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' REPLY IN SUPPORT OF MOTION TO DISMISS

ERIC GRANT
Deputy Assistant Attorney General

DARON T. CARREIRO
MATTHEW MARINELLI
United States Department of Justice
Environment and Natural Resources Division
P.O. Box 7611
Ben Franklin Station
Washington, D.C. 20044-7611
(202) 305-1117
daron.carreiro@usdoj.gov
matthew.marinelli@usdoj.gov

ATTORNEYS FOR DEFENDANTS

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

Constitution, Statutes, and Treaties

Rules

Other Authorities

*Cases or authorities upon which counsel chiefly relies.

INTRODUCTION

The Department of the Interior files this Reply Brief in support of its Motion to Dismiss. As established in the Motion, the United States and the Klamath Tribes ("Tribes") jointly hold senior water rights based on an 1864 Treaty. These rights have been quantified through the Klamath Basin Adjudication ("Adjudication"), and repeatedly confirmed by numerous federal and state courts. Interior and the Tribes have sought to exercise these water rights through "stream calls," which Plaintiffs challenge. Plaintiffs' Opposition fails at every turn because Plaintiffs cannot circumvent the 1864 Treaty or change the priority date of their water rights recognized in the Adjudication's Amended and Corrected Findings of Fact and Order of Determination (the "ACFFOD"). Plaintiffs, as a last resort, challenge these calls based on the Protocol Agreement ("Agreement") between Interior and the Tribes regarding enforcement of these senior water rights, claiming the Agreement is an unlawful delegation and that NEPA mandated analysis prior to making a call.

At the outset, Plaintiffs' claims should be dismissed for lack of standing. Their alleged injuries were not caused by Interior's entry into the Agreement to coordinate enforcement of the Tribes' water rights and cannot be redressed by overturning it. To the contrary, the Agreement has no bearing on the critical fact that the Tribes' treaty-secured water rights are senior to Plaintiffs' rights. And the Tribes' senior rights will be enforced regardless of the Agreement, because, at a minimum, the Tribes retain an independent, sovereign ability to enforce them.

Even if Plaintiffs' have standing, their Opposition fails to support an unlawful delegation argument by not identifying any delegation at all, much less an improper delegation to the Tribes. Plaintiffs' similarly fail to identify any countervailing statute that might permit Interior to prioritize Plaintiffs' junior water rights over the Tribes' senior rights. Nor does NEPA require

Interior to analyze the environmental effects of taking steps to enforce treaty-secured water rights. Plaintiffs' assertion that Interior's actions are not the type of enforcement actions exempted from NEPA analysis because they are not judicial corrective actions is flatly wrong.

Plaintiffs' claims should meet the same fate as every other attempt by Klamath Basin irrigators to have their junior rights fulfilled ahead of the Tribes' senior rights. The recognition of the Tribes' water rights through the 1864 Treaty precludes Plaintiffs' effort to reprioritize water delivery within the Klamath Basin. Interior's efforts to enforce the Tribes' senior water rights through priority administration is neither an improper delegation of authority nor the type of action requiring NEPA analysis. The Court should grant Interior's Motion to Dismiss.

ARGUMENT

I. Plaintiffs' Opposition Brief incorrectly describes the legal framework applicable to reserved Indian water rights.

Interior's Motion described the legal framework governing the water rights at issue in this case, including that (1) reserved Indian water rights are governed by federal law, not state law, and (2) the Tribes have ownership interests and independent authority to request enforcement of their rights as a matter of federal law. Plaintiffs do not seriously contest this framework, but selectively ignore parts of it while urging that the Court instead apply state law to limit the Tribes' treaty-guaranteed and federally protected water rights. Plaintiffs base their entire Amended Complaint on a misinterpretation of these established governing legal principles. While these principles are not the exclusive basis for deciding the pending Motion to Dismiss—Plaintiffs Amended Complaint should be dismissed for these and all of the other reasons explained in the Motion and this Reply—they are helpful in deciding whether Plaintiffs have standing to challenge the Agreement, whether the Agreement constitutes an unlawful delegation of federal authority, and whether NEPA applies in this case.

A. The Tribes' water rights are governed by federal law, not state law.

As explained in Interior's Motion, Indian water rights are governed by federal law, not state law, and "are not dependent upon state law or state procedures." ECF 17 at 6 (quoting *Cappaert v. United States*, 426 U.S. 128, 145 (1976)); *see Arizona v. San Carlos Apache Tribe of Ariz.*, 463 U.S. 545, 550, 571 (1983) (reserved Indian water rights are "governed by federal law" and "state courts . . . have a solemn obligation to follow federal law" in state water adjudications); *Agua Caliente Band of Cahuilla Indians v. Coachella Valley Water Dist.*, 849 F.3d 1262, 1272 (9th Cir.), *cert. denied*, 138 S. Ct. 468 (2017) ("[R]eserved rights . . . are federal water rights that preempt conflicting state law.").

Without directly disputing this authority, Plaintiffs mistakenly claim that the Tribes' water rights are, instead, "governed by Oregon water law" and by Oregon "state procedure." ECF at 19 at 2, 9. They arrive at this conclusion by misconstruing the McCarran Amendment, 43 U.S.C. § 666(a), arguing that the statute subjected Indian reserved water rights to state law.

Contrary to Plaintiffs' argument, the McCarran Amendment "confers judicial jurisdiction only; federal and Indian water rights continue to be determined by federal substantive law." COHEN'S HANDBOOK OF FEDERAL INDIAN LAW at § 6.04[5][c]; *Colo. River Water Conservation Dist. v. United States*, 424 U.S. 800, 813 (1976); *State ex rel. Greely v. Confederated Salish & Kootenai Tribes of Flathead Reservation*, 219 Mont. 76, 94, 712 P.2d 754, 762-66; 768 (1985). True, the McCarran Amendment waived the United States' sovereign immunity so that the United States could be joined as a party in comprehensive general stream adjudications in state courts. But federal substantive law still controls issues related to Indian reserved water rights in such adjudications, and "[s]tate courts . . . have a solemn obligation to follow federal law." *San Carlos Apache Tribe*, 463 U.S. at 571; *see also* COHEN'S at § 19.05[1] ("state courts are

obligated to use federal law to determine tribal reserved rights"). Moreover, "states [must] modify their procedures to accommodate federal water rights." D. Tarlock, L. OF WATER RIGHTS AND RESOURCES (2019 ed.), at §7.3. And to protect instream flows and Indian water rights, "both state procedure and substantive law must pass muster under federal law." *Id.*

None of Plaintiffs' cases support the argument that the Tribes' water rights are governed by substantive state law. For example, Plaintiffs cite a Wyoming Supreme Court pronouncement that "[f]ederal law has not preempted state oversight of reserved water rights." ECF 19 at 10 (quoting *In re General Adjudication of All Rights to Use Water in the Big Horn River System*, 753 P.2d 76, 114-15 (Wyo. 1988)). However, while the Wyoming state engineer has authority to monitor and enforce a state court decree—just as the Oregon Water Resources Department ("OWRD") enforces the ACFFOD—state enforcement of Indian reserved water rights, and the regulation of junior water users to fulfill senior reserved rights, must comport with *federal* law. Plaintiffs omit this key language from the opinion: "[t]he role of the state engineer is thus *not to apply state law*, but to enforce the reserved rights as decreed under principles of federal law." 753 P.2d at 115 (emphasis added); *id.* ("the provisions authorizing the state engineer to monitor reserved water rights contemplate neither the application of state law nor the authority to deprive the Tribes of water without the assistance of the courts"). In other words, *Big Horn* cuts against Plaintiffs' McCarran Amendment and state law arguments, demonstrating, instead, that federal law, not state law, guides the determination and enforcement of Indian reserved water rights.

B. The Tribes have independent authority to enforce request enforcement of their water rights.

It is important to clarify that federal law governs the tribal reserved water rights because federal law provides that such rights are possessed by tribes themselves, even though the United States holds bare title as trustee. *Shoshone Bannock Tribes v. Reno*, 56 F.3d 1476, 1479 (D.C.

Cir. 1995) ("these federally-created rights belong to the Indians rather than to the United States, which holds them only as trustee"); *United States v. Washington*, 853 F.3d 946, 967 (9th Cir. 2017) ("the rights belong to the Tribes"), *aff'd by an equally divided court*, 138 S. Ct. 1832 (2018); *see also* COHEN'S at § 19.04[2] ("Reserved rights to water are property rights held by tribes and their members.").

Tribes, therefore, retain the authority to seek enforcement of such rights. It remains undisputed that the Tribes' senior instream flow water rights "were reserved by the Tribe[s] in the 1864 treaty," that they "belong to the Tribe[s]," and that "the entitlement consists of the right to prevent other appropriators from depleting the streams [and] waters below a protected level." *United States v. Adair*, 723 F.2d 1394, 1411, 1418 (9th Cir. 1983). No state statute, state court decision, or agency action can change these principles,[1] as only Congress can alter or abrogate Indian treaty rights. *United States v. Dion*, 476 U.S. 734, 738-39 (1986); *Washington v. Wash. Commercial Passenger Fishing Vessel Ass'n*, 443 U.S. 658, 690 (1979). Instead of abrogating these rights, Congress has expressly recognized their continued existence. *See* 68 Stat. 718, 722 (1954) (codified at 25 U.S.C. § 564, now omitted) ("Nothing in this Act shall abrogate any water rights of the tribe" nor "any fishing rights . . . of the tribe . . . enjoyed under Federal treaty.").

Plaintiffs, in the face of overwhelming authority demonstrating that tribes retain independent authority to seek enforcement of their treaty rights and other interests in trust resources,[2] respond only that "[u]nlike tribal interests in land or other non-aquatic resources,

[1] Plaintiffs attach significance to OWRD's denial of the Klamath Tribes' claims in the adjudication, in which the Tribes had incorporated by reference the United States' claims for the same water rights. OWRD, however, denied the separate claims not because they described an invalid right, but because they were "duplicative" of other claims for the same right, which OWRD ultimately recognized in the ACFFOD. Moreover, as described in Interior's Motion, ECF 17 at 20 n.5, OWRD's ruling remains the subject of pending exceptions.

[2] *See* ECF 17 at 18-22 (citing authorities).

tribal water rights are subject to the McCarran Amendment." ECF 19 at 12. This just repeats Plaintiffs' flawed and unsupportable argument that the McCarran Amendment ousted tribes from being able to seek enforcement of their *water* rights, even though tribes retain enforcement authority over all other treaty rights and rights in trust lands and resources. The McCarran Amendment, as previously described, only conferred jurisdiction; state courts must still follow federal law with respect to the determination and enforcement of Indian reserved water rights. *See supra* at 3. Without a valid McCarran Amendment argument, Plaintiffs, therefore, fail to distinguish reserved *water* rights from other reserved tribal rights and trust resources, which Plaintiffs do not dispute include independent tribal enforcement authority. ECF 19 at 11-12.

Plaintiffs also attempt to equate the Tribes' ownership interests under federal law to those of private landowners within irrigation districts established under state law. *See, e.g.*, ECF 19 at 10 (citing *Fort Vannoy Irrigation Dist. v. Water Res. Comm.*, 188 P.3d 277, 295-96 (Or. 2008)). This comparison is misplaced for several reasons. First, the government-to-government and treaty relationship between the United States and the tribes bears no similarity to the relationship between a state-law created irrigation district and a private landowner. Second, Oregon cases like *Fort Vannoy* deal with who is the proper owner of a water right within an irrigation district under state law, where "the issue of ownership of a water right within an irrigation district is a recurring question." 188 P.3d at 282.[3] By contrast, the issue of ownership of Indian reserved water rights is a question of federal law and is already well-settled: while the United States holds these rights in trust, they belong to the tribes. *Shoshone Bannock*, 56 F.3d at 1479.[4]

[3] In addition, *Fort Vannoy* answered this question only in relation to the Oregon statute on water rights transfers, ORS 540.510(1), not under any provision related to enforcement.
[4] For similar reasons, Plaintiffs reliance on *Klamath Irrigation District v. United States*, 227, P.3d 1145, 1167 (Or. 2010), is misplaced. That case involved water rights acquired by the

Finally, Plaintiffs have no answer to the fact that Congress has consistently recognized that tribes retain their rights to enforce their ownership interests in federal reserved water rights where such water rights are held by the United States as trustee for the tribes. *See* ECF 17 at 20-21 (citing congressional statutes for the past ten years, involving nine separate tribes).

II. Plaintiffs lack standing to challenge the enforcement of the Tribes' senior instream flow water rights.

Plaintiffs fail to establish any legally-protected interest to divert or use any water until the Tribes' senior instream flow rights are satisfied. *See, e.g., Baley v. United States*, 134 Fed. Cl. 619, 679 (2017), *aff'd* 942 F.3d 1312 (Fed. Cir. Nov. 14, 2019) ("[P]laintiffs had no entitlement to receive any water until the Tribes['] senior rights were fully satisfied."). But even if Plaintiffs have a legally-cognizable injury, they still lack standing because (1) the Agreement did not cause their injuries, and (2) even if the Agreement were invalidated, that would not change either Plaintiffs' junior priority under the ACFFOD nor enforcement of the Tribes' senior water rights.

Causation. Plaintiffs' characterization of their injury as procedural, ECF 19 at 4-5, does not relieve them of the burden to show causation. *Ctr. for Law & Educ. v. Dep't of Educ.*, 396 F.3d 1152, 1159 (D.C. Cir. 2005). Substantive law—not the Agreement—requires that specified amounts of water remain in the rivers and streams. Plaintiffs' junior position in the priority system is demanded by: (1) the 1864 Treaty; (2) the Ninth Circuit's decision in *Adair*, holding that the Tribes have senior "time immemorial" treaty-based water rights that include the right to prevent subsequent appropriators from depleting the streams below certain protected levels; and (3) the ACFFOD, which assigns specific flow rates, in certain times of the year, necessary to satisfy the Tribes' rights. Moreover, the Tribes own and have independent authority to request

---

United States pursuant to state law (not reserved Indian water rights), and the question was whether—as a matter of state law—irrigation districts have equitable interests in such rights.

enforcement of their water rights, *supra* at 4-7, and Oregon watermasters regulate water users in accordance with the priorities set forth in the ACFFOD. ORS 540.045(a)-(b); Or. Admin. R. 690-250-0100.[5] The Agreement—establishing procedures for how Interior and the Tribes will communicate and coordinate on calls to OWRD—does not cause Plaintiffs' injuries.

Redressability. Plaintiffs have failed to demonstrate that the Tribes' rights would not be enforced absent the Agreement. *See Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560-61 (1992) (Plaintiffs must show that it is likely, as opposed to merely speculative, that their injury will be addressed by a favorable decision). To the contrary, the United States and the Tribes have demonstrated a decades-long effort to jointly protect, quantify, and enforce the Tribes' treaty-guaranteed water rights. And every year since 2013, when the Adjudication formally quantified the Tribes' instream flow rights, the Tribes have requested that its numbers be met, the United States has concurred, and OWRD has regulated junior water users to satisfy the Tribes' rights. There is every indication that these parties would not change course, stop coordinating with each other, or cease making enforcement calls absent the Agreement. ECF 17 at 8-13, 23-29.

Finally, Plaintiffs are simply incorrect that Interior possesses discretion to disregard senior federal reserved tribal rights set forth in enforceable orders, such as the ACFFOD, in favor

[5] Plaintiffs admit, ECF 19 at 7 n.5, that the Tribes can trigger an "investigation" of unlawful water use under Or. Admin. R. 690-250-0100(1). That subsection states that a watermaster "shall **investigate** and respond to all **complaints** of water shortages or unlawful use . . ." (emphasis added). But the parties disagree on the interpretation of subpart (2) of the rule, which states that the "watermaster may begin regulation **if investigation** reveals a **valid complaint** of water shortage or unlawful use" (emphasis added). The most natural interpretation would read subparts (1) and (2) together, recognizing not only that a watermaster "shall investigate" a "complaint" initiated by the Tribes under subpart (1), which Plaintiffs admit must occur, but also that the water master may then regulate if, based on the investigation, that same "complaint" turns out to be "valid." Plaintiffs' interpretation—that the Tribes can make a "complaint" under subpart (1), but can never make a "valid complaint" that leads to regulation under subpart (2)—is illogical. The "validity" is determined merely by reference to specific, quantified stream flow right amounts and whether they are being met in each stream during the relevant month.

of legally-unsupported judgment calls aimed at placating junior water users. *See infra* at 21-25; *see also Pyramid Lake Paiute Tribe of Indians v. Morton*, 354 F. Supp. 252, 257 (D.D.C. 1972) (invalidating Interior regulation that did not comply with water rights decree and deprived tribe of water without legal justification); *Joint Bd. of Control of Flathead, Mission & Jocko Irrigation Dists. v. United States*, 832 F.2d 1127, 1131 (9th Cir. 1987) ("[i]t was error . . . for the district court to hold that water claimed under potentially prior tribal fishing rights must be shared with junior appropriators"). Courts have also consistently rejected the argument, similar to the one Plaintiffs make here, that some sort of equitable balancing should take place when determining priorities or enforcement of federal reserved water rights. *Cappaert v. United States*, 426 U.S. at 138-39 n.4; *Joint Bd. of Control*, 832 F.2d at 1132; *Colville Confederated Tribes v. Walton*, 752 F.2d 397, 405 (9th Cir.1985); *Agua Caliente Band of Cahuilla Indians v. Coachella Valley Water Dist.*, No. 5:13-cv-883, 2016 WL 2621301, at *5 (C.D. Cal. Feb. 23, 2016). Contrary to Plaintiffs' assertion, ECF 19 at 4-5, Interior's actions here represent neither a "risk of policy drift" nor an attempt to avoid "accountab[ility] to elected officials." They instead promote the opposite—implementing the 1864 Treaty and protecting property rights.

Plaintiffs seek to rely on a 1977 Office of Legal Counsel (OLC) memorandum and a 1979 Attorney General letter, ECF 19 at 14, in their defense. Neither stand for the proposition that Interior has authority to disregard rights reserved by the 1864 Treaty in favor of Plaintiffs' junior rights. Plaintiffs' misplaced reliance on these irrelevant documents is addressed at page 21-23, below. Plaintiffs' suggestion that Interior has discretion to deprioritize adjudicated tribal water rights, *id.* (citing *Cobell v. Norton*, 240 F.3d 1081, 1099 (D.C. Cir. 2001)), also rests on misapplication of an early *Cobell* decision. The D.C. Circuit's final *Cobell* opinion makes clear that Interior's discretion is cabined by statute. *Cobell v. Salazar*, 573 F.3d 808, 811 (D.C. Cir.

2009) ("Congress's limited appropriation undercut any 'mandate to indulge in cost-unlimited accounting--in fact, [it] suggest[ed] quite the opposite.'"). Here, Plaintiffs point to no applicable statute that would require Interior to do anything other than enforce the Tribes' senior adjudicated and quantified treaty rights.[6]

Plaintiffs fall far short of establishing that their alleged injuries can be redressed because they propose no basis for Interior to conceivably prioritize Plaintiffs' junior rights over the Tribes' senior, treaty-secured rights. In other words, Plaintiffs fail to establish standing because they do not show that Interior "could reach a different conclusion" that would redress their injuries. *See Ctr. for Biological Diversity v. EPA*, 861 F.3d 174, 185 (D.C. Cir. 2017).

III. The Agreement is not an unlawful delegation of federal authority.

A. Nothing in the Agreement delegates specific federal statutory authority to the Tribes.

A claim for unlawful delegation "is applicable only if an agency actually delegated its power in the first place." *La. Forestry Ass'n Inc. v. Secretary U.S. Dept. of Labor*, 745 F.3d 653, 671 (3d Cir. 2014). "Thus, as a threshold matter, we must determine whether any delegation occurred at all." *Id.* at 671-72.

Here, the Agreement, which provides for coordination between Interior and the Tribes, itself demonstrates that no delegation has occurred. The Agreement (1) expressly recognizes that the Tribes and the United States each have pre-existing and independent authority to request enforcement of the tribal water right; (2) provides for the United States' review of and

[6] While Plaintiffs cite Cohen's Handbook of Federal Indian Law for the general proposition that Interior may face competing interests in carrying out its duties, ECF 19 at 14, the more applicable statement from Cohen's is that "the exercise of tribal water rights has the potential to disrupt non-Indian water uses" but that "[t]he impact on junior state appropriators . . . cannot operate to divest tribes of their federal water rights." COHEN'S AT § 19.03[1].

involvement in the decision-making process for all calls for enforcement; and (3) reserves the United States' authority to object to any call sent by the Tribes to OWRD that is inconsistent with any part of the ACFFOD or that is inconsistent with any of the United States' other legal obligations. 2019 Agreement at ¶ 12 ("Each Party retains its independent right to make a call" and "the United States retains the right not to concur with any call for water that is inconsistent with the ACFFOD or other legal obligations").

As a threshold matter, therefore, the Agreement does not delegate any federal authority either through its plain language or through its operative effect. Plaintiffs, in contrast, assert that the "plain language" of the agreement "waives" the United States' ability to review, modify, or object to calls initiated by the Tribes. *See* Am. Compl. ¶¶ 24, 46, 51; ECF 19 at 7. The words "waive" or "waiver," however, do not appear in the Agreement. Nor can the Agreement be accurately characterized as waiving federal review: the Agreement expressly states that (1) the Bureau of Indian Affairs ("BIA") will review all proposed calls; (2) BIA will provide a written response to each Tribe-initiated call by either agreeing to the call, proposing changes to the call, or disagreeing with the call, and stating the reasons for any disagreement; and (3) the United States retains the right to object to any calls that are inconsistent with the ACFFOD or other legal obligations. 2013 Agreement at ¶¶ 2, 3; 2019 Agreement at ¶¶ 2, 3, 8, 12. The Agreement, rather than waiving rights, constitutes a commitment to review, modify, and respond to Tribe-initiated calls, including the ability to object to calls where necessary.

Also fatal to Plaintiffs' delegation argument is that, as previously described, the Tribes possess ownership interests in their reserved water rights as a matter of federal law and have independent authority to request enforcement. *Supra* at 4-7. The McCarran Amendment does not provide otherwise, nor could any state statute. And Congress has repeatedly made clear that

both the United States and individual tribes have independent enforcement authority over federal reserved water rights held by the United States on their behalf, ECF 17 at 20-21. Plaintiffs' failure to respond to Congress's recognition of this fact is telling.

Plaintiffs raise an additional argument that lacks textual support in the Agreement. They assert that the agreement *must* constitute a delegation because "otherwise the Protocol would be largely pointless." ECF 17 at 11. But again, the Agreement's text disproves the argument. The Agreement describes its purposes as the following: facilitating coordination between the United States and the Tribes in making calls to OWRD for watermaster enforcement of the tribal water rights; and "enabling OWRD to more consistently monitor, observe, and, when necessary, regulate junior water users in response to the standing calls." 2019 Agreement at 1. The Agreement provides for coordination as to how two governments—the United States and the Tribes—will coordinate and review requests for enforcement of federal reserved water rights so that a third government—Oregon—has clarity in enforcing them. Although these governmental purposes do not further Plaintiffs' strawman, that does not render them meaningless.

B. Even if the Agreement delegated to the Tribes some specific federal authority that the Tribes otherwise lack, doing so would not be unlawful.

Plaintiffs' delegation argument fails, even if the Tribes lack enforceable interests in their own water rights and even if the Agreement delegates federal enforcement authority to the Tribes (as Plaintiffs allege). First, explicit statutory authorization is not required for a federal agency to delegate authority conferred by Congress. Second, Plaintiffs admit that Interior retains and exercises oversight for all calls made under the Agreement. Because Interior retains the ability to review, respond to, and modify enforcement calls, and to object to any enforcement calls that are contrary to the ACFFOD or other legal obligations, the Agreement would be proper even if it were interpreted as a delegation of some federal interest.

In arguing that delegation is impermissible, Plaintiffs incorrectly contend, ECF 19 at 16-24, that such delegations require express statutory language. But explicit statutory authorization for a delegation is not required. *Sol Tabor v. Joint Bd. for the Enrollment of Actuaries*, 566 F.2d 705, 708 n.5 (D.C. Cir. 1977) ("In any event, appellants are incorrect in asserting that express statutory authority is necessarily required for delegation by an agency."). And Plaintiffs point to nothing in *U.S. Telecom Ass'n v. FCC*, 359 F.3d 554 (D.C. Cir. 2004), or any decision applying it, that imposes an explicit delegation requirement. Plaintiffs' also attempt to apply "non-delegation" principles, ECF 19 at 19. Those principles may constrain *Congress* from delegating authority without laying down an "intelligible principle," but they do not apply to the situation here, where Plaintiffs allege a delegation from a federal agency to an outside party.

Plaintiffs' delegation claim ultimately fails because delegation to private third parties is lawful where "the discretion granted to these third parties is limited and subject to adequate oversight" by the federal agency. *Fund for Animals v. Kempthorne*, 538 F.3d 124, 132 (2d Cir. 2008). As previously described, the Agreement provides that Interior will review all proposed calls; provide a written response to each proposed call by either agreeing to the call, proposing changes to the call, or disagreeing with the call, providing the reasons for its disagreement; and reserves the United States' right to object to any calls that are inconsistent with the ACFFOD or other legal obligations. 2019 Agreement at ¶¶ 2, 3, 8, 12.

Plaintiffs own Amended Complaint and Opposition belies their argument that the Agreement abdicates federal authority. Plaintiffs admit that the United States has "consulted on," has been "involved with," and has exercised "direct oversight and decision-making responsibility" for all calls made under the Agreement for enforcement of the Tribes' reserved water right. Am. Compl. ¶¶ 33-35. Plaintiffs' Opposition states that "the Protocol itself . . .

acknowledges a substantial role for the Government in whether and to what extent a call should be placed," and that "the Government may suggest changes to the scope of a proposed call" and "may disagree with making the proposed call altogether." ECF 19 at 26, 29.

Even if this case were to involve a delegation, it would still more closely resemble cases that have upheld delegations. For example, in *Fund for Animals v. Kempthorne*, the court upheld Interior's delegation of authority to local governments to permit the killing of birds under certain defined circumstances. The court found that despite the agency's congressionally-imposed obligation to protect double winged cormorants, and in the absence of any express delegation authorization, it could allow local authorities to decide when birds can be killed in order to protect fish being raised in aquaculture operations. 538 F.3d at 124; *see also La. Pub. Serv. Comm'n v. Fed. Energy Regulatory Comm'n*, 860 F.3d 691, 696 (D.C. Cir. 2017) (upholding FERC delegation of authority over electricity rates by deferring to state rates); *Alaska Ctr. for the Env't v. West*, 157 F.3d 680, 686 (9th Cir. 1998) (upholding delegation of authority where U.S. Army Corps of Engineers coordinated with municipality regarding wetland permits).

Plaintiffs' attempt to distinguish *Southern Pacific Transportation Co. v. Watt*, 700 F.2d 550 (9th Cir. 1983), ECF 19 at 22-23, is incorrect. *Watt* upheld Interior's non-statutorily-based precondition of requiring tribal consent prior to granting rights-of-ways on Indian lands, holding that this was "not an abdication of the Secretary's power" and not an unlawful delegation, "but rather an effort by the Secretary to incorporate into the decision-making process the wishes of a body with independent authority over the affected lands." *Id.* at 556. The same is true for the Agreement, where the United States has not abdicated its authority, but rather seeks to coordinate with the Tribes on all calls for enforcement of the Tribes' water right.

Plaintiffs argue that *Watt* is inapposite because it dealt with the delegation of

"disapproval" rather than "approval" authority. ECF 19 at 22-23. But any "approval/disapproval" distinction in a right-of-way case is inapplicable to an undisputed violation of a tribal treaty right and whether the Tribes can request to have their treaty-guaranteed water right fulfilled. For this case, the more important point from *Watt* is that "a tribe has independent authority to regulate the use of its own lands," 700 F.2d at 556, and the Secretary does not unlawfully delegate federal authority when a tribe is afforded the ability to express whether a violation of its treaty-guaranteed rights should be addressed.

Plaintiffs would have this Court ignore this established body of law, citing no decision finding that a similar arrangement constituted a delegation, much less an illegal one. Cases cited by Plaintiffs prove this point. *See Perot v. Fed. Election Comm'n*, 97 F.3d 553, 559-60 (D.C. Cir. 1996) (no unlawful delegation where agency gave private non-profit authority to stage a presidential debate and to decide criteria the organization believed would conform to federal law, rejecting request to require the agency to "take back" the authority it allegedly delegated); *United Black Fund, Inc. v. Hampton*, 352 F. Supp. 898, 904 (D.D.C. 1972) (no delegation where agency did not "surrender all authority," where the private entities exercising delegated power were required to satisfy federal standards, and where the agency retained final review authority).

These cases stand in sharp contrast to those invalidating a delegation as unlawful. For example, in *National Park and Conservation Ass'n v. Stanton*, 54 F. Supp. 2d 7 (D.D.C. 1999), the court held that the National Park Service's delegation to an independent local council of *all* of its federal management authority over a national scenic river was unlawful because (1) NPS "retains no oversight over the Council"; (2) NPS retains "no final reviewing authority over the council's action or inaction"; and (3) the council "does not share NPS' national vision and perspective." *Id.* at 20. None of these factors exist in the present case.

Finally, Plaintiffs fail to identify any specific statutory requirement that the United States has delegated to the Tribes. Plaintiffs cite 43 U.S.C. § 1457, saying that Interior is "charged with the supervision of the public business relating to . . . Indians," and 25 U.S.C. § 2, saying that Interior shall "have the management of all Indian affairs and of all matters arising out of Indian relations." ECF 19 at 19, 21. Plaintiffs do not allege that these authorities have been delegated; but that there is some narrower, unspecified responsibility or obligation Interior has delegated. Plaintiffs' unlawful delegation claim fails because Interior's broad authority for "the management of all Indian affairs," 25 U.S.C. § 2, "bears little resemblance to the far narrower band of discretion afforded to" the Tribes. *Kempthorne*, 538 F.3d at 133.

IV. NEPA does not apply to calls made to enforce the Klamath Tribes' water rights.

A. NEPA does not apply to agency actions enforcing water rights secured by law.

As Interior established, NEPA does not apply to its actions enforcing water rights reserved by the Tribes and secured by the 1864 Treaty. ECF 17 at 35-38. Plaintiffs concede that "the 'enforcement action' exemption applies to federal activities that are intended to ensure compliance with, or to punish violation of, federal law." ECF 19 at 27. The 1864 Treaty is federal law.[7] Treaty with the Klamath, 16 Stat. 707 (1864); *Wash. State Dep't of Licensing v. Cougar Den, Inc.*, 139 S. Ct. 1000, 1013 (2019) ("Treaties with federally recognized Indian tribes . . . constitute federal law that pre-empts conflicting state law as applied to off-reservation activity by Indians."). *See also* U.S. CONST. art. VI (Constitution, federal statutes, and treaties constitute the "supreme Law of the Land"). Interior's actions enforcing water rights reserved by the 1864 Treaty help ensure that the 1864 Treaty obligations are carried out. ECF 17 at 35-38.

[7] Plaintiffs' short parentheticals, ECF 19 at 27, attempting to distinguish five cases cited in Interior's Memorandum, fail to address this central issue.

These actions, therefore, are *exactly* the type of enforcement activities that are exempt from NEPA. The Court's analysis need proceed no further.

Every Court to consider this issue has held that the Tribes' senior water rights defeat junior irrigation rights. *See* ECF 17 at 23-24, 39-40. Plaintiffs' arguments about the Federal Circuit's recent decision in *Baley*, ECF 19 at 25 n.12, highlights Plaintiffs' inability to effectively distinguish this precedent. *Baley* found that "it is well-established that the creation of a tribal reservation carries an implied right to unappropriated water 'to the extent needed to accomplish the purpose of the reservation.'" 942 F.3d at 1335. Moreover "the purposes of the Tribes' reservations were to secure to the Tribes a continuation of their traditional hunting and fishing lifestyle." *Id.* "At the bare minimum, the Tribes' rights entitle them to the government's compliance with the [Endangered Species Act] in order to avoid placing the existence of their important tribal resources in jeopardy. . . . [T]he Tribes had rights to an amount of water that was at least equal to what was needed to satisfy the Bureau of Reclamation's ESA obligations." *Id.* at 1337.[8] Rather than being inapposite, *Baley* continues the courts' rejection of irrigators' efforts to circumvent the 1864 Treaty.

Plaintiffs' assertion that Interior's "calls for the enforcement of the Tribes' water right"

[8] Plaintiffs are incorrect that "[t]he Government does not appear to contest that enforcement of the Tribes' water right significantly affects the environment." ECF 19 at 24. To the contrary, enforcement of the Tribes' water rights is important to efforts to avoid adverse impacts to the health of the treaty-protected fishery. *Baley*, 942 F.3d at 1321-1325. But while enforcement of the Tribes' water right may be necessary to avoid a significant adverse environmental effect, that does not help Plaintiffs here. *Otay Mesa Prop., L.P. v. United States DOI*, 144 F. Supp. 3d 35, 68-69 (D.D.C. 2015) ("'the ESA furthers the goals of NEPA without demanding an EIS. . . . [because b]y designating critical habitats for endangered or threatened species, the Secretary 'is working to preserve the environment and prevent the irretrievable loss of a natural resource.'") (quoting *Douglas Cty. v. Babbitt*, 48 F.3d 1495, 1505-06 (9th Cir. 1994)); *Douglas Cty.*, 48 F.3d at 1506 "when a federal agency takes an action that prevents human interference with the environment, it need not prepare an EIS.").

are not enforcement actions because they "do not constitute corrective or punitive activities," ECF 19 at 28, is both factually and legally meritless. Interior's concurrence with calls enforcing the Tribes' water rights are "enforcement actions" because they are part of the legal process of enforcing those rights. First, Interior's actions enforcing the Tribes' water rights are "corrective" because they are part of a process for correcting existing or threatened violations of the Tribes' treaty-secured water rights.[9] Second, Plaintiffs' suggestion, ECF 19 at 25, 28, that federal demands that third parties comply with the law are not enforcement actions "as would be the case with an administrative or judicial action against individual ranchers" is difficult to comprehend. "Requests" to comply with the law are often a precursor to litigation. Here, the "request" that OWRD enforce adjudicated stream flows required by the 1864 Treaty carries with it the possibility that either Interior or the Tribes will exercise their independent rights to further enforce the 1864 Treaty in court, including actions against individual ranchers. ECF 17 at 23-25. It would turn NEPA on its head if agencies were required to conduct NEPA on preliminary enforcement requests, but not on the ensuing litigation. *See Glenn-Colusa Irrig. Dist.*, 788 F. Supp. at 1135 (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."). Plaintiffs cannot now backtrack on their characterization of the challenged actions as "enforcement." ECF 17 at 36

[9] Plaintiffs appear to concede that government enforcement actions aimed at preventing violations of the ESA are exempted from NEPA as enforcement actions. ECF No. 19 at 27 (citing *Envtl. Prot. Info. Ctr. v. U.S. Fish & Wildlife Serv.*, No. C 04-4647 CRB, 2005 WL 3877605, at *2 (N.D. Cal. Apr. 22, 2005); *United States v. Glenn-Colusa Irrig. Dist.*, 788 F. Supp. 1126, 1135 (E.D. Cal. 1992)). As the Federal Circuit recently made clear: 1) enforcement of the Tribes' water rights substantially overlaps with enforcement of the ESA; and 2) corrects against the threat junior irrigation uses (effectively the same as Plaintiffs here) pose to a treaty-protected tribal fishery. *Baley*, 942 F.3d at 1336-37.

(citing Am. Coml.¶¶ 1, 2, 10, 20, 23, 29-33, 45-46, 51).

Plaintiffs' suggestion that *Sierra Club v. U.S. Army Corps of Engineers*, 803 F.3d 31, 46-47 (D.C. Cir. 2015), ECF 19 at 25, requires NEPA analysis of actions purporting to enforce "an Endangered Species Act incidental take permit" misconstrues the agency action in that case. First, Sierra Club's discussion of site-specific NEPA review (as opposed to analysis of an entire pipeline) offers no support for Plaintiffs because the Court found that the plaintiff did not preserve its claim relating to a site-specific NEPA analysis, giving the D.C. Circuit "no occasion to consider it." 803 F.3d at 44. To the extent that the D.C. Circuit nonetheless considered NEPA's applicability to oil pipeline permitting, *Sierra Club* is readily distinguishable. It addressed site-specific verifications to nationwide permits. The Corps' implementation of an incidental take statement could only conceivably be part of a major federal action requiring environmental review under NEPA because it was made "in connection with pipeline construction and operation across jurisdictional waters." *Id.* at 46 (citing 40 C.F.R. 1508.18(b)(4)). Section 1508.18(b)(4), applies to "[a]pproval of specific projects, such as construction or management activities." In contrast, enforcing the water rights reserved in the 1864 Treaty is the antithesis of a new permitting decision on a specific project. BIA's enforcement of senior rights exercised since time immemorial and effectively reserved in 1864 involves no such similar new project and does not constitute a major federal action.

And contrary to Plaintiffs' suggestion, ECF 19 at 28, there are significant distinctions between Reclamation's operation of the Klamath Project, a federal irrigation project, and Interior's actions in placing a call to enforce water rights secured by the Treaty of 1864. *See* ECF 17 at 5 n.1. The most notable distinction is that whereas the United States owns and Reclamation operates many features of the Klamath Project, BIA's involvement in the calls here

is strictly to enforce the legal rights of the Klamath Tribes secured by Treaty and quantified in the ACFFOD. *Id*. BIA does not own or control an irrigation or other project operated for the benefit of the Klamath Tribes that would give it physical control over the waters in question or otherwise subject it to the requirements of NEPA. BIA's decision to seek enforcement of the Tribes' time immemorial water rights through the Oregon administration process is therefore: 1) not a major federal action subject to NEPA; and 2) the type of enforcement action that is explicitly excluded from NEPA.

Plaintiffs' effort to distinguish *High Country Citizens' Alliance v. Norton*, 448 F. Supp. 2d 1235 (D. Colo. 2006), ECF 19 at 28-29, is unpersuasive. Plaintiffs' quotation to the case omits the Court's pertinent, sharp contrast between permanent relinquishment of federal water rights (which was a major federal action subject to NEPA) and annual calls (which were not). *High Country*, 448 F. Supp. 2d at 1244-45 ("Unlike a decision to place a call on a water right in a given year, relinquishing a water right . . . is permanent."). First, contrary to Plaintiffs' suggestion, ECF 19 at 28-29, they are challenging NEPA-exempted annual calls, ECF 15 at 20-21. Second, Plaintiffs' contention that the Agreement coordinating enforcement of water rights is analogous to a permanent relinquishment of government rights, ECF 19 at 28-29, is flatly wrong. The Agreement neither completely nor permanently cedes any federal right, but instead recognizes the Tribes' sovereign right to enforce their Treaty rights and explicitly provides Interior with flexibility to harmonize the 1864 Treaty with other *statutes*. ECF 17 at 12-13, 24-27, 30-31, 40; 2019 Agreement ¶ 12 (retaining "right not to concur with any call for water that is inconsistent with the ACFFOD or other legal obligations"). And rather than permanently cede the ability to enforce water rights, the Agreement coordinates enforcement of treaty-secured water rights. Such enforcement is exempt from NEPA.

B. Interior lacks discretion in this case to prioritize Plaintiffs' junior water rights over the Tribes' senior, treaty-protected water rights.

Even if NEPA were to apply to enforcement of the Tribes' senior water rights (which it does not), the statute does not compel an agency to analyze the environmental impacts of unreasonable alternatives, such as whether it would be appropriate to prioritize Plaintiffs' junior water rights over the Tribes' senior, treaty-protected rights that have been quantified by the ACFFOD. ECF 17 at 38-40. Plaintiffs' Opposition misconstrues both the Agreement and Department of Justice memoranda. Notably absent from Plaintiffs' Opposition is any statute, regulation, or other legal authority supporting their contention that Interior could prioritize Plaintiffs' junior water rights over the Tribes' senior, treaty-protected water rights. This is fatal to Plaintiffs' NEPA claim.

Interior explicitly retained the "right not to concur with any call for water that is inconsistent with the ACFFOD or other legal obligations." 2019 Agreement at ¶ 12. Plaintiffs' suggestion that this language provides Interior with substantial, unfettered discretion, ECF 19 at 29-30, is without support. Interior did nothing more than confirm that it would follow the law, including the 1864 Treaty. *Klene v. Napolitano*, 697 F.3d 666, 668 (7th Cir. 2012) ("Judges must not order agencies to ignore constitutionally valid statutes."). The Agreement merely confirms that Interior must harmonize statutes or other orders in the Adjudication that might conflict or compete with the 1864 Treaty. ECF 17 at 40. Significantly, Plaintiffs fail to identify any countervailing legal obligation providing Interior with discretion to prioritize Plaintiffs' junior water rights over the Tribes' senior, treaty-secured water rights adjudicated in the ACFFOD.

Plaintiffs' reliance on a letter from Attorney General Bell to Interior Secretary Andrus from the 1970s, ECF 19 at 30, is misplaced. Contrary to Plaintiffs' suggestion, *id.*, the letter

does not suggest that the Government is wholly free in this case to define and "protect the common good of the Republic," at the expense of the Tribes' treaty-protected, quantified rights. The letter instead confirms that statutes cabin possible government actions.

> **[W]e are the President's agents in fulfilling his constitutional duty to take care that the laws be faithfully executed. Where a particular statute, treaty, or Executive Order manifests a purpose to benefit all Indians or a tribe . . . or to protect their property, it is the obligation of the responsible Executive Branch officials to give full effect to that purpose. . . . Where applicable law imposes [fiduciary] standards of care, faithful execution of the law of course requires the Executive to adhere to those standards. Thus, it in no way diminishes the central importance of our respective functions to acknowledge that they find their source in specific statutes, treaties, and Executive Orders . . . When the Attorney General brings an action [in support of a tribe] . . . he vindicates not only the property interests of the tribe . . . as they may appear under law to the United States, but also the important governmental interest in ensuring that rights guaranteed to Indians under . . . treaties are fully effective. . . . Where there are other statutory obligations imposed on the Executive in a particular case aside from those affecting Indians,** faithful execution of the laws require 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 faithfully execute existing law does not preclude him from recommending legislative changes in fulfillment of his constitutional duty** to propose to the Congress measures he believes necessary and expedient. . . . **[Any such measures]** must be framed with the interest of the Nation as a whole in mind.

ECF 20-5 (emphasizing omissions by Plaintiffs in ECF 19 at 14, 30). The letter stands for the unremarkable propositions that: 1) Interior's actions must comply with law; and 2) Interior cannot prioritize water deliveries to Plaintiffs absent a legal basis, which may conceivably be supplied by a legislative change. Contrary to Plaintiffs' suggestion, NEPA does not provide a substantive basis for disregarding the 1864 Treaty. *See Marsh v. Or. Nat. Res. Council*, 490 U.S. 360, 371, 109 S. Ct. 1851, 1858 (1989) ("NEPA does not work by mandating that agencies achieve particular substantive environmental results."). Plaintiffs' failure to identify any law abrogating the Tribes' treaty-protected water right or limiting their exercise is fatal to their

claim.[10] Indeed, rather than conflict with the Tribes' water rights, other statutes reinforce the Tribes' non-consumptive rights. *Baley*, 942 F.3d at 1328 (citing Endangered Species Act).

Contrary to Plaintiffs' suggestion, ECF 19 at 39, the Ninth Circuit did not require Reclamation to conduct NEPA prior to satisfying senior tribal rights. *Klamath Water Users Protective Ass'n v. Patterson*, cannot be read to support Plaintiffs' theory that Interior may prioritize deliveries to junior irrigators over deliveries to the Tribes under the current statutory framework. 204 F.3d 1206, 1214 (9th Cir. 1999) ("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."). Plaintiffs similarly misinterpret *Kandra v. United States*, 145 F. Supp. 2d 1192 (D. Or. 2001). *Kandra's* statement that NEPA was appropriate for long-term planning, *id*. at 1206, should be read as, at most, an acknowledgment that Interior's active management of water in Upper Klamath Lake impacts both Upper Klamath Lake and downstream, thereby implicating other Tribes' rights and endangered species. *Id*. at 1196-1200; *Baley*, 942 F.3d at 1328-33 (Reclamation's active management of Klamath Project requires consideration of multiple interests, including

[10] The 1977 Office of Legal Counsel Memorandum that Plaintiffs' rely upon, ECF 19 at 14, similarly undermines their arguments. It notes that "once Congress exercises its power over Indian affairs, the laws it enacts are little different in their legal significance from" other laws and that Interior "has the same constitutional duty to take care that they are faithfully executed." ECF 19-1 at 5. It affirms that "the statute, treaty, or agreement is the source of" federal duties. *Id.* Interior may be required to balance Indian and non-Indian interests and may adopt positions with which Tribes' disagree when the competing responsibilities arise under various *statutes*. "But the competing interests of the United States in such a case would be imposed by Federal statute." *Id*. at 10. *See also, id*. at 15 ("any conflicts . . . are conflicting responsibilities imposed by statute or treaty on the client"). Indeed, the memo states that in balancing "pertinent reclamation statutes and Indian statutes [and] treaties . . . [i]f [Interior] concludes that the project would in fact result in an unauthorized taking of Indian land, it would be [its] responsibility in faithfully executing the laws to deny construction." *Id*. at 8. It also notes that "an Indian tribe may ordinarily sue in its own name to protect its interests." *Id.* at 2; *see also id.* at 18 n.6.

downstream Tribes).[11] Plaintiffs' failure to identify substantial federal involvement remotely comparable to the Klamath Project renders the fact that Interior conducts NEPA on the Project distinguishable. Regardless, even where Reclamation is actively managing water to address competing interests,[12] enforcing senior tribal rights is exempt from NEPA.

Even if NEPA were to apply here (which it does not), NEPA's rule of reason would not require BIA to examine alternatives to enforcing the 1864 Treaty absent any suggestion that legally-permissible alternatives exist. Plaintiffs suggest no basis for prioritizing Plaintiffs' junior rights above the Tribes' senior rights, rendering such an alternative unreasonable. *Cf. Oceana v. Bureau of Ocean Energy Mgmt.*, 37 F. Supp. 3d 147, 174 (D.D.C. 2014) (BLM not required to consider alternative that would conflict with statutory directive, but can acknowledge "practical reality of . . . statutory scheme" in determining alternatives.); *Badoni v. Higginson*, 455 F. Supp. 641, 649 (D. Utah 1977) ("Preparation at this time of a site-specific EIS on the operation of Glen Canyon Dam would be of no benefit to the plaintiff because there are no reasonable alternatives which would afford plaintiffs the relief they seek."). The 1864 Treaty is law. Water rights secured by that treaty have been reduced to specific stream flow measurements. *See* ECF 17 at 9-12. Plaintiffs identify no law that would permit Interior to prioritize junior irrigators over senior, treaty-confirmed, ACFFOD-quantified water rights

[11] *Kandra* involved an irrigation project with substantial federal involvement rather than a water call, which for the reasons discussed above does not rise to the level of major federal action. Moreover, Plaintiffs dramatically over-read Kandra, which stated in denying a motion for preliminary injunction that "Reclamation . . . has a responsibility to divert the water and resources needed to fulfill the Tribes' rights. As such, Reclamation's 'change in operation' is mandated by law, and the requirements of NEPA do not apply." *Id*. at 1204.

[12] Reclamation's active management of impounded water is a more significant federal action than any agency's enforcement of adjudicated water rights. *See Israel v. Morton*, 549 F.2d 128, 132 (9th Cir. 1977) ("A distinction must be recognized between the nature of nonproject water, such as natural-flow water, and project water, and between the manner in which rights to use of such waters are obtained."); *Kandra*, 145 F. Supp. 2d at 1196.

Plaintiffs are incorrect, ECF No. 19 at 30, that the priority of the Tribes' water rights is a "red herring." It is the heart of this case. Each of the courts to address this issue has reached the conclusion that the Tribes' senior rights prevail because they were secured through the 1864 Treaty. Plaintiffs identify no conceivable countervailing duty vesting BIA with discretion to disregard this precedent and instead prioritize Plaintiffs' junior water rights. BIA is simply not required to undertake a NEPA analysis as part of its efforts to aid in the Tribes' exercise of its superior, quantified, legally-protected water rights.

C. NEPA does not apply because Interior lacks control over the Tribes' independent authority to enforce its own water rights in state proceedings.

NEPA, which only applies to "major federal actions," is inapplicable to Interior's coordination with the Tribes' enforcement of its own water rights because the Tribes retain their sovereign power to enforce their water rights. ECF No. 17 at 41-42. Plaintiffs' single paragraph response to this merely asserts that water rights will not be enforced absent a United States call. ECF No. 19 at 32. Plaintiffs do not address, much less distinguish, *Cascadia Wildlands v. U.S. Department of Agriculture*, 752 F. App'x 457, 459-60 (9th Cir. 2018). Like the Oregon wolf cull in that case, OWRD must enforce water rights regardless of Interior. ECF No. 17 at 42. And if Oregon refuses to comply with its duty to enforce senior water rights, Plaintiffs' NEPA argument fails because the Tribes' retain their sovereign right to defend and enforce water rights. ECF No. 17 at 17-22 (citing authorities). The Tribes' independent ability to enforce the 1864 Treaty is fatal to Plaintiffs' NEPA claim.

CONCLUSION

The Court should reject Plaintiffs' thinly veiled attempt to ignore tribal senior property interests in favor of junior interests. The Court should grant Interior's Motion to Dismiss for the reasons described in the Motion and in this Reply.

Dated: December 13, 2019

Respectfully submitted,

ERIC GRANT
Deputy Assistant Attorney General

/s/ Daron T. Carreiro
DARON T. CARREIRO (DC Bar No. 983088)
MATTHEW MARINELLI (IL Bar No. 6277967)
United States Department of Justice
Environment and Natural Resources Division
P.O. Box 7611
Ben Franklin Station
Washington, D.C. 20044-7611
(202) 305-1117
daron.carreiro@usdoj.gov
matthew.marinelli@usdoj.gov

ATTORNEYS FOR FEDERAL DEFENDANTS