

ORAL ARGUMENT REQUESTED
No. 20-5074

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

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

v.

DAVID LONGLY BERNHARDT,
Secretary of the Interior, et al.,
Defendants – Appellees.

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

APPELLANTS' REPLY BRIEF

DOMINIC M. CAROLLO
Yockim Carollo LLP
630 SE Jackson Street, Suite 1
P.O. Box 2456
Roseburg, Oregon 97470
Telephone: (541) 957-5900
Facsimile: (541) 957-5923
Email: dcarollo@yockimlaw.com

DAMIEN M. SCHIFF
DAVID J. DEERSON
Pacific Legal Foundation
930 G Street
Sacramento, California 95814
Telephone: (916) 419-7111
Facsimile: (916) 419-7747
Email: dschiff@pacificlegal.org
Email: ddeerson@pacificlegal.org

Attorneys for Appellants

TABLE OF CONTENTS

TABLE OF AUTHORITIES	iii
GLOSSARY	vi
SUMMARY OF THE ARGUMENT	1
ARGUMENT	3
I. The Ranchers have Article III standing to challenge the Protocol and calls made thereunder	3
A. As trustee holding legal title, the Bureau has discretion over whether to call for the implementation of the Tribes' water right	5
B. To make an effective call, the Government and the Tribes must comply with Oregon's law of administration	9
C. Under Oregon law, the Tribes may not make an effective call for their water right absent the Government's consent	12
D. The Ranchers' injuries are fairly traceable to the Protocol and to calls made thereunder	17
II. The Amended Complaint states a valid claim for an unlawful agency sub-delegation	19
A. The Bureau has the authority to manage Indian affairs, and Congress has not authorized the Bureau to delegate that authority	20
B. <i>U.S. Telecom v. FCC</i> is controlling precedent	24
III. The Amended Complaint states a valid claim for violation of the National Environmental Protection Act	26

CONCLUSION	30
CERTIFICATE OF COMPLIANCE WITH TYPE-VOLUME LIMIT, TYPEFACE REQUIREMENTS, AND TYPE-STYLE REQUIREMENTS.....	31
CERTIFICATE OF SERVICE.....	32

TABLE OF AUTHORITIES

Cases

<i>Burlington N.R. Co. v. Blackfeet Tribe of Blackfeet Indian Res.</i> , 924 F.2d 899 (9th Cir. 1991).....	6
<i>Cappaert v. United States</i> , 426 U.S. 128 (1976).....	29
<i>Cascadia Wildlands v. U.S. Bureau of Indian Affairs</i> , No. 6:13-cv-1559-TC, 2014 WL 2872008 (D. Or. June 24, 2014), <i>aff'd</i> , 801 F.3d 1105 (9th Cir. 2015).....	26
<i>Colorado River Water Conserv. Dist. v. United States</i> , 424 U.S. 800 (1976).....	10-11
<i>*Fort Vannoy Irrigation District v. Water Resources Commission</i> , 188 P.3d 277 (Or. 2008)	13-14, 16
<i>Honeywell Inter., Inc. v. EPA</i> , 705 F.3d 470 (D.C. Cir. 2013)	18-19
<i>Huddy v. F.C.C.</i> , 236 F.3d 720 (D.C. Cir. 2001)	18
<i>Klamath Irrig. Dist. v. United States</i> , 227 P.3d 1145 (Or. 2010)	15-16
<i>Manygoats v. Kleppe</i> , 558 F.2d 556 (10th Cir. 1977).....	27
<i>Michigan v. Bay Mills Indian Community</i> , 572 U.S. 782 (2014).....	21
<i>Nulankeyutmonen Nkihtaqmikon v. Impson</i> , 503 F.3d 18 (1st Cir. 2007)	27
<i>*Printz v. United States</i> , 521 U.S. 898 (1997).....	12

<i>Shoshone-Bannock Tribes v. Reno</i> , 56 F.3d 1476 (D.C. Cir. 1995)	8-9, 25
<i>Solid Waste Agency of N. Cook Cty. v. U.S. Army Corps of Eng'rs</i> , 531 U.S. 159 (2001)	22-23
<i>Stand Up for California! v. U.S. Dep't of Interior</i> , 204 F. Supp. 3d 212 (D.D.C. 2016)	26-27
<i>Summers v. Earth Island Inst.</i> , 555 U.S. 488 (2009)	4
<i>Teel Irrig. Dist. v. Water Res. Dep't of State of Oregon</i> , 919 P.2d 1172 (Or. 1996)	10
<i>*U.S. Telecom Ass'n v. FCC</i> , 359 F.3d 554 (D.C. Cir. 2004)	3, 20, 24
<i>United States v. Adair</i> , 723 F.2d 1394 (9th Cir. 1983)	7-8, 13
<i>United States v. Lara</i> , 541 U.S. 193 (2004)	22
<i>United States v. Mitchell</i> , 463 U.S. 206 (1983)	6
<i>United States v. Oregon</i> , 44 F.3d 758 (9th Cir. 1994)	10
<i>*United States v. White Mountain Apache Tribe</i> , 784 F.2d 917 (9th Cir. 1986)	5, 15, 21, 25

Constitution

<i>*U.S. Const. amend. X</i>	12
------------------------------------	----

Statutes

<i>*25 U.S.C. § 2</i>	21, 25
<i>25 U.S.C. § 71</i>	21-23

*43 U.S.C. § 666(a)(2)	9
Or. Rev. Stat. § 540.045	29

Regulation

40 C.F.R. § 1508.1(q)(1)(iv) (effective Sept. 14, 2020)	27-28
---	-------

Oregon Administrative Rules

Or. Admin. R. 690-250-0020(2)	28
Or. Admin. R. 690-250-0090(2)	30
Or. Admin. R. 690-250-0100.....	29
Or. Admin. R. 690-250-0100(1)	30

Other Authorities

Bricker, Jennie L., <i>Entitlement, Water Resources, and the Common Good</i> , 18 Willamette J. Int'l L. & Disp. Resol. 143 (2010)	28
<i>Enjoin</i> , Black's Law Dictionary (11th ed. 2019)	29
<i>Hearing on S. 18 Before a Subcomm. of the S. Comm.</i> <i>on the Judiciary, United States Senate</i> , 82d Cong. 21 (Apr. 25, Aug. 3-8, 1951).....	11
Restatement (Third) of Trusts (2007)	25

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

GLOSSARY

Ans. Br.:	Appellees' Answering Brief
App.:	Appendix
Bureau:	Bureau of Indian Affairs
Department:	Oregon Water Resources Department
Government:	Appellees David L. Bernhardt, <i>et al.</i>
NEPA:	National Environmental Policy Act
OLC:	Office of Legal Counsel
Op. Br.:	Appellants' Opening Brief
Ranchers:	Appellants Gerald H. Hawkins, <i>et al.</i>
Tribes:	Klamath Indian Tribes

SUMMARY OF THE ARGUMENT

The Protocol Agreement formalizes a procedure for how the Bureau of Indian Affairs and the Klamath Indian Tribes will place calls with the Oregon Water Resources Department for the implementation of the Tribes' water right. Ans. Br. 30. The Ranchers' substantive injuries flow directly from calls that are implemented as a result of that process. This case therefore turns on the rules of that process; specifically, whether the Tribes as owners of a beneficial interest in a non-consumptive water right may call for the implementation of that water right without concurrence from the Government, which holds legal title to the water right.

In its arguments on standing, as well as in its arguments on the merits, the Government relies heavily on the proposition that the Bureau is powerless to withhold concurrence from a lawful call made by the Tribes. That is not correct: it is the Tribes who, in the absence of any law so mandating, are powerless to coerce the Government into taking action. The Government identifies no such law. That is so because, by its statutory authority to manage Indian affairs, by the Executive's Treaty Power, and by the nature of its role as trustee for the benefit of the Tribes,

the Government (through the Bureau) has ultimate management responsibility for the Tribes' water right.

The Government also argues, mistakenly, that the McCarran Amendment does not subject the administration of the Tribes' water right to Oregon law. But it cannot deny that, in seeking the Department's implementation of the Tribes' water right, the Government and the Tribes must operate according to Oregon's administrative procedures. Ans. Br. 32. Pursuant to those procedures, the legal owner of a water right must accede to the call for implementation of that right. Thus, the Government's concurrence in any given Tribal call is a direct cause of the Ranchers' injuries. The Bureau's promise, codified in the Protocol, not to withhold such required concurrence is therefore a delegation of the agency's authority to manage Indian affairs. In light of the Protocol's several provisions for resolving disagreements between the Bureau and the Tribes—and its anticipation that such agreements might not be resolved in every instance—it is more than plausible that the Bureau would decline to concur in a given call if only it had not bargained away its authority to do so.

As to the merits, the Government’s attempt to save the Protocol from the Ranchers’ unlawful delegation challenge does not succeed because this Court’s decision in *U.S. Telecom Ass’n v. FCC*, 359 F.3d 554 (D.C. Cir. 2004), is squarely on point with the delegation at issue here. Equally unsuccessful is the Government’s attempt to avoid NEPA’s strictures. The Government’s argument that the Bureau is without discretion fails for the same reason it fails in the standing context—the Bureau does have such discretion. And the NEPA exemption for “enforcement actions” is reserved for situations, not like the present case, in which federal law is enforced against an alleged violator. But the Department’s implementation of a call does not enforce junior users’ compliance with any law, state or federal; it is merely the assertion under state law of an existing right that secures state administrative implementation of that right.

ARGUMENT

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

As the Government acknowledges, the Ranchers can establish standing if they demonstrate that (1) the Government has final decision-making authority over whether and how the Tribes’ water right should

be implemented, and (2) the Protocol delegated this authority to the Tribes. Ans. Br. 23-24. Although the Government offers several arguments as to why the Ranchers cannot make such a showing, none has merit.¹

All of the Government's arguments fail because the state implementation of water rights that have been recognized in an Oregon administrative adjudication is necessarily subject to Oregon law, which requires the concurrence of the legal owner before the Department will effectuate a given call. Thus, the Bureau's promise not to withhold such required concurrence has a real and tangible effect on the Ranchers' water rights. And as the Protocol anticipates on its face, the Bureau may at times determine that a proposed Tribal call is unwarranted or inappropriate. Restoring the proper trust relationship between the

¹ The Government contends that the Ranchers cannot allege "substantive injuries" because their water rights are junior to the Tribes' water right. Ans. Br. 21-22. But the Ranchers cannot establish standing by alleging procedural injuries *in vacuo*. See *Summers v. Earth Island Inst.*, 555 U.S. 488, 496 (2009). Thus, the Ranchers appropriately advance substantive injuries to their interests protected under the law: *i.e.*, their water rights and their aesthetic and recreational interests. Op. Br. 27-28. That these interests are not absolute—because, for example, the Ranchers' water rights must cede to the Tribes' when the latter is lawfully called upon—does not make the Ranchers' interests any less substantive.

Government and the Tribes by eliminating the Bureau's delegation of decision-making authority would restore to the Bureau the power to withhold concurrence over a given call and thereby prevent its effectuation. Thus, the Ranchers' injuries are fairly traceable to the Protocol and to the calls made thereunder, and would be redressable by judicial order.

A. As trustee holding legal title, the Bureau has discretion over whether to call for the implementation of the Tribes' water right

As discussed in further detail below, Oregon law governs the Department's implementation of water rights, and it requires consent of the legal owner to effectuate a call. The Government urges the Court to put aside the question of whether an effective call can be made absent federal consent, and instead to ask whether the Bureau is even authorized to withhold concurrence from lawful calls made by the Tribes in the first place. Ans. Br. 40.

It is. The Government has an obligation, as trustee, to manage the trust corpus in the manner it believes appropriate. *Cf. United States v. White Mountain Apache Tribe*, 784 F.2d 917, 920 (9th Cir. 1986). Nowhere is this more readily apparent than in the Protocol itself, which

anticipates both that the Bureau may have reasons to disagree with decisions made by the Tribes, and that the Bureau may override Tribal objections. App. 032 ¶¶ 3, 7, 036-37 ¶¶ 8-9, 12. The Government urges that the trust relationship here is “limited,” and therefore does not empower the Government to manage the trust corpus. Ans. Br. 28. But the limitations on the trust relationship discussed in the Government’s authorities, Ans. Br. 26-28, pertain to the ability of (i) Indian tribes as trust beneficiaries to demand certain actions by, or to impose fiduciary duties on, the Government as trustee, or (ii) third parties who seek to use the trust relationship to avoid tribal regulation. *See, e.g., United States v. Mitchell*, 463 U.S. 206, 217-18 (1983) (trust at issue was “limited” in the sense that it did “not impose any fiduciary management duties or render the United States answerable for breach thereof”); *Burlington N.R. Co. v. Blackfeet Tribe of Blackfeet Indian Res.*, 924 F.2d 899, 902-06 (9th Cir. 1991) (defendant tribes retained the power to tax non-Indian owners of on-reservation rights of way despite the existence of a trust relationship between the tribes and the Government). These decisions do not support the Government’s position that a “limited” trust can enhance Tribal power at the expense of federal authority.

In addition to the purported distinction between limited and unlimited trusts, the Government argues that it cannot countermand a Tribal call for water because the Tribes own and control that water, citing *Adair* and *Shoshone*. See Ans. Br. 39. Those decisions do not support the Government. *Adair* involved the Tribes’ reserved water right as well as rights acquired by the Government as purchaser of former reservation lands. *United States v. Adair*, 723 F.2d 1394, 1418-19 (9th Cir. 1983). The *Adair* district court had held that the Tribes’ reserved right was “coterminous with the water right claimed by the United States as a successor land owner[.]” *Id.* at 1399. In rejecting that conclusion, the Ninth Circuit highlighted the distinction between the Tribes’ reserved right, to which the Government holds legal title only, and the rights acquired by purchase of land, in which the Government owns both legal *and* beneficial interests. It was in such a context that the Ninth Circuit observed that the Government does not “control” the Tribes’ reserved right in the way that it controls its own rights acquired by purchase.² *Id.*

² As the Government acknowledges, *Adair*’s conclusion that the Government “has no ownership interest in, or right to control the use of” the Tribes’ right is no longer valid given the subsequent restoration of the federal trust relationship. Ans. Br. 25-26 & n.4.

at 1418. Although *Adair* held that the Tribes' reserved right cannot be transferred, that holding does not conflict with the Ranchers' position. The Ranchers do not contend that the right governed by the Protocol has been transferred to the Government, but merely that the Government possesses management authority over that right, which is to be exercised for the Tribes' benefit. Similarly, in *Shoshone*, while noting that federal reserved water rights "belong to the Indians rather than to the United States, which holds them only as trustee," this Court held that the Attorney General had discretion not to assert a Tribal claim with which he disagreed. *Shoshone-Bannock Tribes v. Reno*, 56 F.3d 1476, 1479, 1481-82 (D.C. Cir. 1995).

Ultimately, the Government's defenses must fail because they are backwards. The Government contends that, "absent treaty or statutory provisions clearly diminishing or abrogating a tribe's rights," the Government must follow along with all tribal decisions made about the exercise of those rights. Ans. Br. 28. It is however just the other way around: "an Indian tribe cannot force the government to take a specific action unless a treaty, statute or agreement imposes, expressly or by implication, that duty." *Shoshone*, 56 F.3d at 1482. The Government does

not point to any provision in the 1864 Treaty, or any other provision of law, imposing such an obligation. Rather, it seems to assume that “the ‘mere existence’ of the Treaty requires the federal government” to act in lockstep with Tribal decision-making. *See id.* As this Court made clear in *Shoshone*, “[t]here is nothing to [that] contention.” *Id.*

Finally, even if the Government were correct that the Bureau must zealously further the Tribes’ interests above all other discretionary counter-considerations, the determination of whether any given call is really necessary to protect the Tribes’ fishing and hunting rights would remain a question of significant technical and scientific expertise. As the Protocol plainly anticipates, App. 032 ¶¶ 3, 036-37 ¶¶ 8-9, such a question is susceptible to legitimate disagreements between the Tribes and the Bureau. Yet the Protocol also delegates these close judgment calls.

B. To make an effective call, the Government and the Tribes must comply with Oregon’s law of administration

The Government contends that the McCarran Amendment cannot subject the Tribes’ water right to state rules of administration because the Oregon call process to which the Protocol relates is not a “suit” for the administration of water rights under 43 U.S.C. § 666(a)(2). That

contention cannot be squared with the fact that the Protocol and the call process governing the Tribes' water right are a direct result of the Klamath Basin Adjudication, App. 030, which is a "suit" under the McCarran Amendment.³ *United States v. Oregon*, 44 F.3d 758, 770 (9th Cir. 1994); Ans. Br. 32.

As the Supreme Court explained in *Colorado River*, the Amendment "bespeaks a policy that recognizes the availability of comprehensive state systems for adjudication of water rights" to achieve the goal of "unified proceedings." *Colorado River Water Conserv. Dist. v. United States*, 424 U.S. 800, 819 (1976). There the Court approved federal abstention from a water rights dispute in Colorado because the state had "established such a [comprehensive] system for the adjudication *and management* of rights to the use of the State's waters." *Id.* (emphasis added). In outlining the comprehensive nature of Colorado's system, the Court highlighted not only the system's provision for referees to oversee

³ Moreover, the Government's argument fails to acknowledge that, just as with the Klamath Basin Adjudication, disputes over the call process are subject to judicial review. *See generally Teel Irrig. Dist. v. Water Res. Dep't of State of Oregon*, 919 P.2d 1172, 1179-80 (Or. 1996) (water master orders are subject to judicial review under Oregon's Administrative Procedure Act).

the adjudication of claims, but also its provisions for engineers to oversee the “administration and distribution” of water. *Id.* at 804-05. So too here, the Oregon law establishing procedures for the management of water rights is a part of the state’s comprehensive system for the adjudication and administration of those rights. To effectuate its policy aim of unifying proceedings, the McCarran Amendment thus subjects the Government to Oregon rules of administration and, by extension, to the Department’s call-making procedure. *See Hearing on S. 18 Before a Subcomm. of the S. Comm. on the Judiciary, United States Senate*, 82d Cong. 21 (Apr. 25, Aug. 3-8, 1951) (statement of Glen G. Saunders attorney representing the National Reclamation Association) (purpose of the McCarran Amendment is to require that the administration and adjudication of the water rights it covers “shall at all times be under the control, direction, and supervision of the established water officials and courts of the State”).

Ultimately, even if the Government were correct that Oregon’s call process does not fall under the McCarran Amendment, both the Government and the Tribes would still be entirely dependent on compliance with that process to secure state administrative

implementation of the Tribes' water right. The Government (and by extension the Tribes) are constitutionally forbidden from dragooning states to become enforcers of federal law. *See* U.S. Const. amend. X; *Printz v. United States*, 521 U.S. 898, 925 (1997) (“[T]he Federal Government may not compel the States to implement, by legislation or executive action, federal regulatory programs.”). Thus, regardless of federal Indian law or federal water law, if Oregon law does not authorize the Department to administratively implement the Tribes' water right absent the Government's consent, then the Tenth Amendment guarantees that there is nothing the Tribes or the Government can undertake to force Oregon to do so without such concurrence.

C. Under Oregon law, the Tribes may not make an effective call for their water right absent the Government's consent

The Government in fact acknowledges that both it and the Tribes are subject to Oregon law when they seek the Department's implementation of water rights. Ans. Br. 32 (“In making these enforcement calls to [the Department], the Tribes and United States . . . necessarily subject themselves to [the Department's] administrative procedures.”); *see* Op. Br. 15-24. But it argues that Oregon law does not

require its concurrence before the Department will implement a call from the Tribes. That view cannot be reconciled with *Fort Vannoy Irrigation District v. Water Resources Commission*, 188 P.3d 277 (Or. 2008).

The Government contends that *Fort Vannoy* is inapposite because, to determine the nature of the trust relationship in that case, the court interpreted statutory provisions not at issue here. Ans. Br. 33-34. Once again, the Government's analysis is exactly backwards. The *Fort Vannoy* decision relied on the nature of the trust relationship in order to interpret the statute at issue. *Fort Vannoy*, 188 P.3d at 295 ("The parties' roles and ownership interests under the trust relationship inform our interpretation of the [statutory] phrase[.]"). The provision at issue gave the "holder" of a water right⁴ the power to make fundamental changes to the right's implementation. *Id.* at 295-96. The court held that the word

⁴ The Government suggests that Oregon law accords substantial discretion to "users" of water even if they are not "owners" or "holders" of water rights. Ans. Br. 33. But even assuming that view to be correct, the Government does not explain how the Tribes' instream, non-consumptive water right can have a "user." Unlike typical appropriative rights, the Tribes' right is not "used" by anyone. Rather, it represents a limit on what other appropriative rights "users" may demand from streams that feed the Upper Klamath Lake. *Adair*, 723 F.2d at 1410-11. Hence, for such a sui generis right, a more plausible conclusion is that, under Oregon law, there can be only an "owner."

“holder” could not refer to one who owns only an equitable or beneficial interest in a water right, because “such a construction would run afoul of the trust relationship by permitting a beneficiary to manage the trust property.” *Id.* at 296. Instead, the word must refer to the trustee, *i.e.*, the *legal* owner, because the grant of authority in the pertinent statute “implicate[s] the trustee’s duty to manage the trust property for the sake of all of the beneficiaries.” *Id.* *Fort Vannoy* thus supports the Ranchers’ contention that, where the ownership of a water right is bifurcated by a trust relationship, Oregon law requires consent from the legal owner before management decisions can be made about the trust corpus, *i.e.*, the water right.

The Government attempts to distinguish *Fort Vannoy* on the further ground that the trust relationship at issue there—between an irrigation district and its constituents—is radically different from the “limited” trust relationship between the Tribes and the Government. Ans. Br. 35-37; *see id.* at 27-28. That is incorrect. To begin with, the “limited” nature of the Tribes’ trust relationship is overstated. The Government asserts that it is not empowered to control the Tribes’ water right. Ans. Br. 28. But the Protocol itself belies that notion by providing

that the Bureau has the unilateral power to make a call, despite the Tribes' objection. App. 032, 037. The Protocol therefore recognizes the power that the Government possesses as trustee for the Tribes. *See White Mountain*, 784 F.2d at 920 ("The fact that the Tribe does not believe the claim the government has submitted for the Tribe is in all respects proper [does not] absolve[] the United States of its responsibility as trustee to assert the claim *it believes appropriate*.") (emphasis added).

More crucially, the Government adduces no authority for the proposition that a nontraditional trust relationship gives unilateral call-making authority to the beneficial owner *under Oregon law*.⁵ *Cf. Klamath Irrig. Dist. v. United States*, 227 P.3d 1145, 1161 (Or. 2010) ("In Oregon, equitable property interests in water rights have not derived solely from formal trust agreements."). As explained above, whether by operation of the McCarran Amendment or by the principles of federalism contained within the Tenth Amendment, the Government and the Tribes are subject to Oregon law when they seek implementation of their rights from

⁵ Such a conclusion would be at odds with the Department's rejection of the Tribes' efforts to secure rights in their own name, and with the watermasters' repeated inquiries about whether the Government, as legal owner, had consented to a given call. *See Op. Br.* 20-23.

the Department. The Klamath Basin Adjudication recognizes the Tribes as beneficial, not legal, owners.⁶ Ans. Br. 26, 32-33. Under Oregon law, once it has been established that a water right has been split into equitable and legal interests—and the Government does not dispute that this is true of the Tribes’ water right—Oregon common law imposes a variety of responsibilities and limitations on the legal and equitable owners, respectively. *See Fort Vannoy*, 188 P.3d at 296-97.

The Government’s final attempt to distinguish *Fort Vannoy*—that placing a call is merely a “ministerial action,” Ans. Br. 35, that is not nearly as significant as a change in the point of diversion—does not hold up to scrutiny. Without a call, there is no impediment under Oregon law to junior use. *See* Op. Br. 14-15. The call process therefore implicates the Ranchers’ substantive interests. And so too does the Protocol, because it prohibits the Bureau from exercising its discretion in an appropriate manner that might result in fewer water shut-offs.

⁶ Possessing only equitable title is significant, as the holder of equitable title does not receive a “certificated” right, which can have important consequences under Oregon law. *Klamath Irrig. Dist.*, 227 P.3d at 1167 (“[A] person holding an equitable interest need not file a claim in a water rights adjudication”); *see* Op. Br. 17-18.

D. The Ranchers' injuries are fairly traceable to the Protocol and to calls made thereunder

Based on its misunderstandings of Oregon law and of the nature of the trust relationship between it and the Tribes, the Government contends that the Ranchers cannot establish a sufficient causal link between the Protocol, or the calls made thereunder, and the Ranchers' injuries.⁷

As discussed, the Bureau retains discretion over how best to administer the trust corpus for which it is legal owner, and Oregon law requires the Government's assent for the implementation of the Tribes' water right. As the Protocol demonstrates, it is not difficult to imagine scenarios in which the Bureau might disagree with the Tribe over whether a given call is appropriate. The Protocol reveals that the Bureau might want to change the scope of a proposed call, or even disagree with

⁷ As a preliminary matter, it must be noted that the Government mischaracterizes the Ranchers' argument. The Government has the Ranchers asserting that, "but for the Protocol, the Tribes would not be able . . . to secure the state administrative implementation of their water rights." Ans. Br. 39 (quoting Op. Br. 11). The ellipsis hides the ball. The Ranchers' actual argument, as stated in the opening brief, is that "but for the Protocol, the Tribes would not be able *on their own* to secure the state administrative implementation of their water rights." Op. Br. 11 (emphasis added).

making the call entirely. App. 032 ¶ 3, 036-37 ¶¶ 8-9. Although the Government urges that there is “no need” for new scientific and technical judgments after the Klamath Basin Adjudication, Ans. Br. 51, that is not the case. The Adjudication quantified the Tribes’ rights, but it did not purport to establish what will be ecologically necessary at any given time. The Adjudication provides a ceiling, not a floor. And again, if the Government were correct, then the consultation process codified in the Protocol would be meaningless.

Thus, the Ranchers’ injuries are fairly traceable to calls made under the Protocol because, but for those calls, the Ranchers’ water use would not be curtailed.⁸ Similarly, the Ranchers’ injuries are traceable to the

⁸ In arguing that the Ranchers have no standing to challenge the making of particular calls, the Government appears to contend that but-for causation may not be sufficient to establish standing. Ans. Br. 41. That is a misreading of the cited authority. This Court in *Huddy v. F.C.C.* was commenting on the tenuous nature of the causal link advanced by the plaintiff in that case, not drawing some distinction between “legal” and “but for” causation as the Government suggests. 236 F.3d 720, 724 n.1 (D.C. Cir. 2001) (explaining that the link in question might not have constituted “but-for” causation at all). The plaintiff in that case based his theory of causation “on merely the passage of time” and a fortuitous change in circumstance. *Id.* at 724. By contrast, here, the Government acknowledges the direct causal relationship between the implementation of a given call and the Ranchers’ injuries. Ans. Br. 41. *Cf. Honeywell Inter., Inc. v. EPA*, 705 F.3d 470, 472 (D.C. Cir. 2013) (“Honeywell’s injury

Protocol itself because, absent the Government's promise not to withhold any "required concurrence," even when it disagrees with the Tribes' decision to make a call, the Bureau might in fact withhold concurrence. In the absence of such required concurrence, the Department would not effectuate a given call, and the Ranchers' use would not be subject to curtailment under state law. The Ranchers' injuries are redressable for much the same reason: absent the Protocol, the Government would decide the call-making question, the answer to which would not inevitably be that desired by the Tribes. Op. Br. 30-36.

II. The Amended Complaint states a valid claim for an unlawful agency sub-delegation

The Government contends that no claim is stated for an unlawful agency sub-delegation. The argument necessarily relies on the Government's view that the Bureau is without authority to manage the water rights it holds in trust for the benefit of the Tribes. As explained above and reiterated below, that view is erroneous. The Bureau does have such authority, and the Government has failed to identify any statute authorizing the Protocol's sub-delegation beyond the confines of the

is fairly traceable . . . because the injury would not have occurred but for the [challenged actions].").

agency. It is therefore unlawful under *U.S. Telecom*, 359 F.3d at 565 (“[S]ubdelegations to outside parties are assumed to be improper absent an affirmative showing of congressional authorization.”).

A. The Bureau has the authority to manage Indian affairs, and Congress has not authorized the Bureau to delegate that authority

The Government argues that the Protocol cannot be considered a delegation because no statute specifically authorizes the Bureau to abrogate the Tribes’ treaty rights. Ans. Br. 43. But the Ranchers’ claims do not require such an abrogation, nor do they challenge the award of those rights in the Klamath Basin Adjudication. The Ranchers do not argue that the Bureau must abrogate treaty rights in order to exercise final call-making authority, but rather that the Bureau as trustee has that authority, and therefore at the very least has discretion not to concur in a Tribal call.

Again, the Government’s argument is backwards. The hallmark of an unlawful agency sub-delegation is the absence of congressional permission to delegate, not the absence of congressional permission to act. *See U.S. Telecom*, 359 F.3d at 566. The Government has pointed to no statute authorizing the Department of Interior or the Bureau to

delegate authority over the “management of all Indian affairs and of all matters arising out of Indian relations” to an Indian tribe, 25 U.S.C. § 2. In contrast, the Ranchers have identified authority giving the Bureau discretion not to concur in a Tribal call.⁹ Such authority arises from the Bureau’s duty to manage Indian affairs, 25 U.S.C. § 2, and the trust relationship between the Government and the Tribes, *cf. White Mountain*, 784 F.2d at 920, as well as the Executive’s¹⁰ Treaty Power.

The Government dismisses the Treaty Power as a source for the Bureau’s discretion. The only authority it cites is 25 U.S.C. § 71, which it

⁹ The Government contends that the Ranchers rely principally on the McCarran Amendment to substantiate the Government’s management authority over the Tribes’ water right, Ans. Br. 43, but that characterization is overstated. To be sure, the Ranchers cite the McCarran Amendment as one reason why the Tribes’ water right is subject to the Oregon call process, and thus why the Government’s concurrence in any Tribal call is necessary. But whether such concurrence can be withheld as a matter of federal law is not resolved by the McCarran Amendment.

¹⁰ The Government argues that only Congress can abrogate Tribal treaty rights. Ans. Br. 37-38, 44. But such a view is inconsistent with the Constitution’s vesting of treaty-making authority principally in the President. The Government’s cited authority states only that Congress has the power to limit Tribal immunity, not that it is the exclusive possessor of the power to abrogate treaties. *See, e.g., Michigan v. Bay Mills Indian Community*, 572 U.S. 782, 788 (2014) (Congress has the exclusive authority *to legislate* in respect to Indian tribes) (emphasis added); *id.* at 790 (Congress has “plenary authority over tribes”).

reads for the proposition that the Executive Branch is prohibited from abrogating Indian treaty obligations arising prior to 1871. But the quoted language—“no obligation . . . shall be hereby invalidated or impaired”—is more naturally read merely to ensure that nothing *within the statute itself*, such as its forward-looking prohibition on Indian treaties, should be interpreted to injure rights under pre-1871 agreements.¹¹ To read it otherwise would cast doubt over the statute’s constitutionality. See *United States v. Lara*, 541 U.S. 193, 218 (2004) (Thomas, J., concurring) (explaining that 25 U.S.C. § 71 is “constitutionally suspect” because “the Constitution vests in the President both the power to make treaties, Art. II, § 2, cl. 2, and to recognize foreign governments, Art. II, § 3[.]”). Where statutory language can be read in a manner that avoids grave constitutional concern, that construction is to be preferred. *Solid Waste*

¹¹ The Government contends that the Klamath Termination and Restoration Acts give it no authority to manage Tribal fisheries or water rights, thereby suggesting that the Tribes have all responsibility and the Government none. Ans. Br. 26-27. But that conclusion cannot be squared with the Adjudication or the Protocol. The former expressly grants the Government legal title to the Tribes’ rights, App. 068, ¶ 2, while the latter expressly recognizes that the Government’s power to negotiate calls, to object to calls, and even unilaterally to place a call over Tribal objections. App. 032 ¶¶ 3, 036-37 ¶¶ 8-9. Hence, whatever independent authority the Tribes may possess, the Government surely has its own significant (and, as the Ranchers argue, superior) authority.

Agency of N. Cook Cty. v. U.S. Army Corps of Eng'rs, 531 U.S. 159, 173 (2001). Thus, 25 U.S.C. § 71 is no obstacle to the Executive's supervisory control over the Tribes' treaty-derived water right.

Finally, in response to government legal memoranda adduced by the Ranchers to support that point, the Government attempts to limit those documents' application to situations involving competing statutory directives or tribal interests. Ans. Br. 44. The Government's effort is not convincing. The OLC memo is not as narrow as the Government suggests. App. 051 ("Nor is there a breach of that duty if the Secretary of the Interior exercises his authority in a manner not favored by the Indians if he reasonably concludes that the proposed action is lawful as it affects Indian rights."). Moreover, the Government ignores the guidance letter from then-Attorney General Griffin B. Bell to then-Secretary of Interior Cecil D. Andrus, App. 065-66, which speaks to the "duties and obligations of the Federal Government to all people of the Nation." These documents do therefore support the Ranchers' position that the Government retains at least some measure of discretionary management control over the administration of the Tribes' water right.

B. *U.S. Telecom v. FCC* is controlling precedent

The Government attempts to distinguish *U.S. Telecom* on three grounds, none of which is convincing. First, it argues that the Protocol's promise cannot be a delegation and is at most a revocable license because the Protocol is subject to termination. Ans. Br. 47. This is an odd position. Presumably, all agency sub-delegations are revocable, so it is difficult to see how the Protocol is saved by its termination clause. The Protocol does, however, differ significantly from a license to use public land. The typical federal licensee does not take actions under the Government's name that would otherwise be in the purview of the Government. For example, if the Government chooses not to grant to a third party a license to graze land, the Government does not then proceed itself to graze the land. By contrast, here, the Protocol delegates to the Tribes the authority to do precisely what the Government would necessarily be doing absent the delegation—managing and supervising the Tribes' water right.

Second, the Government interprets the Ranchers as inferring the Bureau's authority to manage the Tribes' water right from the nature of the Government's legal ownership of that right. It then asks why the authority to sub-delegate may not be similarly inferred. Ans. Br. 48. The

Government misconstrues the Ranchers' argument. The Bureau's authority to manage and supervise does not derive solely from the Government's legal title, but also from the statutes that expressly authorize the management and supervision of Indian affairs. *See, e.g.*, 25 U.S.C. § 2.

Finally, the Government relies on the trust relationship to argue that a delegation of final decision-making authority to a trust beneficiary is meaningfully different from a similar delegation to some other entity. But an essential responsibility of any trustee is to protect the corpus in the interest of the beneficiary,¹² not to abdicate that fiduciary obligation to the beneficiary. *See White Mountain*, 784 F.2d at 920 (government as trustee has affirmative obligations to advance the interests of the beneficiary, even against the beneficiary's wish); *Shoshone*, 56 F.3d at 1482 (despite the trust relationship, "an Indian tribe cannot force the government to take a specific action unless a treaty, statute or agreement imposes, expressly or by implication, that duty").

¹² *See* Restatement (Third) of Trusts § 77, cmt. b (2007) ("The duty of *care* requires the trustee to exercise reasonable effort and diligence in planning the administration of the trust, in making and implementing administrative decisions, and in monitoring the trust situation, with due attention to the trust's objectives and the interests of the beneficiaries.").

III. The Amended Complaint states a valid claim for violation of the National Environmental Protection Act

In arguing that NEPA does not apply, the Government repeats its view that the Bureau has no authority to withhold a required concurrence from a Tribal call. Ans. Br. 50-51. As discussed at length above, this understanding is mistaken.

The Government holds the water right at issue in trust for the Klamath Tribes. That the right belongs to the Tribes as beneficiaries of the trust does not alter the fact that government agencies like the Bureau must comply with NEPA when making decisions that may significantly affect the human environment. *See, e.g., Cascadia Wildlands v. U.S. Bureau of Indian Affairs*, No. 6:13-cv-1559-TC, 2014 WL 2872008, at *1, *6 (D. Or. June 24, 2014) (Bureau was required to perform NEPA analysis before commencing the harvesting of timber that it held in trust for an Indian tribe, even though the tribe supported the harvesting project), *aff'd*, 801 F.3d 1105 (9th Cir. 2015). Indeed, the Government regularly performs NEPA analyses before it makes decisions with respect to myriad assets held in trust for Indian tribes. *See, e.g., Stand Up for California! v. U.S. Dep't of Interior*, 204 F. Supp. 3d 212, 302-03 (D.D.C.

2016) (NEPA applied to the approval of casino development on lands held in trust for an Indian tribe); *Nulankeyutmonen Nkihtaqmikon v. Impson*, 503 F.3d 18, 28-29 (1st Cir. 2007) (NEPA applied to the decision to approve lease of Tribal land despite trust relationship); *Manygoats v. Kleppe*, 558 F.2d 556, 557-58 (10th Cir. 1977) (same, and noting that, even though “[i]n the instant case the duties and responsibilities of the Secretary may conflict with the interests of the Tribe . . . [t]he Secretary must act in accord with the obligations imposed by NEPA”).

The Government also posits that no further scientific or technical judgments of the kind required by NEPA are necessary at this stage, given that the Klamath Basin Adjudication already made such determinations. Ans. Br. 51. Not so. As noted above, the Adjudication quantified the Tribes’ right, to be sure, but it did not purport to determine what will be ecologically necessary at any given time. It is in fact precisely because that determination will vary depending on hydrologic and other physical changes in the Klamath Basin that the Protocol’s consultative process was established. App. 032 ¶ 3, App. 036-37 ¶¶ 8-9.

Finally, the Government argues that NEPA does not apply to “enforcement actions.” Ans. Br. 51-54; see 40 C.F.R. § 1508.1(q)(1)(iv)

(effective Sept. 14, 2020). In so arguing, it conflates the concept of implementation with that of “enforcement.” The Government characterizes a call on water rights as an enforcement action because it is “intended to compel compliance with federal and state water law.” Ans. Br. 54. But under Oregon law (and thus, per the McCarran Amendment, federal law), before a call is made there can be no one who is *out of* compliance; the mere fact that one water user is senior to another does not inevitably mean that the junior use will be curtailed. *See* Jennie L. Bricker, *Entitlement, Water Resources, and the Common Good*, 18 Willamette J. Int’l L. & Disp. Resol. 143, 144 n.6 (2010) (“Under the prior appropriation system, senior water rights holders can ‘call the river’ in times of shortage”); Or. Admin. R. 690-250-0020(2) (“Upon the judgement that water will not reach its destination, or that an inadequate amount of water will reach its destination, the watermaster may disregard the call of the senior downstream appropriator.”). The Government in fact acknowledges this point when it notes that “a water user might forbear at times in the exercise of a water right[.]” Ans. Br. 54.

The Government cites *Cappaert* as an analogous case. Ans. Br. 53; *see Cappaert v. United States*, 426 U.S. 128 (1976). Not only did that case not consider NEPA’s enforcement action exclusion, Ans. Br. 53, it did not involve NEPA at all. Neither did it involve Oregon law, which governs the call process at issue here. Nevertheless, the decision is helpful to highlight the distinction between the type of “enforcement” contemplated in the NEPA regulations and the implementation of rights represented by a call on the water. In *Cappaert*, the United States sought injunctive relief to restrain a private water user. *Cappaert*, 426 U.S. at 135-37. But a call for water does not operate like an injunction because it does not enjoin anybody. *See Enjoin*, Black’s Law Dictionary (11th ed. 2019) (to “enjoin” is “[t]o legally prohibit or restrain[.]”). To submit a call to the Department is not to prohibit or restrain junior users from taking some otherwise available action. Rather, to submit a call is merely to request the fulfillment of water levels to which one has a right.¹³ An enforcement

¹³ At bottom, a “call” operates as a complaint of water shortage to the district watermaster, who then investigates the complaint and, if the investigation validates the complaint, regulates water use “in accordance with the relative rights or rotation agreements of the appropriators involved in the complaint or shortage.” Or. Admin. R. 690-250-0100; *see also* Or. Rev. Stat. § 540.045.

action might follow if, after a call has been made, junior users were to continue to appropriate the senior water.¹⁴ But the call itself is an exercise of right, not an enforcement of law.

CONCLUSION

The district court's order and judgment of dismissal should be vacated, and the district court should be directed to enter a new order denying the Government's motion to dismiss in its entirety.

DATED: September 9, 2020.

Respectfully submitted,

DAMIEN M. SCHIFF
DAVID J. DEERSON
DOMINIC M. CAROLLO

s/ Damien M. Schiff
DAMIEN M. SCHIFF

Attorneys for Appellants

¹⁴ A judicial enforcement action only takes place if a water right holder refuses to comply with less formal regulatory instructions from the watermaster. *Compare* Or. Admin. R. 690-250-0100(1) ("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."), *with* Or. Admin. R. 690-250-0090(2).

**CERTIFICATE OF COMPLIANCE WITH
TYPE-VOLUME LIMIT, TYPEFACE REQUIREMENTS,
AND TYPE-STYLE REQUIREMENTS**

1. This document complies with the type-volume limit of Fed. R. App. P. 32(a)(7)(B) and D.C. Cir. R. 32(e), excluding the parts of the document exempted by Fed. R. App. P. 32(f):

☒ this document contains 6,482 words, or

☐ this brief uses a monospaced typeface and contains _____ lines of text.

2. This document complies with the typeface requirements of Fed. R. App. P. 32(a)(5) and the type-style requirements of Fed. R. App. P. 32(a)(6) because:

☒ this document has been prepared in a proportionally spaced typeface using Word 2013 in Century Schoolbook, 14-point font,

or

☐ this document has been prepared in a monospaced typeface using [state name and version of word-processing program] with [state number of characters per inch and name of type].

DATED: September 9, 2020.

s/ Damien M. Schiff
DAMIEN M. SCHIFF

CERTIFICATE OF SERVICE

I hereby certify that on September 9, 2020, I directed the electronic filing of the foregoing with the Clerk of the Court for the United States Court of Appeals for the D.C. Circuit through the appellate CM/ECF system.

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

s/ Damien M. Schiff
DAMIEN M. SCHIFF