

# 9th Circuit Rebukes U.S. on Native Interests in Colorado River Rights

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A federal appeals court has rebuked the U.S. government for failing to properly consider the interest of Native American nations in developing allocation guidelines for the Colorado River Basin's waters and ordered it to prioritize obligations assumed when it signed a treaty with the Navajo Nation in 1868. The April 28 ruling by the 9th U.S. Circuit Court of Appeals may boost Native American negotiating clout as the basin's states ponder how to address impacts of ongoing drought in the region.

Coming 18 years after the Navajo Nation (Naabeehó

Bináhásdzo) first sued the Department of Interior in an effort to assure that its interests are protected by the federal government in any move to reallocate Colorado River waters, the decision opens the door to a possible federal district court decision directing the Biden administration or a successor about how to fulfill trust and treaty responsibilities owed to the Navajo Nation.

“We hold that the Nation has successfully identified specific treaty, statutory, and regulatory provisions that, taken together, anchor its breach of trust claim,” wrote Judge Ronald Gould of Seattle in the court’s majority opinion. Among the reasons the court relied upon to support that conclusion are the Treaty of Bosque Redondo, under which the Navajos surrendered a significant portion of their historical territory in exchange for a promise of a “permanent homeland,” a long-standing doctrine of water law based on a 1908 Supreme Court decision and the Department of Interior’s “pervasive control” over the river.



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The decision does not mean that the Navajo Nation will be given a specified amount of water. “They’re not seeking a quantification of tribal water rights,” said Mark Squillace, the Raphael J. Moses Professor of Natural Resources Law at the University of Colorado Law School. “What the tribes seem to be claiming is that the federal government has basically dropped the ball in terms of its responsibility to protect the tribe and the tribe’s interest in clean water. It is still the case, I believe, that quite a number of people on the reservation don’t have access to clean drinking water. They don’t have water that is piped into their homes.”

Squillace said that situation is ironic because the tribe has paper water rights. “Here’s this nation that has Winters rights ... that would almost certainly guarantee them enough water, certainly for their domestic purposes but for other purposes as well, and yet they basically have to truck water to their home

in order to have access to clean drinking water," he said.

"That's been an untenable situation for a long period of time." Squillace was referring to a 1908 Supreme Court decision that guarantees federal reserved water rights for Native American reservations.

According to a 1976 ruling by the Supreme Court, *Winters v. United States* means that the federal government must assure Native American reservations of "appurtenant water then unappropriated to the extent needed to accomplish the purpose of the reservation." Although Native American water rights are guaranteed by federal law, their extent must be determined in state courts under a 1952 statute known as the McCarran Amendment. While the Navajo Nation has some of its water rights under that doctrine quantified as a result of settlements with New Mexico and Utah, the tribe has not reached agreement with Arizona on exactly how much Colorado River water it is entitled to use.

Even if the tribe completes a settlement with Arizona and that deal is approved by Congress, the Navajo Nation still might not have the ability to actually use the water. Its need for "wet water" instead of "paper water," as Squillace described the conundrum, drove it to file a lawsuit against the Department of Interior in 2003 in which the Nation challenged guidelines for allocating water among the basin states in the event of drought. The lawsuit was dismissed by a federal district judge

in Arizona in 2013 after more than a decade and a long period in which the litigation was stayed to permit settlement negotiations to proceed. The 9th Circuit reversed that decision in 2017, ordering the district court to reconsider dismissal. The latest appellate decision is on review of the lower court's reiteration that it would dismiss the case.

"This case seems to be about ... the federal government just falling down on its responsibility to the tribe, not just to provide them access to water and make sure that they have the water that they need, at a minimum, for their domestic uses, but also to represent them in all of the different sorts of negotiations that have been going on for many years on the Colorado River," Squillace continued.

Instead, the decision largely relies on the 1868 Treaty. "Water was not explicitly mentioned," said research professor Heather Tanana of the University of Utah S.J. Quinney College of Law. But "the treaty itself says it should receive a liberal construction at all times and in places. No community can survive without water."

The array of statutes, regulations and cases that govern allocation and use of the Colorado River itself also do not provide the Nation with any specific amount of usable water. Neither a 1922 agreement nor a long series of Supreme Court decisions in a case called *Arizona v. California* has effectively guaranteed the Navajos actual access to any Colorado River

water. "They just didn't adjudicate any water rights" for the tribe, Squillace said.

Under the 1922 Colorado River Compact between the seven U.S. states in the river's basin, the 1,447 mile-long river's flows are allocated between those of the upper basin (Colorado, New Mexico, Utah, and Wyoming) and those of the lower basin (Arizona, California and Nevada). Each year, the upper basin states are required to deliver 7,500,000 acre-feet to Lee's Ferry in northern Arizona.

The water delivered to the lower basin states is then allocated between them under a decree issued by the Supreme Court in 1964. The order in a case called *Arizona v. California* requires that, if the minimum flows arrive at Lee's Ferry, California receive 4,400,000 acre-feet that year, Nevada receive 300,000 acre-feet and Arizona receive any remaining Colorado River flows. If the upper basin cannot deliver 7,500,000 acre-feet, the Department of Interior must allocate the water that is available among the lower basin states. In that situation, California would receive an annual maximum of 4,400,000 acre-feet from the river.

The Navajo Nation was not a party to *Arizona v. California* and its interests were not represented in that landmark case either by any attorneys of its own or by the Department of Justice or Department of Interior. "It's hard to describe how far down the tribes were" at the time the Colorado River Compact was

negotiated and signed, said CULaw School emeritus professor Charles Wilkinson, who has written extensively about water law and the legal relationship between Native Americans and the U.S. government. "This was the worst time in the history of the continent for tribes, after the treaties up until about 1970. And so, when the compact was being negotiated, there was very little attention given to the tribes."

Development of the Colorado River has largely been driven by the U.S. government. After the Colorado River Compact was executed, the State Department entered into a treaty with Mexico in which the U.S. promised to deliver 1.5 million acre-feet to its southern neighbor. Hoover Dam, which holds back Lake Mead, was completed in 1935, while Imperial Dam on the Arizona-California border and the All-American Canal that moves water into Southern California were built during the late 1930s. Since then, the Colorado River Aqueduct, Glen Canyon Dam, which forms Lake Powell), and the Central Arizona Project have been finished.

Despite the federally financed and driven engineering of the river, the basin faces the likelihood of persistent drought as the planet's climate continues to change. A recent [report](#) by the Bureau of Reclamation projects at least a 68 percent chance of a shortage by 2022. The upshot, said Tanana, is that the Navajo people, despite Washington's vow, have not been provided all that is necessary to make their reservation

such a long-term home. "Water is a big part of that," Tanana said

Navajo Nation president Jonathan Nez acknowledged that point in a statement released after the 9th Circuit's decision was issued. "Water resources are becoming a greater concern for the southwest portion of the United States," he said. "Over 150 years after the signing of the Treaty of 1868 between the Navajo people and the United States, we are still having to fight for water allocations."

The Navajo Nation is larger than ten U.S. states and Puerto Rico and covers an expanse of 71,000 square kilometers that stretches across northeastern Arizona and parts of New Mexico and Utah.

The Navajo Nation obtained another important victory in its effort to secure water rights on March 28, when the New Mexico Supreme Court rejected the remaining challenges to a settlement of rights to use the San Juan River, a Colorado River tributary, that had been carried on for more than a decade.



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