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Brief of Tribal Nations and Indian Organizations as Amici Curiae in Support of the Navajo Nation

Dylan R. Hedden-Nicely

Nos. 21-1484 & 22-51

In The Supreme Court of the United States

STATE OF ARIZONA, et al.,
Petitioners,
v.
NAVAJO NATION, et al.,
Respondents.

DEPARTMENT OF THE INTERIOR, et al.,
Petitioners,
v.
NAVAJO NATION, et al.,
Respondents.

On Writs Of Certiorari To The United States Court Of Appeals For The Ninth Circuit

BRIEF OF TRIBAL NATIONS AND INDIAN ORGANIZATIONS AS *AMICI CURIAE* IN SUPPORT OF THE NAVAJO NATION

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TABLE OF CONTENTS

TABLE OF CONTENTS—Continued

TABLE OF AUTHORITIES

Page

CASES

TABLE OF AUTHORITIES—Continued

TABLE OF AUTHORITIES—Continued

STATUTES AND RESOLUTIONS

TABLE OF AUTHORITIES—Continued

TABLE OF AUTHORITIES—Continued

Page

TABLE OF AUTHORITIES—Continued

Page

OTHER AUTHORITIES

TABLE OF AUTHORITIES—Continued

INTEREST OF *AMICI CURIAE*[1]

Amici curiae are a diverse coalition of thirty-seven federally recognized Tribal Nations listed in Appendix A, and three intertribal organizations, the San Luis Rey Indian Water Authority ("SLRIWA"); the National Congress of American Indians ("NCAI"), and the Affiliated Tribes of Northwest Indians ("ATNI"). Located in states across the American West, *Amici* and their members rely on reserved water rights for commercial, industrial, and residential uses as well as agriculture, fishing, and cultural and spiritual practices.

Tribal Nation *Amici* include the Assiniboine and Gros Ventre Tribes of the Fort Belknap Indian Community of the Fort Belknap Reservation, whose rights were at issue in *Winters v. United States*, 207 U.S. 564 (1908). Relying on the foundational holding of that case, now known as the *Winters* Doctrine, Tribal Nation *Amici* have participated in all stages of recognizing, quantifying, protecting, and enforcing their federally reserved water rights and worked for decades with *all* water users in their respective regions to ensure sound water management practices promoting economic development and preserving core environmental values. *Amicus* SLRIWA is an intertribal governmental entity created by the federally recognized

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[1] No counsel for any party authored this brief in whole or in part, and no party or counsel for a party made a monetary contribution intended to fund the preparation or submission of this brief. No entity or person aside from *amici curiae*, their members, and their counsel made any monetary contribution intended to fund the preparation or submission of this brief.

La Jolla, Pala, Pauma, Rincon, and San Pasqual Bands Mission Indians in California, as part of their congressionally-ratified water settlement. *Amicus* NCAI, established in 1944, is the oldest and largest national organization comprising federally recognized Tribal Nations and their citizens. *Amicus* ATNI, formed in 1953, represents fifty-seven Tribal Nations from across Oregon, Idaho, Washington, Alaska, California and Montana. *Amici* are committed to protecting reserved water rights, which are foundational to their sovereignty and necessary for the health and welfare of their tribal citizens.

SUMMARY OF ARGUMENT

The *Winters* Doctrine recognizes and gives effect to the promises made by the United States in treaties, congressionally ratified agreements, and executive orders that Tribal Nations would retain permanent and viable homelands. These promises, made in exchange for the Tribal Nations' cession of billions of acres of land, paved the way for the non-Indian settlement of the West. Although every tribal homeland is unique, invariably, each requires water to be livable. Applying the canons of construction this Court has developed as part of its federal Indian law jurisprudence, as well as the history and circumstances surrounding the creation of each individual reservation, the *Winters* Doctrine holds that the United States promised to provide water sufficient to fulfill the purposes for which the reservations were created.

Concomitant with the promise to reserve water rights is the corresponding duty to protect and deliver on that promise and avoid rendering those rights meaningless through obstruction, depletion, or diversion to more junior users. In this way, the *Winters* Doctrine is a pathway for ensuring the United States fulfills its solemn obligations to Tribal Nations. The United States—through both Congress and the Executive—has repeatedly and expressly reaffirmed its understanding of these obligations. Petitioners here articulate no reason why the Lower Colorado River Basin should be treated differently. This Court should once again ensure the United States honors its obligations.

In the 115 years since *Winters v. United States*, the Doctrine solidified into an integral part of the fabric that makes up Western water management. The *Winters* Doctrine forms the basis for extensive adjudication and settlement of claims by Tribal Nations to water rights. Today, millions of tribal and non-tribal citizens benefit from the certainty provided by the *Winters* Doctrine.

ARGUMENT

I. The *Winters* Doctrine is a Foundational Component of Water Resource Management in the West.

A. Prior to *Winters v. United States*, Water Resources Reserved for Tribal Nations were Rapidly Appropriated by Non-Indians.

When Europeans first approached what is today the continental United States, Indigenous peoples controlled over 1.73 billion acres (7 million km^2) of land. J. Farrell et al., *Effects of Land Dispossession and Forced Migration on Indigenous Peoples in North America* 374 SCIENCE 57, https://tinyurl.com/yc2xk4jb. Today, Tribal Nations retain an ownership interest in just 6.1 percent (105 million acres/426,598 km^2) of the land they used to control, a reduction of 93.9 percent. *Id*. For the American West, that part of the country west of the 100th meridian, the turning point came in the middle of the nineteenth century. *See Jennison v. Kirk*, 98 U.S. 453, 457-59 (1878). This expansion was particularly impactful to water resources, ultimately resulting in a new water rights regime that was largely non-existent when the federal government negotiated treaties with sovereign Tribal Nations. REED D. BENSON ET AL., WATER RESOURCES MANAGEMENT: A CASEBOOK IN LAW AND PUBLIC POLICY 797-98 (8th ed. 2021).

The hydrology and climate of the American West required a different approach than the common law's riparian rights doctrine recognized in the eastern

United States.[2] State authority to fundamentally alter the law governing water resources was initially uncertain. *See* Dale D. Goble, *Prior Appropriation and the Property Clause: A Dialogue of Accommodation*, 71 OR. L. REV. 381, 390-91 (1992). A series of federal public land laws—culminating in the Desert Lands Act of March 3, 1877, ch. 107, 19 Stat. 377 (codified as amended 43 U.S.C. §§ 321-339)—collectively "recognized and assented" to state authority to change "th[e] common law rule and permit the appropriation of the flowing waters for such purposes as [they] deem[ ] wise." *United States v. Rio Grande Dam & Irrigation Co.*, 174 U.S. 690, 703, 706 (1899). However, the Court highlighted that Congress' accommodation of the states' authority over water could not "destroy the right of the United States, as the owner of lands bordering on a stream, to the continued flow of its waters; so far at least as may be necessary for the beneficial uses of the government property." *Id*. at 703. Since its beginning, Western water law has been defined by the interrelationship between federal law and the laws of the Western states that adopted the prior appropriation doctrine to govern water rights. *See* Goble, *supra*, at 399-408; *see also* ROBERT T. ANDERSON ET AL., AMERICAN INDIAN LAW: CASES AND COMMENTS 741 (4th ed. 2020).

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[2] "In a riparian jurisdiction, the owner of land bordering a waterbody . . . may make reasonable use of the water on the riparian land if the use does not interfere with reasonable uses of other riparian owners." SANDRA B. ZELLMER & ADELL AMOS, WATER LAW IN A NUTSHELL 15 (6th ed. 2021).

Under the prior appropriation doctrine, water rights are acquired by diverting unappropriated water from its natural source and continually applying it to some beneficial use. *Colo. River Water Cons. Dist. v. United States*, 424 U.S. 800, 805 (1976). During periods of scarcity, "priority among confirmed rights is determined according to the date of initial diversion." *Id.* The doctrine's basic command that 'first in time is first in right' incentivized rapid development and use of scarce water resources with little regard for conservation, efficiency, or equitable allocation. *See* BARTON H. THOMPSON, JR. ET AL., LEGAL CONTROL OF WATER RESOURCES 178 (6th ed. 2018).

Prior appropriation's focus on the self-serving use of water was central to nineteenth century policies that encouraged the "filling up [of] the 'empty' western half of the nation." CHARLES F. WILKINSON, CROSSING THE NEXT MERIDIAN: LAND, WATER, AND THE FUTURE OF THE WEST 236 (1992); *see also id.* at 231-59. The scheme, however, did not account for tribal water needs, nor many Tribal Nations' nascent understanding of large-scale agriculture. As a result, the prior appropriation doctrine served "to divert water away from tribal homelands and to non-Native farms and cities." Daniel McCool, *Searching for Equity, Sovereignty, and Homeland*, *in* CORNERSTONE AT THE CONFLUENCE: NAVIGATING THE COLORADO RIVER COMPACT'S NEXT CENTURY 146 (Jason A. Robison ed., 2022). In the zero-sum game between the politically powerful Western water lobby and Tribal Nations, the Tribal Nations often lost. *Id.* at 151; *see also* Report from Special Master Simon H.

Rifkind, at 261, *Arizona v. California*, 373 U.S. 546 (1963) (report filed as 364 U.S. 940 (1961)). As the first annual report of the Reclamation Service admonished:

> [t]he history of . . . Indians on arid lands has shown that unless protected with great care the rights to the use of water on Indian lands have been gradually lost through neglect or oversight and the mere allotment of land without carefully guarding the future use of the necessary water has resulted disastrously to the Indians.

First Annual Report of the Reclamation Service from June 17 to December 1, H.R. DOC. NO. 57-79, at 289 (1903). This oblique reference to inhumane turn-of-the-century federal Indian policies acknowledged the tragic irony that those who were historically first in time had been practically excluded from claiming and using water during this era.

B. The Reserved Rights Doctrine Protects Federal Promises Made to Tribal Nations in the Face of Widespread Appropriations of Land, Water, and Other Resources Across the American West.

Westward expansion created economic and political incentives for the United States to acquire additional lands, which furthered the policies of removal and relocation of Tribal Nations. Relying on the use of treaties and agreements ratified by Congress, the United States secured massive cessions of tribal lands throughout the nineteenth century.

In recognition of the immense consideration provided by Tribal Nations in these agreements, as well as their status as sovereigns, a series of interpretative rules, known as the Indian Canons of Construction ("Indian Canons"), developed over two centuries of this Court's precedent to ensure the benefits of those original bargains can be understood and protected. *See* COHEN'S HANDBOOK OF FEDERAL INDIAN LAW § 2.02 (NELL JESSUP NEWTON ed. 2012).[3] Under the Indian Canons, all treaties, agreements, statutes, executive orders, and other enactments affecting the rights of Tribal Nations "must be interpreted in light of the parties' intentions, with any ambiguities resolved in favor of the Indians, and the[ir] words . . . construed in the sense in which they would naturally be understood by the Indians." *Herrera v. Wyoming*, 139 S. Ct. 1686, 1699 (2019); *see also Washington v. Washington State Commercial Passenger Fishing Vessel Assoc.*, 443 U.S. 658, 675-76 (1979); *United States v. Washington*, 969 F.2d 752, 755 (9th Cir. 1992), *cert. denied*, 507 U.S. 1051 (1993). Although Congress can unilaterally abrogate

[3] Giving effect to Tribal Nations' view of these agreements is necessary to ensure the United States' legitimacy, both domestically and internationally, which is rooted in the idea that "[g]overnments . . . deriv[e] their just powers from the consent of the governed." THE DECLARATION OF INDEPENDENCE para 2 (U.S. 1776). Indeed, these agreements memorialized the terms of tribal incorporation into the United States and documented the only basis upon which tribes consented to a relationship with the United States. But for these agreements, bare colonialism would be the sole legal justification for assimilating tribes into the domestic constitutional structure. Philip P. Frickey, *Marshalling Past and Present: Colonialism, Constitutionalism, and Interpretation in Federal Indian Law*, 107 HARV. L. REV. 381, 393-417 (1993).

its agreements, there is a heavy presumption that tribal property rights and sovereignty are preserved unless congressional intent is clearly and unambiguously expressed to the contrary. *Minnesota v. Mille Lacs Band of Chippewa Indians*, 526 U.S. 172, 202 (1999).

These principles have been particularly important to the Court's commitment to recognizing and protecting rights reserved by Tribal Nations. *See*, *e.g.*, *United States v. Winans*, 198 U.S. 371 (1905); *see also Wash. State Dep't of Licensing v. Cougar Den, Inc.*, 139 S. Ct. 1000, 1011-13 (2019). In *Winans*, the Court interpreted the 1855 Treaty with the Yakama Nation, which, in exchange for ceding large portions of its aboriginal territory, had reserved (among other things) the "right of taking fish at all usual and accustomed places, in common with the citizens of the Territory. . . ." *Winans*, 198 U.S. at 378. Despite this promise, members of the Yakama Nation were blocked from accessing their usual and accustomed fishing places by private property owners who acquired the recently ceded land. *Id.* at 377, 379.

To justify this exclusion, the non-Indian landowners argued the treaty provided "no rights but what any inhabitant of the Territory or State would have. Indeed, [the Yakama] acquired no rights but such as they would have without the treaty." *Id*. at 380. The Court rejected that construction as "an impotent outcome to negotiations and a convention, which seemed to promise more and *give the word of the Nation* for more." *Id*. (emphasis added). Instead, the Court applied the Indian Canons to the text of the treaty and looked to the

circumstances surrounding its negotiation to discern the intent of both the United States and the Yakama Nation. *Id*. at 380-82. That analysis distilled to the rule that "the treaty was not a grant of rights to the Indians, but a grant of rights from them—a reservation of those not granted." *Id*. at 381. Since both the Yakama Nation and the United States *intended* the treaty to protect those rights, the treaty "imposed a servitude upon every piece of land [adjacent to the Yakama's usual and accustomed fishing places] as though described therein." *Id*.

C. The *Winters* Doctrine Gives Effect to the Central Federal Promise of a Tribal Homeland.

Just three years after *Winans*, this Court extended the reserved rights doctrine to water use on Indian reservations. *Winters v. United States*, 207 U.S. 564 (1908). There, the Assiniboine and Gros Ventre Tribes agreed to cede a "vast territory" of land to the United States that included "the northern half of what would later become . . . the state of Montana." Judith Royster, *Water, Legal Rights, and Actual Consequences: The Story of* Winters v. United States, *in* INDIAN LAW STORIES 81, 82 (Goldberg et al. eds., 2011); *see also* JOHN SHURTS, INDIAN RESERVED WATER RIGHTS: THE WINTERS DOCTRINE IN ITS SOCIAL AND LEGAL CONTEXT, 1880S-1930S 17 (2000). In consideration for that cession, the agreement, ratified by Congress in 1888, promised the Fort Belknap Reservation would remain the "permanent home[]" of the Tribes. Act of May 1, 1888, ch. 213, 25

Stat. 113, 113-14. The Tribes and the United States intended that farming and stock raising would be the economic foundation of that homeland. SHURTS, *supra*, at 19. However, the Reservation's "lands were arid, and, without irrigation, were practically valueless" for agriculture. *Winters*, 207 U.S. at 576. To protect the Reservation's agricultural purposes, the United States took the affirmative step of developing infrastructure for an irrigation project to divert water from the Milk River, which forms the Reservation's northern border, to irrigate 30,000 acres of reservation land. *Id*. at 566.

At the same time, the Tribes' ceded lands were opened to settlement under the federal homestead laws. *See*, section I.A, *supra*. Non-Indian settlers soon began diverting and using water from the Milk River upstream of the reservation under Montana's prior appropriation laws. *Winters*, 207 U.S. at 568-69. In 1905, drought reduced the Milk River's flow, which became inadequate to meet the needs of both the Tribes and non-Indian irrigators. Royster, *supra*, at 81. Consistent with the "historical attitude of the department in dealing with violations of the rights of Indians of whatsoever sort . . . to use for the protection of such rights all means properly at the Government's disposal," the United States filed suit on behalf of the Tribes. SHURTS, *supra*, at 94, n.17.

In *Winters*, the non-Indian irrigators made two arguments seeking to defeat the Tribes' right to divert and use water from the Milk River. The first, just as the States and their *Amicus* assert here, State Pet'rs' Br. 23-24; Colo. Br. 16-17; *Amicus* Western Water Users

Br. 22, was the bare policy-based appeal that "if the claim of the United States and the Indians be maintained, the lands of the defendants and the other settlers will be rendered valueless [and] said communities will be broken up." *Winters*, 207 U.S. at 570. The second, which hinged on Montana's prior appropriation law, was that the Tribes had failed to establish senior water rights because the right to divert and use water from the Milk River was not expressly reserved in the language of the 1888 agreement. *Id.* at 576 ("[I]t is further contended, the Indians knew [the reservation lands were arid], and yet made no reservation of the waters.").

This Court firmly rejected both of these arguments and determined that the case hinged not on bare policy-based appeals or state prior appropriation law but "on the agreement of May, 1888, resulting in the creation of Fort Belknap Reservation." *Id*. at 575. Applying the Indian Canons, it was clear that the United States and the Tribes intended to reserve the right to use water in the 1888 agreement. *Id.* at 576-77 ("By a rule of interpretation of agreements and treaties with the Indians, ambiguities occurring will be resolved from the standpoint of the Indians. . . . On account of their relations to the government, it cannot be supposed that the Indians were alert to exclude by formal words every inference which might militate against or defeat the declared purpose of themselves and the government. . . ."); *see also* State Pet'rs' Br. 26; United States' Br. 36-37. Notwithstanding the "conflict of implications" arising from the agreement's silence on water

rights, the Court paid particular attention to *Winans'* mandate to discern the *Tribes*' understanding of the agreement and the rule that anything not expressly ceded to the United States was reserved by the Tribes:

> The Indians had command of the lands and the waters—command of all their beneficial use, whether kept for hunting, 'and grazing roving herds of stock' or turned to agriculture and the arts of civilization. Did they give up all this? Did they reduce the area of their occupation and give up the waters which made it valuable or adequate? . . . If it were possible to believe affirmative answers, we might also believe that the Indians were awed by the power of the government or deceived by its negotiators. Neither view is possible.

Winters, 207 U.S. at 576. From this vantage, the Court thought it clear that the logic resulting in "the retention of the waters is of greater force than . . . their cession." *Id*.

Not only was the Court's construction of the 1888 agreement rooted in an analysis of its text and the Tribes' history but also the circumstances surrounding the creation of the Reservation. *Id*. ("The reservation was a part of a very much larger tract which the Indians had the right to occupy and use, and which was adequate for [their traditional] habits . . . It was the policy of the government . . . to change those habits and to become a pastoral and civilized people."). Analysis of those circumstances led the Court to the central purpose of the 1888 agreement—developing tribal agriculture on the Fort Belknap Reservation to fulfill

Congress' tribal policy goals. *Id.* at 576-77. Given the climate of the Reservation, the Court found that purpose would be defeated if the 1888 agreement did not include a reservation of water. *Id.* ("And the rule should certainly be applied to determine between two inferences, one of which would support the purpose of the agreement and the other impair or defeat it."). Because Congress did not intend, or clearly express, such a contrary result, the only inference to draw was the one "which would support the purpose of the agreement." *Id*. at 577. Thus was born the *Winters* Doctrine: when the federal government agrees to create an Indian Reservation, it also promises the water necessary to fulfill the purposes of that reservation. *Arizona v. California*, 373 U.S. 546, 599-600 (1963).

The Court's construction of the 1888 agreement likewise disposed of the non-Indian irrigators' policy argument that ruling for the United States would cause their lands to "be rendered valueless [and] said communities . . . be broken up." *Id*. at 570. Notwithstanding this argument's hyperbolic nature, the Court concluded that Congress had already weighed those considerations and nonetheless opted to reserve a water right for the Tribes when it created the Fort Belknap Reservation. *Id*. at 575. Having discerned congressional intent to reserve a homeland pursuant to the 1888 agreement, which necessarily required water, the Court refused to second-guess or reweigh that intent. *Id.* at 577.

Thus, Petitioners here are incorrect that *Winters* rights derive from the common law rather than federal

positive law. *See* United States Br. 36-37; State Pet'rs' Br. 26-36. The *Winters* Court did not create the water rights reserved for the benefit of Tribal Nations, nor has any court since *Winters* purported to create water rights pursuant to the common law. Instead, the *Winters* Court concluded "[t]he case . . . turns on the *agreement* of May, 1888, resulting in the creation of Fort Belknap Reservation." *Id*. at 575 (emphasis added). This Court reaffirmed that holding in *Arizona*, 373 U.S. at 599-600. There, in discerning the purposes for the creation of several executive order reservations, the Court concluded that "*Congress and the [E]xecutive* have ever since recognized these as Indian Reservations." *Id*. at 598 (emphasis added). Simply put, the federal promise to reserve and protect tribal water rights comes from the constitutional powers of *Congress* and the *Executive*, not from the Judiciary. In both cases, the Court has looked to the operative document that served to create the reservation and discerned a federal *and* tribal purpose to reserve a homeland. Because water was necessary to fulfill that purpose, the Court has twice found it inconceivable that the parties failed to ensure a water supply sufficient to make that homeland habitable for future generations. Following this Court's lead, state and federal courts across the American West have engaged in the same analysis to discern the scope of the federal government's intent when reserving an Indian homeland.[4]

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[4] *Conrad Inv. Co. v. United States*, 161 F. 829, 831-32 (9th Cir. 1908) (construing 1888 Agreement with the Blackfeet, 25 Stat. 124); *United States v. Ahtanum Irr. Dist.*, 236 F.2d 321, 326

II. The *Winters* Doctrine is Foundational to the United States' Exercise of its Trust Duties to Protect and Secure Tribal Reserved Water Rights.

A. *Winters* is the foundation for decisions in extensive water adjudications.

Over a half-century after *Winters*, *Arizona v. California* reaffirmed the *Winters* Doctrine's central role in western water law. 373 U.S. 600. There, the Court expressly "follow[ed]" *Winters* when interpreting congressional actions and executive orders establishing reservations in the Colorado River Basin, concluding that "[w]e have no doubt about the power of the United States . . . to reserve water rights for its reservations and its property." *Id*. at 598, 600. As in *Winters*, the question reduced to one of intent, which the Court inferred from the purposes for the creation of the

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(9th Cir. 1956) (construing Treaty with the Yakima, 12 Stat. 951 (1855)); *New Mexico v. Aamodt*, 537 F.2d 1102, 1113 (10th Cir. 1976); *United States v. Abousleman*, 976 F.3d 1146, 1158-60 (10th Cir. 2020); *Colville Confederated Tribes v. Walton*, 647 F.2d 42 (9th Cir. 1981) (construing Executive Order of July 2, 1872); *United States v. Adair*, 723 F.2d 1394, 1409 (9th Cir. 1983) (construing Treaty with the Klamath, 16 Stat. 707 (1864)); *Agua Caliente Band of Cahuilla Indians v. Coachella Valley Water Dist.*, 849 F.3d 1262, 1272 (9th Cir. 2017). *See also In re Gen. Adjudication of All Rts. to Use Water in Big Horn River Sys.*, 48 P.3d 1040, 1046-47 (Wyo. 2002) (construing Treaty of Fort Bridger, 15 Stat. 673 (1868)); *In re Yakima River Drainage Basin*, 850 P.2d 1306, 1317 (Wash. 1993); (construing Treaty with the Yakima, 12 Stat. 951 (1855)); *In re CSRBA Case No. 49576 Subcase No. 91-7755*, 448 P.3d 322, 344 (Idaho 2019) (construing Executive Order of Nov. 8, 1873).

Reservations.[5] *Id.* at 598-99. The Court found that the purposes for these particular Reservations was to provide the Tribal Nations with an agriculturally-based homeland, but also recognized that "most of the lands were of the desert kind—hot scorching sands." *Id*. at 599. Thus, it would be "impossible to believe" Congress and the Executive failed to understand that "water from the river would be essential for the life of the Indian people and to the animals they hunted and the crops they raised." *Id*.

Arizona v. California also provides guidance for the integration of reserved rights into state water law schemes premised on prior appropriation. Recognizing that reserved rights vest "as of the time the Indian Reservations were created," the Court agreed with the Special Master that they constitute " 'present perfected rights' and as such are entitled to priority," based on the date of the reservation. *Id.* at 600; *see also Winters*, 207 U.S. at 577 (reserving Tribes' water rights as of the date of the agreement establishing the Reservation). Such straight-forward integration of federal reserved rights with existing rights recognized under state law ensures consistency with this Court's precedent in *Arizona*.

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[5] The *Arizona* Court also extended the *Winters* Doctrine to non-Indian reservations, *Arizona*, 373 U.S. at 601, and later concluded that Congress intended to reserve water for those reservations where such water would be necessary to fulfill the purposes of the reservation. *Cappaert v. United States*, 426 U.S. 128, 138 (1976).

Federal courts throughout the West have relied upon the *Winters* Doctrine to identify and protect the scope of Indian water rights tied to the reservation of permanent and sustainable tribal homelands. *See* section I.C, *supra*, at n.4. For example, the Ninth Circuit relied on the Doctrine when it reviewed the Executive Order creating the Colville Reservation to confirm that the Order established a homeland for the Colville Tribe and reserved the water necessary to fulfill the purposes of that homeland. *Walton*, 647 F.2d at 46-48 (noting that "[r]esolution of the problem is found in quantifying reserved water rights, not in limiting their use.") Likewise, "the Winters [D]octrine d[id] not distinguish between surface water and groundwater" when, in an Executive Order, "the United States intended to establish a home for the Agua Caliente Band of Cahuilla Indians." *Agua Caliente Band of Cahuilla Indians*, 849 F.3d at 1272. The *Winters* Doctrine and its approach to determining the purposes of tribal homelands recognizes that "permanency requires a reliable supply of water for meeting basic socioeconomic needs, maintaining cultural integrity, and fostering diversified tribal economies; all of which are the heart of what a 'homeland' is," and are vital for tribal sovereignty. McCool, *supra*, at 159.

State courts also broadly define and apply the *Winters* Doctrine when determining tribal reserved rights in general stream adjudications. The McCarran Amendment, 43 U.S.C. § 666, established Congress' preference for a comprehensive forum in which to adjudicate state, federal and tribal rights to water,

including reserved rights. *Arizona v. San Carlos Apache Tribe of Arizona*, 463 U.S. 545, 571 (1983). With respect to those state forums, however, this Court also recognized that the federal "powers and duties regarding Indian water rights are constrained by its fiduciary duty to the Indian tribes who are beneficiaries of the trust," including the "responsibility fully to defend Indian water rights in [] court. . . ." *Colo. River Water Cons. Dist.*, 424 U.S. 800 at 812. Thus, this Court's recognition of state court authority to comprehensively adjudicate all rights, including tribal reserved rights, was balanced with its understanding of the United States' affirmative duty to protect those rights in any forum where they might be addressed or adjudicated.[6] State courts across the West regularly determine tribal reserved rights through such proceedings. In these cases, the United States, as the trustee over tribal water rights, commences litigation on behalf of tribes or joins the proceeding on behalf of tribes. State courts across the West look to and incorporate applicable federal law by relying on the *Winters* Doctrine. *See*, *e.g.*, *In re CSRBA Case No. 49576 Subcase No. 91-7755*, 448 P.3d 322, 362 (Id. 2019); *In re Gen. Adjudication of All Rights to Use Water in the Gila River Sys. & Source*, 35 P.3d 68, 71-72 (Ariz. 2001) (describing the interaction of *Winters* and prior appropriation); *In re Gen.*

[6] In *Colorado River*, the United States assured the Court that "[t]he government's 'ownership' status as trustee is . . . an incident of the special obligation to protect the Indians, which the United States assumed when it occupied their ancestral lands." Brief for the United States at 56, *Colo. River Water Cons. Dist. v. United States*, 424 U.S. at 800.

Adjudication of All Rts. to Use Water in Big Horn River Sys., 48 P.3d 1040, 1046-47 (Wyo. 2002). In this way, the *Winters* Doctrine has become inextricably intertwined with state law water rights and Western water management.

B. *Winters* is the foundation for extensive water settlements.

In addition to its role in adjudications, the *Winters* Doctrine is critical to the negotiated settlement of tribal water rights. The decades following *Arizona v. California* and the implementation of federal strategies to resolve tribal water rights based on *Winters* have yielded a number of negotiated settlements that confirm tribal water rights, thereby providing certainty for tribes and all water users. *See* Appx. B (listing settlements). The enactment of the Hualapai Tribe Water Rights Settlement Act of 2022, Pub. L. No. 117-349 (Jan. 5, 2023), marked the thirty-ninth such settlement across the West. CHARLES V. STERN, CONG. RSCH. SERV., R44148, INDIAN WATER RIGHTS SETTLEMENTS 1 (2022).

While the number of such agreements attests to the ubiquitous role of *Winters* in helping resolve complex and often-competing claims to water, the terms of the settlements themselves also demonstrate the benefits of—and reliance on—the *Winters* Doctrine. The Navajo Nation Water Settlement and Northwestern New Mexico Rural Water Projects Acts of 2009 ("NNWS"), for example, settled Navajo Nation's water

rights "held by the United States in trust" for its 2,795,418 acres of trust lands in New Mexico. Omnibus Public Land Act of 2009, Pub. L. No. 111-11, § 10603, 123 Stat. 991, 1382. Acknowledging the Nation's "critical" water needs that remain unaddressed in the neighboring State of Arizona, *id.* § 10603(i)(3), 123 Stat. at 1387, Congress authorized three projects to sustain Navajo communities within New Mexico, including the Navajo Indian Irrigation Project ("NIIP"). *Id*. § 10701(b), 123 Stat. at 1396-98. The NIIP delivers water from the San Juan River, a Colorado tributary, explicitly quantified in accordance with the *Winters* Doctrine and Indian Canons. MEMORANDUM, OFFICE OF THE SOLICITOR TO THE SECRETARY OF THE INTERIOR, NAVAJO INDIAN IRRIGATION PROJECT WATER ENTITLEMENT OF THE NAVAJO TRIBE 3 (July 30, 1980), https://tinyurl.com/cmatptsk (citing *Winters*, 207 U.S. at 547-77).

The NNWS also provides certainty and benefits to the Navajo Nation's non-Indian neighbors. As set forth in that settlement, the Navajo Nation received entitlements and support for water infrastructure in the San Juan River and Nighthorse Reservoir in Colorado in exchange for relinquishing its reserved *Winters* rights for priority Colorado River Compact water in New Mexico. NNWS § 10701, 123 Stat. at 1396-98. Additional water is thereby freed up for other uses. *See State of New Mexico, ex rel. State Engineer v. United States of America*, 425 P.3d 723, 727-28 (N.M. Ct. App. 2018). The NNWS also authorized the Navajo-Gallup Water Supply Project, which supplies a renewable source of surface water to both Navajo and non-Indian

communities. NNWS § 10402(d), 123 Stat. at 1372-74; *id.* § 10701(b), 123 Stat. at 1396-97. Within the NNWS settlement, the Nation further agreed to conditions-based reductions or alternative supplies from lower-priority sources in times of shortage to ensure New Mexico's compliance with the law of the river and the Colorado River Compact. *Id.* § 10402(d), 123 Stat. at 1372-74.

The remaining thirty-eight settlements address similar needs for tribal and non-Indian communities in nearly every state in the West. *See* STERN, *supra*, at Summary. The geographic and substantive scope of tribal water settlements have come to define the terms on which Tribal Nations and non-tribal citizens across the West now use and rely on water; those settlements are built upon the *Winters* Doctrine and this Court's reserved rights jurisprudence.

C. *Winters* articulates the mandate by which the United States measures the fulfillment of its trust duties to Tribal Nations when protecting, securing, or negotiating tribal water rights.

Since its inception, the *Winters* Doctrine has continued to ensure the continuing vitality of the historical promises of the United States to reserve livable homelands for Tribal Nations by securing the water rights necessary to fulfill the purposes of those reservations. Guided by that mandate, the United States' trust duties to Tribal Nations motivates federal

actions to make good on those promises. *See* STERN, *supra*, at 1-2.

The federal government's modern approach is premised upon the recognition that such rights are "vested property rights for which the United States has a trust responsibility, with the United States holding legal title to such water in trust for the benefit of the Indians." Criteria and Procedures for Participation of Federal Government in Negotiating for Settlement of Indian Water Rights Claims, 55 Fed. Reg. 9223 (Mar. 12, 1990) ("Criteria and Procedures"). In 1968, President Richard Nixon cited the "solemn obligations" assumed by the United States "through written treaties and through formal and informal agreements," as a basis for developing new approaches to fulfilling those obligations. Richard Nixon, A Better Day for the American Indian, Omaha, Nebraska (Sept. 27, 1968), https://tinyurl.com/reasj7tr.

Successive Presidential administrations continued that commitment. In 1978, President Jimmy Carter directed federal agencies "to work promptly and expeditiously to inventory and quantify Federal reserved and Indian water rights." Jimmy Carter, U.S. President, Federal Water Policy Message to the Congress (June 6, 1978), https://tinyurl.com/3ujshvtf. In 1990, President George H.W. Bush implemented a policy that permanently institutionalized settling unresolved tribal water rights as a federal priority of the Department of the Interior. *See generally*, Criteria and Procedures, *supra*, 55 Fed. Reg. 9223. Pursuant to the Criteria and Procedures, the Department of the

Interior is charged with negotiating settlements for water related and other "claims" Tribal Nations otherwise may bring "against the United States." *Id.* at 9223-24. As consideration for settling those claims, the United States as trustee, is to exchange "equivalent benefits for [the] rights" asserted by Tribal Nations. *Id*. This framework engages all branches of government and has guided the settlement process since 1990.

Congressional ratification of settlement agreements also affirms the federal trust responsibility for reserved water rights premised on *Winters*. *See*, *e.g.*, Act of July 28, 1978, Pub. L. No. 95-328, 92 Stat. 409. In the first negotiated settlement, the Ak-Chin Indian Water Rights Settlement Act in 1978, Congress expressly acknowledged that resolution of the Ak-Chin's water rights was necessary to correct the "failure of the United States to meet its trust responsibility to the Indian people. . . ." *Id*. § 1(a), 92 Stat. at 409. The Ak-Chin Settlement, like others that followed, concedes the United States' obligations and past failures "to protect and deliver the water resources," and waives tribal "claims" for otherwise judicially enforceable reserved water rights. *Id.* § 1(b)(5), 92 Stat. at 409. The United States mutually acknowledged in the Ak-Chin Settlement that "it is likely that the United States would be held liable for its failure to provide water and for allowing ground water beneath the reservation to be mined." *Id*. § 1(b)(3), 92 Stat. at 409.

Subsequent settlements characteristically include waivers and releases of claims arising from the United States' "fail[ure] to act consistently with its trust

responsibility to protect and deliver" reserved water resources to Tribal Nations. *See* Colorado Ute Water Rights Settlement Act of 1988, Pub. L. No. 100-585, § 8(a), 102 Stat. 2978 (authorizing the Tribe to "waive and release claims concerning or related to water rights. . . ."); San Luis Rey Indian Water Rights Settlement Act of 1988, Pub. L. No. 100-675, § 107(b)(1), 102 Stat. 4000, 4003 (declaring "the United States has a trust relationship" and that settlement would ensure that responsibility "would be fulfilled"); Truckee-Carson Pyramid Lake Water Settlement Act of 1990, Pub. L. No. 101-618, § 202(e), 104 Stat. 3289, 3294 (finding the purpose of settlement is to "fulfill Federal trust obligations toward Indian tribes"); Jicarilla Apache Tribe Water Rights Settlement Act of 1992, Pub. L. No. 102-441, § 2(1), 106 Stat. 2237 (acknowledging settlement of Tribe's "claims" against the United States for "water rights" based on the "infringement of those rights."); *see also* Appx. B (listing settlements).

In further recognition of the United States' duties to protect and deliver water to Tribal Nations, Congress has appropriated more than $8 billion for the implementation of water settlements throughout the West. STERN, *supra*, at Summary. The Reclamation Water Settlements Fund ("RWSF"), established in 2009, created a new Treasury Fund, which has since been funded with mandatory spending to implement settlement agreements or resolve litigation. *See* Pub. L. No. 111-11, § 10501, 123 Stat. 991, 1375. In adopting that law, Congress found that adequate, clean water is "fundamental to the health, economy, [and] security" of the

United States, *Id.* § 9501(1), 123 Stat. at 1329 (codified at 42 U.S.C. § 10361(1)), and expressly charged federal agencies managing water resources, including the Department of the Interior, with the "responsibility to . . . assess[] risks to the water resources" and "develop strategies" to ensure sustainable water sources. *Id.* § 9501(5), 123 Stat. at 1329 (codified at 42 U.S.C. § 10361(5)).

More recently, Congress enacted legislation establishing the Indian Water Rights Settlement Completion Fund and providing $2.5 billion for the Department of the Interior to "satisfy other obligations" for tribal water rights. Pub. L. No. 117-58, § 70101, 135 Stat. 429. Earlier this year, the Biden Administration allocated $580 million to implement tribal water settlements across the Country. Department of the Interior Press Release, *Bipartisan Infrastructure Law Supports $580 Million Investments to Fulfill Indian Water Rights Settlements* (Feb. 2, 2023), https://tinyurl.com/e7r4jdjb. In announcing that investment, Secretary of the Interior Debra Haaland observed that the funding was necessary for "the Interior Department [to] continue to uphold our trust responsibilities and ensure that Tribal communities receive the water resources they have long been promised. . . ." *Id.*

In the 115 years since *Winters*, the method for recognizing and articulating rights reserved to Tribal Nations by this Court has solidified into a well-established legal doctrine and become the foundation on which state and federal courts—as well as federal, state, local, and tribal negotiators—have crafted meaningful

and lasting solutions to complex conflicts over water rights. In addition, the *Winters* Doctrine and the rights recognized thereunder have been the yardstick by which the United States has measured the fulfillment of its trust duties to assess, protect, and secure water for Tribal Nations. These well-settled principles and the legal regime constructed upon them are now essential elements of the water law framework that underpins the economic and ecological foundation of life in the American West.

III. States' Reliance on *Winters* also Contributes to Certainty in Water Resource Management.

Winters rights are present perfected rights that vest at the time each reservation is created. *Arizona*, 373 U.S. at 600. Those rights often predate the priority systems adopted by non-Indian communities throughout the American West, and therefore can "serve as a needed spur towards cooperation. Indian water rights negotiations have the potential to resolve long-simmering tensions and bring neighboring communities together to face a common future." *Indian Water Settlements: Hearing Before the H. Comm. on Nat. Res.*, 110th Cong. 7 (Apr. 16, 2008) (statement of Michael Bogert, Chairman, Working Group on Indian Water Settlements). Ignoring this, State Petitioners and their *Amici* contend that upholding the Ninth Circuit's decision in favor of Navajo Nation would disrupt water management in the Lower Colorado River Basin and elsewhere in the West. State Pet'rs' Br. 23; *Amicus* Western Water Users

Br. 22. These arguments are "the old and familiar story," that, after a century of purposefully excluding most Tribal Nations from the water they were promised and which they need to live, this Court ought to sanction that exclusion because the parties remain "dissatisfied with the consequences . . . of those promises." *Cougar Den, Inc.*, 139 S. Ct. at 1021 (Gorsuch, J., concurring). The argument is misplaced for several reasons.

First, this Court previously rejected the argument that the *Winters* Doctrine is an "equitable doctrine calling for a balancing of competing interests." *Cappaert*, 426 U.S. at 138. There, this Court harkened back to *Winters* itself, observing that "the upstream users [there] were homesteaders who had invested heavily in dams to divert the water to irrigate their land, not an unimportant interest." *Id*. at 139; *see also* I.C, *supra*. Nonetheless, the Court found no cause to balance those interests; instead, "[t]he Court held that, when the Federal Government reserves land, it reserves water rights sufficient to accomplish the purposes of the reservation." *Cappaert*, 426 U.S. at 139. Furthermore, as a fundamental precept to Western water law, there is no relief to those who unlawfully use water out of priority. As the Colorado Supreme Court recently observed, "[t]he fact that the well owners enjoyed several decades of [out-of-priority water use] . . . does not change the fact that their right to water usage has always been limited by [prior water users]." *Kobobel v. State*, 249 P.3d 1127, 1138 (Colo. 2011). Thus, the "settled expectation" in the Colorado River Basin has

always been that junior water users take their water rights subject to senior uses, regardless of whether those rights stemmed from state or federal law. Finally, the argument fails to recognize the central role the *Winters* Doctrine plays in modern water resources management as recognized by the states in the examples provided below.

A. Western States' Water Policy Experts Recognize the Importance of Water Security for Tribal Nations and Fulfillment of *Winters*-based Claims.

The Western States Water Council ("WSWC"), a "bipartisan government entity created by Western Governors in 1965 that represents eighteen states . . . has long supported the negotiated settlements of Indian water rights claims." *Hearing on H. Res. 320, H.R. 4832, H.R. 5001, and H.R. 5345 Before the Subcomm. on Water, Oceans, and Wildlife of the H. Comm. on Nat. Res.*, 117th Cong. (2021) (Written Testimony of the Western States Water Council); *see also* Western States Water Council, *Resolution #454 In Support of Indian Water Rights Settlements* (Oct. 15, 2020) ("[T]he settlement of Native American water rights claims is one of the most important aspects of the United States' trust obligation to Native Americans and is of vital importance to the country as a whole and not just individual tribes or States. . . ."). The WSWC recently reaffirmed its support of Tribal Nations' water security by recognizing access to clean and reliable drinking water is "an essential component of the federal trust

responsibility to Native Americans," and that such access is frequently achieved through water adjudications and settlements, but that settlement and adjudication is not a prerequisite to access to water. Western States Water Council, *Resolution #465 Universal Access to Reliable, Clean Drinking Water for Federally Recognized Indian Tribes and Alaska Native Communities* (Mar. 25, 2021).

The Western Water Policy Council ("WWPC"), charged with reporting on water issues in the West, underscored the "legal and moral obligations that underpin" tribal water needs addressed by settlements. U.S. Western Water Policy Review Advisory Comm'n, Water in the West: Challenge for the Next Century, Report of the Western Water Policy Review Advisory Commission i (1998). Likewise, the *ad hoc* Western States Policy Commission, advises the federal government on Western water policy objectives and relied upon WWPC reports to inform its recommendations. *See* Western Water Policy Review Act of 1992, Pub. L. No. 102-575, § 3004, 106 Stat. 4600, 4695.

The WWPC's comprehensive understanding of tribal water needs contributed to congressional enactment of the Western Water Policy Review Act, which acknowledges state jurisdiction to allocate water, except as limited or preempted by "Federal reserved water rights either for itself or for the benefit of Indian Tribes," and also provides, "the Federal Government recognizes its trust responsibilities to protect Indian water rights and assist Tribes in the wise use of those resources." *Id.* § 3002(8), (9), 106 Stat. at 4694.

B. When States Recognize and Respect *Winters* Rights, Certainty is Achievable.

Although tribal water rights are often portrayed as a source of uncertainty in Western water management, the *Winters* Doctrine can provide significant benefits to *all* members of the public when states recognize the need to assess, plan for, quantify, and enforce tribal water rights. U.S. GOV'T ACCOUNTING OFF., CED-78-176, RESERVED WATER RIGHTS FOR FEDERAL AND INDIAN RESERVATIONS: A GROWING CONTROVERSY IN NEED OF RESOLUTION ii (1978). This enables states, the federal government, and Tribal Nations to determine the availability of waters for appropriation by all users, and to more accurately manage water resources. *Id*.

Like the federal government, some Western states prioritize water rights settlements with Tribal Nations to resolve real or perceived conflicts in a constructive manner. The State of Montana, for example, established the Reserved Water Rights Compact Commission ("RWRCC") in 1979 to "conclude compacts for the equitable division and apportionment of waters" between the State of Montana and Tribal Nations with claims to reserved water rights, among others. Mont. Code Ann. § 85-2-701(1) (2021). Consistent with the Montana Supreme Court's recognition of tribal reserved rights, the RWRCC successfully settled the reserved water rights of every federally recognized Tribal Nation in Montana[7] with the State and federal

[7] The Little Shell Tribe of Chippewa Indians ("Little Shell") achieved federal recognition through an Act of Congress in 2019, after the RWRCC's authorization ended. Little Shell Tribe of

government. *See State ex rel. Greely v. Confederated Salish & Kootenai Tribes of Flathead Rsrv.*, 712 P.2d 754, 762 (Mont. 1985). To date, all but one of those compacts have been ratified by Congress and decreed by the Montana Water Court. The Montana example illustrates how prioritizing resolution of water supply issues achieves certainty for all users in the system. Other Western states also recognize the importance of quantifying and meeting tribal water needs, often manifested in the state general stream adjudication process. *See*, *e.g.*, *In re Yakima River Drainage* Basin, 296 P.3d 835, 840 (Wash. 2013), *as corrected* (May 22, 2013) (recognizing federal duties in the context of reserved rights).

Broad agreement that *certainty* is a critical objective of Western water law is discernible. State Petitioners and their *Amici* contend that the best way to achieve certainty is by excluding Tribal Nations from their legally protected water rights. But again, as the Ninth Circuit observed, "[r]esolution of the problem is found in quantifying reserved water rights, not in limiting their use." *Walton*, 647 F.2d at 48. The approach that state and federal governments have taken for decades—settlement, adjudication, or some combination of both—yields decisions that *all* water users have come to rely upon. Adjudications ongoing in state and federal courts across the American West rely on the clear articulation of the *Winters* Doctrine. Thus,

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Chippewa Indians Restoration Act of 2019, S.51, 116th Cong. § 4 (2019). Little Shell does not have a reserved water rights settlement.

certainty is engendered through the perpetuation of the *Winters* Doctrine, not its erosion. Stability and predictability in the recognition and establishment of Tribal Nations' reserved water rights are necessary to respect the vast investments and private and public decisions made in reliance on existing judicial decrees and negotiated settlements predicated on the *Winters* Doctrine.

CONCLUSION

The Court should affirm.

Respectfully submitted,

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