

Nos. 21-1484 and 22-51

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

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STATE OF ARIZONA, et al.,  
*Petitioners,*

v.

NAVAJO NATION, et al.,  
*Respondents.*

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DEPARTMENT OF THE INTERIOR, et al.,  
*Petitioners,*

v.

NAVAJO NATION, et al.,  
*Respondents.*

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**On Writs Of Certiorari To The  
United States Court Of Appeals  
For The Ninth Circuit**

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**BRIEF FOR *AMICI CURIAE*  
PROF. DANIEL MCCOOL, PROF. EZRA ROSSER  
AND PROF. DAVID E. WILKINS,  
IN SUPPORT OF RESPONDENTS**

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**INTEREST OF *AMICI CURIAE*<sup>1</sup>**

*Amici* are academicians who have studied and written extensively about the relations between the Navajo Nation (and other Indian tribes) and the United States, and by presenting the following historical information they believe that they will provide the Court with the important factual context within which the legal arguments presented by the parties and other *amici* can better be assessed.

Daniel McCool is Professor Emeritus in the political science department at the University of Utah. He received his Ph.D. in Political Science from the University of Arizona. He is the author of numerous books, including three on rivers and Native water rights.

Ezra Rosser is Professor of Law at American University Washington College of Law. He received his J.D. from Harvard Law School. He is an editor of the forthcoming edition of *Cohen's Handbook of Federal Indian Law* and author of a book on Navajo land and economic development.

David E. Wilkins is a citizen of the Lumbee Nation and is the E. Claiborne Robins Distinguished Professor in Leadership Studies at University of Richmond's Jepson School of Leadership Studies. He received his

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<sup>1</sup> Pursuant to this Court's Rule 37.6, counsel for *amici* certify that no person or entity other than *amici curiae* and their counsel authored this brief in whole or in part, and no person other than *amici curiae* or their counsel made a monetary contribution to the preparation or submission of the brief.

Ph.D. in Political Science from the University of North Carolina. He is the author or editor of twenty books, including *The Navajo Political Experience*.



### **SUMMARY OF THE ARGUMENT**

The 1849 and 1868 treaties entered into by United States and the Navajo Nation confirmed the enforceable trust responsibility that the federal government owes the Navajo Nation. According to the terms of the Senate-ratified 1849 treaty, the Navajo Nation “hereby acknowledge[s] that . . . the said tribe was lawfully placed under the exclusive jurisdiction and protection of the Government of the said United States, and that they are now, and will forever remain, under the aforesaid jurisdiction and protection.” Treaty with the Navaho, 1849 art. I (Sep. 9, 1849), 9 Stat. 974 (“1849 Treaty”). The more detailed 1868 treaty allowed the Navajo people to return to their homeland after a four-year forced internment and carried the trust responsibility forward. Treaty of 1868, 15 Stat. 667 (“1868 Treaty”). The history of the negotiation proceedings leading to the 1868 treaty and the text of the treaty show that both sides agreed that the future of the Navajo Nation depended on being able to successfully pursue farming and grazing and that the treaty was meant to secure that future. Given the high desert location reserved for the Navajo Nation by the 1868 treaty and by subsequent additions to the Navajo Nation’s land base, access to adequate water to support the Navajo Nation is an inseparable part of the trust

responsibility built into the federal government's dealings with the Navajo Nation. The purpose of this *amicus* brief is to provide the Court with a history of the 1849 and 1868 treaties and of the federal government's failure to safeguard the Navajo Nation's water rights—rights which are necessary to fulfill the mandates of the treaties and have been recognized by cases such as *Winters v. United States*, 207 U.S. 564 (1908).

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## ARGUMENT

### **I. The Treaties of 1849 and 1868 Confirm the Trust Relationship Between the United States and the Navajo Nation**

On June 1, 1868, the United States signed a treaty with leaders of the Navajo Nation. Congress ratified the treaty on July 25, 1868. The treaty ended the four-year internment of the tribe at Fort Sumner and provided for the return of Navajos to part of their traditional homeland. Recognizing that the original reservation was too small to meet the needs of the tribe and of the United States with regard to the tribe, subsequent executive orders and acts of Congress expanded the reservation to its present size. The history of U.S.-Navajo interactions since the 1868 treaty shows that the United States has not lived up to the promises made in the 1868 treaty. Nevertheless, that signature treaty endured and remains the foundational text for the relationship between the United States and the Navajo Nation.

The 1868 treaty, like many other Indian treaties, “involved matters of immense scope.” Felix Cohen, *Handbook of Federal Indian Law* § 1.01 (2012 ed., 2019 Supp.) (“Cohen”). Through the treaty, U.S. government negotiators, led by General William Tecumseh Sherman, and Navajo negotiators, led by Barboncito, agreed that the Navajo tribe would return to the tribe’s homeland rather than be forced to move to a reservation in present-day Oklahoma. Though the treaty did not directly discuss allocation of water from rivers and other sources, it envisioned that the Navajo people would support themselves with agricultural and grazing pursuits that depend on water. Longstanding precedent recognizes that, when it comes to treaties and agreements with tribes, “ambiguities occurring will be resolved from the standpoint of the Indians.” *Winters*, 207 U.S. at 576. This interpretive tool was expressly incorporated into the 1849 treaty language: “this treaty is to receive a liberal construction, at all times and in all places . . . and that the United States shall so legislate and act as to secure the permanent prosperity and happiness of said Indians.” 1849 Treaty, art. XI.

Treaties, by design, establish a lasting framework for the relationship between particular tribes and the U.S. government. It is up to Congress, not the courts nor the Executive, to alter treaty terms. As this Court noted, “Congress may abrogate Indian treaty rights, but it must clearly express its intent to do so.” *Minnesota v. Mille Lacs Band of Chippewa Indians*, 526 U.S. 172, 202 (1999). Even if not directly discussed, “[t]ribal

water rights are reserved to carry out the purposes for which particular reservations were established.” Cohen § 19.03[4] at 1217. As the Court recognized in *Winters*, given the arid nature of many of the lands reserved by treaty, Indians could not successfully pursue an agricultural-based lifestyle without adequate water for irrigation. *Winters*, 207 U.S. at 576. *See also* Cohen § 19.03[1]. In light of the multiple treaty provisions intended to induce the Navajo to become farmers and pastoralists, the Navajos plainly had an enforceable expectation that the United States would assure them an adequate supply of water for those purposes.

As the Court described in *Mille Lacs*, treaty interpretation requires the Court to “examine[] the historical record and consider[] the context of the treaty negotiations to discern what the parties intended by their choice of words. This review of the history and the negotiations of the agreements is central to the interpretation of treaties.” *Mille Lacs Band*, 526 U.S. at 202. Part II shows how the 1849 Treaty established a trust relationship between the United States and the Navajo Nation. Part III connects the trust responsibility of the United States with the history of the 1868 Treaty. Part IV explains that the subsequent land transfers that expanded the size of the Navajo reservation also were based on an assumption that water would be available to support the agricultural pursuits. Finally, Part V briefly highlights the contrast between federal support of off-reservation water needs and the minimal efforts made to make water available on the Navajo reservation.

## II. The Treaty of 1849 Intended to Bring the Navajo Nation Under the Guardianship of the United States

The first recorded encounter between the federal government and Navajos took place in October 1846, when a party of only thirty U.S. soldiers ventured into the heart of Navajo country. John Hughes, *Doniphan's Expedition* 63-64 (1847, 2009). Their commander, Captain John Reid, had heard horror stories about the Navajos and expected the worst: "This was the most critical situation in which I ever found myself placed—with only thirty men, in the very center of a people the most savage and proverbially treacherous of any on the continent." But to his surprise, an advance party of forty Navajos gave him and his troops a cordial welcome, and the two groups "passed the night together, the utmost confidence seeming mutually to prevail. Presents were interchanged and conversation was commenced as they sat around their campfires. The night passed off most amicably." *Id.* at 64.

At Captain Reid's urging, a treaty meeting was planned at Ojo del Oso, and the Navajos agreed to a parley with the overall commander of the expedition, Colonel Alexander Doniphan. Lynn R. Bailey, *The Long Walk: A History of the Navajo Wars, 1846-68*, at 5-7 (1964); Bernard DeVoto, *The Year of Decision: 1846*, at 190-92 (1942). Doniphan's orders were clear; he was to "penetrate into the heart of the Navajo district . . . chastising the Navajos where they appeared hostile, and taking their chiefs as hostages for their future good behavior. . . ." Hughes, *supra*, at 56. Colonel

Doniphan met with the Navajos the following month to negotiate a treaty. He took 330 soldiers with him to make an impression; this military invasion of Navajoland was the first significant military thrust into the land of the Navajos. Hughes, *supra*, at 71; Bailey, *supra*, at 8-9. After the initial good tidings, the treaty talk turned ugly. As the sides parleyed, Doniphan told the Navajos they only had two choices: sign a treaty with the U.S. and completely surrender their independence, or the alternative would be “powder, bullet, and the steel.” Hughes, *supra*, at 71 (quoting Doniphan). One of the leading negotiators for the Navajos was Narbona, the highly regarded headman who was one of the principal advocates among the Navajos for peace. The two sides signed the 1846 Treaty of Ojo del Oso, promising a “lasting peace and amity” between the U.S. and the Navajos—the first official document involving the U.S. government and the Navajo Nation and the first of at least nine treaties. Hughes, *supra*, at 72; James Friday Locke, *Book of the Navajo* 210-12 (2001). Despite the tough talk at the treaty negotiations, Colonel Doniphan left with a positive impression of the Navajos:

“The Navajo Indians are a warlike people . . . remarkably wealthy, having immense herds of horses, cattle, and sheep. They are celebrated for their intelligence and good order. They treat their women with great attention, consider them equals, and relieve them from the drudgery of menial work. They are handsome, well made, and in every respect a highly civilized people, being as a nation, of a higher

order of beings than the mass of their neighbors.”

Hughes, *supra*, at 76 (quoting Doniphan). The Senate never ratified the 1846 Treaty of Ojo del Oso, but it is noteworthy that at the time of first contact with the U.S. government, Navajos were wealthy, free and independent, and controlled a large homeland.

The first treaty between the Navajo Nation and the United States to be ratified by the Senate was signed on September 9, 1849, and ratified a year later. The treaty negotiators were Lt. Col. John M. Washington, then Governor of the New Mexico Territory, and James S. Calhoun, Indian Agent, and a large band of Navajos, led by Mariano Martinez after chief Narbona had been killed by American soldiers a few days earlier in the Chuska Mountains. The Navajos expressed their desire to be placed under the protection of the United States and, according to the 1849 treaty, the Navajo tribe “hereby acknowledge that . . . the said tribe was lawfully placed under the exclusive jurisdiction and protection of the Government of the said United States, and that they are now, and will forever remain, under the aforesaid jurisdiction and protection.” 1849 Treaty, art. I. In furtherance of the trust relationship announced in the first article of the 1849 treaty, the treaty concluded with the promise that “the United States shall so legislate and act as to secure the permanent prosperity and happiness of said Indians.” *Id.* at art. XI. By its own terms, the 1849 treaty did not resolve all matters of importance—it left territorial questions for future dealings—but it recognized the



existence of a trust relationship between the U.S. government and the Navajo Nation that found later expression in the 1868 treaty. Additionally, the commitment to ensure Navajo “prosperity” plainly implies a secure source of water in the arid environment of the area.

### **III. The Treaty of 1868 was Premised on the Idea that the Navajos Would Pursue Agriculture and Grazing When They Returned to Their Homeland**

#### **A. History Leading to the Treaty of 1868**

Hardship and war marked the years between the 1849 and 1868 treaties. The 1849 treaty was followed by a decade and a half of relentless warfare between the Navajos and the U.S. government. The failure of the U.S. government to protect Navajo families from slave raids was a significant factor in the ongoing conflict between Navajos and non-Indians. Officially, “[b]y January 1862 at least 600 Navajo women and children were held captive in New Mexico . . . The number of unreported slaves can only be guessed; however, by 1865, Carleton estimated that at least 3,000 were living in Mexican households.” Robert McPherson, *A History of San Juan County: In the Palm of Time* at 63 (1995). According to witnesses before an 1865 commission tasked with determining the causes of the Navajo wars, “even colonist families of modest means kept a Navajo slave or two.” Klara B. Kelley & Peter M. Whiteley, *Navajoland: Family Settlement and Land Use* at 41 (1989). See generally Andrés Reséndez, *The Other Slavery: The Uncovered Story of Indian*

*Enslavement in America* (2016). Navajos, in turn, raided neighboring communities to exact revenge and secure livestock, including sheep, goats, and horses. See generally Frank McNitt, *Navajo Wars: Military Campaigns, Slave Raids, and Reprisals* (1972, 1990).

Determined to end Navajo raids and secure the frontier, Brigadier General James H. Carleton commanded U.S. Army Colonel Christopher “Kit” Carson to achieve the “total defeat and removal [of Navajos] from their ancestral homeland.” Richard C. Hopkins, *Kit Carson and the Navajo Expedition*, 18 *Montana: The Magazine of Western History* 52, 55 (1968). Carson proved up to the task. Starting in 1863 and continuing into 1864, Carson adopted a “scorched earth policy.” Lloyd L. Lee, *Diné Identity in a 21st Century World* 83 (2020). The Army burned Navajo cornfields, captured Navajo livestock, contaminated water wells, and destroyed peach orchards that the tribe had cultivated over generations. See Peter Iverson, *Diné: A History of the Navajos* 54-56 (2002); Marie Mitchell, *The Navajo Peace Treaty 1868*, at 72 (1973). According to a report Carson wrote in January 1864, members of the tribe “declare that owing to the operations of my command they are in a complete state of starvation, and that many of their women and children have already died from this cause.” Letter from Colonel Carson to Captain Ben and C. Culter, Jan. 24, 1864, in Bernhard Michaelis, *The Navajo Treaty of 1868: Treaty Between the United States of America and the Navajo Tribe of Indians* at 111 (2014).

Carson's campaign left Navajos with "only two choices: be exterminated or surrender unconditionally." E. Richard Hart, *Pedro Pino: Governor of Zuni Pueblo, 1830-1878*, at 82 (2003). Beginning in the spring of 1864, Navajos were forced to walk from their homeland to Fort Sumner and the surrounding Bosque Redondo reservation. Known today as the "the Long Walk," and occasionally as the Navajo Trail of Tears, the route along this forced march "was marked by the frozen corpses of Indians." Bailey, *supra*, at 170. Once Navajos arrived at Bosque Redondo, they discovered things were not much better. The land was barren and the water and soil was heavily alkaline, making it difficult to grow crops. Iverson, *supra*, at 59. *See also* Letter from Theodore H. Dodd, U.S. Indian Agent for Navajo Indians, to General Sherman and Colonel Tappan, May 30, 1868, in Michaelis, *supra*, at 25 (highlighting the unproductiveness of the soil at Bosque Redondo). Some Navajos avoided the Long Walk altogether, others escaped Bosque Redondo, and hid in the Chuska Mountains, and in Navajo Mountain near the Colorado River. Still others, living far to the west, were also never interned. *See* Lawrence Kelly, *Navajo Roundup: Selected Correspondence of Kit Carson's Expedition Against the Navajo, 1863-1865*, at 43 (1970) (hereinafter Kelly, *Navajo Roundup*) (Col. Carson reporting "that a large party of Navajos are on the Salt River near the San Francisco Mountains (i.e., the San Francisco Peaks near Flagstaff, one of the 4 sacred mountains of the Navajo)"); *id.* at 160-61 (Capt. Plympton reporting that "some 3,000 Navajos were

still living west of the Hopi villages and south of the [Lower Colorado River] in Apache territory”).

But for four long years, the majority of Navajos “were an exiled people, forced by the United States to live crowded together on a small piece of land on the Pecos River in eastern New Mexico, some 300 miles east of the area they had occupied before the coming of the white man.” *Williams v. Lee*, 358 U.S. 217, 221 (1959). *See also* An Act For the relief of the Navajo Indians at the Bosque Redondo, and to establish them on a reservation, and for other purposes, H.R. 733, 40th Cong. (1868) (describing the Navajos as “held against their will upon the Bosque Redondo reservation”). It is estimated that “2,000 people died during internment or roughly one-quarter of those forced to live at Bosque Redondo.” Ezra Rosser, *A Nation Within: Navajo Land and Economic Development* 27 (2021).

Meanwhile, Congress, in 1867, concerned about the costs associated with Indian wars and hoping to protect emerging transportation routes across the continent, sent “peace commissioners” to negotiate a series of treaties with tribes. Kerry R. Oman, *The Beginning of the End: The Indian Peace Commission of 1867-1868*, 22 *Great Plains Q.* 35, 35 (2002). Among other things, Congress tasked the peace commissioners with selecting “districts where the Indians might become self-supporting through agriculture and stock raising.” John L. Kessell, *General Sherman and the Navajo Treaty of 1868: A Basic and Expedient Misunderstanding*, 12 *W. Hist. Q.* 251, 253 (1981). Since both the U.S. government and the Navajo Nation entered the

negotiations with similar hopes regarding the utility of the land selected, there was space for agreement. General Sherman and Samuel F. Tappan served as the peace commissioners responsible for negotiating a new treaty with the Navajo Nation. The Navajos at Bosque Redondo chose the leaders who would represent the Nation, with Hástiin Dághá, also known as Barboncito, serving as the Nation's lead negotiator.

### **B. Navajo Leaders Sought a Return to Their Homeland in Order to Grow Crops and Raise Animals**

The primary goal of Navajo leaders in their negotiations with U.S. peace commissioners was an agreement that would allow the tribe to return to its traditional homeland. Speaking to General Sherman on behalf of the Navajo, Barboncito drew upon the trust relationship between the two peoples to make the Navajo case, stating, "It appears to me that the General commands the whole thing as a god. I hope therefore he will do all he can for the Indian, this hope goes in at my feet and out at my mouth. I am speaking to you [General Sherman] now as if I was speaking to a spirit and I wish you to tell me when you are going to take us to our own country." *Proceedings of the Council at Fort Sumner*, in Michaelis, *supra*, at 17 (hereinafter *Proceedings*). As Barboncito explained, Navajos highly valued their homeland, for both spiritual and practical reasons:

"When the Navajos were first created four mountains and four rivers were pointed out to

us, inside of which we should live, that was to be our country and was given to us by the first woman of the Navajo tribe. It was told to us by our forefathers, that we were never to move east of the Rio Grande or west of the San Juan rivers and I think that our coming here has been the cause of so much death among us and our animals.”

*Proceedings*, at 16 (quoting Barboncito). As the above passage makes clear, Navajos defined their homeland in part by its location relative to the major rivers of the region, and one of the four rivers that Barboncito referred to is the Colorado River. *See, e.g.*, Kelly, *Navajo Roundup*, at 166 (Gen. Carleton noting in a letter Manuelito’s position that there was a tradition among his people that they should never cross “the Rio Grande, the Rio San Juan, or the Rio Colorado.”).

An important part of Barboncito’s argument was the promise that the tribe could successfully raise crops and animals if allowed to return to their homeland. On the second day of negotiations, Barboncito painted a picture of what life would be like for Navajos upon their return:

“I will take all the Navajos to Canyon de Chelly leave my own family there taking the rest and scattering them between San Mateo mountain and San Juan river. I said yesterday this was the heart of the Navajo country. In this place there is a mountain called the Sierra Chusque or mountain of agriculture from which (when it rains) the water flows in abundance creating large sand bars on which the

Navajos plant their corn: it is a fine country for stock or agriculture. . . . After we get back to our country it will brighten up again and the Navajos will be as happy as the land, black clouds will rise and there will be plenty of rain. Corn will grow in abundance and everything look happy.”

*Proceedings* at 19-20 (quoting Barboncito). Given the unique importance of water for successfully raising stock and agriculture in the arid southwest, it is not surprising that Barboncito emphasized water repeatedly when negotiating on behalf of the Navajo people.

As Barboncito explained, there was a marked contrast in agricultural potential between their traditional homeland and Bosque Redondo: “[t]his ground we were brought on, it is not productive, we plant but it does not yield, all the stock we brought here have nearly all died.” *Id.* at 16. Barboncito emphasized the Navajo desire to return to their homeland’s agricultural strength: “outside my own country we cannot raise a crop, but in it we can raise a crop almost anywhere, our families and stock there increase, here they decrease, we know this land does not like us neither does the water.” *Id.* at 17. Though General Sherman raised the possibility of the Navajo tribe relocating to Cherokee country in Oklahoma, Barboncito pushed back against that idea because “[i]t might turn out [to be] another Bosque Redondo. They told us this was a good place when we came but it is not.” *Id.* at 18. As a U.S. Indian Agent for the Navajo Nation explained to the U.S. peace commissioners, leading up to the

negotiations, Navajos had “been constantly begging me to endeavor to have them removed to their old country where they say the soil is more productive. . . .” Letter from Theodore H. Dodd, U.S. Indian Agent for Navajo Indians, to General Sherman and Colonel Tappan, May 30, 1868, *in Michaelis, supra*, at 25.

As the recorded history of the negotiations leading to the 1868 treaty makes clear, the main goal of Navajo leadership was for the Navajo people to return to their homeland so that they could support themselves. Barboncito argued throughout the negotiations that Navajos would thrive through agricultural pursuits—farming and livestock—once they returned home. Part of the Navajo argument for return involved highlighting the poor soil quality and lack of water at Bosque Redondo in contrast with the better soil quality and availability of water in their homeland.

### **C. The Treaty Specifically Encouraged the Navajos to Engage in Agriculture and Pastoral Pursuits**

The treaty that was signed after three days of negotiations was a victory for the Navajo Nation and for the Peace Commissioners. The tribe was allowed to return to a reservation that included some of the most important parts of the tribe’s homeland, including Canyon de Chelly and the Chuska Mountains. U.S. officials wanted Navajos to be located on land where agricultural pursuits would be successful. In 1868, for example, Senator John B. Henderson, the Chairman of



the Indian Affairs Committee and an appointed Peace Commissioner, lamented the removal of Navajos to the Bosque Redondo, “a place where it is impossible to succeed with any sort of agricultural pursuit.” Cong. Globe, 40th Cong., 2d sess. 2012 (1868). He noted the Navajos “were brought from a country where they were prosperous, where they had herds of cattle and flocks of sheep, peach orchards and farms,” and he wanted “to locate these Indians somewhere where they can cultivate the soil and support themselves,” as they had done prior to removal. *Id.* at 1789-90.

Importantly, provisions throughout the ratified treaty show that the agreement was premised on the idea that Navajos would raise crops and livestock upon their return to their homeland:

- Article V gave individual tribal members a right to select 160-acre farming plots to be held by “his family, so long as he or they may continue to cultivate it.”
- Article VI noted that “the necessity of education is admitted, especially of such of them as may be settled on said agricultural parts of this reservation. . . .”
- Article VII provided that after a head of a family has selected an individual farm plot “and the agent shall be satisfied that he intends in good faith to commence cultivating the soil for a living, he shall be entitled to receive seeds and agricultural implements for the first year, not exceeding in value one hundred dollars, and for each succeeding year he shall continue

to farm, for a period of two years, he shall be entitled to receive seeds and implements to the value of twenty-five dollars.”

- Article VIII granted a ten dollar annuity “for each person who engages in farming or mechanical pursuits.”

Besides providing Navajos a right to return to their homeland, arguably the most significant element of the treaty was the commitment by the United States to the “purchase of fifteen thousand sheep and goats, at a cost not to exceed thirty thousand dollars,” to be given to Navajos upon their return. 1868 Treaty, art. XII. From this foundation, the tribe was able to begin recovering from the horror of the preceding five years. Through careful cultivation and animal husbandry, the Navajo people found ways to survive and attempt to support themselves—if they could get enough water.

#### **IV. Subsequent Land Additions Assumed Navajos Had Enough Water to Meet Their Agricultural and Grazing Needs**

Through a series of executive actions and Congressional acts following the signing of the 1868 treaty, the federal government significantly increased the size of the Navajo reservation. The government was persuaded that such land accessions were necessary because of widespread acknowledgment that the original reservation was inadequate to meet the Navajo Nation’s need for land and for agricultural, grazing, and water resources. Though it took place incrementally,

the Navajo reservation increased from roughly 3.5 million acres in 1868 to nearly 12 million acres by 1930. Rosser, *supra*, at 35. As Navajo scholar Lloyd Lee explains:

The people returned to where they had been living prior to [Bosque Redondo]. No signposts or fences existed, and the government did not force the people to live within the stated reservation boundaries. Within ten years, President Rutherford B. Hayes signed an executive order pushing the reservation boundary twenty miles to the west because the Diné people had lobbied the federal government to increase reservation boundaries. For the next sixty years, lands were added to the reservation via executive orders and congressional confirmation.

Lloyd L. Lee, *Diné Identity in a 21st Century World* 85-86 (2020). *See also* Iverson, *supra*, at 71-73. The land mass was increased, in part, because the Indian agents assigned to the Navajo reservation realized that the 1868 reservation was too small and advocated enlarging it so Navajos could produce more food for themselves and thereby save the government money. *See* Garrick Bailey & Roberta Bailey, *A History of the Navajos: The Reservation Years* 26 (1986); Lawrence Kelly, *The Navajo Indians and Federal Indian Policy, 1900-1935*, at 33 (1968).

Besides being an acknowledgment of de facto Navajo occupation of land off-reservation, the federal government's piecemeal policy of adding land to the

reservation aimed to protect Navajo access to needed land and water resources. When General Sherman visited Navajo leaders a decade after the original treaty, he advocated an expansion of the reservation so that it would include the whole of Canyon de Chelly, one of the more fertile areas of the Navajo homeland, nearly half of which had been inadvertently omitted from the treaty reservation. Rosser, *supra*, at 35. Indian agents in New Mexico reported an 1879 council held by Navajo political leaders where they lobbied the federal government to expand the reservation to the south and east to allow for a larger winter grazing area for their herds. Report of Agents in New Mexico, *Annual Report of the Office of Indian Affairs* 116 (1879). Though it did not mention grazing, the 1880 Executive Order expanded the reservation to the south and east. The reservation was further expanded through executive orders in 1882 and 1884. As the Commissioner of Indian Affairs subsequently explained, the 1880 and 1884 orders were “issued for the purpose of extending the boundaries of the Navajo Reservation so as to include better facilities for grazing and watering their animals and increasing flocks and herds, and to the end that such action might avoid conflict between the Indians and encroaching whites.” Thomas P. Smith, *Agreement with Navajo Indians*, H.R. Doc. No. 310, at 8 (1897).

Tellingly, though many tribes experienced devastating land loss over the allotment era, 1887-1934, the Navajo reservation increased in size. The Dawes Act of 1887 empowered the executive to allot lands on “any

reservation or any part thereof of such Indians is advantageous for agricultural and grazing purposes.” Dawes Act of 1887, ch. 119, 24 Stat. 388. But the Navajos managed to avoid this process, and their reservation expanded to improve Navajo agriculture and grazing. In 1900, following an executive order that increased the size of the reservation, President William McKinley justified the land transfer by arguing that “it was neither just nor possible to confine [Navajos] to the limits of a reservation which would not sustain their flock and herds.” William McKinley, *Settlers on the Navajo Reservation*, H.R. Doc. No. 657, at 2 (1900). Similarly, after Congress eliminated 54,000 acres of land from the Tusayan National Forest and added it to the Navajo reservation on May 23, 1930, 46 Stat. 378, ch. 317 (1930), the Commissioner of Indian Affairs suggested in his 1930 report that Congress’ motivation for the expansion may have been connected to a hope of providing Navajos with more land for grazing purposes. Commissioner of Indian Affairs, *Annual Report of the Office of Indian Affairs* 16 (1930). The 1934 Boundary Act added land to the south and west already occupied by tribal members, extending the reservation to the Colorado River. 1934 Boundary Act, Act of June 14, 1934, ch. 521, 48 Stat. 960.

Beyond the increase in the reservation’s size, the history of post-treaty Navajo land additions demonstrates the federal government’s commitment to the Navajo Nation’s agricultural and water-related needs. The land additions also accorded with the terms of the 1849 treaty, in which United States had agreed to

“designate, settle, and adjust their territorial boundaries, and pass and execute in their territory such laws as may be deemed conducive to the prosperity and happiness of said Indians.” 1849 Treaty, art. IX. The land additions throughout this period were intended to give the Navajo Nation greater access to land and water needed in order to meet the purposes for which the reservation was created and to meet both treaty and trust obligations.

#### **V. The United States Has Continually Favored Non-Indian Water Demands Over Known Navajo Water Needs**

Despite expansion of the Navajo land mass and the 1908 *Winters* decision, the federal government has never successfully developed a water development program for the Navajo Nation. The Bureau of Indian Affairs (BIA) began an irrigation program for Indian lands in the 1870s, but Congress refused to provide even minimal funds. Progress on constructing Indian irrigation projects was so slow, and maintenance funds so rare, that most projects became dilapidated as construction progressed at a snail’s pace. This led to an informal saying in the BIA; “We began our first irrigation project in 1867 and we’ve never finished one yet.” Daniel McCool, *Command of the Waters: Iron Triangles, Federal Water Development, and Indian Water* 112 (1987) (hereinafter, McCool, *Command of the Waters*). After more than 100 years of the Indian water development program, the BIA continues to describe issues of dramatic under-funding:

Construction of most Indian irrigation projects began many years ago, and deterioration now requires a large portion of the construction funding received to be used for rehabilitation. This tends to slow construction progress. Also the past level of appropriated funds to pay the O&M [Operation and Maintenance] assessments for indigent Indians has resulted in deferred maintenance which eventually causes deterioration to the point where rehabilitation is necessary.

Bureau of Indian Affairs, *Report to the United States Senate Committee on Interior and Insular Affairs on the Status of Construction of Indian Irrigation Projects*, 94th Cong., p. 38 (1975).

To make matters worse, most “Indian” irrigation projects actually furnish water to non-Indian farmers. The 1928 Preston-Engle Report made this clear: “. . . based on the acreage of land being used, many of the so-called Indian irrigation projects are in reality white projects. The acreage farmed by Indians is small in comparison with that farmed by whites and is continually decreasing, and under present condition will continue to decrease . . .” Porter Preston & C. A. Engle, *Report of Advisors on Irrigation on Indian Reservations*, reprinted in U.S. Congress, Senate, Committee on Indian Affairs, Subcommittee on Resolution 79, Hearings, Survey of Conditions on the Indians in the United States, 71st Cong. 2d sess., pt. 6, Jan. 21, 1930, at 220 (1928). Problems caused by inadequate funding and the water actually going to non-Indian farmers was especially severe in the Colorado River Basin. As

western historian Norris Hundley explained, “Indians were a forgotten people in the Colorado Basin, as well as in the country at large, and their water needs, when not ignored, were considered negligible.” Norris Hundley, Jr., *Water and the West* 80 (2nd ed. 2009).

Acknowledgment of the failure of the federal government to develop water resources for the Navajo Nation and other reservations can be found throughout the historical record. *See, e.g.*, 51 Cong. Rec. 12950 (1914) (“Where was the Indian Service, with their reclamation bureau, that they were not on the job to see to it that the Indians got their [water] rights?”); Senate Select Comm. on Indian Affs., 95th Cong., *Meetings of the American Indian Policy Review Commission*, February 20, May 8 & 9, 1976 vol. 2, 140 (Comm. Print 1977) (“[I]t is hard to find a single incident when the Department of Interior or the Bureau of Indian Affairs took positive, aggressive action to protect Indian water rights against the taking of their water by non-Indians.”). As the final report of the National Water Commission noted in 1973, “In the history of the United States Government’s treatment of Indian tribes, its failure to protect Indian water rights for use on the Reservations it set aside for them is one of the sorrier chapters” Nat’l Water Comm’n, *Water Policies for the Future: Final Report to the President and to the Congress of the United States* 475 (1973). *See also* U.S. Comm’n on Civil Rights, *The Southwest Indian Report* 131 (1973) (“It appears that the United States Government, which has the obligation to preserve and protect Indian property rights including water rights, has



been grossly derelict in its duties and, as a consequence, Indian water rights are gravely threatened.”).

In stark contrast, funding for the Bureau of Reclamation and the U.S. Army Corps of Engineers seems to have no limits. In 1983, the former Associate Commissioner of Indian Affairs described the difference between funding for Indian projects and non-Indian projects:

“I found getting appropriations for Indian irrigation projects to be the most difficult task I had to face. The appropriations committees, as well as the representatives of the Budget Bureau [now Office of Management and Budget], could find dozens of reasons for denying money to the BIA for Indian irrigation projects, while endorsing gigantic sums to finance reclamation projects with much worse cost-benefit ratios.”

McCool, *Command of the Waters*, at 140 (quoting James Officer, former Associate Commissioner of Indian Affairs). As a result, while the BIA program floundered with incomplete, dilapidated projects, the major agencies that built projects for non-Indian water users in the West built hundreds of expensive projects, many of them massive in scope and dependent on enormous amounts of water. The Bureau of Reclamation irrigated 11 million acres of land, and built 347 dams, 14,590 miles of canals, 990 miles of pipelines, 230 miles of tunnels, 35,160 miles of laterals, and 15,750 miles of drains. McCool, *Command of the Waters*, at 86. The Corps of Engineers built 350 reservoirs, 19,000 miles

of waterways, 500 harbors, and 9,000 miles of levees. U.S. Army Corps of Eng'rs, EP 360-1-2, *Historical Highlights of the United States Army Corps of Engineers* (1973).

The Navajo Nation was no exception to this dismal record. The only irrigation project of any consequence is the Navajo Indian Irrigation Project (NIIP). It was partial compensation for a deal made in 1962 to build the San Juan-Chama Project, which diverted water out of the Colorado Basin, away from the Navajo Nation, to the Rio Grande River and Albuquerque. See Monroe E. Price & Gary D. Weatherford, *Indian Water Rights in Theory and Practice: Navajo Experience in the Colorado River Basin*, 40 *Law & Contemp. Probs.* 97, 119-30 (1976). Congress ended up fully funding the San Juan-Chama Project, which was completed ahead-of-schedule, but provided only partial funding for Navajo irrigation, so that by 1970, the NIIP was only 17 percent complete. *Id.* at 129. Today, only seven of the eleven blocks are actually completed and irrigating crops, meaning the project is still only 63.6 percent complete. Bureau of Reclamation, *Navajo Indian Irrigation Project* (2022), <https://perma.cc/56D2-6N79>. No significant irrigation projects have been built to serve the Arizona portion of the reservation.

The fate of the Navajo Nation's water is largely connected to the Colorado River Basin. The Navajo reservation in Arizona is bounded by the Colorado River, and its water needs in the Arizona portion of the reservation are largely dependent on the Lower Colorado River and the Law of the River. The Law of the River

was largely developed without regard to Navajo water rights or needs and in the absence of an effective federal trust response. Daniel McCool, “Searching for Equity, Sovereignty, and Homeland,” in *Cornerstone at the Confluence: Navigating the Colorado River Compact’s Next Century* 143-169 (Jason Robison ed., 2022). The only branch of government that initially recognized Indian water rights was the judiciary. The 1922 Colorado River Compact divided the Basin into an Upper Basin and Lower Basin, and allocated water between them; it provided no water for tribes. Neither Indian leaders nor federal officials charged with enforcing the government’s trust responsibilities were among the negotiators. The only mention of Indian water was the disclaimer clause in Article VII: “Nothing in this compact shall be construed as affecting the obligations of the United States of America to Indian tribes.” Colorado River Compact, 1923 Colo. Sess. Laws 684, Colo. Rev. Stat. § 37-61-101 to -104 (2022). When the Upper Colorado River Basin Compact was signed in 1948, it too ignored Native Americans, with the same disclaimer clause.

The same mentality of ignoring or trivializing Native American water needs and rights was repeated in all major legislation that developed Colorado River Basin water. The 1928 Boulder Canyon Project Act, which authorized Hoover Dam, and the All-American Canal, did not even mention Indian reservations or tribes. The 1956 Colorado River Storage Project Act authorized three dams in Colorado, Glen Canyon Dam, Flaming Gorge Dam, and Navajo Dam (which, ironically, had

nothing to do with the Navajo Nation), but authorized no Indian water projects and made virtually no mention of reservations. The 1968 Colorado River Basin Project Act authorized the massive \$4 billion Central Arizona Project (CAP). Upon signing the Act, President Johnson said the 336-mile long CAP would deliver water to “growing cities, it will provide more water for expanding industries, for the farmers’ crops, and for the ranchers’ cattle.” President Lyndon B. Johnson, Remarks Upon Signing the Colorado River Basin Project Act (Sept. 30, 1968), <https://perma.cc/CP7P-5SXR>. There was no mention of water for Indian reservations, no recognition that this project consumed water that could also be used by tribes to turn their barren homelands into sustainable farming operations. The 1968 Act paid more attention to the water rights of Mexico than the water rights of Native Americans in the U.S. There was no evidence in any of these laws that the federal government’s trust responsibility was being represented, much less honored with actual diversion and use of water for the Navajo Nation or other Indian reservations.

Indeed, the federal government has admitted that its water development programs directly harmed Native Americans, including the Navajo Nation. The 1977 Final Report of the American Indian Policy Review Commission noted that the “Interior and Justice Departments have often in the past been lax in enforcement of these rights and have not infrequently adopted adverse positions, contributing to the erosion of Indian water rights.” Report submitted to the U.S. Congress,

May 17, 1977, Vol. 2, p. 331. The Bureau of Reclamation's official history admitted that its early projects "appeared to carry the potential for injuring the rights of tribes." Bureau of Reclamation, *Brief History of the Bureau of Reclamation* 7 (2000), <https://perma.cc/EC9J-TRGS>. This "injury" was a direct result of the failure of the federal government to meet its trust responsibilities to the tribes.

One example of direct injury was the livestock reduction program carried out on the Navajo Reservation during the New Deal. Convinced that tribal members had too many sheep, goats, and horses given the carrying capacity of the Navajo range and the danger that over-grazing could cause sediment to build up behind Hoover Dam, the federal government's livestock reduction program dramatically reduced the size of family herds—a principal source of income and wealth for tribal members. Navajos experienced not only the trauma of seeing their animals killed in front of them but also a significant decline in family wealth. Rosser, *supra*, 44-47. The livestock reduction program sacrificed a mainstay of the Navajo economy in part to serve the goals of the federal government's reclamation program. Klara Kelley & Harris Francis, *A Diné History of Navajoland* 19-20 (2019).

The Bureau's blindness to the needs of Native Americans was still apparent in 2012 when it released its much-anticipated Supply and Demand Study. U.S. Bureau of Reclamation, *Colorado River Basin Supply and Demand Study* (2012), <https://perma.cc/Z29A-DEX8>. Once again, the Bureau simply ignored the

needs and rights of Native Americans, necessitating the production of a separate report dealing with the water rights of the Ten Tribes Partnership, which includes the Navajo Nation. Colorado River Basin Ten Tribes Partnership, *Tribal Water Study Report* (2018), <https://perma.cc/SK4L-XQ79>.

The ultimate result of the mismatch between the conspicuous failure of Indian water development, and the funding lavished on projects for non-Indians, is that today the Colorado River serves the water needs of 40 million Americans, most of whom do not even live in the Basin. Today, the river's water is diverted to Cheyenne, Salt Lake City, Albuquerque, Las Vegas, Los Angeles, San Diego, Phoenix, and Tucson. But, with the exception of the five Lower Colorado River tribes (the recipients of water in *Arizona v. California*), the 30 tribes in the Basin use a small fraction of the water of the Colorado, and much of that is leased to non-Indian water users. Water and Tribes Initiative, *The Status of Tribal Water Rights in the Colorado River Basin* (2021), <https://perma.cc/AHJ9-HYZ4>.

When the first Indian irrigation project along the Colorado River was being considered in Congress, the delegate from Arizona stated that "Irrigating canals are essential to the prosperity of these Indians. Without water, there can be no production, no life." *Arizona v. California*, 373 U.S. 546, 599 (1963) (citing Cong. Globe, 38th Cong., 2d Sess. 1321 (1865)). If the purpose of the Navajo Nation's treaties with the U.S. was to allow the Navajos to continue to exist, then "irrigating canals" must be constructed to make that

existence possible. However, the government has largely failed to meet that responsibility. Judicial enforceability of the trust responsibility is critical to ensuring that the United States meets the obligations owed to the Navajo Nation.



## CONCLUSION

Treaties provide the foundation for the trust relationship between the United States government and the Navajo Nation. The trust relationship and the U.S. trust responsibility towards the Navajo Nation is an essential element of the treaties the United States entered into with the Navajo Nation. As the history of those treaties makes clear, a common goal of both the Navajo and U.S. government negotiators was for tribal members to be able to pursue a lifestyle based on farming and grazing. This goal, included in multiple provisions of the 1868 treaty, is incapable of being realized unless the federal government acts upon its trust responsibilities to protect and support the water needs of the Navajo Nation.

Unfortunately, U.S. government policy since 1868 has largely operated in support of the development of water infrastructure for the benefit of non-Indian communities, some far removed from the Colorado River Basin, while doing little to help the Navajo Nation secure and use its water. For most of the Navajo people, the promise of *Winters*—that there would be enough water for agriculture, grazing, homes, and

businesses on the reservation to meet the purpose for which the reservation was established—remains unfulfilled. Though the Navajo Nation theoretically and legally has a lot of water, little of the tribe’s reserved water rights have been converted into accessible water for tribal members because of underinvestment in the infrastructure needed to bring that water to peoples’ homes, fields, and businesses. Without effective enforcement of treaty obligations associated with water for farming and grazing, the Navajo Nation will remain unable to meet the needs of those living on the reservation; the promise of a self-supporting tribal homeland will remain unfulfilled.

Fortunately, long-standing precedent from this Court related to the protection of reservation water rights firmly establishes that the United States has a trust responsibility to secure to the Navajo Nation an amount of water necessary to fulfill the terms and intent of the treaties it made with the Navajo Nation. *See, e.g., Winters, supra.* The Navajo Reservation, like the Fort Belknap Indian Reservation, is “arid” and much of the reservation requires irrigation to serve the purposes envisioned by negotiators on both sides of the treaty relationship. If the reservation is to remain a permanent homeland for the Navajo people, the United States must be held accountable when it



fails to meet its water-tied trust responsibility to the Navajo Nation. The decision below should be affirmed.

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