No. 10-___

IN THE

Supreme Court of the United States

GRANT COUNTY BLACK SANDS IRRIGATION DISTRICT AND WILLIAMSON LAND CO.,

Petitioners,

v.

UNITED STATES BUREAU OF RECLAMATION, *ET AL.*,

Respondents.

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

PETITION FOR A WRIT OF CERTIORARI

Ronald K. Christensen
Ronald Ady
CHRISTENSEN LAW GROUP, LLP.
8 E. Broadway, Ste. 725
Salt Lake City, UT 84111

Kevin K. Russell
Counsel of Record
HOWE & RUSSELL, P.C.
7272 Wisconsin Ave.
Suite 300
Bethesda, MD 20814
(301) 941-1913
krussell@howerussell.com

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QUESTION PRESENTED

Federal reclamation law governs the rights and responsibilities of landowners receiving water for irrigation from federal reclamation projects under contracts with the Bureau of Reclamation. *See generally* 43 U.S.C. §§ 371 *et seq*. It has long been a principle of reclamation law that "the Government's 'ownership' of the water rights" in project water is "at most nominal; the beneficial interest in the rights confirmed to the Government reside[s] in the owners of the land within the Project to which these water rights became appurtenant upon the application of Project water to the land." *Nevada v. United States*, 463 U.S. 110, 126 (1983). As a consequence, once landowners fulfill their contractual obligation to repay the cost of constructing the project works, they obtain a permanent water right and other important entitlements under reclamation law. *See* 43 U.S.C.§§ 372, 390mm, 431, 541. The question presented is:

Whether the Government may deprive landowners of the ability to acquire a permanent water right and other reclamation law entitlements by limiting landowners to perpetually extending ten-year "water utility" contracts under 43 U.S.C. § 485(e).

PARTIES TO THE PROCEEDINGS BELOW

The plaintiffs in this case are the Grant County Black Sands Irrigation District and the Williamson Land Co.

The defendants in this case are the United States Bureau of Reclamation; Dirk Kempthorne, in his official capacity as Secretary of the Interior; Robert W. Johnson, in his official capacity as Commissioner of the Bureau of Reclamation; J. William McDonald, in his individual capacity and in his official capacity as Regional Director of the Pacific Northwest Region of the Bureau of Reclamation.

CORPORATE DISCLOSURE STATEMENT

The Williamson Land Company has no parent corporation and no publicly held company owns more than ten percent of its stock.

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PETITION FOR A WRIT OF CERTIORARI

Petitioners Grant County Black Sands Irrigation District and Williamson Land Co. respectfully petition for a writ of certiorari to review the judgment of the United States Court of Appeals for the Federal Circuit.

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-38a) is reported at 579 F.3d 1345. The district court's opinion (Pet. App. 39a-52a) is reported at 539 F. Supp. 2d 1292.

JURISDICTION

The judgment of the court of appeals was entered on September 2, 2009. Pet. App. 1a. The court denied a timely petition for rehearing and rehearing en banc on February 17, 2010. Pet. App. 53a-54a. The Chief Justice extended the time for filing the petition until July 16, 2010. This Court has jurisdiction pursuant to 28 U.S.C. § 1254(1).

RELEVANT STATUTORY PROVISIONS

Reproduced in an appendix to this brief are the relevant provisions of (1) the Reclamation Act of 1902, Pub. L. No. 57-161, 32 Stat. 388; (2) the Act of August 9, 1912, Pub. L. No. 62-256, 37 Stat. 265; (3) the Reclamation Project Act of 1939, Pub. L. No. 76-260, 53 Stat. 1187; (4) the Act of July 2, 1956, Pub. L. No. 84-643, 70 Stat. 483; and (5) the Reclamation Reform Act of 1982, Pub. L. No. 97-293, 96 Stat. 1261.

STATEMENT OF THE CASE

This case involves the rights of farmers receiving water for irrigation from federal reclamation projects. Petitioners represent landowners with so-called "Section 9(e)" contracts with the U.S. Bureau of Reclamation to receive water from a federal reclamation project in the State of Washington. They filed suit challenging the Bureau's refusal to permit them to obtain permanent water rights and other benefits under federal reclamation law.

I. Statutory Background

1. In the beginning of the last century, Congress authorized the federal government to create massive reclamation projects in the western United States in order to capture and divert available water for publicly beneficial uses, including irrigation. The Reclamation Act of 1902, Pub. L. No. 57-161, 32 Stat. 388, directed the Bureau of Reclamation to identify feasible projects and enter into contracts with individual farmers taking water from the project (project landowners) for the repayment of the construction costs. *See id.* §§ 2-4.

Rather than empowering the Bureau to determine how to allocate water rights among project landowners, Congress directed that distribution of project water would be in accordance with state law. *See* 43 U.S.C. § 383. Consistent with basic water law principles in the western states – which generally allocate water rights in accordance with the order in which users first appropriate water and put it to beneficial use – the statute further provided that the "right to the use of water acquired under the

provisions of this Act shall be appurtenant to the land irrigated, and beneficial use shall be the basis, the measure, and the limit of the right." 43 U.S.C. § 372. However, in order to encourage family farming and to prevent land speculation, Congress precluded the Bureau from providing water to any "tract exceeding one hundred and sixty acres to any one landowner." *Id.* § 431.

Under this scheme, the Government obtained water rights from the states in order to establish the projects, but ultimately was required to transfer the water, and water rights, to landowners who complied with the acreage limitation and put the water to beneficial use in irrigation. *See generally Nevada v. United States*, 463 U.S. 110 (1983). Thus, this Court has explained, "the Government's 'ownership' of the water rights [is] at most nominal; the beneficial interest in the rights confirmed to the Government reside[s] in the owners of the land within the Project to which these water rights became appurtenant upon the application of Project water to the land." *Id.* at 126.

2. Congress originally contemplated that the cost of building the projects would be repaid by the project landowners over ten years. *See* 43 U.S.C. §§ 419, 461; *Swigart v. Baker*, 229 U.S. 187 (1913). But over time, it became clear that farmers would be unable to make those payments, particularly in tough economic times. Accordingly, Congress amended the Act to allow the Government greater flexibility in setting repayment terms. Congress extended the repayment period to 20 years in 1914, and to 40 years in 1926. *See* 43 U.S.C. §§ 423e, 475. It required, however, that annual

payments under new contracts also cover the operation and maintenance costs of the system. *Id.* § 492.[1]

In 1939, Congress again amended the Act to provide the Government even further flexibility. The amendment established two new forms of contracts that have become known as "Section 9(d)" and "Section 9(e)" contracts. Under Section 9(d), the Government was empowered to contract with an irrigation district to repay construction costs over a period of up to forty years (along with annual operation and maintenance costs). 43 U.S.C. § 485h(d). Under Section 9(e), the Government was permitted to enter into "either short- or long-term contracts to furnish water for irrigation purposes." *Id.* § 485h(e). The amendment provided that a Section 9(e) contract

> shall be for such period, not to exceed forty years, and at such rates as in the Secretary's judgment will produce revenues at least sufficient to cover an appropriate share of the annual operation and maintenance cost and an appropriate share of such fixed charges as the Secretary deems proper, due consideration being given to that part of

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[1] Although Congress allowed the Government to increase operation and maintenance charges to reflect rising operating expenses over the years, it prohibited any increase in construction charges (absent the consent of the affected water users) once those charges were set and officially announced. *See id.* § 469-70.

> the cost of construction of works connected with water supply and allocated to irrigation.

Id.

3. The Government construed Section 9(e) to permit a fundamental revision of the purposes of federal reclamation, converting the Bureau of Reclamation into a public utility that retained rights to the water it reclaimed, while giving temporary use of the water to farmers who could never thereafter payoff the construction costs and obtain a permanent right to the water as their own. *See* Pet. App. 15a; H.R. Rep. 84-1754, at 2 (1956).

Congress responded to the potential abuse of Section 9(e) contracts in 1956, enacting what is now codified at 43 U.S.C. §§ 485h-1 to 485h-5. The amendment required that in "any long-term contract hereafter entered into under" Section 9(e), the Government must offer farmers a series of rights, including the right to renew the contract upon its expiration, the right to convert the contract to a Section 9(d) contract, the right to have payments made in excess of operation and maintenance costs credited toward repayment of the construction costs, and the right to obtain a permanent water right once those construction costs have been repaid. *See id.* §§ 485h-1(1), (2), (3), (4); 485h-4. The amendment defined a "long-term contract" as "any contract the term of which is more than ten years." *Id.* § 485h-3.

II. Factual And Procedural Background

The principal controversy in this case is whether petitioners are entitled to the benefits afforded

landowners with repayment contracts or long-term Section 9(e) contracts under the 1956 amendment.

1. Petitioners represent 85 farmers within the Columbia Basin Project in central Washington State. *See* Pet. App. 42a; *see also Flint v. United States*, 906 F.2d 471, 473 (9th Cir. 1990) (describing history of the project). At the time the project was constructed, though petitioners owned project lands, it was believed too expensive to extend the planned facilities to irrigate petitioners' land. Consequently, the Government has not yet built irrigation canals or other distribution systems to petitioners' properties. However, water from other project facilities and lands seeped into the soil and migrated toward petitioners' land underground. The introduction of the pivot sprinkler in the 1960s, together with the raised water table resulting from project seepage, subsequently made irrigation of petitioners' land possible.

At their own expense, petitioners sunk wells to capture the seepage for irrigation. When the State of Washington recognized the United States' claim to the seepage waters in 1973, it required petitioners to obtain both a state permit and a contract with the Bureau of Reclamation to use the water. Starting in 1975, the Government offered petitioners Section 9(e) contracts with an initial term of 10 years, subject to automatic extension without notice provided that the state permit has been extended for a similar period. Pet. App. 3a. The State of Washington did, in fact, extend petitioners' permits and in 1983 made the permits permanent (subject only to modification or cancellation "at any time for good cause," Pet. App. 3a (quoting Wash. Admin. Code 173-134A-080(2)(i))).

Consequently, petitioners have been operating under perpetually extending Section 9(e) contracts for approximately 35 years.

Those contracts require petitioners to pay essentially the same rates as would be charged under a Section 9(d) contract. First, even though petitioners pump seepage water through their own equipment, at their own expense, they are charged a variable annual fee for operation and maintenance equal to 75% of the fee charged to farmers elsewhere in the project who obtain water through irrigation canals and other works operated by the Government. *See* Pet. App. 3a; *Flint*, 906 F.2d at 474 n.2. Second, the Government includes a fixed charge of $1.70 per acre "for participation in Project construction repayment." Pet. App. 3a; *see also Flint*, 906 F.2d at 473 (explaining that the Government imposes "an annual charge based on [petitioners'] acreage to offset the cost of construction of the project"). The Government arrived at that figure through the same amortization method it uses to calculate construction repayment costs for 9(d) contracts elsewhere in the Project. Pet. App. 23a (amortization for Section 9(e) contracts); C.A. J.A. 351-53 (amortization for Section 9(d) contracts).

Although petitioners are paying charges comparable to those paid by other farmers in the project with Section 9(d) contracts, and have been paying those charges for more than a quarter century, the Government has recently taken the position that petitioners' contracts are simply short-term water rental contracts not eligible for any of the ordinary benefits of reclamation law, including the opportunity to obtain a permanent water right or any

of the entitlements specifically provided for long-term Section 9(e) contracts in the 1956 amendment.[2]

2. In 2006, petitioners brought this action seeking injunctive and monetary relief against the Bureau and its officials in the Eastern District of Washington. The district court dismissed the complaint, accepting the Government's position that petitioners held only "short-term water service contracts" and therefore are not entitled to any of the benefits of long-term Section 9(e) or other repayment contracts under the Act. Pet. App. 46a-50a.[3]

Because petitioners sought to recover part of their overcharges under the Little Tucker Act, 28 U.S.C. § 1346(a)(2), the appeal fell within the jurisdiction of the Federal Circuit. *See* Pet. App. 5a-9a. That court affirmed. The court first held that petitioners' contracts did not fall within the scope of the 1956 amendment's protection for "long-term" Section 9(e) contracts because, although they had

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[2] The Government has long subjected petitioners to the obligations attendant repayment contracts, including the pricing and acreage limitations of the 1982 Reclamation Reform Act (RRA). *See* Pet. App. 34a. It was only recently, when petitioners began requesting the benefits that come with the burdens of reclamation law, that the Bureau denied that petitioners were operating under repayment contracts.

[3] The district court concluded that because petitioners failed to state a claim under the reclamation laws, "they are not entitled to an [Administrative Procedures Act] waiver of sovereign immunity." Pet. App. 50a. The court of appeals explained, however, that the district court improperly conflated the merits of petitioners' claims with its jurisdiction to hear them. Pet. App. 5a n.1.

been repeatedly extended without action by the parties for more than 35 years, their initial nominal term was for ten years, and the statute defines "long-term contract" to mean any contract "the term of which is more than ten years." Pet. App. 18a (quoting 43 U.S.C. § 485h-3).

The court of appeals next rejected petitioners' argument that even setting aside the 1956 amendment, they are entitled to repayment rights because their Section 9(e) contracts – as a matter of statutory obligation and Government practice – impose a charge to recover construction costs of the project. Pet. App. 25a-33a. The court of appeals acknowledged that Section 9(e) requires the Government to assess petitioners a "fixed charge" that is set in "due consideration . . . to that part of the cost of construction of works connected with water supply and allocated to irrigation." Pet. App. 27a-28a (quoting 43 U.S.C. § 485h(e)). And the court did not dispute that in implementing this mandate, the Government has assigned to petitioners the same construction charge it would apply to a Section 9(d) repayment contract. *See* Pet. App. 23a. But it nonetheless held that petitioners' Section 9(e) contracts provided none of the basic repayment benefits afforded other farmers paying nearly the same charges under Section 9(d) contracts.

The court began by noting that the first sentence of Section 9(e) states that "[i]n lieu of entering into a repayment contract pursuant to the provisions of subsection (d) . . . the Secretary . . . may" enter into a Section 9(e) contract. Pet. App. 26a (quoting 43 U.S.C. § 485(e)). Rather than construing this sentence to permit the Secretary to enter into a

repayment contract pursuant to subsection (e) rather than subsection (d), the court of appeals read the sentence to imply that Section 9(d) establishes a form of repayment contract, and Section 9(e) does not. Pet. App. 26a. The court further viewed the 1956 amendment as ratifying the general idea that Section 9(e) represented a dramatic departure from prior reclamation principles. Pet. App. 26a, 29a-31a. By providing enumerated rights for "long-term," but not "short-term," Section 9(e) contracts, the court presumed that Congress intended to deprive holders of short-term contracts of the benefits of repayment. Pet. App. 29a-31a.

Finally, the Federal Circuit concluded that petitioners' Section 9(e) contracts do not fall within the statutory definition of a "repayment contract." The statute defines "repayment contract" as "any contract providing for payment of construction charges to the United States." 43 U.S.C. § 485a(e). Although the court acknowledged that petitioners pay construction-related charges under Section 9(e), it concluded that those charges do not count as "construction charges" within the meaning of the statutory definition. Pet. App. 27a-28a.

3. The court of appeals subsequently denied petitioners' petition for rehearing and rehearing en banc. This petition followed.

REASONS FOR GRANTING THE WRIT

It has been a fundamental principle of reclamation law from the beginning that the United States does not own the water it collects, but rather the water becomes the property of the landowners who appropriate it and put it to beneficial use in irrigation. For almost as long, the Government has resisted this principle, attempting to arrogate to itself the power to decide who should receive project water, how much, and for how long. This Court has repeatedly been required to intervene to restore the statutory order Congress intended, and should do so again here. The decision below sanctions the Government's ability to prevent farmers who appropriate and put project water to beneficial use from ever acquiring a permanent right to that water, through the expedient of limiting certain project landowners to what the Government views as simply short-term "water utility" contracts that impose the costs of ordinary repayment contracts, but provide few of the benefits. That decision cannot be squared with the statute, the decisions of this Court, or the decisions of other courts (including the Washington Supreme Court, the jurisdiction in which this case arises). Moreover, the decision will have broad implications for water users throughout the West. This Court's review is required.

I. The Court Of Appeals' Decision Is In Conflict With Fundamental Principles Of Reclamation Law, The Text Of The Reclamation Act, And The Decisions Of This And Other Courts.

The first Reclamation Act declared in no uncertain terms that the only criteria for obtaining a water right in project water is that the landowner appropriate the water and put it to beneficial use on his project lands. Contrary to the court of appeals' decision, nothing in the subsequent history of reclamation law has departed from this foundational principle.

A. The Federal Circuit Disregarded The Foundational Principle Of Reclamation Law That Project Landowners Acquire A Water Right Through Appropriation And Beneficial Use Of Project Water.

The Reclamation Act of 1902 disavowed any claim that the United States was displacing the authority of the states to allocate water rights to their citizens. *See* 43 U.S.C. § 383; *California v. United States*, 438 U.S. 645, 667 (1978). Instead, consistent with state water law, the statute declared that "[t]he right to the use of water acquired under the provisions of this Act shall be appurtenant to the land irrigated, and beneficial use shall be the basis, the measure, and the limit of the right." 43 U.S.C. § 372. The Government's actions, and the Federal Circuit's opinion, cannot be reconciled with this central command of federal reclamation law.

1. In the century since the first Reclamation Act, Congress has reaffirmed the basic principle that

landowners' rights to project water are established by state law and in accordance with the principle of beneficial use. *See, e.g.*, Act of August 9, 1912, Pub. L. No. 62-256, § 1, 37 Stat. 265, 266 (codified at 43 U.S.C. § 541); Act of July 2, 1956, Pub. L. No. 84-643, § 4, 70 Stat. 483, 484 (codified at 43 U.S.C. § 485h-4). Nonetheless, the Government has repeatedly attempted to evade this restriction on its discretion and authority, requiring correction by this Court and others on a number of occasions.

a. For example, in *Ickes v. Fox*, 300 U.S. 82 (1937), this Court rejected a claim quite similar to the one made by the Government in this case. Landowners had appropriated and put to beneficial use an average of 4.84 acre-feet of project water per year. *Id.* at 91-92. In order to finance a new project nearby, the Government declared that going forward, landowners would be restricted to 3 acre-feet of water, but could rent additional water from the Bureau for an extra charge. *Id.* at 92-93. Thus, as in this case, the Government asserted the right to "force and coerce" landowners in Washington State to "sign water-rental applications or be deprived of a portion of the water owned by them" by virtue of their prior appropriation and beneficial use. *Id.* at 92. And as in this case, the Government argued that it was entitled to use water rental contracts in order to retain ownership of the rights in project water. *Id.* at 96 (describing Government's claim that "the United States is the owner of the water" and that the landowners' "claims rest entirely upon executory contracts").

"The fallacy of th[at] contention," this Court declared, "is apparent." *Id.* at 96. The Court

explained that the Government's appropriation of water for the project "was made not for the use of the government, but, under the Reclamation Act, for the use of the landowners." *Id.* at 95. As a consequence, "the water rights became the property of the landowners, wholly distinct from the property right of the government in the irrigation works." *Id.* "The government was and remained simply a carrier and distributor of the water . . . , with the right to receive the sums stipulated in the contracts as reimbursement for the cost of construction and annual charges for operation and maintenance of the works." *Id.* The obligation to pay those charges, the Court explained, did not delay the landowners' acquisition of a water right, but rather operated as "a lien upon the lands and the water rights appurtenant thereto – a provision which in itself imports that the water rights belong to another than the lienor, that is to say, to the landowner." *Id.*

In *Ickes*, this Court ultimately decided only whether the suit against the Secretary of the Interior could go forward based on the allegations in the complaint, *see id.* at 96-97, but later that same year, the Washington Supreme Court held that the Government's scheme was illegal. In *Lawrence v. Southard*, 192 Wash. 287 (1937), the court explained that under settled state law, "the only consideration required by the state for the use of the water for irrigation or agricultural purposes is the beneficial application of the water upon the land for the production of crops." *Id.* at 300. "As soon as this was accomplished . . . the right to the use of those waters was appropriated by the owner . . . and he and his successors became entitled to the quantity of water

appropriated by the then owner." *Id.* Thus, as soon as the landowner applied more than 3 acre-feet of water to beneficial use on his land, he "acquired a prescriptive right which vests title in [him] as completely as if it were conveyed by deed." *Id.* at 302. As a consequence, the Government's insistence that the landowner could obtain water in excess of 3 acre-feet only through a water rental contract was "a nullity." *Id.* at 300-301.

The D.C. Circuit subsequently reached the same conclusion in further proceedings after the remand from this Court in *Ickes*. *See Fox v. Ickes*, 137 F.3d 30 (D.C. Cir. 1943).

b. In *Nebraska v. Wyoming*, 325 U.S. 589 (1945), the United States again claimed ownership of water in a reclamation project, and this Court once again rejected that claim. The case involved a suit to apportion water rights in the North Platte River among the states of Nebraska, Wyoming, and Colorado. The United States intervened, claiming to own all unappropriated water in the river. *Id.* at 611. But, this Court explained, the water the Government claimed had already been distributed to landowners through reclamation projects. *Id.* at 613. Repeating its admonition from *Ickes*, the Court explained that the "property right in the water right is separate and distinct from the property right in the reservoirs, ditches or canals.... The water right is acquired by perfecting an appropriation, i.e., by an actual diversion followed by an application within a reasonable time of the water to a beneficial use." *Id.* at 614. "Though we assume arguendo that the United States did own all of the unappropriated water, the appropriations under state law were made

to the individual landowners pursuant to the procedure which Congress provided in the Reclamation Act." *Id.* at 615. "The right so acquired" by the landowners, the Court declared, was "definite and complete." *Id.*

c. Some thirty years later, this Court was required once again to reject the United States' claim that it was not bound by state law in distributing project water. In *California v. United States*, 438 U.S. 645 (1978), the Government requested a declaratory judgment that it was not bound by conditions imposed by the State of California regarding the use of waters appropriated for the Central Valley Project. *Id.* at 648. After an extensive review the history of the 1902 Reclamation Act, Chief Justice Rehnquist explained that "it is clear that state law was expected to control in two important respects." *Id.* at 665. First, "the Secretary would have to appropriate, purchase, or condemn necessary water rights in strict conformity with state law." *Id.* "Second, once the waters were released from the Dam, their distribution to individual landowners would again by controlled by state law." *Id.* The Court thus rejected dictum in some prior cases that had suggested that the Government was not "bound by state law in disposing of water under the Project," *id.* at 673 (quoting *Arizona v. California*, 373 U.S. 546, 586-87 (1963)). Instead, the Court reaffirmed that in distributing project water and recognizing water rights, the Government is bound by state law, consistent with the principle of beneficial use, unless a specific provision of the Reclamation Act plainly provides otherwise. *Id.* at 668 n.21, 678-79 & n.31.

d. Despite more than 45 years of clear direction from this Court, the Government continued its attempts to claim authority to decide for itself how best to allocate project water. In *Nevada v. United States*, 463 U.S. 110 (1983), the Government sought an order reallocating water rights from project landowners to an Indian Tribe. The Government claimed the right to take water from project landowners and give it to the tribe because, it said, the water previously allocated to the reclamation project belonged "to a single party – the United States," which could do with the water what it pleased. *Id.* at 121. "We are bound to say," this Court remarked, "that the Government's position, if accepted, would do away with half a century of decided case law relating to the Reclamation Act of 1902 and water rights in the public domain of the West." *Id.*

Again, Chief Justice Rehnquist exhaustively recounted the principles and history set out in prior decisions, including *Ickes v. Fox*, *Nebraska v. Wyoming*, and *California v. United States*. *See* 463 U.S. at 122-26. "In light of these cases," the Court concluded, "the Government is completely mistaken if it believes that the water rights confirmed to it [by a prior water rights adjudication] for use in irrigating lands within the Newlands Reclamation Project were like so many bushels of wheat, to be bartered, sold, or shifted about as the Government might see fit." *Id.* at 126. To the contrary, "[o]nce these lands were acquired by settlers in the Project, the Government's 'ownership' of the water rights was at most nominal; the beneficial interest in the rights confirmed to the Government resided in the owners of the land within

the Project to which these water rights became appurtenant upon the application of Project water to the land." *Id.*

3. This case represents another attempt by the Government to avoid the beneficial use provision of the 1902 Act and claim for itself the authority to control the distribution of, and title to, project water. The Federal Circuit's acquiescence in that attempt cannot be squared with this Court's decisions, or the decisions of the Washington Supreme Court.

There is no dispute that for decades petitioners have appropriated and put to beneficial use waters from the Columbia Basin Project on their project lands. As a matter of state and federal law, that use entitles petitioners to a permanent water right. *See, e.g.*, *Lawrence*, 192 Wash. at 299-300; *Ickes*, 300 U.S. at 95. Of course, as users of project water, petitioners are subject to the same limitations and responsibilities as other water right holders in the project. They do not contest that they are subject to the acreage limitations of the Act (which the Government has been only too happy to enforce, Pet. App. 35a). Petitioners likewise acknowledge that they are obligated to pay a portion of the operation and maintenance costs of the system, as well as their share of the construction costs of the project works. And, in fact, the Government has, for decades, been charging petitioners both operation and maintenance fees and the same construction charges it would have imposed under a Section 9(d) contract. *See* Pet. App. 23a.

The Government nonetheless insists that petitioners have acquired no permanent water right and never will; that they have no right to be free of

construction charges once their fair share of the construction costs have been paid; and that because they can never complete repayment of construction costs, they will never free themselves from the acreage limitations of the Act. Petitioners' access to those rights as project landowners, the Government argues, is a matter of bureaucratic grace, which it may withhold from farmers by offering them only extendable Section 9(e) contracts with nominal terms of ten years or less.

That conclusion, accepted by the court of appeals, is at odds with nearly 75 years of teaching from this Court. And it is incompatible with the Washington Supreme Court's decision in *Lawrence v. Southard*, which rejected a similar attempt by the Government to relegate landowners to temporary water utility contracts despite their longstanding beneficial use of the project water. *See* 192 Wash. at 297-303.

To be sure, neither this Court's cases, nor the Washington Supreme Court's decision in *Lawrence*, directly addressed the Government's latest means of evading the Act's beneficial use rule. But in approving the Bureau's stratagem, the court below disregarded the basic principles underlying those decisions. And, as discussed next, neither the 1939 nor the 1956 amendments to the Reclamation Act provides a basis for the Federal Circuit's departure from those precedents.

B. Nothing In Section 9(e) Deprives Project Landowners Of Their Right To Acquire A Permanent Water Right To Project Waters Put To Beneficial Use.

1. In 1939, Congress amended the Reclamation Act in order to provide the Government greater flexibility to develop a "feasible and comprehensive plan for an economical and equitable treatment of repayment problems and for variable payments of construction charges." 43 U.S.C. § 485. To that end, Congress declared that "obligations to pay construction charges may be revised or undertaken pursuant to the provisions of this subchapter." *Id.*

Notably, Congress did not declare that repayment obligations could be avoided altogether, or that it intended to provide a mechanism for depriving farmers of the ability to obtain a permanent water right in project waters. Instead, Sections 9(d) and 9(e) were enacted to create two methods under which the Government could continue to provide water to famers in economic distress, while at the same time maintaining the long-standing reclamation law mandate that the Government's construction costs eventually be repaid. Section 9(d) more closely approximated the prior regime, requiring the Government to contract with an irrigation district, 43 U.S.C. § 485h(d), to repay construction costs over a period of up to forty years, *id.* § 485(d)(3). Section 9(e) allowed greater flexibility. It permitted contracts with individual landowners as well as irrigation districts. *See id.* § 485h(e). And it did not require that the construction costs be fully repaid within forty years. *Id.* The provision nonetheless required the Secretary to charge an amount "sufficient to cover

. . . an appropriate share of such fixed charges as the Secretary deems proper, due consideration being given to that part of the cost of construction of works connected with water supply and allocated to irrigation." *Id.* § 485(e).

The language of Section 9(e) can easily be read in concert with prior reclamation law. The statute eased previous restrictions that required the Government to recoup the entirety of construction costs within a set period, but it nonetheless required repayment of an "appropriate share" of construction charges during the life of a Section 9(e) contract. It said nothing to indicate that farmers obtaining water under Section 9(e) and putting it to beneficial use were deprived of their state law right, protected by the 1902 Act and subsequent Acts, to obtain a water right. Nor did it say anything to indicate that once landowners *did* repay construction costs (whether within the initial nominal term of the contract, or over the course of one or more extensions) they were somehow disentitled to the benefits afforded other landowners who had repaid construction costs.

2. The court of appeals' contrary conclusion that Section 9(e) provided the Government a means of retaining title to project water beneficially used by project landowners must overcome serious obstacles. "The presumption disfavoring implied repeals has been a part of this Court's jurisprudence at least since 1842." *United States v. Fausto*, 484 U.S. 439, 462 n.9 (1988). Moreover, in the 1939 Act itself, Congress expressly declared the "provisions of previous Acts of Congress not inconsistent with the provisions of this subchapter shall remain in full force and effect." 43 U.S.C. § 485j. And Congress has

since reaffirmed the primacy of state law, and the beneficial use principle, in establishing water rights to project water. *Id.* § 485h-4. Thus, the court of appeals' conclusion that the 1939 Amendment created an implicit exception to the 1902 Act's beneficial use standard for allocating water rights requires convincing proof.

The court purported to find such proof in three aspects of the statute's text, but the text does not support its conclusions.

First, the court relied on the opening sentence of Section 9(e), which states that the Government may enter into a Section 9(e) contract "[i]n lieu of entering into a repayment contract pursuant to the provisions of subsection (d)." But all that sentence shows is that the Government has a choice of repayment contract options – it may entered into a "repayment contract pursuant to the provisions of subsection (d)" or it may enter into a repayment contract pursuant to subsection (e). The Federal Circuit's interpretation – which effectively reads the phrase "pursuant to subsection (d)" out of the statute – is far too slender a reed upon which to find an implied repeal.

Second, the Federal Circuit found support in the statutory definition of "repayment contract." Pet. App. 27a-28a. The 1939 Act defined that term to encompass "any contract providing for payment of construction charges to the United States." 43 U.S.C. § 485a(e). "Construction charges," in turn, were defined as "the amounts of principal obligations, payable to the United States." *Id.* § 485a(d). The construction-related component of petitioners' Section 9(e) charges falls easily within those definitions. *Cf. Ivanhoe Irrigation Dist. v. McCracken*, 357 U.S. 275,

286 (1958) (describing Section 9(e) contracts as requiring "[r]epayment, without interest" of the costs of "water supply facilities"). Although Section 9(e) does not require that the entirety of the principal be paid within the initial contracting period, that simply demonstrates that Congress gave the Government flexibility in determining how much the principal must be repaid, and over what period. But the charges nonetheless continue to contain an obligation to pay some of the principal costs of construction. Indeed, as noted above, the Bureau of Reclamation has long set petitioners' construction charges using the same amortization formula it applies to Section 9(d) contracts in the Columbia Basin Project.

Third, the court of appeals found it significant that Section 9(d) refers to an irrigation district's "general repayment obligation," while Section 9(e) refers to construction-related payments as "fixed charges." Pet. App. 27a (quoting 43 U.S.C. § 485h(d)(3)). But the Act's definition of "repayment contract" turns on the *substance* of the landowners' repayment obligations, not the short-hand labels Congress used in various parts of the statute to refer to those obligations. *See id.* § 485a(e).

Beyond these three unconvincing references to the text of the 1939 Act, the court of appeals relied exclusively on the text and legislative history of the subsequent 1956 Act. The later act, the court of appeals concluded, showed that the 1956 Congress viewed Section 9(e) as establishing a form of utility contract under which landowners simply rent water owned by the federal government and never obtain title to it. Pet. App. 26a-27a, 29a-30a. This Court has "often observed, however, that 'the views of a

subsequent Congress form a hazardous basis for inferring the intent of an earlier one.'" *South Dakota v. Yankton Sioux Indian Tribe*, 522 U.S. 329, 355 (1998) (citation omitted); *see also Rainwater v. United States*, 356 U.S. 590, 593 (1958) ("[S]uch interpretation has very little, if any, significance."). And when those views are expressed through post-enactment legislative history (*see* Pet. App. 26a-27a) they are entitled to almost no deference at all. *See, e.g.*, *Massachusetts v. EPA*, 549 U.S. 497, 530 n.27 (2007) ("[P]ost-enactment legislative history is not only oxymoronic but inherently entitled to little weight") (quoting *Cobell v. Norton*, 428 F.3d 1070, 1075 (D.C. Cir. 2005)).

The court of appeals ignored not only these admonitions but also that 1956 Act's express instruction that nothing in its provisions "shall be construed as affecting . . . the laws of any State relating to the control, appropriation, use, or distribution of water used in irrigation, or any vested right acquired thereunder" and that "beneficial use shall be the basis, the measure, and the limit of the right." 43 U.S.C. § 485h-4. In conflict with that command, the Federal Circuit construed the 1956 Act as ratifying an understanding of Section 9(e) under which federal agencies (rather than state law) determine who is entitled to water rights in project water, and bureaucratic discretion (rather than beneficial use) provides the limit of those water rights.

In any event, as discussed next, the Federal Circuit's construction of the 1956 Act is wrong in its entirety; the Act in fact compels the Government to

afford petitioners repayment and other statutory rights.

C. The 1956 Amendments Confirm Petitioners' Right To The Benefits Of Repayment.

After 1939, the Government at first construed Section 9(e) as providing it the power to treat project water as its own and to maintain title to that water by refusing to enter into anything but Section 9(e) contracts with many landowners. Pet. App. 13a. For example, the Government restricted the entirety of the Central Valley Project in California – the nation's largest reclamation project – to Section 9(e) contracts. *See Ivanhoe*, 357 U.S. at 280, 286. Congress responded in 1956 with legislation designed to "alleviate several major objections that have been directed against" the Government's use of Section 9(e) contracts, namely:

> (1) that no assurance can be given in the contract itself or in any other document binding upon the Government that the contract will be renewed upon its expiration; (2) that the water users who have this type of contract are not assured that they will be relieved of payment of construction charges after the Government has recovered its entire irrigation investment; and (3) that the water users are not assured of a 'permanent right' to the use of water under this type of contract.

H.R. Rep. No. 84-1754, at 2.

The amendments required the Government to commit, in the text of its long-term Section 9(e)

contracts, to afford landowners the basic entitlements of reclamation law, including the right to repay construction costs and obtain a permanent right to project water. *See* 43 U.S.C. § 485h-1.[4] The legislation thus directly repudiated the Government's attempts to use Section 9(e) contracts to retain title to project water and evade the beneficial use command of the original Reclamation Act.

The Federal Circuit nonetheless concluded that the 1956 amendment did not apply to petitioners because their contracts were, in its view, short-term rather than long-term contracts. Pet. App. 18a-25a. The court further viewed Congress's failure to address short-term Section 9(e) contracts in the 1956 amendments as confirming that holders of such contracts enjoy no right to repayment or any opportunity to obtain a permanent water right. Pet. App. 26a-27a, 30a-32a. Both conclusions are wrong.

1. Perpetually Extending Contracts With Nominal Ten-Year Terms Are "Long-Term Contracts" Within The Meaning Of The 1956 Amendment.

First, although the 1956 Amendments apply only to "long-term" Section 9(e) contracts, *see* 43 U.S.C. § 485h-1, petitioner's 35-year-old contracts fall within any reasonable understanding of that term. The statute defines "long-term contract" to "mean any contract the term of which is more than ten years." *Id.* § 485h-3. The court of appeals read the word

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[4] The full text of Section 485h-1 is reproduced *infra*, at 65a-67a.

"term" narrowly, to encompass only the nominal initial period of a contract. While that may be one possible interpretation of the word read in isolation, it is not the only available construction. The "term" of a contract can also be understood as the contemplated duration of the contract, or the time during which the contract has been in effect. For example, a contract that automatically extends each year for eleven years could easily be referred to as a contract with an eleven-year term. There would be no practical distinction between such a contract and one with an initial nominal eleven-year term.

Nor is there any practical difference between petitioners' perpetually extending contracts – which have been extended beyond ten years without action by the parties[5] – and a contract with a nominal term of 30 or more years, subject to termination for good cause. By their plain text, the contracts contemplate operation beyond ten years, providing for automatic extension "without further notice" so long as petitioners continue to hold state water permits. Pet. App. 18a.[6]

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[5] The contracts were materially modified only once to apply the provisions of the Reclamation Reform Act of 1982 and its implementing regulations to the contracts. Pet. App. 34a.

[6] The fact that the extension is contingent on petitioners' maintaining their state permits does not render the contracts "short-term." No one would suggest that a contract with a nominal term of more than ten years is converted into a short-term contract by inclusion of a provision allowing the Government to cancel the contract at any time if the landowner fails to renew a state permit.

More importantly, there is no reason to think that Congress would have intended to distinguish between petitioners' contracts and those with nominal eleven-year terms. The 1956 Act was an intensely practical response to the real world problems of western farmers, who complained that the Government was using its Section 9(e) authority to deprive them of basic reclamation law rights. *See, e.g.*, H.R. Rep. No. 84-1754, at 2. It defies belief to think that Congress wrote the statute in a way that would allow the Government to continue its prior practices by simply limiting landowners to perpetually extending contracts with nominal ten-year terms. The statute was enacted precisely to ensure that farmers who have made substantial, long-term investments in their land that depend on a stable long-term supply of project water will be guaranteed a chance to obtain a permanent water right and the other benefits of repayment. A statute that afforded the Government the power it claims here would have achieved none of the Act's basic objectives.

2. Even If Petitioners' Contracts Are Deemed "Short-Term," The 1956 Act Did Not Exempt Petitioners From The Basic Entitlements Of Reclamation Law.

Even if petitioners' contract were deemed "short-term" within the meaning of the 1956 amendments, that would not disentitle them to the rights afforded under the 1902 Act to all landowners who put project water to beneficial use.

1. The Federal Circuit construed the 1956 Act's explicit confirmation of repayment rights for long-

term Section 9(e) contracts to imply that Congress intended to withhold those rights from holders of short-term Section 9(e) contracts. But as shown above, prior to 1956 *all* landowners obtained a water right to project waters put to beneficial use, had the responsibility to pay construction costs, and enjoyed important benefits when those construction costs had been repaid. The 1956 Amendments, which said *nothing* about the rights of short-term contract holders, did not purport to alter existing law in this regard. Even if one thought that the 1956 Congress was acting on the (incorrect) assumption that its predecessors had not extended repayment rights to short-term contracts, that unexpressed assumption is an insufficient basis to find an implied repeal of short-term contract holders' pre-existing rights. *See, e.g.*, *Branch v. Smith*, 538 U.S. 254, 273 (2003) ("An implied repeal will only be found where provisions in two statutes are in 'irreconcilable conflict,' or where the latter Act covers the whole subject of the earlier one and 'is clearly intended as a substitute.'") (citations omitted). And in any event, as noted above, Congress expressly reaffirmed in the 1956 amendments that water rights continued to be allocated by state law, not by the federal government, and that beneficial use remained the "basis, the measure, and the limit of the right." 43 U.S.C. § 485h-4. Those principles entitle petitioners to obtain a permanent water right, and the concomitant right to repayment, however their contracts with the Government may be described.

2. In any event, the Reclamation Reform Act of 1982 (RRA), Pub. L. No. 97-293, tit. II, 96 Stat. 1261 (codified at 43 U.S.C. §§ 390aa-390zz), removed any

lingering ambiguity through provisions that plainly contemplate that Section 9(e) contracts are a form of repayment contract.

The RRA defines the term "contract" to mean "any repayment or water service contract between the United States and a district providing for the payment of construction charges to the United States." 43 U.S.C. § 390bb(1). By referring to both "repayment" *and* "water service" contracts as being capable of "providing for the repayment of construction charges," Congress precluded any argument that Section 9(e) created a new kind of contract that can never repay construction charges.[7]

The Federal Circuit's decision is also incompatible with the basic purposes of the RRA. The RRA revised the Act's acreage limitations and required higher prices for water provided temporarily to lands held in excess of those limits. *See* 43 U.S.C. §§ 390dd, 390ee. At the same time, however, it ensured that once construction costs were repaid, both the acreage limitation and higher pricing provisions no longer applied. *Id.* §§ 390mm, 390tt. The court of appeals declined to decide whether petitioners' contracts were subject to the RRA restrictions (even though the Government has been enforcing those restrictions against petitioners for decades). *See* Pet. App. 35a. But its decision in this case must lead to either of two untenable results.

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[7] There is no dispute that petitioners' contracts are subject to the RRA. Indeed, the Government insisted that petitioners' contracts be amended to conform to the RRA and its implementing regulations. *See* Pet. App. 29a.

First, if petitioners *are* subject to the RRA restrictions, the court of appeals made clear that they are unable to ever escape them because they can never repay construction costs. Second, the only way to avoid that absurd result, consistent with the decision below, would be to hold Section 9(e) contracts like petitioners' are *not* subject to the RRA's acreage and pricing limitations. But that would contravene the RRA's plain intent and language. *See* 43 U.S.C. § 390dd (providing in unambiguous terms that "irrigation water *may not be delivered* to" lands in excess of the acreage limitations) (emphasis added). The only exception the statute allows is for delivery of temporary excess supplies of water (and only for one year). *See* 43 U.S.C. § 390oo(a).

The Federal Circuit's refusal to decide between these untenable alternatives, *see* Pet. App. 35a-37a, only highlights the incompatibility of its holding with the RRA.

II. The Federal Circuit's Decision Will Have A Profound Effect On Irrigators Throughout The Western United States.

Certiorari is also warranted in light of the surpassing importance of the question presented to landowners throughout the West.

1. The Government's disregard for Congress's restriction on its authority has profound consequences not only for the petitioners in this case, but also for thousands of other farmers. The Government has made extensive use of Section 9(e) contracts, including in some of the most massive and significant projects in the country, such as the California Central Valley Project and the Klamath

Project in Oregon and California. *See* U.S. Bureau of Reclamation, RATESETTING PROCESS, *available at* www.usbr.gov/mp/cvpwaterrates/rate_process/overview.html (noting that Government has used 9(e) contracts for 221 districts involving thousands of farms within the Central Valley Project, and thousands more in 22 other reclamation projects). Section 9(e) contracts thus govern water distribution to millions of acres of reclamation project land. In fact, in 2005, the Government administered more than twice as many Section 9(e) contracts as Section 9(d) contracts. *See* Duane Meacham & Benjamin M. Simon, *Forging a New Federal Reclamation Water Pricing Policy: Legal and Policy Considerations*, 27 ARIZ. ST. L.J. 507, 533 (2005) ("The Bureau of Reclamation currently is a party to 1,980 water service contracts and 865 repayment contracts.").

At the same time, the practical importance of a permanent right to project water is difficult to overstate. "Certainty of rights is particularly important with respect to water rights in the Western United States." *Arizona v. California*, 460 U.S. 605, 620 (1983). Petitioners and other landowners like them have invested substantially in farms that are viable only if provided with adequate water from the project. Diminishment of their entitlement, even for a single year, can have catastrophic consequences. For example, some project landowners draw water to irrigate orchards that have taken years of tending without producing any revenue before reaching a productive age. A single year of inadequate irrigation can destroy an orchard, and with it, a family's business and lifetime savings.

Even when adequate water is provided, unless this Court intervenes, farmers irrigating under perpetually extending Section 9(e) contracts will never be able to repay their share of construction costs and become free of construction indebtedness. At the same time, because they are precluded from repaying construction costs, they will never escape acreage limitations that prevent them from taking advantage of the economies of scale enjoyed by other western landowners given more favorable treatment by the Government. The demise of the small family farms envisioned by the first Reclamation Act is a testament to the economic reality that larger farms using expensive modern equipment can raise crops more efficiently. Under the decision below, petitioners and others like them are condemned to a permanent competitive disadvantage against other farmers (even farmers within the same reclamation project) who are able to pay off construction costs and expand their land holdings and productivity.

The decision below will have broader consequences as well, affecting holders of both short- and long-term Section 9(e) contracts, as well as the greater public. Although Congress and this Court have repeatedly made clear that water rights arise as a matter of statute from the beneficial application of project water to project land – *see, e.g.*, 43 U.S.C. §§ 372, 383, 485h-4; *California v. United States*, 438 U.S. at 667; *Ickes*, 300 U.S. at 94-95 – the court of appeals construed the 1939 and 1956 amendments to afford holders of Section 9(e) contracts (short- and long-term alike) only a contractual right to receive water to which the United States retains ownership. *See, e.g.*, Pet. App. 13a-18a. One consequence of that

interpretation is that Section 9(e) contract holders throughout the West will be confronted with the prospect of increased costs of financing their farms due to uncertainties as to their rights to continue to use project water.

Whether title to water is held by the Government or by farmers can have other consequences as well. For example, who owns project water rights could affect whether (or how) the Endangered Species Act and the National Environmental Policy Act apply to the administration of reclamation projects. *See, e.g.*, *Nat'l Res. Def. Council v. Houston*, 146 F.3d 1118, 1125-26 (9th Cir. 1998) (considering those Acts' application to reclamation project water distribution and noting that "[w]here there is no agency discretion to act, the [Endangered Species Act] does not apply"). And the status of farmers' water rights may also affect whether the Government must pay just compensation when it reduces water deliveries to meet other priorities. *See, e.g.*, Douglas L. Grant, *ESA Reductions In Reclamation Water Contract Deliveries: A Fifth Amendment Taking of Property?*, 36 ENVTL. L. 1331 (2006).

2. Review in this case would also permit this Court to resolve confusion that has arisen regarding the degree to which the Government's contracting authority can affect the nature and scope of water rights obtained through beneficial use. *See, e.g.*, Reed D. Benson, *Whose Water Is It? Private Rights and Public Authority Over Reclamation Project Water*, 16 VA. ENVTL. L.J. 363, 391-93 (1997) (describing conflicting views among courts).

While no other court has addressed the precise question presented here, that is no reason to delay

review. By their nature, reclamation law questions do not regularly generate broad circuit conflicts, as the vast majority of reclamation projects are concentrated in a handful of states. *Cf.*, *e.g.*, Meacham, *supra*, at 533 (noting that "[a]bout 70% of all water service [contracts] . . . are in the Pacific Northwest region"). Moreover, by virtue of its jurisdiction over appeals in cases seeking damages for Reclamation Act violations, *see* Pet. App. 5a-9a; *United States v. Hohri*, 482 U.S. 64 (1987), the Federal Circuit plays an outsized role in Reclamation Act law.

In this case, the parties exhaustively briefed, and the court of appeals thoroughly considered, the question presented by the petition. Further delay is unlikely to provide any additional useful ventilation, while tremendous and irreparable damage can be done to thousands of farms in the West in a short period of time if the issues presented in this case are left for another day. Nor is there any reasonable prospect that the Government will alter course without this Court's intervention.

Accordingly, the Court should, as it has often done in the past, grant certiorari to remind the Government of its limited authority under reclamation law and restore to western farmers the important rights Congress intended to provide them.

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be granted.

Respectfully submitted,

Ronald K. Christensen
Ronald Ady
CHRISTENSEN LAW GROUP, LLP.
8 E. Broadway, Ste. 725
Salt Lake City, UT 84111

Kevin K. Russell
Counsel of Record
Amy Howe
HOWE & RUSSELL, P.C.
7272 Wisconsin Ave.
Suite 300
Bethesda, MD 20814
(301) 941-1913
krussell@howerussell.com

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