

No. 22-51

In The
Supreme Court of the United States

DEPARTMENT OF THE INTERIOR, ET AL.,

Petitioners,

v.

NAVAJO NATION, ET AL.,

Respondents.

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

**RESPONSE TO FEDERAL
PETITION FOR WRIT OF CERTIORARI**

RITA P. MAGUIRE
Counsel of Record
RITA P. MAGUIRE, ATTORNEY AT LAW, PLLC
P.O. Box 60702
Phoenix, Arizona 85082
(602) 277-2197
rmaguire@azwaterlaw.com
Attorneys for Respondents

[Additional Counsel Listed On Signature Page]

**RESPONSE TO FEDERAL
PETITION FOR A WRIT OF CERTIORARI**

Respondents State of Arizona, Central Arizona Water Conservation District, Salt River Project Agricultural Improvement and Power District, Salt River Valley Water Users' Association, Imperial Irrigation District, The Metropolitan Water District of Southern California, Coachella Valley Water District, State of Nevada, Colorado River Commission of Nevada, Southern Nevada Water Authority, and State of Colorado ("State Respondents") hereby respond in support of the petition for a writ of certiorari filed by the federal government in this case ("Federal Petition").

State Respondents have filed a petition for a writ of certiorari in Case No. 21-1484 ("State Petition"), seeking review of the same judgment of the Ninth Circuit Court of Appeals as is sought by the federal government in this case. The second question raised in the State Petition asks substantially the same question raised by the Federal Petition in this case.¹ The Federal Petition is well-taken, and the Court should grant both the Federal Petition and the State Petition.

¹ The State Petition presents the additional question of whether the Court's retained and exclusive jurisdiction in Article IX of the Consolidated Decree in *Arizona v. California*, 547 U.S. 150, 166 (2006), precludes the lower federal courts from exercising jurisdiction over the Navajo's claim. See State Petition at i-ii (first question presented). The State Respondents continue to assert that the jurisdictional issue is a necessary predicate to the Navajo Nation's breach of trust claim.

State Respondents agree that the Court of Appeals' decision "threatens significant practical consequences" to others besides the federal parties and the Navajo Nation. Federal Petition at 25. To begin with, a federal trust responsibility rooted in the *Winters* doctrine of impliedly reserved water rights has potentially vast application to Indian tribes, in addition to the Navajo Nation, whose reservations are created by treaty, statute or executive order. *Id.*

Moreover, the decision below immediately threatens the security of existing entitlements made pursuant to a state's allocation to the water source at issue in this case. The Lower Colorado River is already fully allocated and is experiencing a megadrought accompanied by drastically depleted storage in Lake Mead. The federal fiduciary duty recognized by the Court of Appeals essentially entails the federal parties' recognition and protection of an as-yet unproven, unused, claimed reserved right to Lower Colorado River water.² In an already water-short system, the effects of managing the LBCR to protect the Navajo Nation's unadjudicated claim will fall squarely upon existing entitlement holders, who are the real parties in interest in this case. *See United States v. New Mexico*, 438 U.S. 696, 705 (1978) (recognition of a federal reserved right frequently requires a "gallon-for-gallon reduction in the amount of water available for water-needy state and private appropriators"). Given the importance of

² *See* Federal Petition, at 15-16 (decision essentially requires that federal parties "assess and address" the Nation's need for water from the mainstream of the Lower Colorado River).

this water supply to existing entitlement holders and the significant risk of adverse consequences to these interests, the State Respondents urge the Court to grant the Federal and State Petitions addressing the Court of Appeals' recognition of a federal trust responsibility.

As the Federal Petition recognizes, the Ninth Circuit's decision conflicts with multiple decisions of this Court and other circuits of the United States Court of Appeals. The question of whether a federal fiduciary duty to an Indian tribe must originate from an express federal statute or treaty provision, which touches upon every aspect of the federal-tribal relationship, requires a final resolution from this Court. Like the State Petition, the Federal Petition lists multiple decisions of this Court and the Circuit Courts of Appeals that are contrary to the Ninth Circuit's decision in this suit. An additional case not discussed in the Federal Petition is *Hopi Tribe v. United States*, 782 F.3d 662 (Fed. Cir. 2015).

In *Hopi Tribe*, the Federal Circuit was asked to decide whether, in the absence of an express mandate in a federal statute or treaty, the *Winters* doctrine acknowledging an implied federal reserved right to water is sufficient to impose a federal fiduciary responsibility "to ensure adequate water quality" on the Hopi Reservation. *Id.* at 668. A 1958 federal statute and an 1882 Executive Order, confirmed by Congress in 1958, set aside lands to be held in trust for the benefit of the Hopi Tribe but did not refer to drinking water and did not instruct the United States to ensure water quality.

Id. at 669. The Hopi Tribe argued that these actions of Congress and the Executive Branch impliedly reserved water for the benefit of the tribe and, as a consequence, created a fiduciary duty on the part of the United States to ensure adequate water quality on the reservation. *Id.*

The Federal Circuit refused to recognize an implied federal trust responsibility solely originating from the *Winters* doctrine. *Id.* The Federal Circuit’s decision in *Hopi Tribe* is particularly noteworthy as it rejected the very argument embraced by the Ninth Circuit here – that the *Winters* doctrine, standing alone, is a sufficient basis for the creation of a federal trust responsibility to “protect, repair, and preserve” tribal water rights. *Id.* at 670. The State Respondents urge this Court to resolve the conflicting answers to this question by granting review of the breach of trust questions raised by the Petitions in this case.



CONCLUSION

The Federal Petition and the State Petition in Case No. 21-1484 should be granted.

Respectfully submitted,

RITA P. MAGUIRE
Counsel of Record

RITA P. MAGUIRE,
ATTORNEY AT LAW, PLLC
P.O. Box 60702
Phoenix, Arizona 85082
(602) 277-2197
rmaguire@azwaterlaw.com

*Attorneys for Respondent
State of Arizona*

NICOLE D. KLOBAS
JENNIFER HEIM
ARIZONA DEPARTMENT
OF WATER RESOURCES
1110 W. Washington Street,
Suite 310
Phoenix, Arizona 85007
(602) 771-8477

*Attorneys for Respondent
State of Arizona*

Attorneys for Respondents

[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, Arizona 85024
(623) 869-2333

Attorneys for Respondent

Central Arizona Water Conservation District

STUART L. SOMACH
ROBERT B. HOFFMAN
SOMACH SIMMONS & DUNN
A PROFESSIONAL CORPORATION
500 Capitol Mall, Suite 1000
Sacramento, California 95814
(916) 446-7979

Attorneys for Respondent

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, Arizona 85016
(602) 801-9063

Attorneys for Respondents

*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, Nevada 89101
(702) 486-2673
Attorneys for Respondents
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, Arizona 85016-3429
(602) 916-5367
Attorneys for Respondents
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, Nevada 89153
(702) 258-7166
Attorneys for Respondent
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, California 90012
(213) 217-6000
*Attorneys for Respondent
The Metropolitan Water District
of Southern California*

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

CHARLES T. DUMARS
LAW & RESOURCE PLANNING ASSOCIATES, P.C.
One Sun Plaza
100 Sun Avenue NE, Suite 650
Albuquerque, New Mexico 87109
(505) 346-0998
*Attorneys for Respondent
Imperial Irrigation District*

JOANNA M. SMITH
IMPERIAL IRRIGATION DISTRICT
333 East Barioni Boulevard
Imperial, California 92251
(760) 339-9530
*Attorneys for Respondent
Imperial Irrigation District*

PHILIP J. WEISER, Colorado Attorney General
A. LAIN LEONIAK, First Assistant Attorney General
STATE OF COLORADO
1300 Broadway
Denver, Colorado 80203
(702) 508-6313
Attorneys for Respondent
State of Colorado
September 23, 2022