

Nos. 21-1484 & 22-51

In the Supreme Court of the United States

STATE OF ARIZONA, ET AL., PETITIONERS

v.

NAVAJO NATION, ET AL.

DEPARTMENT OF THE INTERIOR, ET AL., PETITIONERS

v.

NAVAJO NATION, ET AL.

*ON WRITS OF CERTIORARI TO THE UNITED STATES COURT
OF APPEALS FOR THE NINTH CIRCUIT*

**BRIEF OF WESTERN WATER USERS AND
TRADE ASSOCIATIONS AS *AMICI CURIAE*
IN SUPPORT OF PETITIONERS**

JEREMY C. MARWELL
Counsel of Record
MATTHEW X. ETCHEMENDY
VINSON & ELKINS LLP
*2200 Pennsylvania Ave.,
NW, Suite 500 West
Washington, DC 20037
(202) 639-6500
jmarwell@velaw.com*

*Counsel for Amici Curiae
[Additional counsel listed on signature page]*

TABLE OF CONTENTS

	Page
Table Of Authorities.....	II
Interest Of <i>Amici Curiae</i>	1
Introduction And Summary Of Argument	3
Argument	5
I. Reliable And Secure Water Rights Are Crucial To The Social, Economic, And Legal Health Of The West.....	5
II. If The Navajo Nation’s Lawsuit Is Allowed To Proceed, Other Users’ Water Rights Will Necessarily Be Curtailed Or At Least Thrown Into Doubt.	13
III. Recognizing Breach-Of-Trust Claims For Unquantified Rights Like The Navajo Nation’s Could Threaten The Stability Of Water Rights Elsewhere In The West, And Is Unnecessary To Provide Pathways For Tribes To Assert Their Claims.....	22
Conclusion.....	26

II

TABLE OF AUTHORITIES

Cases:	Page(s)
<i>Arizona v. California</i> , 373 U.S. 546 (1963).....	11, 16, 17
<i>Arizona v. California</i> , 460 U.S. 605 (1983).....	<i>passim</i>
<i>Arizona v. California</i> , 547 U.S. 150 (2006).....	14
<i>Arizona v. San Carlos Apache Tribe of Arizona</i> , 463 U.S. 545 (1983).....	12
<i>Audubon Soc’y of Portland v. Haaland</i> , 40 F.4th 967 (9th Cir. 2022)	23
<i>Colorado River Water Conservation Dist. v.</i> <i>United States</i> , 424 U.S. 800 (1976).....	10, 12
<i>Hawkins v. Haaland</i> , 991 F.3d 216 (D.C. Cir. 2021)	23
<i>Navajo Nation v. Dep’t of the Interior</i> , 876 F.3d 1144 (9th Cir. 2017).....	14, 15
<i>Pac. Live Stock Co. v. Lewis</i> , 241 U.S. 440 (1916).....	10
<i>United States v. New Mexico</i> , 438 U.S. 696 (1978).....	14
<i>Winters v. United States</i> , 207 U.S. 564 (1908).....	15
Statutes:	
43 U.S.C. § 617	16
43 U.S.C. § 617d	17

III

Statutes—Continued:	Page(s)
43 U.S.C. § 666(a)	12
43 U.S.C. § 1521	17
Arizona Water Settlements Act, Pub. L. No. 108-451, § 104(c)(1)(A), 118 Stat. 3478, 3490 (2004).....	19
Other Authorities:	
<i>About Us</i> , U.S. Bureau of Reclamation, https://tinyurl.com/2p8czkrp	8
<i>About</i> , Cent. Ariz. Project, https://tinyurl.com/574b2nfx	19
Abrahm Lustgarten, <i>As Colorado River Dries, the U.S. Teeters on the Brink of Larger Water Crisis</i> , ProPublica (Aug. 25, 2022), https://tinyurl.com/2mjerj5r	9
Andrew Fahlund, Min L. Janny Choy & Leon Szeptycki, <i>Water in the West</i> , 6 Calif. J. Pol. & Pol’y 61 (2014), https://tinyurl.com/3tram5kd	6, 7, 8, 9
Annie Snider, <i>Drought Forces First Water Cuts on the Colorado River. They’re Just the Beginning</i> , Politico (Aug. 16, 2021), https://tinyurl.com/bdetz3r6	9
Anthony Dan Tarlock, <i>Law of Water Rights and Resources</i> (Aug. 2022 Update)	11, 12

IV

Other Authorities—Continued:	Page(s)
B. I. Cook et al., <i>Uncertainties, Limits, and Benefits of Climate Change Mitigation for Soil Moisture Drought in Southwestern North America</i> , 9 <i>Earth’s Future</i> (2021), https://tinyurl.com/4jm4xy3h	10
<i>Boulder Canyon Project Act (1928)</i> , Nat’l Archives (last reviewed Feb. 8, 2022), https://tinyurl.com/2tr3b5r2	17
<i>CAP Subcontracting Status Report</i> , Cent. Ariz. Project (Oct. 1, 2022), https://tinyurl.com/bdzyw892	19
Cent. Ariz. Project, <i>Colorado River Shortage: 2022 Fact Sheet</i> , https://tinyurl.com/f7yuwnrf	20
<i>Central Arizona Project</i> , U.S. Bureau of Reclamation, https://tinyurl.com/ypmxxn4m	18
Charles V. Stern & Pervaze A. Sheikh, Cong. Rsch. Serv., R45546, <i>Management of the Colorado River: Water Allocations, Drought, and the Federal Role</i> (2022), https://tinyurl.com/5e8trt3k	9, 10, 16
Chelsea Harvey, <i>Western ‘Megadrought’ Is the Worst in 1,200 Years</i> , <i>Sci. Am.</i> (Feb. 15, 2022), https://tinyurl.com/2p8fn9uf	9
Conf. of W. Att’ys Gen., <i>American Indian Law Deskbook</i> (May 2022 Update)	12
DeEtte Person, <i>A Matter of Priorities</i> , Cent. Ariz. Project (Mar. 17, 2021), https://tinyurl.com/db23wjjs	15

Other Authorities—Continued:	Page(s)
<i>Enacted Indian Water Rights Settlements</i> , U.S. Dep't of the Interior (Dec. 2021), https://tinyurl.com/yucja2en	24
<i>Federal Reserved Water Rights and State Law Claims</i> , U.S. Dep't of Justice (updated Jan. 3, 2022), https://tinyurl.com/4c3y58pb	23
<i>Historical Population Change Data (1910-2020)</i> , U.S. Census Bureau (Apr. 26, 2021), https://tinyurl.com/2ytxuew9	6
<i>Klamath River Basin</i> , NOAA Fisheries (last updated Apr. 25, 2022), https://tinyurl.com/56p5dnju	23
<i>Klamath River Basin</i> , Water Educ. Found., https://tinyurl.com/2vtwtdmc	23
<i>Lake Mead Keeps Dropping</i> , NASA Earth Observatory, https://tinyurl.com/wtye69dt	20
<i>Lake Mead</i> , Nat'l Park Serv. (last updated Nov. 29, 2022), https://tinyurl.com/mvnjryjt	17
<i>Law of the River</i> , Cent. Ariz. Project, https://tinyurl.com/2x95yrnz	18
<i>Law of the River</i> , Colo. River Water Users Ass'n, https://tinyurl.com/2vx7c6w3	17
<i>Lean & Water Toolkit: Chapter 2</i> , U.S. EPA (last updated Sept. 29, 2022), https://tinyurl.com/5esxtmcp	7
Marley Shebala, <i>Council Votes Down Proposed Water Rights Settlement</i> , Navajo Times (July 5, 2012), https://tinyurl.com/3hsde7f5	24

VI

Other Authorities—Continued:	Page(s)
Megan Stubbs, Cong. Rsch. Serv., R44158, <i>Irrigation in U.S. Agriculture: On-Farm Technologies and Best Management Practices</i> (2016), https://tinyurl.com/2p8ne876	8
<i>Navajo Nation Water Rights Settlement</i> , New Mexico Off. of the State Eng’r, https://tinyurl.com/mpkjrmd8	25
<i>New AFBF Survey Shows Drought’s Increasing Toll on Farmers and Ranchers</i> , Am. Farm Bureau Found. (Aug. 14, 2022), https://tinyurl.com/46nyvuuz	5, 6
Press Release, U.S. Dep’t of the Interior, <i>Interior Department Announces Actions to Protect Colorado River System, Sets 2023 Operating Conditions for Lake Powell and Lake Mead</i> (Aug. 16, 2022), https://tinyurl.com/5djh69mc	21
Press Release, U.S. Dep’t of the Interior, <i>President Biden’s Bipartisan Infrastructure Law Funds Newly Executed Navajo-Utah Water Rights Settlement</i> (May 27, 2022), https://tinyurl.com/bdwcppud	25
Shannon Hall, <i>A Nation Divided: Arid/Humid Climate Boundary in U.S. Creeps Eastward</i> , Sci. Am. (Apr. 27, 2018), https://tinyurl.com/yl6993e4	6, 7
Sharon B. Megdal, <i>Water Policy Options as Arizona Adapts to a Drier Colorado River: A Perspective</i> , 37 Renewable Res. J. 2 (2022), https://tinyurl.com/34msx8mz	18

VII

Other Authorities—Continued:	Page(s)
Stephen Most, <i>Klamath Basin Project (1906)</i> , Oregon Encyclopedia (last updated July 20, 2022), https://tinyurl.com/56v8amer	23
Steven Sarabia, <i>Historic Water Cuts Set to Hit Arizona on Jan. 1</i> , KOLD News (Dec. 5, 2022), https://tinyurl.com/5863ffue	21
T.R. Witcher, <i>The Storied History of the Central Arizona Project</i> , Am. Soc’y of Civ. Eng’rs (Mar. 1, 2022), https://tinyurl.com/mpzap4kv	17, 18
<i>The California Gold Rush</i> , Nat’l Park Serv. (last updated Feb. 24, 2020), https://tinyurl.com/y98b9yrc	6
<i>The Top 5 Mineral-Producing States</i> , U.S. Geological Survey (Apr. 14, 2017), https://tinyurl.com/4sjvt6bs	6
<i>Tribal Members Question Navajo-Hopi Settlement Act</i> , Ariz. Water Res., Spring 2012, at 5, https://tinyurl.com/2z66dkc7	24
<i>Tribal Water Rights</i> , Cent. Ariz. Project, https://tinyurl.com/5ypykjae	19
U.S. Census Bureau, <i>Census Regions & Divisions of the United States</i> , https://tinyurl.com/mt4unpru	7
U.S. Energy Info. Admin., <i>Primary Energy Production Estimates in Trillion Btu, 2020</i> (released June 24, 2022), https://tinyurl.com/2njcu7rb	6
<i>Water in the West</i> , Nat’l Park Serv., https://tinyurl.com/3mbv7aaj	7

VIII

Other Authorities—Continued:	Page(s)
<i>World War II-Era Boat Emerges from Shrinking Lake Mead</i> , Associated Press (July 1, 2022), https://tinyurl.com/2nywwc7j	20

INTEREST OF *AMICI CURIAE*¹

Amici curiae are associations of western water users and trade associations, representing a broad coalition of water user groups and others with an interest in water rights in the western United States. *Amici* and their members represent the full spectrum of economic sectors, from agriculture to homebuilding, and from energy to mining. *Amici* and their members also include a wide range of entities involved in delivering water and electricity to agricultural, municipal, and industrial customers throughout the western United States.

Amici curiae are: the Agribusiness & Water Council of Arizona; the American Exploration & Mining Association; the Arizona Cattle Feeders' Association; the Arizona Chamber of Commerce and Industry; the Arizona Farm Bureau; the Arizona Farm & Ranch Group; the Arizona Mining Association; the Arizona Rock Products Association; the California Farm Bureau; the Colorado Chamber of Commerce; the Family Farm Alliance; the Home Builders Association of Central Arizona; the Idaho Water Users Association; the Irrigation and Electrical Districts Association of Arizona, Inc.; the Klamath Water Users Association; the Little Colorado Water Conservation District; the National Water Resources Association; the New Mexico Chamber of Commerce; the New Mexico Mining Association;

¹ No counsel for any party authored this brief in whole or in part, and no party or counsel for a party made a monetary contribution intended to fund the preparation or submission of this brief. No entity or person aside from *amici curiae*, their members, and their counsel made any monetary contribution intended to fund the preparation or submission of this brief. All parties were given notice and consented to the filing of this brief.

the North Gila Valley Irrigation and Drainage District; the Unit B Irrigation and Drainage District; the Washington State Water Resources Association; the Wellton Mohawk Irrigation and Drainage District; the Yuma County Agricultural Water Coalition, Inc.; the Yuma County Water Users' Association; the Yuma Irrigation District; and the Yuma Mesa Irrigation and Drainage District.

This case is critically important to *amici* and their members because the questions presented have serious ramifications for the certainty of existing and future water rights, and the stability of the legal framework used to establish and govern the same, in the Colorado River Basin and in the West more broadly. Water users across all sectors rely on water rights established over time through processes that allow input and participation by all stakeholders. Stability and predictability in the legal processes used to establish water rights are necessary to respect the vast investments and innumerable private and public decisions made in reliance on existing entitlements, and to facilitate future investments and economic growth. The Ninth Circuit's decision threatens to undermine the certainty of water rights not only in the Colorado River Basin, but also throughout other water-scarce regions of the United States more broadly—an issue of critical concern to *amici* and their members.

Amici have a strong interest in the sound development of water law and appurtenant doctrines. *Amici* present this brief in support of fair, stable, inclusive, and predictable processes for establishing water rights, and to highlight the adverse consequences for water users in Arizona, in the Colorado River Basin,

and in the West more broadly if the Ninth Circuit's decision is not reversed.

INTRODUCTION AND SUMMARY OF ARGUMENT

1. This case raises the question whether the Navajo Nation can seek to secure additional rights to Colorado River water through the novel procedural mechanism of a breach-of-trust claim against the United States, grounded solely in implied treaty rights. That issue is critically important to water users across the West, and especially in the Colorado River Basin. Reliable and secure water rights are crucial to the social, economic, and legal health of the West. In the arid West and other water-scarce regions of the country, states and private water users need to know that they can depend on their water rights on a prospective basis, or risk jeopardizing existing investments. Given the need to definitively resolve competing claims to limited water resources, and the highly interdependent relationships between different parties' rights, actions seeking the allocation of water are best conducted in unified proceedings, pursuant to clear procedures that provide all interested parties an opportunity to participate. Here, that forum has primarily been the decades-long *Arizona v. California* proceeding in this Court. But the Navajo Nation seeks to circumvent this Court's Consolidated Decree and its retained jurisdiction by attempting to secure additional water rights through a procedural end-run: a breach-of-trust suit against the government in district court. If its lawsuit were successful, it would inevitably reduce the amount of water available to other users in Arizona, with cascading negative consequences for the stability of water

rights in that state and elsewhere. The Navajo Nation's claims for additional water rights should be pursued either through traditional procedural avenues or negotiated settlement—not a novel and legally destabilizing breach-of-trust suit.

2. The reduction of available water would necessarily come at the expense of existing allocation holders, and in particular existing users who receive water from the Central Arizona Project, the system which delivers water to Maricopa, Pinal, and Pima counties, serving more than 5 million people (more than 80% of the state's population) and providing water for numerous industrial and agricultural uses that are critically important to the state's economy. This would have severe negative consequences for Arizona, its residents, its businesses, and its agricultural and industrial sectors. Worse, the serious and increasing shortage conditions on the River will make any new allocation to the Navajo Nation even more disruptive to existing users.

3. In addition to the effects in Arizona, a decision from this Court upholding the Ninth Circuit's approach would threaten the certainty and stability of water rights elsewhere in the West and in other water-scarce regions nationwide. As the Federal Petitioners have observed, allowing the Navajo Nation's suit to proceed would invite additional suits against the government premised on similar asserted trust duties and seeking to unsettle existing water rights elsewhere. This Court should not endorse that novel and disruptive approach. Nor is it necessary to do so to allow tribes full and fair opportunities to assert their water-rights claims. Traditional litigation avenues, as well

as negotiated and Congressionally approved settlements, provide effective mechanisms for resolving tribal water-rights claims through procedures that allow all interested stakeholders to participate.

The Court should reverse the court of appeals' judgment.

ARGUMENT

I. Reliable And Secure Water Rights Are Crucial To The Social, Economic, And Legal Health Of The West.

As this Court has recognized, “[c]ertainty of rights is particularly important with respect to water rights in the Western United States.” *Arizona v. California*, 460 U.S. 605, 620 (1983). “The development of that area” of the country—on which the entire United States now depends in a broad range of respects, from its agricultural output to its abundant natural resources—“would not have been possible without adequate water supplies in an otherwise water-scarce part of the country.” *Ibid.*

Today, the West accounts for a substantial fraction of the United States' economic output. For example, “the 17 states including and north of Texas, up along the Central Plains to North Dakota and west to California * * * support[] nearly half of the nation's \$364 billion” in agricultural production by value. *New AFBF Survey Shows Drought's Increasing Toll on Farmers and Ranchers*, Am. Farm Bureau Found. (Aug. 14, 2022), <https://tinyurl.com/46nyvuuz>. That includes 74% of beef cattle, 50% of dairy production,

over 80% of wheat production, and over 70% of vegetable, fruit, and tree nut production. *Ibid.*² The same states account for over half of primary energy production (including both fossil fuels and renewables). See U.S. Energy Info. Admin., *Primary Energy Production Estimates in Trillion Btu, 2020* (released June 24, 2022), <https://tinyurl.com/2njcu7rb>; accord Andrew Fahlund, Min L. Janny Choy & Leon Szeptycki, *Water in the West*, 6 Calif. J. Pol. & Pol’y 61, 92 (2014), <https://tinyurl.com/3tram5kd> (“Energy production has been a major part of the western economy for the past 100 years—oil production in Texas and California, coal mining in Montana and Wyoming, hydropower in the Columbia and Colorado River basins, uranium mining in Arizona.”). As for the West’s mineral wealth—itsself a subject of national folklore³—Arizona and Nevada’s copper, molybdenum, gold, silver, and stone resources make them the top mineral-producing states in the nation. *The Top 5 Mineral-Producing States*, U.S. Geological Survey (Apr. 14, 2017), <https://tinyurl.com/4sjvt6bs>. Once a sparsely populated frontier, the U.S. West saw its population grow tenfold from 1910-2020, a gain of over 70 million residents. See *Historical Population Change Data (1910-2020)*, U.S. Census Bureau (Apr. 26, 2021),

² These 17 states roughly correspond to the climatic boundary between the humid East and the arid West. See Shannon Hall, *A Nation Divided: Arid/Humid Climate Boundary in U.S. Creeps Eastward*, *Sci. Am.* (Apr. 27, 2018), <https://tinyurl.com/you6993e4> (Hall, *A Nation Divided*) (describing boundary and providing illustrative map).

³ See, e.g., *The California Gold Rush*, Nat’l Park Serv. (last updated Feb. 24, 2020), <https://tinyurl.com/y98b9yrc>.

<https://tinyurl.com/2ytxuew9>; cf. U.S. Census Bureau, *Census Regions & Divisions of the United States*, <https://tinyurl.com/mt4unpru> (last visited Dec. 26, 2022) (map showing U.S. Census regions).

Unlike in the East and other parts of the country where water is generally abundant, water is a scarce resource in much of the West. “To travel westward across the U.S. is to experience a striking landscape metamorphosis” to a far more arid landscape, a “divide * * * so stark airline passengers can see it.” Hall, *A Nation Divided*, *supra*. “The West seemed so parched and desolate to 19th-century explorers that maps labeled it the Great American Desert.” *Water in the West*, Nat’l Park Serv., <https://tinyurl.com/3mbv7aaj> (last visited Dec. 26, 2022). Unlocking the region’s potential has always required a solution to this “defining problem,” *ibid.*, because practically no productive activities are possible without adequate water—for example, water is essential for agriculture, manufacturing, mining, and the extraction and use of energy resources, to name just a few. Cf. *Lean & Water Toolkit: Chapter 2*, U.S. EPA (last updated Sept. 29, 2022), <https://tinyurl.com/5esxtmcp> (listing, among “water-intensive industries,” agriculture, electric power, forest products, and metals/mining, among others); Fahlund et al., 6 Calif. J. Pol. & Pol’y at 92-94 (discussing water intensity of energy production, including oil and gas production, coal and uranium mining, biofuels production, and solar thermal electric power generation). Indeed, particularly in the arid regions of the Mountain West and California, agricultural output *overwhelmingly*—on the order of 90 to 100%, from

state to state—comes from irrigated farms. See Megan Stubbs, Cong. Rsch. Serv., R44158, *Irrigation in U.S. Agriculture: On-Farm Technologies and Best Management Practices* 2 fig. 1 (2016), <https://tinyurl.com/2p8ne876>. And, of course, water is a basic necessity of daily life for all people, and its availability shapes population growth and development patterns.

Thus, the development of the West has historically been marked by the need for extensive and careful water management, both from a physical-infrastructure standpoint and from the standpoint of sound *legal* structures. Large-scale public projects and investments, notably including the construction of dams, powerplants, and canals by the Bureau of Reclamation, have been instrumental in allowing the settlement and economic development of the West. See *About Us*, U.S. Bureau of Reclamation, <https://tinyurl.com/2p8czkrp> (last visited Dec. 26, 2022). And because water has always been a limited and crucial resource in the region, there has always been a corresponding need to adjudicate competing and often inconsistent demands for access to limited water supplies—with many of “the West’s largest and most storied river basins” subject to “tremendous historic competition between upstream and downstream jurisdictions, competing industries, and competing demands served by major federal infrastructure projects.” Fahlund et al., 6 Calif. J. Pol. & Pol’y at 68. Moreover, states and private water users need to know that they can depend on their water rights on a prospective basis, or risk jeopardizing existing investments and undermining a willingness to deploy future

capital and resources. As a result, major rivers like the Colorado, Columbia, Rio Grande, and Missouri are “governed by complex interstate and even international agreements.” *Ibid.* In the case of the Colorado River, the “multiple compacts, federal laws, court decisions and decrees, treaties, contracts, and regulatory guidelines” governing allocation are known by the evocative shorthand “[t]he *Law of the River*.” Charles V. Stern & Pervaze A. Sheikh, Cong. Rsch. Serv., R45546, *Management of the Colorado River: Water Allocations, Drought, and the Federal Role* 4 n.13 (2022), <https://tinyurl.com/5e8trt3k> (Stern & Sheikh).

Though often discussed through a historical lens, the challenges presented by water scarcity in the West are still very much alive. This has been brought into stark relief by the recent “megadrought”—by some estimates, the worst in 1,200 years—which has “gripped the southwest U.S. for more than two decades.” Chelsea Harvey, *Western ‘Megadrought’ Is the Worst in 1,200 Years*, *Sci. Am.* (Feb. 15, 2022), <https://tinyurl.com/2p8fn9uf>. “Lake Mead and Lake Powell—two of the country’s largest reservoirs that provide water for millions of people—both reached record lows in 2021.” *Ibid.* This has already led to shortage declarations and water delivery cuts. See, e.g., Annie Snider, *Drought Forces First Water Cuts on the Colorado River. They’re Just the Beginning*, *Politico* (Aug. 16, 2021), <https://tinyurl.com/bdetz3r6>; Abraham Lustgarten, *As Colorado River Dries, the U.S. Teeters on the Brink of Larger Water Crisis*, *ProPublica* (Aug. 25, 2022), <https://tinyurl.com/2mjcrj5r>. Some modelers predict that climate change will increase the odds

of similar major drought events in the future—suggesting that water scarcity and concomitant management challenges will be a part of Western life for the foreseeable future. B. I. Cook et al., *Uncertainties, Limits, and Benefits of Climate Change Mitigation for Soil Moisture Drought in Southwestern North America*, 9 *Earth's Future* at 1 (2021), <https://tinyurl.com/4jm4xy3h>.⁴

Given the need to definitively resolve competing claims to limited water resources, and the “highly interdependent” relationships between different parties’ interests in the water-rights context, this Court has explained that “actions seeking the allocation of water * * * are best conducted in unified proceedings.” *Colorado River Water Conservation Dist. v. United States*, 424 U.S. 800, 819 (1976). “In such a proceeding the rights of the several claimants are so closely related that the presence of all is essential”; the requisite finality and repose cannot be achieved in “suits in which only a few of the claimants are present.” *Pac. Live Stock Co. v. Lewis*, 241 U.S. 440, 449 (1916).

Here, that forum has primarily been the decades-long *Arizona v. California* proceeding in this Court. That litigation began when Arizona filed a complaint against California to settle issues about Colorado River apportionments under the Boulder Canyon Project Act of 1928. See Stern & Sheikh at 5. “Later, Nevada, New Mexico, Utah, and the United States were

⁴ These recent drought conditions and shortages not only illustrate the general ongoing importance of a stable water-rights regime in the Colorado River Basin and in the West more broadly, but also accentuate the potential practical consequences of this *specific* litigation—as discussed further in Part II below.

added as parties either voluntarily or on motion.” *Arizona v. California*, 373 U.S. 546, 551 (1963). The United States sought “water rights on behalf of various federal establishments, including the reservations” of several Indian tribes. *Arizona v. California*, 460 U.S. at 608-609. Over decades—with the benefit of participation from this wide range of stakeholders, and an understanding of the competing claims and interests involved—this Court comprehensively adjudicated numerous issues regarding rights and entitlements to waters of the mainstream of the Colorado River in the Lower Basin, as recounted at greater length by the Petitioners. See State Pet’rs’ Br. 3-9; U.S. Br. 5-7. In recounting the history of efforts to “transform the erratic and often destructive flow of the Colorado River into a controlled and dependable water supply,” this Court acknowledged the long recognition that viable solutions could not be found “on a farmer-by-farmer, group-by-group, or even state-by-state basis.” *Arizona v. California*, 373 U.S. at 554.⁵

⁵ Although the *Arizona v. California* litigation has been the primary forum for unified adjudication of issues related to the mainstream of the Colorado River in the Lower Basin (and appropriately so, given the interstate nature of the stream), in other contexts, the “traditional[]” forum for adjudicating water rights is state court. Anthony Dan Tarlock, *Law of Water Rights and Resources* § 7:1 (Aug. 2022 Update). In such comprehensive state-court proceedings, the goal is to adjudicate “all respective water rights on a stream system”; such actions “can involve thousands of parties” and provide all interested parties with notice and an opportunity to participate. See *id.* §§ 7:2, 7:10, 7:12. Under the McCarran Amendment, which waives the United States’ sover-

The Navajo Nation’s breach-of-trust suit threatens to dramatically undermine the principles of certainty and unified resolution this Court has emphasized. “A major purpose” of the long-running *Arizona v. California* litigation in this Court “has been to provide the necessary assurance to states of the Southwest and to various private interests, of the amount of water they can anticipate to receive from the Colorado River system.” *Arizona v. California*, 460 U.S. at 620. Yet here the Navajo Nation would circumvent this Court’s Consolidated Decree and its retained jurisdiction by attempting to secure additional water rights—which will necessarily reduce the amount of water available to other users in Arizona, see *infra* Part II—through a breach-of-trust suit against the government in district court. The Navajo Nation’s claims fall within this Court’s exclusive (and retained) jurisdiction, as the

eign immunity in state water-rights adjudications, federal interests are also litigated and resolved in such comprehensive state-court adjudications. *Id.* § 7:3; see 43 U.S.C. § 666(a). This Court has explained that the “consent to jurisdiction given by the McCarran Amendment bespeaks a policy that recognizes the availability of comprehensive state systems for adjudication of water rights” as the proper “means for achieving” unified, fair, and consistent adjudication of water rights. *Colorado River Water Conservation Dist.*, 424 U.S. at 819. Many state-court water rights adjudications include claims asserted by Indian tribes, or by the United States on behalf of tribes. See Conf. of W. Att’ys Gen., *American Indian Law Deskbook* § 8:13 (May 2022 Update) (noting availability of tribal intervention in state water-rights adjudications); accord *Arizona v. San Carlos Apache Tribe of Arizona*, 463 U.S. 545, 569 (1983) (“The McCarran Amendment * * * allows and encourages state courts to undertake the task of quantifying Indian water rights in the course of comprehensive water adjudications.”); cf. U.S. Br. 8-9 & n.2.

State Petitioners forcefully explain. See State Pet'rs' Br. 18-26; Colorado Br. 11-16. Worse, its suit is based on the assertion of “amorphous * * * duties” (U.S. Br. 33) that have no grounding in any clear positive-law source. And the approach it contemplates, with the federal government developing a “plan” through unspecified processes, appears to involve unilateral and internal administrative decisionmaking wherein other parties' participation rights would be unclear at best, unlike in traditional comprehensive adjudications and settlements. The full scope of the consequences and implications, if the Navajo Nation's suit were successful, would be far reaching and unpredictable—even while certain near-term adverse practical implications are clear. The remainder of this brief describes some of those adverse consequences, which are of particular concern to *amici* and their members.

II. If The Navajo Nation's Lawsuit Is Allowed To Proceed, Other Users' Water Rights Will Necessarily Be Curtailed Or At Least Thrown Into Doubt.

One need only look to the facts of this case to see why the Navajo Nation's procedural end-run—i.e., its effort to secure additional water rights through the novel mechanism of a breach-of-trust lawsuit against the United States—would grievously undermine the stability of water rights in Arizona, with potentially severe consequences for other users. As this Court has observed, “[i]f there is no surplus of water in the Colorado River, an increase in federal reserved rights will require a ‘gallon-for-gallon reduction in the amount of

water available for water-needy state and private appropriators.” *Arizona v. California*, 460 U.S. at 621 (quoting *United States v. New Mexico*, 438 U.S. 696, 705 (1978)). Under conditions of scarcity, there is no avoiding the physical reality that “claims to water for use on federal reservations inescapably vie with other public and private claims for the limited quantities to be found in the rivers and streams.” *United States v. New Mexico*, 438 U.S. at 699.

Here, the Navajo Nation seeks to force the Federal Petitioners to “develop a plan to secure” additional water for the Nation, and to “exercise their authorities, including those for the management of the Colorado River,” to advance (or at least “not interfere”) with that plan. U.S. Pet. App. 17a. It appears to be common ground that any additional water secured for the Navajo Nation through this litigation would come from the mainstream of the Colorado River and that the provision of any mainstream water to the Navajo reservation in Arizona would be satisfied out of Arizona’s existing apportionment. See *Arizona v. California*, 547 U.S. 150, 153, 156 (2006) (decree providing that “[c]onsumptive use from the mainstream within a State shall include,” *inter alia*, “consumptive uses made by * * * the United States for the benefit of Indian reservations and other federal establishments within the State,” and that “any mainstream water consumptively used within a State shall be charged to its apportionment, regardless of the purpose for which it was released”); *Navajo Nation v. Dep’t of the Interior*, 876 F.3d 1144, 1165 (9th Cir. 2017) (in prior decision in the instant litigation, quoting Navajo Nation’s assertion that “[t]he Nation’s use of mainstream water

in the Lower Basin will be charged against Arizona’s Lower Basin apportionment”). And the parties to this case appear to agree “that *if* the Nation obtained decreed rights in the Lower Colorado Basin, that entitlement would trump all claims with a later priority date, regardless of whether that water has been developed or relied upon by third parties with junior priority dates,” *Navajo Nation*, 876 F.3d at 1163 (internal quotation marks omitted), pursuant to the doctrine of *Winters v. United States*, 207 U.S. 564 (1908); cf. *Navajo Nation*, 876 F.3d at 1155 (stating that *Winters* rights “vest on the original date of withdrawal of the land and trump the rights of later appropriators”).

The reduction of available water would necessarily come at the expense of existing allocation holders, and in particular existing users who receive water from the Central Arizona Project, the system which delivers water to Maricopa, Pinal, and Pima counties, serving more than 5 million people (more than 80% of the state’s population) and providing water for numerous industrial and agricultural uses that are critically important to the state’s economy. Cf. DeEtte Person, *A Matter of Priorities*, Cent. Ariz. Project (Mar. 17, 2021), <https://tinyurl.com/db23wjjs>. This would have severe negative consequences for Arizona, its residents, its businesses, and its agricultural and industrial sectors.

An explanation of the interrelated legal authorities governing water allocation from the Colorado River shows why this would occur—and illustrates the cascading effects on other water users in Arizona if the Navajo Nation’s novel breach-of-trust suit were successful.

Pursuant to the Colorado River Compact, 7.5 million acre-feet per year are allocated to the “Upper Basin” states (Colorado, New Mexico, Utah, and Wyoming), and 7.5 million acre-feet per year are allocated to the “Lower Basin” states (Arizona, California, and Nevada). See Stern & Sheikh at 4. Pursuant to a separate treaty, 1.5 million acre-feet per year are allocated to Mexico. *Id.* at 6. Congress statutorily apportioned Colorado River mainstream waters between the Lower Basin states in the Boulder Canyon Project Act, apportioning 2.8 million acre-feet to Arizona, 4.4 million acre-feet to California, and 300,000 acre-feet to Nevada. *Id.* at 5.⁶ This Court confirmed that apportionment in *Arizona v. California*, 373 U.S. at 560 (Boulder Canyon Project Act constituted “a complete statutory apportionment intended to put an end to the long-standing dispute over Colorado River waters” among Lower Basin states); see *id.* at 564-565 (“Congress in passing the [Boulder Canyon] Project Act intended to and did create its own comprehensive scheme for the apportionment among California, Arizona, and Nevada of the Lower Basin’s share of the mainstream waters of the Colorado River * * * .”); cf. Stern & Sheikh at 5-6 (summarizing litigation).

The Boulder Canyon Project Act also authorized the Department of the Interior to construct a dam and a reservoir, 43 U.S.C. § 617—what would become the Hoover Dam and resultant reservoir, Lake Mead. Cf.

⁶ Arizona was also allocated one-half of any surplus (with the other half to California). See *Arizona v. California*, 373 U.S. at 565. Under foreseeable circumstances, the likelihood of any surplus being available to Arizona is extraordinarily slim, due to the long-running and worsening drought conditions.

Boulder Canyon Project Act (1928), Nat'l Archives (last reviewed Feb. 8, 2022), <https://tinyurl.com/2tr3b5r2> (describing authorization and construction of Hoover Dam); *Lake Mead*, Nat'l Park Serv. (last updated Nov. 29, 2022), <https://tinyurl.com/mvunjryjt> (describing and picturing Lake Mead reservoir). Crucially, Section 5 of that Act authorized the Secretary of the Interior to enter into “permanent service” contracts “for the storage of water in [Lake Mead] and for the delivery thereof.” 43 U.S.C. § 617d; see *Arizona v. California*, 373 U.S. at 561. It further provided that “[n]o person shall have or be entitled to have the use for any purpose of the water stored” in Lake Mead—i.e., Lower Basin mainstream water—“except by contract made as herein stated.” 43 U.S.C. § 617d. Consistent with Congress’s statutory allocations, in 1944 Arizona entered into a Section 5 contract for the delivery of 2.8 million acre-feet. See *Law of the River*, Colo. River Water Users Ass’n, <https://tinyurl.com/2vx7c6w3> (last visited Dec. 26, 2022) (describing history).

In 1968, Congress—through the Colorado River Basin Project Act—then authorized the construction of the Central Arizona Project (“CAP”). See 43 U.S.C. § 1521. This “complex system of aqueducts, tunnels, pumping stations, underground siphons, and reservoirs” transports “more than 1.4 million acre-ft each year” roughly 335 miles, bringing a major portion of Arizona’s Colorado River water “to approximately 1 million acres of land in the heart of Arizona.” T.R. Witcher, *The Storied History of the Central Arizona Project*, Am. Soc’y of Civ. Eng’rs (Mar. 1, 2022), <https://tinyurl.com/mpzap4kv>. A critical infrastructure project that has been instrumental to Arizona’s

striking population growth since its completion in 1993, see *ibid.*, the CAP serves three counties in Central Arizona—Maricopa, Pima, and Pinal Counties—which are home to the major population centers of Phoenix and Tucson. See *Central Arizona Project*, U.S. Bureau of Reclamation, <https://tinyurl.com/ypmxxn4m> (last visited Dec. 26, 2022).

Of crucial importance here, the Colorado River Basin Project Act assigned junior priority to the CAP in comparison to pre-1968 Section 5 contracts, effectively putting the CAP behind not only all water users in California, but most of the non-CAP Colorado River water users in Arizona. See Sharon B. Megdal, *Water Policy Options as Arizona Adapts to a Drier Colorado River: A Perspective*, 37 *Renewable Res. J.* 2, 2 (2022), <https://tinyurl.com/34msx8mz> (“[I]n order to secure approval of the 1968 Colorado River Basin Project Act authorizing CAP construction, Arizona had to agree that water delivered through the CAP canal would be junior in priority to California’s Colorado River water deliveries.”); *Law of the River*, Cent. Ariz. Project, <https://tinyurl.com/2x95yrnz> (last visited Dec. 26, 2022) (entry for 1968 explaining that Colorado River Basin Project Act “[c]reated a junior priority in the Lower Basin for CAP water and for any new Arizona contracts entered after 1968”).

In sum, Arizona receives 2.8 million acre-feet per year of Lower Basin mainstream water (less in shortage years), nearly all of which is already allocated to existing holders of Section 5 contracts. Should the Navajo Nation secure a right to waters from the Colorado River mainstream, any quantities it receives will

come from that 2.8-million acre-foot apportionment. And because the CAP holds junior priority among Colorado River contractors in Arizona, it—and its users—will be the entity directly affected by an allocation to the Navajo Nation.

The consequences of any resulting shortfall for the CAP would be dire. The CAP is allocated 1,415,000 acre-feet of Colorado River water in non-shortage years. See Arizona Water Settlements Act, Pub. L. No. 108-451, § 104(c)(1)(A), 118 Stat. 3478, 3490 (2004). That water is distributed to subcontractors, including municipalities, private water companies, and industrial users. See generally *CAP Subcontracting Status Report*, Cent. Ariz. Project (Oct. 1, 2022), <https://tinyurl.com/bdzyw892>. These subcontracts amount to more than 600,000 acre-feet of water. Another 46% of the CAP water supply “is, or will be, permanently allocated to Arizona Indian Tribes.” *Tribal Water Rights*, Cent. Ariz. Project, <https://tinyurl.com/5ypykjae> (last visited Dec. 26, 2022). All told, the CAP serves “[m]ore than 5 million people, or more than 80% of the state’s population.” *About*, Cent. Ariz. Project, <https://tinyurl.com/574b2nfx> (last visited Dec. 26, 2022). As a result, interference with CAP water users’ rights would strike at the very heart of Arizona’s social and economic livelihood.

Worse, the serious and increasing shortage conditions on the River will make any new allocation to the Navajo Nation even more disruptive to existing users. As noted above, the West is currently experiencing a “megadrought,” and the Colorado River Basin has been particularly hard-hit. See *supra* Part I. These

conditions would present serious challenges in the best of circumstances; the unexpected creation of new allocations for the Navajo Nation will only further harm existing users' ability to weather these ongoing shortages.

The cumulative effects of this long-running drought have severely reduced the amount of water stored in Lake Mead and Lake Powell, the two major reservoirs that hold water for eventual delivery to Section 5 contract holders in the Lower Basin. As of July 2022, Lake Mead was “filled to just 27 percent of capacity.” *Lake Mead Keeps Dropping*, NASA Earth Observatory, <https://tinyurl.com/wtye69dt> (last visited Dec. 26, 2022). A stark “bathtub ring” of mineralized, formerly underwater lakeshore areas stands as a striking visual marker of the declining water levels, *ibid.*, and decades-old sunken boats (as well as other archaeological detritus) have even emerged as the waters recede. *World War II-Era Boat Emerges from Shrinking Lake Mead*, Associated Press (July 1, 2022), <https://tinyurl.com/2nywwc7j>.

This worsening situation led to the first declared shortage on the Lower Colorado River in 2021—a “Tier 1” shortage that reduced Arizona’s Colorado River supply by 18% for 2022. Cent. Ariz. Project, *Colorado River Shortage: 2022 Fact Sheet* 1, <https://tinyurl.com/f7yuwnrf> (last visited Dec. 26, 2022). In light of the priority scheme explained above, these reductions were “borne almost entirely by the CAP system,” and the Tier 1 reductions “constitute about 30% of CAP’s normal supply.” *Ibid.* But conditions grew worse still: in 2022, the Secretary of the

Interior declared a “Tier 2a” shortage, reducing Arizona’s allocation by 21%. Press Release, U.S. Dep’t of the Interior, *Interior Department Announces Actions to Protect Colorado River System, Sets 2023 Operating Conditions for Lake Powell and Lake Mead* (Aug. 16, 2022), <https://tinyurl.com/5djv69mc>. And “CAP reports current hydrologic modeling indicates the Colorado River Basin will be in deeper levels of shortage in the coming years.” Steven Sarabia, *Historic Water Cuts Set to Hit Arizona on Jan. 1*, KOLD News (Dec. 5, 2022), <https://tinyurl.com/5863ffue>.

Simply put, in an era of drought-driven shortages and cutbacks that are already severely impacting Arizona (and particularly CAP water users), any allocation to the Navajo Nation, and the resulting “gallon-for-gallon” loss to existing users, would have an even greater impact than it otherwise would. *Arizona v. California*, 460 U.S. at 621 (citation omitted). Under such acute scarcity conditions, the pressing need for water rights to be resolved through comprehensive, fair, and centralized processes is even stronger; such a severely taxed system could be pushed to the breaking point if the Navajo Nation and other tribes can inject uncertainty and instability through procedurally novel breach-of-trust claims against the federal government.

III. Recognizing Breach-Of-Trust Claims For Unquantified Rights Like The Navajo Nation's Could Threaten The Stability Of Water Rights Elsewhere In The West, And Is Unnecessary To Provide Pathways For Tribes To Assert Their Claims.

In addition to the effects in Arizona, a decision from this Court upholding the Ninth Circuit's approach would threaten the certainty and stability of water rights elsewhere in the West and in other water-scarce regions nationwide.

Here, the Nation seeks to pursue a novel breach-of-trust action to force the United States to secure additional water rights for it, based on amorphous implied duties. "[T]he urge to [l]itigate" such claims, "once loosed, will not be easily cabined." *Arizona v. California*, 460 U.S. at 625. As the United States has observed, "[t]he sources on which the [Ninth Circuit] relied are hardly unique to the Navajo Nation"; if the decision below stands, "any *Winters* right reserved for a tribe [in connection with federal reservation of public lands] could effectively become a source of affirmative and potentially broad-ranging duties owed by the government," thus "invit[ing] additional suits against the government premised on those asserted duties" and seeking to unsettle existing water rights elsewhere. U.S. Pet. 25. In so doing, the Ninth Circuit departed sharply from this Court's teachings, as the Petitioners persuasively explain. See U.S. Br. 20-21; State Pet'rs' Br. 26-29.

The Colorado River Basin is not the only area that has been subject to damaging curtailments and litigation over water rights in which claims of implied tribal

rights have arisen. As just one example, consider the Klamath River Basin in southern Oregon and northern California. Cf. *Klamath River Basin*, NOAA Fisheries (last updated Apr. 25, 2022), <https://tinyurl.com/56p5dnju>. The Klamath Project, a Bureau of Reclamation water management project, supplies water to approximately 200,000 acres of irrigated farmland, mostly from the Klamath River system. See *Audubon Soc’y of Portland v. Haaland*, 40 F.4th 967, 974 (9th Cir. 2022). That region, too, has sometimes struggled with droughts and curtailments. See, e.g., Stephen Most, *Klamath Basin Project (1906)*, Oregon Encyclopedia (last updated July 20, 2022), <https://tinyurl.com/56v8amer>. “Native Americans have a significant presence in the Klamath Basin,” and several major tribes have been “influential in water negotiations.” *Klamath River Basin*, Water Educ. Found., <https://tinyurl.com/2vtwtdmc> (last visited Dec. 26, 2022). Litigation involving tribes’ impliedly reserved water rights has been considerable. Cf. generally *Hawkins v. Haaland*, 991 F.3d 216 (D.C. Cir. 2021). If breach-of-trust lawsuits similar to the Navajo Nation’s were permitted, Klamath Basin water rights could be thrown into a state of further uncertainty. And that is just one example: federal reserved water rights are often at issue in water-rights adjudications across the West. See generally *Federal Reserved Water Rights and State Law Claims*, U.S. Dep’t of Justice (updated Jan. 3, 2022), <https://tinyurl.com/4c3y58pb>.

For all the reasons discussed above, the uncertainty and instability in water rights that would result

from a profusion of lawsuits similar to the Navajo Nation's would have severe negative practical consequences, both in the Colorado River Basin and elsewhere. It bears emphasis, moreover, that opening the door to the Navajo Nation's novel breach-of-trust lawsuit, or similar suits, would not only be harmful to the stability of water rights in the West; it also is not *necessary* in order for tribes to have viable procedural options to secure water rights. As noted above, tribal water-rights claims can be and frequently are settled in traditional, comprehensive water-rights adjudications. Moreover, tribal water claims often are resolved through negotiated settlements. The Department of Interior identifies 34 congressionally enacted Indian water rights settlements, plus four additional administratively approved settlements, many involving reservations in Arizona. *Enacted Indian Water Rights Settlements*, U.S. Dep't of the Interior (Dec. 2021), <https://tinyurl.com/yucja2en>.

Settlement efforts have also been undertaken with respect to Navajo Nation claims. Indeed, "in November 2010, the Navajo Nation Council approved a water rights settlement agreement to resolve Navajo claims to both the Little Colorado River and Lower Colorado River mainstem." *Tribal Members Question Navajo-Hopi Settlement Act*, Ariz. Water Res., Spring 2012, at 5, 9, <https://tinyurl.com/2z66dkc7>. Legislation to approve a settlement of certain Navajo Nation water claims was also introduced in Congress in 2012, *id.* at 5, though the Navajo Nation Council ultimately voted to reject it. See Marley Shebala, *Council Votes Down Proposed Water Rights Settlement*, Navajo Times (July

5, 2012), <https://tinyurl.com/3hsde7f5>. While negotiations concerning the Navajo Nation's claims in Arizona have not yet been successful, the Navajo Nation has successfully completed negotiations in New Mexico and Utah. See *Navajo Nation Water Rights Settlement*, New Mexico Off. of the State Eng'r, <https://tinyurl.com/mpkjrm8> (last visited Dec. 26, 2022); Press Release, U.S. Dep't of the Interior, *President Biden's Bipartisan Infrastructure Law Funds Newly Executed Navajo-Utah Water Rights Settlement* (May 27, 2022), <https://tinyurl.com/bdwcppud>. To be sure, negotiations have not yet resulted in a settlement of the Navajo Nation's claims involving the Colorado River mainstream, but there is no reason to believe that the procedurally novel breach-of-trust claim for amorphous unquantified rights that the Navajo Nation seeks to pursue, or similar claims by other tribes, are necessary to provide viable opportunities to advance tribal water-rights claims.

CONCLUSION

For the foregoing reasons, and those set forth in the Petitioners' briefs, the Ninth Circuit's judgment should be reversed.

Respectfully submitted.

PAUL L. ARRINGTON
Executive Director
& General Counsel
Idaho Water Users
Association
*1010 W. Jefferson
Suite 101
Boise, ID 83702
(208) 344-6690
paul@iwua.org*

*Counsel for Idaho
Water Users
Association*

NORMAN M. SEMANKO
PARSONS BEHLE &
LATIMER
*800 West Main Street
Suite 1300
Boise, ID 83702
(208) 562-4900
nsemanko@
parsonsbehle.com*

*Counsel for Family
Farm Alliance*

JEREMY C. MARWELL
Counsel of Record
MATTHEW X. ETCHEMENDY
VINSON & ELKINS LLP
*2200 Pennsylvania Ave.,
NW, Suite 500 West
Washington, DC 20037
(202) 639-6500
jmarwell@velaw.com*

Counsel for Amici Curiae