Docket No. 19-17088

In the

United States Court of Appeals

For the

Ninth Circuit

NAVAJO NATION,

Plaintiff and Appellant,

v.

U.S. DEPARTMENT OF THE INTERIOR, et al.,

Defendants and Appellees,

STATE OF ARIZONA, et al.,

Intervenors, Defendants and Appellees.

Appeal from a Decision of the United States District Court for the District of Arizona, No. 3:03-cv-00507-GMS · Honorable G. Murray Snow

APPELLANT'S REPLY BRIEF

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I. INTRODUCTION

The United States rejects the premise of the Navajo Nation's ("Nation") breach of trust claim against the Government grounded in the common law, and argues that this Court cannot "declare" duties owed by the United States to the Nation "as a matter of developing federal common law."[1] The Government is wrong.

The Nation needs water from the Colorado River[2] to fulfill the promise of a permanent homeland embodied in its treaties. This Court, in *Winters v. United States*,[3] recognized that the right to sufficient water to make the Ft. Belknap Reservation a permanent home for the tribes was implied in the Treaty of May 1, 1888. There, the *Government* sought injunctive relief to protect water flows

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[1] Answering Brief for the Federal Appellees at 30 (Apr. 27, 2020) ("US Resp"). The Government's reliance on *Gros Ventre Tribe v. United States* stating, '"[t]here is no such thing as a common law judicial review in the federal courts.'" 469 F.3d 801, 810 (9th Cir. 2006) (citing *Cobell v. Babbit*, 91 F. Supp. 2d 1, 28 (D.D.C. 1999) (quoting *Stark v. Wickard*, 321 U.S. 288, 312 (1994) (Frankfurter, J., dissenting))), is misplaced.

The Nation has stated an alternative cause of action for breach of trust in reliance on positive law as required in Tucker Act cases, which this is not. *See* Appellant's Opening Brief at 39-54 (Feb. 26, 2020) ("Nation's Br.").

[2] "Colorado River" as used herein refers to the mainstem of the Colorado River in the Lower Basin unless otherwise indicated.

[3] 143 F. 740, 749 (9th Cir. 1906).

necessary for the tribes' subsistence. No statute compelled that action, and no statute mandated the Court's decision; the 1888 Treaty included no language to that effect. Relying on its inherent power to make law, this Court, and ultimately the United States Supreme Court, accepted the Government's argument and recognized as a matter of common law that treaties with Indian tribes include a right to water.[4] That right would be hollow if not enforceable, thus, the United States has a concomitant duty to ensure that water needed by the Navajo Nation is protected.[5] In *United States v. Walker River Irr. Dist.*,[6] *another suit initiated by the Government*, this Court recognized that executive orders setting aside lands for Indian reservations, like treaties, include implied rights to water to meet tribal needs and a federal duty to protect those rights. The Nation's breach of trust claim is premised on rights and duties that are implied as a matter of federal common law in the organic documents setting aside the Navajo Reservation.

The Supreme Court in *Winters* references rights to water.[7] *Winters* was an equitable action that did not seek to quantify the tribes' water rights, and those

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[4] *Winters v. United States*, 207 U.S. 564 (1908); *see also Arizona v. California*, 373 U.S. 546, 599-600 (1963).

[5] *See* Nation's Br. at 18, 24-27.

[6] 104 F.2d 334, 339-40 (9th Cir. 1939).

[7] 207 U.S. at 576.

rights remain unquantified. Agreeing with the Government, the Court enjoined water users upstream from the Ft. Belknap Reservation to leave sufficient water in the Milk River to meet the *needs* of the tribes. While the Government and the states continue to think of the *Winters* doctrine in terms of water rights – rights that fit within state water appropriation schemes – *Winters* is not so constrained. It is unlikely that the tribal parties to the 1888 Treaty negotiations thought of anything but water.[8]

One rationale for *Winters*, and an underpinning of the Indian Trust Doctrine, is that tribes would not have ceded enormous land holdings without water to meet their needs on their retained lands. Another is the unique status of tribes in this country's constitutional structure.[9] As this Court previously recognized, water needs are distinct from water rights.[10] And as in *Winters*, the Nation does not seek quantification of its water rights here. However, equity requires the Government to assess the Nation's need for water, and the obligation of the United States to protect and secure adequate water supplies can be decided now.

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[8] *See Washington v. Wash. State Comm'l Passenger Fishing Vessel Ass'n*, 443 U.S. 658, 678 (1979) ("we think greater importance should be given to the Indians' likely understanding of the other words in the treaties").

[9] *See* U.S. Const. art. 1, § 8, cl. 3.

[10] *Navajo Nation v. Dept. of Interior*, 876 F.3d 1144, 1165 (9th Cir. 2017) (the Nation's "interest in, and need for, the water is a cognizable interest").

The Nation filed this action, including the claim for breach of trust, in 2003. Water supplies remain insufficient to meet the needs of the Nation's citizens living within the Lower Colorado River Basin on the Navajo Reservation. The COVID-19 pandemic has brought the deplorable state of water resource development on the Navajo Reservation to the national and international stage. The Nation currently has the greatest percentage of its population infected by the virus anywhere in the United States, with more total cases than ten states,[11] and the Nation's need for adequate water supplies is undeniable. Inadequate water supplies have been demonstrated to adversely affect human health.[12] Without access to water, Navajo people cannot comply with CDC guidance to wash hands thoroughly and frequently to prevent the spread of the coronavirus. Households required to haul water use an average of 7 to 9 gallons per day – approximately 5% of the amount used by non-Indian households in communities surrounding the Nation.

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[11] *Rate of coronavirus (COVID-19) cases in the United States as of June 29, 2020, by state*, Statista (June 29, 2020), https://www.statista.com/statistics/1109004/coronavirus-covid19-cases-rate-us-americans-by-state/ (June 29, 2020); *Cases in the U.S.*, Centers for Disease Control and Prevention (June 29, 2020), https://www.cdc.gov/coronavirus/2019-ncov/cases-updates/cases-in-us.html

[12] Nation's Br. at 9.

Here, the Nation seeks equitable relief from the Secretary, trustee of the Nation's lands and waters, requiring the Government to develop a plan to remedy the water scarcity on the Navajo Reservation. To the extent that the Government suggests water cannot be delivered to the Nation from the mainstem of the Colorado River,[13] one need only consider similar obstacles that were overcome for Phoenix to grow and thrive. The Nation is located in the high desert of the Colorado Plateau with the Colorado River serving as its western boundary; Phoenix is located in the Sonoran Desert hundreds of miles from the Colorado. When the Government promised in 1849 to establish a permanent home for the Navajo people out of their aboriginal territory, Phoenix did not exist.[14] While the Nation is the largest tribe in the United States with a land base approximately the size of West Virginia, it is home to only about 173,000 people (approximately half the Nation's enrolled members live off the Reservation), and an estimated 30% of households lack running water in their homes. By comparison, Phoenix, is a city of approximately 1.7 million people made possible by the Central Arizona Project ("CAP"), a project built by the Government for Arizona, which diverts approximately 1.5 million acre-feet of water annually from Lake Havasu on the

[13] *See* US Resp. at 54.

[14] Treaty with the Navaho, 1849, Sept. 9, 1849, 9 Stat. 974.

Colorado River, transports it through a 336-mile long canal, and uses 14 pumping plants to lift the water 2,900 feet.

The Nation's goal in fulfilling the promise of a permanent homeland is not to turn the Navajo Reservation into a replica of Phoenix. However, the comparison highlights the substantial accomplishments realized when the Government acts. Conversely, the water shortage on the Navajo Reservation is directly attributable to the Government's failure to act on the Nation's behalf as its trustee.[15]

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[15] The Nation replies to the Answering Brief of the Intervenor-Appellees only to point out that the jurisdiction retained by the United States Supreme Court in *Arizona v. California* does not preclude all actions concerning the waters of the Colorado River, including disputes regarding management of the River, as demonstrated by:

- *Grand Canyon Trust v. U.S. Bureau of Reclamation*, No. CV-07-8164 PCT-DGC, 2008 WL 4417227 (D. Ariz. Sept. 26, 2008), *Grand Canyon Trust v. U.S. Bureau of Reclamation*, 623 F. Supp. 2d 1015 (D. Ariz. 2009), and *Grand Canyon Trust v. U.S. Bureau of Reclamation*, No. CV-07-8164-PHX-DGC, 2010 WL 2643537 (D. Ariz. June 29, 2010), *aff'd in part and dismissed in part*, 691 F.3d 1008 (9th Cir. 2012) (NEPA and ESA challenge).

- *Defenders of Wildlife v. Norton*, 257 F. Supp. 2d 53 (D.D.C. 2003) (ESA challenge).

- *Sw. Ctr. for Biological Diversity v. U.S. Bureau of Reclamation*, 6 F. Supp. 2d 1119 (D. Ariz. 1997) (ESA challenge).

- *Laughlin River Tours, Inc. v. Bureau of Reclamation*, 730 F. Supp. 1522 (D. Nev. 1990) (suit to require releases from Hoover Dam).

- *Envtl. Defense Fund, Inc. v. Costle*, 657 F.2d 275 (D.C. Cir. 1981) (challenge under Colo. River Basin Salinity Control Act).

II. THE COMMON LAW, THE TREATIES AND EXECUTIVE ORDERS SETTING ASIDE THE NAVAJO RESERVATION ESTABLISH A CAUSE OF ACTION

The Nation stated a cause of action against the United States for breach of trust in its proposed complaint.

> To sue the government for breach of trust, a tribe must satisfy three major threshold requirements: bring its claim in a competent court, one statutorily vested with subject matter jurisdiction; escape the doctrine of sovereign immunity by establishing the government's

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- *Friends of the Earth v. Armstrong*, 485 F.2d 1 (10th Cir. 1973) (suit to prevent flooding of Rainbow Bridge National Monument).

- *Ak-Chin Indian Cmty. v. Cent. Ariz. Water Conservation Dist.*, 378 F. Supp. 3d 797 (D. Ariz. 2019) (suit involving delivery of CAP water).

- *Cal. ex rel. Imperial Cty. Air Pollution Control Dist. v. U.S. Dep't of Interior*, 767 F.3d 781 (9th Cir. 2014) (NEPA challenge to Secretary's approval of transfer of Colo. River water rights).

- *Gladden v. Comm'r of Internal Revenue*, 262 F.3d 851 (9th Cir. 2001) (examination of Colo. River water rights).

- *Wiechens v. United States*, 228 F. Supp. 2d 1080 (D. Ariz. 2002) (analysis of Colo. River water rights at issue in *Gladden* that were used in exchange for farmland).

- *Mohave Valley Irrigation & Drainage Dist. v. Norton*, 244 F.3d 1164 (9th Cir. 2001) (breach of contract case involving Colo. River water entitlements and present perfected rights).

- *Animal Def. Council v. Hodel*, 840 F.2d 1432 (9th Cir. 1988) (NEPA challenge to CAP EIS).

> consent to be sued; and, finally, assert a claim, a federally recognized right entitling it to the relief requested.[16]

The Government concedes the first two prongs of this test are met, but argues that the Nation fails to state a claim entitling it to relief.[17] Ignoring that in "breach of trust claims, courts have turned most often to statutes and regulations, but sometimes *to treaties and even the federal common law*, as a basis for tribal claims for equitable remedies and money damages."[18]

Federal courts have the power to make law where the Constitution, statutes or treaties do not dictate the result.[19] In *Winters*, the Court exercised that power at the Government's request.

> We realize that there is a conflict of implications, but that which makes for the retention of the waters is of greater force than that which makes for their cession. The Indians had command of the lands and the waters, – command of all their beneficial use, whether kept for

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[16] Nell Jessup Newton, *Enforcing the Federal-Indian Trust Relationship after Mitchell*, 31 CATH. U. L. REV. 635, 639 (1982) ("Newton").

[17] US Resp. at 2, 36.

[18] Newton at 642 (emphasis added) (citing *Edwardsen v. Morton*, 369 F. Supp. 1359, 1375 (D.D.C. 1973) (common law); *Quinault Allottee Ass'n v. United States*, 485 F.2d 1391, 1400-01 (Ct. Cl. 1973) (treaty & statute)); *see also Rosebud Sioux Tribe v. United States*, ___ F. Supp. 3d ___, 2020 WL 1516184 at *14 (D.S.D. 2020) (issuing declaratory judgment on tribe's common law and treaty claim that the Government had a duty to provide adequate tribal health facility).

[19] Thomas W. Merrill, *The Common Law Powers of Federal Courts*, 52 U. CHI. L. REV. 1, 5 (1985) (defining "federal common law" as "*any* federal rule of decision that is not mandated on the face of some authoritative federal text — whether or not that rule can be described as the product of 'interpretation' in either a conventional or an unconventional sense").

> hunting, "and grazing roving herds of stock," or turned to agriculture and the arts of civilization. Did they give up all this? Did they reduce the area of their occupation and give up the waters which made it valuable or adequate? . . . If it were possible to believe affirmative answers, we might also believe that the Indians were awed by the power of the government or deceived by its negotiators. Neither view is possible. *The government is asserting the rights of the Indians*.[20]

The Supreme Court observed that, "federal common law exists only in such narrow areas as those concerned with the rights and obligations of the United States . . . ."[21] "[I]t is generally understood that . . . there has to be at least a federal interest needing protection, and that this interest cannot be adequately protected by the courts using either the Constitution or acts of Congress."[22] Federal Indian law is an "enclave" of federal common law; the "federal interest" is evinced by the Indian Trust Doctrine together with Indian treaties.[23]

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[20] 207 U.S. at 576 (emphasis added). "[W]ith the *Winters* doctrine, the courts have filled the void in the law created when Congress gave the states authority to administer individual rights to the use of water within their boundaries without establishing a means whereby the federal sovereign could secure the water needed for its purposes. It should be remembered in this context that *there is no body of statutory law governing the reservation of water by the federal sovereign — the doctrine rests solely in judicial decisions*." Harold A. Ranquist, *The Winters Doctrine and How it Grew: Federal Reservation of Rights to Use Water*, 1975 BYU L. REV. 639, 648 (1975) (citations omitted) (emphasis added). Paradoxically, the Government argues that because it is the defendant in the Nation's suit, the Nation cannot rely on the common law for its claims. US Resp. at 34.

[21] *Texas Indus., Inc. v. Radcliff Materials, Inc.*, 451 U.S. 630, 641 (1981).

[22] Alex Tallchief Skibine, *Teaching Indian Law in an Anti-Tribal Era*, 82 N.D. L. REV. 777, 787-89 (2006) (citations omitted).

[23] *Id.* at 789 (internal citations omitted). Even the Deputy U.S. Solicitor General

The federal courts' role in creating federal common law is widely acknowledged in Indian law decisions. For example, "Justice Powell's opinion for the Court in *County of Oneida v. Oneida Indian Nation*, recognized an implicit federal common law right of Indians to sue to enforce their aboriginal land rights and determined from all the circumstances that Congress did not preempt or bar those rights."[24]

The United States' argument that none of the cases on which the Nation relies involves suits brought against the Government is telling.[25] When the Government represents tribal interests, it has pushed the boundaries of the law and

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acknowledged that courts make common law in the arena of Indian affairs:

> So much of the law concerning Indian tribal sovereignty has been judge made. The Court has had many decisions over the last twenty or thirty years articulating the scope of tribal sovereignty where there has not been any act of Congress or treaty on the subject, and all the Court could rely upon were its own prior decisions.

Edwin Kneedler, *Indian Law in the Last Thirty Years: How Cases Get to the Supreme Court and How They are Briefed*, 28 AM. INDIAN L. REV. 274, 279-80 (2003).

[24]Martha Field, *The Legitimacy of Federal Common Law*, 12 PACE L. REV. 303, 316 (1992) (citation omitted); *see also United States v. Lara*, 541 U.S.193, 207 (2004) ("recognizing the federal common law component of Indian rights, which common law federal courts develop as a necessary expedient when Congress has not spoken to a *particular* issue" (citing *County of Oneida v. Oneida Indian Nation*, 470 U.S. 226, 233-37 (1985) (internal citations and quotations omitted))); *see* Nation's Br. at 27-29.

[25] US Resp. at 36.

encouraged the courts to create federal common law, as it did in *Winters*, *Walker River*, and *Baley v. United States*.[26] The fact that a state or county rather than the United States is the defendant in a common law action is of no consequence in the legal analysis, so long as the Nation has identified a waiver of the United States' sovereign immunity, as it has done.[27]

Similarly, the Government argues that the Nation "does not seek to enforce any particular treaty terms,"[28] to distinguish the Nation's reliance on the Supreme Court's decisions in *Fishing Vessel*,[29] and *Minnesota v. Mille Lacs Band of Chippewa Indians*.[30] But just as *Winters* implied a tribal right to water as a matter of federal common law to meet the tribes' needs, this Court may imply not only a right but a common law duty imposed on the Government to protect the Nation's rights to and need for water from the Colorado River.[31]

While it is true that some of the cases upon which the Nation relies involve treaties expressly granting rights, they state no express duties of the United States to protect those rights, yet the Government has that duty. The *Winters* doctrine

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[26] 942 F.3d. 1312 (9th Cir. 2019), *cert. denied*, 2020 WL 3405869 (June 22, 2020).

[27] *Navajo Nation*, 876 F.3d at 1172.

[28] US Resp. at 35.

[29] 443 U.S. 658 (1979).

[30] 526 U.S. 172 (1999).

[31] *See* Nation's Br. at 22-27.

provides that the Nation's right to an adequate water supply to meet the Navajo Reservation's homeland purpose can be read into its treaties; *Fishing Vessel* holds that implied rights are enforceable.[32] In *Parravano v. Babbitt*, this Court held that "federally reserved fishing rights are accompanied by a corresponding duty on the part of the government to preserve those rights."[33] The Government's failure to exercise its implied duty to protect the Nation's rights or to address its water needs is cognizable as a claim for breach of trust against the Government.

The Government is grasping at straws when it argues, without citation, that because the lands of the Navajo Reservation abutting the Colorado River were established by executive order, any implied rights or duties are inferior to those implied from the Nation's treaties.[34] The courts have repeatedly recognized that Indian reservation lands set aside by executive order imply both rights to water and duties on the Government to protect Indian trust assets equivalent to treaties. In *Parravano*, this Court also unequivocally rejected the argument that the fishing rights of the tribes implied in executive orders were inferior to other tribes' treaty

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[32] 443 U.S. at 684.

[33] 70 F.3d 539, 547 (9th Cir. 1995) (citing *Wash. State Charterboat Ass'n v. Baldrige*, 702 F.2d 820, 823 (9th Cir. 1983)).

[34] US Resp. at 28-29. Congress abolished the Executive's ability to enter into treaties with Indian tribes in 1871. Act of Mar. 3, 1871, 16 Stat. 566, codified at 25 U.S.C. § 71.

rights and not entitled to the same level of protection:

> First, a treaty/executive order distinction has no historical or legal significance with respect to the Tribes involved here. Second, a treaty/executive order distinction contradicts the doctrine that the grant of hunting and fishing rights is implicit in the setting aside of a reservation "for Indian purposes." Third, a treaty/executive order distinction is inconsistent with the well-established federal trust obligation owed to the Indian tribes.[35]

Parravano thus affirmed the Government's trust obligation to protect the Tribes' right, implied from an executive order, to harvest the salmon fishery.[36]

Also relevant here, the Court in *Parravano* rejected the non-Indian fishermen's argument that even if the tribes had fishing rights, those rights did not extend outside the reservation because they did not derive from a treaty, and the Government could not regulate ocean fishing.[37]

> The Klamath chinook is an anadromous species. As a result, successful preservation of the Tribes' on-reservation fishing rights must include regulation of ocean fishing of the same resource. Indeed, allowing ocean fishing to take all the chinook available for harvest before the salmon can migrate upstream to the Tribes' waters would offer no protection to the Indians' fishing rights.[38]

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[35] 70 F.3d at 544-45 (citing *United States v. S. Pac. Transp. Co.*, 543 F.2d 676, 685-86 (9th Cir. 1976); *Gibson v. Anderson*, 131 F. 39, 41-42 (9th Cir. 1904); *McFadden v. Mountain View Mining & Milling Co.*, 97 F. 670 (9th Cir. 1899), *rev'd on other grounds*, 180 U.S. 533 (1901)); *see also Arizona v. California*, 373 U.S. at 598.

[36] 70 F.3d at 546.

[37] *Id.*

[38] *Id.* at 547.

The facts in *Parravano* are similar to those presented here. The Nation seeks the Government's protection of the Nation's implied rights to water and when taking actions to manage the Colorado River – the water supply for the western Navajo Reservation – the Government must act pursuant to its fiduciary duty. The Ninth Circuit affirmed that the Government not only owed a trust obligation to the tribes to protect the off-reservation fishery, but that duty extends to actions regulating the off-reservation water resource.[39]

The United States' promises in its treaties with the Nation extend to subsequent expansions of the Navajo Reservation by executive order. In *Walker River*, this Court held that although the tribe's reservation was not established until 1874, Departmental action setting aside its reservation lands in 1859 determined the priority of the tribe's water rights, which were superior to the non-Indian settlers' water rights for irrigation that began in 1860.[40] Subsequent additions to

[39] *Parravano*, 70 F.3d at 574; *see also Baley*, 942 F.3d at 1337-38 (Klamath Tribes' implied right to water for hunting, fishing and gathering includes ability to protect water sources adjoining but outside former reservation).

[40] 104 F.2d at 338-40; *see also United States v. Carpenter*, 111 U.S. 347 (1884) (acquisition by non-Indian of rights in quarry in 1871 were subject to prior rights of Indians promised by 1859 treaty but not surveyed until 1872); *State ex rel. Martinez v. Lewis*, 861 P.2d 235, 244 (N.M. App. 1993) (Government's promise to set aside lands for the tribe in 1852 Treaty dictated the priority date for the Tribe's reserved water rights, not later date of reservation establishment by subsequent treaty).

the Navajo Reservation by executive order or congressional action, all from within the Nation's aboriginal territory, benefit from the Government's promises to the Nation in its treaties.[41]

Further, as set forth above and contrary to the Government's assertions, the Nation does not rely on a "bare" trust or "generic" duty, premised on the Government's ownership of the Nation's lands and waters, for its claim.[42] The Nation's treaties together with other federal actions to extend the Navajo Reservation and the common law are the basis for the breach of trust claim against the Government.

Finally, the Government cannot summarily dismiss the amici's reliance on the language in *Gros Ventre* that "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

[41] Treaty with the Navaho, 188, June 1 1868, 15 Stat. 667.

[42] US Resp. at 30, 48. Nor can any implication be drawn from the Nation's decision to pursue a cause of action premised on its treaties, executive orders and the common law instead of the APA. US Resp. at 21, 37. The Nation need not rely on the limited avenues for relief provided by the APA to prosecute its claim. *See*, *e.g.*, *Juliana v. United States*, 947 F.3d 1159, 1167 (9th Cir. 2020) (rejecting Government's argument that various actions contributing to the deprivation of plaintiffs' constitutionally protected right must proceed under the APA).

not arise.'"[43] In *Pit River Tribe v. U.S. Forest Serv.*,[44] this Court reaffirmed that the "government owes a fiduciary duty to all Indian tribes as a class," and that federal "agencies must at least show 'compliance with general regulations and statutes not specifically aimed at protecting tribes.'"[45] Concluding that federal agencies had violated both NEPA and NHPA, "it follows that the agencies violated their *minimum* fiduciary duty" to the tribe.[46] Accordingly, the Court found that it need not reach "the question of whether the fiduciary obligations of federal agencies to Indian nations might require more."[47] The Court should resolve these questions in favor of expansive protection for tribal resources, and hold the

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[43] *See* US Resp. at 40-41 (responding to Brief of Amici Curiae Law Professors in Support of Plaintiff/Appellant and Reversal at 15 (Mar. 4, 2020) (quoting *Gros Ventre*, 469 F.3d at 810 n.10 (citing *Island Mountain Protectors*, 144 IBLA 168 (1998) ("While the trust responsibility created by environmental laws may be "congruent" with other duties they impose, the enactment of those laws does not diminish the Department's original trust responsibility or cause it to disappear."); Amicus Curiae Brief of the NCAI Fund in Support of Plaintiff-Appellant Navajo Nation and Reversal at 22-23 (Mar. 4, 2020) (same)))).

[44] 469 F.3d 768, 788 (9th Cir. 2006) (quoting *Inter Tribal Council of Ariz., Inc. v. Babbitt*, 51 F.3d 199, 203 (9th Cir. 1995)).

[45] *Id*. (quoting *Morongo Band of Mission Indians v. FAA*, 161 F.3d 569, 574 (9th Cir. 1998)).

[46] *Id.* (emphasis added).

[47] *Id*.; *see also Baley*, 942 F.3d at 1337, 1341 (tribal right to protection of fishery was at least as great as protections provided by the ESA so that court need not determine if the tribe could have sued the Government if it had failed to comply with the ESA).

Government to the exacting fiduciary standards required by its treaties with the Nation.[48] The Nation relies on the power of the courts to create federal common law in asserting its breach of trust claim.

III. NONE OF THE GOVERNMENT'S ARGUMENTS NEGATES THE NATION'S BREACH OF TRUST CLAIM

A. THE GOVERNMENT'S REPRESENTATION OF THE NATION'S WATER INTERESTS IN OTHER BASINS DOES NOT SATISFY ITS TRUST RESPONSIBILITY

The Government suggests that its past and present efforts on behalf of the Nation in water rights matters, including its unsuccessful attempt to quantify the Nation's rights in *Arizona v. California*, and its claims on the Nation's behalf in other basins where the Nation's reservation lands are located, are a defense to this action.

> [W]hile the United States undertook to affirmatively represent the Nation's interests in *Arizona v. California*, the Nation does not contend that the Supreme Court's decree in that case compromised any of the Nation's water rights claims; nor does the Nation allege the United States failed or is failing faithfully to represent the Nation in

[48] As Professor Newton commented shortly after the Supreme Court's decision in *United States v. Mitchell*, 445 U.S. 535 (1979):

> If the trust relationship does become a creature of statutory law, its efficacy as a legal theory will be greatly hampered, especially if these statutes are read strictly. Although many statutes govern Indian affairs, they usually grant authority to the federal government or state federal policy regarding Indians. Rarely do they impose enforceable obligations.

Newton, *supra* n.16, at 681. Such a result would be incompatible with the Indian Trust Doctrine.

> the concluded or ongoing state-court adjudications involving the Nation's water rights.[49]

This statement is of little relevance, where it is not demonstrably wrong, and requires a response beyond that provided in the Nation's Opening Brief.

The Government failed to adequately represent the Nation's interests in its claims to the Colorado River in *Arizona v. California*, and acted affirmatively to defeat the Nation's intervention on its own behalf.[50] While the Government acknowledged in 1963 that the difference between the Special Master's Report and the decree entered by the Supreme Court did not reach rights above Lake Mead,

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[49] US Resp. at 27; *see also id.* at 50 (Nation's arguments "disregard efforts by the United States to aid the Nation in the quantification and development of water from the broader Colorado River system").

[50] Nation's Br. at 45-48. Earlier, in December 1953, the Government breached its fiduciary duty to all tribes with claims to the Colorado River when, responding to the demands of the Lower Basin states, the Government amended its *Petition of Intervention on Behalf of the United States of America*, as the tribe's trustee to delete the assertion "that the rights to the use of water claimed on behalf of the Indians and Indian Tribes as set forth in this Petition are prior and superior to the rights to the use of water claimed by the [other] parties . . . ." *See* William H. Veeder, *Federal Encroachment on Indian Water Rights and the Impairment of Reservation Development*, in *Toward Economic Development for Native American Communities: A Compendium of Papers* submitted to the Subcommittee on Economy in Government, Joint Economic Committee, Congress of the United States, V.2, 460, 513, 91st Cong., 1st Sess. (J. Comm. Print 1969), ("Veeder"), available at https://www.jec.senate.gov/reports/91st%20Congress/Toward%20Economic%20Development%20for%20Native%20American%20Communities%20Volume%20II%20(465).pdf.

leaving the Nation's claims to the mainstem of the Colorado River unaddressed, the Government has done nothing to remediate that omission.[51]

This suit does not concern the Government's nonfeasance in other basins. However, to set the record straight, the Government does not represent the Nation in, and the Nation is not a party to, a general stream adjudication in Utah, as alleged.[52] The settlement of the Nation's water rights claims in Utah currently pending before Congress, if approved, will be submitted to the Utah state court for issuance of a decree. Further, the Government did not appoint a federal negotiation team to assist the Nation with its settlement until 2013, despite an initial request in 2007 and a renewed request in 2010, and only after the substantive terms had already been agreed upon by the Nation and the state.[53]

More relevant than the Government's misrepresentations about its legal "assistance" to the Nation in meeting its water needs, is the Government's failure

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[51] Nation's Br. at 46-47.

[52] US Resp. at 55.

[53] In regard to the Government's representation of the Nation in the Little Colorado River Adjudication, the Government, wearing "different hats," represents the Nation, but also the Hopi Tribe in the adjudication. The claims of the Hopi Tribe are to the same water sources and are in direct conflict with the claims of the Nation. Interior counsel, listed as "of counsel" herein and advocating against the position of the Nation, is involved simultaneously in the Little Colorado River Adjudication on behalf of both the Nation and the Hopi Tribe, as well as being involved in several of the Nation's water rights settlement efforts. The conflict of interest for both Interior and Justice Department attorneys is patent.

to acknowledge the problems created by state and federal laws, including the McCarran Amendment,[54] that require the Nation to adjudicate its water rights in multiple basins in the three states in which its Reservation lands are located, and the compacts among the states that place further restrictions on the Nation's ability to use any recognized water rights outside basin boundaries. The Nation cannot simply divert water to which it is entitled in one basin for use in another, and the Government's reference to other water alleged to be available to meet the Nation's claims to the Colorado River is misleading.

The Government also cites the reservation of 6,411 acre-feet per year ("AFY") of Colorado River water in the Arizona Water Settlements Act ("AWSA"),[55] for use by the Nation in its capital in Window Rock and surrounding communities as further action taken to secure the Nation's water rights. However, to the extent that the Government's Answering Brief can be construed to suggest that this quantity of water is adequate to meet the needs of the Nation from the Colorado River, it is in error. The 6,411 AFY was intended only to meet the needs of Navajo communities in Arizona on the border with New Mexico, capable of being served only by the Navajo Gallup Water Supply Project, constructed to

[54] 43 U.S.C. § 666 (1952).

[55] Pub. L. 108-451, § 104(a)(1)(B)(ii), 118 Stat. 3478, 3487-88 (2004).

deliver Upper Basin Colorado River water recognized as belonging to the Nation in its New Mexico settlement.[56]

B. FAILURE TO ACT – THE GOVERNMENT'S HISTORY OF DERELICTION OF DUTY

The Nation included in its TAC2 examples of actions by the Government that demonstrate the long history of federal neglect of the Nation's claims to the mainstem of the Colorado River and its deference to the states and non-Indian water users, to the detriment of the Nation.[57] Unfortunately, these problems are neither new nor unique:

> Conflicting responsibilities, obligations, interests, claims, legal theories – indeed, philosophies – oftentimes prevent the Interior and Justice Department administrators, planners, engineers and lawyers from fulfilling the trust obligation [which the Government owes] to the American Indians in regard to natural resources, particularly in the complex and contentious field of Indian rights to the use of water in

[56] *See* Omnibus Public Land Management Act of 2009, Pub. L. No. 111-11, § 10603(b)(2)(D), 123 Stat. 991, 1383-84; *see also* Navajo-Hopi Little Colorado River Settlement Act of 2012, S.2109, 112th Cong. §§ 4(62), 206 (the failed bill would have resolved the Nation's claims to the Little Colorado River but also reserved a total of 31,000 AFY of Colorado River water for a future Navajo settlement). In touting the benefits of AWSA, the Government fails to mention that AWSA resolved litigation brought by Arizona against the United States contesting the state's CAP repayment obligations. As part of the bargain struck with Arizona, the Government relinquished authority to grant contracts to tribes that had not settled their water rights claims. Second Proposed Third Amended Complaint ¶¶ 115-16 (Jan. 10, 2019) ("TAC2") (ER 70-71); AWSA § 104(a)(1)(B). Further, the Government has never provided Congress with a report on "critical water needs" of tribes, like the Nation, without water settlements as required by AWSA. Nation's Br. at 52

[57] TAC2 ¶¶ 48-76 (ER 45-54).

> the arid and semiarid regions of western United States. Failure . . . to fulfill the Nation's obligation to protect and preserve Indian rights to the use of water includes, but most assuredly is not limited to:
>
> a) Lack of knowledge of the existence, or the nature, measure and extent of those rights to the use of both surface and ground waters . . . ;
>
> (b) Lack of timely action to preserve, protect, conserve and administer those rights;
>
> . . .
>
> (e) Failure to assert rights, interests and priorities of the Indians on a stream or project when to do so would limit the interests of non-Indians.[58]

Veeder offered the following recommendations to Congress:

> In furtherance of economic development of the American Indian Reservations in western United States it is imperative that there be undertaken an inventory of all of the Indian rights to the use of water in the streams and other sources of water arising upon, bordering upon, traversing or underlying their lands.[59]

The Nation seeks no less than what Mr. Veeder recommended over fifty years ago – for the Government to inventory the Nation's water needs from the Colorado River, and then develop a plan to protect those interests.

Courts too have frequently recognized the financial and political disadvantages faced by tribes in securing access to water.[60] As Veeder notes:

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[58] Veeder, *supra* n.50, at 462-63.

[59] *Id*. at 464.

[60] *See*, *e.g.*, *Fishing Vessel*, 443 U.S. at 676 n.22 (given "far superior numbers, capital resources, and technology of the non-Indians," equal opportunity to scarce

> Politics and water readily mix creating an unstable, volatile combination. Only the strong prevail when confronting the combination. That is, of course, the Indian problem in general, and most particularly in the Lower Colorado River Valley. Economic development of Indian lands has long been retarded by reason of politics in and out of the Interior Department.[61]

As a consequence of this inequality, "the Indians are at the mercy of the wheeling and dealing by the states as they attempt to obtain projects and water . . . [and] [e]conomic development has thus been thwarted on all Indian Reservations in the Colorado River Valley."[62]

The Law of the River further demonstrates the Government's dereliction of duty, again, often at the behest of or to advance the interests of non-Indians. One example is the Government's failure to award the Nation a contract for unallocated

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resources is likely to "net them virtually no catch at all"); *United States v. Washington*, 853 F.3d 946, 955 (9th Cir. 2017), *aff'd by an equally divided Court*, 138 S. Ct. 1832 (2018) ("[t]he superior capital, large-scale methods, and aggressiveness of whites . . . quickly led to their domination of the prime fisheries of the region."). *Washington* is yet another case initiated by the Government, and there this Court agreed with the state that if Washington had violated the tribes' treaties it "necessarily means that the United States has also violated the Treaties" in building and maintaining barrier culverts, but the claim belonged to the Tribes not Washington. 853 F.3d at 969.

[61] Veeder, *supra* n.50, at 512.

[62] *Id.* at 514; *see also* Ranquist, *supra* n.20, at 692 (use by non-Indians of unused tribal water rights — whether quantified or unquantified, as permitted under state law — who expend capital in reliance on availability of that water makes "recovery of the water by the Indians . . . difficult, if not impossible").

Colorado River water.[63] In response to the Nation's request for a Colorado River water contract, the Government asserted that an analysis would be required considering the need for that water by "competing entities," and "the views of non-Indian parties."[64] However, "[w]hen the Secretary is acting in his fiduciary role rather than solely as a regulator . . . he must choose the alternative that is in the best interests of the Indian tribe."[65] The Nation was never advised of the results of the analysis, if any, and the Nation still lacks access to Colorado River water.[66]

In response, the Government argues first that the five tribes adjudicated rights to the Colorado mainstem in *Arizona v. California* lack CAP contracts, and second, the CAP contracts are not determinations of *Winters* rights.[67] Neither point has any bearing on the Nation's position, nor undermines the merits of its claim. The tribal rights recognized in *Arizona v. California* predate the 1922 Compact and

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[63] Nation's Br. at 44-45.

[64] TAC2 ¶ 64 (ER 50).

[65] *Jicarilla Apache Tribe v. Supron Energy Corp*., 728 F.2d 1555, 1567 (10th Cir. 1984), *dissenting opinion of Seymour, J. adopted as opinion of the court*, 782 F.2d 855 (10th Cir. 1986) (en banc); *see also Pyramid Lake Paiute Tribe v. Morton*, 354 F. Supp. 252, 256 (D.D.C. 1973) (when the Secretary has a duty to protect tribal rights, it is legally impermissible to "attempt an accommodation" of the needs of competing users).

[66] TAC2 ¶ 65 (ER 51).

[67] US Resp. at 52-53.

are "present perfected rights" often with the highest priority on the River.[68] There is no reason for those tribes to contract for delivery of lower priority CAP water. Contracts awarded to tribes without Colorado River rights further demonstrate that the Government (acting together with the state of Arizona) uses CAP water to further non-Indian interests – such as awarding contracts to tribes that will then lease that water to Arizona municipalities and others[69] – rather than addressing the needs of the Nation, bounded by the Colorado River and with needs to water that can be met from that supply.

Similarly, the Government's argument that the Nation cannot assert a claim based on the Secretary's control of the Colorado River, because "water rights are usufructory," is a red herring, and its reliance on *Sturgeon v. Frost*,[70] is misplaced.[71] Federal reserved rights "are 'usufructuary' in nature, meaning that they are rights for the Government to use—whether by withdrawing or maintaining—certain waters it does not own."[72] The Court went on to recognize

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[68] *Arizona v. California*, 373 U.S. at 600 (tribes' water rights reserved by the Government when their reservations were created "are 'present perfected rights' and as such are entitled to priority under the [Boulder Canyon Project] Act").

[69] Robert Glennon & Michael J. Pearce, *Transferring Mainstem Colorado River Water Rights: The Arizona Experience*, 49 ARIZ. L. REV. 235, 236-42 (2007).

[70] 139 S. Ct. 1066 (2019).

[71] US Resp. at 50.

[72] *Sturgeon*, 139 S. Ct. at 1079 (citations omitted).

the "common understanding . . . [that] reserved water rights are not the type of property interests to which title can be held."[73] In fact, *Sturgeon* recognizes the right of the Government to regulate the use of its reserved waters, despite their "usufructory" nature. Moreover, the role Congress delegated to the Secretary, who serves as water master in the management and control of the Colorado, is far more extensive than the authorities supporting the ability of the United States to protect its rights to the Nation River in Alaska.[74] The Government's assertion that its physical control of the Colorado River mainstem "is not tantamount to control of the Nation's water rights" should be rejected in light of the BCPA.[75]

IV. CONCLUSION

The Nation needs water from, and has unquantified rights to, the mainstem of the Colorado River to fulfill the promises of its treaties, promises also implied in executive orders expanding its Reservation, as a permanent home for the Navajo people. The Government, in addition to assessing the Nation's water needs from the Colorado River, and making a plan to address those needs, must ensure that its

[73] *Id.* (internal quotations and citation omitted).

[74] *See* Boulder Canyon Project Act ("BCPA"), 43 U.S.C. §§ 617-17u; *Arizona v. California*, 373 U.S. 564-90 (discussing powers of the Secretary delegated by Congress in the BCPA).

[75] US Resp. at 50.

actions in managing the Colorado River do not impair the ability of the Nation to meet those needs.

The district court erred in failing to consider the Nation's water needs. The court also erred when it held that it could not address the Nation's breach of trust claim without first determining if the Nation holds rights to the waters of the Colorado River – an examination the district court determined was foreclosed by the retained jurisdiction of the United States Supreme Court in *Arizona v. California*.[76]

For the reasons set forth in its Opening Brief and herein, the Nation requests that this Court reverse the decision of the district court.

Dated: July 1, 2020

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[76] 376 U.S. 340, 353 (1964).

CERTIFICATE OF COMPLIANCE

I certify that this brief complies with the type-volume limitation set forth in Circuit Rule 32-1(a) and Federal Rules of Appellate Procedure 32(a)(5)(A). This brief uses a proportional typeface and 14-point font, and contains 6,993 words

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CERTIFICATE OF SERVICE

I hereby certify that on July 1, 2020, I electronically filed the foregoing with the Clerk of the Court for the United States Court of Appeals for the Ninth Circuit by using the appellate CM/ECF system.

I certify that all participants in the case are registered CM/ECF users and that service will be accomplished by the appellate CM/ECF system.

/s/ Kirstin E. Largent