No. 19-17088

IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

NAVAJO NATION,

Plaintiff-Appellant,

v.

UNITED STATES DEPARTMENT OF THE INTERIOR, et al.,

Defendants-Appellees,

STATE OF ARIZONA; et al.,

Intervenors-Defendants-Appellees.

On Appeal from the United States District Court
for the District of Arizona
No. CV-03-00507-PCT-GMS
Hon. G. Murray Snow

BRIEF OF AMICI CURIAE LAW PROFESSORS IN SUPPORT OF PLAINTIFF/APPELLANT AND REVERSAL

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INTEREST OF AMICI CURIAE

The amici curiae submitting this brief, listed in Appendix A, are law professors who teach and write in the fields of federal Indian law and water law.[1] Through our teaching and scholarship, we promote the understanding of Indian and federal reserved water rights, including the trust duties owed by the federal government to Indian tribes. This case presents a question central to the scope of those duties in the context of reserved water rights, specifically, whether the Navajo Nation may seek to enforce the federal government's trust responsibilities through a common law breach of trust claim.

The District Court refused to recognize such a claim, holding instead that "the Nation must allege a substantive source of law that creates the specific duty that it alleges the government has violated, or that at least 'permit[s] a fair inference that the Government is subject to duties as a trustee.'" *Order* at 3-4 (Aug. 23, 2019) ("Final Order") (ER 2-13) (quoting *United States v. White Mountain Apache Tribe*, 537 U.S. 465, 474 (2003)). Amici submit this brief to explain how the District Court's decision is inconsistent with the Indian trust doctrine particularly where, as here, the result could imperil Indian reserved water rights.

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[1] No counsel for any party authored this brief in whole or in part, nor did any party or any party's counsel contribute money that was intended to fund preparing or submitting this brief. Additionally, no person contributed money intended to fund preparation or submission of this brief. The parties have consented to the filing of this brief.

ARGUMENT

I. INTRODUCTION

> Really, this case just tells an old and familiar story. [The tribe made significant concessions] to the United States under significant pressure. In return, the government supplied a handful of modest promises. The [government] is now dissatisfied with the consequences of one of those promises. It is a new day, and now it wants more. But today and to its credit, the Court holds the parties to the terms of their deal. It is the least we can do.

Washington State Dept. of Licensing v. Cougar Den, Inc., 139 S. Ct. 1000, 1021 (2019) (Gorsuch, J., concurring in judgment).

The Navajo Nation's treaty relationship with the United States established a duty of protection by which the federal government agreed to act to preserve and defend the Nation, its people, lands, and resources. As Felix S. Cohen wrote, "The promise of such protection for lands retained by the Indian tribes was an important *quid pro quo* in the process of treaty-making by which the United States acquired a vast public domain." FELIX S. COHEN, HANDBOOK OF FEDERAL INDIAN LAW vii (1941). Over time, that duty of protection has come to be known as the Indian trust doctrine or trust relationship. A mere four years ago in the Indian Trust Asset Reform Act of 2016, Congress dramatically reaffirmed its commitment to the duty of protection, finding that "historic Federal-tribal relations and understandings have benefitted the people of the United States as a whole for centuries and have

established enduring and *enforceable* Federal obligations to which the national honor has been committed." 25 U.S.C. § 5601(5) (emphasis added).

The decision below would allow the United States to unilaterally excuse itself from these trust duties, by holding—in direct contradiction of the findings of Congress—that the federal government's obligation to the Navajo Nation is unenforceable absent a specific statute affirmatively establishing such a duty. Because that decision ignores the effect of historic treaties between the United States and Indian tribes, forecloses the existence of a general trust relationship in contravention of nearly two centuries of federal law, and would have particularly nefarious effects on well-established but unquantified reserved rights to water like those of the Navajo Nation at issue here, this court should reverse that decision.

I. INDIAN TREATIES ESTABLISHED A DUTY OF PROTECTION OBLIGATING THE SUPERIOR SOVEREIGN TO ACT TO DEFEND AND PRESERVE TRIBAL RESOURCES.

The duty of protection owed by the United States to the Navajo Nation mandates action by the federal government to preserve Navajo resources.

Indian tribes and the United States negotiated for concessions from each other that were memorialized in the form of treaties. *See*, *e.g.*, Treaty with the Navajo Tribe of Indians, 15 Stat. 667, June 1, 1868 ("1868 Treaty"). Though some of these negotiations occurred at arms-length, Indian treaties usually involved unequal bargaining power, with the United States holding the upper hand. For

example, the negotiation of the 1868 Treaty followed a destructive war inflicted on the Navajo Nation, forced relocation, and years of catastrophic internment in a concentration camp. RAYMOND D. AUSTIN, NAVAJO COURTS AND NAVAJO COMMON LAW 2-9 (2009) (summarizing the history). The Supreme Court described the resulting government-to-government relationship as imposing a "duty of protection" on the United States benefitting their tribal partners. *United States v. Kagama*, 118 U.S. 375, 384 (1886) ("From their very weakness and helplessness, so largely due to the course of dealing of the Federal Government with them and the treaties in which it has been promised, there arises the duty of protection, and with it the power."); *see also Worcester v. Georgia*, 31 U.S. 515, 551-52 (1831) ("[The] United States . . . receive[s] the Cherokee nation into their favor and protection."); *Seminole Nation v. United States*, 316 U.S. 286, 296 (1942) (articulating "the distinctive obligation of a trust incumbent upon the Government in its dealings with these dependent and sometimes exploited people"). Congress also acknowledges that "the United States has undertaken a unique trust responsibility to protect and support Indian tribes and Indians. . . ." Indian Trust Asset Reform Act, 25 U.S.C. § 5601(3) (2018).

The duty of protection is a critical component of the federal-tribal relationship. The Supreme Court found that Indian nations negotiated for the United States to act in good faith to effectuate the duty of protection. *Washington*

v. Washington State Commercial Passenger Fishing Vessel Assn., 443 U.S. 658, 667 (1979) ("It is perfectly clear, however, that the Indians were vitally interested in protecting their [resources] . . . and that they were invited by the white negotiators to rely and in fact did rely heavily on the good faith of the United States to protect that right.") Congress shares a similar understanding. *See* Indian Trust Asset Reform Act, 25 U.S.C. §§ 5601(4)-(5) (2018) ("the fiduciary responsibilities of the United States to Indians also are founded in part on specific commitments made through written treaties and agreements securing peace, in exchange for which Indians have surrendered claims to vast tracts of land, which provided legal consideration for permanent, ongoing performance of Federal trust duties…and have established enduring and enforceable Federal obligations ….")

A. Historically, the Federal Government Ignored its Duty of Protection in Favor of other Interests.

The United States benefitted greatly from its transactions with Indian nations. 25 U.S.C. § 5601(5) (finding that "Federal-tribal relations and understandings have benefitted the people of the United States as a whole for centuries"). Sadly, however, many of these benefits flowed from the Legislative and Executive branches taking advantage of broad judicial deference to cynically exploit their relative political strength over Indian tribes in service of other federal interests.

Indian tribes sold nearly all of the land west of the original 13 States to the federal government or its predecessors in interest. *See generally* STUART BANNER, HOW THE INDIANS LOST THEIR LAND (2005) (describing the transactions that memorialized the dispossession of Indian tribes of most of their land). Both Congress and the Executive branch broke up many Indian reservations utilizing allotment plans that the Supreme Court refused to review on the grounds that the federal government was merely acting as "guardian." *Lone Wolf v. Hitchcock*, 187 U.S. 555, 565 (1903). The federal government's powers grew as the Supreme Court routinely deferred to the discretion of the United States in the implementation of its duty of protection. In *Lone Wolf*, for example, the Court held that it would not review Indian affairs laws at all, presuming that the federal government would act in "good faith." 187 U.S. at 565-66. Even now, the Court will not "disturb" judgments of Congress rationally related to the federal government's duty of protection to Indians and Indian nations. *Morton v. Mancari*, 417 U.S. 535, 555 (1974) (holding that so long as an Indian affairs law "can be tied rationally to the fulfillment of Congress' unique obligation toward the Indians[,]" those judgments "will not be disturbed").

Instead of closely scrutinizing its fellow branches to police and prohibit their historical failures as trustees, the federal judiciary often sought to justify such treatment. Drawing from dictum in early Indian affairs cases comparing the duty of

protection to a guardian-ward relationship, *Cherokee Nation v. Georgia*, 30 U.S. 1, 17 (1831) (Marshall, C.J., lead opinion), the judiciary asserted that Indian people were "inferior," *United States v. Sandoval*, 231 U.S. 28, 40 (1913), or "ignorant," *Lone Wolf*, 187 U.S. at 565, and, therefore, could be treated as "wards" subject to few limits on the exercise of federal discretion. The Executive branch also justified some of its claims in court by asserting that "Indians were warlike, heathens, infidels, and savages that had been conquered." Daniel I. Rey-Bear & Matthew L.M. Fletcher, *We Need Protection from Our Protectors: The Nature, Issues, and Future of the Federal Trust Responsibility to Indians*, 6 MICH. J. ENVTL. & ADMIN. L. 397, 431 (2017) (citing Neal Katyal, Acting Solicitor Gen., Speech of Acting Solicitor Gen. Neal Katyal, tr. at 6-8 (Apr. 8, 2011), and concerning *Tee-Hit-Ton Indians v. United States*, 348 U.S. 272 (1955)).

The result of this historical conception of the federal-tribal trust relationship was disastrous for Indian tribes. Felix Cohen wrote that, by the mid-Twentieth century, the federal government routinely "dispos[ed] of Indian tribal lands without the consent of the Indians; . . . compelled . . . individual Indians . . . to pay for [tribal] property when they use it; [. . . and forced Indian allotment owners to] surrender power over these lands to the agency superintendent by signing a power of attorney." Felix S. Cohen, *The Erosion of Indian Rights, 1950-1953: A Case Study in Bureaucracy*, 62 YALE L.J. 348, 364-66 (1953). Cohen concluded, "In the

eyes of many contemporary Indian Bureau administrators, Indian tribal property belongs to the Indian Bureau. . . ." *Id*. at 365. The federal government's actions to implement its duty of protection cloaked as a guardian-ward relationship were horrific failures that resulted in additional dispossession of Indian nations of not only their lands and resources, but their children and their cultures as well. *See generally* Reaffirmation of the United States' Unique Trust Relationship with Indian Tribes and Related Indian Law Principles, Memorandum from Solicitor, U.S. Dep't of the Interior, to Secretary, U.S. Dep't of the Interior, M-37045, at 3-9 (Jan. 18, 2017) (lands and resources); Matthew L.M. Fletcher & Wenona T. Singel, *Indian Children and the Federal-Tribal Trust Relationship*, 95 NEB. L. REV. 885 (2016) (children and culture).

B. The Modern Duty of Protection Promotes Tribal Interests.

Only in recent decades has the United States begun to genuinely reaffirm its duty of protection, now referring to that duty as a trust responsibility. *See*, *e.g.*, Indian Trust Asset Reform Act, 25 U.S.C. § 5601(3) (2018) ("Congress finds that . . . through treaties, statutes, and historical relations with Indian tribes, the United States has undertaken a unique trust responsibility to protect and support Indian tribes and Indians. . . ."); American Indian Agricultural Resource Management Act of 1993, 25 U.S.C. § 3742 (2018) ("Nothing in this chapter shall be construed to diminish or expand the trust responsibility of the United States toward Indian trust

lands or natural resources, or any legal obligation or remedy resulting therefrom.”). Similarly, the modern Supreme Court has begun more carefully scrutinizing legislative enactments affecting tribes, *see*, *e.g.*, *United States v. Sioux Nation*, 448 U.S. 371, 414-16 (1980) (rejecting *Lone Wolf*’s universal “presumption of congressional good faith”), and acknowledges “the undisputed existence of a general trust relationship between the United States and the Indian people.” *United States v. Mitchell*, 463 U.S. 206, 225 (*Mitchell II*) (1983); *see also United States v. Jicarilla Apache Nation*, 564 U.S. 162, 176 (2011) (“We do not question ‘the undisputed existence of a general trust relationship between the United States and the Indian people.’”) (quoting *Mitchell II*); *White Mountain Apache Tribe*, 537 U.S. at 475 n.3 (“We have recognized a general trust relationship since 1831.”)

The United States’ modern conception of its long-standing duty of protection has moved on from taking advantage of historically racist conceptions of tribal inferiority and, instead, is rooted in the federal government’s ongoing commitment to promoting tribal sovereignty and self-determination. *See*, *e.g.*, Indian Trust Asset Reform Act, 25 U.S.C § 5602 (2018) (“Congress reaffirms that the responsibility of the United States to Indian tribes includes a duty to promote tribal self-determination regarding governmental authority and economic development.”); Reaffirmation of the United States’ Unique Trust Relationship with Indian Tribes and Related Indian Law Principles, Memorandum from

Solicitor, U.S. Dep't of the Interior, to Secretary, U.S. Dep't of the Interior, M-37045, at 1 (Jan. 18, 2017) ("the Department of the Interior's … current policy and regulatory approaches are aimed at empowering tribes to more directly manage their own resources and lands, engage in economic development opportunities based on their own strategies and priorities, and self-govern through their own independent judgment and cultural values.")

II. THE DUTY OF PROTECTION IS ENFORCEABLE BY INDIAN TRIBES EVEN IN THE ABSENCE OF ALLEGATIONS THAT THE FEDERAL GOVERNMENT VIOLATED A SPECIFIC STATUTE.

The decision below would significantly transform the scope of the United States' general trust duty to Indian tribes. Rather than the broad duty of protection and support of tribal self-determination recognized for centuries by the Supreme Court and recently reaffirmed by Congress, the District Court's holding reduces the trust relationship to the narrow confines of black letter statutory law. *See Final Order* at 4 ("In this circuit, then, tribes must point to a specific treaty, agreement, executive order, statute, or regulation that the government violated in order to bring a breach of trust claim, even one for injunctive relief rather than money damages.") Such extreme curtailment of the enforceability of the federal government's trust obligations would render the federal government's general duty of protection meaningless and recent federal court decisions have therefore rejected that position. *See*, *e.g.*, *Jicarilla Apache Nation v. United States*, 100 Fed.

Cl. 726, 738 (Fed. Cl. 2011) ("[The United States] would have this court blithely accept what so many courts have rejected—that for the breach of a fiduciary duty to be actionable in this court, that duty must be spelled out, in no uncertain terms, in a statute or regulation."); *White Mountain Apache Tribe*, 537 U.S. at 476–77 (affirming implied trust duty); *Nw. Sea Farms, Inc. v. U.S. Army Corps of Engineers*, 931 F.Supp. 1515, 1520 (W.D. Wash. 1996) (The federal government's "fiduciary duty, rather than any express regulatory provision … mandates that the Corps take treaty rights into consideration."); *Rosebud Sioux Tribe v. Trump*, ___ F.Supp. 3d ___, 2019 WL 7421956, *8 (2019) ("The trust relationship between the United States and the Indian people imposes a fiduciary duty on the government when it conducts 'any Federal government action which relates to Indian Tribes.'") (quoting *Nw. Sea Farms, Inc.*, 931 F.Supp. at 1519-20).

The decision below also ignores the stated position of the United States. The Department of the Interior's official position since at least 1978 is that the federal government owes a fiduciary duty to Indian tribes "of care and loyalty, to make trust property income productive, to enforce reasonable claims on behalf of Indians, and to take affirmative action to preserve trust property." Letter from Leo Krulitz, Solicitor, U.S. Dep't of the Interior, to James W. Moorman, Asst. Att'y Gen., U.S. Dep't of Justice 2 (Nov. 21, 1978), *quoted in* Rey-Bear & Fletcher, *supra*, at 407. More recently, the Solicitor of the Department of the Interior issued

an opinion recognizing a trust obligation to "consider and implement measures to mitigate [deleterious] impacts" on Indian treaty rights. Memorandum from Solicitor, U.S. Dep't of the Interior, to Secretary, U.S. Dep't of the Interior, M-37045, at 22 (citations omitted).

Rather than the narrowly conceived, Congressionally-mandated duty contemplated by the District Court, the United States' duty of protection toward Indian tribes is a broadly enforceable obligation, cognizable in the courts. Consistent with that view, federal courts have repeatedly recognized and distinguished both the specific obligations placed upon the federal government by express law and the government's broader implied trust responsibilities. *See*, *e.g.*, *Blue Legs v. Bureau of Indian Affairs*, 867 F.2d 1094, 1100 (8th Cir. 1989) ("Our holding that [the Bureau of Indian Affairs and Indian Health Service] have a duty to clean up the dumps is buttressed by the existence of the general trust relationship between these agencies and the Tribe."); *Assiniboine and Sioux Tribes of the Fort Peck Indian Reservation v. Board of Oil and Gas Conservation of the State of Montana*, 792 F.2d 782, 794 (9th Cir. 1986) ("Taking into account these specific, congressionally-imposed duties, and *the long-standing, general trust relationship* between the government and the Indians, we conclude that a fiduciary relationship exists in the management of tribal mineral resources.") (emphasis added). In reliance on both statutory and general trust duties, federal courts have

also ordered the federal government to take action to fulfill its duty of protection to the lands and resources – and waters – of Indians and tribes. *See*, *e.g.*, *Pyramid Lake Paiute Tribe of Indians v. Morton*, 354 F. Supp. 252, 256–257 (D.D.C. 1973) (finding that the federal government was "obliged to formulate a closely developed regulation that would preserve water for the Tribe"); *see also White v. Califano*, 437 F. Supp. 543, 555 (D.S.D. 1977), *aff'd*, 581 F.2d 697 (8th Cir. 1978) (per curiam) (obligating the Indian Health Service to provide health care to Indians when the state government cannot); *Joint Tribal Council of Passamaquoddy Tribe v. Morton*, 388 F. Supp. 649, 667 (D. Me.) (ordering the Department of Justice to respond to the tribe's request for litigation assistance in bringing land claims), *aff'd*, 528 F.2d 370 (1st Cir. 1975).

Like its counterparts across the country, this court has firmly recognized the additional duties required of the federal government in its dealings with Indian tribes, even where such duties are not specifically set forth by Congress. In *Hoopa Valley Indian Tribe v. Ryan*, for example, the court noted that "we have 'read the [trust] obligation to extend to any federal government action,'" and that, while those obligations "can coexist with its other responsibilities," the federal government must "still honor[ ] its trust obligations to Indians" when meeting other statutory commands. 415 F.3d 986, 993 (9th Cir. 2005) (quoting *Pyramid Lake Paiute Tribe of Indians v. United States Dep't of Navy*, 898 F.2d 1410, 1420

(9th Cir. 1990)) (other citations omitted). The court made clear the standards by which the federal government must treat tribal interests, calling it "indisputable that the United States …ha[s] a fiduciary obligation of the highest order in [its] dealings with" tribes. *Hoopa Valley Indian Tribe*, 415 F.3d at 993.

Here, the District Court relied extensively on this court's decision in *Gros Ventre Tribe v. United States*, 469 F.3d 801 (9th Cir. 2006) to hold that, even when seeking injunctive relief based on the fiduciary obligations of the federal government, the Navajo Nation must rely on "a specific treaty, agreement, executive order, statute or regulation." *Final Order* at 4. In *Gros Ventre Tribe*, this court felt itself bound to apply circuit precedent, which the court interpreted as: "'unless there is a specific duty … placed on the government with respect to Indians, [the government's general trust obligation] is discharged by [the government's] compliance with general regulations and statutes not specifically aimed at protecting Indian tribes.'" *Gros Ventre Tribe*, 469 F.3d at 810 (quoting *Morongo Band of Mission Indians v. FAA*, 161 F.3d 569, 574 (9th Cir. 1998)) (other citations omitted). Therefore, even where a tribe seeks injunctive relief but not money damages, the *Gros Ventre Tribe* court determined that the standards developed by the Supreme Court for analyzing claims for damages under the Indian Tucker Act should apply. *Gros Ventre Tribe*, 469 F.3d at 811-12 (discussing

United States v. Mitchell (Mitchell I), 445 U.S. 535 (1980) and *Mitchell II*, 463 U.S. 206 (1983)).

Unlike the court below, this court must take a closer look at whether *Gros Ventre Tribe* governs the outcome here and appropriately sets forth the law of this circuit. For example, the *Gros Ventre Tribe* decision failed to carefully analyze how its holding would compel the federal government to meet its "fiduciary obligation[s] of the highest order," *Hoopa Valley Indian Tribe*, 415 F.3d at 993. Instead, according to *Gros Ventre Tribe*, the federal government fulfills those obligations through simple compliance with already applicable federal law. *Gros Ventre Tribe*, 469 F.3d at 810. Additionally, *Gros Ventre Tribe* left open the "question of whether the United States is required to take special consideration of tribal interests when complying with applicable statutes and regulations and when such an obligation may or may not arise." *Gros Ventre Tribe*, 469 F.3d at 810, fn. 10. Here, the District Court failed to recognize or analyze how that unresolved question should be answered where the United States is complying with the "law of the river" and, as part of its general trust duties, would have to "take special consideration" of the Navajo Nation's interests when doing so. *See*, *e.g.*, Plaintiff's Third Amended Complaint for Declaratory and Injunctive Relief ¶¶ 77-82, 91-106 (describing the various statutes and regulations applicable to the federal

government's management of the Colorado River).[2] Finally, the District Court failed to recognize the difference between the rights at issue in *Gros Ventre Tribe*, which the court there found unsupported by the relevant treaties, 469 F.3d at 813, and the "undisputed existence" of the Nation's rights here. *Final order* at 8. In uncritically relying on *Gros Ventre Tribe*, the holding below rendered the general trust obligation hollow and meaningless. This court must more carefully scrutinize *Gros Ventre Tribe* in light of the longstanding trust obligations of the United States toward Indian tribes and their reaffirmation in modern times.

III. THE FEDERAL GOVERNMENT'S DUTY OF PROTECTION OWED TO INDIAN TRIBES IS PARTICULARLY CRITICAL TO THE PROTECTION OF RESERVED WATER RIGHTS.

In the context of its general trust duties, the United States has unique obligations to protect water rights reserved for Indian tribes. The federal government acknowledges that it holds those rights in trust for tribes. *See*, *e.g.*, *Federal Criteria and Procedures for Indian Water Rights Settlements*, Department of the Interior, 55 Fed. Reg. 9,223 (Mar. 12, 1990). And, for over a century, the Supreme Court has recognized and protected tribal rights to water based on promises implied or expressed in treaties between the United States and Indian

[2] While *amici* contend that the general trust duty requires no showing that the United States violated specific, express legal mandates to be enforced at common law, the Navajo Nation further asserts that even if this court strictly adheres to *Gros Ventre Tribe*, the court may find violations of specific mandates in other sources of law. *See Appellant's Opening Brief*, 39-54 (filed Feb. 26, 2020).

nations. *See*, *e.g.*, *Winters v. United States*, 207 U.S. 564 (1908) (recognizing an implied reservation of water upon the creation of an Indian reservation in order to fulfill the purposes of that reservation); *Winans v. United States*, 198 U.S. 371 (1905) (recognizing rights reserved through treaties). But, because these rights are implied through the treaty promises, statutory, or executive action of the United States to provide a tribal homeland, their existence, scope, and nature are regularly challenged and threatened by competing water users claiming rights under state law. *See*, *e.g.*, *Agua Caliente Band of Cahuilla Indians v. Coachella Valley Water District*, 849 F.3d 1262 (9th Cir. 2017) (recognizing a reserved tribal right to groundwater under *Winters*).

In fulfillment of its general trust duties, the United States regularly steps forward to assert and protect those rights although, as Justice Brennan pointed out in his concurring opinion in *Arizona v. California*, "The United States has sometimes been slow to press Indian claims when they conflicted with those of politically influential non-Indian interests." 460 U.S. 605, 651 (1983) (Brennan, J., concurring in part) (citation omitted). In fact, as noted by the National Water Commission in its 1973 report to the President and Congress, "In the history of the United States Government's treatment of Indian tribes, its failure to protect Indian water rights for use on the Reservations it set aside for them is one of the sorrier chapters." National Water Comm'n, Water Policies for the Future—Final Report to

the President and to the Congress of the United States 475 (1973), *available at* https://www.epw.senate.gov/public/_cache/files/0/9/09fa2cfd-e480-40e6-bdf6-fc9fc8b5b0e3/6A20EC2999F0441563294B9DFFCFDD6E.water-policies-for-the-future-final-report-1973.pdf.

Importantly, because the vast majority of those Indian water rights were implied based on the *Winters* decision, they were not specifically set forth in a treaty, statute, regulation, or otherwise. Therefore, under the District Court's interpretation of the general trust duty, tribes would have little or no ability to enforce the United States' duty to protect those rights, notwithstanding its historical failures to do so and the lamentations of those failures by Justice Brennan and the National Water Commission.

Perhaps in light of the importance of tribal water rights, the District Court recognized that "The [Navajo] Nation's strongest argument" to enforce the United States' trust responsibilities arises from its effort to protect its reserved rights to water. *Final Order* at 4. Despite the strength of that argument, however, the decision below wrongly dismissed the existence of a general federal trust duty to protect those rights.

First, the District Court improperly interpreted the Navajo Nation's claims as requiring a judicial determination of its appurtenant water rights, a matter reserved to the Supreme Court in *Arizona v. California*. *Final Order* at 6-7. Alternatively,

according to the court below, if the Navajo Nation is not basing its claim on "identified and appurtenant water, it [can] obtain[ ] no help from *Winters*." *Id.* at 7. That heads-the-Nation-loses, tails-the-United-States-wins approach not only obliterates any obligation on the part of the United States to consider the Navajo Nation's rights in the mainstem of the lower Colorado River, it fundamentally contradicts the reserved rights doctrine.

Dating back to *Winters*, decided in 1908, the reserved rights doctrine recognizes and protects legal rights to water on behalf of Indian tribes, even where the water is not specifically "identified and appurtenant." *See*, *e.g. Winters*, 207 U.S. at 575-76 (describing general implication of rights to water without specifically identifying quantity or location of those rights). In addition, like the Supreme Court in *Winters*, which protected tribal rights far upstream from the reservation boundaries, other courts have viewed the specific identification and appurtenance of reserved rights in the broad context of *Winters*' demand that waters be necessary to fulfill the purposes of the reservation. *See*, *e.g.*, *Baley v. United States*, 942 F.3d 1312, 1337-39 (Fed. Cir. 2019) (reviewing *Winters* and recognizing tribal reserved water rights despite those rights not being adjudicated and being exercised in an off-reservation water body that borders the reservation boundary). In each of these instances, despite not identifying specific appurtenant rights, the existence of those rights—and the corresponding duty of the United

States to protect them—was undisputed. Therefore, the District Court improperly determined that the Navajo Nation would have to identify specific rights to benefit from *Winters* or rely on the Supreme Court to adjudicate those rights before seeking to force the United States to protect its interests in the Colorado.

Second, the decision below also determined that the United States owed no trust duty to the Navajo Nation to protect its reserved water rights because "The Nation's *Winters* rights do not *expressly create those responsibilities*." *Final Order* at 8 (emphasis added). This holding also fundamentally misconstrues the *Winters* doctrine which, since its inception, rested on the recognition that the United States *impliedly* reserved tribal rights to water when entering into treaties or otherwise setting aside land for tribal reservations. *Winters*, 207 U.S. at 576 ("We realize that there is a conflict of *implications* [in the statutory agreement establishing the reservation], but that which makes for the retention of the waters is of greater force than that which makes for their cession.") (Emphasis added). Unlike that time-honored approach, the District Court's approach would instead require that rights implied by treaty language can be protected only where that same language expressly imposes a duty of protection. If upheld, the result would usher in an unfortunate return to the "sorrier chapters" of the federal government's treatment of tribal reserved rights to water. Without an avenue to hold the United States accountable for such rights in the context of other federal responsibilities regarding

management of the Colorado River, the Navajo Nation will be unable to protect its legal rights to water sufficient to ensure the survival of the Nation and its citizens. Beyond a breach of trust, that failure would frustrate the reasoning upon which *Winters* itself was based. 207 U.S. at 576 (without access to the water impliedly reserved for the tribe by the federal government, the reservation would be "valueless").

IV. CONCLUSION

The federal government's trust duty to Indian tribes is rooted in historical treaties and has long been recognized by each of that government's three branches. Although, at times, the United States has taken advantage of the trust relationship to the detriment of Indian tribes, the modern era of federal-tribal relations is marked by federal trust responsibilities that promote tribal interests. Here, the decision below improperly narrowed the enforceability of the federal government's trust obligations to the Navajo Nation by precluding the Nation from pursuing common law breach of trust claims to protect water rights established in part through treaty guarantees. In light of the nature of the United States' trust duty, its treaty relationship with the Navajo Nation, and the importance of reserved water rights to the future of the Navajo Nation, this court should reverse.

Respectfully submitted this 4th day of March, 2020.

*s/Monte Tyler Mills*________________

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APPENDIX A

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Signature s/Monte Tyler Mills **Date** March 4, 2020
*(use "*s/[typed name]*" to sign electronically-filed documents)*

CERTIFICATE OF SERVICE

I hereby certify that on March 4, 2020, I electronically filed the foregoing Brief of Amici Curiae Law Professors in Support of Plaintiff/Appellant and Reversal with the Clerk of Court for the United States Court of Appeals for the Ninth Circuit by using the appellate CM/ECF system. All participants in this appeal are registered CM/ECF users and will be served by the appellate CM/ECF system.

*s/Monte Tyler Mills*________