No. 10-116

In the Supreme Court of the United States

GRANT COUNTY BLACK SANDS IRRIGATION DISTRICT, ET AL., PETITIONERS

v.

UNITED STATES BUREAU OF RECLAMATION, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FEDERAL CIRCUIT

BRIEF FOR THE RESPONDENTS IN OPPOSITION

NEAL KUMAR KATYAL
Acting Solicitor General
Counsel of Record
IGNACIA S. MORENO
Assistant Attorney General
ALLEN M. BRABENDER
Attorney
Department of Justice
Washington, D.C. 20530-0001
SupremeCtBriefs@usdoj.gov
(202) 514-2217

Blank Page

QUESTION PRESENTED

Whether the holders of short-term water-service contracts issued pursuant to Section 9(e) of the Reclamation Project Act of 1939 (1939 Act), 43 U.S.C. 485h(e), are entitled to the same benefits as holders of repayment contracts issued pursuant to Section 9(d) of the 1939 Act, 43 U.S.C. 485h(d).

Blank Page

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Statutes, regulations and rule—Continued: Page

Miscellaneous:

In the Supreme Court of the United States

No. 10-116

GRANT COUNTY BLACK SANDS IRRIGATION DISTRICT, ET AL., PETITIONERS

v.

UNITED STATES BUREAU OF RECLAMATION, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FEDERAL CIRCUIT

BRIEF FOR THE RESPONDENTS IN OPPOSITION

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-38a) is reported at 579 F.3d 1345. The relevant order of the district court (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. A petition for rehearing was denied on February 17, 2010 (Pet. App. 53a-54a). On May 13, 2010, the Chief Justice extended the time within which to file a petition for a writ of certiorari until June 17, 2010. On June 7, 2010, the Chief Justice further extended the time until July 16, 2010, and the petition was filed on that date. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. a. This case involves two subsections of the Reclamation Project Act of 1939 (1939 Act), 43 U.S.C. 485 *et seq.* Those provisions authorize the Bureau of Reclamation (Bureau), an agency within the Department of the Interior, to enter into contracts to provide water for irrigation. Section 9(d) of the 1939 Act, 43 U.S.C. 485h(d),[1] governs "repayment contracts," *i.e.*, contracts pursuant to which the water user repays a portion of the construction costs of the reclamation project, over a period of time. Section 9(e), 43 U.S.C. 485h(e), provides that "[i]n lieu of entering into a repayment contract pursuant to the provisions of subsection (d)," the Secretary of the Interior may instead, "in his discretion, * * * enter into either short- or long-term contracts to furnish water for irrigation purposes." A "long-term contract" is a contract "the term of which is more than ten years." 43 U.S.C. 485h-3. Long-term contracts under Section 9(e) are governed by additional provisions of the reclamation statutes that do not apply to short-term contracts. See 43 U.S.C. 485h-1.

b. The contracts at issue in this case concern artificially stored groundwater from the Columbia Basin Project (Project), a multipurpose federal reclamation project constructed and managed by the Bureau. C.A. App. 99-100. Beginning at the Grand Coulee Dam on the mainstem of the Columbia River in central Washington State, the Project pumps large quantities of water from the river into a reservoir on a plateau above the river, at great expense, for agricultural irrigation purposes. *Id.* at 99. The Project's extensive irrigation works include

---

[1] Petitioners and the courts below refer to Section 485h(d) and (e) as Section 9(d) and (e). For clarity, we do the same. See Sup. Ct. R. 34.5.

dams, reservoirs, pump stations, 282 miles of main canals, 1533 miles of lateral canals, and 636 miles of drains and wasteways. *Ibid.* These works extend 125 miles southward across the Columbia Plateau, to the confluence of the Snake and Columbia Rivers near Pasco, Washington. *Id.* at 99, 101 (map).

Congress authorized the Project in 1935. Act of Aug. 30, 1935, ch. 831, 49 Stat. 1038; see also 16 U.S.C. 835 (authorization of reclamation project). Construction of irrigation works began in the 1940s, once the Grand Coulee Dam was completed. The Project began delivering significant irrigation water in 1952. C.A. App. 100. By 1956, most but not all of the Project's primary features had been constructed; two primary canals in the Project's southern portion remain unfinished today. *Id.* at 99.

The Bureau diverts water from the Columbia River through the Project pursuant to a "Certificate of Water Right" issued by the Washington Department of Ecology. C.A. App. 516-517. The Bureau holds the Certificate to meet its current and future contractual commitments to the three major irrigation districts within the Columbia Basin Project. *Id.* at 474-475, 487-488, 680. In 1945, the Bureau executed repayment contracts under Section 9(d) with those three districts: the East Columbia Basin Irrigation District, the Quincy-Columbia Basin Irrigation District, and the South Columbia Basin Irrigation District (collectively, the Project Repayment Districts).[2] As amended in 1968, the contracts require the Project Repayment Districts to reimburse the Bureau for the operation and maintenance costs associated with the irrigation features of the Project. Those contracts also include an obligation for each Project Repayment

[2] The Project Repayment Districts are not parties to this case.

District to fully repay its allocated share of Project capital construction costs in annual installments over a 50-year period. Gov't Supp. C.A. App. 1-5, 8-10, 15-21. In exchange, the Project Repayment Districts receive a variety of contractual concessions from the Bureau, including preference and priority as to the availability and usage of the Project water and Project works. C.A. App. 487-488. Thus, if the Project's southern portion is completed, the Project Repayment Districts would have a priority claim to the water made available if necessary to irrigate the additional lands.

c. As Project water (*i.e.*, developed water made available from federal reclamation facilities) is diverted from the Columbia River, conveyed to the Project Repayment Districts, and applied to irrigate lands in the Project's northern portion, some of that water seeps into the underlying soil and water table within an area known as the Quincy Ground Water Subarea. The water migrates southward through the soils of the Quincy Subarea, including the Black Sands region where petitioners or their patrons own lands. The water then resurfaces at the Bureau's Potholes Reservoir, where it is recaptured and impounded by O'Sullivan Dam. The Bureau uses this artificially stored groundwater to meet its commitments to the Project Repayment Districts in the Project's southern portion. See *Flint* v. *United States*, 906 F.2d 471, 473 (9th Cir. 1990); *Jensen* v. *Department of Ecology*, 685 P.2d 1068, 1072 (Wash. 1984); C.A. App. 525.

When the Project began operation in the 1950s, the Bureau classified the Black Sands area as non-irrigable because of the nature of the terrain and soils. The Bureau consequently constructed no irrigation delivery facilities (such as canals) in the area. During the mid-

1960s, however, the development of center-pivot sprinklers and the higher water table resulting from Project construction made the Black Sands area irrigable. Landowners on non-Project lands, including petitioners,[3] accordingly began to sink private wells and irrigate their lands using the Project's artificially stored groundwater. *Flint*, 906 F.2d at 473.

In 1973, the Washington State Department of Ecology began management of groundwater in the Quincy Subarea, including the artificially stored groundwater, and declared that no further public groundwater was available for appropriation. As a consequence, a dispute arose between the Bureau and certain landowners over the ownership of the artificially stored groundwater. The Department of Ecology and Washington Supreme Court resolved that dispute in the Bureau's favor and recognized the United States' ownership. *Flint*, 906 F.2d at 473; *Jensen*, 685 P.2d at 1071-1073; C.A. App. 527.

d. As a result of the adjudication in favor of the United States, the Department of Ecology promulgated regulations requiring landowners within the Quincy Subarea to obtain both a contract with the Bureau and a permit from the State before withdrawing groundwater. See *Flint*, 906 F.2d at 473. Rather than enter into repayment contracts like those it had executed with the three Project Repayment Districts pursuant to Section 9(d), the Bureau executed short-term water-service contracts under Section 9(e) (also known as "ASGW license agreements") with the Quincy Subarea landowners, al-

---

[3] Petitioners incorrectly state (Pet. 6) that they own "project lands." They do not. Because their lands were determined to be non-irrigable, the Project did not encompass their lands.

lowing those landowners to withdraw artificially stored groundwater in the Quincy Subarea. C.A. App. 475-476.

Each contract is issued for a term of ten years, renewable for additional ten-year terms. Pet. App. 3a; C.A. App. 161. The contracts may be terminated at or short of the ten-year term for a number of reasons, including a failure to maintain a corresponding state permit or insufficient "quantities and availability" of water. *Id.* at 164-165. These short-term, interruptible Section 9(e) contracts thus allow petitioners to use Project water so long as it is available and so long as their use does not negatively affect the pre-existing contractual rights of the Project Repayment Districts.

In consideration for use of the artificially stored groundwater during this ten-year term, petitioners pay water-service charges to the Bureau. C.A. App. 162. Because Section 9(e) directs the Bureau to set "rates" that will cover "an appropriate share" of the "annual operation and maintenance cost" and of "such fixed charges as the [Bureau] deems proper," with "due consideration" given to capital construction costs, these water-service charges contain two components. The first represents a share of those costs associated with operating and maintaining Project works that supply artificially stored groundwater to the Quincy Subarea (75% of the estimated annual operations and maintenance costs of the three Project Repayment Districts). See *Flint*, 906 F.2d at 474 n.2; C.A. App. 162. The second reflects those costs associated with capital costs incurred by Project construction ($1.70 per acre). *Ibid.* But unlike the repayment contracts held by the Project Repayment Districts, petitioners' contracts do not contain *obligations* to repay allocated Project capital construction costs *in full*. Pet. App. 25a-33a.

2. Petitioner Williamson Land Company and patrons of petitioner Grant County Black Sands Irrigation District are among the landowners within the Quincy Subarea holding short-term contracts executed pursuant to Section 9(e). Petitioners brought this action against the Bureau in federal district court and sought, among other things, a declaration that they are entitled to the same benefits as holders of Section 9(d) repayment contracts, such as the Project Repayment Districts. C.A. App. 155-157 (2d Am. Compl. 31-33). They also sought monetary relief for alleged overpayments. *Id.* at 157.

The district court granted the Bureau's motion to dismiss. Pet. App. 39a-52a. The court concluded that the reclamation laws do not require the Bureau to provide petitioners with the same benefits as those provided to the three Project Repayment Districts that hold Section 9(d) repayment contracts. *Id.* at 48a-49a. The court stated that the statute, in fact, "provide[s] that the water users be treated differently, depending on the type of contract that is entered into with the users and the Bureau." *Id.* at 49a. Here, the court stated, "there are unique differences between the [Project Repayment D]istricts and the individual license-holders [*i.e.*, petitioners], including their histories, their systems, as well as their entitlements and obligations." *Ibid.*

3. The court of appeals affirmed. Pet. App. 1a-38a.[4]

---

[4] Before reaching the merits, the court of appeals first rejected the Bureau's argument that appellate jurisdiction properly lay in the Ninth Circuit. Pet. App. 5a-9a. If a district court's jurisdiction "was based, in whole or in part" on the Little Tucker Act, 28 U.S.C. 1346, the Federal Circuit has exclusive jurisdiction over appeals in the case. 28 U.S.C. 1295(a)(2). The court of appeals concluded that petitioners' claim was best characterized as one seeking (in part) monetary "damages" under a theory of unlawful exaction, and thus as within the Little Tucker Act, Pet. App. 7a; the government had argued that under this Court's

Petitioners argued in the court of appeals that they are entitled to the statutory benefits that holders of repayment contracts receive because: (1) their contracts actually are "long-term" Section 9(e) contracts that provide benefits similar to those of repayment contracts; (2) their contracts actually are repayment contracts, because the Bureau has no authority to enter into utility-type contracts that do not obligate their holders to fully repay capital construction costs; or (3) their contracts include a provision enforcing the acreage limitations of the Reclamation Reform Act of 1982 (RRA), 43 U.S.C. 390aa *et seq.*, and the RRA applies only to repayment contracts, so the Bureau must treat their contracts as repayment contracts. Pet. App. 9a-10a. After thoroughly recounting the historical development of reclamation law and the unique circumstances of the Columbia Basin Project, *id.* at 10a-18a, the court rejected each of those arguments and concluded that petitioners are not entitled to the same statutory benefits as the holders of Section 9(d) repayment contracts, *id.* at 18a-37a.

First, the court concluded that petitioners' contracts have an explicit ten-year term, not a "term of * * * more than ten years," as would be necessary to meet the definition in 43 U.S.C. 485h-3 of a long-term contract. See Pet. App. 18a-25a. The court rejected petitioners' argument that their contracts had terms longer than ten years because the contracts can be and have been renewed for additional ten-year terms. The court stated that a contract "term" should not be interpreted as including renewal periods, because such an interpretation

---

decision in *Bowen* v. *Massachusetts*, 487 U.S. 879 (1988), the refund of the alleged overpayments of capital construction costs that petitioners sought was equitable in nature and not "money damages." Gov't C.A. Br. 18-21.

would be "contrary to the most natural meaning of the word 'term,' as it is used in the contracts, and [because] it is also contrary to the parties' expressed intentions as to the matter and to the statutory and regulatory backdrop of the contractual arrangements at issue in this case." *Id.* at 20a.

Second, the court of appeals concluded that petitioners' short-term contracts were not repayment contracts, because petitioners had no obligation to fully repay Project capital construction costs. Pet. App. 25a-33a. The court rejected petitioners' argument that *all* contracts under Section 9(d) or (e) are repayment contracts and that the Bureau has no authority to enter into utility-type water-service contracts. It noted that this theory contradicted the plain language of Section 9(e), which states that "[i]n lieu of entering into a repayment contract pursuant to the provisions of subsection (d) . . . the Secretary, in his discretion, may enter into either short- or long-term contracts to furnish water for irrigation purposes." *Id.* at 26a. The purpose and effect of this language, the court concluded, is to distinguish Section 9(d) repayment contracts from Section 9(e) water-service contracts, which allow the Bureau to furnish water to users (such as petitioners) much as a public utility does. *Id.* at 26a-28a.

Finally, the court rejected petitioners' argument based on the RRA. Pet. App. 33a-37a. That statute imposes limitations on the acreage of a parcel that can be irrigated on a subsidized basis, and the Bureau enforces those "excess land" limitations against petitioners. *Id.* at 34a-35a. The court assumed, *arguendo*, that the excess-land limitations could apply only to holders of Section 9(d) repayment contracts or long-term Section 9(e) contracts, and that the Bureau therefore erred in

applying those limitations to petitioners as holders of short-term Section 9(e) contracts. *Id.* at 35a, 36a. The court noted, however, that even if these assumptions were correct, any error on the Bureau's part would affect only the enforceability of the excess-land limitations (something petitioners did not challenge); it would "not affect the nature of [petitioners'] contracts with the Bureau." *Id.* at 36a.

4. The court of appeals denied rehearing en banc without recorded dissent. Pet. App. 53a-54a.

ARGUMENT

The decision of the court of appeals is correct and does not conflict with any decision of this Court or of any other court of appeals. Moreover, the petition raises a number of new issues that were not squarely presented below and were not passed on by the court of appeals. In any event, these new arguments are based on fundamental misunderstandings of federal reclamation and state water law. Further review is not warranted.

1. a. The court of appeals correctly applied the unambiguous provisions of the statute to the plain terms of petitioners' short-term Section 9(e) contracts. Reclamation law provides certain benefits to those who hold a specific type of contract, known as a repayment contract, that requires holders to repay allocated capital costs of constructing a reclamation project *in full* over a preset period of years. As the court of appeals correctly concluded, petitioners' agreements contain no obligation to repay allocated capital construction costs *in full*; thus, petitioners do not hold repayment contracts and are not entitled to the same benefits as those who hold repayment contracts. Pet. App. 25a-33a.

Certainly, as Section 9(e) directs, the Bureau considers fixed costs like construction costs when deciding on

the appropriate service rate to charge petitioners for use of water, just as a public utility would do. Pet. App. 27a-28a. That practice, however, does not mean that petitioners have an *obligation* to repay an allocated share of the Columbia Basin Project's capital construction costs in full. Petitioners may choose not to renew their Section 9(e) contracts at the end of the ten-year terms, in which case they would not have fully repaid capital construction costs. Congress did not provide holders of Section 9(e) contracts with the same benefits as those who do have such repayment obligations.

That Congress did not intend for all landowners to be treated like the holders of repayment contracts is evident in the plain text of the statute. The very first sentence of Section 9(e) declares that: "In lieu of entering into a repayment contract pursuant to the provisions of subsection (d) of this section to cover that part of the cost of the construction of works connected with water supply and allocated to irrigation, the Secretary, in his discretion, may enter into either short- or long-term contracts to furnish water for irrigation purposes." 43 U.S.C. 485h(e). Thus, Section 9(e) contracts allow the Bureau to provide a utility-type service "to furnish water for irrigation purposes" *in lieu of* entering into a Section 9(d) contract that requires the full repayment of construction costs within the term of the contract.

Indeed, in amending the 1939 Act in 1956, Congress acquiesced in and acted upon the Bureau's long-standing interpretation of Section 9(e) as conferring discretion to enter into utility-type contracts that lack repayment obligations and benefits. Pet. App. 26a (citing S. Rep. No. 2241, 84th Cong., 2d Sess. 2 (1956) (1956 Senate Report)); accord H.R. Rep. No. 1754, 84th Cong., 2d Sess.

2 (1956).[5] As petitioners note (Pet. 25), in response to the Bureau's interpretation that Section 9(e) contracts are utility-type water-service contracts that do not entitle their holders to the benefits of repayment contracts, Congress amended reclamation law to enable holders of *long-term* Section 9(e) contracts to obtain benefits similar to those of repayment contracts. 43 U.S.C. 485h-1. Congress also provided a means for long-term Section 9(e) contracts to be converted to repayment contracts on "terms and conditions mutually agreeable to the parties." 43 U.S.C. 485h-1(2). Significantly, however, when acting upon the Bureau's interpretation, Congress "avoid[ed] any amendment to the text" of Section 9(e), Pet. App. 26a (quoting 1956 Senate Report 2); it did not in any way repudiate the Bureau's interpretation of its Section 9(e) authority to enter into utility-type short-term contracts.

Furthermore, in the 1956 amendments, Congress granted benefits *only* to holders of long-term Section 9(e) contracts and Section 9(d) repayment contracts. 43 U.S.C. 485h-1. It linked those benefits to the term of the contract—a matter within the Bureau's control—by defining the (previously undefined) term "long-term contract" to mean "any contract the term of which is more than ten years," 43 U.S.C. 485h-3. And the text of the benefits-creating statute expressly recognizes that some "irrigation water contract[s]" will be ineligible: Congress gave holders of long-term Section 9(e) contracts and Section 9(d) repayment contracts "a first right" to

---

[5] Even if the statute were ambiguous, the Bureau's long-standing interpretation, since 1939, that Section 9(e) provides it with the discretion to enter into utility-type contracts that lack repayment obligations and benefits would be entitled to deference under *Chevron U.S.A. Inc.* v. *NRDC*, 467 U.S. 837 (1984).

project water and provided that "the rights of the holders of any other type of irrigation water contract shall be subordinate" to that first right. 43 U.S.C. 485h-1(4). If Congress had intended to provide the same benefits to all reclamation contract holders, or had intended to repudiate the Bureau's interpretation, it would not have created the short-term/long-term distinction or made certain contracts "subordinate" to other contracts in the 1956 Act.[6]

b. The foregoing also refutes petitioners' argument that their contracts should be read as having a "term of * * * more than ten years," as is necessary to be a long-term Section 9(e) contract. 43 U.S.C. 485h-3. Petitioners acknowledge that their contracts have a stated term of ten years, and they recognize (Pet. 27) that the court of appeals reasonably treated the word "term" to have "the ordinary meaning" of that word, *i.e.*, the definite time period set out in the contracts themselves, Pet. App. 20a. But they argue (Pet. 28) that "there is no reason to think that Congress would have intended" for that ordinary meaning to apply to *renewable* reclamation contracts. In fact, as discussed above, Congress gave the Bureau discretion to distinguish between short-term and long-term contracts, because it granted certain ben-

---

[6] Petitioners contend (Pet. 29) that "prior to 1956 *all* landowners obtained a water right to project waters put to beneficial use." Even if that contention were relevant to whether petitioners hold short- or long-term contracts, it is incorrect. As shown above, in the 1939 Act, Congress provided the Bureau with discretion to enter into Section 9(e) water-service contracts "in lieu of" repayment contracts. More fundamentally, there is no uniform rule that irrigators who put federal reclamation water to beneficial use inevitably obtain a permanent right to that water. Rather, state law governs, and under Washington law, see pp. 16-19, *infra*, petitioners have no right to the artificially stored groundwater from the Project.

efits only to holders of long-term Section 9(e) contracts and Section 9(d) repayment contracts, 43 U.S.C. 485h-1, and drew the clear line between short-term and long-term contracts at ten years, 43 U.S.C. 485h-3. Here, the Bureau used that authority to purposefully enter into interruptible ten-year contracts with petitioners so as not to interfere with the rights of the Project Repayment Districts, which have priority to the water at issue. Petitioners' reading, by contrast, would require *any* such renewable contract to be treated as a long-term one, irrespective of the term that the Bureau specified in the contract, unless it would definitely terminate in ten years or less. Petitioners give no reason why Congress would have so constrained the Bureau's authority.

The Columbia Basin Project illustrates why Congress gave the Bureau the flexibility to enter into short-term contracts that do not provide their holders with benefits, like "first right" and "permanent right" to the water, 43 U.S.C. 485h-1(4), that can be obtained by holders of other types of contracts. As mentioned above, p. 4, *supra*, the artificially stored groundwater in the Quincy Subarea, which moves beneath the Black Sands area on its way to the Potholes Reservoir, was committed to the Project Repayment Districts at the Project's unfinished southern portion in 1945, long before petitioners first sunk their wells in the mid-1960s. C.A. App. 487-488. Petitioners' short-term Section 9(e) contracts enable them to use Project water on non-project lands pending the Project's completion. Should the Bureau finish the Project, the water being used by petitioners on their non-project lands could be needed for Project purposes. Entering into additional contracts that provide "priority" and a "permanent right" to non-project landowners like petitioners would have jeopardized the

availability of water to Project landowners. Thus, while petitioners assert that the Bureau is depriving farmers of their rights, in reality the Bureau here is attempting to preserve the rights of farmers within the Project Repayment Districts, with whom it first entered into contracts.

c. Petitioners' reliance on the RRA is without merit. The RRA defines the term "contract"—for purposes of the RRA only, not the 1939 Act—to include "any repayment or water service contract between the United States and a district providing for the payment of construction charges." 43 U.S.C. 390bb(1). That definition does not aid petitioners. First, it reinforces the distinction between repayment contracts and water-service contracts like petitioners'. Second, as already discussed, petitioners' contracts "provid[e] for the payment of construction charges" as part of the formulation of a reasonable water-service fee. That consideration of construction costs does not make petitioners' contracts repayment contracts, nor did the 1982 enactment of the RRA change the established understanding of utility-type water-service contracts.[7] Third, it is not necessary to adopt petitioners' reading in order to give them some way to "escape" the RRA's acreage restriction (Pet. 31). In exchange for accepting the RRA's acreage limitations as terms of their contracts (Pet. 27 n.5), petitioners receive Project water at a price far below the cost of

[7] Petitioners assert (Pet. 8 n.2) that by treating their contracts as covered by the RRA, the Bureau formerly acknowledged that their contracts were repayment contracts. At most, the term "repayment contract" is sometimes used as a generic description for reclamation contracts. Nothing in the RRA changes the fact that petitioners' contracts do not fall within the 1939 Act's definition of repayment contract, because petitioners have no obligation to repay allocated capital construction costs in full.

providing it to them. Petitioners' acceptance of that bargained-for contractual arrangement following the RRA's adoption does not give them anything more than they previously enjoyed: an interruptible right to use Project water only while excess water is available to them. Should the Bureau complete the Project, then under the terms of petitioners' state-issued permits, petitioners' right to use the water must yield to the needs of the Project Repayment Districts.

d. In sum, the court of appeals correctly concluded that petitioners hold neither Section 9(d) repayment contracts nor long-term Section 9(e) water-service contracts that may be converted to repayment contracts, and thus they are not entitled to the benefits due to holders of such contracts. That holding does not warrant this Court's review.

2. Petitioners' principal contention does not attack the court of appeals' actual holding or the issues the parties briefed and argued below. Instead, petitioners argue for the first time that this Court's review is warranted because the court of appeals allegedly ignored the state-law concept of beneficial use, which petitioners now argue controls. That argument was not pressed or passed upon below; to the contrary, in the court of appeals, petitioners made the opposite contention. They argued that federal reclamation law, and not state law, "controlled the beneficial use of th[e] water" because state law allegedly was inconsistent with federal law. Pet. 3d Corrected C.A. Br. 30-31. An argument neither preserved nor decided below does not warrant this Court's review. See, *e.g.*, *Sprietsma* v. *Mercury Marine*, 537 U.S. 51, 56 n.4 (2002).

In any event, the Bureau has agreed throughout this litigation that state law governs "the control, appropria-

tion, use, or distribution of water" used in irrigation. 43 U.S.C. 383. But that principle does not assist petitioners here: the water law of the State of Washington forecloses their arguments, because it secures to the United States a perfected right to all the water of the Columbia Basin Project, and petitioners cannot establish under state law a right that (as shown above) they lack under federal reclamation law.

In 1917, the State of Washington declared that, subject to existing water rights acquired under previous law, all waters within the State thereafter belonged to the public and any right to the water shall be acquired "only by appropriation for a beneficial use" and in the manner provided by the state water code. Wash. Rev. Code § 90.03.010 (2010). The state water code requires persons or entities desiring to appropriate public water for beneficial use first to obtain a permit from the state before using or diverting any such water. See *id.* §§ 90.03.250 (surface water), 90.44.050 (groundwater); Wash. Admin. Code § 173-134A-080(2) (2010). If the state issues the permit and the permit holder perfects its right to the water, the state will issue a "water right certificate" as proof of ownership of the right, and the water under that right is no longer available for appropriation by others through beneficial use. Wash. Rev. Code § 90.03.330 (2010).

Under this framework, the United States holds full legal title to the particular water rights at issue here. The State of Washington issued to the United States a Certificate of Water Right that entitles it to the water that the Bureau diverts for the Columbia Basin Project. C.A. App. 516-517. The artificially stored groundwater at issue is part of this right; it is not public water in which petitioners can acquire an appropriative right by

putting it to beneficial use. See Wash. Admin. Code § 173-134A-020 (2010); *Jensen* v. *Department of Ecology*, 685 P.2d 1068, 1071-1072 (Wash. 1984); see also *Flint* v. *United States*, 906 F.2d 471, 477 (9th Cir. 1990) (artificially stored groundwater from the Columbia Basin Project "is not there for the taking (by the landowner subject to state law), but for the giving by the United States") (citation omitted); *Department of Ecology* v. *United States Bureau of Reclamation*, 827 P.2d 275, 282 (Wash. 1992) (concluding that return flow water from a stream flowing within the boundaries of the Project belonged to the United States, and observing that "under Washington's statutes the decisions regarding distribution of water within a federal irrigation project do not belong to the State," but to the Bureau).

The State's regulatory framework recognizes that any interest in the artificially stored groundwater that petitioners might have or acquire would necessarily be subordinate to the prior interests of the United States and the Project Repayment Districts. See, *e.g.*, Wash. Admin. Code § 173-134A-140(2). For example, the state's regulations specific to the Quincy Subarea require that permits for the withdrawal of artificially stored groundwater "be conditioned to ensure that no withdrawal will interfere with the furnishing of adequate supplies of water to the Potholes Reservoir facility of the [B]ureau to satisfy existing and future project needs of the [B]ureau." *Id.* § 173-134A-080(2)(a); see also *id.* § 173-134A-040(2). The regulations also require that permits be conditioned upon the permit holder's compliance with the terms of an executed agreement with the Bureau for the use of the artificially stored groundwater, subject to termination for failure

to comply. *Id.* § 173-134A-080(2)(e); see also *id.* §§ 173-134A-130, 173-136-060(4). And the regulations also expressly state that "[n]othing in this chapter purports or is intended to modify any rights of an irrigation district created under a water delivery and 'repayment' contract between the United States and irrigation districts located within the Columbia Basin project." *Id.* § 173-134A-140(2).

Consistent with these regulations, petitioners' state-issued permits for withdrawal of artificially stored groundwater declare that such permits are subject to a "U.S. Bureau of Reclamation license." Gov't Supp. C.A. App. 23. The permits also provide that they are subject to the regulations protecting the water rights and needs of the Bureau, both present and future, for the Columbia Basin Project and its Potholes Reservoir, and that the permits do not "establish or embody rights to ground water." *Id.* at 24.

Petitioners' newfound reliance on the principle that state law governs the acquisition of water rights therefore is irrelevant to the disposition of this case. Under the plain terms of petitioners' state-issued permits and Washington's law and regulations pertaining to the Quincy Subarea, petitioners lack any permanent right to the Project groundwater that they receive.

3. Petitioners also seek support from several decisions of this Court and one decision of the Washington Supreme Court, several of which pre-date the adoption of the provisions of the 1939 Act that are controlling here. Nothing in those decisions sheds any light on the permissibility of the Bureau's use of water-service contracts to allow access to artificially stored groundwater to which the United States has a perfected right under Washington law. Indeed, none of those cases involved

groundwater at all. At most, those cases rejected the United States' claim to ownership of surface water under particular circumstances; they say nothing to contradict the fact that the United States has a perfected right to *this* groundwater.

Thus, in *Ickes* v. *Fox*, 300 U.S. 82 (1937), this Court held that the United States was not an indispensable party to a water-rights dispute because, under the terms of the applicable state law *and* reclamation contracts, the water rights were vested in the landowners and not in the United States. See *id.* at 93-94. Similarly, in *Nebraska* v. *Wyoming*, 325 U.S. 589 (1945), "the terms of the law and of the contract" allowed state water users to appropriate the rights to the water, *id.* at 614, and this Court "intimate[d] no opinion" as to whether the United States could have kept all of the water rights for itself, *id.* at 615. So too in *Nevada* v. *United States*, 463 U.S. 110 (1983), in which "the law of the relevant State and the contracts entered into by the landowners and the United States" established that the landowners had a "'permanent water right.'" *Id.* at 126 & n.9 (citation and emphasis omitted). And in *Lawrence* v. *Southard*, 73 P.2d 722 (Wash. 1937), the United States (which was not a party) allegedly had attempted to acquire its own rights to waters of the Yakima River Project, but failed to perfect those rights in accordance with state law, and the United States' rights therefore were presumed to have yielded to a private party's appropriative right. See *id.* at 726-727, 728. Here, by contrast, the United States holds a valid certificate of water right from the State of Washington vesting in it ownership of the artificially stored groundwater. And in the context of this Project and of groundwater, the Bureau plays a different role than that of mere "carrier and distributor," *Fox*,

300 U.S. at 95. Even had the court of appeals addressed the proposition on which petitioners now rely, therefore, its affirmance of the district court's decision would not conflict with any decision of this Court or any other appellate court.

4. This case would not warrant review in any event. The decision of the court of appeals affects only short-term Section 9(e) contracts, which are rare outside this one reclamation project in central Washington State. The vast majority of the Bureau's contracts are Section 9(d) repayment contracts or long-term Section 9(e) water-service contracts, to which the statutory benefits set out in 43 U.S.C. 485h-1 unquestionably apply and for which the question presented here lacks any significance. For instance, the contracts used in the Central Valley and Klamath Projects, to which petitioners and their amici refer (Pet. 31-32; San Luis & Delta-Mendota Water Authority Amici Br. 16-18), are long-term Section 9(e) contracts.

The Bureau uses short-term Section 9(e) water-service contracts to furnish artificially stored groundwater to petitioners in the Quincy Subarea because of circumstances unique to the Columbia Basin Project. The groundwater at issue was contractually committed to the Project Repayment Districts at the Project's unfinished southern portion long before petitioners first sunk their wells. Because of the Project's unfinished nature and the often limited and unpredictable availability of water, the Bureau chose not to enter into perpetual contractual arrangements with petitioners; doing so could have jeopardized the availability of water already contractually committed to the Project Repayment Districts should the Project be completed. Under the short-term water-service contracts with petitioners, the Bureau provides

water only for so long as it is available and so long as their usage does not interfere with the rights of the Project Repayment Districts. The Bureau's response to this unique situation illustrates why Congress, in the 1939 Act, gave the Bureau the flexibility necessary to provide a more limited form of water service in this type of situation.[8]

The Bureau has informed this Office that, outside the Quincy Subarea, it uses short-term Section 9(e) contracts only in a few rare circumstances. Petitioners' contention (Pet. 31-35) that the question presented is one of broader significance for reclamation law therefore is incorrect. In the absence of a conflict with another appellate court— which could arise, for instance, in a case not seeking monetary relief under the Little Tucker Act and thus within the appellate jurisdiction of the appropriate regional court of appeals—further review is not warranted.

---

[8] Indeed, if Section 9(e) did not allow the Bureau the flexibility to provide water for irrigation purposes without entering into a repayment contract that, once repaid, provides a permanent contractual right to Project water, it is unlikely that the Bureau would have entered into contracts with petitioners at all. The artificially stored groundwater to which petitioners would acquire a permanent right already had been promised to the Project Repayment Districts at the Project's unfinished southern portion. The interpretation that petitioners advance thus perversely could result in the Bureau declining to provide water to similarly situated farmers, even though it currently might be available.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

NEAL KUMAR KATYAL
Acting Solicitor General
IGNACIA S. MORENO
Assistant Attorney General
ALLEN M. BRABENDER
Attorney

NOVEMBER 2010

Blank Page