authority to comprehensively adjudicate and administer water rights. The Federal Circuit's decision destabilizes all of those ongoing efforts.

Yet the Federal Circuit's decision threatens western water users far beyond the context of state adjudications

and tribal water right settlements. Based on the Federal Circuit's holding, federal agencies can take unilateral action to enforce any of their federal reserved water rights at any time, with no notice or due process to other water users and no regard for impacts on other vested water rights in the same river basin. *See Baley*, 942 F.3d at 1340 ("[I]t was not necessary for the Tribes' rights to have been adjudicated before the Bureau acted."). The decision touches every single western water system that includes federal reserved water rights, whether those rights are yet to be adjudicated or have been fully quantified and recognized by the states.

The Federal Circuit's decision is not limited to federal irrigation projects. It potentially impacts all water users within any watershed in which a federal agency or Indian tribe may assert a federal reserved water right. Millions of acres of land across the West potentially carry federal reserved water rights, including Indian reservations, designated national monuments, national forests, national recreation areas, and wildlife refuges. By one government estimate, up to 187 million acres in 11 western states might carry federal reserved water rights—or approximately 52 percent of all federal land in those states. *See* U.S. Gen. Accounting Office, Reserved Water Rights for Federal and Indian Reservations: A Growing Controversy in Need of Resolution 9 (1978).

The regulatory backdrop to this litigation illustrates the breadth of the Federal Circuit's decision. It arose out of a routine operational decision by Reclamation's technical and policy staff to implement a

biological opinion under the Endangered Species Act, 16 U.S.C. §§ 1531–1544—one of many biological opinions that influence the federal government's management of water resources across the West. Many—if not most—western water systems with federal reserved water rights also involve species protected under the Endangered Species Act. *Amici* and their members regularly interface with federal agencies, including Reclamation, the U.S. Army Corps of Engineers, the U.S. Forest Service, the Bureau of Land Management, and others to implement the Endangered Species Act within the context of state water resources administration. This litigation is not unique to Reclamation's action in the Klamath Basin in 2001, and similar disputes will inevitably arise in other parts of the West.

III. The Decision Frustrates Long-Term Water Resources Planning Efforts, Further Threatening Water Security in the West.

The Federal Circuit's decision fundamentally destabilizes western water law at a time when western communities need predictability and certainty the most. As climate change continues to impact the West and population continues to grow, it is increasingly essential that individual water users, water delivery entities, and states are able to conduct effective long-term water resource planning. As one example, Oregon is expected to lose the majority of its annual snowpack by the 2080s. *See* Oregon Water Resources Department, Oregon's 2017 Integrated Water Resources Strategy at 72

(2017), https://www.oregon.gov/owrd/WRDPublications1/2017_IWRS_Final.pdf. Precipitation that arrives as rain instead of snow runs off the landscape sooner, reducing the amount of water available throughout the spring and summer, when water is scarce. *Id.* Increasingly, Oregon will depend on water storage, effective water planning, and efficient and equitable water administration to achieve water security. *Id.* Other states throughout the West face similar futures. The Federal Circuit's decision impairs western communities' ability to plan for those challenges.

A. The Decision Creates New Uncertainty Around the Respective Roles of State and Federal Water Resource Managers, Undermining Collaborative Planning Efforts.

Climate change will drive water resource solutions that depend on the centralized administration of water rights by states. Unlike federal agencies, states are uniquely positioned to manage water resources efficiently and comprehensively, because they can manage entire watersheds within their borders. States also administer water rights according to predictable rules, which enable communities and individual water users to plan for the long term. Yet the Federal Circuit's decision restrains states from effectively managing their limited water resources. As a result, the decision undermines long-term, comprehensive water resources planning by states, local governments, and water delivery entities like *amici*, or those represented by

amici. Those planning efforts are essential to meet the water shortages that already exist in the West and will almost certainly increase over time.

The Federal Circuit's decision also disrupts the balance between local, state, and federal water resource managers that has evolved in tandem with the legal principles upon which all western water users rely. Throughout the West, communities must balance competing demands for limited water. Cities, agriculture, industry, and fish and wildlife all rely on adequate water. States, federal agencies, tribes, and private stakeholders all have roles in managing resources to satisfy those various needs. *See generally California*, 438 U.S. at 650–51 (examining the "cooperative federalism" principles that underlie water resource management in the West). The Federal Circuit's decision unsettles those carefully negotiated and clearly defined roles.

That disruption hampers efforts to manage water flexibly and collaboratively outside of litigation. Water users will now be subject to both federal and state enforcement authorities and must monitor and potentially litigate their rights in both federal and state forums. Worse, as this litigation demonstrates, water users may be subject to water rights determinations by federal agencies without any process at all. The Federal Circuit's decision triggers many of the concerns set forth by this Court in *San Carlos Apache Tribe*—namely, duplicative litigation, tension and controversy between the federal and state forums, and confusion over the disposition of property rights. The decision creates a framework in which water users must spend

their money and time litigating in multiple forums, rather than working toward efficient resource management solutions.

B. The Decision Threatens Irrigated Agriculture in the West and Food Security Across the Nation.

The nation's food security depends on long-term water security in the West. Western farmers grow the majority of the crops that feed the nation. However, unlike in many parts of the eastern United States, western farmers rely on stored water to do so. Western culture and economics—and the wellbeing of the nation's entire citizenry—are intimately tied to reliable and certain water allocation systems in the West. As just one example, in 2014, during one of California's more significant droughts, the amount of harvested acreage dropped by one million acres relative to production in the year 2000. *See* Heather Cooley et al., Pacific Institute, *Impacts of California's Ongoing Drought: Agriculture* 5 (Aug. 2015), https://pacinst.org/wp-content/uploads/2015/08/ImpactsOnCaliforniaDrought-Ag-1.pdf.

Many farming decisions are made months or even years in advance. This includes signing crop supply contracts, purchasing equipment and supplies, purchasing and applying seed and fertilizer, and hiring labor. Those decisions are based on expectations about water being available to grow crops. The Federal Circuit's decision introduces a new risk that some federal agency will decide not to deliver irrigation water after

amici and the farmers they serve have made those decisions and investments.

The decision also jeopardizes access to capital. Farming requires annual access to capital early in the growing season that is only recouped from the sale of crops at the end of the season. Agricultural lenders consider water availability and reliability as significant factors when deciding whether to make loans. On a larger scale, for *amici* and their members, the decision undermines the ability to plan for significant investments in water storage and delivery infrastructure. Those investments represent years of planning and regulatory process, and tremendous amounts of capital, often provided by Congress, state legislatures, and the water users themselves—all of which may be for naught without reliable assessments around the future availability of water.

CONCLUSION

This Court should grant the petition for certiorari. While water scarcity is an ever-present challenge for western irrigators, that challenge—and the risks to our country's food security—will be significantly intensified if this Court allows the Federal Circuit's decision to stand and destabilize the century-old system of state

adjudication and administration on which western water law is founded.

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