UC Law Environmental Journal

Volume 30 | Number 2 Article 5

5-2024

Arizona v. Navajo Nation and the Fight for Natural Resources in Indian Country

Katherine Hanson

Arizona v. Navajo Nation and the Fight for Natural Resources in Indian Country

Katherine Hanson

Abstract

Water in the American southwest is fiercely fought over. The Colorado River, a primary water source in the region, has produced volumes of litigation, such that it has come to be known as the "Law of the River." With states, tribes, individuals, and the federal government all vying for water, not all will succeed. The Article begins by discussing the Court's decision in Arizona v. Navajo Nation, demonstrating that agreements with tribes under treaty will no longer be afforded the same protections when ambiguity exists, and, in the battle for water, tribes will be among the first to suffer the impacts. The Article then explores the Ninth Circuit decision, Washington v. United States, to provide a comparison where treaties were viewed more broadly. Finally, the Article delves into the implications these cases will have on the tribes, which will have devastating impacts on their communities and their very ability to survive.

> The first people came up through three worlds and settled in the fourth world . . . The surface of the fourth world was mixed black and white, and the sky was mostly blue and black. There were no sun, no moon, no stars, but there were four great snow-covered peaks on the horizon in each of the cardinal directions.
>
> Creation of First Man and First Woman, Navajo Nation[1]

1. *Creation of First Man and First Woman*, AMERICAN INDIAN MYTHS AND LEGENDS 39 (Richard Erdoes & Alfonso Ortiz eds., 1984).

TABLE OF CONTENTS

Introduction

As resources continue to become more scarce in our changing world, disadvantaged communities are likely to continue to be the most heavily impacted.[2] This effect is especially acute in cases pertaining to water.[3] Tribes in the United States face a unique set of challenges due to intersecting domains of law across state, federal, and tribal boundaries.[4] As sovereign nations within a colonizer country, tribes will likely continue to face an unwelcoming legal arena in which battles for water and other resources are ever more hotly debated.

One such case was the 2023 Supreme Court decision in *Arizona v. Navajo Nation*, a water rights dispute regarding what obligations the United States (U.S.)

2. *See Economically Disadvantaged Communities*, U.S. DEP'T OF AGRIC., https://perma.cc/RT4T-8PHE.

3. *See id.*

4. *See* Joseph William Singer, *The Indian States of America: Parallel Universes and Overlapping Sovereignty*, 38 AM. INDIAN L. REV. 1, 11–15 (2013).

has to the Navajo Nation's rights to water.[5] The Court's analysis can be divided into three main issues: (1) what the Navajo were requesting; (2) how best to characterize that request; and (3) how broadly treaty obligations should be interpreted. This Article argues that the Court held incorrectly against the Navajo on all three counts.

Regarding the first and second issues, the Court incorrectly decided against the Navajo by inaccurately interpreting the Navajo's request—to compel the U.S. to assess their water rights—and instead, focused solely on whether the U.S. had an affirmative duty to provide that water. Unsurprisingly, the Court was reluctant to impose on the United States any sort of affirmative duty to provide water for the Tribe, especially in a region defined by its water scarcity. Regarding the third issue, the Court set a concerning precedent by failing to apply the "Indian canons" of treaty interpretation and failing to uphold the trust relationship between the United States and the tribes. This led to a very narrow interpretation of the 1868 Treaty with the Navajo Nation. Without an assessment of the Navajo's rights, the consequence of the Court's decision on the third issue is that tribes now have little recourse to intervene on their own behalf to defend their access to natural resources and enforce the treaties upon which their rights are based.

This Article begins with an overview of the trust relationship the U.S. has with tribes, the implied water rights doctrine, and a brief history of the Navajo Nation and their experiences with water and the U.S. These sections provide important background for understanding the Court's decision in *Arizona v. Navajo Nation*.[6] The Article will then turn to the case itself and provide a brief overview of the preceding litigation, a breakdown of the arguments and the opinion of the Court, and an analysis of why the Court decided incorrectly in that case. Next, the Article will compare the Court's decision in *Navajo Nation* to the Ninth Circuit's decision in *United States v. Washington*.[7] This comparison will highlight the Ninth Circuit's broader interpretation of treaty rights, which ensures tribes are able to thrive, in contrast to the Supreme Court's narrow interpretation in *Navajo Nation*.[8] In particular, the comparison is critical to the discussion because it illustrates the Court's reluctance around defining tribal rights for scarce resources when treaties are silent as to those rights, which sharply contrasts with the Ninth Circuit's more expansive use of the Indian Canons to infer implied rights in favor of tribes. Finally, the paper will discuss the implications of the *Navajo Nation* decision, which leaves tribes with unquantified rights and little recourse to protect water and potentially other resources, over which the U.S. exercises considerable control.

I. Background

Arizona v. Navajo Nation discussed the obligations of the U.S. regarding the water rights of the Navajo Nation, but the implications of this decision go far beyond that. Central to the Court's holding was its interpretation of the trust relationship between tribes and the United States, the implied water rights doctrine,

5. *See generally* Arizona v. Navajo Nation, 599 U.S. 555 (2023).
6. *See id.*
7. *See generally*, United States v. Washington, 853 F.3d 946, 954 (9th Cir. 2017).
8. *See generally, id.*

and the interpretive principles applicable when faced with ambiguous treaties between tribal nations and the federal government. This section provides background for the subsequent discussion of *Navajo Nation* by explaining the law in each area.

A. A Brief Overview of the Trust Relationship between the U.S. and Tribes

The trust relationship between tribes and the United States is described, by the Department of the Interior, as "a legally enforceable fiduciary obligation on the part of the United States to protect tribal treaty rights, lands, assets, and resources, as well as a duty to carry out the mandates of federal law with respect to American Indian and Alaska Native tribes and villages."[9] As two scholars explained, "[i]n a series of cases known as the *Marshall* trilogy, the U.S. Supreme Court recognized tribal sovereignty—the ability of tribes to govern their land and people—but established a special relationship between the federal government and tribes, similar to that of a guardian and ward, or trustee and beneficiary."[10] The *Marshall* trilogy includes *Johnson v. M'Intosh*, *Cherokee Nation v. Georgia*, and *Worcester v. Georgia*, which collectively established federal control over Indian affairs as "wards," established the United States as their "guardian," and distinguished tribes as distinct entities from states.[11]

The trust doctrine had implications for *Arizona v. Navajo Nation* and will likely continue to impact other cases involving treaty rights. The United States has an obligation to protect rights and resources under treaties, and if the U.S. fails to do so, tribes can compel it to uphold that obligation.[12] Tribes have a legal recourse because treaties are like contracts, and when one side fails to uphold its obligations, the injured party can sue.[13] The U.S. can also bring suit on a tribe's behalf, if third parties are interfering with those rights.[14] However, ambiguities in treaties make the tribe's rights more difficult to interpret. Lately, the Court has established new precedent indicating that the U.S. has no legal obligations or duties, unless the

9. U.S. DEP'T OF INTERIOR, *Frequently Asked Questions*, BUREAU OF INDIAN AFFS., https://perma.cc/THW8-CAKK.

10. Heather Tanana & Elisabeth Parker, *The Unfulfilled Promise of Indian Water Rights Settlements*, 37 NAT. RES. & ENV'T 12, 15 (2022).

11. *See Colonial Period (1492-1828): Key Case Law – Marshall Trilogy*, FEMA EMERGENCY MGMT. INST. INDEP. STUDY PROGRAM, https://perma.cc/XC4J-9ZDD.

12. *See* U.S. Dep't of Interior, *supra* note 9; *see also Navajo Nation*, 599 U.S. at 585 (Gorsuch, J., dissenting).

13. *See Navajo Nation*, 599 U.S. at 585–87 (Gorsuch, J., dissenting).

14. *See, e.g.*, U.S. Dep't. of Justice, Just. Manual § 5-14.001 (2018) (describing instances of the U.S. bringing suit on a tribe's behalf. For example, the Indian Resources Section within the federal Department of Justice was established "to conduct litigation for the United States in order to protect the trust resources, programs, and governmental authority of federally recognized Indian tribes, as well as real property held in trust or restricted fee for members of such tribes."); *see also infra Winters v. United States*, 207 U.S. 564 (1908), and *Washington*, 853 F.3d at 946 (where the United States brought suit on behalf of tribes).

government expressly agreed to a specific obligation or duty.[15] When treaties lack clarity, such as regarding the explicit protections for tribes, the potential for harm is particularly devastating to tribal nations.

B. The Implied Water Rights Doctrine

The implied water rights doctrine, also referred to as "reserved rights," can be traced back to *Winters v. United States*. In *Winters*, water was being diverted upstream, which was impacting the Fort Belknap Reservation's access to water.[16] The United States brought suit on behalf of the tribes to prohibit any manner of preventing the water from flowing to the reservation.[17] In *Winters*, the Court explained that the goal of the government in the creation of the reservation was to change the habits of the tribes from a nomadic people to a more pastoral, "civilized" people, primarily through facilitating farming operations.[18] However, as the Court noted in *Winters*, this policy would make little sense unless the tribes had access to water, for "[t]he lands were arid, and, without irrigation, were practically valueless."[19] The Court stated "it would be extreme to believe that within a year Congress destroyed the reservation and took from the Indians the consideration of their grant, leaving them a barren waste,—took from them the means of continuing their old habits, yet did not leave them the power to change to new ones."[20] Thus, the decree that enjoined the diversion of water away from the reservation was upheld.[21] This case is critical for establishing the implied water rights doctrine itself, through which many tribes have established their water rights.[22]

In *United States v. New Mexico*, another case involving implied water rights, the Court's analysis suggested limits to the scope of the implied water rights doctrine. The Court held that, where water is necessary to fulfill the purposes for which a federal reservation was created, it is implied that the United States intended to reserve the necessary water.[23] However, the Court's analysis expressed a very narrow view of the reasons for which the federal reservation of land, reserved for the Gila National Forest, was set aside. The Court concluded that "Congress intended national forests to be reserved for only two purposes-'[t]o conserve the water flows, and to furnish a continuous supply of timber for the people[,]'"[24] and

15. *See Navajo Nation*, 599 U.S. at 564 (majority opinion); *see also United States v. Jicarilla Apache Nation*, 564 U.S. 162, 177 (2011); *see also United States v. Navajo Nation*, 537 U.S. 488, 506 (2003).

16. *See Winters*, 207 U.S. at 567.

17. *See id.* at 565.

18. *See id.* at 575–76.

19. *Id.*

20. *Id.* at 577.

21. *See id.* at 578.

22. *See* ERIC B. HECOX, *Federal Reserved Water Rights*, WESTERN STATE'S WATER LAWS: A SUMMARY FOR THE BUREAU OF LAND MANAGEMENT 21, 21–22 (2001), https://perma.cc/F4RL-M72V (the implied water rights doctrine applies both for tribal reservations and other federal reservations of land from the public domain).

23. *See* United States v. New Mexico, 438 U.S. 696, 702 (1978).

24. *Id.* at 707 (internal citation omitted).

not for aesthetic, recreational, or preservation purposes.[25] The dissent in *New Mexico* disagreed and stated a much broader view, that forests consist of the wildlife that inhabit them, and "the United States is entitled to so much water as is necessary to sustain the wildlife of the forests, as well as the plants."[26] In spite of its limited view, the majority opinion held that consideration must be given to both the asserted water right and the specific purposes for which the land was reserved.[27] However, compared to the expansive doctrine from *Winters*, the *New Mexico* decision signaled that the Court would henceforth restrictively define the purpose of a federal reservation and, by extension, place limitations on how much water was really necessary to fulfill such a narrow purpose.

Later, in *Cappaert v. United States*, the Court further limited the implied water rights doctrine by stating that, when the federal government reserves land, the government impliedly reserves water only "to the extent needed to accomplish the purpose of the reservation" but no more.[28] In *Sturgeon v. Frost*, the Court clarified that this enabled the federal government to maintain the specific amount of water to fulfill that purpose, meaning that "the Government could control only the volume of water necessary for the tribe to farm or the fish to survive."[29]

Rhetoric regarding farming operations was contained within the treaty with the Navajo as well, similar to that discussed in *Winters*.[30] Despite the assimilationist rhetoric of *Winters* and the narrowing trend of the subsequent cases, the implied water rights doctrine remains the primary source of water rights for many tribes,[31] and is generally quantified through either adjudication or settlement.[32] The Navajo relied on these principles in their argument to the Court.[33]

C. The Navajo Nation and the Law of the River[34]

The Navajo Nation is one of the largest tribes in the United States today. "The Navajo Nation extends into the states of Utah, Arizona, and New Mexico, covering over 27,000 square miles,"[35] with a population of close to 400,000.[36] However, despite being one of the largest tribes, "Navajo households, in particular,

25. *See id.* at 705.
26. *Id.* at 719 (Powell, J., dissenting).
27. *See id.* at 700 (majority opinion).
28. Cappaert v. United States, 426 U.S. 128, 138 (1976).
29. Sturgeon v. Frost, 587 U.S. 28, 44 (2019) (citing *Winters*, 207 U.S. at 576–77 and *Cappaert*, 426 U.S. at 141).
30. Treaty Between the United States of America and the Navajo Tribe of Indians, June 1, 1868, 15 Stat. 667 [hereinafter Treaty of 1868]; Winters v. United States, 207 U.S. 564 (1908).
31. *See* HECOX, *supra* note 22, at 21–22.
32. *See* Tanana & Parker, *supra* note 10, at 7.
33. *See* Brief for the Navajo Nation, Arizona v. Navajo Nation, 599 U.S. 555 (2023) (No. 21-1484).
34. *The Law of the* River, U.S. DEP'T OF INTERIOR (Mar. 2008), https://perma.cc/2XLZ-WTZC (the "Law of the River" refers to the large body of law that is responsible for managing and regulating the Colorado River).
35. *History*, NAVAJO NATION, https://perma.cc/7EQ4-QFFS.
36. *See* Simon Romero, *Navajo Nation Becomes Largest Tribe in U.S. After Pandemic Enrollment Surge*, N.Y. TIMES (May 21, 2021), https://perma.cc/BSC6-83CF.

are 67 times more likely than other Americans to live without access to running water."[37]

Not only is water an important resource, but the Colorado River is a sacred place to the Navajo people.

> This place, Bodaway, Martin [, a Navajo citizen,] says, pronounced "Dibáá' Hóyéé" in the Navajo language, means "water scarce." . . . "That's the way it is out here. We have water, but getting to it is hard." . . . According to Martin, Navajos have been going down [to the river] for salt for a long time. The salt they collect is used in ceremonies for a baby's first laugh, puberty, and marriage. They also use salt for preparing buckskins that will be used in ceremonies.[38]

The river is "revered as a life force and considered a protector of the Navajo people."[39] The Rio Grande, the Little Colorado, the Colorado, and the San Juan are the rivers encircling the land of the Navajo people, and four is an important number in Navajo culture with "four directions, four seasons, four colors and the first four clans all associated with the four sacred mountains."[40]

However, this land and the water were taken away from the Navajo people. As Justice Gorsuch discussed in his dissent in *Navajo Nation*, there were many conflicts between the Navajo Nation and the United States, following the Mexican-American War, eventually leading to the tribal nation's removal from its homeland as well as its "relocation" to the Bosque Redondo, a place ravaged by water scarcity and seen as a "suitable reservation" to end the "wild and predatory life" of the Navajo.[41] In the Navajo Nation's brief to the Court, it discussed how "[t]he U.S. military rounded up the Navajos, forcing them on the Long Walk more than 300 miles from their ancestral homeland to Bosque Redondo. Without usable water, the area was unlivable."[42] During this period of relocation, 2,000 Navajo died in the span of four years.[43] Eventually, it became clear that this relocation was not sustainable, and the U.S. and the Navajo Nation drafted a new treaty in 1868.[44]

The Treaty of 1868 laid out several provisions. It set out the original reservation boundaries, which have since been expanded by Congress.[45] Conveniently, many of the reservation boundaries border but do not include sources of water, like the Colorado River. Additionally, like many other treaties of

37. Tanana & Parker, *supra* note 10, at 12.

38. Sarana Riggs, *Navajo Ties to the Little Colorado River*, GRAND CANYON TR.: BLOG (Mar. 24, 2022), https://perma.cc/CML6-YYTD.

39. Patricia Biggs, *Navajo*, NATURE, CULTURE & HIST. AT GRAND CANYON, https://perma.cc/V8CF-TN9Q.

40. *Id.*

41. *Navajo Nation*, 599 U.S. at 576 (Gorsuch, J., dissenting) (internal citation omitted).

42. Brief for the Navajo Nation at 1, Arizona v. Navajo Nation, 599 U.S. 555 (2023) (No. 21-1484).

43. *See Navajo Nation*, 599 U.S. at 578 (Gorsuch, J., dissenting).

44. *See* Treaty Between the United States of America and the Navajo Tribe of Indians, June 1, 1868, 15 Stat. 667 [hereinafter Treaty of 1868].

45. *See id.* art. II.

that time, the Treaty of 1868 outlined an infrastructure for the Navajo to commence farming operations.[46] The agreement also explained that the Navajo relinquished their claim to all territory outside the reservation, but were permitted to continue hunting on lands contiguous to the reservation.[47] The treaty stated that "[t]he tribe herein named, by their representatives, parties to this treaty, agree to make the reservation herein described their permanent home, and they will not as a tribe make any permanent settlement elsewhere."[48] Thus, even if the reservation itself does not have sufficient water, the tribe must give up any rights, express or implied, if they choose to move elsewhere. The Treaty of 1868 was the subject of the current dispute; however, it is silent as to any explicit rights to water.

As our climate continues to change, tribal communities will disproportionately experience climate-related threats. "Projected reductions in surface-water supplies for irrigation are centered largely in the Mountain, Pacific, and Plains regions and are most severe in the middle and lower Colorado River Basin."[49] The figure below illustrates the estimated surface-water reductions associated with climate projections.[50]

46. *See id.* arts. V, VII.

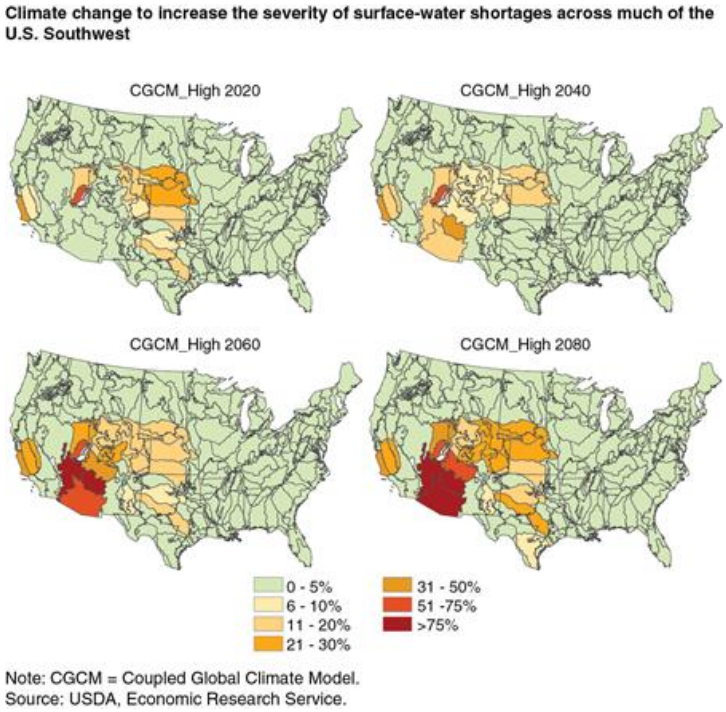
47. *See id.* art. IX.

48. *Id.* art. XIII.

49. Elizabeth Marshall & Marcel Aillery, *Climate Change, Water Scarcity, & Adaptation*, U.S. DEP'T OF AGRIC. ECON. RSCH. SERV. (Nov. 25, 2015), https://perma.cc/828M-D8SV.

50. *Id.*

Figure 1[51]

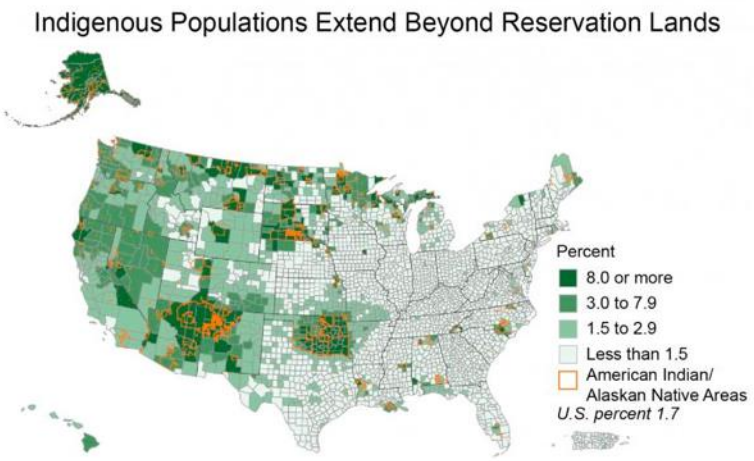


When comparing these models to indigenous populations both on- and off-reservation land, it becomes apparent very quickly how heavily tribal communities are being impacted by water scarcity in arid regions. The figure below shows indigenous populations both on- and off-reservation land.[52]

51. *Climate change to increase the severity of surface-water shortages across much of the U.S. Southwest*, U.S. DEP'T OF AGRICULTURE (Nov. 16, 2015), https://perma.cc/BFG5-Q9VB.

52. *Indigenous Populations Extend Beyond Reservation Lands*, U.S. CLIMATE RESILIENCE TOOLKIT (July 7, 2015, 9:30 AM), https://perma.cc/9L93-L5XQ.

Figure 2[53]



These models also reinforce other similar findings on these matters. For example, an estimated 48% of Native American homes in the United States lack safe drinking water, reliable water sources, or basic sanitation."[54] At the same time, "[c]onversely, less than 1% of the population in the United States lacks access to safe water."[55]

Thus, a decision against the Navajo, as the Court held here, is particularly devastating when considering water scarcity in the region, the historical background of the reservation, and the cultural significance of the Colorado River to the Navajo people.

II. The Supreme Court and Arizona v. Navajo Nation

A. The Preceding Litigation

The earlier litigation leading up to the decision in *Arizona v. Navajo Nation* is long and complex; only a highly abridged version of the tale is contained here. During the 1950's, there were a series of disputes over the rights to the water in the Colorado River.[56] In 1956, the Navajo Nation, and several other tribes, filed a motion to define the scope of their representation by the U.S. in the ongoing dispute, but that motion was denied by the Court.[57] Then, in 1961, the Navajo tribe sought to intervene in the ongoing litigation, arguing that the U.S. had failed to

53. *Tribal Population Map*, U.S. CLIMATE RESILIENCE TOOLKIT (July 7, 2015), https://perma.cc/FJC5-6DJP.

54. Tanana & Parker, *supra* note 10, at 2.

55. *Id.*

56. *See Navajo Nation*, 599 U.S. at 582 (Gorsuch, J., dissenting); *see also* Arizona v. California, 373 U.S. 546, 551 (1963).

57. *See* (Third Amended Complaint) Joint Appendix at 105, Arizona v. Navajo Nation, 599 U.S. 555 (2023) (No. 21-1484).

assert the interests on behalf of the tribe as its trustee, but this intervention was, similarly, denied.[58] In doing so, the Court denied the Navajo Nation's request to represent its own interest.[59] This litigation eventually culminated into the 1963 Supreme Court decision, *Arizona v. California*, which resulted in a consolidated decree allocating the Lower Basin of the Colorado River mainstream among various parties, including several tribes, but without resolving the Navajo's claims.[60] Prior to the current litigation, the Navajo sought the assistance of the Department of the Interior in assessing its water rights and made attempts to reach a settlement with the lower basin states, but those negotiations failed.[61]

The Navajo eventually filed a claim requesting that the U.S. be compelled by the Court, in consultation with the tribe, to:

> (1) determine the extent to which the Nation requires water from [the mainstream of the Colorado River in the Lower Basin] to enable its Reservation to serve as a permanent homeland for the Navajo Nation and its members; (2) develop a plan to secure the needed water; and (3) [manage the Colorado River] in a manner that does not interfere with the plan to secure the water needed by the Navajo Nation.[62]

The Navajo also sought an order from the Court enjoining any further breaches of the treaties and trust relationship the tribe holds with the United States.[63] The states of Arizona, Nevada, and Colorado intervened to protect their interests in the water of the Colorado River.[64]

B. The Navajo's Arguments

To assess the majority's opinion in *Arizona v. Navajo Nation*, it's first important to understand what the Navajo were really asking for. The Navajo sought an assessment of how much water the Nation requires to fulfill its treaty mandate as a "permanent home" for the Navajo people, the creation of a plan to meet those needs, and the prevention of interference with the enforcement of that plan.[65] The Navajo were very clearly *not* asking whether they had rights, nor were they asking for a judicial quantification of their rights to the Colorado River, which would have impacted the consolidated decree.[66] Rather, the heart of the Navajo's requests was to compel the U.S. to uphold its treaty-based obligation to the tribe and help determine what those water rights were.

58. *See id.* at 106.
59. *See id.* at 108.
60. *See id.*
61. *See id.* at 109–10.
62. *Id.* at 138.
63. *See id.* at 138–39.
64. *Navajo Nation*, 599 U.S. at 562.
65. *See* (Third Amended Complaint) Joint Appendix, *supra* note 57, at 138–39.
66. *See* Brief for the Navajo Nation, *supra* note 42, at 44.

1. Breach of Trust Claim

With regards to its requests, the tribe argued that the Treaty of 1868 was a duty-imposing document,[67] meaning that both the tribe and the U.S. had obligations under the treaty. For the tribe, this was the promise to remain within the reservation boundaries and cease its fighting with the U.S..[68] For the U.S., this meant providing a permanent homeland and protection for the tribe.[69] The tribe argued that general Indian-law trust principles,[70] the historic background of the treaty,[71] and the terms of the treaty itself, interpreted in that context, meant the United States would assure the tribes had a viable homeland.[72] The explicit language of the treaty promised a "permanent home" for the Navajo people, and, in an arid, desert area, having a permanent homeland requires water.[73] So, the tribe reasoned, the federal government had a treaty-based obligation to help the tribes assess their water rights and protect their access to that water.[74] The Navajo asserted that the U.S. failed to uphold those treaty and trust obligations here, which the U.S. had previously conceded, are binding.[75]

Additionally, the Navajo noted that the U.S. did not dispute that the Nation's water rights *are* held in trust by the United States.[76] As the government petitioners stated in their brief to the Court, the reserved rights the government holds to water when it reserves land outside the public domain are rights held against other users, and are "'merely' a right 'to take or maintain the specific amount of water—and no more—required to fulfill the purpose of the reservation.'"[77] The Navajo noted that this means that the United States, as the trustee for the Nation, decides whether the tribe has sufficient water to fulfill the purpose of the reservation.[78] Furthermore, the U.S. has extensive control "over unquantified reserved water rights held for the benefit of tribes," and "the United States exerts nearly exclusive control over the waters of the Lower Colorado."[79] The Navajo argued, therefore, that it is a hollow promise "that the Navajos would have rights to water necessary to fulfill the Reservation's purpose, but the government doesn't actually have to do anything about it—and given the United States' control over the Navajos' reserved water rights, the Navajos can't do anything about it either."[80]

67. *See id.* at 24.
68. *See id.* at 7; *see also* Treaty of 1868, *supra* note 30; *see also Navajo Nation*, 599 U.S. at 559.
69. *See* Treaty of 1868, *supra* note 30.
70. *See* Brief for the Navajo Nation, *supra* note 42, at 17–19.
71. *See id.* at 17–18.
72. *See id.* at 2, 30–31.
73. *See id.* at 14, 30.
74. *See id.* at 2.
75. *See id.* at 3.
76. *See id.* at 31.
77. Brief for the Federal Parties at 37, Arizona v. Navajo Nation, 599 U.S. 555 (2023) (No. 21-1484) (quoting *Sturgeon*, 139 S. Ct. at 1079) (citation omitted).
78. *See* Brief for the Navajo Nation, *supra* note 42, at 31.
79. *Id.* at 33.
80. *Id.* at 36.

2. The Consolidated Decree

In regard to conflict with the Court's decree in *Arizona v. California*, the tribe discussed that "the Nation merely seeks injunctive and declaratory relief requiring the government to determine its water needs and develop a plan to meet them, not a judicial quantification of its rights in the Colorado River."[81] Thus, the consolidated decree was not implicated, nor were the Navajo asking the judiciary to quantify their rights.

C. The United States' Main Argument

The arguments submitted by the federal government centered around the failure of the Navajo to allege the violation of any specific trust duty because, the government argued, none had been expressly accepted.[82] At the heart of their argument, they asserted that "*Winters* is a doctrine of implied rights, not affirmative duties" and that because there is "no substantive source of law expressly establish[ing] the particular duty the Navajo Nation asserts," the Navajo cannot succeed on a breach-of-trust claim here.[83]

D. The Majority Opinion

Rejecting the Navajo's claims, the Court ultimately held that the United States had no duty to take "affirmative steps" to provide water for the Navajo people, nor did the Court believe that it should it be up to the judiciary to update a 155-year-old treaty.[84] The Court went so far as to say that it was *unsurprising* that a treaty written 155 years ago would not account for the Navajo's water needs today but avoided dealing with that question by saying that this task should fall to the other branches.[85] As the Court noted, water will inevitably continue to be a scarce resource, and it is clear that new appropriations and allocations may be needed,[86] but the Court seemed reluctant to be the one to define the scope of those allocations.

However, the Court did acknowledge that the 1868 Treaty does contain some implied water rights. Under the Winters doctrine, "the Federal Government's reservation of land for an Indian tribe also implicitly reserves the right to use needed water from various sources—such as groundwater, rivers, streams, lakes, and springs—that arise on, border, cross, underlie, or are encompassed within the reservation," and further, the Federal Government reserves water to the extent needed to accomplish the purpose of the reservation.[87] However, the Court failed to take the logical next step and infer that the Navajo's rights must be assessed in order to accomplish that purpose.

---

81. *Id.* at 46.
82. *See* Brief for the Federal Parties, *supra* note 77, at 17.
83. *Id.* at 18–19.
84. *See Navajo Nation*, 599 U.S. at 559.
85. *See id.* at 566.
86. *See id.* at 567.
87. *Id.* at 561.

In its response to the Tribe's breach of trust claim, the Court relied heavily on cases like *United States v. Jicarilla Apache Nation*, *United States v. Navajo Nation* (2003), and *United States v. Navajo Nation* (2009).[88] The Court reiterated that "[t]he Federal Government owes judicially enforceable duties to a tribe 'only to the extent it expressly accepts those responsibilities,'" and whether the Government has done so rests on the presence of duty-imposing law.[89] The Court disagreed with the Tribe that there was any duty-imposing language within the treaty requiring any sort of affirmative duty on the part of the United States to secure water for the Tribe.[90] The Court did not discount the "general trust relationship" the United States has with tribes but seemed to exempt the United States from following through on its trust obligations and continued to state that "unless Congress has created a conventional trust relationship with a tribe as to a particular trust asset, this Court will not 'apply common-law trust principles' to infer duties not found in the text of a treaty, statute, or regulation."[91]

However, the crux of the matter seems to be that the Supreme Court was unpersuaded by the Tribe's point that the reservation cannot be a permanent home without water. The Court discussed that the phrase "permanent home" within the language of the treaty is not enough to conclude that the United States agreed to take affirmative steps regarding water.[92] Nor did the Court find the treaty's discussion of farming operations to be provided by the United States as something from which to infer "affirmative steps."[93]

The Court went on to say, "the Navajos *may* be able to assert the interests they claim in water rights litigation, including by seeking to intervene in cases that affect their claimed interests, and courts will then assess the Navajos' claims and motions as appropriate."[94] The Court ultimately concluded that the 1868 Treaty reserved the necessary water to accomplish the purpose of the Navajo Reservation but did not require the United States to assess the water needs of the Navajo people, nor take affirmative steps to secure that water.[95]

E. The Dissent

In dissent, Justice Gorsuch noted that the Court still has a role to play here and should not defer to the other branches.[96] He would have held that treaties, like constitutions, are the supreme law of the land; thus, while it may be the job of the Legislature to update the treaty and the job of the Executive to enforce it, it is still

88. *See* United States v. Jicarilla Apache Nation, 564 U.S. 162 (2011); *see also Navajo Nation*, 537 U.S. at 488; *see also* United States v. Navajo Nation, 556 U.S. 287, 301 (2009).

89. *Navajo Nation*, 599 U.S. at 564 (citing to *Jicarilla Apache Nation*, 564 U.S. at 177).

90. *See id.*

91. *Id.* at 566. (citing to *Jicarilla Apache Nation*, 564 U.S. at 178).

92. *See id.* at 567.

93. *See id.* at 568.

94. *Id.* at 568–69 (emphasis added).

95. *See id.* at 569–70.

96. *See id.* at 585 (Gorsuch, J., dissenting).

the job of the Court to interpret it.[97] Furthermore, Justice Gorsuch explained that tribes may sue to enforce the rights outlined in treaties, and it is the Court's job to hear those cases under Article III of the Constitution, which outlines the power of the judicial branch.[98] Thus, although the majority shifted the burden to the Legislature and the Executive branches, Justice Gorsuch argued that it also falls squarely to the Court.

However, the main point Justice Gorsuch made in his dissent is that the Court fundamentally misunderstood the Navajo's complaint. He disapproved of the Court's analysis regarding the "affirmative steps" the U.S. allegedly owed to the tribe and argued that the Court was overstating the limited nature of the Navajo's complaint.[99] Gorsuch discussed that all the Navajos were asking for, which is really a rather simple ask from his perspective, is for the United States to identify the water rights it holds for them, and, in the event the United States finds that it misappropriated those rights, for it to make a plan to stop doing so.[100]

In his view, the Court dismissed too readily the treaty mandate that the reservation was to be a "permanent home" for the Navajo; because the federal government "exercises control over many possible sources of water in which the Tribe may have rights, including the mainstream of the Colorado River," the government owes a duty to at least manage the water it holds in trust for the tribe in a legally responsible manner.[101] Justice Gorsuch wrote that, because the Court acknowledged that the Navajo have some implied rights to water under *Winters*, the United States cannot divert those rights elsewhere "just as a lawyer cannot dispose of a client's property entrusted to him without permission. And the *only* way to ensure compliance with that obligation is to give the Tribe just what they request—an assessment of the water rights the federal government holds on the Tribe's behalf."[102]

Concluding his dissent with uncertainty about where the Navajo go from here, he acknowledged that they have seemingly tried every avenue possible.[103] However, he noted that if there is any silver lining, it is that "the Court [did] not pass on other potential pleadings the Tribe might offer, such as those alleging direct interference with their water rights," and recognized that the Navajo may be able to assert their interests and intervene in water rights litigation going forward.[104]

F. Analysis

There are several points the Court made in its majority opinion that warrant further analysis. The main divisions within the Court's analysis centered around three questions: (1) what were the Navajo really asking for; (2) were "affirmative

97. *See id.*
98. *See id.*
99. *See id.* at 574.
100. *See id.*
101. *Id.* at 584–85.
102. *Id.* at 592–93 (emphasis in original).
103. *See id.* at 599.
104. *Id.*

steps" the best way to label that request; and (3) should treaty obligations be understood through a broader, historical lens or through a narrower, textualist lens?

Regarding the first two issues, the Court's analysis around "affirmative steps" failed to address the Navajo's actual requests as outlined in their complaint. However, Justice Gorsuch's dissent may be able to guide a different way to frame those requests. Regarding the third issue, the Court failed to conclude that the U.S. must be compelled to assess the Navajo's water rights to uphold its trust obligations to the Navajo people and inadequately applied the Indian law canons of construction, which likely would have led to a different result.

1. The Navajo's Request and Affirmative Steps

With regard to the first two questions concerning the Navajo's request and the Court's affirmative steps label, the Court exaggerated and mischaracterized the Navajo's request. The Navajo's main concern was not whether they had rights, all parties agreed that they did under the implied water rights doctrine.[105] Nor did the Navajo make any demands for immediate deliveries or monetary relief.[106] The issue at the heart of the case, which neither the U.S. nor the Supreme Court truly seemed to appreciate, was that the Navajo were trying to enforce the obligations of the U.S. to assess and protect the water rights of the Navajo people. As the Navajo stated, "[t]he lands and waters of the Navajo Nation are held in trust by the United States," thus they "are charged with preserving and protecting those trust resources for the Navajo Nation."[107] The Navajo very explicitly did not ask *the Court* to quantify those rights; they asked the Court to compel the *federal government* to do so.[108]

Justice Gorsuch's framing, in place of the Court's affirmative steps analysis, may have benefited the Navajo's presentation here. The Navajo's brief stated, "[t]he Treaties promise water for the Reservation and impose corresponding duties on the United States to secure the necessary water."[109] It is clear from the Court's opinion that it struggled with this argument, particularly about "securing" water, and had concerns about water scarcity and infrastructure in the United States currently.[110] The majority opinion, authored by Justice Kavanaugh, spent much of its time distancing itself from the concept of "affirmative steps." This is likely because holding otherwise might have spurred more tribes to bring forth complaints, seeking to force the federal government to take affirmative steps to provide resources for tribes. Particularly for water, a scarce resource, it is not hard to see why the Court was concerned.

But the Navajo addressed this concern explicitly in their brief, limiting the scope of their complaint. "[T]he Nation's claim does not threaten to impose amorphous duties on the government. A promise to secure water necessarily includes assessing the Nation's needs and making a plan to meet them—all the

105. *See Navajo Nation*, 599 U.S. at 574 (Gorsuch, J., dissenting).
106. Brief for the Navajo Nation, *supra* note 42, at 26.
107. (Third Amended Complaint) Joint Appendix, *supra* note 57, at 2.
108. *See* Brief for the Navajo Nation, *supra* note 42, at 44, 46.
109. *Id.* at 2.
110. *See Navajo Nation*, 599 U.S at 558–59, 561–62 (majority opinion).

Nation seeks by judicial order."[111] Justice Gorsuch similarly narrowed the scope of the Navajo's complaint through his approach.

It is worth noting that both justices, Gorsuch and Kavanaugh, sit on the conservative side of the bench. Historically, open-ended requests requiring the government to take affirmative action have been met with skepticism, especially from the conservative side of the Court.[112] Conservative judges tend to view these requests as a form of counter-majoritarian and remedial activism, where counter-majoritarian activism is defined as "the reluctance of the courts to defer to the decisions of the judicially elected branches," and remedial activism is "the use of judicial power to impose ongoing affirmative obligations on the other branches of government or to take governmental institutions under ongoing judicial supervision as part of a judicially imposed remedy."[113] Both concepts originate from a preference for limited government and a fear of the judiciary overstepping the role of the other branches. However, Justices Gorsuch and Kavanaugh expressed these principles in very different ways.

Justice Kavanaugh's majority opinion analyzed "affirmative steps" with trepidation, just enough to tumble down a slippery slope, where, motivated by separation-of-powers concerns, he denied the existence of any affirmative duty whatsoever to assess the Tribe's water rights or to provide water for the Tribe.[114] In contrast, Justice Gorsuch applied the brakes, arguing that the Court does not need to engage in an affirmative steps analysis here because it must simply (1) compel the U.S. to assess the rights of the Navajo Nation and determine if any misappropriation has occurred, and (2) develop a plan to remedy the misappropriation if it has.[115] Doing so should have been a familiar exercise for the judiciary, interpreting a treaty, and then upholding the contractual obligations outlined in that treaty.

Justice Gorsuch's framing of the argument also provided a less intrusive and perhaps, more palatable, alternative for how the Navajo could present its argument to the Court. Looking at the three requests the Navajo made—(1) an assessment of how much water the Nation requires to fulfill its treaty mandate as a "permanent home" for the Navajo people; (2) the creation of a plan to meet those needs; and (3) preventing interference with the enforcement of that plan—the Court only responded to the second request and viewed it solely as the U.S. securing water for the Tribe. Had the Court focused on the assessment of rights, the definition of those rights would have allowed the Tribe to negotiate water rights more effectively with states. Furthermore, it would have given the Tribe stronger grounds to sue, an avenue the Court left open for the Navajo, based on interference or misappropriation of those rights. Both sides acknowledged that the U.S. holds at least some water rights in trust for the Tribe and has considerable control over the

111. Brief for the Navajo Nation, *supra* note 42, at 15.

112. *See generally* Norton v. S. Utah Wilderness All., 542 U.S. 55 (2004); *see generally* Kleppe v. Sierra Club, 427 U.S. 390 (1976); *see generally* Lujan v. Nat'l Wildlife Fed'n, 497 U.S. 871 (1990).

113. William P. Marshall, *Conservatives and the Seven Sins of Judicial Activism*, 73 U. COLO. L. REV. 1217, 1220 (2002).

114. *See Navajo Nation*, 599 U.S at 559, 566 (majority opinion).

115. *See id.* at 574 (Gorsuch, J., dissenting).

Colorado River and other water sources in the region.[116] Thus, the Dissent's preference for requiring the U.S. to assess what water rights it holds for the Tribe and then creating a plan to prevent misappropriation of those rights, if it has done so, would have been a more reasonable interpretation than the majority's interpretation of the treaty.[117]

2. The Indian Law Canons of Construction and Trust Obligations

With regards to the third question, concerning the scope of the United States' treaty obligations, the Court's narrow interpretation failed to adequately apply the Indian law "canons of construction"[118] and led to a narrow conclusion that the U.S. is not obligated under treaty or its trust relationship to do anything it has not expressly agreed to. The Indian law canons, as described by Justice Gorsuch, are special applications of ordinary contract principles, interpreting Indian treaties in a spirit which magnanimously recognizes the full obligation of this nation as part of its trust responsibilities.[119] This means that courts must give effect to the terms of the treaties as indigenous peoples would have understood them; that in order to gain a complete view of the tribes' understanding, the court must look beyond the written words to the larger context that frames the treaty; and that courts must read into those treaties a duty of good faith and fair dealing on the part of the U.S. to protect the tribes and their ways of life.[120] Furthermore, contract ambiguities should be construed against the drafting party,[121] which in the case of Indian treaties, is the United States.

The Court was split on just how broadly tribal treaties should be interpreted, with Justices Kavanaugh, Thomas, and Gorsuch all taking vastly different approaches. For example, Justice Kavanaugh's opinion briefly discussed the historical context with a short four-paragraph synopsis,[122] meanwhile Justice Gorsuch's opinion is completely dictated by it and he spends a great deal of time detailing the injustices over time that have occurred regarding the tribe and water.[123] Additionally, while Justice Kavanaugh denied any "conventional trust relationship" as to water because the U.S. did not expressly accept such a duty,[124] Justice Thomas's concurrence took it one step further and denied the existence of *any* trust relationship between the tribes and the U.S.,[125] as well as disapproving of any use of the Indian law canons of treaty interpretation.[126] Ultimately, the Court failed to interpret the treaty in a way that recognized the disparity in bargaining

116. *See id.* at 574, 581.
117. *See id.* at 574.
118. *See id.* at 572.
119. *See id.* at 587.
120. *See id.*
121. *See id.* at 586.
122. *See id.* at 559–61 (majority opinion).
123. *See id.* at 575–84 (Gorsuch, J., dissenting).
124. *See id.* at 566 (majority opinion).
125. *See id.* at 571 (Thomas, J., concurring).
126. *See id.* at 572.

power and the totality of historical inequity the Navajo have faced at the hands of the United States.

The debate underlying the use of the Indian law canons is not new. There have always been divides within the Court about interpreting documents through a textualist lens versus one that takes in a broader vision of the arc of history. This point is further evidenced in the matter of *Washington v. United States*, which will be discussed further below, where the Court was equally divided and split on the matter of breadth regarding treaty interpretation.[127] But, contrary to Justice Thomas's concurrence, there is precedent for upholding the Indian law canons with regard to tribal treaties.[128] Furthermore, the main aspects of the Indian law canons are familiar tools of statutory and contract interpretation, including the examination of the historical context, the parties' intent, and the interpretation of ambiguity against the drafting party.[129]

However, if, as the Court says, the federal government must expressly accept trust obligations in order to be held to them,[130] if control alone is not enough to establish any sort of obligation,[131] and if the federal government has acknowledged that they *do* have considerable control over the water in the region,[132] then what are the Navajo to do? They cannot go back to 1868 and rewrite the treaty, and there is little incentive for the U.S. to define the Navajo's water rights because it would likely result in further litigation from the lower-basin states[133] seeking to prevent a reduction of their water rights, like the intervening states did here. What is clear is that the Navajo are struggling with water scarcity,[134] and the United States, acting in its trust capacity, has not assessed the Navajo's water needs or developed a plan to meet them despite holding the Navajo's water rights in trust.[135]

The Court did leave one avenue open; the Navajo can intervene when the Tribe's claimed interests are at stake.[136] However, the Navajo have tried this route previously, and unsuccessfully.[137] Since the U.S. has refused to assess the water rights of the Navajo people, there is not a means for the Navajo to know when the

127. *See generally* Washington, 853 F.3d at 946.

128. *See* Worcester v. Georgia, 31 U.S. 515, 582 (1832); *see also* Minnesota v. Mille Lacs Band of Chippewa Indians, 526 U.S. 172, 196 (1999); *see also* Choctaw Nation v. United States, 318 U.S. 423, 432 (1943); *see also* Washington v. Wash. State Com. Passenger Fishing Vessel Ass'n, 443 U.S. 658, 666 (1979); *see also* Wash. State Dep't of Licensing v. Cougar Den, Inc., 139 S. Ct. 1000, 1011–13 (2019); *see also* Herrera v. Wyoming, 139 S. Ct. 1686, 1699 (2019); *see generally* McGirt v. Oklahoma, 140 S. Ct. 2452 (2020).

129. *See generally* VALERIE C. BRANNON, STATUTORY INTERPRETATION: THEORIES, TOOLS, AND TRENDS (Cong. Rsch. Serv. ed., 2023).

130. *See Navajo Nation*, 599 U.S. at 564. (citing *Jicarilla Apache Nation*, 564 U.S. at 177).

131. *See id.* at 568. (citing *Navajo Nation*, 556 U.S. at 301).

132. *See id.* at 581 (Gorsuch, J., dissenting).

133. H.R. Con. Res. 5773, 70th Cong. (1928) (enacted) (describing that the lower basin states include Arizona, California, and Nevada).

134. *See* Tanana & Parker, *supra* note 10.

135. *See* Brief for the Federal Parties, *supra* note 77, at 37.

136. *See Navajo Nation*, 599 U.S. at 568–69 (majority opinion).

137. *See id.* at 599 (Gorsuch, J., dissenting).

Tribe's claimed interests *are* at stake. As Justice Gorsuch noted, the only way to figure that out is for the U.S. to assess the water rights of the Navajo people.[138]

III. Case Comparison: Washington v. United States

The case of *Washington v. United States* provides a helpful comparison by offering a different analysis of how treaties with tribes are to be interpreted.[139] That case took place a few years before *Navajo Nation* was decided and involved treaty rights for off-reservation fishing.[140] The appellate decision was affirmed by an equally divided Supreme Court in 2018.[141] Thus, we do not have the Court's opinions for this case, but an analysis of the Ninth Circuit's decision is still helpful to highlight the differences in how the two courts interpreted treaties in each respective case. In contrast to the Supreme Court in *Navajo Nation*, the Ninth Circuit here provided a much more flexible approach to treaty interpretation, interpreting ambiguities in support of outcomes that allow tribes to have a homeland and a means to live and thrive in that homeland.

A. Background of the Case

In the Pacific Northwest, fishing is culturally significant to tribes, but when white settlers arrived, "they blocked access to many of the Tribes' traditional fishing sites."[142] During the early 1900's, white domination of fisheries in the region significantly impacted tribes' support and subsistence.[143] A long series of litigation took place over the following decades.[144] The United States eventually brought suit in 1970, seeking declaratory and injunctive relief on behalf of the tribes based on a fishing clause contained within the Stevens Treaties,[145] which were a series of treaties negotiated by Governor Stevens in the mid-1800's with eight different tribes, allowing them to continue to hunt, fish, and perform traditional activities off-reservation.[146] This suit was part of that ongoing litigation.[147]

More recently, the cultural and religious practices of several tribes in the Pacific Northwest were disrupted after four of Washington's state agencies built a series of culverts to allow water to pass underneath roads.[148] Many of the State's culverts were not allowing fish to pass easily, or at all, and as a result, fish populations declined.[149] The Ninth Circuit determined that this practice violated

138. *See id.* at 593.
139. *See generally*, United States v. Washington, 853 F.3d 946 (9th Cir. 2017).
140. *See id.* at 954.
141. *See* Washington v. United States, 138 U.S. 1832, 1833 (2018).
142. *Washington*, 853 F.3d at 954.
143. *See id.* at 955.
144. *See id.* at 955–57.
145. *See id.* at 958.
146. *See Treaty History with the Northwest Tribes*, WASH. DEP'T OF FISH & WILDLIFE, https://perma.cc/L948-9757.
147. *See Washington*, 853 F.3d at 958.
148. *See id.*
149. *See id.*

the Stevens Treaties.[150] When negotiations were taking place for the treaties, Governor Stevens "assured the Tribes that even after they ceded huge quantities of land, they would still be able to feed themselves and their families forever. As [he] stated, 'I want that you shall not have simply food and drink now but that you may have them forever.'"[151] The tribes signed the treaties with this promise in mind.

The language of the Stevens Treaties explicitly guarantees the tribes a right to engage in off-reservation fishing.[152] Turning to contract principles, the court discussed the language barriers during the drafting of the treaties, as the treaties were written in English, and the superior bargaining power of the United States with negotiators and translators at its disposal.[153] Because of these factors, the court discussed how treaties must be interpreted in the way in which they would have been understood by the Indians, not according to their strict legal, technical meaning as drafted by the United States.[154]

Most critically, the Ninth Circuit discussed that "[o]pening up the Northwest for white settlement was indeed the principal purpose of the United States[;] [b]ut it was most certainly not the principal purpose of the Indians[—][t]heir principal purpose was to secure a means of supporting themselves once the Treaties took effect."[155] It can reasonably be understood that the tribes would have taken Governor Stevens at his word when he stated that they would have food and drink forever.[156] Furthermore, as the court discussed when reviewing the history of this litigation, it would be unfair for the tribes to bear the full burden of the decline in fish caused by non-Indians overfishing and polluting the water in the area.[157]

Even in the absence of an explicit promise within the treaty, the court stated that it would "infer a promise that the number of fish would always be sufficient to provide a 'moderate living' to the Tribes."[158] The phrase "moderate living" was taken from a previous Supreme Court case on earlier litigation involving this dispute, *Washington v. Washington State Commercial Passenger Fishing Vessel Association*, where the Supreme Court held that the fishing clause in the Stevens Treaties guaranteed "so much as, but no more than, is necessary to provide the Indians with a livelihood—that is to say, a moderate living."[159] The Supreme Court stated that, "[d]uring the negotiations, the vital importance of the fish to the Indians was repeatedly emphasized by both sides, and the Governor's promises that the treaties would protect that source of food and commerce were crucial in obtaining the Indians' assent."[160] Here, the Ninth Circuit interpreted this to mean that protection was promised "for the tribes' supply of fish, not merely their share of the fish."[161] Additionally, the Ninth Circuit held "the Tribes' right of access to their

150. *See id.* at 966.
151. *Id.* at 961.
152. *See id.* at 962.
153. *See id.* at 963 (citing to Jones v. Meehan, 175 U.S. 1, 11 (1899)).
154. *See id.*
155. *Id.* at 964.
156. *See id.*
157. *See id.* at 959.
158. *Id.* at 965.
159. *Wash. State Com. Passenger Fishing Vessel Ass'n*, 443 U.S. at 686.
160. *Id.* at 676.
161. *Washington*, 853 F.3d at 959.

usual and accustomed fishing places would be worthless without harvestable fish"[162] in parallel to the *Winters* doctrine.[163] Thus, the court concluded "that in building and maintaining barrier culverts within the Case Area, Washington has violated, and is continuing to violate, its obligation to the Tribes under the Treaties."[164]

B. The Comparison

In comparing *Washington* to *Navajo Nation*, perhaps the most important distinction is the difference in the approach to treaty interpretation. Critical to the analysis in *Washington* were the breadth of interpretation and use of the Indian law canons. The court emphasized the importance of ensuring a "moderate living" for the tribes under the Stevens Treaties.[165] Although the Stevens Treaties explicitly provided for off-reservation fishing,[166] there was nothing within the language of the treaties that guaranteed the tribes' right to the fish, nor a moderate living, for that matter. However, the Ninth Circuit looked to the negotiations between Governor Stevens and the tribes and concluded "that the tribal fishing right conferred on the state an obligation to protect fish, rather than just to allow the tribes a share of otherwise available fish."[167] This was a more far reaching view than the narrow interpretation in *Navajo Nation*, where the Court was reluctant to find any obligation that was not clearly identified in the words of the treaty and denied any sort of affirmative duty on the part of the federal government to provide water for the Navajo.[168] The result was that the Court denied the Navajo's request to have their water needs assessed by the U.S. under the trust relationship despite the considerable control the U.S. holds over the water. The Court, in effect, declined to infer from the historical context and language within the treaty that the reservation would be a "permanent home" for the Navajo people.[169]

However, the Supreme Court did apply a broader approach in *Fishing Vessel*,[170] the predecessor to *Washington*. The Court applied the phrase "moderate living" to demonstrate that the treaties guarantee fish sufficient to allow the tribes to have a moderate living,[171] even though that terminology did not appear in the language of the treaties themselves. In *Navajo Nation*, the phrase "permanent home," which appears in the explicit language of the treaty, is substantially similar not only to "moderate living," but also to the promises Governor Stevens made when negotiating the Stevens Treaties. And both "moderate living" and "permanent home" apply the concepts established under the implied water rights

162. *Id.* at 965.
163. *See generally Winters*, 207 U.S. at 576.
164. *Washington*, 853 F.3d at 966.
165. *See id.* at 965.
166. *See id.* at 962.
167. Miriam Seifter, *Opinion Analysis: Court Affirms Without Opinion in Tribal-Fishing-Rights Case*, SCOTUSBLOG (June 12, 2018, 9:18 AM), https://perma.cc/FCA4-GC8E; *see Washington*, 853 F.3d at 959.
168. *See Navajo Nation*, 599 U.S. at 559.
169. *See* Treaty of 1868, *supra* note 30.
170. *See Wash. State Com. Passenger Fishing Vessel Ass'n*, 443 U.S. at 686.
171. *See* Brief for the Navajo Nation, *supra* note 42, at 13.

doctrine where there is impliedly sufficient water reserved to fulfill the purpose of the reservation.[172] Here, the Navajo urged the Court to uphold the language of the treaty and interpret "permanent home" as the Navajo would have understood it, as guaranteeing water sufficient to allow the Navajo *to have* a permanent home.[173] However, the Court declined this claim,[174] and failed to uphold this contractual promise. This ruling has the potential to be impactful for not only the Navajo in this case, but also for the future, and ongoing, litigation regarding the extent of protection Washington must exercise over the fish to guarantee the tribes in that region a moderate living.

Had the *Washington* case gone to the Supreme Court with its current makeup, it is unlikely that the Court would have been equally divided, as it was in 2018, and the Ninth Circuit's decision would likely not have been affirmed. In that decision, Justice Kennedy abstained,[175] and it can reasonably be inferred that Justice Gorsuch did not hold in favor of the tribes, considering that at the time, there were four liberal justices on the Court. Despite Justice Gorsuch's apparent flip in *Navajo Nation,* the conservative majority of the Court is unlikely to hold in favor of the tribes, should the Washington litigation return to the Supreme Court in the future, even if Justice Gorsuch decides to remain consistent with his dissent in *Navajo Nation* and side with the tribes.

IV. Implications

While *Navajo Nation* is a very recent decision, the reverberations are already being felt. This case should not be understood as only applying to the Colorado River. In fact, looking at the Navajo's brief to the Court, as well as the Court's opinion, this case is not about rights to the Colorado River at all.[176] Rather, this case has much more significant implications.

Although there are not many cases that have relied on *Navajo Nation* as precedent thus far, there have been some with concerning results. One example is *Winnemuca Indian Colony v. United States*, where an Executive Order decreed that "the following lands in Nevada be, and they are hereby reserved from entry, sale or other disposal and set aside for the use of two certain bands of homeless Shoshone Indians now residing near the towns of Winnemucca and Battle Mountain, Nevada."[177] Just as the Supreme Court found the Navajo treaty did not impose a duty to take "affirmative steps" to secure water for the Navajo Tribe, the court here concluded the Executive Order did not impose a duty on the Government to take "affirmative steps" to prevent diversion of water from the Winnemucca reservation.[178] The court, in upholding *Navajo Nation*, stated that the Court's analysis suggested that neither the Government's general trust relationship with the

172. *See Cappaert*, 426 U.S. at 138; *see also* Sturgeon v. Frost, 139 U.S. 1066, 1079 (2019) (citing *Cappaert*, 426 U.S at 141).

173. *See* Brief for the Navajo Nation, *supra* note 42, at 13.

174. *See Navajo Nation*, 599 U.S. at 567.

175. *See Washington*, 138 U.S. at 1833.

176. *See generally* Brief for the Navajo Nation, *supra* note 42, at 44.

177. Winnemucca Indian Colony v. United States, 167 Fed. Cl. 396, 409 (Aug. 25, 2023).

178. *See id.*

Colony nor the Executive Order fill in the gap to create an affirmative duty to ensure the Colony's access to water.[179] Indeed, *Navajo Nation* rejected the argument that the Government's purported control over reserved water rights created trust duties to the Navajos and indicated that the Navajos could assert their own interests in water rights litigation.[180]

It is particularly concerning that the Court of Federal Claims held this way, because there was direct interference with water to the reservation, whereas in *Navajo Nation* there was not.[181] The Court had seemed to imply in *Navajo Nation* that had there been direct interference, then the Navajo would have had grounds to sue the U.S.[182] However, the decision in *Navajo Nation* led the court here to conclude that, because the Executive Order did not contain any explicit duty to prevent third-party diversion of water, nor any affirmative duty mentioning water at all, the federal government had no fiduciary duty to protect any reserved water rights.[183] This reasoning applied in other recent cases as well, such as *Hill v. U.S. Department of the Interior*.[184] The unfortunate reality is that the holding in *Navajo Nation* has the potential to undermine many tribes' rights to natural resources when those rights are not explicitly outlined within treaties.

As demonstrated in *Navajo Nation*, "[t]he lack of water access in tribal communities is tied to past federal policies and reflects historical and persisting racial inequities. 'Race is the strongest predictor of water and sanitation access,' and Native Americans are more likely than any other racial group to face water access issues."[185] However, tribal rights to water, and other natural resources, are largely dependent on what is outlined in their treaty. But, as illustrated in *Navajo Nation*, treaties do not always explicitly guarantee those rights.

V. Where Do the Navajo Go from Here?

The Court's decision seems to leave the Navajo little recourse to move forward. "The Navajo Nation for decades has negotiated with state and federal leaders to try to secure water but have never been able to reach a settlement."[186] In his dissent in *Navajo Nation*, Justice Gorsuch compared the experience of the Navajo to waiting in line at the DMV as follows:

> The Navajo have waited patiently for someone, anyone, to help them, only to be told (repeatedly) that they have been standing in the wrong line and must try another. To this day, the United States has never

179. *Id.*

180. *See id.*

181. *See id.* (the absence of a physical diversion of water led the court to infer that had there been a more direct interference with the Navajo's water, then they may have had grounds to bring suit against the U.S.).

182. *See Navajo Nation*, 599 U.S. at 568–69.

183. *See Winnemucca*, 167 Fed. Cl. at 410 (appeal pending).

184. *See* Hill v. U.S. Dep't of Interior, 2023 WL 6927266 at *12–16 (D.D.C. Oct. 19, 2023) (appeal pending).

185. Tanana & Parker, *supra* note 10.

186. Crystal Owens, *Navajo Will Continue to Seek Water Rights Despite Ruling*, LAW360 (June 23, 2023, 4:35 PM), https://perma.cc/9KDC-XWF7.

> denied that the Navajo may have water rights in the mainstream of the Colorado River (and perhaps elsewhere) that it holds in trust for the Tribe. Instead, the government's constant refrain is that the Navajo can have all they ask for; they just need to go somewhere else and do something else first.[187]

Normally, there are two ways tribes can have their water rights quantified: first, through litigation and adjudication; or second, through negotiated settlements.[188] In some situations, settlements have been successful. For example, the Navajo Utah Water Rights Settlement Act was a settlement reached between the Nation and the State of Utah concerning water rights.[189] It "confirms the Navajo Nation's right to deplete 81,500 acre-feet of water per year from Utah's Colorado River Basin apportionment and authorizes around $220 million for water infrastructure projects. The state has already invested $8 million in the Navajo Utah Settlement Trust Fund."[190]

However, despite the success of the settlement with Utah, the Navajo have been largely *unsuccessful*. The Navajo have moved for the Supreme Court to clarify their water rights, they have sought to intervene directly in water-related litigation, and they have sought to compel the United States to follow through on the promises it made under its trust relationship.[191]

It is possible, that had the Navajo brought a claim alleging direct interference with their water rights that they may have had more success by following the Court's direction: "to assert the interests they claim in water rights litigation, including by seeking to intervene in cases that affect their claimed interests."[192] However, this presents a catch-22 because the Navajo have yet to receive any guidance about what those interests are. Furthermore, the Navajo's previous unsuccessful attempts to intervene on their own behalf [193] and their exclusion from the consolidated decree dividing the Colorado River Basin,[194] make it unlikely that the Court would have found in their favor even if they had pursued that route *because* the interests the tribe holds are not clear.[195]

The only other plausible path seems to be for the tribe to keep attempting to enter negotiated settlements with states whose rights are already protected under the consolidated decree.[196] However, in these negotiated settlements, nothing is

187. *Navajo Nation*, 599 U.S. at 598 (Gorsuch, J., dissenting).

188. Tanana & Parker, *supra* note 10.

189. *The Navajo Utah Water Rights Settlement Act Finalized by the Navajo Nation, State of Utah, and the Interior Department*, NAVAJO NATION COUNCIL (May 27, 2022), https://perma.cc/4MYH-UBNQ.

190. *Id.*

191. *See Navajo Nation*, 599 U.S. at 599 (Gorsuch, J., dissenting).

192. *Id.* at 568–69 (majority opinion).

193. *See id.* at 599 (Gorsuch, J., dissenting); *see also* (Third Amended Complaint) Joint Appendix, *supra* note 57, at 13.

194. *See Navajo Nation*, 599 U.S. at 583.

195. *See id.* at 593.

196. *See* Arizona v. California, 376 U.S. 340 (1964) (the consolidated decree).

guaranteed, and states tend to have more power and means to litigate than tribes.[197] The likely reason the Navajo wanted to compel the U.S. to assess its water needs in the first place is that such litigation is expensive, and most major water users amongst the states with rights to the Colorado already defined would intervene (as the states did here).[198] However, if the Navajo's rights were quantified, they would have stronger power to negotiate with states to secure water for themselves going forward and could directly sue if interference with those rights occurred.

Conclusion

If one thing is clear in this case, it is that the Court is concerned about the increasing issues surrounding water scarcity and does not feel it is the best body to adequately address those concerns. However, this is cause for apprehension, as tribal communities get left in the dust while state rights to resources become more clearly defined.[199] Although the Court left the task of defining the Navajo's rights to the other branches, and left it to the Navajo themselves to assert if the Legislature and Executive branches fail to take action, the Navajo cannot act without knowing what the extent of their rights are. The reality remains that "[t]he [Navajo N]ation is the largest Native American tribe on the Colorado River without defined water rights."[200]

The Navajo are not asking for the moon. They only ask for their rights held in trust by the United States to be assessed by the federal government. If the U.S. has interfered with or misappropriated those rights, then it should be held accountable by developing a plan to remedy that interference. The Court has an obligation to compel the federal government to do so. An assessment would not lead to an endless road of affirmative duties for the U.S., but instead, would allow the Navajo Nation to negotiate more effectively with states, sue on behalf of its water rights, and develop a plan for obtaining water based on those rights. The United States is obligated to uphold the promises it made under the Treaty of 1868 by assessing the Navajo's water rights to determine if there is water sufficient to fulfill the purpose of the reservation: to be a permanent home for the Navajo people.

197. For example, in 2018, the Navajo Nation's GDP was just under 12.8 billion in comparison to Arizona's 351.9 billion. *Compare* GDP on Native Lands and U.S. Counties (2001-2018), NATIVE LAND INFO. SYS., https://perma.cc/TK27-NZQF, *with* Gross Domestic Product (Arizona), USA FACTS, https://perma.cc/R9ET-N9UA.

198. *See Navajo Nation*, 599 U.S. at 562 (majority opinion).

199. One example is the consolidated decree defining the rights of several states and tribes to the Colorado River. *See Arizona*, 376 U.S. at 340.

200. Owens, *supra* note 186.

***