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.

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 FOR THE NAVAJO NATION

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QUESTIONS PRESENTED

The United States and the Navajos have signed two Senate-ratified treaties. The 1849 Treaty placed the Navajos "forever" "under the exclusive jurisdiction and protection" of the United States and promised to establish a reservation. In turn, the 1868 Treaty established the Navajo Reservation in the Navajos' ancestral high-desert homeland as the tribe's "permanent home." It promised that, by giving up "nomadic life" outside the Reservation, the Navajos could return to their "farming" way of life on part of their ancestral home, with government-provided "seeds and agricultural implements." During the negotiations, the United States was confining the Navajos in inhuman conditions, without usable water, at Bosque Redondo, 300 miles from their homeland. The Navajos made clear that they understood the promise of a permanent homeland to include adequate water for agriculture and raising livestock. Enshrined in the 1868 Treaty, that promise of a permanent return home guaranteed sufficient water, as the Court's treaty-interpretation precedent, including *Winters v. United States*, 207 U.S. 564 (1908), confirms.

The questions presented are:

1. Whether the United States has a treaty-based duty to assess the Navajo Nation's water needs and develop a plan to meet them.

2. Whether a lower-court order requiring the United States to assess the Nation's water needs and develop a plan to meet them would conflict with this Court's decree in *Arizona v. California*, 547 U.S. 150 (2006), when the claim does not seek a judicial determination or quantification of the Nation's rights in the Colorado River.

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INTRODUCTION

Many of us take water for granted. The average American uses 80-100 gallons of water per day. But many families on the Navajo Nation live on barely a tenth of that, and more than 30% of households on the Reservation lack running water altogether. J.A. 101. Hauled from miles away, water can cost up to twenty times more than it does in neighboring off-Reservation communities. E. Rosser, *A Nation Within: Navajo Land and Economic Development* 163 (2021).

How did we get here, in this country, in the twenty-first century?

Broken promises. In 1849, the Navajos were a "wealthy tribe," rich with "immense herds of horses, mules, sheep, and cattle," and fields "cultivat[ing] all the grains and fruits known to the Spaniards in this climate." P. Iverson, *Diné: A History of the Navajos* 38 (2002) (quoting letter from territorial governor). That year, they signed a treaty with the United States placing the Navajos "under the exclusive jurisdiction and protection" of the United States. Treaty Between the United States of America and the Navajo Tribe of Indians (1849 Treaty) art. I, *ratified* Sept. 9, 1850, 9 Stat. 974 (U.S. Br. App. (App.) 1a-5a).

Broken promises. In 1863, the U.S. military rounded up the Navajos, forcing them on the Long Walk more than 300 miles from their ancestral homeland to Bosque Redondo. Without usable water, the area was unlivable. Crops failed for three years. Finally, General William Tecumseh Sherman acceded to the Navajos' request to return home to their farming and livestock-rearing way of life. The Navajos made clear that they were bargaining for their land and the water that necessarily came with it. The result was

the 1868 Treaty, which established the Navajo Reservation and promised opportunities and tools for farming and funds for thousands of animals to replenish the Navajo herds. The Treaty, in short, promised both land and water sufficient for the Navajos to return to a permanent home in their ancestral territory.

Broken promises. The Nation is still waiting for the water it needs. This case arises from the Nation's breach-of-trust claim seeking an order requiring the United States to honor its treaty promises by assessing the Nation's water needs and developing a plan to meet them.

1. Courts interpret treaties with tribes, based on familiar meeting-of-the-minds principles, as the tribes would have understood them. That means looking not just to text but also to negotiations and historical context. Here, the specific terms of the 1849 and 1868 Treaties, plus the parties' negotiations, show that the Navajos and United States alike understood the treaties to promise the Navajos a permanent homeland in their ancestral territory, with sufficient water to fulfill the Reservation's purposes. In exchange for agreeing to remain within the Reservation's borders—within just a fraction of their ancestral lands—the Navajos received the United States' guarantees of land and the water necessary to fulfill the Reservation's purposes.

2. The government's breach of those bargained-for treaty promises gives rise to a breach-of-trust claim. The Treaties promise water for the Reservation and impose corresponding duties on the United States to secure the necessary water. The United States' promises establish the elements of an enforceable trust relationship. The government's own position is that it manages the Navajos' unquantified water

rights on the Nation's behalf. Br. 37. Duty-bound to secure water for the Nation—that's what a bargained-for exchange means—the United States cannot complain about an order requiring it to take the necessary first steps to assess the Nation's needs and make a plan to meet them. Nor can it complain about amorphous duties. This case is about *this* promise of water to *this* tribe under *these treaties*, signed after *these* particular negotiations reflecting *this* tribe's understanding. A promise is a promise. And a promise in a treaty, the U.S. concedes, Br. 23 n.5, is binding.

3. The intervenor state Petitioners claim that adjudicating the Nation's breach-of-trust claim would infringe on this Court's decree, consolidated in *Arizona v. California*, 547 U.S. 150 (2006), apportioning the waters of the Colorado River. That argument fundamentally misunderstands the Nation's claim. True, the Nation has unquantified rights to the Colorado River mainstream. But this case is about the United States' failure to secure the water it promised to the Navajos by treaty, wherever that water may come from. If the suit succeeds and the government ultimately determines that it may need Colorado River water to fulfill its promise, then the parties might need to return to this Court. But the Nation's claim does not depend on rights to Colorado River water. It thus does not fall within the narrow category of issues implicating this Court's retained original jurisdiction.

The United States made a solemn promise, and the courts should enforce it. The basic human rights of hundreds of thousands of Navajos, fellow U.S. citizens, hang in the balance. The Court should affirm.

STATEMENT

A. Factual background

1. The Navajo Nation is a federally recognized Indian tribe. U.S. Pet. App. (Pet. App.) 4a. In 1849 and 1868, the United States and the Navajos executed two Senate-ratified treaties establishing the Navajo Reservation as a permanent homeland suitable for agriculture. Pet. App. 4a-5a. Today, the Reservation, which is located almost entirely within the Colorado River Basin, stretches into Arizona, New Mexico, and Utah. *Id.* The Colorado River runs along the Reservation's western border. *Id.*

a. In 1849, the Navajos and the United States signed a treaty placing the Navajos "forever" under the United States' "exclusive jurisdiction and protection." 1849 Treaty art. I, App. 1a. The United States promised to "designate, settle, and adjust" the boundaries of a reservation for the Navajos. *Id.* art. IX, App. 4a. The 1849 Treaty declares that it "shall be binding upon the contracting parties"; that it will be subject to later "modifications and amendments" adopted by the United States; and that it "is to receive a liberal construction." *Id.* art. XI, App. 4a. The Treaty directs the federal government to "so legislate and act as to secure" the Navajos' "permanent prosperity and happiness." *Id.* On September 9, 1850, the Senate ratified the treaty. 9 Stat. 974.

b. In 1868, the Navajos and the United States signed a treaty taking the first step to fulfill the 1849 Treaty's guarantees by establishing the Navajo Reservation. *See* Treaty Between the United States of America and the Navajo Tribe of Indians (1868 Treaty), art. XIII, June 1, 1868, 15 Stat. 668 (App. 6a-18a). Understanding the 1868 Treaty's promises

requires "look[ing] beyond the written words to the larger context that frames the Treaty, including 'the history of the treaty, the negotiations, and the practical construction adopted by the parties.'" *Minnesota v. Mille Lacs Band of Chippewa Indians*, 526 U.S. 172, 196, 206 (1999) (quoting *Choctaw Nation of Indians v. United States*, 318 U.S. 423, 432 (1943)).

The Navajos had been cultivating crops and raising livestock since at least the late sixteenth century. Iverson, *supra*, at 22-23, 26, 28, 33, 38. That changed in 1863, when the United States military forcibly removed the Navajos from their ancestral homeland and marched them "some 300 miles" to live captive at Bosque Redondo, "a small piece of land on the Pecos River in eastern New Mexico." *Williams v. Lee*, 358 U.S. 217, 221 (1959); J.L. Kessell, *General Sherman and the Navajo Treaty of 1868: A Basic and Expedient Misunderstanding*, 12 W. Hist. Q. 251, 254 (1981). Bosque Redondo had little usable water and so was unsuitable for irrigation, farming, raising livestock, or otherwise sustaining the Navajo people. Kessell, *supra*, at 254-55, 259; *The Navajo Treaty 1868: Treaty Between the United States of America and the Navajo Tribe of Indians with a Record of the Discussions that Led to Its Signing* 2-3 (M. Link ed., 1968) [hereinafter *Treaty Record*]. Many Navajos died of starvation and disease. *Treaty Record*, *supra*, at 1-2; Kessell, *supra*, at 258-59.

The United States eventually recognized the disastrous effects of its removal decision and the "deplorable condition[s]" at Bosque Redondo. Kessell, *supra*, at 255-56, 258. The United States and the Navajos thus began negotiating what became the 1868 Treaty to return the Navajos to a permanent homeland on part of their ancestral territory. *Id.* at 258.

The negotiations were translated from English to Spanish, from Spanish to Navajo, and then back again. *Id.* at 251.

The Navajo representative, Barboncito, insisted on the Navajos' returning to their homeland, surrounded by "four mountains and four rivers." *Treaty Record*, *supra*, at 2. He made clear that the Navajos expected to have sufficient water to irrigate the land, farm, raise livestock, and sustain their people when they returned home. He recounted that "the heart of the Navajo country" was suitable for "stock or agriculture," and that "when it rains," "the water flows in abundance." *Id.* at 8. "After we get back to our country," Barboncito explained, he expected that "black clouds will rise and there will be plenty of rain. Corn will grow in abundance and everything [will] look happy." *Id.* at 9. Barboncito contrasted the Navajos' generations-long reliance on water in their homeland with Bosque Redondo's unlivable conditions, *id.* at 1-6, lamenting that Bosque Redondo "does not like us," and "neither does the water," *id.* at 3.

The United States' representative, General William Tecumseh Sherman, understood that the Navajos could not continue living in Bosque Redondo, where their "crops failed for three years." *Id.* at 6-7. He pointed out potential locations for the reservation on a map, offering at first to relocate the Navajos somewhere other than their homeland. *Id.* at 4-5. But given Barboncito's insistence, Sherman ultimately agreed that the Navajos could return to their "own country." *Id.* at 5, 8, 10.

c. The result was the 1868 Treaty. Implementing the 1849 Treaty's promise to "designate, settle, and adjust" the boundaries of the Navajo Reservation,

1849 Treaty art. IX, App. 4a, the 1868 Treaty established the Reservation as the tribe's "permanent home" and designated its initial boundaries, 1868 Treaty art. XIII, App. 15a. The Navajos agreed to "abandon" "nomadic life," return to their agrarian lifestyle on the Reservation, and "relinquish all right to occupy any territory outside their reservation." *Id.* arts. IX, XIII, App. 12a, 15a. For its part, the United States agreed that Navajos who "desire[d] to commence farming" could obtain a tract of reservation land, *id.* art. V, App. 9a, as well as "seeds and agricultural implements," *id.* art. VII, App. 11a. The Treaty also emphasized "the necessity of education," in particular for Navajos "settled on said agricultural parts of this reservation." *Id.* art. VI, App. 10a. And to replenish the Navajos' livestock, the Treaty promised funds to "purchase … fifteen thousand sheep and goats." *Id.* art. XII, App. 14a.

d. The new "permanent home" encompassed just half of what Sherman had promised, Kessell, *supra*, at 263, and only "a portion of what had been [the Navajos'] native country," *Williams*, 358 U.S. at 221. In the years that followed, the United States continued to implement its 1849 Treaty promise to "designate, settle, and adjust" the Reservation's boundaries, 1849 Treaty art. IX, App. 4a, by expanding the Reservation through statutes and executive orders. For example, four Executive Orders between 1878 and 1886 expanded the Reservation to "include better facilities for grazing and watering [the Navajos'] animals and increasing flocks and herds." Letter from Thos P. Smith, Acting Comm'r of Indian Affs., to D.R. Francis, Sec'y of the Interior, H.R. Doc 310 (Feb. 16, 1897); *see* Executive Order of October 29, 1878; Executive Order of

January 6, 1880; Executive Order of May 17, 1884; Executive Order of April 24, 1886.

Congress likewise continued adjusting and expanding the Reservation. *E.g.*, Act of May 23, 1930, 46 Stat. 378; An Act to amend the Act of May 23, 1930, 46 Stat. 1204 (1931). In 1934, Congress enlarged the Reservation and confirmed the Colorado River as its western boundary. Act of June 14, 1934, ch. 521, 48 Stat. 960, 960. The 1934 legislation confirmed that the land within the Reservation was set aside "for the benefit of the Navajo and such other Indians as may already be located thereon." 48 Stat. at 961.

2. The Navajos' concerns with water are unsurprising given their experience at Bosque Redondo and the climate and geography of the western United States. Wide-ranging disagreement over how to apportion the waters of the Colorado River provides important context for this case and the second question presented. Rights to the Colorado River have been "allocated through a series of federal treaties, statutes, regulations, and common law rulings; Supreme Court decrees; and interstate compacts." Pet. App. 5a. "[T]his legal regime is known as the 'Law of the River,'" *id.*, and it gives the federal government extensive control over the Colorado's waters.

a. In 1922, the Colorado River Basin States (Arizona, California, Nevada, Colorado, New Mexico, Utah, and Wyoming) entered into the Colorado River Compact, agreeing to divide the Colorado River Basin into two segments. The Lower Basin would include California, Arizona, and Nevada, and the Upper Basin would include the remaining states. Colorado River Compact art. II, Colo. Rev. Stat. § 37-61-101. Each Basin would receive equal amounts of Colorado River

water. *Arizona v. California,* 373 U.S. 546, 557 (1963) (*Arizona I*). The agreement added that "[n]othing in this compact shall be construed as affecting the obligations of the United States of America to Indian tribes." Colorado River Compact art. VII.

In 1928, Congress enacted the Boulder Canyon Project Act (BCPA) to authorize the Secretary of the Interior to allocate "the waters of the main Colorado River among the Lower Basin States and to decide which users within each State would get water." *Arizona I*, 373 U.S. at 580. The BCPA granted the Secretary broad control over Colorado River water, authorizing projects like the Hoover Dam and a reservoir known as Lake Mead and conferring on the Secretary exclusive authority to make contracts for water storage and delivery. 43 U.S.C. §§ 617–619b.

b. Continued disagreement about the Colorado River led to this Court. In 1952, Arizona invoked the Court's original jurisdiction, suing California and seven of its public agencies to settle the states' rights to "the waters of the Colorado River and its tributaries." *Arizona I*, 373 U.S. at 551. Nevada, New Mexico, Utah, and the United States—in part, as tribal trustee—intervened. *Id.*

The United States asserted claims to the Colorado mainstream on behalf of five tribes, but not the Navajo Nation. Pet. App. 7a. Instead, the United States asserted a claim for the Nation to a tributary, the Little Colorado River. *Id.* The Court denied the Nation's request for a Special Assistant Attorney General, and when the Nation moved to intervene, the federal government successfully opposed the motion. *Id.*

In 1964, the Supreme Court issued a decree quantifying various rights to the Colorado River, including

those of the five tribes whose rights the federal government had asserted. *Arizona v. California*, 376 U.S. 340 (1964) (*1964 Decree*); *see Arizona I*, 373 U.S. at 599-600. But the Court underscored that its decree did not affect "[t]he rights or priorities, except as specific provision is made herein, of any Indian Reservation." *1964 Decree* art. VIII(C), 376 U.S. at 353. The Court did not adjudicate the Nation's rights to the Colorado mainstream or its claim to the Little Colorado River.

Article IX of the Decree retained jurisdiction "for the purpose of any order, direction, or modification of the decree, or any supplementary decree, that may at any time be deemed proper in relation to the subject matter in controversy." *1964 Decree* art. IX, 376 U.S. at 353. "[M]ainly a safety net" to ensure that the Court can "adjust[] the Decree in light of unforeseeable changes in circumstances," Article IX allows the Court "to correct certain errors, to determine reserved questions, and, if necessary, to make modifications in the [D]ecree." *Arizona v. California*, 460 U.S. 605, 618, 622 (1983) (*Arizona II*).

Over the next half-century, the Court modified the 1964 Decree several times. *See, e.g.*, *Arizona v. California*, 466 U.S. 144 (1984); *Arizona v. California*, 531 U.S. 1 (2000) (*2000 Decree*). Finally, in 2006, the Court issued a consolidated decree. *Arizona v. California*, 547 U.S. 150 (2006) (*Consolidated Decree*). At no point did the United States seek to quantify the Nation's rights to the Colorado mainstream.

3. The Nation's water needs are serious. More than 30% of Navajos on the Reservation lack running water. J.A. 101. Many Navajo Nation members thus travel great distances, at great expense, to collect water in unsanitary containers from non-potable sources.

J.A. 101-02. While the average American uses 80-100 gallons of water per day for household needs, Navajo Nation members use about seven. J.A. 101. The resulting difficulty in maintaining hand hygiene contributed to a COVID-19 death rate higher in the Nation than in many other parts of the United States. Pet. App. 9a. And droughts have only made things worse. J.A. 102.

B. Procedural background

This case arises from the Navajo Nation's motion to file a third amended complaint in its breach-of-trust litigation against the federal Petitioners, the Department of the Interior, the Secretary of the Interior, the Bureau of Reclamation, and the Bureau of Indian Affairs. The proposed complaint alleged that the United States breached its treaty-based duties to provide the Nation with sufficient water to fulfill the United States' promise that the Navajo Reservation would serve as the Navajos' permanent homeland. J.A. 135-36, 138. The Nation sought an order requiring the government "to determine the water required to meet the needs of the Nation's lands in Arizona and devise a plan to meet those needs." J.A. 86.

1. The district court denied leave to file an amended complaint. It held that the Nation's requested relief implicated this Court's retained jurisdiction in *Arizona*. Pet. App. 56a. To determine whether the United States breached its trust duties to the Nation, the court reasoned, it would need to determine the Nation's rights to the Colorado River. Pet. App. 59a-60a & n.2. On the merits, the court thought that the Nation had failed to identify a "specific, applicable, trust-creating statute or regulation that the Government violated." Pet. App. 44a-53a.

2. a. The court of appeals reversed. Pet. App. 1a-35a. The court first held that the requested relief does not implicate this Court's retained jurisdiction. The Nation "does not seek a quantification of its rights in the Colorado River," the court reasoned, and the Consolidated Decree does not affect "[t]he rights or priorities, except as specific provision is made herein, of any Indian Reservation." Pet. App. 17a (quoting *1964 Decree* art. VIII(C), 376 U.S. at 353).

On the merits, the court remanded with instructions to allow the Nation to assert claims for breach of trust and breach of the 1849 and 1868 Treaties. Pet. App. 27a n.4, 33a-34a. The court explained that the Nation had identified "specific treaty, statutory, and regulatory provisions that impose fiduciary obligations on [the government]—namely," the 1868 Treaty and related statutes and executive orders that establish the Reservation as a homeland suitable for farming—giving the Nation a right to sufficient water. Pet. App. 25a-27a. The Reservation "cannot exist as a viable homeland for the Nation without an adequate water supply." Pet. App. 25a. And under *Winters v. United States*, 207 U.S. 564 (1908), the court continued, the government has "a duty to protect the Nation's water supply that arises, in part, from specific provisions in the 1868 Treaty that contemplated farming by the members of the Reservation." Pet. App. 26a. The court noted that various Interior documents acknowledge the United States' "trust responsibilities to protect the Nation's *Winters* rights" and observed that "the Secretary's pervasive control over the Colorado River" "strengthened and reinforced" the Nation's claim. Pet. App. 29a-30a.

b. Judge Lee concurred. He emphasized that the Nation's requested relief doesn't implicate this Court's

retained jurisdiction because the "proposed injunction does not ask the district court to quantify any rights that the Nation may have to the Colorado River mainstream." Pet. App. 34a.

SUMMARY OF ARGUMENT

I. The Navajo Nation has stated a treaty-based breach-of-trust claim.

A. When the United States and the Navajos entered into the 1849 and 1868 Treaties, both parties understood that the United States was promising sufficient water for the Reservation to serve as the Navajos' permanent home in the high desert.

1. The Court has long held that treaties with tribes should be interpreted to give effect to the parties' intentions and the purpose of the agreement. Construing treaty terms requires courts to examine the text while drawing on the negotiations and historical context, and to recognize the unequal bargaining power between the federal government and tribes in entering into treaties. Applying those principles, the Court has long understood that when the United States guarantees a permanent homeland, it also promises sufficient water to fulfill the homeland's purpose. *Winters*, 207 U.S. at 575-76. Dry western land without water is no home; the agreement makes sense only as a promise of land and water together.

2. With the 1849 and 1868 Treaties, the United States promised the Navajos a permanent homeland reservation and the water necessary to sustain it. Those agreements must be interpreted as the Navajos would have understood them. After years of failed crops in captivity at Bosque Redondo, the United States acceded to the Navajos' request to return home to irrigate their land, farm, and tend livestock. The

1868 Treaty established the Navajo Reservation and promised the Navajos an opportunity to farm with government-provided seeds. The Navajos, in exchange, promised to abandon nomadic life beyond the Reservation's borders. Both parties understood that the bargained-for exchange included a promise of enough water to make the Navajos' return to their way of life possible. Only that construction supports the Treaties' purpose: without water, the United States' agreement that the Navajos could farm and live permanently within defined boundaries on their high-desert homeland would have been meaningless. Reading the Treaties otherwise would mean the United States made promises it knew it wouldn't keep. And because that treaty promise of water set the terms for the Reservation, it also applies to later executive and congressional expansions of the Reservation.

B. The Navajo Nation has stated a breach-of-trust claim because the 1849 and 1868 Treaties are "specific rights-creating or duty-imposing" sources of law, *United States v. Navajo Nation*, 556 U.S. 287, 301 (2009) (*Navajo II*), that guarantee enough water to fulfill the Reservation's purpose. Read as the Navajos would have understood them, the specific provisions in the Treaties providing the Navajos a permanent homeland and support with agriculture and livestock are agreements that the United States will secure adequate water for the Nation. Those promises establish the elements of an enforceable fiduciary relationship with respect to the Navajos' unquantified reserved water rights, and the government manages those water rights and has a duty to safeguard them. The United States' control over the Nation's unquantified reserved water rights highlights why requiring the

government to assess the Nation's needs and develop a plan to meet them is an appropriate remedy.

C. Petitioners' counterarguments fail. *First*, the Nation has identified a specific promise to provide water. Nothing in *United States v. Jicarilla Apache Nation*, 564 U.S. 162 (2011), suggests that magic words are required or that the longstanding principles of Indian treaty interpretation do not apply in the breach-of-trust context. The United States accepted responsibility for securing the Nation adequate water by treaty, and that meeting of the minds is enforceable and supports the Nation's breach of trust claim.

Second, the Nation's claim does not threaten to impose amorphous duties on the government. A promise to secure water necessarily includes assessing the Nation's needs and making a plan to meet them—all the Nation seeks by judicial order. Requiring the United States to fulfill its specific treaty promise to provide the Nation with adequate water goes no further than interpreting *these treaties* with *this tribe* in *this case*. As this Court has recognized, different treaties with different tribes, even with similar language, may mean different things in light of the negotiations and historical context.

Third, granting the Nation relief doesn't tread on Congress' role in Indian affairs—the Treaties were Senate-ratified, after all, and Congress continued expanding the Reservation against the backdrop of *Winters* and the Court's other Indian-treaty-interpretation caselaw.

Finally, the Nation isn't asking the district court to adjudicate its rights to the Colorado River, so Petitioners' gestures at the distance between the Colorado River and the original 1868 Reservation miss the

point. In any event, the United States' promise of water to satisfy the Navajos' present and future needs continued in full force as the Reservation's "permanent home" expanded.

II. The Nation's breach-of-trust claim doesn't implicate this Court's retained jurisdiction under Article IX of the Consolidated Decree. The Nation isn't asking the district court to adjudicate or quantify its rights to the Colorado River, and its requested relief doesn't require a court to modify the decree.

ARGUMENT

I. The Navajo Nation has stated a claim based on breach of treaty obligations.

Under the Constitution, treaties—including those between the United States and tribes—are considered the "supreme Law of the Land." U.S. Const. art. VI, cl. 2; *Worcester v. Georgia*, 31 U.S. 515, 559 (1832); *see Washington State Dep't of Licensing v. Cougar Den, Inc.*, 139 S. Ct. 1000, 1013 (2019). Treaty rights are thus enforceable unless Congress clearly abrogates them. *E.g.*, *Herrera v. Wyoming*, 139 S. Ct. 1686, 1698 (2019); *Foster v. Neilson*, 27 U.S. 253, 315 (1829). The United States expressly accepted the 1849 and 1868 Treaties by Senate ratification. Under longstanding principles of treaty interpretation, those Treaties promised that the United States would reserve sufficient water for the Reservation to serve as the Navajos' permanent home. *See, e.g.*, *Winters*, 207 U.S. at 576. That promise bears the hallmarks of a trust relationship, so a broken promise is a breach of trust.

A. By entering into the 1849 and 1868 Treaties with the Navajos, the United States promised the Navajos sufficient water for the Reservation to serve as the Navajos' permanent home.

The Court has long held that treaties with tribes, like international treaties, should be interpreted to give effect to the parties' intentions and the purpose of the agreement. Construing treaty promises thus requires asking how the tribe would have understood the treaty based on its text, the negotiations, and the historical context, bearing in mind the United States' superior bargaining power. Under those principles, the United States' promise that the Navajos could live on a reservation within their original homeland, in response to the Navajos' expressed desire to return home to raise crops and livestock after several years at the inhospitable Bosque Redondo, necessarily also included a promise to provide the water needed to make their way of life on the Reservation possible.

1. An Indian treaty must be read to give effect to the parties' intentions and the agreement's purpose.

a. More than a century ago, the Court established a framework for interpreting treaties between the United States and Indian tribes. *See Winters*, 207 U.S. at 576. To determine a treaty's meaning, courts evaluate the purpose of the instrument, the parties' intentions, and how the tribe would have understood the treaty based on the treaty's text, the treaty negotiations, and the historical context in which the treaty was signed. *Herrera*, 139 S. Ct. at 1699, 1701-02; *Cougar Den, Inc.*, 139 S. Ct. at 1012-13; *Mille Lacs*, 526 U.S. at 196, 206; *United States v. Winans*, 198 U.S.

371, 381 (1905). This approach reflects the application of general legal principles governing agreements. Treaties with tribes, like treaties with foreign nations, are "essentially … contract[s] between two sovereign nations." *Herrera*, 139 S. Ct. at 1699 (quoting *Washington v. Washington State Commercial Passenger Fishing Vessel Ass'n*, 443 U.S. 658, 675 (1979)). That means they "must be interpreted in light of the parties' intentions." *Id.* (quoting *Mille Lacs*, 526 U.S. at 206).

Determining the parties' intentions requires recognizing that the United States "presumptively" wielded "superior negotiating skills and superior knowledge of the language in which [treaties with Indians were] recorded." *Fishing Vessel Ass'n*, 443 U.S. at 675-76. That means treaty terms must be interpreted "in the sense [that] they would naturally be understood by the Indians." *Herrera*, 139 S. Ct. at 1699; *Cougar Den, Inc.*, 139 S. Ct. at 1011-12; *Winans*, 198 U.S. at 380. That canon is "rooted in the unique trust relationship between the United States and the Indians." *County of Oneida v. Oneida Indian Nation of N.Y.*, 470 U.S. 226, 247 (1985). But it also reflects the generally applicable principle of blackletter contract law that ambiguous terms are construed "against the drafter who enjoys the power of the pen." *Cougar Den, Inc.*, 139 S. Ct. at 1016 (Gorsuch, J., concurring in the judgment).

Under these principles, treaties with tribes must be interpreted in a manner that "support[s]," rather than "impair[s] or defeat[s]" "the purpose of the agreement." *Winters*, 207 U.S. at 577. To put it another way, the Court requires treaty rights to be "construed in favor [of], not against, tribal rights." *McGirt v. Oklahoma*, 140 S. Ct. 2452, 2470 (2020); *Oneida*

County, 470 U.S. at 247. The Court has applied these principles to favor broad interpretations that "accomplish" "[t]he object of the treaty" over "narrow" constructions that do not. *In re Kansas Indians*, 72 U.S. 737, 760-61 (1866).

b. These interpretive principles align with traditional canons for interpreting international treaties. *See Choctaw Nation v. United States*, 119 U.S. 1, 28 (1886). Treaties with foreign nations are likewise considered contracts, *Lozano v. Montoya Alvarez*, 572 U.S. 1, 11-12 (2014); *Sullivan v. Kidd*, 254 U.S. 433, 439 (1921), so the aim there, too, is "to effect the apparent intention of the parties," *Nielsen v. Johnson*, 279 U.S. 47, 51 (1929); *Tucker v. Alexandroff*, 183 U.S. 424, 437 (1902); *Geofroy v. Riggs*, 133 U.S. 258, 271-72 (1890). Courts thus consider both "the document's text and context," *Lozano*, 572 U.S. at 11, determining the original meaning of treaty terms by "look[ing] beyond the written words to the history of the treaty, the negotiations, and the practical construction adopted by the parties," *Eastern Airlines, Inc. v. Floyd*, 499 U.S. 530, 535 (1991); *Nielsen*, 279 U.S. at 51-52. The upshot is that international treaties, like Indian treaties, "are construed more liberally than private agreements." *Eastern Airlines*, 499 U.S. at 535 (cited in *Cougar Den, Inc.*, 139 S. Ct. at 1016 (Gorsuch, J., concurring in the judgment)). Indeed, "[l]iberality is one of the foremost rules of treaty interpretation." 74 Am. Jur. 2d Treaties § 21 (2012).

2. The Court has long applied canons of Indian treaty interpretation to read promises of a permanent homeland to include promises of sufficient water.

Applying the canons of Indian treaty construction, the Court has long understood promises of a permanent homeland to mean promises of sufficient water for that homeland, as well.

a. In *Winters*, the Court held that when the United States created a reservation for two tribes in Montana, it also promised them enough water to fulfill the purposes of the reservation. 207 U.S. at 576-77. The United States had agreed to establish the Fort Belknap Reservation as the tribes' "permanent home" and a place for farming, but "[t]he lands were arid and, without irrigation, were practically valueless." *Id.* at 565, 575-76. The Court rejected the notion that, in ceding land, the Indians had retained rights only to the "springs and streams on the reservation" while giving up "the waters, without which [the lands] would be valueless" and unable to support them. *Id.* at 575-76. Instead, even though the agreement was silent as to water rights, the Court held that the reservation guaranteed sufficient water for a permanent home. *Id.* at 576-77. Reading the agreement another way, the Court reasoned, would "impair or defeat" its purposes. *Id.* at 577. The Court explained that ambiguities in agreements should be resolved in the Indians' favor and that courts should construe those agreements in a way that "would support the purpose of the agreement." *Id.*

b. The Court applied *Winters* in *Arizona I*, holding that the United States "intended to deal fairly with the Indians" when it created certain homeland

reservations "by reserving for them the waters without which their lands would have been useless." 373 U.S. at 600. The Court explained that the reservations "were not limited to land, but included waters" from the Colorado River as well. *Id.* at 598-99. Water from the Colorado River or its tributaries was "necessary to sustain life" on the reservations, the Court reasoned, because most of the land "is and always has been arid." *Id.* at 598. Congress, too, knew that "[w]ithout water there can be no production, no life" for the Indians living in the Colorado River Basin. *Id.* (citing Cong. Globe, 38th Cong., 2d Sess. 1321 (1865)). In short, when the government created the reservations, it was well known "that water from the river would be essential to the life of the Indian people." *Id.* at 599.

3. The 1849 and 1868 Treaties promise sufficient water for the Reservation to serve as the Navajos' permanent home.

In the 1849 and 1868 Treaties, the United States promised the Navajo Nation sufficient water for the Reservation to serve as the Navajos' permanent home.

a. Both Treaties must be construed as the Navajos would have understood them. For starters, the 1849 Treaty states that it should "receive a liberal construction" and that the federal government should "so legislate and act as to secure" the Navajos' "permanent prosperity and happiness." 1849 Treaty art. XI, App. 4a. Those instructions and the Court's treaty interpretation precedent, *see In re Kansas Indians*, 72 U.S. 737, served as the backdrop for the 1868 Treaty, which began implementing the 1849 Treaty's instruction to designate the Reservation's boundaries. *Supra* p. 4. What's more, as the Court has recognized, the

United States and the Navajos were not "parties dealing at arm's length with equal bargaining positions" when they negotiated the 1868 Treaty at Bosque Redondo. *McClanahan v. Arizona State Tax Comm'n*, 411 U.S. 164, 174 (1973). The bottom line is that the Treaties and their promises mean what the Navajos reasonably understood them to mean.

b. The 1868 Treaty's text and context contain "several cues," *Herrera*, 139 S. Ct. at 1701, showing that the Navajos—and the United States, too—understood that establishing the Reservation also meant promising sufficient water to maintain a permanent homeland under the United States' protection. For example, the 1868 Treaty implemented the guarantee in the 1849 Treaty to "designate, settle, and adjust" the boundaries of a reservation, 1849 Treaty art. IX, App. 4a, by establishing the Reservation as the Navajos' "permanent home," 1868 Treaty art. XIII, App. 15a. The 1868 Treaty also aimed to encourage agriculture on the Reservation. *Id.* arts. V-VII, App. 9a-11a; *id.* art. XII, App. 14a. And the Navajos "relinquish[ed] all right to occupy any territory outside their reservation." *Id.* arts. IX, XIII, App. 12a, 15a; *see Williams*, 358 U.S. at 221, meaning that they would need sufficient water to pursue agriculture and livestock-rearing *on* the Reservation.

Just as in *Winters*, the Treaties' establishment of a "permanent home" suitable for agriculture necessarily promised water. 207 U.S. at 565, 575-76. Only that interpretation supports, rather than undermines, the purpose of the Treaties: without water, a promise that the Navajos could live permanently within defined boundaries and engage in agriculture would have been meaningless. *See id.* at 576. The Navajos did not agree to "give up the waters which made [their

Reservation] valuable or adequate." *Id.*; *see Arizona I*, 373 U.S. at 600.

c. The historical evidence confirms that both parties understood that the Treaties carried a promise of water. The Navajos had been forced against their will from a homeland with fertile areas where they could farm and raise vast herds of livestock to Bosque Redondo, where the water and land were so poor that many Navajos died of starvation and disease. *Supra* pp. 5-6. When negotiating the 1868 Treaty, the Navajos therefore insisted on returning to their homeland, where they expected adequate water to support their people under the federal government's promised "protection," 1849 Treaty art. I, App. 1a. The United States, for its part, recognized the unsuitable living conditions at Bosque Redondo and acceded to the Navajos' request to return to their homeland. *Supra* pp. 5-6. When it signed the 1868 Treaty, the United States knew that water access was crucial to the survival of Indians living in the Colorado River Basin. *Supra* p. 21.

The government's treaty promise of water carries through to the present-day Reservation. Each expansion of the Reservation after the 1868 Treaty acted to "designate, settle, and adjust" boundaries, as promised in the 1849 Treaty. Arts. I, IX, App. 1a, 4a; *supra* pp. 7-8. The United States could not have intended, in expanding the Reservation to better approximate the Navajos' ancestral high-desert home, to do anything other than provide the Navajos the water that was essential for life. The 1849 and 1868 Treaties promised water "for a use which would be necessarily continued through years," *Winters*, 207 U.S. at 577—for "the future as well as the present needs" of the Nation, *Arizona I*, 373 U.S. at 600.

B. The 1849 and 1868 Treaties create enforceable rights to water and impose enforceable duties on the United States to secure that water.

The Navajo Nation has stated a treaty-based breach-of-trust claim because the 1849 and 1868 Treaties are "specific rights-creating or duty-imposing" sources of law, *Navajo II*, 556 U.S. at 301, that promise the Nation sufficient water to fulfill the Treaties' purpose. Read as the Navajos would have understood them, the specific provisions in the Treaties guaranteeing the Navajos a permanent homeland and help with agriculture are agreements that the United States will provide the Nation adequate water. Those provisions establish a meeting of the minds on the hallmarks of a fiduciary relationship over the Navajos' water rights and impose an enforceable duty on the United States to consider the Navajos' water needs and make a plan to meet them.

1. The United States owes an enforceable duty when a tribe identifies a specific "rights-creating or duty-imposing" source of law bearing the key features of a trust relationship.

a. The United States owes an enforceable fiduciary duty to a tribe when the tribe can identify a "specific rights-creating or duty-imposing" source of law that "bears the hallmarks of a 'conventional fiduciary relationship.'" *Navajo II*, 556 U.S. at 301. Those hallmarks include a trustee, a beneficiary, and a trust corpus managed by the trustee. *United States v. Mitchell*, 463 U.S. 206, 225 (1983) (*Mitchell II*). As the

United States acknowledges, "a treaty can be the basis of a breach-of-trust-claim." Br. 23 n.5; *supra* p. 16.

No magic words are required to create an enforceable duty. *Mitchell II*, 463 U.S. at 225. To be sure, the term "trust" or references to the Indians' best interests or the government's obligation to act for the Indians' benefit and protection may point to enforceable fiduciary duties. *United States v. White Mountain Apache Tribe*, 537 U.S. 465, 474-75 (2003); *Mitchell II*, 463 U.S. at 224. But so long as a substantive source of law prescribes rights or duties and "bears the hallmarks of a conventional fiduciary relationship," *Navajo II*, 556 U.S. at 301, it need not use any particular words to establish an enforceable duty, *see Mitchell II*, 463 U.S. at 224.

b. Once a tribe identifies a "'specific rights-creating or duty-imposing'" source of law with the key features of a trust relationship, then common-law "trust principles" may help define the scope of the government's liability. *Navajo II*, 556 U.S. at 301 (quoting *United States v. Navajo Nation*, 537 U.S. 488, 506 (2003) (*Navajo I*)); *accord Jicarilla*, 564 U.S. at 177 (citing *White Mountain Apache*, 537 U.S. at 475-76). This second step reflects the context in which all of this Court's tribal breach-of-trust cases have arisen: Tucker Act and Indian Tucker Act claims for damages, *see* 28 U.S.C. § 1491; *id.* § 1505. Under the Court's Indian Tucker Act decisions, once a tribe identifies a source of law imposing specific duties on the government, common-law principles like the government's control over the trust corpus can help determine whether the law "can fairly be interpreted as mandating compensation for damages sustained as a result of a breach" of those duties. *Navajo II*, 556 U.S. at 290-91.

The only question here is whether the Treaties impose duties on the government (*i.e.*, step one). The Nation is seeking only equitable relief—an order requiring the government to evaluate its water needs and develop a plan to meet them—not monetary relief. Thus, the Nation needs to show only that sources of law like the 1849 and 1868 Treaties promised the Navajos water and created a trust relationship. If so, those treaty promises are enforceable no matter whether a separate step of the Indian Tucker Act analysis would be required to determine whether a breach could give rise to damages. To the extent common-law principles are relevant, it is to confirm that equitable relief is an appropriate remedy for the United States' breach of trust.

c. The Court's Indian Tucker Act decisions show how those principles work.

i. The Court has found enforceable fiduciary duties when sources of law establish the government's responsibility for "manag[ing] and operati[ng]" assets or resources held for the benefit of Indians or tribes. *Mitchell II*, 463 U.S. at 224, 226. For example, in *Mitchell II*, the Court held that the plaintiffs could seek damages based on statutes and regulations that gave the government "full responsibility to manage Indian resources and land for the benefit of the Indians"; referred to the Indians' "needs and best interests"; and required the government to take certain actions "for their benefit" and "consistent with a proper protection and improvement of the forests." *Id.* at 224. "All of the necessary elements of a common-law trust" existed: "a trustee (the United States), a beneficiary (the Indian allottees), and a trust corpus (Indian timber, lands, and funds)." *Id.* at 225.

Similarly, *White Mountain Apache* allowed a tribe to pursue damages for breach of trust based on a statute that imposed a "fiduciary duty to manage land and improvements held in trust for the Tribe but occupied by the Government." 537 U.S. at 468. The statute described the former Fort Apache Military Reservation as being "held by the United States in trust" for the tribe. *Id.* at 474-75. And it "invest[ed] the United States with discretionary authority to make direct use of portions of the trust corpus." *Id.* at 475. The government supervised the property, occupied it daily, and had "obtained control at least as plenary as its authority over the timber in *Mitchell II*." *Id.* The Court held that the government was obligated to "preserve the property," because "elementary trust law" makes clear "that a fiduciary actually administering trust property may not allow it to fall into ruin on his watch." *Id.*

ii. In contrast, the Court has declined to find enforceable fiduciary obligations when the tribe has failed to identify statutory or regulatory provisions imposing specific rights or duties. Importantly, none of those decisions rejected tribal claims based on treaty interpretation. And in the two cases involving tribal resources, there was a legal regime that granted independent authority over the assets to the tribe or its members, rather than to the federal government, suggesting that the tribe, rather than the government, was responsible for managing those assets.

In *United States v. Mitchell*, 445 U.S. 535, 537, 542 (1980) (*Mitchell I*), the Court held that the Indian General Allotment Act of 1887 did not authorize an award of monetary damages against the government because the Act created only a "limited trust relationship" and did not require the government to manage the tribe's timber. The Act's language made clear that

although the United States would hold the land in trust, the Indian allottee—not the federal government—was responsible for managing the land. *Id.* at 541-43. The Court explained that the plaintiffs would have to identify a different source of law for any supposed right "to recover money damages for Government mismanagement of timber resources," *id.* at 546, as the plaintiffs later did in *Mitchell II*, *supra* p. 26.

In *Navajo I*, the Court held that the Nation couldn't seek damages for a breach-of-trust claim based on the Indian Mineral Leasing Act (IMLA) and its implementing regulations because they were not "rights-creating or duty imposing" "source[s] of substantive law" that could "fairly be interpreted as mandating compensation by the Federal Government." 537 U.S. at 503, 506. The Nation argued that the government breached its trust duties by approving inadequate royalty rates in a coal lease on tribal land. *Id.* at 493. But the IMLA and associated regulations did not "assign to the Secretary managerial control over coal leasing." *Id.* at 508. Nor did they create even a "limited trust relationship" or contain any "trust language with respect to coal leasing." *Id.* Several years later, the Court again rejected the Nation's claim for failure to "identify a specific, applicable, trust-creating statute or regulation that the Government violated." *Navajo II*, 556 U.S. at 302.

Finally, in *Jicarilla*, the Court held that the fiduciary exception to the attorney-client privilege did not apply "to the general trust relationship between the United States and the Indian tribes." 564 U.S. at 165. The tribe had brought a breach-of-trust claim under the Indian Tucker Act seeking damages arising from the government's alleged mismanagement of tribal

trust funds, and it moved to compel the government to produce documents it had withheld as privileged. *Id.* at 166-67. The Court concluded that "[t]he two features justifying the fiduciary exception—the beneficiary's status as the 'real client' and the trustee's common-law duty to disclose information about the trust"—were "notably absent" from the general trust relationship between the government and the tribe. *Id.* at 178. And because the tribe had not identified "a right conferred by statute or regulation" to obtain the privileged information, the fiduciary exception did not apply. *Id.* The Court also observed that the relevant statute enumerated the government's "trust responsibilities" and the governing statutory and regulatory regime already "define[d] the Government's disclosure obligation to the Tribe." *Id.* at 184-85. The Court reasoned that "the full duties of a private, common-law fiduciary" could not displace Congress' "narrowly defined disclosure obligations." *Id.* at 185-86.

2. The 1849 and 1868 Treaties are substantive sources of law that establish specific water rights and duties requiring the United States to provide the Navajo Reservation with sufficient water.

Even assuming the Court's Indian Tucker Act jurisprudence applies to the Nation's breach-of-trust claim—which isn't brought under that law—the 1849 and 1868 Treaties are the very kind of "specific rights-creating or duty-imposing" "substantive source[s] of law" that those precedents require as a basis for the government's fiduciary obligations. *Navajo II*, 556 U.S. at 290, 301.

a. Specific treaty provisions can give rise to enforceable trust obligations—as the United States concedes, Br. 23 n.5—because the Constitution puts treaties and statutes "on the same footing," *Whitney v. Robertson*, 124 U.S. 190, 194 (1888). Congress, too, has recognized that by entering into treaties with Indian tribes, the government undertook "specific commitments" "in exchange for which Indians have surrendered claims to vast tracts of land, which provided legal consideration for permanent, ongoing performance of Federal trust duties." 25 U.S.C. § 5601(4). Congress has thus explained that the government owes tribes "enduring and enforceable Federal obligations." *Id.* § 5601(5). And the Secretary and the Department of the Interior, through the Bureau of Indian Affairs and other bureaus and offices, are responsible for carrying out those trust obligations. *See* 43 U.S.C. § 1457(10); 25 U.S.C. § 2; 130 U.S. Dep't of Interior Manual 1.3 (2015). The contractual nature of treaties, with their bargained-for exchange, *see Herrera*, 139 S. Ct. at 1699, underscores the enforceability of unmet promises.

b. Here, specific provisions of the 1849 and 1868 Treaties are "substantive source[s] of law that establish[] specific fiduciary or other duties," *Navajo II*, 556 U.S. at 290, and the elements of an enforceable fiduciary relationship with respect to the Navajos' water rights, *Mitchell II*, 463 U.S. at 224, 226. Specific provisions of the 1868 Treaty made clear that the purpose of the Reservation was to serve as the Navajos' "permanent home" in the high desert and to enable the Navajos to irrigate and farm the land. *Supra* p. 7. Those provisions began to fulfill the 1849 Treaty's agreement that the United States would "designate, settle, and adjust" the boundaries of a reservation.

1849 Treaty arts. I, IX, App. 1a, 4a. Those terms resulted from negotiations in which the Navajos expressed their expectation to return home to irrigate the land, farm, and raise livestock. *Supra* pp. 5-6. Thus, as both parties understood, the guarantee of land and references to agriculture memorialized their agreement that the government would secure the water necessary to fulfill the Reservation's purposes. *Supra* pp. 22-23.

That makes sense. Given the Navajos' agreement to relinquish any right to occupy territories outside the Reservation, *supra* p. 7, the Navajos didn't have independent authority to manage their unquantified reserved rights to water sources outside the Reservation. But the United States admits that *it* does, asserting that the Nation's water rights are "held by the United States," which gets to decide whether "to take or maintain" water to fulfill the Reservation's purpose. U.S. Br. 37. The Treaties thus "bear[] the hallmarks of a 'conventional fiduciary relationship,'" *Navajo II*, 556 U.S. at 301, because they establish "[a]ll of the necessary elements of a common-law trust": "a trustee (the United States), a beneficiary (the [Navajo Nation]), and a trust corpus ([the Nation's unquantified reserved water rights])," *Mitchell II*, 463 U.S. at 225.

No magic words were required to establish the government's fiduciary duties as to the Nation's water rights—indeed, the sources of law in *Mitchell II* didn't even use the word "trust." *Id.* at 209, 221-24. And just as the United States took on duties to maintain Fort Apache in *White Mountain Apache* by investing itself "with discretionary authority to make direct use of portions of the trust corpus," 537 U.S. at 475, here the government by treaty (and its own admission) took on

management of the Nation's unquantified water rights. Like in *White Mountain Apache*, the upshot of that authority to manage the trust corpus is a duty "to preserve and maintain" it. *Id.*

c. Common-law trust principles, including those based on control, are relevant at the second step of the Indian Tucker Act analysis, when courts consider whether a tribe may seek damages. *Navajo II*, 556 U.S. at 301. But because the Nation isn't seeking monetary relief, there is no second-step analysis. Even so, the United States' control over the Nation's unquantified reserved water rights underscores why requiring the government to assess the Nation's needs and develop a plan to meet them is an appropriate remedy.

i. Time and again, the United States has asserted control over the Navajos' unquantified reserved water rights. *See* Pet. App. 29a. Interior, for example, acknowledges that "the United States implicitly reserved water in an amount necessary to fulfill the purposes of an Indian reservation" for the Nation. Colorado River Interim Guidelines for Lower Basin Shortages and Coordinated Operations for Lake Powell and Lake Mead—Final Environmental Impact Statement (Oct. 2007) (D. Ct. Doc. 283-5), at 3-96. Interior has also stated that the "United States, as trustee, *is responsible for* protecting rights reserved by, or granted to, Indian tribes." *Id.* 3-87 (emphasis added). Consistent with that understanding, the United States controlled the Nation's rights in the *Arizona* litigation, going so far as to oppose the Nation's intervention in the proceedings. Pet. App. 7a; J.A. 104-09; *supra* p. 9. If the United States' daily oversight of a fort in *White Mountain Apache* was a relevant factor, 537 U.S. at 475-76, then so too is the

government's asserted control of the Nation's unquantified water rights.

ii. The government's comprehensive control over the Colorado River also serves as an example of how the United States has exerted control over unquantified reserved water rights held for the benefit of tribes. As noted, the complex Law of the River—a network of statutes, regulations, and judicial opinions—governs water rights in the Lower Colorado River Basin. *Supra* pp. 8-10. And under the Law of the River, the United States exerts nearly exclusive control over the waters of the Lower Colorado.

For example, the Secretary has exclusive authority to allocate waters among the Lower Basin States and "decide which users within each State would get water." *Arizona I*, 373 U.S. at 580; *see* 43 U.S.C. § 617d. The government also is responsible for constructing, operating, and supervising "a great complex of other dams and works" and for storing "virtually all the waters of the main river." *Arizona I*, 373 U.S. at 589. And under the BCPA, the *Arizona* decrees, and related statutes, *see, e.g.*, 43 U.S.C. § 1552, the Secretary has promulgated extensive regulations governing the use of Colorado River water. *Supra* p. 8.

The United States also controlled the water rights of tribes in the *Arizona* litigation. The government chose which claims to assert for which tribes—making claims for just five tribes to the Colorado mainstream—then represented those tribes before the Court, ultimately binding them to the Court's judgment. *Arizona II*, 460 U.S. at 612, 614; *Arizona I*, 373 U.S. at 595 (represented five tribes). In sum, the government's control of the Nation's unquantified water

rights and of the Colorado River underscore its duty and ability to secure water for the Nation.

C. Petitioners' arguments lack merit.

Petitioners raise several counterarguments. None has merit.

1. The government claims that the Nation has failed to identify a substantive source of law showing the United States "expressly accept[ed]" a fiduciary duty to assess and address the Nation's water needs. U.S. Br. 21 (quoting *Jicarilla*, 564 U.S. at 177). That argument misunderstands both the law and the facts of this case.

a. On the law, the government mistakes *Jicarilla*'s requirement that a tribe "identify a specific, applicable, trust-creating statute or regulation that the Government violated," 564 U.S. at 177 (quoting *Navajo II*, 556 U.S. at 302), for a magic-words requirement. *Jicarilla*'s point was that "[t]he Government assumes Indian trust responsibilities only to the extent it expressly accepts" them. *Id.*; *see id.* at 177 n.6 (citing guidance from Restatement (Second) of Trusts § 25, Comment *a* (1957), stating that "although the settlor has called the transaction a trust[,] no trust is created unless he manifests an intention to impose duties which are enforceable in the courts"). Requiring the government to accept enforceable duties reflects Congress' choice "to structure the Indian trust relationship in different ways," only sometimes "apply[ing] common-law trust principles." *Id.* at 178.

But neither *Jicarilla* nor any of the Court's other Indian Tucker Act decisions considered how *treaties* can meet that requirement. *See Jicarilla*, 564 U.S. at 178; *Navajo II*, 556 U.S. at 296-300; *Navajo I*, 537 U.S. at 493; *White Mountain Apache*, 537 U.S. at 474-76;

Mitchell II, 463 U.S. at 219-24; *Mitchell I*, 445 U.S. at 542. The point of a treaty is a bargained-for exchange based on a meeting of the minds between two parties. The tribe gave up the right to occupy territory beyond the Reservation; the United States guaranteed a permanent homeland and its protection within the Reservation's borders. *Supra* pp. 4, 6-7. And what the agreements in a particular treaty with a particular tribe mean depends not just on the particular words of the treaty, but on the parties' intent, the purposes of the agreement, and the negotiations and historical context, all with an eye to the parties' comparative bargaining power. The ultimate question is what the tribe would have understood the United States to have promised, all while the United States held the pen. *Supra* pp. 17-19.

The upshot is simple. If the tribe understood the United States to promise water, if the United States knew that water is precisely what the tribe wanted, and if water was necessary to fulfill the Reservation's purposes, then that's what the parties bargained for. There's no question that's how treaty interpretation works. And the government rightly concedes that treaties can give rise to breach-of-trust claims. Br. 23 n.5. That's the end of the legal analysis. If the government makes a promise in a treaty, it also accepts the corresponding duty to deliver on the promise. Treaty terms aren't chameleons, meaning one thing under ordinary treaty-interpretation principles and another for purposes of an "express[] accept[ance]" analysis under *Jicarilla*.

Of course, that's exactly what the government argues. It doesn't contest that the Navajo Nation *has* unquantified reserved water rights under *Winters* as a result of the Treaties. It just thinks those rights

aren't enforceable. That's not how bargained-for promises work.

b. And now for the facts. Unlike the tribe in *Jicarilla*, the Nation has identified specific rights and duties under the 1849 and 1868 Treaties. The express statements promising a permanent home and agriculture are promises that the Reservation will have—and will continue to have—enough water to fulfill those purposes. *Supra* pp. 29-32. The parties' negotiations underscore that point: after three years of failed crops, death, and disease at Bosque Redondo, the Navajos expected to return to their homeland to irrigate the land, farm, and raise livestock, just as they had since time immemorial. Sherman knew all that, and the 1868 Treaty promised the Navajos a piece of their ancestral homeland. *Supra* pp. 5-7. Under the United States' reading, in contrast, the government made a hollow promise to the Nation when it entered into the Treaties: that the Navajos would have rights to water necessary to fulfill the Reservation's purpose, but the government doesn't actually have to do anything about it—and given the United States' control over the Navajos' reserved water rights, the Navajos can't do anything about it either.

What's more, one of the reasons *Jicarilla* found that the fiduciary exception to the attorney-client privilege didn't apply was that the relevant statute enumerated the government's "trust responsibilities," and the statutory and regulatory regime already "define[d] the Government's disclosure obligation to the Tribe." 564 U.S. at 184-85. Thus, "the full duties of a private, common-law fiduciary" could not transplant Congress' "narrowly defined disclosure obligations." *Id.* at 185-86. Here, in contrast, the government's obligation to assess the Navajos' water needs and make

a plan to meet them doesn't displace any statutory or regulatory regime. Just the opposite: those obligations flow naturally from the Treaties. The Nation thus doesn't seek to import "the full duties of a private, common-law fiduciary." It seeks only to hold the United States to the treaty obligations it undertook to secure water for the Nation.

2. The United States argues that if the Nation's claim goes forward, "courts could be asked to enforce broad and amorphous judicially fashioned duties" based on its "trust relationship with Indian tribes." U.S. Br. 33-34. That argument doesn't make sense generally or in the context of this case, and it ignores important limiting principles confining the analysis to the particular tribe and its particular treaty in a particular case.

a. As a general matter, the government confuses trust duties with what a court may order it to do to carry out those duties. Take *White Mountain Apache*, where the Secretary by statute had "discretionary authority to make direct use of portions of the trust corpus" and thus had a duty "to preserve" it. 537 U.S. at 475. The consequence was that "the Government should be liable in damages" if it failed to do so. *Id.* at 475-76. That analysis rebuts the United States' related suggestion (Br. 18, 33) that a tribe must meet something akin to the mandamus standard. The Nation isn't asking for a "general order[] compelling compliance with broad statutory mandates." *Norton v. Southern Utah Wilderness Alliance*, 542 U.S. 55, 66 (2004). Instead, the Nation seeks an order requiring the United States to fulfill a specific treaty promise to ensure the Navajo Reservation has sufficient water to serve as a permanent homeland for the Navajo people. *See supra* pp. 30-32. And just as "[o]ne of the

fundamental common-law duties of a trustee is to preserve and maintain trust assets," *White Mountain Apache*, 537 U.S. at 475, "[a] trustee has a duty to maintain clear, complete, and accurate books and records regarding the trust property and the administration of the trust," and "to provide beneficiaries with reports or accountings" "at reasonable intervals on request," Restatement (Third) of Trusts § 83 (2007).

More importantly, resort to trust law is unnecessary anyway because assessing the tribe's water needs and making a plan to meet them are necessary steps in fulfilling the promise to secure water. The duty here is the enforceable, bargained-for promise to secure water for the Navajos. *Supra* pp. 30-32. And the government *admits* that unquantified water rights are "held by the United States," U.S. Br. 37, and that it regularly litigates water rights as tribal trustee, *supra* p. 32. Similarly, the United States has recognized its obligation to take *some* steps to secure water for the Nation's permanent homeland derive from the 1849 and 1868 Treaties. *See* San Juan River Basin in New Mexico Navajo Nation Water Rights Settlement Agreement §§ 1.3-1.4 (Dec. 17, 2010). Those actions show the obvious—that fulfilling the duty to secure water requires assessing water needs and making plans to satisfy them. If anything, the Nation's request for an order that *the United States* make that assessment leaves the government, not the courts, responsible for "oversight" in the first instance. *Contra* U.S. Br. 33.

b. Ruling for the Nation here doesn't invite the sprawling liability for treaty-based breach-of-trust claims the government seems to imagine, either. Indeed, an order directing the government to assess the

Nation's needs and make a plan to meet them, based on the promises in *these Treaties*, doesn't mean holding that all *Winters* rights give rise to breach-of-trust claims. This case involves only the particular water needs and rights of a particular tribe invoking particular treaties embodying particular promises by the United States.

First, the principle that treaties must be construed "in the sense [that] they would naturally be understood by the Indians," *Herrera*, 139 S. Ct. at 1699; *supra* pp. 17-18, is a natural and important limiting principle. Courts cannot interpret promises in Indian treaties *more broadly* than the Indians would have understood them at the time the treaties were made. For example, in *Herrera*, the Court explained that the Crow Tribe understood when they signed a treaty that tribal members would have "'the right to hunt upon' the land it ceded to the Federal Government '*as long as the game lasts*.'" 139 S. Ct. at 1692 (emphasis added). That promise was itself limited: tribal members could hunt, but the United States would not hold the game in trust or ensure game on the ceded lands. *See id.* at 1700.

The point, as the Court has explained, is that courts must look to the particular treaty and its historical context. *Mille Lacs*, 526 U.S. at 202. And as a result, even "similar language" in treaties that "involv[e] different parties" doesn't necessarily have "precisely the same meaning." *Id.* Here, the promises the United States made to the Navajos are based on the text and "an analysis of the history, purpose, and negotiations of *[these Treaties]*" between the treaty parties. *Id.* No other treaties are at issue.

Second, and relatedly, treaty terms themselves often provide important limitations, because courts cannot disregard treaty terms to impose liability that the United States has disclaimed. *Herrera* provides one example. Another is *Oregon Department of Fish and Wildlife v. Klamath Indian Tribe*, 473 U.S. 753, 767 (1985), which held that a tribe did not retain a right to hunt and fish on non-reservation land. The Court emphasized that the plain terms of the treaty limited the tribe's right to fish to "streams and lakes 'included in said reservation'" and kept its right to gather foods "within [the reservation's] limits." *Id.* Confronted with similar language in *Oklahoma Tax Commission v. Chickasaw Nation*, 515 U.S. 450, 466 (1995), the Court held that a Chickasaw treaty shielded only tribal members who lived inside the reservation from state tax. Although treaties must be construed as the tribe would have understood them, the Court explained that "liberal construction cannot save" a claim that "founders on a clear … limit in the Treaty." *Id.*

3. The United States argues that control alone cannot impose an enforceable duty. Br. 40. But the Nation doesn't argue that it can. The United States undertook an obligation to secure water for the Navajos when it entered into the 1849 and 1868 Treaties. *Supra* pp. 21-23. That bargained-for promise establishes an enforceable duty under this Court's breach-of-trust test.

To the extent it's relevant, control just drives home the duty to secure water, just as control reinforced the duty in *White Mountain Apache*. The government's own position is that it has control over the Nation's unquantified reserved water rights—that it holds those rights, and that it alone decides how to

vindicate them. *See* U.S. Br. 37. That's exactly what the United States claimed the authority to do in the *Arizona* litigation by unilaterally controlling the Nation's claims to water and blocking the Nation's attempt to intervene to protect its own interests. *Supra* p. 9. If the government's control of a fort in *White Mountain Apache* is relevant to the breach-of-trust analysis, then its asserted dominion over the Nation's water rights is, too.

4. The government next argues that ordering the United States to assess the Nation's water needs and develop a plan to meet them would interfere with Congress' role in shaping policy with respect to Indian tribes. U.S. Br. 24. The government has it exactly backward, because such an order would *enforce Senate-ratified treaties*. Again, Congress ratified the 1849 and 1868 Treaties fully aware that they should be construed liberally (as the 1849 Treaty provides) and that water was necessary for life, particularly in the West. *Supra* pp. 4, 19-21. And the Executive Branch and Congress alike continued expanding the Reservation, in line with the 1849 Treaty's directive, against the understanding that the 1868 Treaty promised sufficient water for the Reservation and (after 1908) this Court's decision in *Winters*.

What's more, Congress has recognized that the government has undertaken fiduciary responsibilities "in exchange for which Indians have surrendered claims to vast tracts of land, which provided legal consideration for permanent, ongoing performance of Federal trust duties." 25 U.S.C. § 5601(4). And Congress made clear that the government owes tribes "enduring and enforceable Federal obligations." *Id.* § 5601(5). Just so here. An order requiring the United States to assess the Nation's water needs and develop

a plan to meet them would promote, not interfere with, congressional policy.

5. Petitioners contend that the distance between the Colorado River and the original 1868 Reservation boundaries is fatal to the Nation's case. U.S. Br. 40; Arizona Br. 35. That argument, too, lacks merit. *First*, the Nation's claim doesn't depend on rights to the Colorado River. Instead, the Nation merely seeks an order requiring the government "to determine the water required to meet the needs of the Nation's lands in Arizona and devise a plan to meet those needs." J.A. 86. Whether the government breached its duty to provide adequate water, and whether the district court should order that relief, do not depend on rights to the Colorado River. *See infra* pp. 44-48.

Second, the United States' promises of water start with the Treaties, but they don't end there. The Nation's water rights—and the United States' duties—apply to the present-day Reservation, as enlarged by statute and executive order. And that makes sense, not just because the 1849 Treaty contemplated that there might be further boundary modifications, *supra* p. 4, but also because each of those expansions enlarged *the Reservation*, and the 1868 Treaty promised water for *the Reservation*. What's more, some of those expansions were even for the purpose of providing more water. *Supra* pp. 7-8. In short, as the Reservation's "permanent home" land base expanded to meet the Navajos' present and future needs, the United States' obligation to provide water sufficient to fulfill the Reservation's purposes followed. *See Arizona I*, 373 U.S. at 600.

Contrary to the state Petitioners' argument, the 1934 Act and other government acts expanding the

Reservation didn't need to "incorporate or otherwise mention any provisions of the 1868 Treaty" to implement the United States' ongoing duty to provide water. Arizona Br. 34 n.17. They carried out the 1849 Treaty's directive to "designate, settle, and adjust" boundaries to establish a reservation for the Navajos, 1849 Treaty art. IX, App. 4a, all the same. The 1849 Treaty declared that it was binding on the parties, would be subject to later "modifications and amendments" adopted by the United States, and directed the federal government to "so legislate." *Id.* art. XI, App. 4a. And all the expansions of the Reservation, as noted, were expansions of the same Reservation established in the 1868 Treaty, meaning the same terms carried over.

Menominee Tribe of Indians v. United States, 391 U.S. 404 (1968), and *Choctaw Nation*, 318 U.S. 423, don't help the states. *See* Arizona Br. 34 n.17. *Menominee* merely confirmed that a statute can't abrogate treaty rights unless it does so clearly. 391 U.S. at 413. And unlike in *Choctaw Nation*, the text of the 1849 and 1868 Treaties doesn't conflict with the Nation's construction of their terms. *See* 318 U.S. at 428-29, 430-42.

6. Finally, the state Petitioners argue that even if the Nation has identified a specific duty the government has accepted and violated, the Nation still cannot prevail because the Nation has not shown it is entitled to equitable relief. *See* Arizona Br. 40-41. That's a startling argument. For one thing, this Court's Indian Tucker Act decisions do not suggest that any further inquiry is required where damages aren't at issue. *Supra* pp. 25-26. For another, so long as this is a nation of law, if the United States has made a promise to a tribe in a treaty, a court has the

power to enforce it. *E.g.*, *Herrera*, 139 S. Ct. at 1698; *Whitney*, 124 U.S. at 194; *supra* p. 16.

II. The Nation's breach-of-trust claim does not implicate this Court's retained jurisdiction in the Consolidated Decree.

The court of appeals correctly held that the Nation's breach-of-trust claim does not implicate this Court's retained jurisdiction under Article IX of the Consolidated Decree. *First*, the Nation's claim does not seek a determination or quantification of rights to the Colorado River, so it does not implicate the subject matter of the decree. *Second*, the Nation's requested relief—an order requiring the federal government to assess the Nation's water needs and develop a plan to meet them—doesn't trigger the Court's retained jurisdiction, either, because it doesn't require a determination or quantification of the Nation's right to water from the Colorado River, much less modification of the decree.

A. The Nation's claim does not rest on or seek a quantification of its rights to the Colorado River.

The question here is whether the United States has breached its treaty obligations to provide the Nation sufficient water. The Nation thus seeks an injunction requiring the government to determine its water needs and develop a plan to meet them. J.A. 86. The *Arizona* litigation is about a fundamentally different question: "how much water each State has a legal right to use out of the waters of the Colorado River and its tributaries." *Arizona I*, 373 U.S. at 551. To be sure, the Nation has unquantified rights to the Colorado River. *See* J.A. 104-09. But the Nation's claim doesn't turn on those rights. It requires only a finding

that the government has failed to secure the water it promised by treaty, no matter *where* that water might come from. The Consolidated Decree's apportionment of the Colorado's waters is not at issue.

B. Granting relief would not require a court to modify the Consolidated Decree.

1. The Court's retained jurisdiction extends only as necessary "to correct certain errors, to determine reserved questions, and, if necessary, to make modifications in the [D]ecree." *Arizona II*, 460 U.S. at 618. The Court has occasionally modified the decree to answer reserved questions. For example, in 1978, the United States and state parties successfully sought additional rights to the mainstream and associated priority dates. *Arizona v. California*, 530 U.S. 392, 398 (2000) (*Arizona III*). In earlier stages of the litigation, the Court also indicated that certain tribal water rights might be adjusted in the future, after reservation boundary disputes were resolved. *Id.*; *see id.* at 400, 411. The Court later supplemented the decree after those disputes and other tribal claims were resolved. *See id.* at 418-20; *2000 Decree*, 531 U.S. 1.

The Court has also explained that Article IX was designed mainly to allow the Court to "adjust[] the [D]ecree in light of unforeseeable changes in circumstances." *Arizona II*, 460 U.S. at 622. In other original-jurisdiction water-rights litigation with similar decree language, the Court has done just that. In *Wisconsin v. Illinois*, 278 U.S. 367 (1929), the Court's decree resolved "an action brought to prevent Illinois and the Sanitary District of Chicago from diverting water from Lake Michigan for the purpose of diluting and carrying away the sewage of Chicago." *Arizona II*, 460 U.S. at 624 n.16. More than two decades later, the

Court modified the decree when low water levels in the Mississippi River caused a navigation emergency. *Id.* And in *New Jersey v. New York*, 283 U.S. 336 (1931), the Court later amended the decree "with the consent of the parties to take account of changed conditions concerning the discharge of sewage." *Arizona II*, 460 U.S. at 624 n.16.

While the Court retained jurisdiction in *Arizona* over a narrow category of issues, lower-court adjudication does not implicate that jurisdiction so long as granting relief wouldn't require modifying the decree. The *Arizona* decisions themselves make that clear. For example, the Court explained that a federal district court should resolve issues involving the boundaries of Indian reservations whose water rights had been adjudicated in the decree. *Arizona II*, 460 U.S. at 638-39. The Court explained that the district court was "an available and suitable forum," even though the district court's decision might have an "impact … on [the Court's] outstanding decree with respect to Indian reservation water rights." *Id.* at 638.

2. Granting the Nation's requested relief wouldn't require a lower court to modify the Consolidated Decree. As the court of appeals correctly explained, the Nation merely seeks injunctive and declaratory relief requiring the government to determine its water needs and develop a plan to meet them, not a judicial quantification of its rights in the Colorado River. Pet. App. 17a; J.A. 86. Ordering the government to conduct an assessment and make a plan would not conflict with the decree's prohibition on "releasing water controlled by the United States." *Consolidated Decree* art. II, 547 U.S. at 154-59.

If the district court concludes that the United States breached its treaty duty to provide the Nation sufficient water, remedial questions might arise in the future that could implicate the Court's retained jurisdiction. The United States agrees, noting that *if* the Nation succeeds on the merits, and *if* the United States ultimately must secure water from the Colorado River for the Nation, then the parties might need to repair to this Court. U.S. Br. 44-46. But whether that will be necessary is speculative at this stage, when the Nation is just asking to amend its complaint. And the possibility that the Court *might* be called on to modify the Consolidated Decree if doing so is necessary for the United States to fulfill its treaty obligations doesn't prohibit the lower courts from resolving the Nation's claim. As the court of appeals put it, if the federal government "later determine[s] that [it] cannot meet [its] trust obligation to provide adequate water for the Nation unless the jurisdictional question is resolved, then [the federal government] can petition the Supreme Court for modification of the 1964 Decree." Pet. App. 34a n.7. Put another way, "there will then also be time enough to determine the impact" those determinations might have on the decree. *Arizona II*, 460 U.S. at 638.

C. Petitioners' arguments lack merit.

1. Petitioners complain that, if the Nation wins on the merits, the government *could* be ordered to deliver Colorado River water in violation of the decree. U.S. Br. 46; Arizona Br. 24-26; Colorado Br. 12-16. That argument misses the point. The Nation's claim doesn't seek a judicial determination of rights to the Colorado River. The district court wouldn't have to order the government to secure any Colorado River water to order the government to assess the Nation's

needs and develop a plan to meet them. Nor would the decree have to be modified, as the court of appeals explained. *Supra* pp. 12-13. What's more, whether the Consolidated Decree ultimately will have to be modified at some point in the future is speculative at this stage, when the Nation merely seeks to amend its complaint.

2. Contrary to the state Petitioners' argument, there also is no risk of piecemeal adjudication of water rights in multiple forums. *See* Arizona Br. 22-23; Colorado Br. 13-14. Again, granting relief doesn't require a lower court to determine the extent or priority of the Nation's rights to the Colorado River, much less in an ex parte proceeding. Colorado therefore is wrong that the Secretary "might face conflicting obligations—one to release water under a district court order and another *not* to release that water under the Consolidated Decree." Colorado Br. 20.

* * *

The United States made a bargained-for treaty promise. The courts should enforce it.

CONCLUSION

The Court should affirm.

Respectfully submitted.

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