No. 21-520

In The
Supreme Court of the United States

GERALD H. HAWKINS, 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

BRIEF *AMICUS CURIAE* OF OREGON FARM BUREAU IN SUPPORT OF PETITIONERS

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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?

TABLE OF CONTENTS

Table of Authorities

Cases

Statutes

Regulations

Other Authorities

Kaye, Barry, *How a Historic Drought Has Left Klamath Basin Farmers Caught in the Middle with No Water*, The Siskiyou Daily News, https://bit.ly/3k4RZtA (May 14, 2021) 16

Klamath County, *Drought,* https://bit.ly/3BUcCyR 12

Klamath County, *Frequently Asked Questions: Free Water Storage Tanks, Water Filling Station and Water Deliver in Response to Dry Wells in Klamath County, Oregon,* https://bit.ly/3CIHOlP.....15

Oregon Wild, *A Vision for the Klamath Basin,* https://bit.ly/2ZMx7jq 12

Parks, Bradley, *Bureau of Reclamation Shuts Down Primary Canal for Klamath Project Irrigators Amid Worsening Drought*, Oregon Public Broadcasting (May 12, 2021).....13

Spain, Glen, *Dams, Water Reforms, and Endangered Species in the Klamath Basin*, 22 J. Envtl. L. & Litig. 49 (2007) 16

U.S. Bureau of Reclamation, *Extreme Drought Conditions Force Closure of Klamath Project's "A" Canal,* https://on.doi.gov/3wdr0kd 12

INTEREST OF *AMICUS CURIAE*

Oregon Farm Bureau ("OFB")[1] is Oregon's largest grassroots agriculture association, representing over 6,670 farming and ranching families, raising over 220 different types of crops and livestock across the State. OFB's mission is to promote educational improvement, economic opportunity, and social advancement for its members and the farming, ranching, and natural resources industry as a whole. The OFB has participated as *amicus curiae* in state and federal cases across the country that implicate the interests of Oregon farmers and ranchers. *See, e.g.*, *Audubon Soc'y of Portland v. Zinke*, 2019 U.S. Dist. LEXIS 230161 (D. Or. Nov. 18, 2019); *Aransas Project v. Shaw*, 835 F.Supp.2d 251 (S.D. Tex. 2011); *Stop the Dump Coal. v. Yamhill Cty.*, 435 P.3d 698 (Or. 2019).

OFB's interest lies in the broader consequences of the D.C. Circuit's decision, which upends the State's comprehensive "system for the adjudication and management of rights to the use of the State's waters." *Colorado River Water Conserv. Dist. v. United States*, 424 U.S. 800, 819 (1976). The decision below does this by effectively creating two classes of water users whose water rights are held in trust by third parties. One class is subject to the Oregon rule that the trustee of a water right, as its legal owner, is solely

[1] All counsel of record for the parties in this case received timely notice of, and provided written consent to, the filing of this brief. No party or counsel for any party authored this brief in whole or in part, and no party or counsel for any party made a monetary contribution towards the preparation or submission. No person other than amici, their members or counsel made a monetary contribution towards the preparation or submission of this brief.

responsible for managing that water right. *Fort Vannoy Irrig. Dist. v. Wat. Res. Comm'n*, 188 P.3d 277, 295 (Or. 2008); *see Klamath Irrig. Dist. v. United States*, 635 F.3d 505, 518 (Fed. Cir. 2011). Meanwhile, another class of water users is exempt from the Oregon rule and may independently call for the implementation of a water right legally owned by a third party, even over the legal owner's objection. *Hawkins v. Haaland*, 991 F.3d 216, 225, 231 (D.C. Cir. 2021).

In addition, OFB has an interest in ensuring that the federal government is held to its congressionally imposed obligation to ensure that, as trustee of the Klamath Tribes' water rights, the general public interest—including the interests of farmers, ranchers, and other residents—is acknowledged and adequately protected.

If the D.C. Circuit's decision stands, it will only inject confusion and unfairness into Oregon's well-established system for managing and implementing water rights. And it will do so at the worst possible time—during a state of emergency related to severe drought in the Klamath Basin. The Court should decide whether the same rule should apply to all Oregon water held in trust, as required by Oregon Supreme Court decisions, and whether the federal government's role as guardian of the general public interest should be restored when it acts as trustee of tribal assets. OFB has a keen interest in ensuring that its many members, who are Oregon water users both in and outside the Upper Klamath Basin, are all able to farm, ranch, and support the wildlife on their lands

through a framework that is uniform, consistent, predictable, and fair.

Finally, while OFB acknowledges and respects the sovereign rights of the Klamath Tribes as a governmental entity, OFB supports the efforts of the water users in this case—including individual farmers who belong to the Klamath Tribes—to vindicate their irrigation rights. Further, OFB members strongly support the prior appropriations doctrine, and have been working closely with the tribes, environmental groups, and all water users in the Klamath Basin to resolve the long-standing water conflicts in the Klamath Basin. OFB members are aware of and sensitive to the many broken promises that the federal government has made to the tribes over the years. The issues in the Klamath Basin largely stem from the federal government promising the same resources to multiple parties. Many of OFB's farmers in the basin received their land as part of the G.I bill, and have worked across multiple generations to make it productive. This is why OFB members are participating in processes to try to resolve these long-standing challenges in the basin. One of the biggest challenges facing the basin is that the Klamath Tribes did not come "online" as senior water rights holders in the basin until *2013*—and their water rights and other pre-1909 water rights are still under adjudication in the courts.

SUMMARY OF THE ARGUMENT

This brief highlights two reasons why the Court should grant review in addition to those that the petition identifies.

First, the D.C. Circuit's decision is in tension with the decisions of the Oregon Supreme Court that govern rights to Oregon water held in trust. Significantly, the Oregon Supreme Court has held that the *beneficiary* of trust property—here, the Klamath Tribes—may not manage said property, which is the prerogative and duty of the trustee—here, the federal government. *Fort Vannoy*, 188 P.3d at 295-96. Thus, in addition to creating conflicts with decisions of this Court and federal circuit courts, the D.C. Circuit's decision parts ways with Oregon court precedents.

Second, the D.C. Circuit's decision effectively relieves the federal government of its congressionally mandated obligation—under the Indian trust relationship—to consider the general public interest in managing Indian trust assets, such as water rights. The decision authorizes the federal government to stand by, powerless, as the Klamath Tribes make consequential decisions for an entire region—based on totally unmanaged water calls—without any consideration of the dire impacts on the general populace. The Klamath Basin and its tribal and nontribal farmers, ranchers, and residents have been devastated by drought. The ecosystem, too, has suffered from inadequate water. Life-altering decisions about Indian trust assets normally are made in coordination with the federal government, as representative of the general public interest. The Court should review the lower court's decision to determine whether the D.C. Circuit decision conflicts with well-established federal law concerning the Indian trust relationship, which serves, not just the

interests of tribal governments, but those of the Nation and its people as a whole.

For these reasons, and those stated in the petition, OFB urges the Court to grant review.

ARGUMENT

I. The D.C. Circuit's Decision Is in Tension with Oregon Supreme Court Jurisprudence Concerning the Ownership and Management of Water Rights Held in Trust

Beyond the federal conflicts discussed in the petition, the D.C. Circuit's decision also is in tension with Oregon Supreme Court decisions concerning trust rights to state waters. *Fort Vannoy*, 188 P.3d at 295 (Or. 2008).

"Water law is a creature of state law." Adell Louise Amos, *Developing the Law of the River: The Integration of Law and Policy into Hydrologic and Socio-Economic Modeling Efforts in the Willamette River Basin*, 62 U. Kan. L. Rev. 1091, 1101 (2014). That is because "[a]ll water within the state from all sources of water supply belongs to the public." *See* Or. Rev. Stat. § 537.110. In service of that principle, the Oregon Water Resources Department has extensive rules and procedures for allocating water resources through the permitting process. *See generally* Or. Admin. R. 690 (2021). Oregon's surface waters are extensively regulated pursuant to "both the public trust and the police power" of the State. William F. Cloran, *The Ownership of Water in Oregon: Public Property vs. Private Commodity*, 47 Willamette L.

Rev. 627, 648 (2011) (discussing state ownership of water). In Oregon, adjudication and management of water rights have long been subject to a robust and comprehensive system of rules and regulations. *See, e.g.*, *United States v. Oregon, Water Resources Dep't*, 44 F.3d 758, 766-67 (9th Cir. 1994). As the Ninth Circuit has observed, "Oregon's system" has long been "firmly established" and even "duplicated in Arizona, California, and Nevada." *Id.* at 767.

As is relevant here, Oregon law also governs rights to state water held in trust. This general principle was confirmed in a 2008 decision of the Oregon Supreme Court. In *Fort Vannoy*, 188 P.3d at 295, the Court considered whether the beneficiary of a water right held in trust by a third-party could manage that water right. The trustee with the legal title to the water right was an irrigation district. The beneficiaries with an equitable interest in the water right—the right to use the trust corpus, i.e., the water—were the district's members. *Id.*

Answering the question in the negative, the Court drew on Oregon trust law to define the nature and scope of the trust relationship. *Id.* at 295-96. The Court cited an early Oregon Supreme Court opinion, which established that "[a] trust implies two estates"—"one legal, and the other equitable." *Id.* at 295 (quoting *Allen v. Hendrick*, 206 P. 733, 740 (Or. 1922) (internal citation marks omitted)). As the *Allen* Court explained, the trust "also implies that legal title is held by one person, the trustee, while another person, the cestui que trust, has the beneficial interest." *Allen*, 206 P. at 740. The Court in *Fort Vannoy* concluded:

> The existence of the trust relationship bifurcates the ownership interest in each certificated water right. The [irrigation] district holds legal title to the water right as trustee, and the members hold equitable title as the beneficiaries. Acting in a fiduciary capacity, ***the district's duties as trustee include management of the water right and the water that it provides***, and the members enjoy the use of that water as their beneficial interest.

Fort Vannoy, 188 P.3d at 295 (emphasis added).

Importantly, the *Fort Vannoy* Court held that it would "run afoul of the trust relationship" under Oregon trust law to "permit[] a beneficiary to manage the trust property." *Fort Vannoy*, 188 P.3d at 296. Indeed, the notion that the trustee, as legal owner, manages and controls the trust corpus to the exclusion of the beneficiary is all but inherent in a trust relationship and represents the general national consensus. As the Restatement (3d) of Trusts states:

> In administering a trust, the trustee has, except as limited by statute or the terms of the trust, (a) all of the powers over trust property that a legally competent, unmarried individual has with respect to individually owned property, as well as (b) powers granted by statute or the terms of the trust and (c) powers specifically applicable to trust administration that are recognized in other Sections of this Restatement.

Restatement (Third) of Trusts, § 859(1); *see id.*, cmt. on subsection 1 ("[T]he powers allowed to trustees have gradually, rather steadily, expanded through judicial decisions and legislation and also through the drafting practices of experienced lawyer.").

The principle articulated in *Fort Vannoy* applies with equal force here: Acting through Respondents, the United States is the legal owner of a water right held in trust for the benefit of a tribal government, the Klamath Tribes. As legal owner, the United States is the sole manager of that water right under Oregon trust principles. Therefore, the tribal government may not independently make calls on its instream water right absent federal concurrence.

The D.C. Circuit rejected that argument, parting ways with Oregon Supreme Court decisions pertaining to Oregon water rights held in trust. App. A-21 ("[T]he Tribes were free to make calls in the exercise of their treaty rights."). But tellingly, it did not do so on the grounds that federal law requires that a tribal-government beneficiary be permitted to manage a water right legally owned by the United States. Rather, the lower court rejected the argument because it did not view *Fort Vannoy* as relevant to the trust relationship between the United States and the tribal government App. A-23—24 (discussing *Fort Vannoy*).

The D.C. Circuit's analysis misunderstood the role that State law plays in ascertaining the rights and obligations inherent in trusts—even a federally created trust where federal law is silent. As Cohen's Handbook of Federal Indian Law explains, in relevant part:

> Private trust law principles are most often invoked in controversies involving direct management of tribal resources and funds. In these situations, the government's role is most akin[2] to that of a private fiduciary, and the common law of trusts provides a rich source of norms governing the basic duties of a trustee. Trust law treatises, the Restatement of Trusts, and state and federal trust law opinions are invoked as guides to determine the scope of enforceable fiduciary duties.

1 Cohen's Handbook of Federal Indian Law § 5.05[2].

There may be instances when federal law speaks to the rights and obligations under a federally created trust. But even when "the general 'contours' of the [federal] government's obligations may be defined by statute," "the interstices must be filled in through reference to ***general trust law***"—as supplied by state law and state supreme courts interpreting that law. *Cobell v. Norton*, 240 F.3d 1081, 1101 (D.C. Cir. 2001) (emphasis added). In this case, that "general trust law" includes the Oregon Uniform Trust Code, as well as Oregon common law. Or. Rev. Stat. §§ 130.001 *et seq.*; *see also id.* § 130.025 ("The common law of trusts and principles of equity supplement this chapter, except to the extent modified by this chapter or other law.").

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[2] While there are similarities between a private trust relationship and the Indian trust relationship, the comparison is not exact, as explained in Part II.B, *infra*.

Again, the D.C. Circuit decision cites no federal law that directly answers the dispositive question whether the Klamath Tribes may independently manage a water right legally owned by the federal government. As noted above, the court seemed to cast aside *Fort Vannoy* and other Oregon precedents, instead speculating (again, based on no specific federal or state law on point) that the Klamath Tribes, as trust beneficiary, had somehow been conferred a power normally reserved to the United States as the legal owner of the trust corpus. The court did not adequately address whether Oregon trust law, as interpreted by the Oregon Supreme Court, supports a federal concurrence requirement in these circumstances. *Akhmetshin v. Browder*, 983 F.3d 542, 558, 561 (D.C. Cir. 2020) (Tatel, J., dissenting) ("The Supreme Court recently warned federal courts against '[s]peculat[ing]' about 'novel issues of state law peculiarly calling for the exercise of judgment by the state courts.'" (quoting *McKesson v. Doe*, 141 S. Ct. 48, 51 (2020)).

The tension that the D.C. Circuit's decision creates with Oregon Supreme Court cases erodes the predictability, certainty and basic fairness that all water uses expect in the management of the State's water rights. If the D.C. Circuit decision stands unreviewed, it will create a two-tier system for management of water rights in Oregon. On the one hand, some beneficiaries of a water right held in trust by a third party—including many individual tribal members—will continue to be subject to the rule announced in *Fort Vannoy*, which places control of the water right firmly in the hands of the third party. On the other hand, the Klamath Tribes, as the beneficiary

of a water right legally owned by the federal government, will be entitled to a special rule—created by the D.C. Circuit opinion—that allows it to independently manage the water right.

Significantly, Oregon is home to unadjudicated water rights in other basins claimed by tribal governments. The lower court's decision will also entitle those tribal governments, once their rights are adjudicated, to the same special rule allowing them to manage water rights owned by the federal government. Thus, Oregon water users now are faced with two decisions in fundamental conflict with each other—*Fort Vannoy* and the D.C. Circuit decision—with water users subject to the former at a significant disadvantage vis-à-vis those subject to the latter. Again, the two-tier system that the D.C. Circuit decision endorses is not based on Oregon law; in fact, it appears to be based on no discernible legal authority, state or federal. This Court's review is necessary to resolve this tension between a federal court of appeals decision and the jurisprudence of a State court.

II. The D.C. Circuit Court's Decision Conflicts with the Federal Policy of Ensuring the Indian Trust Relationship Serves, Not Just the Indian Tribes, But the General Public Interest

A. Drought Conditions and Federally Unhampered Water Calls in the Klamath Basin Have Taken a Heavy Toll on the General Public, Including Ranchers, Farmers, and Other Households

Considered "one of the most ecologically important watersheds in the United States," the Klamath Basin is and historically has been in severe drought. Oregon Wild, *A Vision for the Klamath Basin*, https://bit.ly/2ZMx7jq (last visited on Nov. 3, 2021). The basin contains most of Klamath County, which has "declared disaster for drought more than any other county in the state" and has therefore been "a major concern for residents of the county." Klamath County, Oregon, *Drought*, https://bit.ly/3BUcCyR (last visited Nov. 3, 2021). In the latest example of the area's perennial drought conditions, in March 2021, the Governor of Oregon determined there was a state of drought emergency in Klamath County, finding that:

> Extreme low water supply conditions have caused natural and economic disaster conditions in Klamath County, resulting in a severe, continuing drought emergency in that county during 2020. . . . These conditions have had significant economic impact on the agriculture and livestock industries in Klamath County.

Or. Exec. Order No. 20-02 (Mar. 2, 2020).[3]

The Governor's emergency declaration was followed by the United States Bureau of Reclamation's announcement in May 2021 that the Klamath Project—a water-management project developed by

[3] Available at https://bit.ly/3EEWV04 (last visited on Nov. 3, 2021).

the federal government to supply farmers with irrigation water in the Klamath Basin—would receive no water deliveries for the first time since the project's creation in 1907. United States Bureau of Reclamation, *Extreme Drought Conditions Force Closure of Klamath Project's "A" Canal*, https://on.doi.gov/3wdr0kd (May 12, 2021); *see also* Bradley W. Parks, *Bureau of Reclamation Shuts Down Primary Canal for Klamath Project Irrigators Amid Worsening Drought*, Oregon Public Broadcasting (May 12, 2021) (reporting that the "decision will leave Klamath Project irrigators with no water for the season as this year's historic drought deepens").[4]

Needless to say, the region's farmers and ranchers have been ravaged by this state of affairs. Mary Anne Cooper, *Assessing Western Drought Conditions—Natural Disasters Compound Severe Drought for Oregon Farmers and Ranchers*, Oregon Farm Bureau, https://bit.ly/3GZi9YH (Sept. 2, 2021). As *amicus curiae* Oregon Farm Bureau recently reported:

> [T]he Klamath Project delivers water to nearly a quarter of a million acres of productive farmland and two refuges that are critical stops for migratory birds on the Pacific Flyway. Years of unseasonably dry conditions paired with restrictions under the Endangered Species Act left hundreds of farmers

[4] Available at https://bit.ly/2ZMruBN (last visited on Nov. 3, 2021).

> without irrigation water. While some farmers in the basin were able to turn to groundwater to irrigate a portion of their property, many were left with nothing this season.

Id.

The impacts of drought in the Klamath Basin have reverberated throughout Oregon, one of the most agriculturally diverse States in the country. Oregon produces over 225 agricultural commodities, with farm-level agricultural receipts contributing "more than $5 billion to Oregon's economy with an estimated total added value of $28 billion when accounting for total supply chain benefits." *Id.* Oregon "ranks first in the nation for hazelnuts, Christmas trees and many grass and specialty seeds." *Id.* And, "[w]hile Oregon's top commodities are nursery stock ($1.7 billion), cattle and calves ($736 million), dairy ($547 million) and hay ($378 million), Oregon is best known for its specialty crops, like grass seed for golf courses and lawns, and cover crop seed, carrot seed, sugar beet seed and several other specialty seed crops." *Id.* "Oregon is also known for hazelnuts, fruit, berries and vegetables." And "[p]roving that happy cows don't always come from California, Oregon is home to the iconic Tillamook Creamery, a farmer-owned cooperative known worldwide for its cheese, ice cream and other dairy products." *Id.*

In sum, drought conditions have put the region's and State's farming and agricultural industry in peril.

Extreme drought conditions in the Klamath Basin have impacted, not just farmers and ranchers whose livelihoods depend on water, but non-agricultural homeowners, too. "Exceptional drought conditions" have so affected the Klamath Basin that many domestic wells "have received less recharge than normal resulting in an unprecedented number of domestic wells going dry or producing less water than is needed." Klamath County, Oregon, *Frequently Asked Questions: Free Water Storage Tanks, Water Filling Station and Water Delivery in Response to Dry Wells in Klamath County, Oregon*, https://bit.ly/3CIHOlP (Updated 7/27/21). The drought emergency has required, among other things, state and local agencies to mobilize to offer affected households free water-filling stations, free water storage tanks, and even direct water delivery, with severe restrictions on how such water can be used. *Id.* Drought conditions are unlike anything anyone in the basin has seen in many years.

With farmers, ranchers, and households all competing for limited water resources, social conflict has grown. With water cut-offs—from tribal calls and a cessation of water deliveries from the Klamath Project—desperate farmers and ranchers have had to pump water from underground to support their livelihoods, and help feed the region's and the State's residents. Those measures have has caused some to struggle. One resident reported: "I have no water . . . . I can't take a bath. I can't clean my house. I can't cook. And now my well is probably not going to work." April Ehrlich, *Homes Lose Running Water in Klamath Basin As Houses Compete with Farmers, Ranchers*,

Oregon Public Broadcasting, https://bit.ly/2ZPUSXI (April 24, 2016).

These conflicts come as no surprise. As one commentator aptly described it, the Klamath Basin is an area "where water is the limiting factor for so many species as well as for most human development," and "water conflicts are nothing new." Glen Spain, *Dams, Water Reforms, and Endangered Species in the Klamath Basin*, 22 J. Envtl. L. & Litig. 49, 53 (2007).

Then there are the flora and fauna in the Klamath Basin, which have also been hit hard by the region's recurring drought problems. The basin has refuges with, among other environmental features, wetlands that have lacked "a reliable water supply." Reed D. Benson, *Giving Suckers (and Salmon) an Even Break: Klamath Water and the Endangered Species Act*, 15 Tul. Envtl. L.J. 197, 205 (2002). The basin is also home to "many native fish and wildlife species" that "are in serious trouble" because of "too little water and" and "poor water quality." *Id.* at 200. Gone, too, is the rural way of life: "With little water filling the canals or crops in the ground also largely missing are the sounds of rural life, from tree frogs to red-winged black birds to the methodical hum of wheel line irrigation equipment." Barry Kaye, *How a Historic Drought Has Left Klamath Basin Farmers Caught in the Middle with No Water*, The Siskiyou Daily News, https://bit.ly/3k4RZtA (May 14, 2021).

B. The D.C. Circuit's Decision Authorizes the Federal Government to Ignore Its Role To Avoid Public Harms Resulting from Unfettered Water Calls Made by the Klamath Tribes

The D.C. Circuit's decision only exacerbates the above-described harms already suffered by tribal and nontribal farmers, ranchers, and households generally who depend on access to water to sustain their lives and livelihoods. The decision does so by holding that the federal government is powerless to exercise any management authority over Klamath Tribes' water calls. If the federal government exercised the authority its trust ownership implies, including in the context of the Indian trust relationship, the federal government would be forced to independently evaluate the Klamath Tribes' water calls against impacts to the public interest. The Indian trust relationship *requires* the federal government's independent evaluation of such a call's effect on farmers, ranchers and residents in the Klamath Basin.

In many of its decisions, this Court has affirmed the nature and scope of the Indian trust relationship as it pertains to trust assets, highlighting the dual purposes that inform that relationship as regulated by Congress.

"[T]he relationship between the United States and the Indian tribes is distinctive"— "different from that existing between individuals whether dealing at arm's length, *as trustees and beneficiaries*, or otherwise." *United States v. Jicarilla Apache Nation*,

564 U.S. 162 (2011) (internal citation and quotation marks omitted). Significantly, in the Indian trust relationship, "the organization and management of the trust is a ***sovereign function subject to the plenary authority of Congress***," as representative of the people. *Jicarilla*, 564 U.S. at 175 (emphasis added); see also *United States Term Limits v. Thornton*, 514 U.S. 779, 803 (1995) ("In that National Government, representatives owe primary allegiance . . . to the people of the Nation."); *United States v. Davis*, 139 S. Ct. 2319, 2323 (2019) (referring to "the people's elected representatives in Congress'). As a consequence, the federal government, as a sovereign, "has a real and direct interest"—independent of the tribe's—in the management of trust assets. *United States v. Minnesota*, 270 U.S. 181, 194 (1926). The "trust relationship" has been "designed . . . to serve the interests of the United States as well as to benefit the Indian Tribes." *Jicarilla*, 564 U.S. at 180. "The United States has a sovereign interest in the administration of Indian trusts distinct from the private interests of those who may benefit from its administration." *Id.* 181. This becomes especially important where there are conflicting interests:

> [W]hen multiple interests are involved in a trust relationship, the equivalence between the interests of the beneficiary and the trustee breaks down. That principle applies with particular force to the Government. Because of the multiple interests it must represent, the Government cannot follow the fastidious standards of a private fiduciary, who would breach his duties to his single

> beneficiary solely by representing potentially conflicting interests without the beneficiary's consent. . . ***[T]he Government may be obliged to balance competing interests when it administers a tribal trust.***

Id. at 182 (internal citations and quotation marks omitted) (emphasis added).

It stands to reason that, in resolving competing interests in the administration of trust assets like water rights, the federal government would adequately consider and safeguard the general public interest. *See United States v. Rickert*, 188 U.S. 432, 443 (1903) (trust relationship "authorizes the adoption on the part of the United States of such policy as their own public interests may dictate" (quoting *Choctaw Nation v. United States*, 119 U.S. 1, 28 (1886))).

Here, administration of Klamath Tribes' instream water rights requires a balancing of competing interests, including those of tribal and nontribal farmers, ranchers, and residents of the basin who require water. Acknowledgment of its role as the guardian of the general public interest would require the federal government to consider the effects of water calls on the general public interest. In deciding whether to concur in a call, the federal government would be forced to consider, not just the Klamath Tribes' private interests, but the public impacts of that call on the economic, social, and environmental well-being of other members of the public. That approach is consistent with the federal

mandate that the Indian trust relationship serves a dual purpose: promoting the tribe's interests *and* the federal government's independent obligation to safeguard the public interest.

With the D.C. Circuit's opinion, the Indian trust relationship serves *only* the interests of the tribal government. The federal government is rendered impotent over the call process, allowing the Klamath Tribes to make critical decisions without regard to the public interest, resulting in untold impacts on the lives and livelihoods of an entire region. Thus, in addition to the federal and state-court conflicts the D.C. Circuit decision creates, the decision also conflicts with the principles that undergird the Indian trust relationship, as interpreted by this Court.[5]

[5] It should also be noted that the Klamath Tribes receive the benefit of federal resources, attorneys, and the power of the federal government in developing their claims to instream water rights. It stands to reason that those same federal resources—through the voice of the federal government—should also be involved in the water rights' implementation, and that the federal government be precluded from waiving its duty to manage those water rights in service, not just of the tribal government, but of the general public interest as well.

CONCLUSION

For these reasons, and those stated in the petition, the petition should be granted.

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