No. 19-17088

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

NAVAJO NATION,
Plaintiff/Appellant,

v.

DEPARTMENT OF THE INTERIOR; DAVID BERNHARDT, Secretary of the Interior; BUREAU OF RECLAMATION; and BUREAU OF INDIAN AFFAIRS,
Defendants/Appellees,

and

STATE OF ARIZONA, et al.,
Intervenor-Defendants/Appellees.

Appeal from the United States District Court for the District of Arizona
No. 3:03-cv-507-GMS (Hon. G. Murray Snow)

ANSWERING BRIEF FOR FEDERAL APPELLEES

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GLOSSARY

a.f.y.	acre-feet per year
APA	Administrative Procedure Act
AWSA	Arizona Water Settlements Act of 2004
Basin Act	Colorado Basin Project Act of 1968
CAP	Central Arizona Project
E.R.	Excerpts of Record
Interior	U.S. Department of the Interior
Nation	Navajo Nation
NCAI	National Congress of American Indians
NEPA	National Environmental Policy Act
Reclamation	U.S. Bureau of Reclamation
Reservation	Navajo Reservation
S.E.R.	Supplemental Excerpts of Record

INTRODUCTION

The Navajo Nation ("Nation") seeks injunctive relief against the U.S. Department of the Interior and its officers and agencies (collectively, "Interior") for breaching fiduciary obligations allegedly owed to the Nation. The alleged obligations would require Interior to determine the water needs of the Navajo Reservation ("Reservation") from the Colorado River mainstream and to take actions to develop water on the Reservation to meet those needs. The Nation cites no treaty, statute, regulation, or executive order as the source of these duties. Rather, the Nation asks this Court to declare such duties as a matter of federal common law, based on the United States' ownership of land and water in trust for the Nation.

This is the Nation's second appeal in an action initiated primarily under the National Environmental Policy Act ("NEPA"). In 2001 and 2007, Interior's Bureau of Reclamation ("Reclamation") adopted guidelines for declaring "surplus" and "shortage" conditions within federal storage reservoirs on the Colorado River. Those guidelines determine the availability of water for release annually to federal contract users. The Nation alleged that Reclamation's environmental impact statements for the guidelines failed to consider Navajo water rights. The Nation also alleged that Interior breached a common-law trust duty to the Nation by operating the federal dams and reservoirs without considering Navajo water rights.

The district court dismissed the NEPA claims for lack of standing, and it dismissed the breach-of-trust claim due to the Nation's failure to challenge any "final agency action" under the Administrative Procedure Act ("APA"), 5 U.S.C. § 704.

In the first appeal, this Court affirmed the district court's dismissal of the NEPA claims. *Navajo Nation v. Department of Interior*, 876 F.3d 1144, 1160-67 (9th Cir. 2017). But this Court reversed the dismissal of the breach-of-trust claim, holding that the Nation need not challenge final agency action to invoke the APA's waiver of sovereign immunity, 5 U.S.C. § 702. *Id.* at 1167-74. This Court remanded for the district court to consider the breach-of-trust claim "on its merits, after entertaining any request to amend it." *Id.* at 1174. After considering and denying two motions by the Nation to file a third amended complaint, the district court again dismissed the action. The court held that the proposed amendments would be futile because the Nation failed to identify any treaty, statute, or other source of positive law for the alleged trust duties cited in the proposed complaints. For reasons stated herein, the district court's judgment should be affirmed.

STATEMENT OF JURISDICTION

(a) The district court had subject matter jurisdiction under 28 U.S.C. § 1331 and § 1362, because Plaintiff Navajo Nation asserted a claim for breach of trust under federal common law and treaties, and because the Nation is an Indian

tribe with a governing body duly recognized by the Secretary of the Interior. 1 Excerpts of Record ("E.R.") 73-77.

(b) The district court's judgment was final because it disposed of all claims against all defendants. 1 E.R. 1. This Court has jurisdiction under 28 U.S.C. § 1291.

(c) The judgment was entered on August 23, 2019. 1 E.R. 1. The Nation filed its notice of appeal on October 18, 2019, or 56 days later. 2 E.R. 14-15. The appeal is timely under Federal Rule of Appellate Procedure 4(a)(1)(B)(iii).

STATEMENT OF THE ISSUE

Did the district court correctly deny the Nation's motion for leave to file a third amended complaint with a new a breach-of-trust claim, given the Nation's failure to identify any treaty, statute, or other source of positive law establishing a fiduciary duty that may be enforced in an action for injunctive relief?

PERTINENT STATUTES AND REGULATIONS

All pertinent statutes and regulations are set forth in the Addendum following this brief.

STATEMENT OF THE CASE

A. Navajo Nation's water rights

1. Navajo Reservation

In 1849, the Navajo Nation signed a treaty of peace with the United States, acknowledging the Nation to be "under the exclusive jurisdiction and protection of

the United States." *Navajo Nation v. U.S. Department of Interior*, 819 F.3d 1084, 1087 (9th Cir. 2016). In 1868, the parties entered a further treaty, setting aside lands to be the Nation's "permanent home." *Warren Trading Post v. Arizona State Tax Commission*, 380 U.S. 685, 686 (1965) (quoting treaty). The United States expanded the Navajo Reservation through subsequent Acts of Congress and executive orders. *Navajo Nation*, 876 F.3d at 1152. The Reservation is the largest Indian reservation in the United States, covering more than 17 million acres in northeastern Arizona, southern Utah, and northwestern New Mexico; most of the Reservation lies within the Colorado River basin. 2 E.R. 32 (¶14) (complaint).

The Colorado River mainstream flows along the northwestern border of the Reservation. *Navajo Nation*, 876 F.3d at 1152; *see also* Final EIS, Colorado River Interim Guidelines for Lower Basin Shortages and Coordinated Operations for Lake Powell and Lake Mead at 3-7 (Oct. 2007), https://www.usbr.gov/lc/region/programs/strategies/FEIS/Chp3.pdf. This stretch of the river flows through deep and narrow canyons upstream from the Grand Canyon. *Id.* at 3-7, 3-20. There are no present water diversions for irrigation or other uses along this reach. *See id.* at 3-7, 3-112. Most of the Reservation lies within the drainages of two Colorado

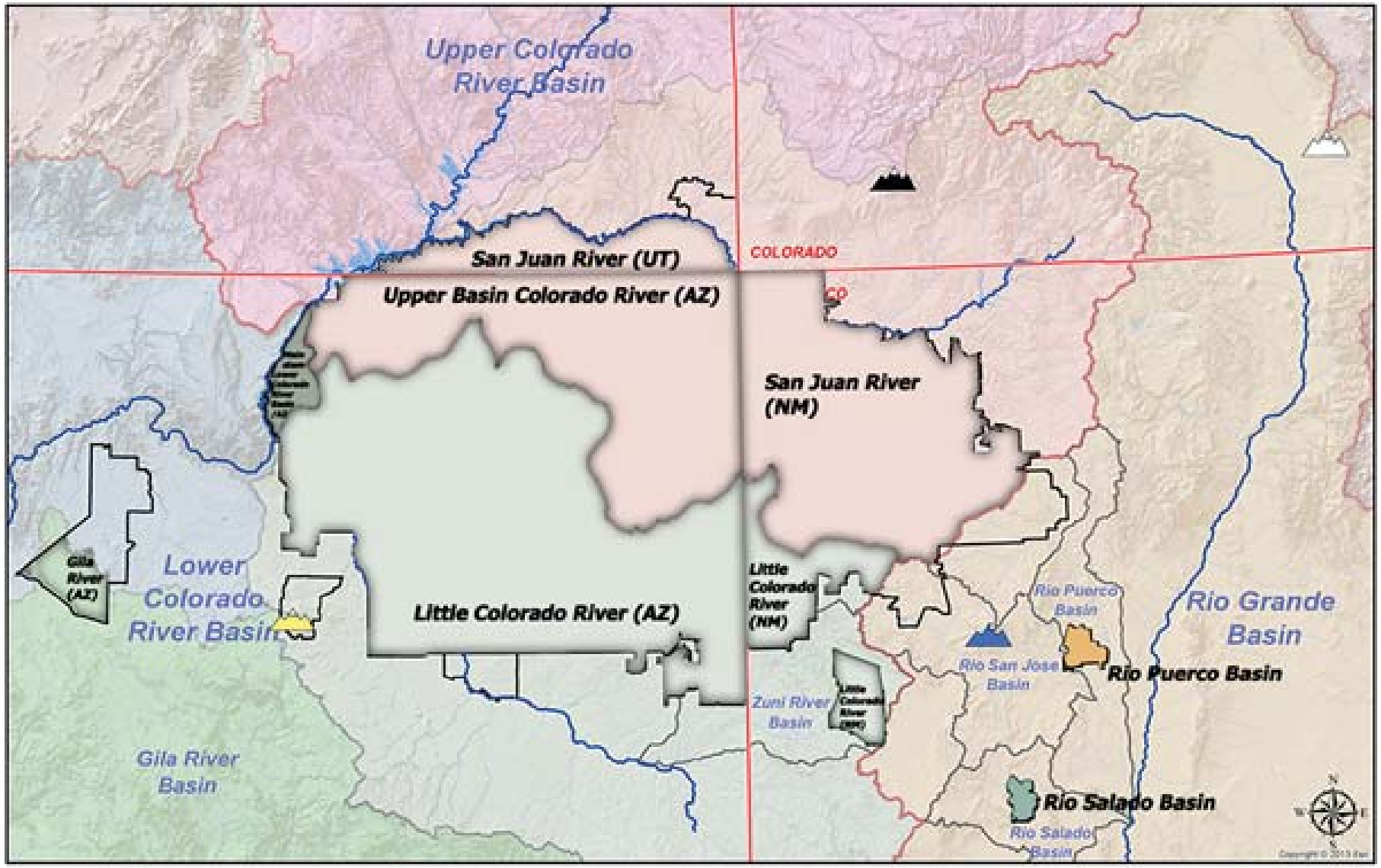
River tributaries: (1) the San Juan River; and (2) the Little Colorado River. The map on the following page depicts the Reservation's watersheds by state.[1]

2. *Winters* rights

Under the law of most western states, the doctrine of prior appropriation governs rights to use water from a river system for agricultural, municipal, or other purposes. *Navajo Nation*, 876 F.3d at 1155 n.11. Under this doctrine, the first person to divert and beneficially use water from a particular source obtains a priority of right over all subsequently developed uses from the same source. *Cappaert v. United States*, 426 U.S. 128, 139 n.5 (1976).

This rule is subject to an important exception: under federal law, the establishment of an Indian Reservation, national forest, national wildlife refuge, or similar area impliedly "reserves appurtenant water then unappropriated to the extent needed to accomplish the purpose of the reservation." *Id.* at 139 (citing *Winters v. United States*, 207 U.S. 564, 576-77 (1908)). This implied reservation of water rights includes all necessary surface flows and groundwater. *Agua Caliente Band of Cahuilla Indians v. Coachella Valley Water District*, 849 F.3d 1262, 1270-72 (9th Cir.), *cert. denied*, 138 S. Ct. 469 (2017). These federal

[1] The map is from the website of the Navajo Nation Water Rights Commission, https://www.nnwrc.navajo-nsn.gov/. As shown on the map, some Navajo lands east of the main reservation are within the Rio Grande River basin, while other Navajo lands west of the main reservation are within the Gila River basin.



reserved (or "*Winters*") rights vest "no later than" the date that the reservation is created, are not lost by nonuse, and are "superior in right to all subsequent appropriations under state law." *Arizona v. San Carlos Apache Tribe*, 463 U.S. 545, 574 (1983).

3. General adjudications

In 1952, Congress enacted the "McCarran Amendment," which waives federal sovereign immunity and grants consent to join the United States in state-court "adjudication[s] of rights to the use of a river system or other source." 43 U.S.C. § 666(a). This waiver authorizes state courts to determine federal water rights—including rights impliedly reserved for Indian reservations—as part of comprehensive proceedings to determine all rights in a specified river system or source. *Colorado River Water Conservation District v. United States*, 424 U.S. 800, 809-13 (1976). With respect to interstate river systems, the waiver authorizes the adjudication of all water rights "within the particular State's jurisdiction." *United States v. District Court in & for Eagle County*, 401 U.S. 520, 523 (1971).

The Colorado River flows for approximately 1,300 miles from the Colorado Rockies, through the southwestern United States, and finally into Mexico, where it empties into the Sea of Cortez. *Arizona v. California*, 373 U.S. 546, 552 (1963); *Navajo Nation*, 876 F.3d at 1152. The river and its tributaries drain approximately 242,000 square miles in seven basin states: Wyoming, Colorado, Utah, Nevada,

New Mexico, Arizona, and California. *Arizona*, 373 U.S. 552; *see also* Supplemental Excerpts of Record ("S.E.R.") 19-20 (maps).

No McCarran Amendment adjudication has comprehensively determined water rights on the Colorado River mainstream. Instead, rights to divert from the mainstream have largely been determined through an interstate compact, federal statutes, and an original Supreme Court action commonly and collectively known as the "Law of the River." *See Navajo Nation*, 876 F.3d at 1153-55; *see also infra* pp. 10-16. But McCarran Amendment adjudications have been initiated on the two principal tributaries to the Colorado River that flow through the Navajo Reservation.

a. San Juan River (New Mexico)

The San Juan River flows westerly across northwestern New Mexico to Utah, where it joins the Colorado River at Lake Powell, a reservoir formed by the Glen Canyon Dam. *See* S.E.R. 19 (map). The river runs along most of the northern boundary of the Navajo Reservation. *See State ex rel. State Engineer v. United States*, 425 P.3d 723, 727 (N.M. Ct. App. 2018). In 1962, Congress authorized construction of the Navajo Indian Irrigation Project, to divert an average of 508,000 acre feet per year ("a.f.y.") from the San Juan River in New Mexico, for the irrigation of 110,630 acres of Navajo land in New Mexico. Pub. L. No. 87-483, § 2, 76 Stat. 96 (1962).

In 1975, the State of New Mexico initiated a general stream adjudication to determine the rights of the Nation and all other claimants on the San Juan River in New Mexico. *See State Engineer*, 425 P.3d at 727-28, 736 n.9. In that action, the United States and the Nation asserted *Winters* rights and other claims for the Navajo Reservation and Navajo Indian Irrigation Project. *Id.* at 728. In 2009, Congress authorized a settlement of the Nation's claims in that adjudication. *Id.*; *see also* Pub. L. No. 111-11, §§ 10302(7), 10302(27), 10701, 123 Stat. 991, 1368, 1370, 1396-1401. The settlement was recently approved in state court, *see State Engineer*, 425 P.3d at 729-38, although the approval decision remains under review by the New Mexico Supreme Court, *see New Mexico v. United States*, No. S-1-SC-37068 (Aug. 13, 2018) (order granting review).

b. San Juan River (Utah)

The Nation's water rights in Utah (all within the San Juan River basin) are part of the Southeastern Colorado River Adjudication, No. 810704477 (Utah 7th Jud. Dist.); *see* https://waterrights.utah.gov/adjstatus/default.asp, and are the subject of a settlement currently being considered by Congress. *See* S. 1207, 116th Cong. (2019); H.R. 644, 116th Cong. (2019) (proposed "Navajo Utah Water Rights Settlement Act"). The proposed settlement and authorizing legislation would recognize a federal reserved water right of 81,500 a.f.y. for the Utah portion of the Reservation and specified Indian allotments, and it would authorize nearly

$200 million in appropriations for water development projects. *See* S. 1207, §§ 5(a), 7(a)(1), 116th Cong. (2019); *see also* S. Rep. No. 116-79, at 4-5 (2019).

c. Little Colorado River (Arizona)

The Little Colorado River flows westerly from the White Mountains of eastern Arizona, through northeastern Arizona and the Navajo Reservation, before joining the Colorado River just east of the Grand Canyon. *See* S.E.R. 19 (map). Roughly half of Navajo Reservation is within the Little Colorado River basin. *See supra* p. 6. In 1979, the State of Arizona initiated a general adjudication to determine all water rights in the Little Colorado River. *See In re General Adjudication of All Rights to Use Water in Gila River System & Source*, 289 P.3d 936, 939 (Ariz. 2012). The adjudication includes federal reserved rights in surface flows and in basin groundwater. *See generally In re General Adjudication of All Rights to Use Water in the Gila River System and Source*, 989 P.2d 739, 745-49 (Ariz. 1995) (reserved rights extend to groundwater). The United States and the Nation asserted *Winters* and other water rights claims in the adjudication. *See Navajo Nation*, 876 F.3d at 1156 n.14. Those claims remain in active litigation. *Id.*; *see also* http://www.superiorcourt.maricopa.gov/SuperiorCourt/GeneralStreamAdjudication/littleColorado.asp.

B. Law of the River

1. Colorado River Compact

Much of the land area in the Colorado River Basin is arid and made productive only through the managed use of the waters from the Colorado River system. *Navajo Nation*, 876 F.3d at 1152-53. Congress began efforts to develop waters from the mainstream in the early 20th Century. The first proposed federal project was a large dam and storage reservoir on the Nevada-Arizona border and an "All-American Canal" to divert water from a point downstream to California's Imperial Valley. *See Arizona*, 373 U.S. at 553-56. In view of the "phenomenal growth" then occurring in southern California, the other basin states developed "strong fears" that this proposal would enable California to appropriate a lion's share of Colorado River water before the other states had an opportunity to develop their own water uses. *Id.* at 556.

To allay such fears, Congress authorized the basin states to enter into an interstate compact to equitably apportion Colorado River flows prior to federal development of water projects. *Id.* at 557. In 1922, representatives of the basin states concluded the Colorado River Compact, which partially apportioned river flows by dividing the river into upper and lower basins, 2 E.R. 134, and by allocating to each basin the "beneficial consumptive use" of 7,500,000 a.f.y., 2 E.R. 134-137. The basin divide is topographical and not along state boundaries,

but it generally separates Wyoming, Utah, Colorado, and New Mexico ("Upper Basin") from California, Nevada, and Arizona ("Lower Basin"). 2 E.R. 134; *see also* S.E.R. 19-20 (maps). The Navajo Reservation straddles the divide. *See supra* p. 6 (map). The Compact apportioned Colorado River water subject to "present perfected rights," including any preexisting federal reserved rights for Indian tribes. 2 E.R. 136.

2. Boulder Canyon Project Act

The basin states were unable to agree in the Colorado River Compact on individual state allocations. *Arizona*, 373 U.S. at 557-58. Arizona ultimately declined to ratify the compact, due to a dispute over whether Colorado River tributaries in Arizona would count against the Lower Basin's 7,500,000 a.f.y. apportionment. *Id.* at 558. To break the impasse, Congress enacted the Boulder Canyon Project Act of 1928, which enabled the compact to take effect without Arizona's agreement upon the ratification of the six other basin states and upon California's enactment of legislation to permanently limit its use of Colorado River water to 4,400,000 a.f.y., plus half of any surplus (i.e., flows into the Lower Basin above 7,500,000 a.f.y.). *Arizona*, 373 U.S. at 560-61; *Navajo Nation*, 876 F.3d at 1154. Subject to such ratification, the act authorized Reclamation to construct what is now Hoover Dam and Lake Mead (as well as the "All-American Canal"). 43 U.S.C. §§ 617, 617c; *see also Arizona*, 373 U.S. at 560-61.

Lake Mead is on the Colorado River downstream from the Navajo Reservation and the Grand Canyon. *See* S.E.R. 20 (map); *see also supra* p. 6 (map). The Boulder Canyon Project Act authorized Reclamation to contract for the delivery of water stored in Lake Mead, 43 U.S.C. § 617d, and to use the dam and reservoir for "irrigation and domestic uses and satisfaction of present perfected rights," *id.* § 617e. Reclamation entered water storage and delivery contracts with several California water districts and with the States of Nevada and Arizona. *Arizona*, 373 U.S. at 562.

3. *Arizona v. California*

California and Arizona continued to disagree over whether Arizona's Colorado River tributaries were included within Arizona's apportionment under the Boulder Canyon Project Act. *See Arizona*, 373 U.S. at 563-64, 573-75. This ongoing uncertainty forestalled plans for the Central Arizona Project ("CAP"), a then-proposed federal project to deliver Colorado River water for beneficial use throughout central Arizona. *See Arizona v. California*, 460 U.S. 603, 647 (1983) (Brennan, J., concurring in part and dissenting in part).

In 1952, Arizona brought an original action in the U.S. Supreme Court against California to obtain a declaration of the States' respective rights in the Colorado River system. *Arizona*, 373 U.S. at 551. Nevada, New Mexico, and Utah intervened. *Id.* The United States intervened to assert federal interests,

including federal reserved rights for 19 Indian reservations and for other federal lands. *Id.* at 551, 595. The United States claimed water rights in the Colorado River mainstream on behalf of five Indian reservations: Chemehuevi, Cocopah, Yuma, Colorado River, and Fort Mohave. *Id.* at 596 & n.97. For the Navajo Reservation and other Indian reservations, the United States claimed water rights in Colorado River tributaries. *See Navajo Nation*, 876 F.3d at 1156, n.13.

The Supreme Court entered final judgment in 1963, upon review of a special master's factual findings and legal conclusions. *Arizona*, 373 U.S. at 551-52. The Court held that the "first 7,500,000" a.f.y. to enter the Lower Basin is to be divided as provided in the Boulder Canyon Project Act, namely: (a) 4,400,000 a.f.y. to California; (b) 2,800,000 a.f.y. to Arizona; and (c) 300,000 a.f.y. to Nevada, *id.* at 565-66, and that Lower Basin tributaries are *not* included within this apportionment, *id.* at 567-75. This leaves Arizona with exclusive rights to its tributaries (subject to federal reserved rights) in addition to its mainstream apportionment. *Id.* The Court held that the Boulder Canyon Project Act and other statutes authorize Interior to "allocate and distribute the waters of the mainstream of the Colorado River" consistent with the Court's judgment. *Id.* at 590.

As for the United States' claims, the Court affirmed the master's determination of the federal reserved water rights for the five Indian reservations and other federal lands along the Colorado River main stream. *Id.* at 595-601. The

Court held that the Indian reserved rights were "present perfected rights" in 1929 when the Boulder Canyon Project Act took effect and were "entitled to priority" under the Act. *Id.* at 600. The Court held that "all uses of mainstream water within a State," including uses under federal reserved rights, "are to be charged against that State's apportionment." *Id.* at 601. The Court summarily affirmed the master's decision not to address the United States' rights to divert water from Colorado River tributaries, including rights claimed for the Navajo Reservation. *Id.* at 595; *see also Navajo Nation*, 876 F.3d at 1156 & n.13.

In 1964, the Supreme Court issued a decree to implement its judgment. *Arizona v. California*, 376 U.S. 340 (1964). The decree states that it "shall not affect" the "rights or priorities . . . of any Indian Reservation" "except as specific provision is made herein." *Id.* at 353. The Court retained jurisdiction "for the purpose of any order, direction, or modification of the decree, or any supplementary decree, that may at any time be deemed proper in relation to the subject matter in controversy." *Id.*; *see also Arizona v. California*, 547 U.S. 150, 151-52 (2006) (subsequent history).

4. Other Projects and Authorities

In 1956, Congress enacted the Colorado River Storage Act, which authorized the construction of additional dams and storage reservoirs on the River, including the Glen Canyon Dam and Lake Powell. *Grand Canyon Trust v. U.S.*

Bureau of Reclamation, 691 F.3d 1008, 1013 (9th Cir. 2012). In 1968, Congress enacted the Colorado Basin Project Act ("Basin Act") to provide for the "further comprehensive development of the water resources of the Colorado River Basin." Pub. L. No. 90-537, § 102, 82 Stat. 885, 886 (1968) (codified at 43 U.S.C. § 1501).

The Basin Act authorized construction of the CAP, which now diverts most of Arizona's apportionment from the Colorado River mainstream. *Navajo Nation*, 876 F.3d at 1165 & n.27. The CAP consists of an extensive canal system that diverts water from Lake Havasu (downstream from Lake Mead) to municipalities, irrigation districts, and Indian tribes in central Arizona. *See* 43 U.S.C. § 1521; *Maricopa-Stanfield Irrigation & Drainage District v. United States*, 158 F.3d 428, 431 (9th Cir. 1998); *see also* S.E.R. 20 (map). Reclamation delivers CAP water pursuant to allocations determined under the 1968 Act, later enactments, and related authorities. *See* 71 Fed. Reg. 50,449, 50,450-51 (Aug. 25, 2006).

In 2004, Congress enacted the Arizona Water Settlements Act ("AWSA"), Pub L. No. 108-451, 118 Stat. 3478. The AWSA authorized reallocations of CAP water to help settle disputes with Indian tribes over tribal water rights. *Id.* § 104, 118 Stat. at 3487; *see also* John B. Weldon, Jr. & Lisa M. McKnight, *Future Indian Water Settlements in Arizona: The Race to the Bottom of the Waterhole?*, 49 Ariz. L. Rev. 441, 463-66 (2007). With respect to the Navajo Nation, the AWSA directed Interior to "retain" 6,411 a.f.y. of unallocated water "for a future

water rights settlement agreement approved by . . . Congress that settles the . . . Nation's claims to water in Arizona." Pub L. No. 108-451, § 104(a)(1)(B)(ii), 118 Stat. at 3487. If such a settlement and congressional approval does not occur by December 31, 2030, the 6,411 a.f.y. will become available for allocations for other purposes (though it will remain available for a potential Navajo water rights settlement). *Id.*

C. Shortage and surplus guidelines

The Basin Act requires Reclamation to manage Lake Mead, Lake Powell, and related facilities in coordination and under long-range operating criteria. 43 U.S.C. § 1552(a); *see also Grand Canyon Trust*, 691 F.3d at 1013. Under these criteria, Reclamation must determine—on an annual basis and in light of the amount of stored water in the reservoirs and the predicted annual runoff—whether there will be sufficient stored water within the system to satisfy 7.5 million acre feet of consumptive use within the Lower Basin states, and whether and how much "surplus" water will be available. *See* 73 Fed. Reg. 19,873, 19,875 (Apr. 11, 2008). In 2001, in order to provide greater certainty to contract users, Reclamation developed guidelines for making its annual surplus determination. 66 Fed. Reg. 7772 (Jan. 25, 2001). In 2007, following years of record drought, Reclamation developed additional guidelines for declaring shortage conditions (when less than

7.5 million a.f.y. is available for consumptive use in the Lower Basin). 73 Fed. Reg. at 19,873.

In its environmental impact statements for the shortage guidelines, Reclamation acknowledged that the Nation claims federal reserved water rights in the Colorado River mainstream. *See* S.E.R. 14-15. Although such rights have "not been judicially determined," Reclamation treated them as an "Indian trust asset" for purposes of its NEPA review. S.E.R. 14. Reclamation determined that the operational guidelines would not alter any vested water right, including any unquantified or non-adjudicated federal reserved rights, and that Reclamation would manage Colorado River facilities in accordance with any reserved rights for the Nation, in the event reserved rights from the mainstream are confirmed, quantified, and developed. S.E.R. 17-18; *see also* S.E.R. 5-15.

D. Proceedings below

1. Navajo Nation's suit

The Nation filed this action in 2003, alleging (1) that Interior violated NEPA by failing to adequately consider the Nation's water rights in evaluating the environmental impacts of the 2001 surplus guidelines; and (2) that Interior breached a fiduciary duty to the Nation by operating the Colorado River dams and reservoirs without adequately considering the Nation's water rights. *See Navajo*, 876 F.3d at 1159. The States of Arizona, Nevada, and Colorado and three

California water districts were granted leave to intervene. *Id.* at 1159 & n.21. In October 2004, on joint motion of the parties and following enactment of the AWSA, *see supra* p. 16, the district court stayed the action to facilitate settlement negotiations, which occurred for a period of years but ultimately were unsuccessful. *Id.* at 1160.

In 2013, the district court lifted the stay and twice granted the Nation leave to amend its complaint. *Id.* The Nation's second amended complaint alleged multiple NEPA claims and one breach-of-trust claim. *Id.* The breach-of-trust claim alleged simply that water from the Colorado River was "require[d] . . . to fulfill the purpose of the Navajo Reservation as a permanent homeland for the Navajo people," and that Interior breached fiduciary obligations to the Nation by "fail[ing] to determine the extent and quantity of the water rights of the Navajo Nation to the waters of the Colorado River." 2 E.R. 120.

On motions by Interior and the intervenor-defendants, the district court dismissed the action for lack of jurisdiction. *See Navajo*, 876 F.3d at 1160. The district court determined that the Nation lacked Article III standing to bring the NEPA claims, and that the breach-of-trust claim was not within the APA's waiver of sovereign immunity because the Nation failed to challenge any "final agency action." *Id.* at 1160, 1167.

2. Original appeal

On the Nation's appeal, this Court agreed that the Nation lacked standing to challenge the surplus and shortage guidelines because the Nation failed to show that they "present[ed] a reasonable probability of threat to . . . the Nation's unadjudicated water rights or its practical water needs." *Id.* But the Court reversed the dismissal of the breach-of-trust claim, disagreeing with the district court's interpretation of the APA's waiver of sovereign immunity. *Id.* at 1167-73.

Section 702 of the APA affords a "right of review" for any person "suffering legal wrong because of agency action" or "adversely affected or aggrieved by agency action within the meaning of a relevant statute." 5 U.S.C. § 702. Section 704 provides that the "actions reviewable" are "agency actions made reviewable by statute and *final* agency action for which there is no other adequate remedy in court." 5 U.S.C. § 704 (emphasis added). As first enacted in 1946, the APA contained no express waiver of federal sovereign immunity, causing courts to continue dismissing claims in an uneven and confusing manner. *See Navajo Nation*, 876 F.3d at 1168 (citing H.R. Rep. 94-1656 at 4-10 (1976)). To clear up this "morass," Congress in 1976 added a second sentence to § 702 specifying:

> An action in a court of the United States seeking relief other than money damages and stating a claim that an agency or officer or employee thereof acted or failed to act in an official capacity or under color of legal authority shall not be dismissed nor relief therein be denied on the ground that it is against the United States or that the United States is an indispensable party.

Id. (quoting 5 U.S.C. § 702).

In pleading its breach-of-trust claim, the Navajo Nation invoked § 702's waiver of sovereign immunity, but it disavowed the need to meet any of the APA's other requirements for judicial review. The APA defines "agency action" to include "the whole or a part of an agency rule, order, license, sanction, relief, or the equivalent or denial thereof, or *failure to act*." 5 U.S.C. § 551(13) (emphasis added). The APA also specifically authorizes courts to "compel agency action unlawfully withheld or unreasonably delayed." 5 U.S.C. § 706(1). To state a "failure to act" claim under the APA, however, a plaintiff must assert that an agency "failed to take a *discrete* agency action that it is *required to take*." *Norton v. Southern Utah Wilderness Alliance*, 542 U.S. 55, 64 (2004) (emphasis in original). Evidently to avoid this requirement, the Nation argued that its breach-of-trust claim is *not* a § 706(1) claim. *See* 2 E.R. 103. For this reason, and because the Nation did not challenge "final agency action" under § 704, the district court held that the APA's waiver of sovereign immunity did not apply. *Id.*

This Court reversed, holding that the second sentence of § 702 is properly construed as "waiv[ing] sovereign immunity broadly for all causes of action that meet its terms" and not only for "actions brought under the APA." *Navajo Nation*, 876 F.3d at 1171. Without addressing whether there is a "common law" cause of action for breach of trust against federal officials, this Court determined that the

Nation's breach-of-trust claim falls "squarely" within § 702's waiver because it "seeks relief other than money damages" and alleges "that an agency or an officer or employee thereof acted or failed to act in an official capacity." *Id.* at 1172-73. The Court remanded for the district court "to consider fully the Nation's breach of trust claim in the first instance, after entertaining any request to amend the claim . . . to flesh it out." *Id.* at 1173-74.

3. Remand proceedings

a. Motion to file third amended complaint

On remand, the Nation moved for leave to file a third amended complaint to add "factual and legal allegations to clarify and bolster the substance" of its breach-of-trust claim and to clarify the "type of relief" requested. S.E.R. 1-2. The Nation also sought to add two new claims, namely, a claim for breach of the 1849 and 1868 treaties and a claim for failure to consult under an executive order requiring consultation on regulatory issues impacting tribes. *See* 2 E.R. 87-89.

By order dated December 11, 2018, the district court denied the proposed amendment. 2 E.R. 82-90. The court reasoned that the amendments would be futile, because the newly stated claims were predicated on the existence of reserved (but unconfirmed) rights for the Navajo Reservation in the Colorado River mainstream. 2 E.R. 83-90. The court determined that it lacked jurisdiction to adjudicate those claims without infringing upon the exclusive continuing

jurisdiction reserved by the Supreme Court in *Arizona v. Colorado*. *Id.* In lieu of dismissing the action, however, the order gave the Nation "one last chance" to amend. 2 E.R. 90.

b. Revised third amended complaint

The Nation then drafted and moved to file a revised third amended complaint, stating a single cause of action for breach of trust. 2 E.R. 22-78. The complaint alleges, in summary, that many residents in the western region of the Navajo Reservation live without indoor plumbing or easy access to water; that "improvements in water supply and water delivery infrastructure" are necessary to improve their living conditions; and that water supplies from the Little Colorado River "will not be sufficient to meet the Nation's [water] needs for its lands in Arizona" or to make those lands a "permanent homeland." 2 E.R. 41, 43-44.

The complaint alleges that the United States failed, in litigating *Arizona v. Colorado*, to secure water rights for the Nation from the Colorado River mainstream; that federal officials have not sought to identify or secure water for the Nation's Arizona residents from sources other than the Little Colorado River; and that Reclamation has managed and continues to manage federal dams and reservoirs on the Colorado River in disregard of the Nation's water rights or needs. 2 E.R. 44-73. The complaint contends that Interior officials have therefore failed "to adequately protect the land held in trust . . . for the benefit of the Navajo

Nation," and that the "only way" federal officials can meet their fiduciary obligations is by working with the Nation to "determine the amount of water that the Navajo Nation needs from sources other than the Little Colorado River" and to "develop a plan to secure that water." 2 E.R. 75.

The complaint seeks a declaratory judgment that Interior officials have a fiduciary obligation to determine the Nation's water needs and to develop a plan to meet those needs, as a result of "obligations undertaken by the United States" in its treaties with the Nation and by "statutes, regulations, executive orders . . . , and policies enacted or promulgated for the protection and benefit of Indian tribes," and by the "common law." 2 E.R. 76. Finally, the complaint seeks an injunction to compel Interior officials, in consultation with the Nation, (1) to determine the Nation's needs from water sources other than the Little Colorado River; (2) to "develop a plan to secure the water needed"; and (3) to exercise their authorities in the management of Colorado River water so not to interfere with plans to secure water needed by the Nation. 2 E.R. 77.

c. Judgment

On August 23, 2019, the district court issued a memorandum opinion and final judgment of dismissal. 1 E.R. 1-13. The court reiterated its determination that the Nation may not base a breach-of-trust claim on its alleged treaty-based *Winters* right in the Colorado River mainstream because the Supreme Court has

exclusive continuing jurisdiction in *Arizona v. California* to determine such claims. 1 E.R. 7-8. In addition, the district court cited this Court's precedent that a tribe must identify a specific fiduciary duty in a "treaty, agreement, executive order, statute, or regulation" in order to state a breach-of-trust claim against federal officials. 1 E.R. 5 (citing *Gros Ventre Tribe v. United States*, 469 F.3d 801 (9th Cir. 2006)). The district court held that a specific trust duty is "not inferable from the mere existence" of *Winters* rights. 1 E.R. 9. Finally, the court determined that none of the other statutes or authorities cited in the Nation's complaint established the specific statutory duties alleged in the complaint. 1 E.R. 8-13.

SUMMARY OF ARGUMENT

The district court properly dismissed the Nation's breach-of-trust action, without leave to amend, for the failure to state a claim on which relief can be granted. Under well-established precedent—including the Supreme Court's decision in *Jicarilla Apache Tribe* and this Court's decision in *Gros Ventre*—the United States owes no common-law trust duties to tribes and consequently owes no common-law duty to determine or develop tribal water resources. Rather, to state a claim for injunctive relief against federal officials, a tribe must identify a specific fiduciary duty assumed by treaty, statute, or other positive law and must plead facts sufficient to show a breach of that duty.

The Nation contends that *Jicarilla Apache* is distinguishable because it arose in an action for damages under the Indian Tucker Act, and that *Gros Ventre* (decided before *Jicarilla Apache*) was incorrectly decided because it improperly followed earlier Indian Tucker Act cases. But the Nation cites not a single authority for the proposition that courts may compel federal officials to undertake trust obligations with respect to Indian tribes on a purely common-law theory. Nor does the Nation provide any legally supportable rationale for limiting the rule against common-law trust duties to tribal claims for damages. Indeed, although *Jicarilla Apache* arose in an Indian Tucker Act case, it involved a collateral discovery dispute that concerned a request to compel government action. *Jicarilla Apache* confirms that *Gros Ventre* was correctly decided; both cases are directly controlling and foreclose the Nation's common-law breach-of-trust claim.

Alternatively, the Nation takes an everything-but-the-kitchen-sink approach, arguing that the *Winters* doctrine, the statutes and Supreme Court decisions that constitute the Law of the River, and various Interior policy statements together establish enforceable fiduciary obligations requiring Interior officials to determine the Nation's water needs and to develop infrastructure to meet those needs. But none of these authorities, individually or collectively, establishes any such duties.

First, *Winters* speaks only to the scope of the trust property reserved for the Nation; it does not obligate the United States to take specific steps to improve trust

property or to develop tribal water resources. Second, while the Boulder Canyon Project Act and the Basin Act protect pre-existing tribal rights, these statutes were not enacted specifically for the development of such rights, and neither statute obligates Interior to contract with the Nation or any other tribe for project water rights. Third, while the United States undertook to affirmatively represent the Nation's interests in *Arizona v. California*, the Nation does not contend that the Supreme Court's decree in that case compromised any of the Nation's water rights claims; nor does the Nation allege the United States failed or is failing faithfully to represent the Nation in the concluded or ongoing state-court adjudications involving the Nation's water rights. Fourth, the various policy statements cited by the Nation merely assert Interior's general duty to protect Indian trust assets; they do not impose specific duties with respect to property or water development. Here, the Nation's allegations that the Interior failed to determine and take steps to satisfy the Nation's water needs do not demonstrate a failure to protect water rights.

The judgment of the district court should be affirmed.

STANDARD OF REVIEW

A district court's order dismissing a complaint under Federal Rule of Civil Procedure 12(b)(6) for failure to state a claim and denying leave to amend based on futility is reviewed de novo. *Schueneman v. Arena Pharmaceuticals, Inc.*, 840

F.3d 698, 704 n.5 (9th Cir. 2016). This Court will affirm a dismissal whenever the complaint fails to state a "cognizable legal theory" or "the facts alleged fail to suffice under a cognizable claim." *Eichenberger v. ESPN, Inc.*, 876 F.3d 979, 982 (9th Cir. 2017). In exercising such review, this Court must accept all factual allegations as true and construe them in a light most favorable to the nonmoving party. *Id.*; *Roberts v. City of Fairbanks*, 947 F.3d 1191, 1194 n.1 (9th Cir. 2020).

ARGUMENT

I. A breach-of-trust claim must be founded upon a specific fiduciary duty assumed by treaty, statute, or regulation.

A. The Nation asks this court to declare fiduciary duties as a matter of common law.

The Nation predicates its breach-of-trust claim on the fact that "the United States holds . . . lands and waters in trust for the benefit of the Nation." 2 E.R. 74 (¶ 123). This trust relationship derives in part from the Nation's treaties. Specifically, the 1868 Treaty set aside lands for the Nation, impliedly reserving water necessary for the reservation's purpose. *See Cappaert* 426 U.S. at 139; *Winters*, 207 U.S. at 577. For this reason, the Nation refers to its common-law breach-of-trust claim as a claim to enforce treaty rights. *See* Opening Brief at 22-27, 30-31. The 1868 Treaty, however, was limited to lands in *northeastern Arizona*. *See* Treaty with the Navajo, June 1, 1868, art. 2, 15 Stat. 667, 668 (1868). Most Reservation lands, including the lands bordering the Colorado River, were set

aside by later executive orders. *See Pittsburg & Midway Coal Mining Co. v. Yazzie*, 909 F.2d 1387, 1389 (10th Cir. 1990). While such orders also established *Winters* rights, *see Arizona*, 373 U.S. at 598, those rights are not necessarily governed by treaty.

In any event, the Nation does not seek to enforce specific treaty provisions under the common law of contracts. *See Washington v. Washington State Commercial Passenger Fishing Vessel Ass'n*, 443 U.S. 658, 675 (1979) ("*Fishing Vessel*") ("A treaty, including one between the United States and an Indian tribe, is essentially a contract between two sovereign nations.") Indeed, if federal officials had taken agency action or had failed to act, in contravention of specific treaty duties, the Nation could have stated a cause of action under the APA without the need for invoking common-law principles. *See Sohappy v. Hodel*, 911 F.2d 1312, 1316-20 (9th Cir. 1990) (reviewing claim, under APA, that Interior eviction notice and regulations violated 1855 treaty); *see also Hoopa Valley Tribe v. Christie*, 812 F.2d 1097, 1101 (9th Cir. 1986) (reviewing claim, under APA, that Interior relocation decision violated 1864 unratified agreement).

The Nation invokes the common law of trusts to import substantive obligations that are not specifically stated in its treaties (or in any executive order), and to urge this Court to expand upon such obligations. *See* Opening Brief at 22-25, 27-29. Because the United States holds tribal lands and water rights reserved

for the Nation—including "unquantified federal reserved rights"—in trust for the Nation, the Nation contends that federal officials have a fiduciary obligation to "protect" and "preserve" these trust resources. 2 E.R. 35 (¶¶ 23-24); 2 E.R. 74 (¶ 123); *see also Weyerhaeuser Co. v. Klamath County*, 151 F.3d 996, 1000 (9th Cir. 1998) (a "trustee has the right and duty to protect the corpus of a trust" (quoting *Anderson* v. *Public Employees Retirement Board*, 895 P.2d 1377, 1382 (Or. App. 1995))). Based on this generic duty, the Nation contends that federal officials have further responsibilities (1) to "determine" the water needed by the Nation "in addition to [water] available from the Little Colorado River"; (2) to "develop a plan to secure" such water for the Nation's use; and (3) to make the Nation's Arizona lands "productive" and "capable" of providing "a permanent homeland for the Navajo people." 2 E.R. 75 (¶ 128).

In urging this Court (as it did the district court) to hold federal officials to these specific duties to determine water needs and to develop water resources—actions that would require substantial federal expenditures—the Nation does not rely on any established principle from the common law of trusts or any established precedent from federal Indian law. Rather, the Nation asks this Court to declare fiduciary duties out of whole cloth, evidently as a matter of *developing* federal common law. *See* Opening Brief at 1-3, 10, 29, 39.

B. Federal duties to Indians do not derive from common law.

Contrary to the Nation's argument, however, there is no common law of Indian trusts for this Court to develop. As the Supreme Court explained in *United States v. Jicarilla Apache Nation*, 564 U.S. 162 (2011), it is "undisputed" that a "general trust relationship" exists between the United States and federally-recognized Indian tribes. *Id.* at 176 (quoting *United States v. Mitchell*, 463 U.S. 206, 225 (1983) ("*Mitchell II*")). But this trust doctrine is a "self imposed policy." *Id.* (quoting *Seminole Nation v. United States*, 316 U.S. 286, 296-97 (1942)). "The Government assumes Indian trust responsibilities only to the extent it expressly accepts those responsibilities by statute." *Id.* at 177. Stated differently, the "trust obligations of the United States to the Indian tribes are established and governed by statute rather than the common law." *Id.* at 165.

This rule "follows from the unique position of the Government as sovereign." *Id.* at 174. The United States "is not a private trustee," even when it expressly assumes "trust" duties by statute. *Id.* at 173-74. The United States "consents to be liable to private parties 'and may yield this consent upon such terms and under such restrictions as it may think just.' " *Id.* at 174 (quoting *Murray's Lessee v. Hoboken Land & Improvement Co.*, 59 U.S. (18 How.) 272, 283 (1856)). Where statutes or regulations establish a trust relationship, common-law trust principles might play a role in informing the nature of fiduciary

obligations. *Id.* at 177-78. But because federal trust obligations to Indians are "defined and governed by statutes rather than the common law," any cause of action for breach of trust "must train on specific rights-creating or duty-imposing statutory or regulatory prescriptions." *Id.* at 174 (quoting *United States v. Navajo Nation*, 537 U.S. 488, 506 (2003) ("*Navajo I*")); *accord United States v. Navajo Nation*, 556 U.S. 287, 296 (2009) ("*Navajo II*").

This rule is longstanding. Four decades ago, the Supreme Court considered a breach-of-trust claim alleging that federal officials had mismanaged timber allotments expressly owned by the United States in trust for individual Indians under the General Allotment Act. *See United States v. Mitchell*, 445 U.S. 535, 541 (1980) ("*Mitchell I*"). The Supreme Court held that the Act created a "bare trust" only; it precluded land alienation but did not impose actionable fiduciary duties with respect to the management of timber resources on the allotments. *Id.* at 542-43. Three years later, the Court considered a different set of statutes that gave federal officials comprehensive control over harvesting the timber resources on the allotments. *Mitchell II*, 463 U.S. at 222-26. Because the timber-management statutes and implementing regulations required federal officials to actively manage harvests for the best interests of Indian allottees and their heirs, the Court determined that they were intended to impose conventional trust duties enforceable

by an action for damages for breach of trust. *Id.* at 226; *see also United States v. White Mountain Apache Tribe*, 537 U.S. 465, 472 (2003) (describing cases).

Following *Mitchell I* and its progeny, this Court has likewise recognized that the "bare" trust relationship resulting from federal trust ownership of tribal lands "does not impose a duty on the government to take action beyond complying with generally applicable statutes and regulations." *Gros Ventre Tribe v. United States*, 469 F.3d 801, 810 (9th Cir. 2006); *accord Morongo Band of Mission Indians v. FAA*, 161 F.3d 569, 574 (9th Cir. 1998). Stated differently, "an Indian tribe cannot force the government to take a specific action unless a treaty, statute or agreement imposes, expressly or by implication, that duty." *Gros Ventre*, 469 F.3d at 810 (quoting *Shoshone-Bannock Tribes v. Reno*, 56 F.3d 1476, 1482 (D.C. Cir. 1995)).

In *Gros Ventre*, a group of tribes brought a breach-of-trust claim to compel federal officials to "reclaim" abandoned gold mines near an Indian reservation, based on the allegation that the mines were leaching cyanide and impairing water quality on the reservation. 469 F.3d at 806. As in the present case, the tribes did not challenge final agency action or a failure to act under the APA; instead, they asserted "common law trust claims" based on the United States' general trust obligation to Indians. *Id.* at 809-12. This Court held that the tribes did "not have a common law claim for breach of trust." *Id.* at 815.

The Nation cannot distinguish *Gros Ventre* on its facts. Rather, the Nation urges this Court to disregard *Gros Ventre* on the view that it was wrongly decided. Opening Brief at 30-39. Specifically, the Nation contends that *Gros Ventre* erred in following *Mitchell I* and its progeny (including *Jicarilla Apache*) because those cases are limited to claims under the Tucker Act and Indian Tucker Act. *Id.* The Nation further reasons that this Court may disregard *Gros Ventre*, notwithstanding the rule of stare decisis, because there is supposedly conflicting and otherwise "controlling Supreme Court and Circuit authority that make [it] clear that an Indian tribe can bring a common law action for violation of its treaties." Opening Brief at 30-31. As elaborated in the following section, these arguments lack merit.[2]

C. The Nation cites no precedent for common-law breach-of-trust claims against the United States.

To begin with, the Nation provides no authority from any Court supporting a "common law action" for injunctive relief against the United States "for violation of tribal treaties." *Id.* Instead, the Nation proffers (1) a handful of treaty and common-law cases that have nothing to do with tribal claims for breach of trust,

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[2] There is also no basis for the Nation's perfunctory argument that this Court rejected the relevant aspect of *Gros Ventre* in the Nation's first appeal. *See* Opening Brief at 36. In the first appeal, this Court disagreed with *Gros Ventre*'s determination that Circuit precedent construing the APA's sovereign immunity waiver stood in irreconcilable conflict. *See Navajo Nation*, 896 F.3d at 1169 (discussing *Gros Ventre* 469 F.3d at 809). But it did not address or reject *Gros Ventre*'s holding that Indian tribes lack a common-law breach-of-trust claim against the United States. *Id.*

(2) two breach-of-trust cases that were not founded on common law, and (3) a confused argument that misconstrues the relevant issue. *Id.* at 22-29.

1. The Nation cites no common-law breach-of-trust cases.

The Nation relies on two cases involving actions by the United States to enforce Indian fishing rights against the State of Washington and other third parties. *See Fishing Vessel*, 443 U.S. at 669-70; *United States v. Washington*, 853 F.3d 946, 953-4, 958-61 (9th Cir. 2017), *cited in* Opening Brief at 24-27. The Nation cites these cases—which involved rights guaranteed in the "Stevens Treaties" of 1854 and 1855—to show that treaties are "enforceable" and subject to "Indian canons of construction," Opening Brief at 25, including the rule that courts must "give effect to the terms as the Indians themselves would have understood them." *Minnesota* v. *Mille Lacs Band of Chippewa Indians*, 526 U.S. 172, 196 (1999); *accord Washington*, 853 F.3d at 963. But neither point is controverted or relevant to the present case, as the Nation here does not seek to enforce any particular treaty terms. *See* Opening Brief at 22-23.

The Nation also relies on *Oneida Indian Nation v. County of Oneida*, 414 U.S. 661, 663-64 (1974), *cited in* Opening Brief at 28, an action by an Indian tribe to enforce federal treaty rights and the Non-Intercourse Act against New York counties. The Nation contends that *Oneida* shows that suits by tribes to enforce treaty rights fall within the subject matter jurisdiction of federal district courts. *Id.*

(citing 28 U.S.C. §§ 1331, 1362). Similarly, the Nation cites *National Farmers Union Insurance Cos. v. Crow Tribe of Indians*, 471 U.S. 845 (1985), for the proposition that federal courts may hear "federal common law claims." Opening Brief at 28. *National Farmers Union* involved an action in federal court to enjoin a tribal court's exercise of jurisdiction over non-Indians. 471 U.S. at 848-50. Because the issue of tribal-court jurisdiction was one of "[f]ederal common law as articulated in rules that are fashioned by court decisions," the Supreme Court held that the action fell within 28 U.S.C. § 1331 (federal question jurisdiction), even though it was not founded on a particular federal statute or constitutional provision. 471 U.S. at 850-53. But in the present case, there also is no dispute that the district court had subject matter jurisdiction under 28 U.S.C. §§ 1331 and 1362.

The issue here is whether a tribe may bring an action against the United States for breach of a purely common-law trust duty. None of the above-discussed cases involved a breach-of-trust claim against federal officials. *National Farmers Union*, 471 U.S. at 848-50; *Fishing Vessel*, 443 U.S. at 669-70; *Oneida*, 414 U.S. at 663-64; *Washington*, 853 F.3d at 953-54. And none of the above-discussed cases lends any support for the Nation's view that such a claim may be brought.

2. The breach-of-trust cases proffered by the Nation are not common-law cases.

In its effort to establish common-law trust duties, the Nation cites only two cases that actually involved Indian breach-of-trust claims against federal officials.

See Opening Brief at 23-24 (citing *Cobell v. Norton*, 240 F.3d 1081 (D.C. Cir. 2001), and *Seminole Nation*, 316 U.S. 286). But neither of these cases involved common-law claims.

Cobell involved a class action by individual Indians to compel accountings to remedy the alleged mismanagement of "individual Indian money" accounts held by Interior under federal statutes. *See* 240 F.3d at 1088-89. The D.C. Circuit held that the plaintiffs had a claim under the APA to challenge an official failure to act in the face of an "unequivocal statutory duty." *Id.* at 1095 (quoting *Sierra Club v. Thomas*, 828 F.2d 783, 793 (D.C. Cir. 1987)). In so holding, the D.C. Circuit determined that the duties owed were "largely defined in traditional equitable terms" informed by the common law of trusts. *Id.* at 159. But the claims were "rooted" in statutes that required Interior officials to collect, manage, and distribute revenues from Indian trust lands. *Id.* at 1095, 1099; *see also id.* at 1087-1089. And the D.C. Circuit specifically observed that there were no purely common-law claims before the court. *Id.* at 1089. In the present case, by contrast, the Nation seeks to plead a claim for common-law breach of trust—as opposed to an APA claim to compel agency action "unlawfully withheld or unreasonably delayed," 5 U.S.C. § 706(1)—presumably because the Nation is unable to identify "discrete agency actions" that federal officials are "required to take" by treaty or statute. *See Southern Utah Wilderness Alliance*, 542 U.S. at 64; *see also supra* pp. 20-21.

As for *Seminole Nation*, it involved a congressionally authorized tribal suit in the Court of Claims for money damages. *See* 316 U.S. at 288-89. The plaintiff tribe sought to recover specific treaty-mandated monetary payments that had been made by federal agents but then misappropriated by tribal officers. *Id.* at 286-88. The Supreme Court observed that the government had "charged itself with moral obligations [to Indians] of the highest responsibility and trust," and that federal agents carrying out such duties "should be judged by the most exacting fiduciary standards." *Id.* at 297. Applying this rule, the Court held that if federal agents had disbursed treaty payments owed to the tribe, to tribal officers known to be "faithless to their own people and without integrity" (a factual matter that the Court did not resolve), then the tribe would be entitled to recover misappropriated funds. *Id.* at 297-309. Again, however, *Seminole Nation* did not hold that courts may impose common-law trust duties on federal officials where the United States has not specifically assumed specific obligations by treaty or statute. *See id.*; *see also Jicarilla Apache*, 564 U.S. at 179 (citing *Seminole Nation*).

3. The Nation misconstrues the issue.

As *Seminole Nation* illustrates, the present issue is not—as the Nation supposes—whether "treaties create enforceable rights and duties" in addition to statutory duties. *See* Opening Brief at 22-27, 30-31. "[T]reaty provisions which create domestic law have the same effect as legislation." *In re Aircrash in Bali,*

Indonesia on April 22, 1974, 684 F.2d 1301, 1309 (9th Cir. 1982). In ending the practice of entering treaties with Indian tribes in 1871, Congress provided that "no obligation of any treaty lawfully made and ratified with any such Indian nation or tribe prior to March 3, 1871, shall be invalidated or impaired." 25 U.S.C. § 71; *see also Lara v. United States*, 541 U.S. 193, 201 (2004). Therefore, tribes may enforce specific treaty rights and duties just like specific statutory rights and duties, *see Seminole Nation*, 316 U.S. at 288-89, including as appropriate in actions for injunctive relief, *Sohappy*, 911 F.2d at 1316-20. To be enforceable in an action for breach of trust, however, the treaty must impose a specific trust duty. *Shoshone Bannock Tribes*, 56 F.3d at 412-13.

This rule is illustrated by *Gros Ventre* itself. In addition to common-law trust principles, the tribes relied on treaty provisions that obligated the United States to "protect" the tribes against "depredations on Reservation lands." 469 F.3d at 812. In holding that the tribe lacked a breach-of-trust action to compel a federal cleanup of the off-reservation mines, this Court did not hold that the treaty provisions were unenforceable. *Id.* at 812-14. Rather, this Court observed that treaty provisions at issue imposed specific duties only with respect to on-reservation depredations. *Id.* at 811-14. As for protecting tribes and tribal resources from off-reservation activities, the Court determined that it had "no way

of measuring" federal compliance, except to look to generally applicable environmental laws. *Id.* at 811-12.

The same analysis applies here. It is not enough for the Nation to allege that United States has a general trust duty to protect resources, including "unquantified reserved water rights" held in trust for the Nation. Opening Brief at 27. To state a cause of action to compel Interior to determine the Nation's water needs or to develop plans to secure water for tribal members, the Nation must identify a specific treaty or statutory provision requiring such action. *Gros Ventre*, 469 F.3d at 810. None of the Supreme Court or other cases cited by the Nation (addressed above) articulates a conflicting rule.

For their part, amici National Congress of American Indians ("NCAI") and a group of law professors cite a footnote in *Gros Ventre* for the proposition that this Court "left open" the nature and scope of the United States' duty to protect trust resources. Amicus Brief for NCAI at 22-23 (citing 469 F.3d at 810 n.10); Amicus Brief for Law Professors at 15. But the amici misconstrue the footnote. The footnote concerns an opinion of the Interior Board of Land Appeals ("IBLA"), which reviewed the Bureau of Land Management's decision to approve an expansion of one of the gold mines at issue in *Gros Ventre*. See 469 F.3d at 805, 810 n.10 (citing *Island Mountain Protectors*, 144 IBLA 168 (May 29, 1998)). Citing federal treaties and trust obligations to the tribes, the IBLA ruled that BLM

needed to consult with the tribes and to help "identify, protect, and conserve trust resources" when conducting NEPA reviews and acting under other environmental statutes. *Island Mountain Protectors*, 144 IBLA at 185. In its footnote, this Court withheld judgment on the IBLA's administrative determination that BLM must take "special consideration of tribal interests" under NEPA and other "applicable statutes and regulations." *Gros Ventre*, 469 F.3d at 810 n.10. This Court did not leave open whether federal officials have enforceable common-law trust duties—a question the Court resolved in the negative. *Id*. at 810.

D. The need to identify a treaty- or statute-based fiduciary duty is not limited to Tucker Act claims.

The Nation and its amici also err in arguing that *Jicarilla Apache* and other cases under the Indian Tucker Act, 28 U.S.C. § 1505, are irrelevant for determining federal trust duties in actions for injunctive relief. *See* Opening Brief at 16, 26 n.7, 30-39; NCAI Amicus Brief at 6-14; Law Professors Amicus Brief at 14-15. The Indian Tucker Act does not "create a substantive right enforceable against the Government." *White Mountain*, 537 U.S. at 472. Like the Tucker Act, it simply effects a waiver of sovereign immunity. *Id.*; *Navajo II*, 556 U.S. at 290. The Tucker Act waives federal sovereign immunity for any claim for damages "founded either upon the Constitution, or any Act of Congress" or "any express or implied contract with the United States" or "not sounding in tort." 28 U.S.C. § 1491(a)(1). The Indian Tucker Act waives federal sovereign immunity for

claims against the United States by Indian tribes "arising under the Constitution, laws, or treaties of the United States, or Executive orders of the President" or any claim "which otherwise would be cognizable" under the Tucker Act. 28 U.S.C. § 1505; *see also Mitchell II*, 463 U.S. at 216.

To state a claim within these waivers, an Indian tribe must clear "two hurdles." *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." *Id.* (quoting *Navajo I*, 537 U.S. at 506). Second, the tribe must show that the relevant source of substantive law "can fairly be interpreted as mandating compensation for damages sustained as a result of [the alleged] breach." *Id.* at 291; *Mitchell II*, 463 U.S. at 218. This second "hurdle" plainly is particular to claims under the Tucker Act and the Indian Tucker Act. *See Mitchell II*, 463 U.S. at 218. Because these statutes waive sovereign immunity only as to claims for money damages, *id.* at 216 (citing *United States v. King*, 395 U.S. 1, 2-3 (1969)), an Indian tribe invoking these statutes must demonstrate not only a specific trust duty, but that the duty is "money mandating," *Navajo II*, 556 U.S. at 302.

The same is not true, however, for the first "hurdle" for stating a breach-of-trust claim, namely, the need to identify a substantive source of law creating a trust duty. *See Navajo II*, 556 U.S. at 290; *Navajo I*, 537 U.S. at 506. The need for a

foundational trust duty is independent from the question of an appropriate remedy and logically applies to *any* cause of action for a breach of trust. *See Jicarilla Apache*, 564 U.S. at 173-74.

Here, the Nation invokes § 702 of the APA as a waiver of sovereign immunity only. Opening Brief at 27-28. To state a cognizable claim within this waiver—without relying on the APA cause of action—the Nation necessarily must identify some other source of law creating an actionable trust duty. *See Navajo II*, 556 U.S. at 290; *Navajo I*, 537 U.S. at 506. As the Supreme Court explained in *Jicarilla Apache*, due to its "unique position . . . as sovereign," the United States is subject only to those trust duties that it assumes via treaties, statutes, or other positive law. 564 U.S. at 174. This rationale is not limited to claims under the Tucker Act or Indian Tucker Act. *Id.*

Indeed, although *Jicarilla Apache* involved an action under the Indian Tucker Act for the mismanagement of Indian trust accounts, the dispute before the Supreme Court did not involve a claim for damages but rather a collateral request for injunctive relief. 564 U.S. at 166-68. Specifically, as a matter of discovery, the plaintiff Indian tribe sought to compel production of attorney-client privileged documents on the view that, as beneficiary of the trusts, the tribe was the "real client" of the Government attorneys who represented the federal trustee. *Id.* at 167-68, 172. The tribe relied on the "fiduciary exception" to the attorney-client

privilege, which U.S. courts have adopted from the English common law. *Id.* at 170-72. Because federal managers of Indian trust accounts are not "mere representatives" of Indian beneficiaries, but have broader and competing responsibilities to the federal Government, the Supreme Court declined to construe the relevant statutes as incorporating the "fiduciary exception" for federal attorney-client communications. *Id.* at 178-87.

Citing Justice Sotomayor's *dissenting* opinion, the Nation seeks to dismiss *Jicarilla Apache* as "pertain[ing] only to [this] narrow evidentiary issue." Opening Brief at 29, n.10 (quoting 564 U.S. at 188 (Sotomayor, J., dissenting)). But the Supreme Court's rejection of the common law as a source for federal trust duties was not limited to the question of attorney-client privilege. *See* 564 U.S. at 165-74. Moreover, in dissenting from the majority's statutory interpretation, Justice Sotomayor did not dissent from the need for a statutory source for federal trust duties. *See id.* at 201-06. To the contrary, she predicated her dissent on the understanding that the relevant "statutory scheme . . . require[d] the Government to act as a conventional fiduciary in managing the Nation's trust funds." *Id*. at 201; *see also id.* at 206. Finding the fiduciary exception to be consistent with the statute's purpose and "plain text," Justice Sotomayor would have construed the statute as incorporating this common-law principle. *Id.* at 201-06.

In contrast, in the present case, the Nation argues that it need not identify *any* basis for its breach-of-trust claim—no statute, no treaty, no other source of positive law—other than the fact that the United States holds the Nation's lands and waters "in trust" for the Nation. Opening Brief at 22-39; *see also* 2 E.R. 74 (¶123) (proposed complaint). As already explained, the argument that enforceable trust duties can be derived from the United States' "trust" ownership of tribal resources has been repeatedly rejected by the Supreme Court and this Court. *See Navajo II*, 556 U.S. at 295-301; *Navajo I*, 537 U.S. at 504-06; *Mitchell I*, 445 U.S. at 541-43; *Gros Ventre*, 469 F.3d at 810; *Morongo Band*, 161 F.3d at 574; *see also Jicarilla Apache*, 564 U.S. at 195 (citing *Mitchell I*).

II. The Nation fails to identify any treaty, statute, or regulation creating the fiduciary duties the Nation seeks to enforce.

In the alternative, the Nation argues that this Court may infer enforceable trust obligations from the *Winters* doctrine, the "Law of the River," and various other sources. Opening Brief at 39-53. But none of the sources proffered by the Nation gives rise to federal fiduciary duties, much less the specific duties that the Nation seeks to enforce in the present action.

A. The *Winters* doctrine does not create fiduciary duties.

To begin with, there is no merit to the Nation's suggestion that fiduciary obligations arise from the *Winters* doctrine alone. Opening Brief at 42-43. This argument is a variation of the argument rejected in *Mitchell I*, 445 U.S. at 542-44

(just discussed). In reprising the argument, the Nation fundamentally misconstrues what it means for the United States to hold lands and water rights "in trust" for the Nation. *See* 2 E.R. 74 (proposed complaint).

Under federal law, Indian tribes are sovereign entities, *see* 25 U.S.C. §§ 3601(3), 5123(h), which retain all inherent powers of self-government, including powers to regulate land use and development, except as removed by Congress. *See Knighton v. Cedarville Rancheria of Northern Paiute Indians*, 922 F.3d 892, 899 (9th Cir. 2019). Thus, absent federal restriction, the Nation's reserved lands and water rights are for the Nation to use and develop under its own sovereign authority. *Id.* The "trust" restriction on tribal land merely precludes alienation; it does not require federal officials to develop or improve tribal lands. *See Jicarilla Apache*, 564 U.S. at 176 (citing *Mitchell I*, 445 U.S. at 544). Similarly, while federal reserved water rights may not be alienated or abandoned, *Navajo Nation*, 876 F.3d at 1155; *Agua Caliente*, 849 F.3d at 1272, federal "trust" ownership of *Winters* rights implies no affirmative duty on the part of federal officials to develop water rights. *Cf. Mitchell I*, 445 U.S. at 544.

In an effort to show otherwise, the Nation cites *Hopi Tribe v. United States*, 782 F.3d 662, 666 (Fed. Cir. 2015), which involved a breach-of-trust claim against the United States relating to tribal drinking water. The United States funded and provided technical assistance for the construction of groundwater wells that were

later found to produce water having unsafe levels of naturally occurring arsenic. *Id.* at 665-66. In seeking damages for the costs of providing alternative drinking water to several Hopi communities, the tribe reasoned that the United States' "trust" ownership of Hopi water rights (under the Executive Orders setting aside Hopi lands as interpreted by *Winters*) gave rise to federal fiduciary obligations to provide safe drinking water. *Id.* at 668. In ruling against the tribe, the Federal Circuit assumed, arguendo, that the United States might have assumed fiduciary duties "by holding reserved [water] rights in trust" for the tribe. *Id.* at 669. But the court opined that such duties "at most" included the "duty to exercise such rights" and the duty to "exclude others from diverting or contaminating water that feeds the reservation." *Id.* (emphasis added). The court held that *Winters* did not make the United States responsible for ensuring water supply or quantity in the absence of a third-party impairment. *Id.*

Contrary to the Nation's argument, *Hopi Tribe* did not thereby "agree" that *Winters* gives rise to federal fiduciary duties. Opening Brief at 43 (citing *Hopi Tribe*, 782 F.3d at 669). Rather, the Federal Circuit opined that if *Winters* (and the relevant Executive Orders) were to give rise to trust obligations, those obligations "at most" would be duties to "exercise" federal reserved rights and to protect such rights from third-party impairment, issues that were not before the court. *See* 782 F.3d at 669. For reasons just explained, however, inferring even those limited

duties would be contrary to *Mitchell I* and to this Court's holding in *Gros Ventre* that federal "trust" ownership does not, by itself, give rise to fiduciary duties. *See Mitchell I*, 445 U.S. at 542-43; *Gros Ventre*, 469 F.3d at 811-12.

As *Hopi Tribe* illustrates, Congress enacted statutory programs, administered by the Indian Health Service, to assist tribes in providing safe drinking water and sanitary sewer systems to their members. *See* 782 F.3d at 669-70; *see also* 25 U.S.C. § 1632(b) and 42 U.S.C. § 2004a(a)(1) (providing financial and technical assistance for drinking water and other sanitation facilities). In establishing those programs, Congress declared that "it is the policy of the United States that all Indian communities . . . be provided with safe and adequate water supply systems and sanitary sewage waste disposal systems as soon as possible." 25 U.S.C. § 1632(a)(5). In the present case, the Nation cites the Indian health care statute in its proposed complaint. 2 E.R. 36 (¶ 28). But the Nation does not challenge the holding of *Hopi Tribe* that such statutes do not create fiduciary duties. *See* Opening Brief at 43 (citing *Hopi Tribe*, 782 F.3d at 670-71).

B. The Law of the River does not require the United States to manage the Nation's water resources or water rights.

Instead, in its effort to show federal fiduciary duties, the Nation principally relies on the statutes and other authorities constituting the Law of the River. As the Nation observes, courts have inferred federal fiduciary obligations from statutory schemes that give federal officials comprehensive control over the

management of a tribal resource. Opening Brief at 44-48; *see also, e.g.*, *White Mountain*, 537 U.S. at 469, 474-79 (statute authorizing United States to use and maintain land and buildings held in trust for tribe); *Mitchell II*, 463 U.S. at 219-26 (statutes directing federal officials to manage to timber resources); *Cobell*, 240 F.3d at 1088-1092 (statutes governing management of Indian trust accounts). But federal duties do not arise from comprehensive control alone. *Navajo II*, 556 U.S. at 301. Rather, courts will infer congressional intent to incorporate common-law principles only when the statutory scheme establishes a relationship that bears the "hallmarks" of a "conventional fiduciary relationship." *Id.* (quoting *White Mountain*, 537 U.S. at 473). Here, the Nation identifies no such scheme.

1. Reclamation's physical control of mainstream flows is not control of the Nation's water rights.

There is no dispute that the Law of the River—and the many Reclamation project facilities on the Colorado River mainstream—give Reclamation comprehensive control over mainstream flows, including the ability and duty to deliver water in accordance with the Colorado Compact, Boulder Canyon Project Act contracts, and the decree in *Arizona v. California*. *See Arizona*, 373 U.S. at 589; *see also supra* pp. 10-15. Under these authorities, Reclamation must operate federal facilities in conformity with pre-existing rights, including any federal reserved rights that the Nation might have in the Colorado River mainstream. *See* 43 U.S.C. § 617e; *Arizona*, 373 U.S. at 600; 2 E.R. 136.

But physical control over river flows does not equate to control over the Nation's water resources. Like other water rights, federal reserved water rights are "usufructuary" in nature, not possessory. *Sturgeon v. Frost*, 139 S. Ct. 1066, 1079 (2019). They are rights to appropriate and use water from a stream or groundwater; they are not ownership of the stream or groundwater aquifer itself. *Id.*; *Crow Creek Sioux Tribe v. United States*, 900 F.3d 1350, 1357 (Fed. Cir. 2018). Accordingly, the United States' physical control of the Colorado River mainstream—for purposes of regulating flows in conformity with water rights—is not tantamount to control of the Nation's water rights or the water rights of any other appropriator.

Significantly, the Nation does not contend that existing Colorado River facilities or facility operations are hindering Navajo use of water from the mainstream, e.g., by reducing flows that the Nation or its members otherwise would divert for beneficial use or by preventing the Nation from developing mainstream water. Rather, the Nation contends that it cannot practicably develop water from the mainstream without aid from the United States, and that the federal government's efforts to develop Colorado River water have aided basin states and others tribes without benefitting the Nation. *See* Opening Brief at 9; *see also* 2 E.R. 54-56 (proposed complaint). These arguments disregard efforts by the United States to aid the Nation in the quantification and development of water from the

broader Colorado River system, including the San Juan River, the Little Colorado River, and basin groundwater. *See supra* pp. 8-10. Regardless, the Nation's complaint concerning unfair or discriminatory treatment does not establish a fiduciary duty or breach of trust.

2. Reclamation's contracting authority does not entail trust obligations.

Moreover, nothing in the Law of the River specifically directs or authorizes the United States to develop the Nation's water resources or to use federal project water on the Nation's behalf. The Nation cites Interior's "broad contracting authority" under the Boulder Canyon Project Act and the Basin Act, as well as Interior's denial of requests by the Nation for a contract. Opening Brief at 8, 19-20, 44-45. But those statutes do not direct Interior to contract with the Nation or with any other Indian tribe. Instead, the Boulder Canyon Project Act simply authorizes Reclamation to contract for the delivery of water stored in Lake Mead. 43 U.S.C. § 617d. The Basin Act simply places conditions on any contracts concerning CAP water, which is diverted from the Colorado River mainstream at Lake Havasu, downstream from Lake Mead. 43 U.S.C. § 1524(a). There are "no express provisions" in either act concerning Indian water allocations—only provisions indicating a "congressional expectancy" that some water would be allocated for Indian use. *See* 41 Fed. Reg. 45,883, 45,885 (Oct. 18, 1976).

As explained above (pp. 11-12), Reclamation contracted with Arizona for the State's entire share of Colorado River mainstream water, on the understanding that already perfected rights would come from the State's allocation of 2.8 million acre-feet. *See Arizona*, 373 U.S. at 592, 601. In 1972, Reclamation executed a contract with the Central Arizona Water Conservation District for the delivery of CAP water, *see Smith v. Central Arizona Water Conservation District*, 418 F.3d 1028, 1030 (9th Cir. 2005), on a similar understanding that some portion of CAP water would be allocated for use on Indian reservations, 41 Fed. Reg. at 45,888.

During the development of the CAP, Interior engaged in a public process to determine CAP allocations, including allocations to tribes. *Id.* at 45,883-84; *see also* 48 Fed. Reg. 12,446 (Mar. 24, 1983) (final allocations to all users); 45 Fed. Reg. 81,265, 81,265-66 (Dec. 10, 1980) (allocation to Indians). Interior initially proposed to allocate water to five tribes within the CAP service area. *See* 41 Fed. Reg. at 45,888. Interior ultimately allocated CAP water to the Ak Chin, Camp Verde, Fort McDowell, Gila River, Papago-Chuichu, Papago-San Xavier, Papago-Schuk Toak, Pasqua Yaqui, Salt River, San Carlos, Tonto, and Yavapai Reservations. 48 Fed. Reg. at 12445-46; *see also* 56 Fed. Reg. 29,704, 29705-06 (June 28, 1991), and subsequently executed water service contracts with those tribes, *see* 71 Fed. Reg. at 50,450, as well as the White Mountain Apache Tribe, *see* 79 Fed. Reg. 8478, 8482 (Feb. 12, 2014).

The tribes with CAP contracts do not include any of the five tribes on the Colorado River mainstream, whose federal reserved rights were determined in *Arizona v. California*. *See* 373 U.S. at 595, n.97. Nor are the CAP contracts a determination of *Winters* rights for the subject reservations. *See* 41 Fed. Reg. at 45,885. The CAP contracts provide contractual rights in project waters, *id.*, which are to be credited against *Winters* rights, if and when those rights are adjudicated, 56 Fed. Reg. at 29,705. Nothing in this history or the terms of the relevant statutes indicates a federal duty to contract.

In its proposed complaint, the Nation observes that, in 2001, years after the initial allocation of CAP water, it requested a water service contract for "uncommitted mainstream Colorado River water." 2 E.R. 50 (¶ 63c). Interior acknowledged that a "limited quantity" of Arizona's mainstream allocation remained unallocated, but it declined at that time to contract with the Nation, citing "numerous competing uses" and the need for "careful consideration" of all competing claims, including competing tribal claims. *Id.* (¶ 64). The Nation contends that the district court erred in failing to consider this contract denial. Opening Brief at 44-45. But the Nation does not show that Interior's discretionary decision was contrary to any specific statutory duty or was otherwise unreasonable.

In 2004, not long after Interior declined the Nation's contract request, Congress enacted the AWSA, which provides for a final allocation of CAP water

under provisions designed to settle numerous Indian water rights claims. *See* 71 Fed. Reg. at 50,450-51 (describing legislation). As noted above (p. 16), the AWSA directs Interior to "retain" 6,411 acre-feet per year of CAP water "for use" in a "future water rights settlement" that resolves the Nation's claims to water in Arizona. *See also* 71 Fed. Reg. at 50,451. Although there is no presently feasible means to deliver CAP water to the Navajo Reservation, this provision would allow such water to be used, for example, in exchange for a right to develop an equivalent amount elsewhere from the Colorado River mainstream.

While the Nation contends that the district court ignored "clear fiduciary duties" imposed in the AWSA, Opening Brief at 51-52, the Nation again fails to show that Interior violated any mandate within or has acted unreasonably under the statute. The AWSA simply provides a water supply that may be used and that remains available in aid of a potential settlement of the Nation's water rights in Arizona. *See* Pub. L. No. 108-451, § 104(a)(1)(B)(i), 118 Stat. at 3487. The underlying Boulder Canyon Project Act and Basin Act do not refer to the Nation at all; they simply provide Interior general authority to enter water service contracts, potentially including contracts with tribes. *See* 43 U.S.C. §§ 617d, 1524(a). The discretionary authority of federal officials to act in aid of developing tribal water rights or in settling tribal water rights claims is not tantamount to a fiduciary obligation to the Nation.

C. *Arizona v. California* imposes no fiduciary obligations.

The Nation's reliance on *Arizona v. California*, *see* Opening Brief at 45-47, is also misplaced. In representing the Nation in that litigation, the United States undertook certain fiduciary duties. *See Nevada v. United States*, 463 U.S. 110, 127-28 (1983); *see also Navajo Nation*, 876 F.3d at 1162 n.22 (noting United States' representation of Nation as "trustee"). But the Nation does not contend that federal officials breached fiduciary duties undertaken in that litigation. The Nation does not argue, for example, that the United States compromised the Nation's claims improperly or unreasonably. Instead, the Nation acknowledges that its mainstream claims were *not* resolved by the Supreme Court's decree and thus remain to be determined. Opening Brief at 46-47 (citing *Arizona*, 376 U.S. at 352-53). The Nation fails to explain how decades-old litigation—which the Nation does not allege to have prejudiced its claims—results in a continuing fiduciary obligation today.

It is true that the United States continues to represent the Nation, alongside the Nation's own counsel, in the ongoing general adjudications now pending in Arizona and Utah State Court. *See supra* pp. 8-10. But again, the Nation does not allege that federal officials have breached a trust obligation in those actions. To the extent that the Nation suggests that the United States is under a fiduciary obligation to initiate some other proceedings to determine the Nation's water rights

in the Colorado River mainstream, that argument is contrary to the well-established rule that litigation decisions of the Department of Justice are not subject to judicial review. *Heckler v. Chaney*, 470 U.S. 821, 831 (1985); *Shoshone-Bannock Tribes*, 56 F.3d at 1480-81 (holding unreviewable the government's decision not to file tribal water-rights claim).

D. Interior has not adopted fiduciary obligations to the Nation in guidelines and policy statements.

Finally, the Nation errs in supposing that various Interior policy statements establish fiduciary responsibilities for the determination and development of the Nation's water rights. Opening Brief at 48-54. In 1990, Interior published criteria and procedures for the participation of federal officials in negotiations to settle Indian water rights claims. 55 Fed. Reg. 9223 (Mar. 12, 1990). That document includes substantive criteria for settlements and procedures for federal participation in settlement discussions, including a commitment by federal officials to "consider" formal negotiations in certain circumstances. *Id.* at 9224. The Nation criticizes the district court for failing to consider these criteria and procedures. Opening Brief at 48. But the Nation does not allege that Interior acted contrary to any particular provision therein. *Id.*

Similarly, the Nation quotes various statements from the NEPA documents for the surplus and shortage guidelines, in which Interior acknowledges its responsibility to "protect" Indian trust assets. Opening Brief at 48-51; *see also* 2

E.R. 59-60, 62, 114, 116. But the Nation errs in suggesting that these statements include an acknowledged duty to "inventory" the Nation's water rights (in the sense of determining the Nation's rights from the mainstream). *Id.* Instead, Interior determined that the guidelines would not alter or affect the Nation's water rights, and that federal reservoir operations will account for the Nation's claimed federal reserved water rights in the Colorado River mainstream in the event those rights are adjudicated and confirmed. S.E.R. 14-15, 17-18. The Nation has pled no facts suggesting that the surplus or shortage guidelines threaten or fail to protect the Nation's unquantified water rights. As this Court already held in the prior appeal, the surplus and shortage Guidelines "do not act directly upon the Nation's unquantified water rights," and the indirect impacts alleged by the Nation are too speculative to provide a case or controversy under Article III of the constitution. *Navajo Nation*, 876 F.3d at 1162-67.

The Nation also errs in relying on a commitment made in the record of decision for the surplus guidelines. Opening Brief at 49 (citing 2 E.R. 153). In response to comments from a group of tribes, the Secretary of the Interior noted that Reclamation had identified "a significant quantity of *confirmed* but unused rights" belonging to several tribes in the Colorado River basin. 2 E.R. 153 (emphasis added). The Secretary urged those tribes to "develop and utilize their water rights" and directed Reclamation to "provide appropriate assistance

(including technical and financial assistance)" to each tribe to "establish a water use plan for on-reservation development." *Id.* Contrary to the Nation's argument, these comments were not specifically directed toward the Nation, which has no confirmed mainstream water rights. *Id.* Regardless, in directing Reclamation to "provide appropriate assistance" to tribes in their water-use planning, the Secretary did not commit to any specific action on behalf of any tribe. *Id.*

The Nation concludes by citing a 2014 order of the Secretary of the Interior, which quotes a 1978 memorandum from Interior's Solicitor for the proposition that the "government has fiduciary duties of care and loyalty, to make trust property income productive, to enforce reasonable claims on behalf of Indians, and to take affirmation action to preserve trust property." *See* Opening Brief at 52-53 (citing Secretarial Order No. 3335, https://www.doi.gov/pmb/cadr/programs/native/Government-to-Government-Secretarial-Orders). But this order is expressly "for guidance purposes only" and creates no "legal right . . . enforceable . . . against the United States" or its agencies, officers, or employees. *See* Order No. 3335 at 6. In any event, the relevant "guiding principle" from the order is simply to "[e]nsure to the maximum extent possible that . . . trust resources . . . are protected." *Id.* As already explained, the Nation has pled no facts demonstrating a failure to *protect* the Nation's water rights or water resources, even if an enforceable duty could be seen to arise merely from federal trust ownership of such resources.

* * *

At bottom, none of the authorities cited by the Nation establishes the specific fiduciary obligations that the Nation seeks to enforce against Interior in this case, namely, responsibilities to determine the Nation's water rights from the Colorado River mainstream and to take affirmative actions to help develop the Nation's water rights and resources. Nor is this Court free to declare such duties as a matter of developing federal common law.

CONCLUSION

For the foregoing reasons, the judgment of the district court should be affirmed.

Respectfully submitted,

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Date April 27, 2020

ADDENDUM

Boulder Canyon Project Act of 1928

43 U.S.C. § 617. Colorado River Basin; protection and development; dam, reservoir, and incidental works; water, water power, and electrical energy; eminent domain

For the purpose of controlling the floods, improving navigation, and regulating the flow of the Colorado River, providing for storage and for the delivery of the stored waters thereof for reclamation of public lands and other beneficial uses exclusively within the United States, and for the generation of electrical energy as a means of making the project herein authorized a self-supporting and financially solvent undertaking, the Secretary of the Interior subject to the terms of the Colorado River compact hereinafter mentioned in this chapter, is authorized to construct, operate, and maintain a dam and incidental works in the main stream of the Colorado River at Black Canyon or Boulder Canyon adequate to create a storage reservoir of a capacity of not less than twenty million acre-feet of water and a main canal and appurtenant structures located entirely within the United States connecting the Laguna Dam, or other suitable diversion dam, which the Secretary of the Interior is authorized to construct if deemed necessary or advisable by him upon engineering or economic considerations . . . .

43 U.S.C. § 617d. Contracts for storage and use of waters for irrigation and domestic purposes; generation and sale of electrical energy

The Secretary of the Interior is authorized, under such general regulations as he may prescribe, to contract for the storage of water in said reservoir and for the delivery thereof at such points on the river and on said canal as may be agreed upon, for irrigation and domestic uses, and generation of electrical energy and delivery at the switchboard to States, municipal corporations, political subdivisions, and private corporations of electrical energy generated at said dam, upon charges that will provide revenue which, in addition to other revenue accruing under the reclamation law and under this subchapter, will in his judgment cover all expenses of operation and maintenance incurred by the United States on account of works constructed under this subchapter . . . . No person shall have or be entitled to have the use for any purpose of the water stored as aforesaid except by contract made as herein stated. . . .

Colorado Basin Project Act of 1968

§ 1501. Congressional declaration of purpose and policy

(a) It is the object of this chapter to provide a program for the further comprehensive development of the water resources of the Colorado River Basin and for the provision of additional and adequate water supplies for use in the upper as well as in the lower Colorado River Basin. This program is declared to be for the purposes, among others, of regulating the flow of the Colorado River; controlling floods; improving navigation; providing for the storage and delivery of the waters of the Colorado River for reclamation of lands, including supplemental water supplies, and for municipal, industrial, and other beneficial purposes; improving water quality; providing for basic public outdoor recreation facilities; improving conditions for fish and wildlife, and the generation and sale of electrical power as an incident of the foregoing purposes.

(b) It is the policy of the Congress that the Secretary of the Interior (hereinafter referred to the "Secretary") shall continue to develop, after consultation with affected States and appropriate Federal agencies, a regional water plan, consistent with the provisions of this chapter and with future authorizations, to serve as the framework under which projects in the Colorado River Basin may be coordinated and constructed with proper timing to the end that an adequate supply of water may be made available for such projects, whether heretofore, herein, or hereafter authorized.

§ 1521. Central Arizona Project

(a) Construction and operation; Hayden-Rhodes Aqueduct and pumping plants; Orme Dam and Reservoir; Buttes Dam and Reservoir; Hooker Dam and Reservoir; Charleston Dam and Reservoir; Tucson aqueducts and pumping plants; Fannin-McFarland Aqueduct; related and appurtenant works

For the purposes of furnishing irrigation water and municipal water supplies to the water-deficient areas of Arizona and western New Mexico through direct diversion or exchange of water, control of floods, conservation and development of fish and wildlife resources, enhancement of recreation opportunities, and for other purposes, the Secretary shall construct, operate, and maintain the Central Arizona Project, consisting of the following principal works: (1) a system of main conduits and canals, including a main canal and pumping plants (Hayden-Rhodes Aqueduct and pumping plants), for diverting and carrying water from Lake Havasu to Orme

Dam or suitable alternative, which system may have a capacity of 3,000 cubic feet per second or whatever lesser capacity is found to be feasible . . . ; (2) Orme Dam and Reservoir and power pumping plant or suitable alternative; (3) Buttes Dam and Reservoir . . . ; (4) Hooker Dam and Reservoir or suitable alternative, which shall be constructed in such a manner as to give effect to the provisions of subsection (f) of section 1524 of this title; (5) Charleston Dam and Reservoir; (6) Tucson aqueducts and pumping plants; (7) Fannin-McFarland Aqueduct; (8) related canals, regulating facilities, hydroelectric powerplants, and electric transmission facilities required for the operation of said principal works; (9) related water distribution and drainage works; and (10) appurtenant works.

§ 1524. Water furnished from Central Arizona Project

(a) Restriction on use of water for irrigation

Unless and until otherwise provided by Congress, water from the Central Arizona Project shall not be made available directly or indirectly for the irrigation of lands not having a recent irrigation history as determined by the Secretary, except in the case of Indian lands, national wildlife refuges, and, with the approval of the Secretary, State-administered wildlife management areas. . . .

Treaty with the Navajo, June 1, 1868
15 Stat. 667 (1868)

Articles of a treaty and agreement made and entered into at Fort Sumner New Mexico, on the first day of June, one thousand eight hundred and sixty-eighty, by and between the United States, represented by its commissioners . . . , and the Navajo Nation or tribe of Indians, represented by their chiefs and head-men, duly Authorized and empowered to act for the whole people of said nation or tribe, . . . witness: —

ARTICLE 1. From this day forward all war between the parties to this agreement shall forever cease. The Government of the United States desires peace, and its honor is hereby pledged to keep it. The Indians desire peace, and they now pledge their honor to keep it.

If bad men among the whites, or among other people subject to the authority of the United States, shall commit any wrong upon the person or property of the Indians, the United States will, upon proof made to the agent and forwarded to the Commissioner of Indian Affairs at Washington City proceed at once to cause the offender to be arrested and punished according to the laws of the United States, and also to reimburse the injured persons for the loss sustained.

If the bad men among the Indians shall commit a wrong or depredation upon the person or property of any one, white, black, or Indian, subject to the authority of the United States and at peace therewith, the Navajo tribe agree that they will, on proof made to their agent, and on notice by him, deliver up the wrongdoer to the United States, to be tried and punished according to its laws; and in case they willfully refuse so to do, the person injured shall be reimbursed for his loss from the annuities or other moneys due or to become due to them under this treaty or any others that may be made with the United States. And the President may prescribe such rules and regulations for ascertaining damages under this article as in his judgment may be, but no such damage shall be adjusted and paid until examined and passed upon by the Commissioner of Indian Affairs, and no one sustaining loss whilst violating, or because of his violating, the provisions of this treaty or the laws of the United States, shall be reimbursed therefor.

ARTICLE II. The United States agrees that the following district of country to wit: bounded on the north by the 37th degree of north latitude, south by an east and west line passing through the site of old Fort Defiance, in Cañon Bonito, east by the parallel of longitude which, if prolonged south, would pass through old Fort

Lyon, or the Ojo-de-oso, Bear Spring, and west by a parallel of longitude about 1090 30' west of Greenwich, provided it embraces the outlet of the Cañon-de-Chilly which cañon is to be all included in this reservation, shall be, and the same is hereby set apart for the use and occupation of the Navajo tribe of Indians, and for such other friendly tribes or individual Indians as from time to time they may be willing, with the consent of the United States, to admit among them; and the United States agrees that no persons except those herein so authorized to do, and except such officers, soldiers, agents, and employees of the Government, or of the Indians, as may be authorized to enter upon Indian reservations in discharge of duties imposed by law or the orders of the President, shall ever be permitted to pass over, settle upon, or reside in, the territory described in this article.

. . . .

ARTICLE XIII. The tribe herein named, by their representatives, parties to this treaty, agree to make the reservation herein described their permanent home, and they will not as a tribe make any permanent settlement elsewhere, reserving the right to hunt on the lands adjoining the said reservation formerly called theirs, subject to the modifications named in this treaty and the orders of the commander of the department in which said reservation may be for the time being and it is further agreed and understood by the parties to this treaty that if any Navajo Indian or Indians shall leave the reservation herein described to settle elsewhere, he or they shall forfeit all the rights, privileges, and annuities conferred by the terms of this treaty and it is further agreed by the parties to this treaty that they will do all they can to induce Indians now away from reservations set apart for the exclusive use and occupation of the Indians, leading a nomadic life, or engaged in war against the people of the United States, to abandon such a life and settle permanently in one of the territorial reservations set apart .for the exclusive use and occupation of the Indians.

In testimony of all which the said parties have hereunto, on this the first day of June, one thousand eight hundred and sixty-eight, at Fort Sumner, in the Territory of New Mexico, set their hands and seals.