PROTECTION OR INDIFFERENCE: WHY THE *ARIZONA V. NAVAJO NATION* DECISION DOESN'T HOLD WATER

Jessica Faucher*

I. INTRODUCTION

In *Arizona v. Navajo Nation*, a 5–4 majority of the Supreme Court held under the Navajo Nation's 1868 Treaty with the United States that the United States has no affirmative duty to secure water for the Tribe.[1] In doing so, the majority inflated the Navajo's request for relief,[2] analyzed the Tribe's claim under the wrong legal framework, and reached the wrong result even under that framework. Located in the arid southwestern region of the United States, the Navajo Reservation is in the midst of a severe water crisis, compounded by climate change and the drought that has plagued the region over recent decades.[3] Roughly thirty percent of the Reservation's residents live without running water, and consume an average of eight to ten gallons of water a day, [4] which

 Candidate for Juris Doctor, Stetson University College of Law, May 2025; B.A. History, minor in Political Science, *summa cum laude*, University of North Florida, 2021. Managing Editor, *Stetson Law Review*, 2024–25; Articles & Symposia Editor, *Stetson Law Review*, 2023–24; *Stetson Law Review* 2024 Spring Scholarship Luncheon Presenter. I am deeply grateful to my Writing Advisor, Professor Grant Christensen, for his thoughtful and informative feedback throughout the writing of this Note. Many thanks as well to my Notes & Comments Editor, Sierra Van Allen, Articles & Symposia Editor, Sarah Yi, and to all the Editors and Associates of *Stetson Law Review*, for their work in preparing this Note for publication. Finally, to my family and friends, I can never thank you enough for your unwavering support and belief in me—it means the world.

1. 143 S. Ct. 1804, 1816 (2023).

2. The Navajo Nation brought a breach-of-trust action in equity against the United States for failing to assess—or rather, provide an accounting of—the Nation's water rights in Arizona. *See id.* at 1819 (Gorsuch, J., dissenting). However, the majority in *Navajo Nation* overstated the Navajo's request as asking the United States to secure access to water for the Tribe by potentially building pipelines and other infrastructure. *Id.* at 1812–13 (majority opinion).

3. Becky Sullivan, *The Supreme Court Wrestles with Questions Over the Navajo Nation's Water Rights*, NPR (Mar. 20, 2023, 7:02 PM), https://www.npr.org/2023/03/20/1164852475/supreme-court-navajo-nation-water-rights.

4. Matthew Fletcher, *As Drought Persists in the West, Justices to Consider Navajo Nation's Rights to Colorado River*, SCOTUSBLOG (Mar. 17, 2023, 12:08 PM),

many must haul over sometimes considerable distances.[5] In comparison, the average resident of Arizona uses one hundred forty-six gallons per day.[6] The Nation has been fighting for decades to solve its water crisis but has been stunted at nearly every turn due to procedural hurdles and competing interests in the Colorado River. Unfortunately, *Arizona v. Navajo Nation* represents another sorry chapter in the Nation's struggle to have the United States assess its water rights in Arizona.

Navajo Nation will have significant real-world and legal ramifications. The decision not only dealt the Navajo another disappointing blow, but it also diminished the trust responsibility the federal government owes to federally recognized Indians[7] and tribes.[8] In future breach-of-trust actions seeking equitable relief, tribes will have to meet the Tucker Acts framework—a much stricter legal test—to sustain the action.

In Part II, this Note will begin by giving a historical background of tribal water rights, the Navajo Nation, the Federal-Indian trust relationship, and the complex body of law governing the Colorado River, known as the "Law of the River."[9] Part II will also provide a brief background of the legal framework courts use to analyze breach-of-trust actions and the legal proceedings leading up to the Supreme Court's decision in *Navajo Nation*. Part

---

https://www.scotusblog.com/2023/03/as-drought-persists-in-the-west-justices-to-consider-navajo-nations-rights-to-colorado-river/.

5. *The Navajo Water Project*, DIGDEEP, https://www.navajowaterproject.org/ (last visited Jan. 23, 2025).

6. Transcript of Oral Argument at 86, *Navajo Nation*, 143 S. Ct. 1804 (Nos. 21-1484, 22-51) [hereinafter Oral Argument]; *see also* Sean D. Lyttle, *The Third World in the American Southwest: The Navajo Nation's Water Crisis and the Failures of Water Law*, 2 GEO. J.L. & MOD. CRITICAL RACE PERSP. 83, 84 (2010) (finding "the average resident of Phoenix, Arizona, the closest major city to the Navajo Reservation, uses one hundred seventy gallons of water per day").

7. The Author recognizes that the word "Indian" has a number of problematic and even racist connotations. Its use in this Note is as a legal term of art to refer to federally recognized Indigenous Americans, as the term is regularly used in American law and in the U.S. Constitution to distinguish "Indian tribes" from fellow sovereign "states" and "foreign nations." For a discussion of how the term 'Indian' is more problematic in other contexts see H.P. GLENN, LEGAL TRADITIONS OF THE WORLD, 60 n.1 (Oxford Univ. Press, 5th ed., 2014).

8. The Department of Justice ("DOJ") has continuously argued the Executive Branch owes no fiduciary duties to tribes unless it is expressly stated in statutes or regulations. *See generally* Daniel I.S.J. Rey-Bear & Matthew L.M. Fletcher, *"We Need Protection from Our Protectors": The Nature, Issues, and Future of the Federal Trust Responsibility to Indians*, 6 MICH. J. ENV'T & ADMIN. L. 397 (2017). Historically, the courts have rejected this claim, until now. *See generally id.*

9. *See* Jason Robison et al., *Indigenous Water Justice*, 22 LEWIS & CLARK L. REV. 841, 860 (2018).

III will summarize the majority's opinion, Justice Thomas's concurrence, and the dissenting opinion. Part IV will analyze the majority's decision and consider what recourse the Navajo Nation has. Finally, Part V will contend that *Navajo Nation* will have significant ramifications on the trust responsibility and tribal water rights in general.

II. HISTORICAL AND LEGAL BACKGROUND

To understand the Nation's claims in *Arizona v. Navajo Nation*, Part II will give a background of the body of law governing tribal water rights and the Federal-Indian trust relationship. Because the Nation's claim is based on a breach of treaty, Part II will describe the events leading up to the Nation's treaties, and how it was left out of the Colorado River Compact, which apportioned waters from the Lower Colorado River. Finally, Part II will provide the legal framework used to analyze breach-of-trust actions and describe the legal proceedings leading up to *Navajo Nation*.

A. The *Winters* Doctrine

Water law in the western United States follows the prior appropriation system, which is rooted in the common law rule of "first in time, first in right."[10] However, access to water is different for federally recognized tribes than for the rest of the U.S. population because it arises through a federally reserved water right—known as a *Winters* right.[11] Under the *Winters* doctrine, Indian water rights are perfected on the date the reservation is created—typically through a treaty or agreement.[12] Additionally, Indian tribes do not forfeit their *Winters* rights through non-use.[13] As a result, Indian tribes in the western states following the prior

10. *See* Anthony D. Tarlock & Jason A. Robison, LAW OF WATER RIGHTS AND RESOURCES §§ 4.1–.3 (2024 ed.); *see also* Arizona v. California, 373 U.S. 546, 555 (1963) ("Under [the law of prior appropriation] the one who first appropriates water and puts it to beneficial use thereby acquires a vested right to continue to divert and use that quantity of water against all claimants junior to him in point of time.").

11. Robin Kundis Craig, *Tribal Water Rights and Tribal Health: The Klamath Tribes and the Navajo Nation During the Covid-19 Pandemic*, 16 ST. LOUIS UNIV. J. HEALTH L. & POL'Y 35, 37 (2022).

12. *See* Cappaert v. United States, 426 U.S. 128, 138 (1976).

13. Judith V. Royster, *A Primer on Indian Water Rights: More Questions than Answers*, 30 TULSA L.J. 61, 63 (1994).

appropriation system almost always have a very early priority right to water.[14]

In *Winters v. United States*, decided in 1908, the United States brought suit against settlers around the Fort Belknap Indian Reservation in Montana to prevent them from damming or disrupting water of the Milk River or its reservoirs from flowing to the Reservation.[15] The Reservation was created through the Tribe's 1888 Treaty with the United States.[16] However, there was no express provision in the Treaty reserving water for use on the Reservation.[17] The Court rejected the defendant's contention that the Tribe "deliberately g[ave] up" its water rights because ceding access to water and irrigation would render the Reservation's arid land inadequate and "valueless."[18] Applying the canon of construction that ambiguities in treaties will be resolved in favor of the Indians, the Court determined that the United States must have "reserve[d]" water rights for the tribes through the Treaty of 1888.[19] Otherwise, it would defeat the purpose of the Treaty to create a permanent reservation for the tribe.[20]

The Supreme Court later summarized its *Winters* doctrine in *Cappaert v. United States*:

> [W]hen the Federal Government withdraws its land from the public domain and reserves it for a federal purpose, the Government, by implication, reserves appurtenant water then unappropriated to the extent needed to accomplish the purpose of the reservation. In so doing the United States acquires a reserved right in unappropriated water which vests on the date of the reservation and is superior to the rights of future appropriators. Reservation of water rights is empowered by the Commerce Clause, Art. I, § 8, which permits federal regulation of navigable streams, and the Property Clause, Art. IV, § 3, which permits federal regulation of federal lands. The doctrine applies to Indian reservations and other federal enclaves, encompassing water rights in navigable and nonnavigable streams.[21]

14. *See id.* at 70.
15. Winters v. United States, 426 U.S. 564, 565, 568 (1908).
16. *Id.* at 565.
17. *Id.* at 571.
18. *Id.* at 576.
19. *Id.* at 576–77.
20. *Id.*
21. Cappaert v. United States, 426 U.S. 128, 138 (1976).

The Supreme Court did not revisit its *Winters* doctrine again until *Arizona v. California* in 1963, in which the Court reaffirmed the doctrine and determined the appropriate method to quantify *Winters* rights was by measuring the Reservation's practicably irrigable acreage.[22]

The Navajo Nation's treaties with the United States, like many Indian treaties, do not contain an express provision reserving water for the Tribe.[23] As a result, the Nation must rely on its *Winters* rights to protect its access to water. Unfortunately, the Nation's superior water rights are both a blessing and a curse, because the states relying on the Colorado River for their water supply have a vested interest in preventing the Nation from asserting its *Winters* rights.[24]

B. The Navajo Nation

The Navajo Nation spans about 27,000 square miles in the Four Corners region of the United States, consisting of parts of Arizona, New Mexico, and Utah.[25] Roughly the size of West Virginia, it is the largest Indian reservation in the United States.[26] The Navajo people, or the Diné,[27] are acquainted with the region's limited availability of water, and historically, were able to persist on rudimentary agriculture and, as a pastoral people, by settling in small bands near a source of water.[28]

After the United States defeated Mexico and gained control of the Southwest, the first treaty ratified by the Senate between the

22. Royster, *supra* note 13, at 74 (citations omitted) (reasoning *Winters* rights were largely "relegated to the legal attic" until *Arizona v. California*). Whether the practicably irrigable acreage standard is the only standard the Court will use to quantify *Winters* rights "remains unclear." Craig, *supra* note 11, at 44–45.

23. *See* Treaty Between the United States of America and the Navajo Tribe of Indians, Navajo Tribe-U.S., *signed* June 1, 1868, *ratified* July 25, 1868, 15 Stat. 667 [hereinafter 1868 Treaty].

24. *See* Craig, *supra* note 11, at 44 ("[F]ormal acknowledgement of the *Winters* right can feel like a real loss to the people and businesses that have been relying on the water in the interim.").

25. Sullivan, *supra* note 3.

26. *Navajo Nation*, INDIAN HEALTH SERV., https://www.ihs.gov/navajo/navajonation/ (last visited Jan. 23, 2025) [hereinafter INDIAN HEALTH SERV.].

27. The Navajo people refer to themselves as the Diné, which in Navajo translates to "the People." *See* Heidi J. Todacheene, *She Saves Us from Monsters: The Navajo Creation Story and Modern Tribal Justice*, 15 TRIBAL L.J. 30, 32 n.2 (2015).

28. *See* INDIAN HEALTH SERV., *supra* note 26.

Navajo and the United States was the Treaty of 1849.[29] Under the 1849 Treaty, the Navajo were "lawfully placed under the exclusive jurisdiction and protection of the Government of the said United States, and that they [were] now, and will forever remain, under the aforesaid jurisdiction and protection."[30] Further, Article XI of the 1849 Treaty provided that "this treaty is to receive a liberal construction . . . and that the United States shall so legislate and act as to secure the permanent prosperity and happiness of said Indians."[31]

Unfortunately, years of warfare between the Navajo and the United States followed the 1849 Treaty.[32] In response to Navajo resistance, the government launched a scorched earth policy by burning the Navajo's homes, killing or stealing its livestock, and contaminating its water supply until the Navajo starved and were forced to submit.[33] Known as the "Long Walk," the survivors were rounded up and forced to walk hundreds of miles to the barren Bosque Redondo[34] Reservation, during which stragglers were often shot and killed by American soldiers.[35] Bosque Redondo proved to be a catastrophe, as both the soil and water were too alkaline to sustain crops.[36] After four years at Bosque Redondo, in which one out of every four Navajo died, the government finally realized the

29. Brief for Amici Curiae Prof. Daniel McCool, et al., in Support of Respondents at 8, Arizona v. Navajo Nation, 143 S. Ct. 1804 (2023) (Nos. 21-1484 & 22-51) [hereinafter Brief for Amici Curiae McCool].

30. *Id.* (quoting Treaty with the Navaho, 1849, Navajo Tribe-U.S., art. I., Sept. 9, 1849, 9 Stat. 974 [hereinafter 1849 Treaty]) (internal quotation marks omitted).

31. *Id.* at 4 (quoting 1849 Treaty, *supra* note 30, art. XI) (internal quotation marks omitted).

32. *Id.* at 9; *see also* John L. Kessell, *General Sherman and the Navajo Treaty of 1868: A Basic and Expedient Misunderstanding*, 12 W. HIST. Q. 251, 254 (1981) (finding the Military Department of New Mexico attempted to end the wars in 1861 with the ultimatum: "[T]he tribe must surrender unconditionally and be 'colonized' at points far removed from the whites, or suffer extermination").

33. INDIAN HEALTH SERV., *supra* note 26.

34. The Navajo name given to the Bosque Redondo area is "Hwéeldi: the place of extreme hardship where the Diné nearly took their last breath." Laura Tohe, *Hwéeldi Bééháníih: Remembering the Long Walk*, 22 WICAZO SA REV. 77, 79 (2007). Today, the trauma experienced by the Navajo people in Hwéeldi occupies a significant, painful place in the Tribe's history, and underscores how the Tribe's experience during The Long Walk and at Bosque Redondo played an important role in the 1868 Treaty negotiations. *See id.* at 82; Todacheene, *supra* note 27, at 46 ("The Long Walk has been the most culturally and socially destructive event the Diné have faced in modern times. The repercussions of Hwéeldih continues to plague the surviving families of the Navajo People and the culture.").

35. Tohe, *supra* note 34, at 79–80 ("[T]he soldiers shot the elderly and young women with children who couldn't keep up as they walked the more than three hundred miles to Hwéeldi.").

36. *See* Brief for Amici Curiae McCool, *supra* note 29, at 11 (internal citations omitted).

situation could not continue, and began treaty negotiations with the Tribe.[37] General Sherman, one of the government's negotiators, tried pressuring the Navajo to relocate to an Indian territory in Oklahoma.[38] However, after experiencing the inhospitable conditions at Bosque Redondo, due in no small part to the location's meager and unhealthy water supply, the Navajo were adamant that they be allowed to return to their ancestral homeland.[39] The United States eventually agreed, and after a period of further negotiations, the Navajo returned home, and the Treaty of 1868 was ratified.[40]

In the Treaty of 1868, the Navajo "agree[d] to make the reservation herein described their permanent home."[41] The United States' Indian policy at the time was to encourage an agricultural and sedentary lifestyle, and as such, the Treaty contained multiple provisions that provided the Navajo with privileges for practicing "farming" and "cultivation."[42] For example, Article 7 of the Treaty entitled Navajo families engaging in cultivation to receive "seeds and agricultural implements" up to a certain value and for two years.[43] There is no express provision in the 1868 Treaty reserving water for the Navajo. The only use of the word "water" is with regard to the United States' promise to build certain buildings "where timber and water may be convenient."[44] The Treaty also provided the Navajo with only half the land they were promised in negotiations, likely due to the negotiators' belief that less land was needed if they sustained themselves through agriculture.[45]

The size of the Reservation was expanded significantly over the years through Executive Orders and Congressional Acts "for

37. *See id.* at 12; *see also* Kessell, *supra* note 32, at 256 (reasoning the decision to relocate the Tribe was due in large part to the substantial government expenditure required to subsist the Navajo people).

38. Todacheene, *supra* note 27, at 47.

39. *See* Kessell, *supra* note 32, at 259–60 (finding during the 1868 Treaty negotiations that Barboncito, the Navajo spokesman, was adamant they return home, and stated "we know this land does not like us neither does the water" (quoting Council proceedings, Fort Sumner, May 28, 1868, Treaties File, Treaty no. 372, Indian Division, RG 48)). The Navajos believe as part of their creation story that they emerged into their ancestral homeland surrounded by four sacred mountains and including four rivers "that was to be [their] country." Todacheene, *supra* note 27, at 47.

40. Arizona v. Navajo Nation, 143 S. Ct. 1804, 1821–22 (2023) (Gorsuch, J., dissenting).

41. 1868 Treaty, *supra* note 23, at 1019.

42. *Id.* at 1017–18.

43. *Id.* at 1017.

44. *Id.* at 1016.

45. *See* Kessell, *supra* note 32, at 263, 269.

the purpose of extending the boundaries . . . to include better facilities for grazing and watering their animals."[46] The need for further water access was apparent in an 1897 letter from the Secretary of the Interior to the House Committee of Indian Affairs.[47] Concerned with the amount of Navajo people living off of the Reservation, the Secretary was tasked with determining how to get them to return.[48] Throughout the letter, agents sent to discern the Navajo's condition all expressed the need for water as the root of the problem.[49] The Secretary concluded:

> [T]o force them . . . upon the reservation without sufficient water . . . would be cruel, unjust, and inhuman. Their stock would perish for want of food and water, and the Indians themselves, who are now self-supporting, would be reduced to want and suffering and to the necessity of support at public expense to save them from starvation. I deem it wise and best to continue the present plan of developing a water supply.[50]

Today, the Reservation borders the Little Colorado River, the San Juan River, and the Colorado River.[51] Unfortunately, a decades-long drought, the impacts of climate change, and the states' competing interests in the region's limited water supply have led to the Navajo experiencing a severe water crisis.[52] A history of extensive uranium mining on the Navajo Reservation that contaminated surrounding water sources has also exacerbated the water crisis, and scientists have found "many unregulated water sources on the Navajo Nation have elevated levels of arsenic, uranium, manganese, and other elements from former mining operations."[53] Of the approximately 170,000 people

46. H.R. DOC. NO. 310, 54TH CONG., 2ND SESS. (1897); *see also* Brief for Amici Curiae McCool, *supra* note 29, at 19 ("[T]he Navajo reservation increased from roughly 3.5 million acres in 1868 to nearly 12 million acres by 1930." (citing EZRA ROSSER, A NATION WITHIN: NAVAJO LAND AND ECONOMIC DEVELOPMENT 35 (2021))).

47. H.R. DOC. NO. 310.

48. *Id.*

49. *Id.*

50. *Id.*

51. Arizona v. Navajo Nation, 143 S. Ct. 1804, 1811 (2023).

52. *See* Sullivan, *supra* note 3.

53. Lindsey Jones & Jani C. Ingram, *Invited Perspective: Tribal Water Issues Exemplified by the Navajo Nation*, 130 ENV'T HEALTH PERSPS. (ISSUE 12) (2022), https://ehp.niehs.nih.gov/doi/10.1289/EHP12187; *see also* Rachel Porter, *The Toxic Legacy of Uranium Mining on Navajo Land: Disproportionate Struggle of Indigenous Peoples and Water*, SAVE WATER (March 18, 2019), https://savethewater.org/the-toxic-legacy-of-uranium

who live on the Reservation, about a third do not have reliable access to safe drinking water and must often travel miles to fill jugs of water.[54] The Navajo obtain water to meet some of their needs from tributaries, springs, rivers, lakes, and aquifers.[55] However, despite the Colorado River running directly alongside the Reservation's western boundary, the Navajo's water rights to the River have never been assessed.[56]

C. The Law of the River

There are thirty federally recognized tribes in the Colorado River Basin.[57] Presently, twenty-two of them have established rights to a portion of the Basin's water.[58] Yet, despite the tribes' obvious interest in the Basin's water supply, tribes were often left out of negotiations and decisions governing the Colorado River, such as the Colorado River Compact.[59] The 1922 Colorado River Compact allocated 7.5 million acre-feet of water per year to both the Lower Basin (parts of Arizona, California, Nevada, New Mexico, and Utah) and the Upper Basin (parts of Wyoming, New Mexico, Arizona, Utah, and Colorado) and left it to the states to allocate the water amongst themselves.[60] Tribes were not included in the allocation of water.[61] The Compact's only mention of Indian interests was the statement, "Nothing in this compact shall be

-mining/ (describing the history and impacts of uranium mining on the Navajo land and people).

54. Sullivan, *supra* note 3.

55. *Navajo Nation*, 143 S. Ct. at 1811.

56. *Id.* at 1822 (Gorsuch, J., dissenting). The Navajo Nation is in the process of litigating its claims in the Little Colorado River Basin in the Little Colorado River General Stream Adjudication that began in Arizona state court in 1978. *Little Colorado River Arizona*, NNWRC, https://nnwrc.navajo-nsn.gov/Basin-Updates/Little-Colorado-River-Arizona (last visited Jan. 23, 2025). The Navajo Nation settled its claims to the San Juan River Basin in New Mexico and Utah and is actively working to achieve a settlement in the Rio San Jose Basin in New Mexico. *Navajo Water Rights by Basin*, NNWRC, https://nnwrc.navajo-nsn.gov/ (last visited Jan. 23, 2025).

57. Heather Tanana, *Voices of the River: The Rise of Indigenous Women Leaders in the Colorado River Basin*, 34 COLO. NAT. RES. ENERGY & ENV'T L. REV. 265, 279 (2023) (citations omitted).

58. *Id.*

59. *Id.*

60. CO. REV. STAT. § 37-61-101 (2023); Lyttle, *supra* note 6, at 98–99. Water from the Upper Basin was allocated as follows: 51.75% to Colorado, 11.25% to New Mexico, 23% to Utah, 14% to Wyoming, "after the deduction of the use, not to exceed 50,000 acre-feet per annum, made in the state of Arizona." § 37-62-101. Even though the Arizona portion of the Upper Basin of the Colorado River sits exclusively within the Navajo Nation's boundaries, there is still no mention of the Navajo in the Upper Basin's compact.

61. *Id.* § 37-61-101.

construed as affecting the obligations of the United States of America to Indian tribes"[62]—what Secretary Hoover referred to as "the wild Indian article."[63]

In 1928 Congress passed the Boulder Canyon Project Act of 1928, which ratified the Compact and authorized construction of the Hoover Dam.[64] Numerous water infrastructure statutes and projects in which "tribes had virtually no voice or input" followed the Boulder Canyon Act, diverting water to different states and cities.[65] The Boulder Canyon Project Act also granted the Secretary of the Interior the power to contract with users in the Lower Basin to divvy up the water.[66] Displeased with its share of the water, in 1952 Arizona brought suit against California in *Arizona v. California* to determine its water rights in the Lower Basin.[67] Several states intervened to assert their own interests, and the United States also intervened claiming to represent the interests of twenty-five Indian tribes in the Lower Basin.[68] During the course of proceedings, the Navajo and six other tribes realized the United States was not representing their best interests, and moved for the scope of the United States' representation to be defined.[69] In 1961, after their motion was denied, and after requesting that the Attorney General object to the Special Master's report and recommendation "that omitted any mention of the Tribe," the Navajo moved to intervene.[70] The Navajo alleged that the United States "failed to vigorously assert their interests" and "abandoned the case so far as the adjudication of the rights of the Navajo Indians was concerned."[71] The United States opposed the motion, arguing that it was already representing "the interests of several Indian Tribes, so there was no need for the Court to hear from the Navajo;" the Court agreed.[72]

62. *Id.*
63. Robert W. Adler, *Revisiting the Colorado River Compact: Time for a Change?*, 28 J. LAND RES. AND ENV'T L. 19, 37 (2008) (quoting NORRIS HUNDLEY, WATER AND THE WEST: THE COLORADO RIVER COMPACT AND THE POLITICS OF WATER IN THE AMERICAN WEST 212 (1975)) (internal quotation marks omitted).
64. Robison et al., *supra* note 9, at 864.
65. *Id.* at 864–65.
66. Arizona v. Navajo Nation, 143 S. Ct. 1804, 1823 (2023) (Gorsuch, J., dissenting).
67. Arizona v. California, 373 U.S. 546, 550–51 (1963).
68. *Id.* at 551; *Navajo Nation*, 143 S. Ct. at 1823 (Gorsuch, J., dissenting).
69. *Navajo Nation*, 143 S. Ct. at 1823.
70. *Id.*
71. *Id.* (citations omitted) (internal quotation marks omitted).
72. *Id.* at 1823–24 (citations omitted) (internal quotation marks omitted).

Arizona v. California culminated with a decree that apportioned water from the Lower Basin Colorado River mainstream to the states and to "five other tribes whose interests the United States did assert."[73] Significantly, Article VIII of the 1964 Decree contained the provision, "This decree shall not effect . . . [t]he rights or priorities, except as specific provision is made herein, of any Indian Reservation."[74] Article IX of the Decree also provided: "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."[75]

Prevented at every turn during the course of litigation from asserting their interests, the Navajo Nation's potential rights in the River were left unassessed. In the years since, the 1964 Decree has been modified several times, but it has never addressed what water rights the Navajo may have to the River.[76] The Nation has made numerous requests for the United States to assess its water rights in Arizona to no avail.[77]

D. The Trust Relationship

To fully understand the trust relationship between the United States and the federally recognized Indian tribes, it is necessary to go back to the doctrine's origin. The trust relationship was developed through a combination of international law, contract law, and property law.[78] Drawing on principles of international customary law, the Supreme Court imposed duties on the United States to protect tribal interests.[79] In the infamous Cherokee cases, Chief Justice John Marshall described tribes as "domestic dependent nations," with the federal-tribal relationship similar to

73. *Id.* at 1824 (citing *California*, 376 U.S. at 344–45). In response to Arizona's arguments that the five represented tribes had no rights to the Colorado River, the Court restated its *Winters* Doctrine, and found the government must have known "water from the river would be essential to the life of the Indian people" on these arid reservations. *Id.* at 1829 (alterations omitted).

74. *California*, 376 U.S. at 352–53.

75. *Id.* at 353.

76. *Navajo Nation,* 143 S. Ct. at 1824 (Gorsuch, J., dissenting).

77. *Id.*

78. *See* Rey-Bear & Fletcher, *supra* note 8, at 405.

79. COHEN'S HANDBOOK OF FEDERAL INDIAN LAW § 5.04 (Nell J. Newton et al. eds., 2023) [hereinafter COHEN'S HANDBOOK] (citing Johnson v. M'Intosh, 21 U.S. (1 Wheat.) 543 (1823)); Cherokee Nation v. Georgia, 30 U.S. (1 Pet.) 1 (1831).

the relationship between a "guardian" and his "ward."[80] Chief Justice Marshall likened the federal-tribal relationship to the tributary and feudatory states in Europe, in which a weaker power places itself under the protection of a stronger government, without surrendering its sovereignty.[81] Thus, the federal-tribal relationship is best described as a sovereign-to-sovereign relationship in which the bigger sovereign—the United States—protects the interests of the little sovereign—the tribes.[82]

In exchange for protection, the tribes entered treaties and agreements in which they relinquished vast amounts of land and resources to the federal government.[83] Like any other contract, in consideration for ceding large tracts of land and resources, the federal government's promise of "protection" must not be an empty one.[84] Treaties necessarily impose duties on the parties to perform their obligations, as well as the implied duty of good faith and fair dealing.[85] The canons of construction the Court has historically employed in interpreting Indian treaties and statutes affecting Indians—known as Indian canon—also derive from contract law.[86] A few of the major Indian canons the Court has employed are that Indian treaties should be liberally construed, ambiguities resolved "in the Indians' favor," and interpreted "as the Indians would have understood them."[87] Though the Court has cited the Federal-Indian trust relationship as the justification for the Indian canons,[88] general contract principles also support their application.[89] For example, the rule that ambiguities be resolved against the drafting party, "that no valid agreement results from fraud or coerced consent," and considerations about bargaining

80. *Cherokee Nation*, 30 U.S. at 17.

81. *See* Worcester v. Georgia, 31 U.S. (1 Pet.) 515, 560–61 (1832).

82. Matthew L.M. Fletcher, *The Dark Matter of Federal Indian Law: The Duty of Protection*, 75 ME. L. REV. 305, 309 (2023).

83. *Id.*

84. *See* Rey-Bear & Fletcher, *supra* note 8, at 401–02 ("[T]he treaties which historically provided the basis of federal-tribal relations were fundamentally and necessarily contracts.").

85. *Id.* at 401.

86. *See* Arizona v. Navajo Nation, 143 S. Ct. 1804, 1825–26 (2023) (Gorsuch, J., dissenting) (discussing principles of contract law that justify Indian canon, such as: the implied covenant of good faith and fair dealing; the doctrine of *contra proferentem*; the doctrine of unilateral mistake; and issues of undue influence).

87. *Indian Canon Originalism*, 126 HARV. L. REV. 1100, 1104 (2013) (quoting COHEN'S HANDBOOK, *supra* note 79, § 2.02(1)) (internal quotation marks omitted).

88. *Id.* at 1105 (citations omitted).

89. Richard B. Collins, *Never Construed to Their Prejudice: In Honor of David Getches*, 84 UNIV. COLO. L. REV. 1, 6–7 (2013).

power, are all general contract principles that justify Indian canon.[90] Applying those principles to Indian treaty interpretation makes sense considering the significant power imbalance and language barrier between the tribes and the United States, and considering that tribes were often coerced or defrauded into ceding large amounts of land and resources in exchange for very little.[91] The Court continues to rely on the Indian canons of construction;[92] however, in recent decades it has sometimes applied the canons disparately or ignored the canons altogether.[93]

Finally, in creating the trust relationship, the courts drew from the common-law of trusts and the relationship between a trustee and beneficiary to determine the duties the federal government owed to Indians and tribes.[94] A trustee's fiduciary duties include the duty of loyalty, care, accounting, and administration, among others.[95] Because the federal government is empowered to hold tribal and individual Indian property in trust, it follows that certain fiduciary duties attach to that authority.[96] The extent and scope of how these fiduciary duties may apply to the Federal-Indian trust relationship has varied over time and circumstances.[97] It is, however, "beyond question" that the United States owes these duties to the tribes.[98] The Department of the Interior has outlined the duties the federal government owes to tribes, including the duty of loyalty and care, a duty to "make trust property income productive, to enforce reasonable claims on behalf of Indians, and to take affirmative

90. *Id.* at 8.

91. *See id.* at 7–9.

92. *See, e.g.*, Herrera v. Wyoming, 139 S. Ct. 1686, 1699 (2019) ("Indian treaties 'must be interpreted in light of the parties' intentions, with any ambiguities resolved in favor of the Indians,' . . . and the words of a treaty must be construed 'in the sense in which they would naturally be understood by the Indians.'" (first quoting Minnesota v. Mille Lacs Band of Chippewa Indians, 526 U.S. 172, 206 (1999); then quoting Washington v. Wash. State Com. Passenger Fishing Vessel Ass'n, 443 U.S. 658, 676 (1979))).

93. *See* Alex Tallchief Skibine, *Textualism and the Indian Canons of Statutory Construction*, 55 U. MICH. J.L. REFORM 267, 307–08 (2022) (analyzing treaty and statutory interpretation cases over the past 35 years and finding the Court has been reluctant to apply the canons—primarily the ambiguity canon—in some cases).

94. *See* Rey-Bear & Fletcher, *supra* note 8, at 405–06.

95. *Id.* at 406 (citations omitted).

96. *See* COHEN'S HANDBOOK, *supra* note 79, § 5.02(4) (first citing Johnson v M'Intosh, 21 U.S. (1 Wheat.) 543, 592 (1823); then citing 25 U.S.C §§ 5108, 2202, 5110).

97. Rey-Bear & Fletcher, *supra* note 8, at 407.

98. *Id.* (quoting Letter from Leo Krulitz, Solicitor, U.S. Dep't of the Interior, to James W. Moorman, Asst. Att'y Gen., U.S. Dep't of Justice 1 (Nov. 21, 1978)) (internal quotation marks omitted).

action to preserve trust property."[99] Though it may have originated in the courts, Congress and the Executive branch have frequently reaffirmed the trust responsibility of the United States.[100] In fact, "[n]early every piece of modern legislation dealing with Indian tribes contains a statement reaffirming the trust relationship between tribes and the federal government."[101] For example, in enacting the Indian Trust Asset Reform Act of 2016, Congress explicitly provided that the trust obligations are "enforceable Federal obligations to which the national honor has been committed."[102]

This amorphous body of law describing federal-tribal relations and the duties and obligations of each party makes up the general trust relationship. Accordingly, the trust responsibility of the United States to the federal Indian tribes is far from a "gratuity, and the assertion that federal Indian policies and benefits are provided at no cost to Indians is a mischaracterization of historical fact."[103]

Ironically, the trust relationship has often been invoked by the courts to allow the disposal of tribal property and to immunize the United States from suit challenging its more "constitutionally suspect" congressional actions.[104] However, in the administrative context and in the management of tribal property and resources, the courts have traditionally held the United States to "the most exacting fiduciary standards."[105] Unfortunately, while Congress and the Department of the Interior have done much over recent decades to reaffirm the United States' commitment to the trust responsibility, the Department of Justice ("DOJ") has firmly opposed it.[106] For example, in Indian trust cases, such as *Navajo Nation*, the DOJ has taken the position that the government owes no fiduciary duties to Indians or tribes unless such duties are

99. *Id.*

100. *See* COHEN'S HANDBOOK, *supra* note 79, § 5.04(3)(a).

101. *Id.*

102. Fletcher, *supra* note 82, at 315 (citing 25 U.S.C. § 5601(5)).

103. Rey-Bear & Fletcher, *supra* note 8, at 403 (citations omitted) ("[F]ederal duties to Indians exist and remain enforceable because the government has over the years made specific commitments to the Indian people through written treaties and through informal and formal agreements, in exchange for which Indians . . . have often surrendered claims to vast tracts of land." (citations omitted) (internal quotation marks omitted)).

104. COHEN'S HANDBOOK, *supra* note 79, § 5.04(3)(a).

105. *Id.* (citations omitted) (quoting Seminole Nation v. United States, 316 U.S. 286, 297 & n.12 (1942)).

106. *See* Fletcher, *supra* note 82, at 315–16.

explicitly accepted by Congress.[107] Moreover, the DOJ and tribal interests are often directly opposed, raising significant conflict of interest concerns.[108] The DOJ is not the sole party responsible for thwarting efforts by the Executive Branch and Congress to improve Federal-Indian affairs and relations; the Supreme Court is equally responsible.[109] Despite robust support for the trust relationship through treaties, Supreme Court precedent, statutes, and Executive action, over the past fifty years the Supreme Court has demonstrated increased skepticism about the scope of the trust responsibility.[110]

There are several Supreme Court cases that have chipped away at the Federal-Indian trust relationship,[111] but perhaps the most significant is *United States v. Jicarilla Apache Nation*.[112] In *Jicarilla*, the Jicarilla Apache Nation sued the United States for breach of trust under the Tucker Act alleging mismanagement of Tribal funds.[113] During the course of discovery, the government resisted the Tribe's efforts to compel discovery of certain documentation on the basis of attorney-client privilege and the work-product doctrine.[114] The Tribe argued that the trustee's (the United States) communications regarding the management of the Tribe's trust fund fall within the fiduciary exception to attorney-client privilege.[115] The Supreme Court reasoned that the exception did not apply because the Federal-Indian trust relationship is different from the common-law trust relationship between private

107. *Id.* at 316.
108. *Id.*
109. *Id.* at 316–17.
110. *Id.* at 317. In addition, the Court has begun to "regularly disregard[]" the canons of construction traditionally employed by the courts. In so doing, it has "interfer[ed] with Congressional policies favoring tribal interests." *Id.* at 318.
111. *See* United States v. Mitchell, 445 U.S. 535, 542–46 (1980) (*Mitchell I*) (holding the General Allotment Act created a "limited" trust and did not impose fiduciary duties that could be used to recover damages under the Tucker Act for mismanagement of timber resources); United States v. Navajo Nation, 537 U.S. 488, 507–08 (2003) (*Navajo I*) (holding the Indian Mineral Leasing Act could not be interpreted to mandate compensation under the Tucker Act); United States v. Navajo Nation, 556 U.S. 287, 301 (2009) (*Navajo II*) (holding the government's control over coal mining on Indian land did not impose fiduciary duties because under the Tucker Act "liability cannot be premised on control alone").
112. 564 U.S. 162 (2011).
113. *Id.* at 166.
114. *Id.* at 167.
115. *Id.* ("Under that exception, which courts have applied in the context of common-law trusts, a trustee who obtains legal advice related to the execution of fiduciary obligations is precluded form asserting the attorney-client privilege against beneficiaries of the trust.").

parties.[116] The Court distinguished the Federal-Indian trust relationship from the private trust relationship on the basis that the latter "is defined and governed by statute rather than the common law."[117] Though the Court did not deny the existence of a general trust relationship, it described the trust relationship as "limited" or "bare" in comparison to a private trust.[118] And held that in order to impose fiduciary obligations on the federal government like that of a private trustee, the Tribe must point to a particular statute or regulation in which the government accepted such duties.[119] The Court stated that if such duties are expressly provided, only then could the common law play a role.[120]

In her dissent, Justice Sotomayor argued that the majority's decision ignored well-settled precedent that common-law trust principles are used to determine the scope of the fiduciary obligations the government owes to the Indian tribes.[121] Justice Sotomayor also argued:

> By rejecting the Nation's claim on the ground that it fails to identify a specific statutory right to the communications at issue, the majority effectively embraces an approach espoused by prior dissents that rejects the role of common-law principles altogether in the Indian trust context. Its decision to do so in a case involving only a narrow evidentiary issue is wholly unnecessary and, worse yet, risks further diluting the Government's fiduciary obligations in a manner that Congress clearly did not intend and that would inflict serious harm on the already-frayed relationship between the United States and Indian tribes.[122]

Unfortunately, Justice Sotomayor's premonition proved to be true.[123]

116. *Id.* at 173–74.
117. *Id.* (citing Navajo I, 537 U.S. 488, 506 (2003)).
118. *Id.* at 174 (quoting Mitchell I, 445 U.S. 535, 542 (1980); United States v. Mitchell, 463 U.S. 206, 224 (1983) (*Mitchell II*)) (internal quotation marks omitted).
119. *Id.* at 177–78.
120. *Id.* at 177.
121. *Id.* at 188 (Sotomayor, J., dissenting).
122. *Id.* at 208–09.
123. *See generally* Arizona v. Navajo Nation, 143 S. Ct. 1804 (2023).

E. Breach-of-Trust Action

A breach-of-trust action against the executive branch seeking specific relief requires (1) subject matter jurisdiction, (2) statutory consent to suit, and (3) the existence of a claim upon which relief can be granted.[124] Subject matter jurisdiction is often premised on 28 U.S.C § 1331 which gives federal courts jurisdiction over civil actions "arising under the Constitution, laws, or treaties of the United States," and § 1362 which authorizes suits by Indian tribes.[125] It is well established that breach-of-trust claims raise federal questions, so subject matter jurisdiction is often easily met.[126] Next, tribes must establish statutory consent to suit. When, as here, tribes are challenging an administrative agency action, those seeking declaratory and injunctive relief typically proceed under Section 702 of the Administrative Procedure Act ("APA").[127] Section 702 of the APA provides:

> A person suffering legal wrong because of agency action, or adversely affected or aggrieved by agency action within the meaning of a relevant statute, is entitled to judicial review thereof. An action in a court of the United States seeking relief other than money damages and stating a claim that an agency or an 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.[128]

Thus, the APA waives sovereign immunity for breach-of-trust claims seeking equitable relief based on agency action, or inaction, that violated a treaty, statute, or common law.[129] Once consent to

---

124. COHEN'S HANDBOOK, *supra* note 79, § 5.05.

125. 28 U.S.C. § 1331 ("The district courts shall have original jurisdiction of all civil actions arising under the Constitution, laws, or treaties of the United States."); *id.* § 1362 ("The district courts shall have original jurisdiction of all civil actions, brought by any Indian tribe or band with a governing body duly recognized by the Secretary of the Interior, wherein the matter in controversy arises under the Constitution, laws, or treaties of the United States.").

126. COHEN'S HANDBOOK, *supra* note 79, § 5.05 (citations omitted).

127. *Id.*

128. 5 U.S.C. § 702.

129. *See* COHEN'S HANDBOOK, *supra* note 79, § 5.05 ("The APA waives sovereign immunity for claims alleging that a federal agency has taken action that is . . . 'otherwise not in accordance with law,' such as violations of statutes, treaties, and common law." (quoting 5 U.S.C. § 706(2)(A))).

suit is met, establishing the existence of a claim upon which relief can be granted is usually based on a breach-of-treaty claim or one of the numerous statutes or regulations that describe the federal-tribal relationship.[130]

The Tucker Act (sometimes called the Indian Tucker Act) establishes exclusive jurisdiction in the Court of Federal Claims for claims by tribes seeking monetary relief based on "the Constitution, or any Act of Congress or any regulation of an executive department, or upon any express or implied contract with the United States."[131] The Indian Tucker Act establishes subject matter jurisdiction and waives sovereign immunity for breach-of-trust claims based on statutes, treaties, or executive orders.[132] However, if the action fails to state a claim, then it will also fail to satisfy subject matter jurisdiction and consent to suit.[133] To state a claim under the Indian Tucker Act for which relief can be granted, the claimant must show that the statute, treaty, or executive order is money-mandating—meaning the source expressly provides a "substantive right enforceable against the United States for money damages."[134] Therefore, in the context of a breach-of-trust action, the court will look to see if the source expressly imposes fiduciary duties on the United States in managing Indian assets.[135] Though the Tucker Act framework requires Indian claimants to point to a specific statute or regulation expressly accepting fiduciary duties, once they succeed, the court may use the common law to inform its analysis.[136] Additionally, whether the federal government exercises elaborate control over managing a tribal resource could play a role in finding a fiduciary duty, but "liability cannot be premised on control alone."[137]

130. *Id.*
131. 28 U.S.C. § 1491(a)(1); *id.* § 1505.
132. COHEN'S HANDBOOK, *supra* note 79, § 5.05 (citing Mitchell II, 463 U.S. 206 (1983)).
133. *Id.*
134. *Id.* (quoting *Mitchell II*, 463 U.S. at 216) (citations omitted) (internal quotation marks omitted).
135. *Id.*
136. *Id.* (citing United States v. Jicarilla Apache Nation, 564 U.S. 162, 177 (2011)).
137. Navajo II, 556 U.S. 287, 301 (2009).

F. Legal Proceedings Leading up to the Supreme Court's Decision in *Navajo Nation*

In March 2003, the Navajo Nation brought action against the Department of the Interior, the Secretary of the Interior, the Bureau of Reclamation, and the Bureau of Indian Affairs ("Federal Defendants") with seven claims.[138] State and government entities from Arizona, Colorado, Nevada, and California intervened as defendants.[139] In 2004, the district court granted the parties' joint motion to stay the proceedings for settlement negotiations.[140] In 2013, after nearly a decade of negotiations proved unsuccessful, the stay was lifted.[141]

Once litigation resumed, the legal proceedings leading up to the Supreme Court's decision bounced from the District Court of Arizona to the Ninth Circuit several times. The Nation's five claims alleging the Federal Defendants' management of the Lower Basin violated the National Environmental Policy Act and the APA were dismissed for lack of standing and are outside the scope of this Note.[142]

Appearing before the District Court of Arizona in 2014, the Nation alleged that the United States breached its trust responsibility to the Tribe by failing to assess the Nation's water rights to the Colorado River and sought to enjoin the United States from further breaches.[143] The district court reasoned under the Ninth Circuit's precedent in *Gros Ventre Tribe v. United States* that "unless there is a specific duty that has been placed on the government with respect to Indians, the government's general trust obligation is discharged by [its] compliance with general regulations and statutes not specifically aimed at protecting Indian tribes."[144] The Nation alleged the provision in the Colorado

138. Navajo Nation v. Dep't of the Interior, 876 F.3d 1144, 1152, 1159 (9th Cir. 2017) (outlining how the Secretary of the Interior manages the delivery of water from the Colorado River to the Western states, and in "shortage" and "surplus" years the amount of water those States receive changes, and crucially, in this case, the Navajo Nation challenged the Secretary's published guidelines under the National Environmental Policy Act because the guidelines failed to consider the Nation's possible rights to the River).

139. *Id.* at 1159.

140. *Id.* at 1160.

141. *Id.*

142. *Id.*

143. Navajo Nation v. U.S. Dep't of the Interior, 34 F. Supp. 3d 1019, 1028 (D. Ariz. 2014).

144. *Id.* (quoting Gros Ventre Tribe v. United States, 469 F.3d 801, 810 (9th Cir. 2006)) (internal quotation marks omitted).

River compact that "nothing in this compact shall be construed as affecting the obligations of the United States of America to Indian tribes" constituted a specific trust obligation.[145] The district court disagreed, reasoning the provision did not impose any new duties on the United States.[146] Further, the court found that the APA's waiver of sovereign immunity was limited to constitutional claims or challenges of a final agency action, and since the Nation did not allege either, its breach-of-trust claim failed.[147] As a result, the district court dismissed the Nation's Second Amended Complaint without prejudice.[148]

In 2017, on appeal to the Ninth Circuit, the court found the district court misinterpreted Ninth Circuit precedent by limiting the APA's waiver of sovereign immunity to constitutional claims and challenges to final agency action.[149] The Ninth Circuit reasoned the Nation's breach-of-trust claim fell "squarely" within Section 702 of the APA's broad waiver of sovereign immunity because it "[sought] 'relief other than money damages'" and alleged an agency "failed to act in an official capacity."[150] Since the district court dismissed the Nation's claim on the basis that it was barred by sovereign immunity, the Ninth Circuit remanded the case and ordered the district court to "consider the claim on its merits, after entertaining any request to amend it."[151]

Remanded back to the district court, the Nation sought leave to file a Third Amended Complaint ("TAC"). In 2018 the district court denied the Nation's motion, holding that the claims in its proposed complaint were "futile."[152] The Nation's proposed TAC maintained its breach-of-trust claim and also raised a breach-of-treaty and a failure-to-consult claim.[153] The district court found that the Supreme Court's reserved jurisdiction in *Arizona v. California* precluded the Nation's breach-of-trust claim because it would require a declaration of the Nation's rights to the Colorado River.[154] The Nation argued that its claim did not require the court

145. *Id.* (citations omitted).
146. *Id.* at 1029.
147. *Id.* at 1030.
148. *Id.*
149. Navajo Nation v. Dep't of the Interior, 876 F.3d 1144, 1167–73 (9th Cir. 2017).
150. *Id.* at 1172–73 (quoting 5 U.S.C. § 702).
151. *Id.* at 1174.
152. Navajo Nation v. U.S. Dep't of the Interior, No. CV-03-00507-PCT-GMS, 2018 WL 6506957, at *5 (D. Ariz. Dec. 11, 2018).
153. *Id.* at *2. The Nation's failure-to-consult claim is beyond the scope of this Note.
154. *Id.* at *2–3.

to declare its rights to the River, but rather is "a more general claim . . . based on the Nation's general need for water to make the Reservation inhabitable."[155] However, the court did not fully address the Nation's argument because it found the TAC, as written, required determining its rights to the Colorado River.[156] The court reasoned the Nation's breach-of-treaty claim—which alleged the United States breached the 1849 and 1868 Treaties by failing to act in the Nation's interest to secure sufficient water—failed for the same reason because it would require determining its rights to the River.[157] After denying the Nation's TAC for futility, the district court ordered that the Nation be given one more opportunity to amend its complaint.[158]

In 2019, considering the Nation's amendments to its proposed TAC, the district court again denied the Nation's motion as futile.[159] The Nation alleged the United States breached its trust obligations by "(1) failing 'to determine the quantities and sources of water required to make the Navajo Reservation a permanent homeland for the Navajo people,' and (2) by failing 'to protect the sovereign interests of the Navajo Nation by securing an adequate water supply to meet those homeland purposes.'"[160] The Tribe argued that the *Jicarilla* standard did not apply, but the court disagreed and reasoned that to sustain its breach-of-trust claim, the Tribe needed to "point to a specific treaty, agreement, executive order, statute, or regulation that the government violated," even when it sought injunctive relief.[161] The court was more persuaded by the Nation's argument that the trust obligations arose from the Nation's Treaties with the United States.[162] However, while recognizing the Nation does have *Winters* rights, the court reasoned implied rights "do not expressly create those [trust] responsibilities."[163] And otherwise held the Nation's *Winters* rights could not support its claim because it would require a

155. *Id.* at *3.
156. *Id.* at *4.
157. *Id.*
158. *Id.* at *4–5.
159. Navajo Nation v. U.S. Dep't of the Interior, No. CV-03-00507-PCT-GMS, 2019 WL 3997370, at *7 (D. Ariz. Aug. 23, 2019).
160. *Id.* at *1 (citations omitted).
161. *Id.* at *2–3.
162. *Id.* at *3.
163. *Id.* at *3–4.

determination of the Nation's possible rights in the Lower Basin, in contravention of the Supreme Court's reserved jurisdiction.[164]

On appeal again in 2019, the Ninth Circuit considered three issues: (1) whether the Supreme Court reserved jurisdiction over its 1964 Decree and, if it did, whether it was exclusive; (2) whether the Nation's claim was barred by *res judicata*; and (3) "whether the Nation could properly state a claim for breach of trust such that amendment was not futile."[165] In regards to the first issue, the Ninth Circuit held the Navajo's complaint and its requested relief were not barred by reserved jurisdiction because it did not seek a judicial quantification of its water rights to the Colorado River or require modifying the Decree.[166] Deciding it could exercise jurisdiction over the Nation's claim, the circuit court did not define the scope of the Supreme Court's reserved jurisdiction, but noted that no express language in the Decree stated that its jurisdiction is "exclusive."[167] Next, the court reasoned the Nation's claim was not barred by *res judicata* because the Nation's breach-of-trust action is not the same claim that the United States could have asserted on behalf of the Tribe in *Arizona v. California*.[168] Further, the duties the United States owed the Nation were not at issue in *Arizona v. California*, "and no final judgment was ever entered on the merits of any question concerning that subject."[169] Finally, the court reasoned that it was not bound by *Jicarilla* because the Nation's claim sought injunctive relief.[170] The court went on to reason that even under the *Jicarilla* standard, the Nation pointed to a specific treaty that under *Winters* gives rise to implied water rights, stressing that "[t]hose necessarily implied rights are just as important as express ones."[171] Further, the court reasoned that the breach-of-trust claim was supported by the "Secretary's pervasive control over the Colorado River" and the federal government's acknowledgment of its "trust responsibilities to protect the Nation's *Winters* rights."[172] Laying the blame for the "exceedingly

164. *Id.* at *4.
165. Navajo Nation v. U.S. Dep't of the Interior, 996 F.3d 623, 634 (9th Cir. 2021).
166. *Id.* at 635.
167. *Id.*
168. *Id.* at 636 ("The Nation's claim, properly understood, is an action for breach of trust—not a claim seeking judicial quantification of its water rights.").
169. *Id.*
170. *Id.* at 638.
171. *Id.* at 639.
172. *Id.* at 640–41.

long delay" in the quantification of the Nation's *Winters* rights with the Federal Appellees, the Ninth Circuit reversed and remanded, holding the proposed TAC properly stated a breach-of-trust claim.[173] Arizona and the Department of the Interior petitioned for a writ of certiorari.[174]

III. COURT'S ANALYSIS

The Supreme Court granted certiorari and the questions presented on review were: (1) "[w]hether the United States has a treaty-based duty to assess the Navajo Nation's water needs and develop a plan to meet them," and (2) "[w]hether a lower-court order requiring the United States to assess the Nation's water needs and develop a plan to meet them would conflict with this Court's decree in *Arizona v. California*."[175]

A. The Majority Opinion

In a 5–4 opinion, the majority of the Supreme Court in *Arizona v. Navajo Nation* held that "[i]n light of the treaty's text and history" the United States had no affirmative duty to assess the Tribe's water needs, develop a plan to meet those needs, or potentially build pipelines, pumps, wells, or other infrastructure to provide water access.[176] The Court declined to address whether the Navajo's claim would conflict with the Court's decree in *Arizona v. California*. [177]

Writing for the majority, Justice Kavanaugh gave a brief background of the Navajo Nation and the 1849 and 1868 Treaties.[178] With regard to the 1868 Treaty, the majority noted that the United States agreed "to build schools, a chapel, and other buildings; to provide teachers for at least 10 years; to supply seeds and agricultural implements for up to three years; and to provide funding for the purchase of sheep, goats, cattle, and corn."[179] In

173. *Id.* at 642–43.
174. Petition for Writ of Certiorari, Arizona v. Navajo Nation, 143 S. Ct. 1804 (2023) (No. 21-1484), 2022 WL 1696336; Petition for Writ of Certiorari, *Navajo Nation*, 143 S. Ct. 1804 (No. 22-51), 2022 WL 2834652.
175. Brief for Navajo Nation at *i, *Navajo Nation*, 143 S. Ct. 1804 (Nos. 21-1484, 22-51), 2023 WL 1779793.
176. 143 S. Ct. at 1810.
177. *Id.* at 1816 n.4.
178. *Id.* at 1810–11.
179. *Id.* at 1811.

consideration, the Court noted the Navajo agreed to give up any right to reside outside of the Reservation, except certain hunting rights, and to make the Reservation their "permanent home."[180]

The majority recognized that under the *Winters* doctrine, the Treaty implicitly reserved water rights to accomplish the purpose of the Reservation, and the Tribe had the right to use water from "various sources . . . that arise on, border, cross, underlie, or are encompassed within the reservation."[181] The majority considered the worsening drought problems the West has faced over the past decades, and stated "even though the Navajo Reservation encompasses numerous water sources . . . the Navajos face the same water scarcity problem that many in the western United States face."[182] Next, the majority noted how the United States has "authorized billions of dollars for water infrastructure on the Navajo reservation," but that the Nation sued because in its view, "those efforts did not fully satisfy the United States's obligation under the 1868 Treaty."[183]

Analyzing the Nation's breach-of-trust claim, the majority applied the *Jicarilla* standard, under which the Tribe must point to the specific text of a treaty, regulation, or statute that expressly "impose[s] certain duties on the United States."[184] In a footnote, the Court disagreed with the Navajo's argument that *Jicarilla*'s framework was only applicable to claims seeking monetary relief, and stated that it "applies to any claim seeking to impose trust duties on the United States, including claims seeking equitable relief."[185] The majority reasoned that there was nothing in the 1868 Treaty that expressly imposed a duty on the United States to secure water for the Tribe.[186] The majority conceded that the United States does maintain a general trust relationship with the Indian tribes but reasoned that it will not infer duties by invoking common-law trust principles unless a conventional trust relationship is created with regards to a particular trust asset.[187]

180. *Id.*
181. *Id.* (citations omitted).
182. *Id.*
183. *Id.* at 1812.
184. *Id.* at 1813 (citing United States v. Jicarilla Apache Nation, 564 U.S. 162, 173–74, 177–78 (2011); Navajo I, 537 U.S. 488, 506–07 (2003); Mitchell I, 445 U.S. 535, 542, 546 (1980)).
185. *Id.* at 1813 n.1.
186. *Id.* at 1813.
187. *Id.* at 1814.

Addressing several additional arguments made by the Tribe, the majority found it unpersuasive that the treaty provisions making the Reservation a "permanent home" and providing seeds and agricultural tools implied water rights.[188] Instead, with regard to the seeds and agricultural implements, the majority reasoned these provisions were temporary, and if anything, demonstrated the United States and the Navajo Nation were capable of being specific if they intended to.[189] The majority also rejected the Tribe's argument that the United States has pervasive control over their water rights, as shown by *Arizona v. California*, reasoning that trust duties "cannot be premised on control alone."[190] Finally, the Court found the Navajo, in signing the 1868 Treaty, would not have understood it to include an obligation on the United States to secure water for the Tribe because there was nothing in the record of negotiations supporting duties relating to water.[191]

The Court stressed that it was not within the judiciary's role to find the Treaty obligated the United States to take affirmative steps to secure water for the Tribe especially considering the "zero-sum reality of water in the West."[192] The Court thus reversed and remanded the judgment of the Ninth Circuit.[193]

B. Justice Thomas's Concurrence

Justice Thomas concurred with the majority's opinion but wrote separately to express his doubts about the general trust relationship the United States has with Indian tribes.[194] Specifically, he argued that it "seems to lack a historical or constitutional basis."[195] In his opinion, the Court's historical precedent had gone too far in "blurr[ing] the lines between the political branches' general moral obligations to Indians, on the one hand, and specific fiduciary obligations of the Federal Government that might be enforceable in court, on the other."[196] To Justice Thomas, the term "trust" in the general trust relationship should

188. *Id.* at 1815.
189. *Id.*
190. *Id.* (quoting, Navajo II, 556 U.S. 287, 301 (2009)).
191. *Id.* at 1816.
192. *Id.* at 1814.
193. *Id.* at 1816.
194. *Id.* (Thomas, J., concurring).
195. *Id.* at 1819.
196. *Id.* at 1817.

"refer merely to the trust that Indians have placed in the Federal Government" to do the right thing.[197] Justice Thomas likened the Federal-Indian relationship to the "[m]any citizens (and foreign nations) [that] trust the Federal Government['s]" moral compass.[198] Justice Thomas was pleased the majority's opinion further refined the circumstances in which the Indian tribes could enforce legal claims against the government, under which they must point to a specific statute or regulation imposing fiduciary duties, as opposed to citing the trust relationship.[199]

In addition to questioning the Court's historical precedent on the trust relationship, Justice Thomas questioned the validity of the "pro-Indian canons," opining that using the canons in place of the Court's ordinary interpretive tools lacks justification.[200] Similarly, Justice Thomas questioned how the trust relationship justifies the plenary power Congress has over Indian affairs, and how that "trust" could be used both to restrict tribal rights through the plenary power and support Indian canon.[201]

C. Justice Gorsuch's Dissent

Justice Gorsuch wrote a dissenting opinion, in which Justices Sotomayor, Kagan, and Jackson joined.[202] In the opening words of Justice Gorsuch, "[t]oday the Court rejects a request the Navajo Nation never made."[203] The four dissenting justices would have affirmed the Ninth Circuit's opinion; they reasoned that the relief requested by the Navajo was "far more modest" than the majority made it out to be, because the Navajo simply asked "the United States to identify the water rights it holds for them."[204]

The dissent criticized the majority for failing to consider three important pieces of context in rendering their decision: the history of the 1868 Treaty, the negotiations leading to it, and the efforts of the Navajo to avoid litigation.[205] The dissent also detailed the disastrous conditions at Bosque Redondo, highlighting its

197. *Id.*
198. *Id.*
199. *Id.*
200. *Id.* at 1817–18.
201. *Id.* at 1818.
202. *Id.* at 1819 (Gorsuch, J., dissenting).
203. *Id.*
204. *Id.*
205. *Id.*

unhealthy and meager water supply, and how discussions of water repeatedly came up during treaty negotiations.[206] In considering the Treaty's history, Justice Gorsuch found the power imbalance between the parties, and the policy of the United States that the Indian tribes pursue agriculture was relevant context to its interpretation.[207] Turning to the situation today, the dissent provided further context about the severe water crises the Nation faces and blamed that issue in part on the government's failure to assess its water needs.[208] The dissent also gave a history of the Colorado River Compact and the Nation's repeated attempts to assert its interests in the *Arizona v. California* litigation.[209]

With context and history in mind, the dissent explained the applicable legal standards the Court should have applied to the Navajo's claim.[210] The dissent reasoned the Indian Trust Asset Reform Act imposed enforceable obligations on the federal government that can be vindicated by tribes through a breach-of-trust action based on a breach-of-treaty claim.[211] As a treaty is essentially a contract, the dissent reasoned it must consider the parties' intents and expectations to inform its interpretation, using both the regular and Indian canons of construction.[212] The dissent also determined that according to the Court's precedent in *Arizona v. California*, when the United States holds water rights "in trust," like it does the Navajo, it is subject to fiduciary duties.[213] From that, it follows a party may seek equitable relief for failing to provide an accounting of those water rights.[214]

The dissent applied the above legal standards to the Navajo's claim, looking first to the 1868 Treaty's plain terms, and concluded that the Treaty necessarily included water to make the Reservation a "permanent home."[215] Moreover, the provisions

206. *Id.* at 1821 (noting the lead negotiator for the United States "underst[ood] the importance of water to the Navajo" and assured them another location "would have 'plenty of water.'" Also noting the Navajo negotiator spoke of the bad water at Bosque Redondo and advocated they be allowed to return home "where 'the water flows in abundance.'" (quoting Treaty Record 5)).

207. *Id.* at 1821–22.

208. *Id.* at 1822.

209. *Id.* at 1823–24.

210. *Id.* at 1825–28.

211. *Id.* at 1825 (quoting 25 U.S.C. § 5601(4)–(5)).

212. *Id.* at 1825–26.

213. *Id.* at 1827–28.

214. *Id.* (citations omitted) (internal quotation marks omitted).

215. *Id.* at 1828 (citations omitted) (internal quotation marks omitted).

discussing farming, cultivation, agricultural supplies, and buildings "'where . . . water may be convenient'" were "expressly keyed to an assumption about the availability of water."[216] The dissent reasoned "'the history of the treaty, the negotiations, and the practical construction adopted by the parties' may also inform [its] interpretation."[217] Given those considerations, and after the crises at Bosque Redondo, the dissent found an adequate water supply was of significant importance to the Navajo and understood by the United States.[218] In fact, "few points appear to have been *more* central to both parties' dealings."[219]

The dissent reasoned the fact that the United States assumes fiduciary duties when it holds water rights "in trust" and that the government exerts pervasive control over the Colorado River "suffice to resolve today's dispute."[220] Specifically, "that exact coupling—a fiduciary relationship to a specific group and complete managerial control over the property of that group—gives rise to a duty to account."[221] The dissent noted the majority's analysis reflected three errors: (1) it misapprehended the Navajo's requested relief by conflating it into requiring the government to build pipelines and other infrastructure, (2) it applied the wrong legal framework, and (3) it reached the wrong result even under that framework.[222]

First, the dissent reasoned the majority misunderstood and exaggerated the Navajo's request for relief.[223] Properly understood, the Nation sought an assessment of its water rights, and "[o]nly if the United States is, in fact, interfering with [its] reserved water rights in some way . . . could the Tribe then ask the federal government to devise a plan for achieving compliance with its obligations."[224] The dissent also noted that the Navajo "expressly disavow[ed]" the majority's suggestion that the United States would be required to pay for infrastructure like pipelines for the Tribe.[225] Second, the dissent argued the majority "tries to hammer

216. *Id.* (citations omitted) (internal quotation marks omitted).
217. *Id.* (quoting Choctaw Nation v. United States, 318 U.S. 423, 432 (1943)).
218. *Id.*
219. *Id.*
220. *Id.* at 1829.
221. *Id.*
222. *Id.* at 1830–33.
223. *Id.* at 1830.
224. *Id.* (internal quotation marks omitted) (citations omitted).
225. *Id.*

a square peg (the Navajo's request) through a round hole (our Tucker Acts framework)," and explained why that framework was incorrect.[226] The dissent reasoned that the Tucker Acts framework is designed to provide a waiver of sovereign immunity for claims seeking monetary relief in the Court of Federal Claims, not a cause of action.[227] Whereas, the Navajo's claim seeks equitable relief under 28 U.S.C. § 1362 which provides the federal district courts with "'original jurisdiction' over 'civil actions' brought by Tribes 'under the Constitution, laws, or treaties of the United States.'"[228] The dissent also concluded that § 1362 was designed to permit Tribes to bring claims that the United States could have brought on their behalf, and "all agree the United States could [have brought the Nation's claim] in its capacity as a trustee."[229] The dissent also noted it was undisputed that the Nation's claim met the requirements of Section 702's waiver of sovereign immunity.[230]

Third, the dissent would have held that even under the Tucker Acts framework the Navajo's claim should be allowed to proceed.[231] The dissent cited *Mitchell II*, for the proposition that when the government exercises control over a tribe's property, a fiduciary relationship typically exists, and when there is "elaborate control" or the government has "full responsibility" in managing a resource, the "fiduciary relationship *necessarily* arises."[232] Applying that logic to the Nation, the dissent found "the Navajo's complaint more than suffices to state a claim for relief" because the government holds the Navajo's water rights "in trust" and exercises "elaborate control" over the tribe's water sources, including the Colorado River.[233] Justice Gorsuch concluded with the apt comparison:

> To date, [the Navajo's] efforts to find out what water rights the United States holds for them have produced an experience familiar to any American who has spent time at the Department of Motor Vehicles. The Navajo have waited patiently for someone, anyone, to help them, only to be told

226. *Id.* at 1830–31.
227. *Id.* at 1831.
228. *Id.* (citing 28 U.S.C. § 1362).
229. *Id.*
230. *Id.* (citing 5 U.S.C. § 702).
231. *Id.* at 1831–32.
232. *Id.* at 1832 (quoting Mitchell II, 463 U.S. 206, 224–225 (1983)).
233. *Id.* (citations omitted).

> (repeatedly) that they have been standing in the wrong line and must try another.[234]

Justice Gorsuch surmised that the government would be hard-pressed to stop the Nation from intervening on its own behalf in future litigation over water sources in which it might have a claim—including litigation involving the Colorado River.[235]

IV. CRITICAL ANALYSIS

The majority reached the wrong decision in *Arizona v. Navajo Nation*. First, the majority misrepresented the Navajo's request for relief. Second, the majority applied the wrong legal framework and by doing so, did not give effect to the party's intent in the 1868 Treaty. Finally, even under the framework the majority applied, the Court should have allowed the Navajo's case to proceed.

A. Conflated the Navajo's Request for Relief

Throughout the Court's opinion, the majority framed the Navajo's request as asking the federal government to take "*affirmative steps*" to provide access to water, potentially by requiring the government to "build[] pipelines, pumps, wells, or other water infrastructure."[236] The Navajo never requested the government to "take affirmative steps" to provide the Navajo with access to water or build water infrastructure, but simply requested the Court order the "United States to honor its treaty promises by assessing the Nation's water needs and developing a plan to meet them."[237] In fact, during oral arguments, counsel for the Navajo Nation expressly disavowed that its requested relief required the government to build water infrastructure, stating "it does not . . . have obligations to build pipelines across the reservation or that sort of thing."[238] During oral arguments, counsel for the Navajo

234. *Id.* at 1833.
235. *Id.*
236. *Id.* at 1812 (majority opinion).
237. Brief for Navajo Nation, *supra* note 175, at *2.
238. Oral Argument, *supra* note 6, at 91. The majority opinion quoted counsel out of context for its support that the Navajo's request could include water infrastructure. *Navajo Nation*, 143 S. Ct. at 1812. What counsel for the Navajo actually said during oral arguments, in response to Justice Alito's question of whether access to water would "*ever* require the government to construct any infrastructure?" was "I can't say that it would never require any infrastructure whatsoever. It—it would depend on exactly what the situation is [such

clarified that its claim was that the United States breached its trust obligation to the Tribe by failing to assess the Nation's water needs.[239] Responding to a question by Justice Barrett, counsel for the Navajo agreed that "one way to think" about the Nation's claim was that it alleged the "United States failed to assert *Winters* rights on [its] behalf and, in fact, blocked [it] from watching out for [itself.]"[240] Counsel for the Navajo clarified however, that in order to even make a claim that the United States failed to assert their *Winters* rights, one first needs to know what *Winters* rights they *even have*—by having those rights assessed.[241]

By suggesting the Navajo's claim included an obligation that the United States build pipes and other infrastructure, the majority was considering future obligations the United States might assume once it crafted a plan to meet the Navajo's water needs. But it was improper for the Court to speculate about what obligations the United States might assume under such a plan and to include such speculation in its analysis. Moreover, the U.S. Government is certainly capable of understanding what responsibilities it assumes in future negotiations on its own without the Court's protection. And even if the government assumed a responsibility to build pipes when it crafted a plan, such obligations would be the subject of future litigation or negotiations—not the subject of this case. Courts are not free to rewrite a claimant's complaint for them, as the Supreme Court did here.

B. Applied an Incorrect Legal Framework

Additionally, the Court erred by applying an incorrect legal framework to the Navajo's claim. The majority analyzed the Navajo's claim under its Tucker Acts framework and its *Jicarilla* line of cases.[242] However, lower courts interpreting the Tucker Acts

---

as a water source that was impossible to reach]. . . . We're not talking about anything like that. We're talking about ensuring access to appurtenant water sources." Oral Argument, *supra* note 6, at 102–03 (emphasis added). And in response to Justice Alito's hypothetical question of whether the government would have to build infrastructure to provide access to a water source blocked by a cliff, counsel for the Navajo said, "it probably would not have to construct that" and if such a thing was required of the government, it would be something likely provided for in settlement negotiations. *Id.* at 103–04.

239. Oral Argument, *supra* note 6, at 81–82.

240. *Id.* at 79.

241. *Id.* at 78–81 (emphasis added).

242. *Navajo Nation*, 143 S. Ct. at 1830–31 (Gorsuch, J., dissenting).

framework have understood it to apply to monetary claims—not claims seeking equitable relief.[243] The Nation brought a breach-of-trust claim based on a breach-of-treaty obligations.[244] As outlined above, traditionally, for a tribe to bring a breach-of-trust action requesting specific relief it must establish subject matter jurisdiction, consent to suit, and assert a claim for which relief can be granted.[245] The Nation established subject matter jurisdiction under § 1331 because its claim arose from the 1868 Treaty. Next, Section 702 of the APA waives the United States' sovereign immunity because the Navajo alleged that several agencies failed to act in their official capacity by failing to assess the Navajo's water rights. Finally, the Navajo asserted a breach-of-treaty claim seeking the court to order the United States to assess its water rights and develop a plan to meet those needs.

Thus, under the proper legal framework, the majority should have applied its traditional framework to interpret the Navajo's treaties with the United States.[246] Applying the Indian canons of construction, the Supreme Court has long held that the Court must interpret Indian treaties "in light of the parties' intentions, with any ambiguities resolved in favor of the Indians."[247] Further, this requires construing a treaty's text in the way in which the Indians would have understood it.[248] In determining a treaty's meaning, courts are not confined to its text, and may look to the treaty's history, negotiations, and the practical construction the parties adopted.[249]

Applying that framework here yields a simple conclusion: under the *Winters* doctrine, the 1868 Treaty reserved water rights because both the Navajo and the United States must have understood the promise of a "permanent homeland" to include access to water. However, even if the Court did not accept its *Winters* precedent as enough, there are numerous provisions about

243. *See id.*

244. Brief for Navajo Nation, *supra* note 175, at *16–17.

245. *See* discussion *supra* pt. II.E.

246. Since this action was still at the pleading stage, it is also worth noting that the Court construed the Navajo's treaties with the United States before discovery and in the absence of a record. *See* M. Kathryn Hoover, *Special Focus on Indian Law: Up Shit Creek—Looking for a Paddle*, 59 ARIZ. ATT'Y (SPECIAL ISSUE) 24, 29 (2023).

247. Herrera v. Wyoming, 587 U.S. 329, 345 (2019) (quoting Minnesota v. Mille Lacs Band of Chippewa Indians, 526 U.S. 172, 206 (1999)) (internal quotation marks omitted).

248. *Id.* (citing Washington v. Wash. State Com. Fishing Vessel Ass'n, 443 U.S. 658, 676 (1979)).

249. *Id.* (citing Choctaw Nation of Indians v. United States, 318 U.S. 423, 432 (1943)).

farming, cultivation, and agriculture in the text of the Treaty that would be rendered useless without water.[250] Additionally, considering the history and negotiations that led to the 1868 Treaty, the Navajo Nation and the United States must have believed the Tribe would have access to water because the crisis at Bosque Redondo was due in large part to a meager and unhealthy water supply. As Justice Gorsuch aptly noted, during negotiations the Navajo stated they wanted to return home where "the water flow[ed] in abundance."[251] A letter from the Department of the Interior in 1897 also suggests both parties believed the Treaty included access to water because the Secretary advised Congress that to keep the Navajo within their Reservation's boundaries, Congress needed to "continue the present plan of developing a water supply" until the Reservation was "capable of sustaining these Indians and their stock."[252] Therefore, the majority should have found that the Navajo's proposed TAC stated a claim for relief and should have remanded the case for consideration on the merits.

C. The Majority Reached the Wrong Result Even Under the Tucker Acts Framework

The Supreme Court previously explained that a tribe must meet two requirements to invoke jurisdiction under the Tucker Acts: (1) it must point to a specific substantive source of law that imposes fiduciary or other duties and assert how the government has failed to perform them, and if that is met, then (2) "the court must then determine whether the relevant source of substantive law can fairly be interpreted as *mandating compensation for damages sustained* as a result of a breach of the duties the governing law imposes."[253] As is evident by the second requirement that the source of law be money-mandating, the framework should only apply to claims seeking monetary damages, and the majority should not have applied it to the Navajo's claim. Yet, even under

250. *See* 1868 Treaty, *supra* note 23.

251. Arizona v. Navajo Nation, 143 S. Ct. 1804, 1821 (2023) (Gorsuch, J., dissenting) (quoting Treaty Record 8).

252. H.R. DOC. NO. 310, 54TH CONG., 2D SESS. (1897).

253. Navajo II, 556 U.S. 287, 290–91 (2009) (citations omitted) (internal quotation marks omitted) (emphasis added).

the Tucker Acts framework, as Justice Gorsuch argued, the Navajo's claim still should have been allowed to proceed.[254]

As the first step requires, the Navajo pointed to their 1868 Treaty with the United States as a substantive source of law that imposed duties on the United States to provide the Tribe with a permanent homeland, and seeds and agricultural implements. The second step of the framework is clearly inapplicable because the Navajo did not seek damages, and the majority neglected to include that step in its analysis.[255] In *Jicarilla*, which the majority cited to support its analysis, the Court stated "[o]nce federal law imposes such duties, the common law 'could play a role' . . . [w]e have looked to common-law principles to inform our interpretation of statutes and to determine the scope of liability."[256] With that in mind, the majority here should have used common-law principles—its *Winters* doctrine—to inform its interpretation of the Treaty's provisions.

Justice Gorsuch argued the Navajo's complaint "easily measure[d] up" under the Tucker Acts framework by comparing the Navajo's claim to the Court's decisions in *Mitchell II* and *White Mountain Apache Tribe*.[257] Justice Gorsuch reasoned that in *Mitchell II* the Court permitted a damages claim that alleged mismanagement of tribal timber resources to proceed based on a "patchwork of statutes and regulations, along with some assorted representations by the Department of the Interior."[258] Further, the *Mitchell II* Court reasoned where the government has "'full responsibility' to manage a resource, or 'elaborate control' over that resource, the requisite 'fiduciary relationship *necessarily* arises.'"[259] Additionally, in *White Mountain Apache Tribe*, the Court considered a statute that declared the United States held part of the Tribe's land in trust and also "emphasized the United States exercised authority over the assets at issue and had considerable 'discretionary authority' over their use."[260]

254. *Navajo Nation*, 143 S. Ct. at 1832.
255. *Id.*
256. United States v. Jicarilla Apache Nation, 564 U.S. 162, 177 (2011) (quoting *Navajo II*, 556 U.S. at 301).
257. *Navajo Nation*, 143 S. Ct. at 1832.
258. *Id.* (citing Mitchell II, 463 U.S. 206, 219–24 (1983)).
259. *Id.* (quoting *Mitchell II*, 463 U.S. at 224–25).
260. *Id.* (quoting United States v. White Mountain Apache Tribe, 537 U.S. 465, 475 (2003)).

The United States admitted that it holds the Navajo's water rights "in trust" for the Tribe, and by doing so the majority should have found that it voluntarily assumed fiduciary duties with respect to managing the Tribe's water rights.[261] The Indian Trust Asset Reform Act authorized the Secretary to hold tribes' water rights in trust, and within the Act is the express statement from Congress:

> [T]he fiduciary responsibilities of the United States to Indians also are founded in part on specific commitments made through written treaties . . . in exchange for which Indians have surrendered claims to vast tracts of land, which provided legal consideration for permanent, ongoing performance of Federal trust duties; and . . . have established enduring and enforceable Federal obligations.[262]

Further, the Court previously stated that the government's control over a resource "could play a role" in its analysis, but that it "cannot be premised on control alone."[263] The Supreme Court previously recognized how much control the federal government exercises over the Colorado River:

> All this vast, interlocking machinery—a dozen major works delivering water according to congressionally fixed priorities for home, agricultural, and industrial uses to people spread over thousands of square miles—could function efficiently only under unitary management, able to formulate and supervise a coordinated plan that could take account of the diverse, often conflicting interests of the people and communities of the Lower Basin States. Recognizing this, Congress put the Secretary of the Interior in charge of these works and entrusted him with sufficient power . . . to direct, manage, and coordinate their operation.[264]

261. *Id.*; Oral Argument, *supra* note 6, at 26; *see also* JOINT SEC'Y OF THE INTERIOR AND SEC'Y OF AGRICULTURE, ORDER NO. 3403, JOINT SECRETARIAL ORDER ON FULFILLING THE TRUST RESPONSIBILITY TO INDIAN TRIBES IN THE STEWARDSHIP OF FEDERAL LANDS AND WATERS (2021) [hereinafter JOINT SECRETARIAL ORDER] ("In managing Federal lands and waters, the Departments are charged with the highest trust responsibility to protect Tribal interests and further the nation-to-nation relationship with Tribes.").

262. 25 U.S.C. § 5601.

263. Navajo II, 556 U.S. 287, 301 (2009).

264. Arizona v. California, 373 U.S. 546, 589–90 (1963).

And the Nation hardly premised its claim on control alone. Rather, the Nation pointed to numerous provisions in the 1868 Treaty to support its claim, including its provisions that the Treaty established a "permanent home" which would be unusable without water, and included provisions on cultivation, farming, and supplying the Tribe with seeds and agricultural implements.[265] Only after pointing to those provisions did the Nation's complaint argue that the government's control over its water rights support imposing duties on the United States.[266] In support, the Nation cited the petitioner's brief in which the United States asserted control over its water rights, documents and statements by the Interior asserting control over the Nation's and tribal water rights in general, and the fact that the United States controlled the Nation's water rights in the *Arizona v. California* litigation and continues to exercise elaborate control of the Colorado River.[267] Thus, it was error for the majority to dismiss the Nation's argument that the United States exercises pervasive control over its water rights, as if it premised its argument on control alone.[268]

D. Recourse of the Navajo Nation

Adding insult to injury, the majority's opinion misrepresented the extent of the water crisis the Nation faces by suggesting "the Navajos face the same water scarcity problem that many in the western United States face."[269] Many Navajo Nation individuals consume less than ten gallons of water per day, in comparison to the average eighty-eight gallons of water the average American consumes, and the one-hundred-plus gallons consumed by the average Phoenix resident.[270] Justice Gorsuch seemed optimistic that the Nation might succeed in intervening on future litigation over their water rights, including to the Colorado River.[271] However, it is difficult to see how the Nation would be able to assert a right to the Colorado River, or allege interference with

265. Brief for Navajo Nation, *supra* note 175, at *7.
266. *See id.* at *31–32.
267. *Id.* at *31–33.
268. Arizona v. Navajo Nation, 143 S. Ct. 1804, 1815–16 (2023) (majority opinion).
269. *Id.* at 1811.
270. See Brief of DigDeep Right to Water Project et al. as Amici Curiae in Support of Respondents at *3–4, *Navajo Nation*, 143 S. Ct. 1804 (No. 21-1484); Lyttle, *supra* note 6, at 84.
271. *Navajo Nation*, 143 S. Ct. at 1833 (Gorsuch, J., dissenting).

those rights, while its reserved water rights remain unassessed. A significant point to the litigation was to satisfy that first step so that the Nation would have a leg to stand on in asserting its water rights. Further, even if the Nation does move to intervene in future litigation over the decree, the DOJ may try to block its motion as meritless given the fact that the Nation's water rights remain undetermined.[272]

On February 28, 2024, the Nation announced it was close to reaching a settlement to all of the Nation's water rights claims in Arizona, including claims to the Little Colorado, the Upper and Lower Basin of the Colorado River, the Gila River Basin, and groundwater.[273] The parties to the proposed settlement are the Nation, the Hopi Tribe, the San Juan Southern Paiute Tribe, the State of Arizona, the United States, and other parties to the Little Colorado River adjudication.[274] In its summary of the proposed settlement, the Nation announced its primary objective "is to affirm and quantify the Nation's enforceable rights to water in Arizona and to secure funding to build much needed water delivery infrastructure on the Navajo Nation."[275]

One major advantage of reaching a settlement rather than engaging in protracted and costly litigation is a settlement secures "wet" water rather than "paper" water for the Tribe.[276] In addition, the comprehensive nature of the proposed settlement would quantify and secure water rights to numerous sources, as opposed

272. During oral arguments, responding to questions from Justice Gorsuch on whether the government would block future motions to intervene, the attorney for the government stated "[w]e might oppose it, but it's not . . . on the grounds that they . . . can't have their own voice. We might oppose it because of merits or collateral estoppel issues but not because we don't think tribes should be able to participate in water rights litigation." Oral Argument, *supra* note 6, at 34.

273. Joint Press Release, Navajo Nation, Navajo Nation Releases Summary of Comprehensive Arizona Indian Water Rights Settlement (Feb. 28, 2024) [hereinafter Joint Press Release]; NAVAJO NATION WATER RIGHTS COMM'N, SUMMARY OF THE PROPOSED NORTHEASTERN ARIZONA INDIAN WATER RIGHTS SETTLEMENT AGREEMENT FOR PUBLIC DISCUSSION PURPOSES (2024), https://nnwrc.navajo-nsn.gov/Portals/0/Files/Arizona%20Settlement/2024-02-28%20-%20SUMMARY%20of%20the%20NE%20AZ%20Indian%20Water%20Settlement%20Agreement%20-%20FINAL.pdf?ver=DaauiAYZpt5MXy3qqwxrsQ%3d%3d [hereinafter SUMMARY OF PROPOSED SETTLEMENT].

274. Joint Press Release, *supra* note 273.

275. SUMMARY OF PROPOSED SETTLEMENT, *supra* note 273.

276. Water secured from a water rights settlement is often referred to as "wet" water because tribes can negotiate for funding to build infrastructure so that the water is actually delivered and can be put to use. *See* Royster, *supra* note 13, at 100. Whereas litigation and judicial quantification can secure "paper" rights to water, but tribes still have to get that water delivered. *See id.*

to just one.[277] Further, a settlement could provide the Tribe with funding for water infrastructure from Congress that is essential to deliver the water to the Nation's residents. The Nation estimates the funding necessary to complete its proposed infrastructure projects will total $2.4 billion, as well as $1.7 billion to build a pipeline diverting water from Lake Powell to both the Navajo and Hopi Reservation.[278] Should the settlement be finalized, it must still be approved by Congress, and there is no guarantee that Congress will approve all of the terms of the settlement nor provide all of the requested funding.[279] If Congress agrees to provide all of the proposed funding, it would be the largest Indian water rights settlement to date.[280] However, even if the Nation is unable to procure the necessary funding, achieving a quantification of its water rights in Arizona would surmount a significant obstacle it has spent decades striving for.

V. RAMIFICATIONS

It appears the Court finally accepted the DOJ's position in Indian trust cases that the United States owes no fiduciary duties to tribes or Indians unless explicitly accepted by Congress "where the government holds Indian or tribal assets in trust."[281] *Arizona*

277. If the terms of the summary are finalized as is, the settlement will secure the following water rights: 44,700 AFY from Arizona's Upper Basin Colorado River allocation; all of the Little Colorado River mainstream water that reaches the Reservation (estimated at 122,000 AFY); all Little Colorado River tributary water that reaches the Reservation; 3,600 AFY of fourth priority Lower Basin Colorado River water; all Coconino aquifer water underlying the Reservation; all Navajo aquifer water underlying the Reservation (subject to an agreement with the Hopi tribe limiting Navajo pumping to 8,400 AFY); water from shared washes with the Hopi Tribe, also subject to an agreement between the Tribes; and 1,000 AFY from Flagstaff's Red Gap Ranch Regional Project. SUMMARY OF PROPOSED SETTLEMENT, *supra* note 273.

278. *Id.*

279. *See id.*

280. The Biden Administration made significant investments in Indian Country over the past several years, which includes funding to settle Indian water rights. The 2021 Bipartisan Infrastructure Law established and allocated $2.5 billion to the Indian Water Rights Settlement Completion Fund for the Secretary of the Interior to satisfy Indian Water Rights Settlements. Infrastructure Investment and Jobs Act, Pub. L. No. 117-58, § 70101, 135 Stat. 429, 1250 (2021). And in March of 2024, the Biden Administration announced its budget would provide an additional $2.8 billion in mandatory funding to the Fund. Press Release, White House, Fact Sheet: The President's Budget Delivers on His Commitment to Tribal Nations and Native Communities (Mar. 11, 2024). If history and the amount available in the Indian Water Rights Settlement Completion Fund offer any indication, it is unlikely the Nation will secure all of the estimated funding for its proposed projects.

281. *See* Fletcher, *supra* note 82, at 316 (citing Rey-Bear & Fletcher, *supra* note 8, at 432).

v. Navajo Nation will likely have major impacts on the Federal-Indian relationship and tribes seeking to enforce the trust responsibility.[282] From here on out, every tribe seeking to enforce the trust responsibility against the United States will be forced to overcome the much higher burden of the *Jicarilla* standard, under which it must point to a particular source of law in which the government expressly accepts fiduciary duties.[283] The Court of Federal Claims recently applied this heightened standard in *Cheyenne River Sioux Tribe v. United States* and found "[a]s the Court held in *Navajo Nation*, any trusts established or duties self-imposed by the United States for a tribe's benefit should be defined and governed by the text of the underlying source of law and not by common-law principles."[284]

Following *Arizona v. Navajo Nation*, in 2023, the Court of Federal Claims also applied *Navajo Nation* to *Winnemucca Indian Colony v. United States*.[285] The Winnemucca Indian Colony alleged that the United States breached its trust obligations under the *Winters* doctrine by allowing third parties to divert water from the Colony lands. In dismissing the Colony's claim, the *Winnemucca* Court found:

> That *Winters* . . . does not in itself create a duty for the Government to enforce those rights against third-party interference. *Winters* only recognized the federal government's power to assert such rights on behalf of a tribe, not that it has a specific fiduciary duty to do so . . . Plaintiff also argues that *Navajo Nation* is inapplicable since it did not overrule *Winters*. But while the Supreme Court did not overrule the earlier precedent, the Court here must nevertheless follow the Supreme Court's guidance in analyzing cases involving the *Winters* doctrine. . . .[286]

282. Fletcher, *supra* note 4; *see also* PATTERSON EARNHART REAL BIRD & WILSON LLP, *Secretary Haaland Successful in Interior Initiative to Dismantle Tribal Water Rights* (June 30, 2023), https://nativelawgroup.com/united-states-supreme-court-rules-against-tribes-in-water-rights-litigation ("This decision casts a shadow on future breach of trust cases and significantly limits the ability of Indian tribes to hold the Federal government responsible for its management of all Indian trust assets, not just reserved water rights.").

283. United States v. Jicarilla Apache Nation, 564 U.S. 162, 177–78 (2011).

284. Cheyenne River Sioux Tribe v. United States, 168 Fed. Cl. 465, 477 (2023) (citing Arizona v. Navajo Nation, 143 S. Ct. 1804, 1817 (2023) (Thomas, J., concurring)).

285. Winnemucca Indian Colony v. United States, 167 Fed. Cl. 396, 408–10 (2023).

286. *Id.* at 409–10.

Before *Navajo Nation*, the extent of the federal government's trust responsibility with regards to *Winters* rights was largely unsettled.[287] Even as Congress and the Executive have recognized that it holds Indian water rights in trust, the courts have often declined to enforce the federal trust duty to manage and protect Indian water rights.[288] Thus, while the *Winters* doctrine remained intact, *Navajo Nation* nevertheless clarified and cemented a narrow view of the doctrine and the scope of the federal government's trust responsibility.

The "trust" tribes put in the United States, in return for conceding the majority of their land and resources, is not the same as the "trust" American citizens place in the federal government "to do the right thing" as Justice Thomas suggests.[289] And to paint it as such is an extreme misrepresentation of the unique relationship between the United States and Federal-Indian tribes. When for example, a person gives their money to a bank to protect it, they do not do so under the assumption that they just have to "trust" the bank to manage their funds in the right way. When a person gives their money to a bank, they do so according to legally enforceable promises. Similarly, the United States and the federally recognized tribes entered into a relationship highlighted by the agreed-upon duty of protection.[290] This relationship, in addition to general contract principles, is why the courts historically employed the Indian canons of construction in construing treaties, agreements, statutes, and other enactments affecting tribal rights. The Court's failure to do so here was another departure from well-established precedent that tribes have often relied on to protect their interests.

Congress and the Executive Branch have recognized and affirmed the trust relationship in almost every piece of legislation, administrative action, and policy statement that concerns Indian tribes.[291] In 2018, the U.S. Commission on Civil Rights released a report on federal-tribal relations in which the Commission stated,

287. *See* Daniel K. Lee, *A Century of Uncertainty and the New Politics of Indian Water Settlements: How Tribes and States Can Overcome the Chilling Effect of the PAYGO Act*, 92 OR. L. REV. 625, 635–36 (2014).

288. *See id.*

289. *See Navajo Nation*, 143 S. Ct. at 1817.

290. Fletcher, *supra* note 82, at 309.

291. COHEN'S HANDBOOK, *supra* note 79, § 5.04 ("Nearly every piece of modern legislation dealing with Indian tribes contains a statement reaffirming the trust relationship between tribes and the federal government.").

"[t]he United States expects all nations to live up to their treaty obligations; it should live up to its own."[292]

VI. CONCLUSION

The majority's decision in *Arizona v. Navajo Nation* will have significant impacts on the Federal-Indian trust relationship. The federal government has repeatedly recognized its historic failure to fulfill its promises to tribes, and the injustice and inequities inflicted on Native peoples as a result.[293] However, while Congress and the Executive Branch have made some efforts to rectify its failures, the Court in *Arizona v. Navajo Nation* has once again obstructed those efforts by depriving tribes of an important and well-established means of protection they rely on to enforce their rights.

292. U.S. COMM'N ON C.R., BROKEN PROMISES: CONTINUING FEDERAL FUNDING SHORTFALLS FOR NATIVE AMERICANS, Letter of Transmittal, 182 (2018) https://www.usccr.gov/files/pubs/2018/12-20-Broken-Promises.pdf (considering the Navajo water crises and the need for water projects on tribal lands, the Commission found the lack of running water was called "abysmal" by advocates that consider water access "an essential human right").

293. *See id.*