

LITIGATION/WATER RIGHTS

Navajo Nation v. Interior/Indian Reserved Water Rights

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On November 4, the U.S. Supreme Court granted certiorari for two petitions from: (1) the States of Arizona, Colorado, Nevada and various water districts from Arizona, California, and Nevada (Docket #21-1484); and (2) the Department of the Interior (DOI) (Docket #22-51), appealing a 9th Circuit decision, *Navajo Nation v. Department of the Interior et al.*, 996 F.3d 623 (9th Cir. 2021). The two cases have been consolidated under Docket #21-1484.

The Navajo Nation filed the underlying case in 2003, which included a breach of trust claim against the federal government for failure to consider or protect the Nation's unquantified water rights in managing water projects on the Colorado River. Following a lengthy stay for settlement negotiations, the case resumed in 2013, and the Navajo Nation amended its complaint multiple times in response to decisions from the District Court and 9th Circuit about issues of sovereign immunity and standing to assert its various claims for relief. In its proposed Third Amended Complaint, the Navajo Nation sought an injunction compelling the federal government to: (1) "...determine the extent to which the Navajo Nation requires water from sources other than the Little Colorado River to enable its Reservation to serve as a permanent homeland for the Navajo Nation;" (2) "develop a plan to secure the water needed;" (3) "exercise [the government's] authorities, including those for the management of the Colorado River, in a manner that does not interfere with [such] plan;" and (4) "analyze" the government's "management decisions" in light of such plan and "adopt appropriate mitigation measures to offset any adverse effects" (as quoted in the DOI petition).

The District Court denied the motion to file the proposed Third Amended Complaint, holding that there was no treaty, statute, or regulation that imposed an enforceable trust duty on the federal government; that enforceable trust duties are not inferable from implied water rights; and that claims to *Winters* rights would have to be filed with the Supreme Court under the retained jurisdiction in *Arizona v. California*. The 9th Circuit reversed the decision, holding that the breach of trust claim was appropriately premised on the implied federally-reserved water rights in the Nation's treaties with the United States, under the *Winters* Doctrine. The court further held that the "Nation's [proposed Third Amended Complaint] does not seek judicial quantification of rights to the [Colorado] River, so we need not decide whether the U.S. Supreme Court's retained jurisdiction [in *Arizona v. California*] is exclusive." The 9th Circuit remanded to the District Court to allow the Navajo Nation to amend its complaint.

The intervenor-defendant States appealed, presenting the questions of: (1) Whether the 9th Circuit's decision was contrary to the Supreme Court's exclusive jurisdiction over the allocation of Lower Basin Colorado River (LBCR) water, as retained in *Arizona v. California*?; and (2) Whether the Navajo Nation could assert breach of trust claims by relying on implied rights to water under the *Winters* Doctrine?

The States argued that DOI would not be able to meaningfully manage the LBCR to protect the Nation's alleged and unquantified water rights, or to develop a plan to meet the Nation's water needs, without a judicial decree quantifying those rights. An *ex parte* determination of those rights by DOI has already been prohibited by *Arizona v. California*. Additionally, the delivery of LBCR water to the Nation would necessarily reduce the volume of water available to vested water rights holders in Arizona under the 2006 Consolidated Decree in *Arizona v. California*, and would undermine the court's goals of finality and clarity in issuing that Decree.

The DOI, including the Bureau of Reclamation and Bureau of Indian Affairs, also appealed, presenting the question: "Whether the federal government owes the Navajo Nation an affirmative, judicially enforceable fiduciary duty to assess and address the Navajo Nation's need for water from particular sources, in the absence of any substantive source of law that expressly establishes such a duty?"

DOI's petition recounted parts of the history of the Colorado River Compact and the proceedings in *Arizona v. California*. While the United States claimed *Winters* rights on behalf of 25 Indian reservations in the Lower Basin, including the Navajo Reservation, only five of those reservations were located on the "mainstream" of the Colorado River. The remaining reservations, including the Navajo Reservation at that time, were located on tributaries, and the Special Master in *Arizona v. California* held that the 1928 Boulder Canyon Project Act intended to apportion only the mainstream, the water delivered to Lee's Ferry by the Upper Basin states. The Supreme Court declined to adjudicate the claims of reservations asserting *Winters* rights in the tributaries.

The boundaries of the Navajo Reservation have been expanded since then, by Executive Order and Congressional statute, and the mainstream of the Colorado River now flows along the Reservation's northwestern border. Meanwhile, the United States has asserted *Winters* rights to tributaries of the Colorado River system on behalf of the Navajo Nation in adjudications in Arizona, New Mexico, and Utah. The Navajo Nation's water rights to tributaries in New Mexico and Utah have been quantified and resolved as part of negotiated settlements approved by Congress, currently in the implementation phase. The United States did not seek to quantify the Nation's rights to the mainstream of the Colorado River.

DOI's petition argued that the Supreme Court and other appellate courts have set precedents "...that an Indian tribe cannot sue to enforce an asserted trust obligation against the United States unless the tribe can 'identify a specific, applicable, trust-creating statute or regulation that the Government violated.'" DOI argued that such trust obligations raise "significant separation-of-powers concerns," where the court may undermine Congress's "sovereign capacity to implement national policy respecting the Indian tribes." Additionally, DOI argued that the amorphous nature of a potentially broad range of duties under the *Winters* Doctrine could impose a regime of ongoing judicial oversight of duties not expressly accepted by Congress.

The Navajo Nation noted that the precedents cited by DOI are all Indian Tucker Act decisions relating to monetary damages, and do not address *Winters* water rights and seeking injunctive relief. The Nation also pointed out that the federal government already litigates *Winters* rights and administers the water on the Colorado River, and the case-specific holding of the 9th Circuit would not have far-reaching trust implications for the courts or Congress. The Nation's brief recounted the Supreme Court's history of recognizing the distinctive obligation of trust with exacting fiduciary standards in the United States' execution of its treaty obligations toward tribes, including the implied rights to water recognized in *Winters*. The Nation also noted the DOI's acknowledgment of the Nation's legal interests in its unquantified reserved water rights in the environmental impact statements for the 2007 Colorado River Interim Guidelines (for shortages) and for surpluses (2020). Further, the Nation emphasized that at this stage, the 9th Circuit has only authorized the Nation to amend its complaint, with no order compelling the government to deliver water.

In their own petition and their response to the DOI petition, the States pointed to cases where courts have "consistently rejected claims that *Winters* rights require the Government to develop water for a tribe or enforce water rights on behalf of a tribe:" (1) *Hawkins v. Haaland*, 991 F.3d 216, 225-27 (D.C.Cir. 2021); *Ute Indian Tribe of the Uintah & Ouray Reservation v. United States Dep't of Interior*, 1:18-CV-00547 (CJN), 2021 WL 4189936, at *7 (D.D.C. Sept. 15, 2021); and *Hopi Tribe v. United States*, 782 F.3d 662, 669 (Fed. Cir. 2015). "In each of these cases, the courts looked for specific, enforceable trust obligations established by federal law or treaty, and found none." The States also noted that the effects of the 9th Circuit opinion would extend beyond this case, impacting eleven other tribes in Arizona with unquantified water rights claims currently assigned settlement negotiation teams. Additionally, "...its effect will be felt throughout the West, leaving those with adjudicated water rights in the Colorado River Basin subject to having the security of their water rights severely undermined by administrative adjudications conducted not in courts but within the offices of the U.S. Bureau of Reclamation and the Bureau of Indian Affairs."

The Navajo Nation disputed that the three cases cited by the States are applicable. "One of the additional decisions doesn't even involve a breach-of-trust claim; another does not involve reserved water rights under *Winters*; and in yet another, the tribe – unlike the Nation here – failed to identify a specific source of law establishing a fiduciary duty. None of the decisions undermines the conclusion that treaty-based *Winters* rights combined with extensive statutory and regulatory government control over water can impose fiduciary duties."