Nos. 21-1484 and 22-51

In the Supreme Court of the United States

STATE OF ARIZONA, ET AL., PETITIONERS

v.

NAVAJO NATION, ET AL.

DEPARTMENT OF THE INTERIOR, ET AL., PETITIONERS

v.

NAVAJO NATION, ET AL.

ON WRITS OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

BRIEF FOR THE FEDERAL PARTIES

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QUESTIONS PRESENTED

1. Whether the federal government owes the Navajo Nation an affirmative, judicially enforceable fiduciary duty to assess and address the Navajo Nation's need for water from particular sources, in the absence of any substantive source of law that expressly establishes such a duty.

2. Whether granting relief on the Navajo Nation's breach-of-trust claim would conflict with this Court's retained jurisdiction in *Arizona* v. *California*, 373 U.S. 546 (1963), or otherwise violate the Court's decree in that case.

PARTIES TO THE PROCEEDING

The United States Department of the Interior; Deb Haaland, Secretary of the Interior; the United States Bureau of Reclamation; and the Bureau of Indian Affairs (defendants-appellees below) are respondents in No. 21-1484 and petitioners in No. 22-51.

The State of Arizona, the Central Arizona Water Conservation District, the Salt River Project Agricultural Improvement and Power District, the Salt River Valley Water Users' Association, the Imperial Irrigation District, the Metropolitan Water District of Southern California, the Coachella Valley Water District, the State of Nevada, the Colorado River Commission of Nevada, the Southern Nevada Water Authority, and the State of Colorado (intervenor-defendants-appellees below) are petitioners in No. 21-1484 and respondents in No. 22-51.

The Arizona Power Authority (intervenor-defendant-appellee below) is a respondent in Nos. 21-1484 and 22-51.

The Navajo Nation (plaintiff-appellant below) is a respondent in Nos. 21-1484 and 22-51.

TABLE OF CONTENTS

Page

Table of Contents—Continued: Page

TABLE OF AUTHORITIES

Cases:

Cases—Continued: Page

Constitution, treaties, and statutes — Page

Statutes—Continued: Page

Miscellaneous:

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OPINIONS BELOW

The amended opinion of the court of appeals (Pet. App. 1-41[1]) is reported at 26 F.4th 794. A prior opinion of the court of appeals (Pet. App. 106-161) is reported at 876 F.3d 1144. The order of the district court granting the government's motion to dismiss (Pet. App. 162-185) is reported at 34 F. Supp. 3d 1019. The order of the district court denying the Navajo Nation's motion for

[1] All references to "Pet. App." are to the appendix to the petition for a writ of certiorari in No. 21-1484.

leave to file a third amended complaint (Pet. App. 93-105) is not published in the Federal Supplement but is available at 2018 WL 6506957. The order of the district court denying the Navajo Nation's renewed motion for leave to file a third amended complaint (Pet. App. 75-92) is not published in the Federal Supplement but is available at 2019 WL 3997370.

JURISDICTION

The judgment of the court of appeals was entered on February 17, 2022, and petitions for rehearing were denied on the same date (Pet. App. 4). The petitions for writs of certiorari were filed on May 17, 2022 (No. 21-1484) and July 15, 2022 (No. 22-51). The petitions for writs of certiorari were granted on November 4, 2022. The jurisdiction of this Court rests on 28 U.S.C. 1254(1).

TREATY AND STATUTORY PROVISIONS INVOLVED

Pertinent treaty and statutory provisions are reproduced in an appendix to this brief. App., *infra*, 1a-24a.

STATEMENT

A. Factual And Legal Background

1. The Colorado River "rises in the mountains of Colorado and flows generally in a southwesterly direction for about 1,300 miles through Colorado, Utah, and Arizona and along the Arizona-Nevada and Arizona-California boundaries, after which it passes into Mexico and empties into the Mexican waters of the Gulf of California." *Arizona* v. *California*, 373 U.S. 546, 552 (1963). "On its way to the sea it receives tributary waters from Wyoming, Colorado, Utah, Nevada, New Mexico, and Arizona." *Ibid.* Those tributaries include the San Juan River, which originates in southwestern Colorado and flows through northern New Mexico and southeastern

Utah; and the Little Colorado River, which flows through eastern Arizona. See App., *infra*, 25a (map).

The Navajo Nation is a federally recognized Indian tribe. Pet. App. 6. In 1849, the Navajo Nation entered into a treaty with the United States, acknowledging that it would "forever remain" under the United States' "exclusive jurisdiction and protection." Treaty Between the United States of America and the Navajo Tribe of Indians (1849 Treaty), art. I, Sept. 9, 1849, 9 Stat. 974. The Navajo Nation also agreed that the United States would "designate, settle, and adjust" the Navajo Nation's "territorial boundaries" at a future date. *Id.* art. IX, 9 Stat. 975.

In 1868, the Navajo Nation and the United States entered into a second treaty, establishing a reservation "for the use and occupation" of the Navajo Nation. Treaty Between the United States of America and the Navajo Tribe of Indians (1868 Treaty) art. II, June 1, 1868, 15 Stat. 668. The Reservation—which the Navajo Nation agreed to make its "permanent home," *id.* art. XIII, 15 Stat. 671—was located in the eastern part of what is now Arizona and the western part of what is now New Mexico. See App., *infra*, 25a (map). Subsequent Acts of Congress and Executive Orders expanded the Reservation in various directions, including westward to the mainstream of the Colorado River. See Pet. App. 7; Act of June 14, 1934, ch. 521, § 1, 48 Stat. 960 (defining the "exterior boundaries of the Navajo Indian Reservation"); App., *infra*, 25a (map).

2. In 1921, Congress authorized the seven States in the Colorado River Basin—Wyoming, Colorado, Utah, Nevada, New Mexico, Arizona, and California—to negotiate and enter into a compact providing for an equitable apportionment of the waters of the Colorado River

and its tributaries. Act of Aug. 19, 1921, ch. 72, § 1, 42 Stat. 172. The resulting Colorado River Compact "divide[d] the entire basin into two parts, the Upper Basin and the Lower Basin, separated at a point on the [mainstream of the Colorado River] in northern Arizona known as Lee Ferry." *Arizona* v. *California*, 373 U.S. at 557; see *id.* at 602 (map); 70 Cong. Rec. 324-325 (1928) (reproducing the Compact's text). The Compact apportioned to each basin in perpetuity 7,500,000 acre-feet of water per year from the "Colorado River System." *Arizona* v. *California*, 373 U.S. at 557; see *id.* at 557 n.22 ("An acre-foot of water is enough to cover an acre of land with one foot of water.").

In 1928, Congress enacted the Boulder Canyon Project Act (Project Act), ch. 42, 45 Stat. 1057. Section 1 of the Project Act authorized the construction of a dam "in the main stream of the Colorado River at Black Canyon or Boulder Canyon," today known as Hoover Dam, to create Lake Mead, a reservoir downstream from Lee Ferry and the Navajo Reservation. 43 U.S.C. 617. "The location of Hoover Dam [was] a result of engineering decisions." *Arizona* v. *California*, 373 U.S. at 590 n.95. "There [was] no place to impound the flood waters except at the lower end of the canyon." *Ibid.* (citation omitted).

Section 4 of the Project Act authorized Arizona, California, and Nevada to adopt a tri-state compact allocating among them the water from the Colorado River in the Lower Basin (Lower Colorado River). *Arizona* v. *California*, 373 U.S. at 568, 579; see 43 U.S.C. 617c(a). "Division of the water did not, however, depend on the States' agreeing to a compact," for Section 5 of the Project Act authorized the Secretary of the Interior (Secretary) "to accomplish the division" by "mak[ing] con-

tracts for the delivery of water" stored in Lake Mead. *Arizona* v. *California*, 373 U.S. at 565; see 43 U.S.C. 617d. Thus, "if the States did not agree on any compact," "the Secretary would then proceed, by making contracts, to apportion water among the States and to allocate the water among users within each State." *Arizona* v. *California*, 373 U.S. at 579.

3. In 1952, after a tri-state compact failed to materialize and the Secretary made various contracts with water users in the Lower Basin States, Arizona brought an original action in this Court against California to obtain a declaration of its water rights in the Lower Basin. *Arizona* v. *California*, 373 U.S. at 551, 562. Nevada and other States later intervened or were joined. *Id.* at 550-551 & n.3. The United States also intervened, claiming reserved water rights under the doctrine of *Winters* v. *United States*, 207 U.S. 564 (1908), which holds that the establishment of an Indian reservation or other federal reservation, "by implication, reserves appurtenant water then unappropriated to the extent needed to accomplish the purpose of the reservation." *Cappaert* v. *United States*, 426 U.S. 128, 138 (1976); see *Arizona* v. *California*, 373 U.S. at 551, 595-596, 599-600.

The United States claimed *Winters* rights on behalf of 25 Indian reservations in the Lower Basin, including the Navajo Reservation. U.S. Proposed Findings of Fact and Conclusions of Law at 51-125, *Arizona* v. *California*, *supra* (U.S. Proposed Findings). On behalf of five of the reservations—namely, the Chemehuevi, Cocopah, Yuma, Colorado River, and Fort Mohave Reservations—the United States claimed *Winters* rights in the Lower Colorado River mainstream. *Arizona* v. *California*, 373 U.S. at 595 & n.97. Each of those five reservations is located on the Lower Colorado

River mainstream south of Lake Mead, along a stretch where the mainstream forms the border between Arizona and California. See U.S. Proposed Findings 64-84.

On behalf of the remaining reservations—including the Navajo Reservation—the United States claimed *Winters* rights in the tributaries, rather than the mainstream, of the Lower Colorado River. U.S. Proposed Findings 52-64, 84-125. As relevant here, the United States identified "within that portion of the Navajo Indian Reservation situated in the Lower Colorado River Basin 8,490 acres" that were suitable for "irrigation from existing irrigation systems or extensions thereof or additional systems." *Id.* at 58. Those 8490 acres were located within 18 "areas of water use," four of which were "within, or partly within, the original Treaty reservation." U.S. Resp. to Navajo Mot. to Intervene at 17, *Arizona* v. *California*, *supra* (U.S. Resp.). And "all" 8490 acres were "within the drainage area of the Little Colorado River." U.S. Proposed Findings 58. Accordingly, the United States claimed "the right to divert water from sources within th[at] drainage area" for irrigation of the Navajo Reservation. *Id.* at 61.

After proceedings before a Special Master, this Court held that "Congress in the Project Act intended to apportion only the mainstream" of the Lower Colorado River, *Arizona* v. *California*, 373 U.S. at 591—*i.e.*, "the water to be delivered by the upper States at Lee Ferry," *id.* at 570—thereby "leaving to each State its own tributaries" in the Lower Basin, *id.* at 591. For that reason, the Court determined only the allocation of that mainstream water that passed Lee Ferry among California, Arizona, and Nevada, *id.* at 564-594, and the *Winters* rights of the five Indian reservations (and certain other federal reservations) in the mainstream within

each State's allocation, *id.* at 595-601. The Court also approved the Special Master's decision to decline to adjudicate the United States' *Winters* claims relating to the tributaries. *Id.* at 595.

The Court entered a decree in accordance with its opinion. *Arizona* v. *California*, 376 U.S. 340 (1964); see *Arizona* v. *California*, 547 U.S. 150, 166 (2006) (current consolidated decree). In addition to allocating the mainstream waters among the Lower Basin States, 547 U.S. at 155 (art. II(b)), the decree enjoins the federal government from releasing mainstream water below Lee Ferry except as permitted under the decree, see *id.* at 153-154 (arts. I(E), II). One provision of the decree permits the government to release water pursuant to "valid contracts" under Section 5 of the Project Act or any other applicable federal statute, *id.* at 156 (art. II(B)(5)), while another provision permits the government to release water to specified "federal establishment[s]," including the five Indian reservations along the mainstream south of Lake Mead, *id.* at 157 (art. II(D)).

The decree states that it "shall not affect * * * [t]he rights or priorities, except as specific provision is made herein, of any Indian Reservation * * * or other lands of the United States." *Arizona* v. *California*, 547 U.S. at 166 (art. VIII(C)). The decree further states:

> 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.

Id. at 166-167 (art. IX).

4. Today, with the addition of lands set aside by statute and Executive Order, the Navajo Reservation spans over 17 million acres within the Upper and Lower Basins of the Colorado River in Utah, Arizona, and New Mexico. J.A. 90. The mainstream of the Colorado River flows along the Reservation's northwestern border within the Upper and Lower Basins. See App., *infra*, 25a (map). The San Juan River primarily flows along the Reservation's northern border within the Upper Basin and empties into the mainstream of the Colorado River in Utah. See *ibid.* A stretch of the Little Colorado River flows through the Reservation near its southwestern border within the Lower Basin before emptying into the mainstream of the Lower Colorado River on the western edge of the Reservation. See *ibid.* Although the United States in *Arizona* v. *California* did not assert rights on behalf of the Navajo Nation (or numerous other tribes) in the Lower Colorado River mainstream, see p. 6, *supra*, the United States has asserted rights on behalf of the Navajo Nation in the tributaries within both the Lower and the Upper Basins.

a. Within the Lower Basin, the Navajo Nation's rights to divert water from the Little Colorado River drainage area—which this Court in *Arizona* v. *California* did not resolve—are the subject of an ongoing general stream adjudication in Arizona state court. See Pet. App. 119 n.14; *In re General Adjudication of All Rights to Use Water in Little Colorado River Sys. & Source*, No. 6417 (Ariz. Super. Ct.).[2] The United States

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[2] The McCarran Amendment, 43 U.S.C. 666, enacted in 1952, waived the United States' sovereign immunity and allowed joinder of the United States and resolution of federal water rights (including those of Indian tribes) in any state or federal suit for the comprehensive adjudication of all water rights in a given basin. See,

has claimed *Winters* rights on behalf of the Navajo Nation in that adjudication. See, *e.g.*, U.S. Second Am. Statement of Claimant on Behalf of the Navajo Nation and Identified Allotments at 5-6, *In re General Adjudication*, *supra* (No. 6417) (July 30, 2019).

b. Within the Upper Basin, the Navajo Nation's rights to divert water from the San Juan River in New Mexico (including rights for the federally funded Navajo Indian Irrigation Project) have been resolved as part of a general stream adjudication in New Mexico state court. *State Engineer* v. *United States*, 425 P.3d 723, 727-728 (N.M. Ct. App. 2018). In that adjudication, the United States claimed *Winters* rights on behalf of the Navajo Nation. See *id.* at 728. The United States, the Navajo Nation, and New Mexico subsequently negotiated a settlement agreement that was approved by Congress and upheld in state court. See *id.* at 728, 738; Northwestern New Mexico Rural Water Projects Act, Pub. L. No. 111-11, Tit. X, Subtit. B, § 10701(a)(1), 123 Stat. 1396. In the same Act that approved the settlement, Congress also authorized over $900 million for the Navajo Gallup Water Supply Project and other water projects for the Navajo Reservation. § 10609, 123 Stat. 1395-1396.

Also within the Upper Basin, the Navajo Nation's rights to divert water from the San Juan River in Utah are part of an ongoing general stream adjudication in Utah state court. See *In re General Determination of Rights to the Use of Water, Both Surface and Underground, Within the Drainage Area of the Colorado River*

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e.g., *Arizona* v. *San Carlos Apache Tribe*, 463 U.S. 545, 550-551 (1983); *Colorado River Water Conservation Dist.* v. *United States*, 424 U.S. 800, 808-809 (1976); *Dugan* v. *Rank*, 372 U.S. 609, 618 (1963).

in San Juan, Grand, and Uinta Counties, Utah and Exclusive of the Green River Drainage, No. 810704477 (Utah D. Ct.). The United States, the Navajo Nation, and Utah have agreed to settle the Navajo Nation's *Winters* rights in Utah. In 2020, Congress approved the settlement and authorized $210 million for Navajo water development projects in Utah. Consolidated Appropriations Act, 2021, Pub. L. No. 116-260, Div. FF, Tit. XI, § 1102(c) and (f), 134 Stat. 3226, 3230. The availability of the funds is contingent on entry of a final decree by the state court. § 1102(e)(5) and (g), 134 Stat. 3228-3229, 3231.

5. In addition to the *Winters* rights the United States asserted on behalf of the Navajo Reservation in Colorado River tributaries and the funding Congress appropriated to develop those rights in the San Juan Basin, Congress has made provision for a possible allocation of additional water to the Navajo Nation, from the Lower Colorado River mainstream, by contract. In 1968, Congress authorized the Central Arizona Project, 43 U.S.C. 1521(a), which diverts mainstream water at Lake Havasu, downstream from Lake Mead, to municipalities, irrigation districts, and Indian tribes in central Arizona, south of the Navajo Reservation. See D. Ct. Doc. 240-17, at ES-4 (Sept. 9, 2013) (map). In the Arizona Water Settlements Act of 2004, Pub. L. No. 108-451, 118 Stat. 3478, Congress authorized use of Central Arizona Project water to help settle disputes over Indian water rights. Tit. I, § 104(a)(1), 118 Stat. 3487. Although the Central Arizona Project's distribution works are hundreds of miles downstream from, and currently incapable of delivering water to, the Navajo Reservation, the Act directs the Secretary to "retain 6,411 acre-feet of water for use for a future water rights settlement agreement

approved by an Act of Congress that settles the Navajo Nation's claims to water in Arizona." § 104(a)(1)(B)(ii), 118 Stat. 3487. If, however, Congress does not approve such a settlement "before December 31, 2030," the 6411 acre-feet will become available for other purposes. *Id.* at 3488.

B. Procedural History

1. In 2003, the Navajo Nation sued the federal parties in the United States District Court in Arizona, alleging that the federal government, while administering projects on the Lower Colorado River, had failed to consider or protect water rights the Navajo Nation asserted that it had in the Lower Colorado River mainstream, in violation of the National Environmental Policy Act of 1969 (NEPA), 42 U.S.C. 4321 *et seq.*, and alleged trust obligations owed by the United States. Pet. App. 126-127. Arizona, Nevada, Colorado, and various water districts and a water user association within the Lower Basin intervened as defendants. *Id.* at 127. The district court "stayed proceedings to allow for settlement negotiations." *Ibid.*

In 2013, after the district court lifted the stay, the Navajo Nation twice amended its complaint. Pet. App. 127. Its second amended complaint continued to assert violations of NEPA and alleged trust obligations. D. Ct. Doc. 281, at 26-33 (Nov. 14, 2013). With respect to the latter, the complaint alleged that the federal government had "failed to determine the extent and quantity of the water rights of the Navajo Nation to the waters of the Colorado River, or otherwise determine the amount of water which the Navajo Nation requires from the Lower Basin of the Colorado River to meet the needs of the Navajo Nation and its members, thereby

breaching the United States' fiduciary obligation to the Navajo Nation." *Id.* at 33.

The district court granted the federal parties' motion to dismiss, concluding that the Navajo Nation lacked Article III standing to bring its NEPA claims and that its breach-of-trust claim did not fall within any waiver of sovereign immunity. Pet. App. 162-185. The court of appeals affirmed in part and reversed in part. *Id.* at 106-161. The court agreed that the Navajo Nation lacked Article III standing to bring its NEPA claims, finding any effect that the Secretary's management of projects on the mainstream might have on the Navajo Nation's asserted water rights or needs to be too speculative. *Id.* at 128-144. But the court held that the waiver of sovereign immunity in Section 702 of the Administrative Procedure Act (APA), 5 U.S.C. 702, applied to the Navajo Nation's breach-of-trust claim. Pet. App. 145-157. The court of appeals therefore remanded the case for the district court "to consider fully the [Navajo] Nation's breach of trust claim in the first instance, after entertaining any request to amend the claim more fully to flesh it out." *Id.* at 157.

2. On remand, the Navajo Nation moved for leave to file a third amended complaint, alleging a breach of trust as well as violations of two treaties and an Executive Order. J.A. 78-82. The Navajo Nation asserted that the government had breached a fiduciary obligation to the Navajo Nation by failing to "secur[e] an adequate water supply from the Lower Basin of the Colorado River to meet" the Navajo Nation's water needs in Arizona. J.A. 29; see J.A. 34-36. With respect to all of its claims, the Navajo Nation sought an injunction compelling the government to "determine the extent to which the [Navajo] Nation requires water from the main-

stream of the Colorado River in the Lower Basin," to "develop a plan to secure the water needed," and to "manage the Colorado River in a manner that does not interfere with [such] plan." J.A. 83.

The district court denied leave to amend. Pet. App. 93-105. The court held that the relief requested would require a determination that the Navajo Nation has water rights in the mainstream of the Colorado River, *id.* at 100, and it viewed such a determination as falling within the jurisdiction retained by this Court in *Arizona* v. *California*, *id.* at 97. The district court therefore concluded that it lacked jurisdiction to entertain the proposed claims. *Id.* at 95.

3. The Navajo Nation thereafter moved to file a modified third amended complaint alleging a single cause of action for breach of trust. J.A. 135-137. In the modified complaint, the Navajo Nation acknowledged that the "ongoing general stream adjudication" of the Little Colorado River "may result in a declaration of water rights to serve some lands of the Navajo Reservation in Arizona." J.A. 103. The Navajo Nation further acknowledged that it "possesses quantified rights to the use of water from the Upper Colorado River Basin in New Mexico." *Ibid.*[3] The Navajo Nation nevertheless alleged that the government breached its fiduciary obligation to the Navajo Nation by "fail[ing] to address the extent to which the Navajo Nation needs water from the Colorado River to make its Arizona lands productive." J.A. 104; see J.A. 118, 136-137. The Navajo Nation sought declaratory relief and an injunction compel-

[3] As noted above, see pp. 9-10, *supra*, the United States, the Navajo Nation, and Utah have also agreed to a settlement of *Winters* claims on behalf of the Navajo Nation to waters of the San Juan River in Utah.

ling the government to (1) "determine the extent to which the Navajo Nation requires water from sources other than the Little Colorado River to enable its Reservation to serve as a permanent homeland for the Navajo Nation"; (2) "develop a plan to secure the water needed"; (3) "exercise [the government's] authorities, including those for the management of the Colorado River, in a manner that does not interfere with [such] plan"; and (4) "analyze" the government's "management decisions" in light of such plan and "adopt appropriate mitigation measures to offset any adverse effects." J.A. 138-139.

The district court again denied leave to amend. Pet. App. 75-92. The court reiterated that "[t]o the extent" the Navajo Nation "bases its claim on any *Winters* rights in the mainstream of the Lower Colorado," "[s]uch a claim would have to be filed with the Supreme Court," given the Court's retention of jurisdiction in *Arizona* v. *California*. *Id.* at 83. The district court further held that, "in any event, the enforceable trust duties the Nation asserts are not inferable from the mere existence of implied water rights." *Id.* at 85. The court explained that "tribes must point to a specific treaty, agreement, executive order, statute, or regulation that the government violated in order to bring a breach of trust claim." *Id.* at 80. The court determined that the Navajo Nation had failed to do so. *Id.* at 85-92. Viewing the Navajo Nation's efforts to amend the complaint as "futile," *id.* at 91, the court dismissed the suit, *id.* at 92.

4. The court of appeals reversed and remanded. Pet. App. 1-74.

The court of appeals held that the Navajo Nation's breach-of-trust claim does not fall within this Court's retained jurisdiction in *Arizona* v. *California*. Pet. App.

19-22. In the court of appeals' view, granting the relief sought on that claim "would not require a judicial quantification of the [Navajo] Nation's rights to water" from the Lower Colorado River mainstream or "require any modification" of this Court's decree in *Arizona* v. *California*. *Id.* at 20. The court of appeals therefore concluded that the Navajo Nation's breach-of-trust claim did "not implicate th[is] Court's reservation of jurisdiction" in that decree. *Id.* at 17. For similar reasons, the court of appeals held that the breach-of-trust claim was "not barred by *res judicata*, despite the federal government's representation of the [Navajo] Nation in" *Arizona* v. *California*. *Id.* at 6; see *id.* at 22-23.

On the merits of the breach-of-trust claim, the court of appeals held that it was "not bound" by this Court's decisions in cases such as *United States* v. *Mitchell*, 445 U.S. 535 (1980), and *United States* v. *Jicarilla Apache Nation*, 564 U.S. 162 (2011), which addressed the standard for establishing a judicially enforceable trust duty. Pet. App. 27; see *id.* at 24-28. The court of appeals regarded those decisions as "not apposite," *id.* at 25, on the view that they involved "suits brought for money damages" rather than claims "for injunctive relief," *id.* at 27. The court instead derived what it believed to be "the governing standard" from circuit precedent. *Id.* at 25. And it read that precedent to allow a tribe to seek injunctive relief for the violation of an asserted trust responsibility that exists either "expressly or *by implication*"—a standard that the court regarded as more permissive than the standard articulated in this Court's decisions. *Ibid.* (emphasis altered) (quoting *Gros Ventre Tribe* v. *United States*, 469 F.3d 801, 810 (9th Cir. 2006), cert. denied, 552 U.S. 824 (2007)).

Applying what it believed to be "the correct legal principles," the court of appeals held that the Navajo Nation's "attempts to amend its complaint were not futile." Pet. App. 38. In the court's view, the Navajo Nation had sufficiently alleged the existence of "an implied fiduciary obligation" to "protect and preserve the [Navajo] Nation's right to water," *id.* at 36, derived from (1) "the implied treaty rights recognized in *Winters*"; (2) "the 1868 Treaty, which recognizes the [Navajo] Nation's right to farm Reservation lands" and "gives rise to an implied right to the water necessary to do so"; (3) the Project Act "and other statutes that grant the Secretary authority to exercise pervasive control over the Colorado River"; and (4) agency "regulations and documents" in which the government has "undertaken to protect Indian Trust Assets," *id.* at 35. The court stated that it was not deciding "whether the [Navajo] Nation's *Winters* rights include rights to the mainstream of the Colorado River or to any other specific water sources," but rather was "hold[ing] only that the [Navajo] Nation may properly base its breach of trust claim on water rights derived from its treaties with the United States under *Winters*, and so may amend its complaint to so allege." *Id.* at 38.

Judge Lee concurred, expressing the view that the Navajo Nation's proposed injunctive relief is not inconsistent with this Court's retained jurisdiction in *Arizona* v. *California*. Pet. App. 39-41.

SUMMARY OF ARGUMENT

I. The Navajo Nation's breach-of-trust claim fails at the threshold because it does not allege the violation of any specific trust duty that the government has expressly accepted.

A. The United States has a general trust relationship with Indian tribes. But the existence of that general relationship does not itself establish any judicially enforceable duties against the United States. In a series of decisions culminating in *United States* v. *Jicarilla Apache Nation*, 564 U.S. 162 (2011), this Court has made clear that a tribe may sue to enforce only those trust responsibilities that the United States has "expressly accept[ed]." *Id.* at 177. Thus, to pursue a breach-of-trust claim against the United States, a tribe must identify a "specific, applicable, trust-creating" statute, treaty, or regulation that the government violated. *Ibid.* (citation omitted). That requirement reflects the respective roles of the political Branches and the Judiciary in our system of separated powers. For, as this Court has recognized throughout the country's history, "the organization and management of the [Indian trust relationship] is a sovereign function subject to the plenary authority of Congress." *Id.* at 175.

B. The requirement that a tribe identify a specific trust duty that the government has expressly accepted applies to claims for non-monetary relief. The court of appeals erred in viewing that requirement as applying only to claims for money damages. That view cannot be squared with *Jicarilla* itself, in which this Court applied the requirement to a request for non-monetary relief. Nor can the court of appeals' view be squared with this Court's other breach-of-trust decisions, which make clear that a tribe must identify a specific trust duty that the government has expressly accepted in order for any judicially enforceable duty to exist in the first place. Indeed, that requirement corresponds to restrictions on issuing mandatory relief to compel agency action unlawfully withheld under the APA and traditional manda-

mus principles. And like those parallel restrictions, it serves "to protect agencies from undue judicial interference with their lawful discretion, and to avoid judicial entanglement in abstract policy disagreements which courts lack both expertise and information to resolve." *Norton* v. *Southwestern Utah Wilderness Alliance*, 542 U.S. 55, 66 (2004). There thus is no basis for a tribe to obtain injunctive or other non-monetary relief without identifying a specific trust duty that the government has "expressly accept[ed]." *Jicarilla*, 564 U.S. at 177.

C. The Navajo Nation alleges in this case that the United States has breached an asserted trust obligation by failing to assess and address the Navajo Nation's need for water in Arizona "from sources other than the Little Colorado River," J.A. 138—meaning, essentially, from the mainstream of the Lower Colorado River. The court of appeals identified four possible sources of such a duty, but none qualifies as a "specific, applicable, trust-creating" statute, treaty, or regulation. *Jicarilla*, 564 U.S. at 177 (citation omitted).

First, the court of appeals relied on the *Winters* doctrine, see *Winters* v. *United States*, 207 U.S. 564 (1908), but *Winters* is a doctrine of implied rights, not affirmative duties—let alone affirmative duties that the government has expressly accepted. Second, the court relied on provisions in the 1868 Treaty relating to farming on the original Navajo Reservation, but those provisions did not impose any duty on the United States relating to water—let alone any duty resembling the duty that the Navajo Nation asserts here. Third, the court relied on statutes granting the Secretary control over the Lower Colorado River mainstream, but "[t]he Federal Government's liability cannot be premised on control alone," and those statutes lack any "prescription

[that] bears the hallmarks of a 'conventional fiduciary relationship'" with the Navajo Nation. *United States* v. *Navajo Nation*, 556 U.S. 287, 301 (2009) (citation omitted). Fourth, the court relied on an environmental impact statement issued by the Bureau of Reclamation in 2007, but that statement lacks the prescriptive, trust-creating force necessary to establish a judicially enforceable duty and, in any event, makes no mention of the duty the Navajo Nation asserts here. Because no substantive source of law expressly establishes the particular duty that the Navajo Nation asserts, the court erred in permitting the Navajo Nation's breach-of-trust claim to go forward.

II. This Court also granted certiorari on an additional question presented by the intervenors, which concerns the relationship between the relief sought by the Navajo Nation in this case and the decree that this Court entered in *Arizona* v. *California*, 373 U.S. 546 (1963). That decree enjoins the United States from releasing water from the Lower Colorado River mainstream except under certain conditions. See *Arizona* v. *California*, 547 U.S. 150, 154-159 (2006) (current consolidated decree). In this case, an order compelling the government to deliver water from the Lower Colorado River mainstream to the Navajo Reservation would violate the decree.

If, however, this Court were to conclude that no judicially enforceable duty exists in the first place, it would be unnecessary to reach the additional issue presented by the intervenors. Although the court of appeals characterized that issue as a "jurisdictional" question, Pet. App. 19, it is not an issue that goes to the district court's subject matter jurisdiction. Rather, it is a remedial question regarding what type of relief would

violate the decree. Before addressing that remedial question, the Court can—and should—address the threshold question whether any judicially enforceable duty exists at all.

ARGUMENT

I. THE NAVAJO NATION'S BREACH-OF-TRUST CLAIM FAILS TO ALLEGE THE VIOLATION OF ANY SPECIFIC TRUST DUTY THAT THE GOVERNMENT HAS EXPRESSLY ACCEPTED

The United States has a general trust relationship with Indian tribes, dating to the founding of this country, to protect them and further their best interests consistent with that relationship. See, *e.g.*, *Seminole Nation* v. *United States*, 316 U.S. 286, 296-297 (1942); *Worcester* v. *Georgia*, 31 U.S. (6 Pet.) 515, 552 (1832); *Cherokee Nation* v. *Georgia*, 30 U.S. (5 Pet.) 1, 17 (1831). The United States' role has been variously described as that of a guardian or trustee. See, *e.g.*, *Cherokee Nation*, 30 U.S. at 17. The general trust relationship thus reflects a "policy" by which the United States "has charged itself with moral obligations of the highest responsibility and trust." *Seminole Nation*, 316 U.S. at 296-297.

The United States has long honored that relationship with respect to the Navajo Nation's water needs—asserting claims for the Navajo Nation in the Little Colorado River in *Arizona* v. *California*, 373 U.S. 546 (1963), and again in an ongoing general stream adjudication in Arizona state court; resolving the Navajo Nation's claims in the San Juan River through congressionally approved settlements that have also authorized more than $1 billion in water projects for the Navajo Nation; and setting aside 6411 acre-feet of water for use in a future congressionally approved agreement that

settles the Navajo Nation's claims to water in Arizona. See pp. 8-11, *supra*.

The Navajo Nation nevertheless alleges that the government has breached its trust obligations by failing to assess and address the Navajo Nation's need for water in Arizona "from sources other than the Little Colorado River," J.A. 138—meaning, essentially, the Lower Colorado River mainstream.[4] Although tribes may appropriately hold the United States liable for a breach of trust in certain circumstances, this Court has made clear that they may sue to enforce only those trust responsibilities that the United States has "expressly accept[ed]." *United States* v. *Jicarilla Apache Nation*, 564 U.S. 162, 177 (2011). Here, the Navajo Nation has not identified any statute, treaty, or regulation that expressly establishes an affirmative trust duty to assess and address the Navajo Nation's general water needs. The court of appeals therefore erred in permitting the Navajo Nation's claim to go forward.

A. This Court's Decisions Require That A Tribe Identify A Substantive Source Of Law Establishing A Specific Trust Duty That The Government Has Expressly Accepted

1. The United States has a "general trust relationship" with Indian tribes. *Jicarilla*, 564 U.S. at 165.

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[4] The Navajo Nation asserts that the "Colorado River * * * is the most likely source to supply the [Navajo] Nation's water needs in Arizona." J.A. 87; see J.A. 104 (asserting that "the Colorado River * * * is the most obvious source of water" in Arizona other than the Little Colorado River). And in finding the existence of a judicially enforceable duty in this case, the court of appeals relied on two sources specific to the Colorado River mainstream. See Pet. App. 33-34 (relying on the Secretary's "control" over the mainstream and an environmental impact statement regarding the administration of reservoirs on the mainstream).

That relationship reflects the tribes' "unique status" in our constitutional order. *National Farmers Union Ins. Cos.* v. *Crow Tribe of Indians*, 471 U.S. 845, 851 (1985). Upon the founding of the United States, Indian tribes assumed the status of "domestic dependent nations." *Cherokee Nation*, 30 U.S. at 17. The United States, in turn, assumed "the duty," as well as "the authority," to provide for the tribes' "protection." *Board of County Comm'rs* v. *Seber*, 318 U.S. 705, 715 (1943). That duty and authority form the basis of the United States' general trust relationship with the tribes to this day.

But the existence of that general trust relationship does not itself establish judicially enforceable duties on the part of the United States. See *Jicarilla*, 564 U.S. at 173 ("The *general* relationship between the United States and the Indian tribes is not comparable to a private trust relationship.") (citation omitted); *United States* v. *Navajo Nation*, 537 U.S. 488, 506 (2003) (*Navajo I*) (explaining that the "'general trust relationship'" "alone is insufficient to support jurisdiction under the Indian Tucker Act") (citation omitted). Rather, a specific measure adopted by Congress or the Executive as authorized by that general relationship is necessary to establish an enforceable duty. *Jicarilla*, 564 U.S. at 177. As this Court has explained, "[t]he Government assumes Indian trust responsibilities only to the extent it expressly accepts those responsibilities." *Ibid.* Thus, to pursue a breach-of-trust claim against the United States, a tribe must identify a "specific, applicable, trust-creating statute or regulation that the Government violated." *Ibid.* (citation omitted).[5]

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[5] Before 1871, the United States and many Indian tribes resolved various issues, including the cession of lands and establishment of Indian reservations, through negotiated treaties pursuant to the

The need to identify such a specific trust duty reflects "the unique position of the Government as sovereign." *Jicarilla*, 564 U.S. at 174. Unlike a private trustee, the Government may "structure[] the trust relationship to pursue its own policy goals." *Id.* at 175. For instance, "Congress may style its relations with the Indians a 'trust' without assuming all the fiduciary duties of a private trustee, creating a trust relationship that is 'limited' or 'bare' compared to a trust relationship between private parties at common law." *Id.* at 174 (citations omitted). Accordingly, "'the contours of the United States' fiduciary responsibilities'" enforceable by courts are defined not by the common law or general notions of trust, but by specific "statutes and regulations." *Id.* at 177 (citation omitted); see *id.* at 165 (explaining that the "trust obligations of the United States to the Indian tribes are established and governed by statute rather than the common law"); *id.* at 184 (explaining that "common-law principles are relevant only when applied to a 'specific, applicable, trust-creating statute or regulation'") (citation omitted). A breach-of-trust claim therefore cannot proceed unless the tribe can allege the violation of "specific rights-creating or duty-imposing stat-

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Treaty Clause, U.S. Const. Art. II, § 2, Cl. 2, which required the advice and consent of the Senate. In 1871, Congress ended treaty-making with tribes, thereby giving the House of Representatives a greater role in Indian policy. Act of Mar. 3, 1871, ch. 120, § 1, 16 Stat. 566; see *Antoine* v. *Washington*, 420 U.S. 194, 202-203 (1975). Like a statute or regulation, a treaty can be the basis of a breach-of-trust claim insofar as a tribe can identify a "specific, applicable, trust-creating [treaty] that the Government violated." *Jicarilla*, 564 U.S. at 177 (citation omitted); see Pet. App. 32 (explaining that treaty provisions "may serve as the 'specific statute' that satisfies *Jicarilla*").

utory or regulatory prescriptions." *Navajo I*, 537 U.S. at 506.

The need to identify such a prescription also reflects the respective roles of the political Branches and the Judiciary in our system of separated powers. As this Court has recognized, "the organization and management of the [Indian trust relationship] is a sovereign function subject to the plenary authority of Congress." *Jicarilla*, 564 U.S. at 175. It is therefore up to Congress to "define[] and redefine[] the trust relationship between the United States and the Indian tribes." *Id.* at 176; see *id.* at 178 (recognizing that Congress may choose "to structure the Indian trust relationship in different ways"). For a court to impose an enforceable duty where Congress has not "expressly accept[ed]" one, *id.* at 177, would thus undermine Congress's role in "implement[ing] national policy respecting the Indian tribes," *id.* at 178.

2. This Court has applied the foregoing principles in a series of decisions, beginning with *United States* v. *Mitchell*, 445 U.S. 535 (1980) (*Mitchell I*). In *Mitchell I*, the Court considered whether the General Allotment Act, ch. 119, 24 Stat. 388, imposed a judicially enforceable fiduciary duty on the United States to manage timber resources on Indian lands that the government held in trust for individual allottees. *Mitchell I*, 445 U.S. at 536-537. The Court held that the Act did "not unambiguously provide that the United States ha[d] undertaken full fiduciary responsibilities as to the management of allotted lands." *Id.* at 542. Rather, the Court "conclude[d] that the Act created only a limited trust responsibility between the United States and the allottee," *ibid.*, and that the Act therefore did not authorize damages against the United States for the alleged mismanagement of the timber resources in question, *id.* at 546.

In *United States* v. *Mitchell*, 463 U.S. 206 (1983) (*Mitchell II*), the Court held that various other statutes and their implementing regulations did impose judicially enforceable duties on the United States with respect to those timber resources. *Id.* at 224. The Court explained that, "[i]n contrast to the bare trust created by the General Allotment Act, the statutes and regulations [at issue in *Mitchell II*] clearly g[a]ve the Federal Government full responsibility to manage Indian resources and land for the benefit of the Indians." *Ibid.* Focusing on the "language" of the "statutory and regulatory provisions" at issue, the Court emphasized that one statutory provision "expressly mandate[d] that sales of timber from Indian trust lands be based upon the Secretary's consideration of 'the needs and best interests of the Indian owner and his heirs' and that proceeds from such sales be paid to owners 'or disposed of for their benefit.'" *Ibid.* (quoting 25 U.S.C. 406(a)). And another statutory provision "expressly directed that the Interior Department manage Indian forest resources 'on the principle of sustained-yield management.'" *Id.* at 221 (quoting 25 U.S.C. 466 (1982)); see *id.* at 222 ("Virtually every stage of the process is under federal control.").

Having concluded that "the statutes and regulations at issue in [*Mitchell II*] clearly establish[ed] fiduciary obligations of the Government in the management and operation of Indian lands and resources," the Court then considered whether those statutes and regulations could "fairly be interpreted as mandating compensation by the Federal Government for damages sustained." *Mitchell II*, 463 U.S. at 226. The Court held that, "[g]iven the existence of a trust relationship, it natu-

rally follows that the Government should be liable in damages for the breach of its fiduciary duties." *Ibid.*

The Court reached a similar conclusion in *United States* v. *White Mountain Apache Tribe*, 537 U.S. 465 (2003). That case involved a statute providing that the "former Fort Apache Military Reservation" would be "held by the United States in trust for the White Mountain Apache Tribe, subject to the right of the Secretary of the Interior to use any part of the land and improvements for administrative or school purposes for as long as they are needed for the purpose." Act of Mar. 18, 1960 (1960 Act), Pub. L. No. 86-392, 74 Stat. 8. After the Secretary had exercised that right for decades, the White Mountain Apache Tribe sued the United States for damages, "alleging breach of fiduciary duty to 'maintain, protect, repair and preserve' the trust property." *White Mountain Apache*, 537 U.S. at 469 (citation omitted).

The Court in *White Mountain Apache* held that the suit could proceed. 537 U.S. at 474-476. The Court explained that the "language" of the 1960 Act "expressly define[d] a fiduciary relationship in the provision that Fort Apache be 'held by the United States in trust for the White Mountain Apache Tribe.'" *Id.* at 474-475 (quoting 74 Stat. 8). And the Court reasoned that, unlike the General Allotment Act in *Mitchell I*, the 1960 Act went "beyond a bare trust" by "invest[ing] the United States with discretionary authority to make direct use of portions of the trust corpus"—an authority that the United States had exercised by conducting "daily supervision," "enjoy[ing] daily occupation," and obtaining "plenary" control of the property. *Ibid.*; see *id.* at 480 (Ginsburg, J., concurring) (emphasizing that the 1960 Act "plac[ed] property in trust and simultaneously provid[ed] for the

Government-trustee's use and occupancy," and that "the Government ha[d] 'availed itself of its option' to 'exercise daily supervision and enjoy daily occupation' of the trust corpus") (brackets, citation, and ellipsis omitted). The Court therefore concluded that "an obligation to preserve the property improvements was incumbent on the United States as trustee." *Id.* at 475 (majority opinion). And as in *Mitchell II*, the Court believed it "naturally follow[ed]" that the government could be held liable in damages. *Id.* at 475-476 (quoting *Mitchell II*, 463 U.S. at 226).

On the same day that the Court decided *White Mountain Apache*, however, the Court rejected a breach-of-trust claim in *Navajo I*. The Secretary in that case had approved a lease executed by the Navajo Nation and a private company, allowing the company to mine for coal within the Navajo Reservation in exchange for royalty payments to the Tribe. *Navajo I*, 537 U.S. at 495. After the lease had been in effect for 20 years, the Secretary approved amendments to the lease raising the royalty rate, but not as high as the Navajo Nation had hoped. *Id.* at 498-500. The Navajo Nation brought suit, seeking to recover damages for the Secretary's alleged breach of trust in approving the lease amendments. *Id.* at 500.

The Court held that to state a cognizable claim, "a tribe 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. The Court concluded that the Navajo Nation had failed to identify such provisions. *Id.* at 506-514. The Court reasoned that, "[u]nlike the 'elaborate' provisions before the Court in *Mitchell II*," *id.* at 507 (citation omitted), the Indian Mineral Leasing Act of 1938 (IMLA), 25 U.S.C.

396a *et seq.*, did not assign the government a "comprehensive managerial role" or "expressly invest[]" the government "with responsibility to secure 'the needs and best interests of the Indian owner and his heirs,'" *Navajo I*, 537 U.S. at 507-508 (citation omitted). Finding "no guides or standards circumscribing the Secretary's affirmation of coal mining leases negotiated between a Tribe and a private lessee," *id.* at 510, the Court held that the Navajo Nation's claim could not be "derive[d] from any liability-imposing provision of the IMLA or its implementing regulations," *id.* at 493.

On remand, "the Tribe argued that even if its suit could not be maintained on the basis of the IMLA," "a 'network' of other statutes, treaties, and regulations could provide the basis for its claims." *United States* v. *Navajo Nation*, 556 U.S. 287, 295 (2009) (*Navajo II*). The Federal Circuit agreed, holding "that the Government had violated the specific duties created by those [other] statutes, as well as 'common law trust duties of care, candor, and loyalty' that arise from the comprehensive control over tribal coal that is exercised by the Government." *Ibid.* (citation omitted). But in *Navajo II*, this Court determined that the statutes cited by the Federal Circuit did "not apply to the lease at all." *Id.* at 302. And the Court explained that because the Navajo Nation could not "identify a specific, applicable, trust-creating statute or regulation that the Government violated," "neither the Government's 'control' over coal nor common-law trust principles matter[ed]." *Ibid.* As the Court emphasized, "[t]he Federal Government's liability cannot be premised on control alone." *Id.* at 301.

Most recently, the Court in *Jicarilla* considered whether a tribe could compel the government to disclose attorney-client communications relating to the

government's management of funds held in trust for the tribe. 564 U.S. at 165-167. The Court noted that the common law has recognized a "fiduciary exception" to the attorney-client privilege, whereby a "trustee cannot withhold attorney-client communications from the beneficiary of the trust." *Id.* at 165. But the Court reaffirmed that "common-law principles are relevant only when applied to a 'specific, applicable, trust-creating statute or regulation.'" *Id.* at 184 (quoting *Navajo II*, 556 U.S. at 302); accord *id.* at 177. And the Court held that the particular statutory provisions at issue in *Jicarilla*—which "define[d] 'the trust responsibilities of the United States' with respect to tribal funds," *id.* at 178 (quoting 25 U.S.C. 162a(d))—could not be read "to include a general common-law duty to disclose all information related to the administration of Indian trusts," *id.* at 185. The Court thus deemed the "fiduciary exception" "inapplicable to the Government's administration of Indian trusts." *Id.* at 187.

B. The Requirement That A Tribe Identify A Specific Trust Duty That The Government Has Expressly Accepted Applies To Claims For Non-Monetary Relief

The court of appeals in this case held that it was "not bound" by the line of this Court's decisions culminating in *Jicarilla* regarding what a tribe must show to establish a judicially enforceable duty. Pet. App. 27. Characterizing those precedents as "decisions concern[ing] suits brought for money damages," *ibid.*, under the Tucker Act, 28 U.S.C. 1491, and the Indian Tucker Act, 28 U.S.C. 1505, the court deemed them "not apposite," Pet. App. 25, when, as here, a tribe seeks "injunctive relief," *id.* at 27. At the petition stage, the Navajo Nation did not defend that aspect of the court of appeals' decision, and for good reason. See 22-51 Br. in Opp. 2, 22.

The court of appeals' view that this Court's breach-of-trust decisions are inapposite cannot be squared with those decisions' holdings or the separation-of-powers principles underlying them.

1. *Jicarilla* forecloses the court of appeals' view that this Court's breach-of-trust decisions apply only to claims for money damages. *Jicarilla* involved a tribe's request for non-monetary relief—namely, a request "to compel the Government to produce [certain] withheld documents." 564 U.S. at 167. And in considering whether the tribe was entitled to such relief, the Court applied the same standard that it had applied in previous breach-of-trust cases—requiring the tribe to "identify a specific, applicable, trust-creating statute or regulation." *Id.* at 177 (quoting *Navajo II*, 556 U.S. at 302).

The court of appeals stated that "*Jicarilla* was at bottom a suit for monetary relief." Pet. App. 28. But though the underlying suit in *Jicarilla* was one for "monetary damages for the Government's alleged mismanagement of funds held in trust for the Tribe," 564 U.S. at 166, the issue before the Court had nothing to do with whether the tribe was entitled to such damages under the Tucker Act or the Indian Tucker Act. Rather, the only issue before the Court was whether the government had a "duty to disclose" the documents that had been withheld. *Id.* at 183 (citation omitted). And in applying the same standard drawn from previous breach-of-trust cases, the Court explained that "[t]he Government assumes Indian trust responsibilities only to the extent it expressly accepts those responsibilities by statute." *Id.* at 177. The Court thus understood that standard to govern what a tribe must show to establish a judicially enforceable duty in the first place—regardless of the context or the relief sought. The court of appeals'

view that the standard articulated in *Jicarilla* is inapposite when a tribe seeks non-monetary relief therefore cannot be squared with *Jicarilla* itself.

2. The court of appeals' view also cannot be squared with this Court's other breach-of-trust decisions, which addressed claims for monetary relief. Those decisions reflect a two-step analysis: first, whether "a substantive source of law" "establishes specific fiduciary or other duties" that the government breached; and second, "[i]f that threshold is passed," "whether the relevant source of substantive law 'can be fairly interpreted as mandating compensation for damages sustained as a result of a breach.'" *Navajo I*, 537 U.S. at 506 (citation omitted); see *Navajo II*, 556 U.S. at 290-291 (describing the same "two hurdles"); *White Mountain Apache*, 537 U.S. at 477 (distinguishing the task of "find[ing] a specific duty" from the task of "drawing the inference that Congress intended damages to remedy a breach of obligation"); *Mitchell II*, 463 U.S. at 226 (deciding, first, that "the statutes and regulations" at issue "clearly establish fiduciary obligations," and second, that "they can fairly be interpreted as mandating compensation").

Although the second step in those cases concerned prerequisites to the particular relief sought, the first step has nothing to do with the relief sought. Rather, the first step presents the "threshold question" whether an enforceable duty exists at all, regardless of remedy. *Navajo II*, 556 U.S. at 293 (citation omitted). In *Mitchell I*, *Navajo I*, and *Navajo II*, the Court answered that question in the negative, finding no judicially enforceable duty in the first place. See *id.* at 302 (concluding, at step one, that "the Tribe cannot identify a specific, applicable, trust-creating statute or regulation that the Government violated"); *id.* at 293 (explaining that *Nav-*

ajo I concluded, at the "threshold," that "the IMLA and its regulations" did not "impose any concrete substantive obligations, fiduciary or otherwise, on the Government") (quoting *White Mountain Apache*, 537 U.S. at 480 (Ginsburg, J., concurring)); *White Mountain Apache*, 537 U.S. at 477 (explaining that "the fact of the trust alone in *Mitchell I* did not imply * * * even the duty claimed"). By the same token, in *Mitchell II* and *White Mountain Apache*, the Court found the existence of a judicially enforceable duty before proceeding to the second step of the analysis. See *White Mountain Apache*, 537 U.S. at 475 (proceeding to step two only after finding the existence of a "duty on the part of the trustee to preserve corpus"); *Mitchell II*, 463 U.S. at 226 (proceeding to step two only after finding "the existence of a trust relationship"). Because this case presents the same threshold issue of whether a judicially enforceable duty exists at all, the court of appeals erred in treating this Court's decisions as "not apposite." Pet. App. 25.

3. The court of appeals' approach also cannot be squared with the separation-of-powers principles underlying this Court's breach-of-trust decisions. Because "the organization and management of the [Indian trust relationship] is a sovereign function subject to the plenary authority of Congress," *Jicarilla*, 564 U.S. at 175, Congress may "define[] and redefine[]" that relationship in different ways, *id.* at 176. Requiring that a tribe identify a "specific, applicable, trust-creating statute or regulation," *Navajo II*, 556 U.S. at 302, ensures that a court is enforcing the trust relationship established and specified by Congress, not the courts.

That requirement is at least as important when a tribe seeks equitable, rather than monetary, relief. Under the APA, a reviewing court considering a request

for mandatory relief under 5 U.S.C. 703 to "compel agency action unlawfully withheld," 5 U.S.C. 706(1)—which is what the Navajo Nation asserts here—may grant such relief "only where * * * an agency failed to take a *discrete* agency action that it is *required to take*," *Norton* v. *Southwestern Utah Wilderness Alliance* (*SUWA*), 542 U.S. 55, 64 (2004). In this regard, the APA carried forward the "traditional practice prior to its passage," under which judicial review could be achieved through use of a writ of mandamus. "The mandamus remedy was normally limited to enforcement of 'a specific, unequivocal command'"—*i.e.*, "the ordering of a precise, definite act about which an official had no discretion whatever." *Id.* at 63 (brackets, citations, ellipsis, and internal quotation marks omitted). As this Court has recognized, the "principal purpose" of those limitations, both in the APA and in the traditional practice on which it rests, was "to protect agencies from undue judicial interference with their lawful discretion, and to avoid judicial entanglement in abstract policy disagreements which courts lack both expertise and information to resolve." *Id.* at 66. Thus, in the absence of a substantive source of law establishing a specific duty to take action, relief cannot be granted under the APA or mandamus principles.

In the present context, the requirement that a tribe identify a "specific, applicable, trust-creating statute or regulation," *Navajo II*, 556 U.S. at 302, corresponds to those restrictions on mandatory relief to compel agency action and serves the same purpose. Without such a requirement, courts could be asked to enforce broad and amorphous judicially fashioned duties against the government, raising the "prospect of pervasive [judicial] oversight" over the United States' trust relationship

with Indian tribes. *SUWA*, 542 U.S. at 67. This case illustrates the problem. The court of appeals used varied formulations to describe the "implied fiduciary duty" that it had imposed, Pet. App. 36—referring to it at one point as a duty to "ensure adequate water for the health and safety of the Navajo Nation's inhabitants in their permanent home reservation," *id.* at 18; at another point as a duty to "protect the [Navajo] Nation's water supply," *id.* at 31; and at yet another point as a "duty to protect and preserve the [Navajo] Nation's right to water," *id.* at 35.

Those vague descriptions give little guidance as to what the supposed duty would entail. And the task of measuring the government's compliance would ultimately fall on the "supervising court," injecting the Judiciary into complex, federal-state-tribal disputes about general water needs, unspecified water rights, and Indian policy that it "lack[s] both expertise and information to resolve." *SUWA*, 542 U.S. at 66; see *Lujan* v. *National Wildlife Fed'n*, 497 U.S. 871, 891 (1990) (noting that "programmatic improvements are normally made" "in the offices of the [Executive] or the halls of Congress," rather than "by court decree"). There thus is no basis for a tribe, including the Navajo Nation here, to obtain injunctive or other non-monetary relief without identifying a specific trust duty that the government has "expressly accept[ed]." *Jicarilla*, 564 U.S. at 177.

C. No Substantive Source Of Law Expressly Establishes A Trust Duty To Assess And Address The Navajo Nation's General Water Needs

In the decision below, the court of appeals identified four possible sources of a judicially enforceable duty to assess and address the Navajo Nation's general water needs: (1) the implied-reservation-of-water-rights doc-

trine of *Winters* v. *United States*, 207 U.S. 564 (1908); (2) the 1868 Treaty's farming provisions; (3) the Project Act and other statutes that grant the Secretary "control" over the Lower Colorado River mainstream; and (4) an environmental impact statement that the Bureau of Reclamation issued in 2007. Pet. App. 29-35. None of those sources, however, qualifies as a "specific, applicable, trust-creating" statute, treaty, or regulation. *Navajo II*, 556 U.S. at 302; see p. 22 n.5, *supra*. The Navajo Nation's breach-of-trust claim therefore cannot succeed.

1. The court of appeals' reliance on the* Winters *doctrine was misplaced

a. This Court has long recognized the "implied-reservation-of-water-rights doctrine," *Cappaert* v. *United States*, 426 U.S. 128, 141 (1976), also known as the "*Winters* doctrine," *Nevada* v. *United States*, 463 U.S. 110, 116 n.1 (1983). Under that doctrine, the reservation of land for a federal establishment reserves, "by implication," sufficient unappropriated water "to accomplish the purpose of the reservation." *Cappaert*, 426 U.S. at 138; see *Arizona* v. *California*, 373 U.S. at 595-601. Reserved water rights vest no later than the date of the reservation and are "superior to the rights of future appropriators." *Cappaert*, 426 U.S. at 138; see *Arizona* v. *California*, 373 U.S. at 600; *United States* v. *Adair*, 723 F.2d 1394, 1413-1414 (9th Cir. 1983), cert. denied, 467 U.S. 1252 (1984).

Winters itself involved a suit brought by the United States against various landowners, alleging that the landowners were diverting water from the Milk River and thus interfering with the reserved water rights of the Fort Belknap Indian Reservation. See 207 U.S. at 565, 567 (statement of the case). The landowners argued

that the 1888 agreement creating the Reservation contained no reservation of water rights, *id.* at 571, but this Court declined to adopt that "construction of the agreement," *id.* at 578 (opinion of the Court). "While the agreement[] did not purport to claim any water rights from the Milk River," the Court held that the establishment of the reservation had "impliedly reserved a right to the amount of river water" necessary to effectuate the purposes of the reservation. *Nevada*, 463 U.S. at 116 n.1; see *Winters*, 207 U.S. at 575-578.

Although *Winters* itself involved an Indian reservation, the doctrine applies to federal reservations generally. See *Cappaert*, 426 U.S. at 138 ("The doctrine applies to Indian reservations and other federal enclaves."). In *Cappaert*, for example, this Court held that when the government reserved land to preserve an underground pool that was the habitat of a rare species of fish, the government impliedly reserved "water sufficient to maintain the level of the pool." *Id.* at 147. And in *Arizona* v. *California*, the Court held that when the government reserved land for various national recreation areas and refuges, the government impliedly reserved "water sufficient for the future requirements" of those "federal establishments." 373 U.S. at 601.

b. The court of appeals' reliance on the *Winters* doctrine was misplaced for at least three reasons.

First, the *Winters* doctrine is an "*implied*-reservation-of-water-rights doctrine." *Cappaert*, 426 U.S. at 141 (emphasis added). It holds that the reservation of land reserves certain water rights "by implication." *Id.* at 138. Those rights become part of the reservation by operation of law when the reservation is established, just as the land itself does. See *ibid.* But just like the setting aside of the land for an Indian reservation, the existence

of implied reserved water rights appurtenant to that land gives rise only to a "limited" or "bare" trust. *Jicarilla*, 564 U.S. at 174 (quoting *Mitchell I*, 445 U.S. at 542, and *Mitchell II*, 463 U.S. at 224). The existence of such implied rights is not—and cannot be—the source of affirmative, judicially enforceable duties that the government has "*expressly* accept[ed]." *Id.* at 177 (emphasis added).

Second, the *Winters* doctrine is a doctrine of reserved rights, not affirmative duties. The "reserved right, by its nature, is limited." *Sturgeon* v. *Frost*, 139 S. Ct. 1066, 1079 (2019). It is a right held by the United States—for federal reservations or in trust for the benefit of Indian tribes—as against other users of a particular water source. See *Cappaert*, 426 U.S. at 138 (explaining that the right "is superior to the rights of future appropriators"). And, as against those other users, it is "merely" a right "to take or maintain the specific 'amount of water'—and 'no more'—required to 'fulfill the purpose of [the] reservation.'" *Sturgeon*, 139 S. Ct. at 1079 (citation omitted). For example, in *Winters* itself, the right was one held by the United States on behalf of a tribe as against other users of the Milk River, and the right enabled the United States to enjoin other users from taking the reservation's share of the water. See 207 U.S. at 574-578.

What the Navajo Nation asserts here is very different: an affirmative "duty to assess the [Navajo] Nation's water needs and develop a plan to meet them." 22-51 Br. in Opp. i. Like the court of appeals, the Navajo Nation has used different formulations to describe the asserted duty. See, *e.g.*, *id.* at 25 (asserting a "duty to preserve and protect the [Navajo] Nation's reserved water rights"); *id.* at 33 (asserting a "duty to supply

tribes with adequate water"). But that asserted duty encompasses various "obligations" "to act affirmatively," including by "determining the extent" of the Navajo Nation's water needs and by "taking actions" to "secure the needed water." J.A. 100. Those "obligations" have no basis in the *Winters* doctrine. Indeed, the doctrine of reserved water rights applies to federal reservations generally. *Cappaert*, 426 U.S. at 138. And this Court has never suggested that when the doctrine applies to an Indian reservation, it imposes on the United States a distinct set of affirmative, judicially enforceable duties like those the Navajo Nation asserts here.

Third, the court of appeals explicitly "decline[d] to address whether the [Navajo] Nation's *Winters* rights include rights to the mainstream of the Colorado River or to any other specific water sources." Pet. App. 38. For that reason as well, the court erred in viewing *Winters* as the basis for any duty to "determine the extent to which the [Navajo] Nation requires water from [those] sources." J.A. 138. If such a duty exists at all, the Navajo Nation must point to something outside the *Winters* doctrine—which, as explained below, it is unable to do.

2. The 1868 Treaty's farming provisions do not support the Navajo Nation's breach-of-trust claim

The court of appeals also relied on the 1868 Treaty, which established the original Navajo Reservation. Pet. App. 31-32. The 1868 Treaty gave individual tribal members who "desire[d] to commence farming" the "privilege to select" "tract[s] of land within said reservation." Art. V, 15 Stat. 668. The tribal member and "his family" would then be entitled to the "exclusive possession" of the tract, "so long as he or they may continue to cultivate it." *Ibid.* The tribal member would also be entitled

to "seeds and agricultural implements" for up to three years after selecting the tract. *Id.* art. VII, 15 Stat. 668-669.

The farming provisions of the 1868 Treaty, however, do not mention any duties to be undertaken by the United States relating to water—let alone any duties resembling the obligations that the Navajo Nation asserts here. That silence forecloses the Navajo Nation's assertion of a judicially enforceable duty because, as explained above, "[t]he Government assumes Indian trust responsibilities only to the extent it expressly accepts [them]." *Jicarilla*, 564 U.S. at 177.

The Court's decision in *Jicarilla* is instructive. The relevant statute in that case "identif[ied] the Secretary's obligation to provide specific information to tribal account holders," 564 U.S. at 184-185, but did not identify any "general" "duty to disclose all information related to the administration of Indian trusts," *id.* at 185. The Court thus declined to read the statute to encompass such a duty, explaining that doing so "would vitiate Congress' specification of narrowly defined disclosure obligations." *Id.* at 186.

Likewise here, the 1868 Treaty specifies narrowly defined obligations relating to farming, and construing those obligations to encompass a broader duty to assess and address the Navajo Nation's general water needs would be contrary to the Treaty's text. And while the 1868 Treaty's farming provisions reinforce the "implication" that the establishment of the original Navajo Reservation reserved water rights for irrigation purposes, *Cappaert*, 426 U.S. at 139; see *Arizona* v. *California*, 373 U.S. at 598-600, the existence of such rights, as explained above, cannot be the source of the affirma-

tive, judicially enforceable duty that the Navajo Nation asserts here, see pp. 35-38, *supra*.

In any event, there is a mismatch between the court of appeals' reliance on the 1868 Treaty's farming provisions and the allegations in the Navajo Nation's modified complaint. The 1868 Treaty's farming provisions apply to land within the original Navajo Reservation, straddling the Arizona-New Mexico border. See App., *infra*, 25a (map). Yet the only water needs alleged in the complaint exist elsewhere, "in the western region of the [present] Navajo Reservation adjacent to the Colorado River." J.A. 102; see *ibid.* (alleging that "[t]he western region of the Navajo Reservation in Arizona experiences severe drought" and predicting a "shortfall of water to meet [the Navajo Nation's] needs" in that region of "8,263 acre-feet per year by 2050"). For this reason as well, the 1868 Treaty's farming provisions cannot be the source of any duty to assess and address the water needs asserted in the Navajo Nation's complaint. See *Navajo II*, 556 U.S. at 302 (requiring that a tribe identify an "applicable" source of law).

3. The government's general control over the Lower Colorado River mainstream does not create specific trust duties owed to the Navajo Nation

The court of appeals additionally relied on the Project Act and other statutes that grant the Secretary "control" over the Lower Colorado River mainstream. Pet. App. 33. But "[t]he Federal Government's liability cannot be premised on control alone." *Navajo II*, 556 U.S. at 301; see *Jicarilla*, 564 U.S. at 177 n.5 (rejecting reliance on "the Government's 'managerial control'") (citation omitted). Even when the government exercises "control" over a resource, a tribe must still identify "'specific rights-creating or duty-imposing statutory or

regulatory prescriptions.'" *Navajo II*, 556 U.S. at 301 (citation omitted). "*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." *Ibid.* (citations omitted).

Here, none of the statutes that grant the Secretary "control" over the Lower Colorado River mainstream contains any "prescription [that] bears the hallmarks of a 'conventional fiduciary relationship'" with the Navajo Nation. *Navajo II*, 556 U.S. at 301 (citation omitted). The only statute that the court of appeals specifically addressed was the Project Act. Pet. App. 33-34. And Section 5 of that Act simply authorizes the Secretary "to contract for the storage of water in [Lake Mead] and for the delivery thereof at such points * * * as may be agreed upon." 43 U.S.C. 617d. That provision does not mention Indian tribes or their water rights, and "does not create even a 'limited trust relationship' with respect to" contracting. *Navajo II*, 556 U.S. at 301-302 (citations and internal quotation marks omitted). Other statutory provisions relating to the Secretary's control likewise lack any trust-creating characteristics. See, *e.g.*, 43 U.S.C. 1552(a) (authorizing the Secretary to "propose criteria for the coordinated long-range operation" of particular federal reservoirs, including Lake Mead and Lake Powell).

The statutory provisions here thus bear no resemblance to those in *Mitchell II* and *White Mountain Apache*. In *Mitchell II*, the detailed provisions that granted the Secretary "'comprehensive' control over the harvesting of Indian timber," 463 U.S. at 209, contained "language" that "directly support[ed] the existence of a fiduciary relationship" in the Secretary's per-

formance of those functions for the benefit of the Indians, *id.* at 224. For example, the provisions "expressly mandate[d] that sales of timber from Indian trust lands be based upon the Secretary's consideration of 'the needs and best interests of the Indian owner and his heirs' and that proceeds from such sales be paid to owners 'or disposed of for their benefit.'" *Ibid.* (quoting 25 U.S.C. 406(a)). No provision here contains any similar language directing the Secretary to conduct her actions with respect to the Colorado River for the benefit of the Navajo Nation.

So too in *White Mountain Apache*, the statute granted the Secretary "control" over property (Fort Apache) that was itself expressly held "'in trust'" for the tribe and "invest[ed] the United States with discretionary authority to make direct use" of the property. 537 U.S. at 474-475 (quoting 74 Stat. 8). The statutory provisions here, in contrast, contain no similar language providing that the waters of the Colorado River are held in trust for the Navajo Nation; nor do they authorize the United States to make direct use of any such waters of the Navajo Nation.

Instead, this case is controlled by *Navajo I* and *Navajo II*. Just as "no provision of the IMLA or its regulations contain[ed] *any* trust language with respect to coal leasing," *Navajo I*, 537 U.S. at 508, no provision of the Project Act contains *any* trust language with respect to the Navajo Nation or contracting. And just as the government's liability could not be premised merely on the Secretary's "'control' over coal," *Navajo II*, 556 U.S. at 301, the government's liability cannot be premised merely on the Secretary's general "control" over the Lower Colorado River mainstream for broad public purposes.

4. The environmental impact statement that the court of appeals cited lacks any prescriptive, trust-creating force

Finally, the court of appeals concluded that agency "documents" supported the Navajo Nation's breach-of-trust claim. Pet. App. 33. But the only document that the court addressed (*ibid.*) was the Bureau of Reclamation's Final Environmental Impact Statement (Final EIS) addressing the environmental effects of proposed guidelines for the operation of Lake Powell and Lake Mead during drought and low-reservoir conditions. See Bureau of Reclamation, *Final Environmental Impact Statement: Colorado River Interim Guidelines for Lower Basin Shortages and Coordinated Operations for Lake Powell and Lake Mead* 3-96 (Oct. 2007).[6]

An environmental impact statement is not a "regulation." *Navajo II*, 556 U.S. at 302. Rather, it is an agency's "written consideration of environmental issues in connection with certain major federal actions." *Aberdeen & Rockfish R.R.* v. *Students Challenging Regulatory Agency Procedures (SCRAP)*, 422 U.S. 289, 319 (1975); see 42 U.S.C. 4332(2)(C). The Final EIS thus lacks the "prescripti[ve]," "rights-creating or duty-imposing" force necessary to establish that the government has accepted a judicially enforceable trust obligation. *Navajo I*, 537 U.S. at 506. For that reason alone, the court of appeals erred in relying on the Final EIS.

In any event, the Final EIS nowhere acknowledged the existence of a trust duty resembling the duty that the Navajo Nation seeks to enforce here. In addressing "the Indian Trust Assets (ITAs) that may be affected

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[6] Chapters of the Final EIS are available at https://www.usbr.gov/lc/region/programs/strategies/FEIS/index.html.

by the proposed federal action," Final EIS 3-87, the Final EIS stated that "[t]he existence of a federally reserved right for the Navajo Nation to mainstream Colorado River water has not been judicially determined at this time" and that "[u]nquantified water rights of the Navajo Nation are considered an ITA," *id.* at 3-96. But the Final EIS did not suggest that the Secretary had any affirmative duty to assess the Navajo Nation's need for water from the Lower Colorado River mainstream or to develop a plan to secure water. Rather, the Final EIS stated merely that, "[*t*]*o the extent that additional Tribal water rights are developed, established or quantified*," "the United States will manage Colorado River facilities to deliver water consistent with such additional water rights, *if any*, pursuant to federal law." *Id.* at 4-249 (emphases added).

* * * * *

The Navajo Nation "cannot identify a specific, applicable, trust-creating statute or regulation that the Government violated." *Navajo II*, 556 U.S. at 302. In the absence of any trust duty that the government has "expressly accept[ed]," *Jicarilla*, 564 U.S. at 177, the Navajo Nation's breach-of-trust claim cannot succeed.

II. AN ORDER COMPELLING THE GOVERNMENT TO DELIVER WATER FROM THE LOWER COLORADO RIVER MAINSTREAM TO THE NAVAJO RESERVATION WOULD VIOLATE THIS COURT'S DECREE IN *ARIZONA* v. *CALIFORNIA*

This Court granted certiorari on an additional issue presented in the intervenors' petition for a writ of certiorari. See 21-1484 Pet. i-ii (first question presented). That question concerns the relationship between the relief sought by the Navajo Nation in this case and the

decree that this Court entered in *Arizona* v. *California*. See *ibid.* If this Court were to conclude that no judicially enforceable duty exists in the first place, then the Navajo Nation's breach-of-trust claim would fail at the threshold, and reaching the additional question presented by the intervenors would be unnecessary. But to the extent that the court of appeals' decision suggests that an order compelling the government to deliver water from the Lower Colorado River mainstream to the Navajo Reservation would not violate this Court's decree in *Arizona* v. *California*, the court of appeals' decision is erroneous.

A. The decree in *Arizona* v. *California* expressly "enjoin[s]" the federal government from "releasing water controlled by the United States"—*i.e.*, "the water in Lake Mead, Lake Mohave, Lake Havasu, and all other water in the [Colorado River] mainstream below Lee Ferry and within the United States"—except as specified in provisions of the decree. 547 U.S. at 153-154 (arts. I(E), II). One of those provisions specifies that "mainstream water shall be released or delivered to water users * * * in Arizona, California, and Nevada only pursuant to valid contracts therefor made with such users by the Secretary of the Interior, pursuant to Section 5 of the Boulder Canyon Project Act or any another applicable federal statute." *Id.* at 156 (art. II(B)(5)). Another provision specifies that, notwithstanding the absence of such a contract, mainstream water may be released "for the benefit of any federal establishment named" in the decree. *Id.* at 157 (art. II(D)).

The Secretary has not entered into a contract to supply mainstream water to the Navajo Nation, and the Navajo Reservation is not a federal establishment named in the decree. See *Arizona* v. *California*, 547

U.S. at 157-159 (art. II(D)). Thus, as the intervenors observe (21-1484 Pet. 22) and the Navajo Nation does not dispute (21-1484 Br. in Opp. 8-9), any order compelling the government to deliver water from the Lower Colorado River mainstream to the Navajo Reservation would violate the Court's decree.

B. Although the court of appeals read the Navajo Nation's complaint as not seeking a "judicial determination" of any Navajo Nation *Winters* rights in the Lower Colorado River mainstream, it acknowledged that the relief sought in the Navajo Nation's modified complaint includes an injunction compelling the government to develop a plan to meet the Navajo Nation's water needs and to exercise the government's authority over the management of the Colorado River in a manner that does not interfere with that plan. Pet. App. 20; see J.A. 138-139. And elsewhere in its decision, the court described the asserted trust obligation as one "to provide adequate water for the [Navajo] Nation." Pet. App. 39 n.7; see *id.* at 18 (holding that the government has a duty to "ensure adequate water for the health and safety of the Navajo Nation's inhabitants in their permanent home reservation").

The court of appeals' decision therefore can be read to contemplate that, if the government were found liable on the Navajo Nation's breach-of-trust claim, the government could be ordered to deliver water from the Lower Colorado River mainstream to the Navajo Reservation. As explained above, however, such an order would be inconsistent with this Court's decree in *Arizona* v. *California*. See pp. 45-46, *supra*; Pet. App. 40-41 (Lee, J., concurring) (stating that the relief the Navajo Nation requests "cannot be used as a backdoor attempt to allocate the rights to the mainstream").

C. The court of appeals characterized this issue regarding the scope of the Court's decree in *Arizona* v. *California* as a "jurisdictional" question, Pet. App. 19, but the issue is not one that goes to the district court's subject matter jurisdiction. The question is instead a remedial question regarding what type of relief would violate the decree. It is therefore not the type of question that must be answered before addressing whether the Navajo Nation has identified a judicially enforceable duty at all. That question regarding the existence of such a duty is a threshold question that this Court can—and should—address first.

CONCLUSION

The judgment of the court of appeals should be reversed.

Respectfully submitted.

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DECEMBER 2022

APPENDIX A

Treaty Between the United States of America and the Navajo Tribe of Indians, Sept. 9, 1849, 9 Stat. 974, provides:

THE following acknowledgements, declarations, and stipulations, have been duly considered, and are now solemnly adopted and proclaimed by the undersigned: that is to say, John M. Washington, Governor of New Mexico, and Lieutenant-Colonel commanding the troops of the United States in New Mexico, and James S. Calhoun, Indian agent, residing at Santa Fé, in New Mexico, representing the United States of America, and Mariano Martinez, Head Chief, and Chapitone, second Chief, on the part of the Navajo tribe of Indians.

I. The said Indians do hereby acknowledge that, by virtue of a treaty entered into by the United States of America and the United Mexican States, signed on the second day of February, in the year of our Lord eighteen hundred and forty-eight, at the city of Guadalupe Hidalgo, by N. P. Trist, of the first part, and Luis G. Cuevas, Bernardo Couto, and Mgl Atristain, of the second part, the said tribe was lawfully placed under the exclusive jurisdiction and protection of the Government of the said United States, and that they are now, and will forever remain, under the aforesaid jurisdiction and protection.

II. That from and after the signing of this treaty, hostilities between the contracting parties shall cease, and perpetual peace and friendship shall exist; the said tribe hereby solemnly covenanting that they will not associate with, or give countenance or aid to, any tribe or band of Indians, or other persons or powers, who may

be at any time at enmity with the people of the said United States; that they will remain at peace, and treat honestly and humanely all persons and powers at peace with the said States; and all cases of aggression against said Navajoes by citizens or others of the United States, or by other persons or powers in amity with the said States, shall be referred to the Government of said States for adjustment and settlement.

III. The Government of the said States having the sole and exclusive right of regulating the trade and intercourse with the said Navajoes, it is agreed that the laws now in force regulating the trade and intercourse, and for the preservation of peace with the various tribes of Indians under the protection and guardianship of the aforesaid Government, shall have the same force and efficiency, and shall be as binding and as obligatory upon the said Navajoes, and executed in the same manner, as if said laws had been passed for their sole benefit and protection; and to this end, and for all other useful purposes, the government of New Mexico, as now organized, or as it may be by the Government of the United States, or by the legally constituted authorities of the people of New Mexico, is recognized and acknowledged by the said Navajoes; and for the due enforcement of the aforesaid laws, until the Government of the United States shall otherwise order, the territory of the Navajoes is hereby annexed to New Mexico.

IV. The Navajo Indians hereby bind themselves to deliver to the military authority of the United States in New Mexico, at Santa Fe, New Mexico, as soon as he or they can be apprehended, the murderer or murderers of Micente Garcia, that said fugitive or fugitives from justice may be dealt with as justice may decree.

V. All American and Mexican captives, and all stolen property taken from Americans or Mexicans, or other persons or powers in amity with the United States, shall be delivered by the Navajo Indians to the aforesaid military authority at Jemez, New Mexico, on or before the 9th day of October next ensuing, that justice may be meted out to all whom it may concern; and also all Indian captives and stolen property of such tribe or tribes of Indians as shall enter into a similar reciprocal treaty, shall, in like manner, and for the same purposes, be turned over to an authorized officer or agent of the said States by the aforesaid Navajoes.

VI. Should any citizen of the United States, or other person or persons subject to the laws of the United States, murder, rob, or otherwise maltreat any Navajo Indian or Indians, he or they shall be arrested and tried, and, upon conviction, shall be subjected to all the penalties provided by law for the protection of the persons and property of the people of the said States.

VII. The people of the United States of America shall have free and safe passage through the territory of the aforesaid Indians, under such rules and regulations as may be adopted by authority of the said States.

VIII. In order to preserve tranquility, and to afford protection to all the people and interests of the contracting parties, the Government of the United States of America will establish such military posts and agencies, and authorize such trading-houses, at such time and in such places as the said Government may designate.

IX. Relying confidently upon the justice and the liberality of the aforesaid Government, and anxious to remove every possible cause that might disturb their

peace and quiet, it is agreed by the aforesaid Navajoes that the Government of the United States shall, at its earliest convenience, designate, settle, and adjust their territorial boundaries, and pass and execute in their territory such laws as may be deemed conducive to the prosperity and happiness of said Indians.

X. For and in consideration of the faithful performance of all the stipulations herein contained by the said Navajo Indians, the Government of the United States will grant to said Indians such donations, presents, and implements, and adopt such other liberal and humane measures, as said Government may deem meet and proper.

XI. This treaty shall be binding upon the contracting parties from and after the signing of the same, subject only to such modifications and amendments as may be adopted by the Government of the United States; and, finally, this treaty is to receive a liberal construction, at all times and in all places, to the end that the said Navajo Indians shall not be held responsible for the conduct of others, and that the Government of the United States shall so legislate and act as to secure the permanent prosperity and happiness of said Indians.

In faith whereof, we, the undersigned, have signed this treaty, and affixed thereunto our seals, in the valley of Cheille, this the ninth day of September, in the year of our Lord one thousand eight hundred and forty-nine.

J. M. WASHINGTON, [L. S.]
Brevet Lieutenant-Colonel Commanding.
JAMES S. CALHOUN, [L. S.]
Indian Agent, residing at Santa Fe.

Mariano Martinez, his x mark, [L. S.]
Head Chief,
Chapitone, his x mark, [L. S.]
Second Chief,
J. L. Collins.
James Conklin.
Lorenzo Force.
Antonio Sandoval, his x mark.
Francisco Josto, his x mark.
Governor of Jemez,

Witnesses—
H. L. Kendrick, *Brevet Major U. S. A*.
J. N. Ward, *Brevet* 1*st Lieut.* 3*d Inf'ry*.
John Peck, *Brevet Major U. S. A*.
J. F. Hammond, *Assistant Surg'n U. S. A*.
H. L. Dodge, *Capt. comd'g Eut. Rg's*.
Richard H. Kern.
J. H. Nones, *Second Lieut.* 2*d Artillery*.
Cyrus Choice.
John H. Dickerson, *Second Lieut.* 1*st Art*.
W. E. Love.
John G. Jones.
J. H. Simpson, *First Lieut. Corps Top. Engrs*.

APPENDIX B

Treaty Between the United States of America and the Navajo Tribe of Indians, June 1, 1868, 15 Stat. 668, provides:

ANDREW JOHNSON,

PRESIDENT OF THE UNITED STATES OF AMERICA,

TO ALL AND SINGULAR TO WHOM THESE PRESENTS SHALL COME, GREETING:

WHEREAS a treaty was made and concluded at Fort Sumner, in the Territory of New Mexico, on the first day of June, in the year of our Lord one thousand eight hundred and sixty-eight, by and between Lieutenant-General W. T. Sherman and Samuel F. Tappan, commissioners, on the part of the United States, and Barboncito, Armijo, and other chiefs and headmen of the, Navajo tribe of Indians, on the part of said Indians, and duly authorized thereto by them, which treaty is in the words and figures following, to wit: —

Articles of a treaty and agreement made and entered into at Fort Sumner, New Mexico, on the first day of June, one thousand eight hundred and sixty-eight, by and between the United States, represented by its commissioners, Lieutenant-General W. T. Sherman and Colonel Samuel F. Tappan, of the one part, and the Navajo nation or tribe of Indians, represented by their chiefs and headmen, duly authorized and empowered to act for the whole people of said nation or tribe, (the names of said chiefs and headmen being hereto subscribed,) of the other part, witness: —

ARTICLE I. From this day forward all war between the parties to this agreement shall forever cease. The government of the United States desires peace, and its honor is hereby pledged to keep it. The Indians desire peace, and they now pledge their honor to keep it.

If bad men among the whites, or among other people subject to the authority of the United States, shall commit any wrong upon the person or property of the Indian, the United States will, upon proof made to the agent and forwarded to the Commissioner of Indian Affairs at Washington city, proceed at once to cause the offender to be arrested and punished according to the laws of the United States, and also to reimburse the injured persons for the loss sustained.

If bad men among the Indians shall commit a wrong or depredation among the upon the person or property of any one, white, black, or Indian, subject to the authority of the United States and at peace therewith, the Navajo tribe agree that they will, on proof made to their agent, and on notice by him, deliver up the wrongdoer to the United States, to be tried and punished according to its laws; and in case they willfully refuse so to do, the person injured shall be reimbursed for his loss from the annuities or other moneys due or to become due to them under this treaty, or any others that may be made with the United States. And the President may prescribe such rules and regulations for ascertaining damages under this article as in his judgment may be proper, but no such damage shall be adjusted and paid until examined and passed upon by the Commissioner of Indian Affairs, and no one sustaining loss whilst violating, or because of his violating, the provisions of this treaty or the laws of the United States, shall be reimbursed therefor.

ARTICLE II. The United States agrees that the following district of country, to wit: bounded on the north by the 37th degree of north latitude, south by an east and west line passing through the site of old Fort Defiance, in Cañon Bonito, east by the parallel of longitude which, if prolonged south, would pass through old Fort Lyon, or the Ojo-de-oso. Bear Spring, and west by a parallel of longitude about 109° 30' west of Greenwich, provided it embraces the outlet of the Cañon-de-Chilly, which cañon is to be all included in this reservation, shall be, and the same is hereby, set apart for the use and occupation of the Navajo tribe of Indians, and for such other friendly tribes or individual Indians as from time to time they may be willing, with the consent of the United Who not to States, to admit among them ; and the United States agrees that no persons except those herein so authorized to do, and except such officers, soldiers, agents, and employés of the government, or of the Indians, as may be authorized to enter upon Indian reservations in discharge of duties imposed by law, or the orders of the President, shall ever be permitted to pass over, settle upon, or reside in, the territory described in this article.

ARTICLE III. The United States agrees to cause to be built, at some by point within said reservation, where timber and water may be convenient, the following buildings: a warehouse, to cost not exceeding twenty-five hundred dollars; an agency building for the residence of the agent, not to cost exceeding three thousand dollars; a carpenter shop and blacksmith shop, not to cost exceeding one thousand dollars each; and a school-house and chapel, so soon as a sufficient number of children can be induced to attend school, which shall not cost to exceed five thousand dollars.

ARTICLE IV. The United States agrees that the agent for the Navajos shall make his home at the agency building; that he shall reside among them, and shall keep an office open at all times for the purpose of prompt and diligent, inquiry into such matters of complaint by or against the Indians as may be presented for investigation, as also for the faithful discharge of other duties enjoined by law. In all cases of depredation on person or property he shall cause the evidence to be taken in writing and forwarded, together with his finding, to the Commissioner of Indian Affairs, whose decision shall be binding on the parties to this treaty.

ARTICLE V. If any individual belonging to said tribe, or legally incorporated with it, being the head of a family, shall desire to commence farming, he shall have the privilege to select, in the presence and with the assistance of the agent then in charge, a tract of land within said reservation, not exceeding one hundred and sixty acres in extent, which tract, when so selected, certified, and recorded in the "land book" as herein described, shall cease to be held in common, but the same may be occupied and held in the exclusive possession of the person selecting it, and of his family, so long as he or they may continue to cultivate it.

Any person over eighteen years of age, not being the head of the family, may in like manner select, and cause to be certified to him or her for purposes of cultivation, a quantity of land, not exceeding eighty acres in extent, and thereupon be entitled to the exclusive possession of the same as above directed.

For each tract of land so selected a certificate containing a description thereof, and the name of the person selecting it, with a certificate endorsed thereon that the

same has been recorded, shall be delivered to the party entitled to it by the agent, after the same shall have been recorded by him in a book to be kept in his office, subject to inspection which said book shall be known as the "Navajo Land Book."

The President may at any time order a survey of the reservation, and, when so surveyed, Congress shall provide for protecting the rights of said settlers in their improvements, and may fix the character of the title held by each.

The United States may pass such laws on the subject of alienation and descent of property between the Indians and their descendants as may be thought proper.

ARTICLE VI. In order to insure the civilization of the Indians entering into this treaty, the necessity of education is admitted, especially of such of them as may be settled on said agricultural parts of this reservation, and they therefore pledge themselves to compel their children, male and female, between the ages of six and sixteen years, to attend school; and it is hereby made the duty of the agent for said Indians to see that this stipulation is strictly complied with; and the United States agrees that, for every thirty children between said ages who can be induced or compelled to attend school, a house shall be provided, and a teacher competent to teach the elementary branches of an English education shall be furnished, who will reside among said Indians, and faithfully discharge his or her duties as a teacher.

The provisions of this article to continue for not less than ten years.

ARTICLE VII. When the head of a family shall have selected lands and received his certificate as above directed, and the agent shall be satisfied that he intends in good faith to commence cultivating the soil for a living, he shall be entitled to receive seeds and agricultural implements for the first year, not exceeding in value one hundred dollars, and for each succeeding year he shall continue to farm, for a period of two years, he shall be entitled to receive seeds and implements to the value of twenty-five dollars.

ARTICLE VIII. In lieu of all sums of money or other annuities provided to be paid to the Indians herein named under any treaty or treaties heretofore made, the United States agrees to deliver at the agency house on the reservation herein named, on the first day of September of each year for ten years, the following articles, to wit:

Such articles of clothing, goods, or raw materials in lieu thereof, as the agent may make his estimate for, not exceeding in value five dollars per Indian-each Indian being encouraged to manufacture their own clothing, blankets, etc.; to be furnished with no article which they can manufacture themselves. And, in order that the Commissioner of Indian Affairs may be able to estimate properly for the articles herein named, it shall be the duty of the agent each year to forward to him a full and exact census of the Indians, on which the estimate from year to year can be based.

And in addition to the articles herein named, the sum of ten dollars for each person entitled to the beneficial effects of this treaty shall be annually appropriated for a period of ten years, for each person who engages in

farming or mechanical pursuits, to be used by the Commissioner of Indian Affairs in the purchase of such articles as from time to time the condition and necessities of the Indians may indicate to be proper; and if within the ten years at any time it shall appear that the amount of money needed for clothing, under the article, can be appropriated to better uses for the Indians named herein, the Commissioner of Indian Affairs may change the appropriation to other purposes, but in no event shall the amount of this appropriation be withdrawn or discontinued for the period named, provided they remain at peace. And the President shall annually detail an officer of the army to be present and attest the delivery of all the goods herein named to the Indians, and he shall inspect and report on the quantity and quality of the goods and the manner of their delivery.

ARTICLE IX. In consideration of the advantages and benefits conferred by this treaty, and the many pledges of friendship by the United States, the tribes who are parties to this agreement hereby stipulate that they will relinquish all right to occupy any territory outside their reservation, as herein defined, but retain the right to hunt on any unoccupied lands contiguous to their reservation, so long as the large game may range thereon in such numbers as to justify the chase; and they, the said Indians, further expressly agree:

1st. That they will make no opposition to the construction of railroads now being built or hereafter to be built, across the continent.

2nd. That they will not interfere with the peaceful construction of any railroad not passing over their reservation as herein defined.

3rd. That they will not attack any persons at home or travelling, nor molest or disturb any wagon trains, coaches, mules or cattle belonging to the people of the United States, or to persons friendly therewith.

4th. That they will never capture or carry off from the settlements women or children.

5th. They will never kill or scalp white men, nor attempt to do them harm.

6th. They will not in future oppose the construction of railroads, wagon roads, mail stations, or other works of utility or necessity which may be ordered or permitted by the laws of the United States; but should such roads or other works be constructed on the lands of their reservation, the government will pay the tribe whatever amount of damage may be assessed by three disinterested commissioners to be appointed by the President for that purpose, one of said commissioners to be a chief or head man of the tribe.

7th. They will make no opposition to the military posts or roads now established, or that may be established, not in violation of treaties heretofore made or hereafter to be made with any of the Indian tribes.

ARTICLE X. No future treaty for the cession of any portion or part of the reservation herein described, which may be held in common, shall be of any validity or force against said Indians unless agreed to and executed by at least three-fourths of all the adult male Indians occupying or interested in the same; and no cession by the tribe shall be understood or construed in such manner as to deprive, without his consent, any individual member of the tribe of his rights to any tract of land selected by him as provided in article ___ of this treaty.

ARTICLE XI. The Navajos also hereby agree that at any time after the signing of these presents they will proceed in such manner as may be required of them by the agent, or by the officer charged with their removal, to the reservation herein provided for, the United States paying for their subsistence en route, and providing a reasonable amount of transportation for the sick and feeble.

ARTICLE XII. It is further agreed by and between the parties to this agreement that the sum of one hundred and fifty thousand dollars appropriated or to be appropriated shall be disbursed as follows, subject to any conditions provided in the law, to wit:

1st. The actual cost of the removal of the tribe from the Bosque Redondo reservation to the reservation, say fifty thousand dollars.

2nd. The purchase of fifteen thousand sheep and goats, at a cost not to exceed thirty thousand dollars.

3rd. The purchase of five hundred beef cattle and a million pounds of corn, to be collected and held at the military post nearest the reservation, subject to the orders of the agent, for the relief of the needy during the coming winter.

4th. The balance, if any, of the appropriation to be invested for the maintenance of the Indians pending their removal, in such manner as the agent who is with them may determine.

5th. The removal of this tribe to be made under the supreme control and direction of the military commander of the Territory of New Mexico, and when completed, the management of the tribe to revert to the proper agent.

ARTICLE XIII. The tribe herein named, by their representatives, parties to this treaty, agree to make the reservation herein described their permanent home, and they will not as a tribe make any permanent settlement elsewhere, reserving the right to hunt on the lands adjoining the said reservation formerly called theirs, subject to the modifications named in this treaty and the orders of the commander of the department in which said reservation may be for the time being; and it is further agreed and understood by the parties to this treaty, that if any Navajo Indian or Indians shall leave the reservation herein described to settle elsewhere, he or they shall forfeit all the rights, privileges, and annuities conferred by the terms of this treaty; and it is further agreed by the parties to this treaty, that they will do all they can to induce Indians now away from reservations set apart for the exclusive use and occupation of the Indians, leading a nomadic life, or engaged in war against the people of the United States, to abandon such a life and settle permanently in one of the territorial reservations set apart for the exclusive use and occupation of the Indians.

In testimony of all which the said parties have hereunto, on this the first day of June, eighteen hundred and sixty-eight, at Fort Sumner, in the Territory of New Mexico, set their hands and seals.

W. T. SHERMAN
Lt. Gen'l, Indian Peace Commissioner.
S. F. TAPPAN,
Indian Peace Commissioner.

BARBONCITO, Chief.	his x mark.
ARMIJO.	his x mark.
DELGADO. MANUELITO.	his x mark.
LARGO.	his x mark.
HERRERO.	his x mark.
CHIQUETO.	his x mark.
MUERTO DE HOMBRE.	his x mark.
HOMBRO.	his x mark.
NARBONO.	his x mark.
NARBONO SEGUNDO.	his x mark.
GANADO MUCHO.	his x mark.
Council.	
RIQUO.	his x mark.
JUAN MARTIN.	his x mark.
SERGINTO.	his x mark.
GRANDE.	his x mark.
INOETENITO.	his x mark.
MUCHACHOS MUCHO.	his x mark.
CHIQUETO SEGUNDO.	his x mark.
CABELLO AMARILLO.	his x mark.
FRANCISCO.	his x mark.
TORIVIO.	his x mark.
DESDENDADO.	his x mark.
JUAN.	his x mark.
GUERO.	his x mark.
GUGADORE.	his x mark.
CABASON.	his x mark.
BARBON SEGUNDO.	his x mark.
CABARES COLORADOS.	his x mark.

Attest:

GEO. W. G. GETTY,
Col. 37th Inf'y, Bt. Maj. Gen'l U.S.A.

B.S. ROBERTS,
Bt. Brg. Gen't U. S. A., Lt. Col. 3rd Cav'y.

J. COOPER MCKEE,
Bt. Lt. Col. Surgeon U.S.A.

THEO. H. DODD,
U.S. Indian Ag't for Navajos.

CHAS. MCCLURE,
Bt. Maj. and C.S. U.S.A.

JAMES F. WEEDS,
Bt. Maj. and Asst. Surg. U.S.A.

J.C. SUTHERLAND,
Interpreter.

WILLIAM VAUX,
Chaplain U.S.A.

And whereas, the said treaty having been submitted to the Senate of the United States for its constitutional action thereon, the Senate did, on the twenty-fifth day of July, one thousand eight hundred and sixty-eight, advise and consent to the ratification of the same, by a resolution in the words and figures following, to wit:

In Executive Session, Senate of the United States,
July 25, 1868.

Resolved, (two-thirds of the senators present concurring,) That the Senate advise and consent to the ratification of the treaty between the United States and the Navajo Indians, concluded at Fort Sumner, New Mexico, on the first day of June, 1868.

Attest:

GEO. C. GORHAM,
Secretary,

By W. J. McDONALD,
Chief Clerk.

Now, therefore, be it known that I Andrew Johnson, President of the United States of America, do, in pursuance of the advice and consent of the Senate, as expressed in its resolution of the twenty-fifth of July, one thousand eight hundred and sixty-eight, accept, ratify, and confirm the said treaty.

In testimony whereof, I have hereto signed my name, and caused the seal of the United States to be affixed.

Done at the City of Washington, this twelfth day of August, in the year of our Lord one thousand eight hundred and sixty-eight, and of the Independence of the United States of America the ninety-third.

ANDREW JOHNSON

By the President:

W. Hunter,

Acting Secretary of State.

APPENDIX C

1. Section 1 of the Boulder Canyon Project Act, 43 U.S.C. 617, provides:

Colorado River Basin; protection and development; dam, reservoir, and incidental works; water, water power, and electrical energy; eminent domain

For the purpose of controlling the floods, improving navigation, and regulating the flow of the Colorado River, providing for storage and for the delivery of the stored waters thereof for reclamation of public lands and other beneficial uses exclusively within the United States, and for the generation of electrical energy as a means of making the project herein authorized a self-supporting and financially solvent undertaking, the Secretary of the Interior subject to the terms of the Colorado River compact hereinafter mentioned in this chapter, is authorized to construct, operate, and maintain a dam and incidental works in the main stream of the Colorado River at Black Canyon or Boulder Canyon adequate to create a storage reservoir of a capacity of not less than twenty million acre-feet of water and a main canal and appurtenant structures located entirely within the United States connecting the Laguna Dam, or other suitable diversion dam, which the Secretary of the Interior is authorized to construct if deemed necessary or advisable by him upon engineering or economic considerations, with the Imperial and Coachella Valleys in California, the expenditures for said main canal and appurtenant structures to be reimbursable, as provided in the reclamation law, and shall not be paid out of revenues

derived from the sale or disposal of water power or electric energy at the dam authorized to be constructed at said Black Canyon or Boulder Canyon, or for water for potable purposes outside of the Imperial and Coachella Valleys: *Provided*, *however*, That no charge shall be made for water or for the use, storage, or delivery of water for irrigation or water for potable purposes in the Imperial or Coachella Valleys; also to construct and equip, operate, and maintain at or near said dam, or cause to be constructed, a complete plant and incidental structures suitable for the fullest economic development of electrical energy from the water discharged from said reservoir; and to acquire by proceedings in eminent domain, or otherwise, all lands, rights-of-way, and other property necessary for said purposes.

2. Section 5 of the Boulder Canyon Project Act, 43 U.S.C. 617d, provides:

Contracts for storage and use of waters for irrigation and domestic purposes; generation and sale of electrical energy

The Secretary of the Interior is authorized, under such general regulations as he may prescribe, to contract for the storage of water in said reservoir and for the delivery thereof at such points on the river and on said canal as may be agreed upon, for irrigation and domestic uses, and generation of electrical energy and delivery at the switchboard to States, municipal corporations, political subdivisions, and private corporations of electrical energy generated at said dam, upon charges that will provide revenue which, in addition to other revenue accruing under the reclamation law and under this

subchapter, will in his judgment cover all expenses of operation and maintenance incurred by the United States on account of works constructed under this subchapter and the payments to the United States under subsection (b) of section 617c of this title. Contracts respecting water for irrigation and domestic uses shall be for permanent service and shall conform to subsection (a) of section 617c of this title. No person shall have or be entitled to have the use for any purpose of the water stored as aforesaid except by contract made as herein stated.

After the repayments to the United States of all money advanced with interest, charges shall be on such basis and the revenues derived therefrom shall be kept in a separate fund to be expended within the Colorado River Basin as may hereafter be prescribed by the Congress.

General and uniform regulations shall be prescribed by the said Secretary for the awarding of contracts for the sale and delivery of electrical energy, and for renewals under subsection (b) of this section, and in making such contracts the following shall govern:

(a) Duration of contracts for electrical energy; price of water and electrical energy to yield reasonable returns; readjustments of prices

No contract for electrical energy or for generation of electrical energy shall be of longer duration than fifty years from the date at which such energy is ready for delivery.

Contracts made pursuant to subsection (a) of this section shall be made with a view to obtaining reasonable returns and shall contain provisions whereby at the

end of fifteen years from the date of their execution and every ten years thereafter, there shall be readjustment of the contract, upon the demand of either party thereto, either upward or downward as to price, as the Secretary of the Interior may find to be justified by competitive conditions at distributing points or competitive centers, and with provisions under which disputes or disagreements as to interpretation or performance of such contract shall be determined either by arbitration or court proceedings, the Secretary of the Interior being authorized to act for the United States in such readjustments or proceedings.

(b) Renewal of contracts for electrical energy

The holder of any contract for electrical energy not in default thereunder shall be entitled to a renewal thereof upon such terms and conditions as may be authorized or required under the then existing laws and regulations, unless the property of such holder dependent for its usefulness on a continuation of the contract be purchased or acquired and such holder be compensated for damages to its property, used and useful in the transmission and distribution of such electrical energy and not taken, resulting from the termination of the supply.

(c) Applicants for purchase of water and electrical energy; preferences

Contracts for the use of water and necessary privileges for the generation and distribution of hydroelectric energy or for the sale and delivery of electrical energy shall be made with responsible applicants therefor who will pay the price fixed by the said Secretary with a

view to meeting the revenue requirements herein provided for. In case of conflicting applications, if any, such conflicts shall be resolved by the said Secretary, after hearing, with due regard to the public interest, and in conformity with the policy expressed in the Federal Power Act as to conflicting applications for permits and licenses, except that preference to applicants for the use of water and appurtenant works and privileges necessary for the generation and distribution of hydroelectric energy, or for delivery at the switchboard of a hydroelectric plant, shall be given, first, to a State for the generation or purchase of electric energy for use in the State, and the States of Arizona, California, and Nevada shall be given equal opportunity as such applicants.

The rights covered by such preference shall be contracted for by such State within six months after notice by the Secretary of the Interior and to be paid for on the same terms and conditions as may be provided in other similar contracts made by said Secretary: Provided, however, That no application of a State or a political subdivision for an allocation of water for power purposes or of electrical energy shall be denied or another application in conflict therewith be granted on the ground that the bond issue of such State or political subdivision necessary to enable the applicant to utilize such water and appurtenant works and privileges necessary for the generation and distribution of hydroelectric energy or the electrical energy applied for, has not been authorized or marketed, until after a reasonable time, to be determined by the said Secretary, has been given to such applicant to have such bond issue authorized and marketed.

(d) Transmission lines for electrical energy; use; rights of way over public and reserved lands

Any agency receiving a contract for electrical energy equivalent to one hundred thousand firm horsepower, or more, may, when deemed feasible by the said Secretary, from engineering and economic considerations and under general regulations prescribed by him, be required to permit any other agency having contracts hereunder for less than the equivalent of twenty-five thousand firm horsepower, upon application to the Secretary of the Interior made within sixty days from the execution of the contract of the agency the use of whose transmission line is applied for, to participate in the benefits and use of any main transmission line constructed or to be constructed by the former for carrying such energy (not exceeding, however, one-fourth the capacity of such line), upon payment by such other agencies of a reasonable share of the cost of construction, operation, and maintenance thereof.

The use is authorized of such public and reserved lands of the United States as may be necessary or convenient for the construction, operation, and maintenance of main transmission lines to transmit said electrical energy.

APPENDIX D

Federal Appellees' Petition for Rehearing En Banc p. 3: