Nos. 21-1484 and 22-51

In the Supreme Court of the United States

STATE OF ARIZONA, ET AL,
Petitioners,

v.

NAVAJO NATION, ET AL.,
Respondents.

DEPARTMENT OF THE INTERIOR, ET AL.,
Petitioners,

v.

NAVAJO NATION, ET AL.,
Respondents.

ON A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF OF *AMICUS CURIAE* THE COALITION OF LARGE TRIBES IN SUPPORT OF RESPONDENT NAVAJO NATION

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QUESTIONS PRESENTED

1. Whether the federal government owes the Navajo Nation an affirmative, judicially enforceable fiduciary duty to assess and address the Navajo Nation's need for water from particular sources, in the absence of any substantive source of law that expressly establishes such a duty.

2. Whether granting relief on the Navajo Nation's breach-of-trust claim would conflict with this Court's retained jurisdiction in *Arizona v. California*, 373 U.S. 546 (1963), or otherwise violate the Court's decree in that case.

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INTERESTS OF THE *AMICI CURIAE*[1]

Amicus Curiae, the Coalition of Large Tribes ("COLT"), was established in April 2011 to provide a unified advocacy base for Native American tribes and nations governing large trust land bases and providing full service in the governing of their members and reservations. COLT represents the interests of the 51 tribes with reservations encompassing 100,000 acres or more, including the Navajo Nation, Crow Tribe, Blackfeet Tribe, Shoshone-Bannock Tribes, Spokane Tribe, Oglala Sioux Tribe, Flandreau Santee Sioux Tribe, Mandan, Hidatsa and Arikara Nation, Rosebud Sioux Tribe, Sisseton Wahpeton Sioux Tribe, Cheyenne River Sioux Tribe, Fort Belknap Indian Community, and others.

These tribes have reserved *Winters* water rights which they have struggled to quantify and develop, often with only limited help, and no small amount of hindrance, from the United States. COLT member tribes govern vast swaths of the West, but do so largely with at least one hand veritably tied behind their back because of their uncertain water rights and the United States' persistent failure to protect tribal water rights. The Decision Below belatedly makes those rights a reality for tribal members who must depend on this water for their daily uses, and for tribes seeking compensation for water that is currently being diverted to other users without payment.

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[1] Pursuant to this Court's Rule 37.6, counsel for *amici curiae* certify that no part of this brief was authored by counsel for any party, and no such counsel or party made a monetary contribution to the preparation or submission of the brief. Petitioner Navajo Nation is a member of COLT and this Rule 37.6 certification applies equally to the Navajo Nation.

INTRODUCTION AND SUMMARY OF ARGUMENT

When the United States set aside lands to be reserved as homelands for Indian tribes, it also reserved the water needed to make those lands livable and productive. *Winters v. United States*, 207 U.S. 564, 576 (1908). These reserved water rights are property of the United States, held in trust for the Tribes. *See*, *e.g.*, Blackfeet Water Rights Settlement Act, WIIN Act of 2016, Pub. L. No. 114-322, subtit. G, § 3715, 130 Stat. 1628, 1832 (2016) ("Blackfeet Settlement").

It is blackletter law that a trustee has an obligation to identify the property held in trust, segregate that property from the trustee's own property to the extent possible, and to refrain from conflicts of interest and self-dealing with regard to that property. Restatement (Third) of Trusts § 84 cmt. d (2012). In the context of Indian reserved water rights, this requires the United States as trustee to identify which waters it believes have been reserved for the Navajo Nation, as well as for other parties. This information is absolutely critical for the federal government to evaluate its own reserved water rights and identify waters which are otherwise within its control and available for federal purposes. Only then can the federal government meet its obligations as trustee to manage water from these different sources in a manner that avoids unnecessarily comingling these assets or engaging in self-dealing and conflicts of interest.

This is not a quantification process. The executive branch is not empowered to quantify and adjudicate water rights, or to foreclose the rights of other claimants. Yet it does play an essential role in this process as a litigant, a regulator, and by assessing, negotiating and preparing the groundwork for water rights settlements that are ultimately adopted by enactments of Congress. As the experience of COLT members attests, efforts to quantify and formalize Native

American water rights are protracted matters, often involving decades of litigation and compromise. In many cases the key issue is not how much water is available, but how much money Congress is prepared to appropriate to enable that water to reach the people who need it. The history of the litigation over the Lower Colorado River Basin clearly attests to this reality, and more examples are provided below.

The relief sought here – an injunction requiring the United States to properly evaluate the water rights that are held in trust by the United States on behalf of the Navajo Nation, subject to the ultimate plenary power of Congress – is a necessary step toward fulfilling its most basic responsibilities to tribes as their trustee.

This is both timely and urgent, because rapid growth and drought conditions have placed Western river systems under increasing pressure. *See generally* Christopher Flavelle, *As the Colorado River Shrinks, Washington Prepares to Spread the Pain*, N.Y. TIMES, Jan. 27, 2023. The United States Department of Interior and Bureau of Reclamation have threatened to impose deep cuts to California and Arizona's water use in an effort to maintain minimum water levels in Lake Powell and Lake Mead; those states and water users have made it clear that they will not make such reductions without a legal battle. *Id*. Tribal water rights will be caught up in this battle, which will likely involve protracted litigation that the tribes can ill afford and intense political pressure on the federal government to prioritize some users over others. *Id*.

Particularly in light of the modern trend for Congressionally enacted water rights settlement agreements, the federal government cannot exercise its trust responsibilities to the Navajo Nation and other Native American tribes without first evaluating their *Winters* rights. Such an assessment is the

necessary first step to understanding the scope of the property that the United States government has a duty to protect as the tribes' trustee. Only then can the other potentially competing interests in those same water resources be weighed in the political process and ultimately resolved by Congress. A trustee that does not even know the scope of the property with which it has been entrusted to preserve and manage, or take the necessary steps to figure it out, is no trustee at all.

ARGUMENT

I. Title to tribal water rights is held by the United States in trust for the tribes, and it is blackletter law that the beneficiaries of a trust are entitled to an accounting of their property.

The Navajo Nation's reserved water rights are held in trust by the United States for its benefit, along with the Nation's land and minerals. "All of the necessary elements of a common-law trust are present: a trustee (the United States), a beneficiary (the [Nation]), and a trust corpus (Indian [water])." *United States v. Mitchell*, 463 U.S. 206, 225 (1983). "Where, as in *Mitchell II*, the relevant sources of substantive law create '[a]ll of the necessary elements of a common-law trust,' there is no need to look elsewhere for the source of a trust relationship." *U.S. v. White Mountain Apache Tribe*, 537 U.S. 465, 476 n.3 (2003) (quoting *Mitchell*, 463 U.S. at 225 (discussing "the undisputed existence of a general trust relationship between the United States and the Indian people")); *see also Cobell v. Norton*, 240 F.3d 1081, 1088 (D.C. Cir. 2001) ("Because the United States holds IIM lands in trust for individual Indian beneficiaries, it assumes the fiduciary obligations of a trustee.")

Although Indian water trusts are generally created by implication, rather than statute, implied

water rights are deeply rooted in this Court's jurisprudence and govern Indian reservations – both Treaty reservations and those created by Executive Order – and other classes of federal land which make up much of the Western United States. *United States v. New Mexic*o, 438 U.S. 696, 699 (1978).[2] This Court has expressly held that "Congress' silence" with regard to reserved water rights is not and cannot be determinative. *Id*.

Congress has repeatedly acknowledged the trust status of Native American water rights when enacting water rights settlement acts, as discussed in greater detail below. *See, e.g.,* Blackfeet Settlement at § 3715; Gila River Indian Cmty. Water Rights Settlement Act of 2004, Pub. L. No. 108-451, tit. H, § 204(a)(2), 118 Stat. 3478, 3502; Snake River Water Rights Act of 2004, Pub. L. No. 108-447, tit. X, § 7(a)(1)(A), 118 Stat. 2809, 3434; Confederated Tribes of the Warm Springs Reservation Water Rights Settlement Agreement, 1997, art. V, § B, approved by Pub. L. No. 107-102, § 2(a), 115 Stat. 974.[3]

The United States has also demonstrated that it has accepted and assumed this trust responsibility by repeatedly participating as trustee of the tribes in general stream adjudications and other legal proceedings involving water, including proceedings specific to the Colorado River. *See, e.g.*, *Arizona v. California*, 460 U.S. 605, 608-09 (1983).

When a trust has been established, it is governed by standard common law principles. *Id*. The

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[2] The Navajo Nation also relies on specific language from its own treaties in support of a finding of a trust relationship in this case.

[3] *See* Judith Royster, *Indian Water and the Federal Trust: Some Proposals for Federal Action*, 46 NAT. RESOURCES J. 375, 375-378 (2006)(collecting references to the trust status of Indian water rights).

prospective injunctive relief ordered by the Ninth Circuit is in keeping with these basic principles of trust law, which impose on the trustee an obligation to identify the trust res, record and segregate it as feasible, and maintain accounts. Restatement (Third) of Trusts § 84 ("The trustee has a duty to see that trust property is designated or identifiable as property of the trust, and also a duty to keep the trust property separate from the trustee's own property and, so far as practical, separate from other property not subject to the trust."); *see also* Restatement (First) of Trusts § 172 cmt. a (1935) ("The trustee is under a duty to keep accounts showing in detail the nature and amount of the trust property and the administration thereof."); Restatement (Second) of Trusts § 172 (1959) (same).

"It is ordinarily the duty of a trustee to have trust property designated or made externally identifiable as trust property." Restatement (Third) of Trusts § 84 cmt. d (2012). "[T]itle to land acquired by a trustee as such should be taken and recorded in the name of the trustee as trustee[,]" and when this is not feasible "the trustee must maintain records clearly reflecting that the property belongs to the trust and must keep that trust property separate from property belonging to the trustee personally." *Id.* When the terms of the trust make it infeasible to the mingling of trust property with assets of the trustee or other trusts (such as the reserved water rights of other Native American tribes and nations to the same water system), "this does not relieve the trustee of the duty to earmark if and as feasible." *Id.* at cmt. e. Thus, trustees have a legal duty to identify the assets held in trust, to make and keep a corresponding record, and to memorialize these property interests through a formal title recording process. These responsibilities are especially crucial when, as with tribal water, the trust assets are inevitably comingled with the assets of the

trustee and other trusts and potentially available for appropriation by other users as well.

Normally the expense of administering a trust would be charged to the trust itself, rather than the trustee. But as this Court has observed, in managing Indian trust relationships, "the Government acts not as a private trustee but pursuant to its sovereign interest in the execution of federal law." *U.S. v. Jicarilla Apache Nation*, 564 U.S. 162, 165 (2011). "Because the Indian trust relationship represents an exercise of that authority, [this Court has] explained that the Government has a real and direct interest in the guardianship it exercises over the Indian tribes; the interest is one which is vested in it as a sovereign." *Id*. at 175 (quotation omitted). "This is especially so because the Government has often structured the trust relationship to pursue its own policy goals." *Id*. at 174. More prosaically, "[a] trustee who fails to keep proper records is liable for any loss or expense from that failure." Restatement (Third) of Trusts § 83 cmt. a(1) (2007).

The federal government chose to become the trustee for the Navajo Nation, and other Native American tribes and nations, in accordance with its own federal policy, on its own terms. Since *Winters* was decided in 1908, it is beyond doubt that this trust responsibility includes reserved water rights. During the century since *Winters*, the United States has engaged in numerous activities involving the lower basin of the Colorado, including adjudications of the water rights of other tribes, without making any systematic effort to account for or quantify the water rights within its care. That this derogation of the most basic trust principles has stubbornly persisted does not make it legally coherent.

It is only appropriate at this late date that the United States be expected to carry out its fundamental duties of accounting, in a meaningful and

consistent manner, for the water resources with which it has been entrusted. Furthermore, without accounting for the water that has been reserved for the Navajo Nation and other tribes, the United States risks further breaching its fiduciary duties and diverting trust assets as it goes about its business of government. That Congress has plenary power over Native American affairs, and with it the ability to make the final decisions as to how competing federal resources are allocated, does not alter the federal government's threshold duty to assess the water resources it holds in trust for the Navajo Nation and other tribes.

II. The executive branch has historically played a complex role in the formalization and quantification of tribal water rights, both as a litigant and, more often, by negotiating water settlements that are ultimately adopted by congressional enactments.

Although the executive branch cannot unilaterally determine contested water rights, documentation and measurement of the water that was reserved to the tribes, including the Navajo Nation, can serve as a starting point for any negotiations or litigation that ensues. Most importantly for the instant case, it will prevent the federal government from actively supporting the diversion of tribal water to other uses.

The idea that this would finally resolve or quantify water rights is absurd; the actual experience of COLT members shows that it takes decades of litigation and negotiation to obtain a quantification of tribal water rights. Indeed, ultimately, the biggest factor in obtaining "wet water" for tribes has proven not to be the retained jurisdiction of any court, but the willingness of Congress to put money on the table to build water infrastructure.

Even under the best circumstances, the resolution of disputes over tribal water rights is often a

protracted and expensive process. Many of the COLT members have been enmeshed in decades of litigation and negotiation over their water rights. This makes it all the more critical for the federal government to evaluate tribes' water rights in the first instance, consistent with foundational common law trust principles.

A. Indian water rights settlements.

Assessing tribes' reserved water rights is an essential precondition for informed Congressional lawmaking in an era of increasingly scarce water resources and rapid population growth. Indeed, it is hard to imagine how the federal government can persist in not doing so, given that "Indian water rights are vested property rights for which the United States has a trust responsibility, with the United States holding legal title to such water in trust for the benefit of the Indians." Working Group in Indian Water Settlements; Criteria and Procedures for the Participation of the Federal Government In Negotiations for the Settlement of Indian Water Rights Claims, 55 Fed. Reg. 9223 (March 12, 1990); Congressional Research Service, *Indian Water Rights Settlements*, CRS Report R44148 (April 16, 2019) at 2. Between 1978 and 2019, the United States entered into 36 water rights settlements with 40 tribes. Congressional Research Service, *supra*, at 1. Nonetheless, there are 574 federally recognized Indian tribes (Indian Entities Recognized by and Eligible to Received Services From the United States Bureau of Indian Affairs, 88 Fed. Reg. 2112 (Jan. 12, 2023)).

The negotiation, resolution and funding of these settlements is often fraught with challenges, including the final implementation stage where Congress often fails to appropriate money to build the projects required by the settlements. *Id*. at 9-15. The alternative, general stream adjudication, can be even less desirable, often resulting in decades-long litigation. Yet to comport with trust principles, either approach must

start with the basic groundwork of an assessment of how much water the tribes can legally claim as necessary and from which sources those rights derive.

B. The Blackfeet Water Rights Settlement

To provide just one recent example, the Blackfeet Nation has recently quantified its water rights through a compact that was adopted by Congress in the Blackfeet Water Rights Settlement Act of 2016. Blackfeet Settlement § 3702. The Blackfeet Settlement formally "ratified, confirmed, and declared to be valid" the Blackfeet Nation's water rights and specified that these rights "(1) shall be held in trust by the United States for the use and benefit of the Tribe and the allottees in accordance with this subtitle; and (2) shall not be subject to forfeiture or abandonment." Blackfeet Settlement § 3715(a)-(c).

This language makes abundantly clear that it is the understanding of Congress that this Act acknowledges an existing, recognized trust responsibility and does not create a new obligation. This existing trust responsibility also came up repeatedly in the legislative history of the Act. *See generally The Blackfeet Water Rights Settlement Act of 2013, Hearing Before the Comm. on Indian Affairs*, S. Hrg. 113-113, 113th Cong. (hereinafter "Blackfeet Settlement Hearing"). Senator Max Baucus of Montana opened his remarks by stating that "[t]he creation of the Blackfeet Reservation implied a commitment on the part of the United States to reserve sufficient water to satisfy both present and future needs of the tribe[,][and] [a] settlement ratified by Congress is far preferable to any litigation over an acknowledged breach of trust." *Id*. (statement of Sen. Baucus).

The Blackfeet Settlement was the culmination of more than a century of disputes regarding the water rights of the Blackfeet Nation. *Id*. (statement of John Bezdek, Counselor to the Deputy Secretary United

States Department of the Interior) ("The Tribe's water rights have been fought over for more than 100 years, as reflected in approximately 14 court cases and congressional proceedings addressing directly or indirectly the use and control of the Reservation's water resources."). During that time, several major diversions were built, moving water off-reservation to other appropriators without tribal permission.

The negotiations that finally resulted in the 2016 settlement began in 1979 with a suit filed by the State of Montana in state court and a parallel proceeding filed by the United States in federal court. *Id*. (statement of Hon. Hay Weiner, Assistant Attorney General, State of Montana). After several years of litigation over which court would have jurisdiction, the Blackfeet Nation entered into formal negotiations with the Montana Compact Commission in 1989, and the federal government appointed its own negotiation team the following year. *Id*. (statement of Hon. Kevin K. Washburn, Assistant Sec'y for Indian Affairs, U.S. Department of the Interior).

Efforts to settle the Blackfeet Nation's water rights were complicated both by competing interests and by the sheer technical complexity of the problem, with the reservation spanning six different drainages and involving not only domestic interests but also an international treaty. *Id*. (statement of Hon. Shannon Augare, Councilman, Blackfeet Nation). The final legislation is lengthy, allocating acre feet from several different creeks, dealing with multiple dams and irrigation projects, as well as the minutia of erosion control, hydroelectric power, and the allocation of maintenance costs.

C. The Crow Water Rights Settlement

The Crow Tribe, a founding member of COLT, also resolved its longstanding water rights disputes through a settlement act, the Crow Water Rights Settlement Act of 2010, enacted as Title IV of the Claims

Resolution Act of 2010 (Pub. L. 111-291) ("Crow Settlement"). Like the Blackfeet Settlement, the Crow Settlement included language confirming the trust status of the tribal water rights at issue: "The tribal water rights are ratified, confirmed, and declared to be valid[,] [and] [t]he tribal water rights—(1) shall be held in trust by the United States for the use and benefit of the Tribe and the allottees in accordance with this section; and (2) shall not be subject to forfeiture or abandonment." *Id*. at § 407.

In this settlement, the tribe secured an allocation of 300,000 acre-feet per year of water stored in Bighorn Lake, under a water right held by the United States and managed by the Bureau of Reclamation, *id*. § 408, of which 50,000 acre feet could be marketed to off-reservation users. The federal government undertook to design and build a Municipal, Rural and Industrial Water System for the Crow Tribe, at an expense not to exceed $246,381,000 and to repair and upgrade the Crow Irrigation Project for an amount not to exceed $131,843,000. *Id*.

This is in keeping with the general pattern of water settlements, which exchange unquantified paper water rights for smaller, quantified rights and money for construction projects to bring that water to where it can be put to beneficial use. As the Department of Interior explained, "[t]he existing drinking water system on the reservation has significant deficiencies in terms of both capacity and water quality, and many tribal members at times must haul water[,] [and] [t]he Crow Irrigation Project is in a state of significant disrepair and currently cannot support the Reservation's mainstay of farming and ranching." U.S. Dep't of Interior, Press Release, Crow Tribe, United States and State of Montana Sign Historic Water Compact (April 27, 2012), https://www.doi.gov/news/pressreleases/Crow-Tribe-United-States-and-State-of-Montana-Sign-Historic-Water-Compact (hereinafter "DOI Press Release").

The Crow Reservation was established by the Treaty of May 7, 1868, 15 Stat. 649, but in 1891 the reservation was diminished in exchange for funds to build an irrigation project for a portion of the remaining lands (the same irrigation project that has since fallen into disrepair). *United States v. Powers*, 305 U.S. 527, 530 (1939). Much of that water was then lost when the irrigated lands were allotted and sold out of tribal ownership. *Id.* (upholding this transfer). The parties had been in litigation and negotiation over the Crow Tribe's remaining water rights since 1975. DOI Press Release, *supra*.

The sums of money involved in settling these claims are substantial, but not out of line with federal expenditures on water projects more generally, including many projects that primarily benefit non-Indian communities. *See On The President's Fiscal Year 2023 Budget*, *Before the H. Subcommittee on Energy and Water Development, and Related Agencies Committee on Appropriations* (Statement of Tanya Trujillo Assistant Sec'y for Water and Science, U.S. DOI) (April 27, 2022) (presenting the proposed 2023 federal budget for Department of Interior water infrastructure projects).

D. The Big Horn General Stream Adjudication

When tribal water rights are handled through a general stream adjudication, reaching resolution is even slower and more expensive, and the results are uncertain, especially if the result the tribe wishes to obtain is actual drinking water. The *Big Horn* general stream adjudication, for example, was described by Wyoming's own state engineer as "a poster child for how not to quantify reserved water rights." Charles Wilkinson, *Introduction to* Big Horn *General Stream Adjudication Symposium*, 15 WYO. L. REV. 233, 240 (2015).

This adjudication opened with a sixteen-month trial and ultimately took four decades to reach final resolution. Jason A. Robison, *Wyoming's* Big Horn *General Stream Adjudication*, 15 WYO. L. REV 243, 244 (2015). The basin is set in a mountainous region of the Northern Rockies with a complex hydrology and five sub-basins. The federal government owns 64 percent of the land, not counting Indian lands. *Id*. at 247-49. The basin also includes the Wind River Reservation, home to the Eastern Shoshone and the Northern Arapaho Tribes. *Id*. at 251. The litigation began in 1976, when the Tribes objected to plans of the municipality of Riverton to drill groundwater wells to support an airport and industrial park. *Id*. at 268. Years of jurisdictional disputes and multiple trials on different issues ensued. *Id*.

Even after the water rights were quantified, the litigation continued to expand, with the Wyoming Supreme Court rejecting the Tribes' claim that their water could be used for non-consumptive purposes. *Id.* at 290-93. Sixteen years of litigation alone ensued over whether non-Indian successors to allottees had water rights and the nature and priority of those rights. *Id*. at 294-97.

III. To fulfill its trust responsibilities, the United States must assess and quantify how much water is held in trust for each tribe.

As we move into an era in which all available water will be fully appropriated or reserved for environmental or other uses, it will become physically impossible for the United States to fulfil its obligations as a trustee to tribes if it does not have at least a working estimate of how much water each tribe, including the Navajo Nation, is actually entitled to and how much water is therefore available for the many other competing interests. Such an assessment will enable the various executive agencies to plan and regulate in

compliance with the federal government's trust obligations.

The United States entered into solemn Treaty obligations with the Navajo Nation, and other COLT member tribes. These treaties, as well as statutes and statutorily codified executive orders, are the "supreme Law of the Land." U.S. CONST. art. VI, cl. 2. This Court has likewise made it clear that water rights were reserved, by Treaty, as a necessary condition without which the other Treaty rights "would be valueless." *Winters*, 207 U.S. at 576.

This Court has long insisted that Treaty obligations with Native American tribes and nations should be construed in favor of the tribes. "The language used in treaties with the Indians should never be construed to their prejudice." *Worcester v. Georgia*, 31 U.S. 515, 582 (1832). "If words be made use of which are susceptible of a more extended meaning than their plain import, as connected with the tenor of the treaty, they should be considered as used only in the latter sense." *Id.* "They must be construed, not according to the technical meaning of its words to learned lawyers, but in the sense in which they would naturally be understood by the Indians." *Jones v. Meehan*, 175 U.S. 1, 11 (1899). "[W]e will construe a treaty with the Indians as [they] understood it, and as justice and reason demand, in all cases where power is exerted by the strong over those to whom they owe care and protection, and counterpoise the inequality by the superior justice which looks only to the substance of the right, without regard to technical rules." *United States v. Winans*, 198 U.S. 371, 380 (1905) (internal quotation omitted). "[A]mbiguities occurring will be resolved from the standpoint of the Indians." *Winters, id.* at 575.

The United States cannot honor its Treaty and trust obligations if it does not know what they are. It has an obligation as the tribes' trustee to understand

those rights so that they can be properly managed and, should settlement legislation be considered, accurately inform Congressional decision-making.

* * *

CONCLUSION

The Court should affirm the decision below.

Respectfully submitted.

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