ORAL ARGUMENT REQUESTED
No. 20-5074

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

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

Plaintiffs – Appellants,

v.

DAVID LONGLY BERNHARDT,
Secretary of the Interior, et al.,

Defendants – Appellees.

On Appeal from the United States District Court
for the District of the District of Columbia
Honorable Beryl A. Howell, Chief Judge

APPELLANTS' OPENING BRIEF

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CERTIFICATE AS TO PARTIES, RULINGS, AND RELATED CASES

A. Parties

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

Vincent Hill[1]; and Chet Vogt, as trustee of the C & A Vogt Community Property Trust.

None of the Appellants—who are small, family-run ranching businesses—has any parent company, and no publicly held company has a 10% or greater ownership interest in any Appellant.

The following parties appeared as defendants in their official capacities before the district court and are Appellees here: David L. Bernhardt, Secretary of the Interior; Tara Katuk Mac Lean Sweeney, Assistant Secretary-Indian Affairs; Darryl LaCounte, Director of the U.S. Bureau of Indian Affairs; and Bryan Mercier, Regional Director of the U.S. Bureau of Indian Affairs.

B. Rulings Under Review

The rulings under review are the Order and Memorandum Opinion in *Hawkins v. Bernhardt*, U.S.D.C., D.D.C. No. 19-cv-1498 (ECF Doc. Nos. 24 & 25), entered by the district court, Chief Judge Beryl A. Howell presiding, on January 31, 2020, granting defendants' motion to dismiss for lack of standing under Federal Rule of Civil Procedure 12(b)(1). These

[1] Plaintiff Vincent Hill died while the action was pending in the district court. Appellants' counsel intend soon to submit a motion to dismiss the late Mr. Hill from this appeal.

are reproduced at App. 100, 121. The district court's opinion is published at 436 F. Supp. 3d 241 (D.D.C. 2020).

C. Related Cases

There are no related cases.

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* Authorities upon which Appellants chiefly rely are marked with an asterisk.

GLOSSARY

Ranchers:	Appellants Gerald H. Hawkins, *et al.*
Government:	Appellees David L. Bernhardt, *et al.*
Tribes:	Klamath Indian Tribes
Department:	Oregon Water Resources Department
NEPA:	National Environmental Policy Act

STATEMENT OF JURISDICTION

The action filed below challenges a Protocol Agreement entered into between the United States and the Klamath Indian Tribes governing the administration of the Tribes' instream water rights, which the federal government holds in trust for the Tribes' benefit. The district court dismissed the action on the ground that Appellants lack standing to challenge the Protocol. As set forth below, the district court erred; Appellants do have standing. *See infra* at 24-36.

Setting aside the issue of standing, the district court had subject matter jurisdiction over the action pursuant to 28 U.S.C. §§ 1331 (federal question jurisdiction), 2201 (declaratory relief), and 2202 (injunctive relief), and 5 U.S.C. § 702 (judicial review under the Administrative Procedure Act).

The district court's final order dismissing the action was entered on January 31, 2020. App. 121. Appellants filed their timely notice of appeal on March 18, 2020. App. 006. This Court has jurisdiction pursuant to 28 U.S.C. § 1291.

STATUTES AND REGULATIONS

The pertinent provisions of (i) the United States Code delegating authority to the Secretary of the Interior and his subordinates to manage Indian affairs, (ii) the National Environmental Policy Act and its implementing regulations, and (iii) the McCarran Amendment, are set forth in the Addendum attached to this brief.

STATEMENT OF THE ISSUES

Three issues are presented for review.

(1) Whether Plaintiffs have standing to challenge the Protocol Agreement, including whether Plaintiffs' injuries are fairly traceable to the Protocol Agreement's delegation of authority to the Klamath Indian Tribes to administer water rights held in trust by the United States.

(2) Whether the Amended Complaint states a claim for unlawful delegation of federal agency authority.

(3) Whether the Amended Complaint states a claim for violation of procedural requirements under the National Environmental Policy Act (NEPA).

STATEMENT OF THE CASE

Appellants Gerald H. Hawkins, *et al.* (Ranchers), are landowners who raise livestock in southern Oregon's Upper Klamath Basin. Supporting an impressive variety of plants and wildlife, their ranches lie within the watersheds of several tributaries to Upper Klamath Lake, a major source of the Klamath River. The Upper Klamath Basin encompasses nearly 200,000 acres of what, traditionally, has been very productive irrigated pasture. But since 2013 agriculture has sharply declined, the growing desuetude a result of massive irrigation cut-offs imposed to satisfy certain instream water rights that Appellees David L. Bernhardt, *et al.* (the Government), hold in trust for the Klamath Indian Tribes. App. 011-14, ¶¶ 3-8, 016, ¶ 14.

The Tribes have resided in the Klamath Basin for over a millennium. *United States v. Adair*, 723 F.2d 1394, 1397 (9th Cir. 1983). In an 1864 Treaty with the Government, 16 Stat. 707 (Oct. 14, 1864), the Tribes relinquished their rights to their original homeland in exchange for a reservation of 800,000 acres in southern Oregon. *Adair*, 723 F.2d at 1397-98. Nearly a century later, Congress passed the Klamath Termination Act, Pub. L. No. 587, 68 Stat. 718 (Aug. 13, 1954), pursuant

to which some of these reservation lands were sold—a good portion becoming part of the National Forest System—and the remainder put into a private land management trust.[2] *Kimball v. Callahan*, 493 F.2d 564, 567 (9th Cir. 1974).

Not long after the reservation's windup, the Government brought an action in federal district court in Oregon for a declaration of the water rights attached to lands within a portion of the former reservation. *Adair*, 723 F.2d at 1397. Named as defendants were the six hundred or so private citizens who owned that land in the Upper Williamson River drainage, as well as the state of Oregon; the Tribes intervened as plaintiffs.[3] *Id.*

Ultimately, the Ninth Circuit held that, "at the time the Klamath Reservation was established, the Government and the Tribe[s] intended to reserve a quantity of the water flowing through the reservation . . . for

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

[3] Neither the Ranchers nor their predecessors in interest were parties to *Adair*.

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

1414—such that their exercise trumps all other waters rights in the Upper Klamath Basin, including those held by the Ranchers.[4]

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

In 2013, the state adjudication came to its administrative conclusion with the Department's issuance of an order of determination (subsequently amended in 2014). App. 103. Among other things, the order of determination awards the Government, as trustee for the Tribes,

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

substantial instream water rights in the same tributaries in which the Ranchers possess their own water rights. App. 018, ¶ 20. The order quantifies the Tribes' instream rights at such high levels that, when fully implemented, little to no water is left for the Ranchers or other irrigators in the Upper Klamath Basin. *Id.*

In jurisdictions like Oregon that follow the law of prior appropriation, *supra* n.4, when there is insufficient water for all users, a senior appropriator places a "call" with the pertinent water master to secure his or her senior entitlement. App. 104 (citing Or. Rev. Stat. § 540.045(1)(a)-(b)). *See generally* David H. Getches, *Water Law in a Nutshell* 103 (3d ed. 1997) ("A senior appropriator seeking to enforce rights as against a junior 'calls the river.' It is usually the job of the state engineer or some other official to ensure that appropriators do not take water out of priority."). To govern how such calls should be made for the Tribes' then recently quantified instream rights, the Tribes and the Government in 2013 entered into a Protocol Agreement. App. 030-33. As amended in 2019, App. 034-38, the Protocol authorizes the Tribes to place calls with the Department for the implementation of the Tribes' instream water rights, after providing the Government with notice of their intent

to call. App. 034-35. Within three or seven business days of receiving such notice,[5] the Government must provide an email response to the Tribes stating whether the Government agrees with the proposed call, and any suggested changes thereto. App. 036. Thereafter, the Protocol authorizes the Tribes, after having allowed two further business days for discussion with the Regional Director of the Bureau of Indian Affairs, to proceed with placing the call, even if the Government believes the call to be ill-advised, excessive, or otherwise unnecessary to support the Tribes' hunting and fishing interests under the Klamath Treaty. *See* App. 037 ("[E]ither Party may independently make a call and the other party will not withhold any required concurrence or object to the call . . . .").

Every year since the Protocol went into effect, the Tribes have placed calls for the implementation (and, since 2017, the full implementation) of their instream water rights, and every year the Government, pursuant to the Protocol, has provided its consent. App. 020-22, ¶¶ 25, 29, 30, 32.

[5] The amount of notice depends on the type of call. A "standing" call, *i.e.*, for the entire season, requires a seven-day notice, whereas ad hoc calls within a season require only a three-day notice. App. 035.

Fearing imminent ruin of their livelihoods and communities, the Ranchers brought this action in the D.C. District Court to challenge the Protocol Agreement. The Ranchers' amended complaint[6] advances two claims against the Protocol. First, the Protocol violates the doctrine of unlawful delegation because it delegates to the Tribes final decision-making authority over when and to what extent a call should be made for the Tribes' instream water rights, to which the Government holds legal title. App. 025-26, ¶¶ 44-46. Second, the Protocol violates the National Environmental Policy Act (NEPA), 42 U.S.C. §§ 4321-4370m-12, because it and calls made thereunder have significant effects on the human environment, yet the Government has conducted no analysis of such actual or anticipated effects. App. 027-28, ¶¶ 51-53.

The Government responded to the amended complaint by moving to dismiss the Ranchers' action for want of standing and for failure to state a claim. The district court granted the motion on the former ground, concluding that the Ranchers' injuries are not fairly traceable to the Protocol, nor would they be redressed by the Protocol's invalidation. Key

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

to the district court's decision was its view that, "[w]ith or without the Protocol Agreements, the Tribes thus remain entitled to seek enforcement of their water rights."[7] App. 114.

SUMMARY OF THE ARGUMENT

Whether the Ranchers have standing to challenge the Protocol depends essentially on this question: can the Tribes place a call for the implementation of their water rights without the consent of the Government? Contrary to the district court's conclusion, the answer is no. As a matter of federal law under the McCarran Amendment, 43 U.S.C. § 666(a), the Government and the Tribes must abide by Oregon's rules for the administration of water rights. *See 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); *Adair*, 723 F.2d at 1403 n.7. According to those rules, a senior appropriator must place a call with the water master to enforce seniority, App. 104 (Mem. Op.); and when a senior right is held in trust, the legal owner of the right must consent to the call, *Fort Vannoy Irrig. Dist. v. Water Resources*

[7] The district court did, however, grant the Ranchers' request for judicial notice of several documents, which are included at App. 063-99. *See* App. 006 (ECF Doc. No. 23).

Comm'n, 188 P.3d 277, 295-96 (Or. 2008). The Protocol purports to delegate the Government's call-making authority to the Tribes. App. 032, ¶ 7; App. 034, ¶ 1, 037, ¶ 12. Thus, but for the Protocol, the Tribes would not be able on their own to secure the state administrative implementation of their water rights, which the Government holds in trust. The economic, environmental, and recreational injuries that the Ranchers have suffered because of water cut-offs imposed to satisfy the Tribes' instream water rights are therefore fairly traceable to the Protocol's delegation of call-making authority. These injuries could in turn be redressed by invalidation of the Protocol, which would restore to the Government its call-making authority, informed by compliance with the Government's environmental review duties.

Because the Government's alternative basis for dismissal—that the amended complaint fails to a state a claim for relief under the doctrine of unlawful delegation or under NEPA—was fully briefed below and does not require further factual development or other action peculiarly appropriate to the district court, and given the irreparable harm that the Ranchers would suffer by delayed adjudication, the Court should exercise its discretion to address the sufficiency of the Ranchers' pleading. *See*

Liberty Prop. Trust v. Republic Props. Corp., 577 F.3d 335, 341-42 (D.C. Cir. 2009).

To that point, the amended complaint states valid claims for relief.

Under the doctrine of unlawful delegation, federal agencies may not delegate final decision-making authority to outside entities—private or sovereign—absent, at the very least, congressional authorization. *U.S. Telecom Ass'n v. F.C.C.*, 359 F.3d 554, 566 (D.C. Cir. 2004). The Protocol, however, does just that: it delegates to the Tribes the power to place calls for the state administrative implementation of water rights the legal title to which rests with the Government. App. 032; App. 034, 037. No statutory or constitutional provision authorizes such an extra-governmental delegation.

Under NEPA, the Government may not take any major action affecting the human environment without first analyzing its environmental impacts. 42 U.S.C. § 4332(C). Implementation of the Tribes' instream water rights significantly affects the environment. App. 023-24, ¶¶ 36, 39-40. Yet no exception shields the Protocol from environmental analysis. The call-making process is an administrative procedure having nothing to do with NEPA-exempt enforcement actions,

but its invocation is something over which the Government exercises substantial discretion.

ARGUMENT[8]

I. The Tribes Cannot Obtain State Administrative Implementation of Their Water Rights Absent the Government's Concurrence

A. Federal reserved water rights, such as the Tribes', are subject to state rules of administration

Under the McCarran Amendment, 43 U.S.C. § 666(a), federal reserved water rights like the Tribes' instream rights are subject to state rules of quantification and administration. *Colo. River*, 424 U.S. at 809-10; *San Carlos Apache Tribe*, 463 U.S. at 590-70. To be sure, the Amendment does not change "the *substantive law* by which Indian rights in state water adjudications must be judged." App. 118 (quoting *San Carlos Apache Tribe*, 463 U.S. at 571) (emphasis added). But it does subject the *administration* of those rights to state rules. *See Adair*, 723 F.2d at 1403 n.7 (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,"

[8] The district court's jurisdictional dismissal is reviewed de novo. *Food & Water Watch, Inc. v. Vilsack*, 808 F.3d 905, 913 (D.C. Cir. 2015).

thereby "harmoniz[ing] the concurrent federal and state jurisdiction mandated by the McCarran Amendment."); *id.* at 1411 n.19 (rejecting the contention that "the Tribes' rights are unaffected by state law" and emphasizing that they are 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); John D. Leshy, *The Interaction of U.S. Public Lands, Water, and State Sovereignty in the West: A Reassessment and Celebration*, 41 Pub. Land & Resources L. Rev. 1, 20 (2019) ("The [McCarran] Amendment . . . expressed a general preference for state court adjudication and administration of all water rights [which] has given states some control, if they choose to exercise it, over water rights connected with public lands and Indian reservations.").

B. In Oregon, administrative implementation of water rights must be preceded by a "call" for senior water

Under Oregon law, water rights are not self-executing. *See, e.g.*, *Benz v. Water Resources Comm'n*, 764 P.2d 594, 599 (Or. Ct. App. 1988) ("[A] party who has a prior right to a certain quantity of water from a watercourse is entitled to the water only to the extent needed for the use

to which it has been appropriated; when not needed or used for that purpose, the next person in priority is entitled to it. [The] right of prior appropriation . . . is not total and absolute.") (citation omitted). Rather, as the Protocol itself recognizes, App. 030-31, 034-35, a call for senior water must be made. App. 104 (Mem. Op.). *See generally* 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 shortage . . . .").

C. In Oregon, administrative implementation of water rights that, like the Tribes', are held in trust, must be consented to by the rights' legal owner

The Tribes' instream water rights are held in trust by the Government for the Tribes' benefit. App. 113 (Mem. Op.) ("The United States holds legal title 'only as trustee.'") (quoting *Shoshone Bannock Tribes*, 56 F.3d at 1479); App. 068 (Department's Corrected Order of Partial Determination) ("The United States holds the rights recognized herein in trust for the Klamath Tribes"); App. 030 (Protocol) ("[C]ertain water rights of the Tribes and of the [Bureau of Indian Affairs] as trustee for the benefit of the Tribes . . . were confirmed and upheld in [the] Final

Order of Determination . . . ."). Thus, the Tribes' interest in those rights is equitable, not legal.

As the Oregon Supreme Court has taught in an analogous context, a call for the implementation of water rights that are held in trust must be approved by the holder of legal title. *See Fort Vannoy Irrig. Dist*, 188 P.3d at 295-96 (given that "'[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)). To be sure, the Oregon high court's ruling in *Fort Vannoy* does not expressly speak to "Indian law and tribal water rights, for which the substantive basis is *federal* law, not state law." App. 118 (Mem. Op.). But the decision does make clear that, once it is established (by whatever manner) that a water right *is* held in trust, then Oregon's common law supplies a special rule for how that right can be implemented. *See Klamath Irrig. Dist. v. United States*, 227 P.3d 1145,

1161 n.18 (Or. 2010) (explaining how *Fort Vannoy* "look[ed] to common law to determine the effect of the trust relationship" created by a state statute governing irrigation districts). This is a rule of "administration," 43 U.S.C. § 666(a), which the McCarran Amendment in turn federalizes.[9]

In addition to *Fort Vannoy*, the necessity of concurrence by the holder of legal title is reflected in the Oregon procedures for stream adjudications like the ongoing Klamath Basin Adjudication. At the conclusion of such an adjudication, the 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 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

[9] In contrast, the volume and scope of the Tribes' water rights are issues generally not subject to state substantive law. *See Baley v. United States*, 942 F.3d 1312, 1340 (Fed. Cir. 2019).

interest in a water right does not receive a certificated right." *Klamath Irrig. Dist.*, 227 P.3d at 1167. The reasonable inference to be drawn from this administrative process is that implementation of water rights is keyed to material set forth in the water right certificate, and thus in the case of the Tribes' equitable water right, such implementation depends at least in part on the Government's say. That conclusion follows even though the Tribes derive their rights ultimately from a treaty rather than from typical appropriation. *Cf.* App. 119 (Mem. Op.). For in either instance the issue is the same—namely, whether "a claim for water" under Oregon's water code has been made. *See Klamath Irrig. Dist.*, 227 P.3d at 1167. And as even the district court recognized, the Tribes' water rights are "physically enforced by" the Department, App. 118, which of course adheres to state law for the administration of such claims.

Despite that acknowledgement, the district court concluded that the Tribes may obtain state administrative implementation of their instream water rights even in the face of Government opposition. App. 114. But neither the district court nor the Government could adduce any authority for the proposition that the Tribes may enforce an equitable

interest *in a water right* independent of the Government and state law.[10] Unlike tribal interests in land or other non-aquatic resources, tribal water rights are subject to the McCarran Amendment. *Cf. San Carlos Apache*, 463 U.S. at 571 ("[W]ater 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."). And as noted above, the 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 owner of . . . water rights[.]" 43 U.S.C. § 666(a). If the district court's conclusion were correct, then the trust relationship which governs the Tribes' water rights would be meaningless; it is rather precisely because the Government retains significant control over the Tribes' instream rights that the trust metaphor is apt. *See generally United States v.*

[10] The district court repeatedly cited *Shoshone Bannock*, but that decision does not deem the Government or state procedure to be irrelevant. There, this Court held that the plaintiff tribe could not force the Attorney General to file claims for water on the tribe's behalf in a general stream adjudication in Idaho state court. *Shoshone Bannock Tribes*, 56 F.3d at 1484. Nevertheless, the tribe was free to pursue its claims on its own in the state adjudication. *See id.* at 1480. The decision is therefore consistent with the Ranchers' position that the Tribes' water rights are subject to state procedures.

Mitchell, 463 U.S. 206, 225 (1983) ("[A] fiduciary relationship necessarily arises when the Government assumes such elaborate control over . . . [the] property belonging to Indians.").

Further support for the proposition that the Tribes' rights are governed by Oregon rules for water rights administration can be found in electronic communications between the Tribes and Department staff. For example, in November 2017 the Tribes placed a call with the Department's Upper Klamath Basin water master. The Tribes' request stated that the Government concurred in the call but the request apparently did not provide evidence of the concurrence. The water master forwarded the call request to the Department's Field Services Administrator, who promptly responded: "we need to await concurrence from [the Bureau of Indian Affairs] on this." App. 064. Similarly, when the Tribes placed a call the following spring, the water master again inquired with her superiors about the proper procedure, noting that, "[d]uring the previous winter call, the [Bureau of Indian Affairs] provided a separate concurrence through an email" and asking whether to expect the same course to be followed again. App. 063. That these agency communications should substantiate the Ranchers' contention that the

Government's concurrence is necessary should come as no surprise. After all, if the Government's concurrence truly were unnecessary, then the Tribes would have little reason to enter into the Protocol in the first place. *Cf.* App. 037 (the Protocol provides that, in certain circumstances, a "party will not withhold any *required concurrence* or object to the call") (emphasis added).

In fact, the Department expressly rejected the Tribes' attempt to secure legal title in their own name to a water right. *See* App. 068 (Corrected Partial Order of Determination, Claims 625-640, Klamath Basin General Stream Adjudication (Feb. 28, 2014)) ("Both the United States and the Klamath Tribes filed claims . . . . 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. *Colorado River Water Conservation Dist. v. United States*, 424 U.S. 800, 810 (1976). As a result, Claim 612 is denied."). The district court thought otherwise, construing the Department's administrative decision as "merely disregard[ing] a set of duplicative claims." App. 120. But that interpretation is belied by the decision's citation of *Colorado River*, which addressed "whether the McCarran Amendment provided consent to

determine federal reserved rights *held on behalf of Indians* [*i.e.*, in trust,] in state court." *Colo. River*, 424 U.S. at 809 (emphasis added). It is belied as well by the appeals taken from the decision by the Tribes and the Government. *See* Addendum of Klamath Basin Adjudication Briefing at 5 (Tribes' motion for legal ruling) ("[The Department] erred in failing to explicitly state that the Tribes also hold an ownership interest in these same water rights . . . . [and] in denying the Tribes' separate claims for the Tribal water rights . . . ."); *id.* at 74 (Government's joinder in Tribes' motion); *id.* at 95 (attachment to Tribes' reply) ("The United States holds the rights recognized herein in trust for the Klamath Tribes and the Tribes hold ownership interests in those same rights based on the Treaty of 1864 and federal law applicable to reserved Indian water rights.") (underlining reflecting the Tribes' proposed changes to the Department's administrative decision).[11] And it is belied by the Protocol, which

[11] The Ranchers respectfully request that the Court take judicial notice of the existence of the briefs in the Addendum—which were filed in Oregon state court after briefing was completed below—and of the fact that they reflect the Tribes' and the Government's interpretation of the Klamath Basin Adjudication. *See Fletcher v. Evening Star Newspaper Co.*, 133 F.2d 395, 395 (D.C. Cir. 1942) ("[I]t is settled law that the court may take judicial notice of other cases including the same subject matter or questions of a related nature between the same parties."). *Cf. Straw v. Supreme Court of the U.S.*, 731 Fed. App'x 7, 7-8 (D.C. Cir. 2018) (per

expressly provides that it may be modified to accommodate "any change in ownership of the Tribal water rights designated in the final court decree." App. 037.

Finally, if the question of whether the consent of the Government is necessary for the Department to implement a call is one of fact, the fair inference from the amended complaint is that concurrence is necessary for all Tribal calls. *See, e.g.*, App. 019, ¶ 23 ("In the absence of such calls, [the Department] would not prohibit junior water users from exercising their water rights."); App. 024, ¶ 40 ("Absent an injunction, defendants will continue to implement the Protocol Agreement and allow calls to be made thereunder . . . ."). That inference must be accepted as true here. *See Lujan v. Defenders of Wildlife*, 504 U.S. 555, 561 (1992) ("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

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curiam) ("No motion is required for the court to take judicial notice of official court records . . . .") (citing *Veg-Mix, Inc. v. U.S. Dep't of Agric.*, 832 F.2d 601, 607 (D.C. Cir. 1987)); *In the Matter of Lisse*, 905 F.3d 495, 497 (7th Cir. 2018) (same).

to support the claim.'") (quoting *Lujan v. National Wildlife Fed'n*, 497 U.S. 871, 889 (1990)).[12]

II. The Ranchers Have Standing to Challenge the Protocol and Calls Made Thereunder for Implementation of the Tribes' Water Rights

To have standing to sue in federal court, a plaintiff must allege and prove the existence of an injury-in-fact that is fairly traceable to the challenged action and that is subject to judicial redress. *Spokeo, Inc. v. Robins*, 136 S. Ct. 1540, 1547 (2016).

The Ranchers allege economic, aesthetic, and other substantive injuries. App. 023, ¶¶ 36-37. Below, neither the Government nor the district court disputed the existence or concreteness of these harms. *See* App. 108-09. The district court, however, held that the Ranchers cannot establish traceability or redressability. App. 110. That holding is a product of the district court's misunderstanding of the nature of the trust relationship between the Tribes and Government. This

[12] Should the Court conclude that the issue is one of state law for which the answer is not clear, the Ranchers would then respectfully request that the Court certify the question to the Oregon Supreme Court. In cases dealing with related issues, that court has been willing to provide guidance. *See, e.g.*, *Klamath Irrig. Dist. v. United States*, 202 P.3d 159 (Or. 2009) (accepting certified questions from the Federal Circuit concerning Oregon water law).

misunderstanding reverberates throughout the district court's opinion. For example, the decision characterizes the alleged harms as "stem[ming] from the government's regulation of an independent third party." App. 109. It therefore concludes that causation and redressability of the harm "depend[] on the behavior" of the Tribes. App. 114.

To the contrary, the Ranchers' injuries are traceable to the Government. Its concurrence as holder of the legal title to the Tribes' water rights is necessary for the state administrative implementation of those rights, which implementation leads directly to the water cut-offs that cause the Ranchers' substantive harms. *See supra* Argument Part I.C. The Protocol's judicial invalidation would therefore provide some redress for the Ranchers' injuries because it would restore final call-making authority to the Government. That in turn would allow the Government to exercise its own discretion over when and how a call should be placed, a discretion appropriately informed by the Protocol's and proposed calls' environmental impacts analyzed under NEPA.

A. The Ranchers' injuries are fairly traceable to the Protocol

When government wrongdoing is procedural in nature, fair traceability is established by demonstrating two links: between the

procedural error and a resulting substantive decision, and between the substantive decision and the injury. *Ctr. for Biological Diversity v. EPA*, 861 F.3d 174, 184 (D.C. Cir. 2017). The first link—between the procedural error and the substantive decision—does not require "but-for" causation. *WildEarth Guardians v. Jewell*, 738 F.3d 298, 306 (D.C. Cir. 2013). Instead, "[a]ll 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)).

The Ranchers' economic, environmental, and other injuries stem from two procedural violations committed in the Protocol: the unlawful delegation of federal power to an outside party, and the failure to analyze environmental impacts under NEPA.

1. The Ranchers allege the violation of procedural requirements that are designed to protect their economic and environmental interests

The doctrine of unlawful delegation ensures that government decision-making will be taken by politically accountable officials duty-bound to pursue the common good, not by non-governmental parties who have no such obligation. *See U.S. Telecom Ass'n*, 359 F.3d at 565-66. *See*

also 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 extra-governmental delegations 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"). *Cf.* Briefing Addendum at 73 n.1 (Government's joinder in Tribes' motion) (acknowledging that the Government "appears in this Adjudication as a single party with numerous broad public interests to protect in the Klamath River Basin").

For its part, NEPA imposes procedural duties to ensure that the environmental effects of major federal action will be analyzed prior to its 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. at 886 (recreational use and aesthetic enjoyment are concrete interests protected by NEPA). Thus, these interests can satisfy the requirements for procedural-injury standing. *See Fla. Audubon Soc'y v. Bentsen*, 94 F.3d 658, 664 (D.C. Cir. 1996) ("[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*, 504 U.S. at 573 n.8).

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

The district court dismissed the Ranchers' action because it concluded that the Ranchers' substantive injuries have nothing to do with the Protocol and are instead ultimately the result of the Klamath Treaty. App. 113. That is incorrect. The Ranchers' substantive injuries are fairly traceable to the Protocol because (i) the Protocol delegates to the Tribes final authority to make calls, (ii) the Protocol's delegation is connected to calls that have been implemented, and (iii) it is substantially

probable that implemented calls produce the Ranchers' concrete injuries.[13] *Cf. WildEarth Guardians*, 738 F.3d at 306.

The Protocol delegates to the Tribes the final authority to direct the Department to implement 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 rights as well as waives in most instances the Government's right to object to a Tribal call. *See* App. 030 (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"); App. 032, ¶ 7 (agreeing that "either Party may independently make a call and the other will not object to the call"). *Accord* App. 034, 037, ¶ 12.

Indeed, the Protocol plainly anticipates that the Government may at times disagree with the Tribes' decision to make a call. App. 032, ¶ 3, (when presented with Tribal notice of intent to make a call, the Government may propose changes to the call's scope or disagree with

[13] As noted above, the district court did not question the existence of a causal relationship between implemented calls and the Ranchers' substantive injuries. *See* App. 108-09. *Cf.* App. 023, ¶¶ 36-37 (alleging how the irrigation curtailments caused by the implementation of calls result in economic, aesthetic, and recreational injuries to the Ranchers).

placing the call altogether); App. 036, ¶ 8 (same). Without the unlawful delegation, such disagreement could result in the Government's refusal to concur in a Tribal call. Similarly, an environmental impact statement under NEPA could persuade the Government that it should object to a particular call to avoid or minimize environmental and related harm. Yet the Protocol, by delegating final decision-making authority to the Tribes, precludes the Government from acting on any such considerations.

In summary—the delegation of final decision-making authority and the failure to perform the required NEPA analysis are connected to the Government's promise, formalized in the Protocol, to concur in Tribal calls. Such concurrence is a cause of the Ranchers' concrete harms because it is a necessary prerequisite to the calls' implementation, *supra* Argument Part I.C., which is the immediate cause of the water cut-offs. The Ranchers have thus established both causal links tying their substantive injuries to the Government's procedural errors.

B. The Ranchers' injuries can 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. v. Dep't of Educ.*, 396 F.3d 1152, 1157 (D.C. Cir. 2005). 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 Parks 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. 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," App. 034, time intended to facilitate "changes to the scope of the proposed call," App. 036, ¶ 8. *Cf.* App. 037, ¶ 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."). 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.

Restoring final call-making authority to the Government would also enable it to resume its responsibility to ensure that the common good—of Indians and all other citizens alike—is served through the Government's execution of its trust duties. *See* App. 066 (Letter of Griffin B. Bell, Atty. Gen., to Cecil D. Andrus, Sec. of Int., 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."); App. 049 (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).

Below, the Government vigorously argued (and the district court impliedly accepted) that it has no discretion to advance agricultural and environmental interests in the Upper Klamath Basin at the expense of the Klamath Treaty and the instream water rights that have been recognized thereunder. But that contention cannot be squared with the Executive Branch's inherent constitutional authority to unilaterally abrogate treaties. *See, e.g.*, Curtis A. Bradley, *Exiting Congressional-Executive Agreements*, 67 Duke L.J. 1615, 1625 (2018) (concluding that "it is generally accepted—although not entirely settled—that the president has the unilateral authority to act for the United States in withdrawing the country from a treaty," an authority stemming "in part

from the president's power over diplomacy and role as head of state, as well as from longstanding historical practice"). It also cannot be reconciled with the Ninth Circuit's decision in *Adair*, which held that one of the "essential purpose[s] in setting aside the Klamath Reservation, recognizing by both the Tribe and the Government, was to encourage Indians to take up farming." *Adair*, 723 F.2d at 1410. And it finds no support in the Klamath Termination Act, which merely disclaimed any effect on such treaty rights.[14] *See* § 14(a)-(b), 68 Stat. at 722 ("Nothing in this Act shall abrogate any water rights [or] any fishing rights or privileges of the tribe or the members thereof enjoyed under Federal treaty"). But even if the Government were correct that it is a mere ministerial functionary under the Klamath Treaty, questions about how best to vindicate the rights recognized thereunder can be—and would be,

[14] Indeed, the Government's position is in some tension with the General Allotment Act, 24 Stat. 388 (Feb. 8, 1887), which authorized the Secretary of the Interior to convert reservation lands into individually owned parcels, *id.* §§ 1-3, and which, to this day, empowers the Secretary, "in cases where the use of water for irrigation is necessary to render the lands within any Indian reservation available for agricultural purposes, . . . to prescribe such rules and regulations . . . to secure a just and equal distribution thereof," 25 U.S.C. § 381. Pursuant to the Act, about one fourth of the Tribes' reservation was converted to individual ownership. *Adair*, 723 F.3d at 1398.

with the Protocol's invalidation—decided by the Government not the Tribes.[15]

To be sure, the Tribes could sue the Government or the Department in the face of an unheeded call. Indeed, 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, supports the proposition that implementation of those rights is at least in part dependent on federal cooperation. If, however, the mere possibility that government action may 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 in fewer calls, or moderations of calls.

[15] For example, the amount of water needed at any given time of the year to sustain the Klamath Basin fisheries—the protection of which is the governing criterion for the quantification of the Tribes' water rights—is a question the resolution of which presupposes the validity and seniority of the Tribes' instream rights but that nevertheless leaves significant room for scientific and technical judgment.

That would increase the availability of irrigation water, thereby directly remedying the Ranchers' concrete economic and aesthetic injuries.[16]

III. The Court Should Exercise Its Discretion to Determine Whether the Ranchers' Amended Complaint States Valid Claims for Relief

Below, the Government moved to dismiss the Ranchers' complaint for lack of standing and for failure to state a claim. Because the district court concluded that the Ranchers lack standing, it did not address the Government's other, fully-briefed, objections to the sufficiency of the Ranchers' pleading. App. 101 n.2. This Court has discretion to consider questions of law that were not ruled on below, *District of Columbia v. Air Florida, Inc.*, 750 F.2d 1077, 1085 (D.C. Cir. 1984), which discretion should be exercised when injustice might otherwise result, *Hormel v.*

[16] Below, the Government contended that the Ranchers' challenges to past calls made under the Protocol are moot and therefore not redressable, a point that the district court did not address. The Government's objection is without merit. 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* App. 023-24, ¶¶ 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 exception for actions capable of repetition yet evading review).

Helvering, 312 U.S. 552, 557 (1941). *See, e.g.*, *Liberty Prop. Trust*, 577 F.3d at 341-42 (deciding whether other grounds, noted but not ruled upon by the district court, could support the latter's order of dismissal).

The Court's exercise of such discretion is merited here to avoid continuing irreparable injury. The Protocol and calls made thereunder have resulted in widespread loss of flora and fauna. App. 023. For example, the water shut-offs have reduced water fowl habitat and converted pasture and other useable rangeland into dusty and weed-choked fields that will need years to recover. App. 024, ¶ 40. Protocol-induced impacts also have crushed ranching revenues and sunk property values. App. 023, ¶ 37. Delay in adjudication will necessarily compound these irreparable injuries. *See generally Amoco Production Co. v. Gambell*, 480 U.S. 531, 545 (1987) ("Environmental injury, by its nature, can seldom be adequately remedied by money damages and is often . . . irreparable."); *Chamber of Commerce v. Edmondson*, 594 F.3d 742, 770-71 (10th Cir. 2010) ("Imposition of monetary damages that cannot later be recovered for reasons such as sovereign immunity constitutes irreparable injury."). The interests of justice therefore support this

Court's ruling on the sufficiency of the Ranchers' pleading, rather than remanding that question to the district court.

IV. The Protocol Unlawfully Delegates to the Tribes Final Authority Over Whether to Make a Call for the Implementation of Water Rights 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."). Below, the Government contended that the Protocol delegates no power. But that position is based on a mistaken view of federal reserved water rights and Oregon's procedures for the administration of water rights, a view that also conflicts with the most reasonable interpretation of the Protocol itself. *See supra* Argument Part I.C. The Government further argued 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 rights. 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 implementation of the Tribes' instream water rights

On the Government's reading, the Protocol delegates nothing because the Tribes, as beneficiaries of instream water rights, may obtain implementation of those rights independent of the Government. But as explained above, *supra* Argument Part I.A., the McCarran Amendment subjects federal reserved water rights to state rules of administration. In Oregon, calls for the implementation of a water right held in trust must include the concurrence of the right's legal owner. *See Fort Vannoy Irrig. Dist.*, 188 P.3d at 295-96. To be sure, the Protocol provides that "[e]ach Party retains its independent right to make a call." App. 032, ¶ 7, App. 037, ¶ 12. But when such a call is proposed by the Tribes, to be legally effective it must still be approved by the Government. *See supra* Argument Part I.C. Thus, the Protocol's promise that the Government will not object to at least some Tribal calls, App. 037, ¶ 12 (agreeing that

neither party will "withhold any required concurrence or object to the call"), necessarily results *pro tanto* in the delegation of the Government's call authority to the Tribes.

Below, the Government also suggested 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." App. 037, ¶ 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 a key Protocol promise—an agreement not to veto certain calls—nugatory. *Cf. M & G Polymers USA, LLC v. Tackett*, 574 U.S. 427, 440 (2015) ("[C]ourts

[are] to avoid constructions of contracts that would render promises illusory . . . .").

B. The Protocol's delegation is unlawful

The Constitution vests "all 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. District of Columbia 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 [the] public business relating to," *inter alia*, "Indians." 43 U.S.C. § 1457(10). *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 . . . all matters arising out of Indian relations." *Id.* § 2. Notably, no provision—constitutional or statutory—authorizes delegation of these authorities outside of 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, cl. 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 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. *See Seila Law LLC v. Consumer Fin. Protection Bureau*, No. 19-7, 2020 WL 3492641, at *22 (U.S. June 29, 2020) (significant executive power cannot be wielded by principal officers acting alone while enjoying removal protection); *Free Enterp. 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 also* 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 for water rights legally owned by the Government. Thus, however its grant of power is construed, the Protocol constitutes an unlawful delegation of such power.

C. Whether the Government's call-making power is authorized by a general or specific statutory grant, the Protocol's delegation is unlawful

Below, the Government contended that there can be no unlawful delegation in the absence of any specific statutory authority purportedly delegated. 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 Ass'n*, 359 F.3d at 565. The unlawful delegation doctrine would be turned into a "greater does not include the lesser" oddity if an agency could not delegate specifically granted powers, but could delegate without limitation powers derived from a general grant of authority.[17]

[17] 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,

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, 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. *See Fund for Animals v. Kempthorne*, 538 F.3d 124, 133 (2d Cir. 2008) ("An agency delegates its authority when it

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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.").

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). *Cf. La. Public Serv. Comm'n v. FERC*, 860 F.3d 691, 696 (D.C. Cir. 2017) (upholding delegation of rate-setting because FERC "has exercised, and intends to continue to exercise, its . . . review authority"); *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 versus general distinction, the Government below relied 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." *Id.* at 556 (quoting *United States v. Mazurie*, 419 U.S. 544, 556-57 (1975)). As this Court 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 Court 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. That 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 "delegating 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 was the Government's reliance below 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.

V. 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 Ranchers have adequately pled how implementation of the Tribes' water rights significantly affects the environment. App. 023, ¶ 36, App. 024, ¶¶ 39-40. None of the Government's arguments advanced below for excluding from NEPA analysis the Protocol and calls made thereunder has merit.

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 view advanced below, 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).

NEPA's "enforcement action" exemption applies to federal activities that are intended to ensure compliance with, or to punish violation of, federal law, *i.e.*, corrective or punitive federal actions. *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 implementation of the Tribes' water rights—which, to be sure, derive from federal law—do not constitute corrective or punitive activities. They are not, for example, the initiation of 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. That is far afield of what presumably was intended by the enforcement exemption to "Major Federal action," 40 C.F.R. § 1508.18, but it is quite analogous to 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). Were the Government's view correct, then the operations of such projects—or for that matter any federal activity—

would also be absolutely exempt from NEPA because they can all be characterized as the "enforcement" of federal rights or duties.

The Government also contended below that calls for the implementation of the Tribes' water rights qualify as federal enforcement efforts exempt from NEPA because they seek to ensure the Government's compliance with the Klamath Treaty, which of course is federal law. The argument misses the point. The question is not the provenance of the Tribes' water rights, but rather the proper characterization of action taken by a state agency, at the Government's request, to implement those rights. Such action is neither corrective nor punitive; it is administrative.[18] The enforcement exemption does not apply.

[18] The Government also suggested below that the Protocol and calls made thereunder are exempted NEPA enforcement actions because they are alleged to benefit the environment by protecting the Tribes' fisheries. Although there is a circuit split on the issue—to which this Court has not spoken—the better-reasoned authority is that NEPA recognizes no "it's good for the environment" exception. *See Catron County Bd. of Comm'rs, N.M. v. U.S. Fish & Wildlife Serv.*, 75 F.3d 1429, 1437 (10th Cir. 1996) (citing, inter alia, 40 C.F.R. § 1508.27(b)(1), which provides that "[a] significant effect may exist even if the Federal agency believes that on balance the effect will be beneficial").

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

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." *Public Citizen*, 541 U.S. at 770. The Government below contended that this "no discretion" exception applies to the Protocol, but this argument cannot be reconciled with the Protocol or with the Government's trust authority over the Tribes' water rights.

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. App. 035, ¶¶ 2-3; App. 030-31, ¶ 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. App. 036, ¶ 8; App. 032, ¶ 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, App. 035, for the purpose of facilitating "changes to the scope of the proposed call," App. 036, ¶ 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 respond in lock-step to the Tribes' lead. 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 32-33 (citing Atty. Gen. Bell Letter; Mem. to the Atty. Gen.; *Cobell*, 240 F.3d at 1099; Cohen's Handbook § 19.06, at 1259-60). *See also* Briefing Addendum at 73 n.1 (the Government represents "numerous broad public interests" in the Klamath Basin Adjudication). Thus, supposed disputes about whether the Government may prioritize the Ranchers' water rights over the Tribes' water rights are a red herring. The pertinent question is *not* whose rights receive preference. Instead, the pertinent question is—may a NEPA analysis of the impact to the human environment caused by implementation of the Tribes' water rights 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.[19]

Moreover, even if the Government's trustee responsibilities or other legal obligations constrain its 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"). That duty is especially important here given how the Protocol itself anticipates that the Government's views on the impacts of a proposed Tribal call may

[19] The irrelevance of disputes about water rights seniority is shown by the following counterfactual. Assume that the Ranchers owned no land but nevertheless retained their bona fide interests in protecting the flora and fauna that dwell in the Upper Klamath Basin. In such a case, *the Ranchers' NEPA claim would be unaffected*: the Government would still be guilty of taking action (call concurrence) that results in a significant impact to the Basin's physical environment without having first conducted any analysis of that impact.

influence the Tribes' views. App. 036, ¶ 8 (Government's response to Tribal call notice may include "changes to the scope of the proposed call").

The Government's reliance below 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), was 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' rights trump the Ranchers' rights, but rather whether the Government retains discretion over how the Tribes' rights will be implemented. 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. True, under the Klamath Basin Adjudication, the Ranchers currently have no right to water that infringes the Tribes' instream rights. But as explained above, appropriative water rights are not self-executing; a call is required from the right's legal owner in order to put into movement the administrative process. *See supra* Argument Parts I.B.–C. And no law requires the Government, as the legal owner of the Tribes' instream water rights, to make a call simply because the

Tribes have requested it. Rather, the Government retains the discretion to make that judgment. NEPA therefore applies.[20]

CONCLUSION

The order and judgment of the district court dismissing the Ranchers' action for lack of standing should be vacated, and that court directed to enter a new order denying the Government's motion to dismiss in its entirety.

DATED: July 17, 2020.

Respectfully submitted,

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[20] Below, the Government suggested that conducting a NEPA analysis prior to each call concurrence might be impossible. 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 bare speculation does not meet this burden.

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DATED: July 17, 2020.

s/ Damien M. Schiff
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ADDENDUM OF STATUTES AND REGULATIONS

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25 U.S.C. § 1a. Delegation of powers and duties by Secretary of the Interior and Commissioner of Indian Affairs

For the purpose of facilitating and simplifying the administration of the laws governing Indian affairs, the Secretary of the Interior is authorized to delegate, from time to time, and to the extent and under such regulations as he deems proper, his powers and duties under said laws to the Commissioner of Indian Affairs, insofar as such powers and duties relate to action in individual cases arising under general regulations promulgated by the Secretary of the Interior pursuant to law. Subject to the supervision and direction of the Secretary, the Commissioner is authorized to delegate, in like manner, any powers and duties so delegated to him by the Secretary, or vested in him by law, to the assistant commissioners, or the officer in charge of any branch, division, office, or agency of the Bureau of Indian Affairs, insofar as such powers and duties relate to action in individual cases arising under general regulations promulgated by the Secretary of the Interior or the Commissioner of Indian Affairs pursuant to law. Such delegated powers shall be exercised subject to appeal to the Secretary, under regulations to be prescribed by him, or, as from time to time determined by him, to the Deputy Secretary or to an Assistant Secretary of the Department of the Interior, or to the Commissioner of Indian Affairs. The Secretary or the Commissioner, as the case may be, may at any time revoke the whole or any part of a delegation made pursuant to this section, but no such revocation shall be given retroactive effect. Nothing in this section shall be deemed to abrogate or curtail any authority to make delegations conferred by any other provision of law, nor shall anything in this section be deemed to convey authority to delegate any power to issue regulations.

25 U.S.C. § 2. Duties of Commissioner

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

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

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

(A) utilize a systematic, interdisciplinary approach which will insure the integrated use of the natural and social sciences and the environmental design arts in planning and in decisionmaking which may have an impact on man's environment;

(B) identify and develop methods and procedures, in consultation with the Council on Environmental Quality established by subchapter II of this chapter, which will insure that presently unquantified environmental amenities and values may be given appropriate consideration in decisionmaking along with economic and technical considerations;

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

(i) the environmental impact of the proposed action,

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

(iii) alternatives to the proposed action,

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

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

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

(D) Any detailed statement required under subparagraph (C) after January 1, 1970, for any major Federal action funded under a program of grants to States shall not be deemed to be legally insufficient solely by reason of having been prepared by a State agency or official, if:

(i) the State agency or official has statewide jurisdiction and has the responsibility for such action,

(ii) the responsible Federal official furnishes guidance and participates in such preparation,

(iii) the responsible Federal official independently evaluates such statement prior to its approval and adoption, and

(iv) after January 1, 1976, the responsible Federal official provides early notification to, and solicits the views of, any other State or any Federal land management entity of any action or any alternative thereto which may have significant impacts upon such State or affected Federal land management entity and, if there is any disagreement on

such impacts, prepares a written assessment of such impacts and views for incorporation into such detailed statement.

The procedures in this subparagraph shall not relieve the Federal official of his responsibilities for the scope, objectivity, and content of the entire statement or of any other responsibility under this chapter; and further, this subparagraph does not affect the legal sufficiency of statements prepared by State agencies with less than statewide jurisdiction.[1]

(E) study, develop, and describe appropriate alternatives to recommended courses of action in any proposal which involves unresolved conflicts concerning alternative uses of available resources;

(F) recognize the worldwide and long-range character of environmental problems and, where consistent with the foreign policy of the United States, lend appropriate support to initiatives, resolutions, and programs designed to maximize international cooperation in anticipating and preventing a decline in the quality of mankind's world environment;

(G) make available to States, counties, municipalities, institutions, and individuals, advice and information useful in restoring, maintaining, and enhancing the quality of the environment;

(H) initiate and utilize ecological information in the planning and development of resource-oriented projects; and

(I) assist the Council on Environmental Quality established by subchapter II of this chapter.

43 U.S.C. § 666(a). Joinder of United States as defendant; costs

Consent is given to join the United States as a defendant in any suit (1) for the adjudication of rights to the use of water of a river system or other source, or (2) for the administration of such rights, where it appears that the United States is the owner of or is in the process of acquiring water rights by appropriation under State law, by purchase, by exchange,

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

43 U.S.C. § 1457. Duties of Secretary

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

1. Alaska Railroad.

2. Alaska Road Commission.

3. Bounty-lands.

4. Bureau of Land Management.

5. United States Bureau of Mines.

6. Bureau of Reclamation.

7. Division of Territories and Island Possessions.

8. Fish and Wildlife Service.

9. United States Geological Survey.

10. Indians.

11. National Park Service.

12. Petroleum conservation.

13. Public lands, including mines.

40 C.F.R. § 1508.18(a). Major Federal action

(a) Actions include new and continuing activities, including projects and programs entirely or partly financed, assisted, conducted, regulated, or approved by federal agencies; new or revised agency rules, regulations, plans, policies, or procedures; and legislative proposals (§§1506.8, 1508.17). Actions do not include funding assistance solely in the form of general revenue sharing funds, distributed under the State and Local Fiscal Assistance Act of 1972, 31 U.S.C. 1221 *et seq.*, with no Federal agency control over the subsequent use of such funds. Actions do not include bringing judicial or administrative civil or criminal enforcement actions.

CERTIFICATE OF SERVICE

I hereby certify that on July 17, 2020, I directed the electronic filing of the foregoing with the Clerk of the Court for the United States Court of Appeals for the D.C. Circuit through the appellate CM/ECF system.

I certify that all participants in the case are registered CM/ECF users and that service will be accomplished by the appellate CM/ECF system

s/ Damien M. Schiff
DAMIEN M. SCHIFF