No. 24-5713

IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

BAKER RANCHES, INC., et al.,
Plaintiffs-Appellants,

v.

DOUGLAS J. BURGUM, in his official capacity as Secretary of the United States Department of the Interior, et al.,
Defendants-Appellees.

APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEVADA
DISTRICT COURT NO. 3:21-CV-00150-GMN-CSD

APPELLANTS' REPLY BRIEF

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I

INTRODUCTION

Since first using water from the Baker-Lehman Creeks in the 1870s, Baker Ranches and its predecessors have been utilizing this source of scarce Western water to sustain life, cultivate agricultural lands, and support their community in the arid Nevada climate. Their water rights were recognized in a Nevada water decree in 1934 and, for

decades, Baker Ranches and its predecessors carefully maintained the creeks to prevent their water from being diverted or improperly consumed upstream.

Over 100 years later in 1986, when Congress created Great Basin National Park, where the Baker-Lehman Creeks originate, Congress promised through the Park's Enabling Act that the Park would not compromise Baker Ranches' water rights. For nearly thirty years thereafter, Baker Ranches continued to maintain the creeks within the Park boundaries until 2014 when the Park Service changed course and threatened to cite the Bakers if they continued to exercise their rights.

In 2019, Baker Creek ran dry when rocks and debris accumulated within the Park and diverted all of the water into adjacent crevices. The Park Service refused to fix these conditions and threatened Baker Ranches with legal action should they attempt, as permitted by Nevada law, to maintain the creek within the Park boundary. The United States now refuses to even litigate the propriety of its threats against Baker Ranches, relying instead on sovereign immunity. Worse, rather than using it as a shield from suit, the United States is weaponizing sovereign immunity to deprive Baker Ranches of its decreed water rights with

impunity. But the "conception of sovereign immunity as a sword rather than a shield is unavailing." *Cal. ex rel. Lockyer v. Dynegy, Inc.*, 375 F.3d 831, 849 (9th Cir. 2004), *amended on denial of reh'g*, 387 F.3d 966.

The sword is dull. Congress waived sovereign immunity, under the McCarran Amendment's plain language, for administration of an "adjudication of rights to the use of water of a river system or other source." 43 U.S.C. § 666(a). Courts recognize that the "adjudication[s]" referred to in the McCarran Amendment are the unified or "comprehensive" adjudications that emerged to supplant piecemeal litigation over water rights in the Western states and to determine the relative rights of many claimants on a stream system, often pursuant to specific statutory procedures. That is just the kind of adjudication that resulted in the 1934 Decree. This Court has acknowledged in its prior decisions that the Nevada Water Law provides for comprehensive adjudications. *See infra* note 4. Moreover, this Court has recognized that the McCarran Amendment works retroactively, permitting Baker Ranches to seek administration for rights decreed in an adjudication that predated the Amendment's 1952 passage. *See infra* Part II.A.1.a

The United States's arguments to the contrary are meritless. Ignorning its own previously self-proclaimed "good procedure," the United States now complains that its hands were tied by sovereign immunity, and it could not have participated in the adjudication that led to the 1934 Decree. That is not true, as the law, Forest Supervisor C.A. Beam's 1927 letter regarding the Baker-Lehman Creeks, and the Department of Justice's own historic policy confirm. OB 14-15.[1] The DOJ told Congress in 1951 that not only *could* the United States participate in an adjudication by appearing, identifying its rights, and asserting sovereign immunity, but doing so is "*good procedure*."[2]

The United States then goes further, asserting it is "not bound by the Decree" whatsoever, despite holding water rights adjudicated in the Decree. GAB 21. That position is unfounded. The United States is

[1] "OB" refers to Appellants' Opening Brief, and "GAB" refers to the United States's Answering Brief, followed by the page references. "ER" refers to the Excerpts of Record and is cited in accordance with Circuit Rule 30-1.6.

[2] Hearings Before a Subcomm. of the Comm. on the Judiciary, 82d Cong. 4-5 (1951) (Statement of William H. Veeder, Special Assistant to the Attorney General, Department of Justice) (emphasis added); *see also infra* Part II.A.1.b.

indisputably *presently benefitting* from the Decree by continuing to own and enjoy water rights adjudicated in the Decree. Moreover, a former lawyer and current senior policy analyst for the Park Service testified just months ago that the Park *is bound* by the Decree.[3]

At bottom, the United States presses a rule that would require its participation in an adjudication for the adjudication to qualify as "comprehensive." That rule does not emerge from the McCarran Amendment, any purpose behind the statute, or this Court's precedent. Indeed, adopting the United States's position would require the Court to ignore the statutory language, all relevant authority that has interpreted it, and—to the extent there is any ambiguity—the legislative history. The Court should adhere to Congress's broad waiver of immunity for administration of comprehensive water rights adjudications and reverse and remand this action.

[3] *See* Ex. A to Baker Ranches' Second Motion for Judicial Notice at 145:4-150:5; *see also id.* at 150:3-5 ("THE COURT: [I]s it the position of the Park Service that it had to comply and has to comply with that decree? THE WITNESS: Yes.").

II

ARGUMENT

A. The McCarran Amendment Waives the United States's Sovereign Immunity to this Action for Administration of Adjudicated Water Rights.

The McCarran Amendment retroactively and prospectively waives sovereign immunity for "the administration" of water rights recognized through a "comprehensive" adjudication "where it appears that the United States is the owner of or is in the process of acquiring water rights by appropriation under State law, by purchase, by exchange, or otherwise, and the United States is a necessary party to such suit." 43 U.S.C. § 666(a). The United States is not necessary, however, to the original adjudication that recognized the rights a party now seeks to administer. It need only currently own or be in the process of owning water rights that relate to or affect adjudicated rights. Baker Ranches holds water rights recognized in a comprehensive adjudication and is thus entitled to bring a suit for administration against anyone infringing upon their adjudicated rights, including the United States.

1. Baker Ranches Holds Senior Rights Recognized In a Comprehensive Adjudication.

Courts recognize that—though not specifically required by its text—the McCarran Amendment applies to and waives sovereign immunity for administration of rights issued through a "general" (also known as a "unified" or "comprehensive") adjudication. It is difficult to imagine a more comprehensive adjudication than the one that preceded the 1934 Baker-Lehman Decree. That eight-year adjudication involved multiple notices requiring "all claimants" to appear and "make proof of their claims," and the adjudication gave opportunity for any person "claiming any interest" in the streams to raise objections. *See* OB 9-15, 62-65; *see also, e.g.*, Nevada Compiled Laws (1929) §§ 7906, 7916, 7917. The record demonstrates, and the United States does not dispute, that the adjudication followed all the procedures required by the 1913 Nevada Water Law. *See* OB 12-15, 62-65; GAB 6-9. And this Court has explained

that Nevada's statutory framework provides for comprehensive adjudications.[4]

The United States creates an exception, arguing that an adjudication cannot be comprehensive unless the United States itself participated in the adjudication. But that argument asks for a definition of "comprehensive" adjudication foreign to that term of art's history and function. And here, whether or not the United States participated hardly matters because *it indisputably owns water rights adjudicated in the 1934 Decree* and is certainly "bound by the Decree." *See* GAB 24 n.1 ("The United States did purchase two parcels of land with decreed water

[4] *See State Eng'r of Nevada v. S. Fork Band of Te-Moak Tribe of W. Shoshone Indians*, 339 F.3d 804, 811 (9th Cir. 2003) (explaining that the "zero-sum nature" of water was "the motivating force behind Nevada's *comprehensive system* for adjudicating water rights" (emphasis added)); *United States v. Oregon*, 44 F.3d 758, 764-65, 767, 770 (9th Cir. 1994) (concluding that an adjudication under Oregon's water rights statute was comprehensive and noting "Oregon's adjudicatory scheme . . . [was] duplicated in . . . Nevada"); *see also Gardner v. Stager*, 892 F. Supp. 1301, 1304 (D. Nev. 1995) (noting that Nevada's water adjudication "statutes provide a detailed and comprehensive scheme for adjudicating the rights of *all* claimants to a particular water system" (emphasis added)), *aff'd*, 103 F.3d 886 (9th Cir. 1996).

rights."); *contra* GAB 20 ("The United States thus is not bound by the Decree.").

a. The 1934 Decree Issued Following a Comprehensive Adjudication.

The United States's involvement in an adjudication is neither necessary nor sufficient for an adjudication to be "comprehensive." Rather, a comprehensive adjudication is one that requires all claimants to appear and intends to "once-for-all" settle claims to a given water source. The United States contends that because it did not claim federal reserved rights in the adjudication, the adjudication is de facto not comprehensive. But there is no requirement that the United States participate in an adjudication to trigger the McCarran Amendment's waiver. Such a requirement would defeat the Amendment's purpose.

"Comprehensive" adjudications emerged in the Western states as a substitute for increasingly cumbersome piecemeal litigation between small groups of parties over water rights. *See* OB 46-50; *see also United States v. Oregon*, 44 F.3d 758, 763-66 (9th Cir. 1994). These comprehensive adjudications were often established by statute. *See, e.g.*, *id.* at 765 ("The system adopted by Oregon at the turn of the century

served as a model for Arizona, California, Nevada and Texas. By the time the McCarran Amendment was passed, most Western states had adopted some statutory procedure for the mass adjudication of water rights.") (citation omitted)). Before the McCarran Amendment's passage in 1952, however, even those comprehensive proceedings could not join the United States, leaving unadjudicated potential rights claimed by the largest landholder in the West. *Id.* That is precisely why Congress enacted the McCarran Amendment. The McCarran Amendment did not invent a category of adjudications called "comprehensive" or "unified" or "general." Rather, it bolstered those adjudications by bringing the last possible stakeholder to the table.

The comprehensiveness consideration for the McCarran Amendment is a commonsense recognition from courts that the McCarran Amendment waived immunity for this already-extant category of "comprehensive" adjudications. OB 49-50. Indeed, this Court relied on the "Senate Report on the bill which became the McCarran Amendment [to] show[] the type of adjudication [that] was contemplated by Congress." *United States v. Cappaert*, 508 F.2d 313, 321 (9th Cir.

1974), *aff'd*, 426 U.S. 128 (1976). That Senate Report described the kind of adjudication that waives immunity as follows:

> All claimants are required to appear and prove their claims; no one can refuse without forfeiting his claim, and all have the same relation to the proceeding. It is intended to be universal and to result in a complete ascertainment of all existing rights.

Id.

The Senate Report quoted *Pacific Live Stock Co. v. Lewis*, where the Supreme Court explained that a state's "comprehensive scheme for securing an economical, orderly, and equitable distribution of the waters among those entitled" is one that is "intended to be universal and to result in a complete ascertainment of all existing rights." 241 U.S. 440, 443-48 (1916). That "comprehensive" adjudications preexisted the McCarran Amendment dooms the United States's claim of immunity.

This Court's precedent, legislative history, and logic reject any notion that the United States must have participated in an adjudication for it to be "comprehensive." Pre-McCarran Amendment adjudications were frequently "comprehensive" while necessarily *omitting* the rights of the United States. *See, e.g.*, *Lewis*, 241 U.S. at 443-48 (recognizing a comprehensive water adjudication in 1916); *Oregon*, 44 F.3d at 765

(explaining that the Western states had "some statutory procedure for the mass adjudication of water rights" before the enactment of the McCarran Amendment). *Lewis* also highlighted the importance of the finality interests that these adjudications vindicate. 241 U.S. at 448 (""To leave them in their uncertainty—to leave one to encroach upon the other[,] to leave each to use as much as he can, and leave the other to sue at law after the injury—is to leave the whole subject-matter to possible waste and destruction."" (citation omitted)). If those adjudications that preceded the McCarran Amendment could be "comprehensive" without the United States's inclusion, then there is no reason the United States must suddenly participate for an adjudication to now qualify as "comprehensive."

Nor does this Court's precedent permit the United States's proposed departure from the logic of the McCarran Amendment, which was passed precisely to address its absence in adjudications intended to be universal. Comprehensive adjudications are those that "establish the relative rights of users of the waters of a stream or other common source: one to settle disputes between such water users with respect to their rights among themselves." *Nevada ex rel. Shamberger v. United States*,

279 F.2d 699, 701 (9th Cir. 1960). Contrary to the United States's reading, *Cappaert* does not require its participation in an adjudication for it to be "comprehensive." 508 F.2d at 320-21; GAB 20, 26-27.

The question there was whether a permitting decision from the State Engineer on an application from ranch owners "to change the use of water from several of their wells" was an adjudication under the Amendment. *Cappaert v. United States*, 426 U.S. 128, 134 (1976). It was not. *Compare* Nev. Rev. Stat. § 533.090 (describing procedures to adjudicate vested claims, as were followed in Baker-Lehman adjudication), *with* Nev. Rev. Stat. § 533.370 (describing procedure for permit applications that was at issue in *Cappaert*). Instead, that permitting proceeding was a paradigmatic example of a *non*-comprehensive proceeding.[5] This Court noted the United States was not required to appear and prove its water rights in Cappaert's permitting process and that "[t]he water rights of the United States were not in issue" there. *Cappaert*, 508 F.2d at 321. Nothing in the *Cappaert* decision

[5] The Supreme Court affirmed this Court's decision in *Cappaert* but offered no additional analysis of the McCarran Amendment. *Cappaert*, 426 U.S. at 145.

even suggested, much less held, that the United States must participate in an adjudication for it to be deemed comprehensive.

The United States likewise relies on *San Luis Obispo Coastkeeper v. U.S. Department of Interior*, but that (unpublished) decision does not support its bold reinterpretation of the Amendment. 827 F. App'x 744 (9th Cir. 2020); GAB 26-27. As Baker Ranches explained in the opening brief, the dispute in *San Luis* was between only a handful of parties and therefore was not "comprehensive." OB 58-60. That case does not support the theory that the United States must be party to an adjudication for it to be comprehensive. But it is also strange that the United States relies so heavily on *San Luis*, a summary decision that depended on *Oregon*, 44 F.3d at 758, a case that the United States barely cites. *See* GAB 26-27. Although the United States is wrong that *San Luis* supports its position, it is revealing that the United States prefers to direct this Court to that summary unexplained decision instead of the *explained* holding in *Oregon*. The irrelevance of *Cappaert* and *San Luis* is only confirmed by the fact that neither case involved an adjudication under a state's comprehensive statutory scheme that was intended to be universal and to result in a complete ascertainment of all existing rights.

The United States similarly argues that the adjudication "must have had the jurisdiction to cover all claimants in a water system." GAB 26. The United States did not advance this theory below, but its pivot is ineffective.[6] The 1934 Decree court had jurisdiction to cover all claimants—i.e., all those who submitted claims for the Baker-Lehman Creeks. *See* Nevada Compiled Laws (1929) § 7922 (requiring all parties aggrieved by the State Engineer's order of determination to file exceptions); *id.* § 7923 (requiring the court to enter a decree "affirming or modifying the order of the state engineer"). The Decree was not issued by a court of limited jurisdiction. Tellingly, the only party the United States can identify over whom the court purportedly lacked jurisdiction is itself.

[6] This is perhaps an effort to distance itself from a theory that would allow for any single unadjudicated claim to render an adjudication non-comprehensive. But the pivot does not work: The United States's theory would still allow the government to avoid the reach of comprehensive adjudications preceding the McCarran Amendment by belatedly asserting a claim to federal reserved rights. *See* OB 54-57, 61-62. That is precisely what the United States appears to be doing here. At no point—previously or now—has the United States identified what alleged federal reserved right it claims as the basis to defeat the State Court's jurisdiction.

That untimely and meritless argument notwithstanding, the United States retroactively submitted itself to the Decree court's jurisdiction in two ways: (1) when Congress enacted the McCarran Amendment coupled with any reservation of water rights to Baker-Lehman Creeks that the United States claims, and (2) when it acquired water rights adjudicated in the 1934 Decree as a successor in interest. *See State Eng'r of Nevada v. S. Fork Band of Te-Moak Tribe of W. Shoshone Indians*, 339 F.3d 804, 811-13 (9th Cir. 2003); *see also United States v. Dist. Ct. for Eagle Cnty.*, 401 U.S. 520, 523 (1971) (explaining that the McCarran Amendment applies to reserved water rights).

Although the United States attempts to dispute the retroactivity of the Amendment, this Court has already held that the statute is retroactive. In *Te-Moak*, this Court squarely addressed the question of retroactivity, explaining that the McCarran Amendment would apply retroactively if *either* (1) it "takes away no substantive right and does not alter liability under the applicable substantive law" or (2) the Court can "discern a clear indication from Congress that it intended such a result." 339 F.3d at 811-12 (citation modified). "The Amendment satisfies both criteria." *Id.*

The Court recognized "statutes that waive the United States's sovereign immunity do not implicate the concerns of 'fair notice, reasonable reliance, and settled expectations' that undergird the usual presumption against retroactive application." *Id.* The Court reasoned "there are sufficient indications from Congress that the Amendment should be applied retrospectively," pointing to the statute's "use of the present tense and its reference to the United States as a *current* owner of water rights." *Id.*

Moreover, the Court rejected the theory the United States presses now—that the McCarran Amendment is not retroactive—as "completely at odds with the evils the law is designed to combat." *Te-Moak*, 339 F.3d at 812 n.1. Rather, "it is essential that each and every owner along a given water course, *including the United States*, must be amenable to the law of the State, if there is to be a proper administration of the water law as it has developed over the years." *Id.* (emphasis added); *see also Lewis*, 241 U.S. at 443-48.

The United States attempts to narrow *Te-Moak* to its "context." GAB 24-25. But the context in *Te-Moak* and the context here are the same: In both cases, the United States obtained rights that had been

adjudicated under state law and were recognized in a decree. *See* (3-ER-178–220, 3-ER-222–23, 3-ER-358–59; 4-ER-508–14); OB 16; GAB 24 n.1. Moreover, the Court in *Te-Moak* held that the McCarran Amendment was categorically retroactive; it did not limit its holding to any narrow set of facts.

Nor does adhering to *Te-Moak*'s retroactivity holding affect the United States's claims or defenses or its ability to have its reserved rights properly adjudicated. *Contra* GAB 25. The United States cannot undo what happened in 1934. The latest priority date of Baker Ranches' water rights is 1904; the earliest (possible) priority date for the United States's reserved rights is 1909. *Compare, e.g.*, OB 15-16, *with* GAB 5-6. Applying the McCarran Amendment here will not impair junior priority claims to federal reserved rights that may belong to the United States. At any time, the United States can seek to have any claims to federal reserved rights adjudicated. *See* Brief of *Amicus Curiae* the State of Nevada in Support of Neither Party at 10-14; *id.* at 13 ("[T]hose decrees can only be supplemented with the Federal Government's reserved water rights or claims to vested water rights."); *see also* GAB 34 (agreeing but insisting

that it should be Baker Ranches to institute a supplemental adjudication and citing favorably Nevada's amicus brief).

All-in-all, this Court and the Supreme Court have repeatedly warned against inserting unwarranted technicalities into the McCarran Amendment.[7] But the United States seeks to do just that. The McCarran Amendment requires only an adjudication where "[a]ll claimants are required to appear and prove their claims" which is "intended to be universal and to result in a complete ascertainment of all existing rights." *Cappaert*, 508 F.2d at 321 (internal quotation marks and citation omitted). The 1934 Decree resulted from the exact type of comprehensive adjudication contemplated by the McCarran Amendment. The 1934 Decree was issued pursuant to Nevada's Water Law, a statute that this Court has already recognized facilitates comprehensive adjudications. *See supra* note 4. Indeed, the United States does not dispute that the

[7] *See Eagle Cnty.*, 401 U.S. at 525 (rejecting the United States's interpretation of the McCarran Amendment as "extremely technical"); *United States v. Idaho ex rel. Dir., Dep't of Water Res.*, 508 U.S. 1, 7 (1993) (same); *United States v. Adair*, 723 F.2d 1394, 1405 n.9 (9th Cir. 1983) ("[T]he Supreme Court has warned against overly technical application of the McCarran Amendment."); OB 56-57.

1934 Decree was issued after observing all procedural requirements of the Nevada Water Law.

b. The United States Is Subject to the 1934 Decree.

Because the adjudication was comprehensive, the McCarran Amendment waives immunity for administration of the rights adjudicated thereunder. In addition to the arguments addressed above, the United States contends it is not subject to the Decree because Baker Ranches (purportedly) seeks to administer the unadjudicated rights of the United States and because it had no opportunity to appear in the adjudication preceding the 1934 Decree. These arguments all fail.

First, the United States claims that this entire litigation seeks to administer unadjudicated federal reserve rights. GAB 21-23. Incorrect. Baker Ranches seeks to administer *its own* rights that were recognized in the 1934 Decree and prevent the United States from trampling upon those rights or expanding its successor rights by violating the injunctive provisions of the Decree. (2-ER-28); *see also* Brief of *Amicus Curiae* Eureka County Supporting Plaintiffs-Appellants (hereinafter, "Eureka Amicus") at 18 ("Appellants did not seek to adjudicate any water rights in their action nor does the United States seek to adjudicate any water

rights in Appellants' action."). The United States reveals its misunderstanding when it claims that Baker Ranches "seek[s] to enlarge rights obtained against *other private claimants*." GAB 24 n.1. Which is it? Either way, that is not how general adjudications of water work; the general adjudication recognizes certain claimants' rights *to the water*. Baker Ranches received rights *to beneficially use the water of Baker-Lehman Creeks* without obstruction or interference by others. It is administering *those* rights.

Only the United States has inserted its purported claims to federal reserved rights into this litigation. Baker Ranches did not allege anything regarding federal reserved rights. It alleges that the United States claimed to be "successor-in-interest to two water rights adjudicated under the [1934] Decree." (2-ER-24.) As explained in the opening brief, the United States obtained these rights from private appropriators who participated in or were successors to participants in the adjudication proceedings. OB 16, 42. And under the United States's own interpretation of this Court's decision in *Te-Moak*, a "decree c[an] fairly be applied against the United States in a suit for water-rights administration" when the United States is "a successor in interest to a

party to the decree." GAB 23. The United States's ownership of adjudicated water rights is alone sufficient to submit it to the Decree court's jurisdiction for administration of Baker Ranches' rights. *See Te-Moak*, 339 F.3d at 813-14; *see also* Eureka Amicus at 14-15 (explaining that holding adjudicated water rights subjects the United States to the Nevada court).

Setting aside the United States's water rights adjudicated in the Decree, there is no merit to the claim that this litigation seeks to administer unadjudicated federal reserved rights. The United States contends that resolving this dispute requires quantifying its purported federal reserved rights because Baker Ranches alleged in its complaint that the United States was "'consuming water that belongs to others'" and that it is "'consuming water in excess of [its] decreed rights.'" GAB 22-23. These allegations, of course, refer to the United States's *adjudicated* rights that it acquired after the decree was issued, and those are the *only* rights mentioned in the complaint. (2-ER-21–30.)

There is no need to "determine[e] and quantif[y]" any supposed claims to federal reserved rights before the Decree can be administered. GAB 22. There is no dispute that any reserved rights would be inferior

in priority to Baker Ranches' rights as a matter of law. As a result, whatever those junior rights might be, the administration, enforcement and delivery of the full senior decreed rights must occur first before any junior right could be exercised. *Compare, e.g.*, OB 15-16 (identifying Baker Ranches' water rights with priority dates of, *at latest*, 1904), *with* GAB 5-6 (indicating that the United States reserved the relevant land, *at earliest*, in 1909).

The relief that Baker Ranches seeks through this administration would not require any comparison of water rights. The United States has no "federal reserved water right" to refuse to remove debris from the stream channel to preserve its unobstructed flow or, alternatively, prevent Baker Ranches from doing so. *See, e.g.*, *United States v. New Mexico*, 438 U.S. 696, 700 (1978) (noting that the United States reserves only water "'necessary to fulfill the purpose of the reservation,'" which is limited to conserving water flow for downstream water users and providing timber (quoting *Cappaert*, 426 U.S. at 141)).

To the extent that adjudication of the United States's alleged claims to reserved rights is necessary to administer certain relief, that argument is properly raised in the state court. The United States is not entitled to

sovereign immunity on the basis that a subset of requested relief (ostensibly) cannot be granted. *Cf. Eagle Cnty.*, 401 U.S. at 526 (holding McCarran Amendment waived immunity and emphasizing that questions on specifics, "including the volume and scope of particular reserved rights, are federal questions which, if preserved, can be reviewed here after final judgment by the [state] court").

Second, the United States claims that it is "not bound by the Decree." GAB 20. Yet, days before the United States filed its answering brief, a former attorney for and current policy analyst for the National Park Service was asked under oath by a federal district court whether it was "the position of the Park Service that it had to comply and has to comply with that decree." Ex. A to Baker Ranches' Second Motion for Judicial Notice at 150:3-5. The analyst responded, "Yes." *Id.*

Beyond its double-speak, the United States claims immunity because the McCarran Amendment is purportedly inapplicable to the 1934 Decree. In addition to the reasons discussed above, the United States's contention that it is free to violate the Decree without consequence is particularly egregious because sovereign immunity is immunity from suit; it does not permit the United States to ignore the

law. Again, the United States is bound by the Decree, not least because the United States acquired two water rights that were adjudicated under the Decree, rights that the Decree continues to protect for the benefit of the United States. *See Te-Moak*, 339 F.3d at 813-14; *see also* Eureka Amicus at 14-15. There is likewise no merit to the contention it can avoid "state-court jurisdiction," in light of the McCarran Amendment's plain subjection of the United States to "the judgments, orders, and decrees of the court having jurisdiction," which will most often be state court. 43 U.S.C. § 666(a); *see Te-Moak*, 339 F.3d at 814 (affirming remand to state court of suit for administration).

The United States's attempt to immunize itself from the laws that bind it is part of an attempt to use sovereign immunity, not as a shield from litigation, but as a sword to deprive others of their rights and not be held to account. The United States has little interest in where certain rocks sit in the Baker-Lehman Creeks, yet it is weaponizing a tortured sovereign immunity theory to deprive Baker Ranches from realizing access to its decreed water rights, which are the lifeblood of its agricultural operations. The United States's "conception of sovereign immunity as a sword rather than a shield is unavailing." *See, e.g.*, *Cal. ex*

rel. Lockyer v. Dynegy, Inc., 375 F.3d 831, 849 (9th Cir. 2004), *amended on denial of reh'g*, 387 F.3d 966. "Sovereign immunity is not a sword, but a shield; and as a shield it means simply that 'the United States cannot be sued at all without the consent of Congress.'" *United States v. Bankers Ins. Co.*, 245 F.3d 315, 320 (4th Cir. 2001) (quoting *Block v. North Dakota ex rel. Bd. of Univ. & Sch. Lands*, 461 U.S. 273, 287 (1983)).

The United States likewise claims that "it is not bound by the Decree" "under state law" because the United States was not "'lawfully embraced'" by the adjudication. GAB 21. It is not clear how this would affect the comprehensiveness or binding nature of the 1934 Decree, but the United States is also wrong as a matter of law. The Nevada Water Law provides that it is conclusive upon "all persons and rights lawfully embraced within the adjudication" and, after three years, "any party." *See* Nevada Compiled Laws (1929) § 7924. The State Court amended the Decree *nunc pro tunc* on February 23, 1950. (3-ER-178–220.) Because Congress passed the McCarran Amendment just two years later, the United States could have challenged the amended Decree within the 3-year statutory window but chose not to. *See* Nev. Rev. Stat. § 533.210.1.

Notably, the state court did not see any issue of jurisdiction when it held the United States in contempt for violating the decree. (5-ER-753–54.)

Third, the United States wrongly claims that it had no opportunity to assert any claims to water rights in the adjudication preceding the 1934 Decree. GAB 27-28. Even before the McCarran Amendment, while the United States still enjoyed sovereign immunity—even from comprehensive adjudications—it regularly appeared at water adjudications to identify its rights and assert they were protected by sovereign immunity. And that was not just a possibility. Special Assistant to the U.S. Attorney General William Veeder—in his testimony before a Senate subcommittee regarding the bill that became the McCarran Amendment—testified that it is "good procedure" for the United States to appear in a water adjudication and identify its rights and that it has done so "back as far as our history," even if those rights cannot be adjudicated because of sovereign immunity:

> I went back and checked on the historical means that have been followed where litigation in which the United States is interested has arisen, but to which the United States was not a party. It goes back as far as our history that the Attorney General has appeared specially and said:

> ["]Here is our interest. We aren't going to be in this litigation, but we wish to call to your attention that these are our interests, and we wish that the court would recognize them.["]
>
> *That is a good procedure*.[8]

And nothing would have prevented the United States from following its own "good procedure" then or even now through supplemental proceedings to call attention to its interests so the "court would recognize them." If the United States had followed good procedure and appeared at the adjudication to identify and make claims to any reserved rights, the court and all parties would have received notice of the rights at issue. There is no doubt the United States knew of the adjudication. *See* Ex. D to Appellants' Motion for Judicial Notice (Dkt. No. 24.5) (Letter from C.A. Beam) (U.S. Forest Supervisor acknowledging the adjudication and the need to be ready "at all times . . . [to] be in a position to produce our proofs for use of water"). But the United States chose not to follow that "good procedure." It cannot now argue that its hands were tied, especially considering the acknowledgement that it would have been good procedure to intervene.

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[8] Hearings Before a Subcomm. of the Comm. on the Judiciary, 82d Cong. 4-5 (1951) (Statement of William H. Veeder, Special Assistant to the Attorney General, Department of Justice).

The 1934 Decree binds the United States. The McCarran Amendment waives sovereign immunity for administration of rights recognized in the Decree.

2. Baker Ranches Seeks Administration of Its Water Rights.

The United States further argues that the district court should be affirmed because, even if the 1934 Decree was issued following a comprehensive adjudication, the relief that Baker Ranches seeks is not "administration." *See* GAB 30-33. The relief sought by Baker Ranches—to prohibit the United States from obstructing and diverting water from the Baker-Lehman Creeks in violation of the Decree and depriving downstream rights-holders of their rights—is plainly administration of the Decree, not an effort to determine or undermine the purported federal reserved rights of the United States, whatever they may be.[9]

[9] Baker Ranches argued in its opening brief this Court should allow the district court to determine first whether this relief is administration. OB 40, 65-66. But the shallowness of the United States's arguments on this point clarify that there is no reason for this Court to leave that question open. This Court should reach the question, decide that the relief sought is administration, and remand for the district court to remand to the Nevada state court.

The United States advances two arguments: (1) the relief requested is not within the terms of the 1934 Decree, and (2) the relief requested is not "administration" under the McCarran Amendment. Both arguments fail.

First, there is no reason for this Court to interpret the exact boundaries of the 1934 Decree or the ability of a Nevada court to subsequently modify a water right decree under state law. That is not what Baker Ranches seeks to do in this case anyway. But if this Court were to decide such questions in the first instance, the 1934 Decree affords the requested relief as discussed above and in the opening brief.

The 1934 Decree (1) enjoined "every water user and claimant to the use of the waters of Baker and Lehman Creeks stream system" from "diverting . . . or obstructing the flow" of water beyond its allotted amount, and (2) enjoined each water user to keep the stream "reasonably clean of weeds" and "vegetation" and "in all other respects, maintain said . . . channels in a manner conducive to minimum loss of conveyed water by seepage, evaporation, and other causes." (3-ER-212, 3-ER-215.) Baker Ranches asked in its complaint that the court enforce (or administer) both these specific provisions and prohibit the United States

from "diverting" the water "at the campgrounds," from interfering with Baker Ranches' efforts to remedy the obstructions and efforts to "maximize the flows of Baker and Lehman Creeks," or to alternatively require the United States to undertake efforts that would achieve the same ends. (2-ER-28–29.) These are remedies authorized by the Decree and by Nevada law. *See Ennor v. Raine*, 74 P. 1, 2 (Nev. 1903); Nev. Rev. Stat. § 533.055.

If these remedies were not within the specific letter of the 1934 Decree, the Court should remand so a Nevada court can determine the necessary relief in the first instance. *See McCormick v. Sixth Jud. Dist. Ct. for Humboldt Cnty.*, 246 P.2d 805, 811 (Nev. 1952); *State ex rel. Hinckley v. Sixth Jud. Dist. Ct. for Humboldt Cnty.*, 1 P.2d 105, 108 (Nev. 1931); *see also* OB 69; *see supra* note 9. The United States claims those cases are inapposite because they "involved administration of actual diversion of water, not the types of land-management activities sought by Plaintiffs here." GAB 32 n.3. Yet Baker Ranches is seeking to prevent the "actual diversion of water." Moreover, nothing in those cases implied that a court could update its enforcement only if the defendant was engaging in a specific kind of violation. Rather, those cases stand for the

commonsense conclusion that a court has the inherent power to enforce its decree and fashion the necessary relief.

Second, Baker Ranches's request for the United States to stop diverting water or to allow Baker Ranches to remove debris interfering with the flow of water is the kind of relief that the McCarran Amendment contemplated would be allowed against the United States in its waiver of immunity for "administration" of comprehensive adjudications.

"To administer a decree is to execute it, to enforce its provisions, to resolve conflicts as to its meaning, to construe and to interpret its language." *S. Delta Water Agency v. United States*, 767 F.2d 531, 541 (9th Cir. 1985) (quoting *United States v. Hennen*, 300 F. Supp. 256, 263 (D. Nev. 1968)). The McCarran Amendment does not limit "administration" to a specific kind of enforcement. *Id.* (explaining that after a comprehensive adjudication has occurred, "one or more persons who hold adjudicated water rights can, within the framework of 666(a)(2), commence among others such actions as described above, subjecting the United States, in a proper case, to the judgments, orders and decrees of the court having jurisdiction" (quoting *Hennen*, 300 F. Supp. at 263)).

The United States wants to cabin "administration" to only "the enforcement of rights determined in the Decree in priority relative to each other." GAB 33. The United States cites *Klamath Irrigation District v. U.S. Bureau of Reclamation*, 48 F.4th 934 (9th Cir. 2022). *See* GAB 30-31, 33.[10] But the *Klamath* Court did not confine "administration" to the resolution of priority disputes. The Court held that the suit was not for "administration" because it was an "[Administrative Procedures Act] challenge" to the Bureau of Reclamation's adoption of an Amended Proposed Action to use water to satisfy its "obligations" under the Endangered Species Act and to certain tribes. 48 F.4th at 947.

Indeed, one of the parties there argued, like here, that the suit was not administration because it was not to "administer the various water rights at stake in the [adjudication] in relation to one another." *Id.* at 946-47. This Court declined to adopt that rationale.

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[10] Continuing its trend of inconsistency, the United States waffles here. The United States attempts to redefine "administration" by relying on *Klamath*. GAB 33. But three pages earlier, it interpreted that same case as holding that administration requires that the suit *either* "seek to resolve a dispute over the conflicting exercise of water rights determined in a state adjudication ***or*** to enforce or interpret the terms of that adjudication." GAB 30-31 (emphasis added).

The United States's argument thus collapses. Baker Ranches does not seek to foist any kind of land management policy on the National Park Service. It asks for its rights in the 1934 Decree to be administered by prohibiting the United States from obstructing and diverting water in violation of the Decree. However the lower court fashions a remedy to achieve that goal—e.g., permitting Baker Ranches to clear the creeks of debris (as allowed by Nevada law), ordering the United States to stop diverting water, ordering the United States to cease planting vegetation in the creek beds, or any other form of relief—is immaterial to the question before this Court.

Even if some of the requested relief would encroach upon the United States's land management prerogatives, dismissal on sovereign immunity grounds is not the appropriate result. Baker Ranches specifically sought in its complaint "[s]uch other and further relief as the Court may deem proper." (2-ER-29.) There is relief available that would qualify as administration of the decree. Any objection to a *subset* of relief being outside the boundaries of "administration" is properly considered in the lower courts. *Cf. Eagle Cnty.*, 401 U.S. at 526.

B. Baker Ranches Lacks an Adequate Remedy.

The district court appeared to take comfort in its ruling from the belief that Baker Ranches could obtain relief through other means. The United States attempts to defend this belief, but both the United States and the court greatly overestimate the potential for relief absent an order of administration by the Decree court.

The United States claims that Baker Ranches could obtain relief by seeking to initiate a new adjudication of the Baker-Lehman Creeks. *See* GAB 34. Baker Ranches has no obligation to seek the adjudication of alleged claims to federal reserved rights before it can have its own adjudicated rights enforced. Nevertheless, after receiving the district court's order and in an effort to prevent the Park Service from continuing to dodge enforcement of the Decree, Baker Ranches *did* request, to no avail, that the Nevada State Engineer initiate a supplemental adjudication of any alleged claims to federal reserved rights. Baker Ranches cannot control whether any such supplemental adjudication will take place; it is the State Engineer who decides, and there is no way to compel action. *See* Nev. Rev. Stat. § 533.090.1; OB 72.

Likewise, the United States claims that Baker Ranches could pursue a special use permit. GAB 35. But a special use permit would not stop the United States from illegally diverting water, and any special use permit to clear debris from the creek (or take other action) is left to the discretion of each Park Superintendent. Baker Ranches tried this avenue as well. But—for nearly a decade—the Park Service has failed to act on the application for a special use permit that Baker Ranches filed to perform work in another creek. Plaintiffs are entitled to enforcement of their rights under the Decree, not left to pursue relief that is subject to the whims of certain individuals.

III

CONCLUSION

For the reasons set forth above, the judgment of the district court should be reversed and the case remanded to the district court with instructions to remand to the state court.

DATED: August 15, 2025

Respectfully submitted,
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/s/ Benjamin J. Hogan

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CERTIFICATE OF COMPLIANCE

I certify that:

1. This brief complies with the length limits permitted by Ninth Circuit Rule 32-1 because the brief contains 7,000 words, excluding the portions exempted by Fed. R. App. P. 32(f), if applicable.

2. This brief complies with the typeface requirements of Fed. R. App. P. 32(a)(5) and the type-style requirements of Fed. R. App. P. 32(a)(6) because it has been prepared in a proportionally spaced typeface (14-point Century Schoolbook) using Microsoft Word 2016.

DATED: August 15, 2025

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