High Court's Tribal Water Rights Ruling Steadies The Boat

By **Jena MacLean, Michael Huston and Janet Howe** (July 28, 2023)

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Between 1778 and 1871, the U.S. signed more than 370 treaties with Native American tribes. In them, the federal government made a variety of specific promises — such as guaranteeing land and providing health care, education and agricultural assistance.

In its June 22 decision in Arizona v. Navajo Nation, No. 21-1484, the U.S. Supreme Court **declined** to expand this list of federal promises beyond those the government expressly made.

The case centers on whether the Navajo Nation's 1868 treaty requires the federal government to help the nation secure access to water from water sources bordering, within or underlying its reservation. The 1868 treaty does not address water, but the nation maintained that the U.S. was duty bound to assist it in assessing its water needs and developing a plan to secure needed water.

By a 5-4 vote, the court rejected the claims because the nation failed to "establish, among other things, that the text of a treaty, statute, or regulation imposed certain duties on the United States." Instead, the court observed that it was the job of Congress and the president, not the judiciary, to "update the law to meet modern policy concerns and needs" of the nation.

The court's June 22 decision should quell fears of a new federal adjudicatory process for quantifying tribal water rights that could undermine established water rights and disrupt state court water adjudications.

The decision also reaffirms the court's long-standing approach to treaty interpretation, preventing the U.S. from facing a barrage of new breach-of-trust claims. But for the nation, whose water needs are acute and well-documented, the decision is yet another delay in its decadeslong effort to quantify its rights in the lower Colorado River.

Background

The roughly 17.5 million-acre Navajo Nation reservation straddles portions of Utah, New Mexico and Arizona. The current reservation is bordered by three major rivers — the San Juan along the northern boundary, the Little Colorado to the south and the Colorado along the northwestern border.

Established by treaty in 1868, the reservation was initially much smaller and did not border either the Colorado or Little Colorado River. The reservation was expanded by executive orders at various times so that by 1930, the length of the Colorado River between the San Juan to the Little Colorado tributaries formed the reservation's western border.

In addition to setting aside the initial reservation for the nation's use and occupation, the 1868 treaty committed the federal government to building certain facilities, providing

teachers and supporting agriculture.

Competition for Colorado River water has long been fierce. Driven by concerns with California's rapid growth and a Supreme Court decision holding that the law of prior appropriation applied regardless of state lines,[1] the Colorado River basin states negotiated the Colorado River Compact in 1922 to apportion the water.

The compact divided the river into the upper and lower basin — demarcated at Lee's Ferry in northern Arizona near the Utah border — and apportioned each basin 7.5 million-acre-feet annually.[2]

The compact did not apportion any water to the Native American reservations that the Colorado River serves. With respect to their rights, the compact merely states that nothing in it "shall be construed as affecting the obligations of the United States of America to Indian Tribes."[3]

As the Supreme Court recognized 14 years earlier in Winters v. U.S., Native American water rights were established when the reservations were established.[4] Winters rights differ from other water rights in that they include future uses and cannot be forfeited by nonuse. In addition, the Native American water rights must be satisfied from the allocation of the state in which the reservation is located.

For decades, the nation worked to resolve its water rights in the San Juan, Little Colorado and Colorado Rivers. While the nation has settlements with New Mexico and Utah for some of its water rights and is currently actively adjudicating certain tributary rights in Arizona state court, its claims to main stem Colorado River water remain unresolved.

That's not for lack of trying. In 1961, the nation moved to intervene in a 1952 suit filed by Arizona against California regarding the apportionment of Colorado River water among the lower basin states.[5] The nation maintained that the U.S., which had intervened years earlier to represent federal and tribal interests, was not adequately addressing its interests in the litigation.

The U.S. successfully opposed the nation's motion but ultimately did not assert the nation's Winters rights to the Colorado River main stem. The government only resolved the Winters rights of five reservations located south of Lake Mead. Since the court issued its 1964 decree in the case, the nation has repeatedly asked the U.S. to assess its rights to the main stem of the Colorado River.

The Nation's Suit

The nation initiated this suit in 2003, seeking an order to compel the government to secure its rights to main stem Colorado River water.[6] After Arizona, Nevada, Colorado and various water districts and water users intervened, the case was stayed to allow for settlement negotiations.[7] Negotiations failed, and in 2013, the stay was lifted.

The current litigation centers on the nation's motion for leave to file its third amended complaint, which alleges breach of trust and treaty violations.

For its relief, the nation sought an order compelling the U.S. to determine the extent to which the nation needs water from the Colorado River main stem, develop a plan to secure the needed water and manage the Colorado River in a manner that does not interfere with such plan, including by reevaluating its management decisions and mitigating adverse

effects.[8]

The district court found the nation's amended complaint failed to state a claim on which relief could be granted, but the U.S. Court of Appeals for the Ninth Circuit reversed.

In the Ninth Circuit's view, the nation "successfully identified specific treaty, statutory, and regulatory provisions that, taken together, anchor [its] breach of trust claim" based on its implied Winters rights, its 1868 treaty recognizing the nation's right to farm reservation lands, various statutes giving the federal government pervasive control over the Colorado River and federal regulations protecting Native American trust assets.[9]

The court also rejected the intervening states' argument that the relief sought was jurisdictionally barred because it would require reopening the Supreme Court's 1964 decree in Arizona v. California.[10]

The Supreme Court's Decision

The Supreme Court reversed. The majority opinion, authored by Justice Brett Kavanaugh — joined by Chief Justice John Roberts and Justices Clarence Thomas, Samuel Alito and Amy Coney Barrett — held that the federal government does not owe the nation an affirmative, judicially enforceable fiduciary duty to assess and address its need for water from particular sources.

The court explained that the 1868 treaty setting aside the reservation for the "use and occupation of the Navajo tribe" did not contain "any 'rights-creating or duty-imposing'" language that required the "United States to take affirmative steps to secure water for the Tribe."

The court further clarified that such "rights-creating or duty-imposing" language refers to explicit commitments, such as the government's promise in the 1868 treaty "to construct a number of buildings on the reservation, including schools, a chapel, a carpenter shop, and a blacksmith shop." The 1868 treaty, however, "said nothing about any affirmative duty for the United States to secure water."

The opinion leans heavily on the court's 2011 decision in U.S. v. Jicarilla Apache Nation, in which the court held that the federal government did not have a specific fiduciary duty to disclose all information related to the administration of Native American trusts.

The court explained that while its cases have frequently referred to a trust relationship between the federal government and tribes, that relationship is, in fact, one among sovereigns and the common law of trusts does not apply.

Although the nation maintained that the Jicarilla line of cases applied only in the context of actions for damages, the court rejected that argument based on separation of powers principles.

Allowing courts to determine the government's trust obligations under common law principles — even for equitable purposes — would usurp Congress' authority to shape the government's trust relationship with a tribe. The court observed that "Congress and the President may update the law to meet modern policy priorities and needs," but the judiciary cannot.

In a separate concurrence, Justice Thomas called into question the court's entire trust-

relationship jurisprudence. Noting that the court has often blurred the lines between the federal government's moral and fiduciary obligations to tribes, he suggested that "the idea of a generic trust relationship with all tribes — to say nothing of legally enforceable fiduciary duties — seems to lack a historical or constitutional basis."

Justice Neil Gorsuch, the author of several recent opinions supporting the interests of Native American tribes, wrote a lengthy dissent joined by Justices Elena Kagan, Sonia Sotomayor and Ketanji Brown Jackson.

The dissent charged the majority with "misapprehending the nature of the Navajo's complaint" and failing to account for the Navajo Nation's history in interpreting the 1868 treaty.

In the dissent's reading, the nation's request for an order compelling the government to "develop a plan to secure the water needed" and "manage the Colorado River in a manner that does not interfere with such plan" asked the federal government merely to "assess what it holds in trust and … ensure that it is not misappropriating water that belongs to the Tribe."

And to properly understand the 1868 treaty, the dissent said, its promises must be "read in conjunction with other provisions in the Treaty, the history surrounding its enactment, and background principles of Indian law," apparently without the necessity of finding ambiguity.

Thus, in addition to the government's implied reservation of water recognized in Winters, the dissent reads the 1868 treaty to create an affirmative "duty to manage [those rights] in a legally responsible manner" and assess "what water rights it holds for them."

Key Takeaways

The Supreme Court's decision should provide some measure of assurance to states and water users regarding the security of their water rights.

The process for establishing water rights is long and contentious. Because tribal water rights were not quantified when reservations were established, they must be adjudicated pursuant to state water law. Since 1990, the U.S. Department of the Interior's policy has been to resolve tribal water rights claims through negotiated settlements rather than litigation.

Settlement negotiations include tribes, federal representatives, states, water districts and private water users, and settlements typically provide tribes funding for critical infrastructure to secure water and other expenses. As of March, the federal government has approved 39 Native American water rights settlements with total estimated costs in excess of $8.5 billion.[11]

The Ninth Circuit's decision threatened to undermine adjudicated water rights and disrupt state water adjudications. An order compelling the government to quantify the nation's water rights likely would have necessitated an administrative adjudication conducted by the Bureau of Reclamation or Bureau of Indian Affairs with the involvement of interested parties.

The effects would have been far-reaching. Twelve of the 30 reservation tribes in the Lower Colorado Basin have some unresolved water rights claims, and there are many more reservation tribes throughout the west with unquantified water rights.

The court's decision allays the threat of federal adjudicatory proceedings and keeps water adjudications in state courts. And the U.S. may continue to assert and adjudicate rights in these state proceedings at its discretion.

In addition, the decision will discourage a new generation of breach-of-trust and treaty claims that would leave it to the courts to identify affirmative duties based on their reading of treaty history and understanding of background principles of Native American law.

Treaty rights have been interpreted to create duties never contemplated by the parties, such as the imposition of specific water quality standards or the removal of structures that impede fish passage. While the court's decision does not directly address those issues, it calls into question other decisions invoking Native American treaties to compel certain environmental outcomes.

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[1] Wyoming v. Colorado, 259 U.S. 419 (1922).

[2] That allocation was based on the Bureau of Reclamation's erroneous flow estimate at Lee's Ferry of 16.4 maf. The actual average annual flow at that time was 13.1 maf, but it varied significantly from year to year.

[3] U.S. BOR, Colorado River Compact (1922), https://www.usbr.gov/lc/region/pao/pdfiles/crcompct.pdf.

[4] Winters v. United States, 207 U.S. 564, 576 (1908).

[5] Arizona v. California, 376 U.S. 340 (1964).

[6] See Navajo Nation v. U.S. DOI, No. CV-03-00507-PCT-GMS, 2018 WL 6506957, at *1 (D. Ariz. Dec. 11, 2018), rev'd by and remanded by Navajo Nation v. U.S. DOI, 26 F. 4th 794, 801-02 (9th Cir. 2022), rev'd by Arizona v. Navajo Nation, __ S .Ct. __, 2023 WL 4110231.

[7] See Navajo Nation, 26 F. 4th at 801-02.

[8] Navajo Nation, 2018 WL 6506957, at *3.

[9] Id.

[10] Id. at 806. ("Granting this scope of relief would not require a judicial quantification of the Nation's rights to water from the River. Nor would it require any modification of the

Arizona Decree.").

[11]CRS, Indian Water Rights Settlements (Mar. 28, 2023), https://crsreports.congress.gov/product/pdf/R/R44148.