No. 25-266

In the
Supreme Court of the United States

CITY OF FRESNO, CALIFORNIA, *ET AL.*,

Petitioners,

v.

UNITED STATES, *ET AL*,

Respondents.

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

BRIEF OF *AMICUS CURIAE* MOUNTAIN STATES LEGAL FOUNDATION IN SUPPORT OF PETITIONERS

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IDENTITY AND INTEREST OF *AMICUS CURIAE*[1]

Mountain States Legal Foundation is a nonprofit, public-interest legal foundation organized under the laws of the State of Colorado. Mountain States was founded in 1977 and is dedicated to the principles of individual liberty, the right to own and use property, limited and ethical government, and free enterprise. Among other issues, we fight to ensure that federal regulators follow Congress's demands that the regulators respect water rights in the West and do not use their disparate sovereign powers—real or imagined—to make access to water a coercive weapon.

To that end, Mountain States is very interested in the resolution of this case and urges the Court to review the Federal Circuit's decision. While Mountain States recently has focused its litigation efforts on preventing federal regulators from "opting out" of the McCarran Amendment, 43 U.S.C. § 666, and this petition arises from the Reclamation Act of 1902, this

[1] Pursuant to Supreme Court Rule 37.6, *amicus curiae* affirms that no counsel for a party authored this brief in whole or in part, and no person other than *amicus curiae*, its members, or its counsel made a monetary contribution to its preparation or submission. Pursuant to Supreme Court Rule 37.2, counsel for *amicus curiae* certifies that notice of intention to file was given.

case and Mountain States' pending appeals at the Ninth Circuit have a big-picture theme in common that warrants the Court's review now: federal regulators are repeatedly—maybe, increasingly—"appropriating" unto themselves decision-making powers regarding Western water rights that Congress has forbidden the regulators from assuming. The Court should step in now to stop this abusive flexing of sovereign muscle.

SUMMARY OF ARGUMENT

The legal architecture of Western water, established by the Reclamation Act of 1902 and the McCarran Amendment of 1952, requires federal regulators both substantively and procedurally to forego their sovereign leverage when it comes to questions of water in the West.

As most relevant to this case, Section 8 of the Reclamation Act[2] dictates that the actual property interest—the ownership of a right to use water—vests in the landowners who apply the water to beneficial use. 43 U.S.C. § 372. For nearly a century, this Court has held that the government acts merely as "a carrier and distributor of the water," holding "at most

[2] As the Court has explained, "§ 8 of the Reclamation Act of 1902, 32 Stat. 390" is "codified" now as "43 U.S.C. §§ 372, 383." *California v. United States*, 438 U.S. 645, 647 (1978).

nominal" title. *Ickes v. Fox*, 300 U.S. 82, 95 (1937); *Nevada v. United States*, 463 U.S. 110, 126 (1983). Contracts govern delivery and repayment; they do not extinguish the underlying property rights defined by Section 8. The Federal Circuit's decision eviscerates this framework by denying the growers a compensable property interest.

This ruling endorses an alarming pattern of federal agencies attempting to operate outside the rule of law. Across the West, the federal regulators are aggressively litigating to undermine the McCarran Amendment—the mechanism ensuring government accountability in state courts. 43 U.S.C. § 666. By simultaneously denying substantive property rights (as here) and asserting procedural immunity (as in related litigation), federal regulators have been trying to establish themselves as unbound by the laws governing every other water user.

At bottom, the Federal Circuit decided that this case presented a question of federal regulatory discretion rather than a question of federal law. But the Federal Circuit was wrong. Its error defied Supreme Court precedent and has potentially staggering consequences across the West. This Court should grant certiorari to correct the Federal Circuit's error and reaffirm that federal regulators, when dealing with the West's most vital resource, must play by the same rules as the citizens they serve.

ARGUMENT

I. Congress Forbade Federal Regulators from Asserting Sovereign Power over Western Water.

The framework Congress enacted in the Reclamation Act of 1902 and the McCarran Amendment of 1952 reflects a deliberate policy choice to restrain federal authority. Congress recognized that the stability of the West depended on the certainty of state-law water rights. Therefore, it mandated that federal regulators would help develop irrigation projects, but would do so within the confines of established state law and without claiming a superior sovereign right to the water itself.

But Congress was not going out into the West itself to implement federal laws; that job was for federal regulators. Would those regulators follow Congress's reserved approach? Or would they instead see an opening to assert authority and flex federal muscles? To avoid doubt, Congress over the years enacted laws like the Reclamation Act and then the McCarran Amendment to give clear instructions to the federal regulators: do not flex your muscles in Western water issues. And—as relevant to this case and two similar McCarran Amendment cases pending at the Ninth Circuit Court of Appeals—it is not up to *the regulators* to decide whether they can or cannot flex sovereign muscles.

There is no vacuum of statutory guidance. Congress wanted to prevent federal regulators from "appropriating" unto themselves decision-making powers that Congress withheld, ensuring the United States plays by the same rules as every other water user in the West.

A. The Reclamation Act binds federal agencies to state law and denies them beneficial ownership of project water.

The Reclamation Act was not an assertion of federal dominion; it was a limitation on federal power. The cornerstone of the Act is Section 8, which contains two critical mandates designed to prevent the government from using its sovereign status to override state law or private property rights.

First, Section 8 commands deference to state law. It says that nothing in the Act will "interfere" "in any way" with state laws relating to the control, appropriation, use, or distribution of water, and requires the Secretary of the Interior to proceed in conformity with those laws. 43 U.S.C. § 383. This was a substantive directive stripping federal regulators of any assumed power to ignore the established systems of prior appropriation.

Second, Section 8 defines the locus of the property right, explicitly denying beneficial ownership to the federal government. It mandates that the right acquired under the Act "shall be appurtenant to the land irrigated," and crucially, that "beneficial use shall be the basis, the measure, and the limit of the right." 43 U.S.C. § 372.

By adopting the lexicon of Western water law—appurtenance and beneficial use—Congress tied the ownership of the water right to the individuals who apply the water to the land, not the federal entity supplying it. This structure was confirmed in *California v. United States*, 438 U.S. 645 (1978), where this Court recognized the Act requires the United States to "bend[] to the prerequisite of state law." *Id*. at 675.

For nearly a century, this Court has consistently interpreted Section 8 as a barrier against federal claims of ownership. The seminal case is *Ickes v. Fox*, 300 U.S. 82 (1937). In *Ickes*, the Secretary of the Interior, Harold L. Ickes, argued that the United States' role in diverting, storing, and distributing water pursuant to the Act vested ownership of related water rights in the United States. *Id*. at 94–95. But the Court rejected that contention as "not well founded." *Id*. at 95. The water rights became the property of the appurtenant users, "wholly distinct from the government's property right in the irrigation works." *Id*. The government's role, the Court clarified, was strictly limited to that of "simply a carrier and distributor of the water." *Id*. (citations omitted).

The *Ickes* distinction prevents federal regulators from leveraging federal investment in infrastructure—the "sovereign muscle"—to assert control over the water itself in a manner contrary to state law and the Fifth Amendment. The Court reaffirmed the principle in *Nevada v. United States*, 463 U.S. 110 (1983), clarifying that the government's ownership was "at most nominal," while the "beneficial interest" resided in the landowners. *Id*. at 126. Evidently, federal regulators must be reminded of their roles in Western water every few decades, lest they forget that they *do not* get to flex sovereign muscle here.

The existence of contracts within this framework does not alter the analysis. Contracts under the Reclamation Act do not create the water right. *See* 43 U.S.C. §§ 372, 383. The contracts are vehicles through which the government executes its role as carrier and secures repayment. *Ickes*, 300 U.S. at 95. They cannot be used to grant the government powers that the statute denies.

The complex history of the Central Valley Project illustrates this point. Fair enough, construction of the Friant Dam disrupted the rights of senior water users downstream. *See United States v. Gerlach Live Stock Co.*, 339 U.S. 725, 734–35 (1950). And the Bureau entered the "Exchange Contract" to help make those downstream water users whole. Pet.

App. 7a–8a. But the appurtenant growers had every right to put the water to use as irrigators, and in doing so they appropriated the right—the beneficial interest vested in them, not downstream potential users. *Nevada*, 463 U.S. at 126. And as most important for this and other cases, Congress *took away* the federal regulators' otherwise assumed ability to decide winners from losers. *See* 43 U.S.C. §§ 372, 383. To be clear: in this brief, Mountain States is not trying to pick "winners and losers" in this dispute over who should have had access to water in 2014; the point is that the federal regulators *also* do not have authority to decided "winners and losers." Despite their desires to control water and outcomes in the West, the federal regulators simply do not get to do that. They don't have the power.

B. The McCarran Amendment eliminates the government's sovereign immunity defense against accountability.

While not as directly relevant in this case, it is worth briefly describing the procedural emphasis that Congress further imposed on federal regulators. Fifty years after it enacted the Reclamation Act, Congress reinforced its substantive limitations on federal power in the West by a procedural mechanism to ensure the government could not use its sovereign status to evade accountability: the McCarran Amendment, 43 U.S.C. § 666. Prior to the Amendment, comprehensive water management and respect for use-rights in the West were frustrated because federal regulators routinely asserted sovereign immunity to avoid being joined in state court adjudications—they wanted to game the process.

Congress eliminated this abuse of "sovereign muscle" in 1952, providing a broad waiver of immunity. The Amendment consents to join the United States in any suit for the adjudication of water rights or for the administration of such rights. 43 U.S.C. § 666(a). The intent was to force the United States to play on a level ground as other water users in the West. As the Senate Report explained, it is essential that every owner, including the United States, must be amenable to the law of the State. S. Rep. No. 82-755, at 6 (1951).

The Amendment reflects a "clear federal policy" of avoiding "piecemeal adjudication of water rights." *Colo. River Water Conservation Dist. v. United States*, 424 U.S. 800, 819 (1976). This Court has consistently rejected attempts by the government to narrowly construe the Amendment, characterizing it as "an all-inclusive statute." *United States v. Dist. Ct. for Eagle Cnty.*, 401 U.S. 520, 525 (1971); *see also United States v. Idaho*, 508 U.S. 1, 7 (1993).

The Reclamation Act and the McCarran Amendment form a cohesive restraint on federal power: the former denies the government beneficial ownership of the water; the latter denies the government the procedural immunity necessary to escape the consequences of interfering with those rights.

II. Federal Regulators are Making a Systemic Effort to Evade their Congressional Mandates and Act Unbound by Law.

The Federal Circuit's decision is not an isolated error. It is part of a broader, systemic effort by federal regulators to dismantle the framework of cooperative federalism and respect for beneficial users governing Western water. The federal regulators are pursuing a strategy designed to elevate the United States' status above that of ordinary Western water users, asserting privileges and immunities that Congress forbade. They do not want to be bound by the laws that govern everyone else. Rather, they want to use their sovereign powers to make access to water a coercive weapon.

A couple of current examples arising under the McCarran Amendment show how the federal regulators are trying to do this outside the Reclamation Act context. But the theme is the same: the regulators have tried to "appropriate" for themselves the power to decide matters that Congress long ago decided for them. Now is a good time for the Court to step in and set them right.

A. *The federal regulators concurrently engage in procedural maneuvers to "opt out" of the McCarran Amendment.*

The substantive attack on property rights in *Fresno* is compounded by the government's simultaneous efforts in other cases to evade the procedural mechanisms Congress set up for accountability. The government consistently looks to "opt out" of the McCarran Amendment's broad waiver of sovereign immunity, trying to avoid the administration of state water law altogether.

This strategy of evasion is illustrated in *Baker Ranches, Inc. v. Burgum*, No. 24-5713 (9th Cir. pending), a case involving *amicus* Mountain States as counsel. There, the National Park Service obstructed the flow of water necessary to satisfy senior rights recognized in a 1934 Nevada decree. When the ranchers sought administration of the decree—the precise scenario envisioned by 43 U.S.C. § 666(a)(2)—the government asserted sovereign immunity.

The government argued the 1934 adjudication was not "comprehensive" *enough* to trigger the waiver simply because the United States had chosen not to take part fully at the time. *See* Appellants' Opening Br. at 43–45, *Baker Ranches*, No. 24-5713 (9th Cir. Feb. 11, 2025). In other words, because the government had "opted out" of the adjudication a century ago, it now says that it had reserved for itself the ability to "opt out" again and retain for itself discretion whether to be subject to Nevada water law. It is a blatant attempt to unilaterally defeat the McCarran Amendment's waiver. *See* Appellants' Reply Br. at 6, *Baker Ranches*, No. 24-5713 (9th Cir. Aug. 15, 2025). Put another way, it creates a loophole in the McCarran Amendment big enough for a river to run through it. And the whole point is that the federal regulators want to "appropriate" power to themselves even when Congress has taken that power away.

For another example, the federal regulators have tried to wield sovereign immunity *offensively* to avoid the McCarran Amendment. In *United States v. State of Idaho*, No. 25-947 (9th Cir. pending), another case involving Mountain States as counsel, the federal government sued the State of Idaho, asserting a novel "sovereign immunity claim" to invalidate a state law that creates an administrative procedure for determining whether someone who claims a right to use stockwater in Idaho stockwater has in fact failed to use the water. *See* Ranchers' Resp. Br. and Br. on Cross-Appeal at 14–16, *United States v. State of Idaho*, No. 25-947 (9th Cir. July 30, 2025). No one sued the United States in the case. Rather, the federal regulators have decided to wield sovereign immunity as a sword, so that they can roam the Nation looking for state laws that they don't like. But the Court long ago explained that the mighty federal regulators cannot wield their power so tyrannically. *See United*

States v. Lee, 106 U.S. 196, 220–21 (1882). And as applied to the Idaho case now pending, the federal regulators' try to avoid Congress—in that case using *offensive* "sovereign immunity" to get around the McCarran Amendment—represents an aggressive strategy to preemptively dismantle the state systems Congress intended the federal regulators to follow.

These cases reveal a systemic pattern of regulators abusing their sovereign muscle. In *Fresno*, the federal regulators attack the substance of the rights, denying property interests protected by the Fifth Amendment. In *Baker Ranches* and *Idaho*, they attack the procedures, arguing the United States is immune from the mechanisms designed to administer those rights.

The common thread is the federal regulators' refusal to stay within the limits that Congress set. Regardless of the statutory hook, federal regulators will not accept their collective role as an equal participant in the West. Instead, they seek substantive superiority and procedural immunity. As applied here, the Court's review is urgently needed to halt this pattern of evasion and restore fairness and integrity to Western water law.

B. The decision below endorses the government's appropriation of powers denied by the Reclamation Act.

Turning back to this case, the Federal Circuit's analysis enables federal regulators to act without regard for the water-rights protections central to the Reclamation Act. The court concluded that the growers have no property rights based on a rationale that does not flow from the Act—which the court itself invented despite Congress: that the water supply would not exist without the "efforts of Reclamation." Pet. App. 36a.

This reasoning that the entity providing the infrastructure owns the water rights is the argument this Court rejected in *Ickes v. Fox*. The *Ickes* Court held that the federal regulators' contention that construction efforts vested water rights in the United States was "not well founded." 300 U.S. at 95. The Court drew a sharp distinction between the government's right in the "irrigation works" themselves and the water rights that became the "property of the landowners." *Id.*

The Federal Circuit's reliance on the "efforts of Reclamation" is a repudiation of this Court. What is more, the Federal Circuit's opinion does not mention *Ickes*. By not engaging with the controlling precedent—without even mentioning it—the court committed reversible error and endorsed the federal regulators' attempt to rewrite the law. That error in the context of the federal regulators' attempt to accrue power in the West is sufficiently compelling to justify the Court's review. *See* Rule 10(c).

The court below effectively adopted the position that the Bureau, by virtue of its investment, holds absolute control. This transforms the government from a "carrier and distributor" into a sovereign proprietor, unbound by the constraints of the Fifth Amendment. This rationale cannot be squared with Section 8, which mandates that beneficial use is the basis of the right. 43 U.S.C. § 372.

The Federal Circuit further erred by relying on isolated statements suggesting that Reclamation holds "title" to the water. Pet. App. 35a. This misunderstands the critical distinction between nominal title held for administrative convenience and beneficial ownership. *Nevada*, 463 U.S. at 126. Furthermore, state law cannot control if it is inconsistent with the clear congressional directive in Section 8 that the right is appurtenant to the land. *California*, 438 U.S. at 672.

The implications of this decision are severe and, unfortunately, align with the federal regulators' goal of acting unbound by law. If beneficial users have no compensable property rights, then the federal regulators are free to reallocate water based on political expediency without the obligation to pay just compensation. The decision allows them to "appropriate" decision-making powers regarding Western water that Congress explicitly forbade, treating the United States not as a market participant, but as a sovereign unbound by the vested rights of its citizens.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

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