

No. 21-1484

**In The
Supreme Court of the United States**

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

v.

NAVAJO NATION, et al.,
Respondents.

**On Petition For A Writ Of Certiorari
To The United States Court Of Appeals
For The Ninth Circuit**

**PETITIONERS' REPLY TO FEDERAL
MEMORANDUM AND NAVAJO NATION
RESPONSE TO THEIR PETITION**

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**PETITIONERS' REPLY TO FEDERAL
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RESPONSE TO THEIR PETITION**

Petitioners State of Arizona, Central Arizona Water Conservation District, Salt River Project Agricultural Improvement and Power District, Salt River Valley Water Users' Association, Imperial Irrigation District, The Metropolitan Water District of Southern California, Coachella Valley Water District, State of Nevada, Colorado River Commission of Nevada, Southern Nevada Water Authority, and State of Colorado ("State Petitioners") file this Reply to Navajo Nation ("Nation") Response to the State Petition and the Federal Memorandum responding to the State Petition.

The State Petitioners present two questions for review. First, whether the retained and exclusive jurisdiction of the Court in *Arizona v. California*, 376 U.S. 340, 353 (1964) to allocate and quantify rights to water in the Lower Basin of the Colorado River ("LBCR") mainstream is usurped by the Ninth Circuit's ruling (App. 1-74, hereafter "Ninth Circuit Opinion"). *See also Arizona v. California*, 547 U.S. 150, 166-67 (2006) ("jurisdictional question"). Second, whether "the federal government owes the Navajo Nation an affirmative, judicially enforceable fiduciary duty to assess and address the Navajo Nation's need for water from particular sources, in the absence of any substantive source of law that expressly establishes such a duty." The same question is raised by the Federal Respondents. Fed. Pet. at I.

The Federal Respondents ask this Court to “grant the government’s petition for a writ of certiorari and hold [the] petition filed by the state petitioners pending the disposition of that case.” Memo. for Fed. Resps. (“FedMemo”) at 4. The Nation’s Opposition¹ goes further to argue that this Court’s original jurisdiction is not implicated by the remedy expressly sought by the Nation in each of its proposed amended complaints. StateOpp at 1, 8, 10. The Court should grant both the Federal and State Petitions, including the jurisdictional question, and consolidate the two cases for hearing and decision.

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ARGUMENT

1. The jurisdictional question is the cornerstone issue in this case.

The jurisdictional question raised by the State Petitioners is the cornerstone issue that should be resolved concurrently with the breach of trust question. The Nation has repeatedly mischaracterized its breach of trust claim as requesting nothing more than “requiring the United States to assess and develop a plan to meet the Nation’s water needs.” StateOpp at i, 1. But the Nation’s claim goes much further. It seeks a mandatory injunction against the Secretary directing the

¹ The Nation incorporates by reference its Brief in Opposition to the United States Petition (No. 22-51) (“USOpp”) and thus this Reply addresses its argument in that Opposition as well as the Opposition in this case (No. 21-1484) (“StateOpp”). StateOpp at 1.

Secretary to mitigate any adverse impacts on the water reserved from the LBCR for the Nation and to “manage the Colorado River in a manner that does not interfere with the plan to secure the water from the Colorado River needed by the Navajo Nation.” (App. 99; App. 20, 29)

In twice dismissing the Nation’s complaint, the district court correctly ruled that it lacked subject matter jurisdiction to grant the Nation’s request for declaratory and injunctive relief. As the district court recognized, the relief sought by the Nation would require it to determine, as an initial matter, whether the Nation has a federal reserved right to water from the LBCR. (App. 75, 93) The district court understood that it is bound by this Court’s 2006 Consolidated Decree that expressly “retains jurisdiction of this suit for the purpose of any order, direction, or modification of the decree, or any supplementary decree, that may at any time be deemed proper in relation to the subject matter in controversy.” *Arizona v. California*, 547 U.S. 150, 166-67 (2006). The futility of amendment of the complaint was self-evident. (App. 15) The Decree’s retained jurisdiction provision deprives the district court jurisdiction to decide the question. (App. 82-84)

The Ninth Circuit reversed, finding that the Nation’s proposed Complaint (Ninth Circuit Excerpts of Record 26-81) does not seek a judicial quantification or right to the mainstream of the LBCR. (App. 6) But the imposition of a federal fiduciary obligation to manage the LBCR and directing the federal government to secure water for the Nation necessarily assumes the

Nation has rights to water from the LBCR, and improperly circumvents the jurisdiction retained by the Court in *Arizona v. California*. Furthermore, the Nation's requested relief would result in an *ex parte* determination of reserved water rights by the Secretary, an action clearly prohibited by this Court in *Arizona v. California*, 460 U.S. 605, 636-38 (1983) ("we in no way intended that *ex parte* secretarial determinations of the boundary issues would constitute 'final determinations' that could adversely affect the States, their agencies, or private water users holding priority water rights").

The Federal Respondents argue that State Petitioners believe the relief sought by the Nation "is an order requiring the federal government to manage the Lower Colorado River in a manner that would *result in the delivery of mainstream water to the Navajo Nation.*" FedMemo at 2 (emphasis added). While the Nation does not seek an order explicitly directing Federal Respondents to deliver water to the Nation,² the practical effect of the Nation's requested relief would allow the Nation's claimed reserved water rights in the LBCR to be determined administratively followed by a requirement that the Secretary to manage the LBCR for the benefit of those administratively determined

² The Federal Respondents correctly observe that the Consolidated Decree prohibits the Secretary of the Interior from delivering mainstream water to the Navajo reservation because the Decree does not enumerate a right for the Navajo reservation and the Nation has no water delivery contract with the Secretary of the Interior. FedMemo at 3.

reserved water rights to the detriment of adjudicated right holders.

Moreover, the Nation cannot obtain the relief it seeks without resolution of the jurisdictional question. State Petitioners agree with the Federal Respondents that if the Court rules no breach of trust claim can be alleged, the jurisdictional question would be moot. Fed-Memo at 4. However, if the Court were to decide that the Nation has asserted a cognizable claim, the jurisdictional question must also be answered. Regardless of the Court's determination with respect to the breach of trust question, the Nation cannot obtain the relief it seeks unless the Nation's claim to water from the LBCR is adjudicated.

The question of this Court's "retained jurisdiction" over rights to water from the LBCR is, therefore, essential to a final resolution of the Nation's proposed complaint. Taking up the breach of trust question alone, as proposed by the Federal Respondents, risks the Court deciding this issue in a vacuum, without regard to the jurisdictional implications in the event of a favorable outcome for the Nation. The Court avoids this risk by considering the State Petition and the Federal Petition at the same time.

Additionally, separate briefing and argument before this Court on the jurisdictional question, after the Court has decided the breach of trust issue, would require duplicative efforts and unnecessarily waste judicial and litigant resources. Moreover, review of the questions in a piecemeal fashion risks needless delay of the final resolution of this case.

2. The jurisdictional question must be resolved by this Court.

The Ninth Circuit Opinion held that the Nation's breach of trust claim "does not implicate this Court's reservation of jurisdiction, and that it therefore was error for the district court not to grapple with the scope of *Winters* rights available to the Nation in connection with its current requests." (App. 17) The Ninth Circuit rested its conclusion on the Nation's assertion that it is not seeking "a quantification of its rights in the Colorado River." (App. 20) On that basis, the court concluded that it need not decide whether this Court's retained jurisdiction is exclusive. (App. 22)

What the Ninth Circuit failed to recognize, however, is that the district court's jurisdiction is even more limited than simply refraining from a quantification of mainstream reserved right. Indeed, neither the Ninth Circuit nor the district court can decide the predicate question of whether any mainstream reserved right exists. The answer to that question can only be decided by this Court, exercising its retained and exclusive jurisdiction. *Arizona v. California*, 547 U.S. 150, 166-67 (2006). Most importantly, the Ninth Circuit's Opinion does not address the core issue raised by the State Petitioners about which court has jurisdiction to determine whether the Nation holds a federal reserved water right in the LBCR. Remanding the Complaint to the district court to allow the Nation to amend its complaint yet again cannot provide an answer to this pivotal question. Any solution that manages water in the LBCR for the benefit of the Navajo is

effectively an adjudication of its reserved right and only this Court can make that determination. *Id.*

The Ninth Circuit's failure to recognize the broader scope of this Court's retained and exclusive jurisdiction conflicts with both this Court's 2006 Consolidated Decree, which expressly retains jurisdiction in the matter, and the prior decisions of this Court and other courts holding that in water adjudications, the first court to assume jurisdiction over the stream has prior, exclusive jurisdiction over actions involving the *res*. *Arizona v. California*, 547 U.S. 150, 166-67 (2006); *United States v. Alpine Land & Reservoir Co.*, 174 F.3d 1007, 1012-13 (9th Cir. 1999); *State Eng'r v. S. Fork Band of the Te-Moak Tribe of W. Shoshone Indians*, 339 F.3d 804 (9th Cir. 2003). This has been described as a "mandatory jurisdictional limitation" *Id.* at 810, citing *Palmer v. Texas*, 212 U.S. 118, 125 (1909) and *Kline v. Burke Const. Co.*, 260 U.S. 226, 229-30 (1922). State Petitioners have very substantial arguments that any claim of a mainstream reserved right by the Nation whether directly or indirectly, is procedurally flawed and is factually unfounded. 547 U.S. at 166-67. It is for this Court alone to decide these issues if the appropriate motion to reopen is made.

3. The breach of trust question must be resolved by this Court.

The Nation's Opposition to the State and Federal Petitions only serves to highlight the fundamental disagreement between the Nation's position and that of

all other courts to decide the scope of the federal government's fiduciary obligation to Native Americans, bolstering the need for this Court's review of whether the Nation may make a breach of trust claim against the U.S. Department of Interior ("DOI") based solely on implied obligations.

The Nation's glib conclusion that this issue "isn't certworthy" (StateOpp at 11) is based on two factual assumptions that the State Petitioners dispute and further, contend are wrong: (1) the Nation is entitled to LBCR water rights because its reservation is appurtenant to or bounded by the river; and (2) the language in the 1849³ and 1868 Treaties applies to the portion of the reservation near the river that was added decades later by the 1934 Boundary Act. See USOpp at 1, 13-14, 21-23; see also R. App. 1, Appx. H, 150a to Fed. Pet. (attached hereto and modified to show the Upper and Lower Basins) ("Map"). Much of the Navajo's breach of trust argument rests on the assumption that the tribe is entitled to LBCR water rights because the reservation is appurtenant to the river. However, this disputed fact has not been decided in this action or otherwise litigated. The Nation admits that the reservation was not extended until 1934. USOpp at 23. Even if the reservation's boundary is appurtenant to the river, the reservation lies approximately 3,500 feet above the

³ The Ninth Circuit held that language identical to that relied on by the Navajo in the 1849 Treaty did not create any fiduciary duty and thus, the 1849 Treaty is inapplicable here also. *Apache Stronghold v. United States*, 38 F.4th 742, 771-73 (9th Cir. 2022).

ridge of the canyon in which the river flows.⁴ Furthermore, the 1934 Boundary Act includes an express exception of a strip of land reserved for the federal government for water and power use, that runs from the river up to the edge of the canyon cliff. 1934 Boundary Act, Act of June 14, 1934, ch. 521, 48 Stat. 960, 961 (citing to a 1910 Act).

The Nation cites exclusively to language in the 1868 Treaty describing farming rights as the basis for its breach of trust claim but fails to explain how that language applies to lands that were not added to the reservation until 1934. *See* USOpp at 1, 13-14, 21-23. The 1934 Boundary Act contains no reference to the cited language from the Treaty (48 Stat. 960), moreover, Article IX of the 1868 Treaty stipulates that the Nation “will relinquish all right to occupy any territory outside their reservation, as herein defined. . . .” (App. 201) And in Article XIII the “tribe . . . agree to make the reservation herein described their permanent home, and they will not as a tribe make any permanent settlement elsewhere. . . .” (App. 204) Thus, even if the 1868 Treaty’s language is found to support the Nation’s claims to the LBCR, absent express language in the 1934 Act, it cannot be extrapolated to provide the basis for a breach of trust for lands outside the treaty reservation added to the reservation decades later.

⁴ *See* U.S. Geological Survey, Geographic Names Information System: Marble Canyon, Arizona (for a publicly available description of the height of the canyon near the reservation at <https://edit.nationalmap.gov/apps/gaz-domestic/public/summary/25252>).

The Nation also relies on DOI's pervasive control of the LBCR as a basis of an alleged fiduciary duty to it without explaining that only a small portion of the original reservation was actually within the Lower Basin of the Colorado River—and much of the current reservation remains outside the Lower Basin. USOpp at 4, 15-17, 19-20, 24-25. As the Nation admits and as shown on the Map (R. App. 1), the lands added to the reservation by the 1868 Treaty are barely within the LBCR and many miles away from the actual river. Even today, much of the Nation's reservation is in the Upper Basin of the Colorado River and the San Juan River watershed, which provide significant sources of water to the reservation. As noted in the State Petition, the Nation has other sources of water, including from the Little Colorado River in the Lower Basin, and the San Juan River Basin in New Mexico, and water rights in Utah in the Upper Basin. Pet. at 5 n.5. Thus, it is misleading to argue that DOI has somehow neglected its alleged responsibilities to the Nation when there are other more appropriate sources of water supply.

Well-established law holds that the United States “assumes Indian trust responsibilities” . . . “only to the extent it expressly accepts those responsibilities by statute,” treaty, or regulation; there must be an express, not implied duty. *United States v. Jicarilla Apache Nation*, 564 U.S. 162, 177 (2011) (quoting *United States v. Navajo Nation*, 556 U.S. 287, 302 (2009) (“*Navajo II*”)); see also *Hopi Tribe v. United States*, 782 F.3d 662 (Fed. Cir. 2015) (refusing to recognize an implied federal trust responsibility arising

solely from the *Winters* doctrine). In contrast, the *Winters* doctrine establishes the legal principle that Tribes have reserved water rights but in the absence of specific legislation, it does not empower the DOI to affirmatively manage the LBCR to the detriment of vested right holders. Thus, whether a breach of trust may arise solely out of the implied right created by *Winters* is a question of critical importance for the Court to decide.

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CONCLUSION

Both the State and Federal Petitions should be granted and the cases consolidated for hearing before this Court.

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**R. App. 1—Appendix H to the Federal
Petition—Map from federal appellees’ petition
for rehearing en banc, modified to show
the Upper and Lower Basin boundaries**

APPENDIX H
Federal Appellees' Petition for Rehearing En Banc p. 3:



 Boundary for Upper and Lower Colorado River Basins