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.,

Respondents.

DEPARTMENT OF THE INTERIOR, et al.,

Petitioners,

v.

NAVAJO NATION, et al.,

Respondents.

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

BRIEF FOR DINÉ HATAAŁII ASSOCIATION, INC. AS *AMICUS CURIAE* IN SUPPORT OF RESPONDENTS

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INTERESTS OF THE *AMICUS CURIAE*

Established in the 1970s, *Amicus* Diné Hataałii Association, Inc.[1] is a 501(c)(3) nonprofit organization, comprised of over 200 *Diné*[2] medicine men and women from across the Navajo Reservation, that exists to protect, preserve, and promote the *Diné* cultural wisdom, spiritual practice, and ceremonial knowledge for present and future generations. The Association is certified and incorporated under the auspices of the Navajo Nation Division of Economic Development business regulatory process and is overseen by a board of directors from each of the five geographic regions of the Navajo Nation. *Amicus* is uniquely situated to inform the Court about traditional *Diné* worldviews and laws, particularly as related to interpreting treaties between the United States and the Navajo Nation and how the implicit promise of water in the Navajo Nation's 1868 treaty with the United States compels the relief sought in this case—the United States' obligations to plan for and protect the water for the treaty homelands.

[1] Pursuant to this Court's Rule 37.6, counsel for *amicus curiae* certify that no person or entity other than *amicus curiae* and their counsel authored this brief in whole or in part. No person other than *amicus curiae* or their counsel made a monetary contribution to its preparation or submission of the brief.

[2] Navajos refer to themselves as "Diné," which means "the people" in their language. Navajo and Diné will be used interchangeably throughout this brief.

SUMMARY OF ARGUMENT

Amicus endeavors to provide the Court with critical information about *Diné* worldviews and traditional Navajo law, also known as *Diné bi beehaz'áanii*. An understanding of traditional Navajo law, which has existed since time immemorial and is still intact today, will help inform how Navajo signatories would have understood the Navajo Nation's treaties with the United States. *Amicus* will explain how traditional Navajo law governs *Diné* relationships generally with the surrounding elements—water, air, fire, and land, and how traditional Navajo law generally seeks balance and harmony, while also addressing inevitable conflict and resolution. *Amicus* will also explain the importance of critical thinking and planning in traditional *Diné* culture.

An understanding of traditional Navajo law is necessary to comprehend, from a Navajo perspective, the effects of the imprisonment of Navajo people by the United States at Bosque Redondo between the years 1864 and 1868. Traditional Navajo law will help inform the Court on how the Navajo signatories would have understood the sacred promises and responsibilities agreed to by the United States in signing the 1868 treaty.

Amicus will explain how these traditional Navajo laws provide the foundation of modern day *Diné bi beehaz'áanii* ("Navajo law") and have been in continuous use since the time of signing the treaties. *Amicus* will further explain how the Navajo Nation's requested

relief sought in this case—affirmative and judicially enforceable duties on the part of the United States to plan for the Navajo Nation's water needs—is consistent with traditional Navajo laws, whereas the result requested by Petitioners in this case would lead to disharmony and disparate treatment under this Court's precedent.

Specific to the underlying element in this case, *tó* ("water"), *Amicus* suggests that the United States' obligations are clear under both traditional Navajo law and under this Court's *Winters* doctrine. Federal duties that attach themselves to Navajo treaties and *Winters* rights must be viewed through this traditional lens, which is consistent with this Court's unwavering precedent.

ARGUMENT

I. THE NAVAJO NATION'S TREATIES MUST BE INTERPRETED HOW THE NAVAJO NATION WOULD HAVE UNDERSTOOD THEM.

In the mid-1800s, the United States exercised its treaty powers, under Article II, Section 2 of the U.S. Constitution, to enter into binding agreements with numerous Indian tribes, including the Navajo Nation. These treaties helped pave the way for non-Indian settlement across the western United States, and resulted in large swaths of federal landholdings west of the 100th Meridian. *See*, *e.g.*, National Park Service,

Policy Mem. No. 22-03, at 2 (Sept. 12, 2022), https://www.nps.gov/subjects/policy/upload/PM_22-03.pdf. Importantly, the Framers determined that "all Treaties made . . . under the Authority of the United States, shall be the supreme Law of the Land." U.S. CONST. art. VI, cl. 2. The United States bound itself to unique promises and responsibilities in exchange for tribes ceding extensive landholdings and remaining on smaller land parcels (often, but not always known as "Reservations"). *See generally* Charles J. Kappler, *Kappler's Indian Affairs: Laws and Treaties Compiled and Edited by Charles J. Kappler*, Vol. II (1904). In reviewing Indian treaties, this Court has said, "Treaty analysis begins with the text, and treaty terms are construed as 'they would naturally be understood by the Indians.'" *Herrera v. Wyoming*, 139 S.Ct. 1686, 1701 (2019) (quoting *Washington v. Washington State Commercial Passenger Fishing Vessel Ass'n* ("*Fishing Vessel*"), 443 U.S. 658, 676 (1979)).

In reviewing and interpreting Indian treaties, this Court has said that treaties may best be understood by the circumstances surrounding their negotiation and execution. *United States v. Winans*, 198 U.S. 371, 381 (1905). This Court has also held consistently that Indian treaties "are to be interpreted liberally in favor of the Indians," *Minnesota v. Mille Lacs Band of Chippewa Indians*, 526 U.S. 172, 200 (1999) (citing *Fishing Vessel*, 443 U.S. at 675–76; *Choctaw Nation v. United States*, 318 U.S. 423, 432 (1943)), and that "ambiguities are to be resolved in their favor." *Id.* (citing *Winters v. United States*, 207 U.S. 564, 576–77 (1908)). More

recently, in *Washington State Department of Licensing v. Cougar Den, Inc.*, this Court explained the Indian treaty interpretation cases "base their reasoning in part upon the fact that the treaty negotiations were conducted in, and the treaty was written in, languages that put the [Indians] at a significant disadvantage." 139 S.Ct. 1000, 1012 (2019); *see also Fishing Vessel*, 443 U.S. at 666–67 (explaining "[t]here is no evidence of the precise understanding the Indians had of any of the specific English terms and phrases in the treaty . . . ", but they were interested in protecting their right to fish, and that they "rel[ied] heavily on the good faith of the United States to protect that right"). This Court's Indian treaty interpretation precedent must guide its review of the Navajo Nation's treaties with the United States.

A. History of the Navajo Nation's Treaties with the United States.

Two treaties between the Navajo Nation and the United States are pertinent to this case—one in 1849 and another in 1868. In 1849, the Navajo Nation entered into a treaty with the United States establishing a robust trust responsibility "plac[ing] [the Navajo Nation] under the exclusive jurisdiction and protection of the . . . United States[,] . . . forever." *See* Treaty with the Navajos, Concluded Sept. 9, 1849, Ratified Sept. 9, 1850, Proclaimed Sept. 24, 1850, 9 Stat. 974, art. I ("1849 Treaty"). The 1849 Treaty included a plan to delineate future boundaries for the Navajo Nation's permanent homeland. *Id*. at art. IX ("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."). The 1849 Treaty is "to receive a liberal construction, at all times and in all places, . . . and that the government of the United States shall so legislate and act as to secure the permanent prosperity and happiness of [the Navajo Nation]." *Id*. at art. XI.

In 1868, nearly two decades later, while imprisoned under deplorable conditions on the Bosque Redondo Reservation at Fort Sumner, New Mexico, the Navajo Nation entered into another treaty with the United States. Treaty Between the United States of America and the Navajo Tribe of Indians, Concluded June 1, 1868, Ratification advised July 25, 1868, Proclaimed Aug. 12, 1868, 15 Stat. 668 ("1868 Treaty"). The 1868 Treaty delineated the Navajo Reservation's boundaries and was designed to entice farming by Navajo families on plots of land "not [to exceed] one hundred sixty acres," and by individual adult Navajos on plots of land "[not exceeding] eighty acres." *Id*. at art. V. The United States also agreed to purchase "fifteen thousand sheep and goats," and "five hundred beef cattle" to better encourage an agrarian lifestyle. *Id*. at art. XII. Upon these promises, among others, the Navajo Nation agreed "to make [the Navajo Reservation] their permanent home, and [that] they [would] not as a tribe make any permanent settlement elsewhere." *Id*. at art. XIII.

The 1868 Treaty was negotiated between the United States and the Navajo Nation using two interpreters—one fluent in the Navajo language and Spanish, the other fluent in Spanish and English. John L. Kessell, *General Sherman and the Navajo Treaty of 1868: A Basic and Expedient Misunderstanding*, 12 W. Hist. Q. 251, 261–66 (Jul. 1981) (describing the dual translation process of negotiating the Reservation boundaries provisions of the 1868 Treaty, first from English to Spanish with one interpreter, James C. Sutherland; then from Spanish to Navajo via another interpreter, Jesus Arviso.). Similar to the circumstances surrounding the *Fishing Vessel* decision, the Navajo signatories lacked a "precise understanding . . . of the specific English terms and phrases in the treaty," but it is clear from records of the negotiation that they bargained for a return to their traditional homelands—to live within their four sacred mountains and their rivers and streams.

This trilingual negotiation process resulted in a colossal misunderstanding of the Reservation boundaries, with the United States relying on its description of metes and bounds, and the Navajo relying on promises that they could return "home." *General Sherman and the Navajo Treaty of 1868: A Basic and Expedient Misunderstanding*, 12 W. Hist. Q. at 261. As a result, "[i]n 1869, the year after the Navajos' return from the Bosque, a concerned army officer estimated that half of the tribe was outside treaty boundaries." *Id*. at 271. The Navajo had returned to their traditional homelands and continued their lifeways planting crops,

grazing cattle and sheep, and migrating within their homelands. From this point, the federal government consistently chose not to enforce the boundary lines for several reasons, "because the government was able to renege both treaty and trust obligations, to spend less per capita on the Navajos than on practically any other tribe, to save the tens of millions of dollars it would have cost over the years to confine and to subsist them, or to educate them (per Article VI) and wisely develop the resources of the reservation." *Id*. Congress finally resolved the border question with legislation "defining the exterior boundaries of the Navajo Reservation in Utah and in Arizona." in the 1930s. *Id*. at 272.

B. The Navajo Nation's *Winters* Rights.

When the United States establishes an Indian reservation, "the Government, by implication, reserves appurtenant water then unappropriated to the extent needed to accomplish the purpose of the Reservation." *Navajo Nation v. Dep't of Interior, et al.*, D.C. No. 3:03-cv-00507-GMS at 10 (9th Cir. 2021) (citing *Cappaert v. United States*, 426 U.S. 128, 138 (1976); *see also Winters v. United States*, 207 U.S. at 576. This Court has described the ancestral homelands of the Navajo people as "arid," reasoning "[i]f the water necessary to sustain life is to be had, it must come from the Colorado River or its tributaries." *Arizona v. California*, 373 U.S. 546, 598–99 (1963).

The multiple provisions in the 1868 Treaty encouraging an agrarian society discussed above, coupled

with the forced farming activities Navajo people were subjected to while imprisoned in Bosque Redondo make clear that the United States intended to secure ample water resources for the Navajo Nation's permanent homeland. *See*, *e.g.*, Bernhard Michaelis, *The Navajo Treaty of 1868*, at 131 (Navajo Historical Ser. No. 4, 2014) (Sept. 6, 1863 letter from Brigadier General James Carleton to Brigadier General Lorenzo Thomas stating, "[t]he purpose had in view is to send all captured Navajoes and Apaches to [Bosque Redondo], and there to feed and take care of them until they have opened farms and become able to support themselves, as the Pueblo Indians of New Mexico are doing"). Indeed, the 1868 Treaty negotiations included specific discussions about the poor water quality in Bosque Redondo when compared to the Navajo peoples' ancestral homelands. Treaty Between the United States of America and the Navajo Tribe of Indians, With a Record of the Discussions that Led to its Signing, 3, Aug. 12, 1868 (1968) [hereafter *1868 Treaty with Record of the Discussions*] ("I thought at one time the whole world was the same as my own country but I got fooled in it, outside my own country we cannot raise a crop, but in it we can raise a crop almost anywhere, . . . we know this land does not like us neither does the water.").

Moreover, the Department of the Interior recently acknowledged that "under the *Winters* doctrine, the federal government impliedly 'reserved water in an amount necessary to fulfill the purposes of [the Navajo Reservation]'", and that "[u]nquantified water rights

of the Navajo Nation are considered an ITA [(Indian Trust Asset)]." *Navajo Nation v. Dep't of Interior, et al.*, D.C. No. 3:03-cv-00507-GMS, at 14 (citing *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)) [hereinafter *Shortage Guidelines FEIS*]. Generally, the federal government considers *Winters* rights as "vested property rights for which the United States has a trust responsibility." Department of the Interior, *Criteria and Procedures for Indian Water Rights Settlements*, 55 Fed. Reg. 9223 (Mar. 12, 1990). Along with lands set aside under Indian treaties, "the United States [holds] legal title to such water in trust for the benefit of the Indians." *Id.* To understand how the Navajo would have understood these express treaty provisions and the established implicit promise of water that accompanies them, *Amicus* will next explain selected aspects of traditional Navajo law.

II. THE NAVAJO NATION'S UNDERSTANDING OF ITS TREATIES IS GOVERNED BY PRE-EXISTING TRADITIONAL NAVAJO LAW.

Amicus will now discuss traditional laws regarding balance and disharmony, cultural perspectives about the circumstances surrounding the signing of the 1868 Treaty, and traditional *Diné* principles governing the importance of critical thinking and planning in Navajo culture. These principles are paramount in discerning how the treaty signatories

would have viewed the 1868 Treaty and how the relief sought by the Navajo Nation in this matter is consistent with those views as detailed further below.

A. Traditional Navajo Law Regarding Balance and Disharmony, and the 1868 Treaty.

The starting point to understand the Navajo way of thinking is *hózhǫ́*, or *Diné* peoples' balance with the world around them. All *Diné* lifeways are governed by *hózhǫ́*, described as "the perfect state." Robert Yazzie, "*Life Comes From It": Navajo Justice Concepts*, 24 N.M. L. Rev. 175 (1994); *see also* Raymond D. Austin, *Navajo Courts and Navajo Common Law* 54 (2009) [hereinafter Austin] (stating "*hózhǫ́* describes a state . . . where everything, tangible and intangible, is in its proper place and functioning well with everything else, such that the condition produced can be described as peace, harmony, and balance"); Declaration of Roman Bitsuie, ¶5 (Jan. 30, 2023), http://bit.ly/romanbitsuie (describing *hózhǫ́* as both "to achieve a state of beauty by attaining a state of balance," and as "a holy condition to be strived for and sought after for one's entire life"). Thus, Navajos are taught to live according to *hózhǫ́*, "because it embodies everything that is considered good." Austin at 55.

At times, *Diné* encounter the opposite of *hózhǫ́*—*hóchxǫ'*, or disharmony, caused by *naayéé'* ("monsters"). *Naayéé'* can be "anything that causes disharmony, friction, or discord in life." *Id.* at 60–61. By way of analogy,

the conflicts that underlie certain matters before this Court often have their own *naayéé'*, and the parties involved in those matters often seek restoration of their respective *hózhǫ́* through this Court's constitutional jurisdiction. Importantly, *Diné* lifeways also provide processes to eliminate *naayéé'* through ceremonies intended to restore *hózhǫ́*. *See* Yazzie, *Life Comes From It*, 24 N.M. L. Rev. at 181–82. Different ceremonies are conducted to restore *hózhǫ́* depending on the circumstances and the nature of the *naayéé'*. *Id.*

In 1864, "more than 7,000 Navajo men, women, and children were driven like cattle across the barren, mesquite-studded plains of New Mexico to Fort Sumner, where a reservation held them prisoners for . . . four years of hardships, disease, and near starvation." Marie Mitchell, *The Navajo Peace Treaty 1868* ix (1973). This experience is collectively referred to among the *Diné* as *Hwéeldi* ("a place of suffering and fear") and it was here that the 1868 Treaty was negotiated and signed.

The Navajo imprisonment at *Hwéeldi* was an environment of *hóchxǫ'*, or disharmony, embodied by the worst *naayéé'* ("monsters") Navajo people have endured in modern times. The 1868 Treaty and the United States' promises therein are predicated, from a *Diné* perspective, on efforts to restore *hózhǫ́*. Circumstances like *Hwéeldi*, where an abundance of *naayéé'* contribute toward a state of *hóchxǫ'*, require a regimented corrective process under *Diné bi beehaz'áanii* ("Navajo law"). The traditional problem-solving process is described as follows:

> (1) the *hózhǫ́* condition exists; (2) negative forces called *naayéé'* ("monsters") disrupt the *hózhǫ́* condition, resulting in *hóchxǫ'* (disharmony); (3) the negative forces (*naayéé'*) are identified/isolated and then matched to a specific ceremony; (4) the ceremony expels or neutralizes the negative forces; and (5) the ceremony returns things and beings (humans included) to *hózhǫ́*. . . . The end result is called *hózhǫ́ nahasdłii* (*hózhǫ́* restored).

Austin at 61. The historical record of activities preceding the signing of the 1868 Treaty evidence *Diné* leaders adhering to this process before agreeing to the 1868 Treaty.

In this instance, elements (1) and (2) are respectively pre-*Hwéeldi* and *Hwéeldi*. Predicting the devastation to come in Bosque Redondo, "[a]s early as 1865, the Indians . . . warn[ed] that if they were forced to remain upon the reservation [at Bosque Redondo] they would 'all die very soon.' They explained that they had been instructed by their Holy People to remain within the boundaries of three rivers, the Rio Grande, the Rio San Juan, and the Rio Colorado, and that their violation of this restriction was responsible for their current suffering." Katherine Marie Birmingham Osburn, *The Navajo at the Bosque Redondo: Cooperation, Resistance, and Initiative, 1864-1868*, 60 N.M. Hist. Rev. 399, 407–08 (1985). Barboncito, a spiritual leader and the Head Chief of the Navajos when the 1868 Treaty was signed, attributed the despair inflicted on Navajo people to the removal from their homeland which went against their forefathers advice to not "cross[ ] the line

of my own country." *1868 Treaty with Record of the Discussions*, at 1-3. He observed that the forced imprisonment and harsh conditions at Bosque Redondo resulted in death of both people and animals. "It seems that whatever we do here causes death, some work at the Acequias take sick and die, others die with the hoe in their hands, they go to the river to their waists and suddenly disappear, others have been struck and torn to pieces by lightning." *Id*. The impact of *Hwéeldi* continues to be felt today and is credited as the beginning of many current social plagues within the Navajo community. Interview with Avery Denny, President, Diné Hataałii Association, Inc. ("Denny Interview") (Dec. 17, 2022) (on file with the author). With respect to elements (3) and (4), Navajo historians recount the performance of a Coyote Way ceremony after the first day negotiating the 1868 Treaty. Austin, at 5 (describing that "[a] group stood away from the [treaty] negotiations, and while the Coyote way chants were sung, a coyote entered the circle. He ran around inside it, and at one point during the chant, he broke the circle and ran to the west. That was an indication that Navajos would return west, back to *Diné Bikeyah* (Navajo country), rather than to the east and Indian Territory"). The purpose of the Coyote Way ceremony was to restore *hózhǫ́* and effectuate the release of Navajo people back to their homeland.

"Although some informants claimed that the ritual was divinatory, indicating that the government was now ready to free the Navajo, other Navajos attributed their freedom to this ceremony" because their

request to leave was not granted until the Coyote Way ceremony was performed. Osburn at 408 (Adding, "[t]o this day, some Navajo believe that, ultimately, their Holy People, not the United States government, returned them to their current reservation."). The 1868 Treaty, from a *Diné* perspective, is therefore a sacred document, referred to as *Naaltsoos Sání* ("the paper that is aged"), which the treaty signatories believed was intended to restore *hózhǫ́*. In fact, "[t]he Navajo people see the [1868 Treaty] as equal to their covenant with the Holy Beings: both are binding sacred agreements that must be respected and honored continuously and in perpetuity." Austin at 6; *see also Office of Navajo Nation President and Vice-President v. Navajo Nation Council*, 9 Am. Tribal Law 46, 60 (Nav. Sup. Ct. 2010) (stating, "there is a Navajo higher law in fundamental customs and traditions, *as well as substantive rights found in the Treaty of 1868*, the Navajo Nation Bill of Rights, the Judicial Reform Act of 1985, and the Title Two Amendments of 1989") (emphasis added). It follows that the Navajo 1868 Treaty signatories would have believed the United States felt the same. Indeed, as mentioned earlier, the U.S. Constitution deems the 1868 Treaty and other treaties, "the supreme Law of the Land." U.S. CONST. art. VI, cl. 2.

B. *Diné* Thinking and Planning in Finding Solutions.

In *Diné* culture, binding agreements between parties create implied directives—much like the *Winters* doctrine recognizes an implied right to water for

federal reservations. Put another way, it is not enough to promise something—"leaders are required to . . . [actively] seek solutions to problems," Bitsuie Decl. ¶6, such as securing water resources. *Diné* believe that "every word is powerful, sacred, and never frivolous," and that every provision of an agreement must be given force and effect. *Off. of Navajo Lab. Rels., ex rel. Bailon v. Cent. Consol. Sch. Dist. 22*, No. SC-CV-37-00, 5 Am. Tribal Law 412, 415 (Nav. Sup. Ct. 2004). To effectuate this, the traditional process for fulfilling obligations and/or finding solutions includes four steps: (1) *Nitsáhákees* ("thinking"), (2) *Nahat'a* ("planning"), (3) implementation, and (4) "reflection on the results with improvements as necessary." Bitsuie Decl. ¶6.

Nitsáhákees ("thinking") and *Nahat'a* ("planning"), steps one and two, work together closely with the former informing the latter. *Id.* (Describing *Nitsáhákees* ("thinking") as "the process of gathering the insights of everyone involved in an issue or a problem."). Importantly, in *Nitsáhákees*, "leaders seek to facilitate a balanced solution that . . . [respects] . . . all positions and needs, and is recognized by participants as egalitarian." *Id*. *Nitsáhákees* "involves critical thinking, and more broadly, to give direction and guidance to the issue at hand, in a constant cycle of examining and analyzing issues for growth and development." 2 Navajo Nation Code ("N.N.C.") § 110(q).

Nahat'a ("planning") is the result of *Nitsáhákees* ("thinking") and intended to "craft the details of a solution that puts a toe on every stone in the creek to get across." Bitsuie Decl. ¶6; *see also* 2 N.N.C. § 110(p)

(describing *Nahat'a* as "to strategically plan while utilizing *Diné bi beehaz'áanii Bitsé Siléá* (foundation of *Diné* law), statutory laws, informed research and public input (through use of the *Naabik'áyáti* process) in a constant cycle of examining and analyzing issues for growth and development").

The Navajo Nation's government is built upon the thinking and planning that derive from traditional law, customary law, natural law, and common law. *See*, *e.g.*, 1 N.N.C. § 202 ("*Diné bi nahat'a* [("Navajo planning")] is the foundation of the *Diné bi naat'á* (Navajo government)"); *see also* Robert Yazzie, Avery Denny, Lorene Legah, Amber Crotty, James McKenzie, *Diné Good Governance and Leadership Framework* (2014), https://www.aisc.ucla.edu/gng/posters/amber.crotty.poster.pdf. (stating, "*Nahat'a Bibee Haz'áanii Bitsé siléí Bee Na'anish*," or "the principles of *Nahat'a* [("Navajo planning")] constitute the foundation of good Navajo governance."). Steps three and four, implementation and "reflection on the results with improvements as necessary," Bitsuie Decl. ¶6, are intended to ensure the planned solution remains fluid to account for change in circumstances or unintended consequences that need to be addressed. This is because "Participatory Democracy" is the foundation of "Navajo Governance," Bitsuie Decl. ¶4, and requires that "persons who have positions of authority through government roles, wealth, situational power, or other circumstances, have an unequivocal duty to steward the rights and needs of those who are not in the room." *Id.*

The Navajo Nation has used *Nitsáhákees* ("thinking") and *Nahat'a* ("planning") effectively to meet the needs of its communities. Since the signing of the 1868 Treaty, "the BIA has been largely responsible for the design, implementation, and maintenance of reservation infrastructure that includes roads, housing, utilities, and facilities." Michelle Hale, *Empowered Sovereignty for Navajo Chapters Through Engagement in a Community Planning Process*, *in* Navajo Sovereignty, Understandings and Visions of the Diné People 135 (Lloyd L. Lee ed. 2017). In 1975, the Indian Self-Determination and Education Assistance Act ("ISDEAA") authorized the Navajo Nation to contract for the authority to plan and implement the use of certain federal funds, thus allowing the incorporation of traditional thinking and planning into tribal infrastructure. An ISDEAA contract was used to plan and help build the Tsehootsooi Medical Center in Fort Defiance as a result. *Id.* Cliff Johns, a Navajo architect working under this ISDEAA contract, "consulted with Navajo traditional leaders to create a patient-based facility where healing benefits mind, body, and spirit." *Id*. The "$18 million dollar, 43,000 square-foot facility" also includes a space where traditional ceremonies may be conducted. *Id*. at 135–36. "The hope is that Navajo patients and doctors will recognize their cultural identity in the facility, feel a sense of ownership in the space and use it as a comfortable and powerful place for healing." *Id.* at 136. The Tsehootsooi Medical Center reflects but one example of proper *Nitsáhákees* ("thinking") and *Nahat'a* ("planning") in Navajo governance. Correlatively, *Diné* worldviews suggest that

the foundation of good federal governance is also *Nahat'a* ("planning"), informed by robust *Nitsáhákees* ("thinking").

C. Traditional *Diné* Thinking Continues to Exist and Inform How *Diné* Conduct Themselves.

Traditional *Diné* worldviews guided Navajo leaders during the treaty-making era and continue to be the foundation for the Navajo Nation's governance system and philosophy. The Navajo Nation's self-governance approach has incorporated traditional *Diné* worldviews and *Diné bi beehaz'áanii* ("Navajo law") into all facets of its self-governance.

All branches of Navajo government reflect traditional principles. The Navajo Nation Code codifies many of the traditional principles discussed above as *Diné bi beehaz'áanii* ("Navajo law"). In turn, the Navajo Nation courts routinely apply *Diné bi beehaz'áanii* ("Navajo law") in court holdings. *See*, *e.g.*, *Navajo Nation v. Bedonie*, 6 Am. Tribal Law 725, 728 (Nav. Sup. Ct. 2006) (Applying *Diné bi beehaz'áanii* ("Navajo law") in analyzing the "right to a speedy and public trial" under the Navajo Nation Bill of Rights.); 1 N.N.C. § 7. Title 1, Chapter 2.

Canon One of the Navajo Nation Code of Judicial Conduct states, "judges, as Navajos, should apply Navajo concepts and procedures for justice, including the principles of maintaining harmony, establishing order, respecting freedom, and talking things out in free

discussion." Navajo Nation Code of Judicial Conduct, Canon One (1991). For instance, in reviewing whether the Navajo Nation fulfilled its obligations to its people with respect to providing economic opportunities under its own Bill of Rights, 1 N.N.C. § 2, the Navajo Nation Supreme Court invoked *Diné bi beehaz'áanii* in reversing the government action. The Navajo Nation Supreme Court explained that the *Diné* principle of "self-sufficiency teaches that the obligation of Diné individuals to take care of themselves impacts the community, which relies on the survival of individuals in order to continue to exist as a cohesive people." *Iina Ba, Inc. v. Navajo Business Regulatory*, 11 Am. Tribal Law 447, 457-58 (Nav. Sup. Ct. 2014). This also includes *t'áá nihí ák'ineildzil dóó adiká' adiilwol*, or "economic self-sufficiency," to ensure you have essentials such as clothes, food, and housing for your family. *Id.* This teaches that an individual must work hard and sacrifice "(*t'áá hwó ájít'éego t'éiyá*) to learn the skills necessary to sustain a prosperous life for an entire community." *Id.* "It is up to our leaders to make this possible, and it is within this teaching of Diné self-sufficiency that our leaders created the [Navajo Business Opportunity Act] and the [Navajo Nation Procurement Act]." *Id.* The *Iina Ba, Inc.* Court added, "*Naata'aniis* ["Leaders"] are required to be conscious of their authority to find sacred solutions," *Id*. at 458 (referencing the critical thinking and planning process described above in Section II(B)).

This belief and traditional governance system continue today through the Navajo Traditional Peacemaking Program. The Peacemaker, or *hózhǫ́ǫjí naat'áanii* ("a combination of leader, teacher, and healer"), is tasked with "bring[ing] the people out of chaos into *hózhǫ́* by using stories and teachings to enable them to resolve the problem and decide on mutual positive action." Peacemaking Program of the Judicial Branch of the Navajo Nation, PEACEMAKING PLAN OF OPERATIONS 9 (2012), https://courts.navajo-nsn.gov/Peacemaking/Plan/PPPO2013-2-25.pdf. Importantly, the Program is rooted in traditional worldviews "which does not label individuals 'offender' and 'victim,' or as wrongdoer and harmed party." *Id.* at 12. Instead, the Program acknowledges that "all who are embroiled in *hóóchxǫ'/anáhóót'i'* possess some qualities of causing the offense or being the victim." *Id.* Resolutions garnered from the Program may then be confirmed by the Navajo Nation Judicial Branch. *Id.* at 4.

In these ways, modern Navajo governance reflects traditional *Diné bi beehaz'áanii* ("Navajo law") as described in the preceding sections of this brief describing responsibilities to think critically and plan for solutions.

D. The Relief Sought by the Navajo Nation is Supported by Applying Traditional Navajo Law and this Court's Precedent.

The Navajo Nation's requested relief seeks an order determining the United States owes a fiduciary

duty to assess its water needs and develop a plan to meet them. This is wholly consistent with traditional *Diné* obligations to think critically and plan for solutions. In fact, given the federal obligations involve water, or "*tó*," such fiduciary duties are arguably more pronounced. *Diné bi beehaz'áanii* ("Navajo law"), as codified in the Navajo Nation Code, states: "*Tó dóó dził diyinii nahat'á yił hadeidiilaa*", or "Water and the sacred mountains embody planning," and "*Nitsáhákees éí nahat'á bitsé silá*," or "Thinking is the foundation of planning." 1 N.N.C. § 201. So planning is built upon proper critical thinking and embodied in the sacred mountains and water themselves—*i.e.*, the Reservation itself, as described by Barboncito when negotiating the 1868 Treaty. *1868 Treaty with Record of the Discussions* at 2 ("When the Navajos were first created four mountains and four rivers were pointed out to us, inside of which we should live, that was to be our country.").

Importantly, the *Diné* believe water must be discussed with caution, including avoiding arguments about it. Miranda Warburton, *We Don't Own Nature, Nature Owns Us: The Ceremonial and Esoteric Nature of Water in the Little Colorado River Basin and Diné Bikeyah* 186 (July 1, 2020) (unpublished manuscript) (on file with author). Arguing about water is disrespectful and not honorable and can cause negativity to come back to the Navajo Nation and hurt its people. *Id.* at 188. "No one can own it; No one can sell it; No one can buy it." *Id.* at 191. "Our ancestors told us to be careful about how we use water—not to fight over it,

use it equally and collaboratively, it is sacred and important." *Id.* at 187. Specifically, fighting about water will tarnish traditional ceremonies. "For example, . . . if someone . . . doesn't have the water from [a] little spring due to the adverse [e]ffect of water rights issues, it could force him to change his ways (he wouldn't have pure water or the plants/medicine)" to perform the Waterway ceremony. *Id.* at 189. Thus, the Navajo Nation, operating under these principles, asks the federal government to think critically and plan to meet its water needs.

The Navajo Nation's relief sought is consistent with how the traditional Navajo signatories would have understood the United States would meet its treaty obligations generally. Such critical thinking and strategic and inclusive planning provide a strong foundation for both traditional and modern *Diné* views on governance and fulfilling obligations.

III. *WINTERS* DOCTRINAL RIGHTS AND TRADITIONAL *DINÉ* WORLDVIEWS.

This Court established in *Winans* that a "treaty was not a grant of rights *to the Indians*, but a grant of right *from them*." 198 U.S. at 381 (emphasis added). This Court also held that when the United States sets aside an Indian reservation as a permanent homeland, it reserves the appurtenant water necessary to meet that purpose. *Winters*, 207 U.S. at 577; *Cappaert*, 426 U.S. at 138.

Combining the *Winans* principles with the *Winters* doctrine, the Ninth Circuit has recognized that reserved water rights, like the Navajo Nation's, may carry a priority date of "time immemorial" where the Tribe would not have understood "such a reservation of land to include a relinquishment of its right to use the water as it had always used it on the land it had reserved as a permanent home." *United States v. Adair*, 723 F.2d 1394, 1414 (9th Cir. 1983). Nothing in the historic record suggests the Navajo Nation would have understood the 1868 Treaty to relinquish their rights to use water. Under those facts, the *Adair* Court reasoned a tribe's water rights "were not created" by a treaty, but instead "the treaty confirmed the continued existence of these rights." *Id.* The State Petitioners understand the weight of such a priority date, combined with the size of the Navajo Reservation and its projected population growth. Consequently, they misconstrue this Court's opinion in *Arizona v. California*, 460 U.S. 605, 616–18 (1983), to provide blanket pronouncements about Indian water rights. Brief for State Petitioners at 23–24, *Arizona v. Navajo Nation*, Nos. 21-1484 and 22-51 (2022).

Justice White's *Arizona v. California* opinion is meant to apply only to the State parties and the specifically-referenced federal and Indian Reservations in the Court's decree, as made clear by a plain reading of Art. VIII(C) of the Consolidated Decree. 547 U.S. 150, 166 (2006) ("This decree shall not affect . . . The rights or priorities, except as specific provision is made herein, of any Indian Reservation, National Forest,

Park, Recreation Area, Monument or Memorial, or other lands of the United States. . . ."). For good measure, Art. II(D) of the Consolidated Decree makes clear that "nothing [in the Consolidated Decree] shall prohibit the United States from making future additional reservations of mainstream water for use in any of such States as may be authorized by law and subject [to existing rights]." *Id.* at 157.

As detailed below, this Court's *Winters* precedent and traditional *Diné* laws are generally consistent with one another, as are this Court's precedent with respect to fiduciary duties resulting from federal management of trust property interests and *Diné* philosophies on meeting duties and obligations. As such, the magnitude of the water rights involved here and the disparate impact western water policy has had on the Navajo Nation—and therefore on *Amicus* and the communities *Amicus* serves—provide a firm basis for this Court to uphold the decision below.

A. *Diné Winters* Rights under Federal Law Must be Understood According to *Diné* Rights to *Tó* ("Water") and Nature's Elements under *Diné* Natural Laws.

In this instance, the Navajo Nation's *Winters* rights claims ripen through treaties, executive orders, and statutes creating the boundaries of the Navajo Nation, alongside strong federal policies designed to contain Navajo people—permanently on the Navajo Reservation as an agrarian society. Brief for

Respondents at 20–24, *Arizona v. Navajo Nation*, Nos. 21-1484 & 22-51 (2023). Without water, the Navajo Reservation would not be able to support an agrarian lifestyle contemplated in the 1868 Treaty. The United States has acknowledged such rights and referred to them as Indian Trust Assets, or "ITAs", in public documents related to Colorado River water management. *See Shortage Guidelines FEIS*, at 3-96. Notably, "[t]he United States, as trustee, is responsible for protecting rights reserved by, or granted to, Indian tribes or individual Indians by treaties, statutes, executive and secretarial orders, and other federal actions." *Id.* at 3-87.

In *White Mountain Apache Tribe*, this Court held that when the United States holds a property interest in trust status for an Indian tribe, there is a duty to maintain such property interests—"a fiduciary actually administering trust property may not allow it to fall into ruin on his watch." *United States v. White Mountain Apache Tribe*, 537 U.S. 565, 575 (2003). The Navajo Nation's *Winters* rights are analogous to the federal facilities administered by the Secretary in *White Mountain Apache Tribe*. There, this Court found it persuasive that the Secretary "enjoyed daily occupation" alongside "daily supervision" of the federal facility. *Id*. Here too, the federal government exercises daily and exclusive control over the management of the Colorado River, which it has determined the Navajo Nation has *Winters* rights to despite failure to quantify such rights. The duty described in *White Mountain Apache Tribe* is analogous to *Diné* worldviews about

how *Diné* people care for obligations under their control. Subsequently, *Diné* people agree that such obligations cannot "fall into ruin" under their watch.

Diné natural laws interpret the treaties as preserving the entirety of *Diné* lifeways on *Diné bi keyah* (Navajo land), under federal "jurisdiction and protection" in perpetuity. 1849 Treaty, art. I; 1868 Treaty, art. I, *see generally United States v. Kagama*, 118 U.S. 375, 384–85 (1986) (upholding Congress' authority to assert federal criminal jurisdiction over Indian reservations based on the United States' exclusive authority over tribes and its duty to protect Indians). A key aspect of those lifeways is the relationship between Navajo people and *tó* ("water"), *ch'il* ("plants"), *níłch'i* ("air"), and *jóhonaa'éí* ("sun")—which *Amicus* acknowledges as *nihiDyin dine'é*, or "our Holy People." Denny Interview; *see also* Robert Yazzie, *Air Light/Fire, Water and Earth/Pollen: Sacred Elements that Sustain Life*, 18 J. Env't L. & Litig. 191, 206 (2003) (stating that *Diné* natural law requires that "[t]he four sacred elements of life, air, light/fire, water and earth/pollen in all their forms must be respected, honored, and protected for they sustain life").

According to *Diné bi beehaz'áanii* ("Navajo law"), imperfect beings, like humans, red ants, birds, and the like, established laws in this world—the Glittering World (the fourth world in *Diné* cosmology)—in order to keep from destroying it. Denny Interview. Accordingly, *Diné* culture consistently seeks to balance and appreciate the privilege to use all nature's elements, and through *Diné bizaad* ("the Navajo language")

Navajo people communicate with the world around them, providing offerings and prayers. *Id*. Indeed, "[t]he Diné have a sacred obligation and duty to respect, preserve and protect all that was provided[,] for [Navajo people] were designated as the steward of these relatives through [their] use of the sacred gifts of language and thinking." Yazzie, *Air Light/Fire*, 18 J. Env't L. & Litig. at 194.

In other words, *Diné* cultural practices are designed to ensure such elements do not "fall into ruin" under *Diné* peoples' watch. In traditional *Diné* communities, these traditional practices safeguard the land, water, air, and fire analogous to the Clear Water Act or the Clean Air Act. Like this Court's holding protecting the trust corpus in *White Mountain Apache Tribe*, these traditional relationships with nature's elements ensure care for, and nurturing of, those obligations and elements under *Diné* peoples' daily purview: the water used; the land tended to or traveled upon; the air breathed; and the fire of a Navajo home—symbolic of the Sun.

B. The State and Federal Petitioners' Proposed Indian Water Policy Results in Disparate Treatment, as Applied, to the Navajo Nation's Reserved Property Interests.

This Court's *Winters* holding is consistent with *Diné* laws and worldviews—the water is reserved with the land. In addition, Article VII of the 1922 Colorado

River Compact, which binds the Petitioners, states, "nothing in this compact shall be construed as affecting the obligations of the United States of America to Indian tribes." Colorado River Compact of 1922, art. VII.

From this point, the sovereigns diverge. The States assert this Court retains exclusive and preclusive jurisdiction over quantification, where they claim all paths lead. The federal government asserts it has no enforceable affirmative duty to protect the Navajo Nation's *Winters* rights, but admits they exist. *Shortage Guidelines FEIS*, at 3-96. These arguments advocate for a framework that results in absolute disparate treatment, effectively and as applied, with respect to the Navajo Nation's water rights. *See*, *e.g.*, *Washington State Dep't of Licensing v. Cougar Den, Inc.*, 139 S.Ct. 1000, 1026–27 (2019) (Kavanaugh, B., dissenting) (expressing concern on whether tax policies, as applied, were effectively discriminatory to tribal treaty rights). Under this approach, the Navajo Nation is left with no recourse but quantification before this Court, which the Navajo Nation does not seek. As a result, the Navajo Nation would be unable to prevent its reserved property interests from dwindling away while under exclusive federal control.

Instead, *Amicus* supports the Navajo Nation's position—that a breach of trust claim, at a minimum, can be remedied by a duty to plan for water needs under the United States' jurisdiction—and further asserts that the United States' exclusive control over the Colorado River imports sacred obligations which require

proper *Nitsáhákees* ("thinking") and *Nahat'a* ("planning"). Bitsuie Decl. ¶6. With respect to *hózhǫ́*, and to prevent disparate treatment under federal water policies and laws (as applied and implemented), the United States' discretion to manage the Colorado River must be accomplished holistically, accounting for quantified rights, but also considering unquantified reserved water rights it holds for the Navajo Nation. *See*, *e.g.*, *Parravano v. Babbit*, 70 F.3d 539, 546–47 (9th Cir. 1995) (upholding the Secretary of the Interior's policy, supported by the United States' trust responsibility and where the Tribe's water rights were unquantified, to regulate Klamath River salmon as they migrate in the open ocean).

In addition, Article VII of the 1922 Colorado River Compact was likely intended to safeguard *Winters* rights like the Nation's, which under *Diné bi beehaz'áanii* ("Navajo law") cannot be severed from the land—"it's all the same." Denny Interview (explaining that you cannot sever the water, because the water is your relative, a part of you, and also all around you; and the same with the air, the plants, and the earth's fire, "the sun," all of which must be in balance to sustain life). Succinctly, traditional *Diné* believe the treaties preserved the entirety of the *Diné* universe between their four sacred mountains, and within the bounds of the various streams that traverse through and are contiguous to the Reservation. A century after the Compact was ratified, the federal government has yet to firm up these rights; the River itself is experiencing historic droughts, *see*, *e.g.*, *Responding to Historic Drought and Ongoing Dry Conditions in the*

Colorado River Basin: Request for Input, 84 Fed. Reg. 2244 (Feb. 6, 2019), and the Navajo Nation and *Amicus*' communities suffer from inadequate water infrastructure and scarcity of water itself, Frances Stead Sellers, *It's Almost 2020, and 2 Million Americans Still Don't Have Running Water, According to New Report*, Washington Post (Dec. 11, 2019), https://www.washingtonpost.com/national/its-almost-2020-and-2-million-americans-still-dont-have-running-water-new-report-says/2019/12/10/a0720e8a-14b3-11ea-a659-7d69641c6ff7_story.html ("In the Navajo Nation, . . . where water has long been sacred, about one-third of the population of more than 300,000 does not have a tap or flushing toilet.").

Navajo culture is complex. *Amicus* understands this. But it is purposeful and life-driven. The Navajo leaders that signed the Treaty of 1868, relying on the United States' promises of protection, understood that they would be returning home. This includes "water." Barboncito described "home" as he understood it in the treaty negotiations:

> When the Navajos were first created four mountains and four rivers were pointed out to us, inside of which we should live, that was to be our country and was given to us by the first woman of the Navajo tribe. It was told to us by our forefathers, that we were never to move east of the Rio Grande or west of the San Juan rivers and I think that our coming here has been the cause of so much death among us and our animals.

1868 Treaty with Record of the Discussions, at 2. Returning home also requires that the federal

government meet the federal obligations required to make this land habitable and usable.

In 1849, the United States promised to "pass and execute . . . such laws as may be deemed conducive to the prosperity and happiness of [the Navajo people]." 1849 Treaty at art. IX. Upon this backdrop, the 1868 Treaty delineated boundaries and federal purposes for the Navajo Reservation. Executing federal water law and policy in a manner that thoughtfully considers and plans for the Navajo Nation's *Winters* rights to the Colorado River is consistent with: these treaty promises to protect the Navajo people and their permanent homelands; the Court's precedent on federal treaty obligations, *Winans*, 198 U.S. at 380 ("[W]e will construe a treaty with the Indians as [they] understood it, and 'as justice and reason demand, in all cases where power is exerted by the strong over those to whom they owe care and protection.'"); and how the traditional Navajo signatories would have understood the United States' duties to protect and preserve their rights and their homelands under the negotiated treaties.

CONCLUSION

For all of the above reasons, the Court should affirm the decision below.

Respectfully submitted,

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