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

BRIEF IN OPPOSITION

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QUESTION PRESENTED

Since *Winters v. United States*, 207 U.S. 564 (1908), this Court has held that when the United States creates an Indian reservation, it also promises and reserves for the tribe the amount of then-unappropriated water necessary to fulfill the reservation's purposes.

Here, the government signed two treaties with the Navajo Nation. The 1849 Treaty placed the Navajos "forever" "under the exclusive jurisdiction and protection" of the United States and promised to establish a reservation. The 1868 Treaty did just that, establishing the Navajo Reservation in the high desert as the Navajos' "permanent home" and promising that they could "commence farming," with government-provided "seeds and agricultural implements," on the reservation in exchange for relinquishing their "nomadic life" beyond the Reservation's borders.

Since then, various statutes and executive orders have altered and expanded the Navajo Reservation's boundaries. The 1934 Boundary Act enlarged the Reservation and confirmed that its western boundary is the Colorado River, a water source over which the federal government exercises extensive statutory and regulatory control.

The question presented is whether, given the United States' promise to provide the Navajo Nation sufficient water by entering into the treaties establishing the Navajo Reservation, coupled with the government's nearly exclusive statutory and regulatory control over the Colorado River, the United States owes the Navajo Nation a fiduciary duty to assess the Nation's water needs and develop a plan to meet them.

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INTRODUCTION

This case turns on a simple proposition: when the United States signed treaties in 1849 and 1868 with the Navajos establishing a permanent homeland reservation in the high desert along with seeds and tools to begin farming, it also promised the Navajos water. *See Winters v. United States*, 207 U.S. 564, 565-66, 576 (1908). Because the government has breached its duty to provide sufficient water, the Navajo Nation sued the government for breach of trust, seeking an injunction requiring the government to assess the Nation's water needs and develop a plan to meet them. The court of appeals, reading the treaties and looking to the government's pervasive control of the Colorado River, held that the Nation could amend its complaint to bring a breach-of-trust claim. That decision was correct, and it does not conflict with any decision of this Court or any other court of appeals.

The government nonetheless wants this Court to intervene. In its view, the court of appeals declined to follow this Court's decisions, all in the Indian Tucker Act money-damages context, establishing when an Indian tribe can sue to enforce an asserted trust obligation. According to the government, a tribe bringing a breach-of-trust claim must "identify a specific, applicable, trust-creating statute or regulation that the Government violated." Pet. 14 (quoting *United States v. Jicarilla Apache Nation*, 564 U.S. 162, 177 (2011)). And, the government continues, the court of appeals erroneously held *Jicarilla* and other decisions "'not apposite,'" instead relying on sources that do not "impose[] any specific and affirmative duties on the federal government on behalf of the Navajo Nation with respect to the water of the Colorado River." Pet.

14-15 (quoting Pet. App. 21a). The government claims that the court of appeals thus split from other circuits by holding that this Court's decisions apply only to damages claims under the Indian Tucker Act, not to claims for equitable relief. Unless this Court intervenes, the government concludes, the court of appeals' decision will undermine Congress' role in implementing national policy respecting Indian tribes.

The government is wrong on each point.

1. On the merits, the government ignores the key holding of the court of appeals: the Nation could amend its complaint to pursue a breach-of-trust claim because "the farming provisions in the 1868 Treaty may serve as the 'specific statute' that satisfies *Jicarilla*." Pet. App. 27a; *see* Pet. App. 25a. The court thus held that specific provisions of a treaty—which is on par with a statute—satisfied the standard under this Court's Indian Tucker Act decisions. To be sure, the court of appeals *also* thought that a claim for equitable relief, unlike a claim for damages, did not trigger this Court's Indian Tucker Act standard, but it held that the Nation satisfied that standard all the same. The government might disagree with that conclusion, but it seeks only factbound error correction.

And there is no error here. *Winters* rights to water based on specific treaty provisions are no different from rights based on specific statutory provisions—after all, the Court has long recognized that treaties are just like statutes, and the Indian Tucker Act itself refers to "laws or treaties of the United States." 28 U.S.C. § 1505. As the court of appeals recognized, this case is just like *Winters*: "The Treaty's farming-related provisions, which sought to encourage the Nation's transition to an agrarian lifestyle, would have been

meaningless unless the Nation had sufficient access to water." Pet. App. 27a. The 1849 Treaty placed the Navajos "forever" "under the exclusive jurisdiction and protection" of the federal government and promised to establish a reservation. Treaty Between the United States and the Navajo Tribe of Indians, art. I, 9 Stat. 974, 974 (ratified Sept. 24, 1850) (1849 Treaty). The 1868 Treaty, in turn, established a reservation as the Navajos' "permanent home," Pet. App. 146a art. XIII, and promised that they could "commence farming," Pet. App. 140a art. V, with government-provided "seeds and agricultural implements," Pet. App. 142a art. VII, on the reservation in exchange for relinquishing their "nomadic life" beyond the Reservation's borders, Pet. App. 146a art. XIII. Since then, the Navajo Reservation has grown by statute and executive order to reach the Colorado River, while the federal government has exerted nearly exclusive statutory and regulatory control over the Colorado's waters. In sum, the court of appeals got it right: the Nation "has identified specific treaty, statutory, and regulatory provisions that impose fiduciary obligations" on the government. Pet. App. 25a.

2. This case doesn't implicate any circuit split for the same reasons. According to the government, the court of appeals' decision conflicts with decisions of the D.C. and Tenth Circuits because those courts apply this Court's Indian Tucker Act decisions to breach-of-trust claims for equitable relief but the court of appeals here did not. Again, the government ignores the court of appeals' holding that the specific provisions of the 1868 Treaty, among others, *satisfied Jicarilla*. Pet. App. 27a. What's more, none of the decisions the government cites involved *Winters* rights, and one of the D.C. Circuit decisions even noted that the tribe

had not argued that the Indian Tucker Act standard did not apply.

3. The government's conclusory suggestions about this case's importance don't warrant this Court's intervention, either. The government first says that the decision will undermine congressional policy. How so? *Winters* has been the law for 114 years, and neither it nor the court of appeals' decision here ties Congress' hands. The government next says that the court of appeals' decision threatens to impose judicial oversight over amorphous duties to assess water rights. Again, how so? The court's case-specific holding, based on the particular language of the Navajo treaties coupled with pervasive regulatory and statutory control over the Colorado, doesn't have far-reaching implications. And the government (by its own admission) litigates *Winters* rights on tribes' behalf (including the Nation's) all the time. Presumably, then, it already regularly assesses treaty-based tribal water needs. So whatever this Court would hold if it granted the petition, the government would continue administering and regulating the Colorado River and litigating tribal water rights under *Winters*.

The Court should deny review.

STATEMENT

A. Legal background

This Court's longstanding precedent establishes three fundamental principles relevant to this case. *First*, in carrying out its treaty obligations to Indian tribes, the government is subject to "exacting fiduciary standards." *Seminole Nation v. United States*, 316 U.S. 286, 297 (1942). *Second*, when the government reserves land for a tribe, that tribe has a concomitant right to then-unappropriated water necessary to fulfill

the reservation's purposes. *Third*, common-law trust principles can help courts interpret the sources of law establishing specific fiduciary obligations owed to a tribe.

1. For nearly two centuries, this Court has recognized that a "distinctive obligation of trust" governs the United States' relationship with Indian tribes. *Seminole Nation*, 316 U.S. at 296; *see Cherokee Nation v. Georgia*, 5 Pet. 1, 17 (1831) (Marshall, C.J.). That trust relationship imposes "the most exacting fiduciary standards" on the United States' execution of "its treaty obligations." *Seminole Nation*, 316 U.S. at 296-97; *Washington v. Washington State Com. Passenger Fishing Vessel Ass'n*, 443 U.S. 658, 675-76 (1979).

"A treaty is 'essentially a contract between two sovereign nations.'" *Herrera v. Wyoming*, 139 S. Ct. 1686, 1699 (2019) (quoting *Fishing Vessel Ass'n*, 443 U.S. at 676). The Court has long held that "the words of a treaty must be construed in the sense in which they would naturally be understood by the Indians." *Id.* The Court also has directed that "treaties should be construed liberally in favor of the Indians, … with ambiguous provisions interpreted to their benefit." *Oneida County v. Oneida Indian Nation of N.Y. State*, 470 U.S. 226, 247 (1985); *Herrera*, 139 S. Ct. at 1699.

Congress, too, has recognized that by entering into treaties with Indian tribes, the government undertook 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). The government thus owes tribes "enduring and enforceable Federal obligations." *Id.* § 5601(5). The Secretary of the Interior 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* 25 U.S.C. § 2; 130 U.S. Dep't of Interior Manual 1.3 (2015).

2. This Court's precedents establish that when the government creates an Indian reservation, it reserves then-unappropriated water sufficient to fulfill the reservation's purposes.

a. Under the longstanding reserved-water-rights doctrine, when the government "withdraws its land from the public domain and reserves it for a federal purpose," it impliedly "reserves appurtenant water then unappropriated to the extent needed to accomplish the purpose of the reservation." *Cappaert v. United States*, 426 U.S. 128, 138 (1976). The right to unappropriated water "vests on the date of the reservation and is superior to the rights of future appropriators." *Id.*; *see Arizona v. California*, 373 U.S. 546, 597-98 (1963) (*Arizona I*).

b. More than a century ago, the Court made clear in *Winters* that when the United States creates an Indian reservation to serve as a permanent homeland, the United States also reserves sufficient unappropriated water to fulfill the reservation's purposes. In *Winters*, the United States had entered into an agreement with two tribes establishing the Fort Belknap Reservation as the tribes' "permanent home and abiding place" and a place for farming. 207 U.S. at 565, 575-76. The Court held that the reservation impliedly reserved sufficient then-unappropriated water for a permanent home. "The lands were arid, and, without irrigation, were practically valueless." *Id.* at 576. Thus, even though the agreement was silent as to water rights, it necessarily reserved the water without

which the reservation's purposes would have been "impair[ed] or defeat[ed]." *Id.* at 577. In reaching that conclusion, the Court explained that ambiguities in treaties should be resolved in the Indians' favor and also held that the tribes had rights to water not just for their present needs, but also "for a use which would be necessarily continued through years." *Id.*

c. The Court and others have repeatedly reaffirmed *Winters*. *See, e.g.*, *Sturgeon v. Frost*, 139 S. Ct. 1066, 1078-79 (2019); *Arizona I*, 373 U.S. at 599-600; *United States v. Powers*, 305 U.S. 527, 532 (1939); *Baley v. United States*, 942 F.3d 1312, 1333-34 (Fed. Cir. 2019); *Hackford v. Babbitt*, 14 F.3d 1457, 1469 (10th Cir. 1994). *Arizona I* is instructive. There, the Court held that in creating homeland Indian reservations, the United States "intended to deal fairly with the Indians by reserving for them the waters without which their lands would have been useless." 373 U.S. at 600. *Arizona I* explained that the reservations "were not limited to land, but included waters as well." *Id.* at 598. The Court thus held that by establishing the reservations, the United States also reserved water for them from the Colorado River. *Id.* at 599.

Arizona I underscored that water from the Colorado River or its tributaries was "necessary to sustain life" on the reservations because most of the land "is and always has been arid." *Id.* at 598. Indeed, when the government created the reservations, it was well-known "that most of the lands were of the desert kind—hot, scorching sands—and that water from the river would be essential to the life of the Indian people" and the animals and crops upon which the tribal members relied. *Id.* at 599. The Court reiterated that reserved water rights are intended to satisfy a reservation's future and present needs. *Id.* at 600.

d. The government has acknowledged that "the purpose of a *Winters* right is to provide the protection of federal law to water resources reserved by the United States in trust for the benefit of tribes and their members." Gov't Br. 41, *Agua Caliente Band of Cahuilla Indians v. Coachella Valley Water Dist.*, No. 15-55896 (9th Cir. Feb. 12, 2016). The government also has long recognized the "responsibilities inherent" in its role as trustee of Indian reserved water rights. *Ft. Mojave Indian Tribe v. United States*, 23 Cl. Ct. 417, 425-26 (1991). Most relevant here, the United States has "acknowledged [its] trust responsibilities to protect the Nation's *Winters* rights." Pet. App. 29a. And the government has repeatedly taken steps to meet its admitted obligation to "safeguard[]" against the "depletion and diversion" of reserved water when the purpose of the reservation so requires. *Sturgeon*, 139 S. Ct. at 1079 (citation omitted); *see, e.g.*, *Powers*, 305 U.S. at 528; *Baley*, 942 F.3d at 1316.

3. One way Indian tribes have sought to enforce the government's fiduciary duties—although not the Nation's course here—is by suing for damages in the Court of Federal Claims under the Indian Tucker Act's waiver of sovereign immunity, 28 U.S.C. § 1505. Under this Court's Indian Tucker Act caselaw, a tribe may seek damages when a source of law, such as a statute or contract, (1) imposes "specific fiduciary or other duties" on the government and (2) "can fairly be interpreted as mandating compensation for damages sustained as a result of a breach" of those duties. *United States v. Navajo Nation*, 556 U.S. 287, 290-91 (2009) (*Navajo II*) (citation omitted).

The Court's Indian Tucker Act decisions hold that courts may draw upon common-law trust principles when interpreting the sources of law establishing the

government's fiduciary obligations to the tribes. To determine whether a source of law establishes a fiduciary duty, the Court asks whether the tribe has "identifie[d] a 'specific rights-creating or duty-imposing statutory or regulatory prescription[]'" and whether "that prescription bears the hallmarks of a 'conventional fiduciary relationship.'" *Id.* at 301 (citations omitted). One of those hallmarks is the trustee's "elaborate control" over a trust corpus. *United States v. Mitchell*, 463 U.S. 206, 225 (1983) (*Mitchell II*). Once a tribe identifies a "trust-creating" source of law, courts may turn to "common-law trust principles" to help interpret what duties the law imposes. *Jicarilla*, 564 U.S. at 177 (citation omitted).

There is no "magic words" requirement. So long as a source of law establishes the elements of a common-law trust, it need not use the term "trust" to establish a fiduciary relationship. *United States v. White Mountain Apache Tribe*, 537 U.S. 465, 474 n.3 (2003); *see Mitchell II*, 463 U.S. at 224. References to the Indians' best interests and the government's obligation to act for their benefit and protection support the existence of a fiduciary relationship. *Mitchell II*, 463 U.S. at 224.

a. In *Mitchell II* and *White Mountain Apache*, the Court found enforceable fiduciary duties.

Mitchell II held that the plaintiffs could seek damages based on a series of statutes and regulations that imposed fiduciary obligations on the government to manage and operate Indian lands and resources. *Id.* at 226. *First*, the statutes "directly support[ed] the existence of a fiduciary relationship." *Id.* at 224. Although they didn't use the term "trust," the statutes created a trust relationship by referring to the Indians' "needs and best interests" and by requiring the

government to take certain actions "for their benefit" and to act "consistent with a proper protection and improvement of the forests." *Id.* (citations omitted).

Second, the statutory and regulatory framework gave the government "elaborate control over forests and property belonging to Indians." *Id.* at 225. Thus, "[a]ll 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.*

Finally, the "general trust relationship" between the government and the Indian tribes bolstered the conclusion that the statutory and regulatory framework imposed a fiduciary duty on the government to manage the tribe's timber resources. *Id.*

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 (citation omitted). 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.*

b. The Court has also rejected breach-of-trust claims brought under the Indian Tucker Act for failure to identify statutory or regulatory provisions imposing specific rights or duties.

First, 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" with no attendant requirement that the government 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 was responsible for managing the land. *Id.* at 541-43. In addition, the Act did not grant the government "full fiduciary responsibilit[y]" to manage timber resources. *Id.* at 542-43. 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*.

In *United States v. Navajo Nation*, 537 U.S. 488, 503, 506 (2003), 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." 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 substantive source of law that establishes specific fiduciary or other duties." *Navajo II*, 556 U.S. at 290.

Finally, in *Jicarilla*, the Court held, again in the Indian Tucker Act context, 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 seeking damages arising from the government's alleged mismanagement of tribal trust funds, and it moved to compel the production of documents the government asserted were 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 noted, moreover, 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. In the Court's view, "the full duties of a private, common-law fiduciary" could not transplant Congress' "narrowly defined disclosure obligations." *Id.* at 185-86.

B. Factual background

1. The Navajo Nation is a federally recognized Indian tribe. Pet. App. 4a. In 1849 and 1868, the United States signed treaties with the Nation that established the Navajo Reservation as a homeland suitable for agriculture. Pet. App. 5a. The Navajo Reservation stretches into Arizona, New Mexico, and Utah, and is located almost entirely within the Colorado River Basin. *Id.* The Colorado River runs along the Reservation's western border. *Id.*

a. In 1849, the Navajo Nation and the United States entered into a peace treaty placing the Nation "forever" under the federal government's "exclusive jurisdiction and protection." 1849 Treaty art. I. Declaring that it should "receive a liberal construction," the 1849 Treaty promised that the government would establish a reservation for the Nation and directed the federal government to "so legislate and act as to secure" the Navajos' "permanent prosperity and happiness." *Id.* arts. IX, XI.

In 1868, in keeping with the 1849 Treaty's promise, the Navajos and the United States entered into a treaty establishing the Reservation as the tribe's "permanent home." Pet. App. 146a art. XIII; s*ee* 1849 Treaty art. IX. As part of the bargain, the Navajos agreed to "abandon" their "nomadic life"; refrain from engaging in war with the government; and "relinquish all right to occupy any territory outside their reservation." Pet. App. 143a, 146a arts. IX, XIII. The Navajos' agreed to transition to an agrarian lifestyle on the Reservation, and the United States agreed to facilitate that transition. For example, the United States promised that Navajos who "desire[d] to commence farming" could obtain a tract of reservation land, Pet.

App. 140a art. V, and they would be entitled to "seeds and agricultural implements" to transition to farming as a way of life, Pet. App. 142a art. VII. The Treaty also placed particular emphasis on "the necessity of education … , especially of such [Navajos] as may be settled on said agricultural parts of this reservation." Pet. App. 141a art. VI.

b. Since the Treaties, various statutes and executive orders have altered and expanded the Reservation's boundaries. *See, e.g.*, Executive Order of May 17, 1884; Executive Order of January 8, 1900; Act of May 23, 1930, 46 Stat. 378 (Pub. Law 71-250). The 1934 Boundary Act, for instance, enlarged the Reservation and confirmed that the Colorado River is its western boundary. Act of June 14, 1934, ch. 521, 48 Stat. 960, 960. The Act also provided that all available lands within the Reservation's boundaries "are hereby permanently withdrawn from all forms of entry or disposal *for the benefit of the Navajo* and such other Indians as may already be located thereon." 48 Stat. at 961 (emphasis added).

2. Disputes involving the Colorado River are nothing new. Throughout the last century, rights to that water have been "allocated through a series of federal treaties, statutes, regulations, and common law rulings; Supreme Court decrees; and interstate compacts." Pet. App. 5a. Together, "this legal regime is known as the 'Law of the River.'" *Id.* And under the Law of the River, the government exerts extensive control over the Colorado River.

a. In 1922, after failed negotiations over how to allocate water from the Colorado River, the Colorado River Basin States—Arizona, California, Nevada, Colorado, New Mexico, Utah, and Wyoming—entered

into the Colorado River Compact and agreed to divide the Colorado River basin in two. The Lower Basin States would include California, Arizona, and Nevada, and the Upper Basin States would include the remaining states. Colorado River Compact, art. I, Colo. Rev. Stat. § 37-61-101. Each basin would receive equal amounts of Colorado River water. *Arizona I*, 373 U.S. at 557. 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.

b. In 1928, Congress enacted the Boulder Canyon Project Act (BCPA) to enable the Secretary "both to carry out the allocation of 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 thus granted the Secretary broad control over the water from the Colorado River. 43 U.S.C. §§ 617–619b, 617c(a). Among other things, the BCPA authorized Interior to undertake a number of projects, including construction of the Hoover Dam and a reservoir at Lake Mead. *Id.* § 617. It also gave the Secretary authority to contract for the storage and delivery of Colorado River water and directed that "[n]o person shall have or be entitled to" such water "except by" contract with the Secretary. *Id.* § 617d.

In addition, the BCPA authorized the Lower Basin States to enter into a compact that would specify how to divide water among themselves. *Arizona I*, 373 U.S. at 561-62; 43 U.S.C. § 617c(a). But the Lower Basin States failed to reach an agreement. *Arizona I*, 373 U.S. at 562. Nonetheless, pursuant to the BCPA, the Secretary began contracting for water with the Lower Basin States. *Id.*

c. Continued disagreement over access to the Colorado River led to this Court. In 1952, Arizona invoked the Court's original jurisdiction by filing a complaint against California and seven of its public agencies "over how much water each State has a legal right to use out of the waters of the Colorado River and its tributaries." *Id.* at 551. Nevada, New Mexico, Utah, and the United States—in part, as tribal trustee—intervened. *Id.* With respect to the Colorado mainstream, the federal government asserted claims on behalf of five tribes, not including the Navajo Nation. Pet. App. 7a. Instead, the United States limited the Nation's claim to the Little Colorado River, a tributary in the Colorado River system. *Id.* The Nation's requests to intervene or for appointment of a Special Assistant Attorney General to represent its interests were denied. *Id.*

In 1964, the Supreme Court issued a decree quantifying various rights to the Colorado River. *Arizona v. California*, 376 U.S. 340 (1964). The Court did not adjudicate the Nation's claim to the Little Colorado River. *See id.* art. VIII(B), 376 U.S. at 352-53; *Arizona I*, 373 U.S. at 594-95. Nor did it adjudicate the Nation's rights to the Colorado mainstream. Over the next half-century, the 1964 Decree was modified several times. *See, e.g.*, *Arizona v. California*, 466 U.S. 144 (1984); *Arizona v. California*, 531 U.S. 1 (2000). Finally, in 2006, the Court issued a consolidated decree. *Arizona v. California*, 547 U.S. 150 (2006). At no point did the United States seek to quantify the Nation's rights to the Colorado mainstream.

d. Meanwhile, pursuant to the BCPA, the various decrees, and related statutes, *see, e.g.*, 43 U.S.C. § 1552, the Secretary has promulgated extensive regulations governing use of water from the Lower Basin.

For example, Interior promulgated "'surplus' and 'shortage' guidelines to clarify how it determines whether a particular year was a 'shortage' or 'surplus' year" so it can allocate water accordingly. Pet. App. 11a (citing 66 Fed. Reg. 7772 (Jan. 25, 2001); 73 Fed. Reg. 19,873 (Apr. 11, 2008)).

Before adopting those guidelines, Interior published environmental impact statements recognizing that the reserved water rights—and the Navajos' reserved water rights, in particular—are held in trust by the United States. *See* 42 U.S.C. § 4332; 40 C.F.R. § 1502.20. The Surplus Guidelines final environmental impact statement (Surplus FEIS), for example, provides that the government holds water rights "in trust" for the tribes. *See Colorado River Interim Surplus Criteria Final Environmental Impact Statement*, (Dec. 2000) (D. Ct. Doc. 282-2), at 3.14-1. Similarly, the Shortage Guidelines final environmental impact statement (Shortage FEIS) acknowledges that Interior "consider[s]" the Nation's "[u]nquantified water rights" to be a "'legal interest[]' in 'assets' held in 'trust' by the federal government." *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 3-87, 3-96 (citation omitted). Both the Shortage and Surplus FEIS recognize that "[t]he United States, as trustee, is responsible for protecting" tribal reserved rights. *Id.* at 3-87; Surplus Guidelines FEIS, at 3.14-1.

C. Procedural background

This case arises from the Navajo Nation's request to file a third amended complaint in its breach-of-trust litigation against Interior, the Secretary, the Bureau

of Reclamation, and the Bureau of Indian Affairs over their management of the Colorado River. Arizona, Nevada, Colorado, and various state and local government entities are intervenors.

1. In 2019, on remand from the court of appeals, the Nation sought to file a third amended complaint. Pet. App. 13a. The proposed complaint alleged that the United States breached its fiduciary duties arising from the 1849 and 1868 Treaties to provide the Nation with sufficient water. The Nation sought an injunction requiring the government to determine its water needs and develop a plan to meet them. Pet. App. 17a.

The district court denied the Nation leave to file an amended complaint because, among other things, it thought that unquantified water rights under *Winters* could not give rise to any fiduciary duties and that the Nation otherwise failed to identify a "specific, applicable, trust-creating statute or regulation that the Government violated." Pet. App. 44a-53a.

2. The court of appeals reversed. Pet. App. 1a-35a. As relevant here, the court held that the Nation's attempt to amend its complaint was not futile and remanded with instructions to permit amendment. Pet. App. 33a-34a.

The court of appeals explained that the Nation had identified "specific treaty, statutory, and regulatory provisions that impose fiduciary obligations on [the government]—namely," the Treaties and related statutes and executive orders that establish the Reservation as a homeland suitable for farming, and that, "under the long-established *Winters* doctrine," confer on the Nation a right to sufficient water. Pet. App. 25a-27a. The court explained that the Reservation "cannot exist as a viable homeland for the Nation

without an adequate water supply." Pet. App. 25a. Under *Winters*, 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." *See* Pet. App. 26a.

Reinforcing that reasoning, the court of appeals looked to various Interior documents—including the Shortage FEIS—that have acknowledged the United States' "trust responsibilities to protect the Nation's *Winters* rights." Pet. App. 29a. The court also reasoned that "the Secretary's pervasive control over the Colorado River" "strengthened and reinforced" the Nation's breach-of-trust claim. *See* Pet. App. 29a-30a. Among other things, the court observed, the 1922 Compact, the BCPA, and other sources of law grant the Secretary control over who gets water within each state as well as the authority to allocate the water. *Id.*

The court of appeals underscored that "[n]one of the twists and turns in the responsible federal agencies' and courts' historical treatment of Indian law has brought the *Winters* declaration of necessarily implied water rights into question." Pet. App. 26a. In closing, the court observed that this Court "could not have intended to hamstring the *Winters* doctrine—which has remained good law for more than one hundred years—by preventing tribes from seeking vindication of their water rights by the federal government when the government has failed to discharge its duties as trustee." Pet. App. 32a.

REASONS FOR DENYING THE PETITION

This case does not warrant this Court's review. *First*, the court of appeals' decision is correct. The United States' 1849 and 1868 Treaties with the

Navajos specifically promised them a permanent homeland and the seeds and tools they needed to farm. Under this Court's longstanding *Winters* doctrine, the Treaties thus also promised the Nation sufficient water and imposed a duty on the government, which has pervasive control over the Colorado River, to assess, preserve, and protect those water rights. As the court of appeals correctly held, the Nation's claim satisfies *Jicarilla* and this Court's other Indian Tucker Act precedents even assuming those decisions apply to suits seeking equitable relief.

Second, the court of appeals' decision doesn't implicate any circuit split. None of the decisions the government cites even involved *Winters* rights, much less calls into question whether *Winters* rights can support a breach-of-trust claim.

Finally, this case does not warrant this Court's intervention, and nothing the government says suggests otherwise. There is no reason to think the court of appeals' decision intrudes on Congress' role or that the court's holding imposes amorphous duties. The court's ruling was case-specific, relying on the particular language of the Navajo treaties together with the United States' unique and virtually exclusive statutory and regulatory control over the Colorado River. Beyond that, the government, by its own admission, litigates *Winters* rights all the time, and thus must already perform the very kind of duties the Nation seeks to enforce here. So the Court's intervention would make no practical difference.

I. The court of appeals' decision is correct.

The court of appeals' decision is correct. Under *Winters*, the 1849 and 1868 Treaties are specific rights-creating, duty-imposing substantive sources of

law. The Treaties confer on the Nation a right to sufficient water for their Reservation and impose on the federal government a corresponding fiduciary duty to assess, preserve, and protect that right. The court of appeals' conclusion was right, and its decision aligns with this Court's caselaw.

A. Under *Winters*, the 1849 and 1868 Treaties promise the Navajo Nation sufficient water for the Reservation.

When the government entered into the 1849 and 1868 Treaties with the Nation, it reserved sufficient unappropriated appurtenant water "to accomplish the purpose of the reservation." *Cappaert*, 426 U.S. at 138. This case is just like *Winters*, where the treaty established the reservation as the tribes' "permanent home and abiding place" and sought to enable the tribes to use the land for agriculture. 207 U.S. at 565, 575-76. Here, the 1868 Treaty, following through on the promises in the 1849 Treaty, established the Reservation as the Navajos' "permanent home," Pet. App. 146a art. XIII; s*ee* 1849 Treaty art. IX, and aimed to transition the Navajos from a "nomadic" people to farmers by setting up the Reservation for agriculture, Pet. App. 140a-42a arts. V-VII, Pet. App. 146a art. XIII.

Under this Court's precedents, those specific provisions—even though they don't mention water rights—carry a basic guarantee that the Nation would have a right to then-unappropriated water sufficient to fulfill the Reservation's purposes. *See Winters*, 207 U.S. at 577; *Arizona I*, 373 U.S. at 598. To read the Treaties otherwise would mean that the United States promised the Navajos a permanent home suitable for agriculture on lands that "were practically valueless." *Winters*, 207 U.S. at 576. But this Court long ago

rejected the notion that tribes would have agreed to "reduce the area of their occupation and give up the waters which made it valuable or adequate." *Id.*; *see Arizona I*, 373 U.S. at 600. Indeed, *Arizona I* recognized that water from the Colorado River is "necessary to sustain life"—and "essential to the life of the Indian people" in particular—given the "hot, scorching" character of the surrounding lands. 373 U.S. at 598-99.

B. Just like statutes, the 1849 and 1868 Treaties are substantive sources of law that establish specific rights and duties.

Even assuming the Court's Indian Tucker Act jurisprudence applies to the Nation's breach-of-trust claim—and the Nation reserves the right to argue otherwise—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 (citation omitted).

1. Under the Court's Indian Tucker Act decisions, a tribe must first "identify a substantive source of law that establishes specific fiduciary or other duties." *Id.* at 290. Here, the 1849 and 1868 Treaties do just that: their specific provisions, as interpreted under *Winters*, give the Navajos a right to water and impose on the government a corresponding duty to protect that right. *Id.* at 301. And those specific treaty provisions are no different than statutory terms, because the Constitution puts treaties and congressional enactments "on the same footing." *Whitney v. Robertson*, 124 U.S. 190, 194 (1888).

In the 1868 Treaty, the United States began to fulfill its promise in the 1849 Treaty to "protect[]" the

Navajos. 1849 Treaty art. I. The 1868 Treaty states that the purpose of the Reservation it was creating is to serve as the Navajos' "permanent home" and to enable the Navajos to farm the land. *Supra* pp. 13-14. Under *Winters*, those references create "specific rights"—the reservation of sufficient then-unappropriated water. *Supra* pp. 6-8. The 1868 Treaty thus created a specific trust relationship between the government and the Nation with respect to reserved water. No magic phrase was 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." 463 U.S. at 209, 221-24.

When the 1934 Boundary Act confirmed that the Reservation reached the Colorado River and that the government had withdrawn the Reservation lands "for the [Nation's] benefit," 48 Stat. at 961, the *Winters* rights came along, too. That's because *Winters* rights are rights not just to water for "present needs," but also for "future … needs." *Arizona I*, 373 U.S. at 600; *see Winters*, 207 U.S. at 577. And in stating that it was withdrawing lands for the tribes' "benefit," Congress reaffirmed the existence of a specific trust relationship. *Mitchell II*, 463 U.S. at 224.

In short, like in *Mitchell II*, "[a]ll of the necessary elements of a common-law trust are present: a trustee (the United States), a beneficiary (the [Navajo Nation]), and a trust corpus (Indian [reserved water rights])." *Id.* at 225. The Treaties, therefore "bear[] the hallmarks of a 'conventional fiduciary relationship.'" *Navajo II*, 556 U.S. at 301 (citation omitted).

2. By securing the Nation's *Winters* rights, the 1849 and 1868 Treaties impose a "corresponding duty on the part of the government to preserve those

rights." *Parravano v. Babbitt*, 70 F.3d 539, 547 (9th Cir. 1995). In *White Mountain Apache*, for instance, the Court held that the government had a duty not to let the trust corpus it controlled "fall into ruin on [its] watch." 537 U.S. at 475. Just so here: the unusually comprehensive Law of the River governing the waters of the Colorado likewise "invest[s] the United States with discretionary authority to make direct use of portions of the trust corpus." *Id.*; *see Sturgeon*, 139 S. Ct. at 1079. The upshot of that authority over the trust corpus is a duty "to preserve and maintain" it. *White Mountain Apache*, 537 U.S. at 475 (citation omitted).

Start with the Secretary's 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. Indeed, under the BCPA, the Secretary can contract for the storage and delivery of Colorado River water, with "[n]o person" permitted to "have or be entitled to" such water "except by" contract with the Secretary. 43 U.S.C. § 617d. That contracting power "carr[ies] out a congressional plan for the complete distribution of waters to users," and is so extensive that "state law has no place" in the scheme. *Arizona I*, 373 U.S. at 588.

What's more, with its authority over the Colorado, the government has "responsibility for the construction, operation, and supervision of Boulder Dam and a great complex of other dams and works" storing "virtually all the waters of the main river." *Id.* at 589. Beyond all that, the BCPA also directs the Secretary to investigate the feasibility of irrigation and other projects so the Secretary can "formulat[e] a comprehensive scheme of control and the improvement and utilization of the water of the Colorado River and its tributaries." 43 U.S.C. § 617n.

That's not all. Pursuant to 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* pp. 14-17. In addition, the government 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.

In sum, the United States' nearly exclusive control over the Colorado River confirms that the government has a fiduciary duty to preserve and protect the Nation's reserved water rights.

3. The government itself has long maintained both that it holds tribal reserved water rights in trust and that it has a corresponding duty to protect those rights. Indeed, the Shortage FEIS acknowledges that under *Winters*, "the United States implicitly reserved water in an amount necessary to fulfill the purposes of an Indian reservation" for the Nation. Shortage FEIS, at 3-96. And, the document continues, the "United States, as trustee, *is responsible for* protecting rights reserved by, or granted to, Indian tribes." *Id.* 3-87 (emphasis added). In other contexts, too, the government has argued that *Winters* rights impose on it responsibilities in its role as trustee to defend and protect against the diminishment of reserved water when the purpose of the reservation so requires. Gov't Br. 41, *Agua Caliente Band*, No. 15-55896 (9th Cir. Feb. 12, 2016); *see supra* p. 8.

C. The government's counterarguments are meritless.

The United States raises several objections to the court of appeals' decision. None has merit.

1. Leaning on *Jicarilla*, the government argues (Pet. 15-22) that the Nation has failed to identify a substantive source of law for its breach-of-trust claim. But unlike the tribe in *Jicarilla*, the Nation has identified specific rights conferred by the 1849 and 1868 Treaties. *Supra* pp. 21-25. Although *Jicarilla* stated that the government must "expressly accept[]" trust obligations to the Indians, 564 U.S. at 177, under *Winters*, express statements in a treaty promising a permanent home and agriculture are promises that the reservation will have—and will continue to have—enough water to survive. *Supra* pp. 6-8, 12-22. *Jicarilla*, which had nothing to do with reserved water rights or the government's fiduciary duties arising from treaties, casts no doubt on *Winters*' vitality.

Moreover, 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 obligations to assess, preserve, and protect the Nation's reserved water rights don't displace any existing statutory or regulatory regime. Just the opposite: those obligations flow naturally under *Winters* from the Treaties and the Law of the River. The Nation doesn't seek to import "the full duties of a private, common-law fiduciary." It seeks only to hold the United States to its duty to preserve and protect the Nation's reserved water rights.

2. Next, the government suggests that the Colorado River is too "far away" from the original Reservation to be an "appurtenant" water source under *Winters*. Pet. 20. The government doesn't contest that the Nation has reserved water rights to appurtenant, then-unappropriated water under the 1849 and 1868 Treaties, or subsequent government actions expanding the Reservation. In fact, the government notes that it has asserted the Nation's *Winters* rights to other sources of water. *See* Pet. 5, 7-8. According to the government, however, the Nation cannot rely on the Treaties to protect its unquantified rights to the Colorado.

The government is wrong. The government cites no authority for the proposition that a particular body of water must have been within a certain distance of the original Indian reservation to be considered "appurtenant." And neither *Winters* nor any other decision of this Court has imposed such a requirement. To the contrary, "there is an apparent consensus that [appurtenant] does not mean physical attachment," but instead refers "to the legal doctrine that attaches water rights to land to the extent necessary to fulfill reservation purposes." *John v. United States*, 720 F.3d 1214, 1229-30 (9th Cir. 2013) (citation omitted). "Appurtenancy has to do with the relationship between reserved federal land and the use of the water, not the location of the water." *Id*. at 1230. In any event, the government concedes (as it must) that "[t]he mainstream of the Colorado River flows along the Reservation's northwestern border." Pet. 6.

3. The government next argues (Pet. 19, 22) that it has no fiduciary duties to the Nation arising from *Winters* and the 1849 and 1868 Treaties. In essence,

the government asserts that it made a hollow promise in those Treaties: it promised the Navajos that they would have rights to then-unappropriated water necessary to fulfill the Reservation's purpose, but the government doesn't actually have to do anything about it.

That makes no sense. *Winters* is a promise to reserve water for a reservation's purposes. Here, the Nation's claim is that *it* does not have access to adequate water, but *the United States* does—indeed, the United States has extensive statutory, regulatory, and practical control over the Colorado River. What's more, the government itself has acknowledged those duties and pursued *Winters* rights on tribes' behalf—including the Nation's. *See supra* pp. 8, 17; Pet. 6-7.

4. The government also complains that "the court of appeals inferred a judicially enforceable duty from what it described as the Secretary's 'pervasive control' over the Colorado River mainstream." Pet. 20 (quoting Pet. App. 29a). As explained above (at 21-23), however, the Nation's claim does not rest on control alone. The United States undertook specific obligations to assess, preserve, and protect the Navajos' water rights when it entered into the 1849 and 1868 Treaties that expressly guarantee the Reservation as a permanent home for the tribe and an environment suitable for agriculture. And for that reason, too, there is no "bare trust" at issue, Pet. 22, but rather specific fiduciary duties arising from the government's treaty obligations.

Still fighting control, the government observes that the statutes authorizing federal projects don't "mention the Navajo Nation or the water rights of any specific Indian tribe." Pet. 21. But whether those

statutes "mention the Navajo Nation" is beside the point. The government doesn't contest (nor can it) that *it*, not the Navajo Nation, has authority "to allocate and distribute the waters of the mainstream of the Colorado River." *Arizona I*, 373 U.S. at 590.

5. Finally, the government asserts that the FEIS doesn't qualify as a "regulatory prescription" that establishes judicially enforceable duties. Pet. 21-22 (citation omitted). But final environmental impact statements are intended to "inform[] Federal agency decision making," 40 C.F.R. § 1502.1. And the FEIS documents here confirm the pervasive control the government exercises over the Colorado River—a factor that supports the existence of a trust relationship imposing specific trust duties. *Supra* pp. 17, 23-25.

II. The court of appeals' holding does not implicate any circuit split.

Not only is the court of appeals' decision correct, but it does not conflict with the decisions of any other court of appeals. The government claims that the court of appeals' decision is out of step with D.C. and Tenth Circuit caselaw because it refused to apply the principles from this Court's Indian Tucker Act cases. But the court of appeals' decision doesn't implicate any circuit conflict.

To be sure, the court of appeals thought this Court's Indian Tucker Act decisions inapposite. Yet it held their standard satisfied all the same. The court held that "the Nation, in pointing to its reserved water rights, has identified specific treaty, statutory, and regulatory provisions that impose fiduciary obligations on [the United States]." Pet. App. 25a. Indeed, the court continued, the Nation had identified provisions in its "treaties and related statutes and

executive orders that establish the Navajo Reservation and, under the long-established *Winters* doctrine, give rise to implied water rights to make the reservation viable." *Id.* Nothing in the circuit decisions cited in the petition's account of the purported split undermines that conclusion. None of the decisions involved reserved water rights under *Winters*, much less suggested that treaty-based *Winters* rights coupled with extensive statutory and regulatory government control over water cannot impose fiduciary duties.

A. 1. The government first claims (Pet. 23) that the court of appeals' decision conflicts with the D.C. Circuit's decision in *El Paso Natural Gas Co. v. United States*, 750 F.3d 863, 895 (D.C. Cir. 2014), because *El Paso* applied this Court's Indian Tucker Act decisions "even though the claim" was "for equitable relief (not money damages)." That argument is wrong for three reasons.

First, as noted, the court of appeals here held that the Indian Tucker Act standard *was satisfied*. As discussed above (at 21-25), the Nation has identified substantive sources of law giving rise to the government's fiduciary duty to assess and preserve the Nation's reserved water rights. There is thus no conflict with *El Paso*. *Second*, *El Paso* didn't involve a tribe's water rights, much less reserved water rights under *Winters*. It thus did not address the question whether a treaty with implied reserved water rights can form the basis of a breach-of-trust claim. *Finally*, *El Paso* did not foreclose the court of appeals' view here that this Court's Indian Tucker Act jurisprudence applies only to claims for monetary relief. To the contrary, the D.C. Circuit noted that the tribe there "ha[d] not marshaled an argument" on that point. *El Paso*, 750 F.3d at 895.

2. *Shoshone-Bannock Tribes v. Reno*, 56 F.3d 1476 (D.C. Cir. 1995), doesn't suggest circuit conflict either. The issue there was whether a court could compel the U.S. Attorney General to file off-reservation-water-rights claims on the tribes' behalf based on a treaty granting them the right to hunt on unoccupied lands outside the reservation. *See id.* at 1478, 1480. But the case didn't involve *Winters* rights, and the court held only that the Attorney General had discretion, when not limited by statute or other authority, to decide when to sue. *Id.* at 1480-82. And just as in *El Paso*, the court merely *assumed* that this Court's Indian Tucker Act jurisprudence applies to equitable claims. *See id.* at 1482.

B. The government next asserts (Pet. 23-24) that the court of appeals' decision conflicts with *Flute v. United States*, 808 F.3d 1234, 1237-39 (10th Cir. 2015), which applied the Indian Tucker Act standard to a request for equitable relief. But there is no conflict with the Tenth Circuit for the same reason there is no conflict with the D.C. Circuit: the government's argument relies on the same flawed premise that this case does not meet the standard under this Court's Indian Tucker Act decisions. Moreover, *Flute* did not involve tribal reserved water rights under *Winters*—the tribe instead sought an accounting of funds allegedly held in trust. *Id.* at 1245. The court thus did not address, much less call into question, whether a treaty reserving water rights—like the 1868 Treaty here—can support a breach-of-trust claim.

* * *

The court of appeals' decision doesn't implicate any split. None of the decisions the government cites casts any doubt on the court of appeals' conclusion

that the Nation's Treaties with the United States, read in light of *Winters*, coupled with the government's extensive statutory and regulatory control under the Law of the River, impose an enforceable duty to assess, preserve, and protect the Nation's reserved water rights. In the end, the alleged circuit split is just a collection of decisions applying the same rules to different facts—with no other decision even involving *Winters* rights. The government has identified no disagreement requiring this Court's attention.

III. This case does not warrant this Court's intervention.

The government claims (Pet. 15, 25) that the Court should grant review because the court of appeals' decision will (1) intrude upon Congress' role in implementing national policy respecting tribes and (2) impose judicial oversight over amorphous duties. Both contentions lack merit. The government has failed to explain why this Court's intervention is of any practical importance.

First, the court of appeals' decision *supports* congressional policy, which recognizes 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). In any event, it's unclear how the court's decision ties Congress' hands.

Second, the court of appeals' decision doesn't impose judicial oversight over amorphous duties. For starters, the court held that the Nation could proceed with its claim, based on *Winters* and the specific, agriculture-oriented language of the 1849 and 1868

Treaties, together with the federal government's uniquely pervasive statutory and regulatory control over the Colorado River. *See supra* pp. 18-19. The government does not explain how that case-specific holding applying this Court's precedents threatens broader ramifications.

In any event, the government's complaint about amorphous duties to assess water rights doesn't make sense. The government cannot comply with its existing duty to supply tribes with adequate water without assessing what adequate water is in the first place. *See Arizona I*, 373 U.S. at 600 (reservation of water rights includes enough water "to satisfy the [tribes'] future as well as … present needs"). Indeed, the government admits that it regularly litigates *Winters* cases as a trustee. *Supra* p. 8. So it can hardly complain about the need to assess water rights.

Finally, the government hasn't even tried to explain why this Court's intervention is practically important. Separate from this case, the government frequently litigates *Winters* rights, including on the Nation's behalf; it exercises nearly exclusive control over the Colorado River; and it has acknowledged its water-related obligations to the Nation. *See supra* pp. 8, 17, 23-25; Pet. 22. In other words, the government already assesses water needs. It is unclear why the government thinks that the relief the Nation seeks here imposes any additional burden, much less a significant one. It also is unclear why the government is unwilling to address the Nation's needs and instead wants this Court to intervene. After all, whatever this Court does, the United States will continue exercising pervasive control over the Colorado River and litigating the Nation's and other tribes' *Winters* rights.

CONCLUSION

The petition should be denied.

Respectfully submitted.

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