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.

DEB HAALAND, SECRETARY OF THE INTERIOR, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

BRIEF FOR THE RESPONDENTS IN OPPOSITION

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QUESTION PRESENTED

Whether the court of appeals correctly determined that petitioners' alleged injuries are not fairly traceable to a federal Protocol Agreement, and cannot be redressed by the invalidation of the Protocol Agreement, because petitioners' alleged injuries result from the Klamath Tribes' exercise of their treaty-reserved water rights, and the Tribes would retain the ability to exercise those rights in the absence of the Protocol Agreement.

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. A1-A29) is reported at 991 F.3d 216. The opinion of the district court (Pet. App. B1-B26) is reported at 436 Fed. Supp. 3d 241.

JURISDICTION

The judgment of the court of appeals was entered on March 19, 2021. A petition for rehearing was denied on May 10, 2021 (Pet. App. C1). The petition for a writ of certiorari was filed on October 5, 2021. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

Petitioners are ranchers who claim water rights in streams within the Upper Klamath River Basin in Ore-

gon. Pet. App. A2. The Klamath Tribes hold senior water rights in those streams, and petitioners allege that the Tribes' exercise of their rights has impeded petitioners' access to the water. *Ibid.* Petitioners further allege that the Tribes are able to exercise their own water rights only because the Bureau of Indian Affairs (BIA) entered into a Protocol Agreement with the Tribes that impermissibly delegates the federal government's authority to manage the Tribes' water rights to the Tribes. *Ibid.* Petitioners brought suit challenging the validity of the Protocol, and the district court dismissed the suit for lack of standing. *Id.* at A13-A14. The court of appeals affirmed, explaining that petitioners could not satisfy the Article III requirements of traceability and redressability because the Tribes would have the right to exercise their own treaty-reserved water rights even without the Protocol. *Id.* at A29.

1. a. In the early 19th Century, the Klamath Tribe, Modoc Tribe, and the Yahooskin Band of Snake Indians —collectively known as the Klamath Tribes—occupied 22 million acres of territory in southern Oregon, east of the Cascade Mountains. *Oregon Dep't of Fish & Wildlife* v. *Klamath Indian Tribe*, 473 U.S. 753, 755 (1985). The Tribes had hunted, fished, and foraged on these lands for over one thousand years. *United States* v. *Adair*, 723 F.2d 1394, 1397 (9th Cir. 1983), cert. denied, 467 U.S. 1252 (1984).

In 1864, the Tribes entered into a treaty with the United States, in which they ceded most of their aboriginal territory to the United States, excluding roughly two million acres "within the country ceded," which the parties agreed would be held for the Tribes "as an Indian reservation." *Oregon Dep't of Fish & Wildlife*, 473

U.S. at 755 (quoting Treaty of Oct. 14, 1864, art. I, 16 Stat. 707, 708). The treaty expressly reserved to the Tribes "the exclusive right of taking fish in the streams and lakes" on the reservation. *Ibid.*

In 1887, Congress enacted the Indian General Allotment Act, 25 U.S.C. 331, which authorized the subdivision of Indian reservations and the allotment of parcels to individual Indians. *Upper Skagit Indian Tribe* v. *Lundgren*, 138 S. Ct. 1649, 1652-1653 (2018). Under the Act, some Klamath Reservation lands were allotted to individual Indians, and some of these allotments were later conveyed in fee to non-Indians. *Adair*, 723 F.2d at 1398.

In 1954, Congress passed the Klamath Termination Act, ch. 732, 68 Stat. 718 (Termination Act), which terminated federal supervision of the Klamath Tribes and provided for the disposition of all Klamath Reservation lands that had not been allotted. See *Oregon Dep't of Fish & Wildlife*, 473 U.S. at 761-762. Over the next two decades, the United States acquired approximately 70% of the former reservation for a national forest and a national wildlife refuge. *Adair*, 723 F.2d at 1398, 1417-1419. The Termination Act did not, however, extinguish the Klamath Tribes' treaty-reserved water rights. See *Oregon Dep't of Fish & Wildlife,* 473 U.S. at 768-769; *Kimball* v. *Callahan*, 493 F.2d 564, 567-570 (9th Cir.), cert. denied, 419 U.S. 1019 (1974). Rather, the Act specifically provided that "[n]othing in this Act shall abrogate any fishing rights" the Tribes or their members "enjoyed under" the 1864 Treaty, and "[n]othing in this Act shall abrogate any water rights" of the Tribes and their members. § 14, 68 Stat. 722.

Relying on this language in the Termination Act, the Ninth Circuit issued a 1983 decision determining that

the statute had not abrogated the Tribes' instream water rights. *Adair*, 723 F.2d at 1411-1412, 1418. The Ninth Circuit further found that the Tribes' right "to use * * * water for the preservation of hunting and fishing" on "reservation lands" was based on "aboriginal title," had a priority date of "time immemorial," and was "superior" to the irrigation rights. *Id.* at 1413-1416. Although the court also determined that these "nonconsumptive" rights did not authorize the Tribes to divert the water for off-stream use, it found that the Tribes could exercise the rights to "prevent other appropriators from depleting the streams" below a level necessary to protect fish and wildlife. *Id.* at 1411, 1418.

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

2. a. The Tribes are not the only parties that hold rights to the waters in the Upper Klamath River Basin. Over time, many other parties—including the federal government—have asserted claims to those waters. See *United States* v. *Oregon*, 44 F.3d 758, 762-764 (9th Cir. 1994), cert. denied, 516 U.S. 943 (1995). In 1975,

the Oregon Water Resources Department (OWRD) initiated a state proceeding known as the Klamath Basin Adjudication to settle the disputed rights to those Klamath Basin waters located in Oregon. *Ibid.* The United States initially asserted that sovereign immunity prevented the adjudication of federal rights as part of these state proceedings. *Ibid.* But the Ninth Circuit rejected that assertion in a 1994 decision, see *id.* at 763-770, holding that the Klamath Basin Adjudication falls within the McCarran Amendment, a 1952 law that waives federal sovereign immunity and grants consent to join the United States in any comprehensive suit "for the adjudication of rights to the use of water of a river system or other source," 43 U.S.C. 666(a).

Under Oregon law, water rights that are not claimed within a duly-noticed state adjudication are subject to forfeiture. Or. Rev. Stat. § 539.210 (2019). And this Court has held that the McCarran Amendment's waiver of sovereign immunity for the state adjudication of water rights applies to *all* federal reserved rights encompassed by the adjudication, including rights impliedly reserved for Indian reservations. *Colorado River Water Conservation Dist.* v. *United States*, 424 U.S. 800, 809-813 (1976). Accordingly, after the Ninth Circuit held that the Klamath Basin Adjudication fell within the McCarran Amendment, the United States filed with OWRD hundreds of claims to water rights in the Klamath Basin in Oregon, including dozens on behalf of the Klamath Tribes, with whom a trust relationship, at the time of filing, had been restored. *United States* v. *Braren*, 338 F.3d 971, 973 (2003). The Tribes also filed their own claims, incorporating by reference the relevant federal claims. *Ibid.*

b. In 2013, OWRD issued an order of determination on all rights claimed in the Klamath Basin Adjudication, C.A. App. 18 (¶ 19), later amending that order in February 2014. See *Baley* v. *United States*, 942 F.3d 1312, 1321 (Fed. Cir. 2019) (describing adjudication), cert. denied, 141 S. Ct. 133 (2020); Or. Admin. R. 690-025-0020(1) (2022). Through the two orders, OWRD provisionally confirmed numerous instream water rights on behalf of the Klamath Tribes with a priority date of time immemorial. See C.A. App. 18 (¶ 20).[*] OWRD further found that the stream flows and lake levels associated with the tribal rights are the amount "necessary to provide for the health and productivity of fish habitat" so as to restore and maintain tribal fisheries in the Upper Klamath Basin. *Id.* at 70. OWRD declared that the tribal water rights were held by the United States "in trust for the Klamath Tribes." *Id.* at 68 (citing *Colorado River*, 424 U.S. at 810). OWRD therefore confirmed the rights in the name of the United States as trustee for the Tribes and denied the Tribes' separate claims as "duplicative." *Ibid.*

OWRD also provisionally confirmed water rights claimed by petitioners, who are landowners who own property within the Upper Klamath Basin, C.A. App. 11-13 (¶¶ 3-8), and who assert irrigation water rights appurtenant to their lands, including rights acquired from Klamath Reservation allottees. *Id.* at 12-14 (¶¶ 4-5, 7-8). OWRD provisionally determined that all of petitioners' water rights have priority dates of 1864 or later, making those rights junior to the time-immemorial rights of the Klamath Tribes. *Id.* at 12 (¶ 5).

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[*] The relevant OWRD orders are available at https://www.oregon.gov/OWRD/programs/WaterRights/Adjudications/KlamathRiverBasinAdj/Pages/ACFFOD.aspx.

In accordance with state law, OWRD filed its orders of determination in Oregon circuit court. Or. Rev. Stat. § 539.130(1) (2019). The United States, the Tribes, and petitioners, as well as many other parties, filed "exceptions" to various findings of fact and conclusions of law. See C.A. App. 18 (¶ 19); Or. Rev. Stat. § 539.150 (2019). Proceedings on the exceptions are ongoing and expected to continue for at least several more years. See C.A. App. 18 (¶ 20).

c. While the appeal is pending, OWRD is operating a call system in the Upper Klamath Basin. See Or. Admin. R. 690-025-0025(1) (2022). Under this system, the user of any verified water right—including any right provisionally determined in the Klamath Basin Adjudication—may make a "call" on junior users to prevent interference with the senior right. See *id.* 690-025-0020. Following review of records and field inspections as warranted, OWRD may direct junior users to cease diversions that it determines are interfering with any senior right. See *id.* 690-025-0025(1); *id.* 690-250-0100.

In May 2013, the BIA and the Tribes entered into a Protocol Agreement regarding the exercise of the Tribes' water rights that had been provisionally confirmed through the Klamath Basin Adjudication. C.A. App. 30. Acknowledging OWRD's desire for a "point of contact" for enforcement purposes, the Protocol identifies the Tribes as the entity primarily responsible for making calls. *Id.* at 30 (¶ 1), 34 (¶ 1). As amended in March 2019, the Protocol specifies that the Tribes are to notify the BIA seven business days before making a "standing" call (*i.e.*, a call prior to any actual water shortage) and three business days before making any other call. *Id.* at 36 (¶ 8). The Protocol provides proce-

dures and timelines to help facilitate agreement between the BIA and the Tribes, *id.* at 35-37 (¶¶ 2-11), but it does not require the BIA's concurrence as a precondition for making a call, *id.* at 37 (¶ 12). Rather, the Protocol specifies that the Tribes "retain[]" their "independent right to make a call," except that the BIA reserves its right to "withhold any required concurrence" for "any call [by the Tribes] for water that is inconsistent with [OWRD's final administrative determination] or other legal obligations." *Ibid.* The Protocol also recognizes the BIA's "independent right" to make a call for the Klamath Tribes, with advance notice to the Tribes, if the "BIA believes a call should be made for the protection of the Tribes' treaty resources," or for "protection of the Tribal water rights." *Id.* at 37 (¶¶10, 12).

d. In April 2014, the Tribes, the State of Oregon, and landowners in the Upper Klamath Basin (including most of the petitioners) executed the Upper Klamath Basin Comprehensive Agreement, a broad set of agreements designed to settle longstanding disputes over water use among the Tribes, other fisheries proponents, and agricultural interests. C.A. App. 20 (¶ 26). In the Comprehensive Agreement, the Tribes agreed to forebear from fully exercising their instream water rights in exchange for commitments by the other parties to restrict water use, protect riparian areas, and aid in tribal economic development. *Ibid.*; see *id.* at 21 (¶ 28).

The Upper Klamath Basin Comprehensive Agreement was entered into on a temporary basis with potential permanent duration, conditioned upon future events, including Congressional approval of the Klamath Basin Restoration Agreement, a broader agreement addressing water use in the entire Klamath Basin.

See 82 Fed. Reg. 61,582 (Dec. 28, 2017). The Upper Klamath Basin Comprehensive Agreement charged the Secretary of the Interior with responsibility for making findings regarding the occurrence of the requisite conditions. *Id.* at 61,583.

After Congress failed to provide necessary approval and funding for the Klamath Basin Restoration Agreement, the Secretary in December 2017 issued a "Negative Notice," finding that multiple conditions necessary for the continuance of the Upper Klamath Basin Comprehensive Agreement had not been and could not be met. 82 Fed. Reg. at 61,583-61,584. This notice terminated the Upper Klamath Basin Comprehensive Agreement in accordance with its own terms. *Ibid.* Thereafter, the Tribes ceased to forbear from exercising any part of their instream water rights above Upper Klamath Lake, making calls for their full rights as determined under the Klamath Basin Adjudication. See C.A. App. 21-22 (¶¶ 31-32).

3. Petitioners filed the present action in the federal district court for the District of Columbia in May 2019. Pet. App. A13. Petitioners alleged that OWRD's enforcement of the Klamath Tribes' water calls resulted in "widespread and severe curtailment" of irrigation use on petitioners' lands, C.A. App. 21-22 (¶¶ 31-32), thus causing environmental and economic injury, which petitioners alleged would continue with future calls. *Id.* at 21-23 (¶¶ 31-38). Petitioners asserted: (1) that the Protocol unlawfully delegated the BIA's authority to manage tribal water rights; and (2) that the BIA violated the National Environmental Policy Act of 1969 (NEPA), 42 U.S.C. 4321 *et. seq.*, by failing to conduct an environmental review prior to the alleged delegation. C.A. App. 21-23 (¶¶ 31-38). Petitioners asked the district court to

set aside the Protocol and all previous calls by the Tribes under the Protocol, and to enjoin the BIA from making any future calls until the BIA "fully complie[s] with the law." *Id.* at 28.

a. The district court dismissed the suit for lack of standing. Pet. App. B26. Because the "Klamath Tribes are entitled to enforce their senior water rights * * * regardless of whether the Protocol * * * stand[s]," *id.* at B22, the court determined that petitioners' alleged injuries are not fairly traceable to the Protocol and cannot be redressed by setting aside the Protocol or by enjoining the BIA from making calls, *id.* at B17-B21.

b. The court of appeals unanimously affirmed. Following longstanding precedent from this Court, the court of appeals held that the general trust relationship between the United States and Indian tribes, including federal trust ownership of land and water rights on behalf of Indians, does not give federal officials exclusive authority to manage or control the Tribes' resources. Pet. App. A18-A19 (citing *United States* v. *Mitchell*, 445 U.S. 535 (1980) (*Mitchell I*); *United States* v. *Mitchell*, 463 U.S. 206 (1983) (*Mitchell II*)). The court explained that, absent statutory provisions to the contrary, the lands and water rights held under federal law for Indians belong to them and are for the Tribes to manage and control. See *id.* at A20-A21. And the court observed that the relevant statutes in this case—the Termination and Restoration Acts—specifically acknowledge the Tribes' water rights and do nothing to abrogate tribal control. *Ibid.*

The court of appeals then addressed what it described as the "heart" of petitioners' argument—the contention that the BIA is required to approve the Tribes' calls as a matter of Oregon state law. Pet. App.

A21-A28. While the government disputed the applicability of Oregon law on this issue, the court found that it "need not resolve that question because none of the four sources" of the asserted "Oregon-law concurrence requirement offered by [petitioners] show that Oregon law requires the federal government to concur in the Tribes' calls for their reserved water rights held in trust." *Id.* at A23.

"In sum," the court determined that under both federal and state law, the Klamath Tribes have the authority to exercise their own treaty-reserved water rights, without the need for the BIA's concurrence. Pet. App. A29. The court therefore found that petitioners "lack Article III standing" because they cannot "show their alleged injuries are fairly traceable to federal government action or inaction, or would be redressed by striking the Protocol." *Ibid.*

ARGUMENT

Petitioners contend (Pet. i) that the court of appeals' determination that petitioners lack Article III standing is incorrect because the federal government necessarily possesses "final decision-making authority over the management of water rights held in trust for an Indian tribe," such that—if petitioners challenge to the Protocol succeeds—the Tribes will not be able to exercise their water rights without the BIA's concurrence. That contention finds no support in federal law or this Court's precedents, which have repeatedly recognized that, absent clear statutes to the contrary, the Tribes have the sovereign power to control their own lands and waters. Petitioners also fail to identify any conflict in the circuits or question of sufficient importance to warrant this Court's review. The petition for a writ of certiorari should therefore be denied.

1. Under federal law, Indian tribes are "domestic dependent nations" that exercise "inherent sovereign authority." *Michigan* v. *Bay Mills Indian Community*, 572 U.S. 782, 788 (2014) (internal quotation marks and citations omitted). Congress possesses "plenary control" over tribes, including the ability to abrogate tribal sovereign powers. *Ibid.* But this plenary authority to "control and manage the property and affairs of Indians" does not "extend so far as to enable the [g]overnment 'to give the tribal lands to others, or to appropriate them to its own purposes, without rendering, or assuming an obligation to render, just compensation.'" *Shoshone Tribe of Indians* v. *United States*, 299 U.S. 476, 497 (1937) (quoting *United States* v. *Creek Nation*, 295 U.S. 103, 110 (1935)); see also *United States* v. *Sioux Nation of Indians*, 448 U.S. 371, 423 (1980). Moreover, "unless and 'until Congress acts, the tribes retain' their historic sovereign authority." *Bay Mills*, 572 U.S. at 788 (quoting *United States* v. *Wheeler*, 435 U.S. 313, 323 (1978)). This Court will not find a statutory abrogation of tribal sovereignty unless such intent is clearly and unequivocally expressed. *Id.* at 790.

The sovereign powers retained by Indian tribes include "the right to control the lands held in trust for them by the federal government." *Kahawaiolaa* v. *Norton*, 386 F.3d 1271, 1273 (9th Cir. 2004), cert. denied, 545 U.S. 1114 (2005). Reserved water rights, like reserved lands, are real property rights. *Escondido Mut. Water Co.* v. *FERC*, 692 F.2d 1223, 1235-1236 (9th Cir. 1982), aff'd *sub nom. Escondido Mutual Water Co.* v. *La Jolla Band of Mission Indians*, 466 U.S. 765 (1984). They "belong to the Indians rather than to the United States, which holds them only as trustee." *Shoshone-Bannock Tribes* v. *Reno*, 56 F.3d 1476, 1479 (D.C. Cir. 1995).

The water rights at issue here are rights that the Klamath Tribes reserved for themselves in the 1864 Treaty. *Adair*, 723 F.2d at 1408-1411. Petitioners identify no statute authorizing or directing the BIA to manage the Tribes' water rights, nor do they identify a statute creating a BIA obligation that might somehow conflict with the Tribes' exercise of their own rights. To the contrary, the Termination and Restoration Acts expressly acknowledge the Tribes' water rights and do nothing to diminish or abrogate those rights or vest the exercise of those rights in federal officials. See, *e.g.*, Termination Act § 14, 68 Stat. 722 (providing that "[n]othing in this Act shall abrogate any water rights" of the Tribes and its members). Thus, as the court of appeals explained, and as the Ninth Circuit has previously recognized, the United States possesses "no * * * right to control the use of[] the Klamath Tribe's * * * reserved water rights." Pet. App. A20-A21 (quoting *Adair*, 723 F.2d at 1418) (internal quotation marks omitted).

2. Petitioners do not challenge the court of appeals' application of the doctrine of retained tribal sovereignty or the court's construction of the Termination and Restoration Acts. Instead, petitioners contend (Pet. 14-24) that the court's decision conflicts with an array of decisions addressing the federal government's general authority with respect to Indian tribes. Those contentions are mistaken.

a. Petitioners initially assert that the court of appeals' decision is at odds with a set of cases that purportedly stand for the proposition that "the federal government's role as trustee * * * necessarily carries with it the power and obligation to manage [trust] assets." Pet. 16 (citing *Morton* v. *Ruiz*, 415 U.S. 199 (1974);

Udall v. *Littell*, 366 F.2d 668 (D.C. Cir. 1966), cert. denied, 385 U.S. 1007 (1967); and *Agua Caliente Band of Cahuilla Indians* v. *Riverside Cnty.*, 181 F. Supp. 3d 725 (C.D. Cal. 2016)). But none of the cited cases embraces such a blanket rule. In *Morton*, this Court determined only that the BIA had the regulatory authority to fill in a "gap" in a statutory assistance program for the tribes. 415 U.S. at 231. In *Udall*, the D.C. Circuit recognized that, where a statute required the Secretary of the Interior to approve tribal contracts paid for with federal funds, the Secretary's "broad authority" to "oversee Indian affairs" meant that he could also terminate such contracts, even though the statute did not expressly grant him that power. 366 F.2d at 674. And in *Agua Caliente*, a federal district court upheld a BIA regulation clarifying that leaseholds on trust lands and other possessory interests under such leases are exempt from state taxation. 181 F. Supp. 3d at 738-745 (applying *White Mountain Apache Tribe* v. *Bracker*, 448 U.S. 136 (1980)). None of those cases suggests that the federal government has the inherent authority to manage Indian tribes' reserved water rights. Indeed, of the three cases, only *Agua Caliente* involved trust property, and Interior's authority in that case came from a statute that specifically directed Interior to review and approve leases. See *id.* at 738 (citing 25 U.S.C. 415(a)).

Petitioners' attempt (Pet. 19) to rely on *Armstrong* v. *United States*, 306 F.2d 520 (10th Cir. 1962) is equally unavailing. Petitioners observe that *Armstrong* stated that the "management of water and water projects on a reservation is clearly within the scope" of Interior's "general statutory authority." Pet. 19 (quoting *Arm-*

strong, 306 F.2d at 522). But the only issue in *Armstrong* was whether Interior employees constructing an on-reservation irrigation project for Indians were "engaged in * * * official duties" for purposes of the criminal statute prohibiting assault on such persons. See *Armstrong*, 306 F.2d at 522-523 (construing 18 U.S.C. 111). *Armstrong* did not hold that Interior's general authority over Indian affairs includes the right or duty to control the tribes' exercise of their water rights.

b. Petitioners also err in asserting (Pet. 16) that the court of appeals' decision misconstrued this Court's precedents in *United States* v. *Mitchell*, 445 U.S. 535 (1980) (*Mitchell I*), and *United States* v. *Mitchell*, 463 U.S. 206 (1983) (*Mitchell II*). *Mitchell I* concerned whether the provision of the General Allotment Act that declares that reservation allotments are to be held "in trust" for Indian allottees imposes on the government the duty to manage timber resources on a reservation. 445 U.S. at 541. This Court rejected the proposition that the trust language should be read "as *authorizing*, much less requiring, the Government to manage timber resources for the benefit of Indian allottees." *Id.* at 545 (emphasis added). And, more generally, the Court found that neither the trust language in the General Allotment Act, nor the precedent acknowledging a general trust relationship between the United States and Indian tribes, creates a conventional trust under which federal officials possess fiduciary powers and obligations to "control use of the land." *Id.* at 544. Rather, in the General Allotment Act, Congress merely intended to "prevent alienation of the land and to ensure that allottees would be immune from the state taxation." *Ibid.* Then, in *Mitchell II*, this Court found that a series of statutes

and regulations empowering the Secretary of the Interior to sell and manage timber on reservation land imposed the duty on the federal government to manage timber resources that was *not* supplied by the general trust relationship alone. 463 U.S. at 224-226.

In the present case, there are no statutes or regulations like those in *Mitchell II* directing Interior to manage the Klamath Tribes' water rights. The Termination and Restoration Acts instead provide that the Tribes' rights remain undisturbed. See pp. 3-4, *supra*. And, while OWRD declared that the tribal water rights are held by the United States "in trust for the Klamath Tribes," C.A. App. 68, it did so on the basis of the general trust relationship between the Tribes and the federal government. *Ibid.* (citing *Colorado River Water Conservation Dist.* v. *United States*, 424 U.S. 800, 810 (1976)). *Mitchell I* establishes that such a relationship does not grant the federal government the power to "control use of the land." 445 U.S. at 544. Thus, the court of appeals appropriately followed *Mitchell I* and *Mitchell II* when it determined that the form of federal "trust" ownership at stake in this case is not indicative of federal control over the water rights. See Pet. App. A18-A23.

Petitioners contend (Pet. 17) that this analysis is "precisely backwards," because the "limited trust exemplified" in *Mitchell I* is limited only "with respect to what Indian tribes may demand" from federal officials and not with respect to the power Interior may exercise "as trustee." In petitioners' view, the "consequence" of a limited trust is not simply the absence of fiduciary obligations to tribes, but also the "minimization" of a tribe's "management power." Pet. 18 (emphasis omitted). But petitioners provide no reason for equating a

lack of federal fiduciary obligations over tribal trust property with a "minimization" of tribal control over such property. As the *Mitchell* cases illustrate, Congress creates fiduciary obligations when it expressly directs Executive Branch officials to manage trust resources for the benefit of Indians, thereby precluding the Indians from exercising such authority themselves. Cf. *Mitchell II*, 463 U.S. at 224 (implying trust duties under particular statutes that gave Interior responsibility to manage Indian resources for the benefit of the Indians). Conversely, as the court of appeals explained, see Pet. App. A18-A21, where Congress has not granted management authority to Executive Branch officials, tribes *retain* broad sovereign authority to control the use of their own land and resources, see *Bay Mills*, 572 U.S. at 788.

c. Petitioners are similarly mistaken in their contention (Pet. 20-24) that the court of appeals' decision conflicts with the decisions of the Ninth Circuit in *United States* v. *Eberhardt*, 789 F.2d 1354 (1986), and *United States* v. *Ahtanum Irrigation District*, 236 F.2d 321 (1956), cert. denied, 352 U.S. 988 (1957).

i. *Eberhardt* concerned Interior's authority to regulate fishing on the Hoopa Valley Reservation in California. 789 F.2d at 1356-1357. Interior adopted federal regulations that imposed a moratorium on commercial fishing, after finding that regulatory action was necessary to conserve tribal resources and that tribal regulations were not possible because two tribes (the Hoopa Valley and the Yurok) shared the reservation and the latter lacked a functioning government. 44 Fed. Reg. 17,144, 17,145 (Mar. 20, 1979). In response to a challenge by individual Indians prosecuted for violating the regulations, the Ninth Circuit held that Interior had

sufficient authority under 25 U.S.C. 2 and 9 to issue the regulations because they did not "extinguish any reserved tribal fishing rights," and the court then remanded to the district court for a determination of whether the regulations were nonetheless arbitrary and capricious. *Eberhardt*, 789 F.2d at 1361; see *id.* at 1362.

Highlighting the court of appeals' observation that Interior had "balanced" tribal fishing for subsistence and ceremonial purposes against tribal commercial fishing, petitioners cite *Eberhardt* for the proposition that Interior "must manage tribal trust assets in light of all * * * of the purposes for which those assets have been placed in trust." Pet. 20, 21 (citing *Eberhardt*, 789 F.2d at 1357) (emphasis omitted). Petitioners then argue that, because the 1864 Treaty with the Klamath Tribes reserved water for both agricultural and fishing and hunting purposes, see Pet. 21 (citing *Adair*, 723 F.2d at 1410), Interior has authority to "countermand" the Tribes' "demands" for water for "just one part of the Tribes' trust assets," *ibid.* This argument suffers from at least three major flaws.

First, *Eberhardt* confirmed the federal government's authority to issue regulations for the conservation and protection of tribal resources in certain circumstances, but it did not suggest that the federal government's general trust relationship with Indian tribes grants Interior the authority to override a tribe's exercise of its treaty-reserved water rights. To the contrary, the Ninth Circuit repeatedly emphasized that the regulations in question in *Eberhardt* might be upheld precisely because they did *not* "extinguish" or "abrogat[e]" the tribes reserved fishing rights. 789 F.2d at 1361. And the Ninth Circuit expressly recognized that

"[o]nly Congress can modify or abrogate Indian tribal rights." *Ibid.*

Second, in upholding the regulations as a valid exercise of Interior's authority with respect to the tribes under 25 U.S.C. 2 and 9, the Ninth Circuit observed that Interior adopted the regulations "to respond to comments reflecting the views of the majority of the Indians on the Reservation." *Eberhardt*, 789 F.2d at 1359 (citing 44 Fed. Reg. at 17,146). In other words, the regulations were intended to vindicate the Tribes' members' decisions about how to use their fishing resources, not to override them. Indeed, Interior issued the subject regulations only after finding that the resident Indians were unable to issue their own regulations as necessary to protect tribal resources. 44 Fed. Reg. at 17,144-17,145. And *Eberhardt* did not address whether Interior could have acted to displace tribal fishing regulations had there been a functioning tribal government to issue such regulations itself.

Third, *Eberhardt* involved regulations adopted in the face of competing claims by multiple tribes to a common resource, and the Ninth Circuit merely upheld Interior's authority to step in to balance competing *tribal* claims on that resource. See 789 F.3d at 1360. Even if the general authority conferred in 25 U.S.C. 2 and 9 is sufficient to grant Interior the power to regulate and conserve tribal resources in that context, that would not suggest that those statutes grant Interior the authority to override a tribe's exercise of its water rights in the face of competing claims from outside parties.

ii. Petitioners' reliance on *Ahtanum* is also misplaced. That 1956 decision involved a 1908 agreement between Interior and certain non-Indian water users, executed after the water users sued Interior officials to

enjoin a federal irrigation project that the officials were constructing on Ahtanum Creek for the Indians of the Yakima Reservation. *Ahtanum*, 236 F.2d at 326-331. In the agreement, Interior committed to limiting its water-rights claim and water usage for the Indians to 25% of the creek's natural flow. *Id.* at 327-329. Decades later, as part of a suit to adjudicate the federal reserved water rights for the Yakima Reservation, the United States asked the court to declare the 1908 agreement null and void on the view that the officials who had entered the agreement lacked authority to abrogate the treaty-based water rights. *Id.* at 324.

The Ninth Circuit acknowledged that the tribes' water rights for the Yakima Reservation likely encompassed *all* of the flows of Ahtanum Creek, not merely 25%. *Ahtanum*, 236 F.2d at 328-329, 337. Nonetheless, the court held that the 1908 agreement was valid and limited the United States' claims on the Indians' behalf. *Id.* at 340-343. The court reasoned that Interior had the "power to make the 1908 agreement" *id.* at 338, by virtue of the grant of general powers "of supervision and management" over Indian affairs and Interior's need to manage "relations between the Indians on the one hand and their white neighbors on the other," *id.* at 335, even if Interior's exercise of its authority had amounted to an "act of appropriation" or taking, *id.* at 339.

Analogizing to *Ahtanum*, petitioners contend (Pet. 23-24) that Interior has authority to "adjust[]" the Klamath Tribes' calls for the exercise of the Tribes' water rights, for purposes of "facilitat[ing] peaceable arrangements with other inhabitants of the Klamath Basin." But this argument again fails for at least three reasons.

First, unlike the present case, *Ahtanum* involved disputed water rights that had not been adjudicated in

any proceeding. The 1908 agreement was prompted by and effectively resolved litigation challenging the actions of federal officials to divert water for use on the Yakima Reservation. 236 F.2d at 330. And in affirming the validity of the 1908 agreement, the Ninth Circuit specifically noted the United States' ability to initiate suit to adjudicate the water rights, and presumed that Congress intended to give Interior similar power to enter a "working arrangement" with non-Indian neighbors to resolve disputes over Indian water claims. *Id.* at 336-337; see *United States* v. *Ahtanum Irrigation Dist.*, 330 F.2d 897, 902-903 (9th Cir. 1964), cert. denied, 381 U.S. 924 (1965). The court therefore found the 1908 agreement valid on the theory that it was akin to a settlement agreement resolving disputed water rights.

Even if that theory were correct, it would not apply here because, in the present case, petitioners do not dispute Oregon's provisional determination of the Klamath Tribes' water rights, nor do petitioners contend that the BIA has the authority to declare the Klamath Tribes' water rights outside of or in lieu of a determination in the ongoing Klamath Basin Adjudication. Instead, petitioners take the Tribes' senior water rights as a given, but assert that it is the federal government that has the ultimate authority to decide how the Tribes exercise those rights. *Ahtanum* provides no support for that claim of federal power.

Second, unlike the present case, *Ahtanum* did not involve questions of tribal sovereign authority. Interior officials entered the 1908 agreement in the course of developing water rights for the individual Indians of the Yakima Reservation, 236 F.2d at 328-329, who belonged to multiple tribes, *Brendale* v. *Confederated Tribes & Bands of the Yakima Indian Nation*, 492 U.S. 408, 414

(1989) (opinion of White, J.). At that time, federal policy per the General Allotment Act aimed to "extinguish tribal sovereignty" and "force the assimilation of Indians." *County of Yakima* v. *Confederated Tribes & Bands of the Yakima Indian Nation*, 502 U.S. 251, 254 (1992). Thus, as in *Eberhardt*, *Ahtanum* did not address Interior's authority to exercise tribal water rights where, as here, there is a duly constituted tribal government capable of exercising such rights.

Third, *Ahtanum* is an outlier and a historical artifact that is not in keeping with current Ninth Circuit case law. As the *Ahtanum* court itself observed, the 1908 agreement was "practically without precedent" and presented a "most difficult question" of statutory authority. 236 F.2d at 331. The court ultimately held that Interior possessed (in retrospect) the power by contract to "improvident[ly] dispos[e] of three-fourths" of a water right that "justly belonged to the Indians," because such action was not "out of character with the sort of thing which Congress and the Department of the Interior has been doing throughout the * * * history of the Government's dealings with the Indians," because a remedy in just compensation presumably was available, and because the court was seemingly reluctant to allow the United States to renounce a longstanding agreement that Interior officials had duly approved. See *id.* at 337-339; see also *id.* at 342 (Chambers, J., concurring) (noting that "unfairness" resulting from the 1908 agreement should be "correct[ed]" by Congress).

More recently in *Adair*, the Ninth Circuit specifically addressed the Klamath Tribes' authority over their own water rights, and it held that the United States had "no * * * right to control the use of" those rights. 723 F.2d at 1418. In the present case, the court

of appeals appropriately followed the Ninth Circuit's directly relevant precedent in *Adair*. Pet. App. A20-A21.

d. Finally, petitioners mistakenly contend (Pet. 24-27) that the court of appeals' decision runs contrary to the NEPA, 42 U.S.C. 4321-4370(f), and decisions applying NEPA to the federal government's management of tribal affairs.

As petitioners observe, where Interior has statutory authority to approve the use of Indian lands or to otherwise manage tribal trust assets, the decisions by Interior that have potential environmental effects are subject to the requirements of NEPA. See, *e.g.*, *Nulankeyutmonen Nkihtaqmikon* v. *Impson*, 503 F.3d 18, 25-30 (1st Cir. 2007) (lease approval on Indian land); *Manygoats* v. *Kleppe*, 558 F.2d 556, 558-559 (10th Cir. 1977) (same). But none of the NEPA cases cited by petitioners suggests that a NEPA obligation arises with respect to federal actions that are not the actual cause of alleged environmental impacts. Cf. *Department of Transp.* v. *Public Citizen*, 541 U.S. 752, 770 (2004) (no NEPA obligation where agency has "no ability to prevent a certain effect due to its limited statutory authority"). And here, the court of appeals determined that the Protocol is not a cause of the alleged adverse environmental effects that result from the enforcement of the Klamath Tribes' instream water rights because the Tribes have primary authority, under federal and Oregon law, to exercise their own water rights. Pet. App. A29. Petitioners' NEPA arguments (Pet. 24-27) therefore depend entirely on their mistaken view (Pet. 26) that the BIA has management discretion "as trustee" of the tribal water right, to determine "[t]he amount of water needed to satisfy the Tribes' hunting and fishing needs." Because it is the Tribes that have discretion to

exercise their own water rights, see pp. 12-13, *supra*, petitioners' NEPA claims necessarily fail.

3. Finally, petitioners have not identified an important question of federal law that requires resolution by this Court. As petitioners observe (Pet. 27-28), there is a drought emergency in the Klamath River Basin that has significantly diminished shared water resources and placed a considerable strain on all water users. Under Oregon's water allocation system, junior water users are the first to feel the brunt of the water shortages. Concerns like these led affected water users to seek a compromise solution via a legislatively aided settlement, the Upper Klamath Basin Comprehensive Agreement, but Congress failed to take the actions necessary to make the Comprehensive Agreement permanent. See pp. 8-9, *supra*. Petitioners' path to relief therefore lies through Congress, not the courts.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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