

Supreme Court Rules Against the Navajo Nation in Water Rights Dispute

By Lisa A. Bell, Renée Martin-Nagle and David A. Rockman

On June 23rd, 2023, the U.S. Supreme Court issued a five-to-four decision in *Arizona, et al. v. Navajo Nation*,¹ holding that the 1868 Peace Treaty (“Treaty”) between the United States (“Federal Government”) and the Navajo Nation does not require the United States to take any affirmative steps to secure accessible water on the Navajo Reservation.

Prior to the Supreme Court ruling, the U.S. Court of Appeals for the 9th Circuit held in 2022 that the Navajo Nation properly stated a breach of trust claim with respect to the Navajo Nation’s undetermined water rights and its relationship to the Federal Government’s role in securing those rights. The States of Arizona, Nevada, Colorado, and the Metropolitan Water District of Southern California, collectively referred to as “Arizona”, appealed to the U.S. Supreme Court asserting their right to access water from the Colorado River as needed. The Supreme Court reversed the decision of the Ninth Circuit, holding that without a “conventional trust relationship” the Court will not infer any legal duties owed by the Federal Government to the Navajo Nation that were not specifically enumerated in the 1868 Treaty. Yes, there is a lot of water in the Colorado River, but everyone is on their own when it comes to apportioning, transporting, and using it.

BACKGROUND

The decision arrives in light of a longstanding history of disputes and litigation between the Navajo Nation and its surrounding states concerning the scope of the 1868 Treaty.² This Peace Treaty was signed by the Federal Government and the Navajo Nation to secure a fragile peace during a time of frequent wars, hostilities, and a westward migration trend.

The Treaty obligated the United States to “set apart” a reservation for the Navajo Nation in the Western territories in exchange for the Navajo Nation’s agreement to cease hostilities and to refrain from thwarting settlement and westward migration. The United States selected northeastern Arizona, northwestern New Mexico, and southeastern Utah as the ideal location for the Navajo Reservation. At the time, the Navajo Reservation had direct access to water to use for living, farming, and ranching. Today, the Navajo Reservation comprises 27,000 square miles and has a population of close to 170,000 people. Most of the land is located on the Colorado Plateau, and a majority of the Navajo Reservation experiences extreme desert conditions. The Colorado River now provides water to the states of Arizona, Nevada, Colorado, and California as well as to the Navajo Reservation³. There was no express language in the 1868 Treaty that described the Navajo Reservation water rights. The Navajo Nation, therefore, relied on the *Winters* doctrine to infer affirmative duties implicated by other language in the treaty.

Specific legal duties to the Navajo Nation by the United States were imposed by the 1868 Treaty, such as construction of a school, a chapel, a carpenter shop, and a blacksmith shop. With prescient caution, the United States did not identify express “obligations” to water rights. The ill-defined water rights dispute posed an ongoing threat to the Navajo Nation’s long-term water security and that of its neighbors. As a central source of water, no formula existed to determine how the parties would work together to use the water. Fast forward through years of drought and declining groundwater levels, and the southwest, including the Navajo Nation, continues to face a severe water crisis. The confluence of uncertainty and need heightens the water rights battle, and the Supreme Court needed to weigh in on

¹ *Arizona, et al. v. Navajo Nation*, No. 21-1484 and 22-51 (U.S. June 22, 2023); 599 U.S. ____ (2023).

² Rita Maguire, *Tribal rights, water rights, state’ rights and the Colorado River: What is at stake in the SCOTUS case, Arizona v. Navajo Nation (May 2, 2023)* https://www.americanbar.org/groups/environment_energy_resources/publications/trends/2022-2023/may-june-2023/tribal-rights-water-rights/.

³ The Navajo Nation also has access to the San Juan River Basin in New Mexico and a small portion of the Rio Grande River Basin.

allocation and other issues. Arizona, Utah, and New Mexico expressed concerns to the Supreme Court that if the Federal Government set aside water for the Navajo Nation, those States would be required to reduce their own interests in the water today and would have great concerns about future water availability. The Supreme Court rejected the opportunity to infer such a duty, rather requiring the Navajo Nation to negotiate for itself.

ANALYSIS

The Supreme Court settled the question of water rights by essentially declaring that “everyone is on their own” with access to the Colorado River, or, in other words, “tie goes to the runner”. Rejecting the offer to impose a duty on the United States to take affirmative steps, the Court directed the Navajo Nation to function as a sovereign state by “assessing the Tribe’s water needs, developing a plan to secure the needed water, and potentially building pipelines, pumps, wells or other water infrastructure” to secure water for the Navajo Nation.

Reviewing its history, in *United States v. Mitchell*, the Supreme Court noted it defined the trust responsibility as “the undisputed existence of a general trust relationship between the United States and the Indian people.”⁴ Clarifying that ruling, the majority found, without a “conventional trust relationship,” the Supreme Court would not infer any legal duty not explicitly enumerated in the 1868 Treaty.

Relying on the language and history of the Treaty and citing cases like *United States v. Jicarilla Apache Nation*⁵, the Court reaffirmed that the Federal Government owes no legal duty, outside those expressly enumerated. In addressing the language and plain text of the Treaty, the Court also considered the Navajo Nation’s argument that the language of the Treaty imposed an implied affirmative duty on the Federal Government to secure water for the reservation by assessing the Navajo Nation’s water needs and building water infrastructure.

The Court affirmed the Navajo Nation’s assertions that (a) 1868 Treaty was legitimate and (b) under the *Winters* doctrine, (*Winters v. United States*, 207 US. 564, 576-577 1908) every Treaty implicitly includes a right to use and obtain water from any lakes, rivers, or streams on a reservation. However, the Court rejected the Navajo Nation’s argument: (c) that the Federal Government had a duty to take affirmative steps to ensure reasonable access to these bodies of water.

The Navajo Nation further argued that the language “permanent home,” referring to the Nation’s relationship with the Navajo Reservation, imposed a duty on the Federal Government to secure water for the Tribe. The Court called this argument unfounded, noting that no language in the Treaty supported that interpretation. In the same vein, the Navajo Nation argued that the Federal Government’s requirement to provide seeds and farm implements supported the inference that a requirement to provide access to the water was mandated. However, the Court read the provision requiring the Federal Government to supply seeds and implements as evidence of the Treaty writer’s ability to draft specific affirmative duties. Therefore, in analyzing the express language and implied result, the Court concluded that the lack of specific language, imposing affirmative duties for water rights in the presence of other affirmative duties, was an intentional omission by the drafters.

Further, the Navajo Nation argued that because the United States refused to intervene in the prior Navajo Nation’s Colorado River water rights cases in the late 1900s, if reaffirmed by the Navajo Nation maintained control over its water rights in the river. According to the Navajo Nation, those cases were interpreted as the Federal Government’s attempt to represent the Navajo Nation and its failure to “vigorously assert their interest.”⁶ The Nation intervened in *Arizona v. California*. The motion was denied, leaving the water rights question unclear.⁷ Using this judicial history, to assert that legal conclusion, the Navajo Nation now asserted that the United States had effectively ignored its concerns as its representative. The Court found that argument baseless, citing *United States v. Navajo Nation* 556 U.S. 287, 129 SCt. 1547 (2009). In that case, the justices held the “Federal Government’s liability cannot be premised on control alone. Noting a substantive source of law establishing a specific fiduciary or other duties must first be identified before alleging the government failed faithfully to perform”. 123 SCt 1079 *Id.* @506. The majority thus reasoned that the Federal Government is not required to take any affirmative steps absent language imposing such a duty.

⁴ *United States v. Mitchell*, 463 U.S. 206 (1983)@225 (citations omitted)

⁵ *United States v. Jicarilla Apache Nation*, 564 U.S. 162 (2011).

⁶ See *Arizona v. California*, 373 U.S. 546, 551 (1963).

⁷ *Id.*

Given the lack of duty-imposing enumerated water rights, the majority successfully restricted the scope of the Federal Government's trust relationship with the Navajo Nation and maintained that the proper solution for the Navajo Nation's water crisis lies in the hands of the US Congress and the President. While acknowledging the Navajo Nation's apparent water crisis, the Court decided to "leave to Congress and the President the responsibility to enact appropriations laws and to otherwise update federal law as they see fit in light of the contemporary needs for water."⁸

Justice Gorsuch, joined by Justice Sotomayor, Justice Kagan, and Justice Jackson, dissented, concluding that the majority misunderstood the Navajo Nation's request entirely, and was blinded by its fear of the decision's long-term implications for the Federal Government. The dissent premised its argument on the assumption that the Navajo Nation wants "the United States to identify the water rights it holds for them" and create a plan for apportioning the water effectively if it is not already. Relying on the history of the Treaty, the dissent pointed to a longstanding erasure of the Navajo Nation's water rights to argue that, upon the Treaty's creation, the Federal Government had a duty to manage and secure water for the Navajo Nation's "permanent home."

THE FUTURE OF WATER DISTRIBUTION

Both Utah and New Mexico have passed settlement acts that recognize the water rights of the Navajo Nation as it relates to the Colorado River Basin and the San Juan River Basin, respectively. The Navajo Utah Water Rights Settlement Act of 2019 recognizes the water rights of close to 5,000 Navajo people in the Utah portion of the Navajo Reservation and authorizes \$220 million in funding for water infrastructure development.⁹ Specifically, the Navajo Nation has the right to deplete the Utah/Colorado River basin apportionment by no more than 81,500 acre-feet annually. Likewise, the New Mexico Navajo Water Rights Settlement¹⁰ provides water development projects for the benefit of the Navajo Nation and non-Navajo communities in exchange for a release of the Navajo Nation's claims to water that potentially could displace existing non-Navajo water uses in the basin. For example, the Navajo-Gallup Water Supply Project includes a pipeline and water treatment plant that are subsidized by the Bureau of Reclamation.

Although the Navajo Nation has water settlement agreements with both Utah and New Mexico, Arizona has yet to agree to enter a settlement with the Navajo Nation. Even further, without a settlement agreement, the multibillion-dollar pipeline that the Federal Government is building that will connect the Navajo Nation's capital in Arizona to water from the San Juan River in New Mexico cannot legally transport the water pursuant to a ranking system. Like many western states, Arizona does not recognize riparian water rights to determine allocation. Instead, the state takes a "first in time" appropriation approach, accepting applications for those seeking to use the water in "beneficial ways."¹¹ In light of this, the Navajo Nation believed it may be left out of the apportionment discussion.

In seeking a solution, a mutually beneficial agricultural development system could be an efficient next step for Arizona and the Navajo Nation. For example, Arizona could supply water acquisition infrastructure, and the Navajo Nation, in turn, could provide agricultural goods or a portion of the revenue from goods such as grains, wine, or beans. Like tribal casinos that generated fifteen billion dollars in taxes and revenue share payments in 2018 to federal, state, and local governments, a mutually beneficial agricultural program could be profitable for surrounding states.

In the meantime, the United States Bureau of Reclamation has partnered with the Navajo Nation on various projects to continue the work toward providing clean and accessible water for the Navajo people. The Biden Administration awarded \$580M of federal dollars for water rights settlement this year to define tribal rights to water from the Colorado

⁸ *Arizona v. Navajo Nation*, No. 21-1484 (U.S. June 22, 2023); 599 U.S. ____ (2023).

⁹ The Navajo Utah Water Rights Settlement Act finalized by the Navajo Nation, State of Utah, and the Interior Department (May 27, 2022) (settling all current and future claims by the Navajo Nation for water rights in Utah) https://www.navajonationcouncil.org/wpcontent/uploads/2022/05/Navajo_Utah_Water_Rights_2022.05.27.pdf

¹⁰ Indian Water Rights Settlement Fund Report (Nov. 15, 2022) <https://www.nmlegis.gov/handouts/IAC%20111722%20Item%205%20INDIAN%20WATER%20RIGHTS%20SETTLEMENT%20FUND%20REPORT.pdf>.

¹¹ "Any person, the state of Arizona or a political subdivision thereof may appropriate unappropriated water for domestic, municipal, irrigation, stock watering, waterpower, recreation, wildlife, including fish, nonrecoverable water storage pursuant to section 45-833.01 or mining uses, for his personal use or for delivery to consumers. The person, the state of Arizona or a political subdivision thereof first appropriating the water shall have the better right." A.R.S. § 45-151.

Experts: Andrew Curley, assistant professor School of Geography Development and Environment at the University of Arizona Navajo-Hopi Little Colorado River Rights Settlement

River and other sources, as well as pipelines, pumping stations, and canals for reservations. Though the Nations are limited in the realization of the Biden Administration, grant and infrastructure challenges with Arizona will continue. The grants and infrastructures can be used to initiate a framework for an alliance to keep the water flowing. Arizona needs water (a lot of it) for its energy needs¹². A better understanding of water could only help both sides. Yosemite Sam could never outrun Bugs Bunny and the former never reached the riches he had hoped for. Today's race to resolve the Colorado River allocation of water is not a race, it can be a blueprint of mapping water allocation to broaden the water's reach, not restrict it. The Supreme Court has instead decided we should all be in the 'pick and shovel' business during a gold rush; perhaps they have been reading Mark Twain as well.

Eckert Seaman lawyers handle a wide range of issues related to water, energy, infrastructure, environmental matters along with litigation, contracts, compliance, and municipal law. Please contact for more information about this case and other environmental issues.



This Environmental Update is intended to keep readers current on developments in the law. It is not intended to be legal advice. If you have any questions, please contact [Lisa Bell](mailto:lbell@eckertseamans.com) at 202.659.6629 or lbell@eckertseamans.com, [Renée Martin-Nagle](mailto:rmartin-nagle@eckertseamans.com) at 412.566.6865 or rmartin-nagle@eckertseamans.com, [David Rockman](mailto:drockman@eckertseamans.com) at 412.566.1999 or drockman@eckertseamans.com, or any other attorney at Eckert Seaman with whom you have been working.

¹² The Colorado River is also home to the Hoover Dam at Lake Mead and the Glen Canyon Dam at Lake Powell. The dams provided power to Four Million people in seven states. Relying on the river for water and power is Forty Million people. The Navajo Tribal Utility Authority currently gets about 40% of its energy from the river, but the rapidly sinking Colorado River water level is of constant concern. Management of the river's resources will change the way we think about and use hydropower. [The Colorado River's Urgent Lesson for Energy Policy](#), by Avery Arena, February 14, 2023 SLATE GROUP