

# **ARIZONA V. NAVAJO NATION AND SYSTEMIC FAILURES IN THE TRIBAL WATER ALLOCATION SCHEME**

*Jennifer Horkovich*\*

## INTRODUCTION

When the United States Supreme Court's decision in *Arizona v. Navajo Nation* was published in June 2023, Indian Country was hardly surprised with the Court's ruling. There, the Court found that the United States had no affirmative duty to affirmatively protect the Navajo Nation's water rights under the 1868 Treaty.<sup>1</sup> The Court was clear: the treaty is insufficient for the Navajo's current water needs, but the judiciary is unable to step in to find relief.<sup>2</sup> This decision is another in a long series of cases on water allocation and the federal reserved water right, where tribes have been unable to obtain fundamental rights and/or basic needs guaranteed by treaty. The current legal system by which Native American tribes quantify their federal reserved water allocation right is overly complex and archaic, leaving tribes in a particularly vulnerable position trying to secure water for their people and regular operations. This problem will worsen along with climate change, as higher temperatures lead to lower water levels and tribes and states continue to compete for limited water resources for their people.<sup>3</sup>

---

\* J.D. Candidate, 2025, Fordham University School of Law; B.A., 2022, Wellesley College. The author expresses her gratitude to Professor Nicholas Johnson for his guidance and insight in drafting this Note.

1. *Arizona v. Navajo Nation*, 143 S. Ct. 1804, 1813 (2023).

2. *Id.*

3. BUREAU OF RECLAMATION, BASIN REPORT: COLORADO RIVER, U.S. DEP'T OF THE INTERIOR, <https://www.usbr.gov/climate/secure/docs/2016secure/factsheet/ColoradoRiverBasinFactSheet.pdf> (last visited Dec. 12, 2023).

This note first reviews the decision in *Arizona v. Navajo Nation*, with a particular focus on Justice Neil Gorsuch’s Dissent and the greater implications of the case. The paper then outlines water allocation schemes in the United States on a state (riparian, prior appropriation, and hybrid) and federal level (federal reserved rights). The paper goes on to discuss how federal reserved water rights apply to Native American tribes. Moreover, it outlines primary conflicts in water allocation between tribes and the states, particularly Arizona. It then addresses the current structure of tribal water settlements. Finally, this paper concludes with recommendations for Congressional intervention in setting standards for interpreting and quantifying tribal water allocation and general settlement improvements.

## I. ARIZONA V. NAVAJO NATION

### A. *Brief Introduction to Native American Law Interpretation Principles*

Native American Law<sup>4</sup> is notoriously complex. It involves the laws of over 600 distinct tribal nations and governments,<sup>5</sup> the federal laws on the power and rights of

---

4. American Indian (Native American) Law and Tribal Law are not the same. Professor Elizabeth Reese (Nambe Pueblo) describes “Tribal Law,” as “a kind of law that is passed by a tribal government and that applies on their land and to – in varying degrees – persons on that land” and includes the laws of over 600 tribal governments. LIBRARY OF CONGRESS, *AMERICAN INDIAN LAW: A BEGINNER’S GUIDE* (July 6, 2022), <https://guides.loc.gov/american-indian-law>; National Conference of State Legislatures, *State Recognition of American Indian Tribes* (Oct. 10, 2016), <https://www.ncsl.org/quad-caucus/state-recognition-of-american-indian-tribes#:~:text=State%20Action,formal%20process%20for%20recognizing%20tribes>. “American Indian Law,” on the other hand, “includes both ‘tribal law’ and all other law that has to do with Indians, most importantly, the body of federal laws that determine how much power and what kinds of powers tribal governments have.” Felicity Barringer, *How the U.S. Legal System Ignores Tribal Law*, HIGH COUNTRY NEWS (Oct. 7, 2021), <https://www.hcn.org/articles/law-how-the-us-legal-system-ignores-tribal-law>.

5. National Conference of State Legislatures, *State Recognition of American Indian Tribes* (Oct. 10, 2016), <https://www.ncsl.org/quad-caucus/state-recognition-of-american-indian->



“ the tribes.”<sup>9</sup> This principle was not initially a legislative creation but stemmed from Chief Justice John Marshall’s landmark 1831 ruling in *Cherokee Nation v. Georgia*. There, Chief Justice Marshall famously compared the relationship between tribes and the United States to “that of a ward to his guardian.”<sup>10</sup> Since then, courts have interpreted this relationship as a legally enforceable trust responsibility.<sup>11</sup> But, as a sovereign, the Government does not have the same obligations as a private trustee.<sup>12</sup> Instead, “that trust is defined and governed by statutes [and treaties] rather than the common law,” and so the Government does not assume all of the typical fiduciary duties.<sup>13</sup> Further, “[t]he Government assumes Indian trust responsibilities only to the extent it expressly accepts those responsibilities by statute.”<sup>14</sup> And so, for a tribe to assert a breach-of-trust claim against the United States, the tribe must show that the relevant treaty, statute, or regulation imposed such a duty.<sup>15</sup>

The Supreme Court outlined how these treaties are to be interpreted in *United States v. Winans* (1905).<sup>16</sup> Rather than applying traditional contract rules, courts “construe a treaty with the Indians as ‘that unlettered people’ understood it, and ‘as justice and reason demand in all cases where power is exerted by the strong over those to whom they owe care and protection’ . . . .”<sup>17</sup> The treaty is interpreted in its historical context.<sup>18</sup> Further, “[t]he language used in treaties with the Indians should never be construed to their

---

9. BUREAU OF INDIAN AFFAIRS, WHAT IS THE FEDERAL INDIAN TRUST RESPONSIBILITY, U.S. DEP’T OF THE INTERIOR, <https://www.bia.gov/frequently-asked-questions> (last visited Dec. 12, 2023).

10. *Cherokee Nation v. Georgia*, 30 U.S. 1, 17 (1831).

11. BUREAU OF INDIAN AFFAIRS, *supra* note 8.

12. *See Cherokee Nation of Oklahoma v. United States*, 21 Cl. Ct. 565, 573 (1990) (“The general relationship between the United States and the Indian tribes is not comparable to a private trust relationship.”).

13. *United States v. Jicarilla Apache Nation*, 564 U.S. 162, 174-75 (2011).

14. *Id.* at 177.

15. *Arizona v. Navajo Nation*, 599 U.S. 555, 563 (2023).

16. *See generally, United States v. Winans*, 198 U.S. 371, 371-84 (1905).

17. *Id.* at 380.

18. *Id.* at 381.

prejudice.”<sup>19</sup> In setting this standard, the Court sought to remedy inequalities, including language barriers, severely unequal bargaining power, and a general lack of understanding of British and early American jurisprudence.<sup>20</sup>

### B. *Summary of the Case*

*Arizona v. Navajo Nation* (2023) represents the importance of this debate among tribes, the federal government, and states surrounding water allocation. The Navajo Nation asserted a breach-of-trust claim against the United States, arguing that the 1868 Treaty required the U.S. to take affirmative steps to secure water for the tribe.<sup>21</sup> The Court acknowledged that the treaty included the right to use water as needed. However, the Court rejected the assertion that the United States must “assess[] the Tribe’s water needs, develop[] a plan to secure the needed water, and potentially build[] . . . water infrastructure.”<sup>22</sup> The Court ruled that the United States had no affirmative duty under the 1868 Treaty to affirmatively protect the tribe’s water rights.<sup>23</sup>

Under the first treaty between the United States and the Navajo Nation and as part of the U.S.’s forced assimilation policies, the United States forcibly removed the Navajo from its traditional large stretch of land in the Western United States to an internment camp at Bosque Redondo.<sup>24</sup> The United States was searching for metals in Navajo land.<sup>25</sup> United States officials knew Bosque Redondo lacked safe

---

19. *Worcester v. State of Georgia* 31 U.S. 515 (1832).

20. See generally, *United States v. Winans*, 198 U.S. at 371-84.

21. But see *Arizona v. Navajo Nation*, 599 U.S. 555, 574 (2023) (disagreeing with the majority’s conclusion that “affirmative steps” were requested by the Navajo) (Gorsuch, J. dissenting).

22. *Arizona v. Navajo Nation*, 143 S. Ct. at 1810.

23. *Id.*

24. Native Knowledge 360, *Bosque Redondo*, NAT’L MUSEUM OF THE AMERICAN INDIAN, <https://americanindian.si.edu/nk360/navajo/bosque-redondo/bosque-redondo.cshml> (last visited Dec. 12, 2023).

25. *Arizona v. Navajo Nation*, 599 U.S. 555, 576 (2023) (Gorsuch, N., dissenting).

drinking water, lacked available food (especially with the lack of water), and was geographically remote.<sup>26</sup> By 1864, 8,570 Navajo people were imprisoned there and constantly “faced deprivation, starvation, disease, and death.”<sup>27</sup> 2,000 people died at Bosque Redondo within four years.<sup>28</sup> Eventually, the United States sought to negotiate a new treaty, the Treaty of 1868, with the Navajo - who still were kept forcibly in Bosque Redondo during negotiations.<sup>29</sup>

The United States wanted to forcibly move the Navajo to present-day Oklahoma. However, Navajo leaders Manuelito and Chief Barboncito were firm that they would not go anywhere but home.<sup>30</sup> As Chief Barboncito said to General William Sherman, “I hope to God you will not ask me to go to any other country except my own.”<sup>31</sup> Ultimately, the United States agreed to some of the Navajo Nation’s requests, creating a new reservation in a section of the Colorado River Basin.<sup>32</sup> Notably, the United States promised the land would be the Navajo’s “permanent home.”<sup>33</sup> The U.S. “also agreed . . . to build schools, a chapel, and other buildings; to provide teachers for at least 10 years; to supply seeds and agricultural implements for up to three years; and to provide funding for the purchase of sheep, goats, cattle, and corn.”<sup>34</sup> But now, as climate change worsens, the Navajo have severe water scarcity issues. These

---

26. *Id.* at 576-577.

27. Native Knowledge 360, *supra* note 24.

28. *Arizona v. Navajo Nation*, 599 U.S. 555, 578 (2023) (Gorsuch, N., dissenting).

29. *Id.*

30. Native Knowledge 360, *supra* note 24.

31. *Id.*

32. *Arizona v. Navajo Nation*, 599 U.S. 555, 1821 (2023) (Gorsuch, N., dissenting).

33. Native Knowledge 360, *Navajo Treaty of 1868*, NAT’L MUSEUM OF THE AMERICAN INDIAN, [https://americanindian.si.edu/nk360/navajo/treaty/treaty.cshtml#:~:text=For%20the%20Navajo%20\(Din%C3%A9\)%20the,as%20Navajo%20\(Din%C3%A9\)%20people](https://americanindian.si.edu/nk360/navajo/treaty/treaty.cshtml#:~:text=For%20the%20Navajo%20(Din%C3%A9)%20the,as%20Navajo%20(Din%C3%A9)%20people) (last visited Dec. 12, 2023).

34. *Arizona v. Navajo Nation*, 599 U.S. 555, 578 (2023) (Gorsuch, N., dissenting).

issues are often similar to those faced by settlers in the West but with a different context.<sup>35</sup>

The Navajo sued the U.S. Department of the Interior, the Bureau of Indian Affairs, and other federal parties, asserting a breach-of-trust claim.<sup>36</sup> Arizona, Nevada, and Colorado intervened against the tribe for their own interests in the Colorado River.<sup>37</sup> The U.S. District Court for the District of Arizona had dismissed the tribe's complaint, finding that there was no such affirmative duty imposed by the 1868 treaty.<sup>38</sup> The U.S. Court of Appeals for the Ninth Circuit reversed.<sup>39</sup> The United States Supreme Court concluded that as the 1868 treaty did impose some specific duties, but none related to water beyond agricultural tools, there was no affirmative duty to secure water.<sup>40</sup> As there is no conventional trust relationship between the United States and the tribes, common-law trust principles to infer duties do not apply.<sup>41</sup> And, here, there is no trust established in the treaty regarding water.<sup>42</sup> The Court rejected the argument that the use of the phrase "permanent home" and the history of lacking water at Bosque Redondo would imply an affirmative duty.<sup>43</sup> The Court was clear that Congress could update the law for the Navajo's modern needs, but the Court ruled that it was not the judiciary's role to do so, especially in a setting so complex as allocating water in an arid region.<sup>44</sup>

---

35. *Id.*

36. *Id.* at 1812.

37. *Id.*

38. *Id.*

39. *Id.*

40. *Id.* at 1814.

41. *Id.*

42. *Id.*

43. *Id.* at 1815.

44. *Id.* at 1814.

### C. Justice Gorsuch's Damning Dissent

Notably, Justice Gorsuch and the dissent viewed this case fundamentally differently. In his dissent, Justice Gorsuch argued that because the United States held water in trust for the Navajo, the tribe has a legally cognizable claim for relief to request that the U.S. assess what water rights are held in trust.<sup>45</sup> He highlighted the massive bargaining asymmetry between the United States and the Navajo, as the Navajo tribe was still held against its will at Bosque Redondo, experiencing a continued genocide, struggling with language barriers, and having fundamental misunderstandings with its negotiation partner about the territory's boundaries.<sup>46</sup> Further, he noted that the federal government has intervened to protect Navajo rights in other cases while arguing the Navajo had no right of intervention, such as in *Arizona v. California* (1963). There, the Navajo felt the representation was ineffective but were ultimately denied their own intervention.<sup>47</sup> A 1964 decree establishing water rights in the Colorado River Basin never even mentioned the Navajo.<sup>48</sup> Since then, although the United States has admitted it holds some water rights in trust for the Tribe, the federal government refuses to quantify that water allotment, nor assess these water rights it admits it holds in trust.<sup>49</sup> According to Justice Gorsuch, by making the reservation a "permanent home" for the tribe, the treaty denotes that the Navajo would have continued access to water, and it is inconceivable that the Navajo would contract to give up that right, especially given the tribe's concerns about water.<sup>50</sup> To Justice Gorsuch, when using the basics of treaty interpretation and construing such negotiations in

---

45. *Id.* at 1821.

46. *Id.*

47. *Id.*

48. *Id.*

49. *Id.*

50. *Id.*



favor of the tribe, it is evident that the Navajo adequately pled a complaint and stated a claim for relief.<sup>51</sup>

Justice Gorsuch lamented “[t]he Navajo have tried it all.”<sup>52</sup> Working with federal officials, seeking (and being denied) intervention, attempting clarification on quantification<sup>53</sup> with the Supreme Court, the tribe has tried it all to no avail.<sup>54</sup> There are water rights held in trust for them, again as admitted by the federal government, but it seems hopeless to quantify them at this point.<sup>55</sup> Justice Gorsuch offers a “silver lining here,” suggesting “it is hard to see how this Court (or any court) could ever again fairly deny a request from the Navajo to intervene in litigation over the Colorado River . . . .”<sup>56</sup> But, for now, all the Navajo can hope for is “some measure of justice will prevail in the end.”<sup>57</sup>

#### D. Greater Implications

The U.S. Supreme Court’s decision in *Arizona v. Navajo Nation* reflects how United States environmental law intersects with conflicting Native American, state, and federal interests. The Colorado River Basin, the body of water at issue in the case, is a critical resource in the West. As droughts worsen, there is significantly less water for the states and tribes dependent on the same limited water resource to use.<sup>58</sup> In 2012, the Colorado River Basin Water Supply and Demand Study by the U.S. Department of the Interior, “confirmed, in the absence of timely action, there is likely to be significant shortfalls between projected water supplies and demand in the basin in coming decades,”

---

51. *Id.*

52. *Id.* at 1833.

53. Quantification is used throughout this paper to refer to the process by which the literal amount of water specific tribes are entitled to is assessed.

54. *Id.*

55. *Id.*

56. *Id.*

57. *Id.*

58. Colorado Water Conservation Board, *Colorado River Basin*, COLORADO DEP’T OF NATURAL RESOURCES, <https://cwcb.colorado.gov/colorado-river> (last visited Dec. 12, 2023).

impacting every sector dependent on the Colorado River and its tributaries.<sup>59</sup> The storage reservoirs for the basin, Lake Mead and Lake Powell, are respectively at 27 and 25 percent of capacity, a historic low.<sup>60</sup> There is an increasing risk of “dead pool,” in which water will not flow from the lakes through the basin.<sup>61</sup> The climate crisis only is making matters worse as 42 percent of the severity of the region’s drought can be attributed to human causes.<sup>62</sup> Over the last two decades, increased temperatures have resulted in a 10 percent decrease in the river’s flow.<sup>63</sup> Future drought are predicted to be “hotter, longer-lasting, and larger,” meaning addressing water allocation dynamics between the federal government, states, and tribes is even more pressing moving forward.<sup>64</sup>

Tribes have not always been a part of the allocation conversation. Rather, they have been denied intervention in water allocation litigation. For example, the 1922 Colorado River Compact did not include tribes, nor was it clear what tribes were guaranteed.<sup>65</sup> And, while twenty-two of the thirty Colorado River Basin tribes have some federally recognized right to a quarter of the river’s water, tribes still struggle to quantify and settle claims already established.<sup>66</sup> Further,

---

59. BUREAU OF RECLAMATION, BASIN REPORT: COLORADO RIVER, U.S. DEP’T OF THE INTERIOR, <https://www.usbr.gov/climate/secure/docs/2016secure/factsheet/ColoradoRiverBasinFactSheet.pdf> (last visited Dec. 12, 2023).

60. Tim Vanderpool, *Colorado River Basin Tribes Address a Historic Drought – and Their Water Rights – Head-On*, THE NATURAL RESOURCES DEFENSE COUNCIL (Nov. 14, 2022), <https://www.nrdc.org/stories/colorado-river-basin-tribes-address-historic-drought-and-their-water-rights-head>.

61. *Id.*

62. *Id.*

63. Ella Nilsen, *Colorado River Basin has Lost 10 Trillion Gallons Due to Warming Temps, Enough Water to Fill Lake Mead, Study Shows*, CNN (Aug. 1, 2023) <https://www.cnn.com/2023/08/01/us/colorado-river-water-loss-lake-mead-climate/index.html>.

64. Climate Adaptation Science Centers, *CASC Drought Research Highlights*, USGS (Nov. 29, 2021), <https://www.usgs.gov/programs/climate-adaptation-science-centers/science/casc-drought-research-highlights#overview>.

65. Tim Vanderpool, *supra* note 60.

66. *Id.*

tribes often lack the expensive infrastructure needed to move the water to typically remote reservations, especially when non-Native settlers dam rivers and divert water flow upstream.<sup>67</sup> More recently, in 2019, some tribes were included in drafting the Colorado River Basin Drought Contingency plans – which the U.S. Bureau of Reclamation ordered them to renegotiate in 2022 – while fourteen of the Basin Tribes claimed they were not meaningfully consulted yet again.<sup>68</sup> No agreement was reached.<sup>69</sup>

The legal conflicts surrounding water rights between the federal government, states, and tribes have a direct impact on the daily lives of Native Americans living on reservations. In the United States, 49 percent of tribal homes lack access to reliable water sources, clean drinking water, and basic sanitation.<sup>70</sup> Colorado River Basin tribal members are 67 times more likely to live without running water than other Americans. For the Hopi reservation, roughly 75 percent of members are forced to use drinking water containing arsenic and uranium.<sup>71</sup> While many tribal members struggle to have their basic water needs met, the Biden Administration and Arizona paid two tribes, the Gila River Indian Community and the Colorado River Indian Tribes, to reduce their water usage in order to ease pressure on the state, effectively paying the tribe to relinquish its water right to accommodate the states for three years.<sup>72</sup> How that will impact the local tribal community still is unclear.

As climate change worsens, tribes, states, and the federal government increasingly are concerned about water. Tribes must have a say as early as possible in negotiations over

---

67. *Id.*

68. *Id.*

69. *Id.*

70. Alex Hager, *Many Tribal Homes Don't Have Clean Water, and the Road to Getting It Is Lined with Hurdles*, KUNC (Dec. 8, 2021, 12:00 PM), <https://www.kunc.org/environment/2021-12-08/many-tribal-homes-dont-have-clean-water-and-the-road-to-getting-it-is-lined-with-hurdles>.

71. *Id.*

72. Jake Bittle, *US Turns to Tribes to Help Arizona Survive Colorado River Cuts*, GRIST (April 11, 2023), <https://grist.org/indigenous/colorado-river-arizona-tribes-wategila-river-conservation-deal-biden/>.

consumption pacts to guarantee water access for future generations. However, *Arizona v. Navajo Nation*'s procedural history indicates tribes' water access is complex and convoluted due to the lack of legal protections from Congress and an intricate water rights quantification process catered to special interests. Thus, *Arizona v. Navajo Nation* depicts the ongoing impact of centuries-old tribal and property legal doctrine and jurisprudence and highlights where the federal government might act to improve the water allocation system and tribal involvement. It further emphasizes the urgency of such action.

## II. WATER ALLOCATION SCHEMES

This section provides an overview of water allocation schemes in the United States at both the federal and state level. It includes a review of judicial principles and tribal water rights settlements, to show their unnecessary complexity and archaicness. This section first outlines the state schemes for determining water rights: riparian, prior appropriation, and hybrid. It then describes the origins and constitutional roots of the federal reserved water rights doctrine. Then it offers an overview of the three main types of tribal federal reserved water rights: *Winans*, *Winters*, and Pueblo Indian rights. This section then discusses the impact of involving both state and federal courts in judicial review and the valuation of tribal water rights, ending with an explanation of the current tribal water rights settlement program.

### A. State Schemes: Riparian, Prior Appropriation, and Hybrid

The federal government derives its authority to regulate waters within the United States primarily from the Commerce Clause.<sup>73</sup> While the authority is plenary and

---

73. CONG. RSCH. SERV., R44585, EVOLUTION OF THE MEANING OF "WATERS OF THE UNITED STATES" IN THE CLEAN WATER ACT 5 (2019).

Congress largely delegated responsibility to the states,<sup>74</sup> “with the exception of federal reserved water rights, and to a certain extent with regard to the Colorado River, as to the day-to-day actual governmental control of the rights to use the waters of the United States, Congress has left allocation decisions to the states.”<sup>75</sup> Courts are reluctant to allow meddling in state allocation systems and prioritize local stability.<sup>76</sup> That said, “even parties with a vested state water right are subject to federal statutes that dictate specific rules regarding delivery and use,” and state laws must be consistent with federal regulation.<sup>77</sup>

Nevertheless, states operate on their frameworks regarding general water allocation. There generally are three versions, riparian, prior appropriation, and hybrid, though states do differ in form.<sup>78</sup> Riparian rights “grant[] rights of water use to landowners whose lands are contiguous with the water’s edge.”<sup>79</sup> Thus, water rights are determined by land ownership. Riparian rights stem from the common law<sup>80</sup> and entitle landowners to “reasonable use” in their access to water, the ability to build wharves and piers, and non-transformative water use and consumption.<sup>81</sup> They primarily are seen in the eastern United States.<sup>82</sup> Prior appropriation “is a first-in-time, first-in-right approach” to water allocation.<sup>83</sup> Thus, the earliest “beneficial use” is granted

---

74. 1 Waters and Water Rights § 35.02 (Amy K. Kelley, ed., 3rd ed. LexisNexis/Matthew Bender 2023).

75. *Id.* at § 36.02.

76. *Id.*

77. *Id.*

78. See generally, *id.* at § 37.04.

79. AMANDA WATERS & ERICA SPITZIG, *Water Rights Based on State Law, in WATER RIGHTS AND ENVIRONMENTAL REGULATION: A LAWYER’S GUIDE* (2018).

80. *Id.*

81. Matthew Bender, *supra* note 74, at § 6.01.

82. *Overview of Riparian Water Rights*, Sea Grant Law Center (May 1, 2021), <https://nsglc.olemiss.edu/projects/waterresources/files/overview-of-riparian-water-rights.pdf>.

83. Neil S. Grigg, *State Government Roles in Water Governance: Time for an Upgrade*, 28 PUBLIC WORKS MANAGEMENT & POLICY 2, 11 (2022).

superior rights.<sup>84</sup> But, one can lose their prior appropriation rights by stopping the beneficial use for some time.<sup>85</sup> They primarily are found in the western United States, A non-uniform hybrid system combining aspects of both riparianism and prior appropriation exists in ten Western and Midwestern states.<sup>86</sup>

### B. Federal Reserved Water Rights

#### 1. Federal Reserved Water Rights Broadly

While Congress primarily has left water allocation decisions and schemes to the states, the federal government still plays a role here. Reserved water rights are founded on the assumption that “[w]hen the federal government reserves public lands for particular purposes, it also impliedly reserves sufficient water to effectuate those purposes.”<sup>87</sup> It is considered an exception to typical federal deference to state water law.<sup>88</sup> Further, states are bound by this doctrine “even where the state’s constitution proclaims that all waters are state property. Moreover, reserved rights can be established subsequent to statehood . . .”<sup>89</sup> And, as these uses do not need to be beneficial nor are reserved rights lost from non-use, the doctrine is not as stable or consistent as some courts would prefer.<sup>90</sup> This dynamic inevitably creates conflicts between states and the United States.

Adding tribal water rights complicates it further, particularly in prior appropriation states.<sup>91</sup> As “Indian tribes

---

84. *Id.*

85. *Id.* at 16.

86. *Id.* at 5.

87. Bender, *supra* note 74, at § 37.01.

88. *Id.*

89. *Id.*

90. *Id.*

91. “No case has involved the application of a reserved rights claim in a riparian jurisdiction . . .” *Id.*

But, one Virginia Circuit Court judge has posited that such a claim would be possible. But, “riparian rights attach only to riparian lands, so federal reserved rights

seldom could qualify as senior appropriators,” tribes find themselves at odds with state goals for water allocation.<sup>92</sup> But because tribal reserved water rights “are federal rights under the Supremacy Clause [of the Constitution] . . . state laws cannot affect Indian reserved rights without federal approval.”<sup>93</sup> The United States government must operate with a trust responsibility for these vested property rights,<sup>94</sup> and it frequently asserts these rights on behalf of tribes through litigation, negotiation, and other means. Further, as per the McCarran Amendment and the Department of Justice Appropriation Act of 1953 Section 208, the United States may be joined in any suit for the adjudication of water rights and waives its sovereign immunity.<sup>95</sup> Courts have developed jurisprudence surrounding three types of tribal water rights: *Winans*, *Winters*, and Pueblo Indian Rights.

## 2. “Winans” Rights

*Winans* rights recognize tribal water rights as “reservations of preexisting uses.”<sup>96</sup> In *United States v. Winans* (1905), the Supreme Court recognized that “the treaty was not a grant of rights to the Indians, but a grant of rights from them – a reservation of those not granted.”<sup>97</sup> The United States sought to enjoin various landowners along the Columbia River in Washington from preventing Yakima Nation tribal members from fishing.<sup>98</sup> Under the Treaty of 1859 between the Yakima Nation and the United States, the tribe agreed to cede its land to the United States. The tribe reserved “[t]he

---

would probably attach only to waters on or bordering federal reservations” and would likely not include groundwater. *Id.*

92. *Id.*

93. *Id.* at § 37.02.

94. U.S. Dep’t of the Interior, *Tribes to Receive \$1.7 Billion from President Biden’s Bipartisan Infrastructure Law to Fulfill Indian Water Rights Settlements* (Feb. 23, 2022), <https://www.doi.gov/pressreleases/tribes-receive-17-billion-president-bidens-bipartisan-infrastructure-law-fulfill>.

95. 82 P.L. 495, 66 Stat. 549, 82 Cong. Ch. 651.

96. Matthew Bender, *supra* note 74, at § 37.02.

97. *United States v. Winans*, 198 U.S. 371, 381 (1905).

98. *Id.* at 377.

exclusive right of taking fish in all the streams where running through or bordering [the] reservation . . . in common with citizens of the Territory” as well as hunting, gathering, and pasturing rights.<sup>99</sup> The settler landowners had alleged patents of the United States for this land and grants from Washington for the shore land.<sup>100</sup> The settlers argued that using “in common with the citizens of the Territory” limits tribal rights to that of non-tribal members such that the landowners would have the right to exclude tribal members.<sup>101</sup>

However, because treaty terms must be construed in favor of tribes, the Court looked to the greater context and tribal understanding. And, as the treaty is a reservation of rights by the Yakima Nation, “Citizens might share it, but the [tribe was] secured in its enjoyment [of its rights outside reserved boundaries] by a special provision of means for its exercise.”<sup>102</sup> Without it, the treaty has no effect.<sup>103</sup> As a result, Washington and its residents equally are bound to this treaty, even though Washington was not a state when the treaty was ratified.<sup>104</sup> In summary, the *Winans* doctrine acknowledges the sovereign status of tribes when treaties were negotiated and ensures that those protections are guaranteed against states and local landowners. Courts began interpreting water rights more broadly in later cases, as in *Winters v. United States* (1908) as water often went unmentioned in treaties<sup>105</sup>

### 3. “Winters” Rights

After 1871, the United States stopped negotiating treaties with tribes as independent nations, establishing reservations

---

99. *Id.* (emphasis added).

100. *Id.* at 377.

101. *Id.* at 379.

102. *Id.* at 381.

103. *Id.*

104. *Id.* at 382.

105. Matthew Bender, *supra* note 74, at § 37.02.



by executive order (until 1919) and statute.<sup>106</sup> While the form may matter in interpreting tribal rights, especially given the different directions rights are flowing in each, the Ninth Circuit has held that tribal rights from executive order are entitled to the same protections as those rights from treaties.<sup>107</sup> Notably, treaties are viewed differently from conveyances by statute and executive order, which “are expressed as grants of new uses from the federal government to the Indians,” rather than reserved in negotiation.<sup>108</sup> These “grants of new uses” are *Winters* rights, which can be established through statutes, executive orders, and treaties.

In *Winters v. United States* (1908), the United States sought to enjoin the construction of dams and reservoirs on the Milk River in Montana would have prevented the tributaries from flowing on the Fort Belknap Indian Reservation.<sup>109</sup> Under the May 1888 agreement creating the Fort Belknap Reservation, there was no reservation of water for the tribe.<sup>110</sup> But, the Supreme Court concluded, as ambiguities here are construed in favor of the tribe, the fact that the lands would be “practically valueless” without irrigation, the tribe could not have intentionally not reserved water rights.<sup>111</sup> As such, the Court found the federal government had reserved water rights for the tribes, especially considering its agrarian assimilation goals in creating these reservations, and that it was unfathomable that Congress would take “from [tribes] the means of continuing their old habits, yet did not leave them the power to change to new ones.”<sup>112</sup> Thus, the Supreme Court firmly established that where there was an intended agrarian purpose in reservation creation, the federal government explicitly reserved water for the tribes for that purpose, a “grant of new use[.]”<sup>113</sup> Further, the Court

---

106. *Id.*

107. *Id.*

108. *Id.*

109. *Winters v. United States*, 207 U.S. 564, 576 (1908).

110. *Id.*

111. *Id.*

112. *Id.* at 577.

113. Matthew Bender, *supra* note 74, at § 37.02.

recognized “that the creation of reservations by the Federal Government implied an allotment of water necessary to ‘make the reservation livable.’”<sup>114</sup> Thus, the Court was clear that even if water allotment was not explicitly mentioned in the treaty, courts should presume it to be included in most circumstances.

#### 4. Pueblo Indian Rights

While not as common as *Winans* and *Winters* rights, Pueblo Indian Rights impact some tribes. They are “distinctive in that Pueblos own their lands in fee instead of having the federal government hold their lands in trust . . .”<sup>115</sup> Under the Treaty of Guadalupe Hidalgo in 1848, those living in land ceded by Mexico to the United States became American citizens with property rights as established by Mexican civil law.<sup>116</sup> Pueblo Rights are derived from Spanish and Mexican law, and thus, the foundational jurisprudence is different from the other two.<sup>117</sup> Under the pre-cessation doctrine, “municipalities held prior and paramount rights to surface water and groundwater sufficient to meet the community’s present and future needs,” such that “they may displace long-held existing uses . . . [and] can expand to accommodate new needs.”<sup>118</sup> States in the ceded territory take different stances on Pueblo rights. For example, California recognizes Pueblo rights in addition to riparian, appropriative, and reserved rights.<sup>119</sup> In contrast, the New Mexico Supreme Court determined that

---

114. *Arizona v. California*, 460 U.S. 605, 616 (1982).

115. Matthew Bender, *supra* note 74, at § 37.02.

116. James Grijalva, *Ending the Interminable Gap in Indian Country Water Quality Protection*, 45 HARV. ENV'T L. REV. 1 (2020).

117. Matthew Bender, *supra* note 74, at § 37.05.

118. *Id.*

119. California State Water Resources Control Board, *The Water Rights Process*, [https://www.waterboards.ca.gov/waterrights/board\\_info/water\\_rights\\_process.html](https://www.waterboards.ca.gov/waterrights/board_info/water_rights_process.html) (last updated Aug. 20, 2020).

Pueblo municipal water rights were inconsistent with New Mexico's prior appropriation and beneficial use doctrines.<sup>120</sup>

As for Pueblo Indians, the story is more complicated. In 1858, seventeen Indian pueblos were given a communal, fee simple absolute to their lands.<sup>121</sup> Twenty-five years later, though, the Supreme Court found that those in New Mexico "did not benefit from the restraints on alienation imposed on other Indian lands by the Non-Intercourse Act."<sup>122</sup> Thus, roughly 80 percent of their land was given to settlers before the decision was repudiated by the New Mexico Statehood Act (1910).<sup>123</sup> Later enactments to compensate tribes for their losses effectively disposed of pueblo title to most lands owned by settlers.<sup>124</sup> In 1933, the Pueblo Compensation Act recognized a prior right of water use for lands still in Pueblo ownership.<sup>125</sup> Thus, some scholars find Pueblo's rights similar to *Winans*' due to its having both retaining of lands and "time immemorial" water rights.<sup>126</sup>

### C. Conflicts in Water Allocation

#### 1. Introduction to the State-Tribal Water Appropriation Conflict

State-tribal water conflicts often stem from disdain for federal influence and tribal sovereignty over property the states consider their own as it is physically within the state's boundaries. Litigation occurs regularly. As one scholar summed up the roots of this regular conflict:

"After two hundred years, some states still resent the presence of Indian country within their borders and the limits imposed on state authority there, and they robotically react to tribal exercises of governmental

---

120. *State ex rel. Martinez v. City of Las Vegas*, 135 N.M. 375, 386 (N.M. 2004).

121. Matthew Bender, *supra* note 74, at § 37.05.

122. *Id.*

123. *Id.*

124. *Id.*

125. *Id.*

126. *Id.*

authority with taxpayer-funded lawsuits. Non-Indian industry presumably cares little for the integrity of state sovereignty, but perhaps its comfort with state politicians and their tendency to favor economic development over environmental protection immediately causes disquiet at the first hint of federal or tribal regulation.”<sup>127</sup>

For example, in *Arizona v. California* (SCOTUS, 1952), Arizona filed suit, seeking to resolve ongoing disputes with California over the Colorado River.<sup>128</sup> The United States ultimately intervened on behalf of five tribal reservations, alleging that as the trustees of the tribes, it “[a]sserted ‘that the rights to the use of water claimed on behalf of the Indians and Indian Tribes as set forth in this Petition are prior and superior to the rights to the use of water claimed by the parties to this cause in the Colorado River and its tributaries in the Lower Basin . . . .’”<sup>129</sup> The Lower Basin states were extremely unhappy with the claim that these tribal rights are “prior and superior,” and immediately attacked the Attorney General, applying political pressure such that the petition was withdrawn. The Attorney General refiled to remove the assertion that tribes had prior and superior rights.<sup>130</sup> Thus, tribes often find themselves caught in the power struggle between the states and the federal government and the overall political process in trying to quantify water rights guaranteed by various treaties.

## 2. Quantification & Judicial Review

With so many different and competing rights to water, judicial review of state allocation schemes can be

---

127. Grijalva, *supra* note 116, at 23.

128. ENV'TL AND NATURAL RESOURCES DIVISION, *ARIZONA V. CALIFORNIA*, U.S. DEP'T OF JUSTICE, <https://www.justice.gov/enrd/indian-resources-section/arizona-v-california> (last updated June 6, 2023).

129. *Federal Protection of Indian Resources, Part 1 Before the Subcom on Administrative Practice and Procedure*, 92nd Cong. 212 (1971) (emphasis added).

130. *Id.*



complicated. Such a piecemeal result is hardly surprising, but courts have struggled to find stability and certainty, especially where tribal-reserved (and federal-reserved more broadly) water rights are essentially unquantified until the tribe or the federal government asserts its rights. The Supreme Court has repeatedly affirmed that state courts have jurisdiction over reserved rights with concurrent federal jurisdiction.<sup>131</sup> Thus, “[t]he result is that the law of reserved water rights has become a fractured one.”<sup>132</sup> State forums often quantify reserved water rights of tribes within the state’s jurisdiction.<sup>133</sup> Generally, “[t]he quantity reserved, like the existence and priority of a reserved right, is a function of the purpose of the reservation.”<sup>134</sup> Further, the Supreme Court expressly rejected the notion that off-reservation needs are to be balanced with the reservation’s needs regarding quantification.<sup>135</sup>

Nevertheless, even quantification standards vary. In *Arizona v. California*, the Supreme Court affirmed a “practicably-irrigable-acreage” (“PIA”) standard for quantifying tribal reserved water rights.<sup>136</sup> This standard again reflects the agrarian purposes of reservation creation. The Court found this standard preferable, as it decreased uncertainty by creating a more stable water allocation scheme based on one standard.<sup>137</sup> However, the PIA standard did divide SCOTUS in the 1980s.

While some states have embraced PIA, not all states have.<sup>138</sup> For example, the Arizona Supreme Court explicitly rejected PIA and instead created “a multi-factor balancing test, including the importance of water to tribal culture and

---

131. Matthew Bender, *supra* note 74, at § 37.04.

132. *Id.*

133. *Id.* at § 37.01.

134. *Id.* at § 37.02.

135. *Id.*

136. *Arizona v. California*, 460 U.S. 605, 617 (1982).

137. *Id.*

138. Wyoming Supreme Court in *Big Horn* litigation “established a two-part test for PIA lands: those lands which are (1) physically capable of sustained irrigation, and (2) irrigable at a reasonable cost” with extreme deference. Matthew Bender, *supra* note 74, at § 37.02.

historic water use patterns, the reservation's geography and topography, tribal economic development plans and needs, the practicability and feasibility of planned water uses, and the tribe's present population and projected growth."<sup>139</sup> While the Arizona methodology is more complicated than PIA, it reflects a fuller understanding of specific tribal needs.

#### D. Tribal Water Settlements

While litigation over water rights occurs, such cases are frequently settled or negotiated before proceedings begin or progress. Tribes negotiate for their reserved water rights such that they are established beyond the limited content of treaties, statutes, and executive orders.<sup>140</sup> States may even prefer settlements as they provide states "the certainty they need to plan for the future, including the opportunity to clarify how both Indian and non-Indian rights will be administered."<sup>141</sup> The federal government similarly prefers settlements, primarily because of a Department of Interior Policy Statement stating "disputes regarding Indian water rights should be resolved through negotiated settlements rather than litigation."<sup>142</sup> Relatedly, the Bureau of Indian Affairs, in collaboration with other federal agencies, does run a Water Rights Negotiations/Litigation program "intended to provide technical consultation, and administrative cost support for Tribes engaged in the protection of Indian Water Rights."<sup>143</sup> The Department of the Interior, Department of Justice, and Office of Management and Budget have set criteria for settlements.<sup>144</sup>

---

139. *Id.* at § 37.01.

140. BUREAU OF INDIAN AFFAIRS, INDIAN WATER RIGHTS SETTLEMENTS, U.S. DEP'T OF THE INTERIOR, <https://www.bia.gov/service/indian-water-rights-settlements#:~:text=Indian%20water%20rights%20settlements%20ensure,%2C%20economic%2C%20and%20cultural%20needs> (last visited Dec. 12, 2023).

141. Matthew Bender, *supra* note 74, at § 37.04.

142. BUREAU OF INDIAN AFFAIR, *supra* note 140.

143. BUREAU OF INDIAN AFFAIRS, WATER RIGHTS NEGOTIATION AND LITIGATION PROGRAM, U.S. DEP'T OF THE INTERIOR, <https://www.bia.gov/service/water-rights-negotiation-and-litigation-program> (last visited Dec. 12, 2023).

144. BUREAU OF INDIAN AFFAIR, *supra* note 140.

As of February 2021, thirty-six tribal water rights settlements have been enacted.<sup>145</sup> Further, in 2022, the Bipartisan Infrastructure Law allocated \$2.5 billion to the Indian Water Rights Settlement Completion Fund, including \$1.7 billion for “outstanding federal payments necessary to complete their terms.”<sup>146</sup>

Some critique the settlement and negotiation system as “vehicles by which the federal government may compromise tribal claims or subject the tribes to state control.”<sup>147</sup> Tribes might receive significantly less water than a court would have granted them but with additional concessions forced onto the tribes.<sup>148</sup> Arizona is a particular problem. The state regularly prioritizes business interests over tribal water rights, focused on promoting water for its citizens but regularly obstructing the same for tribes in the state.<sup>149</sup> Settlements can make these problems worse as instead of a court in equity making determinations on the full extent of a tribe’s legal right to reserved water, tribes have to contend with nongovernmental entities having heavy influence and involvement in settlements.<sup>150</sup> This problem makes it harder for the tribe to get a fair deal even though they are legally entitled to significantly more water.<sup>151</sup> Further, tribes have had to make concessions in order to obtain their reserved water rights, “including dropping objections against mining companies and giving up the right to future litigation.”<sup>152</sup> It seems strange that tribes on arid land that lack water, a basic necessity for survival, are considered to be in equal bargaining power with states and corporations.<sup>153</sup>

---

145. *Id.*

146. U.S. Dep’t of the Interior, *supra* note 94.

147. Matthew Bender, *supra* note 74, at § 37.04.

148. *Id.*

149. Anna V. Smith, *How Private Interests Benefit from Tribal Water Settlements*, HIGH COUNTRY NEWS (July 6, 2023), <https://www.hcn.org/issues/55.7/indigenous-affairs-colorado-river-how-private-interests-benefit-from-tribal-water-settlements>.

150. *Id.*

151. *Id.*

152. *Id.*

153. Mark Olalde, Umar Farooq & Anna V. Smith, *How Arizona Stands Between Tribes and Their Water*, PRO PUBLICA (June 14, 6:00 AM),

Regardless, with how lengthy both litigation and settlement processes are, and the continued over-appropriation of water by the states and decreased water availability due to climate change, tribes are in a desperate spot to quantify these rights before it is too late, even if significant concessions are made.<sup>154</sup>

### III. IMPROVING THE UNITED STATES'S WATER ALLOCATION SCHEME AND PROMOTING TRIBAL INTERESTS

In *Arizona v Navajo*, the Court wrote, “It is not surprising that a treaty ratified in 1868 did not envision and provide for all of the Navajos current water needs 155 years later, in 2023. Under the Constitution’s separation of powers, Congress and the President may update the law to meet modern policy priorities and needs.”<sup>155</sup> Fundamentally, that disconnect between the treaties “negotiated” 100+ years and modern needs is central to problems tribes face with water rights. Water scarcity only is going to worsen due to climate change.<sup>156</sup> Native American tribes long have had these problems with water due to the nature of the reservations onto which they were forced. For example, the Navajo Nation lacks running water for approximately 30 percent of its nearly 400,000 members.<sup>157</sup> More broadly, 49 percent of tribal homes lack access to reliable, clean drinking water and basic sanitation.<sup>158</sup> They have fought with states and former

---

<https://www.propublica.org/article/how-arizona-stands-between-tribes-and-their-water>.

154. Anna v. Smith, *supra* note 149.

155. *Arizona v Navajo Nation*, 143 S. Ct. 1804, 1814 (2023).

156. The United Nations, *Water – at the Center of the Climate Crisis*, <https://www.un.org/en/climatechange/science/climate-issues/water> (last visited Dec. 12, 2023).

157. Ian James, *Tribes Seek Greater Involvement in Talks on Colorado River Water Crisis*, THE LA TIMES (June 16, 2023, 5:00 AM), <https://www.latimes.com/environment/story/2023-06-16/tribes-push-for-greater-involvement-in-colorado-river-talks#:~:text=In%20the%20Navajo%20Nation%2C%20an,water%20contaminated%20with%20toxic%20arsenic>.

158. Alex Hager, *supra* note 70.





territories for decades just for basic access to water to meet their needs. Climate change only will make these issues worse. Thus, *Arizona v. Navajo Nation* highlights the need for immediate action to address water rights, including Congressional intervention in defining and interpreting tribal water rights, promotion of tribal sovereignty, and improvements to tribal settlements.

### *A. Congressional Intervention*

As discussed throughout this paper, there are significant failures in the current tribal water rights allocation scheme that the judiciary alone cannot solve. These problems only will continue to worsen as climate change continues to impact water supplies. Thus, Congress must adapt the law to meet current tribal needs.

#### 1. Congressional Standards for Interpreting Tribal Water Allocation

First, Congress can and should set interpretation standards for tribal treaties and reservation-creating legislation and executive orders such that tribal water allocation is not limited to agricultural purposes. The current *Winans* and *Winters* doctrines reflect settler views of tribes as “uncivilized” and often limit tribal water use to an agrarian purpose, resulting in difficulties adapting “negotiated” rights to current needs and practices.

The assumption that tribes were “uncivilized” was the basis for many aspects of forced removal and genocide.<sup>159</sup> For example, through the Dawes Act of 1887, the United States broke up reservations and tribal lands and allotted land (previously held in common by tribal members) to Native American families to take up agriculture.<sup>160</sup> Those lands “were often unsuitable for farming,” despite this

---

159. Matthew Bender, *supra* note 74, at § 37.01.

160. DAWES ACT (1887), THE NAT’L ARCHIVES, <https://www.archives.gov/milestone-documents/dawes-act> (last visited Dec. 12, 2023).

agrarian goal.<sup>161</sup> The policy's ultimate "goal in reserving land for the Indians was to make the "nomadic and uncivilized' tribes into pastoral agrarians."<sup>162</sup> Further, "[i]t was reasoned that if a person adopted 'White' clothing and ways, and was responsible for their own farm, they would gradually drop their 'Indian-ness' and be assimilated into White American culture."<sup>163</sup> In order to fulfill this goal, these lands would need water. This understanding is crucial to the greater Native American water rights picture.

The "agrarian purpose" of reservations directly impacts court decisions on these topics. For example, in *In re General Adjudication of All Rights to Use Water in Big Horn River System* (1992), the Wyoming Supreme Court found that the Shoshone and Arapaho Tribes were not entitled to water rights for fisheries and other uses.<sup>164</sup> Instead, the tribes only could claim water rights for agriculture as "it was the intent at the time to create a reservation with a sole agricultural purpose."<sup>165</sup> As a result, these tribes lost any greater entitlement to water due to the problematic underlying purpose of forced assimilation via agrarianism. These generalizations and historical racist purposes have an impact not just historically but in the current legal scheme, and Congress must reject this view.<sup>166</sup>

---

161. BADLANDS NAT'L PARK, THE DAWES ACT, U.S. NAT'L PARK SERV., <https://www.archives.gov/milestone-documents/dawes-act> (last visited Dec. 13, 2023).

162. Matthew Bender, *supra* note 74, at § 37.02.

163. BADLANDS NAT'L PARK, THE DAWES ACT, U.S. NAT'L PARK SERV., <https://www.archives.gov/milestone-documents/dawes-act> (last visited Dec. 13, 2023).

164. *In re General Adjudication of All Right to Use Water in Big Horn River Sys.*, 835 P.2d 273, 278 (WY, 1992).

165. *Id.* at 277.

166. Congress should be careful to not to go too far the opposite direction by invoking the "ecological Indian" stereotype. The "ecological Indian" is a term best summed up as "a softly spoken 'noble savage,' a natural conservationist who was attuned to the earth's rhythms." Gregory D. Smithers, *Beyond the 'Ecological Indian': Environmental Politics and Traditional Ecological Knowledge in Modern North America*, 20(1) ENV'T HIST. 83-111 (Jan. 2015), <https://www.jstor.org/stable/24690695>. The stereotype intertwines Native people and nature, such that Native Americans are othered and considered closer to nature

Forcing tribes to have limited water use based on centuries-old understandings of tribal civilization and general water needs is inconsistent with the fundamental principles of tribal self-governance. Tribes must be able to adapt their needs not just to an increase in population but to changing goals and social structure. Further, some tribes have greater rights to protected water activities than others, establishing an inconsistent application and result. Thus, Congress should pass legislation clearly outlining what activities tribes have the right to water for and setting clear standards for quantifying that water need. In doing so, Congress should be careful not to limit any right a particular tribe already possesses. Uniformity and consistency are also crucial.

Congress, or the Executive for its agencies, should set standards for ensuring tribal involvement and that tribal needs are met in any proceedings impacting the tribes. There should be a streamlined process by which impacted tribes are alerted to ongoing negotiations or litigation concerning a relevant water supply. The tribes should be able to assert their own claims, separate from the federal government but still with federal support, as required by the federal Indian trustee relationship. The federal government should not be able to deny tribes a right to participate in litigation impacting them. Individual tribes have their own unique interests and cannot be reliably represented fully by one party.

## 2. Protecting Tribal Sovereignty and the Federal Indian Trust Responsibility

Congress should focus on protecting tribal sovereignty and committing to its duty to the federal Indian trust responsibility. Justice Clarence Thomas's concurrence in *Arizona v. Navajo Nation*, as well as his dissent in *Haaland*

---

than humans. For a more in-depth discussion of the ecological Indian stereotype, see Jennifer Horkovich, et al., *The Wolf Controversy: Complicating the Relationship between People and Wolves in the United States*, WELLESLEY COLLEGE (2022).

v. *Brackeen* (2023) and concurrence in *Lac du Flambeau Band of Lake Superior Chippewa Indians v. Coughlin* (2023), reflects a horrifying new direction for Native American Law in arguing for an extreme limitation of the federal Indian trust responsibility. As such, Congress should explicitly reject that proposition as soon as possible and codify fundamental aspects of Native American Law interpretation.

In *Arizona v. Navajo Nation*, Justice Thomas wrote separately, joining the Court's opinion in full but adding onto it his dislike of the trustee doctrine between tribes and the federal government.<sup>167</sup> He expressly takes no issue with precedents' trust language insofar as the trust tribes have previously put into the United States but finds that court interpretation has gone against that direction.<sup>168</sup> Further, Justice Thomas claims that the Constitution's text and history are silent on the trust relationship and dismisses early Supreme Court jurisprudence establishing that relationship as merely dicta. He ultimately writes to push the Court to "clarify the exact status of this amorphous and seemingly ungrounded 'trust relationship,'" seemingly with the intent to abandon it, and thus abandon precedent dating at least as far back as the early 19th century in future cases.<sup>169</sup>

Justice Thomas's proposition would further complicate an already disjointed and unpredictable field of law, disrupting tribal stability. His suggestion unnecessarily would confuse and disrupt multiple centuries' worth of precedent, creating instability in Indian country and confusion regarding already decided rights and future rights of tribes already having a clear direction. Congressional action codifying the federal Indian trust relationship explicitly would solve this problem quickly.

Further, Congress should look beyond Justice Thomas's words and protect tribal sovereignty more broadly through legislation. For example, Congress may increase tribal self-

---

167. *Arizona v. Navajo Nation*, 143 S. Ct. 1819 (2023) (Thomas, J., concurring).

168. *Id.*

169. *Id.*

governance by treating tribes as states for specific legislation. The Clean Water Act is a prime example.

The Clean Water Act is one of three EPA regulatory statutes that treat tribes like states.<sup>170</sup> The Clean Water Act of 1977 amended the Federal Water Pollution Control Act and became the primary federal law governing water pollution in the United States.<sup>171</sup> The Clean Water Act's purpose is "to restore and maintain the chemical, physical, and biological integrity of the Nation's waters."<sup>172</sup> Generally, the Clean Water Act made it illegal "to discharge any pollutant from a point source into navigable waters" without a permit.<sup>173</sup> While the Clean Water Act primarily focuses on setting the ground floor for water pollution regulation, states can establish their schemes with that base floor.<sup>174</sup> Further, tribes expressly are treated as States by the Environmental Protection Agency (EPA) for purposes of many sections<sup>175</sup> of the Clean Water Act, but only if:

- (1) "The Indian tribe has a governing body carrying out substantial governmental duties and powers;"
- (2) "[T]he functions to be exercised by the Indian tribe pertain to the management and protection of water resources which are held by an Indian tribe, held by the United States in trust for Indians, held by a member of an Indian tribe if such property interest is subject to a

---

170. EPA Indian Tribes; Eligibility for Program Authorization Rule, 40 C.F.R. §§ 123, 124, 131, 142, 145, 233, and 501 (1994). The other two acts are Safe Drinking Water Act and Clean Air Act, not explored in this paper. U.S. ENV'T'L PROTECTION AGENCY, TRIBAL INVOLVEMENT IN LAND CLEANUP AND SPILL PREVENTION: LAWS AND REGULATIONS, <https://www.epa.gov/tribal-lands/tribal-involvement-land-cleanup-and-spill-prevention-laws-and-regulations> (last visited Dec. 12, 2023).

171. *See generally*, The Clean Water Act, 33 U.S.C. § 1251 et seq. (1972).

172. *Id.* at § 101(a).

173. U.S. ENV'T'L PROTECTION AGENCY, SUMMARY OF THE CLEAN WATER ACT, <https://www.epa.gov/laws-regulations/summary-clean-water-act> (last visited Dec. 12, 2023).

174. *See generally*, The Clean Water Act, 33 U.S.C. § 1251 et seq. (1972).

175. Specifically §§ 104, 106, 303, 305, 308, 309, 314, 319, 401, 402, and 404. The Clean Water Act, 33 U.S.C. at § 518(e).

trust restriction on alienation, or otherwise within the borders of an Indian reservation; and . . . .”

(3) “[T]he Indian tribe is reasonably expected to be capable, in the [EPA] Administrator’s judgment, of carrying out the functions to be exercised in a manner consistent with the terms and purposes of this Act and of all applicable regulations.”<sup>176</sup>

These tribes also must be federally recognized.<sup>177</sup> The EPA Administrator was tasked with creating final regulations to specify what that treatment would look like.<sup>178</sup> Currently, 84 tribes are authorized to exercise regulatory authority as per the Clean Water Act’s Water Quality Standards.<sup>179</sup> Further, 285 tribes are authorized to be treated as states for purposes of the Clean Water Act’s Water Pollution Control Grants (CWA § 106), and 211 tribes are authorized for its Nonpoint Source Management Grants (CWA § 319).<sup>180</sup> Under CWA 101(g), Congress makes clear that nothing in the Act is meant to supersede or abrogate State water allocation rights and existing policies.<sup>181</sup> Tribes also are authorized to be treated as states for that section, meaning tribal water rights are also not superseded or abrogated but also recognize the equal right to certain bodies of water.<sup>182</sup>

Passing legislation treating tribes as equal to states in limited contexts is challenging. Even in passing the Clean Water Act, the treatment of tribes as equal to states in water regulation was not popular with all of Congress, and some members used debates over the Clean Water Act amendments to tie in questions of water use rights. In

---

176. *Id.* at § 518(e).

177. *Id.* at § 518(h)(2).

178. *Id.* at § 518(e).

179. 107 tribes are authorized under other environmental policies. U.S. ENV’T L PROTECTION AGENCY, TRIBES APPROVED FOR TREATMENT AS A STATE (TAS), <https://www.epa.gov/tribal/tribes-approved-treatment-state-tas> (last visited Dec. 13, 2023).

180. *Id.*

181. The Clean Water Act, 33 U.S.C. at § 101(g).

182. *Id.* at § 518(a).

discussions regarding the amendment, Senator Clifford Hansen discussed the dynamics of state and federal water policies, bringing in the tribal issue. He emphasized westward expansion's emphasis on prior appropriations with State water laws developing around it.<sup>183</sup> As a result, he explicitly takes issue with "the Federal Government declar[ing] that it will make use of the 50 percent of the land that it owns in the West, . . . its position as trustee for Indian lands, . . . money it returns to the American taxpayer, to change the water law of the West and put in its place a system that someone in Washington thinks is better."<sup>184</sup> He views water allocation as a state problem needing state solutions and that this act, in some ways, would be an overreach of federal power.<sup>185</sup> The legislation passed and included the provision treating tribes as states, but the debate behind the Clean Water Act can serve as an example of the success of treating tribes as such.

For legislation treating states as tribes to be successful, the federal government must make it easier for tribes to apply for status, as currently not many tribes actually take advantage of that status. It should review tribal water quality standards to ensure they comply with federal standards. Currently, only 15 percent of eligible tribes are subject to water quality standards, leaving 260 underregulated.<sup>186</sup> This discrepancy is partially explained by tribes' lack of financial and human resources to manage environmental programs, and there is insufficient federal aid to build that program.<sup>187</sup> Professor James Grijalva argues that by not passing water quality standards, the 260 unregulated tribes triggered the Environmental Protection Agency's duty to "promptly

---

183. 123 Cong. Rec. S.1952 (1977).

184. *Id.*

185. *Id.*

186. Katherine McKeen, *Regulating Tribal Waters Without Attacking Tribal Sovereignty*, THE REGULATORY REV. (Aug. 5, 2021), <https://www.theregview.org/2021/08/05/mckeen-regulating-tribal-waters-without-attacking-sovereignty/>.

187. Grijalva, *supra* note 116, at 60.

prepare” and administer standards, which would proactively mandate permitting standards for tribes.<sup>188</sup>

In his article, Professor Grijalva notes several vital impacts of mandating permitting standards. First, he notes that tribes actually can avoid litigation with states and industry interests, lowering tribal costs and limiting that barrier.<sup>189</sup> Many tribes avoid issuing their own water standards out of fear of litigation that could limit the tribes’ sovereignty.<sup>190</sup> Under the CWA, when states sue the EPA over these water regulations, they typically name the EPA as the sole or lead defendant, insulating tribes from significant financial and legal consequences.<sup>191</sup> Second, he argues that tribes treated as states are better positioned to protect themselves from non-tribal pollution.<sup>192</sup> Under the CWA, if a downstream state, or tribe as a state, has stricter water permitting than its neighbor, the upstream state must attain and maintain the downstream standards.<sup>193</sup> Thus, approving these water quality standards and treating them as equal to states “creates a buffer of sorts protecting tribal waters from upstream, off-reservation pollution sources.”<sup>194</sup> Further, tribes can then benefit from judicial deference to the EPA in some cases, especially as the possibility of economic impact upstream is not a legal basis to vacate those standards.<sup>195</sup> These benefits, so long as constrained by tribal self-determination, could significantly improve tribal water concerns. By treating tribes as states in other legislation, Congress further can enhance tribal sovereignty and improve tribes’ abilities to assert legitimate claims.

---

188. *Id.*

189. *Id.*

190. *Id.* at 23.

191. *Id.*

192. *Id.* at 26.

193. *Id.*

194. *Id.*

195. *Id.*



### B. Settlement Improvements

As discussed earlier, settlements increasingly are common, but many tribes' water allocations are unsettled. Congress should create a Special Task Force dedicated to resolving as many tribes' water allocation claims as possible and adequately quantify them urgently. However, in doing so, government branches must ensure that they are fulfilling their duty to the tribes and filtering out competing interests that might limit to what a tribe is legally entitled.

For example, state and private intervention is a significant issue burdening settlement negotiations. A study found that Arizona goes to extensive lengths in negotiation "to extract concessions that could delay tribes' access to more reliable sources of water and limit their economic development," typically by forcing concessions unrelated to water.<sup>196</sup> While the federal government has rejected Arizona's approach, Arizona consistently has been able to delay the appropriation of tribal water rights significantly.<sup>197</sup> As a result, almost half of the tribes in the state still have unsettled water claims.<sup>198</sup> Recently, Arizona attempted to make the state's approval or renewal of casino licenses contingent on water deals and to prevent tribes from quickly expanding reservations.<sup>199</sup> While this problem is not as prominent in other states, tribal water rights are inhibited by states, forcing the federal government and tribes to behave in specific ways and arguably infringing on federal constitutionally granted powers. Local governments and private companies also frequently join the negotiating table.<sup>200</sup> While scholars have found "the full scope of corporate involvement [to be] difficult to track," mining companies benefited in at least six out of fourteen tribal settlements in Arizona.<sup>201</sup> Further, nearly every water settlement for the Colorado River Basin

---

196. Mark Olalde, et al. *supra* note 153.

197. *Id.*

198. *Id.*

199. *Id.*

200. Anna V. Smith, *supra* note 19.

201. *Id.*

guaranteed water contracts for companies, and some protected these companies from future litigation.<sup>202</sup> No agreements lead to severe delays while water continues to decrease in the basin.<sup>203</sup> Under this current system, there are serious environmental justice and equity concerns. As Professor Heather Tanana put it, “[a] big piece of all of this is just how unethical it is to make tribes give up something in order to fulfill a basic human right like water access, and how water has been over-appropriated in the basin at the expense of the tribes.”<sup>204</sup> Thus, while the current settlement structure allows tribes to negotiate water rights without costly and uncertain litigation, it does so still at the expense of tribes, which have to make significant concessions to both state and local governments and private corporations just to gain access to less water than they likely are guaranteed by treaty.<sup>205</sup>

First, the Department of Interior, Bureau of Indian Affairs, and other agencies should commit to assessing and settling every tribe’s existing water allocation quickly, efficiently, and fairly. One of the main problems for the Navajo in *Arizona v. Navajo* is that the tribe simply does not know how much or what water the United States already holds in trust for it. This lack of knowledge prevents the tribe from planning for the tribe and its people’s future. Further, it reflects a greater problem with tribes lacking the tools or resources to determine and fight for their reserved water rights. Congress should consider offering principles and guidelines to use in negotiations, emphasizing the priority of fulfilling the federal government’s fiduciary obligations to the tribes as their trustee. These guidelines might include restricting private corporation involvement in the negotiation process, prohibiting certain concessions from being made in water treaty negotiations, etc.

As climate change worsens, tribes are slated to continue to face the serious economic and general consequences of not

---

202. *Id.*

203. *Id.*

204. *Id.*

205. *Id.*

knowing or being able to determine current and future water access. Thus, Congress and important executive agencies must commit to ensuring the settlement of all tribal water negotiations and the quantification of all tribal water rights within the next twenty years.

#### IV. CONCLUSION

In sum, Native American tribes are facing severe challenges in obtaining water and quantifying the water to which they are entitled. Under the existing scheme, numerous tribes face serious water shortages but are frequently unable to obtain their full water rights. As climate change worsens and water levels fall, it is increasingly crucial that tribes be able to ascertain and assert their water rights. Without quantified water rights, states and local governments will appropriate amongst themselves without tribal interests asserted, leaving tribes without water in the planning process. While the federal government can assert tribal interests, it does not do so consistently or particularly well.

*Arizona v. Navajo Nation* plainly shows that water allocation schemes are an ongoing issue and that the current policy is not updated or sufficient to address tribal needs. While the Court may not have had another option, Congress has the authority to act on this issue. Congress must update the tribal settlement negotiation program and tribal programs more broadly to protect tribal sovereignty and fully obtain guaranteed tribal water rights.