Nos. 21-1484 and 22-51

In The Supreme Court of the United States

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

Petitioners,

v.

NAVAJO NATION, et al.,

Respondents.

DEPARTMENT OF THE INTERIOR, et al.,

Petitioners,

v.

NAVAJO NATION, et al.,

Respondents.

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

PETITIONERS' REPLY TO BRIEF FOR THE NAVAJO NATION

RITA P. MAGUIRE
Counsel of Record
RITA P. MAGUIRE, ATTORNEY AT LAW, PLLC
4139 North 49th Place
Phoenix, AZ 85018
(602) 277-2197
rmaguire@azwaterlaw.com
Attorneys for Petitioner State of Arizona

*Attorneys for Petitioners**

*Additional counsel listed on signature page

COCKLE LEGAL BRIEFS (800) 225-6964
WWW.COCKLELEGALBRIEFS.COM

TABLE OF CONTENTS

TABLE OF CONTENTS—Continued

TABLE OF CONTENTS—Continued

TABLE OF AUTHORITIES

Page

CASES

TABLE OF AUTHORITIES—Continued

STATUTES

TABLE OF AUTHORITIES—Continued

Page

OTHER AUTHORITIES

ARGUMENT

For more than 20 years, the Navajo Nation ("Nation") has sought to enjoin the Secretary of the Interior ("Secretary") to assess, plan for, protect and mitigate for the Nation's unquantified claim to the Colorado River downstream from Lee Ferry ("Mainstream"). Framed as a claim for injunctive and declaratory relief against the Secretary, this claim has been presented twice to the district court and twice to the Ninth Circuit. The Ninth Circuit had no other claim before it when it issued the Opinion that resulted in Federal and State Petitioners seeking writs before this Court. Now, on the eve of oral argument, the Nation has seemingly abandoned its effort to require the Secretary to protect the Nation's unquantified claim to the Mainstream and more narrowly seeks to enjoin the Secretary to determine its water needs and develop a plan to meet them without reference to any water source.

The Nation apparently concedes that its previous attempts to compel the Secretary to protect and mitigate for the Nation's unquantified Mainstream claims violate this Court's retained and exclusive jurisdiction under Article IX of the 2006 Consolidated Decree ("Decree"). *Arizona v. California*, 547 U.S. 150 (2006). Accordingly, the Ninth Circuit decision must be vacated as to those claims for relief.

But this concession does not resolve the lack of legal foundation for the two remaining demands in the latest iteration of the Nation's complaint. As to these remaining claims, the Nation must identify a statute,

regulation or treaty provision imposing an affirmative fiduciary duty of the United States ("Government") to assess the Nation's water needs and develop a plan to meet them. The Nation has failed to do so here.

The Ninth Circuit mistakenly relied upon the judicially created *Winters* doctrine as the basis for the alleged duty, but, as a creature of federal common law, the doctrine cannot create an enforceable fiduciary duty owed by the Secretary to the Nation. *Winters v. United States*, 207 U.S. 564 (1908). The Treaties between the Nation and the Government are silent as to any duty of the Government to assess water needs or develop a plan to meet them. And the express provisions of the Treaties, together with the history of negotiations between the parties, demonstrate that the Government's obligations to the Navajo Indians were narrow, of short duration, and exclusive of the duties alleged by the Nation here. This Court has long recognized Congress' exclusive authority to establish and set the parameters of any federal trust responsibility to an Indian tribe. In the absence of direction from Congress, there is no basis for a court to direct the Secretary to take the actions sought by the Nation.

If this Court agrees that the Nation has narrowed its breach of trust claims to an assessment of the reservation's water needs and development of a plan to meet those needs (without reference to a source of water), State Petitioners ask this Court to vacate the Ninth Circuit's decision for failure to identify a statute, regulation or treaty that specifically imposes a federal fiduciary duty to take these actions. This Reply

provides rebuttal argument as to the Nation's claims in their entirety.

I. The Supreme Court Retains Exclusive Jurisdiction over the Determination of Entitlements to Water from the Mainstream.

It is undisputed that allocation of water in the Mainstream is governed by the Decree. It is also undisputed that the Decree enjoins the Secretary from delivering Mainstream water to the Navajo reservation in the absence of a decreed right pursuant to *Arizona v. California* (*see* Decree, Article II.D), or contract right pursuant to Section 5 of the Boulder Canyon Project Act ("BCPA"). Furthermore, this Court retains exclusive jurisdiction over "any order, direction, or modification of the decree or any supplementary decree. . . ." (*see* Decree, Article IX). As a result, the Nation's claim to Mainstream water can be decided only by this Court.

A. The Injunctive Relief Sought by the Proposed Third Amended Complaint Necessarily Entails the Judicial Determination of the Nation's Unquantified Claim to Mainstream Water.

The Nation argues that it does not seek a judicial determination of its water rights, Navajo. Br. 44, but instead asks the Arizona district court to enjoin the Secretary to "assess the Navajo Nation's water needs and develop a plan to meet them." *Id.* This description

of the requested relief omits two fundamental components of the Nation's proposed Third Amended Complaint ("TAC"), upon which the Ninth Circuit's ruling is based. *See* JApp. 138-39.[1]

In its Second Prayer for Relief before the district court, the Nation sought to enjoin the Secretary:

> "(3) to exercise their authorities, including those for the management of the Colorado River, in a manner that does not interfere with the plan to secure the water needed by the Navajo Nation; and
>
> (4) to require the Federal Defendants to analyze their actions in adopting the Shortage and Surplus Guidelines, and other management decisions identified herein, in the light of any plan to secure the water from the Colorado River and adopt appropriate mitigation measures to offset any adverse effects from those actions; or provide such other relief as the Court deems appropriate."

See, *id.* at 20, Prayers for Relief 2(b)(3) and (4), JApp. 138-39. Although the district court gave the Nation "one last chance" to plead a breach of trust claim premised upon water from a source other than the Mainstream, the Nation chose not to do so and, once again, sought leave to file an amended complaint that

---

[1] References are to the Joint Appendix ("JApp."), filed on December 19, 2022. References are also made to the Appendix ("App."), filed in support of State Intervenors Petition for Writ of Certiorari on May 17, 2022.

identified only the Mainstream as a source of water for the Reservation.[2] App. 105; JApp. 85-139.

B. Repeated Citation to Administrative Programs Implementing the Law of the River Confirms the Third Amended Complaint's Objective of Attaining a Right to Mainstream Water.

As the basis for its complaint, the TAC relied upon the Secretary's role as watermaster under the BCPA, implementing regulations, and this Court's Decree.[3] These federal laws exclusively govern operation of Mainstream reservoirs and the delivery of Mainstream

---

[2] The change in the Nation's position is not surprising; in fact, abandonment of paragraphs (3) and (4) is exactly what the district court suggested would be necessary for the Nation to avoid a dismissal of the suit on jurisdictional grounds. (App. 83-84) Here, the Nation seeks to narrow its requested relief to an injunction requiring the Secretary "to (1) determine the extent to which the Nation requires water from sources other than the Little Colorado River . . . " and "(2) develop a plan to secure the needed water. . . . " JApp. 138. But as established in Petitioners' briefs before this Court, no substantive source of law imposes a duty on the Secretary to take the actions described in paragraphs (1) and (2) of the TAC's Second Prayer for Relief.

[3] *See* Nation's TAC, Subheading E, ¶¶ 48-76 [alleging failures to address Nation's needs for Mainstream water], Subheading F, ¶¶ 77-82 [describing the Secretary's role as watermaster for Mainstream], Subheading G, ¶¶ 83-89 [allegations regarding Colorado River Compact], Subheading H, ¶¶ 90-104 [allegations regarding Interim Surplus Guidelines and Shortage Guidelines governing Mainstream reservoir operations], Subheading I ¶¶ 105-106 [allegations regarding other Mainstream management actions], Subheading I [alleging inducement of reliance by others on use of Mainstream water]. JApp. 104-27.

water to authorized right holders, compelling the conclusion that the Nation seeks a right to the Mainstream. Only this Court can determine whether the Nation's reservation in Arizona is entitled to a federal reserved right to Mainstream water based upon the criteria set forth in *Cappaert v. United States*, 426 U.S. 128 (1976) (a federal reserved water right exists to appurtenant, unappropriated water, to the extent needed to fulfill the purpose of the reservation) citing *Winters v. United States*, 207 U.S. 564 (1908) (upon the creation of a federal reservation it is implied that the government intended to reserve water for it).

The Nation's eleventh-hour retraction in its Response from the relief sought below cannot evade the jurisdictional bar created by this Court's retained and exclusive jurisdiction in Article IX of the Decree. The Nation argues that this Court's jurisdiction is not exclusive by quoting language from its 1983 Opinion, which described Article IX as "mainly a safety net added to retain jurisdiction and to ensure that we had not, by virtue of res judicata, precluded ourselves from adjusting the decree in light of unforeseeable changes in circumstances." *Arizona v. California*, 460 U.S. 605, 622 (1983). The Nation argues that Article IX is primarily an authorization of jurisdiction, rather than a limitation on it. (Navajo Br. 8-10) Not so. If the Nation's interpretation of Article IX were correct, there would be no need for the article. Courts would simply rule on issues involving the creation of water rights to the Mainstream relying on the holdings in *Cappaert* and the common law *Winters* doctrine. But as this Court's

1983 Opinion observed, "Article IX did not contemplate a departure from these fundamental principles [of certainty and finality] so as to permit retrial of factual or legal issues that were fully and fairly litigated 20 years ago." *Id.* at 621. Given the extensive actions this Court has taken to retain *exclusive* jurisdiction over this case throughout its 60-plus years of litigation, including limiting its review of the case to "unforeseeable changes in circumstances," it defies logic to suggest that Article IX leaves open the door for other courts to address the same legal issues presented in *Arizona v. California*. *Id.* at 621-22.

C. The Ninth Circuit's Opinion Leads to Both Quantification and Prioritization of the Nation's Unadjudicated Claims to the Mainstream.

Importantly, the Nation's back-door effort to acquire a right to the Mainstream goes beyond the protection of its yet-to-be determined rights, it also requires Secretarial prioritization of those rights. In order to protect the Nation's theoretical water rights when making operational decisions, the Secretary necessarily must decide whether those rights are subject to shortage. Given the severe and extended shortages in the Colorado River system, questions will quickly arise regarding how the Nation's rights would fit into the complex priority scheme that governs Mainstream water deliveries. If the Ninth Circuit decision is affirmed, only the Nation would determine whether the Secretary has done enough to protect the Nation's

unquantified rights, creating a tacit veto by the tribe over any changes in the operation of the Colorado River system going forward. Affirmation of the decision also would create uncertainty as to the security of existing, vested rights to Mainstream water.

D. The Ninth Circuit's Opinion Undermines the Unified Approach established by this Court to Allocate the Mainstream's Scarce Water Supplies.

For more than two decades, the Southwest has suffered from a severe drought that reduced elevations in Lakes Mead and Powell to lows not seen since these reservoirs were originally filled. *See* 87 Fed. Reg. 69042 (Nov. 17, 2022) (Secretary's notice discussing drought conditions). To address these conditions, the seven Basin States and the Secretary developed and implemented a series of management programs to reduce diversions from the Mainstream and increase the amount of water stored in both reservoirs. *See*, *e.g.*, Interim Guidelines for Lower Basin Shortages and Coordinated Operations for Lake Powell and Lake Mead, 73 Fed. Reg. 19873 (Apr. 11, 2008), and the 2019 Colorado River Drought Contingency Plan Authorization Act, Pub. L. 114-16, 133 Stat. 850. Each of these programs was designed to impose a predictable and reliable water management regime in the face of extreme hydrologic uncertainty. This allowed vested right holders, including municipal, industrial and agricultural users, to plan for reductions in their annual entitlements. It also has minimized the risk of litigation as

right holders compete for increasingly scarce water supplies.

This Court's Decree in *Arizona v. California* provides the backbone for the laws and regulations that govern the Mainstream and its reservoirs. Without it, the economic fabric of the Southwest, particularly in the Lower Basin states of Arizona, California and Nevada, will be severely torn. Inviting lower courts to issue rulings that impact how the system is managed only undermines the security of Colorado River water rights. As this Court explained, "actions seeking the allocation of water . . . are best conducted in unified proceedings." *Colo. River Water Conservation Dist. v. United States*, 424 U.S. 800, 819 (1976). Moreover, any adjudication of a reserved water right when there is no surplus "will require a gallon-for-gallon reduction in the amount of water available for water-needy state and private appropriators." *Arizona v. California*, 460 U.S. at 621 citing *United States v. New Mexico*, 438 U.S. 696, 705 (1978).

The implications of the Nation's lawsuit are clear. If the suit is successful, the Secretary would be required to consult with the Nation concerning the potential impact on its claimed rights prior to undertaking any actions involving management and operation of the Colorado River. This result would effectively paralyze ongoing efforts to stabilize the Colorado River's rapidly declining reservoirs.

The district court correctly ruled that this Court's retained and exclusive jurisdiction in Article IX of the

Decree precludes its consideration of the relief sought by the Nation. As the district court could not determine a foundational element that would entitle the Nation to relief of any kind, whether it be a demand study or requiring operational actions to accomplish delivery of Mainstream water to the reservation, the district court did not abuse its discretion in denying leave to amend and properly terminated the action. The Ninth Circuit erred in ignoring the jurisdictional bar that precludes granting the requested relief.

II. The Third Amended Complaint Fails to Identify Any Specific, Congressionally Imposed Duty of the Secretary to Assess, Plan For, Protect and Mitigate for the Nation's Claimed Right to the Mainstream.

A. The 1849 and 1868 Treaties are silent regarding any duty of the Government involving the Nation's claimed Mainstream rights.

As the Nation's Response concedes, any affirmative fiduciary duty of the Government to an Indian tribe exists only when specifically imposed by Congress. Navajo Br. 29; *see United States v. Jicarilla Apache Nation*, 564 U.S. 162, 173-74 (2011). Here, any such duty must originate from and be specifically imposed by the 1849 and 1868 Treaties, ultimately ratified by Congress.

The 1849 Treaty merely placed the Navajo Indians under the protection of the Government, without

making any specific promises to reserve lands or water for the reservation. 1849 Treaty, Art. I, 9 Stat. 974. Through the 1868 Treaty, Congress fixed the boundaries of a reservation for the Navajo located far from the Mainstream, and almost entirely within the Upper Colorado River Basin.[4]

Silent as to water, the 1868 Treaty obligated the government to provide land, seeds and farming implements to individual Indians for a three-year period following the Treaty's execution. 1868 Treaty, Arts. V, VII (15 Stat. 667); *see* Pet. Opening Brief at 32, n.14. In exchange, the Navajo agreed that they would occupy no lands other than the Reservation lands described in the Treaty, and that, if an Indian left the Reservation, the Indian would forfeit all of the rights granted to the Navajo under the Treaty. *Id*., Art. XIII.

The Nation argues that the Treaties' "guarantee of land and references to agriculture memorialized the[] agreement [of the government and the Navajo] that the government would secure the water necessary to fulfill the Reservation's purposes." Navajo Br. 31. According to the Nation, "[i]f the tribe understood the United States to promise water, if the United States knew that water is precisely what the tribe wanted, and if water was necessary to fulfill the Reservation's purposes, then that's what the parties bargained for." *Id*. at 35. But the Nation misapprehends the question

---

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

before this Court. The question is not whether the 1868 Treaty, in reserving land, impliedly reserved water to fulfill the reservation's purpose, per this Court's subsequent decision in *United States v. Winters*.[5] The question is whether Congress, through the Treaties, affirmatively obligated the Government to assess, plan for, protect or mitigate for the claimed rights of the Nation, if any, to Mainstream water. *See* TAC, Prayers for Relief One and Two. JApp. 138-39.

Irrespective of a tribe's wishes or the Government's knowledge of those wishes, "Indian treaties cannot be rewritten or expanded beyond their clear terms to remedy a claimed injustice or to achieve the asserted understanding of the parties." *Choctaw Nation of Indians v. United States*, 318 U.S. 423, 432 (1943). Nor can reasonable treaty interpretations be ignored "upon the ground of mere justice or fairness[.]" *United States v. Choctaw Nation*, 179 U.S. 494, 535 (1900).[6] And even under the more generous rules of

---

[5] As discussed in Section 2, *infra*, the existence of a "*Winters* right" for the reservation does not impose an affirmative duty on the Government to assess, develop a plan for, protect and mitigate for the effects on any such right. As this Court's past decisions recognize, and consistent with the Doctrine of Separation of Powers, only Congress may impose the duty. Congress has not done so here.

[6] *See also United States v. Gotchnik*, 222 F.3d 506, 509 (8th Cir. 2000) ("When a term is unambiguous when reasonably interpreted, however, we may not ignore this interpretation even if it is against Indian interests."); *Mille Lacs Band of Chippewa Indians v. State of Minn.*, 861 F. Supp. 784, 822 (D. Minn. 1994), *aff'd*, 124 F.3d 904 (8th Cir. 1997), *aff'd sub nom. Minnesota v. Mille Lacs Band of Chippewa Indians*, 526 U.S. 172, 119 S. Ct. 1187, 143

construction afforded to treaties with tribes, the 1868 Treaty cannot reasonably be interpreted as imposing the duties alleged in the TAC.

1. The 1868 Treaty did not impose a fiduciary duty upon the Government to take the actions described in the Third Amended Complaint.

This Court's breach of trust jurisprudence requires that a statute "unambiguously provide that the Government has undertaken full fiduciary responsibilities" to manage the resource at issue. *United States v. Mitchell*, 445 U.S. 535, 542 (1980) (*Mitchell I*). The Nation alleges that the 1868 Treaty imposes a federal fiduciary duty to assess, plan for, protect and mitigate for its claimed right to the Mainstream. But the Treaty created limited, finite obligations of the Government, none of which pertains to the actions the Nation seeks to compel.

While expressly reserving land, the 1868 Treaty made no mention of water and limited the provision of seeds and farming implements to a period of three years. 1868 Treaty, Arts. V and VII (15 Stat. 667); *see* J.L. Kessell, General Sherman and the Navajo Treaty of 1868: A Basic and Expedient Misunderstanding, 12 W. Hist. Q. 251, 268 (1981) ("Historical Quarterly

---

L. Ed. 2d 270 (1999) ("Although these canons of construction require treaties to be interpreted liberally in favor of the Indians, courts may not ignore the reasonably interpreted language of a treaty[.]").

Article"). The Treaty also did not purport to be a "first step" in fulfilling promises of the Government to acquire additional land, as the Nation's Brief implies. To the contrary, the Treaty forbade the Navajo from occupying lands other than those the Treaty reserved. *See* 1868 Treaty, Article XIII.

The secondary authorities cited by the Nation's Merits Brief are similarly unavailing. *See* Navajo Br. 5-7. They reinforce the conclusion that the Government did not consider water in negotiating the Treaty, did not contemplate more than minimal, short-term involvement by the Government in Navajo farming activities and did not make provision for additional reservations of land for the Navajo.

Compared to treaties contemporaneously negotiated by the Government with other tribes, the 1868 Treaty contained a minimal set of promises that were of shorter duration than that offered to other tribes. In particular, from 1867-1868, the Indian Peace Commission negotiated seven similar Indian treaties. Historical Quarterly Article, at 268.

> All of the others stipulated seed and agricultural implements for the value of $100 per farmer in the first year and to a lesser amount for three years more; the Navajo (Article VII) for two years more. All of the others offered instructions in farming, the Navajo treaty did not. Nor did it contain the clause, as in three of the others, whereby the United States agreed to add to the treaty reservation more

> arable land should the quantity be found insufficient.[7]

Id. The provisions of these contemporaneous treaties, when compared to the Treaty with the Navajo, demonstrate that the Government's negotiators intentionally chose a different, more limited path with respect to its obligations to the Navajo.

2. The 1934 Boundary Act, while adding land to the Navajo Reservation in Arizona, did not, and could not, amend the 1868 Treaty or otherwise extend any provisions of the Treaty to the subsequently added land.

The Nation argues that the 1868 Treaty, which reserved land for the Navajo located mostly in the Upper Basin, imposed a duty upon the government to "secure water" for the entire reservation, including lands subsequently added to the reservation by Congress in 1934.[8] Navajo Br. 42-43. The 1934 Boundary Act (§ 1,

---

[7] The three treaties promising additional land acquisitions are the Treaty with the Kiowa and Comanche, art. 3, Oct. 21, 1867, 15 Stat. 581; the Treaty with the Cheyenne and Arapaho, art. 3, Oct. 28, 1867, 15 Stat. 593; and the Treaty with the Sioux—Brulé, Oglala, Miniconjou, Yanktonai, Hunkpapa, Blackfeet, Cuthead, Two Kettle, Sans Arcs, Santee—and Arapaho, art. 3, Apr. 29, 1868, 15 Stat. 635. Mr. Tappan signed all three, plus the Navajo Treaty, on behalf of the Government, and General Sherman signed the last of the three and the Navajo Treaty on behalf of the Government. *Id.*

[8] As Petitioners have established, the 1868 Treaty imposed no duty on the Government to take the actions requested in the Navajo claim. Regardless, as argued here, in the absence of an

48 Stat. 960) reserved lands for the Nation in Arizona, including a small area near but not adjacent to the Mainstream, upstream of its confluence with the Little Colorado River. According to the Nation, "all the expansions of the Reservation. . . . were expansions of the same Reservation established in the 1868 Treaty, meaning the same terms carried over." *Id*. at 43. But the 1868 Treaty did not contemplate expansions to the 1868 Reservation and the 1934 Boundary Act did not, and could not, amend the Treaty to extend its provisions to other lands.

At the outset, the 1868 Treaty itself compels the conclusion that Congress (through the Senate) did not intend that there would be future expansions of the reservation, let alone that the Treaty's provisions would apply to later added lands. In addition to expressly limiting the rights of the Navajo to the lands described in the 1868 Treaty, Article XIII of the Treaty expressly stated that the rights granted in the Treaty would be forfeited if a Navajo left and settled on other lands. The Senate could not have intended that the Treaty's limited terms would extend to subsequent additions to the reservation when the Treaty specifically contemplated that there would be no such additions and that any rights granted by the Treaty would be forfeited if individual Indians relocated off the reservation.

---

express amendment to the Treaty, approved by the full Congress, its provisions extended only to the 1868 Reservation lands.

Consequently, a Congressional alteration of the 1868 Treaty was needed to make the Treaty's provisions applicable to the 1934 Boundary Act lands. *See* Professors' Amicus Curiae Brief, at 4 ("It is up to Congress, not the courts nor the Executive, to alter treaty terms."). But the 1934 Act did not, and could not, alter or add to the 1868 Treaty. Federal legislation passed in 1871 prohibited the Government's entry into additional treaties with Indian tribes, although "substitute treaties," approved by both houses of Congress, could be entered into.[9] But no provision of the 1934 Act purports to be a "substitute treaty" or to apply the 1868 Treaty provisions to the 1934 Act lands. In fact, the 1934 Act made no reference to the Treaty at all. Given this silence, Congress could not have intended that the Government's narrow obligations under the Treaty would carry over to subsequently reserved lands.

---

[9] 25 U.S.C. § 71. *See* Historians' Amicus Curiae Brief, at 4 ("[I]n 1871 Congress purported to end treatymaking with Native nations, finally yielding to the House's long-expressed desire for greater involvement in Indian affairs. Treaties already ratified, however, remained in effect. Moreover, even as relations with Native nations became increasingly governed by statute, those statutes often took the form of "treaty substitutes" – that is, bilateral agreements with Indian tribes negotiated by the Executive and then ratified by both chambers of Congress. Notably, *Winters v. United States*, 207 U.S. 564 (1908), involved such a treaty substitute.").

B. In the absence of specific direction from Congress, courts lack the power to impose, by judicial fiat, a fiduciary duty based either upon the bare reservation of land or this Court's implied reservation of water doctrine in *Winters v. United States*.

The 1868 Treaty and the background material cited by the Nation's Response offer no evidence of or parameters for a specific duty of the Government to assess, plan for, protect or mitigate for any right of the Nation to Mainstream water. That is why the Nation, while conceding the applicability of this Court's "duty of trust" jurisprudence, in effect urges the Court to break new ground by creating an implied, common law duty to "secure water" solely through the Treaty's reservation of land and the implied reservation of water created in *Winters v. United States*.[10]

While dressed up as a liberal construction of the 1868 Treaty, this Court is essentially asked to judicially read into the Treaty, not only a reservation of water from the Mainstream based on *Winters*, but, additionally, an amorphous duty to "secure" (or assess, plan for, protect, and mitigate for) the reserved water. But, as established in Petitioners' Opening Brief, fiduciary duties of the federal government cannot originate from judge-made, common law doctrines. In the absence of a specific duty imposed by the Treaty to take

---

[10] *See* Navajo Br. 20 ("[T]he Court has long understood promises of a permanent homeland to mean promises of sufficient water for that homeland, as well. . . . " [citing *Winters*]).

the actions requested by the TAC, neither the reservation of the land, nor the implied reservation of water under *Winters*, serves as a basis for fashioning a common law duty to "secure water."[11] Only Congress may create the duty, and it has not done so here.

C. The vague nature of the relief sought, and the lack of specific parameters to determine if the alleged duty has been fulfilled, highlights the need for Congress, rather than the courts, to specifically impose any duty of trust upon the Government.

Considering the breadth and the vagaries of the claimed fiduciary duty in this case, the need for a specific directive from Congress imposing such a duty becomes readily apparent. The Court is asked to

---

[11] In establishing *Winters* rights, the Court sought to address, by judicial implication, a matter as to which Congress had remained silent. The principle that when the government reserves land, it also reserves the water necessary to carry out the purpose of the reservation has been made applicable to Indian reservations throughout the United States, irrespective of whether a reservation was created by treaty, statute or executive order. In this sense, the rights created by the decision are creatures of the common law. Robert J. Grow and Monte N. Stewart, "The '*Winters*' Doctrine as Federal Common Law," *Natural Resources Lawyer*, 1977, Vol. 10, No. 3, 457-97 (1977). While relying upon *Winters* as the basis for claiming a reserved right under the 1868 Treaty, the Nation does not take issue with Petitioners' argument that the common law established by *Winters* cannot form the basis of a fiduciary duty of the government with respect to water. Nor can the reservation of land give rise to the imposition of such a duty, by judicial fiat, where Congress has not seen fit to provide direction.

judicially create an array of "duties" ranging from assessment, to planning, to protection, to mitigation based on an implied reservation of water under *Winters* and the reservation of land in the 1868 Treaty. But without specific language in the 1849 and 1868 Treaties imposing these duties, there is no standard or measure for determining what is required to satisfy them, inviting endless litigation. This is precisely the problem with an "implied" common law fiduciary duty, and the very reason why, as this Court has recognized time and again, a specific directive from Congress is needed to create such a duty.

D. The Government's operation of the Mainstream pursuant to the Law of the River does not establish "elaborate control" over the resource within the meaning of *Mitchell II* and cannot serve as the basis for a duty of trust to the Nation to "secure" Mainstream water.

As discussed in *Mitchell I* and *II*, there is a distinction between the Government's general "trust relationship" and an affirmative responsibility to take specific actions with respect to tribal resources. In *Mitchell I*, the Court declined to find that the General Allotment Act imposed a fiduciary duty of the Government to manage timber resources for an Indian allottee. While providing that the Government would hold the allotment in trust for the duration of the trust period, the Act did not "unambiguously provide that the United States [had] undertaken full fiduciary responsibilities

as to the management of allotted lands." 445 U.S. at 542. In *Mitchell I*, this "limited trust relationship" was insufficient to create an affirmative fiduciary duty.

In contrast, the *Mitchell II* Court found an enforceable duty of trust where the network of governing statutes and regulations accorded the Secretary a "pervasive role in the sales of timber *from Indian lands*[.]" 463 U.S. 206, 219 (emphasis added). Emphasizing the exclusivity of the Secretary's statutory responsibilities, this Court held that a fiduciary relationship "necessarily arises when the Government assumes . . . *elaborate control over forests and property belonging to Indians*." *Id*. at 225 (emphasis added).

This case is analogous to *Mitchell I* and in sharp contrast with *Mitchell II*. Just as the Government held the allotments in *Mitchell I* in trust for the allottees, here, the Government holds the land that was the subject of the 1868 Treaty in trust for the Nation. But despite this "limited trust relationship," the 1868 Treaty did not "unambiguously provide that the United States has undertaken full fiduciary responsibilities" for the management of water resources for the 1868 Reservation. *Mitchell I*, 445 U.S. at 542.

Unlike the network of statutes cited in *Mitchell II*, the network of authorities comprising the "Law of the River"[12] contemplates neither a "pervasive role" nor

---

[12] *See*, *e.g.*, 1922 Colorado River Compact art. II, reprinted in 70 Cong. Rec. 324 (Dec. 10, 1928); Boulder Canyon Project Act, 43 U.S.C. § 617 *et seq.*; Decree in *Arizona v. California*, 376 U.S. 340 (1964); Colorado River Basin Project Act, 43 U.S.C. § 1521 *et seq.*

"elaborate control" by the Government over the Mainstream for the benefit of the Navajo. Indeed, none of these authorities mentions the Navajo Nation or its reservation at all.[13] Instead, the Secretary is required to operate the Mainstream in fulfillment of her responsibilities to water and power stakeholders in three states, including five Indian tribes with direct diversion rights and 10 Indian tribes with contracts for Central Arizona Project water, as well as the Republic of Mexico. The Decree, a centerpiece of the Law of the River, specifically prohibits the Government from releasing water it controls for irrigation or domestic use or to a federal establishment in the Lower Basin except as provided in the Decree. *See* Art. II.B and D, respectively, in the Decree.

Far from vesting in the Secretary "pervasive control" over Reservation water resources for the Nation's benefit, the Law of the River imposes a strict set of rules that the Secretary must follow for the benefit of specifically identified parties with vested, quantified property rights. And no such duty may be implied for the Navajo merely by virtue of the Government's operation of the Mainstream.[14]

---

[13] *See* Professors' Amicus Curiae Brief, at 26-29, detailing the absence of any reference to the Nation or its interests in these authorities.

[14] The Law of the River does not do away with the more limited "trust relationship" recognized in *Mitchell I*. But "unless there is a specific duty that has been placed on the government with respect to Indians, this responsibility is discharged by the agency's compliance with general regulations and statutes not

E. The Government's assertion of claims in water adjudications on the Nation's behalf does not demonstrate comprehensive control over the resource; the Nation has the authority to bring its own claims and has done so for decades in state adjudications in Utah, New Mexico and Arizona.

The Nation asserts that "[t]ime and again, the United States has asserted control over the Navajos' unquantified reserved water rights" and that "the Navajos didn't have independent authority to manage their unquantified reserved rights to water sources outside the [1868] Reservation" Navajo Br. 32. But the long history of litigation and settlement of the Nation's reserved water rights claims belies these assertions.

The Government has pursued *Winters* rights claims on behalf of the Nation in the Upper and Lower Colorado River basins. But the assertion of a claim on the Nation's behalf in a general stream adjudication, as an exercise of prosecutorial discretion, does not rise to the level of exclusive, elaborate control over water resources, as was the case with the timber resource in *Mitchell II*. Independent of the Government, the Nation has, for decades, actively litigated its own *Winters* right claims in Utah, Arizona and New Mexico. For example, in Arizona, the Nation, along with the Government, has asserted *Winters* rights claims in the Little

---

specifically aimed at protecting Indian tribes." *Morongo Band of Mission Indians v. FAA*, 161 F.3d 569, 574 (9th Cir. 1998).

Colorado River Adjudication.[15] A trial on the first phase of these claims will commence in April 2023.[16] Contemporaneously, the Nation has pursued the settlement of its *Winters* claims through intrastate negotiations with local water users and individual states. In these negotiations, the Nation has played the central, pivotal role, with the Government acting as a supporting player.

---

[15] The Nation claims reserved rights for domestic, commercial, municipal and industrial purposes, along with a separate claim for irrigation, mining and large industrial use. The claim by the Nation, for all uses on the reservation, totals not less than 359,369 acre-feet per year. The government's claim for these uses, also filed in the Little Colorado River Adjudication, totals not less than approximately 123,998 acre-feet per year. *See* https://infoshare.azwater.gov/docushare/dsweb/View/Collection-19711 for Appendix B to the 2019 Final Navajo Reservation Hydrographic Survey Report by the Arizona Department of Water Resources, which includes copies of the Navajo Nation claims, Government claims, amendments, and other supporting documentation filed prior to December 2, 2019. For subsequent amendments, *see also*: Oct. 7, 2020: https://infoshare.azwater.gov/docushare/dsweb/Get/Document-19794/2020%2010-07%20US_%20Amended%20Statement%20of%20Claimant%20of%20Behalf%20of%20the%20Navajo%20Nation%20(Phase%20II).pdf Oct. 7, 2020: https://infoshare.azwater.gov/docushare/dsweb/Get/Document-19791/2020%2010-07%20Navajo%20Nation_s%20Amended%20SOC%20-Phase%20II.pdf Dec. 1, 2021: https://infoshare.azwater.gov/docushare/dsweb/Get/Document-22616/2021%2012-01%20 US_%20Amended%20Statement%20of%20Claimant%20on%20Behalf%20of%20the%20Navajo%20Nation%20(Phase%20III).pdf Dec. 1, 2021: https://infoshare.azwater.gov/docushare/dsweb/Get/Document-22617/2021%2012-01%20NN%20ASOC%20Phase%20III%20Irrigation.pdf

[16] *See* http://www.superiorcourt.maricopa.gov/SuperiorCourt/GeneralStreamAdjudication/docs/CV6417-300-OR-postpone-trial-dates-2-15-23.pdf.

Far from being dependent upon the Government to protect its interests, the Nation "time and again" has taken the initiative to assert claims for and protect the water resources for its Reservation. In fact, that is the very remedy Petitioners suggest is available to the Nation here, through the assertion of its claims to the Mainstream in this Court.

CONCLUSION

The Court should hold that the district court lacked jurisdiction to hear the Nation's claim and that the Nation cannot state a valid claim for breach of trust. The Ninth Circuit decision should be reversed.

Respectfully submitted,

RITA P. MAGUIRE
Counsel of Record
RITA P. MAGUIRE,
ATTORNEY AT LAW, PLLC
4139 North 49th Place
Phoenix, AZ 85018
(602) 277-2197
rmaguire@azwaterlaw.com
Attorneys for Petitioner
State of Arizona

NICOLE D. KLOBAS
ARIZONA DEPARTMENT OF
WATER RESOURCES
1110 W. Washington Street,
Suite 310
Phoenix, AZ 85007
(602) 771-8477
Attorneys for Petitioner
State of Arizona

*Attorneys for Petitioners**

*Additional counsel listed on the next page

Additional counsel:

JAY M. JOHNSON
GREGORY L. ADAMS
CENTRAL ARIZONA WATER CONSERVATION DISTRICT
23636 N. 7th Street
Phoenix, AZ 85024
(623) 869-2333
Attorneys for Petitioner
Central Arizona Water Conservation District

STUART L. SOMACH
ROBERT B. HOFFMAN
SOMACH SIMMONS & DUNN
A PROFESSIONAL CORPORATION
500 Capitol Mall, Suite 1000
Sacramento, CA 95814
(916) 446-7979
Attorneys for Petitioner
Central Arizona Water Conservation District

JOHN B. WELDON, JR.
LISA M. MCKNIGHT
SALMON, LEWIS & WELDON, P.L.C.
2850 East Camelback Road, Suite 200
Phoenix, AZ 85016
(602) 801-9063
Attorneys for Petitioners
Salt River Valley Water Users'
Association and Salt River Project
Agricultural Improvement and Power District

AARON FORD
Attorney General of Nevada
DAVID NEWTON
Special Counsel to the Colorado
River Commission of Nevada
STATE OF NEVADA AND COLORADO RIVER
COMMISSION OF NEVADA
555 East Washington Avenue, Suite 3100
Las Vegas, NV 89101
(702) 486-2673
Attorneys for Petitioners
State of Nevada and Colorado River
Commission of Nevada

LAUREN J. CASTER
BRADLEY J. PEW
FENNEMORE CRAIG, P.C.
2394 East Camelback Road, Suite 600
Phoenix, AZ 85016-3429
(602) 916-5367
Attorneys for Petitioners
State of Nevada, Colorado River
Commission of Nevada,
and Southern Nevada Water Authority

GREGORY J. WALCH, General Counsel
SOUTHERN NEVADA WATER AUTHORITY
1001 South Valley View Boulevard
Las Vegas, NV 89153
(702) 258-7166
Attorneys for Petitioner
Southern Nevada Water Authority

MARCIA L. SCULLY, General Counsel
CATHERINE M. STITES
THE METROPOLITAN WATER DISTRICT
OF SOUTHERN CALIFORNIA
700 North Alameda Street
Los Angeles, CA 90012
(213) 217-6000
Attorneys for Petitioner
The Metropolitan Water District of Southern California

STEVEN B. ABBOTT
REDWINE AND SHERRILL, LLP
3890 11th Street, Suite 207
Riverside, CA 92501
(951) 684-2520
Attorneys for Petitioner
Coachella Valley Water District

CHARLES T. DUMARS
LAW & RESOURCE PLANNING ASSOCIATES, P.C.
100 Sun Avenue NE, Suite 650
Albuquerque, NM 87109
(505) 346-0998
Attorneys for Petitioner
Imperial Irrigation District

JOANNA S. HOFF
IMPERIAL IRRIGATION DISTRICT
333 East Barioni Boulevard
Imperial, CA 92251
(760) 339-9530
Attorneys for Petitioner
Imperial Irrigation District

March 3, 2023