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1 P R O C E E D I N G S

2 (10:04 a.m.)

3 CHIEF JUSTICE ROBERTS: We will hear
4 argument this morning in Case 21-1484, Arizona
5 versus the Navajo Nation, and the consolidated
6 case.

7 Mr. Liu.

8 ORAL ARGUMENT OF FREDERICK LIU
9 ON BEHALF OF THE FEDERAL PARTIES

10 MR. LIU: Thank you, Mr. Chief
11 Justice, and may it please the Court.

12 When a reservation is established,
13 that reservation isn't just the land. It's also
14 a right to the timber on the land, a right to
15 the minerals below the surface, and, under
16 Winters, a right to water for the reservation.

17 Each of those rights is a stick in the
18 bundle that makes up the reservation, and when
19 the Navajo Reservation was originally
20 established and later expanded, the Navajo
21 Nation got all of those sticks, and it still
22 possesses them today. There's no dispute about
23 that.

24 The dispute here is about something
25 different, whether the United States owes the

1 Navajo Nation a judicially enforceable
2 affirmative duty to assess the tribe's water
3 needs, develop a plan to meet them, and then
4 carry out that plan by building water supply
5 infrastructure on the reservation.

6 The answer to that question is no.
7 Just as the 1868 treaty didn't impose on the
8 United States a duty to build roads or bridges
9 or to harvest timber or to mine coal, the 1868
10 treaty didn't impose on the United States a duty
11 to construct pipelines, pumps, or wells to
12 deliver water. Those affirmative duties aren't
13 part of the treaty. And because the government
14 has never expressly accepted those duties, the
15 Navajo Nation's breach-of-trust claim can't
16 proceed.

17 This is not to say that the
18 United States doesn't have a moral and political
19 responsibility to address the Navajo Nation's
20 water needs. As part of the general trust
21 relationship, Congress and the executive have
22 secured for the Navajo Nation hundreds of
23 thousands of acre feet of water and over a
24 billion of -- billions of dollars for
25 infrastructure on the reservation. And in -- in

1 exercising its own sovereignty, the Navajo
2 Nation is free to develop its own infrastructure
3 projects, including by drilling water to access
4 the cheapest source of water on the reservation,
5 groundwater.

6 What the Navajo Nation cannot do,
7 however, is to impose on the United States a
8 duty that the government has never expressly
9 accepted. Accordingly, the judgment below
10 should be reversed.

11 I welcome the Court's questions.

12 JUSTICE THOMAS: Mr. Liu, would you
13 just take a step back and address the
14 jurisdictional issue, particularly with respect
15 to redressability and this Court's retention of
16 jurisdiction on the Colorado River.

17 MR. LIU: Sure. We don't view the
18 issue as going to the district court's subject
19 matter jurisdiction. We view it as a
20 substantive merits determination about whether
21 the relief that could be granted at the end of
22 this suit would violate the substance of the
23 decree that this Court entered in Arizona versus
24 California.

25 So I think you'd have to look at the

1 relief that could be ordered down the road and
2 measure it against the decree. I think everyone
3 at this point agrees that an order by the
4 district court in this case that would order the
5 delivery of water from the lower mainstream of
6 the Colorado River to the Navajo reservation
7 would violate the decree because the degree --
8 the decree places conditions on when such water
9 can be delivered by the United States.

10 JUSTICE THOMAS: Where else would the
11 water come from?

12 MR. LIU: There's plenty of sources on
13 the Navajo reservation. So, if we're talking
14 about the particular region of the Navajo
15 reservation that's at issue in this complaint,
16 the most accessible source of water on the
17 reservation is groundwater. There are aquifers
18 that lie beneath the reservation, and there's no
19 impediment to the Navajo Nation accessing those
20 water sources today. In fact, they're doing it
21 across other parts of the reservation.

22 Another source of possible water for
23 this region is the upper basin, the Colorado
24 River in the upper basin. That -- that upper
25 basin water is farther away than the lower

1 Colorado mainstream, but it's far more
2 accessible, and the reason why is, if you look
3 at the terrain of the lower Colorado mainstream
4 that's adjacent to this part of the -- of the
5 reservation, it is a steep canyon. You're --
6 the -- the -- the reservation is on a plateau,
7 and then it's a 3,000- to 4,000-foot drop down
8 the canyon to the Lower Colorado River.

9 CHIEF JUSTICE ROBERTS: You -- you
10 said the -- that water was farther away.

11 MR. LIU: Yes.

12 CHIEF JUSTICE ROBERTS: How far away
13 is it?

14 MR. LIU: It -- it still borders the
15 reservation, but it's further north. It's just
16 above Lee Ferry. The -- the -- the -- the area
17 we're talking about here is below Lee Ferry, so
18 it's not much farther.

19 CHIEF JUSTICE ROBERTS: Yeah, I'm
20 sorry, but how far away from the agricultural
21 areas where the water is needed?

22 MR. LIU: Well, I think, to be clear,
23 the -- the water needed here isn't for
24 agricultural needs. If you read the complaint
25 at JA 101 to 102, the needs there alleged aren't

1 agricultural needs; they are domestic, municipal
2 needs. And I think that just highlights the
3 mismatch between the needs here and the
4 agricultural provisions that are relied upon in
5 the 1868 treaty.

6 The 1868 treaty provisions are about
7 farming. They are about providing seeds and
8 agricultural implements to the tribe in the
9 original part of the reservation. The needs
10 alleged in the complaint exist hundreds of miles
11 away, and they're not even about agricultural
12 needs. They're about needs for domestic and
13 municipal consumption.

14 You know, if you look at the text of
15 the -- of the treaty, the -- and this is
16 reproduced at 11a of our -- of our statutory
17 appendix -- the provisions at issue -- this is
18 Article VII of the provision -- they're about
19 particular items, seeds and agricultural
20 implements, for a particular area, the tracts of
21 land that were selected in the original
22 reservation. They're for a limited period of
23 time, up to three years, and they're for a
24 particular amount, a hundred year -- a hundred
25 dollars the first year, \$25 the second and

1 third.

2 The duty asserted here is about
3 something else. It's about water. It's about
4 water for a different part of the reservation a
5 hundred miles away. It's about water for an
6 ongoing and indefinite basis, not for a limited
7 period of time. And the dollar amount, there --
8 there's no limit.

9 I think part of the problem, the
10 separation-of-powers concerns that the claim
11 raises, is that the -- it's really unclear what
12 the scope of the plan that the Navajo Nation
13 envisions the -- the United States will design
14 --

15 JUSTICE ALITO: Mr. --

16 MR. LIU: -- will look like at the
17 end.

18 JUSTICE ALITO: -- Mr. Liu, I think
19 you said that the -- the Navajo Nation has
20 "hundreds of thousands of acre feet of water."
21 Is that correct?

22 MR. LIU: Correct.

23 JUSTICE ALITO: Do you have a figure
24 for how much water that is?

25 MR. LIU: It is -- well, an acre feet

1 is how much water would fill up an acre of land

2 --

3 JUSTICE ALITO: Sure.

4 MR. LIU: -- one foot.

5 JUSTICE ALITO: Right, right.

6 MR. LIU: And, you know, we could do

7 that --

8 JUSTICE ALITO: But do you know how
9 many hundreds of thousands? Do you know -- do
10 you know the amount of -- can the United -- has
11 the United States calculated or could you
12 calculate water per capita --

13 MR. LIU: I don't have --

14 JUSTICE ALITO: -- for the Navajo
15 Nation?

16 MR. LIU: -- I don't -- I don't have
17 water per capita, but, to give you some -- some
18 examples, the -- the San Juan settlement in
19 New Mexico provides 37,000 acre feet annually.
20 You know, this covers 250,000 people over a
21 40-year time horizon. The appropriations
22 associated with that are \$1.9 billion.

23 So that's sort of the magnitude. It's
24 300 miles of pipeline, 19 pumping plants, two
25 water treatment facilities. So these -- these

1 are substantial facilities that the government,
2 in furtherance of its general trust
3 relationship, has agreed to provide, and --

4 JUSTICE JACKSON: But I understood
5 that that was part of the Navajo's argument in
6 this case. In other words, you -- you -- you
7 say here that you don't have calculations about
8 water per capita, and I understood that their
9 breach-of-trust claim was about that, was about
10 the fact that the United States, they say, has
11 not done what it needs to do as a trustee to
12 determine what their water needs are.

13 MR. LIU: And I would say that there's
14 no duty, no specific duties found in the treaty
15 that requires us to conduct that sort of
16 analysis. Any -- any -- any --

17 JUSTICE GORSUCH: Mr. Liu, with
18 respect to that, there are provisions in the
19 treaty with respect to agricultural --
20 agriculture, a promise that this will be a
21 permanent home and that there will be a
22 opportunity for raising animals, right?

23 MR. LIU: Correct.

24 JUSTICE GORSUCH: Is it possible to
25 have a permanent home, farm, and raise animals

1 without water?

2 MR. LIU: No.

3 JUSTICE GORSUCH: And could the
4 United States dam the Little Colorado right
5 above the reservation and prevent water from
6 flowing into the reservation?

7 MR. LIU: It could do that as a matter
8 of fact.

9 JUSTICE GORSUCH: Well, as a matter of
10 fact --

11 MR. LIU: Right. Not legally.

12 JUSTICE GORSUCH: -- but, as a matter
13 of law, could it do that?

14 MR. LIU: No.

15 JUSTICE GORSUCH: No. Because that
16 would breach the treaty obligation, right?

17 MR. LIU: If the tribe were making use
18 of the water, then it would breach -- it -- it
19 -- it would -- it would interfere with their
20 exercise of their Winters rights.

21 JUSTICE GORSUCH: Okay. So, clearly,
22 there is a duty to provide some water to this
23 tribe under the treaty, right?

24 MR. LIU: No.

25 JUSTICE GORSUCH: Well, hold on. What

1 am I missing? We just agreed you can't dam the
2 Little Colorado because that would breach the
3 treaty.

4 MR. LIU: Right.

5 JUSTICE GORSUCH: That's water, right?

6 MR. LIU: Correct.

7 JUSTICE GORSUCH: So there's some
8 obligation with respect to water in this treaty.

9 MR. LIU: There is an obligation to
10 respect their Winters rights, just as any other
11 landowner would have to do, but the difference
12 here is --

13 JUSTICE GORSUCH: And there's an
14 obligation to provide opportunities for a
15 permanent home.

16 Now let's say, as a matter of state
17 contract, I promise you a permanent home and
18 that you'll be able to raise animals there and
19 you'll be able to conduct agriculture there.

20 Would it not be a breach of contract
21 to then provide a home where none of those
22 things is possible? Is that a permanent home?

23 MR. LIU: I -- I -- I -- I -- I
24 think -- I think everyone agrees that the
25 permanent homeland comes with the bundle of

1 sticks that I said at the outset. One of those
2 sticks --

3 JUSTICE GORSUCH: If you'd just answer
4 my question. Could I bring a good
5 breach-of-contract claim for someone who
6 promised me a permanent home, the right to
7 conduct agriculture and raise animals if it
8 turns out it's the Sahara Desert?

9 MR. LIU: I don't think you would be
10 able to bring a breach-of-contract claim.

11 JUSTICE GORSUCH: Really?

12 MR. LIU: I -- I think -- I --

13 JUSTICE GORSUCH: You don't think
14 that's a breach of good faith and fair dealing?

15 MR. LIU: I don't --

16 JUSTICE GORSUCH: You don't think at
17 least it would state a claim?

18 MR. LIU: -- I don't think so. And I
19 -- I -- and I -- I'm happy to apply ordinary --

20 JUSTICE GORSUCH: If we disagree with
21 that, then what?

22 MR. LIU: If --

23 JUSTICE GORSUCH: If we found that
24 that might, under ordinary contract principles,
25 state a claim --

1 MR. LIU: Right.

2 JUSTICE GORSUCH: -- and that, in
3 fact, many state courts have found such claims
4 --

5 MR. LIU: If --

6 JUSTICE GORSUCH: -- to -- to --

7 MR. LIU: -- if this Court --

8 JUSTICE GORSUCH: -- then what?

9 MR. LIU: -- if this Court thought the
10 Jicarilla standard were satisfied, then -- then
11 there would be a judicially enforceable duty and
12 we'd move on to the second step --

13 JUSTICE GORSUCH: All right.

14 MR. LIU: -- of -- of the analysis.

15 JUSTICE GORSUCH: And -- and with
16 respect to that second step, or maybe it's the
17 first, I don't know, the jurisdictional
18 question, you agree that the trust claim brought
19 here is not the type of question that must be
20 addressed before addressing whether the Navajo
21 Nation has identified a judicially enforceable
22 duty, right?

23 MR. LIU: We don't think the
24 jurisdictional issue needs to be addressed
25 before. We don't think it's a jurisdictional

1 issue, correct.

2 JUSTICE KAGAN: Mr. -- Mr. Liu, I --
3 I -- I guess I'm just not understanding the
4 nature of your argument, so would -- would you
5 clarify it for me?

6 You -- you start by saying that the
7 Indians have rights to water and that they get
8 them by virtue of having rights to land, having
9 a reservation of this kind, and the rights to
10 water just go along with that.

11 Is that a matter of the treaty, or are
12 you saying it's something else, that the rights
13 arise some other way?

14 MR. LIU: It -- it is a matter of the
15 treaty setting aside the land for the Indians.
16 This is Article II of --

17 JUSTICE KAGAN: Okay. So, if it's a
18 matter of the treaty, if -- if you read the
19 treaty as giving rights to water, right, because
20 you could read the treaty and say, I don't see
21 anything about water here.

22 MR. LIU: Right.

23 JUSTICE KAGAN: There are no rights to
24 water. But you're not reading the treaty that
25 way. You're saying, look, when the treaty gives

1 land, the treaty also says, you know, implicit
2 in that is that you have a right to the water
3 that will enable you to live on that land.

4 So then there seems to me to be a gap
5 because then you're saying, well,
6 notwithstanding that the treaty gives water,
7 that the treaty promises water. That's what
8 treaties do. It's a contract that promises
9 something.

10 You're saying those rights are
11 unenforceable. And I guess I don't understand,
12 if the treaty promises water, where you get the
13 idea that that is unenforceable?

14 MR. LIU: No, the -- the treaty does
15 vest water rights in the tribe, and those rights
16 are enforceable, including by the tribe.

17 But the promise that we've allegedly
18 breached here isn't about violating those
19 rights; it's about violating affirmative duties
20 to supply the water to the tribe.

21 It -- it -- it's just like my
22 minerals --

23 JUSTICE KAGAN: I guess I'm not
24 getting it. If -- if -- if -- if there's a
25 contract and the contract gives a right to one

1 party, then just by the nature of how rights
2 work, it gives a duty to the other party.

3 So there's a contract here and it
4 gives a right to the Navajos, you say so
5 yourself, that means it puts a duty on the other
6 party to the contract, which is the U.S.
7 Government.

8 MR. LIU: The right that is conferred
9 by the -- by the reservation of the land is a
10 right to use the -- the water and to exclude
11 others from using it, just like it's a right to
12 use the minerals or to exclude others from using
13 it, just like it's a right to use the land or to
14 exclude others from using it.

15 But none of that --

16 JUSTICE KAGAN: So you're saying that
17 we should read this contract as giving the
18 tribes rights but only as against third parties?

19 MR. LIU: Well, it is against the
20 government because we can be liable for taking
21 their land, for taking their timber, and for
22 taking their water. But the rights themselves
23 are property rights. They are -- they are
24 sticks in a bundle that the tribe got.

25 What they're asking for now is for us

1 to help them use all of those sticks in the
2 bundle, for example, by -- by building the
3 plants, the pipelines, the wells, et cetera.
4 And --

5 JUSTICE KAGAN: So -- so you're saying
6 that this -- this contract obligation that you
7 read into the treaty is just the U.S. Government
8 saying, we won't interfere with your ability to
9 get water, but the U.S. Government did not say,
10 you know, in giving you this land, we are also
11 promising you that we will do what's necessary
12 to make the land livable?

13 MR. LIU: That is correct. That is
14 correct. What we -- what the reservation
15 conveys is a set of property interests, and, by
16 their nature, those property interests allow
17 the -- the tribe to use and exclude, but, by
18 their nature, they don't impose on the
19 United States new duties.

20 JUSTICE JACKSON: But how is that --

21 CHIEF JUSTICE ROBERTS: Thank you --

22 JUSTICE JACKSON: -- consistent --

23 CHIEF JUSTICE ROBERTS: -- thank you,
24 counsel.

25 Justice Thomas?

1 JUSTICE THOMAS: Mr. Liu, is there a
2 difference in your answer for pre-existing
3 access to water on the -- on the land as opposed
4 to the need to bring water to that land?

5 MR. LIU: It -- it is a difference
6 between the right to use the land, whether it's
7 pre-existing or not. They -- they can be new --

8 JUSTICE THOMAS: I think what I'm
9 trying to get you to -- to focus on is, if I
10 hear you, you're saying that the government and
11 third parties cannot interfere with water on the
12 land.

13 MR. LIU: Correct.

14 JUSTICE THOMAS: But you also said you
15 have no affirmative duty. So my second question
16 is whether or not you -- it could be argued that
17 by providing a permanent home, you are required
18 to bring water to land where there is no water.

19 MR. LIU: No, we -- we do not
20 understand the permanent homeland language to
21 convey that sort of duty. And I think it would
22 be surprising to those who entered into the
23 treaty if -- if that were such a promise.

24 The whole -- the whole point of the
25 treaty was to allow the Navajo Nation to return

1 to their ancestral homeland, where they could
2 support themselves.

3 CHIEF JUSTICE ROBERTS: Justice Alito?

4 JUSTICE ALITO: Well, I wanted to
5 pursue the questions that I asked about some of
6 the real-world impacts of what's at stake here.

7 So I asked about the total amount of
8 water that has been supplied to the Navajo and
9 whether there's a per capita calculation. I
10 gather you don't have that.

11 MR. LIU: I don't have a per cap --

12 JUSTICE ALITO: Can that be supplied
13 to us?

14 MR. LIU: Yes, we could supply that.

15 JUSTICE ALITO: And how would -- if
16 that were calculated, how would it compare to
17 water per capita for the residents of, let's
18 say, Arizona?

19 MR. LIU: It may -- it may well be
20 less. I think no one denies that there are
21 water needs on the reservation.

22 JUSTICE ALITO: If I had been shown a
23 seat-of-the-pants calculation that per capita
24 water on the Navajo Nation is greatly in excess
25 of per capita water for residents of Arizona, do

1 you think that would be incorrect?

2 MR. LIU: Honestly, I have -- I don't
3 have a basis to know whether that's correct or
4 not.

5 JUSTICE ALITO: Is there anything in
6 the view of the United States that is
7 distinctive about this treaty as opposed to many
8 other treaties entered into between the
9 United States and other Indian tribes with
10 reservations adjacent to bodies of water?

11 MR. LIU: No. There's -- the -- the
12 -- the provisions in particular that the Navajo
13 Nation has relied upon are not, in our view,
14 distinctive to this treaty. There are
15 many treaties -- I mean, most treaties set aside
16 a reservation that is intended to be a permanent
17 homeland, and many treaties also have provisions
18 that supply support for agriculture.

19 So, if this Court were to conclude
20 that there were judicially enforceable duties
21 that arose out of provisions like that, I think
22 we would be facing similar suits across
23 reservations in the country.

24 JUSTICE ALITO: What would be the
25 nationwide impact of such a ruling?

1 MR. LIU: Well, there are 500 or so
2 tribal reservations. The government has entered
3 into about 30 or so water agreements since the
4 late 1970s. There's ongoing litigation in -- in
5 courts across the country.

6 I think this would impose on the
7 United States a sort of amorphous duty to take a
8 -- take another look at all those issues.

9 JUSTICE ALITO: What would be the
10 impact on access to water by people who don't
11 live on reservations?

12 MR. LIU: Well, I think, because the
13 Indian water rights has this powerful preemptive
14 effect, which is that it has a priority date
15 that is no later than the date of the
16 reservation and that the use -- the right to use
17 the water can't be lost by virtue of non-use, it
18 could have an effect on water used by other
19 entities.

20 JUSTICE ALITO: In -- in 1868, was the
21 reservation adjacent to the Colorado River?

22 MR. LIU: It was not. The 1868
23 reservation straddled the New Mexico-Arizona
24 border, which is hundreds of miles away from the
25 Lower Colorado River mainstream.

1 JUSTICE ALITO: So, if we are looking
2 at the expectations of the treaty parties, do we
3 look at what their expectations would have been
4 in 1868 or at the time of the expansion of the
5 reservation subsequently?

6 MR. LIU: We look to the 1868 time
7 frame, and in that time frame, what they were
8 thinking about was the land set aside for the
9 original reservation, not the land that's at
10 issue today.

11 JUSTICE ALITO: Where would they have
12 accessed water in 1868?

13 MR. LIU: In 1868, on the original
14 reservation, that -- that -- much of that area
15 lies within the Little Colorado River Basin, and
16 there are washes that come off the main Little
17 Colorado River that would have been sources of
18 water. There was groundwater. They could have
19 impounded water. So, you know, springs, washes,
20 wells.

21 JUSTICE ALITO: Thank you.

22 CHIEF JUSTICE ROBERTS: Justice
23 Sotomayor?

24 JUSTICE SOTOMAYOR: Counsel, you agree
25 that the tribe has reserved water rights,

1 correct?

2 MR. LIU: Correct.

3 JUSTICE SOTOMAYOR: All right. The --
4 you agree that the U.S. has a trust over that
5 water for the Indians, don't you?

6 MR. LIU: Correct. We hold it in
7 trust.

8 JUSTICE SOTOMAYOR: You hold it in
9 trust.

10 MR. LIU: Correct.

11 JUSTICE SOTOMAYOR: And, in fact, in
12 the Arizona litigation, the Navajo tribe wanted
13 to intervene, and you said you can't because we
14 represent your interests, correct?

15 MR. LIU: Correct.

16 JUSTICE SOTOMAYOR: And they can't
17 assert rights in their own name because you hold
18 it in trust. So you not only control it, but
19 you're the only one who can assert their
20 interests, is that correct?

21 MR. LIU: That's not true as a general
22 matter, no.

23 JUSTICE SOTOMAYOR: Why? They tried
24 to intervene in Arizona, and you said you
25 can't --

1 MR. LIU: That --

2 JUSTICE SOTOMAYOR: -- because we're
3 the trustee.

4 MR. LIU: In that particular case, we
5 opposed intervention, and the Court agreed and
6 denied intervention. But, as the Court has
7 since made clear, including in Arizona versus
8 California itself, tribal participation in water
9 rights disputes shouldn't be discouraged.

10 And so it is the normal --

11 JUSTICE SOTOMAYOR: Well, they could,
12 but they can't start it without your approval?

13 MR. LIU: It depends on what they're
14 starting. There -- there's nothing that
15 requires our approval to start. They -- the
16 tribe can enforce its own water rights under 28
17 U.S.C. 1362 by bringing a suit in federal court.
18 They can make their own priority calls for
19 administration once their rights are quantified.
20 They can bring Tucker Act claims against the
21 United States if we interfere with their use of
22 water. And they can assert their own Winters
23 claims in ongoing stream adjudications, as they
24 are doing now in the Little Colorado River Basin
25 and -- and going --

1 JUSTICE SOTOMAYOR: But what you're
2 saying is your trust obligation is meaningless.
3 They can't force you to do anything to protect
4 their water rights. That's what you're saying,
5 correct?

6 MR. LIU: Well, the -- the nature of
7 the trust obligation we have with respect to the
8 water rights is the same trust obligation we
9 have with respect to the land. And in Mitchell
10 I, this Court addressed that obligation and said
11 it was only a bare or limited trust and did not
12 bear the hallmarks of a conventional fiduciary
13 relationship. And so --

14 JUSTICE SOTOMAYOR: You don't think
15 there's a fiduciary relationship here at all?

16 MR. LIU: Not that is judicially
17 enforceable with respect to the --

18 JUSTICE SOTOMAYOR: That's a -- that's
19 -- that's quite an odd agreement the tribe
20 entered into, isn't it? They agreed to go back
21 to a piece of their homeland and gave -- gave
22 the United States control over the vast majority
23 of it.

24 MR. LIU: I don't --

25 JUSTICE SOTOMAYOR: They agreed to sit

1 -- to a land that would permit them to return to
2 agriculture, and the bargain they got in return
3 was we, the United States, took away all of your
4 other lands, we gave you this piece of land
5 here, survive, even if it's -- it turns into a
6 desert condition, where you admit there are
7 significant water needs on the reservation, but
8 the tribe can't do anything about it --

9 MR. LIU: Yeah, I --

10 JUSTICE SOTOMAYOR: -- against you,
11 can't hold you responsible?

12 MR. LIU: -- I guess two quick points.
13 One is we're holding -- we're -- we're
14 maintaining the same relationship with respect
15 to the express reservation of land as we are to
16 the implied reservation of water. And I think
17 it would be strange if the express reservation
18 of land did not give rise to affirmative duties,
19 but the implied reservation of water --

20 JUSTICE SOTOMAYOR: Well --

21 MR. LIU: -- did.

22 JUSTICE SOTOMAYOR: -- but what you're
23 talking about is -- and a lot of your criticism
24 of the remedies that a court can or can't order,
25 I think, are different from the question of are

1 there any remedies.

2 It seems to me you yourself are
3 agreeing that there could be litigation over
4 whether there are sources of water that could be
5 made available from tributaries and not -- and
6 not violate the -- and not violate the Arizona
7 consent decree.

8 So I don't know why we should say
9 there's no cause of action here merely because
10 there are some remedies that you think exceed
11 your obligations --

12 MR. LIU: Well, we don't think --

13 JUSTICE SOTOMAYOR: -- and others
14 don't. It -- it appears to me that if there are
15 sources of water that you could litigate about
16 and -- and secure for the use of the Navajo
17 Nation without building pipes, that that might
18 be something that, in fact, there is no defense
19 against.

20 MR. LIU: We don't think there's any
21 available remedy here because we don't think
22 there's any judicially enforceable duty in the
23 first place, so -- and that is irrespective of
24 the scope of the decree in Arizona versus
25 California.

1 But I do want to address the -- the
2 sort of historical account of -- of what
3 happened. It's absolutely true that the
4 United States forcibly relocated the Navajo
5 Nation in 1863 to an area called Bosque Redondo,
6 and in -- and five years later, the --

7 JUSTICE SOTOMAYOR: And in that -- and
8 that land, they couldn't farm, there was drought
9 conditions, and for at least three seasons they
10 were not able to grow any food, correct?

11 MR. LIU: What -- what -- it's -- it's
12 --

13 JUSTICE SOTOMAYOR: And then the U.S.
14 wanted to put them someplace else, and they
15 insisted on returning to a part of their native
16 homeland.

17 MR. LIU: It's true that the crops at
18 Bosque Redondo failed, but I think it's
19 important to understand why they failed. It
20 wasn't because they alleged that the
21 United States had a duty to provide water and we
22 weren't providing it. It was because there was
23 alkaline in both the soil and the water.

24 And so, when the Navajo and General
25 Sherman met in May of 1868, the Navajo Nation's

1 request was to be able to return to their
2 ancestral homeland, where they could live as
3 they did in the status quo ex ante before they
4 were forcibly relocated.

5 And if we look at the status quo that
6 they wanted to be returned to, it was a status
7 quo in which they could support themselves. It
8 was not a status quo in -- there never was a
9 status quo in which the United States was
10 supplying the Navajo Nation with water or water
11 infrastructure.

12 CHIEF JUSTICE ROBERTS: Justice Kagan?
13 I'm sorry, Justice Gorsuch?

14 JUSTICE GORSUCH: You emphasize that
15 they got the bundle of sticks, including water,
16 right?

17 MR. LIU: Correct.

18 JUSTICE GORSUCH: Their water rights
19 with respect to the Colorado River have never
20 been adjudicated, right?

21 MR. LIU: Correct.

22 JUSTICE GORSUCH: And that's because
23 the government opposed their motion to intervene
24 in Arizona versus California, right?

25 MR. LIU: No, I don't think that's

1 quite right because, if you look at the motion
2 for intervention that they filed, they weren't
3 seeking intervention to make claims in the Lower
4 Colorado mainstream. They raised five grounds
5 as to why the United States' representation was
6 inadequate. This is reproduced at JA 106 and
7 107. Not one of them is about a failure to seek
8 water in the mainstream.

9 At the time of that litigation, the
10 irrigable acreage on the Navajo reservation
11 was -- was understood to exist within the
12 drainage basin that the --

13 JUSTICE GORSUCH: Mr. Liu, I -- I
14 think we're talking at cross-purposes.

15 MR. LIU: Okay.

16 JUSTICE GORSUCH: You agree they have
17 a bundle of rights, whatever they are, with
18 respect to water.

19 MR. LIU: Correct.

20 JUSTICE GORSUCH: It may or may not
21 include some portion of the mainstream of the
22 Colorado. Nobody knows, right?

23 MR. LIU: Correct.

24 JUSTICE GORSUCH: Because the
25 government opposed the motion to intervene to

1 allow them to participate in that litigation.

2 MR. LIU: They weren't looking to
3 participate to assert those claims.

4 JUSTICE GORSUCH: Well, nobody's ever
5 litigated them, and you assert the exclusive
6 right to litigate them on behalf of the Navajo.

7 MR. LIU: That's not true. The Navajo
8 --

9 JUSTICE GORSUCH: You think the Navajo
10 could now intervene in Arizona versus Colorado?

11 MR. LIU: They could file a motion to
12 intervene and --

13 JUSTICE GORSUCH: You think they could
14 intervene. Would the government oppose it
15 again?

16 MR. LIU: We might oppose it, but it's
17 not -- not on grounds that they -- they -- they
18 can't have their own voice. We might oppose it
19 because of merits or collateral estoppel issues
20 but not because we don't think tribes should be
21 able to participate in water rights litigation.

22 JUSTICE GORSUCH: So they have a
23 bundle of sticks that remain adjudicated and
24 that the United States Government opposed their
25 participation to adjudicate? That's where we

1 sit?

2 MR. LIU: I -- I -- I think we -- the
3 government opposed it. And, frankly, the Court
4 agreed with the merits of our opposition.

5 Our filing in opposition --

6 JUSTICE GORSUCH: The ultimate consent
7 decree specifically says that it doesn't resolve
8 the rights of any Indian tribe except as
9 expressly provided in the consent decree, and
10 that does not include the Navajo, right?

11 MR. LIU: Correct. And that -- and I
12 think --

13 JUSTICE GORSUCH: Thank you.

14 MR. LIU: -- that's partly why the
15 Navajo can bring a motion to reopen the decree
16 if they want to.

17 JUSTICE GORSUCH: Well, except for
18 you're going to oppose it again. You just made
19 that clear standing at the lectern.

20 MR. LIU: Well, I don't know if we're
21 going to -- I think it --

22 JUSTICE GORSUCH: And -- and so what
23 remedy do they have --

24 MR. LIU: I think --

25 JUSTICE GORSUCH: -- other than to

1 say, okay, if you're going to assert the right
2 to control that litigation and -- and -- and
3 adjudicate our bundle of sticks, we can at least
4 pursue litigation to try to force you to do
5 that.

6 MR. LIU: I'm not saying we would
7 oppose it or not. I'm just saying, you know,
8 we'll make that determination based on the
9 substance of the motion. But the point is we do
10 not control what the Navajo Nation does with its
11 water rights. They can vindicate them on their
12 own. They are a sovereign nation.

13 CHIEF JUSTICE ROBERTS: Justice
14 Kavanaugh?

15 JUSTICE KAVANAUGH: To pick up on
16 Justice Alito's questions from earlier and ask
17 you about assertion made in the amicus brief of
18 the Western Water Users and just to get the
19 United States' assessment of them.

20 That amicus brief says the reduction
21 of available water would necessarily come at the
22 expense of existing allocation holders,
23 particularly from the Central Arizona Project,
24 which delivers water to 80 percent of the
25 state's population.

1 This amicus brief says that would have
2 severe negative consequences for Arizona, its
3 businesses, and its agricultural and industrial
4 sectors, and would strike at the heart of the
5 social and economic livelihood of Arizona, with
6 dire consequences.

7 I'm not saying I agree with that. I
8 just want -- that's an assertion in the amicus
9 brief. I want your assessment of the
10 implications.

11 MR. LIU: Yeah, it is -- it is true
12 that, basically, all the water in the Lower
13 Basin is allocated. And I guess, to respond to
14 that directly, Congress has set aside in the
15 2004 Arizona Water Settlements Act 6411 acre
16 feet of water for a future water settlement out
17 of the Central Arizona Project for the Navajo
18 Nation.

19 That is water that would require
20 additional congressional action to allow the
21 Navajo Nation to use. If they were to use that
22 water, it wouldn't affect -- I don't think it
23 would affect necessarily all the other users
24 because that's -- that's why that's already been
25 set aside.

1 And so I think the fact that Congress
2 has done that just reinforces where this dispute
3 belongs. It doesn't belong in the courts. It
4 belongs in front of the political branches,
5 which have focused on these sorts of issues.

6 JUSTICE KAVANAUGH: A different tack.
7 The Ninth Circuit decision is barely defended by
8 the Navajo Nation. What should we do with that?

9 I mean, one option sometimes is, well,
10 we'll just --

11 MR. LIU: Yeah.

12 JUSTICE KAVANAUGH: -- send it back to
13 the Ninth Circuit because none of the arguments
14 that persuaded the Ninth Circuit are being
15 re-upped here.

16 MR. LIU: Right. I -- I think the
17 only issue that's really in dispute at this
18 point is the interpretation of the 1849 and 1868
19 treaties. And we would urge the Court to decide
20 the issue of that interpretation for all the
21 usual reasons this Court decides issues because
22 it was addressed below, Pet. App. 31, the Ninth
23 Circuit did address these provisions of the
24 treaties, because the issue has been fully
25 briefed here, because it is a purely legal

1 issue, and, frankly, because we think the issue
2 is straightforward.

3 JUSTICE KAVANAUGH: Thank you.

4 CHIEF JUSTICE ROBERTS: Justice
5 Barrett?

6 JUSTICE BARRETT: Mr. Liu, the
7 United States asserted Winters rights on behalf
8 of five tribes in Arizona versus California.
9 Why didn't you assert Winters rights on behalf
10 of the Navajo?

11 MR. LIU: Because, when we looked at
12 the evidence of where the Navajo had irrigable
13 acreage, all of that acreage existed in the
14 Little Colorado River Basin, which is a
15 tributary of the Lower Colorado and not in the
16 part that would be supplied by the Lower
17 Colorado itself.

18 JUSTICE BARRETT: So you made the
19 determination that they did not have Winters
20 rights in the mainstream?

21 MR. LIU: Yes, at a time when the
22 applicable standard was practicably irrigable
23 acreage.

24 JUSTICE BARRETT: And to clarify your
25 interchange, your position and your interchange

1 with Justice Gorsuch, you might oppose -- you --
2 you can't commit the United States --

3 MR. LIU: Can't commit.

4 JUSTICE BARRETT: -- to what they
5 would do, but you're saying that, in your view,
6 nothing stops the Navajo now from seeking to
7 intervene and assert their own Winters rights in
8 Arizona versus California --

9 MR. LIU: Correct.

10 JUSTICE BARRETT: -- to reopen that
11 duty?

12 MR. LIU: They can make that request.

13 JUSTICE BARRETT: Do you see Winters
14 rights as something that belong to the Navajo or
15 something that belong to the United States that
16 United States protects on behalf of the Navajo?

17 MR. LIU: We view the Winters rights
18 as belonging to the Navajo. They are the
19 beneficial owners. The United States merely has
20 legal title and holds those in trust. But we
21 view the Navajo as the owners as they own the
22 land, the minerals, the timber.

23 JUSTICE BARRETT: Okay. Earlier, I
24 think maybe to -- in response to Justice Alito,
25 you said that there would be groundwater and

1 other sources and aquifers underneath the
2 reservation that the Navajo could use to supply
3 their water needs.

4 MR. LIU: Correct.

5 JUSTICE BARRETT: Why then would this
6 necessarily be -- why would resolving this
7 dispute be at odds with the decree? Because it
8 sounds to me like what you're saying is that
9 they could get water from places other than the
10 mainstream.

11 MR. LIU: Right. I think there are
12 ways to resolve this suit without violating the
13 decree. Even if the Court believes there is a
14 duty, there are forms of relief that fall --
15 that are short of ordering a delivery of water
16 from the Lower Colorado to the Navajo Nation.
17 And so long as the decree, I think -- I mean, so
18 long as the relief here avoids that sort of
19 relief, I don't think the decree is implicated.

20 JUSTICE BARRETT: So the decree part
21 is kind of irrelevant?

22 MR. LIU: In the United States' view,
23 it comes into play only if they're seeking a
24 particular type of relief.

25 JUSTICE BARRETT: Okay. And then,

1 last question, I'm having trouble conceptually
2 thinking of this, trying to decide whether this
3 feels more like a breach-of-contract claim for
4 breaching the treaty or a --

5 MR. LIU: Right.

6 JUSTICE BARRETT: -- breach-of-trust
7 claim because, in a breach of trust and when you
8 look at the line of cases that are at dispute
9 here, like, say, timber, or, you know, mineral
10 rights, those kinds of things, you're looking at
11 a res.

12 MR. LIU: Yes.

13 JUSTICE BARRETT: You know, there's --
14 there's actually -- there's mineral rights,
15 there's timber, et cetera. And, here, we're not
16 looking at a res.

17 So it seems to me more and the
18 strongest arguments, and I think you've heard
19 some of that today, seems to me that the
20 strongest arguments made on behalf of the Navajo
21 in the Navajos's brief are in the nature of you
22 breached the treaty, it was broken promises, you
23 promised us a permanent home and you're not.

24 Is there a claim that the Navajo could
25 have brought for breaching the treaty? It just

1 doesn't seem to me to fit very neatly in the
2 breach-of-trust model.

3 MR. LIU: I -- I fully understand the
4 point. I -- I -- I think there is an overlap
5 between a treaty claim and a trust claim. I
6 think both of them, if you're going to base them
7 on the treaty, overlap in this way. To -- to
8 prove up either claim, you would need to point
9 to an actual duty that exists in the treaty.
10 Whether you want to say it's a breach of treaty
11 or a breach of trust, you -- you at least have
12 to show that.

13 Now I think where the difference lies
14 is, if the Navajo Nation wanted to take
15 advantage of common law trust principles, for
16 example, if they wanted to hold us to a duty of
17 prudence or a duty of loyalty, then they would
18 have to prove something more than just any old
19 treaty duty. They'd have to show that that duty
20 also bore the characteristics of a conventional
21 fiduciary relationship.

22 And I -- I -- I -- and to just draw a
23 comparison, I -- I think the earlier cases, like
24 Mitchell I and Mitchell II, if you look at the
25 statutes in those cases, the -- they say

1 something like the government will hold the
2 timber in trust and will have the responsibility
3 to manage them. There's nothing in there about
4 a duty of prudence or loyalty or anything like
5 that, but, because that type of duty looks like
6 a trust duty, you can use the common law to
7 flesh out those duties.

8 Contrast that with a -- a promise in
9 this treaty, which is something like we will
10 give you seeds for up to three years. That is a
11 duty, and we agree that under today's legal
12 regime, it would be enforceable as a treaty
13 duty. But I don't think it would be a trust
14 duty because a promise to give someone seeds
15 doesn't bear all the hallmarks --

16 JUSTICE BARRETT: Okay. So --

17 MR. LIU: -- of -- of a --

18 JUSTICE BARRETT: -- what -- but I
19 think it matters how we think about it. I mean
20 -- and I guess my first question is, would there
21 be a cause of action? Could they bring kind of
22 a breach-of-contract, breach-of-treaty claim if
23 that's how they had wanted to style this cause
24 of action?

25 MR. LIU: Yes. They could have

1 brought --

2 JUSTICE BARRETT: They could have
3 brought that.

4 MR. LIU: -- a breach-of-treaty claim,
5 yes.

6 JUSTICE BARRETT: And if they brought
7 a breach-of-treaty claim, we would be talking
8 about a different set of legal rules because,
9 presumably, all of these rules about
10 explicitness would not apply because we would be
11 thinking more about benefit of the bargain and
12 expectation of the parties, and so we would be
13 using a different legal framework, right?

14 MR. LIU: Well, I don't think you
15 necessarily would. We understand the Jicarilla
16 standard to simply say to courts: Don't make up
17 the duties. Look at what the political branches
18 have done.

19 JUSTICE BARRETT: If you're talking
20 about a trust?

21 MR. LIU: I think, if we're talking
22 about really any -- any duty, because I think
23 the -- the -- the -- the overlapping element
24 that both a treaty claim and a trust claim have
25 is that there must be some actual duty in the

1 treaty.

2 JUSTICE BARRETT: I mean, I agree,
3 but, you know, for treaties, we construe them in
4 favor of the Indians. For the trusts, when
5 we're looking at trust principles in the
6 Jicarilla line, we're talking about, no, you
7 have to have something that's very express. And
8 that's at odds with construing the document in
9 favor of the Indians, right?

10 MR. LIU: Well, we don't read the
11 express acceptance language in Jicarilla as
12 imposing a clear statement rule. We read that
13 as -- as saying look at the words that the
14 political branches have enacted in a statute,
15 treaty, or regulation. We then think you apply
16 the usual tools of interpretation to those
17 words. So, in the case of a treaty, you can
18 apply the Indian canons.

19 Now all the Indian canons are
20 themselves about how to interpret words. This
21 Court has made clear that even Indian treaties
22 can be written or expanded beyond their --
23 beyond their clear terms.

24 And so, even applying those very
25 favorable canons of interpretation, I don't

1 think that gets the Navajo Nation anywhere.
2 They haven't pointed to any ambiguity in any of
3 the language of -- of the treaty, and the treaty
4 terms at issue are about seeds and agricultural
5 implements, which everyone agrees are about
6 seeds and agricultural implements.

7 JUSTICE BARRETT: Okay. So just to
8 make sure that I understand, you don't think
9 that they've brought the wrong cause of action;
10 you think that a contract or this -- this treaty
11 could have established a trust? It feels odd to
12 me because there's not a res. But you're saying
13 it could have, but it's just that the language
14 in this treaty fell short of doing that?

15 MR. LIU: Correct.

16 JUSTICE BARRETT: Okay. Thank you.

17 CHIEF JUSTICE ROBERTS: Justice
18 Jackson?

19 JUSTICE JACKSON: Can I go back to
20 Justice Kagan's question? Because,
21 notwithstanding the fact that the treaty doesn't
22 have the express terminology that you were just
23 exploring with Justice Barrett, you've also said
24 here and in previous litigation and your
25 practices indicate that the Winters right that

1 belongs to the Navajo is being held in trust by
2 the United States.

3 So, to the extent that Winters looks
4 at the treaty and treaties like this and says
5 there is a water right, the United States
6 concedes that it has a trust relationship with
7 respect to those water rights.

8 So what I don't understand is why we
9 don't have a simple breach of fiduciary duty
10 kind of scenario where anyone who has a trustee
11 controlling their interests can come to court
12 and say the trustee is not doing what it's
13 supposed to do in terms of those interests. I
14 don't -- I just don't understand why that's not
15 where we are in this case.

16 MR. LIU: It's because of the
17 distinction this Court has drawn, starting in
18 Mitchell I and then reaffirmed in the Navajo
19 cases and then reaffirmed again in Jicarilla,
20 that a bare or limited trust isn't enough to
21 give rise to judicial --

22 JUSTICE JACKSON: All right. So I
23 thought you were going to say that, so let me
24 explore those with you, all right?

25 I -- I read Mitchell, Navajo I, Navajo

1 II, and Jicarilla to all be Tucker Act cases.
2 Do -- do you concede that there was a Tucker Act
3 issue going on in those cases?

4 MR. LIU: They were all underlying
5 Tucker Act suits.

6 JUSTICE JACKSON: All right. And so
7 the cause of action and the right to sue because
8 of sovereign immunity was arising under the
9 Tucker Act, you needed to satisfy the Tucker Act
10 in those cases, and it's the Tucker Act that
11 gives rise to this positive source of law
12 requirement, right? I mean, that -- that
13 requirement is in the Tucker Act, and anybody
14 who tries to sue the federal government for
15 damages under the Tucker Act has to point to a
16 specific positive source of law.

17 But, to the extent that this is not a
18 Tucker Act case, I don't understand why we care
19 whether or not there's a positive source of law.
20 This is not like Mitchell, Navajo, Jicarilla.
21 We -- we don't have that responsibility because
22 we're not trying to waive sovereign immunity
23 under the Tucker Act in this way.

24 MR. LIU: Well, I think this Court's
25 cases made clear that, yes, the Tucker Act

1 references the same positive sources of law but
2 that this is a requirement that goes to whether
3 a judicially enforceable duty exists in the
4 first place.

5 JUSTICE JACKSON: Why -- why when it
6 doesn't in any other fiduciary duty context,
7 right? If this was a regular fiduciary duty
8 case, you would not be here arguing this didn't
9 involve Indians and it didn't involve rights.
10 You would just say, okay, let's talk about
11 whether or not we actually have a fiduciary duty
12 under common law or whatever. But you seem to
13 be getting this positive source of law thing
14 from the Mitchell Act cases, and those cases, I
15 think, don't apply.

16 MR. LIU: Well, Jicarilla itself,
17 while it was an underlying Tucker Act suit, the
18 relief sought there was equitable relief, and --

19 JUSTICE JACKSON: Yeah, but Jicarilla
20 wasn't even about whether or not there's a cause
21 of action for a breach of fiduciary duty.
22 Jicarilla, everybody agreed, you know, this --
23 excuse me. In Jicarilla, unlike this case,
24 there was no agreement about the extent of the
25 fiduciary obligation, right?

1 I understood that case to be a dispute
2 over whether or not the United States had acted
3 as a -- a fiduciary insofar as the tribe could
4 point to that action and use the exception to
5 attorney-client privilege, right? It was -- it
6 was about documents. And the United States
7 said, okay, you know, you want to try to get
8 access to these documents under the fiduciary
9 exception to attorney-client privilege, but
10 we're really not acting as a fiduciary. And the
11 Court agreed. All right?

12 That has nothing to do with, I think,
13 what is at issue in this case, where you agree
14 that you have acted as a fiduciary, that you are
15 a fiduciary in the sense that you hold the
16 rights in trust. So we've already taken care of
17 the Jicarilla issue as to whether or not you're
18 a fiduciary. The question here is whether
19 there's a cause of action by the Indians to sue
20 you for breach of that fiduciary duty.

21 MR. LIU: And here was Jicarilla's
22 reasoning: The government is a sovereign, not a
23 private trustee. The government, because it's a
24 sovereign, can structure the -- the trust
25 relationship to serve its own policy goals. As

1 part of that discretion, Congress can shape the
2 -- the -- the relationship so that it is just a
3 bare or limited trust, so that it doesn't -- is
4 not taking on all the fiduciary duties that
5 would go along with a private trustee.

6 JUSTICE JACKSON: All right. But is
7 there any -- is there any real dispute here that
8 the government understood its trust obligations
9 to be to assert Winter rights and to make sure
10 that, as Justice Gorsuch pointed out, the -- the
11 Navajo had enough water? I mean --

12 MR. LIU: Yes, that is -- that is
13 absolutely in dispute.

14 JUSTICE JACKSON: So can I just ask
15 you, how so, when the United States has asserted
16 these Winter rights in at least -- with respect
17 to the Navajo Nation, in at least three
18 different actions outside of the Colorado
19 mainstream, when it's represented various tribes
20 in the original Arizona versus California
21 litigation, when it obtains waivers or releases
22 of the right to sue the U.S. for Winters
23 violations? It's clear that the United States
24 thinks that it is acting as a fiduciary with
25 respect to this.

1 MR. LIU: We take all those actions in
2 furtherance of our general trust
3 responsibilities to the Navajo Nation. We --
4 we, of course, acknowledge that we have a
5 general trust relationship with all tribes,
6 including the Navajo Nation. And so we --

7 JUSTICE JACKSON: But the tribes can't
8 sue you if they think you're not up to task with
9 respect to that?

10 MR. LIU: Unless Congress has
11 expressly assumed those duties. And in Mitchell
12 II, with respect to timber, Congress did.
13 Congress enacted statutes that said not only
14 would the timber be held in trust, but that
15 trust is going to bear the hallmarks of a
16 conventional fiduciary relationship.

17 JUSTICE JACKSON: And didn't our --
18 didn't our analysis in -- in -- in Mitchell II
19 really also focus on the degree to which the
20 government assumed elaborate control over the
21 forests? It wasn't so much just the language of
22 the statute, but the government was acting as
23 though it was controlling the forests in a way
24 that is similar, I think, to what's happening
25 here.

1 MR. LIU: Well, the Court's made clear
2 in Navajo II that control is not enough. And so
3 what was doing the work in Mitchell II was that
4 Congress, in the language of the -- of the
5 relevant statutes, had -- had recognized this
6 trust relationship and imposed on the government
7 duties to manage the timber in a way for the
8 benefit of the Indians.

9 And -- and that language is just
10 absent from the treaty here. There is no
11 language like the statutes in Mitchell II that
12 do for the --

13 JUSTICE JACKSON: So, if we think --
14 if we think this is a -- an APA claim, if we
15 think that what's actually happening is that the
16 tribe is suing the government under 706 for
17 otherwise violating the law under their -- what
18 they perceive to be a fiduciary duty, a breach
19 of fiduciary duty, do you lose?

20 MR. LIU: No, not at all. I mean,
21 everyone agrees that the APA in Section 702
22 supplies the applicable waiver of sovereign
23 immunity. But they still need to have some
24 cause of action, some duty --

25 JUSTICE JACKSON: The APA also has a

1 cause of action. That's what I'm asking you.
2 If they're relying on the APA's cause of action,
3 not anything analogous to the Tucker Act or
4 anything else, then don't they at least survive
5 the motion to dismiss and then we can go on to
6 other parts of this litigation?

7 MR. LIU: No, for the same reason,
8 because they haven't pointed to any specific
9 duty that would justify that sort of relief.

10 CHIEF JUSTICE ROBERTS: Thank you,
11 counsel.

12 Ms. Maguire.

13 ORAL ARGUMENT OF RITA P. MAGUIRE
14 ON BEHALF OF THE STATE PARTIES

15 MS. MAGUIRE: Mr. Chief Justice, and
16 may it please the Court.

17 I'd like to start out this morning
18 just pointing out briefly two areas of confusion
19 that I've heard on the Court this morning.

20 The first is with respect to federal
21 reserved rights. Justice Barrett, I believe you
22 asked Mr. Liu about the federal reserved claims
23 brought forward by the federal government, and
24 he responded in Arizona versus California that
25 federal reserved right claims were made for five

1 tribes by the federal government.

2 That is not quite correct. The
3 federal government made federal reserved right
4 claims to 20 -- for 25 reservations. Five of
5 those claims went to the Lower Colorado River.
6 Twenty of those claims were to the Little
7 Colorado River and other tributaries of the
8 Lower Colorado River system.

9 So the government clearly in Arizona
10 versus California was acting on behalf of 25
11 different tribes making claims to different
12 water sources.

13 Those federal reserved rights are
14 simply rights that then need to be adjudicated.
15 In Arizona versus California, this Court did so
16 with respect to the Lower Colorado River and
17 elected not to hear the claims regarding the
18 tributaries of the river.

19 So the Navajos were represented in
20 Arizona versus California, like the other 19
21 tribes, but their claims did not go to --

22 JUSTICE GORSUCH: Well, counsel --

23 MS. MAGUIRE: -- the Lower Colorado
24 River.

25 JUSTICE GORSUCH: -- that's -- you

1 know, I'm not sure that's quite right either.
2 The federal government refused to bring a claim
3 on behalf of certain tribes into the Lower
4 Colorado, including the Navajo, and this Court
5 said that no adjudication of any tribes other
6 than those expressly discussed in the decree
7 were adjudicated, right?

8 MS. MAGUIRE: Thank you, Justice
9 Gorsuch. There was an extensive colloquy with
10 the special master with respect to the claims
11 being made by the federal government. The
12 federal government was not refusing --

13 JUSTICE GORSUCH: It acted -- it acted
14 as judge and -- and as well as, in its trust
15 obligations, found -- it said it didn't have any
16 trust obligations with respect to the Navajo and
17 the Lower Colorado, so it didn't bring them.
18 That was its judgment.

19 MS. MAGUIRE: No, it believed it had
20 trust obligations and it raised claims to the
21 Little Colorado River, and, in fact --

22 JUSTICE GORSUCH: I -- I'm talking
23 about the Lower Colorado, the mainstream.

24 MS. MAGUIRE: But --

25 JUSTICE GORSUCH: And the government

1 decided there that it was not going to bring any
2 Winters claim with respect to the Navajo in the
3 -- in the mainstream, and so the Navajo have
4 never had an adjudication of their rights with
5 respect to the mainstream, correct?

6 MS. MAGUIRE: That is correct.

7 JUSTICE GORSUCH: All right.

8 MS. MAGUIRE: I would welcome the
9 Court's questions. I think we're well into the
10 meat of the discussion here.

11 JUSTICE KAVANAUGH: You were going to
12 make a second area of confusion. I just wanted
13 to make sure you get that out.

14 MS. MAGUIRE: Yes. Part of the
15 difficulty when you're talking about federal
16 reserved rights is that those rights stem from
17 the Winters decision. It is an implied right.
18 There is no duty that attaches to Winters.

19 And if you look at what the Supreme
20 Court was reviewing when it reached its
21 determination that an implied right to water was
22 created, it never looked at a treaty, it did not
23 look at an agreement. It looked at the federal
24 government's actions.

25 So that implied right then needs to be

1 made effective. It's made effective through the
2 adjudication process either before this Court
3 and the unique nature of the Lower Colorado
4 River or in state adjudication proceedings.

5 So there is a second step to
6 effectuating those federal reserved rights
7 beyond simply the notion that they have --

8 JUSTICE KAGAN: I guess I'm not sure I
9 quite understand that reading of Winters and --
10 or maybe I just didn't understand quite what you
11 said. But are -- are -- are you -- I mean,
12 Winters is clearly a case about a treaty,
13 correct?

14 MS. MAGUIRE: No, Your Honor.

15 JUSTICE KAGAN: I mean, Winters says,
16 the case, as we view it, turns on the agreement,
17 resulting in the creation of Fort Belknap
18 Reservation. You can't say it any more clearly
19 than that.

20 MS. MAGUIRE: That is true, but
21 there's no mention of water in that treaty.

22 JUSTICE KAGAN: Yes, there isn't a
23 mention of water in the treaty, that's correct.
24 I mean, there's, like, a page which is very
25 clear in Winters which says there's no mention

1 of water in this treaty, but there's a very
2 clear principle about how we interpret Indian
3 treaties, and it gives the benefit of the doubt
4 to the Indians.

5 And so, as between these two things,
6 and it goes on a little bit about it's a little
7 bit ambiguous, what does it mean with respect to
8 this water, did they retain it, did they cede
9 it, what did they do, and then they said, we --
10 we refer to this very clear understanding of how
11 we interpret Indian treaties, and that requires
12 that we rule in favor of the Indians here.

13 So it's quite clear that Winters says,
14 you know, there's this way of dealing with
15 Indian treaties, and this is a case about a
16 treaty, and it just doesn't matter that it
17 doesn't say water.

18 MS. MAGUIRE: I take your point,
19 Justice Kagan, but I think it's important to
20 remember that the actual holding of Winters is
21 we have found that when the federal government
22 sets aside land for, in this case, an Indian
23 reservation, they intended to reserve sufficient
24 water to meet the purpose of the reservation.

25 It is an intent. It does not define a

1 duty for the federal government. That implied
2 reservation of rights is important, but it does
3 not bring an obligation on the federal
4 government to do something more with that
5 implied right to water.

6 JUSTICE KAGAN: Right. Well, I mean,
7 rights usually have a correlative duty attached
8 to them. So what do you take -- and this was
9 the conversation that I had with Mr. Liu, which
10 I think is at the heart of this case. So what's
11 the correlative duty that the right that they
12 got from this treaty, which the government
13 admits they got, what is the correlative duty?

14 MS. MAGUIRE: Justice Kagan, I would
15 say the state petitioners want to make it clear.
16 We do not dispute that they don't have a federal
17 reserved right.

18 What the state petitioners dispute is
19 what is the res, what is the source of that
20 right that they think they have. They're
21 claiming consistently through 20 years of
22 litigation that that right goes to the Lower
23 Colorado River. Our argument is they cannot
24 have a right to the Lower Colorado River until
25 they come before this Court and receive an

1 adjudicated right.

2 So it gives them -- a federal reserved
3 right gives them the right to enforce a claim
4 against another party that has claims to the
5 same body of water, but that's in an
6 adjudication proceeding. It's not independent
7 based on the federal reserved right alone.

8 CHIEF JUSTICE ROBERTS: Ms. Maguire,
9 did the government's representative, Mr. Liu,
10 say anything during his time with which you
11 disagree?

12 MS. MAGUIRE: I would disagree on
13 behalf of the state petitioners that it is
14 solely a breach-of-trust case. I think it's a
15 jurisdictional case first and foremost because,
16 throughout the 20 years of litigation on this
17 case, there's only been one source of water
18 identified. That's the Lower Colorado River.

19 And even with the modified reply that
20 we have before the Court today, they say that
21 they're now only looking for the Secretary to
22 plan for and assess their water rights on the
23 reservation in the Arizona portion of that
24 reservation.

25 But that pleading is riddled with

1 references to the Lower Colorado River, and no
2 less than a half a dozen times they say we have
3 unquantified rights to the Lower Colorado.

4 JUSTICE BARRETT: If that's what
5 they're after, do the state petitioners have any
6 objection to it? Because it doesn't seem then
7 that it affects you very much if they're not
8 getting the water from the mainstream.

9 MS. MAGUIRE: It does affect us. The
10 problem is the cloud on title, if you will. As
11 long as any lower court has the potential to
12 issue a ruling that directs the Secretary to
13 take an action that manages the system
14 differently, then it currently is -- under what
15 we call the Law of the River, there is a risk
16 that the vested right holders with more than 60
17 years of rights --

18 JUSTICE BARRETT: But Judge Lee --

19 MS. MAGUIRE: -- are jeopardized.

20 JUSTICE BARRETT: -- but Judge -- I
21 guess what I'm getting at is Judge Lee in his
22 concurrence in the Ninth -- Ninth Circuit said,
23 you know, listen, this can go forward so long as
24 whatever happens doesn't wind up messing with
25 the decree essentially. And I -- I gather in

1 the interchange with Mr. Liu that there are
2 things now that the federal government
3 understands the Navajo to be asking for which
4 are separate from the mainstream, which are
5 coming up with a plan, figuring out maybe
6 drilling, tapping aquifers, et cetera. What is
7 the state's interest in that? I guess I don't
8 understand it. That wouldn't really involve the
9 decree. So, if there was a way for them to
10 litigate that claim that didn't involve the
11 mainstream, would the states have any objection
12 to that? I mean, what's your interest?

13 MS. MAGUIRE: Our interest would be
14 simply the fact that this case is at the
15 pleadings stage and would be remanded to a lower
16 court, and then that court would interpret
17 whatever this Court has directed it to do. And
18 it could potentially be issuing an order for the
19 Secretary to take certain actions that may,
20 indeed, color the ability of the Secretary to
21 manage --

22 JUSTICE JACKSON: What if --

23 MS. MAGUIRE: -- the river system.

24 JUSTICE GORSUCH: Counsel, I'm not
25 sure I -- I understood the answer to that --

1 Justice Barrett's question, because it seems to
2 me like you're maybe hyping -- battling the
3 hypothetical.

4 The hypothetical is suppose, as the
5 government itself concedes, that there are
6 actions it could take that would not affect the
7 mainstream at all, that would vindicate the
8 Navajos' contract right to water. Assume there
9 is one. What's the states' interest?

10 MS. MAGUIRE: Your Honor, I would
11 simply not concede that they're only asking
12 for --

13 JUSTICE GORSUCH: I know that.

14 MS. MAGUIRE: -- a plan and assess.

15 JUSTICE GORSUCH: I know that. But
16 I'm asking you to -- to deal with the
17 hypothetical that I presented you with rather
18 than fight it.

19 MS. MAGUIRE: I would -- I would agree
20 if you could narrow it to plan and assess.

21 Let me just add one fact, though,
22 here --

23 JUSTICE GORSUCH: No, no. Before you
24 add any facts, can we agree that the states
25 don't have any interest if the mainstream of the

1 Colorado is not touched?

2 MS. MAGUIRE: No. I think the --

3 JUSTICE GORSUCH: Then -- then you --

4 MS. MAGUIRE: -- the state petitioners
5 would still be concerned.

6 JUSTICE GORSUCH: -- then -- then you
7 need to articulate for us what interest the
8 states have in that scenario.

9 MS. MAGUIRE: In that scenario,
10 planning and assessment really then, as Mr. Liu
11 indicated, leaves a great deal of room for
12 interpretation. What does it mean to plan?
13 What are you assessing? You're assessing
14 sources of water. You're assessing water
15 demands. The Navajo have access to the Little
16 Colorado, the tributaries and washes on the
17 reservation in Arizona, and groundwater, as you
18 said.

19 Now, if you narrowed it and said you
20 can only assess the needs based on
21 groundwater -- and, by the way, they've excluded
22 the Little Colorado -- that's all you're left
23 with. So it's almost nonsensical --

24 JUSTICE GORSUCH: Do you have any
25 objection to that?

1 MS. MAGUIRE: A study of groundwater?

2 JUSTICE GORSUCH: Yeah.

3 MS. MAGUIRE: I do not --

4 JUSTICE GORSUCH: Okay.

5 MS. MAGUIRE: -- Your Honor.

6 CHIEF JUSTICE ROBERTS: Justice

7 Thomas, anything further?

8 JUSTICE THOMAS: In your years of
9 litigating this, has there been a suggestion of
10 any source other than the Lower Colorado?

11 MS. MAGUIRE: There has not,
12 Your Honor.

13 CHIEF JUSTICE ROBERTS: Justice Alito?

14 Justice -- Justice Sotomayor?

15 Justice -- Justice Kagan?

16 Justice Gorsuch?

17 Justice Kavanaugh?

18 Justice Barrett?

19 Justice Jackson?

20 JUSTICE JACKSON: Can I just clarify
21 one quick thing. This is the same issue, if --
22 if, hypothetically, the Navajo just said what we
23 would like is for the federal government to
24 calculate how much water we need per capita.
25 Mr. Liu says we don't know that information.

1 The Navajo is claiming they don't have enough.

2 If that was the world that we're
3 living in, does the state -- would the state
4 object?

5 MS. MAGUIRE: The state would not
6 object, but I would say that I think there are
7 serious problems with the enforceability of
8 that --

9 JUSTICE JACKSON: Understood. But --

10 MS. MAGUIRE: -- direction.

11 JUSTICE JACKSON: -- but would there
12 be jurisdiction under Arizona versus Colorado
13 for a court to entertain a Navajo suit claiming
14 that the government has a responsibility to
15 figure out how much water they need and it
16 hasn't done so?

17 MS. MAGUIRE: As long as it was
18 absolutely clear that the decree and the
19 decision in Arizona versus California are
20 completely carved out of any assessments, if any
21 rights to that river are undertaken.

22 JUSTICE JACKSON: Thank you.

23 CHIEF JUSTICE ROBERTS: Thank you,
24 counsel.

25 MS. MAGUIRE: Thank you.

1 CHIEF JUSTICE ROBERTS: Mr. Dvoretzky?

2 ORAL ARGUMENT OF SHAY DVORETZKY

3 ON BEHALF OF THE NAVAJO NATION

4 MR. DVORETZKY: Mr. Chief Justice, and
5 may it please the Court.

6 The Senate ratified two treaties with
7 the Navajo Nation. In the 1868 treaty, the
8 United States promised the Navajos a permanent
9 homeland. Both parties understood that in
10 promising the Navajos their land, the
11 United States was also promising them the water
12 it needed to sustain life in the arid southwest.
13 Those treaties are specific sources of law that
14 give the Nation rights to water and impose
15 duties on the government to secure that water.

16 But, for years, the United States has
17 failed to fulfill that promise. Today, the
18 average person on the Navajo reservation uses
19 just seven gallons of water a day. The national
20 average is 80 to 100 gallons. The United States
21 agrees that, on paper, the Nation has treaty
22 rights to the water its people need.

23 We're here because the United States
24 says it doesn't have to do anything to secure
25 the water it promised, even though the

1 United States also says it speaks for the
2 Navajos as trustee of the Nation's water rights.

3 When the United States blocked the
4 Nation from intervening in Arizona versus
5 California, it said, "the United States is
6 authorized exclusively to represent the Indian
7 tribes in litigation affecting their property
8 rights," and its actions are, "binding upon
9 those tribes."

10 The states say we're here to take
11 their water behind their back. No, the Nation
12 is here for its fair share through a fair
13 process. The Nation, not the states, was cut
14 out of Arizona versus California by the federal
15 government and left without water.

16 The United States thinks that it alone
17 decides whether it has made good on its
18 promises. But that's not how promises work. A
19 promise is a solemn duty, and the United States'
20 duty is to see that the Nation has the water it
21 needs and the United States promised.

22 The Nation and its people know and
23 feel the water -- the water shortage in the
24 southwest. The Nation asks only that the
25 United States, as trustee, assess its people's

1 needs and develop a plan to meet them in
2 consultation with the Nation.

3 I welcome the Court's questions.

4 JUSTICE THOMAS: If it were agreed
5 that the only source of water was the Lower
6 Colorado, would your argument be the same --

7 MR. DVORETZKY: It would. The
8 United States --

9 JUSTICE THOMAS: -- as far as
10 jurisdiction?

11 MR. DVORETZKY: Yes, it would, because
12 the relief that we are seeking here is an
13 assessment of the Nation's needs and a plan to
14 meet them. If that plan -- if that assessment
15 ultimately calls for allocating additional water
16 from the lower mainstream of the Colorado, the
17 parties might well at that point need to return
18 to this Court. But the remedy that we are
19 seeking from the district court does not require
20 reallocating water in a way that would
21 contravene this Court's decree.

22 JUSTICE THOMAS: Have you, throughout
23 this litigation, suggested any other source than
24 the Lower Colorado?

25 MR. DVORETZKY: I don't believe we

1 have, but it's also not our burden to do so.
2 The United States has taken on the fiduciary
3 obligation to ensure our Winters rights. The
4 United States itself believes that it holds the
5 Winters rights in trust. The very first step
6 that it needs to take is to assess and figure
7 out its plan for how those Winters rights will
8 -- how those Winters rights will be satisfied
9 and met. And so it is the United States' duty
10 to figure out where that water ought to come
11 from.

12 But, as has been discussed earlier and
13 I think -- as I think Mr. -- Mr. Liu
14 acknowledges, there are other potential sources
15 besides the Colorado, including -- besides the
16 lower mainstream, including the upper
17 mainstream, the Zuni River, the San Juan River.
18 There are other potential appurtenant water
19 sources that could supply water to the
20 reservation.

21 CHIEF JUSTICE ROBERTS: Counsel, prior
22 to the execution of the -- the treaty, the
23 Navajo were, of course, forcibly removed from
24 their reservation to an area that they, it
25 turned out, were not able to -- to -- to grow

1 crops on, and then the agreement with General
2 Sherman, they were allowed to move back.

3 Shouldn't the -- why -- why isn't the
4 permanent home feature a reference to that? In
5 other words, they didn't want again to be moved
6 off of their current home?

7 MR. DVORETZKY: Two points, Mr. Chief
8 Justice. One, I think "permanent home" has to
9 be understood in light of how Winters understood
10 that term, which is to include water that is
11 necessary for life as a permanent homeland.

12 But, second, to get to I think the
13 factual premise of your question, when the
14 Navajos returned to a portion of their permanent
15 homeland, they were returning under very
16 different conditions than they had been there
17 before. They would at that point under the
18 treaties be under the protection and
19 jurisdiction of the United States. They would
20 no longer have free rein of the territory to --
21 to be able to access water in the same way that
22 they were before. They would no longer be able
23 to leave the reservation in the same way that
24 they were before.

25 And so the situation had changed, and

1 they were dependent on the government for access
2 to water, just as they had been at Bosque
3 Redondo, which -- with -- in the unlivable
4 conditions there.

5 CHIEF JUSTICE ROBERTS: The treaty
6 specifically mentions a variety of things that
7 would be necessary for agriculture, you know,
8 the 15,000 sheep, however many cattle, the
9 seeds. If the water were -- why wasn't the
10 water mentioned, as -- your argument now is it's
11 necessarily implicit, but the other things were
12 spelled out. Wouldn't you have spelled out the
13 water at the time?

14 MR. DVORETZKY: Well, the -- the other
15 things were spelled out, and as -- as you
16 pointed out, Mr. Chief Justice, the other things
17 were spelled out with -- with numbers. They
18 could be very specifically enumerated in that
19 way.

20 Water was something that was simply
21 inherent in the permanent homeland and -- and
22 making it suitable both as a permanent homeland
23 and for the very purpose of agriculture.

24 As the Court recognized in Winters, if
25 you have a permanent homeland for agriculture,

1 both of which were features of -- of the -- the
2 reservation in Winters as well, if you have
3 those things, you -- you -- you can't carry out
4 the purpose of that agreement without also
5 having water. And so it didn't need --

6 JUSTICE KAGAN: So, Mr. --

7 MR. DVORETZKY: -- to be -- I'm sorry.

8 JUSTICE KAGAN: No, go ahead, please.

9 MR. DVORETZKY: It didn't need to be
10 spelled out because it was an essential
11 component of fulfilling the purposes of the
12 agreement.

13 JUSTICE KAGAN: As -- as I understand
14 the government's argument, the government is not
15 contesting that the treaty gives the Navajo
16 Nation water rights. It's simply contesting
17 what the nature of its own responsibility is
18 with respect to those rights.

19 So the question is, you know, what
20 duties attach to the government. And the
21 government is saying the duty that attaches to
22 it is that it can't interfere with the Navajo
23 Nation's water rights, but it has no affirmative
24 obligation to ensure that the Navajo Nation has
25 a supply of water.

1 And it seems to me that that's the
2 difference between the two of you, not, you
3 know, whether the treaty conveys a promise as to
4 water. The government agrees that it does. The
5 government is just saying it has no affirmative
6 duty with respect to the supply of water.

7 So what's your answer to that?

8 MR. DVORETZKY: Justice Kagan, I think
9 the government's conduct both in Arizona versus
10 California and in other cases belies the notion
11 that the treaty just gives the -- gives the
12 tribe a stick and a bundle to do with as it
13 wishes.

14 The government itself, its own
15 conduct, shows that it believes it has
16 affirmative duties. In Arizona versus
17 California, the United States said that it spoke
18 for the Nation.

19 More recently, in a January 20 -- 2022
20 intervention motion in New Mexico litigation,
21 the government said again, "The United States is
22 the legal owner of all water rights recognized
23 for the Navajo Nation, holding these rights in
24 trust for the Navajo Nation."

25 So the United States is controlling

1 these Winters rights and, in certain instances,
2 like Arizona versus California, blocking the
3 Nation from asserting those rights for itself.

4 So the United -- this is not a
5 situation where the United States simply gave
6 the Nation a stick and said, here you go, use
7 it. The United States continues to exercise
8 control over that stick, and, in doing so, the
9 United States itself is recognizing that it has
10 duties with respect to the water.

11 JUSTICE BARRETT: Mr. Dvoretzky, it
12 seems to me like Winters rights are something
13 different than tapping aquifers and helping come
14 up with a plan or helping install pumps.

15 I mean, are you -- are you arguing for
16 those latter kinds of duties or just for Winters
17 rights? Because it would be a different claim
18 to say, we have Winters rights and the
19 government hasn't been asserting them on our
20 behalf, they breached their trust obligation by
21 blocking our intervention. That's a different
22 kind of claim.

23 MR. DVORETZKY: That's right. So --
24 so let me be clear about what I think the scope
25 of the Winters right is.

1 The -- the -- the scope of the Winters
2 rights includes access to sufficient water from
3 appurtenant water sources either within or along
4 the border of the reservation. The
5 United States has to ensure that access.

6 We are not saying as a matter of
7 treaty interpretation that the United States is
8 legally obligated to pay for pipelines or
9 aquifers or whatever, that whether the
10 United States has a moral or political
11 obligation to do that, as Mr. Liu acknowledged,
12 I think it does. But, in terms of the Winters
13 rights under the treaty, that is really a right
14 of access to an appurtenant water source. But
15 --

16 JUSTICE BARRETT: So that's really
17 just about intervening in litigation to assert
18 those on the Navajo's behalf and to protect
19 them, right? Like to safeguard those rights so
20 that you're not deprived of them, as Justice
21 Gorsuch was pointing out, the Navajo haven't had
22 an opportunity in Arizona versus California or
23 any other time to assert those Winters rights
24 and to have any rights in the mainstream
25 adjudicated.

1 MR. DVORETZKY: I -- I -- I think
2 that's right, Justice Barrett.

3 JUSTICE BARRETT: Okay. And, I mean,
4 putting --

5 JUSTICE JACKSON: But, to be --

6 JUSTICE BARRETT: -- putting aside
7 here, like, the whole question of the decree and
8 whether you're trying to get rights to the
9 mainstream, let's just take that part off the
10 table, but -- but, really, one way to think
11 about the breach of trust here, just to make
12 sure that I'm clear, is that the United States
13 failed to assert Winters rights on your behalf
14 and, in fact, blocked you from watching out for
15 yourselves?

16 MR. DVORETZKY: That's right. I was
17 going to emphasize the last part. Not only
18 failed to assert but, in fact, put us in a
19 catch-22 by keeping us out of the Arizona versus
20 California litigation.

21 JUSTICE BARRETT: Why wouldn't you try
22 to intervene in that litigation now?

23 MR. DVORETZKY: I think there would be
24 very significant obstacles to doing that without
25 the United States' support, including the -- the

1 states would -- would assert sovereign immunity
2 objections that the United States could
3 overcome, query whether the -- the Nation could
4 overcome those on its own, and the United States
5 is not -- not exactly volunteering to help us
6 even after all this litigation in terms of
7 reopening the -- the litigation that we were
8 blocked out of.

9 JUSTICE JACKSON: Doesn't the failure
10 to assert also carry with it an obligation to
11 evaluate to the extent that the government is
12 claiming that it doesn't assert because it
13 didn't think that you had needs for water or
14 whatnot?

15 So I don't know that it's as narrow as
16 just they breached the fiduciary obligation of
17 not asserting, but they also have to figure out
18 the circumstances under which assertion is
19 required.

20 MR. DVORETZKY: Well, of course,
21 Justice Jackson, and I think that the -- the key
22 first step in figuring out what claims to assert
23 is assessing what are the needs and how are
24 those needs going to be met, and that --

25 JUSTICE JACKSON: And so a -- a breach

1 of fiduciary duty claim could rest on the
2 Navajos claiming you haven't even done the
3 legwork to determine whether or not to assert
4 our rights.

5 MR. DVORETZKY: Absolutely. And
6 the -- the breach of fiduciary duty in that
7 situation would be analogous to a failure to
8 provide an accounting of what's in the trust.

9 Before you can figure out how to
10 actually manage the trust, whether to assert the
11 Winters rights in litigation, you have to figure
12 out what is in -- what is in the trust and what
13 the needs of the trustee are.

14 JUSTICE ALITO: When I look at the
15 relief that you are requesting, I don't see
16 anything about the -- the original action.
17 You're now saying the breach of trust occurred
18 as a result of actions that the United States
19 took in the original action.

20 But the relief that you're now
21 requesting here doesn't have anything to do with
22 your ability to attempt to intervene in that
23 action, is that correct?

24 MR. DVORETZKY: Well, Justice Alito, I
25 think the breach is a continuing breach of

1 failing, at a minimum, to conduct the assessment
2 and come up with a plan.

3 The -- the United States' conduct in
4 Arizona versus California is one element of that
5 breach. It's not the only one. As I say, it's
6 an ongoing breach not to have remedied what
7 happened in Arizona versus California.

8 JUSTICE ALITO: Well --

9 MR. DVORETZKY: The other thing that I
10 think --

11 JUSTICE ALITO: -- all right. You say
12 that -- no, go ahead.

13 MR. DVORETZKY: Well, I -- I -- I was
14 just going to say I think it might be helpful to
15 the Court to understand in a little bit more
16 detail what actually happened in Arizona versus
17 California.

18 JUSTICE ALITO: Well, I -- I don't --
19 I -- I -- I'm not interested right now in -- in
20 Arizona versus California. I'm interested in --
21 of course, it's important, but I'm interested in
22 the relief that you're asking for.

23 Now you want a plan. If all you
24 want -- if all you got was a plan, that wouldn't
25 do you any good, would it?

1 MR. DVORETZKY: The -- the plan would
2 then need to be implemented, of course.

3 JUSTICE ALITO: Yeah.

4 MR. DVORETZKY: But that's it.

5 JUSTICE ALITO: Okay. So you want the
6 United States to "exercise their authorities in
7 a manner that does not interfere with the plan
8 to secure the water needed by the Navajo
9 Nation."

10 So, you know, you may have structured
11 your -- you -- you may have used words in
12 describing your relief that doesn't require the
13 allocation of water from the Colorado River.
14 But, in the end, that's really what you want,
15 isn't it, in -- do you deny that?

16 MR. DVORETZKY: Well, I -- I -- I
17 think it depends. As -- as Mr. Liu
18 acknowledged, there may be other sources of
19 water, and so I think it depends what the
20 assessment and the plan show.

21 If the assessment and the plan show
22 that the Nation does need water from the lower
23 mainstream, as it very well might -- I don't
24 want to -- to fight on that point -- then, at
25 that point, the decree would need to be

1 reopened. But we're not at that point and we
2 don't know that at this stage.

3 JUSTICE ALITO: But you've studied the
4 problem. Is there any realistic possibility
5 that you can get the water that you think that
6 you need from sources other than the Colorado
7 River?

8 MR. DVORETZKY: I -- I -- I think it
9 is very likely that some water from the lower
10 mainstream would ultimately be needed, but the
11 plan of -- the process of conducting the
12 assessment and coming up with a plan has to
13 happen first before we can know that, and we're
14 simply not -- not at that stage.

15 And that -- that, of course, is what
16 Judge Lee recognized in concurring in the Ninth
17 Circuit and -- and why he would allow this case
18 to go forward.

19 JUSTICE ALITO: You mentioned the
20 small amount of water used per household on the
21 reservation. Do you know the percentage of the
22 total water that is available to the Navajo
23 Nation that is used for household use and the
24 percentage that is used for agricultural use?

25 MR. DVORETZKY: I -- I don't have that

1 percentage, Justice Alito.

2 JUSTICE ALITO: If you take all of the
3 water that the Navajo Nation now has and divide
4 it by the number of residents, do you know the
5 per capita amount of water, which could be quite
6 different from household use?

7 MR. DVORETZKY: I -- I don't have
8 the -- the per capita. And on your earlier
9 question, I think that the agricultural uses
10 would far dwarf household uses, but I don't have
11 the -- the -- the particular number on that.

12 Justice Alito, in response, if I
13 could, to questions that you were asking earlier
14 today, if you look at the DigDeep Right to Water
15 amicus brief, it gives statistics about the per
16 capita use on the Nation versus neighboring
17 states, and those statistics come from a U.S.
18 Geological Survey study.

19 The -- the average American uses 88 to
20 a hundred gallons a day. In the particular
21 states that you were asking about, New Mexico is
22 81, Utah is 169, Arizona is 146. And, again, on
23 the Navajo Nation, the Navajo Nation is about
24 seven gallons.

25 JUSTICE ALITO: Yeah, but that's use,

1 right? That's not total -- that's not per
2 capita water. It's -- it's how much is used by
3 the household. You could have -- a state could
4 have an enormous amount of water and use --
5 well, it could have a certain amount of water
6 and use a very high percentage of that for
7 agriculture, right?

8 MR. DVORETZKY: It -- it could. I can
9 tell you that as a practical matter, the Navajo
10 Nation has a water shortage for all purposes.
11 This is -- the reality on the ground is not that
12 there are sprinkler systems, you know --

13 JUSTICE ALITO: No, no.

14 MR. DVORETZKY: -- irrigating while
15 people are, you know, driving miles to wells in
16 order to get water to be able to wash their
17 hands or do their dishes. That's just not the
18 reality on the ground.

19 JUSTICE ALITO: Is there anything
20 special about this treaty that -- in a relevant
21 respect that distinguishes it from many other
22 treaties that the United States has entered into
23 with other tribes?

24 MR. DVORETZKY: I think each -- each
25 treaty, as a matter of treaty interpretation,

1 has to be looked at in light of its history and
2 context. And the particular history of the
3 Navajos -- as the Chief Justice recounted
4 earlier, the particular history of the Navajos
5 informs the interpretation here in a way that
6 may or may not apply for other treaties.

7 In terms of the language, certainly,
8 the "permanent homeland" language is something
9 that is found in other treaties as well, but not
10 all tribes are similarly situated to the Navajos
11 in terms of their -- either their history or
12 their location. Not all -- some -- some tribes
13 may have sufficient water. Not all tribes have
14 unadjudicated water rights in the way that the
15 Navajos do. And so I can't give you a
16 categorical answer other than to say that the
17 analysis has to go treaty by treaty.

18 JUSTICE ALITO: Well, if we said that
19 the language in the treaty regarding a permanent
20 homeland was not itself sufficient, what would
21 you point to to take you over the line?

22 MR. DVORETZKY: Permanent homeland
23 plus the agriculture provisions, both of which
24 are similar to Winters, which I think has to
25 inform how this Court reads those terms, but

1 also the negotiations and the historical context
2 and the context of the reservation today. The
3 climate is particularly arid. As I explained to
4 the Chief Justice earlier, when the Navajos were
5 returning to a portion of their original
6 homeland, they were confined to only -- to only
7 a portion of the reservation without the same
8 access that they had had before to be able to
9 get water for themselves. They were returning
10 under the government's protection.

11 All that context is an important tool
12 of treaty construction, and in order to carry
13 out the purpose of this treaty, it has to be
14 read to include these promises of water.

15 CHIEF JUSTICE ROBERTS: Counsel, what
16 --

17 JUSTICE KAVANAUGH: In response --

18 CHIEF JUSTICE ROBERTS: -- what other
19 obligations are there in -- in the phrase
20 "permanent home" in addition to providing water?

21 MR. DVORETZKY: I -- I think, really,
22 it's just the land and the water that are
23 inherent in the term "permanent homeland." And,
24 again, that comes from this Court's -- this
25 Court's opinion in Winters.

1 I -- water is particularly important
2 for life in a way that -- that this Court
3 recognized. It's a unique resource. It is not
4 one, again, that the Navajos can -- can simply
5 access on their own.

6 CHIEF JUSTICE ROBERTS: So you can't
7 think of anything else beyond water, beyond the
8 land, I guess, and the -- and the associated
9 water that would be an implicit requirement in
10 the permanent home?

11 MR. DVORETZKY: Not, I think, that
12 comes just from that language. There may, of
13 course, be --

14 CHIEF JUSTICE ROBERTS: Sure.

15 MR. DVORETZKY: -- there may, of
16 course, be other breach-of-treaty or
17 breach-of-trust claims that could be brought. I
18 don't mean to suggest that water is the only
19 type of claim that could ever be brought. But,
20 in terms of what that particular language is
21 understood to mean, I think, in light -- in
22 light of Winters and the particular importance
23 of water for carrying out the reservation's
24 purposes, that that is really the -- the key --
25 the key element there.

1 JUSTICE KAVANAUGH: In response to
2 earlier questions I think from Justice Kagan, I
3 believe you said that the U.S. can't interfere
4 with the Navajos' access, was your word, to
5 sufficient water, but you said that you were not
6 saying that the U.S. has a duty to construct
7 infrastructure, build pipelines or the like. I
8 just want to make sure I have that correct.

9 MR. DVORETZKY: So I think, on the
10 first part, it's more than just not interfering
11 with the access to water. The -- the
12 United States does have an affirmative duty --
13 particularly since the United States believes
14 that it holds these waters rights in trust, it
15 has an affirmative duty to ensure that the
16 Navajos have access to the water.

17 JUSTICE KAVANAUGH: Okay. And how --

18 MR. DVORETZKY: That --

19 JUSTICE KAVANAUGH: Keep going.

20 MR. DVORETZKY: Well, and -- and that
21 -- that may well require -- as I explained to
22 Justice Barrett, that may well require
23 litigating on behalf of the Navajos or, at a
24 minimum, allowing them to litigate on behalf of
25 themselves, rather than taking the position the

1 United States has taken, which is that it alone
2 speaks for the Navajos.

3 Once the -- once the United States has
4 assured access to the water, it does -- it does
5 not, as a matter of the treaty, have obligations
6 to build pipelines across the reservation or
7 that sort of thing. The Winters rights are
8 about access to the appurtenant water source.

9 JUSTICE KAVANAUGH: And what does
10 ensuring access to the waters entail then or
11 encompass potentially?

12 MR. DVORETZKY: Well, at a minimum, I
13 think it requires, in a litigation context,
14 ensuring that water is allocated to the Navajos,
15 that the -- that the Navajos have the legal
16 right to the water, which is --

17 JUSTICE KAVANAUGH: How about at a
18 maximum?

19 MR. DVORETZKY: -- which is what could
20 have happened in Arizona versus California.
21 Beyond that, I think the -- the Nation -- that
22 the United States does have an obligation to
23 make sure that the water is accessible. So, for
24 example --

25 JUSTICE KAVANAUGH: What does that

1 mean?

2 MR. DVORETZKY: Well, you -- you
3 couldn't, for example, get a court to decree
4 that the Navajos have a legal right to certain
5 water, but then the United States blocks -- puts
6 up a dam and blocks the -- the Navajos from
7 accessing that water.

8 It makes -- has to make sure that it
9 is actually accessible, but it doesn't have to
10 build infrastructure --

11 JUSTICE KAGAN: I hate to --

12 MR. DVORETZKY: -- to make that
13 happen.

14 JUSTICE KAGAN: -- be stuck on the
15 same question, Mr. Dvoretzky, but, as between
16 these two positions, which is Mr. Liu's position
17 is that you have a right and they have a duty --
18 you know, you have -- they have a duty not to
19 interfere with your water, as opposed to they
20 have a duty to ensure access to your water.

21 Both of those are not spelled out in
22 the contract. You know, both of those are
23 implied rights and duties. So how do we choose
24 between them?

25 MR. DVORETZKY: I think you choose

1 between them based on -- first of all, based on
2 the recognition that Winters has that water is
3 essential to life and to the purpose of the --
4 the treaty.

5 Second, based on the understanding of
6 the contracting parties, that's a --

7 JUSTICE KAGAN: But do you think -- I
8 -- I mean, I agree that Winters is about a
9 treaty and says water is really important. But
10 do you think Winters actually says the
11 government, in one of these kinds of treaties,
12 is obligated to ensure access to water? I'm not
13 sure Winters gets you all the way there on that.

14 MR. DVORETZKY: I -- I don't think
15 Winters says that because that wasn't the issue
16 in Winters, but --

17 JUSTICE KAGAN: Correct.

18 MR. DVORETZKY: That wasn't the issue
19 in Winters. However, the right to water would
20 be meaningless if the government, as trustee,
21 doesn't also have an affirmative duty as the
22 trustee to ensure that the water is available to
23 the beneficiary of the trust.

24 It would be one thing if we were in a
25 situation where the Navajos could -- could

1 engage in full self-help. As both a practical
2 and a legal matter, they could simply access the
3 water for themselves. That would be one thing.

4 That's not the situation here, though,
5 where the United States affirmatively says that
6 it controls these Winters rights. It is the
7 trustee. And so the United States seems to
8 recognize itself that it has some duties.

9 And, as a practical matter, that puts
10 the Navajos in an impossible situation if the
11 United States on the one hand says we control
12 these water rights, we can block you from
13 asserting them for yourselves, maybe you can
14 intervene permissively, but you have no right --
15 you have no intervention as of right, and if we
16 come in, we take over the litigation.

17 That's the position the United States
18 takes not only in Arizona versus California but
19 as recently as last year in litigation involving
20 the Navajos. That's putting the Navajos in an
21 impossible position so that, to answer your
22 question, Justice Kagan, if you're choosing
23 between the two competing views of this case,
24 you ought to choose the view that reflects both
25 the -- the understanding of the tribe at the

1 time, and treaty interpretation favors the
2 understanding of the Indians --

3 JUSTICE BARRETT: Mr. Dvoretzky --

4 MR. DVORETZKY: -- but also the --

5 JUSTICE ALITO: Mr. Dvoretzky, I -- go
6 ahead.

7 JUSTICE BARRETT: I -- I was just
8 going to ask you, what if you had intervened in
9 Arizona versus California or if the United
10 States had asserted the Winters rights on your
11 behalf and it still wasn't enough?

12 So let's say that the special master
13 in the decree that we entered doesn't give you
14 anything close to the 80 gallons a day, say,
15 that you might need. What's the United States'
16 obligation then?

17 MR. DVORETZKY: It still has an
18 obligation to do an assessment and a plan to see
19 if there are other sources of water.

20 JUSTICE BARRETT: And there's not.
21 Like let's just say it would be very expensive.
22 You know, you -- you -- you have rights to the
23 mainstream. It's not enough. You have some
24 rights to the tributaries -- tributaries, but
25 it's still not enough. But there is something

1 in an aquifer or groundwater that would require
2 building pipes, et cetera, and the Navajo
3 doesn't have the resources to do it.

4 Does the United States have an
5 obligation to get you the water you need?

6 MR. DVORETZKY: I don't think there
7 would be a legal obligation there. The Winters
8 rights, again, are about appurtenant water
9 sources. And at a certain point, as a practical
10 matter, if those dry up, if they're simply not
11 available to supply the Navajo's water needs,
12 the United States can't --

13 JUSTICE BARRETT: So this is all about
14 the Winters rights? I'm just -- I didn't
15 understand that before, so this has been
16 helpful. This really is like what you're
17 asserting the obligation is, is about the
18 Winters rights.

19 MR. DVORETZKY: That's right.

20 JUSTICE JACKSON: Can I ask you if --
21 are you bringing this lawsuit under the Tucker
22 Act?

23 MR. DVORETZKY: No, we are not.

24 JUSTICE JACKSON: And so are you --
25 you're not relying on the Tucker Act's waiver of

1 sovereign immunity for the claims that you're
2 bringing in this case?

3 MR. DVORETZKY: We're relying on the
4 waiver of sovereign immunity in Section 702 for
5 suits seeking injunctive relief in this case.

6 JUSTICE JACKSON: Of the APA?

7 MR. DVORETZKY: Yes.

8 JUSTICE JACKSON: All right. So do
9 you -- I -- I guess I'm -- I understand that you
10 say that the treaty does give a positive source
11 of rights and that's all in your brief and
12 that's what we're arguing here today.

13 But do we really need it if you're
14 bringing this claim under the APA?

15 MR. DVORETZKY: Well, I -- I don't
16 think -- we're not bringing an APA cause of
17 action. To be clear, we're bringing a
18 breach-of-trust cause of action, and --

19 JUSTICE JACKSON: Under, like, a
20 common law breach of trust?

21 MR. DVORETZKY: A common -- common law
22 breach of trust, and the United -- and the Ninth
23 Circuit also granted us leave to amend on remand
24 if we wished to assert a breach-of-treaty claim
25 as well. I know Justice Barrett had some

1 earlier questions about the difference between
2 those two causes of action, and I'm happy to
3 address them.

4 JUSTICE JACKSON: All right. So
5 focusing in on the breach of trust, do we have
6 to find that -- I mean, the United States is
7 making -- is taking the position that you failed
8 to state a claim for that. We're at the motion
9 to dismiss stage because you haven't identified
10 a positive source of law. So I -- I guess I
11 didn't understand that you would have to if
12 you're just bringing a breach-of-trust claim.

13 MR. DVORETZKY: Well, I think there
14 still -- there has to be a source of law that we
15 would point to for where the -- the rights and
16 duties come from. I think that that much would
17 --

18 JUSTICE JACKSON: Could it be -- could
19 it be something like the -- the practices of the
20 United States with respect to their acting as a
21 fiduciary, controlling these rights? Could that
22 be something that you look to as the duty?

23 I mean, I -- I -- I had this feeling
24 throughout the whole case in a way about kind of
25 like common law estoppel kinds of principles.

1 To the extent that the United States
2 says we have a trust obligation and is acting as
3 a trustee, why isn't that enough for someone who
4 claims to be a beneficiary to say, hey, we can
5 sue you for not, you know, doing all that you're
6 supposed to do in your role as trustee?

7 MR. DVORETZKY: So I -- I think you
8 could. I think our case is stronger than that
9 because I think that the United States' conduct
10 shows that the United States itself understood
11 that arising out of the treaties, which are the
12 first source of law that we point to, that the
13 United States had --

14 JUSTICE JACKSON: Right. So you have
15 the treaties too, but I guess, to the extent
16 that there are people and the United States is
17 arguing that the treaties actually don't have an
18 express requirement or a duty, I guess one might
19 also say, well, you've been acting as a trustee,
20 you admit you've been acting as a trustee, and
21 why isn't that enough --

22 MR. DVORETZKY: That -- that's right.

23 JUSTICE JACKSON: -- to be --

24 MR. DVORETZKY: That's right.

25 JUSTICE JACKSON: -- the basis of --

1 of the breach-of-duty claim that we're trying to
2 bring here?

3 MR. DVORETZKY: That -- that's right,
4 Justice Jackson.

5 JUSTICE SOTOMAYOR: Counsel, Justice
6 Kavanaugh -- this is -- Justice Kavanaugh asked
7 a question earlier that you're not defending the
8 Ninth Circuit decision. Could you succinctly
9 point out why you're not or, if you are, why
10 he's wrong and -- and explain how your position
11 differs from the Ninth Circuit, if it does?

12 MR. DVORETZKY: Yes, Justice
13 Sotomayor. We are defending the Ninth Circuit's
14 decision. The core of the Ninth Circuit's
15 analysis was correct. The United States said
16 that even under the Jicarilla standard,
17 identifying a specific source of law, the tribe
18 -- the tribe has pointed to the treaties and
19 that the treaties properly understood, in light
20 of Winters and in light of the agricultural
21 provisions and in light of all of the canons of
22 construction that apply to Indian treaties,
23 those create the rights and duties that we're
24 seeking to enforce. That was the heart of the
25 Ninth Circuit's analysis, and we are defending

1 that.

2 The Ninth Circuit also recognized
3 that Winters -- and -- and I'll just quote
4 here -- "the Supreme Court could not have
5 intended to hamstring the Winters doctrine,
6 which has remained good law for more than 100
7 years, by preventing tribes from seeking
8 vindication of their water rights by the federal
9 government when the government has failed to
10 discharge its duties as trustee."

11 That's at the government's Petition
12 Appendix 32a. The previous analysis that I was
13 pointing to was at the government's Petition 25
14 -- Petition Appendix 25a to 26a. So we are
15 defending the -- the Ninth Circuit's analysis.

16 CHIEF JUSTICE ROBERTS: Justice
17 Thomas?

18 JUSTICE THOMAS: So you are arguing in
19 much the posture that Winter took place that
20 there's a pre-existing right to water that is
21 already there?

22 MR. DVORETZKY: That -- that's right.
23 These are reserved water rights, reserving for
24 the tribe -- reserving to the tribe its
25 pre-existing water rights.

1 CHIEF JUSTICE ROBERTS: Justice Alito?

2 JUSTICE ALITO: I'm still not sure I
3 understand exactly what you mean by access to
4 water on the ground. In response to a lot of
5 the questions about access, you spoke about the
6 ability of the Navajo Nation to engage in
7 certain litigation. But put all that aside and
8 talk about what access means on the ground, so
9 to speak. Does it ever require the government
10 to construct any infrastructure?

11 MR. DVORETZKY: I -- it -- I can't say
12 that it would never require any infrastructure
13 whatsoever. It -- it would depend on exactly
14 what the situation is. If you had a -- if you
15 had a situation where you had an appurtenant
16 water source and the tribe had an allocation of
17 water from that appurtenant water source, but,
18 as a practical matter, there was simply no way
19 to actually reach it, even though it was an
20 appurtenant water source, perhaps in that
21 situation the government would have some
22 obligation in order to ensure access through
23 a -- through an impenetrable wall or something
24 like that.

25 But I also think that the government

1 hypothesizes a parade of horrors where the
2 government would have to be building pipelines
3 across, you know, miles and miles and miles of
4 territory.

5 We're not talking about anything like
6 that. We're talking about ensuring access to
7 appurtenant water sources.

8 JUSTICE ALITO: Well, if the -- if the
9 reservation is here and the Colorado River is
10 down here and you have a cliff that's hundreds
11 of feet high, would -- do you think access means
12 that the government has to create -- has to
13 construct whatever facility is necessary to get
14 the water up the cliff?

15 MR. DVORETZKY: I -- I think it
16 probably would not have to construct that,
17 although, certainly, if there were any
18 settlement negotiations, that's something that
19 could and very well might be provided for.

20 JUSTICE ALITO: If you could -- could
21 access a water source on your own or with
22 whatever assistance you think the government has
23 to provide you with, how much water do you think
24 you are entitled to extract from that water
25 source? What does access mean in that respect?

1 Does it mean a right to take out as much water
2 as the Navajo Nation thinks it needs?

3 MR. DVORETZKY: Well, I think this
4 goes back to the question of the assessment that
5 the United States has never conducted, and --
6 and so we -- we don't know the quantity of
7 water. And it's not necessarily how much we
8 think we need. It --

9 JUSTICE ALITO: All right. How much
10 that you actually need to have -- to -- to
11 transform the reservation into a permanent
12 homeland, a livable, permanent homeland?

13 MR. DVORETZKY: I -- I -- I think the
14 Nation has a right to access up to that point
15 from appurtenant water sources.

16 Going back to Justice Barrett's
17 earlier question, if it's impossible, we're --
18 we're not suggesting that water can be
19 manufactured out of nowhere --

20 JUSTICE ALITO: No, no.

21 MR. DVORETZKY: -- or that it has to
22 be trucked from the Great Lakes --

23 JUSTICE ALITO: No, no.

24 MR. DVORETZKY: -- or something like
25 that.

1 JUSTICE ALITO: But, if you can access
2 it, let's say you could access it yourself and
3 you're not even asking the government to provide
4 any infrastructure, do you think that you have
5 the right to take out from that water source
6 whatever quantity of water is necessary to meet
7 the standard of a livable, permanent homeland
8 regardless of the needs of others who are
9 drawing water from the same water source?

10 MR. DVORETZKY: So whatever right we
11 have would, of course, be subject to in a -- in
12 an adjudication what is allocated to us, which
13 may be something short of that. But we do
14 have -- the -- the Nation had water rights
15 first. We do have priority rights to the water,
16 and that's something that ought to be considered
17 as part of an adjudication requirement.

18 JUSTICE ALITO: Well, when there's --
19 when an allocation is being made and you assert
20 we have the right under federal law, under the
21 federal treaty, to take out as much water as we
22 need to make the reservation a livable,
23 permanent homeland, you said we have that right,
24 that supersedes other rights, it supersedes any
25 rights that the states may have, is that your

1 position? You -- you have that priority and
2 other -- other users of the water simply have to
3 accept that no matter what the consequences for
4 them?

5 MR. DVORETZKY: I -- I think, as a
6 practical matter, the way this would work is
7 that there would be -- there -- there would --
8 there would likely be some sort of a negotiated
9 resolution. We would like to have a seat at the
10 table to be a part of that, which we've been cut
11 out for -- cut out from.

12 But, in terms of figuring out what the
13 needs are also, it -- it's not just whatever we
14 might want. There are judicially accepted
15 methodologies for assessing what the water needs
16 of a tribe are.

17 The Arizona Supreme Court has a
18 multifactor test that it's used. This Court in
19 Arizona versus California used a different
20 methodology. There are ways of assessing this.
21 It's not -- the idea is not just that we get to
22 say what we want and take it. That's not how
23 this works in practice.

24 CHIEF JUSTICE ROBERTS: Justice
25 Sotomayor?

1 JUSTICE SOTOMAYOR: No, thank you. He
2 answered my question.

3 CHIEF JUSTICE ROBERTS: Justice Kagan?

4 JUSTICE KAGAN: You said earlier that
5 you had some things to say about Arizona v.
6 California and the nature of what happened
7 there. Have you gotten that out?

8 MR. DVORETZKY: I haven't. Thank you,
9 Justice Kagan.

10 Just to explain -- just to explain
11 something about what happened there that I think
12 is relevant for the Court's context, the
13 reservation is adjacent to a stretch of the
14 Colorado in northern Arizona that is upstream
15 from Lake Mead. In 1960, the special master
16 decided that only mainstream water in and
17 downstream from Lake Mead was at issue. And so
18 the portion of the Colorado that was adjacent to
19 the reservation, according to the special master
20 at first, was not at issue.

21 The Nation moved to intervene and
22 argued that if the Court rejected the special
23 master's recommendation and apportioned
24 mainstream Colorado water upstream of Lake Mead,
25 the Nation's interests would be affected and the

1 United States wouldn't adequately represent
2 them.

3 This Court, of course, denied
4 intervention, and the United States, in opposing
5 the motion, actually agreed that if the Court
6 did decide to apportion water upstream from Lake
7 Mead, it would then -- and this is at page 15
8 from the government's intervention opposition --
9 "it will then be necessary to determine the
10 appropriateness of an application under Article
11 IX for adjudication of the Nation's rights."

12 That never happened after the Court
13 rejected the special master's conclusion about
14 Lake Mead. And so this Court ended up
15 adjudicating rights upstream from Lake Mead that
16 affected the portion of the Colorado adjacent to
17 the reservation. But the United States never
18 followed up and did what it said it would do,
19 which is to figure out whether, at that point,
20 the Nation's interests were -- would be
21 affected, which, in fact, they were.

22 JUSTICE KAGAN: Do we know why?

23 MR. DVORETZKY: Why they never did
24 that? I don't.

25 CHIEF JUSTICE ROBERTS: Justice

1 Gorsuch?

2 Justice Kavanaugh?

3 JUSTICE KAVANAUGH: Two things.

4 First, on -- on the Ninth Circuit, I take your
5 point about the treaty, but I just want to make
6 sure of the parts that you are not defending of
7 the Ninth Circuit's decision.

8 So the -- there you took the position
9 that the Court's breach-of-trust decisions were
10 applicable only to claims seeking money damages.
11 You persuaded the Ninth Circuit of that. You're
12 no longer defending that, correct?

13 MR. DVORETZKY: I -- I -- I think
14 that's right insofar as we need -- I think we
15 need to and have shown a specific source of law
16 that creates rights and imposes duties. That's
17 the standard that has to be met.

18 JUSTICE KAVANAUGH: Okay. And then,
19 in the Ninth Circuit, you also relied on various
20 statutes and an environmental impact statement.
21 You're no longer relying on those, correct?

22 MR. DVORETZKY: We haven't relied --
23 we haven't made our argument based on those
24 here.

25 JUSTICE KAVANAUGH: So that's a yes?

1 MR. DVORETZKY: Yes, we are no
2 longer -- we are not affirmatively relying on
3 them. I am not --

4 JUSTICE KAVANAUGH: Okay. That's all
5 I wanted to --

6 MR. DVORETZKY: -- not rejecting the
7 Ninth Circuit --

8 JUSTICE KAVANAUGH: -- that's all I
9 wanted to make clear. You're not relying on
10 various arguments that you persuaded the Ninth
11 Circuit on; you are relying on the treaty and
12 the -- the Winters.

13 MR. DVORETZKY: We are relying on what
14 we believe was the core of the Ninth Circuit's
15 analysis, which was correct.

16 JUSTICE KAVANAUGH: Okay. And then a
17 big part of the Solicitor General's position
18 seems to be, at a big-picture level, leave it to
19 Congress, that the courts lack the authority,
20 arguably, from their perspective, also the
21 competence, arguably, from their perspective, to
22 sort all these competing interests out in
23 Arizona in a way that's going to be fair and
24 equitable and that Congress has shown the
25 ability to do this with other tribes and other

1 reservations and that rather than a multiyear
2 journey here, where, really, it's not clear you
3 can ever get what you really want out of the
4 court system, as we've danced around today, we
5 should leave it to Congress.

6 So that's, I think, their theory, and
7 I just want to get your response to that.

8 MR. DVORETZKY: First, the -- the
9 relevant action by Congress is ratifying the
10 treaties, and the treaties, properly understood,
11 as I've argued today --

12 JUSTICE KAVANAUGH: Right, Congress
13 now.

14 MR. DVORETZKY: -- impose these --

15 JUSTICE KAVANAUGH: Congress now.
16 Congress now. Leave it to Congress now.

17 MR. DVORETZKY: It -- it shouldn't be
18 left to Congress now because Congress now, like
19 Congress then, seemed to have agreed to these
20 treaties.

21 It -- it, of course, is possible for
22 us to get the relief that we want out of the
23 judicial system. We can get the plan and the
24 assessment, and the plan will either provide for
25 water sources other than the Colorado and can be

1 implemented or, if it's necessary to access
2 water from the lower mainstream of the Colorado,
3 at that point, the parties can return to this
4 Court and get that relief. So it is possible to
5 get relief from the Court.

6 And then, third, as a practical
7 matter, the government says leave it to
8 Congress, leave it to the political branches.
9 We've been waiting half a century, since the --
10 the mistake that I explained to Justice Kagan in
11 the Arizona versus California litigation. We've
12 been waiting half a century for the political
13 branches to solve this problem for the Nation.
14 It hasn't happened.

15 JUSTICE KAVANAUGH: Thank you.

16 CHIEF JUSTICE ROBERTS: Justice
17 Barrett?

18 JUSTICE BARRETT: Just a quick -- I'm
19 kind of stuck in the same place as Justice
20 Alito. You just said in response to Justice
21 Kavanaugh, you know, plan and assess, we haven't
22 had that yet. So let's say plan and assess
23 shows, yeah, you know, we can't get everything
24 we need from the mainstream Colorado River, even
25 assuming Winters rights. Is it just thanks for

1 the plan, thanks for help with the assessment,
2 United States, we'll take it from here?

3 MR. DVORETZKY: Once we get the plan,
4 the plan itself might be judicially
5 reviewable -- or would be judicially reviewable,
6 but we're -- we're simply not at that point.

7 JUSTICE BARRETT: But --

8 MR. DVORETZKY: It would be --

9 JUSTICE BARRETT: Well, I know you
10 keep saying that, but, like, I guess what I'm --
11 you know, Justice Alito asked, so does this
12 involve infrastructure, does this involve
13 pipelines? And that's a different thing than
14 just, hey, help us figure out what our needs are
15 so we have a plan, an assessment, and then maybe
16 we can be part of the Arizona versus California
17 litigation and assert Winters rights.

18 But -- but you're not saying any of
19 that. You're just saying we just need the plan
20 and the assessment, and then, thanks, we'll take
21 it from there and maybe we can intervene in
22 Arizona versus California?

23 MR. DVORETZKY: No. I'm saying that
24 in this litigation, we are seeking the plan and
25 the assessment, which is like an accounting in a

1 common law trust action. Once we have the plan
2 and the assessment, hopefully, the United States
3 would simply -- would simply implement the plan.
4 And if the plan calls for reopening the decree,
5 then they would seek to have that happen.

6 If we're dissatisfied with the plan,
7 that might be a separate breach-of-trust or
8 potentially breach-of-treaty claim.

9 JUSTICE BARRETT: But it's possible
10 that the plan might require some sort of
11 infrastructure, pipes, et cetera?

12 MR. DVORETZKY: It is possible that
13 the United States would include such things in
14 the plan. Whether -- whether -- if the question
15 is whether we could go to court and say the plan
16 is deficient because it doesn't include pipes
17 running across the reservation, I don't
18 think that --

19 JUSTICE BARRETT: The plan calls for
20 pipes, the United States has to provide them?
21 Is that what you mean by judicially enforceable
22 plan? It's just a different thing if what you
23 want is the ability to assert Winters rights to
24 the mainstream. I think this is some of what
25 Justice Alito was getting at. That's just a

1 different thing than saying our enforceable
2 treaty obligation is that the United States
3 helps us plan, assess, pipelines,
4 infrastructure. And at some points, you've said
5 that's not what you're asking, but then it seems
6 like maybe it is what you're asking.

7 MR. DVORETZKY: I think it's not what
8 we're asking. We are asking for the
9 United States to ensure that there is adequate
10 water available. I think that that invokes the
11 -- that is meant to invoke the Winters rights.

12 Right now, there is no water even to
13 pipe. That is what we are asking them to
14 assess, how much water do we need and how is it
15 going to be made available, but not how is it
16 going to be piped across the reservation.

17 JUSTICE BARRETT: Okay. Thanks.

18 MR. DVORETZKY: Right now, there's
19 simply no -- no water to pipe.

20 CHIEF JUSTICE ROBERTS: Justice
21 Jackson?

22 JUSTICE JACKSON: I guess some of my
23 confusion about the questions about how much
24 water the Indians have now on the reservation
25 and the sort of details and contours of the

1 U.S.'s obligation is the fact that I thought
2 this was at the motion to dismiss stage and that
3 you've claimed that they have breached a
4 fiduciary duty to ensure that there's access to
5 water, and at some level, we have to, I guess,
6 assume the truth of that for the purpose of
7 evaluating the government's argument, which is
8 that we can't even go forward to litigate
9 whether there's a breach in this case because
10 you have to point to a particular express duty,
11 and you haven't done so.

12 I sort of felt like that's where we
13 were, and so help me to understand the relevance
14 at this stage of arguments about whether or not
15 there's actually been a breach, whether or not
16 the Navajo really have enough water, all of
17 that. Is that -- should we be thinking about
18 that right now with respect to where we are in
19 this litigation?

20 MR. DVORETZKY: No, Justice Jackson.
21 This -- this litigation is at the point where we
22 have not even been allowed to amend the
23 complaint in order to assert a breach-of-trust
24 claim or a breach-of-treaty claim as to
25 the United -- as to the United States' conduct.

1 All that needs to happen at this point
2 is that we ought to be allowed to amend the
3 complaint and go forward with the litigation.

4 The precise scope of the government's duty, what
5 the plan ought to contain, all of that is --

6 JUSTICE JACKSON: And to be clear --

7 MR. DVORETZKY: -- it would -- would
8 happen over the course of litigation --

9 JUSTICE JACKSON: -- the Navajo could
10 still win -- lose -- lose later on in the
11 litigation, right? I mean, if you amend the
12 complaint and the complaint goes forward because
13 it is not precluded insofar as you, you know,
14 haven't done some sort of identification of the
15 positive duty or whatever, we go on, and then
16 there's discovery and litigation about the
17 degree to which the United States has or has not
18 breached its obligation, and it's possible that
19 the Navajo would lose?

20 MR. DVORETZKY: It's always possible.
21 I hope not, but it's always possible.

22 JUSTICE JACKSON: I'm just saying that
23 the -- the -- the -- the decision that we're
24 making right now is not on the merits of whether
25 or not the Navajo is correct about the

1 United States having breached its duty.

2 MR. DVORETZKY: That -- that's right.
3 The only question at this point is whether we
4 ought to be allowed to amend our complaint or
5 whether it was futile for us to do so -- to try
6 to do so.

7 JUSTICE JACKSON: Thank you.

8 CHIEF JUSTICE ROBERTS: Thank you,
9 counsel.

10 MR. DVORETZKY: Thank you.

11 CHIEF JUSTICE ROBERTS: Mr. Liu,
12 rebuttal?

13 REBUTTAL ARGUMENT OF FREDERICK LIU
14 ON BEHALF OF THE FEDERAL PARTIES

15 MR. LIU: Thank you, Mr. Chief
16 Justice. Just a few quick points.

17 First, about the Winters decision, we
18 read that decision as having basically two
19 parts. One part of it is about the scope of the
20 reservation that's granted to the Indians. That
21 scope of reservation includes water.

22 My friend described it as access to
23 water. Justice Kagan, you asked, that seems
24 different from how we're describing it. It is,
25 and we're correct for two reasons.

1 Look at -- look at the nature of the
2 right with respect to the land that's reserved
3 under -- under that reservation. There are no
4 ensure access to land, build roads, build
5 bridges as to the land. There's no such duty as
6 with respect to the minerals. No such duties
7 with respect to the timber. So, if you compare
8 the water to those other things that also come
9 with the same bundle of sticks, we're right
10 about what the right is being -- what -- what
11 right is being conveyed.

12 Also, compare the Winters doctrine not
13 just in the Indian context but to every other
14 context it applies: not just to Indian
15 reservations but to national monuments, national
16 parks, national refuge areas.

17 In all of those other instances, this
18 is a doctrine of reserved rights, rights against
19 interference, rights to use, rights to exclude.
20 In none of those situations is it an affirmative
21 duty.

22 There's a second part of the Winters
23 case. That's where the Indian canons come in.
24 The Indians can -- Indian canons came in to
25 construe the cession of land that was at issue

1 in that agreement. That agreement took the
2 Indians' land. They ceded a lot of it, kept
3 some of it. The question was, when they ceded a
4 lot of it, did they cede the water with it. The
5 Indian canon came in to construe that cession
6 and the answer was, no, they didn't cede it with
7 it.

8 Because Winters can't be doing all the
9 work, my friend needs to point to something
10 outside Winters as a source of this duty. It
11 can't be Winters itself.

12 So what do they point to? It's the
13 treaty. The treaty doesn't do the work for it.
14 We'd agree water is implicit in one part of the
15 treaty. It's Article II of the treaty that
16 makes the reservation. We do not think water is
17 implicit in all the other agricultural
18 provisions. No one thinks seeds means water.
19 No one thinks agricultural implements means
20 water. Seeds mean seeds, and agricultural
21 implements mean agricultural implements. So
22 the -- the treaty doesn't support them.

23 This idea that we at least have a duty
24 to do some sort of common law trust accounting
25 is contrary to this Court's cases that say you

1 can't import those common law duties until the
2 tribe has gone through the threshold step of
3 establishing a duty in a statute, treaty, or a
4 -- or a regulation.

5 And so, while those duties might make
6 sense if the government were a private trustee
7 that had taken on all fiduciary -- all the
8 duties of a -- of a conventional fiduciary, they
9 don't make sense when Congress is in the
10 driver's seat and can decide how to shape the
11 contours of the trust relationship.

12 I think my friend said, if -- if
13 the -- if the tribe can engage in full
14 self-help, then there's no claim here. Well,
15 the -- the tribe can engage in full self-help.
16 It can fund its own infrastructure projects. It
17 can tap the groundwater on the reservation
18 today. There's no impediment. It can assert
19 its own Winters claims.

20 I see my time is up.

21 CHIEF JUSTICE ROBERTS: Thank you,
22 counsel. The case is submitted.

23 (Whereupon, at 11:54 a.m., the case
24 was submitted.)

25

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