Nos. 21-1484 & 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 Writs of Certiorari to the United States Court of Appeals for the Ninth Circuit

BRIEF FOR *AMICI CURIAE* SOUTHERN UTE INDIAN TRIBE AND UTE MOUNTAIN UTE TRIBE IN SUPPORT OF RESPONDENT

DAVID C. SMITH
Director
LORELYN HALL
Deputy Director
SOUTHERN UTE
LEGAL DEPARTMENT
P.O. Box 737
Ignacio, CO 81137
(970) 563-2140

PETER ORTEGO
General Counsel
UTE MOUNTAIN UTE TRIBE
LEGAL DEPARTMENT
P.O. Box 128
Towaoc, CO 81334
(970) 564-3641

THOMAS H. SHIPPS
Counsel of Record
ADAM T. REEVES
MAYNES, BRADFORD,
SHIPPS & SHEFTEL, LLP
835 East Second Ave.
Suite 123
Durango, CO 81301
(970) 247-1755
tshipps@mbssllp.com

Counsel for Amici Curiae

February 8, 2023

WILSON-EPES PRINTING CO., INC. – (202) 789-0096 – WASHINGTON, D.C. 20002

TABLE OF CONTENTS

TABLE OF CONTENTS—Continued

TABLE OF AUTHORITIES

TABLE OF AUTHORITIES—Continued

TABLE OF AUTHORITIES—Continued

TABLE OF AUTHORITIES—Continued

TABLE OF AUTHORITIES—Continued

INTEREST OF AMICI CURIAE[1]

The Southern Ute Indian Tribe and the Ute Mountain Ute Tribe (the "Tribes") are federally recognized Indian tribes whose dealings with the United States include a common, land-reserving treaty ratified in 1868. They are the only federally recognized Indian tribes with reservation lands in Colorado; however, the Ute Mountain Ute Tribe also has reservation lands in northern New Mexico and southeast Utah. As a result of historical events and fluctuations in federal Indian policy reflected in acts of Congress and executive orders, the boundaries of their reservations include only a small part of the lands initially set aside in the 1868 Treaty for their perpetual occupation and use. Within the Tribes' respective reservations, both of which are located entirely within the Upper Basin of the Colorado River system, the United States holds title to lands in trust for each Tribe's benefit. The United States also holds some lands in trust for the descendants of individual allottees within each reservation.

Water is essential for the Tribes and their members to carry out the purposes for which their lands were reserved, including current and future agricultural and commercial development. The Tribes' *Winters*[2] water rights for reservation lands in Colorado have been quantified and are the subject of a comprehensive settlement agreement approved by Congress, the terms of which are addressed in a series of decrees

---

[1] No counsel for any party authored this brief in whole or in part. No person or entity other than *amici*, their members, and their counsel made a monetary contribution to fund the preparation or submission of this brief.

[2] *Winters v. United States*, 207 U.S. 564 (1908).

entered in the District Court for the Sixth Judicial District of Colorado. The Colorado court decrees vest the Tribes' water rights in the hands of the United States, as trustee. *Winters* water rights for portions of the Ute Mountain Ute Reservation located in Utah and New Mexico are subject to ongoing state water court proceedings in which the United States is participating on behalf of the Ute Mountain Ute Tribe. Upon completion of the New Mexico and Utah adjudications it is anticipated that the United States will continue to hold legal title to the Ute Mountain Ute Tribe's water as its trustee.

Tribal use of the land and water held by the United States for their benefit is vital for the continued survival of tribes and their preservation as culturally and politically distinct entities. Tribal members live, work, hunt, gather, recreate, and congregate on those trust lands. Whether seeking confirmation of *Winters'* water rights, protection of quantified water rights, or reasonable administration of other assets and resources held in trust by the United States, the Tribes have a substantial interest in the availability of judicial remedies, if and when needed, to compel administrative agencies and officials within the U.S. Department of the Interior ("Interior") to carry out administrative trust functions lawfully, without unreasonable delay, and reasonably for the benefit of the Tribes.[3]

SUMMARY OF ARGUMENT

Federal court access for tribes seeking to compel federal administrators to carry out trust duties requires an examination of the special relationship

[3] The federal petitioners in case No. 22-51 are referred to as "Interior."

between Indian tribes, or the particular tribe involved, and the United States to ascertain a tribe's standing and the applicable scope of congressional waivers of federal sovereign immunity. Evaluation of the special trust relationship properly includes consideration of treaties, executive orders, legislative agreements, court decisions, regulations and, most obviously, the enactments of Congress.

Interior proposes a new, severe, bright-line test restricting Indian tribes from judicial access for equitable enforcement of trust duties. Under Interior's proposal, Indian tribes would have no judicial access to compel enforcement in equity of trust duties unless Congress has expressly and specifically articulated such a remedy by statute. In addition to ignoring the historical dealings between Indian tribes and the United States, Interior essentially asks tribes to identify a "super-waiver" of federal sovereign immunity to enforce Indian trust duties before they may seek equitable relief against federal officials.

The clear consequence of adopting Interior's proposal would be to reduce substantially the accountability of federal administrators to honor trust obligations of the United States to Native American beneficiaries. Not only would Interior's position terminate the long-delayed federal evaluation of the Navajo Nation's water needs and potential rights, but it could also jeopardize the enforceability of the quantified, adjudicated rights of the Tribes and the negotiated terms for water usage painstakingly hammered out with states, cities, and neighbors in Colorado state water adjudication proceedings. The impacts of Interior's position would not be limited to water, but rather could extend to the trust assets of every tribe and to the express and implied duties of prudent management of those assets

by the United States arising from Indian trust source documents. These trust responsibilities could encompass, among many others, such things as real property record-keeping, proper plugging and abandonment of orphaned oil and gas wells, and the timely granting of rights-of-way across tribal lands needed for utilities and broadband access to Native American communities.

Interior's approach is not consistent with tribes' legitimate expectations that federal officials can be held to account judicially for ignoring or misperforming Interior's trust duties inherent in the special relationships between the United States and Indian tribes. Interior's position not only contradicts prior positions advanced by the United States before this Court, but also contravenes the canons of construction employed by the Court in analyzing the scope of rights obtained by tribes through their unique relationship with the United States.

ARGUMENT[4]

I. ASSESSING CLAIMS FOR ENFORCEMENT OF FEDERAL TRUST DUTIES REQUIRES AN ANALYSIS OF THE SPECIAL RELATIONSHIP BETWEEN THE PARTICULAR TRIBE AND THE UNITED STATES OVER AN EXTENDED PERIOD OF TIME.

No bright-line test can serve as a substitute for careful analysis of Indian trust relations. A tribe's pleading against federal officials for enforcement of Indian trust duties should describe the nature of the tribe's relationship with the United States, as well as

[4] References to "Pet. App." are to the appendix to the petition for writ of certiorari in No. 21-1484.

the nature of the claim asserted, or the federal duty implicated. General statutes addressing federal Indian policy, such as the General Allotment Act, though creating a "limited trust relationship," are insufficient to define the trust *res* or duties imposed on federal administrators in the specific context of a particular case. *United States v. Mitchell* (*Mitchell I*), 445 U.S. 535, 542, 546 (1980). Depending on the right claimed, the scope of the trust relationship may require examination of treaties (*see, e.g.*, *United States v. Winans*, 198 U.S. 371 (1905) (construing treaty provisions as reserving right to enter and fish on fee patented lands along Columbia River)), statutes (*see, e.g.*, *Morton v. Mancari*, 417 U.S. 535, 555 (1974) (upholding statutory BIA employment preferences for Indians based on "rational[ ] fulfillment of Congress' unique obligation toward Indians")), executive orders (*see, e.g.*, *Hynes v. Grimes Packing Co.*, 337 U.S. 86 (1949) (confirming validity of Secretary of the Interior order including waters for fishery within boundaries of Annette Islands reservation)), agreements (*see, e.g.*, *Shoshone Tribe of Indians v. United States*, 299 U.S. 476 (1937) (considering effect of Secretarial agreement granting right of occupancy to Arapaho Tribe on Wind River Indian Reservation)), court decisions (*see, e.g., Oliphant v. Suquamish Indian Tribe*, 435 U.S. 191, 207-12 (1978) (dependent, domestic status of Indian tribes inconsistent with exercise of criminal jurisdiction over non-Indians in absence of act of Congress)), and regulations (*see, e.g.*, *Kenai Oil and Gas, Inc. v. Dep't of the Interior*, 671 F.2d 383 (10th Cir. 1982) (considering economic impacts on tribe in applying Interior regulation regarding oil and gas leases and in disapproving communitization agreement)). These various defining sources of the relationship may span

a century or more of federal Indian policy,[5] hundreds of congressional sessions, interpretations from different courts and judges, the evolution of applicable law, and even changes in diction and the style of parlance over time. To rest judicial access for equitable enforcement of trust duties solely upon the presence of specific, express language of enforceability in source documents declaring that promises made by the United States will be enforceable is unduly restrictive.

Moreover, courts have been instructed to apply unique rules of interpretation to Indian treaties and special canons of statutory construction to questions involving the scope of rights and duties associated with the trust relationship. A review and analysis of the "history, purpose, and negotiations" of treaties "is central to [their] interpretation . . . ." *Minnesota v. Mille Lacs Band of Chippewa Indians*, 526 U.S. 172, 202 (1999) (citing *El Al Israel Airlines, Ltd. v. Tsui Yuan Tseng*, 525 U.S. 155, 167 (1999)); *see also Herrera v. Wyoming*, __ U.S. __, 139 S. Ct. 1686, 1699, 1701-02 (2019)). "Statutes are to be construed liberally in favor of the Indians, with ambiguous provisions interpreted to their benefit." *Montana v. Blackfeet*

---

[5] Consideration of federal Indian policy may also be important in evaluating the nature of the relationship between the United States and Indian tribes and the justiciability of a tribe's breach-of-trust claims against the Department of the Interior. *See, e.g.,* Special Message to Congress on Indian Affairs, Pub. Papers of the President of the U.S. – Richard M. Nixon 212 (July 8, 1970) (heralding a new era in federal Indian policy emphasizing tribal self-determination); *see also* Office of the Solicitor, Dep't of the Interior, "Reaffirmation of the United States' Unique Trust Relationship with Indian Tribes and Related Indian Law Principles," No. M-37045, 2017 WL 9288216 at *2-9 (Jan. 18, 2017) (summarizing evolution in federal Indian policy) ("Solicitor's Reaffirmation Opinion").

Tribe of Indians, 471 U.S. 759, 766 (1985) (citing *Oneida County v. Oneida Indian Nation*, 470 U.S. 226, 247 (1985), *McClanahan v. Arizona State Tax Comm'n*, 411 U.S. 164, 174 (1973), and *Choate v. Trapp,* 224 U.S. 665, 675 (1912)). These long-standing guiding principles of interpretation and construction should also be considered in a court's review of the adequacy of a tribe's pleading against federal administrators in actions for equitable enforcement of trust duties. These principles are entirely inconsistent with the position now taken by Interior – that equitable enforcement of trust duties arising from those statutes and treaties must be premised upon express and specific authorization from Congress in those source documents.

II. INTERIOR'S POSITION CONTRAVENES POSITIONS PREVIOUSLY ADVANCED BY THE UNITED STATES TO THE COURT, AND ITS PRACTICAL CONSEQUENCES WOULD ADVERSELY AFFECT TRIBES.

Interior would sever ownership of assets held by the United States for the benefit of tribes from any enforceable duty associated with federal administration of those assets. Brief of the Federal Parties at 16, 21, 22 ("Fed. Brf."). In seeming disregard of *Winters v. United States*, 207 U.S. 564 (1908), and fundamental rules of interpretation and canons of construction applicable to Indian treaties, statutes, and regulations, Interior maintains that, though a tribe may have obtained a trust asset expressly or by reasonable implication, such tribe obtained no enforceable federal obligation associated with administration of such an asset in the absence of a specific provision in a treaty, statute, or other source document expressly accepting

the enforceability of the same. *Id*.[6] Interior's rejection of each of the Navajo Nation's supporting treaties, statutes, or materials from which enforceable duties could reasonably be inferred, demonstrates dramatically the extraordinary scope of Interior's disclaimer of responsibility and the paucity of evidence that could be marshaled under Interior's proposal to address maladministration of Indian trust assets. *Id.* 35-44; *see* Third Amended Complaint for Declaratory and Injunctive Relief ("TAC") ¶¶ 13-37 (filed Jan. 10, 2019), Joint Appendix 90-101.

A. *Mitchell II* and Previous Position of the United States

The issues now before the Court are similar in some respects to those considered in *United States v. Mitchell* (*Mitchell II*), 463 U.S. 206 (1983), in which the Court was called upon to determine whether money damages could be recovered from the United States under the Tucker Act, 28 U.S.C. § 1491, and the Indian Tucker Act, 28 U.S.C. § 1505, for mismanagement of Indian timber resources held in trust by the United States on the Quinault Reservation. In that case the United States maintained that the Court of Claims had lacked jurisdiction to entertain the breach-of-trust claims of Quinault allottees because the jurisdiction of the Court of Claims required a "source of substantive law . . . that can fairly be interpreted as mandating compensation by the Federal Government for the damage sustained." *Id.* at 210, 216-17 (internal quotations omitted) (quoting *United States v. Testan*, 424 U.S. 392, 400 (1976)). Having ruled in *Mitchell I*

[6] This separation, captured under the label "procedural trust responsibility," is discussed in the Solicitor's Reaffirmation Opinion. 2017 WL 9288216 at *15-17.

that the General Allotment Act was not sufficient "to render the United States answerable in money damages," the Court of Claims determined, and the *Mitchell II* Court agreed, that the network of statutes and regulations governing Indian timber management and the degree of control exercised by the United States in that trust activity, was a source of substantive law sufficient to meet the jurisdictional requirements for awarding money damages. *Mitchell II*, 424 U.S. at 226.

As discussed in *Mitchell II*, *id.* at 227, the United States sought reversal of the Court of Claims' decision at least in part based on the ready availability of equitable, prospective remedies accessible by Indian tribes following passage of the Administrative Procedure Act ("APA"),[7] the very availability Interior now contends is implausible. In its previous arguments to the Court, the United States stated as follows:

> We fully accept the obligations that are imposed by the relationship between the United States and Indian tribes. *These obligations are, in our judgment, enforceable against the Secretary, if need be, in an action for declaratory or injunctive relief, or for judicial review of administrative action*. In such litigation, the trust relationship supplies the standard that guides the courts in determining whether the Secretary has abused his discretion in action respecting Indian affairs under authority delegated by Congress.

Brief for the United States at 16, *Mitchell II*, No. 81-1748 (filed Sept. 3, 1982) (emphasis added).

---

[7] 5 U.S.C. §§ 701-706.

> Contrary to the Court of Claims' assumption, the result of this analysis is not that the respondents were left powerless to enforce the rights Congress gave them by imposing statutory duties upon the Secretary. On the contrary, respondents simply were remitted to the remedy of timely filing an action for declaratory or injunctive relief so as to correct any perceived maladministration on the part of the Secretary and his subordinates.

Id. at 15. While not persuaded by the United States' argument as to the *adequacy* of equitable relief as a remedy for an Indian allottee who had suffered retrospective injury, the Court agreed with the position advanced by the United States as to the *availability* of actions for equitable enforcement of trust duties following passage of the 1976 amendment to Section 702 of the APA. *Mitchell II*, 463 U.S. at 227 ("The Government contends that violations of duties imposed by the various statutes may be cured by declaratory, injunctive, or mandamus relief against the Secretary, although it concedes that sovereign immunity might have barred such suits before 1976.").[8]

The resulting test that arose from *Mitchell II*, is due directly to the nature of damage claims under the Tucker Act and the Indian Tucker Act. In order to establish a waiver of sovereign immunity for money damages against the United States, a claim must be

---

[8] The fact that the United States did not prevail on the specific jurisdictional question before the Court in *Mitchell II* involving money damages remedies under the Indian Tucker Act, did not vitiate the Government's argument that equitable relief was available under § 702 of the APA for breaches of Indian trust duties or the Court's acceptance of that position. *Mitchell II,* 463 U.S. at 227 n.32.

"founded either upon the Constitution, or an Act of Congress, or any regulation of an executive department," 28 U.S.C. § 1491. Based on textual analysis of the Tucker Act's specific statutory language, this Court held that in seeking damages from the federal government, "the analysis must train on specific rights-creating or duty-imposing statutory or regulatory prescriptions." *United States v. Navajo Nation*, 537 U.S. 488, 506 (2003). The statutes and regulations at issue in a money damage context must, either expressly or impliedly, provide the requisite "substantive law" that "'mandat[es] compensation by the Federal Government.'" *Id.* at 507 (quoting *Mitchell II*, 463 U.S. at 226).

The complete reversal of position reflected by Interior's arguments in the present case – applying the test in damages cases to actions under the APA – would have potentially devastating consequences in Indian country if accepted by the Court. Unless the specific claim involves "agency action" as defined in 5 U.S.C. § 551, tribes would be stripped of potential enforcement of trust duties in suits permitted by Congress when it enacted the second sentence of § 702 of the APA.

B. State Water Adjudications – Enforcement of Federal Duties

Adjudications of reserved water rights provide a ready setting for previewing the impact of Interior's current position. As noted in Interior's opening brief, the McCarran Amendment, 43 U.S.C. § 666, authorizes the joinder of the United States in general water rights adjudications maintained in state courts. Fed. Brf. at 8 n.2. Notwithstanding the jurisdictional access afforded to Indian tribes by 28 U.S.C. § 1362 to federal district courts to enforce rights under federal law, under *Arizona v. San Carlos Apache Tribe*, 463

U.S. 545 (1983), Indian tribes must often rely on the United States, as the legal owner of reservation lands, to participate on their behalf in state court proceedings to obtain confirmation and quantification of *Winters'* water rights. Many tribal water settlements began in this way. State water adjudications generally have deadlines for presenting water rights claims, and failure to file under state law may result in abandonment. *See, e.g., San Carlos Apache Tribe*, 463 U.S. at 555 n.4 (referencing Montana's deadlines for filing claims in general stream adjudication). If the United States declined to present a claim confirming a tribe's *Winters'* rights, under Interior's proposal, a tribe would have no legal avenue to compel federal officials to protect the tribe's rights in the state water court proceedings unless the tribe's reservation-creating treaty, executive order, or agreement contained specific language expressly authorizing enforcement of the United States' duty of protection of the tribe's water rights. That new textual predicate for equitable relief would be engrafted retroactively as a mandatory element of treaties, executive orders, legislation, and other trust-source documents written decades and, in some cases, centuries ago, before a trust duty would be deemed enforceable.

The Navajo Nation is not the only tribe whose treaty rights or trust assets would be threatened under the newly proposed litmus test for enforceability of trust duties. Even tribes who have had their water rights quantified based on the exercise of trust duties by the United States (duties similar to those identified by the Navajo Nation in this case) would face obstacles in challenging the United States' performance of its duties in protecting those quantified rights.

In 1930, twenty-two years before passage of the McCarran Amendment, the United States "on behalf of its Indian wards," entered into a stipulated decree issued by the United States District Court for the District of Colorado sitting in equity, quantifying and protecting the Southern Ute Indian Tribe's water rights in the Pine River, which runs through irrigated, agricultural lands in the middle of the Tribe's reservation. Decree, *United States v. Morrison Consolidated Ditch Co.*, Case No. 7736 (D. Colo., entered Oct. 25, 1930). As had been warned by the Indian Affairs Superintendent in 1909:

> The time is fast approaching when the water in the Pine [R]iver will have to be adjudicated and if we as representatives of the Indians can not claim rights for them and at the same time be able to prove our claim the natural result will be: the Indians will have no water rights.

Letter from Superintendent Charles Werner, Southern Ute Agency, to W.H. Code, Chief Engineer, Indian Service (Jan. 3, 1909). After having first obtained approval from the U.S. Attorney General, the Special Assistant to the Attorney General, Mr. Ethelbert Ward, filed suit in federal court on August 13, 1924,[9] which resulted in the 1930 federal district court settlement decree.

Four decades later, in 1976, the United States filed an application in Colorado District Court for confirmation and quantification of the *Winters'* rights held in

---

[9] Letter from Commissioner of Indian Affairs Charles H. Burke to Herbert Robinson, Supervising Engineer, Indian Irrigation Service (Sept. 3, 1924) (advising of the filing of suit on August 13, 1924).

trust by the United States for the Tribes in 11 different rivers in Southwest Colorado, including claims to Pine River water.[10] Although initially opposed by the State of Colorado and more than 100 additional parties, a final consent decree was entered on December 19, 1991. Consent Decree, *In re Application for Water Rights of the United States of America (Bureau of Indian Affairs, Southern Ute and Ute Mountain Ute Tribes) For Claims to the Pine River in Water Division No. 7, Colorado*, Case No. W-1603-76D (Dist. Ct., Water Div. 7, Colo., entered Dec. 19, 1991) ("Consent Decree"). Intervening events culminating in that Consent Decree (and similar decrees for the 10 other rivers) included extensive negotiations, approval of a comprehensive settlement agreement in 1986,[11] enactment of federal and state legislation in 1988,[12] and entry into a Stipulation for Consent Decree in November of 1991.[13] As to each of the rivers, the

---

[10] *See, e.g., In re Application for Water Rights of the United States of America (Bureau of Indian Affairs, Southern Ute and Ute Mountain Ute Indian Tribes) for Claims to the Pine River in Water Division No. 7, Colorado*, Case No. W-1603-76D (Colo. Dist. Ct., Water Div. No. 7, filed Dec. 29, 1976) (separate applications were filed as to each of the 11 rivers).

[11] Colorado Ute Indian Water Rights Final Settlement Agreement (Dec. 10, 1986).

[12] *See* Act of November 3, 1988, Pub. L. No. 100-585, 102 Stat. 2973 ("Colorado Ute Tribes' Water Settlement Act"), subsequently amended, Pub. L. No. 106-154, 114 Stat. 2763A-258, App. D (HR 5666), Div. B, Title III ("Colorado Ute Settlement Act Amendments of 2000").

[13] Stipulation for Consent Decree, *In re Application for Water Rights of the United States of America (Bureau of Indian Affairs, Southern Ute and Ute Mountain Ute Indian Tribes) for Claims to the Pine River in Water Division No. 7, Colorado*, Case No. W-1603-76D (Colo. Dist. Ct., Water Div. No. 7, filed Nov. 12, 1991).

United States holds title to adjudicated *Winters*' water rights in trust on behalf of the Southern Ute Indian Tribe.

The settlement documents in the state adjudication contain provisions that address administration of the Consent Decree, including provisions that designate the Colorado State Engineer as the official to oversee the distribution of water. *See* Stipulation for Consent Decree ¶ 12 at 14; *see also* Act of November 3, 1988 § 9, Pub. L. No. 100-585, 102 Stat. 2973, 2978 ("Colorado Ute Tribes' Water Settlement Act"); Colorado Ute Indian Water Rights Final Settlement Agreement at 49 (Dec. 10, 1986). The mechanics of administration, however, differ from the decision of a water rights owner, such as the United States (as trustee), to place a call for water, which triggers deliveries based on adjudicated volumes and priorities for distribution. Nothing in the settlement documents directly addresses under what circumstances the United States must place a call on the Tribe's behalf. Nor do those documents expressly address the remedies available to the Tribe should the United States, as its trustee, decline to place a call for the Tribe's water when requested by the Tribe.

If the settlement documents were not considered by the United States as creating an enforceable duty to make the call for water when needed and requested by the Tribe, the Tribe, like the Navajo Nation, would be forced to seek judicial enforcement in federal court of the federal administrators' trust obligations as evidenced by the settlement documents, its *Winters*' rights, and the specific trust relationship between the

Tribe and the United States.[14] Particularly if the reason for the federal administrators' refusal to make a call for water for the Tribe's benefit was because of other federal interests, such as maintaining flows of water into Navajo Lake, Lake Powell or Lake Mead, a critical question would be whether the United States could lawfully withhold volumes of water from the Tribe for purposes other than those for which the waters were reserved and the water right was created, i.e., fulfillment of Indian trust obligations. *See Sturgeon v. Frost*, __ U.S. __, 139 S. Ct. 1066, 1079 (2019), citing *Cappaert v. United States*, 426 U.S. 128, 141 (1976)).[15]

---

[14] In *Hawkins v. Haaland*, 991 F.3d 216 (D.C. Cir., 2021), *cert. denied*, 142 S. Ct. 1359 (2022), the circuit court found that federal governmental concurrence was not required for the Klamath Tribes to initiate a call for non-consumptive, reserved water confirmed under Oregon's Klamath Basin Adjudication. *See id.* at 231. The court reached its decision "[g]iven the specific text of the [Klamath Tribes'] Termination Act and . . . Restoration Act," *id.* and explicit language in an expired Protocol Agreement that had granted the Klamath Tribes the "independent right to make a call," *id.* at 223. There, the tribes had independent authority to make a call for their water. The state administrator honored the tribes' call and did not need to consider whether the United States had a trust obligation to honor the tribes' request. Unlike that situation, if the BIA declined to concur or place the call on the Pine River for the Southern Ute Indian Tribe, the resulting litigation in state or federal court would undoubtedly involve the role of the United States and the scope of its duties under the special trust relationship with the Tribe, assuming that declaratory or injunctive relief could be pursued.

[15] As the Court's analysis in *Sturgeon* amply demonstrates in a different context, a consideration of the merits in a case commenced by a tribe to enforce Indian trust duties, could require consideration of history and purpose, as well as the specific documents at issue in such a case. *Sturgeon v. Frost*, 139 S. Ct. 1066 (2019).

The Southern Ute example illustrates how application of Interior's "express acceptance" test to determine whether injunctive relief is available to tribes to enforce Indian trust duties would set an unreasonable standard that dispenses with historical understandings and developments over many decades, if not hundreds of years. Interior's "express acceptance" test of enforceability would nullify those obligations.

III. THE STANDING REQUIREMENTS FOR ASSERTING INJURY TO A TRUST ASSET OR FOR CLAIMING A VIOLATION OF A TRUST DUTY SHOULD NOT BE MORE ONEROUS THAN THOSE REQUIRED FOR ANY OTHER CLAIM.

A tribe asserting breach-of-trust claims against federal agencies or officials, of course, bears the burden of establishing standing; however, the standards for satisfying constitutional and prudential standing in asserting Indian breach-of-trust claims should be no greater than those imposed in presenting other claims for equitable relief in federal court. "At the pleading stage, general factual allegations of injury resulting from the defendant's conduct may suffice, for on a motion to dismiss we 'presum[e] that general allegations embrace those specific facts that are necessary to support the claim.'" *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 561 (1992) (Scalia, J.) (quoting *Lujan v. National Wildlife Federation*, 497 U.S. 871, 889 (1990)). That is not how Interior would have it.

The Navajo Nation's TAC satisfied the pleading requirements for standing by containing allegations that "[t]he plaintiff [has] (1) suffered an injury in fact, (2) that is fairly traceable to the challenged conduct of the defendant, and (3) that is likely to be redressed by a favorable judicial decision." *See Spokeo, Inc. v.*

Robins, 136 S. Ct. 1540, 1547 (2016); *see also Warth v. Seldin*, 422 U.S. 490 (1975). In evaluating the adequacy of the Navajo Nation's pleadings, and in reviewing specific trust source documents that constituted substantially more than allusion to a general Indian trust relationship, the appeals court determined that the TAC "properly stated a breach of trust claim premised on the [Navajo] Nation's treaties with the United States and the [Navajo] Nation's federally reserved *Winters* rights, especially when considered along with the Federal Appellees' pervasive control over the Colorado River." Pet. App. 6, 34. The appeals court found:

> [T]he [Navajo] Nation, in pointing to its reserved water rights, has identified specific treaty, statutory, and regulatory provisions that impose fiduciary obligations on Federal Appellees—namely, those provisions of the [Navajo] Nation's various treaties and related statutes and executive orders that establish the Navajo Reservation and, under the long-established *Winters* doctrine, give rise to implied water rights to make the reservation viable.

Pet. App. 29.

Without specifically referring to its bright-line test as a standing requirement, Interior proposes a new "express acceptance" test for justiciability applicable to equitable actions in which Indian tribes seek a declaration of the scope of Indian trust duties and injunctive relief for enforcement of those duties.[16]

---

[16] Interior does not clearly identify the legal basis for its "express acceptance" pleading requirement before a tribe would be permitted to seek declaratory or injunctive relief involving a

Under this new standard, even after setting forth detailed documentation of the dealings between a tribe and the United States from which those duties are alleged to arise, a tribe would be denied access to federal courts to seek a determination of the scope of those trust duties until it had already established that very scope and had also identified an express provision providing for enforcement of those associated duties. Failure to meet that near-impossible test would bar access for equitable relief in federal courts for enforcement of trust duties.

In advancing its replacement for existing standing requirements, Interior relies heavily on the Court's characterization of the Indian trust relationship set forth in *United States v. Jicarilla Apache Nation*, 564 U.S. 162 (2011). *See* Fed. Brf. at 22. Seemingly lost in Interior's reliance on *Jicarilla* is the very nature of that case, which did not address justiciability, but rather addressed whether an exception to the attorney-client privilege would apply to production requests by the Jicarilla Apache Nation as an Indian trust beneficiary in the same manner that the exception to the privilege applied to common law trusts. *Jicarilla*, 564 U.S. at 165-66. In ruling that the exception to the privilege should not apply, the Court described at length the difference between common law trusts and the Indian trust relationship. *Id.* at 173-87. At no point, however, did the Court state or suggest that the underlying litigation in which the Jicarilla Apache Nation was pursuing claims for monetary relief

---

trust duty, whether an aspect of standing, subject matter jurisdiction, or an element required for a favorable decision on the merits of a tribe's claims. Regardless, Interior asserts that a court would "err[ ] in permitting the Navajo Nation's breach-of-trust claim to go forward." Fed. Brf. at 19.

against the United States under the Tucker Act and the Indian Tucker Act was somehow deficient from a justiciability standpoint or that a related claim for prospective enforcement of such duties would be unavailable. The leap that Interior makes in converting a case about privilege to a test for justiciability, is more than a step too far. The Court should decline to impose the obstacles proposed by Interior to tribes seeking declaratory and injunctive remedies related to Indian trust duties provided that standing requirements have been satisfied and provided that the United States has waived sovereign immunity for such non-monetary actions.

IV. THE UNITED STATES HAS WAIVED SOVEREIGN IMMUNITY FROM SUIT BROUGHT BY TRIBES SEEKING NON-MONETARY RELIEF BASED ON SPECIFIC INDIAN TRUST DUTIES.

In the absence of an express waiver by the United States, sovereign immunity shields the federal government from suit. *See, e.g., Loeffler v. Carlin*, 486 U.S. 549 (1988) (concluding that sue-and-be-sued clause of the Postal Reorganization Act waived immunity from interest awards). The second sentence of § 702, enacted as an amendment to the APA in 1976,[17] provides an express waiver of federal sovereign immunity for non-monetary actions:

> An action in a court of the United States seeking relief other than money damages and stating a claim that an agency or an officer or employee thereof acted or failed to act in an official capacity or under color of legal

[17] Act of October 21, 1976, Pub. L. No. 94-574, 90 Stat. 2721.

> authority shall not be dismissed nor relief therein be denied on the ground that it is against the United States or that the United States is an indispensable party.

In the first appeal in the proceedings below, the Ninth Circuit confirmed that Congress waived sovereign immunity from suit for non-monetary claims in enacting § 702 of the APA. Opinion of December 4, 2017, Pet. App. 106, 153. After exhaustively examining the interplay of § 702 and § 704 of the APA, *see id.* Pet. App. 145-47, the Ninth Circuit also determined that the waiver of sovereign immunity expressly afforded by § 702 provides the necessary consent by the United States for the Navajo Nation to pursue equitable remedies – to have the scope of federal trust duties declared and enforced, as applicable.

Interior does not directly contest the determination that § 702 is a waiver of sovereign immunity by the United States expressly permitting suits for non-monetary relief. Nor does Interior appear to challenge the availability of declaratory relief expressly provided for under § 703 of the APA. Interior does, however, seek to limit the scope of relief that may be provided under the Navajo Nation's equitable action, by invoking limitations on mandamus available under 5 U.S.C. § 706(1). Fed. Brf. at 33 (citing *Norton v. Southern Utah Wilderness Alliance*, 542 U.S. 55, 64 (2004)). Interior's objection to entry of mandatory injunctive relief fails to account for the principal issue in this case, which is whether an amended pleading will be permitted to be filed at all. Because the Navajo Nation has identified in detail the substantive sources of law on which it relies in seeking equitable relief, and because the United States has waived sovereign immunity permitting such an action to proceed, the

courts below should be permitted to review those claims following the filing of the Navajo Nation's TAC and allowed to determine the nature of the relief to which the Navajo Nation is entitled.

CONCLUSION

The Order and Amended Opinion of the United States Court of Appeals for the Ninth Circuit, entered on February 17, 2022, should be upheld.

Respectfully submitted,

DAVID C. SMITH
Director
LORELYN HALL
Deputy Director
SOUTHERN UTE
LEGAL DEPARTMENT
P.O. Box 737
Ignacio, CO 81137
(970) 563-2140

PETER ORTEGO
General Counsel
UTE MOUNTAIN UTE TRIBE
LEGAL DEPARTMENT
P.O. Box 128
Towaoc, CO 81334
(970) 564-3641

THOMAS H. SHIPPS
Counsel of Record
ADAM T. REEVES
MAYNES, BRADFORD,
SHIPPS & SHEFTEL, LLP
835 East Second Ave.
Suite 123
Durango, CO 81301
(970) 247-1755
tshipps@mbssllp.com

Counsel for Amici Curiae

February 8, 2023