

GORSUCH, J., dissenting

SUPREME COURT OF THE UNITED STATES

Nos. 21–1484 and 22–51

21–1484 ARIZONA, ET AL., PETITIONERS
v.
NAVAJO NATION, ET AL.

22–51 DEPARTMENT OF THE INTERIOR, ET AL.,
PETITIONERS
v.
NAVAJO NATION, ET AL.

ON WRITS OF CERTIORARI TO THE UNITED STATES COURT OF
APPEALS FOR THE NINTH CIRCUIT

[June 22, 2023]

JUSTICE GORSUCH, with whom JUSTICE SOTOMAYOR,
JUSTICE KAGAN, and JUSTICE JACKSON join, dissenting.

Today, the Court rejects a request the Navajo Nation never made. This case is not about compelling the federal government to take “*affirmative steps* to secure water for the Navajos.” *Ante*, at 2. Respectfully, the relief the Tribe seeks is far more modest. Everyone agrees the Navajo received enforceable water rights by treaty. Everyone agrees the United States holds some of those water rights in trust on the Tribe’s behalf. And everyone agrees the extent of those rights has never been assessed. Adding those pieces together, the Navajo have a simple ask: They want the United States to identify the water rights it holds for them. And if the United States has misappropriated the Navajo’s water rights, the Tribe asks it to formulate a plan to stop doing so prospectively. Because there is nothing remarkable about any of this, I would affirm the Ninth Circuit’s judgment and allow the Navajo’s case to proceed.

GORSUCH, J., dissenting

I

Understanding this lawsuit requires at least three pieces of context the Court’s opinion neglects. It requires some understanding of the history that led to the Treaty of 1868 establishing the Navajo Reservation. It requires some insight into the discussions that surrounded that Treaty. Finally, it requires an appreciation of the many steps the Navajo took to avoid this litigation.

A

For centuries, the Navajo inhabited a stretch of land in “present-day northwestern New Mexico, northeastern Arizona, and the San Juan drainage beyond.” J. Kessell, *General Sherman and the Navajo Treaty of 1868: A Basic and Expedient Misunderstanding*, 12 *W. Hist. Q.* 251, 253 (1981) (Kessell). This ancestral home was framed by “four mountains and four rivers” the Tribe considered sacred. *Treaty Between the United States of America and the Navajo Tribe of Indians, With a Record of the Discussions That Led to Its Signing* 2 (1968) (Treaty Record); see also E. Rosser, *Ahistorical Indians and Reservation Resources*, 40 *Env. L.* 437, 445 (2010). There, tribal members “planted their subsistence crops,” “hunted and gathered,” and “r[an] their livestock” over the plains. Kessell 253.

In the 1860s, that way of life changed forever. In the aftermath of the Mexican-American War—and following a period of rapid westward expansion—the United States found itself embroiled in a series of bitter conflicts with the Navajo. P. Iverson, *Diné: A History of the Navajos* 37–48 (2002) (Iverson). Eventually, the United States tasked James Henry Carleton with resolving them. *Id.*, at 47–48. “Determined to bring an end to Native resistance in the territory,” he elected for a program of “removal, isolation, and incarceration.” *Id.*, at 48. He hoped that time on a reservation would teach the Navajo “the art of peace,” and that, while confined, they might “acquire new habits, new values, new

GORSUCH, J., dissenting

modes of life.” *Id.*, at 49. In time, he imagined, “the old Indians will die off and carry with them the latent longings for murder and robbing; the young ones will take their places without these longings: and thus, little by little, they will become a happy and contented people.” *Ibid.* This vision found support from others in the federal government. As Commissioner of Indian Affairs William P. Dole put it in his annual report, the situation with the Navajo “demand[ed] the earliest possible interposition of the military force of the government.” *Ibid.* In his view, only putting the Navajo on a “suitable reservatio[n]” would end their “wild and predatory life.” *Ibid.*

In settling on this plan, the federal government had goals in mind beyond reducing conflict. As Carleton explained, “[b]y the subjugation and colonization of the Navajo [T]ribe we gain for civilization their whole country, which is much larger in extent than the [S]tate of Ohio, and, besides being the best pastoral region between the two oceans, is said to abound in the precious as well as [other] useful metals.” *Id.*, at 50. The “exodus of this whole people from the land of their fathers” would be, he imagined, “a touching sight.” *Ibid.* But no matter. He saw it as the Navajo’s “destiny” to “give way to the insatiable progress of our race.” *Ibid.*

Removal demanded finding a new home for the Tribe. Carleton picked the location himself: an area hundreds of miles from the Navajo’s homeland “commonly called the Bosque Redondo.” *Ibid.*; see also Kessell 254. Warning signs flashed from the start. Officers tasked with surveying the site cautioned that it was “remote” from viable “forage” and that “[b]uilding material” would have to come from a significant distance. Iverson 50. Worse, they found that the water supply was meager and contained “much unhealthy mineral matter.” *Ibid.*; see also Kessell 269. Carleton ignored these findings and charged ahead with his plan. Iverson 50.

GORSUCH, J., dissenting

That left the not-so-small matter of securing the Navajo's compliance. To that end, the federal government unleashed a "maelstrom of destruction" on the Tribe. *Id.*, at 51. Before all was said and done, "the Navajo had to be literally starved into surrender." 2 Hearing before the U. S. Commission on Civil Rights, Office of General Counsel, Demographic and Socio-Economic Characteristics of the Navajo 6 (1973) (Commission Report). "[T]housands of U. S. troops roamed the Navajo [Country] destroying everything the Navajo could use; every field, storehouse, and hut was burned." *Ibid.* The campaign was "brief, blunt, and, when combined with a particularly difficult winter," effective. Iverson 51. By the winter of 1863–1864, most of the Navajo had surrendered. Commission Report 6–7; see also Iverson 51.

That period of violence led to "the Long Walk." In truth, it was not one walk but many—over 53 separate incidents, according to some. *Id.*, at 52. In each case, federal officers rounded up tribal members, "[h]erded [them] into columns," and marched them hundreds of miles from their home. Kessell 254. "Many died en route, some shot by the souldiers." Commission Report 7. As one Navajo later recounted, people were killed "'on the spot if they sa[id] they [were] tired or sick or if they stop[ped] to help someone.'" Iverson 55. Still "[o]thers fell victim to slavers with the full complicity of the U. S. officials." Commission Report 7.

Those who survived wound up at "a destination that surpassed their fears." Iverson 52. Bosque Redondo was just what the officers had warned: a "semiarid, alkaline, fuel-stingy, insect-infested environment." Kessell 255. And, just as they predicted, water proved a serious issue. The Tribe was forced to rely on a "little stream winding through an immense plain." Iverson 59. But its "water was bad." Kessell 259. No surprise, then, that "[o]nly half the land under cultivation at the Bosque was productive." *Ibid.* No surprise either that even the productive land yielded "one

GORSUCH, J., dissenting

disastrous crop failure after another.” *Id.*, at 255. Further feeding the crisis, Carleton “badly underestimated the number of Navajos who would end up at the Bosque Redondo.” *Ibid.* All told, the relocation proved a “catastrophe for the Navajo; 2,000 died there in four years.” Commission Report 8.

B

“By 1868 even the U. S. government could see” that the present conditions could not persist. *Ibid.* So it set out to relocate the Navajo once more. To that end, the United States sent members of the Indian Peace Commission to negotiate a new treaty with the Tribe. Kessell 257–258. Led by General William Tecumseh Sherman, the Commission disfavored allowing the Navajo to return to their homeland. *Ibid.* Doing that, the Commission feared, risked rekindling old hostilities. *Id.*, at 257. So Sherman tried to persuade the Navajo to relocate someplace else. Understanding the importance of water to the Navajo, he offered them assurances that other locations would have “plenty of water.” Treaty Record 5.

The Navajo would have none of it. Their lead negotiator, Barboncito, refused to “go to any other country except [his] own.” *Ibid.* Any place else, he said, could “turn out another Bosque Redondo.” *Id.*, at 5–6. “[O]utside [our] own country,” Barboncito told Sherman, “we cannot raise a crop, but in it we can raise a crop almost anywhere.” *Id.*, at 3. “[W]e know this land does not like us,” he said of Bosque Redondo, and “neither does the water.” *Ibid.* Along the way, he spoke of “the heart of Navajo country,” which he described as including a place where “the water flows in abundance.” *Id.*, at 8. In the end, “[t]he will of the Navajos—personified in the intense resolve of Barboncito,” won out. Kessell 259. Sherman came to realize that, if he left the Navajo at Bosque Redondo, the dire conditions—including “the foul character of [the] water”—would eventually induce them

GORSUCH, J., dissenting

to drift away from the encampment. *Id.*, at 260. And the Navajo flatly refused to move to some other unfamiliar place. *Ibid.*

Arriving at that conclusion proved simple enough; arriving upon a treaty proved more challenging. There was, of course, no small power asymmetry. As one Senator noted at the time, it was a curious feature that the Commissioners set out to “conclude a treaty with Indians” who were at that very moment being “held on a reservation against their will.” *Id.*, at 259. Language barriers presented complications too. Messages had to be translated twice—first from English to Spanish, and then from Spanish to Navajo. *Id.*, at 261. Aggravating matters, the parties saw the world very differently. The United States’ representatives “spoke of artificial lines on maps, of parallels and meridians”; the Navajo spoke “of geographical features, of canyons, mountains, and mesas.” *Ibid.* The United States’ representatives “talked about ownership and a claim to the land”; the Navajo talked about “using the land.” *Ibid.* As a result, the parties often “misunderstood each other.” *Ibid.* And whether intentionally or inadvertently, Sherman “misled” the Navajo about, among other things, the size of their reservation. *Id.*, at 263. He promised twice the land that they received in the final accounting. *Ibid.*

In the end, the Treaty of 1868 provided the Navajo less land per capita—two-thirds less—than the other Tribes the Indian Peace Commission would go on to negotiate with. *Id.*, at 268. It seems that owed, in no small part, to the negotiators’ understanding that the Navajo had “already experienced irrigation agriculture” and could plausibly get by with less. *Ibid.* Indeed, when providing instructions to the Indian Peace Commission about how they should negotiate with the Navajo, the Secretary of the Interior discussed the possibility of agriculture as bearing on the appropriate size of the Tribe’s reservation. Unlike the Navajo, he thought, “[w]ild Indians cannot at once be transformed

GORSUCH, J., dissenting

into farmers. They must pass through the intermediate stage of herdsmen. They must first become pastoral, then agricultural.” *Id.*, at 269.

Despite all this, “[f]or the Navajos the treaty signified not defeat, but victory, and not disappearance, but continuation.” Iverson 36. “The agreement allowed [them] to return to a portion of their home country.” *Ibid.* Nor would that “portion” remain so confined. The Navajo often struggled to stay on the narrow tract of land the United States provided. Commission Report 9. In practice, the federal government often tolerated (and sometimes encouraged) the Navajo to live and tend to livestock off reservation to preserve their self-sufficiency. Kessell 271. These arrangements continued until the 1930s, when Congress first “enact[ed] legislation defining the exterior boundaries of the Navajo Reservation.” *Id.*, at 272. Over the ensuing decades, Congress would go on to extend the reservation’s boundaries repeatedly. See, e.g., Act of June 14, 1934, 48 Stat. 960; Act of Feb. 21, 1931, ch. 269, 46 Stat. 1204; Act of May 23, 1930, ch. 317, 46 Stat. 378.

C

Fast forward to the present. Today, the Navajo Reservation has become “the largest Indian reservation in the United States,” with over “17 million acres,” and over “300,000 members.” App. 90. Its western boundary runs alongside a vast stretch of the Colorado River. *Id.*, at 91. Yet even today, water remains a precious resource. “Members of the Navajo Nation use around 7 gallons of water per day for all of their household needs”—less than one-tenth the amount the average American household uses. *Id.*, at 101. In some parts of the reservation, as much as 91% of Navajo households “lack access to water.” *Id.*, at 102.

That deficit owes in part to the fact that no one has ever assessed what water rights the Navajo possess. For instance, “[a]lthough the Navajo Reservation is adjacent to

GORSUCH, J., dissenting

the Colorado River, the Navajo Nation’s rights to use water from the Colorado River” have never been adjudicated. *Id.*, at 36. The United States acknowledges that it holds certain water rights “in trust” for the Navajo. See Tr. of Oral Arg. 26, 40. It does not dispute that it exercises considerable control over the disposition of water from the Colorado River. And it concedes that the Navajo’s water rights “may . . . include some portion of the mainstream of the Colorado.” *Id.*, at 33. But instead of resolving what the Navajo’s water rights might be, the United States has sometimes resisted efforts to answer that question.

The current legal regime governing the Colorado River began with a 1922 interstate compact between seven States. That agreement split the Colorado into two basins—an Upper Basin and a Lower Basin. See Colorado River Compact, Art. II, Colo. Rev. Stat. §37–61–101 (2022). The compact answered some high-level questions about which States could lay claim to which sections of the river. But it did not purport to “affec[t] the obligations of the United States of America to Indian [T]ribes.” *Id.*, Art. VII. In that way, it left the Navajo with no insight into what water they could claim as their own.

Six years later, Congress entered the picture by passing the Boulder Canyon Project Act, 45 Stat. 1057, codified at 43 U. S. C. §§617–619b. That Act had a profound impact on the Lower Basin. It authorized the construction of the Hoover Dam and the creation of Lake Mead. §617. More than that, it gave the Secretary of the Interior substantial power to divvy up the resulting impounded water. Failing agreement among the States in the region, the law authorized the Secretary to enter into contracts for the delivery of water and provided that “[n]o person” may have water from the mainstream of the Colorado in the Lower Basin “except by contract.” §617d; see also *Arizona v. California*, 373 U. S. 546, 565 (1963) (*Arizona I*). In adopting this law, Congress hoped “to put an end to the long-standing dispute over

GORSUCH, J., dissenting

Colorado River waters.” *Id.*, at 560.

Reality never quite caught up to the law’s ambitions. After an agreement among the States failed to emerge and the Secretary began issuing contracts to various users, Arizona in 1952 brought an original action in this Court against California seeking a declaration of its water rights in the Lower Basin. *Id.*, at 550–551. Several other States intervened. *Ibid.* So did the United States. *Ibid.* In doing so, the federal government claimed the need to “protect federal interests, including the rights of the Navajo Nation and twenty-four other Indian [T]ribes in the Lower Basin.” App. 104. As the litigation unfolded, however, the Navajo began to worry that the United States did not have their best interests in mind. In 1956, the Navajo Nation sought leave to file (along with six other Tribes) a motion seeking “to define the scope of the representation of the [T]ribes by the United States” and objecting to what they considered a “lack of effective representation and [a] conflict of interest.” *Id.*, at 105. That motion was denied. *Ibid.*

Proceeding without the Navajo, this Court referred the litigation to a Special Master. In time, the Special Master prepared a report and recommendation that omitted any mention of the Tribe. *Ibid.* In response, the Navajo wrote to the Attorney General. They asked the United States to object to the Special Master’s report on their behalf. *Id.*, at 105–106. The Navajo say they never received a response. *Id.*, at 106. For its part, the United States eventually did object—but not on the grounds the Navajo sought. *Ibid.*

Having seen enough, the Navajo in 1961 moved to intervene. *Ibid.* They “argued that the United States had failed to vigorously assert” their interests. *Ibid.* More than that, the Tribe contended, the United States had “‘abandoned the case so far as the adjudication of the rights of the Navajo Indians [was] concerned.’” *Ibid.* The United States opposed the Tribe’s motion. *Ibid.* On its view, it had already

GORSUCH, J., dissenting

“undertaken representation of the interests of several Indian [T]ribes,” so there was no need for the Court to hear from the Navajo. *Id.*, at 107. In any event, the United States assured the Court, it would continue to apply “‘considerations of justice’” in its dealings with the Tribe. *Ibid.* The government conceded, however, “no evidence had been submitted on behalf of the Navajo Nation for uses from the mainstream.” *Ibid.* And it conceded that “such evidence would have had to be submitted in order for the Court to consider the issue of the Navajo Nation’s rights to the mainstream.” *Ibid.* As with their previous attempts to make their voices heard in the litigation, the Navajo’s motion to intervene was denied. *Id.*, at 108.

In 1964, the litigation Arizona initiated more than a decade earlier culminated in a decree. See *Arizona v. California*, 376 U. S. 340. It allocated the Lower Basin Colorado River mainstream among various parties—including five other Tribes whose interests the United States did assert. See *id.*, at 344–345. The decree also permitted the federal government to release water pursuant to certain “valid contracts” and applicable federal laws. *Id.*, at 343; Brief for Federal Parties 7. But the Tribe’s rights remained in limbo. The United States never asserted any rights on the Navajo’s behalf; the Navajo never received an opportunity to assert them for themselves. Since 1964, the decree governing the Lower Basin has been modified at various points. See, e.g., *Arizona v. California*, 547 U. S. 150 (2006); *Arizona v. California*, 531 U. S. 1 (2000); *Arizona v. California*, 466 U. S. 144 (1984). But it has never been modified to address the Navajo.

In the intervening years, the Navajo have asked the federal government—repeatedly—to assess their rights in the mainstream of the Colorado. App. 109. In response to those inquiries, the Tribe received a letter from the Department of the Interior indicating that the Department still had not made “any decisions” about what water rights, if any, the

GORSUCH, J., dissenting

Navajo may have in the river. *Id.*, at 110. The Department posited that figuring that out would be a “somewhat lengthy process,” one that had “yet to be initiated.” *Ibid.*

Unwilling to wait indefinitely, the Navajo eventually filed this suit. In it, the Navajo sought “injunctive and declaratory relief to compel the Federal Defendants to determine the water required to meet the needs of the Nation’s lands in Arizona and devise a plan to meet those needs to fulfill the promise of the United States to make the Nation’s Reservation lands a permanent homeland for the Navajo people.” *Id.*, at 86. In other words, the Tribe asked the United States to assess what water rights it holds in trust on the Tribe’s behalf pursuant to the Treaty of 1868. Tr. of Oral Arg. 71–72. And if it turns out the United States has misappropriated those water rights, the Tribe wants the federal government to come up with a plan to set things right.

II

With a view of this history, the proper outcome of today’s case follows directly. The Treaty of 1868 promises the Navajo a “permanent home.” Treaty Between the United States of America and the Navajo Tribe of Indians, June 1, 1868, Art. XIII, 15 Stat. 671 (ratified Aug. 12, 1868) (Treaty of 1868). That promise—read in conjunction with other provisions in the Treaty, the history surrounding its enactment, and background principles of Indian law—secures for the Navajo some measure of water rights. Yet even today the extent of those water rights remains unadjudicated and therefore unknown. What is known is that the United States holds some of the Tribe’s water rights in trust. And it exercises control over many possible sources of water in which the Tribe may have rights, including the mainstream of the Colorado River. Accordingly, the government owes the Tribe a duty to manage the water it holds for the Tribe in a legally responsible manner. In this lawsuit, the Navajo

GORSUCH, J., dissenting

ask the United States to fulfill part of that duty by assessing what water rights it holds for them. The government owes the Tribe at least that much.

A

Begin with the governing legal principles. Under our Constitution, “all Treaties made” are “the supreme Law of the Land.” Art. VI, cl. 2. Congress can pass laws to implement those treaties, see, *e.g.*, *Bond v. United States*, 572 U. S. 844, 851, 855 (2014), and the Executive Branch can act in accordance with them, see, *e.g.*, *Fok Yung Yo v. United States*, 185 U. S. 296, 303 (1902). But the Judiciary also has an important role to play. The Constitution extends “[t]he judicial Power” to cases “arising under . . . Treaties made, or which shall be made.” Art. III, §2, cl. 1. As a result, this Court has recognized that Tribes may sue to enforce rights found in treaties. See *Moe v. Confederated Salish and Kootenai Tribes of Flathead Reservation*, 425 U. S. 463, 472–477 (1976). Other branches share the same understanding. In enacting the Indian Trust Asset Reform Act of 2016, Congress confirmed its belief that “commitments made through written treaties” with the Tribes “established enduring and *enforceable* Federal obligations” to them. 25 U. S. C. §5601(4)–(5) (emphasis added). The Executive Branch has likewise and repeatedly advanced the position—including in this very litigation—that “a treaty can be the basis of a breach-of-trust claim” enforceable in federal court. Brief for Federal Parties 22–23, n. 5.

What rights does a treaty secure? A treaty is “essentially a contract between two sovereign nations.” *Washington v. Washington State Commercial Passenger Fishing Vessel Assn.*, 443 U. S. 658, 675 (1979). So a treaty’s interpretation, like “a contract’s interpretation, [is] a matter of determining the parties’ intent.” *BG Group plc v. Republic of Argentina*, 572 U. S. 25, 37 (2014). That means courts must look to the “shared expectations of the contracting parties.”

GORSUCH, J., dissenting

Air France v. Saks, 470 U. S. 392, 399 (1985). All with an eye to ensuring both sides receive the “benefit of their bargain.” *Mobil Oil Exploration & Producing Southeast, Inc. v. United States*, 530 U. S. 604, 621 (2000).

That exercise entails the application of familiar principles of contract interpretation. Those principles include an implied covenant of “the utmost good faith” and fair dealing between the parties. *Sullivan v. Kidd*, 254 U. S. 433, 439 (1921). They include the doctrine of *contra proferentem*—the principle that any uncertainty in a contract should be construed against the drafting party. See *Lamps Plus, Inc. v. Varela*, 587 U. S. ___, ___–___ (2019) (slip op., at 9–10); see also 1 Oppenheim’s International Law 1279 (R. Jennings & A. Watts eds., 9th ed. 1992). And they include the doctrine of unilateral mistake—the notion that, if two parties understand a key provision differently, the controlling meaning is the one held by the party that could not have anticipated the different meaning attached by the other. See Restatement (Second) of Contracts §201(2) (1979).

Still other doctrines impose a “higher degree of scrutiny” on contracts made between parties sharing a fiduciary relationship, given the risk the fiduciary will (intentionally or otherwise) “misuse” its position of trust. 28 R. Lord, Williston on Contracts §71:53, p. 617 (4th ed. 2020). When it comes to the United States, such fiduciary duties must, of course, come from positive law, “not the atmosphere.” *Haaland v. Brackeen*, 599 U. S. ___, ___–___ (2023) (slip op., at 11–12). But the United States has, through “acts of Congress” and other affirmative conduct, voluntarily assumed certain specific fiduciary duties to the Tribes. *Seminole Nation v. United States*, 316 U. S. 286, 287, 297 (1942). That raises the specter of undue influence—especially since, in many negotiations with the Tribes, the United States alone had “representatives skilled in diplomacy” who were “masters of [its] written language,” who fully “underst[ood] the . . . technical estates known to [its] law,” and who were

GORSUCH, J., dissenting

“assisted by an interpreter [they] employed.” *Jones v. Meehan*, 175 U. S. 1, 11 (1899).

Put together, these insights have long influenced the interpretation of Indian treaties. “The language used in treaties with the Indians should never be construed to their prejudice.” *Worcester v. Georgia*, 6 Pet. 515, 582 (1832) (McLean, J., concurring). Rather, when a treaty’s words “are susceptible of a more extended meaning than their plain import,” we must assign them that meaning. *Ibid.* Our duty, this Court has repeatedly explained, lies in interpreting Indian treaties “in a spirit which generously recognizes the full obligation of this [N]ation.” *Tulee v. Washington*, 315 U. S. 681, 684–685 (1942); see also *United States v. Winans*, 198 U. S. 371, 380–381 (1905); *Choctaw Nation v. United States*, 119 U. S. 1, 27–28 (1886). We sometimes call this interpretive maxim—really just a special application of ordinary contract-interpretation principles—the Indian canon. See F. Cohen, Handbook of Federal Indian Law §2.02, p. 119 (N. Newton ed. 2005); R. Collins, Never Construed to Their Prejudice: In Honor of David Getches, 84 U. Colo. L. Rev. 1, 6–7 (2013).

With time, too, these interpretive insights have yielded some more concrete rules. First, courts must “give effect to the terms” of treaties as “the Indians themselves would have understood them.” *Minnesota v. Mille Lacs Band of Chippewa Indians*, 526 U. S. 172, 196 (1999); see also *Tulee*, 315 U. S., at 684. Second, to gain a complete view of the Tribes’ understanding, courts may (and often must) “look beyond the written words to the larger context that frames the Treaty.” *Mille Lacs Band*, 526 U. S., at 196. That includes taking stock of “the history of the treaty, the negotiations, and the practical construction adopted by the parties.” *Choctaw Nation v. United States*, 318 U. S. 423, 432 (1943). Third, courts must assume into those treaties a duty of “good faith” on the part of the United States to “protect[t] the Tribes and their ways of life. See *Washington*

GORSUCH, J., dissenting

State Commercial Passenger Fishing Vessel Assn., 443 U. S., at 666–667.

It is easy to see the purchase these rules have for reservation-creating treaties like the one at issue in this case. Treaties like that almost invariably designate property as a permanent home for the relevant Tribe. See *McGirt v. Oklahoma*, 591 U. S. ___, ___ (2020) (slip op., at 5). And the promise of a permanent home necessarily implies certain benefits for the Tribe (and certain responsibilities for the United States). One set of those benefits and responsibilities concerns water. This Court long ago recognized as much in *Winters v. United States*, 207 U. S. 564 (1908).

That case involved the Milk River, which flows along the northern border of the Fort Belknap Reservation. *Id.*, at 565–567 (statement of McKenna, J.). Upstream landowners invested their own resources to build dams and reservoirs which indirectly deprived the Tribes living on the reservation of water by reducing the volume available downstream. *Id.*, at 567. The United States sued on the Tribes’ behalf to enjoin the landowners’ actions. *Id.*, at 565. In assessing the government’s claim, the Court looked to the agreement establishing that reservation and found no language speaking to the Tribes’ water rights at all. *Id.*, at 575–576. Nevertheless, the Court concluded, the agreement reserved water rights for the Tribes in the Milk River and found for the government. *Id.*, at 577. The Court considered it inconceivable that, having once enjoyed “beneficial use” of nearby waters, the Tribes would have contracted to “give up all th[at].” *Id.*, at 576. After all, the lands described in the reservation “were arid and, without irrigation, were practically valueless,” and “communities could not be established” without access to adequate water. *Ibid.* (internal quotation marks omitted). For these reasons, the agreement’s provisions designating the land as a permanent home for the Tribes necessarily implied that the Tribes would enjoy continued access to nearby sources of

GORSUCH, J., dissenting

water. *Ibid.* A contrary reading, the Court said, would “im-pair or defeat” the parties’ agreement. *Id.*, at 577.

While *Winters* involved a claim brought by the United States, the federal government asserted “the rights of the Indians” themselves. *Id.*, at 576. This Court’s subsequent cases have confirmed as much. In *United States v. Powers*, 305 U. S. 527 (1939), for instance, this Court cited *Winters* as authority for its holding that a different treaty impliedly “reserved” waters “for the equal benefit of *tribal members*.” *Id.*, at 532 (emphasis added). So when the reservation was dissolved and the land allotted, “the right to use some por-tion of tribal waters essential for cultivation passed to the owners” of the individual plots of land. *Ibid.* (emphasis added). Later, in *Arizona I*, this Court described *Winters* as standing for the principle that “the Government, when it create[s an] Indian Reservation, intend[s] to deal fairly with the Indians by reserving for them the waters without which their lands would have been useless.” 373 U. S., at 600 (emphasis added). Congress would not “creat[e] an In-dian Reservation without intending to reserve waters nec-essary to make the reservation livable.” *Id.*, at 559.

Sometimes the United States may hold a Tribe’s water rights in trust. When it does, this Court has recognized, the United States must manage those water rights “[a]s a fidu-ciary,” *Arizona v. California*, 460 U. S. 605, 626–627 (1983) (*Arizona II*), one held to “the most exacting fiduciary stand-ards,” *Seminole Nation*, 316 U. S., at 297. This is no special rule. “[F]iduciary duties characteristically attach to deci-sions” that involve “managing [the] assets and distributing [the] property” of others. *Pegram v. Herdrich*, 530 U. S. 211, 231 (2000). It follows, then, that a Tribe may bring an action in equity against the United States for “fail[ing] to provide an accurate accounting of” the water rights it holds on a Tribe’s behalf. *United States v. Tohono O’odham Na-tion*, 563 U. S. 307, 318 (2011). After all, it is black-letter law that a plaintiff may seek an accounting “whenever the

GORSUCH, J., dissenting

defendant is a fiduciary who has been entrusted with property of some kind belonging to the plaintiff,” even if the defendant is not “express[ly]” named a “trustee.” J. Eichen-grun, *Remedying the Remedy of Accounting*, 60 Ind. L. J. 463, 468–469, and n. 18 (1985) (noting cases); see also A. Newman, G. Bogert, & G. Bogert, *Law of Trusts and Trustees* §967, p. 201 (3d ed. 2010) (“fiduciary relationship [is] sufficient to support an action for an accounting” whenever the fiduciary exercises “discretion over trust” assets).

B

With these principles in mind, return to the Navajo’s case and start with the most basic terms of the parties’ agreement. In signing the Treaty of 1868, the Navajo agreed to “relinquish all right to occupy any territory outside their reservation.” Art. IX, 15 Stat. 670. In exchange, the Navajo were entitled to “make the reservation . . . their permanent home.” Art. XIII, *id.*, at 671. Even standing alone, that language creates enforceable water rights under *Winters*. As both parties surely would have recognized, no people can make a permanent home without the ability to draw on adequate water. Otherwise, the Tribe’s land would be “practically valueless,” “defeat[ing] the declared purpose” of the Treaty. *Winters*, 207 U. S., at 576–577.

Other clues make the point even more obvious. Various features of the Treaty were expressly keyed to an assumption about the availability of water. The United States agreed to build certain structures “within said reservation, where . . . water may be convenient.” Art. III, 15 Stat. 668. Under the Treaty’s terms, too, individual Navajo were entitled to select tracts of land within the reservation to “commence farming” and for “purposes of cultivation.” Art. V, *ibid.* If an individual could show that he “intend[ed] in good faith to commence cultivating the soil for a living,” the Treaty entitled him to “receive seeds and agricultural implements.” Art. VII, *id.*, at 669. Similarly, the Treaty

GORSUCH, J., dissenting

promised large numbers of animals to the Tribe. Art. XII, *id.*, at 670. Those guarantees take as a given that the Tribe could access water sufficient to live, tend crops, and raise animals in perpetuity.

As we have seen, “the history of the treaty, the negotiations, and the practical construction adopted by the parties” may also inform a treaty’s interpretation. *Choctaw Nation*, 318 U. S., at 432. And here history is particularly telling. Much of the Navajo’s plight at Bosque Redondo owed to both the lack of water and the poor quality of what water did exist. General Sherman appreciated this point and expressly raised the availability of water in his negotiations with the Tribe. Treaty Record 5. Doubtless, he did so because everyone had found the water at Bosque Redondo insufficient and because the Navajo’s strong desire to return home rested in no small part on the availability of water there. *Id.*, at 3, 8. Because the Treaty of 1868 must be read as the Navajo “themselves would have understood” it, *Mille Lacs Band*, 526 U. S., at 196, it is impossible to conclude that water rights were not included. Really, few points appear to have been *more* central to both parties’ dealings.

What water rights does the Treaty of 1868 secure to the Tribe? Remarkably, even today no one knows the answer. But at least we know the right question to ask: How much is required to fulfill the purposes of the reservation that the Treaty of 1868 established? See *Nevada v. United States*, 463 U. S. 110, 116, n. 1 (1983) (citing cases). We know, too, that a Tribe’s *Winters* rights are not necessarily limited to the water sources found within the corners of their reservation. *Winters* itself involved a challenge to the misappropriation of water by upstream landowners from a river that ran along the border of tribal lands. 207 U. S., at 576. And here the Navajo’s Reservation likewise stands adjacent to a long stretch of the Colorado River flowing through both its Upper and Lower Basins. App. 91. Finally, we know that

GORSUCH, J., dissenting

“it is impossible to believe that when . . . the Executive Department of this Nation created the [various] reservations” in the arid Southwest it was “unaware that . . . water from the [Colorado R]iver 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 598–599. Nor does the United States dispute any of this. To the contrary, it acknowledges that the Navajo’s water rights very well “may . . . include some portion of the mainstream of the Colorado” that runs adjacent to their reservation. Tr. of Oral Arg. 33.

For our purposes today, that leaves just one question: Can the Tribe state a legally cognizable claim for relief asking the United States to assess what water rights they have? Not even the federal government seriously disputes that it acts “as a fiduciary” of the Tribes with respect to tribal waters it manages. *Arizona II*, 460 U. S., at 627–628. Indeed, when it comes to the Navajo, the United States freely admits that it holds certain water rights for the Tribe “in trust.” Tr. of Oral Arg. 40. And of course, that must be so given that the United States exercises pervasive control over much water in the area, including in the adjacent Colorado River. See *Arizona I*, 373 U. S., at 564–565.

Those observations suffice to resolve today’s dispute. As we have seen, that exact coupling—a fiduciary relationship to a specific group and complete managerial control over the property of that group—gives rise to a duty to account. See *supra*, at 16–17. The United States, we know, must act in a “legally [a]dequate” way when it comes to the Navajo’s water it holds in trust. *Arizona II*, 460 U. S., at 627. It follows, as the United States concedes, that the federal government could not “legally” dam off the water flowing to their Reservation, as doing so would “interfere with [the Tribe’s] exercise of their” water rights. Tr. of Oral Arg. 13. Implicit in that concession is another. Because *Winters* rights belong to the Navajo themselves, the United States

GORSUCH, J., dissenting

cannot lawfully divert them elsewhere—just as a lawyer cannot dispose of a client’s property entrusted to him without permission. And the *only* way to ensure compliance with that obligation is to give the Tribe just what they request—an assessment of the water rights the federal government holds on the Tribe’s behalf.

III

The Court does not dispute most of this. It agrees that the Navajo enjoy “water rights implicitly reserved to accomplish the purpose of the reservation.” *Ante*, at 2. It agrees that the United States cannot lawfully interfere with those water rights. *Ante*, at 2, 6, 7. And it leaves open the possibility that the Navajo “may be able to assert the interests they claim in water rights litigation.” *Ante*, at 12. Really, the Court gets off the train just one stop short. It insists (and then repeats—again and again) that the United States owes no “affirmative duty” to the Navajo with respect to water, and therefore does not need to take any “affirmative steps” to help the Tribe on that score. *Ante*, at 2, 6–13. This reasoning reflects three errors.

A

The Court begins by misapprehending the nature of the Navajo’s complaint. Though it never quite cashes out what the phrase “affirmative steps” means, the Court appears concerned that allowing this complaint to proceed could result in a court order requiring the United States to “buil[d] pipelines, pumps, wells, or other water infrastructure.” *Ante*, at 2, 6, 7. More than that, the Court worries that—if a lower court finds that the United States has any water-related responsibilities to the Tribe—the federal government might even eventually find itself on the hook to “farm land, mine minerals, harvest timber, build roads, or construct bridges on the reservation.” *Ante*, at 13; see also *ante*, at 9.

GORSUCH, J., dissenting

The Tribe’s lawsuit asks for nothing of the sort. The Tribe expressly disavows any suggestion that, “as a matter of treaty interpretation . . . the United States is legally obligated to pay for pipelines or aquifers,” for example. Tr. of Oral Arg. 78. Instead and again, the Tribe’s complaint seeks simply to “compel the Federal Defendants to determine the water required to . . . fulfill the promise[s]” made to them under the Treaty of 1868. App. 86. Only if the United States is, in fact, “*interfer[ing]* with [their] reserved water rights” in some way, *ante*, at 6, could the Tribe then ask the federal government to “devise a plan” for achieving compliance with its obligations, App. 86. And, for all anyone presently can tell, the United States may be interfering in just that way. Asking the federal government to assess what it holds in trust and to ensure that it is not misappropriating water that belongs to the Tribe has nothing to do with building pipelines or farming land.

B

Having mistaken the nature of the Navajo’s complaint, the Court proceeds next to analyze it under the wrong legal framework. Citing cases like *United States v. Jicarilla Apache Nation*, 564 U. S. 162 (2011); *United States v. Navajo Nation*, 537 U. S. 488 (2003) (*Navajo I*); and *United States v. Mitchell*, 445 U. S. 535 (1980) (*Mitchell I*), the Court tries to hammer a square peg (the Navajo’s request) through a round hole (our Tucker Acts framework). See *ante*, at 7–9, and n. 1. To understand why those cases are inapposite, a little background is in order.

When an Indian Tribe seeks damages from the United States, it must usually proceed under the terms of the Tucker Act, 28 U. S. C. §1491, and the Indian Tucker Act, §1505. Together, those provisions facilitate suits for money damages in the Court of Federal Claims for claims “arising under the Constitution, laws or treaties of the United

GORSUCH, J., dissenting

States, or Executive orders of the President.” *Ibid.* Notably, however, the Tucker Acts provide only a selective waiver of sovereign immunity, not a cause of action. To determine whether a Tribe can seek money damages on any given claim, this Court has laid out a two-part test. First, a court must ascertain whether there exists “specific rights-creating or duty-imposing statutory or regulatory prescriptions,” *Navajo I*, 537 U. S., at 506, producing a scheme that bears the “hallmarks of a more conventional fiduciary relationship,” *United States v. White Mountain Apache Tribe*, 537 U. S. 465, 473 (2003). Second, once a Tribe has identified such a provision, the court must use “trust principles” to assess whether (and in what amount) the United States owes damages. *United States v. Navajo Nation*, 556 U. S. 287, 301 (2009) (*Navajo II*).

To describe this regime is to explain why the Court errs in relying on it. The Navajo do not bring a claim for money damages in the Court of Federal Claims under the Tucker Acts (thereby implicating those Acts’ selective waiver of sovereign immunity). Rather, the Navajo seek equitable relief in federal district court on a treaty claim governed by the familiar principles recounted above. See *supra*, at 12–17. They do so with the help of 28 U. S. C. §1362, a provision enacted *after* the Tucker Acts that gives federal district courts “original jurisdiction” over “civil actions” brought by Tribes “under the Constitution, laws, or treaties of the United States.” *Ibid.*; see also Brief for Historians as *Amici Curiae* 31. As this Court has noted, §1362 serves “to open the federal courts to the kind of claims that could have been brought by the United States as trustee, but for whatever reason were not so brought.” *Moe*, 425 U. S., at 472. That perfectly summarizes the claim that the Navajo advance here—a treaty-based claim bottomed on *Winters* that all agree the United States could bring in its capacity as a trustee. Nor does anyone question that the United States has waived sovereign immunity for claims “seeking relief other

GORSUCH, J., dissenting

than money damages” based on an allegation that federal officials have “acted or failed to act” as the law requires. 5 U. S. C. §702.

This Court’s decisions have long recognized that claims for equitable relief in federal district court operate under a distinct framework than claims for money damages brought in the Court of Federal Claims under the Tucker Acts. In *United States v. Mitchell*, 463 U. S. 206 (1983) (*Mitchell II*), for example, the United States argued that the Court should not allow an action for damages under the Tucker Acts to proceed because the plaintiffs could have brought a *separate* “actio[n] for declaratory, injunctive, or mandamus relief against the Secretary” in federal district court. *Id.*, at 227. This Court agreed with the government’s assessment that the plaintiffs could have brought a claim like that—even as it went on to hold that they were free to bring a damages action under the Tucker Acts framework too. *Ibid.*

Lower courts have appreciated all this as well. As they have observed, nothing in the Tucker Acts or our decisions applying them “impl[ies] that [Tribes] are not [separately] entitled to declaratory or injunctive relief” under other laws or treaties and the traditional framework described above. *Cobell v. Norton*, 240 F. 3d 1081, 1101 (CA10 2001); see also *Loudner v. United States*, 108 F. 3d 896, 899 (CA8 1997). Consistent with this approach, they have frequently allowed Tribes to bring freestanding claims seeking to enforce treaty obligations—including water-related ones. See, e.g., *Pyramid Lake Paiute Tribe of Indians v. Morton*, 354 F. Supp. 252, 256 (DC 1973) (requiring the Secretary of the Interior to “justify any diversion of water from the Tribe with precision”); see also *Northwest Sea Farms, Inc. v. United States Army Corps of Engineers*, 931 F. Supp. 1515, 1520 (WD Wash. 1996) (“In carrying out its fiduciary duty, it is the government’s . . . responsibility to ensure that Indian treaty rights are given full effect”). The cases the Court relies on simply do not enter the picture.

GORSUCH, J., dissenting

C

After misreading the Navajo’s request and applying the wrong analytical framework, the Court errs in one last way. It reaches the wrong result even under this Court’s Tucker Acts framework. The second step of the analysis—using “trust principles” to sort out the damages the United States owes, *Navajo II*, 556 U. S., at 301—clearly has no purchase in this context. (Another tell that the Tucker Acts framework itself has no purchase.) But what about the first step? Historically, this Court’s cases have distinguished between regulatory schemes that create “bare trusts” (that cannot sustain actions for damages) and a “conventional” trust (that can make the government “liable in damages for breach” under the Tucker Acts). *White Mountain Apache Tribe*, 537 U. S., at 473–474; see *ante*, at 9. A close look at those decisions suggests that, even under them, the Tribe’s claim should be allowed to proceed.

Take *Mitchell II* as an example. There, this Court allowed a claim for money damages relating to the mismanagement of tribal forests. On what basis? A patchwork of statutes and regulations, along with some assorted representations by the Department of the Interior. 463 U. S., at 219–224. In holding this showing sufficient to support an action for money damages, this Court observed that, “where the Federal Government takes on or has control” of property belonging to a Tribe, the necessary “fiduciary relationship normally exists . . . even though nothing is said expressly” about “a trust or fiduciary connection.” *Id.*, at 225 (internal quotation marks omitted). Further, where the federal government has “full responsibility” to manage a resource or “elaborate control” over that resource, the requisite “fiduciary relationship *necessarily* arises.” *Id.*, at 224–225 (emphasis added). Statements by the United States “recogniz[ing]” a fiduciary duty, the Court explained, can help confirm as much too. *Id.*, at 224.

Consider *White Mountain Apache Tribe* as well. There,

GORSUCH, J., dissenting

this Court allowed a claim for money damages based on the United States’ breach of its “fiduciary duty to manage land and improvements” on a reservation. 537 U. S., at 468. The Tribe defended the right to bring that claim by pointing to a statute declaring certain lands would be “held by the United States in trust” for the Tribe and allowing the Secretary of the Interior to use “any part” of those lands “for administrative or school purposes.” *Id.*, at 469. In holding that statute sufficient to support a claim for money damages, this Court emphasized the United States exercised authority over the assets at issue and had considerable “discretionary authority” over their use. *Id.*, at 475.

Held even to these yardsticks, the Navajo’s complaint easily measures up. Our *Winters* decisions recognize that the United States holds reserved water rights “[a]s a *fiduciary*” for the Tribes. *Arizona II*, 460 U. S., at 627–628 (emphasis added). The United States’ control over adjacent water sources—including the Colorado River—is “elaborate.” *Mitchell II*. 463 U. S., at 225; see also *Arizona I*, 373 U. S., at 564–565; *White Mountain Apache Tribe*, 537 U. S., at 475. It can dole out water in parts of the Colorado by contract. 43 U. S. C. §617d. And, of course, the United States has expressly acknowledged that it holds water rights “in trust” for the Navajo, see Brief for Federal Parties 37; Tr. of Oral Arg. 40, perhaps including rights in the Colorado River mainstream, *id.*, at 33. Given these features, the Navajo’s complaint more than suffices to state a claim for relief.

IV

Where do the Navajo go from here? To date, their efforts to find out what water rights the United States holds for them have produced an experience familiar to any American who has spent time at the Department of Motor Vehicles. The Navajo have waited patiently for someone, anyone, to help them, only to be told (repeatedly) that they have been standing in the wrong line and must try another. To

GORSUCH, J., dissenting

this day, the United States has never denied that the Navajo may have water rights in the mainstream of the Colorado River (and perhaps elsewhere) that it holds in trust for the Tribe. Instead, the government's constant refrain is that the Navajo can have all they ask for; they just need to go somewhere else and do something else first.

The Navajo have tried it all. They have written federal officials. They have moved this Court to clarify the United States' responsibilities when representing them. They have sought to intervene directly in water-related litigation. And when all of those efforts were rebuffed, they brought a claim seeking to compel the United States to make good on its treaty obligations by providing an accounting of what water rights it holds on their behalf. At each turn, they have received the same answer: "Try again." When this routine first began in earnest, Elvis was still making his rounds on The Ed Sullivan Show.

If there is any silver lining here it may be this. While the Court finds the present complaint lacking because it understands it as seeking "affirmative steps," the Court does not pass on other potential pleadings the Tribe might offer, such as those alleging direct interference with their water rights. Importantly, too, the Court recognizes that the Navajo "may be able to assert the interests they claim in water rights litigation, including by seeking to intervene in cases that affect their claimed interests." *Ante*, at 12. After today, it is hard to see how this Court (or any court) could ever again fairly deny a request from the Navajo to intervene in litigation over the Colorado River or other water sources to which they might have a claim. Principles of estoppel, if nothing else, may have something to say about the United States' ability to oppose requests like that moving forward. Cf. *United States v. Louisiana*, 394 U. S. 11, 73–74, n. 97 (1969). All of which leaves the Navajo in a familiar spot. As they did at Bosque Redondo, they must again fight for themselves to secure their homeland and all that must

GORSUCH, J., dissenting

necessarily come with it. Perhaps here, as there, some measure of justice will prevail in the end.