No. 25-1170

In the Supreme Court of the United States

WINNEMUCCA INDIAN COLONY, PETITIONER

v.

UNITED STATES OF AMERICA

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

BRIEF FOR THE UNITED STATES IN OPPOSITION

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QUESTION PRESENTED

To establish that the Court of Federal Claims has jurisdiction under the Tucker Act, 28 U.S.C. 1491, and Indian Tucker Act, 28 U.S.C. 1505, over an Indian tribe's breach-of-trust claim seeking money damages from the United States, the tribe must, among other things, "identify a substantive source of law that establishes specific fiduciary or other duties, and allege that the Government has failed faithfully to perform those duties." *United States* v. *Navajo Nation*, 556 U.S. 287, 290 (2009); see *Arizona* v. *Navajo Nation*, 599 U.S. 555, 564 & n.1 (2023). The question presented is:

Whether the reserved-water-rights doctrine of *Winters* v. *United States*, 207 U.S. 564 (1908), and 25 C.F.R. 152.22(b)'s provisions governing the conveyance of federal land held in trust for an Indian tribe are relevant substantive sources of law that impose a specific duty on the United States to prevent a third party from taking action upstream of an Indian reservation that diverts water from a stream that would have otherwise flowed through the reservation.

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 3a-28a) is reported at 156 F.4th 1339. The opinion and order of the Court of Federal Claims (Pet. App. 29a-91a) is reported at 167 Fed. Cl. 396.

JURISDICTION

The judgment of the court of appeals was entered on October 16, 2025. A petition for rehearing was denied on January 8, 2026 (Pet. App. 1a-2a). The petition for a writ of certiorari was filed on April 8, 2026. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

This case arises from a longstanding internal membership and leadership dispute within the Winnemucca Indian Colony, a federally recognized Indian tribe. Petitioner contends that when the United States declined for more than a decade to recognize one of two competing factions as the Tribe's lawful government, its members "suffered without a permanently recognized government" because, as relevant here (and as alleged in petitioner's Third Claim), the United States "[a]s a result" failed to prevent a third party's upstream diversion of water that had previously flowed through petitioner's reservation. See Pet. 6-7; see also Pet. 4, 13-14; Pet. App. 34a, 123a, 130a-131a.

1. a. In 1917 and 1918, President Wilson set aside two quarter-sections (*i.e.*, 320 acres) of surveyed land in Nevada for a "band[] of homeless Shoshone Indians" then residing near Winnemucca, Nevada. Exec. Order No. 2639 (June 18, 1917) (second paragraph); Exec. Order No. 2803 (Feb. 8, 1918); see Pet. App. 4a, 121a. In 1928, Congress authorized the purchase of an additional 20-acre parcel near Winnemucca "to be used as an Indian colony." Act of May 21, 1928, ch. 646, § 1, 45 Stat. 618; see Pet. App. 4a, 121a. After the Indians living on that land, who were both Paiute and Shoshone, adopted a representative form of government, the Assistant Secretary of the Interior for Indian Affairs approved petitioner's constitution and by-laws in 1971. See *Brown* v. *Haaland*, 604 F. Supp. 3d 1059, 1068 (D. Nev. 2022); Pet. App. 97a-98a. Petitioner interprets the Tribe's constitution to require an individual to be at least one-quarter Paiute or Shoshone by blood quantum in order to be an enrolled member of the Tribe. Pet. App. 98a.

Since the 1980s, the Tribe's political leadership "has been subject to uncertainty and turmoil." See *Brown*, 604 F. Supp. 3d at 1068-1070. By 2000, the Department of the Interior (Department), acting through its Bureau of Indian Affairs (BIA), had recognized the Tribe's five-member tribal council, which at the time included Glenn Wasson as chairman; his son, Thomas Wasson; and William Bills, the vice chairman. Pet. App. 105a; see *Winnemucca Indian Colony* v. *United States ex rel. Dep't of the Interior*, 837 F. Supp. 2d 1184, 1186 (D. Nev. 2011). In February 2000, Chairman Wasson reported to the tribal council that Vice Chairman Bills might not be properly enrolled as a member of the Tribe because he had been adopted; the chairman further indicated that action would be taken on that matter in the following month's council meeting. Pet. App. 105a. Less than two weeks later, the chairman was murdered. *Ibid.*; see *Winnemucca*, 837 F. Supp. 2d at 1186. The murder remains unsolved. See Pet. App. 105a.

After the murder, the Tribe's council split into two factions—the so-called "Wasson group," which included the murdered chairman's son; and the "Bills/Ayers group," which was led by Vice Chairman Bills. Pet. App. 5a; see *Winnemucca*, 837 F. Supp. 2d at 1186. Each faction claimed to be "the proper tribal government and entitled to control of the Colony's assets." Pet. App. 5a. The younger Wasson contended that Bills—who petitioner asserts is "100% Filipino by blood quantum," *id.* at 115a; see *id.* at 106a; cf. Pet. 6—"was not an Indian eligible for membership on the Council or even membership in the [Tribe]." *Winnemucca*, 837 F. Supp. 2d at 1186; see Pet. 106a.

b. In July 2000, in light of the Tribe's governance breakdown, the BIA determined that "[the Tribe] was dysfunctional and refused to recognize any [tribal] government." *Winnemucca*, 837 F. Supp. 2d at 1186-1187; see Pet. App. 106a.

Lengthy litigation between the two factions ensued in tribal courts. See Pet. App. 108a-110a. In 2001, the Winnemucca Tribal Court initially determined that Bills was the Tribe's lawful acting chairman. See *Bank* *of Am., N.A.* v. *Bills*, No. 3:00-cv-450, 2008 WL 682399, at *1 (D. Nev. Mar. 6, 2008), aff'd, 400 Fed. Appx. 159 (9th Cir. 2010), cert. denied *sub nom. Winnemucca Colony Council* v. *Wasson*, 563 U.S. 936 (2011). But after holding a trial as directed by the Inter-Tribal Court of Appeals, the tribal court determined that "no legitimately formed tribal council" existed. *Id.* at *2. Both parties appealed and stipulated to the appointment of a special appellate panel composed of judges from the Sioux Nation in Minnesota to issue a binding decision. *Ibid.* In 2002, the Minnesota panel determined that the valid tribal council included specific individuals, a majority of whom were aligned with the Wasson group. See *ibid.* It also determined that "subsequent activities of the Bills Council" were "unconstitutional and invalid." *Ibid.* (citation omitted).

The Bills/Ayers group appealed that decision to the Inter-Tribal Court of Appeals, which, in 2007, dismissed the case for lack of appellate jurisdiction. *Bank of Am.*, 2008 WL 682399, at *2. But in doing so, the court stated that it "withdr[e]w the mandates of all orders and rulings." *Id.* at *2, *5 (citation omitted). Each faction claimed that the 2007 order favored its position. *Ibid.*; see Pet. App. 110a-111a.

Meanwhile, Bank of America had filed an interpleader action in district court to determine whether the Wasson group or the Bills/Ayers group was the lawful tribal government possessing authority over the Tribe's bank account. *Bank of Am.*, 2008 WL 682399, at *2. In 2008, the district court gave effect to the Minnesota panel's 2002 decision. *Id.* at *6. In 2010, the Ninth Circuit affirmed. *Bank of Am., N.A.* v. *Swanson*, 400 Fed. Appx. 159. And in 2011, this Court denied certiorari. *Winnemucca Colony Council* v. *Wasson*, 563 U.S. 936; see Pet. App. 111a-112a.

c. While litigation ensued on multiple fronts, the BIA continued (from 2000 until late 2014) to "refuse[] to recognize either faction as the [Tribe's] government." Pet. App. 5a, 7a. Petitioner contends in this case that, as relevant here, the United States failed during that interregnal period to prevent a third-party development company from diverting water for a subdivision from a stream that had previously flowed through the 320-acre portion of petitioner's reservation, leaving "no available water or water rights" for that land. *Id.* at 123a, 131a; see Pet. 4, 6; see also Pet. App. 34a, 86a (discussing petitioner's claims and noting that petitioner previously asserted the diversion claim in 2013).

2. Because the United States was not a party to Bank of America's interpleader action, the action did not definitively resolve the question of who properly represented the Tribe's government. That question continued to spawn litigation, including two cases that preceded and are relevant to the present case.

a. In the first case, which was filed 2011, the Wasson group sued the United States in the District of Nevada, challenging the BIA's failure to recognize them as petitioner's lawful government. Pet. App. 5a-6a; see C.A. App. 48-63 (amended complaint in *Winnemucca Indian Colony* v. *United States ex rel. Dep't of the Interior*, No. 3:11-cv-622 (D. Nev.)). The Bills/Ayers group intervened and argued that they should be recognized as petitioner's lawful government. Pet. App. 7a.

In 2012, the district court initially ordered the BIA to recognize Thomas Wasson as the representative of the tribal council. Pet. App. 7a. After council members were elected in October 2014, the court ordered the BIA to recognize the election results, which also favored the Wasson group. *Ibid.* Accordingly, in December 2014, the BIA recognized the Wasson group as representing petitioner's lawful government. *Id.* at 7a, 33a.

The Bills/Ayers group, however, challenged the election results in tribal courts. Pet. App. 7a. After a tribal appellate court upheld the election by affirming the dismissal of that challenge in 2016, the district court in the Nevada action "extend[ed] comity" to the tribal-court rulings in 2018. *Id.* at 8a (describing and quoting *Winnemucca Indian Colony* v. *United States ex rel. Dep't of the Interior*, 11-cv-622, 2018 WL 4714755, at *1 (D. Nev. Oct. 1, 2018)) (brackets in original).

The Bills/Ayers group appealed, but the United States did not participate in that appeal. Pet. App. 8a. In June 2020, the Ninth Circuit vacated the district court's judgment and remanded. *Winnemucca Indian Colony* v. *United States ex rel. Dep't of the Interior*, 819 Fed. Appx. 480, 482-483 (2020). The court of appeals determined that the district court lacked authority to adjudicate the case because, when the case was filed, the Department—which had been conducting agency proceedings, including administrative review by the Interior Board of Indian Appeals—had not reached a final agency action deciding which group, if any, should be recognized as the Tribe's council. *Ibid.* The Ninth Circuit accordingly remanded with instructions (1) to dismiss the case and (2) to "vacate the district court's various orders." *Id.* at 483. After the Ninth Circuit issued its mandate in December 2020, Pet. App. 8a, the district court in the Nevada action issued an order implementing that mandate, which ended the case. 11-cv-622 D. Ct. Doc. 333 (Dec. 29, 2020).

b. In the second case, which was filed in 2013 while the Nevada action was pending, petitioner sued the United States in the Court of Federal Claims (CFC) for money damages under the Tucker Act, 28 U.S.C. 1491, and the Indian Tucker Act, 28 U.S.C. 1505. See C.A. Supp. App. 462-481 (complaint in *Winnemucca Indian Colony* v. *United States*, No. 13-874 (CFC)); *id.* at 463. Petitioner alleged that the United States had breached its trust duties to the Tribe by "unreasonably refusing to recognize [petitioner's] tribal government" and thereby causing, *inter alia*, "the loss of water rights," *id.* at 462-463, by allowing water to be diverted over the prior decade (2003-2013) from the stream crossing the 320-acre portion of petitioner's reservation, which had allegedly supplied the reservation with over "60 cubic feet per second" of water, *id.* at 465 (¶¶ 14-15), see *id.* at 477-480. In 2014, the CFC dismissed that damages action under 28 U.S.C. 1500. *Winnemucca Indian Colony* v. *United States*, No. 13-874, 2014 WL 3107445 (July 8, 2014).

Section 1500 provides that the CFC "shall not have jurisdiction" of "any claim for or in respect to which" the plaintiff has "any suit or process" against the United States (or an agent thereof) "pending in any other court." 28 U.S.C. 1500; see *United States* v. *Tohono O'odham Nation*, 563 U.S. 307, 311 (2011). In *Tohono*, this Court held that Section 1500 prevents a plaintiff from "carving up a single transaction into overlapping pieces seeking different relief," 563 U.S. at 315, by providing that the CFC will lack jurisdiction over a claim if there is a "substantial overlap in operative facts" between the CFC claim and an earlier pending action, regardless of whether the actions seek different relief, *id.* at 317-318. That jurisdictional bar is thus triggered by the existence of a pending "action [that] is related although not identical" to the CFC claim, *id.* at 312, as it "embodie[s]" principles reflected in "the doctrine of claim preclusion," under which the existence of a "factual overlap" with a previously adjudicated claim bars a plaintiff from bringing additional "'claims arising from the same transaction,'" *id.* at 315-316 (citation omitted).

Applying that standard, the CFC dismissed the relevant claims in petitioner's 2013 action because their "operative facts" were "substantially the same" as those in the pending Nevada district court action challenging the BIA's failure to recognize petitioner's government. *Winnemucca*, 2014 WL 3107445, at *3-*4 (citation omitted).

3. a. In November 2020—after the Ninth Circuit had issued its decision in the Nevada action but while the Nevada action remained pending—petitioner filed this CFC action against the United States under the Tucker and Indian Tucker Acts. Pet. App. 8a.[1]

In this case, petitioner "alleges that because of the ongoing leadership dispute and the BIA's failure to permanently recognize a government of the [Tribe] during the dispute, the BIA failed to fulfill its trust responsibilities to the [Tribe] and prevented [it] from managing and preserving its resources." Pet. App. 34a; see *id.* at 29a. Petitioner's amended complaint (*id.* at 92a-144a) thus refers to the Bills/Ayer group as "the trespassers" (*id.* at 103a) and recounts in detail the Tribe's lengthy internal-governance dispute and the BIA's failure to take sides in that dispute. See *id.* at 103a-118a. As rel-

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[1] The United States assumes *arguendo* that this action was properly filed on behalf of the Winnemucca Indian Colony by persons representing its tribal government. Cf. Pet. App. 41a n.2 (CFC's conclusion that it need not resolve whether "this suit is brought by and through the [Tribe's] duly elected council").

evant here, petitioner's Third Claim (*id.* at 130a-131a) incorporates those factual allegations, *id.* at 130a, and further asserts that the BIA then failed to prevent a third party—the Offenhauser Development Company—from diverting water from the stream that previously supplied over "60 [cubic feet per second]" of water to the 320-acre portion of petitioner's reservation, water which the company allegedly has held in "upstream wells and holding tanks." *Id.* at 123a, 131a; see, *e.g.*, Pet. 4, 6.

b. The CFC dismissed each of petitioner's 11 claims for want of jurisdiction. Pet. App. 29a-91a; see *id.* at 41a. As relevant here, the CFC determined that it lacks jurisdiction over petitioner's Third Claim on three independent grounds. *Id.* at 42a-56a, 69a-86a.

First, the CFC determined that Section 1500 deprives it of jurisdiction over petitioner's Third Claim because petitioner filed its CFC action against the United States when its related 2011 Nevada district court action against the United States was still pending. Pet. App. 42a-46a. The court noted that petitioner does not "dispute that the claims asserted in [the Nevada action] are substantially the same as the claims in this case." *Id.* at 43a. The court also observed that petitioner's earlier 2013 CFC damages action against the United States—which had similarly challenged the United States' purported failure to prevent the third-party "upstream * * * diversion of water" from petitioner's reservation, *id.* at 86a—had been "dismissed under § 1500 due to the same concurrent [Nevada] litigation." *Id.* at 43a. The court thus explained that petitioner disputed Section 1500's application only by arguing that the Ninth Circuit appeal in the Nevada case "was not pending 'against the United States'" within the meaning of Section 1500 "because the Government [did] not participat[e] in the appeal." *Ibid.* (citation omitted). The CFC rejected that contention. *Id.* at 43a-46a.

Second, the CFC determined that it also lacks jurisdiction over petitioner's Third Claim under the Tucker and Indian Tucker Acts because petitioner has failed to allege (as those jurisdictional statutes require) that the United States' alleged conduct violated any "specific rights-creating or duty-imposing statutory or regulatory prescription[]" that "can fairly be interpreted as mandating compensation for damages sustained as a result of [that] breach of [those] duties," Pet. App. 48a-49a. See *id.* at 47a-56a. The court rejected petitioner's reliance on President Wilson's executive orders creating petitioner's reservation "in conjunction with" the reserved-water-rights doctrine in *Winters* v. *United States*, 207 U.S. 564 (1908), because neither imposed upon the United States any trust responsibility to enforce any reserved water "rights against third-party interference." Pet. App. 50a, 53a-55a.

Finally, the CFC determined that petitioner's Third Claim is independently barred by 28 U.S.C. 2501's six-year statute of limitations. Pet. App. 69a-86a. The court determined that the claim accrued more than six years before petitioner filed this action in 2020, *id.* at 69a-70a, noting, among other things, that petitioner's 2013 CFC complaint itself referred to the "upstream subdivision's diversion of water," *id.* at 86a.

4. The court of appeals affirmed. Pet. App. 3a-28a. The court determined that petitioner has failed in its Third Claim to identify any money-mandating "substantive source of law that establishes specific fiduciary or other duties" that the government allegedly violated, *id.* at 12a-13a. See *id.* at 11a-15a. The court stated that

the source of law imposing the relevant duty must be "'a treaty, statute, or regulation,'" but the *Winters* doctrine is "a common law doctrine" that merely recognizes that the federal government's reservation of land for an Indian tribe "'implicitly reserves the right to use needed water.'" *Id.* at 13a-14a (quoting *Arizona* v. *Navajo Nation*, 599 U.S. 555, 561, 563-564 (2023)). The court noted that petitioner had invoked 25 C.F.R. 152.22 on appeal, but it concluded that the regulation, which "does not mention water rights or establish any governmental duty relevant to the diversion of tribal water," has not imposed any "money-mandating duty relevant to [petitioner's water-diversion-focused claim in] Count Three." Pet. App. 14a.

The court of appeals stated that it "need not reach [petitioner's] section 1500 arguments" with respect to the Third Claim because the court had affirmed that claim's dismissal on money-mandating-source-of-law grounds. Pet. App. 24a-25a. The court, however, concluded that Section 1500 requires dismissal of several of petitioner's other claims in light of the Nevada district court action, which "was filed first and remained pending when this suit was filed," *id.* at 24a. See *id.* at 25a-26a. With respect to those other claims, the court stated that it had discretion to address petitioner's argument that their operative facts do not substantially overlap with the Nevada action even if petitioner had forfeited that contention below. *Id.* at 24a-25a & n.9. But the court found that Section 1500 precludes jurisdiction over those other claims because their operative facts substantially overlap with the Nevada action. *Id.* at 26a.

ARGUMENT

Petitioner contends (Pet. 15-24) that the court of appeals erred in determining that petitioner has failed to establish the CFC's jurisdiction over petitioner's Third Claim under the Tucker Act, 28 U.S.C. 1491, and Indian Tucker Act, 28 U.S.C. 1505, because petitioner failed to identify a source of substantive law that imposed any duty that the United States could have violated by purportedly failing to prevent a third party from diverting water from the Tribe's reservation. The decision of the court of appeals is correct, does not conflict with any decision of this Court or another court of appeals, and does not warrant further review. Review is particularly unwarranted because—as the CFC further held—the jurisdictional bar in 28 U.S.C. 1500 and the statute of limitations in 28 U.S.C. 2501 both confirm that the CFC lacks jurisdiction over petitioner's claim. The petition for a writ of certiorari should be denied.

1. The court of appeals correctly determined that petitioner failed to establish the CFC's jurisdiction over its Third Claim under the Tucker and Indian Tucker Acts seeking damages for a third party's alleged diversion of water from the Tribe's reservation.

a. The Tucker Act grants the CFC jurisdiction over "any claim against the United States founded either upon the Constitution, or any Act of Congress or any regulation of an executive department, or upon any express or implied contract with the United States, * * * in cases not sounding in tort." 28 U.S.C. 1491(a)(1). The Indian Tucker Act extends the terms of the Tucker Act to Indian tribes by allowing a tribe to bring suit in the CFC on a claim that "otherwise would be cognizable in the [CFC] if the claimant were not an Indian tribe," 28 U.S.C. 1505. See *United States* v. *Navajo Nation*, 556 U.S. 287, 290 (2009) (*Navajo II*); *United States* v. *Navajo Nation*, 537 U.S. 488, 503 & n.10 (2003) (*Navajo I*). The Indian Tucker Act additionally permits suit on certain claims arising under "treaties of the United States" and "Executive orders," 28 U.S.C. 1505, but the two Acts otherwise provide the "same access" to relief. *United States* v. *Mitchell*, 445 U.S. 535, 540 (1980) (*Mitchell I*).

While the Tucker Acts address claims "founded * * * upon" (28 U.S.C. 1491(a)(1)) or "arising under" (28 U.S.C. 1505) the Constitution or a federal statute or regulation, it is well settled that "[n]ot every claim invoking the Constitution, a federal statute," treaty, regulation, or executive order "is cognizable." *United States* v. *Mitchell*, 463 U.S. 206, 216 (1983) (*Mitchell II*). Instead, "[t]he claim must be one for money damages against the United States, and the claimant must demonstrate that the source of substantive law [it] relies upon 'can fairly be interpreted as mandating compensation by the Federal Government for the damage sustained.'" *Id.* at 216-217 (citation omitted); accord *Navajo I*, 537 U.S. at 503.

A tribal plaintiff asserting a non-contract claim under the Tucker or Indian Tucker Act must therefore clear "two hurdles" to invoke federal jurisdiction. *Navajo II*, 556 U.S. at 290. "First, the tribe 'must identify a substantive source of law that establishes specific fiduciary or other duties, and allege that the Government has failed faithfully to perform those duties.'" *Ibid.* (quoting *Navajo I*, 537 U.S. at 506). That "threshold" showing must be based on "specific rights-creating or duty-imposing [constitutional,] statutory, or regulatory prescriptions"—or, for Indian Tucker Act claims, such prescriptions in a treaty or executive order—that establish "specific fiduciary or other duties" that the government allegedly has failed to fulfill. *Navajo I*, 537 U.S.

at 506; see *Arizona* v. *Navajo Nation*, 599 U.S. 555, 564 (2023).

That threshold requirement reflects that "the trust obligations of the United States to the Indian tribes are established by Congress and the Executive, not created by the Judiciary." *Arizona*, 599 U.S. at 564 n.1. And because "[t]he Federal Government owes judicially enforceable duties to a tribe 'only to the extent it expressly accepts those responsibilities,'" courts "must adhere to the text of the relevant law" as drafted by Congress or the Executive when analyzing a tribe's breach-of-trust claims under the Tucker Acts. *Id.* at 564 & n.1 (quoting *United States* v. *Jicarilla Apache Nation*, 564 U.S. 162, 177 (2011)). Accordingly, those Acts do not grant jurisdiction over claims based on "common-law trust principles," which are defined by the courts. *Navajo II*, 556 U.S. at 301; see *Arizona*, 599 U.S. at 566 ("[T]his Court will not 'apply common-law trust principles' to infer duties not found in the text of a treaty, statute, or regulation.") (citation omitted).

Second, "[i]f that threshold is passed," the tribal plaintiff must additionally show that "the relevant source of substantive law," the violation of which forms the basis of its claim, "'can fairly be interpreted as mandating compensation for damages sustained as a result of a breach of the duties the governing law imposes.'" *Navajo II*, 556 U.S. at 290-291 (quoting *Navajo I*, 537 U.S. at 506) (brackets and citation omitted).

b. Neither of the two bases that petitioner invokes for its request for damages arising from the United States' purported failure to prevent a third party's diversion of water resources from the Tribe's reservation (petitioner's Third Claim) satisfies those Tucker Act requirements.

i. First, petitioner invokes (Pet. 12, 15-21) the reserved-water-rights doctrine of *Winters* v. *United States*, 207 U.S. 564 (1908), under which the establishment of an Indian reservation or other federal reservation, automatically and "by implication, 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) (citing *Winters*, 207 U.S. at 576); see *Arizona*, 599 U.S. at 561. For at least three reasons, that doctrine interpreting the existence and scope of the property rights that accompany a federal reservation cannot establish jurisdiction over petitioner's claim.

Most simply, the *Winters* doctrine is not a provision in the Constitution, a statute, a treaty, a regulation, or an executive order the text of which might show that the United States has "'expressly accept[ed]'" the responsibility to perform certain "enforceable duties to a tribe." *Arizona*, 599 U.S. at 564 (citation omitted). Just like "common-law trust principles" established by the courts, the judicial doctrine cannot form the basis for a Tucker or Indian Tucker Act claim. *Id.* at 566 (citation omitted); see *Navajo II*, 556 U.S. at 302; pp. 13-14, *supra*.

Furthermore, the *Winters* doctrine does not even "create a trust obligation" requiring the United States to prevent third parties from appropriating water upstream from an Indian reservation. Pet. App. 13a. The doctrine simply recognizes that the "bundle of property rights that makes up a reservation" (*Arizona*, 599 U.S. at 563) includes a right to use certain unappropriated water, which vests no later than "the date of the reservation" and is thus "superior to the rights of future appropriators," *Cappaert*, 426 U.S. at 138; see *Arizona* v.

California, 373 U.S. 546, 600 (1963); *United States* v. *Adair*, 723 F.2d 1394, 1413-1414 (9th Cir. 1983) (noting that tribe's water rights can be aboriginal rights, which vest earlier), cert. denied, 467 U.S. 1252 (1984). Even if the creation of that property right were to reflect "a trust relationship" between the United States and the relevant tribe, it would reflect only a "limited or bare" trust that cannot impose "duties [on the United States] not found in the text of a treaty, statute, or regulation." *Arizona*, 599 U.S. at 565-566.

Finally, the *Winters* doctrine cannot be fairly interpreted to mandate compensation in damages. It simply addresses the existence and scope of relevant property rights reserved when the federal government creates a reservation, not the remedies that would be appropriate if those rights are violated.

Petitioner contends (Pet. 15-19) that this Court's decision in *Arizona* v. *Navajo Nation*, *supra*, is distinguishable because, it asserts, *Arizona* considered a contention by a tribe that the United States was obligated to take "affirmative steps to find *new* water" for the tribe, not (as here) to prevent a third party's interference with "existing water," Pet. 15-16. But even if that distinction were valid, petitioner fails to explain (1) how the *Winters* doctrine could be considered a "substantive source of law"—like a statute, treaty, or regulation—the text of which might impose "specific fiduciary or other duties" on the United States, *Navajo I*, 537 U.S. at 506; (2) why the doctrine should be understood to impose an obligation on the United States to take affirmative acts to prevent third parties from diverting water from a reservation; or (3) why the doctrine is fairly interpreted as mandating a damages remedy from the United States for such third-party diversions. Each of those shortcomings is independently fatal to petitioner's position.

In any event, petitioner's proffered distinction runs dry. The Court's decision in *Arizona* applied the general principle—applicable to "claims seeking damages from the United States pursuant to the Tucker Act and Indian Tucker Act"—that a tribe asserting a "breach-of-trust claim * * * must establish, among other things, that the text of a treaty, statute, or regulation impose[s] certain duties on the United States" through "'specific rights-creating or duty-imposing' language in [those provisions]" because "the trust obligations of the United States to the Indian tribes are established by Congress and the Executive, not created by the Judiciary." *Arizona*, 599 U.S. at 563-564 & n.1 (quoting *Navajo I*, 537 U.S. at 506, and citing, *e.g.*, *Mitchell I*, 445 U.S. at 542, 546). That principle is not limited to alleged violations of water-related rights and does not turn on a distinction between new and existing water.

Petitioner's distinction between new and existing water is also misplaced. Neither the United States nor petitioner owns the surface or ground waters that run through the Tribe's reservation. See *Sturgeon* v. *Frost*, 587 U.S. 28, 42 (2019) (Unlike "the lands beneath th[em]," "running waters cannot be owned—whether by a government or by a private party."). The water rights reserved for the Tribe's reservation are "'usufructuary'" rights, *i.e.*, rights "to use—whether by withdrawing or maintaining—certain waters [that the rights-holder] does not own." *Id.* at 43 (discussing rights under the *Winters* doctrine); see *Federal Power Comm'n* v. *Niagara Mohawk Power Corp.*, 347 U.S. 239, 247 (1954) (distinguishing usufructuary water rights from "claims to the legal ownership of the water itself"). Such a right "merely enables [its holder] to take or maintain the specific 'amount of water'—and 'no more'—required to 'fulfill the purpose [of the federal] reservation.'" *Sturgeon*, 587 U.S. at 44 (quoting *Cappaert*, 426 U.S. at 141). No relevant distinction therefore exists between "new" and "existing" water in this context because any water right that the Tribe might invoke is a general right to use water within a river system, not a right to any specific collection of water molecules. See *Crow Creek Sioux Tribe* v. *United States*, 900 F.3d 1350, 1357 (Fed. Cir. 2018) (explaining that a tribe "has no right to any particular molecules of water, either on [a] Reservation or up- or downstream").[2]

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[2] Petitioner suggests (Pet. 19-22) that the court of appeals' earlier decision in *Ute Indian Tribe* v. *United States*, 99 F.4th 1353 (Fed. Cir. 2024), recognizes a distinction between "new" and "existing" water and allowed Tucker Act claims alleging "the United States['] failure to protect existing water" to proceed, Pet. 20 (emphasis omitted). But petitioner misreads that decision. *Ute Indian Tribe* addressed a 1906 statute, the "text" of which the court viewed as imposing on the United States "a duty to 'hold and operate' [certain] irrigation systems 'in trust for the Indians'"—a duty that the tribe alleged had been breached by allowing the "infrastructure to fall into 'a grave state of disrepair.'" 99 F.4th at 1368 (brackets and citations omitted). Although the court determined that the Act "obligat[ed] the United States to protect and preserve th[at] water infrastructure," it declined to decide whether "[t]he language of the 1906 Act" imposed a more "general obligation to protect and preserve water rights." *Id.* at 1370. The court simply left that question for remand because the CFC had "not specifically address[ed]" it. *Ibid.*

Petitioner's focus (Pet. 17-18) on *Hopi Tribe* v. *United States*, 782 F.3d 662 (Fed. Cir. 2015), is similarly misplaced. In *Hopi Tribe*, the court of appeals held that the tribe there *failed* to identify any substantive source of law establishing a "fiduciary duty to ensure adequate water quality" on the tribe's reservation. *Id.* at 668, 671. In so holding, the court declined to decide whether "Congress intended the term 'land' in [a 1958 statute] to include reserved water rights

ii. Second, petitioner's reliance (Pet. 12, 23-24) on 25 C.F.R. 152.22 is also unavailing. The regulation provides that "[l]ands held in trust by the United States for an Indian tribe" and "land owned by an Indian tribe" may "only be conveyed where specific statutory authority exists and then only with the approval of the Secretary unless the Act of Congress authorizing sale provides that approval is unnecessary." 25 C.F.R. 152.22(b). That regulation has no application here. Its requirement of statutory authority and secretarial approval concerns only the "convey[ance]" of "[l]ands held in trust by the United States" or "land owned by an Indian tribe." *Ibid.* It "does not mention water rights or establish any governmental duty relevant to the diversion of tribal water," much less to third-party diversions like that alleged in petitioner's Third Claim. Pet. App. 14a.

Petitioner briefly suggests (Pet. 23) that "the word 'water' may be implied" as part of Section 152.22 "through [the] *Winters*" doctrine because, under that doctrine, the regulation's express reference to "'[l]ands held in trust by the United States for an Indian tribe'" purportedly "also means water." That contention fails for multiple reasons. As an initial matter, the regulation governs the "convey[ance]" of land. 25 C.F.R. 152.22(b). Land and its ownership, as discussed above, are different from any usufructuary water right that might be reserved when a federal government establishes a reservation from land that it owns. That water

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under the Winters doctrine," adding that even if it did, the statute would "[a]t most" impose a duty to exercise those rights and "exclude others from diverting or contaminating water" flowing to the reservation, not to eliminate naturally occurring contaminants. *Id.* at 669. Such dicta—concerning a potential reading of a statute irrelevant to this case—provide petitioner no meaningful support.

right is not even a "ownership" right to any particular water. See pp. 17-18, *supra*.

Moreover, even if one could properly equate the conveyance of land addressed by Section 152.22 with a conveyance of an associated water right, petitioner's Third Claim does not allege that the government has approved any conveyance of any water rights to a third party. Petitioner instead contends that the United States failed to prevent a third party from diverting water upstream of the Tribe's reservation, a diversion that would be unlawful if the third party's use interferes with the reservation's relevant needs and the third party lacked water rights with a priority date superior to those reserved for the reservation. But failing to prevent a third party from taking action that impairs a water right for a reservation is fundamentally different from "convey[ing]" that right to the third party. And petitioner's focus (Pet. 23-24) on whether the regulation could be fairly interpreted as "money mandating" fails to confront the Tucker Act's distinct threshold requirement that petitioner identify a relevant source of law having text imposing "*specific* fiduciary or other duties" that petitioner alleges the United States failed to perform, *Navajo II*, 556 U.S. at 290 (emphasis added; citation omitted). See pp. 13-14, *supra*.

2. Petitioner incorrectly suggests (Pet. 15, 25) that, absent a claim for money damages from the United States under the Tucker Acts, its reservation will be "reduced to useless sand without water." Any water rights reserved for the Tribe's reservation under the *Winters* doctrine continue to exist and can be enforced against third parties who impair those rights.

Such reserved water rights, which vest no later than "the date of the reservation," are "superior to the rights of future appropriators," *Cappaert*, 426 U.S. at 138; see *Arizona* v. *California*, 373 U.S. at 600, and "are not lost through non-use," *Agua Caliente Band of Cahuilla Indians* v. *Coachella Valley Water Dist.*, 849 F.3d 1262, 1272 (9th Cir.), cert. denied, 583 U.S. 996 (2017). Moreover, those rights may be adjudicated in federal or state proceedings. See *Arizona* v. *San Carlos Apache Tribe of Arizona*, 463 U.S. 545 (1983). Thus, as this Court has observed in another context, the Tribe "may be able to assert the interests [that it] claim[s] in water rights litigation" and, if it does, "courts will then assess the [Tribe's] claims and motions as appropriate." *Arizona*, 599 U.S. at 568-569.

3. In any event, this case would be a poor vehicle for review because two additional bases exist for dismissing petitioner's Third Claim for lack of jurisdiction.

a. First, the CFC correctly determined that Section 1500 deprived it of jurisdiction over that claim because there is a "substantial overlap" between the claim's "operative facts," *United States* v. *Tohono O'odham Nation*, 563 U.S. 307, 318 (2011), and those in petitioner's 2011 Nevada action, which was still pending when petitioner filed its complaint in this case. See Pet. App. 42a-46a. That "factual overlap" illustrates that the "related although not identical" claim in this case "'ar[ose] from the same transaction'" as those in the Nevada case and is therefore barred by Section 1500. *Tohono*, 563 U.S. at 312, 316 (citation omitted); see pp. 7-8, *supra*.

In the CFC, petitioner did not even "dispute that the claims asserted in [the Nevada district court action] are substantially the same as the claims in this case." Pet. App. 43a. In briefing, petitioner argued only that the Nevada case was not then pending against the United States because the appeal was a different proceeding in which the United States did not participate. See C.A. App. 182, 191-192. Petitioner continued to assert at oral argument that "the appeal [was] a new process" and it was therefore a "new case" to which "the United States [was] not a party." *Id.* at 403. Petitioner also asserted orally that the appeal in the Nevada case did not involve "the same set of facts" as this case because, in the Ninth Circuit, the appellants (the Bills/Ayers group) "never made the argument" that they were "tribal members" and, thus, made "no argument" that under the Tribe's constitution they were "the properly seated tribal council." *Id.* at 402-403. But petitioner did not dispute that the operative facts in the Nevada *district court action* against the United States—which remained pending until after the Ninth Circuit's mandate remanding the case—substantially overlap with the operative facts for its relevant claims in this case. Petitioner's Third Claim ultimately attributes various injuries to the United States' inaction purportedly stemming from its failure to recognize petitioner's side as the Tribe's lawful council. See pp. 8-9, *supra*; see also, *e.g.*, Pet. App. 29a ("The events underpinning [petitioner's] claims relate to a long-running internal tribal dispute about the [Tribe's] proper membership and leadership."), 34a-35a (explaining that petitioner alleges "encroachments and harms" that were purportedly the "result" of BIA inaction "during the pendency of the leadership dispute" that "prevented the [Tribe] from managing and preserving its resources").

Moreover, petitioner's Third Claim in this case directly tracks the water-rights claim in its earlier 2013 CFC action, which asserted that the United States' purportedly unreasonable failure to recognize petitioner's tribal government caused, through resulting inaction, the diversion of the stream that carried "60 cubic feet per second" of water to the 320-acre portion of the Tribe's reservation. C.A. Supp. App. 465 (¶¶ 14-15), 479 (¶ 100.e); see p. 7, *supra*. The Third Claim here rests on the same purported government-inaction-caused diversion of the same "60 [cubic-foot-per-second]" stream, which is allegedly the only water source for the 320-acre portion of the reservation. Pet. App. 123a, 131a; see pp. 8-9, *supra*. The CFC dismissed petitioner's 2013 damages action under Section 1500 because it had "substantially the same operative facts" as the Nevada district court action. *Winnemucca Indian Colony* v. *United States*, No. 13-874, 2014 WL 3107445, at *3-*4 (July 8, 2014) (citation omitted). And under the doctrine of collateral estoppel, petitioner cannot now properly challenge that determination regarding its earlier claim that directly tracks its Third Claim here.

b. Second, the CFC correctly determined that petitioner's Third Claim is barred by a six-year statute of limitations, which begins to run when a "claim first accrues," 28 U.S.C. 2501. See Pet. App. 69a-86a; cf. *John R. Sand & Gravel Co.* v. *United States*, 552 U.S. 130, 133-139 (2008) (Section 2501's limitations period is jurisdictional). A claim accrues "'when the plaintiff has a complete and present cause of action,'" *i.e.*, when "the plaintiff suffers the injury required to press [its] claim in court." *Corner Post, Inc.* v. *Board of Governors of the Fed. Reserve Sys.*, 603 U.S. 799, 810-811 (2024) (citation omitted). And as just noted, petitioner asserted the same water-diversion-focused claim in its 2013 CFC action, demonstrating that the claim accrued more than six years before petitioner filed this action in November 2020.

The court of appeals did not decide whether an action —such a purported failure to stop a third party's "construc[tion]" of a structure that impinges a property right—may be viewed as supporting separate "continuing claims" if the structure has continuing effects due to its ongoing existence or operation. Pet. App. 21a-23a. But the relevant claim here is not that a third party continues to violate petitioner's asserted water rights; it is that the United States wrongfully failed to act during the Tribe's internal leadership dispute to stop the third party's construction of the upstream structures that continue to divert water from the Tribe's reservation. And when the CFC asked petitioner's counsel whether petitioner could identify "any discrete events" with respect to its claims involving the 320-acre portion of the reservation that "occurred in the six years prior to the filing of [its] complaint" in this case, petitioner failed to do so. C.A. App. 407-408. Petitioner simply represented that beyond "the diversion from the company" that it had alleged, it was "looking into" whether another third party "subsequent[ly] * * * diverted water" but did not "have all the facts at this point." *Ibid.*

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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