No. _____

In The
Supreme Court of the United States

STATE OF ARIZONA, STATE OF NEVADA, STATE OF COLORADO, THE METROPOLITAN WATER DISTRICT OF SOUTHERN CALIFORNIA, et al.,

Petitioners,

v.

NAVAJO NATION, et al.,

Respondents.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Ninth Circuit

PETITION FOR A WRIT OF CERTIORARI

RITA P. MAGUIRE
Counsel of Record
RITA P. MAGUIRE, ATTORNEY AT LAW, PLLC
P.O. Box 60702
Phoenix, AZ 85082
(602) 277-2197
rmaguire@azwaterlaw.com
Attorneys for Petitioner State of Arizona

*Attorneys for Petitioners**

*Additional counsel listed on signature page

COCKLE LEGAL BRIEFS (800) 225-6964
WWW.COCKLELEGALBRIEFS.COM

QUESTIONS PRESENTED

The Consolidated Decree in *Arizona v. California,* 547 U.S. 150 (2006), apportions the mainstream of the Colorado River in the Lower Basin ("LBCR") among three States, decrees rights to the LBCR for five Indian Reservations (but not the Navajo reservation) and various other entities, and prescribes how the Secretary of the Interior ("Secretary") shall operate the mainstream dams in satisfaction of the decreed rights and water delivery contracts entered under the Boulder Canyon Project Act ("BCPA"). The Court retained exclusive 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.* at 166-67 (emphasis added).

The United States "assumes Indian trust responsibilities only to the extent it expressly accepts those responsibilities by statute," treaty, or regulation. *U.S. v. Jicarilla Apache Nation*, 564 U.S. 162, 176-77 (2011). The federal treaties with the Navajo Nation ("Nation") do not require the Secretary to develop a plan to secure water for the Nation; and they do not address water at all. The doctrine of implied rights to water in *Winters v. United States*, 426 U.S. 207 (1908) ("*Winters* Doctrine") cannot justify imposing such a fiduciary duty on the Secretary. The questions presented are:

I. Does the Ninth Circuit Opinion, allowing the Nation to proceed with a claim to enjoin the Secretary to develop a plan to meet the Nation's water needs and

QUESTIONS PRESENTED – Continued

manage the mainstream of the LBCR so as not to interfere with that plan, infringe upon this Court's retained and exclusive jurisdiction over the allocation of water from the LBCR mainstream in *Arizona v. California*?

II. Can the Nation state a cognizable claim for breach of trust consistent with this Court's holding in *Jicarilla* based solely on unquantified implied rights to water under the *Winters* Doctrine?

PARTIES TO PROCEEDING

The Petitioners were intervenor-defendants and appellees below.

Petitioners from Arizona are the State of Arizona, the Central Arizona Water Conservation District, the Salt River Valley Water Users' Association, and the Salt River Project Agricultural Improvement and Power District.

Petitioners from Nevada are the State of Nevada, the Colorado River Commission of Nevada, and Southern Nevada Water Authority.

Petitioners from California are The Metropolitan Water District of Southern California, Coachella Valley Water District, and Imperial Irrigation District.

The State of Colorado is also a Petitioner.

Respondent Navajo Nation was the plaintiff and appellant below.

Respondents also include the federal defendant-appellees below the U.S. Department of the Interior, Deb Haaland, Secretary of the Interior, the U.S. Bureau of Reclamation, and the U.S. Bureau of Indian Affairs.

Arizona Power Authority, an intervenor-defendant and appellee below, is also a Respondent.

CORPORATE DISCLOSURE STATEMENT

Pursuant to Rule 29.6, other than Salt River Valley Water Users' Association, petitioners are all governmental entities and thus have no corporate interests to disclose. No publicly held corporation owns 10% or more of the stock in the Salt River Valley Water Users' Association, and it has no parent corporation.

RELATED PROCEEDINGS

This petition arises from the following proceedings in *Navajo Nation v. U.S. Dept. of Interior, et al.*:

1. In the United States Court of Appeals for the Ninth Circuit, Docket No. 19-17088, Final Judgment Entered: February 25, 2022.

2. In the United States District Court for the District of Arizona, Docket No. CV-03-00507-PCT-GMS, Judgment Entered: August 23, 2019.

3. In the United States Court of Appeals for the Ninth Circuit, Docket No. 14-16864, Final Judgment Entered: January 26, 2018.

4. In the United States District Court for the District of Arizona, Docket No. CV-03-00507-PCT-GMS, Judgment Entered: July 22, 2014.

RELATED PROCEEDINGS – Continued

There are no other proceedings in state or federal trial or appellate courts, or in this Court, directly related to the case within the meaning of Rule 14.1(b)(iii).

TABLE OF CONTENTS

TABLE OF CONTENTS – Continued

TABLE OF CONTENTS – Continued

TABLE OF AUTHORITIES

Page

CASES

TABLE OF AUTHORITIES – Continued

TABLE OF AUTHORITIES – Continued

STATUTES

TABLE OF AUTHORITIES – Continued

OPINIONS BELOW

The initial decision of the Ninth Circuit is reported at 996 F.3d 623 (9th Cir. 2021). The amended decision of the Ninth Circuit is reported at 26 F.4th 794 (9th Cir. 2022) and is reproduced at Appendix 1 to 74. The district court decision denying the Navajo Nation's renewed motion for leave to file a third amended complaint is reproduced at Appendix 75 to 92. A prior opinion by the Ninth Circuit decided in 2017 is reproduced at Appendix 106 to 161, along with the underlying district court decision from 2014 at Appendix 162 to 185.

JURISDICTION

The Ninth Circuit issued its initial decision on April 28, 2021. (ECF[1] 51) On June 3, 2021, the Ninth Circuit entered an order extending the time for any party to file a petition for rehearing to July 29, 2021. (ECF 56) Separate petitions for rehearing en banc were filed by the federal defendants and state intervenors on July 29, 2021. (ECF 61, 62) The Ninth Circuit issued its amended decision and an order denying the petitions for rehearing en banc on February 17, 2022. This Court has jurisdiction under 28 U.S.C. § 1254(1).

[1] All citations to ECF are to the documents in the Ninth Circuit's Electronic Court Files on this matter.

STATUTORY AND REGULATORY PROVISIONS INVOLVED

The relevant statutory and regulatory provisions are reprinted in an appendix to this petition.

BACKGROUND

The 1922 Colorado River Compact divided the Colorado River Basin into the Upper Basin and the Lower Basin annually with the dividing line at Lee Ferry in the State of Arizona, and apportioned Colorado River system water between those two basins. (ER[2] 133-37.) In 1928, the BCPA further divided the waters of the Lower Basin annually among the three Lower Basin states. Nevada was apportioned 300,000 acre-feet, California 4.4 million acre feet ("maf") and Arizona 2.8 maf.[3] 43 U.S.C. §§ 617, 617c; App. 108-211; SER 47. Arizona ultimately ratified the Compact in 1944. *Arizona v. California*, 373 U.S. 546, 558 n.24 (1963). However, the potential application of the doctrine of prior appropriation threatened the ability of Arizona to fully develop its allocation under the Act.

On August 13, 1952, Arizona commenced an action within the Court's original jurisdiction against

[2] All references to ER are to the Nation's Excerpts of Records in the Ninth Circuit (ECF 13-1 & 13-2). References to the SER are to Intervenor-Appellee's Supplemental Excerpts of Record (ECF 27).

[3] An additional 1.5 maf was apportioned to Mexico in the 1944 Mexican Water Treaty. 59 Stat. 1219, 1237 (1944).

California and several California water contractors, including Coachella Valley Water District, Imperial Irrigation District and the Metropolitan Water District of Southern California, to resolve major disputes over the States' respective Lower Basin apportionments. The United States and the State of Nevada intervened. *Arizona v. California*, 547 U.S. 150 (2006). The action concluded with the entry of the Consolidated Decree in 2006. During that 54-year period, the Court comprehensively and finally adjudicated many issues regarding the rights and entitlements to waters of the mainstream of the LBCR.[4]

The United States' Petition for Intervention in *Arizona v. California* asserted specific water right claims for Indian reservations in the Lower Basin, including the Navajo Reservation, but limited the Navajo Reservation claim to water from the Little Colorado River, seeking no rights in the mainstream. (Petition for Intervention, pp. 22-23, ¶¶ XXV through XXVII and Appendix IIA, pp. 56-57 (SER 42-45).)

At trial, the United States proceeded on the basis that all rights in the LBCR system, including tributaries, were to be adjudicated. For the Navajo Reservation, the United States made claims for ten projects on the Reservation, with the water source being the Little Colorado River system and local springs and washes. Importantly, the United States made no claim for

---

[4] The 1964 Decree in *Arizona v. California*, defined "mainstream" to refer to "the mainstream of the Colorado River downstream from Lee Ferry." 376 U.S. 340 (1964).

water from the mainstream of the LBCR for the Navajo Reservation. (RT 12500-502 (Aug. 13, 1957) (SER 35-37); U.S. Exhibit 349 (SER 46).)

After considering recommendations from the Special Master, the Court issued an opinion in 1963, 373 U.S. 546, and entered the 1964 Decree. Article VI of the 1964 Decree directed the States to submit lists of "present perfected rights" in waters of the mainstream of the LBCR and directed the United States to submit a similar list with respect to claims for federal reserved rights within each State. 376 U.S. 340, 351-52. Article VII of the Decree provided that the Decree would not affect "[t]he rights or priorities, except as specific provision is made herein, of any Indian Reservation," *id.* at 352-53, and Article IX of the Decree provided that parties may apply to amend the decree, and that the Court retained jurisdiction of the case for any modification or supplemental decree. *Id.* at 353.

Abiding by Article VI of the 1964 Decree, the United States submitted its list of present perfected rights in March 1967, which did not claim any water rights for the Navajo Reservation. (List of Present Perfected Rights Claimed by the United States, filed March 10, 1967 (SER 70-74).) After protracted negotiations among the State parties and the United States, the parties filed a joint motion asking the Court to enter a supplemental decree confirming the present perfected rights submitted by the parties. The Court granted the motion, and entered the 1979 Supplemental Decree, which did not decree any reserved

water rights for the Navajo Reservation. *Arizona v. California*, 439 U.S. 419 (1979).

The remaining *Arizona v. California* proceedings, which went on for another 26 years, addressed disputed reservation boundary issues for the Colorado River, Fort Mohave and Fort Yuma Indian Reservations, and the related water right claims. *Arizona v. California*, 547 U.S. 150, 151-52 (2006). When those controversies were finally resolved, the Court entered the Consolidated Decree in 2006. *Id.*

During six decades of litigation, the United States never claimed reserved water rights in the mainstream of the LBCR for the Navajo Reservation, but it has represented the Nation in three other adjudications of water sources in Upper and Lower Basin States. These other adjudications are: (1) the on-going adjudication of the Little Colorado River in Arizona; (2) the San Juan River Basin in New Mexico Navajo Nation Water Rights Settlement Agreement of 2010; and (3) the Navajo Utah Water Rights Settlement Act of 2020.[5]

[5] Information on these adjudications and relevant settlement agreements may be found at the following cites respectively: (1) a discussion of the pending Little Colorado River adjudication is at http://www.superiorcourt.maricopa.gov/SuperiorCourt/GeneralStreamAdjudication/littleColorado.asp; (2) a copy of the San Juan River Basin in New Mexico Navajo Nation Water Rights Settlement Agreement may be found at https://www.ose.state.nm.us/Legal/settlements/NNWRS/settlements/121710%20SJRiver%20Basin%20in%20NM%20NN%20WRs%20Settlement%20Agreement.pdf; and (3) the Navajo Utah Water Rights Settlement Act of 2020 is codified at Pub. L. No. 116-260, div. FF, tit. XI, § 1102, 134 Stat. 1181, 3224-34 (2020).

STATEMENT OF THE CASE

The Nation filed its first complaint against the U.S. Department of the Interior, the Secretary, the Bureau of Reclamation, and the Bureau of Indian Affairs (collectively, the "Federal Appellees") in 2003. The complaint alleged that the Federal Appellees violated the National Environmental Policy Act ("NEPA"), 42 U.S.C. § 4321, et seq., and breached their trust obligations to the Nation by managing the Colorado River in a manner that did not consider or meet the Nation's unquantified federal reserved water rights and unmet water needs. (Appendix ("App.") 93, 170-72) The district court dismissed the Nation's NEPA claims based on a lack of Article III standing and dismissed its breach of trust claim based on sovereign immunity. (App. 176-83) The Ninth Circuit affirmed the dismissal of the NEPA claims but reversed the ruling that the breach of trust claim was barred by sovereign immunity and remanded the case to the district court. *Navajo Nation v. Dept. of Interior*, 876 F.3d 1144, 1174 (9th Cir. 2017). On remand, the Nation filed a motion for leave to file a Third Amended Complaint.

The Nation's proposed Third Amended Complaint ("proposed Complaint") seeks to allege a "common law" breach of trust claim to compel the Federal Appellees to determine the Nation's needs for water, develop a plan to secure the water, and manage the mainstream of the LBCR in a manner that does not interfere with the plan. (ER 26-81) The proposed Complaint did not identify any statute, regulation, or treaty expressly imposing these duties, a prerequisite for a cognizable

breach of trust claim. *Id.*; *see also United States v. Jicarilla Apache Nation*, 564 U.S. 162, 165, 173-78 (2011); *United States v. Mitchell*, 445 U.S. 535, 541-46 (1980) ("*Mitchell I*"); *Gros Ventre Tribe v. United States*, 469 F.3d 801, 809-14 (9th Cir. 2006). The district court denied the motion for leave to amend and dismissed the action holding that: (1) it lacked jurisdiction to decide the breach of trust claim because this Court reserved jurisdiction over the allocation of mainstream rights to the LBCR in *Arizona v. California* (Consolidated Decree, Art. IX), 547 U.S. at 166-67; and (2) the Nation failed to identify a treaty, statute, or regulation that imposed an enforceable trust duty on the Federal Appellees. (App. 92)

The Ninth Circuit panel reversed, holding that the Nation's proposed Complaint properly states a breach of trust claim premised on: (1) the Nation's federal reserved *Winters* rights, which the Ninth Circuit found were supported by certain provisions of the Nation's treaties with the Government and were acknowledged by the Department of Interior in agency documents, and (2) the Secretary's "pervasive control" over the LBCR. (App. 29-38)[6] While the panel acknowledged that the Court retained original jurisdiction over water

[6] While the Ninth Circuit Opinion states that language in the Nation's treaties and in "Interior regulations and documents" support the finding of a fiduciary duty in the case (App. 385), the language relied upon does not establish such a duty and does not provide support for the existence of *Winters* rights held by the Nation in the mainstream of the LBCR. At most, the treaties might support an inference of *Winters* rights in the local streams that were located on lands reserved in the treaties.

rights claims to the mainstream of the LBCR, it concluded that the "Nation's complaint does not seek judicial quantification of rights to the River, so we need not decide whether the U.S. Supreme Court's retained jurisdiction is exclusive." (App. 6)

Although the panel found that the Nation's proposed Complaint does not seek a judicial quantification or right to the mainstream of the LBCR, the Secretary must necessarily quantify the Nation's alleged rights in order to meaningfully manage the River to protect the Nation's thus far unadjudicated water rights as directed by the Ninth Circuit's opinion. How could the Secretary manage the LBCR to protect future rights without knowing the quantity of water rights being protected? Judge Lee, in his concurring opinion, highlighted the dilemma created by the panel's ruling stating, "the requested relief that the Federal Defendants develop a plan to meet the Nation's water needs and manage the River accordingly, cannot be used as a back door attempt to allocate the rights to the mainstream." (26 F.4th at 814-15.) Yet, the relief sought by the Nation is the functional equivalent of a quantified decreed right.

REASONS FOR GRANTING THE PETITION

I. INTERVENORS WILL BE DIRECTLY AND NEGATIVELY IMPACTED BY THE NINTH CIRCUIT OPINION

The Ninth Circuit's ruling requiring the Secretary to manage the LBCR in a manner that protects the Nation's alleged water rights authorizes the Secretary to conduct an *ex parte* administrative adjudication of the LBCR without the benefit of a full and fair hearing to consider whether the Nation actually holds a reserved water right to the flows in the mainstream of the LBCR.

A. The Ninth Circuit Opinion will reduce the volume of water available to vested right-holders in Arizona.

The Consolidated Decree provides that "any mainstream water consumptively used within a State shall be charged to its apportionment, regardless of the purpose for which it was released." 547 U.S. 150, 155 (Article II(B)(4)); *id.* at 156. Thus, any delivery of mainstream water to the Nation for use within the State of Arizona, whether directly or indirectly, reduces the amount of water available to entitlement holders in Arizona. Because the Consolidated Decree and the contracts issued pursuant to the BCPA prioritize the delivery of LBCR water, senior entitlement holders take delivery prior to deliveries to junior entitlement holders. *See* Article II(B)(3) and (B)(4). Any federal reservation of water made by the Secretary for the benefit

of the Nation in Arizona will effectively have the status of a perfected water right with a seniority date based upon the establishment, or addition of reservation lands, to which it is appurtenant and thereby displace all junior priority-holders. *Arizona v. California*, 460 U.S. 605, 621 (1983).

B. The Ninth Circuit Opinion will result in an *ex parte* determination of the amount of LBCR water the Nation is entitled to receive.

The Ninth Circuit concluded that the injunctive relief sought by the Nation would not require a "judicial" quantification of the LBCR. But the court's ruling effectively achieved that result by requiring the Secretary to manage the system based upon the Secretary's sole determination of the amount of LBCR water the Nation is entitled to receive. (App. 20) This is because the Nation seeks an injunction "requiring the Federal Appellees. . . . (1) to determine the extent to which the Navajo Nation requires water . . . (2) to develop a plan to secure the water needed; (3) to exercise their authorities, including those for the management of the Colorado River, in a manner that does not interfere with the plan to secure the water needed . . . and (4) to require the Federal Appellees to analyze their actions . . . and adopt appropriate mitigation measure to offset any adverse effects from those actions." (App. 20-21, 40, 98-100, citing ER 26-81)

If upheld, the Ninth Circuit Opinion will result in an *ex parte* determination of reserved water rights, an action clearly prohibited by this Court in *Arizona v. California*, 460 U.S. 605, 636-38 (1983) ("we in no way intended that *ex parte* secretarial determinations . . . would constitute 'final determinations' that could adversely affect the States, their agencies, or private water users holding priority water rights.") Any action taken by the Secretary to deliver mainstream water in the Lower Basin must be pursuant to express authority granted by the Consolidated Decree or congressional act.

C. The Ninth Circuit Opinion undermines the security and reliability of the Intervenors' water rights.

In an arid environment, having a secure and reliable supply of water is essential to building a community. Without it, cities cannot guarantee their residents that affordable, high-quality water will always be available, businesses will be unwilling to make the infrastructure investments necessary to create jobs, and agriculture will be unable to rely on the water necessary to grow its crops.

This Court has consistently recognized the importance of having certainty of water rights in the Western United States. In *Arizona v. California*, 460 U.S. 605, 620 (1983), the Court noted that "development of [the Western United States] would not have been possible without adequate water supplies in an

otherwise water-scarce part of the country." *Id.*, quoting *Colorado River Water Conservation District v. United States*, 424 U.S. 800, 804 (1976). This Court also noted that a "major purpose of this litigation (referring to *Arizona v. California*), from its inception to the present day, has been to provide the necessary assurance to States of the Southwest and to various private interests, of the amount of water they can anticipate [receiving] from the Colorado River system." *Id.* at 620.

If the Nation is successful in enjoining the Secretary to operate the LBCR in a manner that potentially redirects water away from vested right-holders based solely upon the Nation's unquantified and unadjudicated rights, the goals of finality and clarity articulated by this Court in *Arizona v. California* will be undermined. Specifically, this result would upset the priorities and amount of water available to those with existing rights awarded them by the decree in *Arizona v. California*.

This issue has arisen elsewhere. In *Arizona II*, this Court recognized that an increase in reserved Indian water rights would necessarily diminish the water rights of other parties, and accordingly held that the Court would not revisit a water right determination. 460 U.S. 605, 621-26 (1983). To emphasize the permanency of its apportionments, the Court also held that even though the Tribes whose reservations were at issue in the *Arizona II* proceedings may not have been parties to the former proceedings in the case, they had been represented by the United States and were bound by the previous water right determinations. *Id.*

at 626-28. Neither the Ninth Circuit nor the Secretary has jurisdiction to adjudicate future rights to the mainstream of the LBCR. In fact, Article II of the Consolidated Decree expressly enjoins the "United States, its officers, attorneys, agents and employees" from operating the LBCR regulatory structures or releasing water not in accordance with the allocations set forth in the Decree. 547 U.S. at 154-59.

II. THE DISTRICT COURT CORRECTLY RULED THAT IT LACKS SUBJECT MATTER JURISDICTION TO DETERMINE WHETHER THE NATION HAS A WATER RIGHT IN THE MAINSTREAM OF THE LBCR.

The district court dismissed the Nation's breach of trust claim on several grounds, including the keystone jurisdictional ground: "[T]o the extent that the Nation would have this Court determine that the United States has violated its trust responsibility by failing to appropriate sufficient appurtenant water from the mainstream of the LBCR, that determination cannot be made by this Court in light of the Supreme Court's reservation of the question." (App. 82-83) The district court correctly noted that the allegations "run headlong into the Supreme Court's reservation of jurisdiction in *Arizona v. California*. In order to determine that the United States breached its trust duties [. . .], the Court would have to determine that the Nation in fact has rights to the water in the mainstream of the LBCR. To the extent that the Nation wishes to use the

Secretary's regulation of the LBCR as a basis for its breach of trust claim, it asks this Court to assume facts that are beyond its jurisdiction." (App. 83)

The Ninth Circuit reversed and remanded, reasoning that the Nation was not seeking a "quantification" of its water rights. (26 F.4th at 806; conc. opinion, at 814-15.) Assuming *arguendo* that the Nation does not seek a "quantification," the district court nevertheless lacks jurisdiction because the scope of this Court's retained jurisdiction in *Arizona v. California* is broader than a mere quantification; it extends to the essential question of whether the Nation has any reserved right to the mainstream of the LBCR at all. All other water users in the LBCR will need to be given the opportunity to be heard on that question if the decision as to the extent of their water rights is to have the finality accorded by the principles of *res judicata*. This is, of course, critical; if no mainstream reserved right exists, there is no trust duty to be enforced. Whether a mainstream right exists can only be adjudicated and determined by this Court, which first obtained jurisdiction over the mainstream and retained continuing jurisdiction over it. The district court correctly ruled it lacked jurisdiction to make that determination.

A. This Court's retained jurisdiction is exclusive.

Article IX of the Consolidated Decree describes the scope of this Court's retained jurisdiction:

> Any of the parties may apply at the foot of this decree for its amendment or for further relief. The Court *retains jurisdiction* of this suit 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*.

Arizona v. California, 547 U.S. 150, 166-67 (2006) (emphasis added).[7] The retention of jurisdiction is broadly stated, referring to "any order," "direction" or "modification of the decree," as well as "supplemental decree[s]." *Id.* Rather than being limited to modification of just the terms of the decree, the retention extends, without limitation as to time, to the broader "subject matter in controversy." *Id.* at 167. To be sure, *Arizona v. California*, 460 U.S. 605 (1983), made clear that Article IX is governed by general principles of finality and repose, *id.* at 619; it does not "permit retrial of factual or legal issues that were fully and fairly litigated" in the proceeding. *Id.* at 621. Instead, the retention of jurisdiction is intended to accommodate "changed circumstances," *id.* at 619, 622, or "unforeseen issues not previously litigated." *Id.* at 619.

---

[7] The initial 1964 Decree contained the same "reservation of jurisdiction" provision. *See Arizona v. California, supra*, 376 U.S. at 353. Other supplemental decrees contained reservations that were worded slightly differently. *See Arizona v. California, supra*, 439 U.S. at 421 (stating that Article IX is not affected by the list of present perfected rights); *Arizona v. California, supra*, 466 U.S. at 146 (retaining jurisdiction to order further proceedings and enter supplemental decrees as appropriate); *Arizona v. California*, 531 U.S. 1, 3-4 (2000) (same).

Arizona v. California is a case within the Court's original and exclusive jurisdiction. 28 U.S.C. § 1251(a); U.S. Constitution Art. III, § 2, Cl. 2; *California v. Arizona*, 440 U.S. 59, 61 (1979). The issue of whether or not the Nation should be able to proceed with a claim to the mainstream of the LBCR notwithstanding the finality intended by *Arizona v. California* decision and the Consolidated Decree can only be decided by this Court. It should be clear beyond peradventure that the Secretary has no authority to make a determination that the Nation has a federally reserved water right. For that reason, the Ninth Circuit Opinion must be reversed.

B. Exclusive jurisdiction is preserved in the court that issued the judgment or decree.

Retention of jurisdiction provisions are generally construed to preserve exclusive jurisdiction in the court that issued the judgment or decree, or that approved the settlement agreement over which jurisdiction was retained. *See United States v. Alpine Land & Reservoir Co.*, 174 F.3d 1007, 1012-13 (9th Cir. 1999) ("Not only is the district court's jurisdiction continuing, it is exclusive."); *Flanigan v. Arnaiz*, 143 F.3d 540, 545 (9th Cir. 1998) ("The reason why exclusivity is inferred is that it would make no sense for the district court to retain jurisdiction to interpret and apply its own judgment to the future conduct contemplated by the judgment, yet have a state court construing what the federal court meant in the judgment.))

For one court to adjudicate issues within the retained jurisdiction of another court, let alone the highest court in the land, is inappropriate. *See Lapin v. Shulton, Inc.*, 333 F.2d 169, 172 (9th Cir. 1964), *cert. denied*, 379 U.S. 904 (1964). As stated by the Ninth Circuit in *Lapin*:

> [F]or a non-issuing court to entertain an action for such relief would be seriously to interfere with, and substantially to usurp, the inherent power of the issuing court . . . to supervise its continuing decree by determining from time to time whether and how the decree should be supplemented, modified or discontinued in order properly to adapt it to new or changing circumstances.

Id. at 172 (citations omitted); *see also Treadaway v. Academy of Motion Picture Arts & Sciences*, 783 F.2d 1418, 1421-22 (9th Cir. 1986); *Mann Mfg., Inc. v. Hortex, Inc.*, 439 F.2d 403, 407-08 (5th Cir. 1971).

Water adjudications, like that in *Arizona v. California*, are in the nature of an *in rem* proceeding involving a *res*. *Nevada v. United States, supra*, 463 U.S. at 143-44; *Alpine Land & Reservoir Co., supra*, 174 F.3d at 1014. In water right cases, the "zero-sum nature of the resource," *State Engineer, supra*, 339 F.3d at 811, where an entitlement by one diminishes the amount remaining for others, makes it particularly important to avoid multiple adjudications by different courts. *See also United States v. New Mexico*, 438 U.S. 696, 705 (1978) (observing an adjudication of a federal reserved water right results in a "one for one"

reduction in water available to others in a basin). Such would be the inevitable result were the district court to entertain the Nation's proposed breach of trust claim.

C. The Nation's breach of trust claim falls within this Court's retained and exclusive jurisdiction.

The Nation has conceded that a quantification of a mainstream right can only occur under the Court's retained jurisdiction (Appellant's Opening Brief ("AOB"), ECF 12 at 18), but the Nation seeks to circumvent the Court's retained and exclusive jurisdiction by arguing that it is not asking the district court to quantify its rights to the mainstream of the LBCR, and that the district court can enforce the alleged trust duty without having to quantify its claimed rights. (*Id.* at 18, 28-31) However, even if no formal quantification occurs, the requirement that the Secretary manage the LBCR in accordance with a plan to acquire water from the mainstream of the LBCR necessarily presumes the Nation possesses federal reserved rights to the mainstream. Intervenors dispute this claim on several grounds, including: (1) that the Nation's claims are barred by *res judicata*, and (2) the Navajo Reservation is not and has never been appurtenant to the LBCR.

First, there is a substantial argument that any claim for mainstream water for the Navajo Reservation is barred by principles of *res judicata*. The United States did not advance a mainstream claim for the

Navajo Reservation in its initial motion to intervene in 1953, at trial before Special Master Rifkind,[8] in the United States' submission of its list of present perfected rights in 1967, in the United States' motion to modify the decree in 1979, or at the time of filing the joint motion to enter the Consolidated Decree in 2006, which fulfilled the Court's expressed desire "to enter a final consolidated decree and bring this case to a close." *Arizona v. California*, 530 U.S. 392, 420 (2000). As has been recognized by this Court, "[t]he policies advanced by the doctrine of *res judicata* perhaps are at their zenith in cases concerning . . . water." *Nevada v. United States*, 463 U.S. 110, 129 n.10 (1983). *See also Arizona v. California*, 460 U.S. 605 (1983) (ruling that that notwithstanding the retention of jurisdiction in Article IX to modify the decree, principles of *res judicata* and finality barred any further claims for additional water for "omitted" Indian reservation lands).

Second, Intervenors contend that the Nation does not have federal reserved rights to the mainstream of the LBCR because its reservation is not appurtenant to the mainstream of the LBCR. *See Cappaert v. United States*, 426 U.S. 128, 138 (1976) (explaining that, under

---

[8] Although the United States argued that under the "practicably irrigable acreage" standard there were some lands in the Navajo Reservation that might be irrigated with waters of the Little Colorado River and some with local springs and washes, it made *no* argument (understandable in light of the lift from steep canyons that would be required) that any lands were practicably irrigable with water that would be diverted from the mainstream. (*See* RT 12500-502 (Aug. 13, 1957) (SER 35-37); U.S. Exhibit 349 (SER 46).).

Winters, "when the Federal Government withdraws its land from the public domain" for the purpose of establishing an Indian reservation, "the Government, by implication, reserves *appurtenant* water then unappropriated to the extent needed to accomplish the purpose of the reservation." (Emphasis added.)

Intervenors raise these arguments, not to litigate them as part of this Petition, but to highlight the dilemma created by the Ninth Circuit Opinion. It is for this Court alone to decide whether any claim by the Nation for mainstream supplies can even proceed, let alone be quantified.

D. Management of the LBCR in the manner sought by the Nation would conflict with existing rights to the LBCR.

Neither the Nation nor the Ninth Circuit Opinion has described how the Secretary could operate the system in such a manner without impacting vested rightholders. In *Arizona v. California, supra*, 460 U.S. at 620-21 (1983), this Court explained how the recognition of additional reserved water rights like those at issue there, would be satisfied first in a Colorado River shortage because of their senior priority date, and would *necessarily* harm and diminish the rights of other holders of decreed mainstream water rights:

> 'In the arid parts of the West . . . claims to water for use on federal reservations inescapably vie with other public and private claims for the limited quantities to be found in the rivers

> and streams.' If there is no surplus water in the Colorado River, *an increase in federal reserved water rights will require a 'gallon-for-gallon reduction in the amount of water available for water-needy state and private appropriators*.' As Special Master Tuttle recognized, '[n]ot a great deal of evidence is really needed to convince anyone that western states would rely upon water adjudications.' Not only did the Metropolitan Water District in California and the Central Arizona Project predicate their plans on the basis of the 1964 allocations, but, due to the high priority of Indian water claims, *an enlargement of the Tribe's allocation cannot help but exacerbate potential water shortage problems for these projects and their States*.

(Emphasis added, internal citations omitted.) Thus, if the Secretary were to follow the mandate of the Ninth Circuit and manage the LBCR as though the Nation had mainstream rights, it would necessarily negatively impact the priorities and amount of water available to those with existing rights under the Consolidated Decree.[9] Jurisdiction to modify rights and priorities in the decree lies exclusively with this Court, not the district court. *Nebraska v. Wyoming*, 515 U.S. 1, 21 (1995) ("Wyoming's claim derives not from [water] rights under individual contracts but from the decree,

---

[9] The Nation alleges that provision of any mainstream water to its Reservation in Arizona would be satisfied out of Arizona's BCPA normal year apportionment of 2.8 maf. (ER 55, ¶80).

and the decree can be modified only by this Court." (emphasis added)).

The Ninth Circuit Opinion is thus in direct conflict not only with a controlling opinion of this Court, but with this Court's Consolidated Decree entered under its original jurisdiction. 547 U.S. 150 (2006). The issue takes on even greater importance now that the LBCR is in a declared shortage condition for the first time in history, with contractors voluntarily making even greater reductions in use to avoid more painful shortages if the River's hydrology fails to improve.

III. THE NINTH CIRCUIT'S RELIANCE ON THE *WINTERS* DOCTRINE TO IMPOSE A TRUST OBLIGATION ON THE SECRETARY IS LEGALLY FLAWED

The Ninth Circuit Opinion, finding a trust obligation owed to the Nation, is based largely on the assumed premise that the Nation has *Winters* rights in the LBCR mainstream. Even if that premise were correct, which Intervenors dispute, *Winters* rights do not impose fiduciary obligations on the United States to develop or manage water supplies on behalf of a tribe.

Under *Winters*, "when the Federal Government withdraws its land from the public domain" for the purpose of establishing an Indian reservation, "the Government, by implication, reserves appurtenant water then unappropriated to the extent needed to accomplish the purpose of the reservation." *Cappaert v. United States*, 426 U.S. 128, 138 (1976); *see Winters v.*

United States, 207 U.S. 564, 576 (1908). Relying on the peace Treaty of 1849,[10] which placed the Nation under the protection of the Government, and Articles V and VII of the Nation's Treaty of 1868,[11] which made available land, seed and farm implements to any tribal member who elected "to commence farming" (App. 31), the Ninth Circuit found that reserved water rights for the Navajo Reservation were implied. Based on the singular premise that the Nation has *Winters* rights, the Ninth Circuit concluded that "Federal Appellees have an irreversible and dramatically important trust duty requiring them to ensure adequate water for the health and safety of the Navajo Nation's inhabitants in their permanent home reservation" (App. 18), and that the Nation could require the Secretary to quantify its need for water, make a plan to acquire the water, and *manage the Colorado River* in accordance with that plan.

Until the Ninth Circuit Opinion, no federal appellate court had interpreted *Winters* to impose affirmative duties on the United States to determine water needs, develop water supplies, or manage water supplies on behalf of a tribe. Even if *Winters* rights in a water source are implied, those rights are at most rights to water that may be enforced by the United States or the tribe. They do not impose an obligation on the Secretary to secure water for the Reservation or

[10] App. 187-92 (Treaty with the Navaho, 1849, 9 Stat. 974).

[11] App. 193-207 (Treaty with the Navaho, 1868, 15 Stat. 667).

to manage the Colorado River for the benefit of the Nation.

A. The Ninth Circuit Opinion is contrary to this Court's holdings in *Jicarilla* and related precedent.

As recently as 2011, this Court in *United States v. Jicarilla Apache Nation*, 564 U.S. 162 (2011), ("*Jicarilla*") declared that the United States "assumes Indian trust responsibilities only to the extent it expressly accepts those responsibilities by statute," treaty or regulation. *Id.* at 165, 176-77. For that reason, an *implied* right to water cannot give rise to an affirmative trust obligation. Moreover, even if *Winters* rights were expressly contained within the language of the treaties between tribes and the United States, they are simply reserved rights to water; they are not an acceptance by the Government of a responsibility to *determine a tribe's water needs* or *develop a plan to secure water to meet those needs*, and they are certainly not, as the Ninth Circuit decided, acceptance by the Government of a responsibility to *manage a particular source* for the benefit of a tribe.

Jicarilla is based on a long line of Supreme Court precedent, including *United States v. Mitchell*, 445 U.S. 535, 542 (1980) ("*Mitchell I*"), 463 U.S. 206, 224-27 (1983) ("*Mitchell II*"), *United States v. Navajo Nation*, 537 U.S. 488, 506 (2003) ("*Navajo I*"), *United States v. Navajo Nation*, 556 U.S. 287, 301 (2009) ("*Navajo II*"), and *United States v. White Mountain Apache Tribe*, 537

U.S. 465, 475 (2003) ("*White Mountain*"). Collectively, these cases hold that "trust" ownership by the United States of tribal land or assets creates a "bare trust," which does not impose fiduciary management obligations upon the Government. *Mitchell II*, 463 U.S. at 224 (citing *Mitchell I*, 445 U.S. at 542-46). The extent of trust obligations owed to a tribe "is defined and governed by statutes rather than the common law." *See Jicarilla*, 564 U.S. at 174 (citing *Navajo I*).

In this case, the Ninth Circuit held that it was "not bound" by *Jicarilla* or related Supreme Court precedent, including *Mitchell I*, because those cases involved claims for money damages under the Indian Tucker Act (28 U.S.C. § 1505), and not claims for injunctive relief, as is sought in this case. (App. 25-28) However, the holding of *Jicarilla* and related cases is not so limited. The Indian Tucker Act is a waiver of sovereign immunity only, and a tribe must identify a separate substantive source of law to bring a claim under it. *Mitchell II*, 463 U.S. 206, 216. The rule of *Jicarilla* and related cases, that the assumption of Indian trust responsibilities arises "only to the extent [the United States] expressly accepts those responsibilities by statute," treaty, or regulation, was developed in the context of defining the contours of the separate substantive law on breach of trust claims. *See Jicarilla*, 564 U.S. at 176-77. Therefore, there is no basis to disregard the holdings of those cases where a tribe seeks declaratory or injunctive relief based on a claim of breach of trust.

B. The Ninth Circuit Opinion is in conflict with the decisions of other federal appellate courts and the Ninth Circuit's own precedent.

Applying the rule in *Jicarilla* and related Supreme Court precedent, other Circuit Courts have consistently rejected breach-of-trust claims asserted by tribes when they are not based upon a specific, express statutory, treaty, or regulatory text, even when those claims did not seek damages, but rather sought some form of injunctive relief. For instance, in *Flute v. United States*, 808 F.3d 1234 (10th Cir. 2015), the Court of Appeals for the Tenth Circuit affirmed that "the Supreme Court's precedents in *Mitchell I*, *Mitchell II*, *Navajo I*, and *White Mountain* establish the guidelines by which [to] determine whether a statute or regulation creates a trust relationship" in the context of a claim for trust accounting. *Id.* at 1247. In *El Paso Nat. Gas Co. v. United States*, the Court of Appeals for the D.C Circuit held that the principles of *Mitchell I*, *Mitchell II*, *White Mountain*, and *Navajo I* preclude a finding of a trust obligation on the United States "even though the claim is for equitable relief (not money damages) and even though sovereign immunity is waived under § 702 of the APA (and not the Indian Tucker Act)." 750 F.3d 863, 895 (D.C. Cir. 2014).[12]

[12] *See also Rosebud Sioux Tribe v. United States*, 9 F.4th 1018, 1023 (8th Cir. 2021) ("[T]he existence of an equitable obligation to a tribe depends on 'the terms of some authorizing document (e.g., statute, treaty, executive order)' " (citing *Navajo Tribe of Indians v. United States*, 624 F.2d 981, 988 (Ct. Cl. 1980).

Moreover, courts in other circuits have consistently rejected claims that *Winters* rights require the Government to develop water for a tribe or enforce water rights on behalf of a tribe, whether or not those claims arise under the Indian Tucker Act. Particularly relevant to this case, the Court of Appeals for the D.C. Circuit recently affirmed that trust ownership over tribal water rights derived from federal reserved rights, does not establish fiduciary duties to develop those water rights or enforce water rights on behalf of a tribe. *Hawkins v. Haaland*, 991 F.3d 216, 225-27 (D.C. Cir. 2021). Additionally, a district court in the D.C. Circuit, relying in part on that Circuit's precedent in *El Paso*, rejected the Ute Indian Tribe's claim that the Government has a trust duty to take certain actions for the benefit of the tribe, including protecting and developing the full scope of the tribe's water right, finding that several federal acts relied on by the tribe did not "demonstrate that the government 'expressly accepts' any of the specific trust duties alleged by the Tribe." *Ute Indian Tribe of the Uintah & Ouray Reservation v. United States Dep't of Interior*, 1:18-CV-00547 (CJN), 2021 WL 4189936, at *7 (D.D.C. Sept. 15, 2021), at *6-7. And finally, the Federal Circuit Court of Appeals rejected a claim by the Hopi Tribe that the *Winters* doctrine gave rise to fiduciary duties regarding water quality on the reservation. *Hopi Tribe v. United States*, 782 F.3d 662, 669 (Fed. Cir. 2015). In each of these cases, the courts looked for specific, enforceable trust obligations established by federal law or treaty, and found none.

Furthermore, the Ninth Circuit Opinion cannot be squared with the Ninth Circuit's own precedent. In *Gros Ventre*, the Ninth Circuit expressly rejected the argument that *Mitchell I* applies only to claims for money damages. 469 F.3d at 812 ("This is the law of the circuit, and this is the law we must follow.") The Ninth Circuit more recently affirmed the applicability of *Jicarilla* to claims that lie outside of the scope of the Indian Tucker Act. *See Quechan Tribe of Ft. Yuma Indian Reservation v. United States*, 599 Fed. Appx. 698, 699 (9th Cir. 2015) (holding that the court could not compel Indian Health Services to maintain the Fort Yuma Service Unit "because there is no specific, unequivocal statutory command requiring IHS to do so.")

Thus, the Ninth Circuit Opinion stands in direct conflict with other circuits and its own precedent.

C. The Ninth Circuit Opinion misapplies *Mitchell II*.

Emphasizing the Secretary's discretion to issue contracts for the delivery of water from Lake Mead under the BCPA, the Ninth Circuit concluded that the Secretary's "pervasive control" over the LBCR supported finding that the Secretary has a fiduciary obligation to the Nation to manage the River for the Nation's benefit. (App. 6, 14, 33-35) In doing so, the Ninth Circuit misapplied this Court's analysis in *Mitchell II*. (App. 34 (citing *Mitchell II*, 463 U.S. at 219).)

In *Mitchell II*, this Court found support for an enforceable trust obligation arising from alleged

mismanagement of timber lands within a reservation because certain statutes and regulations accorded the Secretary a "pervasive role in the sales of timber from Indian lands" (463 U.S. 206, 219 & 224), and because the United States assumed "elaborate control over forests and property belonging to Indians." *Id.* at 225. The relevant consideration in *Mitchell II* was the Secretary's degree of control over assets that indisputably belonged to the Quinalt Tribe – timber grown on tribal lands. 463 U.S. 206 at 209-10. In contrast, the Nation has no adjudicated rights to the mainstream of the LBCR. Unless and until the Nation's rights to the LBCR are adjudicated by this Court, the Secretary cannot have a trust obligation to manage that source for the benefit of the Nation. *See Gros Ventre Tribe*, 469 F.3d at 813 ("We are not aware of any circuit or Supreme Court authority that extends a specific *Mitchell*-like duty to non-tribal resources.")

Furthermore, control only becomes a factor *after* a court has found a specific fiduciary obligation prescribed in federal law. *See Hopi Tribe*, 782 F.3d at 668 ("Regardless of the United States' actual involvement in the provision of drinking water on the Hopi Reservation, we cannot infer from that control alone that the United States has accepted a fiduciary duty to ensure adequate water quality on the reservation.")

And finally, the Secretary's "pervasive control" over the LBCR is limited by both the BCPA and the Consolidated Decree. The Consolidated Decree imposes clear obligations and limitations on the Secretary's role as Water Master. 547 U.S. 150, 157

(Consolidated Decree, Art. II(D)). The Secretary is obligated to deliver annually to each LBCR entitlement holder the quantity of water they are legally entitled to pursuant to the Decree or a Section 5 Contract under the BCPA. 43 U.S.C. § 617d. It is a gross distortion of this Court's reasoning in *Mitchell II* to hold that the Secretary's "control" with respect to the mainstream of the LBCR imposes a duty on the Secretary to manage that source in a manner that does not interfere with the Nation's unquantified and unadjudicated claims, particularly when such management would be directly contrary to the Consolidated Decree. The Ninth Circuit Opinion misapplies and contradicts the precedent of this Court.

D. The effects of the Ninth Circuit Opinion will extend well beyond this case.

If the Ninth Circuit Opinion in this case stands, other tribes with unadjudicated water rights may seek to require the Secretary to manage nearby water systems under the presumption of a right. As of early 2021, federal negotiation teams had been assigned to work on the settlement of the water rights claims of 21 Indian tribes in nine different states. (Charles V. Stern, *Indian Water Rights Settlements*, Congressional Research Service Report No. R44148, at 6, 9-10 (January 18, 2022).) Within the Colorado River Basin, 12 of the 30 federally recognized Indian tribes had unresolved water rights claims, including 11 tribes with reservations in Arizona. (Larry MacDonell, et al., *The Status of Tribal Water Rights in the Colorado River Basin*,

Policy Brief #4, U. Colorado Law School, at 7 (April 9, 2021).) Should the Ninth Circuit Opinion not be reversed, its effect will be felt throughout the West, leaving those with adjudicated water rights in the Colorado River Basin subject to having the security of their water rights severely undermined by administrative adjudications conducted not in courts but within the offices of the U.S. Bureau of Reclamation and the Bureau of Indian Affairs.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

RITA P. MAGUIRE
Counsel of Record
RITA P. MAGUIRE, ATTORNEY AT LAW, PLLC
P.O. Box 60702
Phoenix, AZ 85082
(602) 277-2197
rmaguire@azwaterlaw.com
Attorneys for Petitioner State of Arizona

KENNETH C. SLOWINSKI
JENNIFER HEIM
ARIZONA DEPARTMENT OF WATER RESOURCES
1110 W. Washington Street, Suite 310
Phoenix, AZ 85007
(602) 771-8472
Attorneys for Petitioner State of Arizona

*Attorneys for Petitioners**

*Additional counsel listed on the next page

Additional counsel:

JAY M. JOHNSON
GREGORY L. ADAMS
CENTRAL ARIZONA WATER
CONSERVATION DISTRICT
23636 N. 7th Street
Phoenix, AZ 85024
(623) 869-2333
Attorneys for Petitioner
Central Arizona Water Conservation District

STUART L. SOMACH
ROBERT B. HOFFMAN
SOMACH SIMMONS & DUNN
A PROFESSIONAL CORPORATION
500 Capitol Mall, Suite 1000
Sacramento, CA 95814
(916) 446-7979
Attorneys for Petitioner
Central Arizona Water Conservation District

JOHN B. WELDON, JR.
LISA M. MCKNIGHT
SALMON, LEWIS & WELDON, P.L.C.
2850 East Camelback Road, Suite 200
Phoenix, AZ 85016
(602) 801-9063
Attorneys for Petitioners
Salt River Valley Water Users'
Association and Salt River Project
Agricultural Improvement and Power District

AARON FORD
ATTORNEY GENERAL OF NEVADA
CHRISTINE GUERCI-NYHUS
SPECIAL COUNSEL TO THE COLORADO
RIVER COMMISSION OF NEVADA
STATE OF NEVADA AND COLORADO
RIVER COMMISSION OF NEVADA
555 East Washington Avenue, Suite 3100
Las Vegas, NV 89101
(702) 486-3505
Attorneys for Petitioners
State of Nevada and Colorado
River Commission of Nevada

LAUREN J. CASTER
BRADLEY J. PEW
FENNEMORE CRAIG, P.C.
2394 East Camelback Road, Suite 600
Phoenix, AZ 85016
(602) 916-5367
Attorneys for Petitioners
State of Nevada, Colorado
River Commission of Nevada, and
Southern Nevada Water Authority

GREGORY J. WALCH, GENERAL COUNSEL
SOUTHERN NEVADA WATER AUTHORITY
1001 South Valley View Boulevard
Las Vegas, NV 89153
(702) 258-7166
Attorneys for Petitioner
Southern Nevada Water Authority

MARCIA L. SCULLY, GENERAL COUNSEL
CATHERINE M. STITES
THE METROPOLITAN WATER DISTRICT
OF SOUTHERN CALIFORNIA
700 North Alameda Street
Los Angeles, CA 90012
(213) 217-6000
Attorneys for Petitioner
The Metropolitan Water
District of Southern California

STEVEN B. ABBOTT
REDWINE AND SHERRILL, LLP
3890 11th Street, Suite 207
Riverside, CA 92501
(951) 684-2520
Attorneys for Petitioner
Coachella Valley Water District

CHARLES T. DUMARS
LAW & RESOURCE PLANNING ASSOCIATES, P.C.
201 Third Street NW, Suite 1750
Albuquerque, NM 87102
(505) 346-0098
Attorneys for Petitioner
Imperial Irrigation District

JOANNA M. SMITH
IMPERIAL IRRIGATION DISTRICT
333 East Barioni Boulevard
Imperial, CA 92251
(760) 339-9530
Attorneys for Petitioner
Imperial Irrigation District

PHILIP J. WEISER, Colorado Attorney General
A. LAIN LEONIAK, First Assistant
Attorney General
STATE OF COLORADO
1300 Broadway
Denver, CO 80203
(702) 508-6313
Attorneys for Petitioner
State of Colorado