No. _____

In The
Supreme Court of the United States

GERALD H. HAWKINS, individually and as a trustee of the CN Hawkins Trust and Gerald H. Hawkins and Carol H. Hawkins Trust, et al.,
Petitioners,

v.

DEBRA HAALAND, Secretary of the Interior, et al.,
Respondents.

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

PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED

The United States is the owner of certain instream water rights within Oregon's Upper Klamath Basin. The federal government holds these water rights in trust for the benefit of the Klamath Indian Tribes. In 2013, the Tribes and the federal government entered into a Protocol Agreement, which establishes a process by which "calls" for the implementation of the water rights are to be placed with Oregon's Water Resources Department. Among other things, the Protocol provides that, if "the Parties cannot agree on whether to make a call, either Party may independently make a call and the other party will not withhold any required concurrence or object to the call[.]"

The D.C. Circuit held below that Petitioners—a group of landowners and livestock producers whose lands and businesses have been devastated by the Protocol-authorized implementation of the Tribes' instream water rights—lack standing to challenge the Protocol. Regardless of the Protocol, the D.C. Circuit reasoned, the federal government has no authority to countermand the Tribes' preferred management of trust assets. In so holding, the D.C. Circuit parted company with decisions of this Court, as well as of other circuit courts, which have repeatedly affirmed the federal government's paramount authority in managing Indian trust property.

The question presented is:

Does the federal government possess final decision-making authority over the management of water rights held in trust for an Indian tribe?

LIST OF ALL PARTIES

The Petitioners are Gerald H. Hawkins, individually and as trustee of the CN Hawkins Trust and Gerald H. Hawkins and Carol H. Hawkins Trust; John B. Owens, as trustee of the John and Candace Owens Family Trust; Harlowe Ranch, LLC; Goose Nest Ranches, LLC; Agri Water, LLC; NBCC, LLC; Roger Nicholson; Nicholson Investments, LLC; Mary Nicholson, as co-trustee of the Nicholson Living Trust; Martin Nicholson, individually and as co-trustee of the Nicholson Living Trust; Randall Kizer; Rascal Ranch, LLC; Jacox Ranches, LLC; E. Martin Kerns; Troy Brooks; Tracey Brooks; Barbara A. Duarte and Eric Lee Duarte, as trustees of the Duarte Family Trust, UTD January 17, 2002; Kevin Newman; Jennifer Newman; Duane Martin Ranches, L.P.; Geoffrey T. Miller and Catherine A. Miller, as co-trustees of The Geoff and Catherine Miller Family Trust, UTD February 6, 2017; Casey Lee Miller, as trustee of The Casey Miller Trust, UTD January 9, 2017; Wilks Ranch Oregon, Ltd.; Margaret Jacobs; Darrell W. Jacobs; Franklin J. Melness; Janet G. Melness; Barnes Lake County, LLC; David Cowan; Theresa Cowan; and Chet Vogt, as trustee of the C & A Vogt Community Property Trust.

The Respondents are Debra Haaland, Secretary of the Interior; Bryan Newland, Assistant Secretary – Indian Affairs; Darryl LaCounte, Director of the U.S. Bureau of Indian Affairs; and Bryan Mercier, Regional Director of the U.S. Bureau of Indian Affairs.

CORPORATE DISLOSURE STATEMENT

No Petitioner has any parent corporation, and no publicly held company owns 10% or more of the stock of any Petitioner.

RELATED PROCEEDINGS

- *Hawkins v. Bernhardt*, No. 19-1498 (BAH), 436 F. Supp. 3d 241 (D.D.C. Jan. 31, 2020).

- *Hawkins v. Haaland*, No. 20-5074, 991 F.3d 216 (D.C. Cir. Mar. 19, 2021).

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PETITION FOR WRIT OF CERTIORARI

Petitioners Gerald H. Hawkins, *et al.*, respectfully petition for a writ of certiorari to review the judgment of the United States Court of Appeals for the District of Columbia Circuit.

OPINIONS BELOW

The panel opinion of the D.C. Circuit is reported at 991 F.3d 216, and is reproduced in the Appendix beginning at A-1. The opinion of the United States District Court for the District of Columbia is reported at 436 F. Supp. 3d 241, and is reproduced in the Appendix beginning at B-1.

JURISDICTION

The date of the decision sought to be reviewed is March 19, 2021. On May 3, 2021, Petitioners filed a timely petition for panel rehearing, which the D.C. Circuit denied on May 10th, 2021. By order of March 19, 2020, and July 19, 2021, this Court extended the deadline to file any petition for writ of certiorari to 150 days from the date of an order denying a timely petition for rehearing entered prior to July 19, 2021.

Jurisdiction is conferred under 28 U.S.C. § 1254(1).

CONSTITUTIONAL, TREATY, AND STATUTORY PROVISIONS AT ISSUE

The pertinent text of the following constitutional, treaty, and statutory provisions involved in this case is set out in the Appendix.

- U.S. Const. art. I, § 1.
- Treaty with the Klamath, Etc., Oct. 14, 1864, 16 Stat. 707.
- 25 U.S.C. § 2.
- 42 U.S.C. § 4332(C).
- 43 U.S.C. § 1457(10).

INTRODUCTION

Petitioners are ranchers whose families for over a century have made their homes and their livelihoods in the Upper Klamath Basin of southern Oregon. Once superb farmland and still home to six National Wildlife Refuges, the Basin is now a dustbowl. Its present desiccation results in large measure from irrigation shut-offs requested by the Klamath Indian Tribes and mechanically approved by Respondents Debra Haaland, Secretary of the Interior, *et al.*, without any consideration of the environmental or other impacts of such acquiescence. The shut-offs are supposedly necessary to satisfy the Tribes' hunting, fishing, and gathering interests, for which federally-held instream water rights were provisionally awarded in Oregon's general stream adjudication for the Klamath Basin.

To preserve their businesses, communities, and way of life, Petitioners filed suit to challenge a 2013 Protocol Agreement, executed between the Tribes and the Bureau of Indian Affairs, as representative of the federal government. The Protocol purports to cede the federal government's discretionary management authority over trust water rights to the Tribes. The district court dismissed Petitioners' lawsuit for want of standing, and the D.C. Circuit affirmed. Both courts concluded that Petitioners' economic, social, and environmental injuries bear no causal relationship to the Protocol because, even without its ostensible delegation of federal management authority, the Tribes would still be free to direct irrigation shut-offs at their discretion notwithstanding any objection from the federal government.

Congress has charged the Department of the Interior—which houses the Bureau—with the "supervision of public business relating to," *inter alia*, "Indians." 43 U.S.C. § 1457(10). It has authorized the Secretary of the Interior to delegate Indian-related regulatory powers to the Commissioner of Indian Affairs, who in turn is authorized to delegate them to assistant commissioners and other officers within the Bureau. 25 U.S.C. § 1a. The Commissioner, under the Secretary's direction, is also independently authorized to manage "all Indian affairs and . . . all matters arising out of Indian relations." 25 U.S.C. § 2. As these statutory provisions show, the superintendence of water rights held in trust by the federal government for the benefit of Indian tribes is squarely within the authority of Interior and the Bureau. *See Armstrong v. United States*, 306 F.2d 520, 522 (10th Cir. 1962) ("The management of water and water projects on a

reservation is clearly within the scope of the general statutory authority granted to the Commissioner of Indian Affairs[.]"); *Udall v. Littell*, 366 F.2d 668, 672 (D.C. Cir. 1966) ("In charging the Secretary with broad responsibility for the welfare of Indian tribes, Congress must be assumed to have given him reasonable powers to discharge it effectively.").

By promising complete and total deference to the Tribes, the Protocol permits the federal government to shirk these duties. As Petitioners' lawsuit contends, such a promise violates the doctrine of unlawful sub-delegation by, without Congressional authorization, giving final regulatory authority to a private entity. *Cf. U.S. Telecom Ass'n v. FCC*, 359 F.3d 554, 566 (D.C. Cir. 2004) (federal agency officials "may not subdelegate" their decision-making authority "to outside entities—private or sovereign—absent affirmative evidence to do so"). It also violates the National Environmental Policy Act, 42 U.S.C. §§ 4321–4370m-12, by allowing the federal government to abdicate discretionary management authority over tribal trust assets without giving any thought to the environmental consequences of that passive acquiescence, or to viable alternatives. *Cf. Manygoats v. Kleppe*, 558 F.2d 556, 558 (10th Cir. 1977) (although "the duties and responsibilities of the Secretary may conflict with the interests of the Tribe[,]" the Secretary nevertheless "must act in accord with the obligations imposed by NEPA.").

Petitioners, like many others in the Klamath Basin, are suffering. As a result of the irrigation cut-offs which follow the federal government's lock-step adherence to the Tribes' water delivery requests, they

endure financial damages to their livestock production businesses, the infestation of noxious weeds, the reduction and loss of wildlife, and the disappearance of grass plant communities from their lands. These injuries are undisputed. Meanwhile, although the Tribes possess a beneficial interest in the right to a certain level of instream flows, it is not necessarily the case that the right must be exercised to its fullest extent in every instance in order to satisfy the Tribes' treaty-protected fishing purposes. Indeed, the determination of the necessary amount of water entails substantial judgment calls of technical and scientific nature—precisely the sort of decisions that the federal government as trustee is obligated to make and which NEPA is meant to assist.

Yet the D.C. Circuit concluded that Petitioners lack standing to challenge the Protocol because the Tribes purportedly may independently seek the full implementation of their instream rights held in trust, and the federal government is powerless to stop them. App. A-21. Thus, per the D.C. Circuit, Petitioners have no hope of legal or other recourse through the federal government for the human and environmental catastrophe unfolding in the Klamath Basin, despite that catastrophe being the direct result of the management regime decreed by the Protocol Agreement.

The D.C. Circuit's ruling perversely inverts the default federal-Indian relationship by presuming that the Tribes may, absent express Congressional direction to the contrary, dictate to the federal government how tribal trust assets are to be managed. In so holding, the D.C. Circuit's decision effectively

bars application of laws like NEPA—which regulate and are intended to better inform discretionary federal decision-making—to Indian trust assets. The D.C. Circuit's decision therefore conflicts with case law from this Court, as well as from other federal circuit courts, affirming the federal government's authority and obligation to manage Indian trust assets, consistent with Congressional policy and statutory command. Given the worsening drought in the Klamath Basin, as well as the need for close planning coordination between the federal government and state and local entities in the Klamath Basin, the necessity for this Court's review of the conflicts created by the D.C. Circuit's decision is especially pressing.

STATEMENT OF THE CASE

Petitioners are landowners and ranchers who raise livestock in southern Oregon's Upper Klamath Basin. Supporting an impressive variety of plants and wildlife, their ranches lie within the watersheds of several tributaries to Upper Klamath Lake, a major source of the Klamath River. The Upper Klamath Basin encompasses nearly 200,000 acres of what, traditionally, has been highly productive irrigated pastureland for livestock. Since 2013, however, agriculture in the region has sharply declined. This growing desuetude results largely from severe irrigation cut-offs imposed to satisfy certain instream water rights that the federal government holds in trust for the Klamath Indian Tribes. App. K-8 to K-9, K-17 to K-19 (Am. Compl. ¶¶ 14, 36–40).

The Tribes have resided in the Klamath Basin for over a millennium. *United States v. Adair*, 723 F.2d

1394, 1397 (9th Cir. 1983). In an 1864 Treaty with the federal government, 16 Stat. 707 (Oct. 14, 1864), App. E, the Tribes relinquished their rights to their original homeland in exchange for a reservation of 800,000 acres in southern Oregon. *Adair*, 723 F.2d at 1397–98. The Treaty had two essential purposes: preservation of the Tribes' traditional hunting and fishing lifestyle, and encouragement and support of agriculture. *Id.* at 1410.

Nearly a century later, Congress passed the Klamath Termination Act, Pub. L. No. 587, 68 Stat. 718 (Aug. 13, 1954), pursuant to which some of these reservation lands were sold with the remainder put into a private land management trust.[1] *Kimball v. Callahan*, 493 F.2d 564, 567 (9th Cir. 1974).

Not long after the reservation's windup, the federal government brought an action in federal district court in Oregon for a declaration of the water rights attached to lands within a portion of the former reservation. *Adair*, 723 F.2d at 1397. Named as defendants were the six hundred or so private citizens who owned land in the Upper Williamson River drainage, as well as the State of Oregon. The Tribes intervened as plaintiffs.[2] *Id.*

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[1] Members were given the option to withdraw from the Tribes and receive a cash payment, or to remain in the Tribes and enjoy the benefits of the private land trust. *Kimball*, 493 F.2d at 567. Some three decades after the termination of federal supervision, the Tribes secured renewed federal recognition through the passage of the Klamath Indian Tribe Restoration Act, Pub. L. No. 99-398, 100 Stat. 849 (Aug. 27, 1986).

[2] Neither Petitioners nor their predecessors in interest were parties to *Adair*, as they own lands and water rights from

Ultimately, the Ninth Circuit held that, "at the time the Klamath Reservation was established, the Government and the Tribe[s] intended to reserve a quantity of the water flowing through the reservation . . . for the purpose of maintaining the [Tribes'] treaty right to hunt and fish on reservation lands," and that this federal reserved water right survived the Termination Act. *Id.* at 1410–12. As recognized by the Ninth Circuit, the Tribes' right is somewhat different from water rights possessed by private parties. Unlike most such rights, which entitle their holders "to withdraw water from the stream for agricultural, industrial, or other consumptive uses," the Tribes' hunting-and-fishing entitlement "consists of the right to prevent other appropriators from depleting the [stream's] waters below a protected level." *Id.* at 1411. Also atypical, the Tribes' interest in their instream water rights is beneficial only, legal title remaining with the federal government. *See generally Shoshone-Bannock Tribes v. Reno*, 56 F.3d 1476, 1479 (D.C. Cir. 1995) ("With respect to reserved water rights on Indian reservations, these federally-created rights belong to the Indians rather than to the United States, which holds them only as trustee."). An additional peculiarity is the priority date of the Tribes' water rights—"time immemorial," *Adair*, 723 F.2d at 1414—such that their exercise trumps all other water rights

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different Upper Klamath Basin tributaries, such as the Wood River and Sprague River. *See* App. K-3 to K-6 (Am. Compl. ¶¶ 3–8). Therefore, they are not bound by the *Adair* decision and their challenges to certain legal issues decided in *Adair* remain active in the ongoing Klamath Basin Adjudication litigation.

in the Upper Klamath Basin, including those held by Petitioners.[3]

Shortly after the federal government filed the *Adair* litigation, the Oregon Water Resources Department initiated a general stream adjudication for the Klamath Basin. *Adair*, 723 F.3d at 1404–05. In addition to naming thousands of individual landowners as parties, the state included the Tribes and the federal government pursuant to the McCarran Amendment, 43 U.S.C. § 666(a), which waives the federal government's and Indian tribes' immunity for purposes of such comprehensive state stream adjudications. *See United States v. Oregon*, 44 F.3d 758, 762–63 (9th Cir. 1994).

In 2013, the state adjudication came to its administrative conclusion with the issuance of an order of determination (subsequently amended in 2014). Among other things, the order of determination awards the federal government, as trustee for the Tribes, substantial instream water rights in the same tributaries in which Petitioners possess their own water rights. The order quantifies the Tribes' instream rights at such high levels that, when fully implemented, little to no water is left for Petitioners or other irrigators in the Upper Klamath Basin. App. K-11 to K-12 (Am. Compl. ¶ 20).

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[3] Oregon follows the law of prior appropriation, which grants protection only to "beneficial" uses of water and which, as between competing uses, prefers the older or "senior" use. *Alexander v. Cent. Or. Irrig. Dist.*, 528 P.2d 582, 585 (Or. Ct. App. 1974). The priority of the Tribes' water rights and their quantification are determined in part according to Oregon's prior appropriation law. *Adair*, 723 F.2d at 1411 n.19.

In jurisdictions like Oregon which follow the law of prior appropriation, when there is insufficient water for all users, a senior appropriator places a "call" with the pertinent water master to secure his or her senior entitlement. Or. Rev. Stat. § 540.045(1)(a)–(b). *See generally* David H. Getches, *Water Law in a Nutshell* 103 (3d ed. 1997) ("A senior appropriator seeking to enforce rights as against a junior 'calls the river.' It is usually the job of the state engineer or some other official to ensure that appropriators do not take the water out of priority."). To govern how such calls would be made for the then-recently quantified instream rights, the Tribes and the federal government in 2013 entered into a Protocol Agreement. As amended in 2019, the Protocol authorizes the Tribes to place calls with the Oregon Water Resources Department for the implementation of the Tribes' instream water rights after providing the federal government (via the Bureau of Indian Affairs) with notice of their intent to call. Within three or seven business days of receiving such notice,[4] the Bureau must provide an email response to the Tribes stating whether it agrees with the proposed call and whether it suggests any changes. Thereafter, the Protocol authorizes the Tribes, after having allowed two further business days for discussion with the Bureau's Regional Director, to proceed with placing the call, even if the federal government believes the call to be ill-advised, excessive, or otherwise unnecessary to support the Tribes' hunting and

[4] The time of notice depends on the type of call. A "standing" call, *i.e.*, one for the entire season, requires a seven-day notice, whereas ad-hoc calls within a season require only a three-day notice.

fishing interests under the Klamath Treaty. *See* App. I-4 to I-5; App. J-6 to J-7.

Every year since the Protocol became effective, the Tribes have placed calls for the implementation (and, since 2017, the full implementation) of their instream water rights, and every year the federal government, pursuant to the Protocol, has provided its consent. The resulting orders from the Oregon Water Resources Department have compelled hundreds of landowners throughout the Upper Klamath Basin, including Petitioners, dramatically to curtail and, in some cases, entirely to cease irrigation. *See* App. K-14, 16 (Am. Compl. ¶¶ 25, 32).

Following the initial shutoffs in 2013, the federal government and the State of Oregon sought to ameliorate the Basin-wide crisis by convening stakeholders to reach a comprehensive water rights settlement. That effort produced the Upper Klamath Basin Comprehensive Agreement, to which Oregon, the Tribes, and many landowners—including most Petitioners—were signatories. Former Secretary of the Interior Sally Jewell personally participated in the signing ceremony. App. K-14 (Am. Compl. ¶ 26).

Among other things, the Agreement reduced the level of instream flows that the federal government and the Tribes demanded to significantly below the ceiling awarded in the Klamath Basin Adjudication. These limited flows were designed to support the Tribes' fish and wildlife resources while providing irrigation for landowners such as Petitioners. App. K-15 (Am. Compl. ¶ 28).

From 2014 through 2016, the federal government and the Tribes placed calls for water at levels consistent with the Agreement. Although many landowners, including some Petitioners, still experienced significant water curtailments, these modified calls did mitigate the environmental and economic impacts in the Upper Klamath Basin by allowing more land to be irrigated. App. K-15 (Am. Compl. ¶ 29).

In 2017, however, the Tribes and the federal government departed from the Agreement, citing a lack of progress in obtaining the funding necessary to implement the Agreement in full. They therefore resumed calls for the implementation of the maximum instream flows. Later that year, Secretary of the Interior Ryan Zinke formally terminated the Agreement. *See* Notice Regarding Upper Klamath Basin Comprehensive Agreement, 82 Fed. Reg. 61,582 (Dec. 28, 2017). Since then, the federal government and the Tribes have sought implementation of their maximum allotted instream flows, which has resulted in renewed water shutoffs to Basin landowners, including Petitioners. App. K-15 to K-16 (Am. Compl. ¶¶ 30–31).

Fearing the ruin of their livelihoods and communities, Petitioners brought this action in the United States District Court for the District of Columbia to challenge the Protocol Agreement. Petitioners' amended complaint[5] advances two claims under the Administrative Procedure Act, 5 U.S.C. §§ 701–706. First, the Protocol violates the doctrine of

[5] The only change from the original complaint was the addition of a plaintiff.

unlawful delegation because, without specific Congressional authorization, it delegates to the Tribes final decision-making authority over when and to what extent a call should be made for the Tribes' instream water rights, to which the federal government holds legal title. *Cf. U.S. Telecom Ass'n*, 359 F.3d at 565 ("[S]ubdelegations to outside parties are assumed to be improper absent an affirmative showing of congressional authorization."). Second, the Protocol violates NEPA because it, and the calls made thereunder, have significant effects on the human environment, yet the federal government has conducted no analysis of such actual or anticipated effects or possible alternatives.

The district court granted the federal government's motion to dismiss the action for lack of standing, concluding that Petitioners' injuries are not fairly traceable to the Protocol, nor would they be redressed by the Protocol's invalidation. App. B-12.

The D.C. Circuit affirmed. In its view, traceability and redressability here "depend on the conduct of a third party," namely, the Tribes. App. A-16. But under federal law, the Tribes are "free to make calls in the exercise of their treaty rights." App. A-21. Thus, the federal government's concurrence *vel non* in any Tribal call for water would have no "predictable effect on the [state] watermaster's issuance of orders that require [Petitioners] to curtail irrigation of their lands."[6] The D.C. Circuit therefore concluded that

[6] The D.C. Circuit also rejected Petitioners' alternative argument that federal management authority over the Tribes' water rights could be inferred from the McCarran Amendment, which subjects the federal government as well as Indian tribes to state

Petitioners' injuries are traceable to the Tribes, not the federal government, and thus invalidation of the Protocol would not redress Petitioners' harms. App. A-29.

REASONS FOR GRANTING CERTIORARI

I.

The D.C. Circuit's Ruling Upsets the Balance of the Federal-Indian Trust Relationship Struck by Decisions of This Court and Faithfully Implemented by Those of Other Circuit Courts

In holding that the federal government is powerless to exercise final management authority over assets held in trust for Indian tribes, the D.C. Circuit recognized that its decision threatens to disturb the traditional federal-Indian trust relationship. Responding to the federal government's argument that the Bureau of Indian Affairs "was obligated, if asked, to concur in lawful water calls proposed by the Tribes," App. A-21, the D.C. Circuit acknowledged that the government's position cannot readily be squared with the hitherto undisputed proposition that "an Indian tribe cannot force the government to take a specific action unless a treaty, statute, or agreement imposes, expressly or by implication, that duty." *Id.* (quoting *Shoshone-Bannock Tribes*, 56 F.3d at 1482). Yet the court gave

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procedural rules of water rights administration. *See* App. A-23. The court of appeals concluded that the argument was unavailing because, under its view of state law, Oregon does not require the concurrence of the federal government before state officials will heed a call from the Tribes for implementation of their water rights. App. A-29.

no further attention to this evident conflict because it concluded that "the Tribes were free to make calls in the exercise of their treaty rights." *Id.* But that conclusion does not avoid the problem; it merely rephrases it. For the Tribes are only free to make their own calls to the extent that they can veto contrary management direction from the federal government.

Congress, however, has made clear that the Tribes have no such power. After all, Congress has specifically charged the Bureau of Indian Affairs and the Department of the Interior to manage Indian affairs and all matters arising out of Indian relations. 25 U.S.C. §§ 1a, 2. *See* App. F. And as even the D.C. Circuit has recognized, this responsibility necessarily presupposes the authority to discharge it ably. *Udall v. Littell*, 366 F.2d at 672. Moreover, decisions of this Court and other circuit courts affirm—contrary to the decision of the D.C. Circuit below—that such authority includes the power to manage trust assets to accommodate a variety of interests, such as the need to conserve other resources within the same trust, the need to negotiate over trust assets to broker compromises with competing users and thereby foster long-term cooperation, and the need to satisfy statutory commands governing discretionary federal decision-making.

A. The D.C. Circuit's decision conflicts with decisions of this Court and of other lower courts affirming that the federal government retains general management authority and discretion over Indian trust assets

In holding that the federal government has no power to exercise final decision-making authority over the Tribes' water rights, the D.C. Circuit departed from the well-established rule that the federal government's role as trustee of Indian trust assets necessarily carries with it the power and obligation to manage those assets. *See, e.g.*, *Morton v. Ruiz*, 415 U.S. 199, 231 (1974) ("In the area of Indian affairs, the Executive has long been empowered to promulgate rules and policies, and the power has been given explicitly to the Secretary and his delegates at the [Bureau of Indian Affairs]." (footnotes omitted)); *Udall*, 366 F.2d at 672–73 (authority to cancel contract of general counsel for Indian tribe); *Agua Caliente Band of Cahuilla Indians v. Riverside County*, 181 F. Supp. 3d 725, 740 (C.D. Cal. 2016) (authority to prohibit state taxation on possessory interests in reservation lands). *Cf.* 25 U.S.C. § 2 ("The Commissioner of Indian Affairs shall, under the direction of the Secretary of the Interior, and agreeably to such regulations as the President may prescribe, have the management of all Indian affairs and of all matters arising out of Indian relations.").

The D.C. Circuit saw no conflict, relying on this Court's rulings in *United States v. Mitchell*. App. A-18 (citing *United States v. Mitchell*, 445 U.S. 535 (1980) (*Michell I*); *United States v. Mitchell*, 463 U.S. 206

(1983) (*Mitchell II*)). The question in these cases was whether the Quinault Tribe and others could seek money damages from the United States for the alleged mismanagement of timberland trust assets. *Mitchell I*, 445 U.S. at 537; *Mitchell II*, 463 U.S. at 207. The Court's first ruling held that the broad provisions of the General Allotment Act of 1887 did not create such a claim, *Mitchell I*, 445 U.S. at 542, whereas the Court's second ruling held that other statutes and regulations imposing more specific and elaborated duties on the federal government did, *Mitchell II*, 463 U.S. at 228.

In the D.C. Circuit's view, the Court's decisions in *Mitchell* stand for the proposition that a bare or "limited" trust relationship, like that created by the Klamath Treaty,[7] does not authorize the federal government to assume management authority over Indian trust assets. App. A-18, A-21. The court of appeals' reasoning is precisely backwards. The limited trust exemplified by the *Mitchell* cases is only limited with respect to what Indian tribes may demand, *not* with respect to the federal government's management authority as trustee of those assets. *See Mitchell I*, 445 U.S. at 546 (because the General Allotment Act "cannot be read as establishing . . . a fiduciary responsibility . . . [,] [a]ny right of the respondents to recover money damages for Government mismanagement . . . must be found in some [other] source"); *Mitchell II*, 463 U.S. at 226 ("Because the statutes and regulations at issue in this case clearly establish fiduciary obligations of the Government in

[7] *See* Appellees' Ans. Br., Doc. No. 1857331, at 28 (D.C. Cir. Aug. 19, 2020) ("As stated above, however, this trust ownership is 'limited.'") (quoting *Mitchell II*, 463 U.S. at 224).

the management and operation of Indian lands and resources, they can fairly be interpreted as mandating compensation by the Federal Government for damages sustained."). *Cf. id.* at 209 (acknowledging that the federal government has "broad statutory authority" over the management of trust assets). In other words, where a trust relationship between the federal government and an Indian tribe is, as here, "limited," the consequence is the *minimization* of the Tribes' management power and not, as the D.C. Circuit inversely held, its maximization.

Indeed, prior to the decision below, the D.C. Circuit had consistently ruled that the federal-Indian trust relationship, coupled with various statutory grants of power to manage Indian affairs, places decision-making authority over the management of tribal trust assets squarely in the federal government as trustee and not the Indian tribes as beneficiaries. *See Udall*, 366 F.2d at 672–73. *Cf. Shoshone-Bannock Tribes*, 56 F.3d at 1482 ("[A]n Indian tribe cannot force the government to take a specific action unless a treaty, statute or agreement imposes, expressly or by implication, that duty.").

For example, in *Udall* the D.C. Circuit considered whether the Secretary of the Interior had the power administratively to terminate, for cause, a tribe's employment of its general counsel. *Udall*, 366 F.2d at 670. In seeking to enjoin the Secretary from terminating the contract, the Tribe's general counsel argued that the existence of specific statutory duties implied the absence of a general authority that would sustain the challenged termination power. *Id.* at 673. The court disagreed, reasoning that "the very general

language of the statutes [*viz.,* 25 U.S.C. § 2 and 43 U.S.C. § 1457][8], makes it quite plain that the authority conferred [is] to manage all Indian affairs, and all matters arising out of Indian relations . . . ." *Id.* at 672–73. *See* App. F, H.

Decisions from other circuits are of the same accord. *See United States v. Eberhardt*, 789 F.2d 1354, 1359 (1986) ("These provisions generally authorize the Executive to manage Indian affairs but do not expressly authorize Indian fishing regulation. However, ever since these statutes were enacted in the 1830's, they have served as the source of Interior's plenary administrative authority in discharging the federal government's trust obligations to Indians.") (citing 25 U.S.C. §§ 2, 9); *Armstrong*, 306 F.2d at 522 ("The management of water and water projects on a reservation is clearly within the scope of the general statutory authority granted to the Commissioner of Indian Affairs[.]").

Thus, this Court's review is merited to resolve the conflict between the D.C. Circuit's ruling and decisions of this Court and other lower federal courts as to the extent to which the federal government possesses general management and final decision-making authority over assets held in trust for the benefit of Indian tribes.

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[8] The decision references R.S. § 441, then codified at 5 U.S.C. § 485, but which is now codified in identical language at 43 U.S.C. § 1457.

B. The D.C. Circuit's decision conflicts with the rule of the Ninth Circuit that the federal government must manage tribal trust assets in light of all and not just one of the purposes for which those assets have been placed in trust

Like most treaties, the Klamath Treaty has more than one purpose: in addition to preserving the Tribes' hunting and fishing lifestyle, the Klamath Treaty also aims to support agriculture. *Adair*, 723 F.2d at 1409–10. *See* App. E. *Cf. Colville Confederated Tribes v. Walton*, 647 F.2d 42, 48 (9th Cir. 1981) (holding that the Colville Indian Reservation was established for the dual purpose of providing for a land-based agrarian society and of preserving tribal access to fishing grounds). Implementation of the Tribes' instream water rights can, by definition, only further the former purpose. By affirming the Protocol's effective abandonment of the Klamath Treaty's agricultural purpose, the D.C. Circuit's ruling below conflicts with the Ninth Circuit's rule that the federal government may make adjustments in the management of tribal trust assets so as to better further the several purposes for which those assets have been reserved.

In *United States v. Eberhardt*, 789 F.2d 1354 (9th Cir. 1986), members of the Yurok Tribe were criminally prosecuted for violating Department of the Interior regulations that prohibited commercial fishing by Indians on a stretch of the Klamath River running through the Hoopa Valley Reservation. *Id.* at 1356. The district court dismissed on the ground that the regulations were an *ultra vires* abrogation of the

Yurok's federally reserved commercial fishing rights. *See id.* at 1357. Reversing, the Ninth Circuit held that the federal government had the authority to regulate tribal fishing in order to advance interests other than commerce. As the court explained, the tribal fishing right at issue was not reserved exclusively for commercial purposes, but was intended to advance ceremonial and subsistence purposes as well. *Id.* at 1359. Further, not only had Interior been granted general authority to regulate all fishing on Indian reservations, *id.* at 1359–60 (citing 25 U.S.C. §§ 2, 9),[9] but the regulations at issue were expressly designed to balance commercial use with the need for preserving enough salmon to serve the trust's other purposes. *See id.* at 1357 ("Interior justified the moratorium because the anadromous fish runs were not large enough to sustain commercial fishing as well as consumptive and escapement needs.").

Just as in *Eberhardt*, the tribal trust assets here were reserved for more than one purpose. *See Adair*, 723 F.2d at 1410 (promotion of agriculture as well as hunting and fishing). *See also* App. E. Yet unlike in *Eberhardt*, the D.C. Circuit below affirmed the federal government's erasure of the Klamath Treaty's multiple purposes, by concluding that the federal government has no power to countermand, or even to moderate, tribal demands seeking to vindicate just one part of the Tribes' trust assets. This Court's review is therefore merited to resolve the conflict between the D.C. Circuit and the Ninth Circuit as to the federal government's responsibility as trustee to

[9] These same statutes also "provide a statutory basis for Interior regulations administering Indian lands and managing other Indian fishery resources." *Eberhardt*, 789 F.2d at 1359 n.8.

manage Indian trust property that is subject to potentially divergent purposes.

C. The D.C. Circuit's decision conflicts with the rule of the Ninth Circuit that the federal government is authorized to negotiate with trust assets to secure long-term security for Indian tribes by minimizing or resolving conflicts with non-Indian entities

Just as with management of trust assets subject to multiple purposes, the D.C. Circuit's ruling conflicts with case law from the Ninth Circuit in how the latter recognizes the federal government's authority to make concessions over the management of tribal trust assets to secure a long-term, mutually beneficially resolution of conflicts with non-tribal entities.

In *United States v. Ahtanum Irrigation District*, 236 F.2d 321 (9th Cir. 1956), the Ninth Circuit addressed a dispute arising from a 1908 agreement between the Department of the Interior and non-Indian water users whose lands abutted the Ahtanum Creek along the Yakima Indian Reservation. *Id.* at 323–24. The Yakima possessed federally reserved rights to the creek's waters pursuant to an 1855 treaty. *Id.* at 323, 327. In 1906, a non-Indian living outside the reservation sued to claim rights to the creek's waters and alleged that federal agents were wrongfully diverting water therefrom. Acting for the Department, the Commissioner of Indian Affairs sought to reach a settlement out of court. This effort resulted in the 1908 agreement allocating the creek's waters between, on the one hand, certain non-Indian

users who agreed to take 75% of the flow and, on the other hand, the United States, which agreed to take 25% as trustee for the Yakima. *Id.* at 329. Nearly five decades later, the federal government brought suit to quiet title in the Yakima to the full use of the creek's waters, alleging that Interior had no power to make the 1908 agreement "in the absence of specific statutory authority so to do." *Id.* at 323, 334–35.

The Ninth Circuit rejected the federal government's argument, pointing to 25 U.S.C. § 2 and 43 U.S.C. § 1457 as sources of Interior's authority to enter into the agreement.[10] *Ahtanum*, 236 F.2d at 332, 335–36. ("It is fair to say that in conferring these powers upon the Secretary of the Interior Congress must have had it in mind that a part of the Secretary's task of supervision and of management of Indian affairs would necessarily deal with certain relations between the Indians on the one hand and their white neighbors on the other."). Although acknowledging that the water rights of the non-Indians "were subordinate to the rights of the Indians," the court nevertheless determined that Congress could not have contemplated that "the Secretary, vested as he was with the general power of supervision and management of Indian affairs, and of matters arising out of Indian relations, could not make a peaceful arrangement for a practical mode of use of the waters of this stream." 236 F.2d at 335–36.

Just as Interior in *Ahtanum* had the authority to enter into an agreement allocating much of the Yakima Tribe's reserved water rights to their neighbors, so does Interior here have authority to

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[10] *See supra* note 8.

make adjustments to the Tribes' calls for instream flows to facilitate peaceable arrangements with other inhabitants of the Klamath Basin, such as Petitioners, as well as with the general public. *Cf. Udall*, 366 F.2d at 672–73 (Commissioner of Indian Affairs must "manage all Indian affairs, and all matters arising out of Indian relations, with a just regard, not merely to the rights and welfare of the public, but also to the rights and welfare of the Indians[.]"). Yet the D.C. Circuit's ruling, by concluding that "the Tribes [are] free to make calls in the exercise of their treaty rights," App. A-21, effectively cancels Interior's authority to manage any tribal trust assets.

Accordingly, the conflict presented between the decision below and that of the Ninth Circuit as to the federal government's inherent discretion as trustee to manage tribal trust assets to avoid conflict and secure good relations with competing users of those assets merits this Court's review.

D. The D.C. Circuit's decision conflicts with rulings of other circuit courts holding that tribal trust assets are not exempt from federal environmental statutes, such as NEPA, that regulate discretionary agency decision-making

By holding that the federal government has no discretionary authority to manage the Tribes' water rights, the D.C. Circuit essentially nullified the application to tribal trust assets of any and all federal statutes, such as NEPA, that regulate discretionary federal decision-making to protect the human and natural environment. *See* App. A-13, 14, 21; App G. *Cf. Dep't of Transp. v. Public Citizen*, 541 U.S. 752,

770 (2004) (NEPA applies only to discretionary action).

That consequence sharply conflicts not only with authority generally affirming the federal government's substantial discretion in how to manage Indian trust assets,[11] but also with many decisions specifically holding that Indian trust assets enjoy no exemption from statutes that, like NEPA, regulate discretionary decision-making. *See Manygoats*, 558 F.2d at 558–59 ("In the instant case the duties and responsibilities of the Secretary may conflict with the interests of the Tribe. The Secretary must act in accord with the obligations imposed by NEPA. . . . We find nothing in NEPA which excepts Indian lands from national environmental policy."); *North Slope Borough v. Andrus*, 642 F.2d 589, 612 (D.C. Cir. 1980) ("[T]he Secretary, even aside from his imputed role of trustee, does not have a free hand to neglect the environment. All of the environmental statutes, particularly [the Endangered Species Act], structure and prescribe for the Secretary a solicitous stance toward the environment. Hence, where the Secretary

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[11] *See, e.g.*, *Cobell v. Norton*, 240 F.3d 1081, 1099 (D.C. Cir. 2001) ("Despite the imposition of fiduciary duties [to Indian tribes], federal officials retain a substantial amount of discretion to order their priorities."); Cohen's Handbook of Federal Indian Law § 19.06, at 1259–60 (Nell Jessop Newton ed., 2012) ("The Department of the Interior is responsible both for advancing the interests of the Indian tribes and for representing a variety of often-competing public interests in lands and resources.") (footnote omitted); Bureau of Indian Affairs, Division of Environmental and Cultural Resources Management, *National Environmental Policy Act (NEPA) Guidebook* 8 (2012), https://on.doi.gov/38vKMfL ("Proposals to use or develop resources on Indian trust lands may also trigger NEPA. . . . If the BIA acts on such proposals, NEPA review would be required.").

has acted responsible in respect of the environment, has implemented responsibly, and protected, the parallel concerns of the Native Alaskans."). *Accord Nulankeyutmonen Nkihtaqmikon v. Impson*, 503 F.3d 18, 28 (1st Cir. 2007) (federal lease of tribal trust land subject to NEPA and the Endangered Species Act); *United States v. Billie*, 667 F. Supp. 1485, 1492 (S.D. Fla. 1987) (Endangered Species Act applies to Seminole Tribes' hunting rights on trust land).

But as a result of the D.C. Circuit's decision, the federal government is relieved of these obligations, because the great harm to the Upper Klamath Basin's human environment caused by the implementation of the Tribes' instream water rights is supposedly entirely the Tribes' doing. *See* App. A-21. As explained above, *see supra* Parts I.A–C., that position cannot be reconciled with how this Court and other lower federal courts have construed the federal government's management authority as trustee of tribal assets. But even if the federal government did in fact lack power to do anything with the Tribes' instream rights that is not strictly directed toward maximizing the Tribes' hunting and fishing interests, the federal government's role as trustee would still be relevant. The amount of water needed to satisfy the Tribes' hunting and fishing needs is not self-evident or ascertainable by easy arithmetic calculation. Rather, its determination entails substantial judgment calls of a difficult technical and scientific nature—exactly the sort of task that the federal government as trustee is meant to take up in a year-to-year or long-term

programmatic planning process, and which NEPA is meant to assist.[12]

This Court's review is therefore merited to resolve the conflicts between the D.C. Circuit's ruling, absolving the federal government of any general discretionary duty to manage tribal trust assets, and the decisions of other courts affirming the application of NEPA and other discretion-based statutes to such assets.

II.

Whether the Federal Government Lacks Any Discretion to Manage Tribal Trust Assets Is an Issue of Pressing Public Importance

On March 31, 2021, less than two weeks after the issuance of the D.C. Circuit's decision below, Oregon Governor Kate Brown declared a state of drought emergency in Klamath County, Oregon, for the second year in a row. *See* Or. Exec. Order No. 20-02 (Mar. 2, 2020).[13] Governor Brown called it "one of the most difficult water years in recent memory," and declared a commitment "to doing everything possible to make state resources available to provide immediate relief and assistance to water users throughout Klamath County." Press Release, Or. Governor's Office, Governor Kate Brown Declares Drought Emergency

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[12] For example, simply because the Tribes have the right *when necessary* to call upon a certain amount water does not mean that the maximum allowable amount will *always* be advisable when weighed and considered with environmental and other impacts.

[13] *Available at* https://bit.ly/3ua5dJh.

for Klamath County (Mar. 31, 2021).[14] The severe conditions have had a devastating effect not just on farmers and ranchers like Petitioners—indeed, even domestic wells have dried up, Jamie Parfitt, *Historic Drought Leaves Klamath Basin Domestic Wells High and Dry*, KDRV.com (July 30, 2021, 5:54 PM)[15]—but also on upland forestry, native plant and wildlife species in the region, and the flora and fauna protected by the Klamath wildlife refuges, Bradley W. Parks, *Oregon Governor Declares Drought Emergency in Klamath Basin*, OPB.org (Oregon Public Broadcasting) (Mar. 31, 2021, 2:50 PM).[16]

Governor Brown's emergency order directs the Oregon Water Resources Department and the Oregon Department of Agriculture to coordinate with federal agencies to promote agricultural recovery in the region. But that much-needed coordination is unlikely to happen thanks to the D.C. Circuit's decision below, which renders the federal government an impotent trustee, at best a mere mechanical implementer of the Tribes' management preferences. The decision therefore augurs ill for the many people who live and work in the Klamath Basin. Their troubles are no less deserving of this Court's solicitude than those of other Basin residents that have arisen from past Klamath controversies, which this Court has agreed to resolve. *See, e.g.*, *Dep't of Interior v. Klamath Water Users Protective Ass'n*, 532 U.S. 1 (2001) (concerning the scope of an exemption from disclosure under the Freedom of Information Act); *Bennett v. Spear*, 520

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[14] *Available at* https://bit.ly/2W3iUNv.

[15] *Available at* https://bit.ly/39zXTNr.

[16] *Available at* https://bit.ly/3nUs5LT.

U.S. 154 (1997) (concerning the designation of critical habitat under the Endangered Species Act); *Oregon Dep't of Fish & Wildlife v. Klamath Indian Tribe*, 469 U.S. 879 (1984) (concerning off-reservation fishing and hunting).

But the bad consequences of the D.C. Circuit's ruling are by no means limited to the Klamath Basin. By holding that the federal government has essentially no authority or responsibility to manage tribal trust assets, the D.C. Circuit's decision menaces the gamut of federal-Indian trust issues. As noted above, *supra* Part I.A., it inverts the default principle that an Indian tribe cannot force the federal government to take any specific action absent a specific grant of statutory authority to so compel. Subject to the same proviso, the decision therefore also threatens to undermine *tribal* interests, by relieving the federal government of any affirmative obligation to protect trust resources. *Cf. United States v. White Mountain Apache Tribe*, 784 F.2d 917, 920 (9th Cir. 1986) ("It is also clear that the federal government, as trustee for the tribes, is under an affirmative obligation to assert water claims on its beneficiaries' behalf."); *Pawnee v. United States*, 830 F.2d 187, 190 (Fed. Cir. 1987) ("[T]he United States has a general fiduciary obligation toward the Indians with respect to the management of those oil and gas leases.").

That the D.C. Circuit's ruling promises such baleful results for the Klamath Basin and beyond underscores the need for this Court's review.

CONCLUSION

The petition for writ of certiorari should be granted.

DATED: October 2021.

Respectfully submitted,

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Counsel for Petitioners

United States Court of Appeals
for the District of Columbia Circuit

Argued November 23, 2020 Decided March 19, 2021

No. 20-5074

GERALD H. HAWKINS, INDIVIDUALLY AND AS A TRUSTEE OF THE CN HAWKINS TRUST AND GERALD H. HAWKINS AND CAROL H. HAWKINS TRUST, ET AL.,

APPELLANTS

V.

DEBRA A. HAALAND, SECRETARY OF THE INTERIOR, ET AL.,

APPELLEES

Appeal from the United States District Court
for the District of Columbia
(No. 1:19-cv-01498)

David J. Deerson argued the cause for appellants. With him on the briefs were *Damien M. Schiff* and *Dominic M. Carollo*.

John L. Smeltzer, Attorney, U.S. Department of Justice, argued the cause for appellees. With him on the brief were *Jeffrey Bossert Clark*, Assistant Attorney General, *Eric Grant*, Deputy Assistant Attorney General, and *Erika Kranz* and *Daron T. Carreiro*, Attorneys.

Before: ROGERS, KATSAS and RAO, *Circuit Judges*.

Opinion for the Court by *Circuit Judge* ROGERS.

ROGERS, *Circuit Judge*: Ranchers in the Upper Klamath Basin region of the State of Oregon who hold irrigation water rights, sued to prevent the exercise of water rights that interfere with the irrigation of their lands. The district court dismissed their lawsuit for lack of standing under Article III of the Constitution. Viewing their standing to turn on whether the Klamath Tribes can call upon state officials to implement their superior instream water rights without the consent of the federal government, the ranchers challenge a Protocol Agreement executed by the United States and the Tribes. They contend that the federal government, as trustee of those water rights, unlawfully delegated its call-making authority to the Tribes and that absent such delegation, the Tribes would be unable to secure state implementation of their water rights. The ranchers maintain that the economic, environmental, and recreational injuries they suffered because of water cut offs imposed to satisfy the Tribes' superior water rights are fairly traceable to the federal government's delegation of its authority and could be redressed by invalidation of the Protocol, which would restore the federal government's call-making authority. We conclude that the Protocol does not delegate federal authority to the Tribes but recognizes the Tribes' preexisting authority to control their water rights under a Treaty in 1864 with the United States. Accordingly, the ranchers have not established the causation or redressability necessary for standing, and the dismissal of their complaint is affirmed.

I.

The Klamath Tribes have hunted, fished, and lived in the Klamath River watershed of Southern Oregon for over a thousand years. *See Oregon Dep't of Fish & Wildlife v. Klamath Indian Tribe*, 473 U.S. 753, 766 (1985); *United States v. Adair*, 723 F.2d 1394, 1397–98 (9th Cir. 1983). In 1864, the Tribes entered into a treaty with the United States in which they ceded most of their aboriginal territory, approximately 22 million acres, excluding approximately 1.9 million acres that the parties agreed would be held for the Tribes "as an Indian reservation." *Oregon Dep't*, 473 U.S. at 755 (internal quotation marks omitted) (quoting Treaty Between the United States of America and the Klamath and Moadoc Tribes and Yahooskin Band of Snake Indians ("1864 Treaty") art. I, Oct. 14, 1864, 16 Stat. 707, 707–08).[1] The Tribes reserved "the exclusive right of taking fish in the streams and lakes" on the reservation, 1864 Treaty art. I, 16 Stat. at 708, and of "gathering edible roots, seeds, and berries within its limits," *id.*, and the United States agreed to compensate the Tribes for the ceded lands in the form of federal expenditures to promote the Tribes' well-being and "advance them in civilization . . . especially agriculture," *id.* art. II, 16 Stat. at 708.

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[1] The Klamath Tribes are federally recognized as a single tribal entity, but that entity is composed of three historically distinct groups: the Klamath tribe, the Modoc tribe, and the Yahooskin band of Snake Indians. *See* 1864 Treaty preamble, 16 Stat. at 707. The court follows the practice of the parties to refer to "the Tribes" while some older sources refer to the Klamath as a single "tribe."

After establishing the Klamath Reservation, Congress enacted the General Allotment Act of 1887, which authorized subdivision of the reservation and allotment of parcels granted in fee to individual members of the Tribes, as part of a policy, since repudiated, "to extinguish tribal sovereignty, erase reservation boundaries, and force the assimilation of Indians into the society at large." *Upper Skagit Indian Tribe v. Lundgren*, 138 S. Ct. 1649, 1652–53 (2018) (internal quotation marks omitted) (quoting *Cnty. of Yakima v. Confederated Tribes & Bands of the Yakima Indian Nation*, 502 U.S. 251, 254 (1992)). Since then Congress has addressed the federal government's relationship to the Tribes in ways directly relevant here. Nearly a century later, Congress ended the federal government's historical role as trustee while reaffirming the Tribes' reserved aboriginal water rights. By 1986, Congress had restored certain of its trustee services to the Tribes, but again expressly left the Tribes' aboriginal water rights in the Tribes' exclusive control.[2]

The Klamath Termination Act of 1954 terminated federal supervision of the Tribes and provided for disposition of their reservation land that had not been allotted. Pub. L. No. 83-587, § 1, 68 Stat. 718, 718. It closed the tribal roll and provided that tribal members

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[2] Regarding the federal government's trust relationship with Indian tribes, *see* COHEN'S HANDBOOK OF FEDERAL INDIAN LAW §§ 5.05(1)(b)–(2), 15.03, 19.06 (Nell Jessup Newton ed., 2017) (hereinafter "COHEN'S HANDBOOK"); *see also* Reid Peyton Chambers, *Judicial Enforcement of the Federal Trust Responsibility to Indians*, 27 STAN. L. REV. 1213 (1975); Mary Christina Wood, *Indian Land and the Promise of Native Sovereignty: The Trust Doctrine Revisited*, 1994 UTAH L. REV. 1471.

could elect to withdraw from the Tribes and receive a cash payout of the individual's interest in tribal property. Termination Act §§ 3–5, 68 Stat. at 718–19. The Tribes' property could be appraised and sold to fund individual cash payments. *Id.* § 5, 68 Stat. at 719. The property of the remaining members of the Tribes would be managed by a private trustee or corporation. *Id.* All restrictions on sale or encumbrance of land owned by members of the Tribes would be removed four years after the Act became effective. *Id.* § 8, 68 Stat. at 720. Specifically, the Termination Act provided:

> Upon removal of Federal restrictions on the property of the tribe and individual members thereof, the Secretary [of the Interior] shall publish in the Federal Register a proclamation declaring that the Federal trust relationship to the affairs of the tribe and its members has terminated. Thereafter individual members of the tribe shall not be entitled to any of the services performed by the United States for Indians because of their status as Indians and, except as otherwise provided in this Act, all statutes of the United States which affect Indians because of their status as Indians shall no longer be applicable to the members of the tribe, and the laws of the several States shall apply to the tribe and its members in the same manner as they apply to other citizens or persons within their jurisdiction.

Id. § 18(a), 68 Stat. at 722. Regarding water and fishing rights, the Termination Act provided:

> (a) Nothing in this Act shall abrogate any water rights of the tribe and its members, and the

> laws of the State of Oregon with respect to the abandonment of water rights by nonuse shall not apply to the tribe and its members until fifteen years after the [termination of the federal trust relationship to the tribe].
>
> (b) Nothing in this Act shall abrogate any fishing rights or privileges of the tribe or the members thereof enjoyed under Federal treaty.

Id. § 14, 68 Stat. at 722.

About 78% of the Tribes' members elected to withdraw and receive a payout. *Klamath & Modoc Tribes v. United States*, 436 F.2d 1008, 1012 (Ct. Cl. 1971). Reservation property not set aside to pay their claims was transferred to a private trustee. *Id.* In 1961, the Secretary of the Interior published a notice in the Federal Register that "the Federal trust relationship to the affairs of the tribe and its members is terminated." Termination of the Federal Trust Relationship to the Property of the Klamath Tribe of Indians Located in the State of Oregon, and of Federal Supervision Over the Affairs of the Individual Members Thereof, 26 Fed. Reg. 7362, 7362 (Aug. 12, 1961).

In 1986, Congress unwound some of the effects of the Termination Act. The Klamath Indian Tribe Restoration Act of 1986 restored the Federal trust relationship with the Tribes. It provided:

> All rights and privileges of the tribe and the members of the tribe under any Federal treaty, Executive order, agreement, or statute, or any other Federal authority, which may have been diminished or lost under the [1954 Termination

> Act] are restored, and the provisions of such Act, to the extent that they are inconsistent with this Act, shall be inapplicable to the tribe and to members of the tribe after the date of the enactment of this Act.

Pub. L. No. 99-398, § 2(b), 100 Stat. 849, 849. The Tribes were restored to the status of a federally recognized tribe. *Id.* § 2(a), 100 Stat. at 849. The Act specified that it did not "alter any property right or obligation," and thus did not restore previously alienated lands to the Tribes' land base. *See id.* §§ 2(d), 6, 100 Stat. at 850. It also expressly provided that the Act would not "affect in any manner any hunting, fishing, trapping, gathering, or water right of the tribe and its members." *Id.* § 5, 100 Stat. at 850. The United States presently recognizes the Tribes as a tribal sovereign, 25 U.S.C. §§ 3601(3), 5123(h), with inherent powers of self-government, including powers over land and water rights except as reserved by Congress. *See Kahawaiolaa v. Norton*, 386 F.3d 1271, 1273 (9th Cir. 2004); *Burlington N. R.R. Co. v. Blackfeet Tribe of the Blackfeet Indian Rsrv.*, 924 F.2d 899, 902 (9th Cir. 1991), *overruled on other grounds by Big Horn Cnty. Elec. Co-op., Inc. v. Adams*, 219 F.3d 944, 953 (9th Cir. 2000); *see also Michigan v. Bay Mills Indian Cmty.*, 572 U.S. 782, 788 (2014); *Oregon Dep't*, 473 U.S. at 765–66; *United States v. Shoshone Tribe of Indians of Wind River Rsrv.*, 304 U.S. 111, 116–17 (1938); Indian Entities Recognized by and Eligible to Receive Services from the United States Bureau of Indian Affairs, 84 Fed. Reg. 1200, 1202 (Feb. 1, 2019).

A.

Prior to passage of the Restoration Act, the determination of competing claims to water in the

Klamath Basin was underway in the federal courts and under Oregon law. The Tribes' reserved water rights arise as an exception to the doctrine of prior appropriation governing rights to use water from river systems in Oregon and other western states, based on acknowledgement that the establishment of an Indian reservation and other federal reservations impliedly reserves then-unappropriated water "to the extent needed to accomplish the purpose of the reservation." *Cappaert v. United States*, 426 U.S. 128, 138 (1976).

In 1975, the United States sued in federal court for a declaration of water rights in the Williamson River drainage in the Klamath Basin. *Adair*, 723 F.2d at 1398. The Tribes intervened as a plaintiff. *Id.* at 1399. The State of Oregon intervened as defendant and moved unsuccessfully for the federal court to abstain to state proceedings. *Id.* The Court of Appeals for the Ninth Circuit concluded that the Tribes held a right to "a quantity of the water flowing through the reservation . . . for the purpose of maintaining the [Tribes'] treaty right to hunt and fish on reservation lands." *Id.* at 1410. The right is "non-consumptive" in that the holder is not entitled to withdraw water from the stream but has "the right to prevent other appropriators from depleting the stream['s] waters below a protected level in any area where the non-consumptive right applies." *Id.* at 1411. Further, the right carried a priority date of "time immemorial," and the amount of water protected under the right was not to the flows present at the 1864 Klamath Treaty, but rather to "the amount of water necessary to support its hunting and fishing rights as currently exercised to maintain the livelihood of Tribe members." *Id.* at 1414–15. Additionally, the court concluded that:

> [T]he [federal] [g]overnment has no ownership interest in, or right to control the use of, the Klamath Tribe's hunting and fishing water rights. The hunting and fishing rights from which these water rights arise by necessary implication were reserved by the Tribe in the 1864 treaty with the United States. The hunting and fishing rights themselves belong to the Tribe and may not be transferred to a third party. Because the Klamath Tribe's treaty right to hunt and fish is not transferable, it follows that no subsequent transferee may acquire that right of use or the reserved water necessary to fulfill that use.

Id. at 1418 (citations omitted). The court proceeded to determine the extent of the federal government's own water right, *id.* at 1418–19, while leaving the quantification of the Tribes' water right to be determined in the state proceeding, *id.* at 1399, 1407. In 1952, Congress had adopted the McCarran Amendment, 43 U.S.C. § 666(a), which waived the United States' sovereign immunity and granted consent to join the United States in any suit for the adjudication of rights to use of a river system or other source.

Under Oregon law, a call system is used to allocate water. The process, as relevant, begins when the Oregon Water Resources Department ("OWRD") collects the water claims submitted by various persons, resolves objections to them, and as needed holds a hearing on the claims. Or. Rev. Stat. §§ 539.021, .030, .100, .110. OWRD will issue "findings of fact and an order of determination . . . establishing the several rights to the waters of the stream." *Id.* § 539.130(1). Upon issuance of the order,

OWRD's administrative determination is in "full force and effect." *Id.* § 539.130(4). OWRD files its findings and order, along with the administrative record, in Oregon Circuit Court for a non-jury adjudication, where exceptions can be filed. *Id.* § 539.130(1), .150. While the matter is pending before the Circuit Court, the division of water from the stream involved in the appeal is made in accordance with the order of OWRD. *Id.* § 539.170. Upon the "final determination" of water rights, OWRD will issue "a certificate setting forth the name and post-office address of the owner of the right; the priority of the date, extent and purpose of the right, and if the water is for irrigation purposes, a description of the legal subdivisions of land to which the water is appurtenant." *Id.* § 539.140. To administer determined water rights, OWRD has established water districts, *id.* § 540.010, whose "watermasters" allocate water in accordance with the users' existing water rights of record in the OWRD, *id.* §§ 540.020, .045(1)(a), with authority — when a holder of water rights has placed a "call" for water — to suspend conflicting upstream usages, *see* Or. Admin. R. 690-025-0025.

In 1975, the Klamath Basin Adjudication began when OWRD announced the intent to investigate usage of the Klamath River. The Tribes and the federal government filed the water enforcement claims at issue in 1997. The federal government's claims (Nos. 625–40) included claims on behalf of the Tribes, whose trust relationship had by then been restored; the Tribes filed their own claim (No. 612), which incorporated the claims made by the federal government. Following a lengthy administrative process, an administrative law judge in 2011 issued a proposed order approving the claims of the federal

government and the Tribes and quantifying the flows "necessary to establish a healthy and productive habitat to allow the exercise of the Klamath Tribes' hunting, fishing, trapping, and gathering rights guaranteed by the treaty of 1864."[3] OWRD's Administrative Determination largely confirmed the ALJ's proposal as to the federal government's claims, but dismissed the Tribes' omnibus claim (No. 612) as "duplicative of the United States' claims, not additive," because "[t]he United States holds the rights recognized herein in trust for the Klamath Tribes." Administrative Determination, *supra* note 3, at 4898, 5074 (citing *Colorado River Water Conservation Dist. v. United States*, 424 U.S. 800, 810 (1976)). It also provisionally confirmed water rights claimed by the ranchers with priority dates of 1864 or later, including irrigation water rights acquired from reservation allottees. *See* Am. Compl. ¶¶ 5, 8. OWRD filed its Administrative Determination in the Oregon Circuit Court, Or. Rev. Stat. § 539.130(1), and the parties here, and other claimants, filed exceptions, *id.* § 539.150. The Oregon Circuit Court recently issued an opinion on Phase 3, Part 1, Group C Motions, *In re Waters of the Klamath River Basin*, No. WA1300001 (Or. Cir. Ct. Feb. 24, 2021) ("Or. Cir. Ct. Op., Feb. 24, 2021").

The Tribes and the federal government executed a Protocol Agreement following OWRD's Administrative Determination in order "to position

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[3] Amended Corrected Findings of Fact and Order of Determination at 5153, *Klamath River Basin General Stream Adjudication* (Feb. 28, 2014), https://www.oregon.gov/owrd/programs/WaterRights/Adjudications/KlamathRiverBasinAdj/Pages/ACFFOD.aspx (hereinafter "Administrative Determination").

themselves to make [water rights] calls in a timely and effective manner." Protocol at 1 (May 2013). It provided that "[e]ach Party retains its independent right to make a call" and that if after following a consultation procedure "the Parties cannot agree on whether to make a call, either Party may independently make a call and the other will not object to the call." *Id.* at 3. As amended in 2019, the Protocol extends some consultation deadlines and adds that "the United States retains the right not to concur with any call for water that is inconsistent with the [Administrative Determination] or other legal obligations." Protocol at 4 (Mar. 2019).

In June 2013, the Tribes issued enforcement calls to OWRD. Am. Compl. ¶ 25. Oregon, the Tribes, and landowners including most of the ranchers here then entered into the Upper Klamath Basin Comprehensive Agreement (the "Upper Basin Agreement"). *Id.* ¶ 26. The Tribes agreed to forbear from enforcing the full extent of their reserved instream water rights in exchange for commitments by the other parties as to water use, riparian protection, and economic development. Notice Regarding Upper Klamath Basin Comprehensive Agreement, 82 Fed. Reg. 61,582, 61,582–83 (Dec. 28, 2017) ("Notice"). During 2014–16, the Tribes made calls for flows at these lower levels. Am. Compl. ¶ 29. But, in 2017, citing a lack of progress in implementing the promised benefits, the Tribes reverted to the higher water levels under OWRD's Administrative Determination. *Id.* ¶ 30. The federal government terminated the Upper Basin Agreement in view of Congress's failure to approve the necessary funding. Notice, 82 Fed. Reg. at 61,583–84. In 2018 and 2019,

the Tribes again issued calls for the full enforcement of their water rights. Am. Compl. ¶¶ 31–32.

B.

The ranchers filed the instant lawsuit against the federal government in May 2019. In their amended complaint, they alleged that after termination of the Upper Basin Agreement, the Tribes "by and through the power and authority delegated by" the federal government issued calls for enforcement of the full extent of their instream flow water rights. Am. Compl. ¶¶ 31–32. OWRD's enforcement of these calls, they alleged, resulted in "widespread and severe curtailment" of water rights for irrigation use on their lands, resulting in environmental and economic injury, and that similar injury will result from future calls. *Id.* ¶¶ 31–38. Specifically, the ranchers alleged they have suffered and will continue to suffer the following injuries: (1) reduction of wildlife on their ranches, (2) infestation of undesirable plants, (3) the loss of plant communities, (4) lost revenues, and (5) reduced property values. *Id.* ¶¶ 36–37. The ranchers argued that the Protocol constitutes an unlawful delegation to the Tribes of the federal government's authority to decide whether to concur in a call. *Id.* ¶¶ 41–46. Further, they argued that the calls made in 2013 and 2017–19 constituted major federal actions for which an environmental impact statement should have been prepared under the National Environmental Policy Act ("NEPA"). *Id.* ¶¶ 47–53. As a remedy, they asked the district court to set aside the Protocol, all previous calls, and to enjoin any future calls by the federal government until it "fully complied with the law," including "to make a final, independent decision on the propriety of

a call, having taken into account the general public interest and welfare, as well as NEPA." *Id.*

The district court dismissed the complaint for lack of Article III standing. The court determined that the Klamath Tribes "are entitled to enforce their senior water rights . . . regardless of whether the Protocol . . . stand[s]." Mem. Op. 18 (Jan. 31, 2020). The ranchers thus could not demonstrate that their injuries were traceable to the challenged Protocol or to any action of the federal government. *Id.* at 10–15. Nor could they show redressability because even if the federal government were prohibited from enforcing the Tribes' rights, the district court concluded, the Tribes would do so themselves, resulting in the same hardships to the ranchers. *Id.* at 15–21. The ranchers appeal.

II.

To establish standing to litigate in the federal courts, Article III of the Constitution requires a plaintiff to "present an injury that is concrete, particularized, and actual or imminent; fairly traceable to the defendant's challenged behavior; and likely to be redressed by a favorable ruling." *Dep't of Commerce v. New York*, 139 S. Ct. 2551, 2565 (2019) (internal quotation marks omitted) (quoting *Davis v. Fed. Election Comm'n*, 554 U.S. 724, 733 (2008)). Causation requires a "fairly traceable connection between the plaintiff's injury and the complained-of conduct of the defendant." *Steel Co. v. Citizens for a Better Env't*, 523 U.S. 83, 103 (1998). And redressability requires a litigant to demonstrate "a likelihood that the requested relief will redress the alleged injury." *Id.*

The ranchers frame their claims in terms of procedural injury. They concede that as junior appropriators they have no right to water that infringes the Tribes' instream rights, Appellants' Br. 5–7, and priority enforcement of water rights through a call system is in accordance with the nature of those rights under Oregon law, *see Montana v. Wyoming*, 563 U.S. 368, 375–76 (2011); *Klamath Irrigation Dist. v. United States*, 227 P.3d 1145, 1150 (Or. 2010).

To establish traceability in a procedural-injury case, "an adequate causal chain must contain at least two links:" (1) a connection between the omitted procedure and a government decision and (2) a connection between the government decision and the plaintiff's particularized injury. *WildEarth Guardians v. Jewell*, 738 F.3d 298, 306 (D.C. Cir. 2013) (internal quotation marks omitted) (quoting *Fla. Audubon Soc'y v. Bentsen*, 94 F.3d 658, 668 (D.C. Cir. 1996)). The plaintiff is not required to "show that but for the alleged procedural deficiency the agency would have reached a different substantive result. 'All that is necessary is to show that the procedural step was connected to the substantive result.'" *Id.* (citations omitted) (quoting *Massachusetts v. EPA*, 549 U.S. 497, 518 (2007)). Claims for procedural violations also receive a "relaxed redressability requirement" in which the plaintiff need only show that "correcting the alleged procedural violation *could* still change the substantive outcome in the [plaintiff's] favor" not "that it *would* effect such a change." *Narragansett Indian Tribal Historic Pres. Office v. FERC*, 949 F.3d 8, 13 (D.C. Cir. 2020). These relaxed standards do not apply to the link between the government decision and the plaintiff's injury. *See WildEarth Guardians*, 738 F.3d at 306. "[Alt]hough the plaintiff in a

procedural-injury case is relieved of having to show that proper procedures would have caused the agency to take a different substantive action, the plaintiff must still show that the agency action was the cause of some redressable injury to the plaintiff." *Arpaio v. Obama*, 797 F.3d 11, 21 (D.C. Cir. 2015) (internal quotation marks omitted) (quoting *Renal Physicians Ass'n v. U.S. Dep't of Health & Human Servs.*, 489 F.3d 1267, 1279 (D.C. Cir. 2007)).

Notably here, "[w]here traceability and redressability depend on the conduct of a third party not before the court 'standing is not precluded, but it is ordinarily substantially more difficult to establish.'" *Competitive Enter. Inst. v. FCC*, 970 F.3d 372, 381 (D.C. Cir. 2020) (quoting *Lujan v. Defs. of Wildlife*, 504 U.S. 555, 562 (1992)). "The party invoking our jurisdiction must show that the third party will act 'in such manner as to produce causation and permit redressability of injury.'" *Id.* A permissible theory of standing "does not rest on mere speculation about the decisions of third parties; it relies instead on the predictable effect of Government action on the decisions of third parties." *Dep't of Commerce*, 139 S. Ct. at 2566.

The ranchers trace their alleged injuries to OWRD orders that compelled them to curtail irrigation of their lands. Am. Compl. ¶¶ 25, 30–32. Those orders follow from the Tribes' calls for enforcement of their reserved water rights. *Id.* ¶¶ 22–25, 29–33. The Tribes and OWRD are third parties not joined as defendants in the ranchers' lawsuit here. Instead, the ranchers sued only the federal government on the premise that the Tribes would be unable to obtain enforcement of their calls for water

in the absence of concurrence by the federal government. Am. Compl. ¶¶ 2, 38. To determine whether the ranchers have standing, the court must determine whether the federal government's concurrence in or non-objection to the Tribes' enforcement calls will have a predictable effect on the OWRD watermaster's issuance of orders that require the ranchers to curtail irrigation of their lands. For the following reasons, we conclude that no such concurrence requirement exists under federal or Oregon law, and that, consequently, the ranchers cannot establish the causation or redressability necessary for standing.

A.

The Tribes' water rights have their source in federal law. The 1864 Klamath Treaty extinguished the Tribes' title to ceded lands while preserving their "exclusive right" to hunt and fish on reservation land. Art. I, 16 Stat. at 707–08. The scope of the Tribes' water rights under the Treaty is a question of federal law. Under the "reserved water rights" doctrine, when the federal government creates an Indian reservation, it impliedly reserves "that amount of water necessary to fulfill the purpose of the reservation." *Cappaert*, 426 U.S. at 141. The 1864 Treaty thus reserved to the Tribes "a quantity of the water flowing through the reservation . . . for the purpose of maintaining [their] treaty right to hunt and fish on reservation lands." *Adair*, 723 F.2d at 1410. The nature of the federal government's trust relationship with the Tribes is also governed by federal law, and the ranchers' understanding of the federal government's role and the Protocol is "fundamentally in error." Appellees' Br. 24.

The principles announced by the Supreme Court disfavor the ranchers' assertion of standing. In *United States v. Mitchell* ("*Mitchell I*"), 445 U.S. 535 (1980), individual Indians who had been allotted former reservation land sought damages from the federal government for failing its fiduciary duties to maximize the value of timber on the allotted land. *Id.* at 537. The Supreme Court concluded that under the General Allotment Act "the trust Congress placed on allotted lands is of limited scope," and held, therefore, that the Act did not give rise to a claim for breach of fiduciary duty of timber management. *Id.* at 542–43, 546. On remand, the U.S. Court of Claims interpreted various statutes and regulations related to timber management to impose fiduciary duties on the federal government as trustee. The Supreme Court affirmed, holding in *United States v. Mitchell* ("*Mitchell II*"), 463 U.S. 206 (1983), that the cited statutes and regulations vested in the federal government "full responsibility to manage Indian resources and land for the benefit of the Indians" and thereby "establish[ed] a fiduciary relationship and define[d] the contours of the United States' fiduciary responsibilities." *Id.* at 224. Although this conclusion was "reinforced by the undisputed existence of a general trust relationship between the United States and the Indian people," the Court principally grounded its holding on the text of the statutes and regulations, which "clearly establish[ed] fiduciary obligations of the [federal government] in the management" of the lands and resources at issue. *Id.* at 224–26; *see also* COHEN'S HANDBOOK § 5.05(1)(b).

This court applied these principles in *Shoshone-Bannock Tribes v. Reno*, 56 F.3d 1476 (D.C. Cir. 1995). There, as here, a state had commenced a general

stream adjudication and joined the United States. *Id.* at 1478. The Shoshone-Bannock Tribes argued that they were entitled to water rights beyond their reservation's boundaries based on a treaty provision granting them the right to hunt on unoccupied land outside the reservation. *Id.* When the federal government declined to assert the off-reservation claims on their behalf, the tribes filed suit seeking to compel the U.S. Attorney General to file their claims. *Id.* at 1479. This court acknowledged that under the federal doctrine reserved water rights on Indian reservations "belong to the Indians rather than to the United States, which holds them only as trustee." *Id.* Recognizing that the Attorney General generally retained discretion to conduct litigation on behalf of the United States, the court noted that the tribes had identified no statute or other restriction limiting that discretion. *Id.* at 1480–82. Explaining, the court stated:

> While it is true that the United States acts in a fiduciary capacity in its dealings with Indian tribal property, it is also true that the government's fiduciary responsibilities necessarily depend on the substantive laws creating those obligations. We agree with the district court that an Indian tribe cannot force the government to take a specific action unless a treaty, statute or agreement imposes, expressly or by implication, that duty.

Id. at 1482 (citations omitted). The "'mere existence' of the Treaty [did not] require[] the federal government to protect whatever [water claims] the Tribes may wish to advance." *Id.*

Neither the 1864 Klamath Treaty, nor the 1954 Termination Act, nor the 1986 Restoration Act establish a trust relationship between the federal government and the Tribes that requires the federal government to concur in the Tribes' calls for enforcement of their reserved instream water rights. Article I of the Treaty guaranteed the Tribes' "exclusive" hunting and fishing rights on the reservation. That exclusive right was expressly acknowledged by Congress as to the reserved water rights in both the Termination Act and the Restoration Act. Those Acts provided as well that nothing in their provisions would "affect in any manner any . . . water right of the tribe and its members," Restoration Act § 5, 100 Stat. at 850, or "abrogate any water rights of the tribe and its members," Termination Act § 14(a), 68 Stat. at 722. Despite restoring federal recognition to the Tribes and the "rights and privileges" that might have been diminished under the Termination Act, section 5 of the Restoration Act expressly carved out the Tribes' exclusive rights guaranteed by the Treaty. The federal government's historical trustee relationship with Indian tribes was thereby limited so as not to interfere with the Tribes' exclusive rights under Article I of the 1864 Treaty.

In short, as was true before the Restoration Act, the federal government has "no ownership interest in, or right to control the use of, the Klamath Tribe's hunting and fishing" rights and attendant reserved water rights. *Adair*, 723 F.2d at 1418; *see Oregon Dep't*, 473 U.S. at 765–68. Neither statutory text nor the historical trusteeship that existed prior to the Termination Act indicate that Congress intended in the Restoration Act to require the federal

government's concurrence for the Tribes' instream calls to be effective. They do not require the federal government to assume "elaborate control," *Mitchell II*, 463 U.S. at 224–25, over the Tribes' water rights. Nor would such a requirement be a "right," "privilege," "service," or "benefit" within the meaning of section 2 of the Restoration Act, 100 Stat. at 849. To the contrary, such a concurrence requirement would directly interfere with the Tribes' exercise of their sovereignty, here their assertion and control of their reserved water rights. *See* Restoration Act § 5, 100 Stat. at 850. *See generally* COHEN'S HANDBOOK § 19.06. Indeed the federal government maintains that it was obligated, if asked, to concur in lawful water calls proposed by the Tribes. This court previously held that despite the existence of a trust relationship "an Indian tribe cannot force the government to take a specific action unless a treaty, statute, or agreement imposes, expressly or by implication, that duty." *Shoshone-Bannock Tribes*, 56 F.3d at 1482. The court need not consider whether that standard was met here given our conclusion that the Tribes were free to make calls in the exercise of their treaty rights.

B.

The heart of the ranchers' argument is that a concurrence requirement is found in Oregon law, which is made applicable to the Klamath Basin Adjudication by the McCarran Amendment of 1952, 43 U.S.C. § 666(a).[4] Appellants' Br. 13–24. In *Colorado*

[4] The McCarran Amendment provides:

> Consent is given to join the United States as a defendant in any suit (1) for the adjudication of rights to the use of water of a river system or other source, or (2) for the

River Water Conservation District v. United States, 424 U.S. 800 (1976), the Supreme Court held that the McCarran Amendment is properly understood to reach Indian reserved water rights held in trust on behalf of Indians. *Id.* at 809. The Supreme Court emphasized that in "resolv[ing] conflicting claims to a scarce resource," *id.* at 812, such state jurisdiction "in no way abridges any substantive claim on behalf of Indians under the doctrine of reserved rights," *id.* at 813. The McCarran Amendment, then, does not change the fact that the substance and scope of tribal water rights is governed by federal law. *Arizona v. San Carlos Apache Tribe of Ariz.*, 463 U.S. 545, 571 (1983). Necessarily, "[s]tate courts, as much as federal courts, have a solemn obligation to follow federal law." *Id.* Still, in submitting federal water right controversies to state courts for "adjudication" or "administration," the Supreme Court concluded that state procedural rules apply because the McCarran Amendment "bespeaks a policy that recognizes the availability of comprehensive state systems for

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> administration of such rights, where it appears that the United States is the owner of or is in the process of acquiring water rights by appropriation under State law, by purchase, by exchange, or otherwise, and the United States is a necessary party to such suit. The United States, when a party to any such suit, shall (1) be deemed to have waived any right to plead that the State laws are inapplicable or that the United States is not amenable thereto by reason of its sovereignty, and (2) shall be subject to the judgments, orders, and decrees of the court having jurisdiction, and may obtain review thereof, in the same manner and to the same extent as a private individual under like circumstances: *Provided*, That no judgment for costs shall be entered against the United States in any such suit.

43 U.S.C. § 666(a).

adjudication of water rights," which advance the goal of avoiding piecemeal proceedings and inconsistent dispositions. *Colorado River*, 424 U.S. at 819; *see United States v. Idaho ex rel. Idaho Dep't of Water Res.*, 508 U.S. 1, 6–8 (1993).

The ranchers maintain that requiring the concurrence of the legal title holder (i.e., the trustee) is a state procedural rule to which the McCarran Amendment subjects the Tribes' reserved water rights. The federal government suggests that even if there were such a rule, it would be a substantive one that flows from the nature of the trust relationship, not state procedure. Appellees' Br. 32–33. We need not resolve that question because none of the four sources of an Oregon-law concurrence requirement offered by the ranchers show that Oregon law requires the federal government to concur in the Tribes' calls for their reserved water rights held in trust.

(1) *Fort Vannoy Irrigation District v. Water Resources Commission*, 188 P.3d 277 (Or. 2008). The ranchers characterize *Fort Vannoy* as establishing a general rule that "a call for the implementation of water rights that are held in trust must be approved by the holder of legal title." Appellants' Br. 16. No such broad proposition is found in *Fort Vannoy*. There, Ken-Wal Farms had filed an application to change the points of diversion for water under two water rights certificates, which had been issued to the Fort Vannoy Irrigation District. *Fort Vannoy*, 188 P.3d at 280–81. By Oregon statute, the "holder of any water use subject to transfer" is given the authority to seek a change of the point of diversion. *Id.* at 281 (quoting Or. Rev. Stat. § 540.510(1)). An irrigation district to facilitate the construction of irrigation works is

formed upon proposal of landowners, governed by an elected board of directors, and has the power to acquire lands for reservoirs or other purposes. *Id.* at 286. The "legal title to all such property 'vests in the irrigation district and is held by it in trust.'" *Id.* (alterations omitted) (quoting Or. Rev. Stat. § 545.253). The narrow question in *Fort Vannoy* was whether such a district is the "holder of any water use subject to transfer," when it receives the certificate to a particular water right. *Id.* at 286, 288.

In identifying the "holder," the court in *Fort Vannoy* examined the trust relationship between the irrigation district and its members. *Id.* at 295. The trust relationship was not governed by federal Indian law; instead, a state statute established that property acquired by the district would be held in trust and the board was empowered "to hold, use, acquire, manage, occupy, possess and dispose of the property as provided in the Irrigation District Law." *Id.* (quoting Or. Rev. Stat. § 545.253). Relying in part on the Oregon law of private trusts, the court in *Fort Vannoy* concluded that "the phrase 'holder of any water use subject to transfer' cannot be construed as referring to Ken–Wal, because such a construction would run afoul of the trust relationship by permitting a beneficiary to manage the trust property." *Id.* at 295–96.

As is evident, *Fort Vannoy* did not establish a general procedural rule governing calls to enforce water rights held in trust and its construction of the state statutes governing irrigation districts has nothing to say about a trust relationship created by federal Indian law.

(2) State statutes related to water rights certificates. The ranchers urge that the necessity of a concurrence by the legal title holder is reflected in Oregon's procedures for stream adjudication. Appellants' Br. 17. At the conclusion of a stream adjudication, they state, OWRD issues a certification listing the owner of the right, which original certificate is sent to the owner and used by the watermasters to determine whether action should be taken. *See* Or. Rev. Stat. § 539.140. The owner of an equitable interest, they continue, does not receive a certificate. Appellants' Br. 17–18. The ranchers maintain that the reasonable inference from this administrative process is that implementation of water rights is "keyed" to the certification, and implementation of the Tribes' equitable water right depends at least in part on the federal government's say. *Id.* at 18. Even were the court to assume for purposes of argument that the ranchers have accurately described the process, they do not demonstrate that OWRD regulations authorizing enforcement of the Administrative Determination require such a certificate. The OWRD watermasters are to allocate water in accordance with the claims determined in the Determination. *See* Or. Admin. R. 690-025-0020(1)–(2), -0025(1). Those claims list rights in the name of both the Tribes and the federal government. *See, e.g.*, Administrative Determination at 5076 (listing the Tribes as the "claimants" and the federal government as "trustee" for the Tribes). Nothing in the ranchers' cited authority on certificates imposes a concurrence requirement here.

(3) Denial of the Tribes' independent claim in OWRD's Administrative Determination. As noted, OWRD reasoned that the Tribes' composite claim (No.

612) was "duplicative of the [federal government's] claims, not additive. The [federal government] holds the rights recognized herein in trust for the Klamath Tribes. *Colorado River Water Conservation Dist. v. United States*, 424 [U.S.] 800, 810 (1976)." Administrative Determination at 4898, 5074. The citation to *Colorado River* reveals this ruling was grounded in OWRD's understanding of federal law. Right or wrong, OWRD's decision to deny the Tribes' claim cannot reasonably be understood to impose a *state law* concurrence requirement.

The ranchers' view is that recognizing the Tribes' authority to exercise their own water rights is inconsistent with OWRD's determination that the federal government "holds" the water rights "in trust" for the Tribes. *See* Appellants' Br. 21–23. The ranchers also point to the recent decision of the Oregon Circuit Court indicating that the Tribes' water rights are held by the United States "in trust," and declining to disturb the Administrative Determination on this point. Or. Cir. Ct. Op., Feb. 24, 2021, at 8–9; Appellants' FED. R. APP. P. 28(j) Ltr. of Mar. 3, 2021. This misunderstands the nature of the limited trust involved. Although Congress may abrogate or diminish treaty rights by clearly expressed intent, *Minnesota v. Mille Lacs Band of Chippewa Indians*, 526 U.S. 172, 202 (1999), the Termination Act abrogated the Tribes' land rights but it did not abrogate any reserved water rights of the Tribes. The Restoration Act restored the federal trust relationship with the Tribes while expressly stating in section 5 that it would not "affect in any manner any . . . water right of the [Tribes]." 100 Stat. at 850. Unlike in *Mitchell II*, where federal statutes and regulations "establish[ed] 'comprehensive' responsi-

bilities" in the federal government for managing the harvesting of Indian timber, 463 U.S. at 222 (quoting *White Mountain Apache Tribe v. Bracker*, 448 U.S. 136, 145 (1980)), the relevant federal statutes have preserved the Tribes' instream water rights impliedly reserved in the 1864 Treaty for tribal fisheries and fishing rights. Absent a treaty or statutory provisions clearly abrogating or diminishing the Tribes' exclusive instream rights, their beneficial ownership of reservation lands includes "all rights normally associated with 'fee simple absolute title.'" *Blackfeet Tribe*, 924 F.2d at 902 (quoting *Shoshone Tribe of Wind River*, 304 U.S. at 117). In denying the Tribes' independent claim, OWRD relied on the principle of federal law that water rights reserved for Indians are held in trust by the federal government, whose limited trust designation does not imply federal authority or obligations to control or manage the trust resource. Given the specific text of the Termination Act and the Restoration Act, the Tribes retain full authority to control the use of their water right. *See Oregon Dep't.*, 473 U.S. at 765–67; *Adair*, 723 F.2d at 1418; *Blackfeet Tribe*, 924 F.2d at 902. Nothing in the recent opinion of the Oregon Circuit Court could alter the federal law that defines and determines the scope of the Tribes' reserved water rights. The ranchers do not contest the well-established legal federal precedent that the substance of the Tribes' reserved water rights remains governed by federal law even in state water adjudicatory proceedings. *See* Appellants' Br. 13.

(4) Emails from OWRD employees suggesting the federal government's concurrence was necessary. The ranchers' reliance on informal communications between OWRD employees is unavailing. In 2017, upon receiving a call from the Tribes, an OWRD

employee emailed another employee, "[W]e need to await concurrence from [the Bureau of Indian Affairs] on this." In 2018, an OWRD employee inquired about whether the federal government would again provide an "official concurrence." Even assuming the emails indicate these employees thought the federal government's concurrence was needed for an effective Tribal call, in the absence of a legal basis for a concurrence requirement these emails are insufficient to show that OWRD would predictably decline to enforce the Tribes' instream rights without a concurrence by the federal government. Insofar as the emails reflect a misunderstanding of the federal trust relationship, that would presumably be corrected by today's decision, which explains that there is no federal law concurrence requirement for the Tribes' water rights. State agency adjudicators, like the state courts reviewing their decisions, can be expected to discharge their "solemn obligation to follow federal law." *San Carlos Apache Tribe*, 463 U.S. at 571.

Moreover, to the extent the ranchers point to the clause in the 2019 Protocol that the parties would not "withhold any required concurrence" in a call made by the other party after following the consultation procedures, they overlook a key word. The Protocol states that "either Party may independently make a call and the other party will not withhold any required concurrence or object to the call," except that the United States reserves the right not to concur in a call that is inconsistent with the Administrative Determination or other legal obligations. Protocol at 4. Inclusion of the word "any" belies the ranchers' suggestion that the federal government had concluded such concurrence was "required."

In sum: There is no concurrence requirement imposed by federal law on the Tribes' reserved instream water rights, whether by the 1864 Klamath Treaty or the federal government's trust relationship. The McCarran Amendment subjects the Tribes' reserved water rights to state procedural rules in its quantification proceedings, but the substance and scope of the Tribes' rights remain governed by federal law. Oregon law does not require federal government concurrence to enforce the Tribes' water rights, and we leave for another day the question of what, if any, legal effect such a state requirement could have. Therefore, invalidating the Protocol, and requiring the federal government to independently assess whether it would concur in the Tribes' calls, would not remedy the ranchers' injuries. The Tribes would continue to make calls in the exercise of their Treaty rights, and OWRD would enforce the calls. Because the ranchers fail to show their alleged injuries are fairly traceable to federal government action or inaction, or would be redressed by striking the Protocol, they lack Article III standing. Accordingly, the dismissal of the ranchers' complaint for lack of standing is affirmed.

Filed 01/31/2020

UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF COLUMBIA

GERALD H. HAWKINS, *et al.*, Plaintiffs, v. DAVID L. BERNHARDT, *Secretary, U.S. Department of the Interior, et al.*, Defendants.	Civil Action No. 19-1498 (BAH) Chief Judge Beryl A. Howell

MEMORANDUM OPINION

Plaintiffs, a group of landowners in the Upper Klamath Basin in Oregon, seek declaratory and injunctive relief against defendants, officials in the Bureau of Indian Affairs ("BIA") and the Department of the Interior, to prevent enforcement of the Klamath Tribes' reserved water rights.[1] In particular, plaintiffs challenge two protocol agreements executed by the Klamath Tribes and the BIA, setting forth procedures

[1] The four named defendants are David L. Bernhardt, Secretary of the Interior; Tara Katuk MacLean Sweeney, Assistant Secretary-Indian Affairs; Darryl Lacounte, Director, U.S. Bureau of Indian Affairs; and Bryan Mercier, Regional Director, U.S. Bureau of Indian Affairs, Northwest Regional Office, each of whom are sued in their official capacities. Am. Compl. ¶¶ 1, 9–13, ECF No. 15.

for the enforcement of the tribes' water rights, arguing that in signing the agreements, the BIA unlawfully delegated federal power to the tribes and, additionally, violated the National Environmental Policy Act ("NEPA"). *See* Am. Compl. ¶¶ 41–53; Pl.'s Opp'n to Mot. to Dismiss ("Pl.'s Opp'n") at 1, ECF No. 19. Defendants move pursuant to Federal Rules of Civil Procedure 12(b)(1) and 12(b)(6) to dismiss the plaintiffs' amended complaint for lack of subject matter jurisdiction and for failure to state a claim. *See* Defs.' Mot. to Dismiss and Mem. Pts. and Auth. in Support ("Defs.' Mot."), ECF No. 17. The defendants are correct that the plaintiffs lack standing, and thus the amended complaint is dismissed under Rule 12(b)(1).[2]

I. BACKGROUND

The gravamen of this case is the repercussions to the plaintiffs of enforcement of tribal water rights. To provide context for resolution of the pending motion, the applicable treaty, laws and challenged protocol agreements are described below, followed by a summary of the plaintiffs' claims.

A. Overview of Legal Regime Governing Relationship Between United States and Klamath Tribes

For more than a thousand years, the Klamath Tribes "hunted, fished, and foraged in the area of the Klamath Marsh and upper Williamson River," in southern Oregon. *United States v. Adair*, 723 F.2d

[2] Having reached the conclusion that dismissal is appropriate under Rule 12(b)(1), the alternative basis for dismissal, under Rule l2(b)(6), need not be addressed. *See* Defs.' Mot. at 29–42.

1394, 1397 (9th Cir. 1983).[3] In 1864, the Tribes ceded approximately 12 million acres of land to the United States by treaty, and, in exchange, the United States reserved roughly 800,000 acres for the Tribes. *Id.* at 1398; Treaty with the Klamath ("Klamath Treaty"), 16 Stat. 707 (1864). Article I of the Klamath Treaty granted the tribes "the exclusive right to hunt, fish, and gather on their reservation." *Adair*, 723 F.2d at 1398; 16 Stat. 708. Article II created a [trust fund] designed to "advance [the Tribes] in civilization ... especially in agriculture." *Id.*

In 1954, Congress terminated federal supervision of the Tribes. *See* Klamath Termination Act, 68 Stat. 718 (1954) (codified at 25 U.S.C. § 564, now omitted). "The express purpose of [the Klamath Termination Act] was to terminate federal supervision over the Klamath Tribe of Indians, to dispose of federally owned property acquired for the administration of Indian affairs, and to terminate the provision of federal services to the Indians solely because of their status as Indians." *Kimball v. Callahan*, 493 F.2d 564, 567 (9th Cir. 1974). The Termination Act did not, however, abrogate the Tribes' treaty rights to hunt, fish, and gather. *Id.* at 568–69; *Adair*, 723 F.2d at 1411–12. Indeed, the Termination Act states explicitly, "[n]othing in this Act shall abrogate any water rights of the tribe and its members" and "[n]othing in this Act shall abrogate any fishing rights or privileges of the tribe or the members thereof

[3] The Klamath Tribes are currently a federally recognized nation consisting of three related tribes: the Klamath, Modoc, and Yahooskin. Older caselaw concerning the Tribes' rights generally refers to the Tribes in the singular, as the "Klamath Tribe," but the federal government, the parties and the Tribes themselves use the more accurate plural "Klamath Tribes."

enjoyed under Federal Treaty." 68 Stat. at 722, 25 U.S.C. § 564m.

Pursuant to the Termination Act, certain tribal members elected to withdraw from the tribes in exchange for the cash value of their proportionate interest in the tribal property. *Kimball*, 493 F.2d at 567. Reservation lands were sold "to pay the withdrawn members," while a smaller portion was retained in trust under a "nongovernmental tribal management plan." *Id.*

In 1986, Congress restored the Klamath Tribes to federal recognition. *See* Klamath Indian Tribe Restoration Act, 100 Stat. 849 (1986) (codified at 25 U.S.C. § 566). The Restoration Act "restored the Tribes' federal services, as well as the government-to-government relationship between the Tribe and the United States," but "did not alter existing property rights," meaning previously sold reservation lands were not returned. *Klamath Tribe Claims Committee v. United States*, 106 Fed. Cl. 87, 90 (2012).

In 1975, the United States filed suit in Federal District Court in Oregon, seeking a declaratory judgment to determine the respective water rights of the Klamath Tribes and interested private land owners in Klamath County. *See* Am. Compl. At ¶ 15; Defs.' Mot. at 9. The Tribes intervened as a plaintiff, and Oregon intervened as a defendant. Defs.' Mot. at 9. The district court's finding that the Tribes had implied water rights "necessary to preserve their hunting and fishing rights," under the 1864 Klamath Treaty, *United States v. Adair*, 478 F. Supp. 336, 350 (D. Or. 1979), was affirmed, *Adair*, 723 F.2d at 1399 (holding that the Tribes possessed a right "to as much water on the Reservation lands as they need to protect

their hunting and fishing rights"). Specifically, the Ninth Circuit concluded that the Termination Act had not abrogated Tribes' water rights, *id.* at 1411–12, which took priority over those of private landowners and allowed the tribes to "prevent other appropriators from depleting the streams and waters below a protected level in any area where the[ir] non-consumptive right applies, *id.* at 1411.

While protecting the Tribes' water rights, the Ninth Circuit did not determine the precise water levels subject to protection. *See United States v. Braren*, 338 F.3d 971, 973 (9th Cir. 2003). Adjudication over protected water levels took place between 1976 and 2013 in lengthy state-run administrative proceedings in Oregon. The United States, the Tribes, and private landowners—including many of the plaintiffs in this case—filed thousands of claims in the state's administrative proceeding, known as the Klamath Basin Adjudication. *See id.* At the close of the administrative phase of the Klamath Basin Adjudication, the Oregon Water Resources Department ("OWRD") issued findings of fact and an order of determination on March 7, 2013, which was amended on February 14, 2014. Am. Compl. ¶ 19; Defs.' Mot. at 11. OWRD's Amended and Corrected Findings of Fact and Order of Determination ("ACFFOD") provisionally determined more than 700 claims, including claims brought by the United States as trustee on behalf of the Klamath Tribes. Am. Compl. ¶ 20. These determinations quantified tribal water rights "for the Wood River and two of its tributaries, Fort Creek and Crooked Creek, the Sprague River and several of its tributaries, including Five Mile Creek, and the lower Williamson River and

several of its tributaries, including Larkin Creek and Spring Creek." *Id.*

Under Oregon Revised Statute ("ORS") 539.150, parties subject to the ACFFOD may file exceptions to OWRD's determinations in Oregon state circuit court. Plaintiffs and the United States both filed exceptions, *see* Defs.' Mot. at 11, which remain pending and "are not likely to be resolved for several more years," Am. Compl. ¶ 20. Notwithstanding these appeals, determined claims under the ACFFOD are in effect, pursuant to ORS 539.130(4). *See* Am. Compl. ¶ 19. A watermaster appointed by the OWRD is tasked with enforcing such claims. *See* ORS 540.045(a)-(b). To enforce their rights under the ACFFOD, water users issue "calls" to the watermaster, who, upon investigation, regulates upstream usage to maintain necessary supply to satisfy senior downstream water rights. *See* Defs.' Mot. at 12.

B. Challenged Protocol Agreements Between United States and Klamath Tribes

In 2013, following OWRD's preliminary determination, the BIA and the Klamath Tribes entered into one of the two protocol agreements challenged in this lawsuit, in order to delineate procedures for the issuance of calls enforcing the Tribes' water rights. Am. Compl. ¶ 22; Defs.' Mot., Ex. 1, Protocol Agreement Between the Klamath Tribes and the Bureau of Indian Affairs (May 30, 2013) ("2013 Protocol Agreement"), ECF No. 17-1. The 2013 Protocol Agreement established that a representative of the Tribes would, when necessary, "contact[] OWRD to make calls for enforcement of the Tribal water rights." 2013 Protocol Agreement ¶ 1. Prior to making

such a call, the Tribes would notify the BIA, two business days in advance, to provide "the reasons for making such a call, including: the Tribal water right not being met, the water source and amount for the call, and an assessment based on the Tribes' information and belief that water is currently being diverted from the source at issue and that a call would provide water for the Tribal water right." *Id.* ¶ 2. Pursuant to the agreement, the BIA would then "timely provide an email response to the call notice stating either (i) agreement with making the proposed call, (ii) changes to the scope of the proposed call, (iii) disagreement with making the proposed call and the reasons for that disagreement, or (iv) that BIA needs an additional business day to complete deliberations on the call notice." *Id.* ¶ 3.

In the event of disagreement, the 2013 Protocol Agreement established additional procedures for further discussion between the Tribal Chairman and the BIA's Regional Director. *See id.* at 4. Although this agreement authorized the United States to initiate calls on behalf of the tribes, should the Tribes not issue a call notice when necessary, *see id.* at 5, both the Tribes and the United States retained an "independent right to make a call" such that if "the Parties cannot agree on whether to make a call, either Party may independently make a call and the other will not object to the call," *id.* ¶ 7.

In 2019, the BIA and Klamath Tribes replaced the 2013 Protocol Agreement with an Amended Protocol Agreement to provide for seasonal "standing calls" and enable "OWRD to more consistently monitor, observe, and, when necessary, regulate junior water users." Defs.' Mot., Ex. 2, Protocol Agreement

Between the Klamath Tribes and the Bureau of Indian Affairs (Mar. 7, 2019) ("2019 Protocol Agreement"), Preamble, ECF No. 17-2. The 2019 Protocol Agreement set forth procedures for issuing standing calls twice yearly, "one for the irrigation season (beginning on or about March 1) and one for the non-irrigation season (beginning on or about November 1)." *Id.* The Agreement also extended the time periods by which the BIA was to respond to proposed calls, to seven business days for proposed standing calls, and three business days for other calls. *See id.* ¶¶ 2–3. Again, the amended agreement retained the "independent right" of each party to make a call without the other's concurrence. *Id.* ¶ 12. In so doing, however, the agreement stipulated that the United states "retains the right not to concur with any call for water that is inconsistent with the ACFFOD or other legal obligations." *Id.*

C. Implementation of ACFFOD

In June 2013, following enforcement calls made by the Tribes with the concurrence of the BIA, pursuant to the Protocol Agreement, OWRD issued orders directing the plaintiffs and other landowners in the Upper Klamath Basin to cease all irrigation. Am. Compl. ¶ 25. State authorities then initiated settlement negotiations that, in April 2014, resulted in a comprehensive water settlement between the tribes and landowners called the Upper Klamath Basin Comprehensive Agreement ("UKBCA"). *Id.* ¶ 26. The UKBCA effectively lowered the water levels protected by the Tribes' rights, and established new, lower levels "designed to support fish and wildlife resources important to the Klamath Tribes while also providing irrigation opportunities for plaintiffs and

other irrigators..." *Id.* ¶ 28. The Tribes and United States issued calls between 2014 and 2016 to enforce these lower, agreed-to water levels (referred to as "instream flows" and "streamflow levels") under the UKBCA. *Id.* at ¶ 29.

On December 28, 2017, the former secretary of the Interior issued a Negative Notice in the Federal Register terminating the UKBCA after Congress left the agreement unfunded. *See id.* at ¶ 31; 82 Fed. Reg. 61582 (Dec. 28, 2017). In 2017 and 2018, after the UKBCA's collapse, the Tribes and the United States issued calls seeking to enforce the tribes' water rights at the levels previously determined by the ACFFOD rather than the lower levels specified in the UKBCA. Am. Compl. ¶¶ 30–31. As in 2013, OWRD's resulting enforcement of the tribes' water rights resulted in the "severe curtailment of irrigation" and in certain cases in "complete shut-offs" for plaintiffs and other landowners in the Upper Klamath Basin. *Id.* at ¶ 31. In April 2019, the Tribes and United States again issued calls to OWRD "for enforcement of the full instream flow level water rights." *Id.* at ¶ 32.

D. Plaintiffs' Instant Claims

In May 2019, the plaintiffs, including over thirty individual ranchers and ranches located in the Wood River Valley in Klamath County, brought this action seeking declaratory and injunctive relief invalidating the 2019 Protocol Agreement, vacating those calls for enforcement made between 2013 and 2019, and prohibiting the defendants from issuing further calls for enforcement. *See* Complaint., Prayer for Relief (May 22, 2019), ECF No. 1; Am. Compl., Prayer for Relief. In August, the plaintiffs filed an Amended Complaint, *see* Am. Compl., and in September, the

defendants filed the pending motion to dismiss the Amended Complaint. Following grant of an extension requested by the plaintiffs, *see* Min. Order (Sept. 17, 2019), the defendants' motion to dismiss became ripe for review on December 14, 2019.[4]

II. LEGAL STANDARD

"'Federal courts are courts of limited jurisdiction,' possessing 'only that power authorized by Constitution and statute.'" *Gunn v. Minton*, 568 U.S. 251, 256 (2013) (quoting *Kokkonen v. Guardian Life Ins. Co. of Am.*, 511 U.S. 375, 377 (1994)). Under the Constitution "the 'judicial Power of the United States' is limited to 'Cases' or 'Controversies,' U.S. Const. art. III, §§ 1-2, and the requirement of standing is 'rooted in the traditional understanding of a case or controversy.'" *Twin Rivers Paper Co. LLC v. SEC*, 934 F.3d 607, 612–13 (D.C. Cir. 2019) (quoting *Spokeo, Inc. v. Robins*, 136 S. Ct. 1540, 1547 (2016)). To establish standing, a "plaintiff must show (1) an 'injury in fact,' (2) a sufficient 'causal connection between the injury and the conduct complained of,' and (3) a 'likel[lihood]' the injury 'will be redressed by a favorable decision.'" *Susan B. Anthony List v. Driehaus (SBA)*, 573 U.S. 149, 157–58 (2014) (quoting *Lujan v. Defs. Of Wildlife*, 504 U.S. 555, 560–61 (1992)); *see also Woodhull Freedom Foundation, et al. v. United States*, No. 18-5298, 2020 WL 398625, at *6 (D.C. Cir. Jan. 24, 2020); *Carbon Sequestration Council v. E.P.A.*, 787 F.3d 1129, 1133 (D.C. Cir.

[4] The plaintiffs have requested a hearing, Pl.'s Opp'n at 1, n.1, but given the exhaustive briefing on the relevant issues, no hearing is necessary, *see* LCvR 7(f) (noting that "allowance" of party's request for oral hearing, "shall be within the discretion of the Court").

2015); *Grocery Mfrs. Ass'n v. E.P.A.*, 693 F.3d 169, 174 (D.C. Cir. 2012). "The party invoking federal jurisdiction bears the burden of establishing these elements." *Lujan*, 504 U.S. at 561; *see also Twin Rivers Paper Co.*, 934 F.3d at 613 (same). Absent subject-matter jurisdiction, the court must dismiss a case. *See Arbaugh v. Y & H Corp.*, 546 U.S. 500, 506–07 (2006); FED. R. CIV. P. 12(h)(3).

III. DISCUSSION

Defendants move to dismiss the plaintiff's Amended Complaint on the grounds that the plaintiffs can demonstrate neither causation nor redressability and therefore lack standing. *See* Defs.' Mot. at 1. The plaintiffs counter that the requirements of standing are met due to two procedural injuries: first, under the Protocol Agreements, the government unlawfully delegated federal power to make calls for the enforcement of federal reserved water rights to the Tribes, *see* Pl.'s Opp'n at 4; Am. Compl. ¶ 46 (First Claim for Relief); and second, that the government violated NEPA "in each of 2013 and 2017 through 2019" by failing to conduct an environmental impact study before acceding to the Tribes' calls for enforcement, Pl.'s Opp'n at 5; Am. Compl. ¶ 53 (Second Claim for Relief).

Notwithstanding the hardships alleged by the plaintiffs arising from OWRD's enforcement of the Tribes' water rights, which enforcement allegedly "resulted in widespread and severe curtailment of irrigation, and in many cases complete shut-offs," Am. Compl. ¶¶ 30, 31, 32, and concomitant "substantial injuries to their aesthetic, environmental, recreational and other interests," as well as loss of wildlife and grass plants, and a decrease in land

value. *id.* ¶¶ 36-37, due to nature of the tribal water rights central to this case, the plaintiffs have failed to meet the standing requirements of causation and redressability. Thus, for the reasons explained in more detail below, the defendants are correct, and the amended complaint must be dismissed.

A. Plaintiffs Have Established Neither Causation Nor Redressability

The plaintiffs allege that the defendants' enforcement, in accordance with the Protocol Agreements, of the Klamath Tribes' water rights, suffers from the procedural defects of improper delegation of federal power and violation of NEPA. *See* Pl.'s Opp'n at 2–16. To demonstrate standing "a procedural-rights plaintiff must show not only that the defendant's acts omitted some procedural requirement, but also that it is substantially probable that the procedural breach will cause the essential injury to the plaintiff's own interest." *Fla. Audubon Soc. v. Bentsen*, 94 F.3d 658, 664–65 (D.C. Cir. 1996) (en banc); *see also National Parks Conservation Ass'n v. Manson*, 414 F.3d 1, 5–6 (D.C. Cir. 2005).

When the alleged harm, however, stems from the government's regulation of an independent third party not before the court, rather than the plaintiff directly, standing is "'substantially more difficult' to establish." *Lujan*, 504 U.S. at 562 (quoting *Allen v. Wright*, 468 U.S. 737, 758 (1984)). In such cases, "causation and redressability ordinarily hinge on the response of the regulated (or regulable) third party to the government action or inaction—and perhaps on the response of others as well." *Id.* To prove standing in these circumstances, the plaintiff must "adduce facts showing that [third-party] choices have been or

will be made in such manner as to produce causation and permit redressability of injury.'" *Ctr. For Law & Educ.*, 396 F.3d at 1161 (quoting *Nat'l Wrestling Coaches Ass'n v. Dep't of Educ.*, 366 F.3d 930, 938 (D.C. Cir. 2014)). In other words, the plaintiff must allege facts "sufficient to demonstrate a substantial likelihood that the third party directly injuring the plaintiff would cease doing so as a result of the relief the plaintiff sought." *Renal Physicians Ass'n v. U.S. Dep't of Health and Human Servs.*, 489 F.3d 1267, 1275 (D.C. Cir. 2007); *see also Klamath Water Users Ass'n v. F.E.R.C.*, 534 F.3d 737, 739 (D.C. Cir. 2008).

Here, the plaintiffs complain about harms derived from the enforcement of the rights of an independent third party not before the Court, namely, the Klamath Tribes. In these circumstances, plaintiffs lack standing because they have demonstrated neither causation nor redressability. To understand why this is the case, the nature of the tribal water rights enforced by the tribes, the BIA, and OWRD are explained first.

1. *Federally Protected Tribal Water Rights*

In *Winters v. United States*, 207 U.S. 564, 576 (1908), the Supreme Court held that a treaty establishing an Indian reservation implicitly created water rights necessary to carry out the purposes of the reservation. As the Court has since explained, "when the Federal Government withdraws its land from the public domain and reserves it for a federal purpose, the Government, by implication, reserves appurtenant water then unappropriated to the extent needed to accomplish the purpose of the reservation." *Cappaert v. United States*, 426 U.S. 128, 138 (1976);

see also Arizona v. California, 373 U.S. 546, 600 (1963) ("The Court in *Winters* concluded that the Government, when it created that Indian Reservation, intended to deal fairly with the Indians by reserving for them the waters without which their lands would have been useless.").

Winters' recognition of water rights "rests on the idea that the reservation of public lands for a public purpose implies the reservation of unappropriated, and thus available, water appurtenant to the land to the extent necessary to fulfill that purpose." *Shoshone Bannock Tribes v. Reno*, 56 F.3d 1476, 1479 (D.C. Cir. 1995). Such rights are "federal right[s], derived from the federal reservation of the land," and thus "do[] not depend on state law." *Id.*; *see also Cappaert*, 426 U.S. at 145 (reserved water rights are "governed by federal law," and are "not dependent upon state law or state procedures."); F. Cohen, *Handbook of Federal Indian Law* ("Cohen's Handbook") 1210 (2012) ("Indian reserved rights to water are determined by federal, not state, law."). As a general rule, reserved tribal water rights persist, regardless of actual use, unless they are relinquished by treaty or explicitly abrogated by Congress. *See United States v. Dion*, 476 U.S. 734, 738–39 (1986) ("We have required that Congress' intention to abrogate Indian treaty rights be clear and plain" since "Indian treaty rights are too fundamental to be easily cast aside."); *Navajo Nation v. Dep't of the Interior*, 876 F.3d 1144, 1155 (9th Cir. 2017) ("*Winters* rights, unlike water rights gained through prior appropriation, are not lost through non-use." (citing *Colville Confederated Tribes v. Walton*, 647 F.2d 42, 51 (9th Cir. 1981)).

The water rights of the Klamath Tribes are reserved treaty rights of exactly the nature expressly protected in *Winters*. In *Adair*, the Ninth Circuit held that the 1864 Klamath Treaty, which explicitly gave the Tribes a right to maintain their traditional hunting and fishing practices, implicitly created a water right necessary to fulfill that purpose. The Tribes' water right is "non-consumptive," meaning that the Tribes are not entitled to "withdraw water from the stream for agricultural, industrial, or other consumptive uses." *Adair*, 723 F.2d at 1411. Instead, "the entitlement consists of the right to prevent other appropriators from depleting the streams below a protected level in any area where the non-consumptive right applies." *Id*; *see also Baley v. United States*, 942 F.3d 1312, 1322 (Fed. Cir. 2019) (characterizing the Klamath Tribes' water rights, as determined in *Adair*, in similar terms).[5]

The priority date of the Tribes' water rights—meaning the date at which the rights were perfected—is "time immemorial." *Adair*, 723 F.2d at 1414. That is because, as the Ninth Circuit held in *Adair*, "[t]he

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[5] Thus, despite the plaintiffs' NEPA claim here, enforcement of the Tribes' water rights actually serves an environmental purpose, since those rights entitle the Tribes to maintain water levels necessary to prevent the extinction of certain fish the Tribes traditionally hunted. *See Baley*, 942 F.3d at 1328–29 (explaining, as the Court of Federal Claims found, that the Klamath Tribes have an "aboriginal right to take fish [that] entitles them to prevent junior appropriators from withdrawing water from Upper Klamath Lake and its tributaries in amounts that would cause the extinction of the Lost River and short nose suckers." (internal quotations omitted)); *see also* Defs.' Reply at 17, n.8 (noting that "enforcement of the Tribes' water rights is important to efforts to avoid adverse impacts to the health of the treaty-protected fishery.").

rights were not created by the 1864 Treaty, rather, the treaty confirmed the continued existence of these rights." *Id.*; *see also Baley*, 942 F.3d at 1328, 1341 (affirming the Court of Federal Claims' conclusion that the Klamath Tribes' water right carries a "time immemorial" priority date).

As a result, as the plaintiffs concede, the Tribes' water rights are senior to and take priority over the subsequently established water rights of the plaintiffs. *See* Am. Compl. ¶ 15. In Oregon, as in most Western states, state-law water rights are determined according to the doctrine of prior appropriation. *Adair*, 723 F.2d at 1410. Prior appropriation is essentially a first-in-time rule. Under this doctrine, "the one who first appropriates water and puts it to beneficial use thereby acquires a vested right to continue to divert and use that quantity of water against all claimants junior to him in point of time." *Arizona*, 373 U.S. at 555. In *Adair*, the Ninth Circuit held that the "Klamath Tribe is entitled to a reservation of water, with a priority date of immemorial use, sufficient to support exercise of treaty hunting and fishing rights." *Adair*, 723 F.2d at 1415. Applying this federally protected right as against the state-law rights of neighboring junior appropriators, the Klamath Basin Adjudication then quantified the specified water levels to which the Tribes were entitled. *See* Am. Compl. ¶ 20 (describing the conclusions of the ACFFOD).

Thus, the Klamath Tribes have a legally enforceable federal right to maintain streamflow levels as quantified in the ACFFOD. That right, as is the case with all reserved tribal rights, belongs to the tribes. *Shoshone Bannock Tribes*, 56 F.3d at 1479

("With respect to reserved water rights on Indian reservations, these federally-created rights belong to the Indians rather than to the United States."); *see also* Cohen's Handbook at 1238 ("Reserved rights to water are property rights held by tribes and their members."). The United States holds legal title "only as trustee." *Shoshone Bannock Tribes*, 56 F.3d at 1479. Consistent with the United States' trust obligation to protect Indian treaty rights, the government can bring suit to enforce those rights, but the rights themselves clearly "belong to the Tribes." *United States v. Washington*, 853 F.3d 946, 967 (9th Cir. 2017), *aff'd by an equally divided court*, 138 S. Ct. 735 (2018).

2. *Plaintiffs' Focus on the Protocol Agreements is Misplaced*

Set against these clearly established legal principles surrounding federally protected tribal water rights, the plaintiffs cannot establish causation or redressability. First, with regard to causation, the plaintiffs' injuries are not "fairly traceable" to the Protocol Agreements. *Lujan*, 504 U.S. at 560 (internal quotation marks omitted). Nor is it "substantially probable" that the procedural breaches alleged by the plaintiffs have caused or will cause "the essential injury to the plaintiff's own interest." *Fla. Audubon Soc.*, 94 F.3d at 665. The Protocol Agreements are not the source of the Tribes' authority to enforce their water rights against those of junior appropriators, including plaintiffs. That authority is clearly established in federal law and stems from the 1864 Treaty. With a priority date of "time immemorial," as held in *Adair*, the Tribes' federal water right is senior to plaintiffs' water rights.

Meanwhile, the plaintiffs do not allege that the Protocol Agreements amplified or otherwise distorted the Tribes' federally protected rights to the detriment of the plaintiffs. The calls for enforcement made between 2013 and 2018 by the Tribes and the BIA were calls to enforce to the levels quantified by the ACFFOD or to lesser agreed-upon levels. *See* Am. Compl. ¶¶ 25, 29, 32. In other words, the complained of calls, implemented in accordance with the Protocol Agreements, did nothing to increase the Tribes' water rights entitlement. In 2013, 2017, and 2018, the calls simply sought to protect the Tribes' non-consumptive right as quantified by the ACFFOD. *See id.* ¶¶ 25, 32. Between 2014 and 2016, the Tribes sought less water, in accord with the now defunct UKBCA settlement agreement reached between the Tribes and the plaintiffs. *See id.* ¶¶ 28–29. Thus, the ultimate cause of plaintiff's essential injuries the waterflow reductions and shut-offs instituted by OWRD—is the Klamath Tribes' federally protected, senior water right, not the Protocol Agreements. The Protocol Agreements simply establish a consultation procedure, as well as points of contact to facilitate communication with OWRD when necessary.

Second, the plaintiffs have also failed to demonstrate redressability. When, as here, the complained of harm depends on the behavior of a third party not before the Court, the plaintiffs must allege facts "sufficient to demonstrate a substantial likelihood that the third party directly injuring the plaintiff would cease doing so as a result of the relief the plaintiff sought." *Renal Physicians Ass'n*, 489 F.3d at 1275; *see also Klamath Water Users Ass'n*, 534 F.3d at 739. The plaintiffs argue that invalidating the Protocol Agreements would redress their ultimate

injuries. *See* Pl.'s Opp'n at 13–15. Yet, even if the Protocol Agreements were invalidated, plaintiffs provide no reason to believe the Klamath Tribes would cease to seek enforcement of their water rights. As discussed, these rights, held in trust by the United States, belong to the Tribes. *See Shoshone Bannock Tribes*, 56 F.3d at 1479; *United States v. Washington*, 853 F.3d at 967. With or without the Protocol Agreements, the Tribes thus remain entitled to seek enforcement of their water rights at the levels quantified by the ACFFOD.

The redressability problem plaintiffs face is analogous to that in *St. John's United Church of Christ v. F.A.A.*, 520 F.3d 460 (D.C. Cir. 2008), a case that also involved harm caused by a third-party. There, the D.C. Circuit held that the plaintiffs lacked standing to challenge the procedure by which the Federal Aviation Administration ("FAA") approved grant funding for an airport extension project carried out by the city of Chicago. The plaintiffs alleged procedural injury, arguing that the FAA violated the Religious Freedom Restoration Act in approving the grant money. Nonetheless, the Circuit found no redressability since the plaintiffs failed to show a "substantial probability" that the city—the third-party source of plaintiff's complained of harm—would have abandoned the airport extension without the FAA's grant funds. *St. John's United Church*, 520 F.3d at 463. The "redressability obstacle the petitioners face," the Circuit explained, "is uncertainty over what Chicago would do—not the FAA." *Id.*

Likewise, in *Klamath Water Users Association*, the D.C. Circuit found no redressability when a

plaintiff failed to show that third-party regulatory decisions responsible for alleged harm were likely to change as a result of a favorable decision. In that case, the Klamath Water Users Association sought relief against the Federal Energy Regulatory Commission ("FERC"), which had decided not to renew a contract provision setting low electricity rates for Klamath Basin irrigators in Oregon and California in FERC's lease agreement with PacifiCorp, a power company, for the Link River Dam. 534 F.3d at 736–38. Separately, the Oregon Public Utility Commission and California Public Utilities Commission, which had "independent authority to fix the rates charged ... to [their] retail customers," *id.* at 736, decided to charge irrigators in the Klamath Basin "full tariff rates" rather than the lower rates established in FERC's prior contract, *Id.* at 738. The Circuit held that the water association "failed to demonstrate redressability," *id.* at 739, because it "offered no reason to believe that a decision requiring FERC to include the 1956 contract in PacifiCorp's annual licenses would have such an effect on the retail rate decisions of California and Oregon," *id.* at 740. The court further explained that, when "relief for the petitioner depends on actions by a third party not before the court, the petitioner must demonstrate that a favorable decision would create 'a significant increase in the likelihood that the plaintiff would obtain relief that directly redresses the injury suffered.'" *Id.* at 739 (quoting *Utah v. Evans*, 536 U.S. 452, 464 (2002)). That was not the case in *Klamath Water Users*, since the ultimate harm—increased power costs—was unlikely to be redressed by a

favorable decision as to FERC, given Oregon and California's independent rate-setting authority.[6]

In yet another closely analogous case, *Ashley v. U.S. Dep't of the Interior*, 408 F .3d 997 (8th Cir. 2005), the Eighth Circuit applied this same principle concerning the lack of redressability when dependent on a third party's choices. There, the Sioux tribe issued bonds and, with government approval, assigned certain funds received from a federal development grant to the purchaser of the bonds. *Id.* at 999. The plaintiffs challenged the government's approval, arguing—as plaintiffs do here, Am. Compl. ¶¶ 44, 46—that the government's action was *ultra*

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[6] The D.C. Circuit recently found that plaintiffs had sufficiently met the redressability requirement for standing when their alleged harm was due, in part, to the decision of a third party not before the court. *See Woodhull Freedom Foundation v. United States*, No. 18-5298, 2020 WL 398625, (D.C. Cir. Jan. 24, 2020). *Woodhull* confirmed the long-standing redressability standard that "[w]here the requested relief for the [plaintiff] depends on actions by a third party not before the court, the plaintiff must demonstrate that a favorable decision would create a significant increase in the likelihood that the plaintiff would obtain relief that directly redresses the injury suffered." *Id.* at *6 (internal quotation marks omitted) (citing *Klamath Water Users Ass'n*, 534 F.3d at 739)). Applying this standard, the Court found that the third party in the case—Craigslist—*would* act differently if the challenged statute, the Allow States and Victims to Fight Online Sex Trafficking Act ("FOSTA"), were struck down, citing evidence that Craigslist had removed the plaintiff's massage listings, which caused the complained of harm, to avoid anticipated liability under FOSTA, and had clearly expressed "its desire" to restore such listings if legally feasible in the future. *See id.* at *6. *Woodhull* is thus distinguishable from this litigation, where plaintiffs, as explained above, have failed to demonstrate that the Klamath Tribes are likely to abandon enforcement of their senior water rights absent the challenged Protocol Agreements.

vires. Finding that no order in the case "would be likely to remedy the injuries complained of" since "the Tribe is not a defendant and none of the defendants controls the Tribe's challenged behaviors," *id.* at 999–1000, the case was dismissed for lack of standing, *id.* at 999. The court reasoned that undoing the government's approval of the bond issuance would do nothing "to prevent the Tribe from spending trust money on a new bond deal of the same sort." *Id.* at 1000. "The underlying difficulty for the plaintiffs," as in *St. John's United Church*, was that "they 'seek to change the defendant's [*i.e.*, the government's] behavior only as a means to alter the conduct of a third party [the Tribe], not before the court, who is the direct source of the plaintiff['s] injury.'" *Id.* at 1003 (alterations in original) (quoting *Common Cause v. Dep't of Energy*, 702 F.2d 245, 251 (D.C. Cir. 1983)).

Here, as in *St. John's United Church*, *Klamath Water Users Association*, and *Ashley*, the plaintiffs challenge government action in order to remedy harm ultimately caused by enforcement of a third-party's senior water rights. Yet the third party, the Klamath Tribes, are entitled to enforce their senior water rights, as established in *Adair* and quantified by the ACFFOD, regardless of whether the Protocol Agreements stand. In these circumstances, the plaintiffs have not shown, as they must, that the Tribes are likely to abandon enforcement if the remedy plaintiffs seek—rescission of the challenged Protocol Agreements, *see* Am. Compl., Prayer for Relief—is granted.

Accordingly, this case must be dismissed due to the plaintiffs' lack of standing.

B. The Plaintiffs' State-Law Arguments Are Unavailing

In a last-gasp effort to proceed with this lawsuit, the plaintiffs argue that another Federal law, plus Oregon state law and a state administrative decision, would prevent the Tribes from enforcing their rights independently. *See* Pl.'s Opp'n at 8–12. These arguments are incorrect. Plaintiffs rely first on the McCarran Amendment, 43 U.S.C. § 666, a federal statute enacted in 1952 that waives federal sovereign immunity to allow for "the joinder of the federal government in state suits for the general adjudication of all water rights in river systems and for the administration of the adjudicated rights." Cohen's Handbook at 1242; *see also Colo. River Water Conservation Dist. v. United States*, 424 U.S. 800, 802–03 (1976). While the McCarran Amendment's sovereign immunity waiver applies to Indian water rights held in trust by the federal government, *see Colo. River Water*, 424 U.S. at 809–12, the Supreme Court has made clear this law "in no way changes the substantive law by which Indian rights in state water adjudications must be judged," *Arizona v. San Carlos Apache Tribe*, 463 U.S. 545, 571 (1983); *see also Colo. River Water*, 424 U.S. at 813 ("The Amendment in no way abridges any substantive claim on behalf of Indians under the doctrine of reserved rights."). The fact that the Klamath Tribes' reserved rights were quantified in state proceedings, and are physically enforced by the state's water department, does nothing to alter the substantive rights themselves. That is to say, the McCarran Amendment does not—as plaintiffs seem to suggest, *see* Pl.'s Opp'n at 11–13—compromise, revise, or otherwise diminish the Klamath Tribes' water rights.

Plaintiffs rely on two Oregon supreme court cases to bolster their position, but neither case supports the proposition that the Klamath Tribes lack the ability to enforce their water rights absent the Protocol Agreements. In *Fort Vannoy Irr. Dist. v. Water Resources Com'n*, 188 P.3d 277 (Or. 2008), the Oregon Supreme Court interpreted a state statute, ORS 540.510(1), governing the diversion or transfer of certificated water use, as part of the determination whether a private water user could make such a transfer without the consent of the irrigation district of which he was a member. The state statute at issue and the broader question addressed by the court—"whether the ownership of water rights resides with a water organization or its members," *see id.* at 286—play no role in the outcome of this case. *Fort Vannoy* says nothing about Indian law and tribal water rights, for which the substantive basis is *federal* law, not state law. The Klamath Tribes' rights important to this case derive from the Klamath Treaty, not the doctrine of prior appropriation or, as was dispositive in *Fort Vannoy*, "the intent of [the Oregon] legislature as expressed in the Water Rights Act and the Irrigation District Law." *Id.* at 286–87.

The plaintiffs' reliance on *Klamath Irr. Dist. v. United States*, 227 P.3d 1145 (Or. 2010) (en banc), *see* Pls.' Opp'n at 11, is similarly misplaced because it deals solely with questions of state law, not with federal reserved rights. In *Klamath Irrigation District*, the Oregon Supreme Court addressed three questions certified by the Federal Circuit, the second of which was "whether beneficial use alone is sufficient to acquire a beneficial or equitable property interest in a water right to which another person holds legal title." *Id.* at 1160. The state court's subsequent

analysis about how to establish a beneficial use right through *appropriation* is not relevant here, since the Klamath Tribes' rights are established by treaty, not by appropriation. Indeed, after the certified state-law questions had been answered, the Court of Federal Claims and the Federal Circuit held that the water rights of the private landowner appellants in the case "were subordinate to the Tribes' federal reserved water rights," *Baley*, 942 F.3d at 1341, and that the "the superior water rights of the Tribes required that the Bureau [of Reclamation] temporarily halt deliveries of water to [private landowner] appellants," *id.* at 1331.

Finally, the plaintiffs argue that OWRD "expressly rejected the Tribes' attempt to secure legal title in their own name to a water right," Pl.'s Opp'n at 8, by pointing to a 2014 order of determination issued as part of the Klamath Basin Adjudication, *see* Amended Mot. Requesting Judicial Notice, Ex. 4, Corrected Partial Order of Determination ("Corrected Partial Order") (Feb. 28, 2014), ECF No. 21-6. The order of determination, however, simply does not do what the plaintiffs say it does. During the adjudication, the United States filed multiple claims concerning the "hunting, trapping, fishing and gathering purposes of the Klamath Treaty of 1864" on behalf of the tribes. *See* Corrected Partial Order at 12. The Tribes then filed an additional claim "incorporate[ing] the United States' claims in this case by reference." *Id.* ORWD dismissed this additional claim, which simply restated by reference the claims already filed, as "duplicative of the United States' claims," *id.*, not because the Tribes lacked authority to seek enforcement of their rights. In other words, the order did not "expressly reject[] the Tribes' attempt to

secure legal title in their own name to a water right," Pl.'s Opp'n at 8, but merely disregarded a set of duplicative claims. Plaintiffs' state-law arguments are thus entirely unavailing.

The plaintiffs have fallen far short of demonstrating that the harms they allege are caused by the challenged Protocol Agreements or would be redressed by rescission of those agreements, since the relief they seek, including "prohibiting defendants from issuing any more calls," Am. Compl., Prayer for Relief, ¶ 4, would not stop enforcement of the water rights held by the Klamath Tribes, a third party not before the Court. For either of these shortcomings, the plaintiffs lack standing.

IV. CONCLUSION

For the foregoing reasons, the defendants' Motion to Dismiss, ECF No. 17, is granted because the plaintiffs lack standing. An accompanying Order consistent with this Memorandum Opinion will be entered contemporaneously.

Date: January 31, 2020

s/ Beryl A. Howell
BERYL A. HOWELL
Chief Judge

United States Court of Appeals
for the District of Columbia Circuit

No. 20-5074 **September Term, 2020**

1:19-cv-01498-BAH

Filed On: May 10, 2021

Gerald H. Hawkins, Individually and as a trustee of the CN Hawkins Trust and Gerald H. Hawkins and Carol H. Hawkins Trust, et al.,

Appellants

v.

Debra A. Haaland, Secretary of the Interior, et al.,

Appellees

BEFORE: Rogers, Katsas, and Rao, Circuit Judges

ORDER

Upon consideration of appellants' petition for panel rehearing filed on May 3, 2021, it is

ORDERED that the petition be denied.

Per Curiam

FOR THE COURT:
Mark J. Langer, Clerk

BY: /s/
Daniel J. Reidy
Deputy Clerk

U.S. Const. art. I, § 1

Section 1. Legislative Power Vested in Congress

All legislative Powers herein granted shall be vested in a Congress of the United States, which shall consist of a Senate and House of Representatives.

TREATY WITH THE KLAMATH, ETC., 1864.

16 Stat. 707 (Oct. 14, 1864)

Treaty between the United States of America and the Klamath and Moadoc Tribes and Yahooskin Band of Snake Indians: Concluded, October 14, 1864; Ratification advised, with Amendments, July 2, 1866; Amendments assented to, December 10, 1869; Proclaimed, February 17, 1870.

ULYSSES S. GRANT,

President of the United States of America

TO ALL AND SINGULAR TO WHOM THESE PRESENTS SHALL COME, GREETING:

Preamble

WHEREAS a treaty was made and concluded at Klamath lake, in the State of Oregon, on the fourteenth day of October, in the year of our Lord one thousand eight hundred and sixty-four, by and between J. W. Perit Huntington and William Logan, commissioners on the part of the United States, and La-Lake, Chil-o-que-nas, and other chiefs and headmen of the Klamath tribe of Indians; Schon-chin, Stak-it-ut, and other chiefs and headmen of the Moadoc tribe of Indians, and Kile-to-ak and Sky-te-ock-et, chiefs and headmen of the Yahooskin band of Snake Indians, respectively, on the part of said tribes and band of Indians, and duly authorized thereto

Contracting parties.

by them, which treaty is in the words and figures following, to wit:

Articles of agreement and convention made and concluded at Klamath Lake, Oregon, on the fourteenth day of October, A. D. one thousand eight hundred and sixty-four, by J. W. Perit Huntington, superintendent of Indian affairs in Oregon, and William Logan, United States Indian agent for Oregon, on the part of the United States, and the chiefs and headmen of the Klamath and Moadoc tribes, and Yahooskin band of Snake Indians, hereinafter named, to wit: La-Lake, Chil-o-que-nas, Kellogue, Mo-ghen-kas-kit, Blow, Le-lu, Palmer, Jack, Que-as, Poo-sak-sult, Che-mult, No-ak-sum, Mooch-kat-allick, Toon-tuck-te, Boos-ki-you, Ski-a-tic, Shol-las-loos, Ta-tet-pas, Muk-has, Herman-koos-mam, chiefs and headmen of the Klamaths, Schon-chin, Stat-it-ut, Keint-poos, Chuck-e-i-ox, chiefs and headmen of the Moadocs, and Kile-to-ak and Sky-te-ock-et, chiefs of the Yahooskin band of Snakes.

Cession of lands to the United States.

ARTICLE I. The tribes of Indians aforesaid cede to the United States all their right, title, and claim to all the country claimed by them, the same being determined by the following boundaries, to wit:

Boundaries.

Beginning at the point where the forty-fourth parallel of north latitude crosses the summit of the Cascade mountains; thence following the main dividing ridge of said mountains in a southerly direction to the ridge which separates the waters of Pitt and McCloud Rivers from the waters on the north; thence along said dividing ridge in an easterly direction to the southern end of Goose lake; thence northeasterly to the northern end of Harney lake; thence due north to the forty-fourth parallel of north latitude; thence west to the place of beginning: *Provided*, That the following-described tract, within the country ceded by this treaty, shall, until otherwise directed by the President of the United States, be set apart as a residence for said Indians, [and] held and regarded as an Indian reservation, to wit: Beginning upon the eastern shore of the middle Klamath lake, at the Point of Rocks, about twelve miles below the mouth of Williamson's river; thence following up said eastern shore to the mouth of Wood river; thence up Wood river to a point one mile north of the bridge at Fort Klamath; thence due east to the summit of the ridge which divides the upper and middle Klamath lakes; thence along said

Reservation.

Boundaries.

ridge to a point due east of the north end of the upper lake; thence due east, passing the said north end of the upper lake, to the summit of the mountains on the east side of the lake; thence along said mountain to the point where Sprague's river is intersected by the Ish-tish-ea-wax creek; thence in a southerly direction to the summit of the mountain, the extremity of which forms the Point of Rocks; thence along said mountain to the place of beginning. And the tribes aforesaid agree and bind themselves that, immediately after the ratification of this treaty, they will remove to said reservation and remain thereon, unless temporary leave of absence be granted to them by the superintendent or agent having charge of the tribes.

Indians to remove to, and live upon the reservation.

It is further stipulated and agreed that no white person shall be permitted to locate or remain upon the reservation, except the Indian superintendent and agent, employees of the Indian department, and officers of the Army of the United States, *guaranteed* [and] that in case persons other than those specified are found upon the reservation, they shall be immediately expelled therefrom; and the exclusive right of taking fish in the streams and lakes, included in said reservation, and of

White persons not to remain on reservation;

Post, p. 711.

nor fish, &c.

gathering edible roots, seeds, and berries within its limits, is hereby secured to the Indians aforesaid: *Provided*, *also*, That the right of way for public roads and railroads across said reservation is *guaranteed* [reserved] to citizens of the United States.

Right of way for railroads.
Post, p. 711.

ARTICLE II. In consideration of, and in payment for the country ceded by this treaty, the United States agree to pay to the tribes conveying the same the several sums of money hereinafter enumerated, to wit: Eight thousand dollars per annum for a period of five years, commencing on the first day of October, eighteen hundred and sixty-five, or as soon thereafter as this treaty may be ratified; five thousand dollars per annum for the term of five years next succeeding the first period of five years; and three thousand dollars per annum for the term of five years next succeeding the second period; all of which several sums shall be applied to the use and benefit of said Indians by the superintendent or agent having charge of the tribes, under the direction of the President of the United States, who shall, from time to time, in his discretion, determine for what objects the same shall be expended, so as to carry out the design of the expenditure, [it] being

Payments by the United States;

how to be expended.

to promote the well-being 'of' the Indians, advance them in civilization, and especially agriculture, and to secure their moral improvement and education.

Additional payment, and for what purposes.

ARTICLE III. The United States agree to pay said Indians the additional sum of thirty-five thousand dollars, a portion whereof shall be used to pay for such articles as may be advanced to them at the time of signing this treaty, and the remainder shall be applied to subsisting the Indians during the first year after their removal to the reservation, the purchase of teams, farming implements, tools, seeds, clothing, and provisions, and for the payment of the necessary employees.

Mills and shops to be erected.

ARTICLE IV. The United States further agree that there shall be erected at suitable points on the reservation, as soon as practicable after the ratification of this treaty, one saw-mill, one flouring-mill, suitable buildings for the use of the blacksmith, carpenter, and wagon and plough maker, the necessary buildings for one manual-labor school, and such hospital buildings as may be necessary, which buildings shall be kept in repair at the expense of the United States for the term of twenty years; and it is further

School-house and hospital.

stipulated that the necessary tools and material for the saw-mill, flour-mill, carpenter, blacksmith, and wagon and plough maker's shops, and books and stationery for the manual-labor school, shall be furnished by the United States for the period of twenty years.

Tools, books, and stationary.

ARTICLE V. The United States further engage to furnish and pay for the services and subsistence, for the term of fifteen years, of one superintendent of farming operations, one farmer, one blacksmith, one sawyer, one carpenter, and one wagon and plough maker, and for the term of twenty years of one physician, one miller, and two school-teachers.

Farmer, mechanics, and teachers.

ARTICLE VI. The United States may, in their discretion, cause a part or the whole of the reservation provided for in Article I to be surveyed into tracts and assigned to members of the tribes of Indians, parties to this treaty, or such of them as may appear likely to be benefited by the same, under the following restrictions and limitations, to wit: To each head of a family shall be assigned and granted a tract of not less than forty nor more than one hundred and twenty acres, according to the number of persons in such

Reservation may be surveyed into tracts, and assigned to heads of families and single persons;

family; and to each single man above the age of twenty-one years a tract not exceeding forty acres. The Indians to whom these tracts are granted are guaranteed the perpetual possession and use of the tracts thus granted and of the improvements which may be placed thereon; but no Indian shall have the right to alienate or convey any such tract to any person whatsoever, and the same shall be forever exempt from levy, sale, or forfeiture: *Provided*, That the Congress of the United States may hereafter abolish these restrictions and permit the sale of the lands so assigned, if the prosperity of the Indians will be advanced thereby: *And provided further*, If any Indian, to whom an assignment of land has been made, shall refuse to reside upon the tract so assigned for a period of two years, his right to the same shall be deemed forfeited.

not to be alienated, nor subject to levy, &c.

Restrictions may be removed.

Forfeiture.

ARTICLE VII. The President of the United States is empowered to declare such rules and regulations as will secure to the family, in case of the death of the head thereof, the use and possession of the tract assigned to him, with the improvements thereon.

Regulations as to successions.

ARTICLE VIII. The annuities of the tribes mentioned in this treaty shall not be held liable or taken to pay the debts of individuals.

Annuities not liable for debts.

ARTICLE IX. The several tribes of Indians, parties to this treaty, acknowledge their dependence upon the government of the United States, and agree to be friendly with all citizens thereof, and to commit no depredations upon the person or property of said citizens, and to refrain from carrying on any war upon other Indian tribes; and they further agree that they will not communicate with or assist any persons or nation hostile to the United States, and, further, that they will submit to and obey all laws and regulations which the United States may prescribe for their government and conduct.

Peace and friendship.

ARTICLE X. It is hereby provided that if any member of these tribes shall drink any spirituous liquor, or bring any such liquor upon the reservation, his or her proportion of the benefits of this treaty may be withheld for such time as the President of the United States may direct.

Members drinking, &c. spiritous liquors, not to have the benefits of this treaty.

ARTICLE XI. It is agreed between the contracting parties that if the United States, at any future time,

Other tribes may be

may desire to locate other tribes upon the reservation provided for in this treaty, no objection shall be made thereto; but the tribes, parties to this treaty, shall not, by such location of other tribes, forfeit any of their rights or privileges guaranteed to them by this treaty.

located on reservation.

Proviso.

ARTICLE XII. This treaty shall bind the contracting parties whenever the same is ratified by the Senate and President of the United States.

Treaty when to take effect.

In witness of which, the several parties named in the foregoing treaty have hereunto set their hands and seals at the place and date above written.

Execution.

J. W. PERIT HUNTINGTON, [SEAL.]
Supt. Indian Affairs.
WILLIAM LOGAN, [SEAL.]
U. S. Indian Agt.

LA-LAKE,	his x mark.	[SEAL.]
CHIL-O-QUE-NAS,	his x mark.	[SEAL.]
KELLOGUE,	his x mark.	[SEAL.]
MO-GHEN-KAS-KIT,	his x mark.	[SEAL.]
BLOW,	his x mark.	[SEAL.]
LE-LU,	his x mark.	[SEAL.]
PALMER,	his x mark.	[SEAL.]
JACK,	his x mark.	[SEAL.]
QUE-ASS,	his x mark	[SEAL.]
POO-SAK-SULT,	his x mark.	[SEAL.]
CHE-MULT,	his x mark.	[SEAL.]

NO-AK-SUM,	his x mark.	[SEAL.]
MOOCH-KAT-ALLICK,	his x mark.	[SEAL.]
TOON-TUC-TEE,	his x mark.	[SEAL.]
BOSS-KI-YOU,	his x mark.	[SEAL.]
SKI-AT-TIC,	his x mark.	[SEAL.]
SHOL-LAL-LOOS,	his x mark.	[SEAL.]
TAT-TET-PAS,	his x mark.	[SEAL.]
MUK-HAS,	his x mark.	[SEAL.]
HERMAN-KUS-MAM,	his x mark.	[SEAL.]
JACKSON,	his x mark.	[SEAL.]
SCHON-CHIN,	his x mark.	[SEAL.]
STAK-IT-UT,	his x mark.	[SEAL.]
KEINT-POOS,	his x mark.	[SEAL.]
CHUCK-E-I-OX,	his x mark.	[SEAL.]
KILE-TO-AK,	his x mark.	[SEAL.]
SKY-TE-OCK-ET,	his x mark.	[SEAL.]

Signed in the presence of—

R. P. EARHART, *Secretary*.
WM. KELLY,
Capt. 1*st Cav.*, *Oregon Volunteers*.
JAMES HALLORAN,
2*d Lieut.* 1*st Inf.*, *W. T. Vols.*
WILLIAM C. MCKAY, *M. D.*
his
ROBERT (his x mark) BIDDLE.
mark.

25 U.S.C. § 2

§ 2. Duties of Commissioner

The Commissioner of Indian Affairs shall, under the direction of the Secretary of the Interior, and agreeably to such regulations as the President may prescribe, have the management of all Indian affairs and of all matters arising out of Indian relations.

42 U.S.C. § 4332(C)

§ 4332. Cooperation of agencies; reports; availability of information; recommendations; international and national coordination of efforts

The Congress authorizes and directs that, to the fullest extent possible: (1) the policies, regulations, and public laws of the United States shall be interpreted and administered in accordance with the policies set forth in this chapter, and (2) all agencies of the Federal Government shall—

* * * * *

(C) include in every recommendation or report on proposals for legislation and other major Federal actions significantly affecting the quality of the human environment, a detailed statement by the responsible official on--

(i) the environmental impact of the proposed action,

(ii) any adverse environmental effects which cannot be avoided should the proposal be implemented,

(iii) alternatives to the proposed action,

(iv) the relationship between local short-term uses of man's environment and the maintenance and enhancement of long-term productivity, and

(v) any irreversible and irretrievable commitments of resources which would be involved in the proposed action should it be implemented.

Prior to making any detailed statement, the responsible Federal official shall consult with and obtain the comments of any Federal agency which has

jurisdiction by law or special expertise with respect to any environmental impact involved. Copies of such statement and the comments and views of the appropriate Federal, State, and local agencies, which are authorized to develop and enforce environmental standards, shall be made available to the President, the Council on Environmental Quality and to the public as provided by section 552 of Title 5, and shall accompany the proposal through the existing agency review processes[.]

43 U.S.C. § 1457(10)

§ 1457. Duties of Secretary

The Secretary of the Interior is charged with the supervision of public business relating to the following subjects and agencies:

* * * * *

10. Indians.

Dated May 30, 2013

Protocol Agreement between
The Klamath Tribes and
the Bureau of Indian Affairs

The following Agreement is entered into on the date of the last signature hereto by The Klamath Tribes (the Tribes) and the United States Bureau of Indian Affairs (the BIA), herein collectively called "the Parties."

WHEREAS, the Tribes and the BIA are claimants in the Klamath Basin Adjudication (KBA) initially conducted by the Oregon Water Resources Department (OWRD), and now before the Klamath County Circuit Court, and

WHEREAS, certain water rights of the Tribes and of the BIA as trustee for the benefit of the Tribes (collectively, the Tribal water rights), were confirmed and upheld in OWRD's Final Order of Determination in the KBA filed with the Klamath County Circuit Court on March 7, 2013, and

WHEREAS, such water rights are enforceable as of the date of that filing, so that "calls" for water to satisfy the Tribal water rights and calls for enforcement can be made, and

WHEREAS, the Parties desire to position themselves to make such calls in a timely and effective manner, after consultation with each other, and the Parties are mindful of OWRD's desire for the Parties to have a point of contact to make calls for the Parties;

NOW, THEREFORE, the Parties agree as follows:

1. The Tribes will be the entity that generally contacts OWRD to make calls for enforcement of the Tribal water rights. The Tribes designate the Director of the Natural Resources Department to be the point of contact to make calls to OWRD:

> Will Hatcher, 541-783-2219, ext. 112, will.hatcher@klamathtribes.com, or, alternatively, the Tribes' Water Management Liaison, Larry Dunsmoor, 541-783-2149, ext. 21, lkdunsmoor@aol.com

The Tribes will notify OWRD and the BIA of any changes to this designation.

2. Prior to making a call to OWRD, the Tribes will provide two business days' notice to the BIA by email and telephone to the BIA call representative designated below, with a copy of the email notice to BIA's Solicitor's Office attorney and BIA designees listed under "copy to" below. Such call notice will include the reasons for making such a call, including: the Tribal water right not being met, the water source and amount for the call, and an assessment based on the Tribes' information and belief that water is currently being diverted from the source at issue and that a call would provide water for the Tribal water right. Upon mutual agreement the Tribes and the BIA may consent in writing to a shorter time period for a specific notice of a call.

The Parties' respective call representatives for the call notice will be:

> For the Klamath Tribes:
>
> > Will Hatcher, Director of Natural Resources

(541) 783-2219, ext. 112
will.hatcher@klamathtribes.com

copy to: Larry Dunsmoor, Water Management Liaison, lkdunsmoor@aol.com

For the Bureau of Indian Affairs:

Deputy Regional Director for Indian Services, Scott Aikin
(503) 231-6705
scott.aikin@bia.gov

copy to: Bodie Shaw, Deputy Regional Director for Trust Services, bodie.shaw@bia.gov
Michael Dammarell, Water Rights Specialist, michael.dammarell@bia.gov
Barbara Scott-Brier, attorney, Office of the Solicitor PNWR, ssbrier@corncast.net

If a Party's call representative is out of the office for more than a day, the following will serve as the Party's acting "call representative" during the call representative's absence:

For the Klamath Tribes:

Larry Dunsmoor, Water Management Liaison
(541) 783-2149, ext. 21
lkdunsmoor@aol.com

copy to: Don Gentry, Chairman, don.gentry@klamathtribes.com
Kathleen Mitchell, General Manager, Kathleen.mitchell@klamathtribes.com

For the Bureau of Indian Affairs:

Bodie Shaw, Deputy Regional Director for Trust Services
(503) 231 -6705
bodie.shaw@bia.gov

copy to: Michael Dammarell, Water Rights Specialist,
michael.dammarell@bia.gov
Barbara Scott-Brier, attorney,
Office of the Solicitor PNWR,
ssbrier@comcast.net

The Parties will notify the Tribal Chairman and the BIA Regional Director, at the addresses in the signature blocks below, of any changes in their call representative or acting call representative.

3. The BIA call representative will timely provide an email response to the call notice stating either (i) agreement with making the proposed call, (ii) changes to the scope of the proposed call, (iii) disagreement with making the proposed call and the reasons for that disagreement, or (iv) that BIA needs an additional business day to complete deliberations on the call notice.

4. If after reviewing BIA's response under parts (ii) or (iii) of paragraph 3, the Tribes continue to believe the proposed call is necessary, the Tribal Chairman will initiate discussion of the matter with the BIA Regional Director in an attempt to resolve the disagreement and will refrain from pursuing the call without the BIA's agreement while such discussions are ongoing. Such discussions must conclude or be deemed concluded within two business days of the Tribal Chairman's initiating the discussion.

5. If in the absence of an expression of such from the Tribes the BIA believes a call should be made for the Tribes' benefit for the protection of the Tribes' treaty resources or protection of the Tribal water rights, the BIA will follow the same general procedures described above in paragraphs 2-4 and will refrain from pursuing the call without the Tribes' agreement while discussions to resolve any disagreement regarding the proposed call are ongoing. The BIA designates the Deputy Regional Director for Indian Services to be the point of contact to make calls to OWRD:

> Scott Aikin, (503) 231-6705, scott.aikin@bia.gov, or, alternatively, the Deputy Regional Director for Trust Services, Bodie Shaw, (503) 231-6705, bodie.shaw@bia.gov.

The BIA will notify OWRD and the Tribes of any changes to this designation.

6. Failure to respond within two business days (i) to a notice for a call as provided in paragraphs 3 and 5, or (ii) to an initiation of discussions as provided in paragraph 4, constitutes consent to making the call.

7. Each Party retains its independent right to make a call: if after following the procedures as described in paragraphs 2-5, the Parties cannot agree on whether to make a call, either Party may independently make a call and the other will not object to the call.

8. All calls on water rights made to OWRD will be made in writing delivered by any means (hand, fax, e-mail, first class mail) with a copy to the other Party's call representative and BIA's Solicitor's Office attorney at the email addresses indicated in paragraph 2.

9. The Parties may modify this Agreement upon mutual agreement, including, for example, modification based on any change in ownership of the Tribal water rights designated in the final court decree, by execution of a written modification.

10. This Agreement will remain in effect until terminated by either Party on 30 days' written notice to the other Party.

IN WITNESS WHEREOF the Parties have hereunto set their hands on the dates shown.

FOR THE KLAMATH TRIBES	**FOR THE BUREAU OF INDIAN AFFAIRS**
/s/ Don Gentry	/s/ Stanley Speaks
Chairman	Regional Director
The Klamath Tribes	Bureau of Indian Affairs
PO BOX 436	Northwest Regional Office
501 Chiloquin Blvd	911 NE 11th Avenue
Chiloquin, OR 97624	Portland, OR 97232-4169
5/24/2013	5/30/2013
Date	Date

Dated Mar. 7, 2019

Protocol Agreement between
The Klamath Tribes and
the Bureau of Indian Affairs

The following Agreement is entered into on the date of the last signature hereto by The Klamath Tribes (the Tribes) and the United States Bureau of Indian Affairs (the BIA), herein collectively called "the Parties."

WHEREAS, the Tribes and the BIA are claimants in the Klamath Basin Adjudication (KBA), initially conducted by the Oregon Water Resources Department (OWRD), and now before the Klamath County Circuit Court; and

WHEREAS, water rights claims were filed by both the Tribes and the United States on behalf of and in trust for the Tribes (Tribal water rights), and some of those claims were recognized and determined in OWRD's Amended and Corrected Findings of Facts and Order of Determination (ACFFOD) in the KBA, dated February 28, 2014, and originally filed with the Klamath County Circuit Court on March 7, 2013; and

WHEREAS, such determined water rights claims are enforceable as of the date of the March 7, 2013, filing, such that calls for water to satisfy the Tribal water rights and calls for enforcement can be made; and

WHEREAS, the Parties desire to position themselves to make such calls in a timely and effective manner, after consultation with each other, and the Parties are mindful of OWRD's desire for the Parties to have designated points of contact responsible for making calls on behalf of the Parties; and

WHEREAS, the Parties have confirmed with OWRD that calls are now generally to be made on a "standing" basis, with one for the irrigation season (beginning on or about March 1) and one for the non-irrigation season (beginning on or about November 1), thereby enabling OWRD to more consistently monitor, observe, and, when necessary, regulate junior water users in response to the standing calls (hereafter referred to as a "standing call");

WHEREAS, the Parties originally signed this Agreement on May 30, 2013, and are amending it to revise some of the procedures, including giving the BIA more time to respond to call notices from the Tribes;

NOW, THEREFORE, the Parties agree as follows:

1. Unless the BIA decides to make a unilateral call pursuant to paragraph 5, the Tribes will be the entity that contacts OWRD to make calls for enforcement of the Tribal water rights. The Tribes designate the Water Rights Specialist of the Natural Resources Department's Aquatics Program to be the point of contact to make calls to OWRD:

> Bradley Parrish, 541-783-2219, ext. 234,
> bradley.parrish@klamathtribes.com
>
> or alternatively, the Aquatics Supervisor,
> Stanley Swerdloff, 541-783-2219, ext. 222,
> stan.swerdloff@klamathtribes.com.

The Tribes will notify OWRD and the BIA of any changes to this designation.

2. Prior to making a standing call to OWRD, the Tribes will provide seven business days' notice to the BIA by both sending an email to and having a

telephone conversation with the BIA call representative designated below, with copies of the email notice sent to BIA's Solicitor's Office attorney and BIA designees listed under "copy to" below. Such call notice will include a list of the Tribal water rights and amounts that the Tribes seek to have OWRD regulate for during the respective season. This call notice has historically been in the form of a written draft call to OWRD and the Parties agree that this is an acceptable form of call notice.

3. The Tribes and the BIA also agree that for a call other than a standing call, the Tribes will provide three business days' notice to the BIA by both sending an email to and having a telephone conversation with the BIA call representative designated below, with copies of the email notice sent to BIA's Solicitor's Office attorney and BIA designees listed under "copy to" below. For purposes of this Agreement, a "call other than a standing call" is a call that is made in response to the Tribes' or BIA's desire to make changes to a standing call, based on hydrologic conditions or a desire to otherwise alter a standing call. A call other than a standing call notice will include the reasons for making the call, including the reason the party wishes to alter a standing call and if applicable: the Tribal water right(s) not being met, the water source(s) and amount(s) for the call, and an assessment based on the Tribes' information and belief that water is currently being diverted from the source(s) at issue and that a call would provide water for the unmet Tribal water right(s).

4. For purposes of computing the notice time period for both a standing call and a call other than a standing call, day one of the notice period is the first

business day after the Tribes have provided both the e-mail and telephone conversation required by paragraph 3.

5. Upon mutual agreement, the Tribes and the BIA may consent in writing to a shorter time period for the notice of a specific call.

6. The Parties' respective call representatives for the call notice will be:

For the Klamath Tribes:

Bradley Parrish, Water Rights Specialist of Natural Resources' Aquatics Program
(541) 783-2219, ext. 234;
bradley.parrish@klamathtribes.com

copy to: Stanley Swerdloff, Aquatics Supervisor,
stan.swerdloff@klamathtribes.com

For the Bureau of Indian Affairs:

Deputy Regional Director for Trust Services
Bodie Shaw, (503) 231-6705,
bodie.shaw@bia.gov

copy to: Deputy Regional Director for Indian Services, ~~Twyla Stange,~~ ~~twyla.stange@bia.gov~~ retired

Michael Dammarell, Water Rights Specialist,
michael.dammarell@bia.gov

Michael Schoessler, Attorney, Office of the Solicitor PNWR,
michael.schoessler@sol.doi.gov

If a Party's call representative is out of the office for more than a day, the following will serve as the Party's acting call representative during the call representative's absence:

For the Klamath Tribes:

Stanley Swerdloff, Aquatics Supervisor
(541) 783-2219, ext. 222
stan.swerdloff@klamathtribes.com, or
alternatively,
Mark Buettner, Environmental Scientist
(541) 783-2219, ext. 227,
mark.buettner@klamathtribes.com

copy to: Don Gentry, Chairman,
don.gentry@klamathtribes.com

George Lopez, General Manager,
george.lopez@klamathtribes.com

Will Hatcher, Natural Resources Director,
will.hatcher@klamathtribes.com

For the Bureau of Indian Affairs:

Deputy Regional Director for Indian Services
~~Twyla Stange~~, (503) 231-6705,
~~twyla.stange@bia.gov~~ retired
or alternatively, the Natural Resource Officer,
~~David Redhorse~~, (503) 231-6883,
~~david.redhorse@bia.gov~~ retired

copy to: Michael Dammarell, Water Rights Specialist,
michael.dammarell@bia.gov

Michael Schoessler, Attorney, Office of the Solicitor PNWR,
michael.schoessler@sol.doi.gov

7. The Parties will notify in writing the Tribal Chairman and the BIA Regional Director, at the addresses in the signature blocks below, of any changes in their call representative or acting call representative. It is each Party's responsibility to ensure that an acting call representative is available to receive the e-mail and telephone notice when the primary representative is out of the office.

8. The BIA call representative will timely provide an email response acknowledging the call notice. Within seven business days for standing calls and three business days for calls other than a standing call, the BIA call representative will provide an email response stating either (i) agreement with making the proposed call, (ii) changes to the scope of the proposed call, or (iii) disagreement with making the proposed call and the reasons for that disagreement.

9. If after reviewing BIA's response under parts (ii) or (iii) of paragraph 8, the Tribes continue to believe the proposed call is necessary, the Tribal Chairman will initiate discussion of the matter with the BIA Regional Director in an attempt to resolve the disagreement and will refrain from pursuing the call without the BIA's concurrence while such discussions are ongoing. Such discussions must conclude or be deemed concluded no later than two business days after the Tribal Chairman's initiation of discussion.

10. If, in the absence of a call notice from the Tribes, the BIA believes a can should be made for the protection of the Tribes' treaty resources or protection of the Tribal water rights, the BIA will follow the same procedures described above in paragraphs 2-9 and will refrain from pursuing the call without the Tribes' concurrence while discussions to resolve any disagreement regarding the proposed call are ongoing. The BIA designates the Deputy Regional Director for Trust Services to be the point of contact to make calls to OWRD:

Bodie Shaw, (503) 231-6705,
bodie.shaw@bia.gov
or, alternatively, the Deputy Regional Director for Indian Services,
~~Twyla Stange~~, (503) 231-6705,
~~twyla.stange@bia.gov~~ retired

The BIA will notify OWRD and the Tribes of any changes to this designation.

11. Failure to respond (i) within seven business days to a notice for a standing call or three business days to a notice for a call other than a standing call as provided in paragraphs 8 and 10, or (ii) to an initiation of discussions as provided in paragraph 9, constitutes consent to making the call.

12. Each Party retains its independent right to make a call. If after following the procedures as described in paragraphs 2-10, the Parties cannot agree on whether to make a call, either Party may independently make a call and the other party will not withhold any required concurrence or object to the call, except for the following: the United States retains the right not

to concur with any call for water that is inconsistent with the ACFFOD or other legal obligations.

13. All calls on Tribal water rights made to OWRD will be made in writing delivered by any means (hand, fax, e-mail, first class mail) with a copy to the other Party's call representative and BIA's Solicitor's Office attorney at the email addresses indicated in paragraph 6.

14. The Parties may modify this Agreement upon mutual agreement, including, for example, modification based on any change in ownership of the Tribal water rights designated in the final court decree, or by execution of a written modification.

15. This Agreement will remain in effect until terminated by either Party, which shall require 30 days' written notice to the other Party before the termination may take effect. The Parties agree to meet and confer in good faith during that 30 day period to attempt to address and remediate the issue(s) giving rise to the termination notice.

IN WITNESS WHEREOF the Parties have hereunto set their hands on the dates shown.

FOR THE KLAMATH TRIBES	**FOR THE BUREAU OF INDIAN AFFAIRS**
/s/ Don Gentry	/s/
Chairman The Klamath Tribes PO BOX 436 501 Chiloquin Blvd Chiloquin, OR 97624	Regional Director Bureau of Indian Affairs Northwest Regional Office 911 NE 11th Avenue Portland, OR 97232-4169
11/14/2018	3/7/2019
Date	Date

Filed Aug. 7, 2019

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

GERALD H. HAWKINS, individually and as trustee of the CN Hawkins Trust and Gerald H. Hawkins and Carol H. Hawkins Trust, * * * * * Plaintiffs, v. **DAVID L. BERNHARDT**, Secretary of the Interior, * * * * * Defendants.	Civil No. 1:19-cv-01498-BAH Action for Declaratory and Injunctive Relief (Administrative Procedure Act, 5 U.S.C. §§ 701-706) **AMENDED COMPLAINT**

AMENDED COMPLAINT

For their complaint, plaintiffs allege as follows:

INTRODUCTION

1. This is an action against the Hon. David L. Bernhardt, in his official capacity as Secretary of the Interior, Tar Katuk Mac Lean Sweeney, in her official capacity as the Assistant Secretary—Indian Affairs, Darryl LaCounte, in his official capacity as Director of the Bureau of Indian Affairs (BIA), and Bryan Mercier, in his official capacity as Regional Director for the Northwest Region of the BIA, for declaratory and injunctive relief from final agency action that is *ultra vires*, as well as in violation of the National Environmental Policy Act (NEPA), 42 U.S.C. §§ 4321-

4347. Specifically, this action challenges decisions by defendants to authorize the execution and implementation of an agreement (Protocol Agreement) with the Klamath Tribes, signed on May 30, 2013. The Protocol Agreement unlawfully delegates to the Klamath Tribes authority to issue "calls" for state enforcement of instream water rights held by the United States, as trustee for the Klamath Tribes, for streams in the Upper Klamath Basin in Klamath County, Oregon. This action also challenges defendants' connected final decisions to concur with, or accede to, such calls made under the Protocol Agreement without first evaluating the effects to the human environment, and considering alternatives to the resulting widespread irrigation shut-offs against plaintiffs and the entire Upper Basin community, in accordance with NEPA. Plaintiffs seek declaratory and injunctive relief declaring the Protocol Agreement unlawful, declaring each of the calls issued in 2013 and 2017 through 2019 unlawful, setting aside and vacating each of those decisions, and enjoining defendants from making any further calls for enforcement of the United States' instream water rights unless and until defendants have complied with NEPA and have determined that any such calls are in the general public interest and would further the general welfare of the Nation.

JURISDICTION AND VENUE

2. This Court has jurisdiction over this action pursuant to 28 U.S.C. § 1331 (federal question), § 2201 (declaratory relief) and § 2202 (injunctive relief). Plaintiffs have challenged final agency actions as defined by the Administrative Procedure Act (APA), 5 U.S.C. § 704. Venue in this district is proper under 28

U.S.C. § 1391(e) because a substantial part of the events or omissions giving rise to the claims occurred in this district, and/or defendants Bernhardt, Sweeney and LaCounte reside in this district. This action is timely under 28 U.S.C. § 2401(a)(1) because the Protocol Agreement was executed on May 30, 2013 and defendants have subsequently concurred with, or acceded to, calls issued by the Klamath Tribes for enforcement of instream water rights held by the United States in each year since the Protocol Agreement was executed.

PARTIES

Wood River Landowners

3. Plaintiffs Gerald B. Hawkins, individually and as a trustee of the CN Hawkins Trust and Gerald H. Hawkins and Carol H. Hawkins Trust; John B. Owens, as a trustee of the John and Candace Owens Family Trust; Harlowe Ranch, LLC, an Oregon limited liability company; Goose Nest Ranches, LLC, an Oregon limited liability company; Agri Water, LLC, an Oregon limited liability company; NBCC, LLC, an Oregon limited liability company; Roger Nicholson; Nicholson Investments, LLC, an Oregon limited liability company; Mary Nicholson, as trustee of the Nicholson Loving Trust; Martin Nicholson, individually and as co-trustee of the Nicholson Loving Trust; Rascal Ranch, LLC, an Oregon limited liability company; JaCox Ranch, LLC, an Oregon limited liability company; and E. Martin Kerns (collectively, Wood River Landowners) are the owners of thousands of acres of real property in the Wood River Valley in

Klamath County, Oregon. They[1] use and enjoy their ranches for multiple purposes including, but not limited to: cattle ranching, growing pasture grasses, recreation, observing and experiencing wildlife, boating, fishing, and hunting. Wood River Landowners' ability to use and enjoy their properties is dependent on having access to water for irrigation.

4. Wood River Landowners' properties have appurtenant water rights that allow for the diversion of water from the Wood River and/or its tributaries Fort Creek, Crooked Creek, Annie Creek, and Sun Creek for the purpose of irrigation and stock watering. Wood River Landowners use the water to irrigate their pastures for growing grass to feed cattle. Wildlife such as waterfowl, migratory birds (such as red-tailed hawks, owls and bald eagles), amphibians, reptiles, deer and elk depend on Wood River Landowners' irrigated pastures for habitat, refuge, and feed. Wood River Landowners enjoy observing and experiencing wildlife on their private property.

5. Some Wood River Landowners' water rights have been provisionally recognized in the Klamath Basin Adjudication as having a priority date of 1864, originating under the Klamath Treaty. 16 Stat. 707. Some of Wood River Landowners' ranches were formerly part of the Agency Unit of the Klamath Indian Irrigation Project that was funded and developed by the U.S. Indian Irrigation Service commencing in 1900. Other Wood River Landowners hold water rights that were adjudicated in a prior state adjudication of the Wood River, with pre-1909

[1] For corporate entities, references to Wood River Landowners' use and enjoyment of their properties, and associated injuries, refer to their corporate owners, members, and managers.

priority dates. Finally, some Wood River Landowners also hold water rights that were issued by OWRD after 1909, including groundwater rights.

Sprague River Landowners

6. Plaintiffs Troy Brooks and Tracey Brook, husband and wife; Barbara A. Duarte and Eric Lee Duarte, as trustees of the Duarte Family Trust, UTD January 17, 2002; Kevin Newman and Jennifer Newman, husband and wife; Duane Martin Ranches, L.P., a California limited partnership; Geoffrey T. Miller and Catherin A. Miller, as Co-Trustees of The Geoff and Catherine Miller Family Trust, UTD February 6, 2017; Casey Lee Miller, as Trustee of The Casey Miller Trust, UTD January 9, 2017; Wilks Ranch Oregon, Ltd., a Texas limited partnership; Margaret Jacobs; Darrell W. Jacobs; Franklin J. Melsness and Janet G. Melsness; Barnes Lake County, LLC, an Oregon limited liability company; David Cowan and Theresa Cowan, husband and wife; Vincent Hill; and Chet Vogt, as trustee for C & A Vogt Community Property Trust (collectively, Sprague River Landowners) are the owners of thousands of acres of real property in the Sprague River Valley, as well as along tributaries of the lower Williamson River, all in Klamath County, Oregon. They[2] use and enjoy their real properties for multiple purposes including, but not limited to: cattle ranching, growing pasture grasses, recreation, observing and experiencing wildlife, boating, fishing, and hunting. Sprague River Landowners' ability to use and enjoy

[2] For corporate entities, references to Sprague River Landowners' use and enjoyment of their properties, and associated injuries, refer to their corporate owners, members, and managers.

their properties is dependent on having access to water for irrigation.

7. Sprague River Landowners' properties have appurtenant water rights that allow for the diversion of water from the Sprague River and/or its tributaries, as well as from the Lower Williamson River and its tributaries, including Larkin Creek and Spring Creek, for the purposes of irrigation and stock watering. Sprague River Landowners use the water to irrigate their pastures for growing grass to feed cattle. Wildlife such as waterfowl, migratory birds, amphibians and deer depend on Sprague River Landowners' irrigated pastures for habitat, refuge and feed. Sprague River Landowners enjoy observing and experiencing wildlife on their private property.

8. Some Sprague River Landowners' water rights have been provisionally recognized in the Klamath Basin Adjudication as having a priority date of 1864, originating under the Klamath Treaty. 16 Stat. 707. Some of Sprague River Landowners' members are part of the Chiloquin Unit, Spring Creek Unit and Yainax Unit of the Klamath Indian Irrigation Project that was first planned, funded and/or developed by the U.S. Indian Irrigation Service commencing in the early 1900s. Other Sprague River Landowners hold water rights that were adjudicated in a prior state adjudication of the Sprague River, with pre-1909 priority dates. Finally, some Sprague River Landowners also hold water rights that were issued by OWRD after 1909, including groundwater rights.

Defendants

9. Defendant Bernhardt, the Secretary of Interior, is the official responsible for supervising

several federal agencies with an interest in the Klamath Basin, including the BIA, the Bureau of Reclamation (BOR), and the Fish and Wildlife Service (FWS). Defendant Bernhardt, in addition, is the primary official responsible for making policy-decisions that balance the United States' Indian trust responsibilities with the United States' other varied interests and obligations owed to all people of the Nation. *See* Letter from Griffin B. Bell, Attorney General, to Cecil D. Andrus, Secretary of Interior (May 31, 1979). *See also* Memorandum to the Attorney General from John M. Harmon, Assistant Attorney General, Office of Legal Counsel (August 11, 1977) [hereinafter Harmon Memo]. Particularly pertinent here, Defendant Bernhardt is responsible for the United States' policy decisions on Indian trust matters which affect private landowners and irrigators in the Upper Klamath Basin such as plaintiffs, including with respect to lands that were formerly part of the Klamath Indian Reservation and which the Department of Interior supported developing for irrigation and agriculture from the early 1900s through the 1960s.

10. The Secretary has been personally involved in significant recent decisions affecting plaintiffs and the Upper Klamath Basin, decisions which are part of the subject matter of this case, including the Upper Klamath Basin Comprehensive Agreement (UKBCA) and the Klamath Basin Restoration Agreement (KBRA). *See* 82 Fed. Reg. 61582 (December 28, 2017). Secretary Sally Jewel personally visited the Upper Klamath Basin to participate in the signing ceremony for the UKBCA with plaintiffs and the other signatories. *See* https://www.doi.gov/news/press releases/historic-upper-klamath-basin-agreement-

signed-alongbanks-of-spring-creek. The UKBCA specifically referenced, and contemplated defendants utilizing, the Protocol Agreement to issue calls for enforcement of United States-held water rights against plaintiffs. Secretary Bernhardt is sued in his official capacity only.

11. Defendant Sweeney, the Assistant Secretary—Indian Affairs is, pursuant to 25 U.S.C. § 2, responsible for management of all Indian affairs and of all matters arising out of Indian relations, under the direction of Secretary Bernhardt. Assistant Secretary Sweeney is sued in her official capacity only.

12. Defendant LaCounte, the Director of the BIA, is the official in charge of the BIA and supervising the activities and decisions of the BIA's Regional Offices, including the Northwest Region and its regional director. Director LaCounte is sued in his official capacity only.

13. Defendant Mercier is the Regional Director for the Northwest Regional Office of the BIA. His predecessor, Stanley Speaks, signed the Protocol Agreement on May 30, 2013. Regional Director Mercier is sued in his official capacity only.

BACKGROUND ALLEGATIONS

14. Plaintiffs' ranches are located throughout what is known as the Upper Klamath Basin in Klamath County, Oregon. Plaintiffs' ranches drain the Wood River, the Sprague River, the Williamson River, and their tributaries, into Upper Klamath Lake, which, in turn, empties into the mainstem Klamath River. The Upper Klamath Basin contains approximately 180,000 acres of irrigated pasture, the development of much of which was supported by the

U.S. Indian Irrigation Service in the early 1900s, but which has been actively declining since 2013 because of decisions by defendants that have drastically curtailed irrigation. Plaintiffs' ranches are home to an array of wildlife that depend on irrigation for providing habitat that is important for carrying out behavioral functions, including feeding and sheltering. Numerous plant communities located on plaintiffs' ranches also rely on irrigation.

15. On September 29, 1975, the United States filed a complaint in Oregon Federal District Court against private landowners in the Upper Williamson River basin in Klamath County, Oregon to "determine the extent of the rights appurtenant to lands presently owned by the defendants and the extent of the rights of plaintiff to utilize the waters." *United States v. Adair*, Case No. 75-914 (D. Or.) (plaintiff's complaint); *see also id.*, 478 F. Supp. 336 (D. Or. 1979) (*Adair I*). The district court held that, under the Klamath Treaty, the Tribes had an implied right to "all of the water rights necessary to protect their hunting and fishing rights[,]" with a "time immemorial" priority date. *Adair I*, 478 F. Supp. at 345. The Ninth Circuit Court of Appeals affirmed this ruling with the clarification that the water right consisted of "the amount of water necessary to support its hunting and fishing rights as currently exercised to maintain the livelihood of Tribe members, not as these rights once were exercised by the Tribe in 1864." *United States v. Adair*, 723 F.2d 1394, 1414-15 (1983) (*Adair II*). The Ninth Circuit left to the State of Oregon the task of quantifying the water right in a state adjudication.

16. The district court also recognized that, in addition to supporting the Klamath Tribes' hunting

and fishing rights, the Treaty's other primary purpose was "to encourage agriculture," and that non-Indian landowners were "entitled to an 1864 priority date for water rights appurtenant to their land which formerly belonged to the Klamath Indians." *United States v. Adair*, Case No. 75-914 (D. Or.) (final judgment). Many of these lands, "approximately 25% of the original Klamath Reservation," were developed and passed on to non-Indians under the General Allotment Act of 1887. *Adair II*, 723 F.2d at 1398. Several plaintiffs are owners of those government-allotted lands, as described in paragraphs 5 and 8, above.

17. The Department of Interior was responsible for transferring those allotted lands to the predecessor-in-interest of many of the plaintiffs. In 1958, the Solicitor for the United States Department of Interior released a memorandum indicating that the Department of Interior would "support the rights of Indian landowners and third party purchasers of Klamath [Reservation] lands as having" water rights under the Klamath Treaty of 1864. The Department of Interior provided this support during the termination period of the Klamath Reservation, according to the Solicitor, "in order to give potential non-Indian purchasers of land some assurance of rights to the use of water on the land they purchase." The Department of Interior's position coincided with a long history of the federal government's enthusiastic support for the development of all the available water from the streams within the former Reservation ("former Reservation") for irrigation and agriculture. At the Secretary's direction, in the early 1900s the U.S. Indian Irrigation Service filed notices and applications with the state engineer to develop all the

available water from the Wood River, Sprague River, and Williamson River for irrigation and agriculture. *See Adair I*, 478 F Supp at 339-340 (referencing the Williamson River application).

18. Despite those actions by the Department of Interior to support irrigation development and agriculture on many of the lands now owned by plaintiffs, in 1997, the United States filed instream water right claims, as trustee for the Klamath Tribes, for practically all the available water in the Wood River and tributaries, Sprague River and tributaries, and the Williamson River and tributaries in Oregon's general stream adjudication for the Klamath Basin (Klamath Basin Adjudication or KBA), for the purpose of supporting the Klamath Tribes' fishing and hunting rights, relying on *Adair II*.

19. Following a lengthy administrative proceeding and hearings, the State of Oregon, by and through the Oregon Water Resources Department (OWRD), issued its findings of fact and order of determination (FFOD) for the KBA on March 7, 2013. The FFOD provisionally determined more than 700 water right claims filed in the KBA, subject to parties' rights to file exceptions to OWRD's findings and determinations in state circuit court pursuant to Oregon Revised Statute (ORS) 539.150. Under ORS 539.130(4), the determined water rights claims went into "full force and effect," pending the state circuit court's resolution of parties' exceptions.

20. In the FFOD, OWRD provisionally awarded to the United States, as trustee for the Klamath Tribes, substantial instream water right claims for the Wood River and two of its tributaries, Fort Creek and Crooked Creek, the Sprague River and several of

its tributaries, including Five Mile Creek, and the lower Williamson River and several of its tributaries, including Larkin Creek and Spring Creek. The instream water rights were quantified at such high levels that, if enforced at their full levels, they leave little water, and in many cases no water, available for irrigation uses throughout the entire Upper Klamath Basin. These water cut-offs have directly injured plaintiffs' private ranches, many of which were developed for irrigation with the active support of the Department of Interior, led by the Secretary. The Wood River Landowners and Sprague River Landowners filed exceptions to OWRD's determinations, in state circuit court, and those exceptions remain pending. The exceptions are not likely to be resolved for several more years.

21. In the FFOD, OWRD also provisionally awarded several Wood River Landowners and Sprague River Landowners irrigation water rights with an 1864 priority date, pursuant to the Klamath Treaty. Despite identifying those very same lands for irrigation development in the early 1900s, by and through the U.S. Indian Irrigation Service, the United States has filed exceptions to OWRD's determinations of several of those claims, seeking to have them severely limited or denied, and those exceptions remain pending. The exceptions are not likely to be resolved for several more years.

22. In the FFOD, OWRD specifically determined that the tribal instream water rights would not be held by the Klamath Tribes and would, instead, be held by the United States, as trustee, based on the U.S. Supreme Court's holding in *Colorado River Water Conservation Distr. v. United States*, 424 U.S. 800, 810

(1976). In response, defendants, by and through the BIA's Regional Director for the Northwest Region, entered into the Protocol Agreement on May 30, 2013. The Protocol Agreement delegates to the Klamath Tribes the United States' authority and discretion to make "calls" for the State of Oregon, by and through OWRD, to prohibit junior water uses when the streamflows are not being met, under Oregon's prior appropriation doctrine system of water right regulation.

23. The Protocol Agreement authorizes the Klamath Tribes to contact OWRD to formally issue calls for enforcement of the instream water rights, after providing notice to the BIA. In the absence of such calls, OWRD would not prohibit junior water users from exercising their water rights. The Protocol Agreement provides that, within two business days of receiving notice for the Tribes, the BIA will provide an email response stating either: "(i) agreement with making the proposed call, (ii) changes to the scope of the proposed call, (iii) disagreement with making the proposed call and the reasons for that disagreement or, (iv) that BIA needs an additional business day to complete deliberations on the call notice."

24. In the event BIA disagrees with a call, or the scope of the call, and the dispute cannot be resolved within two business days, the Protocol Agreement empowers the Klamath Tribes to nonetheless proceed to issue the call, notwithstanding BIA's objections. In such event, the Protocol agreement specifically provides that the BIA "will not object to the call[,]" effectively waiving any final review authority of the agency to prohibit or modify the call.

25. Pursuant to the Protocol Agreement, in June, 2013, the Klamath Tribes, by and through the power and authority delegated by defendants, issued calls to OWRD which resulted in OWRD issuing final orders directing hundreds of landowners throughout the Upper Klamath Basin, including plaintiffs, to cease all irrigation.

26. Following the 2013 shut-off, the United States and the State of Oregon sought to find a solution for this basin-wide crisis by bringing landowners and the Klamath Tribes together to reach a comprehensive water right settlement. This effort resulted in execution of the Upper Klamath Basin Comprehensive Agreement (UKBCA) on April 18, 2014, between the State of Oregon, Klamath Tribes, and landowners in the Upper Klamath Basin, including most of the plaintiffs to this action. Former Secretary of Interior, Sally Jewell, personally participated in the signing ceremony for the UKBCA on the banks of the Lower Williamson River.

27. Defendants, or their predecessors, and/or their direct subordinates, were directly involved in the negotiation, and subsequent implementation, of the UKBCA, as well as related and connected agreements, including the Klamath Basin Restoration Agreement (KBRA) and the Klamath Hydroelectric Settlement Agreement (KHSA). Section 13.3 of the UKBCA specifically provided: "[n]othing in this Agreement is intended to affect the agreement between the Klamath Tribes and the BIA when placing calls pursuant to the May 24, 2013 Protocol Agreement between the Klamath Tribes and the BIA, which is on file with OWRD, amended as needed from time to time."

28. The UKBCA included a Water Use Program (WUP) that significantly reduced the magnitude of the instream flows awarded to the United States in the KBA to flows called "Specified Instream Flows" (SIF). The SIFs consisted of lower streamflow levels that were designed to support fish and wildlife resources important to the Klamath Tribes while also providing irrigation opportunities for plaintiffs and other irrigators and, consequently, a sustainable basis for the continuation of irrigated agriculture in the Upper Klamath Basin.

29. Pursuant to the Protocol Agreement, in 2014, 2015, and 2016, the Klamath Tribes, by and through the power and authority delegated by defendants, issued calls to OWRD for enforcement of the SIFs designated under the UKBCA. Although these modified calls mitigated some of the environmental and economic impacts in the Upper Klamath Basin by allowing more land to be irrigated, including lands owned by plaintiffs, many landowners, including some plaintiffs, still experienced significant curtailment to their water use. Despite these impacts, plaintiffs acknowledge that the calls for enforcement to the SIFs were issued under the agreement reached in the UKBCA.

30. In 2017, citing a lack of progress in implementing the UKBCA (due to lack of federal funding), the Klamath Tribes, by and through the power and authority delegated by defendants, issued calls to OWRD for enforcement of the full instream flow level water rights held by the United States, instead of at the SIF levels. OWRD's enforcement of these calls resulted in widespread and severe curtailment of irrigation, and in many cases complete

shut-offs, against plaintiffs and similarly-situated landowners in the Upper Klamath Basin.

31. On December 28, 2017, the former Secretary of Interior, Ryan Zinke, issued a "Negative Notice" in the Federal Register terminating the UKBCA. 82 Fed. Reg. 61582 (December 28, 2017). The following spring, in 2018, the Klamath Tribes, by and through the power and authority delegated by defendants, and in coordination with defendants, issued calls to OWRD for enforcement of the full instream flow level water rights held by the United States. OWRD's enforcement of these calls resulted in widespread and severe curtailment of irrigation, and in many cases complete shut-offs, against plaintiffs and similarly-situated landowners in the Upper Klamath Basin.

32. In April 2019, the Klamath Tribes, by and through the power and authority delegated by defendants, issued blanket calls to OWRD for enforcement of the full instream flow level water rights held by the United States. OWRD's enforcement of these calls will imminently result in the severe curtailment of irrigation, and in many cases complete shut-offs, against plaintiffs and similarly-situated landowners in the Upper Klamath Basin.

33. In the course of the Klamath Tribes' calls for water right enforcement in each of 2013 through 2019, defendants, or defendants' direct subordinates, have been consulted on the Klamath Tribes' desire to make the calls. Defendants, or defendants' direct subordinates, have been involved in decision-making processes related to the Klamath Tribes' calls.

34. For instance, in 2015, John Bezdek, former Counsel to the Deputy Secretary, was consulted on, and involved with, decision-making related to the Klamath Tribes' proposed call. Mr. Bezdek, who had been appointed by former Secretary Sally Jewell as the 'point person' from the Secretary's office for Klamath water-related issues, including the negotiation and implementation of the UKBCA, had direct oversight and decision-making responsibility for the calls issued from 2014-2016, for the Secretary. In place of the role that Mr. Bezdek formerly served, Defendant Bernhardt has appointed Alan Mikkelson, as Senior Advisor to the Secretary on Water and Western Resource Issues, to serve as the point person for Klamath water-related issues, including termination of the UKBCA and ongoing efforts to reach a new basin-wide settlement agreement,. Mr. Mikkelson reports directly to defendant Bernhardt on Klamath water-related issues.

35. Mr. Mikkelson has made, and continues to make, regular trips to the Klamath Basin on the Secretary's behalf to facilitate the development of long-term permanent solutions to the basin's natural resource crises. On behalf of the Secretary, Mr. Mikkelson provides direction to various federal agencies with interests in the Klamath Basin, including the BIA, the BOR and FWS. Mr. Mikkelson has had direct oversight responsibility for the calls issued from 2017-2019, which were issued pursuant to the Protocol Agreement.

36. As a direct result of the calls issued from 2013-2019, plaintiffs have suffered, and will continued to suffer, substantial injuries to their aesthetic, environmental, recreational and other

interests. These injuries include: (1) the reduction and loss of wildlife on plaintiffs' ranches as a result of irrigation curtailments; (2) the infestation of weeds and other undesirable plants as a result of irrigation curtailments; (3) and the wholesale loss of grass plant communities on portions of some of plaintiffs' ranches as a result of irrigation curtailments. These environmental impacts are among the kinds that are required to be analyzed and considered under NEPA before a federal agency decides to undertake a major federal action.

37. In addition, plaintiffs and other similarly-situated landowners are suffering social and economic injuries by virtue of lost revenues and substantially reduced property values which, in turn, have had substantial and devastating negative socioeconomic impacts on the entire Upper Klamath Basin agricultural community. These environmental and social justice impacts are also required to be analyzed and considered under NEPA.

38. Defendants' acts and omissions in delegating authority to the Klamath Tribes to make these calls, and the resulting Tribe-initiated calls on water rights held by the United States and made without compliance with NEPA, are causing plaintiffs real and substantial injuries. The relief sought in this lawsuit will redress injuries to plaintiffs' interests.

DECLARATORY AND INJUNCTIVE RELIEF ALLEGATIONS

39. An actual and substantial controversy exists between plaintiffs and defendants. Plaintiffs contend that the Protocol Agreement constitutes an unlawful delegation of power, and that the Agreement, as well

as calls made pursuant to it, result in significant impacts to the human environment that require an environmental impact statement under NEPA. Defendants, however, contend that the Protocol Agreement is lawful and that NEPA does not apply to it nor to calls made pursuant to it. Declaratory relief is therefore appropriate to resolve this dispute.

40. If an injunction does not issue precluding defendants from continuing to operate under the Protocol Agreement, and to allow calls to be made thereunder without compliance with NEPA, plaintiffs will be irreparably harmed. The water shut-offs that have occurred pursuant to the Protocol Agreement have significantly injured plaintiffs' aesthetic, recreational, and agricultural interests. The cut-offs have significantly affected the human environment, by among other things reducing water fowl habitat and converting pasture and other usable rangeland into dusty and weed-infested fields. Once damaged, these habitats and plant communities take years to try to re-establish and recover. These environmental effects of the shut-offs—all directly attributable to the Protocol Agreement and calls made thereunder—have injured plaintiffs' aesthetic and other interests in the native flora and fauna of their lands and the Upper Klamath Basin as a whole. Absent an injunction, defendants will continue to implement the Protocol Agreement and allow calls to be made thereunder, because the political and environmental factors that have led to the creation of the Protocol Agreement and its repeated implementation will persist into the foreseeable future. Plaintiffs have no plain, speedy, and adequate remedy at law for their economic and aesthetic injuries. Money damages in this case are not available.

FIRST CLAIM FOR RELIEF

(Against all defendants; unlawful delegation of federal agency authority; *ultra vires* final agency action under 5 U.S.C. § 706(2)(A)-(C))

41. Plaintiffs reallege the allegations in paragraphs 1 through 40 as if fully set forth herein.

42. 43 U.S.C. § 1451 authorizes the "executive department to be known as the Department of the Interior, and a Secretary of Interior, who shall be the head thereof." 43 U.S.C. § 1541. The Secretary of Interior is "charged with the supervision of the public business relating to[,]" *inter alia*, "Indians." 43 U.S.C. § 1457.

43. 25 U.S.C. § 1a authorizes the Secretary of Interior to "delegate, from time to time … his powers and duties under said laws to the Commissioner of Indian Affairs," aka the Assistant Secretary—Indian Affairs. 25 U.S.C. § 1a. The section authorizes the Commissioner to redelegate, but only to assistant commissioners or other officers within BIA. *Id.* No constitutional or statutory provision authorizes the delegation of power to make final decisions concerning Indian water rights held in trust by the United States to an Indian tribe.

44. Under the unlawful delegation doctrine, a federal agency acts *ultra vires* whenever it attempts, without constitutional or statutory authorization, to sub-delegate decision-making authority. Such sub-delegation is presumed to be unlawful when made to non-federal entities or persons. *U.S. Telecom Ass'n v. FCC*, 359 F.3d 554, 565-66 (D.C. Cir. 2004).

45. The Protocol Agreement is a final agency action subject to the APA. The Protocol Agreement

delegates to the Klamath Tribes the authority to issue calls for the enforcement of federal reserved water rights that are held by the United States. *See Colorado River Water Conservation Dist. v. United States*, 424 U.S. 800, 810 (1976). With respect to such federal reserved water rights held by the United States, the Klamath Tribes do not possess any independent or residual authority.

46. In approving, authorizing the execution of, and executing the Protocol Agreement—and in carrying out federal actions pursuant to the Agreement annually—defendants have unlawfully delegated to the Klamath Tribes the authority to make calls for enforcement of federal reserved water rights held by the United States. In the Protocol Agreement, defendants unlawfully waived the Secretary's power and authority to object to, suspend, modify or otherwise change a call proposed by the Klamath Tribes, unless agreed-to by the Klamath Tribes. *See generally* Harmon Memo at 9 ("[T]he Secretary may conclude that, even after taking th[e] presumption [of construing statutes to favor Indian interests] into account, he may legally follow a course of action not favored by the Indians."). In doing so, defendants acted in manner arbitrary, capricious, contrary to law, contrary to constitutional rights, power, privilege or immunity, and in excess of jurisdiction, authority, or limitations or short of statutory right. 5 U.S.C. § 706(2)(A)-(C).

SECOND CLAIM FOR RELIEF

(Against all defendants; violation of NEPA in concurring with, or acceding to, calls for enforcement of United States-held water rights; unlawful agency action under 5 U.S.C. § 706(2)(A)-(D))

47. Plaintiffs reallege the allegations in paragraphs 1 through 46 as if fully set forth herein.

48. NEPA is our "basic national charter for protection of the environment." 40 C.F.R. § 1500.1(a). It serves two purposes: (1) "it ensures that the agency, in reaching its decision, will have available, and will carefully consider, detailed information concerning significant environmental impacts," and (2) it "guarantees that the relevant information will be made available to the larger audience that may also play a role in both the decisionmaking process and the implementation of that decision." *Robertson v. Methow Valley Citizens Council*, 490 U.S. 332, 349 (1989).

49. NEPA requires agencies to prepare an environmental impact statement (EIS) for "major Federal actions significantly affecting the quality of the human environment." 42 U.S.C. § 4332(2)(C). The EIS must "provide full and fair discussion of significant environmental impacts." 40 C.F.R. § 1502.1. Agencies must consider every significant aspect of the environmental impact of a proposed action. This includes studying the direct, indirect, and cumulative impacts of the action. *See* 40 C.F.R. §§ 1508.7, 1508.8.

50. Analysis prepared in order to satisfy NEPA must include consideration of a reasonable range of

alternatives to a proposed action. 42 U.S.C. § 4332(2)(C)(iii); *see also* 40 C.F.R. § 1502.14 (alternatives including the proposed action).

51. Pursuant to the unlawful Protocol Agreement, in each of 2013, 2017, 2018, and 2019 defendants have allowed for the issuance of calls for enforcement of United States-held water rights to the substantial injury to plaintiffs and the environment. In so allowing, defendants have exercised considerable discretion without observance or compliance with NEPA. In waiving their right to object to, or modify, calls proposed by the Klamath Tribes in the Protocol Agreement, defendants unlawfully decided that they would not evaluate the potential environmental impacts of the calls nor consider alternatives to the Klamath Tribes' preferred course of action.

52. Each of the calls has constituted "major federal actions" under NEPA. Additionally, and/or alternatively, defendants' program and/or protocol for making those calls is a major federal action under NEPA.

53. In allowing for the issuance of the calls, especially in each of 2013 and 2017 through 2019, defendants violated NEPA, including but not limited to the requirement to prepare an EIS under 42 U.S.C. § 4332(2)(C). Defendants acted in manner arbitrary, capricious, contrary to law, in excess of jurisdiction and authority, and without observance of procedures requirement by law, in violation of 5 U.S.C. § 706(2)(A)-(D).

PRAYER FOR RELIEF

WHEREFORE, plaintiffs pray for a judgment granting the following relief;

1. A declaration that the Protocol Agreement is a final agency action constituting an *ultra vires* and therefore unlawful sub-delegation of agency authority, in violation of 5 U.S.C. § 706(2)(A)-(C).

2. A declaration that the calls for enforcement of the United States-held water rights in each of 2013, 2017, 2018 and 2019 violated NEPA and therefore constitute final agency actions that were arbitrary, capricious, contrary to law, in excess of jurisdiction and authority, and without observance of procedures required by law, in violation of 5 U.S.C. § 706(2)(A)-(D).

3. An order reversing, setting aside, vacating and/or remanding the Protocol Agreement and each of the calls made in 2013, 2017, 2018, and 2019.

4. An injunction prohibiting defendants from issuing any more calls until such time as defendants have fully complied with the law, including their obligation to make a final, independent decision on the propriety of a call, having taken into account the general public interest and welfare, as well as NEPA;

5. An award of plaintiffs' reasonable costs, litigation expenses, and attorney's fees associated with this litigation pursuant to the Equal Access to Justice Act, 28 U.S.C. § 2412 *et seq.*, and any other applicable authorities;

6. Granting to plaintiffs such other relief as may be just and equitable.

Respectfully submitted this 7th day of August, 2019.

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Of Attorneys for Plaintiffs

No. _____

In the
Supreme Court of the United States

GERALD H. HAWKINS, individually and as a trustee of the CN Hawkins Trust and Gerald H. Hawkins and Carol H. Hawkins Trust, et al.,

Petitioners,

v.

DEBRA HAALAND, Secretary of the Interior, et al.,

Respondents.

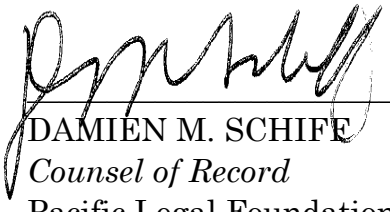
On Petition for Writ of Certiorari
to the United States Court of Appeals
for the District of Columbia Circuit

CERTIFICATE OF COMPLIANCE

As required by Supreme Court Rule 33.1(h), I certify that the PETITION FOR WRIT OF CERTIORARI contains 7,179 words, excluding the parts of the document that are exempted by Supreme Court Rule 33.1(d).

I declare under penalty of perjury that the foregoing is true and correct.

Executed on September 29, 2021.



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No. _____

GERALD H. HAWKINS, individually and as a trustee of the CN Hawkins Trust and Gerald H. Hawkins and Carol H. Hawkins Trust, et al.,
Petitioners,
v.
DEBRA HAALAND, Secretary of the Interior, et al.,
Respondents.

AFFIDAVIT OF SERVICE

I, Andrew Cockle, of lawful age, being duly sworn, upon my oath state that I did, on the 5th day of October, 2021, send out from Omaha, NE 1 package(s) containing 3 copies of the PETITION FOR WRIT OF CERTIORARI in the above entitled case. All parties required to be served have been served by Priority Mail. Packages were plainly addressed to the following:

SEE ATTACHED

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Subscribed and sworn to before me this 5th day of October, 2021.
I am duly authorized under the laws of the State of Nebraska to administer oaths.

GENERAL NOTARY-State of Nebraska
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My Comm. Exp. September 5, 2023

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