

No. 21-1484

In the
Supreme Court of the United States

STATE OF ARIZONA, STATE OF NEVADA, STATE OF
COLORADO, METROPOLITAN WATER DISTRICT OF
SOUTHERN CALIFORNIA, *et al.*,

Petitioners,

v.

NAVAJO NATION, *et al.*,

Respondents.

ON WRIT OF CERTIORARI TO THE
U.S. COURT OF APPEALS FOR THE NINTH CIRCUIT

**BRIEF ON THE MERITS FOR PETITIONER
STATE OF COLORADO**

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QUESTIONS PRESENTED

1. Does the Ninth Circuit opinion allowing the Navajo Nation to proceed with a breach of trust claim premised on an unadjudicated right to water from the mainstream of the Lower Basin of the Colorado River infringe upon the Court's retained and exclusive jurisdiction over the adjudication of water from the Mainstream in *Arizona v. California*?

2. Whether the United States has a judicially enforceable fiduciary duty to assess, quantify, and protect from interference an unproven claim of the Navajo Nation to water from the Lower Basin of the Colorado River based on the common law "implied reserved rights doctrine" in *Winters v. United States*.

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INTRODUCTION

The Colorado River is vital—on many levels—to the people, tribes, and governments of the seven States that contain its watershed. To manage this critical resource, this Court has played a significant role in the development and oversight of the robust legal framework known as the “Law of the River.” This framework allocates water across this part of the United States and addresses disagreements that arise over the management of the Colorado River system. The predictable and effective management of the Colorado River system that the Law of the River provides is critical for Colorado to benefit from and protect its apportionments of Colorado River water.

The Law of the River generally refers to the longstanding and complex body of cases, legal agreements, laws, and regulations governing the Colorado River. 21-1484 Pet. App. 7-11. The Law of the River both binds all significant stakeholders—the federal government, States, water users, and tribes—and ensures that changes to the distribution of water apportionments consider not just a particular stakeholder’s needs, but also how those needs relate to the river system as a whole.

This Court’s retention of exclusive jurisdiction in *Arizona v. California*, 376 U.S. 340, 353 (1964), serves as a key foundation of the Law of the River. That decision finalized water apportionments in the mainstream of the Lower Colorado River Basin (“Mainstream”) to the Lower Basin States and provided the exclusive mechanism for adjusting the distribution of water in accordance with those apportionments going forward.

Colorado joins with the federal and State petitioners in urging reversal of the decision below because it violates settled law. Colorado writes separately to emphasize the importance of the Law of the River and to explain why the decision below conflicts with it. The Law of the River—and this Court’s role in enforcing it through its retained exclusive jurisdiction—decides this case. Consequently, this Court need not reach the scope of the fiduciary duty the federal government owes the tribes.

Allowing the Navajo Nation to pursue an injunction outside the Law of the River to address the apportionment of Colorado River water would undermine this Court’s retained and exclusive jurisdiction. It would also inject uncertainty into operations of the Colorado River that would compromise the ability of Colorado and other States to protect their rights under interstate compacts. Under settled law, the development of any plan to provide water from the Mainstream, as well as any action to implement that plan, must proceed under the Law of the River and be governed within its legal framework.

Two tribes in Colorado, the Southern Ute Indian Tribe and the Ute Mountain Ute Tribe, depend on the Law of the River to govern and protect their reserved water rights. Under existing adjudications, Colorado must fulfill the Tribes’ reserved water rights from its apportionments under the compacts. Colorado and the Tribes quantified those rights in the Colorado Ute Settlement Act Amendments of 2000, Pub. L. 106-554, 114 Stat. 2763A–258. For all water users governed by the Law of the River, including Colorado’s two recognized Indian Tribes, significant uncertainty or disruption in the distribution of compact

apportionments that would flow from the decision below threatens established water rights in all of the Basin States.

The decision below upsets the longstanding process for addressing water needs from the Colorado River because it interferes with this Court's retained and exclusive jurisdiction and does not follow the process required by the Law of the River. This Court should reverse.

STATEMENT OF THE CASE

Over the past century, the Colorado River Basin States, Congress, and this Court have developed the plan that apportions and distributes the waters of the Colorado River. Any attempt to redistribute the scarce waters of the Colorado River must be managed by this framework.

A. Negotiations Between the States

The States have long disagreed about how to apportion the waters of the Colorado River. In the 1922 Compact, the Basin States split the river basin into two parts: the Upper Basin and the Lower Basin. The 1922 Compact allocated 7,500,000 acre-feet¹ of water to each basin annually. Colo. River Compact, art. III(a) (1922), authorized under Act of August 19, 1921, ch. 72, 42 Stat. 171. However, it did not have unanimous approval, as Arizona refused to ratify the compact, and it left the States of each basin to divide their allocation among themselves. *Arizona v. California*, 373 U.S. 546, 561-62 (1963).

¹ An acre-foot is the amount of water needed to cover the area of an acre at the depth of one foot, or roughly 326,000 gallons.

The Upper Basin States—Colorado, New Mexico, Utah, and Wyoming—did just that. In 1948, they ratified the Upper Colorado River Compact, which apportioned the allocated 7,500,000 acre-feet among the States. Upper Colo. River Basin Compact, ch. 48, §III(a)(2), 63 Stat. 31 (1949). But even after Arizona ratified the Compact in 1944, the Lower Basin States—Arizona, California, and Nevada—could not agree to a plan to apportion their half of the Colorado River water from the 1922 Compact.

B. Congressional Action

Recognizing the destabilizing effect that a single State holding out from the Compact could have on water rights in the region, Congress stepped in to encourage the Lower Basin States to reach a plan. It passed the Boulder Canyon Project Act, 43 U.S.C. § 617, ch. 42, 45 Stat. 1057 (1928) (“Act”), which proposed a plan to apportion waters of the Mainstream. In its plan, Congress authorized the Lower Basin States to enter an agreement that apportioned 300,000 acre-feet to Nevada and 2,800,000 acre-feet to Arizona. *Arizona v. California*, 373 U.S. at 561. It made its passage contingent upon California’s enactment of legislation limiting the State to a maximum of 4,400,000 acre-feet. *Id.* at 561-62. This complete apportionment was intended to overcome the stalemate in the Lower Basin and stop the longstanding dispute over the Mainstream.

The Act gave the Secretary of the Interior broad authority to carry out the distribution of the waters of the Mainstream, both between the Lower Basin States and to the different users within each Lower Basin State. *Id.* at 589-90. But Congress did not authorize

the Secretary to determine tribal water rights to the Mainstream, leaving that matter to be resolved by this Court. Because of the scarcity of water in the Colorado River Basin, however, any undetermined right in the Mainstream would impact distributions of the allocations to other water users within the Lower Basin States.

C. Supreme Court Decisions

The Tribes' rights to the Mainstream were finally determined in *Arizona v. California*, 373 U.S. 546 (1963). There, this Court spent decades resolving the dispute over allocations to the Mainstream, including claims by the United States to water for tribes. *Id.* at 551. In these proceedings, the United States asserted claims to water from the Mainstream for use on some Indian Reservations, securing water rights on behalf of five Tribes. *See Arizona v. California*, 376 U.S. 340, 344-46 (1964).

This litigation led to a decree detailing all water rights to the Mainstream. *Arizona v. California*, 376 U.S. 340 (1964). The 1964 Decree "specified the quantities and priorities of the water entitlements for the States, the United States, and the Tribes." *Arizona v. California*, 530 U.S. 392, 398 (2000) (describing the Court's earlier ruling).

Article VI of the 1964 Decree directed the States to submit lists of existing water rights to waters of the Mainstream and directed the United States to submit a similar list with respect to claims for federal reserved rights within each State. *Arizona v. California*, 376 U.S. at 351-52. Article VII of the Decree provided that the Decree would not affect "[t]he rights or

priorities, except as specific provision is made herein, of any Indian Reservation.” *Id.* at 352-53.

This Court further decreed that it “retain[ed] jurisdiction of [the] suit for the purpose of any order, direction, or modification of the decree, or any supplementary decree, that may at any time be deemed proper in relation to the subject matter in controversy.” *Id.* at 353.

This Court has revisited the decree, in part to address tribal claims to water. *See, e.g., Arizona v. California*, 547 U.S. 150, 166-67 (2006). For instance, the Lower Basin States successfully moved to reopen the decree in the Court’s original jurisdiction. *Arizona v. California*, 493 U.S. 886 (1989). There, all original parties—whose previously determined rights would be affected by recognition of any new right—could participate fully in the litigation.

As this Court’s practice has reflected, any new claims to the scarce resource of Colorado River water necessarily impact the rights of the other listed claimants. Put another way, any plan to supply a new water claim from the Mainstream will affect the distribution to other users within the affected State and may create additional uncertainty for other Mainstream water users.

D. Decisions Below

The Navajo Nation sued the Department of the Interior in the District of Arizona, seeking an injunction directing the federal government to meet its water needs. 21-1484 Pet. App. 127-28 (describing procedural history). It included statutory claims and a

claim based on its trust relationship with the federal government. 21-1484 Pet. App. 126-27.

Arizona, California, and Nevada, along with their water districts, intervened to protect their rights in the Mainstream. *See* 21-1484 Pet. App. 127. The district court stayed the case for years of settlement negotiations, which ultimately failed. 21-1484 Pet. App. 127. Almost a decade later, Colorado intervened “to protect [its] interests in the Colorado River as acknowledged by the Law of the River.” Mem. in Supp. of Colo.’s Mot. to Intervene at 13, *Navajo Nation v. U.S. Dep’t of the Interior*, No. 03-00507 (D. Ariz. Sept. 24, 2013), ECF No. 255-1. Litigation resumed, and the district court eventually dismissed the Navajo Nation’s second amended complaint. 21-1484 Pet. App. 163.

The Ninth Circuit affirmed the dismissal as to the statutory claims, but it remanded the trust claim to allow the Navajo Nation to again amend its complaint. 21-1484 Pet. App. 160-61.

On remand, the district court denied the Navajo Nation’s motion to file a third amended complaint, finding that any amendment would be futile. 21-1484 Pet. App. 104-05. It found that the Navajo Nation sought a determination of rights to the Mainstream of the Colorado and such rights were within this Court’s exclusive jurisdiction. 21-1484 Pet. App. 97 (finding that “any claim that requires any determination of rights to the River” is within this Court’s exclusive jurisdiction and that all the Navajo Nation’s claims required the district court “to determine the Nation has rights to the River”). Thus, no amendment of the

Navajo Nation's complaint could cure the district court's lack of jurisdiction.

The Ninth Circuit reversed. 21-1484 Pet. App. 6. It found that the district court abused its discretion in denying the Navajo Nation's motion to amend. 21-1484 Pet. App. 38. It determined that the Navajo Nation did not make any claim to the Mainstream. 21-1484 Pet. App. 6. Thus, it did not address whether claims to the Mainstream must be heard within this Court's retained jurisdiction.

The Ninth Circuit acknowledged that legal claims to the Mainstream, including those on behalf of Indian tribes, have exclusively been decided by this Court in *Arizona v. California*. 21-1484 Pet. App. 10 (discussing the Consolidated Decree allocating water rights to five Tribes). But it denied that the Navajo Nation's requested relief required any quantification of its rights in the Mainstream. Instead, it found that the Navajo Nation requested an injunction directing the Department of the Interior to exercise its authority over the Colorado River "in a manner that does not interfere with the plan to secure the water needed [by the Navajo Nation]." 21-1484 Pet. App. 20 (quoting J.A. 83). The decision below quoted the Navajo Nation's requested relief and, without any further reasoning, stated that "[g]ranting this scope of relief would not require a judicial quantification of the Nation's rights to water from the River" nor would it "require any modification of the *Arizona* decree." 21-1484 Pet. App. 20.

The decision below quickly dismissed the jurisdictional question and then rejected the Intervenor's defenses. First, it found that the Navajo Nation's

claims were not barred by *res judicata*. 21-1484 Pet. App. 22-23. Second, it found that an enforceable trust duty existed between the federal government and the Navajo Nation. 21-1484 Pet. App. 38. Thus, it again reversed the district court and allowed the Navajo Nation's claim to proceed.

Judge Lee wrote separately to emphasize that the Ninth Circuit's opinion did not address the Supreme Court's exclusive jurisdiction over Mainstream water rights. 21-1484 Pet. App. 39. The concurring opinion notes that, "on its face," the Navajo Nation's amended complaint did not request rights in the Mainstream. 21-1484 Pet. App. 40. The complaint requested that the federal government, under its authority over the Mainstream, make a plan to quantify the Navajo Nation's water needs and act in accordance with that plan. 21-1484 Pet. App. 20. The concurrence emphasized that the majority's "narrow construction" of the Navajo Nation's artfully pled complaint was "imperative." 21-1484 Pet. App. 40. Without it, the Navajo Nation could not "pursue its claims without raising the separate and more complex issue of the Supreme Court's retained jurisdiction." 21-1484 Pet. App. 40.

Both the Department of the Interior and the Intervenors petitioned this Court for writs of certiorari.

This Court should reverse. Despite the Ninth Circuit's effort at an artful construction, the decision below in fact requires redistribution of Mainstream water rights outside this Court's retained exclusive jurisdiction. Under the Law of the River, the only avenue to grant rights to water from the Mainstream is through this Court.

SUMMARY OF THE ARGUMENT

The decision below conflicts with this Court's retained exclusive jurisdiction and disrupts the certainty created by the Law of the River for adjudicating rights in the Mainstream.

When this Court issued its Consolidated Decree, it retained jurisdiction over the matter to enter orders modifying the decree. The decision below wrongly concluded that this suit does not implicate this Court's retained jurisdiction because the Navajo Nation does not seek to have its rights in the Mainstream quantified.

By demanding the Secretary determine the Navajo Nation's need for water, develop a plan to meet those needs, and *manage the Colorado River* consistent with that plan, the Navajo Nation seeks a de facto quantification of its rights to Mainstream water. Because such a quantification would modify this Court's Consolidated Decree, it must occur within the context of the preexisting *Arizona v. California* litigation under this Court's retained exclusive jurisdiction. Thus, the district court correctly concluded that it lacked jurisdiction and the contrary holding in the decision below must be reversed.

Further, permitting the piecemeal adjudication of water rights claims, as the decision below allows, undermines the certainty necessary for the proper management of the Colorado River system. In the short-term, it threatens to delay the implementation of several cooperative agreements intended to address the historic drought conditions that exist in the system. But beyond that, it threatens to undermine the distribution of apportionments contained in the

Consolidated Decree and the negotiated agreements that have relied on those, as well as the premise that all future disputes would continue to occur within the context of the Law of the River and not in one-off proceedings.

Finally, this jurisdictional question disposes of the issues presented here and should be addressed first. There is no need for this matter to proceed—or for this Court to address the breach-of-trust issue—because the district court lacked jurisdiction to enter the relief the Navajo Nation requests. Any other approach risks a significant waste of judicial resources, invites conflicting decisions, and encourages forum-shopping.

ARGUMENT

A. **The Decision Below Conflicts with the Court’s Retention of Exclusive Jurisdiction to Determine Rights to the Mainstream**

Rights in the Colorado River have been determined by Congress, this Court, the Basin States, Tribes, and other stakeholders under the Law of the River for a century. Central to the certainty the Law of the River provides is this Court’s retention of exclusive jurisdiction in the 1964 Decree. There, the decree ordered, “The Court retains jurisdiction of this suit for the purpose of any order, direction, or modification of the decree, or any supplementary decree, that may at any time be deemed proper in relation to the subject matter in controversy [(i.e., rights to the Mainstream)].” *Arizona v. California*, 376 U.S. at 353. This Court has continued to include language making its retention of jurisdiction clear in its later decrees,

including most recently, the 2006 Consolidated Decree. *Arizona v. California*, 547 at 166-67; *Arizona v. California*, 531 U.S. 1, 3 (2000); *Arizona v. California*, 466 U.S. 144, 146 (1984); *Arizona v. California*, 439 U.S. 419, 421 (1979).

By retaining jurisdiction, this Court ensured that any claimants seeking relief that would disrupt the distribution of apportionment of Mainstream water in the Consolidated Decree would participate in the existing litigation and would involve all parties to that litigation. And nothing in this Court's language suggests its retention of jurisdiction was anything other than exclusive. It would diverge from the organization of the judiciary and this Court's original and exclusive jurisdiction over controversies among the States to allow a district court to enter an order that modifies this Court's Decree. U.S. CONST. art. III, § 2; 28 U.S.C. § 1251(a). Modifications to an order entered by this Court—such as the Consolidated Decree—must come from this Court. Any other approach would empower a district court to override this Court's judgment.²

² This Court has had occasion to modify the 1964 Decree several times. In 1979, this Court supplemented the decree to address the treatment of certain perfected rights. *Arizona v. California*, 439 U.S. at 420-21. In 1983 and 2000, this Court again considered and supplemented the 1964 Decree with respect to certain Indian Tribes' claims to additional water rights. *Arizona v. California*, 466 U.S. at 144-46; *Arizona v. California*, 531 U.S. at 1-3. Most recently, in 2006, this Court issued a Consolidated Decree that both aggregated the changes made since the 1964 Decree and implemented additional modifications related to tribal claims to Mainstream water. *Arizona v. California*, 547 U.S. at 152

That this Court retained exclusive jurisdiction is also in keeping with the “clear federal policy” to avoid the “piecemeal adjudication of water rights in a river system.” *Colo. River Water Conservation Dist. v. United States*, 424 U.S. 800, 819 (1976) (discussing the McCarran Amendment, 43 U.S.C. § 666(a)). That policy recognizes that “by reason of the interlocking of adjudicated rights on any stream system, *any order or action affecting one right affects all such rights.*” S. Rep. No. 82-755, at 5 (1951) (emphasis added).

Indeed, “actions seeking the allocation of water . . . are *best* conducted in unified proceedings.” *Colo. River Water Conservation Dist.*, 424 U.S. at 819 (emphasis added). A unified approach avoids the piecemeal litigation of water claims and judgments that are binding on some parties but not other water users. *See Pac. Live Stock Co. v. Lewis*, 241 U.S. 440, 449 (1916). The importance of having all interested parties in a single proceeding has even led to federal courts abstaining from adjudicating individual water claims in light of a consolidated preexisting state proceeding despite the federal courts’ “virtually unflagging obligation . . . to exercise the jurisdiction given to them.” *Arizona v. San Carlos Apache Tribe*, 463 U.S. 545, 571 (1983) (quoting *Colo. River Water Conservation Dist.*, 424 U.S. at 817) (internal quotation marks omitted). It would depart from this Court’s longstanding recognition that water rights disputes are best handled in the context of a unified proceeding to conclude that this Court’s retention of jurisdiction was not

(describing effect of the decree). This history of modification in the context of *Arizona v. California* only further demonstrates the exclusivity of this Court’s retained jurisdiction.

exclusive and instead invited modification by the district courts and circuit courts of appeal should any potential claimant choose to pursue their case in separate proceedings.³

The decision below, however, concluded that it need not wrestle with this jurisdictional bar to the Navajo Nation's separate suit. 21-1484 Pet. App. 21. That ruling rested on a single faulty premise: that the Navajo Nation was not seeking a quantification of its rights to Mainstream Water. 21-1484 Pet. App. 21. In practice, however, the Navajo Nation's requested relief is the same as a quantified right. It seeks to require the federal government to "to determine the extent to which the Navajo Nation requires water," then "develop a plan to secure the water needed" and finally to "secure the water needed" under the plan. 21-1484 Pet. App. 20. The decision below asserted that this only required the district court "to consider whether the Nation needs water to fulfill the promise of

³ Both the decision below and the Navajo Nation point out that this Court previously indicated the circumstances surrounding the retention of jurisdiction suggest that it "was mainly a safety net added to retain jurisdiction and to ensure that we had not, by virtue of *res judicata*, precluded ourselves from adjusting the Decree in light of unforeseeable changes in circumstances." *Arizona v. California*, 460 U.S. 605, 622 (1983), discussed in 21-1484 Pet. App. 21-22 and 21-1484 Resp. Br. in Opp'n 9. But the question presented in that case was whether the retention of jurisdiction created a lack of finality such that the parties should be allowed to retry "factual or legal issues that were fully and fairly litigated 20 years ago." *Arizona v. California*, 460 U.S. at 621. This Court did not address whether its jurisdiction was exclusive nor did it have any reason to do so in that discussion. The statement is irrelevant when considering whether this Court's retained jurisdiction is exclusive or not.

establishing the Navajo Reservation as a homeland for the Nation's people." 21-1484 Pet. App. 20.

The requested relief goes far beyond considering whether the Navajo Nation needs water. It would also require the Secretary to operate the Mainstream in a manner that ensures the Navajo Nation receives whatever water the Secretary might determine the Navajo Nation needs. Functionally, such an enforceable right is difficult, if not impossible, to distinguish from a quantified reserved right. No matter if water is consumed under a quantified reserved right or the Secretary's judicially enforceable determination, it will have the same effect on other users. Consumption of that water by the Navajo Nation will affect the distribution of water to other users within the affected State. *See Arizona v. California*, 547 U.S. at 156 ("[A]ny mainstream water consumptively used within a State shall be charged to its apportionment, regardless of the purpose for which it was released."). Indeed, the United States recognizes that "any order compelling the government to deliver water from the Lower Colorado mainstream to the Navajo Reservation would violate the Court's decree." 21-1484 Fed. Resp. Mem. 3. Whether or not the decision below uses the same phrasing, it requires the same result and thus violates this Court's decree.

It makes no difference that the Consolidated Decree "does not affect '[t]he rights or priorities, except as specific provision is made herein, of any Indian Reservation,'" when considering the scope of this Court's retained jurisdiction. 21-1484 Pet. App. 21 (quoting *Arizona v. California*, 376 U.S. at 353). By retaining jurisdiction, this Court preserved its ability to

determine “future additional reservations of mainstream water.” *Arizona v. California*, 376 U.S. at 344.

The Navajo Nation requests an order directing the Secretary to determine its needs for water from the Mainstream and a judicially enforceable order requiring the Secretary to manage the Mainstream to meet those needs. This is exactly the type of “backdoor attempt to allocate the rights to the mainstream” that the concurring opinion criticized, and it conflicts with this Court’s retained exclusive jurisdiction. 21-1484 Pet. App. 40-41. The Court should reverse the decision below because only this Court has jurisdiction to modify the Consolidated Decree, as the Navajo Nation seeks to do here.

B. The Decision Below Will Cause Both Immediate and Long-Term Harm to the Management of the Colorado River

Permitting the piecemeal adjudication of rights to the Mainstream, as the decision below allows, creates both immediate and long-term disruptions to the coordinated management of the Colorado River. There is no reason to inflict these harms on a river system already stretched beyond its capacity.

In the immediate term, permitting piecemeal adjudication will undermine existing cooperative agreements. For example, the United States, the Basin States, Tribes, water users, and other stakeholders are already implementing the 2007 Colorado River Interim Guidelines for Lower Basin Shortages and Coordinated Operations for Lake Powell and Lake Mead, 73 Fed. Reg. 19873 (Apr. 11, 2008), and the 2019 Colorado River Drought Contingency Plan Authorization

Act, Pub. L. 116-14, 133 Stat. 850. The 2007 Guidelines implement the Law of the River. They were issued under the authority vested in the Secretary by the Law of the River, including the Boulder Canyon Project Act of 1928 (45 Stat. 1057); the Colorado River Storage Project Act (70 Stat. 105); the Criteria for the Coordinated Long Range Operation of Colorado River Reservoirs, 35 Fed. Reg. 8951 (June 10, 1970) promulgated under the Colorado River Basin Project Act of September 30, 1968 (Pub. L. No. 90-537); and the Consolidated Decree issued by this Court in *Arizona v. California*, 547 U.S. 150 (2006). The 2007 Guidelines were adopted in response to drought and with considerable cooperation from the Basin States, as required by the Law of the River. And they provide for a plan to distribute all of the supplies of the Mainstream.

The 2019 Drought Contingency Plans overlay the 2007 Guidelines and provide additional measures to implement the 2007 Guidelines, as well as the Law of the River. They address the extended, severe drought conditions in the Colorado River Basin and include an agreement for releases from federally owned reservoirs in the Upper Basin to help protect the entire Colorado River system. Because the 2007 Guidelines and the Drought Contingency Plans were negotiated on the foundation of allocations under the Consolidated Decree and rely on the coordinated operations of Lake Powell and Lake Mead under the Law of the River, any piecemeal adjudication outside the Law of the River threatens to upset the foundation on which those cooperative agreements are based.

Long term, permitting piecemeal litigation threatens the viability of the Consolidated Decree itself and the Basin States' ability to rely on it when

negotiating the management of the Colorado River. Piecemeal litigation to determine management of the Mainstream would force parties to the Consolidated Decree to intervene in each independent suit to protect against operations that could impair distribution of water under their apportionments. Rather than having the certainty of the Consolidated Decree, all of the parties to the Consolidated Decree—including the Basin States and the Tribes discussed there—will need to appear in courts throughout the West to defend their rights or face the consequences of adverse decisions.

And if those other courts have the authority to order the Secretary to determine third-party water rights to the Mainstream, as the Navajo Nation seeks here, then all interested parties will be subject to continued uncertainty about how much water they will have available for use regardless of the language in the Consolidated Decree.⁴ This will undermine previously negotiated agreements (which relied on the 1964 and Consolidated Decrees' apportionments) and make future negotiations even tougher because of the lack of certainty that the water rights a party has at the time of the negotiation will be the same as those they have after the negotiation ends.

While new or supplemental claims under this Court's retained exclusive jurisdiction might also impact the distribution of water under existing

⁴ The decision below suggested that plaintiffs in these suits could petition this Court to approve those district court decrees and modify the Consolidated Decree accordingly. *See* 21-1484 Pet. App. 39 n.7. That approach is problematic, as discussed below. *Infra*, p. 20.

allocations, the determination of those claims will occur with all parties to that litigation participating and in the full context of the Law of the River. No such certainty surrounds the piecemeal adjudication of claims like those the Navajo Nation asks for here.

Managing the Colorado River in a way that maximizes its beneficial use and adapts to conditions that threaten the security and stability of the system is challenging. The fragmented litigation of claims that the decision below empowers will make that process even harder at a time when decisive action is necessary to protect this vital river system. Reversing the decision below and requiring litigation over rights to the Mainstream to occur within this Court's retained exclusive jurisdiction provides a level of certainty in how future claims to Mainstream water will be determined that avoids these additional short- and long-term challenges.

C. This Matter Cannot Proceed If the District Court Lacks Jurisdiction

This Court should address the jurisdictional issue presented here first. For the reasons discussed above, that issue is dispositive, and the Court need go no further.

Jurisdiction—not the merits of the breach-of-trust argument, 21-1484 Fed. Resp. Mem. 3—is the threshold issue before the Court. “Federal courts must determine that they have jurisdiction before proceeding to the merits.” *Lance v. Coffman*, 549 U.S. 437, 439 (2007). As discussed above, the district court lacks jurisdiction because of this Court's retained exclusive jurisdiction. Therefore, the matter must be dismissed.

The Navajo Nation argued that this Court need not address the jurisdictional issue at all. 21-1484 Resp. Br. in Opp'n 8-9. Yet there is little dispute that the district court would lack jurisdiction if the Navajo Nation's requested relief implicates this Court's retained jurisdiction and the Court's jurisdiction is exclusive. As the United States stated, "any order compelling the government to deliver water from the Lower Colorado mainstream to the Navajo Reservation would violate the Court's decree." 21-1484 Fed. Resp. Mem. 3.

Under these circumstances, allowing the district court to proceed would violate this Court's retention of exclusive jurisdiction. This Court should instead decide here whether the district court has jurisdiction to enter an order enjoining the Secretary's operation of the Mainstream.

Dealing with the jurisdictional issue here would also avoid potentially conflicting judgments. The decision below and the Navajo Nation suggest that, if a subsequent district court order sought to compel the Secretary to act in violation of the Consolidated Decree, then the solution would be for the United States to apply to this Court to modify the Consolidated Decree. 21-1484 Pet. App. 39 n.7; 21-1484 Resp. Br. in Opp'n 9. But there is no guarantee that the Court would agree with the district court on the appropriate resolution of the dispute. And the Secretary might face conflicting obligations—one to release water under a district court order and another *not* to release that water under the Consolidated Decree.

On top of creating conflict, this approach might encourage gamesmanship as future claimants seek

out the forum most likely to rule in their favor on the merits and then approach this Court to modify the Consolidated Decree. This Court has recognized and sought to discourage such forum-shopping. *See Agency Holding Corp. v. Malley-Duff Assocs., Inc.*, 483 U.S. 143, 154 (1987) (preferring a uniform federal statute of limitations for civil RICO claims because using state periods “would present the danger of forum shopping”); *Walker v. Armco Steel Corp.*, 446 U.S. 740, 744 (1980) (discussing how *Erie R. Co. v. Tompkins*, 304 U.S. 64 (1938), reversed a prior doctrine that “had led to the undesirable result of . . . forum shopping.”).

All of this can—and should—be avoided by first deciding the jurisdictional question. If the district court lacked jurisdiction, there is no need for this Court to address the breach-of-trust issue.

CONCLUSION

The judgment below should be reversed.

Respectfully submitted,

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