

# “Reserved” but Not “Secured”: Supreme Court Sinks Navajo Nation’s Attempt to Compel Federal Action on Tribal Water Rights

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On June 22, 2023, the Supreme Court issued its [decision](#) in two consolidated cases (hereinafter *Navajo Nation*) involving the Navajo Nation’s rights to water on the Navajo Reservation, which generally lie within the Colorado River basin. In *Navajo Nation*, the Court reaffirmed that the United States had reserved water rights on the Navajo Nation’s behalf pursuant to a [treaty establishing](#) the Navajo reservation as a “permanent home,” but [rejected](#) the implication that the United States could be required to “take affirmative steps” as trustee to assess or secure those rights.

The Supreme Court’s decision arose in the contexts of the United States’ trust responsibility toward federally recognized Indian Tribes and of tribal water rights, stemming from two landmark Supreme Court cases: *Winters v. United States* and *Arizona v. California*. This Sidebar examines that legal background before summarizing the *Navajo Nation* opinions and discussing considerations for Congress.

## The United States’ Trust Responsibility Toward Tribes

The Supreme Court has long [recognized](#) the “undisputed existence of a general trust relationship between the United States and the Indian people.” The Court has [described](#) the trust relationship as “a humane and self-imposed policy” under which the United States charges “itself with moral obligations of the highest responsibility and trust,” such that its conduct should “be judged by the most exacting fiduciary standards.”

The exact contours of the trust relationship, however, and the extent to which the United States may have a common-law fiduciary duty to act for Tribes’ benefit, [may vary](#) depending on courts’ interpretation of the treaties, statutes, and regulations involved.

## Tribal Reserved Water Rights: *Winters v. United States*

Among the facets of trust relationship—and one expressly reaffirmed by the Court in *Navajo Nation*—is the [Winters doctrine](#), derived from the 1908 Supreme Court opinion in *Winters v. United States*. The

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doctrine refers to the principle that the federal government, by reserving land for tribal use, *also* implicitly reserves “appurtenant water” in amounts sufficient “to accomplish the purpose of the reservation.”

In *Winters*, the federal government acted on behalf of a federally recognized Tribe to prevent upstream water users from interfering with the Tribe’s downstream uses on its reservation. The United States designated the reservation by treaty as a “permanent home and abiding place” for the Tribe. Although the treaty creating the reservation did not expressly mention water rights, the Court ruled that the federal government, through the treaty, *implicitly reserved* water rights to be held in trust by the United States on behalf of the Tribe.

### **Allocation of Colorado River Rights: *Arizona v. California***

Conflicting claims to water rights in the Lower Basin of the Colorado River have existed for many years, but the Supreme Court set forth a legal framework for determining at least some of those rights in the 1960s. In 1952, the State of Arizona sued California directly in the Supreme Court to resolve a *disagreement* over how much water each state could legally use from the Colorado River and its tributaries. The United States initially intervened to assert claims to reserved water rights for 25 Tribes in the Colorado River Basin, including the Navajo Nation. As the case’s scope became limited to the Colorado River itself rather than any tributaries, the United States’ involvement became limited to intervention on behalf of five Tribes along the mainstream of the Colorado River. The Navajo Nation was not among them.

In 1963, the Supreme Court issued its *first* opinion in *Arizona v. California*, followed by a 1964 decree that allocated water from the Colorado River mainstream in the Lower Basin among several parties, including the five Tribes with recognized rights to the mainstream. The Court did not quantify water rights for any interests in the Colorado River’s tributaries (i.e., outside the mainstream) and therefore did not address the water rights of the Navajo Nation or the other 20 tribes on whose behalf the United States had asserted reserved water rights in those tributaries. The 1964 decree also *specified* that it did not affect, except where expressly provided, the water rights or priorities of any Indian Reservation. For the five Tribes with recognized rights to the mainstream, the Court *applied the Winters doctrine*, recognizing reserved water rights as of the date each reservation was established. This prioritized those tribal water rights over later-established water rights (such as those recognized pursuant to the *Boulder Canyon Project Act* of 1929).

The Supreme Court retained jurisdiction over the case after the 1964 decree, and various entities have returned to the Court multiple times to clarify their rights to the Colorado River mainstream. The Court has issued several subsequent opinions and decrees, including a *consolidated 2006 decree* that incorporated earlier amendments. However, the Court never directly addressed questions related to the Navajo Nation’s water rights claims in the Colorado River Basin.

### **The Navajo Nation Cases**

In 2003, the Navajo Nation *sued* the United States via the Department of the Interior and some of its components, alleging among other things that the United States breached its trust responsibilities to the Navajo Nation by failing to evaluate and protect tribal water rights. As the Supreme Court later *put it*, the United States could have done this “for example, by assessing the Tribe’s water needs, developing a plan to secure the needed water, and potentially building pipelines, pumps, wells, or other water infrastructure—either to facilitate better access to water on the reservation or to transport off-reservation water onto the reservation.” Arizona, Nevada, and other various state and local entities (collectively, the State Parties) intervened in the case to protect their interests in the Colorado River waters.

The federal district court [dismissed](#) the Navajo Nation's complaint. The court agreed with the State Parties that it lacked jurisdiction because the Supreme Court retained jurisdiction over *Arizona v. California*-related claims. The court also agreed with the United States that the Navajo Nation had failed to state a valid breach of trust claim because it did not identify a specific treaty, statute, or regulation that imposed an enforceable trust duty on the United States.

The U.S. Court of Appeals for the Ninth Circuit [reversed](#) the district court's judgment, holding that the Supreme Court's retained jurisdiction in *Arizona v. United States* was not implicated because the Navajo Nation was not seeking "a judicial quantification of rights to the River." The Ninth Circuit then determined that the Navajo Nation's complaint properly stated a breach of trust claim based on its treaties with the United States and its *Winters* rights. The court did not address whether the Navajo Nation's *Winters* rights included any rights to the Colorado River mainstream or any other specific water sources.

Both Arizona and the United States [filed](#) petitions for certiorari with the United States Supreme Court, challenging various aspects of the Ninth Circuit decision. The Supreme Court granted both petitions and combined the cases for argument.

## The Supreme Court's Decision

In a 5–4 decision, the Supreme Court [held](#) that the United States as water-rights trustee has no affirmative, judicially enforceable obligation to support water access or infrastructure on the Navajo reservation—or even to assess the extent of the Navajo Nation's reserved water rights. In Justice Kavanaugh's majority opinion, the Court [confirmed](#) that the Navajo Nation enjoyed reserved water rights necessary to accomplish the purpose of its reservation consistent with *Winters*. The Court held, however, [that because](#) "the United States is a sovereign, not a private trustee," the United States' trust obligations "to the Indian tribes are established and governed by treaty, statute, or regulation, rather than by the common law of trusts." In other words, only a specific and affirmative obligation in a treaty, statute, or regulation could command the United States to quantify tribal water needs or secure water for the Navajo Nation, notwithstanding the existence of their reserved water rights. Examining the treaty language governing the relationship between the Navajo Nation and the United States, the majority [reasoned](#) that the text included no specific terms mandating water access in the same way the treaty mandated the provision of schools, seeds, and clothing.

The Court further [explained](#) that its precedents required specific "rights-creating or duty-imposing language" to create *judicially enforceable* rights—that is, to create rights that a Tribe could sue to protect, rather than relying on the United States to act of its own accord. "In light of the treaty's text and history," the majority concluded, it "does not require the United States to take those affirmative steps. And it is not the Judiciary's role to rewrite and update this 155-year-old treaty."

Although the Court [did not reach](#) the question of whether it retained exclusive jurisdiction to hear this case in light of its retained jurisdiction in *Arizona v. California*, it observed that the Navajo Nation could potentially intervene in water rights litigation on a case-by-case basis, at which point courts could address those claims "[as appropriate](#)."

Justice Thomas wrote a separate concurrence in which no other Justice joined. As in [prior cases](#), he [questioned](#) the legal foundation of the trust relationship between Tribes and the United States, including the canons of construction that typically apply in federal Indian law.

## The Dissent

Justice Gorsuch dissented, joined by Justices Kagan, Sotomayor, and Jackson. The dissent viewed the guarantee of a "permanent home" on the reservation—along with other treaty provisions, the Navajo Nation's specific history, and principles of Indian law—as collectively securing reserved water rights. In

the dissent's view, the government's [fiduciary duty](#) to manage the Navajo Nation's water rights requires the government "[at least](#)" to assess what water rights the Navajo Nation holds. The dissent also cited the Navajo Nation's inability to intervene in the 1963 *Arizona v. California* case as evidence of decades-long delays by the United States. According to the dissent, these delays could be seen as potentially [interfering](#) with the Navajo Nation's water rights—something the majority acknowledged the government may not do. The dissent also noted that, in the wake of the Court's decision, the Navajo Nation lacks any clear legal avenue to secure, or even to inquire about the scope of, their reserved water rights.

## Considerations for Congress

The Court's opinion noted that Congress and the President may enact laws "assist[ing] the citizens of the western United States, including the Navajos, with their water needs." As the Court [explained](#), because the 1868 treaty did not expressly "envision and provide for" the Navajo Nation's 21st-century water needs, the political branches have the responsibility to decide whether to amend the law to address those current and future needs. The Court observed that Congress could address the Navajo Nation's request by enacting legislation that provides for water rights, access, and infrastructure while acknowledging competing demands in the water-scarce environment of the American West.

For its part, Congress could independently consider legislation to apportion water rights to the Navajo Nation, or among some or all of the rights holders in the region. Similarly, Congress could direct an agency official such as the Secretary of the Interior to assess or quantify any of those rights. Congress could also require the United States to take any or all of the specific affirmative actions requested by the Navajo Nation, or it could choose to continue to await action by the executive branch to negotiate and recommend enactment of specific settlements.

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