U.S. Supreme Court will review Colorado River water rights dispute raising important questions over scope of *Arizona v. California* and the federal trust duty to tribes

On November 4, 2022, the United States Supreme Court granted certiorari to review the Ninth Circuit's decision in *Navajo Nation v. U.S. Dept. of Interior*, 996 F.3d 623 (9th Cir. 2021), *modified and petition for reh'g denied*, 26 F.4th 794 (2022). There, the Court of Appeals reversed the District Court's denial of leave for the Nation to file a third amended complaint alleging that the Department has "failed to (1) 'determine the quantities and sources of water required to make the Navajo Nation a permanent homeland for the Navajo People,' and (2) 'protect the sovereign interests of the Navajo Nation by securing an adequate water supply to meet those homeland purposes.'" The trial court dismissed the suit with prejudice. The court reasoned that it lacked jurisdiction to consider the breach-of-trust claim "because [the claim] falls within the Supreme Court's reserved jurisdiction under Article IX of the 1964 Decree" in *Arizona v. California*, 376 U.S. 340, 353 (1964). It also denied leave to further amend on futility grounds because "although a general trust relationship exists between the United States and the tribes, the Nation failed to identify a specific trust-creating statute, regulation, or other form of positive law that the federal government violated." The Ninth Circuit panel reversed and remanded, holding that the 1964 Decree was not implicated because the Supreme Court's retention of jurisdiction was limited to disputes over the quantification of rights to use of Colorado River water—something that was not at issue under the Nation's third amended complaint." As to the breach-of-trust claim, the panel found itself unbound by the analysis in Supreme Court decisions seeking damages under the Tucker and the Indian Tucker Acts, given the fact that "this case involves a claim for injunctive relief brought under § 702 of the [Administrative Procedure Act]." It instead found the requisite trust duty in the *Winters* doctrine.

The questions as to which certiorari was granted follow, together with a link to the United States' and Arizona's petitions.

Department of Interior v. Navajo Nation, No. 22-55

Whether the federal government owes the Navajo Nation an affirmative, judicially enforceable fiduciary duty to assess and address the Navajo Nation's need for water from particular sources, in the absence of any substantive source of law that expressly establishes such a duty.

https://www.supremecourt.gov/DocketPDF/22/22-51/230200/20220715171806279_Navajo%20Pet%200715.pdf

Arizona v. Navajo Nation, No. 22-1484

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

Project Act ("BCPA"). The Court retained exclusive jurisdiction "for the purpose of any order, direction, or modification of the decree, or any supplementary decree, that may at any time be deemed proper in relation to the subject matter in controversy." *Id.* at 166-67 (emphasis added).

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

I. Does the Ninth Circuit Opinion, allowing the Nation to proceed with a claim to enjoin the Secretary to develop a plan to meet the Nation's water needs and manage the mainstream of the LBCR so as not to interfere with that plan, infringe upon this Court's retained and exclusive jurisdiction over the allocation of water from the LBCR mainstream in *Arizona v. California*?

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

https://www.supremecourt.gov/DocketPDF/21/21-1484/225579/20220517123359998_2022.05.17%20Petition%20for%20a%20Writ%20of%20Certiorari.pdf