

# [***Note & Comment: Building With Blinders On: How Policymakers Ignored Indian Water Rights to the Colorado, Setting the Stage for the Navajo Claim***](https://advance.lexis.com/api/document?collection=analytical-materials&id=urn:contentItem:52JV-4DT0-00CV-H0C0-00000-00&context=1516831)

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**Text**

**[\*159]**

[*I*](https://advance.lexis.com/api/document?collection=statutes-legislation&id=urn:contentItem:8T9R-T2X2-D6RV-H374-00000-00&context=1516831). Introduction

On March 14, 2003, the Navajo Nation filed a lawsuit against the U.S. Department of the Interior in an effort to resolve its potentially huge share of the ***Colorado*** ***River***. [[1]](#footnote-2)1 The suit focuses on the tribe's reserved water rights for the western half of its reservation, above Lake Mead in Arizona. [[2]](#footnote-3)2 It should have come as no surprise.

Millions of people rely on ***Colorado*** ***River*** water for municipal and commercial purposes in the Lower Basin states of Arizona, California, and Nevada. Billions have been spent in the Southwest based on this reliance, fueling rapid growth and economic prosperity. Yet a heavy cloud of uncertainty hovered over all this development from the beginning. The policymakers who split up and consistently sparred over the ***river*** chose to look the other way, however, preferring to focus their eyes on a future full of dollars and dams. Those days are over.

**[\*160]** "People have known for years that the Navajos have a potentially enormous claim on the ***Colorado***," said David Getches, a water and Indian law expert who is currently dean of the University of ***Colorado*** Law School. [[3]](#footnote-4)3 States simply developed in spite of this knowledge. [[4]](#footnote-5)4

Estimates for the tribe's reserved water rights to the ***Colorado*** vary wildly, but Stanley Pollack, assistant attorney general for the Navajo, places it around 300,000 acre-feet ("af") of water per year. [[5]](#footnote-6)5 Some members of the Navajo Nation consider that number to be modest. [[6]](#footnote-7)6 For a frame of reference, the 1928 Boulder Canyon Project Act ("BCPA") tentatively divided the Lower Basin's annual 7.5 million acre-feet ("maf") share of the ***Colorado*** as follows: California, 4.4 maf; Arizona, 2.8 maf; and Nevada, 0.3 maf. [[7]](#footnote-8)7 If the Navajo's legal strategy is even moderately successful, the ***Colorado*** ***River*** allocation system, as it exists now, could be completely upended. This reality was not lost on the parties involved, who quickly agreed to stay the complaint and work on a settlement. [[8]](#footnote-9)8 In fact, the seriousness of the situation is reflected by the names of the intervening parties: the state of Arizona, Arizona Power Authority, Imperial Irrigation District, Metropolitan Water District of Southern California, Southern Nevada Water Authority, and Coachella Valley Water District, to name a few. [[9]](#footnote-10)9 The Navajo claim threatens those who have benefited most from the ***Colorado*** ***River***.

This note's aim is to provide a historical sketch of how existing Lower Basin users undermined their own interests by neglecting to quantify what could be significant water rights to the ***Colorado*** ***River***. The focus is on the Navajo, and specifically, on an unfortunate trend that plagued ***Colorado*** ***River*** management from the beginning: The Navajo, like other tribes, were never at the table while the ***Colorado*** was being divvied up. To this day, their senior water rights remain unsettled. As a result, Lower Basin uses of the ***Colorado*** ***River*** potentially rest on shaky ground.

**[\*161]** The first section of the note analyzes the "Law of the ***River***," how Indian water rights fit into the current legal system, and the evolution of the Navajo claim. This analysis is limited to certain aspects of ***Colorado*** ***River*** management that are most relevant to the Navajo claim. The second section discusses the current settlement negotiations and lawsuit, including the legal landscape that may enable the Navajo to finally realize their rightful share of the ***Colorado***. My hope is to draw attention to another chapter of Western history where poor decisions from the past have caught up to us, and help find a path forward for the people of the Southwest.

[*II*](https://advance.lexis.com/api/document?collection=statutes-legislation&id=urn:contentItem:8T9R-T352-D6RV-H379-00000-00&context=1516831). Indians and the Law of the ***River***

The "Law of the ***River***" is complex. It is a treaty, two interstate compacts, a federal statute, and a Supreme Court decision that all serve as guidelines for use and allocation of the ***Colorado*** ***River***. [[10]](#footnote-11)10 According to Marc Reisner, author of Cadillac Desert, the ***river*** is the "most legislated, most debated, and most litigated ***river*** in the entire world. It also has more people, more industry, and a more significant economy dependent on it than any comparable ***river*** in the world." [[11]](#footnote-12)11

This note, however, focuses on just one of the ***river***'s many management problems: how tribes were left out in the cold when the major allocation decisions were made. The reason for this course of action is difficult to comprehend, especially in the Navajo's case. After all, the reservation is impossible to miss on any map of the ***Colorado*** Plateau--or for that matter, any map of the Southwest. It spans three states, covers over 13 million acres, and is the largest Indian reservation in the United States. [[12]](#footnote-13)12 More importantly, the mainstream of the ***Colorado*** and one of its largest tributaries literally flow through Navajo lands.

A. Navajo Treaty and Executive Orders

On June 1, 1868, the United States and the Navajo signed an agreement providing that war between the parties "shall for ever [sic] cease," [[13]](#footnote-14)13 and that lands were to be "set apart for the use and occupation **[\*162]** of the Navajo tribe of Indians." [[14]](#footnote-15)14 The treaty came four years after U.S. forces trapped the Navajo near Canyon De Chelly in Arizona, then marched them hundreds of miles to Fort Sumner, New Mexico, which is known as the "Long Walk of the Navajos." [[15]](#footnote-16)15 The 1868 treaty guaranteed to the Navajo a return to their ancestral lands, which are surrounded by four mountain peaks the Navajo consider sacred. [[16]](#footnote-17)16 In the ensuing years, the government significantly expanded the original reservation through executive orders. [[17]](#footnote-18)17 The heart of the treaty--especially with regard to reserved water rights--is in Article XIII, which stipulates that the U.S. government and the Navajo agree that the land in question shall serve as the Navajo's "permanent home." [[18]](#footnote-19)18 In the years to come, those two words would strengthen in meaning.

B. Winters v. United States

Over a century ago, in 1908, the U.S. Supreme Court laid the groundwork for the legal doctrine that serves as the backbone for the Navajo's current ***Colorado*** ***River*** claim. In a bold decision, the Court held that when the U.S. government created the Fort Belknap Indian Reservation in 1888, making it the Gros Ventre and Assiniboing's permanent home in Montana, it reserved water rights for their future use. [[19]](#footnote-20)19 The water rights are exempt from state appropriation laws and reserved to give Indians the "power to change" [[20]](#footnote-21)20 and control their own destiny. Reserved rights do not evaporate over time, [[21]](#footnote-22)21 but retain their seniority status even if the tribes never put the water to beneficial use. [[22]](#footnote-23)22 The Court reasoned that the "lands were arid, and, without irrigation, were practically valueless," [[23]](#footnote-24)23 so there was no way that the tribe would **[\*163]** have voluntarily given up the one resource that made their lands valuable: water. [[24]](#footnote-25)24

Today, Indian reserved rights, based on Winters and its progeny, are arguably the most sturdy and valuable water rights in the West--at least on paper. [[25]](#footnote-26)25 The problem, however, is that the Winters decision failed to explain how reserved rights were to be measured, or if there were built-in limitations to Indian water claims in the future. [[26]](#footnote-27)26 But the Court did make one issue very clear: the United States reserved water for tribes "to fulfill the purposes for which the reservations were established." [[27]](#footnote-28)27

The Court's holding should have forced policymakers to apply caution when they decided to allocate the ***Colorado*** ***River*** among states, ushering in the "Big Buildup" that forever changed the West. [[28]](#footnote-29)28 It did not.

C. 1922 ***Colorado*** ***River*** Compact

When the parties to the ***Colorado*** ***River*** Compact gathered at the swanky Bishop's Lodge in Santa Fe, New Mexico, to sort out a division of the ***river***, the participants knew that they were setting precedent--nothing like this type of compact had ever been attempted before. [[29]](#footnote-30)29 The goals were ambitious and twofold: first, ease controversies that were already brewing among the states with a clear agreement to solve problems associated with ***Colorado*** ***River*** management; and second, usher in the development of the Southwest by paving the way for massive engineering projects. [[30]](#footnote-31)30

Any visitor to the urban sprawls of Phoenix, Las Vegas, or Los Angeles, or the hundreds of thousands of irrigated acres in between these desert oases, knows that the drafters of the Compact were wildly successful in achieving one of their goals, which was to exploit the ***river*** for growth. However, that success has to be tempered by the complete failure of their other goal. [[31]](#footnote-32)31 Instead of peace and clarity they created **[\*164]** standoffs among states, resulting in distrust and legal claims that raged for decades. [[32]](#footnote-33)32 In addition, the stream flow assumptions that were used to divide the ***river*** later proved to be unrepresentative of normal flows, complicating matters further. [[33]](#footnote-34)33

The negotiating parties also failed to adequately address the many shares to the ***river*** that Indians might feasibly claim as their own. [[34]](#footnote-35)34 In fact, Indians were not even invited to the discussions, even though the Navajo lived just a short distance to the west. [[35]](#footnote-36)35 Considering the federal government serves as trustee for Indians and therefore must act on their behalf, which is "one of the primary cornerstones of Indian law," [[36]](#footnote-37)36 the federal government--at least when it comes to ***Colorado*** ***River*** allocations--shirked its duties from the start.

The Compact's major practical accomplishment divided the ***river*** between the Upper Basin states (***Colorado***, New Mexico, Wyoming, and Utah) and the Lower Basin states (Arizona, California, and Nevada) at Lee Ferry. [[37]](#footnote-38)37 Both Basins were awarded 7.5 maf annually, with the Upper Basin states assuming the burden of making that delivery, regardless if flows were lower than usual or if a drought gripped the region. [[38]](#footnote-39)38 Further, in Article VIII the commissioners stipulated that "present perfected rights to the beneficial use of waters of the ***Colorado*** ***River*** System are unimpaired by this compact." [[39]](#footnote-40)39 And, "[all] other rights to beneficial use of waters … shall be satisfied from the water apportioned to that Basin in which they situate." [[40]](#footnote-41)40 Forty years later, "present perfected" rights would take on a whole new meaning [[41]](#footnote-42)41 --one that is safe to say the commissioners did not see coming

Throughout the eleven articles, Indians are mentioned once, in Article VII. [[42]](#footnote-43)42 It reads: "Nothing in this compact shall be construed as affecting the obligations of the United States of America to Indian Tribes." [[43]](#footnote-44)43 Twenty words, that is all.

According to the unearthed minutes of the meetings, including **[\*165]** those twenty words in the Compact was not a priority, but a mere afterthought if anything. [[44]](#footnote-45)44 It was Herbert Hoover, commerce secretary at the time and chairman of the negotiations, [[45]](#footnote-46)45 who suggested that the language be included. [[46]](#footnote-47)46 Hoover held sway throughout the meetings, not only because he was acting on behalf of President Harding, but also because of his vast engineering experience and well-earned reputation as a problem solver. [[47]](#footnote-48)47 Hoover felt it politically unwise to ignore the Indians completely in such a monumental agreement, because, "you always find some congressman … who will bop up and say, "What is going to happen to the poor indian [sic]?' " [[48]](#footnote-49)48 Article VII, in his mind, served to appease these soft-hearted lawmakers and their consciences. [[49]](#footnote-50)49 Still, the words in Article VII are oddly vague, and no sincere effort was made to determine what tribes would be affected in the region, or what their current and future water needs might be. [[50]](#footnote-51)50 The commissioners were all of the opinion that if there were Indian claims to the ***Colorado***, they would be minor, and that Article VII was sufficient to settle any disputes. [[51]](#footnote-52)51 The commissioners passed Hoover's suggestion quickly and unanimously. [[52]](#footnote-53)52

In hindsight, it is easy to attack the commissioners for their shortsightedness with Article VII. Still, these were smart men who surely must have realized, based on the recent Winters decision, that Indians now held cards when it came to water. Delph Carpenter, who served as ***Colorado***'s representative, was, according to one historian, perhaps the "shrewdest water-rights lawyer in the United States." [[53]](#footnote-54)53 New Mexico's representative, Stephen B. Davis, Jr., entered the negotiations with his eyes set on the San Juan ***River***, which gathers strength in northern New Mexico before veering west until it connects with the ***Colorado*** in southern Utah. [[54]](#footnote-55)54 Davis must have known that the ***river*** cuts directly through Navajo lands, and considering the Winters reserved rights holding, that there was a good chance the tribe also had rights to **[\*166]** some of those flows. What is most striking is that in their efforts to protect their respective interests, the commissioners focused solely on the other states and neglected to consider the Indians, which posed a significant threat to their grand plans.

The Compact was not the final word on ***Colorado*** ***River*** management--not by a long shot--but it did create the broad allocation guidelines that are still enforced today, even though Arizona was much slower to approve the Compact than the other states. [[55]](#footnote-56)55 Those guidelines purposely left out the Indians. The irony, of course, is that by including what appeared to be innocuous language in Article VII and Article VIII, the Compact framers inadvertently set the stage for the current Navajo water claim.

D. 1928 Boulder Canyon Project Act

Six years after the historic Compact, the Lower Basin states still had not reached agreement on how to apportion their 7.5 maf share of the ***river***. [[56]](#footnote-57)56 The controversy the drafters hoped to avoid now festered on the ground in the Southwest and throughout Washington D.C. hallways; something had to be done. [[57]](#footnote-58)57 Congress took action with the Boulder Canyon Project Act, which approved the 1922 Compact, authorized the construction of what would later be called Hoover Dam, and suggested to Lower Basin states a way to divide the water among themselves annually. [[58]](#footnote-59)58 The plan included 4.4 maf for California, 2.8 maf for Arizona, and Nevada, which at that time was a far cry from the glitz and games for which it is now known, received 0.3 maf. [[59]](#footnote-60)59 The split first had to be approved by six of the seven states, but Congress included the numbers so the states could enter into an agreement that already had Congress's blessing, thus saving time. [[60]](#footnote-61)60 By June 25, 1929, six of the seven states approved the split--enough for President Hoover to declare the statute binding law. [[61]](#footnote-62)61

Once again, a plan to ease controversy along the ***river*** did anything but. Neither Arizona nor California favored the numbers, so a **[\*167]** detente proved elusive. [[62]](#footnote-63)62 Instead, Arizona sued California four times over the next thirty years, as it sat and watched its neighbor state boom because of the ***Colorado*** water it was now able to put to use, thanks to the Hoover Dam and transportation systems approved in the 1928 law. [[63]](#footnote-64)63

Nothing in the legislation mentions Indians, [[64]](#footnote-65)64 and no contingency or surplus plan was built in to safeguard Lower Basin states from new users who may have more senior rights than the Compact, pursuant to Article VII's "present perfected" clause. The BCPA continued the trend, started by the 1922 Compact, of excluding tribes from major management decisions. Furthermore, the BCPA opened up the federal government's purse to start developing massive engineering projects that greatly benefited non-Indian economies in the region, but did little if anything for the tribes along the ***Colorado***. The Lower Basin states, especially California, were now free to grow rapidly, relying on their respective cuts of 7.5 maf. With the benefit of ***Colorado*** ***River*** water, plus federal subsidies and related projects ushered in by the BCPA, Lower Basin states now had the power to swiftly change into desert oases. However, this power to adapt and control one's destiny, which water makes a reality in the West, was denied to Indians again in 1928.

E. 1944 United States and Mexico Treaty

Although not invited to the 1922 Compact negotiations either, it is fair to say that Mexico was more on the minds of the commissioners than Indians. [[65]](#footnote-66)65 For example, Mexico tried to gain access to the negotiations, but was rebuffed twice--first by the State Department, then by Hoover himself, on the grounds that the negotiations were to focus solely on "domestic matters." [[66]](#footnote-67)66 Mexico, in Hoover's opinion, had little to fuss about, despite the fact that the ***Colorado*** ***River*** does not stop at the border, and any apportionment among the states certainly has international implications. [[67]](#footnote-68)67 During negotiations, the commissioners delayed dealing with Mexico, just as they did with the Indians, inserting language in Article III that Mexico might have a "right to the use of any waters of the ***Colorado*** ***River*** System," should the United States approve **[\*168]** such a right at a later date. [[68]](#footnote-69)68

The date came in 1944, over twenty years later. [[69]](#footnote-70)69 Treaty terms guaranteed Mexico an annual delivery of 1.5 maf, [[70]](#footnote-71)70 and in "the event of extraordinary drought or serious accident [in the United States] … water allocated to Mexico … will be reduced in the same proportion as consumptive uses in the United States are reduced." [[71]](#footnote-72)71 Carrying out this provision is rife with possible conflicts and administrative difficulties, [[72]](#footnote-73)72 and many even considered the allocation far too generous. [[73]](#footnote-74)73 By subtracting 1.5 maf from both Basins' share of the ***Colorado***, pursuant to Article III(c) in the 1922 Compact, [[74]](#footnote-75)74 policymakers placed a significant new strain on the ***river***. [[75]](#footnote-76)75 Furthermore, Mexico's allotment, considering its authority derived from a congressionally approved treaty, now became the new senior right on the ***river***. [[76]](#footnote-77)76

Adding to these difficulties is the fact that Mexico likely needs more than 1.5 maf of freshwater from the ***river*** if the ***Colorado*** ***River*** Delta is ever going to thrive again. [[77]](#footnote-78)77 The situation in the delta--once a diverse ecosystem in Northern Mexico--deteriorated significantly in the twentieth century as freshwater flows dropped nearly seventy-five percent, caused largely by construction of the Hoover and Glen Canyon dams north of the border. [[78]](#footnote-79)78 Sadly, the delta is nothing like it was when Aldo Leopold and his brother explored the area by canoe in 1922. [[79]](#footnote-80)79 During their stay, the wilderness area teemed with wildlife and lush vegetation. [[80]](#footnote-81)80 Today, however, the "delta's physical appearance, hydrology, fish, and wildlife have changed markedly since the United **[\*169]** States asserted full control over the ***Colorado*** ***River***"--a change for the worse. [[81]](#footnote-82)81

Hanging over the treaty between Mexico and the United States remained the issue of tribal water rights that had yet to be quantified. Mexico's 1.5 maf became the senior right, but a Supreme Court decision that had been in the making for decades would soon reinforce the Indians' reserved rights, placing further uncertainty on ***Colorado*** ***River*** allocations that states across the Southwest were already betting their entire economies on.

F. Arizona vs. California: "In the hands of the Secretary"

After years of resentment and lost court cases, Arizona finally joined the other six states and ratified the 1922 Compact in 1944. [[82]](#footnote-83)82 Still, a truce between California and Arizona regarding their split of the 7.5 maf remained out of reach, with both states thoroughly dug into their respective positions. [[83]](#footnote-84)83 Just over ten years prior, Arizona Governor Benjamin B. Moeur had ordered the state's national guard to its border with California to stop construction of the Parker Dam. [[84]](#footnote-85)84 Clearly, Arizona was intent on preserving the largest share of the ***Colorado*** it could get its hands on, terrified of the prospect that California was in a much better position to put ***Colorado*** ***River*** water to beneficial use first, thus gaining a right to those flows under the prior appropriation doctrine. [[85]](#footnote-86)85

During the World War II era, Arizona still lacked sufficient infrastructure to transport surface water to its rapidly growing metropolitan areas and farmlands. [[86]](#footnote-87)86 As result, it relied heavily on limited groundwater supplies. [[87]](#footnote-88)87 This tenuous policy, which threatened the state's emerging economy, forced it to push proposals that would bring ***Colorado*** ***River*** water to the state at the earliest possible date. [[88]](#footnote-89)88 Arizona pinned its hopes on the Central Arizona Project ("CAP"), a canal scheme to send water uphill toward the population centers, such as Phoenix and Tucson. [[89]](#footnote-90)89 But Congress, aided by strong resistance from **[\*170]** California, refused to approve the billion-dollar project because Arizona's share of the ***Colorado*** remained undetermined. [[90]](#footnote-91)90 A hesitant Congress was not going to fund a canal without assurance that water would actually hit the concrete. [[91]](#footnote-92)91 Hoping to finally clear things up and receive the much-needed rubber stamp from Congress, Arizona appealed to the Supreme Court in 1952. [[92]](#footnote-93)92 The Court agreed to take the case not only to settle Arizona and California's rift, but also to clarify another issue that was becoming tougher to ignore: Indian rights to the ***Colorado*** ***River***. [[93]](#footnote-94)93 The federal government, cognizant of the growing human rights movement and no longer blind to the gross inequities between the haves (Whites) and have-nots (Indians) on the ***river***, urged the Court to take the case. [[94]](#footnote-95)94

Justice Hugo Black, a Southerner and key member of the Warren Court's liberal bloc, wrote the Arizona v. California opinion (Arizona I), handed down on June 3, 1963. [[95]](#footnote-96)95 It is a lengthy opinion, based on a lengthy and costly case. [[96]](#footnote-97)96 The decision served as victory for both Arizona and the Indians. [[97]](#footnote-98)97 For Arizona, the Court held that it was entitled to the 2.8 maf recommended by Congress in the 1928 BCPA, which limited California to 4.4. maf. [[98]](#footnote-99)98 Further, Arizona's tributaries that feed the ***Colorado***, notably the Gila ***River***, are not to be considered part of the state's 2.8 maf share. [[99]](#footnote-100)99 And finally, the BCPA, not the law of prior appropriation, controls ***Colorado*** ***River*** apportionments. [[100]](#footnote-101)100 In other words, just because California put more water to use at an earlier date than Arizona, that does not bestow seniority status and greater rights to the ***river***.

Also of "far-reaching importance," the Court's decision greatly increased the Secretary of Interior's powers, [[101]](#footnote-102)101 granting the office unprecedented authority to "allocate and distribute the waters of the mainstream of the ***Colorado*** ***River***." [[102]](#footnote-103)102 In times of shortages, no matter **[\*171]** how they should occur, the Secretary is not bound by the hard-fought formulas laid out in the 1922 Compact or BCPA. [[103]](#footnote-104)103 The Secretary's methods must only be "reasonable," and honor the present-perfected rights that existed in 1928. [[104]](#footnote-105)104 In other words, the Law of the ***River*** is now "in the hands of the Secretary." [[105]](#footnote-106)105

In a fiery dissent, Justice Harlan reasoned that such extraordinary consolidation of power in the Secretary's hands raises "the gravest constitutional doubts," [[106]](#footnote-107)106 considering the office is now "vested with absolute control, unrestrained by adequate standards, over the fate of a substantial segment of the life and economy of three States." [[107]](#footnote-108)107 In a prescient statement, he argued that in time of shortages, the Secretary now assumes the unenviable duty of making a "political decision of the highest order," and the "pressures that will doubtless be brought to bear on the Secretary as a result of this decision are disturbing to contemplate." [[108]](#footnote-109)108 For example, if existing users' water rights need to be curtailed in order to settle Indian claims.

In a strong affirmation of its earlier holding in Winters, the Court then reiterated that the "United States did reserve the water rights for the Indians effective as of the time the Indian Reservations were created." [[109]](#footnote-110)109 The reservations were "not limited to land, but included waters as well." [[110]](#footnote-111)110 For the Navajo, this means its reserved rights to the ***Colorado*** stretch back to 1868, over half a century before the original 1922 Compact. Their rights vested before the Compact, and should therefore be considered present-perfected pursuant to the language in Article VIII. [[111]](#footnote-112)111 In sum, Navajo water rights are senior to non-Indian rights appropriated after 1868, even if they have yet to put the water to use. [[112]](#footnote-113)112

In terms of measuring Indians' water rights, the Court stated in blunt terms that Indians were not given the most "desirable" lands when the government created reservations. [[113]](#footnote-114)113 Though referring to the ***Colorado*** ***River*** Indian Reservation, the language easily applies to the Navajo. The Court reasoned that there was no way, when creating the reservations, that the government was "unaware that most of the lands were of the **[\*172]** desert kind … and that water from the ***river*** [the ***Colorado***] would be essential to the life of the Indian people." [[114]](#footnote-115)114

The Arizona I decision also created a method of quantifying Indian reserved water rights. [[115]](#footnote-116)115 Because the Court reasoned that reserved water rights "were intended to satisfy the future as well as the present needs of the Indian Reservations," [[116]](#footnote-117)116 reinforcing the "power to change" language in Winters, [[117]](#footnote-118)117 it decided to calculate water rights based on how much water was needed to "irrigate all the practicably irrigable acreage on the reservations." [[118]](#footnote-119)118 Thus, the Court created what is today known as the Practically Irrigable Acreage ("PIA") standard. In applying the standard, the Court calculated the water rights for five tribes located along the mainstream of the ***Colorado***, [[119]](#footnote-120)119 granting them around 0.9 maf. [[120]](#footnote-121)120 However, the Court stopped short of quantifying the water rights for dozens of other reservations along the ***Colorado***, including the Navajo. [[121]](#footnote-122)121 The Court also failed to explore the idea of whether or not Indians may choose to use their water for functions other than agriculture, [[122]](#footnote-123)122 though it did stress that reserved rights were intended to satisfy the "future as well as the present needs of the Indian Reservations." [[123]](#footnote-124)123 After all, the "power to change" [[124]](#footnote-125)124 rings hollow if it requires a sovereign nation to stick to one way of living and earning revenue.

The Court also failed to clarify whether the PIA standard applied to just the tribes along the ***Colorado*** ***River***, [[125]](#footnote-126)125 and whether Indians have to use all their ***Colorado*** ***River*** water or if they can sell or lease their water rights to other users. [[126]](#footnote-127)126 However, the Court was clear on one point that could cause major problems for Lower Basin users: Indian reserved rights, depending on the reservation's geographic location, are to be **[\*173]** borne out of that particular state's Compact share of the ***Colorado*** ***River***. [[127]](#footnote-128)127 For example, if the Navajo were to win water rights for the western half of its reservation in northern Arizona, above Lake Mead, where the ***Colorado*** runs along its western border, those water rights would come out of Arizona's 2.8 maf annual share.

If further strains on the ***river*** emerge--such as a prolonged drought, shortages associated with climate change, endangered species regulations, or Indian rights that significantly cut into states' shares--it is easy to contemplate the political and practical problems that might land swiftly on the Secretary of the Interior's lap, as Justice Harlan predicted in his dissent. One might think that if policymakers missed the warning flare in Winters, the Arizona I decision--which, after all, declared Indian water rights to the ***Colorado*** ***River*** superior to practically all other rights--might force them to reassess past water management decisions and look to remove the cloud of uncertainty on the ***river***. But Arizona I did not.

G. 1968 ***Colorado*** ***River*** Basin Project Act

Five years after the landmark Arizona I decision, where the Court granted Indians considerably more bargaining power in ***Colorado*** ***River*** matters, policymakers saw no reason to rethink their trend of leaving Indians out of major management decisions regarding the ***Colorado***. Again, they chose to ignore the growing Navajo silhouette lurking in the background. [[128]](#footnote-129)128

In 1968, Congress authorized Arizona's long sought-after Central Arizona Project, [[129]](#footnote-130)129 yet approved it with several built-in limitations. [[130]](#footnote-131)130 First, CAP users are junior to "holders of present perfected rights," [[131]](#footnote-132)131 which, according to the recent Arizona I decision, includes Indians. [[132]](#footnote-133)132 Second, should the annual 7.5 maf be unavailable to Lower Basin states, California has a right to its 4.4 maf before any CAP water can flow toward Phoenix, Tucson, and Arizona farmers. [[133]](#footnote-134)133 The project, which pumps water from Lake Havasu uphill 1,800 feet toward Phoenix then south toward Tucson, cost taxpayers $ 4.7 billion. [[134]](#footnote-135)134 The power to transport CAP water over 300 miles would come from a massive coal **[\*174]** plant to be built on the Navajo Reservation in Page, Arizona, called the Navajo Generating Station. [[135]](#footnote-136)135 Lured by promises of much-needed economic development on the reservation, the Navajo agreed to limit use of their Upper Basin ***Colorado*** ***River*** water rights to make the coal plant a reality. [[136]](#footnote-137)136 Those promises did not live up to expectations. [[137]](#footnote-138)137

With passage of the ***Colorado*** ***River*** Basin Project Act, Arizona residents and its economy were now increasingly dependent on water that had a low--very low--priority in the Law of the ***River***.

H. Building With Blinders On

Throughout the twentieth century, the stakes have only increased on the ***river***. The federal government poured billions into projects to harness her flows, and states waged bruising battles against one another, fighting for the rights to every last drop--sometimes in court, sometimes in Congress, and sometimes in backrooms of posh resorts. Ironically, policymakers repeatedly based major allocation decision on the false assumption that there would always be 7.5 maf available for each basin. [[138]](#footnote-139)138 However, since at least 1953, policymakers knew the stream flow estimates that the original compact were based on could be off by as much as 6 maf per year. [[139]](#footnote-140)139 Furthermore, time and again policymakers neglected to account for Indian rights to the ***river*** and failed to contemplate what type of effect a Navajo claim could have on Lower Basin apportionments. Based on these shaky foundations, it is not hyperbole to suggest that panic should have set in across the Southwest long ago. But with blinders on, the magnitude of the situation often remained out of view.

For the Navajo, who have sat by and watched as the Southwest boomed around them, rights to the ***river*** may finally be within their grasp. But question marks still linger and some formidable hurdles remain in their way.

**[\*175]**

[*III*](https://advance.lexis.com/api/document?collection=statutes-legislation&id=urn:contentItem:8T9R-T372-8T6X-731R-00000-00&context=1516831). Time to Act: The Navajo Take Steps Toward Realizing Their Reserved Rights to the ***Colorado*** ***River***

A. The Navajo Reservation

For a sovereign nation that holds possibly the best water rights in the West, forty percent of Navajo Nation members currently have no running water in their homes. [[140]](#footnote-141)140 Considering the reservation spans three states (Arizona, New Mexico, and Utah), members must often drive considerable distances to fill up large drums of water to then haul back home. [[141]](#footnote-142)141 Per capita income is around $ 8,000 per year, and over half of the Navajo living on the reservation are unemployed. [[142]](#footnote-143)142 This translates into around 125,000 Navajo without jobs, considering the tribe's population is approximately 250,000. [[143]](#footnote-144)143

One of the largest economic drivers on the reservation is the Navajo Generating Station in Page, employing hundreds. [[144]](#footnote-145)144 The large coal plant generates ninety-five percent of the power necessary to pump CAP water from Lake Havasu toward central and southern Arizona, [[145]](#footnote-146)145 so non-Indians also rely on the coal plant to help sustain their economies. [[146]](#footnote-147)146 Located just over ten miles from the Grand Canyon, the generating station also contributes to the air pollution in and around the national park. [[147]](#footnote-148)147 Another large coal plant, in the works for years, remains on the drawing board for western New Mexico. [[148]](#footnote-149)148 If constructed, it too would create more jobs on the reservation, and, like the Navajo Generating Station, serve as a much-needed source of revenue for the tribal **[\*176]** government and its members. [[149]](#footnote-150)149

B. Clarity and Justice: The Navajo Claim and Settlement Negotiations

Starting in 1989, three developments occurred that brought existing Lower Basin users to the bargaining table and arguably improved the Navajo's chances for a large cut out of Arizona's Compact share of the ***Colorado*** ***River***.

1.

"Sensitivity Doctrine" Narrowly Averted

In 1989, the Supreme Court agreed to review a Wyoming Supreme Court decision that upheld the use of the PIA standard to quantify the Wind ***River*** Reservation's reserved water rights. [[150]](#footnote-151)150 Curiously though, the Court did not release an opinion, but merely affirmed the lower court's decision in a four-four vote. [[151]](#footnote-152)151 The split resulted from Justice O'Connor's recusal from the case, after argument, and just days before the Court released its decision. [[152]](#footnote-153)152 Late in the game she discovered that her family's ranching business--in which she held a financial interest--was party to an ongoing stream adjudication involving Indian water rights. [[153]](#footnote-154)153 For tribes, and especially for the Navajo, this translated into a fortuitous turn of events. Before she recused herself, the vote was five to four, with Justice O'Connor having written the majority opinion that significantly narrowed the PIA standard to the detriment of the tribes by requiring a new "sensitivity" analysis. [[154]](#footnote-155)154

Following the Arizona I case, which included just one paragraph on how to quantify Indian reserved water rights under the PIA doctrine, [[155]](#footnote-156)155 the PIA standard evolved through court decisions to require a cost-benefit analysis when measuring Indian reserved water rights. [[156]](#footnote-157)156 Essentially, "land will be classified as practicably irrigable if it can be shown not only that the land can support the growth of crops, but that **[\*177]** those crops can be grown economically." [[157]](#footnote-158)157 This is a tall order and such a determination "can be easily misused," especially for tribes like the Navajo who do not have the greatest agricultural lands in northern Arizona or easy access to millions of dollars to build necessary reservoirs and related irrigation projects to make crops profitable. [[158]](#footnote-159)158 Considering the massive sums of taxpayer dollars the United States spent on extremely questionable irrigation projects for non-Indians over the years, this requirement could certainly be seen as a double standard. [[159]](#footnote-160)159 The difficulties inherent in a cost-benefit analysis for tribes is one thing; however, had Justice O'Connor not recused herself, the PIA standard would have become an even greater barrier to Indians seeking to win their reserved water rights.

Wyoming's argument against the Shoshone and Northern Arapaho Indians, who reside on the Wind ***River*** Reservation, advanced the position that the PIA standard should be abandoned for three reasons: (1) it gives tribes the chance to win excessive water rights, (2) those rights can in turn be problematic for existing users, and (3) the standard is rife with subjectivity because it is too difficult to prove what land is actually irrigable. [[160]](#footnote-161)160 According to her draft opinion, made available to the public by the late Justice Thurgood Marshall, Justice O'Connor agreed with the second argument that "reserved water rights must entail sensitivity to the impact on state and private appropriators of scarce water under state law." [[161]](#footnote-162)161 Although her opinion retained the PIA standard, the decision would have injected a pragmatic or "sensitivity" analysis into the doctrine, thus easing the blow on existing users. [[162]](#footnote-163)162 Furthermore, courts would be required to assess the "reasonable likelihood that future irrigation projects … will actually be built," placing a considerably higher hurdle in front of Indians looking to claim reserved rights, with courts now in charge of deciding what appropriations might be passed by Congress in the years to come. [[163]](#footnote-164)163

Justice Marshall's papers also included a draft of Justice Brennan's strongly worded dissenting opinion. In his view, the sensitivity doctrine proposed by Justice O'Connor was nothing more than a "redistribution of rights at the expense of one of the most disadvantaged groups in American society." [[164]](#footnote-165)164 According to Justice **[\*178]** Brennan, a "reasonable likelihood" test is highly subjective, unworkable, and turns the PIA standard into the "politically irrigable acreage" standard. [[165]](#footnote-166)165 Relying on Winters and Arizona I, Justice Brennan explained that Court precedent has continually denied an equitable balancing test concerning Indian reserved water rights. [[166]](#footnote-167)166 Also, introducing "sensitivity" into the analysis in effect favors non-Indians over Indians, placing an "illegitimate thumb on the scales" when weighing what could be the most important decision for a tribe's future. [[167]](#footnote-168)167 In closing, Justice Brennan laid it on the table: if the Court wants to overrule Winters or Arizona I, then say so; if not, "then let us stick to them [the decisions] even if it means the Indians get more water than we think they "need.' " [[168]](#footnote-169)168

Of course, neither opinion saw the light of day because of Justice O'Connor's recusal. The existing PIA standard hung on. Barely. However, had this new rule been adopted, the Navajo's hand today might be significantly weaker. The residents and economies of Arizona, Nevada, and Southern California most likely could have garnered "sensitivity" from the new rule because of their heavy and historic dependence on the ***Colorado*** ***River***, limiting the size of the Navajo water claim. But that is not how things played out. Instead of another setback, the legal tide changed for the Navajo.

2. The Gila Case

Stanley Pollack, assistant attorney general for the Navajo and lead counsel for the current Navajo claim against the Department of the Interior, took part in an important water rights case on behalf of the tribe in 2001, which ended up broadening the PIA standard to the advantage of tribes. The Arizona Supreme Court decision concerned a general stream adjudication for the Gila ***River***, [[169]](#footnote-170)169 which begins in the New Mexico Mountains and flows west through Arizona, just south of Phoenix. The Gila is south of the Navajo Reservation and the tribe was not seeking water rights to the ***river***. Instead, it participated because of the key question that the court was asked to decide: How should Indian reserved water rights be quantified in Arizona? [[170]](#footnote-171)170

The court began by reinforcing the key rules from the Winters **[\*179]** decision, reasoning that "the government, in establishing Indian or other federal reservations, impliedly reserves enough water to fulfill the purpose of each reservation." [[171]](#footnote-172)171 Indian reserved water rights usually trump other water rights in a prior appropriation system, the doctrine used for surface water in Arizona, because tribal water rights date back to the year of the reservation's creation (in the Navajo's case, 1868) and are therefore first in time, first in right. [[172]](#footnote-173)172 Also, for Indians, priority is not determined by use [[173]](#footnote-174)173 because the government reserved sufficient water to "fulfill the purpose of each reservation," now and into the future. [[174]](#footnote-175)174 Further, the court reiterated its agreement with the Winters and Arizona I decisions, that reservations were created to provide Indians with a lasting home and a "livable" environment. [[175]](#footnote-176)175

The court then took a step beyond prior Supreme Court decisions. It declined to hold that the PIA standard, first created in Arizona I, should serve as the exclusive method for quantifying Indian reserved water rights. [[176]](#footnote-177)176 The court reasoned that it is patently unfair to limit Indians' use of water to agriculture. [[177]](#footnote-178)177 After all, other twenty-first-century water users are not forced to use water exactly as their ancestors did in the nineteenth century, [[178]](#footnote-179)178 so "nothing should prevent tribes from diversifying their economies if they so choose." [[179]](#footnote-180)179 The PIA standard punished those tribes "who fail to show either the engineering or economic feasibility of proposed irrigation projects," [[180]](#footnote-181)180 which could especially harm the Navajo considering the changing topography, broad distances, and arid characteristics of their lands in Northern Arizona. The court concluded that the inequity caused by the PIA standard "is unacceptable and inconsistent with the idea of a permanent homeland." [[181]](#footnote-182)181 As discussed earlier, the 1868 Treaty stipulated that the Navajo Reservation is to serve as the tribe's "permanent home." [[182]](#footnote-183)182

The "power to change," outlined in Winters, [[183]](#footnote-184)183 is no power at all if tribes are limited to an agrarian economy--especially in northern **[\*180]** Arizona-- and unable to innovate or modernize with the times. The PIA standard is inflexible, so the court created a new rule for how to quantify water rights that considers a tribe's history; its culture; the reservation's natural resources, topography, geography, and groundwater supplies; its economic base; the reservation's past water use; and a forecast of the tribe's future population. [[184]](#footnote-185)184 In conclusion, the court reasoned that as long as the tribe's proposed uses for the water are "reasonably feasible" and "economically sound," its reserved rights should be measured accordingly. [[185]](#footnote-186)185

Although this decision came from the Arizona Supreme Court and is not binding precedent on other states or in federal court, it still marked a major departure from the traditional PIA standard. By significantly broadening how reserved water rights can be measured, tribes that historically or currently do not have fertile agricultural lands, or the funds to put the water to use, are not necessarily punished when reserved rights are being measured.

3. San Juan ***River*** Settlement

The ***Colorado*** is not the only ***river*** that flows through Navajo lands. The San Juan ***River*** flows from the east, straddling the Navajo Reservation in northern New Mexico, before it feeds into the ***Colorado*** via Lake Powell. The State of New Mexico filed the San Juan Adjudication in 1975, yet after twenty years, the adjudication languished, failing to quantify Navajo rights to the San Juan ***River***. [[186]](#footnote-187)186 Since the Navajo arguably held one of the most senior rights on the ***river***, which could affect every other right in the basin, the "800 pound Gorilla" lumbered on. [[187]](#footnote-188)187

Fed up with the slow adjudication process, around 1996 the tribe shifted gears to a strategy of settlement, realizing that even if they successfully won every drop of the San Juan through a court decree, those rights would be "paper" rights and of little use for drinking or economic development purposes because they would not include the necessary funds to develop or transport the water. [[188]](#footnote-189)188 Still, before the tribe entered negotiations, it was imperative that non-Indians drop the position that the Navajo waived all of their Winters claims to the San **[\*181]** Juan pursuant to the Navajo Indian Irrigation Project (NIIP), [[189]](#footnote-190)189 approved by Congress in 1962. [[190]](#footnote-191)190 In the end, considering the ineffectiveness of the stream adjudication, both New Mexico and the Navajo considered settlement discussions, with an eye on "wet" water rights and not theoretical claims, the most attractive route. [[191]](#footnote-192)191 The Navajo could garner a fair share of the San Juan, along with the much-needed funding to transport the water to their lands, while New Mexico could clear the cloud of uncertainty hanging over the ***river***, and avoid a costly court case that "may have the effect of unraveling compact allocations upon which western water development has been based." [[192]](#footnote-193)192

On April 19, 2005, while Arizona settlement negotiations were in their early stages, the Navajo reached an initial agreement with New Mexico over water rights in the San Juan ***River*** Basin. [[193]](#footnote-194)193 The agreement included a large number of water rights and considerable funds to build related water supply projects. [[194]](#footnote-195)194 In exchange, the Navajo agreed to forgo future claims to the ***river*** that could adversely impact the New Mexico economy and existing users. [[195]](#footnote-196)195 However, before the deal could be finalized, Congress first had to give the settlement its stamp of approval. Legislative approval is a recommended course of action for reserved water rights settlements because of the government's trust responsibilities, its authority over interstate compacts, and its power to appropriate large sums of money to carry out complex agreements. [[196]](#footnote-197)196

**[\*182]** Joe Shirley Jr., former president of the Navajo Nation, urged lawmakers to approve the settlement, noting that the alternative for the tribe was to pursue a reserved water rights claim in court, which could expose New Mexico to "horrific liabilities even if the Navajo Nation were to obtain only modest water rights." [[197]](#footnote-198)197 Congress approved the settlement in March, 2009. [[198]](#footnote-199)198 The final deal handed water rights to the Navajo totaling approximately 600,000 af per year and included over $ 800 million in federal funds to build a pipeline that will send San Juan water to Gallup in western New Mexico, greatly increasing drinking water supplies for the eastern portion of the reservation. [[199]](#footnote-200)199 Importantly, the settlement only dealt with Navajo rights to the San Juan in New Mexico (an Upper Basin state, pursuant to the Compact), not Navajo rights to the ***Colorado*** in Arizona. [[200]](#footnote-201)200

Though Congress and the president ratified the deal, increased drinking water is still not a reality for the New Mexico side of the reservation. Thus far, President Obama included $ 10 million in his 2010 budget to complete the necessary engineering analysis for the Navajo-Gallup pipeline project. [[201]](#footnote-202)201 It remains to be seen whether additional appropriations will be included in future budgets.

C. Navajo Claim and Settlement Discussions

On March 14, 2003, the Navajo Nation filed a lawsuit against the U.S. Department of the Interior to force the government to quantify its reserved water rights to the ***Colorado*** ***River*** in Arizona. According to David Getches, the Navajo lawsuit is a "shot across the bow of the non-Indian water users in the ***Colorado*** ***River*** Basin" and is a "significant claim that has to be reckoned with." [[202]](#footnote-203)202 For Pollack,

the premise of the case is that every decision the Secretary [of the Interior] makes respecting the management of the ***river*** assumes the nonexistence of a Navajo right. Each time the Secretary takes an action with respect to the management of the ***Colorado*** ***River*** without evaluating the impact on the tribe's unquantified water rights," the federal government "is more or less **[\*183]** institutionalizing the reliance on unquantified Navajo water by all of the other water users. [[203]](#footnote-204)203

In particular, the complaint alleges that, for example, continued CAP allocations, Arizona water banking, and past National Environmental Policy Act ("NEPA") compliance all failed to consider Navajo claims to Lower Basin ***Colorado*** ***River*** waters. [[204]](#footnote-205)204 Thus, according to the claim, the federal government is violating its trust duties owed to the Navajo living on the western side of the reservation, above Lake Mead. [[205]](#footnote-206)205

After filing the lawsuit in 2003, the negotiating parties stayed the proceedings to work on a settlement. As of this writing, the settlement talks are still underway, and, according to Pollack, the discussions are increasingly complex. [[206]](#footnote-207)206 But for the Navajo, the cards seem to be in their favor. First, they have the lawsuit, backed up by the Winters, Arizona I, and Gila decisions as leverage. Based on the reserved rights doctrine, which dates Navajo rights to the ***river*** at 1868, an enormous settlement--at least in terms of paper rights--is possible, one that could easily upend the Law of the ***River***. This gives existing users a strong incentive to seek an agreement with the Navajo. It is a safer route for them.

[*Second*](https://advance.lexis.com/api/document?collection=statutes-legislation&id=urn:contentItem:8T9R-T352-D6RV-H379-00000-00&context=1516831), the New Mexico settlement also provides leverage for the Navajo. Congress recently approved legislation awarding the tribe 600,000 af and funds to transport the water. This leaves Arizona with possibly fewer options, considering the Navajo can argue that any settlement in Arizona must at least be in the ballpark of the New Mexico deal, although the circumstances are admittedly quite different. As discussed earlier, and pursuant to Arizona I, Navajo water rights would come out of Arizona's allotment of ***Colorado*** ***River*** water--that likely means CAP users, such as Phoenix-area residents and farmers, who hold junior priority rights on the ***river***.

The goal of the settlement for the Navajo is to deliver adequate drinking water to the western half of the reservation and provide necessary supplies to sustain their "permanent homeland," including water for commercial purposes. [[207]](#footnote-208)207 There are three principal reasons why **[\*184]** the settlement approach, compared to a traditional Winters claim, is preferable for tribes, and the Navajo in particular.

[*First*](https://advance.lexis.com/api/document?collection=statutes-legislation&id=urn:contentItem:8T9R-T2X2-D6RV-H374-00000-00&context=1516831), general stream adjudications that can determine Indian reserved water rights (like the Gila and San Juan adjudications discussed earlier), which occur in state courts pursuant to the McCarran Amendment, often take decades. [[208]](#footnote-209)208 For the Navajo, where drinking water is in short supply, this route is too little too late. Plus, ***river*** adjudications are very expensive, due to the time involved. [[209]](#footnote-210)209

[*Second*](https://advance.lexis.com/api/document?collection=statutes-legislation&id=urn:contentItem:8T9R-T352-D6RV-H379-00000-00&context=1516831), a court decision may only deliver "paper" rights, or no reserved rights at all. It is a risky approach, considering once rights are quantified, that is it. The Navajo are very aware of the 1988 Big Horn I decision, where the Wyoming Supreme Court granted tribes 500,000 af of reserved water rights. [[210]](#footnote-211)210 For perspective, this is 200,000 af more than Nevada's entire share out of the ***Colorado*** ***River*** Compact. The problem, however, is that the tribes had no way to put the paper rights to use after the decree. [[211]](#footnote-212)211 Two decades have now elapsed since that decision, but the "victory" in court has yet to produce the economic benefits that the reservation had hoped for, thwarting the "power to change" rationale for reserved water rights, first envisioned in the Winters decision. [[212]](#footnote-213)212 Court decrees may award tribes large water rights, but those decisions do not come with the millions of dollars needed to put the water to use. [[213]](#footnote-214)213 On the other hand, settlements can deliver tangible assets to tribes that they otherwise cannot achieve through litigation, like funds to build transport systems in the San Juan ***River*** settlement. [[214]](#footnote-215)214

The final reason why settlement is arguably a better option for tribes is because of precedent. Congress has approved over a dozen settlements in the past two decades, including the Navajo's agreement with New Mexico regarding the San Juan. [[215]](#footnote-216)215 In particular, Arizona is on the front lines trying to work out deals with tribes, where CAP water is used to "lubricate settlement discussions." [[216]](#footnote-217)216 In fact, a settlement **[\*185]** awarded just under 200,000 af of CAP water to Arizona tribes in 2004. [[217]](#footnote-218)217 These are all good signs for the Navajo, showing the willingness of states to negotiate and reach deals.

D. Remaining Hurdles for the Navajo

Settlements are not free from danger, however. Many Indian settlements, though "final," are contingent on implementation factors that are far from certain for the parties that sign on the dotted line; the most glaring example is funding limitations. [[218]](#footnote-219)218 Congressional budgets shift course rapidly. For example, during the Clinton years when Bruce Babbitt headed Interior, the administration made a conscious effort to include a separate line item in the budget solely for Indian water settlements. [[219]](#footnote-220)219 The idea was to incentivize settlements and limit the siphoning of funds from other Indian accounts. [[220]](#footnote-221)220 However, the funds never materialized in the budget at the levels originally sought. [[221]](#footnote-222)221

Moreover, there is a clash of opinion among administrations and federal agencies in Washington regarding the appropriate level of funding for Indian water settlements. Some believe settlement costs should equal the government's legal liability if a Winters claim were litigated, and no more, while others take a broader view of the government's trust duties toward tribes, favoring a water settlement that actually helps tribes succeed in the future, even if it is costly. [[222]](#footnote-223)222

For the Navajo, any settlement with Lower Basin interests for a share of the ***Colorado*** must include funds to help transport the water. In terms of geography, water must be pumped many miles, and in the Navajo's case, uphill as well. [[223]](#footnote-224)223 However, the federal government is currently running a budget deficit of $ 1.3 trillion. [[224]](#footnote-225)224 Thus, there is a **[\*186]** possibility that even if a successful settlement emerges from the talks, funding limitations could delay important provisions down the road. Further, large water projects, such as a pipeline, might run "headlong into environmental laws," such as NEPA and the Endangered Species Act. [[225]](#footnote-226)225

Another problem for the Navajo is that its entire legal strategy is built around the possibility of a large Winters claim to the ***Colorado*** ***River*** in Arizona. But litigation is never a sure thing. According to a former solicitor of the Department of Interior, the validity of a tribe's water rights claim, in terms of PIA, is the starting point for settlement discussions. [[226]](#footnote-227)226 The goal is to find parameters for talks that include realistic volumes of water, taking into account the geography of the reservation and the risks to existing users and other tribes, as well as funding possibilities. [[227]](#footnote-228)227 For example, the circumstances for the Navajo in Arizona are a lot different than they were in New Mexico.

Since no two settlements are the same, it is also tough to pinpoint what Interior's trust duties entail when it comes to tribal water rights, as every settlement has different parties, histories, locations, and waters at stake. [[228]](#footnote-229)228 One can only imagine the complexities involved in the current Navajo settlement discussions, particularly for Interior, which has a trust responsibility to the Navajo, but is also charged by Congress to manage the ***river*** and comply with environmental laws. [[229]](#footnote-230)229 These competing demands can and often do clash. [[230]](#footnote-231)230

Still, when weighing settlement negotiations versus a lawsuit, the **[\*187]** risks associated with litigation appear to outweigh the former. A settlement holds the possibility of wet water for a tribe, and by extension, more control over the direction it chooses to take in the future. [[231]](#footnote-232)231 Water settlements, therefore, represent a "second treaty-making era." [[232]](#footnote-233)232 The Navajo's 1868 treaty and subsequent executive orders concerned land but failed to address water. If the reservation is going to serve as the tribe's "permanent homeland," as stipulated in the treaty, it needs water as well as borders. [[233]](#footnote-234)233

[*IV*](https://advance.lexis.com/api/document?collection=statutes-legislation&id=urn:contentItem:8T9R-T3H2-D6RV-H37G-00000-00&context=1516831). Conclusion: A Livable Reservation

Indians have a right to control their own destiny. It follows then, that they have a right to sufficient water supplies to ensure that their lands are capable of serving as livable, permanent homes--both today and into the future.

From Mexico's ***Colorado*** ***River*** Delta and climate change, to drought conditions and endangered species, significant problems loom for future managers of the ***river*** in the Lower Basin states of California, Nevada, and Arizona. But perhaps the biggest source of uncertainty for policymakers--an uncertainty that exists entirely because of their own decisions--are the Navajo reserved water rights to the mainstream of the ***Colorado*** ***River*** in northern Arizona. For clarity's sake, but more importantly, for justice's sake, these rights need to be quantified fairly and as quickly as possible. It is the way forward.

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3. 3 Matt Jenkins, The ***Colorado*** ***River***'s Sleeping Giant Stirs, High Country News, Apr. 28, 2003, at 2, available at [*http://www.hcn.org/issues/249/13923*](http://www.hcn.org/issues/249/13923) [hereinafter Sleeping Giant]. [↑](#footnote-ref-4)
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5. 5 Matt Jenkins, Seeking the Water Jackpot, High Country News, March 17, 2008, at 5, available at [*http://www.hcn.org/issues/366/17573*](http://www.hcn.org/issues/366/17573) [hereinafter Water Jackpot]. [↑](#footnote-ref-6)
6. 6 Id. at 6, 9. [↑](#footnote-ref-7)
7. 7 Boulder Canyon Project Act of 1928, [*43 U.S.C. § 617c*](https://advance.lexis.com/api/document?collection=statutes-legislation&id=urn:contentItem:8SDD-0HD2-8T6X-73RB-00000-00&context=1516831)(a) (1928). [↑](#footnote-ref-8)
8. 8 Navajo Nation v. U.S. Dep't of the Interior, 2007 WL 4400511 (D. Ariz. 2007) (joint status report). [↑](#footnote-ref-9)
9. 9 Id. The other intervening parties are: the Salt ***River*** Project Agricultural Improvement and Power District, the Salt ***River*** Valley Water Users' Association, and the State of Nevada and its ***Colorado*** ***River*** Commission. [↑](#footnote-ref-10)
10. 10 David H. Getches, ***Colorado*** ***River*** Governance: Sharing Federal Authority as an Incentive to Create a New Institution, [*68 U.* ***Colo.*** *L. Rev. 573, 574-75 (1997).*](https://advance.lexis.com/api/document?collection=analytical-materials&id=urn:contentItem:3S3T-T610-00CV-N03B-00000-00&context=1516831) [↑](#footnote-ref-11)
11. 11 Marc Reisner, Cadillac Desert 120 (rev. ed. 1993). [↑](#footnote-ref-12)
12. 12 Navajo Compl., supra note 1, at 7. [↑](#footnote-ref-13)
13. 13 Treaty Between United States and Navajo Tribe, art. I, June 1, 1868, ***15 Stat. 667*** [hereinafter Navajo Treaty]. [↑](#footnote-ref-14)
14. 14 Id. at art. II (emphasis added). [↑](#footnote-ref-15)
15. 15 Charles Wilkinson, Fire on the Plateau, 287 (1999) [hereinafter Fire on the Plateau]. [↑](#footnote-ref-16)
16. 16 Navajo Treaty, supra note 13, at art. II.; Fire on the Plateau, supra note 15, at 58 (The peaks are: "Mount Taylor (Tsoodzil), outside of Grants, New Mexico. The San Francisco Peaks (Dook' "o' ooslid) to the south, near Flagstaff. Hespersus Peak (Dibe nitsaa) to the west, above Cortez and Durango in the La Plata Mountains. Mount Blanca (Sisnaajini) to the north, across ***Colorado***'s San Luis Valley."). [↑](#footnote-ref-17)
17. 17 Navajo Compl., supra note 1, at 7-9; see also Fire on the Plateau, supra note 15, at 288. [↑](#footnote-ref-18)
18. 18 Navajo Treaty, supra note 13, at art. XIII. [↑](#footnote-ref-19)
19. 19 [*Winters v. United States, 207 U.S. 564, 565, 577 (1908).*](https://advance.lexis.com/api/document?collection=cases&id=urn:contentItem:3S4X-9WV0-003B-H241-00000-00&context=1516831) [↑](#footnote-ref-20)
20. 20 [*Id. at 577.*](https://advance.lexis.com/api/document?collection=cases&id=urn:contentItem:3S4X-9WV0-003B-H241-00000-00&context=1516831) [↑](#footnote-ref-21)
21. 21 Id. [↑](#footnote-ref-22)
22. 22 Bonnie G. Colby, John E. Thorson, & Sarah Britton, Negotiating Tribal Water Rights: Fulfilling Promises in the Arid West 10 (2005). [↑](#footnote-ref-23)
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25. 25 Colby et al, supra note 22, at 10. [↑](#footnote-ref-26)
26. 26 See supra text accompanying note 25. [↑](#footnote-ref-27)
27. 27 Colby et al., supra note 22, at 10-11. [↑](#footnote-ref-28)
28. 28 Fire on the Plateau, supra note 15, at 185. [↑](#footnote-ref-29)
29. 29 Noris Hundley Jr., Water and the West: The ***Colorado*** ***River*** Compact and the Politics of Water in the American West 3 (2009). [↑](#footnote-ref-30)
30. 30 ***Colorado*** ***River*** Compact of 1922, [*C.R.S. § 37-61-101*](https://advance.lexis.com/api/document?collection=statutes-legislation&id=urn:contentItem:61P5-WY01-DYDC-J33S-00000-00&context=1516831), art. I; Hundley, supra note 29, at 4. [↑](#footnote-ref-31)
31. 31 Hundley, supra note 29, at 5. [↑](#footnote-ref-32)
32. 32 Id. at 4-5. [↑](#footnote-ref-33)
33. 33 Id. at xiv. [↑](#footnote-ref-34)
34. 34 Id. at 4, 211. [↑](#footnote-ref-35)
35. 35 See supra text accompanying note 34. [↑](#footnote-ref-36)
36. 36 Felix. S. Cohen, Handbook of Federal Indian Law 221 (Rennard Strickland ed., rev. ed. 1982). [↑](#footnote-ref-37)
37. 37 ***Colorado*** ***River*** Compact, C.R.S.A. [*§ 37-61-101*](https://advance.lexis.com/api/document?collection=statutes-legislation&id=urn:contentItem:61P5-WY01-DYDC-J33S-00000-00&context=1516831), art. II(c)-(d). [↑](#footnote-ref-38)
38. 38 See id. at art. III. [↑](#footnote-ref-39)
39. 39 Id. at art. VIII. [↑](#footnote-ref-40)
40. 40 Id. [↑](#footnote-ref-41)
41. 41 [*Arizona v. California, 373 U.S. 546, 600 (1963).*](https://advance.lexis.com/api/document?collection=cases&id=urn:contentItem:3S4X-H3B0-003B-S2D7-00000-00&context=1516831) [↑](#footnote-ref-42)
42. 42 ***Colorado*** ***River*** Compact, C.R.S.A. [*§ 37-61-101*](https://advance.lexis.com/api/document?collection=statutes-legislation&id=urn:contentItem:61P5-WY01-DYDC-J33S-00000-00&context=1516831), art. VII. [↑](#footnote-ref-43)
43. 43 Id. [↑](#footnote-ref-44)
44. 44 See Hundley, supra note 29, at 211-12. [↑](#footnote-ref-45)
45. 45 Id. at 139. [↑](#footnote-ref-46)
46. 46 Id. at 212. [↑](#footnote-ref-47)
47. 47 See id. at 2. [↑](#footnote-ref-48)
48. 48 Id. at 212 (Hundley pieced together this quote from minutes taken at a Nov. 19, 1922 Compact meeting. He conceded that he altered the quote "slightly," but "not the meaning.") [↑](#footnote-ref-49)
49. 49 Id. [↑](#footnote-ref-50)
50. 50 Id. at 211. [↑](#footnote-ref-51)
51. 51 Id. at 211-12. [↑](#footnote-ref-52)
52. 52 Id. at 212. [↑](#footnote-ref-53)
53. 53 Id. at 139. [↑](#footnote-ref-54)
54. 54 Id. at 142. [↑](#footnote-ref-55)
55. 55 See Joseph L. Sax, Barton H. Thompson, Jr., John D. Leshy, & Robert H. Abrams, Legal Control of Water Resources: Cases and Materials 805 (4th ed. 2006). [↑](#footnote-ref-56)
56. 56 Hundley, supra note 29, at 269. [↑](#footnote-ref-57)
57. 57 See id. [↑](#footnote-ref-58)
58. 58 Boulder Canyon Project Act of 1928, [*43 U.S.C. § 617c*](https://advance.lexis.com/api/document?collection=statutes-legislation&id=urn:contentItem:8SDD-0HD2-8T6X-73RB-00000-00&context=1516831) (2010). [↑](#footnote-ref-59)
59. 59 Id. § 617c(a). [↑](#footnote-ref-60)
60. 60 Hundley, supra note 29, at 270. [↑](#footnote-ref-61)
61. 61 Id. at 281. [↑](#footnote-ref-62)
62. 62 See Sax et al, supra note 55, at 806. [↑](#footnote-ref-63)
63. 63 Id. [↑](#footnote-ref-64)
64. 64 See Boulder Canyon Project Act, [*43 U.S.C. § 617c*](https://advance.lexis.com/api/document?collection=statutes-legislation&id=urn:contentItem:8SDD-0HD2-8T6X-73RB-00000-00&context=1516831) (2010); see also ***Colorado*** ***River*** Compact, C.R.S.A. [*§ 37-61-101*](https://advance.lexis.com/api/document?collection=statutes-legislation&id=urn:contentItem:61P5-WY01-DYDC-J33S-00000-00&context=1516831), art. VII. [↑](#footnote-ref-65)
65. 65 See Hundley, supra note 29, at 175. [↑](#footnote-ref-66)
66. 66 Id. [↑](#footnote-ref-67)
67. 67 Id. [↑](#footnote-ref-68)
68. 68 ***Colorado*** ***River*** Compact, C.R.S.A. [*§ 37-61-101*](https://advance.lexis.com/api/document?collection=statutes-legislation&id=urn:contentItem:61P5-WY01-DYDC-J33S-00000-00&context=1516831), art. III(c). [↑](#footnote-ref-69)
69. 69 Treaty Between the United States of America and Mexico Respecting Utilization of Waters of the ***Colorado*** and Tijuana ***Rivers*** and of the Rio Grande, U.S.-Mexico, Nov. 8, 1945 (effective date), [*59 Stat. 1219.*](https://advance.lexis.com/api/document?collection=statutes-legislation&id=urn:contentItem:5CBP-FY70-01XN-S099-00000-00&context=1516831) [↑](#footnote-ref-70)
70. 70 Id. at art. 10(a). [↑](#footnote-ref-71)
71. 71 Id. at art. 10(b). [↑](#footnote-ref-72)
72. 72 See Charles J. Meyers, The ***Colorado*** ***River***: The Treaty with Mexico, 19 Stan. L. Rev. 367, 414-15 (1967). [↑](#footnote-ref-73)
73. 73 Hundley, supra note 29, at 296. [↑](#footnote-ref-74)
74. 74 ***Colorado*** ***River*** Compact, C.R.S.A. [*§ 37-61-101*](https://advance.lexis.com/api/document?collection=statutes-legislation&id=urn:contentItem:61P5-WY01-DYDC-J33S-00000-00&context=1516831), art. III(c) ("the burden of such deficiency shall be equally borne by the Upper Basin and Lower Basin"). [↑](#footnote-ref-75)
75. 75 See Hundley, supra note 29, at 296. [↑](#footnote-ref-76)
76. 76 Rudy E. Verner, Short Term Solutions, Interim Surplus Guidelines, and the Future of the ***Colorado*** ***River*** Delta, [*14* ***Colo.*** *J. Int'l Envtl. L. & Pol'y 241, 255 (2003).*](https://advance.lexis.com/api/document?collection=analytical-materials&id=urn:contentItem:48TC-VKJ0-00CV-H064-00000-00&context=1516831) [↑](#footnote-ref-77)
77. 77 See [*id. at 245.*](https://advance.lexis.com/api/document?collection=analytical-materials&id=urn:contentItem:48TC-VKJ0-00CV-H064-00000-00&context=1516831) [↑](#footnote-ref-78)
78. 78 [*Id. at 244.*](https://advance.lexis.com/api/document?collection=analytical-materials&id=urn:contentItem:48TC-VKJ0-00CV-H064-00000-00&context=1516831) [↑](#footnote-ref-79)
79. 79 Aldo Leopold, A Sand County Almanac and Sketches Here and There, 141 (Oxford Univ. Press rev. ed. 1987) (1949). [↑](#footnote-ref-80)
80. 80 See id. at 141-45. [↑](#footnote-ref-81)
81. 81 Getches, supra note 10, at 605. [↑](#footnote-ref-82)
82. 82 See Hundley, supra note 29, at 295. [↑](#footnote-ref-83)
83. 83 See generally id. [↑](#footnote-ref-84)
84. 84 Id. at 294. [↑](#footnote-ref-85)
85. 85 See Sax et al, supra note 55, at 805. [↑](#footnote-ref-86)
86. 86 See Hundley, supra note 29, at 298. [↑](#footnote-ref-87)
87. 87 Id. [↑](#footnote-ref-88)
88. 88 See id. [↑](#footnote-ref-89)
89. 89 See id. at 299-300. [↑](#footnote-ref-90)
90. 90 Id. at 300. [↑](#footnote-ref-91)
91. 91 Id. [↑](#footnote-ref-92)
92. 92 Id. at 302. [↑](#footnote-ref-93)
93. 93 Id. [↑](#footnote-ref-94)
94. 94 Id. [↑](#footnote-ref-95)
95. 95 Id. at 303; see generally James MacGregor Burns, Packing the Court 179-200 (2009). [↑](#footnote-ref-96)
96. 96 Hundley, supra note 29, at 302. [↑](#footnote-ref-97)
97. 97 Id. at 303. [↑](#footnote-ref-98)
98. 98 [*Arizona v. California, 373 U.S. at 565 (1963).*](https://advance.lexis.com/api/document?collection=cases&id=urn:contentItem:3S4X-H3B0-003B-S2D7-00000-00&context=1516831) [↑](#footnote-ref-99)
99. 99 [*Id. at 567-68.*](https://advance.lexis.com/api/document?collection=cases&id=urn:contentItem:3S4X-H3B0-003B-S2D7-00000-00&context=1516831) [↑](#footnote-ref-100)
100. 100 [*Id. at 585-86.*](https://advance.lexis.com/api/document?collection=cases&id=urn:contentItem:3S4X-H3B0-003B-S2D7-00000-00&context=1516831) [↑](#footnote-ref-101)
101. 101 Hundley, supra note 29, at 305. [↑](#footnote-ref-102)
102. 102 [*Arizona v. California, 373 U.S. 546, 590 (1963).*](https://advance.lexis.com/api/document?collection=cases&id=urn:contentItem:3S4X-H3B0-003B-S2D7-00000-00&context=1516831) [↑](#footnote-ref-103)
103. 103 [*Id. at 593.*](https://advance.lexis.com/api/document?collection=cases&id=urn:contentItem:3S4X-H3B0-003B-S2D7-00000-00&context=1516831) [↑](#footnote-ref-104)
104. 104 [*Id. at 593-94.*](https://advance.lexis.com/api/document?collection=cases&id=urn:contentItem:3S4X-H3B0-003B-S2D7-00000-00&context=1516831) [↑](#footnote-ref-105)
105. 105 Id. [↑](#footnote-ref-106)
106. 106 [*Id. at 626*](https://advance.lexis.com/api/document?collection=cases&id=urn:contentItem:3S4X-H3B0-003B-S2D7-00000-00&context=1516831) (Harlan, J., dissenting). [↑](#footnote-ref-107)
107. 107 [*Id. at 603*](https://advance.lexis.com/api/document?collection=cases&id=urn:contentItem:3S4X-H3B0-003B-S2D7-00000-00&context=1516831) (Harlan, J., dissenting). [↑](#footnote-ref-108)
108. 108 [*Id. at 626*](https://advance.lexis.com/api/document?collection=cases&id=urn:contentItem:3S4X-H3B0-003B-S2D7-00000-00&context=1516831) (Harlan, J., dissenting). [↑](#footnote-ref-109)
109. 109 [*Id. at 600.*](https://advance.lexis.com/api/document?collection=cases&id=urn:contentItem:3S4X-H3B0-003B-S2D7-00000-00&context=1516831) [↑](#footnote-ref-110)
110. 110 [*Id. at 598.*](https://advance.lexis.com/api/document?collection=cases&id=urn:contentItem:3S4X-H3B0-003B-S2D7-00000-00&context=1516831) [↑](#footnote-ref-111)
111. 111 See [*id. at 600.*](https://advance.lexis.com/api/document?collection=cases&id=urn:contentItem:3S4X-H3B0-003B-S2D7-00000-00&context=1516831) [↑](#footnote-ref-112)
112. 112 Hundley, supra note 29, at 303. [↑](#footnote-ref-113)
113. 113 [*Arizona v. California, 373 U.S. 546, 598 (1963).*](https://advance.lexis.com/api/document?collection=cases&id=urn:contentItem:3S4X-H3B0-003B-S2D7-00000-00&context=1516831) [↑](#footnote-ref-114)
114. 114 [*Id. at 599.*](https://advance.lexis.com/api/document?collection=cases&id=urn:contentItem:3S4X-H3B0-003B-S2D7-00000-00&context=1516831) [↑](#footnote-ref-115)
115. 115 [*Id. at 600.*](https://advance.lexis.com/api/document?collection=cases&id=urn:contentItem:3S4X-H3B0-003B-S2D7-00000-00&context=1516831) [↑](#footnote-ref-116)
116. 116 Id. [↑](#footnote-ref-117)
117. 117 [*Winters v. United States, 207 U.S. 564, 577 (1908).*](https://advance.lexis.com/api/document?collection=cases&id=urn:contentItem:3S4X-9WV0-003B-H241-00000-00&context=1516831) [↑](#footnote-ref-118)
118. 118 [*Arizona v. California, 373 U.S. 546, 600 (1963).*](https://advance.lexis.com/api/document?collection=cases&id=urn:contentItem:3S4X-H3B0-003B-S2D7-00000-00&context=1516831) [↑](#footnote-ref-119)
119. 119 Hundley, supra note 29, at 303. The five reservations along the ***river*** are the Chemehuuevi, Cocopah, Yuma, ***Colorado*** ***River***, and Fort Mohave. [↑](#footnote-ref-120)
120. 120 Getches, supra note 10, at 592. [↑](#footnote-ref-121)
121. 121 See supra text accompanying note 120. [↑](#footnote-ref-122)
122. 122 Hundley, supra note 29, at 330. [↑](#footnote-ref-123)
123. 123 [*Arizona v. California, 373 U.S. 546, 600 (1963).*](https://advance.lexis.com/api/document?collection=cases&id=urn:contentItem:3S4X-H3B0-003B-S2D7-00000-00&context=1516831) [↑](#footnote-ref-124)
124. 124 [*Winters v. United States, 207 U.S. 564, 577 (1908).*](https://advance.lexis.com/api/document?collection=cases&id=urn:contentItem:3S4X-9WV0-003B-H241-00000-00&context=1516831) [↑](#footnote-ref-125)
125. 125 Andrew C. Mergen & Sylvia F. Liu, A Misplaced Sensitivity: The Draft Opinions in Wyoming v. United States, [*68 U.* ***Colo.*** *L. Rev. 683, 694 (1997)*](https://advance.lexis.com/api/document?collection=analytical-materials&id=urn:contentItem:3S3T-T650-00CV-N03D-00000-00&context=1516831) (draft majority and dissenting opinions reprinted as appendix). [↑](#footnote-ref-126)
126. 126 See Hundley, supra note 29, at 331. [↑](#footnote-ref-127)
127. 127 [*Arizona v. California, 373 U.S. 546, 601 (1963).*](https://advance.lexis.com/api/document?collection=cases&id=urn:contentItem:3S4X-H3B0-003B-S2D7-00000-00&context=1516831) [↑](#footnote-ref-128)
128. 128 See Water Jackpot, supra note 5, at 2. [↑](#footnote-ref-129)
129. 129 ***Colorado*** ***River*** Basin Project Act, [*43 U.S.C. § 1521*](https://advance.lexis.com/api/document?collection=statutes-legislation&id=urn:contentItem:8SDD-0HD2-8T6X-74DB-00000-00&context=1516831) (2006). [↑](#footnote-ref-130)
130. 130 Id. [↑](#footnote-ref-131)
131. 131 Id. § 1521(b). [↑](#footnote-ref-132)
132. 132 [*Arizona v. California, 373 U.S. 546, 600 (1963).*](https://advance.lexis.com/api/document?collection=cases&id=urn:contentItem:3S4X-H3B0-003B-S2D7-00000-00&context=1516831) [↑](#footnote-ref-133)
133. 133 See [*43 U.S.C. § 1521*](https://advance.lexis.com/api/document?collection=statutes-legislation&id=urn:contentItem:8SDD-0HD2-8T6X-74DB-00000-00&context=1516831)(b). [↑](#footnote-ref-134)
134. 134 Sax et al., supra note 55, at 807. [↑](#footnote-ref-135)
135. 135 Fire on the Plateau, supra note 15, at 222. [↑](#footnote-ref-136)
136. 136 David H. Getches, Competing Demands for the ***Colorado*** ***River***, 56 U. ***Colo.*** L. Rev. 413, 441 (1985) (The Navajos "agreed to confine their claims to the amount of Arizona's Upper Basin share of water under the Upper Basin Compact - 50,000 acre-feet a year - for the life of the plant or for fifty years, whichever was earlier."). [↑](#footnote-ref-137)
137. 137 Id. [↑](#footnote-ref-138)
138. 138 Reisner, supra note 11, at 264. [↑](#footnote-ref-139)
139. 139 See Id. at 262-64. [↑](#footnote-ref-140)
140. 140 Sleeping Giant, supra note 3, at 1. [↑](#footnote-ref-141)
141. 141 Water Jackpot, supra note 5, at 1. [↑](#footnote-ref-142)
142. 142 See supra text accompanying note 141. [↑](#footnote-ref-143)
143. 143 See Navajo Compl., supra note 1, at 6. [↑](#footnote-ref-144)
144. 144 Dennis Wagner, Coal Plants, Power Plant Give Navajos Income, Controversy, The Arizona Republic, Nov. 2, 2009, available at [*http://www.azcentral.com/news/articles/2009/11/02/20091102navajo1102.html*](http://www.azcentral.com/news/articles/2009/11/02/20091102navajo1102.html). [↑](#footnote-ref-145)
145. 145 Navajo Station Needs Emission Control Reprieve, The Arizona Daily Star, Oct. 25, 2009, (Editorial), available at [*http://azstarnet.com/news/opinion/editorial/article\_3042114a-6a94-5b5a-941c-44155040f6d5.html*](http://azstarnet.com/news/opinion/editorial/article_3042114a-6a94-5b5a-941c-44155040f6d5.html). [↑](#footnote-ref-146)
146. 146 Id. [↑](#footnote-ref-147)
147. 147 See id. [↑](#footnote-ref-148)
148. 148 Wagner, supra note 144. [↑](#footnote-ref-149)
149. 149 See supra text accompanying note 148. [↑](#footnote-ref-150)
150. 150 Mergen & Liu, supra note 125, at 683. [↑](#footnote-ref-151)
151. 151 Id. [↑](#footnote-ref-152)
152. 152 Id. at 684-85. [↑](#footnote-ref-153)
153. 153 Id. [↑](#footnote-ref-154)
154. 154 Id. at 684. The late Justice Thurgood Marshall posthumously made his files available to the public, which included the draft opinions. [↑](#footnote-ref-155)
155. 155 [*Arizona v. California, 373 U.S. 546, 600-01 (1963).*](https://advance.lexis.com/api/document?collection=cases&id=urn:contentItem:3S4X-H3B0-003B-S2D7-00000-00&context=1516831) [↑](#footnote-ref-156)
156. 156 See, e.g,, In re Gen. Adjudication of All Rights to Use Water in the [*Big Horn* ***River*** *Sys., 753 P.2d 76 (Wyo. 1988)*](https://advance.lexis.com/api/document?collection=cases&id=urn:contentItem:3RVJ-BYP0-003G-J29J-00000-00&context=1516831) (Big Horn I); [*New Mexico ex rel Martinez v. Lewis, 861 P.2d 235, 246 (N.M. Ct. App. 1993).*](https://advance.lexis.com/api/document?collection=cases&id=urn:contentItem:3S3J-X2N0-003D-D3NK-00000-00&context=1516831) [↑](#footnote-ref-157)
157. 157 Mergen & Liu, supra note 125, at 696. [↑](#footnote-ref-158)
158. 158 Id; see generally [*Martinez, 861 P.2d at 246.*](https://advance.lexis.com/api/document?collection=cases&id=urn:contentItem:3S3J-X2N0-003D-D3NK-00000-00&context=1516831) [↑](#footnote-ref-159)
159. 159 Reisner, supra note 11, at 135-36. [↑](#footnote-ref-160)
160. 160 Mergen & Liu, supra note 125, at 732. [↑](#footnote-ref-161)
161. 161 Id. at 706. [↑](#footnote-ref-162)
162. 162 Id. at 738. [↑](#footnote-ref-163)
163. 163 Id. [↑](#footnote-ref-164)
164. 164 Id. at 742. [↑](#footnote-ref-165)
165. 165 Id. at 745 (emphasis added). [↑](#footnote-ref-166)
166. 166 Id. at 747. [↑](#footnote-ref-167)
167. 167 Id. at 751. [↑](#footnote-ref-168)
168. 168 Id. at 760. [↑](#footnote-ref-169)
169. 169 In re Gen. Adjudication of all Rights to Use water in the [*Gila* ***River*** *Sys. & Source, 35 P.3d 68 (Ariz. 2001)*](https://advance.lexis.com/api/document?collection=cases&id=urn:contentItem:44JD-GKM0-0039-43YD-00000-00&context=1516831) (en banc). [↑](#footnote-ref-170)
170. 170 [*Id. at 72.*](https://advance.lexis.com/api/document?collection=cases&id=urn:contentItem:44JD-GKM0-0039-43YD-00000-00&context=1516831) [↑](#footnote-ref-171)
171. 171 Id. [↑](#footnote-ref-172)
172. 172 [*Id. at 71.*](https://advance.lexis.com/api/document?collection=cases&id=urn:contentItem:44JD-GKM0-0039-43YD-00000-00&context=1516831) [↑](#footnote-ref-173)
173. 173 [*Id. at 72.*](https://advance.lexis.com/api/document?collection=cases&id=urn:contentItem:44JD-GKM0-0039-43YD-00000-00&context=1516831) [↑](#footnote-ref-174)
174. 174 Id. [↑](#footnote-ref-175)
175. 175 [*Id. at 74*](https://advance.lexis.com/api/document?collection=cases&id=urn:contentItem:44JD-GKM0-0039-43YD-00000-00&context=1516831) (quoting [*Arizona v. California, 373 U.S. 546, 599 (1963)).*](https://advance.lexis.com/api/document?collection=cases&id=urn:contentItem:3S4X-H3B0-003B-S2D7-00000-00&context=1516831) [↑](#footnote-ref-176)
176. 176 Id. at 79. [↑](#footnote-ref-177)
177. 177 Id. at 76. [↑](#footnote-ref-178)
178. 178 Id. [↑](#footnote-ref-179)
179. 179 Id. [↑](#footnote-ref-180)
180. 180 Id. at 78. [↑](#footnote-ref-181)
181. 181 Id. [↑](#footnote-ref-182)
182. 182 Navajo Treaty, supra note 13, at art. 13. [↑](#footnote-ref-183)
183. 183 [*Winters v. United States, 207 U.S. 564, 577 (1908).*](https://advance.lexis.com/api/document?collection=cases&id=urn:contentItem:3S4X-9WV0-003B-H241-00000-00&context=1516831) [↑](#footnote-ref-184)
184. 184 In re Gen. Adjudication of all Rights to Use water in the [*Gila* ***River*** *Sys. & Source, 35 P.3d 68, 79-81 (Ariz. 2001)*](https://advance.lexis.com/api/document?collection=cases&id=urn:contentItem:44JD-GKM0-0039-43YD-00000-00&context=1516831) (en banc). [↑](#footnote-ref-185)
185. 185 [*Id. at 81.*](https://advance.lexis.com/api/document?collection=cases&id=urn:contentItem:44JD-GKM0-0039-43YD-00000-00&context=1516831) [↑](#footnote-ref-186)
186. 186 E-mail interview with Stanley Pollack, Assistant Attorney General for Navajo Nation, Sept. 3, 2010 (on file with the author). [↑](#footnote-ref-187)
187. 187 Id. [↑](#footnote-ref-188)
188. 188 Id. [↑](#footnote-ref-189)
189. 189 Id.; Stanley M. Pollack, Address at New Mexico Water Resources Institute: Integrated Water Resources Management in the San Juan Basin: The Navajo Perspective, 3 (Sept. 1996) (on file with the author). [↑](#footnote-ref-190)
190. 190 Act of June 13, 1962, Pub. L. No. 87-4834 (codified at [*43 U.S.C. 620*](https://advance.lexis.com/api/document?collection=statutes-legislation&id=urn:contentItem:8SDD-0HD2-8T6X-73SX-00000-00&context=1516831)-6200). Congress ostensibly approved NIIP to award the Navajo a considerable share of the San Juan ***River***. Still, NIIP practically and legally did not solve Navajo reserved rights to either the San Juan or the ***Colorado***. For a detailed discussion of NIIP and its shortcomings for the Navajo, including its notorious funding issues and unfinished nature, see Charles F. Wilkinson, Crossing the Next Meridian, 226-231 (1992). For a detailed discussion on why NIIP did not quantify the Navajo's Winters rights to the San Juan, see Judith E. Jacobsen, The Navajo Indian Irrigation Project and Quantification of Navajo Winters Rights, 32 Nat. Res. J. 825 (1992). [↑](#footnote-ref-191)
191. 191 E-mail interview with Stanley Pollack, supra note 186. [↑](#footnote-ref-192)
192. 192 Id.; Stanley M. Pollack, Address at New Mexico Water Resources Institute: Integrated Water Resources Management in the San Juan Basin: The Navajo Perspective, 3 (Sept. 1996) (on file with the author). [↑](#footnote-ref-193)
193. 193 Executive Summary of the San Juan ***River*** Basin in New Mexico Navajo Nation Water Rights Settlement, New Mexico Office of the State Engineer (April 19, 2005), available at [*http://www.ose.state.nm.us/water-info/NavajoSettlement/NavajoExecutiveSummary.pdf*](http://www.ose.state.nm.us/water-info/NavajoSettlement/NavajoExecutiveSummary.pdf). [↑](#footnote-ref-194)
194. 194 Id. [↑](#footnote-ref-195)
195. 195 Id. [↑](#footnote-ref-196)
196. 196 Peter W. Sly, Reserved Water Rights Settlement Manual 161-66 (1988). [↑](#footnote-ref-197)
197. 197 Water Jackpot, supra note 5, at 6. [↑](#footnote-ref-198)
198. 198 Staci Matlock, Congress Approves Massive Public Lands Bill, Santa Fe New Mexican, March 25, 2009, at 1, available at [*http://www.santafenewmexican.com/Local%20News/Congress-approves-massive-public-lands-bill*](http://www.santafenewmexican.com/Local%20News/Congress-approves-massive-public-lands-bill). [↑](#footnote-ref-199)
199. 199 Id. [↑](#footnote-ref-200)
200. 200 Id. [↑](#footnote-ref-201)
201. 201 Phone interview with Stanley Pollack, Assistant Attorney General for Navajo Nation (Mar. 8, 2010). [↑](#footnote-ref-202)
202. 202 Sleeping Giant, supra note 3, at 1. [↑](#footnote-ref-203)
203. 203 Navajo Sue U.S. to Protect ***Colorado*** ***River*** Rights, U. of Ariz. C. of Agric. & Life Sci. Water Res. Ctr., March-April 2003, available at [*http://cals.arizona.edu/azwater/awr/marapr03/feature2.html*](http://cals.arizona.edu/azwater/awr/marapr03/feature2.html). [↑](#footnote-ref-204)
204. 204 Navajo Compl. supra note 1, at 2. [↑](#footnote-ref-205)
205. 205 Id. at 3. [↑](#footnote-ref-206)
206. 206 Phone Interview with Stanley Pollack, supra note 201. [↑](#footnote-ref-207)
207. 207 Water Jackpot, supra note 5, at 11-12; Phone interview with Stanley Pollack, supra note 201. [↑](#footnote-ref-208)
208. 208 [*43 U.S.C. § 666*](https://advance.lexis.com/api/document?collection=statutes-legislation&id=urn:contentItem:8SDD-0HD2-8T6X-73VR-00000-00&context=1516831) (1970); see In re Gen. Adjudication of all Rights to Use water in the [*Gila* ***River*** *Sys. & Source, 35 P.3d 68, 79-81 (Ariz. 2001)*](https://advance.lexis.com/api/document?collection=cases&id=urn:contentItem:44JD-GKM0-0039-43YD-00000-00&context=1516831) (en banc); see also Sax et al, supra note 55, at 992-93. [↑](#footnote-ref-209)
209. 209 See Sax et al, supra note 55, at 992-93. [↑](#footnote-ref-210)
210. 210 In re Gen. Adjudication of All Rights to Use Water in the [*Big Horn* ***River*** *Sys., 753 P.2d 76, 76 (Wyo. 1988).*](https://advance.lexis.com/api/document?collection=cases&id=urn:contentItem:3RVJ-BYP0-003G-J29J-00000-00&context=1516831) [↑](#footnote-ref-211)
211. 211 Sax et al, supra note 55, at 993. [↑](#footnote-ref-212)
212. 212 Id. at 992-93; [*Winters v. United States, 207 U.S. 564, 577 (1908).*](https://advance.lexis.com/api/document?collection=cases&id=urn:contentItem:3S4X-9WV0-003B-H241-00000-00&context=1516831) [↑](#footnote-ref-213)
213. 213 Sax et al, supra note 55, at 993. [↑](#footnote-ref-214)
214. 214 Id. [↑](#footnote-ref-215)
215. 215 Id. at 995. [↑](#footnote-ref-216)
216. 216 Id. at n. 6. [↑](#footnote-ref-217)
217. 217 Arizona Water Settlements Act, Pub. L. No. 108-451, § 104(a), (2004). The Gila ***River*** Indian Community received 102,000 af; the Tohono O'odham Nation received 28,200 af; and 67,300 af went to Arizona Indian Tribes. [↑](#footnote-ref-218)
218. 218 Daniel McCool, Indian Water Settlements: Negotiating Tribal Claims to Water, 107 Water Res. Update: Univ. Council on Water Res. 28, 29 (Spring 1997), available at [*http://www.ucowr.org/updates/107/index.html*](http://www.ucowr.org/updates/107/index.html). Examples of Indian settlements that were not "settled" after the actual settlement, include: the San Luis Rey, Fort McDowell, Fort Peck, Yavapai-Prescott, the Southern Arizona Water Rights Settlement Act of 1982 (Tohono O'odham), ***Colorado*** Ute Settlement of 1988, Uintah and Ouray Reservation, and the Jicarilla Apache. [↑](#footnote-ref-219)
219. 219 Id. at 29. [↑](#footnote-ref-220)
220. 220 Id. [↑](#footnote-ref-221)
221. 221 Id. [↑](#footnote-ref-222)
222. 222 Id. [↑](#footnote-ref-223)
223. 223 Sleeping Giant, supra note 3, at 2. [↑](#footnote-ref-224)
224. 224 The Budget and Economic Outlook: An Update, Cong. Budget Office (Aug. 2010), [*http://www.cbo.gov/doc.cfm?index=11705*](http://www.cbo.gov/doc.cfm?index=11705). [↑](#footnote-ref-225)
225. 225 McCool, supra note 218, at 30. [↑](#footnote-ref-226)
226. 226 Phone interview with John Leshy, Harry D. Sunderland Distinguished Professor of Real Property Law at the Univ. of California, Hastings C. of Law (Sept. 9, 2010). Mr. Leshy served as solicitor of the Department of the Interior throughout the Clinton Administration (notes on file with author). [↑](#footnote-ref-227)
227. 227 Id. [↑](#footnote-ref-228)
228. 228 Id. [↑](#footnote-ref-229)
229. 229 Navajo Compl., supra note 1, at 13. For a detailed discussion of Interior's competing and often clashing duties when representing tribes, see Ann C. Juliano, Conflicted Justice: The Department of Justice's Conflict of Interest Representing Native American Tribes, [*37 Ga. L. Rev. 1307 (2003).*](https://advance.lexis.com/api/document?collection=analytical-materials&id=urn:contentItem:491S-PP20-00CW-G08N-00000-00&context=1516831) [↑](#footnote-ref-230)
230. 230 However, President Obama issued an executive order in 2009, re-affirming President Clinton's Executive Order 13175 of 2000, which charges departments and agencies "with engaging in regular and meaningful consultation and collaboration with tribal officials in the development of Federal policies that have tribal implications, and are responsible for strengthening the government-to-government relationship between the United States and Indian tribes." Presidential Memorandum (Nov. 5, 2009), available at [*http://www.whitehouse.gov/the-press-office/memorandum-tribal-consultation-signed-president*](http://www.whitehouse.gov/the-press-office/memorandum-tribal-consultation-signed-president). [↑](#footnote-ref-231)
231. 231 McCool, supra note 218, at 31. [↑](#footnote-ref-232)
232. 232 Id. [↑](#footnote-ref-233)
233. 233 Id. [↑](#footnote-ref-234)