No. 25-

IN THE

Supreme Court of the United States

CITY OF FRESNO, CALIFORNIA, *et al.*,

Petitioners,

v.

UNITED STATES, *et al.*,

Respondents.

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

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

To comply with Section 8 of the Reclamation Act of 1902, state water law must provide that "the right to the use of water acquired under the provisions of [the] Act shall be appurtenant to the land irrigated, and beneficial use shall be the basis, the measure, and the limit of the right." 43 U.S.C. § 372. This "beneficial ownership of water rights in [Reclamation Act] water projects," *Nevada v. United States*, 463 U.S. 110, 123 (1983), means that "the water rights [are] the property of the landowners," *Ickes v. Fox*, 300 U.S. 82, 95 (1937), and "the Government's 'ownership' of the water rights [is] at most nominal." *Nevada*, 463 U.S. at 126.

During the 2014 drought in California's Central Valley—one of the most important agricultural areas in the United States—15,000 farms suffered devastating economic losses because the Bureau of Reclamation provided *none* of the Reclamation Project water that was available for their use. Petitioners, on behalf of the affected growers or themselves, filed, *inter alia*, a Fifth Amendment takings claim, which the Federal Circuit rejected on the theory that the growers (i.e., landowners) possess no water-property rights in the water that Reclamation withheld.

The questions presented are:

1. Whether in accordance with Section 8 of the Reclamation Act, 28 U.S.C. § 372, the beneficial users of Reclamation Project irrigation water have compensable water-property rights under the Fifth Amendment.

2. Whether Reclamation's refusal to release available water for growers' use is a compensable taking under the Fifth Amendment.

PARTIES TO THE PROCEEDINGS BELOW

Petitioners were appellants in the U.S. Court of Appeals for the Federal Circuit and plaintiffs in the Court of Federal Claims. They are as follows: City of Fresno (California), Arvin-Edison Water Storage District, Chowchilla Water District, Delano-Earlimart Irrigation District, Exeter Irrigation District, Ivanhoe Irrigation District, Lindmore Irrigation District, Lindsay-Strathmore Irrigation District, Lower Tule Irrigation District, Orange Cove Irrigation District, Porterville Irrigation District, Saucelito Irrigation District, Shafter-Wasco Irrigation District, Southern San Joaquin Municipal Utility District, Stone Corral Irrigation District, Tea Pot Dome Water District, Terra Bella Irrigation District, Tulare Irrigation District, Loren Booth LLC, Matthew J. Fisher, Julia K. Fisher, Hronis Inc., Clifford R. Loeffler, Maureen Loeffler, Douglas Phillips, Caralee Phillips.

Respondent United States was an appellee in the Federal Circuit and the defendant in the Court of Federal Claims.

The additional Respondents were appellees in the Federal Circuit and defendant-intervenors in the Court of Federal Claims. They are as follows: San Luis & Delta-Mendota Water Authority, Santa Clara Valley Water District, San Luis Water District, Westlands Water District, Grassland Water District, James Irrigation District, Byron Bethany Irrigation District, Del Puerto Water District, San Joaquin River

Exchange Contractors Water Authority, Central California Irrigation District, Firebaugh Canal Water District, San Luis Canal Company, Columbia Canal Company.

CORPORATE DISCLOSURE STATEMENT

Neither of the corporate Petitioners—Loren Booth LLC and Hronis, Inc.—has a parent corporation, and no publicly held company owns 10% or more of either of those Petitioners' stock.

RELATED PROCEEDINGS

This case arises from *City of Fresno, et al. v. United States*, *et al.*, No. 16-1276L (U.S. Court of Federal Claims) (Opinion and Order filed Mar. 25, 2020), and *City of Fresno, et al. v. United States*, *et al.*, No. 2022-1994 (U.S. Court of Appeals for the Federal Circuit) (Opinion filed Dec. 17, 2024). There are no other related cases within the meaning of Supreme Court Rule 14.1(b)(3).

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PETITION FOR WRIT OF CERTIORARI

Petitioners respectfully request the Court to issue a writ of certiorari to the U.S. Court of Appeals for the Federal Circuit in this Fifth Amendment agricultural water-property rights takings case.

The Court repeatedly has recognized that under Section 8 of the Reclamation Act of 1902, 28 U.S.C. § 372, the owners of irrigated lands hold a property right in federal Reclamation Project water—a right that is appurtenant to their land.[1] *See, e.g.*, *Ickes v. Fox*, 300 U.S. 82, 95 (1937) ("the water rights became the property of the landowners, wholly distinct from the right of the government in the irrigation works"); *Nebraska v. Wyoming*, 325 U.S. 589, 614 (1945) (same) (quoting *Ickes*, 300 U.S. at 95); *California v. United States*, 438 U.S. 645, 667 n.21 (1978) ("Congress provided in § 8 itself that the water right must be appurtenant to the land irrigated and governed by beneficial use . . . ."); *Nevada v. United States*, 463 U.S. 110, 126 (1983) ("the Government's 'ownership' of the water rights was at most nominal; the beneficial interest in the rights confirmed to the Government resided in the owners of the land within the Project to which these water rights became appurtenant upon the application of Project water to the land").

Despite this and similar case law authority, including from the Federal Circuit, a court of appeals

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[1] Under California law, "'appurtenant' denotes that the water right or interest is attached to the land." *Abatti v. Imperial Irrig. Dist.*, 52 Cal.App.5th 236, 255 (2020).

panel held here that landowners (referred to as "growers" in this petition) have no "protected property interest in the water supplied to them by Reclamation," *i.e.*, by the Department of the Interior's Bureau of Reclamation. App-32a n.11. According to the panel, because growers do not "possess any property rights in water delivery from the government, they cannot maintain a takings claim." App-37a.

The 15,000 California Central Valley growers affected by this case produce many types of fruits, vegetables, and nuts on more than 1 million acres in the Friant Division of Reclamation's Central Valley Project ("CVP"), "the largest federal water management project in the United States." *Stockton East Water Dist. v. United States*, 583 F.3d 1344, 1349 (Fed. Cir. 2009).

During the drought of 2014, Reclamation had irrigation water available to distribute to Friant Division growers through the Friant Division water districts,[2] but Reclamation chose to provide those districts and the Friant Division growers that rely on them with "essentially 'a *zero allocation*'" of irrigation water. App-12a (emphasis added). Instead, Reclamation allocated the available water to other districts (referred to by the Federal Circuit as the "Exchange Contractors"), claiming that it was

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[2] This petition collectively refers to California water districts and irrigation districts as "water districts." *See* App-4a n.1.

contractually obligated to do so. As a result of this taking of their water-property rights in 2014, many thousands of Friant Division growers suffered devastating economic losses.

Pursuing the takings claim, Petitioners are the City of Fresno (as both a user and supplier of CVP water), the Friant Division water districts (under Cal. Water Code § 22654 as representatives of the thousands of growers they supply), and several individual growers (on behalf of themselves and a putative class of all Friant Division growers).

The Court should grant certiorari and hold, consistent with Section 8 of the Reclamation Act, that the Friant Division growers have compensable water-property rights in the irrigation water that Reclamation deliberately withheld from them. Where, as here, Reclamation has irrigation water available for growers' beneficial use during a particular growing season, but for whatever reason decides not to provide it, the growers' water-property rights have been taken without just compensation in violation of the Fifth Amendment.

OPINIONS BELOW

The Opinion of the U.S. Court of Appeals for the Federal Circuit affirming the judgment of the Court of Federal Claims is reported at 124 F.4th 876 and reproduced at App. A (App-1a–38a). The Opinion and Order of the U.S. Court of Federal Claims dismissing Petitioners' takings claim without prejudice is unreported and reproduced at App. B (App-39a–78a).

The Federal Circuit's Order denying Petitioners' timely petition for panel rehearing and rehearing en banc is unreported and reproduced at App. C (App-79a–81a).

JURISDICTION

The Federal Circuit filed its Opinion on December 17, 2024 (App. A) and denied rehearing on April 9, 2025 (App. C). On June 18, 2025 Chief Justice Roberts granted Petitioners' application to extend the time for filing a petition for writ of certiorari until September 6, 2025 (Docket 24A1228). This Court has jurisdiction under 28 U.S.C. § 1254(1).

CONSTITUTIONAL & STATUTORY PROVISIONS INVOLVED

The Takings/Just Compensation Clause of the Fifth Amendment, U.S. Const. amend. V, states that "nor shall private property be taken for public use, without just compensation."

Section 8 of the Reclamation Act of 1902 states in relevant part as follows: "The right to the use of water acquired under the provisions of this Act shall be appurtenant to the land irrigated, and beneficial use shall be the basis, the measure, and the limit of the right." 43 U.S.C. § 372.

The full text of Section 8 of the Reclamation Act of 1902, 32 Stat. 390, codified as 43 U.S.C. §§ 372 & 383, states as follows:

> That nothing in this Act shall be construed as affecting or intended to affect or in any

> way to interfere with the laws of any State or Territory relating to the appropriation, control, use, or distribution of water used in irrigation, or any vested right acquired thereunder, and the Secretary of the Interior, in carrying out the provisions of this Act, shall proceed in conformity with such laws, and nothing herein shall affect any such right of any State or of the Federal Government or of any land owner, appropriator, or user of water in, to, or from any interstate stream or the waters thereof: *Provided*, That the right to the use of water acquired under the provisions of this Act shall be appurtenant to the land irrigated, and beneficial use shall be the basis, the measure, and the limit of the right.

STATEMENT OF THE CASE

A. Legal Background

"Congress passed the Reclamation Act of 1902 [because] private and State reclamation projects had gone far toward reclaiming arid lands, but massive projects were now needed to complete the goal and these were beyond the means of private companies and the States." *California v. United States*, 438 U.S. at 663. Under Section 8 of the Act, "the actual construction and operation of the projects would be in the hands of the Secretary of the Interior," but "state water law would control in the appropriation and later

distribution of the water." *Id.* at 664; *see* 43 U.S.C. § 383 (Vested rights and State laws unaffected) ("nothing in this Act shall be construed as affecting or intended to affect or in any way to interfere with the laws of any State or Territory relating to the appropriation, control, use, or distribution of water used in irrigation, or any vested right acquired thereunder").

This preservation of state authority is subject, however, to the following express proviso in Section 8: "*Provided*, That the right to the use of water acquired under the provisions of this Act shall be appurtenant to the land irrigated, and beneficial use shall be the basis, the measure, and the limit of the right." 43 U.S.C. § 372. (Water right as appurtenant to land and extent of right). Under this federally mandated, water-property rights provision, each State's law governs the appropriation, control, distribution, and use of federal Reclamation Project water in the State, *id.* § 383, but must vest (or be construed to vest) ownership of Reclamation Project water-property rights in the growers that beneficially use the water to irrigate their land.[3]

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[3] "Conceptually, what is meant by a water right is the right to *use* the water—to divert it from its natural course." *United States v. State Water Res. Ctrl. Bd.*, 182 Cal.App.3d 82, 100 (1986). "It is equally axiomatic that once rights to use water are acquired, they become vested property rights. As such, they cannot be infringed by others or taken by governmental action without due process and just compensation." *Id.* at 101.

In *Ickes v Fox*, 300 U.S. at 416, the Court, quoting and discussing Section 8, rejected the government's contention that because "the government, diverted, stored, and distributed the water . . . ownership of the water or water rights became vested in the United States." Instead, the Court explained that "[a]ppropriation was made not for the use of the government, but, under the Reclamation Act, for the use of the landowners . . . the *water rights became the property of the landowners*, wholly distinct from the property right of the government in the irrigation works." *Id.* (emphasis added).

Almost 40 years later, in *Nevada v. United States*, the Court, quoting *Ickes* and Section 8, further explained that "the Government's 'ownership' of the water rights was at most nominal; the beneficial interest in the rights confirmed to the Government resided in the owners of the land within the Project to which these water rights became appurtenant upon the application of Project water to the land." 463 U.S. at 126; *see also Nebraska v. Wyoming*, 325 U.S. at 614 ("The water right is appurtenant to the land, the owner of which is the appropriator. The water right is acquired by perfecting an appropriation, i.e., by an actual diversion followed by an application within a reasonable time of the water to a beneficial use.") (citing Section 8).

B. Factual Background

1. California's Central Valley is one of the most important agricultural areas in the United States,

and arguably "the most agriculturally-productive region in the world." *Westlands Water Dist. v. United States*, 153 F. Supp. 2d 1133, 1138 (E.D. Cal. 2001). It is a "vast basin, stretching over 400 miles on its polar axis and a hundred in width, in the heart of California." *United States v. Gerlach Live Stock Co.*, 339 U.S. 725, 728 (1950); *see* U.S. Geological Survey (USGS), California's Central Valley (map);[4] App-5a (map). Tens of thousands of Central Valley growers produce more than 250 crops—including 40% of the nation's fruits, nuts, and other table foods—with an annual estimated value of $17 billion. *Id.* (Valley Facts).

The Central Valley's "rich acres, counted in the millions, are deficient in rainfall and must remain generally arid and unfruitful unless artificially watered." *Gerlach*, 339 U.S. at 728. For this reason, approximately 75% of the irrigated land in California, and 17% of the nation's irrigated land, is in the Central Valley. USGS, *supra* (Valley Facts).

Built to serve the Central Valley growers' vital irrigation needs, the Central Valley Project ("CVP") is "the largest reclamation project" ever authorized under the Reclamation Act. *California v. United States*, 438 U.S. at 651. Operated by Reclamation since 1935, the CVP "consists of twenty dams and reservoirs, eleven power plants, over 500 miles of

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[4] U.S. Geological Survey (USGS), California's Central Valley, Valley Facts, https://tinyurl.com/53b37s7s.

major canals, and numerous other facilities." *Id.* "This is a gigantic undertaking built to redistribute principal fresh-water resources in California." *Gerlach*, 339 U.S. at 728; *id.* at 728-30 (description of the CVP); *see also Westlands Water Dist. v. United States*, 337 F.3d 1092, 1095 (9th Cir. 2003) (same); Bur. of Recl., Central Valley Project.[5]

The Central Valley's two major rivers are the Sacramento River in the north and the San Joaquin River in the south.

> Through its operation of the CVP, Reclamation controls water from the Sacramento and San Joaquin Rivers and allocates those waters throughout California.
>
> The Sacramento River has substantial water resources, but the land abutting it is not generally suitable for agriculture. By contrast, the San Joaquin River lacks sufficient water to meet all the agricultural and other needs of the San Joaquin Valley.

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[5] https://tinyurl.com/y2m4vk67 (last visited Aug. 20, 2025).

App-3a; *see Gustine Land & Cattle Co. v. United States,* 174 Ct. Cl. 556, 560 (1966) ("[M]uch of the water of the Sacramento River, prior to the construction of the Central Valley project, was dissipated needlessly into San Francisco Bay while large areas of fertile land in the southern part of the San Joaquin Valley remained undeveloped for lack of water.").

2. The CVP's Friant Division "suppl[ies] water to more than 15,000 farms on one million acres of land and several cities along the San Joaquin Valley's eastside delivered from the Madera Canal, Friant-Kern Canal, or from the San Joaquin River downstream from the Friant Dam."[6] Millerton Lake, created by the Friant Dam, has a capacity of 520,500 acre-feet of water and is located on the San Joaquin River northeast of Fresno.[7] *See Westlands*, 337 F.3d at 1096 (describing the Friant Division).

To construct this critical infrastructure, and thereby make San Joaquin River water available to Friant Division growers, Reclamation in 1939 purchased certain landowners' San Joaquin River water rights, now held by their successors-in-interest,

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[6] Friant Water Authority, What Is Friant? (brochure), available at https://tinyurl.com/4drrej7j (last visited Aug. 20, 2025).

[7] Friant Water Authority, What Is Friant? (web page), available at https://tinyurl.com/4fwtx3js (last visited Aug. 20, 2025).

the Intervenor-Respondent "Exchange Contractors."[8] These non-Friant Division water districts have entered into a contract with Reclamation (commonly referred to as the "Exchange Contract") under which they can receive up to a maximum specified amount of "substitute water" from the Sacramento River in exchange for certain Millerton Lake "reserved water"—water that is reserved for Friant Division water districts and the growers they serve. *See Westlands*, 337 F.3d at 1096 (discussing Exchange Contract); *Gustine*, 174 Ct. Cl. at 580 (same); *Wolfsen v. United States*, 162 F. Supp. 403, 405 (Ct. Cl. 1958) (same); App-47a.

Through individual water supply contacts, which are "subject to" the terms of the Exchange Contract, Reclamation makes the reserved water available to the Petitioner Friant Division water districts (referred to as "Friant Contractors" by the Federal Circuit) for distribution to Friant Division growers. App-48a; *see* Section 9(d) of the Reclamation Act, 43 U.S.C.

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[8] "Under section 8 of the Reclamation Act of 1902 (43 U.S.C. § 383), [Reclamation] is required to comply with state law in acquiring water rights for the diversion and storage of water by the CVP." *Westlands*, 337 F.3d at 1101. Because Reclamation is "obligated to comply with state law in appropriating water," *Stockton East*, 583 F.3d at 1350, it was required when developing the CVP to obtain permits from the California State Water Resources Control Board ("SWRCB"), "which has the power to make decisions for the state regarding water appropriation." *Id*; *see* App-47a; *see also California v. United States*, 438 U.S. at 652.

§ 385h(d). In return for the permanent right to specified quantities of Millerton Lake water, the Friant Division water districts have paid hundreds of millions of dollars to Reclamation for their 100% share of Friant Division capital and operating costs. *See* App-108a; *see also* 43 U.S.C. § 485h-1(4); *Ickes*, 300 U.S. at 95 ("The government was and remained simply a carrier and distributor of the water . . . with the right to receive the sums stipulated in the contracts as reimbursement for the cost of construction and annual charges for operation and maintenance of the works.").

3. Despite the severe drought during 2014 and shifting federal water-allocation policy priorities (e.g., fish protection and habitat restoration), substantial quantities of Millerton Lake water *were available* at the start of the growing season and during the summer. *See City of Fresno v. United States*, No. 16-1276C (Fed. Cl. June 6, 2022) at 7-8 (discussing 2014 water allocations).[9] But Reclamation—for the first time ever—decided to release the available Millerton Lake water to third-parties—the Exchange Contractors—and thus, provided a 'zero allocation'" of irrigation water to the Petitioner Friant Division water districts and the City of Fresno. App-12a. As a result of this deprivation of essential irrigation water, Friant Division growers suffered huge losses. App-33a, 83a, 109a (Second Am. Compl., ¶ 33).

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[9] Fed. Cir. J.A. 27-28.

C. Procedural History

Petitioners' Second Amended Complaint, filed on December 18, 2018 in the Court of Federal Claims, alleges causes of action for taking of water rights without just compensation (Count I) and for breach of the Friant Division water district supply contracts (Count II). *See* App. D.[10]

On March 25, 2020 the Court of Federal Claims issued an Opinion and Order, App. B, finding that the complaint alleges sufficient facts to defeat the government's and the defendant-intervenors' (i.e., Respondents') motions to dismiss as to the breach of contract claim. App-68a. The court granted, however, Respondents' motions to dismiss the takings claim for lack of standing, finding that "none of the Plaintiffs [i.e., Petitioners] possess a property interest in the water supplied to them by or through Reclamation." App-69a.

In a subsequent Opinion and Order, filed on June 6, 2022, the Court of Federal Claims granted Respondents' motions for summary judgment as to breach of contract. The Federal Circuit affirmed the

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[10] *See generally Stockton East*, 583 F.3d at 1369 ("[W]hile one recovery is all that can be had for the same harm, the fact that a cause of action was pled under a contract theory did not preclude a separate count for a cause of action based on a taking.").

trial court's grant of summary judgment on the breach of contract claim. App-32a; *see* 28 U.S.C. § 1295(a)(3).

As to Petitioners' takings claim, the Federal Circuit, contrary to the trial court, concluded that they "established standing and that the Court of Federal Claims has subject matter jurisdiction." App-33a. More specifically, the court of appeals found that Petitioners "adequately alleged they were injured by Reclamation's water allocation decisions and that the Court of Federal Claims could adequately redress their injuries." *Id.* The court explained that Petitioners' "allegation of protected property interest is not wholly insubstantial or frivolous, nor patently without merit." App-34a (internal quotation marks omitted).

The court of appeals held, however, that Petitioners "do no have any water rights under California law because, instead, as the California State Water Resource Control Board ('SWRCB') has held, it is *Reclamation* that has appropriative water rights in the Central Valley Project." App-35a (internal quotation marks omitted).[11] According to the Federal Circuit, "[w]hile [Petitioners] put the water

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[11] "Appropriative rights confer[] upon one who actually diverts and uses water the right to do so provided that the water is used for reasonable and beneficial uses and is surplus to that used by riparians or earlier appropriators. . . . Appropriative water rights are ordinarily *appurtenant to the land*." *Abatti*, 52 Cal.App.5th at 255 (emphasis added).

provided to them by Reclamation to beneficial use, that supply of water would not exist without the creation and operation of the Project, i.e., the efforts of Reclamation. In this context, California law does not assign property rights in water based on the uses put to it by end users." App-36a. The court of appeals concluded that "[b]ecause [Petitioners] have failed to establish that they possess any property rights in water delivery from the government, they cannot maintain a takings claim." App-37a.

After the Federal Circuit denied Petitioners' petition for panel rehearing and rehearing en banc, *see* App. C, App-81a, they filed this petition for writ of certiorari, which is limited to their takings claim.[12]

REASONS FOR GRANTING THE PETITION

I. The Decision Below Conflicts With This Court's Reclamation Act Jurisprudence and Creates A Significant Split Within the Federal Circuit

This Court often has reviewed and corrected erroneous decisions in cases that are within the

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[12] Petitioners' decision not to seek this Court's review of their breach of contract claim should not be construed as agreement with the Federal Circuit's or Court of Federal Claims' rulings.

Federal Circuit's exclusive jurisdiction[13]—and it needs to do so here. The Federal Circuit's takings decision warrants review and reversal because it not only conflicts with this Court's Reclamation Act precedents, but also with prior Federal Circuit water-property rights opinions. Unless the Court intercedes and holds that the Friant Division growers have compensable water-property rights for the irrigation water that Reclamation deliberately deprived them of receiving and using, untold numbers of growers will be divested of their constitutional right to just compensation whenever and wherever—and for whatever reason—Reclamation decides to withhold irrigation water that is available for their use.

1. The Federal Circuit held that Petitioners "do not have any water rights under California law." App-35a. According to the panel, under California law "it is *Reclamation* that has appropriative water rights in the Central Valley Project." App-35a (internal quotation marks omitted).

This holding directly conflicts with the

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[13] *See, e.g.*, *United States v. Arthrex, Inc.*, 594 U.S. 1 (2021); *Minerva Surgical, Inc. v. Hologic, Inc.*, 594 U.S. 559 (2021); *Google LLC v. Oracle America, Inc.*, 593 U.S. 1 (2021); *Romag Fasteners, Inc. v. Fossil, Inc.*, 590 U.S. 212 (2020); *Return Mail, Inc v. USPS*, 587 U.S. 618 (2019); *Impression Prods., Inc. v. Lexmark, Int'l, Inc.*, 581 U.S. 360 (2017); *TC Heartland LLC v. Kraft Foods Group Brands LLC*, 581 U.S. 258 (2017); *Kingdomware Techs., Inc. v. United States*, 579 U.S. 162 (2016); *Teva Pharm. USA, Inc. v. Sandoz, Inc.*, 574 U.S. 318 (2015).

unequivocal text of Section 8 of the Reclamation Act, 43 U.S.C. § 372, which mandates that state law make "the right to the use" of federal Reclamation Project water "appurtenant to" (i.e., attached to) "the land irrigated," and that "beneficial use shall be the basis, the measure, and the limit of the right." *Id.* The Federal Circuit's single, passing reference to Section 8—the crucial provision that should have been the focus of the court's takings analysis—asserts exactly the opposite: According to the court of appeals panel, which all but ignored Section 8's proviso, *id.*, "California law does not assign property rights in water based on the uses put to it by end users." App-36a.

2. The Federal Circuit's holding also conflicts with this Court's Reclamation Act precedents. In *Ickes v. Fox*, the Court addressed the question of whether the United States, rather than users of Reclamation Project irrigation water, own the property rights to the water. The Court explained that "ownership is in them [the users], not in the United States." 300 U.S. at 96. After citing and quoting Section 8, the Court observed as follows:

> [I]t long has been established law that the right to the use of water can be acquired only by prior appropriation for a beneficial use; and that such right when thus obtained is a *property right*, which, when acquired for irrigation, becomes, by state law and here *by express provision of the Reclamation Act* as well, part and parcel of the land upon which it is applied.

Id. at 95-96 (emphasis added).

According to the Federal Circuit's opinion, which nowhere cites *Ickes*, Reclamation owns the water-property rights because "[w]hile [Petitioners] put the water provided to them by Reclamation to beneficial use, that supply of water would not exist without the creation and operation of the Project, i.e., the efforts of Reclamation." App-36a. *Ickes* squarely rejects this contention:

> Although the government diverted, stored, and distributed the water, the contention of petitioner that thereby ownership of the water or water rights became vested in the United States is not well founded. Appropriation was made not for the use of the government, but, under the Reclamation Act, for the use of the landowners; and by the terms of the law . . . *the water rights became the property of the landowners*, wholly distinct from the property right of the government in the

> irrigation works.

Id. at 94-95 (emphasis added).

Invoking the "pattern of state law as provided in the Reclamation Act," the Court in *Nebraska v. Wyoming*, repeated the foregoing statement from *Ickes*, and then added:

> The property right in the water right is separate and distinct from the property right in the reservoirs, ditches or canals. *The water right is appurtenant to the land, the owner of which is the appropriator*. The water right is acquired by perfecting an appropriation, i.e., by an actual diversion followed by an application within a reasonable time of the water to a beneficial use. Indeed § 8 of the Reclamation Act provides as we have seen that "the right to the use of water acquired under the provisions of this Act shall be appurtenant to the land irrigated, and beneficial use shall be the basis, the measure, and the limit of the right."

325 U.S. at 614 (quoting Section 8) (emphasis added).

In *California v. United States* the Court addressed the question of whether the State Water Resources Control Board (SWRCB) could attach numerous use-related conditions to its approval of a Reclamation application for a permit to appropriate and impound certain waters for the CVP. Although the Court explained that Congress in Section 8 of the

Reclamation Act "clearly provided that state water law would control in the appropriation and later distribution of the water," 438 U.S. at 664, it also observed that

> *Congress did not intend to relinquish total control of the actual distribution of the reclamation water to the States.* Congress provided in § 8 itself that the *water right must be appurtenant to the land irrigated and governed by beneficial use* . . . .[T]his Court has held that state water law does not control in the distribution of reclamation water *if* inconsistent with other Congressional directives . . . .

Id. at 667 n.21 (emphasis added).

Nevada v. United States, decided in 1983, contains the Court's most recent discussion of Section 8. That case involved Reclamation's efforts to secure additional water rights in a Nevada river for a reclamation project. In relevant part, the Court's opinion, quoting *Ickes*, discussed "the beneficial ownership of water rights in irrigation projects built pursuant to the Reclamation Act." 463 U.S. at 123. The Court explained that "[t]he government was and remains simply a carrier and distributor of the water." *Id.* Section 8 of the Act makes clear that the "beneficial interest" in federal reclamation project water-property rights "reside[s] in *the owners of the land*," and the "Government's 'ownership' of the water rights is at most *nominal*." *Id.* at 126 (emphasis added).

California's State Water Resources Control Board has interpreted the State's water-property rights law in a similar manner. *See* SWRCB Decision No. D 935 (June 2, 1959) at 98 ("[W]hen any entity is an applicant for a water right for irrigation which has no intention to itself use the water . . . even though formal title to the use is held of record by the permittee or licensee, *the right by use is vested in those by whom use has been made*, *as a matter of law*.") (emphasis added).[14]

3. The Federal Circuit panel's superficial takings analysis also conflicts with other Federal Circuit decisions regarding California water-property rights. In its decision here, the Federal Circuit found "no California precedent persuasively supporting the proposition that the water delivered by Reclamation creates in the Friant Growers, or in the end users whose interests the Friant Contractors seek to represent, appropriative property rights." App-36a.

To the contrary, in *Casitas Municipal Water District v. United States*, 708 F.3d 1340 (Fed. Cir. 2013), a takings case not cited by the panel, the Federal Circuit explained as follows:

> Under well-established California law, the right of property in water is usufructuary, and consists not so much of the fluid itself as the advantage of its use.

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[14] Available at https://tinyurl.com/364wp584.

> * * *
>
> Despite this preclusion on a private entity's ownership of the corpus of water itself, appropriative water rights (such as those at issue here) have long been recognized by California courts as private property subject to ownership and disposition.
>
> * * *
>
> Although appropriative rights are viewed as property under California law, those rights are limited to the "beneficial use" of the water involved.
>
> * * *
>
> It is the *holder's rights (as limited by beneficial use) that represent the property interest subject to a potential government taking*.

Id. at 1353, 1354, 1357 (internal quotation marks and citations omitted) (emphasis added); *see* App-70a (Court of Federal Claims opinion below citing *Casitas*) ("The Federal Circuit has recognized that the government's physical appropriation of water to which a plaintiff has valid rights under state law may constitute a physical taking under the Fifth Amendment.").

Casitas' discussion of California water-property rights is consistent with Section 8; the Federal Circuit's ruling that the Friant Division

growers have no compensable water-property rights is not. *See also Wolfsen*, 162 F. Supp. at 408 ("Any future withdrawal of [CVP] waters would render the United States liable to respond with just compensation . . . .").

The court of appeals also indicated in *Casitas*, that "the state of California does not categorize storage or diversion for storage, in and of themselves, as beneficial uses." *Id.* at 1356. This statement contradicts the court's ruling here that "it is *Reclamation* that has appropriative water rights in the Central Valley Project" in part because of its "initiative" and "efforts" in creating and operating, i.e., diverting, storing, and supplying water, for the CVP. App-35a, 36a (internal quotation marks omitted).

In *Baley v. United States*, 942 F.3d 1312 (Fed. Cir. 2019), a takings case involving Reclamation's Klamath River Basin Project in Oregon, the Federal Circuit explained that

> [i]ndividual plaintiff landowners (or their lessees) have applied water diverted from the Klamath River to irrigate crops. In this manner, they have put Klamath Project water to beneficial use. As a result, the water became appurtenant to their land. The United States holds the water right that it appropriated . . . for the use and benefit of the landowners.

Id. at 1321 (internal quotation marks and citations

omitted).[15] The court's statement that "the water became appurtenant to [the landowners'] land" is consistent with the requirements of Section 8's proviso, 43 U.S.C. § 372. And it is contrary to the Federal Circuit's ruling here that "[w]hile [Friant Division growers] put the water provided to them by Reclamation to beneficial use," App-36a, that does not vest them with water-property rights appurtenant to their land.

Further, the statement in *Baley* that "[t]he United States holds the water right that is appropriated . . . for the use and benefit of the landowners," 942 F.3d at 1321, supports the fact that the growers are the beneficial owners of the property right to use the Friant Division water that is captured and stored in Millerton Lake for the growers' benefit. In short, "the Government's 'ownership' of the water rights [is] at most nominal." *Nevada*, 463 U.S. at 126.

II. The Decision Below Is Wrong

1. The Federal Circuit's basis for holding that Reclamation, not Petitioners, has "appropriative water rights in the Central Valley Project," App-35a, is flimsy at best. The court's principal authority is a sentence buried in a footnote in a 1997 California intermediate appellate court decision, *County of San Joaquin v. State Water Resources Control Board*, 54 Cal.App.4th 1144 (1997). Certain CVP water districts

[15] California's water-property rights system is based on Oregon's. *See United States v. Oregon*, 44 F.3d 758, 765 (9th Cir. 1994).

challenged an SWRCB order imposing restrictions on the their water-rights permits. In a footnote rejecting one of the appellant water districts' arguments that Reclamation was not an indispensable party to the suit, the California Court of Appeal stated as follows:

> Appellants assert the Bureau "holds only legal title to the water" and "has no substantial interest in the water," emphasizing the Bureau "uses no water." The argument is highly misleading: the fact the Bureau does not consume water is not synonymous with having no substantial interest in the water. The Bureau has appropriative water rights in the Central Valley Project. (*United States v. State Water Resources Control Bd.* (1986) 182 Cal.App.3d 82, 106, 227 Cal.Rptr. 161.) The Bureau owns the CVP facilities, has operational control and responsibilities relating to flood control, water supply, power generation, and fish and wildlife mitigation. The Bureau has substantial property rights in its water rights permits, whereby the Bureau diverts, transports, and stores water. The Bureau clearly has a substantial interest in this litigation.

Id. at 1156 n.12. The authority cited in this footnote for the statement that Reclamation "has appropriative water rights in the Central Valley Project" is a brief passage in *United States v. State*

Water Resources Control Board, *supra*, which was a challenge to an SWRCB water quality plan. That passage merely notes that "[f]or their *initial operations* in the Sacramento Valley and the [Sacramento-San Joaquin] Delta, federal authorities acquired appropriative rights." 182 Cal.App.3d at 106 (emphasis added). It is clear in context that these "appropriative rights" refer to the development of the CVP, not to the appropriative water-property rights of growers who make beneficial use of CVP irrigation water.

The Federal Circuit's opinion also quotes an isolated sentence from a 2000 SWRCB decision: "Title to the water rights under the permits is held by [Reclamation]." App-35a (quoting SWRCB Decision D 1641 (Mar. 15, 2000)).[16] This fleeting reference to Reclamation's nominal title to Reclamation Project water says and proves nothing about growers' beneficial ownership of water-property rights.

Along the same lines, the Federal Circuit's opinion, App-35a, quotes out of context part of a sentence from paragraph 31 in Petitioners' Second Amended Complaint. *See* App. D (App-109a) ("[t]he United States holds legal title to such water and water rights"). This is what Petitioners' complaint actually says:

> Each municipal, industrial, and agricultural water user within Fresno and

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[16] Available at https://tinyurl.com/mwva975h.

> Plaintiff water agencies *holds a property right in the beneficial use of the water and water rights* of the San Joaquin River which the United States acquired to benefit the landowners and water users within the Friant Division of the Central Valley Project. The United States holds legal title to such water and water rights *to benefit Plaintiffs, their landowners and water users*. The United States does not have the discretion or the right to use or reallocate that water as it might see fit.

App-109a (emphasis added).

2. As indicated above, Petitioners are requesting the Court to decide whether the Friant Division *growers* (i.e., landowners) have compensable water-property rights, and assuming so, whether Reclamation's decision to provide them with a *zero allocation* of water during 2014 was a Fifth Amendment taking of their water-property rights. The Petitioner water districts have brought the takings claim in a representative capacity on behalf of the non-party growers to whom they supply irrigation water. *See* App-32a n.11. There is no contractual relationship between the Friant Division growers and Reclamation, *id.*, and Reclamation cannot rely on a contract with third-parties (the Exchange Contractors) as a legal basis for taking those Friant Division growers' property rights without payment of just compensation. Thus, Reclamation's argument before the Federal Circuit that the *water districts*'

property rights cannot exceed their contractual rights does not affect the growers' property rights or their Fifth Amendment right to just compensation.

III. The Questions Presented Are Important, and This Is An Ideal Case For Addressing Them

Reclamation's expansive Western irrigation projects encompass 17 States. *See* Bur. of Recl., About Us – Mission (*see also* map).[17] This single federal agency wields tremendous power over the nation's agricultural economy, and the livelihoods of tens of thousands of farmers. More specifically, Reclamation "provide[s] one out of five Western farmers (140,000) with irrigation water for 10 million acres of farmland that produce 60% of the nation's vegetables and 25% of its fruits and nuts." *Id.*

The critical importance of Reclamation's irrigation water allocation decisions is underscored not only by ever-present drought—a fact of life in the West—but also by shifting federal environmental policies. *See, e.g.*, U.S. Drought Monitor (continually updated);[18] *Stockton East*, 503 F.3d at 1356 ("[B]y the late 1980s and early 1990s, as environmental concerns became more pronounced and fish and wildlife interests moved more to the forefront, Government policy began

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[17] https://tinyurl.com/mrwh7c6t (last visited Aug. 20, 2025).

[18] Nat'l Drought Mitigation Center (U. Neb.-Lincoln), https://tinyurl.com/n44wm5tr.

to shift.").

Reclamation continues to be confronted with the need to make controversial decisions regarding where, and to what extent, irrigation water should be allocated during periods of drought. *See, e.g.*, Abraham Lustgarten, *A Water War Is Brewing Over the Dwindling Colorado River*, ProPublica (Dec. 22, 2022) ("On June 14, [Bur. of Recl. Comm'r] Camille Touton delivered a stunning ultimatum: Western states had 60 days to figure out how to conserve as much as 4 million acre-feet of 'additional' water from the Colorado River or the federal government would, acting unilaterally, do it for them.").

Petitioners are not asking this Court to second-guess Reclamation's water allocation decisions, including in connection with the 2014 Central Valley drought. Instead, the focus of this appeal is the *constitutional impact* of Reclamation's decisions on farmers' water-property rights, and in particular, the rights of the Friant Division growers.

The Federal Circuit's opinion that they have no compensable property rights under the Fifth Amendment leaves these growers in the dust. By granting certiorari and reversing the Federal Circuit, this Court would enable the growers to obtain the just compensation that the Constitution guarantees for the taking of their water-property rights.

This is an ideal vehicle for the Court to revisit Section 8 of the Reclamation Act (after a four-decade hiatus), and the effect of that section's proviso,

43 U.S.C. § 372, on beneficial ownership of Reclamation Project water-property rights. The Federal Circuit's decision is final, and the facts are not in dispute. The key fact that Reclamation had water available, but decided to allocate *none* of it to the Friant Division water districts and growers, brings the question of the taking of compensable water-property rights into sharp focus. It is a question that the Court needs to address by granting certiorari in this case.

CONCLUSION

The Court should grant this petition for writ of certiorari.

Respectfully submitted,

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September 5, 2025

APPENDIX

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APPENDIX A — OPINION, U.S. COURT OF APPEALS FOR THE FEDERAL CIRCUIT, *CITY OF FRESNO, ET AL. V. UNITED STATES, ET AL.*, NO. 2022-1994 (DEC. 17, 2024)

UNITED STATES COURT OF APPEALS
FOR THE FEDERAL CIRCUIT

2022-1994

CITY OF FRESNO, ARVIN-EDISON WATER STORAGE DISTRICT, CHOWCHILLA WATER DISTRICT, DELANO-EARLIMART IRRIGATION DISTRICT, EXETER IRRIGATION DISTRICT, IVANHOE IRRIGATION DISTRICT, LINDMORE IRRIGATION DISTRICT, LINDSAY-STRATHMORE IRRIGATION DISTRICT, LOWER TULE RIVER IRRIGATION DISTRICT, ORANGE COVE IRRIGATION DISTRICT, PORTERVILLE IRRIGATION DISTRICT, SAUCELITO IRRIGATION DISTRICT, SHAFTER-WASCO IRRIGATION DISTRICT, SOUTHERN SAN JOAQUIN MUNICIPAL UTILITY DISTRICT, STONE CORRAL IRRIGATION DISTRICT, TEA POT DOME WATER DISTRICT, TERRA BELLA IRRIGATION DISTRICT, TULARE IRRIGATION DISTRICT, LOREN BOOTH LLC, MATTHEW J. FISHER, JULIA K. FISHER, HRONIS INC., CLIFFORD R. LOEFFLER, MAUREEN LOEFFLER, DOUGLAS PHILLIPS, CARALEE PHILLIPS,

Plaintiffs-Appellants,

v.

Appendix A

UNITED STATES, SAN LUIS & DELTA-MENDOTA WATER AUTHORITY, SANTA CLARA VALLEY WATER DISTRICT, SAN LUIS WATER DISTRICT, WESTLANDS WATER DISTRICT, GRASSLAND WATER DISTRICT, JAMES IRRIGATION DISTRICT, BYRON BETHANY IRRIGATION DISTRICT, DEL PUERTO WATER DISTRICT, SAN JOAQUIN RIVER EXCHANGE CONTRACTORS WATER AUTHORITY, CENTRAL CALIFORNIA IRRIGATION DISTRICT, FIREBAUGH CANAL WATER DISTRICT, SAN LUIS CANAL COMPANY, COLUMBIA CANAL COMPANY,

Defendants-Appellees.

Appeal from the United States Court of Federal Claims in No. 1:16-cv-01276-AOB, Judge Armando O. Bonilla.

Decided: December 17, 2024

Before Moore, *Chief Judge*, Clevenger and Stark, *Circuit Judges.*

Stark, *Circuit Judge.*

In this case, we are called upon to review how the federal government resolved a particular dispute over water distribution during the drought-ridden year of 2014. As we explain in more detail below, individual growers, irrigation districts (which provide water to farms), water districts (which provide water to municipalities), and the City of Fresno, all located within the area served by the

Central Valley Project ("CVP" or "Project"), sued the United States ("government") over its failure to deliver water they contend they were entitled to under a series of contracts. The government defended its water allocation decisions by pointing to obligations it had under other contracts, to deliver water to another set of entities. Through adjudication of a series of motions, the Court of Federal Claims dismissed several of the plaintiffs' claims and granted summary judgment to the government on all remaining claims.

Because we agree with the disposition of the Court of Federal Claims, we affirm.

I

A

The Central Valley of California lies in the center of the state, to the west of the Sierra Nevada mountains and to the east of the Coastal Ranges. The Central Valley, through which the Sacramento River and the San Joaquin River flow, is home to the largest federal water management project in the United States: the CVP. The CVP consists of dams, reservoirs, hydropower stations, canals, and other infrastructure operated by the United States Bureau of Reclamation ("Reclamation"). Through its operation of the CVP, Reclamation controls water from the Sacramento and San Joaquin Rivers and allocates those waters throughout California.

The Sacramento River has substantial water resources, but the land abutting it is not generally suitable

for agriculture. By contrast, the San Joaquin River lacks sufficient water to meet all the agricultural and other needs of the San Joaquin Valley. The CVP aims to "re-engineer its natural water distribution," *United States v. Gerlach Live Stock Co.*, 339 U.S. 725, 728, 70 S. Ct. 955, 94 L. Ed. 1231, 116 Ct. Cl. 895 (1950), addressing the mismatch between where water is abundant, but arguably less needed, and where it is scarce, yet could—if diverted—be put to more efficient agricultural benefit. *See generally Gustine Land & Cattle Co. v. United States*, 174 Ct. Cl. 556, 560-61 (1966).

The CVP consists of multiple "divisions." Most pertinent to this case is the Friant Division, which includes the Friant Dam, where Reclamation collects water originating in the San Joaquin River and stores that water in Millerton Lake. From Millerton Lake, the water is distributed to water and irrigation districts through the Madera and Friant-Kern Canals.[1]

Key features of the CVP that are pertinent to the background and analysis of the issues presented in this appeal are shown in Figure 1, an annotated map, below.[2]

1. For simplicity, and because it does not impact the analysis, we use "water district" throughout the remainder of this opinion to refer to both water districts and irrigation districts.

2. *See* Friant Water Authority Amicus Curiae Br., ECF No. 52 at 2 (further annotations added by court).

Appendix A

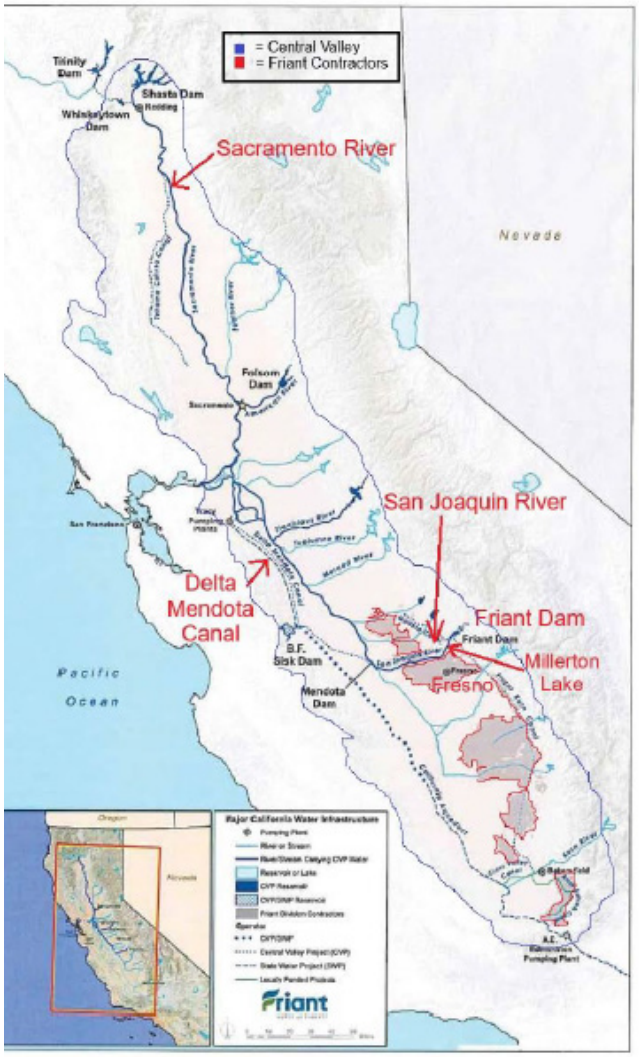

Figure 1. Map of Central Valley

Appendix A

B

Reclamation's role in the CVP includes obtaining rights to water resources in the Central Valley and undertaking commitments to deliver those waters. Prior to the inception of the CVP, various private entities owned rights to San Joaquin River water. These entities, which we (like the parties) refer to as the "Exchange Contractors,"[3] are successors to parties that entered into various agreements with the government. In one such agreement, which we will call the "Purchase Contract," the predecessors of the Exchange Contractors sold the bulk of their rights to San Joaquin River water to the government while at the same time reserving their rights to San Joaquin River water "in excess of specified rates of flow" identified in Schedule 1 of the Purchase Contract ("reserved waters"). J.A. 232-83, 314. The same parties then executed a "Contract for the Exchange of Waters" (the "Exchange Contract"), which granted Reclamation authority to "store, divert, dispose of and otherwise use" even these "reserved waters"—that is, the Exchange

3. We use "Exchange Contractors" to refer to, collectively, the parties that intervened in this litigation to join the government's defense: San Luis & Delta-Mendota Water Authority, Westlands Water District, Santa Clara Valley Water District, San Luis Water District, Grassland Water District, James Irrigation District, Byron Bethany Irrigation District, Del Puerto Water District, San Joaquin River Exchange Contractors Water Authority, Central California Irrigation District, Firebaugh Canal Water District, San Luis Canal Company, and Columbia Canal Company.

Contractors' predecessors' Schedule 1 "reserved waters" from the San Joaquin River.[4] J.A. 315-16.

Because all the rights of the Exchange Contractors' predecessors now indisputably are held by the Exchange Contractors, we will at this point dispense with referring to the predecessors, except where relevant.

As consideration to the Exchange Contractors, the government agreed in the Exchange Contract to provide them with "substitute water." J.A. 315-16. Specifically, Reclamation's rights to the Exchange Contractors' "reserved waters" of the San Joaquin River exist "so long as, and only so long as, the United States does deliver to the [Exchange Contractors] by means of the Project or otherwise substitute waters in conformity with this contract." J.A. 316. Article 8 of the Exchange Contract requires that a specified "Quantity of Substitute Water" be delivered to the Exchange Contractors:

> During all calendar years, other than those defined as critical, the United States shall deliver to the [Exchange Contractors] for use hereunder an annual substitute water supply of not to exceed 840,000 acre-feet in accordance with the [specified] maximum monthly entitlements.

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4. The Exchange Contract has been amended several times. The version in effect at the pertinent time, 2014, is the 1968 version. J.A. 25, 309-44. All references to the "Exchange Contract" are to this 1968 version.

J.A. 326. During critical years, which are those in which water is less abundant (according to specific measures set out in the Exchange Contract), the government is required to provide a lesser amount to the Exchange Contractors, a maximum of 650,000 acre-feet. Other provisions, most pertinently Article 4, describe Reclamation's obligations when there are certain interruptions to its ability to supply substitute waters to the Exchange Contractors. J.A. 315-17.

C

Having obtained from the Exchange Contractors rights to San Joaquin River water, Reclamation then contracted to deliver water to municipal and private entities within the Friant Division. Specifically, the government entered into the "Friant Contract" with certain water districts and the City of Fresno ("Friant Contractors");[5] the Friant Contractors, in turn, deliver

5. We use "Friant Contractors" to refer to, collectively: City of Fresno, Arvin-Edison Water Storage District, Chowchilla Water District, Delano-Earlimart Irrigation District, Exeter Irrigation District, Ivanhoe Irrigation District, Lindmore Irrigation District, Lindsay-Strathmore Irrigation District, Lower Tule River Irrigation District, Orange Cove Irrigation District, Porterville Irrigation District, Saucelito Irrigation District, Shafter-Wasco Irrigation District, Southern San Joaquin Municipal Utility District, Stone Corral Irrigation District, Tea Pot Dome Water District, Terra Bella Irrigation District, and Tulare Irrigation District. We use "Friant Growers" to refer to, collectively: Loren Booth LLC, Matthew J. Fisher, Julia K. Fisher, Hronis Inc., Clifford R. Loeffler, Maureen Loeffler, Douglas Phillips, and Caralee Phillips.

water to, among others, individual growers ("Friant Growers").[6] The Friant Contract requires Reclamation to deliver water, including water from the San Joaquin River, to the Friant Contractors. As consideration, the Friant Contractors agreed to pay the government for delivered water and paid part of the costs of constructing the infrastructure of the CVP.

The Friant Contract obligates the government to deliver specified amounts of water to the Friant Contractors each year, although this duty is "subject to the terms of" the pre-existing Exchange Contract. J.A. 368. In particular, Article 3(n) of the Friant Contract states that "[t]he rights of the [Friant] Contractor[s] under this Contract are *subject to the terms of the contract for exchange waters*," that is, the Exchange Contract. *Id.* (emphasis added). But crucially to Appellants' case here, the government also agreed in Article 3(n) that it "will not deliver to the Exchange Contractors [under the Exchange Contract] waters of the San Joaquin River unless and until required by the terms of [the Exchange Contract]." *Id.*

Other provisions of the Friant Contract relate to other aspects of potential conflicts between the government's water delivery obligations to the Friant Contractors and those it owes to other parties, such as the Exchange Contractors. Most pertinent to this appeal are Articles 13(b) and 19(a), which provide the government some

6. All citations to the "Friant Contract" are to the 2010 version, which was in effect in 2014. The parties are in agreement that this version is representative of the governing agreements between the Friant Contractors and the United States.

measure of immunity from liability for some of its allocation decisions. J.A. 394, 402. The extent of this immunity is disputed among the parties.

In sum, then, under the Friant Contract, the Friant Contractors are entitled to delivery of amounts of water from Reclamation, including water from the San Joaquin River. However, because the government only obtained rights to control San Joaquin River water by virtue of entering into the Exchange Contract—thereupon undertaking duties owed to the Exchange Contractors—the Friant Contract also addresses how Reclamation must navigate conflicts between its obligations to the Exchange Contractors and those it owes to the Friant Contractors.

D

As the Court of Federal Claims explained, and the parties do not dispute:

> Since 1951, Reclamation has stored and diverted the Exchange Contractors' reserved San Joaquin River water at the Friant Dam and supplied [the Exchange Contractors] with substitute water [from the Sacramento-San Joaquin River Delta] through the Delta-Mendota Canal. . . . Since 1962, . . . Reclamation has supplied the Friant Contractors with San Joaquin River water impounded at the Friant Dam and stored in Millerton Lake.

J.A. 25, 27. In all years until 2014, Reclamation was able to meet its contractual obligation to supply the Exchange

Contractors with substitute water by delivering water sourced solely from the Sacramento-San Joaquin River Delta, without drawing on water from the San Joaquin River.

In early 2014, due to drought conditions, the Governor of California declared a state of emergency, which eventually lasted until 2017. Reclamation recognized it was not going to be able to meet its combined water-delivery obligations for 2014 to the Exchange Contractors and the Friant Contractors. Thus, on February 15, 2014, Reclamation informed the Exchange Contractors that 2014 would be a "critical year," as that term is defined in the Exchange Contract. Reclamation predicted it would only be able to allocate to the Exchange Contractors "336,000 acre-feet rather than the maximum 650,000 acre-feet critical year entitlement." J.A. 1859-60. Several months later, on May 13, 2014, Reclamation updated its forecasts and advised the Exchange Contractors that "[d]ue to the continued drought and unique hydrology, Reclamation [would] for the first time provide water [to the Exchange Contractors] from both Delta [i.e., Sacramento River water through the Delta-Mendota Canal] *and San Joaquin River sources*." J.A. 1660 (emphasis added). By drawing from these multiple sources, including San Joaquin River water, Reclamation "anticipate[d] being able to meet [the] critical year demands for the months of April through October[,] which totals 529,000" acre-feet. *Id.*

Reclamation did, in fact, supply significant amounts of water to the Exchange Contractors between May 15

and September 27, 2014, although it thereafter released no San Joaquin River water to these entities in October, November, or December of that year. During 2014, Reclamation delivered approximately 540,000 acre-feet of water to the Exchange Contractors, of which roughly 209,000 acre-feet had originated in the San Joaquin River (before being sent to the Friant Dam and stored in Millerton Lake), and the other approximately 331,000 acre-feet having originated in the Sacramento River, released from the Delta-Mendota Canal.

In the meantime, in March 2014, Reclamation notified the Friant Contractors that it would not be supplying them with any water that year, other than the minimum needed for public health and safety considerations. Ultimately, while Reclamation delivered these "health and safety" waters to the Friant Contractors (as well as carryover water from the previous year's allocation), what the Friant Contractors received in 2014 was essentially a "zero allocation." J.A. 1888-89.

E

In October 2016, the Friant Contractors and Friant Growers (collectively, "Friant Parties" or "Appellants") filed suit against the United States in the Court of Federal Claims.[7] The Friant Parties alleged that Reclamation's actions in 2014, and particularly Reclamation's diversion

7. On January 8, 2021, the Friant Parties filed a substantially identical case challenging the Bureau's 2015 water allocations. *See City of Fresno v. United States*, No. 21-375 (Fed. Cl. Jan. 8, 2021). That matter is currently stayed. *See id.*, ECF No. 9. (Feb. 11, 2021).

of San Joaquin River water to the Exchange Contractors instead of to them, constituted a breach of the Friant Contract. The alleged breach caused Appellants to "suffer[] huge losses of annual and permanent crops, loss of groundwater reserves, water shortages and rationing, and [to] incur[] millions of dollars [of losses] to purchase emergency water supplies." J.A. 198. The Friant Parties further claimed that "[t]he water and water rights of the Friant Division appropriated by the United States in 2014 were the property of Plaintiffs, and their landowners and water users, each of which are the beneficial owners of the water rights." J.A. 222. Thus, the Friant Parties alleged that the government's actions constituted takings without just compensation in violation of the Fifth Amendment.

The United States, joined by the Exchange Contractors, who intervened in the litigation, responded by arguing that Reclamation had been required under the Exchange Contract to deliver water from the San Joaquin River to the Exchange Contractors due to the drought conditions experienced in 2014, which left no other water available for Reclamation to use to meet its contractual obligations. Therefore, they contended, there had been no breach of the Friant Contract. Further, the government and Exchange Contractors (collectively, hereinafter, "Appellees") asserted that even if there had been a breach, the Friant Contract immunized the government from liability, because Reclamation's water allocation decisions had not been arbitrary, capricious, or unreasonable. Finally, Appellees insisted that the Friant Contractors and Friant Growers could not maintain a takings claim because none of these entities had a property interest in the water they

expected Reclamation to deliver to them under the Friant Contract and lacked standing.

The Court of Federal Claims dismissed the Friant Growers' breach of contract claim because these entities were neither parties to nor third-party beneficiaries of the Friant Contract and, therefore, lacked standing.[8] The court also dismissed the Friant Growers' and the Friant Contractors' takings claims for lack of standing, as none of these parties possesses a property interest in water supplied to them directly (or through third parties) by Reclamation. The Friant Contractors' breach of contract claims proceeded and, after discovery, the trial court granted Appellees' motion for summary judgment and denied the Friant Contractors' cross-motions for summary judgment. These rulings were based on the court's conclusions that (a) the Friant Contractors' rights under the Friant Contract were subordinate to the rights of the Exchange Parties under the Exchange Contract; (b) the conditions in 2014 required Reclamation, under the Exchange Contract, to deliver San Joaquin River water to the Exchange Contractors, because San Joaquin River water may be treated as "substitute water;" and (c) the government was, regardless, immunized under the Friant Contract for its water allocation decisions because no reasonable factfinder could find its decisions to have been arbitrary, capricious, or unreasonable.

The Friant Parties timely appealed. We have jurisdiction under 28 U.S.C. § 1295(a)(3).

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8. This aspect of the trial court's ruling is not on appeal.

II

The Friant Parties' appeal presents solely issues of law. We review de novo a determination by the Court of Federal Claims to dismiss a claim for lack of subject matter jurisdiction or failure to state a claim, as well as that court's interpretation of a contract. *See Ute Indian Tribe of the Uintah & Ouray Indian Rsrv. v. United States*, 99 F.4th 1353, 1364 (Fed. Cir. 2024)*; Gould, Inc. v. United States*, 935 F.2d 1271, 1273 (Fed. Cir. 1991). Likewise, "[w]e review the Court of Federal Claims'[] grant of summary judgment under a de novo standard of review, with justifiable factual inferences being drawn in favor of the party opposing summary judgment." *Russian Recovery Fund Ltd. v. United States*, 851 F.3d 1253, 1259 (Fed. Cir. 2017). "For Fifth Amendment takings claims, we review de novo the existence of a compensable property interest." *Fishermen's Finest, Inc. v. United States*, 59 F.4th 1269, 1274 (Fed. Cir. 2023) (internal quotation marks omitted).

III

On appeal, the Friant Contractors contend that the Court of Federal Claims misinterpreted both the Exchange Contract and the Friant Contract. In particular, they argue that the Exchange Contract did not require the United States to provide San Joaquin River water to the Exchange Contractors and, thus, Reclamation breached its obligations under Articles 3(a) and 3(n) of the Friant Contract by doing so. In the Friant Contractors' view, San Joaquin River water cannot constitute "substitute

water" under the Exchange Contract because Articles 4(b) and 4(c) of that contract set out the only circumstances under which San Joaquin River water can be provided to the Exchange Contractors, and the conditions of those provisions were not met in 2014. The Friant Contractors alternatively contend that, even if Reclamation was required by the Exchange Contract to deliver San Joaquin River water to the Exchange Contractors, it nonetheless breached the Friant Contract by delivering an amount of such water that exceeded what was required. They also dispute the Court of Federal Claims' conclusion that the government is immune from liability for its breach of the Friant Contract. Finally, the Friant Parties challenge the trial court's dismissal of their takings claim.

The government and Exchange Contractors ask us, instead, to endorse the analysis of the Court of Federal Claims. They argue that the critical year circumstances Reclamation confronted in 2014, and the government's competing obligations to the Exchange Contractors and Friant Contractors, required Reclamation to source "substitute water" from the San Joaquin River for delivery to the Exchange Contractors, and required it to do so in the amounts that Reclamation actually delivered. They further contend that, in any event, the government is immunized from any breach of the Friant Contract as long as the government's determinations were not arbitrary, capricious, or unreasonable, and here they were not. Finally, the government and Exchange Contractors urge us to affirm the trial court's conclusion that none of the Friant Parties has a property interest in Reclamation water under state or federal law and, accordingly, there was no Fifth Amendment taking.

Our analysis of these various contentions proceeds as follows. First, we explain that the Exchange Contract broadly defines "substitute water" and expressly contemplates that Reclamation may be required, under certain circumstances, to deliver water originating in the San Joaquin River to the Exchange Contractors as "substitute water." Second, nothing about this interpretation of the Exchange Contractors' rights and Reclamation's obligations contradicts or renders meaningless Article 4 of the Exchange Contract. Third, Reclamation did not breach the Friant Contract by delivering the amounts of San Joaquin River water it supplied to the Exchange Contractors. Fourth, even if any of the actions undertaken by Reclamation were a breach of the Friant Contract, Reclamation enjoyed immunity from liability because its actions could not be found to be arbitrary, capricious, or unreasonable. Fifth, and finally, we affirm the Court of Federal Claims' dismissal of the takings claims.

A

The Friant Contractors allege that the government breached Articles 3(a) and 3(n) of the Friant Contract. Article 3(a) provides that, subject to certain conditions and limitations (which are not at issue in this appeal), the government "shall make available for delivery to the [Friant] Contractor[s] from the Project" specified amounts of water. J.A. 362. Article 3(n) then states:

> The rights of the [Friant] Contractor[s] under this Contract are *subject to* the terms of the

> contract for exchange waters [i.e., the Exchange Contract]. . . . The United States agrees that it will not deliver to the Exchange Contractors thereunder waters of the San Joaquin River unless and until *required* by the terms of [the Exchange Contract], and the United States further agrees that it will not voluntarily and knowingly determine itself unable to deliver to the Exchange Contractors entitled thereto from water that is available or that may become available to it from the Sacramento River and its tributaries or the Sacramento-San Joaquin Delta those quantities required to satisfy the obligations of the United States under said Exchange Contract and under [the Purchase Contract].

J.A. 368 (emphasis added). The Friant Contractors allege that the government breached these provisions by delivering San Joaquin River water to the Exchange Contractors in 2014 despite not being *required* to do so by the Exchange Contract.[9] We disagree.

To determine whether the government breached its contractual obligations, we start with the text of the relevant contracts, "the 'plain and unambiguous' meaning of which control[]." *Aspen Consulting, LLC v. Sec'y of Army*, 25 F.4th 1012, 1016 (Fed. Cir. 2022). An "[a]greement must be considered as a whole and interpreted

9. It is undisputed that in 2014 "Reclamation delivered San Joaquin River-sourced water to the Exchange Contractors at Mendota Pool." Gov't Br. at 26.

so as to harmonize and give reasonable meaning to all of its parts." *Coast Fed. Bank, FSB v. United States*, 323 F.3d 1035, 1038 (Fed. Cir. 2003).

Because the issue of whether the government breached the Friant Contract turns on whether the government acted in a way that it was not *required* to act by the Exchange Contract, our analysis begins with the text of the Exchange Contract. We start with "substitute water," which Article 3 of the Exchange Contract defines:

> The term "substitute water" as used herein means all water delivered hereunder at the points of delivery hereinafter specified to the Contracting Entities [i.e., the Exchange Parties], *regardless of source*.

J.A. 315 (emphasis added). By stating that "all water" may be "substitute water" "*regardless of source*," this definition does not exclude any source from potentially providing substitute water. Thus, the Exchange Contract's definition of "substitute water" plainly does not exclude San Joaquin River water.

Other provisions of the Exchange Contract confirm that the contracting parties contemplated that San Joaquin River water might be required to be used as substitute water and delivered to the Exchange Contractors. *See, e.g.*, J.A. 321 (Article 5(d)(5)(e): "Whenever sufficient water is available *from the San Joaquin River* and/or Fresno

Slough[10] to meet the needs of the [Exchange Contractors] at Mendota Pool, [Reclamation] reserves the right to make all deliveries to the [Exchange Contractors] at that point.") (emphasis added); J.A. 333 (Article 9(f): describing certain conditions applying "[w]hen less than 90 percent of the total water being delivered to the [Exchange Contractors] is *coming from the San Joaquin River* and/or the Fresno Slough") (emphasis added). Additionally, as the Court of Federal Claims correctly observed, these and other provisions of the Exchange Contract anticipate that water will be provided to the Exchange Contractors from the Mendota Pool, even though the parties understood the Mendota Pool could contain San Joaquin River-sourced water. J.A. 42 (citing Articles 5(d), 9(f), and 11).

None of this is to say that the United States is always entitled to supply San Joaquin River water as substitute water to the Exchange Contractors. The Friant Contract restricts the government's authority to do so to only those circumstances in which the government is *required* to use San Joaquin River water to meet its obligations under the Exchange Contract. J.A. 445. In other words, only when Reclamation does not have sufficient water from other sources—including the Sacramento River, Sacramento-San Joaquin Delta, and Delta-Mendota Canal—to fulfill its contractual duty to supply the specified quantities of substitute water to the Exchange Contractors is Reclamation *permitted* to deliver San Joaquin River water to the Exchange Contractors, because it is only in those

10. The Fresno Slough is "at times a tributary of" the San Joaquin River. J.A. 234.

circumstances that Reclamation is *required*, under the Exchange Contract, to do so.

Our conclusion is based on the contractual language we have discussed above, and it is also supported by two realities, which are reflected in the contracts. First, the rights to San Joaquin River water initially belonged to the predecessors of the Exchange Contractors, and they only relinquished those rights subject to the government's commitment to provide them (and their successors) with substitute water, with no limitation on the location from which that water may be sourced. As the government accurately explains:

> The context for the 1939 Exchange Contract was that the Exchange Contractors' predecessors-in-interest held senior water rights that Reclamation needed to obtain to make possible the Central Valley Project. . . . Possessing that leverage, the Exchange Contractors' predecessors-in-interest were able to protect themselves by obtaining broad "substitute water" rights in the Exchange Contract that were not limited to Delta-sourced [or Sacramento River] water.

Gov't Br. at 32.

Second, as we noted earlier and now emphasize, Article 3(n) of the Friant Contract expressly makes "[t]he rights of the [Friant] Contractor[s]," including the Friant Contractors' rights to government delivery of water, "*subject to the terms*" of the Exchange Contract. J.A.

368 (emphasis added). Thus, we agree with the Court of Federal Claims:

> [T]he Exchange Contractors are entitled to San Joaquin River water over . . . the Friant Contractors, even though it is relegated to a last resort source [for the Exchange Contractors] under the Friant Contract. A contrary interpretation would prioritize the clearly subordinated contractual rights of the Friant Contractors over the superior rights of the Exchange Contractors.

J.A. 42.

Therefore, we conclude that San Joaquin River water may be used by Reclamation as "substitute water" when such water is required by the Exchange Contract to be used as "substitute water," such as when the government cannot otherwise meet its obligations to the Exchange Contractors. Here, it is undisputed that during 2014, Reclamation was only able to deliver approximately 331,000 acre-feet of non-San Joaquin River water to the Exchange Contractors, thereby requiring the remaining substitute water to be sourced from the San Joaquin River to fulfill its obligations under Article 8 of the Exchange Contract. J.A. 33-34.

B

The Friant Contractors object that our conclusion as just described cannot be squared with Article 4 of the Exchange Contract. More particularly, they contend that

the Court of Federal Claims' interpretation of Article 4(a) improperly renders Articles 4(b) and 4(c) of the Exchange Contract nullities—because those are the only sections that *require* Reclamation to provide the Exchange Contractors with San Joaquin River water. We are not persuaded.

Article 4(a), entitled "Conditional Permanent Substitution of Water Supply," provides that the government may

> store, divert, dispose of and otherwise use, within and without the watershed of the aforementioned San Joaquin River, the aforesaid reserved waters of said river for beneficial use by others than [the Exchange Contractors] *so long as, and only so long as*, the United States does deliver to [the Exchange Contractors] by means of the Project or otherwise substitute water in conformity with this contract.

J.A. 315-16 (emphasis added). In this way, Article 4(a) makes the government's ability to provide San Joaquin River water to "others," including the Friant Contractors, dependent on the government's simultaneous ability ("so long as, and only so long as") to provide substitute water to the Exchange Contractors.

Article 4(b), "Temporary Interruption of Delivery," then provides:

> Whenever the United States is temporarily unable for any reason or for any cause to deliver

> to the [Exchange Contractors] substitute water from [the Sacramento River through] the Delta-Mendota Canal or other sources, *water will be delivered from the San Joaquin River.*

J.A. 316 (emphasis added). The San Joaquin River water to be provided during such a temporary interruption in the government's ability to deliver non-San Joaquin River substitute water to the Exchange Contractors must be (1) in the same quantities as required under Article 8 for the first seven days, and (2) for the rest of the temporary interruption, "in quantities and rates as reserved in the Purchase Contract," which (as we discuss further below) are quantities significantly *less* than the quantities owed to the Exchange Contractors under Article 8. J.A. 316. Article 4(c) goes on to address "Permanent Failure of Delivery," providing that "[w]henever the United States is permanently unable for any reason or for any cause to deliver" the Exchange Contractors the required substitute water, the Exchange Contractors "shall receive the said reserved waters *of the San Joaquin River* as specified in said Purchase Contract." J.A. 316-17 (emphasis added).

Nothing about our interpretation of the Exchange Contract, including Article 4(a), renders Articles 4(b) or 4(c) meaningless. The Friant Contractors' contrary view rests on their incorrect assumption that Articles 4(b) and 4(c) set out the sole circumstances under which San Joaquin River water is required to be delivered to the Exchange Contractors. To adopt the Friant Parties' reading—that Articles 4(b) and 4(c) are triggered on each occasion Reclamation is unable (temporarily or

permanently) to meet even a small portion of its substitute water obligations to the Exchange Contractors from non-San Joaquin River sources—would materially reduce the rights the Exchange Contractors bargained for in their contract.

Reclamation may, for instance, be unable to deliver substitute water to the Exchange Contractors from the Sacramento River through the Delta-Mendota Canal because certain facilities necessary to do so may, at some point, be inoperative or under repair. Consistent with these foreseeable possibilities, the Friant Contract references "errors in physical operations of the Project, drought, [and] other physical causes beyond the control of the Contracting Officer," J.A. 394, which likewise could result in the government—temporarily or permanently—being unable to supply the Exchange Contractors with *any* non-San Joaquin River-sourced substitute water. Articles 4(b) and 4(c) address these specific circumstances. They do not more generally govern in all circumstances under which the government is able to provide some non-San Joaquin River water to the Exchange Contractors, but is not able to provide all of the required water from non-San Joaquin River sources.

Our conclusion is consistent with a common-sense understanding of the parties' intent in entering into the Exchange Contract. The amount of water to which the Exchange Contractors are entitled under Article 8 of the Exchange Contract is 840,000 acre-feet in non-critical years and 650,000 in critical years. This significantly exceeds the amounts to which they are entitled when

Articles 4(b) and 4(c) are triggered. For instance, during a temporary interruption in the government's ability to supply any substitute water from non-San Joaquin River sources, the Exchange Contractors are entitled to the amounts "as specified in Article 8" *only* "for the first 7 consecutive days." J.A. 316. Thereafter, the quantities they are entitled to are reduced to "quantities and rates as reserved in the Purchase Contract." *Id.*

Appellants' position, then, that Article 4(b) applies whenever Reclamation is unable to deliver *the full amount* of substitute water (from non-San Joaquin River sources) to which the Exchange Contractors are entitled under Article 8, would, as the Exchange Contractors write in their brief, "convert a shortfall of even a single acre-foot into the Exchange Contractors' loss of entitlement to the remaining 649,999 acre-feet of water" in a critical year, "senselessly punish[ing] [them] for the government's inability to meet its obligations." Intervenors' Br. at 17. Nothing in the contractual language warrants such a result, which would contradict the history and intent of the Exchange Contract: to provide the Exchange Contractors' reserved water rights in the San Joaquin River to the government to use in the CVP but *conditioned upon* the government's obligation to deliver the Exchange Contractors the specified amounts of substitute water, preferably from non-San Joaquin River sources but, if necessary, from the San Joaquin River.

Importantly, when the government acts pursuant to Article 4(b), instead of Article 8, it is relieved of other obligations as well. In addition to being permitted to

deliver lesser amounts of substitute water (after the first seven days) to the Exchange Contractors, invoking Article 4(b) also eliminates the government's responsibility to ensure the quality of substitute water (Article 9(f)), waives limits on the methods by which substitute water is to be delivered (Article 10), and changes the location where the substitute water is delivered (Article 5). There is no indication in the Exchange Contract that the Exchange Contractors would have absolved the government of all of these duties in circumstances in which the government was still able to deliver a substantial proportion of substitute water from non-San Joaquin River water—as opposed to the narrow circumstances in which, temporarily or permanently, the government is unable to deliver *any* water from non-San Joaquin River sources.

In short, Article 4(b) addresses specific circumstances in which the government is wholly unable to provide the Exchange Contractors with substitute water from anywhere other than the San Joaquin River. It is undisputed that in 2014 this never occurred. While the drought limited how much non-San Joaquin River water the government delivered to the Exchange Contractors, the government was able to—and did—deliver non-San Joaquin River water to the Exchange Contractors throughout that year; eventually, more than 300,000 acre-feet of such water. J.A. 2114 (Appellants' expert acknowledging "there was never a day [in 2014] in which Reclamation was unable to deliver water from the Delta-Mendota Canal to the Exchange Contractors"). Accordingly, the situation here was *not* governed by Article 4(b) of the Exchange Contract. Instead, as the

government has repeatedly maintained, it acted in 2014 pursuant to its authority—and obligation—under Article 8 of that contract. Hence, again, we agree with the Court of Federal Claims that the government was entitled to summary judgment on the Friant Contractors' breach of contract claims.

C

The Friant Contractors argue that even if we determine, as we have, that San Joaquin River water may be "substitute water," and that Article 4(a)—and, therefore, the quantities of Article 8, rather than the lower quantities of Article 4(b)—applied in 2014, as we have also concluded, the government nonetheless breached the Friant Contract due to specific features of the deliveries it made that year. We again disagree.

First, the Friant Contractors contend that during certain months in 2014 the government "over-delivered" San Joaquin River water to the Exchange Contractors, thereby breaching the government's duty under the Friant Contract not to supply any more water to the Exchange Contractors than was prescribed by the Exchange Contract. The Friant Contractors did not make this argument in their opening brief and, as such, it is forfeited. *See United States v. Ford Motor Co.*, 463 F.3d 1267, 1276 (Fed. Cir. 2006). ("Arguments raised for the first time in a reply brief are not properly before this court."). Even if the argument had been preserved, it lacks merit. As the Court of Federal Claims explained, the "maximum monthly entitlements" of the Exchange Contract are non-

binding guidelines, so long as Reclamation does not exceed the "*annual* substitute water supply" limit of that same contract. J.A. 38-39 (emphasis added). It is undisputed that the government delivered only approximately 540,000 acre-feet of water to the Exchange Contractors over the whole of 2014. Thus, regardless of how much water the government delivered the Exchange Contractors during any particular month that year, it did not exceed the binding annual cap—so it did not deliver more water than was required under the Exchange Contract and, hence, did not breach duties owed to the Friant Contractors under the Friant Contract.

Second, the government also did not breach the Friant Contract by including among the substitute water it provided to the Exchange Contractors water it had stored in Millerton Lake. The Friant Contractors argue that "over 100,000 acre-feet of water delivered to the Exchange Contractors (largely from storage in Millerton Lake [and originating in the San Joaquin River]) . . . should have been delivered to the Friant Contractors." Reply Br. at 1. As we explained above, *see supra* III.A, including this water among what it delivered to the Exchange Contractors was entirely consistent with the Exchange Contract. To the extent the Friant Contractors are also contending that Reclamation committed a breach by storing San Joaquin River water at Millerton Lake in anticipation of needing it to supply to the Exchange Contractors, they fail to point to any specific duty in the Friant or Exchange Contract that the government violated. At most, the Friant Contractors contend that because Article 4(b) doesn't require the use of water from Millerton Lake, the Friant Contract does not

permit it. But they fail to identify any section of the Friant Contract prohibiting the use of water from Millerton Lake. Even if no provision of the Exchange Contract explicitly authorizes this action, neither does any provision in it (or in the Friant Contract) prohibit it.

Again, then, there was no breach of contract.

D

Even if the Friant Contractors could, contrary to our analysis above, demonstrate that delivery of San Joaquin River-sourced water to the Exchange Contractors in 2014 was not *required* by the Exchange Contract and, therefore, such delivery constituted a breach of the government's obligations to the Friant Contractors, we would still affirm the Court of Federal Claims on the alternative grounds of the government's contractual immunity from liability. As the Ninth Circuit has recognized, operation of the CVP assigns to Reclamation "an extremely difficult task: to operate the country's largest federal water management project in a manner so as to meet the Bureau's many obligations." *Cent. Delta Water Agency v. Bureau of Reclamation*, 452 F.3d 1021, 1027 (9th Cir. 2006). Unsurprisingly, then, when the government undertook these obligations it did so while also obtaining a measure of immunity from liability.

Specifically, Article 13(b) of the Friant Contract provides:

> If there is a Condition of Shortage because of . . . drought . . . or actions taken by the

> Contracting Officer to meet legal obligations . . . then, except as provided in subdivision (a) of Article 19 of this Contract, no liability shall accrue against the United States . . . for any damage, direct or indirect, arising therefrom.

J.A. 394. Article 19(a), in turn, states:

> Where the terms of this Contract provide for actions to be based upon the opinion or determination of either party to this Contract, said terms shall not be construed as permitting such action to be predicated upon arbitrary, capricious, or unreasonable opinions or determinations.

J.A. 402. We agree with the government that "[r]ead together, Articles 13 and 19 prevent liability from accruing against the United States during periods of drought so long as the contracting officer does not take actions that are predicated upon arbitrary, capricious, or unreasonable opinions or determinations." Gov't Br. at 13 (internal quotation marks omitted).

Taking the evidence in the light most favorable to the Friant Contractors, no reasonable factfinder could find that the Contracting Officer's actions here were of this nature. During the "critical year" of 2014, Reclamation, confronted with insufficient water from non-San Joaquin River sources to meet its full contractual obligation to supply "substitute water" to the Exchange Contractors, determined that it was required under the Exchange

Contract to supply San Joaquin River water to the Exchange Contractors. The record is devoid of evidence that the government's actions were anything other than a good faith, reasonable effort to address a challenging circumstance in a manner that officials believed was compliant with the government's contractual obligations.

Accordingly, the Court of Federal Claims was right to grant summary judgment to the government on the Friant Contractors' breach of contract claim, as the government could not be found liable based on its actions, which cannot reasonably be found to be arbitrary, capricious, or unreasonable.

E

Finally, we address Appellants' takings claims.[11] Appellants allege that the 2014 actions of Reclamation constituted a taking of their property without justification, in violation of the Fifth Amendment. Here, again, we reach the same conclusion as the Court of Federal Claims, which

11. The takings claim was brought by the Friant Contractors (on behalf of non-party individuals to whom they deliver water), the Friant Growers, and Fresno. J.A. 222-23 (Complaint); *see also* J.A. 15. The Court of Federal Claims dismissed as to each of these Appellants, as none had shown it had a property right to water, and the Friant Growers additionally lacked any contractual rights whatsoever. On appeal, the Friant Parties challenge only the dismissals as to the Friant Contractors (in their representative capacity) and as to the Friant Growers. Because, as a matter of law, none of the Appellants has a protected property interest in the water supplied to them by Reclamation, we need not make distinctions among them in our analysis.

dismissed these claims based on the lack of a protected property interest.

While the Court of Federal Claims based its dismissal decision on the Friant Parties' lack of standing, pursuant to Rule 12(b)(1) of the Rules of the Court of Federal Claims ("RCFC"), J.A. 19, we have determined that the issue before us is instead whether Appellants stated a takings claim upon which relief may be granted, an inquiry governed by RCFC 12(b)(6).[12] The Friant Parties adequately alleged they were injured by Reclamation's water allocation decisions and that the Court of Federal Claims could redress their injuries. Hence, they established standing and that the Court of Federal Claims had subject matter jurisdiction. *See Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560-61, 112 S. Ct. 2130, 119 L. Ed. 2d 351 (1992) ("[T]he irreducible constitutional minimum of standing contains three elements. First, the plaintiff must have suffered an injury in fact—an invasion of a legally protected interest which is (a) concrete and particularized, and (b) actual or imminent, not conjectural or hypothetical. Second, there must be a causal connection between the injury and the conduct complained of—the injury has to be fairly . . . trace[able] to the challenged action of the defendant, and not . . . th[e] result [of] the independent action of some third party not before the court. Third, it must be likely, as opposed to merely speculative, that the injury will be redressed by

12. Appellees moved to dismiss the takings claims based on both RCFC 12(b)(1) and 12(b)(6). *See City of Fresno v. United States*, No. 16-1276C, 143 Fed. Cl. 226, ECF No. 136 at 3, 22-23; ECF No. 137 at 15-19, 26, 34-36; ECF No. 138 at 6-7, 9.

a favorable decision.") (alterations in original; internal citations, quotation marks, and footnotes omitted). Because Appellants' allegation of a protected property interest is not "wholly insubstantial and frivolous," nor "patently without merit," they have standing and the trial court had jurisdiction to determine whether they stated a claim. *Bell v. Hood*, 327 U.S. 678, 682-83, 66 S. Ct. 773, 90 L. Ed. 939 (1946).

We turn, then, to whether Appellants stated a takings claim upon which relief may be granted. *See Columbus Reg'l Hosp. v. United States*, 990 F.3d 1330, 1342 (Fed. Cir. 2021) ("If we conclude that [the plaintiff's] allegations fail to state a cognizable claim, we can convert the [Court of Federal Claims'] Rule 12(b)(1) dismissal into a Rule 12(b)(6) dismissal."). They did not.

In the context of water rights state law, not federal law, "define[s] the dimensions of the requisite property rights for purposes of establishing a cognizable taking." *Klamath Irr. Dist. v. United States*, 635 F.3d 505, 511 (Fed. Cir. 2011) (internal quotation marks omitted); *see also id.* at 512-17 (applying Oregon law). As the Supreme Court has stated on several occasions, "the [Reclamation] Act clearly provided that state water law would control in the appropriation and later distribution of the water." *Nevada v. United States*, 463 U.S. 110, 122, 103 S. Ct. 2906, 77 L. Ed. 2d 509 (1983) (internal emphasis omitted); *see also California v. United States*, 438 U.S. 645, 664, 98 S. Ct. 2985, 57 L. Ed. 2d 1018 (1978) (same).

Thus, we must assess whether the Friant Contractors or the Friant Growers possess property rights under

California law. J.A. 199-215 (complaint alleging 18 times that Appellants have property rights "under California law"). They do not.

Appellants argue they have "appurtenant" rights to CVP water because it is delivered to their customers or to their lands. Open. Br. at 48 ("[T]he Government's allocation of water acquired for the Reclamation Act project is constrained by the appurtenant right of the landowners within that project who beneficially use the [P]roject's water to irrigate their crops."). Like the trial court, we understand their argument to be that California law gives them "appropriative" rights, i.e., a right that "'confers upon one who actually diverts and uses water the right to do so provided that water is used for reasonable and beneficial uses and is surplus to that used by riparians or earlier appropriators.'" J.A. 16 (quoting *United States v. State Water Res. Control Bd.*, 182 Cal. App. 3d 82, 227 Cal. Rptr. 161, 168 (Cal. Ct. App. 1986)). Appellants are wrong.

First, Appellants do not have any water rights under California law because, instead, as the California State Water Resource Control Board ("SWRCB") has held, it is *Reclamation* that "has appropriative water rights in the Central Valley Project." *Cnty. of San Joaquin v. State Water Res. Control Bd.*, 54 Cal. App. 4th 1144, 63 Cal. Rptr. 2d 277, 285 n.12 (Ct. App. 1997); *see also* J.A. 2399-2403 (SWRCB Decision D-1641 (Mar. 15, 2000) ("Title to the water rights under the permits is held by [Reclamation]."), *aff'd sub nom. State Water Res. Control Bd. Cases*, 136 Cal. App. 4th 674, 39 Cal. Rptr. 3d 189 (Cal. Ct. App. 2006)); J.A. 221 (complaint acknowledging "[t]he United States holds legal title to such water and water rights").

Second, as the government points out, "[t]he purpose of the appropriation doctrine is to reward initiative that allows water that would have otherwise sat worthless to be put to beneficial use, thus contributing to the state's development." Gov't Br. at 56 (citing *Irwin v. Phillips*, 5 Cal. 140, 146 (Cal. 1855)). This is exactly the type of action that Reclamation undertook pursuant to the Reclamation Act, 43 U.S.C. § 372. While Appellants put the water provided to them by Reclamation to beneficial use, that supply of water would not exist without the creation and operation of the Project, i.e., the efforts of Reclamation. In this context, California law does not assign property rights in water based on the uses put to it by end users. *See Ivanhoe Irr. Dist. v. All Parties and Persons*, 53 Cal. 2d 692, 3 Cal. Rptr. 317, 350 P.2d 69, 75 (Cal. 1960) (holding that Project water "belongs to or by appropriate action may be secured by the United States" and "[i]n a very real sense it is or will become the property of the United States"), *abrogated on other grounds by California v. United States*, 438 U.S. 645, 672, 98 S. Ct. 2985, 57 L. Ed. 2d 1018 (1978).

Appellants point to no California precedent persuasively supporting the proposition that the water delivered by Reclamation creates in the Friant Growers, or in the end users whose interests the Friant Contractors seek to represent, appropriative property rights. Appellants cite to a decision of the SWRCB, Cal. SWRCB Decision No. D-935. This SWRCB decision, in the course of granting permits to the United States to control certain water rights, discussed the rights of recipients of such water. J.A. 975-1086. It observed: "[u]nder our

permit and license system the right to the use of water by appropriation does not vest by virtue of application, permit or license, [but] by application of the water to beneficial use upon the land." J.A. 1074. This statement does not constitute a holding that putting received Project water to "beneficial use upon the land" is sufficient to create a property right in receipt of that water. Other California authorities, including those we have already cited above, further clarify this point. *See* J.A. 2402 (SWRCB Decision D-1641) (rejecting argument that water users have property rights in Project water and stating "[the] argument that the end users of water are the water right holders would mean that instead of having a relatively few water purveyors subject to statewide regulatory authority of the SWRCB, there would be millions of water right holders"); *Israel v. Morton*, 549 F.2d 128, 132 (9th Cir. 1977) (holding that appurtenance doctrine does not apply to water delivered by Reclamation).

Because Appellants have failed to establish that they possess any property rights in water delivery from the government, they cannot maintain a takings claim. *See Fishermen's Finest*, 59 F.4th at 1275 (explaining that only "if the court concludes that a cognizable property interest exists" do we determine whether that property interest was "taken"). Therefore, we affirm the Court of Federal Claims' dismissal of these claims.

IV

We have considered Appellants' remaining arguments and find them unpersuasive. For the reasons stated, we affirm the judgment of the Court of Federal Claims.

AFFIRMED

COSTS

No costs.

APPENDIX B — OPINION & ORDER, U.S. COURT OF FEDERAL CLAIMS, *CITY OF FRESNO, ET AL. V. UNITED STATES, ET AL.*, NO. 16-1276L (MAR. 25, 2020)

IN THE UNITED STATES
COURT OF FEDERAL CLAIMS

No. 16-1276L

CITY OF FRESNO, *et al.*,

Plaintiffs,

v.

UNITED STATES OF AMERICA,

Defendant.

and

SAN LUIS & DELTA-MENDOTA WATER AUTHORITY, *et al.*, AND CENTRAL CALIFORNIA IRRIGATION DISTRICT, *et al.*,

Defendant-Intervenors.

Filed March 25, 2020

OPINION AND ORDER

KAPLAN, Judge.

Plaintiffs in this action include the City of Fresno, California, seventeen irrigation districts in California that

have entered contracts with the Bureau of Reclamation to receive water supplied by the Friant Division of the Central Valley Project ("CVP") (hereinafter the District Plaintiffs),[1] and eight individual landowners who rely upon water supplied to them by the irrigation districts for agricultural purposes (hereinafter the Individual Plaintiffs).[2] The Individual Plaintiffs purport to sue on behalf of themselves and similarly-situated property owners served by the CVP.

Plaintiffs allege that in 2014, in the wake of water shortages caused by a severe drought, Reclamation provided the City and the District Plaintiffs with only a fraction of the water to which they claim entitlement under their contracts. According to Plaintiffs, Reclamation instead "appropriated all of the water of the Friant

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1. The "District Plaintiffs" are: Arvin-Edison Water Storage District, Chowchilla Water District, Delano-Earlimart Irrigation District, Exeter Irrigation District, Ivanhoe Irrigation District, Lindmore Irrigation District, Lindsay-Strathmore Irrigation District, Lower Tule River Irrigation District, Orange Cove Irrigation District, Porterville Irrigation District, Saucelito Irrigation District, Shafter-Wasco Irrigation District, Southern-San Joaquin Municipal Utility District, Stone Corral Irrigation District, Tea Pot Dome Water District, Terra Bella Irrigation District, and Tulare Irrigation District. 2d Am. Compl. For Taking of Water Rights Without Just Compensation & for Breach of Contract ("2d Am. Compl.") ¶¶ 4-18, ECF No. 128-1.

2. The "Individual Plaintiffs" are: Loren Booth LLC, Matthew J. Fisher, Julia K. Fisher, Hronis Inc., Clifford R. Loeffler, Maureen Loeffler, Douglas Phillips, and Caralee Phillips. 2d Am. Compl. ¶¶ 21-25.

Division of the [CVP] to satisfy what it determined to be a contractual requirement to provide this water as substitute water under a 1939 Contract . . . to a group of water users referred to as the Exchange Contractors." 2d Am. Compl. ¶ 32. As a result Plaintiffs allege, the City and the District Plaintiffs, as well as their water users, including the Individual Plaintiff landowners, "suffered huge losses of annual and permanent crops, loss of groundwater reserves, water shortages and rationing, and incurred millions of dollars to purchase emergency water supplies." *Id.* ¶ 33.

Plaintiffs contend that Reclamation breached its contract with the City and the District Plaintiffs "by failing to make available to them the quantities required by Article 3 of their contracts." *Id.* ¶ 46. They also allege that "[t]he water and water rights of the Friant Division appropriated by the United States in 2014 were the property of Plaintiffs, and their landowners and water users, each of which are the beneficial owners of the water rights." *Id.* ¶ 34. According to Plaintiffs, when Reclamation provided the water to the Exchange Contractors, rather than the City and the District Plaintiffs, it effected a taking of their property without just compensation, in violation of the Fifth Amendment. *Id.* ¶ 35.

Presently before the Court are motions to dismiss filed by the United States and the Defendant Intervenors[3]

3. There are two sets of defendant intervenors: 1) San Luis & Delta-Mendota Water Authority along with its member districts—Westlands Water District, Santa Clara Valley Water District, Grassland Water District, San Luis Water District,

pursuant to Rules 12(b)(1) and 12(b)(6) of the Rules of the Court of Federal Claims ("RCFC"). The government contends that the City and District Plaintiffs lack standing to pursue Fifth Amendment takings claims because under California law they do not have property interests in the water supplied to them by Reclamation. According to the government, whatever rights the City and the District Plaintiffs possess arise exclusively under their water-supply contracts with Reclamation.

The United States further argues that the City and the District Plaintiffs have failed to state a claim for breach of the water-supply contracts because those contracts immunize the United States from any liability in cases of shortages caused by actions Reclamation took to meet its obligations under the exchange contracts. Further, the government contends that the Individual Plaintiffs also have no water rights under California law; nor are they third-party beneficiaries to the water-supply contracts between Reclamation and the City or Reclamation and the District Plaintiffs.[4]

James Irrigation District, Byron Bethany Irrigation District, and Del Puerto Water District—(collectively the District Intervenors); and 2) Central California Irrigation District, San Luis Canal Company, Firebaugh Canal Water District, Columbia Canal Company, the San Joaquin River Exchange Contractors Water Authority—(collectively the Exchange Contractor Intervenors).

4. The District Intervenors make similar arguments in seeking to dismiss the Individual Plaintiffs' contract claims for lack of standing. They also argue that if the Court dismisses the City and District Plaintiffs' contract claims, then it should also dismiss the City and District Plaintiffs' takings claims.

The Intervenor Exchange Contractors make similar arguments, but offer additional grounds for dismissal. They contend that Plaintiffs' claims seek declaratory relief that is beyond the Court's power to grant. They also argue that Plaintiffs' Second Amended Complaint fails to allege that the United States' determination of the condition of shortage was arbitrary and capricious, as required by the shortage provisions in the water-supply contracts. For the reasons set forth below, the motions to dismiss are **GRANTED-IN-PART** and **DENIED-IN-PART**. The City and the District Plaintiffs have adequately pleaded a breach of contract and, thus, the motions are **DENIED** as to those claims. The motions are **GRANTED** as to all remaining claims, including those presented by the Individual Plaintiffs as third-party beneficiaries of the water-supply contracts.

BACKGROUND[5]

I. The Central Valley Project

"The Central Valley Project is the largest federal water management project in the United States." *Stockton E. Water Dist. v. United States*, 583 F.3d 1344, 1349 (Fed. Cir. 2009). It consists of a massive set of dams, reservoirs, hydropower generating stations, canals, electrical transmission lines, and other infrastructure. *United States v. Gerlach Live Stock Co.*, 339 U.S. 725, 728, 70 S. Ct. 955, 94 L. Ed. 1231, 116 Ct. Cl. 895 (1950). The CVP

5. The facts in this section are drawn from the parties' pleadings and their filings on the motions to dismiss.

"was built to serve the water needs in California's Central Valley Basin," *Stockton E. Water Dist.*, 583 F.3d at 1349, which has been characterized as "the most agriculturally-productive region in the world," *Westlands Water Dist. v. United States (Westlands Water Dist. I)*, 153 F. Supp. 2d 1133, 1138 (E.D. Cal. 2001), *aff'd*, 337 F.3d 1092 (9th Cir. 2003). The CVP was originally conceived by the State of California, but "was taken over by the United States in 1935 and has since been a federal enterprise." *Gerlach Live Stock Co.*, 339 U.S. at 728. It is operated by the Bureau of Reclamation, a division of the Department of the Interior. *Stockton E. Water Dist.*, 583 F.3d at 1349.

The CVP's purposes were to "improv[e] navigation, regulat[e] the flow of the San Joaquin River and the Sacramento River . . . [to store and deliver] waters thereof, for the reclamation of arid and semiarid lands . . . and other beneficial uses." *Westlands Water Dist. v. United States (Westlands Water Dist. II)*, 337 F.3d 1092, 1095 (9th Cir. 2003) (quoting Act of August 26, 1937, Pub. L. No. 75-392, 50 Stat. 844, 850). The CVP achieved these purposes by "re-engineer[ing] [the] natural water distribution" of California's Central Valley. *Gerlach Live Stock Co.*, 339 U.S. at 728.

As the government observes, "[a]s originally conceived, the CVP developed a water supply from two rivers: the Sacramento and the San Joaquin." Corrected Resp. of the U.S. to Show Cause Order at 4, ECF No. 113. The Sacramento River generates a "surplus of water because of heavier rainfall in the northern region but has little available tillable soil." *Westlands Water Dist. I*, 153

F. Supp. 2d at 1146 (quoting *Cty. of San Joaquin v. State Water Res. Control Bd.*, 54 Cal. App. 4th 1144, 63 Cal. Rptr. 2d 277, 279 (Cal. Ct. App. 1997)) (alterations omitted). The San Joaquin River, by contrast, cannot supply sufficient water for irrigation and other beneficial uses in the San Joaquin Valley. *Id.*

The claims before the Court in this case arise out of the Project's Friant Division, 2d Am. Compl. ¶ 29,[6] where the Friant Dam impounds all of the waters of the San Joaquin River and stores them in Millerton Lake. The waters stored in Millerton Lake are distributed via the Madera and Friant-Kern Canals to water and irrigation districts like the District Plaintiffs that hold contracts with Reclamation. *See Dugan v. Rank*, 372 U.S. 609, 613, 83 S. Ct. 999, 10 L. Ed. 2d 15 (1963); *Westlands Water Dist. II*, 337 F.3d at 1096; *United States v. State Water Res. Control Bd. ("SWRCB")*, 182 Cal. App. 3d 82, 227 Cal. Rptr. 161, 167 (Cal. Ct. App. 1986).

II. Reclamation's Water Rights

Congress passed the Reclamation Act of 1902 to facilitate federal management of limited water resources in the western states. *See California v. United States*, 438 U.S. 645, 649, 98 S. Ct. 2985, 57 L. Ed. 2d 1018 (1978).

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6. The Friant Division encompasses one of the nine distinct geographic areas, known as "divisions," that make up the CVP. *Westlands Water Dist. I*, 153 F. Supp. 2d at 1138 (E.D. Cal. 2001). It consists of the Friant Dam, Millerton Lake, the Friant-Kern Canal, the Madera Canal, and the John A. Franchi Diversion Dam. *Id.* at 1142.

Under the act, funds reserved from the sale of public lands in several western states, including California, are deposited into a "reclamation fund," controlled by the Treasury, which is used for "the construction and maintenance of irrigation works for the storage, diversion, and development of waters for . . . [these] arid and semiarid lands." Reclamation Act of 1902, Pub. L. 57-161, § 1, 32 Stat. 388 (1902).

To "facilitate water distribution" and "provide a reliable and stable water supply," the United States had to "obtain, by purchase or otherwise, rights (both appropriative and riparian) from water-rights holders in strategic areas." *Westlands Water Dist. I*, 153 F. Supp. 2d at 1143; *see also Gerlach Live Stock Co.*, 339 U.S. at 734 (observing that "[b]y its command that the provisions of the reclamation law should govern the construction, operation, and maintenance of the several construction projects, Congress directed the Secretary of the Interior to proceed in conformity with state laws, giving full recognition to every right vested under those laws"). Reclamation used three methods to secure the water rights it needed to operate the CVP.

First, in 1939, Reclamation entered purchase agreements with downstream holders of riparian rights on the San Joaquin River (the Exchange Contractors). *See* 2d Am. Compl. Ex. 1, ECF No. 128-2 (Contract for Purchase of Miller and Lux Water Rights—hereinafter the "purchase contract"). Under these agreements, the Exchange Contractors "sold all of their San Joaquin River water rights to the United States, except for 'reserved

water'" to which they held vested rights. *Westlands Water Dist. II*, 337 F.3d at 1097.

Second, Reclamation and the Exchange Contractors entered "Contract[s] for the Exchange of Waters" under which Reclamation was given authority to exercise the contractors' remaining (reserved) rights to San Joaquin River waters in exchange for the agreement of the Bureau to provide them with "substitute water." *Westlands Water Dist. v. Firebaugh Canal*, 10 F.3d 667, 669 (9th Cir. 1993); *see also* 2d. Am. Compl. Ex. 2 (Contract for Exchange of Waters (July 27, 1939)), ECF No. 128-3; *id.* Ex. 3 (Second Amended Contract for Exchange of Waters (February 14, 1968)—hereinafter the "exchange contract"), ECF No. 128-4. The exchange contracts further provided that Reclamation's rights to exercise the reserved rights of the Exchange Contractors were conditional. They would last "so long as, and only so long as, the United States does deliver to [the Exchange Contractors] by means of the [Central Valley] Project or otherwise substitute waters in conformity with this contract." *Id.* Ex. 3, at 8 (Article 4 of Second Amended Exchange Contract).[7]

Reclamation secured the remaining water rights it needed to operate the CVP from the California State Water Resources Control Board ("SWRCB"). *See generally California v. United States*, 438 U.S. 645, 98 S. Ct. 2985, 57 L. Ed. 2d 1018 (1978). Specifically, on June 2, 1959, the SWRCB issued Decision No. D-935, which

7. Citations to the exhibits appended to the second amended complaint refer to the pagination assigned by the court's electronic filing system.

authorized and issued permits to allow Reclamation to impound and divert the entire flow of the San Joaquin River at Friant Dam, and to store and release the water for re-diversion into the Friant-Kern and Madera Canals. *See* Cal. SWRCB Decision No. D-935 (June 2, 1959), https://www.waterboards.ca.gov/waterrights/board_decisions/adopted_orders/decisions/d0900_d0949/wrd935.pdf.

In short, "[t]he United States . . . acquired, by exchange, purchase, exercise of eminent domain, and appropriation, riparian and appropriative rights to all water within the CVP." *Westlands Water Dist. I*, 153 F. Supp. 2d at 1144 (citing 43 U.S.C. § 511 (2001)). As a result, "[a]ccess to CVP water is only by contract with the United States." *Id.*

III. The Water-Supply Contracts

Reclamation has entered water-supply contracts with the City and each of the District Plaintiffs. *See, e.g.*, 2d Am. Compl. Ex. 5 (Arvin-Edison water-supply contract), ECF No. 128-6. The water-supply contracts provide at Article 3(a) that "[d]uring each year, consistent with all applicable State water rights, permits, and licenses, Federal law . . . and subject to the provisions set forth in Articles 12 and 13 of this Contract, the Contracting Officer shall make available for delivery" specified amounts of Class 1 and Class 2 water. *Id.* at 18.

Article 3(n) of the water-supply contracts makes the rights of the Districts "subject to the terms of [the exchange contracts]." *Id.* at 24. It states, however, that

"[t]he United States agrees that it will not deliver to the Exchange Contractors thereunder the water of the San Joaquin River unless and until required by the terms of said contract." *Id.* Article 3(n) also states that the United States further agreed not to "voluntarily and knowingly determine itself unable to deliver to the Exchange Contractors entitled thereto from water that is available or that may become available to it from the Sacramento River and its tributaries or the Sacramento-San Joaquin Delta those quantities required to satisfy the obligations of the United States under" the exchange and purchase contracts. *Id.*

Article 12 of the water-supply contracts provides in pertinent part that Reclamation will "make all reasonable efforts to optimize delivery of the Contract Total subject to . . . [inter alia] the obligations of the United States under existing contracts, or renewals thereof, providing for water deliveries from the Project." *Id.* at 123. In Article 13, Reclamation agrees that "the Contracting Officer will use all reasonable means to guard against a Condition of Shortage." *Id.* at 124. Article 13(b) further provides that "[i]f there is a Condition of Shortage because of . . . actions taken by the Contracting Officer to meet legal obligations . . . then, except as provided in subdivision (a) of Article 19 of this Contract, no liability shall accrue against the United States . . . for any damage, direct or indirect, arising therefrom." *Id.* at 125. Article 19(a) provides, in turn, that "[w]here the terms of this Contract provide for actions to be based upon the opinion or determination of either party to this Contract, said terms shall not be construed as permitting such action to be predicated

upon arbitrary, capricious, or unreasonable opinions or determinations." *Id.* at 131-32.

IV. Plaintiffs' Legal Claims in this Case Regarding Water Year 2014

A. Breach of Water-Supply Contracts

In 2014, California was in the second year of a multi-year severe drought. *See Friant \Water Auth. v. Jewell*, 23 F. Supp. 3d 1130, 1140 (E.D. Cal. 2014). Plaintiffs allege that in that year, "the United States breached Plaintiffs' water-supply contracts by failing to make available to them the quantities required by Article 3 of their contracts." 2d Am. Compl. ¶ 46. They assert that during that year "there was a substantial quantity of San Joaquin River water available to the United States, stored and otherwise existing within the Friant Division, even though precipitation had been low during the winter." *Id.* According to Plaintiffs, "in breach of their permanent contracts, the United States failed and refused to make that water available to Plaintiffs (with the minor exception of small quantities of 'health and safety' and 'carry over water'), determining instead to release and deliver that water to the Exchange Contractors." *Id.* They seek an award of damages to compensate them for "the cost of purchasing replacement water for the quantities not made available by Reclamation, management and operations costs for 2014 (including the cost of delivering the water to the Exchange Contractors)," and other related costs "plus other damages as yet unascertained." *Id.* ¶ 50.

B. Fifth Amendment Taking

In addition to their breach of contract claim, Plaintiffs assert that the actions Reclamation took in 2014 resulted in a taking of their property without just compensation, in violation of the Fifth Amendment. They allege that "[e]ach municipal, industrial, and agricultural water user within Fresno and Plaintiff water agencies holds a property right in the beneficial use of the water and water rights of the San Joaquin River" and that the United States acquired such rights "to benefit the landowners and water users within the Friant Division of the Central Valley Project." *Id.* ¶ 31. Therefore, they allege, the United States' decision in 2014 to "appropriat[e] all of the water of the Friant Division of the [CVP] to satisfy what it determined to be a contractual requirement to provide th[e] water as substitute water" under the exchange contracts, *Id.* ¶ 32, resulted in a Fifth Amendment taking of their property, *id.* ¶ 34. "As a direct and proximate result of the United States' failure to pay just compensation for the water and water rights of the Friant Division it appropriated in 2014," Plaintiffs contend, they "have been damaged equal to the fair market value of the property appropriated, including compound interest from the date of taking, in an amount that will be proved at trial." *Id.* ¶ 36.

V. Previous District Court Suit

In 2014, thirteen of the plaintiffs in this litigation filed suit in the United States District Court for the Eastern District of California. *See* Compl., *Friant Water Auth. v. Jewell*, 23 F. Supp. 3d 1130 (E.D. Cal. 2014) (No. 1:14-cv-765);

1st Am. Compl., *Friant Water Auth. v. Jewell*, 23 F. Supp. 3d 1130 (E.D. Cal. 2014) (No. 1:14-cv-765).[8] In that case (as relevant here), the plaintiffs also alleged that Reclamation's 2014 water allocation decisions breached their water-supply contracts and violated the Fifth Amendment's Takings Clause. *Id.* ¶¶ 99-112. In addition, they claimed that Reclamation's water allocation decisions violated the Administrative Procedure Act. *Id.* ¶ 98.

On December 1, 2014, the district court denied the plaintiffs' motion to transfer the case to the Court of Federal Claims. It reasoned that it possessed jurisdiction over the breach of contract claims "to the extent [plaintiffs] request equitable relief available under the APA." *Friant Water Auth. v. Jewell*, No. 1:14-cv-765, 2014 U.S. Dist. LEXIS 166399, 2014 WL 6774019, at *12 (E.D. Cal. Dec. 1, 2014) (denying request to transfer but striking the request for damages). It declined to transfer the takings claim because it found that claim as presented to it "frivolous." It so found because the taking claim was "premised upon the underlying allegation that Reclamation failed to correctly implement provisions in the [Central Valley Project Improvement Act]," and, as the court noted, clear Federal

8. Plaintiffs that also participated in the earlier district court case are Arvin-Edison Water Storage District, Delano-Earlimart Irrigation District, Lindmore Irrigation District, Lindsay-Strathmore Irrigation District, Lower Tule River Irrigation District, Orange Cove Irrigation District, Porterville Irrigation District, Saucelito Irrigation District, Shafter-Wasco Irrigation District, Stone Corral Irrigation District, Tea Pot Dome Water District, Terra Bella Irrigation District, and Tulare Irrigation District.

Circuit precedent "bars takings claims premised upon the United States' violation of a statute." *Id.* (citing *Lion Raisins Inc. v. United States*, 416 F.3d 1356, 1370 (Fed. Cir. 2005)) (noting also that, "in a takings case, [the court] assume[s] that the underlying governmental action was *lawful*"). Thus, the district concluded that transferring the case to the Court of Federal Claims would "not be in the interests of justice." *Id.*

On December 18, 2014, plaintiffs voluntarily dismissed their claims in the district court pursuant to Rule 41(a)(1)(A)(i) of the Federal Rules of Civil Procedure. Notice of Voluntary Dismissal, *Friant Water Auth.*, No. 1:14-cv-765 (E.D. Cal. Dec. 18, 2014); *see also* Mem. Dec. & Order Re Pls.' Mot. to Transfer to Ct. of Federal Claims, *Friant Water Auth.*, No. 1:14-cv-765 (E.D. Cal. Jan. 5, 2015) (ordering that "all remaining claims against all remaining parties [be] dismissed without prejudice" and that the case be closed).

VI. The Present Suit

Plaintiffs filed the present action on October 5, 2016. The case was assigned to then-Judge (now Senior Judge) Mary Ellen Coster Williams. The original complaint was brought only by the City and the District Plaintiffs and it alleged a Fifth Amendment taking as the only cause of action. ECF No. 1. The government moved to dismiss the complaint pursuant to RCFC 12(b)(1) and (6). It contended that the plaintiffs lacked standing to pursue a Fifth Amendment Takings claim because they lacked the requisite property interest in the water they contended

the government had appropriated, and because they failed to otherwise adequately plead a takings claim. ECF No. 7.

Several months later, the District Intervenors and the Exchange Contractor Intervenors sought to intervene in the case on the side of the government. ECF Nos. 10, 25. Plaintiffs objected to the motions to intervene. ECF No. 40. The Court initially deferred a ruling on the motions to intervene pending its decision on the government's first motion to dismiss, *see* ECF No. 52, but subsequently granted the motion during a hearing held on November 6, 2018, Tr. of Show Cause Hr'g Held on Nov. 6, 2018, at 105:21-23, ECF No. 123.

The Court held oral argument on the government's first motion to dismiss on December 11, 2017. During that hearing the Court stated its intent to "defer ruling on the standing issue" and to deny the 12(b)(6) motion for the purpose of allowing further development of the record. Tr. of Oral Arg. Held on Dec. 11, 2017 at 110:17-20, ECF No. 58; *see also* Order at 1, ECF No. 56 (memorializing the ruling announced during oral argument).

On January 30, 2018, Plaintiffs filed an amended complaint with leave of the court, ECF No. 65, to which the government filed an answer on February 26, 2018, ECF No. 66. On May 31, 2018, the Court issued a show cause order directing Plaintiffs to demonstrate: 1) "[w]hy the water rights at issue are not exclusively derived from contract as a matter of law"; and 2) "[w]hat, if any, property rights exist independently of contractual rights."

Order, ECF No. 76. After receiving responses from the parties, the Court held a show cause hearing on November 6, 2018 during which it directed the parties to submit a proposal for further proceedings in the case. Tr. of Show Cause Hr'g Held on Nov. 6, 2018, at 105:24-106:15.

After receiving a proposal from all parties (who could not agree on a path forward), the Court granted the government's request to stay discovery and issued a scheduling order to govern future proceedings. ECF No. 124. In accordance with the Court's order, Plaintiffs filed a second amended complaint on December 18, 2018, in which they added a claim for breach of contract. *See* 2d Am. Compl. ¶¶ 38-50.

The government and Defendant-Intervenors filed the motions to dismiss presently before the Court on May 15, 2019. The motions were fully briefed as of July 1, 2019. ECF Nos. 144-146. Oral argument was initially scheduled for November 18, 2019, but was rescheduled at the request of the government until January 9, 2020. ECF No. 154.

When the parties convened for oral argument, Senior Judge Coster Williams announced her recusal on the basis of a recently developed conflict. *See* ECF Nos. 157, 160. The case was transferred to the undersigned on January 22, 2020. ECF No. 158. A status conference was held on February 3, 2020, ECF No. 161. An oral argument on the pending motions was scheduled, ECF No. 162, and held on March 5, 2020.

Appendix B

DISCUSSION

I. Contract Claims

A. Motions to Dismiss for Lack of Subject-Matter Jurisdiction

As noted, Plaintiffs allege that in 2014 the government breached the water-supply contracts by not making available to the City and the District Plaintiffs the quantities of water required under Article 3(a). The Intervenor Exchange Contractors have moved to dismiss Plaintiffs' contract claims under RCFC 12(b)(1) on the theory that Plaintiffs seek declaratory relief that lies beyond the Court's jurisdiction. Mem. of Points & Auths. in Support of Def.-Intervenor San Joaquin River Exchange Contractors Water Auths.' Mot. to Dismiss ("Intervenor Exchange Contractors' Mem."), ECF No. 137-1. The District Intervenors have moved to dismiss the claims of the Individual Plaintiffs for lack of jurisdiction for another reason—they argue that the Individual Plaintiffs are not in privity of contract with the government and are not third-party beneficiaries to any contract. *See* Mot. to Dismiss & Mem. in Support of Mot. By San Luis & Delta-Mendota Water Auth. et al. ("District Intervenor's Mem.") at 1-2, ECF No. 138.

For the reasons set forth below, the Court concludes that the jurisdictional objection posed by the Intervenor Exchange Contractors lacks merit. On the other hand, and also for reasons set forth below, the Court finds persuasive the arguments of the government and the

District Intervenors that the Individual Plaintiffs lack standing to pursue their breach of contract claims because they are not third-party beneficiaries of the water-supply contracts.

1. The Motion of the Intervenor Exchange Contractors

When ruling on a motion to dismiss for lack of subject-matter jurisdiction, the Court "consider[s] the facts alleged in the complaint to be true and correct." *Reynolds v. Army & Air Force Exch. Serv.*, 846 F.2d 746, 747 (Fed. Cir. 1988) (citing *Scheuer v. Rhodes*, 416 U.S. 232, 236, 94 S. Ct. 1683, 40 L. Ed. 2d 90 (1974)). "If a motion to dismiss for lack of subject-matter jurisdiction, however, challenges the truth of the jurisdictional facts alleged in the complaint, the [court] may consider relevant evidence in order to resolve the factual dispute." *Id.*

Under the Tucker Act, 28 U.S.C. § 1491(a)(1), this Court has jurisdiction "to render judgment upon any claim against the United States founded . . . upon any express or implied contract with the United States, or for liquidated or unliquidated damages in cases not sounding in tort." Plaintiffs' claims seeking damages for the alleged breach of the water-supply contracts, fall squarely within this grant of jurisdiction. Nonetheless, the Intervenor Exchange Contractors contend that this Court lacks jurisdiction to decide those claims because doing so would require the Court to issue a declaratory judgment regarding the appropriate interpretation of the exchange contracts, and the scope of the Exchange

Contractors' rights under those agreements. Intervenor Exchange Contractors' Mem. at 16-22. As the Intervenor Exchange Contractors point out, this Court lacks general jurisdiction to issue declaratory judgments. *See Nat'l Air Traffic Controllers Ass'n v. United States*, 160 F.3d 714, 716-17 (Fed. Cir. 1998).

The Intervenor Exchange Contractors' contentions lack merit. Plaintiffs do not request a declaratory judgment regarding the proper interpretation of the exchange contracts. They seek an award of damages for breach of the water-supply contracts, to which the City and the District Plaintiffs are parties. The fact that the Court may be required to interpret the exchange contracts in the course of adjudicating Plaintiffs' claims that the water-supply contracts have been breached, does not change the fundamental character of this action. The Intervenor Exchange Contractors' motion to dismiss under RCFC 12(b)(1) is therefore denied.

2. The Motions of the Government and the District Intervenors

As noted, the District Intervenors have also filed a motion to dismiss under RCFC 12(b)(1). They contend that the breach of contract claims brought by the Individual Plaintiffs must be dismissed because the Individual Plaintiffs are not parties to any contract with the government and are not third-party beneficiaries of any such agreement. The government makes the same argument in seeking to dismiss the claims of the Individual Plaintiffs pursuant to RCFC 12(b)(6) for failure

to state a claim. *See* Def.'s Mot. at 32-35. The Court agrees that the Individual Plaintiffs lack standing to pursue breach of contract claims and therefore dismisses those claims for lack of subject matter jurisdiction pursuant to RCFC 12(b)(1).

"A plaintiff must be in privity with the United States to have standing to sue the sovereign on a contract claim." *Sullivan v. United States*, 625 F.3d 1378, 1379-80 (Fed. Cir. 2010) (citing *Anderson v. United States*, 344 F.3d 1343, 1351 (Fed. Cir. 2003)). This requirement notwithstanding, the Federal Circuit has recognized "limited exceptions to that general rule when a party standing outside of privity 'stands in the shoes of a party within privity.'" *Id.* at 1380 (quoting *First Hartford Corp. Pension Plan & Trust v. United States*, 194 F.3d 1279, 1289 (Fed. Cir. 1999)). "A nonparty becomes legally entitled to a benefit promised in a contract . . . only if the contracting parties so intend." *G4S Tech. LLC v. United States*, 779 F.3d 1337, 1340 (Fed. Cir. 2015) (quoting *Astra USA, Inc. v. Santa Clara Cty.*, 563 U.S. 110, 117, 131 S. Ct. 1342, 179 L. Ed. 2d 457 (2011). Such intent may be either express or implied. *Id.* (citing *Glass v. United States*, 258 F.3d 1349, 1354 (Fed. Cir. 2001)). In order to confer third-party beneficiary status, the benefit to the third party must be "direct." *Id.*; *see also Pac. Gas & Elec. Co. v. United States*, 838 F.3d 1341, 1361 (Fed. Cir. 2016) (quoting *Flexfab, L.L.C. v. United States*, 424 F.3d 1254, 1259 (Fed. Cir. 2005)) ("To demonstrate third-party beneficiary status [] a party must prove that 'the contract not only reflects the express or implied intention to benefit the party, but that it reflects an intention to benefit the party directly.'").

It is undisputed that the Individual Plaintiffs are not parties to any agreement with Reclamation. While the Individual Plaintiffs certainly benefit from the water-supply contracts between Reclamation and the District Plaintiffs, "[t]hird-party beneficiary status is not established 'merely because [a] contract would benefit [a party].'" *Pac. Gas & Elec. Co. v. United States*, 838 F.3d at 1361 (quoting *Fed. Deposit Ins. Corp. v. United States*, 342 F.3d 1313, 1319 (Fed. Cir. 2003)); *see also Klamath Water Users Protective Ass'n v. Patterson*, 204 F.3d 1206, 1211 (9th Cir. 1999), *opinion amended on denial of reh'g*, 203 F.3d 1175 (9th Cir. 2000) (citing Restatement (Second) of Contracts § 313 (Am. Law Inst. 1981)) ("Parties that benefit from a government contract are generally assumed to be incidental beneficiaries, and may not enforce the contract absent a clear intent to the contrary."); Restatement (Second) of Contracts § 313 cmt. a ("Government contracts often benefit the public, but individual members of the public are treated as incidental beneficiaries unless a different intention is manifested.").

Plaintiffs identify no language in the water-supply contracts that evinces—either expressly or implicitly—an intent to confer third-party beneficiary status on the Individual Plaintiffs, much less a clear one. Here, as in *Klamath Water Users*, "[a]lthough the Contract operates to the Irrigators' benefit by impounding irrigation water, and was undoubtedly entered into with the Irrigators in mind, to allow them intended third-party beneficiary status would open the door to all users . . . achieving similar status, a result not intended by the Contract." 204 F.3d at 1212; *see also Smith v. Cent. Ariz. Water*

Conserv. Dist., 418 F.3d 1028, 1034 (9th Cir. 2005) (finding that landowners were not third-party beneficiaries to a reclamation contract); *Orff v. United States*, 358 F.3d 1137, 1144 (9th Cir. 2004), *aff'd on other grounds*, 545 U.S. 596, 125 S. Ct. 2606, 162 L. Ed. 2d 544 (2005) (same).

Further, as the court of appeals has observed, "[f]or determination of contractual and beneficial intent when . . . the contract implements a statutory enactment, it is appropriate to inquire into the governing statute and its purpose." *Roedler v. Dep't of Energy*, 255 F.3d 1347, 1352 (Fed Cir. 2001). Here, "the governing statute restricts Reclamation's contracting authority to extend only to irrigation districts and other such entities organized under state law, not individual water users." *Stockton E. Water Dist. v. United States*, 75 Fed. Cl. 321, 350, *modified in part*, 76 Fed. Cl. 470 (2007) (citing 43 U.S.C. § 423e and also observing that "th[e] governing statutes further support defendant's argument that the [cities that secure water from the water districts] should not be granted third-party beneficiary status, as the intent of Congress would appear to limit the power of Reclamation to enter into contracts with such entities").

Further, in this case, as in *Pacific Gas and Electric Co.*, "there is no identifiable benefit flowing from [Reclamation] to the particular [plaintiffs]." 838 F.3d at 1362. The contract between Reclamation and the Districts was not "intended to benefit them specifically, independent of all other market participants." *Id.*

The Individual Plaintiffs' reliance on *H.F. Allen Orchards v. United States*, 749 F.2d 1571 (Fed. Cir. 1984)

for a contrary proposition is unavailing. In that case, the appellants were members of the Yakima Project Irrigation District. *Id.* at 1573. They alleged that Reclamation breached an obligation to accurately forecast the amount of water it intended to supply to irrigation districts, which they claimed was imposed by contracts between Reclamation and the districts that were incorporated into a consent decree. The court of appeals affirmed the Claims Court's determination that Reclamation did not undertake such an obligation, but disagreed with its conclusion that the appellants could not sue as third-party beneficiaries to the district-Bureau contracts. *Id.* at 1572-73. It found the landowners entitled to assert third-party beneficiary status because, among other reasons, it was undisputed that they had a property right to the water under *Fox v. Ickes*, 137 F.2d 30, 78 U.S. App. D.C. 84 (D.C. Cir. 1943), so that "the Bureau was obligated to distribute the available water according to priorities established under State of Washington law." *Id.* at 1575.

The court of appeals' observations regarding the appellants' third-party beneficiary status was arguably dicta. But in any event, the would-be third-party beneficiaries in *H.F. Allen Orchards* had property interests in the water itself. Thus, as the court of appeals observed in *Pacific Gas and Electric Co.*, in *H.F. Allen Orchards* "a specific identifiable benefit flowed from the government to each farmer under the consent decree." *Pacific Gas & Electric Co.*, 838 F.3d at 1362. For the reasons set forth below, the Individual Plaintiffs here do not have property interests in the water that is the subject of the contracts between Reclamation and the

District Plaintiffs or Reclamation and the City. *H.F. Allen Orchards* is therefore inapposite.

In short, third-party beneficiary status imparts an "exceptional privilege," which is why the court of appeals has "cautioned that the privilege of third-party beneficiary status 'should not be granted liberally.'" *G4S Tech. LLC*, 779 F.3d at 1340 (quoting *Flexfab, L.L.C.*, 424 F.3d at 1259). The Court agrees with the government and District Intervenors that there is nothing in the water-supply contracts that vests the Individual Plaintiffs with the right to assert that exceptional privilege here. Their breach of contract claims must accordingly be dismissed based on lack of standing.

B. Motion to Dismiss for Failure to State a Claim

The government and the Exchange Contractor Intervenors have each filed motions to dismiss the remaining breach of contract claims (brought by the City and the District Plaintiffs) under RCFC 12(b)(6). For the reasons that follow, the Court concludes that those motions lack merit.

1. Standards for Motion to Dismiss Under RCFC 12(b)(6)

A complaint may be dismissed under RCFC 12(b)(6) "when the facts asserted by the claimant do not entitle him to a legal remedy." *Lindsay v. United States*, 295 F.3d 1252, 1257 (Fed. Cir. 2002). When considering a motion to dismiss for failure to state a claim upon which relief

may be granted, the Court "must accept as true all the factual allegations in the complaint, and must indulge all reasonable inferences in favor of the non-movant." *Sommers Oil Co. v. United States*, 241 F.3d 1375, 1378 (Fed. Cir. 2001) (citations omitted). The Court, however, is not required to "accept inferences drawn by plaintiffs if such inferences are unsupported by the facts set out in the complaint. Nor must the court accept legal conclusions cast in the form of factual allegations." *Kowal v. MCI Communications Corp.*, 16 F.3d 1271, 1276, 305 U.S. App. D.C. 60 (D.C. Cir. 1994) (citing *Papasan v. Allain*, 478 U.S. 265, 286, 106 S. Ct. 2932, 92 L. Ed. 2d 209 (1986)).

"To avoid dismissal" under RCFC 12(b)(6) "a party need only plead 'facts to state a claim to relief that is plausible on its face,' with facts sufficient to nudge 'claims across the line from conceivable to plausible.'" *TrinCo Inv. Co. v. United States*, 722 F.3d 1375, 1380 (Fed. Cir. 2013) (quoting *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 570, 127 S. Ct. 1955, 167 L. Ed. 2d 929 (2007)). "A claim is plausible on its face when 'the plaintiff pleads factual content that allows the court to draw the reasonable inference that the defendant is liable for the misconduct alleged.'" *Id.* (quoting *Ashcroft v. Iqbal*, 556 U.S. 662, 129 S. Ct. 1937, 173 L. Ed. 2d 868 (2009)).

2. Contract Claims of the City and the District Plaintiffs

As noted, Plaintiffs allege that in 2014 the government breached the water-supply contracts by not making available to them the quantities of water specified in

Article 3(a) of those contracts. They assert that—notwithstanding the drought—the federal government had a substantial quantity of San Joaquin River water available, stored, and otherwise existing in the Friant Division. 2d Am. Compl. ¶ 46. But instead of fulfilling its obligations to make that water available to Plaintiffs, they allege, Reclamation released and delivered the water to the Exchange Contractors. *Id.*

The government contends that the complaint nonetheless fails to state a claim for breach of contract because, in its view, Plaintiffs' allegations do not take sufficient account of Article 13(b) of the water delivery contracts, which the government contends "immunize[s] [it] from liability for conditions of shortage caused by efforts to meet legal obligations." Def.'s Mot. to Dismiss the 2d Am. Compl. ("Def.'s Mot.") at 28, ECF No. 136. In addition, the government contends that Plaintiffs have failed to put forth facts sufficient to support their breach claim. *Id.* at 29-30. The Intervenor Exchange Contractors further argue that Plaintiffs' complaint fails to state a claim because it does not allege that it was arbitrary and capricious for the agency to determine that its obligations under the exchange contracts precluded it from meeting its obligations under the water-supply contracts, as allegedly required to establish a breach of the latter. The Court finds these arguments unpersuasive.

Article 13 of the water-supply contracts is entitled "Constraints on the Availability of Water." Subsection (b) provides that "[i]f there is a Condition of Shortage because of . . . actions taken by the Contracting Officer to meet

legal obligations . . . then, except as provided in subdivision (a) of Article 19 of this Contract, no liability shall accrue against the United States . . . for any damage, direct or indirect, arising therefrom." 2d Am. Compl. Ex. 5, at 125, ECF No. 128-6. Article 19(a) provides in turn that "[w]here the terms of this Contract provide for actions to be based upon the opinion or determination of either party to this Contract, said terms shall not be construed as permitting such action to be predicated upon arbitrary, capricious, or unreasonable opinions or determinations." *Id.* at 131-32.

For two independent reasons, the Court is not persuaded by the contentions of the government and the Exchange Contractor Intervenors that Plaintiffs have failed to state a claim for breach of contract because their complaint does not take sufficient account of the "immunity" provided to Reclamation under Article 13(b). For one thing, the court of appeals has characterized similar "immunity provisions" as establishing affirmative defenses for which the government bears the burden of proof. *See Stockton E. Water Dist.*, 583 F.3d at 1360 (finding that the provision in a water-supply contract that permits the government to escape liability where the water shortage caused by drought or other reasons beyond the control of the contracting officer supplies an affirmative defense that must be proven by the government). Plaintiffs are not required to negate affirmative defenses in their complaints. *ABB Turbo Sys. AG v. Turbousa, Inc.*, 774 F.3d 979, 985 (Fed. Cir. 2014) (citing *La Grasta v. First Union Sec., Inc.*, 358 F.3d 840, 845-46 (11th Cir. 2004)).

Further, and in any event, the complaint does in fact take account of the provisions the government and

the Intervenor Exchange Contractors cite, and contains sufficient factual allegations to survive a 12(b)(6) motion to dismiss. Thus, read together, Articles 13(b) and 19(a) shield the government from liability for failing to meet its obligations under Article 3 in cases where the contracting officer has reasonably determined that the water must instead be provided to the Exchange Contractors to meet Reclamation's obligations to them. While Plaintiffs do not use the words "arbitrary," "capricious," or "unreasonable," they do allege that "the San Joaquin River water that Reclamation released and delivered to the Exchange Contractors in 2014 was made at a time, in a manner, and in an amount substantially greater than what the Exchange Contractors were entitled to under [Article 4 of] the Exchange contract." 2d Am. Compl. ¶ 48.[9] They further allege that the United States "fail[ed] and refus[ed] to make Friant Division water available to Plaintiffs, over and above the flows to which the Exchange Contractors were entitled under the terms of the Exchange Contract." *Id.* ¶ 49.

For purposes of ruling on a motion to dismiss under RCFC 12(b)(6), these allegations are sufficient to address the immunity provisions, including the "arbitrary and capricious" requirement. They also state claims for a breach of Article 3(n) of the water-supply contract, which

9. Article 4 of the exchange contracts applies "[w]henever the United States is temporarily unable for any reason or any cause to deliver to the [Exchange Contractors] substitute water from the Delta-Mendota Canal." 2d Am. Compl. Ex. 3, at 8. It specifies the quantities and rates of San Joaquin River water that Reclamation is required to supply to the Exchange Contractors.

provides that "[t]he United States agrees that it will not deliver to the Exchange Contractors thereunder the water of the San Joaquin River unless and until required by the terms of said contract." 2d Am. Compl. Ex. 5, at 24; *see also id.* at 48 (providing in pertinent part that Reclamation will "make all reasonable efforts to optimize delivery of the Contract Total subject to . . . [inter alia] the obligations of the United States under existing contracts, or renewals thereof, providing for water deliveries from the Project").

In short, Plaintiffs have set forth sufficient facts to defeat the government's motion to dismiss. While the allegations contain less specificity than the government would like, much of the detail the government would require Plaintiffs to supply is in the exclusive possession of the government and the Exchange Contractors. Therefore, the motions of the government and the Exchange Contractor Intervenors to dismiss the City and the District Plaintiffs' breach of contract claims under RCFC 12(b)(6) must be denied.

II. Takings Claims

The City, the District Plaintiffs, and the Individual Plaintiffs allege that they each "hold[] a property right in the beneficial use of the water and water rights of the San Joaquin River which the United States acquired to benefit the landowners and water users within the Friant Division of the Central Valley Project." 2d Am. Compl. ¶ 31. When Reclamation decided to use the water of the Friant Division of the Central Valley Project to provide "substitute water" to the Exchange Contractors, Plaintiffs

contend, it appropriated Plaintiffs' water rights thereby effecting a Fifth Amendment taking of their property for which they are owed just compensation. *Id.* ¶¶ 32, 34.

The government and the Intervenor Exchange Contractors have moved to dismiss all of Plaintiffs' takings claims for lack of standing under RCFC 12(b)(1). They contend that none of the Plaintiffs possess extra-contractual water rights under state law based merely on their application of CVP water to beneficial purposes. The District Intervenors point to certain provisions of the California Water Code as an additional ground to dismiss the takings claims of the Individual Plaintiffs.

For the reasons set forth below, the Court concludes that—as a matter of law—none of the Plaintiffs possesses a property interest in the water supplied to them by or through Reclamation. Their takings claims must therefore be dismissed for lack of standing.

The Fifth Amendment to the United States Constitution provides that "private property" shall not be "taken for public use, without just compensation." U.S. Const. amend. V. To establish entitlement to compensation under the Takings Clause, a plaintiff must show: 1) that he has "a property interest for purposes of the Fifth Amendment," *Members of the Peanut Quota Holders Ass'n v. United States*, 421 F.3d 1323, 1330 (Fed. Cir. 2005) (citing *Conti v. United States*, 291 F.3d 1334, 1339 (Fed. Cir. 2002)), and 2) that the government's actions "amounted to a compensable taking of that property interest." *Am. Pelagic Fishing Co. v. United States*, 379 F.3d 1363, 1372 (Fed. Cir. 2004).

Appendix B

The Federal Circuit has recognized that the government's physical appropriation of water to which a plaintiff has valid rights under state law may constitute a physical taking under the Fifth Amendment. *See, e.g., Casitas Mun. Water Dist. v. United States*, 543 F.3d 1276, 1296 (Fed. Cir. 2008) (determining that a physical takings analysis was appropriate where the government "directly appropriate[s] . . . water for its own use—for the preservation of an endangered species"); *Washoe Cty., Nev. v. United States*, 319 F.3d 1320, 1326 (Fed. Cir. 2003) ("In the context of water rights, courts have recognized a physical taking where the government has physically diverted water for its own consumptive use or decreased the amount of water accessible by the owner of the water rights."). In such cases, state law "define[s] the dimensions of the requisite property rights for purposes of establishing a cognizable taking." *Klamath Irr. Dist. v. United States*, 635 F.3d 505, 511 (Fed. Cir. 2011).

California law recognizes both riparian and appropriative water rights. Riparian rights "are those that a person whose land is bounded or traversed by a natural stream has to the use of the stream or water." *Westlands Water Dist. I*, 153 F. Supp. 2d at 1142 n.10 (citing 62 Cal. Jur. 3d., Water § 65 at 101 (1981 & 2000 Supp.)). Plaintiffs do not contend that they possess riparian rights to the water provided to them by Reclamation.

An appropriative right "confers upon one who actually diverts and uses water the right to do so provided that water is used for reasonable and beneficial uses and is surplus to that used by riparians or earlier appropriators."

SWRCB, 227 Cal. Rptr. at 168. As of 1914, the only way to acquire appropriative rights to water in California has been by invoking the administrative scheme established under California law. *People v. Shirokow*, 26 Cal. 3d 301, 162 Cal. Rptr. 30, 605 P.2d 859, 864 (Cal. 1980); *SWRCB*, 227 Cal. Rptr. at 168; *see also* Cal. Water Code §§ 1201, et. seq. Under that scheme, "an application for appropriative rights must now be made to the [SWRCB] for a permit authorizing construction of necessary water works and the taking and use of a specified quantity of water." *SWRCB*, 227 Cal. Rptr. at 168-69. If an appropriative water right is recognized, the permit holder may take and use the water subject to the terms of the permit. *Id.*

Plaintiffs, of course, have not sought or received permits to use the water to which they claim a right in their complaint. To the contrary, Reclamation is the owner of permits that allow it to draw upon the waters of the San Joaquin, subject to the vested priority rights of the Exchange Contractors. Plaintiffs argue, however, that Reclamation has only "nominal" title to the water, and that the water rights actually belong to the City and the District Plaintiffs, as well as their customers, the Individual Plaintiffs, by virtue of their application of the project water to beneficial use. Pls.' Consolidated Resp. to Mot. to Dismiss ("Pls.' Resp.") at 44, ECF No. 141.

Plaintiffs find support for this theory in language contained in SWRCB Decision No. D-935, which granted Reclamation its permits to draw water from the San Joaquin River for CVP purposes. In fact, they contend that, under that decision, "[t]he City, the Districts, and the

individual Plaintiffs within their District boundaries hold state-granted water rights in the beneficial use of Friant Division water." *Id.* at 7. They rely upon language in the decision stating that "the United States holds all water rights acquired for project purposes in trust for project beneficiaries who by use of the water on the land will become the true owners of the perpetual rights to continue such use, subject to noted exceptions." *Id.* at 8 (citing Cal. SWRCB Decision No. D-935 at 99). Further, Plaintiffs cite the board's statement that "[t]he right to the beneficial use of water for irrigation purposes, except where water is distributed to the general public by a private agency in charge of a public use, shall be appurtenant to the land on which said water shall be applied, subject to continued beneficial use." *Id.* at 50 (citing Cal. SWRCB Permit 11886 at 14-15 (June 2, 1959)).

While the Court agrees that this language is supportive of Plaintiffs' arguments, their reliance upon it is misplaced. Fourteen years ago, in SWRCB Decision D-1641 (March 15, 2000), *aff'd, State Water Res. Control Bd. Cases*, 136 Cal. App. 4th 674, 39 Cal. Rptr. 3d 189 (Cal. Ct. App. 2006), the SWRCB rejected the theory that the United States is merely a trustee of the water rights it secured for project purposes, while the plaintiff in that proceeding (the Westlands Water District) as well as other consumers of the water were the true owners of those rights. It confirmed that "[t]itle to the water rights under the permits is held by [Reclamation]." Cal. SWRCB Decision No. D-1641 at 127 (Mar. 15, 2000), https://www.waterboards.ca.gov/waterrights/board_decisions/adopted_orders/decisions/d1600_d1649/

wrd1641_1999dec29.pdf). Further, it explained that "even if water use is appurtenant to the enjoyment of a particular property, that does not mean that the owner of the property is the water right holder." *Id.* at 128. "[T]he permit language," the SWRCB observed, "does not dictate the quantity of water to be delivered to any end user." *Id.* "In effect," the Board found, "making the water right appurtenant to the land insofar as it is used for irrigation is a designation of a place of use of the water." *Id.*[10]

Further, as the SWRCB observed in No. D-1641, Plaintiffs' claimed ownership of water rights from use of irrigation water is not supported by federal law. *Id.* at 129 (citing *Israel v. Morton*, 549 F.2d 128, 132 (9th Cir. 1977)). To the contrary, Plaintiffs' theory—that the beneficial use of CVP project water by water districts and irrigators creates a property interest that exists independently of their contracts—has been repeatedly rejected by state and federal courts. The courts have also rejected the argument that Reclamation lacks any substantial interest in CVP water because it does not itself apply that water to beneficial use.

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10. Plaintiffs contend that in *State Water Resources Control Board Cases*, the California court of appeals reversed this aspect of D-1641. Pls.' Resp. at 51-52 (citing 136 Cal. App. 4th 674, 39 Cal. Rptr. 3d 189, 293 (Cal. Ct. App. 2006)). But the passage of the court's decision that they cite in support of this contention does not appear to address in any way the Board's rejection of the argument that irrigation districts, and not Reclamation, are the owners of water rights that arise out of their beneficial use of project water.

Thus, the courts have explained that project water is of a different legal character from water that users draw directly from streams or rivers such as the San Joaquin. It is different because project water has been diverted from the River and then stored, rediverted, and delivered through federal Reclamation facilities. As the Ninth Circuit observed in *Israel v. Morton*, 549 F.2d at 132, "[p]roject water . . . would not exist but for the fact that it has been developed by the United States." For that reason, "[i]t is not there for the taking (by the landowner subject to state law), but for the giving by the United States." *Id.* Further, "[t]he terms upon which it can be put to use, and the manner in which rights to continued use can be acquired are for the United States to fix." *Id.* at 132-33; *see also Del Puerto Water Dist. v. U.S. Bureau of Reclamation*, 271 F. Supp. 2d 1224, 1250 (E.D. Cal. 2003) (same); *San Luis Unit Food Producers v. United States*, 772 F. Supp. 2d 1210, 1244 (E.D. Cal. 2011), *aff'd*, 709 F.3d 798 (9th Cir. 2013) ("[C]ontracts for federal water service from Irrigation Districts do not create continuing 'water rights' that are enforceable, except in strict compliance with identified contracts."); *Cty. of San Joaquin v. State Water Res. Control Bd.*, 54 Cal. App. 4th 1144, 63 Cal. Rptr. 2d 277, 285 n.12 (Cal. Ct. App. 1997) (characterizing as "highly misleading" the appellants' arguments that Reclamation "'holds only legal title to the water' and 'has no substantial interest in the water'" ruling that it has "appropriative water rights in the Central Valley Project," that it "owns the CVP facilities, has operational control and responsibilities relating to flood control, water supply, power generation, and fish and wildlife mitigation," and that it "has substantial property rights in its water

rights permits, whereby the Bureau diverts, transports, and stores water"); *Ivanhoe Irr. Dist. v. All Parties and Persons*, 53 Cal. 2d 692, 3 Cal. Rptr. 317, 350 P.2d 69, 75 (Cal. 1960) (recognizing that project water "belongs to or by appropriate action may be secured by the United States," and that "[i]n a very real sense it is or will become the property of the United States"); *Westlands Water Dist. I*, 153 F. Supp. 2d at 1149 (observing that "[t]he United States holds all water rights to CVP water" and that "[t]o access CVP water, water users such as [the plaintiff irrigation districts] must enter into water service contracts with the United States").

The cases upon which Plaintiffs rely to support their arguments are inapposite. A number of them involve takings claims in the context of a plaintiff's assertion of riparian rights. In *Dugan v. Rank*, 372 U.S. 609, 83 S. Ct. 999, 10 L. Ed. 2d 15 (1963), for example, the taking was of plaintiff's right "to the continued flow in the San Joaquin [River] and to its use as it flows along the landowner's property." *Id.* at 625. In *Gerlach Live Stock Co.*, 339 U.S. 725, 70 S. Ct. 955, 94 L. Ed. 1231, 116 Ct. Cl. 895 (1950), the plaintiff also held riparian water rights that pre-dated the construction of the Friant Dam.

In other cases Plaintiffs cite, the landowners had appropriative rights secured by permits. In *Ickes v. Fox*, the landowners were required under their contracts with Reclamation to initiate the appropriation of water rights under Washington state law prior to the construction of the Yakima Project. 300 U.S. 82, 89-90, 57 S. Ct. 412, 81 L. Ed. 525, (1937). In *Casitas Mun. Water District v.*

United States, 708 F.3d 1340, 1343 (Fed. Cir. 2013), the contract with the United States required the water district to secure appropriative rights by obtaining permits. Similarly, in *H.F. Allen Orchards v. United States*, it was undisputed that the plaintiff irrigators were the holders of the water rights and the focus of the court of appeals' decision was on their breach of contract claim. In none of these cases did the courts suggest that a plaintiff irrigation district or landowner could assert a property right that arose exclusively out of their use of project water supplied through a contract with the federal government.

Plaintiffs' reliance on *Nebraska v. Wyoming*, 325 U.S. 589, 65 S. Ct. 1332, 66 S. Ct. 1, 89 L. Ed. 1815 (1945), and *Nevada v. United States*, 463 U.S. 110, 103 S. Ct. 2906, 77 L. Ed. 2d 509 (1983), is also unavailing. As the court explained in *San Luis*, 772 F. Supp. 2d at 1244, in both of those cases (as in *Ickes*) "the contracts between the United States and the landowners directly provided that the landowners either would take ownership of the water right itself, or at the very least would possess a contractual right to a fixed volume of water." Neither is true in this case. The Individual Plaintiffs are not parties to the contracts. And the contracts do not provide for the City or the District Plaintiffs to take any ownership of water rights; nor do they entitle them to a fixed volume of water. To the contrary, the contracts explicitly recognize that the contractual rights of the City and the District Plaintiffs are subordinate to the Exchange Contractors' vested water rights.

In short, none of these cases stands for the proposition that mere beneficial use of project water confers rights

independent of those provided under contracts with Reclamation. Plaintiffs cannot assert property rights greater than those secured through their contracts, which give a priority to the Exchange Contractors. Indeed, as the district court observed in *Westlands Water District I*, "[t]he argument that a last-in-time taker of a benefit," like Plaintiffs, "can impair the rights of a first-in-time contributor who made the benefit possible," i.e., the Exchange Contractors, "defies logic and the fifty-year CVP history." 153 F. Supp. 2d at 1177.

The Court has carefully considered Plaintiffs' remaining arguments in support of their claimed water rights and finds them without merit. While the Court is not bound by the decisions of the Ninth Circuit or the district courts in California, it finds those decisions, but not Plaintiffs' efforts to distinguish them, persuasive. Therefore, it concludes that Plaintiffs have failed to establish their standing to pursue takings claims based on Reclamation's actions.[11]

CONCLUSION

On the basis of the foregoing, the motions to dismiss of the government and the intervenors on its side are

11. Given the Court's determination that none of the Plaintiffs have established that they possess water rights under California law, the Court does not reach the issue of whether collateral estoppel applies to the takings claims brought by some of the District Plaintiffs. Nor does it address the arguments made by the District Intervenors concerning whether the takings claims of the Individual Plaintiffs are precluded by certain provisions of the California Water Code.

GRANTED-IN-PART and **DENIED-IN-PART**. The breach of contract claims of the Individual Plaintiffs (Loren Booth LLC, Matthew J. Fisher, Julia K. Fisher, Hronis Inc., Clifford R. Loeffler, Maureen Loeffler, Douglas Phillips, and Caralee Phillips) are **DISMISSED without prejudice** for lack of standing. The takings claims of all Plaintiffs are similarly **DISMISSED without prejudice** pursuant to RCFC 12(b)(1) for lack of standing.

The parties shall file a joint status report within thirty days, proposing a schedule for proceedings going forward, including discovery.

IT IS SO ORDERED.

/s/ Elaine D. Kaplan
ELAINE D. KAPLAN
Judge

APPENDIX C — ORDER DENYING COMBINED PETITION FOR PANEL REHEARING AND REHEARING EN BANC, U.S. COURT OF APPEALS FOR THE FEDERAL CIRCUIT, *CITY OF FRESNO, ET AL. V. UNITED STATES, ET AL.*, NO. 2022-1994 (APR. 9, 2025)

UNITED STATES COURT OF APPEALS
FOR THE FEDERAL CIRCUIT

2022-1994

CITY OF FRESNO, ARVIN-EDISON WATER STORAGE DISTRICT, CHOWCHILLA WATER DISTRICT, DELANO-EARLIMART IRRIGATION DISTRICT, EXETER IRRIGATION DISTRICT, IVANHOE IRRIGATION DISTRICT, LINDMORE IRRIGATION DISTRICT, LINDSAY-STRATHMORE IRRIGATION DISTRICT, LOWER TULE RIVER IRRIGATION DISTRICT, ORANGE COVE IRRIGATION DISTRICT, PORTERVILLE IRRIGATION DISTRICT, SAUCELITO IRRIGATION DISTRICT, SHAFTER-WASCO IRRIGATION DISTRICT, SOUTHERN SAN JOAQUIN MUNICIPAL UTILITY DISTRICT, STONE CORRAL IRRIGATION DISTRICT, TEA POT DOME WATER DISTRICT, TERRA BELLA IRRIGATION DISTRICT, TULARE IRRIGATION DISTRICT, LOREN BOOTH LLC, MATTHEW J. FISHER, JULIA K. FISHER, HRONIS INC., CLIFFORD R. LOEFFLER, MAUREEN LOEFFLER, DOUGLAS PHILLIPS, CARALEE PHILLIPS

Plaintiffs-Appellants,

v.

Appendix C

UNITED STATES, SAN LUIS & DELTA-MENDOTA WATER AUTHORITY, SANTA CLARA VALLEY WATER DISTRICT, SAN LUIS WATER DISTRICT, WESTLANDS WATER DISTRICT, GRASSLAND WATER DISTRICT, JAMES IRRIGATION DISTRICT, BYRON BETHANY IRRIGATION DISTRICT, DEL PUERTO WATER DISTRICT, SAN JOAQUIN RIVER EXCHANGE CONTRACTORS WATER AUTHORITY, CENTRAL CALIFORNIA IRRIGATION DISTRICT, FIREBAUGH CANAL WATER DISTRICT, SAN LUIS CANAL COMPANY, COLUMBIA CANAL COMPANY,

Defendants-Appellees.

Appeal from the United States Court of Federal Claims in No. 1:16-cv-01276-AOB, Judge Armando O. Bonilla.

Filed April 9, 2025

ON PETITION FOR PANEL REHEARING AND REHEARING EN BANC

Before Moore, *Chief Judge*, Lourie, Clevenger[1], Dyk, Prost, Reyna, Taranto, Chen, Stoll, Cunningham, and Stark, *Circuit Judges*.[2]

1. Circuit Judge Clevenger participated only in the decision on the petition for panel rehearing.

2. Circuit Judge Newman and Circuit Judge Hughes did not participate.

Appendix C

PER CURIAM.

ORDER

Appellants filed a combined petition for panel rehearing and rehearing en banc. The petition was referred to the panel that heard the appeal, and thereafter the petition was referred to the circuit judges who are in regular active service.

Upon consideration thereof,

IT IS ORDERED THAT:

The petition for panel rehearing is denied.

The petition for rehearing en banc is denied.

April 9, 2025
Date

APPENDIX D — SECOND AMENDED COMPLAINT FOR TAKING OF WATER RIGHTS WITHOUT JUST COMPENSATION AND FOR BREACH OF CONTRACT, U.S. COURT OF FEDERAL CLAIMS, *CITY OF FRESNO, ET AL. V. UNITED STATES, ET AL.*, NO. 16-1276L (DEC. 18, 2018)

U.S. COURT OF FEDERAL CLAIMS

CLIFFORD R. LOEFFLER, MAUREEN LOEFFLER, DOUGLAS PHILLIPS, AND CARALEE PHILLIPS,

Plaintiffs,

v.

UNITED STATES OF AMERICA,

Defendant,

and

SAN LUIS & DELTA-MENDOTA WATER AUTHORITY, *et al.*, AND CENTRAL CALIFORNIA IRRIGATION DISTRICT, *et al.*,

Defendant-Intervenors.

Filed December 18, 2018

SECOND AMENDED COMPLAINT FOR TAKING OF WATER RIGHTS WITHOUT JUST COMPENSATION AND FOR BREACH OF CONTRACT

In water year 2014 the United States appropriated all of the water of the Friant Division of the Central Valley

Project of California to satisfy what it determined to be a contractual requirement to provide substitute water to a group of water users referred to as the Exchange Contractors in breach of the Districts and City of Fresno contracts with the United States, and in violation of the Just Compensation Clause of the Fifth Amendment. Because of this unconstitutional appropriation and contract breach, in 2014 Plaintiffs and their landowners and water users suffered huge losses of annual and permanent crops, loss of groundwater reserves, water shortages and rationing, and incurred millions of dollars to purchase emergency water supplies.

Parties

1. The City of Fresno is a California Charter City, originally incorporated in 1885.[1] The City's population is approximately 520,000, making it the fifth largest city in California. Fresno is located near the geographic center of California, having a total area of approximately 112 square miles. The City receives and delivers water from the Friant Division to approximately 225,000 retail customers after disinfection and treatment by the City's surface water treatment plant. The City is also a direct user of Friant Division water.[2] The City is a direct, beneficial user and owner of water from the Friant Division, and directly uses its water in City-owned buildings, parks, road and highway landscaping, construction, and many similar uses

1. Cal. Const. art. XI, § 3(a).

2. Cal. Const., art. XIII, § 9; Gov't Code § 38730 et. seq.; Pub. Util. Code § 10001 et. seq.; Fresno Charter § 200.

to support its proprietary activities. The City also relies on the Friant Division Central Valley Project water supply as a source of water for groundwater recharge and later extraction for beneficial uses by its customers and as a direct source of water used by its customers, delivered through the City's surface water treatment plant. The City of Fresno owns water rights (beneficial interests) in Friant Division water. These water rights are recognized as property rights under California law, and are separate from the water rights owned by the District farmers. As a Charter City of California established by and representing all of the water users within its boundaries, the City brings this action both on its own behalf, for the taking of its own property without just compensation, and as a representative of its constituents who are also the beneficial owners of water rights taken in 2014, and entitled to receive water from the City.

2. Plaintiff Arvin-Edison Water Storage District is a California water storage district formed in 1942.[3] Arvin-Edison is authorized to construct, operate and maintain irrigation, distribution, and other facilities and equipment to deliver water for irrigation, groundwater replenishment, and other beneficial uses to its landowners and water users on approximately 111,510 acres of highly productive agricultural land in Kern County, California. The District receives and delivers water from the Friant Division located on the San Joaquin River in Central California. This Friant Division water supply, which is an essential component of the District's water supply, is delivered through District owned facilities and beneficially

3. California Water Storage District Law, Cal. Water Code §§ 39000–48401.

used within and around the District. The District relies on the Friant Division water supply as a source of water for groundwater recharge and later extraction for beneficial uses by its customers and as a direct source of water used by its landowners and water users, delivered through District-owned facilities. The Plaintiff District owns water rights (beneficial interests) in Friant Division water, and these water rights are recognized as property rights under California law, separate from the water rights owned by the District landowners and water users. As an agency of the State of California established by and representing all of the water users within its boundaries, the District brings this action both on its own behalf, for the taking of its own property without just compensation, and as representative of all its landowners and water users who are also beneficial owners of water rights taken in 2014, and entitled to receive water from the District.

3. Plaintiff Chowchilla Water District is a California water district formed in 1949. Chowchilla is authorized to construct, operate, and maintain irrigation, distribution, and other facilities and equipment to deliver water for irrigation, groundwater replenishment, and other beneficial uses to its landowners and water users on approximately 75,000 acres of highly productive agricultural land in Merced and Madera Counties, California. The District receives and delivers water from the Friant Division located on the San Joaquin River in Central California. This Friant Division water supply, which is an essential component of the District's water supply, is delivered through District-owned facilities and beneficially used within and around the District.

The District relies on the Friant Division water supply as a source of water for groundwater recharge and later extraction for beneficial uses by its customers and as a direct source of water used by its customers, delivered through District-owned facilities. The Plaintiff District owns water rights (beneficial interests) in Friant Division water, and these water rights are recognized as property rights under California law, separate from the water rights owned by the District landowners and water users. As an agency of the State of California established by and representing all of the water users within its boundaries, the District brings this action both on its own behalf, for the taking of its own property without just compensation, and as representative of all its landowners and water users who are also beneficial owners of water rights taken in 2014, and entitled to receive water from the District.

4. Plaintiff Delano-Earlimart Irrigation District is a California irrigation district formed in 1938.[4] Delano-Earlimart is authorized to construct, operate, and maintain irrigation, distribution, and other facilities and equipment to deliver water for irrigation, groundwater replenishment, and other beneficial uses to its landowners and water users on approximately 56,500 acres of highly productive agricultural land in Tulare and Kern Counties, California. The District receives and delivers water from the Friant Division located on the San Joaquin River in Central California. This Friant Division water supply, which is an essential component of the District's water

4. California Irrigation District Law, Cal. Water Code §§ 20500–29978.

supply, is delivered through District-owned facilities and beneficially used within and around the District. The District relies on the Friant Division water supply as a source of water for groundwater recharge and later extraction for beneficial uses by its customers. The Plaintiff District owns water rights (beneficial interests) in Friant Division water, and these water rights are recognized as property rights under California law, separate from the water rights owned by the District landowners and water users. As an agency of the State of California established by and representing all of the water users within its boundaries, the District brings this action both on its own behalf, for the taking of its own property without just compensation, and as representative of all its landowners and water users who are also beneficial owners of water rights taken in 2014, and entitled to receive water from the District.

5. Plaintiff Exeter Irrigation District is a California irrigation district formed in 1937.[5] Exeter is authorized to construct, operate, and maintain irrigation, distribution and other facilities, and equipment to deliver water for irrigation, groundwater replenishment, and other beneficial uses to its landowners and water users on approximately 12,557 acres of highly productive agricultural land in Tulare County, California. The District receives and delivers water from the Friant Division located on the San Joaquin River in Central California. This Friant Division water supply, which is

5. California Irrigation District Law, Cal. Water Code §§ 20500–29978.

an essential component of the District's water supply, is delivered through District-owned facilities and beneficially used within and around the District. The District relies on the Friant Division water supply as a source of water for groundwater recharge and later extraction for beneficial uses by its customers. The Plaintiff District owns water rights (beneficial interests) in Friant Division water, and these water rights are recognized as property rights under California law, separate from the water rights owned by the District landowners and water users. As an agency of the State of California established by and representing all of the water users within its boundaries, the District brings this action both on its own behalf, for the taking of its own property without just compensation, and as representative of all its landowners and water users who are also the beneficial owners of water rights taken in 2014, and entitled to receive water from the District.

6. Plaintiff Ivanhoe Irrigation District is a California irrigation district formed in 1948.[6] Ivanhoe is authorized to construct, operate, and maintain irrigation, distribution, and other facilities and equipment to deliver water for irrigation, groundwater replenishment, and other beneficial uses to its landowners and water users on approximately 10,908 acres of highly productive agricultural land in Tulare County, California. The District receives and delivers water from the Friant Division located on the San Joaquin River in Central California. This Friant Division water supply, which is

6. California Irrigation District Law, Cal. Water Code §§ 20500–29978.

an essential component of the District's water supply, is delivered through District-owned facilities and beneficially used within and around the District. The District relies on the Friant Division water supply as a source of water for groundwater recharge and later extraction for beneficial uses by its customers. The Plaintiff District owns water rights (beneficial interests) in Friant Division water, and these water rights are recognized as property rights under California law, separate from the water rights owned by the District landowners and water users. As an agency of the State of California established by and representing all of the water users within its boundaries, the District brings this action both on its own behalf, for the taking of its own property without just compensation, and as representative of all its landowners and water users who are also the beneficial owners of water rights taken in 2014, and entitled to receive water from the District.

7. Plaintiff Lindmore Irrigation District is a California irrigation district formed in 1937.[7] Lindmore is authorized to construct, operate, and maintain irrigation, distribution, and other facilities and equipment to deliver water for irrigation, groundwater replenishment, and other beneficial uses to its landowners and water users on approximately 27,000 acres of highly productive agricultural land in Tulare County, California. The District receives and delivers water from the Friant Division located on the San Joaquin River in Central California. This Friant Division water supply, which is

7. California Irrigation District Law, Cal. Water Code §§ 20500–29978.

an essential component of the District's water supply, is delivered through District-owned facilities and beneficially used within and around the District. The District relies on the Friant Division water supply as a source of water for groundwater recharge and later extraction for beneficial uses by its customers. The Plaintiff District owns water rights (beneficial interests) in Friant Division water, and these water rights are recognized as property rights under California law, separate from the water rights owned by the District landowners and water users. As an agency of the State of California established by and representing all of the water users within its boundaries, the District brings this action both on its own behalf, for the taking of its own property without just compensation, and as representative of all its landowners and water users who are also the beneficial owners of water rights taken in 2014, and entitled to receive water from the District.

8. Plaintiff Lindsay-Strathmore Irrigation District is a California irrigation district formed in 1915.[8] Lindsay-Strathmore is authorized to construct, operate, and maintain irrigation, distribution, and other facilities and equipment to deliver water for irrigation, groundwater replenishment, and other beneficial uses to its landowners and water users on approximately 14,400 acres of highly productive agricultural land in Tulare County, California. The District receives and delivers water from the Friant Division located on the San Joaquin River in Central California. This Friant Division water supply, which is

8. California Irrigation District Law, Cal. Water Code §§ 20500–29978.

an essential component of the District's water supply, is delivered through District-owned facilities and beneficially used within and around the District. The District relies on the Friant Division water supply as a source of water for groundwater recharge and later extraction for beneficial uses by its customers. The Plaintiff District owns water rights (beneficial interests) in Friant Division water, and these water rights are recognized as property rights under California law, separate from the water rights owned by the District landowners and water users. As an agency of the State of California established by and representing all of the water users within its boundaries, the District brings this action both on its own behalf, for the taking of its own property without just compensation, and as representative of all its landowners and water users who are also the beneficial owners of water rights taken in 2014, and entitled to receive water from the District.

9. Plaintiff Lower Tule River Irrigation District is a California irrigation district formed in 1950.[9] Lower Tule is authorized to construct, operate, and maintain irrigation, distribution, and other facilities and equipment to deliver water for irrigation, groundwater replenishment, and other beneficial uses to its landowners and water users on approximately 102,000 acres of highly productive agricultural land in Tulare County, California. The District receives and delivers water from the Friant Division on the San Joaquin River in Central California. This Friant Division water supply, which is an essential

9. California Irrigation District Law, Cal. Water Code §§ 20500–29978.

component of the District's water supply, is delivered through District-owned facilities and beneficially used within and around the District. The District relies on the Friant Division water supply as a source of water for groundwater recharge and later extraction for beneficial uses by its customers. The Plaintiff District owns water rights (beneficial interests) in Friant Division water, and these water rights are recognized as property rights under California law, separate from the water rights owned by the District landowners and water users. As an agency of the State of California established by and representing all of the water users within its boundaries, the District brings this action both on its own behalf, for the taking of its own property without just compensation, and as representative of all its landowners and water users who are also the beneficial owners of water rights taken in 2014, and entitled to receive water from the District.

10. Plaintiff Orange Cove Irrigation District is a California irrigation district formed in 1937.[10] Orange Cove is authorized to construct, operate, and maintain irrigation, distribution, and other facilities and equipment to deliver water for irrigation, groundwater replenishment, and other beneficial uses to its landowners and water users on approximately 26,000 acres of highly productive agricultural land in Fresno and Tulare Counties, California. The District receives and delivers water from the Friant Division on the San Joaquin River in Central California. This Friant Division water supply, which is

10. California Irrigation District Law, Cal. Water Code §§ 20500–29978.

an essential component of the District's water supply, is delivered through District-owned facilities and beneficially used within and around the District. The District relies on the Friant Division water supply as a source of water for groundwater recharge and later extraction for beneficial uses by its customers. The Plaintiff District owns water rights (beneficial interests) in Friant Division water, and these water rights are recognized as property rights under California law, separate from the water rights owned by the District landowners and water users. As an agency of the State of California established by and representing all of the water users within its boundaries, the District brings this action both on its own behalf, for the taking of its own property without just compensation, and as representative of all its landowners and water users who are also the beneficial owners of water rights taken in 2014, and entitled to receive water from the District.

11. Plaintiff Porterville Irrigation District is a California irrigation district formed in 1949.[11] Porterville is authorized to construct, operate, and maintain irrigation, distribution, and other facilities and equipment to deliver water for irrigation, groundwater replenishment, and other beneficial uses to its landowners and water users on approximately 13,553 acres of highly productive agricultural land in Tulare County, California. The District receives and delivers water from the Friant Division on the San Joaquin River in Central California. This Friant Division water supply, which is an essential

11. California Irrigation District Law, Cal. Water Code §§ 20500–29978.

component of the District's water supply, is delivered through District-owned facilities and beneficially used within and around the District. The District relies on the Friant Division water supply as a source of water for groundwater recharge and later extraction for beneficial uses by its customers. The Plaintiff District owns water rights (beneficial interests) in Friant Division water, and these water rights are recognized as property rights under California law, separate from the water rights owned by the District landowners and water users. As an agency of the State of California established by and representing all of the water users within its boundaries, the District brings this action both on its own behalf, for the taking of its own property without just compensation, and as representative of all its landowners and water users who are also the beneficial owners of water rights taken in 2014, and entitled to receive water from the District.

12. Plaintiff Saucelito Irrigation District is a California irrigation district formed in 1941.[12] Saucelito is authorized to construct, operate, and maintain irrigation, distribution, and other facilities and equipment to deliver water for irrigation, groundwater replenishment, and other beneficial uses to its landowners and water users on approximately 19,400 acres of highly productive agricultural land in Tulare County, California. The District receives and delivers water from the Friant Division on the San Joaquin River in Central California. This Friant Division water supply, which is an essential

12. California Irrigation District Law, Cal. Water Code §§ 20500–29978.

component of the District's water supply, is delivered through District-owned facilities and beneficially used within and around the District. The District relies on the Friant Division water supply as a source of water for groundwater recharge and later extraction for beneficial uses by its customers. The Plaintiff District owns water rights (beneficial interests) in Friant Division water, and these water rights are recognized as property rights under California law, separate from the water rights owned by the District landowners and water users. As an agency of the State of California established by and representing all of the water users within its boundaries, the District brings this action both on its own behalf, for the taking of its own property without just compensation, and as representative of all its landowners and water users who are also the beneficial owners of water rights taken in 2014, and entitled to receive water from the District.

13. Plaintiff Shafter-Wasco Irrigation District is a California irrigation district formed in 1937.[13] Shafter-Wasco is authorized to construct, operate, and maintain irrigation, distribution, and other facilities and equipment to deliver water for irrigation, groundwater replenishment, and other beneficial uses to its landowners and water users on approximately 30,720 acres of highly productive agricultural land in Kern County, California. The District receives and delivers water from the Friant Division on the San Joaquin River in Central California. This Friant Division water supply, which is an essential

13. California Irrigation District Law, Cal. Water Code §§ 20500–29978.

component of the District's water supply, is delivered through District-owned facilities and beneficially used within and around the District. The District relies on the Friant Division water supply as a source of water for groundwater recharge and later extraction for beneficial uses by its customers. The Plaintiff District owns water rights (beneficial interests) in Friant Division water, and these water rights are recognized as property rights under California law, separate from the water rights owned by the District landowners and water users. As an agency of the State of California established by and representing all of the water users within its boundaries, the District brings this action both on its own behalf, for the taking of its own property without just compensation, and as representative of all its landowners and water users who are also the beneficial owners of water rights taken in 2014, and entitled to receive water from the District.

14. Plaintiff Southern San Joaquin Municipal Utility District is a California municipal utility district formed in 1935.[14] Southern San Joaquin is authorized to construct, operate, and maintain irrigation, distribution, and other facilities and equipment to deliver water for irrigation, groundwater replenishment, and other beneficial uses to its landowners and water users on approximately 49,316 acres of highly productive agricultural land in Kern County, California. The District receives and delivers water from the Friant Division on the San Joaquin River in Central California. This Friant Division water supply,

14. California Municipal Utility District Act, Cal. Public Util. Code § 11501–14403.

which is an essential component of the District's water supply, is delivered through District-owned facilities and beneficially used within and around the District. The District relies on the Friant Division water supply as a source of water for groundwater recharge and later extraction for beneficial uses by its customers. The Plaintiff District owns water rights (beneficial interests) in Friant Division water, and these water rights are recognized as property rights under California law, separate from the water rights owned by the District landowners and water users. As an agency of the State of California established by and representing all of the water users within its boundaries, the District brings this action both on its own behalf, for the taking of its own property without just compensation, and as representative of all its landowners and water users who are also the beneficial owners of water rights taken in 2014, and entitled to receive water from the District.

15. Plaintiff Stone Corral Irrigation District is a California irrigation district formed in 1948.[15] Stone Corral is authorized to construct, operate, and maintain irrigation, distribution, and other facilities and equipment to deliver water for irrigation, groundwater replenishment, and other beneficial uses to its landowners and water users on approximately 6,600 acres of highly productive agricultural land in Tulare County, California. The District receives and delivers water from the Friant Division on the San Joaquin River in Central California.

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15. California Irrigation District Law, Cal. Water Code §§ 20500–29978.

This Friant Division water supply, which is an essential component of the District's water supply, is delivered through District-owned facilities and beneficially used within and around the District. The District relies on the Friant Division water supply as a source of water for groundwater recharge and later extraction for beneficial uses by its customers. The Plaintiff District owns water rights (beneficial interests) in Friant Division water, and these water rights are recognized as property rights under California law, separate from the water rights owned by the District landowners and water users. As an agency of the State of California established by and representing all of the water users within its boundaries, the District brings this action both on its own behalf, for the taking of its own property without just compensation, and as representative of all its landowners and water users who are also the beneficial owners of water rights taken in 2014, and entitled to receive water from the District.

16. Plaintiff Tea Pot Dome Water District is a California water district formed in 1954.[16] Tea Pot is authorized to construct, operate, and maintain irrigation, distribution, and other facilities and equipment to deliver water for irrigation, groundwater replenishment, and other beneficial uses to its landowners and water users on approximately 3,500 acres of highly productive agricultural land in Tulare County, California. The District receives and delivers water from the Friant Division on the San Joaquin River in Central California.

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16. California Water District Law, Cal. Water Code §§ 34000–38501.

This Friant Division water supply, which is an essential component of the District's water supply, is delivered through District-owned facilities and beneficially used within and around the District. The District relies on the Friant Division water supply as a source of water for groundwater recharge and later extraction for beneficial uses by its customers and as a direct source of water used by its landowners and water users, delivered through District-owned facilities. The Plaintiff District owns water rights (beneficial interests) in Friant Division water, and these water rights are recognized as property rights under California law, separate from the water rights owned by the District landowners and water users. As an agency of the State of California established by and representing all of the water users within its boundaries, the District brings this action both on its own behalf, for the taking of its own property without just compensation, and as representative of all its landowners and water users who are also the beneficial owners of water rights taken in 2014, and entitled to receive water from the District.

17. Plaintiff Terra Bella Irrigation District is a California irrigation district formed in 1915.[17] Terra Bella is authorized to construct, operate, and maintain irrigation, distribution, and other facilities and equipment to deliver water for irrigation, groundwater replenishment, and other beneficial uses to its landowners and water users on approximately 14,000 acres of highly productive agricultural land in Tulare County, California. The

17. California Irrigation District Law, Cal. Water Code §§ 20500–29978.

District receives and delivers water from the Friant Division on the San Joaquin River in Central California. This Friant Division water supply, which is an essential component of the District's water supply, is delivered through District-owned facilities and beneficially used within and around the District. The District relies on the Friant Division water supply as a source of water for groundwater recharge and later extraction for beneficial uses by its customers. The Plaintiff District owns water rights (beneficial interests) in Friant Division water, and these water rights are recognized as property rights under California law, separate from the water rights owned by the District landowners and water users. As an agency of the State of California established by and representing all of the water users within its boundaries, the District brings this action both on its own behalf, for the taking of its own property without just compensation, and as representative of all its landowners and water users who are also the beneficial owners of water rights taken in 2014, and entitled to receive water from the District.

18. Plaintiff Tulare Irrigation District is a California irrigation district formed in 1889.[18] Tulare is authorized to construct, operate, and maintain irrigation, distribution, and other facilities and equipment to deliver water for irrigation, groundwater replenishment, and other beneficial uses to its landowners and water users on approximately 65,000 acres of highly productive agricultural land in Tulare County, California. The

18. California Irrigation District Law, Cal. Water Code §§ 20500–29978.

District receives and delivers water from the Friant Division on the San Joaquin River in Central California. This Friant Division water supply, which is an essential component of the District's water supply, is delivered through District-owned facilities and beneficially used within and around the District. The District relies on the Friant Division water supply as a source of water for groundwater recharge and later extraction for beneficial uses by its customers. The Plaintiff District owns water rights (beneficial interests) in Friant Division water, and these water rights are recognized as property rights under California law, separate from the water rights owned by the District landowners and water users. As an agency of the State of California established by and representing all of the water users within its boundaries, the District brings this action both on its own behalf, for the taking of its own property without just compensation, and as representative of all its landowners and water users who are also the beneficial owners of water rights taken in 2014, and entitled to receive water from the District.

19. Plaintiff Districts and the City, *each* own the right to the beneficial use of water of the San Joaquin River, including the return flows and the storage of water underground to be thereafter applied to beneficial purposes within their respective boundaries. The recharge and storage of water underground by the Districts and the City, with later recovery (including groundwater replenishment, recharge, water banking, and other programs) constitute beneficial uses of water within the meaning of California Water Code Section 1242, are authorized by the permits issued by the California State

Water Board decision D-935, and are property rights under California law.

20. Each of the Plaintiff Districts is an agency of the State of California established to provide water to its landowners and water users. Under California law, a California water district may "commence, maintain, intervene in, compromise, and assume the costs of any action or proceeding involving or affecting the ownership or use of waters or water rights within the district used or useful for any purpose of the district of or of benefit to any land."[19] Plaintiff Districts have the power to "commence, maintain, intervene in, defend, and compromise actions and proceedings to prevent interference with or diminution of the natural flow of any stream or natural or artificially created subterranean supply of waters which may: (a) be used or be useful for any purpose of the district. (b) be of common benefit to the land or its inhabitants. (c) endanger the inhabitants or the land."[20] The City is authorized to undertake all those activities reasonably necessary to provide a reliable, secure water supply to its residents, businesses and customers.[21]

21. Plaintiff, Loren Booth LLC, is the owner in fee of approximately 7,500 acres of farmland with appurtenant water rights that receives water from Plaintiffs Orange

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19. Cal. Water Code §§ 22654, 35408.

20. Cal. Water Code §§ 22655, 35409.

21. Cal. Const., art. XI11, § 9; Gov't Code § 38730 et. seq.; Pub. Util. Code § 10001 et. seq.; Fresno Charter § 200.

Cove Irrigation District and other Plaintiff Districts. On these lands Booth receives Friant Division water through the Districts and puts it to beneficial use to grow oranges. To keep its orchards from dying in 2014, when the Bureau of Reclamation cut off her Friant Division water supply, Booth was required to purchase emergency irrigation water, at substantial cost. The company nevertheless lost hundreds of acres of orchards, which had to be bulldozed, also at substantial cost. Booth was also required to "chop" a large number of trees—severely cutting back the branches to preserve the trunk—which then produced no fruit in 2014 or several years afterward. The claims of this representative Plaintiff are typical of the claims of the other members of the class she represents, they present questions of law and fact that are common to all members of the class, and this Plaintiff has agreed to and will fairly and adequately represent the interests of the other members of the class in this case.

22. Plaintiffs, Matthew J. Fisher and Julia K. Fisher, through their wholly owned company, Fisher Citrus LLC, and their partial ownership of Jasmine Citrus LLC, and Matthew J. Fisher, as co-trustee of John N. Fisher IV Living Trust, are the owners in fee of approximately 660 acres of farmland with appurtenant water rights that receives water from Plaintiff Districts Arvin-Edison, Delano-Earlimart, Exeter, Ivanhoe, Lindmore, Lindsay-Strathmore, Orange Cove, Southern San Joaquin, Stone Corral, Tea Pot, Terra Bella, and Tulare. In addition, the John N. Fisher IV Living Trust in 2014 leased an additional 400 acres of similar farmland, with appurtenant water rights. On these lands the

Fishers grow citrus crops, including navel and Valencia oranges, blood oranges, grapefruit, and lemons. To keep their orchards from dying in 2014, when the Bureau of Reclamation cut off their Friant Division water supply, the Fishers were required to purchase emergency irrigation water, drill multiple new groundwater wells, and string miles of irrigation pipe to carry well water to orchards where it was needed, at substantial cost. They nevertheless lost substantial crops and produced inferior fruit as a result of the water shutoff. The claims of these representative Plaintiffs are typical of the claims of the other members of the class they represent, they present questions of law and fact that are common to all members of the class, and these Plaintiffs have agreed to and will fairly and adequately represent the interests of the other members of the class in this case.

23. Plaintiff, Hronis, Inc., is the lessee of approximately 6,000 acres of farmland owned by members of the Hronis family with appurtenant water rights that receives water from Plaintiff Districts Arvin-Edison, Delano-Earlimart, Saucelito, Southern San Joaquin, Terra Bella, and Tulare. On these lands Hronis receives Friant Division water through the Districts and puts it to beneficial use to grow table grapes and citrus trees. To keep its orchards from dying in 2014, when the Bureau of Reclamation cut off its Friant Division water supply, Hronis was required to purchase emergency irrigation water and to drill six new groundwater wells, at substantial cost. The claims of this representative Plaintiff are typical of the claims of the other members of the class it represents, they present questions of law and fact that

are common to all members of the class, and this Plaintiff has agreed to and will fairly and adequately represent the interests of the other members of the class in this case.

24. Plaintiffs, Clifford R. Loeffler and Maureen Loeffler, are the owners in fee of approximately 100 acres of farmland with appurtenant water rights that receives water from Plaintiff Districts Lindmore and Lindsay-Strathmore. On these lands the Loefflers receive Friant Division water through the Districts and put it to beneficial use to grow tree crops, including citrus. To keep their orchards from dying in 2014, when the Bureau of Reclamation cut off their Friant Division water supply, the Loefflers were required to pump emergency supplies of groundwater, at substantial cost. The claims of these representative Plaintiffs are typical of the claims of the other members of the class they represent, they present questions of law and fact that are common to all members of the class, and these Plaintiffs have agreed to and will fairly and adequately represent the interests of the other members of the class in this case.

25. Plaintiffs, Douglas Phillips and Caralee Phillips, are the owners in fee of approximately 500 acres of farmland with appurtenant water rights that receives water from Plaintiff Districts Ivanhoe and Stone Corral. On these lands the Phillips receive Friant Division water through the Districts and put it to beneficial use to grow tree crops, including citrus, kiwi, pomegranates, peaches, plums, and apricots. To keep their orchards from dying in 2014, when the Bureau of Reclamation cut off their Friant Division water supply, the Phillips were required to

purchase emergency irrigation water and to drill two new groundwater wells, at substantial cost. They nevertheless lost approximately 25 acres of orchards, which had to be bulldozed, and have replanted approximately 10 of those acres, also at substantial cost. The claims of these representative Plaintiffs are typical of the claims of the other members of the class they represent, they present questions of law and fact that are common to all members of the class, and these Plaintiffs have agreed to and will fairly and adequately represent the interests of the other members of the class in this case.

26. The joinder of all the landowners and water users who own water rights under State law in the Friant Division is impracticable due to the size of the class, which numbers in the thousands, and the disposition of their claims in this action rather than in individual actions will foster judicial economy. Pursuing separate actions is also unlikely due to the small amount of many of the claims of the individual landowners and water users. Each claim has a common basis with every other claim, namely taking appurtenant water and water rights by the United States' impoundment, diversion, and delivery of Plaintiffs' water from the San Joaquin River to others without just compensation.

27. Defendant, the United States of America, is a republic formed under the Constitution of the United States, and exercises the powers described subject to certain limitations, including the Fifth Amendment to the United States Constitution.

Appendix D

Jurisdiction

28. This Court has jurisdiction over these claims under 28 U.S.C. § 1491 (the Tucker Act) as a "claim against the United States founded either upon the Constitution, or any Act of Congress or any regulation of any executive department or upon any express or implied contract with the United States."[22]

Statement of Facts

29. Under the Reclamation Act,[23] in 1935 Congress authorized construction and operation of the Friant Division of the Central Valley Project to provide for municipal, industrial, and other beneficial uses to Fresno, and to supply irrigation, groundwater replenishment, and other beneficial uses on approximately 837,000 acres of highly productive farmland in Madera, Merced, Fresno, Tulare, and Kern Counties in the San Joaquin Valley of California. The United States, acting through its Department of Interior Bureau of Reclamation, owns and operates the facilities of the Friant Division of the Central Valley Project, which includes Friant Dam and Millerton Lake, and two canals – the Madera and Friant-Kern Canal constructed to divert, convey and deliver the waters of the San Joaquin River to Plaintiffs for beneficial uses within their boundaries in Madera, Merced, Fresno, Tulare and Kern Counties in the San Joaquin Valley of California.

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22. 28 U.S.C. § 1491.

23. Pub. L. 57-161, 32 Stat. 388 (June 17, 1902).

30. To provide water for Plaintiffs, the United States acquired water and water rights of the San Joaquin River, including the rights of water users downstream of Friant Dam, to impound that water in Millerton Lake for delivery to Plaintiffs' water users, who are the beneficial owners of the water right, and for their beneficial use. The United States acquired the water and water rights of the San Joaquin River to benefit Plaintiffs, their landowners and water users, who beneficially use the water, and

> not for the use of the government, but, under the Reclamation Act, for the use of the landowners, and by the terms of the law and the contract already referred to, the water rights became the property of the landowners, wholly distinct from the property right of the government in the irrigation works. The government was, and remained, simply a carrier and distributor of the water, with the right to receive the sums stipulated in the contracts as reimbursement for the cost of construction and annual charges for operation and maintenance of the works.[24]

31. Each municipal, industrial, and agricultural water user within Fresno and Plaintiff water agencies holds a property right in the beneficial use of the water and water rights of the San Joaquin River which the United

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24. *Ickes v. Fox*, 300 U.S. 82, 95 (1937) (internal citations omitted); *see also Nevada v. United States*, 463 U.S. 110, 123-25 (1983); *California v. United States*, 438 U.S. 645, 677 (1978); *Nebraska v. Wyoming*, 325 U.S. 589, 614 (1945).

States acquired to benefit the landowners and water users within the Friant Division of the Central Valley Project. The United States holds legal title to such water and water rights to benefit Plaintiffs, theirlandowners and water users. The United States does not have the discretion or the right to use or reallocate that water as it might see fit.

32. But, in water year 2014 the United States appropriated all of the water of the Friant Division of the Central Valley Project to satisfy what it determined to be a contractual requirement to provide this water as substitute water under a 1939 Contract for Exchange of Waters, Contract No. Ilr-1144, as amended, to a group of water users referred to as the Exchange Contractors, and refused to deliver this water to Plaintiffs for delivery to their landowners and water users who are the beneficial owners of the water right, despite Plaintiffs' demands.

33. Because of the United States' appropriation of their vitally needed San Joaquin River water in 2014, Plaintiffs, their landowners and water users who are the beneficial owners of the water right, suffered huge losses of annual and permanent crops, loss of groundwater reserves, water shortages and rationing, and incurred millions of dollars to purchase emergency water supplies. Many of these injuries are permanent and irreparable.

Appendix D

First Cause of Action
(Taking of Water and Water Rights Without Just Compensation)

34. The water and water rights of the Friant Division appropriated by the United States in 2014 were the property of Plaintiffs, and their landowners and water users, each of which are the beneficial owners of the water rights. Under the Fifth Amendment of the United States Constitution, these property rights may not be taken for public use without payment of just compensation.

35. The United States has refused to pay Plaintiffs, their landowners, and water users just compensation for taking their Friant Division water and water rights in 2014, in violation of the Fifth Amendment to the United States Constitution which provides, in part: "[N]or shall private property be taken for public use, without just compensation."[25]

36. As a direct and proximate result of the United States' failure to pay just compensation for the water and water rights of the Friant Division it appropriated in 2014, Plaintiffs and their landowners and water users, all of which are the beneficial owners of the water right, have been damaged equal to the fair market value of the property appropriated, including compound interest from the date of taking, in an amount that will be proved at trial.

37. As an additional direct and proximate result of taking their water and water rights of the Friant Division

25. U.S. Const. amend. V.

without just compensation, Plaintiffs have had to retain the services of counsel to prosecute this action, incurring attorney's fees, expert witness fees, and costs and expenses of litigation which Plaintiffs will seek against the United States under the Uniform Relocation Act.[26]

Second Cause of Action
(Breach of Contract)

As a separate and additional cause of action, Plaintiffs further allege:

38. Plaintiffs incorporate by reference all prior allegations of this Amended Complaint, and further allege as follows.

The Exchange Contract

39. On July 27, 1939, the United States entered into a written contract to purchase most of the water rights of Miller & Lux, Inc. in the San Joaquin River for $2.4 million. Defendant-Intervenors, the Columbia Canal Company, Firebaugh Canal Company, San Luis Canal Company, and San Joaquin & Kings River Canal & Irrigation Company, Incorporated (now Central California Irrigation District), also signed that contract, which states:

> [E]ach for itself and for its successors and assigns, consents and agrees to the foregoing contract, and each of them hereby disclaims all

26. 42 U.S.C. §§ 4601–4655.

> right, title and interest in and to the water, water rights and use of water herein agreed to be sold to the United States, being water and the rights to the use thereof in excess of Schedule One (1) water mentioned in said contract.[27]

Schedule 1 of the contract reserved to the vendors specified rates of flow by month, known as "reserved waters." A copy of this July 27,1939 purchase-and-sale contract is attached as Exhibit 1.

40. On July 27, 1939, the same day they executed the purchase-and-sale contract, and as an integral part of that single transaction, Reclamation entered into a second contract with Defendant-Intervenors, the Exchange Contractors, referred to as the Contract for Exchange of Waters or "Exchange Contract." Under this 1939 Exchange Contract, the United States obtained the right to utilize all of the vendors' remaining water rights identified in Schedule 1 of the 1939 contract for sale of water rights (attached as Exhibit 1) in exchange for providing them a substitute water supply from the Sacramento River or the Sacramento-San Joaquin Delta.[28] The Exchange Contract provides:

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27. Contract for Purchase of Miller & Lux Water Rights at 27 (July 27, 1939) ("purchase- and-sale contract"), attached as Exhibit 1.

28. Contract for Exchange of Waters (July 27, 1939) ("Exchange Contract"), attached as Exhibit 2.

> [O]nly during those periods when a substitute water supply as herein defined is being furnished to the Contracting Companies, the United States may, either in whole or in part, store, divert, dispose of and otherwise use, within and without the watershed of the San Joaquin River, all waters the use of which was reserved to the Contracting Companies as against the United States, by the aforesaid Purchase Contract dated July 27, 1939[29]

The Exchange Contract was subsequently amended and then novated on February 14, 1968 and was in force during 2014. A copy of the Second Amended Contract for Exchange of Waters is attached as Exhibit 3.

The Plaintiffs' contracts

41. In 2014, each of the Plaintiff Districts and the City held a permanent water supply and repayment contract with the United States for a specified quantity of "Project Water stored or flowing through Millerton Lake" that the United States "develops, diverts, stores and delivers . . . in accordance with State and Federal law for the benefit of Project Contractors in the Friant Division and for other specified Project purposes. . . ."[30] These contracts state that the mutual goal of the contracting parties is

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29. *Id.* at ¶ 7.

30. Contract Between the United States and Arvin-Edison Water Storage District Providing for Project Water Service from Friant Division and Facilities Repayment Exhibit E Recital 5 (Nov. 1, 2010) ("District Contract").

> [t]o provide for reliable Project Water supplies; to control costs of those supplies; to achieve repayment of the Central Valley Project as required by law; to guard reasonably against Project Water shortages; to achieve a reasonable balance among competing demands for use of Project Water; and to comply with all applicable environmental statutes. . . .[31]

Copies of the contracts signed by each Plaintiff District and the City, which are essentially identical, except for the parties' names, quantities, and dates of execution, are attached as Exhibits 4-21.

42. Individual Plaintiffs, Loren Booth LLC, Matthew J. Fisher, Julia K. Fisher, Hronis Inc., Clifford R. Loeffler, Maureen Loeffler, Douglas Phillips, Caralee Phillips, and the class they represent, are third-party beneficiaries of the City and Districts' permanent water supply contracts, which were entered into for their specific benefit to provide water for domestic, municipal, industrial, groundwater recharge, and irrigation of agricultural lands, to which these water rights are appurtenant.

43. The joinder of all the landowners and water users who are third-party beneficiaries of these contracts is impracticable due to the size of the class, which numbers in the thousands, and the disposition of their claims in this action rather than in individual actions will foster judicial economy. Pursuing separate actions is also unlikely due to

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31. District Contract Recital 16, at 4.

the small amount of many of the claims of the individual landowners and water users. Each claim has a common basis with every other claim, namely the United States' breach of contract in 2014 by failing and refusing to make available the quantities of water specified in Article 3 of the water supply contracts.

44. Prior to Plaintiffs commencing this legal action Plaintiff Districts and the City participated in an extensive meet and confer process in an attempt to resolve this dispute. At all material times in 2014 Plaintiffs had complied with all requirements of their water supply contracts.

45. Article 3 of Plaintiffs' contracts, titled "Water to be Made Available and Delivered to the Contractor," is Reclamation's promise to provide San Joaquin River water through Friant Division facilities to the Plaintiff Districts and the City:

> (a) During the Year, consistent with all applicable State water rights, permits, and licenses, Federal law, the Settlement including the SJRRSA, and subject to the provisions set forth in Articles 12 and 13 of this Contract, the Contracting Officer shall make available for delivery to the Contractor from the Project 40,000 acre-feet of Class 1 Water and 311,675 acre-feet of Class 2 Water for irrigation and M&I purposes. The quantity of Water Delivered to the Contractor in accordance with this subdivision shall be scheduled and paid for

pursuant to the provisions of Articles 4 and 7 of this Contract.[32]

The breach of contract in 2014

46. In 2014, the United States breached Plaintiffs' water supply contracts by failing to make available to them the quantities required by Article 3 of their contracts. In 2014, there was a substantial quantity of San Joaquin River water available to the United States, stored and otherwise existing within the Friant Division, even though precipitation had been low during the winter. Yet, in breach of their permanent contracts, the United States failed and refused to make that water available to Plaintiffs (with the minor exception of small quantities of "health and safety" and "carry-over" water), determining instead to release and deliver that water to the Exchange Contractors, over Plaintiffs' objections.

47. In 2014, the United States erroneously determined and asserted that it was required under the terms of the Exchange Contract to provide Defendant-Intervenors, the Exchange Contractors, nearly all the waters of the San Joaquin River available in the Friant Division as substitute water. Article 4 of the Exchange Contract, which governed any temporary interruption in delivery of substitute water such as occurred in 2014, provides:

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32. *Id.* art. 3(a). The contracts of the Districts and the City specify different quantities of Class 1 and Class 2 water that Reclamation shall make available.

> Whenever the United States is temporarily unable for any reason or for any cause to deliver to the [Exchange Contractors] substitute water from the Delta–Mendota Canal or other sources, water will be delivered from the San Joaquin River as follows:
>
> (1) During this period, for the first 7 consecutive days, in the quantities and rates as specified in Article 8 of this contract;
>
> (2) For the balance of this period, in quantities and rates as reserved in the Purchase Contract, except that the United States further agrees that if the resulting delivery of water would be less than seventy-two per centum (72%) of Schedule One in said Purchase Contract then the United States shall make up such quantities by releases of available storage from Millerton Lake, provided, however, that the United States shall in no event be required to draw the storage in Millerton Lake below Elevation 464.00 U.S.G.S. datum or to retain water in storage for such releases.[33]

48. The San Joaquin River water that Reclamation released and delivered to the Exchange Contractors in 2014 was made at a time, in a manner, and in an amount substantially greater than what the Exchange Contractors were entitled to under the Exchange

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33. *Friant Water Auth. v. Jewell*, 23 F. Supp. 3d 1130, 1137 (E.D. Cal. 2014) (quoting Exchange Contract art. 4b).

Contract. Reclamation's voluntary delivery of this Friant Division water to the Exchange Contractors in excess of the requirements of the Exchange Contract, rather than to Plaintiffs who badly needed this water, breached, among other provisions, Article 3(n) of Plaintiffs' water supply contracts, which reads:

> The rights of the Contractor under this Contract are subject to the terms of the contract for exchange of waters . . . Contract No. Ilr-1144, as amended. The United States agrees that it will not deliver to the Exchange Contractors thereunder water of the San Joaquin River unless and until required by the terms of said contract, and the United States further agrees that it will not voluntarily and knowingly determine itself unable to deliver to the Exchange Contractors entitled thereto from water that is available or that may become available to it from the Sacramento River and its tributaries or the Sacramento-San Joaquin Delta those quantities required to satisfy the obligations of the United States under said Exchange Contract and under Schedule 2 of the Contract for Purchase of Miller and Lux Water Rights (Contract Ilr-1145, dated July 27, 1939).[34]

49. The United States' failure and refusal to make Friant Division water available to Plaintiffs, over and above the flows to which the Exchange Contractors were entitled under the terms of the Exchange Contract,

34. District Contract art. 3(n).

included violations of Articles 3(a), 13, 19, and 20 of Plaintiffs' water supply contracts, as well as the covenant of good faith and fair dealing that is implied in every contract with the Government.

Damages

50. As a direct and proximate result of the Government's breach of their permanent water supply and repayment contracts in 2014, Plaintiffs suffered substantial damages, in an amount as yet unascertained. These breach-of-contract damages include the cost of purchasing replacement water for the quantities not made available by Reclamation, management and operations costs for 2014 (including the cost of delivering the water to the Exchange Contractors), cost of temporary pipeline and pump facilities, cost of drilling and operating groundwater wells to replace Friant Division water, interest and other expenses to finance these costs, lost groundwater storage and supply, lost revenue from sale of water, and the market value of the water not provided, plus other damages as yet unascertained.

PRAYER FOR RELIEF

Plaintiffs, for themselves and the class they represent, therefore request relief as follows:

On their First Cause of Action:

1. A money judgment equal to the fair market value of their water and water rights taken in 2014, estimated to be over $350,000,000, plus compound interest from the date of the taking;

2. Reasonable attorneys' fees for bringing and prosecuting this action;

3. The expenses of appraisers and other experts reasonably required to prosecute this action;

On their Second Cause of Action:

4. A money judgment equal to their breach-of-contract damages, according to proof at trial;

On both their First and Second Causes of Action:

5. Costs of suit; and,

6. Any other or further relief as the Court may deem just.

Respectfully submitted,

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Appendix D

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