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Tribal rights, water rights, states' rights and the Colorado River: What's at stake in the SCOTUS case, Arizona v. Navajo Nation

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The U.S. Supreme Court recently heard oral arguments in [*Arizona v. Navajo Nation*, No. 21-1484](#), a case consolidated with a separate petition for certiorari filed by the U.S. Department of the Interior (DOI), No. 21-51. The consolidated

cases involve a water rights case initially brought by the Navajo Nation against DOI. The states of Arizona, Nevada, and Colorado, along with six major municipal and agricultural water providers with adjudicated rights to the Colorado River in the Lower Basin, intervened in the case. Those states and public water providers (Intervenors) filed the petition for certiorari seeking review of the decision of the U.S. Court of Appeals for the Ninth Circuit. DOI and the Intervenors are appealing the Ninth Circuit's ruling, which held that the federal government has a trust duty to the Navajo to, among other things, manage the Lower Colorado River to protect the Navajo's unadjudicated claims to water for the part of its reservation located in Arizona. DOI and the Intervenors argued that there is no such trust duty and that the Navajo Nation's complaint seeks rights to the Lower Colorado River, which is subject to the retained and exclusive jurisdiction of the Supreme Court pursuant to its [2006 Final Consolidated Decree](#).



The Navajo Nation contends that it does not seek quantification of the reservation's water rights but instead claims that the secretary and DOI have failed to comply with the federal government's fiduciary duties to assess, plan, manage, or otherwise protect any right of the Nation to Colorado River water in the Lower Basin. In response, DOI

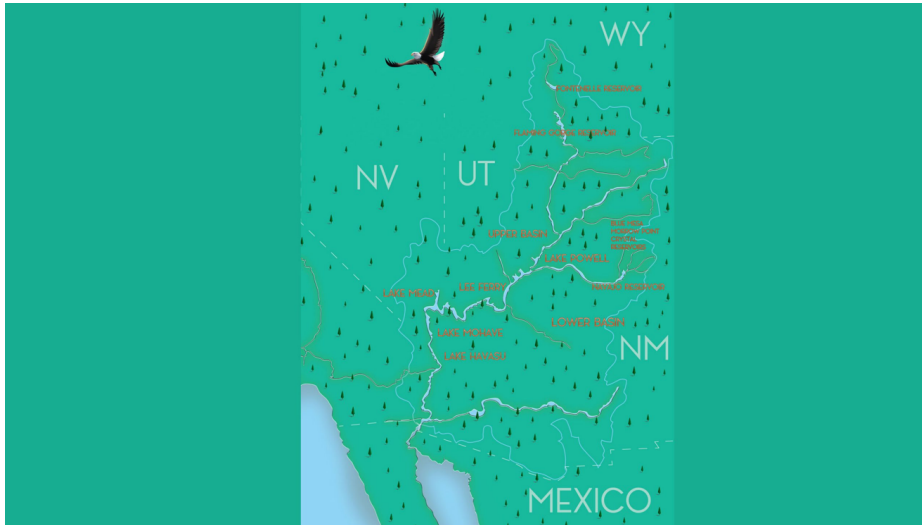
and the Intervenor argue that a fiduciary duty cannot be imposed on the federal government without express language in a federal statute, regulation, or treaty.

The Navajo Nation looked to the history surrounding the establishment of its reservation, which crosses three southwestern state boundaries, including Arizona, as support for the Nation's expectation of federally reserved water in the Lower Colorado River. The Tribe argues that two treaties signed with the federal government in 1849 and 1868, in conjunction with the implied reservation of water established in [*Winters v. United States*](#), 207 U.S. 564 (1908), are sufficient to create a fiduciary duty between the tribe and the federal government. But DOI and the Intervenor point out that neither treaty references water and that other Supreme Court cases such as [*United States v. Mitchell*](#), 445 U.S. 535 (1980), and [*United States v. Jicarilla Apache Nation*](#), 564 U.S. 162 (2011), found that an enforceable duty cannot be imposed on the federal government where Congress has not expressly accepted one. Otherwise, Congress' role in implementing national policy respecting Indian tribes would be undermined. Moreover, the federal government has made federal reserved water rights claims on behalf of the Navajo in multiple state and federal water adjudications in New Mexico, Utah, and Arizona.

More than a dozen amicus curiae briefs were filed with the Supreme Court, most in support of the Navajo Nation's claim for water and some citing the necessity to haul water to the homes of one third of the Tribe's population. The amicus

brief filed by the [Western Water Users and Trade Associations](#), in support of the non-federal petitioners, pointed out that if the Navajo's lawsuit were successful, it would inevitably reduce the amount of water available to other users in Arizona and would create a cascade of negative consequences for the certainty and stability of water rights in the Lower Colorado River Basin and elsewhere.

The Colorado River system was first divided among seven basin states by the 1922 Colorado River Compact. The Compact split the river's flows in half between the Upper and Lower Basins but did not allocate the river's flows among the individual states or the federal establishments within the Basins. Since then, Congress and the U.S. Supreme Court have directed the river's allocations and the secretary's management in the Lower Basin. If the Ninth Circuit's ruling is affirmed and the Navajo Nation's complaint is successful, the Secretary of the Department of Interior would be required to consider the potential impacts on the Navajo's unadjudicated rights in its daily operational decisions.



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Even as the Supreme Court was proceeding toward argument, the [Congressional Research Service](#) published an updated report in February of this year on the Colorado River, its current drought-impacted conditions, and the ongoing federal role in managing the river.

The case was argued on March 20, 2023, and [the transcript](#) of the argument is now available. It is anticipated that the Court will issue a decision before the end of this term. That decision may elucidate this complex intersection of tribal rights, municipal, and agricultural water rights. The decision may also restrict the management of an over-allocated river that provides water to seven states, multiple tribal nations, and Mexico with a combined population of over 40 million people.

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