Nos. 21-1484 and 22-51

In the Supreme Court of the United States

STATE OF ARIZONA, ET AL., PETITIONERS

v.

NAVAJO NATION, ET AL.

DEPARTMENT OF THE INTERIOR, ET AL., PETITIONERS

v.

NAVAJO NATION, ET AL.

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

REPLY BRIEF FOR THE FEDERAL PARTIES

ELIZABETH B. PRELOGAR
Solicitor General
Counsel of Record
Department of Justice
Washington, D.C. 20530-0001
SupremeCtBriefs@usdoj.gov
(202) 514-2217

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases: Page

Cases—Continued: Page

Treaties, statutes, and regulation:

In the Supreme Court of the United States

No. 21-1484

STATE OF ARIZONA, ET AL., PETITIONERS

v.

NAVAJO NATION, ET AL.

No. 22-51

DEPARTMENT OF THE INTERIOR, ET AL., PETITIONERS

v.

NAVAJO NATION, ET AL.

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

REPLY BRIEF FOR THE FEDERAL PARTIES

In a series of decisions culminating in *United States* v. *Jicarilla Apache Nation*, 564 U.S. 162 (2011), this Court has made clear that, to pursue a breach-of-trust claim against the United States, a tribe must identify a specific trust duty that the government has "expressly accept[ed]." *Id.* at 177. The court of appeals in this case deemed those decisions "not apposite," 21-1484 Pet. App. (Pet. App.) 25; declared that the *Winters* reserved-water-rights doctrine "in itself gives the Tribe the right to proceed on a breach of trust claim," *id.* at 35; see

Winters v. *United States*, 207 U.S. 564 (1908); and imposed on the United States an "implied fiduciary obligation" to assess and address the Navajo Nation's general water needs, Pet. App. 36.

The Navajo Nation scarcely defends the court of appeals' reasoning. The Navajo Nation now accepts (Br. 26) that the Court's breach-of-trust decisions establish the relevant "principles" here. The Navajo Nation denies (Br. 39) that "all *Winters* rights give rise to breach-of-trust claims." And the Navajo Nation does not dispute that several other sources on which the court of appeals relied—namely, various statutes granting the Secretary of the Interior authority with respect to the Lower Colorado River mainstream and an environmental impact statement issued in 2007—cannot, by themselves, "impose an enforceable duty." Navajo Br. 40; see *id.* at 32-34; Pet. App. 33-35.

Having abandoned much of the court of appeals' reasoning, the Navajo Nation now frames "[t]he only question" before this Court as "whether the [1849 and 1868] Treaties impose [the asserted] duties on the government." Navajo Br. 26; see Treaty Between the United States of America and the Navajo Tribe of Indians (1849 Treaty), Sept. 9, 1849, 9 Stat. 974; Treaty Between the United States of America and the Navajo Tribe of Indians (1868 Treaty), June 1, 1868, 15 Stat. 667. The answer to that question is no. The 1849 and 1868 Treaties do not impose any affirmative duties on the United States of the sort the Navajo Nation asserts here. The Navajo Nation's breach-of-trust claim therefore fails at the threshold—making it unnecessary to decide whether granting relief on that claim would conflict with the Court's decree in *Arizona* v. *California*, 373 U.S. 546 (1963).

I. THE NAVAJO NATION FAILS TO IDENTIFY ANY JUDICIALLY ENFORCEABLE DUTY TO SUPPORT ITS BREACH-OF-TRUST CLAIM

The Navajo Nation no longer disputes that, to pursue a breach-of-trust claim against the United States, it must identify a "specific, applicable, trust-creating" statute, treaty, or regulation that the government violated. *Jicarilla*, 564 U.S. at 177 (citation omitted); see Navajo Br. 24-29. Because the Navajo Nation fails to identify any such source of law, its breach-of-trust claim cannot proceed.

A. The Navajo Nation Must Identify A Specific Trust Duty That The Government Has Expressly Accepted

In the court of appeals, the Navajo Nation took the position that this Court's breach-of-trust decisions were applicable only to claims seeking damages under the Indian Tucker Act, 28 U.S.C. 1505. See Navajo C.A. Br. 10, 15-16, 29-30, 34, 38-39. The Navajo Nation thus argued that those decisions had "no application to [its] claim" here, which seeks non-monetary relief. *Id.* at 16. The court of appeals agreed, expressing the view that it was "not bound by" this Court's "Indian Tucker Act" decisions. Pet. App. 27; see *id.* at 25.

The Navajo Nation no longer defends the view that it persuaded the court of appeals to adopt. Instead, the Navajo Nation now acknowledges that, regardless of the particular relief sought, a tribe must first establish the existence of a judicially "enforceable fiduciary duty." Navajo Br. 24; see *id.* at 26 (describing that requirement as "step one"). The Navajo Nation further acknowledges (Br. 26) that "[t]he Court's Indian Tucker Act decisions show how [the relevant] principles work." As those decisions make clear, a breach-of-trust claim

cannot proceed unless it satisfies the following requirements.

First, the claim must allege the violation of a "specific, applicable" duty. *Jicarilla*, 564 U.S. at 177 (citation omitted). Alleging a violation of the United States' "general trust relationship" with Indian tribes is not enough. *United States* v. *Navajo Nation*, 537 U.S. 488, 506 (2003) (*Navajo I*) (citation omitted). That is because the government is a "sovereign," "not a private trustee." *Jicarilla*, 564 U.S. at 173-174. The relevant trust relationship is thus defined by the specific duties that the government has adopted—not by general common-law principles. See *id.* at 174, 177.

Second, the asserted duty must be one that the government has "expressly accept[ed]." *Jicarilla*, 564 U.S. at 177. This is not a "magic words" requirement. Navajo Br. 25, 31. But it is, at a minimum, a "words" requirement: The asserted duty must appear in text adopted by Congress or the Executive. That requirement ensures that courts enforce only those trust duties that the political Branches have chosen to assume. See *Jicarilla*, 564 U.S. at 177. And the requirement is just as applicable to treaties as it is to statutes and regulations. Cf. Navajo Br. 34-35. After all, courts have no more license to "rewrite" a treaty than they do any other law. *Lozano* v. *Alvarez*, 572 U.S. 1, 17 (2014); see *United States* v. *Choctaw Nation*, 179 U.S. 494, 533 (1900) ("[T]o alter, amend or add to any treaty by inserting any clause, whether small or great, important or trivial, would be * * * to make, and not to construe a treaty.") (quoting *The Amiable Isabella*, 19 U.S. (6 Wheat.) 1, 71 (1821) (Story, J.)).

Third, the "prescription" allegedly violated must "bear[] the hallmarks of a 'conventional fiduciary rela-

tionship.'" *United States* v. *Navajo Nation*, 556 U.S. 287, 301 (2009) (*Navajo II*) (citation omitted). A "limited" or "bare" trust is not enough. *Jicarilla*, 564 U.S. at 174 (citation omitted). That is because the government may "structure[] the trust relationship to pursue its own policy goals," *id.* at 175—including by "styl[ing] its relations with the Indians a 'trust' without assuming all the fiduciary duties of a private trustee," *id.* at 174 (citation omitted). Thus, unless the relevant prescription not only is specific but bears the hallmarks of a conventional fiduciary relationship, the government cannot be said to have assumed a judicially enforceable trust duty.

B. The Navajo Nation's Breach-Of-Trust Claim Does Not Rest On Any Specific Trust Duty That The Government Has Expressly Accepted

As the government's opening brief explains (at 34-44), the court of appeals identified four possible bases for the Navajo Nation's breach-of-trust claim, but none qualifies as a specific, applicable, trust-creating statute, treaty, or regulation. In response, the Navajo Nation focuses (Br. i) on one set of sources that the court identified: the 1849 and 1868 Treaties. The affirmative duties that the Navajo Nation asserts, however, cannot be found in those treaties.

1. The Navajo Nation asserts the violation of affirmative duties, not reserved rights

Throughout its brief, the Navajo Nation asserts that the United States has broken a "promise to provide the [Navajo] Nation with adequate water." Navajo Br. 15; see *id.* at 11, 17, 21, 23, 24, 29, 31, 37, 42, 44, 47. At the outset, it is worth spelling out what the Navajo Nation means by that asserted "promise," which is quite different from the *Winters* doctrine.

Under the *Winters* doctrine, the reservation of land for a federal establishment, "by implication, reserves appurtenant water then unappropriated to the extent needed to accomplish the purpose of the reservation." *Cappaert* v. *United States*, 426 U.S. 128, 138 (1976). There is thus no dispute that when the 1868 Treaty "set apart" land for the Navajo Nation's original Reservation, art. II, 15 Stat. 668, water was reserved along with it. The federal reserved right to that water "vested" in 1868—when the original Reservation was established—with a priority date no later than that. *Arizona* v. *California*, 373 U.S. at 600; see *United States* v. *Adair*, 723 F.2d 1394, 1413-1414 (9th Cir.), cert. denied, 467 U.S. 1252 (1984). Federal reserved water rights likewise vested with each statute or Executive Order expanding the Reservation. See *Arizona* v. *California*, 373 U.S. at 598.

The Navajo Nation continues to possess the reserved water rights that vested when the Reservation was established and later expanded—and it does not argue otherwise. Thus, when the Navajo Nation alleges (Br. 15) that the United States has failed "to provide the [Navajo] Nation with adequate water," the Navajo Nation is *not* alleging an abrogation of its reserved water rights.

Rather, the Navajo Nation is alleging a failure of a different kind: a failure to "act affirmatively" to supply the Navajo Nation with water. J.A. 100. Throughout its brief, the Navajo Nation distinguishes (at 14) the existence of its "reserved water rights" under *Winters* from the "dut[ies]" the government allegedly breached—asserting that the 1849 and 1868 Treaties not only "create[d] enforceable rights to water," but also "impose[d] enforceable duties on the United States to secure that water." Navajo Br. 24 (emphases omitted); see *id.* at 2

(asserting that the treaties not only "promise water," but also "impose corresponding duties on the United States to secure the necessary water"); *id.* at 31 (asserting that the United States has a duty to "manage" the Navajo Nation's "reserved rights"); see also J.A. 128 (distinguishing the Navajo Nation's "reserved rights" from its "need for water").

Only the asserted duties to "provide" or "secure" water for the Navajo Nation are at issue here. Navajo Br. 14-15. According to the Navajo Nation (Br. 15), those duties "necessarily include[] assessing the [Navajo] Nation's [water] needs and making a plan to meet them." And as the Navajo Nation's brief makes clear (at 3), those would be just the "first steps": Having made a plan, the government would then be required to carry it out, "taking actions to * * * secure the needed water." J.A. 100; see Navajo Br. 15, 47. Although the Navajo Nation largely leaves unspecified what those actions might be, it suggests that the government may be required to construct "improvements in water supply and water delivery infrastructure," J.A. 102, and that the government may be under an obligation to ask this Court "to modify" its decree in *Arizona* v. *California*, *supra*, to permit the delivery of water from the Lower Colorado River mainstream to the Navajo Reservation, Navajo Br. 47. As the Navajo Nation's prayer for relief indicates, the Navajo Nation also believes that the government would be required to "manage[]" "the Colorado River" in "a manner that does not interfere with the plan to secure the water needed," and to "adopt appropriate mitigation measures to offset any adverse effects" from "other management decisions" on that plan. J.A. 139.

2. The government has not expressly accepted the affirmative duties that the Navajo Nation asserts

The Navajo Nation contends (Br. 30) that the 1849 and 1868 Treaties establish the affirmative duties described above. But the government did not "expressly accept[]" such duties in either treaty. *Jicarilla*, 564 U.S. at 177.

a. The Navajo Nation relies on provisions in the 1868 Treaty making the 1868 Reservation a "permanent home," art. XIII, 15 Stat. 671, and providing "seeds and agricultural implements," art. VII, 15 Stat. 669. As the Navajo Nation has acknowledged, however, those provisions "do[] not mention water." Navajo C.A. Br. 23. That silence is dispositive with respect to the duties the Navajo Nation seeks to impose, because "[t]he Government assumes Indian trust responsibilities only to the extent it expressly accepts [them]." *Jicarilla*, 564 U.S. at 177.

The Navajo Nation nevertheless contends (Br. 35) that the 1868 Treaty should be construed to impose the affirmative duties described above in light of "the parties' intent, the purposes of the agreement, and the negotiations and historical context." Of course, "the words of a treaty must be construed in the sense in which they would naturally be understood by the Indians." *Herrera* v. *Wyoming*, 139 S. Ct. 1686, 1699 (2019) (citation and internal quotation marks omitted). And "discern[ing] what the parties intended by their choice of words" may sometimes involve "examin[ing] the historical record and consider[ing] the context of the treaty negotiations." *Minnesota* v. *Mille Lacs Band of Chippewa Indians*, 526 U.S. 172, 202 (1999). But "even 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).

The clear terms of the 1868 Treaty are controlling here. Article V allowed individual tribal members to select "tract[s] of land within said reservation" for "farming." 15 Stat. 668. When "so selected," the tracts would "cease to be held in common" and could "be occupied and held in the exclusive possession of the person selecting it." *Ibid.* Article VII further provided that each person who selected a tract "shall be entitled to receive seeds and agricultural implements for the first year, not exceeding in value one hundred dollars, and for each succeeding year he shall continue to farm, for a period of two years, he shall be entitled to receive seeds and implements to the value of twenty-five dollars." 15 Stat. 669.

The Navajo Nation does not identify any ambiguity in the text of those provisions; it simply asserts that they should be read to impose the affirmative duties it alleges. But the provisions describe with specificity what individual tribal members would be entitled to if they selected tracts for farming, and the provisions make no mention of any affirmative duty undertaken by the government to deliver water to those tracts, through the construction of facilities or otherwise—let alone to assess and address the general water needs of the Reservation as a whole on an ongoing and indefinite basis. To read such duties into those provisions would thus "be to make, and not to construe a treaty." *United States* v. *Choctaw Nation*, 179 U.S. at 533 (quoting *The Amiable Isabella*, 19 U.S. (6 Wheat.) at 71 (Story, J.)). And under both *Jicarilla* and ordinary treaty-interpretation principles, "[t]hat would be an intrusion upon the do-

main committed by the Constitution to the political departments of the Government." *Id.* at 532.

b. The Navajo Nation's reliance on various provisions of the 1849 Treaty is likewise misplaced. In one, the Navajo Nation "acknowledge[d]" being under the "protection" of the United States. Art. I, 9 Stat. 974. In another, the parties agreed that the 1849 Treaty was "to receive a liberal construction, * * * to the end that the said Navajo Indians shall not be held responsible for the conduct of others, and that the government of the United States shall so legislate and act as to secure the permanent prosperity and happiness of said Indians." Art. XI, 9 Stat. 975. Those provisions simply reflect the United States' general trust relationship with the Navajo Nation, which might then be the subject of legislation or other undertakings adopted by Congress and the Executive to implement that general relationship in particular contexts. Neither provision imposes of its own force anything resembling the particular duties asserted here.

The Navajo Nation does not argue otherwise. Rather than rely on the 1849 Treaty as an independent source of the asserted duties, the Navajo Nation argues merely (Br. 21-22) that the 1849 Treaty supports construing the *1868 Treaty* as imposing those duties. But the farming provisions of the 1868 Treaty are specific and clear, with no mention of affirmative duties concerning water, see pp. 8-10, *supra*, and construing them against "the backdrop" of the 1849 Treaty cannot change their clear meaning, Navajo Br. 21.

c. In any event, to pursue a breach-of-trust claim against the government, a tribe must identify a "specific, *applicable*, trust-creating" source of law. *Jicarilla*, 564 U.S. at 177 (emphasis added; citation omitted). The 1868

Treaty's farming provisions applied only to tracts selected for farming within the Navajo Nation's original Reservation, in western New Mexico and eastern Arizona. See art. V, 15 Stat. 668; Gov't Br. App. 25a (map). So even if those provisions could be construed to give rise to an ongoing and indefinite duty to supply those tracts with water, they could not be the basis for the Navajo Nation's breach-of-trust claim, which is addressed only to water needs elsewhere, "in the western region of the [present-day] Navajo Reservation adjacent to the Colorado River." J.A. 102.

In an attempt to bridge that gap, the Navajo Nation argues that the 1868 Treaty and all later "government acts expanding the Reservation" were adopted to "carr[y] out the 1849 Treaty's directive to 'designate, settle, and adjust' boundaries to establish a reservation for the Navajos." Navajo Br. 42-43 (quoting 1849 Treaty art. IX, 9 Stat. 975). But even if that were true, it would not change the fact that the 1868 Treaty's farming provisions, by their terms, applied only to tracts within "said reservation"—*i.e.*, the original Reservation. Art. V, 15 Stat. 668.

The Navajo Nation also contends (Br. 42) that each later expansion "enlarged *the Reservation*, and the 1868 Treaty promised water for *the Reservation*." But the 1868 Treaty is not the source of reserved water rights anywhere other than the original Reservation. In the areas of the present-day Reservation where the complaint alleges water needs, the sources of reserved water rights are the statutes or Executive Orders that withdrew those particular lands from the public domain. See, *e.g.*, Act of June 14, 1934, ch. 521, 48 Stat. 960-961; Act of May 23, 1930, ch. 317, 46 Stat. 378; Exec. Order of Jan. 8, 1900, *reprinted in* 1 Charles J. Kappler, *Indi-*

ans Affairs: Laws and Treaties 877 (Charles J. Kappler ed., 1904). Nothing in those withdrawals imposes any affirmative duty on the United States to assess and address the Navajo Nation's water needs.

3. There is no other basis for imposing the affirmative duties that the Navajo Nation asserts

Because the Navajo Nation's breach-of-trust claim does not rest on a "'specific, applicable'" trust duty that the government has "expressly accept[ed]," *Jicarilla*, 564 U.S. at 177 (citation omitted), that should be the end of the matter. In any event, there is no other basis for imposing the affirmative duties that the Navajo Nation asserts.

a. The Winters *doctrine does not support the Navajo Nation's breach-of-trust claim*

As the government's opening brief explains (at 35-38), the *Winters* doctrine cannot be the source of the affirmative duties that the Navajo Nation asserts. For the most part, the Navajo Nation seems to agree. The Navajo Nation does not defend the court of appeals' view that the *Winters* doctrine "in itself gives the Tribe the right to proceed on a breach of trust claim," Pet. App. 35, and it disclaims (Br. 39) seeking a ruling that "all *Winters* rights give rise to breach-of-trust claims." In addition, the Navajo Nation, throughout its brief, distinguishes its "reserved water rights" from the "dut[ies]" the government allegedly breached. Navajo Br. 14; see p. 7, *supra*.

Nevertheless, at various other points, the Navajo Nation suggests that *Winters* involved the same "promise[] of sufficient water" that the Navajo Nation alleges the government breached here. Navajo Br. 20; see *id.* at 22-23. That suggestion is mistaken. *Winters* was a

suit brought *by* the United States, not *against* it. See 207 U.S. at 565 (statement of the case). And the issue was not whether the United States had breached any "promise" in the 1888 agreement establishing the Fort Belknap Indian Reservation, but rather whether that agreement had reserved water in the Milk River for the Reservation. Applying the canon that "agreements and treaties with the Indians" should be construed "from the standpoint of the Indians," the Court rejected any "inference[]" that the Indians had "give[n] up"—*i.e.*, failed to "reserv[e]"—water for the Reservation. *Id.* at 576-577 (opinion of the Court). But the Court did not construe the agreement to include any "promise" by the United States to supply such water. Rather, the Court held that the tribes' reserved water rights were enforceable against other users of water from the same river, who were not parties to the agreement. See *id.* at 575-577. The Court has thus consistently described *Winters* as a case about reserved rights, not affirmative duties. See, *e.g.*, *Sturgeon* v. *Frost*, 139 S. Ct. 1066, 1078-1079 (2019); *Nevada* v. *United States*, 463 U.S. 110, 116 n.1 (1983); *Cappaert*, 426 U.S. at 139; *Arizona* v. *California*, 373 U.S. at 600.

The suggestion that *Winters* can be the source of affirmative duties owed by the United States also cannot be squared with how the doctrine operates. Under *Winters*, the reservation of land also reserves with it a right to use water. By operation of law, that right becomes part of the reservation—*i.e.*, part of the overall property interest—just as the land itself does. See Gov't Br. 36-37. No one suggests, however, that the reservation of land imposes on the United States any affirmative duties to develop the land or to otherwise make it productive. See pp. 16-17, *infra*. It would there-

fore be anomalous for the implied reservation of water to give rise to such duties when the express reservation of land does not.

Moreover, *Winters* is a generally applicable doctrine; it applies to the creation not only of Indian reservations, but also of other federal establishments, such as national monuments or recreation areas. See *Cappaert*, 426 U.S. at 138. It is undisputed that in those other contexts, *Winters* is only a doctrine of reserved rights, not a source of affirmative duties on the government. It would therefore be anomalous for *Winters* to impose affirmative duties in the Indian context only.

b. The history of the 1868 Treaty does not support the Navajo Nation's breach-of-trust claim

The Navajo Nation also seeks support (Br. 23, 31, 36) in the 1868 Treaty's history. As explained above, courts have no license to expand Indian treaties beyond their "clear terms" to "achieve the asserted understanding of the parties." *Choctaw Nation of Indians* v. *United States*, 318 U.S. at 432. But the history does not support any inference of the asserted duties in any event.

At the time the 1868 Treaty was signed, the Navajos lived at Bosque Redondo, "a small piece of land on the Pecos River in eastern New Mexico, some 300 miles east of the area they had occupied" before the Europeans arrived. *Williams* v. *Lee*, 358 U.S. 217, 221 (1959). The United States had forced the Navajos to relocate to Bosque Redondo in 1863. When General William Tecumseh Sherman met with the Navajos in 1868, the Navajos insisted on returning to their ancestral homeland. See *The Navajo Treaty—1868: Treaty Between the United States of America and the Navajo Tribe of Indians with a Record of the Discussions That Led to Its Signing* 6 (Martin A. Link ed., 1968) (*Record*). Their

leader, Barboncito, explained that although the Navajos knew "how to irrigate and farm," their crops had failed because the soil at Bosque Redondo was "not productive." *Record* 2; see *Record* 14 (blaming "the unproductiveness of the soil"). General Sherman agreed that a reservation should be established for the Navajos within their ancestral homeland, *Record* 6-7, and after reducing the agreement to writing, the United States and the Navajos signed the 1868 Treaty, see *Record* 10-11.

The 1868 Treaty's history reinforces the implication that the establishment of the original Navajo Reservation reserved water rights for irrigation purposes. But the history does not support any inference that the 1868 Treaty imposed on the United States any affirmative duty to supply the Navajo Nation with water, whether for irrigation or for any other purpose. Indeed, although references to water and irrigation appear in the record of the treaty negotiations, there is no mention of any water-related obligation of the United States at all—let alone any obligation resembling the duties asserted here. See, *e.g.*, *Record* 8 (Barboncito: "In [the heart of the Navajo country] there is a mountain * * * from which (when it rains) the water flows in abundance."); *Record* 9 (Barboncito: "After we get back to our country * * *, black clouds will rise and there will be plenty of rain.").

Nor does the historical record suggest that the parties intended to leave certain duties unstated. To the contrary, the record suggests that the United States intended to reduce all its commitments to writing. See *Record* 7 (General Sherman: "We want to put everything on paper so that hereafter there may be no misunderstanding between us."); *Record* 10 (General Sherman: "Tomorrow we will * * * commit[] it to writing."); *ibid.* (General Sherman: "[W]e have it all written down

on paper and settled."). And consistent with the treaty's history, the treaty's text contains no suggestion that the United States assumed any affirmative duties relating to water. See pp. 8-10, *supra*.

c. The government's purported control over water rights does not support the Navajo Nation's breach-of-trust claim

The government's opening brief explains (at 40-42) that even when the government exercises control over a resource, such control alone is insufficient to give rise to judicially enforceable trust duties. That is so even when the government exercises "managerial control." *Jicarilla*, 564 U.S. at 177 n.5 (citation omitted).

The Navajo Nation does not dispute (Br. 40) that "control alone cannot impose an enforceable duty." The Navajo Nation nevertheless argues (*ibid.*) that the government's purported "control" over the Navajo Nation's reserved water rights "drives home" the existence of a treaty-based duty here. Citing page 37 of the government's opening brief, the Navajo Nation contends that "[t]he government's own position is that it manages the Navajos' unquantified water rights on the Nation's behalf." Navajo Br. 2-3; see *id.* at 31-32 (similar).

But that is not the government's position. Rather, what page 37 of the government's opening brief says is that, when water rights are impliedly reserved through the creation of an Indian reservation, they are "held by the United States * * * in trust for the benefit of Indian tribes." Elsewhere on that same page, the government explains that the trust is only a "limited" or "bare" trust—the same type of trust that is created when the government holds land in trust for a tribe. Gov't Br. 37 (quoting *Jicarilla*, 564 U.S. at 174); see J.A. 91. And this Court has made clear that such a "limited" or "bare"

trust does not give rise to judicially enforceable trust duties. *Jicarilla*, 564 U.S. at 174 (quoting *United States* v. *Mitchell*, 445 U.S. 535, 542 (1980) (*Mitchell I*), and *United States* v. *Mitchell* (*Mitchell II*), 463 U.S. 206, 224 (1983)); see *Navajo II*, 556 U.S. at 301; *United States* v. *White Mountain Apache Tribe*, 537 U.S. 465, 473 (2003).

Moreover, because the trust is only a limited or bare one, the government does not have exclusive authority to control or manage a tribe's reserved water rights, any more than it has such authority to control or manage a tribe's land. See *Mitchell I*, 445 U.S. at 544. Rather, absent statutory provisions to the contrary, tribes retain the power to control their own water rights, just as they do their own land. See *Hawkins* v. *Haaland*, 991 F.3d 216, 227 (D.C. Cir. 2021) (recognizing that the government's holding of a tribe's water rights in trust does not create federal authority to control or manage those rights), cert. denied, 142 S. Ct. 1359 (2022); *Colville Confederated Tribes* v. *Walton*, 647 F.2d 42, 48 (9th Cir.) (recognizing that when a tribe "has a vested property right in reserved water, it may use it in any lawful manner"), cert. denied, 454 U.S. 1092 (1981). Thus, it is neither correct nor the government's position that the government "alone decides how to vindicate" the Navajo Nation's water rights. Navajo Br. 40-41.

C. Allowing The Navajo Nation's Breach-Of-Trust Claim To Proceed Would Threaten The Separation Of Powers

As the government's opening brief explains (at 32-35), allowing the Navajo Nation's breach-of-trust claim to proceed would threaten the separation of powers by putting courts in the position of enforcing broad and amorphous duties that Congress and the Executive have never expressly accepted. The Navajo Nation has three responses, each of which is unavailing.

First, the Navajo Nation asserts (Br. 37-38) that it is simply "seek[ing] an order requiring the United States to fulfill a specific treaty promise" to "assess[] the tribe's water needs and mak[e] a plan to meet them." But even that description of the purported "promise" reveals how broad and amorphous the asserted duty is. After all, it leaves unanswered the most important questions, such as what a "plan" should include and when a "plan" is sufficient. Should the plan include, for example, constructing new infrastructure to pump water from the Lower Colorado River mainstream and deliver it up steep canyons to the western region of the Navajo Reservation, thousands of feet above the river, notwithstanding the enormous engineering obstacles and cost? Or should the plan instead include constructing a pipeline from a more accessible water source or drilling additional groundwater wells? How would the cost of any new infrastructure be shared? And are there more cost-effective alternatives or better uses of limited funds for the Reservation? Such issues are generally the subject of "policy disagreements which courts lack both expertise and information to resolve." *Norton* v. *Southern Utah Wilderness Alliance*, 542 U.S. 55, 66 (2004). Yet, under the Navajo Nation's approach, courts would have no choice but to become entangled in such issues in determining the sufficiency of any plan developed by the United States, with nothing in the text of any statute or treaty to guide their decisionmaking.

Such judicial entanglement is particularly unwarranted under our system of separated powers. The Constitution assigns to the political Branches the "sovereign capacity to implement national policy respecting the Indian tribes." *Jicarilla*, 564 U.S. at 178. In exercising that capacity, Congress and the Executive have

long worked to honor the United States' general trust relationship with the Navajo Nation by addressing water needs on the Navajo Reservation. Those efforts include congressionally approved settlements recognizing the Navajo Nation's reserved rights to hundreds of thousands of acre-feet of water in the San Juan River. See Gov't Br. 9-10. They also include over $1 billion for infrastructure improvements—including pipelines, pumping plants, and water-treatment plants—to bring clean water to portions of the Reservation in Utah and New Mexico. See *ibid.* And they include asserting water claims in the Little Colorado River Basin on behalf of the Navajo Nation in *Arizona* v. *California*, *supra*, which this Court did not resolve, and asserting such claims alongside the Navajo Nation in general stream adjudications, such as the pending Little Colorado River Basin general adjudication. See Gov't Br. 6-9. Those examples show that matters of tribal water policy can—and should—be addressed by the political Branches under the general trust relationship, rather than made the subject of breach-of-trust litigation.

Second, the Navajo Nation contends (Br. 38-39) that "an order directing the government to assess the [Navajo] Nation's needs and make a plan to meet them, based on the promises in *these Treaties*, doesn't mean holding that all *Winters* rights give rise to breach-of-trust claims." Of course, the court of appeals thought otherwise, expressing the view that the *Winters* doctrine "in itself gives the Tribe the right to proceed on a breach of trust claim." Pet. App. 35. The Navajo Nation attempts (Br. 39) to distance itself from that view, but points to nothing in "*these Treaties*" that actually supports its contention. The only treaty-related evidence —textual or historical—that the Navajo Nation cites

merely reinforces the implication of *Winters* rights, without suggesting the existence of anything resembling the affirmative duties that the Navajo Nation seeks to impose. See pp. 8-10, 14-16, *supra*. The Navajo Nation's assertion that letting its claim proceed would not open the door to similar claims across the country rings hollow.

Third, the Navajo Nation contends (Br. 41) that an order compelling the United States to "assess the [Navajo] Nation's water needs and develop a plan to meet them" would not offend the separation of powers because "such an order would *enforce Senate-ratified treaties*." But the Navajo Nation does not identify any actual language in those treaties that such an order would enforce. And the absence of such language simply highlights the separation-of-powers concerns here. After all, this Court "does not possess any treaty-making power. That power belongs by the Constitution to another department of the Government." *United States* v. *Choctaw Nation*, 179 U.S. at 533 (quoting *The Amiable Isabella*, 19 U.S. (6 Wheat.) at 71 (Story, J.)).

II. AN ORDER REQUIRING DELIVERY OF WATER FROM THE LOWER COLORADO RIVER MAINSTREAM WOULD VIOLATE THIS COURT'S DECREE IN *ARIZONA* v. *CALIFORNIA*

Because the Navajo Nation's breach-of-trust claim does not rest on any judicially enforceable duty in the first place, this Court need not reach the additional question presented in the intervenors' petition. In any event, as the government's opening brief explains (at 44-47), an order requiring the government to deliver water from the Lower Colorado River mainstream to the Navajo Reservation would violate this Court's decree in *Arizona* v. *California*, *supra*. Though the Nav-

ajo Nation does not dispute (Br. 46-47) that conclusion, it argues that such remedial questions are speculative at this juncture. In making that argument, however, the Navajo Nation only highlights the broad and amorphous nature of its breach-of-trust claim.

The Navajo Nation contends (at 44-45), for example, that its claim "doesn't turn on" its rights to the Lower Colorado River mainstream because its claim "requires only a finding that the government has failed to secure the water it promised by treaty, no matter *where* that water might come from." The Navajo Nation's own complaint suggests otherwise. The complaint expressly limits the Navajo Nation's breach-of-trust claim to "Navajo Reservation lands located in the Lower Basin in Arizona," J.A. 91, and alleges only water needs "in the western region of the [present-day] Navajo Reservation adjacent to the Colorado River," J.A. 102. Further, the complaint expressly carves out the Little Colorado River and other "water sources in the Little Colorado River Basin" from the scope of the claim, J.A. 103; see J.A. 138, and identifies no other source of the water that the Navajo Nation contends it needs in the Lower Basin except the Lower Colorado River mainstream, which the complaint characterizes as "the most obvious source of water" to meet those needs, J.A. 104. That the Navajo Nation now asserts (Br. 45) that its claim covers water "no matter *where* that water might come from" only highlights the claim's ever-changing scope.

The Navajo Nation's assertion (Br. 46) that it "merely seeks injunctive and declaratory relief requiring the government to determine its water needs and develop a plan to meet them" also contradicts its complaint. As the government's opening brief noted (at 46), the complaint additionally seeks an injunction compel-

ling the government to exercise its authority over the Colorado River in a manner that does not interfere with the plan. The Navajo Nation's failure to address that relief—or to explain why it would not encompass an order compelling the government to deliver water from the Lower Colorado River mainstream to the Navajo Reservation—further underscores the claim's amorphous nature.

Finally, the Navajo Nation suggests (Br. 3, 47) that the government could be required to move to modify this Court's decree in *Arizona* v. *California*, *supra*, "*if* the United States ultimately must secure water from the Colorado River for the [Navajo] Nation." That suggestion simply highlights the problematic nature and breadth of the affirmative duties that the Navajo Nation seeks to impose. An order of a district court compelling the Executive to take a particular position in litigation before this Court would represent a remarkable intrusion into matters traditionally reserved to the Executive. See *Shoshone-Bannock Tribes* v. *Reno*, 56 F.3d 1476, 1483 (D.C. Cir. 1995) (holding that "the United States has no duty, or at least no legal duty a federal court may impose on it, to assent to the Tribe's litigation demand").

* * * * *

For the foregoing reasons and those stated in our opening brief, the judgment of the court of appeals should be reversed.

Respectfully submitted.

ELIZABETH B. PRELOGAR
Solicitor General

MARCH 2023