No. _____

IN THE
Supreme Court of the United States

WINNEMUCCA INDIAN COLONY,
Petitioner,
v.
UNITED STATES,
Respondents.

On Petition for A Writ of Certiorari
to the United States Court of Appeals
For the Federal Circuit

PETITION FOR A WRIT OF CERTIORARI

TREVA HEARNE
RENO LAW GROUP, LLC
433 W. Plumb Lane
Reno, Nevada 89509

NORBERTO J. CISNEROS
Counsel of Record
BARBARA M. MCDONALD
MADDOX & CISNEROS, PLLC
1210 S. Valley View Blvd.
Suite 202
Las Vegas, NV 89102
(702) 366-1900
NCisneros@mc-thefirm.com

Attorneys for Petitioner

LEGAL PRINTERS LLC ● Washington, DC ● 202-747-2400 ● legalprinters.com

QUESTIONS PRESENTED

(1) Is the United States' promise to provide the Winnemucca Indian Colony, a federally recognized Tribe with lands held in trust established by an Executive Order and a separate legislative act, coupled with the government's nearly exclusive statutory and regulatory control over the water on Indian lands, sufficient to entitle an Indian tribe to money damages when the United States breaches its fiduciary duty to protect the natural resources on those Indian lands?

(2) Did the Federal Court of Appeals, Federal Circuit, err when it affirmed dismissal of the Winnemucca Indian Colony's third claim for relief – Breach of Trust – Water?

(3) Can the Winnemucca Indian Colony state a cognizable claim for breach of trust against the United States in relation to BIA failure to prevent trespass and theft of natural resources by third parties, under the *Winters* doctrine and 25 C.F.R. § 152.22?

CORPORATE DISCLOSURE STATEMENT

Pursuant to Rule 29.6, petitioner is a governmental entity and thus has no corporate interests to disclose.

RELATED PROCEEDINGS

1. *Winnemucca Indian Colony v. United States of America*, No. 2024-1108, United States Court of Appeals for the Federal Circuit. Final Judgment entered January 8, 2026.

2. *Winnemucca Indian Colony v. United States of America*, No. 2024-1108, United States Court of Appeals for the Federal Circuit. Judgment entered October 16, 2026.

3. *Winnemucca Indian Colony v. United States of America*, No. 20-1618, United States Court of Federal Claims, Judgment entered August 25, 2023.

PARTIES TO PROCEEDING

Petitioner, Winnemucca Indian Colony, was plaintiff and appellant below.

Respondent, the United States, was the defendant and appellee below.

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases:

Statutes:

Treaties:

Executive Orders:

Other Authorities

OPINIONS BELOW

The initial decision of the Federal Circuit is reported at 156 F.4th 1339 (Fed Cir. 2025) and is reproduced at Appendix 3a to 28a. The Order denying Petition for Rehearing and Rehearing *en Banc* (Fed. Cir January 8, 2026) [Doc 53] is reproduced at Appendix 1a to 1b.

JURISDICTION

The Federal Circuit issued its initial decision on October 16, 2025. ECF No. 47. On January 8, 2026, the Federal Circuit issued its order denying the combined petition for panel rehearing and rehearing *en banc*. ECF No. 53. Federal Circuit has jurisdiction under 28 U.S.C. § 1254(1).

STATUTORY AND REGULATORY PROVISIONS INVOLVED

The relevant statutory and regulatory provisions are reprinted in an appendix to this petition.

BACKGROUND

I. The land

The Winnemucca Indian Colony was established in the last century when President Woodrow Wilson signed two Executive Orders setting aside land for the use of "homeless Shoshone." Executive Order No. 2639, June 18, 1917, described 160 acres of land to be set aside as the NE ¼ of Section

32, Township 36N., Range 38E., M.D.M. (Mount Diablo Meridian). Executive Order dated February 8, 1918 described an additional 160 acres to be set aside as the SE 1/4 of Section 32, Township 36N., Range 38E., M.D.M. (Mount Diablo Meridian). These two contiguous parcels are commonly referred to by the Tribe as the "320 acres."

In 1928, because the BIA records reflected that the homeless Shoshone were still living on 20 acres near the railroad where they worked, a separate 20 acres was conveyed by Congressional Act, described as N1/2 NE1/4 SW1/4, Section 29, Township 36, Range 38 East, Mount Diablo Meridian, Nevada, containing 20 acres more or less. This parcel is commonly referred to by the Tribe as the "20 acres."

The 320 acres and the 20 acres have since been held in trust by the United States. The United States set aside small Colonies and reservations in Nevada under the Ruby Valley Treaty of 1863: "The said bands agree that whenever the President of the United States shall deem it expedient for them to abandon the roaming life, which, they now lead, and become herdsmen or agriculturalists, he is hereby authorized to make such reservations for their use as he may deem necessary within the country above described; and they do also hereby agree to remove their camps to such reservations as he may indicate, and to reside and remain therein." United States Treaty with the Western Shoshone, October 1, 1863, 18 Stat. 689, Article 6. Further the reservation of Indian lands was provided for in the Treaty of Guadalupe Hidalgo wherein the United States

promised to allow the native Indians to remain on their homelands, ". . . but, on the contrary, special care shall then be taken not to place its Indian occupants under the necessity of seeking new homes, by committing those invasions which the United States have solemnly obliged themselves to restrain." Treaty of Guadalupe Hildago, Feb. 2, 1848, 9 Stat. 922, Article XI.

II. The water appurtenant to the land

The Winnemucca Indian Colony's land is located within the Humboldt River Basin, an extensive river drainage system located in north-central Nevada and extending in a generally east-to-west direction from its headwaters in the Jarbidge, Independence and Ruby Mountains in Elko County, to its terminus in the Humboldt Sink, approximately 225 miles away in the desert of northwest Churchill County. The basin encompasses an area of approximately 16,840 square miles and is the only major river system wholly contained within the State of Nevada. [1] The State of Nevada is wholly contained within the geological formation known as the Great Basin which is bordered by the Rocky Mountains and the Sierra Nevada Mountains. Because of the arid nature of the lands, the water systems or drainage systems have been categorized and mapped extensively.

In the 1800s the only use of the waters was by emigrants passing through to California and Oregon,

[1] Chronology of the Humboldt River, Nevada Dept. of Water Resources, Nevada Water Basin and Technology Series at P.I-1.

and by miners and trappers, but mostly by the Shoshone Indians who camped, trapped and migrated along the Humboldt River. The flows of the lower Humboldt River that flow through Humboldt County, Nevada and the Winnemucca Indian Colony are derived from snow melt from the Toiyabe Mountains and Shoshone Mountains.[2]

Specifically, White's Creek, which flows through Water Canyon and then into the Humboldt River, has been the sole water source available on the Winnemucca Indian Colony since it was designated as a Colony and a federally recognized Tribe by Executive Order of 1916. In 1916 the water from White's Creek, which was an all-weather stream, flowed through the Colony and was used to irrigate grassland and feed livestock belonging to members of the Colony. Today, as a result of third-party trespass, the water no longer flows through the Colony.

Since Winnemucca is located in an arid desert type environment, sources of water are critical to the use and habitability of the land. The climate in the Winnemucca area is an arid, "high-desert" type that is characterized by dry, hot summers and cold, moderately dry winters. For the period 1877 through 2011, the annual average high temperature was 66°F., the annual average low temperature was 33°F., and the average annual precipitation (rain and snow) was 8.28 inches. This amount of precipitation is not sufficient to support dryland agriculture, which generally requires a minimum of 20 inches of rain per year. Summer days tend to be hot with sharp

[2] *Id.* at (p I-8).

temperature drops at night, typical of any high-desert environment; freezing temperatures have occurred in every month of the year.

III. The people

The Winnemucca Indian Colony's members have lived continuously on the land. During the years 1933 to 1941, New Deal funds were distributed to the Nevada Shoshone for purchase of livestock and for improving grazing lands. Remnants of the corrals and pens were still visible on the Winnemucca Indian Colony in 2000. Although Winnemucca was rarely mentioned, it was referred to in conjunction with the Battle Mountain Shoshone reservation. *See* Steven J. Crum, *The Road on Which We Came,* (Univ. of Utah Press, 1994) at 85-117.

However, beginning with the First World War, there was a diaspora of members of the Colony due to enlistment in the fighting for the two world wars and because families with children were escaping from the Colony to save their children from conscription into the Stewart Indian residential school. The Colony members lived on the Colony sporadically, but returned to bury their relatives on the lands and returned for family gatherings.

Throughout the 20th century, the Winnemucca Indian Colony's population varied. However, the land was developed for personal and business use, such as for the Winnemucca Indian Colony's smoke shop. During such time, the United States has always exerted its power of trust over the Winnemucca

Indian Colony. For example, when a membership dispute arose in 1985/1986, the Western Nevada Agency of BIA took control and acted as a trustee of the Colony's smoke shop and other assets until a proper government could be organized. All the funds were collected and turned over to the new government when it was established.

The Western Nevada Agency of the BIA took over the entirety of the governance of the Colony in 1986 and undertook a thorough determination of the qualified membership. However, when the Tribal Chairman was murdered on the Administration doorsteps in February 2000, the BIA refused to recognize the true membership, even though these members were the same as those determined to be qualified in 1986. With this refusal, outsiders – including a Filipino – argued they were the true members, when they obviously were not. Thus, the true and proven membership suffered without a permanently recognized government from 2000 to 2022. BIA has never made an inventory of the assets of the Colony in breach of its trust duty. As a result, BIA has never provided an assessment of the water flow into the Winnemucca Indian Colony from White's Creek. Instead, BIA allowed the only existing water to be stolen by corporate third parties.

STATEMENT OF THE CASE

The United States government has long been the trustee for the natural resources of the tribes as

compensation for peace with the Indians,[3] but this case, if allowed to stand, will breach that critical promise. The government trustee has rendered the reservations a useless piece of sand without water. To wit, this case arises from the Winnemucca Indian Colony's claims against the United States in the Court of Federal Claims. In its First Amended Complaint, the Winnemucca Indian Colony sued for money damages, *inter alia,* in relation to failure by the United States to stop trespasses to water on tribal trust land. Specifically, in Count Three, titled "Breach of Trust – Water," the Winnemucca Indian Colony alleged that the government allowed a third-party development company "to divert a stream and remove water from wells from which water was able to reach the Colony's lands" and hold that water in upstream wells and holding tanks, such that "there is no available water or water rights located on the 320 acres" of the Winnemucca Indian Colony's land. App. 131a.

The United States brought a Motion to Dismiss First Amended Complaint, arguing, in relevant part, that the Winnemucca Indian Colony had not identified a source of law imposing a money-mandating duty on the United States to manage Plaintiff's alleged *Winters* Doctrine water rights under *Winters v. United States,* 207 U.S. 564 (1908).

The Winnemucca Indian Colony understood that, in order to bring a water-based, breach of trust claim in the Court of Federal Claims, the Indian

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[3] See, Article 6, Ruby Valley Treaty and Article VI, Treaty of Guadalupe Hidalgo, 1843.

Tucker Act requires a plaintiff to "identify a substantive source of law that establishes specific fiduciary or other duties." *United States v. Navajo Nation,* 537 U.S. 488, 506, 123 S. Ct. 1079 (2003) *("Navajo I")* (internal quotation omitted). "[T]he analysis must train on specific rights-creating or duty-imposing statutory or regulatory prescriptions." *Id.* If the Tribe identifies such a statute at step one of the *Navajo I* analysis, at the second step "the court must then determine whether the relevant source of substantive law 'can fairly be interpreted as mandating compensation for damages sustained as a result of a breach of the duties [the governing law] impose[s].'" *Id.* (alteration in original) (quoting *United States v. Mitchell,* 463 U.S. 206, 219, 103 S. Ct. 2961(1983) *("Mitchell II")).*

The Winnemucca Indian Colony argued that *Winters,* in combination with 25 C.F.R. § 152.22 – a regulation – fulfills the requirements for finding a money mandate. Both steps are fulfilled by 25 C.F.R. § 152.22, which expressly requires:

> Lands held in trust by the United States for an Indian tribe, lands owned by a tribe with Federal restrictions against alienation and any other land owned by an Indian tribe may only be conveyed where specific statutory authority exists and then only with the approval of the Secretary unless the Act of Congress authorizing sale provides that approval is unnecessary.

25 C.F.R. § 152.22 (b).

In Reply to the Motion to Dismiss Amended Complaint, the Winnemucca Indian Colony explained that 25 C.F.R. § 152.22 states that Secretarial approval is necessary to convey individual-owned trust or restricted lands or land owned by a tribe. This is control sufficient to establish a fiduciary responsibility:

> '[W]here the Federal Government takes on or has control or supervision over tribal monies or properties, the fiduciary relationship normally exists with respect to such monies or properties (unless Congress has provided otherwise) even though nothing is said expressly in the authorizing or underlying statute (or other fundamental document) about a trust fund, or a trust or fiduciary connection.'

Mitchell II at 225, 103 S.Ct. at 2972 (quoting *Navajo Tribe of Indians v. United States,* 224 Ct.Cl. 171, 183, 624 F.2d 981, 987 (1980)).

The Winnemucca Indian Colony further argued that though 25 C.F.R. § 152.22 does not mention water, a reservation of water is implied through the *Winters* doctrine. *Arizona v. Navajo*, 599 U.S. 555, 561 (2023) (citing *Winters*, 207 U.S. at 576-77). Thus, the *Winters* doctrine and 25 C.F.R. § 152.22 constitute "a substantive source of law that establishes specific fiduciary or other duties," and the Winnemucca Indian Colony has "allege[d] that the Government has

failed faithfully to perform those duties." *United States v. Navajo Nation* (*Navajo I*), 537 U.S. 488, 506 (2003).

The Court of Federal Claims dismissed the case in the entirety, finding, as to the water claim, that:

> Importantly, after the parties completed briefing on the Government's Motion, the Supreme Court decided *Navajo Nation*, holding that an 1868 treaty with the Navajos did not impose upon the federal government a duty to take affirmative steps to secure water for the tribe, even if under the *Winters* doctrine the treaty reserved the tribe's water rights. 143 S. Ct. at 1811, 1814. In that case, the Navajos were not alleging that the Government had interfered with water access but that it should assess, plan, and provide for the tribe's water needs. *Id.* at 1810. The Court held that, although the treaty creating the Navajo reservation imposed several specific duties on the United States, "the treaty said nothing about any affirmative duty for the United States to secure water." *Id.* at 1813. Specifically, the Court found no language in the Navajo treaty that would establish a "conventional trust relationship with respect to water." *Id.* at 1814 (explaining that the Court would not "'apply common-law trust principles' to infer duties not found in the text of a

> treaty, statute, or regulation"). As "it is not the Judiciary's role to update the law," the Court concluded it must leave "to Congress and the President the responsibility to enact appropriations laws and to otherwise update federal law as they see fit in light of the competing contemporary needs for water." *Id.* at 1814–15.

App. 53a.

The Court of Federal Claims further found:

> Just as the Supreme Court found the Navajo treaty did not impose a duty to take "affirmative steps" to secure water for the Navajo Tribe, the Court also concludes the Executive Order does not impose a duty on the Government to take "affirmative steps" to prevent diversion of water onto the Winnemucca reservation. *Navajo Nation*, 143 S. Ct. at 1814. That *Winters* nonetheless recognizes the Colony's reserved water rights does not in itself create a duty for the Government to enforce those rights against third-party interference. *Winters* only recognized the federal government's power to assert such rights on behalf of a tribe, not that it has a specific fiduciary duty to do so. *Navajo Nation* instructs that neither the Government's general trust relationship

> with the Colony nor the Executive Order fill in the gap to create an affirmative duty to ensure the Colony's access to water. Indeed, *Navajo Nation* rejected the argument that the Government's purported control over reserved water rights created trust duties to the Navajos and indicated that the Navajos could assert their own interests in water rights litigation.4 *Navajo Nation*, 143 S. Ct. at 1815–16.

App. 54a.

The Court of Federal Claims further found that the Winnemucca Indian Colony had not identified an otherwise money-mandating source of law underlying the third claim. App. 47a. However, the Court did not explain how 25 C.F.R. § 152.22 was not money mandating.

On appeal, the Winnemucca Indian Colony argued that dismissal of Count Three was improper because the *Winters* doctrine and 25 C.F.R. § 152.22 established: 1) BIA's fiduciary duty, and 2) a money mandate, as required under *United States v. White Mountain Apache Tribe,* 537 U.S. 465 (2003) and *United States v. Mitchell,* 463 U.S. 206, 225, 103 S.Ct. 2961, 2962 (1983) (*Mitchell II).* The mandate required BIA to observe its fiduciary duty to stop diversion of water from the Winnemucca Indian Colony lands.

The Federal Circuit affirmed. App.12a. The Federal Circuit's analysis began with what the *Winters* doctrine stands for – that the "Federal Government's reservation of land for an Indian tribe . . . implicitly reserves the right to use needed water from various sources." App. 13a (quoting *Arizona v. Navajo Nation*, 599 U.S. 555, 561 (2023) (citing *Winters v. United States*, 207 U.S. 564, 576–77 (1908)). Next, however, the Court found that the *Winters* doctrine "is a common law doctrine that does not, on its own, create a trust obligation." *Id.* The Court did not cite any case wherein an Indian tribe sought money damages in relation to a failure to protect *existing* water. Instead, the Court noted that in *Arizona,* the Supreme Court "held that the 1868 treaty establishing the Navajo Reservation reserved necessary water to accomplish the purpose of the Reservation but did not require the government to take affirmative steps to secure water for the tribe." *Id.* (citing *Arizona* at 566.) Federal Circuit further cited its decision in *Ute Indian Tribe of the Uintah & Ouray Indian Reservation v. United States*, 99 F.4th 353 (Fed. Cir. 2024), stating that the case involved a "similar situation," specifically, that the Ute had "alleged that the government had 'duties in trust to secure new water for the tribe . . . ." *Id.*

The Federal Circuit found that 25 C.F.R. § 152.22 "does not mention water rights or establish any governmental duty relevant to the diversion of tribal water" and therefore did not establish a money-mandating duty relevant to Count Three. *Id.* at 10-11. The Federal Circuit, thus, ignored that the value of

the land is its natural resources, and, in this case, the natural resource was water.

The Winnemucca Indian Colony sought reconsideration or *en banc* review regarding Federal Circuit's finding that case dismissal is warranted under *Arizona* as well as *Ute Indian Tribe of the Uintah & Ouray Indian Reservation v. United States,* 99 F.4th 353 (Fed. Cir. 2024). App. 1a to 2a. In particular, and as noted by Federal Circuit, the Ute tribe "alleged that the government had 'duties in trust to secure new water for the Tribe, including by constructing new water storage infrastructure." App. 14-15a (citing *Ute* at 1364-65). This case does not involve "new water," and thus, *Ute* does not support dismissal.

The Winnemucca Indian Colony argued that because *Ute* is distinguishable: here, the issue is not about "new water," but instead, about existing water. Furthermore, *Ute* did not involve third party interference. The Winnemucca Indian Colony sought ruling in reconsideration or *en banc* review that *Winters* and 25 C.F.R. § 152.22 support claims for money damages against the United States when it fails to stop third party interference with existing water rights, and thus, fails to reserve sufficient water rights to accomplish the purposes of the reservation. The Federal Circuit Court of Appeals finally sounded the death knell for the Colony's right to useable land for their homes. The Federal Court of Appeals rendered the Winnemucca Indian Colony a useless patch of sand.

The Federal Circuit denied the Winnemucca Indian Colony Petition.

LEGAL ARGUMENT

In affirming dismissal of the Winnemucca Indian Colony's Third Claim, the Federal Circuit compared the facts in this case to those in *Arizona v. Navajo Nation*, 599 U.S. 555 (2023), and in *Ute Indian Tribe of the Uintah & Ouray Indian Reservation v. United States*, 99 F.4th 1353 (Fed. Cir. 2024). First, the Court noted that in *Arizona,* "the Navajo Nation filed suit seeking to compel the United States government to take affirmative steps to secure needed water for the tribe." App. 14a (citing *Arizona* at 558-59). Second, the Court noted that in *Ute,* "the Tribe alleged that the government had "duties in trust to secure new water for the Tribe, including by construction of new water storage infrastructure." App. 14-15a (citing *Ute* at 1365-66).

But both *Arizona* and *Ute* were about affirmative steps to find *new* water, not existing water – a crucial distinction from this case. Without this Court's intervention, the Federal Circuit's ruling results in the Winnemucca Indian Colony's tribal homelands being reduced to useless sand without water.

I. *Arizona v. Navajo* did not involve third-party interference of existing tribal water.

From the outset of the opinion, the court in *Arizona v. Navajo Nation* noted the difference between protecting existing water (as here), and securing new water (as in *Arizona):*

> The Navajos' claim is not that the United States has *interfered* with their water access. Instead, the Navajos contend that the treaty requires the United States to *take affirmative steps* to secure water for the Navajos—for example, by assessing the Tribe's water needs, developing a plan to secure the needed water, and potentially building pipelines, pumps, wells, or other water infrastructure—either to facilitate better access to water on the reservation or to transport off-reservation water onto the reservation.

Arizona at 558-59, 143 Sup. Ct. at 1809 (emphasis in original).

The *Arizona* Court repeated this important distinction several times, for example, stating:

> According to the Navajos, the United States must do more than simply not *interfere* with the reserved water rights. The Tribe argues that the United States

> also must *take affirmative steps* to secure water for the Tribe— including by assessing the Tribe's water needs, developing a plan to secure the needed water, and potentially building pipelines, pumps, wells, or other water infrastructure. See Tr. of Oral Arg. 102 (counsel for Navajo Nation: "I can't say that" the United States's obligation "to ensure access" to water "would never require any infrastructure whatsoever").

Id. at 547-48, 14 Sup. Ct. at 1812. And:

> As relevant here, the Navajos do not contend that the United States has interfered with their access to water. Rather, the Navajos argue that the United States must take affirmative steps to secure water for the Tribe—for example, by assessing the Tribe's water needs, developing a plan to secure the needed water, and potentially building pipelines, pumps, wells, or other water infrastructure.

Id. at 563, 143 Sup. Ct. at 1812-13.

The Court's repeated acts of distinguishing between new water and existing water evokes the very same distinction made in *Hopi Tribe v. United States,* 782 F.3d 662, 665 (Fed. Cir. 2015) – a case cited by the Winnemucca Indian Colony. *See Hopi* at 669 ("In some circumstances, *[Winters]* may also give

the United States the power to enjoin others from practices that reduce the quality of water feeding the reservation.").

As in *Arizona,* the facts in *Hopi* involved a tribal request to assist with the procurement of *new* water. The public water systems on the Hopi reservations were found to contain arsenic, and thus, the Hopi sued the United States, seeking damages to cover the cost of providing alternative sources of drinking water in all five communities. *Id.* at 665. The court affirmed dismissal, finding that *Winters* "does not . . . give the United States responsibility for the quality of water within the reservation, independent of any third-party diversion or contamination" *Id.* at 669. Further, the *Hopi* court found that even if Congress intended the term "land" in an Act of 1958 to include reserved water rights under the Winters doctrine, the Act still had not imposed a fiduciary duty to manage water quality on the Hopi Reservation, "absent third-party interference." *Id.* At most, by holding reserved water rights in trust, **"Congress accepted a fiduciary duty to exercise those rights and exclude others from diverting or contaminating water that feeds the reservation."** *Id.* (emphasis added).

Similarly, here the Winnemucca Indian Colony sued for BIA failure to protect tribal water from third party interference. No demand has been made that BIA help the Winnemucca Indian Colony find new water from an outside source, or to build pipelines, pumps, wells, or other water infrastructure, or to remove poison from wells on the Winnemucca Indian

Colony's land. Instead, the Winnemucca Indian Colony seeks money damages for diversion of water from its own land. The only way to replace lost water in the arid desert of Nevada is with money damages to buy replacement water rights.

Arizona therefore does not support dismissal. At the very least, the Court's emphatic distinction between new water and existing water means that the holding of *Arizona* was narrow, confined to cases involving a request by a tribe to secure new sources of water. Broadening the holdings therein to cases involving diversion of tribal water would result in a devastating precedent.

II. The court in *Ute Indian Tribe of the Uintah & Ouray Indian Reservation v. United States* dismissed claims involving new water, but allowed claims related to existing water to continue.

Neither did *Ute Indian Tribe of the Uintah & Ouray Indian Reservation v. United States*, 99 F.4th 1353 (Fed. Cir. 2024), cited by the Federal Circuit, support dismissal. The court noted that in *Ute,* the Tribe alleged that the government had "duties in trust to secure ***new*** water for the Tribe, including by constructing new water storage infrastructure." App. 14-15a (emphasis added) citing *Ute* at 1364–65. The Ute Tribe pointed to the *Winters* doctrine and federal statutes as imposing those duties. *Id.* at 1365–66. The *Ute* Court held that the statutes did not impose trust duties to secure water for the tribe because the

general instruction of one of the statutes to "otherwise protect the rights and interests of the Indians" was not specific enough to create trust duties. *Id.* at 1366, 1371 (cited at App. 15a). On such basis, Federal Circuit saw "no obligation for the government to take action with respect to the alleged diversion of tribal water." App. 15a.

The Federal Circuit's comparison of this case to *Ute* was only to rejection of a money mandate supporting damages related to *new* water. The Federal Circuit held that the subject statutes did not impose trust duties to secure water for the tribe because the general instruction of one of the statutes – to "otherwise protect the rights and interests of the Indians" – was not specific enough to create trust duties. App. 15a (citing *Ute* at 1366, 1371). However, the court's citation was to Discussion, Part IA of *Ute*. *See Ute* at 1364-66.

But *Ute* also involved allegations over the United States failure to protect existing water, discussed in the decision at Discussion Part IB. *Ute* at 1366-71. There, the Court upheld the claim. *See Ute* at 1366 ("We reach a different conclusion as to the second category of the Tribe's breach of trust claims, at least as to water infrastructure. In the second category, the Tribe alleges that the United States has mismanaged particular infrastructure and specific water rights previously appropriated to the Tribe and held in trust for the Tribe's benefit."). The Ute Tribe had alleged "'that the United States violated this duty by affecting "transfers of the Tribe's water rights . . . from Indian lands to non-Indian lands under the UIIP

[Uintah Indian Irrigation Project] and from Indian lands on the Reservation not non-Indian lands outside the UIIP.'" *Id.* at 1370 (citing Complaint). The court deemed that even where the issue had not been briefed, the breach of trust claims related to diversion would go forward, as otherwise, "'injustice might otherwise result . . . .'" *Id.* at 1370 (citation omitted).

Injustice certainly would have resulted for the Ute, who were noted to be living on "exceptionally arid" land. *Id.* at 1358. The description fits the Winnemucca Indian Colony land as well, one State over in the dry Nevada desert. Compounding the injustice of the Winnemucca Indian Colony living without water is the story of how and why existing water was taken away. The Winnemucca Indian Colony was unable to protect itself from the loss of the water from its lands because BIA intentionally refused to recognize a government for twenty-two years. App. 29a. Moreover, during this time, the Colony members could not enter their lands since they had been arrested for trespass once and threatened with it again by BIA police. App. 33a. The Winnemucca Indian Colony members were excluded from their lands and arrested for trespass and then threated with arrest again even after the IBIA stated that BIA must recognize a Council, but BIA refused. *Id.* Now, the members are denied the full use of their property rights – the land *and* the water. BIA had the power to disable the tribe by not recognizing tribal government and then breached its own trust duties. The Winnemucca Indian Colony is now left in the absurd position of having to buy its own water from a utility, due to BIA's failure to stop third party

interference. Because the Winnemucca Indian Colony now has no more water, the only way to recompense for the loss is funds to purchase water rights.

The Ute arrived at a happier outcome. The *Ute* court allowed diversion-related claims to proceed because a 1906 Act was deemed to be a substantive source of law that established specific fiduciary or other duties under *Navajo I*, and the Act could be fairly interpreted as a money mandate under *Mitchell II*. *Id.* at 1368-69. The Act satisfied *Navajo I* in part because the United States held the irrigation systems "in trust for the Indians." *Id.* at 1368 (citing 34 Stat. 375). The Act next satisfied *Mitchell II* because, as in *United States v. White Mountain Apache Tribe,* 537 U.S. 465 (2003), the fact that the *Ute* property "occupied by the United States is expressly subject to a trust supports a fair inference that an obligation to preserve the property improvements was incumbent on the United States as trustee' because 'a fiduciary actually administering trust property may not allow it to fall into ruin on his watch." *Id.* (quoting *White Mountain Apache* at 475 (citing, *inter alia*, Restatement (Second) of Trusts § 176 (1957)); *see also* Restatement (Third) of Trusts § 76 (2007). The *Ute* court thus held: "Here, as in *White Mountain Apache*, 'it naturally follows that the Government should be liable in damages for the breach of its fiduciary duties.'" *Ute* at 1369 (quoting *White Mountain Apache* at 476 (quoting *Mitchell II,* 463 U.S. at 226)." The *Ute* court thus found that the duties prescribed by the 1906 Act could be fairly interpreted as money-mandating, and, therefore, that the second element of

the *Navajo I* jurisdictional analysis was satisfied as to the water infrastructure claims.

The Winnemucca Indian Colony made similar arguments about 25 C.F.R. § 152.22 – that it placed land and water into trust, over which it had control. Certainly, to conclude otherwise – that the United States does not control the water flowing through the Winnemucca Indian Colony – would contravene *Winters*. But the Federal Circuit did not fully analyze the significance of section 152.22 because it stopped at the first step of the Tucker Act analysis, finding no duty under *Navajo I*. The Winnemucca Indian Colony now requests that the Court reconsider, find a trust duty, and interpret section 152.22 as money mandating.

The law requires only a "fair inference" of a money mandate. *Ute* at 1369 (quoting *White Mountain Apache* at 473). In *White Mountain Apache,* "the Supreme Court noted that the statutory language expressly defined a fiduciary relationship and that the United States enjoyed occupation of the trust property, which was sufficient for Indian Tucker Act jurisdiction even though the statute did not 'expressly subject the Government to duties of management and conservation.'" *Id.* at 1368 (quoting *White Mountain Apache* at 474-75). Similarly, here the word "water" may be implied through *Winters;* when 25 C.F.R. § 152.22 says, "[l]ands held in trust by the United States for an Indian tribe," it also means water. Otherwise, the Winnemucca Indian Colony would find itself back in the situation described in *Winters* – a tribe with rights to land but not to the

water. Presumably, too, the United States would prefer an interpretation that all Indian water, including the Winnemucca Indian Colony's, is water held in trust by the United States. A money mandate is further inferred through control. In *White Mountain Apache*, the statute provided that the "former Fort Apache Military Reservation" would be "held by the United States in trust for the White Mountain Apache Tribe, subject to the right of the Secretary of the Interior to use any part of the land and improvements for administrative or school purposes." *White Mountain Apache* at 469 (quoting Pub. L. 86-392, 74 Stat. 8). *See also Ute* at 1368 (quoting same). Here, 25 C.F.R. § 152.22 makes clear that only the United States has the control to sell land (and water). Control is complete, indicating a money mandate.

The Winnemucca Indian Colony identified 25 C.F.R. § 152.22 as the requisite source of law. Under the Regulation, the Secretary *must* approve land sales. The Winnemucca Indian Colony argued that the *Winters* doctrine extends such a prohibition to the Winnemucca Indian Colony's implied water rights. The doctrine simply stands for the precept that, "when the Federal Government reserves land, by implication it reserves water rights sufficient to accomplish the purposes of the reservation." *Cappaert v. United States,* 426 U.S. 128, 138, 96 S. Ct. 2063, 2070 (1976) (citing *Winters v. United States,* 207 U.S. 564 (1908)). Under *Winters,* the United States holds reserved water rights "[a]s a *fiduciary*" for the Tribes" *Arizona v. California,* 460 U.S. 605, 626-627, 103 S. Ct. 1382 (1983) *("California")* (emphasis added).

Otherwise, the United States has created a reservation, a homeland for these homeless Shoshone that, by the Federal Court's ruling has been rendered a useless patch of sand.

CONCLUSION

The petition should be granted.

Respectfully submitted,

NORBERTO J. CISNEROS
Counsel of Record
BARBARA M. MCDONALD
MADDOX & CISNEROS, PLLC
1210 S. Valley View Blvd.
Suite 202
Las Vegas, NV 89102
(702) 366-1900
NCisneros@mc-thefirm.com

TREVA HEARNE
RENO LAW GROUP, LLC
433 W. Plumb Lane
Reno, Nevada 89509

Attorneys for Petitioner