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Ezra Littlewood ✍ · 3 days ago · 3 min read

The Uncertain State of Navajo Water Rights After *Arizona v. Navajo Nation*

Between 30-40% of Navajo households lack access to running water,[1] and many households haul water from communal wells, which is expensive and time-consuming.[2] Navajos use approximately one-tenth as much water as the average American household.[3] To this day, the Navajo Nation has been unable to get its water rights quantified and converted into usable water for its citizens despite the Navajo Reservation's founding treaty implicitly reserving "necessary water to accomplish the purpose of the Navajo Nation." [4]

This year, the Supreme Court delivered a disappointing decision on water rights to the Navajo Nation in need. In *Arizona v. Navajo Nation*, the Court affirmed that the 1868 Treaty of Bosque Redondo reserved water necessary to "accomplish the purpose of the Navajo Nation," but held, in a 5-4 decision, that the treaty does not "require the United States to take affirmative steps to secure water for the Tribe." [5] Justice Kavanaugh, writing for the majority, defined "affirmative steps" to include "assessing the Tribe's water needs, developing a plan to secure the needed water, and potentially building... water infrastructure." [6] As the Court sees it, the Treaty reserved a "bundle of property rights" including land, minerals, timber, and water, [7] but cannot be read as imposing enforceable duties on the United States to manage, cultivate, or obtain these resources; this, the majority said, would be to "update the law," an undertaking better left to the political branches. [8]

Draped in the language of judicial modesty, adherence to precedent, and separation of powers concerns, this holding neglects the unique legal status of water rights within the reservation "bundle" and the central role of the federal judiciary in their establishment, [9] assessment, and vindication. [10] In its wake are questions without answers. For instance, what is the nature of the "general trust relationship"—historically understood to encompass the United States holding "certain water rights 'in trust' for the Navajo" [11] after this decision? [12] Critically, what good are paper rights to water, or a trust relationship without duties, to a Nation in crisis?

[1] HEATHER TANANA, JAIME GARCIA, ANA OLAYA, CHELSEA COLWYN, HANNA LARSEN, RYAN WILLIAMS & JONATHAN KING, *UNIVERSAL ACCESS TO CLEAN WATER FOR TRIBES IN THE COLORADO RIVER BASIN*, WATER & TRIBES INITIATIVE 15 (2021).

[2] *Id.* at 2.

[3] Brief for the Navajo Nation at 1, *Arizona v. Navajo Nation*, 599 U.S. 555 (2023) (Nos. 21-1484, 22-51).

[4] *Arizona v. Navajo Nation*, 599 U.S. 555, 569 ("The 1868 Treaty reserved necessary water to accomplish the purpose of the Navajo Nation.").

[5] *Id.* at 569-70.

[6] *Id.* at 558.

[7] *Id.* at 563.

[8] *Id.* at 566-567 ("[I]t is not the Judiciary's role to update the law. And on this issue, it is particularly important that federal courts not do so . . . [T]he zero-sum reality of water in the West underscores that courts must stay in their proper constitutional lane and interpret the law (here, the treaty) . . . leaving 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 competing contemporary needs for water.").

[9] *See* *Winters v. United States*, 207 U.S. 564, 575-76 (1908) (holding that the agreement creating the Fort Belknap Reservation impliedly reserved water to accomplish the purpose of the reservation); *see also* *United States v. Powers*, 305 U.S. 527, 532-33 (1939) (citing *Winters* in finding an implied reserved water right in the 1868 Treaty with the Crow Tribe); *see generally* Lloyd Burton, *The American Indian Water Rights Dilemma: Historical Perspective and Dispute-Settling Policy Recommendations*, 7 UCLA J. ENV'TL. L. & POL'Y 1, 9-10 (discussing the Supreme Court's role in defining tribal resource rights through treaty interpretation up to and including *Winters*).

[10] *See, e.g.*, *Arizona v. California*, 573 U.S. 546 (1963) (decree allocating Lower Colorado River Basin mainstream waters among various parties, including five Tribes (but not the Navajo Nation)); *Winters*, 207 U.S. at 578 (affirming the grant of a permanent injunction against some upstream diverters of the Fort Belknap Reservation's primary water source).

[11] *Arizona v. Navajo Nation*, 599 U.S. at 581 (Gorsuch, J., dissenting) ("The United States acknowledges that it holds certain water rights 'in trust' for the Navajo... [a]nd it concedes that the Navajo's water rights 'may ... include some portion of the mainstream of the Colorado.'").

[12] *See id.* at 565 ("To be sure, this Court's precedents have stated that the United States maintains a general trust relationship with Indian tribes, including the Navajos.").