No. 19-17088

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

NAVAJO NATION,
Plaintiff/Appellant,

v.

DEPARTMENT OF THE INTERIOR; DEB HAALAND, Secretary of the Interior; BUREAU OF RECLAMATION; and BUREAU OF INDIAN AFFAIRS,
Defendants/Appellees,

and

STATE OF ARIZONA, *et al*.,
Intervenor-Defendants/Appellees.

Appeal from the United States District Court for the District of Arizona
No. 3:03-cv-00507-GMS (Hon. G. Murray Snow)

THE NAVAJO NATION'S RESPONSE TO MOTIONS FOR REHEARING *EN BANC*

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I. INTRODUCTION AND PROCEDURAL BACKGROUND

The panel's decision, although of great importance to Plaintiff/Appellant, the Navajo Nation, is neither controversial nor inconsistent with Circuit precedent and therefore does not meet the Circuit criteria for granting *en banc* review. Appellees' motions for rehearing *en banc* should be denied.

The Interior Secretary and Interior agencies, Defendant/Appellees ("Federal Appellees" or "government"), have failed for decades to manage the Colorado River in the Lower Basin[1] ("Colorado River") in a manner that protects the Nation's needs for water from and unquantified rights to the Colorado, thereby breaching their fiduciary duties to the Nation. The Nation sued the Federal Appellees in 2003, alleging violations of the National Environmental Policy Act, 42 U.S.C. § 4321 *et seq.* ("NEPA") and breach of the government's fiduciary obligations to the Nation.

The States of Arizona, Nevada, and Colorado (an Upper Basin State), as well as water authorities from Arizona and California ("Intervenor Appellees") were granted leave to participate as defendants. Intervenor Appellees hold water rights in the Colorado River subordinate to the unquantified prior perfected rights of the Nation and assert, *inter alia*, that the Nation's complaint seeks to quantify

[1] The 1922 Colorado River Compact divided the seven states within the Colorado River Basin between the Lower Basin, comprising the states of Arizona, California and Nevada, and the Upper Basin. *Navajo Nation v. Dep't of the Interior*, 876 F.3d 1144, 1153 (9th Cir. 2017) ("*Navajo Nation v. DOI I*").

the Nation's rights to the River and this action is barred because within the Supreme Court's jurisdiction retained in the *Arizona v. California* decree. 376 U.S. 340 (1964). The district court dismissed the Nation's suit on Federal Appellees' motion in 2014[2] and the Nation appealed.

In that first appeal, the panel held that the Nation had identified a waiver of the government's sovereign immunity in the Administrative Procedure Act, 5 U.S.C. § 702 ("APA"), that was limited neither to actions brought pursuant to the APA nor to constitutional claims as Federal Appellees alleged. The panel remanded to the district court to allow the Nation's claim for breach of trust to proceed but upheld the dismissal of the Nation's NEPA claims for lack of standing. *Navajo Nation v. DOI I*, 876 F.3d at 1174.

On remand, ignoring direction from the panel to "to consider the [Nation's breach of trust] claim on its merits, after entertaining any request to amend it," *id.*, the district court twice denied the Nation's motions for leave to file a third amended complaint. Ultimately, the district court found that the Nation could not state a claim for breach of trust, that amendment would be futile and directed the clerk to terminate the action. *Navajo Nation v. Dep't of the Interior,* 2019 WL 3997370 (D. Ariz. 2019).

[2] The Nation's suit was stayed for almost a decade to permit settlement negotiations that were ultimately unsuccessful to proceed.

II. THE PANEL DECISION AND THE CRITERIA THAT MUST BE MET TO SECURE EN BANC REVIEW

In this the Nation's second appeal, the panel identified this Court's decisions in *Morongo Band of Mission Indians v. Fed. Aviation Admin.*, 161 F.3d 569 (9th Cir. 1998) and *Gros Ventre Tribe v. United States*, 469 F.3d 801 (9th Cir. 2006), as establishing the "governing standard" against which to review the Nation's claim for breach of trust *Navajo Nation v. Dep't of the Interior,* 996 F.3d 623, 637 (9th Cir. 2021) ("*Navajo Nation v. DOI II")*. The panel drew as well on the Supreme Court's decision in *Jicarilla Apache Nation v. United States*, 564 U.S. 162 (2011). Each of those decisions holds in some iteration that "[A]n Indian tribe cannot force the government to take a specific action unless a treaty, statute or agreement imposes, expressly or by implication, that duty." *Gros Ventre*, 469 F.3d at 810. The primary ground for Federal Appellees' motion is that the panel disregarded these very decisions, resulting in an intra-Circuit conflict and lack of uniformity with Supreme Court precedent necessitating resolution by the Court sitting *en banc*

The essence of the panel's holding is that the Nation's "complaint properly stated a breach of trust claim premised on the Nation's treaties with the United States and the Nation's federally reserved *Winters* rights, especially when considered along with the Federal Appellees' pervasive control over the Colorado River." *Id.* at 641. The panel went on to hold that the government has "an irreversible and dramatically important trust duty requiring them to ensure

adequate water for the health and safety of the Navajo Nation's inhabitants in their permanent home reservation." *Id.* at 634.

The panel also rejected the Intervenor Appellees' separate arguments, premised on the assertion that the Nation's complaint seeks to quantify its reserved rights to the Colorado River, finding that a "plain reading of the Nation's complaint makes clear that it does not seek a quantification of its rights in the Colorado River[;] [t]he Nation seeks an injunction." *Id.* at 635. The panel concluded that the "Nation's breach of trust claim [] falls outside the scope of the [*Arizona v. California*] Decree, and our jurisdiction is proper." *Id.*

According to the Supreme Court, "en banc courts are the exception, not the rule." *United States v. American-Foreign S.S. Corp.,* 363 U.S. 685, 689 (1960). That is, "[t]hey are convened only when extraordinary circumstances exist that call for authoritative consideration . . . ." *Id.* Under the Rules, an *en banc* call is also available to "secure or maintain uniformity of the court's decisions," Fed. R. App. P. 35(a)(1), including the decisions of the Supreme Court, Fed. R. App. P. 35(b)(1)(A). *Accord, Makaeff v. Trump University, L.L.C.,* 736 F.3d 1180 (9th Cir. 2013) (Wardlaw, J. and Callahan, J., concurring). The Appellees have failed to surmount the high bar established by the Rules and the motions for rehearing *en banc* should be denied.

III. ARGUMENT

A. Consistent with Circuit Precedent, the Panel Identified Both Express and Implied Rights and Corollary Duties of Protection that Demonstrate Federal Appellees Breached Their Fiduciary Duties

In their "Statement Under Rule 35," Federal Appellees argue that "the Nation did not identify any statute, regulation, or treaty imposing these duties" and failed to meet this Circuit's requirements to bring an action for breach of trust. US Mot. at 1 citing, *inter alia*, *Jicarilla* and *Gros Ventre*. To the contrary, the Nation's complaint is grounded in its Treaty of 1849, in which the government promised to take the Navajo people under its protection and to set aside land for a permanent home, and its Treaty of 1868 where the government established the boundaries of the Nation's original reservation (subsequently expanded by congressional acts and executive orders) and impliedly reserved sufficient water to make the Navajo Reservation a viable homeland. The Nation relies in addition on statutes, regulations, executive orders, and other federal decisional documents in which the government undertook fiduciary obligations to the Nation.[3]

[3] To be clear, the Nation also alleged that the common law duty of trust long recognized by the courts, Congress, and the Administration, sometimes referred to as the Indian Trust Doctrine, standing alone gives rise to obligations owed to Indian tribes that may be enforced against the government. The panel, however, chose to adopt the Nation's alternate theory relying on *Gros Ventre*.

The Nation disagrees with Circuit precedent requiring that a common law action for breach of trust be subject to the requirements to bring a claim for money

The *Winters* Doctrine provides that when the government set aside land for an Indian reservation, sufficient water was also reserved by implication to serve the lands' permanent homeland purpose. *Winters v. United States,* 207 U.S. 264 (1908) This has been federal law for over a century. Treaties, acts of Congress and Executive Orders establishing Indian reservations typically address reservation boundaries –identifying lands "ceded" by, and more often "extorted" from, Indian tribes to advance the government's non-Indian policies. Sometimes those documents mention subsistence activities anticipated to continue, but they rarely mentioned water.

When questions arose in the early 20th century concerning the rights of Indian people to use water on their reservation, whether to continue traditional practices such as hunting and fishing or to engage in agriculture using traditional or "modern" methods, both this Court in *Winters v. United States*, 143 F. 740, 745-46 (9th Cir. 1906), and the Supreme Court hearing *Winters* on appeal, 207 U.S. 564, 576, recognized that the establishment of a reservation without access to water would undermine the federal purpose to create a tribal homeland. The courts found that a right to use water must therefore be implied. *See also Arizona v.*

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damages under the Tucker Act. Even less persuasive is the government's reliance on statements in the Supreme Court's decision in *Jicarilla,* 564 U.S. 162, 165, 173-178, which both distort by elision the language of previous cases and are *dicta* unnecessary to decide the narrow question before the Court. Regardless, the Nation met these requirements.

California, 373 U.S. 546, 599-600 (1963) ("*Arizona I*") (the government intended to deal fairly with the Indians by "reserving for them the waters without which their lands would be valueless.")

The Nation alleged in its complaint that its *implied right* to use water from the Colorado River in reliance on *Winters*, was necessarily buttressed by a corollary *implied duty* undertaken by the government to protect that right. While acknowledging the existence of implied federal reserved rights, as they must, the Federal and Intervenor Appellees both argue that because the Nation's treaties impose no *express* duties on the government to protect the Nation's *Winters* rights, and no such duty exists. The Federal Appellees seek to disavow their trust responsibilities, and the Intervenor Appellees who benefit from the government's dereliction of duty, and the continuing uncertainty regarding the Nation's water rights, join that argument. Intervenors' Mot. at 8. However, the notion that there could be *express* duties to protect rights to use water that are *implied* is absurd, and that is not the law. Quoting *Gros Ventre* back to the Appellees, the panel noted that "a specific duty can be imposed by 'a treaty, statute or agreement . . . expressly *or by implication*.'" 469 F.3d at 810 (emphasis added). Rejecting Appellees' argument, the panel opined that the "Supreme Court could not have intended to hamstring the *Winters* doctrine—which has remained good law for more than one hundred years—by preventing tribes from seeking vindication of

their water rights by the federal government when the government has failed to discharge its duties as trustee." *Id.*

B. The Nation's Treaties and the Implied Rights and Duties Encompassed Therein Give Rise to More than a "Bare Trust"

As with other tribal resources, the Nation's unquantified water rights to the Colorado mainstream are held in trust by the government. The panel observed, citing an environmental impact statement prepared by the Federal Appellees, that "the Nation's unquantified water rights are considered an Indian Trust Asset, which Interior recognizes as interests that the federal government holds in trust . . . and that the *federal government must protect*." *Id.* at 640 (citing Final EIS, Colorado River Interim Guidelines for Lower Basin Shortages and the Coordinated Operations for Lake Powell and Lake Mead ("Shortage Guidelines FEIS") at 3-96 (emphasis added) Appellant's Opening Br. (ER 116).

This is more than a "bare trust," where the government holds assets in trust solely to prevent the dissipation of tribal assets. *Id.* at 504 quoting *United States v. Mitchell*, 445 U.S. 535 (1980) ("*Mitchell I*"). As the government has acknowledged, and the panel held, the government has a fiduciary duty to protect the Nation's unquantified reserved rights to the Colorado River. The Nation has rights implied in its treaties to use water necessary to support its reservation and allegations of the government's failure to protect those rights support the Nation's claim for breach of trust. *Id.* at 641

The panel held in a logical extension of the Supreme Court's decision in *United States v. Mitchell,* 463 U.S. 206 (1983) ("*Mitchell II*") that the Secretary's role as water master of the Colorado River, a role delegated by Congress in the Boulder Canyon Project Act 28 U.S.C. § 617 *et seq*., and confirmed by the Supreme Court in *Arizona I*, 373 U.S. at 561, is the kind of pervasive control of the Nation's trust resources in the Colorado that bolsters the Nation's claim to a federal fiduciary duty to protect that resource, and to ensure that the Nation's water needs can be met from that resource. Federal Appellees manage the Colorado River by carrying out the allocation of its waters between the Lower Basin States, deciding which users within each State will receive a contract for water delivery, *id.* at 641, quoting *Arizona I*, 373 U.S. at 580, and make decisions, including the development of regulation, to facilitate those allocations. Fiduciary duties have been held to arise from the federal government's control over tribally owned buildings, tribal natural resources, and tribal funds, and there is nothing in the law that precludes the extension of the concept of control to waters to which an Indian tribe has unquantified *Winters* rights.

The panel opined that "[h]aving established that a fiduciary duty exists, we hold that common-law sources of the trust doctrine and the control the Secretary exercises over the Colorado River firmly establish the Federal Appellees' duty to protect and preserve the Nation's right to water." *Id.* This holding is entirely

consistent with the Supreme Court's decision in *Jicarilla,* that "[o]nce federal law imposes such [fiduciary] duties, the common law could play a role." 564 U.S. at 177 (cleaned up). There is no basis for the Government's admonition that allowing the Nation's breach of trust action to proceed in reliance on the implied federal fiduciary duties attendant upon the Nation's *Winters* rights "would create two tiers of *Winters* rights, some that entail fiduciary duties and others that do not." US. Motion at 18.

C. Federal Appellees Cannot Avoid Their Trust Obligations by Asserting that the Nation Has the Sovereign Power to Protect Its Own Water Rights

Federal Appellees attempt to disavow their fiduciary duties by asserting for the first time in their motion that "[t]rust ownership alone does not give federal officials authority over tribal lands or water rights; nor does it establish fiduciary obligations to develop tribal lands or water resources or to exercise water rights for a tribe," U.S. Motion at 10, citing *Hawkins v. Haaland*, 991 F.3d 216, 225-227 (D.C. Cir. 2021). *Hawkins* involved a challenge by non-Indian ranchers to "calls"[4] by the Klamath Tribes [5]that would have deprived plaintiffs of irrigation water. Plaintiffs asserted that only the government as trustee of the Tribes' water rights

[4] A "call" is the process by which a senior water right holder seeks through administrative action to suspend conflicting junior upstream uses so that the water is available to satisfy the senior downstream right.

[5] There are three tribes that make up the "Klamath Tribes." They have been variously referred to in the courts' opinions, and the Nation adopts here the Klamath Tribes' preferred usage except when included in a quote.

was empowered to exercise a call. The District of Columbia Circuit rejected that argument in mistaken reliance on a statement in this Court's decision in *United States v. Adair* that "the Government has no ownership interest in, or right to control the use of, the Klamath Tribe's hunting and fishing water rights." 723 F.2d 1394, 1418 (9th Cir. 1983).

Adair dealt with the Klamath Tribes' hunting and fishing water rights this Court described as "virtually unique." *Id.* at 1400. The Tribes had entered into a treaty in 1864 ceding much of their aboriginal territory but preserving subsistence rights on their remaining reservation lands. Subsequently, the government terminated its trust relationship with the Tribes; allotted, sold, or condemned their reservation lands; and acquired the majority of those lands to establish a wildlife refuge and supplement the lands of a national forest. In yet another reversal, the Klamath Restoration Act reestablished the Tribes and the government's trust relationship with them.

Adair, rather than a state court general stream adjudication, was a federal action limited to determining the priority of the various federal claims before the court. This Court recognized that the Tribes' implied rights to water to support their treaty-reserved hunting and fishing rights were expressly preserved by the Klamath Termination Act and continued to exist despite the loss of any appurtenant lands. As the Court explained, the Tribes' water rights were exclusive

to the Tribes, were not subject to the ordinary rules of transfer and change of use, and thus were not acquired by the government when it took former reservation lands for its own by purchase or condemnation.

The statement from *Adair* relied upon in *Hawkins* arose in the context of an overreaching claim by the government attempting to tack the Tribes' 1864 priority date onto the later date for its reserved water rights associated with the establishment of the national wildlife refuge and forest. *Adair* at 1419. This Court rejected the government's claim, holding that the Tribes' hunting and fishing rights belonged to the Tribes by virtue of their 1864 Treaty, and "[b]ecause the Klamath Tribe's treaty right to hunt and fish is not transferable, it follows that no subsequent transferee [i.e., the United States] may acquire that right of use or the reserved water necessary to fulfill that use." *Adair* at 1418. And if the tribe had transferred the land and not reserved the hunting and fishing right there would be no basis for the continued existence of the water right. *Id*. at 1419. Further, because the Tribes retained their non-consumptive water use right to support their treaty protected subsistence rights with an 1864 priority date (which the government benefited from as the water flowed through the federal reservations established on former tribal reservation lands), and the government had succeeded to the irrigation water rights of allottees from whom it acquired those lands with an 1864 treaty-based priority date, this Court concluded that "all the water rights

reserved in 1864 on land the Government now owns are accounted for." *Id.*

The Court in *Hawkins* understood *Adair* to hold that the "federal government's historical [general] trustee relationship with Indian tribes was [] limited [by the Restoration Act] so as not to interfere with the Tribes' exclusive rights [to water to support hunting & fishing] under Article I of the 1864 Treaty." This characterization of the decision in *Adair* is incorrect. This Court did not hold that the government's trust relationship had been limited by the Restoration Act, but rather that the government could not acquire, as a successor to the Tribes' reservation lands, the Tribes' implied water rights to support its subsistence lifestyle nor exercise control over the Tribes' retained water right for its own purposes. Neither *Hawkins* nor *Adair*, properly understood, support the Federal Appellees' argument that they have no fiduciary obligations to the Nation.

Further, Federal Appellees' arguments ignore two important points. First, in *United States v. Dist. Ct. for Eagle County*, 401 U.S. 520 (1971), the Supreme Court held that the waiver of sovereign immunity of the United States in the McCarran Amendment, 28 U.S.C. § 666, that permits the adjudication of federal reserved water rights in state general stream adjudications, includes the interests of the government as trustee for Indian tribes. Thus, while the tribes are immune from state court jurisdiction, the Supreme Court held that the McCarran Amendment provided that the government could be haled into court to quantify–

and presumably defend – the federal reserved rights claims of Indian tribes without tribal consent. And second, as the government acknowledges, US Mot. at 11, it has declined to pursue the Nation's claims to the mainstream of the Colorado River based on its own determination of what is in the Nation's best interest and ignoring that the Nation would have to overcome the immunity of the State of Arizona should it attempt to quantify its rights by reopening *Arizona v California* in the Supreme Court; a result that the Intervenor/Appellees are no doubt counting on.[6] The Federal Appellees seek to turn the hard-won decisions recognizing tribal sovereignty into an excuse for their nonfeasance. This is not the import of those cases.

Finally, the Nation did not assert a claim to compel agency action in reliance on the APA, as the Federal Appellees should know.[7]

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[6] Intervenor Appellees assert in a remarkable statement that the "express duties of the Secretary to water users in the Lower Colorado River Basin cannot be compromised by a duty inferred by the Panel for the Navajo's exclusive benefit. Intervenors' Mot. at 13. The Government owes no fiduciary duties to the Intervenor Appellees, and as the 10th Circuit recognized "[w]hen the Secretary is acting in his fiduciary rolerather than solely as a regulator . . . he must choose the alternative that is in the best interests of the Indian tribe." *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.2d855 (10th Cir. 1986) (*en banc*); *see also Pyramid Lake Paiute Tribe v. Morton,* 354F. 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).

[7] The Nation has made its position clear throughout these proceedings. As the Court recognized in the Nation's first appeal, the Nation relies on the APA

D. The Panel's Decision Does Not Trench on the Jurisdiction of the Supreme Court Retained in *Arizona v. California*

Intervenor/Appellees, while joining the government's assertion that the panel failed to follow Circuit precedent, separately contend that the Nation's suit seeks to quantify the Nation's water rights to the Colorado River and is therefore barred by the exclusive jurisdiction of the Supreme Court retained in the *Arizona v. California* Decree. Intervenors' Motion at 2-3, 7. They argue first that the Nation's complaint seeks to quantify the Nation's *Winters* federal reserved rights. The panel held, however, that as is clear from the Nation's complaint, it asserts only claims for breach of trust, and its federally reserved rights to the Colorado River need not be quantified to require that the government protect them and rejected Intervenor Appellees argument. *Navajo Nation v. DOI II,* 996 F.3d at 628, 635.

Second, Intervenor/Appellees make the inapt argument that established precedent holds that the Supreme Court retains jurisdiction over this matter as the first court to exercise jurisdiction over a "water adjudication." Intervenors' Motion at 1, 4. But, again, the Nation's complaint does not seek to adjudicate the Nation's

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solely for its waiver of the Government's sovereign immunity but brings its breach of trust claim in reliance on the common law. The panel held there that § 702 of the APA is "an unqualified waiver of sovereign immunity in all actions seeking relief from official misconduct except for money damages." 876 F.3d at 1171 (cleaned up). The Court's extensive analysis of the applicability of the APA's waiver would not have necessary if the Nation were asserting a claim under § 704 of the APA challenging final agency action.

water rights, nor is this action a water adjudication.

Finally, Intervenor/Appellees joining the primary argument of Federal Appellees argue that there is a "long, unbroken line of decisions" (originating in 1980) holding that no fiduciary duty may be imposed on the government absent a clear expression of substantive law. Intervenors' Mot. at 1. While the Nation takes issue with this statement and asserts that the longer line of cases recognize a common law fiduciary duty owed by the government to Indian tribes, as discussed in note 3, *supra*, the panel held that the Nation had identified sufficient expressions of positive law to meet *Gros Ventre's* requirements to state a claim for breach of trust.

In sum, the arguments of the Appellees should be rejected as they were by the panel and the decision of the panel should stand. The panel understood that the Nation is seeking equitable relief to compel the government to fulfill its fiduciary obligations to determine the needs of the Nation for water from the Colorado, to develop a plan to protect those water supplies, and to desist from actions that frustrate that plan by making the Nation's access to necessary water supplies more difficult. The panel remanded to the district court for further proceedings consistent with its decision, and that is how the matter should proceed.

CONCLUSION

Rehearings *en banc* are disfavored. Appellees have failed to meet this Court's narrow and stringent requirements for securing rehearing, and the Court should deny their respective motions for rehearing en banc.

Respectfully submitted this 30th day of September 2021.

SACKS TIERNEY P.A.

By: */s/ M. Kathryn Hoover*
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UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

Form 11. Certificate of Compliance for Petitions for Rehearing or Answers

9th Cir. Case Number 19-17088.

I am an attorney for the Navajo Nation, Plaintiff/Appellant.

I certify that pursuant to Circuit Rule 35-4 or 40-1, the attached Response to Motions for Rehearing *En banc* is:

[√] Prepared in a format, typeface, and type style that complies with Fed. R. App. P. 32(a)(4)-(6) and contains the following number of words: 4,070 .

(*Petitions and answers must not exceed 4,200 words*)

OR

[ ] In compliance with Fed. R. App. P. 32(a)(4)-(6) and does not exceed 15 pages.

Signature: */s/ M. Kathryn Hoover*

Date: September 30, 2021

STATEMENT OF RELATED CASES

Pursuant to the Ninth Circuit Rule 28-2.6, Plaintiff/Appellant, through its undersigned counsel, hereby states that it is not aware of any related cases pending before this Court.

/s/ M. Kathryn Hoover

CERTIFICATE OF SERVICE

I hereby certify that on September 30, 2021, the foregoing Response was electronically filed 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 are registered CM/ECF users and service will be accomplished by the appellate CM/ECF system.

/s/ M. Kathryn Hoover