

Standing in the Wrong Line: Navajo Nation Water Rights After *Arizona v. Navajo Nation*

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INTRODUCTION

Close to a thousand years ago, the ancestors of the Navajo Nation arrived in what would become the American Southwest.¹ They settled in the Colorado River basin, using the river's water to support agriculture and establish a homeland for themselves in the region.² Pushed out by the encroachment of the United States as it expanded West, the Navajo were insistent upon maintaining their homeland, and eventually established by treaty what is now the largest Indian reservation in the country.³

Based on a principle of federal water law known as the *Winters* doctrine, this reservation comes with an implied guarantee of enough water for the Navajo to establish a permanent homeland.⁴ Despite this guarantee, the Navajo Nation's water right has never been formally quantified, so the Navajo have not been able to fully reap the benefits of the rivers running through their land.⁵ Between 30% and 40% of the reservation's residents do not have consistent access to running water,⁶ showcasing the critical difference between a legal water right and actual water security.

Seeking to rectify this situation and vindicate their rights, the Navajo Nation filed suit against the Department of the Interior in the District of

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1. *Navajo Nation*, INDIAN HEALTH SERV., <https://www.ihs.gov/navajo/navajonation> [<https://perma.cc/DB73-CUNM>].

2. *Navajo Water Rights Overview*, NAVAJO NATION WATER RTS. COMM'N, <https://nnwrc.navajo-nsn.gov/Public-Education/Navajo-Water-Rights-Overview> [<https://perma.cc/NT8V-XR4J>].

3. *Id.*

4. *See generally* *Winters v. United States*, 207 U.S. 564 (1908).

5. Kyle Dunphey, 'A 100-Year Tragedy' for Tribes in the Colorado River Basin, DESERET NEWS (Dec. 19, 2022), <https://www.deseret.com/utah/2022/12/19/23471244/colorado-river-water-rights-navajo-nation-homes-without-water> [<https://perma.cc/7D2S-K2R8>].

6. *Id.*

Arizona.⁷ After several appeals and re-filings, by 2023 the case had made its way to the United States Supreme Court, with Arizona, Nevada, Colorado, and several irrigation districts in California intervening in the suit to oppose the Navajo Nation's claims.⁸ By the time it reached the Supreme Court, the case had been boiled down to two questions. First, did the federal government have a treaty-based obligation to assess the Navajo Nation's water rights and assist them if their current water supply fell short of those rights?⁹ Second, could federal agencies fulfill this request in light of the Supreme Court's reservation of jurisdiction over the quantification of tribal water rights to the Colorado River?¹⁰ The Court ruled that no such treaty-based obligation was owed to the Navajo Nation.¹¹ Due to the lack of such obligation, the court did not address the question of whether such obligation could be fulfilled without violating the reservation of jurisdiction.¹²

This Note addresses the holding of *Navajo Nation v. Arizona* and the impacts the case will have on Indian Law as a whole and on the Navajo Nation in particular. The Note argues that following the U.S. Supreme Court's decision in this case, the best option for the Navajo Nation moving forward is to use the current circumstances surrounding the Colorado River as leverage to obtain favorable terms in a settlement of their water right with Arizona and the federal government. Part I of this Note provides an overview of water law as it applies to the State of Arizona and to Indian Reservations, as well as a discussion of the particular "Law of the River" governing the Colorado River. Part II breaks down the specific arguments advanced in *Navajo Nation v. Arizona* and what the Supreme Court decided regarding those claims. Part III proposes settlement as a path forward for the Navajo Nation after this case and discusses the advantages and disadvantages of choosing that approach. Part IV concludes.

7. *Navajo Nation v. U.S. Dep't of the Interior*, 34 F. Supp. 3d 1019 (D. Ariz. 2014).

8. *Arizona v. Navajo Nation*, 599 U.S. 555 (2023).

9. Brief for the Navajo Nation at i, *Navajo Nation*, 599 U.S. 555 (No. 21-1484), 2023 WL 1779793.

10. *Id.*

11. *Navajo Nation*, 599 U.S. at 564–66, 566 n.2.

12. *See id.*

I. FEDERAL WATER LAW, ARIZONA WATER LAW, AND THE LAW OF THE COLORADO RIVER

The Colorado River is one of the most heavily litigated rivers in the world.¹³ The Colorado's basin includes seven states and two countries, and it supplies water to thirty-six million Americans in one of the driest parts of the country.¹⁴ There are also thirty federally recognized tribes in the basin, and each has an interest in maintaining a supply of the river's water.¹⁵ It is no surprise, then, that the Colorado River is subject to extensive litigation, and understanding it implicates numerous areas of law.

This Part first examines the basic principles of water law in the western United States. It then provides a brief look at the relationship between the federal government and tribal governments and what duties are owed between those parties. Next, it delves into the "Law of the River"—the specific legal framework that governs the Colorado River and its tributaries. Lastly, this Part introduces the litigation and settlement agreements that come about when a tribe attempts to vindicate its water rights under the law.

A. *Water Law in the West*

A complex legal regime of state and federal law governs water rights in the western United States. The Navajo Nation borders the Colorado River in Utah and Arizona, and both these states grant surface water rights by prior appropriation.¹⁶ Prior appropriation, which is often characterized as "first in time, first in right,"¹⁷ is a system that assigns water rights to the first party to make beneficial use of that water.¹⁸ Beneficial use is statutorily defined, with most states recognizing a broad array of uses as beneficial, including

13. Jonathan Waterman, *The American Nile*, NAT'L GEOGRAPHIC, <https://www.nationalgeographic.com/americanile> [<https://perma.cc/GQ59-723W>].

14. *Id.*

15. Mark Olalde & Anna V. Smith, *Western States Opposed Tribes' Access to the Colorado River 70 Years Ago. History Is Repeating Itself*, PROPUBLICA (Oct. 17, 2023), <https://www.propublica.org/article/states-tribes-water-rights-history-repeating-itself> [<https://perma.cc/8JB9-7QWE>].

16. *Water Right Information*, UTAH DIV. WATER RTS., <https://waterrights.utah.gov/wrinfo/default.asp> [<https://perma.cc/33G6-3SBT>]; *Surface Water*, ARIZ. DEP'T WATER RES., <https://www.azwater.gov/surface-water> [<https://perma.cc/GJ69-2QCV>].

17. ARIZ. DEP'T WATER RES., *supra* note 16.

18. *Id.*

agriculture, municipal uses, recreation, and mining.¹⁹ Because prior appropriation gives priority to the first appropriator, it is preferable to have a diversion date that is as early as possible as that results in the strongest claim.²⁰

The water right that the Navajo Nation has under this prior appropriation system comes from the water law principle known as the *Winters* doctrine, which was established in the case *Winters v. United States*.²¹ *Winters* was a case regarding the water rights of the Fort Belknap Indian Reservation in Montana.²² The Supreme Court determined that, while the treaty that established the reservation did not grant any explicit water rights to the reservation, without water rights the reservation would not be able to fulfill its purpose as a tribal homeland.²³ As a result of this decision, every federal reservation, including Indian Reservations, has an implicit water right.²⁴

The *Winters* doctrine was then expanded and clarified in *Cappaert v. United States*.²⁵ This case focused on a dispute over the water rights of Devil's Hole Monument in Nevada.²⁶ In *Cappaert*, the Supreme Court established that the amount of water reserved by the *Winters* doctrine is enough water to meet the primary purpose of the reservation,²⁷ and that this water right vests on the date of the reservation's founding.²⁸ For Indian reservations such as the Navajo Nation, the primary purpose of the reservation is to provide a permanent homeland for the tribe.²⁹

19. See, e.g., ARIZ. REV. STAT. ANN. § 45-151(A) (2024); S. Hockaday & K.J. Ormerod, *Western Water Law: Understanding the Doctrine of Prior Appropriation*, UNIV. NEV., RENO EXTENSION, <https://extension.unr.edu/publication.aspx?PubID=3750> [https://perma.cc/7JGD-STDF].

20. See Hockaday & Ormerod, *supra* note 19.

21. 207 U.S. 564 (1908).

22. *Id.* at 575.

23. *Id.* at 576–77.

24. CYNTHIA BROUGH, CONG. RSCH. SERV., RL32198, INDIAN RESERVED WATER RIGHTS UNDER THE *WINTERS* DOCTRINE: AN OVERVIEW 1 (2011).

25. 426 U.S. 128 (1976).

26. *Id.* at 131.

27. *Id.* at 141.

28. *Id.* at 138.

29. *Agua Caliente Band of Cahuilla Indians v. Coachella Valley Water Dist.*, 849 F.3d 1262, 1270 (9th Cir. 2017). *But see United States v. Adair*, 723 F.2d 1394, 1408 (9th Cir. 2017) (explaining that while it provides a useful guideline, the *Cappaert* primary purpose analysis is not directly applicable to tribal *Winters* rights).

B. The Relationship Between Federal and Tribal Governments

Also relevant to the water rights recognized by *Winters*—known as “*Winters* rights”—is the trust relationship that the federal government has with tribes. This trust obligation arises from the treaties that tribes and the United States enter into when establishing reservations, as well as Congressional statutes.³⁰ The federal government is responsible for upholding its treaty obligations to tribes.³¹ Federal agencies also own the majority of tribal land on behalf of the tribes and, therefore, are responsible for managing this land and authorizing any actions that tribes may wish to undertake on their land.³² The most relevant ramification of that relationship for this discussion is that tribes require congressional approval if they wish to sell a portion of their water off-reservation.³³ Furthermore, there are limits to this relationship that keep tribes from fully benefitting from the arrangement.³⁴

A recent example of the limitations in this trust relationship can be seen in *United States v. Jicarilla Apache Nation*.³⁵ There, the tribe sued the federal government for mismanagement of funds that the government held in trust for the tribe.³⁶ The government withheld certain documents as part of that litigation, citing attorney–client privilege.³⁷ The tribe argued for the “fiduciary exception,” which prevents a common-law trustee from asserting attorney–client privilege in regard to legal advice obtained for the purpose of fulfilling a fiduciary obligation.³⁸

The Court rejected this argument and held that the fiduciary exception did not apply.³⁹ It explained that “[a]lthough the Government’s responsibilities with respect to the management of funds belonging to Indian tribes bear some

30. *American Indians and Alaska Natives—The Trust Responsibility*, U.S. DEP’T HEALTH & HUM. SERVS., <https://www.acf.hhs.gov/ana/fact-sheet/american-indians-and-alaska-natives-trust-responsibility> [<https://perma.cc/FAS6-K94A>].

31. *Id.*

32. *Id.*

33. Leslie Sanchez, *Addressing Institutional Barriers to Native American Water Marketing*, PERC POL’Y BRIEF (PERC, Bozeman, Mont.) Feb. 14, 2022, at 4, <https://www.perc.org/wp-content/uploads/2022/02/sanchez-tribal-water-brief.pdf> [<https://perma.cc/PBU6-BEM8>].

34. See, e.g., *United States v. Jicarilla Apache Nation*, 564 U.S. 162, 178–79 (2011); *United States v. Mitchell*, 445 U.S. 535, 542–44 (1980) (explaining that the federal government holding certain land in trust for a tribe did not mean that the government had a fiduciary responsibility for the land).

35. 564 U.S. at 165–66.

36. *Id.* at 166.

37. *Id.*

38. *Id.*

39. *Id.* at 169.

resemblance to those of a private trustee, this analogy cannot be taken too far.”⁴⁰ The difference arises from the fact that the relationship between government and tribe is governed by statute and treaty rather than common law.⁴¹ Therefore, common law trust obligations, including the duty of loyalty to the trustee and the duty of prudence in managing the trust,⁴² do not apply. If the federal government has not expressly accepted a trust duty by statute, it does not owe that duty.⁴³

C. *The Law of the Colorado River*

In addition to these general state and federal water law principles, there is also a specific body of law known as the “Law of the River” that governs the Colorado River.⁴⁴ As a huge source of surface water in the arid West, the Colorado River was subject to many competing claims from all the states that bordered it and wished to claim as much of this valuable resource as possible.⁴⁵ Attempts to resolve these disputes culminated in the Colorado River Compact of 1922, which divided the river into the Upper Basin and Lower Basin at Lees Ferry, Arizona, and gave each basin a right to 7.5 million acre-feet of water per year (“AFY”).⁴⁶ But the compact failed to end disputes over the river,⁴⁷ and Arizona did not even ratify the agreement until 1944.⁴⁸ The compact also notably included no input from or reference to Indian tribes, except for a single sentence: “Nothing in this compact shall be construed as affecting the obligations of the United States of America to Indian tribes.”⁴⁹

40. *Id.* at 165.

41. *Id.* at 175.

42. ROBERT H. SITKOFF & JESSE DUKEMINIER, *WILLS, TRUSTS, AND ESTATES* 405 (11th ed. 2022).

43. *Jicarilla*, 564 U.S. at 177.

44. *Colorado River Compact*, WATER EDUC. FOUND., <https://www.watereducation.org/aquapedia-background/colorado-river-compact> [<https://perma.cc/4FFW-X9WZ>].

45. *Id.*

46. *Id.*

47. Likely the most bizarre of these disputes occurred in 1934 when the governor of Arizona deployed National Guardsmen and commissioned a navy to halt California’s construction of Parker Dam on the Colorado River. See Clay Thompson, *Avast Ye Scalawags: The Extremely Brief History of the Arizona Navy*, AZ CENTRAL (Apr. 12, 2014), <https://www.azcentral.com/story/claythompson/2014/04/12/arizona-navy-battle-with-california-colorado-river/7425253> [<https://perma.cc/8YSK-BFXA>].

48. WATER EDUCATION FOUNDATION, *supra* note 44. See generally ARIZ. REV. STAT. ANN. § 45-1301(5) (2024).

49. Colorado River Compact, art. VII (1922); see Matthew McKinney et al., *First in Time: The Place of Tribes in Governing the Colorado River System*, 63 NAT. RES. J. 153, 163–64 (2023).

The continuing conflict over the river between the Lower Basin states—Arizona, California, and Nevada—came to a head in the landmark 1963 case *Arizona v. California*.⁵⁰ This case, and the accompanying 1964 decree issued by the Supreme Court,⁵¹ formally allocated the 7,500,000 AFY across the Lower Basin, with 4,400,000 AFY allocated to California, 2,800,000 AFY to Arizona, and 300,000 AFY to Nevada.⁵² In addition, five Indian tribes located along the Colorado River had their water rights decreed by the Court.⁵³ The Navajo Nation was not among them,⁵⁴ as the Court’s special master did not think it appropriate to assign water rights to those tribes that mostly drew water from the Colorado’s tributaries.⁵⁵ The Court also approved the special master’s creation of the practicably irrigable acreage (“PIA”)⁵⁶ standard for determining the quantity of an Indian reservation’s water right.⁵⁷ In addition, the decision established that no other party or federal agency may allocate Colorado River water outside of the bounds of the Court’s decree.⁵⁸ This series of rulings from the Court created an uphill battle for any party seeking to place a claim for Colorado River water, as the Court ensured that the only way for a party not mentioned in the 1964 decree to obtain a Colorado water right is to go through them.

50. 373 U.S. 546 (1963).

51. *See Arizona v. California*, 376 U.S. 340 (1964).

52. *Id.* at 342.

53. *Id.* at 344–45.

54. *Id.* It is worth noting that the Navajo Nation did attempt to intervene in this case as a self-represented party and alternatively by having the federal government advocate for it. *See Olalde & Smith, supra* note 15. These efforts were opposed by the states involved in the case and were ultimately unsuccessful. *See id.*

55. Report of Special Master Simon H. Rifkind at 255, *Arizona v. California*, 373 U.S. 546 (1963). A special master is an individual appointed by the Court to assist in fact-finding for the case and provide recommendations, often in the form of a report. Anne-Marie C. Carstens, *Lurking in the Shadows of the Judicial Process: Special Masters in the Supreme Court’s Original Jurisdiction Cases*, 86 MINN. L. REV. 825, 827 (2002). The Supreme Court utilizes special masters in some water law cases due to the level of technical complexity of the cases and the specialized nature of that field of law. L. Elizabeth Sarine, *The Supreme Court’s Problematic Deference to Special Masters in Interstate Water Disputes*, 39 ECOLOGY L.Q. 535, 554–55 (2012).

56. Report of Special Master Simon H. Rifkind, *supra* note 55, at 265. PIA is determined using a formula that takes into account (1) whether the reservation’s soil is arable, (2) the engineering feasibility of growing and transporting crops on the reservation, and (3) the economic viability of growing reasonably productive crops. Clayton Kinsey, *All Homelands Need Agua Caliente: Analyzing the Impact of Arizona’s Gila III via the Hopi Tribe’s Recommended Decree*, 55 ARIZ. ST. L.J. 1107, 1115 (2023).

57. *Arizona*, 373 U.S. at 560.

58. *Arizona v. California*, 547 U.S. 150 (2006).

The current state of affairs in the Lower Basin is uncertain, to say the least.⁵⁹ Lake Mead, a key reservoir and indicator of the flow of the Colorado River, recently reached a historically low level and is well short of its full capacity.⁶⁰ In response, the Department of Reclamation considered imposing mandatory cuts on the Lower Basin states in order to prevent the reservoir from reaching critically low levels.⁶¹ To avert this, Arizona, California, and Nevada proposed a joint plan for voluntary water cuts, which the Department approved in 2023.⁶² These cuts run through the end of 2026, at which point they, along with a great deal of other agreements, conservation plans, and reservoir guidelines, will expire.⁶³ That makes the next few years a vital time in Colorado River politics. These years will see parties to the river seek to prepare for possible further cuts in the future and attempt to negotiate a deal amongst themselves without the federal government mandating an agreement.⁶⁴

D. Vindicating Water Rights Through Stream Adjudications

The Navajo Nation is also involved in water rights litigations at the state level in the form of general stream adjudications.⁶⁵ General stream adjudications are judicial proceedings used to determine the amount and priority of water rights in an entire river system.⁶⁶ These adjudications are enormously complex, as they involve any party who has a claim to use water within the river system.⁶⁷ As a result, they can potentially involve hundreds of claimants and thousands of claims.⁶⁸

59. See Phillip Womble, *The Coming Months in the Colorado River Basin*, WATER IN THE WEST (June 15, 2023), <https://waterinthewest.stanford.edu/publications/coming-months-colorado-river-basin> [<https://perma.cc/LF42-6H7N>].

60. *Id.*

61. *Id.*

62. Rachel Becker, *Western States' Planned Water Cuts Are Enough to Avert a Colorado River Crisis, for Now*, CALMATTERS (Oct. 25, 2023), <https://calmatters.org/environment/water/2023/10/colorado-river-california-water-cuts> [<https://perma.cc/LXL7-9U8W>].

63. *Id.*

64. *Id.*

65. See *Little Colorado River Arizona*, NAVAJO NATION WATER RTS. COMM'N, <https://nnwrc.navajo-nsn.gov/Basin-Updates/Little-Colorado-River-Arizona> [<https://perma.cc/69E9-H2J5>].

66. *Overview of General Stream Adjudications*, JUD. BRANCH ARIZ., <https://www.superiorcourt.maricopa.gov/SuperiorCourt/GeneralStreamAdjudication/faq.asp> [<https://perma.cc/DL3V-H3TW>].

67. *Id.*

68. *Id.*

As a federally recognized tribe, the Navajo Nation's tribal government would typically be exempt from a suit in state court due to its sovereign immunity.⁶⁹ This immunity protects the tribe from being sued in state court, barring Congressional authorization or tribal waiver.⁷⁰ The reason the Navajo Nation may nevertheless be involved in a general stream adjudication is the McCarran Amendment.⁷¹ This law, passed in 1952 by Congress, waives federal sovereign immunity in state suits over the rights to a river system.⁷² This waiver of immunity includes federally reserved water rights such as *Winters* rights.⁷³ In *Arizona v. San Carlos Apache Tribe*, the Court extended this waiver of immunity to attempts to join a tribe to a state stream adjudication, so long as the adjudication is sufficiently comprehensive.⁷⁴

The McCarran Amendment complicates the Navajo Nation's claim to water rights on the Little Colorado River.⁷⁵ The Little Colorado is a tributary of the Colorado River that flows through Navajo Nation and is a major source of its water.⁷⁶ It is currently subject to a general stream adjudication, which began in 1978 and was joined by the Navajo Nation in 1985.⁷⁷ This litigation, which is incredibly complex and involves hundreds of claimants, is still ongoing.⁷⁸ Closing arguments for the first phase of the litigation were completed in the summer of 2024, with the second phase set to begin in 2027 if necessary.⁷⁹ The first phase addressed only the Navajo Nation's claims for

69. Luke Hasskamp, *Tribal Sovereign Immunity: A Defense Available to Individuals*, BONA L. (July 3, 2020), <https://www.bonalaw.com/insights/legal-resources/tribal-sovereign-immunity-a-defense-available-to-individuals> [<https://perma.cc/4QK4-M54G>].

70. *Id.*; see, e.g., *Lac du Flambeau Band of Lake Superior Chippewa Indians v. Coughlin*, 599 U.S. 382, 387 (2023) (“Our cases have thus repeatedly emphasized that tribal sovereign immunity, absent a clear statement of congressional intent to the contrary, is the ‘baseline position.’” (quoting *Michigan v. Bay Mills Indian Cmty.*, 572 U.S. 782, 790 (2014))).

71. 43 U.S.C. § 666.

72. Lawrence J. MacDonnell, *General Stream Adjudications, the McCarran Amendment, and Reserved Water Rights*, 15 WYO. L. REV. 313, 315 (2015).

73. *Id.* at 318.

74. 463 U.S. 545, 570 (1983).

75. See Andrew Curley, *Unsettling Indian Water Settlements: The Little Colorado River, the San Juan River, and Colonial Enclosures*, 53 ANTIPODE 705, 715 (2021) (noting that, because of the McCarran Amendment, “all water rights litigation involving the federal government must be decided in state courts and not within federal courts, where tribes would prefer to litigate”).

76. *Navajo Nation Leadership Attends First Phase of Little Colorado River Adjudication Trial*, NAVAJO-HOPI OBSERVER (May 2, 2023), <https://www.nhnews.com/news/2023/may/02/navajo-nation-leadership-attends-first-phase-littl> [<https://perma.cc/VJ4Y-ZQX5>].

77. NAVAJO NATION WATER RTS. COMM’N, *supra* note 65.

78. *Id.*

79. Arlyssa D. Becenti, *Sweeping Colorado River Settlement Will Bring Water, Equity to Navajo Communities*, AZ CENTRAL (May 1, 2024), <https://www.azcentral.com/story/news/local/>

“stock ponds, livestock and wildlife watering, wells, springs, impoundments, and domestic, commercial, municipal, and light industrial (“DCMI”) uses,”⁸⁰ so it only went partway in determining what rights the Navajo Nation has in the river. Whether additional phases of the trial will be necessary depends on the whether the Northeastern Arizona Indian Water Rights Settlement Agreement is approved by the involved parties and ratified by Congress and the adjudication court.⁸¹

The Navajo Nation’s water right is also implicated, albeit indirectly, by the Gila River general stream adjudication.⁸² The Gila River is another major tributary of the Colorado in Arizona—but unlike the Little Colorado River, it does not pass through the Navajo Nation’s land.⁸³ It was subject to a general stream adjudication and produced a series of Arizona Supreme Court decisions that included a case known as *Gila V*.⁸⁴ Notably, this case was the first rejection of the PIA standard for Indian water right quantification that the Supreme Court established in *Arizona v. California*.⁸⁵ The Arizona Supreme Court instead established a fact-intensive standard that weighed factors including the “tribe’s history, culture, financial resources and economic base, the geography and topography of the reservation, past use of water on the reservation, and the present and projected population of a tribe.”⁸⁶ Legal experts disagree over whether the *Gila V* standard is better for tribes than PIA, or whether *Gila V* is even constitutional since it flies in the face of the standard established by the Supreme Court.⁸⁷ As of this writing, however, it is the law of the land in Arizona for tribal quantifications.⁸⁸

arizona/2024/05/01/colorado-river-settlement-to-bring-water-equity-to-thousands-of-navajo/73442480007.

80. NAVAJO NATION WATER RTS. COMM’N, *supra* note 65.

81. See CORA TSO, KYL CTR. FOR WATER POL’Y AT MORRISON INST., ARIZ. STATE UNIV., THE NORTHEASTERN ARIZONA INDIAN WATER RIGHTS SETTLEMENT AGREEMENT (Sept. 2024), <https://issuu.com/asuwattscollge/docs/kyl-neaz-wtrrghts-fnl-2?fr=sN2MzNTgxNTIwMzM> [<https://perma.cc/TZ8Z-BKZS>]. For further discussion of the settlement agreement, see *infra* text accompanying notes 189–92.

82. See Galen Lemei, Note, *Abandoning the PIA Standard: A Comment on Gila V*, 9 MICH. J. RACE & L. 235, 253–56 (2003).

83. See *Gila River*, AM. RIVERS, <https://www.americanrivers.org/river/gila-river> [<https://perma.cc/2LQ7-MX4J>].

84. *In re General Adjudication of All Rights to Use Water in the Gila River System and Source (Gila V)*, 35 P.3d 68 (Ariz. 2001).

85. Lemei, *supra* note 82, at 253.

86. *Id.* at 257.

87. See *id.* at 257, 266.

88. See Kinsey, *supra* note 56, at 1125–26.

E. Tribal Water Rights Settlements

Winters and its progeny continue to affirm that every federal Indian reservation has an implicit water right.⁸⁹ However, many tribes choose to settle their water rights and take less than the full amount they are owed under *Winters*.⁹⁰ Settlement allows tribes to avoid lengthy and costly litigation over exactly how much water the tribe has a right to and from which sources the water will come.⁹¹ In return for giving up a portion of their water right, tribes typically receive money to improve their water infrastructure so they can make full use of the water that they have.⁹² Settlement is a common path for tribes in Arizona.⁹³ Of the twenty-two federally recognized tribes in the state, eight have completely settled their water right, four have water rights that were decreed in 1963 by *Arizona v. California*,⁹⁴ two have partially settled their rights, and eight—including the Navajo Nation—have not settled any part of their claims in the state.⁹⁵

The most recent of these settlements was finalized with the Hualapai Tribe in 2023.⁹⁶ The Hualapai Reservation is located in northwestern Arizona and borders a 108 mile stretch of the Colorado River.⁹⁷ Despite this long boundary on the river, the Hualapai never had their water right perfected and therefore did not have any actual access to Colorado River water.⁹⁸ This finally changed in 2023, when the Tribe and the federal government reached a settlement agreement after over a decade of negotiations.⁹⁹ This settlement granted the Hualapai a \$312 million trust to develop their water infrastructure, a supply

89. See *Winters v. United States*, 207 U.S. 564, 576–77 (1908).

90. See *Indian Water Rights Settlements*, BUREAU INDIAN AFFS., <https://www.bia.gov/service/indian-water-rights-settlements> [<https://perma.cc/ZTR2-FET2>].

91. *Id.*

92. *Id.*

93. *Tribal Water Rights*, CENT. ARIZ. PROJECT, <https://www.cap-az.com/about/tribal-water-rights> [<https://perma.cc/C2ER-UQG>].

94. 373 U.S. 546 (1963).

95. *Id.*

96. Hualapai Tribe Water Rights Settlement Act of 2022, Pub. L. No. 117-349, 136 Stat. 6225 (2023) (approving the settlement of the Hualapai Tribe's water rights claims).

97. *About the Hualapai Tribe*, HUALAPAI TRIBE, <https://hualapai-nsn.gov/about-2> [<https://perma.cc/2F6S-SL4E>].

98. Shondiin Silversmith, 'Blessed to Have Water': Hualapai Tribe Praises Historic Water Rights Settlement, ARIZ. MIRROR (Sept. 29, 2023), <https://azmirror.com/2023/09/29/blessed-to-have-water-hualapai-tribe-praises-historic-water-rights-settlement> [<https://perma.cc/HWL3-EJQN>].

99. *Id.*

of Central Arizona Project water,¹⁰⁰ and authorization to sell or lease their water rights off-reservation in exchange for agreeing to the settlement.¹⁰¹ At the same time as the Hualapai settlement, President Biden also signed the Colorado River Indian Tribes Water Resiliency Act, which likewise allowed the Colorado River Indian Tribes (“CRIT”) to lease part of their water right off-reservation.¹⁰² The Biden Administration had a policy of encouraging Indian water settlements, with 2021’s Infrastructure Investment and Jobs Act containing \$2.5 billion for such settlements in the form of the Indian Water Rights Settlement Completion Fund.¹⁰³

The Navajo Nation itself is no stranger to water rights settlements. A major source of water for their reservation is the San Juan River.¹⁰⁴ The San Juan is a tributary of the Colorado River that forms in Colorado before running through New Mexico and Utah and then joining with the Colorado River at Lake Powell.¹⁰⁵ The Navajo Nation settled their claim to their portion of the river in New Mexico in 2005, with the tribe receiving around 600,000 AFY of water in the settlement.¹⁰⁶ The settlement was signed into law by President Obama in 2009 and also included funding for the construction of a pipeline to bring this water to Navajo Nation settlements in the area.¹⁰⁷ In 2022, the tribe finalized a settlement of their water rights to the San Juan in Utah as

100. Hualapai Tribe Water Rights Settlement Act § 7(a)(1). The Central Arizona Project is a complex water system that transports water from the Colorado River to central Arizona, including Phoenix and Tucson. T.R. Witcher, *The Storied History of the Central Arizona Project*, AM. SOC’Y CIV. ENG’RS (Mar. 1, 2022), <https://www.asce.org/publications-and-news/civil-engineering-source/civil-engineering-magazine/issues/magazine-issue/article/2022/03/the-storied-history-of-the-central-arizona-project> [https://perma.cc/WU2C-DQSL].

101. Hualapai Tribe Water Rights Settlement Act § 5(e).

102. Colorado River Indian Tribes Water Resiliency Act of 2022, Pub. L. No. 117-343, 136 Stat. 6186; see also Samuel Joyce, *Tribal Water Sovereignty: Authorizing Indian Water Marketing in the Colorado Basin*, 35 STAN. L. & POL’Y REV. 161, 163 (2024).

103. Press Release, U.S. Dep’t of the Interior, President Biden’s Investing in America Agenda Supports \$327 Million Investment to Fulfill Indian Water Rights Settlements (Oct. 26, 2023), <https://www.doi.gov/pressreleases/president-bidens-investing-america-agenda-supports-327-million-investment-fulfill> [https://perma.cc/8RQ5-7GH8].

104. *San Juan River New Mexico*, NAVAJO NATION WATER RTS. COMM’N, <https://nnwrc.navajo-nsn.gov/Basin-Updates/San-Juan-River-New-Mexico> [https://perma.cc/MD4Q-WN5M].

105. *Basic Information About the San Juan Watershed*, EPA, <https://www.epa.gov/san-juan-watershed/basic-information-about-san-juan-watershed> [https://perma.cc/76J8-F58N] (Mar. 6, 2024).

106. NAVAJO NATION WATER RTS. COMM’N, *supra* note 104.

107. *Id.*

well, with the tribe receiving 81,500 AFY of water and \$218 million in water infrastructure funding.¹⁰⁸

II. NAVAJO HISTORY, ARGUMENTS ADVANCED BY THE NAVAJO NATION, AND THE COURT'S DECISION

It has been a long journey for the Navajo Nation to finally bring their claims before the Supreme Court. This Part begins with a short history of the Navajo's relationship with the United States. It then delves into the procedural history of *Arizona v. Navajo Nation*, starting with the tribe's suit in district court in 2014. This Part then concludes with a discussion of the arguments advanced by the Navajo Nation and the Supreme Court's responses to those arguments.

A. A Brief History of the Navajo

The Navajo have a long history of fighting for their water rights. The traditional homeland of the Navajo encompasses much of northeast Arizona and northwest New Mexico, as well as parts of Colorado and Utah.¹⁰⁹ As the United States expanded westward it came into contact with the Navajo, who fought to resist the taking of their land.¹¹⁰ The two parties first attempted to resolve this conflict with a treaty in 1849.¹¹¹ This agreement placed the Navajo under "exclusive jurisdiction" of the United States, stated that conflict between the parties would cease, and promised that the U.S. would "designate, settle, and adjust" the territorial boundaries of the Navajo's land.¹¹² Despite this treaty, conflict did not stop, and the Navajo continued to resist American encroachment into their territory.¹¹³ The U.S. Army conducted a scorched-earth campaign to end this resistance, burning crops and killing livestock.¹¹⁴ The Navajo eventually surrendered and the U.S.

108. Alastair Lee Bitsóí, *Water Agreement Resolves Utah's Long-Standing Dispute Over Navajo Nation's Rights to the Colorado*, SALT LAKE TRIB. (May 27, 2022), <https://www.sltrib.com/news/environment/2022/05/27/water-agreement-resolves> [https://perma.cc/53LQ-NZMW].

109. *The Long Walk*, SMITHSONIAN INST., <https://americanindian.si.edu/nk360/navajo/long-walk/long-walk.cshtml> [https://perma.cc/7J79-P6PE].

110. *Id.*

111. Treaty Between the United States of America and the Navajo Tribe of Indians, Navajo Nation-U.S., Sept. 9, 1849, 9 Stat. 974.

112. *Id.* arts. 1–2, 9.

113. SMITHSONIAN INST., *supra* note 109.

114. *Id.*

Army forced them to march hundreds of miles to the Bosque Redondo Reservation in New Mexico.¹¹⁵

Bosque Redondo proved to be wholly inadequate as any sort of permanent homeland for the Navajo.¹¹⁶ The land was arid and lacked the necessary water to support either farming or raising livestock.¹¹⁷ The federal government eventually came to agree with the tribe that the situation was unlivable for the Navajo, and so consequently negotiated to allow the tribe to leave Bosque Redondo.¹¹⁸ These negotiations culminated in the Treaty of 1868, which established the base of the current Navajo Nation reservation and allowed the Navajo to return to their ancestral homeland.¹¹⁹ The 1868 treaty forms the basis of the relationship between the tribe and the federal government that still exists to this day.¹²⁰

B. The Procedural Posture of Arizona v. Navajo Nation

While the history of the Navajo Nation's relationship with the United States is extensive, *Arizona v. Navajo Nation* originated with a decision in the District of Arizona in 2014.¹²¹ In that case, the tribe sued the U.S. Department of the Interior over the federal government's handling of the Nation's water right.¹²² The Navajo Nation claimed that by failing to quantify their Colorado River rights and allocating this water to other parties, the federal government was violating the National Environmental Policy Act ("NEPA") and the Administrative Procedure Act ("APA").¹²³ The Navajo Nation also argued that by allocating this water to other parties, the federal

115. *Id.*

116. *Bosque Redondo*, SMITHSONIAN INST., <https://americanindian.si.edu/nk360/navajo/bosque-redondo/bosque-redondo.cshtml> [<https://perma.cc/4VY9-SV7V>].

117. *Id.*

118. *Id.*

119. Treaty Between the United States of America and the Navajo Tribe of Indians, Navajo Nation-U.S., June 1, 1868, 15 Stat. 667.

120. *Navajo Treaty of 1868*, SMITHSONIAN INST., <https://americanindian.si.edu/nk360/navajo/treaty/treaty.cshtml> [<https://perma.cc/5EJH-RBJF>]. The Navajo did frequently reference the 1849 treaty in their brief to the Court, but the Court chose to focus almost exclusively on the 1868 treaty in their analysis. See Brief for the Navajo Nation, *Arizona v. Navajo Nation*, 599 U.S. 555 (2023) (No. 21-1484), 2022 WL 1779793, at *13–14, *17–24; *Arizona v. Navajo Nation*, 599 U.S. 555, 559–61 (2023).

121. *Navajo Nation v. U.S. Dep't of the Interior*, 34 F. Supp. 3d 1019 (D. Ariz. 2014).

122. *Id.* at 1022.

123. *Id.* at 1025. The court ruled that any injury to the Navajo under NEPA or the APA was speculative rather than actual or imminent and so dismissed these claims for lack of standing. *Id.* at 1028. See generally National Environmental Policy Act of 1969, 42 U.S.C. §§ 4321–4347; Administrative Procedure Act, 5 U.S.C. §§ 551–559.

government was failing to fulfill the fiduciary duty it owed the Navajo Nation as trustee of the reservation.¹²⁴ The court found that the federal government had not actually breached any of its trust obligations, as the water rights that the tribe has through *Winters* remain intact and are just waiting to be eventually allocated.¹²⁵ In addition, the court held that the breach of trust claim was barred because it did not fit within any exception to sovereign immunity.¹²⁶

The Navajo Nation appealed this dismissal to the Ninth Circuit.¹²⁷ The appellate court upheld the dismissals for the tribe's statutory claims but held that the breach of trust claim was not barred by sovereign immunity and so should have been allowed to proceed.¹²⁸ On remand, the Navajo Nation was denied leave to amend their complaint.¹²⁹ The district court held that proceeding with their claim would require allocating Colorado River water, which would violate the Supreme Court's reservation of jurisdiction in *Arizona v. California* (2006).¹³⁰ After the denial, the Navajo Nation filed a renewed motion to amend their complaint.¹³¹ This time, Arizona and two irrigation districts in California intervened in the lawsuit on the side of the federal government, attempting to protect their water rights in the Colorado by preventing another user with a strong priority date from gaining a right to it.¹³² This motion was denied for the same reason as the previous one, and the court dismissed the tribe's suit.¹³³

The Navajo Nation again appealed the dismissal to the Ninth Circuit.¹³⁴ The Ninth Circuit reversed and remanded, holding that the tribe was requesting a determination of their water needs, not a formal quantification of their Colorado River water rights, and so their request was not barred by *Arizona v. California*.¹³⁵ At the Ninth Circuit, additional intervenors joined

124. *Id.*

125. *Id.* at 1028–29.

126. *Id.* at 1029–30.

127. *Navajo Nation v. U.S. Dep't of the Interior*, 876 F.3d 1144, 1160 (9th Cir. 2017).

128. *Id.* at 1174.

129. *Navajo Nation v. U.S. Dep't of the Interior*, No. CV-03-00507, 2018 WL 6506957, at *5 (D. Ariz. Dec. 11, 2018).

130. *Id.* at *2.

131. *Navajo Nation v. U.S. Dep't of the Interior*, No. CV-03-00507, 2019 WL 3997370 (D. Ariz. Aug. 23, 2019).

132. *Id.* at *1; see Rita Maguire & Nicole Klobas, *Tribal Rights, Water Rights, States' Rights and the Colorado River: What's at Stake in the SCOTUS Case, Arizona v. Navajo Nation*, A.B.A. TRENDS, May/June 2023, at 9.

133. *Navajo Nation*, 2019 WL 3997370, at *7.

134. *Navajo Nation v. U.S. Dep't of the Interior*, 996 F.3d 623 (9th Cir. 2021), *amended by* 26 F.4th 794 (9th Cir. 2023), *rev'd sub nom. Arizona v. Navajo Nation*, 599 U.S. 555 (2023).

135. *Id.* at 635.

the case on the side of the federal government, including the states of Colorado and Nevada, who also had an interest in preventing another party from establishing a claim to the Colorado.¹³⁶ The case was appealed to the Supreme Court, which granted certiorari.¹³⁷

C. The Navajo Nation's Arguments and the Court's Response

By the time their case had made it through all the arguments and revisions in the lower courts, the Navajo Nation had narrowed their claim to two distinct questions.¹³⁸ The first was whether the treaty between the United States and the Navajo obligates the federal government to “assess the Navajo Nation’s water needs and develop a plan to meet them.”¹³⁹ The second was whether lower courts can compel an agency to take these steps without running afoul of the Supreme Court’s reservation of jurisdiction in *Arizona v. California*.¹⁴⁰

The Court identified five distinct arguments made by the Navajo Nation as to why their treaty with the United States obligated the federal government to help them meet their water needs; the Court ultimately rejected each argument in a 5–4 decision.¹⁴¹

The Navajo Nation’s first claim was for breach of trust.¹⁴² They argued that the trust relationship established by the treaty between the United States and the Navajo was breached by the federal government’s failure to help the Navajo Nation develop their water right.¹⁴³ Citing to *Jicarilla*, the Court stated that any duty owed by the federal government in the trust relationship with the tribe must be expressly accepted, and that there was no such explicit mention of water in the treaty.¹⁴⁴ The Court explained that while Congress could pass a law to create this duty, it would be outside of the Court’s role to create that responsibility where it was not laid out in the treaty.¹⁴⁵

The other arguments advanced by the Navajo Nation were briefly considered and dismissed.¹⁴⁶ The Navajo Nation claimed that the treaty’s

136. See Maguire & Klobas, *supra* note 132.

137. *Navajo Nation*, 599 U.S. 555.

138. Brief for the Navajo Nation at i, *Navajo Nation*, 599 U.S. 555 (Nos. 21-1484, 22-51), 2023 WL 1779793.

139. *Id.*

140. *Id.*

141. See *Navajo Nation*, 599 U.S. 555.

142. *Id.* at 563.

143. See *id.* at 563–64.

144. *Id.* at 564–65.

145. *Id.* at 566–67.

146. *Id.* at 567–69.

establishment of a permanent homeland includes the right to water.¹⁴⁷ The Court said that this included the right to use the water on the land but did not impose an affirmative obligation on the federal government to develop that right.¹⁴⁸ The Navajo Nation also argued that the treaty's mention of "seeds and agricultural implements" implicitly included the right to water to help with farming, but the Court once again stated that they had the right to the water on their reservation, just not the right to have the United States develop it for them.¹⁴⁹

Another argument raised by the Navajo Nation was that the United States had intervened to keep them out of litigation over the Colorado River, and that this action showed that the federal government had control over their water right and therefore a responsibility for it.¹⁵⁰ The Court disagreed with this argument and again cited to *Jicarilla*, explaining that without explicit acceptance of a responsibility the government had not accepted it.¹⁵¹ They also explained that the Navajo Nation may be able to intervene in future water right litigation, and that their intervention in those cases would be handled by the Court as it came up.¹⁵²

Finally, the Navajo Nation argued that at the time of the treaty, they would have understood it as imposing an affirmative duty on the federal government to develop their water right.¹⁵³ The Court found this argument unpersuasive and stated that nothing either in the treaty itself or in the historical record supports this claim.¹⁵⁴ Having rejected all of their arguments, the Court found against the Nation's claim that the federal government had an affirmative obligation to help them develop their water right.¹⁵⁵ Because the Court rejected this claim, it did not consider the question of whether a lower court could have made a ruling on the Navajo water right without running afoul of *Arizona v. California*.¹⁵⁶

Justice Gorsuch dissented, and he was joined by Justices Sotomayor, Kagan, and Jackson.¹⁵⁷ The dissent first focuses on the Navajo's history with this case—both in terms of their long history in this country and their long

147. *Id.* at 567.

148. *Id.*

149. *Id.* at 567–68.

150. *Id.* at 568.

151. *Id.*

152. *Id.* at 568–69.

153. *Id.* at 569.

154. *Id.*

155. *Id.* at 569–70.

156. *See id.*

157. *Id.* at 574 (Gorsuch, J., dissenting).

history of attempting to have the case heard by the Court.¹⁵⁸ The dissent proceeds to assert that, based on the language of the 1868 treaty and the government's trust obligations, the federal government owes the Navajo Nation a proper assessment of the water rights the tribe holds under *Winters*.¹⁵⁹ According to Justice Gorsuch, the majority erred in stating that the Nation was asking for federal assistance in building water infrastructure.¹⁶⁰ Instead, he argues that the tribe is merely asking for a quantification of their water right.¹⁶¹ The dissent further argues that the majority then used the wrong legal framework to determine what trust obligation the federal government has here.¹⁶² Justice Gorsuch concludes by empathizing with the tribe's history of frustration in water litigation and suggests that after this decision, the Court could not in good faith exclude the Navajo Nation from future litigation over the Colorado.¹⁶³

III. LACK OF CLARITY AND HOPE FOR THE FUTURE: THE NAVAJO NATION'S PATH FORWARD

The outcome of this case promises to have a strong effect on not only the Navajo Nation, but on water law and politics in the entire southwestern United States. This Part addresses what these far-reaching effects will be, and how the Navajo can move forward from here. This Part first briefly examines the high-level Indian law ramifications of this case. It then examines what the effects of the holding will be on the Navajo Nation in particular. Finally, it suggests that the Nation can move forward after this setback by pursuing a federal settlement for their water claim to the Colorado River.

A. Reaffirming *Winters* and *Jicarilla*

There are two high-level takeaways from this case that, while not the focus of this Note, are worth addressing. The first is the reaffirmation of *Winters* rights. In *Arizona v. Navajo Nation*, the Court confirmed that *Winters* rights still exist, and that they still provide the same quantity of water—enough to

158. *Id.* at 575–84.

159. *Id.* at 592–93.

160. *Id.* at 593.

161. *Id.* at 594.

162. *Id.* at 594–99.

163. *Id.* at 599. Notably, Justice Gorsuch compares the Navajo's experience to the frustration of waiting in line at the DMV: "The Navajo have waited patiently for someone, anyone, to help them, only to be told (repeatedly) that they have been standing in the wrong line and must try another." *Id.* at 598–99.

meet the primary purpose of the reservation.¹⁶⁴ While this was not an issue raised by either party, these rights are key to the Navajo Nation's claim, and indeed to the claims of any other recognized tribes that are seeking to assert their water rights. For these reasons, it was significant that even though the Court denied the Navajo Nation's overall claim, it affirmed that these rights still exist.

The other broad impact of this case is the confirmation of the fragility of the trustee relationship between the federal government and the tribes. The Court reinforced the holding from *Jicarilla* that the federal government's duties are those explicitly stated in a treaty or statute.¹⁶⁵ *Arizona v. Navajo Nation*, like *Jicarilla*, indicates that while the Court states that there is a "general trust relationship" between the United States and the tribes,¹⁶⁶ no common-law trust principles actually apply to this relationship. This confirms that *Jicarilla* is not limited to its context of the attorney–client relationship, and that the federal government owes no duties beyond those that are laid out in the text of a treaty, statute, or regulation.

However, while the Court in this case continued to limit what is owed to the tribes as part of this trust relationship, it did not address the other side of that relationship—the control that the government has over tribal actions. The federal government helped to ensure that the Navajo Nation could not intervene directly in *Arizona v. California* (1963) and also pulled back from its initial position of asserting the Nation's water rights in that case.¹⁶⁷ This trustee relationship also prevents tribes from using their water rights to the fullest extent in other ways. For example, as mentioned previously, tribes are unable to sell their water rights off-reservation without federal approval,¹⁶⁸ which is why permission to do so is one of the benefits typically sought by tribes in water right settlement agreements.

This leads to a situation wherein the benefits that tribes receive from the trust relationship continue to dwindle, while the drawbacks of the arrangement remain in place. Justice Thomas's concurrence acknowledges this disparity and refers to the trust relationship, as it exists now, as "amorphous and seemingly ungrounded."¹⁶⁹ While not directly addressed in this case, the imbalance of power created by the Court's recent jurisprudence regarding the government–tribe trust relationship seems ripe for future

164. *Id.* at 569 (majority opinion).

165. *See id.* at 563–64.

166. *Id.* at 565.

167. *See* Olalde & Smith, *supra* note 15.

168. *See* Sanchez, *supra* note 33, at 4.

169. *Navajo Nation*, 555 U.S. at 574 (Thomas, J., concurring).

litigation to clarify exactly what the bounds and responsibilities of the arrangement are.

B. Negative Effects on the Navajo Nation

The outcome of this case was undoubtedly a defeat for the Navajo Nation. As mentioned above, *Winters* was reaffirmed,¹⁷⁰ so the Navajo do know that they have an implied water right for their reservation. But they have no idea what the quantity of that water right is, and they are no closer to either getting that quantification or getting any government assistance in actually having access to that water.¹⁷¹ The Navajo Nation is also running out of options to have their water right vindicated. Because the Court denied their breach of trust claim, the Navajo were unable to even get an answer as to whether a lower court or federal agency could even quantify their water right without violating the reservation of jurisdiction from *Arizona v. California*.¹⁷² In short, to borrow from Justice Gorsuch's dissent, "[t]he Navajo have waited patiently for someone, anyone, to help them, only to be told (repeatedly) that they have been standing in the wrong line and must try another."¹⁷³

This decision also does nothing to help the Navajo Nation clarify whether they could intervene in future litigation over the Colorado River. In the past the federal government has, in its role as a trustee, kept the Nation out of that legislation.¹⁷⁴ The Court frustratingly did not indicate whether the government could continue to do so in the future, as they only state that the Navajo "may be able to assert the interests they claim in water rights litigation."¹⁷⁵ In dissent, however, Justice Gorsuch argues no court could fairly keep the tribe from intervening in future legislation over the Colorado.¹⁷⁶ This seemingly indicates that at least four justices would allow the Navajo Nation to intervene in Colorado River litigation. However, even if they had the support of all nine justices, the Navajo Nation is still limited in how they could get before the Court.

A few factors combine to create this difficulty. The fact that the *Arizona v. California* reservation of jurisdiction went unaddressed in this case means that a lower court would still be unable to actually allocate any Colorado

170. *Id.* at 569 (majority opinion).

171. *See generally id.*

172. *See generally id.*

173. *Id.* at 595 (Gorsuch, J., dissenting).

174. Olalde & Smith, *supra* note 15.

175. *Navajo Nation*, 599 U.S. at 568.

176. *Id.* at 599 (Gorsuch, J., dissenting).

River water to the Navajo Nation. The quickest route for the tribe to get in front of the Supreme Court for this allocation would be via original jurisdiction, which they do not have access to as the reservation is not a state.¹⁷⁷ They could intervene in a suit between states over the Colorado, but that is out of their control and requires them to wait for an issue to arise between those states. There is potential for litigation in the relatively near future, as the current set of agreements between the Lower Basin states expires in 2026, but the states could reach another agreement that would push litigation even farther into the future. Successful negotiations amongst these states would reduce the chances of lawsuits between them, which would harm the tribe's chances of being able to intervene in Supreme Court litigation.

In sum, the Navajo Nation's prospects of having their water rights vindicated through the legal system are tenuous. They need an original jurisdiction suit to arise between states over the Colorado so they can access the Supreme Court, and they have no control over if or when that happens. Then, even if that litigation does occur, the tribe is relying on an assurance from the Court that they "may" be able to intervene in that litigation, which is hardly a certainty given that the Nation has been shut out from such cases in the past. And, even if everything else goes to plan, they are still at the mercy of the Court's determination of their PIA, and whether the Court would find that Colorado River water is even necessary to meet that PIA determination. It will be an uphill battle for the Navajo to gain access to the water they are owed if they rely solely on the judicial system.

C. Settlement: A Potential Path Forward

What should the Navajo Nation do in light of these challenges? The best solution would be settlement. As demonstrated by the Hualapai water rights settlement and the \$2.5 billion earmarked for Indian water settlements by Congress, around the time the decision came down there was a government appetite for settlement and money available for it.¹⁷⁸ It is an option that the tribe should seriously consider with a number of compelling advantages.

The first and most obvious benefit to the Navajo Nation would be monetary. As mentioned previously, the Hualapai Tribe received a \$312

177. See U.S. CONST. art. II, § 2, cl. 2.

178. See Hualapai Tribe Water Rights Settlement Act of 2022, Pub. L. No. 117-349, 136 Stat. 6225; 25 U.S.C. § 149 (directing the Secretary of Treasury to deposit \$2.5 billion into the Indian Water Rights Settlement Completion Fund); see also Press Release, U.S. Dep't of the Interior, *supra* note 103.

million trust fund in return for settling their water right,¹⁷⁹ demonstrating that there are hundreds of millions of dollars available for those tribes that are willing to settle their rights. The Navajo Nation would be able to use this funding to build and maintain water infrastructure, meaning that even if they lose out on part of their water right, they could use what remains more efficiently, resulting in a net gain in water resources available to them. In addition, the tribe could negotiate for the right to sell or lease water off-reservation as part of their settlement, just as the Hualapai and CRIT did. Such a right would open up yet another valuable income stream, especially in light of increasing water scarcity in the Southwest. Entering into a settlement agreement would also save the tribe the cost of any future litigation that would be necessary for them to vindicate their water right.

Beyond just the raw income gained from water settlement, equally beneficial to the Navajo Nation is that the money and water would be available quickly and on their terms. As opposed to litigation, settlement occurs on a much faster timeline and can be resolved in years instead of decades. Receiving these economic benefits sooner would allow the Navajo to take action to resolve some of the pressing issues facing their reservation, rather than relying on the federal government to do it for them. The construction of the water infrastructure needed to supply the water-starved residents of the Navajo Nation,¹⁸⁰ who are spread out over a large area, will be a much more immediate priority for the government of the Nation itself than it would be if they were relying on the federal government to have it built. In addition, the Navajo have struggled to obtain federal support for the cleanup of old uranium mine sites that are contaminating their land and water,¹⁸¹ and so the windfall from a settlement could be used to address this need as well.

Another benefit of settlement is the certainty it affords. The Navajo Nation's rights to Colorado River water are dependent on an unpredictable future ruling from the Supreme Court, and there is no guarantee the tribe would have any say in such a ruling. In addition, a large percentage of their water right comes from the Little Colorado River, and over forty years of litigation over that water body have resulted in only a single phase of that

179. Witcher, *supra* note 100.

180. See Dunphey, *supra* note 5 (explaining how up to 40% of Navajo Nation lacks access to running water); see also Richard Tsong-Taataarii, *On the Navajo Nation, a Life Without Water*, SEARCHLIGHT N.M. (Nov. 29, 2023), <https://searchlightnm.org/on-the-navajo-nation-a-life-without-water> [https://perma.cc/98B4-KWA3] (explaining that due to their remoteness some Navajo residents must travel over thirty miles to access clean water).

181. See Tsong-Taataarii, *supra* note 180.

adjudication being concluded.¹⁸² A settlement would allow the Navajo to no longer have to deal with that litigation, instead having a firm idea of how much water they will have to work with now and in the future. It will also secure the tribe against changes in law that may result from increasing water scarcity in the Southwest.

In addition, soon after a loss at the Supreme Court may not seem like the best time for the Navajo Nation to negotiate from a position of strength, but there are still several factors that would allow them to strike a favorable deal. The most important of these is the current state of the Colorado River. The looming 2026 expiration of the current agreement between the Lower Basin states means that those states will be facing a contentious and complicated negotiation in a couple of years. Environmental factors, including the record low water level of Lake Mead,¹⁸³ have made every potential party to the river acutely aware of how limited and valuable the supply of Colorado River water is. Such water scarcity encourages states to try to avoid the establishment of additional significant water rights to the Colorado.

With this scarcity in mind, a silver lining of the Navajo Nation's loss at the Supreme Court is the uncertainty surrounding their water right. This uncertainty is a double-edged sword—although the tribe does not have a firm idea of what their water right is, neither do any of the other claimants to the Colorado River.¹⁸⁴ The states and irrigation districts negotiating over the Colorado are already faced with a situation where there is less water to go around than what is needed. If the Navajo Nation's claim remains unsettled, those claimants must be wary of the prospect that the tribe will at some point have their water right perfected and be able to step in as the additional priority stakeholder that the states were trying to avoid.

This leaves the parties to the agreements over the river with a decision to make. They can proceed as they have in the past and leave the Navajo Nation's right to the river unaddressed, knowing that in the future the tribe may have their right vindicated at a time when there is even less water available in the river. A large allocation to the Navajo Nation would result in sudden cuts to the claims of the other parties to the river in order to make the system work, inevitably leading to turmoil in and among those states as they have to quickly decide who will be cut off as a result.

182. See NAVAJO NATION WATER RTS. COMM'N, *supra* note 65.

183. See Womble, *supra* note 59.

184. This uncertainty is only heightened by Arizona's adoption of the *Gila V* water quantification standard, as this standard's increased nuance compared to PIA means that its outcome is harder to predict. In addition, it is not even certain if a quantification made under *Gila V* would survive a challenge to the Supreme Court. For further discussion of this issue, see *supra* Section I.D.

Alternatively, these claimants could support settlement with the Navajo Nation now. This approach would avoid future uncertainty and upheaval, as all parties to the river could then proceed knowing exactly what was owed to the tribe and could factor that amount into upcoming negotiations over the Colorado's water. With that choice in mind, the Navajo Nation could attempt to persuade these states to pressure the federal government to give the tribe a more favorable settlement agreement. This would allow the tribe to maximize what they get in return for relinquishing a portion of their valuable water rights.

There are, of course, downsides to the immediate settlement approach recommended here. From a tactical standpoint, while the Navajo Nation has more leverage than would appear at first glance, they are still coming off of a defeat at the Supreme Court. If the tribe delays any settlement negotiations until they were allowed to intervene in a future Supreme Court case over the Colorado—as a majority of the Court states that they may be able to—it would certainly increase their leverage and help them to secure a better deal. Furthermore, over the past few years, the falling level of the Colorado and increased focus on climate change have resulted in more attention to water policy at the state and national levels.¹⁸⁵ As this level of attention increases, so does the pressure on the states using Colorado River water to resolve the conflict surrounding it. If this trend continues, the Navajo may get a better deal simply by biding their time for several years and letting pressure build on the other claimants to the river, rather than pressing for a settlement agreement as soon as possible.

The nature of a settlement itself may also give the tribe pause. Despite all the benefits that come with it, at the end of the day a settlement would involve the Navajo Nation giving up a portion of the water that they are lawfully owed. The tribe has been fighting for vindication of that water right, in one form or another, since before their reservation was even established. To give up a portion of that right now, even in exchange for money and other benefits, would be to give up a portion of a centuries-long goal. With that in mind, it would be perfectly understandable for the Navajo Nation to refuse to settle for anything less than 100% of their *Winters* water right, no matter how tempting the option of settlement may appear.

The idea of the tribe refusing to settle, and pursuing their water claim through the legal system until its vindication, is a valid one. However, *Arizona v. Navajo Nation* shows the pitfalls of that approach. The case was

185. See Lara Korte, *The Southwest Is Bone Dry. Now, a Key Water Source Is at Risk.*, POLITICO (July 6, 2022), <https://www.politico.com/news/2022/07/06/colorado-river-drought-california-arizona-00044121> [<https://perma.cc/43MU-2S9L>].

first resolved in district court in 2014, and yet the Navajo Nation did not receive a final resolution for their claims for almost ten years.¹⁸⁶ Even then, their first claim to water was denied, and the Court did not even reach their second claim regarding *Arizona v. California*.¹⁸⁷ In Arizona itself, the tribe has been engaged in litigation over the Little Colorado River for almost forty years, and that adjudication is still ongoing with no clear end in sight.¹⁸⁸ While the idea of using the justice system seems appealing, history has shown that for the Navajo, the courts are slow, difficult to access, and often unfriendly—even when the Navajo do manage to get a resolution to their claims. While settlement may not be the ideal solution to their problems, their best outcome will likely result from seeking to settle their water rights now while they can leverage the uncertainty following this case in their favor.

The Nation appears to have reached the same conclusion about the appeal of a speedy settlement. In May 2024, the governments of the Navajo Nation, Hopi Tribe, and San Juan Southern Paiute Tribe approved the Northeastern Arizona Indian Water Rights Settlement Agreement, which settles their claims to the Colorado and Little Colorado Rivers as well as to groundwater in Arizona.¹⁸⁹ This agreement would grant these tribes the right to lease water off-reservation and includes \$5 billion for projects and infrastructure funding.¹⁹⁰ This agreement must still be approved by enabling legislation from Congress and a decree from the adjudication court.¹⁹¹ As of March 2025, identical bills have been introduced in the U.S. House and Senate to approve this settlement agreement, but there has been no further legislative progress.¹⁹²

IV. CONCLUSION

Uncertainty about their water right is nothing new for the Navajo Nation. They would be perfectly justified in staying the course after this defeat, continuing their efforts to have their claims resolved in the Little Colorado River, and filing new litigation to have their unanswered questions from this case resolved. The tribe's reservation has existed for over 150 years, and they have survived all that time without having their Colorado River right

186. For a more thorough discussion of this procedural history, see *supra* Section II.B.

187. See generally *Arizona v. Navajo Nation*, 599 U.S. 555 (2023).

188. See NAVAJO NATION WATER RTS. COMM'N, *supra* note 65.

189. TSO, *supra* note 81, at 1.

190. *Id.* at 5–7.

191. *Id.* at 8.

192. See Northeastern Arizona Indian Water Rights Settlement Act of 2024, S. 4633, 118th Cong.; Northeastern Arizona Indian Water Rights Settlement Act of 2024, H.R. 8940, 118th Cong.

quantified, so there may be no urgent need for them to try something new. What this Note argues, however, is that if there was ever a time to push for settlement of that water right, it is now.

The combination of the Colorado's falling water levels, an increased focus on water conservation, and the approaching uncertainty of the end of the current Lower Basin agreement all indicate a favorable atmosphere for the Navajo to settle their Colorado River claims. In addition, the Navajo Nation's own loss in this case shows that settlement is a stronger option for them than to continue attempting to vindicate their rights through the courts. If this case does result in the Navajo and the federal government coming together to form a settlement plan that ensures the most efficient use of water in the region while justly compensating the Navajo for the vital resource that they are giving up, then there is a chance that ruling is looked back on not as a defeat, but rather a turning point for the Navajo and their water rights.