No. _____

In The
Supreme Court of the United States

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

v.

DEBRA HAALAND, Secretary of the Interior, et al.,
Respondents.

On Petition for Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit

PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED

The United States is the owner of certain instream water rights within Oregon's Upper Klamath Basin. The federal government holds these water rights in trust for the benefit of the Klamath Indian Tribes. In 2013, the Tribes and the federal government entered into a Protocol Agreement, which establishes a process by which "calls" for the implementation of the water rights are to be placed with Oregon's Water Resources Department. Among other things, the Protocol provides that, if "the Parties cannot agree on whether to make a call, either Party may independently make a call and the other party will not withhold any required concurrence or object to the call[.]"

The D.C. Circuit held below that Petitioners—a group of landowners and livestock producers whose lands and businesses have been devastated by the Protocol-authorized implementation of the Tribes' instream water rights—lack standing to challenge the Protocol. Regardless of the Protocol, the D.C. Circuit reasoned, the federal government has no authority to countermand the Tribes' preferred management of trust assets. In so holding, the D.C. Circuit parted company with decisions of this Court, as well as of other circuit courts, which have repeatedly affirmed the federal government's paramount authority in managing Indian trust property.

The question presented is:

Does the federal government possess final decision-making authority over the management of water rights held in trust for an Indian tribe?

LIST OF ALL PARTIES

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

The Respondents are Debra Haaland, Secretary of the Interior; Bryan Newland, Assistant Secretary – Indian Affairs; Darryl LaCounte, Director of the U.S. Bureau of Indian Affairs; and Bryan Mercier, Regional Director of the U.S. Bureau of Indian Affairs.

CORPORATE DISLOSURE STATEMENT

No Petitioner has any parent corporation, and no publicly held company owns 10% or more of the stock of any Petitioner.

RELATED PROCEEDINGS

- *Hawkins v. Bernhardt*, No. 19-1498 (BAH), 436 F. Supp. 3d 241 (D.D.C. Jan. 31, 2020).

- *Hawkins v. Haaland*, No. 20-5074, 991 F.3d 216 (D.C. Cir. Mar. 19, 2021).

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PETITION FOR WRIT OF CERTIORARI

Petitioners Gerald H. Hawkins, *et al.*, respectfully petition for a writ of certiorari to review the judgment of the United States Court of Appeals for the District of Columbia Circuit.

OPINIONS BELOW

The panel opinion of the D.C. Circuit is reported at 991 F.3d 216, and is reproduced in the Appendix beginning at A-1. The opinion of the United States District Court for the District of Columbia is reported at 436 F. Supp. 3d 241, and is reproduced in the Appendix beginning at B-1.

JURISDICTION

The date of the decision sought to be reviewed is March 19, 2021. On May 3, 2021, Petitioners filed a timely petition for panel rehearing, which the D.C. Circuit denied on May 10th, 2021. By order of March 19, 2020, and July 19, 2021, this Court extended the deadline to file any petition for writ of certiorari to 150 days from the date of an order denying a timely petition for rehearing entered prior to July 19, 2021.

Jurisdiction is conferred under 28 U.S.C. § 1254(1).

CONSTITUTIONAL, TREATY, AND STATUTORY PROVISIONS AT ISSUE

The pertinent text of the following constitutional, treaty, and statutory provisions involved in this case is set out in the Appendix.

- U.S. Const. art. I, § 1.
- Treaty with the Klamath, Etc., Oct. 14, 1864, 16 Stat. 707.
- 25 U.S.C. § 2.
- 42 U.S.C. § 4332(C).
- 43 U.S.C. § 1457(10).

INTRODUCTION

Petitioners are ranchers whose families for over a century have made their homes and their livelihoods in the Upper Klamath Basin of southern Oregon. Once superb farmland and still home to six National Wildlife Refuges, the Basin is now a dustbowl. Its present desiccation results in large measure from irrigation shut-offs requested by the Klamath Indian Tribes and mechanically approved by Respondents Debra Haaland, Secretary of the Interior, *et al.*, without any consideration of the environmental or other impacts of such acquiescence. The shut-offs are supposedly necessary to satisfy the Tribes' hunting, fishing, and gathering interests, for which federally-held instream water rights were provisionally awarded in Oregon's general stream adjudication for the Klamath Basin.

To preserve their businesses, communities, and way of life, Petitioners filed suit to challenge a 2013 Protocol Agreement, executed between the Tribes and the Bureau of Indian Affairs, as representative of the federal government. The Protocol purports to cede the federal government's discretionary management authority over trust water rights to the Tribes. The district court dismissed Petitioners' lawsuit for want of standing, and the D.C. Circuit affirmed. Both courts concluded that Petitioners' economic, social, and environmental injuries bear no causal relationship to the Protocol because, even without its ostensible delegation of federal management authority, the Tribes would still be free to direct irrigation shut-offs at their discretion notwithstanding any objection from the federal government.

Congress has charged the Department of the Interior—which houses the Bureau—with the "supervision of public business relating to," *inter alia*, "Indians." 43 U.S.C. § 1457(10). It has authorized the Secretary of the Interior to delegate Indian-related regulatory powers to the Commissioner of Indian Affairs, who in turn is authorized to delegate them to assistant commissioners and other officers within the Bureau. 25 U.S.C. § 1a. The Commissioner, under the Secretary's direction, is also independently authorized to manage "all Indian affairs and . . . all matters arising out of Indian relations." 25 U.S.C. § 2. As these statutory provisions show, the superintendence of water rights held in trust by the federal government for the benefit of Indian tribes is squarely within the authority of Interior and the Bureau. *See Armstrong v. United States*, 306 F.2d 520, 522 (10th Cir. 1962) ("The management of water and water projects on a

reservation is clearly within the scope of the general statutory authority granted to the Commissioner of Indian Affairs[.]"); *Udall v. Littell*, 366 F.2d 668, 672 (D.C. Cir. 1966) ("In charging the Secretary with broad responsibility for the welfare of Indian tribes, Congress must be assumed to have given him reasonable powers to discharge it effectively.").

By promising complete and total deference to the Tribes, the Protocol permits the federal government to shirk these duties. As Petitioners' lawsuit contends, such a promise violates the doctrine of unlawful sub-delegation by, without Congressional authorization, giving final regulatory authority to a private entity. *Cf. U.S. Telecom Ass'n v. FCC*, 359 F.3d 554, 566 (D.C. Cir. 2004) (federal agency officials "may not subdelegate" their decision-making authority "to outside entities—private or sovereign—absent affirmative evidence to do so"). It also violates the National Environmental Policy Act, 42 U.S.C. §§ 4321–4370m-12, by allowing the federal government to abdicate discretionary management authority over tribal trust assets without giving any thought to the environmental consequences of that passive acquiescence, or to viable alternatives. *Cf. Manygoats v. Kleppe*, 558 F.2d 556, 558 (10th Cir. 1977) (although "the duties and responsibilities of the Secretary may conflict with the interests of the Tribe[,]" the Secretary nevertheless "must act in accord with the obligations imposed by NEPA.").

Petitioners, like many others in the Klamath Basin, are suffering. As a result of the irrigation cut-offs which follow the federal government's lock-step adherence to the Tribes' water delivery requests, they

endure financial damages to their livestock production businesses, the infestation of noxious weeds, the reduction and loss of wildlife, and the disappearance of grass plant communities from their lands. These injuries are undisputed. Meanwhile, although the Tribes possess a beneficial interest in the right to a certain level of instream flows, it is not necessarily the case that the right must be exercised to its fullest extent in every instance in order to satisfy the Tribes' treaty-protected fishing purposes. Indeed, the determination of the necessary amount of water entails substantial judgment calls of technical and scientific nature—precisely the sort of decisions that the federal government as trustee is obligated to make and which NEPA is meant to assist.

Yet the D.C. Circuit concluded that Petitioners lack standing to challenge the Protocol because the Tribes purportedly may independently seek the full implementation of their instream rights held in trust, and the federal government is powerless to stop them. App. A-21. Thus, per the D.C. Circuit, Petitioners have no hope of legal or other recourse through the federal government for the human and environmental catastrophe unfolding in the Klamath Basin, despite that catastrophe being the direct result of the management regime decreed by the Protocol Agreement.

The D.C. Circuit's ruling perversely inverts the default federal-Indian relationship by presuming that the Tribes may, absent express Congressional direction to the contrary, dictate to the federal government how tribal trust assets are to be managed. In so holding, the D.C. Circuit's decision effectively

bars application of laws like NEPA—which regulate and are intended to better inform discretionary federal decision-making—to Indian trust assets. The D.C. Circuit's decision therefore conflicts with case law from this Court, as well as from other federal circuit courts, affirming the federal government's authority and obligation to manage Indian trust assets, consistent with Congressional policy and statutory command. Given the worsening drought in the Klamath Basin, as well as the need for close planning coordination between the federal government and state and local entities in the Klamath Basin, the necessity for this Court's review of the conflicts created by the D.C. Circuit's decision is especially pressing.

STATEMENT OF THE CASE

Petitioners are landowners and ranchers who raise livestock in southern Oregon's Upper Klamath Basin. Supporting an impressive variety of plants and wildlife, their ranches lie within the watersheds of several tributaries to Upper Klamath Lake, a major source of the Klamath River. The Upper Klamath Basin encompasses nearly 200,000 acres of what, traditionally, has been highly productive irrigated pastureland for livestock. Since 2013, however, agriculture in the region has sharply declined. This growing desuetude results largely from severe irrigation cut-offs imposed to satisfy certain instream water rights that the federal government holds in trust for the Klamath Indian Tribes. App. K-8 to K-9, K-17 to K-19 (Am. Compl. ¶¶ 14, 36–40).

The Tribes have resided in the Klamath Basin for over a millennium. *United States v. Adair*, 723 F.2d

1394, 1397 (9th Cir. 1983). In an 1864 Treaty with the federal government, 16 Stat. 707 (Oct. 14, 1864), App. E, the Tribes relinquished their rights to their original homeland in exchange for a reservation of 800,000 acres in southern Oregon. *Adair*, 723 F.2d at 1397–98. The Treaty had two essential purposes: preservation of the Tribes' traditional hunting and fishing lifestyle, and encouragement and support of agriculture. *Id.* at 1410.

Nearly a century later, Congress passed the Klamath Termination Act, Pub. L. No. 587, 68 Stat. 718 (Aug. 13, 1954), pursuant to which some of these reservation lands were sold with the remainder put into a private land management trust.[1] *Kimball v. Callahan*, 493 F.2d 564, 567 (9th Cir. 1974).

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

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

[2] Neither Petitioners nor their predecessors in interest were parties to *Adair*, as they own lands and water rights from

Ultimately, the Ninth Circuit held that, "at the time the Klamath Reservation was established, the Government and the Tribe[s] intended to reserve a quantity of the water flowing through the reservation . . . for the purpose of maintaining the [Tribes'] treaty right to hunt and fish on reservation lands," and that this federal reserved water right survived the Termination Act. *Id.* at 1410–12. As recognized by the Ninth Circuit, the Tribes' right is somewhat different from water rights possessed by private parties. Unlike most such rights, which entitle their holders "to withdraw water from the stream for agricultural, industrial, or other consumptive uses," the Tribes' hunting-and-fishing entitlement "consists of the right to prevent other appropriators from depleting the [stream's] waters below a protected level." *Id.* at 1411. Also atypical, the Tribes' interest in their instream water rights is beneficial only, legal title remaining with the federal government. *See generally Shoshone-Bannock Tribes v. Reno*, 56 F.3d 1476, 1479 (D.C. Cir. 1995) ("With respect to reserved water rights on Indian reservations, these federally-created rights belong to the Indians rather than to the United States, which holds them only as trustee."). An additional peculiarity is the priority date of the Tribes' water rights—"time immemorial," *Adair*, 723 F.2d at 1414—such that their exercise trumps all other water rights

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different Upper Klamath Basin tributaries, such as the Wood River and Sprague River. *See* App. K-3 to K-6 (Am. Compl. ¶¶ 3–8). Therefore, they are not bound by the *Adair* decision and their challenges to certain legal issues decided in *Adair* remain active in the ongoing Klamath Basin Adjudication litigation.

in the Upper Klamath Basin, including those held by Petitioners.[3]

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

In 2013, the state adjudication came to its administrative conclusion with the issuance of an order of determination (subsequently amended in 2014). Among other things, the order of determination awards the federal government, as trustee for the Tribes, substantial instream water rights in the same tributaries in which Petitioners possess their own water rights. The order quantifies the Tribes' instream rights at such high levels that, when fully implemented, little to no water is left for Petitioners or other irrigators in the Upper Klamath Basin. App. K-11 to K-12 (Am. Compl. ¶ 20).

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

In jurisdictions like Oregon which follow the law of prior appropriation, when there is insufficient water for all users, a senior appropriator places a "call" with the pertinent water master to secure his or her senior entitlement. Or. Rev. Stat. § 540.045(1)(a)–(b). *See generally* David H. Getches, *Water Law in a Nutshell* 103 (3d ed. 1997) ("A senior appropriator seeking to enforce rights as against a junior 'calls the river.' It is usually the job of the state engineer or some other official to ensure that appropriators do not take the water out of priority."). To govern how such calls would be made for the then-recently quantified instream rights, the Tribes and the federal government in 2013 entered into a Protocol Agreement. As amended in 2019, the Protocol authorizes the Tribes to place calls with the Oregon Water Resources Department for the implementation of the Tribes' instream water rights after providing the federal government (via the Bureau of Indian Affairs) with notice of their intent to call. Within three or seven business days of receiving such notice,[4] the Bureau must provide an email response to the Tribes stating whether it agrees with the proposed call and whether it suggests any changes. Thereafter, the Protocol authorizes the Tribes, after having allowed two further business days for discussion with the Bureau's Regional Director, to proceed with placing the call, even if the federal government believes the call to be ill-advised, excessive, or otherwise unnecessary to support the Tribes' hunting and

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

fishing interests under the Klamath Treaty. *See* App. I-4 to I-5; App. J-6 to J-7.

Every year since the Protocol became effective, the Tribes have placed calls for the implementation (and, since 2017, the full implementation) of their instream water rights, and every year the federal government, pursuant to the Protocol, has provided its consent. The resulting orders from the Oregon Water Resources Department have compelled hundreds of landowners throughout the Upper Klamath Basin, including Petitioners, dramatically to curtail and, in some cases, entirely to cease irrigation. *See* App. K-14, 16 (Am. Compl. ¶¶ 25, 32).

Following the initial shutoffs in 2013, the federal government and the State of Oregon sought to ameliorate the Basin-wide crisis by convening stakeholders to reach a comprehensive water rights settlement. That effort produced the Upper Klamath Basin Comprehensive Agreement, to which Oregon, the Tribes, and many landowners—including most Petitioners—were signatories. Former Secretary of the Interior Sally Jewell personally participated in the signing ceremony. App. K-14 (Am. Compl. ¶ 26).

Among other things, the Agreement reduced the level of instream flows that the federal government and the Tribes demanded to significantly below the ceiling awarded in the Klamath Basin Adjudication. These limited flows were designed to support the Tribes' fish and wildlife resources while providing irrigation for landowners such as Petitioners. App. K-15 (Am. Compl. ¶ 28).

From 2014 through 2016, the federal government and the Tribes placed calls for water at levels consistent with the Agreement. Although many landowners, including some Petitioners, still experienced significant water curtailments, these modified calls did mitigate the environmental and economic impacts in the Upper Klamath Basin by allowing more land to be irrigated. App. K-15 (Am. Compl. ¶ 29).

In 2017, however, the Tribes and the federal government departed from the Agreement, citing a lack of progress in obtaining the funding necessary to implement the Agreement in full. They therefore resumed calls for the implementation of the maximum instream flows. Later that year, Secretary of the Interior Ryan Zinke formally terminated the Agreement. *See* Notice Regarding Upper Klamath Basin Comprehensive Agreement, 82 Fed. Reg. 61,582 (Dec. 28, 2017). Since then, the federal government and the Tribes have sought implementation of their maximum allotted instream flows, which has resulted in renewed water shutoffs to Basin landowners, including Petitioners. App. K-15 to K-16 (Am. Compl. ¶¶ 30–31).

Fearing the ruin of their livelihoods and communities, Petitioners brought this action in the United States District Court for the District of Columbia to challenge the Protocol Agreement. Petitioners' amended complaint[5] advances two claims under the Administrative Procedure Act, 5 U.S.C. §§ 701–706. First, the Protocol violates the doctrine of

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

unlawful delegation because, without specific Congressional authorization, it delegates to the Tribes final decision-making authority over when and to what extent a call should be made for the Tribes' instream water rights, to which the federal government holds legal title. *Cf. U.S. Telecom Ass'n*, 359 F.3d at 565 ("[S]ubdelegations to outside parties are assumed to be improper absent an affirmative showing of congressional authorization."). Second, the Protocol violates NEPA because it, and the calls made thereunder, have significant effects on the human environment, yet the federal government has conducted no analysis of such actual or anticipated effects or possible alternatives.

The district court granted the federal government's motion to dismiss the action for lack of standing, concluding that Petitioners' injuries are not fairly traceable to the Protocol, nor would they be redressed by the Protocol's invalidation. App. B-12.

The D.C. Circuit affirmed. In its view, traceability and redressability here "depend on the conduct of a third party," namely, the Tribes. App. A-16. But under federal law, the Tribes are "free to make calls in the exercise of their treaty rights." App. A-21. Thus, the federal government's concurrence *vel non* in any Tribal call for water would have no "predictable effect on the [state] watermaster's issuance of orders that require [Petitioners] to curtail irrigation of their lands."[6] The D.C. Circuit therefore concluded that

[6] The D.C. Circuit also rejected Petitioners' alternative argument that federal management authority over the Tribes' water rights could be inferred from the McCarran Amendment, which subjects the federal government as well as Indian tribes to state

Petitioners' injuries are traceable to the Tribes, not the federal government, and thus invalidation of the Protocol would not redress Petitioners' harms. App. A-29.

REASONS FOR GRANTING CERTIORARI

I.

The D.C. Circuit's Ruling Upsets the Balance of the Federal-Indian Trust Relationship Struck by Decisions of This Court and Faithfully Implemented by Those of Other Circuit Courts

In holding that the federal government is powerless to exercise final management authority over assets held in trust for Indian tribes, the D.C. Circuit recognized that its decision threatens to disturb the traditional federal-Indian trust relationship. Responding to the federal government's argument that the Bureau of Indian Affairs "was obligated, if asked, to concur in lawful water calls proposed by the Tribes," App. A-21, the D.C. Circuit acknowledged that the government's position cannot readily be squared with the hitherto undisputed proposition that "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." *Id.* (quoting *Shoshone-Bannock Tribes*, 56 F.3d at 1482). Yet the court gave

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procedural rules of water rights administration. *See* App. A-23. The court of appeals concluded that the argument was unavailing because, under its view of state law, Oregon does not require the concurrence of the federal government before state officials will heed a call from the Tribes for implementation of their water rights. App. A-29.

no further attention to this evident conflict because it concluded that "the Tribes were free to make calls in the exercise of their treaty rights." *Id.* But that conclusion does not avoid the problem; it merely rephrases it. For the Tribes are only free to make their own calls to the extent that they can veto contrary management direction from the federal government.

Congress, however, has made clear that the Tribes have no such power. After all, Congress has specifically charged the Bureau of Indian Affairs and the Department of the Interior to manage Indian affairs and all matters arising out of Indian relations. 25 U.S.C. §§ 1a, 2. *See* App. F. And as even the D.C. Circuit has recognized, this responsibility necessarily presupposes the authority to discharge it ably. *Udall v. Littell*, 366 F.2d at 672. Moreover, decisions of this Court and other circuit courts affirm—contrary to the decision of the D.C. Circuit below—that such authority includes the power to manage trust assets to accommodate a variety of interests, such as the need to conserve other resources within the same trust, the need to negotiate over trust assets to broker compromises with competing users and thereby foster long-term cooperation, and the need to satisfy statutory commands governing discretionary federal decision-making.

A. The D.C. Circuit's decision conflicts with decisions of this Court and of other lower courts affirming that the federal government retains general management authority and discretion over Indian trust assets

In holding that the federal government has no power to exercise final decision-making authority over the Tribes' water rights, the D.C. Circuit departed from the well-established rule that the federal government's role as trustee of Indian trust assets necessarily carries with it the power and obligation to manage those assets. *See, e.g.*, *Morton v. Ruiz*, 415 U.S. 199, 231 (1974) ("In the area of Indian affairs, the Executive has long been empowered to promulgate rules and policies, and the power has been given explicitly to the Secretary and his delegates at the [Bureau of Indian Affairs]." (footnotes omitted)); *Udall*, 366 F.2d at 672–73 (authority to cancel contract of general counsel for Indian tribe); *Agua Caliente Band of Cahuilla Indians v. Riverside County*, 181 F. Supp. 3d 725, 740 (C.D. Cal. 2016) (authority to prohibit state taxation on possessory interests in reservation lands). *Cf.* 25 U.S.C. § 2 ("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.").

The D.C. Circuit saw no conflict, relying on this Court's rulings in *United States v. Mitchell*. App. A-18 (citing *United States v. Mitchell*, 445 U.S. 535 (1980) (*Michell I*); *United States v. Mitchell*, 463 U.S. 206

(1983) (*Mitchell II*)). The question in these cases was whether the Quinault Tribe and others could seek money damages from the United States for the alleged mismanagement of timberland trust assets. *Mitchell I*, 445 U.S. at 537; *Mitchell II*, 463 U.S. at 207. The Court's first ruling held that the broad provisions of the General Allotment Act of 1887 did not create such a claim, *Mitchell I*, 445 U.S. at 542, whereas the Court's second ruling held that other statutes and regulations imposing more specific and elaborated duties on the federal government did, *Mitchell II*, 463 U.S. at 228.

In the D.C. Circuit's view, the Court's decisions in *Mitchell* stand for the proposition that a bare or "limited" trust relationship, like that created by the Klamath Treaty,[7] does not authorize the federal government to assume management authority over Indian trust assets. App. A-18, A-21. The court of appeals' reasoning is precisely backwards. The limited trust exemplified by the *Mitchell* cases is only limited with respect to what Indian tribes may demand, *not* with respect to the federal government's management authority as trustee of those assets. *See Mitchell I*, 445 U.S. at 546 (because the General Allotment Act "cannot be read as establishing . . . a fiduciary responsibility . . . [,] [a]ny right of the respondents to recover money damages for Government mismanagement . . . must be found in some [other] source"); *Mitchell II*, 463 U.S. at 226 ("Because the statutes and regulations at issue in this case clearly establish fiduciary obligations of the Government in

[7] *See* Appellees' Ans. Br., Doc. No. 1857331, at 28 (D.C. Cir. Aug. 19, 2020) ("As stated above, however, this trust ownership is 'limited.'") (quoting *Mitchell II*, 463 U.S. at 224).

the management and operation of Indian lands and resources, they can fairly be interpreted as mandating compensation by the Federal Government for damages sustained."). *Cf. id.* at 209 (acknowledging that the federal government has "broad statutory authority" over the management of trust assets). In other words, where a trust relationship between the federal government and an Indian tribe is, as here, "limited," the consequence is the *minimization* of the Tribes' management power and not, as the D.C. Circuit inversely held, its maximization.

Indeed, prior to the decision below, the D.C. Circuit had consistently ruled that the federal-Indian trust relationship, coupled with various statutory grants of power to manage Indian affairs, places decision-making authority over the management of tribal trust assets squarely in the federal government as trustee and not the Indian tribes as beneficiaries. *See Udall*, 366 F.2d at 672–73. *Cf. Shoshone-Bannock Tribes*, 56 F.3d at 1482 ("[A]n Indian tribe cannot force the government to take a specific action unless a treaty, statute or agreement imposes, expressly or by implication, that duty.").

For example, in *Udall* the D.C. Circuit considered whether the Secretary of the Interior had the power administratively to terminate, for cause, a tribe's employment of its general counsel. *Udall*, 366 F.2d at 670. In seeking to enjoin the Secretary from terminating the contract, the Tribe's general counsel argued that the existence of specific statutory duties implied the absence of a general authority that would sustain the challenged termination power. *Id.* at 673. The court disagreed, reasoning that "the very general

language of the statutes [*viz.,* 25 U.S.C. § 2 and 43 U.S.C. § 1457][8], makes it quite plain that the authority conferred [is] to manage all Indian affairs, and all matters arising out of Indian relations . . . ." *Id.* at 672–73. *See* App. F, H.

Decisions from other circuits are of the same accord. *See United States v. Eberhardt*, 789 F.2d 1354, 1359 (1986) ("These provisions generally authorize the Executive to manage Indian affairs but do not expressly authorize Indian fishing regulation. However, ever since these statutes were enacted in the 1830's, they have served as the source of Interior's plenary administrative authority in discharging the federal government's trust obligations to Indians.") (citing 25 U.S.C. §§ 2, 9); *Armstrong*, 306 F.2d at 522 ("The management of water and water projects on a reservation is clearly within the scope of the general statutory authority granted to the Commissioner of Indian Affairs[.]").

Thus, this Court's review is merited to resolve the conflict between the D.C. Circuit's ruling and decisions of this Court and other lower federal courts as to the extent to which the federal government possesses general management and final decision-making authority over assets held in trust for the benefit of Indian tribes.

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[8] The decision references R.S. § 441, then codified at 5 U.S.C. § 485, but which is now codified in identical language at 43 U.S.C. § 1457.

B. The D.C. Circuit's decision conflicts with the rule of the Ninth Circuit that the federal government must manage tribal trust assets in light of all and not just one of the purposes for which those assets have been placed in trust

Like most treaties, the Klamath Treaty has more than one purpose: in addition to preserving the Tribes' hunting and fishing lifestyle, the Klamath Treaty also aims to support agriculture. *Adair*, 723 F.2d at 1409–10. *See* App. E. *Cf. Colville Confederated Tribes v. Walton*, 647 F.2d 42, 48 (9th Cir. 1981) (holding that the Colville Indian Reservation was established for the dual purpose of providing for a land-based agrarian society and of preserving tribal access to fishing grounds). Implementation of the Tribes' instream water rights can, by definition, only further the former purpose. By affirming the Protocol's effective abandonment of the Klamath Treaty's agricultural purpose, the D.C. Circuit's ruling below conflicts with the Ninth Circuit's rule that the federal government may make adjustments in the management of tribal trust assets so as to better further the several purposes for which those assets have been reserved.

In *United States v. Eberhardt*, 789 F.2d 1354 (9th Cir. 1986), members of the Yurok Tribe were criminally prosecuted for violating Department of the Interior regulations that prohibited commercial fishing by Indians on a stretch of the Klamath River running through the Hoopa Valley Reservation. *Id.* at 1356. The district court dismissed on the ground that the regulations were an *ultra vires* abrogation of the

Yurok's federally reserved commercial fishing rights. *See id.* at 1357. Reversing, the Ninth Circuit held that the federal government had the authority to regulate tribal fishing in order to advance interests other than commerce. As the court explained, the tribal fishing right at issue was not reserved exclusively for commercial purposes, but was intended to advance ceremonial and subsistence purposes as well. *Id.* at 1359. Further, not only had Interior been granted general authority to regulate all fishing on Indian reservations, *id.* at 1359–60 (citing 25 U.S.C. §§ 2, 9),[9] but the regulations at issue were expressly designed to balance commercial use with the need for preserving enough salmon to serve the trust's other purposes. *See id.* at 1357 ("Interior justified the moratorium because the anadromous fish runs were not large enough to sustain commercial fishing as well as consumptive and escapement needs.").

Just as in *Eberhardt*, the tribal trust assets here were reserved for more than one purpose. *See Adair*, 723 F.2d at 1410 (promotion of agriculture as well as hunting and fishing). *See also* App. E. Yet unlike in *Eberhardt*, the D.C. Circuit below affirmed the federal government's erasure of the Klamath Treaty's multiple purposes, by concluding that the federal government has no power to countermand, or even to moderate, tribal demands seeking to vindicate just one part of the Tribes' trust assets. This Court's review is therefore merited to resolve the conflict between the D.C. Circuit and the Ninth Circuit as to the federal government's responsibility as trustee to

[9] These same statutes also "provide a statutory basis for Interior regulations administering Indian lands and managing other Indian fishery resources." *Eberhardt*, 789 F.2d at 1359 n.8.

manage Indian trust property that is subject to potentially divergent purposes.

C. The D.C. Circuit's decision conflicts with the rule of the Ninth Circuit that the federal government is authorized to negotiate with trust assets to secure long-term security for Indian tribes by minimizing or resolving conflicts with non-Indian entities

Just as with management of trust assets subject to multiple purposes, the D.C. Circuit's ruling conflicts with case law from the Ninth Circuit in how the latter recognizes the federal government's authority to make concessions over the management of tribal trust assets to secure a long-term, mutually beneficially resolution of conflicts with non-tribal entities.

In *United States v. Ahtanum Irrigation District*, 236 F.2d 321 (9th Cir. 1956), the Ninth Circuit addressed a dispute arising from a 1908 agreement between the Department of the Interior and non-Indian water users whose lands abutted the Ahtanum Creek along the Yakima Indian Reservation. *Id.* at 323–24. The Yakima possessed federally reserved rights to the creek's waters pursuant to an 1855 treaty. *Id.* at 323, 327. In 1906, a non-Indian living outside the reservation sued to claim rights to the creek's waters and alleged that federal agents were wrongfully diverting water therefrom. Acting for the Department, the Commissioner of Indian Affairs sought to reach a settlement out of court. This effort resulted in the 1908 agreement allocating the creek's waters between, on the one hand, certain non-Indian

users who agreed to take 75% of the flow and, on the other hand, the United States, which agreed to take 25% as trustee for the Yakima. *Id.* at 329. Nearly five decades later, the federal government brought suit to quiet title in the Yakima to the full use of the creek's waters, alleging that Interior had no power to make the 1908 agreement "in the absence of specific statutory authority so to do." *Id.* at 323, 334–35.

The Ninth Circuit rejected the federal government's argument, pointing to 25 U.S.C. § 2 and 43 U.S.C. § 1457 as sources of Interior's authority to enter into the agreement.[10] *Ahtanum*, 236 F.2d at 332, 335–36. ("It is fair to say that in conferring these powers upon the Secretary of the Interior Congress must have had it in mind that a part of the Secretary's task of supervision and of management of Indian affairs would necessarily deal with certain relations between the Indians on the one hand and their white neighbors on the other."). Although acknowledging that the water rights of the non-Indians "were subordinate to the rights of the Indians," the court nevertheless determined that Congress could not have contemplated that "the Secretary, vested as he was with the general power of supervision and management of Indian affairs, and of matters arising out of Indian relations, could not make a peaceful arrangement for a practical mode of use of the waters of this stream." 236 F.2d at 335–36.

Just as Interior in *Ahtanum* had the authority to enter into an agreement allocating much of the Yakima Tribe's reserved water rights to their neighbors, so does Interior here have authority to

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[10] *See supra* note 8.

make adjustments to the Tribes' calls for instream flows to facilitate peaceable arrangements with other inhabitants of the Klamath Basin, such as Petitioners, as well as with the general public. *Cf. Udall*, 366 F.2d at 672–73 (Commissioner of Indian Affairs must "manage all Indian affairs, and all matters arising out of Indian relations, with a just regard, not merely to the rights and welfare of the public, but also to the rights and welfare of the Indians[.]"). Yet the D.C. Circuit's ruling, by concluding that "the Tribes [are] free to make calls in the exercise of their treaty rights," App. A-21, effectively cancels Interior's authority to manage any tribal trust assets.

Accordingly, the conflict presented between the decision below and that of the Ninth Circuit as to the federal government's inherent discretion as trustee to manage tribal trust assets to avoid conflict and secure good relations with competing users of those assets merits this Court's review.

D. The D.C. Circuit's decision conflicts with rulings of other circuit courts holding that tribal trust assets are not exempt from federal environmental statutes, such as NEPA, that regulate discretionary agency decision-making

By holding that the federal government has no discretionary authority to manage the Tribes' water rights, the D.C. Circuit essentially nullified the application to tribal trust assets of any and all federal statutes, such as NEPA, that regulate discretionary federal decision-making to protect the human and natural environment. *See* App. A-13, 14, 21; App G. *Cf. Dep't of Transp. v. Public Citizen*, 541 U.S. 752,

770 (2004) (NEPA applies only to discretionary action).

That consequence sharply conflicts not only with authority generally affirming the federal government's substantial discretion in how to manage Indian trust assets,[11] but also with many decisions specifically holding that Indian trust assets enjoy no exemption from statutes that, like NEPA, regulate discretionary decision-making. *See Manygoats*, 558 F.2d at 558–59 ("In the instant case the duties and responsibilities of the Secretary may conflict with the interests of the Tribe. The Secretary must act in accord with the obligations imposed by NEPA. . . . We find nothing in NEPA which excepts Indian lands from national environmental policy."); *North Slope Borough v. Andrus*, 642 F.2d 589, 612 (D.C. Cir. 1980) ("[T]he Secretary, even aside from his imputed role of trustee, does not have a free hand to neglect the environment. All of the environmental statutes, particularly [the Endangered Species Act], structure and prescribe for the Secretary a solicitous stance toward the environment. Hence, where the Secretary

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[11] *See, e.g.*, *Cobell v. Norton*, 240 F.3d 1081, 1099 (D.C. Cir. 2001) ("Despite the imposition of fiduciary duties [to Indian tribes], federal officials retain a substantial amount of discretion to order their priorities."); Cohen's Handbook of Federal Indian Law § 19.06, at 1259–60 (Nell Jessop Newton ed., 2012) ("The Department of the Interior is responsible both for advancing the interests of the Indian tribes and for representing a variety of often-competing public interests in lands and resources.") (footnote omitted); Bureau of Indian Affairs, Division of Environmental and Cultural Resources Management, *National Environmental Policy Act (NEPA) Guidebook* 8 (2012), https://on.doi.gov/38vKMfL ("Proposals to use or develop resources on Indian trust lands may also trigger NEPA. . . . If the BIA acts on such proposals, NEPA review would be required.").

has acted responsible in respect of the environment, has implemented responsibly, and protected, the parallel concerns of the Native Alaskans."). *Accord Nulankeyutmonen Nkihtaqmikon v. Impson*, 503 F.3d 18, 28 (1st Cir. 2007) (federal lease of tribal trust land subject to NEPA and the Endangered Species Act); *United States v. Billie*, 667 F. Supp. 1485, 1492 (S.D. Fla. 1987) (Endangered Species Act applies to Seminole Tribes' hunting rights on trust land).

But as a result of the D.C. Circuit's decision, the federal government is relieved of these obligations, because the great harm to the Upper Klamath Basin's human environment caused by the implementation of the Tribes' instream water rights is supposedly entirely the Tribes' doing. *See* App. A-21. As explained above, *see supra* Parts I.A–C., that position cannot be reconciled with how this Court and other lower federal courts have construed the federal government's management authority as trustee of tribal assets. But even if the federal government did in fact lack power to do anything with the Tribes' instream rights that is not strictly directed toward maximizing the Tribes' hunting and fishing interests, the federal government's role as trustee would still be relevant. The amount of water needed to satisfy the Tribes' hunting and fishing needs is not self-evident or ascertainable by easy arithmetic calculation. Rather, its determination entails substantial judgment calls of a difficult technical and scientific nature—exactly the sort of task that the federal government as trustee is meant to take up in a year-to-year or long-term

programmatic planning process, and which NEPA is meant to assist.[12]

This Court's review is therefore merited to resolve the conflicts between the D.C. Circuit's ruling, absolving the federal government of any general discretionary duty to manage tribal trust assets, and the decisions of other courts affirming the application of NEPA and other discretion-based statutes to such assets.

II.

Whether the Federal Government Lacks Any Discretion to Manage Tribal Trust Assets Is an Issue of Pressing Public Importance

On March 31, 2021, less than two weeks after the issuance of the D.C. Circuit's decision below, Oregon Governor Kate Brown declared a state of drought emergency in Klamath County, Oregon, for the second year in a row. *See* Or. Exec. Order No. 20-02 (Mar. 2, 2020).[13] Governor Brown called it "one of the most difficult water years in recent memory," and declared a commitment "to doing everything possible to make state resources available to provide immediate relief and assistance to water users throughout Klamath County." Press Release, Or. Governor's Office, Governor Kate Brown Declares Drought Emergency

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[12] For example, simply because the Tribes have the right *when necessary* to call upon a certain amount water does not mean that the maximum allowable amount will *always* be advisable when weighed and considered with environmental and other impacts.

[13] *Available at* https://bit.ly/3ua5dJh.

for Klamath County (Mar. 31, 2021).[14] The severe conditions have had a devastating effect not just on farmers and ranchers like Petitioners—indeed, even domestic wells have dried up, Jamie Parfitt, *Historic Drought Leaves Klamath Basin Domestic Wells High and Dry*, KDRV.com (July 30, 2021, 5:54 PM)[15]—but also on upland forestry, native plant and wildlife species in the region, and the flora and fauna protected by the Klamath wildlife refuges, Bradley W. Parks, *Oregon Governor Declares Drought Emergency in Klamath Basin*, OPB.org (Oregon Public Broadcasting) (Mar. 31, 2021, 2:50 PM).[16]

Governor Brown's emergency order directs the Oregon Water Resources Department and the Oregon Department of Agriculture to coordinate with federal agencies to promote agricultural recovery in the region. But that much-needed coordination is unlikely to happen thanks to the D.C. Circuit's decision below, which renders the federal government an impotent trustee, at best a mere mechanical implementer of the Tribes' management preferences. The decision therefore augurs ill for the many people who live and work in the Klamath Basin. Their troubles are no less deserving of this Court's solicitude than those of other Basin residents that have arisen from past Klamath controversies, which this Court has agreed to resolve. *See, e.g.*, *Dep't of Interior v. Klamath Water Users Protective Ass'n*, 532 U.S. 1 (2001) (concerning the scope of an exemption from disclosure under the Freedom of Information Act); *Bennett v. Spear*, 520

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[14] *Available at* https://bit.ly/2W3iUNv.

[15] *Available at* https://bit.ly/39zXTNr.

[16] *Available at* https://bit.ly/3nUs5LT.

U.S. 154 (1997) (concerning the designation of critical habitat under the Endangered Species Act); *Oregon Dep't of Fish & Wildlife v. Klamath Indian Tribe*, 469 U.S. 879 (1984) (concerning off-reservation fishing and hunting).

But the bad consequences of the D.C. Circuit's ruling are by no means limited to the Klamath Basin. By holding that the federal government has essentially no authority or responsibility to manage tribal trust assets, the D.C. Circuit's decision menaces the gamut of federal-Indian trust issues. As noted above, *supra* Part I.A., it inverts the default principle that an Indian tribe cannot force the federal government to take any specific action absent a specific grant of statutory authority to so compel. Subject to the same proviso, the decision therefore also threatens to undermine *tribal* interests, by relieving the federal government of any affirmative obligation to protect trust resources. *Cf. United States v. White Mountain Apache Tribe*, 784 F.2d 917, 920 (9th Cir. 1986) ("It is also clear that the federal government, as trustee for the tribes, is under an affirmative obligation to assert water claims on its beneficiaries' behalf."); *Pawnee v. United States*, 830 F.2d 187, 190 (Fed. Cir. 1987) ("[T]he United States has a general fiduciary obligation toward the Indians with respect to the management of those oil and gas leases.").

That the D.C. Circuit's ruling promises such baleful results for the Klamath Basin and beyond underscores the need for this Court's review.

CONCLUSION

The petition for writ of certiorari should be granted.

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Respectfully submitted,

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