

# Colo. River Dispute A Matter Of Human Rights, Navajos Say

By **Caleb Symons**

Law360 (February 2, 2023, 7:15 PM EST) -- The Navajo Nation is casting its attempt to draw water from the drought-stricken Colorado River as a question of human rights, telling the U.S. Supreme Court that its citizens risk losing their livelihoods, or even their homeland, if federal officials keep withholding such resources.

With the justices set to hear oral argument next month, Navajo leaders sought on Wednesday to buttress their stance that a pair of 19th-century treaties entitle them to a viable reservation — while also trying to ease concerns about diverting more water from the Colorado River.

Those treaties, which Congress ratified in 1849 and 1868, require the U.S. government to supply Navajo land with enough water to serve agricultural and livestock-rearing purposes, as well as the usual community need, according to the tribe. Regardless of present-day circumstances, that commitment was clearly understood by federal and tribal leaders at the time, the Nation said Wednesday.

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

The water-rights dispute has drawn considerable interest for several reasons.

For one, supplying the Navajo reservation — a 17.5-million-acre territory that includes parts of three Southwestern states — with enough water to meet its needs promises to be a large undertaking for the federal government.

The litigation is also playing out amid historic drought conditions that have reduced the Colorado River's flow by some 20% over the past century. Just this week, Southwestern states missed a federal deadline to renegotiate their water-sharing agreement in line with that reality, as California refused to agree to voluntary usage cuts and pledged its own conservation strategy.

Despite the dwindling resources, the Navajo Nation — which already gets water from Colorado River tributaries — has cast its treaty claim as non-negotiable.

The federal government, through the 1849 and 1868 agreements, allowed the tribe to return to its ancestral homeland after Navajo people had been forcibly relocated to Bosque Redondo, a site near Fort Sumner in eastern New Mexico. Those treaties included a

promise to make the Navajo reservation viable for crops and livestock, a pledge the tribe now contends was a commitment from the U.S. to supply adequate water resources.

"Dry western land without water is no home," it told the Supreme Court on Wednesday, saying "the agreement makes sense only as a promise of land and water together."

Federal authorities have **rejected that interpretation**, though, claiming the Navajo Nation cannot cite an explicit duty requiring the U.S. Department of the Interior to divert water from the Colorado River for the tribe.

Late last year, the Biden administration said a landmark Supreme Court case delineating Native American water rights, **Winters v. United States** , set out a "doctrine of implied rights, not affirmative duties — let alone affirmative duties that the government has expressly accepted." Nor does the 1868 treaty, which formally established the Navajo reservation, clearly obligate the federal government to reserve water for that land, it added.

"Here," the administration said on Dec. 19, "the Navajo Nation has not identified any statute, treaty, or regulation that expressly establishes an affirmative trust duty to assess and address the [its] general water needs."

But tribal officials say the 19th-century treaties clearly established a federal trust obligation, even if their language didn't phrase it that way, arguing on Wednesday that "no magic words are required to create an enforceable duty." Instead, the Navajo Nation is asking the Supreme Court to focus on the signatories' intent in reaching those agreements, as well as their relative negotiating strength.

"The ultimate question," it said, "is what the tribe would have understood the United States to have promised, all while the United States held the pen."

Navajo leaders are also facing pushback from Southwestern states and local water districts that **oppose their bid for expanded water rights**.

Colorado has urged the justices to uphold the so-called Law of the River — an amalgamation of "cases, legal agreements, laws, and regulations governing the Colorado River." In a Dec. 19 brief, the Centennial State warned the Supreme Court that any new claims to the lower portion of the river, as offered by the Navajos, could upset its carefully balanced distribution.

"Put another way," Colorado said, "any plan to supply a new water claim from the Mainstream will affect the distribution to other users within the affected state and may create additional uncertainty for other Mainstream water users."

In a nod, perhaps, to such concern, the Navajo Nation pointed out Wednesday that it is asking the Interior Department only to calculate how much water it must provide the tribe to satisfy its alleged trust responsibility.

The tribe's water rights, it maintains, are tied to the Colorado River. But the tribe appeared to leave the door open, in its latest brief, to resource-sharing negotiations if things eventually come to that point. The water-rights suit, it said, "requires only a finding that the government has failed to secure the water it promised by treaty, no matter where that water might come from."

Oral argument in the case is scheduled for March 20.

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.

Last month, a libertarian group called the Citizens Equal Rights Alliance **sought to use the case** as an opportunity to advance its campaign of abolishing federal Indian law.

CERA, through its nonprofit Citizens Equal Rights Foundation, urged the justices to reverse the Ninth Circuit ruling on the basis that the Winters doctrine — from the landmark 1908 case delineating Indigenous water rights — discriminates against Native communities. Instead, the organization said, Native Americans would be better served by enforcing their water rights via equal-protection claims.

"The federal reserved rights doctrine has never been a workable legal doctrine," CERA said. "It has created ridiculous disparities between Indian tribes and attacked state authority and jurisdiction to the detriment of all people."

The Interior Department, through a spokesman, declined to comment Thursday on the litigation. The Arizona Department of Water Resources, which is among the state intervenors, also declined to comment.

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.

Arizona is represented by independent practitioner Rita P. Maguire and by Nicole D. Klobas and Jennifer Heim of the Arizona Department of Water Resources.

Colorado is represented by Philip J. Weiser, Eric R. Olson, Scott Steinbrecher, A. Lain Leoniak, Russell D. Johnson and Haley Dutch of the state attorney general's office.

Nevada is represented by Aaron Ford and David Newton of the state attorney general's office and by Lauren J. Caster and Bradley J. Pew of Fennemore Craig PC.

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.

