

Nos. 21-1484, 22-51

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IN THE  
**Supreme Court of the United States**

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ARIZONA, *et al.*,

*Petitioners,*

*v.*

NAVAJO NATION, *et al.*,

*Respondents.*

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DEPARTMENT OF THE INTERIOR, *et al.*,

*Petitioners,*

*v.*

NAVAJO NATION, *et al.*,

*Respondents.*

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ON PETITION FOR A WRIT OF CERTIORARI TO THE  
UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

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**BRIEF FOR *AMICI CURIAE* LAWRENCE J.  
MACDONNELL, ROBERT W. ADLER, BURKE W.  
GRIGGS, DAN LUECKE AND JASON ANTHONY  
ROBISON IN SUPPORT OF RESPONDENTS**

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**THE INTERESTS OF THE *AMICUS*'**

The people submitting this Amicus are deeply experienced in matters of water law and policy, especially in the western United States, and have an interest in ensuring that the Court receives a clear explanation of the unique legal framework governing uses of water from the Colorado River and how that framework has placed the United States in virtually total control of the river's water.

Lawrence J. MacDonnell is a retired Professor of Law from the University of Wyoming College of Law and is a Senior Fellow at the Getches-Wilkinson Center for Natural Resources, Energy, and the Environment at Colorado Law. He has worked on legal issues related to the Colorado River for more than 30 years and has published numerous related articles and papers.

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1. No counsel for a party authored this brief in whole or in part, and no such counsel or party made a monetary contribution intended to fund the preparation or submission of this brief. No person other than the *amici curiae*, or their counsel, made a monetary contribution to its preparation or submission.

Burke W. Griggs is a Professor of Law at the Washburn University School of Law. He represented the State of Kansas before the Court to enforce the Republican River Compact in *Kansas v. Nebraska*, No. 126 Orig., and to administer the Court's decree concerning the Arkansas River Compact in *Kansas v. Colorado*, No. 105 Orig.; he also served as the state's counsel of record in the Kickapoo Tribe of Kansas reserved water rights settlement, which fully recognized the Tribe's *Winters* rights. He advises the Departments of State and Commerce on indigenous and trans-boundary water issues in Latin America and serves on the Department of Justice's Heartland Environmental Justice Group.

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Jason Anthony Robison is a Professor of Law at the University of Wyoming College of Law. He is the author of the water law treatise, *Law of Water Rights & Resources* (2022), as well as a variety of articles addressing legal and policy issues facing the Colorado River system. Professor Robison is also the editor of the centennial volume, *Cornerstone at the Confluence: Navigating the Colorado River Compact's Next Century* (2022), and the chair of the Colorado River Research Group. (Signed in individual capacity.)

## THE SUMMARY OF ARGUMENT

- Under the Law of the River, the United States Controls Uses of Water from the Mainstream Colorado River Beginning at Glen Canyon Dam and Extending to the Mexican Border.
- Despite Federal Trust Responsibilities, Tribal Water Needs and Water Rights in the Lower Basin have been only partially satisfied under the Law of the River.
- The Navajo Nation Has Neither Quantified Water Rights nor Adequate Access to Water in the Lower Basin in Arizona Despite Clear Needs.
- Pervasive Control and Treaty-Based and other Fiduciary Obligations Require the United States to Make Sufficient Water Available for the Lower Basin Portion of the Navajo Reservation in Arizona.

## THE ARGUMENT

### I. Introduction.

Because water from the Colorado River and its tributaries serves essential needs in the seven basin states and a part of Mexico, its management and use have been made subject to an extraordinary array of physical and legal controls. The federal role in managing the control and use of basin water is perhaps unparalleled in any other river basin in the United States. That control is important to understand in the context of this litigation in

which the Navajo Nation seeks enforcement of the United States' treaty-based obligation to ensure the availability of sufficient water on the reservation to achieve its most fundamental purpose—to serve as a permanent homeland for the Navajo people.

This Amicus Brief seeks to support the Navajo Nation's claim, upheld by the Ninth Circuit Court of Appeals, *Navajo Nation v. United States Department of the Interior*, 26 F.4th 794 (9th Cir. 2022), that the United States breached its trust duty to the Navajo Nation by failing to use its virtually total control of the water resources of the Colorado River to help the Navajo Nation investigate needs and options for gaining access to the use of water necessary to make its Arizona portion of the reservation a viable homeland. *cert. granted*, 143 S. Ct. 398 (2022). This Amicus Brief seeks to explain the complex legal framework developed over the past 100 plus years governing the development and use of the water of the Colorado River system, with special reference to the unique role this framework establishes for the United States. It provides a brief recap of the painfully slow development of Colorado River water for use on Indian reservations in the Lower Basin during a time in which non-Indian uses grew exponentially. It surveys the prolonged and still unsuccessful efforts of the Navajo Nation to obtain water needed for its reservation lands in Arizona. Finally, it argues that the United States has a clear duty to assist the Navajo Nation in determining its water needs and investigating options for acquiring needed water supplies. It further argues that these supplies can be obtained without the need for an adjudication and without any involuntary disruption in existing water uses.



## II. Under the Law of the River, the Federal Government Controls Uses of Water from the Mainstream Colorado River Beginning at Glen Canyon Dam and extending to the Border with Mexico.

The water in the Colorado River from Glen Canyon Dam to the Mexican border is stored and managed in a series of dams and reservoirs built and operated by the United States under Congressional legislation authorizing their construction, including the Boulder Canyon Project Act (Hoover Dam) and the Colorado River Storage Project Act (Glen Canyon Dam).<sup>2</sup> The uses of this water are governed by the Colorado River Compact, the Boulder Canyon Project Act and contracts issued under its authority, the treaty with Mexico, the Colorado River Storage Project Act, the 1963, 1964, and 2006 Supreme Court rulings in *Arizona v. California*, the Colorado River Basin Project Act, and administrative guidelines adopted by the Department pursuant to those authorities. Collectively, these legal instruments and others are known as the “Law of the River.”<sup>3</sup> This section provides a brief overview of these critical features of the Law of the River as they pertain to federal control of the uses of Colorado River water.

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2. An overview of the development and use of the water of the Colorado River Basin is provided in Lawrence J. MacDonnell, *Colorado River Basin, Waters and Water Rights*, Lexis-Nexis, CORB-12-29 (2021) (“Colorado River Basin”).

3. A more complete account of the many elements of the Law of the River is provided in Colorado River Basin, at CORB-6-12. See *Arizona v. California*, 373 U.S. 546 (1963); *Arizona v. California*, 376 U.S. 340 (1964); *Arizona v. California*, 547 U.S. 150 (2006).

### A. The Colorado River Compact.<sup>4</sup>

The 1922 Colorado River Compact hydrologically divided the Colorado River Basin into two parts, with the dividing line at Lee Ferry in northern Arizona. Compact, Article II (f) & (g). The commissioners from the seven basin states and the United States apportioned the beneficial consumptive use of a maximum of 7.5 million acre-feet per year to the Lower Basin (Arizona, California, and Nevada) and an equal amount to the Upper Basin (Colorado, New Mexico, Utah, and Wyoming), Compact, Article III (a), tacking on an additional one million acre-feet for consumptive use in the Lower Basin to address Arizona concerns that not enough water would be available for Lower Basin needs. Compact, Article III (b). The commissioners believed the basin's annual water supply averaged at least 20 million acre-feet (Norris Hundley, Jr., *Water and the West: The Colorado River Compact and the Politics of Water in the American West* 217 (2d ed), and made provision for a subsequent process to apportion the remaining water. Compact, Article III (f). Water for Mexico was to come out of surplus; if this source proved insufficient, the two basins agreed to share any deficiency. Compact, Article III (c). The States of the Upper Division also agreed not to deplete flows at Lee Ferry below 75 million acre-feet over consecutive ten-year periods. Compact, Article III (d).

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4. U.S. Bureau of Reclamation, Colo. River Compact (Nov. 24, 1922), <https://www.usbr.gov/lc/region/pao/pdfiles/crcompct.pdf>. Congressional authorization for compact negotiation was provided in "An Act to permit a compact or agreement between the States of Arizona, California, Colorado, Nevada, New Mexico, Utah, and Wyoming respecting the disposition and apportionment of the waters of the Colorado River, and for other purposes." 43 U.S.C. § 617/.

There were no tribal participants in the negotiations, and the interests of tribes in the basin only emerged briefly late in the nearly year-long process, resulting in a provision stating: “Nothing in this compact shall be construed as affecting the obligations of the United States of America to Indian tribes.”<sup>5</sup> Compact, Art. VII.

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5. The following dialogue occurred in the 20th meeting of the Commission:

Herbert Hoover: “Then there is the wild Indian article. ‘Nothing in this compact shall be construed as effecting the rights of Indian tribes.’

MR. SCRUGHM: Why should such a paragraph be inserted.

MR. HOOVER: To protect the U. S. who have treaties with the Indians. Those treaty rights would probably exceed these rights anyway. We don’t want the question raised, that’s all. Has anyone any objection to it?

MR. NORVIEL: I never heard of it before.

MR. SCRUGHAM: I can’t see any objection to its inclusion.

MR. HOOVER: All those in favor of this, please say Aye.

COLO. RIVER COMM’N, Colo. River Comm’n, Minutes and Record of the Sessions 19-27 of the Colorado River Commission Negotiating the Colorado River Compact of 1922, 89 (1922), <http://www.ucrcommission.com/wp-content/uploads/2022/04/1922-Colorado-River-Compact-Commission-Meeting-Minutes-Volumes-19-27.pdf>. When final language was presented to the Commissioners at the following meeting, Chairman Hoover said: “The purpose of it, Mr. Emerson [Commissioner from Wyoming], is to reduce all objection in Congress because the United States has a treaty with the Indian tribes affecting Irrigation water and if we don’t have some expression in here Congress will probably put a reservation on it in that particular.”

This language sought to place responsibility for tribal water needs solely with the federal government. The “obligations” of the United States likely referred to those emerging from treaty and other trust obligations, as well as those recognized by this Court 14 years earlier in *Winters v. United States*, 207 U.S. 564 (1908). The facts and the holding in that case are presented at length in the Brief of Tribal Nations and Indian Organizations as Amici Curiae in Support of the Navajo Nation, at 10-16. Here it is sufficient to state that the decision identified the existence of tribal reserved water rights established at the time a reservation was established, if not before.

**B. The Boulder Canyon Project Act, 45 Stat. 1057, 43 U.S.C. § 617, and the Water Contracts.**

Congress finally ratified the Compact in the 1928 Boulder Canyon Project Act (“BCPA”), providing also for federal construction of what became Hoover Dam and Lake Mead. BCPA § 1. Arizona opposed the Compact and refused to ratify it, forcing Congress to adopt a six-state compact. BCPA § 4 (a). In Section 5, the BCPA authorized the Secretary of the Interior to enter contracts for the storage of water in Lake Mead and its delivery and stipulated that “[n]o person shall have or be entitled to have the use for any purpose of the water stored as aforesaid except by contract made as herein stated.” 8 (a) provides, in relevant part, that the United States (Secretary) “shall observe and be subject to and controlled by said Colorado River compact in the construction, management, and operation of said reservoir, canals, and other works and the storage, diversion, delivery, and use of water for the generation of power, irrigation, and other purposes.” 43 U.S.C. § 617g. In Section 9, the statute

made all contracts expressly subject to the Colorado River Compact—including the obligations of the United States to tribes in Article VII. In 1931, the Secretary of the Interior entered contracts with water suppliers in California and later with the States of Nevada and Arizona. Hoover Dam Documents, U.S. Department of the Interior (1948), 106-14. The Arizona contract included a provision reducing the amount of its delivery obligation by consumptive uses occurring in Arizona above Lake Mead and below Lee Ferry.<sup>6</sup>

### C. The 1944 Treaty with Mexico.

After decades of off and on negotiations the Republic of Mexico and the United States agreed to a treaty that, among other things, generally assured the availability of at least 1.5 million acre-feet of water per year to Mexico. Hoover Dam Documents, Ch. XIV, 152-67.

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6. Arizona Contract of February 9, 1944, Paragraph (d): “The obligation to deliver water at or below Boulder Dam shall be diminished to the extent that consumptive uses now or hereafter existing in Arizona above Lake Mead diminish the flow into Lake Mead, and such obligation shall be subject to such reduction on account of evaporation, reservoir and river losses, as may be required to render this contract in conformity with said compact and said act.” Hoover Dam Documents at A561. The U.S. Supreme Court limited this provision to uses from the mainstream Colorado River, not the tributaries. *Arizona v. California*, 373 U.S. at 590-92. Consequently, any uses of water in Arizona from the main Colorado River below Lee Ferry and above Lake Mead must be deducted from the water allocated to Arizona in the contract.

**D. Colorado River Storage Project Act of 1956, Pub. L. 84-485, 70 Stat. 105 (“Storage Act”).**

An act of Congress largely concerned with federal funding for building water storage projects in the Upper Basin, the Storage Act included funding for construction of Glen Canyon Dam and Lake Powell just above Lee Ferry in northern Arizona, creating a massive storage project presumably ensuring availability of water to the Lower Basin and Mexico. Storage Act, § 1. Glen Canyon Dam is operated primarily to make deliveries to the Lower Basin and Mexico while generating hydroelectric power and providing the desired flow regime in the Grand Canyon. Colorado River Basin Project Act, § 602(a); Grand Canyon Protection Act, Pub. Law 102-575, 106 Stat. 4669. Again, Congress emphasized the responsibility of the Secretary of the Interior when operating federally controlled facilities to comply with the Colorado River Compact and other provisions of the Law of the River. Storage Act § 14.

**E. *Arizona v. California*, 373 U.S. 546 (1963).**

In 1952, the State of Arizona filed an original action with this Court seeking to quiet title to its claimed share of water in the Lower Basin, said to be 3.8 million acre-feet. Motion for Leave to File Bill of Complaint and Bill of Complaint, *State of Arizona v. State of California*, October Term 1952 (January 19, 1953). California, in turn, asserted its rights to the use of 5.362 million acre-feet. Answer of Defendants to Bill of Complaint, *State of Arizona v. State of California*, October Term 1952 No. 10 Original (May 19, 1953). Because Arizona sought the determination of all rights to the use of the water apportioned to the Lower Basin, the United States intervened to represent

its interests, including the water needs for Indians with reservations in the Lower Basin. Petition of Intervention on Behalf of the United States of America, *Arizona v. California*, No. 10, Original, 1953 Term (United States). In this petition, the United States made claims for 733,450 acre-feet per year for Indian reservations located along the mainstream Colorado River in Arizona below Lake Mead and 191,000 acre-feet for Indian reservations located in California. U.S. Petition of Intervention, Appendix II A, 56-57. In addition, the United States asserted claims for tribes with reservations within the Gila River Basin and the Little Colorado River Basin, tributaries to the Colorado River in the Lower Basin. No claims were made from the Colorado River for the Navajo Reservation, even though its western boundary is directly appurtenant.

Ultimately, the Special Master decided to limit consideration to claims from the mainstream Colorado River at Lake Mead and below, upheld the existence of reserved water rights for the five mainstream Tribal reservations below Lake Mead, addressed these rights based on agricultural, stock, and domestic use purposes, and quantified each tribe's diversion right from the Colorado River. Simon H. Rifkind, Special Master Report, *Arizona v. California*, December 5, 1960, 254-88. Largely upholding the Special Master, this Court determined that, in the Boulder Canyon Project Act, Congress had already allocated the 7.5 million-acre-foot apportionment out of the mainstream Colorado River below Lee Ferry, providing 2.8 million acre-feet to Arizona, 4.4 million acre-feet to California, and 300,000 acre-feet to Nevada. 373 U.S. at 575-585. It further agreed that the five Indian reservations located along the Colorado River below Lake Mead held reserved water rights and quantified those

rights based on the amount of water needed to irrigate practicably irrigable lands on the reservations.<sup>7</sup> 373 U.S. at 595-97. This Court provided this context: “It can be said without overstatement that when the Indians were put on these reservations they were not considered to be located in the most desirable area of the Nation. . . [M]ost of the lands were of the desert kind—hot, scorching sands—and that water from the river would be essential to the life of the Indian people and to the animals they hunted and the crops they raised.” 373 U.S. at 598-99.

The following year, this Court issued its Decree implementing its decision. *Arizona v. California*, 376 U.S. 340 (1964). The Decree is framed as an injunction ordering the United States to operate its mainstream Colorado River facilities only as required under the Decree while giving the Secretary of the Interior responsibility for deciding whether water supply conditions are normal, surplus, or shortage, thus affecting deliveries to the states and the water users located within their boundaries, including tribes. 376 U.S. at 342. After resolving disputes regarding boundaries and other matters, the Court issued its final consolidated decree in 2006. *Arizona v. California*, 547 U.S. 150 (2006).

Although *Arizona v. California* gave full-throated support to the *Winters* Doctrine, the water rights of the Navajo Nation were not adjudicated or quantified in this process.

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7. In its 1964 Decree, this Court determined the five tribes held diversion rights to 910,496 acre-feet/year. *Arizona v. California*, 376 U.S. at 344-45.



**F. Colorado River Basin Project Act of 1968, Pub. L. 90-537 (“Project Act”).**

The 1963 decision in *Arizona v. California* laid the groundwork for the Project Act’s passage five years later. The primary driver of the Project Act was to provide federal funding to build Arizona’s long-sought-after Central Arizona Project (“CAP”), enabling the delivery of water hundreds of miles from the mainstream Colorado River in the Lower Basin to uses in central and south-central Arizona. Project Act § 301 (a). To obtain California’s support, Arizona had to agree to reduce diversions for the CAP as necessary to ensure the availability of sufficient water to meet all present perfected rights,<sup>8</sup> California’s basic 4.4 million-acre-foot apportionment, and other senior diverters in Arizona and Nevada. Project Act § 302 (b). In addition, the Project Act directed the Secretary of the Interior to develop criteria for the coordinated operation of Lake Powell and Lake Mead. Project Act, § 602 (a). Even as Arizona finally got federal support for the CAP, it was widely understood that

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8. In its 1964 Decree, this Court determined those rights identified in Article VIII of the 1922 Colorado River Compact as present perfected rights include “water rights created by the reservation of mainstream water for the use of federal establishments under federal law whether or not the water has been applied to beneficial use.” *Arizona v. California*, 376 U.S. at 341. This Court has explicitly recognized that tribal reserved water rights vest at the date the reservation is established. *See Arizona v. California*, 373 U.S. 600 (“We follow it now and agree that the United States did reserve the water rights for the Indians effective as of the time the Indian Reservations were created. This means, as the Master held, that these water rights, having vested before the Act became effective on June 25, 1929, are ‘present perfected rights’ and as such are entitled to priority under the Act.”).

there would be insufficient water to meet project demands by the early 2000s.<sup>9</sup>

### **G. Summary.**

With dams authorized by Congress for storage and management of all water available in the mainstream Colorado River from Lake Powell to the Mexican border, the United States controls essentially the entire water supply in this reach of the river. All users of water from the Colorado River in the Lower Basin must have contracts with the Secretary of the Interior. Water available for use is governed first by the 1922 Colorado River Compact and then by the Boulder Canyon Project Act as interpreted by this Court in its 1963 *Arizona v. California* decision. That decision only acknowledged the rights of five Indian reservations along the Colorado River below Lake Mead.

### **III. Despite Federal Trust Responsibilities, Tribal Water Needs and Water Rights in the Lower Basin have been only partially satisfied.**

There are 18 tribes with reservations partially or totally located in the Lower Basin, including the Navajo Nation. Bureau of Reclamation, Colorado River Basin Water Supply and Demand Study, Technical Appendix C, Appendix C, Table C9-5. Efforts to identify and meet tribal water needs on these reservations have proceeded slowly while water uses of non-Indians have grown rapidly. This section introduces the process of tribes achieving use of mainstream Colorado River water in the Lower Basin.

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9. This development is discussed in Lawrence J. MacDonnell, *Arizona v. California Revisited*, 52 Nat. Res. J. 363, 410-11 (2012).

### A. Early Efforts.

The Colorado River Irrigation Project was the first irrigation project initiated under the auspices of the Bureau of Indian Affairs.<sup>10</sup> It serves water from the Colorado River to lands within the reservation of the Colorado River Indian Tribes, one of the five reservations now with adjudicated water rights under *Arizona v. California*. Colorado River Basin Ten Tribes Partnership Tribal Water Study 5.8-4 (2018).

The Yuma Project was authorized for investigation shortly after Congress established the Reclamation Service in 1902. Act of June 17, 1902, 32 Stat. 388. Reclamation identified lands along both the Arizona and California sides of the Colorado River in the vicinity of Yuma, Arizona as suitable for irrigation and developed a plan for their use. Christine Pfaff et al., *The Historic Yuma Project: History, Resources Overview, and Assessment* 26-29 (1992, rev'd 1999). Lands in California included the Fort Yuma (Quechan) Indian Reservation, established in 1884. In 1904, Congress specified that each Quechan family was to receive ten acres of irrigable lands, with the remainder of the reservation lands made available for entry and settlement by non-Indians. Act of April 21, 1904, 33 Stat. 189. In short, the Yuma Project primarily serves water to non-Indian users and reduced reservation lands to enable their ownership by non-Indians. This Court

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10. As explained in the History of Federal Relations with the Navajo Amicus Brief, projects sponsored by the Bureau of Indian Affairs have been chronically underfunded. *See also* Daniel McCool, *Searching for Equity, Sovereignty, and Homeland*, ch. 5, 150-51, *Cornerstone at the Confluence: Navigating the Colorado River Compact's Next Century*, Jason A. Robison, ed. (2022).

decreed reserved water rights in the amount of 77,966 acre-feet of annual diversions for the Quechan in *Arizona v. California*, 547 US 157-58 (2006).

### **B. Central Arizona Project.**

The Central Arizona Project (“CAP”) was not originally intended to supply water to tribes. It represented instead a long-sought-after source of surface water supply for agriculture in the Phoenix area to replace declining groundwater resources. Rich Johnson, *The Central Arizona Project 1918—1968* (1977) at 31, 52, 99. The source of water was the Colorado River, some 190 miles from agricultural lands in central Arizona and requiring an elevation gain of more than 2,900 feet, including 800 vertical feet directly out of Lake Havasu. Project costs pushed the price of CAP water beyond the means of many of its originally intended users, jeopardizing the ability of the Central Arizona Water Conservation District to repay its share of project costs. W. Michael Hanemann, *The Central Arizona Project* (Univ. of Cal., Berkeley Dep’t of Agric. & Res. Econ. & Pol’y Working Paper No. 937, 2002). Beginning in 1975, the Secretary of the Interior began contracting with tribes in the central part of Arizona to receive CAP water.<sup>11</sup> By shifting control of a part of the CAP’s water supply to tribes with reservations capable of being served by the CAP system, the construction costs associated with this part of the supply did not have to be repaid to the United States. Leavitt Act, 25 U.S.C. § 386a; Colorado River Project Storage Act § 4(d). In 2004, Congress largely finalized CAP water allocations in the

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11. Reid Peyton Chambers, *Implementing the Federal Trust Responsibility to Indians After President Nixon’s 1970 Message to Congress on Indian Affairs: Reminiscences of Reid Peyton Chambers*, 53 TULSA L. REV 395, 435 (2017).

Indian Water Settlements Act, dedicating 650,724 acre-feet per year to Arizona tribes. Pub. L. No. 108-451, 118 Stat. 3478, § 104(c)(1)(A)(a).

It is no small irony that a massive federal reclamation project costing \$4.4 billion dollars became the means for making water available for tribes with reservations in central and southern Arizona. Primarily as the result of negotiated settlements ratified by Congress and through Secretarial contracts, tribes gained access to CAP water. John D. Weldon, Jr. & Lisa M. McKnight, *Future Indian Water Settlements in Arizona: The Race to the Bottom of the Waterhole?* 49 *Ariz. L. Rev.* 441 (2007). Many settlements included limitations of tribal water uses, especially for off-reservation purposes. Colorado River Basin, Appendix 1, *Leasing Provisions in Tribal Water Settlements*, 73-83. The effect is to ensure that many tribes can only lease CAP water to specified non-Indian users; they are not free to lease their water to other parties. While central and southern Arizona tribes with reservations able to access CAP water now or will soon control 46 percent of the CAP's authorized diversion of 1.415 million acre-feet, *Tribal Water Rights, CENTRAL ARIZONA PROJECT*, [HTTPS://WWW.CAP-AZ.COM/ABOUT/TRIBAL-WATER-RIGHTS/](https://www.cap-az.com/about/tribal-water-rights/) (last visited Feb. 6, 2023), no CAP water has yet been made available to the Navajo Reservation, located north of the CAP service area.

### **C. Summary.**

After 150 years of water development and use of the Colorado River in the Lower Basin, many tribes now hold at least some legally recognized rights to use water. Most of these tribes are those that have achieved settlements allocating them water from the CAP. Not all

these tribes have the infrastructure necessary to make use of these rights—in some cases, not even for domestic drinking water supplies. Colorado River Basin Ten Tribes Partnership Tribal Water Study, 7-10-7-11. At least nine tribes with reservations in the Lower Basin, including the Navajo Nation, still have outstanding claims for water rights. Water and Tribes Initiative, *The Status of Tribal Water Rights in the Colorado River Basin*, 9 (Apr. 9, 2021).

#### **IV. The Navajo Nation Has Neither Quantified Water Rights nor Adequate Access to Water in the Lower Basin in Arizona Despite Clear Needs.**

The present litigation before this Court is part of the continuing efforts by the Navajo Nation to realize the use of water expected at the time the Nation entered the treaty with the United States in 1868 establishing the Navajo Reservation. Treaty with the Navaho, June 1, 1868, 15 Stat. 667. This Court explicitly recognized the implied understanding established with such treaties that tribes have use of the water necessary from appurtenant sources to establish and maintain a permanent homeland and that this right vests at the time the treaty or agreement is established if not before. *Winters*, 207 U.S. 564. The mainstream Colorado River and two of its tributaries, the San Juan, and the Little Colorado, “are the only streams of the Navajo country that carry water from areas beyond the limits of the reservation . . . an area which contains no perennial through-flowing streams.” Dep’t of the Interior Water Supply Paper 380, *The Navajo Country* 87 (1916). Despite unparalleled development of the water resources in the Lower Colorado Basin by the United States effectively placing all water in the Colorado River below Lee Ferry under federal control, the Navajo Nation has received none of this water. This section reviews Navajo

Nation efforts over the years to gain recognition and use of its rights in the Lower Basin and to obtain needed supplies of water for uses on its reservation in the Lower Basin.

**A. *Arizona v. California.***

As noted above, in *Arizona v. California* the United States did not make any claims for Navajo Nation's rights to the mainstream Colorado River to which its reservation is appurtenant. Pet. of Intervention on Behalf of the United States of America, *Arizona v. California*, No. 10, Original, 1953 Term (United States). The reasons for not making such claims are unclear, but the consequences have continued to this day. The Nation sought to intervene directly twice in the litigation to represent its own interests.<sup>12</sup> The Special Master denied the first motion, unwilling to purportedly "disqualify the trustee." Brf. of the Navajo Nation Tribe in Support of Motion to Intervene, *Arizona v. California*, 1961.at 22.

After the Special Master determined that he was excluding tributaries and the mainstream of Colorado

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12. Motion for Leave to File Representation of Interest and Representation of Interest by the Colorado River Indian Tribes, the Colorado River Indian Reservation, Arizona and California; Gila River Pima-Maricopa Indian Community, Arizona; Hualapai Indian Tribes of the Hitalapai Reservation, Arizona; Navajo Tribe of Indians of the Navajo Reservation, Arizona and New Mexico; Salt River Pima-Maricopa Indian Community of the Salt River Reservation, Arizona; The San Carlos Apache Tribe, Arizona and the Fort McDowell Mohave-Apache Indian Community of the Fort McDowell Reservation, Arizona, *State of Arizona v. State of California*, October Term, 1956; Mot. on Behalf of Navajo Tribe of Indians of the Navajo Reservation, Arizona, New Mexico and Utah, for Leave to Intervene, Br. in Support Thereof, and Petition of Intervention, *Arizona v. California*, 1961 ("Navajo Motion").

above Lake Mead, where the lands and interests of the Navajo Nation are located, the Navajo Nation moved to intervene a second time. In its motion, the Nation claimed “substantial rights in and to the water of the Colorado River.” Navajo Motion at 2. Because the Special Master had declined to make apportionment of the water above Lake Mead, when there were “various contentions” regarding that determination, the Nation contended that it was possible that the interests of the Navajo Nation would be affected by the adjudication. *Id.* at 3. The United States made no exception to the Special Master’s determination to exclude water above Lake Mead, and the Nation argued that the United States had thereby abandoned the Nation’s claims. *Id.* at 4. In response to the Nation’s motion to intervene after the close of evidence before the Special Master, the United States acknowledged that no evidence had been submitted on behalf of the Nation for mainstream uses above Lake Mead, and if the Court rejected the Special Master’s recommendation, then it would be necessary to adjudicate the Nation’s rights above Lake Mead. *US Response to Mot. by Navajo Tribe to Intervene, Arizona v. California*, 961, at 15.

In the end, the Court disagreed with the Special Master, finding that the BCPA addressed the entirety of the Lower Basin, including lands above Lake Mead and below Lee Ferry. 1964 Decree, 373 U.S. 340, 591. The Court did not direct the Special Master to conduct an additional trial to determine the water rights associated with the lands he had excluded, however, and the Special Master did not modify the recommended decree. The water needs of the Navajo Nation in Arizona from the Colorado River and other water sources in the Lower Basin remain undetermined.



## **B. The Little Colorado River Adjudication.**

In 1978, the Phelps-Dodge Corporation petitioned the State of Arizona seeking adjudication of all rights to use the waters of the Little Colorado River and its tributaries. ARIZ. DEP'T OF WATER RES. (2023), <https://new.azwater.gov/adjudications/gila-river-and-little-colorado-river-general-stream-adjudications>. That case was referred to Apache County Superior Court in 1979 and named *In re: The General Adjudication of all Rights to Use Water in the Little Colorado River System and Source*, Superior Ct. No. 6417, Apache County, Arizona. There are over 6,000 parties to the adjudication, now in its 44<sup>th</sup> year. The Navajo Nation filed its Statement of Claim in 1985 for the use of more than 500,000 acre-feet of water per year from surface and groundwater sources. Statement of Claimant, The Navajo Nation, Little Colorado River Watershed Adjudication, Superior Court of Apache County. The Superior Court has yet to consider the Navajo Nation's claims. Whatever the outcome of this prolonged adjudication, water from this system cannot meet all needs for the reservation in Arizona.

## **C. Direct Requests from the Navajo Nation to the Secretary of the Interior Seeking Water from the Colorado River.**

As outlined in the Navajo Nation's Third Amended Complaint in *Navajo Nation v. United States*, No. CV-03-507 PCT-GMS, on April 4, 2000, Navajo Nation water rights counsel Stanley M. Pollack sent a letter to David J. Hayes, Deputy Secretary of the U.S. Department of the Interior seeking settlement of Navajo rights to use water in the Lower Basin. JA 41, ¶ 37(a). Later that year,

Navajo Nation President Kelsey A. Begaye sent a letter to Secretary of the Interior Bruce Babbitt asking for a contract for then uncommitted mainstream Colorado River water apportioned to Arizona. JA 41, ¶ 37(b). In 2001, Navajo President Begaye sent a similar letter to Interior Secretary Gale A. Norton. JA 41, ¶ 37(c).

On November 7, 2001, Interior Solicitor William G. Myers III replied that the Nation's request raised questions about "competing entities, the views of non-Indian parties and the other tribes that may have an interest in the water." Letter Dated November 7, 2001, from William G. Myers III to Kelsey A. Begaye. He expected his review to entail a "lengthy process." There has been no further response. Nevertheless, the Navajo Nation continued its efforts to work with the Interior Department to address its water needs, as outlined in Paragraphs 66 – 72 of the Third Amended Complaint. It is difficult to reconcile federal trust responsibilities with these failures to act.

**V. Pervasive Control and Treaty-Based and other Fiduciary Obligations Require the United States to Make Sufficient Water Available for the Lower Basin Portion of the Navajo Reservation in Arizona.**

**A. The United States has developed and controls all the water resources in the Colorado River beginning at Glen Canyon Dam and Lake Powell, including all storage and deliveries of water.**

With construction of Glen Canyon Dam and Hoover Dam, the United States established complete control of all

water in the main Colorado River. The dams are operated in a coordinated fashion under which releases from Glen Canyon are tied to storage elevations in both reservoirs. Record of Decision, Colorado River Interim Guidelines for Lower Basin Shortages and the Coordinated Operations for Lake Powell and Lake Mead, December 2007; Lower Basin Drought Contingency Plan Agreement, Attachment B to the Agreement Concerning Colorado River Drought Contingency Management and Operations, 2019. The Secretary of the Interior is charged with developing annual operating plans for the reservoirs and producing 24 Month Studies anticipating future operations. Interior tracks flows into its reservoirs and, in the Lower Basin, provides an annual accounting of water uses. Uses of water from Lake Mead are governed by contracts with the three states and the users within their boundaries; no use is permissible except with a contract from the United States.

The decision by the Navajo people to accept a permanent homeland of a limited area of land established the necessary presumption that there would be sufficient water resources available for use from appurtenant water sources to make living on these lands viable. This Court recognized this implied right in *Winters*, 207 U.S. 564, and strongly reaffirmed the existence of tribal reserved rights in *Arizona v. California*, 373 U.S. at 595-97. Despite the clear need for water for the Navajo people to live on their reservation in the Lower Basin, no reserved rights have yet been expressly adjudicated nor has the United States taken affirmative steps to ensure the availability of necessary water.

**B. In this litigation, the Navajo Nation is asserting an affirmative duty on the part of the United States to determine the Nation's water needs on reservation lands in Arizona and to devise a plan for meeting these needs.**

One hundred and fifty-four years after settling on the reservation, the Navajo Nation is still seeking the required assistance from the United States to get water for Lower Basin reservation lands in Arizona. The Nation urges fulfillment of the trust duty owed by the United States under the treaties and asserts a breach of this trust resulting from the failure of the United States to take the affirmative steps necessary to ensure the Navajo people have sufficient and reliable water necessary for homeland needs. The Navajo Nation points to its lengthy efforts to obtain water from the Colorado River, including recent specific requests to the Secretary of the Interior. Remarkably, the United States now denies that trust responsibility, stating that the Navajo Nation fails to identify a specific duty to protect the interests of the Navajo Reservation. Brief of the Federal Parties, *Navajo Nation v. Arizona*, 20-21. It has long been established that the relationship created when a tribe enters a treaty or other agreement with the United States establishing a reservation is one of a fiduciary, in which the United States stands in the role of trustee safeguarding the interests of the tribe respecting its lands and resources. *Seminole Nation v. United States*, 316 U.S. 286, 296-97 (1942). This Court recognized a critical aspect of that trust responsibility when affirming tribal water rights in *Winters v. United States*—the responsibility to protect and help provide for the water needs of reservations established under treaties. The Colorado River Compact

expressly acknowledged federal obligations to tribes respecting waters of the Colorado River Basin. Colorado River Compact, Art. VII.

Consider the facts of *Winters*. Non-Indian landholders upstream from the Fort Belknap Indian Reservation sought to develop the water resources of the Milk River in a manner that would have precluded the tribes from realizing the water supply they needed to be able to grow crops on reservation lands. By its intervention, the United States sought to protect the essential interests of the tribes for necessary water resources. Now consider the situation on the Colorado River in the Lower Basin where it is the United States that has developed and controls all the river's water. Despite its power over the use of this water, here the United States has failed to help the Navajo Nation enjoy the use of any water from this source appurtenant to the reservation.

**C. The Navajo Nation is seeking affirmative but appropriately limited relief in this litigation, based on its unique situation.**

The Navajo Reservation is the only reservation in the Lower Basin directly appurtenant to the mainstream Colorado River without the legally acknowledged ability to use water from that source.<sup>13</sup> The United States has unique control of the use of the water in this part of

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13. The Havasupai Reservation is in the Grand Canyon along the Colorado River and also has unresolved water rights claims, but not apparently to the mainstream Colorado River. *See Havasupai Tribe v. Anasazi Water Company LLC*, 321 F.R.D. 351, 353 (D. Ariz. 2017) (describing sources of water on the reservation as Havasu Creek and groundwater resources).

the river but has taken no steps to assist the Nation in developing the means to access and use this water. The Nation seeks only to remedy this specific situation, one unlike other reservations in the Lower Basin with unresolved claims to water. The conjunction of the treaty relationship between the Navajo Nation and the United States, together with existence of implied reserved rights to the use of water from the Colorado River completely under the control of the United States and the obligations of the United States to tribes expressly acknowledged in the Colorado River Compact, makes clear the existence of a duty in this situation and the appropriateness of having the United States fulfill this duty by determining Navajo Nation water needs and exploring means of making the necessary water available. This Court need do no more than recognize the clear obligation owed here by the United States to the Navajo Nation to determine its needs and investigate options for meeting those needs.

**D. The Navajo Nation is not seeking an adjudication of its reserved rights in the Colorado River in the Lower Basin, nor need it do so.**

The State of Arizona and the United States argue that any effort by the United States to make mainstream Colorado River water available to the Navajo Nation must necessarily constitute an adjudication of Navajo Nation reserved rights, an action that would implicate this Court's retained jurisdiction in *Arizona v. California*. But, in fact, the Navajo Nation is not seeking an adjudication of tribal reserved water rights. The Nation is seeking water. This Court's retained jurisdiction is not triggered in this instance, as pointed out by the Ninth Circuit decision. *Navajo Nation*, 26 F.4th at 799 ("Although the Supreme

Court retained original jurisdiction over water rights claims to the Colorado River in Arizona I, the Nation's complaint does not seek a judicial quantification of rights to the River, so we need not decide whether the Supreme Court's retained jurisdiction is exclusive").

Much is made of the importance of maintaining the "security and reliability" of rights to use water from the Colorado River. Br. of Arizona, *Arizona v. Navajo Nation*, 23-24, 44-46. The assertion seems to be that providing water to the Navajo Nation, even without accounting for the seniority of the Nation's reserved rights, would "unsettle" existing water uses. Br. of Western Water Users and Trade Associations as *Amici Curiae* in Support of Pet'r's, *Arizona v. Navajo Nation*, 5, 8-19; Br. on the Merits for Pet'r State of Colo., *Arizona v. Navajo Nation*, 16-19. This argument rests on the assumption that legally recognized water rights are fixed and unchangeable and that the only way to satisfy Navajo needs for water is by involuntarily displacing some existing uses.

This assertion is without merit. Water rights and water uses are by no means fixed. Their initial determination in the appropriate legal proceeding ordinarily establishes a priority date, designated uses, and a maximum rate of diversion or diversion quantity that provide important boundaries establishing the dimensions of the right. Jason Anthony Robison, *Law of Water Rights and Resources* §§ 5:31, 5:68-5:69. But a water right is a property right that may be transferred, bought, and sold. *Id.* at 5:74. Its use may be changed so long as other water users from the same source are not harmed. *Id.* at § 5:78. Similarly, contract rights to water establish an initial arrangement under which water may be used, but contracts can be

changed if the parties agree. The flexibility of our system of water rights is essential to our ability to meet changing needs and interests.

There are many opportunities for voluntarily obtaining existing water rights to the use of mainstream Colorado River water and changing their use to the Navajo Reservation. In fact, there is a considerable history of changing the use of Colorado River water to benefit tribes. Perhaps the first example is found in the Southern Arizona Water Rights Settlement Act of 1982, Pub. L. No. 97-293, 96 Stat. 1261, under which the Tohono O'odham Nation received 37,800 acre-feet of CAP water. That was followed by the Ak-Chin Water Settlement Act of 1984, Pub. L. 98-530, 98 Stat. 2698, in which the United States agreed to make 50,000 acre-feet of Colorado River water available from a portion of Yuma Mesa Division of the Gila Project for use on the Ak-Chin reservation in south-central Arizona. Section 2(f)(1). This is not CAP water but water from another existing Reclamation project. In addition, the Ak-Chin received 58,300 of CAP water. Other tribes receiving CAP water (and sometimes other Colorado River water) include Salt River Pima-Maricopa Indian Community, the Fort McDowell Indian Community, and the Gila River Indian Community.<sup>14</sup> The most recent settlement ratified by Congress enables the Hualapai Tribe to use 4,000 acre-feet of CAP water on its reservation in the Grand Canyon or elsewhere in the State of Arizona, together with funding needed to build the infrastructure necessary to lift this water up from the

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14. A useful summary is provided in John B. Weldon, Jr. and Lisa M. McKnight, *Future Indian Water Settlements in Arizona: A Race to the Bottom of the Waterhole*, 49 *Ariz. L. Rev.* 441, 455-62 (2007).



Colorado River and move it to the reservation. Hualapai Tribe Water Rights Settlement Act of 2022, 117 Pub. L. 349. Simultaneously, Congress passed the Colorado River Indian Tribes Water Resiliency Act of 2022, 117 Pub. L. 343, authorizing the Colorado River Indian Tribes to lease water historically consumptively used on reservation for off-reservation uses. Section 4.

## CONCLUSION

An oft-quoted passage from the 1973 National Water Commission report concludes: “In the history of the United States Government’s treatment of Indian tribes, its failure to protect Indian water rights for use on the reservations it set aside for them is one of the sorrier chapters.”<sup>15</sup> The present case before the Court provides still another example. Perhaps this history is not surprising, given the few American Indians serving in Congress and the predominant interests of non-Indians represented by states. But the federal courts are especially suited to protect the rights of underrepresented minorities. It was this Court that first recognized the existence of tribal reserved water rights. And tribes hold a unique status in their legal relationship with the government of the United States, one characterized as a trust relationship. This Court’s consideration occurs in the context of a situation in which the United States has assumed full control over the water in the Colorado River, has spent billions of dollars building the dams that provide that control, formed contracts with the three Lower Basin states and

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15. National Water Commission, *Water Policies for the Future: Report to the President and to the Congress of the United States* 475 (1973).

their users for delivery and use of that water resulting in extraordinary growth in use, but has made none of that water available for use on the Navajo Reservation, despite its appurtenance to the Colorado River. We respectfully request that this Court acknowledge the justice of this request as well as the legal and moral obligation of the United States to fulfill its duties to the Navajo Nation.

Respectfully submitted.

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