IN THE UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF COLUMBIA

GERALD H. HAWKINS, et al.,	)	No. 1:19-cv-01498-BAH
	)	
Plaintiffs,	)	
	)	
v.	)	
	)	
DAVID L. BERNHARDT, et al.,	)	
	)	
Defendants.	)	
	)	

PLAINTIFFS' OPPOSITION TO MOTION TO DISMISS

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Introduction[1]

This action challenges the Protocol Agreement between the Klamath Tribes and the Bureau of Indian Affairs. Through the Protocol, Defendants David L. Bernhardt, *et al*. (Government), delegated to the Tribes the authority to make calls for the enforcement of a water right to which the Government holds legal title.[2] The Protocol, and the making of calls thereunder, have drastically curtailed irrigation to the Upper Klamath Basin, resulting in significant economic, social, and environmental injuries. Am. Compl. ¶¶ 36-40. Plaintiffs Gerald H. Hawkins, *et al*. (Ranchers), contend that the Protocol constitutes an unlawful delegation of power to a non-federal entity. *Id*. ¶¶ 41-46. They also contend that the Protocol and calls made thereunder are illegal because they have not been subjected to an analysis pursuant to the National Environmental Policy Act (NEPA), 42 U.S.C. §§ 4321-4370m-12. Am. Compl. ¶¶ 47-53.

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[1] Given the complexity of the issues raised by the motion to dismiss, Plaintiffs respectfully request that the Court set the motion for hearing.

[2] In pertinent part, the water rights at issue in this case are governed by the doctrine of prior appropriation. *See United States v. Adair*, 723 F.2d 1394, 1411 n.19, 1414-15 (9th Cir. 1983). Under that system, a person "whose appropriation is first in time (the prior appropriator) has the highest priority and hence a right to make beneficial use of water superior to all others." David H. Getches, *Water Law in a Nutshell* 101 (3d ed. 1997). If there is insufficient water to satisfy all needs, "the doctrine of priority allows the full senior right to be exercised before the junior can use any water." *Id*. Priority is enforced through the senior user's placement of a "call" with the pertinent state water official. *Id*. at 103 ("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 water out of priority.").

Although the Government raises a variety of arguments against the Ranchers' claims, they largely hinge upon a single, and erroneous, contention: the Tribes can obtain the enforcement of their instream water right independent of the Government. As explained below, federal law subjects the Tribes' right to state procedure, and that procedure requires in Oregon that a call for enforcement of a water right must be agreed to by the legal owner of that right. Hence, the Government's promise, memorialized in the Protocol, not to countermand in most instances a Tribal call constitutes the unlawful delegation of final decision-making authority over whether and how the Tribes' water right should be implemented. And because "enforcement" of the Tribes' water right pursuant to the Protocol—itself the product of the Government's discretion—does not depend on any federal judicial or administrative action against any other party, the Protocol and calls made thereunder are subject to NEPA.

Argument

I. The Ranchers have standing to challenge the Protocol and calls made thereunder

To sue in federal court, a plaintiff must establish the existence of an injury-in-fact that is fairly traceable to the challenged action and that is subject to judicial redress. *Spokeo v. Robins*, 136 S. Ct. 1540, 1547 (2016). The Government contends that the Ranchers cannot establish the second and third requirements, *i.e.*, fair traceability and redressability. But as set forth below, the Ranchers' economic, aesthetic, and other concrete injuries are directly traceable to calls for the enforcement of the Tribes' water right; and these calls are causally connected to the

Protocol's delegation of the Government's decision-making authority to the Tribes. Further, the Ranchers' concrete injuries can be redressed by the Protocol's judicial invalidation, which would restore final call-making authority to the Government, thereby allowing the Government to overrule Tribal calls and to protect the general public interest.

A. The Ranchers' economic and other injuries are fairly traceable to the Protocol's delegation of the Government's call-making authority to the Tribes

Generally, a harm is fairly traceable to government action if a "causal connection [exists] between the alleged injury and the . . . conduct at issue." *Ctr. for Law & Educ. v. Dep't of Educ.*, 396 F.3d 1152, 1157 (D.C. Cir. 2005). Such a connection can be established by showing that it is "substantially probable" that the challenged action is the cause of the injury. *Fla. Audubon Soc'y v. Bentsen*, 94 F.3d 658, 663 (D.C. Cir. 1996) (en banc).

With respect specifically to procedural harm, causation is established by demonstrating two links: one between the alleged procedural error and the substantive decision, and a second between the substantive decision and the plaintiff's concrete injury. *Am. Tunaboat Ass'n v. Ross*, 391 F. Supp. 3d 98, 108 (D.D.C. 2019) (citing *Ctr. for Biological Diversity v. EPA*, 861 F.3d 174, 184 (D.C. Cir. 2017)). Although the second link is subject to the "substantially probable" test for causal connection, "[t]he first link does not require the plaintiff to show that but for the alleged procedural deficiency the agency would have reached a different substantive result." *WildEarth Guardians v. Jewell*, 738 F.3d 298, 306 (D.C. Cir.

2013). "All that is necessary is to show that the procedural step was connected to the substantive result." *Massachusetts v. EPA*, 549 U.S. 497, 518 (2007) (quoting *Sugar Cane Growers Coop. of Fla. v. Veneman*, 289 F.3d 89, 94-95 (D.C. Cir. 2002)).

1. The Ranchers' injuries are procedural

The Ranchers' lawsuit seeks redress for the Ranchers' economic, aesthetic, and other substantive injuries traceable to the calls for enforcement of the Tribes' water right. *See* Am. Compl. ¶¶ 36-37, 40. The lawsuit does so by seeking to vindicate two procedural rights. *See generally Am. Tunaboat Ass'n*, 391 F. Supp. 3d at 108 ("Procedural injury occurs when an agency fails to follow a legally required procedure and this failure increases the risk of future harm to some party.").

First, the Ranchers' action seeks to vindicate the procedural right protected by the doctrine of unlawful delegation—ensuring that government decision-making affecting citizens will be taken by politically accountable officials duty-bound to pursue the common good, not by non-governmental parties who have no such duty. *See U.S. Telecom Ass'n v. FCC*, 359 F.3d 554, 565-66 (D.C. Cir. 2004) ("[W]hen an agency delegates power to outside parties, lines of accountability may blur, undermining an important democratic check on government decision-making[,] increas[ing] the risk that these parties will not share the agency's national vision and perspective, and . . . aggravat[ing] the risk of policy drift inherent in any principal-agent relationship.") (internal quotation marks and citations omitted). *See also* A. Michael Froomkin, *Wrong Turn in Cyberspace: Using ICANN to Route Around the APA and the Constitution*, 50 Duke L.J. 17, 28 (2000) (explaining that the law's

disfavoring of delegations outside the government arises from "a long tradition of seeking to ensure that public power is exercised in a manner that makes it both formally and, insofar as possible, actually accountable to elected officials, and through them—we hope—to the electorate").

Second, the Ranchers' action seeks to vindicate the key procedural right protected by NEPA: ensuring that the environmental effects of government action that may have a significant impact on the human environment will be analyzed prior to the action's implementation. *See* 42 U.S.C. §§ 4331(b), 4332(C). *See also WildEarth Guardians*, 738 F.3d at 305 (the "archetypal procedural injury" is "an agency's failure to prepare . . . an [environmental impact statement under NEPA] before taking action with adverse environmental consequences").

Combined, these procedural rights protect the Ranchers' concrete interests in their property, livelihoods, and local environment. *See Carter v. Carter Coal Co.*, 298 U.S. 238, 311 (1936) (unchecked conferral of governmental power on outside parties "undertakes an intolerable and unconstitutional interference with personal liberty and private property"); *Lujan v. Nat'l Wildlife Fed'n*, 497 U.S. 871, 886 (1990) (recreational use and aesthetic enjoyment are concrete interests protected by NEPA). Therefore, these interests can satisfy the requirements for procedural-injury standing. *Fla. Audubon Soc'y*, 94 F.3d at 664 ("[A] plaintiff may have standing to challenge the failure of an agency to abide by a procedural requirement only if that requirement was 'designed to protect some threatened concrete interest' of the plaintiff.") (quoting *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 573 n.8 (1992)).

2. The Ranchers' injuries are causally connected to the Protocol

The Government contests the Ranchers' standing principally on the ground that the Ranchers' substantive injuries allegedly have nothing to do with the Protocol or the Government's involvement therein, but instead are the result of the 1864 Klamath Treaty, Oregon's system of prior appropriation, the ongoing Klamath Basin Adjudication, or similar causes. *See* MTD 22-23. The Government is mistaken. The Ranchers' substantive injuries, Am. Compl. ¶¶ 36-37, 40, are fairly traceable to the Protocol[3] because (i) the Protocol delegates to the Tribes final authority to make calls for water, (ii) the Protocol's delegation is connected to calls for the enforcement of the Tribes' water right, and (iii) it is substantially probable that implemented calls produce the Ranchers' substantive injuries.[4] *Cf. WildEarth Guardians*, 738 F.3d at 306.

[3] The Government contends that the 2013 Protocol has been supplanted by a 2019 Protocol. But the 2019 agreement describes itself not as a new Protocol but rather as an amendment to the (still existing) 2013 Protocol. MTD Exh. 2 at 1 ("WHEREAS, the Parties originally signed this Agreement on May 30, 2013, and are amending it to revise some of the procedures . . . ."). In any event, the challenged provisions of the 2013 Protocol, concerning the delegation of authority to the Tribes to make calls without the Government's concurrence, persist in the 2019 version of the agreement. *Compare* MTD Exh. 1 at 3 ¶ 7 *with* MTD Exh. 2 at 4 ¶ 12.

[4] The Government does not appear to contest the existence of a causal relationship between implemented calls and the Ranchers' substantive injuries. *See* MTD 2-3. *Cf.* Am. Compl. ¶¶ 36-37 (alleging how the irrigation curtailments caused by the enforcement of calls result in economic, aesthetic, and recreational injuries to the Ranchers).

To begin with, the Protocol delegates to the Tribes the final authority to direct the Oregon Water Resources Department to enforce the water rights to which the Government has legal title. This delegation is demonstrated by the plain language of the Protocol itself, which both recognizes the Government's legal title to the Tribes' equitable water right as well as waives in most instances the Government's right to object to a Tribal call. *See* MTD Exh. 1 at 1 (observing that the Department confirmed "certain water rights of the Tribes and of the [Bureau of Indian Affairs] as trustee for the benefit of the Tribes"); *id*. at 3 ¶ 7 (agreeing that "either Party may independently make a call and the other will not object to the call"). *Accord* MTD Exh. 2 at 1, 4 ¶ 12. The Government contests this characterization, claiming that the Protocol "substantively delegates nothing." MTD 31. But the Government's view is based entirely on the proposition that the Tribes may obtain enforcement absent the Government's consent. *Id*. at 30-31. That view is incorrect, for two related reasons.

First, the mere fact that one water use is senior to another does not inevitably mean that the junior use will be curtailed; a non-futile call for the senior water must be made.[5] *See* Jennie L. Bricker, *Entitlement, Water Resources, and the Common Good*, 18 Willamette J. Int'l L. & Disp. Resol. 143, 144 n.6 (2010) ("Under the prior appropriation system, senior water rights holders can 'call the river' in times of

[5] The Government is correct, MTD 24, that the Tribes (or anyone, for that matter) can request a water master to investigate an alleged unlawful use. *See* Or. Admin. R. 690-250-0100(1). But "investigation" is not the same thing as enforcement; the latter, not surprisingly, requires "a *valid* complaint of . . . unlawful use." *Id*. R. 690-250-0100(2) (emphasis added). And, as explained in the text, use by a junior appropriator does not become unlawful until a valid call has been made by a senior appropriator.

shortage . . . ."); Or. Admin. R. 690-250-0020(2) ("Upon the judgement that water will not reach its destination, or that an inadequate amount of water will reach its destination, the watermaster may disregard the call of the senior downstream appropriator."). This requirement is recognized by the Protocol itself, which governs how calls for the Tribes' water right will be placed with the Oregon Water Resources Department. *See* MTD Exh. 1 at 1-3; MTD Exh. 2 at 1-2. *Cf.* MTD 31 (acknowledging that the Protocol memorializes how the Government and the Tribes will "make such calls in a timely and effective manner").

Second, under Oregon water law, the Tribes cannot secure the enforcement of their water right without the Government's consent. To be sure, the Tribes are the beneficial owners of a substantial water right. But as the Government itself acknowledges, MTD 12, the Tribes do not possess legal title to that water right, which instead resides with the Government as trustee. In fact, the Oregon Water Resources Department expressly rejected the Tribes' attempt to secure legal title in their own name to a water right. *See* RJN Deerson Decl. Exh. 4 (Corrected Partial Order of Determination, Claims 625-640, Klamath Basin General Stream Adjudication, at 12 (Feb. 28, 2014)) ("Both the United States and the Klamath Tribes filed claims based on the hunting, trapping, fishing and gathering purposes of the Klamath Treaty of 1864. The Klamath Tribes' Claim 612 incorporates the United States' claims in this case by reference. The Klamath Tribes' claims are duplicative of the United States' claims, not additive. The United States holds the rights recognized herein in trust for the Klamath Tribes. As a result, Claim 612 is denied.") (citation omitted). *See also*

RJN Carollo Decl. Exh. 1 (Oregon Water Resources Department staff emails discussing the necessity of the Government's concurrence).[6]

Although the Tribes' equitable interest in their water right gives them standing to protect that right, MTD 17-21, the *mode* by which the Tribes' water right may be enforced as against junior appropriators is governed by Oregon water law. Pursuant to the McCarran Amendment, 43 U.S.C. § 666(a), federal reserved water rights, including Indian water rights, are subject to state rules of quantification and administration.[7] *Colo. River Water Conserv. Dist. v. United States*, 424 U.S. 800, 809-10 (1976); *Arizona v. San Carlos Apache Tribe of Ariz.*, 463 U.S. 545, 569-70 (1983). *See United States v. Adair*, 723 F.2d 1394, 1403 n.7 (9th Cir. 1983) (commending the district court's decision to leave "quantification and administration of the[] [Klamath Tribes'] rights to later proceedings to be conducted by the State Water Resources Director," thereby "harmoniz[ing] the concurrent federal and state jurisdiction mandated by the McCarran Amendment"); *id.* at 1411 n.19 (rejecting the contention that "the Tribe's rights are unaffected by state law" and emphasizing that they are

[6] Consideration of judicially noticeable materials on a motion to dismiss is proper. *Stewart v. Nat'l Educ. Ass'n*, 471 F.3d 169, 173 (D.C. Cir. 2006).

[7] Thus, contrary to the Government's characterization, MTD 19, the Ranchers do not contend that the Tribes' water right is "diminished" by virtue of its being held in trust. Rather, the Ranchers argue that the Tribes' right is subject to the same Oregon rules of administration—including the call process—as all other Oregon water rights, *see* Or. Rev. Stat. § 540.045(1), a point that the Government appears to accept, MTD 12 ("[The Oregon Water Resources Department] now enforces the water rights determined by the [Amended and Corrected Findings of Fact and Order of Determination] through a[] [Department]-appointed watermaster . . . [who] responds to such user requests, or 'calls,' by investigating the call . . . and then regulating upstream junior uses . . . .").

governed "in accordance with state techniques and procedures"). *See generally In re Gen. Adj. of All Rights to Use Water in the Big Horn River Sys.*, 753 P.2d 76, 114-15 (Wyo. 1988) (observing that "Federal law has not preempted state oversight of reserved water rights" and discussing pertinent authorities). And under Oregon water law, enforcement of a senior water right requires, at the very least, the consent and cooperation of the legal owner of the right. *See Fort Vannoy Irrig. Dist. v. Water Resources Comm'n*, 188 P.3d 277, 295-96 (Or. 2008) (given that the "'[t]he relationship between an irrigation district and its constituent landowners as to the water rights and other property of such district is that of trustee and cestuis que trustent,'" landowners cannot—notwithstanding their "equitable ownership interest"—dictate how the district trustee manages the landowners' water rights, "because [that would] implicate the trustee's duty to manage the trust property") (quoting *Smith v. Enterp. Irrig. Dist.*, 85 P.2d 1021, 1024 (Or. 1939)).

That conclusion is supported by Oregon law governing stream adjudications like the ongoing Klamath Basin Adjudication, to which the Government and Tribes are subject. *See United States v. Oregon*, 44 F.3d 758, 770-71 (9th Cir. 1994) (the McCarran Amendment requires the Government and the Tribes to participate in the Klamath Basin Adjudication). At the conclusion of such an adjudication, the Oregon Water Resources Department issues "a certificate setting forth," among other things, "the name and post-office address of the owner of the right," as well as "the priority of the date, extent and purpose of the right." Or. Rev. Stat. § 539.140. The original certificate is sent to the "owner," and the Department retains "a record of the

certificate." *Id*. The records of such certificates are then employed by the water masters to determine whether enforcement action should be taken. *See* Or. Admin. R. 690-250-0100(1) ("The watermaster shall investigate and respond to all complaints of . . . unlawful use based on a review of appropriate records . . . ."). Notably, "[a] person claiming an equitable interest in a water right does not receive a certificated right." *Klamath Irrig. Dist. v. United States*, 227 P.3d 1145, 1167 (Or. 2010). The reasonable inference from this administrative process is that enforcement of water rights is keyed to material set forth in the water right certificate and therefore, in the case of the Tribes' equitable water right, such enforcement depends at least in part on the Government's say. Buttressing that inference is the Protocol itself, which, as explained above, delegates to the Tribes the Government's power to object to most Tribal calls. *See* MTD Exh. 1 at 3 ¶ 7; MTD Exh. 2 at 4 ¶ 12. Presumably, that power must mean something, otherwise the Protocol would be largely pointless. *Cf. Hol–Gar Mfg. Corp. v. United States*, 351 F.2d 972, 979 (Ct. Cl. 1965) ("[A]n interpretation which gives a reasonable meaning to all parts of an instrument will be preferred to one which leaves a portion of it useless, inexplicable, inoperative, void, insignificant, meaningless or superfluous . . . .").

The Government marshals a number of citations for the proposition that the Tribes may enforce their equitable water right regardless of the Government's view. MTD 17-21. But none of the Government's authority supports the proposition that the Tribes may enforce an equitable interest in a *water* right independent of the

Government and state law.[8] Unlike tribal interests in land or other non-aquatic resources, tribal water rights are subject to the McCarran Amendment. *Cf. Arizona*, 463 U.S. at 571 ("But water rights adjudication is a virtually unique type of proceeding, and the McCarran Amendment is a virtually unique federal statute, and we cannot in this context be guided by general propositions."). As noted above, that Amendment incorporates state law for "the adjudication of rights to the use of water [and] for the administration of such rights, where it appears that the United States is the owner of . . . water rights by appropriation under State law." 43 U.S.C. § 666(a). *Cf. United States v. Orr Water Ditch Co.*, 600 F.3d 1152, 1159-60 (9th Cir. 2010) (recognizing that Nevada law allows for any person, including an Indian tribe, "aggrieved" by a water allocation decision of the state engineer to seek judicial review of that decision), *cited in* MTD 17 n.7.

Finally, to the extent that the Oregon Water Resources Department's resolution of a dispute between the Tribes and the Government over whether to make a call is a question of fact, the fair inference from the Amended Complaint is that Governmental concurrence in all Tribal calls is necessary. *See, e.g.*, Am. Compl. ¶ 23 ("In the absence of such calls, [the Department] would not prohibit junior water users from exercising their water rights."); *id.* ¶ 40 ("Absent an injunction, defendants will

[8] Moreover, the Government's position is in some tension with the undisputed proposition that the Government is the trustee of the Tribes' water right. This trust relationship, which arises precisely because the Government has assumed significant control over the Tribes' right, *see United States v. Mitchell*, 463 U.S. 206, 225 (1983) ("[A] fiduciary relationship necessarily arises when the Government assumes such elaborate control over . . . property belonging to Indians."), would be otiose if the Tribes truly had full and independent authority over their water right.

continue to implement the Protocol Agreement and allow calls to be made thereunder . . . ."). Therefore, the Government cannot contest that inference through its motion to dismiss. *See Lujan*, 504 U.S. at 561 ("At the pleading stage, general factual allegations of injury resulting from the defendant's conduct may suffice, for on a motion to dismiss we 'presum[e] that general allegations embrace those specific facts that are necessary to support the claim.'") (quoting *Lujan*, 497 U.S. at 889).

B. The Ranchers' injuries could be redressed by the setting aside of the Protocol

Because the Ranchers seek to vindicate procedural rights, the redressability analysis is relaxed. *Ctr. for Law & Educ.*, 396 F.3d at 1157. Specifically, a "procedural-rights plaintiff need not show that 'court-ordered compliance with the procedure would alter the final [agency decision],'" but only that through procedural compliance the government "*could* reach a different conclusion." *Ctr. for Biological Diversity*, 861 F.3d at 185 (quoting *Nat'l Park Conserv. Ass'n v. Manson*, 414 F.3d 1, 5 (D.C. Cir. 2005)). *Accord Sierra Club v. EPA*, 699 F.3d 530, 533 (D.C. Cir. 2012) (injury need only be "potentially redressable").

Here, it is certainly possible that the Government could decide not to concur in a Tribal call that otherwise would have proceeded without objection under the Protocol. Even the Protocol itself contemplates instances when the Government may object. MTD Exh. 2 at 4 ¶ 12 ("[T]he United States retains the right not to concur with any call for water that is inconsistent with the [Amended and Corrected Findings of Fact and Order of Determination] or other legal obligations."). Restoring final call-making authority to the Government also would enable the Government to

resume its responsibility to ensure that the common good—of Indians *and* non-Indians alike—is served through the Government's execution of its trust duties. *See* RJN Deerson Decl. Exh. 3 (Letter of Griffin B. Bell, Attorney General, to Cecil D. Andrus, Secretary of Interior, re Guidance Concerning the Conduct of Indian Litigation (1979)) ("Thus, in a case involving property held in trust for a tribe, the Attorney General . . . . is not obliged to adopt any position favored by a tribe in a particular case . . . . [¶] [F]aithful execution of the laws require[s] the Attorney General to resolve these competing or over-lapping interests to arrive at a single position of the United States. . . . [T]he President's duty . . . to propose to the Congress measures he believes necessary and expedient . . . must be framed with the interest of the Nation as a whole in mind."); Attachment 1 at 9 (Mem. to the Atty. Gen. from John M. Harmon, Asst. Atty. Gen., Off. of Legal Counsel (Aug. 11, 1977) ("[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.")). *See generally 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).

The Protocol's process for giving the Government time to consider the propriety of a Tribal call prior to the Tribes' placing the call also supports the potential redressability of the Ranchers' injuries. This procedure suggests that there are instances in which the Government would consider a Tribal call to be ill-advised and, absent the Protocol, would not concur in a Tribe-initiated call. Indeed, the 2019 amendments to the Protocol were adopted in part to give the Government "more time to respond to call notices from the Tribes." MTD Exh. 2 at 1. That time is intended, as the Protocol itself explains, to facilitate "changes to the scope of the proposed call. *Id*. at 3 ¶ 8. Further, it is quite plausible that having information about the environmental impact of calls—precisely the type of information that a NEPA analysis would provide—would influence the Government's (as well as the Tribes') view of the propriety of a call.

To be sure, the Tribes could sue the Government or the Oregon Water Resources Department in the face of an unheeded call.[9] *See* MTD 27. But if the mere possibility that government action can be undone by litigation were enough to defeat an otherwise adequate showing of redressability, no party injured by government action would ever be able to seek redress of those injuries in federal court. And, in any event, the Ranchers need only show that the Protocol's invalidation *may* result

[9] In fact, the existence of a substantial body of case law governing the relief that Indian tribes may seek against the federal government for failure to adequately administer Indian water rights, *see* Cohen's Handbook, *supra*, § 19.06, at 1261-62, further supports the proposition that enforcement of those rights is at least in part dependent on federal cooperation.

in no or at least moderated calls—which would make more irrigation water available and thereby directly remedy the Ranchers' concrete economic, aesthetic, and related injuries.[10] *Cf. Salmon Spawning & Recovery All. v. Gutierrez*, 545 F.3d 1220, 1226-27 (9th Cir. 2008) ("Plaintiffs alleging procedural injury can often establish redress[a]bility with little difficulty, because they need to show only that the relief requested—that the agency follow the correct procedures—may influence the agency's ultimate decision of whether to take or refrain from taking a certain action.").

II. The Protocol impermissibly delegates to the Tribes final authority over whether to make a call for the enforcement of a water right legally owned by the Government

Federal agencies may not delegate final decision-making authority to outside entities—private or sovereign—absent, at the very least, congressional authorization. *See U.S. Telecom Ass'n*, 359 F.3d at 566. *Cf. Ass'n of Am. Railroads v. U.S. Dep't of Transp.*, 721 F.3d 666, 670 (D.C. Cir. 2013), *vacated on other grounds*, 135 S. Ct. 1225 (2015) ("Federal lawmakers cannot delegate regulatory authority to a private entity."). The Government responds that the Protocol delegates no power. MTD 30-31. But that position is based on a mistaken view of the nature of the Tribes' water

[10] The Government contends that the Ranchers' challenges to past calls are moot and therefore not redressable. MTD 27. But given that (i) calls are made on a yearly or more frequent basis and are quickly implemented, (ii) the Government intends to continue to abide by the Protocol, and (iii) the economic and other injuries produced by past calls are likely to continue to be produced by future calls, *see* Am. Compl. ¶¶ 36, 40, the Ranchers' challenges to past calls are subject to the mootness exception for actions capable of repetition yet evading review. *See Humane Soc'y of U.S. v. EPA*, 790 F.2d 106, 113-14 (D.C. Cir. 1986) (challenge to agency action of one year's duration subject to the exception for actions capable of repetition yet evading review).

right and Oregon's procedures for the administration of water rights, a view that also conflicts with the most reasonable interpretation of the Protocol itself. The Government further argues that, even if the Protocol delegates federal power, the Ranchers' unlawful delegation claim must fail because it does not identify a specific source for the Government's authority to make calls for the enforcement of the Tribes' water right. MTD 31-33. But a claim of unlawful delegation does not turn on the source of delegated power. It depends rather on the absence of any authorization *for the delegation* of such power. *See U.S. Telecom Ass'n*, 359 F.3d at 565; *Nat'l Park & Conservation Ass'n v. Stanton*, 54 F. Supp. 2d 7, 18-19 (D.D.C. 1999).

A. The Protocol delegates to the Tribes the final decision-making authority to call for the enforcement of the Tribes' water right

The Government asserts that the Protocol "substantively delegates nothing," MTD 31, reasoning that the Tribes, as beneficiaries of an instream water right, may obtain enforcement of their water right independent of the Government, MTD 29-30. But as explained above, *supra* Part I.A.2., the McCarran Amendment subjects the Tribes' water right—to which the Government has legal title—to state rules of administration. That means, in Oregon, that calls for the enforcement of a water right must include the concurrence of the Government as the right's legal owner. *See Fort Vannoy Irrig. Dist.*, 188 P.3d at 295-96. *See also* MTD Exh. 2 at 4 ¶ 12 (agreeing that neither party will "withhold *any required concurrence* or object to the call") (emphasis added). The Government points to language in the Protocol stating that "[e]ach Party retains its independent right to make a call." MTD 30-31, Exh. 1 at 3 ¶ 7, Exh. 2 at 4 ¶ 12. Very well—the Ranchers do not contest that the Tribes may request a call. But

such a call, to be legally effective, must still be approved by the Government. *See, e.g.*, RJN Carollo Decl. Exh. 1 (email from Oregon Water Resources Department official in response to a Tribal call) ("[W]e need to await concurrence from [Bureau of Indian Affairs] on this."). Hence, the Protocol's promise that the Government will not object to at least some Tribal calls necessarily results, *pro tanto*, in the delegation of the Government's call authority to the Tribes.

The Government suggests that the Protocol is immune to a claim of unlawful delegation because the Protocol reserves to the Government the power not to concur in calls inconsistent with the ongoing Klamath Basin Adjudication or "other legal obligations." MTD 34 (quoting Exh. 2 at 4 ¶ 12). But the Ranchers' argument is that *any* delegation of call-making authority is impermissible, because such delegation gives to a non-federal actor final decision-making authority as to that call. *Cf. Nat'l Park & Conservation Ass'n*, 54 F. Supp. 2d at 19 ("Delegations by federal agencies to private parties are . . . valid so long as the federal agency or official retains final reviewing authority."). Hence, the possibility that the Government has not delegated decision-making for all calls cannot save the Protocol. Similarly unavailing is an interpretation of the Protocol reserving call power whenever such reservation is required by the doctrine of unlawful delegation; such a reading would render the Protocol's principal promise nugatory. *Cf. M & G Polymers USA, LLC v. Tackett*, 135 S. Ct. 926, 936 (2015) ("[C]ourts [are] to avoid constructions of contracts that would render promises illusory . . . .").

B. The Protocol's delegation is unlawful

The Constitution vests "[a]ll legislative Powers" in Congress. U.S. Const. art. I, § 1. A corollary of this vesting is that Congress may not shirk responsibility or avoid political consequences by delegating legislative power to executive agencies without providing an intelligible principle to guide a law's execution. *See Gundy v. United States*, 139 S. Ct. 2116, 2123 (2019). But even when Congress has provided sufficient direction to executive agencies, those entities may not further delegate that authority to outside parties unless, at the very least, Congress has authorized the extra-governmental delegation. *U.S. Telecom Ass'n*, 359 F.3d at 566. *See Shook v. D.C. Fin. Responsibility & Mgmt. Assistance Auth.*, 132 F.3d 775, 783 (D.C. Cir. 1998) (observing that "it would be unusual, if not unprecedented, for Congress to authorize" the defendant agency "to delegate its own governing authority, its policymaking function, to another outside multi-member body"). *Cf. Perot v. FEC*, 97 F.3d 553, 559 (D.C. Cir. 1996) ("We agree with the general proposition that when Congress has specifically vested an agency with the authority to administer a statute, it may not shift that responsibility to a private actor . . . .").

Congress has charged the Secretary of the Interior with the "supervision of public business relating to," *inter alia*, "Indians." 43 U.S.C. § 1457. *Cf. United States v. Lara*, 541 U.S. 193, 200 (2004) (identifying the Indian Commerce Clause, U.S. Const. art. I, § 8, cl. 3, and the Treaty Clause, *id.* art. II, § 2, cl. 2, as the sources of Congress's "plenary and exclusive" powers to legislate with respect to Indian tribes). The Secretary is authorized to delegate his Indian-related powers to the

Commissioner of Indian Affairs, who is authorized to re-delegate them to assistant commissioners and other officers within the Bureau of Indian Affairs. 25 U.S.C. § 1a. The Commissioner is also authorized to manage, under the Secretary of the Interior's direction, "all Indian affairs and of all matters arising out of Indian relations." *Id*. § 2. Notably, no provision—constitutional or statutory—authorizes delegation of these authorities outside the Government. The Protocol, which purports to do so, therefore constitutes an unlawful delegation of governmental power.

That conclusion obtains even if the Protocol is construed as a delegation of the Executive Branch's treaty power, U.S. Const. art. II, § 2. Just as the Constitution vests in Congress "[a]ll legislative powers," *id*. art. I, § 1, the Constitution vests in the President "[t]he executive Power," *id.* art. II, § 1, cl. 1. Although some of the President's executive power may be delegated to subordinates, *Myers v. United States*, 272 U.S. 52, 117 (1926), such delegation cannot extend to actors unaccountable to the President, *Free Enterprise Fund v. Public Co. Account. Oversight Bd.*, 561 U.S. 477, 496-97 (2010) (executive power cannot be wielded by federal officers enjoying two layers of protection from Presidential removal). *See* Dina Mishra, *An Executive-Power Non-Delegation Doctrine for the Private Administration of Federal Law*, 68 Vand. L. Rev. 1509, 1581 (2015) ("[A]n executive-power non-delegation doctrine would hold that the President (with or without the Senate's consent) may not enter into a self-executing treaty purporting to confer [outside of the federal government] the permanent, unremovable, unnullifiable, and exclusive power to completely dictate the terms of the execution of U.S. law against U.S.

citizens within U.S. jurisdiction."). Yet that is exactly what the Protocol brings about: the Tribes exercise final decision-making authority, without federal oversight, for a water right legally owned by the Government. Thus, however its grant of power is construed, the Protocol constitutes an unlawful delegation of such power.

C. The Protocol's delegation is unlawful regardless of whether the Government's call-making power is authorized by a general or specific statutory grant

The Government contends that there can be no unlawful delegation in the absence of any specific statutory authority purportedly delegated. MTD 32. The Government's argument is backwards. An extra-governmental delegation is presumed to be unlawful, and it is the Government's burden to establish that such delegation is permissible. *See U.S. Telecom*, 359 F.3d at 565. The unlawful delegation doctrine would be turned into a "greater does not include the lesser" oddity if, as the Government would have it, MTD 22-23, an agency could not delegate specifically granted powers, but could delegate without limitation powers derived from a general grant of authority.[11]

The likely statutory source of the Government's power to make calls is its authority to manage "Indian affairs and . . . all matters arising out of Indian relations." 25 U.S.C. § 2. As the case law demonstrates, such a broad responsibility includes the power to discharge it effectively. *See, e.g.*, *Udall v. Littell*, 366 F.2d 668,

[11] If there is no statutory authorization—general or specific—for the Protocol, then the result is not a lawfully delegated power but rather an ultra vires agreement. *See generally Michigan v. EPA*, 268 F.3d 1075, 1081 (D.C. Cir. 2001) ("[A] federal agency . . . has no constitutional or common law existence or authority, but only those authorities conferred upon it by Congress.").

672-73 (D.C. Cir. 1966) (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); *Yavapai-Prescott Indian Tribe v. Watt*, 528 F. Supp. 695, 698 (D. Ariz. 1981), *rev'd on other grounds*, 707 F.2d 1072 (9th Cir. 1983) (authority to terminate lease of Indian land). Under the Government's theory, the Government would be free to delegate any of these implied authorities to third parties—even parties with interests adverse to the Tribes—simply because they derive from a general not specific statutory grant. Such a perverse result finds no support in the unlawful delegation case law. *Cf. Fund for Animals v. Kempthorne*, 538 F.3d 124, 133 (2d Cir. 2008) ("An agency delegates its authority when it shifts to another party 'almost the entire determination of whether a specific statutory requirement . . . has been satisfied,' *U.S. Telecom*, 359 F.3d at 567, ***or*** where the agency abdicates its 'final reviewing authority,' *Nat'l Park & Conservation Ass'n v. Stanton*, 54 F. Supp. 2d 7, 19 (D.D.C. 1999).") (emphasis added); *United Black Fund, Inc. v. Hampton*, 352 F. Supp. 898, 904 (D.D.C. 1972) ("[S]ubdelegations by federal agencies to private parties are not invalid when the federal agency or official retains final reviewing authority.").

Perhaps sensing the inadequacy of its specific vs. general distinction, the Government relies upon *Southern Pacific Transportation Company v. Watt*, 700 F.2d 550 (9th Cir. 1983), for the proposition that limitations on delegation are "less stringent" if the delegate possesses "independent authority over the subject matter," MTD 34. *See S. Pac. Transp. Co.*, 700 F.2d at 556 (quoting *United States v. Mazurie*,

419 U.S. 544, 556-57 (1975)). As the D.C. Circuit has recognized, *Watt*'s relaxed standard for reviewing certain types of delegations does not constitute the decision's holding. *U.S. Telecom Ass'n*, 359 F.3d at 566. As the D.C. Circuit also has recognized, *Watt*'s reliance on *Mazurie* is unwarranted. *Id.* The Supreme Court in *Mazurie* considered the propriety of a direct delegation from Congress to a non-federal entity, *see Mazurie*, 419 U.S. at 556, but the concerns about political accountability which underlie the unlawful delegation doctrine are less acute—and thus the standard of review to be employed should be less exacting—when elected officials (like the Congressmen in *Mazurie*) are directly answerable for the delegation. Here, however, no elected federal official is responsible for the Protocol.

But even taken on its own terms, *Watt* does not support the Government's position. The case concerned Congress's authorization for the Secretary of the Interior to establish conditions precedent for obtaining rights-of-way through Indian lands. The Secretary exercised that authority by establishing tribal consent as a permitting condition. *Watt*, 700 F.2d at 552. In upholding this delegation of federal permitting authority, the Ninth Circuit distinguished between "relinquish[ing] . . . final authority to approve," which is impermissible, and "delegat[ing] a power to disapprove," which is permissible. *Id.* at 556. The Protocol pertains to the former, not the latter, category of delegations. Pursuant to the Protocol, the Government does not make the Tribes' concurrence a precondition of making a call; instead, the Government pledges not to withhold its *own* concurrence when the Tribes request that a call be made. Thus, rather than adopting Tribal concerns as an element of its

decision-making process, the Government through the Protocol has delegated "the entire determination," *U.S. Telecom Ass'n*, 359 F.3d at 567, of whether a call should be made. *Watt* is inapposite.

Similarly misplaced is the Government's reliance on *Fund for Animals*. There, a federal agency had retained "broad permitting authority" to regulate migratory birds, while delegating to local governments the power to authorize the take of one type of migratory bird for limited purposes. *Fund for Animals*, 538 F.3d at 133. Thus, because the agency had merely "incorporate[ed] 'obviously relevant local concern[s] as . . . element[s] of its decision process,'" *id*. (quoting *U.S. Telecom Ass'n*, 359 F.3d at 567), the Second Circuit found no improper delegation. In contrast here, the Protocol goes beyond merely incorporating Tribal views into the larger call-making process; it makes those views determinative of the entire decision of whether to make a call. The delegation of such final decision-making authority is unlawful.

III. Neither the "enforcement action" nor the "no discretion" exemption to NEPA applies to the Protocol

NEPA requires the Government to produce an environmental impact statement for all major federal actions significantly affecting the quality of the human environment. 42 U.S.C. § 4332(C). The Government does not appear to contest that enforcement of the Tribes' water right significantly affects the environment. *Cf*. Am. Compl. ¶¶ 36, 39-40 (so alleging). Instead, the Government argues, first, that neither the Protocol itself nor calls made thereunder are subject to NEPA because they are analogous to "judicial or administrative civil or criminal enforcement actions" exempted from NEPA. MTD 35–38. But merely because implementation of a call for

water can be characterized as "enforcement" of a water right does not mean that a call is an exempted "enforcement action." *See Dep't of Transp. v. Public Citizen*, 541 U.S. 752, 765 (2004) (characterizing agency action as "enforcement" but not rejecting application of NEPA on that ground); *Sierra Club v. U.S. Army Corps of Eng'rs*, 803 F.3d 31, 46-47 (D.C. Cir. 2015) (recognizing that NEPA applies to Clean Water Act verifications that "purport[] to enforce" an Endangered Species Act incidental take permit). Moreover, to the extent that there is any "enforcement action" going on, it is enforcement by a state actor of state water law procedure—far afield of what presumably was intended by the enforcement exemption to "Major Federal action," 40 C.F.R. § 1508.18.

The Government also argues that NEPA does not apply because the Government lacks discretion to prioritize the Ranchers' water rights over the Tribes' water right. MTD 38–41. The Government misses the point; the issue is not about a competition between water rights[12] but rather about whether the environmental impact resulting from the enforcement of the Tribes' right—to which the Government has legal and controlling title—may reasonably inform whether and to what extent a

[12] Thus, the Federal Circuit's recent decision in *Baley v. United States*, No. 2018-1323, 2019 WL 5995861 (Fed. Cir. Nov. 14, 2019), is inapposite. There, several Klamath Project water users sued the Government for a taking of their water rights. The Federal Circuit ruled that there was no taking because (i) the water not delivered to the plaintiffs was necessary to sustain the fisheries in which the Tribes have a treaty right, and (ii) the Tribes' correlated instream water right is senior to all other appropriators in the Klamath Basin. *See id.* at *22 (because "appellants' water rights were subordinate to the Tribes' federal reserved water rights," there was "no error in the [lower] court's holding that the Bureau of Reclamation's action in temporarily halting deliveries of Klamath Project water in 2001 did not constitute a taking of appellants' property").

request for the enforcement of that right should be made. *Cf.* Am. Compl. ¶ 28 (explaining how, under the 2014 Upper Klamath Basin Comprehensive Agreement, the Government's promise to request streamflow levels lower than those granted to the Tribes in the Klamath Basin Adjudication balanced "support [for] fish and wildlife resources important to the Klamath Tribes while also providing . . . a sustainable basis for the continuation of irrigated agriculture in the Upper Klamath Basin"). Moreover, a "no discretion" defense is at odds with the Protocol itself, which acknowledges a substantial role for the Government in whether and to what extent a call should be placed, as well as with the Government's overriding obligation to serve the general public interest. Finally, the Government asserts that NEPA does not apply because the Government does not control the Tribes' ability to make a call. MTD 41-42. But that is simply a restatement of the erroneous view that the Tribe may enforce a call of its water right without the Government's concurrence.[13]

A. The Protocol is not an "enforcement action" exempt from NEPA

By regulation, "judicial or administrative civil or criminal enforcement actions" are not subject to NEPA. 40 C.F.R. § 1508.18(a). But contrary to the Government's

[13] The Government suggests that conducting a NEPA analysis prior to each call-concurrence "might be impossible." MTD 40 n.14 (citing *Kandra v. United States*, 145 F. Supp. 2d 1192, 1205 (D. Or. 2001); *Trinity v. Andrus*, 438 F. Supp. 1368, 1389 (E.D. Cal. 1977)). The Government bears a heavy burden of establishing that NEPA compliance is entirely excused because impossible. *Calvert Cliff's Coordinating Comm. v. U.S. Atomic Energy Comm'n*, 449 F.2d 1109, 1114-15 (D.C. Cir. 1971) ("[T]he requirement of environmental consideration 'to the fullest extent possible' sets a high standard for the agencies," and "[c]onsiderations of administrative difficulty, delay or economic cost will not suffice to strip [NEPA] of its fundamental importance.") (quoting 42 U.S.C. § 4332). The Government's passing footnote reference does not meet this burden.

view, that the implementation of the Protocol entails the "enforcement" of a water right does not exempt the Protocol from NEPA, a point suggested by the Protocol's express call-reservation to assure the Government's compliance with "other legal obligations." MTD Exh. 2 at 4 ¶ 12.

As the Government's cited case law demonstrates, MTD 35-37, the "enforcement action" exemption applies to federal activities that are intended to ensure compliance with, or to punish violation of, federal law. *See, e.g.*, *Ctr. for Biological Diversity v. Salazar*, 791 F. Supp. 2d 687, 697 (D. Ariz. 2011) (actions taken to ensure a mine's continuing compliance with Bureau of Land Management regulations and related legal obligations); *Envtl. Prot. Info. Center v. U.S. Fish & Wildlife Serv.*, No. C 04-4647 CRB, 2005 WL 3877605, at *2 (N.D. Cal. Apr. 22, 2005) (monitoring for compliance with an Endangered Species Act permit); *Tucson Rod & Gun Club v. McGee*, 25 F. Supp. 2d 1025, 1029 (D. Ariz. 1998) (suspension of a Forest Service special use permit); *Calipatria Land Co. v. Lujan*, 793 F. Supp. 241, 243, 245-46 (S.D. Cal. 1990) (enforcement of federal anti-baiting regulations); *United States v. Glenn-Colusa Irrig. Dist.*, 788 F. Supp. 1126, 1135 (E.D. Cal. 1992) (litigation to enjoin violation of the Endangered Species Act); *United States v. Rainbow Family*, 695 F. Supp. 314, 324 (E.D. Tex. 1988) (enforcement of laws and regulations governing uses of Forest Service lands). *Cf.* 61B Am. Jur. 2d Pollution Control § 87 (2019) (characterizing the exemption as covering "law enforcement proceedings").

In contrast, calls for the enforcement of the Tribes' water right do not constitute corrective or punitive activities, such as would be the case with an administrative or judicial action against individual ranchers for appropriating water that has been called upon by senior users. *See* Or. Admin. R. 690-260-0005 to 690-260-0110 (procedure for assessment of civil penalties for violation of state water law). Rather, Protocol-directed "enforcement" essentially boils down to a request for the state to deliver federally entitled water—much like the federal government's operation of reclamation projects throughout the country, which are subject to NEPA. *See, e.g.*, *San Luis & Delta-Mendota Water Auth. v. Jewell*, 747 F.3d 581, 646 (9th Cir. 2014) (more than a "routine" adjustment to federal water delivery operations constitutes a major federal action under NEPA).

Although the Government relies heavily on *High Country Citizens' Alliance v. Norton*, 448 F. Supp. 2d 1235 (D. Colo. 2006), that decision undercuts rather than supports the Government's position. It is true, as the Government points out, that the court distinguished between annual calls for water and a permanent relinquishment of a water right. *Id*. at 1244-45. But the court did not hold that the former were exempt from NEPA; it simply held that the latter was subject to NEPA. *Id*. at 1245 ("Although an annual decision as to how much water to release and whether or not to place a call on senior water rights *may* be a discretionary matter best left to the National Park Service and the Secretary of the Interior, the same cannot be said for permanently passing up a priority date.") (emphasis added). And if anything, the Protocol's relinquishment of call-making authority is analogous to

the relinquishment of a water right which *High Country* held to be subject to NEPA. Also cutting against the Government is the court's rejection of the argument that the relinquishment of the Government's water right was exempt from NEPA because the Government had "advocated [its] position in water court." *Id.* at 1246 n.3. In the same way here, just because the Tribes' water right can be enforced through administrative or judicial channels does not exempt calls for enforcement from NEPA.[14]

B. The Government possesses sufficient discretion over the Protocol and call-making to trigger NEPA

NEPA does not apply if "an agency has no ability to prevent a certain effect due to its limited statutory authority over the relevant actions." *Dep't of Transp. v. Public Citizen*, 541 U.S. at 770. The Government contends that this "no discretion" exception applies to the Protocol, but this argument cannot be squared with the Protocol's plain text, or with the Government's trust authority over the Tribes' water right.

To begin with, the Protocol itself belies the Government's claim of no discretion. The Protocol directs the Tribes to provide the Government with advance notice of intent to make a call. MTD Exh. 2 at 2 ¶¶ 2-3; Exh. 1 at 1-2 ¶ 2. It explicitly anticipates that the Government may suggest changes to the scope of a proposed call, and that the Government may disagree with making the proposed call altogether.

[14] Equally unhelpful to the Government is the fact that the Protocol is terminable, MTD 36–37. *See Sierra Club v. Bosworth*, 465 F. Supp. 2d 931, 939 (N.D. Cal. 2006) (that a government contract may be terminated based on new information pertaining to the environmental impact of its implementation supports rather than undercuts application of NEPA).

MTD Exh. 2 at 3 ¶ 8; Exh. 1 at 3 ¶ 3. Indeed, one of the recited reasons for amending the Protocol in 2019 was to give the Government more time to respond to Tribal call notices, MTD Exh. 2 at 2, for the purpose of facilitating "changes to the scope of the proposed call," *id.* at 3 ¶ 8. The consultative procedure established by the Protocol would be pointless if it had no influence on whether a call is actually placed. *Cf. RESTORE: The North Woods v. U.S. Dep't of Agric.*, 968 F. Supp. 168, 171 n.2 (D. Vt. 1997) ("A major federal action may encompass action by non-federal actors if the federal agency has the authority to influence significant non-federal activity.").

And regardless of the Protocol, no law requires the Government to accede to the Tribes' demands. Rather, even when acting as a trustee for the Tribes, the Government continues to serve as the sovereign for all citizens, Indian and non-Indian, to protect the common good of the Republic. *See supra* at 14-15 (citing Atty. Gen. Bell Letter; Attachment 1 at 9 (Mem. to the Atty. Gen.); *Cobell*, 240 F.3d at 1099; Cohen's Handbook § 19.06, at 1259-60). *See also Arizona*, 463 U.S. at 571 (Indian tribes retain their sovereign authority only if consistent with the federal government's overriding interests). Thus, supposed disputes about whether the Government may prioritize the Ranchers' water rights over the Tribes' water rights, MTD 38-40, are a red herring. The pertinent question instead is—may a NEPA analysis of the impact to the human environment caused by call enforcement legitimately inform the Government's decision whether the general public interest would be served by concurrence with a proposed Tribal call? The answer is yes. Moreover, even if its trustee responsibilities or other legal obligations constrain the

Government's discretion to some degree, the extent of any such constraint is itself an issue that should be disclosed and explored through the development of a reasonable range of alternatives under NEPA. *See* 40 C.F.R. § 1502.14(a), (c) (an agency shall "[r]igorously explore and objectively evaluate all reasonable alternatives," "[i]nclud[ing] reasonable alternatives not within the jurisdiction of the lead agency," "and for alternatives which were eliminated from detailed study, briefly discuss the reasons for their having been eliminated").

The Government's reliance on *Klamath Water Users Protective Association v. Patterson*, 204 F.3d 1206 (9th Cir. 1999), and *Kandra v. United States*, 145 F. Supp. 2d 1192 (D. Or. 2001), is unwarranted. In *Patterson*, the Ninth Circuit held that the Government had "the authority to direct operation of the [Klamath Basin's Link River] Dam to comply with Tribal water requirements," because "the Tribes' rights . . . take precedence over any alleged rights of the Irrigators." *Patterson*, 204 F.3d at 1213-14. But here, the question is not whether the Tribes' right trumps the Ranchers' rights, but rather whether the Government retains discretion over how the Tribes' right will be enforced. Citing *Patterson*, the district court in *Kandra* held that NEPA did not apply to the Government's decision to operate the Klamath Project so as to benefit certain endangered species in which the Tribes have fishery rights. *Kandra*, 145 F. Supp. 2d at 1204-05. But the court went on to acknowledge that the long-term implementation of that operational change *would* be subject to NEPA. *See id*. at 1206. Just so here, the long-term plan over whether and how to accede to Tribal calls for enforcement—*i.e.*, the Protocol and its implementation to the present day—should be

subject to NEPA. *See* 40 C.F.R. § 1508.18(b)(3) (projects typically subject to NEPA include the "[a]doption of programs, such as a group of concerted actions to implement a specific policy or plan"). *Cf. Conservation Law Found. of New England, Inc. v. Harper*, 587 F. Supp. 357, 364-65 (D. Mass. 1984) (the preparation of an environmental impact statement is required for "a coherent, detailed plan . . . that . . . is likely to have wide-ranging environmental consequences").

Finally, nothing peculiar to water law generally or Oregon water law in particular converts the Government into a marginal, NEPA-excused actor. *Cf.* MTD 41-42. True, under the Klamath Basin Adjudication, the Government was awarded instream water rights intended to support Tribal fishing and hunting rights, rights which are senior to the Ranchers' rights (although many of the Ranchers' water rights arise under the same Klamath Treaty). But as explained above, *supra* Part I.A.2, appropriative water rights are not self-executing; a call is required from the right's legal owner in order to put into movement the water enforcement process. And no law requires the Government, as the legal owner of the Tribes' beneficial right, to make a call simply because the Tribes have requested it. Rather, the Government retains the discretion to make that judgment. NEPA therefore applies.

Conclusion

The motion to dismiss should be denied.

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Respectfully submitted,

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