

9th Circuit revives Navajo Nation's water-rights claim against DOI

4/29/21 REUTERS LEGAL 04:09:39 • Copyright (c) 2021 Thomson Reuters • Barbara Grzincic

REUTERS LEGAL • April 29, 2021



(Reuters) - A federal appeals court on Wednesday once again revived a breach of trust claim filed in 2003 by the Navajo Nation, alleging that the U.S. Department of the Interior has failed to secure adequate water for reservation lands in Arizona, New Mexico, and Utah.



The 9th U.S. Circuit Court of Appeals reversed a ruling by a federal judge in Prescott, Arizona, who said the Navajo Nation had not identified any source imposing such a duty on the Interior Department or its Bureaus of Indian Affairs and Reclamation.

The 9th Circuit disagreed, citing 175 years' worth of treaties and precedent as well as news reports this year linking COVID-19 deaths on the Navajo reservation to a lack of running water.

The government agencies "have an irreversible and dramatically important trust duty requiring them to ensure adequate water for the health and safety of the Navajo Nation's inhabitants in their permanent home reservation," Circuit Judge Ronald Gould wrote for the panel. He was joined by Circuit Judges Marsha Berzon and Kenneth Lee.

An attorney for the Navajo Nation, Alice Walker of Meyer, Walker, Condon & Walker, said the 9th Circuit's opinion will not only guide the parties on remand, but "may also guide Indian tribes in other litigation to protect their federal reserved rights."

The Interior Department and the U.S. Justice Department, which represented it, declined to comment.

According to the 9th Circuit, the lawsuit began as a challenge to an Environmental Impact Statement the Interior Department had issued while developing "surplus and shortage" water management plans for the Colorado River basin in 2001.

The district court dismissed the entire suit in 2014, but the 9th Circuit reinstated the breach of trust claim in 2017.

On remand, Chief U.S. District Judge G. Murray Snow again dismissed the case. In addition to faulting the complaint for failing to identify an "enforceable trust" duty, Snow said he could not consider it in any event because the U.S. Supreme Court had reserved jurisdiction over the allocation of Colorado River Water in the 1964 Decree from case known as Arizona I.

The 9th Circuit, however, said the Navajo Nation's rights were not affected by Arizona I, and that the cases present different issues.

"The federal government's fiduciary duty to the Navajo Nation was never at issue," in Arizona I, Gould wrote. That case involved a "judicial quantification" of rights to the Colorado River's "mainstream" among various states and five tribes. The Supreme Court declined to consider the rights of 20 other tribes, including the Navajo, that were deemed to rely on tributaries.

In the current litigation, the Navajo Nation alleges that the government has a fiduciary duty to determine whether the tributary is sufficient "to fulfill the Reservation's purpose of establishing a permanent homeland for the Nation" – a standard known as Winters rights, for a 1908 U.S. Supreme Court decision – and if not, to develop a plan to meet those needs.

Since the treaty creating the reservation listed farming as a purpose, the Navajo Nation's Winters rights include an implied right to water, the 9th Circuit said.

Lee concurred, but warned against using the current litigation "as a backdoor attempt to allocate the rights to the mainstream" of the Colorado River.

The case is Navajo Nation v. U.S. Department of Interior, Deb Haaland, Secretary, et al., 9th U.S. Circuit Court of Appeals, No. 19-17088.

For Navajo Nation: M. Kathryn 'Kate' Hoover, now of Sacks Tierney; Stanley Pollack of the Navajo Nation Department of Justice; and Alice Walker of Meyer Walker Condon & Walker

For the U.S. Interior Department: John Smeltzer of the U.S. Justice Department

References

[US DEPARTMENT OF THE INTERIOR \(THE\)](#)