No. 21-520

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

REPLY IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI

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INTRODUCTION

Congress has entrusted the Department of the Interior with "supervision of public business relating to . . . Indians." 43 U.S.C. § 1457(10). And it has given to the Commissioner of Indian Affairs, under Interior's direction, "the management of all Indian affairs and of all matters arising out of Indian relations." 25 U.S.C. § 2. As the D.C. Circuit previously recognized, "[i]n 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." *Udall v. Littell*, 366 F.2d 668, 672 (D.C. Cir. 1966).

But the decision below stands for the opposite. The D.C. Circuit departed from its own precedent and from that of other federal appellate courts in holding that Congress has given the Executive Branch no general management authority whatsoever over assets held in trust for Indian tribes.

That decision makes a key mistake, repeated by Respondents in their arguments opposing certiorari: the conflation of federal liability with federal authority. The *Mitchell* cases hold that specific statutory language is needed before a tribe can seek money damages for breach of trust obligations. *See United States v. Mitchell*, 445 U.S. 535 (1980) (hereinafter *Mitchell I*); *United States v. Mitchell*, 463 U.S. 206 (1983) (hereinafter *Mitchell II*). But neither they nor any other of this Court's precedents suggest that statutory specificity is needed to enable the federal government to exercise management authority over tribal trust assets.

Eliding this distinction, the D.C. Circuit below ruled that the United States has no authority to manage the implementation of reserved water rights held in trust for the Klamath Tribes. The panel decision thus turns the federal-Indian relationship on its head. Although Indian tribes are traditionally viewed as "domestic dependent nations" under federal law, Opposition Br. 12, the decision below places the United States in the role of dependency. According to the D.C. Circuit's ruling, the federal government has no independent power to manage the implementation of water rights to which it holds legal title, and must instead yield to the Tribes' preferences. More than conflicting with the approach of other federal appellate courts, especially the Ninth Circuit, that inversion contravenes the long-expressed will of Congress. *See* 25 U.S.C. § 2; 43 U.S.C. § 1457(10). *See also* Western Water Policy Review Act of 1992, Pub. L. No. 102-575, § 3002(9), 106 Stat. 4693, 4694 (codified by reference in the note to 43 U.S.C. § 371) ("The Congress finds that . . . the Federal Government recognizes its trust responsibilities to protect Indian water rights and assist Tribes in the wise use of those resources[.]").

Review is warranted.

ARGUMENT

I.

The Decision Below Departs From Decisions of Other Appellate Courts in Construing This Court's *Mitchell* Cases as Governing Not Only Questions of Federal Liability But Also of Federal Authority

At issue in the *Mitchell* cases was whether the federal government was answerable in money damages for alleged mismanagement of timber resources held in trust for allottees of Quinault Reservation lands. *Mitchell I*, 445 U.S. at 537-38; *Mitchell II*, 463 U.S. at 210-11. In *Mitchell I*, the Court held that such a remedy is not to be found in the General Allotment Act, 445 U.S. at 546; *see* 49 Cong. Ch. 119, 24 Stat. 388 (1887), and thus, if the United States is subject to money damages, liability "must be found in some source other than [that] Act." *Mitchell II*, 463 U.S. at 211 (quoting *Mitchell I*, 445 U.S. at 546). In *Mitchell II*, this Court reviewed a different set of statutes and regulations and concluded that, unlike the General Allotment Act, these did "clearly establish fiduciary obligations of the Government in the management and operation of Indian lands and resources[.]" 463 U.S. at 226. Together, the *Mitchell* cases stand for the proposition that the federal government is not liable for money damages[1] based on its breach of trust obligations unless Congress has

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[1] The *Mitchell* claimants invoked jurisdiction under the Tucker Act, which is limited to claims for money damages. *Mitchell II*, 463 U.S. at 211-12, 216-17; *see* 28 U.S.C. §§ 1491, 1505. Like Petitioners, the Tribes may sue for nonmonetary relief under the Administrative Procedure Act when they are aggrieved by final agency action. *See* 5 U.S.C. § 706; Pet. App. K-24, ¶ 1.

imposed such obligations by clear and specific language. *See* Opposition Br. 17.

But the Ranchers' petition does not ask whether the federal government is liable in money damages to the Klamath Tribes. Rather, it asks whether the government is authorized to manage Tribal trust assets. That is a very different question from what was posed in the *Mitchell* cases.[2] Not surprisingly, then, the post-*Mitchell* cases cited in the Ranchers' petition affirming the federal government's general management authority over Indian trust assets do not consider the *Mitchell* cases to be relevant. *See United States v. Eberhardt*, 789 F.2d 1354, 1359 (9th Cir. 1986) (25 U.S.C. §§ 2 and 9 "generally authorize the Executive to manage Indian affairs . . . . [E]ver 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."); *Agua Caliente Band of Cahuilla Indians v. Riverside Cty.*, 181 F. Supp. 3d 725, 739 (C.D. Cal. 2016) ("The power of the Secretary of the Interior to promulgate regulations is broad, encompassing 'the management of all Indian affairs and of all matters arising out of Indian relations.'" (footnote omitted)) (quoting 25 U.S.C. §§ 2, 9, and citing *Eberhardt*, 789 F.2d at 1360).

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[2] Respondents cite language from *Mitchell I* that the General Allotment Act "should not be read as authorizing, much less requiring, the Government to manage timber resources for the benefit of Indian allottees." 445 U.S. at 545; Opposition Br. 15. Although this observation was not necessary to the Court's holding, it is worth noting that, unlike the management of timber, management of water resources for supporting agricultural was specifically authorized by the Act. *See* § 7, 24 Stat. at 390.

This same approach to construing the federal government's authority as trustee—namely, requiring only general statutory authorization to sustain the government's power to manage Indian trust assets—is reflected in pre-*Mitchell* decisions as well. *See Udall*, 366 F.2d at 672-73 ("[T]he very general language of the statutes makes it quite plain that the authority conferred [is] to manage all Indian affairs, and all matters arising out of Indian relations . . . .") (citing 25 U.S.C. § 2 and 43 U.S.C. § 1457[3]); *United States v. Ahtanum Irrig. Dist.*, 236 F.2d 321, 332, 334-36 (9th Cir. 1956) (rejecting the argument that Interior may not make arrangement for use of trust water "in the absence of specific statutory authority so to do," and holding that "the Secretary, vested as he was with the general power of supervision and management of Indian affairs," did have such authority).

The decision below breaks with this approach by holding that the *Mitchell* cases pertain not only to executive liability but also to executive authority. In so ruling, the decision validates a sweeping abdication of executive power—the Protocol's relinquishment of the Secretary's oversight and management of Tribal water rights. That is the precise wrong the doctrine of unlawful delegation is meant to avoid. *See* Pet. 4; *U.S. Telecom Ass'n v. FCC*, 359 F.3d 554, 565-66 (D.C. Cir. 2004) (agency subdelegation to outside entities "undermin[es] an important democratic check on government decision-making" and "aggravates the risk of policy drift inherent in any principal-agent relationship"). By contrast, the Ranchers' understanding of the *Mitchell* cases—requiring

[3] Then codified at 5 U.S.C. § 485.

statutory specificity to sustain a challenge to the federal government's alleged mismanagement of tribal trust assets under the Tucker Act, but accepting general authority when determining whether the federal government has the power to manage such assets—is consistent with most other appellate precedent. It is consistent as well with the Court's practice of deferring to Congressional judgments, not Executive Branch abdications, about how best to regulate Indian affairs. *See, e.g.*, *Okla. Tax Comm'n v. Chickasaw Nation*, 515 U.S. 450, 459 (1995) (observing the "due deference to the lead role of Congress in evaluating state taxation as it bears on Indian tribes and tribal members"); *United States v. Sandoval*, 231 U.S. 28, 46 (1913) ("[I]n respect of distinctly Indian communities the questions whether, to what extent, and for what time they shall be recognized and dealt with as dependent tribes requiring the guardianship and protection of the United States are to be determined by Congress, and not by the courts.").

The D.C. Circuit's novel view upends the federal-Indian trust relationship and, in effect, approves of the Executive Branch's unlawful transfer of its Congressionally delegated management authority to a non-federal entity. These alarming consequences underscore the need for this Court's review.

II.

Respondents' Efforts to Distinguish the Authorities Cited in the Petition Are Unconvincing

a. *United States v. Eberhardt*, 789 F.2d 1354 (9th Cir. 1986). Respondents point out that the regulations in *Eberhardt* did not extinguish or abrogate Tribal rights. Opposition Br. 18. But that is neither here nor there, because the Ranchers do not seek to extinguish or abrogate Tribal rights either. The question raised by the Ranchers' lawsuit is not whether the Tribes retain their reserved water rights; they surely do, and will continue to regardless of whether the Ranchers' lawsuit is successful. *See* Pet. App. B-16 ("[A]s the plaintiffs concede, the Tribes' water rights are senior to and take priority over the subsequently established water rights of the plaintiffs."). Rather, the question is whether the United States possesses authority *to manage* trust assets—specifically, reserved water rights held in trust for the Klamath Tribes. The Ninth Circuit's decision in *Eberhardt* holds that the federal government does have such management authority. 789 F.2d at 1359-60 (Interior has "plenary administrative authority in discharging the federal government's trust obligations to Indians," including the regulation of fishing rights, even though such authority is not specifically granted by statute).

Respondents next observe that Interior's actions in *Eberhardt* accounted for the preferences of the Tribe. Opposition Br. 19. This too is no distinction. Petitioners do not challenge the Protocol's consultation provisions; they challenge only the Protocol's assurance that the federal government will not object to any otherwise lawful management

proposal from the Tribes. *See* Pet. App. I-5, J-7. *Cf. U.S. Telecom*, 359 F.3d at 567-68 (agencies may condition grants of permission on third-party acquiescence, and may consult with external entities for factual information, advice, and policy recommendations, but cannot "merely 'rubber-stamp' decisions made by others under the guise of seeking their 'advice'").

Finally, Respondents attempt to distinguish *Eberhardt* because it involved competing claims by multiple Indian tribes, in contrast to the Ranchers' action which supposedly seeks to override Tribal rights in favor of non-Tribal interests. Opposition Br. 19. But that distinction is unavailing. Many of the properties owned by the Ranchers were originally Klamath lands transferred under the General Allotment Act. Pet. App. K-9 to K-10 (Compl. ¶¶ 16-17). Thus, these lands continue to enjoy rights created by the Klamath Treaty of 1864. *Id.* (citing a 1958 memorandum issued by the Solicitor for Interior to the effect that Interior would "support the rights of Indian landowners and third party purchasers of Klamath [Reservation] lands as having" water rights under the Klamath Treaty of 1864). *Cf. Or. Dep't of Fish & Wildlife v. Klamath Indian Tribe*, 473 U.S. 753, 766-68 (1985) (holding that general conveyance of former Klamath Reservation lands under 1901 Cession Agreement "unquestionably carried with it whatever special hunting and fishing rights the Indians had previously possessed"). Moreover, Respondents fail to address the Ranchers' argument that the Protocol impermissibly subordinates one of the purposes of the Klamath Treaty. *See* Opposition Br. 18; Pet. 20-22. The Ninth Circuit has made clear that the Klamath Treaty is aimed at two distinct

purposes: preservation of the Tribes' traditional hunting and fishing lifestyle, and encouragement of agriculture among the Tribes. *See United States v. Adair*, 723 F.2d 1394, 1409-10 (9th Cir. 1983). The Ranchers' action therefore cannot be characterized as elevating non-Tribal interests above Tribal rights. Instead, it seeks merely to prevent Interior from abdicating its duties to balance internally competing[4] primary Treaty purposes.

b. *United States v. Ahtanum Irrig. Dist.*, 236 F.2d 321 (9th Cir. 1956). Respondents argue that *Ahtanum* is distinguishable because, unlike here, the water rights in that case were disputed and unadjudicated. Opposition Br. 20-21. Yet the water rights at issue here have only been provisionally determined in the Klamath Basin Adjudication, and are subject to ongoing adjudication, *id.* at 6-7, just as the rights at issue in *Ahtanum, see* 236 F.2d at 329-30. Although the specific authority questioned in *Ahtanum* (settling agreements for the distribution of contested waters) may differ in the particulars from the authority here alleged (to supervise the use of provisionally adjudicated water rights), Respondents do not explain the legal significance of such a difference. Contrary to

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[4] Although the *Adair* decision does not read any hierarchy of priorities into the Treaty's dual purposes, the language of the Treaty strongly suggests that agriculture is intended as the dominant purpose. *Compare* Klamath Treaty, Art. I (Pet. App. E-2 to E-5) ("securing" exclusive fishing and gathering rights to the Tribes on Reservation lands) *with id.* Arts. II-V (Pet. App. E-5 to E-7) (providing for various expenditures "to promote the well-being 'of' the Indians . . . *and especially agriculture*," such as "farming implements, tools, [and] seeds," and mills) (emphasis added); *cf. Adair*, 723 F.2d at 1409-11 (acknowledging that Articles II-V all "evince a purpose to *convert* the Klamath Tribe to an agricultural way of life") (emphasis added).

their view that *Ahtanum* "provides no support" for the assertion that the federal government possesses ultimate management authority over trust water rights, Opposition Br. 21, the decision plainly observes that 25 U.S.C. § 2 and 43 U.S.C. § 1457 "in general language confer upon the [S]ecretary powers of supervision and of management," and holds this general grant to include the specific management authority at issue. 236 F.2d at 335. There is no reason why the same general grant should not supply the federal government with management authority here.

Similarly unconvincing is Respondents' second point of supposed distinction, that the Indians of the Yakima Reservation did not belong to a unified and sovereign tribal government as do the members of the Klamath Tribes. Opposition Br. 21-22. But the statutory authorization relied on by *Ahtanum*—the same authorization still in effect and relied upon by the Ranchers—covers the "management of *all* Indian affairs and of *all* matters arising out of Indian relations," 25 U.S.C. § 2 (emphasis added); 43 U.S.C. § 1457, not merely the affairs of Indians having no organized tribal government.

Contrary to Respondents' contention, Opposition Br. 22, *Adair* does not cast doubt on this point; the Ninth Circuit's observation that the federal government does not "control" the Klamath Tribes' reserved water rights was made in a different context. *See Adair*, 723 F.2d at 1418-19. At issue in *Adair* were two sets of water rights: the Tribes' reserved water rights, as well as rights acquired by the federal government as purchaser of former reservation lands. *Id.* The federal government had argued that, by virtue of its acquisition of these lands, it also had acquired

the underlying Treaty rights and was therefore entitled to convert those rights to another use. *Id.* at 1419. In rejecting that argument, the Ninth Circuit in *Adair* highlighted the distinction between the Tribes' reserved water rights and the water rights acquired by the federal government in its purchase of former reservation lands. The Ninth Circuit then made the unremarkable observation that the federal government does not "control" the Tribes' reserved rights in the same way that it controls its own water rights acquired by purchase. *Id.* at 1418-19. That conclusion has no conflict with the Ranchers' position, which is that the federal government as trustee has authority to manage tribal trust assets even though it may not possess the same degree of authority as an outright legal owner of such rights.

In short, *Eberhardt* and *Ahtanum* hold that Interior's authority to manage all matters of Indian affairs is derived from broad Congressional authorization and does not require any more specificity than that. The decision below holds otherwise, creating a conflict between federal appellate courts that warrants review.

III.

Because Interior Possesses Management Authority Over the Klamath Tribes' Reserved Water Rights, NEPA Applies

Respondents argue against review of the NEPA issues raised in the Ranchers' petition because NEPA does not apply to federal actions "that are not the actual cause of alleged environmental impacts." Opposition Br. 23. The argument misses the point. To be sure, whether NEPA applies to the decision-

making leading up to those calls depends on whether the federal government has management authority over the Tribes' water rights. *See* Opposition Br. 23-24. But the Ranchers' complaint plainly and competently alleges that calls for the Klamath Tribes' water rights have resulted in several serious environmental harms. Pet. App. K-18, ¶ 36. Thus, if the Ranchers are correct that the government has management authority over those rights, then it necessarily follows that NEPA applies. *See Dep't of Transp. v. Public Citizen*, 541 U.S. 752, 770 (2004).

IV.

Conclusion

The *Mitchell* cases hold that specific statutory language is required for the federal government to be liable in money damages for violating Indian treaty obligations. The D.C. Circuit below expanded this ruling to hold that specific statutory language is also needed to sustain the federal government's ability as trustee to manage Indian trust assets. The decision conflicts with other federal appellate court precedents. It permits the Executive Branch to shirk its Congressionally delegated responsibilities and to evade political accountability. And it dramatically limits the ability of non-Indian parties to seek redress for harms caused by federal mismanagement of Indian trust assets.

The petition for writ of certiorari should be granted.

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Respectfully submitted,

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