(ORDER LIST: 600 U.S. __)

FRIDAY, NOVEMBER 3, 2023

CERTIORARI GRANTED

23-1491 DAKOTA FARM BUREAU V. NORTHERN TRIBE, ET AL.

The petition for a writ of certiorari is granted.

No. 23-1491

In The
Supreme Court of the United States

DAKOTA FARM BUREAU,

Petitioner,

v.

NORTHERN TRIBE, ET. AL.,

Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Thirteenth Circuit

PETITION FOR WRIT OF CERTIORARI

Georgia Custard
Counsel of Record
Dakota Farm Bureau
P.O. Box 1000
Sapphire City, Dakota 59860

QUESTION PRESENTED

This case requires the Court to decide a dispute over Grand River water management issues. The Grand River runs through Sapphire Valley, which is contained within the western State of Dakota (admitted 1889) and the Northern Reservation – the permanent homeland of the Northern Tribe. The Tribe ceded its lands outside the present-day reservation in an 1857 treaty with the United States, but expressly retained certain hunting and fishing rights in the ceded territory.

In 1892 the United States negotiated the purchase of additional lands within the reservation. These lands eventually became part of the Sapphire National Forest, managed by the U.S. Forest Service. When ceding these additional lands, the Tribe also reserved hunting and fishing rights upon them.

The State of Dakota follows the prior appropriation doctrine for water rights arising under state law. Under federal law and its treaty, the Tribe holds certain reserved water rights on the Grand River which pre-date all state-based water rights. Some of these tribal water rights are for instream flows to support treaty fishing rights. *Northern Tribe v. Dakota*, 723 F.2d 1508, 1514 (13th Cir. 1983). Although all state and tribal water rights in the Grand River basin are currently undergoing adjudication in state court pursuant to 43 U.S.C. § 666, the quantity of the Tribe's water rights has not yet been decreed in those proceedings.

The U.S. Bureau of Reclamation ("Reclamation"), a federal agency housed within the U.S. Department of Interior, is authorized to carry out water management projects in accordance with state law, except where state law conflicts with superseding federal law. 43 U.S.C. § 383. In 1905, the United States Reclamation Service, the predecessor to Reclamation, obtained a state-based water right for the Sapphire Valley Reclamation Project ("Sapphire Project"), commenced construction of a large dam and diversion works, and entered into contractual arrangements with individual agricultural operators in the Valley for delivery of water for irrigation use. The Dakota Farm Bureau is comprised of members that include these agricultural operators, and its standing to bring claims on their behalf is not in dispute. The project water right is for the full flow of the Grand River.

The Sapphire Project is located within the 1892 ceded territory and, until recently, was directly managed by Reclamation. In 2022, pursuant to Joint Secretarial Order No. 3403, the Northern Tribe entered into a Joint Co-Management Agreement with the United States Departments of Agriculture and Interior ("Management Agreement") for the 1892 ceded territory, recognizing that this area contains cultural and natural resources of significance and value to the Northern Tribe. One important resource is the Grand Trout – a fish that until recently was listed as endangered under the federal Endangered Species Act and remains designated as an endangered fish of high cultural and ecological importance under the Northern Tribe Legal Code. The Management Agreement establishes the Tribe as the manager of the Sapphire Project, subject to the obligations set forth in 43 U.S.C. § 383.

Thereafter, the Tribe took over management of the Sapphire Project and established the Grand River Operations Plan ("Plan"), which provides for a balancing of 1) delivery of project water pursuant to existing contracts and 2) the release of flows into the Grand River to support the

needs of the Grand Trout when temperatures rise and river flows decrease. Prior to the Plan, these released flows would have been delivered to agricultural operators, who are predicted to receive as much as 50% less than their contracted amount in dry summer months. The Plan asserts that all releases for the Grand Trout are an exercise of the Tribe's instream flow water rights. The Plan also cites the Northern Tribe Legal Code, which speaks of the Grand River as a living being and requires the Tribe's members to care for the River just as the River has provided for them ("Rule of Reciprocity.").

The Questions Presented are:

1. Whether the doctrine of tribal sovereign immunity requires dismissal of an action challenging tribal management of waters on which state and tribal water rights exist?

2. Whether federal agency delegation of water management authority to an Indian Tribe is unlawful when that authority involves state and tribal water rights?

****

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF DAKOTA
SAPPHIRE CITY DIVSION

DAKOTA FARM BUREAU, Plaintiff, v. NORTHERN TRIBE OF THE NORTHERN RESERVATION, a federally recognized Indian tribe, UNITED STATES DEPARTMENT OF INTERIOR; DEB HAALAND, Secretary of the Interior, in her official capacity; UNITED STATES BUREAU OF RECLAMATION; CAMILLE CALIMLIM TOUTON, Commissioner of the Bureau of Reclamation, in her official capacity; BRENT C. ESPLIN, Director of the Missouri Basin Region, Bureau of Reclamation, in his official capacity; JOE HALL, Area Manager for the Dakotas Area, Bureau of Reclamation, in his official capacity Defendants, _____	)	Case No. 22-CV-701-SBD-OPP ORDER

Harold Hickes, District Judge

I. Introduction

This matter arises out of the federal Sapphire Valley Reclamation Project ("Sapphire Project"), which was built to supply irrigation water to State of Dakota agricultural operators back in 1906. The Sapphire Project was developed on the Grand River within the 1892 ceded territory of the Northern Tribe, on lands now part of the Sapphire National Forest. The Grand River runs a course through the Sapphire Valley and is contained within the western State of Dakota (established 1889) and the Northern Reservation – the permanent homeland of the Northern Tribe, whose members have lived, hunted, and fished in the Valley since time immemorial. The region is experiencing climate change impacts typical for the West, such as reduced high mountain snowpack, more intense flood events, increased wildfire, and low surface flows in late summer. "[N]o problem" in the American West is "more critical than that of the scarcity of water." *Colo. River Water Conservation Dist. v. United State*s, 424 U.S. 800, 804

(1976).

Until recently, the United States Bureau of Reclamation (Reclamation), located within the Department of the Interior, managed the Sapphire Project in accordance with state and federal law. 43 U.S.C. § 383. The agency has done so pursuant to a 1905 water right issued by the State of Dakota that allows impoundment and distribution of all Grand River flows to agricultural operators. Reclamation is responsible for ensuring that the Sapphire Project is managed in a manner consistent with its statutory obligations, which include providing water to irrigators and protecting areas from flooding and other hazards. Reclamation also has a duty of trust toward Indian Tribes and is thus obligated to fulfill these "multiple buckets" to the best of its ability. The Tribe's water rights, while recognized as existing, have not yet been quantified in the ongoing adjudication proceedings in the State of Dakota.[1]

In 2022, pursuant to Joint Secretarial Order No. 3403, the Northern Tribe entered into a co-management agreement with the United States Departments of Agriculture and Interior to manage the lands and waters located within the 1892 ceded territory, recognizing that the area contains cultural and natural resources of significance and value to the Northern Tribe and its citizens, including sacred religious sites, burial sites, wildlife, fish, and sources of indigenous foods and medicines. The Management Agreement acknowledges that the federal signatories are charged with the highest treaty trust responsibility to protect the interests of the Northern Tribe and further the nation-to-nation relationship with the Tribe. Among those interests is the Grand Trout – a fish inhabiting the Grand River that was briefly listed as endangered under the federal Endangered Species Act ("ESA"). The Northern Tribe has fished for the Grand Trout and used it for food and ceremonies since time immemorial. Although Congress delisted the Grand Trout under the ESA,[2] it remains designated as an endangered fish of high cultural and ecological importance under the Northern Tribe Legal Code. The Northern Tribe has concluded that the Grand Trout requires certain minimum river flows to survive as a species. As a result, the Management Agreement establishes the Tribe as the primary manager of the Sapphire Project, subject to the obligations in 43 U.S.C. § 383.

The Northern Tribe thereafter established the Grand River Operations Plan ("Plan"), which provides for the release of additional flows in the Grand River to support the needs of the Grand Trout. These released flows would otherwise be delivered to agricultural operators, who are predicted to receive as much as 50% less than their contracted amount in dry summer months. The Plan indicates that all releases for the Grand Trout are an exercise of the Tribe's instream flow water rights and that releases are also being done pursuant to the Northern Tribe Legal Code, which requires protection of the Grand Trout and speaks of the Grand River as a living being. The Code requires the Tribe's members to care for the River just as the River has provided for them ("Rule of Reciprocity."). The Plan bases its flow release regime on a Biological and Cultural Assessment Report ("Report") that documents fishery survival needs using both western science and Indigenous Knowledge (*See* Executive Office Memorandum, *Guidance for Federal Departments and Agencies on Indigenous Knowledge* (November 30, 2022); 36 C.F.R. § 219.4(a)(3) (2023)). This Report's conclusions are consistent with prior

[1] While the Tribe is recognized as having a variety of reserved water rights, this dispute centers on the Tribe's exercise of its instream flow rights. Thus, other types of water rights held by the Tribe are not discussed here.
[2] Congress delisted the Grand Trout using a rider on an omnibus spending bill.

Biological Opinions issued by the federal government when the Grand Trout was previously listed under the ESA.

The Tribe's actions under the Plan have reduced water deliveries to agricultural operators, who are members of the Dakota Farm Bureau. The Dakota Farm Bureau alleges that the Plan impairs its members' rights to receive project water under state law and their delivery contracts with Reclamation – water which the Tribe has not historically put to beneficial use but has rather been beneficially used by its members. Affidavits submitted by some of those members describe how they and their predecessors have developed irrigated lands in reliance on the federal government's water deliveries and are at risk of losing their livelihoods if water deliveries are reduced. The Dakota Farm Bureau also alleges that the Department of Interior must retain final managerial authority over the Project and how tribal instream flow rights are used and cannot delegate that authority to the Tribe to administer under its own tribal laws. As such, the Dakota Farm Bureau seeks declaratory and injunctive relief against the Tribe and federal parties.

The Tribe in turn asserts sovereign immunity, requesting dismissal of the case, and further argues that is has authority to manage the Sapphire Project under agency delegation by virtue of its inherent sovereignty, superior reserved instream flow water rights, and federal statutes and directives. The federal government maintains that the Management Agreement is a lawful delegation, and that the Tribe is in compliance with the parties' Management Agreement.

I. Background

a. Tribal Fishing Rights & Instream Flow Rights

The Northern Tribe is a federally recognized tribe which has hunted, fished, and foraged in the Sapphire Valley for over a thousand years. The basis for the Northern Tribe's fishing rights is an 1857 treaty with the United States, in which the Northern Tribe relinquished its aboriginal claim to the Sapphire Valley in return for a reservation as a permanent homeland. In addition to other rights, the 1857 Treaty guaranteed the Northern Tribe "the right to take fish at all usual and accustomed places" throughout all of the ceded lands, the right to hunt on "open and unclaimed lands," and "the exclusive right to take fish from streams running through the reservation." Treaty Between the United States of Am. & the Northern Tribe of Indians, Art. II, Oct. 14, 1857, 11 Stat. 701 ("the Treaty of Dakota" or "the 1857 Treaty"). Furthermore, an 1892 Agreement which ceded a portion of the Northern Reservation also reserved to the Tribe the right to "hunt upon said lands and fish in the streams thereof so long as the same shall remain public lands of the United States." *Agreement with the Northern Tribe*, October 4, 1892, 31 Stat. 74. In *Northern Tribe v. Dakota*, the United States Court of Appeals for the Thirteenth Circuit determined that "one of the very purposes of establishing the Northern Reservation was to secure to the Tribe a continuation of its traditional hunting and fishing lifestyle." 723 F.2d 1508, 1514 (13th Cir. 1983). The Northern Tribe's instream flow water rights, which the court of appeals recognized as implied within the fishing rights reservation, "necessarily carry a priority date of time immemorial. The rights were not created by the 1857 Treaty, rather, the treaty confirmed the continued existence of these rights." *Id.*

The Tribe's instream flow rights are non-consumptive, meaning that the Tribe is "not

entitled to withdraw water from the stream for agricultural, industrial, or other consumptive uses" in connection with these rights. *Northern Tribe v. Dakota*, 723 F.2d 1508, 1514 (13th Cir. 1983); *see also United States v. Adair*, 723 F.2d 1394, 1411 (9th Cir. 1983). Instead, under these rights the Tribe holds "the right to prevent other appropriators from depleting the streams' waters below a protected level in any area where the non-consumptive right applies." *Id.* While recognizing the Tribes' water rights, the Court did not determine the precise water levels subject to protection. *Id.* at 1515.

In *Winters v. United States*, the United States sued to enjoin upstream irrigators from constructing or maintaining dams on the Milk River, or from otherwise preventing the water of the river or its tributaries from flowing downstream to the Fort Belknap Indian Reservation in Montana. 207 U.S. 564, 565 (1908). Although there was no express reservation of the river's water in the 1888 agreement creating the reservation, the Supreme Court noted that it was the "policy" of the government and the "desire of the Indians" to become "a pastoral and civilized people" and that, without the river water to irrigate the land of the reservation, the land would be "practically valueless." *Id.* at 576. Noting that "[b]y a rule of interpretation of agreements and treaties with the Indians, ambiguities occurring will be resolved from the standpoint of the Indians," the Court affirmed the permanent injunction of the district court that prevented the irrigators from interfering with the water flow needed by the reservation. The Supreme Court has subsequently restated this "Reserved-Water-Rights Doctrine" as follows:

> This Court has long held that when the Federal Government withdraws its land from the public domain and reserves it for a federal purpose, 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). Cases refer to these reserved water rights as *Winters* rights. *Crow Creek Sioux Tribe v. United States*, 900 F.3d 1350, 1352, 1355–56 (Fed. Cir. 2018); *Navajo Nation v. Dep't of the Interior*, 876 F.3d 1144, 1155 (9th Cir. 2017); *see also Arizona v. California*, 373 U.S. 546, 600 (1963) ("The Court in *Winters* concluded that the Government, when it created that Indian Reservation, intended to deal fairly with the Indians by reserving for them the waters without which their lands would have been useless.").

Winters' recognition of water rights "rests on the idea that the reservation of public lands for a public purpose implies the reservation of unappropriated, and thus available, water appurtenant to the land to the extent necessary to fulfill that purpose." *Shoshone Bannock Tribes v. Reno*, 56 F.3d 1476 (D.C. Cir. 1995). Such rights are "federal right[s], derived from the reservation of the land," and thus "do not depend on state law." *Id*. *See also Cappaert*, 426 U.S. at 145 (reserved water rights are "governed by federal law," and are "not dependent upon state law or state procedures."); F. Cohen, *Handbook of Federal Indian Law* 1210 (2012) ("Indian reserved rights to water are determined by federal, not state, law"). As a general rule, reserved tribal water rights persist, regardless of actual use, unless they are relinquished by treaty or explicitly abrogated by Congress. *See United States v. Dion*, 476 U.S. 734, 738-39 (1986) ("We have required that Congress' intention to abrogate Indian treaty rights be clear and plain" since "Indian treaty rights are too fundamental to be easily cast aside."); *Colville Confederated Tribes v. Walton*, 647 F.2d 42, 51 (9th Cir. 1981) ("*Winters* rights, unlike water rights gained through prior appropriation, are not lost through non-use."). *Winters'* implied reserved rights doctrine has been extended to recognition of instream flow water rights when a Tribe has reserved fishing

rights. *See, e.g., United States v. Adair*, 723 F.2d at 1414.

b. The Sapphire Project & Adjudication

The Reclamation Act of 1902, Pub. L. No. 57-161, 32 Stat. 388 (codified, as amended, at 43 U.S.C. § 371 *et seq.*) ("the Reclamation Act" or "the Act") "laid the groundwork for a vast and ambitious federal program to irrigate the arid lands of the western states." *Grant Cty. Black Sands Irrigation Dist. v. U.S. Bureau of Reclamation*, 579 F.3d 1345, 1351 (Fed. Cir. 2009). The Act authorizes Reclamation to carry out water management projects in accordance with state law regarding the control, appropriation, use, and distribution of water for irrigation purposes, except where state law conflicts with superseding federal law. 43 U.S.C. § 383; *Baley v. United States*, 134 Fed. Cl. 619, 626 (2017) (Section 8 of the Reclamation Act requires the Secretary of the Interior to comply with state law regarding the appropriation of water for irrigation, to the extent such law is not inconsistent with federal law.).

The State of Dakota follows the doctrine of prior appropriation of water rights. Under the prior appropriation doctrine, "diversion and application of water to a beneficial use constitute an appropriation and entitle the appropriator to a continuing right to use the water, to the extent of the appropriation, but not beyond that reasonably required and actually used. The appropriator first in time is prior in right over others upon the same stream." *Arizona v. California,* 298 U.S. 558, 565–66 (1936). "[T]he doctrine provides that rights to water for irrigation are perfected and enforced in order of seniority, starting with the first person to divert water from a natural stream and apply it to a beneficial use (or to begin such a project, if diligently completed)." *Montana v. Wyoming*, 563 U.S. 368, 375–76 (2011) (citing *Hinderlider v. La Plata River & Cherry Creek Ditch Co.*, 304 U.S. 92, 98 (1938); *Arizona v. California*, 298 U.S. at 565–66). "Once such a water right is perfected, it is senior to any later appropriators' rights and may be fulfilled entirely before those junior appropriators get any water at all." *Id.* at 376; *see also* Dakota Stat. § 72-1-2 ("Priority in time shall give the better right.").

In 1905, the United States Reclamation Service, the predecessor to Reclamation, filed a notice of appropriation with the Dakota State Engineer, indicating its intent to utilize the full flow of the waters of the Grand River in accordance with the Reclamation Act, and began construction of the Sapphire Project. The notice set forth plans for proposed works and proof of authorization for the Sapphire Project. The notice stated that "the United States intends to utilize ... [a]ll of the waters of the Sapphire Valley in Dakota, constituting the entire drainage basins of the Grand River, and all of the lakes, streams and rivers supplying water thereto or receiving water therefrom" for purposes of "the operation of works for the utilization of water ... under the provisions of the ... Reclamation Act." 1905 Notice of Appropriation. Under the Sapphire Project, river water is stored by means of a dam and is then diverted and conveyed through canals and laterals to individual users within the Sapphire Valley. Reclamation constructed the dam and diversion works in 1906, and title to it remains with the United States.

The Dakota Farm Bureau has members that include agricultural operators from the Sapphire Valley who receive project water and put it to beneficial use through irrigation of crops. As a result, the water has become appurtenant to the operators' lands. 42 U.S.C. § 372. The

United States holds the 1905 water right that it appropriated pursuant to the Sapphire Project for the use and benefit of these landowners.

In 1975, the State of Dakota began a general stream adjudication for the purpose of determining surface water rights in the Grand River Basin ("the Grand River Adjudication" or "the Adjudication"). The Adjudication was undertaken pursuant to Dakota state law. The Adjudication covers pre-1909 state-based water rights not previously adjudicated, as well as federal reserved water rights, including tribal water rights, pursuant to 43 U.S.C. § 666. Claims were filed beginning in 1990. Administrative hearings were initiated in 2001, and on February 28, 2014, the adjudicator issued orders of determination. Those orders acknowledge Reclamation's 1905 state-based water right and also recognize that the Tribe holds reserved rights under federal law, including time immemorial instream flow rights, based on the ruling of the United States Court of Appeals for the Thirteenth Circuit in *Northern Tribe v. Dakota,* 723 F.2d 1508 (13th Cir. 1983). The adjudicator's orders are now before the Dakota state courts for judicial confirmation by decree. By stipulation of the parties, the quantification of the Northern Tribe's instream flow reserved rights has been bifurcated from the main proceedings and thus remains to be resolved before the basin adjudication is complete.

c. Backdrop of 2022 Delegation

In 1988, Congress broadened the Indian Self-Determination and Education Assistance Act ("ISDEAA") to allow contracts to be given for any program "for the benefit of Indians because of their status as Indians." 25 U.S.C. § 5321. This allowed for tribes to begin to contract for implementing federal Indian water rights settlements for the U.S. Bureau of Reclamation. In 1994, Congress further amended the ISDEAA to establish that "a tribe may contract for federal activities or programs that have a "special geographic, historical, or cultural significance" to the Tribe. 25 U.S.C. § 5363(c). Ten year later, in 2004 Congress expanded contracting to the U.S. Forest Service, through the Tribal Forest Protection Act ("TFPA"). 108 P.L. 278, 118 Stat. 868, 869, 2004 Enacted H.R. 3846, 108 Enacted H.R. 3846. The TFPA allowed the U.S. Forest Service to contract with tribes to achieve enumerated federal land management goals such as restoring public lands "bordering or adjacent to" Indian lands as long as the land possesses a "feature or circumstance unique to [the relevant] Indian tribe (including treaty rights or biological or, archeological, historical or cultural circumstances)." *Id*. In 2018, Congress again expanded tribal self-determination and U.S. Forest Service contracting authority in the Agriculture Improvement Act ("Farm Bill"). 25 U.S.C. § 3115(b). The only obligation that Congress specifically established through these enactments is for each agency to identify potential contractible programs by activity and unit (location) and provide notice by publishing the list annually.

In November 2021, the Secretaries of Interior and Agriculture instituted the Tribal Homelands Initiative pursuant to a joint Secretarial Order 3403, calling for increased efforts on the parts of both of their departments to engage in co-stewardship of public lands and resources. Deb Haaland & Thomas J. Vilsack, U.S. Dep't of the Interior & U.S. Dep't of Agric., Order No. 3403, Joint Secretarial Order on Fulfilling the Trust Responsibility to Indian Tribes in the Stewardship of Federal Lands and Waters (2021). That order was built on a 2016 order from former Secretary of the Interior Sally Jewell seeking to promote similar efforts, which stopped

short of suggesting that the federal government could share management responsibilities with tribes. Sally Jewell, U.S. Dep't of the Interior, Order No. 3342, Identifying Opportunities for Cooperative and Collaborative Partnership with Federally Recognized Indian Tribes in the Management of Federal Lands and Resources (2016). In September 2022, the Department of the Interior issued new guidance to federal agencies pursuant to joint Secretarial Order 3403, to strengthen collaboration with Native Nations in the management of public lands, water, and wildlife. This new policy supports the development of co-stewardship agreements to allow Tribes with the ability to co-manage projects on public lands.

Against this backdrop, and pursuant to Joint Secretarial Order No. 3403, the Northern Tribe in 2022 entered into the aforementioned Management Agreement with the Sapphire National Forest and the Department of Interior to manage the lands and waters located within the 1892 ceded territory. Because of the Tribe's longstanding relationship with the Grand Trout, and its reserved fishing rights and instream flow rights, the Management Agreement establishes the Tribe as the primary manager of the Sapphire Project. The Tribe has begun releasing flows from the project dam into the Grand River during late summer low flows according to a flow release regime that is based on a combination of western science, Indigenous Knowledge, and the Tribe's Rule of Reciprocity set forth in its Legal Code, thereby reducing contract water deliveries to agricultural operators under Reclamation's 1905 water right.

II. Discussion

a. Water as a Trust Asset

I begin with the question of water as a trust asset. The Tribe and federal parties argue that the Management Agreement is a fulfillment of federal trust obligations to the Tribe. The Court of Appeals has already recognized the Northern Tribe's reserved instream flow water rights under federal law and that ruling will not be disturbed. *Northern Tribe v. Dakota*, 723 F.2d 1508 (13th Cir. 1983). As *Winters* rights, the federal government impliedly reserved these water rights in an amount necessary to fulfill the purposes of the Northern Tribe's reservation. *Navajo Nation v. Dep't of Interior, et al.*, 876 F.3d 1144, 1155 (9th Cir. 2017). Furthermore, these *Winters* rights, even when unquantified, are still considered an Indian Trust Asset. *Id.* at 1159. The United States holds legal title to such water in trust for the benefit of the Indians.

Winters rights also provide the foundation of the Northern Tribe's defense here – that its Operating Plan and the flow releases thereunder are merely implementing the Tribe's time immemorial rights, which are senior to Reclamation's 1905 state-based water right. Unlike the plaintiffs in *Morongo*, *Gros Ventre*, and *Jicarilla*, the Northern Tribe, in pointing to its reserved water rights, has identified specific treaty and regulatory provisions that impose trust obligations on the federal parties. *See Morongo Band of Mission Indians v. F.A.A.*, 161 F.3d 569 (9th Cir. 1998); *Gros Ventre Tribe v. United States*, 469 F.3d 801 (9th Cir. 2006); *United States v. Jicarilla*, 564 U.S. 162 (2011).

I 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 my

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.

I hold in particular that, under *Winters*, the federal parties have a duty to protect the Northern Tribe's water supply that arises, in part, from specific provisions in the 1857 Treaty. 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 (1979) (citing *Lone Wolf v. Hitchcock*, 187 U.S. 553 (1903)). Courts have consistently 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).

Perhaps most on point, the United States Court of Appeals for the Ninth Circuit 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; *see also Northern Tribe v. Dakota*, 723 F.2d 1508, 1514 (13th Cir.1983). The Ninth Circuit 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. The Ninth Circuit 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, which is the same claim at issue in this case, were "essentially non-consumptive 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 Northern Tribe v. Dakota*, 723 F.2d 1508, 1514 (13th Cir. 1983) (The Tribe's rights are non-consumptive, meaning that the Tribe is "not entitled to withdraw water from the stream for agricultural, industrial, or other consumptive uses"); *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.").

This court's 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. 287, 301 (2009), 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…'" *Id.* (quoting *United States v. White Mountain Apache Tribe*, 537 U.S. 465, 473 (2003)). The defendants have identified a specific duty-imposing treaty, as I have explained.

To summarize: I hold that the Northern Tribe and federal government have successfully identified specific treaty and statutory provisions that, taken together, anchor their assertion that the federal signatories to the Management Agreement owe a duty of trust to the Tribe. Having established that a trust duty exists, I hold that the tribal trust doctrine firmly mandates the federal

parties' duty to protect and preserve the Tribe's right to water. Under *Winters*, when the federal government took the Northern Reservation into trust, it "reserve[d] appurtenant water then unappropriated to the extent needed to accomplish" that purpose. *Northern Tribe v. Dakota*, 723 F.2d 1508, 1514 (13th Cir. 1983). 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 Tribe's treaty with the United States, the *Winters* rights that attach to the Reservation are sufficiently well-established to create an implied trust obligation on the federal parties. *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.3d at 1482). As noted below, however, it is this trust obligation, among other concerns, that precludes Reclamation from delegating primary authority over water rights to the Tribe.

b. Delegation of Authority

In addressing the question of delegated authority, the Dakota Farm Bureau suggests Reclamation should not have taken unilateral action in delegating its management and trust obligations to the Tribe. I agree. Because tribal water rights are a recognized trust asset, the federal parties lacked the authority to delegate management of the tribal water rights through the Sapphire Project. For such a delegation to be lawful, Congress must enact the delegation of authority. *See U.S. v. Lara*, 541 U.S. 193, 202 (2004) ("Congress, with this Court's approval, has interpreted the Constitution's 'plenary' grants of power as authorizing it to enact legislation that both restricts and, in turn, relaxes those restrictions on tribal sovereign authority.").

Furthermore, Reclamation has "multiple buckets" to fill in fulfilling its responsibility to the users of the Sapphire Project. Even if I were to accept the notion that Reclamation had the authority to delegate its tribal trust obligations to the Tribe, there is no evidence, and the Tribe has cited no authority, that Reclamation is allowed to delegate its competing obligations to state water users. When the Federal government, in relation to Indians, has "multiple buckets" to fill, it must do so in manner that depicts a "good faith effort" in achieving the multiple goals. *See Three Affiliated Tribes of the Fort Berthold Reservation v. United States*, 390 F. 2d 686, 691 (1968).

The Plan provides for the release of flows in the Grand River to support the Grand Trout. As justification for the Plan, the Tribe issued a Report pertaining to the Sapphire Project. This court finds that the science contained in the Report is reasoned and credible. Moreover, this court accepts the conclusions of the Report, including that the elevation levels for Grand River are necessary to avoid jeopardizing the continued existence of the Grand Trout. This court also accepts that the co-management agreement was implemented with the intention of satisfying Reclamation's tribal trust obligations to the Tribe. However, the Report fails to make any acknowledgment about the water needs of other users of the Grand River and the Plan fails to make a good faith effort at establishing harmonious and coordinated management of the system. This is the case, even though the Plan acknowledges the "Rule of Reciprocity" when making decisions about water. The Court understands that this rule, pursuant to the Tribe's own law, requires the Tribe to engage in reciprocal relationships in a respectful manner that attempts to

achieve harmony and balance. The Tribe cannot have it both ways – invoking one side of the federal trust coin without honoring the other. This further underscores my conclusion that a delegation of Reclamation's authority to tribes is untenable when the agency has trust obligations in "multiple buckets." Absent explicit Congressional authorization, this delegation is a bridge too far.

c. Quantification

Additionally, even assuming that tribes theoretically *can* exercise delegated authority from Reclamation, I hold that the Northern Tribe is not among those tribes qualified for such a delegation. The Tribe cannot withhold water from Dakota Farm Bureau members to satisfy an unquantified water right. Section 8 of the Reclamation Act states that the Bureau is to distribute water in conformity with state laws. *See* 43 U.S.C. § 383. The "state" law to which the Dakota Farm Bureau points is Dakota state law. In accordance with Dakota law, the Grand River Adjudication establishes the extent of water rights in the Grand River basin. For the Northern Tribe to implement its rights, it must obtain a judicial determination pursuant to the Grand River Adjudication. *See Nevada v. United States*, 463 U.S 110 (1983). In such a quantification, the Tribe is only entitled to an allocation adequate to support a "reasonable livelihood" or a "moderate living," as stated in *Washington v. Washington State Commercial Passenger Fishing Vessel Association*. 443 U.S. at 685. In applying the "reasonable livelihood" or "moderate living" standard, it is possible that the needs of the Tribe may be satisfied without reducing water deliveries to irrigators. This is a question for state court adjudicators.

d. McCarran Amendment and Sovereign Immunity

The McCarran Amendment is a "virtually unique federal statute." *Arizona v. San Carlos Apache Tribe of Ariz.*, 463 U.S. 545, 571(1983). It waives federal sovereign immunity in "any suit" for the "adjudication" or "administration" of the "rights to the use of water of a river system or other source." 43 U.S.C. § 666(a). The Amendment recognizes the "highly interdependent" nature of water rights and the costs of "permitting inconsistent dispositions" of such rights among different proceedings. *Colo. River Water Conservation Dist.*, 424 U.S. at 819. By stripping sovereign immunity, Congress sought to "avoid [the] piecemeal adjudication of water rights" and to encourage their resolution in "unified proceedings." *Id.*

The Supreme Court has construed the Amendment to strip sovereign immunity over tribal water rights held as "reserved rights" by the federal government. *United States v. District Court for Eagle Cnty.*, 401 U.S. 520, 524 (1971). Based on its text and underlying policy, the Court has held that the Amendment "reach[es] federal water rights reserved on behalf of Indians." *Colo. River Water Conservation Dist.*, 424 U.S. at 811. Because of the "ubiquitous nature of Indian water rights," the Court has observed that it would frustrate Congress' will to exclude those rights from water-rights suits. *Id.* So, at its core, the McCarran Amendment grants parties an opportunity to resolve competing water rights, including against reserved tribal water rights, in any suit for stream-wide adjudication or administration.

Given the unique nature of the McCarran Amendment, the Court has emphasized that in McCarran proceedings, the federal government retains "responsibility [to] fully ... defend Indian

rights" and to ensure that "Indian interests [are] satisfactorily protected." *Colo. River Water Conservation Dist.*, 424 U.S. at 812. Thus, by consenting to join tribal water rights in water rights adjudications, Congress entrusted the stewardship of those rights to the federal government. And so, in my view, if a case falls within the scope of the McCarran Amendment, then sovereign immunity over reserved tribal water rights is stripped.

The important question here is, thus, whether the Dakota Farm Bureau has brought a suit subject to the McCarran Amendment. I hold that this case is a McCarran Amendment case because the Tribe's instream flow water rights, at issue here, are currently under judicial review by the State of Dakota in a comprehensive, stream-wide adjudication. Further, the Tribe is, in effect, "administering" the rights currently under adjudication by distributing them according to their priority date. To hold otherwise, simply because this case involves a federal reclamation project, would be to elevate form over substance. This is the precise situation in which Congress intended states to have judicial recourse so that all water rights issues can be fully resolved in one proceeding. As a result, Congress has waived the sovereign immunity of the Tribe for the purposes of this suit.

e. Tribal Law and Sovereign Immunity

The Northern Tribe's Plan invokes the Norther Tribe Legal Code as an additional basis for its flow release regime, including the tribal requirements for protecting the Grand Trout and the Rule of Reciprocity. Tribal law can under certain circumstances serve as a means to find a tribal waiver of sovereign immunity. *See Stephanie Wright, et. al. v. Nottawaseppi Huron Band of the Potawatomi, et. al.*, Case No. 21-154-APP (Supreme Court for the Nottawaseppi Huron Band of the Potawatomi June 3, 2022); *Wescogame v. Alvirez*, No. 2017-AP-001 (Haulapai Nation Court of Appeals 2017); *Davis v. Keplin*, 18 Indian L. Rep. 6148 (Turtle Mountain Band of Chippewa Indian Tribal Court 1991). As stated previously, however, Section 8 of the Reclamation Act specifies that the Bureau is to distribute water in conformity with state laws. *See* 43 U.S.C. § 383. The "state" law to which the Dakota Farm Bureau points is Dakota state law. As a result, we do not need to look to tribal law, as state law controls. *See Jensen v. EXC, Inc.*, 2017 WL 6523446 (D. Ariz. 2017). This is true specifically since the court has already concluded that this is a McCarran Amendment case and subject to adjudication in the State of Dakota. Therefore, it is not necessary to determine whether the application of tribal law to the Sapphire Project supports an alternative waiver of sovereign immunity.

III. Conclusion

For the foregoing reasons, the plaintiff's request for declaratory and injunctive relief against the Tribe and federal parties is granted because the co-management agreement and resulting release of additional flows in the Grand River to support the needs of the Grand Trout arise from an unquantified water right and an unlawful delegation that impairs the adjudicated rights of the Dakota Farm Bureau members. An accompanying Order consistent with this Opinion will be entered contemporaneously.

IN THE UNITED STATES COURT OF APPEALS

FOR THE THIRTEENTH CIRCUIT

NO. 23-17954

NORTHERN TRIBE OF THE NORTHERN RESERVATION, a federally recognized Indian tribe, UNITED STATES DEPARTMENT OF INTERIOR; DEB HAALAND, Secretary of the Interior, in her official capacity; UNITED STATES BUREAU OF RECLAMATION; CAMILLE CALIMLIM TOUTON, Commissioner of the Bureau of Reclamation, in her official capacity; BRENT C. ESPLIN, Director of the Missouri Basin Region, Bureau of Reclamation, in his official capacity; JOE HALL, Area Manager for the Dakotas Area, Bureau of Reclamation, in his official capacity,

Defendant, Appellants

v.

DAKOTA FARM BUREAU,

Plaintiff, Appellees

Appeal from the United States District Court
for the District of Dakota
(D.C. No. 22-CV-701-SBD-OPP)

Before BRENDALE, Circuit Judge, JONES, Senior Circuit Judge, and MERRION, Circuit Judge.

JONES, Senior Circuit Judge

I. Background

The facts surrounding this case were detailed by the District Court in *Dakota Farm Bureau v. Northern Tribe, et al.*, 480 F. Supp. 4th 1104 (D. Dak. 2022). We will reiterate them briefly here. This case arises out of the management of the federal government's Sapphire Valley Reclamation Project ("Sapphire Project"), located in the Sapphire National Forest. The Sapphire Project impounds and delivers irrigation water from the Grand River, a waterbody that runs through Sapphire Valley and is contained within the western State of Dakota (established 1889)

and the Northern Reservation – the permanent homeland of the Northern Tribe, whose members have lived, hunted, and fished in the Valley since time immemorial. Pursuant to its statutory mandate, the United States Bureau of Reclamation ("Reclamation") holds a water right issued to it by the State of Dakota in 1905, distributing the water to agricultural operators under individual contracts. *See Standard Water Delivery Contract*, Appendix to Appellant Brief. The 1905 right purports to appropriate the full flow of the Grand River, although in actuality it is subject to superior tribal water rights under federal law.

In an 1857 treaty with the United States, the Northern Tribe relinquished its aboriginal claim to the Sapphire Valley in return for a reservation as a permanent homeland. In addition to other rights, the 1857 Treaty guaranteed the Northern Tribe "the right to take fish at all usual and accustomed places" throughout all of the ceded lands, the right to hunt on "open and unclaimed lands," and "the exclusive right to take fish from streams running through the reservation." Treaty Between the United States of Am. & the Northern Tribe of Indians, Art. II, Oct. 14, 1857, 11 Stat. 701 ("the Northern Treaty" or "the 1857 Treaty").

In 1892, a mere 35 years after the United States promised the Northern Tribe its permanent homeland, the United States negotiated the purchase of additional lands within the reservation. Tribal members speak of these negotiations as fraudulent and coercive, believing that federal negotiators forced the Tribe to accept the terms of the purchase. As a result, the Tribe ceded the land on which the Sapphire Project sits today. That cession was not absolute, however, because the Tribe reserved the right to "hunt upon said lands and fish in the streams thereof so long as the same shall remain public lands of the United States." *Agreement with the Northern Tribe*, October 4, 1892, 31 Stat. 74.

It is the law of the case that the Northern Tribe holds senior instream flow rights to support these reserved fishing rights. *Northern Tribe v. Dakota*, 723 F.2d 1508 (13th Cir. 1983) (concluding the water rights, which are necessary to fulfill the antecedent fishing rights reserved by the Tribe, date to "time immemorial"). The State of Dakota has recognized this court's holding in its Grand River Adjudication, and, by stipulation of the parties, all that remains for the adjudication to be final is a quantification of the Tribe's water rights.

Until recently, Reclamation managed the Sapphire Project in accordance with state and federal law. 43 U.S.C. § 383. As the district court correctly observed, Reclamation has a duty of trust toward Indian Tribes and also is responsible for ensuring that the Sapphire Project is managed in a manner consistent with its obligations to provide water to water rights holders and protect areas from flooding and other hazards. Reclamation is "obligated to fulfill these 'multiple buckets' to the best of its ability." *Dakota Farm Bureau,* 480 F. Supp. 4th at 1113-14.

Congress has authorized the federal government to contract out a variety of services with third-party vendors, including tribes. Most directly on point, the Indian Self-Determination and Education Assistance Act ("ISDEAA") allows contracts to be given for any program "for the benefit of Indians because of their status as Indians." 25 U.S.C. § 5321. This allows tribes to implement federal Indian water rights settlements for Reclamation. ISDEAA also establishes that "a tribe may contract for federal activities or programs that have a "special geographic, historical, or cultural significance" to the Tribe. 25 U.S.C. § 5363(c). Congress has also

expressly authorized the U.S. Forest Service to contract with tribes to achieve enumerated federal land management goals such as restoring public lands "bordering or adjacent to" Indian lands as long as the land possesses a "feature or circumstance unique to [the relevant] Indian tribe (including treaty rights or biological or, archeological, historical or cultural circumstances)." Tribal Forest Protection Act, 108 P.L. 278, 118 Stat. 868, 869, 2004 Enacted H.R. 3846, 108 Enacted H.R. 3846; *see also* Agriculture Improvement Act ("Farm Bill"), 25 U.S.C. § 3115(b).

Federal support of tribal management is thus a growing priority for Congress. This priority is being implemented at the agency level in a variety of ways. For example, the Tribal Homelands Initiative (Joint Secretarial Order 3403) calls for the United States Departments of Interior and Agriculture to strengthen collaboration with Native Nations in the management of public lands, water, and wildlife. Deb Haaland & Thomas J. Vilsack, U.S. Dep't of the Interior & U.S. Dep't of Agric., Order No. 3403, Joint Secretarial Order on Fulfilling the Trust Responsibility to Indian Tribes in the Stewardship of Federal Lands and Waters (2021).

Precisely as envisioned by Congress and Joint Secretarial Order No. 3403, in 2022 the Northern Tribe entered into a joint Co-Management Agreement ("Management Agreement") with the United States Departments of Interior and Agriculture to manage the lands and waters located within the 1892 ceded territory, recognizing that those lands and waters contain cultural and natural resources of significance and value to the Northern Tribe and its citizens, including sacred religious sites, burial sites, wildlife, fish, and sources of indigenous foods and medicines. The Management Agreement acknowledges that the Departments are charged with the highest treaty trust responsibility to protect the interests of the Northern Tribe and further the nation-to-nation relationship with the Tribe. As a result, the Management Agreement establishes the Tribe as the primary manager of the Sapphire Project, subject to 43 U.S.C. § 383.

The Tribe has begun its management under a Grand River Operations Plan ("Plan") that delivers project water in compliance with state, federal, and tribal law by 1) releasing adequate flows to support the Tribe's time immemorial instream flow right during dry summer months; 2) delivering the balance of water to state agricultural operators who have contracted for such deliveries under Reclamation's junior, 1905 state water right; and 3) ensuring that the Tribe protects the Grand Trout as required under its Legal Code and the Rule of Reciprocity. Further, the Plan's flow release regime is supported by both western science and traditional knowledge and is in keeping with prior agency flow recommendations under the federal Endangered Species Act. *See generally* Biological and Cultural Assessment Report ("Report"). The Report's conclusions are consistent with prior Biological Opinions issued by the federal government when the Grand Trout was formerly listed under the ESA. The federal government parties have concluded the Tribe's implementation of the Management Agreement is in full compliance with federal law.

The district court granted the Dakota Farm Bureau's request for declaratory and injunctive relief against the Tribe and federal parties because the court determined that the Management Agreement and the Plan were unlawful. Among its varied reasons, the court held *inter alia* that: water is a recognized Indian trust asset over which the federal government must retain final decision-making authority absent Congressional authorization to delegate; that a

"multiple buckets" agency like Reclamation does not have the authority to delegate its obligations to other non-Indian users to a Tribe; and that this is a McCarran Amendment case in which Congress has waived the sovereign immunity of the Tribe, allowing for entry of judgment.

We review a district court's grant of declaratory and injunctive relief against the Tribe and federal parties 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).

This appeal presents two threshold issues. First, whether the doctrine of tribal sovereign immunity requires dismissal of an action challenging tribal management of water. Second, whether the federal government possesses final decision-making authority over the management of water rights held in trust for an Indian tribe, along with federal duties to state water users, which preclude delegation to an Indian tribe. We conclude that under the doctrine of tribal sovereign immunity, Congress has not clearly and unequivocally waived the immunity of the Tribe as this case does not fall within the ambit of the McCarran Amendment. However, pursuant to Northern tribal law, the Tribe has issued a waiver of its sovereign immunity. In finding a waiver of tribal sovereign immunity we are able to address the merits of the second threshold issue. Accordingly, we conclude that Reclamation's delegation of authority to the Tribe to manage the Sapphire Project was lawful. In making this determination, we abstain from determining whether the quantity of releases under the Plan is the actual quantity of the Tribe's instream flow right since that legal question is pending in the State of Dakota. Nonetheless, because the amount of the releases is supported by sound science, and is corroborated by similar federal government findings, we hold that the lack of quantification is not an obstacle to the Tribe exercising its reasoned judgment until the state adjudication of quantity is complete.

II. Discussion

a. Sovereign Immunity Under McCarran Amendment

The district court incorrectly concluded that this case falls within the ambit of the McCarran Amendment, 43 U.S.C. § 666 – a federal statute enacted in 1952 that waives federal sovereign immunity to allow for the "joinder of the federal government in state suits for the general adjudication of all waters in river systems and for the administration of the adjudicated rights." F. Cohen, *Handbook of Federal Indian Law* 1242 (2012); *see also Colo. River Water Conservation District v. United States*, 424 U.S. 800, 802–03 (1976).

While the McCarran Amendment "reach[es] federal water rights reserved on behalf of Indians," *Colo. River Water Conservation Dist.*, 424 U.S. at 811–12, the Amendment only controls in cases "adjudicati[ng]" or "administ[ering]" water rights. 43 U.S.C. § 666(a). Thus, even assuming the McCarran Amendment's waiver of sovereign immunity extends to tribes as parties, *but see Arizona v. San Carlos Apache Tribe of Arizona*, 463 U.S. 545, 567 n. 17 (1983), the Amendment does not waive sovereign immunity in every case that implicates water rights.

An "administration" of water rights under 43 U.S.C. § 666(a)(2) occurs after there has been a "prior adjudication of relative general stream water rights." *See South Delta Water Agency v. United States*, 767 F.2d 531, 541 (9th Cir. 1985). Even then, not every suit that comes later in time than a related adjudication amounts to an administration under the Amendment. *Id.* at 542 ("The McCarran Amendment was ... not an attempt to resolve the whole field of water rights litigation."); *San Luis Obispo Coastkeeper v. U.S. Dep't of the Interior*, 394 F. Supp. 3d 984, 995 (N.D. Cal. 2019) ("In sum, the purpose of the McCarran Amendment is not to waive sovereign immunity whenever litigation may incidentally relate to water rights administered by the United States. It is for determining substantive water rights by giving courts the ability to enforce those determinations ....").

The parties do not dispute that the Grand River Adjudication is an adjudication within the meaning of the McCarran Amendment, and we agree. However, the parties disagree as to whether *this* case is an administration of that general stream adjudication within the meaning of the McCarran Amendment. The Dakota Farm Bureau argues that this case is, in effect, an enforcement action in that the Tribe is determining priority among competing users and distributing water accordingly. The federal parties and the Tribe disagree. They argue that the present suit is not one to administer rights pursuant to the Grand River Adjudication, which is not yet a completed proceeding with an enforceable decree to be administered. They also argue that this suit is not an administration because, rather than requesting that the government administer the various water rights at stake in relation to one another, the Dakota Farm Bureau seeks an injunction against all fishery releases and delegation of project authority to the Tribe. *See Navajo Nation v. U.S. Dep't of Interior*, 26 F.4th 794, 806 (9th Cir. 2022) ("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…").

We conclude that this lawsuit is not an administration of previously determined rights but is instead a challenge to federal agency action – specifically, Reclamation's delegation under the co-management agreement, thereby providing the Tribe with the ability to exercise its sovereign authority to release additional flows in the Grand River to support the needs of the Grand Trout. *See Klamath Irrigation District v. United States Bureau of Reclamation*, 48 F.4th 934 (9th Cir. 2022). As a result, the McCarran Amendment has not waived the inherent sovereign immunity of the Tribe in this case.

b. Tribal Law and Sovereign Immunity

We must separately address the question of whether the Tribe, pursuant to Northern tribal law, provides a waiver of the tribe's sovereign immunity regarding a challenge to the tribal use of water. As noted, the Tribe in its Plan cites the Rule of Reciprocity and its Grand Trout designation as an additional basis for its approach to water management. The Dakota Farm Bureau asserts that only state law should apply to the Sapphire Project but that, alternatively, if the Tribe can invoke its own laws, it is violating the Rule of Reciprocity by curtailing water deliveries to operators by as much as 50%.

The Northern Tribe is a federally recognized Tribe, organized pursuant to a constitution adopted according to the Indian Reorganization Act of 1934 (hereinafter "IRA"). Generally

speaking, the IRA was an attempt by the United States Congress to support tribal self-determination, recognizing sovereignty as an absolute principle and subject only to express Congressional limitations provided in treaties or legislation. Shortly after electing to reorganize in accordance with the IRA, the Tribe adopted a tribal constitution and bylaws, thereby providing a framework for the exercise of self-governance.

Importantly, although the IRA contained a provision for supporting efforts of tribes to "…adopt an appropriate constitution and bylaws…", the Act itself did not contain any mandated language for tribal constitutions. Felix S. Cohen, *On the Drafting of Tribal Constitutions* 3 (2006) (Many tribes opting for federal recognition under the IRA adopted a template constitution that was circulated by the Bureau of Indian Affairs after the Act was passed; however, there was no federal mandated language relevant to Tribal Constitutions). The creation of tribal constitutions, and amendments, was and remains an act of self-determination rooted in inherent sovereign rights of the tribes to self-govern. To this end, tribes have great latitude in shaping their branches of government, specifying leadership roles and responsibilities, and creating individual rights within their constitutional framework. *Id.* Like many other tribes, the Northern Tribe enacted a version of the IRA "boilerplate" constitution.

To resolve the question of sovereign immunity pursuant to tribal law, we must examine the pertinent provisions of the Tribe's Constitution. Different provisions in the Constitution, however, point in different directions. In this case, this Court recognizes that Article VI, §1 specifies that in exercising its sovereign delegated authorities, "the Tribal Council shall ensure that the Rule of Reciprocity controls."

This language strongly suggests a need for a mechanism to restrain tribal officials who might otherwise violate the Rule of Reciprocity. At the same time, Article XVI, §1 proclaims that "in exercising self-determination and sovereignty to its fullest extent, the Northern Tribe of Indians is immune from suit except to the extent that the Tribal Council waives sovereign immunity, or as provided by this Constitution. No tribal council member acting within the scope of their duties or authority is subject to suit." This language appears to close off litigation as a mechanism for holding the Tribe accountable for violations of the Rule of Reciprocity, at least in the absence of a waiver, whenever tribal officials are found to be acting in their official capacity. *See Hoffman v. Sault Ste. Marie Tribe of Chippewa Indians Board of Directors*, Case No. APP-2022-05 (Sault Ste. Marie Tribe of Chippewa Indians Court of Appeals, Dec. 7, 2022) (When the Tribe makes a decision, the court has an obligation to "trust that the right decision will be made for the community as a whole."). There is no separate language anywhere in the Constitution providing for suits against the Tribe or tribal officials to enforce its terms. There also does not appear to be any express waiver of sovereign immunity for suits alleging violations of the Rule of Reciprocity that seek declaratory relief against the Tribal Council or tribal officials, through the Northern Tribe Legal Code.

Because Article XVI, §1 includes exceptions to sovereign immunity, either by constitutional provision or express waiver, this Court is compelled to apply a strong presumption against actions against the Tribe or its officials beyond those exceptions. The opinions of some tribal courts reflect this Court's reluctance to poke holes in the protection afforded by sovereign immunity. *See Hoffman v. Sault Ste. Marie Tribe of Chippewa Indians Board of Directors*, Case

No. APP-2022-05 (Sault Ste. Marie Tribe of Chippewa Indians Court of Appeals, Dec. 7, 2022); *McCormick v. Election Committee of Sac and Fox Tribe of Indians of Oklahoma*, 1 Okla. Tribal Court Rep. 8, 1980 WL 128844 (Court of Indian Offenses for the Sac and Fox Tribe 1980); *Sliger v. Stalmack*, 2000 WL 35750181 (Grand Traverse Band of Ottawa and Chippewa Indians Tribal Court 2000).

In contrast, however, when the government takes an action contrary to its obligations established in the Rule of Reciprocity, an injunction may be the only means vindicating the dereliction of the government's responsibilities. If injunctive relief is denied in the name of sovereign immunity, the Rule of Reciprocity may become meaningless. The opinions of other tribal courts reflect this consideration, concluding that tribal law may operate to abrogate tribal immunity. *See Stephanie Wright, et. al. v. Nottawaseppi Huron Band of the Potawatomi, et. al.*, Case No. 21-154-APP (Supreme Court for the Nottawaseppi Huron Band of the Potawatomi June 3, 2022); *Wescogame v. Alvirez*, No. 2017-AP-001 (Haulapai Nation Court of Appeals 2017); *Davis v. Keplin*, 18 Indian L. Rep. 6148 (Turtle Mountain Band of Chippewa Indian Tribal Court 1991).

Before the enactment of the IRA, the Northern tribal people were not subject to the coercive power of a centralized government. Extended family groups were the main form of social and political organization through the Rule of Reciprocity, to live a good life in harmony with all of creation. *See Spurr v. Tribal Council*, No. 12-005APP, (Nottawseppi Huron Band of Potawatomi Supreme Court February 21, 2012) (All aspects of the natural world are imbued with law – the great laws of nature – and are ordered. These laws govern all aspects of the natural world, including human life. When these laws are followed, the result is harmony.).

The Rule of Reciprocity recognizes that reciprocal relationship protocols provide the legal requirements of how we are supposed to conduct ourselves, in the pursuit of harmony. As a result, pursuant to the Rule, all of creation have their own laws and the freedom to exist. As a consequence the rights and obligations of the Northern people, to the use of the land and natural resources must be accomplished through proper protocols of respect. Northern Tribe Constitution Article VI, §1. Therefore, the Rule of Reciprocity governs the sacred obligation and duty to respect, preserve, and protect all that was provided for, as the designated steward for these relatives of creation. *See also Nelson v. Yurok*, 5 NICS App. 119 (May 1999) ("The Tribe has placed upon itself and its members a traditional obligation of living in harmony with nature.").

As the Navajo Nation Supreme Court has established, tribes must develop their own legal systems because "the concept of justice has its source in the fabric of each individual society. The concept of justice, what it means for any group of people, cannot be separated from the total beliefs, ideas, and customs of that group of people." *In re Validation of Marriage of Francisco*, 6 Navajo Rep. 134, 16 Indian L. Rep. 6113 (Navajo Nation Supreme Court August 2, 1989). According to this line of analysis, the sovereign immunity of the Tribe, including its officials, will be deemed to have been waived when they are alleged to have acted contrary to their obligations mandated under the Rule of Reciprocity and they are sued solely for declaratory or injunctive relief.

Under those circumstances, as in this case, we believe it is the Tribal Court that properly

possesses jurisdiction to determine whether the Tribe has in fact acted contrary to their obligations mandated under the Rule of Reciprocity. The determination of such a claim is not entirely settled under Northern Tribal law, particularly when the claim is made by parties outside the tribal community. As a result, such a determination of tribal law warrants certification to the Northern Tribe Supreme Court. *See Jensen v. Exc, Inc.*, 82 F.4th 835, 855 (9th Cir. 2023); *Navajo Nation v. Intermountain Steel Bldgs, Inc.*, 42 F.Supp. 2d 1222, 1230 (D. N.M. 1999). However, for our purposes, the acknowledged obligation established in Article VI, §1 weighs in favor of establishing that the Tribe has issued a waiver of its sovereign immunity because the "or as provided by this Constitution" provision of Article XVI, §1 directly correlates to the obligations established in Article VI, §1 as a waiver established by the Tribe's constitution. Accordingly, the Dakota Farm Bureau's case against the Tribe can advance in this court.

c. Delegation and Final Decision-Making Authority of Trust Asset

As we have concluded that pursuant to Northern tribal law, the Tribe has issued a waiver of its sovereign immunity, we will address the question of delegated authority. The Dakota Farm Bureau argues that the federal government has an obligation to exercise final decision-making authority over the Tribe's instream flow water rights because they are a trust asset. We disagree that the existence of a trust asset automatically results in a non-delegable trust obligation. In this case, contrary to the decision of the district court below, no party is able to point to any express acceptance of a trust duty by treaty, statute, or regulation that *requires* the United States to exercise final decision-making authority over the Tribe's water rights. *See Arizona v. Navajo Nation*, 143 S. Ct. 1804, 1813 (2023) ("The Tribe asserts a breach-of-trust-claim. To maintain such a claim here, the Tribe must establish, among other things, that the text of a treaty, statute, or regulation imposed certain duties on the United States."). *See also United States v. Jicarilla Apache Nation*, 564 U.S. 162, 176 (2011). The United States "owes judicially enforceable duties to a tribe only to the extent it expressly accepts those responsibilities," [in the treaty, statute, or regulation] because "Indian treaties cannot be rewritten or expanded beyond their clear terms." *Navajo Nation*, 143 S. Ct. at 1813.

Unlike in *Mitchell II*, where federal statutes and regulations "establish[ed] 'comprehensive' responsibilities" in the federal government, the Tribe's instream water rights were impliedly reserved in the 1857 treaty for tribal fisheries and fishing rights. *United States v. Mitchell* ("*Mitchell II*"), 463 U.S. 206, 222 (1983) (quoting *White Mountain Apache Tribe v. Bracker*, 448 U.S. 136, 145 (1980). As a result, the water rights reserved for the Northern Tribe are held in trust by the federal government, but this limited trust designation does not imply federal authority or obligations to control or manage the trust resource. Indeed, as we have detailed, it is the policy of Congress and the federal agencies to *fulfill* the government's trust obligation to tribes through the transfer of management authority. Therefore, the Tribe retains full sovereign authority to control the use of their water rights. *See Oregon Dep't. of Fish & Wildlife v. Klamath Indian Tribe*, 473 U.S. 753, 765-67 (1985); *United States v. Adair*, 723 F.2d 1394, 1418 (9th Cir. 1983); *Burlington Northern R. Co. v. Blackfeet Tribe of the Blackfeet Indian Reservation*, 924 F.2d 889, 902 (9th Cir. 1991).

d. Quantification as an Obstacle to Delegation

In addressing the question of quantification, we begin with the recognition that the Northern Tribe's reserved rights are senior to those of the Dakota Farm Bureau as a matter of undisputed fact under both the prior holding of this court and the State of Dakota adjudication. The priority date of a tribe's reserved rights is "no later than the date on which a reservation was established." F. Cohen, Handbook of Federal Indian Law § 19.01[1] (2012). However, when a treaty recognizes the continued existence of a tribe's water rights, as the 1857 Treaty with the Northern Tribe did, the rights carry a priority date of "time immemorial." *Adair*, 723 F.2d at 1414. We agree with the district court that, absent quantification of the Tribe's water rights, it is not finally determined which portion of the water in Grand River belongs to the Tribe. Nonetheless, the Tribe holds a senior, legally protectable right and has made a good faith effort to implement that right based on science and legal precedent until such time as its final quantification is decreed in state court. Nothing appears arbitrary or capricious under the Plan. We abstain from interfering with the state court adjudication proceeding, *Colo. River Water Conservation Dist.*, 424 U.S. at 818, yet note that requests for injunctions should tilt toward the party with a showing of actual success on the merits. *Prairie Band Potawatomi Nation v. Wagnon*, 476 F.3d 818, 822 (10th Cir. 2007); *Ute Indian Tribe of the Uintah & Ouray Rsrv. v. Lawrence*, 22 F.4th 892, 909 (10th Cir. 2022). Here a showing of actual success favors the Tribe. A holding to the contrary, and a requirement that the Tribe wait for months or even years for a final state court decree, risks losing the very fishery upon which the 1857 Treaty was negotiated.

While the McCarran Amendment allows state adjudication of the Northern Tribe's water rights quantities, the Supreme Court has made clear this law "in no way changes the substantive law by which Indian rights in state water adjudications must be judged." *San Carlos Apache Tribe*, 463 U.S. at 571; *see also Colo. River Water Conservation Dist.*, 424 U.S. at 813 ("The Amendment in no way abridges any substantive claim on behalf of Indians under the doctrine of reserved rights."). Reserved rights, "represent an exception to the general rule that allocation of water is the province of the states." *Id.* (first quoting F. Cohen, Handbook of Federal Indian Law § 19.01[1] (2012), then quoting *Cappaert v. United States*, 426 U.S. 128, 145 (1976)).

As expressed previously, Tribal water rights are federal reserved rights. *Cappaert*, 426 U.S. at 138. ("[W]hen the Federal Government withdraws its land from the public domain and reserves it for a federal purpose, the Government, by implication, reserves appurtenant water then unappropriated to the extent needed to accomplish the purpose of the reservation"). As a result, although the McCarran Amendment subjects the Tribe's reserved water rights to state procedural rules in its quantification proceedings, the substance and scope of the Tribe's reserved water rights remain governed by federal law. *Hawkins v. Haaland*, 991 F.3d 216, 248 (D.C. Cir. 2021).

Under federal law, a tribe's non-consumptive rights entitle them to prevent other appropriators from depleting [Grand River] waters below levels that would prevent them from "support[ing] game and fish adequate to the needs of Indian hunters and fishers." *Adair*, 723 F.2d at 1410-11. The Grand Trout that the Tribe has harvested for millennia are tribal resources and have played an important role in the Northern Tribe's history. Therefore, the Northern Tribe's aboriginal right to take fish entitles them to prevent junior appropriators from

withdrawing water from the Grand River and its tributaries in amounts that would cause the extinction of the Grand Trout. *See United States v. Anderson*, 591 F. Supp. 1, 5-6 (E.D. Wash. 1982).

The Dakota Farm Bureau contends that it is contrary to Dakota law, and thus the Reclamation Act, for the Sapphire Project water to be "delivered" to anyone other than the agricultural operators with existing delivery contracts without their first being a final adjudication and quantification. But federal courts have consistently held that tribal water rights arising from federal reservations are federal water rights not governed by state law. Therefore, since the volume and scope of reserved tribal water rights are federal questions, there is no need for a state adjudication to be completed before federal reserved rights are recognized and protected. *See Agua Caliente Band of Cahuilla Indians v. Coachella Valley Water Dist*., 849 F.3d 1262, 1272 (9th Cir. 2017); *Colorado River Water Conservation District*, 424 U.S. at 813. In sum, the federal reserved rights of the Tribe need not have been adjudicated or quantified before they were asserted to protect the Tribe's fishing right. This is because "tribal water rights may trump water rights of state users, even when those users have been drawing from the water source for a longer time." *Navajo Nation v. U.S. Dep't of Interior*, 26 F.4th 794 (9th Cir. 2022). The Tribe can continue exercising its reasoned judgment about the amount of releases necessary to protect the Grand Trout until the state adjudication of that issue is complete.

e. Delegation with "Multiple Buckets"

As noted, the Report establishes the necessary elevation levels for the Grand River required to avoid jeopardizing the continued existence of the Grand Trout, which results in reductions to agricultural operators. The Dakota Farm Bureau argues that Reclamation's delegation of authority to the Tribe failed to consider the agency's obligations associated with its "multiple buckets," specifically its obligation to provide water to state irrigators under contract for delivery. In essence, the assertion is that although the Management Agreement may further the federal trust responsibility to the Tribe, it fails to take into account the needs of the other users of the system, in derogation of Reclamation's statutory mandate. *See Hoopa Valley Tribe v. Ryan*, 415 F.3d 986 (9th Cir. 2005).

The Dakota Farm Bureau requests as a remedy that the Management Agreement be declared unlawful and that no additional water be released for the fishery until the federal government fully complies with the law, including making a final, independent decision on the propriety of the release of additional water, having considered state law, its contract obligations, and the general public interest and welfare. What Dakota Farm Bureau fails to acknowledge is that, had Reclamation retained management of the Sapphire Project, federal law would also require it to curtail deliveries due to the superior water rights of the Tribe – a curtailment that the agricultural operators expressly accepted under the delivery contracts, which enumerate events that may result in reductions of water supply, including when federal law so requires. *See Standard Water Delivery Contract*, Appendix to Appellant Brief. Both Reclamation (or any contracting operator) is obligated to follow state law only to the extent there is no conflict with federal law. 43 U.S.C. § 383. Indeed, because of federal preemption, even a State of Dakota official charged with distributing Grand River waters would be obligated to ensure the Tribe's

senior instream flow rights were protected in times of shortage. In other words, regardless of the project operator, the legally required result would be the same.

A recent Supreme Court opinion characterized initiatives such as the Management Agreement as "decentralizing" the provision of federal Indian benefits "away from the Federal Government" and toward tribes and tribal organizations. *Yellen v. Confederated Tribes of the Chehalis Reservation*, 141 S. Ct. 2434 (2021). As a result, the Management Agreement is not the source of the Tribe's authority to enforce its water rights against those of junior appropriators. That authority is clearly established in federal law and stems from the 1857 Treaty. With a priority date of "time immemorial," as held in *Northern Tribe*, the Tribes water rights are senior to the 1905 water rights of the Sapphire Project. 723 F.2d at 1514. The Management Agreement neither amplified nor distorted the Tribes' federally protected rights to the detriment of the Dakota Farm Bureau members. The Tribe's release of additional flows in the Grand River to support the needs of the Grand Trout did nothing to increase the Tribe's water rights entitlement. Thus, the ultimate cause of the Dakota Farm Bureau's essential injuries – the delivery curtailments – is the Northern Tribe's federally protected, senior water right, not the Management Agreement. The Management Agreement simply established the mechanism for the implementation of the Tribe's protected water rights. While we can appreciate the harsh reality that reduced water deliveries may create financially devastating effects on many irrigators in Sapphire Valley, there simply is no concurrent requirement imposed by federal law on the Tribe's reserved instream water rights, whether by the 1857 Treaty or the federal government's trust relationship, which requires the Tribe to delivery water out of priority so that project recipients are uninjured. *Hawkins*, 991 F.3d at 248.

In summary, the Dakota Farm Bureau contends that if the court granted the requested relief (invalidating the Management Agreement), it would redress its members ultimate injuries. Yet even if the Management Agreement was invalidated, the Tribe would still be able to seek enforcement of its water rights, to the detriment of the Dakota Farm Bureau irrigators. As things now stand, the Tribe is honoring Reclamation's water delivery contracts to the extent there is water in excess of its instream flow rights. This distribution by priority comports with both state and federal law.

III. Conclusion

For the aforementioned reasons, we REVERSE the district court's grant of declaratory and injunctive relief.

REVERSED.

TREATY OF DAKOTA

Oct. 14, 1857. | 11 Stats., 701. | Ratified, July 2, 1858. | Proclaimed Feb. 17, 1859.

Articles of agreement and convention made and concluded at Sapphire Valley, Dakota, on the fourteenth day of October, A. D. one thousand eight hundred and fifty-seven, by Issac Stevens, superintendent of Indian affairs, and Lewis Cass, United States Indian agent for Dakota, on the part of the United States, and the chiefs and head-men of the Northern Band of Indians, hereinafter named, to wit, La-Lake, Chil-o-que-nas, Kellogue, Mo-ghen-kas-kit, Blow, Le-lu, Palmer, Jack, Que-as, Poo-sak-sult, Che-mult, No-ak-sum, Mooch-kat-allick, Toon-tuck-tee, Boos-ki-you, Ski-a-tic, Shol-las-loos, Ta-tet-pas, Muk-has, Herman-koos-mam, Schon-chin, Stat-it-ut, Keint-poos, Chuck-e-i-ox, Kile-to-ak and Sky-te-ock-et.

ARTICLE I.

Peace, friendship and amity shall hereafter exist between the United States and the aforesaid tribe of Indians, party to this treaty, and the same shall be perpetual.

ARTICLE II.

The tribe of Indians aforesaid cede to the United States all their right, title, and claim to all the country claimed by them, the same being determined by the following boundaries of the Sapphire Valley, to wit: Beginning at the point where the forty ninth parallel of north latitude crosses the summit of the Rocky Mountains; thence following the main dividing-ridge of said mountains in a southerly direction to the ridge which originates the waters of Grand and Missouri Rivers; thence along said main channel of the Missouri River in an easterly direction to the to the mouth of the Milk River; to the forty-fourth parallel of north latitude; thence west to the place of beginning: *Provided*, That the following-described tract, within the country ceded by this treaty, shall, until otherwise directed by the President of the United States, be set apart as a residence for said Indians, [and] held and regarded as an Indian reservation, to wit: Beginning upon the Hell Gate or Medicine Rock Passes, in an easternly direction, to the nearest source of the Grand River, thence down the channel of the Grand River, thence due north to the forty ninth parrallel, thence due west on said parallel to the main range of the Rocky Mountains, and thence southerly along said range to the place of beginning. And the tribe aforesaid agrees and binds itself that, immediately after the ratification of this treaty, it will remove to said reservation and remain thereon, unless temporary leave of absence be granted to them by the superintendent or agent having charge of the tribe.

It is further stipulated and agreed that no white person shall be permitted to locate or remain upon the reservation, except the Indian superintendent and agent, employees of the Indian department, and officers of the Army of the United States, and that in case persons other than those specified are found upon the reservation, they shall be immediately expelled therefrom; and the exclusive right to take fish from streams running through the reservation, and the right to take fish at all usual and accustomed places throughout all of the ceded lands including the right to hunt on open and unclaimed lands and of gathering edible roots, seeds, and berries within the same, is hereby secured to the Indians aforesaid: *Provided, also,* That the right of way for public roads and railroads across said reservation is reserved to citizens of the United States.

ARTICLE III.

In consideration of, and in payment for the country ceded by this treaty, the United States agree to pay to the tribe conveying the same the several sums of money hereinafter enumerated, to wit: Eight thousand dollars per annum for a period of five years, commencing on the first day of November, eighteen hundred and fifty-seven, or as soon thereafter as this treaty may be ratified; five thousand dollars per annum for the term of five years next succeeding the first period of five years; and three thousand dollars per annum for the term of five years next succeeding the second period; all of which several sums shall be applied to the use and benefit of said Indians by the superintendent or agent having charge of the tribes, under the direction of the President of the United States, who shall, from time to time, in his discretion, determine for what objects the same shall be expended, so as to carry out the design of the expenditure, [it] being to promote the well-being of the Indians, advance them in civilization, and especially agriculture, and to secure their moral improvement and education.

ARTICLE IV.

The United States agree to pay said Indians the additional sum of thirty-five thousand dollars, a portion whereof shall be used to pay for such articles as may be advanced to them at the time of signing this treaty, and the remainder shall be applied to subsisting the Indians during the first year after their removal to the reservation, the purchase of teams, farming implements, tools, seeds, clothing, and provisions, and for the payment of the necessary employees.

ARTICLE V.

The United States further agree that there shall be erected at suitable points on the reservation, as soon as practicable after the ratification of this treaty, one saw-mill, one flouring-mill, suitable buildings for the use of the blacksmith, carpenter, and wagon and plough maker, the necessary buildings for one manual-labor school, and such hospital buildings as may be necessary, which buildings shall be kept in repair at the expense of the United States for the term of twenty years; and it is further stipulated that the necessary tools and material for the saw-mill, flour-mill, carpenter, blacksmith, and wagon and plough maker's shops, and books and stationery for the manual-labor school, shall be furnished by the United States for the period of twenty years.

ARTICLE VI.

The United States further engage to furnish and pay for the services and subsistence, for the term of fifteen years, of one superintendent of farming operations, one farmer, one blacksmith, one sawyer, one carpenter, and one wagon and plough maker, and for the term of twenty years of one physician, one miller, and two school-teachers.

ARTICLE VII.

The United States may, in their discretion, cause a part or the whole of the reservation provided for in Article 2 to be surveyed into tracts and assigned to members of the tribes of Indians,

parties to this treaty, or such of them as may appear likely to be benefited by the same, under the following restrictions and limitations, to wit: To each head of a family shall be assigned and granted a tract of not less than forty nor more than one hundred and twenty acres, according to the number of persons in such family; and to each single man above the age of twenty-one years a tract not exceeding forty acres. The Indians to whom these tracts are granted are guaranteed the perpetual possession and use of the tracts thus granted and of the improvements which may be placed thereon; but no Indian shall have the right to alienate or convey any such tract to any person whatsoever, and the same shall be forever exempt from levy, sale, or forfeiture: *Provided,* That the Congress of the United States may hereafter abolish these restrictions and permit the sale of the lands so assigned, if the prosperity of the Indians will be advanced thereby: *And provided further,* If any Indian, to whom an assignment of land has been made, shall refuse to reside upon the tract so assigned for a period of two years, his right to the same shall be deemed forfeited.

ARTICLE VIII.

The President of the United States is empowered to declare such rules and regulations as will secure to the family, in case of the death of the head thereof, the use and possession of the tract assigned to him, with the improvements thereon.

ARTICLE IX.

The annuities of the tribes mentioned in this treaty shall not be held liable or taken to pay the debts of individuals.

ARTICLE X.

The tribe of Indians, party to this treaty, acknowledge their dependence upon the Government of the United States, and agree to be friendly with all citizens thereof, and to commit no depredations upon the person or property of said citizens, and to refrain from carrying on any war upon other Indian tribes; and they further agree that they will not communicate with or assist any persons or nation hostile to the United States, and, further, that they will submit to and obey all laws and regulations which the United States may prescribe for their government and conduct.

ARTICLE XI.

It is hereby provided that if any member of these tribes shall drink any spirituous liquor, or bring any such liquor upon the reservation, his or her proportion of the benefits of this treaty may be withheld for such time as the President of the United States may direct.

ARTICLE XII.

It is agreed between the contracting parties that if the United States, at any future time, may desire to locate other tribes upon the reservation provided for in this treaty, no objection shall be

made thereto; but the tribes, parties to this treaty, shall not, by such location of other tribes, forfeit any of their rights or privileges guaranteed to them by this treaty.

ARTICLE XIII.

This treaty shall bind the contracting parties whenever the same is ratified by the Senate and President of the United States.

In witness of which, the several parties named in the foregoing treaty have hereunto set their hands and seals at the place and date above written.

Issac Stevens, Superintendent Indian Affairs.
Lewis Cass, United States Indian Agent.

La-lake, his x mark.
Chil-o-que-nas, his x mark.
Kellogue, his x mark.
Mo-ghen-kas-kit, his x mark.
Blow, his x mark.
Le-lu, his x mark.
Palmer, his x mark.
Jack, his x mark.
Que-ass, his x mark.
Poo-sak-sult, his x mark.
Che-mult, his x mark.
No-ak-sum, his x mark.
Mooch-kat-allick, his x mark.
Toon-tuc-tee, his x mark.

Boss-ki-you, his x mark.
Ski-at-tic, his x mark.
Shol-lal-loos, his x mark.
Tat-tet-pas, his x mark.
Muk-has, his x mark.
Herman-kus-mam, his x mark.
Jackson, his x mark.
Schon-chin, his x mark.
Stak-it-ut, his x mark.
Keint-poos, his x mark.
Chuck-e-i-ox, his x mark.
Kile-to-ak, his x mark.
Sky-te-ock-et, his x mark.

Signed in the presence of—

R. P. Earhart, secretary.
Wm. Kelly, captain First Cavalry, Dakota Volunteers.
James Halloran, second lieutenant First Infantry, W. T. Volunteers.
William C. McKay, M. D.
Robert (his x mark) Biddle.

AGREEMENT WITH THE INDIANS OF THE NORTHERN INDIAN RESERVATION IN DAKOTA.

Oct. 4, 1892. | 31 Stats., 74. | Ratified, Jan. 27, 1893. | Proclaimed Mar. 17, 1893.

This agreement, made and entered into the fourth day of October, A.D. eighteen hundred and ninety-two, by and between William C. Pollock, George Bird Grinnell, and Walter M. Clements, commissioners on the part of the United States, and the undersigned Indians, both full bloods and mixed bloods, residing upon and attached to the Northern Indian Reservation, in the State of Dakota, the same constituting a majority of the male adult Indians belonging upon said reservation, both full bloods and mixed bloods, the latter's rights to participate in all business proceedings of said tribe and to share in all the benefits accruing to said tribe from a sale of land or otherwise being hereby recognized as equal to the full bloods, witnesseth that:

ARTICLE I.

For and in consideration of the sums to be paid and the obligations assumed upon the part of the United States, as hereinafter set forth, said Indians of the Northern Reservation hereby convey, relinquish, and release to the United States all their right, title, and interest in and to that portion of their present reservation in the State of Dakota lying and being west of the following-described line, to wit:

Beginning at a point on the northern boundary of the reservation due north from the summit of Chief Mountain, and running thence south to said summit; thence in a straight line to the most northeasterly point of Sapphire Mountain; thence to the most westerly of the mouths of Grand Creek; thence up said creek to a point where a line drawn from the said northeasterly point of Sapphire Mountain to the summit of Grand Mountain intersects Grand Creek; thence to the summit of Grand Mountain; thence in a straight line to the western extremity of the lower Sapphire Lake; thence in a straight line to a point on the southern line of the right of way of the Great Northern Railway Company four miles west of the western end of the railway bridge across the north fork of the Grand River; thence in a straight line to the summit of Heart Butte, and thence due south to the southern line of the present reservation: *Provided,* That said Indians shall have, and do hereby reserve to themselves, the right to go upon any portion of the lands hereby conveyed so long as the same shall remain public lands of the United States, and to cut and remove therefrom wood and timber for agency and school purposes, and for their personal uses for houses, fences, and all other domestic purposes: *And provided further,* That the said Indians hereby reserve and retain the right to hunt upon said lands and to fish in the streams thereof so long as the same shall remain public lands of the United States under and in accordance with the provisions of the game and fish laws of the State-of Dakota.

ARTICLE II.

For and in consideration of the conveyance, cession, and relinquishment herein made the United States hereby covenants and agrees to advance and expend during the period of ten years beginning from ratification of this agreement, under the direction of the Secretary of the Interior

for the Indians, both full bloods and mixed bloods, now attached to and receiving rations and annuities at the Northern Agency, and all who shall hereafter be declared by the tribe located upon said reservation, with the approval of the Secretary of the Interior, entitled to membership in the tribe, the sum of one million five hundred thousand ($1,500,000.00) dollars.

It is agreed that said money shall be paid as follows: The first year after ratification of this agreement, three hundred thousand ($300,000.00) dollars, one-half of which shall be deposited in the United States Treasury and bear interest at four per centum per annum, and one-half, or so much thereof as shall be necessary, shall be expended as hereinafter provided; and annually thereafter for eight years the sum of one hundred and fifty thousand ($150,000.00) dollars: *Provided,* That any surplus that may remain from any annual payment provided for herein, shall also be placed in the United States Treasury to the credit of said Indians, and shall bear interest at the rate of four per centum per annum. Such sums, or so much thereof as may be necessary in any one year, shall be expended in the purchase of cows, bulls, and other livestock, goods, clothing, subsistence, agricultural implements, in providing employees, in the education of Indian children, in procuring medicine and medical attendance, in the care and support of the aged, sick, and infirm, and of helpless orphans, in the erection and keeping in repair of such new agency and school buildings, mills, blacksmith, carpenter, and wagon shops as may be necessary, in assisting the Indians to build and keep in repair their houses, enclose and irrigate their farms, and in such other ways as may best promote their civilization and improvement.

ARTICLE III.

It is agreed that in the employment of all agency and school employees preference in all cases be given to Indians residing on the reservation, who are well qualified for such positions; and that all cattle issued to said Indians for stock-raising purposes, and their progeny, shall bear the brand of the Indian Department, and shall not be sold, exchanged, or slaughtered, except by the consent of the agent in charge, until such time as this restriction shall be removed by the Commissioner of Indian Affairs.

ARTICLE IV.

In order to encourage habits of industry and to reward labor, it is further understood and agreed that, in the giving out or distribution of cattle or other stock, goods, clothing, subsistence, and agricultural implements, as provided in Article II, preference shall be given to Indians who endeavor by honest labor to support themselves, and especially to those who in good faith undertake the cultivation of the soil and engage in pastoral pursuits as a means of obtaining a livelihood, and the distribution of these benefits shall be made from time to time, in such manner as shall best promote the objects specified.

ARTICLE V.

Since the situation of the Northern Reservation renders it wholly unfit for agriculture, and since these Indians have shown within the past four years that they can successfully raise horned cattle, and there is every probability that they will become self-supporting by attention to this

industry, it is agreed that during the existence of this agreement no allotments of land in severalty shall be made to them, but that this whole reservation shall continue to be held by these Indians as a communal grazing tract upon which their herds may feed undisturbed; and that after the expiration of this agreement the lands shall continue to be held until such time as a majority of the adult males of the tribe shall request in writing that allotment in severalty shall be made of their lands: *Provided,* That any member of the tribe may, with the approval of the agent in charge, fence in such area of land as he and the members of his family would be entitled to under the allotment act, and may file with the agent a description of such land and of the improvements that he has made on the same, and the filing of such description shall give the said members of the tribe the right to take such land when allotments of the land in severalty shall be made.

ARTICLE VI.

So soon as this agreement shall have received the approval of Congress the boundary lines described in Article I shall be surveyed and designated by two engineers, one of whom shall be selected by the Indians and one by the Secretary of the Interior; the said boundaries shall at once be marked by monuments, not more than one-half mile apart; the points at the mouth of Grand Creek and the westernmost extremity of the lower Sapphire Lake, after they have been marked, shall be fixed and remain unchanged, no matter what alterations may hereafter take place in the course of said creek, or in the level of said lake. The expense of said survey should be shared equally between the United States and the tribes occupying this reservation, but the unskilled laborers employed in the work shall be hired from among the Indians residing on this reservation.

Such survey and the marking of the above-described boundary lines shall be begun immediately-not later than ninety days after the approval of this agreement by Congress-and completed as speedily as possible, and the ceded portion of the reservation shall not be thrown open to occupancy by the whites until after the new boundaries of the reservation shall have been established and marked.

ARTICLE VII.

It is further agreed that whenever, in the opinion of the President, the public interests require the construction of railroads or other highways, telegraph or telephone lines, canals and irrigating ditches, through any portion of this reservation, right of way shall be and is hereby granted for such purposes, under such rules, regulations, limitations, and restrictions as the Secretary of the Interior may prescribe; the compensation to be fixed by said Secretary and by him expended for the benefit of the Indians.

ARTICLE VIII.

It is further agreed and provided that none of the money realized from the sale of this land shall be applied to the payment of any judgment which has been or may hereafter be rendered upon any claim for damages because of depredations committed by said Indians prior to the date of this agreement.

ARTICLE IX.

It is understood and declared that wherever the word Indian is used in this agreement it includes mixed bloods as well as full bloods.

ARTICLE X.

This agreement shall not be binding upon either party until ratified by Congress.

Dated and signed at Northern Agency, Dakota, on the fourth day of October, eighteen hundred and ninety-two (A. D. 1892).

WILLIAM C. POLLOCK. [SEAL.]
GEO. BIRD GRINNELL. [SEAL.]
WALTER M. CLEMENTS. [SEAL.]

NIS TAI PO KAH, his x mark (WHITE CALF), and others.

Witness:
J.E. WEBB.
A. B. HAMILTON.
GEORGE STEELL, United States Indian Agent.

* * *

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, that said agreement be, and the same is hereby, accepted, ratified, and confirmed.

That for the purpose of paying one-half of the expense of making the survey of the boundary line described in article one, as provided by article six of said agreement, there be, and hereby is, appropriated, out of any moneys in the Treasury not otherwise appropriated, the sum of two thousand five hundred dollars, or so much thereof as may be necessary, the same to be immediately available; and the Secretary of the Interior is hereby authorized to use so much of any appropriation heretofore or hereafter made for the benefit of the Indians of the Northern Reservation as may be necessary to pay one-half of the expense of the survey of the said boundary line by the said article six of the agreement to be borne by the Indians.

* * *

….

Excerpts from the

Constitution of the Northern Tribe of Indians
of the
Northern Indian Reservation

Adopted pursuant to the Indian Reorganization Act

….

ARTICLE VI - POWERS

Section 1. The people of the Northern Tribe of Indians, in order to achieve a responsible and wise administration of this sovereignty delegated by this Constitution to the Tribal Council, hereby recognize that the Tribal Council shall ensure that the Rule of Reciprocity controls.

ARTICLE XVI – MISCELLANEOUS

Section 1. In exercising self-determination and sovereignty to its fullest extent, the Northern Tribe of Indians is immune from suit except to the extent that the Tribal Council waives sovereign immunity, or as provided by this Constitution. No tribal council member acting within the scope of their duties or authority is subject to suit.

….

STANDARD WATER DELIVERY CONTRACT

UNITED STATES DEPARTMENT OF THE INTERIOR, BUREAU OF RECLAMATION,
Sapphire Valley Reclamation Project

* * *

3(a). Consistent with all applicable state water rights permits, and licenses, federal law, and subject to the provisions set forth in this Contract, the [U.S. Bureau of Reclamation], or its designated operator, shall make available for delivery to the Contracting Party ____ acre-feet of Project Water for beneficial use purposes. …

3(b). Because the capacity of the Project to deliver Project Water has been constrained in recent years and may be constrained in the future due to many factors including hydrologic conditions and implementation of federal and state laws, the likelihood of the Contracting Party actually receiving the amount of Project Water set out in subdivision (a) in any given year is uncertain. The Contracting Party shall pay only for the costs of Water Delivered … .

(c) The Contracting Party shall utilize the Project Water in accordance with all applicable legal requirements.

* * *