Nos. 21-1484 and 22-51

In The Supreme Court of the United States

STATE OF ARIZONA, STATE OF NEVADA, STATE OF COLORADO, THE METROPOLITAN WATER DISTRICT OF SOUTHERN CALIFORNIA, et al.,

Petitioners,

v.

NAVAJO NATION, et al.,

Respondents.

DEPARTMENT OF THE INTERIOR, et al.,

Petitioners,

v.

NAVAJO NATION, et al.,

Respondents.

On Writ Of Certiorari To The United States Court Of Appeals For The Ninth Circuit

BRIEF FOR STATE PETITIONERS

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QUESTIONS PRESENTED

I. Whether the Ninth Circuit opinion allowing the Navajo Nation to proceed with a breach of trust claim premised on an unadjudicated right to water from the mainstream of the Lower Basin of the Colorado River ("Mainstream") infringes upon this Court's retained and exclusive jurisdiction over the adjudication of water from the Mainstream in *Arizona v. California*.

II. Whether the United States has a judicially enforceable fiduciary duty to assess, quantify, and protect from interference an unproven claim of the Navajo Nation to water from the Mainstream based on the common law "implied reserved rights doctrine" in *Winters v. United States*.

PARTIES TO PROCEEDING

The Petitioners in Case No. 21-1484 were Intervenor-Defendants and Appellees below, and are referred to collectively herein as State Petitioners with the exception of the State of Colorado who is filing a separate brief. State Petitioners are also Respondents in the consolidated Case No. 22-51.

Petitioners from Arizona are the State of Arizona, the Central Arizona Water Conservation District, the Salt River Valley Water Users' Association, and the Salt River Project Agricultural Improvement and Power District.

Petitioners from Nevada are the State of Nevada, the Colorado River Commission of Nevada, and Southern Nevada Water Authority.

Petitioners from California are The Metropolitan Water District of Southern California, Coachella Valley Water District, and Imperial Irrigation District.

The State of Colorado is also a Petitioner, but is filing a separate brief.

Respondent Navajo Nation ("Nation") was the Plaintiff and Appellant below.

Respondents also include the federal Defendant-Appellees below the U.S. Department of the Interior, Deb Haaland, Secretary of the Interior, the U.S. Bureau of Reclamation, and the U.S. Bureau of Indian Affairs. The federal parties are also Petitioners in the consolidated case No. 22-51.

PARTIES TO PROCEEDING – Continued

Arizona Power Authority, an Intervenor-Defendant and Appellee below, is also a Respondent.

CORPORATE DISCLOSURE STATEMENT

Pursuant to Rule 29.6, other than Salt River Valley Water Users' Association, State Petitioners are all governmental entities and thus have no corporate interests to disclose. No publicly held corporation owns 10% or more of the stock in the Salt River Valley Water Users' Association, and it has no parent corporation.

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JURISDICTION

The Ninth Circuit issued its initial decision on April 28, 2021. (ECF[2] 51) On June 3, 2021, the Ninth Circuit entered an order extending the time for any party to file a petition for rehearing to July 29, 2021. (ECF 56) Separate petitions for rehearing en banc were filed by the Federal Defendants and State Party Intervenors on July 29, 2021. (ECF 61,62) The Ninth

[1] Unless otherwise stated, references to the Appendix are to the Appendix in support of State Intervenors Petition for Writ of Certiorari, filed in this case on May 17, 2022. The parties also prepared a supplemental Joint Appendix in support of this brief and the Federal Defendants' opening brief in the consolidated case number 22-51, which shall be referred to herein as the Joint Appendix or JApp. in citations.

[2] Citations to ECF are to the documents in the Ninth Circuit's Electronic Court Files on this matter.

Circuit issued its amended decision and an order denying the petitions for rehearing en banc on February 17, 2022. (ECF 70) This Court has jurisdiction under 28 U.S.C. § 1254(1).

STATUTORY AND REGULATORY PROVISIONS INVOLVED

The relevant statutory and regulatory provisions are reprinted in the Appendix.

STATEMENT OF THE CASE

I. HISTORY OF *ARIZONA v. CALIFORNIA*

The 1922 Colorado River Compact divides the Colorado River Basin into the Upper Basin and the Lower Basin with the dividing line at Lee Ferry in the State of Arizona, and it apportions Colorado River system water between those two basins. (ER[3] 133-37.)[4] Arizona was the last of the seven Basin states to ratify the Compact and did so in 1944. *Arizona v. California*, 373 U.S. 546, 558 n.24 (1963). The waters of the Colorado River apportioned to the Upper Basin were further apportioned among the Upper Basin states by compact in

[3] All references to ER are to the Nation's Excerpts of Records in the Ninth Circuit (ECF 13-1 & 13-2). References to the SER are to Intervenor-Appellee's Supplemental Excerpts of Record (ECF 27).

[4] An additional 1.5 million acre feet was apportioned to Mexico in the 1944 Mexican Water Treaty. 59 Stat. 1219, 1237 (1944).

1948. Though the Boulder Canyon Project Act expressly authorized a Lower Basin compact with specific apportionments, 43 U.S.C. § 617c, the Lower Basin states never entered into a formal compact.

As the potential application of the doctrine of prior appropriation threatened the ability of Arizona to fully develop its share of the Lower Basin Apportionment, Arizona sought leave to file a bill of complaint within the Court's original jurisdiction against California and several California water contractors, including Coachella Valley Water District, Imperial Irrigation District, and the Metropolitan Water District of Southern California, to resolve major disputes over the states' respective Lower Basin apportionments. Between January 1953, when the Court granted leave to file and allowed the United States and Nevada to intervene, and October 2006, when the Court entered the Consolidated Decree, the Court comprehensively and finally adjudicated many issues regarding the rights and entitlements to waters of the Mainstream. *Arizona v. California*, 547 U.S. 150 (2006).

In 1963, the Court held:

> [T]hat Congress in passing the [Boulder Canyon Project] Act intended to and did create its own comprehensive scheme for the apportionment among California, Arizona, and Nevada of the Lower Basin's share of the mainstream waters of the Colorado River, leaving each State its tributaries. Congress decided that a fair division of the first 7,500,000 acre-feet of such mainstream waters would give 4,400,000

> acre-feet to California, 2,800,000 to Arizona and 300,000 to Nevada; Arizona and California would each get one-half of any surplus. Prior approval was therefore given in the Act for a tri-state compact to incorporate these terms. . . . Division of the water did not, however, depend on the States' agreeing to a compact, for Congress gave the Secretary of the Interior adequate authority to accomplish the division. Congress did this by giving the Secretary power to make contracts for the delivery of the water and by providing that no person could have water without a contract.

Arizona v. California, 373 U.S. 546, 564-65 (1963). These apportionments were confirmed in the Consolidated Decree. *Arizona v. California*, 547 U.S. 150, 155-56 (2006).

Arizona v. California was not confined to a determination of the three states' apportionments. The United States' Petition for Intervention in *Arizona v. California* asserted reserved water right claims for 25 Indian reservations in the Lower Basin, including the Navajo Reservation, but limited the Navajo Reservation claim to water from the Little Colorado River, and local washes, seeking no rights in the Mainstream. (Petition for Intervention, pp. 22-23, ¶¶ XXV through XXVII and Appendix IIA, pp. 56-57 (SER 42-45).)

At trial, the United States proceeded on the basis that all its rights in the Colorado River system in the Lower Basin, both Mainstream and tributaries, were to be adjudicated, including reserved water rights

claims for the Indian reservations.[5] For the Navajo Reservation, the United States made claims for ten proposed projects on the Reservation, with the water source being the tributary Little Colorado River system and local springs and washes. Importantly, the United States made no claim for water from the Mainstream of the Colorado River for the Navajo Reservation. (Record Transcript 12500-12502 (Aug. 13, 1957) (SER 35-37); U.S. Exhibit 349 (SER 46).) The Special Master's report and proposed decree recommended that apportionments in the Lower Basin attach only to water in Lake Mead or downstream, that the federal reserved rights were "present perfected rights" that were to be satisfied from those apportionments, and that there was no need to adjudicate any rights in the tributaries except for the Gila River. (Special Master's Report, pp. 305-24 (1961) (SER 47-63).)

After the Special Master filed his report, the Nation moved to intervene. The Court denied the motion. *Arizona v. California*, 368 U.S. 917 (1961). The Nation filed a motion for reconsideration of the denial of the motion to intervene and for an order requiring the

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[5] When the United States was presenting its evidence in support of reserved rights claims, a colloquy occurred between the Special Master and the United States trial counsel in which the Special Master stated he was treating the U.S. evidence as a "bill of particulars" that would define the U.S. claim (*See* DCECF Doc. 248-4, pp. 1-6), and this Court relied upon that colloquy and general principles of finality in holding that the U.S. could not seek additional rights in subsequent proceedings for irrigable lands omitted in the original trial. *Arizona v. California*, 460 U.S. 605, 615-26, 622 n.14 (1983).

United States to show cause why it should not be ordered to account to the Court as to the adequacy of its representation of the Navajo interests. The Court denied the motion. *Arizona v. California*, 368 U.S. 950 (1962).

The Court issued an opinion in 1963 ruling on the several exceptions of the parties to the Special Master's report, *Arizona v. California*, 373 U.S. 546 (1963). The Court sustained the United States' exception that the scope of the adjudication should extend upstream to Lee Ferry, the very reach where the Nation now seeks water. *Id.* at 590-91. The Court approved the Special Master's decision not to adjudicate claims to tributaries of the Colorado. *Id*. at 595. In 1964, the Court entered a Decree which in Article VI directed the States to submit lists of "present perfected rights" in waters of the Mainstream and directed the United States to submit a similar list with respect to Mainstream claims for federal reserved rights within each State. *Arizona v. California*, 376 U.S. 340, 351-52 (1964). Article VIII of the Decree provided that the Decree would not affect "[t]he rights or priorities, except as specific provision is made herein, of any Indian Reservation," *id.* at 352-53, and Article IX of the Decree provided that parties may apply to amend the Decree, and that the Court retained jurisdiction of the case for any modification or supplemental decree. *Id.* at 353.

Abiding by Article VI of the 1964 Decree, the United States submitted its list of present perfected rights in March 1967, which did not claim any Mainstream water rights for the Navajo Reservation. (List

of Present Perfected Rights Claimed by the United States, filed March 10, 1967 (SER 70-74).) After protracted negotiations among the State parties and the United States, the parties filed a joint motion asking the Court to enter a supplemental decree confirming the present perfected rights submitted by the parties. The Court granted the motion, and entered the 1979 Supplemental Decree, which did not decree any reserved water rights for the Navajo Reservation. *Arizona v. California*, 439 U.S. 419 (1979).

While the joint motion for a supplemental decree was under submission, the United States filed a motion to modify the decree to claim additional reserved water rights in the Mainstream for various Indian reservations. The Navajo Reservation was not one of these reservations. When the Court entered the 1979 supplemental decree, it referred the United States' motion for additional Indian reserved water rights to the Special Master, along with motions to intervene by three Indian Tribes seeking increased reserved water rights. *Id. at* 436-37.

The claims for additional Mainstream reserved rights fell into two categories: (1) water for so-called "omitted lands," which were irrigable lands within the 1964 recognized boundaries of reservations but which had not been asserted in previous proceedings, *see Arizona v. California*, 460 U.S. 605, 612-28 (1983) ("*Arizona II*"); and (2) water for "boundary lands," which were irrigable lands whose inclusion within reservation boundaries had been disputed or was uncertain in

the past, but whose status as part of the reservation had supposedly been resolved. *Id*.

After receiving the Special Master's Report, this Court ruled on the "omitted" and "boundary" lands claims in 1983 in *Arizona II*. The Court ruled that notwithstanding the retention of jurisdiction in Article IX to modify the decree, principles of *res judicata* and finality barred any further claims for additional Mainstream water for "omitted" Indian reservation lands. 460 U.S. at 612-28. The Court stressed the importance of having certainty of water rights in the Western United States and noted that an increase in reserved Indian water rights would necessarily diminish the water rights of other parties, *id.*, that advances in irrigation technology making it feasible to irrigate an area that previously was infeasible to irrigate was not a sufficient "change in circumstances" to justify modifying the decree, and that the Court would not revisit a water right determination to reconsider a factual determination that had been previously made. *Id.* The Court also held that even though the Tribes were not parties to the earlier proceedings, they had been represented by the United States and were bound by the previous water right determinations. *Id*.

Turning to the claims for the "boundary" lands, the Court held that where there had been a final judicial determination of reservation boundaries, claims for such lands were permissible. 460 U.S. at 612-28. But where the final boundary determinations had been by administrative action that had not yet been subject to judicial review, such claims would not be recognized.

"[W]e in no way intended that *ex parte* secretarial determinations of the boundary issues would constitute 'final determinations' that could adversely affect the States, their agencies, or private water users holding priority rights." *Id.* at 636. The Court then entered a supplemental decree to incorporate the water rights for certain boundary lands where the boundaries had been judicially determined. *Arizona v. California*, 466 U.S. 144 (1984).

The remaining *Arizona v. California* proceedings, which went on for another two decades, addressed disputed reservation boundary issues for the Colorado River, Fort Mohave, and Fort Yuma (Quechan) Indian Reservations, and the related water right claims left unresolved in *Arizona II*. *See Arizona v. California*, 530 U.S. 392 (2000). When those controversies were finally resolved, the Court entered the Consolidated Decree in 2006. *Arizona v. California*, 547 U.S. 150 (2006).

Two provisions of the Consolidated Decree are important to the resolution of this case.

Article II specifically enjoins the United States and its officers and agents "from releasing water controlled by the United States for irrigation and domestic use in the States of Arizona, California, and Nevada except as follows," with Art. II(B)(5) permitting deliveries "only pursuant to valid contracts" under Section 5 of the Boulder Canyon Project Act or other applicable federal statute and Art. II(D) allowing releases to federal establishments listed in the Consolidated Decree

only in accordance with allocations made therein. *Arizona v. California*, 547 U.S. 150, 156-57 (2006).[6]

Article IX provides: "Any of the parties may apply at the foot of this decree for its amendment or for further relief. The Court retains jurisdiction of this suit for the purpose of any order, direction, or modification of the decree, or any supplementary decree, that may at any time be deemed proper in relation to the subject matter in controversy." *Arizona v. California*, 547 U.S at 166-67. Thus, no lower court may exercise jurisdiction directly or indirectly to adjudicate a claim by the Nation for a Mainstream water right.

During six decades of litigation, the United States never claimed reserved water rights in the Mainstream for the Navajo Reservation, but it has represented the Nation in three other adjudications of water sources in Upper and Lower Basin States. These are: (1) the ongoing adjudication of the Little Colorado River in Arizona; (2) San Juan River Basin in New Mexico Navajo Nation Water Rights Settlement Agreement

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[6] As the Solicitor General has noted, the Navajo Reservation is not named in the Consolidated Decree and has no section 5 contract, so the Secretary would violate the Consolidated Decree if she obeyed a lower court order to deliver Mainstream water to the reservation. See Memo. for Federal Resp., filed July 15, 2022 in No. 21-1484, pp. 2-3. While Article VIII states that "This decree shall not affect: . . . (C) The rights or priorities, except as specific provision is made herein, of any Indian Reservation. . . ." (547 U.S. at 166), there is no disagreement among the Federal and State Party petitioners that specific injunctions in Article II control and preclude delivery of Mainstream water to the Navajo Reservation.

of 2010; and (3) the Navajo Utah Water Rights Settlement Act of 2020.[7]

II. PROCEDURAL HISTORY OF THE CASE

The Nation filed its first complaint against the U.S. Department of the Interior, the Secretary, the Bureau of Reclamation, and the Bureau of Indian Affairs (collectively, the "Federal Petitioners") in 2003. The State Parties intervened as defendants. (DCECF Doc. 133, 297)[8] The complaint alleged that the Federal Petitioners violated the National Environmental Policy Act (NEPA), 42 U.S.C. § 4321, *et seq.*, and breached their trust obligations to the Nation by managing the Colorado River in a manner that did not consider or meet the Nation's unquantified federal reserved water rights and unmet water needs. (App. 93, 170-72) The district court dismissed the Nation's NEPA claims based on a lack of Article III standing and dismissed its breach of trust claim based on the Government's sovereign immunity. (App. 176-83) The Ninth Circuit affirmed the dismissal of the NEPA claims for lack of standing but reversed the ruling that the breach of trust claim was barred by sovereign immunity and remanded the case to the district court. (App. 106-61)

On remand, the Nation filed a motion for leave to file a Third Amended Complaint (DCECF 335-36),

[7] *See infra* n.18.

[8] Citations to DCECF are to the documents in the district court's Electronic Court Files on this matter.

which the district court denied, ruling that the Nation could not pursue any claim requiring a determination of whether it had reserved water rights to the Mainstream because "it is clear from the latest decree in *Arizona v. California* that such determination is off-limits to any lower court." (DCECF 359, pp. 3-4.) The district court allowed the Nation "one last chance to file an amended complaint asserting a breach of trust claim consistent with this Order" i.e., a claim not dependent upon a determination of Mainstream water rights. (DCECF 359, p. 9.)

In response, the Nation again moved for leave to file a Third Amended Complaint attempting to allege a single breach of trust claim. The proposed amendment specifically excluded from its claim the Little Colorado River, which is the subject of a general stream adjudication in Arizona state court, and the mainstream of the Colorado River in the Upper Basin. (JApp. 85-139) Instead, the proposed amended complaint focused solely on the mainstream of the Colorado River in the Lower Basin as the subject of its breach of trust claim (JApp. 104-35) and prayed in substantially similar terms that the court order the Federal Defendants "to (1) determine the extent to which the Nation requires water from sources other than the Little Colorado River to enable its Reservation in Arizona to serve as a permanent homeland for the Navajo Nation and its members; (2) to develop a plan to secure the needed water; and (3) utilize their authorities, including those related to the management of the Colorado River, in a manner that does not interfere with

the plan to secure the water needed by the Navajo Nation." (JApp. 138-39)

The district court denied the Nation's motion for leave to amend and terminated the action holding that: (1) the court lacked jurisdiction to decide the breach of trust claim because jurisdiction over the adjudication of rights to the Mainstream is reserved to this Court in *Arizona v. California* (Consolidated Decree, Art. IX), 547 U.S. at 166-67; and (2) the Nation failed to identify a treaty, statute, or regulation that imposed an enforceable trust duty on the Federal Appellees. (App. 92) The Nation appealed.

The Ninth Circuit panel reversed, holding that the Nation's proposed Third Amended Complaint properly stated a breach of trust claim premised on: (1) the Nation's federal reserved *Winters* rights, which the Ninth Circuit found were supported by certain provisions of the Nation's treaties with the Government and were acknowledged by the Department of Interior in agency documents; and (2) the Secretary's "pervasive control" over the Mainstream. (App. 29-38)

The Ninth Circuit held that the common law "implied water rights" doctrine in *Winters v. United States* is "itself" sufficient to give rise to an enforceable duty of trust to protect the Nation's water rights. (App. 31, 35) The Ninth Circuit additionally cited the 1868 Navajo Treaty, which established a reservation for the Navajo straddling the boundary between the New Mexico and Arizona Territories. (App. 31-32 (Art. II, 15 Stat. at 668).) The Treaty gave individual Indians the

right to "tract[s] of land," "seeds, and agricultural implements" for farming. *Id.*; 1868 Treaty arts. V, VII, 15 Stat. 668-69. The Treaty did not mention water at all and was silent as to any duty of the United States to protect any of resources that the Ninth Circuit implied from the Treaty for benefit of the Navajo Indians. Even though the lands described in the Treaty are nowhere near the Mainstream, the Ninth Circuit inferred a *Winters* right from the Treaty, then presumed a concomitant trust duty by the United States to protect the right, including any right to water from the Mainstream. (App. 31-32)

The court also inferred an affirmative duty to the Nation based on more general laws governing the Secretary's management of the Mainstream, including the Consolidated Decree, interstate compacts, multiple Congressional enactments and federal regulations. (App. 33-34) None of these authorities, which collectively comprise the "Law of the River," prescribes any duty of the government to act on behalf of the Navajo Indians in managing the Mainstream. Having reached the conclusion that a duty of trust may be inferred from these sources, the Ninth Circuit panel vacated the decision of the district court dismissing the Nation's proposed Third Amended Complaint.

While the panel acknowledged that this Court retained original jurisdiction over water rights claims to the Mainstream, it concluded that the "Nation's complaint does not seek judicial quantification of rights to the River, so we need not decide whether the Supreme Court's retained jurisdiction is exclusive." (App. 6)

The Court granted the States Petitioners' and the Federal Petitioners' petitions for writs of certiorari and consolidated the cases. (598 U.S. ___ (Nov. 4, 2022).)

SUMMARY OF THE ARGUMENT

In 1953, this Court obtained jurisdiction to apportion the waters of the Colorado River in the Lower Basin, including the adjudication of claims of federal reserved water rights, and expressly retained that jurisdiction in the Consolidated Decree entered in 2006. *Arizona v. California*, 547 U.S. 150, 166-67 (2006). The district court accordingly ruled:

> [The allegations of the proposed Third Amended Complaint] run headlong into the Supreme Court's reservation of jurisdiction in *Arizona v. California*. In order to determine that the United States breached its trust duties by taking the actions complained of, the Court would have to determine that the Nation in fact has rights to the water in the mainstream of the Lower Colorado River. To the extent the Nation wishes to use the government's regulation of the Colorado River as a basis for its breach of trust claim, it asks this Court to assume facts that are beyond its jurisdiction.

(App. 83-84) The district court's conclusion was correct.

Allowing a breach of trust claim founded upon an alleged Mainstream reserved right would intrude upon this Court's exclusive and retained jurisdiction.

Further, under the doctrine of prior exclusive jurisdiction, the first court to obtain jurisdiction over a *res*, retains exclusive jurisdiction. The doctrine is especially applicable in the context of stream adjudications, where it is essential that one court adjudicate and enforce the resulting judgment that divides the limited supply furnished by a river among competing rights holders. This Court has also held that the Secretary of the Interior may not determine foundational matters in the case *ex parte*. *Arizona II*, 460 U.S. 605, 636. (1983). As this Court alone can determine whether the Nation has a reserved right to Mainstream water, and if so, the extent of any such right, the district court correctly dismissed the Nation's claim in this suit, and the Ninth Circuit erred in allowing the Nation's claim to proceed.

The Ninth Circuit erred in concluding that the Nation could state a claim for breach of fiduciary duty. Contrary to the court's decision, the common law *Winters* doctrine cannot serve as the basis of an enforceable federal fiduciary duty to protect an unproven claim of the Nation to Mainstream water. The right in *Winters* was created by judicial implication. But duties of trust cannot be implied by reference to the common law. Rather, Congress, and not the courts, wields the power to impose a duty of trust upon the United States to manage and protect tribal assets. This Court's breach of trust decisions recognize this principle, requiring that a claim for breach of trust must be based on a substantive source of law—a statute or regulation—that establishes the specific duty owed.

Here, the Ninth Circuit diverged from the controlling law and found a duty of trust based on the common law *Winters* doctrine, taken together with an 1868 Treaty and what the court characterized as the government's "pervasive control" over Mainstream operations under the "Law of the River." But none of these authorities supplies the "specific rights-creating or duty-imposing statutory or regulatory prescriptions" required by this Court's decisions. *See United States v. Navajo Nation* (*Navajo I*), 537 U.S. 488, 506 (2003). None of them "unambiguously provide[s] that the United States has undertaken full fiduciary responsibilities." *United States v. Mitchell* (*Mitchell I*), 445 U.S. 535, 542 (1980). The *Winters* doctrine, founded in the common law, is disqualified as a source of the duty from the very outset. The 1868 Treaty is silent as to water and silent as to any duty of the United States to manage the resources that are the subject of the Treaty for the benefit of the Nation. In any event, the lands described in the Treaty are far from the Mainstream and, therefore, cannot form the basis for a *Winters* right to the Mainstream; in fact, much of the area described in the Treaty is located in the Upper Colorado River Basin.

Finally, the government exercises control over the Mainstream pursuant to a network of more general laws, including the Consolidated Decree, interstate compacts, multiple statutes and regulations. These authorities, collectively comprising the "Law of the River," make no mention of the Nation or the Navajo Reservation. While providing the framework for the Secretary's operation of the Mainstream, none of these

authorities prescribes any duty to the Secretary to assess tribal claims, quantify them and adjust Mainstream operations accordingly. In fact, no such "duty" could originate from these laws, as this Court, and not the Secretary, exercises exclusive jurisdiction over the adjudication of the extent and priority of claims to the Mainstream.

The Nation's claim for breach of trust falls short because there is no substantive source of law imposing upon the government the claimed duty owed. The district court properly denied the Nation leave to file its proposed Third Amended Complaint.

ARGUMENT

I. THIS COURT HAS EXCLUSIVE JURISDICTION TO DETERMINE WHETHER THE NATION HAS A WATER RIGHT IN THE MAINSTREAM.

The district court dismissed the Nation's breach of trust claim on several grounds, including the keystone jurisdictional ground: "[T]o the extent that the Nation would have this Court determine that the United States has violated its trust responsibility by failing to appropriate sufficient appurtenant water from the mainstream of the lower Colorado River, that determination cannot be made by this Court in light of the Supreme Court's reservation of the question." (App. 82) The district court correctly noted that the allegations "run headlong into the Supreme Court's reservation of

jurisdiction in *Arizona v. California*. In order to determine that the United States breached its trust duties [. . .], the Court would have to determine that the Nation in fact has rights to the water in the mainstream of the Lower Colorado River. To the extent that the Nation wishes to use the government's regulation of the Colorado River as a basis for its breach of trust claim, it asks this Court to assume facts that are beyond its jurisdiction." (App. 83-84)

The Ninth Circuit reversed and remanded, reasoning that the Nation was not seeking a "quantification" of its alleged Mainstream water rights. (App. 19-22; concurring opinion, App. 39-41) Assuming *arguendo* that the Nation does not seek a "quantification," the district court nevertheless lacks jurisdiction because the scope of this Court's retained jurisdiction in *Arizona v. California* is broader than a mere quantification; it extends to the fundamental question of whether the Nation has any reserved right to the Mainstream at all. That question can only be adjudicated and determined by this Court, which first obtained jurisdiction over the Mainstream and retains continuing jurisdiction over it.[9] The district court correctly ruled it lacked jurisdiction to make that determination.

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[9] Moreover, if the United States or the Nation moved to reopen the Consolidated Decree in *Arizona v. California* to seek a Mainstream right for the reservation, all other parties to the Consolidated Decree would be entitled to notice and an opportunity to be heard, and difficult issues could arise concerning whether the principles of finality akin to *res judicata* apply to the Consolidated Decree. Those are issues for another day.

A. The Consolidated Decree Retains Jurisdiction in this Court.

Article IX of the Consolidated Decree provides for this Court's broad retention of jurisdiction:

> Any of the parties may apply at the foot of this decree for its amendment or for further relief. The Court *retains jurisdiction* of this suit for the purpose of any order, direction, or *modification of the decree*, or any *supplementary decree*, that may at any time be deemed proper *in relation to the subject matter* in controversy.

Arizona v. California, 547 U.S. 150, 166-67 (2006) (emphasis added).[10] The retention of jurisdiction is broadly stated, referring to "any order," "direction" or "modification of the decree," as well as "supplemental decree[s]." *Id.* Rather than being limited to modification of just the terms of the Decree, the retention extends, without limitation as to time, to the broader "subject matter in controversy." *Id.* at 167. At the same time, in *Arizona II*, this Court made clear that Article IX is governed by general principles of finality and repose, 460 U.S. at 619; it does not "permit retrial of factual or legal issues that were fully and fairly litigated" in the

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[10] The initial 1964 Decree contained the same "reservation of jurisdiction" provision. *See Arizona v. California, supra*, 376 U.S. at 353. Other supplemental decrees contained reservations that were worded slightly differently. *See Arizona v. California, supra* 439 U.S. at 421 (stating that Article IX is not affected by the list of present perfected rights); *Arizona v. California, supra* 466 U.S. at 146 (retaining jurisdiction to order further proceedings and enter supplemental decrees as appropriate); *Arizona v. California*, 531 U.S. 1, 3-4 (2000) (same).

proceeding. *Id.* at 621. Instead, the retention of jurisdiction is intended to accommodate "changed circumstances," *id.* at 619, 624, or "unforeseen issues not previously litigated." *Id.* at 619.

Arizona v. California is a case within the Court's original and exclusive jurisdiction. 28 U.S.C. § 1251(a); U.S. Const. art. III, § 2, cl. 2; *California v. Arizona*, 440 U.S. 59, 61 (1979). Thus, a lower federal court is *a fortiori* without jurisdiction over matters reserved to the Court. The issue of whether the Nation should be able to proceed with a claimed right to the Mainstream is one that can only be decided by this Court.

B. The Doctrine of Prior Exclusive Jurisdiction Precludes the District Court from Exercising Jurisdiction.

Retention of jurisdiction provisions are generally construed to preserve exclusive jurisdiction in the court that issued the judgment or decree or approved the settlement agreement over which jurisdiction was retained. *See United States v. Alpine Land & Reservoir Co.*, 174 F.3d 1007, 1012-13 (9th Cir. 1999) ("Not only is the district court's jurisdiction continuing, it is exclusive."); *Flanigan v. Arnaiz*, 143 F.3d 540, 545 (9th Cir. 1998) ("The reason why exclusivity is inferred is that it would make no sense for the district court to retain jurisdiction to interpret and apply its own judgment to the future conduct contemplated by the judgment, yet have a state court construing what the federal court meant in the judgment."). This has been

described as a "mandatory jurisdictional limitation." *State Eng'r v. S. Fork Band of the Te-Moak Tribe of W. Shoshone Indians*, 339 F.3d 804, 810 (9th Cir. 2003), citing *Palmer v. Texas*, 212 U.S. 118, 125 (1909); *Kline v. Burke Const. Co.*, 260 U.S. 226, 229-30 (1922).

For one court to adjudicate issues within the retained jurisdiction of another court, let alone the highest court in the land, is not permissible. *See Lapin v. Shulton, Inc.*, 333 F.2d 169 (9th Cir. 1964), *cert. denied*, 379 U.S. 904 (1964). As noted by the Ninth Circuit in *Lapin*:

> [F]or a non-issuing court to entertain an action for such relief would be seriously to interfere with, and substantially to usurp, the inherent power of the issuing court . . . to supervise its continuing decree by determining from time to time whether and how the decree should be supplemented, modified or discontinued in order properly to adapt it to new or changing circumstances.

Id. at 172 (citations omitted); *see also Treadaway v. Acad. of Motion Picture Arts & Sciences*, 783 F.2d 1418, 1421-22 (9th Cir. 1986); *Mann Mfg., Inc. v. Hortex, Inc.*, 439 F.2d 403, 407-08 (5th Cir. 1971).

Water adjudications are in the nature of an *in rem* proceeding involving a *res. United States v. Alpine Land & Reservoir Co.*, *supra* 174 F.3d at 1014. In a water rights case, where an entitlement by one diminishes the amount remaining for others, it is particularly important to avoid multiple adjudications

by different courts. *See United States v. New Mexico*, 438 U.S. 696, 705 (1978) (observing an adjudication of a federal reserved water right results in a "gallon-for-gallon" reduction in water available to others in a basin). Having different courts dividing (or re-dividing) a limited resource invites chaos, as neither users nor system operators will have the certainty that a water adjudication is supposed to provide to attract the investments needed to reclaim desert lands for irrigation and to develop and maintain an urban civilization.

C. The Ninth Circuit Opinion undermines the security and reliability of the established Mainstream water rights.

This Court has consistently recognized the importance of having certainty of water rights in the Western United States. In *Arizona II*, the Court noted that "development of [the Western United States] would not have been possible without adequate water supplies in an otherwise water-scarce part of the country." 460 U.S. 605, 620, citing *Colorado River Water Conservation District v. United States*, 424 U.S. 800, 804 (1976). This Court also noted that a "major purpose of this litigation [referring to *Arizona v. California*], from its inception to the present day, has been to provide the necessary assurance to States of the Southwest and to various private interests, of the amount of water they can anticipate [receiving] from the Colorado River system." *Id.*

If the Secretary were enjoined to operate the Mainstream in a manner that redirects water away from vested right-holders based solely upon the Nation's unquantified and unadjudicated rights, the goals of finality and clarity articulated in *Arizona v. California* would be undermined. Specifically, this result would upset the priorities and amount of water available to those in Arizona with existing rights awarded them by the Consolidated Decree.

In *Arizona II*, this Court recognized that an increase in reserved Indian water rights would necessarily diminish the water rights of other parties, and it accordingly held that the Court would not revisit a water right determination. 460 U.S. at 621-26. To emphasize the permanence of its apportionments, the Court also held that even though the Tribes whose reservations were at issue in the *Arizona II* proceedings were not parties to the earlier proceedings in the case, they had been represented by the United States and were bound by the previous water right determinations. *Id.* at 626-28. Neither the lower federal courts nor the Secretary has jurisdiction to adjudicate rights to the Mainstream. Article II of the Consolidated Decree expressly enjoins the "United States, its officers, attorneys, agents and employees" from operating the Mainstream regulatory structures or releasing water not in accordance with the allocations set forth in the Decree, 547 U.S. at 154-59, and the Solicitor General has acknowledged this. See Memo. for Federal Resp., filed July 15, 2022 in No. 21-1484, pp. 2-3.

D. The Ninth Circuit Opinion imposes upon the Secretary of Interior the duty to make an *ex parte* allocation of Mainstream water to the Nation, thereby circumventing the exclusive and retained jurisdiction of this Court.

The Ninth Circuit concluded that the injunctive relief sought by the Nation would not require a "judicial" quantification of the Mainstream. But the court's ruling effectively achieved that result by requiring *the Secretary* to first determine the amount of Mainstream water the Nation is entitled to receive, then to manage the system based upon the Secretary's sole determination. (App. 20) This is because the Nation seeks an injunction "requiring the Federal Appellees. . . . (1) to determine the extent to which the Navajo Nation requires water . . . (2) to develop a plan to secure the water needed; (3) to exercise their authorities, including those for the management of the Colorado River, in a manner that does not interfere with the plan to secure the water needed . . . and (4) to require the Federal Appellees to analyze their actions . . . and adopt appropriate mitigation measures to offset any adverse effects from those actions." (App. 20-21, 40, 98-100, citing ER 26-81)

If upheld, the Ninth Circuit Opinion will result in an *ex parte* determination of reserved water rights, an action clearly prohibited by this Court in *Arizona II*, 460 U.S. at 636-38 ("[W]e in no way intended that *ex parte* secretarial determinations . . . would constitute 'final determinations' that could adversely affect the

States, their agencies, or private water users holding priority water rights.") Any action taken by the Secretary to deliver Mainstream water must be pursuant to express authority granted by the Consolidated Decree or congressional act.

II. THE COMMON LAW "*WINTERS* DOCTRINE" CANNOT CREATE A FIDUCIARY DUTY OF THE UNITED STATES TO PROTECT AND PRESERVE THE NATION'S UNPROVEN CLAIM TO THE MAINSTREAM.

At issue in this case is whether the judicially created "implied water rights" doctrine in *Winters*, coupled with the Navajo Treaty of 1868, impose any concrete, substantive fiduciary obligations upon the United States to the Nation to secure, manage, and protect water from the Mainstream for the Reservation.

Congress, not the judiciary, has the authority to impose a duty of trust upon the United States with respect to the assets of an Indian tribe. *See United States v. Jicarilla Apache Nation*, 564 U.S. 162, 173-74 (2011) (trust relationship between the United States and Indian tribes "is defined and governed by statutes rather than the common law"). Recognizing this, in prior decisions, this Court has declined to impose a duty of trust based on common law principles, deferring instead to Congress to set the parameters of any such duty through plainly worded legislation. *Id.* at 175 (noting "the organization and management of the trust

is a sovereign function subject to the plenary authority of Congress"); *see also Lone Wolf v. Hitchcock*, 187 U.S. 553, 565 (1903) ("Plenary authority over the tribal relations of the Indians has been exercised by Congress from the beginning, and the power has always been deemed a political one, not subject to be controlled by the judicial department of the government."); *Cherokee Nation v. Hitchcock*, 187 U.S. 294, 308 (1902) ("The power existing in Congress to administer upon and guard the tribal property, and the power being political and administrative in its nature, the manner of its exercise is a question within the province of the legislative branch to determine, and is not one for the courts.").

In a series of decisions, this Court has consistently held that an Indian tribe's claim for breach of trust arises only if two conditions are met.

First, the claim "must identify a substantive source of law that establishes specific fiduciary or other duties, and allege that the Government has failed faithfully to perform those duties." *Navajo I*, 537 U.S. at 506; *see also United States v. Mitchell* (*Mitchell II*), 463 U.S. 206, 216-17, 219 (1983). In the context of damages claims brought under the waiver of sovereign immunity in the Indian Tucker Act, 28 U.S.C. § 1505, this Court's decisions have required that the fiduciary duty originate from "specific rights-creating or duty-imposing statutory or regulatory prescriptions." *Navajo I*, 537 U.S. at 506; *see also Mitchell II*, 463 U.S. at 225. More recently, in *Jicarilla*, the United States sought injunctive relief in the context of a suit by the tribe for

breach of trust. In addressing whether any enforceable duty was owed, this Court imposed a more exacting standard, holding that the "Government assumes Indian trust responsibilities only to the extent it expressly accepts those responsibilities by statute." *Jicarilla*, 564 U.S. at 177. Irrespective of the remedy sought, this Court has refused to consider common law and common law doctrines when determining, as an initial matter, *whether* an enforceable duty of trust exists. *Id.*; *United States v. Navajo Nation* (*Navajo II*), 556 U.S. 287, 301 (2009)*; United States v. White Mountain Apache Tribe*, 537 U.S. 465, 473 (2003).

If, and only if, the first condition is met,[11] the claim for breach of trust must then establish that the trust-creating statute or regulation may "fairly be interpreted" as mandating a remedy for the government's failure to perform the duty. *Mitchell II*, 463 U.S. at 217-18 (whether a right exists and whether that right fairly mandates monetary compensation under the Indian Tucker Act are "analytically distinct" issues); *Navajo I*, 537 U.S. at 506 (in damages suit under Indian Tucker Act, second prong of breach of trust analysis required court to determine whether "substantive source of law" can "fairly be interpreted as mandating compensation" for damages). At this point, and not before, common law trust principles may be brought to bear in determining whether the government obligation entitles a

[11] *See Navajo II*, 556 U.S. at 302 ("Because the Tribe cannot identify a specific, applicable, trust-creating statute or regulation that the Government violated, we do not reach the question whether the trust duty was money mandating.").

tribe to the requested relief. *Navajo II*, 556 U.S. at 301 ("*If* a plaintiff identifies such a prescription, and *if* that prescription bears the hallmarks of a 'conventional fiduciary relationship' . . . *then* trust principles (including any such principles premised on 'control') could play a role in 'inferring that the trust obligation [is] enforceable by damages[.]' ") (emphasis in original) (internal citations omitted); *see also White Mountain*, 537 U.S. at 473.

In the context of tribal claims brought pursuant to the United States' waiver of sovereign immunity in the Administrative Procedure Act ("APA"), 5 U.S.C. § 702, as is the case here, federal courts have interpreted the second prong as requiring a showing that the underlying statute may be fairly interpreted as mandating injunctive relief. *El Paso Natural Gas Co. v. United States*, 750 F.3d 863, 895 (D.C. Cir. 2014); *Cobell v. Norton*, 240 F.3d 1081, 1101 (D.C. Cir. 2001). Unless a "fair inference" can be made that the substantive statute or regulation creating the duty also mandates the relief sought, no cognizable claim for breach of trust exists. *El Paso*, 750 3d at 894 (quoting *White Mountain*, 537 U.S. at 474).

In allowing the Nation to proceed with its breach of trust claim, the Ninth Circuit committed three critical errors.

A. The judicially created *Winters* doctrine cannot give rise to a federal fiduciary obligation to assess, quantify and protect the Nation's unproven claim to Mainstream water.

The Ninth Circuit incorrectly found that a duty of trust arises merely from the Nation's claim of a right to Mainstream water under the implied reservation of water doctrine in *Winters v. United States*, 207 U.S. 564 (1908). (App. 31) This Court in *Winters* judicially "implied" the existence of a water right under a treaty between the United States and an Indian tribe based upon the reservation's need for water. *Winters*, 207 U.S. at 576-77. The treaty itself contained no express reservation of water, nor did it impose upon the United States ongoing duties to manage or control the tribe's water resources. While the Court in *Winters* found that the United States had impliedly reserved the water for the tribe's use, it was based upon the federal government's prior construction and diversion of water from the Milk River for the benefit of the tribe. The decision did not, and could not, create via common law an enforceable fiduciary duty of the government to protect the resource.[12]

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[12] No court mandated the filing of a claim by the United States on behalf of the tribe in *Winters*. Rather, the Attorney General, exercising prosecutorial discretion, elected to assert a claim to protect the rights of the Fort Belknap tribe. Here, in contrast, the Ninth Circuit would compel the Secretary to take actions leading to the assertion of a reserved rights claim for the Nation. But the decision to assert a reserved rights claim is presumptively

Ignoring this Court's admonishment that common law and common law doctrines alone do not give rise to federal fiduciary responsibilities, the Ninth Circuit wrongly held that the Nation's claimed right to Mainstream water under *Winters* satisfied the first prong of the test. (App. 31) Without substantive discussion, the Ninth Circuit ignored the *Mitchell* and *Navajo* decisions (involving monetary claims under the Indian Tucker Act), as well as the *Jicarilla* decision (involving a claim for injunctive relief),[13] all of which refused to consider the common law in determining whether a fiduciary duty is owed. The court found these decisions "not apposite" on the basis that the claims involved money, while the Nation's claim under the APA seeks injunctive relief. *Id.* at 25. But this is a distinction without a difference. Like the Indian Tucker Act, the APA does not supply the substantive law entitling a claimant to relief, but merely provides a waiver of federal sovereign immunity from suit. *Hill v. United*

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within the discretion of the Attorney General. *See Shoshone Bannock Tribes v. Reno*, 56 F.3d 1476, 1481 and n.3 (D.C. Cir. 1995).

[13] The Ninth Circuit's cavalier dismissal of this Court's decision in *Jicarilla* misapprehends the nature of the claim at issue there, as well as the Court's holding. While the underlying action in *Jicarilla* was for breach of trust, the issue before the Court was a request for injunctive relief by the United States, after the tribe sought "to obtain otherwise privileged information from the Government against its wishes." 564 U.S. at 178. The tribe argued that the United States had a fiduciary duty to provide the information. In rejecting the tribe's claim, this Court emphasized that "the Government assumes Indian trust responsibilities only to the extent it expressly accepts those responsibilities by statute." Id. at 177. Consequently, "the Tribe must point to a right conferred by statute or regulation." Id. at 178.

States, 571 F.2d 1098, 1102 n.7 (9th Cir. 1978). And similar to this Court's reasoning in *Jicarilla*, circuit courts entertaining breach of trust claims for injunctive relief have required that the tribe identify a statute, regulation, or treaty as the source of the *trust duty*. *See, e.g.*, *El Paso Natural Gas Co.*, 750 F.3d at 895 (holding that the Court's Indian Tucker Act decisions are controlling in breach of trust suits brought pursuant to the APA, "even though the claim is for equitable relief (not money damages) and even though sovereign immunity is waived under § 702 of the APA (and not the Indian Tucker Act")); *United States v. Flute*, 808 F.3d 1234, 1247 (10th Cir. 2015) (Indian Tucker Act cases applied in suit for trust accounting). The Ninth Circuit erred in declining to apply the proscription set out in these cases, which admits of no exception: The common law and common law doctrines cannot supply the "substantive" source of law creating an enforceable duty of trust.

Emphasizing that a portion of the Navajo Reservation was established by the 1868 Treaty with the Government, which made available land, seed and farm implements to any tribal member who elected "to commence farming,"[14] the Ninth Circuit inferred a *Winters* right from the Treaty, then presumed a concomitant trust duty by the United States to protect the

[14] Treaty Between the United States of America and the Navajo Tribe of Indians (1868 Treaty), June 1, 1868, 15 Stat. 667, Arts. V, VII. A tract of land would be reserved to a tribal member only as long as the member "continue[d] to cultivate" the land. *Id.*, Art. V. (App. 31-33)

right. (App. 31-33) But the portion of the reservation established by the 1868 Treaty is not appurtenant to the Mainstream; indeed, the majority of the 1868 Treaty reservation is located in the Upper Colorado River basin, not the Lower Colorado River basin.[15] The Treaty expressly provided that the Navajo Indians would have no land rights other than those specifically reserved in the Treaty. 1868 Treaty, art. 9 (App. 201) ("[T]he tribes who are parties to this agreement . . . will relinquish all right to occupy any territory outside their reservation, as herein defined[.]"); *id*., art. 13 (App. 204) (stating the tribes "agree to make the reservation herein described their permanent home, and they will not as a tribe make any permanent settlement elsewhere").[16] More fundamentally, the 1868 Treaty was entirely silent on any duty of the United

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[15] See Map of Nation's Reservation, attached as Appendix 1 to the State Petitioners' Reply to the Federal Memorandum and Nation's Opposition, filed in case no. 21-1484, on October 7, 2022 ("Map").

[16] An 1849 Treaty, cited by the Ninth Circuit as an additional source of the federal obligation, placed the Navajo Indians under the protection of the Government but did not reserve land or water to the Navajo Indians. Treaty Between the United States of America and the Navajo Tribe of Indians art. 1, Sept. 9, 1849, 9 Stat. 974 (1849) (App. 187-92). In *Uintah Ute Indians of Utah v. United States*, the United States Court of Claims rejected a tribe's breach of trust claim founded in a treaty that "contain[ed] no obligations with respect to property" and "reserve[d] for a future date the final delineation of boundaries." 28 Fed. Cl. 768, 788-89 (1993). Like the treaty at issue in *Uintah*, the 1849 Treaty conferred no rights to trust property, let alone an affirmative duty of the government to manage trust property. As a consequence, the treaty cannot support the Nation's breach of trust claim.

States to secure, manage and protect water supplies within the Treaty reservation for the benefit of the Navajo Indians.[17]

At most, the 1868 Treaty might be construed as establishing a "limited" or "bare" trust relationship, without any of the "hallmarks of a more conventional fiduciary relationship." *White Mountain*, 537 U.S. at 472-73; (quoting *Mitchell I*, 445 U.S. at 542; *Mitchell II*, 463 U.S. at 224); *see also Jicarilla*, 564 U.S. at 174. But a "general trust relationship between the United States and the Indian people[,]" does not, by itself, create an enforceable fiduciary duty. *Mitchell II*, 463 U.S. at 224; *see also Mitchell I*, 445 U.S. at 542.

In *Mitchell I*, this Court declined to find that the General Allotment Act created a fiduciary duty of the United States to manage timber for the benefit of allottees. 445 U.S. at 542. Through the Act, Congress

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[17] Over 65 years later, Congress, in the 1934 Boundary Act, added lands to the Nation's reservation in Arizona, including a small area near but not adjacent to the Mainstream, upstream of the Little Colorado River. § 1, 48 Stat. 960; *see also* Map. The 1934 Boundary Act did not incorporate or otherwise mention any provisions of the 1868 Treaty. Consequently, the Act could not have modified or expanded any rights stemming from the 1868 Treaty to the newly added reservation lands. *See Menominee Tribe of Indians v. United States*, 391 U.S. 404, 413 (1968) ("the intention to abrogate or modify a treaty is not to be lightly imputed to the Congress" (citation omitted)); *Choctaw Nation of Indians v. United States*, 318 U.S. 423, 432 (1943) ("Indian treaties cannot be rewritten or expanded beyond their clear terms to remedy a claimed injustice or to achieve the asserted understanding of the parties."). The Ninth Circuit made no mention of the 1934 Boundary Act in considering the Nation's breach of trust claim.

allotted lands to individual Indians for farming purposes. *Id.* While providing that the United States would hold the lands in trust for allottees for the duration of the trust period, the Act did not "unambiguously provide that the United States ha[d] undertaken full fiduciary responsibilities as to the management of allotted lands." *Id.* This Court found that the "limited" trust relationship between the United States and allottees intended by the Act "does not impose any duty upon the Government to manage timber resources." *Id.*

Like the statute in *Mitchell I*, the 1868 Treaty cannot form the basis for the Nation's breach of trust claim against the United States. Indeed, there is sparse indication of an intent to create even the "limited trust relationship" that existed in *Mitchell I*, let alone a fiduciary responsibility to "protect" the Nation's unproven claim to Mainstream water. Far from unambiguously imposing a duty on the government to manage water rights, the 1868 Treaty makes no mention of water at all. Further, the Treaty's plain language limited the rights of the Indians to the lands specifically described in the Treaty, which are distant from the Mainstream.

No reasoned construction of the 1868 Treaty admits of an inference that it was intended to grant the Nation rights to water from the Mainstream under *Winters*. Regardless, *Winters*, as a common law doctrine, cannot suffice as a "substantive source of law" imposing a fiduciary duty on the United States to assess, quantify and protect the Nation's unproven claim to Mainstream water. *Navajo I*, 537 U.S. at 506;

Jicarilla, 564 U.S. at 177. The Ninth Circuit's decision, which wrongly relied upon common law principles in allowing the Nation's breach of trust claim to proceed, should be reversed.[18]

B. The "Law of the River" imposes no affirmative fiduciary obligation on the Secretary of the Interior to manage the Mainstream for the benefit of the Nation's claimed *Winters* right.

The Ninth Circuit additionally erred by holding that the Secretary of the Interior's "pervasive control" over operation of the Mainstream, which invokes the interests of decreed right holders and contractors in three states (including other Indian tribes), created an

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[18] To the extent that any duty exists to prosecute the Nation's claims to water for its reservation, the Government has diligently pursued such actions for six decades. The United States has represented the Nation in three adjudications of water sources in Upper and Lower Colorado river basins, two of which have led to Congressionally funded settlements: (1) the on-going adjudication of the Little Colorado River in Arizona; (2) the Northwestern New Mexico Rural Water Projects Act, which settled the Nation's claims to the San Juan River Basin; and (3) the Navajo Utah Water Rights Settlement Act of 2020. Information on these adjudications and relevant settlement agreements may be found at the following cites respectively: (1) a discussion of the pending Little Colorado River adjudication may be found at http://www.superiorcourt.maricopa.gov/SuperiorCourt/GeneralStreamAdjudication/littleColorado.asp; (2) the Omnibus Public Land Management Act of 2009, Pub. L. No. 111-11, tit. X, subtit. B, 123 Stat. 911, 1367; and (3) the Navajo Utah Water Rights Settlement Act of 2020, Pub. L. No. 116-260, div. FF, tit. XI, § 1102, 134 Stat. 1181, 3224-34.

affirmative duty of the United States to protect the Nation's claimed *Winters* right. The United States' ongoing management or control over a resource, by itself, is insufficient to create an enforceable fiduciary duty. *Navajo II*, 556 U.S. at 301. Rather, a cognizable breach of trust claim must "identify a specific, applicable, trust-creating statute or regulation that the Government violated" with respect to the Indian asset in issue. *Id.* at 302.

This Court's decision in *Mitchell II* is instructive regarding the role of "federal control" in determining whether a duty of trust is owed. *Mitchell II* involved a tribal claim that the government mismanaged timber resources belonging to the tribe and thereby breached its fiduciary obligation to the tribe. 463 U.S. at 210. This Court found an enforceable duty of trust where the network of governing statutes and regulations accorded the Secretary of the Interior a "pervasive role in the sales of timber *from Indian lands*[.]" *Id.* at 219 (emphasis added). Emphasizing the exclusivity of the Secretary's statutory responsibilities, this Court held that a fiduciary relationship "necessarily arises when the Government assumes . . . elaborate control over forests and property *belonging to Indians*." *Id*. at 225 (emphasis added).

In this case, by statute, interstate compact and decree, the Secretary of the Interior's "control" over the Colorado River in the Lower Basin is exercised in furtherance of numerous interests. *See, e.g.*, 1922 Colorado River Compact art. II, reprinted in 70 Cong. Rec. 324 (Dec. 10, 1928); Boulder Canyon Project Act

(BCPA), 43 U.S.C. § 617, *et seq.*; Decree in *Arizona v. California*, 376 U.S. 340 (1964); Colorado River Basin Project Act, 43 U.S.C. § 1521, *et seq.* Unlike the laws in *Mitchell II*, none of the authorities collectively comprising the "Law of the River" imposes a specific, affirmative duty upon the federal government to assess, quantify or protect a claimed, unproven right *of the Nation* to the Mainstream. Indeed, none of these authorities mentions the Nation or its reservation at all.

The Secretary's control over Mainstream operations is, by necessity, exercised consistent with her wide-ranging responsibilities to various stakeholders under the Law of the River. This situation is not unusual; the federal government often finds itself in the position of having to balance multiple responsibilities in carrying out statutory mandates. *See Nevada v. United States*, 463 U.S. 110, 128 (1983) ("The Government does not 'compromise' its obligation to one interest that Congress obliges it to represent by the mere fact that it simultaneously performs another task for another interest that Congress has obligated it by statute to do."). Under these circumstances, it is not reasonable to infer that the government owes a higher fiduciary duty to a single party, which would potentially conflict with its duties to numerous others. Rather, the government may balance its competing roles through compliance with more general duties to the public. *El Paso Natural Gas Co.*, 750 F.3d at 898 (holding that statute intended to protect public health in general did not create trust duty to Indian tribe); *Morongo Band of Mission Indians v. Federal Aviation*

Admin., 161 F.3d 569, 574 (9th Cir. 1998) ("Thus, although the United States does owe a general trust responsibility to Indian tribes, unless there is a specific duty that has been placed on the government with respect to Indians, this responsibility is discharged by the agency's compliance with general regulations and statutes not specifically aimed at protecting Indian tribes.").

As this Court admonished in *Navajo II*, "control alone" is insufficient to establish the government's liability for breach of fiduciary duty. 556 U.S. at 301. Congress, rather than the courts, has the power to create any duty of trust owed by the United States to an Indian tribe. Here, the Ninth Circuit attempted to infer an enforceable duty to the Nation based on more general laws related to the management of the Mainstream. But these laws do not contain "specific rights-creating or duty-imposing statutory or regulatory prescriptions" requiring the government to assess, quantify and protect the Nation's unproven claim to Mainstream water. *Navajo I*, 537 U.S. at 506.

As the Law of the River is entirely silent as to the contours of any fiduciary duty owed to the Nation, the government's "control" of the river, in a more general sense, does not give rise to an enforceable trust duty. *See id.* at 302 (holding when "the Tribe cannot identify a specific, applicable, trust-creating statute or regulation that the Government violated," neither "Government[] 'control' over" a resource "nor common-law trust principles matter").

C. The injunctive relief sought by the Nation cannot address the harm alleged, as the Nation's only avenue available to attain a reserved right to Colorado River water is the reopening of the Decree, which is subject to the exclusive jurisdiction of this Court.

Finally, the Ninth Circuit entirely failed to address the second condition for establishing a breach of trust claim—whether the substantive source of law creating the trust duty may fairly be interpreted as providing a right to the relief sought. As this Court recognized in *Mitchell II*, this second condition is distinct and must be considered separately from the first. 463 U.S. at 218; *see also White Mountain*, 537 U.S. at 472-73.

The Ninth Circuit incorrectly assumed, without separate analysis, that the existence of a duty of trust establishes the availability of the remedy sought by the Nation in this case—to "assess and address" the Nation's claimed right to Mainstream water. This assumption short circuits the second prong of the breach of trust analysis and is contrary to the clear pronouncements of this Court.

Here, the Ninth Circuit held that the *Winters* doctrine, coupled with the 1868 Treaty "in itself gives the Tribe the right to proceed on a breach of trust claim. . . ." (App. 35) The court found that the Nation's claimed *Winters* right to water in the Mainstream imposed a duty on the Government to protect that claimed right, and, further, that the "Supreme Court

could not have intended" for this duty to be unenforceable. *Id.* at 37. At the outset, this conclusion incorrectly assumes that the Supreme Court in *Winters*, in the absence of any affirmative action by Congress, could *create* a trust duty by implication. But even assuming that such a duty exists, it does not follow that a failure to protect *Winters* rights entitles the Nation to the injunctive relief it seeks.

The Nation's Modified Third Amended Complaint requests not only that the government take up its claim to Mainstream water, but also quantify its rights and, ultimately, "protect" those rights even though they are unadjudicated. (JApp. 91-100, 138-39) The nature of the relief sought by the Nation poses obvious problems. Because there is no direction from Congress, there is no means by which a court could decide that the Government had met (or failed to meet) its duty to the Nation.

Equally compelling, an injunction would not provide the Nation with the relief it ultimately seeks—an enforceable entitlement to water from the Mainstream and additional water for its Reservation. As State Petitioners have argued here, any such entitlement must be established by the Decree, which is under the retained and exclusive jurisdiction of this Court. The means of "protecting" the Nation's claimed entitlement is not an injunction against the federal defendants, but an adjudicated federal reserved right to water from the Lower Basin of the Colorado River, which would

require reopening the Decree.[19] Because the remedy sought by the Nation would not address the harm alleged, the second condition to a cause of action for breach of trust is not met.

[19] Article II(B) of the Consolidated Decree, *Arizona v. California*, 547 U.S. 150, 154-59 (2006), enjoins the United States from releasing water it controls for irrigation and domestic use in the Lower Basin states except as provided in the Decree. The plain language of this provision precludes the relief sought by the Nation in its Third Amended Complaint. As the Nation lacks an adjudicated right to water under the Decree, the Secretary may neither "quantify" nor "protect" the Nation's claimed right to the Mainstream. The Nation's request for relief must be directed to this Court, as only this Court has the power to adjudicate Mainstream water rights claims. If such a right is ultimately decreed, the United States has acknowledged that the Secretary will operate the Mainstream in accordance with any decreed right. *See Navajo Nation v. Dep't of Interior*, 876 F.3d 1144, 1159 (9th Cir. 2017).

CONCLUSION

For all the foregoing reasons, the Court should hold that the district court lacked jurisdiction to hear the Nation's claim and that the Nation could not state a valid claim for breach of trust. The Ninth Circuit decision should be reversed.

Respectfully submitted,

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