No. 22-51

In the Supreme Court of the United States

DEPARTMENT OF THE INTERIOR, ET AL., PETITIONERS

v.

NAVAJO NATION, ET AL.

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

REPLY BRIEF FOR THE PETITIONERS

ELIZABETH B. PRELOGAR
Solicitor General
Counsel of Record
Department of Justice
Washington, D.C. 20530-0001
SupremeCtBriefs@usdoj.gov
(202) 514-2217

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In a series of decisions, this Court has made clear that Indian tribes may sue to enforce only those trust responsibilities that the United States has "expressly accept[ed]." *United States* v. *Jicarilla Apache Nation*, 564 U.S. 162, 177 (2011). The court of appeals in this case held that it was "not bound by those decisions," Pet. App. 23a, and then imposed on the United States an "implied fiduciary obligation" to assess and address the Navajo Nation's water needs, *id.* at 31a. As the government's petition explains (at 14-26), the court of appeals' decision conflicts with this Court's precedents and the decisions of other circuits and, if allowed to stand, would raise significant separation-of-powers concerns regarding the role of courts with respect to the United States' relationship with Indian tribes.

The Navajo Nation nevertheless contends that this Court's review is unwarranted. Its principal submission

is that after deeming this Court's decisions "not apposite," Pet. App. 21a, the court of appeals applied them anyway, see Br. in Opp. 2. But that characterization of the decision below is wrong. And even if it were not, the decision below would still conflict with this Court's precedents and raise an important federal question warranting this Court's review.

A. The Court Of Appeals' Decision Conflicts With This Court's Precedents

Under this Court's decisions in *Jicarilla* and other cases, an Indian tribe may not sue the United States for an alleged breach of trust unless the tribe points to a substantive source of law that "expressly" establishes a trust responsibility. *Jicarilla*, 564 U.S. at 177 (citation omitted); see *United States* v. *Navajo Nation*, 556 U.S. 287, 302 (2009) (*Navajo II*). In the absence of any such source of law, the court of appeals nevertheless held that the United States owes the Navajo Nation an affirmative, judicially enforceable fiduciary duty to assess and address the Navajo Nation's water needs. Pet. App. 31a. The Navajo Nation's attempts to reconcile the decision below with this Court's precedents lack merit.

1. The Navajo Nation does not defend the court of appeals' view (which the Navajo Nation had urged below) that *Jicarilla* and this Court's other breach-of-trust decisions are "not apposite" to claims for injunctive relief. Pet. App. 21a; see Br. in Opp. 2, 22; Navajo Nation C.A. Br. 29-30. Instead, the Navajo Nation argues (Br. in Opp. 2) that the court's rejection of the standard set forth in *Jicarilla* (and this Court's other decisions) made no difference in this case. As the Navajo Nation reads the decision below (*ibid.*), the court

rejected the *Jicarilla* standard but then "held that the [Navajo] Nation satisfied that standard all the same."

That characterization of the court of appeals' decision is mistaken. After concluding that the district court had committed "legal error[]" in applying the *Jicarilla* standard, the court of appeals did not then apply that same standard to the Navajo Nation's breach-of-trust claim. Pet. App. 33a; see *id.* at 46a. Rather, in "revers[ing] the district court's dismissal of the [Navajo] Nation's complaint," the court of appeals "[a]ppl[ied]" what it believed to be "the correct legal principles," not *Jicarilla*. *Id.* at 33a. Indeed, the court of appeals stated: "*Applying the correct legal principles*, we hold that the Nation's attempts to amend its complaint were not futile." *Ibid.* (emphasis added). The Navajo Nation's reading of the decision below contradicts that stated holding.

The Navajo Nation's reading likewise contradicts the decision's reasoning. The court of appeals derived what it believed to be "the correct legal principles" from circuit precedent—namely, *Gros Ventre Tribe* v. *United States*, 469 F.3d 801 (9th Cir. 2006), cert. denied, 552 U.S. 824 (2007), and *Morongo Band of Mission Indians* v. *FAA*, 161 F.3d 569 (9th Cir. 1998). Pet. App. 33a; see *id.* at 20a-21a. But whereas *Jicarilla* requires a tribe to point to a trust responsibility that the government has "expressly accept[ed]," 564 U.S. at 177, the court read *Gros Ventre* to allow a tribe to seek injunctive relief for the violation of a trust responsibility that exists either "expressly or *by implication*"—a standard that the court regarded as more permissive than *Jicarilla*. Pet. App. 21a (emphasis altered) (quoting *Gros Ventre*, 469 F.3d at 810).

The court of appeals' reasoning reflects the application of what it believed to be the *Gros Ventre* standard. In evaluating the Navajo Nation's breach-of-trust claim, the court specifically referred to *Gros Ventre* as "establish[ing] the governing standard." Pet. App. 21a. The court repeatedly cited *Gros Ventre* for the proposition that judicially enforceable trust responsibilities may exist "by implication." *Id.* at 21a, 26a, 31a (quoting 469 F.3d at 810) (emphasis omitted). And the court expressly acknowledged the "implied" nature of the asserted trust responsibility in this case—holding that the Navajo Nation had established the existence of "an implied fiduciary obligation," *id.* at 31a, by pointing to "implied" rights, *id.* at 30a, under *Winters* v. *United States*, 207 U.S. 564 (1908), and the Treaty Between the United States of America and the Navajo Tribe of Indians (1868 Treaty), June 1, 1868, 15 Stat. 667.

The Navajo Nation nevertheless contends (Br. in Opp. 2, 3) that the court of appeals applied the *Jicarilla* standard based on a single sentence in the court's decision that the Navajo Nation reads to say that "the specific provisions of the 1868 Treaty * * * *satisfied Jicarilla*." But that is not what the sentence says. What the sentence actually says is that "the farming provisions in the 1868 Treaty *may serve* as the 'specific statute' that satisfies *Jicarilla*, *Morongo*, and *Gros Ventre*," Pet. App. 27a (emphasis added)—in other words, that treaty provisions are on par with statutes, such that *if* the United States had accepted a trust responsibility in a treaty provision, that responsibility would be judicially enforceable under *Jicarilla*, just as it would be under *Morongo* and *Gros Ventre*. See Br. in Opp. 2 (making the same point that a "treaty" is "on par with a statute"); *id.* at 22 (likewise arguing that "specific treaty

provisions are no different than statutory terms"). The court, however, did not go on to find that the United States had expressly accepted a duty to assess and address the Navajo Nation's water needs in the 1868 Treaty. Rather, the court found only an "*implied* right to the water necessary" to "farm Reservation lands," Pet. App. 30a (emphasis added)—a finding that was sufficient to impose an affirmative duty under the court's reading of *Gros Ventre*, but is not sufficient under *Jicarilla*.

The court of appeals' decision thus rested on its rejection of the *Jicarilla* standard and its application of what it believed to be a different standard under *Gros Ventre*. Because its rejection of the *Jicarilla* standard cannot be squared with this Court's precedents, see Pet. 16-19—a point that the Navajo Nation does not even dispute, see Br. in Opp. 2—this Court's review is warranted.

2. In any event, even if the decision below could be read as applying the *Jicarilla* standard, it would still conflict with this Court's precedents. That is because none of the sources on which the court of appeals relied demonstrates that the United States has "expressly accept[ed]" a trust responsibility to assess and address the Navajo Nation's water needs. *Jicarilla*, 564 U.S. at 177.

a. Like the court of appeals, the Navajo Nation relies heavily (Br. in Opp. 21-22) on the *Winters* doctrine. But as the government's petition explains (at 19), that reliance is misplaced. *Winters* is a doctrine of "rights" held by the United States on behalf of tribes as against other water users in particular sources from which water could be expected to be drawn. *Cappaert* v. *United States*, 426 U.S. 128, 138 (1976); see *Colorado River Water Conservation Dist.* v. *United States*, 424 U.S. 800,

809-810 (1976). *Winters* is not a general "duty" imposed on the United States to "supply tribes with adequate water." Br. in Opp. 33. Moreover, the rights that *Winters* reserves exist "by implication." *Cappaert*, 426 U.S. at 138. *Winters* therefore cannot be a source of express, affirmative, and judicially enforceable duties under *Jicarilla*.

The Navajo Nation's reliance on *Winters* is particularly misplaced because, as the government's petition emphasizes (at 19), the court of appeals expressly declined to determine whether the Navajo Nation even has *Winters* rights "to the mainstream of the Colorado River or to any other specific water sources." Pet. App. 33a. Without acknowledging that point, the Navajo Nation simply assumes throughout its brief that it has "reserved water rights" in the Colorado River mainstream. Br. in Opp. 23. But "no court" has adjudicated any Navajo Nation *Winters* rights in the Colorado River mainstream. Pet. App. 31a. In *Arizona* v. *California*, 373 U.S. 546 (1963), the United States sought and the Court decreed reserved water rights in the Colorado River mainstream only for five tribes below Hoover Dam. Pet. 4-5. The United States sought then and seeks now reserved rights for the Navajo Reservation in the Little Colorado River. Pet. 5, 7.

b. The Navajo Nation also defends the court of appeals' reliance on the 1868 Treaty's "farming provisions." Br. in Opp. 2 (quoting Pet. App. 27a). But as the Navajo Nation acknowledges (*id.* at 21), those provisions "don't mention water rights," let alone duties. Under *Jicarilla*, that silence is dispositive because "[t]he Government assumes Indian trust responsibilities only to the extent it expressly accepts [them]." 564 U.S. at 177. Indeed, the Navajo Nation did not even argue

below that the Treaty's provisions satisfied *Jicarilla*. See Navajo Nation C.A. Br. 39-54.

In any event, as the government's petition explains (at 20), the 1868 Treaty could not be the basis of the Navajo Nation's breach-of-trust claim because the 1868 Treaty governed only the Navajo Nation's original reservation, located in what is now eastern Arizona and western New Mexico. See Pet. App. 150a (map). The Navajo Nation responds that the Colorado River might still qualify as a water source "appurtenant" to the original reservation under *Winters*. Br. in Opp. 27 (citation omitted). But even if it did, treaty provisions relating to the *original reservation* cannot be the source of a duty to supply water *elsewhere*. And here, the only water needs that the relevant complaint identifies are water needs "in the western region of the Navajo Reservation adjacent to the Colorado River"—far away from the original reservation. D. Ct. Doc. 360-2, at 18 (Jan. 10, 2019); see *ibid.* (alleging that "[t]he western region of the Navajo Reservation in Arizona experiences severe drought" and predicting a "shortfall of water to meet [the Navajo Nation's] needs" in that region of "8,263 acre-feet per year by 2050"). Thus, even if the 1868 Treaty could be read to create a duty to assess and address the water needs of the Navajo Nation on the original reservation, it could not be the basis of a duty to assess and address the water needs asserted in the Navajo Nation's complaint.

c. As for the remaining sources on which the court of appeals relied, the Navajo Nation does not dispute that the Secretary of the Interior's "control" over the Colorado mainstream cannot, in and of itself, establish any judicially enforceable trust obligation. Br. in Opp. 28; see *Navajo II*, 556 U.S. at 301 ("The Federal Govern-

ment's liability cannot be premised on control alone."). Nor does the Navajo Nation dispute that the Final Environmental Impact Statement that the court cited cannot be the source of any relevant "regulatory prescription." Br. in Opp. 29 (citation omitted); see *Navajo II*, 556 U.S. at 296 (emphasizing the need to identify "specific rights-creating or duty-imposing statutory or regulatory prescriptions") (citation omitted). The court of appeals therefore did not identify any source that satisfies *Jicarilla*. It instead held that the Navajo Nation could sue to enforce "an implied fiduciary obligation," Pet. App. 31a, contrary to this Court's precedents.

B. The Court Of Appeals' Decision Conflicts With The Decisions Of Other Circuits On An Important Question Of Federal Law

1. As the government's petition explains (at 23-24), the court of appeals' rejection of the *Jicarilla* standard is also contrary to decisions of the D.C. and Tenth Circuits. The Navajo Nation attempts (Br. in Opp. 29) to reconcile the decision below with those other decisions on the ground that the court of appeals in this case found the *Jicarilla* standard to be satisfied "all the same." But as explained above, that characterization of the court's decision is mistaken. See pp. 2-5, *supra*.

The Navajo Nation also argues (Br. in Opp. 30) that the decisions of the other circuits did not involve "reserved water rights under *Winters*." But the court of appeals' reason for rejecting the *Jicarilla* standard in this case was not based on *Winters*; rather, the court rejected the *Jicarilla* standard on the view that this Court's breach-of-trust decisions apply only to claims for "money damages." Pet. App. 23a; see *id.* at 24a ("*Jicarilla* was at bottom a suit for monetary relief."). The D.C. and Tenth Circuits, in contrast, have held that

those decisions also apply to claims for equitable relief. See *El Paso Natural Gas Co.* v. *United States*, 750 F.3d 863, 895 (D.C. Cir. 2014); *Flute* v. *United States*, 808 F.3d 1234, 1247 (10th Cir. 2015), cert. denied, 137 S. Ct. 146 (2016). That this case involves an assertion of *Winters* rights therefore does not eliminate the conflict.

With respect to the D.C. Circuit's decision in *El Paso*, the Navajo Nation makes one additional argument (Br. in Opp. 30): that *El Paso* does "not foreclose" a future panel of that circuit from holding that this Court's breach-of-trust decisions apply "only to claims for monetary relief." But *El Paso* understood "the established law of the circuit" to be that this Court's decisions apply to claims for equitable relief. 750 F.3d at 896. Indeed, the D.C. Circuit held that it was "constrained," *ibid.*, by its "own Indian trust law precedent," *id.* at 893, to apply this Court's decisions to such claims. The Navajo Nation asserts that "the D.C. Circuit noted that the tribe there 'had not marshaled an argument'" regarding the applicability of this Court's decisions. Br. in Opp. 30 (brackets omitted) (quoting *El Paso*, 750 F.3d at 895). But what the D.C. Circuit actually noted was that "the Tribe ha[d] not marshaled an argument that [the court] should *reconsider* [the] approach" that it had already taken in "past cases." *El Paso*, 750 F.3d at 895 (emphasis added).

Thus, contrary to the Navajo Nation's contention, the decision below conflicts with "the established law" of both the D.C. Circuit and the Tenth Circuit. *El Paso*, 750 F.3d at 896; see *Flute*, 808 F.3d at 1247. This Court's review is warranted to resolve that conflict.

2. In any event, even in the absence of any circuit conflict, this Court's review would still be warranted. The Navajo Nation does not dispute that "this Court

has previously granted certiorari to review decisions imposing judicially enforceable Indian trust obligations on the United States," even when no circuit conflict existed. Pet. 24. And the Navajo Nation identifies no valid reason for a different outcome here.

As the government's petition explains (at 24-25), the decision below raises significant separation-of-powers concerns by imposing judicially enforceable duties on the United States that no substantive source of law expressly establishes. In response, the Navajo Nation asserts (Br. in Opp. 32) that it is "unclear how the [court of appeals'] decision ties Congress's hands." But the problem is not that the decision ties Congress's hands; it is that the decision imposes a duty that the United States has never "accept[ed]." *Jicarilla*, 564 U.S. at 177.

The Navajo Nation also disputes (Br. in Opp. 32) that the decision below subjects the United States to "judicial oversight over amorphous duties." But like the court of appeals, see Pet. 25-26, the Navajo Nation fails to describe the asserted duty with any consistency—characterizing it variously as a "duty to assess the [Navajo] Nation's water needs and develop a plan to meet them," Br. in Opp. i; a "duty to preserve and protect the [Navajo] Nation's reserved water rights," *id.* at 25; and a "duty to supply tribes with adequate water," *id.* at 33. That the scope of the asserted duty is so unclear simply reflects the lack of any statute, treaty, or regulation that expressly establishes it.

The Navajo Nation likewise errs in contending (Br. in Opp. 33) that the asserted duty would not impose "any additional burden" on the United States. It is of course true, as this Court and the government have long recognized, that the United States has a general trust relationship with Indian tribes. See, *e.g.*, *Cherokee Nation*

v. *Georgia*, 30 U.S. (5 Pet.) 1, 17 (1831). And the United States has long honored that relationship with respect to the Navajo Nation's water needs—asserting the Navajo Nation's claims in the Little Colorado River in *Arizona* v. *California*, *supra*; again asserting the Navajo Nation's claims in the Little Colorado River in an ongoing adjudication in Arizona state court; and resolving the Navajo Nation's claims in the San Juan River through congressionally enacted settlements and related adjudications that have also authorized more than $1 billion in water projects for the Navajo Nation. Pet. 6-9.

But what the court of appeals did here was impose on the United States a duty that the United States has never accepted. And contrary to the Navajo Nation's contention (Br. in Opp. 33), the court's decision, if allowed to stand, would threaten significant practical consequences beyond this case. After all, "*Winters* rights are necessarily implied in each treaty" that establishes an Indian reservation, Pet. App. 14a, and the court took the view that *Winters* "in itself" gives tribes "the right to proceed on a breach of trust claim," *id.* at 30a.

* * * * *

For the foregoing reasons and those stated in the petition for a writ of certiorari, the petition should be granted.

Respectfully submitted.

ELIZABETH B. PRELOGAR
Solicitor General

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