

## U.S. Supreme Court Declines to Expand the Reserved Water Right



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On June 22, the U.S. Supreme Court issued a decision in *Arizona v. Navajo Nation*, No. 21-1484, holding that the Federal government is not responsible for taking affirmative steps to help the Navajo Nation secure access to water reserved for the Tribe from sources within, bordering, or underlying the Reservation. The ruling

focused on whether the 1868 treaty establishing the Navajo Reservation imposed a duty on the Federal government to take such affirmative steps. The Court upheld the Tribe’s rights under the *Winters* doctrine as giving the Tribe rights to use water as necessary for the purposes of its Reservation, but it held that the Tribe’s water rights do not include the right to affirmative measures ensuring that access to the water is secured for its use.

As the Court recognized, water in the western United States is over-allocated and often “a zero-sum situation.” The Court’s decision allows western states to manage water resources in a manner that may prioritize agriculture and urban growth over tribal well-being and environmental protections. The decision also narrows the definition of the scope of the United States’ trust responsibilities to tribes that suffer from water scarcity and poverty partly due to the Federal government’s past failures and inconsistencies in managing resources reserved to the tribes by treaty.

### Key Takeaways

- ◆ The United States has a general trust relationship with Native American tribes, but the relationship is limited compared to trust relationships between private parties at common law.
- ◆ Unless Congress has created a “conventional trust relationship” with a tribe regarding a particular asset, courts will not apply “common-law trust principles” to infer duties not found in any treaty, statute, or regulation.
- ◆ The 1868 treaty did not establish a conventional trust relationship with respect to water.

### Background

In 1849, the United States entered a treaty with the Navajo Nation to cease hostilities and maintain “perpetual peace” between the parties. In return, the United States agreed to “designate, settle, and adjust” the boundaries of the Navajo territory. The United States then forcibly removed many Navajo from their homeland to the Bosque Redondo Reservation in New Mexico. Following two decades of continued hostilities, the United States and the Navajo Nation entered into a second treaty to end “all war between the parties.” The Federal government then “set apart” a large reservation “for the use and

occupation of the Navajo tribe” on the Navajo’s original homeland in the western United States. The treaty established the Reservation as a “permanent home” for the Navajos. The government agreed to build schools, a chapel, and other buildings on the Reservation; to provide teachers for at least 10 years; to supply seeds and agricultural implements for up to three years; and to provide funding for the purchase of sheep, goats, cattle, and corn.

Under the Supreme Court’s well-established *Winters* doctrine, the Federal government’s reservation of land for a tribe implicitly reserves the right to use water from various sources, including groundwater, rivers, streams, lakes, and springs that arise on, border, cross, underlie, or are encompassed within the Reservation. The Navajo Reservation lies within the Colorado River Basin, and the Colorado River is one of three rivers that border the Reservation.

The Navajo Nation is one of the largest U.S. tribes without defined water rights. For decades the Tribe has tried to secure a quantified water source through negotiation with states and the federal government.

In 2003, the Navajo Nation sued the United States to compel it to assess the Tribe’s water needs and devise a plan to meet them. Arizona, Colorado, and Nevada intervened in the suit seeking to protect their access to water from the Colorado River.

## Further Defining the Reserved Water Right

The *Navajo Nation* case is the latest of many cases analyzing the scope of the duty the United States owes to federally recognized Native American tribes. The majority opinion focused on whether, under the 1868 treaty or the *Winters* doctrine, the Federal government has a duty to take concrete steps to help the Navajo Nation obtain water necessary for the Reservation.

The Court concluded that the treaty did not expressly impose any duties on the Federal Government to assess the Tribe’s water needs, develop a plan to secure the needed water, or build water infrastructure. The Court held that unless Congress has created a “conventional trust relationship” with a tribe as to a particular asset, courts will not apply “common-law trust principles” to infer duties not found in any treaty, statute, or regulation and that the Federal government owes judicially enforceable duties to a tribe “only to the extent it expressly accepts [such] responsibilities.” The opinion then noted that the 1868 treaty imposed several specific duties on the Federal Government but that none of those duties required the government to take action to ensure the Navajo Reservation has secure access to water.

The Navajo Nation also argued the United States had opposed the Tribe’s intervention in lengthy water rights litigation in a series of cases decided by the Court from the 1960s to the early 2000s. The Tribe contended that this showed that the United States has control over the water rights in the Colorado River and supports the existence of trust duties to the Navajos with respect to water. The Court held, however, that the Federal Government’s liability on a breach-of-trust claim cannot be based on control alone and that the Tribe had not identified any language showing that the United States had expressly accepted the trust responsibilities the Navajo sought to impose on the Federal government.

The Court also declined to read the *Winters* doctrine to impose any duty on the Federal government regarding water access. Thus, the water rights implicit in the reservation of land for the Navajo include the right to use the water from the sources of water within, underlying, or bordering the Reservation, but they do not include rights to any affirmative efforts by the Federal government to secure access to the water sources.

Justice Gorsuch, joined by Justices Kagan, Sotomayor, and Jackson, disagreed with the Court’s decision and the majority’s understanding of the Navajo Nation’s requested relief. Justice Gorsuch first stated that the case is not about compelling the Federal government to take “affirmative steps to secure water for the

Navajos” and that the Navajo Nation instead asked the United States to identify the water rights it holds for the Tribe and formulate a plan to stop any misappropriation that may have occurred. Justice Gorsuch also stated that the majority had analyzed the United States’ duties under the treaty under the wrong legal framework, treating the complaint as seeking monetary damages under the Tucker Act and the Indian Tucker Act rather than equitable relief under the treaty itself. Considering these legal principles, the history surrounding the enactment of the 1868 treaty, and other treaty provisions, Justice Gorsuch concluded that the treaty’s promise that the Navajo Nation may make its Reservation a “permanent home” secures some measure of water rights and imposes a duty on the Federal government to manage the water it holds for the Tribe in a legally responsible manner.

The majority’s opinion makes it clear that the Court does not consider the relief the Navajo Nation seeks to be within the Court’s “proper constitutional lane.” Rather, the majority maintains that it is within the province of Congress and the President to enact appropriations laws for water and water infrastructure. However, as Justice Gorsuch noted in his dissent, the opinion does not foreclose other efforts the Navajo Nation may take to assert its water rights, including claiming direct interference with its *Winters* rights and continuing to seek to intervene in cases that affect its water rights.

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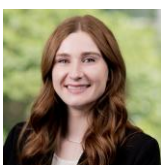
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