

FOR PUBLICATION

**UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT**

NAVAJO NATION,
Plaintiff-Appellant,

v.

U.S. DEPARTMENT OF THE INTERIOR;
DEB HAALAND, Secretary of the
Interior; UNITED STATES BUREAU OF
RECLAMATION; BUREAU OF INDIAN
AFFAIRS,

Defendants-Appellees,

STATE OF ARIZONA; CENTRAL
ARIZONA WATER CONSERVATION
DISTRICT; ARIZONA POWER
AUTHORITY; SALT RIVER PROJECT
AGRICULTURAL IMPROVEMENT AND
POWER DISTRICT; SALT RIVER
VALLEY WATER USERS'
ASSOCIATION; IMPERIAL IRRIGATION
DISTRICT; METROPOLITAN WATER
DISTRICT OF SOUTHERN CALIFORNIA;
COACHELLA VALLEY WATER
DISTRICT; STATE OF NEVADA;
COLORADO RIVER COMMISSION OF
NEVADA; SOUTHERN NEVADA
WATER AUTHORITY; STATE OF
COLORADO,

Intervenor-Defendants-Appellees.

No. 19-17088

D.C. No.
3:03-cv-00507-
GMS

OPINION

Appeal from the United States District Court
for the District of Arizona
G. Murray Snow, Chief District Judge, Presiding

Argued and Submitted October 16, 2020
Pasadena, California

Filed April 28, 2021

Before: Ronald M. Gould, Marsha S. Berzon, and
Kenneth K. Lee, Circuit Judges.

Opinion by Judge Gould;
Concurrence by Judge Lee

SUMMARY*

Water Rights / Tribal Matters

The panel reversed the district court's dismissal, based on lack of jurisdiction, of Navajo Nation's breach of trust claim alleging that Federal Appellees failed to consider the Nation's as-yet-undetermined water rights in managing the Colorado River.

The district court held that any attempt by the Nation to amend its complaint was futile because the district court lacked jurisdiction to decide the breach of trust claim due to the Supreme Court reserving jurisdiction over allocation of rights to the Colorado River in *Arizona v. California*

* This summary constitutes no part of the opinion of the court. It has been prepared by court staff for the convenience of the reader.

(*Arizona I*), 373 U.S. 546 (1963) (opinion); accord *Arizona v. California (1964 Decree)*, 376 U.S. 340, 353 (1964) (decree).

The panel held that the district court erred in dismissing the complaint because the amendment was not futile. Although the Supreme Court retained original jurisdiction over water rights claims to the Colorado River in *Arizona I*, the Nation's complaint did not seek a judicial quantification of rights to the River, and therefore, the panel need not decide whether the Supreme Court's retained jurisdiction was exclusive. The panel concluded it had jurisdiction to consider the Nation's claim, and the district court erred in holding otherwise.

The panel held, contrary to the Intervenor's arguments on appeal, that the Nation's claim was not barred by *res judicata*, despite the federal government's representation of the Nation in *Arizona I*. The panel held that the Nation, here, asserted a different claim than the water rights claim the federal government could have asserted on the Nation's behalf in *Arizona I*. The federal government's fiduciary duty to the Nation was never at issue in *Arizona I*, and no final judgment was ever entered on the merits of any question concerning that subject.

Finally, the panel held that the district court erred in denying the Nation's motion to amend and in dismissing the Nation's complaint, because the complaint properly stated a breach of trust claim premised on the Nation's treaties with the United States and the Nation's federally reserved *Winters* rights, especially when considered along with the Federal Appellees' pervasive control over the Colorado River. At this early stage of the litigation, the panel declined to address whether the Nation's *Winters* rights included rights to the

mainstream of the Colorado River or to any other specific water resources. The panel remanded to the district court with instructions to permit the Nation to amend its complaint.

Judge Lee concurred. He wrote separately to emphasize that the Nation's proposed injunctive relief should not and did not implicate the Supreme Court's retained jurisdiction in the *1964 Decree*.

COUNSEL

M. Kathryn Hoover (argued) and Stanley M. Pollack, Navajo Nation Department of Justice, Window Rock, Arizona; Alice E. Walker and Gregg H. DeBie, Meyer Walker Condon & Walker P.C., Boulder, Colorado; for Plaintiff-Appellant.

John L. Smeltzer (argued), Mary Gabrielle Sprague, and Thomas Snodgrass, Attorneys; Environment and Natural Resources Division, United States Department of Justice, Washington, D.C.; Robert Snow and Sarah Foley, Attorneys, Solicitor's Office, United States Department of the Interior, Washington, D.C.; for Defendants-Appellees.

Rita P. Maguire (argued), Rita P. Maguire PLLC, Phoenix, Arizona; Steven B. Abbott, Redwine and Sherrill LLP, Riverside, California; Kenneth C. Slowinski, Arizona Department of Water Resources, Phoenix, Arizona; Marcia Scully and Catherine M. Stites, Metropolitan Water District of Southern California, Los Angeles, California; Charles T. DuMars, Law & Resource Planning Associates P.C., Albuquerque, New Mexico; John B. Weldon Jr. and Lisa M. McKnight, Salmon Lewis & Weldon P.L.C., Phoenix,

Arizona; Stuart L. Somach and Robert B. Hoffman, Somach Simmons & Dunn APC, Sacramento, California; Jay M. Johnson, Central Arizona Water Conservation District, Phoenix, Arizona; Aaron Ford, Attorney General; Christine Guerci-Nyhus, Special Counsel to the Colorado River Commission of Nevada; State of Nevada and Colorado River Commission of Nevada, Las Vegas, Nevada; Gregory J. Walch, General Counsel, Southern Nevada Water Authority, Las Vegas, Nevada; Lauren J. Caster and Bradley J. Pew, Fennemore Craig P.C., Phoenix, Arizona; for Intervenor-Defendants-Appellees.

Monte Tyler Mills, Associate Professor and Director, Margery Hunter Brown Indian Law Clinic, Alexander Blewett III School of Law, University of Montana, Missoula, Montana, for Amici Curiae Law Professors.

David L. Gover, Joe M. Tenorio, and Matthew Campbell, Native American Rights Fund, Boulder, Colorado; Daniel D. Lewerenz, Native American Rights Fund, Washington, D.C.; Derrick Beetso, National Congress of American Indians, Washington, D.C.; for Amicus Curiae NCAI Fund.

OPINION

GOULD, Circuit Judge:

In 2003, the Navajo Nation (the Nation) sued the Department of the Interior (Interior), the Secretary of the Interior (the Secretary), the Bureau of Reclamation, and the Bureau of Indian Affairs (collectively, the Federal Appellees), bringing claims under the National Environmental Policy Act (NEPA) and a breach of trust claim for failure to consider the Nation's as-yet-

undetermined water rights in managing the Colorado River. Several parties, including Arizona, Nevada, and various state water, irrigation, and agricultural districts and authorities (collectively, the Intervenors), intervened to protect their interests in the Colorado's waters. In a prior appeal, we held that while the Nation lacked Article III standing to bring its NEPA claims, its breach of trust claim was not barred by sovereign immunity, and we remanded to the district court. *Navajo Nation v. Dep't of Interior (Navajo I)*, 876 F.3d 1144, 1174 (9th Cir. 2017). After re-considering the breach of trust claim, the district court dismissed the Nation's complaint because of its view that any attempt to amend the complaint was futile. The district court held that it lacked jurisdiction to decide the claim because the Supreme Court reserved jurisdiction over allocation of rights to the Colorado River in *Arizona v. California (Arizona I)*, 373 U.S. 546 (1963) (opinion); *accord Arizona v. California (1964 Decree)*, 376 U.S. 340, 353 (1964) (decree). The district court also held that the Nation did not identify a specific treaty, statute, or regulation that imposed an enforceable trust duty on the federal government that could be vindicated in federal court. The Nation appealed.

We conclude that the district court erred in dismissing the complaint because, in contrast to the district court's determination, the amendment was not futile. Although the Supreme Court retained original jurisdiction over water rights claims to the Colorado River in *Arizona I*, the Nation's complaint does not seek a judicial quantification of rights to the River, so we need not decide whether the Supreme Court's retained jurisdiction is exclusive. And contrary to the Intervenors' arguments on appeal, the Nation's claim is not barred by *res judicata*, despite the federal government's representation of the Nation in *Arizona I*. Finally, the district court erred in denying the Nation's motion to amend and in

dismissing the Nation's complaint, because the complaint properly stated a breach of trust claim premised on the Nation's treaties with the United States and the Nation's federally reserved *Winters* rights, especially when considered along with the Federal Appellees' pervasive control over the Colorado River. We remand to the district court with instructions to permit the Nation to amend its complaint.

I

The Nation is a federally recognized Indian tribe that has signed two treaties with the United States. In ratifying the first treaty in 1849, the United States placed the Navajo people "under the exclusive jurisdiction and protection of the . . . United States," providing "that they are now, and will forever remain, under the aforesaid jurisdiction and protection." Treaty with the Navaho, 1849 art. I (Sep. 9, 1849), 9 Stat. 974. The Navajo Reservation (the "Reservation") was established as the "permanent home" of the Nation by the 1868 Treaty between the United States of America and the Navajo Tribe of Indians, 1868 art. XIII (June 1, 1868), 15 Stat. 667 (1868 Treaty). The Reservation was later expanded by executive orders and acts of Congress.

The Reservation sprawls across Arizona, New Mexico, and Utah, and lies almost entirely within the drainage basin of the Colorado River. The Colorado River flows along and defines a significant part of the Reservation's western border. Because much of the land in the Colorado River drainage basin is arid, competition for water from the Colorado River and its tributaries is fierce.

To resolve disputes arising from water scarcity, rights to the Colorado River's waters are allocated through a series of federal treaties, statutes, regulations, and common law

rulings; Supreme Court decrees; and interstate compacts. Collectively, this legal regime is known as the “Law of the River.”

A

The Law of the River begins with the 1922 Colorado River Compact (1922 Compact), which split the Colorado River water equally between two groups of states: the “Upper Basin” states, consisting of Colorado, New Mexico, Utah, and Wyoming, and the “Lower Basin” states: Arizona, California, and Nevada. 1922 Compact art. II, *reprinted in* 70 Cong. Rec. 324 (Dec. 10, 1928). Each group collectively received 7.5 million acre-feet per year (maf) of water. *Id.* art. III. The 1922 Compact did not, however, apportion the 7.5 maf *among* the individual states in either the Upper or Lower Basin. *See id.* art. VIII. Nor did it “affect[] the obligations of the United States of America to Indian tribes.” *Id.* art. VII.

Six years later, Congress conditionally approved the 1922 Compact through the Boulder Canyon Project Act (BCPA). 43 U.S.C. § 617 *et seq.* The BCPA allowed Interior to construct the Hoover Dam and a reservoir at Lake Mead. *See id.* § 617. It empowered the Secretary to contract for the storage and delivery of water in Lake Mead. *See id.* The BCPA also authorized construction of the Central Arizona Project (CAP), which consists of an extensive canal system that diverts water from Lake Havasu to municipalities, irrigation districts, and Indian tribes in central Arizona. *See* 43 U.S.C. § 1521. Finally, it authorized the Lower Basin States to negotiate a second compact dividing their 7.5 maf share: 4.4 maf to California, 2.8 to Arizona, and 0.3 to Nevada. *See* 43 U.S.C. § 617c(a).

The 1922 Compact—including the second compact apportionment—was to take effect once all three Lower Basin states ratified it. *See id.* But Arizona, displeased with the Compact’s terms, failed to ratify it. So the issue of how to share the Lower Basin States’ apportionment went unresolved. *See Arizona I*, 373 U.S. at 561–62. Nonetheless, because six of the seven Basin states ratified the BCPA, the Secretary began contracting for water with the Lower Basin states.¹ *Id.* at 562.

In 1952, still dissatisfied with its allotment, Arizona sued California in the Supreme Court, invoking the Court’s original jurisdiction. *Id.* at 550–51. Nevada and other Basin States intervened, as did the United States. *Id.* at 551.

In proceedings before a Special Master, the United States asserted claims to various water sources in the Colorado River Basin on behalf of twenty-five tribes. But the United States only asserted claims to the Colorado River *mainstream* on behalf of five tribes, and the Nation was not among them. Instead, the United States at that time limited the Nation’s claim to the Little Colorado River, one of the tributaries in the Colorado River system. *Navajo I*, 876 F.3d at 1156 n.13. The Nation, along with other tribes, sought the appointment of a Special Assistant Attorney General to represent their interests, but their request was denied. The Nation also sought to intervene in proceedings before the Special Master, but its motion to intervene was denied at the United States’ urging. *See* Response of the United States to the Motion on Behalf of the Navajo Tribe of Indians for

¹ The BCPA lowered the 1922 Compact’s ratification threshold: six states would suffice for ratification as long as California was among them and committed to a ceiling on its apportionment. *See* 43 U.S.C. § 617c(a).

Leave to Intervene, *Arizona I*, 373 U.S. 546 (No. 8, Original).

The Supreme Court issued its decree in 1964. *See 1964 Decree*, 376 U.S. 340. The Court excluded the Little Colorado River—and therefore the Nation’s claim—from the adjudication, along with other tributaries in the river system. *See id.* art. VIII(B), 376 U.S. at 352–53. It also affirmed the apportionment of the first 7.5 mafy among the Lower Basin States as specified in the BCPA and the accompanying second compact. *Id.* art. II(B), 376 U.S. at 341–42. The Decree stated that in years where there is less than 7.5 million acre-feet available in the Lower Basin, Interior must first “provide[] for satisfaction of present perfected rights in the order of their priority dates without regard to state lines.” *Id.* art. II(B)(3), 376 U.S. at 342. Then, “after consultation with the parties to major delivery contracts and such representatives as the respective States may designate, [the Secretary] may apportion the amount remaining available for consumptive use in such manner as is consistent with” the BCPA, the 1964 Decree, and other applicable federal statutes. *Id.*

The 1964 Decree also determined the *Winters* rights of the five tribes for whom the federal government asserted federally reserved rights. *See id.* at 344–45. Under the *Winters* doctrine, “when the Federal Government withdraws its land from the public domain” for the purpose of establishing an Indian reservation, “the Government, by implication, reserves appurtenant water then unappropriated to the extent needed to accomplish the purpose of the reservation.” *Cappaert v. United States*, 426 U.S. 128, 138 (1976); *see Winters v. United States*, 207 U.S. 564, 576 (1908).

Water is essential to life on earth, *see* Sandra Alters, *Biology: Understanding Life* 39 (3d ed. 2000), and it is particularly essential for healthy human societies.² Further, beyond the general import of water for societies, in the specific case of the Navajo Nation, news reports have indicated that the Nation's shortage of water have in part caused exacerbation of the risks from COVID-19. Many homes on the Reservation lack running water, making it difficult for tribal members to wash their hands regularly. *See* Ian Lovett et. al, *Covid-19 Stalks Large Families in Rural America*, Wall St. J. (June 7, 2020), <https://www.wsj.com/articles/covid-19-households-spread-coronavirus-families-navajo-california-second-wave-11591553896>. The Nation has as a result been particularly affected by the current pandemic, with a death rate significantly higher than that of many other parts of the country. *See id.*³

² It is by no accident that many of the world's ancient civilizations were born in places such as the Tigris-Euphrates delta, and the valleys of the Nile, Indus, and Yellow Rivers. Pierre-Louis Viollet, *Water Engineering in Ancient Civilizations*9 (Forrest M. Holly trans., 2017). The engineers of classical Rome built a vast network of aqueducts that, at its peak, spanned over 250 miles in length. During the Last Gothic War, King Vitiges led an army of Ostrogoths to the gates of Rome itself. The invaders encircled the city and blocked off the aqueducts, keenly aware that the Romans could not survive a prolonged siege without access to water. *See* Peter J. Aicher, *Guide to the Aqueducts of Ancient Rome* 6 (1995). In more recent times, Israel, faced with a paucity of water, has developed techniques for managing wastewater and pioneered desalinization techniques. In 2011, Israel desalinated 296 million cubic meters (MCM) of water out of sea water, and forty-five MCM out of brackish water. *Water Policy in Israel* 5 (Nir Becker ed., 2013).

³ The vast majority of deaths on the Reservation due to COVID-19 are among people aged sixty and older, including the hataalii, traditional

In *Winters*, the United States, acting as trustee of the Fort Belknap Tribe, sought to enjoin upstream diversions on Montana’s Milk River from interfering with the Fort Belknap Reservation’s downstream diversions. *See Winters*, 207 U.S. at 565. Although the 1888 treaty that established the Reservation made no express provision for tribal water rights to the Milk River, the United States maintained that the water had been impliedly reserved to fulfill the purpose of the reservation as a “permanent home and abiding place” for the Fort Belknap Tribe. *Id.* The Court agreed, noting that the Reservation lands “were arid, and, without irrigation, were practically valueless.” *Id.* at 576. The Court applied the Indian canons of construction, under which ambiguities in agreements and treaties with tribes “will be resolved from the standpoint of the Indians,” and held that the Tribe was entitled to federally reserved rights to the Milk River. *Id.*; *see id.* at 576–77.

Winters set a “solid foundation” for later decisions that reaffirmed the scope of Indian reserved water rights. Robert T. Anderson, *Indian Water Rights and the Federal Trust Responsibility*, 46 Nat. Res. J. 399, 414 (2006). Subsequent decisions have established that these rights are determined by federal, not state law. *See* 1 Cohen’s Handbook of Federal Indian Law § 19.03 (Nell Jessup Newton ed., 2019) (Cohen’s Handbook). Moreover, tribal water rights may trump water rights of state users, even when those users have

medicine men and women entrusted with preserving the Nation’s cultural heritage. Jack Healy, *Tribal Elders Are Dying From the Pandemic, Causing a Cultural Crisis for American Indians*, N.Y. Times (Jan. 12, 2021), <https://www.nytimes.com/2021/01/12/us/tribal-elders-native-americans-coronavirus.html>.

been drawing from the water source for a longer time. *See id.*

In awarding five tribes federally reserved water rights, the *Arizona* Court reaffirmed the *Winters* doctrine, noting that “most of the [reservation] lands were of the desert kind—hot, scorching sands—and . . . water from the [Colorado] river would be essential to the life of the Indian people and to the animals they hunted and the crops they raised.” *Arizona I*, 373 U.S. at 599. These five tribes received rights to water commensurate with the “practically irrigable acreage” within each tribe’s reservation. *Id.* at 600; *see 1964 Decree* art. II(D), 376 U.S. at 343–45. However, the Supreme Court declined to adjudicate the claims of the twenty other tribes for whom the United States asserted claims—including the Nation’s. *Arizona I*, 373 U.S. at 595 (“While the [Special] Master passed upon some of these claims, he declined to reach others, particularly those relating to tributaries. We approve his decision as to which claims required adjudication . . .”).

B

Federal Appellees, through Interior and its Secretary, exercise pervasive control over the Colorado River pursuant to the BCPA, the 1964 Decree, and other components of the Law of the River. *See id.* at 593. The Secretary has discretion to apportion shortfalls in years of shortage, *see id.* at 593–94, and also has the authority to determine whether there is a surplus or shortage of water each year, *see 1964 Decree*, art. II(B)(2)–(3), 376 U.S. at 342.

In 1968, Congress enacted the Colorado River Basin Project Act (the “Basin Act”), which requires Interior to manage Lake Mead, Lake Powell, and related facilities in coordination and under long-range operating criteria.

43 U.S.C. § 1552(a). Each year, Interior must determine whether there will be enough water to satisfy the 7.5 mafy budgeted among the Lower Basin states, and whether and how much “surplus” water will be available. *See* 73 Fed. Reg. 19,873, 19,875 (Apr. 11, 2008). In 2001 and 2007, Interior adopted “surplus” and “shortage” guidelines to clarify how it determines whether a particular year was a “shortage” or “surplus” year. *See* 66 Fed. Reg. 7772 (Jan. 25, 2001); 73 Fed. Reg. 19,873 (Apr. 11, 2008).

Before adopting the shortage guidelines, the Secretary published a draft environmental impact statement (EIS) discussing Indian Trust Assets, which are defined as legal interests in assets held in trust by the federal government for federally recognized tribes. *See Final Environmental Impact Statement, Colorado River Interim Guidelines for Lower Basin Shortages and Coordinated Operations for Lake Powell and Lake Mead (Shortage Guidelines FEIS)* 3-87 (Oct. 2007). The EIS acknowledges that under the *Winters* doctrine, the federal government impliedly “reserved water in an amount necessary to fulfill the purposes of an Indian reservation” for the Navajo Reservation. *Id.* at 3-96. The EIS also states that while “[t]he existence of a federally reserved right for the Navajo Nation to mainstream Colorado River has not been judicially determined at this time[, u]nquantified water rights of the Navajo Nation are considered an [Indian Trust Asset].” *Id.*

II

The Nation filed a complaint against Federal Appellees under the Administrative Procedure Act (APA), 5 U.S.C. §§ 701–706, challenging the 2001 Surplus Guidelines. *Navajo I*, 876 F.3d at 1159. The Nation alleged that Federal Appellees violated the National Environmental Policy Act (NEPA), 42 U.S.C. § 4321 *et seq.*, and breached its trust

obligations based on the Federal Appellees' management of the Colorado River without considering or meeting the Nation's unquantified federal reserved water rights and unmet water needs, *Navajo I*, 876 F.3d at 1159. Several parties—Arizona, Nevada, and various state water, irrigation, and agricultural districts and authorities (collectively, “Intervenors”)—intervened to protect their interests in the Colorado's waters. *Id.* The district court dismissed the complaint, holding that the Nation lacked standing to bring its NEPA claims and that its breach of trust claim was barred by sovereign immunity.

On appeal, we agreed with the district court that the Nation lacked standing to bring its NEPA claims but reversed and remanded on the breach of trust claim. *Id.* at 1174. We held that the waiver of sovereign immunity in § 702 of the APA “applie[d] squarely to the Nation's breach of trust claim.” *Id.* at 1173. Because the breach of trust claim was not barred by sovereign immunity, we instructed the district court to fully consider the claim on its merits, “after entertaining any request to amend the claim more fully to flesh it out.” *Id.*

On remand, the Nation twice moved for leave to file an amended complaint. The Proposed Third Amended Complaint (TAC) alleged that the Federal Appellees have failed to (1) “determine the quantities and sources of water required to make the Navajo Nation a permanent homeland for the Navajo People,” and (2) “protect the sovereign interests of the Navajo Nation by securing an adequate water supply to meet those homeland purposes.” The Intervenors opposed both motions to amend, arguing that because the United States could have asserted the Nation's claim to the mainstream of the Colorado River in the *Arizona v. California* litigation and the rights to the River were fully

adjudicated in that action, the Nation's claim was barred by *res judicata*.

The district court denied both motions to amend and dismissed the Nation's complaint with prejudice. The district court held that although a general trust relationship exists between the United States and the tribes, the Nation failed to identify a specific trust-creating statute, regulation, or other form of positive law that the federal government violated. And though the Nation argued that such a specific trust obligation is created under the *Winters* doctrine, the district court held that a determination of whether *Winters* rights attached to the mainstream of the Colorado River was jurisdictionally barred by the Supreme Court's reservation of jurisdiction in *Arizona v. California*. We conclude that the Nation's claim does not implicate the Court's reservation of jurisdiction, and that it therefore was error for the district court not to grapple with the scope of *Winters* rights available to the Nation in connection with its current requests.

The district court further reasoned that even if it could decide the breach of trust claim, *Winters* rights alone do not give rise to specific and enforceable trust duties on the federal government. The district court also held that none of the treaties, statutes, and regulations that the Nation cited in support of its trust claim were "specific . . . trust-creating statute[s] or regulation[s] that the Government violated." Finally, the district court held that the Nation could not allege a common law cause of action for breach of trust that is "wholly separate from any statutorily granted right."

We disagree with the district court as to the role of *Winters* rights in establishing enforceable trust duties. *Winters* rights are necessarily implied in each treaty in which the government took land from Native Americans and

established reservations that were to be permanent homes for them. That was the case with the Nation's reservation. Federal Appellees have an irreversible and dramatically important trust duty requiring them to ensure adequate water for the health and safety of the Navajo Nation's inhabitants in their permanent home reservation.

Because the district court concluded that the Nation's attempts to amend its complaint were futile, the district court denied the motion to amend and dismissed the complaint. The Nation timely appealed. Although the district court did not decide the *res judicata* issue in dismissing the Nation's complaint, Intervenor's assert that *res judicata* defense on appeal.

This appeal presents three issues. First, we determine whether the Nation's breach of trust claim falls within the Supreme Court's reserved jurisdiction in *Arizona v. California*. If it does, we decide whether that jurisdiction is not only reserved, but also *exclusive*. Second, we determine whether the Nation's claim is barred by *res judicata*. Third, we decide whether the Nation could properly state a claim for breach of trust such that amendment was not futile.

III

We review a district court's denial of a motion to amend a complaint for abuse of discretion. *Wheeler v. City of Santa Clara*, 894 F.3d 1046, 1051 (9th Cir. 2018). "A district court's exercise of discretion based on an erroneous interpretation of the law constitutes an abuse of discretion." *Ahlmeyer v. Nev. Sys. of Higher Educ.*, 555 F.3d 1051, 1055 (9th Cir. 2009). Moreover, "[d]ismissal without leave to amend is improper unless it is clear, upon *de novo* review, that the complaint could not be saved by any amendment." *Polich v. Burlington N., Inc.*, 942 F.2d 1467, 1472 (9th Cir.

1991). Finally, we review a district court's decision to dismiss for lack of subject matter jurisdiction *de novo*. *DaVinci Aircraft, Inc. v. United States*, 926 F.3d 1117, 1122 (9th Cir. 2019).

IV

A

We begin with the jurisdictional question. The district court determined it could not decide the Nation's breach of trust claim because it falls within the Supreme Court's reserved jurisdiction under Article IX of the 1964 Decree. Article IX provides that:

Any of the parties may apply at the foot of this decree for its amendment or for further relief. The Court retains jurisdiction of this suit for the purpose of any order, direction, or modification of the decree, or any supplementary decree, that may at any time be deemed proper in relation to the subject matter in controversy.

1964 Decree, art. IX, 376 U.S. at 353. The parties and the district court assumed that this provision reserves the Supreme Court's *exclusive* jurisdiction over—and strips lower courts of jurisdiction to determine—whether the Nation has water rights to a specific allocation from the mainstream of the Colorado River. But in attempting to avoid Article IX's jurisdictional bar, the Nation represents that it does not seek a judicial determination of its rights to the Colorado. The Nation argues that it merely seeks an injunction ordering the Federal Appellees to investigate the Nation's needs for water, to develop a plan to meet those needs, and to exercise its authority over the management of

the Colorado River consistent with that plan. Under this reading of the Nation's claim, the district court only had to consider whether the Nation needs water to fulfill the promise of establishing the Navajo Reservation as a homeland for the Nation's people.

We agree with the Nation's characterization of its claim. A plain reading of the Nation's complaint makes clear that it does not seek a quantification of its rights in the Colorado River. The Nation seeks an injunction "[r]equiring the Federal Appellees . . . (1) to determine the extent to which the Navajo Nation requires water . . . (2) to develop a plan to secure the water needed; (3) to exercise their authorities, including those for the management of the Colorado River, in a manner that does not interfere with the plan to secure the water needed . . . and (4) to require the Federal Appellees to analyze their actions . . . and adopt appropriate mitigation measures to offset any adverse effects from those actions." Granting this scope of relief would not require a judicial quantification of the Nation's rights to water from the River. Nor would it require any modification of the *Arizona* Decree. Furthermore, Article VIII(C) of the Decree provides that the Decree does not affect "[t]he rights or priorities, except as specific provision is made herein, of any Indian Reservation." *1964 Decree*, 376 U.S. at 353. As discussed *infra*, the Nation's claim is not determined by any specific provision in the 1964 Decree, as none addresses the Navajo Nation's water rights. The Nation's breach of trust claim thus falls outside the scope of the Decree, and our jurisdiction is proper.

Because the Nation does not seek a judicial determination of its rights to the waters of the Colorado River, we need not resolve the scope of the Supreme Court's reserved jurisdiction under Article IX. But we note that the

Supreme Court’s own interpretation of the Decree does not expressly state whether Article IX’s reserved jurisdiction is exclusive. In the sequel to *Arizona I*, the federal government sought to increase the water allotments for the five tribes that were awarded federally reserved water rights in the original litigation, arguing that the earlier calculations of the practicably irrigable acreage within the reservations were inaccurate. *Arizona v. California (Arizona II)*, 460 U.S. 605, 608 (1983). The Court denied the request, and stated that if not for Article IX, the Court would have been barred by *res judicata* from re-opening the matter. *Id.* at 617–18. The Court explained that Article IX was “mainly a safety net added to retain jurisdiction and to ensure that we had not, by virtue of *res judicata*, precluded ourselves from adjusting the Decree in light of unforeseeable changes in circumstances.” *Id.* at 622. Because the Supreme Court is best positioned to interpret its own Decree, we defer to the interpretation it laid out in *Arizona II* and understand Article IX primarily as an authorization of jurisdiction, rather than a limitation on it.

Because the Nation neither seeks modification of the Decree nor seeks to relitigate any issues resolved in the *Arizona* cases, *see infra*, however, we need not resolve the scope of the Supreme Court’s jurisdiction under Article IX. We have jurisdiction to consider the Nation’s claim, and the district court erred in holding otherwise.

B

Having established that we have jurisdiction, we turn to the Intervenor’s argument that *res judicata* bars the Nation’s claim. Intervenor’s argue that the Nation’s breach of trust claim is barred by *res judicata* because the Nation effectively seeks a judicial determination of its rights to the Colorado River, which is a claim that the federal government could have asserted on the Nation’s behalf in *Arizona I*, but

did not. We reject the Intervenor's argument because the Nation's claim is not barred by *res judicata*.

In *Nevada v. United States*, 463 U.S. 110 (1982), the Supreme Court held that *res judicata* barred the federal government from seeking additional water rights for the Pyramid Lake Tribe beyond the rights the tribe obtained in previous water rights litigation, *id.* at 113, 145. The *Nevada* Court considered “first if the cause of action which the Government now seeks to assert is the same cause of action that was asserted” in previous litigation, and then “whether the parties in the instant proceeding are identical to or in privity with” the parties in the previous litigation. *Id.* at 130 (internal quotation marks omitted). The Court held that the federal government, in a decades-long adjudication that began in 1913, sought to “assert . . . the Reservation's full water rights.” *Id.* at 132. Because *Nevada* involved the same parties “asserting the same reserved right” as that adjudicated by the previous litigation, *id.* at 134, the later claim was barred.

In this case, by contrast, the Nation asserts a different claim than the water rights claim the federal government could have asserted on the Nation's behalf in *Arizona I*. The Nation's claim, properly understood, is an action for breach of trust—not a claim seeking judicial quantification of its water rights. The federal government's fiduciary duty to the Navajo Nation was never at issue in *Arizona v. California*, and no final judgment was ever entered on the merits of any question concerning that subject. *Cf. Nevada*, 463 U.S. at 129–30. As the Decree does not affect “[t]he rights or priorities” of Indian Reservation beyond those specifically enumerated, *1964 Decree*, 376 U.S. at 353, the federal government's fiduciary duty to the Nation remains unaltered by the *Arizona* litigation.

The Nation's breach of trust claim is not barred by *res judicata*.

C

1

Finally, we address whether the Nation's attempts to amend its complaint to plead their substantive breach of trust claim were futile. The Federal Appellees and the Intervenor argue that the district court correctly denied the Nation's motion for leave to amend its complaint, because it could not point to any specific treaty provision, statute, or regulation that imposed a trust obligation on the Federal Appellees. We disagree and hold that the district court should have allowed the Nation to amend its complaint.

This circuit first considered the requirements a tribe must meet to bring a breach of trust action for non-monetary relief in *Morongo Band of Mission Indians v. F.A.A.*, 161 F.3d 569 (9th Cir. 1998). There, the Morongo Tribe challenged a Federal Aviation Administration (FAA) proposal that would have increased air traffic over reservation lands. *Id.* at 572–73. The Tribe sought non-monetary relief under the APA, alleging violations of various statutes and FAA regulations. *Id.* at 572. We held that “unless there is a specific duty that has been placed on the government with respect to Indians, this responsibility is discharged by the agency's compliance with general regulations and statutes not specifically aimed at protecting Indian tribes.” *Id.* at 574.

We addressed this issue again in *Gros Ventre Tribe v. United States*, 469 F.3d 801 (9th Cir. 2006). There, the Gros Ventre Tribe alleged that the federal government breached its trust obligations “by approving, permitting, and failing to reclaim” two cyanide heap-leach gold mines upriver from

the Tribe's reservation. *Id.* at 806. The panel explained that “an Indian tribe cannot force the government to take a specific action *unless a treaty, statute or agreement imposes, expressly or by implication, that duty.*” *Id.* at 810 (emphasis added) (quoting *Shoshone-Bannock Tribes v. Reno*, 56 F.3d 1476, 1482 (D.C. Cir. 1995)). In holding that the Tribe failed to identify a treaty, statute, or regulation that would create an enforceable trust duty, we observed that the Tribe's treaties with the federal government “at most . . . merely recognize[d] a general or limited trust obligation to protect the Indians against depredations *on Reservation lands.*” *Id.* at 812 (emphasis added). Because the Tribe sought an injunction requiring the federal government to “manage resources that exist *off of the Reservation,*” we held that no treaty provision imposed an enforceable trust duty that could be vindicated through injunctive relief. *Id.* at 812–13 (emphasis added).

Morongo and *Gros Ventre* establish the governing standard here. Although Federal Appellees rely on another strain of cases concerning the need to identify specific statutory bases for obtaining monetary relief under the Tucker Act, 28 U.S.C. § 1491, those cases are not apposite.

The fiduciary claim in this case is one for injunctive relief under § 702 of the APA. In *United States v. Mitchell (Mitchell I)*, 445 U.S. 535 (1980), individual members of the Quinault Tribe sued the federal government through the Tucker Act, 28 U.S.C. § 1491, over alleged mismanagement of timber resources on their allotted reservation lands, 445 U.S. at 537, 539. The timber was managed by the Secretary of Interior under the General Allotment Act (GAA). *Id.* at 537. The Supreme Court rejected the tribal allottees' argument that the GAA imposed enforceable trust duties on the federal government to manage tribal timber

resources in a fiduciary capacity. *Id.* at 546. The Court explained that when Congress enacted the GAA, it intended that the federal government hold the land in trust “not because it wished the Government to control use of the land and be subject to money damages for breaches of fiduciary duty, but simply because it wished to prevent alienation of the land and to ensure that allottees would be immune from the state taxation.” *Id.* at 544. The Court remanded the case to the Court of Claims to consider whether the federal government could be held liable for breach of trust based on any other statutes. *Id.* at 546.

On remand, the Court of Claims held that the government was subject to suit for money damages based on various statutes and regulations detailing the federal government’s responsibilities in managing the tribal timber resources. *United States v. Mitchell (Mitchell II)*, 463 U.S. 206, 211 (1983). The Supreme Court affirmed, holding that the regulations and statutes created an enforceable trust obligation because they accorded the Secretary a “pervasive role in the sales of timber from Indian lands.” *Id.* at 219. The Court observed that a substantive right to sue under the Tucker Act “must be found in some other source of law, such as ‘the Constitution, or any Act of Congress, or any regulation of an executive department.’” *Id.* at 216 (quoting 28 U.S.C. § 1491). “[T]he claimant must demonstrate that the source of substantive law he relies upon ‘can fairly be interpreted as mandating compensation by the Federal Government for the damages sustained.’” *Id.* at 216–17 (quoting *United States v. Testan*, 424 U.S. 392, 400 (1976)).

These Supreme Court decisions concerned suits brought for money damages under the Tucker Act, 28 U.S.C. § 1491, and the Indian Tucker Act, 28 U.S.C. § 1505. But this case

involves a claim for injunctive relief brought under § 702 of the APA, so we are not bound by those decisions.

A more recent decision, *United States v. Jicarilla*, 564 U.S. 162 (2011), concerned a breach of trust claim in a discovery context and imported requirements similar to those stated in the Tucker Act and Indian Tucker Act cases. In *Jicarilla*, the Court decided whether the Jicarilla Apache Nation (the “Tribe”) could assert the “fiduciary exception” to the attorney-client privilege in a suit against the federal government, *id.* at 165. At first, the Tribe sued the government for breach of trust, seeking monetary damages for alleged mismanagement of tribal funds. *Id.* at 166. Then the parties participated in alternative dispute resolution, wherein the government refused to produce certain documents, claiming the attorney-client privilege. *Id.* So the Tribe moved to compel production of those documents. *Id.* at 167. It asserted the “fiduciary exception” to the attorney-client privilege, which states that a trustee cannot assert the privilege against a beneficiary after obtaining legal advice on how to execute its fiduciary obligations. *Id.*

The Court held that the Tribe could not compel the federal government to produce privileged documents in discovery based on the fiduciary exception, because it failed to “point to a right conferred by statute or regulation in order to obtain otherwise privileged information from the Government against its wishes.” *Id.* at 178. In doing so, the Court observed that it had previously “found that particular ‘statutes and regulations . . . clearly establish fiduciary obligations of the Government’ in some areas.” *Id.* at 177 (ellipsis in original) (quoting *Mitchell II*, 463 U.S. at 226). But the Court also explained that “[o]nce federal law imposes such duties, the common law ‘could play a role’” in defining the scope of those duties. *Id.* (quoting *United States*

v. Navajo Nation, 556 U.S. 287, 301 (2009)). Again, *Jicarilla* was at bottom a suit for monetary relief. Its ruling must be understood against that background.

2

Federal Appellees contend that under these precedents, the Nation has failed to state a breach of trust claim because it cannot point to any treaty, statute, or regulation that imposes an affirmative trust duty on the federal government to ensure that the Nation has an adequate water supply. We disagree.

Here, the injunctive relief the Nation seeks would not require the federal government to manage off-reservation resources. Instead, the Nation seeks an injunction compelling the Secretary to determine the extent to which the Reservation requires water from sources other than the Little Colorado River to fulfill the Reservation's purpose of establishing a permanent homeland for the Nation. The mainstream of the Colorado River is appurtenant to the Nation and defines a significant segment of the Reservation's western boundary.

Moreover, neither *Morongo* nor *Gros Ventre* nor *Jicarilla* involved claims to vindicate *Winters* rights, which provide the foundation of the Nation's claim here. Unlike the plaintiffs in those cases, the Nation, in pointing to its reserved water rights, has identified specific treaty, statutory, and regulatory provisions that impose fiduciary obligations on Federal Appellees—namely, those provisions of the Nation's various treaties and related statutes and executive orders that establish the Navajo Reservation and, under the long-established *Winters* doctrine, give rise to implied water rights to make the reservation viable.

Under *Winters*, the federal government “reserve[d] appurtenant water then unappropriated to the extent needed to accomplish” the purpose of establishing the Reservation as a permanent homeland for the Navajo people. *Navajo I*, 876 F.3d at 1155 (quoting *Cappaert*, 426 U.S. at 138). In *Colville Confederated Tribes v. Walton*, 647 F.2d 42 (9th Cir. 1981), we noted that while “[t]he specific purposes of an Indian reservation . . . were often unarticulated,” “[t]he general purpose, to provide a home for the Indians, is a broad one and must be liberally construed,” *id.* at 47. It is clear that the Reservation cannot exist as a viable homeland for the Nation without an adequate water supply. As the Court observed in *Arizona I*:

Most of the land in [the reservations appurtenant to the Colorado River] is and always has been arid. If the water necessary to sustain life is to be had, it must come from the Colorado River or its tributaries. It can be said without overstatement that when the Indians were put on these reservations they were not considered to be located in the most desirable area of the Nation. It is impossible to believe that when Congress created the great Colorado River Indian Reservation and when the Executive Department of this Nation created the other reservations they were unaware that most of the lands were of the desert kind—hot, scorching sands—and that water from the river would be essential to the life of the Indian people and to the animals they hunted and the crops they raised.

373 U.S. at 598–99.

We stress that *Winters* rights are long-established and clearly qualify as rights “by implication” under a treaty. *Gros Ventre*, 469 F.3d at 810 (quoting *Shoshone-Bannock*, 56 F.3d at 1482). Those necessarily implied rights are just as important as express ones. It is not our province to modify the Supreme Court’s definitive law establishing water rights as contained in treaties establishing Native American reservations, whether express or not. None of the twists and turns in the responsible federal agencies’ and courts’ historical treatment of Indian law has brought the *Winters* declaration of necessarily implied water rights into question.

We hold in particular that, under *Winters*, Federal Appellees have a duty to protect the Nation’s water supply that arises, in part, from specific provisions in the 1868 Treaty that contemplated farming by the members of the Reservation. The Treaty provides that individual members of the Nation may select plots of land if they “desire to commence farming.” 1868 Treaty, art. V. Tribal members who took up farming would be entitled to “seeds and agricultural implements” to help make this transition. *Id.* art. VII. The Treaty’s farming-related provisions, which sought to encourage the Nation’s transition to an agrarian lifestyle, would have been meaningless unless the Nation had sufficient access to water.⁴ Indeed, in *Winters* itself, the Court explained that at the time the Fort Belknap Tribe signed its treaty with the federal government, it was the government’s policy to change the Tribe’s “habits and

⁴ In the Nation’s first motion for leave to file a third amended complaint, the Nation sought to add, in addition to its breach of fiduciary duty claim, a claim for breach of the 1849 and 1868 Treaties, but later omitted that claim from its renewed motion. On remand, the district court is instructed that the Nation should be permitted to amend its complaint in this respect if it seeks to do so.

wants” to those of “a pastoral and civilized people.” *Winters*, 207 U.S. at 576. We do not pass judgment on the wisdom of such a policy, nor on the merits of particular allegations that may be offered relating to agrarian rights, but it is clear that the *Winters* Court based its holding in large part on the fact that without water, the reservation lands could not support an agrarian lifestyle in accordance with government policy. *See id.* (“The lands were arid, and, without irrigation, were practically valueless.”).

That the farming provisions in the 1868 Treaty may serve as the “specific statute” that satisfies *Jicarilla*, *Morongo*, and *Gros Ventre* is consistent with more general principles concerning the interpretation of treaties between the United States and Indian tribes. The Supreme Court has explained: “A treaty, including one between the United States and an Indian tribe, is essentially a contract between two sovereign nations.” *Washington v. Wash. State Com. Passenger Fishing Vessel Ass’n*, 443 U.S. 658, 675, *modified sub nom. Washington v. United States*, 444 U.S. 816 (1979) (citing *Lone Wolf v. Hitchcock*, 187 U.S. 553 (1979)). We have inferred a promise of water rights into treaties that contained no explicit reservation of those rights. *See, e.g., Arizona I*, 373 U.S. at 599; *Agua Caliente Band of Cahuilla Indians v. Coachella Valley Water Dist.*, 849 F.3d 1262, 1268 (9th Cir. 2017).

We did so in *United States v. Adair*, 723 F.2d 1394 (9th Cir. 1983), for example, where the Klamath Tribe’s treaty with the United States merely preserved the right to “hunt, fish, and gather on their reservation,” *Id.* at 1398. We recognized that a main purpose of the treaty was to “secure to the Tribe a continuation of its traditional hunting and fishing lifestyle.” *Id.* at 1409. We reasoned that this purpose would have been defeated unless the Klamath Tribe had the

right to enjoy and use water sufficient to ensure an adequate supply of game and fish. *See id.* at 1411. Although the claimed water rights at issue in that case were “essentially nonconsumptive in nature,” *id.* at 1418, *Adair* stands for the broader proposition that we may read water rights into a treaty where those rights are necessary to fulfill the treaty’s primary purpose. *See United States v. Washington*, 853 F.3d 946, 965 (9th Cir. 2017) (“Thus, even if Governor Stevens had made no explicit promise, we would infer, as in *Winters* and *Adair*, a promise to ‘support the purpose’ of the Treaties.”).

Interior’s documents also demonstrate that the Federal Appellees have acknowledged their trust responsibilities to protect the Nation’s *Winters* rights. For example, the final EIS relating to Interior’s shortage guidelines acknowledges that the federal government impliedly “reserved water in an amount necessary to fulfill the purposes of” the Navajo Reservation. *Shortage Guidelines FEIS*, 3-96. The EIS also states that the Nation’s unquantified water rights are considered an Indian Trust Asset, which Interior recognizes as interests that the federal government holds in trust for recognized Indian tribes, and that the federal government must protect. *Id.*

The Nation’s breach of trust claim is also strengthened and reinforced by the Secretary’s pervasive control over the Colorado River. The BCPA requires the United States and all Colorado River users to “observe and be subject to and controlled by” the 1922 Compact, which apportioned the Colorado River’s waters among the Lower Basin states. 43 U.S.C. § 617g(a). But within the general allocation of water that the 1922 Compact entails, the Secretary has pervasive authority “both to carry out the allocation of the waters of the main Colorado River among the Lower Basin

States and to decide which users within each State would get water.” *Arizona I*, 373 U.S. at 580.

In this respect, the Supreme Court’s reasoning in *Mitchell II* is pertinent: just as the statutes and regulations in that case gave the Secretary a “pervasive role in the sales of timber from Indian lands,” 463 U.S. at 219, so too do the BCPA and other components of the Law of the River confer broad authority upon the Secretary to manage and contract for Colorado River water, *see, e.g.*, BCPA, 43 U.S.C. § 617d (“No person shall have or be entitled to have the use for any purpose of the water stored as aforesaid except by contract made as herein stated.”). This pervasive control over the Colorado River, coupled with the Nation’s *Winters* rights, outlines the scope of Federal Appellees’ trust duties.

Our holding is consistent with the Supreme Court’s decision in *United States v. Navajo Nation*. Although the Court there held that “[t]he Federal Government’s liability cannot be premised on control alone,” 556 U.S. at 301, the Court also explained that once a plaintiff identifies a specific duty-imposing treaty, statute, or regulation, “*then* trust principles (including any such principles premised on ‘control’) could play a role in ‘inferring that the trust obligation [is] enforceable by damages.’” *Id.* (quoting *United States v. White Mountain Apache Tribe*, 537 U.S. 465, 473 (2003)). The Nation—which in any case does not here seek money damages—has identified a specific duty-imposing treaty, as we have explained.

To summarize: We hold that the Nation has successfully identified specific treaty, statutory, and regulatory provisions that, taken together, anchor its breach of trust claim. First, we have the implied treaty rights recognized in *Winters*, which in itself gives the Tribe the right to proceed on a breach of trust claim here; second, the 1868 Treaty,

which recognizes the Nation's right to farm Reservation lands and, under *Adair*, gives rise to an implied right to the water necessary to do so; third, the BCPA and other statutes that grant the Secretary authority to exercise pervasive control over the Colorado River; and fourth and finally, the Nation has pointed to Interior regulations and documents in which Federal Appellees have undertaken to protect Indian Trust Assets, including the Nation's as-yet-unquantified *Winters* rights.

Having established that a fiduciary duty exists, we hold that common-law sources of the trust doctrine and the control the Secretary exercises over the Colorado River firmly establish the Federal Appellees' duty to protect and preserve the Nation's right to water. Under *Winters*, when the federal government took the Reservation into trust, it "reserve[d] appurtenant water then unappropriated to the extent needed to accomplish" that purpose. *Navajo I*, 876 F.3d at 1155 (quoting *Cappaert*, 426 U.S. at 138). These rights are recognized as reserved by treaty, applying the canon that in "agreements and treaties with the Indians, ambiguities occurring will be resolved from the standpoint of the Indians." *Winters*, 207 U.S. at 576; see *Washington*, 853 F.3d at 965. Though water rights are not expressly stated in the Nation's treaties with the United States, the *Winters* rights that attach to the Reservation are sufficiently well-established to create an implied fiduciary obligation on the Federal Appellees. See *Gros Ventre*, 469 F.3d at 810 (noting that a specific duty can be imposed by "a treaty, statute or agreement . . . expressly or by implication.") (quoting *Shoshone-Bannock*, 56 F.2d at 1482).

We recognize that no court has yet quantified the Nation's *Winters* rights. But the fault for the exceedingly long delay in that respect, if any, lies with Federal Appellees.

As trustee, the federal government has the power to not only bring water rights claims on behalf of the tribes, but also to bind them in litigation. *See Nevada*, 463 U.S. at 135. When the Nation tried to intervene in *Arizona v. California*, the federal government opposed the Nation’s motion. And in the more than half of a century since the Supreme Court issued its 1964 Decree, the Nation has never had its *Winters* rights adjudicated or quantified by any court.⁵ This result is but one example of what a commentator has described as the federal government’s failure “to secure, protect, and develop adequate water supplies for many Indian tribes.” Cohen’s Handbook § 19.06. Indeed, “[i]n the history of the United States Government’s treatment of Indian tribes, its failure to protect Indian water rights for use on the reservations it set aside for them is one of the sorrier chapters.”⁶ *Id.* (citing National Water Comm’n, *Water Policies for the Future: Final Report to the President and to the Congress of the United States*, 474–75 (1973)); *see also* Anderson, *supra*, at 400.

The Supreme Court could not have intended to hamstring the *Winters* doctrine—which has remained good law for more than one hundred years—by preventing tribes from seeking vindication of their water rights by the federal government when the government has failed to discharge its duties as trustee. Such a perverse reading of the Court’s

⁵ The Nation is actively seeking water from various sources in other litigation. *See generally Navajo I*, 876 F.3d at 1156 n.14.

⁶ Perhaps recognizing this failure, some members of Congress have proposed legislation that would empower the Administrator of the Environmental Protection Agency to “give priority to projects that respond to emergency situations where a lack of access to clean drinking water threatens the health of Tribal populations” in the Columbia River Basin. S. 421, 117th Cong. § 2 (2021).

precedents would render ineffectual the federal government's promise to "charge[] itself with moral obligations of the highest responsibility and trust," *Seminole Nation v. United States*, 316 U.S. 286, 297 (1942), by ensuring that the tribes of this country can make their reservation lands livable. This principle takes on even more importance in an era in which the COVID-19 pandemic renders reservation lands more dangerous to tribal members—particularly when they lack adequate water for health and safety purposes.

The Nation's attempts to amend its complaint were not futile. The Nation can state a cognizable claim for breach of trust because it has identified specific regulations and treaty provisions that can "fairly be interpreted," *Mitchell II*, 463 U.S. at 218, as establishing Federal Appellees' fiduciary obligations to ensure that the Nation's Reservation has the water it needs to exist as a viable homeland for the Navajo people.

At this early stage of litigation, we decline to address whether the Nation's *Winters* rights include rights to the mainstream of the Colorado River or to any other specific water sources. We hold only that the Nation may properly base its breach of trust claim on water rights derived from its treaties with the United States under *Winters*, and so may amend its complaint to so allege.

V

Because the district court's denial of the Nation's motion for leave to amend and subsequent dismissal of the Nation's complaint were based on legal errors, the court abused its discretion. Applying the correct legal principles, we hold that the Nation's attempts to amend its complaint were not futile. We reverse the district court's dismissal of the

Nation's complaint and remand to the district court with instructions to permit amendment to the complaint consistent with this opinion.⁷

REVERSED AND REMANDED.

LEE, Circuit Judge, concurring:

I write separately to emphasize that the Nation's proposed injunctive relief should not and does not implicate the Supreme Court's retained jurisdiction in *Arizona v. California (1964 Decree)*, 376 U.S. 340, 353 (1964).

When the Supreme Court first adjudicated the rights to the Colorado River, it issued a Decree listing the Indian tribes and other entities holding present perfected rights to the mainstream. *Id.* at 344–46. Article IX of the Decree “retain[ed] jurisdiction . . . for the purpose of any order, direction, or modification of the decree, or any supplementary decree . . .” *Id.* at 353. Since then, there have been several iterations of the *Arizona v. California* litigation, but none has explicitly addressed whether Article IX reserves exclusive jurisdiction for adjudication of rights to

⁷ As the concurrence recognizes, we need not and do not decide whether the Supreme Court's retained jurisdiction in the 1964 Decree is exclusive. That is because the Nation's claim does not seek a quantification of any rights it may have to the Colorado River mainstream. If, however, Federal Appellees later determine that they cannot meet their trust obligation to provide adequate water for the Nation unless the jurisdictional question is resolved, then they can petition the Supreme Court for modification of the 1964 Decree.

the mainstream. *See, e.g., Arizona v. California (Arizona II)*, 460 U.S. 605, 622 (1983).

In this case, the Nation seeks additional water for its Reservation, and both the parties and the district court considered whether the Supreme Court's retained jurisdiction applied. But our decision does not answer that question, as the Nation's Proposed Third Amended Complaint ("TAC") does not, on its face, actually seek rights to the mainstream.

The Nation's TAC seeks injunctive relief requiring, in part, that the Federal Defendants "determine the extent to which the Navajo Nation requires water from sources other than the Little Colorado River to enable its Reservation to serve as a permanent homeland for the Navajo Nation and its members" and "develop a plan to secure the water needed." The Nation asserts, and our decision affirms, that this proposed injunction does not ask the district court to quantify any rights that the Nation may have to the Colorado River mainstream. This narrow construction of the proposed relief is imperative, as it allows the Nation to pursue its claims without raising the separate and more complex issue of the Supreme Court's retained jurisdiction.

Thus, on remand and in all future proceedings, the TAC's proposed injunctive relief should not be construed as implicitly authorizing a reassessment of the rights to the Colorado River mainstream. In other words, the requested relief that the Federal Defendants develop a plan to meet the Nation's water needs cannot be used as a backdoor attempt to allocate the rights to the mainstream. If such rights are to be reassessed, that action may be taken only after resolving the jurisdictional question raised by Article IX of the 1964 Decree.

Covid-19 Stalks Large Families in Rural America

WSJ [wsj.com/articles/covid-19-households-spread-coronavirus-families-navajo-california-second-wave-11591553896](https://www.wsj.com/articles/covid-19-households-spread-coronavirus-families-navajo-california-second-wave-11591553896)

June 7, 2020

June 7, 2020 2:22 pm ET

By Ian Lovett, Dan Frosch and Paul Overberg

The Woods family did everything together at the house on Paden Road in Gadsden, Ala. They gathered there before going to high-school football games on Friday nights. They ate there after church on Sundays, when the family matriarch, Barbara Woods, would make chicken and dressing for her children and grandchildren.

And this spring, they grew sick there together. For weeks in early April, seven family members staying in the three-bedroom home were stricken by the new coronavirus, several of them recounted. Five ended up in the hospital. Two died.

“I was just wishing that we had extra rooms, so we could have separated,” said Ms. Woods, 71, who for years owned a barbecue restaurant in Gadsden, a rural town 60 miles northeast of Birmingham. “It has been devastating.”

Communities are reopening after months-long lockdown orders managed to slow the spread of Covid-19 in some places. But the lockdowns have done little to thwart the virus’s transmission within packed households. Outside of institutional settings like assisted-living facilities, large, multigenerational homes have emerged as one of the most dangerous places to be during the outbreak—a weak spot in the country’s public health response especially in the event of another wave of infections in the fall, as some experts fear.

A Wall Street Journal analysis found that, across the country, the virus has spread more widely in places with the most crowded households, not necessarily places with the largest or densest populations. Remote, rural hamlets where extended families live under the same roof have turned deadlier than some of the densest blocks of Manhattan or Chicago, the analysis found. In both contexts, the virus has zeroed in on crowded homes, sometimes wiping out generations in a matter of days.

Housing analysts and some government agencies consider a home with more than one resident per room to be crowded. Nationwide—4 million homes, or about 3%—fall into this category, according to census data.



Barbara Woods, center, and her daughters Kyra Porter, left, and Johnjalene Woods all had Covid-19.

Photo: Lynsey Weatherspoon for The Wall Street Journal

The Journal analyzed all 1,487 U.S. counties with at least 50 Covid-19 cases, as of June 7. The 10% with the highest rates of crowding accounted for 28% of the coronavirus cases among those 1,487 counties, according to census and Johns Hopkins University data.

The Journal also found that in selected areas—including Cook County, Ill., New York City and Wayne County, Mich.—ZIP Codes with the largest share of households of at least five people have disproportionate shares of their counties' Covid-19 infections. The problem is particularly acute in poorer and minority communities, according to data from some cities, where extended families often live together and lack space and resources to isolate anyone who falls ill.

Crowded Homes

Families that live on Indian reservations often live in crowded homes, which the census defines as more than one occupant per room. These areas have also seen some of the highest infection rates in the nation.

Percentage of households that are crowded

Covid-19 cases per 100,000 as of June 5

Sources: U.S. Census Bureau; Johns Hopkins Center for Systems Science and Engineering

As states reopen, stopping transmission of the virus within households will be key to preventing a second wave of infections, said Dr. Ashish Jha, a health-policy professor at the Harvard T.H. Chan School of Public Health.

San Francisco, Kansas and the Navajo Nation in the Southwest are among the places that have encouraged sick people to leave their homes and stay in alternative housing sites and hotels that have been converted into quarantine facilities. Yet, persuading people to do so has been difficult, health workers say, and there is little appetite among public officials to make the sick leave their families.

“I’m 110% opposed to anything forcible on this,” said Dr. Jha. But if the U.S. can’t find a way to control intra-household infections, he said, “that will lead to more community transmission.”

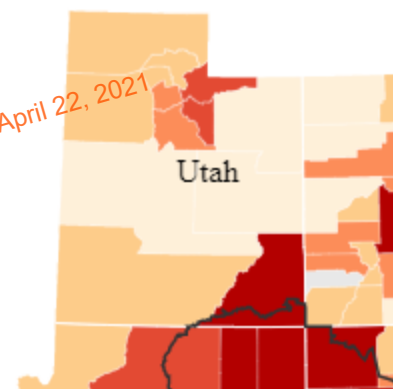
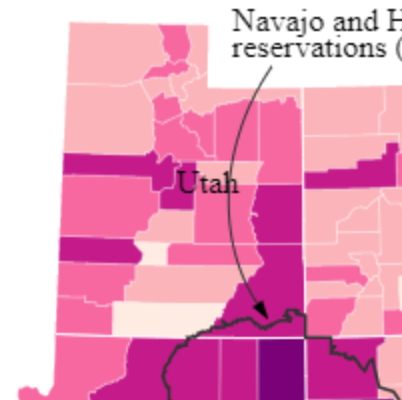
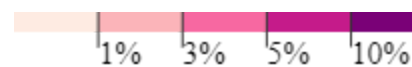
‘Big Cough-19’

On the Navajo Nation, where roughly 175,000 people are scattered across a three-state swath of the Southwest, household crowding has contributed to one of the country’s worst outbreaks. Some 18% of homes have five or more people and 14% are classified as crowded, among the highest rates in the country, according to census data.

The Navajo Nation’s coronavirus death rate was 154 per 100,000 people as of June 5—compared with 123 in New York state, 136 in New Jersey and 33 for the U.S. overall.

Tina Harvey lives with her extended family in a cluster of several small houses in the tiny Navajo village of Tes Nez Iah, Ariz. None of the structures have running water, not uncommon on the reservation, making it difficult to wash hands regularly. Ms. Harvey, a 55-year-old home health-care worker, has watched with horror as “Big Cough-19” or “Invisible Parasite-19,” as the coronavirus is known in Navajo, struck family member after family member.

First, she said, it was her brother, Amos Tso, 71, who fell ill in April after returning from New Mexico, where he had gone to have toes amputated due to an infection. On April 4, his niece, one of numerous family members caring for Mr. Tso, drove him to an Indian Health Service



clinic after he began experiencing body aches and breathing problems. Seven days later, he was dead from Covid-19.

In one trailer, four of the six family members who stayed there began running fevers, coughing and suffering body aches, Ms. Harvey said. They all tested positive for the coronavirus and were sent home with Tylenol and cough syrup, she said.

In a second trailer, another sister and her husband, in their 60s, fell ill. Their grandson, who lived with them and was sick too, drove them to an IHS hospital in Shiprock, N.M. The couple died days later.

The IHS didn't respond to a request for comment on Ms. Harvey's family's case.

In all, 11 family members got sick, including Ms. Harvey, who was hospitalized for nearly two weeks. "It has been very hard—what has happened to us," she said. "Right now, people are scared to turn up the road to our house. 'Those people over there. They all have coronavirus. They're dying.' That's what we've been hearing."

Tribal leaders and health officials said it has been difficult to keep the virus from ricocheting through crowded homes on the reservation.





cited in Navajo Nation v. USDOJ No. 19-17088 archived on April 22, 2021





Tina Harvey in Tes Nez Iah, Ariz., holds a portrait of her sister Jane and brother-in-law Richard Mustache, who both died of Covid-19.

Photographs by Sharon Chischilly for The Wall Street Journal

Eric Pelt, grandson of Jane and Richard, tends to his late grandparents' sheep in May. He tested positive for Covid-19.

Nine of Ms. Harvey's family members who stayed on the family land, and two more who came there to help, became ill with Covid-19.

Martha and Clifford Yazzie, members of Ms. Harvey's family, at home in Tes Nez Iah. Both were sick with Covid-19.

“It is physically impossible to practice social distancing in these homes,” said Dr. Loretta Christensen, chief medical officer for the IHS’s Navajo area. “We have discovered people living in their cars to avoid exposing their families to Covid-19.”

Adding to their struggles: a lack of resources and issues with poor care at the IHS before the pandemic struck.

Hoping to get sick people out of their households, the IHS and tribal health officials have set up quarantine sites where more than 165 people were staying as of Friday, mostly in converted hotel rooms. Health officials were also deploying isolation tents for those who want to remain on their land.

The infections on the reservation have spilled into surrounding communities. McKinley County, part of which lies on the reservation, comprises about 3.4% of New Mexico’s population but has nearly a third of its Covid-19 cases, according to state data. About 14% of the county’s homes are crowded, compared with 3.5% statewide, according to census data.

Share Your Thoughts

What should the government and health authorities do—if anything—about the spread of Covid-19 in large households? Join the conversation below.

Household crowding is also helping fuel the outbreak in urban areas.

A study from New York University’s Furman Center found that in New York City, the areas hit hardest by the disease weren’t those with the densest population; they were the ones with the greatest household crowding among renters.

The Journal analysis found that in Chicago, ZIP Codes where crowded households are most common accounted for a disproportionate share of the city’s coronavirus cases. The Humboldt Park neighborhood on Chicago’s West Side, for example, has a household crowding rate more than eight times as high as the Evergreen Park area, on the city’s outskirts. Its infection rate is twice as high.

Household crowding frequently overlaps with other risk factors, studies show. It is more common in poorer neighborhoods, where residents are more likely to have underlying health conditions and to still be working outside the house during the outbreak.

Covid-19 has disproportionately hit African-Americans and Latinos, several studies have shown. Black and Latino households are almost twice as likely to be multigenerational as white households, according to the Pew Research Center.

Essential worker

In California, the three counties with the highest coronavirus rates—Kings County, Imperial County and Los Angeles County—are majority Latino and Black and have among the highest rates of household crowding in the country.

In Azusa, Calif., a working-class, mostly Latino city in eastern Los Angeles County, the Ramirez family took strict precautions to avoid spreading the coronavirus. By mid-March, no one was working outside the home except Guillermo Ramirez, said his wife, Luciana Ramirez. His job driving trucks for an asphalt company was among work Gov. Gavin Newsom deemed essential.

A study from the Public Policy Institute of California found that essential workers are at higher risk of contracting Covid-19—and more likely to live in crowded homes.

Mr. Ramirez, 47, wore a mask and gloves on the job, and he would spray off his shoes before coming into the five-bedroom house. Only he and Guillermo Jr., his 25-year-old eldest son, shopped for food, and they washed the groceries off before bringing them inside, Ms. Ramirez said. Still, after spending Easter Sunday watching movies and playing games with her children and grandchildren, Ms. Ramirez began to feel feverish.

She isolated herself in the bedroom, and Mr. Ramirez moved to the living room. But within days, the virus had swept through the household. Ultimately, all 10 people living there—Mr. and Ms. Ramirez; four of their children; three grandchildren and Ms. Ramirez's mother, who was staying with them at the time—tested positive for Covid-19.



Guillermo Ramirez and his wife, Luciana, celebrate Christmas Eve 2019 with their family at home in Azusa, Calif.

Photo: Ramirez family

By late April, the entire family had isolated from one another in their rooms and wore masks. Their 26-year-old daughter, who lives down the street, dropped groceries outside the front door. Their 12-year-old son, who was asymptomatic, slept on the couch and left food and water outside his relatives' rooms.

First, Guillermo Jr. went to the hospital. Then Mr. Ramirez himself. Then Ms. Ramirez's mother. On April 28, Mr. Ramirez called his wife from the Emanate Health Inter-Community Hospital in West Covina at 3 a.m., telling her he was frightened and she needed to pick him up. By 8 a.m., she said, he was dead.

Ms. Ramirez, 46, said the family tried desperately to keep from spreading the virus to one another—even after the funeral, they continued to wear masks at home—but it was impossible once the disease was in the house.

“It is a big house, but you have to pass each other through the hallways,” Ms. Ramirez said. “We took it serious. We got hand sanitizer. We got masks. We got our gloves. We got Lysol. We sprayed our shoes. We did everything right and we still got it, and it affected us this way.”

Recognizing that simply staying at home won't stop transmission of the virus, countries in Asia have adopted more drastic measures. Singapore and South Korea required all people who test positive for Covid-19 to move into isolation or medical facilities; Vietnam and Hong Kong extended mandatory out-of-home quarantining to contacts of the sick as well.

In Italy, where multigenerational households are common and most people with Covid-19 remain at home, the country's National Health Institute found that one in five people who have tested positive in April and early May were likely infected by family members, the second-highest source of infection after nursing homes.

A study from the London School of Hygiene & Tropical Medicine found that in a city of four million people, home-based isolation would result in a 20% reduction in coronavirus cases, while isolation in quarantine centers would cut cases by 59%.

In the U.S., quarantine centers have been used sparingly. Because testing hasn't been as widespread as in some other countries, many people have passed the virus to loved ones before even realizing they are sick.

Kansas officials have set up quarantine centers in six counties across the state, including Ford County, where outbreaks at two meatpacking plants have sickened workers and their family members. The county of 33,600 people has more than 1,800 confirmed cases, the highest total in the state. According to census data, 18% of households in Ford County have five or more people and 7.1% are crowded, both well above the national average.

As of Saturday, only 8 Covid-positive people were checked into the quarantine center in Ford County, state health officials said. Statewide, just 12 of more than 300 available rooms for infected residents were occupied. Public-health officials and immigrant advocates said some workers in the county, who may be undocumented, are wary of using the facilities. A Ford County official said the quarantine centers were working well.

San Francisco has contracted with hotels to provide more than 1,000 rooms where people who get sick can isolate and are provided with three meals a day. But convincing the sick to leave their families can be difficult, said Trent Rhorer, director of San Francisco's Human Services Agency.

“Often, the family bond is strong—you have multigenerational households and they all rely on each other for income, or to cook, or to clean,” Mr. Rhorer said.

The Woods Family

Even in places that have escaped the worst of the outbreak, crowded households have proven vulnerable. In Gadsden, a working-class town of 35,000 along Alabama's Coosa River, the Woods family was decimated by the very closeness that had for so long been their bedrock.

When Ms. Woods's 24-year-old grandson got sick in late March, he didn't realize it was Covid-19 and came to her house so his grandmother and mother, who also lived there, could take care of him, family members said. When Ms. Woods' youngest daughter, Kyra Porter, 48, grew ill, she too came to the house on Paden Road. Seven people were now staying in three bedrooms—Ms. Woods and her husband, all three of her daughters, her son-in-law and her grandson.

Ms. Woods' oldest daughter died April 13. Ms. Woods' husband, age 70, died five days after. A nephew who lived nearby died the same day.







Barbara Woods, foreground, and members of her family who survived Covid-19.

Photos by: Lynsey Weatherspoon for The Wall Street Journal

A photo collage of Billy Ray Woods, Phacethia Posey and Michael Todd Woods, who died of Covid-19. The family held all three funerals on April 22.

Barbara Woods's home in Gadsden, Ala., where seven family members were sick with the virus.

Johnjalene Woods, left, and Kyra Porter wear earrings with pictures of their sister who died of Covid-19.

Etowah County, in which Gadsden lies, is among the U.S. counties with more than 50 Covid-19 cases and is near the national average for crowded homes. A dozen people have died of Covid-19 in the county of 102,000. Of those 12 deaths, three were in the Woods family.

The family held all three funerals April 22, each with no more than 10 people.

“Everything happened so fast,” said Ms. Porter. “Walking into the house after the funeral and them not being there, it just seemed like a dream. It was almost like, ‘Are you guys hiding from us? Are you going to come back?’ ”

Write to Ian Lovett at ian.lovett@wsj.com, Dan Frosch at dan.frosch@wsj.com and Paul Overberg at paul.overberg@wsj.com

Copyright ©2020 Dow Jones & Company, Inc. All Rights Reserved.
87990cbe856818d5eddac44c7b1cdeb8

Appeared in the June 8, 2020, print edition as '.'

cited in Navajo Nation v. USDOJ No. 19-17088 archived on April 22, 2021

Tribal Elders Are Dying From the Pandemic, Causing a Cultural Crisis for American Indians

[nytimes.com/2021/01/12/us/tribal-elders-native-americans-coronavirus.html](https://www.nytimes.com/2021/01/12/us/tribal-elders-native-americans-coronavirus.html)

By Jack Healy
Photographs by Victor J. Blue
Published Jan. 12, 2021
Updated Jan. 19, 2021



Pall bearers with the coffin of Jesse Taken Alive, a Lakota member of the Standing Rock Tribe, who died from Covid-19, at Kesling Funeral Home in Mobridge, S.D., last month. Credit...

Listen to This Article

Listen 10:46

To hear more audio stories from publishers like *The New York Times*, [download Audm for iPhone or Android](#).

STANDING ROCK RESERVATION, N.D. — The virus took Grandma Delores first, silencing an 86-year-old voice that rang with Lakota songs and stories. Then it came for Uncle Ralph, a stoic Vietnam veteran. And just after Christmas, two more elders of the Taken Alive family were buried on the frozen North Dakota prairie: Jesse and Cheryl, husband and wife, who died a month apart.

“It takes your breath away,” said Ira Taken Alive, the couple’s oldest son. “The amount of knowledge they held, and connection to our past.”

One by one, those connections are being severed as the coronavirus tears through ranks of Native American elders, inflicting an incalculable toll on bonds of language and tradition that flow from older generations to the young.

“It’s like we’re having a cultural book-burning,” said Jason Salsman, a spokesman for the Muscogee (Creek) Nation in eastern Oklahoma, whose grandparents contracted the virus but survived. “We’re losing a historical record, encyclopedias. One day soon, there won’t be anybody to pass this knowledge down.”

The loss of tribal elders has swelled into a cultural crisis as the pandemic has killed American Indians and Alaska Natives at nearly twice the rate of white people, deepening what critics call the deadly toll of a tattered health system and generations of harm and broken promises by the U.S. government.

Image



Jessie Taken Alive-Rencountre, left, with her sister Nola Taken Alive on Christmas morning. Their parents died a month apart, both from the coronavirus.

Image



This sisters placed a bundle of sage in their mother's coffin.

The deaths of Muscogee elders strained the tribe's burial program. They were grandparents and *mikos*, traditional leaders who knew how to prepare for annual green-corn ceremonies and how to stoke sacred fires their ancestors had carried to Oklahoma on the Trail of Tears. One tiny Methodist church on the reservation recently lost three cherished great-aunts who would sneak candy and smiles to restless children during Sunday services.

"We'll never be able to get that back," Mr. Salsman said.

Tribal nations and volunteer groups are now trying to protect their elders as a mission of cultural survival.

Your Coronavirus Tracker: We'll send you the latest data for places you care about each day. Navajo women started a campaign to deliver meals and sanitizer to high-desert trailers and remote homes without running water, where elders have been left stranded by quarantines and lockdowns of community centers. Some now post colored cardboard in their windows: green for "OK," red for "Help."

In western Montana, volunteers led by a grocery-store worker put together turkey dinners and hygiene packets to deliver to Blackfeet Nation elders. In Arizona, the White Mountain Apache sent out thermometers and pulse oximeters and taught young people to monitor their grandparents' vital signs.

Across the country, tribes are now putting elders and fluent Indigenous language speakers at the head of the line for vaccinations. But the effort faces huge obstacles. Elders who live in remote locations often have no means to get to the clinics and hospitals where vaccinations are administered. And there is deep mistrust of the government in a generation that was subjected without consent to medical testing, shipped off to boarding schools and punished for speaking their own language in a decades-long campaign of forced assimilation.

Image



Ira Taken Alive at the burial of his parents. “It takes your breath away,” he said. “The amount of knowledge they held, and connection to our past.”

Image



Mourners paid their respects at the burial service.

About a year into the pandemic, activists say there is still no reliable death toll of Native elders. They say their deaths are overlooked or miscounted, especially off reservations and in urban areas, where some 70 percent of Indigenous people live.

Adding to the problem, tribal health officials say their sickest members can essentially vanish once they are transferred out of small reservation health systems to larger hospitals with intensive-care units.

[The Coronavirus Outbreak >](#)

“We don’t know what happens to them until we see a funeral announcement,” said Abigail Echo-Hawk, director of the Urban Indian Health Institute.

The virus claimed fluent Choctaw speakers and dressmakers from the Mississippi Band of Choctaw Indians. It took a Tulalip family matriarch in Washington State, then her sister and brother-in-law. It killed a former chairman of the Yocha Dehe Wintun Nation in California who spent decades fighting to preserve Native arts and culture. It has killed members of the American Indian Movement, a group founded in 1968 that became the country’s most radical and prominent civil rights organization for American Indian rights.

On the Navajo Nation, where 565 of the reservation’s 869 deaths are among people 60 and older, the pandemic has devastated the ranks of hataalii, traditional medicine men and women.

When the virus exploded across the Navajo Nation, traditional healers who use prayer, songs and herbs as treatments tried to protect themselves with masks and gloves. They wrapped ceremonial objects in plastic. They set hand sanitizer outside traditional hogan dwellings.

Image



A funeral procession for Jesse and Cheryl Taken Alive.

But people came, seeking help with their grief or prayers for ailing relatives. And the healers got sick.

Now, remote meetings of the Diné Hataakii Association, a group of Navajo medicine men and women, include updates on who has died, members said. The roster of loss now includes Avery Denny's 75-year-old grandfather and 78-year-old aunt, who both died of the virus.

"When they pass on, all that knowledge is gone forever, never to be retained," said Mr. Denny, a member of the association and professor at Diné College. "It's just lost."

Cemeteries are filling up on the rolling plains of the Standing Rock Sioux in western North Dakota, where families like the Taken Alives have buried multiple grandparents, matriarchs and patriarchs. Standing Rock has recorded 24 deaths during the pandemic.

In 2016, the tribe's fight to block an oil pipeline propelled Standing Rock to international fame, drawing thousands of activists to protest camps that sprawled along the Missouri River. This winter, Standing Rock's families are waging a lonelier battle as the virus rages through crowded multigenerational homes where elders raise children and pass along their language — a crucial role that has made them incredibly vulnerable.

Diane Gates, 75, one of Standing Rock's first elders to die of the virus, lived with multiple family members, relatives said. Her 75-year-old sister-in-law, Reva, who recently had open-heart surgery, also lives with several grandchildren in an isolated corner of the reservation. They see few visitors and have a lock on their gate, and they try to protect themselves with herbs and steam treatments. But there is always the risk of what a granddaughter could bring home from work.

Tribal health workers say they are also tired and overwhelmed, the strains of fighting Covid compounded by isolation, distance and a lack of resources.

Image



The Fort Yates Indian Health Service Hospital on the Standing Rock Reservation. The pandemic has challenged the health care system for American Indian tribes.

Image

SR ST COVID-19 snapshot		Active
Active Cases	- 40	15
Pending	-	5
Current Hospitalized	-	10
Total Deaths	- 20	5
*Cases confirmed thru Case Investigation 2:50 pm 12/11/20 We are working with CDC for additional updated information.		0
	Long Soldier	0
	Cannonball	0
	Porcupine	0
	Bear Soldier	0
	Wakpala	0
	Kenel	0
	Running Antelope	0
	Rock Creek	5
	Unknown	
		Total Active 40

Statistics on Covid-19 cases were written on a white board for contact tracers in their offices on the Standing Rock Reservation.

The Standing Rock Sioux had to create their own contact-tracing team after tribal officials said governments in North Dakota and South Dakota failed to track the virus. Over the summer, bureaucratic conflicts scuttled an effort to set up a testing site on the southern end of the reservation, forcing people without cars to hitchhike or walk for miles to get swabbed. Those who do recover from the virus often find themselves stranded at hospitals hundreds of miles from the reservation, and have to call a tiny team of drivers to shuttle them home.

In October, as an outbreak of coronavirus swarmed across North Dakota, Rita Hunte, 66, woke one morning gasping for breath in her riverside community of Cannon Ball. She called her daughter and said: My girl, I don't know what to do.

She spent two days in the 12-bed Indian Health Service hospital on the reservation, begging to be transferred out, her daughter, Marlo, said. She was taken to a hospital in Fargo where she lingered for weeks, mostly unconscious and on a breathing machine, as her daughter washed her hair and tried to move her arms and legs to reduce the swelling. She died on Nov. 29.

Ms. Hunte was one of just 290 people who still spoke fluent Dakota, and in her work with a tribal cancer program, she would often pray with patients before they traveled to Bismarck or the Mayo Clinic for treatment.

Since her death, her widower, Marlon, has been trying to stay busy with church services where he plays acoustic guitar and lays hands on people as they testify to the goodness of the Lord. But his daughter said that Mr. Hunte's role as a respected elder has paradoxically isolated him even further. Some neighbors now keep their distance because they are uneasy about asking whether he is doing OK, Marlo Hunte said.

"I feel a little lost there every now and then," Mr. Hunte said.

Image



Marlon Hunte, whose wife Rita died of Covid-19, preaching at an evening service at Word of God Ministries church in Fort Yates, N.D.

Image



Mr. Hunte prayed with Helen Flood, 76, of Gering, Neb., an Oglala Lakota woman whose husband was hospitalized with the coronavirus.

Many of the elders now perishing are dying after months of monastic precautions. When the pandemic first erupted, Jesse Taken Alive helped record public-service messages in Lakota urging fellow elders to protect themselves. He set up a computer in the tepee beside his home where he taught remote language classes.

But as the pandemic grew worse, requests from his community piled up: Help with funeral prayers. Help with a ceremony. He had been a tribal chairman, and he and his wife, Cheryl, had spent their lives trying to help people on Standing Rock, whether it was fighting for tribal land and sovereignty or addressing a rash of suicides.

“We tried our best to keep everyone away,” their daughter Nola Taken Alive said. “But my Dad had a hard time saying no when people needed him.”

The couple ended up on separate floors of the same hospital in Fargo. When Cheryl died in November, the fight began to fade in Jesse, said his son, Ira, who is also vice-chairman of the Standing Rock Sioux Tribe. Jesse Taken Alive died on Dec. 14. The family has been reflecting on the loss — Delores, the walking dictionary of Lakota linguistics. Ralph’s quiet dignity. Jesse and Cheryl’s deep faith and love for each other and their people.

“We’ll still be here,” Nola Taken Alive said. “But it’s going to be a struggle. How do I fill their shoes?”

Image



The coffins of Jesse and Cheryl Taken Alive, who died one month apart.

Jack Healy is a Colorado-based national correspondent who focuses on rural places and life outside America's "City Limits" signs. He has worked in Iraq and Afghanistan and is a graduate of the University of Missouri's journalism school. @jackhealynyt • Facebook

A version of this article appears in print on Jan. 13, 2021, Section A, Page 6 of the New York edition with the headline: Cultural Crisis for American Indians as Elders Die. Order Reprints | Today's Paper | Subscribe

United States Court of Appeals for the Ninth Circuit

Office of the Clerk
95 Seventh Street
San Francisco, CA 94103

Information Regarding Judgment and Post-Judgment Proceedings

Judgment

- This Court has filed and entered the attached judgment in your case. Fed. R. App. P. 36. Please note the filed date on the attached decision because all of the dates described below run from that date, not from the date you receive this notice.

Mandate (Fed. R. App. P. 41; 9th Cir. R. 41-1 & -2)

- The mandate will issue 7 days after the expiration of the time for filing a petition for rehearing or 7 days from the denial of a petition for rehearing, unless the Court directs otherwise. To file a motion to stay the mandate, file it electronically via the appellate ECF system or, if you are a pro se litigant or an attorney with an exemption from using appellate ECF, file one original motion on paper.

Petition for Panel Rehearing (Fed. R. App. P. 40; 9th Cir. R. 40-1)

Petition for Rehearing En Banc (Fed. R. App. P. 35; 9th Cir. R. 35-1 to -3)

(1) A. Purpose (Panel Rehearing):

- A party should seek panel rehearing only if one or more of the following grounds exist:
 - ▶ A material point of fact or law was overlooked in the decision;
 - ▶ A change in the law occurred after the case was submitted which appears to have been overlooked by the panel; or
 - ▶ An apparent conflict with another decision of the Court was not addressed in the opinion.
- Do not file a petition for panel rehearing merely to reargue the case.

B. Purpose (Rehearing En Banc)

- A party should seek en banc rehearing only if one or more of the following grounds exist:

- ▶ Consideration by the full Court is necessary to secure or maintain uniformity of the Court's decisions; or
- ▶ The proceeding involves a question of exceptional importance; or
- ▶ The opinion directly conflicts with an existing opinion by another court of appeals or the Supreme Court and substantially affects a rule of national application in which there is an overriding need for national uniformity.

(2) Deadlines for Filing:

- A petition for rehearing may be filed within 14 days after entry of judgment. Fed. R. App. P. 40(a)(1).
- If the United States or an agency or officer thereof is a party in a civil case, the time for filing a petition for rehearing is 45 days after entry of judgment. Fed. R. App. P. 40(a)(1).
- If the mandate has issued, the petition for rehearing should be accompanied by a motion to recall the mandate.
- *See* Advisory Note to 9th Cir. R. 40-1 (petitions must be received on the due date).
- An order to publish a previously unpublished memorandum disposition extends the time to file a petition for rehearing to 14 days after the date of the order of publication or, in all civil cases in which the United States or an agency or officer thereof is a party, 45 days after the date of the order of publication. 9th Cir. R. 40-2.

(3) Statement of Counsel

- A petition should contain an introduction stating that, in counsel's judgment, one or more of the situations described in the "purpose" section above exist. The points to be raised must be stated clearly.

(4) Form & Number of Copies (9th Cir. R. 40-1; Fed. R. App. P. 32(c)(2))

- The petition shall not exceed 15 pages unless it complies with the alternative length limitations of 4,200 words or 390 lines of text.
- The petition must be accompanied by a copy of the panel's decision being challenged.
- An answer, when ordered by the Court, shall comply with the same length limitations as the petition.
- If a pro se litigant elects to file a form brief pursuant to Circuit Rule 28-1, a petition for panel rehearing or for rehearing en banc need not comply with Fed. R. App. P. 32.

- The petition or answer must be accompanied by a Certificate of Compliance found at Form 11, available on our website at www.ca9.uscourts.gov under *Forms*.
- You may file a petition electronically via the appellate ECF system. No paper copies are required unless the Court orders otherwise. If you are a pro se litigant or an attorney exempted from using the appellate ECF system, file one original petition on paper. No additional paper copies are required unless the Court orders otherwise.

Bill of Costs (Fed. R. App. P. 39, 9th Cir. R. 39-1)

- The Bill of Costs must be filed within 14 days after entry of judgment.
- See Form 10 for additional information, available on our website at www.ca9.uscourts.gov under *Forms*.

Attorneys Fees

- Ninth Circuit Rule 39-1 describes the content and due dates for attorneys fees applications.
- All relevant forms are available on our website at www.ca9.uscourts.gov under *Forms* or by telephoning (415) 355-7806.

Petition for a Writ of Certiorari

- Please refer to the Rules of the United States Supreme Court at www.supremecourt.gov

Counsel Listing in Published Opinions

- Please check counsel listing on the attached decision.
- If there are any errors in a published opinion, please send a letter **in writing within 10 days** to:
 - ▶ Thomson Reuters; 610 Opperman Drive; PO Box 64526; Eagan, MN 55123 (Attn: Jean Green, Senior Publications Coordinator);
 - ▶ and electronically file a copy of the letter via the appellate ECF system by using “File Correspondence to Court,” or if you are an attorney exempted from using the appellate ECF system, mail the Court one copy of the letter.

**UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT
Form 10. Bill of Costs**

Instructions for this form: <http://www.ca9.uscourts.gov/forms/form10instructions.pdf>

9th Cir. Case Number(s)

Case Name

The Clerk is requested to award costs to (*party name(s)*):

I swear under penalty of perjury that the copies for which costs are requested were actually and necessarily produced, and that the requested costs were actually expended.

Signature

Date

(use "s/[typed name]" to sign electronically-filed documents)

COST TAXABLE	REQUESTED <i>(each column must be completed)</i>			
DOCUMENTS / FEE PAID	No. of Copies	Pages per Copy	Cost per Page	TOTAL COST
Excerpts of Record*	<input style="width: 50px; height: 25px;" type="text"/>	<input style="width: 50px; height: 25px;" type="text"/>	\$ <input style="width: 50px; height: 25px;" type="text"/>	\$ <input style="width: 50px; height: 25px;" type="text"/>
Principal Brief(s) (<i>Opening Brief; Answering Brief; 1st, 2nd, and/or 3rd Brief on Cross-Appeal; Intervenor Brief</i>)	<input style="width: 50px; height: 25px;" type="text"/>	<input style="width: 50px; height: 25px;" type="text"/>	\$ <input style="width: 50px; height: 25px;" type="text"/>	\$ <input style="width: 50px; height: 25px;" type="text"/>
Reply Brief / Cross-Appeal Reply Brief	<input style="width: 50px; height: 25px;" type="text"/>	<input style="width: 50px; height: 25px;" type="text"/>	\$ <input style="width: 50px; height: 25px;" type="text"/>	\$ <input style="width: 50px; height: 25px;" type="text"/>
Supplemental Brief(s)	<input style="width: 50px; height: 25px;" type="text"/>	<input style="width: 50px; height: 25px;" type="text"/>	\$ <input style="width: 50px; height: 25px;" type="text"/>	\$ <input style="width: 50px; height: 25px;" type="text"/>
Petition for Review Docket Fee / Petition for Writ of Mandamus Docket Fee				\$ <input style="width: 50px; height: 25px;" type="text"/>
TOTAL:				\$ <input style="width: 50px; height: 25px;" type="text"/>

***Example:** Calculate 4 copies of 3 volumes of excerpts of record that total 500 pages [Vol. 1 (10 pgs.) + Vol. 2 (250 pgs.) + Vol. 3 (240 pgs.)] as:

No. of Copies: 4; Pages per Copy: 500; Cost per Page: \$.10 (or actual cost IF less than \$.10);

TOTAL: 4 x 500 x \$.10 = \$200.

Feedback or questions about this form? Email us at forms@ca9.uscourts.gov