UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

GERALD H. HAWKINS, et al. Plaintiffs, v. DAVID L. BERNHARDT, et al. Defendants.	)	Civil Action No. 19-1498 (BAH)

DEFENDANTS' MOTION TO DISMISS AND
MEMORANDUM OF POINTS AND AUTHORITIES IN SUPPORT

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Plaintiffs' Amended Complaint collaterally challenges the exercise of an adjudicated federal water right held by the United States in trust for the benefit of the Klamath Tribes, as established by an 1864 Treaty and as recognized by the Ninth Circuit Court of Appeals and other courts. Federal Defendants David L. Bernhardt, Tara Mac Lean Sweeney, Darryl LaCounte, and Bryan Mercier respectfully move to dismiss this action under Federal Rule of Civil Procedure 12(b)(1), because Plaintiffs' inability to prove standing deprives the Court of subject matter jurisdiction, and under Rule 12(b)(6) for failure to state a claim.

INTRODUCTION

The Klamath Tribes signed a Treaty in 1864 with the United States, ceding millions of acres of their aboriginal territory but reserving their right to hunt, fish, and gather as they had done for thousands of years. The Tribes reserved sufficient water to maintain these traditional practices as part of establishing a home and self-sustaining Indian community on their reservation. This case is about the ability of the Tribes and the United States to protect these treaty rights.

Plaintiffs are landowners who irrigate land in the Klamath Basin above Upper Klamath Lake in Oregon. Federal and state courts have long recognized that the Klamath Tribes' water rights to instream flows and water levels—specified amounts of water to remain in the rivers, streams, and water bodies necessary to maintain fish life and satisfy the 1864 Treaty's reserved hunting and fishing rights—are senior to those of subsequent water users, like Plaintiffs. And recently, the Oregon Water Resources Department ("OWRD") determined the specific *quantity* of water necessary to fulfill the Tribes' instream flow rights, while also confirming, again, that the Tribes' rights are senior to Plaintiffs' water rights for irrigation. Federal and state law therefore dictate that the Tribes' instream flow rights must be fulfilled, and the specified amounts

of water must remain in the rivers and streams prior to Plaintiffs being able to take water.

Having determined these and other water rights in the Klamath Basin, and having determined the corresponding priorities among other rights holders, OWRD now enforces these water rights. OWRD does so by monitoring, observing, and, when necessary, regulating junior water users in response to requests for enforcement, or "calls," by senior water rights holders.

Plaintiffs, having so far failed in their challenges to the senior tribal instream flow rights in the Klamath Basin Adjudication in the state of Oregon, now bring a back-door challenge to those senior rights in this Court. They challenge OWRD's regulation of Plaintiffs' junior rights through a collateral attack on a procedural agreement (the "Protocol Agreement") between the Tribes and the United States Bureau of Indian Affairs ("BIA"), which describes the process for how the two parties will coordinate prior to transmitting requests for enforcement of the senior tribal water rights to OWRD. Specifically, Plaintiffs argue that the Protocol Agreement unlawfully delegates federal authority to the Tribes—arguing that the federal government alone can request enforcement of the tribal water rights—and that the calls for enforcement that have been made under the Protocol Agreement and the execution of the Protocol Agreement itself both violate the National Environmental Policy Act ("NEPA"). However, for the reasons set out below, Plaintiffs' Amended Complaint should be dismissed for lack of jurisdiction and for failure to state a claim.

First, Plaintiffs lack standing to challenge the Protocol Agreement. Plaintiffs' alleged injuries are caused by the 1864 Treaty, the prior decisions upholding that Treaty and the Tribes' reserved water rights, the prior appropriation law applicable to water rights in Oregon, and the Tribes' independent ability to enforce its property rights – not the Protocol Agreement. Plaintiffs are unable to establish that their alleged injuries are redressable because, even if this Court

invalidated the Protocol Agreement, Plaintiffs' water rights would still be subordinate to those of the Tribes. Moreover, no order or declaration from this Court to invalidate or set aside the Protocol Agreement and the prior calls for enforcement could redress retrospectively Plaintiffs' alleged injuries because OWRD's enforcement of the Tribes' senior water rights have already come and gone.

Second, Plaintiffs' entire Amended Complaint hinges on the faulty premise that the Tribes have no right or interest in their water or treaty rights, such that they lack the independent authority to request enforcement of their water rights. Plaintiffs are wrong as a matter of law. The United States holds legal title to reserved Indian water rights in trust for the Tribes. But the Klamath Tribes *also* hold property interests in these water rights as beneficial owners. They have inherent authority to request enforcement of those rights.

Third, the Protocol Agreement is not an unlawful delegation of federal authority. In fact, the actual text of the document shows no delegation at all. But even accepting Plaintiffs' contrary legal and factual characterizations as true—that is, even if the Tribes had no right or interest in the tribal water right and even if the Protocol Agreement expressly delegated authority to the Tribes to make requests for enforcement of the tribal water right—the Protocol Agreement still would not constitute the sort of delegation that courts have found problematic.

Finally, the Protocol Agreement does not violate NEPA because, among other things, the BIA's concurrence in the Tribes' request for enforcement of their senior water rights does not constitute a major federal action. NEPA does not apply to such enforcement actions. NEPA similarly does not apply where an agency lacks substantial discretion. And Plaintiffs do not, and cannot, establish that the United States has the discretion to prioritize the rights of junior irrigators over senior tribal water rights that the Senate confirmed by treaty.

BACKGROUND

I. History of the Klamath Tribes.

The Klamath Tribes once occupied 22 million acres of territory in southern Oregon. *Oregon Dep't of Fish & Wildlife v. Klamath Indian Tribe*, 473 U.S. 753, 755 (1985). The Tribes hunted, fished, and foraged in this area for over a thousand years. *United States v. Adair*, 723 F.2d 1394, 1397 (9th Cir. 1983).

In 1864, the Tribes entered into a Treaty with the United States, ceding "all their right, title and claim to all the country claimed by them," except for a small tract of land "within the country ceded," which they agreed to have to set apart for them as a home, to be "held and regarded as an Indian reservation." Treaty with the Klamath, 16 Stat. 707, 708 (1864). In Article I of the Treaty, the Tribes reserved "the exclusive right of taking fish in the streams and lakes, included in said reservation, and of gathering edible roots, seeds, and berries within its limits." . *Id.* at 708. In Article II of the Treaty, the United States agreed to pay consideration for the territory ceded by the Tribes, to be expended "by the superintendent or agent having charge of the tribes" to promote their well-being and "advance them in civilization . . . especially agriculture." . *Id.*

In 1954, Congress passed the Klamath Termination Act, providing for the termination of federal supervision of the Klamath Tribes and for the disposition of reservation lands. 68 Stat. 718 (1954) (codified at 25 U.S.C. § 564, now omitted). The 1954 Termination Act did not, however, extinguish tribal treaty rights to hunt and fish within the former reservation, nor did it abrogate the Tribes' water rights; instead, the Act expressly recognized the continued existence of these tribal treaty rights. *Id.* at 722 ("[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 enjoyed under Federal treaty."); *see also Adair*, 723 F.2d at 1408 (Klamath Treaty right to hunt, fish, and gather "survived the Klamath Termination Act"), 1412 ("the water rights reserved to the Klamath Tribe by Treaty in 1864 were not abrogated by enactment of the Klamath Termination Act in 1954"); *Kimball v. Callahan*, 493 F.2d 564, 567-70 (9th Cir. 1974).

After the Klamath Termination Act, the United States continued to hold title to approximately 70% of the former reservation lands, which it managed mainly for national forest and wildlife refuge purposes. *Adair*, 723 F.2d at 1398. In 1986, Congress restored the Klamath Tribes to federal recognition, extending to the Tribes all federal laws and regulations generally applicable to Indian Tribes and any other rights and privileges under any federal treaty, executive order, agreement, statute, or other federal authority which may have been diminished or lost under the Klamath Termination Act. Klamath Indian Tribe Restoration Act, Pub. L. No. 99-398, 100 Stat. 849 (1986).

Since its restoration, the Tribes have repeatedly intervened in litigation to vindicate their water rights. *Kandra v. United States*, 145 F. Supp. 2d 1192, 1197, 1204-06 (D. Or. 2001) (denying preliminary injunction sought by junior irrigators, in part, because "Reclamation must also consider the rights of Indian tribes, including defendants-intervenors Klamath and Yurok Tribes").[1]

[1] *Kandra* involved the Bureau of Reclamation's operation of the Klamath Project, a "water storage and irrigation project" downstream of Plaintiffs. 145 F. Supp. 2d at 1196. In contrast to BIA's peripheral involvement in the Klamath Tribes' exercise of their own water rights, Reclamation operates the Klamath Project to balance sometimes competing interests of irrigators, tribes, wildlife refuges, and statutory duties under the Endangered Species Act and recently completed an Environmental Assessment under NEPA for proposed project operations. *Id*. at 1196-97; Reclamation Managing Water in the West, Envtl. Assessment, Implementation of Klamath Project Operating Procedures 2019-2024 (April 2019), https://www.usbr.gov/mp/nepa/includes/documentShow.php?Doc_ID=37942 (last visited Sept.

II. The *Winters* doctrine and Indian reserved water rights.

Pursuant to *Winters v. United States*, 207 U.S. 564 (1908) and subsequent case law applying it (the "*Winters* Doctrine"), the establishment of an Indian reservation implicitly reserves sufficient water to accomplish the purposes of the reservation. *Id.* at 576; *Cappaert v. United States*, 426 U.S. 128, 139 (1976); *Arizona v. California*, 373 U.S. 546, 597-602 (1963). The purposes of an Indian reservation have been interpreted broadly as enabling the establishment of a home and self-sustaining Indian community, *Winters*, 207 U.S. at 565, 576; *Arizona*, 373 U.S. at 599-600; *Agua Caliente Band of Cahuilla Indians v. Coachella Valley Water Dist.*, 849 F.3d 1262, 1265, 1270 (9th Cir. 2017), and the *Winters* doctrine entitles the reservation to as much then-unappropriated water as necessary to fulfill those purposes.

Winters rights are unique in that they are "governed by federal law," and "are not dependent upon state law or state procedures." *Cappaert*, 426 U.S. at 145; *see also Adair*, 723 F.2d at 1411 n.19 (the "fact that water rights of the type reserved for the Klamath Tribes are not generally recognized under state prior appropriations law is not controlling as federal law provides an unequivocal source of such rights"). Reserved rights are "protected by federal law[,]" and secured by the "powerful federal interest in safeguarding [them] from state encroachment." *Arizona v. San Carlos Apache Tribe of Ariz.*, 463 U.S. 545, 571 (1983). Moreover, *Winters* rights prevail over state law, and arise without regard to any alleged equities that may favor competing water users. *Colville Confederated Tribes v. Walton*, 752 F.2d 397, 405 (9th Cir. 1985).

The chief characteristics of Indian reserved water rights differ significantly from those of

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10, 2019). Reclamation's EA relating to its 2019-2024 Klamath Project Operating Procedures is currently being challenged in two separate lawsuits. *Yurok Tribe v. U.S. Bureau of Reclamation*, No. 16-cv-6863 (N.D. Cal.).

state-based water rights in states that follow the "prior appropriation doctrine," as Oregon does. First, reserved rights are not measured by the quantity of water used at the time of reservation; rather, they are measured by the amount of water necessary to meet current and future needs of the reservation. *Winters*, 207 U.S. at 576; *Arizona*, 373 U.S. at 600; *Cappaert*, 426 U.S. at 141. Second, rather than vesting upon the date of diversion and first beneficial use, as is the case for most state-based rights in the West, reserved rights either have a "time immemorial" priority date (for uses pre-dating treaties or agreements with the United States) or vest on the date of the reservation (for future uses contemplated by the treaty, but for which water may not yet have been put to use at the date of reservation). *Adair*, 723 F.2d at 1414; *Arizona*, 373 U.S. at 600. Third, unlike state-based rights, *Winters* rights cannot be lost through nonuse. *Colville Confederated Tribes v. Walton*, 647 F.2d 42, 51 (9th Cir. 1981).

The *Winters* doctrine applies equally to rights to instream flows, termed "nonconsumptive" rights,[2] where necessary to support reservation purposes. In establishing the Klamath reservation, whose purposes expressly include maintenance of traditional hunting and fishing practices, the Treaty impliedly reserved the water rights necessary to support the Tribes' fishery. The 1864 Treaty did not create the Klamath Tribes' instream flow water rights, as historical evidence establishes that the Tribes used such water prior to its treaty with the United States, but rather the Treaty "confirm[s] the continued existence of the right." *Adair*, 723 F.2d at 1414; *see also United States v. Wheeler*, 435 U.S. 313, 315 n.24 (1978); *United States v. Winans* 198 U.S. 371, 381 (1905) (treaties are "not a grant of rights to the Indians, but a grant of right

[2] *Adair*, 723 F.2d at 1411 ("The holder of such a right is not entitled to withdraw water from the stream . . . . Rather, the entitlement consists of the right to prevent other appropriators from depleting the streams [sic] waters below a protected level in any area where the non-consumptive right applies.").

from them -- a reservation of those not granted."). Thus, "where, as here, a tribe shows its aboriginal use of water to support a hunting and fishing lifestyle, and then enters into a treaty with the United States that reserves this aboriginal water use, the water right thereby established retains a priority date of first or immemorial use." *Adair*, 723 F.2d at 1414.

III. General stream adjudications in state courts.

Although federal reserved water rights for an Indian tribe derive from and are defined by federal law, the quantification of such reserved water rights may take place in federal court as well as in state court pursuant to 43 U.S.C. § 666, known as the "McCarran Amendment." In that legislation, Congress waived the United States' sovereign immunity so that the United States could be joined as a party in a comprehensive general stream adjudication of water rights in state court. *See, e.g.*, *Colo. River Water Conservation Dist. v. United States*, 424 U.S. 800, 808 (1976).[3]

The state-based rights of private landowners in Oregon are governed by the doctrine of prior appropriation. *Washington v. Oregon*, 297 U.S. 517, 521 (1936). Under the doctrine of prior appropriation, "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; *Cappaert*, 426 U.S. at 139 n.5. These rights ("appropriative rights") are defined by a priority scheme under which the right of the first to appropriate a water right ("prior appropriator") is senior to those who subsequently appropriate water rights ("junior appropriators"). Central to this priority scheme is the concept

[3] The McCarran Amendment is not a "substantive statute, requiring the United States to 'perfect its water rights in the state forum like all other land owners.'" *Cappaert*, 426 U.S. at 145-46. Nor did the McCarran Amendment repeal 28 U.S.C § 1345, pursuant to which "federal courts have jurisdiction . . . to adjudicate the water rights claims of the United States." *Id.*

of a "priority date." A priority date is the date upon which a water user first acquires appropriative rights against subsequent users by putting unused water to beneficial use. "Essentially, the rule of priority is that 'as between appropriators the one first in time is the first in right.'" *Baley v. United States*, 134 Fed. Cl. 619, 669 (2017) (citation omitted), *appeal docketed*, Nos. 18-1323, 18-1325 (Fed. Cir. Dec. 17, 2017).

As described above, reserved Indian water rights have a priority date of no later than the date of a reservation's creation, and sometimes a "time immemorial" priority date, and thus are senior to subsequent water users claiming rights under state law.

IV. The current Klamath Basin Adjudication.

As noted above, Indian water rights may be adjudicated in both federal and state courts. This has been true for the Klamath Tribes' water rights, where federal courts initially determined the scope and nature of the Tribes' rights over 35 years ago and the ongoing Klamath Basin Adjudication in Oregon has since quantified these senior federal rights as well as the state-based rights of junior water rights holders, such as Plaintiffs.

A. The Klamath Tribes' water rights adjudicated in federal court.

In 1975, the United States filed suit in federal district court to obtain a declaration of water rights in an area that roughly coincided with the northern part of the former Klamath Indian Reservation. *Adair*, 723 F. 2d at 1397-99; Am. Compl. ¶ 15, ECF No. 15. The Tribes intervened as a plaintiff to assert their treaty reserved water rights, and the State of Oregon intervened as a defendant. *Adair*, 723 F. 2d at 1397-99.

The federal district court held, and the Ninth Circuit affirmed, that (1) "the Klamath Tribe Indians have a water right, with a priority date of time immemorial, 'to as much water on the Reservation lands as they need to protect their hunting and fishing rights,'" . at 1399 (citation

omitted); (2) that "the entitlement consists of the right to prevent other appropriators from depleting the streams and waters below a protected level in any area where the non-consumptive right applies," *id.* at 1411; and (3) that these treaty rights survived the 1954 Termination Act, *id.* at 1408, 1412.[4]

The federal district court in *Adair* limited its determination to identifying and ordering the priority among reserved water rights arising under federal law. *See Adair*, 723 F. 2d at 1406 ("[a]ctual quantification of the [reserved] rights . . . will be left for judicial determination, consistent with the decree in this action, by the State of Oregon under the provisions of [the McCarran Amendment]."). The state adjudication, in contrast, has preliminarily quantified the water rights of the other owners and assigned them relative priorities.

B. The Klamath Tribes' water rights adjudicated in state court.

In 1976—the same year that the State of Oregon intervened in the *Adair* case in federal district court—the State initiated the Klamath Basin Adjudication to determine water rights in the Klamath Basin, including the federal claims within the former Klamath Indian Reservation covered by the *Adair* case in federal court. *Id.* at 1398-99. The United States filed hundreds of claims in the Klamath Basin Adjudication, including, consistent with *Adair*, "claims by the Bureau of Indian Affairs on behalf of the Klamath Tribes." *See United States v. Braren*, 338 F.3d 971, 973 (9th Cir. 2003); *see also* Am. Compl. ¶ 18 ("the United States filed instream water rights claims, as trustee for the Klamath Tribes"). The Klamath Tribes also filed "claims" in their own name, "incorporating by reference all claims filed by the Bureau of Indian Affairs." *Braren*, 338 F.3d at 973.

[4] The court rejected contentions by the State of Oregon and private landowners that, *inter alia*, the Tribes had no water rights at all. *See United States v. Adair*, 478 F. Supp. 336, 341-44 (D. Or. 1979) (summarizing parties' contentions).

Pursuant to Oregon's adjudication statute, water rights claims are adjudicated in two phases: an administrative phase before OWRD, and a judicial phase before the state circuit court.

After a lengthy administrative phase, OWRD issued its findings of fact and order of determination for the Klamath Basin Adjudication on March 7, 2013, Am. Compl. ¶ 19, which was amended by an Amended and Corrected Findings of Fact and Order of Determination on February 28, 2014 (the "ACFFOD"). The ACFFOD provisionally determined more than 700 water rights claims, including the tribal instream water rights claims held by "the United States, as trustee for the Klamath Tribes," *id.* ¶¶ 19-20, with a corresponding "time immemorial priority date," *id.* ¶ 15 (citation and internal quotation marks omitted). The ACFFOD also provisionally determined several of Plaintiffs' irrigation water rights, with a range of priority dates, all junior to the tribal instream flow water rights. *Id.* ¶¶ 5, 8, 21.

The ACFFOD was then filed in state circuit court, beginning the second or judicial phase of the adjudication, where the case is still pending. Oregon Revised Statutes ("ORS") ORS 539.130; ORS 539.150 ;.

Plaintiffs and the United States have both filed exceptions to the ACFFOD in state circuit court. Am. Compl. ¶¶ 20-21.[5] According to Plaintiffs' Amended Complaint, "[t]he exceptions are not likely to be resolved for several more years." *Id.* Future proceedings that remain in the Klamath Basin Adjudication include hearings on the exceptions, the possibility of remand to

[5] As noted above, both the United States and the Klamath Tribes filed separate claims for the tribal water rights, with the Tribes incorporating by reference the United States' claims. OWRD denied the Klamath Tribes' separate claims as duplicative, and determined the rights as being held by the United States as trustee on behalf of the Tribes. OWRD's denial is the subject of pending exceptions, and it also appears to be the basis of the mistaken argument that "the Klamath Tribes do not possess any independent or residual authority" related to their water rights where such rights are held in trust by the United States. Am. Compl. ¶ 45. Such an interpretation of OWRD's decision, which would seemingly abrogate the Tribes' treaty right, runs counter to well-established federal law.

OWRD for further testimony if necessary, and a "final hearing" in the state district court, after which the court will "enter a judgment affirming or modifying the order of the [OWRD] director as the court considers proper." ORS 539.150(3)-(4) . An appeal of the state district court judgment may be taken to the state's court of appeals. *Id.*

OWRD now enforces the water rights determined by the ACFFOD through an OWRD-appointed watermaster.[6] ORS 540.020 , 540.045, 539.130(4) , 539.170; Am. Compl. ¶ 19. Watermasters must "[r]egulate the distribution of water among the various uses" and "[u]pon the request of the users, distribute water among the various users . . . in accordance with the users' existing water rights." ORS 540.045(a)-(b) . The watermaster responds to such user requests, or "calls," by investigating the call, reviewing records, conducting field inspections, and then regulating upstream junior users as appropriate according to their relative priority dates. Or. Admin. R. 690-250-0100; Or. Admin. R. 690-025-0025.

V. The Protocol Agreements between the Klamath Tribes and the BIA.

The Klamath Tribes are the beneficial owner of the reserved water rights at issue, and the United States holds these rights in trust for the Tribes. For purposes of coordination, the Klamath Tribes and BIA entered into the Protocol Agreement on May 30, 2013. Am. Compl. ¶ 2; *see also* Protocol Agreement between the Klamath Tribes and the Bureau of Indian Affairs (May 30, 2013) (Ex. 1) ("2013 Agreement"). To this end, the Agreement provides, "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

[6] Enforcement may be stayed in whole or in party by any party by filing a bond or an irrevocable letter of credit in the circuit court where the determination is pending, in such amount as the judge may prescribe. ORS 539.130(4), 539.180. There is no allegation that Plaintiffs are currently seeking a state circuit court stay of enforcement of the Klamath Tribes' senior instream flow water rights.

have a point of contact to make calls for the Parties." *Id*. at 1. The Agreement lists points of contacts from both the Tribes and the BIA, and describes a notification and consultation process, describing how the parties will coordinate with one another to make calls to OWRD for watermaster enforcement of the tribal water rights.

Significantly, the Protocol Agreement recognizes that "[e]ach Party retains its independent right to make a call" and that if "the Parties cannot agree on whether to make a call, either Party may independently make a call . . . ." 2013 Agreement at ¶ 7.

The Klamath Tribes and BIA amended the Protocol Agreement on March 7, 2019, in response to OWRD's desire to have calls made on a "standing basis," rather than requiring individual calls to be made each time junior water rights needed to be curtailed. Protocol Agreement between the Klamath Tribes and the Bureau of Indian Affairs at 1 (March 7, 2019) (Ex. 2) ("2019 Agreement"). The Amended Agreement again sets forth points of contact and the notification and consultation process, except 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." *Id*. The Amended Protocol Agreement again recognizes that "[e]ach Party retains its independent right to make a call." *Id.* ¶ 12.

The United States has been consulted with and involved with the decision making related to each of the Tribes' calls for enforcement from 2013 through 2019, Am. Compl. ¶ 33, and has concurred with all calls, *id.* ¶ 2.

STATUTORY AND REGULATORY FRAMEWORK

NEPA requires federal agencies proposing "major Federal actions significantly affecting the quality of the human environment" to prepare an environmental impact statement ("EIS"). 42 U.S.C. § 4332(2)(C). The purpose of NEPA is to ensure that agencies take a "hard look" at potential environmental consequences before approving major federal actions. *Robertson v. Methow Valley Citizens Council*, 490 U.S. 332, 350 (1989).

The Council on Environmental Quality ("CEQ"), established by NEPA, has authority to interpret the statute and has promulgated regulations to guide federal agencies in complying with its mandate. *W. Org. of Res. Councils v. Zinke*, 892 F.3d 1234, 1237 (D.C. Cir. 2018). CEQ's regulations define the types of major federal actions that require NEPA analysis. Those regulations exclude "bringing judicial or administrative civil or criminal enforcement actions." 40 C.F.R. § 1508.18(a).

STANDARD OF REVIEW

I. Subject matter jurisdiction.

Subject matter jurisdiction is a threshold issue, which should be addressed prior to any consideration of the merits. *Steel Co. v. Citizens for a Better Env't*, 523 U.S. 83, 88-89 (1998). Federal courts presumptively lack jurisdiction "unless the contrary appears affirmatively from the record." *Renne v. Geary*, 501 U.S. 312, 316 (1991) (quotation omitted). Furthermore, because "[f]ederal courts are courts of limited jurisdiction . . . [i]t is to be presumed that a cause lies outside this limited jurisdiction, and the burden of establishing the contrary rests on the party asserting jurisdiction." *Kokkonen v. Guardian Life Ins. Co. of Am.*, 511 U.S. 375, 377 (1994) (citations omitted). Therefore, to survive a motion to dismiss pursuant to Rule 12(b)(1), a plaintiff bears the burden of establishing that the court has subject matter jurisdiction over its

claim. *Moms Against Mercury v. FDA*, 483 F.3d 824, 828 (D.C. Cir. 2007); *El Paso Nat. Gas Co. v. United States*, 605 F. Supp. 2d 224, 227 (D.D.C. 2009) ("When evaluating subject matter jurisdiction, plaintiffs bear the burden of proof."). When the United States is the defendant, "a plaintiff must overcome the defense of sovereign immunity in order to establish the jurisdiction necessary to survive a Rule 12(b)(1) motion to dismiss." *Jackson v. Bush*, 448 F. Supp. 2d 198, 200 (D.D.C. 2006) (citing *Tri State Hosp. Supply Corp. v. United States*, 341 F.3d 571, 575 (D.C. Cir. 2003)).

"In ruling upon a motion to dismiss brought under Rule 12(b)(1), a court must construe the allegations in the complaint in the light most favorable to the plaintiff." *Scolaro v. Dist. of Columbia Bd. of Elections & Ethics*, 104 F. Supp. 2d 18, 22 (D.D.C. 2000). "But where necessary, the court may consider the complaint supplemented by undisputed facts evidenced in the record, or the complaint supplemented by undisputed facts plus the court's resolution of disputed facts." *Herbert v. Nat'l Acad. of Sciences*, 974 F.2d 192, 197 (D.C. Cir. 1992).

II. Failure to state a claim.

"A Rule 12(b)(6) motion tests the legal sufficiency of a complaint." *Browning v. Clinton*, 292 F.3d 235, 242 (D.C. Cir. 2002). "To survive a motion to dismiss, a complaint must contain sufficient factual matter, accepted as true, to 'state a claim to relief that is plausible on its face.'" *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009) (quoting *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 570 (2007)). A claim is facially plausible "when the plaintiff pleads factual content that allows the court to draw [a] reasonable inference that the defendant is liable for the misconduct alleged." *Id.* (citing *Twombly*, 550 U.S. at 556).

Legal conclusions and "[t]hreadbare recitals of the elements of a cause of action, supported by mere conclusory statements do not suffice" to state a cause of action and must be

disregarded. *Id.* (citing *Twombly*. 550 U.S. at 555). Similarly, "[a] pleading that offers 'labels and conclusions' or 'a formulaic recitation of the elements of a cause of action will not do.' Nor does a complaint suffice if it tenders 'naked assertion[s]' devoid of 'further factual enhancement.'" *Id*. (quoting *Twombly*, 550 U.S. at 555, 557). In evaluating a Rule 12(b)(6) motion, the court "may consider only the facts alleged in the complaint, any documents either attached to or incorporated in the complaint and matters of which [the court] may take judicial notice." *EEOC v. St. Francis Xavier Parochial Sch.*, 117 F.3d 621, 624 (D.C. Cir. 1997).

ARGUMENT

Plaintiffs' entire Amended Complaint is predicated on the misconception that the Klamath Tribes lack independent authority to seek enforcement of their treaty-protected water right. Plaintiffs assert that a tribal water right held by "the United States as for the Klamath Tribes" means that the United States has sole enforcement authority, and that the Klamath Tribes "do not possess any independent or residual authority." Am. Compl. ¶ 45. Plaintiffs are incorrect as a matter of law. The Klamath Tribes are a federally recognized Indian tribe that entered into a treaty with the United States that confirmed their fishing and related real property and water rights. The Tribes' powers include, among other things, the authority to request and pursue enforcement of the rights secured by their 1864 Treaty with the United States.

The Klamath Tribes' independent authority to assert their water rights dooms Plaintiffs' Amended Complaint under both Rule 12(b)(6), for failure to state a claim, and Rule 12(b)(1), because Plaintiffs' inability to prove standing deprives the Court of subject matter jurisdiction.

Because this legal principle underpins the Plaintiffs' Amended Complaint, as well as the United States' remaining arguments, both on standing and on the merits of Plaintiffs' nondelegation and NEPA claims, it is addressed here first to explain the issues before the Court.

The United States subsequently demonstrates why Plaintiffs lack standing to challenge the Protocol Agreement, why the Agreement is not an unlawful delegation of federal authority, and why the Agreement does not violate NEPA.

I. The Klamath Tribes have property interests in their water rights and have independent authority to request enforcement.

Even though the United States holds legal title to reserved Indian water rights and protects such rights for the benefit of tribes, tribes too hold property interests in these rights as the beneficial owners, along with the authority to request enforcement of their water rights.

The D.C. Circuit has confirmed this legal principle: "[w]ith 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." *Shoshone Bannock Tribes v. Reno*, 56 F.3d 1476, 1479 (D.C. Cir. 1995). Thus, "[t]he United States, as trustee for the Tribes, may bring suit on their behalf to enforce the Tribes' rights, *but the rights belong to the Tribes*." *United States v. Washington*, 853 F.3d 946, 967 (9th Cir. 2017) (emphasis added), *aff'd by an equally divided court,* 138 S. Ct. 735 (2018); *see also* COHEN'S HANDBOOK OF FEDERAL INDIAN LAW at 1238, § 19.04[2] ("Reserved rights to water are property rights held by tribes and their members.").[7]

In keeping with this, the Ninth Circuit found regarding the Klamath Tribes that "[t]he hunting and fishing rights from which these water rights arise were *reserved by the Tribe* in the 1864 treaty" and "[t]he hunting and fishing rights themselves *belong to the Tribe* . . . ." *Adair*,

[7] This does not to diminish the United States' legal title or its authority over these and other trust resources. But the existence of federal supervision of reserved Indian water rights does not prevent the Klamath Tribes from independently enforcing their property rights, requesting enforcement, or maintaining suits to protect such rights. See *United States v. Orr Water Ditch Co.*, 600 F.3d 1152, 1154-55 (9th Cir. 2010) (describing decreed rights as owned by the Pyramid Lake Paiute Tribe, and holding that the federal district court had jurisdiction over tribe's action alleging that state administration of the decree adversely affected its tribal water rights).

723 F.2d at 1418 (emphasis added).[8] And there is no allegation that Congress has ever abrogated any aspect of the Klamath Tribes' time immemorial rights to water necessary to sustain tribal fisheries. *See United States v. Dion*, 476 U.S. 734, 738-39 (1986) (only Congress can abrogate Indian treaty rights, and its intention to do so must generally be "clear and plain") (citing *United States v. Santa Fe Pac. R. Co.*, 314 U.S. 339, 353 (1941) and *Washington v. Wash. Commercial Passenger Fishing Vessel Ass'n*, 443 U.S. 658, 690 (1979) ("Absent explicit statutory language, we have been extremely reluctant to find congressional abrogation of treaty rights . . . .")). In fact, Congress expressly recognized the continued existence of these tribal treaty rights in the Klamath Termination Act. 68 Stat. 718, 722 ("[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 enjoyed under Federal treaty."); *see also Adair*, 723 F.2d at 1408 (Klamath Treaty right to hunt, fish, and gather "survived the Klamath Termination Act"), 1412 ("the water rights reserved to the Klamath Tribe by Treaty in 1864 were not abrogated by enactment of the Klamath Termination Act in 1954").

The Supreme Court has long recognized that tribes retain independent authority to seek enforcement of their rights in Indian trust lands and resources (i.e., those held in trust by the United States for the benefit of tribes), and need not rely exclusively on the federal government to do so. *See, e.g.*, *Oneida Cty. v. Oneida Indian Nation of New York State*, 470 U.S. 226, 235

[8] The Supreme Court explained this dichotomy between the United States' legal title to trust resources, and the Klamath Tribes' beneficial ownership of such resources, in *United States v. Algoma Lumber Co.*, 305 U.S. 415 (1939), which dealt with Klamath timber resources reserved by the Tribes and held in trust by the United States. The Supreme Court described the United States' "legal interest" in trust resources, and its "plenary power of control" over trust resources, "to be exercised for the benefit and protection of the Indians." *Id.* at 420-21. But it also explained that "the Indians are the beneficial owners" of trust resources and that "substantial ownership remained with the tribe as it existed before the treaty." *Id.*

(1985) ("Indians have a federal common-law right to sue to enforce their aboriginal land rights"); *id.* at 239 n.12 ("we find no support for petitioners' contention that the availability of suits by the United States on behalf of Indian tribes precludes common-law actions by the tribes themselves"); *Poafpyitty v. Skelly Oil Co.*, 390 U.S. 365, 368-70 (1968) (recognizing that the United States and tribes each have rights and interests in trust property and that the United States' supervisory authority over trust resources, and right to sue to protect such resources, does not diminish a tribe's right to sue on its own behalf); *see also Agua Caliente Band of Mission Indians v. Riverside Cty.*, 442 F.2d 1184, 1186 (9th Cir. 1971) ("An Indian, as the beneficial owner of lands held by the United States in trust has a right acting independently of the United States to sue to protect his property interests."); *New Mexico v. Aamodt*, 537 F.2d 1102, 1107 (10th Cir. 1976) ("The obligation of the United States to fulfill its fiduciary duties to the Pueblos does not diminish the rights of the Pueblos to sue on their own behalf."); *Water Wheel Camp. Rec. Area, Inc. v. Larance*, 642 F.3d 802, 805, 808-09 (9th Cir. 2011) (upholding tribal jurisdiction to evict trespasser from lands held in trust).[9]

There is no reason to depart from this approach in the context of reserved Indian water rights. The Tribes' beneficial ownership rights are not diminished by the United States holding legal title to the rights as trustee for the Tribes or by the federal government's trust relationship regarding such rights. Even though the United States holds certain land, rights, and title in trust for the Tribes, the Tribes' beneficial ownership interests remain "as sacred and as securely

[9] Indeed, 28 U.S.C. § 1362 provides that "[t]he district courts shall have original jurisdiction of all civil actions, brought by any Indian tribe . . . duly recognized by the Secretary of the Interior, wherein the matter in controversy arises under the Constitution, laws, or treaties of the United States." Section 1362's legislative history indicates "a congressional purpose to open the federal courts to the kind of claims that could have been brought by the United States as trustee, but for whatever reason were not so brought." *Moe v. Confederated Salish & Kootenai Tribes of Flathead Reservation*, 425 U.S. 463, 472-73, (1976).

safeguarded as is fee simple absolute tile." *United States v. Shoshone Tribe*, 304 U.S. 111, 117 (1938).

Moreover, Plaintiffs' argument—that a tribal water right held by "the United States as for the Klamath Tribes" means that the United States has sole enforcement authority—is disproved by every single water rights settlement passed by Congress in the past 10 years. In each settlement, Congress recognized a tribal water right "held in trust by the United States" "on behalf of" or "for the use and benefit of" a particular tribe, while simultaneously recognizing that both the United States and the tribe each *retained* claims for enforcement of the water rights. *See, e.g.*, Claims Resolution Act of 2010, Pub. L. 111-291, § 305(a)(1), 124 Stat. 3064, 3077 ("The tribal water rights . . . shall be held in trust by the United States on behalf of the [White Mountain Apache] Tribe."); § 309(b), 124 Stat. at 3086 ("the [White Mountain Apache] Tribe, on behalf of itself and its members, and the United States, acting as trustee for the Tribe and its members, shall retain any right . . . to assert claims for injuries to, and seek enforcement of, the rights of the Tribe and its members under the Agreement or this title in any Federal or State court of competent jurisdiction.").[10]

[10] *See also id.* at § 407(c)(1), 124 Stat. at 3104 ("The tribal water rights . . . shall be held in trust by the United States for the use and benefit of the [Crow] Tribe."); § 410(c), 124 Stat. at 3111 ("the [Crow] Tribe . . . and the United States, acting as trustee for the Tribe . . . retain . .. all claims for enforcement" of the water settlement agreement or any final decree of the tribal water right); § 504(a), 124 Stat. at 3123 ("Those rights to which the [Taos] Pueblo is entitled under the Partial Final Decree shall be held in trust by the United States on behalf of the Pueblo . . . ."); § 510(c), 124 Stat. at 3132 ("The [Taos] Pueblo on behalf of itself and its members and the United States acting in its capacity as trustee for the Pueblo retain . . . all claims for enforcement[, and] all claims . . . for damages, losses or injuries to water rights . . . ."); § 613(c), 124 Stat. at 3142 ("The [Nambe, Pojoaque, San Ildefonso, and Tesuque] Pueblo water rights . . . shall be held by the United States in trust for the Pueblos."); § 624(c), 124 Stat. at 3155 ("the Pueblos on behalf of themselves and their members and the United States acting in its capacity as trustee for the Pueblos retain . . . all claims for enforcement of the [water] Settlement Agreement, . . . the Final Decree, . . . [and] all claims . . . for damages, losses or injuries to water rights or claims of interference with, diversion or taking water . . . . "); *see also* San Joaquin River Restoration

Repeated congressional recognition of tribes' rights to enforce their ownership interests in reserved water rights, where such water rights are held by the United States as trustee, undercuts Plaintiffs' legal argument, Am. Compl. ¶ 45, that tribes do not have enforcement authority over reserved water rights held by the United States as trustee for the Tribes.

As discussed in more detail below, the legal principle that the Klamath Tribes have the independent ability to seek enforcement of their tribal instream water rights is fatal to Plaintiffs' claims under Rules 12(b)(1) and 12(b)(6).

II. Plaintiffs lack standing to challenge the Protocol Agreement.

Adair and the ACFFOD establish that the United States and the Tribes possess a water right that is senior to those of Plaintiffs. As a result, Plaintiffs cannot premise standing on the United States and the Tribes calling for or enforcing their senior water rights. Plaintiffs, instead, claim a procedural injury based on the Tribes, rather than the United States, initiating the call. As an initial matter, because the Tribes have independent authority to call on their rights, Plaintiffs cannot establish either causation or redressability regarding their claims. Plaintiffs' allegations focus on Defendants' entry into two Protocol Agreements and alleged concurrence in or accession to the Klamath Tribes' calls under those protocol agreements. Am. Compl. ¶¶ 45,

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Settlement Act, Pub. L. No. 111-11, § 10704, 123 Stat. 1349, 1405 (2009) (Navajo Nation tribal water right "shall be held by the United States on behalf of the Nation"); § 10703(c), 123 Stat. at 1404 ("the [Navajo] Nation on behalf of itself and its members . . . and the United States acting in its capacity as trustee for the Nation and allottees, retain . . . all claims for enforcement of the Agreement, the Contract, the Partial Final Decree, the Supplemental Partial Final Decree, or this subtitle, through any legal and equitable remedies available in any court of competent jurisdiction . . . ."); § 10805(a), 124 Stat. at 1408 ("Tribal water rights [of the Shoshone-Paiute Tribes] shall be held in trust by the United States for the benefit of the Tribes."); § 10808(c), 123 Stat. at 1412 ("the [Shoshone-Paiute] Tribes on their own behalf and the United States acting in its capacity as trustee for the Tribes retain . . . all claims for enforcement of the Agreement, the decree referred to in subsection (d)(2), or this subtitle, through such legal and equitable remedies as may be available in the decree court or the appropriate Federal court . . . .").

46, 51, 53. Implicit in Plaintiffs' claims is the admission that: 1) any rights Plaintiffs possess are junior to the Klamath Tribes' rights; and 2) the Tribes can initiate the process of enforcing their senior water rights. Plaintiffs are therefore unable to establish the causation and redressability necessary to confer standing.

A plaintiff bears the burden of proof to establish federal jurisdiction. *Lujan v. Defs. of Wildlife,* 504 U.S. 555, 561 (1992). To meet the Article III standing requirements, Plaintiffs must establish three elements. *Id*. at 560. First, Plaintiffs must show that they have suffered an "injury in fact" that is "concrete and particularized" and actual or imminent, not "conjectural" or "hypothetical." *Id.* (citations omitted). Plaintiffs' injury must be "certainly impending" and cannot rely "on a highly attenuated chain of possibilities." *Clapper v. Amnesty Int'l USA*, 568 U.S. 398, 409, 410 (2013). Plaintiffs' injuries must be "fairly . . . trace[able]" to BIA's action. *Lujan*, 504 U.S. at 560-61 (citations omitted). Third, Plaintiffs must show it is likely, as opposed to merely speculative, that the injury will be addressed by a favorable decision of the Court. *Id*.

And even if a plaintiff claims a procedural injury, "[a] would-be 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.'" *In Def. of Animals v. Salazar*, 713 F. Supp. 2d 20, 26 (D.D.C. 2010) (quoting *Ctr. for Biological Diversity v. U.S. Dep't of the Interior*, 563 F.3d 466, 479 (D.C. Cir. 2009)).

Under the prior appropriation doctrine and Oregon water law, Plaintiffs' claims according to the ACFFOD are junior to those of the Tribes and the Tribes have independent authority to assert those claims against Plaintiffs. Regardless, Plaintiffs assert that they are injured when the Tribes, rather that the United States, exercise the decreed water rights. The Tribes' independent ability to exercise their senior water rights means that Plaintiffs, as junior rights holders, cannot

establish either causation or redressability in connection with a call placed by the Tribes. In that situation, any alleged injury to Plaintiffs is caused by the Klamath Tribes, not the United States. And the Klamath Tribes' ability to independently enforce their water rights similarly means that Plaintiff's alleged injury cannot be redressed by this lawsuit. In short, Plaintiffs fail to establish causation and redressability.

A. Plaintiffs' injuries stem from the Klamath Tribes' ability to enforce their treaty-protected water rights, rather than from any action by the Bureau of Indian Affairs or the Interior Department.

It is well-established that irrigators such as Plaintiffs have no right to divert or use any water until the Klamath Tribes' senior water rights are fully satisfied. The Tribes' water right "consists of the right to prevent other appropriators from depleting the streams waters below a protected level in any area where [Klamath's] non-consumptive right applies." *Adair*, 723 F.2d at 1411. As *Adair* recognized, the water rights of individual irrigators are junior to the aboriginal, "time immemorial" priority of the water rights that support the Tribes' treaty-reserved hunting and fishing rights. *Id*. at 1416-17 & n.25. The state's Klamath Basin Adjudication has likewise adopted these priority dates and has quantified the amount of water necessary for these and other claims as part of the ACFFOD. *See* pages 9-12, above. Recognition and enforcement of the Tribes' water rights simply follows both federal and state law, and Plaintiffs have no entitlement to water until these senior rights are met.[11]

[11] The Court of Federal Claims similarly found in a recent case involving the Tribes' water rights, "[t]he fact is that the Tribes' reserved water rights are senior to the water rights held by the plaintiffs and, therefore, plaintiffs had no entitlement to receive any water until the Tribes senior rights were fully satisfied." *Baley*, 134 Fed. Cl. at 679. *Baley* therefore held that junior water users suffered no taking because their "junior water rights did not entitle them to receive any Klamath Project water." *Id*. at 680; *see also Benz v. Water Res. Comm'n.*, 764 P.2d 594, 599 (Or. App. 1988) ("A junior appropriator's water right cannot be exercised until the senior appropriator's right has been satisfied."). An Oregon District Court similarly found that similarly-situated irrigators' "contract rights to irrigation water" were "subservient to ESA and

The Tribes, as a sovereign, maintain the power not only to request enforcement of their rights, but to independently defend and exercise their own water rights. *See also*, pages 17-21, above. As a result, Plaintiffs cannot establish that their alleged injury—being denied use of water because of the Klamath Tribes' senior water rights—is fairly traceable to any Federal action. And it cannot reasonably be contested that the Tribes would continue to request enforcement even if the Protocol Agreement did not exist. Plaintiffs lack standing because any injury they have suffered is caused by the Tribes' exercise of their treaty-protected water rights, not BIA's concurrence in the Tribes' sovereign actions.

The Klamath Tribes are free to continue to seek enforcement of their water rights under Oregon law regardless of whether: (1) the Protocol Agreement exists; (2) the United States concurs in the Tribes' call for enforcement; and (3) any relief is available to Plaintiffs in this case. Under Oregon law, the Tribes may trigger state investigations by alleging that Plaintiffs are unlawfully using their water. Or. Admin. R. 690-250-0100 (permitting regulation by water master "if investigation reveals a valid complaint of water shortage or unlawful use."). Oregon's watermasters then regulate the distribution of Upper Klamath Basin water "in accordance with the users' existing water rights." ORS 540.045; Or. Admin. R. 690-025-0025; Or. Admin. R. 690-225; Or. Admin. R. 690-250-0050(2). Indeed, Plaintiffs do not dispute that the Tribes initiate enforcement. Am. Compl. ¶ 38.

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tribal trust requirements." *Kandra,* 145 F. Supp. 2d at 1201. And the Ninth Circuit held that the Klamath Tribes' and other Klamath basin tribes' "rights . . . take precedence over any alleged rights of" an overlapping group of irrigators. *Klamath Water Users Protective Ass'n v. Patterson*, 204 F.3d 1206, 1214 (9th Cir. 1999). In sum, Plaintiffs have no right to draw any water under their determined water rights claims until senior, "time immemorial" tribal rights are satisfied.

And the Klamath Tribes unquestionably possesses the ability to defend and enforce their treaty-protected water rights in court. *See* pages 17-21, above. The Tribes can and do intervene in both state and federal proceedings to defend their water rights. Order Granting Klamath Tribes' and United States' Motions to Intervene, *TPC, LLC v. Or. Water Res. Dep't*, No.: 15cv20875 (Or. Cir. Ct. Feb. 4, 2016) (Ex. 3); *Adair*, 723 F.2d at 1397-99. Plaintiffs' Amended Complaint unsurprisingly falls short of alleging that, absent BIA's concurrence, the Tribes would cease exercising their water rights or enforcing their rights against junior water rights. Am. Compl. ¶¶ 22-27.

Plaintiffs also fall far short of alleging, much less establishing, that the Klamath Tribes would fail to enforce their treaty-protected senior water rights absent the Protocol Agreement. *Nat'l Wrestling Coaches Ass'n v. Dep't of Educ.*, 366 F.3d 930, 939 (D.C. Cir. 2004), overruled on other grounds by *Perry Capital LLC ex rel. Inv. Funds v. Mnuchin*, 864 F.3d 591, 621 (D.C. Cir. 2017) (Plaintiffs must establish "the requisite likelihood that the educational institutions whose choices lie at the root of appellants' alleged injuries will behave any differently with respect to men's wrestling if appellants prevailed on the merits and secured their requested relief."). Indeed, the Protocol Agreements merely reflect the reality that both the Tribes and BIA maintain the right to independently pursue enforcement of calls that either the Tribes or BIA believe to be appropriate. 2013 Agreement ¶ 7; 2019 Agreement ¶ 12. This is fatal to Plaintiffs' claims.

B. Invalidating the Protocol Agreement would not redress Plaintiffs' alleged injuries because the Klamath Tribes can and will enforce their water rights regardless of the Agreement.

Even if BIA were enjoined from either entering into a written Protocol Agreement to coordinate with the Klamath Tribes on how calls for enforcement were to be made or from concurring with the Tribes' calls pursuant to the Protocol Agreement, Am. Compl. ¶¶ 41-53, it would not redress Plaintiffs' alleged injury. To the contrary, the Tribes and the United States could and would continue to seek enforcement of the Tribes' senior water rights.

Plaintiffs' collateral attack on Oregon's Klamath Basin Adjudication cannot redress the true source of Plaintiffs' "injury." "The causation or traceability element of standing requires that 'there must be a causal connection between the injury and the conduct complained of—the injury has to be fairly traceable to the challenged action of the defendant, and not the result of the independent action of some third party not before the court.'" *Chesapeake Climate Action Network v. Exp.-Import Bank of the U.S.*, 78 F. Supp. 3d 208, 224 (D.D.C. 2015) (quoting *Defs. of Wildlife*, 504 U.S. at 560). Here, the Treaty of 1864, as interpreted by federal courts and the state's adjudication forum, protects the Tribes' right to prevent other appropriators from depleting the streams waters below a protected level where the Tribes' non-consumptive right applies. *E.g. Adair*, 723 F.2d at 1411. Second, OWRD quantified the Tribes' senior water rights in a manner that, at certain times, may leave the holders of junior water rights, including Plaintiffs, with little or no water. Am. Compl. ¶¶ 19-20. Third, the Tribes' water rights will continue to be subject to enforcement in Oregon state court regardless of the Protocol Agreement. *See* pages 17-21, above. Fourth, the Tribes retain an independent right to enforce their treaty rights in court. *Id*.

Plaintiffs are simply unable to establish that enjoining BIA or Interior will, or even could, cause the Klamath Tribes, the State of Oregon, and the courts to ignore or abrogate the Tribes' treaty-protected water rights. This case is therefore similar to *Goat Ranchers of Oregon v. Williams*, in which the Ninth Circuit found that enjoining the Federal culling of cougars would not redress the alleged injuries because Oregon would continue to cull cougars. 379 F. App'x 662, 663-64 (9th Cir. 2010) ("Cougars are being culled under Oregon's own state-run, state-funded Cougar Management Plan. Oregon does not need federal approval to manage the cougars within its [borders], and has killed cougars without federal assistance. The Oregon Department of Fish and Wildlife is not a party before the court, and is free to continue (as it has indicated it will) the trapping and killing of cougars regardless of any relief available to appellants in this case. Whether or not the federal government assists Oregon, Oregon will continue to kill and trap cougars."). And even if OWRD did not immediately comply with the Tribes' calls, the Tribes retain the sovereign right to independently pursue enforcement of their water rights in court. Plaintiffs' claims are likewise not redressable because the Tribes' water rights will continue to be enforced regardless of the Protocol Agreement.

Plaintiffs' challenges to water calls made in 2013, 2017, 2018, and the majority of 2019 are also both unredressable and moot because this Court is unable to grant any relief that would remedy any past injury Plaintiffs suffered from the enforcement of Klamath's treaty-protected, senior water rights. The 2013 agreement is no longer operative because it was replaced by the 2019 agreement. Pages 12-13, above. Even if Interior concurred in the Tribes' calls under the 2013 Protocol Agreement, this Court cannot revise a concurrence that was already incorporated into Oregon's past regulation of water. "Article III of the U.S. Constitution limits federal courts to resolving actual cases or controversies and thus 'prevents their passing on moot questions —

ones where intervening events make it impossible to grant the prevailing party effective relief.'" *Standing Rock Sioux Tribe v. U.S. Army Corps of Eng'rs*, 301 F. Supp. 3d 50, 62 (D.D.C. 2018) (quoting *Burlington N. R.R. Co. v. Surface Transp. Bd.*, 75 F.3d 685, 688 (D.C. Cir. 1996)). To the extent that Plaintiffs have suffered harms such as "loss of wildlife," infestation of weeds," and "wholesale loss of grass plant communities in portions of some of plaintiffs' ranches" from enforcement of Klamath's rights, Am. Compl. ¶ 36, invalidating past water calls will not help Plaintiffs. Nor will invalidating past calls remedy any "lost revenues" due to grass that was not grown in past years. Am. Compl. ¶ 37. Indeed, as Plaintiffs recognize "[m]oney damages in this case are not available." Am. Compl. ¶ 40. *See also Baley*, 134 Fed. Cl. at 679-80. Plaintiffs nonetheless challenge water calls made in "2013, 2017, 2018, and 2019." Am. Compl. ¶¶ 51-53. This Court cannot change calls already transmitted to and acted on by Oregon. OWRD's past enforcement of the Tribes senior water rights cannot be changed and no NEPA analysis can undo any injury Plaintiffs may have suffered from that past enforcement. *See Standing Rock Sioux Tribe*, 301 F. Supp. 3d at 61-64. Plaintiffs' retrospective claims are therefore moot, as well as unredressable.

C. Plaintiffs lack standing even if their claims are construed as alleging a procedural injury based on NEPA.

Plaintiffs lack standing even though their NEPA claims purport to allege a procedural injury. While "courts relax – while not wholly eliminating" Plaintiffs' burden to establish redressability in procedural injury cases, the requirement of causation is not relaxed simply because a procedural injury is claimed. *Ctr. for Law & Educ. v. Dep't of Educ.*, 396 F.3d 1152, 1157-59 (D.C. Cir. 2005); *Nat'l Parks Conservation Ass'n v. Manson*, 414 F.3d 1, 5 (D.C. Cir. 2005). Moreover, even under the relaxed redressability standard for procedural injuries, the Plaintiffs must demonstrate that the hoped-for NEPA analysis would alter the conduct of a third

party—here, the Tribes—in a way that redresses the injury in fact. *See Ctr. for Law & Educ.*, 396 F.3d at 1160; *Indian River Cty. v. Rogoff*, 201 F. Supp. 3d 1, 7 (D.D.C. 2016) ("there is no relaxed standard for establishing a causal link" between Federal actions and alleged injuries where the standing inquiry concerns the actions of third parties) (citing *Fla. Audubon Soc'y v. Bentsen*, 94 F.3d 658, 664 (D.C. Cir. 1996)). "Despite this relaxed standard, a claim still lacks redressability if the plaintiff will nonetheless suffer the claimed injury if a court rules in its favor." *Ctr. for Biological Diversity v. Exp.-Imp. Bank of the U.S.*, 894 F.3d 1005, 1013 (9th Cir. 2018).

Here, the Amended Complaint and the Tribes' independent enforcement of their water rights in multiple courts and administrative proceedings establishes that Plaintiffs are unable to demonstrate that any possible injury to Plaintiffs would be redressed by an action by Federal Defendants. Plaintiffs cannot establish redressability because—even assuming the most favorable substantive decision by the agency—that decision cannot provably alter the "independent action of some third party not before the court." *San Luis & Delta-Mendota Water Auth. v. Haugrud*, 848 F.3d 1216, 1233-34 (9th Cir. 2017) (quoting *Ass'n of Public Agency Customers v. Bonneville Power Admin.*, 733 F.3d 939, 950 (9th Cir. 2013); *see also Fla. Audubon Soc'y*, 94 F.3d at 663 ("It must be "substantially probable . . . that the challenged acts of the defendant ... will cause the particularized injury of the plaintiff.").

III. The Protocol Agreement does not constitute an unlawful delegation of federal authority.

Plaintiffs' "unlawful delegation" argument fails to state a claim because it is based entirely on the faulty legal premise that the Klamath Tribes have no independent right or interest in their treaty-based water rights, such that they cannot independently request enforcement. As previously described above, Plaintiffs are wrong as a matter of law. Moreover, the actual text of

the Protocol Agreement shows that no delegation has occurred. Rather, the text of the Protocol Agreement confirms and recognizes that the Tribes and the United States each have pre-existing and independent authority to request enforcement of the tribal water rights, and seeks to coordinate on enforcement efforts. And even if a "delegation" has occurred, it is not impermissible.

A. On its face, the Protocol Agreement delegates nothing.

Plaintiffs characterize the Protocol Agreement as an unlawful delegation of federal authority. Before diving too deeply into federal delegation law, and the legality of the Protocol Agreement specifically, it is important for the Court to determine first whether any portion of the operative text of the Agreement actually delegates anything at all. Clearly it does not.

Tellingly, Plaintiffs refer to, but do not attach, the actual text of the Protocol Agreements, which are attached here as Ex. 1 (2013 Agreement) and Ex. 2 (2019 Agreement). In deciding this Motion, this Court "must consider the complaint in its entirety, as well as other sources courts ordinarily examine when ruling on Rule 12(b)(6) motions to dismiss, in particular, documents incorporated into the complaint by reference . . . ." *Tellabs, Inc. v. Makor Issues & Rights, Ltd.*, 551 U.S. 308, 322 (2007); *see also Vanover v. Hantman*, 77 F. Supp. 2d 91, 98 (D.D.C. 1999) ("where a document is referred to in the complaint and is central to plaintiff's claim, such a document attached to the [Rule 12(b)(6)] motion papers may be considered without converting the motion to one for summary judgment."), *aff'd,* 38 F. App'x. 4 (D.C. Cir. 2002).

Plaintiffs' allegations regarding the Protocol Agreement do not survive scrutiny of the actual document. Based on Plaintiffs' allegations, one might surmise that the Protocol Agreement delegates to the Tribes some federal authority that the Tribes did not otherwise have. But both versions of the Protocol Agreement expressly recognize that the Tribes and the United

States each have pre-existing and independent authority to request enforcement of the tribal water right. *See* 2013 Agreement ¶ 7 ("Each Party retains its independent right to make a call."); 2019 Agreement ¶ 12 (same). Instead of substantively delegating powers, therefore, the Protocol Agreement merely describes how the Tribes and the United States will coordinate and consult with each other "to make such calls in a timely and effective manner," and satisfy "OWRD's desire for the Parties to have designated points of contact responsible for making calls on behalf of the Parties." 2013 Agreement at 1; 2019 Agreement at 1.

The Protocol Agreement substantively delegates nothing.

B. Even if the Protocol Agreement delegated to the Tribes the authority to make calls for water rights enforcement, doing so would not be unlawful.

Plaintiffs allege that the Protocol Agreement constitutes an impermissible "delegation" of "power to make final decisions concerning Indian water rights held in trust by the United States to an Indian tribe." Am. Compl. ¶ 43. Defendants dispute that any sort of "delegation" has occurred, either with regard to the Protocol Agreement itself or calls made pursuant to it. But even if Plaintiffs correctly characterize the Protocol Agreement, the "delegation" bears no similarity to the broad delegations to non-federal entities that have, in limited circumstances, concerned the D.C. Circuit and other courts.

Initially, it is worth noting that two forms of delegation exist. One is delegation within agencies, and these have rarely been seriously questioned, as federal agencies must have the flexibility to delegate and redelegate authority within the agency. *See Barr v. Mateo*, 360 U.S. 564, 573 (1959); *Fleming v. Mohawk Wrecking & Lumber Co.*, 331 U.S. 111, 122 (1947). This form of delegation is not referenced by Plaintiffs, and is irrelevant.

To prevail on a claim of unlawful delegation, a plaintiff must show that an agency has impermissibly delegated its statutory powers to an entity outside the agency. *U.S. Telecom Ass'n*

v. FCC, 359 F.3d 554, 565-66 (D.C. Cir. 2004) (collecting authorities). The inquiry is, at bottom, a question of Congressional intent. *Id*.; *see also United States v. Giordano*, 416 U.S. 505, 514-15 (1974) (discussing the "purpose of the legislation" in determining the permissibility of redelegation of authority granted to Attorney General).

Plaintiffs' claim fails at this threshold level, because while the Amended Complaint identifies a statutory provision that generally authorizes *internal* delegations, it nowhere identifies a specific statutory provision that commands that the Interior Department "issue calls for the enforcement of federal reserved water rights that are held by the United States", Am. Compl. ¶ 45, or that otherwise directly obligates the agency in a manner that has anything to do with the Protocol Agreement.

Section 1451 of Title 43 of the U.S. Code provides that the Department of the Interior exists and designates the Secretary of the Interior as the "head thereof." Am. Compl. ¶42. And 43 U.S.C. § 1457 provides that Interior is "charged with the supervision of the public business relating" to "Indians." Am. Compl. ¶ 42. These broad and amorphous statutes and duties are not the type of specific congressionally imposed duties courts have analyzed as the predicate for impermissible delegation. These statutory provisions do not speak of any particular responsibility or obligation with regard to the issuance of calls for water rights enforcement, either generally or with regard to the Klamath Tribes. Indeed, no such statute exists.

This case is therefore nothing like *U.S. Telecom Ass'n*, 359 F.3d at 565, cited at Am. Compl. ¶ 44. There, the FCC expressly delegated some of its specific statutory authority—the explicit requirement to decide which network elements incumbent telecommunications carriers must make available to competing carriers on an unbundled basis—to state utility commissions. Under the relevant statute, 47 U.S.C. § 251(d)(2), Congress insisted that the FCC make

individualized adjudicative determinations about costs in competitive telecommunications markets, and that had never been done before (using a method approved by the courts). *U.S. Telecom Ass'n*, 359 F.3d at 561-66. The court emphasized that the potential difficulty was delegating "almost the entire determination of whether a *specific statutory requirement* . . . has been satisfied." *Id*. at 567 (emphasis added).

Nor is this case akin to *National Park and Conservation Ass'n v. Stanton*, 54 F. Supp. 2d 7 (D.D.C. 1999), where the district court found that the National Park Service ("NPS") had improperly delegated its distinct statutory obligation, 16 U.S.C. §§ 1274(a)(117) and 1281(c), to manage the Niobrara National Scenic River. The NPS attempted to delegate all of its specified management authority over a river to a "local council [with 15 members] over which NPS has virtually no control" and which was "totally inexperienced in managing national resources." *Nat'l Park & Conservation*, 54 F. Supp. 2d at 9, 11, 14. That lack of control led the court to find that "NPS ha[d] no way of ensuring that its statutory duties will be fulfilled." *Id*. at 15, 19.

Other cases likewise make clear that delegation concerns arise in the context of delegation of specific statutory responsibilities. In *Fund for Animals v. Kempthorne*, 538 F.3d 124 (2d Cir. 2008), the Second Circuit rejected the argument that the U.S. Fish and Wildlife Service violated the Migratory Bird Treaty Act, 16 U.S.C. § 704(a), by delegating certain management authority to states, federally recognized tribes, and other agencies. Indeed, Interior delegations of express statutory authority to Indian tribes, and other delegations of agency responsibilities to other sovereigns, have routinely been upheld. *See, e.g.*, *S. Pac. Transp. Co. v. Watt*, 700 F.2d 550, 556 (9th Cir. 1983) (upholding the Secretary of the Interior's redelegation of statutory authority to an Indian tribe, requiring tribal consent prior to granting right-of-way across tribal land).

Even if a true delegation of a specified federal, statutory authority were present here, Plaintiffs would have a difficult task. The 2019 Protocol Agreement does not constitute a delegation, and the United States expressly retains the "right not to concur with any call for water that is inconsistent with the ACFFOD or other legal obligations." 2019 Agreement ¶ 12.

Watt demonstrates another reason why Plaintiffs' claim cannot succeed. There, a railroad challenged an Interior regulation that conditioned the grant of a right-of-way permit on tribal lands on the tribal government's approval. 700 F.2d at 552. Congress gave Interior the authority to grant an application when certain specific factors were satisfied, *id*. at 552-53, but also provided that the Secretary had the authority to establish more conditions as long as they were consistent with the statute. *Id*. at 553. *Watt* noted that "[s]ubdelegation of administrative authority to an Indian tribe is analogous to subdelegation to a state or local government," and does not need to "rest on" express statutory authority. *Id.* at 556. This is because "Indian tribes are unique aggregations possessing attributes of sovereignty over both their members and their territory . . . ; they are 'a separate people' possessing 'the power of regulating their internal and social relations . . . .'" *Id.* (quoting *United States v. Mazurie*, 419 U.S. 544, 557 (1975) (citations omitted)). Moreover, limitations on delegation to non-federal entities are "less stringent in cases where the entity exercising the delegated authority itself possesses independent authority over the subject matter." *Id*. at 556–57 (citation omitted). The Ninth Circuit found that the requirement that a railroad first obtain the tribal government's consent was merely "an effort by the Secretary to incorporate into the decision-making process the wishes" of the tribal government, which had "independent authority" to regulate the land at issue. *Id*. at 556. Likewise, even if there was a delegation of express statutory responsibility in the Protocol Agreement, the Tribes here have "independent authority" to make calls, and no federal statute

restricts the Tribes from doing so.[12]

IV. NEPA does not apply to either the Protocol Agreement or any calls made to enforce the Klamath Tribes' water rights, because neither constitute major federal action.

Plaintiffs' NEPA claims also fail because BIA and Interior have taken no action, either with regard to entering into the Protocol Agreement or through concurring with the Klamath Tribes' calls for enforcement of their water rights, that requires review under NEPA. First, the Agreement should be characterized as an enforcement instrument. Enforcement actions are not major federal actions and thus are not subject to NEPA. That is doubly so here, where the Tribes initiate administrative enforcement actions by placing a call and OWRD actually administratively regulates water use in response to the call. Second, NEPA does not apply where agencies lack substantial discretion that would be informed by NEPA analysis. BIA was not required to conduct any NEPA analysis here because it lacks substantial discretion to prioritize the rights of junior irrigators over the Tribes' senior, treaty-protected rights. Put another way, Plaintiffs are incorrect, Am. Compl. ¶ 53, that it is arbitrary or capricious for BIA or Interior to concur in the Tribes' enforcement of "time immemorial" water rights that have been repeatedly confirmed by Congress and the Courts.

A. Enforcement of the Klamath Tribes' water rights is not subject to NEPA because such enforcement actions are not major federal actions.

It is well-established that NEPA does not apply to enforcement actions. 40 C.F.R. § 1508.18(a). "The NEPA regulations themselves explicitly provide that major federal actions '*do not include* bringing judicial or administrative civil or criminal enforcement actions.'" *Ctr. for Biological Diversity v. Salazar*, No. CV-09-8207-PCT-DGC, 2010 U.S. Dist. LEXIS 143149, at

[12] It is also worth noting that the United States has been consulted with and involved with the decision making related to each of the Tribes' calls for enforcement from 2013 through 2019, Am. Compl. ¶ 33, and has concurred with all calls. *Id.* ¶ 2.

*17-18 (D. Ariz. June 17, 2010) (quoting *Sierra Club v. Penfold*, 857 F.2d 1307, 1314 (9th Cir. 1988)). Accordingly, an agency's "ongoing role of overseeing the . . . mine's compliance with environmental and mining laws does not constitute a major federal action requiring NEPA supplementation." *Id*. Similarly, an agency's imposition of sanctions for violations of environmental laws and an incidental take permit is not a major federal action under NEPA. *Envtl. Protection Info. Ctr. v. U.S. Fish & Wildlife Serv.*, No. C 04-4647 CRB, 2005 WL 3877605, at *2 (N.D. Cal. Apr. 22, 2005). And an agency's temporary suspension of a permit does "not require performance of a NEPA analysis" because it is not a major federal action. *Tucson Rod & Gun Club v. McGee*, 25 F. Supp. 2d 1025, 1029 (D. Ariz. 1998). Plaintiffs' claim fails because it is nothing more, nor less, than a challenge to the enforcement of water rights secured by the Treaty of 1864 and repeatedly affirmed by courts to be senior to any non-tribal water rights. *See* Pages 21-28, above.

Plaintiffs' Amended Complaint repeatedly and unavoidably characterizes Plaintiffs' claim as a challenge to the "enforcement" of water rights. Am. Compl. ¶¶ 1, 2, 10, 20, 23, 29-33, 45-46, 51; Prayer for Relief ¶ 2. Such enforcement decisions "to place a call on a water right in a given year" are not subject to NEPA even when they involve the United States' exercise of its own water rights. *High Country Citizens' All. v. Norton*, 448 F. Supp. 2d 1235, 1244-45 (D. Colo. 2006). *High Country* notably contrasted discretionary, annual decisions enforcing water rights, which are not subject to NEPA, with a permanent relinquishment of water rights for a National Park, which it determined was subject to NEPA. *Id*. Rather than relinquishing any Federal water right here, BIA is merely concurring in the Tribes' enforcement of their treaty-protected water rights that have been determined and recognized by OWRD and are fully enforceable under Oregon law. And far from being permanent, the Protocol Agreements may be

"terminated by either Party on 30 days' written notice." 2013 Agreement ¶ 10; 2019 Agreement ¶ 15. BIA's involvement in enforcing the Tribes' water rights is simply not subject to NEPA.

That is particularly so here, where the rights being enforced have been recognized and guaranteed by the United States since at least 1864. In *Calipatria Land Co. v. Lujan*, the Court held that NEPA did not apply to the enforcement of long-standing regulations prohibiting baiting ducks. 793 F. Supp. 241, 245 (S.D. Cal. 1990) ("enforcement . . . of these regulations at this time is not a major federal action as defined by the regulations promulgated pursuant to NEPA"). And as Plaintiffs recognize, OWRD quantified the Tribes' senior water rights and those "determined water rights claims went into 'full force and effect'" on March 7, 2013 at a level that, if enforced, leaves Plaintiffs with little or no water. Am. Compl. ¶¶ 19-20. Accordingly, even if BIA's entry into the Protocol Agreements or concurrence in the Tribes' calls is an action, it is the type of enforcement action that is not subject to NEPA.

Plaintiffs' untenable view of NEPA is made clear by their requested relief, which seeks an "injunction prohibiting defendants from issuing any more calls" enforcing the Tribes' senior water rights until conducting NEPA. Am. Compl. at 21. In other words, the Amended Complaint is based on the misunderstanding that the United States must conduct NEPA prior to concurring in the Tribe's enforcement of their water rights. *See High Country Citizens' All.*, 448 F. Supp. 2d at 1244-45. Plaintiffs' "interpretation of the applicability of NEPA would lead to a highly impractical result in which any decision of a law enforcement agency—whether to go forward with an action or forbear from action—would require a NEPA analysis." *United States v. Glenn-Colusa Irrigation Dist.*, 788 F. Supp. 1126, 1135 (E.D. Cal. 1992). Courts have consistently applied CEQ's regulations to exclude enforcement actions from NEPA. *E.g., id.* ("effort to enforce compliance is not a major federal action triggering NEPA"). Defendants

submit that Plaintiffs' effort to frustrate enforcement of treaty-protected senior tribal water rights recognized by Congress, the Ninth Circuit, Oregon District Court, the Court of Federal Claims, and OWRD should be dismissed because such enforcement actions are exempt from NEPA.

B. NEPA does not apply because Interior lacks discretion to prioritize Plaintiffs' junior water rights over the Klamath Tribes' senior, treaty-protected water rights.

Plaintiffs' NEPA claim is founded on the misunderstanding that BIA could consider a "range of alternatives" that includes prioritizing Plaintiffs' junior water rights over the Tribes' treaty-protected, senior water rights. Am. Compl. ¶¶ 49-50. "The touchstone of whether NEPA applies is discretion." *Citizens Against Rails-to-Trails v. Surface Transp. Bd.*, 267 F.3d 1144, 1151 (D.C. Cir. 2001). For NEPA to apply, a federal agency must be able to select an environmentally preferable alternative (even if that alternative is the "no-action" alternative of denying a proposal) or to impose conditions to mitigate environmental concerns. *Citizens*, 267 F.3d at 1151. In *Department of Transportation v. Public Citizen*, the Supreme Court held NEPA does not apply to actions where the United States lacks discretion. 541 U.S. 752, 769 (2004) ("It would not, therefore, satisfy NEPA's 'rule of reason' to require an agency to prepare a full EIS due to the environmental impact of an action it could not refuse to perform."). Similarly, a court recently refused to "compel the Secretary to conduct any review pursuant to NEPA because such review is not required" where Interior's discretion was dramatically circumscribed. *Stand Up for Cal.! v. U.S. Dept. of the Interior*, 328 F. Supp. 3d 1051, 1069-70 (E.D. Cal. 2018) , *appeal docketed*, No. 18-16830 (9th Cir. Sept. 25, 2018). Just as the Indian Gaming Regulatory Act cabined Interior's discretion in *Stand Up*, the 1864 Treaty cabins BIA's discretion here. NEPA's rule of reason prevents dissatisfied parties from compelling environmental analysis that would serve no purpose. *Public Citizen*, 541 U.S. at 767. Where a federal agency has no such

discretion, it would be pointless to conduct an analysis of alternatives--the "heart" of an EA or an EIS. *See* 40 C.F.R. §1502.14. BIA lacks substantial discretion to refuse to concur in the Tribes' exercise of senior, treaty-protected water rights in favor of Plaintiffs' junior water rights. *See Patterson*, 204 F.3d at 1214. NEPA therefore does not apply to BIA's concurrence in the Tribes' exercise of water rights that Congress protected in the Treaty of 1864.

Indeed, Plaintiffs allege no facts or law permitting Interior to disregard the Tribes' senior, "time immemorial" water rights in favor of junior irrigators. In *Citizens Against Rails-To-Trails*, the D.C. Circuit interpreted a statute requiring that "all rail lines that are to be abandoned are potentially suitable for trail use and left the precise configuration of the trail use to the [non-Federal] parties' voluntary agreement." *Citizens*, 267 F.3d at 1153 (citation omitted). The court held that the Surface Transportation Board lacks "significant discretion . . . regarding issuance" of a certificate for interim trail use to parties who state their willingness to assume responsibility for a rail right-of-way. *Id.* at 1152-53. Here, the United States entered into a treaty in 1864 that secured the Tribes' "time immemorial" water rights. *Adair*, 723 F.2d at 1397-98, 1415.[13] And Congress vested Oregon with the authority to quantify those water rights. *Id*. at 1399. As Plaintiffs admit, OWRD quantified the Tribes' water rights in a manner that, if enforced, leaves Plaintiffs with little or no water. Am. Compl. ¶¶ 19-20. Just as in *Kandra*, another case involving irrigators seeking to use Klamath River water, the seniority of the Tribes' water rights means that Interior's "tribal trust obligations . . . would preclude the delivery of any irrigation

[13] "NEPA was not intended to repeal by implication any other statute." *United States v. Students Challenging Regulatory Agency Procedures*, 412 U.S. 669, 694 (1973). This is doubly so with respect to treaties. *TWA v. Franklin Mint Corp.*, 466 U.S. 243, 252 (1984) ("There is, first, a firm and obviously sound canon of construction against finding implicit repeal of a treaty in ambiguous congressional action.").

water" to junior irrigators regardless of any NEPA analysis. *Kandra*, 145 F. Supp. 2d at 1204-06 (denying preliminary injunction sought by irrigators).

Plaintiffs do not, and cannot, allege that Congress vested Interior with the discretion to prioritize Plaintiffs' junior water rights over Klamath's senior water rights. To the contrary, Congress prioritized Klamath's "right to prevent other appropriators from depleting the streams waters below a protected level in any area where [Klamath's] non-consumptive right applies." *Adair*, 723 F.2d at 1411 (citation omitted). Tribes "have treaty rights to Klamath River fish, and the Department of Interior must meet the United States' fiduciary duty to maintain these resources." *Pac. Coast Fed'n of Fishermen's Ass'ns v. U.S. Bureau of Reclamation*, 426 F.3d 1082, 1085-86 (9th Cir. 2005); *Patterson*, 204 F.3d at 1214 ("Because Reclamation maintains control of the Dam, it has a responsibility to divert the water and resources needed to fulfill the Tribes' rights, rights that take precedence over any alleged rights of the Irrigators."); *Kandra*, 145 F. Supp. 2d at 1204-06.[14] While it is conceivable that the Tribes' proposed calls might be inconsistent with a different federal legal obligation, Plaintiffs have identified no such obligation that would elevate their junior claims above the Tribes' senior claims. *See* 2019 Agreement ¶ 12 (retaining "right not to concur with any call for water that is inconsistent with the ACFFOD or other legal obligations"); Am. Compl. ¶¶ 15, 19-20. NEPA does not apply here because Interior lacks the discretion to overrule the Tribes' valid calls for enforcement of senior tribal water rights in favor of Plaintiffs' junior water rights.

[14] To the extent that Plaintiffs suggest that BIA must conduct NEPA on an annual basis prior to concurring in Klamath's exercise of Klamath's water rights, at least two courts indicated that such analysis might be impossible. *Kandra*, 145 F. Supp. 2d at 1205 (citing *Trinity v. Andrus*, 438 F. Supp. 1368, 1389 (E.D. Cal. 1977)).

C. NEPA does not apply because Interior lacks control over the Klamath Tribes' enforcement of its own water rights in Oregon state proceedings.

NEPA is likewise inapplicable to Interior's peripheral involvement in the Tribes' enforcement of its own water rights because the Tribes retain their sovereign power to defend and enforce their water rights. Just as an agency cannot take a "major federal action" requiring NEPA analysis if it lacks substantial discretion, no major federal action can exist absent a federal agency's authority to influence or control nonfederal activity. *Sierra Club v. U.S. Army Corps of Eng'rs*, 803 F.3d 31, 54 (D.C. Cir. 2015) ("NEPA requires agency environmental review when the agency undertakes a major federal action defined as an action that significantly affects the human environment and is subject to federal control and responsibility."); *Vill. of Los Ranchos de Albuquerque v. Barnhart*, 906 F.2d 1477, 1482 (10th Cir. 1990) (for NEPA to apply to a nonfederal activity, "'the federal agency must possess actual power to control the nonfederal activity'" (quoting *Sierra Club v. Hodel*, 848 F.2d 1068 (10th Cir. 1988)). "If the agency cannot materially influence the project or require a project's proponent to take environmental mitigation measures in response to an EIS, there is no point in forcing that agency to conduct an environmental review in the first place before the project occurs." *Indian River Cty.*, 201 F. Supp. 3d 1, 18-19 (D.D.C. 2016). NEPA does not apply here because BIA and Interior lack the ability to control the Tribes and OWRD's enforcement of the Tribes' water rights.

The Tribes retain a sovereign ability to independently exercise and protect their water rights. *See* pages 17-21, above. And OWRD – not BIA – is responsible for regulating the distribution of Upper Klamath Basin water "in accordance with the users' existing water rights." ORS 540.045; Or. Admin. R. 690-025-0025; pages 10-12, above. Indeed, Plaintiffs do not dispute that the Tribes initiate enforcement. Pages 21-28, above; Am. Compl. ¶ 38.

Moreover, as noted, the Tribes may independently initiate lawsuits to protect their trust resources regardless of Interior's position. *See* pages 17-21, above. Indeed, the Tribes actively defend water rights in Oregon state courts. *See* Order Granting Klamath Tribes' and United States' Motions to Intervene, *TPC, LLC v. Or. Water Res. Dep't*, Case No.: 15cv20875 (Ex. 3). Simply put, the Tribes can and would continue to enforce their water rights in some manner regardless of a written Protocol Agreement or whether the United States concurs in specific calls.

NEPA does not apply because BIA has only marginal involvement in the Klamath Tribes' enforcement of their water rights. In *Cascadia Wildlands v. U.S. Dep't of Agric.*, the Ninth Circuit recently determined that a Federal agency was not required to conduct NEPA even where the agency itself removed wolves from Oregon. 752 F. App'x 457, 459-60 (9th Cir. 2018). The court held that the agency lacked actual power to control Oregon's Wolf Plan, which was "a state-run program covered by state administrative rules and led by" Oregon's Department of Fish and Wildlife, under which Oregon had discretion to determine when and where wolves should be killed. *Id*. The Court found it significant that "Oregon would continue to kill gray wolves" regardless of Federal involvement, "which suggests that Wildlife Services' involvement does not control the Plan's outcomes." *Id*. BIA's involvement in Oregon's state enforcement of the Tribes' water rights is even more attenuated. *See* pages 4-13, above. The Tribes' independent right to seek enforcement of its treaty rights and initiate Oregon enforcement proceedings therefore renders NEPA analysis unnecessary.

CONCLUSION

The Klamath Tribes have ownership interests in their treaty water rights and independent authority to request enforcement as a matter of federal law. Plaintiffs cannot prove standing and, as described above, the Protocol Agreement is not an unlawful delegation of federal authority, nor does it violate NEPA. For the foregoing reasons, Plaintiffs' Amended Complaint should be dismissed under Federal Rule of Civil Procedure 12(b)(1), because Plaintiffs' inability to prove standing deprives the Court of subject matter jurisdiction, and under Rule 12(b)(6) for failure to state a claim.

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Respectfully submitted,

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