

# SUPREME COURT OF THE UNITED STATES

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IN THE SUPREME COURT OF THE UNITED STATES

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ARIZONA, ET AL., )  
                    ) Petitioners, )  
                    ) v. ) No. 21-1484  
NAVAJO NATION, ET AL., )  
                    ) Respondents. )  
- - - - -

DEPARTMENT OF THE INTERIOR, )  
ET AL., )  
                    ) Petitioners, )  
                    ) v. ) No. 22-51  
NAVAJO NATION, ET AL., )  
                    ) Respondents. )  
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Pages: 1 through 122  
Place: Washington, D.C.  
Date: March 20, 2023

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Petitioners, )

v. ) No. 21-1484

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ET AL., )

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v. ) No. 22-51

NAVAJO NATION, ET AL., )

Respondents. )

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Washington, D.C.

Monday, March 20, 2023

The above-entitled matter came on for oral  
argument before the Supreme Court of the United  
States at 10:04 a.m.

1 APPEARANCES:

2 FREDERICK LIU, Assistant to the Solicitor General,

3 Department of Justice, Washington, D.C.; on behalf

4 of the Federal parties.

5 RITA P. MAGUIRE, ESQUIRE, Phoenix, Arizona; on behalf

6 of the State parties.

7 SHAY DVORETZKY, ESQUIRE, Washington, D.C.; on behalf

8 of the Navajo Nation.

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1 P R O C E E D I N G S

2 (10:04 a.m.)

3 CHIEF JUSTICE ROBERTS: We will hear  
4 argument this morning in Case 21-1484, Arizona  
5 versus the Navajo Nation, and the consolidated  
6 case.

7 Mr. Liu.

8 ORAL ARGUMENT OF FREDERICK LIU

9 ON BEHALF OF THE FEDERAL PARTIES

10 MR. LIU: Thank you, Mr. Chief  
11 Justice, and may it please the Court.

12 When a reservation is established,  
13 that reservation isn't just the land. It's also  
14 a right to the timber on the land, a right to  
15 the minerals below the surface, and, under  
16 Winters, a right to water for the reservation.

17 Each of those rights is a stick in the  
18 bundle that makes up the reservation, and when  
19 the Navajo Reservation was originally  
20 established and later expanded, the Navajo  
21 Nation got all of those sticks, and it still  
22 possesses them today. There's no dispute about  
23 that.

24 The dispute here is about something  
25 different, whether the United States owes the

1 Navajo Nation a judicially enforceable  
2 affirmative duty to assess the tribe's water  
3 needs, develop a plan to meet them, and then  
4 carry out that plan by building water supply  
5 infrastructure on the reservation.

6           The answer to that question is no.  
7 Just as the 1868 treaty didn't impose on the  
8 United States a duty to build roads or bridges  
9 or to harvest timber or to mine coal, the 1868  
10 treaty didn't impose on the United States a duty  
11 to construct pipelines, pumps, or wells to  
12 deliver water. Those affirmative duties aren't  
13 part of the treaty. And because the government  
14 has never expressly accepted those duties, the  
15 Navajo Nation's breach-of-trust claim can't  
16 proceed.

17           This is not to say that the  
18 United States doesn't have a moral and political  
19 responsibility to address the Navajo Nation's  
20 water needs. As part of the general trust  
21 relationship, Congress and the executive have  
22 secured for the Navajo Nation hundreds of  
23 thousands of acre feet of water and over a  
24 billion of -- billions of dollars for  
25 infrastructure on the reservation. And in -- in

1 exercising its own sovereignty, the Navajo  
2 Nation is free to develop its own infrastructure  
3 projects, including by drilling water to access  
4 the cheapest source of water on the reservation,  
5 groundwater.

6           What the Navajo Nation cannot do,  
7 however, is to impose on the United States a  
8 duty that the government has never expressly  
9 accepted. Accordingly, the judgment below  
10 should be reversed.

11           I welcome the Court's questions.

12           JUSTICE THOMAS: Mr. Liu, would you  
13 just take a step back and address the  
14 jurisdictional issue, particularly with respect  
15 to redressability and this Court's retention of  
16 jurisdiction on the Colorado River.

17           MR. LIU: Sure. We don't view the  
18 issue as going to the district court's subject  
19 matter jurisdiction. We view it as a  
20 substantive merits determination about whether  
21 the relief that could be granted at the end of  
22 this suit would violate the substance of the  
23 decree that this Court entered in Arizona versus  
24 California.

25           So I think you'd have to look at the

1 relief that could be ordered down the road and  
2 measure it against the decree. I think everyone  
3 at this point agrees that an order by the  
4 district court in this case that would order the  
5 delivery of water from the lower mainstream of  
6 the Colorado River to the Navajo reservation  
7 would violate the decree because the degree --  
8 the decree places conditions on when such water  
9 can be delivered by the United States.

10 JUSTICE THOMAS: Where else would the  
11 water come from?

12 MR. LIU: There's plenty of sources on  
13 the Navajo reservation. So, if we're talking  
14 about the particular region of the Navajo  
15 reservation that's at issue in this complaint,  
16 the most accessible source of water on the  
17 reservation is groundwater. There are aquifers  
18 that lie beneath the reservation, and there's no  
19 impediment to the Navajo Nation accessing those  
20 water sources today. In fact, they're doing it  
21 across other parts of the reservation.

22 Another source of possible water for  
23 this region is the upper basin, the -- the  
24 Colorado River in the upper basin. That -- that  
25 upper basin water is farther away than the lower



1 Colorado mainstream, but it's far more  
2 accessible, and the reason why is, if you look  
3 at the terrain of the lower Colorado mainstream  
4 that's adjacent to this part of the -- of the  
5 reservation, it is a steep canyon. You're --  
6 the -- the -- the reservation is on a plateau,  
7 and then it's a 3,000- to 4,000-foot drop down  
8 the canyon to the Lower Colorado River.

9 CHIEF JUSTICE ROBERTS: You -- you  
10 said the -- that water was farther away.

11 MR. LIU: Yes.

12 CHIEF JUSTICE ROBERTS: How far away  
13 is it?

14 MR. LIU: It -- it's -- it still  
15 borders the reservation, but it's further north.  
16 It's just above Lees Ferry. The -- the -- the  
17 -- the area we're talking about here is below  
18 Lees Ferry, so it's not much farther.

19 CHIEF JUSTICE ROBERTS: Yeah, I'm  
20 sorry, but I -- it -- how far away from the  
21 agricultural areas where the water is needed?

22 MR. LIU: Well, I think, to be clear,  
23 the -- the water needed here isn't for  
24 agricultural needs. If you read the complaint  
25 at JA 101 to 102, the needs there alleged aren't

1 agricultural needs; they are domestic, municipal  
2 needs. And I think that just highlights the  
3 mismatch between the needs here and the  
4 agricultural provisions that are relied upon in  
5 the 1868 treaty.

6           The 1868 treaty provisions are about  
7 farming. They are about providing seeds and  
8 agricultural implements to the tribe in the  
9 original part of the reservation. The needs  
10 alleged in the complaint exist hundreds of miles  
11 away, and they're not even about agricultural  
12 needs. They're about needs for domestic and  
13 municipal consumption.

14           You know, if you look at the text of  
15 the -- of the treaty, the -- and this -- this is  
16 reproduced at 11a of our -- of our statutory  
17 appendix -- the provisions at issue -- this is  
18 Article VII of the provision -- they're about  
19 particular items, seeds and agricultural  
20 implements, for a particular area, the tracts of  
21 land that were selected in the original  
22 reservation. They're for a limited period of  
23 time, up to three years, and they're for a  
24 particular amount, a hundred year -- a hundred  
25 dollars the first year, \$25 the second and

1 third.

2 The duty asserted here is about  
3 something else. It's about water. It's about  
4 water for a different part of the reservation a  
5 hundred miles away. It's about water for an  
6 ongoing and indefinite basis, not for a limited  
7 period of time. And the dollar amount, there --  
8 there's no limit.

9 I think part of the problem, the  
10 separation-of-powers concerns that the claim  
11 raises, is that the -- it's really unclear what  
12 the scope of the plan that the Navajo Nation  
13 envisions the -- the United States will design  
14 --

15 JUSTICE ALITO: Mr. --

16 MR. LIU: -- will look like at the  
17 end.

18 JUSTICE ALITO: -- Mr. Liu, I think  
19 you said that the -- the Navajo Nation has  
20 "hundreds of thousands of acre-feet of water."  
21 Is that correct?

22 MR. LIU: Correct.

23 JUSTICE ALITO: Do you have a figure  
24 for how much water that is?

25 MR. LIU: It is -- well, an acre-feet

1 is how much water would fill up an acre of land

2 --

3 JUSTICE ALITO: Sure.

4 MR. LIU: -- one foot.

5 JUSTICE ALITO: Right, right.

6 MR. LIU: And, you know, we could do

7 that --

8 JUSTICE ALITO: But do you know how  
9 many hundreds of thousands? Do you know -- do  
10 you know the amount of -- can the United -- has  
11 the United States calculated or could you  
12 calculate water per capita --

13 MR. LIU: I don't have --

14 JUSTICE ALITO: -- for the Navajo  
15 Nation?

16 MR. LIU: -- I don't -- I don't have  
17 water per capita, but, to give you some -- some  
18 examples, the -- the San Juan settlement in  
19 New Mexico provides 37,000 acre-feet annually.  
20 You know, this covers 250,000 people over a  
21 40-year time horizon. The appropriations  
22 associated with that are \$1.9 billion.

23 So that's sort of the magnitude. It's  
24 300 miles of pipeline, 19 pumping plants, two  
25 water treatment facilities. So these -- these

1 are substantial facilities that the government,  
2 in furtherance of its general trust  
3 relationship, has agreed to provide, and --

4 JUSTICE JACKSON: But I understood  
5 that that was part of the Navajo's argument in  
6 this case. In other words, you -- you -- you  
7 say here that you don't have calculations about  
8 water per capita, and I understood that their  
9 breach-of-trust claim was about that, was about  
10 the fact that the United States, they say, has  
11 not done what it needs to do as a trustee to  
12 determine what their water needs are.

13 MR. LIU: And I would say that there's  
14 no duty, no specific duties found in the treaty  
15 that requires us to conduct that sort of  
16 analysis. Any -- any -- any --

17 JUSTICE GORSUCH: Mr. Liu, with  
18 respect to that, there are provisions in the  
19 treaty with respect to agricultural --  
20 agriculture, a promise that this will be a  
21 permanent home and that there will be a  
22 opportunity for raising animals, right?

23 MR. LIU: Correct.

24 JUSTICE GORSUCH: Is it possible to  
25 have a permanent home, farm, and raise animals

1 without water?

2 MR. LIU: No.

3 JUSTICE GORSUCH: And could the  
4 United States dam the Little Colorado right  
5 above the -- the reservation and prevent water  
6 from flowing into the reservation?

7 MR. LIU: It could do that as a matter  
8 of fact.

9 JUSTICE GORSUCH: Well, as a matter of  
10 fact --

11 MR. LIU: Right. Not legally.

12 JUSTICE GORSUCH: -- but, as a matter  
13 of law, could it do that?

14 MR. LIU: No.

15 JUSTICE GORSUCH: No. Because that  
16 would breach the treaty obligation, right?

17 MR. LIU: If the tribe were making use  
18 of the water, then it would breach -- it -- it  
19 -- it would -- it would interfere with their  
20 exercise of their Winters rights.

21 JUSTICE GORSUCH: Okay. So, clearly,  
22 there is a duty to provide some water to this  
23 tribe under the treaty, right?

24 MR. LIU: No.

25 JUSTICE GORSUCH: Well, hold on. What

1 am I missing? We just agreed you can't dam the  
2 Little Colorado because that would breach the  
3 treaty.

4 MR. LIU: Right.

5 JUSTICE GORSUCH: That's water, right?

6 MR. LIU: Correct.

7 JUSTICE GORSUCH: So there's some  
8 obligation with respect to water in this treaty.

9 MR. LIU: There is an obligation to  
10 respect their Winters rights, just as any other  
11 landowner would have to do, but the difference  
12 here is --

13 JUSTICE GORSUCH: And there's an  
14 obligation to provide opportunities for a  
15 permanent home.

16 Now let's say, as a matter of state  
17 contract, I promise you a permanent home and  
18 that you'll be able to raise animals there and  
19 you'll be able to conduct agriculture there.

20 Would it not be a breach of contract  
21 to then provide a home where none of those  
22 things is possible? Is that a permanent home?

23 MR. LIU: I -- I -- I -- I -- I  
24 think -- I think everyone agrees that the  
25 permanent homeland comes with the bundle of

1 sticks that I said at the outset. One of those  
2 sticks --

3 JUSTICE GORSUCH: Well that's -- I --  
4 if you'd just answer my question. Could I bring  
5 a good breach-of-contract claim for someone who  
6 promised me a permanent home, the right to  
7 conduct agriculture and raise animals if it  
8 turns out it's the Sahara Desert?

9 MR. LIU: I don't think you would be  
10 able to bring a breach-of-contract claim. I --  
11 I --

12 JUSTICE GORSUCH: Really?

13 MR. LIU: I -- I think -- I --

14 JUSTICE GORSUCH: You don't think  
15 that's a breach of good faith and fair dealing?

16 MR. LIU: I don't --

17 JUSTICE GORSUCH: You don't think at  
18 least it would state a claim?

19 MR. LIU: -- I don't think so. And I  
20 -- I -- and I -- I'm -- I'm happy to apply  
21 ordinary --

22 JUSTICE GORSUCH: If we disagree with  
23 that, then what?

24 MR. LIU: If --

25 JUSTICE GORSUCH: If we found that



1 that might, under ordinary contract principles,  
2 state a claim --

3 MR. LIU: Right.

4 JUSTICE GORSUCH: -- and that, in  
5 fact, many state courts have found such claims  
6 --

7 MR. LIU: If --

8 JUSTICE GORSUCH: -- to -- to --

9 MR. LIU: -- if this Court --

10 JUSTICE GORSUCH: -- then what?

11 MR. LIU: -- if this Court thought the  
12 Jicarilla standard were satisfied, then -- then  
13 there would be a judicially enforceable duty and  
14 we'd move on to the second step --

15 JUSTICE GORSUCH: All right.

16 MR. LIU: -- of -- of the analysis.

17 JUSTICE GORSUCH: And -- and with  
18 respect to that second step, or maybe it's the  
19 first, I don't know, the jurisdictional  
20 question, you agree that the trust claim brought  
21 here is not the type of question that must be  
22 addressed before addressing whether the Navajo  
23 Nation has identified a judicially enforceable  
24 duty, right?

25 MR. LIU: We don't think the

1 jurisdictional issue needs to be addressed  
2 before. We don't think it's a jurisdictional  
3 issue, correct.

4 JUSTICE KAGAN: Mr. -- Mr. Liu, I --  
5 I -- I guess I'm just not understanding the  
6 nature of your argument, so would -- would you  
7 clarify it for me?

8 You -- you start by saying that the  
9 Indians have rights to water and that they get  
10 them by virtue of having rights to land, having  
11 a reservation of this kind, and the rights to  
12 water just go along with that.

13 Is that a matter of the treaty, or are  
14 you saying it's something else, that the rights  
15 arise some other way?

16 MR. LIU: It -- it is a matter of the  
17 treaty setting aside the land for the Indians.  
18 This is Article II of --

19 JUSTICE KAGAN: Okay. So, if it's a  
20 matter of the treaty, if -- if you read the  
21 treaty as giving rights to water, right, because  
22 you could read the treaty and say, I don't see  
23 anything about water here.

24 MR. LIU: Right.

25 JUSTICE KAGAN: There are no rights to

1 water. But you're not reading the treaty that  
2 way. You're saying, look, when the treaty gives  
3 land, the treaty also says, you know, implicit  
4 in that is that you have a right to the water  
5 that will enable you to live on that land.

6 So then there seems to me to be a gap  
7 because then you're saying, well,  
8 notwithstanding that the treaty gives water,  
9 that the treaty promises water. That's what  
10 treaties do. It's a contract that promises  
11 something.

12 You're saying those rights are  
13 unenforceable. And I guess I don't understand,  
14 if the treaty promises water, where you get the  
15 idea that that is unenforceable?

16 MR. LIU: No, it -- the -- the treaty  
17 does vest water rights in the tribe, and those  
18 rights are enforceable, including by the tribe.

19 But the promise that we've allegedly  
20 breached here isn't about violating those  
21 rights; it's about violating affirmative duties  
22 to supply the water to the tribe.

23 It -- it -- it's just like my  
24 minerals --

25 JUSTICE KAGAN: I guess I'm not

1 getting it. If -- if -- if -- if there's a  
2 contract and the contract gives a right to one  
3 party, then just by the nature of how rights  
4 work, it gives a duty to the other party.

5 So there's a contract here and it  
6 gives a right to the Navajos, you say so  
7 yourself, that means it puts a duty on the other  
8 party to the contract, which is the U.S.  
9 Government.

10 MR. LIU: The -- the right that is  
11 conferred by the -- by the reservation of the  
12 land is a right to use the -- the water and to  
13 exclude others from using it, just like it's a  
14 right to use the minerals or to exclude others  
15 from using it, just like it's a right to use the  
16 land or to exclude others from using it.

17 But none of that --

18 JUSTICE KAGAN: So you're saying that  
19 we should read this contract as giving the  
20 tribes rights but only as against third parties?

21 MR. LIU: Well, it is against the  
22 government because we can be liable for taking  
23 their land, for taking their timber, and for  
24 taking their water. But the rights themselves  
25 are property rights. They are -- they are

1 sticks in a bundle that the tribe got.

2 What they're asking for now is for us  
3 to help them use all of those sticks in the  
4 bundle, for example, by -- by building the  
5 plants, the pipelines, the wells, et cetera.  
6 And it --

7 JUSTICE KAGAN: So -- so you're saying  
8 that this -- this contract obligation that you  
9 read into the treaty is just the U.S. Government  
10 saying, we won't interfere with your ability to  
11 get water, but the -- the U.S. Government did  
12 not say, you know, in giving you this land, we  
13 are also promising you that we will do what's  
14 necessary to make the land livable?

15 MR. LIU: That is correct. That is  
16 correct. What we -- what the reservation  
17 conveys is a set of property interests, and, by  
18 their nature, those property interests allow  
19 the -- the tribe to use and exclude, but, by  
20 their nature, they don't impose on the  
21 United States' new duties.

22 JUSTICE JACKSON: But how is that --

23 CHIEF JUSTICE ROBERTS: Thank you --

24 JUSTICE JACKSON: -- consistent --

25 CHIEF JUSTICE ROBERTS: -- thank you,

1 counsel.

2 Justice Thomas?

3 JUSTICE THOMAS: Mr. Liu, is there a  
4 difference in your answer for pre-existing  
5 access to water on the -- and -- on -- on the  
6 land as opposed to the need to bring water to  
7 that land?

8 MR. LIU: It -- it -- it is a  
9 difference between the right to use the land,  
10 whether it's pre-existing or not. They -- they  
11 can be new --

12 JUSTICE THOMAS: I think what I'm  
13 trying to get you to -- to focus on is, if I  
14 hear you, you're saying that the government and  
15 third parties cannot interfere with water on the  
16 land.

17 MR. LIU: Correct.

18 JUSTICE THOMAS: But you also said you  
19 have no affirmative duty. So my second question  
20 is whether or not you -- it could be argued that  
21 by providing a permanent home, you are required  
22 to bring water to land where there is no water.

23 MR. LIU: No, we -- we do not  
24 understand the permanent homeland language to  
25 convey that sort of duty. And it -- I think it

1 would be surprising to those who entered into  
2 the treaty if -- if that were such a promise.

3 The whole -- the whole point of the  
4 treaty was to allow the Navajo Nation to return  
5 to their ancestral homeland, where they could  
6 support themselves.

7 CHIEF JUSTICE ROBERTS: Justice Alito?

8 JUSTICE ALITO: Well, I wanted to  
9 pursue the questions that I asked about some of  
10 the real-world impacts of what's at stake here.

11 So I asked about the total amount of  
12 water that has been supplied to the Navajo and  
13 whether there's a per capita cap -- calculation.  
14 I gather you don't have that.

15 MR. LIU: I don't have a per cap --

16 JUSTICE ALITO: Can that be supplied  
17 to us?

18 MR. LIU: Yes, we could supply that.

19 JUSTICE ALITO: And how would -- if  
20 that were calculated, how would it compare to  
21 water per capita for the residents of, let's  
22 say, Arizona?

23 MR. LIU: It may -- it may well be  
24 less. I think no one denies that there are  
25 water needs on the reservation.

1 JUSTICE ALITO: If -- if I had been  
2 shown a seat-of-the-pants calculation that per  
3 capita water on the Navajo Nation is greatly in  
4 excess of per capita water for residents of  
5 Arizona, do you think that would be incorrect?

6 MR. LIU: Honestly, I have -- I don't  
7 have a basis to know whether that's correct or  
8 not.

9 JUSTICE ALITO: Is there anything in  
10 the view of the United States that is  
11 distinctive about this treaty as opposed to many  
12 other treaties entered into between the  
13 United States and other Indian tribes with  
14 reservations adjacent to bodies of water?

15 MR. LIU: No. There's -- the -- the  
16 -- the provisions in particular that the Navajo  
17 Nation has relied upon are not, in our view,  
18 distinctive to this treaty. There are many -- I  
19 mean, most treaties set aside a reservation that  
20 is intended to be a permanent homeland, and many  
21 treaties also have provisions that supply  
22 support for agriculture.

23 So, if -- if this Court were to  
24 conclude that there were judicially enforceable  
25 duties that arose out of provisions like that, I



1 think we would be facing similar suits across  
2 reservations in -- in the country.

3 JUSTICE ALITO: And what would be the  
4 nationwide impact of such a ruling?

5 MR. LIU: Well, there are 500 or so  
6 tribal reservations. The government has entered  
7 into about 30 or so water agreements since the  
8 late 1970s. There's ongoing litigation in -- in  
9 courts across the country.

10 I think this would impose on the  
11 United States a sort of amorphous duty to take a  
12 -- take another look at all those issues.

13 JUSTICE ALITO: What would be the  
14 impact on access to water by people who don't  
15 live on reservations?

16 MR. LIU: Well, I -- I think, because  
17 the Indian water rights has this powerful  
18 preemptive effect, which is that it has a  
19 priority date that is no later than the date of  
20 the reservation and that the use -- the right to  
21 use the water can't be lost by virtue of  
22 non-use, it could have an effect on water used  
23 by other entities.

24 JUSTICE ALITO: In -- in 1868, was the  
25 reservation adjacent to the Colorado River?

1           MR. LIU: It was not. The 1868  
2 reservation straddled the New Mexico-Arizona  
3 border, which is hundreds of miles away from the  
4 Lower Colorado River mainstream.

5           JUSTICE ALITO: So, if we are looking  
6 at the expectations of the treaty parties, do we  
7 look at what their expectations would have been  
8 in 1868 or at the time of the expansion of the  
9 reservation subsequently?

10          MR. LIU: We look to the 1868 time  
11 frame, and in that time frame, what they were  
12 thinking about was the land set aside for the  
13 original reservation, not the land that's at  
14 issue today.

15          JUSTICE ALITO: Where would they have  
16 accessed water in 1868?

17          MR. LIU: In 1868, on the original  
18 reservation, that -- that -- much of that area  
19 lies within the Little Colorado River Basin, and  
20 there are washes that come off the main Little  
21 Colorado River that would have been sources of  
22 water. There was groundwater. They could have  
23 impounded water. So, you know, springs, washes,  
24 wells.

25          JUSTICE ALITO: Thank you.

1 CHIEF JUSTICE ROBERTS: Justice  
2 Sotomayor?

3 JUSTICE SOTOMAYOR: Counsel, you agree  
4 that the tribe has reserved water rights,  
5 correct?

6 MR. LIU: Correct.

7 JUSTICE SOTOMAYOR: All right. The --  
8 you agree that the U.S. has a -- a trust over  
9 that water for the Indians, don't you?

10 MR. LIU: Correct. We hold it in  
11 trust.

12 JUSTICE SOTOMAYOR: You hold it in  
13 trust.

14 MR. LIU: Correct.

15 JUSTICE SOTOMAYOR: And, in fact, in  
16 the Arizona litigation, the Navajo tribe wanted  
17 to intervene, and you said you can't because we  
18 represent your interests, correct?

19 MR. LIU: Correct.

20 JUSTICE SOTOMAYOR: And they can't  
21 assert rights in their own name because you hold  
22 it in trust. So you not only control it, but  
23 you're the only one who can assert their  
24 interests, is that correct?

25 MR. LIU: That's not true as a general

1 matter, no.

2 JUSTICE SOTOMAYOR: Why? They tried  
3 to intervene in Arizona, and you said you  
4 can't --

5 MR. LIU: That --

6 JUSTICE SOTOMAYOR: -- because we're  
7 the trustee.

8 MR. LIU: In that particular case, we  
9 opposed intervention, and the Court agreed and  
10 denied intervention. But, as the Court has  
11 since made clear, including in Arizona versus  
12 California itself, tribal participation in water  
13 rights disputes shouldn't be discouraged.

14 And so it is the normal --

15 JUSTICE SOTOMAYOR: They could, but  
16 they can't start it without your approval?

17 MR. LIU: It depends on what they're  
18 starting. There -- there's -- there's nothing  
19 that requires our approval to start. They --  
20 the -- the tribe can enforce its own water  
21 rights under 28 U.S.C. 1362 by bringing a suit  
22 in federal court. They can make their own  
23 priority calls for administration once their  
24 rights are quantified. They can bring Tucker  
25 Act claims against the United States if we

1 interfere with their use of water. And they can  
2 assert their own Winters claims in ongoing  
3 stream adjudications, as they are doing now in  
4 the Little Colorado River Basin and -- and going  
5 --

6 JUSTICE SOTOMAYOR: But what you're  
7 saying is your trust obligation is meaningless.  
8 They can't force you to do anything to protect  
9 their water rights. That's what you're saying,  
10 correct?

11 MR. LIU: Well, the -- the nature of  
12 the trust obligation we have with respect to the  
13 water rights is the same trust obligation we  
14 have with respect to the land. And in Mitchell  
15 I, this Court addressed that obligation and said  
16 it was only a bare or limited trust and did not  
17 bear the hallmarks of a conventional fiduciary  
18 relationship. And so --

19 JUSTICE SOTOMAYOR: You don't think  
20 there's a fiduciary relationship here at all?

21 MR. LIU: Not that is judicially  
22 enforceable with respect to the --

23 JUSTICE SOTOMAYOR: That's a -- that's  
24 -- that's quite an odd agreement the tribe  
25 entered into, isn't it? They agreed to go back

1 to a piece of their homeland and gave -- gave  
2 the United States control over the vast majority  
3 of it.

4 MR. LIU: I don't --

5 JUSTICE SOTOMAYOR: They agreed to sit  
6 -- to a land that would permit them to return to  
7 agriculture, and the bargain they got in return  
8 was we, the United States, took away all of your  
9 other lands, we gave you this piece of land  
10 here, survive, even if it's in -- it turns into  
11 a desert condition, where you admit there are  
12 significant water needs on the reservation, but  
13 the tribe can't do anything about it --

14 MR. LIU: Yeah, I --

15 JUSTICE SOTOMAYOR: -- against you,  
16 can't hold you responsible?

17 MR. LIU: -- I guess two quick points.  
18 One is we're holding -- we're -- we're -- we're  
19 maintaining the same relationship with respect  
20 to the express reservation of land as we are to  
21 the implied reservation of water. And I think  
22 it would be strange if the express reservation  
23 of land did not give rise to affirmative duties,  
24 but the implied reservation of water --

25 JUSTICE SOTOMAYOR: Well --

1 MR. LIU: -- did.

2 JUSTICE SOTOMAYOR: -- but what you're  
3 talking about is -- and -- and a lot of your  
4 criticism of the remedies that a court can or  
5 can't order, I think, are different from the  
6 question of are there any remedies.

7 It seems to me you yourself are  
8 agreeing that there could be litigation over  
9 whether there are sources of water that could be  
10 made available from tributaries and not -- and  
11 not violate the -- and not violate the Arizona  
12 consent decree.

13 So I don't know why we should say  
14 there's no cause of action here merely because  
15 there are some remedies that you think exceed  
16 your obligations --

17 MR. LIU: Well, we don't think --

18 JUSTICE SOTOMAYOR: -- and others  
19 don't. It -- it -- it -- it -- it appears to me  
20 that if there are sources of water that you  
21 could litigate about and -- and secure for the  
22 use of the Navajo Nation without building pipes,  
23 that that might be something that, in fact,  
24 there is no defense against.

25 MR. LIU: We don't think there's any

1 available remedy here because we don't think  
2 there's any judicially enforceable duty in the  
3 first place, so -- and that is irrespective of  
4 the scope of the decree in Arizona versus  
5 California.

6 But I do want to address the -- the  
7 sort of historical account of -- of what  
8 happened. It -- it's absolutely true that the  
9 United States forcibly relocated the Navajo  
10 Nation in 1863 to an area called Bosque Redondo,  
11 and in -- and five years later, the --

12 JUSTICE SOTOMAYOR: And in that -- and  
13 that land, they couldn't farm, there was drought  
14 conditions, and for at least three seasons they  
15 were not able to grow any food, correct?

16 MR. LIU: What -- what -- it's -- it's  
17 --

18 JUSTICE SOTOMAYOR: And then the U.S.  
19 wanted to put them someplace else, and they  
20 insisted on returning to a part of their native  
21 homeland.

22 MR. LIU: It's true that the crops at  
23 Bosque Redondo failed, but I think it's  
24 important to understand why they failed. It  
25 wasn't because they alleged that the



1 United States had a duty to provide water and we  
2 weren't providing it. It was because there was  
3 alkaline in both the soil and the water.

4 And so, when the Navajo and General  
5 Sherman met in May of 1868, the Navajo Nation's  
6 request was to be able to return to their  
7 ancestral homeland, where they could live as  
8 they did in the status quo ex ante before they  
9 were forcibly relocated.

10 And if we look at the status quo that  
11 they wanted to be returned to, it was a status  
12 quo in which they could support themselves. It  
13 was not a status quo in -- there never was a  
14 status quo in which the United States was  
15 supplying the Navajo Nation with water or water  
16 infrastructure.

17 CHIEF JUSTICE ROBERTS: Justice Kagan?  
18 I'm sorry, Justice Gorsuch?

19 JUSTICE GORSUCH: You emphasize that  
20 they got the bundle of sticks, including water,  
21 right?

22 MR. LIU: Correct.

23 JUSTICE GORSUCH: Their water rights  
24 with respect to the Colorado River have never  
25 been adjudicated, right?

1 MR. LIU: Correct.

2 JUSTICE GORSUCH: And that's because  
3 the government opposed their motion to intervene  
4 in Arizona versus California, right?

5 MR. LIU: No, I don't think that's  
6 quite right because, if you look at the motion  
7 for intervention that they filed, they weren't  
8 seeking intervention to make claims in the Lower  
9 Colorado mainstream. They raised five grounds  
10 as to why the United States' representation was  
11 inadequate. This is reproduced at JA 106 and  
12 107. Not one of them is about a failure to seek  
13 water in the mainstream.

14 At the time of that litigation, the  
15 irrigable acreage on the Navajo reservation  
16 was -- was understood to exist within the  
17 drainage basin that the --

18 JUSTICE GORSUCH: Mr. Liu, I -- I  
19 think we're talking at cross-purposes.

20 MR. LIU: Okay.

21 JUSTICE GORSUCH: You agree they have  
22 a bundle of rights, whatever they are, with  
23 respect to water.

24 MR. LIU: Correct.

25 JUSTICE GORSUCH: They may or may not

1 include some portion of the mainstream of the  
2 Colorado. Nobody knows, right?

3 MR. LIU: Correct.

4 JUSTICE GORSUCH: Because the  
5 government opposed the motion to intervene to  
6 allow them to participate in that litigation.

7 MR. LIU: They weren't looking to  
8 participate to assert those claims.

9 JUSTICE GORSUCH: Well, nobody's ever  
10 litigated them, and you assert the exclusive  
11 right to litigate them on behalf of the Navajo.

12 MR. LIU: That's not true. The Navajo  
13 --

14 JUSTICE GORSUCH: You think the Navajo  
15 could now intervene in Arizona versus Colorado?

16 MR. LIU: They could file a motion to  
17 intervene and --

18 JUSTICE GORSUCH: You think they could  
19 intervene. Would the government oppose it  
20 again?

21 MR. LIU: We might oppose it, but it's  
22 not -- not on grounds that they -- they -- they  
23 can't have their own voice. We might oppose it  
24 because of merits or collateral estoppel issues  
25 but not because we don't think tribes should be

1 able to participate in water rights litigation.

2 JUSTICE GORSUCH: So they have a  
3 bundle of sticks that remain unadjudicated and  
4 that the United States Government opposed their  
5 participation to adjudicate? That's where we  
6 sit?

7 MR. LIU: I -- I -- I think we -- the  
8 government opposed it. And, frankly, the Court  
9 agreed with the merits of our opposition.

10 The -- our filing in opposition --

11 JUSTICE GORSUCH: The ultimate consent  
12 decree specifically says that it doesn't resolve  
13 the rights of any Indian tribe except as  
14 expressly provided in the consent decree, and  
15 that does not include the Navajo, right?

16 MR. LIU: Correct. And that -- and I  
17 think --

18 JUSTICE GORSUCH: Thank you.

19 MR. LIU: -- that's partly why the  
20 Navajo can bring a motion to reopen the decree  
21 if they want to.

22 JUSTICE GORSUCH: Well, except for  
23 you're going to oppose it again. You just made  
24 that clear standing at the lectern.

25 MR. LIU: Well, I -- I don't know if

1 we're going to -- I think it --

2 JUSTICE GORSUCH: And -- and so what  
3 remedy do they have --

4 MR. LIU: I think --

5 JUSTICE GORSUCH: -- other than to  
6 say, okay, if you're going to assert the right  
7 to control that litigation and -- and -- and  
8 adjudicate our bundle of sticks, we can at least  
9 pursue litigation to try to force you to do  
10 that.

11 MR. LIU: I'm not saying we would  
12 oppose it or not. I'm just saying, you know,  
13 we'll make that determination based on the  
14 substance of the motion. But the point is we do  
15 not control what the Navajo Nation does with its  
16 water rights. They can vindicate them on their  
17 own. They are a sovereign nation.

18 CHIEF JUSTICE ROBERTS: Justice  
19 Kavanaugh?

20 JUSTICE KAVANAUGH: To pick up on  
21 Justice Alito's questions from earlier and ask  
22 you about assertion made in the amicus brief of  
23 the Western Water Users and just to get the  
24 United States' assessment of them.

25 That amicus brief says, "the reduction

1 of available water would necessarily come at the  
2 expense of existing allocation holders,"  
3 particularly from the Central Arizona Project,  
4 which delivers water to 80 percent of the  
5 state's population.

6 This amicus brief says, that "would  
7 have severe negative consequences for Arizona,  
8 [...] its businesses, and its agricultural and  
9 industrial sectors," and "would strike at the  
10 [...] heart" of the social and economic  
11 livelihood of Arizona, with dire consequences.

12 I'm not saying I agree with that. I  
13 just want -- that's an assertion in the amicus  
14 brief. I want your assessment of the  
15 implications.

16 MR. LIU: Yeah, it is -- it is true  
17 that, basically, all the water in the Lower  
18 Basin is allocated. And I guess, to respond to  
19 that directly, Congress has set aside in the  
20 2004 Arizona Water Settlements Act 6411  
21 acre-feet of water for a future water settlement  
22 out of the Central Arizona Project for the  
23 Navajo Nation.

24 That is water that would require  
25 additional congressional action to allow the

1 Navajo Nation to use. If they were to use that  
2 water, it wouldn't affect -- I don't think it  
3 would affect necessarily all the other users  
4 because that's -- that's why that's already been  
5 set aside.

6 And so I think the fact that Congress  
7 has done that just reinforces where this dispute  
8 belongs. It doesn't belong in the courts. It  
9 belongs in front of the political branches,  
10 which have focused on this -- these sorts of  
11 issues.

12 JUSTICE KAVANAUGH: A different tack.  
13 The Ninth Circuit decision is barely defended by  
14 the Navajo Nation. What should we do with that?

15 I mean, one option sometimes is, well,  
16 we'll just --

17 MR. LIU: Yeah.

18 JUSTICE KAVANAUGH: -- send it back to  
19 the Ninth Circuit because none of the arguments  
20 that persuaded the Ninth Circuit are being  
21 re-upped here.

22 MR. LIU: Right. I -- I think the  
23 only issue that's really in dispute at this  
24 point is the interpretation of the 1849 and 1868  
25 treaties. And we would urge the Court to decide

1 the issue of that interpretation for all the  
2 usual reasons this Court decides issues because  
3 it was addressed below, Pet. App. 31, the -- the  
4 Ninth Circuit did address these provisions of  
5 the treaties, because the issue has been fully  
6 briefed here, because it is a purely legal  
7 issue, and, frankly, because we think the issue  
8 is straightforward.

9 JUSTICE KAVANAUGH: Thank you.

10 CHIEF JUSTICE ROBERTS: Justice  
11 Barrett?

12 JUSTICE BARRETT: Mr. Liu, the  
13 United States asserted Winters rights on behalf  
14 of five tribes in Arizona versus California.  
15 Why didn't you assert Winters rights on behalf  
16 of the Navajo?

17 MR. LIU: Because, when we looked at  
18 the evidence of where the Navajo had irrigable  
19 acreage, all of that acreage existed in the  
20 Little Colorado River Basin, which is a  
21 tributary of the Lower Colorado and not in the  
22 part that would be supplied by the Lower  
23 Colorado itself.

24 JUSTICE BARRETT: So you made the  
25 determination that they did not have Winters



1 rights in the mainstream?

2 MR. LIU: Yes, at a time when the  
3 applicable standard was practicably irrigable  
4 acreage.

5 JUSTICE BARRETT: And to clarify your  
6 interchange, your position and your interchange  
7 with Justice Gorsuch, you might oppose -- you --  
8 you can't commit the United States --

9 MR. LIU: Can't commit.

10 JUSTICE BARRETT: -- to what they  
11 would do, but you're saying that, in your view,  
12 nothing stops the Navajo now from seeking to  
13 intervene and assert their own Winters rights in  
14 Arizona versus California --

15 MR. LIU: Correct.

16 JUSTICE BARRETT: -- to reopen that  
17 duty?

18 MR. LIU: They can make that request.

19 JUSTICE BARRETT: Do you see Winters  
20 rights as something that belong to the Navajo or  
21 something that belong to the United States that  
22 United States protects on behalf of the Navajo?

23 MR. LIU: We view the Winters rights  
24 as belonging to the Navajo. They are the  
25 beneficial owners. The United States merely has

1 legal title and holds those in trust. But we  
2 view the Navajo as the owners as they own the  
3 land, the minerals, the timber.

4 JUSTICE BARRETT: Okay. Earlier, I  
5 think maybe to -- in response to Justice Alito,  
6 you said that there would be groundwater and  
7 other sources and aquifers underneath the  
8 reservation that the Navajo could use to supply  
9 their water needs.

10 MR. LIU: Correct.

11 JUSTICE BARRETT: Why then would this  
12 necessarily be -- why would resolving this  
13 dispute be at odds with the decree? Because it  
14 sounds to me like what you're saying is that  
15 they could get water from places other than the  
16 mainstream.

17 MR. LIU: Right. I -- I think there  
18 are ways to resolve this suit without violating  
19 the decree. Even if the Court believes there is  
20 a duty, there are forms of relief that fall --  
21 that are short of ordering a delivery of water  
22 from the Lower Colorado to the Navajo Nation.  
23 And as -- so long as the decree, I think of -- I  
24 mean, so long as the relief here avoids that  
25 sort of relief, I don't think the decree is

1       implicated.

2                   JUSTICE BARRETT:   So the decree part  
3       is kind of irrelevant?

4                   MR. LIU:   In the United States' view,  
5       it comes into play only if they're seeking a  
6       particular type of relief.

7                   JUSTICE BARRETT:   Okay.   And then,  
8       last question, I'm having trouble conceptually  
9       thinking of this, trying to decide whether this  
10      feels more like a breach-of-contract claim for  
11      breaching the treaty or a --

12                   MR. LIU:   Right.

13                   JUSTICE BARRETT:   -- breach-of-trust  
14      claim because, in a breach of trust and when you  
15      look at the line of cases that are at dispute  
16      here, like, say, timber, or, you know, mineral  
17      rights, those kinds of things, you're looking at  
18      a res.

19                   MR. LIU:   Yes.

20                   JUSTICE BARRETT:   You know, there's --  
21      there's actually -- there's mineral rights,  
22      there's timber, et cetera.   And, here, we're not  
23      looking at a res.

24                   So it seems to me more and the  
25      strongest arguments, and I think you've heard

1 some of that today, seems to me that the  
2 strongest arguments made on behalf of the Navajo  
3 in the Navajos's brief are in the nature of you  
4 breached the treaty, it was broken promises, you  
5 promised us a permanent home and you're not.

6 Is there a claim that the Navajo could  
7 have brought for breaching the treaty? It just  
8 doesn't seem to me to fit very neatly in the  
9 breach-of-trust model.

10 MR. LIU: I -- I fully understand the  
11 point. I -- I -- I think there is an overlap  
12 between a treaty claim and a trust claim. I  
13 think both of them, if you're going to base them  
14 on the treaty, overlap in this way. To -- to  
15 prove up either claim, you would need to point  
16 to an actual duty that exists in the treaty.  
17 Whether you want to say it's a breach of treaty  
18 or a breach of trust, you -- you at least have  
19 to show that.

20 Now I think where the difference lies  
21 is, if the Navajo Nation wanted to take  
22 advantage of common law trust principles, for  
23 example, if they wanted to hold us to a duty of  
24 prudence or a duty of loyalty, then they would  
25 have to prove something more than just any old

1 treaty duty. They'd have to show that that duty  
2 also bore the characteristics of a conventional  
3 fiduciary relationship.

4           And I -- I -- I -- and to just draw a  
5 comparison, I -- I think the earlier cases, like  
6 Mitchell I and Mitchell II, if you look at the  
7 statutes in those cases, the -- they say  
8 something like the government will hold the  
9 timber in trust and will have the responsibility  
10 to manage them. There's nothing in there about  
11 a duty of prudence or loyalty or anything like  
12 that, but, because that type of duty looks like  
13 a trust duty, you can use the common law to  
14 flesh out those duties.

15           Contrast that with a -- a promise in  
16 this treaty, which is something like we will  
17 give you seeds for up to three years. That is a  
18 duty, and we agree that under today's legal  
19 regime, it would be enforceable as a treaty  
20 duty. But I don't think it would be a trust  
21 duty because a promise to give someone seeds  
22 doesn't bear all the hallmarks --

23           JUSTICE BARRETT: Okay. So --

24           MR. LIU: -- of -- of a --

25           JUSTICE BARRETT: -- what -- but I

1 think it matters how we think about it. I mean  
2 -- and I guess my first question is, would there  
3 be a cause of action? Could they bring kind of  
4 a breach-of-contract, breach-of-treaty claim if  
5 that's how they had wanted to style this cause  
6 of action?

7 MR. LIU: Yes. They could have  
8 brought --

9 JUSTICE BARRETT: They could have  
10 brought that.

11 MR. LIU: -- a breach-of-treaty claim,  
12 yes.

13 JUSTICE BARRETT: And if they brought  
14 a breach-of-treaty claim, we would be talking  
15 about a different set of legal rules because,  
16 presumably, all of these rules about  
17 explicitness would not apply because we would be  
18 thinking more about benefit of the bargain and  
19 expectation of the parties, and so we would be  
20 using a different legal framework, right?

21 MR. LIU: Well, I don't think you  
22 necessarily would. We understand the Jicarilla  
23 standard to simply say to courts: Don't make up  
24 the duties. Look at what the political branches  
25 have done.

1 JUSTICE BARRETT: If you're talking  
2 about a trust?

3 MR. LIU: I think, if we're talking  
4 about really any -- any duty, because I think  
5 the -- the -- the -- the overlapping element  
6 that both a treaty claim and a trust claim have  
7 is that there must be some actual duty in the  
8 treaty.

9 JUSTICE BARRETT: I mean, I agree,  
10 but, you know, for treaties, we construe them in  
11 favor of the Indians. For the trusts, when  
12 we're looking at trust principles in the  
13 Jicarilla line, we're talking about, no, you  
14 have to have something that's very express. And  
15 that's at odds with construing the document in  
16 favor of the Indians, right?

17 MR. LIU: Well, we don't read the  
18 express acceptance language in Jicarilla as  
19 imposing a clear statement rule. We read that  
20 as -- as saying look at the words that the  
21 political branches have enacted in a statute,  
22 treaty, or regulation. We then think you apply  
23 the usual tools of interpretation to those  
24 words. So, in the case of a treaty, you can  
25 apply the Indian canons.

1                   Now all the Indian canons are  
2 themselves about how to interpret words. This  
3 Court has made clear that even Indian treaties  
4 can be written or expanded beyond their --  
5 beyond their clear terms.

6                   And so, even applying those very  
7 favorable canons of interpretation, I don't  
8 think that gets the Navajo Nation anywhere.  
9 They haven't pointed to any ambiguity in any of  
10 the language of -- of the treaty, and the treaty  
11 terms at issue are about seeds and agricultural  
12 implements, which everyone agrees are about  
13 seeds and agricultural implements.

14                   JUSTICE BARRETT: Okay. So just to  
15 make sure that I understand, you don't think  
16 that they've brought the wrong cause of action;  
17 you think that a contract or this -- this treaty  
18 could have established a trust? It feels odd to  
19 me because there's not a res. But you're saying  
20 it could have, but it's just that the language  
21 in this treaty fell short of doing that?

22                   MR. LIU: Correct.

23                   JUSTICE BARRETT: Okay. Thank you.

24                   CHIEF JUSTICE ROBERTS: Justice  
25 Jackson?



1                   JUSTICE JACKSON: Can I go back to  
2 Justice Kagan's question? Because,  
3 notwithstanding the fact that the treaty doesn't  
4 have the express terminology that you were just  
5 exploring with Justice Barrett, you've also said  
6 here and in previous litigation and your  
7 practices indicate that the Winters right that  
8 belongs to the Navajo is being held in trust by  
9 the United States.

10                   So, to the extent that Winters looks  
11 at the treaty and treaties like this and says  
12 there is a water right, the United States  
13 concedes that it has a trust relationship with  
14 respect to those water rights.

15                   So what I don't understand is why we  
16 don't have a simple breach of fiduciary duty  
17 kind of scenario where anyone who has a trustee  
18 controlling their interests can come to court  
19 and say the trustee is not doing what it's  
20 supposed to do in terms of those interests. I  
21 don't -- I -- I just don't understand why that's  
22 not where we are in this case.

23                   MR. LIU: It's because of the  
24 distinction this Court has drawn, starting in  
25 Mitchell I and then reaffirmed in the Navajo

1 cases and then reaffirmed again in Jicarilla,  
2 that a bare or limited trust isn't enough to  
3 give rise to judicial --

4 JUSTICE JACKSON: All right. So I  
5 thought you were going to say that, so let me  
6 explore those with you, all right?

7 I -- I read Mitchell, Navajo I, Navajo  
8 II, and Jicarilla to all be Tucker Act cases.  
9 Do -- do you concede that there was a Tucker Act  
10 issue going on in those cases?

11 MR. LIU: They were all underlying  
12 Tucker Act suits.

13 JUSTICE JACKSON: All right. And so  
14 the cause of action and the right to sue because  
15 of sovereign immunity was arising under the  
16 Tucker Act, you needed to satisfy the Tucker Act  
17 in those cases, and it's the Tucker Act that  
18 gives rise to this positive source of law  
19 requirement, right? I mean, that -- that  
20 requirement is in the Tucker Act, and anybody  
21 who tries to sue the federal government for  
22 damages under the Tucker Act has to point to a  
23 specific positive source of law.

24 But, to the extent that this is not a  
25 Tucker Act case, I don't understand why we care

1 whether or not there's a positive source of law.  
2 This is not like Mitchell, Navajo, Jicarilla.  
3 We -- we don't have that responsibility because  
4 we're not trying to waive sovereign immunity  
5 under the Tucker Act in this way.

6 MR. LIU: Well, I think this Court's  
7 cases made clear that, yes, the Tucker Act  
8 references the same positive sources of law but  
9 that this is a requirement that goes to whether  
10 a judicially enforceable duty exists in the  
11 first place.

12 JUSTICE JACKSON: Why -- why when it  
13 doesn't in any other fiduciary duty context,  
14 right? If this was a regular fiduciary duty  
15 case, you would not be here arguing this didn't  
16 involve Indians and it didn't involve rights.  
17 You would just say, okay, let's talk about  
18 whether or not we actually have a fiduciary duty  
19 under common law or whatever. But you seem to  
20 be getting this positive source of law thing  
21 from the Mitchell Act cases, and those cases, I  
22 think, don't apply.

23 MR. LIU: Well, Jicarilla itself,  
24 while it was an underlying Tucker Act suit, the  
25 relief sought there was equitable relief, and --

1                   JUSTICE JACKSON:  Yeah, but Jicarilla  
2  wasn't even about whether or not there's a cause  
3  of action for a -- a breach of fiduciary duty.  
4  Jicarilla, everybody agreed, you know, this --  
5  excuse me.  In Jicarilla, unlike this case,  
6  there was no agreement about the extent of the  
7  fiduciary obligation, right?

8                   I understood that case to be a dispute  
9  over whether or not the United States had acted  
10 as a -- a fiduciary insofar as the tribe could  
11 point to that action and use the exception to  
12 attorney-client privilege, right?  It was -- it  
13 was about documents.  And the United States  
14 said, okay, you know, you want to try to get  
15 access to these documents under the fiduciary  
16 exception to attorney-client privilege, but  
17 we're really not acting as a fiduciary.  And the  
18 Court agreed.  All right?

19                   That has nothing to do with, I think,  
20 what is at issue in this case, where you agree  
21 that you have acted as a fiduciary, that you are  
22 a fiduciary in the sense that you hold the  
23 rights in trust.  So we've already taken care of  
24 the Jicarilla issue as to whether or not you're  
25 a fiduciary.  The question here is whether

1       there's a cause of action by the Indians to sue  
2       you for breach of that fiduciary duty.

3                 MR. LIU:  And here was Jicarilla's  
4       reasoning:  The government is a sovereign, not a  
5       private trustee.  The government, because it's a  
6       sovereign, can structure the -- the trust  
7       relationship to serve its own policy goals.  As  
8       part of that discretion, Congress can shape the  
9       -- the -- the relationship so that it is just a  
10      bare or limited trust, so that it doesn't -- is  
11      not taking on all the fiduciary duties that  
12      would go along with a private trustee.

13                JUSTICE JACKSON:  All right.  But is  
14      there any -- is there any real dispute here that  
15      the government understood its trust obligations  
16      to be to assert Winter rights and to make sure  
17      that, as Justice Gorsuch pointed out, the -- the  
18      Navajo had enough water?  I mean --

19                MR. LIU:  Yes, that is -- that is  
20      absolutely in dispute.

21                JUSTICE JACKSON:  So can I just ask  
22      you, how so, when the United States has asserted  
23      these Winter rights in at least -- with respect  
24      to the Navajo Nation, in at least three  
25      different actions outside of the Colorado

1 mainstream, when it's represented various tribes  
2 in the original Arizona versus California  
3 litigation, when it obtains waivers or releases  
4 of the right to sue the U.S. for Winters  
5 violations? It's clear that the United States  
6 thinks that it is acting as a fiduciary with  
7 respect to this.

8 MR. LIU: We take all those actions in  
9 furtherance of our general trust  
10 responsibilities to the Navajo Nation. We --  
11 we, of course, acknowledge that we have a  
12 general trust relationship with all tribes,  
13 including the Navajo Nation. And so we --

14 JUSTICE JACKSON: But the tribes can't  
15 sue you if they think you're not up to task with  
16 respect to that?

17 MR. LIU: Unless Congress has  
18 expressly assumed those duties. And in Mitchell  
19 II, with respect to timber, Congress did.  
20 Congress enacted statutes that said not only  
21 would the timber be held in trust, but that  
22 trust is going to bear the hallmarks of a  
23 conventional fiduciary relationship.

24 JUSTICE JACKSON: And didn't our --  
25 didn't our analysis in -- in -- in Mitchell II

1 really also focus on the degree to which the  
2 government assumed elaborate control over the  
3 forests? It wasn't so much just the language of  
4 the statute, but the government was acting as  
5 though it was controlling the forests in a way  
6 that is similar, I think, to what's happening  
7 here.

8 MR. LIU: Well, the Court's made clear  
9 in Navajo II that control is not enough. And so  
10 what was doing the work in Mitchell II was that  
11 Congress, in the language of the -- of the  
12 relevant statutes, had -- had recognized this  
13 trust relationship and imposed on the government  
14 duties to manage the timber in a way for the  
15 benefit of the Indians.

16 And -- and that language is just  
17 absent from the treaty here. There is no  
18 language like the statutes in Mitchell II that  
19 do for the --

20 JUSTICE JACKSON: So, if we think --  
21 if we think this is a -- an APA claim, if we  
22 think that what's actually happening is that the  
23 tribe is suing the government under 706 for  
24 otherwise violating the law under their -- what  
25 they perceive to be fiduciary duty, a breach of

1 fiduciary duty, do you lose?

2 MR. LIU: No, not at all. I mean,  
3 everyone agrees that the APA in Section 702  
4 supplies the applicable waiver of sovereign  
5 immunity. But they still need to have some  
6 cause of action, some duty --

7 JUSTICE JACKSON: The APA also has a  
8 cause of action. That's what I'm asking you.  
9 If they're relying on the APA's cause of action,  
10 not anything analogous to the Tucker Act or  
11 anything else, then don't they at least survive  
12 the motion to dismiss and then we can go on to  
13 other parts of this litigation?

14 MR. LIU: No, for the same reason,  
15 because they haven't pointed to any specific  
16 duty that would justify that sort of relief.

17 CHIEF JUSTICE ROBERTS: Thank you,  
18 counsel.

19 Ms. Maguire.

20 ORAL ARGUMENT OF RITA P. MAGUIRE  
21 ON BEHALF OF THE STATE PARTIES

22 MS. MAGUIRE: Mr. Chief Justice, and  
23 may it please the Court.

24 I'd like to start out this morning  
25 just pointing out briefly two areas of confusion



1 that I've heard on the Court this morning.

2           The first is with respect to federal  
3 reserved rights. Justice Barrett, I believe you  
4 asked Mr. Liu about the federal reserved claims  
5 -- were brought forward by the federal  
6 government, and he responded in Arizona versus  
7 California that federal reserved right claims  
8 were made for five tribes by the federal  
9 government.

10           That is not quite correct. The  
11 federal government made federal reserved right  
12 claims to 20 -- for 25 reservations. Five of  
13 those claims went to the Lower Colorado River.  
14 Twenty of those claims were to the Little  
15 Colorado River and other tributaries of the  
16 Lower Colorado River system.

17           So the government clearly in Arizona  
18 versus California was acting on behalf of 25  
19 different tribes making claims to different  
20 water sources.

21           Those federal reserved rights are  
22 simply rights that then need to be adjudicated.  
23 In Arizona versus California, this Court did so  
24 with respect to the Lower Colorado River and  
25 elected not to hear the claims regarding the

1 tributaries of the river.

2 So the Navajos were represented in  
3 Arizona versus California, like the other 19  
4 tribes, but their claims did not go to --

5 JUSTICE GORSUCH: Well, counsel --

6 MS. MAGUIRE: -- the Lower Colorado  
7 River.

8 JUSTICE GORSUCH: -- that's -- you  
9 know, I'm not sure that's quite right either.  
10 The federal government refused to bring a claim  
11 on behalf of certain tribes into the Lower  
12 Colorado, including the Navajo, and this Court  
13 said that no adjudication of any tribes other  
14 than those expressly discussed in the decree  
15 were adjudicated, right?

16 MS. MAGUIRE: Thank you, Justice  
17 Gorsuch. There was an extensive colloquy with  
18 the special master with respect to the claims  
19 being made by the federal government. The  
20 federal government was not refusing --

21 JUSTICE GORSUCH: It acted -- it acted  
22 as judge and -- and as well as, in -- in its  
23 trust obligations, found -- it said it didn't  
24 have any trust obligations with respect to the  
25 Navajo and the Lower Colorado, so it didn't

1 bring them. That was its judgment.

2 MS. MAGUIRE: No, it believed it had  
3 trust obligations and it raised claims to the  
4 Little Colorado River, and, in fact --

5 JUSTICE GORSUCH: I -- I'm talking  
6 about the Lower Colorado, the mainstream.

7 MS. MAGUIRE: But --

8 JUSTICE GORSUCH: And -- and the  
9 government decided there that it was not going  
10 to bring any Winters claim with respect to the  
11 Navajo in the -- in the mainstream, and so the  
12 Navajo have never had an adjudication of their  
13 rights with respect to the mainstream, correct?

14 MS. MAGUIRE: That is correct.

15 JUSTICE GORSUCH: All right.

16 MS. MAGUIRE: I would welcome the  
17 Court's questions. I think we're well into the  
18 meat of the discussion here.

19 JUSTICE KAVANAUGH: You were going to  
20 make a second area of confusion. I just want to  
21 make sure you get that out.

22 MS. MAGUIRE: Yes. Part of the  
23 difficulty when you're talking about federal  
24 reserved rights is that those rights stem from  
25 the Winters decision. It is an implied right.

1 There is no duty that attaches to Winters.

2 And if you look at what the Supreme  
3 Court was reviewing when it reached its  
4 determination that an implied right to water was  
5 created, it never looked at a treaty, it did not  
6 look at an agreement. It looked at the federal  
7 government's actions.

8 So that implied right then needs to be  
9 made effective. It's made effective through the  
10 adjudication process either before this Court  
11 and the unique nature of the Lower Colorado  
12 River or in state adjudication proceedings.

13 So there is a second step to  
14 effectuating those federal reserved rights  
15 beyond simply the notion that they have a  
16 right --

17 JUSTICE KAGAN: I guess I'm -- I'm not  
18 sure I quite understand that reading of Winters  
19 and -- or maybe I just didn't understand quite  
20 what you said. But are -- are -- are you -- I  
21 mean, Winters is clearly a case about a treaty,  
22 correct?

23 MS. MAGUIRE: No, Your Honor.

24 JUSTICE KAGAN: I mean, Winters says,  
25 the case, as we view it, turns on the agreement,

1 resulting in the creation of Fort Belknap  
2 Reservation. You can't say it any more clearly  
3 than that.

4 MS. MAGUIRE: That is true, but  
5 there's no mention of water in that treaty.

6 JUSTICE KAGAN: Yes, there isn't a  
7 mention of water in the treaty, that's correct.  
8 I mean, there's, like, a page which is very  
9 clear in Winters which says there's no mention  
10 of water in this treaty, but there's a very  
11 clear principle about how we interpret Indian  
12 treaties, and it gives the benefit of the doubt  
13 to the Indians.

14 And so, as between these two things,  
15 and it goes on a little bit about it's a little  
16 bit ambiguous, what does it mean with respect to  
17 this water, did they retain it, did they cede  
18 it, what did they do, and then they said, we --  
19 we refer to this very clear understanding of how  
20 we interpret Indian treaties, and that requires  
21 that we rule in favor of the Indians here.

22 So it's quite clear that Winters says,  
23 you know, there's this way of dealing with  
24 Indian treaties, and this is a case about a  
25 treaty, and it just doesn't matter that it

1 doesn't say water.

2 MS. MAGUIRE: I take your point,  
3 Justice Kagan, but I think it's important to  
4 remember that the actual holding of Winters is  
5 we have found that when the federal government  
6 sets aside land for, in this case, an Indian  
7 reservation, they intended to reserve sufficient  
8 water to meet the purpose of the reservation.

9 It is an intent. It does not define a  
10 duty for the federal government. That implied  
11 reservation of rights is important, but it does  
12 not bring an obligation on the federal  
13 government to do something more with that  
14 implied right to water.

15 JUSTICE KAGAN: Right. Well, I mean,  
16 rights usually have a correlative duty attached  
17 to them. So what do you take -- and this was  
18 the conversation that I had with Mr. Liu, which  
19 I think is at the heart of this case. So what's  
20 the correlative duty that the right that they  
21 got from this treaty, which the government  
22 admits they got, what is the correlative duty?

23 MS. MAGUIRE: Justice Kagan, I would  
24 say the state petitioners want to make it clear.  
25 We do not dispute that they don't have a federal

1 reserved right.

2           What the state petitioners dispute is  
3 what is the res, what is the source of that  
4 right that they think they have. They're  
5 claiming consistently through 20 years of  
6 litigation that that right goes to the Lower  
7 Colorado River. Our argument is they cannot  
8 have a right to the Lower Colorado River until  
9 they come before this Court and receive an  
10 adjudicated right.

11           So it gives them -- a federal reserved  
12 right gives them the right to enforce a claim  
13 against another party that has claims to the  
14 same body of water, but that's in an  
15 adjudication proceeding. It's not independent  
16 based on the federal reserved right alone.

17           CHIEF JUSTICE ROBERTS: Ms. Maguire,  
18 did the government's representative, Mr. Liu,  
19 say anything during his time with which you  
20 disagree?

21           MS. MAGUIRE: I would disagree on  
22 behalf of the state petitioners that the -- it  
23 is solely a breach-of-trust case. I think it's  
24 a jurisdictional case first and foremost  
25 because, throughout the 20 years of litigation

1 on this case, there's only been one source of  
2 water identified. That's the Lower Colorado  
3 River.

4 And even with the modified reply that  
5 we have before the Court today, they say that  
6 they're now only looking for the Secretary to  
7 plan for and assess their water rights on the  
8 reservation in the Arizona portion of that  
9 reservation.

10 But that pleading is riddled with  
11 references to the Lower Colorado River, and in  
12 no less than a half a dozen times they say we  
13 have unquantified rights to the Lower Colorado.

14 JUSTICE BARRETT: If that's what  
15 they're after, do the state petitioners have any  
16 objection to it? Because it doesn't seem then  
17 that it affects you very much if they're not  
18 getting the water from the mainstream.

19 MS. MAGUIRE: It does affect us. The  
20 problem is the cloud on title, if you will. As  
21 long as any lower court has the potential to  
22 issue a ruling that directs the Secretary to  
23 take an action that manages the system  
24 differently, then it currently is -- under what  
25 we call the Law of the River, there is a risk



1 that the vested right holders with more than 60  
2 years of rights --

3 JUSTICE BARRETT: But Judge Lee --

4 MS. MAGUIRE: -- are jeopardized.

5 JUSTICE BARRETT: -- but Judge -- I  
6 guess what I'm getting at is Judge Lee in his  
7 concurrence in the Ninth -- Ninth Circuit said,  
8 you know, listen, this can go forward so long as  
9 whatever happens doesn't wind up messing with  
10 the decree essentially. And I -- I gather in  
11 the interchange with Mr. Liu that there are  
12 things now that the federal government  
13 understands the Navajo to be asking for which  
14 are separate from the mainstream, which are  
15 coming up with a plan, figuring out maybe  
16 drilling, tapping aquifers, et cetera. What is  
17 the state's interest in that? I guess I don't  
18 understand it. That wouldn't really involve the  
19 decree. So, if there was a way for them to  
20 litigate that claim that didn't involve the  
21 mainstream, would the states have any objection  
22 to that? I mean, what's your interest?

23 MS. MAGUIRE: Our interest would be  
24 simply the fact that this case is at the  
25 pleadings stage and would be remanded to a lower

1 court, and then that court would interpret  
2 whatever this Court has directed it to do. And  
3 it could potentially be issuing an order for the  
4 Secretary to take certain actions that may,  
5 indeed, color the ability of the Secretary to  
6 manage --

7 JUSTICE JACKSON: What if --

8 MS. MAGUIRE: -- the river system.

9 JUSTICE GORSUCH: Counsel, I'm -- I'm  
10 not sure I -- I understood the answer to that --  
11 Justice Barrett's question, because it seems to  
12 me like you're maybe hyping -- battling the  
13 hypothetical.

14 The hypothetical is suppose, as the  
15 government itself concedes, that there are  
16 actions it could take that would not affect the  
17 mainstream at all, that would vindicate the  
18 Navajos' contract right to water. Assume there  
19 is one. What's the states' interest?

20 MS. MAGUIRE: Your Honor, I would  
21 simply not concede that they're only asking  
22 for --

23 JUSTICE GORSUCH: I know that.

24 MS. MAGUIRE: -- a plan and assess.

25 JUSTICE GORSUCH: I -- I know that.

1 But I'm asking you to -- to deal with the  
2 hypothetical that I presented you with rather  
3 than fight it.

4 MS. MAGUIRE: I would -- I would agree  
5 if you could narrow it to plan and assess.

6 Let me just add one fact, though,  
7 here --

8 JUSTICE GORSUCH: No, no. Before you  
9 add any facts, can we agree that the states  
10 don't have any interest if the mainstream of the  
11 Colorado is not touched?

12 MS. MAGUIRE: No. I think the --

13 JUSTICE GORSUCH: Then -- then you --

14 MS. MAGUIRE: -- the state petitioners  
15 would still be concerned.

16 JUSTICE GORSUCH: -- then -- then you  
17 need to articulate for us what interest the  
18 states have in that scenario.

19 MS. MAGUIRE: In that scenario,  
20 planning and assessment really then, as Mr. Liu  
21 indicated, leaves a great deal of room for  
22 interpretation. What does it mean to plan?  
23 What are you assessing? You're assessing  
24 sources of water. You're assessing water  
25 demands. The Navajo have access to the Little

1 Colorado, the tributaries and washes on the  
2 reservation in Arizona, and groundwater, as you  
3 said.

4 Now, if you narrowed it and said you  
5 can only assess the needs based on  
6 groundwater -- and, by the way, they've excluded  
7 the Little Colorado -- that's all you're left  
8 with. So it's almost nonsensical --

9 JUSTICE GORSUCH: Do you have any  
10 objection to that?

11 MS. MAGUIRE: A study of groundwater?

12 JUSTICE GORSUCH: Yeah.

13 MS. MAGUIRE: I do not --

14 JUSTICE GORSUCH: Okay.

15 MS. MAGUIRE: -- Your Honor.

16 CHIEF JUSTICE ROBERTS: Justice  
17 Thomas, anything further?

18 JUSTICE THOMAS: In your years of  
19 litigating this, has there been a suggestion of  
20 any source other than the Lower Colorado?

21 MS. MAGUIRE: There has not,  
22 Your Honor.

23 CHIEF JUSTICE ROBERTS: Justice Alito?  
24 Justice -- Justice Sotomayor?  
25 Justice -- Justice Kagan?

1 Justice Gorsuch?

2 Justice Kavanaugh?

3 Justice Barrett?

4 Justice Jackson?

5 JUSTICE JACKSON: Can I just clarify  
6 one quick thing. This is the same issue, if --  
7 if, hypothetically, the Navajo just said what we  
8 would like is for the federal government to  
9 calculate how much water we need per capita.  
10 Mr. Liu says we don't know that information.  
11 The Navajo is claiming they don't have enough.

12 If that was the world that we're  
13 living in, does the state -- would the state  
14 object?

15 MS. MAGUIRE: The state would not  
16 object, but I would say that I think there are  
17 serious problems with the enforceability of  
18 that --

19 JUSTICE JACKSON: Understood. But --

20 MS. MAGUIRE: -- direction.

21 JUSTICE JACKSON: -- but would there  
22 be jurisdiction under Arizona versus Colorado  
23 for a court to entertain a Navajo suit claiming  
24 that the government has a responsibility to  
25 figure out how much water they need and it

1 hasn't done so?

2 MS. MAGUIRE: As long as it was  
3 absolutely clear that the decree and the  
4 decision in Arizona versus California are  
5 completely carved out of any assessments, if any  
6 rights to that river are undertaken.

7 JUSTICE JACKSON: Thank you.

8 CHIEF JUSTICE ROBERTS: Thank you,  
9 counsel.

10 MS. MAGUIRE: Thank you.

11 CHIEF JUSTICE ROBERTS: Mr. Dvoretzky?

12 ORAL ARGUMENT OF SHAY DVORETZKY

13 ON BEHALF OF THE NAVAJO NATION

14 MR. DVORETZKY: Mr. Chief Justice, and  
15 may it please the Court.

16 The Senate ratified two treaties with  
17 the Navajo Nation. In the 1868 treaty, the  
18 United States promised the Navajos a permanent  
19 homeland. Both parties understood that in  
20 promising the Navajos their land, the  
21 United States was also promising them the water  
22 it needed to sustain life in the arid southwest.  
23 Those treaties are specific sources of law that  
24 give the Nation rights to water and impose  
25 duties on the government to secure that water.

1           But, for years, the United States has  
2 failed to fulfill that promise. Today, the  
3 average person on the Navajo reservation uses  
4 just seven gallons of water a day. The national  
5 average is 80 to 100 gallons. The United States  
6 agrees that, on paper, the Nation has treaty  
7 rights to the water its people need.

8           We're here because the United States  
9 says it doesn't have to do anything to secure  
10 the water it promised, even though the  
11 United States also says it speaks for the  
12 Navajos as trustee of the Nation's water rights.

13           When the United States blocked the  
14 Nation from intervening in Arizona versus  
15 California, it said, "the United States is  
16 authorized exclusively to represent the Indian  
17 tribes in litigation affecting their property  
18 rights," and its actions are, "binding upon  
19 those tribes."

20           The states say we're here to take  
21 their water behind their back. No, the Nation  
22 is here for its fair share through a fair  
23 process. The Nation, not the states, was cut  
24 out of Arizona versus California by the federal  
25 government and left without water.

1           The United States thinks that it alone  
2 decides whether it has made good on its  
3 promises. But that's not how promises work. A  
4 promise is a solemn duty, and the United States'  
5 duty is to see that the Nation has the water it  
6 needs and the United States promised.

7           The Nation and its people know and  
8 feel the water -- the water shortage in the  
9 southwest. The Nation asks only that the  
10 United States, as trustee, assess its people's  
11 needs and develop a plan to meet them in  
12 consultation with the Nation.

13           I welcome the Court's questions.

14           JUSTICE THOMAS: If it were agreed  
15 that the only source of water was the Lower  
16 Colorado, would your argument be the same --

17           MR. DVORETZKY: It would. The  
18 United States --

19           JUSTICE THOMAS: -- as far as  
20 jurisdiction?

21           MR. DVORETZKY: Yes, it would, because  
22 the relief that we are seeking here is an  
23 assessment of the Nation's needs and a plan to  
24 meet them. If that plan -- if it -- that  
25 assessment ultimately calls for allocating



1 additional water from the lower mainstream of  
2 the Colorado, the parties might well at that  
3 point need to return to this Court. But the  
4 remedy that we are seeking from the district  
5 court does not require reallocating water in a  
6 way that would contravene this Court's decree.

7 JUSTICE THOMAS: Have you, throughout  
8 this litigation, suggested any other source than  
9 the Lower Colorado?

10 MR. DVORETZKY: I -- I don't believe  
11 we have, but it's also not our burden to do so.  
12 The United States has taken on the fiduciary  
13 obligation to ensure our Winters rights. The  
14 United States itself believes that it holds the  
15 Winters rights in trust. The very first step  
16 that it needs to take is to assess and figure  
17 out its plan for how those Winters rights will  
18 -- how those Winters rights will be satisfied  
19 and met. And so it is the United States' duty  
20 to figure out where that water ought to come  
21 from.

22 But, as has been discussed earlier and  
23 I think -- as I think Mr. -- Mr. Liu  
24 acknowledges, there are other potential sources  
25 besides the Colorado, include -- besides the

1 lower mainstream, including the upper  
2 mainstream, the Zuni River, the San Juan River.  
3 There are other potential appurtenant water  
4 sources that could supply water to the  
5 reservation.

6 CHIEF JUSTICE ROBERTS: Counsel, prior  
7 to the execution of the -- the treaty, the --  
8 the Navajo were, of course, forcibly removed  
9 from their reservation to an area that they, it  
10 turned out, were not able to -- to -- to grow  
11 crops on, and then the agreement with General  
12 Sherman, they were allowed to move back.

13 Shouldn't the -- why -- why isn't the  
14 permanent home feature a reference to that? In  
15 other words, they didn't want again to be moved  
16 off of their current home?

17 MR. DVORETZKY: Two points, Mr. Chief  
18 Justice. One, I think "permanent home" has to  
19 be understood in light of how Winters understood  
20 that term, which is to include water that is  
21 necessary for life as a permanent homeland.

22 But, second, to get to I think the  
23 factual premise of your question, when the  
24 Navajos returned to a portion of their permanent  
25 homeland, they were returning under very

1 different conditions than they had been there  
2 before. They would at that point under the  
3 treaties be under the protection and  
4 jurisdiction of the United States. They would  
5 no longer have free rein of the territory to --  
6 to be able to access water in the same way that  
7 they were before. They would no longer be able  
8 to leave the reservation in the same way -- way  
9 that they were before.

10 And so the situation had changed, and  
11 they were dependent on the government for access  
12 to water, just as they had been at Bosque  
13 Redondo, which -- with -- with -- in the  
14 unlivable conditions there.

15 CHIEF JUSTICE ROBERTS: The treaty  
16 specifically mentions a variety of things that  
17 would be necessary for agriculture, you know,  
18 the 15,000 sheep, however many cattle, the  
19 seeds. If the water were -- why wasn't the  
20 water mentioned, as -- your argument now is it's  
21 necessarily implicit, but the other things were  
22 spelled out. Wouldn't you have spelled out the  
23 water at the time?

24 MR. DVORETZKY: Well, the -- the other  
25 things were spelled out, and -- and as -- as you

1 pointed out, Mr. Chief Justice, the other things  
2 were spelled out with -- with numbers. They  
3 could be very specifically enumerated in that  
4 way.

5 Water was something that was simply  
6 inherent in the permanent homeland and -- and  
7 making it suitable both as a permanent homeland  
8 and for the very purpose of agriculture.

9 As the Court recognized in Winters, if  
10 you have a permanent homeland for agriculture,  
11 both of which were features of -- of the -- the  
12 reservation in Winters as well, if you have  
13 those things, you -- you -- you can't carry out  
14 the purpose of that agreement without also  
15 having water. And so it didn't need --

16 JUSTICE KAGAN: So, Mr. --

17 MR. DVORETZKY: -- to be -- I'm sorry.

18 JUSTICE KAGAN: No, go ahead, please.

19 MR. DVORETZKY: It -- it didn't need  
20 to be spelled out because it was an essential  
21 component of fulfilling the purposes of the  
22 agreement.

23 JUSTICE KAGAN: As -- as I understand  
24 the government's argument, the government is not  
25 contesting that the treaty gives the Navajo

1 Nation water rights. It's simply contesting  
2 what the nature of its own responsibility is  
3 with respect to those rights.

4 So the question is, you know, what  
5 duties attach to the government. And the  
6 government is saying the duty that attaches to  
7 it is that it can't interfere with the Navajo  
8 Nation's water rights, but it has no affirmative  
9 obligation to ensure that the Navajo Nation has  
10 a supply of water.

11 And it seems to me that that's the  
12 difference between the two of you, not, you  
13 know, whether the treaty conveys a promise as to  
14 water. The government agrees that it does. The  
15 government is just saying it has no affirmative  
16 duty with respect to the supply of water.

17 So what's your answer to that?

18 MR. DVORETZKY: Justice Kagan, I think  
19 the government's conduct both in Arizona versus  
20 California and in other cases belies the notion  
21 that the treaty just gives the -- gives the  
22 tribe a stick and a bundle to do with as it  
23 wishes.

24 The government itself, its own  
25 conduct, shows that it believes it has

1 affirmative duties. In Arizona versus  
2 California, the United States said that it spoke  
3 for the Nation.

4 More recently, in a January 20 -- 2022  
5 intervention motion in New Mexico litigation,  
6 the government said again, "The United States is  
7 the legal owner of all water rights recognized  
8 for the Navajo Nation, holding these rights in  
9 trust for the Navajo Nation."

10 So the United States is controlling  
11 these Winters rights and, in certain instances,  
12 like Arizona versus California, blocking the  
13 Nation from asserting those rights for itself.

14 So the United -- this is not a  
15 situation where the United States simply gave  
16 the Nation a stick and said, here you go, use  
17 it. The United States continues to exercise  
18 control over that stick, and, in doing so, the  
19 United States itself is recognizing that it has  
20 duties with respect to the water.

21 JUSTICE BARRETT: Mr. Dvoretzky, it  
22 seems to me like Winters rights are something  
23 different than tapping aquifers and helping come  
24 up with a plan or helping install pumps.

25 I mean, are you -- are you arguing for

1 those latter kinds of duties or just for Winters  
2 rights? Because it would be a different claim  
3 to say, we have Winters rights and the  
4 government hasn't been asserting them on our  
5 behalf, they breached their trust obligation by  
6 blocking our intervention. That's a different  
7 kind of claim.

8 MR. DVORETZKY: That's right. So --  
9 so let me be clear about what I think the scope  
10 of the Winters right is.

11 The -- the -- the -- the scope of the  
12 Winters rights includes access to sufficient  
13 water from appurtenant water sources either  
14 within or along the border of the reservation.  
15 The United States has to ensure that access.

16 We are not saying as a matter of  
17 treaty interpretation that the United States is  
18 legally obligated to pay for pipelines or  
19 aquifers or whatever, that whether the  
20 United States has a moral or political  
21 obligation to do that, as Mr. Liu acknowledged,  
22 I -- I think it does. But, in terms of the  
23 Winters rights under the treaty, that is really  
24 a right of access to an appurtenant water  
25 source. But --

1 JUSTICE BARRETT: So that's really  
2 just about intervening in litigation to assert  
3 those on the Navajo's behalf and to protect  
4 them, right? Like to safeguard those rights so  
5 that you're not deprived of them, as Justice  
6 Gorsuch was pointing out, the Navajo haven't had  
7 an opportunity in Arizona versus California or  
8 any other time to assert those Winters rights  
9 and to have any rights in the mainstream  
10 adjudicated.

11 MR. DVORETZKY: I -- I -- I think  
12 that's right, Justice Barrett.

13 JUSTICE BARRETT: Okay. And, I mean,  
14 putting --

15 JUSTICE JACKSON: But, to be --

16 JUSTICE BARRETT: -- putting aside  
17 here, like, the whole question of the decree and  
18 whether you're trying to get rights to the  
19 mainstream, let -- let's just take that part off  
20 the table, but -- but, really, one way to think  
21 about the breach of trust here, just to make  
22 sure that I'm clear, is that the United States  
23 failed to assert Winters rights on your behalf  
24 and, in fact, blocked you from watching out for  
25 yourselves?



1           MR. DVORETZKY: Well, that's right. I  
2 was going to emphasize the last part. Not only  
3 failed to assert but, in fact, put us in a  
4 catch-22 by keeping us out of the Arizona versus  
5 California litigation.

6           JUSTICE BARRETT: Why wouldn't you try  
7 to intervene in that litigation now?

8           MR. DVORETZKY: I think there would be  
9 very significant obstacles to doing that without  
10 the United States' support, including the -- the  
11 states would -- would assert sovereign immunity  
12 objections that the United States could  
13 overcome, query whether the -- the Nation could  
14 overcome those on its own, and the United States  
15 is not -- not exactly volunteering to help us  
16 even after all this litigation in terms of  
17 reopening the -- the litigation that we were  
18 blocked out of.

19           JUSTICE JACKSON: Doesn't the failure  
20 to assert also carry with it an obligation to  
21 evaluate to the extent that the government is  
22 claiming that it doesn't assert because it  
23 didn't think that you had or needs for water or  
24 whatnot?

25           So I don't know that it's as narrow as

1 just they breached the fiduciary obligation of  
2 not asserting, but they also have to figure out  
3 the circumstances under which assertion is  
4 required.

5 MR. DVORETZKY: Well, of course,  
6 Justice Jackson, and I think that the -- the key  
7 first step in figuring out what claims to assert  
8 is assessing what are the needs and how are  
9 those needs going to be met, and that --

10 JUSTICE JACKSON: And so a -- a breach  
11 of fiduciary duty claim could rest on the  
12 Navajos claiming you haven't even done the  
13 legwork to determine whether or not to assert  
14 our rights.

15 MR. DVORETZKY: Absolutely. And  
16 the -- the breach of fiduciary duty in that  
17 situation would be analogous to a failure to  
18 provide an accounting of -- of what's in the  
19 trust.

20 Before you can figure out how to  
21 actually manage the trust, whether to assert the  
22 Winters rights in litigation, you have to figure  
23 out what is in -- what is in the trust and what  
24 the needs of the trustee are.

25 JUSTICE ALITO: When I look at the

1 relief that you are requesting, I don't see  
2 anything about the -- the original action.  
3 You're now saying the breach of trust occurred  
4 as a result of actions that the United States  
5 took in the original action.

6 But the relief that you're now  
7 requesting here doesn't have anything to do with  
8 your ability to attempt to intervene in that  
9 action, is that correct?

10 MR. DVORETZKY: Well, Justice Alito, I  
11 think the breach is a continuing breach of  
12 failing, at a minimum, to conduct the assessment  
13 and come up with a plan.

14 The -- the United States' conduct in  
15 Arizona versus California is one element of that  
16 breach. It's not the only one. It -- as I say,  
17 it's an ongoing breach not to have remedied what  
18 happened in Arizona versus California.

19 JUSTICE ALITO: Well --

20 MR. DVORETZKY: The other thing that I  
21 think --

22 JUSTICE ALITO: -- all right. You say  
23 that -- no, go ahead.

24 MR. DVORETZKY: Well, I -- I -- I was  
25 just going to say I think it might be helpful to

1 the Court to understand in a little bit more  
2 detail what actually happened in Arizona versus  
3 California.

4 JUSTICE ALITO: Well, I -- I don't --  
5 I -- I -- I'm not interested right now in -- in  
6 Arizona versus California. I'm interested in --  
7 of course, it's important, but I'm interested in  
8 the relief that you're asking for.

9 Now you want a plan. If all you  
10 want -- if all you got was a plan, that wouldn't  
11 do you any good, would it?

12 MR. DVORETZKY: The -- the plan would  
13 then need to be implemented, of course.

14 JUSTICE ALITO: Yeah.

15 MR. DVORETZKY: But that's it.

16 JUSTICE ALITO: Okay. So you want the  
17 United States to "exercise their authorities in  
18 a manner that does not interfere with the plan  
19 to secure the water needed by the Navajo  
20 Nation."

21 So, you know, you may have structured  
22 your -- you -- you may have used words in  
23 describing your relief that doesn't require the  
24 allocation of water from the Colorado River.  
25 But, in the end, that's really what you want,

1       isn't it, in -- do you deny that?

2                   MR. DVORETZKY: Well, I -- I -- I  
3       think it depends. As -- as Mr. Liu  
4       acknowledged, there may be other sources of  
5       water, and so I think it depends what the  
6       assessment and the plan show.

7                   If the assessment and the plan show  
8       that the Nation does need water from the lower  
9       mainstream, as it very well might -- I don't  
10      want to -- to fight on that point -- then, at  
11      that point, the decree would need to be  
12      reopened. But we're not at that point and we  
13      don't know that at this stage.

14                   JUSTICE ALITO: But you've studied the  
15      problem. Is there any realistic possibility  
16      that you can get the water that you think that  
17      you need from sources other than the Colorado  
18      River?

19                   MR. DVORETZKY: I -- I -- I think it  
20      is very likely that some water from the lower  
21      mainstream would ultimately be needed, but the  
22      plan of -- the process of conducting the  
23      assessment and coming up with a plan has to  
24      happen first before we can know that, and we're  
25      simply not -- not at that stage.

1                   And that -- that, of course, is what  
2                   Judge Lee recognized in concurring in the Ninth  
3                   Circuit and -- and why he would allow this case  
4                   to go forward.

5                   JUSTICE ALITO: You mentioned the  
6                   small amount of water used per household on the  
7                   reservation. Do you know the percentage of the  
8                   total water that is available to the Navajo  
9                   Nation that is used for household use and the  
10                  percentage that is used for agricultural use?

11                  MR. DVORETZKY: I -- I don't have that  
12                  percentage, Justice Alito.

13                  JUSTICE ALITO: If you take all of the  
14                  water that the Navajo Nation now has and divide  
15                  it by the number of residents, do you know the  
16                  per capita amount of water, which could be quite  
17                  different from household use?

18                  MR. DVORETZKY: I -- I don't have  
19                  the -- the per capita. And -- and on your  
20                  earlier question, I think that the agricultural  
21                  uses would far dwarf household uses, but I don't  
22                  have the -- the -- the particular number on  
23                  that.

24                  Justice Alito, in -- in response, if I  
25                  could, to questions that you were asking earlier

1 today, if you look at the DigDeep Right to Water  
2 amicus brief, it gives statistics about the per  
3 capita use on the Nation versus neighboring  
4 states, and those statistics come from a U.S.  
5 Geological Survey study.

6 The -- the average American uses 88 to  
7 a hundred gallons a day. In the particular  
8 states that you were asking about, New Mexico is  
9 81, Utah is 169, Arizona is 146. And, again, on  
10 the Navajo Nation, the Navajo Nation is about  
11 seven gallons.

12 JUSTICE ALITO: Yeah, but that's use,  
13 right? That's not total -- that's not per  
14 capita water. It's -- it's how much is used by  
15 the household. You could have -- a state could  
16 have an enormous amount of water and use --  
17 well, it could have a certain amount of water  
18 and use a very high percentage of that for  
19 agriculture, right?

20 MR. DVORETZKY: It -- it could. I can  
21 tell you that as a practical matter, the Navajo  
22 Nation has a water shortage for all purposes.  
23 This is the -- the reality on the ground is not  
24 that there are sprinkler systems, you know --

25 JUSTICE ALITO: No, no.

1           MR. DVORETZKY: -- irrigating while  
2 people are, you know, driving miles to wells in  
3 order to get water to be able to wash their  
4 hands or do their dishes. That's just not the  
5 reality on the ground.

6           JUSTICE ALITO: Is -- is there  
7 anything special about this treaty that -- in a  
8 relevant respect that distinguishes it from many  
9 other treaties that the United States has  
10 entered into with other tribes?

11           MR. DVORETZKY: I think each -- each  
12 treaty, as a matter of treaty interpretation,  
13 has to be looked at in light of its history and  
14 context. And the particular history of the  
15 Navajos as -- as the Chief Justice recounted  
16 earlier, the particular history of the Navajos  
17 informs the interpretation here in a way that  
18 may or may not apply for other treaties.

19           In -- in terms of the language,  
20 certainly, the -- the "permanent homeland"  
21 language is something that is found in other  
22 treaties as well, but not all tribes are  
23 similarly situated to the Navajos in terms of  
24 their -- either their history or their location.  
25 Not all -- some -- some tribes may have



1 sufficient water. Not all tribes have  
2 unadjudicated water rights in the way that the  
3 Navajos do. And so I can't give you a  
4 categorical answer other than to say that the  
5 analysis has to go treaty by treaty.

6 JUSTICE ALITO: Well, if we said that  
7 the language in the treaty regarding a permanent  
8 homeland was not itself sufficient, what would  
9 you point to to take you over the line?

10 MR. DVORETZKY: Permanent homeland  
11 plus the agriculture provisions, both of which  
12 are similar to Winters, which I think has to  
13 inform how this Court reads those terms, but  
14 also the negotiations and the historical context  
15 and -- and the context of the reservation today.  
16 The climate is particularly arid. As I  
17 explained to the Chief Justice earlier, when the  
18 Navajos were returning to a portion of their  
19 original homeland, they were confined to only --  
20 to only a portion of the reservation without the  
21 same access that they had had before to be able  
22 to get water for themselves. They were  
23 returning under the government's protection.

24 All that context is an important tool  
25 of treaty construction, and in order to carry

1 out the purpose of this treaty, it has to be  
2 read to include these promises of water.

3 CHIEF JUSTICE ROBERTS: Counsel, what  
4 --

5 JUSTICE KAVANAUGH: In response --

6 CHIEF JUSTICE ROBERTS: -- what other  
7 obligations are there in -- in the phrase  
8 "permanent home" in addition to providing water?

9 MR. DVORETZKY: I -- I think, really,  
10 it's -- it's just the land and the water that  
11 are inherent in the term "permanent homeland."  
12 And -- and, again, that comes from -- from this  
13 Court's -- this Court's opinion in Winters.

14 I -- I -- water is particularly  
15 important for life in a way that -- that this  
16 Court recognized. It's a unique resource. It  
17 is not one, again, that the Navajos can -- can  
18 simply access on their own.

19 CHIEF JUSTICE ROBERTS: So you can't  
20 think of anything else beyond water, beyond the  
21 land, I guess, and the -- and the associated  
22 water that would be an implicit requirement in  
23 the permanent home?

24 MR. DVORETZKY: Not -- not, I think,  
25 that comes just from that language. There may,

1 of course, be --

2 CHIEF JUSTICE ROBERTS: Sure.

3 MR. DVORETZKY: -- there may, of  
4 course, be other breach-of-treaty or  
5 breach-of-trust claims that could be brought. I  
6 don't mean to suggest that water is the only  
7 type of claim that could ever be brought. But,  
8 in terms of what that particular language is  
9 understood to mean, I think, in light -- in  
10 light of Winters and the particular importance  
11 of water for carrying out the reservation's  
12 purposes, that -- that is really the -- the key  
13 -- the key element there.

14 JUSTICE KAVANAUGH: In response to  
15 earlier questions I think from Justice Kagan, I  
16 believe you said that the U.S. can't interfere  
17 with the Navajos' access, was your word, to  
18 sufficient water, but you said that you were not  
19 saying that the U.S. has a duty to construct  
20 infrastructure, build pipelines or the like. I  
21 just want to make sure I have that correct.

22 MR. DVORETZKY: So I think, on the  
23 first part, it's more than just not interfering  
24 with the access to water. The -- the  
25 United States does have an affirmative duty --

1 particularly since the United States believes  
2 that it holds these waters rights in trust, it  
3 has an affirmative duty to ensure that the  
4 Navajos have access to the water.

5 JUSTICE KAVANAUGH: Okay. And how --

6 MR. DVORETZKY: That --

7 JUSTICE KAVANAUGH: Keep going.

8 MR. DVORETZKY: Well, and -- and --  
9 and that -- that may well require -- as I  
10 explained to Justice Barrett, that may well  
11 require litigating on behalf of the Navajos or,  
12 at a minimum, allowing them to litigate on  
13 behalf of themselves, rather than taking the  
14 position the United States has taken, which is  
15 that it alone speaks for the Navajos.

16 Once the -- once the United States has  
17 assured access to the water, it does -- it does  
18 not, as a matter of the treaty, have obligations  
19 to build pipelines across the reservation or  
20 that sort of thing. The -- the Winters rights  
21 are about access to the appurtenant water  
22 source.

23 JUSTICE KAVANAUGH: And what does  
24 ensuring access to the waters entail then or  
25 encompass potentially?

1           MR. DVORETZKY: At well, at -- at a  
2           minimum, I think it requires, in a litigation  
3           context, ensuring that water is allocated to the  
4           Navajos, that the -- that the Navajos have the  
5           legal right to the water, which is --

6           JUSTICE KAVANAUGH: How about at a  
7           maximum?

8           MR. DVORETZKY: -- which -- which is  
9           what could have happened in Arizona versus  
10          California. Beyond that, I -- I think the --  
11          the Nation -- that the United States does have  
12          an obligation to make sure that the water is  
13          accessible. So, for example --

14          JUSTICE KAVANAUGH: What does that  
15          mean?

16          MR. DVORETZKY: Well, you -- you --  
17          you -- you couldn't, for example, get a court to  
18          decree that the Navajos have a legal right to  
19          certain water, but then the United States, you  
20          know, blocks -- then puts up a dam and blocks  
21          the -- the Navajos from accessing that water.

22                 It makes -- has to make sure that it  
23          is actually accessible, but it doesn't have to  
24          build infrastructure --

25          JUSTICE KAGAN: I hate to --

1 MR. DVORETZKY: -- to make that  
2 happen.

3 JUSTICE KAGAN: -- be stuck on the  
4 same question, Mr. Dvoretzky, but, as between  
5 these two positions, which is Mr. Liu's position  
6 is that you have a right and they have a duty --  
7 you know, you have -- they have a duty not to  
8 interfere with your water, as opposed to they  
9 have a duty to ensure access to your water.

10 Both of those are not spelled out in  
11 the contract. You know, both of those are  
12 implied rights and duties. So how do we choose  
13 between them?

14 MR. DVORETZKY: I -- I think you  
15 choose between them based on -- first of all,  
16 based on the recognition that Winters has that  
17 water is -- is essential to life and to the  
18 purpose of the -- the treaty.

19 Second, based on the understanding of  
20 the -- the contracting parties, that's a --

21 JUSTICE KAGAN: But do you think -- I  
22 -- I -- I mean, I agree that Winters is about a  
23 treaty and says water is really important. But  
24 do you think Winters actually says the  
25 government, in one of these kinds of treaties,

1 is obligated to ensure access to water? I'm not  
2 sure Winters gets you all the way there on that.

3 MR. DVORETZKY: I -- I -- I don't  
4 think Winters says that because that wasn't the  
5 issue in Winters, but --

6 JUSTICE KAGAN: Correct.

7 MR. DVORETZKY: That wasn't the issue  
8 in Winters. However, the right to water would  
9 be meaningless if the government, as trustee,  
10 doesn't also have an affirmative duty as the  
11 trustee to ensure that the water is available to  
12 the beneficiary of the trust.

13 It would be one thing if we were in a  
14 situation where the Navajos could -- could  
15 engage in full self-help. As both a practical  
16 and a legal matter, they could simply access the  
17 water for themselves. That would be one thing.

18 That's not the situation here, though,  
19 where the United States affirmatively says that  
20 it controls these Winters rights. It is the  
21 trustee. And so the United States seems to  
22 recognize itself that it has some duties.

23 And, as a practical matter, that puts  
24 the Navajos in an impossible situation if the  
25 United States on the one hand says we control

1 these water rights, we can block you from  
2 asserting them for yourselves, maybe you can  
3 intervene permissively, but you have no right --  
4 you have no intervention as of right, and if we  
5 come in, we take over the litigation.

6 That's the position the United States  
7 takes not only in Arizona versus California but  
8 as recently as last year in litigation involving  
9 the Navajos. That's putting the Navajos in an  
10 impossible position so that, to answer your  
11 question, Justice Kagan, if you're choosing  
12 between the two competing views of this case,  
13 you ought to choose the view that reflects both  
14 the -- the understanding of the tribe at the  
15 time, and treaty interpretation favors the  
16 understanding of the Indians --

17 JUSTICE BARRETT: Mr. Dvoretzky --

18 MR. DVORETZKY: -- but also the --

19 JUSTICE ALITO: Mr. Dvoretzky, I -- go  
20 ahead.

21 JUSTICE BARRETT: I -- I -- I was just  
22 going to ask you, what if you had intervened in  
23 Arizona versus California or if the United  
24 States had asserted the Winters rights on your  
25 behalf and it still wasn't enough?



1                   So let's say that the special master  
2                   in the decree that we entered doesn't give you  
3                   anything close to the 80 gallons a day, say,  
4                   that you might need. What's the United States'  
5                   obligation then?

6                   MR. DVORETZKY: It still has an  
7                   obligation to do an assessment and a plan to see  
8                   if there are other sources of water.

9                   JUSTICE BARRETT: And there's not.  
10                  Like let's just say it would be very expensive.  
11                  You know, you -- you -- you have rights to the  
12                  mainstream. It's not enough. You have some  
13                  rights to the tributaries -- tributaries, but  
14                  it's still not enough. But there is something  
15                  in an aquifer or groundwater that would require  
16                  building pipes, et cetera, and the Navajo  
17                  doesn't have the resources to do it.

18                  Does the United States have an  
19                  obligation to get you the water you need?

20                  MR. DVORETZKY: I -- I don't think  
21                  there would be a legal obligation there. The  
22                  Winters rights, again, are about appurtenant  
23                  water sources. And at a certain point, as a  
24                  practical matter, if those dry up, if they're  
25                  simply not available to supply the Navajo's

1 water needs, the United States can't --

2 JUSTICE BARRETT: So this is all about  
3 the Winters rights? I'm just -- I -- I didn't  
4 understand that before, so this has been  
5 helpful. This really is like what you're  
6 asserting the obligation is, is about the  
7 Winters rights.

8 MR. DVORETZKY: That's right.

9 JUSTICE JACKSON: Can I ask you if --  
10 are -- are you bringing this lawsuit under the  
11 Tucker Act?

12 MR. DVORETZKY: No, we are not.

13 JUSTICE JACKSON: And so are you --  
14 you're not relying on the Tucker Act's waiver of  
15 sovereign immunity for the claims that you're  
16 bringing in this case?

17 MR. DVORETZKY: Well, we're -- we're  
18 relying on the waiver of sovereign immunity in  
19 -- in Section 702 for suits seeking injunctive  
20 relief in this case.

21 JUSTICE JACKSON: Of the APA?

22 MR. DVORETZKY: Yes.

23 JUSTICE JACKSON: All right. So do  
24 you -- I -- I guess I'm -- I -- I understand  
25 that you say that the treaty does give a

1 positive source of rights and that's all in your  
2 brief and that's what we're arguing here today.

3 But do we really need it if you're  
4 bringing this claim under the APA?

5 MR. DVORETZKY: Well, I -- I don't  
6 think we're -- we're not bringing an APA cause  
7 of action. To be clear, we're bringing a  
8 breach-of-trust cause of action, and --

9 JUSTICE JACKSON: Under the, like, a  
10 common law breach of trust?

11 MR. DVORETZKY: A common -- common law  
12 breach of trust, and the United -- and -- and  
13 the Ninth Circuit also granted us leave to amend  
14 on remand if we wished to assert a  
15 breach-of-treaty claim as well. I know Justice  
16 Barrett had some earlier questions about the  
17 difference between those two causes of action,  
18 and I'm happy to address them.

19 JUSTICE JACKSON: All right. So  
20 focusing in on the breach of trust, do we have  
21 to find that -- I mean, the United States is  
22 making -- is taking the position that you failed  
23 to state a claim for that. We're at the motion  
24 to dismiss stage because you haven't identified  
25 a positive source of law. So I -- I guess I

1 didn't understand that you would have to if  
2 you're just bringing a breach-of-trust claim.

3 MR. DVORETZKY: Well, I think there  
4 still -- there has to be a source of law that we  
5 would point to for where the -- the rights and  
6 duties come from. I think that -- that  
7 much would --

8 JUSTICE JACKSON: Could it be -- could  
9 it be something like the -- the practices of the  
10 United States with respect to their acting as a  
11 fiduciary, controlling these rights? Could that  
12 be something that you look to as the duty?

13 I mean, I -- I -- I had this feeling  
14 throughout the whole case in a way about kind of  
15 like common law estoppel kinds of principles.

16 To the extent that the United States  
17 says we have a trust obligation and is acting as  
18 a trustee, why isn't that enough for someone who  
19 claims to be a beneficiary to say, hey, we can  
20 sue you for not, you know, doing all that you're  
21 supposed to do in your role as trustee?

22 MR. DVORETZKY: So I -- I think you  
23 could. I think our case is stronger than that  
24 because I think that the United States' conduct  
25 shows that the United States itself understood

1 that arising out of the treaties, which are the  
2 first source of law that we point to, that the  
3 United States had the treaties --

4 JUSTICE JACKSON: Right. So you have  
5 the treaties too, but I guess, to the extent  
6 that there are people and the United States is  
7 arguing that the treaties actually don't have an  
8 express requirement or a duty, I guess you --  
9 one might also say, well, you've been acting as  
10 a trustee, you admit you've been acting as a  
11 trustee, and why isn't that enough --

12 MR. DVORETZKY: That -- that's right.

13 JUSTICE JACKSON: -- to be --

14 MR. DVORETZKY: That's right.

15 JUSTICE JACKSON: -- the basis of --  
16 of the breach-of-duty claim that we're trying to  
17 bring here?

18 MR. DVORETZKY: That -- that's right,  
19 Justice Jackson.

20 JUSTICE SOTOMAYOR: Counsel, Justice  
21 Kavanaugh -- this is -- Justice Kavanaugh asked  
22 a question earlier that you're not defending the  
23 Ninth Circuit decision. Could you succinctly  
24 point out why you're not or, if you are, why  
25 he's wrong and -- and explain how your position

1 differs from the Ninth Circuit, if it does?

2 MR. DVORETZKY: Yes, Justice  
3 Sotomayor. We are defending the Ninth Circuit's  
4 decision. The core of the Ninth Circuit's  
5 analysis was correct. The United States said  
6 that even under the Jicarilla standard,  
7 identifying a specific source of law, the tribe  
8 -- the tribe has pointed to the treaties and  
9 that the treaties properly understood, in light  
10 of Winters and in light of the agricultural  
11 provisions and in light of all of the canons of  
12 construction that apply to Indian treaties,  
13 those creates the rights and duties that we're  
14 seeking to enforce. That was the heart of the  
15 Ninth Circuit's analysis, and we are defending  
16 that.

17 The Ninth Circuit also recognized  
18 that Winters -- and -- and I'll just quote  
19 here -- "The Supreme Court could not have  
20 intended to hamstring the Winters doctrine --  
21 which has remained good law for more than 100  
22 years -- by preventing tribes from seeking  
23 vindication of their water rights by the federal  
24 government when the government has failed to  
25 discharge its duties as trustee."

1                   That's at the government's Petition  
2 Appendix 32a. The previous analysis that I was  
3 pointing to was at the government's Petition 25  
4 -- Petition Appendix 25a to 26a. So we are  
5 defending the -- the Ninth Circuit's analysis.

6                   CHIEF JUSTICE ROBERTS: Justice  
7 Thomas?

8                   JUSTICE THOMAS: So you are arguing in  
9 much the posture that Winter took place that  
10 there's a pre-existing right to water that is  
11 already there?

12                  MR. DVORETZKY: That -- that's right.  
13 These are reserved water rights, reserving for  
14 the tribe -- reserving to the tribe its  
15 pre-existing water rights.

16                  CHIEF JUSTICE ROBERTS: Justice Alito?

17                  JUSTICE ALITO: I'm still not sure I  
18 understand exactly what you mean by access to  
19 water on the ground. In response to a lot of  
20 the questions about access, you spoke about the  
21 ability of the Navajo Nation to engage in  
22 certain litigation. But put all that aside and  
23 talk about what access means on the ground, so  
24 to speak. Does it ever require the government  
25 to construct any infrastructure?

1                   MR. DVORETZKY: I -- it -- I can't say  
2                   that it would never require any infrastructure  
3                   whatsoever. It -- it would depend on exactly  
4                   what the situation is. If you had a -- if you  
5                   had a situation where you had an appurtenant  
6                   water source and the tribe had an allocation of  
7                   water from that appurtenant water source, but,  
8                   as a practical matter, there was simply no way  
9                   to actually reach it, even though it was an  
10                  appurtenant water source, perhaps in that  
11                  situation the -- the government would have some  
12                  obligation, in order to ensure access, through  
13                  a -- through an impenetrable wall or something  
14                  like that.

15                  But I also think that the -- the  
16                  government hypothesizes a parade of horrors  
17                  where the government would have to be building  
18                  pipelines across, you know, miles and miles and  
19                  miles of territory.

20                  We're not talking about anything like  
21                  that. We're talking about ensuring access to  
22                  appurtenant water sources.

23                  JUSTICE ALITO: Well, if the -- if the  
24                  reservation is here and the Colorado River is  
25                  down here and you have a cliff that's hundreds



1 of feet high, would -- do you think access means  
2 that the government has to create -- has to  
3 construct whatever facility is necessary to get  
4 the water up the cliff?

5 MR. DVORETZKY: I -- I think it  
6 probably would not have to construct that,  
7 although, certainly, if there were any  
8 settlement negotiations, that's something that  
9 could and very well might be provided for.

10 JUSTICE ALITO: If you could -- could  
11 access a water source on your own or with  
12 whatever assistance you think the government has  
13 to provide you with, how much water do you think  
14 you are entitled to extract from that water  
15 source? What does access mean in that respect?  
16 Does it mean a right to take out as much water  
17 as the Navajo Nation thinks it needs?

18 MR. DVORETZKY: Well, I think this  
19 goes back to the question of the assessment that  
20 the United States has never conducted, and --  
21 and so we -- we don't know the quantity of  
22 water. And it's not necessarily how much we  
23 think we need. It --

24 JUSTICE ALITO: All right. How much  
25 that you actually need to have -- to -- to

1 transform the reservation into a permanent  
2 homeland, a livable, permanent homeland?

3 MR. DVORETZKY: I -- I -- I think the  
4 Nation has a right to access up to that point  
5 from appurtenant water sources.

6 Going back to Justice Barrett's  
7 earlier question, if it's impossible, we're --  
8 we're not suggesting that water can be  
9 manufactured out of nowhere --

10 JUSTICE ALITO: No, no.

11 MR. DVORETZKY: -- or that it has to  
12 be trucked from the Great Lakes --

13 JUSTICE ALITO: No, no.

14 MR. DVORETZKY: -- or something like  
15 that.

16 JUSTICE ALITO: But, if you can access  
17 it, let's say you could access it yourself and  
18 you're not even asking the government to provide  
19 any infrastructure, do you think that you have  
20 the right to take out from that water source  
21 whatever quantity of water is necessary to meet  
22 the standard of a livable, permanent homeland  
23 regardless of the needs of others who are  
24 drawing water from the same water source?

25 MR. DVORETZKY: So whatever right we

1 have would, of course, be subject to in a -- in  
2 an adjudication what is allocated to us, which  
3 may be something short of that. But we do  
4 have -- the -- the -- the Nation had water  
5 rights first. We do have priority rights to the  
6 water, and that's something that ought to be  
7 considered as part of an adjudication  
8 requirement.

9 JUSTICE ALITO: Well, when there's --  
10 when an allocation is being made and you assert  
11 we have the right under federal law, under the  
12 federal treaty, to take out as much water as we  
13 need to make the reservation a livable,  
14 permanent homeland, you said we have that right,  
15 that supersedes other rights, it supersedes any  
16 rights that the states may have, is that your  
17 position? You -- you have that priority and  
18 other -- other users of the water simply have to  
19 accept that no matter what the consequences for  
20 them?

21 MR. DVORETZKY: I -- I think, as a  
22 practical matter, the way this would work is  
23 that there would be -- there -- there would --  
24 there would likely be some sort of a negotiated  
25 resolution. We would like to have a seat at the

1 table to be a part of that, which we've been cut  
2 out for -- cut out from.

3 But, in terms of figuring out what the  
4 needs are also, it -- it's not just whatever we  
5 might want. There are judicially accepted  
6 methodologies for assessing what the water needs  
7 of a tribe are.

8 The Arizona Supreme Court has a  
9 multifactor test that it's used. This Court in  
10 Arizona versus California used a different  
11 methodology. There are ways of assessing this.  
12 It's not -- the idea is not just that we get to  
13 say what we want and take it. That's not how  
14 this works in practice.

15 CHIEF JUSTICE ROBERTS: Justice  
16 Sotomayor?

17 JUSTICE SOTOMAYOR: No, thank you. He  
18 answered my question.

19 CHIEF JUSTICE ROBERTS: Justice Kagan?

20 JUSTICE KAGAN: You said earlier that  
21 you had some things to say about Arizona v.  
22 California and the nature of what happened  
23 there. Have you gotten that out?

24 MR. DVORETZKY: I -- I -- I haven't.  
25 Thank you, Justice Kagan.

1           Just -- just to explain -- just to  
2 explain something about what happened there that  
3 I think is relevant for the Court's context, the  
4 reservation is adjacent to a stretch of the  
5 Colorado in northern Arizona that is upstream  
6 from Lake Mead. In 1960, the special master  
7 decided that only mainstream water in and  
8 downstream from Lake Mead was at issue. And so  
9 the portion of the Colorado that was adjacent to  
10 the reservation, according to the special master  
11 at first, was not at issue.

12           The Nation moved to intervene and  
13 argued that if the Court rejected the special  
14 master's recommendation and apportioned  
15 mainstream Colorado water upstream of Lake Mead,  
16 the Nation's interests would be affected and the  
17 United States wouldn't adequately represent  
18 them.

19           This Court, of course, denied  
20 intervention, and the United States, in opposing  
21 the motion, actually agreed that if the Court  
22 did decide to apportion water upstream from Lake  
23 Mead, it would then -- and this is at page 15  
24 from the government's intervention opposition --  
25 "it will then be necessary to determine the

1     appropriateness of an application under Article  
2     IX for adjudication of the Nation's rights."

3             That never happened after the Court  
4     rejected the special master's conclusion about  
5     Lake Mead. And so this Court ended up  
6     adjudicating rights upstream from Lake Mead that  
7     affected the portion of the Colorado adjacent to  
8     the reservation. But the United States never  
9     followed up and did what it said it would do,  
10    which is to figure out whether, at that point,  
11    the Nation's interests were -- would be  
12    affected, which, in fact, they were.

13            JUSTICE KAGAN: Do we know why?

14            MR. DVORETZKY: Why they never did  
15    that? I -- I don't.

16            CHIEF JUSTICE ROBERTS: Justice  
17    Gorsuch?

18            Justice Kavanaugh?

19            JUSTICE KAVANAUGH: Two things.  
20    First, on -- on the Ninth Circuit, I take your  
21    point about the treaty, but I just want to make  
22    sure of the parts that you are not defending of  
23    the Ninth Circuit's decision.

24            So the -- there you took the position  
25    that the Court's breach-of-trust decisions were

1 applicable only to claims seeking money damages.  
2 You persuaded the Ninth Circuit of that. You're  
3 no longer defending that, correct?

4 MR. DVORETZKY: I -- I -- I think  
5 that's right insofar as we need -- I -- I think  
6 we need to and have shown a specific source of  
7 law that -- it creates rights and imposes  
8 duties. That's the standard that has to be met.

9 JUSTICE KAVANAUGH: Okay. And then,  
10 in the Ninth Circuit, you also relied on various  
11 statutes and a environmental impact statement.  
12 You're no longer relying on those, correct?

13 MR. DVORETZKY: We -- we haven't  
14 relied -- we haven't made our argument based on  
15 those here.

16 JUSTICE KAVANAUGH: So that's a yes?

17 MR. DVORETZKY: Yes, we are no  
18 longer -- we -- we are not affirmatively relying  
19 on them. I am not --

20 JUSTICE KAVANAUGH: Okay. That's all  
21 I wanted to --

22 MR. DVORETZKY: -- not rejecting the  
23 Ninth Circuit --

24 JUSTICE KAVANAUGH: -- that's all I  
25 wanted to make clear. You're not relying on

1 various arguments that you persuaded the Ninth  
2 Circuit on; you are relying on the treaty and  
3 the -- the Winters.

4 MR. DVORETZKY: We are relying on what  
5 we believe is the core of the Ninth Circuit's  
6 analysis, which was correct.

7 JUSTICE KAVANAUGH: Okay. And then a  
8 big part of the Solicitor General's position  
9 seems to be, at a big-picture level, leave it to  
10 Congress, that the courts lack the authority,  
11 arguably, from their perspective, also the  
12 competence, arguably, from their perspective, to  
13 sort all these competing interests out in  
14 Arizona in a way that's going to be fair and  
15 equitable and that Congress has shown the  
16 ability to do this with other tribes and other  
17 reservations and that rather than a multiyear  
18 journey here, where, really, it's not clear you  
19 can ever get what you really want out of the  
20 court system, as we've danced around today, we  
21 should leave it to Congress.

22 So that's, I think, their theory, and  
23 I just want to get a -- your response to that.

24 MR. DVORETZKY: First, the -- the  
25 relevant action by Congress is ratifying the



1 treaties, and the treaties, properly understood,  
2 as I've argued today --

3 JUSTICE KAVANAUGH: Right, Congress  
4 now.

5 MR. DVORETZKY: -- impose these --

6 JUSTICE KAVANAUGH: Congress now.  
7 Congress now. Leave it to Congress now.

8 MR. DVORETZKY: It -- it shouldn't be  
9 left to Congress now because Congress now, like  
10 Congress then, it -- it seemed to have agreed to  
11 these treaties.

12 It -- it, of course, is possible for  
13 us to get the relief that we want out of the  
14 judicial system. We can get the plan and the  
15 assessment, and the plan will either provide for  
16 water sources other than the Colorado and can be  
17 implemented or, if it's necessary to access  
18 water from the lower mainstream of the Colorado,  
19 at that point, the parties can return to this  
20 Court and get that relief. So it is possible to  
21 get relief from the Court.

22 And -- and then, third, as a practical  
23 matter, the government says leave it to  
24 Congress, leave it to the political branches.  
25 We've been waiting half a century, since the --

1 the mistake that I explained to Justice Kagan in  
2 the Arizona versus California litigation. We've  
3 been waiting half a century for the political  
4 branches to solve this problem for the Nation.  
5 It hasn't happened.

6 JUSTICE KAVANAUGH: Thank you.

7 CHIEF JUSTICE ROBERTS: Justice  
8 Barrett?

9 JUSTICE BARRETT: Just a quick -- I'm  
10 -- I'm kind of stuck in the same place as  
11 Justice Alito. You just said in response to  
12 Justice Kavanaugh, you know, plan and assess, we  
13 haven't had that yet. So let's say plan and  
14 assess shows, yeah, you know, we can't get  
15 everything we need from the mainstream Colorado  
16 River, even assuming Winters rights. Is it just  
17 thanks for the plan, thanks for help with the  
18 assessment, United States, we'll take it from  
19 here?

20 MR. DVORETZKY: Once we get the plan,  
21 the plan itself might be judicially  
22 reviewable -- or would be judicially reviewable,  
23 but we're -- we're simply not at that point.

24 JUSTICE BARRETT: But --

25 MR. DVORETZKY: It would be --

1 JUSTICE BARRETT: Well, I know you  
2 keep saying that, but, like, I guess what I'm --  
3 you know, Justice Alito asked, so does this  
4 involve infrastructure, does this involve  
5 pipelines? And that's a different thing than  
6 just, hey, help us figure out what our needs are  
7 so we have in a plan, an assessment, and then  
8 maybe we can be part of the Arizona versus  
9 California litigation and assert Winters rights.

10 But -- but you're not saying any of  
11 that. You're just saying we just need the plan  
12 and the assessment, and then, thanks, we'll take  
13 it from there and maybe we can intervene in  
14 Arizona versus California?

15 MR. DVORETZKY: No. I'm saying that  
16 in this litigation, we are seeking the plan and  
17 the assessment, which is like an accounting in a  
18 common law trust action. Once we have the plan  
19 and the assessment, I mean, hopefully, the  
20 United States would simply -- would simply  
21 implement the plan. And if the plan calls for  
22 reopening the decree, then they would seek to --  
23 to have that happen.

24 If we're dissatisfied with the plan,  
25 that might be a separate breach-of-trust or

1 potentially breach-of-treaty claim.

2 JUSTICE BARRETT: But it's possible  
3 that the plan might require some sort of  
4 infrastructure, pipes, et cetera?

5 MR. DVORETZKY: It -- it -- it is  
6 possible that the United States would include  
7 such things in the plan. Whether -- whether --  
8 if the question is whether we could go to court  
9 and say the plan is deficient because it doesn't  
10 include pipes running across the reservation, I  
11 -- I don't think that --

12 JUSTICE BARRETT: The plan calls for  
13 pipes, the United States has to provide them?  
14 Is that what you mean by judicially enforceable  
15 plan? It's just a different thing if -- if what  
16 you want is the ability to assert Winters rights  
17 to the mainstream. I think this is some of what  
18 Justice Alito was getting at. That's just a  
19 different thing than saying our enforceable  
20 treaty obligation is that the United States  
21 helps us plan, assessed, pipelines,  
22 infrastructure. And at some points, you've said  
23 that's not what you're asking, but then it seems  
24 like maybe it is what you're asking.

25 MR. DVORETZKY: I -- I think it's not

1 what we're asking. We are asking for the  
2 United States to ensure that there is adequate  
3 water available. I think that that invokes the  
4 -- that is meant to invoke the Winters rights.

5 Right now, there is no water even to  
6 pipe. That is what we are asking them to  
7 assess, how much water do we need and how is it  
8 going to be made available, but not how is it  
9 going to be piped across the reservation.

10 JUSTICE BARRETT: Okay. Thanks.

11 MR. DVORETZKY: Right now, there's  
12 simply no -- no water to pipe.

13 CHIEF JUSTICE ROBERTS: Justice  
14 Jackson?

15 JUSTICE JACKSON: So, I guess some of  
16 my confusion about the questions about how much  
17 water the Indians have now on the reservation  
18 and the sort of details and contours of the  
19 U.S.'s obligation is the fact that I thought  
20 this was at the motion to dismiss stage and that  
21 you've claimed that they have breached a  
22 fiduciary duty to ensure that there's access to  
23 water, and at some level, we have to, I guess,  
24 assume the truth of that for the purpose of  
25 evaluating the government's argument, which is

1 that we can't even go forward to litigate  
2 whether there's a breach in this case because  
3 you have to point to a particular express duty,  
4 and you haven't done so.

5 I sort of felt like that's where we  
6 were, and so help me to understand the relevance  
7 at this stage of arguments about whether or not  
8 there's actually been a breach, whether or not  
9 the Navajo really have enough water, all of  
10 that. Is that -- should we be thinking about  
11 that right now with respect to where we are in  
12 this litigation?

13 MR. DVORETZKY: No -- no, Justice  
14 Jackson. This -- this -- this litigation is at  
15 the point where we have not even been allowed to  
16 amend the complaint in order to assert the  
17 breach-of-trust claim or a breach-of-treaty  
18 claim as to the United -- as -- as to the  
19 United States' conduct.

20 All that needs to happen at this point  
21 is that we ought to be allowed to amend the  
22 complaint and go forward with the litigation.  
23 The precise scope of the government's duty, what  
24 the plan ought to contain, all -- all of that is  
25 --

1 JUSTICE JACKSON: And to be clear --

2 MR. DVORETZKY: -- it would -- would  
3 happen over the course of litigation --

4 JUSTICE JACKSON: -- the Navajo could  
5 still win -- lose -- lose later on in the  
6 litigation, right? I mean, if you amend the  
7 complaint and the complaint goes forward because  
8 it is not precluded insofar as you, you know,  
9 haven't done some sort of identification of the  
10 positive duty or whatever, we go on, and then  
11 there's discovery and litigation about the  
12 degree to which the United States has or has not  
13 breached its obligation, and it's possible that  
14 the Navajo would lose?

15 MR. DVORETZKY: It's always possible.  
16 I hope not, but it's always possible.

17 JUSTICE JACKSON: I'm just saying that  
18 the -- the -- the -- the decision that we're  
19 making right now is not on the merits of whether  
20 or not the Navajo is correct about the  
21 United States having breached its duty.

22 MR. DVORETZKY: That -- that's right.  
23 The only question at this point is whether we  
24 ought to be allowed to amend our complaint or  
25 whether it was futile for us to do so -- to try

1 to do so.

2 JUSTICE JACKSON: Thank you.

3 CHIEF JUSTICE ROBERTS: Thank you,  
4 counsel.

5 MR. DVORETZKY: Thank you.

6 CHIEF JUSTICE ROBERTS: Mr. Liu,  
7 rebuttal?

8 REBUTTAL ARGUMENT OF FREDERICK LIU  
9 ON BEHALF OF THE FEDERAL PARTIES

10 MR. LIU: Thank you, Mr. Chief  
11 Justice. Just a few quick points.

12 First, about the Winters decision, we  
13 read that decision as having basically two  
14 parts. One part of it is about the scope of the  
15 reservation that's granted to the Indians. That  
16 scope of reservation includes water.

17 My friend described it as access to  
18 water. Justice Kagan, you asked, that seems  
19 different from how we're describing it. It is,  
20 and we're correct for two reasons.

21 Look at -- look at the nature of the  
22 right with respect to the land that's reserved  
23 under -- under that reservation. There are no  
24 ensure access to land, build roads, build  
25 bridges as to the land. There's no such duty as



1 with respect to the minerals. No such duties  
2 with respect to the timber. So, if you compare  
3 the water to those other things that also come  
4 with the same bundle of sticks, we're right  
5 about what the right is being -- what -- what  
6 right is being conveyed.

7           Also, compare the Winters doctrine not  
8 just in the Indian context but to every other  
9 context it applies: not just to Indian  
10 reservations but to national monuments, national  
11 parks, national refuge areas.

12           In all of those other instances, this  
13 is a doctrine of reserved rights, rights against  
14 interference, rights to use, rights to exclude.  
15 In none of those situations is it an affirmative  
16 duty.

17           There's a second part of the Winters  
18 case. That's where the Indian canons come in.  
19 The Indians can -- Indian canons came in to  
20 construe the cession of land that was at issue  
21 in that agreement. That agreement took the  
22 Indians' land. They ceded a lot of it, kept  
23 some of it. The question was, when they ceded a  
24 lot of it, did they cede the water with it. The  
25 Indian canon came in to construe that cession

1 and the answer was, no, they didn't cede it with  
2 it.

3           Because Winters can't be doing all the  
4 work, my friend needs to point to something  
5 outside Winters as a source of this duty. It  
6 can't be Winters itself.

7           So what do they point to? It's the  
8 treaty. The treaty doesn't do the work for it.  
9 We'd agree water is implicit in one part of the  
10 treaty. It's Article II of the treaty that  
11 makes the reservation. We do not think water is  
12 implicit in all the other agricultural  
13 provisions. No one thinks seeds means water.  
14 No one thinks agricultural implements means  
15 water. Seeds mean seeds, and agricultural  
16 implements mean agricultural implements. So  
17 the -- the treaty doesn't support them.

18           This idea that we at least have a duty  
19 to do some sort of common law trust accounting  
20 is contrary to this Court's cases that say you  
21 can't import those common law duties until the  
22 tribe has gone through the threshold step of  
23 establishing a duty in a statute, treaty, or a  
24 -- or a regulation.

25           And so, while those duties might make

1 sense if the government were a private trustee  
2 that had taken on all fiduciary -- all the  
3 duties of a -- of a conventional fiduciary, they  
4 don't make sense when Congress is in the  
5 driver's seat and can decide how to shape the  
6 contours of the trust relationship.

7 I think my friend said, if -- if  
8 the -- if the tribe can engage in full  
9 self-help, then there's no claim here. Well,  
10 the -- the tribe can engage in full self-help.  
11 It can fund its own infrastructure projects. It  
12 can tap the groundwater on the reservation  
13 today. There's no impediment. It can assert  
14 its own Winters claims.

15 I see my time is up.

16 CHIEF JUSTICE ROBERTS: Thank you,  
17 counsel. The case is submitted.

18 (Whereupon, at 11:54 a.m., the case  
19 was submitted.)

20

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## Official

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