

## NOT YET SCHEDULED FOR ORAL ARGUMENT

No. 20-5074

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UNITED STATES COURT OF APPEALS  
FOR THE DISTRICT OF COLUMBIA CIRCUIT

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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 LONGLEY BERNHARDT, Secretary of the Interior, et al.,  
*Defendants/Appellees.*

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

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**APPELLEES' ANSWERING BRIEF**

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**CERTIFICATE AS TO PARTIES, RULINGS, AND RELATED CASES**

Pursuant to Circuit Rule 28(a)(1), the undersigned counsel certifies as follows:

**A. Parties and amici**

All parties, intervenors, and amici appearing before the district court and in this court are listed in Appellants' Opening Brief.

**B. Rulings under review**

References to the rulings at issue appear in Appellants' Opening Brief.

**C. Related cases**

This case involves a challenge to a protocol agreement between the Bureau of Indian Affairs and the Klamath Tribes of Oregon in regard to the enforcement of water rights provisionally determined in the Klamath Basin Adjudication, an ongoing general stream adjudication in Oregon. *See In Re Waters of the Klamath River Basin*, No. WA13000001 (Klamath Cty. Cir. Ct.); *see also* <https://www.courts.oregon.gov/courts/klamath/resources/Pages/KlamathBasinAdjudication.aspx> (adjudication home page) The water rights were determined in an administrative order issued in 2014 and entitled "Amended and Corrected Findings and Fact and Order of Determination." These rights are enforceable under Oregon law, Or. Rev. Stat. §§ 539.130(4), 539.170, although they remain subject to judicial review in the

above-described proceeding, *see* Or. Rev. Stat. § 539.150. The protocol agreement has not been challenged in any other case.

The present case has not previously been before this Court.

/s/ John L. Smeltzer  
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## GLOSSARY

Adjudication .....	Klamath Basin Adjudication
APA.....	Administrative Procedure Act
BIA.....	Bureau of Indian Affairs
NEPA .....	National Environmental Policy Act
OWRD.....	Oregon Water Resources Department
Tribes (or Klamath Tribes).....	Klamath and Modoc Tribes and Yahooskin Band of Snake Indians

## INTRODUCTION

Plaintiffs are landowners who hold irrigation water rights that were administratively determined in the Klamath Basin Adjudication, an ongoing Oregon state proceeding. Plaintiffs challenge a “Protocol Agreement” (“Protocol”) between the U.S. Department of the Interior’s Bureau of Indian Affairs (“BIA”) and the Klamath Tribes. The Protocol recognizes the Tribes’ authority to make “calls” to enforce their own federal reserved water rights (instream water rights for tribal fisheries), which were also administratively determined in the Klamath Basin Adjudication. Due to the seniority of the Tribes’ rights, such calls limit the water that is available to satisfy Plaintiffs’ rights. Plaintiffs contend (1) that the Protocol amounts to an unlawful delegation of federal agency authority from BIA to the Tribes, and (2) that BIA must conduct an environmental impact analysis under the National Environmental Policy Act (“NEPA”) before making calls directly or by delegation to the Tribes.

As the district court correctly held, the Protocol does not delegate federal agency authority to the Tribes; it simply recognizes the Tribes’ preexisting authority to control their own water rights. For this reason, Plaintiffs lack standing and have failed to state viable claims. In addition, even if the Protocol could be construed as delegating authority, the delegation did not contravene any governing legal principle and BIA’s actions are not subject to NEPA because of an express

regulatory exemption for bringing enforcement actions. Accordingly, the district court's judgment should be affirmed.

### **STATEMENT OF JURISDICTION**

(A) The district court had subject matter jurisdiction under 28 U.S.C. § 1331 because Plaintiffs brought claims under the Administrative Procedure Act (“APA”), 5 U.S.C. § 706(2)(A), alleging that Department of the Interior officials unlawfully delegated non-delegable authority and acted contrary to NEPA, 42 U.S.C. § 4332(2)(C), in agreeing to the Protocol with the Klamath Tribes. Appendix 25-28. But as the district court held, it did not have Article III jurisdiction because Plaintiffs lack standing to challenge the Protocol. *See infra* Part I (pp. 21-42).

(B) This Court has jurisdiction under 28 U.S.C. § 1291 because the district court entered a final judgment. Appendix 121.

(C) That judgment was entered on January 31, 2020. *Id.* Plaintiffs timely filed their notice of appeal on March 18, 2020, or 46 days later. Appendix 6 (Doc. No. 26); *cf.* Fed. R. App. P. 4(a)(1)(B)(iii).

(D) The appeal is from final judgment that disposes of all parties' claims.



## **STATEMENT OF THE ISSUES**

1. Do Plaintiffs have standing to challenge the Protocol Agreement between BIA and the Klamath Tribes in light of the Tribes' authority to enforce their instream water rights (the alleged cause of Plaintiffs' injuries) with or without the Protocol? (No.)
2. Can Plaintiffs state a claim for relief for an alleged improper delegation of agency authority where (a) the Protocol does not delegate any agency authority to the Tribes; and (b) the authority at issue (the power to exercise water rights) is not subject to any nondelegation rule? (No.)
3. Can Plaintiffs state a claim for relief under NEPA for BIA's failure to analyze the environmental effects of enforcing the Tribes' water rights, where (a) such effects are not caused by the Protocol or other federal agency action; and (b) NEPA's exemption for enforcement actions would apply in any event? (No.)

## **PERTINENT STATUTES AND REGULATIONS**

Pertinent statutes and regulations are set forth in the Addendum following this brief.

## STATEMENT OF THE CASE

### A. Klamath Tribes and Klamath Reservation

In the early Nineteenth Century, the Klamath and Modoc Tribes and the Yahooskin Band of Snake Indians—collectively, the “Klamath Tribes” or “Tribes”—occupied 22 million acres of territory in southern Oregon, east of the Cascade Mountains. *Oregon Dep’t of Fish & Wildlife v. Klamath Indian Tribe*, 473 U.S. 753, 755 (1985). The Tribes had hunted, fished, and foraged on these lands for more than one thousand years. *United States v. Adair*, 723 F.2d 1394, 1397 (9th Cir. 1983).

In 1864, the Tribes entered a treaty with the United States, in which they ceded most of their aboriginal territory to the federal government, excluding 1.9 million acres “within the country ceded,” which the parties agreed would be held for the Tribes “as an Indian reservation.” *Oregon Dep’t of Fish & Wildlife*, 473 U.S. at 755 (quoting Treaty of Oct. 14, 1864, art. I, 16 Stat. 707, 708). In the 1864 Treaty, the Tribes reserved “the exclusive right of taking fish in the streams and lakes” on the reservation, *id.*, and the United States agreed to compensate the Tribes for the ceded lands, in the form of federal expenditures to promote the Tribes’ well-being and “advance them in civilization . . . especially agriculture,” art. II, 16 Stat. at 708.

After establishing the Klamath Reservation (“Reservation”), Congress adopted the General Allotment Act of 1887, which authorized the subdivision of Indian reservations and the allotment of parcels to individual Indians. *Upper Skagit Indian Tribe v. Lundgren*, 138 S. Ct. 1649, 1652-53 (2018). The Act was part of a federal policy—since repudiated by Congress—“to extinguish tribal sovereignty, erase reservation boundaries, and force the assimilation of Indians into the society at large.” *Id.* (quoting *County of Yakima v. Confederated Tribes and Bands of Yakima Nation*, 502 U.S. 251, 254 (1992)). Under the Act, some Reservation lands were allotted to individual Indians, and some allotments were later conveyed in fee to non-Indians. *Adair*, 723 F.2d at 1398.

In 1954, Congress terminated federal supervision of the Tribes and provided for the disposition of all Reservation lands that had not previously been allotted. Pub. L. No. 83-587, 68 Stat. 718 (1954) (“Termination Act”); *see also Oregon Dep’t of Fish & Wildlife*, 473 U.S. at 761-62. In the next two decades, most of these lands—approximately 70 percent of the former reservation—were acquired by the United States for a national forest and for a national wildlife refuge. *Adair*, 723 F.2d at 1398, 1417-19.

The Termination Act did not, however, extinguish the Tribes’ treaty rights to hunt and fish within the former reservation. *See Oregon Dep’t of Fish & Wildlife*, 473 U.S. at 768-69; *Kimball v. Callahan*, 493 F.2d 564, 567-70 (9th Cir. 1974).

To the contrary, “[n]othing in this Act shall abrogate any fishing rights” of the Tribes or their members “enjoyed under” the 1864 Treaty, and “[n]othing in this Act shall abrogate any water rights” of the Tribes and its members. Pub. L. No. 83-587, § 14, 68 Stat. 722. In light of these provisions, the Ninth Circuit held that the Tribes retained water rights that were reserved under the 1864 Treaty for tribal fisheries. *Adair*, 723 F.2d at 1411-12; *see also infra* pp. 7-10.

In 1986, Congress enacted the Klamath Indian Tribe Restoration Act (“Restoration Act”), which restored the Tribes to “federal recognition” and restored “[a]ll rights and privileges” held by the Tribes “under any Federal treaty, Executive order, agreement, or statute, or any other Federal authority, which may have been diminished or lost under the [Termination] Act.” Pub. L. No. 99-398, § 2(b), 100 Stat. 849, 849 (1986). The Restoration Act excluded any alienated “property right[s]” and thus did not restore the Tribes’ land base. § 2(d), 100 Stat. 850.<sup>2</sup> But the Act expressly left the Tribes’ “hunting, fishing, trapping, gathering, [and] water right[s]” unaffected, § 5, 100 Stat. at 850, and it fully restored the “Federal trust relationship” between the United States and the Tribes, *id.*, 100 Stat. at 849. The United States presently recognizes the Tribes as a tribal “sovereign,”

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<sup>2</sup> The United States holds several small parcels of land in trust for the Tribes. *See* 62 Fed. Reg. 30,335 (June 3, 1997) (proclaiming certain former reservation lands to be the Tribes’ reservation); *see also* Restoration Act, § 6, 100 Stat. at 850 (authorizing the Department of the Interior to accept land transfers and hold land in trust as part of a tribal reservation).

*see* 25 U.S.C. §§ 3601(3), 5123(h), with inherent powers of self-government, including powers over land and water rights, except as removed by Congress, *see Knighton v. Cedarville Rancheria*, 922 F.3d 892, 899 (9th Cir. 2019).

## **B. Treaty and reserved water rights**

Under the law of Oregon and most western states, the doctrine of “prior appropriation” governs rights to use water from a river system for agricultural, municipal, or other purposes. *Colorado v. New Mexico*, 459 U.S. 176, 179 n.4 (1982); *Klamath Irrigation District v. United States*, 227 P.3d 1145, 1150 (Or. 2010). Under this doctrine, a landowner’s water right depends on diversion and “beneficial use.” *Klamath Irrigation District*, 227 P.3d at 1150. Specifically, a person who diverts and beneficially uses water from a particular source—subject to any state-law notice or permit requirements—obtains a priority of right over all subsequently developed uses from the same source. *Id.* Such rights are “perfected and enforced in order of seniority, starting with the first person to divert water from a natural stream and apply it to a beneficial use.” *Montana v. Wyoming*, 563 U.S. 368, 375-76 (2011).

This rule is subject to an important exception: establishment of an Indian reservation or other federal reservation impliedly reserves “then unappropriated” water “to the extent needed to accomplish the purpose of the reservation.”

*Cappaert v. United States*, 426 U.S. 128, 138 (1976) (citing *Winters v. United*

*States*, 207 U.S. 564, 576-77 (1908)); *see also Arizona v. California*, 373 U.S. 546, 597-601 (1963). Such federal reserved rights or “*Winters*” rights vest “no later than” the date that the reservation is created, cannot be lost through nonuse, and are “superior in right to all subsequent appropriations under state law.” *Arizona v. San Carlos Apache Tribe*, 463 U.S. 545, 574 (1983).

In 1975, the United States filed suit in federal district court in Oregon to obtain a declaration of the United States’ reserved water rights for national forest and national wildlife refuge lands within the upper Williamson River watershed, including lands formerly within the Reservation. *Adair*, 723 F.2d at 1397-99. The United States named as defendants hundreds of private landowners—Indian allottees or their non-Indian successors—who also hold parcels within the former reservation. *Id.* at 1397. The Tribes (which were not then federally recognized due to the Termination Act) intervened to assert their own water rights associated with tribal treaty rights to hunt and fish on their former reservation. *Id.* at 1397-99. The district court determined the existence and priority of federal reserved rights among these parties, *id.* at 1396, 1406, leaving the quantification and the final adjudication of such rights to the “Klamath Basin Adjudication,” a general stream adjudication initiated under Oregon law. *Id.* at 1398-1400, 1407; *see also infra* pp. 10-14.

On appeal, the Ninth Circuit held that the 1864 Treaty impliedly reserved water rights for two purposes: (1) to “encourage the Indians to take up farming” and thus to “convert the Klamath Tribe[s] to agricultural way of life”; and (2) “for the purpose of maintaining the Tribe[s’] treaty right to hunt and fish on reservation lands.” *Id.* at 1408-11. The court held that these reserved rights for agriculture—i.e., for irrigation—were conveyed to Indian allottees and subsequently to their Indian or non-Indian successors, with a priority date of 1864. *Id.* at 1416-17 (citing *United States v. Powers*, 305 U.S. 527, 531 (1939)).

The Ninth Circuit further held that these “irrigation rights” are “subject to the superior right” of the Tribes “to use the water for the preservation of hunting and fishing on Reservation lands.” *Id.* at 1415-16. The hunting and fishing rights are “nonconsumptive”. *Id.* at 1410-11. They do not authorize the Tribes to divert water for agriculture or other off-stream use; rather, they are rights to “prevent other appropriators from depleting stream flows below a protected level” in order to preserve stream flows for fish and wildlife. *Id.* These instream rights were not abrogated by the Termination Act, *id.* at 1411-12, 1418, and have a priority date of time “immemorial,” because they are based on “aboriginal title” and hunting and fishing practices that long predated the establishment of the Reservation in 1864, *id.* at 1413-15.

As for the United States' water rights for national forest and national wildlife refuge lands, the Ninth Circuit held that the United States "may participate in the enjoyment of the [Tribes'] hunting and fishing water rights" "to the extent that the United States now owns former reservation lands which may be benefited by a compatible nonconsumptive use of water." *Id.* at 1418. But the court also observed that the United States then "ha[d] no ownership interest in, or right to control the use of, the Klamath Tribe[s'] hunting and fishing water." *Id.*

### **C. Klamath Basin Adjudication**

#### **1. Background**

In 1952, Congress enacted the "McCarran Amendment," which waives federal sovereign immunity and grants consent to join the United States in any "suit for the adjudication[s] of rights to the use of a river system or other source." 43 U.S.C. § 666(a). This waiver authorizes state courts to determine federal water rights—including rights impliedly reserved for Indian reservations—as part of comprehensive suits to determine all rights in a specified river system or source. *Colorado River Water Conservation District v. United States*, 424 U.S. 800, 809-13 (1976).

In 1975, the Oregon Water Resources Department ("OWRD") initiated administrative proceedings known as the "Klamath Basin Adjudication" ("Adjudication") to determine water rights in Oregon's Klamath River basin. *See*



*United States v. Oregon*, 44 F.3d 758, 762-64 (9th Cir. 1994). Under Oregon law, water rights that are not claimed within a duly-noticed state administrative adjudication are subject to forfeiture. Or. Rev. Stat. § 539.210.

In 1994, the Ninth Circuit held, in light of Oregon-law judicial review provisions, that the Adjudication constituted a McCarran Amendment “suit.” *Oregon*, 44 F.3d at 763-770. Thereafter, the United States filed hundreds of water rights claims in the Adjudication, including dozens on behalf of the Tribes (whose trust relationship by then had been restored). *United States v. Braren*, 338 F.3d 971, 973 (9th Cir. 2003). The Tribes also filed their own claims, incorporating by reference the relevant federal claims. *Id.*

## **2. Administrative determination**

In 2013, OWRD issued “Findings of Facts and [an] Order of Determination” on all rights claimed in the adjudication. *See* Appendix 18 (¶ 19). In February 2014, OWRD issued “Amended and Corrected Findings of Fact and [an] Order of Determination.” *See* Or. Admin. R. 690-025-0020(1); *Baley v. United States*, 942 F.3d 1312, 1321 (Fed. Cir. 2019) (describing adjudication), *cert. denied*, No. 19-1134 (U.S. June 22, 2020);. Through these orders, OWRD provisionally confirmed numerous instream water rights asserted on behalf of the Tribes. *See* Appendix 18 (¶ 20). Specifically, OWRD determined that the United States, as trustee for the Tribes, has the right to specified minimum stream flows in the

Wood, Sprague, and Williamson Rivers and several of their tributaries, as well as the right to specified minimum lake levels in Upper Klamath Lake (into which the rivers flow), all with a priority date of “time immemorial.” *See, e.g.*, Appendix 70-99 (adjudicated rights for Williamson River and tributaries). OWRD found that the minimum stream and lake levels are “necessary to provide for the health and productivity of fish habitat” to restore and maintain tribal fisheries in the upper Klamath Basin. Appendix 70.

In setting out the federal reserved right for the Tribes, OWRD observed that the United States, under federal law, “holds” the subject rights “in trust for the Klamath Tribes.” *See* Appendix 68 (citing *Colorado River*, 424 U.S. at 810). For this reason, OWRD confirmed the Tribes’ water rights in the name of the United States (as trustee for the Tribes) and denied the Tribes’ own claims as “duplicative.” *Id.*

In its administrative determination, OWRD also provisionally confirmed water rights claimed by Plaintiffs, with priority dates of 1864 or later. Appendix 12 (¶ 5). Plaintiffs are landowners who own property within the Wood River and Sprague River watersheds. Appendix 11-13 (¶¶ 3-8). They assert irrigation water rights appurtenant to their lands, including rights acquired from Reservation allottees. Appendix 12-14 (¶¶ 4-5, 7-8); *see also supra* p. 5.

In accordance with state law, OWRD filed its administrative determination in Oregon circuit court. *See* [https://www.courts.oregon.gov/courts/klamath/resources/Documents/Case\\_Mgmt\\_Order7.pdf](https://www.courts.oregon.gov/courts/klamath/resources/Documents/Case_Mgmt_Order7.pdf); Or. Rev. Stat. § 539.130(1). The United States, the Tribes, and Plaintiffs—and many other parties—filed “exceptions” to factual findings and legal conclusions made by OWRD in the administrative determination. *See* Appendix 18 (¶ 19); Or. Rev. Stat. § 539.150. Proceedings on the exceptions are expected to continue for at least several more years. Appendix 18 (¶ 20).

Pending the completion of judicial review, the water rights administratively determined by ODWR are in “full force and effect.” Or. Rev. Stat. § 539.130(4); *see also* Or. Rev. Stat. § 539.170; *see also Oregon*, 44 F.3d at 764. Oregon law empowers “watermasters” to enforce relative rights on adjudicated streams through a “call” system. *See generally* <https://www.oregon.gov/owrd/programs/regulation/Pages/default.aspx>; *see also* Or. Rev. Stat. §§ 540.020, 540.045(1), 540.145.

While the Adjudication remains pending, OWRD operates a call system in the upper Klamath Basin. *See* Or. Admin. R. 690-025-0025(1). Under this system, the user of any verified water right—including any right determined by OWRD in its final administrative order—may make a “call” on junior users to prevent interference with the senior right. *See* Or. Admin. R. 690-025-0020. Following any necessary investigation, including review of records and field inspections as

warranted, OWRD may direct junior users to cease diversions that it determines are interfering with any senior right. *See* Or. Admin. R. 690-025-0025(1); Or. Admin. R. 690-250-0100.

#### **D. Protocol Agreement**

In May 2013, after Klamath Basin water rights were administratively determined by OWRD and became subject to OWRD enforcement, BIA and the Tribes agreed to the Protocol, to facilitate calls for the enforcement of the Tribes' water rights. Appendix 30. Acknowledging OWRD's desire for a "point of contact" for enforcement purposes, the Protocol designates the Tribes as the entity primarily responsible for making calls for water to OWRD. Appendix 30 (¶ 1), 34 (¶ 1). The Protocol specified that the Tribes would provide BIA notice, at least two business days in advance of making a call, to enable BIA to express its "agreement" or "disagreement" with the call. Appendix 30 (¶ 2). In March 2019, after OWRD confirmed that calls generally should be made on a "standing" basis, with one standing call for the irrigation season and one standing call for the non-irrigation season, BIA and the Tribes amended the Protocol. Appendix 34. As amended, the Protocol states that the Tribes are to notify BIA seven business days before making a standing call and three business days before making any other call. Appendix 36 (¶ 8).

The Protocol provides additional procedures and timelines to help facilitate agreement between BIA and the Tribes as to whether to make a call, Appendix 35-37 (¶¶ 2-11), but it does not require consensus as a precondition for making a call, Appendix 37 (¶12). To the contrary, the Protocol specifies that the Tribes “*retain*” their “*independent* right to make a call” and that BIA will not object to a call by the Tribes, even if BIA and the Tribes do not come to agreement, with one exception: BIA reserves its right to “withhold any required concurrence” for “any call [by the Tribes] for water that is inconsistent with [OWRD’s final administrative determination] or other legal obligations.” Appendix 37 (¶ 12) (emphasis added). The Protocol also recognizes BIA’s “independent right” to make a call itself, with advance notice to the Tribes, if “BIA believes a call should be made for the protection of the Tribes’ treaty resources,” or for “protection of the Tribal water rights.” Appendix 37 (¶ 10).

#### **E. Upper Klamath Basin Comprehensive Agreement**

The Tribes first issued calls for the enforcement of their water rights in June 2013. Appendix 20 (¶ 25). In response to the Tribes’ call and to protect the Tribes’ instream rights, OWRD issued orders requiring hundreds of landowners in the Upper Klamath basin to suspend diversions for irrigation. *Id.*

In April 2014, the Tribes, the State of Oregon, and landowners in the Upper Klamath Basin (including most of the Plaintiffs) executed the Upper Klamath

Basin Comprehensive Agreement (“Upper Klamath Agreement”), a broad set of agreements designed to settle longstanding disputes over water use between the Tribes and other fisheries proponents and agricultural interests. Appendix 20 (¶ 26); *see also* <https://kbifrm.psmfc.org/file/upper-klamath-basin-comprehensive-agreement/>. The Tribes agreed to forebear from enforcing the full extent of their instream water rights in exchange for commitments by the other parties as to water use, riparian protection, and economic development. *Id.*; Appendix 21 (¶ 28).

The Upper Klamath Agreement referenced and depended upon an earlier agreement, the Klamath Basin Restoration Agreement, which was designed to achieve similar goals throughout the entire Klamath Basin. *See* 82 Fed. Reg. 61,582 (Dec. 28, 2017). After Congress failed to provide necessary approval and funding for the basin-wide agreement, the Secretary of the Interior in December 2017 issued a “negative notice,” which terminated the Upper Klamath Agreement because necessary conditions were not met. *Id.* at 61,583-84.

## **F. Proceedings below**

### **1. Plaintiffs’ claims**

Plaintiffs initiated this suit in May 2019. Appendix 1, 14-15. Plaintiffs’ operative complaint alleges that, after termination of the Upper Klamath Agreement, the Tribes “by and through power delegated by” BIA, issued calls for enforcement of the full extent of their instream flow water rights. Appendix 21-22

(¶¶ 31-32). Plaintiffs allege that OWRD’s enforcement of these calls resulted in “widespread and severe curtailment” of water rights for irrigation use on Plaintiffs’ lands, *id.*, resulting in environmental and economic injury, and that similar injury will result from future calls. Appendix 21-23 (¶¶ 31-38).

Plaintiffs asserted two claims for relief under the APA, 5 U.S.C. § 706: (1) that the alleged delegation of agency authority to the Tribes in the Protocol is unlawful and “*ultra vires*”; and (2) that BIA failed to conduct an environmental review—allegedly required under NEPA—before issuing the Protocol or before the making of calls under the Protocol. Appendix 25-28. As remedy, Plaintiffs asked the district court to set aside the Protocol, to set aside all previous calls, and to enjoin any future calls by BIA until the agency “fully complie[s] with the law,” including its alleged obligation “to make a final, independent decision on the propriety of a call, having taken into account the general public interest and welfare, as well as NEPA.” Appendix 28.

## **2. District court’s judgment**

BIA moved to dismiss, arguing principally that the Protocol is not a delegation of authority from BIA to the Tribes and, therefore, that Plaintiffs both lack standing to challenge the Protocol and lack any claim upon which relief can be granted. *See* Appendix 100-101. Alternatively, BIA argued that even if the

Protocol constitutes a delegation of authority as alleged, the delegation was both lawful and exempt from NEPA. *Id.*

The district court dismissed Plaintiffs' complaint for lack of standing. *Id.* The court determined that the "Klamath Tribes are entitled to enforce their senior water rights . . . regardless of whether the Protocol . . . stand[s]." Appendix 117. For this reason, the court determined that Plaintiffs' alleged injuries are not fairly traceable to the Protocol and cannot be redressed by setting aside the Protocol or by enjoining BIA from making calls. Appendix 109-20.

## **SUMMARY OF ARGUMENT**

### **A. Standing**

Plaintiffs' claims and theory of standing to bring those claims is predicated on a mistaken understanding of BIA's authority based on the United States' status as "legal owner" of the Tribes' water rights. Under federal law, the United States holds treaty-reserved lands and water rights "in trust" for the subject Indian tribes. But tribes possess sovereign authority over their lands and water rights, and a tribe's "beneficial ownership" includes the right to control the use or exercise of its land and water rights, unless Congress, by clearly expressed intent, has abrogated or diminished those rights. Here, no federal statute authorizes BIA to manage or control the Tribes' treaty-reserved fishing and water rights. In providing that the Tribes "retain" their right to make water-rights enforcement calls, and that BIA



will not object to such calls, the Protocol simply reflects the Tribes' preexisting authority. The Protocol delegates no agency authority to them.

In an effort to show otherwise, Plaintiffs' contend that the McCarran Amendment "federalizes" state rules of administration, including a rule that beneficial users of water rights held in trust may not place calls without the legal owner's consent. But there is no such rule in Oregon law and, even if there were, it would not be a rule of "administration." At most, therefore, Plaintiffs are left with evidence suggesting that OWRD has in the past required BIA concurrence in tribal enforcement calls as a matter of administrative practice. But this requirement (if any) does not alter the parties' relative rights and authorities.

Ultimately, under the governing law, the Tribes may make enforcement calls, and BIA must concur in any lawful call (if asked). Accordingly, neither the Protocol nor BIA's concurrence is a cause of Plaintiffs' injuries. And setting aside the Protocol will not redress Plaintiffs' injuries.

## **B. Improper delegation**

For essentially the same reason, Plaintiffs lack a viable claim for an improper delegation to the Tribes. BIA cannot be held to have improperly delegated authority that the Tribes already possessed.

In any event, even if BIA does possess primary authority (veto power) over the exercise of the Tribes' water rights, a decision by BIA to delegate this authority

to the Tribes would not contravene any nondelegation principle. Plaintiffs rely on precedent from this Court addressing an agency's authority to "subdelegate" rulemaking authority specifically granted to the agency by Congress. This precedent does not govern the decision of BIA, as trustee, to assign to the Tribes (subject to revocation), a property right held by the United States solely for the benefit of the Tribes.

### C. NEPA

Nor can Plaintiffs state a legally sufficient NEPA claim. In *Department of Transportation v. Public Citizen*, 541 U.S. 752 (2004), the Supreme Court held that an agency is not required to assess the environmental effects of a decision that the agency is *required* to make, where the agency has no statutory authority to prevent or mitigate the effects. Here, the Tribes may lawfully make calls with or without the Protocol and BIA lacks authority to refuse to concur in lawful calls if asked. Thus, under *Public Citizen*, BIA's actions are not a "legally relevant" cause of the calls or of the resulting environmental effects Plaintiffs would have BIA evaluate, and BIA has no obligation under NEPA to evaluate those effects.

Moreover, even if the enforcement calls are BIA's to make, NEPA does not apply. NEPA regulations contain an exemption for agency decisions to bring administrative civil or criminal enforcement actions. Calls for the enforcement of the Tribes' water rights, if attributable to BIA, fall squarely within this exemption.

## STANDARD OF REVIEW

This Court reviews de novo a district court's dismissal of a complaint for lack of standing or for failure to state a claim. *Estate of Boyland v. USDA*, 913 F.3d 117 (D.C. Cir. 2019). This Court may affirm on any legal basis properly presented. *In re Bureau of Prisons' Execution Protocol Cases*, 955 F.3d 106, 112 (D.C. Cir. 2020).

## ARGUMENT

### **I. Plaintiffs lack Article III standing to challenge the Protocol.**

#### **A. Plaintiffs' claims are founded on the mistaken view that the Tribes may not exercise their own water rights.**

To establish standing to challenge the Protocol, Plaintiffs must show that they have suffered an "injury in fact" that is "fairly traceable" to the Protocol and that is "likely to be redressed by a favorable judicial decision." *Louie v. Dickson*, 964 F.3d 50, 54 (D.C. Cir. 2020) (citing *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560-61 (1992)). Plaintiffs assert "economic, environmental, and recreational injuries" from "water cut-offs" imposed by OWRD in response to enforcement calls by the Tribes. Opening Brief at 11.

Plaintiffs concede that, as junior appropriators, they "have no right to water that infringes the Tribes' instream rights." *Id.* at 5-6, 57. For this reason, Plaintiffs err in suggesting that they suffer "*substantive injuries*," i.e., injuries to substantive legal rights. *See id.* at 24, 28-30. Priority enforcement of water rights through a

call system might curtail water use by junior appropriators, and such curtailment might constitute concrete and particularized harm for standing purposes. But curtailing use by junior appropriators to enable the satisfaction of senior rights is fully in accordance with the nature of those rights under the priority system of western and Oregon water law, *see Montana*, 563 U.S. at 375-76; *Benz v. Water Resources Commission*, 764 P.2d 594, 599 (Or. App. 1988), and thus does not substantively impair the junior water rights. *See, e.g., Baley*, 942 F.3d at 1332-41 (priority enforcement does not “take” junior rights); *accord Kobobel v. Colorado Dep’t of Natural Resources*, 249 P.3d 1127, 1134 (Colo. 2011); *Nettleton v. Higginson*, 558 P.2d 1048, 1054 (Idaho 1977).

Properly understood, Plaintiffs’ claims seek to vindicate procedural rights only. The gravamen of those claims (and Plaintiffs’ theory of standing) is the notion that the Tribes may not make calls for the enforcement of their own water rights without BIA’s consent. Opening Brief at 10, 13-24. Plaintiffs acknowledge that the Tribes are the beneficial owners of the subject instream water rights. *Id.* at 5. But Plaintiffs contend that the Tribes’ beneficial ownership does not include final authority to determine whether, when, and to what extent to exercise those rights. *Id.* at 25. Rather, Plaintiffs assert, such final authority resides with BIA as the “legal owner” and trustee of the water rights. *Id.* at 57-58. In addition, Plaintiffs contend that BIA has “substantial discretion” over the Tribes’ water

rights, *id.* at 13, including the authority to veto tribal enforcement calls, if BIA determines that such forbearance is consistent with the “common good,” *id.* at 26, 32, 54.

Based on this understanding of BIA’s trust authority, Plaintiffs construe the Protocol as a delegation of agency authority from BIA to the Tribes. *Id.* at 28-30. Plaintiffs contend that this delegation was unlawful for two reasons: (1) BIA’s purported authority to control the exercise of the Tribes’ water rights is not subject to delegation; and (2) BIA may not make any call for the enforcement of the Tribes’ water rights, directly or by delegation, without first conducting a NEPA review. *Id.* at 26-28. For standing purposes, Plaintiffs speculate that if BIA (rather than the Tribes) assumed control over the exercise of the Tribes’ water rights, and if BIA conducted a NEPA review before making any enforcement calls, there is a possibility that BIA could decline to make calls that the Tribes otherwise would make, which might reduce the curtailment of Plaintiffs’ water rights. *Id.* at 31-36.

If Plaintiffs were correct—(1) that BIA indeed has authority to restrict the Tribes’ lawful exercise of their own water rights based on an agency determination of the “common good” and not due to any conflicting legal mandate; and (2) that the Protocol effectively delegated that authority to the Tribes—Plaintiffs’ alleged injuries would be fairly traceable to the Protocol and arguably might be redressed by an order setting aside the Protocol and compelling NEPA review prior to any

call to enforce the Tribes' water rights.<sup>3</sup> But Plaintiffs' understanding of BIA's role and of the Protocol are fundamentally in error.

As explained below, the Tribes possess sovereign authority over their treaty-reserved water rights, and that authority has never been abrogated by Congress. BIA has no statutory authority to restrict the Tribes' exercise of their own treaty-reserved water rights, as long as enforcement calls are within the scope of those rights (as determined in the Klamath Basin Adjudication) and not contrary to any other law. Properly construed in this legal context, the Protocol delegated *nothing*. The Tribes possess primary authority to fully exercise their water rights with or without the Protocol.

**B. The Tribes possess sovereign authority to exercise tribal water rights.**

Federal law recognizes Indian tribes as “domestic dependent nations” that exercise “inherent sovereignty.” *Michigan v. Bay Mills Indian Community*, 572 U.S. 782, 788 (2014) (internal quotation marks and citations omitted); *Knighton*, 922 F.3d at 899. As sovereigns, tribes possess “the right to control the lands held

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<sup>3</sup> In considering a plaintiff's standing, this Court ordinarily presumes the merits of the plaintiff's claim. *See Estate of Boyland*, 913 F.3d at 123. This rule derives from the court's obligations to accept factual allegations as true and to construe the complaint in the light most favorable to the plaintiff. *See id.* at 123 (citing *Warth v. Seldin*, 422 U.S. 490, 501-02 (1975)). Here, a common legal issue regarding the scope of BIA's authority controls both the standing and merits inquiries. This brief begins with standing because the district court dismissed on standing grounds without reaching the merits. JA 108-20.

in trust for them by the federal government.” *Kahawaiolaa v. Norton*, 386 F.3d 1271, 1273 (9th Cir. 2004). Reserved water rights, like reserved lands, are real property rights. *Escondido Mutual Water Co. v. FERC.*, 692 F.2d 1223, 1235-36 (9th Cir. 1982), *aff’d sub nom. Escondido Mutual Water Co. v. La Jolla Band of Mission Indians*, 466 U.S. 765 (1984). They “belong to the Indians rather than to the United States, which holds them only as trustee.” *Shoshone Bannock Tribes v. Reno*, 56 F.3d 1476, 1479 (D.C. Cir. 1995); *accord United States v. Washington*, 853 F.3d 946, 967 (9th Cir. 2017) (water rights reserved by treaty “belong to the Tribes”), *aff’d by equally divided Court*, 138 S. Ct. 1832 (2018).

As explained above (pp. 4-7), the present case involves aboriginal water rights that the Tribes reserved for themselves in the 1864 Treaty. *Adair*, 723 F.2d at 1408-15. Although Congress may abrogate or diminish tribal treaty rights by “clearly express[ed] intent,” *Minnesota v. Mille Lacs Band of Chippewa Indians*, 526 U.S. 172, 202 (1999), the Termination Act expressly did the opposite: it did not “abrogate any water rights” of the Tribe, § 14, 68 Stat. at 722, a point that the Ninth Circuit has already confirmed. *Adair*, 723 F.2d at 1411-12. Moreover, the Ninth Circuit explained that the United States “has no ownership interest in, or

*right to control the use of*, the Klamath Tribe’s hunting and fishing water rights.”

*Id.* at 1418 (emphasis added).<sup>4</sup> Rather, those rights belong to the Tribes. *Id.*

When Congress restored the Tribes to federal recognition in 1986, Congress expressed no intent to diminish the Tribes’ sovereign authority to control their own water rights; again, it expressed the opposite intent. *See* Restoration Act, § 5, 100 Stat. at 850 (providing that restoration of the federal trust relationship with the Klamath Tribes did not “affect in any manner any . . . water right of the tribe or its members”) To be sure, by restoring the “trust relationship” between the United States and the Tribes, § 2, 100 Stat. at 849, the Restoration Act restored the United States’ trust authority, including the power “to bring suit on [the Tribes’] behalf to enforce [their] rights.” *Washington*, 853 F.3d at 967. But the water rights otherwise “belong to the Tribes,” *id.*, and are subject to tribal sovereign control. *Kahawaiolaa*, 386 F.3d at 1273.

Contrary to Plaintiffs’ argument, recognizing the Tribes’ authority to exercise their own water rights is not inconsistent with OWRD’s determination that the United States “owns” the water rights “in trust” for the Tribes; nor does such recognition render the trust relationship “meaningless.” *See* Opening Brief at 19-

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<sup>4</sup> *Adair* was decided before Congress restored the “Federal trust relationship” with the Tribes. *See* Pub. L. No. 99-398, 100 Stat. 849. The Restoration Act restored the United States’ trust interest (and legal ownership), *id.*, but did not otherwise affect the Tribes’ water rights, *id.* § 5, 100 Stat. 850, including the Tribes’ “right [of] control.” *Adair*, 723 F.2d at 1418.



23. Plaintiffs misunderstand the nature of the trust at issue. They quote *United States v. Mitchell*, 463 U.S. 206, 225 (1983) (“*Mitchell II*”), for the proposition that a “fiduciary relationship necessarily arises when the Government assumes such elaborate control over . . . [the] property belonging to Indians.” Opening Brief at 20. But *Mitchell II* is inapposite: it involved federal statutes and regulations that “established ‘comprehensive’ responsibilities” in the Department of the Interior for “managing the harvesting of Indian timber,” thereby granting the Department “full responsibility to manage Indian resources and land for the benefit of the Indians.” 463 U.S. at 224.

In contrast, the relevant statutes here are the Termination Act and the Restoration Act, which (as already explained) simply preserve the instream water rights impliedly reserved in the 1864 Treaty for tribal fisheries and fishing rights. These statutes do not authorize federal officials to manage tribal fisheries or tribal water rights. Accordingly, the federal trusteeship over the Tribes’ water rights is a “limited” trust. *See Mitchell II*, 463 U.S. at 224.

As a general rule, whenever the federal government reserves lands for Indians, the reservations are said to be held by the United States in “trust” for the resident tribes. *Burlington Northern Railroad Co. v. Blackfeet Tribe of Blackfeet Indian Reservation*, 924 F.2d 899, 902 (9th Cir. 1991) (citing *Cotton Petroleum Corp. v. New Mexico*, 490 U.S. 163, 175 (1989)). The same principle extends to

water rights. *See Colorado River*, 424 U.S. at 810. Federal law “view[s] the Government’s trusteeship of Indian [water] rights as ownership.” *Id.*

As stated above, however, this trust ownership is “limited.” *Mitchell II*, 463 U.S. at 224. It connotes special status under federal law, e.g., reserving land from taxation or alienation. *See United States v. Mitchell*, 445 U.S. 535, 544 (1980) (“*Mitchell I*”); *Cotton Petroleum*, 490 U.S. at 175. But it does not empower the “Government to control use of the land” or associated water rights. *Mitchell I*, 445 U.S. at 544; *Blackfeet Tribe*, 924 F.2d at 902. Rather, absent treaty or statutory provisions clearly diminishing or abrogating a tribe’s rights, a tribe’s “beneficial ownership” of reservation lands includes “all rights normally associated with ‘fee simple absolute title.’” *Blackfeet Tribe*, 924 F.2d at 902 (quoting *United States v. Shoshone Tribe of Wind River Reservation*, 304 U.S. 111, 118 (1938)). These rights include the authority to bring suit to enforce the property rights. *See County of Oneida v. Oneida Indian Nation*, 470 U.S. 226, 233-40 (1985).

The federal reserved water rights at issue in this case were reserved by and for the Tribes in the same 1864 Treaty that established their Reservation. As explained, although the Termination Act abrogated the Tribes’ land rights, it did not abrogate or diminish the Tribes’ water rights. § 14, 68 Stat. at 722; *Adair*, 723 F.2d at 1411-12. Thus, the Tribes plainly retain authority to exercise and call for the enforcement of those rights. *Id.* at 1418; *Blackfeet Tribe*, 924 F.2d at 902.

**C. The Protocol did not delegate agency authority.**

In light of the Tribes' inherent and retained authority to exercise their own treaty-reserved water rights, the Protocol cannot reasonably be construed as delegating agency authority. The Protocol uses no terms suggesting a grant or a delegation of authority. Instead, the Protocol specifies that the Tribes “*retain*” their right to make calls; designates the Tribes as the “entity that contacts OWRD to make calls”; and provides that BIA may not “object” or “withhold any required concurrence,” unless the Tribes’ call is “inconsistent with the [final administrative determination in the Klamath Basin Adjudication] or other [BIA] legal obligations.” Appendix 34, 37 (¶ 1, 12) (emphasis added).

Plaintiffs view the formal promise by BIA to “concur in Tribal calls” as a relinquishment and “delegation” of BIA’s authority to control the exercise of the Tribes water rights. Opening Brief at 30, 37. But the promise to concur in *lawful* calls simply reflects the preexisting law that the United States has “no . . . right to control the use of . . . the Klamath Tribe[s’] . . . water.” *Adair*, 723 F.2d at 1418; *see also Shoshone Bannock Tribes*, 56 F.3d at 1479 (reserved water rights “belong” to the subject tribe). Under that preexisting law, BIA may object to a call by the Tribes only if that call is inconsistent with the Tribes’ adjudicated water rights, or if BIA has a countervailing obligation under a statute or to another tribe.

As Plaintiffs observe, the Protocol also provides BIA with the opportunity to “disagree” with calls by the Tribe; to “object” to calls that are not consistent with OWRD’s final determination of the Tribes’ rights; and to make calls for the Tribe—in the absence of tribal action—to protect tribal fisheries. *See* Opening Brief at 29-30; Appendix 37 (¶¶ 10, 12). But these provisions likewise reflect no delegation of agency authority. Rather, they reflect BIA’s preexisting authority, on behalf of the United States as trustee, to assist the Tribes in the lawful exercise of federal reserved water rights to help protect tribal trust resources, and to carry out other statutory or trust duties.

At bottom, the Protocol is exactly what it purports to be: an agreement over “consultation” procedures to assist both BIA and the Tribes in carrying out their independent and preexisting authorities with respect to the Tribes’ treaty-reserved water rights, in light of OWRD’s “desire . . . for designated points of contact for making calls,” and so that calls may be made “in a timely and effective manner.” Appendix 34. The Protocol did not grant any agency authority to the Tribes. If the Protocol did not exist—or if it were set aside by the courts—the Tribes would have no less authority to make calls for the enforcement of their water rights.

**D. OWRD’s “concurrence” requirement (if any) is irrelevant.**

In an effort to prove that the Protocol nonetheless causes their injuries, Plaintiffs make a three-pronged argument. *First*, Plaintiffs cite the McCarran

Amendment, 43 U.S.C. § 666(a), for the proposition that the Tribes' water rights are "subject to state rules of . . . administration." Opening Brief at 13-14 (heading). *Second*, Plaintiffs rely on *Fort Vannoy Irrigation District v. Water Resources Commission*, 188 P.3d 277, 295-96 (Or. 2008), in an effort to derive a state rule of administration under which calls for the enforcement of water rights held in trust "must be approved by the holder of legal title." Opening Brief at 16-17. *Third*, Plaintiffs cite various record evidence to show that OWRD has actually required BIA concurrence as a precondition to enforcing tribal calls. *Id.* at 17-24. These arguments misconstrue the cited authorities and do not prove standing.

**1. The McCarran Amendment does not alter the Tribes' water rights.**

As a threshold matter, Plaintiffs mischaracterize the breadth of the McCarran Amendment. *See* Opening Brief at 13. The Amendment is not a blanket declaration subjecting all federal reserved water rights to "state rules of quantification and administration." *Id.* Rather, the McCarran Amendment is a limited waiver of sovereign immunity, which provides Congress's consent to the joinder of the United States "as defendant" in the event one of the following proceedings is initiated under state law: (1) a "suit" for the "adjudication of rights to the use of water of a river system or other source," or (2) a suit "for the administration" of such rights. 43 U.S.C. § 666(a); *see also United States v. Idaho*, 508 U.S. 1, 5-8 (1993) (describing statute).

There is no dispute (in the present case) that the ongoing Klamath Basin Adjudication (including OWRD’s final administrative determination) constitutes a suit “for the adjudication of [water] rights” within the meaning of § 666(a)(1). *See Oregon*, 44 F.3d at 762-63. But the question whether OWRD enforcement actions constitute a suit “for the administration” of water rights under § 666(a)(2) is not before this Court. The present case concerns past and prospective actions by the Tribes to *voluntarily* seek enforcement of the Tribes’ water rights under the call system established for the Klamath Basin under Oregon law. In making these enforcement calls to OWRD, the Tribes and United States (to the extent the latter participates) necessarily subject themselves to OWRD’s administrative procedures. But in that narrow context, sovereign immunity is not at issue, and the McCarran Amendment is not implicated.

In any event, as Plaintiffs concede, in situations in which the McCarran Amendment applies, federal law—not state law—governs the *substance* of federal reserved water rights. *San Carlos Apache Tribe*, 463 U.S. at 571; *Colorado River*, 424 U.S. at 813; *see also* Opening Brief at 13. Plaintiffs make much ado of OWRD’s decision—in its final administrative determination of the Tribes’ water rights—that such rights should be adjudicated in the name of the United States. *See* Opening Brief at 21. But Plaintiffs misconstrue the import of that ruling. OWRD simply relied on the principle of federal law that water rights reserved for

Indians are held in trust by the United States. Appendix 68 (citing *Colorado River*, 424 U.S. at 810). As explained above (pp. 26-28), that limited trust designation does not imply federal authority or obligations to control or manage the trust resource. Rather, absent specific statutory provisions to the contrary, the Tribes, as “beneficial owners,” retain full authority to control the use of their water right. *Blackfeet Tribe*, 924 F.2d at 902; *see also Adair*, 723 F.2d at 1418.

## **2. *Fort Vannoy* is inapposite.**

Though conceding that the McCarran Amendment does not subject federal reserved rights to state substantive law, Plaintiffs contend that the McCarran Amendment nonetheless grants BIA a veto over the exercise of the Tribes’ water rights by “federaliz[ing]” the supposed Oregon rule of water rights “administration” set out in the Oregon Supreme Court’s decision in *Fort Vannoy*. Opening Brief at 16-17. Contrary to Plaintiffs’ argument, *Fort Vannoy* did not address enforcement calls; nor did it establish any state rule of “administration.”

In *Fort Vannoy*, a water user within an Oregon irrigation district sought to change the place of use of a water right without the district’s consent. 188 P.3d at 281. Under Oregon’s water code, only the “holder of a water use” may change the beneficial use, place of use, or point of diversion of a water right. *Id.* at 289 (citing Or. Rev. Stat. § 540.510(1)). Construing various code provisions, including a section granting irrigation districts authority to “hold,” “use,” “manage,” and

“possess” water rights, *id.* at 295, the Oregon Supreme Court concluded that the irrigation district was the legal “owner” and “*holder* of the water use,” and therefore that the beneficial user could not change the use without the district’s consent, *id.* at 299.

This ruling of statutory construction does not translate to enforcement calls. Significantly, Plaintiffs cite no Oregon statute or regulation restricting enforcement calls to the “*holder* of a water use” or the “*owner*” of a water right. To the contrary, the Oregon water code directs watermasters to “[r]egulate the distribution of water among the various *users*” of water from a particular source, in accordance with the “*users*’ existing rights of record.” Or. Rev. Stat. § 540.045(1)(a) (emphasis added). Similarly, under the water code, watermasters may regulate the distribution of water among the users of a particular reservoir or ditch, upon petition from the “owner” or any “user.” *Id.* § 540.210(1). In addition, the state regulation governing water distribution in the Upper Klamath Basin (pending a final decision in the Klamath Basin Adjudication) grants OWRD authority to “regulate the distribution of water among the various *users* of water . . . in accordance with the *users*’ existing rights of record.” Or. Admin. R. 690-025-0025(1) (emphasis added). These provisions belie Plaintiffs’ argument that enforcement calls must be made by “owners.”



Nor are Plaintiffs correct that *Fort Vannoy* arose in a context “analogous” to enforcement calls. *See* Opening Brief at 16. An application to permanently change the beneficial use, place of use, or point of diversion of a water right is a request to permanently alter one or more of the legal attributes of the right. *See* Or. Rev. Stat. §§ 540.510, 540.520; *see also id.* § 540.523 (temporary transfers). Because a change in use could impair the rights of other water users, change applications generally require public notice, the opportunity for protests, and hearings on any protests. *See id.* § 540.520; *see also id.* § 540.523 (proceedings for temporary transfers); *Wyoming*, 563 U.S. at 378-380 (addressing change rule). In such proceedings, the consent of the *owner* of the right is to be expected. In contrast, enforcement of a water right in accordance with its already adjudicated attributes and priority is a largely ministerial action that does not change the attributes of the right and thus does not implicate the owner’s property interest.

Instead of offering any textual support or rationale for requiring owners (as opposed to beneficial users) to make enforcement calls, Plaintiffs speculate that owners must make water-rights calls because water distribution depends on the records maintained by OWRD, and because water rights certificates—issued by OWRD after adjudicating the rights on a stream—require only the name of the water rights “owner.” Opening Brief at 17 (citing Or. Rev. Stat. § 539.140). But that practical concern did not prevent Oregon from expressly providing beneficial

“users”—along with the “owners”—a right to petition for equitable distribution of water from a reservoir or ditch. *See* Or. Rev. Stat. § 540.210(1). And the concern is not germane where beneficial ownership is undisputed. Here, as explained above, there is no dispute that the Tribes are the beneficial owners of the subject instream water rights.

Finally, even if *Fort Vannoy* could be construed as requiring an irrigation district’s consent to an enforcement call by a beneficial user within such district, such rule is not a rule of water-rights *administration*. Under Oregon law, absent contractual agreements to the contrary, the beneficial users who first put water to use hold equitable property interests in the water rights legally “owned” by the irrigation districts that distribute such water. *Klamath Irrigation District*, 227 P.3d at 1157-62; *see also Baley*, 942 F.3d at 1326-27. *Fort Vannoy* determined the relative property rights of irrigation districts and their members under the Oregon statutes that created the districts and govern water appropriation. *See Klamath Irrigation District*, 227 P.3d at 1161 (describing *Fort Vannoy*).

*Fort Vannoy* says nothing about the unique trust relationship between the United States and the Tribes with respect to federal reserved water rights or the exercise of those rights. As the Supreme Court has explained, “the relationship between the United States and . . . Indian tribes is distinctive, ‘different from that existing between . . . [private] *trustees and beneficiaries*’ ” under common law or

state statutes. *United States v. Jicarilla Apache Nation*, 564 U.S. 162, 173 (2011) (emphasis in original) (quoting *Klamath and Moadoc Tribes v. United States*, 296 U.S. 244, 254 (1935)). Under the controlling *federal* law, the Tribes possess the authority to exercise their own treaty-reserved rights (which includes the right to make enforcement calls). See *County of Oneida*, 470 U.S. at 233-240; *Shoshone Tribe*, 304 U.S. at 118; *Shoshone Bannock Tribes*, 56 F.3d at 1479; *Adair*, 723 F.2d at 1418.

**3. An OWRD concurrence requirement (if it exists) does not alter the Tribes' rights.**

Notwithstanding the clarity of federal law on the Tribes' ability to control their own water rights, OWRD's decision to adjudicate the Tribes' water rights in the name of the United States created some uncertainty about the need for federal concurrence. As Plaintiffs observe, OWRD officials asked for evidence of BIA concurrence in response to at least some prior tribal enforcement calls. See Opening Brief at 20 (citing Appendix 63-64). And the Protocol itself acknowledges the possibility that OWRD might require concurrence; hence, BIA's agreement with the Tribes not to "withhold any *required* concurrence" in the event of a lawful tribal call. Appendix 37 (¶ 12) (emphasis added). For reasons already explained, however, OWRD lacks authority—under federal or state law—to diminish the Tribes' beneficial ownership rights or to enhance BIA's rights as trustee. Only Congress can diminish or abrogate tribal treaty rights. *Mille Lacs*

*Band*, 526 U.S. at 202; *McGirt v. Oklahoma*, 140 S.Ct. 2452, 2462-63 (2020).

Accordingly, to the extent that OWRD has erected or might erect a concurrence requirement as a matter of administrative practice, that requirement amounts to nothing more than an administrative formality, which does not alter the Tribes' water rights.

**E. Plaintiffs' injuries are not fairly traceable to the Protocol.**

To establish standing to challenge an agency's compliance with NEPA or any other procedural requirement, a plaintiff must establish a "causation chain" with "two links." *See WildEarth Guardians v. Jewell*, 738 F.3d 298, 306 (D.C. Cir. 2013) (quoting *Florida Audubon Society v. Bentsen*, 94 F.3d 658, 668 (D.C. Cir. 1996) (en banc)). *First*, the plaintiff must identify a "substantive government decision" that was "wrongly decided" as a matter of procedure. *Id.* *Second*, the plaintiff must connect that substantive decision to a "particularized injury." *Id.*

As Plaintiffs observe, the "first link" does not require proof of "but for" causation between the alleged procedural error and the particularized injury. Opening Brief at 26 (citing *WildEarth Guardians*, 738 F.3d at 306). Rather, it is enough for a plaintiff to show that, but for the procedural error, the agency might have reached a different substantive decision, which might have avoided or mitigated the particularized injury. *See Defenders of Wildlife*, 504 U.S. at 572 n.7; *Center for Biological Diversity v. EPA*, 861 F.3d 174, 185 (D.C. Cir. 2017). But

this “relaxed” rule for standing to vindicate procedural rights does not relieve a plaintiff from showing (at a minimum) “but for” causation in the “second link,” i.e., the link between the challenged government action and the particularized injury. *See Florida Audubon Society*, 94 F.3d at 664-69.

Plaintiffs cannot make that showing. They assert that, “but for the Protocol, the Tribes would not be able . . . to secure the state administrative implementation of their water rights.” Opening Brief at 11. But this is patently mistaken. There is no rule of law requiring BIA and the Tribes to make a protocol agreement as a precondition for seeking enforcement of the Tribes’ water rights. To the extent that OWRD has required BIA concurrence in calls by the Tribes, OWRD has only asked for an email from the designated BIA official. Appendix 63-64. If the parties had never entered the Protocol, the Tribes could still make enforcement calls and BIA could express concurrence via email or otherwise on an ad hoc basis. Moreover, with or without the Protocol, BIA as tribal trustee may not lawfully refuse to concur in a lawful enforcement call—a call within the Tribe’s adjudicated rights and not otherwise contrary to law or to another federal trust obligation—because the water rights “belong” to the Tribes, *Shoshone Bannock Tribes*, 56 F.3d at 1479, and are subject to the Tribes’ “control,” *Adair*, 723 F.2d at 1418.

Thus, the controlling question in this case is not (as Plaintiffs argue), whether the Tribes may call for OWRD enforcement without BIA’s concurrence.

*See* Opening Brief at 10. Rather, the relevant question is whether BIA may withhold concurrence—if such concurrence is required by OWRD—when the Tribes make a lawful enforcement call. Because BIA lacks such authority, BIA’s concurrence cannot be deemed the cause of Plaintiffs’ injuries. Nor can Plaintiffs’ injuries be redressed by an order setting aside the Protocol. With or without the Protocol, the Tribes would have the authority to exercise their own water rights, and BIA would lack authority to withhold concurrence.

**F. Plaintiffs’ injuries are not fairly traceable to calls by the Tribes.**

In addition to challenging the Protocol, Plaintiffs allege that all individual calls to enforce the Tribes’ water rights—whether made by BIA directly, with BIA concurrence, or through BIA delegation—are both “final agency actions” under the APA and “major federal actions” subject to NEPA. Appendix 27 (¶ 52), 28 (¶ 2). On this theory, Plaintiffs have challenged all prior calls as contrary to NEPA, Appendix 27-28 (¶¶ 52-53), and prayed for an order enjoining any future calls, unless and until BIA “make[s] a final, independent decision on the propriety of a call . . . tak[ing] into account the general public interest and welfare,” as well as environmental impacts as disclosed in a NEPA review, Appendix 28 (¶ 4).

This alternative framing of Plaintiffs’ NEPA claim—to challenge individual calls as opposed to the Protocol—slightly alters the standing analysis. As just explained, the Protocol is not a “but for” cause of water curtailment resulting from

the enforcement of the Tribes' water rights, because the Tribes may make calls with or without the Protocol, and because BIA's "promise" to concur in lawful calls by the Tribes did not change the parties' relative rights. BIA would be obligated to concur in any lawful call in any event. In contrast, BIA's concurrence in a future lawful call by the Tribes—if actually required by OWRD—would be a "but for" cause of water curtailment resulting from the implementation of the call, even though such a concurrence requirement is not mandated by substantive law.

Nonetheless, the outcome of the standing analysis is the same. Because BIA lacks authority to veto a lawful enforcement call by the Tribes, BIA's concurrence in a tribal enforcement call is not a *legal* cause of injury resulting from OWRD's enforcement of the call, even if BIA's concurrence is a "but for" cause as a matter of administrative practice. *Cf. Huddy v. FCC*, 236 F.3d 720, 724 (D.C. Cir. 2001) (questioning whether "narrow 'but for' causation . . . could ever be sufficient for constitutional standing"). Moreover, given BIA's lack of authority, Plaintiffs' injury cannot be redressed. A remand requiring BIA to consider environmental impacts or any other factors relevant to the "common good" before concurring in a tribal enforcement call has no potential to change BIA's substantive decision in a manner favorable to Plaintiffs, given BIA's lack of authority to veto a lawful enforcement call. *See Center for Biological Diversity*, 861 F.3d at 185.

Alternatively, if this Court determines that BIA's lack of authority is not an impediment to Plaintiffs' standing or is more properly addressed as a merits issue, *see Estate of Boyland*, 913 F.3d at 123, then this Court should affirm the district court's judgment on the grounds that Plaintiffs' claims are legally insufficient. *See Federal Execution Protocol Cases*, 955 F.3d at 112 (court of appeals may affirm a district court's judgment on any alternative ground that rests on "purely legal arguments"). As explained in Parts II and III below, the absence of BIA veto authority is a fatal deficiency to both of Plaintiffs' merits claims. Indeed, even if BIA is presumed to have authority to veto or modify a tribal call, Plaintiffs' allegations are insufficient to state an improper delegation or NEPA claim.

\* \* \*

In sum, Plaintiffs lack Article III standing to challenge the Protocol.

## **II. Plaintiffs cannot state a claim for an improper delegation.**

### **A. The Protocol does not delegate agency authority.**

A *sine qua non* of a claim for improper delegation is an actual delegation. As already explained above (pp. 29-30), the Protocol cannot be considered a delegation of agency authority for three reasons: (1) the water rights at issue are treaty-reserved property rights; (2) such rights belong to and are subject to the Tribes' control unless Congress diminishes or abrogates the rights; and (3) there are no federal statutes giving BIA control over the Tribes' fisheries or water rights.



In an effort to show that BIA has authority over the Tribes' water rights (and that such authority was delegated), Plaintiffs' principally rely on the McCarran Amendment. But that reliance is misplaced. The McCarran Amendment is simply a waiver of sovereign immunity with respect to certain types of state water-rights adjudications. *See supra* pp. 31-33. It does not substantively alter federal reserved water rights or tribal interests in those rights. *Id.* The only other statutes cited by Plaintiffs are those that grant officers of the Department of the Interior general authority to "supervis[e]" public business relating to Indians, 43 U.S.C. § 1457(10), and to manage "Indian affairs and . . . all matters arising out of Indian relations," 25 U.S.C. § 2. *See* Opening Brief at 42. But these generic grants plainly do not abrogate or authorize BIA to abrogate the Tribes' treaty rights. *See Mille Lacs Band*, 526 U.S. at 202; *Adair*, 723 F.2d at 1411-12. Rather, to properly "manage" tribal affairs, BIA must acknowledge and honor the treaty obligations of the United States to Indian tribes. *See* 25 U.S.C. § 2; 43 U.S.C. § 1457.

Unable to identify any statutory authority for the proposition that BIA may veto the Tribes' exercise of their own treaty-reserved water rights, Plaintiffs proffer the argument that the President has "inherent constitutional authority to unilaterally abrogate treaties." Opening Brief at 33 (citing Curtis A. Bradley, *Exiting Congressional-Executive Agreements*, 67 Duke L.J. 1615, 1625 (2018)). Whatever merit this contention might have with respect to the President's

constitutional authority over foreign affairs—an issue not before the Court—it has no merit in the context of treaties with Indian tribes. *Cf. Goldwater v. Carter*, 617 F.2d 697, 706-07 (D.C. Cir.), *vacated* 444 U.S. 996 (1979). Congress ended the practice of treating with Indian tribes in 1871. *See Lara v. United States*, 541 U.S. 193, 201 (2004). In so doing, Congress provided that “no obligation of any treaty lawfully made and ratified with any such Indian nation or tribe prior to March 3, 1871, shall be hereby invalidated or impaired.” 25 U.S.C. § 71. No Executive Branch official can abrogate or diminish the Tribes’ treaty rights without contravening this statute and Congress’s “plenary” authority over Indian affairs. *See Bay Mills*, 572 U.S. at 788-91.

Nor are Plaintiffs correct in supposing that BIA inherently possesses general authority or responsibility to consider the “common good,” which trumps treaty obligations. *See* Opening Brief at 32-33. Plaintiffs cite government legal memoranda and other authorities addressing the Executive Branch’s obligations in the face of *competing* statutory directives, or when representing multiple tribes with *conflicting* interests. *Id.* (citing, *inter alia*, Memorandum of John M. Harmon, Assistant Attorney General, Office of Legal Counsel (Aug. 11, 1977), *reproduced in* Appendix 41-62). As explained in the cited OLC memorandum, Interior need not fully support a tribe’s position when carrying out “competing [statutory]

responsibilities” or where tribal rights “compete with other statutorily enacted policies and programs.” Appendix 47, 49.

But that principle does not apply in this case. Plaintiffs identify no statute requiring or enabling BIA to consider either Plaintiffs’ interests or the “common good” in carrying out the United States’ limited trust authorities with respect to the Tribes’ water rights. Absent such a statute, BIA is bound by the terms of the 1864 Treaty and by precedent dictating that the water rights under that treaty “belong” to the Tribes, *Shoshone Bannock Tribes*, 56 F.3d at 1479, and are theirs to “control.” *Adair*, 723 F.2d at 1418.

At bottom, in agreeing (through the terms of the Protocol) to allow the Tribes to lawfully exercise their own treaty-reserved rights, BIA did not abdicate or transfer any agency authority. *Cf. Oliver v. Udall*, 306 F.2d 819, 821-823 (D.C. Cir. 1962) (affirming dismissal of claim against Secretary of the Interior, where the Secretary did “no more than approve action” that a tribe was “entitled to take” under its own legal authority).

**B. Plaintiffs fail to identify any applicable non-delegation principle.**

Even if the Protocol is presumed to delegate some agency authority, Plaintiffs identify no legal principle prohibiting such delegation. Plaintiffs rely on this Court’s decision in *U.S. Telecom Ass’n v. FCC*, 359 F.3d 554, 565-66 (D.C. Cir. 2004), which adopted a rule for determining when federal agency officials

may “subdelegate” statutorily-conferred “decision-making authority.” This Court held that agency officials “may subdelegate their decision-making authority to subordinates absent evidence of contrary congressional intent,” but those officials “may not subdelegate to outside entities—private or sovereign—absent *affirmative* evidence of authority to do so.” *Id.* at 566 (emphasis added). Applying this rule to the present case, Plaintiffs argue that BIA may not delegate its presumed authority over the Tribes’ water rights to the Tribes (an “outside” sovereign), without some “affirmative” evidence of Congress’s intent to authorize such delegation, which Plaintiffs contend to be absent. *See* Opening Brief at 41-44. This argument should be rejected for three reasons.

*First, U.S. Telecom* did not adopt a rule for evaluating the validity of any and every grant of agency authority; it applies only to the “subdelegation” of an agency’s “decision-making” authority. *See* 359 F.3d at 565-66. The statute at issue in *U.S. Telecom* gave the FCC authority to determine what “network elements” of an “incumbent” phone or internet carrier must be “unbundled” to provide competitive access to other carriers. *Id.* at 561. In its rules, the FCC gave state commissions “virtually unlimited discretion” to make critical determinations for local markets. *Id.* at 564. Thus, the case involved a “subdelegation” of rulemaking authority. *Id.*

In contrast, the present case involves (at most) a revocable assignment of an interest in property. Assuming, *arguendo*, that BIA has primary and final authority to exercise the Tribes' water rights, the Protocol assigns that authority to the Tribes not permanently but subject to termination by BIA on 30 days' notice. Appendix 37 (¶ 15). Plaintiffs fail to explain how this assignment differs from a license or a permit to use public land. To be sure, BIA may not authorize the use of federal property without any statutory authority to do so. But such authorizations do not implicate the policy issues that arise from a delegation of rulemaking or legislative authority and thus do not call for a special rule of statutory construction. *Cf. U.S. Telecom*, 359 F.3d at 565 (citing concerns about government "accountability" and need for "democratic check on government decision making"); *see also National Ass'n of Regulatory Utility Commissioners v. FCC*, 737 F.2d 1095, 1143 n.41 (D.C. Cir. 1984) (same).

*Second*, *U.S. Telecom* adopted a rule of statutory construction for the "subdelegation" of a specific rulemaking task that Congress expressly assigned to the FCC. 359 F.3d at 565. Where Congress expressly gives a specific task to an agency, the absence of express authority to sub-delegate might be telling. Here, however, Plaintiffs merely infer BIA's authority to control the Tribes' water rights based on BIA's "legal ownership" of the water rights, which is not specifically provided for in any statute or treaty. If BIA's authority may properly be inferred in

the absence of an express delegation from Congress—i.e., based merely on the Department of the Interior’s general authority to manage Indian affairs—BIA’s authority to “subdelegate” may likewise be inferred. Nothing in *U.S. Telecom* suggests otherwise. *See id.* at 565-69.

*Third* and finally, context matters. Courts have repeatedly upheld federal agency delegations of authority to Indian tribes in matters over which the tribes have sovereign authority. *See Assiniboine & Sioux Tribes v. Board of Oil and Gas Conservation*, 792 F.2d 782, 795 (9th Cir.1986); *Southern Pacific Transportation Co. v. Watt*, 700 F.2d 550, 556 (9th Cir.1983); *see also United States v. Mazurie*, 419 U.S. 544, 556–57 (1975) (congressional delegation). As Plaintiffs observe, this Court in *U.S. Telecom* declined to interpret those cases as establishing a more “relaxed” rule for agency subdelegations to “sovereigns” generally (as opposed to “private” entities). *See* Opening Brief at 46-47 (citing 359 F.3d at 566-67).

But the present case does not merely involve a delegation to another sovereign entity. Assuming *arguendo* that BIA has primary and final authority over the exercise of the Tribes’ water rights, BIA possesses such authority *solely as trustee for the Tribes*. Contrary to Plaintiffs’ argument, BIA does not claim the authority to delegate any of its authorities in the area of Indian affairs to any third party, including entities “with interests adverse to the tribes.” Opening Brief at 45. Rather, the only question in this case—assuming there was a delegation of agency

authority at all—is whether BIA as trustee may assign to a tribal beneficiary, on a revocable basis, the authority to exercise a property right held solely for the benefit of the tribe. Absent any suggestion of a breach of a fiduciary duty (which Plaintiffs do not allege and cannot show), there is no basis for invalidating the presumed delegation in this case.

In sum, Plaintiffs cannot state a claim for an improper delegation.

### **III. Plaintiffs failed to state a viable claim under NEPA.**

#### **A. NEPA is inapplicable because the challenged federal actions have no environmental effects.**

Under NEPA, a federal agency proposing any “major Federal action[] significantly affecting the quality of the human environment” must prepare, for public review, a detailed statement discussing the likely environmental impacts and potential alternatives. 42 U.S.C. § 4332(2)(C); *see also NRDC v. Nuclear Regulatory Commission*, 879 F.3d 1202, 1207 (D.C. Cir. 2018). The *sine qua non* of a NEPA claim, therefore, is an agency decision with environmental effects. *Public Citizen*, 541 U.S. at 764. As the Supreme Court has explained, to show that an agency decision has environmental effects, it is not enough to establish “but for” causation. *Id.* at 767-770; *see also* 40 C.F.R. § 1508.1(g)(2) (effective Sept. 14, 2020). NEPA’s purpose is to ensure informed decision making. *Public Citizen*, 541 U.S. at 768-69. Accordingly, “where an agency has no ability to prevent a certain effect due to its limited statutory authority . . . , the agency cannot

be considered a legally relevant ‘cause’ of the effect” and NEPA review of the effect is not required. *Id.* at 770; *accord Sierra Club v. FERC*, 867 F.3d 1357, 1372 (D.C. Cir. 2017).

As already explained, BIA’s actions—in entering the Protocol or otherwise concurring in the Tribes’ enforcement calls—are not “legally relevant” causes of environmental effects under the rule in *Public Citizen*. This is so because the Tribes have primary authority to enforce their own water rights; and because, as a result of “limited statutory authority,” BIA “has no ability to prevent” associated environment effects. 541 U.S. at 770. Specifically, BIA lacks statutory authority—with or without the Protocol—to veto the Tribes’ lawful enforcement requests. *See supra* pp. 39-40. Plaintiffs are simply mistaken in arguing that there is “no law” requiring BIA to follow “in lock-step to the Tribes’ lead.” Opening Brief at 54, 57-58. There is such a law: the 1864 Treaty in which the Tribes reserved the water rights for themselves and the judicial precedents that obligate BIA to honor those treaty rights. *See Adair*, 723 F.2d at 1418; *Shoshone Bannock Tribes*, 56 F.3d at 1479.

In addition to misconstruing BIA’s authority, Plaintiffs err in representing that “significant . . . scientific and technical judgments” are required to make or implement calls. *Id.* at 34-35 & n.13. The amount of water needed at different times of the year to sustain tribal fisheries were issues tried in the Klamath Basin



Adjudication. The Tribes' adjudicated rights are premised on the minimum stream flows that OWRD has already determined, based on technical and scientific evidence, to be necessary to provide a healthy and productive habitat for target fish. *See, e.g.*, Appendix 67-99 (order on the Tribes' rights in the Williamson River watershed). In response to a call by the Tribes, OWRD need only ensure that sufficient water remains within the subject streams to provide the already-determined minimum flows. There is no need for new "scientific and technical judgments."

In any event, because primary call authority rests with the Tribes and because BIA has no veto over lawful tribal calls, there is no merit to Plaintiffs' argument that a NEPA review of the impacts or "alternatives" to full enforcement calls would inform BIA's decision making. Opening Brief at 53-54. Because BIA lacks authority to prevent the environmental effects (if any) attributable to lawful enforcement calls by the Tribes, NEPA is inapplicable. *Public Citizen*, 541 U.S. at 770; *Sierra Club v. FERC*, 827 F.3d 36, 47-48 (D.C. Cir. 2016).

**B. NEPA does not apply to enforcement actions.**

Finally, even if BIA had primary authority to exercise the Tribes' water rights (including discretionary authority to forbear from doing so), NEPA review would not be required to make enforcement calls. The Council on Environmental Quality ("CEQ") has issued regulations that govern the form, content, and other

aspects of preparing an environmental impact statement. *See* 40 C.F.R. § 1500 *et seq.* These regulations are binding on agencies and are owed “substantial deference” by the courts. *TOMAC v. Norton*, 433 F.3d 852, 861 (D.C. Cir. 2006). These regulations include a rule defining “major federal actions” expressly to exclude “judicial or administrative civil or criminal enforcement actions.” 40 C.F.R. § 1508.1(q)(1)(iv) (2020) (formerly 40 C.F.R. § 1508.18(a)).<sup>5</sup>

Asking OWRD to enforce the Tribes’ adjudicated water rights against junior appropriators whose water use is infringing those rights falls squarely within the terms of this exemption. An enforcement call is the functional equivalent of a civil action to enforce a federal property right, and an administrative order directing junior appropriators to refrain from water use that infringes with federal rights is the functional equivalent of an injunction in such an action. *Id.* Moreover, the enforcement calls in the present case are an ineluctable and foreseeable result of the water-rights claims that the United States filed in the Klamath Basin Adjudication. *See supra* pp. 10-12. Under Plaintiffs’ theory, the United States would have to initiate public notice-and-comment NEPA proceedings to review impacts and alternatives before filing any claims to vindicate federal water rights. Plaintiffs cite no precedent or practice to support this notion.

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<sup>5</sup> CEQ recently updated its NEPA regulations effective September 14, 2020. *See* 85 Fed. Reg. 43,304, 43,372 (July 16, 2020). The enforcement-action exemption was renumbered but not changed. *See id.* at 43,347, 43,375.

For example in *Cappaert v. United States*, 426 U.S. 128, 135 (1976), the United States filed an action to enjoin private landowners from pumping groundwater that was lowering water levels in Devil’s Hole (part of the Death Valley National Monument) and thereby threatening the habitat of a resident fish species. As in the present case, the United States claimed senior federal reserved rights. *Id.* And as in the present case (assuming federal participation in the Tribes’ calls), the United States sought injunctive relief in the form of an order curtailing the junior appropriators’ water use, to the extent necessary to maintain a minimum water level in Devil’s Hole. *Id.* at 136-37. Although *Cappaert* did not address NEPA’s “enforcement action” exclusion—which originated in rules that CEQ adopted thereafter, *see* 43 Fed. Reg. 55990 (Nov. 29, 1978)—Plaintiffs cite no precedent and provide no argument for the proposition that federal agencies must conduct NEPA review before bringing water-rights suits like *Cappaert*. Nor do Plaintiffs provide any basis for distinguishing *Cappaert* from the present proceedings for purposes of 40 C.F.R. § 1508.1(q)(1)(iv). Instead, Plaintiffs offer three arguments that are readily dismissed.

*First*, Plaintiffs observe that a government action does not fall within § 1508.1(q)(1)(iv) simply because it might be characterized as relating to the enforcement of federal statutory requirements. Opening Brief at 49-50 (citing, for example, *Public Citizen*, 541 U.S. at 765, and *Sierra Club v. U.S. Army Corps of*

*Engineers*, 803 F.3d 31, 46-47 (D.C. Cir. 2015)). But the cited examples only serve to undermine Plaintiffs’ position. *Public Citizen* involved the Department of Transportation’s adoption of regulations to “enforce[]” motor-safety requirements. 541 U.S. at 765. *Sierra Club* involved conditions to “enforce” the Endangered Species Act, which the Corps of Engineers imposed when it issued a “verification” to a pipeline developer that private stream crossings (for a proposed pipeline) fell with a nationwide Clean Water Act permit. 803 F.3d at 38-39, 47. Unlike making a water-rights call, agency actions to adopt regulations or to grant the equivalent of a permit plainly are not bringing an “administrative . . . enforcement action.” 40 C.F.R. § 15081.1(q)(1)(iv).

*Second*, Plaintiffs observe that the enforcement-action exemption has been applied only to federal activities designed “to ensure compliance with, or to punish violation[s] of federal law.” Plaintiffs’ Br. at 50 (citing examples). But again, this observation does not support Plaintiffs’ position. While a call for the enforcement of a federal reserved water right (during times when there is insufficient water to satisfy all adjudicated rights) is not a request for a “punitive” sanction, it plainly is intended to compel compliance with federal and state water law. *Cf. Cappaert*, 426 U.S. at 135-37. That a water user might forbear at times in the exercise of a water right does not change the nature of an enforcement call. If and when the user

chooses to exercise the water right, making a call is “bringing” an action to compel compliance with the law.

*Third*, Plaintiffs argue that making or concurring in an enforcement call is “quite analogous” to a decision to change the operation of a federal reclamation project. Opening Brief at 51 (citing *San Luis & Delta-Mendoza Water Authority v. Jewell*, 747 F.3d 581, 646 (9th Cir. 2014)). But Plaintiffs fail to demonstrate any relevant similarity. Proposing changes to the operation of a federal reclamation project and making water rights calls are different in kind. Only enforcement calls satisfy the terms of the enforcement-action exemption in § 1508.1(q)(1)(iv).

Because the Protocol Agreement serves only to facilitate calls to enforce the Klamath Tribes’ water rights and because such calls are exempt under the plain terms of § 1508.1(q)(1)(iv), Plaintiffs have not asserted viable NEPA claims.

### **CONCLUSION**

For the foregoing reasons, the district court’s judgment dismissing Plaintiffs’ claims should be affirmed.

Respectfully submitted,

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August 19, 2020

DJ No. 90-1-4-15793

**CERTIFICATE OF COMPLIANCE**

I certify that:

1. Pursuant to Fed. R. App. P. 32(a)(7)(C), the attached answering brief is:  
  
Proportionately spaced, has a typeface of 14 points or more and  
  
contains 12,879 words (exclusive of the table of contents, table of  
  
authorities, certificates of counsel, glossary, and addendum).

*August 19, 2020*

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Date

*/s/ John L. Smeltzer*

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John L. Smeltzer

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## **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.

## **25 U.S.C. § 71. Future treaties with Indian tribes**

No Indian nation or tribe within the territory of the United States shall be acknowledged or recognized as an independent nation, tribe, or power with whom the United States may contract by treaty; but no obligation of any treaty lawfully made and ratified with any such Indian nation or tribe prior to March 3, 1871, shall be hereby invalidated or impaired. \* \* \*

## **25 U.S.C. § 3601. Findings**

The Congress finds and declares that--

(1) there is a government-to-government relationship between the United States and each Indian tribe;

(2) the United States has a trust responsibility to each tribal government that includes the protection of the sovereignty of each tribal government;

(3) Congress, through statutes, treaties, and the exercise of administrative authorities, has recognized the self-determination, self-reliance, and inherent sovereignty of Indian tribes;

\* \* \*

**25 U.S.C. § 5123.**  
**Organization of Indian tribes; constitution and bylaws**  
**and amendment thereof; special election**

\* \* \*

(h) Tribal sovereignty

Notwithstanding any other provision of this Act--

(1) each Indian tribe shall retain inherent sovereign power to adopt governing documents under procedures other than those specified in this section; and

(2) nothing in this Act invalidates any constitution or other governing document adopted by an Indian tribe after June 18, 1934, in accordance with the authority described in paragraph (1).

**42 U.S.C. § 4332. (National Environmental Policy Act)**  
**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;

\* \* \*

**43 U.S.C. § 666. (McCarran Amendment)**  
**Suits for adjudication of water rights**

(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.

### **Pub. L. No. 83-587, § 14, 68 Stat. 718 (1954) (Klamath Indian Tribe Termination Act)**

AN ACT To provide for the termination of Federal supervision over the property of the Klamath Tribe of Indians located in the State of Oregon and the individual members thereof, and for other purposes.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That the purpose of this Act is to provide for tile termination of Federal supervision over the trust and restricted property of tile Klamath Tribe of Indians consisting of the Klamath and Modoc Tribes and tile Yahooskin Band of Snake Indians, and of the individual members thereof, for the disposition of federally owned property acquired or withdrawn for the administration of the affairs of said Indians, and for a termination of Federal services furnished such Indians because of their status as Indians.

\* \* \*

[68 Stat. 722]

SEC. 14. (a) Nothing in this Act shall abrogate any water rights of the tribe and its members, and the laws of the State of Oregon with respect to the abandonment of water rights by nonuse shall not apply to the tribe and its members until fifteen years after the date of the proclamation issued pursuant to section 18 of this Act.

(b) Nothing in this Act shall abrogate any fishing rights or privileges of the tribe or the members thereof enjoyed under Federal treaty.

**Pub. L. No. 99–398, 100 Stat. 849 (1986)**  
**(Klamath Indian Tribe Restoration Act)**

An Act to provide for the restoration of the Federal trust relationship with, and Federal services and assistance to, the Klamath Tribe of Indians and the individual members thereof consulting of the Klamath and Modoc Tribes and the Yahooskin Band of Snake Indians, and for other purposes.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled,

**SECTION 1. SHORT TITLE.**

This Act may be cited as the “Klamath Indian Tribe Restoration Act”.

**SEC. 2. RESTORATION OF FEDERAL RECOGNITION, RIGHTS, AND PRIVILEGES.**

(a) **FEDERAL RECOGNITION.** — Notwithstanding any provision of law, Federal recognition is hereby extended to the tribe and to members of the tribe. Except as otherwise provided in this Act, all laws and regulations of the United States of general application to Indians or nations, tribes, or bands of Indians which are not inconsistent with any specific provision of this Act shall be applicable to the tribe and its members.

(b) **RESTORATION OF RIGHTS AND PRIVILEGES.** — All rights and privileges of the tribe and the members of the tribe under any Federal treaty, Executive order, agreement, or statute, or any other Federal authority, which may

have been diminished or lost under the Act entitled “An Act to provide for the termination of Federal supervision over the property of the Klamath Tribe of Indians located in the State of Oregon and the individual members thereof, and for other purposes”, approved August 13, 1954 (25 U.S.C. 564 et seq.), are restored, and the provisions of such Act, to the extent that they are inconsistent with this Act, shall be inapplicable to the tribe and to members of the tribe after the date of the enactment of this Act.

(c) **FEDERAL SERVICES AND BENEFITS.** — Notwithstanding any other provision of law, the tribe and its members shall be eligible, on and after the date of the enactment of this Act, for all Federal services and benefits furnished to federally recognized Indian tribes or their members without regard to the existence of a reservation for the tribe. In the case of Federal services available to members of federally recognized Indian tribes residing on or near a reservation, members of the tribe residing in Klamath County shall be deemed to be residing in or near a reservation. Any member residing in Klamath County shall continue to be eligible to receive any such Federal service notwithstanding the establishment of a reservation for the tribe in the future. Notwithstanding any other provision of law, the tribe shall be considered an Indian tribe for the purpose of the “Indian Tribal Government Tax Status Act” (Sec. 7871, I.R.C. 1954).

#### **[100 Stat. 850]**

(d) **CERTAIN RIGHTS NOT ALTERED.** — Nothing in this Act shall alter any property right or obligation, any contractual right or obligation, or any obligation for taxes already levied.

(e) This Act does not apply to the members of the Modoc Indian Tribe of Oklahoma as recognized under section 2(a) of the Act of May 15, 1978 (92 Stat. 246) and the Klamath Tribe of Indians does not (except for the purposes set out in section 2(a)(1) of that Act) include the members of the Modoc Indian Tribe of Oklahoma.

### **SEC. 3. TRIBE CONSTITUTION AND BYLAWS.**

The tribe's Constitution and Bylaws shall remain in full force and effect and nothing in this Act shall affect the power of the General Council to take any action under the Constitution and Bylaws.

#### SEC. 4. CONSERVATION AND DEVELOPMENT OF LANDS.

(a) IN GENERAL. — Notwithstanding the tribe's previous rejection of the Act of June 18, 1934 (25 U.S.C. 461 et seq.), upon written request of the General Council, the Secretary of the Interior shall conduct a special election pursuant to section 18 of such Act to determine if such Act should be applicable to the tribe.

(b) ADOPTION OF CONSTITUTION. — Upon written request of the General Council, the Secretary shall conduct an election pursuant to section 16 of the Act approved on June 18, 1934 (43 Stat. 987; 25 U.S. C. 476), for the purpose of adopting a new constitution for the tribe.

#### SEC. 5. HUNTING, FISHING, TRAPPING, AND WATER RIGHTS.

Nothing in this Act shall affect in any manner any hunting, fishing, trapping, gathering, or water right of the tribe and its members.

#### SEC. 6. TRANSFER OF LAND TO BE HELD IN TRUST.

The Secretary shall accept real property for the benefit of the tribe if conveyed or otherwise transferred to the Secretary. Such property shall be subject to all valid existing rights including liens, outstanding taxes (local and State), and mortgages. Subject to the conditions imposed by this section, the land transferred shall be taken in the name of the United States in trust for the tribe and shall be part of their reservation. The transfer of real property authorized by this section shall be exempt from all local, State, and Federal taxation as of the date of transfer.

#### SEC. 7. CRIMINAL AND CIVIL JURISDICTION.

The State shall exercise criminal and civil jurisdiction within the boundaries of the reservation, in accordance with section 1162 of title 18, United States Code, and section 1360 of title 28, United States Code, respectively.

#### SEC. 8. ECONOMIC DEVELOPMENT.

(a) PLAN FOR ECONOMIC SELF-SUFFICIENCY. — The Secretary shall

—

(1)(A) enter into negotiations with the Executive Committee of the General Council with respect to establishing a plan for economic development for the tribe; and

(B) in accordance with this section and not later than two years after the date of the enactment of this Act, develop such a plan.

(2) Upon the approval of such plan by the General Council (and after consultation with the State and local officials pursu-

**[100 Stat. 851]**

ant to subsection (b)), the Secretary shall submit such plan to the Congress.

(b) CONSULTATION WITH STATE AND LOCAL OFFICIALS REQUIRED. — To assure that legitimate State and local interests are not prejudiced by the proposed economic self-sufficiency plan, the Secretary shall notify and consult with the appropriate officials of the State and all appropriate local governmental officials in the State. The Secretary shall provide complete information on the proposed plan to such officials, including the restrictions on such proposed plan imposed by subsection (c). During any consultation by the Secretary under this subsection, the Secretary shall provide such information as the Secretary may possess, and shall request comments and additional information on the extent of any State or local service to the tribe.

(c) RESTRICTIONS TO BE CONTAINED IN PLAN. — Any plan developed by the Secretary under subsection (a) shall provide that —

(1) any real property transferred by the tribe or any member to the Secretary shall be taken and held in the name of the United States for the benefit of the tribe;

(2) any real property taken in trust by the Secretary pursuant to such plan shall be subject to —

(A) all legal rights and interests in such land existing at the time of the acquisition of such land by the Secretary, including any lien, mortgage, or previously levied and outstanding State or local tax; and (B) foreclosure or sale in accordance with the laws of the State pursuant to the terms of any valid obligation in existence at the time of the acquisition of such land by the Secretary; and

(3) any real property transferred pursuant to such plan shall be exempt from Federal, State, and local taxation of any kind.



(d) APPENDIX TO PLAN SUBMITTED TO THE CONGRESS. — The Secretary shall append to the plan submitted to the Congress under subsection (a) a detailed statement —

(1) naming each individual and official consulted in accordance with subsection (b); (2) summarizing the testimony received by the Secretary pursuant to any such consultation; and (3) including any written comments or reports submitted to the Secretary by any party named in paragraph (1).

#### SEC. 9. DEFINITIONS.

For the purposes of this Act the following definitions apply:

(1) The term “tribe” means the Klamath Tribe consisting of the Klamath and Modoc Tribes of Oregon and the Yahooskin Band of Snake Indians.

(2) The term “member” means those persons eligible for enrollment under the Constitution and Bylaws of the Klamath Tribe.

(3) The term “Secretary” means the Secretary of the Interior or his designated representative.

(4) The term “State” means the State of Oregon.

(5) The term “Constitution and Bylaws” means the Constitution and Bylaws of the Klamath Tribe of Indians in effect on the date of the enactment of this Act.

(6) The term “General Council” means the governing body of the tribe under the Constitution and Bylaws.

#### **[100 Stat. 852]**

#### SEC. 10. REGULATIONS.

The Secretary may make such rules and regulations as are necessary to carry out the purposes of this Act.

**CEQ NEPA Regulations, 40 C.F.R. § 1508.1** (effective Sept. 14, 2020)

\* \* \*

(g) Effects or impacts means changes to the human environment from the proposed action or alternatives that are reasonably foreseeable and have a reasonably close causal relationship to the proposed action or alternatives, including those effects that occur at the same time and place as the proposed action or alternatives and may include effects that are later in time or farther removed in distance from the proposed action or alternatives.

(1) Effects include ecological (such as the effects on natural resources and on the components, structures, and functioning of affected ecosystems), aesthetic, historic, cultural, economic (such as the effects on employment), social, or health effects. Effects may also include those resulting from actions that may have both beneficial and detrimental effects, even if on balance the agency believes that the effect will be beneficial.

(2) A “but for” causal relationship is insufficient to make an agency responsible for a particular effect under NEPA. Effects should generally not be considered if they are remote in time, geographically remote, or the product of a lengthy causal chain. Effects do not include those effects that the agency has no ability to prevent due to its limited statutory authority or would occur regardless of the proposed action.

\* \* \*

(q) Major Federal action or action means an activity or decision subject to Federal control and responsibility subject to the following:

(1) Major Federal action does not include the following activities or decisions:

(i) Extraterritorial activities or decisions, which means agency activities or decisions with effects located entirely outside of the jurisdiction of the United States;

(ii) Activities or decisions that are non-discretionary and made in accordance with the agency's statutory authority;

(iii) Activities or decisions that do not result in final agency action under the Administrative Procedure Act or other statute that also includes a finality requirement;

(iv) Judicial or administrative civil or criminal enforcement actions;

(v) Funding assistance solely in the form of general revenue sharing funds with no Federal agency control over the subsequent use of such funds;

(vi) Non-Federal projects with minimal Federal funding or minimal Federal involvement where the agency does not exercise sufficient control and responsibility over the outcome of the project; and

(vii) Loans, loan guarantees, or other forms of financial assistance where the Federal agency does not exercise sufficient control and responsibility over the effects of such assistance (for example, action does not include farm ownership and operating loan guarantees by the Farm Service Agency pursuant to 7 U.S.C. 1925 and 1941 through 1949 and business loan guarantees by the Small Business Administration pursuant to 15 U.S.C. 636(a), 636(m), and 695 through 697g).

\* \* \*

### **Or. Rev. Stat. § 539.130.**

#### **Findings of fact and determination; certification of proceedings; filing in court; time for hearing by court; notice; force of administrative determination**

(1) As soon as practicable after the compilation of the data the Water Resources Director shall make and cause to be entered of record in the Water Resources Department findings of fact and an order of determination determining and establishing the several rights to the waters of the stream. The original evidence gathered by the director, and certified copies of the observations and measurements and maps of record, in connection with the determination, as provided for by ORS 539.120, together with a copy of the order of determination and findings of fact of the director as they appear of record in the Water Resources Department, shall be certified to by the director and filed with the clerk of the circuit court wherein the determination is to be heard. A certified copy of the order

of determination and findings shall be filed with the county clerk of every other county in which the stream or any portion of a tributary is situated.

(2) Upon the filing of the evidence and order with the court the director shall procure an order from the court, or any judge thereof, fixing the time at which the determination shall be heard in the court, which hearing shall be at least 40 days subsequent to the date of the order. The clerk of the court shall, upon the making of the order, forthwith forward a certified copy to the department by registered mail or by certified mail with return receipt.

(3) The department shall immediately upon receipt thereof notify by registered mail or by certified mail with return receipt each claimant or owner who has appeared in the proceeding of the time and place for hearing. Service of the notice shall be deemed complete upon depositing it in the post office as registered or certified mail, addressed to the claimant or owner at the post-office address of the claimant or owner, as set forth in the proof of the claimant or owner theretofore filed in the proceeding. Proof of service shall be made and filed with the circuit court by the department as soon as possible after mailing the notices.

(4) The determination of the department shall be in full force and effect from the date of its entry in the records of the department, unless and until its operation shall be stayed by a stay bond as provided by ORS 539.180.

**Or. Rev. Stat. § 539.140.**  
**Water right certificates**

Upon the final determination of the rights to the waters of any stream, the Water Resources Department shall issue to each person represented in the determination a certificate setting forth the name and post-office address of the owner of the right; the priority of the date, extent and purpose of the right, and if the water is for irrigation purposes, a description of the legal subdivisions of land to which the water is appurtenant. The original certificate shall be mailed to the owner and a record of the certificate maintained in the Water Resources Department.

**Or. Rev. Stat. § 539.150.**  
**Court proceedings to review administrative determination**

(1) From and after the filing of the evidence and order of determination in the circuit court, the proceedings shall be like those in an action not triable by right

to a jury, except that any proceedings, including the entry of a judgment, may be had in vacation with the same force and effect as in term time. At any time prior to the hearing provided for in ORS 539.130, any party or parties jointly interested may file exceptions in writing to the findings and order of determination, or any part thereof, which exceptions shall state with reasonable certainty the grounds and shall specify the particular paragraphs or parts of the findings and order excepted to.

(2) A copy of the exceptions, verified by the exceptor or certified to by the attorney for the exceptor, shall be served upon each claimant who was an adverse party to any contest wherein the exceptor was a party in the proceedings, prior to the hearing. Service shall be made by the exceptor or the attorney for the exceptor upon each such adverse party in person, or upon the attorney if the adverse party has appeared by attorney, or upon the agent of the adverse party. If the adverse party is a nonresident of the county or state, the service may be made by mailing a copy to that party by registered mail or by certified mail with return receipt, addressed to the place of residence of that party, as set forth in the proof filed in the proceedings.

(3) If no exceptions are filed the court shall, on the day set for the hearing, enter a judgment affirming the determination of the Water Resources Director. If exceptions are filed, upon the day set for the hearing the court shall fix a time, not less than 30 days thereafter, unless for good cause shown the time be extended by the court, when a hearing will be had upon the exceptions. All parties may be heard upon the consideration of the exceptions, and the director may appear on behalf of the state, either in person or by the Attorney General. The court may, if necessary, remand the case for further testimony, to be taken by the director or by a referee appointed by the court for that purpose. Upon completion of the testimony and its report to the director, the director may be required to make a further determination.

(4) After final hearing the court shall enter a judgment affirming or modifying the order of the director as the court considers proper, and may assess such costs as it may consider just except that a judgment for costs may not be rendered against the United States. An appeal may be taken to the Court of Appeals from the judgment in the same manner and with the same effect as in other cases in equity, except that notice of appeal must be served and filed within 60 days from the entry of the judgment.

**Or. Rev. Stat. § 539.170.**  
**Division of water pending hearing**

While the hearing of the order of the Water Resources Director is pending in the circuit court, and until a certified copy of the judgment, order or decree of the court is transmitted to the director, the division of water from the stream involved in the appeal shall be made in accordance with the order of the director.

**Or. Rev. Stat. § 539.210.**  
**Appearance and submission of proof by claimants;**  
**nonappearance as forfeiture; intervention in proceedings**

Whenever proceedings are instituted for determination of rights to the use of any water, it shall be the duty of all claimants interested therein to appear and submit proof of their respective claims, at the time and in the manner required by law. Any claimant who fails to appear in the proceedings and submit proof of the claims of the claimant shall be barred and estopped from subsequently asserting any rights theretofore acquired upon the stream or other body of water embraced in the proceedings, and shall be held to have forfeited all rights to the use of the water theretofore claimed by the claimant. \* \* \*

**Or. Rev. Stat. § 540.020.**  
**Watermasters; appointment; removal;**  
**Director vested with powers of watermaster**

(1) The Water Resources Director shall appoint one watermaster for each water district. The watermaster shall hold office until removed by the director, and shall be subject to any applicable provision of the State Personnel Relations Law. The director shall fill all vacancies which occur in the office.

(2) The director, or any duly authorized assistant, shall have the powers and authority of a watermaster in the distribution of water in any water district.

**Or. Rev. Stat. §540.045.**  
**Watermaster duties**

(1) Each watermaster shall:

(a) Regulate the distribution of water among the various users of water from any natural surface or ground water supply in accordance with the users' existing water rights of record in the Water Resources Department.

(b) Upon the request of the users, distribute water among the various users under any partnership ditch, pipeline or well or from any reservoir, in accordance with the users' existing water rights of record in the department.

(c) Divide the waters of the natural surface and ground water sources and other sources of water supply among the canals, ditches, pumps, pipelines and reservoirs taking water from the source for beneficial use, by regulating, adjusting and fastening the headgates, valves or other control works at the several points of diversion of surface water or the several points of appropriation of ground water, according to the users' relative entitlements to water.

(d) Attach to the headgate, valve or other control works the watermaster regulates under paragraph (c) of this subsection, a written notice dated and signed by the watermaster, setting forth that the headgate, valve or other control works has been properly regulated and is wholly under the control of the watermaster.

(e) Perform any other duties the Water Resources Director may require.

(2) When a watermaster must rely on a well log or other documentation to regulate the use or distribution of ground water, the regulation shall be in accordance with ORS 537.545(4).

(3) For purposes of regulating the distribution or use of water, any stored water released in excess of the needs of water rights calling on that stored water shall be considered natural flow, unless the release is part of a water exchange under the control of, and approved by, the watermaster.



(4) As used in this section, “existing water rights of record” includes all completed permits, certificates, licenses and ground water registration statements filed under ORS 537.605 and related court decrees.

**Or. Rev. Stat. § 540.145.**  
**Distribution rules; applicability**

The Water Resources Commission may adopt rules to secure the equal and fair distribution of water in accordance with the rights of the various users. The rules shall apply to all water rights that have been established:

- (1) By court decree;
- (2) Under an order of the commission or the Water Resources Director in proceedings for the determination of relative rights to the use of water; or
- (3) Through permits to appropriate water or certificates of water rights issued by the commission.

**Or. Rev. Stat. § 540.210.**  
**Distribution among users from ditch or reservoir**

(1) Whenever any water users from any ditch or reservoir, either among themselves or with the owner thereof, are unable to agree relative to the distribution or division of water through or from the ditch or reservoir, either the owner or any such water user may apply to the watermaster of the district in which the ditch or reservoir is located, by written notice, setting forth such facts, and asking the watermaster to take charge of the ditch or reservoir for the purpose of making a just division or distribution of water from it to the parties entitled to the use thereof.

(2) The watermaster shall then take exclusive charge of the ditch or reservoir, for the purpose of dividing or distributing the water therefrom in accordance with the respective and relative rights of the various users of water from the ditch or reservoir, and shall continue the work until the necessity therefor shall cease to exist.

(3) The distribution and division of water shall be made according to the relative and respective rights of the various users from the ditch or reservoir, as



determined by the Water Resources Director, by decree of the circuit court, or by written contract between all of the users filed with the watermaster.

(4) The circuit court having jurisdiction may request the watermaster of the district to take charge of any such ditch or reservoir, and to enforce any decree respecting such ditch or reservoir made under the jurisdiction of the court.

**Or. Rev. Stat. § 540.510.**

**Appurtenance of water to premises; change of use or place of use or point of diversion; application for transfer of primary and supplemental water rights; severability of right to use conserved water**

(1) Except as provided in subsections (2) to (8) of this section, all water used in this state for any purpose shall remain appurtenant to the premises upon which it is used and no change in use or place of use of any water for any purpose may be made without compliance with the provisions of ORS 540.520 and 540.530. However, the holder of any water use subject to transfer may, upon compliance with the provisions of ORS 540.520 and 540.530, change the use and place of use, the point of diversion or the use theretofore made of the water in all cases without losing priority of the right theretofore established. A district may change the place of use in the manner provided in ORS 540.572 to 540.580 in lieu of the method provided in ORS 540.520 and 540.530. \* \* \*

**Or. Rev. Stat. § 540.520.**

**Application for change of use, place of use or point of diversion; public notice; filing of protest; hearing; exemptions**

(1) Except when the application is made under ORS 541.327 or when an application for a temporary transfer is made under ORS 540.523, if the holder of a water use subject to transfer for irrigation, domestic use, manufacturing purposes, or other use, for any reason desires to change the place of use, the point of diversion, or the use made of the water, an application to make such change, as the case may be, shall be filed with the Water Resources Department.

(2) The application required under subsection (1) of this section shall include:

- (a) The name of the owner;
- (b) The previous use of the water;

- (c) A description of the premises upon which the water is used;
- (d) A description of the premises upon which it is proposed to use the water;
- (e) The use that is proposed to be made of the water;
- (f) The reasons for making the proposed change; and
- (g) Evidence that the water has been used over the past five years according to the terms and conditions of the owner's water right certificate or that the water right is not subject to forfeiture under ORS 540.610.

(3) If the application required under subsection (1) of this section is necessary to allow a change in a water right pursuant to ORS 537.348, is necessary to complete a project funded under ORS 541.932, or is approved by the State Department of Fish and Wildlife as a change that will result in a net benefit to fish and wildlife habitat, the department, at the discretion of the Water Resources Director, may waive or assist the applicant in satisfying the requirements of subsection (2)(c) and (d) of this section. The assistance provided by the department may include, but need not be limited to, development of an application map.

(4) If the application is to change the point of diversion, the transfer shall include a condition that the holder of the water right provide a proper fish screen at the new point of diversion, if requested by the State Department of Fish and Wildlife.

(5) Upon the filing of the application the department shall give notice by publication in a newspaper having general circulation in the area in which the water rights are located, for a period of at least two weeks and not less than one publication each week. The notice shall include the date on which the last notice by publication will occur. The cost of the publication shall be paid by the applicant in advance to the department. In applications for only a change in place of use or for a change in the point of diversion of less than one-fourth mile, and where there are no intervening diversions between the old diversion of the applicant and the proposed new diversion, no newspaper notice need be published. The department shall include notice of such applications in the weekly notice published by the department.

(6) Within 30 days after the last publication of a newspaper notice of the proposed transfer or the mailing of the department's weekly notice, whichever is

later, any person may file, jointly or severally, with the department, a protest against approval of the application.

(7) If a timely protest is filed, or in the opinion of the Water Resources Director a hearing is necessary to determine whether the proposed changes as described by the application would result in injury to existing water rights, the department shall hold a hearing on the matter. Notice and conduct of the hearing shall be under the provisions of ORS chapter 183, pertaining to contested cases, and shall be held in the area where the rights are located unless all parties and persons who filed a protest under this subsection stipulate otherwise.

(8) An application for a change of use under this section is not required if the beneficial use authorized by the water use subject to transfer is irrigation and the owner of the water right uses the water for incidental agricultural, stock watering and other uses related to irrigation use, so long as there is no increase in the rate, duty, total acreage benefited or season of use.

(9) A water right transfer under subsection (1) of this section is not required for a general industrial use that was not included in a water right certificate issued for a specific industrial use if:

(a) The quantity of water used for the general industrial use is not greater than the rate allowed in the original water right and not greater than the quantity of water diverted to satisfy the authorized specific use under the original water right;

(b) The location where the water is to be used for general industrial use was owned by the holder of the original water right at the time the water right permit was issued; and

(c) The person who makes the change in water use provides the following information to the Water Resources Department:

(A) The name and mailing address of the person using water under the water right;

(B) The water right certificate number;

(C) A description of the location of the industrial facility owned by the holder of the original water right at the time the water right permit was issued; and

(D) A description of the general industrial use to be made of the water after the change.

**Or. Rev. Stat. § 540.523.**

**Temporary transfer of water right or permit; terms; revocation; status of supplemental water right or permit**

(1) In accordance with the provisions of this section, any person who holds a water use subject to transfer may request that the Water Resources Department approve the temporary transfer of place of use and, if necessary to convey water to the new temporary place of use, temporarily change the point of diversion or point of appropriation for a period not to exceed five years. An application for a temporary transfer shall:

- (a) Be submitted in writing to the Water Resources Department;
- (b) Be accompanied by the appropriate fee for a change in the place of use as set forth in ORS 536.050;
- (c) Include the information required under ORS 540.520 (2); and
- (d) Include any other information the Water Resources Commission by rule may require.

(2) Notwithstanding the notice and waiting requirements under ORS 540.520, the department shall approve by order a request for a temporary transfer under this section if the department determines that the temporary transfer will not injure any existing water right.

(3) All uses of water for which a temporary transfer is allowed under this section shall revert automatically to the terms and conditions of the water use subject to transfer upon expiration of the temporary transfer period.

(4) The time during which water is used under an approved temporary transfer order does not apply toward a finding of forfeiture under ORS 540.610.

(5) The department may revoke a prior approval of the temporary transfer at any time if the department finds that the transfer is causing injury to any existing water right.

(6) Any map that may be required under subsection (1) of this section need not be prepared by a certified water right examiner.

(7) The lands from which the water right is removed during the period of a temporary transfer shall receive no water under the transferred water right.

(8) When an application for a temporary change of the place of use for a primary water right is submitted in accordance with this section, the applicant also shall indicate whether the land described in the application has an appurtenant supplemental water right or permit. If the applicant also intends to temporarily transfer the supplemental water right or permit, the applicant also shall include the information required under ORS 540.520 (2) for the supplemental water right or permit. \* \* \*

(9) In issuing an order under subsection (2) of this section, the department shall include any condition necessary to protect other water rights.

#### **Or. Admin R. 690-025-0020.**

##### **Definitions**

Notwithstanding OAR 690-008-001, the following definitions apply to OAR 690-0025-0020 to OAR 690-0025-0040, unless the context requires otherwise:

(1) “Determined claim” means a claim for surface water as provided in the Amended and Corrected Findings of Fact and Order of Determination issued on February 28, 2014, and subject to regulation pursuant to ORS 539.170.

(2) “Existing rights of record” means authorized groundwater uses, determined claims, groundwater registrations, and surface water rights.

\* \* \*

(7) “Upper Klamath Basin” means the area above and around Upper Klamath Lake that encompasses all water sources that are tributary to Upper Klamath Lake, including groundwater, the Wood River, Williamson River and Sprague River and their tributaries and the Klamath Marsh and its tributaries.

(8) “Surface water right” means certificated and permitted water rights, and determined claims, the source of which is surface water, including springs, streams, and rivers.

**Or. Admin R. 690-025-0025.**

**Distribution of Water between Existing Rights of Record**

(1) Whenever there is impairment of, or interference with, existing water rights to appropriate surface water the Oregon Water Resources Department may regulate the distribution of water among the various users of water from any natural surface or groundwater reservoir in accordance with the users' existing rights of record as authorized by ORS 537.525, ORS 539.170 and ORS 540.045.

(2) These rules, OAR 690-0025-0020 to OAR 690-0025-0040, govern the control of wells in the Upper Klamath Basin that produce from a groundwater reservoir that is hydraulically connected to surface water and subject to regulation in the course of distribution of water in accordance with the users' existing rights of record.

(3) These rules operate in lieu of OAR Chapter 690, Division 09, and in conjunction with OAR Chapter 690, Division 250, except that these rules govern distribution of groundwater and surface water in the Upper Klamath Basin in lieu of OAR 690-250-0120(2).

**Or. Admin. R. 690-250-0100.**

**Regulation of Surface Water**

(1) The watermaster shall investigate and respond to all complaints of water shortages or unlawful use based on a review of appropriate records and performance of field inspections, as judgement may require. The watermaster's response may be oral or written communication to appropriators involved in the complaint or shortages, or by personal visits by the watermaster or assistant watermaster.

(2) The watermaster may begin regulation if investigation reveals a valid complaint of water shortage or unlawful use. Water shall be regulated in accordance with the relative rights or rotation agreements of the appropriators involved in the complaint or shortage.