

No. 25-1170

IN THE
Supreme Court of the United States

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

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

**REPLY BRIEF IN SUPPORT OF PETITION
FOR A WRIT OF CERTIORARI**

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LEGAL ARGUMENT

The Court should hold that the Winnemucca Indian Colony states 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. Petition at Question Presented 3. The dire effects of a ruling to the contrary cannot be overstated. It would sound a death knell to any hopes by members of the Winnemucca Indian Colony to return to their land. For far too long, the land has been inhospitable due to lack of a basic human need – water.

Over and over again, the United States clings to the myth that this case is about a membership dispute. Opp. 1. The US has had the duty to protect Indian water regardless. The duty to stop third party interference did not require permission from tribal leadership.

The *Winters* doctrine and 25 C.F.R. § 152.22 fulfill both steps of the Tucker Act and Indian Tucker Act and therefore require the United States to protect existing water held in trust. The United States argues that neither step has been met and that the distinction between existing water and new water is irrelevant. Not only is the United States incorrect, but its arguments, if accepted, would open the floodgates to trespasses of water on Indian land nationwide. The Court should reject such a dangerous result.

The United States further argues that the third claim was barred by 28 U.S.C § 1500 and 28 U.S.C § 2501. But the Federal Appeals Court did not affirm

dismissal under either statute because it found other grounds to uphold dismissal. This Court should find that the claims may proceed under the *Winters* doctrine and 25 C.F.R. § 152.22.

I. The *Winters* doctrine and 25 C.F.R. § 152.22 fulfill the first step under the Tucker Act.

The United States argues that the first step under the Tucker Act – finding a substantive source of law that establishes specific fiduciary or other duties – must be based on specific “specific rights-creating or duty-imposing [constitutional], statutory, or regulatory prescriptions” Opp. 13 (quoting *United States v. Navajo Nation*, 556 U.S. 287, 290 (2009) (“*Navajo II*”). The Winnemucca Indian Colony cited 25 C.F.R. § 152.22 as the specific regulatory prescription. The regulation expressly states that “[l]ands held in trust by the United States for an Indian Tribe” and “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 Congress authorizes that such approval is unnecessary. 25 C.F.R. § 152.22. Since the Court issued its holding in *Winters* almost 120 years ago, the United States has accepted the definition of “land” on Indian territory as including appurtenant water. *See Cappaert v. United States*, 426 U.S. 128, 138 (1976) (citing *Winters v. United States*, 207 U.S. 564, 576 (1908)). “When the United States establishes a tribal reservation, the reservation generally includes (among other things) the land, the minerals below the land’s surface, the timber on the land, and the right to use needed water on the reservation,

referred to as reserved water rights.” *Arizona v. Navajo Nation*, 599 U.S. 555, 548 (2023) (citing *United States v. Shoshone Tribe*, 304 U.S. 111, 116-118, 58 S.Ct. 794 (1938); *Winters* at 576-77, and *Cappaert* at 128). Thus, contrary to argument by the United States, *see* Opp. 15, it has “expressly accepted such obligations” to protect Indian land, including appurtenant water. *See Arizona* at 548. Thus 25 C.F.R. § 152.22 forbids the United States to convey any interest in water appurtenant to Indian land. The argument that *Winters* does not create an obligation upon the United States to prevent third parties from appropriating water, *see* Opp. 15, is ironic, given that *Winters* was in fact about stopping interference by third parties upon Indian water. *See Cappaert* at 139 (explaining that in *Winters*, upstream users were homesteaders who had invested heavily in dams to divert the water to irrigate their land). The United States now tries to limit the *Winters* doctrine to one in which certain rights are merely “recognized,” Opp. 15, but the *Winters* Court went further, stopping intrusion and trespass.

To deny the Petition would be to contravene the purpose of the Indian Non-Intercourse Act which 25 C.F.R. § 152.22 carries out through regulation. 25 C.F.R. § 152.22 requires that Indian land may 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” and specifically cites the Indian Non-Intercourse Act, 25 U.S.C. § 177. The fact that Congress intended the Non-Intercourse Act to apply to appurtenant water is demonstrated by the fact that water rights cannot be sold without

Congressional approval. Otherwise, parties to a contract of water rights must agree to waive the approval required under section 177. *See, e.g.*, Colorado River Indian Tribes Water Resiliency Act of 2022, 117 P.L. 343, 136 Stat. 6186 (enacted January 5, 2023), § 6a (“Notwithstanding section 2116 of the Revised Statutes (commonly known as the “Indian Trade and Intercourse Act”) (25 U.S.C. 177) or any other provision of law, the [Colorado River Indian Tribe] is authorized, subject to the approval of the Secretary under section 7(a), and has the sole authority, to enter into, with any person, an agreement for conserved water, subject to the conditions that if the conserved water is delivered, the delivery is to a location in the Lower Basin in the State and is not to a location in the counties of Navajo, Apache, or Cochise in the State.”)

II. The *Winters* doctrine and 25 C.F.R. § 152.22 fulfill the second step under the Tucker Act.

Contrary to argument by the United States, Opp. 15, the *Winters* doctrine and 25 C.F.R. § 152.22 together further satisfy the second step of the Tucker Act – they “can fairly be interpreted as mandating compensation for damages sustained as a result of a breach of the duties the governing law imposes.” *Navajo II*, 556 U.S. at 290-291. In arguing that *Winters* alone does not satisfy the requirement, Opp. 16, it fails to read both *Winters* and the regulation together.

The United States further fails to acknowledge that only a “fair inference” of an obligation to preserve

property in order to conclude that a regulation such as 25 C.F.R. § 152.22 is a money mandate. The Winnemucca Indian Tribe cited *United States v. White Mountain Apache Tribe*, 537 U.S. 465 (2003) for the precept, but the United States completely ignores this important case. The United States seeks a ruling that a money mandate must be expressly stated, not inferred – but the important precedent established in *White Mountain* does not support such a position. Because the United States completely controls the right to convey land and water, 25 C.F.R. § 152.22 is a money mandate.

Ignoring *White Mountain*, the United States next argues that it has no power, authority or obligation to protect water on Indian land because “neither the United States nor petitioner owns the surface or ground waters that run through the Tribe’s reservation.” Opp. 17 (citing *Sturgeon v. Frost*, 587 U.S. 28 (2019)). Such an argument is irrelevant. Of course, the United States does not convey “molecules of water,” Opp. 18, to third parties. That said, even where “the water itself, the *corpus* of the stream, never becomes or, in the nature of things, can become, the subject of fixed appropriation or exclusive dominion, in the sense that property in the water itself can be acquired, or become the subject of transmission from one to another,” a sovereign may “acquire the right to its use.” *Federal Power Comm’n v. Niagara Mohawk Power Corp.*, 347 U.S. 239, 247 (1954), fn. 10 (quoting *Sweet v. Syracuse*, 129 N. Y. 316, 335, 27 N. E. 1081, 1084)). Even the United States acknowledges that it has the right “to use—whether by withdrawing or maintaining—certain waters [that the rights-holder] does not own.” Opp. 17

(quoting *Sturgeon* at 43). The United States controls the water.

Thus, in *Sturgeon*, the court explained:

“[W]hen the Federal Government withdraws its land from the public domain and reserves it for a federal purpose, the Government, 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, 96 S. Ct. 2062, 48 L. Ed. 2d 523 (1976). For example, this Court decided that in reserving land for an Indian tribe, the Government impliedly reserved sufficient water from a nearby river to enable the tribe to farm the area. See *Winters v. United States*, 207 U. S. 564, 576, 28 S. Ct. 207, 52 L. Ed. 340 (1908). And similarly, we held that in creating a national monument to preserve a species of fish inhabiting an underground pool, the United States acquired an enforceable interest in preventing others from depleting the pool below the level needed for the fish to survive. See *Cappaert*, 426 U. S., at 147, 96 S. Ct. 2062, 48 L. Ed. 2d 523.

Sturgeon at 43.

The nature of water – whether molecular and amenable only to usufructuary rights – does not absolve the United States the responsibility to secure and protect Indian water.

The Winnemucca Indian Colony argued that rulings by both the Court of Federal Claims and the Federal Appeals Court were incorrect because both misunderstood the Winnemucca Indian Colony to be seeking appropriation of new water for the Tribe. Pet.11. The Court of Federal Claims held, “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.” App. 54a (citing *Arizona v. Navajo Nation*, 143 S. Ct. 1804, 1814 (2023)). The Court of Federal Claims provided no analysis under 25 C.F.R. § 152.22. Subsequently, the Federal Appeals Court, echoing the misunderstanding that the case was about finding new water, stated that this case was “similar” to *Ute Indian Tribe of the Uintah & the Ouray Indian Reservation v. United States*, 99 F.4th 353 (Fed. Cir. 2024), specifically, that the Ute had “alleged that the government had duties in trust to secure new water for the tribe.” App. 12a.

The United States does not contest that both rulings were incorrect. Instead, it argues that the misunderstandings mean nothing. Indeed, the United States suggests that because it does not own the water, it has no duty to take any action whatsoever. Such a conclusion, if adopted by this Court, would

likely result in total abdication of any obligation by the United States to protect existing Indian water.

The United States addresses *Ute* only in a footnote, arguing that the court did not decide whether the United States had a duty to protect existing water and remanded the question. Opp. 18, fn. 2. The United States misses the point: dismissal of such a claim was not affirmed.

The United States argues that the Winnemucca Indian Tribe has alleged failure to stop third party interference with water but not actual conveyance of water as stated in 25 CFR § 152.22. Opp. 20. But the Winnemucca Indian Tribe properly alleged that such conveyance was by way of easements – a type of conveyance. Pet. App. 124a. (“The BIA failed and refused, and continues to fail and refuse, to protect the lands of the Winnemucca Indian Colony from the discharge of storm sewer water or the use of such easement by the City of Winnemucca.”).

The United States argues that the Winnemucca Indian Tribe should sue the third-party trespassers directly. But the United States holds the land and the appurtenant water in trust for the benefit of the Tribe. The injury derives from the actions of the United States.

III. 28 U.S.C. § 2501 does not bar the third claim.

The United States argues that the Winnemucca Indian Tribe’s third claim, entitled “Breach of Trust – Water” is time-barred under 28 U.S.C. § 2501. But the Federal Appeals Court did not affirm dismissal of the third claim under section 2501.

Pet. App. 15a – 23a. Instead, the court affirmed only the Claims Court’s dismissal of Counts One, Two, Five, and the remaining portion of Six as time-barred under 28 U.S.C. § 2501. *Id.* The Federal Appeals Court further acknowledged that some claims might survive under the continuing claims doctrine:

The continuing claims doctrine allows “later arising claims even if the statute of limitations has lapsed for earlier events.” *Tamerlane, Ltd. v. United States*, 550 F.3d 1135, 1145 (Fed. Cir. 2008) (citation omitted). It applies where a plaintiff’s claim is “inherently susceptible to being broken down into a series of independent and distinct events or wrongs, each having its own associated damages.” *Brown Park Ests.-Fairfield Dev. Co. v. United States*, 127 F.3d 1449, 1456 (Fed. Cir. 1997). “The continuing claims doctrine has been applied when the government owes a continuing duty to the plaintiffs. In such cases, each time the government breaches that duty, a new cause of action arises.” *Boling v. United States*, 220 F.3d 1365, 1373 (Fed. Cir. 2000). The doctrine does not apply to single events that have continuing negative effects. *Brown Park*, 127 F.3d at 1456.

Id.

Certainly, the doctrine may be applied to allegations of ongoing trespass of water. The only

grounds upon which the Federal Appeals Court upheld dismissal of the third claim was the alleged lack of duty and a money mandate. The Federal Appeals Court's decision not to affirm dismissal of the water claim as time-barred means it is not.

IV. 28 U.S.C. § 1500 does not bar the third claim.

The United States argues that 28 U.S.C. § 1500 bars the water claim. But just as the Federal Appeals Court did not affirm dismissal of the third claim under section 2501, it did not do so under section 1500. Specifically, the Federal Appeals Court stated: “We need not reach the Colony’s section 1500 arguments as to many of the appealed claims because, as explained above, we affirm the dismissal of those claims on other grounds.” *Id.* Only as to “portions of Counts One, Two, Five, and Six that are alleged to have accrued on or after November 18, 2014” did the court emphatically affirm the Claims Court’s dismissal under section 1500. *Id.* The Federal Appeals Court came to such a holding after the following analysis:

In the Nevada complaint, the Colony alleged that the BIA “allowed and supported” “[t]he lands of the Colony [to] continue to be occupied by non[]members of [the Colony],” App’x 54 ¶ 27, and that “[t]here ha[d] been no federal consent to convey any interest in the . . . Colony lands including any possessory interest,” App’x 56 ¶ 36. These allegations are operative facts in

the Claims Court complaint. As described earlier, the complaint here alleges claims that the government allowed continuing trespasses on tribal land. These overlapping facts “are not mere background facts; they are critical to [the Colony’s] claims in both actions.” *Cent. Pines*, 697 F.3d at 1365. We thus conclude that the appealed portions of Counts One, Two, Five, and Six that are alleged to have accrued on or after November 18, 2014, are barred by section 1500, and affirm the Claims Court’s dismissals under that section.

Pet. App. 26a.

In other words, section 1500 applied to claims of intrusion by individuals – those persons whom the United States has failed for decades to acknowledge were not members of the Winnemucca Indian Colony. The water trespass at bar was an act by corporate trespassers, not individuals. Section 1500 has nothing whatsoever to do with the claim and does not bar it.

Yet the United States continues its mischaracterization of the claim as arising from a “membership dispute.” Opp.1. The first use of the term arose in its Motion to Dismiss; the United States argued it did not know who might be the rightful members of the Tribe. The Court of Federal Claims rejected such argument. Pet. App. 41a (“Because . . . the Government’s standing argument addresses what amounts to a pleading issue, it is unnecessary to

determine whether Plaintiff has sufficiently pleaded facts showing that this suit is brought by and through the Colony’s duly elected council.”). The United States now continues to falsely state that membership was in dispute when it knew in 1986 that none of the Bills/Ayers group, *see* Pet. App, 99a – 100 a, could possibly be tribal members. The assertion is not only irrelevant to water claims, but is insulting to tribal sovereignty.

Furthermore, the United States waived any argument that section 1500 applies to the water claim, as noted by the court:

The government acknowledges that section 1500 is applied on a claim-by-claim basis. Oral Arg. at 15:57–16:04 (admitting that “[i]f there are counts [in the Claims Court complaint] that don’t involve overlap [with the Nevada complaint], then the section 1500 bar wouldn’t apply”).

Pet. App. 25a.

There is no overlap with the 2023 Complaint, which involved allegations that third-party individuals – not corporate trespassers – caused injuries to the Winnemucca Indian Colony. The Federal Appeals Court did not find that section 1500 bars the claims.

CONCLUSION

The petition should be granted.

Respectfully submitted,

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