

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' OPENING BRIEF

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CORPORATE DISCLOSURE STATEMENT

Pursuant to Federal Rule of Appellate Procedure 26.1, Plaintiffs-Appellants make the following corporate disclosure as to Baker Ranches, Inc., which is the only corporate Appellant:

Baker Ranches has no parent company and no publicly held company owns 10% or more of the stock of Baker Ranches, Inc.

Dated: February 11, 2025

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APPELLANTS' OPENING BRIEF

I

INTRODUCTION AND ISSUES PRESENTED

For 150 years—since the Presidency of Ulysses S. Grant, the Gilded Age, and the American Renaissance—Plaintiffs-Appellants¹ have been

¹ Plaintiffs-Appellants are hereafter collectively referred to as “Baker Ranches” for simplicity. *See* Fed. R. App. P. 28(d).

using water from the Baker and Lehman Creeks to irrigate their agricultural land in Nevada's Snake Valley. Baker Ranches' water rights date back to the 1870s.

On the heels of rapid economic growth and westward expansion, significant changes came to the settling American West. The completion of the railroads to the West following the Civil War opened vast areas of the region to settlement and economic development. As settlers poured across the country to mine, farm, and ranch, the use of the limited waters in the arid west increasingly came to the fore.

The initial status of water rights in the early-settlement West was chaotic, resulting in voluminous piecemeal litigation over who had rights to water. As the West boomed, however, piecemeal litigation became cumbersome and inefficient, so the States enacted statutes to bring clarity and finality to claims for water rights through unified proceedings addressing entire river systems. Like countless other settlers, Baker Ranches' predecessors had their water rights officially decreed in 1934 as part of a Nevada adjudication that was binding on "all water users" of the Baker-Lehman Creeks.

But there remained a major problem: the United States—as the largest landowner and stakeholder—was sovereignly immune from these unified proceedings and its absence diminished their value and efficacy. In 1952, Congress fixed that problem by retroactively and prospectively waiving the United States’s sovereign immunity “in any suit (1) for the adjudication of rights to the use of water of a river system or other source, or (2) for the administration of such rights, where it appears that the United States is the owner of or is in the process of acquiring water rights.” 43 U.S.C. § 666(a).

Despite flowing steady for nearly 150 years, Baker Ranches’ water rights have run dry because of the United States’s upstream misuse and mismanagement of the Baker-Lehman Creeks. Baker Ranches sued to have its adjudicated water rights administered consistent with the 1934 decree and to stop the United States’s infringement of those rights.

And yet, despite the McCarran Amendment’s clear language, the district court held that the United States is sovereignly immune from Baker Ranches’ suit for administration because, in the court’s view, the 1934 adjudication did not include every single potential claim for water

rights and was thus not “sufficiently ‘comprehensive.’” As explained below, this conflicts with the text and purpose of the McCarran Amendment, rests on no authority from the Supreme Court or this Court, and is an altogether unworkable limitation on Congress’s clear waiver of immunity. This Court should reverse and remand, holding that the McCarran Amendment operates here, as Congress intended, to waive the United States’s sovereign immunity to a lawsuit for the administration of water rights—rights the United States is violating—that were adjudicated as part of a proceeding that was intended to be universal and result in a complete ascertainment of rights to the Baker-Lehman Creeks.

The questions presented are:

A. Whether every party, who has a potential claim to a water right (past, present, future, or unidentified) to a particular river system, must be included in the general adjudication to trigger the McCarran Amendment’s waiver of the United States’s sovereign immunity in a subsequent proceeding to administer those adjudicated rights.

B. Whether the United States maintains sovereign immunity, despite the McCarran Amendment’s waiver, when it infringes upon the fully adjudicated and senior water rights of another party because every possible claim for water rights may not have been settled by a single prior adjudication.

II

STATUTORY AND REGULATORY AUTHORITIES

All relevant statutory and regulatory authorities appear in the Addendum to this brief.

III

STATEMENT OF THE CASE

A. Jurisdiction and Timeliness

The district court invoked 28 U.S.C. § 1442 as the basis for its jurisdiction. This Court’s jurisdiction rests on 28 U.S.C. § 1291.

The district court entered its final judgment on August 23, 2024. (1-ER-2–13).² Plaintiffs-Appellants Baker Ranches, Inc.; David John

² “ER” refers to the Excerpts of Record and is cited in accordance with Circuit Rule 30-1.6.

Eldridge and Ruth Eldridge, as Co-Trustees of the David John Eldridge and Ruth Eldridge Family Living Trust, dated January 31, 2007; and Zane Jordan and Judee Schaley, filed a timely notice of appeal on September 17, 2024. (5-ER-769); Fed. R. App. P. 4(a)(1)(A).

B. Statement of Facts and Procedural History

1. Baker Ranches Has Long Relied on Water from the Baker-Lehman Creeks to Irrigate Its Land.

Baker Ranches, Inc. is a “fourth-generation livestock operation based in Baker, Nevada.” (3-ER-166, ¶ 5.) The ranch is “approximately 5,400 acres, approximately 4,000 acres of which are irrigated,” and is “one of the largest water users” in the region. (3-ER-175, ¶ 53, 3-ER-166, ¶ 5.) Baker Ranches “is a very successful business that provides jobs to about 25 people and contributes to jobs of many others in associated industries.” (3-ER-176, ¶ 59) Its contribution to the “local economy” is comparable to that of neighboring Great Basin National Park (the “Park”). (*Id.*) The Baker family took over operations of the ranch in 1960 (3-ER-167, ¶ 9), but it dates to the 1870s when George W. Baker began the ranch. (3-ER-167, ¶ 7, 3-ER-174, ¶ 49, 3-ER-242–45.) Baker Ranches is in the arid eastern Nevada region close to the Utah border. The ranch depends on a

variety of decreed water rights to divert water from streams to irrigate its land. (3-ER-372–73.) One of those decreed water rights permits Baker Ranches to divert water from the Baker-Lehman Creeks. (See 3-ER-166–67, ¶ 5-7, 3-ER-178-220, 3-ER-354, ¶ 3, 3-ER-356, ¶ 4.) Those creeks begin independently inside the Park, flow out of the Park, and converge. (3-ER-225.) Exercising rights dating to the 1870s, Baker Ranches diverts water from the creeks downstream from their convergence and the Park:



(3-ER-225.)

In the 1870s, when Baker Ranches’ predecessors first diverted water from the Baker-Lehman Creeks, the federal land through which the creeks flowed were part of the “public domain”—i.e., “land owned by the Government, mostly in the West, that was [historically] ‘available for sale, entry, and settlement under the homestead laws, or other disposition under the general body of land laws.’” *Hagen v. Utah*, 510 U.S. 399, 412 (1994) (quoting E. Peffer, *The Closing of the Public Domain* 6 (1951)). A portion of that land was withdrawn from the public domain in 1909 to form the Nevada National Forest. See Proclamation No. 839, 35 Stat. 2220 (February 10, 1909); *History of the Toiyabe National Forest: A Compilation, U.S. Forest Service History Collection R4-1680-2009-0291* (2009 ed.) at 128.³ Another portion was withdrawn in 1922 to become the Lehman Caves National Monument. Baker Ranches’ predecessors have historically taken action on these federal lands to protect the flow of water in Baker-Lehman Creeks. (See, e.g., 3-ER-167–69, ¶¶ 9-11, 12, 14-16, 3-ER-174–75, ¶¶ 49-52, 3-ER-300–03, 3-ER-348–49; 5-ER-651.)

³ Available at https://www.fs.usda.gov/Internet/FSE_DOCUMENTS/fsbd ev3_042121.pdf.

2. *Baker Ranches Hold Water Rights Adjudicated in a 1934 Nevada Adjudication of Waters of Baker-Lehman Creeks.*

Baker Ranches hold water rights to Baker-Lehman Creek. These water rights were decreed by a Nevada court in 1934 pursuant to a Nevada statute authorizing general adjudications of water rights. Although the United States knew of the adjudication, it declined to participate.

a. *The 1913 Nevada Water Law*

In 1913, the Nevada legislature enacted “[a]n Act to provide a water law for the State of Nevada.” 1913 Nev. Stat. 192 (codified as reported in Nevada Compiled Laws 1929 § 7890 (Curtis Hillyer, Compiler and Annotator)). The “water law . . . was manifestly designed to be a comprehensive statute covering the water law of the state.” *Ormsby Cnty. v. Kearney*, 142 P. 803, 805 (Nev. 1914). Prior to the enactment of this law (the “Water Law”), “the first appropriators of waters upon the natural streams” in Nevada—that is, the first to beneficially divert water⁴—were “frequently forced into long, vexatious, and expensive

⁴ See *Application of Filippini*, 202 P.2d 535, 537 (Nev. 1949).

litigation to protect their rights against subsequent appropriators.” *Id.* at 806. Moreover, without “some form of state supervision,” it was “difficult to perceive how there may be any effective regulation or control over the water rights of [large water sources].” *Id.* at 805.

The Water Law sought to bring order and finality to these water disputes by a statute imposing “detailed procedure[s]” on water adjudications. *Id.* at 811 (Talbot, C.J., concurring). The statute entrusted the State Engineer, upon a petition or on his own initiative, with initiating a “determination of the relative rights of the various claimants” to a water source. Nevada Compiled Laws 1929 § 7905. After initiating a determination, the State Engineer was required to publish a “notice” for “four consecutive weeks in one or more newspapers of general circulation within the boundaries.” *Id.* § 7906. The notice needed to “set forth that all claimants to rights in the waters . . . [were] required . . . to make proof of their claims” and state when the examination was set to begin. *Id.* The Water Law then required the State Engineer to make his examination and file his observations. *See id.* § 7907.

The Water Law then required publication of an additional notice setting the period for claimants to make their proofs. *See id.* § 7909. After that period ended, the State Engineer was required “prepare and certify an abstract” of the proofs and prepare “a preliminary order of determination establishing the several rights of claimants to the waters of the stream.” *Id.* § 7915. The Water Law required yet another notice giving “interested persons” the opportunity to inspect the claims and evidence before the State Engineer. *Id.*

The State Engineer was required to set a “time and place” for hearing objections from any person “claiming any interest” in the stream and was required to serve by registered mail notice of the hearing “to the persons to be affected by [the] objections.” *Id.* §§ 7916, 7917. After hearing the objections, the State Engineer was required enter an “order of determination, defining the several rights to the waters of the stream.” *Id.* § 7920. A copy of the determination was then served on claimants, objectors, and intervenors. *Id.*

In the final stage of the statutory adjudication process, the State Engineer would file a “certified copy of the order of determination” and

other required documents with clerk of the county in which the stream is located. *Id.* § 7921. This had the “legal effect of a complaint in a civil action.” *Id.* § 7920. Upon the filing, the relevant court issued “an order . . . setting the time for hearing,” which was then mailed to all parties in interest and published in a newspaper for four consecutive weeks. *Id.* § 7921.

The statute then required all parties aggrieved by the order of determination to file exceptions with the court. *Id.* § 7922. On the day of the hearing, “all parties in interest who have filed notices of exception[]” were required to appear, and the court would then address the exceptions. *Id.* The Water Law required the court to then issue “proposed findings of fact and decree” and serve the same on claimants and interested parties. *Id.* The court would ultimately “enter a decree affirming or modifying the order of the state engineer.” *Id.* § 7923.

b. The Baker-Lehman Creek Adjudication

In 1925, the State Engineer began an adjudication of the Baker-Lehman Creeks as authorized by the Water Law. *See Nevada Compiled Laws 1929 § 7905.* “It appear[ed]” to the State Engineer “that the relative

rights to the use of water of the various claimants upon . . . Baker Creek and its Tributaries in the County of White Pine . . . should be determined.” (4-ER-404.) He ordered that, without exception, “all claimants were required to make proof in the manner prescribed by law.”

(Id.)

As required by statute, the State Engineer published the notices and orders once a week for four consecutive weeks in the Ely Daily Times, a local newspaper. (4-ER-395, 4-ER-407–15.) Ultimately, the State Engineer extended the time for claimants to file proofs by nearly four years. (4-ER-439–41.) In 1933—nearly eight years after the adjudication began—the State Engineer compiled the relevant documents and issued the order of determination. (4-ER-417–85.) Despite being on notice like any other interested party over the preceding eight years, the United States did not file any proof of claim, identify or claim any water rights, assert sovereign immunity, or object to claims made by others. *(Id.)* The State Engineer later mailed the order of determination to the claimants and to the United States. (4-ER-486–94.)

The State Engineer filed documentation of all the proceedings in the Seventh Judicial District Court of Nevada. (4-ER-387–88, 4-ER-403–515.) The state court then issued an order setting a hearing for taking exceptions to the order of determination to take place in May 1933. (4-ER-498.) Certified copies of the order were sent by registered mail to the claimants on the Baker-Lehman Creeks and to the United States. (4-ER-498–505.) The state court’s scheduling order was published in the Ely Record for five consecutive weeks. (4-ER-506–07.)

The United States did not file exceptions or appear at the hearing to claim any federal rights to the water system, claim its sovereign immunity from the proceeding, or object to claims made by others. (3-ER-178–220.) This, despite knowing of the ongoing proceeding and knowing it needed to be ready “at all times . . . [to] be in a position to produce our proofs for use of water . . . at any time the State might set for final disposition.” See Ex. D to Motion for Judicial Notice (Letter from C.A. Beam, Forest Supervisor, to District Forester, Ogden, Utah (Feb. 21, 1927)). On October 16, 1934, the state court entered its findings of fact, conclusions of law, and decree in Case No. 2874, *In the Matter of*

the Determination of the Relative Rights in and to the Waters of Baker and Lehman Creeks and Tributaries in the County of White Pine, State of Nevada,⁵ which constituted a final determination under Nevada law of the relative rights to the waters of Baker and Lehman Creeks and their tributaries. (3-ER-178–220); see Nev. Rev. Stat. § 533.210.

3. *The 1934 Decree Recognized and Memorialized the Water Rights of Plaintiffs-Appellants’ Predecessors.*

The Nevada state court’s decree set forth the respective rights of the various claims to water rights in Baker-Lehman Creeks and issued certain injunctions to enforce those rights. Plaintiffs-Appellants are the lawful successors in interest to water rights to irrigate farming and grazing lands decreed by the state court as follows:

1. Plaintiff-Appellant Baker Ranches, Inc.’s share of Proof of Appropriation No. 01066 is appurtenant to 1,751.87 acres and has a priority date between 1872 to 1904.
2. Plaintiff-Appellants David John Eldridge and Ruth Eldridge Family Living Trust’s share of Proof of Appropriation No. 01066 is appurtenant to 8.8 acres and has a priority date of 1872.

⁵ As corrected *nunc pro tunc* on February 23, 1950, “the decree.” (3-ER-178–220.)

3. Plaintiffs-Appellants Zane Jordan's and Judee Schaley's share of Proof of Appropriation No. 01066 is appurtenant to 7.13 acres and has a priority date of 1876.

(See 3-ER-166–67, ¶¶ 5-7, 3-ER-178–220, 3-ER-354, ¶ 3, 3-ER-356, ¶ 4).

Like Plaintiffs-Appellants, the United States holds water rights adjudicated under the same 1934 decree.⁶ The United States holds Proof of Appropriation 01065 (with a priority date of 1890) and a share of Proof of Appropriation 01066 (with a priority date of 1904), having acquired both rights from private appropriators who participated in or were successors to participants in the adjudication proceedings. (3-ER-178–220, 3-ER-222–23, 3-ER-358–59.).

The decree issued certain injunctions to enforce these rights, including enjoining “each and every water user and claimant to the use of the waters of Baker and Lehman Creeks stream system and its tributaries” from, *inter alia*, “diverting or using or preventing or obstructing the flow, in whole or in part, in or along its natural channel, of any of the water or said stream system.” (3-ER-215.) The decree further

⁶ For simplicity, this brief refers to the defendants collectively as “United States.”

required each water user to “keep . . . the mainstream channel through his land reasonably clean of weeds, vegetation, and deposits of silt” and to further maintain the “channels” to minimize “loss of conveyed water.” (3-ER-212.)

C. Baker Ranches and Their Predecessors Took Steps to Prevent Water from Being Lost into Caves and Sinks and Ensure the Free Flow of Their Senior Priority Water Rights.

1. Actions to Control Flows and Prevent Water Losses

The historical record and first-hand accounts indicate that Baker Ranches’ predecessors took actions, including actions starting more than 100 years ago to ensure the delivery of their water by preventing water from being lost into sinks, cracks and caves along the channel. (3-ER-167–69, ¶¶ 9-11, 12, 14-16, 3-ER-174–75, ¶¶ 49-52, 3-ER-300–03, 3-ER-349–52; 5-ER-651.) Much of this conduct was to remedy obstructions and diversions occurring in the “Baker Creek Narrows,” a portion of Baker Creek flowing through the federal land that later became part of the Park. (3-ER-225.)

Because high flows cause rocks and debris to move within the channel after the spring run-off, Baker Ranches and their predecessors

would regularly enter the Baker Creek channel to clear channel obstructions, move rocks and debris, and block the openings of the caves, cracks, and sinks located in the Baker Creek Narrows to prevent the loss of their decreed water rights. (3-ER-167–69, ¶¶ 9-15, 17, 3-ER-171, ¶ 28.) Daisy Gonder, a previous owner of rights to water in the Baker-Lehman Creeks, testified that from approximately 1966 to 1980, she would manage the water flow every year in the Narrows and no one ever prevented her from doing that work. (3-ER-237–38.) Craig Baker, one of the current operators of Baker Ranches, would go up to the Narrows with his father Dean and grandfather Fred almost annually to ensure that water was not going into the sinks, cracks, and caves and to move rocks and obstructions, as needed, to maximize the flow in the channel. (3-ER-169, ¶ 17.) Indeed, Dean Baker received permission from the Forest Service in the early 1960s to drive a bulldozer into Baker Creek and correct the channel near the Narrows. (3-ER-168, ¶ 14.)

2. Prior Diversion Structures

Baker Ranches has not been alone in taking action to ensure that Baker-Lehman creeks continue to deliver water where it has gone for

generations and needs to go today. There are obvious manmade dams and ditches that were built on federal land (now inside the Park) that clearly show a long history of water users' efforts, prior to the land being withdrawn from the public domain, to ensure that the full flow of Baker Creek reached their points of diversion. (3-ER-169, ¶ 16, 3-ER-174–75, ¶¶ 49-51.) The original 1872 Baker Creek point of diversion established by Baker Ranches' predecessor was inside what is now the Park boundary just downstream of the Narrows. (3-ER-226, 3-ER-174, ¶ 19, 3-ER-242–45.) On-the-ground remnants of other historical diversion and flow-control structures that were built decades before the Park was established are still readily observable, and photographic evidence from the 1920s also shows one such structure. (3-ER-167–68, ¶¶ 13-14, 17, 3-ER-171, ¶ 28, 3-ER-175, ¶ 52, 3-ER-242–45, 3-ER-247–49, 3-ER-251–61, 5-ER-648–93, 5-ER-695–704.)⁷

⁷ *Twaddle v. Winters*, 85 P. 280, 284–85 (Nev. 1906) (explaining that to make the most use of water, prior appropriation law, and the federal and state dollars invested in promoting it, farmers are encouraged to use every drop rather than allow water to sink into or evaporate from desert soils), *aff'd on reh'g*, 89 P. 289 (Nev. 1907).

D. The United States Formed Great Basin National Park from Former Federal Lands.

In 1985, certain members of Congress renewed a decades-old effort to establish a national park from lands including portions of the Nevada National Forest—which by this time had been incorporated into the Humboldt National Forest⁸—and Lehman Caves National Monument. See H.R. 4642, 99th Cong. § 201 (2d Sess. 1986) (bill to establish “the Great Basin National Park and Preserve”). A major concern prevented Nevada’s congressional delegations from supporting the effort—namely, that creation of a park would undermine water rights in the region.

Indeed, in 1961, while the proposed Great Basin National Park was being considered, Fred Baker expressed concerns to Representative Walter S. Baring about being able to maintain his rights to transport water in the streams. The Secretary of the Department of the Interior addressed this specific concern:

Mr. Baker was worried about the maintenance of the stream channels within the boundaries of the proposed park itself because of debris and beaver dam obstruction. Should the park be established we do not foresee anything which will prevent Mr. Baker from clearing such stoppage so the streams

⁸ See History of the Toiyabe National Forest, *supra*, at 128.

may flow freely. If the park is established, arrangements could then be worked out with the ranger who would be in charge.

(5-ER-746); Letter from Stewart Udall, U.S. Secretary of the Interior to Walter S. Baring, U.S. House Representative (Sept. 25, 1961), quoted in *Baker Ranches, Inc. v. Haaland*, No. CV-2103035, 2022 Nev. Dist. LEXIS 1264, at *12 (7th Jud. Dist. Ct. of Nev. Dec. 1, 2022).

Additionally, Baker Ranches appeared at a congressional hearing to object to the proposed park, explaining they “own the water rights from Baker and Lehman Creeks.” *Establishing the Great Basin National Park and Miscellaneous Boundary Adjustments in the National Park System: Hearing on S. 2384, S. 2506, and S. 2534 before S. Subcomm. On Public Lands, Reserved Water and Resource Conversation, 99th Cong.* 190 (1986) (Statement of Carl Baker). Baker Ranches’ representative specifically objected that the bill should explicitly “permit channel maintenance whenever it is required.” *Id.* A U.S. Senator recognized the concern, noting they had made “every attempt to try and work out the different boundary lines, and your water rights, and everything.” *Id.* at 287. He later praised a version of the bill for including “language protecting water

rights in Nevada.” 132 Cong. Rec. 29,914 (Statement of Sen. Chic Hecht). One U.S. Representative noted that “there are no anticipated conflicts with existing water right uses affecting the park.” 132 Cong. Rec. 33,667 (Statement of Rep. Bruce F. Vento). According to one report, then-Congressman Harry Reid personally went to Dean Baker (father to current Baker Ranches’ operators) and asked for support for the park. Baker responded that they would “have to protect our water,” and Reid agreed.⁹

After careful compromise, including compromise over the protection of Nevadans’ water rights, Congress created the Great Basin National Park in 1986. *See* Pub. L. No. 99-565, § 2, 100 Stat. 3181 (Oct. 27, 1986). The Park consists of a portion of the former Nevada National Forest and all of what was Lehman Caves National Monument, land through which the Baker-Lehman Creeks flow. *See* 16 U.S.C. § 410mm(d)(1). The compromise resulted in the park being created “[s]ubject to valid existing rights” and a prohibition against the Secretary of the Interior acquiring

⁹ Emily Green, *Satiating a Booming City*, Las Vegas Sun (June 1, 2008), <https://lasvegassun.com/news/2008/jun/01/satiating-booming-city/>.

“lands or interests . . . without the consent of the owner thereof.” 16 U.S.C. §§ 410mm-1(d), 410mm-2(a). The legislation required that any new rights to water be acquired only “*in accordance with the substantive and procedural law of the State of Nevada.*” 16 U.S.C. § 410mm-1(h) (emphasis added).

Moreover, the enacted bill specifically disclaimed any new “express or implied . . . water or water-related right” except for those rights already created in the “initial establishment and withdrawal of Humboldt National Forest and the Lehman Caves National Monument.” 16 U.S.C. § 410mm-1(h). When the United States withdraws land from the public domain, it “reserves” the right to use some water. *United States v. New Mexico*, 438 U.S. 696, 699 (1978). And the United States impliedly reserves *only* that water “necessary to fulfill the purpose of the reservation.” *Id.* at 700 (citation omitted). For a national forest, such as Humboldt National Forest, the implied reservation of water is only that necessary to “conserve the water flows[] and to furnish a continuous supply of timber for the people.” *Id.* at 707 (citation omitted). Accordingly, when Congress created Great Basin National Park and

primarily limited its water rights to those associated with Humboldt National Forest and Lehman Caves National Monument, it substantially limited the United States’s reserved water rights to those needed to “conserve the water flow” and provide timber.

The statute placed real limitations on the interference with water rights. Because any federal reserved rights that could be claimed by the Park were substantially limited to protecting the water flow, the law communicated to Nevadans that they could continue exercising and protecting their water rights without fear that the establishment of the Park changed the legal landscape. And Baker Ranches did indeed continue to protect the flow of water through Baker-Lehman Creeks, even when obstructions and disruptions occurred on Park property. Several of the Bakers took action within Park boundaries almost annually to protect water flow. (3-ER-169, ¶ 17.)

E. The United States Obstructed the Natural Flow of, and Diverted Water from, the Baker-Lehman Creeks.

The National Park Service has obstructed the flow of and diverted water from the Baker-Lehman Creeks in several ways, depriving Baker Ranches of their decreed rights.

1. *The United States's Roads*

Since the time that Baker Ranches' predecessors established their water rights, the United States constructed two roads that have the effect of diverting water into caves, cracks, and sinks in the Baker Creek Narrows. The United States has not disputed these facts.

Indeed, a hydrologist for the National Park Service ("NPS") investigated the conditions surrounding a road that crosses Baker Creek and concluded that "human-built flow modifiers," a "heavily vegetated" stream channel, and a culvert, among other factors, "create a flow system that is unstable in planform and inclined to send flow" toward cracks, sinks, and caves. (5-ER-645–64.) The NPS hydrologist further concluded that the "only way" to prevent the creek from moving "more aggressively" into the location of those cracks, sinks, and caves "is to perform physical modifications to the channel on a periodic basis." (5-ER-646.) The Baker Creek Road that runs adjacent to Baker Creek also has the effect of shunting the stream flow into the cave system. (5-ER-651–52, 5-ER-657–58, 5-ER-674, 5-ER-696, 5-ER-698–701.)

Although NPS acknowledges that its roads interfere with the natural flow and divert water into the cave system under certain conditions, it has failed to mitigate this human-caused interference to ensure that Baker Ranches' water rights are satisfied in accordance with the decree and, starting in 2014, informed Baker Ranches that they would be cited should they do so. (5-ER-644–46, 5-ER-709–15; *see also* 5-ER-648–93.)

2. NPS's Diversions of Water for Its Own Use

NPS operates campgrounds along Lehman Creek and Baker Creek that have no associated water rights, a point NPS does not dispute. (3-ER-171, ¶ 30.) Nevertheless, NPS diverts tributary water from Baker and Lehman Creeks for use at the campgrounds.¹⁰ (*Id.*, 3-ER-229–30.) Additionally, NPS has used water for dust suppression without a water

¹⁰ The United States has claimed that it has now ceased its illegal water diversions at the campgrounds. (2-ER-102 n.5.) However, it did so only after Baker Ranches filed their Complaint and sought to hold the United States in contempt of court for violating the decree, demonstrating precisely why Congress ensured the United States was subject to the state court's jurisdiction. Should the Court find no waiver of sovereign immunity here, the Park Service may simply resume the illegal campground diversions or otherwise illegal diversions and use of water in the future.

right or any legal authority to support the use. (5-ER-722.) Defendants' unlawful diversions violate the decree. (3-ER-178–220.)

3. *NPS's Obstructions of Water Flow Through the Addition of Debris in the Stream Channels*

NPS and the U.S. Forest Service have engaged in decades of unnatural fire suppression activities, resulting in the proliferation of vegetation and woody debris in Baker and Lehman Creeks and their tributaries that did not exist at the time Baker Ranches' predecessors established their decreed rights. (3-ER-172, ¶ 31, 3-ER-247–49, 3-ER-274–87, 3-ER-304–21, 3-ER-326–41.) When NPS engaged in campground renovation and fuels-reduction projects, it felled trees into the channels and allowed downed woody debris to choke Baker and Lehman Creeks. (3-ER-174, ¶ 47, 3-ER-283–87, 3-ER-304–16, 3-ER-326–41.) Additionally, Park visitors routinely build rock dams in Baker and Lehman Creeks, often near the campgrounds. (3-ER-174, ¶ 46.) These dams, in addition to the logs the Park Service has felled across the creek channels and the debris that accumulates within the channels, impede and spread the creek flow and divert water into caves, cracks, and sinks, and other areas. (3-ER-169, ¶20, 3-ER-174, ¶ 46, 3-ER-322–25, 3-ER-342–47.) They also

cause side channels to develop, further spreading the water. (3-ER-172–73, ¶¶ 35-37, 39, 3-ER-283–87, 3-ER-295–96, 3-ER-304–21, 5-ER-650–52, 5-ER-657–59.)

4. NPS's Planting of Vegetation that Consumes Tributary Water

In locations where the debris has caused Lehman Creek to form side channels, NPS planted vegetation adjacent to, and placed vegetation cuttings within, the braiding side channels that slows and spreads the water, making it less likely that the water will return to the main Lehman Creek channel. (3-ER-229, 3-ER-173–74, ¶¶ 42, 44, 3-ER-288–94, 3-ER-297–99.) Downstream of the debris jams that create this braiding, water no longer flows in the main Lehman Creek channel. (3-ER-173, ¶ 43, 3-ER-295–96, 3-ER-317–21.) NPS's newly planted vegetation and side channels on Lehman Creek are consuming Baker Ranches' senior decreed rights and preventing Baker Ranches' decreed rights from reaching Baker Ranches' point of diversion. (3-ER-173–74, ¶¶ 44, 48.)

F. NPS Has Prevented Baker Ranches from Effectuating Their Adjudicated Rights.

Notwithstanding the long historical record of water appropriators taking the steps necessary to ensure that water flows unobstructed and undiverted from the natural channel as allowed by state and federal law, starting in 2014, the United States threatened Baker Ranches with law enforcement action should they enter into the Park to remove obstructions to salvage their decreed water rights from being lost into caves, cracks, and sinks. (3-ER-170, ¶ 21.) On or about April 7, 2012, Craig Baker observed uncharacteristically low flows reaching Baker-Ranches' point of diversion, which is downstream of the Park and the confluence of Baker and Lehman Creeks. Upon investigation, he discovered that the Baker Creek channel was dry upstream before the stream left the Park. (3-ER-169, ¶¶ 18-19, 3-ER-225, 3-ER-230, 3-ER-262–65.) Data later confirmed that the creek was indeed dry before it left the Park boundary. (3-ER-170–71, ¶¶ 24-26, 3-ER-266–69.) The absence of any flowing water can be seen in the photo below. (3-ER-264.)



Craig walked the creek upstream and found that all the water was flowing into a sink. (3-ER-169, ¶ 20.) It appeared as if rocks had been placed in the stream to divert water into the sink. (*Id.*) Craig and his brother started to move rocks and other material to direct the water away from the sink and back down the channel when they were detained by a park ranger. (3-ER-170, ¶21.) The Park superintendent permitted them to finish their work, but two years later, a new Park superintendent

informed them that they would be cited should they engage in future efforts to maintain the flow in the channel. (3-ER-170, ¶¶ 21, 23.)

G. NPS's Interference with Baker Ranches' Water Rights Causes Short- and Long-Term Harm to Baker Ranches' Agricultural Lands.

In 2012, approximately 2.76 cubic feet per second (“cfs”) was lost into a sink for at least 90 days with no measurable flow leaving the Park boundary. (3-ER-169–70, ¶¶ 18-26, 3-ER-262–65.) During much of 2020 through 2022, an estimated 2-3 cfs of Plaintiffs’ decreed water was again being lost into the sink, resulting in the stream bed running dry. (3-ER-171, ¶ 27, 3-ER-270–73.) As of May 2023, 4.7 cfs was being lost into the sink. (5-ER-650.) The drying up of Baker Creek and reduced flows on both Baker and Lehman Creek affect the productivity and health of Plaintiffs’ fields and pastures, harming the soil moisture profile and reducing crop yields. (3-ER-372, ¶¶ 4-7.) Baker Creek is and has been the largest single source of water for the 4,000-acre Baker Ranch since 1872. (3-ER-175, ¶ 53.) Lehman Creek is also a significant water source. (*Id.*)

The water of Baker and Lehman Creeks has been put to beneficial use on the ranch continuously for 150 years. (3-ER-175, ¶ 54.) Since

Craig, Tom, and Dave Baker’s family has owned the property starting in 1960, the only time a usable amount of Baker Creek water has failed to arrive at the place of use was for a short period in 1963, three months in 2012, and 2020-2022, when debris diverted the water into a sink for prolonged periods because NPS refused to clear it or allow Baker Ranches to do so. (3-ER-175–76, ¶¶ 55-56.). Baker Ranches estimates its losses from Baker Creek to be approximately 2,000 acre feet¹¹ per year in 2020, 2021 and 2022 and approximately 350 acre feet in 2023. (3-ER-176, ¶ 58, 5-ER-735, ¶ 11.)

Baker Ranches is a very successful business that provides jobs to about 25 people and contributes to jobs of many others in associated industries. (3-ER-176, ¶ 59.) It produces high-value products that it sells for well-above-average commodity prices. (*Id.*) As they have been since at least 1872, the waters of Baker and Lehman Creeks are critical to Baker Ranches’ operation. (3-ER-176, ¶ 61.)

¹¹ “[A]cre feet” refers to the “the volume of water it would take to cover an acre to a depth of one foot.” *Wilson v. Pahrump Fair Water, LLC*, 481 P.3d 853, 855 (Nev. 2021).

H. Procedural History

Nearly four years ago, in March 2021, Baker Ranches filed a complaint in the Seventh Judicial District Court of Nevada—the same state court that issued the 1934 decree. Baker Ranches sought an administration—i.e., formally requested the Seventh District to enforce—the 1934 decree.¹² Baker Ranches requested, *inter alia*, an order enjoining the United States “from diverting and using tributary water from Baker and Lehman Creeks at the campgrounds”; enjoining the United States from interfering with Plaintiffs’ rightful efforts to remove the obstructions and debris from the Baker-Lehman creek and “otherwise maximize the flows of Baker and Lehman Creeks from their sources to Plaintiffs’ points of diversion”; or for NPS to do that work consistent with its obligations under the decree. (2-ER-28–29.)

The United States removed the case to the United States District Court for the District of Nevada under 28 U.S.C. § 1442(a)(1) and sought

¹² “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) (citation omitted).

dismissal on the basis that the United States was sovereignly immune from the litigation. (2-ER-55–72.)

Baker Ranches moved to remand on the basis that the Nevada state court had exclusive jurisdiction over administration of the 1934 decree and because the United States waived sovereign immunity. (2-ER-33–53.) The district court determined that the state court had prior exclusive jurisdiction, denied the United States’s motion to dismiss, and remanded the case to Nevada state court. (2-ER-73–82.)

The United States appealed the remand order to this Court but did not ask either the district court or this Court to stay litigation in the Nevada state court. As such, following the district court’s remand order, litigation proceeded concurrently in both federal and state court.

1. State Court Litigation Following May 2022 Remand

On remand to the state court, the United States moved to dismiss on the basis of its sovereign immunity. *See* Ex. A to Motion for Judicial Notice (Defendants Motion to Dismiss (Apr. 11, 2022)). The Nevada court rejected the United States’s arguments—the same arguments underlying the district court’s order in this appeal—and denied the motion to

dismiss. *See* Ex. B to Motion for Judicial Notice (Order Denying Defendants’ Motion to Dismiss (July 22, 2022)). On Baker Ranches’ motion, the Nevada court found the United States in contempt for violating the 1934 decree and “granted [Baker Ranches] immediate access to the Baker-Lehman Creeks for the purpose of” assessing the creek in the Park, granted Baker Ranches authority to remedy those “conditions that can easily be remedied on the spot,” and invited the parties to provide the court with “proposed suggestions to guide the parties in the orderly performance of future maintenance for Lehman-Baker Creeks.” (5-ER-753–54.) The state court “reserve[d] a ruling on the imposition of sanctions until a future date.” (5-ER-755.) The United States appealed the contempt order to the Nevada Supreme Court, which dismissed the appeal for lack of jurisdiction. *Haaland v. Baker Ranches Inc.*, 527 P.3d 968 (Nev. 2023) (table decision).

As instructed by the Nevada trial court, Baker Ranches submitted a proposed action plan and the United States filed a response. *See* Ex. C to Motion for Judicial Notice at 1 (Order Regarding Plaintiffs’ Proposed Action Plan and Defendants’ Response (Aug. 24, 2023)). The Nevada

court, on August 24, 2023, issued an Order Regarding Plaintiffs' Proposed Action Plan and Defendants' Response. *See id.* Defendants appealed this order to the Nevada Supreme Court. Defendants later moved to dismiss the appeal, and the Nevada Supreme Court recently—following substantial litigation in the federal district court, described below—dismissed the appeal without reaching the question of sovereign immunity. *Haaland v. Baker Ranches Inc.*, 560 P.3d 664 (Nev. 2024) (table decision).

2. *Federal Litigation Following May 2022 Remand*

On appeal of the district court's initial remand order, this Court concluded that the district court was correct that the state court maintained prior exclusive jurisdiction *if* the United States had waived its sovereign immunity. The Court remanded for the district court to decide, in the first instance, whether the United States had waived its immunity. *Baker Ranches, Inc. v. Haaland*, Nos. 22-15765, 22-15846, 2023 WL 6784357 (9th Cir. Oct. 13, 2023).

Back in district court, Baker Ranches again moved to remand and the United States moved to dismiss for lack of subject matter jurisdiction

based on its purported sovereign immunity. (2-ER-83–111, 2-ER-114–53.) The United States argued that the McCarran Amendment, which waives the United States’s sovereign immunity for adjudications or administrations of water rights, did not apply because the 1934 decree was not a “comprehensive” adjudication and because Baker Ranches’ claim was not for “administration” of a water right. (2-ER-97–108.)

The district court noted that the McCarran Amendment only waives sovereign immunity for a “comprehensive adjudication of water rights” or administration of rights decreed pursuant to such comprehensive adjudications. (1-ER-8.) The court then explained that the 1934 decree did not “determine any federal water rights, but the United States had reserved water rights at the time of the adjudication.” (1-ER-9.) Because those reserved water rights “were not included in the Baker-Lehman adjudication, the adjudication was not comprehensive for purposes of the McCarran Amendment.” (*Id.*) The court’s analysis thus required that every claim be present in an adjudication for it to be “comprehensive,” a requirement it derived from *San Luis Obispo Coastkeeper v. U.S. Dep’t of Interior*, 827 F. App’x 744, 745 (9th Cir. 2020)

(unpublished). (1-ER-8.) And because the court concluded the adjudication was not comprehensive, it ruled that the McCarran Amendment's waiver did not apply.

IV

SUMMARY OF ARGUMENT

Congress enacted the McCarran Amendment to waive the United States's sovereign immunity to mass adjudications of water rights under state law and the administration of those rights. Where an adjudication is "intended to be universal and to result in a complete ascertainment of all existing rights" and is thus "comprehensive,"¹³ the McCarran Amendment waives the United States's immunity and allows its rights to be adjudicated just as any private water user. Likewise, when a party brings suit for administration of water rights that were adjudicated under such a comprehensive adjudication and the United States holds water rights decreed in that adjudication or is otherwise a "necessary

¹³ *United States v. Cappaert*, 508 F.2d 313, 321 (9th Cir. 1974) (quoting S.Rep.No.755, 82d Cong., 1st Sess. 5 (1951) (Senate Report on McCarran Amendment)).

party,” the McCarran Amendment waives the United States’s sovereign immunity.

Congress waived this immunity to ensure that States could do away with the “long, vexatious, and expensive litigation” that attended piecemeal adjudication of water rights. *Ormsby Cnty.*, 142 P. at 805. Departing from the text and purpose of the McCarran Amendment, the district court created an exception that swallowed the waiver of sovereign immunity. The court ruled that the 1934 adjudication was not “sufficiently ‘comprehensive’” because it did not include potential (and unidentified) federal reserved rights that the United States declined to present in that adjudication. (1-ER-9.)

Because the district court offered no limiting principle, its decision apparently rests on the belief that any claim—whether belonging to the United States or some other party—that is not actually presented in a mass adjudication prevents the adjudication from being “comprehensive” and prevents application of the McCarran Amendment. Alternatively, even if the court’s decision were more narrow—i.e., that only the absence of a potential water-right-claim by United States’s claim from a prior

adjudication renders the adjudication non-comprehensive—it would fare no better. Either position is untenable for the same reason: there is nothing in the text of the McCarran Amendment that limits the waiver of immunity to only those adjudications that actually included all potential claims or all of the United States’s potential claims. No decision from this Court or the Supreme Court imposes such a limit on the scope of the McCarran Amendment, the limitation undermines Congress’s stated purpose, and there is no practical way for a court to ensure that all claims or all claims held by the United States are *actually* adjudicated.

The district court dismissed the complaint based on its erroneous view of what is “sufficiently ‘comprehensive.’” But the United States also argued—and the lower court did not address—whether the relief sought by Baker Ranches is the type of relief that the McCarran Amendment authorizes private water users to pursue, through administration, against the United States. This Court need not reach that issue in the first instance. Should the Court address the issue, it should recognize that the requested relief is just the kind of “administration” authorized by the McCarran Amendment.

Finally, the district court's impossible view of the McCarran Amendment's wavier provisions leaves Baker Ranches without a remedy while their water rights run dry. Dismissal of the underlying complaint on the grounds of sovereign immunity clearly jeopardizes Baker Ranches' ability to vindicate the water rights it has exercised for over 150 years and which were decreed almost a century ago following a nearly 10-year adjudication.

V

STANDARD OF REVIEW

This Court “review[s] de novo the district court’s dismissal for lack of subject matter jurisdiction, including whether the United States has waived its sovereign immunity.” *Harger v. Dep’t of Lab.*, 569 F.3d 898, 903 (9th Cir. 2009); *see Tobar v. United States*, 731 F.3d 938, 941 (9th Cir. 2013).

VI

ARGUMENT

A. The District Court Erred in Concluding that the United States Had Not Waived Its Sovereign Immunity.

Baker Ranches brought suit for administration of water rights that they or their predecessors have exercised on their lands since the 1870s, which were adjudicated as part of the 1934 decree regarding the water rights to the Baker-Lehman Creeks. After a nearly ten-year adjudication process that required “[a]ll claimants to rights in the waters” of the Baker and Lehman Creek systems “to make proof of their claims,” (4-ER-407) which necessarily included any claims that the United States might assert, the court decreed that “*each and every water user and claimant to the use of the waters of Baker and Lehman Creeks stream system and its tributaries . . . be . . . perpetually enjoined and restrained.*” (3-ER-215 (emphasis added).) No one disputes that both the United States and Baker Ranches are such “water user[s]” of the Baker-Lehman Creeks. Baker Ranches now simply seeks administration of that 1934 decree.

This is just the kind of action that Congress intended to allow plaintiffs to bring against the United States when it enacted the

McCarran Amendment and waived the United States’s sovereign immunity for the adjudication and administration of water rights. Ruling on the United States’s dismissal motion, the district court held, however, that the McCarran Amendment’s waiver does not apply because the 1934 decree did not include “the United States’ reserved rights” and was thus not “sufficiently ‘comprehensive.’” (1-ER-9.) The court gave no limiting principle. Under the court’s logic, the absence of a single claim from an adjudication—whether belonging to the United States or some other party—means that the adjudication was not “comprehensive” and thus the McCarran Amendment does not apply. That interpretation lacks rooting in the text and purpose of the McCarran Amendment and is fundamentally unworkable.

Neither the Supreme Court nor this Court has ever held that the absence of a single claim from an otherwise comprehensive adjudication negates the effect of the McCarran Amendment. By its language and in its purpose, the McCarran Amendment waives immunity from adjudications (and the administrations of rights fixed in such adjudications) that require the presentation of all claims and are

intended to definitively establish the relative rights of all users of a given water system.

Resolving the case on the threshold issue of comprehensiveness, the district court declined to reach the United States's second argument: that Baker Ranches' claims were not for the administration of water rights. As explained below, this Court should decline to reach that issue in the first instance. But if the Court does decide that issue, it should conclude that Baker Ranches have brought claims for administration that trigger the McCarran Amendment's waiver of sovereign immunity. *See infra* Part VI.A.3. Because the McCarran Amendment waives the United States's immunity from this suit, this Court should reverse the district court.

1. Congress Waived the United States's Immunity to Suits for the Administration of Water Rights Previously Recognized Through a Comprehensive Adjudication Procedure.

The McCarran Amendment waives the United States's sovereign immunity "in any suit (1) for the adjudication of rights to the use of water of a river system or other source, or (2) for the administration of such rights, where it appears that the United States is the owner of or is in

the process of acquiring water rights.” 43 U.S.C. § 666(a). The district court, however, concluded that the McCarran Amendment did not waive the United States’s sovereign immunity for administration of water rights adjudicated in the 1934 decree because it was supposedly not “sufficiently ‘comprehensive.’” (1-ER-8–9.) But the adjudication that preceded the decree was comprehensive in exactly the way that the McCarran Amendment requires.

The McCarran Amendment was enacted to remove the United States’s sovereign immunity as an obstacle to the effectuation of comprehensive adjudications of water rights, especially those adjudications accomplished through state statutory processes. The McCarran Amendment achieved this goal by putting the United States on equal footing with private holders of water rights. Courts interpreting the McCarran Amendment have observed that it waives the United States’s immunity to “comprehensive” or “unified” adjudications that *intend* to settle all claims to a water source. The district court ruled, however, that an adjudication that leaves a single claim unadjudicated—even if the claim was never asserted or identified—is not

“comprehensive” enough to trigger the McCarran Amendment’s waiver of sovereign immunity.

That is a radical narrowing of the McCarran Amendment that this Court should reject for three reasons: (1) it is divorced from the text and purpose of the statute, (2) the rigid comprehensiveness requirement imposed by the district court is inconsistent with this Court’s and the Supreme Court’s decisions, and (3) it is unworkable and would permit the United States to opt out of the McCarran Amendment and escape virtually all water right adjudications or administrations by later asserting its own new claim (or identifying the unadjudicated claim of another party) to a water right that was not part of a particular adjudication.

a. Text and Purpose of the McCarran Amendment

The word “comprehensive” does not appear in the text of the McCarran Amendment. *See* 43 U.S.C. § 666(a). Courts have interpreted the McCarran Amendment, however, to apply only to “unified” (also called “comprehensive” or “general”) adjudications based on the legislative history of the Act and the obvious role the McCarran

Amendment is intended to serve: facilitate consolidated adjudications of rights to limited water resources. *See United States v. Oregon*, 44 F.3d 758, 766 (9th Cir. 1994) (“The Supreme Court has repeatedly looked to indicia of Congressional intent in order to construe the scope of the unequivocally expressed waiver of immunity in the McCarran Amendment.”). The McCarran Amendment accomplishes that goal by putting all water users on equal footing. *See, e.g., State Eng’r of Nevada v. S. Fork Band of Te-Moak Tribe of W. Shoshone Indians*, 339 F.3d 804, 812 n.1 (9th Cir. 2003) (“[I]t 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.” (quoting S. Rep. No. 82–755, at 5–6 (1951))).

During early settlement of the Western United States, “the relative rights of various claimants to water from a river system were determined piecemeal, as conflicts arose, in traditional lawsuits in equity.” *Oregon*, 44 F.3d at 763. As the West grew in population, “a dilemma emerged: the nature of traditional civil litigation made joinder of the hundreds or

thousands of claimants to a river system extremely cumbersome and inefficient, while less comprehensive adjudications were of little value.” *Id.* at 763–64 (footnote omitted). Indeed, one case grew to include 10,000 parties. *See id.* at 764 n.2. To resolve this problem, states began enacting statutory schemes that would enable the comprehensive, unified, or “general” adjudication of water rights. These systems were promising, but they were “impaired by the refusal of the federal government to participate.” *Id.* at 765.

The United States’s sovereign immunity “significantly diminished the *value* of” what were already determined to be “comprehensive state adjudications” because it had withdrawn substantial land from the public domain. *Id.* (emphasis added); *Hagen*, 510 U.S. at 412 (that “land owned by the Government, mostly in the West, that was [historically] ‘available for sale, entry, and settlement under the homestead laws, or other disposition under the general body of land laws’” (quoting E. Peffer, *supra*, at 8)). And when the United States “withdraws its land from the public domain and reserves it for a federal purpose, the Government, by implication, reserves appurtenant water then unappropriated to the

extent needed to accomplish the purpose of the reservation.” *Cappaert v. United States*, 426 U.S. 128, 138 (1976). The incredible amount of land withdrawn from the public domain thus reserves the related water rights.¹⁴ And because of the “interlocking” nature of water rights, the inability of these unified proceedings to adjudicate rights belonging to the United States diminished their value. *Colo. River Water Conservation Dist. v. United States*, 424 U.S. 800, 811 (1976).

The McCarran Amendment was designed to solve this problem by waiving the United States’s sovereign immunity from unified (or “general” or “comprehensive”) proceedings adjudicating and administering water rights. This waiver put the United States on equal footing with other water users, making them both “amenable to the law of the State[s].” *Te-Moak*, 339 F.3d at 812 n.1 (citation omitted). “The clear federal policy evinced by that legislation is the avoidance of piecemeal adjudication of water rights in a river system.” *Colo. River*

¹⁴ Indeed, the Supreme Court noted many years ago that, at that time, 86.5% of the land in Nevada belonged to the federal government. *New Mexico*, 438 U.S. at 699 n.3 .

Water, 424 U.S. at 819. The McCarran Amendment applies retroactively to waive immunity for administration of pre-McCarran Amendment comprehensive adjudications, ensuring the effectiveness of the great efforts to bring finality to water rights prior to the waiver’s enactment. See *Te-Moak*, 339 F.3d at 812–13. Without that waiver, the states’ attempt to bring finality to water disputes through comprehensive adjudications—especially through statutory schemes enacted for just that purpose—would have floundered. See *United States v. Truckee-Carson Irrigation Dist.*, 649 F.2d 1286, 1308 (9th Cir. 1981) (subsequent history omitted).

Courts early on recognized that the McCarran Amendment was not intended to waive the United States’s sovereign immunity for private disputes between a plaintiff or small group of plaintiffs and the United States. See *Dugan v. Rank*, 372 U.S. 609, 618 (1963) (holding the McCarran Amendment did not waive immunity because, instead of being “a case involving a general adjudication of ‘all of the rights of various owners on a given stream,’ it is a private suit to determine water rights solely between the respondents and the United States and the local

Reclamation Bureau officials” (cleaned up)); *Nevada v. United States*, 279 F.2d 699, 701 (9th Cir. 1960) (“The suit to which the section refers is one to 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.”).

The courts contrasted these private disputes with adjudications and administrations that were pursuant to state systems for comprehensive or general adjudications or the administration of those adjudications. *Dugan*, 372 U.S. at 618–19; *United States v. Dist. Ct. for Eagle Cnty.*, 401 U.S. 520, 525 (1971) (“This proceeding, unlike the one in *Dugan*, is not a private one to determine whether named claimants have priority over the United States.”). Given the purpose of the McCarran Amendment, courts deciding whether an adjudication is unified or general often consider whether the adjudication was accomplished pursuant to a state statute providing for a unified proceeding. *See, e.g., Colo. River Water*, 424 U.S. at 819 (emphasizing that Colorado’s statute “established a single continuous proceeding for water rights adjudication”).

A comprehensive or general adjudication is one that is “intended to be universal and to result in a complete ascertainment of all existing rights.” *United States v. Cappaert*, 508 F.2d 313, 321 (9th Cir. 1974) (quoting S. Rep. No. 755, 82d Cong., 1st Sess. 5 (1951) (Senate Report on McCarran Amendment)), *aff’d*, 426 U.S. 128 (1976). What is not required for an adjudication to be comprehensive is 100 percent inclusivity in determining or adjudicating every single possible claim, including those that may later be asserted; so long the adjudication process is intended to be universal for a given water system and provides the *opportunity to present claims* for determination, it is comprehensive.

b. The District Court’s Radical Narrowing of the McCarran Amendment

The district court, at the urging of the United States, redefined the term “comprehensive” to functionally return the United States to its pre-McCarran Amendment status under which the United States’s amenity to suit on water rights turned on whether the United States, in its discretion, opted into a particular adjudication. *See, e.g., Klamath Irrigation Dist. v. U.S. Bureau of Reclamation*, 48 F.4th 934, 940 (9th Cir. 2022) (noting that in 1905, the United States filed a notice of

appropriation with the Oregon State Engineer). The district court reasoned that the adjudication was not “sufficiently ‘comprehensive’” because it did not include “the United States’ reserved rights in the Baker and Lehman Creeks.” (1-ER-9.)

Under the district court’s interpretation, the United States would be immune any time it could identify some potential claim that was not adjudicated in a unified water adjudication, even if it waits 100 years after the adjudication occurred to assert or identify that new claim. Instead of attending to whether Nevada’s statute “is intended to be universal and to result in a complete ascertainment of all existing rights,” *Cappaert*, 508 F.2d at 321 (citation omitted), the district court imposed a requirement that every possible water right claim—no matter when it arises—*actually was presented in the adjudication*. Even if the district court could be read to have required only that the adjudication include all of the United States’s implied claims to water, that is likewise a judicial abrogation of the McCarran Amendment without legal foundation. This Court should reject that interpretation of the McCarran Amendment because it departs from the text and purpose of the statute,

imposes a rigid requirement inconsistent with case law, and is unworkable.

First, the district court’s holding that every potential claim must be present in an adjudication for that adjudication to be comprehensive has no grounding in the text or purpose of the McCarran Amendment. As stated above, the term “comprehensive” is not in the text of the statute. Nor is there any requirement or mechanism for a court to ensure that every possible claim is presented in an adjudication before that adjudication qualifies as “comprehensive.” Far from the district court’s impossible requirement that every potential claim must be present (and consequent narrowing of the McCarran), the Supreme Court has said that the language of the McCarran Amendment “would seem to be all-inclusive.” *Eagle Cnty.*, 401 U.S. at 523.

Nor would the district court’s requirement serve the purpose of the McCarran Amendment. Indeed, the court’s decision flips the “comprehensiveness” requirement on its head. That requirement is meant to *prevent* piecemeal adjudication and enable finality of adjudication of water rights by broadly waiving the United States’s

immunity. *See Colo. River Water*, 424 U.S. at 819. But the court’s opinion will only fuel piecemeal litigation by allowing the United States to later assert a previously unidentified claim to avoid enforcement or administration of the decree that resulted from the original adjudication. What remedy would a party with rights adjudicated under the 1934 decree have if the United States were transgressing those rights? The remedy suggested by the district court was for Baker Ranches to ask Nevada for a redo of this nearly 100-year-old adjudication of the Baker-Lehman Creeks, which originally took nearly 10 years to complete. (1-ER-12.)

But under the district court’s logic, finality would be a distant dream: so long as the United States could identify or manufacture a single potential unadjudicated claim, the prior adjudication would not be “comprehensive” and the McCarran Amendment would not apply. Importantly, the district court’s opinion and the United States’s theory would not require that the unadjudicated claim even belong to the United States. The United States could almost always identify *someone* who might have a potential colorable claim that was not adjudicated, however

small that claim may be and no matter that it may post-date every single claim that was adjudicated, determined, and recognized in the resulting decree. The result of this new rule would allow the United States to always avoid the McCarran Amendment's waiver of sovereign immunity by simply belatedly asserting the purported existence of federal reserved rights as it did here a century after the adjudication occurred. Instead of permitting the United States to be brought into general adjudications and administrations of water rights for entire water systems, this carveout would render the McCarran Amendment a nullity.

The statute itself belies the district court's manufactured requirement. The McCarran Amendment removes immunity "where it appears that the United States is the owner of . . . water rights . . . and the United States is a necessary party to such suit." 43 U.S.C. § 666(a). If the mere "appear[ance]" that the United States owns water rights is sufficient to trigger the waiver of immunity, it is doubtful that Congress ever intended—through its *silence*—to impose the highly technical and impossible requirement advanced by the United States and adopted by the district court.

Indeed, this is just the kind of technicality that the Supreme Court has admonished courts to avoid reading into the McCarran Amendment. For example, in *Eagle County*, the state court “issued a notice” asking “all owners and claimants of water rights” for certain streams “to file a statement of claim and to appear . . . in regard to all water rights owned or claimed by them.” 401 U.S. at 521–22. The United States argued the McCarran Amendment did not waive its immunity from the suit because the adjudication was a “supplemental adjudication” and only involved “those who claim water rights acquired since the last adjudication of that water district.” *Id.* at 525. As the United States saw things, the McCarran Amendment did not apply because “the owners of previously decreed rights” were not before the court. *Id.* The Court rejected this argument, calling it “extremely technical” and refusing to “confine 43 U.S.C. § 666 so narrowly.” *Id.* The Supreme Court has repeated this admonition against such an “overly technical application of the McCarran Amendment.” *United States v. Adair*, 723 F.2d 1394, 1405 n.9 (9th Cir. 1983); see also *United States v. Idaho ex rel. Dir., Dep’t of Water Res.*, 508 U.S. 1, 7 (1993) (same).

Second, contrary to the district court and the United States’s blunt analysis, neither this Court nor the Supreme Court has ever required a court to ensure that every potential claim is present in an adjudication before the McCarran Amendment applies.

The district court relied on *San Luis Obispo Coastkeeper v. U.S. Department of Interior* for the rule that “an adjudication of water rights ‘must include the undetermined claims of all parties with an interest in the relevant water source.’” (1-ER-8–9 (quoting *San Luis Obispo Coastkeeper v. U.S. Dep’t of Interior*, 827 F. App’x 744, 745 (9th Cir. 2020) (quoting *Oregon*, 44 F.3d at 769)).) To be sure, this Court held that the prior litigation in that case was not a comprehensive adjudication. But that was because the dispute was between only a handful of parties, not a comprehensive adjudication intended to determine all rights within an entire creek system pursuant to a statutory process (as occurred here). *See San Luis Obispo Coastkeeper v. U.S. Dep’t of Interior*, 394 F. Supp. 3d 984, 990–91 (N.D. Cal. 2019) (subsequent history omitted) (describing the noncomprehensive “adjudication” as litigation between one water

district and “several public water producers” that was later consolidated with similar litigation).

Moreover, the rule that the district court relied on from *San Luis Obispo Coastkeeper* is quoted from *United States v. Oregon*. But *Oregon* does not support the implausible requirement that all claims *in fact* have to be presented. 44 F.3d 758. Rather, that case confirms that the district court here erred. In *Oregon*, this Court concluded that the United States had waived its immunity to an adjudication brought under Oregon’s “statutory system for mass adjudication of surface water rights,” which was enacted in 1909. *Id.* at 764. All water rights that had vested prior to the statute’s enactment in 1909 were considered “undetermined vested rights.” *Id.* (quoting Or. Rev. Stat §§ 536.007(11), 539.010). The statute required a party claiming one of these undetermined vested rights to file a “registered statement” or be subject to a presumption that the party abandoned that claim. *See id.* at 764 & n.3. The appropriate Oregon agency could then initiate an adjudication and require “those with undetermined claims” to appear and “submit proof.” *Id.* at 764.

This Court held that an adjudication under this statute was comprehensive for purposes of the McCarran Amendment. It explained that a comprehensive adjudication must “include the undetermined claims of all parties with an interest in the relevant water source.” *Id.* at 769.

The United States and the district court here apparently interpret this to mean that an adjudication is only comprehensive if it somehow includes *all* possible claims. But this Court had already clarified what “undetermined claims” mean: they are claims that existed prior to the enactment of the state statutory process for mass adjudication. This Court was thus just reiterating what was clear—the adjudication would not be “comprehensive” if it categorically left out the pre-enactment claimed rights.

Far from establishing the United States’s ahistoric and atextual view of the McCarran Amendment, *Oregon* rebuts it. In *Oregon*, this Court concluded that the adjudication was indeed comprehensive. 44 F.3d at 767–70. But the statutory system in that case allowed for adjudications with less than all claims. If a party did not present a claim,

there was a rebuttable presumption that it was abandoned. *See id.* at 764 & n.3. This Court, however, never indicated that one of these unfiled claims would preclude the adjudication from being comprehensive.

Third, the district court’s requirement is unworkable and would render the McCarran Amendment a nullity. The Western states were thoughtful and careful in structuring their mass adjudication statutes to capture most claims to a particular water source. The Nevada statute that governed the 1934 decree, for example, required that the State Engineer, after selecting a stream “upon which the determination of rights is to begin,” “prepare a notice setting forth” that the determination was to begin and “that all claimants to rights in the waters of said stream system are required . . . to make proof of their claims.” Nevada Compiled Laws (1929), § 7906; *see also supra*, Section III.B.2.a (discussing the 1913 Nevada Water Law). But none of these well-thought procedures equip a court to *in fact* ensure that every potential claim is before the court. In fact, there is no mechanism for any court to undertake such an investigation. The district court’s rule—that an adjudication is not comprehensive if *any* claim is left unadjudicated—would retroactively

require courts in the past to have complied with an unknown and impossible standard. Rather, the statute puts the onus on the claimant to assert its claims, not on the court to ensure there is not a would-be claimant that might later come forward or to revisit a completed adjudication because an absent claimant renounces it.

2. Baker Ranches Hold Water Rights that Were Adjudicated Under a Comprehensive State Statute.

Baker Ranches hold water rights adjudicated in the 1934 decree. That decree was issued under and pursuant to the procedural requirements of Nevada’s Water Law, a statute that intends adjudications “to be universal and to result in a complete ascertainment of all existing rights.” *Cappaert*, 508 F.2d at 321 (citation omitted). This Court has recognized that Nevada’s Water Law facilitates comprehensive adjudications. *See Te-Moak*, 339 F.3d at 811 (explaining that the “zero-sum nature” of water was “the motivating force behind Nevada’s *comprehensive system* for adjudicating water rights” (emphasis added)). Because the statute provides for comprehensive adjudications, and there is no dispute here that the 1934 decree was issued pursuant to the

procedures required by that statute, the 1934 decree was a “comprehensive” adjudication and the McCarran Amendment applies.

This Court has described the Nevada statute as comprehensive. *Id.*; *Oregon*, 44 F.3d at 764–65, 767, 770 (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). Courts have concluded that other state adjudication proceedings analogous to those prescribed by Nevada’s statute also meet this standard. *See Eagle Cnty.*, 401 U.S. at 521–22 (finding waiver over water adjudication and supplemental proceedings under Colorado statute).

Next, the 1934 decree was issued pursuant to that comprehensive statute and honored its requirements. The State Engineer sent out notices indicating that “[a]ll claimants to rights in the waters of [Baker-Lehman Creeks] are required to make proof of their claims in the manner

prescribed by law.” (4-ER-407.) The State Engineer filed an “Affidavit of Compliance With Jurisdictional Requisites” in the state court. (3-ER-375, 4-ER-393–402.) The certified copy of the decree contained detailed findings of fact regarding compliance with the statutory requirements, indicating the state court “ha[d] jurisdiction of the subject matter and of the parties herein”:

The Court further finds that all and singular the orders and notices required by said Water Code of this State were duly made and given as required by law and all and singular the proceedings required by law to be had were duly had as required by said Water Code.

(3-ER-180, 3-ER-186.)

As a result, the adjudication was “comprehensive,” and the McCarran Amendment’s waiver of sovereign immunity applies here. *See Oregon*, 44 F.3d at 767. The government’s failure to assert claims in the adjudication does not make it any less “comprehensive” for the McCarran Amendment’s waiver to apply now. *See United States v. Bell*, 724 P.2d 631, 642 (Colo. banc 1986); *supra* section VI.A.1.

It is immaterial, as discussed above, whether the 1934 decree adjudicated some claim that the United States may or may not have had to water in the Baker-Lehman Creeks in 1934. *See Bell*, 724 P.2d at 642.

The statute provided for an adjudication “intended to be universal and to result in a complete ascertainment of all existing rights,” *Cappaert*, 508 F.2d at 321 (citation omitted), and the 1934 decree was issued under that statute. The McCarran Amendment thus waives the United States’s sovereign immunity for claims of administration of all rights adjudicated in the 1934 decree.

3. Baker Ranches Bring Claims of Administration of Rights Adjudicated in a Comprehensive Adjudication.

The McCarran Amendment waives the United States’s immunity to claims seeking to administer water rights that were recognized in a comprehensive adjudication. *See Orff v. United States*, 358 F.3d 1137, 1150 n.3 (9th Cir. 2004) (“To come within § 666(a)(2), a suit must seek to enforce or administer rights of the sort covered by § 666(a)(1), already adjudicated”), *aff’d*, 545 U.S. 596 (2005). Because Baker Ranches seek to administer claims that were recognized in the comprehensive 1934 decree, the McCarran Amendment waives the United States’s sovereign immunity from this suit. The United States claimed below that the specific remedies requested in Baker Ranches’ complaint render their suit one that is not for “administration” as meant by the McCarran

Amendment. The district court declined to address the argument and this Court need not decide it in the first instance. (1-ER-8.) But if the Court reaches the question, it should conclude that the underlying complaint is for administration of already-adjudicated rights as understood by the McCarran Amendment.

The 1934 decree recognized Baker Ranches' rights to certain amounts of water from the Baker-Lehman Creeks system. (*See* 3-ER-166–67, ¶¶ 5-7, 3-ER-178–220, 3-ER-354, ¶ 3, 3-ER-356, ¶ 4.) To effectuate these rights, the court (1) enjoined “every water user of the Baker and Lehman Creeks 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 water by seepage, evaporation, and other causes.” (3-ER-212, 3-ER-215.)

In their complaint, Baker Ranches asked the court to enforce both these specific injunctions and to further enforce their rights by enjoining 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 the same efforts. (2-ER-28–29.) The complaint also sought to enjoin the United States from threatening Plaintiffs with law enforcement action for their work in the Park to protect their water rights, from diverting water other than that allowed by the 1934 decree, from "planting vegetation in the riparian corridors" or "otherwise consuming tributary water," and from "felling trees or other vegetation in the channels of Baker and Lehman Creeks." (2-ER-29.)¹⁵

"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

¹⁵ "[A]ppropriators of water out of a natural stream for irrigation purposes, with priorities decreed, are entitled to have the conditions substantially maintained upon the stream as they were when the appropriations were made, and have existed during the continuance and perfection of such appropriations." *Comstock v. Ramsay*, 133 P. 1107, 1111 (Colo. 1913). Neither a junior appropriator nor owner of lands riparian to the watercourse may interfere with the exercise of senior rights. *Ennor v. Raine*, 74 P. 1, 2 (Nev. 1903); *Kent v. Smith*, 140 P.2d 357, 361 (Nev. 1943).

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 above remedies are all various means of administering or enforcing the rights that Baker Ranches received under the 1934 decree. *Id.*

The United States argued below that some of the remedies sought are not “administration” remedies within the meaning of the McCarran Amendment. (2-ER-105–08.) Its arguments, relying exclusively on non-precedential decisions, are specious. The United States first argued that the relief sought was not an “administration” of the 1934 decree because the decree itself did not specifically authorize it. That is incorrect. The decree did authorize the injunctive relief sought, but this Court should not bother with interpreting the boundaries of injunctions issued in a state decree that was entered nearly a century ago for the first time on appeal. Even if the United States were correct that the remedies sought by Baker Ranches were not part and parcel of the injunctions contained in the 1934 decree (and the United States is wrong), the state court can *administer* the decreed rights by enforcing and issuing appropriate

injunctive relief. It is irrelevant whether the specific relief, which only became necessary ninety years after the decree was issued, was actually contained within the 1934 decree. *See McCormick v. Sixth Jud. Dist. Ct. for Humboldt Cnty.*, 246 P.2d 805, 811 (Nev. 1952); *Hinckley v. Sixth Jud. Dist. Ct. for Humboldt Cnty.*, 1 P.2d 105, 108 (Nev. 1931). Put simply, the requested relief is for “enforce[ment of the decree’s] provisions.” *S. Delta Water Agency*, 767 F.2d at 541.

The United States also attempted to cast Baker Ranches’ claims for administration as seeking to direct the management of the Great Basin Park in ways that “do not involve the exercise of water rights.” That claim is divorced from the record. The relief is all tied specifically to ways that the United States’s action or inaction has interfered with and eroded the water rights that Baker Ranches are entitled to enjoy.

The United States cannot change the basic fact that a comprehensive adjudication occurred and Baker Ranches now seek a court order that merely enforces the rights that were determined in that adjudication.

B. The District Court Failed to Grasp that Its Order Functionally Left Baker Ranches with No Remedy.

The district court failed to recognize the stakes involved in its decision. Baker Ranches are local ranchers, and they or their predecessors have been a fixture of the local economy and provided jobs and food to the community since 1872. (3-ER-167, ¶ 9, 3-ER-176, ¶ 59.) Their ability to play this critical role depends on being able to sustain their fields and pastures with water from sources like the Baker-Lehman Creeks system. And they are not pleading for a handout. They are simply asking that the rights recognized in the 1934 decree be honored.

The district court appeared to take some comfort in its decision by incorrectly stating that Baker Ranches have other remedies available to them to vindicate their rights. (1-ER-12.) This is wrong and irrelevant to the question presented in this appeal. The relevant legal question is whether the United States waived its immunity under the McCarran Amendment, not whether Baker Ranches could have taken a different approach to vindicating their water rights. And the importance of the question presented cannot be overstated. A conclusion that the United States is immune from this suit for administration of settled rights

threatens the very existence of Baker Ranches and other water rights holders throughout the West.

That reality notwithstanding, the remedies the district court mentioned and those the United States identified below are either legally or functionally unavailable. **First**, the district court noted that “Plaintiffs could seek to initiate a comprehensive adjudication of water rights on the Baker and Lehman Creeks.” Of course, there has already *been* a comprehensive adjudication of water rights on the Baker-Lehman Creeks—it was finalized in 1934. Strangely enough, repeating a multi-year intensive process and opening up a long-concluded judgment is just the kind of “piecemeal adjudication” that the McCarran Amendment was supposed to stop. *Colo. River Water*, 424 U.S. at 819. Indeed, this Court has previously rejected an attempt to re-adjudicate a long-settled water decree under Nevada law and because “such challenges after so much time has elapsed would plainly undermine the ‘finality in water rights’ that Nevada’s water statutes deem important.” *United States v. Walker River Irrigation Dist.*, 986 F.3d 1197, 1204 (9th Cir. 2021).

Moreover, even if the water rights could be re-opened, the Nevada comprehensive adjudication statute still vests discretion in the Nevada State Engineer in determining whether an adjudication is appropriate. See Nev. Rev. Stat. Ann. § 533.090.1 (stating the State Engineer “shall” proceed with an adjudication “*if* upon investigation the State Engineer finds the facts and conditions justify it” (emphasis added)). And it is far from clear that the State Engineer, with plenty of competing priorities, would find it appropriate to undertake a complicated resource-intensive adjudication of creeks that *have already been adjudicated*.

Second, the district court took solace in the proposal that Baker Ranches could “apply for a special use permit from the National Park Service to perform the work they seek to do” and then file a federal lawsuit under the Administrative Procedures Act (APA) if that permit is denied. (1-ER-12.) That suggestion rings hollow for numerous reasons. To start, a special use permit is not available to prevent NPS from illegally diverting and consuming water, as it was doing until Baker Ranches filed this lawsuit seeking to enforce the decree.

What is more, NPS can simply sit on a special use permit application without taking any action. For example, in 2016, Baker Ranches filed an application for a special use permit to perform repairs on a pipeline that runs through the Park and delivers water to Baker Ranches from another water source. (5-ER-767–68, ¶¶ 10-11.) In the ensuing nine years, NPS has failed to act on that application (5-ER-768, ¶ 12), resulting in Baker Ranches’ loss of hundreds of acre feet of water annually. Even if NPS granted a special use application, any subsequent superintendent could revoke it in their broad discretion. *See* National Park Services, *Management Policies* § 8.6.1.1 (“A superintendent must deny . . . requests for renewal upon finding that the proposed activity would cause unacceptable impacts.”); U.S. Dep’t of the Interior, *Director’s Order #53: Special Park Uses* § 4 (Feb. 23, 2010; as amended Aug. 31, 2020, Nov. 20, 2020, and Nov. 29, 2023) (restricting the superintendent to approving only requests that do not “trigger” any of several criteria such as “[u]nreasonably interfer[ing] with interpretive programs”). The enabling legislation created the Park subject to existing rights and bound NPS to substantive and procedural Nevada water law precisely to protect

Baker Ranches' rights. 16 U.S.C. § 410mm-1(d). They are not subject to the winds and whims of each new superintendent.

Assuming NPS might someday act on a special use permit application, Baker Ranches might be able, as the district court suggested, to file suit under the APA for judicial review of a denial of the special use permit. But any hope that a court would grant relief under the APA rests on a number of assumptions and variables beyond Baker Ranches' control. The National Park Service has substantial discretion to deny a requested special use permit and need only offer a "satisfactory explanation for its action including a rational connection between the facts found and the choice made." *All. for Wild Rockies v. Petrick*, 68 F.4th 475, 493 (9th Cir. 2023) (cleaned up). And it is far from clear that a court applying this deferential standard would require the NPS to issue a special use permit.¹⁶

¹⁶ Moreover, an application for a special use permit by Baker Ranches could give air to an argument that it waives rights under the 1934 decree. *See, e.g., Bradley v. Schafer*, No. CV 08-85-BU-RFC-JCL, 2010 WL 5105049, at *4 (D. Mont. Nov. 8, 2010), *report and recommendation* (continued)

The district court failed to grasp the import of its revisionist interpretation of the McCarran Amendment as applied to Baker Ranches—namely, the functional denial of their rights to the Baker-Lehman Creeks.

VII

CONCLUSION

For the reasons set forth above, the judgment of the district court should be reversed and the case remanded to the district court for consideration of whether Baker Ranches' claims are for administration of water rights.

DATED: February 11, 2025

Respectfully submitted,

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adopted, No. CV-08-85-BU-RFC-JCL, 2010 WL 5100598 (D. Mont. Dec. 9, 2010), *aff'd sub nom. Bradley v. Vilsack*, 467 F. App'x 713 (9th Cir. 2012) (finding waiver after application for a special use permit by the statute of limitations in a quiet title action).

STATEMENT OF RELATED CASES

Plaintiffs-Appellants state, pursuant to Ninth Circuit Rule 28-2.6, that they are unaware of any cases related to this appeal.

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 13,637 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: February 11, 2025

/s/ BENJAMIN J. HOGAN
Attorneys for Plaintiffs-Appellants

STATUTORY ADDENDUM

DESCRIPTION

PAGE(S)

1. 43 U.S.C. § 666

1. 43 U.S.C. § 666 provides:

(a) Joinder of United States as defendant; costs

Consent is given to join the United States as a defendant in any suit (1) for the adjudication of rights to the use of water of a river system or other source, or (2) for the administration of such rights, 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. The United States, when a party to any such suit, shall (1) be deemed to have waived any right to plead that the State laws are inapplicable or that the United States is not amenable thereto by reason of its sovereignty, and (2) shall be subject to the judgments, orders, and decrees of the court having jurisdiction, and may obtain review thereof, in the same manner and to the same extent as a private individual under like circumstances: *Provided*, That no judgment for costs shall be entered against the United States in any such suit.

(b) Service of summons

Summons or other process in any such suit shall be served upon the Attorney General or his designated representative.

(c) Joinder in suits involving use of interstate streams by State

Nothing in this section shall be construed as authorizing the joinder of the United States in any suit or controversy in the Supreme Court of the United States involving the right of States to the use of the water of any interstate stream.