

Dozens Of Tribes Back Navajo Water Claims At Supreme Court

By **Caleb Symons**

Law360 (February 8, 2023, 8:38 PM EST) -- The Navajo Nation on Wednesday secured the support of 50 other Indigenous tribes in its efforts to tap the Colorado River, with an influential tribal advocacy group telling the U.S. Supreme Court that federal authorities owe the Navajos at least a summary of their water rights.

In an amicus brief, the Coalition of Large Tribes — which represents the 51 tribes, including the Navajo Nation, with reservations of more than 100,000 acres — sought to cast the current dispute in larger terms, saying the U.S. government often fails to respect its trust obligations.

"COLT member tribes govern vast swaths of the West, but do so largely with at least one hand veritably tied behind their back because of their uncertain water rights and the United States' persistent failure to protect tribal water rights," the organization said.

Native American tribes routinely back one another in federal litigation, but Wednesday's amicus brief is notable because the Navajo case implicates many other Southwest tribes that already draw water from the Colorado River.

Perhaps in a reflection of that reality, the Coalition of Large Tribes urged the justices to view the litigation in a limited manner, saying the Navajo Nation is seeking only an accounting of its water rights — not an allocation. Still, that information is "absolutely critical" to making sure Indigenous tribes can eventually obtain such resources, COLT said.

"Only then can the other potentially competing interests in those same water resources be weighed in the political process and ultimately resolved by Congress," it told the Supreme Court.

A federal accounting of Navajo water rights is particularly important now, COLT added, because drought conditions in the Southwest have led to heated competition over the Colorado River. The Biden administration has responded by threatening to reduce the water distributions to multiple states, including Arizona and California, if they cannot agree on their own cuts.

"Tribal water rights will be caught up in this battle, which will likely involve protracted litigation that the tribes can ill afford and intense political pressure on the federal government to prioritize some users over others," COLT told the high court on Wednesday.

At issue is a **procedural ruling** by the Ninth Circuit, which in April 2021 gave the Navajo

Nation a chance to revise its two-decade-old lawsuit claiming the Interior Department owes a full accounting of the tribe's water needs.

The circuit court, in reviving the Navajo suit, said an Arizona federal judge was wrong to have dismissed the case without letting it file an amended complaint. Federal and state officials subsequently appealed to the Supreme Court, which granted certiorari last November.

Navajo officials are casting their attempt to draw water from the Colorado River as a **question of human rights**, telling the Supreme Court last week that the tribe's citizens risk losing their livelihoods, or even their homeland, if the U.S. government keeps withholding such resources.

Treaties that Congress ratified in 1849 and 1868, read together, require the government to supply the Navajo Nation's arid reservation with enough water to serve agricultural and livestock-rearing purposes, as well as regular community need, according to the tribe. That commitment was clearly understood by federal and tribal leaders at the time, the Nation said Feb. 1.

"The United States made a solemn promise, and the courts should enforce it," it told the justices. "The basic human rights of hundreds of thousands of Navajos, fellow U.S. citizens, hang in the balance."

Troy A. Eid, an attorney for the Coalition of Large Tribes, said Wednesday the advocacy group is "very pleased" to support the Navajo Nation.

Eid, co-chair of the American Indian Law practice at Greenberg Traurig LLP, lauded the Ninth Circuit's ruling two years ago as a crucial recognition of the federal government's trust obligations to tribal communities. Calling that decision an "encouraging" step, Eid — who also serves as president of the Navajo Nation Bar Association — said COLT is speaking up to advance its members' interests.

"All these tribes benefit from the federal government undertaking an assessment of their water rights," he told Law360.

Three of COLT's members — the Ute Indian Tribe of the Uintah and Ouray Reservation, the Southern Ute Indian Tribe, and the Ute Mountain Ute Tribe — filed their own amicus briefs Wednesday backing the Navajo Nation.

The Nation also got support from a group of history professors, including from the NYU-Yale American Indian Sovereignty Project, who told the Supreme Court that tribes in the West expected to retain their water rights when they ceded land to the U.S. government.

The high court recognized that assumption in the 1908 case **Winters v. United States** , according to the historians, who said the landmark decision, when applied to the Navajo case, requires federal action. Treaties that delineate tribal homelands, like the pair of 19th-century agreements cited by the Navajo Nation, "were necessarily intended to obligate the United States to secure and enforce Winters rights," they said Wednesday.

The Biden administration has **taken a different view of Winters**, claiming it created a "doctrine of implied rights, not affirmative duties — let alone affirmative duties that the government has expressly accepted." Navajo leaders haven't identified a statute or treaty

that explicitly creates a federal trust obligation over its water rights, the government says.

COLT is represented by Troy A. Eid, Jennifer H. Weddle, Harriet McConnell Retford and Kyle Montour of Greenberg Traurig LLP.

The historians are represented by Sam Hirsch, Leonard R. Powell, Troy Emiliano Aguirre and Abraham Kanter of Jenner & Block LLP and by Amanda L. White Eagle of the NYU-Yale American Indian Sovereignty Project.

The Navajo Nation is represented by Ethel B. Branch, G. Michelle Brown-Yazzie and Paul Spruhan of the tribe's Department of Justice, Shay Dvoretzky, Parker Rider-Longmaid, Sylvia O. Tsakos and Jeremy Patashnik of Skadden Arps Slate Meagher & Flom LLP, M. Kathryn Hoover of Sacks Tierney PA and by Alice Elizabeth Walker of Meyer Walker & Walker PC.

The federal government is represented by Elizabeth B. Prelogar, Todd Kim, Edwin S. Kneedler, Frederick Liu, William B. Lazarus and John L. Smeltzer of the U.S. Department of Justice.

The consolidated case is Arizona et al. v. Navajo Nation et al., case number 21-1484, in the U.S. Supreme Court.

--Editing by Emily Kokoll.