No. 14-5018

IN THE UNITED STATES COURT OF APPEALS
FOR THE FEDERAL CIRCUIT

THE HOPI TRIBE,
A Federally Recognized Tribe

Plaintiff/Appellant,

v.

THE UNITED STATES OF AMERICA,

Defendant/Appellee.

Appeal from the United States Court of Federal Claims
Case No. 12-45 L
The Honorable Lawrence J. Block, Judge Presiding

REPLY BRIEF OF PLAINTIFF/APPELLANT THE HOPI TRIBE

Michael D. Goodstein
HUNSUCKER GOODSTEIN PC
5335 Wisconsin Avenue NW
Suite 360
Washington, DC 20015
Ph: (202) 895-5380
Fax: (202) 895-5390

Attorneys for Plaintiff/Appellant
The Hopi Tribe

ORAL ARGUMENT REQUESTED

Table of Contents

Table of Authorities

Cases

Statutes

Rules

Other Authorities

SUMMARY OF THE ARGUMENT

The issue on appeal here is straightforward: Should the Hopi Tribe be afforded an opportunity to show that the United States has breached a duty by installing water systems at certain Hopi Villages that are contaminated with up to four times the allowable level of arsenic? The answer, under the appropriate standards of review and applicable rules of construction, is unequivocally "yes." At the very least, the case should be remanded to the Court of Claims for jurisdictional discovery to permit the Hopi Tribe to learn of the actions taken by the United States and authorities for those actions regarding drinking water on the Hopi Reservation.

The United States and Hopi Tribe have a long history. In brief, the United States established the Hopi Reservation by Executive Order in 1882, ratified that action through the Act of 1958, installed several groundwater wells and water delivery systems to effectuate the Tribe's rights under the *Winters* Doctrine, handed them over to the Hopi Tribe, and then declared the water delivered by those systems unfit for human consumption and illegal to serve the public. The United States now

disclaims any responsibility for bringing those water systems up to federal standards.

The United States' Opposition Brief ("Opp.") advances two main arguments to support its position that the Court of Claims lacks jurisdiction in this case: that no statute confers any duty on the United States to rehabilitate these systems and that the Court should not consider the United States' pervasive control and supervision over Hopi groundwater supplies when deciding whether there is jurisdiction.

The United States' first argument — that the 1882 Executive Order and Act of 1958 establishing the Hopi Reservation do not contain the proper level of specificity to waive the sovereign immunity of the United States, Opp. at 18-33 — should be rejected. As a preliminary matter, the United States seeks to impose a level of specificity in the underlying statutes that is out–of–step with established precedent. The question presented by the United States is whether the 1882 Executive Order or Act of 1958 "impose[s] a *specific* fiduciary duty requiring the United States to build water system infrastructure or to deliver drinking water of certain quality to specific locations within the Hopi Reservation[.]" Opp. at 1 (emphasis added). In so doing, the United

States attempts to impose a level of specificity in the underlying statute and the *Winters* Doctrine that has never been endorsed by the Supreme Court. Acceptance of the United States' position would increase the hurdle for finding jurisdiction under the Indian Tucker Act in contradiction of Supreme Court precedent. Indeed, the level of specificity advocated by the United States is at odds with binding precedent, and would leave *Mitchell II* and *White Mountain* wrongly decided.

As shown below, however, the Act of 1958 and the *Winters* Doctrine provide appropriate specificity to defeat the United States' motion to dismiss. The United States' attempts to align this case with *Mitchell I*, *Navajo Nation I*, and *Navajo Nation II* are unavailing. Those cases found that the passive role assumed by the United States was insufficient to confer jurisdiction in the Court of Claims. But, the United States has been anything but passive here, and a the Act of 1958, when properly interpreted, provides sufficient basis for jurisdiction.

Second, the United States argues that the Court should ignore the active role the United States has played in supervision, control, and

management of the Hopi groundwater resources. Opp. at 48-56. However, this attempt to avoid acknowledgement of its active role in designing and installing the contaminated wells and obtain a complete walk–away from the harm it has caused the Tribe must not be rewarded. The United States' comprehensive role in every aspect of the Hopi Tribe's drinking water resources was directly authorized by Congress.

Finally, to the extent that there is any lingering question over whether jurisdiction is appropriate, the case should be remanded with instructions to allow jurisdictional discovery. Because the United States owned and operated the wells, and designated itself as the record–keeper for those wells, much of the information concerning the water systems at issue is not available to the Hopi Tribe.

For these reasons the United States' arguments must be rejected and the case remanded for further proceedings.

ARGUMENT

I. The Act of 1958, when Properly Construed, Establishes the United States' Duty to Rehabilitate the Trust Property to Current Federal Standards.

The Act of 1958, ratifying the 1882 Executive Order establishing the Hopi Reservation, when properly construed in accordance with

established principles, provides the underlying basis for finding that the United States owes the Tribe a duty to rehabilitate the contaminated drinking water systems that the United States designed and installed, and that are now out of compliance with federal standards. The United States' Opposition rests almost entirely on asking the wrong question. Instead of addressing the Tribe's claim, the United States repeatedly states that there is no specific obligation that it construct new infrastructure to deliver drinking water to specific locations on an Indian reservation. *See* Opp. at 1-4, 12-13, 18-19, 21-27, 30, 33-34, 41, 44, 51, 53, 55-56. When properly framed, however, it is clear that there is jurisdiction for the Tribe's action based on the Act of 1958, coupled with the *Winters* Doctrine and other mandatory rules of statutory construction.

A. The United States' Position Rests on a Level of Specificity in the Act of 1958 that Is Out of Step with Key Cases, Including *White Mountain* and *Mitchell II*.

The United States' argument that the Act of 1958 does not create a fiduciary duty towards the Tribe must be rejected. The United States' position in this appeal rests largely on demanding a level of specificity in the Act of 1958 and the *Winters* Doctrine that is simply out of step

with what the Indian Tucker Act requires. The United States argues that neither the Act of 1958 nor the *Winters* Doctrine "impose[s] a *specific* fiduciary duty requiring the United States to build water system infrastructure or to deliver drinking water of certain quality to specific locations within the Hopi Reservation[.]" Opp. at 1. The United States' statement of the issue disingenuously implies that the Hopi Tribe asks the United States to build new infrastructure, when, in reality, the Tribe's claim is for damages necessary to bring the existing water delivery systems — designed, installed, and originally managed and owned by the United States — into compliance with current federal regulations. A15-16 at Request for Relief; A37-38; Hopi Tribe's Opening Brief ("Br.") at 5. Moreover, a statement in the Act of 1958 or the *Winters* Doctrine specifically calling for rehabilitation of the water systems on the Hopi Reservation is not a prerequisite for jurisdiction. Such a narrowly tailored statement has never been required under Indian Tucker Act jurisprudence and would leave significant Supreme Court cases wrongly decided.

For example, in *White Mountain Apache Tribe v. United States*, the Apache tribe argued that the United States owed damages

sufficient to rehabilitate certain trust property that had fallen into disrepair. 537 U.S. 465, 469 (2003). The background of *White Mountain* is important to understanding the ultimate holding of the Court. In 1960, the United States passed the underlying statute at issue, which provided that the former Fort Apache Military Reservation would be held in trust for the tribe, subject to the right of the United States to use it for administrative or school purposes. *Id.* The Secretary exercised that right and used about thirty of the post's buildings and appurtenances. *Id.* The United States later passed the National Historic Preservation Act, and the National Park Service listed the site as a national historical site in 1976. *Id.* In 1998, the tribe commissioned an engineering assessment of the property, which found that it would cost about $14 million to bring the property up to historic preservation standards. *Id.*

Like this case, in *White Mountain*, the United States argued the underlying act "creat[ed] nothing more than a 'bare trust'" because it did not contain the specific "mandate that the United States manage the site on behalf of the Tribe," *id.* at 471. The Supreme Court rejected

that argument and found that the underlying act did create a fiduciary duty to rehabilitate the trust property. The Court explained:

> While it is true that the 1960 Act does not . . . *expressly* subject the Government to duties of management and conservation, the fact that the property occupied by the United States is expressly subject to a trust supports a fair inference that an obligation to preserve the property improvement was incumbent on the United States as trustee.

Id. at 475 (emphasis added). By analogy, the fact that the Act of 1958 establishing the Hopi Reservation does not contain specific language requiring the "construction of water system infrastructure or delivery of water of certain quality," Opp. at 21, is not dispositive. Rather, like in *White Mountain*, here the United States passed the underlying Act of 1958, requiring the United States to hold the Hopi land and water in trust for the Tribe, made use of the resource, later promulgated federal standards relating to the minimum quality of the trust resource, and then refused to bring that resource into compliance with the minimum standard.

Analysis of *White Mountain* also shows that the level of specificity requested by the United States in the underlying statute is wrong. The Tribe simply requests that when the United States installs and

manages a trust resource that falls into disrepair through no fault of the Hopi Tribe, the United States should pay the damages for bringing it up to code. Such a result is directly in line with *White Mountain*.

Additionally, the United States' request that the underlying statute mandate the exact duty sought by the Tribe does not conform to the history of the Indian Tucker Act or other express waivers of sovereign immunity. In fact, in *United States v. Mitchell*, 463 U.S. 206, 219 (1983) ("*Mitchell II*"), the Court found it inappropriate to narrowly construe the underlying statutes, warning that "[t]he exemption of the sovereign from suit involves hardship enough where consent has been withheld. We are not to add to its rigor by refinement of construction where consent has been announced." (quoting *United States v. Aetna Surety Co.*, 338 U.S. 366, 383 (1949)).[1] Moreover, it is a cornerstone of

[1] Thus, the cases the United States relies on to support its articulation of the standard required for a waiver of sovereign immunity — *Lane v. Pena*, 518 U.S. 187 (1996) and *United States Department of Energy v. Ohio*, 503 U.S. 607 (1992) — are not applicable. These cases addressed whether the statute contained any waiver of sovereign immunity. *Lane*, 518 U.S. at 192 (interpreting the Rehabilitation Act of 1973); *U.S. Dep't of Energy*, 503 U.S. at 615 (interpreting the Clean Water Act and the Resource Conservation and Recovery Act). In contrast, the Supreme Court has specifically advised that "by giving the Court of Claims jurisdiction over specified types of claims against the United States, the Tucker Act constitutes a waiver of sovereign immunity with respect to

Indian law that "treaties, statutes, and executive orders are construed liberally in the Indians' favor," which "is equally applicable to the federal government's actions with regard to water for Indian reservations." *In re the Gen. Adjudication of All Rights to Use Water in the Gila R. Sys. & Source*, 201 Ariz. 307, 313 (Ariz. 2001) (en banc) (internal citations omitted).

The holding in *Mitchell II* reflects these principles. There, the Court found sufficient specificity in the underlying statutes, even though they did not reference the exact actions the Court found to be required by the United States. Rather, the Court found most significant that the "language of the[] statutory and regulatory provisions directly supports the existence of a fiduciary relationship," which

> *necessarily arises* when the Government assumes such elaborate control over forests and property belonging to Indians. All of the necessary elements of a common–law trust are present: a trustee (the United States), a beneficiary (the Indian allottees), and a trust corpus (Indian timber, lands and funds).

---

those claims." *Mitchell II*, 463 U.S. at 212. "Because the Tucker Act supplies a waiver of immunity for claims of this nature, the separate statutes and regulations need not provide a second waiver of sovereign immunity, nor need they be construed in the manner appropriate to waivers of sovereign immunity." *Id.* at 218-19.

Mitchell II, 463 U.S. at 224, 225. The Court's holding was "reinforced by the undisputed existence of a general trust relationship between the United States and the Indian people." *Id.* at 225.

The United States' attempts to distinguish *White Mountain* by focusing entirely on the Court's recognition that the underlying statute there articulated the United States' authority to use the property must be rejected. *See* Opp. at 34-38, 49. The Court's analysis focused on the United States' *actual use* of the property, which was authorized by the statute.

> It is undisputed that the Government has to this day availed itself of its option. As to the property subject to the Government's actual use, then, the United States has not merely exercised daily supervision but has enjoyed daily occupation, and so has obtained control at least as plenary as its authority over the timber in *Mitchell II*.

White Mountain, 537 U.S. at 475. The Court concluded, "elementary trust law, after all, confirms the commonsense assumption that a fiduciary *actually administering trust property* may not allow it to fall into ruin on his watch." *Id.* (emphasis added.)

The D.C. Circuit has recently addressed this issue, and agrees. In *El Paso Nat. Gas Co. v. United States*, --- F.3d ---, Nos. 12-5156. 12-5157, 2014 WL 1328164 (D.C. Cir. Apr. 4, 2014), the D.C. Circuit

addressed the United States' position that *White Mountain* mandates that the underlying statute include express language authorizing use by the United States in order for a trust duty to be found. The Circuit rejected that argument and instead found that "an express right of governmental use is [not] always necessary to find that a statute affords a cause of action for breach of trust." *Id.* at *30. Rather, "governmental use *may be relevant* when a statutory reference to 'trust' does not itself indicate whether Congress intended to establish specific fiduciary duties or a 'bare trust' instead." *Id.*

As in *White Mountain*, here the United States has *actually administered* the trust property, and has exercised supervision over, enjoyed use of, and obtained control over the trust property. *See* Br. 47-52. Moreover, the actual use and trust relationship at issue here arises directly from the United States' act of establishing the land and water reservation in trust for the Hopi Tribe. Br. at 8-13. As such, the United States is responsible for deterioration, and resulting damages, to the trust property.

B. The Act of 1958 and the *Winters* Doctrine Provide an Appropriate Basis for Jurisdiction in the Court of Federal Claims.

Here, the Act of 1958 and the *Winters* Doctrine, along with the supplementary statutes discussed in Section II.A below, provide an appropriate basis for jurisdiction in the Court of Federal Claims. As a preliminary matter, the United States' position that the Hopi Reservation was not established as a homeland for the Hopi Tribe, and thus "the Act of 1958 cannot fairly be interpreted to mandate compensation for damages sustained as a result of breach of duties respecting water system infrastructure," Opp. at 19 n.8, must be rejected. The United States' argument that the "purpose of the Act of 1958 was to provide a judicial mechanism to resolve a land dispute between the Navajo Nation and Hopi Tribe," Opp. at 19, fails to acknowledge the history of the relationship between the Hopi Tribe and the United States. Part and parcel of establishing a permanent homeland for the Hopi Tribe was resolution of any dispute over the right to the land at issue in *Healing v. Jones*, 174 F. Supp. 211 (D. Ariz. 1959). The United States' position also ignores that there can be more

than one primary purpose in establishing a reservation. *See United States v. Adair*, 723 F.2d 1394, 1410 (9th Cir. 1983).

The United States' focus on the word "lands" in the Act of 1958 is entirely misplaced. As shown in the Tribe's Opening Brief, the *Winters* Doctrine mandates that "land" includes both land and water. *See* Br. at 29-32.[2] While the United States does not dispute that the *Winters* Doctrine applies to the Hopi Reservation and to both surface and groundwater, Br. at 6; or that it must take into account current and future needs of the reservation, *id.* at 31, the United States continues to focus wrongly on "lands" in the Act of 1958. *See* Opp. at 5 ("The Act of 1958 declared that 'lands' described in the 1882 Executive Order are 'held by the United States in trust . . ."), Opp. at 12-13 ("The Act of 1958's declaration that Hopi reservation 'lands' are held 'in trust' does not impose any specific mandatory duty on the United States to build water system infrastructure or to deliver water that meets regulatory drinking water requirements to specific locations within the reservation."). It is established black–letter law that when the United

[2] The United States also wrongly suggests that it is the Tribe's position that the United States' generalized status as a trustee gives rise to a requirement to maintain and rehabilitate the trust *res*. Opp. at 21. *Compare* Br. 16-17.

States creates a land reservation, by implication it also reserves sufficient water to meet the current and future needs of the reservation. *Winters*, 207 U.S. 564, 575-77 (1908); *White Mountain Apache Tribe of Arizona v. United States,* 10 Cl. Ct. 115,119.

For example, in *Fort Mojave Indian Tribe v. United States*, the court explicitly recognized that in *Winters* even though "the reservation was created by a treaty which similarly made no reference to water rights," it "should be interpreted to contain an implied reservation of sufficient water rights for the tribe to carry out the purposes for which its reservation was created." 23 Cl. Ct. 417, 420 (1991).

Drinkable water is essential to carry out the purposes for which the Hopi Reservation was created. Without drinkable water, people cannot survive in the arid lands where the Hopi live, lands that the United States reserved for them.

The main crux of the United States' argument, however, is that it should not have to rehabilitate the arsenic–contaminated water systems it designed and installed, in part, because the Act of 1958 and the *Winters* Doctrine, as understood and articulated by the United States, do not specifically mandate construction of water delivery

infrastructure. *See* Opp. at 27 (arguing that *Winters* Doctrine is simply a property right which has nothing to do with water delivery infrastructure because "reserved water rights vest even though water has not yet been put to use and because Indian reserved water rights cannot be lost by disuse or abandonment," and because "title to reserved water rights is not diminished by the absence of water system infrastructure facilities").[3]

The *Winters* Doctrine reflects a cornerstone of the trust relationship between the United States and Indian tribes. "[M]any of the contours of what has come to be called the 'implied–reservation–of–water doctrine' remain unspecified," *United States v. New Mexico*, 438 U.S. 696, 700 (1978), and "[n]ot all of the issues arising from the application of the *Winters* doctrine have been resolved, because in the

[3] This argument is largely a red herring, as the question is not whether the United States has a duty to deliver water to the Hopi Villages. *See* Opp. at 1-4, 12-13, 18-19, 21-27, 30, 33-34, 41, 44, 51, 53, 55-56. Rather, the appropriate question is whether the United States, after having decided to design, install, own, and operate those drinking water systems, has a duty to bring them into compliance with the minimum drinking water standards imposed by the United States. It cannot be correct that after having exercised this type of control, the United States can leave the Hopi with water intended to fulfill the purpose of the reservation as a permanent homeland that the United States has mandated is unfit for human consumption.

past the scope of Indian reserved rights has infrequently been adjudicated." *Arizona v. San Carlos Apache Tribe of Arizona*, 463 U.S. 545, 574 (1983). Nonetheless, requiring that when the United States chooses to provide drinking water to a tribe, it must meet the current and future needs of the reservation, including federally–imposed drinking water standards, is consistent with the underlying principles and the articulation of the *Winters* Doctrine to date.[4]

Many authorities in the area of reserved water rights agree that *Winters* rights include a right to water of sufficient quality to meet the needs of the reservation. The seminal Handbook of Federal Indian Law advises that "Indian reserved water rights probably are protected against impairment of water quality . . . [because i]t is difficult to draw a meaningful distinction between quantity and quality of water for purposes of the Winters doctrine." Felix S. Cohen's Handbook of Federal Indian Law, 587 (Rennard Strickland et al. eds., 1982). Similarly, authorities in this area recognize that "Courts frequently

[4] *C.f. United States v. Anderson*, 591 F. Supp. 1, 5-6 (E.D. Wash. 1982), rev'd in part, aff'd in part, 736 F.2d 1358 (9th Cir. 1984) (holding *Winters* rights extended to water temperature); *Adair*, 723 F.2d at 1411 (extending *Winters* rights to the non-consumptive use of protecting the tribe's hunting and fishing rights).

imply that water rights on Indian reservations imply a certain quality of water as well as quantity," and that *Winters*, "along with its rationale, and the Canons of Construction" support the conclusion that *Winters* rights "mandate a quality of water sufficient to support the purposes of a reservation." Amy Allison, *Extending Winters to Water Quality: Allowing Groundwater for Hatcheries*, 77 Wash. L. Rev. 1193, 1209-11, 1217 (2002).

> Where water of adequate quality is necessary to fulfill the purposes for which the reservation was set aside . . . the Winters doctrine would seem to dictate that the tribal water right includes a right to quality as well as quantity. Both irrigation and fisheries protection require water of adequate quality for the intended uses. Certainly if domestic uses such as water for drinking and cooking are subsumed . . . water quality becomes an even more vital concern.

Judith Royster, *A Primer on Indian Water Rights: More Questions than Answers*, 30 Tulsa L.J. 61, 85-86 (1994) (internal citations omitted)). It has been specifically recognized that even though "a tribe may receive the quantity of water called for under its *Winters* rights, but the quality of the water may make it unusable for the purposes for which it was intended," and "if the water provided . . . is so degraded that it cannot be used for [its intended purpose], then the water right is essentially meaningless." Judith Royster, *Water Quality and the Winters Doctrine*,

107 J. of Contemporary Water Res. & Educ. 50.[5] *See also* Sean Hanlon, *A Non–Indian Entity Is Polluting Indian Waters: "Water" Your Rights to the Waters, and "Water" Ya Gonna Do About It?*, 69 Mont. L. Rev. 173, 203 (2008) ("Although generally litigated as a right to a certain quantity of water, water quality in its natural state must certainly be implicit under the Winters doctrine.").

The Court in *Winters* specifically cautioned that

> it cannot be supposed that the Indians were alert to exclude by formal words every inference which might militate against or defeat the declared purpose of themselves and the government, even if it could be supposed that they had the intelligence to foresee the 'double sense' which might some time be urged against them.

207 U.S. at 577. Yet, the United States attempts to impose a "double sense" on the Hopi Tribe by establishing the Reservation, which, without adequate drinking water would be uninhabitable, *In re Gila R. Sys. & Source*, 201 Ariz. at 313 (en banc), and then arguing that the United States has met its obligations by providing water to certain Villages that is unfit for human consumption. As such, the United States' narrow reading of the *Winters* Doctrine should be rejected,

---

[5] *Available at* http://opensiuc.lib.siu.edu/jcwre/vol107/iss1/10/ (last visited June 12, 2014).

particularly in the context of the motion to dismiss, where all inferences are to be made in favor of the Hopi Tribe. *Pixton v. B&B Plastics, Inc.*, 291 F.3d 1324, 1326 (Fed. Cir. 2002); *Travelers Indem. Co. v. United States*, 72 Fed. Cl. 56, 59 (2006); *Hamlet v. United States*, 873 F.2d 1414, 1416 (Fed. Cir. 1989).

C. The United States' Attempt to Align this Case with *Mitchell I* and *Navajo I* and *II* Must Be Rejected.

Unlike in *White Mountain*, where the Court found that the Government's daily supervision, occupation, and control of the trust property gave rise to the fiduciary duty to rehabilitate it, the Court in *Mitchell I*, and the *Navajo Nation* cases found that the passive role played by the United States with respect to the trust property was insufficient to give rise to jurisdiction under the Indian Tucker Act. In each of those cases, the underlying statute gave the *plaintiff*, not the Government, the right and authority to make decisions about the trust property. Those underlying statutes were not read "as authorizing, much less requiring" the Government to undertake any particular duties with respect to the resource at issue. *Mitchell I*, 445 U.S. at 545. The United States' strained efforts to align this case with *Mitchell I*, *Navajo I*, and *Navajo II*, Opp. at 22-24, should be rejected.

Mitchell I is unavailing to the United States. The Court in *Mitchell I* analyzed the General Allotment Act, which provided that the United States would hold certain land "in trust for the sole use and benefit of the Indian to whom such allotment shall have been made." 445 U.S. at 541 (quoting 25 U.S.C. § 348). The Court considered the purpose of the trust provision in the General Allotment Act, and found that Congress "simply . . . wished to prevent alienation of the land and to ensure that allottees would be immune from the state taxation." *Id.* at 544. All decisions regarding the use of the trust property were left to the allottee. Thus, the Court found jurisdiction lacking largely because the act "removed a standard element of a trust relationship by making 'the Indian allottee, and not a representative of the United States, . . . responsible for using the land for agricultural or grazing purposes.'" *United States v. Navajo Nation*, 537 U.S. 488, 504 (2003) ("*Navajo I*") (describing *Mitchell I*, 445 U.S. at 542-43).

When the Court reconsidered the jurisdictional question in *Mitchell II*, however, it found that the network of statutes, regulations, and government actions controlling timber resources on the allotment lands gave "the Federal Government full responsibility to manage

Indian resources and land for the benefit of the Indians," and thus provided sufficient contour to the trust relationship to confer jurisdiction. *Navajo I*, 537 U.S. at 505 (describing *Mitchell II*).

The *Navajo Nation* cases, 537 U.S. 488 (2003) and 556 U.S. 287 (2009), likewise do not support the United States' position here. In those cases the statute at issue, the Indian Mineral Leasing Act ("IMLA"), gave the "Tribes, not the Government, the lead role in negotiating mining leases with third parties," and gave the United States "only the power to approve coal leases already negotiated by the Tribes." *Navajo II*, 556 U.S. at 293; *see also Navajo I*, 537 U.S. 488, 508 (2003) ("The IMLA aims to enhance tribal self–determination by giving Tribes, not the Government, the lead role in negotiating mining leases with third parties."). The United States had the limited passive role of reviewing and approving the leases already negotiated by the tribes. The Navajo Nation argued that the United States owed damages to compensate for the difference between the price of coal negotiated by the Navajo Nation and what the United States allegedly knew the coal was worth. But the Court found that the IMLA set only a minimum royalty of ten cents per ton, and so the United States' approval of the

Navajo Nation's lease containing a royalty rate of 12.5 cents per ton could not constitute a breach of duty. *Navajo I*, 537 U.S. at 510-11.

The *Navajo Nation* cases are readily distinguishable from this situation because here the Government, not the Tribe, took the lead role in designing, installing, owning and operating the wells.

II. The United States' Control and Supervision of the Trust Property Pursuant to a Network of Statutes and Regulations Is Relevant.

The United States does not dispute that it designed, constructed, installed, managed, owned, and operated the drinking water systems that are now contaminated with arsenic, or that the United States has declared it illegal for the Hopi Villages to provide this water to its people. Rather, the United States argues that its actions are irrelevant, Opp. at 48-51, or that "the particular actions on which the Tribe relies provide no sound basis" for defining the United States' fiduciary duties, Opp. at 51-56. The United States is wrong on both points.

A. Control and Supervision Is Relevant.

Contrary to the United States' assertions, control and supervision of a trust resource is relevant in defining the scope of the fiduciary duty of the United States. Indeed, the Federal Circuit has recognized that "control or supervision" over a trust resource is relevant and can be

sufficient to confer jurisdiction under the Indian Tucker Act. *Mitchell II*, 463 U.S. at 225.

The United States also wrongly argues that the Court should apply a test out of step with *Mitchell II* and its progeny. *See* Opp. at 28-29 (arguing that "the use of water on Indian land is not subject to *extensive daily supervision and pervasive control* by the government") (emphasis added) & 34 (distinguishing *Mitchell II* on the basis that the statutes and regulations there "required the government to exercise *literally daily supervision* over timber harvesting and management) (emphasis added). In *Brown v. United States*, the Court held that something less than complete control is sufficient to find jurisdiction under the Indian Tucker Act, explaining that the Supreme Court did not qualify "'control or supervision' with modifiers such as 'significant,' 'comprehensive,' 'pervasive,' or 'elaborate.' Nor did the Court anywhere suggest that the assumption of either control or supervision alone was insufficient to give rise to an enforceable fiduciary duty." 86 F.3d 1554, 1561 (Fed. Cir. 1996). The Court reversed the Court of Claims dismissal because it "impos[ed] a more restrictive test for the existence

of a fiduciary duty than was established by *Mitchell II*." *Id.* at 1561. The Court found it

> would run afoul of both the plain terms of the Court's test and the general trust relationship that informs that test were we, like the trial court, to further restrict the 'control or supervision' test by recasting it as a 'comprehensive management responsibility or elaborate control' test.

Id.

Using control or supervision as a basis for jurisdiction is also consistent with *White Mountain* and *Fort Mojave*. As discussed above, in *White Mountain*, the Supreme Court found it significant that the United States made actual use of the trust property. The Court specifically stated that the United States "has enjoyed daily occupation, and so has obtained control at least as plenary as its authority over the timber in *Mitchell II*." 537 U.S. at 475. The Court concluded, "a fiduciary *actually administering trust property* may not allow it to fall into ruin on his watch." *Id.* (emphasis added). The United States' attempt to distinguish *White Mountain* by focusing on the statement in the underlying act authorizing the United States to make use of the property and completely ignoring the Court's consideration of the actions of the United States, Opp. at 49, must be rejected. *See supra*

11; *see also El Paso Nat. Gas*, --- F.3d ---, 2014 WL 1328164 at *31 (discussing *White Mountain* and stating that while an express right of governmental use is not always necessary to find a cause of action for breach of trust, "governmental use *may be relevant* when a statutory reference to 'trust' does not indicate whether Congress intended to establish specific fiduciary duties or a 'bare trust' instead") (emphasis added)).

The Court of Claims has likewise recognized that the United States' actions can inform the scope of its trust duty. In *Fort Mojave*, the court found that the United States was subject to jurisdiction where it inadequately represented the tribe's water rights. The court recognized that the tribes "do not fault defendant for refusing to represent plaintiffs' interests in *Arizona I*, but rather for *choosing* to represent their interests and then doing so inadequately," 23 Cl. Ct. at 426-27 (emphasis added). The court thus rejected the United States' argument that its actions were "totally discretionary" and thus "could not give rise to a breach of trust action." *Id.* at 426. Even where the United States has discretion when to act, "it does not follow that the government is free from accountability for its actions." *Id.* The United

States' attempt to distinguish *Fort Mojave* based on the substance of the underlying claim misses the point that the United States' actions are relevant in defining the scope of its fiduciary obligations.

B. The Fiduciary Duty Alleged by the Hopi Tribe in Its Complaint Is Consistent with the United States' Actions.

The United States argues that there is only "bare 'in trust' statutory language and a few examples of limited federal activities involving a resource" here. Opp. at 36. As shown in the Hopi Tribe's Opening Brief, however, the United States has been involved in nearly every aspect of the trust resource, and exercised control and supervision over the particular wells and drinking water systems at issue. Br. 8-13. Moreover, the United States designed these systems to tap into the arsenic–rich portion of the aquifer, handed them over to the Hopi Villages, and then declared that serving water from them is illegal. The United States thus has been intimately involved each step of the way in creating the damages and problem facing the Hopi Tribe.

The Hopi Tribe has shown at least the requisite level of control and supervision over the groundwater resources to require reversal of the Court of Claims' dismissal of the Tribe's complaint in this action. To the extent there is any lingering question, jurisdictional discovery is

appropriate to ascertain the precise scope of control or supervision that the United States has exercised over this tribal resource. The full scope of the authorities used by the United States to design, install, own, and operate these water systems is unknown, as no discovery has yet occurred. *See infra* 32-33.

C. The Trust Obligation Asserted by the Hopi Tribe Is Consistent with Congress' Understanding.

The United States misunderstands the use of the statutes cited in the Hopi Tribe's Opening Brief, Br. at 50-52. This network of statutes clearly establishes that the Government exerts comprehensive control over the Hopi Tribe's water resources, necessarily resulting in a fiduciary relationship as contemplated by the Supreme Court in *Mitchell II*. 463 U.S. at 225 ("[A] fiduciary relationship necessarily arises when the Government assumes such elaborate control over . . . property belonging to Indians."). Contrary to the United States' suggestion, the Hopi Tribe does not rely on these statues as the source of substantive law listing specific duties that the government failed to perform. The Hopi Tribe has highlighted these statutes to demonstrate that all the actions taken by the various governmental agencies to provide the Hopi Tribe with drinking water are consistent with, and

have been taken pursuant to, congressional authorization, and are consistent with Congress' understanding of the scope of the trust relationship between the United States and the Hopi Tribe. *Fletcher v. United States*, 730 F.3d 1206, 1210 (10th Cir. 2012) (the Supreme Court has "said we *may* refer to traditional trust principles when those principles are consistent with the statute and help illuminate its meaning" (original emphasis) (relying on *United States v. Jicarilla Apache Nation*, 131 S. Ct. 2313, 2325 (2011)).

For example, Congress has stated that it is "the policy of the United States, that all Indian communities and Indian homes, new and existing, be provided with safe and adequate water supply systems," 25 U.S.C. § 1632(a)(5). This policy statement provides a backdrop for the fiduciary relationship between the United States and the Indian People concerning the supply of safe drinking water. Elsewhere, Congress has broadly defined the United States' trust obligations to include "[a]pproporiately managing the natural resources located within the boundaries of Indian reservations and trust land." 25 U.S.C. § 162a(d)(8).

The United States cites *Blackfeet Housing v. United States*, 106 Fed. Cl. 142, 151-52 (Fed. Cl. 2012) *aff'd*, 521 F. App'x 925 (Fed. Cir. 2013), for the proposition that a policy goal in a congressional finding does not equate to the "specific prescription" required to meet the first jurisdictional step of the Indian Tucker Act analysis. Opp. at 41. But the court in *Blackfeet Housing* simply found that a congressional statement in the preamble to the Native American Housing Assistance and Self–Determination Act did not establish a trust relationship sufficient to confer jurisdiction. 106 Fed. Cl. at 150. The underlying statute in *Blackfeet Housing* is unlike the Act of 1958, which unequivocally states that the lands comprising the Hopi Reservation be held "in trust" by the United States—not as part of a policy statement, but in the statute itself.

Moreover, the United States' marginalization of Congress' clear statements of its policy goals in framing the trust relationship is out of step with *Jicarilla*, where the Supreme Court recognized that the Government often structures the trust relationship to further its own policy goals, which can be contemplated in determining the scope of the trust relationship. 131 S. Ct. at 2324.

Consistent with the articulated policy of the United States, Congress has empowered Government agencies to construct, improve, extend, provide and maintain "essential sanitation facilities, including domestic and community water supplies and facilities . . . for Indian homes, communities and lands," 42 U.S.C. § 2004a(a)(1),[6] 25 U.S.C. § 13, and to take actions on the Hopi and Navajo Reservations, including setting aside appropriations to develop domestic water supply, 25 U.S.C. §§ 631, 638.[7] The Indian Health Care Improvement Act likewise provides that IHS "shall provide health promotion and disease prevention services to Indians," 25 U.S.C. § 1621b, which includes "making available safe water and sanitary facilities," 25 U.S.C. § 1603(11)(D).

---

[6] In fact, documentation discovered by the Hopi Tribe to date indicates that Polacca Wells #5 and #6 were constructed pursuant to this authority by the U.S. Public Health Service. *See* A120, A126.

[7] The United States also argues that the Navajo-Hopi Rehabilitation Act of 1950 is irrelevant because the funds authorized therein have expired. Opp. at 45. However, "the jurisdictional foundation of the Tucker Act is not limited by the appropriation status of the agency's funds or the source of funds by which any judgment may be paid." *Slattery v. United States*, 635 F.3d 1298, 1321 (Fed. Cir. 2011).

As a whole, this network of statutes provides context and understanding of the United States' actions controlling and supervising administration of the Hopi trust resource.

III. Request for Jurisdictional Discovery

The Hopi Tribe believes it has established its entitlement to a "fair day in court so that [it] can call the various Government agencies to account on the obligations that the Federal government assumed," *Mitchell II,* 463 U.S. at 214, and "offer evidence to support the claims" it has raised, *Carrington v. United States,* 106 Fed. Cl. 129, 132 (2012). In the event there is any question, however, the Tribe requests remand for discovery so that the Tribe may learn the full extent of the United States' activities and the authorities pursuant to which those actions were taken. Thus far, the United States has refused to acknowledge its role in creating the problem and damaging the Tribe.

The United States only alludes to its role in the closing pages of its brief. Opp. at 48-49, 51-56. The United States attempts to marginalize its actions by characterizing them as "a few examples of limited federal activities involving a resource," Opp. at 36, and focusing on the Hopi Villages' ownership of four of the five public water systems

at issue, Opp. at 52. The United States refuses to acknowledge that *it* owned and operated these systems before turning them over to the Villages. The United States asks the Court for a complete walk–away from the harm it imposed on the Hopi Tribe. In short, the United States would like to leave contaminated drinking water wells to the Hopi people whose only access to water is through those wells.

Discovery would further illuminate the United States' control and supervision over the Hopi Tribe's water resources. Discovery may also reveal duties of the United States appearing in contracts or other agreements that additionally give rise to jurisdiction under the Indian Tucker Act. *See Oglala Sioux Tribe of Pine Ridge Indian Reservation v. United States*, 21 Cl. Ct. 176, 192 (1990) (finding that agreements between the United States and the tribe defined fiduciary obligations to provide jurisdiction under the Indian Tucker Act). The Tribe has not yet had the advantage of those documents, as the United States designated itself as the record–keeper for the wells and water systems in question before they were turned over to the Hopi Villages. As such, jurisdictional discovery is particularly appropriate in this case.

CONCLUSION

For the reasons shown in the Tribe's Opening Brief and herein, the Tribe requests reversal of the decision to dismiss its complaint for lack of jurisdiction and remand to the Court of Claims for further proceedings.

Dated: June 16, 2014 Respectfully submitted,

/s/ Michael D. Goodstein

Michael D. Goodstein

HUNSUCKER GOODSTEIN PC
5335 Wisconsin Avenue, NW
Suite 360
Washington, DC 20015
(202)895-5380 (ph)
(202)895-5390 (fax)
mgoodstein@hgnlaw.com

Attorneys for Plaintiff/Appellant
The Hopi Tribe

CERTIFICATE OF SERVICE

I hereby certify that on June 16, 2014, I electronically filed the foregoing with the Clerk of the Court for the United States Court of Appeals for the Federal Circuit by using the CM/ECF system. I certify that all participants in the case are registered CM/ECF users and that service will be accomplished by the CM/ECF system and electronic mail.

/s/ Michael D. Goodstein

CERTIFICATE OF COMPLIANCE WITH TYPE-VOLUME LIMITATION, TYPEFACE REQUIREMENTS, AND TYPE STYLE REQUIREMENTS

1. This brief complies with the type-volume limitation of Federal Rule of Appellate Procedure 32(a)(7)(B) or Federal Rule of Appellate Procedure 28.1(e).

   □ The brief contains 6983 words, excluding the parts of the brief exempted by Federal Rule of Appellate Procedure 32(a)(7)(B)(iii).

2. This brief complies with the typeface requirements of Federal Rule of Appellate Procedure 32(a)(5) or Federal Rule of Appellate Procedure 28.1(e) and the type style requirements of Federal Rule of Appellate Procedure 32(a)(6).

   □ The brief has been prepared in a proportionally spaced typeface using Microsoft Word 2010 in Century, 14 point font.

/s/ Michael D. Goodstein
(Signature of Attorney)

Michael D. Goodstein
Attorney for Plaintiff/Appellant

June 16, 2014