ARIZONA V. NAVAJO NATION: A PERSISTENT LEGACY OF BROKEN PROMISES

*Holly Barrass**

INTRODUCTION

The story of the Navajo Nation is one of broken promises.[1] When the Diné[2] people signed a treaty with the United States in 1868, they were promised a permanent home in their ancestral homelands with adequate resources to sustain the Nation.[3] Today, the Navajo Nation is still waiting for enough water to sustain life on the reservation.[4] The average Diné person lives on seven gallons of water per day, a tenth of what the average non-Indigenous American uses in a day.[5] Extreme poverty on the Navajo Nation reservation has led to poor water quality, a lack of sanitation, and the spread of disease.[6] Even though Native American nations possess established water rights, a significant disparity exists with most Native Americans living on reservations lacking comparable access to water enjoyed by non-Indigenous Americans.[7]

Through treaties with Native American nations, the U.S. government assumes the role of trustee for Native American property and "thus, accepts the imposition of a fiduciary standard."[8] This forms a significant legal foundation used by both Tribes and the federal government to

---

* Holly Barrass is a Juris Doctorate Candidate at the University of Denver, Sturm College of Law. During her time in Law School, Holly pursued the Workplace Law Certificate and participated in the Civil Litigation Clinic as a student attorney litigating wage theft and civil protection order cases. Holly would like to thank Professor Tom Romero for his guidance, support, and leadership in the writing and publication of this Note. Holly would also like to thank Charlotte Rhoad, *Denver Law Review's* Senior Forum Editor, for her meticulous editing and flexibility throughout the publication process.

1. Brief for the Navajo Nation at 1, Arizona v. Navajo Nation, 599 U.S. 555 (2023) (Nos. 21-1484, 22-51), 2023 WL 1779793, at *1 [hereinafter Brief for the Navajo Nation].

2. There are many terms to refer to Indigenous Americans, including Indian, American Indian, Native American, and Indigenous. Appropriate language and terminology are constantly evolving. Most legal sources will use the term American Indian, which is still the term used in Federal Indian Law. When describing Indigenous Americans generally, this Note will use the term "Native American." Indigenous Peoples in the United States represent more than 550 tribal groups and prefer to be referred to by their tribal name. Wherever possible, this Note will use the specific tribal name to describe an Indigenous nation. Additionally, wherever possible this Note will use the word "Diné" to describe the Navajo people as this is their preferred term to describe themselves. *See* Michael Yellow Bird, *What We Want to be Called: Indigenous Peoples' Perspectives of Racial and Ethnic Identity Labels*, 23 AMERICAN INDIAN QUARTERLY No. 2, 1, 8-9 (1999); Dr. Twyla Baker, Wizipan Little Elk, Bryan Pollard, & Margaret Yellow Bird, *How to Talk About Native Nations: A Guide*, NATIVE GOVERNANCE CENTER (May 27, 2021), https://nativegov.org/news/how-to-talk-about-native-nations-a-guide/; *see generally Native American and Indigenous Peoples FAQs*, UCLA RESOURCES ON NATIVE AMERICAN AND INDIGENOUS AFFAIRS (April 14, 2020), https://equity.ucla.edu/know/resources-on-native-american-and-indigenous-affairs/native-american-and-indigenous-peoples-faqs/; *Editorial Guide*, U.S. DEPT. OF THE INTERIOR INDIAN AFFAIRS, https://www.bia.gov/guide/editorial-guide (last visited Oct. 4, 2024).

3. Brief for the Navajo Nation, *supra* note 1, at *3.

4. *Id.* at *1–*3.

5. *Id.* at *1.

6. Adam Crepelle, *The Reservation Water Crisis: American Indians and Third World Water Conditions*, 32 TUL. ENV'T. L.J. 157, 170–73 (2019).

7. *Id.* at 158–60; Brief for the Navajo Nation, *supra* note 1, at *1.

8. 9 Powell on Real Property § 67.01 (2023).

ascertain the legal rights of Native Americans.[9] Regarding water rights, the Supreme Court has construed treaties between the United States and Native American nations to encompass inherent reserved water rights for the Tribes.[10] The Court has consistently affirmed that, in entering into treaties to establish land reservations with Native American nations, the United States intended to provide a permanent homeland for Native American peoples and ensure access to the water resources essential to meet their needs.[11]

In the June 2023 case of *Arizona v. Navajo Nation*,[12] the Nation petitioned the Court to confirm the United States' fiduciary duty to the Nation and compel the government to fulfill its commitments by accurately quantifying the Nation's water needs and rights pertaining to the Lower Colorado River.[13] The two questions before the Court were: (1) did the Ninth Circuit's 2022 decision infringe on the jurisdictional provision of the Court's *Arizona v. California*[14] decree governing the Lower Colorado River; and (2) did the Navajo Nation state a cognizable breach of trust claim?[15] The Court only addressed the jurisdictional issue in a footnote[16] and instead examined three breach of trust arguments: (1) the 1849 and 1868 treaties with the Nation promised the Navajo People sufficient water for the reservation to serve as the Diné's permanent home;[17] (2) the 1849 and 1868 treaties created enforceable rights to water and imposed enforceable duties on the United States to secure that water;[18] and (3) the 1849 and 1868 treaties were substantive sources of law that established specific water rights and duties requiring the United States to provide the Navajo Reservation with sufficient water.[19] The Court held that the 1868 Treaty between the United States and the Navajo Nation does not impose a duty on the government to assess the Nation's water needs and develop a plan to meet them.[20]

Part I of this Note provides the background and history of the Navajo Nation in the context of water rights and the trust relationship between Native American nations and the federal government. Specifically, Part I.A of this Note delves into the history of the Navajo Nation, shedding light on the injustices perpetrated by the U.S. government against the Diné

9. *Id.*
10. Winters v. United States, 207 U.S. 564, 577 (1908).
11. *Id.*; In re Gen. Adjudication of All Rts. to Use Water in the Big Horn River Sys., 753 P.2d 76, 91 (Wyo. 1988), *aff'd sub nom.* Wyoming v. United States, 492 U.S. 406, (1989); In re Gen. Adjudication of All Rts. to Use Water in the Gila River Sys. and Source, 989 P.2d 739, 748–49 (Ariz. 1999); Arizona v. California, 373 U.S. 546, 600 (1963), *judgment entered*, 376 U.S. 340 (1964), *amended by* 383 U.S. 268 (1966), *and amended by* 466 U.S. 144 (1984).
12. 599 U.S. 555 (2023).
13. *Id.* at 562.
14. Arizona v. California, 373 U.S. 546, 602 (1963).
15. *Navajo Nation*, 599 U.S. at 563.
16. *Id.* at 569 n.4.
17. *Id.* at 563.
18. *Id.* at 567.
19. *Id.* at 568.
20. *Id.* at 570.

people. This background serves to contextualize the establishment of the 1868 Treaty. Part I.B explores the nature of the trust relationship between Native American nations and the federal government. Part I.C scrutinizes how this trust relationship is operationalized in the context of water rights. Part I.D concludes the section by examining how the particular challenges to the Diné and other Native American water rights are implicated by the legal and political history of the "Law of the [Colorado] River."

Part II of this Note contends that the decision in *Arizona v. Navajo Nation* was wrongly decided. In particular, Part II.A scrutinizes how the majority opinion erroneously applied previous precedents, inaccurately applying legal standards to assess the Navajo Nation's rights. Part II.B then delves into the historical and judicial context of tribal water rights, arguing that the Court should have identified an affirmative duty on the part of the United States to quantify the water needs of the Diné people. Lastly, Sections II.C and II.D examine the existing obstacles affecting the Diné people's access to their water rights and the future ramifications of this decision in the context of climate change.

I. BACKGROUND

A. Relevant History of the Navajo Nation

The Navajo Nation occupied land in what is now known as northwestern New Mexico for centuries before European colonization.[21] After the Mexican-American War and a series of hostilities between the American military and the Navajo Nation, the United States forcibly removed the Diné people from their homeland to live on what was then called the Bosque Redondo reservation in eastern New Mexico.[22] The forced removal of the Diné people is now called "The Long Walk." During this three-hundred-mile march, many died from illness, injury, fatigue, or were killed by American soldiers.[23]

The Bosque Redondo itself was a dry, arid, and inhospitable place.[24] More than 8,000 Diné people were detained at Bosque Redondo where approximately 2,000 additional people died of starvation, exposure, or malnutrition.[25] The water on the Bosque Redondo was mostly alkaline, and the land was unsuitable for cultivation,[26] leading the Navajo Nation's crops to fail and most of their sheep to die.[27]

---

21. Richard W. Hughes, *Indian Law*, 18 N.M. L. REV. 403, 406 (1988); *Navajo Nation*, 599 U.S. at 575 (Gorsuch, J., dissenting).
22. *Navajo Nation*, 599 U.S. at 576–77 (Gorsuch, J., dissenting).
23. *Id.* at 577.
24. *Id.*
25. OFFICE OF GEN. COUNSEL, U.S. COMM'N ON CIVIL RIGHTS, DEMOGRAPHIC AND SOCIO-ECONOMIC CHARACTERISTICS OF THE NAVAJO 4 (1973) (quoting Ezra Rosser, *Ahistorical Indians and Reservation Resources*, 40 ENV'T. L. 437, 550 (2010)).
26. *Navajo Nation*, 599 U.S. at 577 (Gorsuch, J., dissenting).
27. Hughes, *supra* note 21.

Eventually, the U.S. government realized that the conditions on the Bosque Redondo were inhospitable and intolerable.[28] In 1868, the Navajo Nation and the U.S. government reached an agreement that became the Treaty of 1868.[29] The Treaty allowed the Diné people to return to their ancestral homeland and outlined the borders of the new Navajo reservation.[30] The Navajo people agreed to not oppose the construction of railroads and to cease any ongoing wars with the United States.[31] The United States agreed to supply a schoolhouse and a teacher for children and agricultural implements to begin crops.[32] During negotiations, a Navajo representative, Barboncito, emphasized that the Diné people expected to have sufficient water to irrigate the land, farm, raise livestock, and sustain their people when they returned home.[33] He recounted that "the heart of the Navajo country" was suitable for "stock or agriculture" and that "when it rains . . . the water flows in abundance."[34] Under this Treaty, the Diné people were allowed to return to their original homeland which contained adequate land and water to sustain life.[35] The boundaries of the Navajo reservation expanded over the years, and the lands of the Navajo Nation now lie primarily in the Colorado River Basin, overlapping with New Mexico, Arizona, and Utah.[36]

B. The Trust Relationship Between the United States and Indigenous Nations

Through treaties with Native American nations, the U.S. government assumes the role of trustee for Native American property and "thus, accepts the imposition of a fiduciary standard."[37] The Supreme Court's jurisprudence has emphasized that the relationship is not an exact analog of a traditional trust relationship.[38] However, through its jurisprudence, the Court continually has reemphasized that the unique federal-tribal relationship is both a source of federal power over Tribes and a source of Native

28. Hughes, *supra* note 21; Brief for the Navajo Nation, *supra* note 1, at *5.
29. Brief for the Navajo Nation, *supra* note 1, at *5.
30. *Navajo Treaty of 1868*, NATIVE KNOWLEDGE 360 (2019), https://americanindian.si.edu/nk360/navajo/treaty/treaty.cshtml.
31. *Id.*
32. *Id.*
33. Brief for the Navajo Nation, *supra* note 1, at *6.
34. *Id.*
35. *Id.*
36. Heather Whiteman Runs Him, Arizona v. Navajo Nation, *Historical Hardships and the Unquenched Thirst for Water Justice*, 235 THE WATER REP., Sept. 15, 2023, at 1.
37. 9 Powell on Real Property § 67.01 (2023); Jill De La Hunt, *The Canons of Indian Treaty and Statutory Construction: A Proposal for Codification*, 17 U. MICH. J. L. REFORM 681, 682–87 (1984); Worcester v. Georgia, 31 U.S. 515, 562 (1832); *see* Johnson v. M'Intosh, 21 U.S. 543, 568–72 (1823); Cherokee Nation v. Georgia, 30 U.S. 1, 17, 20 (1831).
38. *Cherokee Nation*, 30 U.S. at 17, 20; *Worcester*, 31 U.S. at 562; United States v. Navajo Nation, 537 U.S. 488, 506 (2003); United States v. Mitchell, 445 U.S. 535, 542, 546 (1980); *see* Arizona v. Navajo Nation, 599 U.S. 555, 564 (2023).

American and tribal rights.[39] In congressional findings on Indian Law,[40] Congress determined that "the fiduciary responsibilities of the United States to Indians also are founded in part on specific commitments made through written treaties and agreements securing peace, in exchange for which Indians have surrendered claims to vast tracts of land, which provided legal consideration for the permanent, ongoing performance of Federal trust duties."[41]

As a result, the treaties between the United States and Native American nations are a contract between two sovereign nations and thus serve as substantial sources of law that establish this trust relationship between the Tribes and the federal government.[42] If a Tribe seeks damages from the government, it must bring claims under the Tucker Act, 28 U.S.C. § 1491 and its counterpart for claims brought by Tribes, 28 U.S.C. § 1505, known as the Indian Tucker Act.[43] Under a Tucker Act claim, the Tribe must also point to law that creates duties for the government and show that the government failed to fulfill those duties.[44] In *United States v. White Mountain Apache Tribe*,[45] for example, the Tribe identified a 1960 statute that established a fiduciary duty upon the United States to maintain and preserve land held in trust for the Tribe.[46] The Supreme Court held that the United States breached its fiduciary duty in failing to maintain and preserve trust property, which gave rise to a substantive claim for monetary damages under the Indian Tucker Act.[47] The Court emphasized that while the 1960 statute does not expressly confer a duty on the government, the

39. *See* Haaland v. Brackeen, 599 U.S. 255, 274 (2023); Seminole Nation v. United States, 316 U.S. 286, 296 (1942); United States v. Mitchell, 463 U.S. 206, 225–26 (1983); United States v. Jicarilla Apache Nation, 564 U.S. 162, 176 (2011).

40. The federal government still refers to Native American Law as Indian Law. *Supra* text accompanying note 2.

41. 25 U.S.C.A. § 5601 (West).

42. *Id.*; Herrera v. Wyoming, 587 U.S. 329, 349 (2019); *Haaland*, 599 U.S. at 274; *Seminole Nation*, 316 U.S. at 295. The Supreme Court has held that tribal treaties are a contract between two sovereign nations and that the text of the treaties must be construed in light of the parties' intentions and in "favor of the Indians." This principle is derived from Cannons of Indian Treaty Construction, established in some of the Supreme Court's earliest cases and affirmed throughout the court's history. In the Eighteenth and Nineteenth centuries the United States acquired vast tracts of land by forcibly removing Native Americans to reservations. In exchange for that land the United States signed treaties with Native American Tribes. The Cannons of Indian Treaty Construction are a series of cases that recognize the power differential between Native Americans and the federal government in signing those treaties and establish that treaty ambiguities must be resolved in the favor of Indians. Hunt, *supra* note 36; *Cherokee Nation*, 30 U.S. at 17, 20; *Worcester*, 31 U.S. at 562; Jones v. Meehan, 175 U.S. 1, 10, 20 (1899); Washington v. Wash. State Com. Passenger Fishing Vessel Ass'n, 443 U.S. 658, 675, *modified sub nom*. Washington v. United States, 444 U.S. 816 (1979).

43. *Mitchell*, 463 U.S. at 212. When a Native American Nation seeks an interpretation of a treaty and their trust relationship with the United States, they must bring claims under an act of Congress that waives sovereign immunity. The Tucker Act is a mechanism to establish jurisdiction and waive sovereign immunity.

44. *Id.* at 218.

45. 537 U.S. 465 (2003).

46. *Id.* at 474–75.

47. *Id.*

government had occupied and controlled the land in question and as such, management of the land is incumbent upon the United States.[48]

In some instances, a Tribe has not been able to establish either a treaty or legislative trust obligation on the United States.[49] For instance, in *United States v. Jicarilla Apache Nation*,[50] the Court considered whether the fiduciary exception to attorney-client privilege applied to the general trust relationship between the United States and Tribes and held that it does not.[51] The Court recognized that "not every aspect of private trust law can properly govern the unique relationship of Tribes and the federal government," and that the treaty between the Tribe and the government does not establish the Tribe as a "client" to which the fiduciary exception would extend.[52] The Court reasoned that the Tribe must identify a specific trust obligation that the government has expressly accepted to impose an affirmative fiduciary duty on the United States.[53]

C. The Trust Relationship in the Context of Water Rights

Treaties between the United States and Native American nations include reserved water rights for the Tribes inherent in land reservation.[54] These water rights are known as "*Winters* Rights" and are the leading doctrine for examining such rights in the tribal context.[55] In the 1908 case, *Winters v. United States*,[56] the Court held that when the United States created a reservation for the Gros Ventre and Assiniboine Tribes in Montana, it also promised them enough water to fulfill the purposes of the reservation.[57] Local settlers had diverted much of the water in the Milk River, depleting the Tribes' water supply.[58] The United States filed suit on behalf of the Tribes,[59] seeking a declaration that their water rights had priority over the rights of local settlers.[60] The Court held that the United States had agreed to establish the Fort Belknap Reservation as the Tribes' "permanent home" and a place for farming, but "[t]he lands were arid and, without irrigation, were practically valueless."[61] Even though the treaty agreement did not mention water rights, the Court reasoned that Congress's purpose

48. *Id.*
49. United States v. Jicarilla Apache Nation, 564 U.S. 162, 187 (2011).
50. *Id.*
51. *Id.* at 167.
52. *Id.* at 187.
53. *Id.* at 184–86.
54. Winters v. United States, 207 U.S. 564, 577 (1908).
55. Amy Cordalis & Daniel Cordalis, *Indian Water Rights: How* Arizona v. California *Left an Unwanted Cloud Over the Colorado River Basin,* 5 ARIZ. J. ENV'T. L. & POL'Y 333, 338–40 (2014).
56. 207 U.S. 564.
57. *Id.* at 577.
58. *Id.* at 566–67.
59. As a trustee of Native American Tribes, the federal government could bring suit on behalf of Tribes to protect their rights held in trust through treaties. In 1946 Congress passed the Indian Tucker Act, 28 U.S.C. § 1505, which provides a waiver of sovereign immunity and creates jurisdiction in Federal Courts for Tribes to bring their claims against the federal government. JURISDICTION OF COURT OF FEDERAL CLAIMS OVER INDIAN CLAIMS, 7A Fed. Proc., L. Ed. § 19:79.
60. *Winters*, 207 U.S. at 565.
61. *Id.* at 576.

when creating the Fort Belknap Reservation had been to make the Gros Ventre and Assiniboine Tribes a "pastoral and civilized" people, and in an arid location such as the Fort Belknap Reservation, water is necessary to create a permanent home.[62] This landmark decision informs all Supreme Court jurisprudence on Native American water rights and remains the standard today.[63]

State and federal courts have consistently relied on the *Winters* doctrine to adjudicate issues of tribal water rights.[64] In *In re All Rights to Use Water in Big Horn River System*,[65] for instance, the Supreme Court of Wyoming affirmed the lower court's analysis and the findings of a Special Master in examining the treaty with the Tribe under the *Winters* doctrine.[66] The treaty establishing the Wind River Reservation does not mention water rights, but the court reasoned that there was an intent to reserve water for the Tribe under the *Winters* doctrine.[67] The court concluded that the purposes of the reservation would be defeated without reserved water rights.[68] In *Winters* and *Big Horn*, the courts used historical context to determine the parties' intent when a treaty was signed and determined that the treaties must be interpreted in the light most favorable to the Native Americans as they would have understood it.[69] These principles are critical to protecting and preserving Native American property rights and sovereignty.[70]

Courts have accordingly followed these principles in interpreting water and property rights for Native American nations.[71] In *In re General Adjudication of all Rights to Use Water in the Gila River System and*

---

62. *Id.*

63. Cordalis & Cordalis, *supra* note 55, at 338.

64. In re All Rights to Use Water in Big Horn River Sys., 753 P.2d 76, 91 (Wyo. 1988); In re All Rights to Use Water in the Gila River Sys. and Source, 989 P.2d 739, 748–49 (Ariz. 1999); Arizona v. California, 373 U.S. 546, 600 (1963). While many Tribes have successfully asserted claims recognizing their reserved *Winters* rights, some Tribes have had less success establishing affirmative duties on the United States to protect their water rights. In *Hopi Tribe v. United States*, the Federal Circuit Court held that an act of Congress, the agreement with the Tribe, and other federal provisions did not impose a fiduciary duty on the United States to manage water quality on the Hopi Reservation, absent third-party interference. In this case, the Tribe asserted claims under the Indian Tucker Act for damages. The Hopi Tribe claimed that the federal government had a fiduciary duty to ensure adequate water quality on the Hopi Reservation. The Tribe based its claims on federal Executive Orders interpreted under the *Winters* doctrine, and provisions of other agencies for safe drinking water on reservations. The court examined the claims under *Jicarilla*. It held that "[a]t most, by holding reserved water rights in trust, Congress accepted a fiduciary duty to exercise those rights and exclude others from diverting or contaminating water that feeds the reservation." However, this relationship did not extend to affirmative duties. Hopi Tribe v. United States, 782 F.3d 662, 671 (Fed. Cir. 2015).

65. 753 P.2d 76.

66. *Id.* at 91.

67. *Id.*

68. *Id.*

69. *Winters*, 207 U.S. at 576; *Big Horn*, 753 P.2d at 96.

70. Brief of Tribal Nations and Indian Organization as Amici Curiae in Support of the Navajo Nation at 8–10, Arizona v. Navajo Nation, 599 U.S. 555 (2023) (Nos. 21-1484, 22-51), 2023 WL 1967314 at *8–10 [hereinafter Brief of Tribal Nations].

71. *Big Horn*, 753 P.2d at 91; In re All Rights to Use Water in the Gila River Sys. and Source, 989 P.2d 739, 748–49 (Ariz. 1999); Arizona v. California, 373 U.S. 546, 600 (1963).

Source,[72] the Supreme Court of Arizona expanded the *Winters* doctrine and held that it applies to surface water and groundwater.[73] The court reasoned that holders of federal reserved water rights could invoke federal law to protect their groundwater from subsequent diversion to the extent such protection is necessary to fulfill the reserved rights.[74] The Sixth Circuit further expanded this concept in *Grand Traverse Band of Ottawa & Chippewa Indians v. Director, Michigan Department of Natural Resources*[75] when it held that under the treaty's scope with Native American Tribes, fishing rights include access to the mooring on public property because it would otherwise frustrate the treaty's purpose.[76] Finally, the Ninth Circuit held that when the Colville Indian Reservation was created, sufficient appurtenant water was reserved to permit irrigation of all practically irrigable acreage on the reservation.[77] Furthermore, there is an implied reservation of water from the creek for the development and maintenance of replacement fishing grounds.[78] These holdings when read together show an expansive view of the *Winters* doctrine and establish the water rights of Native American peoples as likely superior to the water rights conferred by individual states. [79]

However, several of these landmark cases are considered by some scholars as nothing but hollow victories.[80] For example, *Big Horn* took a decade to litigate, and the court held that the Shoshone and Arapahoe Tribes have rights to nearly half a million acres of water to irrigate their land under standards set by *Arizona v. California* and *Winters*.[81] However, the water rights were decreed with no federal funds to develop infrastructure to deliver water to these Tribes.[82] To this day, the Tribes have received no water despite a clear legal entitlement to the water rights.[83] *Winters* itself does not contain an affirmative obligation for the United States to develop infrastructure for Tribes to use water rights.[84]

In the decades after *Winters*, the federal government largely ignored the holding and continued to develop large water infrastructure projects

72. *Gila River*, 989 P.2d at 48–49.
73. *Id.*
74. *Id.*
75. 141 F.3d 635 (6th Cir. 1998).
76. *Id.* at 642.
77. Colville Confederated Tribes v. Walton, 647 F.2d 42, 49 (9th Cir. 1981).
78. *Id.* at 48.
79. Cordalis & Cordalis, *supra* note 55, at 346; Reid Peyton Chambers, *Protection and Implementation of Indian Reserved Water Rights as a Necessary Condition for Tribal Economic Development*, 2022 WIS. L. REV. 383, 385 (2022); Rebecca Cruz Guiao, *How Tribal Water Rights Are Won in the West: Three Case Studies from the Northwest*, 37 AM. INDIAN L. REV. 283, 289–90 (2013).
80. Gregor Allen MacGregor, *When the Navajo Generating Station Closes, Where Does the Water Go?*, 31 COLO. NAT. RESOURCES, ENERGY & ENV'T L. REV. 289, 321 (2020); Chambers, *supra* note 79.
81. MacGregor, *supra* note 80; Chambers, *supra* note 79.
82. MacGregor, *supra* note 80; Chambers, *supra* note 79.
83. MacGregor, *supra* note 80; Chambers, *supra* note 79.
84. Winters v. United States, 207 U.S. 564, 576 (1908); *see* MacGregor, *supra* note 80; Chambers, *supra* note 79.

that did not benefit Native Americans.[85] Throughout the early twentieth century, Congress appropriated millions of dollars a year and constructed massive irrigation projects throughout the west to provide water to non-Native Americans, even though the Native nations in the west legally held water rights to the western river systems.[86] For example, in 1909, a year after the *Winters* decision, the United States negotiated the Boundary Waters Treaty with Canada. One purpose of this Treaty was to authorize the increase of the Milk River's flow, which enters the United States from Canada north of the Fort Belknap Reservation.[87] This project aimed to support the water needs of non-Indigenous Americans near the Fort Belknap Reservation through a federal reclamation project.[88] At the same time, no federal funds were allocated to increase the water infrastructure of Native Americans on the Fort Belknap Reservation—this has remained largely unchanged since 1910.[89]

Winters and *Big Horn* are both examples of courts decreeing what is often referred to as "paper" water rights.[90] The courts determined that the Tribes are entitled to the water rights, but the holdings come with no determination of infrastructure to convert the paper rights into "wet" water rights.[91] This limitation of the courts has led many Tribes to seek negotiated water settlements instead of lengthy court proceedings and ineffectual water rights.[92] However, as R.P. Chambers explains:

> [W]ater settlements over the past four decades have resolved the water rights of fewer than forty Indian tribes. This is an average of roughly one tribal settlement a year. There are over 350 federally recognized Indian tribes in the United States outside Alaska; thus, the great majority of tribes have *not* been able to finalize water settlements during the past four decades since the first settlements were approved.[93]

As a result, many Native American Tribes in the west hold legal water rights to the river systems adjacent to their land, but due to Congress disregarding these rights and ineffectual legal remedies, many Tribes lack actual access to the water they desperately need and legally hold rights to.[94]

D. Tribal Water Rights and the Colorado River

---

85. *See infra* p. 16; Chambers, *supra* note 79, at 386–87.
86. Chambers, *supra* note 79, at 386–87; *see* Monique C. Shay, *Promises of a Viable Homeland, Reality of Selective Reclamation: A Study of the Relationship Between the* Winters *Doctrine and Federal Water Development in the Western United States*, 19 ECOLOGY L. Q. 547, 550–52, 557 (1992).
87. Chambers, *supra* note 79, at 386–87.
88. *Id.*
89. *Id.*
90. *Id.* at 393–94.
91. *Id.* at 386.
92. *Id.* at 397.
93. *Id.* at 408.
94. *Id.* at 408; M. Kathryn Hoover, *Up Shit Creek—Looking for A Paddle*, ARIZ. ATT'Y, July/August 2023, at 24, 26–27 (2023).

The Colorado River flows from Colorado to the Gulf of California, passing through five western states: Colorado, Utah, Arizona, Nevada, and California.[95] The development of the Colorado River has shaped much of the American Southwest as it has enabled the expansion of large metropolitan areas such as Albuquerque, Denver, Las Vegas, Los Angeles, Phoenix, Salt Lake City, and San Diego.[96] As the Southwest expanded, so did the legal landscape of the river.[97] Over much of the twentieth century, disputes, court decisions, and agreements surrounding the Colorado River have collectively been known as the "Law of the River."[98] The Law of the River is comprised of an international treaty,[99] two interstate compacts, a historic U.S. Supreme Court decision (*Arizona v. California*),[100] and several dozen federal statutes and regulations.[101] Understanding the background of the Law of the River is critical to understanding the implications of *Arizona v. Navajo Nation*.

The Colorado River Compact is central to the Law of the River.[102] The Compact was negotiated in Santa Fe, New Mexico in 1922 and is an agreement between six of the seven states in the Colorado River Basin: Colorado, Wyoming, Utah, New Mexico, Nevada, and California.[103] The Compact divides the annual volume of available water for consumption from the Colorado River system.[104] The Compact divides the Colorado River at Lee's Ferry in northern Arizona into two "basins": the "Upper Basin" and the "Lower Basin."[105] The Compact prohibits the Upper Basin from causing the flow to drop below an agreed rate in the Lower Basin.[106] The Compact does not apportion water to specific states, and thus, states were left to apportion for themselves.[107] The Upper Basin States

95. Jason A. Robison & Douglas S. Kenney, *Equity and the Colorado River Compact*, 42 ENV'T. L. 1157, 1158 (2012). In the western United States, most states generally follow the doctrine of "prior appropriation." Under prior appropriation, the first appropriator of the water is the senior rights holder and has the superior right to use it. Under prior appropriation, in times of short water supply, a rights holder is entitled to their full allocation before a junior user gets to use any water. Additionally, the doctrine of prior appropriation establishes a "use it or lose it" ethos around water in the west. Senior rights holders must use water or express an intent to use water or risk losing their rights to junior rights holders. The states where the Colorado River flows generally follow the doctrine of prior appropriation. Guiao, *supra* note 79, at 286; Chambers, *supra* note 79.

96. Robison & Kenney, *supra* note 95.

97. *Id.*

98. *Id.*

99. Treaty on Utilization of the Waters of the Colorado and Tijuana Rivers and of the Rio Grande, U.S.-Mex., at p. 2, Feb. 3, 1944, T.S. 994 [hereinafter U.S.-Mexico Treaty].

100. Arizona v. California, 373 U.S. 546, 600 (1963).

101. Robison & Kenney, *supra* note 95.

102. Jason Anthony Robison, *The Colorado River Revisited*, 88 U. COLO. L. REV. 475, 509 (2017).

103. It took many years for all of the states to ratify the compact, Arizona did not ratify the compact until twenty-two years after it was negotiated. Robert Glennon & Jacob Kavkewitz, *"A Smashing Victory"?: Was* Arizona v. California *A Victory for the State of Arizona?*, 4 ARIZ. J. ENV'T. L. & POL'Y 1, 4–5 (2013).

104. Cordalis & Cordalis, *supra* note 55, at 343–44.

105. *Id.*

106. Jason A. Robison & Lawrence J. MacDonnell, Arizona v. California *& the Colorado River Compact: Fifty Years Ago, Fifty Years Ahead*, 4 ARIZ. J. ENV'T. L. & POL'Y 130, 134 (2014); Glennon & Kavkewitz, *supra* note 103, at 7.

107. Cordalis & Cordalis, *supra* note 55, at 343–44.

established the Upper Basin Compact in 1948, but the Lower Basin States could not agree, primarily due to disagreements between Arizona and California over apportionment, ultimately resulting in the *Arizona v. California* litigation.[108]

While disagreements over ratification of the Colorado River Compact continued for many years, Congress passed the Boulder Canyon Project Act (BCPA) in 1928 to bypass disputes between Arizona and California and speed up ratification of the Compact.[109] In passing the BCPA, Congress took federal control of building the infrastructure contemplated by the states in the Compact.[110] The BCPA authorized the construction of the Hoover Dam, the All-American Canal, and Lake Mead.[111] It also diverted the flow of the Colorado River and divided the upper and lower Colorado River.[112] The BCPA authorized up to $165 million in spending to develop the infrastructure for the project and apportioned rights to the Colorado River to the surrounding states.[113] The project was one of the most significant water infrastructure projects ever implemented in the United States and is an example of the federal government taking affirmative steps to develop water infrastructure for non-Native Americans.[114] The passage of the BCPA and the construction of associated water infrastructure was the culmination of decades of congressional disregard for the *Winters* holding and the legal water rights of Native American Tribes.[115]

Arizona staunchly opposed the Colorado River Compact and refused to sign because the state government wanted to take significantly more water than apportioned in Compact negotiations.[116] Arizona brought an original jurisdiction[117] suit against California to the Supreme Court, claiming that the Colorado River Compact and the BCPA were unconstitutional and seeking an injunction to stop the construction of the Hoover Dam.[118] This began decades of litigation and culminated in the 1963 decision of *Arizona v. California*.[119] Other states, federal entities, and the United States intervened in the litigation.[120] The United States intervened on behalf of several Native American reservations adjacent to the Lower

108. Glennon & Kavkewitz, *supra* note 103, at 7. The Upper Basin Compact also became the foundation for the Colorado River Storage Project Act and the construction of Glen Canyon Dam and Lake Powell. Cordalis & Cordalis, *supra* note 55, at 343–44.

109. James S. Lochhead, *An Upper Basin Perspective on California's Claims to Water from the Colorado River Part I: The Law of the River*, 4 U. DENV. WATER L. REV. 290, 306 (2001).

110. *Id.*

111. *Id.*

112. *Id.*

113. *Id.*

114. *See id.*; *see* MacGregor, *supra* note 80, at 307; *see* Whiteman Runs Him, *supra* note 36, at 5.

115. Chambers, supra note 79, at 386–87; *see* Shay, *supra* note 86, at 550–52.

116. Glennon & Kavkewitz, *supra* note 103, at 7.

117. Art. III, S.2 of the Constitution gives the Supreme Court original jurisdiction of actions in which two or more states are parties. Arizona v. California, 373 U.S. 546, 564 (1963).

118. Glennon & Kavkewitz, *supra* note 103, at 7.

119. *Id.* at 25; Arizona v. California, 373 U.S. at 600.

120. Glennon & Kavkewitz, *supra* note 103, at 25.

Colorado River but did not include the Navajo Nation.[121] The Navajo Nation sought to intervene and assert their rights to the mainstem of the Lower Colorado River.[122] The United States opposed intervention, and the Court denied the Navajo Nation's motion to intervene.[123]

The Court appointed a "special master" to adjudicate the apportionment of the water in the Colorado River and recommend a decree for the division of water rights.[124] Special Master Simon Rifkind heard testimony for over two years and issued a 433-page report in late 1960.[125] In the 1963 decision, based on the Special Master's Report, the Court held that Congress has Commerce Clause power to apportion Colorado River water, and that power was exercised in the Boulder Canyon Project Act of 1928.[126] The Special Master also "found that the water was intended to satisfy the future as well as the present needs of the Indian Reservations and ruled that enough water was reserved to irrigate all the practicably irrigable acreage on the reservations . . . ."[127] The practicably irrigable acreage (PIA) standard is significantly less water allocation than a recognition of full *Winters* rights.[128] *Winters* rights would have allocated senior water rights for any and all uses to make a reservation a permanent home.[129] PIA limits water allocation to irrigation for agricultural uses.[130] The Court and the Master were concerned that giving the Native American reservations adjacent to the Lower Colorado River their full *Winters* rights would jeopardize junior water rights and thereby hinder financing of non-Indigenous American water projects.[131]

The Court held that the United States had reserved water rights for the five Native American reservations named in the litigation under *Winters*.[132] The Court expanded on *Winters* by quantifying those rights for the Tribes.[133] However, the Court limited this to PIA, and the five Tribes were decreed 905,496 acre-feet a year (AFY) for 136,636 practically irrigable acres.[134] These five Tribes were allocated over 12% of the Lower Colorado River's total dependable water supply, which amounts to 7,500,000 AFY.

This case is significant in the history of Native American water rights because it was the first major decision since *Winters* that analyzed tribal

121. Cordalis & Cordalis, *supra* note 55, at 349.
122. *Id.*
123. MacGregor, *supra* note 80, at 310.
124. Cordalis & Cordalis, *supra* note 55, at 345.
125. *Id.*
126. Glennon & Kavkewitz, *supra* note 103, at 25.
127. Chambers, *supra* note 79, at 389–90.
128. Michelle Uberuaga Zanoni, *Evaluating the Consequences of Climate Change on Indian Reserved Water Rights and the PIA: The Impracticably Irrigable Acreage Standard*, 31 PUB. LAND & RESOURCES L. REV. 125, 138 (2010); s*ee* Guiao, *supra* note 79, at 288; *see* Chambers, *supra* note 79, at 395.
129. Guiao, *supra* note 79, at 288.
130. Zanoni, supra note 128, at 136–38; Guiao, *supra* note 79, at 288.
131. Glennon & Kavkewitz, *supra* note 103, at 7.
132. *Id.* at 25; MacGregor, *supra* note 80, at 310.
133. Chambers, *supra* note 79, at 389–90.
134. *Id.*

reserved water rights and was the first case to quantify those reserved *Winters* rights for any Tribe.[135] The Court coined these water rights for the five Tribes "present perfected rights," and the Court found that they were vested before the BCPA and as such, were entitled to priority under the Act.[136] On March 9, 1964, the Supreme Court issued a decree that specified the quantities and priorities of the water entitlements for states, the United States, and the Tribes.[137] Recall that the Court denied the Navajo Nation's motion to intervene in this litigation.[138] While the decree has been modified several times in later litigation,[139] the Navajo Nation's rights to the Lower Colorado River were never adjudicated or quantified.[140]

The Colorado River Compact did not allocate tribal water rights for Native American nations on the Colorado River, and *Arizona v. California* only allocated water to the five Tribes adjacent to the river.[141] During Compact negotiations, the federal government was supposed to represent the interests of the Tribes adjacent to the Colorado River, but those Tribes were never invited to any of the Compact's proceedings nor did they sign the agreement.[142] The Compact did, however, include one clause regarding Native American nations.[143] Article VII reads, "Nothing in this compact shall be construed as affecting the obligations of the United States of America to Indian Tribes."[144] Then-Secretary of Commerce Herbert Hoover is said to have concluded that the water rights of Native American Tribes were "negligible," and when explaining why Article VII was included, he stated:

> This article was perhaps unnecessary. It is merely a declaration that the states, in entering into the agreement, disclaim any intention of affecting the performance of any obligations owing by the United States to Indians. It is presumed that the states have no power to disturb these relations, and it was thought wise to declare that no such result was intended.[145]

The disregard of Native Americans in the Compact and the Navajo Nation being shut out of *Arizona v. California* litigation led to the Navajo Nation having no perfected water rights to the Lower Colorado River.[146] Again, Tribes in this situation typically seek water rights litigation and negotiated settlements in order to convert paper *Winters* rights to perfected

---

135. *Id.* at 389.
136. *Arizona v. California*, 373 U.S. 546, 599 (1963); Cordalis & Cordalis, *supra* note 55, at 344.
137. Glennon & Kavkewitz, *supra* note 103, at 25–26; Brief for the Navajo Nation, *supra* note 1, at *9–10.
138. MacGregor, *supra* note 80, at 310.
139. *Arizona v. California*, 373 U.S. at 600.
140. MacGregor, *supra* note 80, at 311; Whiteman Runs Him, *supra* note 36, at 1; Brief for the Navajo Nation, *supra* note 1 at *9–10.
141. Cordalis & Cordalis, *supra* note 55, at 343–44.
142. *Id.*
143. *Id.*
144. *Id.*
145. *Id.* at 343.
146. *Id.* at 357; Hoover, *supra* note 94, at 26.

wet water rights.[147] This issue initiated the *Arizona v. Navajo Nation* litigation.[148] The Navajo Nation has never had their water rights established by *Winters* to the Lower Colorado River quantified, and thus the Nation was forced to bring the government to court.[149]

II. ARIZONA V. NAVAJO NATION

A. Facts and Procedural History

Arizona v. Navajo Nation is the result of twenty years of litigation.[150] The Navajo Nation filed suit in 2003 against the United States Department of the Interior and other federal entities.[151] The Nation asserted claims under the National Environmental Policy Act and the Federal Administrative Procedure Act,[152] challenging the federal government's administrative actions in developing guidelines, plans, and agreements that manage the flow of the Lower Colorado River.[153] The Nation alleged that these actions established "a system of reliance upon the Colorado River that ensures that entities other than the Navajo Nation will continue to rely on water supplies claimed by, reserved for, needed by, and potentially belonging to the Navajo Nation."[154] The Nation alleged that by developing this system of reliance the United States failed in its trust obligation to assert and protect the Nation's water rights by "expressly" leaving "open the question of the Navajo Nation's beneficial rights to the waters of the Colorado River."[155]

The Nation sought injunctive relief, asking the court to compel the United States to identify the water rights it holds for them, and if the United States had misappropriated their water rights, the Nation asked the court to formulate a plan to stop the misappropriation prospectively.[156] The district court dismissed the claim in 2014,[157] holding that the Nation failed to claim an injury in fact necessary to establish standing and also failed to identify a waiver of sovereign immunity.[158] The Nation appealed to the Ninth Circuit Court of Appeals, which affirmed in part and reversed in part the district court decision.[159]

---

147. Cordalis & Cordalis, *supra* note 55, at 357; Chambers, *supra* note 79, at 386.
148. Whiteman Runs Him, *supra* note 36, at 1; Brief for the Navajo Nation, *supra* note 1, at *9–10.
149. Cordalis & Cordalis, *supra* note 55, at 357; Whiteman Runs Him, *supra* note 36, at 1; Brief for the Navajo Nation, *supra* note 1, at *9–10.
150. Whiteman Runs Him, *supra* note 36, at 1; Hoover, *supra* note 94, at 26.
151. Navajo Nation v. U.S. Dep't of the Interior, 34 F. Supp. 3d 1019, 1022 (D. Ariz. 2014), *aff'd in part, rev'd in part sub nom.* Navajo Nation v. Dep't of the Interior, 876 F.3d 1144 (9th Cir. 2017).
152. *Id.*
153. *Id.* at 1024.
154. *Id.*
155. *Id.* at 1022.
156. Brief for the Navajo Nation, *supra* note 1, at *1.
157 . The case was stayed for over a decade in multiple attempts at settlement. Hoover, *supra* note 94, at 26.
158. Navajo Nation v. U.S. Dep't of the Interior, 34 F. Supp. 3d at 1030.
159. *Id.*

After more than a decade of stays in litigation for attempts to settle, the Nation submitted its third amended complaint.[160] This time, they only brought a breach of trust claim with no claims under federal statutes.[161] Arizona, Colorado, Nevada, and other entities intervened to assert their interests in Colorado River water rights.[162] The Supreme Court combined the petitions and granted certiorari to hear the case on November 4, 2022.[163]

B. Majority Opinion

Justice Kavanaugh delivered the Court's opinion,[164] holding that the 1868 Treaty between the United States and the Navajo Nation does not create a fiduciary duty for the government to take affirmative steps to assess the Nation's water needs, and the government is not obligated to develop plans to meet those needs.[165]

Justice Kavanaugh began by discussing the history of the Navajo Nation and the treaties with the United States.[166] He briefly overviewed the 1848 Treaty with the Navajo Nation, signed after the Mexican-American war, to establish peace between the Nation and the United States.[167] He then described the Bosque Redondo Reservation in one sentence and explained that the 1868 Treaty is a treaty to end "all war between the parties."[168] He noted that the 1868 Treaty established the Navajo Nation reservation in the Navajo people's original homeland and that the reservation would enable the Navajo people to become self-sufficient.[169]

Justice Kavanaugh acknowledged that with the reservation of land comes water rights.[170] He explained that the Nation has reserved water

160. Brief for the Navajo Nation, *supra* note 1, at *12; Whiteman Runs Him, *supra* note 36, at 2.
161. Brief for the Navajo Nation, *supra* note 1, at *12; Whiteman Runs Him, *supra* note 36, at 2.
162. Brief for the Navajo Nation, *supra* note 1, at *12; Whiteman Runs Him, *supra* note 36, at 2.
163. Whiteman Runs Him, *supra* note 36, at 3. The Tribe also asserted jurisdictional claims related to the decree in *Arizona v. California*. The Court did not address these claims, and they did not affect the outcome of the case. They will not be analyzed in this Note. Brief for the Navajo Nation, *supra* note 1, at *15.
164. *Navajo Nation*, 599 U.S. 555, 558 (2023); Chief Justice Roberts and Justices Alito and Barrett joined; Justice Thomas joined the Court in full but wrote a concurring opinion highlighting what he saw as a "troubling" aspect of this case. *Id.* at 570 (Thomas, J., concurring). Justice Thomas was concerned about interpreting the trust relationship with Native American Tribes. *Id.* Thomas suggested that the trust relationship should be interpreted to mean simply that the Native American Tribes have put their trust in the federal government. *Id.* Justice Thomas believed that any past precedent from the Court holding that the trust relationship is anything beyond a general trust in the federal government had misinterpreted the meaning of the trust relationship and is "troubling." *Id.* Justice Thomas' opinion departs significantly from the Supreme Court jurisprudence of federal Indian Law, and even from the majority opinion. Hoover, *supra* note 94, at 29. Justice Thomas does not recognize a legal trust relationship between Native American Tribes and the federal government. Hoover, *supra* note 94, at 29. Justice Thomas departs significantly from the other justices on the Court and the opinion does not contribute to the analysis of this case.
165. *Navajo Nation*, 599 U.S. at 569–70.
166. *Id.* at 558–59.
167. *Id.*
168. *Id.* at 560.
169. *Id.*
170. *Id.* at 561.

rights under the *Winters* doctrine.[171] The opinion then detailed the current physical water availability and infrastructure on the Navajo Nation reservation.[172] He pointed out that the federal government has secured "hundreds of thousands of acre-feet of water" for the Nation "and authorized billions of dollars for water infrastructure on the Navajo Reservation."[173]

Justice Kavanaugh then spent the remainder of the opinion detailing the Court's central holding: the trust relationship between the Navajo Nation and the United States does not create an obligation for the United States to take affirmative steps to secure water for the Nation.[174] Justice Kavanaugh reasoned that to maintain a breach of trust claim, the Nation must point to specific "text of the treaty, statute, or regulation" that imposes a duty on the United States.[175] He explained that while a trust relationship exists, it is not a traditional one in which the United States would assume the fiduciary duties of a private trustee.[176] The Court opined that "Indian treaties cannot be rewritten or expanded beyond their clear terms," and that the 1868 Treaty included affirmative duties to construct buildings and provide teachers, clothing, seeds, and agricultural implements.[177] However, Justice Kavanaugh explained that the Treaty provides no affirmative duty to secure water and likened that to similar duties not included in the Treaty, like mining, farming, or forestry.[178]

Aligning with *Jicarilla* and the other Tucker Act cases, the majority narrowly construed the Treaty to conclude there was no expressly accepted duty of trust.[179] Justice Kavanaugh emphasized that the "Federal Government owes judicially enforceable duties to a [T]ribe 'only to the extent it expressly accepts those responsibilities.'"[180] Kavanaugh concluded this portion by stating that it is not the "Judiciary's role to update the law" but Congress's role to enact law to meet the Nation's water needs.[181]

Justice Kavanaugh also addressed each of the Nation's arguments but claimed none of them were persuasive.[182] He determined that the Nation's first argument—that the text of the 1868 Treaty established the Navajo reservation as a permanent home and that the United States had an obligation to secure water for the Nation[183]—is not supported by the text or history of the Treaty.[184] Justice Kavanaugh explained that the Treaty

171. *Id.*
172. *Id.* at 562.
173. *Id.*
174. *Id.* at 566.
175. *Id.*
176. *Id.*
177. *Id.* at 567–68.
178. *Id.* at 568.
179. *Id.* at 566.
180. *Id.* at 564.
181. *Id.* at 566.
182. *Id.* at 567.
183. *Id.*
184. *Id.*

included provisions for schools, a chapel, and supplying seeds and agricultural implements.[185] However, the Treaty did not confer any additional water rights beyond the existing water on the reservation.[186]

Next, Justice Kavanaugh addressed the Nation's argument that the treaty provision granting seeds and agricultural implements implies water to support such ventures would be provided by the United States.[187] Justice Kavanaugh declared that the seeds and agricultural implements were only offered for three years, and thus, the clause includes no indefinite duties to secure water.[188] He also wrote that since the Navajo Nation asked for schools and a chapel, then the "Navajos knew how to impose specific affirmative duties on the United States when they wanted to do so."[189]

Third, Justice Kavanaugh addressed the Nation's argument relying on *Arizona v. California*.[190] The Navajo Nation argued that when the United States opposed their intervention in *Arizona v. California*, the United States was asserting control over the Navajo Nation's water rights.[191] Justice Kavanaugh concluded that a breach of trust claim "cannot be premised on control alone" and that this is not evidence of the United States expressly accepting a duty.[192]

Finally, Justice Kavanaugh addressed the Navajo Nation's argument that in 1868, the Navajo people would have understood the Treaty to mean that the United States would take steps to secure water for the Nation.[193] In a very short paragraph,[194] Justice Kavanaugh explained that the Treaty includes no such language, nor does the historical record suggest that there was any understanding to that effect.[195] Justice Kavanaugh concluded, "The 1868 Treaty reserved necessary water to accomplish the purpose of the Navajo Reservation. But the treaty did not require the United States to take affirmative steps to secure water for the Tribe."[196]

C. Dissenting Opinion by Justice Gorsuch

The dissent written by Justice Gorsuch[197] opined that under the United States Constitution, "all treaties made" are "the supreme law of the land," and, as such, the judiciary has a role to play in upholding such treaties.[198] Justice Gorsuch argued that the Court must interpret tribal treaties to determine the Tribe's understanding of the terms and view treaties

185. *Id.* at 568.
186. *Id.*
187. *Id.*
188. *Id.*
189. *Id.*
190. *Id.*
191. *Id.*
192. *Id.*
193. *Id.* at 569.
194. *See infra* pp. 31–32.
195. *Navajo Nation*, 599 U.S. at 569.
196. *Id.* at 569–70.
197. Joined by Justices Sotomayor, Kagan, and Jackson.
198. *Navajo Nation*, 599 U.S. at 585 (Gorsuch, J., dissenting).

within the larger context that frames them.[199] Gorsuch also reasoned that the Court should follow the precedent set in the case *Winters v. United States*.[200]

Justice Gorsuch began his dissent by arguing that the Navajo Nation was not asking the federal government to take affirmative steps to secure water for the nation.[201] Instead, the Nation was asking for the United States to quantify their water rights and develop a plan to apportion the rights appropriately.[202] Justice Gorsuch spent a large portion of his opinion detailing the relevant history of the Navajo Nation, including the atrocities committed against the Navajo people by the United States.[203] He then addressed the fact that that Diné people only use around seven gallons of water daily, less than one-tenth of what the average American household uses.[204] He argued that while the Diné people have rights to use the Lower Colorado River, those rights have never been assessed by the United States because, throughout the *Arizona v. California* litigation and the Boulder Canyon Project Act, the Navajo Nation was left out of any determination of water rights.[205] Justice Gorsuch explained that, as a result of this repeated exclusion of the Navajo Nation, the Nation was forced to file this suit to compel the federal government to determine the Nation's water rights to the Lower Colorado River and potentially develop a plan to meet those needs.[206]

Gorsuch argued that the Treaty between the Navajo Nation and the United States should be analyzed under the principles of contract interpretation.[207] He noted that in any contract interpretation the court should first determine the parties intent at the time of drafting the contract.[208] He then explained that the covenant of good faith and fair dealing should apply, and within that, any uncertainty should be construed against the drafting party.[209] Within this line of reasoning, Justice Gorsuch asserted that the interpretation of the Treaty gave rise to fiduciary duties imposed on the United States.[210] He argued that the treaties must be interpreted in the light most favorable to the Tribes, and thus courts "must give effect to the terms of treaties as the [T]ribes would have understood them."[211]

Justice Gorsuch then conducted a detailed analysis of *Winters v. United States*.[212] He highlighted the argument in *Winters* that Native

199. *Id.* at 574.
200. *Id.* at 588.
201. *Id.* at 574.
202. *Id.*
203. *Id.* at 575–85.
204. *Id.* at 580.
205. *Id.* at 584.
206. *Id.*
207. *Id.*
208. *Id.* at 586.
209. *Id.*
210. *Id.*
211. *Id.* at 587.
212. *Id.* at 588–89.

American reservations could not be established without access to adequate irrigation, and thus, designating a reservation as a Tribe's permanent home implied that the Tribes would enjoy continued access to nearby water sources.[213] Gorsuch argued that the language of the 1868 Treaty making the reservation the "permanent home" of the Navajo Nation alone created enforceable water rights under *Winters*.[214] He also argued that additional textual and historical context created enforceable duties of the United States, such as the Treaty requiring buildings to be built near available water and the fact that the Diné people were moved from the Bosque Redondo Reservation because water was not available or non-potable.[215]

Additionally, Justice Gorsuch argued that the majority applied the wrong legal framework in applying the *Jicarilla* line of cases and Tucker Act claims.[216] They brought a treaty-based claim under the *Winters* doctrine seeking equitable relief.[217] Justice Gorsuch argued the Navajo Nation's claims should have been able to proceed under an analysis of the trust relationship and the *Winters* doctrine.[218] Justice Gorsuch finished with a particularly poignant statement in reference to the Diné people: "As they did at Bosque Redondo, they must again fight for themselves to secure their homeland and all that must necessarily come with it. Perhaps here, as there, some measure of justice will prevail in the end."[219]

III. ANALYSIS

A. The Majority Opinion Misunderstands the Navajo Nation's Claims and Incorrectly Applies the Principles of Native American Treaty Construction

The majority in *Arizona v. Navajo Nation* failed to understand jurisprudence on Native American treaty construction and preceding case law and thus applied the incorrect standard.[220] First, the Court incorrectly insisted that the Nation was asking the Government to take affirmative steps to secure water for the Navajo Nation.[221] In reality, the Nation sought a judicial order to compel the United States to assess existing water needs of the Navajo Nation and develop a plan to meet those needs,[222] per the 1849 and 1868 Treaties which "guarantee[d] enough water to fulfill the Reservation's purpose."[223] The Court interpreted this requested relief as requiring the Court to establish new duties upon the United States to secure

213. *Id.* at 589.
214. *Id.* at 574.
215. *Id.* at 592.
216. *Id.* at 594. The Indian Tucker Act facilitates suits for monetary damages in the Court of Federal Claims. Justice Gorsuch explained that the Navajo Nation did not bring a Tucker Act claim for money damages in this case.
217. *Id.* at 595.
218. *Id.* at 599.
219. *Id.* at 599.
220. *Id.* at 574.
221. *Id.*
222. Brief for the Navajo Nation, *supra* note 1, at *14.
223. Brief for the Navajo Nation, *supra* note 1, at *3.

water for the Tribe.[224] However, the Nation was only asking the Court to compel the Government to meet its existing obligations under *Winters* and *Arizona v. California*.[225]

The misinterpretation by the Court led the majority to apply *Jicarilla* and the Tucker Act cases.[226] The majority analyzed the Navajo Nation's claims against *Jicarilla*, a case where the Tribe sought monetary damages under the Tucker Act and an exception to attorney-client privilege under the trust exception.[227] Neither of these claims align with the Nation's claims here. [228] The Nation sought an injunction asserting a treaty-based breach of trust action under 28 U.S.C. § 1362.[229] As Justice Gorsuch pointed out in dissent, this is a "provision enacted *after* the Tucker Acts that gives federal district courts 'original jurisdiction' over 'civil actions' brought by Tribes 'under the Constitution, laws, or treaties of the United States.'"[230] The majority then proceeded to hold the Nation to a standard outlined in *Jicarilla*, in which the Tribe was required to show "that the text of a treaty, statute, or regulation imposed certain duties on the United States."[231] Based on this reasoning, the majority claimed that the 1868 Treaty did not impose any affirmative duties on the United States to secure water for the Navajo Nation.[232]

This reasoning ignores precedent where the Court has interpreted treaties with Tribes to reserve water rights for Native American people and duties upon the United States to protect those water rights.[233] The majority acknowledged that the Navajo Nation has reserved water rights under *Winters*,[234] but failed to recognize that the government should have any obligation to perfect those water rights.[235] In the Navajo Nation's brief, the Tribe argued that under *Winters*, the 1868 Treaty secured a "permanent homeland" for the Navajo people.[236] Because of this "permanent homeland" language, the Tribe argued that the United States intended to promise sufficient water to sustain the Navajo people and established a duty to safeguard their water rights.[237] Like in *Winters* and *Big Horn*, the 1868 Treaty with the Navajo Nation is silent regarding water; however, in those cases, the Court interpreted the Treaty as the Tribe would have

224. Brief for the Navajo Nation, *supra* note 1, at *14.
225. *See infra* pp. 33–35.
226. *Navajo Nation*, 599 U.S. at 564.
227. *Id.*
228. *Id.* at 594 (Gorsuch, J., dissenting).
229. *Id.* at 595.
230. *Id.*
231. *Id.* at 564 (majority opinion).
232. *Id.*
233. Winters v. United States, 207 U.S. 564, 577 (1908).
234. *Navajo Nation*, 599 U.S. at 561.
235. *See infra* pp. 33–35.
236. Brief for the Navajo Nation, *supra* note 1, at *17.
237. *Id.*

understood it and in favor of the Native American people.[238] Here, the Court should have done the same.[239]

In *Herrera v. Wyoming*,[240] the Court analyzed the terms of a treaty between the Crow Tribe and the United States as they would have "been understood by the Indians" at the time the treaty was signed.[241] The Court examined the historical context to determine that the United States and the Crow Tribe did not intend for the Tribe's hunting rights to expire when Wyoming became a state. Much like in *Herrera*, the 1868 Treaty between the Navajo Nation and the United States, along with context and history, show evidence that, when construed as the Tribe would have understood it, the reservation of a "permanent home" included the promise to protect adequate water to sustain the lives of the Diné.[242] At the time the Treaty was signed, the Diné were confined to the Bosque Redondo Reservation, which was known to have poor-quality water inadequate to sustain life.[243] The water on the Bosque Redondo was so poor that many of the Diné died of starvation and disease.[244] The agreement of the 1868 Treaty was signed with the understanding that the Diné would return to their homelands where adequate water was present to sustain their needs.[245] This included using the seeds and agricultural implements provided in the Treaty, and thus, naturally, they needed water to farm and maintain crops.[246] Like in *Winters* and *Big Horn*, the Treaty's purpose would be defeated if the agreement did not contain continued access to water.[247] The Court in *Arizona v. California* aptly illustrates this point:

> It is impossible to believe that when Congress created the great Colorado River Indian Reservation and when the Executive Department of this Nation created the other reservations, they were unaware that most of the lands were of the desert kind—hot, scorching sands—and that water from the river would be essential to the life of the Indian people and to the animals they hunted and the crops they raised.[248]

The Navajo Nation experiences these exact issues today.[249] Current-day Diné are faced with water shortages, hygiene problems, and waterborne disease.[250] Once again, the Navajo Nation and Diné people are

238. *Id.*; *Winters*, 207 U.S. at 577; In re All Rights to Use Water in Big Horn River Sys., 753 P.2d 76, 91 (Wyo. 1988).
239. *See* In re All Rights to Use Water in Big Horn River Sys., 753 P.2d 76, 91 (Wyo. 1988); *see Winters*, 207 U.S. at 577; *see* Whiteman Runs Him, *supra* note 36, at 5.
240. Herrera v. Wyoming, 587 U.S. 329 (2019).
241. *Id.* at 352.
242. *Id.*
243. Brief for the Navajo Nation, *supra* note 1, at *8.
244. *Id.*
245. *Id.*
246. *Id.*
247. Brief of Tribal Nations, *supra* note 70, at *16; Winters v. United States, 207 U.S. 564, 577 (1908); In re All Rights to Use Water in Big Horn River Sys., 753 P.2d 76, 91 (Wyo. 1988).
248. Arizona v. California, 373 U.S. 546, 599 (1963); Cordalis & Cordalis, *supra* note 55, at 350.
249. Cordalis & Cordalis, *supra* note 55, at 350.
250. Crepelle, *supra* note 6, at 170–71.

forced to seek enough water to sustain their homeland and meet the needs of the reservation.[251]

B. The Court Fails to Acknowledge that the United States Breached an Existing Fiduciary Duty to the Navajo Nation

By disregarding authority that establishes an obligation on the United States, the Court sidesteps the crucial issue in Federal Indian Water Law:[252] *Winters* rights remain largely theoretical without the creation of mechanisms to access those rights through stream adjudications, negotiated settlements, or federal court litigation.[253] As a result, Native American Tribes are unable to access their perfected water rights.[254] The Court opined that the United States has no affirmative duty to secure water for the Navajo Nation.[255] The majority reasoned that the United States has never expressly accepted a duty to the Nation under *Jicarilla* and *Mitchell*.[256] However, the majority failed to follow *Arizona v. California* and recognize that that the United States has an established fiduciary duty to perfect the Navajo Nation's water rights and quantify the Tribe's existing rights to the Lower Colorado River.[257]

Under the doctrine of prior appropriation, water rights are not perfected until they are used, so while the Navajo Nation has reserved rights in the Lower Colorado River under *Winters*, they are currently not perfected.[258] The Court failed to understand this issue and declined to recognize that the United States breached its fiduciary duty to the Navajo Nation by not quantifying existing rights for the Navajo Nation.[259]

The Colorado River Compact states clearly that none of the agreements contained in the Compact shall impact the "obligations of the United States of America to Indian Tribes."[260] This language, while an afterthought at the time, carries more weight now than anticipated.[261] In *Arizona v. California*, the Court reasoned that inherent in the Compact were "present perfected rights," and the Court aligned them with *Winters* rights having vested before the BCPA and as such, were entitled to priority under the Act.[262] *Arizona v. California* expressly affirmed *Winters* rights for Tribes in the Colorado River Basin by confirming the findings of the Special Master that the United States had reserved water rights for the

251. *Id.*; *see* Arizona v. Navajo Nation, 599 U.S. 555, 599 (2023) (Gorsuch, J., dissenting).
252. *Navajo Nation*, 599 U.S. at 594 (Gorsuch, J., dissenting).
253. Chambers, *supra* note 79, at 386–87.
254. *Id.* at 386–89.
255. *Navajo Nation*, 599 U.S. at 564; Brief for the Federal Parties, at 17, Arizona v. Navajo Nation, 599 U.S. 555 (2023) (Nos. 21-1484, 22-51), 2023 WL 17881608 at *17.
256. *Navajo Nation*, 599 U.S. at 564.
257. *Id.* at 594 (Gorsuch, J., dissenting).
258. Chambers, *supra* note 79, at 386–89.
259. *Id.* at 594 (Gorsuch, J. dissenting).
260. Cordalis & Cordalis, *supra* note 55, at 342.
261. *Id.* at 344.
262. Arizona v. California, 373 U.S. 546, 599 (1963); Cordalis & Cordalis, *supra* note 55, at 344.

Native American reservations, "effective as of the time of their creation."[263] Additionally, the Court expanded those rights by quantifying them and creating a mechanism by which those Tribes could access their reserved water.[264] Here, in *Arizona v. Navajo Nation*, the Court conceded that the Navajo Nation has *paper* water rights to the Lower Colorado under *Winters*, but the Court failed to follow *Arizona v. California* and acknowledge that inherent in those rights is an obligation to convert those paper rights into *present perfected* water rights.[265]

While the Government and the majority argued that the only duty accepted by the United States was to recognize *Winters* rights for the Tribe, there is extensive historical and judicial evidence to the contrary.[266] In *United States v. Mitchell*,[267] the Court held that "a fiduciary relationship necessarily arises when the Government assumes such elaborate control over . . . property belonging to Indians. All of the necessary elements of a common-law trust are present: a trustee (the United States), a beneficiary (the Indian allottees), and a trust corpus (Indian timber, lands, and funds)."[268] Congress expressly approved the Colorado River Compact and took control of apportioning water rights with the BCPA.[269] All of the Colorado River Basin states and the five Tribes in the basin would not have been able to access their water rights to the Colorado River without massive federal investment in the BCPA and the construction of the Hoover Dam.[270] Under *Mitchell* and *White Mountain Apache Tribe*, this extensive federal control of resources establishes a fiduciary duty on the United States to manage and operate the resources for the Navajo Nation.[271] Every American in the Southwest has benefitted from the BCPA and the Colorado River Compact, except for the majority of Native Americans.[272] By mismanaging the Navajo Nation's Lower Colorado River water rights, the United States has breached its trust duty with the Tribe and failed to fulfill its obligation under the 1868 Treaty.[273] Failure to honor "all treaties made" is a violation of the U.S. Constitution.[274]

263. Cordalis & Cordalis, *supra* note 55, at 346.
264. Arizona v. California, 373 U.S. at 599; Cordalis & Cordalis, *supra* note 55, at 346; Chambers, *supra* note 79, at 390.
265. Arizona v. Navajo Nation, 599 U.S. 555, 561 (2023); *see* Chambers, *supra* note 79, at 390.
266. Brief of Tribal Nations, *supra* note 70, at 22–23; *see Navajo Nation*, 599 U.S. at 593–94 (Gorsuch, J., dissenting); *see* Cordalis & Cordalis, *supra* note 55, at 342; *see* Robison & Kenney, *supra* note 95; *see* Lochhead, *supra* note 109.
267. United States v. Mitchell, 463 U.S. 206 (1983).
268. *Id.* at 225.
269. Lochhead, *supra* note 109.
270. *Id.*
271. *Mitchell*, 463 U.S. at 225; United States v. White Mountain Apache Tribe, 537 U.S. 465, 474–75 (2003).
272. Lochhead, *supra* note 109; *see* Whiteman Runs Him, *supra* note 36, at 5; *see* MacGregor, *supra* note 80, 322.
273. *See* Arizona v. Navajo Nation, 599 U.S. 555, 593 (2023) (Gorsuch, J., dissenting); *see* Whiteman Runs Him, *supra* note 36, at 5.
274. *See Navajo Nation*, 599 U.S. at 585 (Gorsuch, J., dissenting).

C. The Court Ignores the Reality of Congressional, Federal, and State Policy

By failing to honor the 1868 Treaty with the Navajo Nation and not requiring the Government to perfect the Navajo Nation's *Winters* rights, the Court enforces a pattern of congressional, federal, and state policy that disregards tribal water rights.[275] The majority claims that this is an issue for Congress to address and should not be one of judicial enforcement.[276] However, congressional action is often unlikely to be an option for most Native American nations.[277] Many Tribes lack the financial and legal resources to pursue claims either in litigation or in settlement.[278] If a Tribe can reach a negotiated settlement, it then requires the Department of Interior, Department of Justice, and Congress to become involved.[279] The federal agencies lack the resources to manage tribal water settlements.[280] Congress consistently underfunds the agencies responsible for managing these settlements; for example, the Interior Department's Indian Water Rights Office staffs only four people.[281] If a settlement makes it to Congress for approval, it is complicated, time-consuming, and expensive for all parties.[282] As mentioned above, "[w]ater settlements over the past four decades have resolved the water rights of fewer than forty Indian tribes."[283]

In addition to the procedural and logistical challenges Tribes face, state governments will often block the resolution of water settlements, refusing to concede any water to Native American nations.[284] The Navajo Nation has been "locked in contentious negotiations" with Arizona over water for years.[285] Arizona's negotiating strategy is to force Tribes to make concessions unrelated to water such as conditions on casino licenses and limits on reservation boundaries.[286] Arizona's policy often involves creating barriers that Tribes cannot overcome, making negotiations seemingly never-ending.[287] In one instance, Arizona blocked the completion of a pipeline to transport water from New Mexico to the Navajo Nation by inserting federal legislation language that prevents the Tribe from receiving the water until it reaches settlement with Arizona.[288] However, as

275. Whiteman Runs Him, *supra* note 36, at 5; *see Navajo Nation*, 599 U.S. at 585 (Gorsuch, J., dissenting).
276. *Navajo Nation*, 599 U.S. at 566.
277. Cordalis & Cordalis, *supra* note 55, at 354–56; *see* Judith V. Royster, *Climate Change and Tribal Water Rights: Removing Barriers to Adaptation Strategies*, 26 TUL. ENV'T. L.J. 197, 214–15 (2013); *see* Whiteman Runs Him, *supra* note 36, at 5.
278. Cordalis & Cordalis, *supra* note 55, at 354–56; *see* Whiteman Runs Him, *supra* note 36, at 5.
279. Cordalis & Cordalis, *supra* note 55, at 354–56.
280. *Id.*
281. *Id.*
282. *Id.*
283. Chambers, *supra* note 79, at 408.
284. *Id.* at 398–401; Anna V. Smith, Mark Olade & Umar Farooq, *How Arizona Squeezes Tribes for Water*, HIGH COUNTRY NEWS (June 14, 2023), https://www.hcn.org/issues/55-7/indigenous-affairs-colorado-river-how-arizona-stands-between-tribes-and-their-water-squeezed/.
285. Smith et. al., *supra* note 284.
286. *Id.*
287. *Id.*
288. *Id.*

evidenced from other settlements, it is unlikely the Navajo Nation will ever be able to reach settlement with Arizona, and thus, the pipeline from New Mexico will sit unfinished.[289]

In some instances, there is established congressional approval and a statutory duty, and still, Tribes cannot access their water rights.[290] For example, in Durango, Colorado, the Ute and Southern Ute Tribes retain rights to 31% of the water in Nighthorse Lake, yet Congress has never funded the infrastructure needed to bring the water to the reservation.[291] In 1986, Congress enacted the Colorado Ute Indian Water Rights Settlement Act.[292] In committing the United States to this settlement, Congress agreed that the resolution of the Colorado Ute Tribes' water rights claims would be accomplished by building a large water project to supply water to the Colorado Ute Tribes—an enterprise known as the Animas-La Plata Project (ALP).[293] The ALP resulted in the construction of a dam to form Nighthorse Lake and pipelines from surrounding rivers that feed into it.[294] However, due to legal challenges and revised settlements, the project was halted and then downsized.[295] Congress failed to fund any infrastructure to build pipelines to the Ute tribal lands.[296] The dam is complete and the lake is full, but the Ute Tribes and the Ute people have still received no water from the reservoir despite dropping their claims to other water rights in surrounding areas in exchange for this infrastructure.[297]

The majority in *Arizona v. Navajo Nation* claimed that the Navajo Nation could seek congressional action to address their claims to the Lower Colorado River. However, Lake Nighthorse, *Big Horn*, and the never-ending negotiations between Arizona and the Navajo Nation indicate that without the courts recognizing the United States' obligations to Tribes in perfecting water rights, Congress, the federal government, and states will continue to disregard Native American water rights.[298] *Arizona v. California* is an example of the Court quantifying the rights of the Native American Tribes, and as a result, the Tribes receiving perfected water rights through federal programs.[299] Here, the Court had an

289. *Id.*
290. Jim Mimiaga, *Tribes Assert Water Rights on Colorado River Basin*, DURANGO HERALD (Apr. 7, 2022), https://www.durangoherald.com/articles/tribes-assert-water-rights-on-colorado-river-basin/; Mary Shinn, *Lake Nighthorse: "This Water Would Really Help Our Future" — Manuel Heart*, COYOTE GULCH (Jan. 7, 2015), https://coyotegulch.blog/2015/01/07/lake-nighthorse-this-water-would-really-help-our-future-manuel-heart/.
291. Mimiaga, *supra* note 290; Shinn, *supra* note 290.
292. TODD ELLISON, DURANGO DOINGS: CITY FACTS AND PHENOMENA SINCE 1881 451 (2021).
293. *Id.*
294. *Id.*
295. Kalen Goodluck, *Colorado River Crisis Giving Tribes New Opportunities to Right Century-Old Water Wrongs*, WATER EDUCATION COLORADO (May 11, 2022), https://www.watereducationcolorado.org/fresh-water-news/colorado-river-crisis-giving-tribes-new-opportunities-to-right-century-old-water-wrongs/#/.
296. *Id.*
297. Mimiaga, *supra* note 290; Shinn, *supra* note 290.
298. Arizona v. Navajo Nation, 599 U.S. 555, 566 (2023); MacGregor, *supra* note 80, at 321; Mimiaga, *supra* note 290; Shinn, *supra* note 290.
299. Chambers, *supra* note 79, at 392.

opportunity to do the same for the Navajo Nation and yet declined to follow its own precedent to enforce existing obligations on the United States.

The holding in *Arizona v. Navajo Nation* fails to recognize pervasive, systemic issues of unfairness and refuses to hold the United States accountable for breaching its obligations to Native Americans.[300] The Navajo Nation reservation is the largest Native American reservation in the United States, containing thirteen million irrigable acres.[301] Irrigating that total irrigable acreage would require upwards of fifty million acre-feet of water, more than three times the annual flow of the Colorado River.[302] The Navajo Nation was not asking for this amount of water. They were simply asking for the United States to fulfill its trust obligations and quantify the Nation's water rights in the Lower Colorado, and to develop a plan to meet the Tribe's water needs.[303] The federal government is aware of the potential implications on the water supply to other states if the Navajo Nation were granted any access to water rights to the Lower Colorado River.[304] The government refuses to recognize any of the past harm done to the Diné people and fails to prioritize the Nation's needs over those of other states.[305] Non-Indigenous peoples receive the benefits of massive federal investment into water infrastructure.[306] At the same time, Native American nations must invest scarce resources to settle any water rights claims and receive almost no access to federal funding for infrastructure.[307] The result of *Arizona v. Navajo Nation* is yet another decision in a long line of broken promises to the Navajo Nation and the Diné people.

D. The Majority Ignores the Impacts of Climate Change on Marginalized Populations

The climate is changing. Climate scientists have issued dire warnings about the impacts of global climate change,[308] including increased drought and water scarcity in already arid areas.[309] As snowpacks decrease in the western United States, snow melt and the flow of western rivers also decreases.[310] This increases the water scarcity in all western states and the Native American Tribes whose reservations overlap those states.[311]

---

300. *See* Whiteman Runs Him, *supra* note 36, at 5; Brief of Tribal Nations, *supra* note 70, at *27; MacGregor, *supra* note 80, at 322.
301. MacGregor, *supra* note 80, 322.
302. *Id.*
303. *Navajo Nation*, 599 U.S. at 574 (Gorsuch, J., dissenting); Brief for the Navajo Nation, *supra* note 1, at *i.
304. *See* Brief for the Navajo Nation, *supra* note 1, at *17; Whiteman Runs Him, *supra* note 36, at 5.
305. *See* Whiteman Runs Him, *supra* note 36, at 5; MacGregor, *supra* note 80, at 322.
306. *See* Whiteman Runs Him, *supra* note 36, at 5; MacGregor, *supra* note 80, at 322; Lochhead, *supra* note 109, at 306.
307. *See* Whiteman Runs Him, *supra* note 36, at 5; MacGregor, *supra* note 80, at 322; Lochhead, *supra* note 109, at 306.
308. Royster, *supra* note 277, at 203.
309. *Id.* at 214–15.
310. *Id.*
311. Zanoni, *supra* note 128, at 31.

Considering the current state of the climate and water scarcity in the west, the majority opinion asserted that "[t]he Navajos face the same water scarcity problem that many in the western United States face."[312] However, the Diné people's water scarcity problem is different from others in the western United States.[313] On the Navajo Nation reservation, the average Diné person uses roughly seven gallons of water per day, while the average American uses one hundred gallons of water per day.[314] Many houses on the Navajo Nation lack running water, proper sinks, or flush toilets.[315] Additionally, water on the Navajo Nation has been contaminated with uranium from mining, leading to the "Navajo suffer[ing] their own unique radiation-induced disease: Navajo Neuropathy."[316] Extreme poverty on Native American reservations leads to these issues of poor water quality, and the lack of clean water infrastructure leads to the spread of disease among Native American communities.[317] Quite contrary to Justice Kavanaugh's comment, the Navajo people face a very different water problem than other people in the western United States.[318]

Perhaps most importantly, Native American populations have some of the lowest impacts on climate change.[319] They produce the lowest greenhouse gas emissions, the least pollution, and have virtually no industrial operations.[320] However, Native American populations experience an outsized effect from climate change.[321] The Navajo Nation already has a dire water scarcity issue affecting the safety and health of its people, and the increase in water scarcity will only drastically enhance that problem.[322] To compound water scarcity issues, the Navajo Nation and other Tribes lack the resources to engage in lengthy conflicts over water rights with states and federal entities.[323] As water scarcity in the west increases, so will the cost of the water available.[324] Again, the Diné people and other Native American Tribes will lack the economic resources to secure their water through the power of the Tribe alone.[325]

Native American people have a deep spiritual connection to the land, and many Tribes treat water as sacred.[326] "Water is inextricably linked to the economic and social dimensions of Indigenous Peoples'

312. Arizona v. Navajo Nation, 599 U.S. 555, 561(2023).
313. Crepelle, *supra* note 6, at 170–71.
314. *Id.*
315. *Id.* at 170.
316. *Id.* at 171.
317. *Id.*
318. *See id.*
319. Crepelle, *supra* note 6, at 171.
320. *Id.*
321. *Id.*
322. *Id.*
323. Cordalis & Cordalis, *supra* note 55, at 354–57.
324. Zanoni, *supra* note 128, at 143.
325. *See* Cordalis & Cordalis, *supra* note 55, at 354–57; Whiteman Runs Him, *supra* note 36, at 5.
326. Royster, *supra* note 277, at 203.

self-determination. It forms part of their physical basis for their existence."[327] Tribes will not only experience the economic and health impacts of climate change but also face continued attacks on their cultural and spiritual ways of life.[328] Many Native subsistence cultures derive their culture and way of life from the land, but the threats of climate change impact harvests, cultural traditions, and people's health.[329] Lack of precipitation in the parts of North America where Native American people live affects crops and harvests.[330] Finally, many Native American people are seeing the very land they live on being threatened by climate change.[331] Increased fire danger, flooding, and erosion in the American west threatens the land, homes, and safety of many Native American people.[332]

Without an assessment of what the Nation's water needs are and a plan to meet those needs, the Tribe is unable to utilize any of its water rights to the Lower Colorado River and develop plans to adapt to climate change.[333] In *Arizona v. Navajo Nation*, the Tribe requested the Court to acknowledge the United States' responsibility to the Diné people and meet their obligation to provide a permanent home for them.[334] However, the Court declined to do so, perpetuating a pattern of marginalization against Native American people throughout history.[335]

V. CONCLUSION

The recurring failure of the United States government and the Supreme Court to fulfill commitments made in the 1868 Treaty with the Navajo Nation reflects a longstanding pattern of broken promises and injustices against Native Americans. The recent opportunity presented to the Court in *Arizona v. Navajo Nation* and the Court's failure to recognize the trust duty owed to the Navajo Nation exemplifies a continued disregard for the well-being and rights of the Diné people. This persistent cycle of marginalization and oppression, compounded by the adverse impacts of current federal policies and climate change, underscores the urgent need for a comprehensive reevaluation of the government's approach to its treaty obligations and tribal relations.

---

327. Jason Robison, Barbara Cosens, Sue Jackson, Kelsey Leonard & Daniel McCool, *Indigenous Water Justice*, 22 LEWIS & CLARK L. REV. 841, 853 (2018).
328. Robison et al., *supra* note 327, at 853.
329. Itzchak Kornfeld, *The Impact of Climate Change on American and Canadian Indigenous Peoples and Their Water Resources*, 47 ENV'T. L. REP. NEWS & ANALYSIS 10245, 10246 (2017).
330. *Id.*
331. *Id.* at 10247.
332. *Id.*
333. *Id.*; *see* Whiteman Runs Him, *supra* note 36, at 5.
334. Brief for the Navajo Nation, *supra* note 1, at *17; *see* Whiteman Runs Him, *supra* note 36, at 5.
335. Whiteman Runs Him, *supra* note 36, at 5.