

WHERE DO WE GO FROM HERE? NAVAJO NATION'S FIGHT FOR WATER

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*Bringing us here has made many of us die, also a great number of our animals. Our Grandfathers had no idea of living in any other place except our own land, and I don't think it is right for us to do what we were taught not to do. When the Navajo were first made, First Woman pointed out four mountains and four rivers that was to be our land. Our grandfathers told us to never move east of the Rio Grande River nor west of the San Juan River. . . . I hope to God, you will not ask me to go anywhere except my own country.*²

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² Comments made by Barboncito, Navajo Representative, negotiating the 1868 Treaty with General William Tecumseh Sherman after removal to Bosque Redondo. Dennis W. Zotigh, *The Treaty that Reversed a Removal—the Navajo Treaty of 1868—Goes on View*, SMITHSONIAN MAG. (Feb. 21, 2018), <https://www.smithsonianmag.com/blogs/national-museum-american-indian/2018/02/22/treaty-that-reversed-a-removal-navajo-treaty-1868-goes-on-view/>.

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I.INTRODUCTION

Since 2020, 2,224 Navajo Tribal Citizens have died from COVID-19.³ Navajo Nation has experienced more COVID-19 transmissions per capita than any state in the country.⁴ Water scarcity, poor access to effective sanitation and critical water infrastructure, and limited quantification of the Navajo Nation’s reserved water rights significantly contributed to these unfortunate statistics.⁵ As Navajo Nation citizens are “67 times more likely than other Americans to live without access to running water,” they must pay exorbitant prices to import water on to the reservation.⁶ On top of these expenses, severe drought plagues the Southwest,

³ *Dikos Ntsaaígíí-19 (COVID-19)*, NAVAJO NATION DEP’T OF HEALTH, <https://ndoh.navajonnsn.gov/COVID-19> (last visited Oct. 31, 2023).

⁴ Rebecca Klar, *Navajo Nation Reports More Coronavirus Cases Per Capita Than Any US State*, THE HILL (May 11, 2020), <https://thehill.com/policy/healthcare/497091-navajo-nation-has-more-coronavirus-cases-per-capita-than-any-us-state/>.

⁵ *See Water as a Trust Resource: Examining Access in Native Communities Initiative Lead Heather Tanana, Universal Access to Clean Water for Tribal Communities: Oversight Hearing, Before the S. Comm. on Indian Affairs*, 118th Cong. 2 (2023) (statement of Heather Tanana, J.D. University of Utah S.J. Quinney College of Law) [hereinafter Tanana] (“Without a safe, reliable, affordable, and easily accessible water supply, Tribal households are unable to meet basic personal hygiene, food preparation, domestic cleaning, and other needs required for good health. Indeed, without access to water, tribal nations are unable to truly exist and fully exercise their sovereign rights. The harsh reality is that the U.S.’s failure to prioritize and meaningfully address tribal water rights and access essentially perpetuates pre-1800s extermination policies.”).

⁶ *Id.* at 40 (“The Navajo Nation, the largest and most populous reservation in the country, has significant piped water access gaps. Navajo residents are 67 times more likely than other Americans

with its greatest water source, the Colorado River, drying up quickly.⁷ The Navajo Nation sought relief for these issues and sued the federal government for a breach of trust claim, grounded in the 1868 Treaty, for failure to secure water for the Navajo Nation reservation.⁸ On June 22, 2023, the United States Supreme Court issued an opinion in *Arizona v. Navajo Nation* declaring that the federal government did not have a duty to take affirmative steps to secure water for the Navajo Nation under the 1868 Treaty, nor generally as a principle of trust responsibility.⁹

This article examines what the ruling in *Arizona v. Navajo Nation* means for the Navajo Nation in its attempts to secure clean drinking water for its people. It also suggests alternative avenues for the tribal nation's quest for water while facing climate change and water scarcity. To fully achieve the Navajo Nation's goals of securing water for its people, the tribe must take a three-prong approach to challenging and settling any of its Indian reserved water rights claims for quantification, including any rights to the Colorado River Basin, and advocate for funding to build critical infrastructure. In Part I, this article presents the Supreme Court's holding and rationale in *Arizona v. Navajo Nation* and the legal arguments and issues advanced by the Navajo Nation. Part II outlines the canons of construction for interpreting Indian treaties, explains the federal trust responsibility related to Indian reserved water rights, known as the Winters Doctrine, and introduces the legal framework for Indian reserved water rights adjudication and quantification. Part III explores three options for the Navajo Nation to secure water resources for its people and homelands. First, it analyzes the potential outcome of *Arizona v. California*¹⁰ if the Navajo Nation intervened in the case to assert the tribe's reserved water rights to the Colorado River Basin. The Navajo Nation would likely succeed in its water claims to the Colorado River if it chose to intervene in the ongoing *Arizona v. California* litigation, despite the *Arizona v. Navajo Nation* ruling. Second, it argues that the Navajo Nation should negotiate a water rights settlement regarding the Colorado River Basin with key stakeholder states. Finally, this article recommends that the Navajo Nation must advocate for congressional support to build essential water infrastructure and sanitation systems on the Navajo Reservation.

to live without access to running water. As a result, many households are required to haul water from communal wells—a costly and time-consuming burden.”).

⁷ See Annie Snider, *Drought Forces First Water Cuts on the Colorado River. They're Just the Beginning*, POLITICO (Aug. 16, 2021), <https://www.politico.com/news/2021/08/16/megadrought-colorado-river-505190>.

⁸ *Arizona v. Navajo Nation*, 599 U.S. 555, 562 (2023).

⁹ *Id.* at 567-68.

¹⁰ *Arizona v. California*, 373 U.S. 546 (1963).

II. PROCEDURAL BACKGROUND AND HISTORY

The Navajo Nation boasts one of the largest tribal populations in the country, with a massive reservation that extends into three Southwestern states.¹¹ The Navajo Nation entered two treaties with the United States in 1849 and 1868.¹² In the 1849 Treaty, the Navajo Nation assented to American jurisdiction, agreed to halt hostilities with the United States, and ceded much of its traditional homelands to establish the boundaries of Navajo territory.¹³ However, the Navajo Nation and the United States continued to war with each other, eventually culminating in the tribe's forced removal to the Bosque Redondo Reservation, located in New Mexico on dry and desolate land.¹⁴ On June 1, 1868, the Navajo Nation and the United States signed a treaty designed to set aside a reservation on the Navajo Nation's traditional homelands for the tribe's "use and occupation."¹⁵ The federal government agreed to build certain infrastructure, provide seeds and agricultural equipment, and fund livestock for the tribe.¹⁶ The 1868 Treaty established a "permanent home" for the Navajo and reserved the tribe's water rights to fulfill its purpose of "use and occupation."¹⁷

The Navajo Nation acquires its water from the Colorado River Basin and other water sources located on and bordering the reservation.¹⁸ Like much of the arid West, the Navajo Nation faces a water scarcity problem.¹⁹ However, the shortage is particularly harsh for the Navajo Nation as about 30% of tribal households have no access to running water.²⁰ Tribal citizens often truck in their water and pay at least "twenty times more than [] neighboring off-Reservation communities."²¹ Even though the federal government previously "secured hundreds of thousands of acre-feet of water and authorized billions of dollars for water infrastructure on the Navajo Reservation," the Navajo Nation recognizes that its current water supply is insufficient to meet its people's needs.²²

¹¹ *Arizona v. Navajo Nation*, 599 U.S. at 559. Navajo Nation enrollment includes 300,000 tribal citizens, with approximately 190,000 living on the reservation. The reservation extends into Arizona, New Mexico, and Utah encompassing 17 million acres of land.

¹² *Id.* at 558. The United States claimed jurisdiction over large swaths of the southwestern United States after signing the Mexican-American Treaty in 1848 with Mexico. Mexico ceded lands that included the traditional homelands of the Navajo Nation.

¹³ *Id.* at 559.

¹⁴ *Id.* at 560.

¹⁵ *Id.*

¹⁶ *Id.* The treaty stipulated that infrastructure would include a church and a school.

¹⁷ *See id.* at 560.

¹⁸ *Id.* at 561.

¹⁹ *Id.*

²⁰ Brief for Navajo Nation at 1, *Arizona v. Navajo Nation*, 599 U.S. 555 (2023) (No. 21-1484), Native American Rights Fund Tribal Supreme Court Project [hereinafter Navajo Nation's Brief].

²¹ *Id.*

²² *Arizona v. Navajo Nation*, 599 U.S. at 561-62. The Supreme Court cited several settlements and compacts of the Navajo Nation and the United States, including the Consolidated Appropriations Act, 2021, Pub. L. 116-260, 134 Stat. 3227, 3230; Northwestern New Mexico Rural Water Projects

Standing up for its water needs, the Navajo Nation filed a breach of trust claim under the 1868 Treaty and sued the “Department of the Interior, the Secretary, the Bureau of Reclamation, and the Bureau of Indian Affairs” for mismanaging the Navajo Nation’s water rights.²³ The Navajo Nation also filed other claims under the Administrative Procedure Act, the 2001 Surplus Guidelines, and the National Environmental Policy Act for failing to “consider and protect” its reserved rights.²⁴ Arizona, Colorado, and Nevada also intervened in the suit to assert their claims to water from the Colorado River Basin.²⁵ The District Court* dismissed the tribe’s claims and the Ninth Circuit reversed the lower court’s ruling by holding that the 1868 treaty imposed a duty upon the federal government to take affirmative steps to secure the Navajo Nation’s water needs.²⁶ The Supreme Court granted certiorari and reversed.²⁷ The Navajo Nation argued that the federal government failed to fulfill its promises under the 1868 treaty, including the duty to take affirmative steps to assess the tribe’s water needs and develop a plan to meet these needs.²⁸ During oral arguments, the federal government admitted that it “owe[d] a general fiduciary duty” to the Navajo Nation, but it did not acknowledge a consequent duty to protect the tribe’s water rights.²⁹

A. Kavanaugh’s Majority Opinion

Although the Court recognized that the 1868 treaty reserved water to establish the Navajo Reservation, it held that the 1868 treaty did not create any affirmative duty for the federal government to secure the tribe’s water needs.³⁰ Relying on statements made by the Navajo Nation’s counsel during oral argument, the Kavanaugh opinion noted that the tribe argued that the federal government must take the affirmative step to “potentially [build] pipelines, pumps, wells, or other water infrastructure” for the Navajo Nation.³¹ First, the Court determined by reviewing the 1868 treaty for any “specific rights creating or duty-imposing” language that Congress did not expressly accept any judicially enforceable duty.³² The Court found it noteworthy that the treaty imposed specific duties on the

Act, §§10402, 10609, 10701, 123 Stat. 1372, 1395–1397; Central Arizona Project Settlement Act of 2004, §104, 118 Stat. 3487; Colorado Ute Settlement Act Amendments of 2000, 114 Stat. 2763A–261, 2763A–263; Act of June 13, 1962, 76 Stat. 96; Act of Apr. 19, 1950, 64 Stat. 44–45.

²³ Navajo Nation v. Dep’t of Interior, 876 F.3d 1144, 1159 (9th Cir. 2017); Arizona v. Navajo Nation, 599 U.S. at 562.

²⁴ Navajo Nation v. Dep’t of Interior, 876 F.3d at 1159.

²⁵ *Id.*

²⁶ Arizona v. Navajo Nation, 599 U.S. at 562-63.

²⁷ *Id.* at 563, 570.

²⁸ Navajo Nation’s Brief, *supra* note 20, at 2-3.

²⁹ M. Kathryn Hoover, *Up Shit Creek Looking for a Paddle*, ARIZ. ATTORNEY 27, 28 (July/Aug. 2023).

³⁰ Arizona v. Navajo Nation, 599 U.S. at 569-70.

³¹ *Id.* at 562-63.

³² *Id.* at 565.

United States to build schools and churches while excluding any mention of taking affirmative steps to secure water for the tribe.³³ Even though the Navajo Nation argued that the treaty text establishing a “permanent home” could reasonably include the duty to secure water for the reservation, the Kavanaugh opinion considered the treaty text and history as excluding such a duty.³⁴ The Court also found the Navajo Nation’s argument that the federal government’s duty to supply agricultural equipment and seeds for three years implied a duty to secure water unpersuasive.³⁵ Rejecting the Navajo Nation’s argument that the tribe would have understood the treaty provisions as creating a duty, the Court construed the treaty record as not presenting any requests for water infrastructure.³⁶ Second, since no duty existed to build or maintain roads and other infrastructure for the Navajo Nation’s land, the Court found it reasonable to presume no similar duty applied to securing water.³⁷ Third, the Court balked at applying common law trust duties to the Navajo Nation’s claims since “nothing in the 1868 treaty establishes a conventional trust relationship with respect to water.”³⁸ Lastly, the Court recommended that the Navajo Nation advocate for the President or Congress to devise a plan to secure access and reach a settlement instead of petitioning the judiciary for a remedy to its water needs.³⁹

B. Thomas’s Concurrence

Concurring with the Court’s judgment, Justice Clarence Thomas wrote on his concerns with the concept of the federal government owing a general trust responsibility to tribes.⁴⁰ Thomas acquiesced to the notion of trust, if defining the word as “merely . . . the trust that Indians have placed in the Federal Government.”⁴¹ However, Thomas averred that the Court has stretched the legal trust responsibility “beyond the discrete terms of those trusts” to conflate enforceable fiduciary duties and moral obligations.⁴² Critiquing the canons of construction, Thomas contended foundational decisions used the canons to interpret ambiguous treaty provisions in favor of the non-drafting party and not under the premise of the trust responsibility.⁴³ Thomas found the trust responsibility contradicts with plenary power because the Court has often

³³ *Id.*

³⁴ *Id.* at 567.

³⁵ *Id.* at 567-68.

³⁶ *Id.* at 568.

³⁷ *Id.* at 569.

³⁸ *Id.* at 566.

³⁹ *Id.* at 566-67.

⁴⁰ *See id.* at 570 (Thomas, J., concurring).

⁴¹ *Id.* (Thomas, J., concurring).

⁴² *Id.* at 571 (Thomas, J., concurring).

⁴³ *See id.* at 572 (Thomas, J., concurring).

interpreted Congress's plenary power to strip away tribal sovereignty and rights.⁴⁴ Calling for the Court to review federal trust responsibility in future cases, Thomas reasoned that the notion of a general trust relationship has no constitutional or historical basis.⁴⁵ As the most senior conservative Justice on a predominately conservative bench, the Navajo Nation and tribes alike must take notice of Justice Thomas's legal principles on the federal trust responsibility as Thomas can potentially influence the junior conservative Justices' views on Federal Indian Law.⁴⁶

C. Gorsuch's Dissent

Justice Gorsuch along with Justices Kagan, Sotomayor, and Jackson dissented.⁴⁷ Gorsuch laid out the history leading to the 1868 treaty, from the Navajo Nation's tradition of farming and raising livestock to their removal to Bosque Redondo in an uninhabitable area.⁴⁸ Relying on the 1868 treaty records, Gorsuch emphasized the Navajo Nation representative Barboncito's persistent pleas for the tribe to return to their homelands, where the tribe knew water was plentiful, to raise their traditional crops.⁴⁹ Gorsuch noted the contrast in language and interpretation between the federal government and the Navajo Nation during treaty negotiations, and that this contrast led to frequent misunderstandings between the parties.⁵⁰ After reviewing this history, Gorsuch contended "the government owes the Tribe a duty to manage the water it holds for the Tribe in a legally responsible manner," including offering a quantification of the Navajo Nation's water rights.⁵¹ Possibly answering Thomas's concerns, the Gorsuch opinion focuses on the relationship between constitutional treaty powers and the principles underlying contract interpretation. Gorsuch emphasizes in particular the principle that any uncertainty in a contract should be construed against the drafting party and the doctrine of unilateral mistake, as treaties are "contract[s] between two sovereign nations."⁵² Concluding, Gorsuch applied the canons of construction, the Winters Doctrine, and fiduciary case law to the Navajo Nation's

⁴⁴ *Id.* at 572-73 (Thomas, J., concurring).

⁴⁵ *Id.* at 574 (Thomas, J., concurring).

⁴⁶ See generally Jeffrey Toobin, *Analysis: Clarence Thomas Has Waited Over 30 Years for This Moment*, CNN NEWS (May 11, 2022), <https://www.cnn.com/2022/05/11/politics/clarence-thomas-analysis/index.html>; see generally Jill Abramson, *In the Ultimate Coup for the Right, It's Justice Thomas's Supreme Court Now*, FINANCIAL TIMES (July 6, 2022), <https://www.ft.com/content/b188c7dc-8374-47da-9222-a53141a04bbd>.

⁴⁷ *Arizona v. Navajo Nation*, 599 U.S. 555, 574 (2023) (Gorsuch, J., dissenting).

⁴⁸ *Id.* at 576-78 (Gorsuch, J., dissenting).

⁴⁹ *Id.* at 578-79 (Gorsuch, J., dissenting).

⁵⁰ *Id.* at 579 (Gorsuch, J., dissenting).

⁵¹ *Id.* at 584-85 (Gorsuch, J., dissenting).

⁵² *Id.* at 585-86 (Gorsuch, J., dissenting) (citing *Wash. v. Wash. State Com. Passenger Fishing Vessel Ass'n*, 443 U.S. 658, 675 (1979)).

case, and determined the federal government owed a fiduciary duty to the tribe to secure water.⁵³

III. LEGAL BACKGROUND

Indian reserved water rights, established in *Winters v. United States*, provide the foundation for a tribe's quantification efforts and negotiating water rights settlements.⁵⁴ Tribes cannot lose their *Winters* rights through non-use, unlike ownership in prior appropriation systems.⁵⁵ These rights also "vest on the original date of withdrawal of the land and trump rights of later appropriators."⁵⁶ The decision in *Arizona v. Navajo Nation* implicates the federal government's trust responsibility to secure water for tribes under the *Winters* Doctrine.⁵⁷ By limiting the federal trust responsibility to a fiduciary duty, concerns arise with the federal government fulfilling tribal water claims.⁵⁸ When the Supreme Court deferred to the political branches to address Navajo Nation's concerns, it placed tribes in an insecure situation, dependent on the frequently shifting political landscape of Congress and the Executive.⁵⁹ Nevertheless, this section explains the legal framework of Indian reserved water rights that Navajo Nation must use to secure the water necessary for its community to thrive during climate change and beyond.

The federal government derives its power to reserve water rights from the Commerce Clause.⁶⁰ To determine tribal reserved rights, courts look to the source that established the reservation.⁶¹ Generally, courts must liberally construe

⁵³ *Id.* at 590-598 (Gorsuch, J., dissenting).

⁵⁴ Brief of Tribal Nations and Indian Organizations as Amici Curiae Supporting Navajo Nation at 20, *Arizona v. Navajo Nation*, 599 U.S. 555 (2023) (No. 21-1484), Native American Rights Fund Tribal Supreme Court Project [hereinafter Brief of Tribal Nations].

⁵⁵ *Navajo Nation v. Dep't of Interior*, 876 F.3d 1144, 4 (9th Cir. 2017).

⁵⁶ *Id.*

⁵⁷ Arlyssa Becenti, 'Water is a Human Right: Supreme Court Ruling in Navajo Case Disappoints, Angers People,' AZ CENTRAL (June 23, 2023), <https://www.azcentral.com/story/news/local/arizona/2023/06/23/supreme-court-ruling-on-navajo-water-claims/70349767007/> ("SCOTUS completely ignored *Winters v. United States*, in which it states that the establishment of an Indian reservation implicitly reserves the amount of water necessary to fulfill the purpose of the reservation/sovereign nation," said Kim Smith, from the Indigenous mutual aid collective Nihi K'é Ba.').

⁵⁸ *Id.* ("Monte Mills, a law professor at the University of Washington School of Law and another author on the amicus brief, said the decision may make it harder for tribes to argue that the United States has a trust obligation to assist tribes.').

⁵⁹ See generally Tanana, *supra* note 5, at 5 ("Of these Tribes with settled water rights, a still smaller set have received the funding they agreed to in exchange for vast amounts of water to which they would otherwise still have a legal claim. The Indian Water Rights Settlement Completion Fund and the Reclamation Water Settlements Fund have served as the sources of federal dollars for these settlements but rely on the priorities of a given administration for funding. If made permanent, the way settlements are achieved would become more durable and efficient.').

⁶⁰ *Arizona v. California*, 373 U.S. 546, 597-98 (1963).

⁶¹ *Id.* at 598. The Court rejected Arizona's argument in *Arizona v. California* that executive orders do not reserve water rights for a tribe's use. Sources include treaties, executive orders, or congressional enactments.

treaties in favor of tribes, including any textual ambiguities.⁶² Because the federal government often imposed treaties on tribes non-consensually, courts must interpret “any doubtful expressions” as the tribes would have understood the agreements to mean when entering them.⁶³ A treaty’s history and negotiations guide courts in interpreting treaty terms when such ambiguities arise.⁶⁴

A. *Winters Doctrine*

Tribal water rights are reserved to fulfill the intended purposes of establishing a reservation.⁶⁵ In *Winters v. United States*,⁶⁶ the federal government sought an injunction to stop defendants from interfering with the Fort Belknap Reservation’s water claims to the Milk River in Montana.⁶⁷ The Fort Belknap Indian Reservation was established in the spring of 1888 as a permanent home for the Aaniiih and Nakoda peoples.⁶⁸ In 1889, the tribes and the federal government took affirmative steps to secure water for the tribes’ use by diverting water to irrigate the reservation’s lands to grow crops and raise livestock, long before the defendants built infrastructure to divert water to their lands.⁶⁹ The United States argued that to fulfill the purposes of creating the reservation, which included “furthering and advancing the civilization and improvement of the Indians, and to encourage habits of industry and thrift,” tribes must enjoy unobstructed access in quantity and quality to the waters of the Milk River.⁷⁰ Ignoring the fact that the tribes likely used the water in the Milk River for other purposes long before colonization, the Court grounded its ruling in fulfilling the federal government’s stated purpose of establishing the reservation, which included furthering its policy to assimilate tribes to “pastoral and civilized” people.⁷¹ Since *Winters* the federal government has failed to “aggressively” adjudicate the water rights of numerous tribes, including the Navajo Nation.⁷²

⁶² COHEN’S HANDBOOK OF FEDERAL INDIAN LAW § 2.02[1], 113 (NELL JESSUP NEWTON ET AL. EDS., 2012) [hereinafter COHEN’S].

⁶³ *Yakama Indian Nation v. Flores*, 955 F. Supp. 1229, 1235, 1249 (E.D. Wash. 1997) (citing *Choctaw Nation v. Okla.*, 397 U.S. 620, 630-31 (1970)); see also COHEN’S, *supra* note 62, at 113-14.

⁶⁴ WILLIAM CANBY, JR., *AMERICAN INDIAN LAW IN A NUTSHELL*, 132-33, (7 ed. 2020).

⁶⁵ *Winters v. United States*, 207 U.S. 564, 576-77 (1908).

⁶⁶ *Id.*

⁶⁷ *Id.* at 565.

⁶⁸ *Id.* Aaniiih and Nakoda are the traditional names for the Gros Ventre and Assiniboine tribes of the Fort Belknap Reservation.

⁶⁹ *Id.* at 566.

⁷⁰ *Id.* at 566-67.

⁷¹ *Id.* at 575-78.

⁷² Hoover, *supra* note 29, at 25.

B. *The Ongoing Arizona v. California*

The federal government reserved tribal water rights for Indians effective as of the creation of the reservation.⁷³ In *Arizona v. California*, the special master determined that only five tribes had reserved water rights associated with the Colorado River and its tributaries, excluding the Navajo Nation, the largest reservation and tribe in the area.⁷⁴ Indeed, the federal government opposed the Navajo Nation's intervention to assert its water claims.⁷⁵ Agreeing with the Special Master's report, the Court reasoned that because these five reservations are located on arid lands, and water is necessary to sustain life, the federal government reserved water for the tribes' use.⁷⁶ The Court declared that the tribes possessed "present perfected rights" since their reserved water rights vested before statehood; therefore, the tribes were entitled to priority.⁷⁷ Rejecting Arizona's arguments, the Court noted that tribes are not states, so the doctrine of equitable apportionment does not apply to tribal reserved water rights, and it is too challenging to apportion water based on predicted future use and how many tribal citizens will be.⁷⁸ Instead, the Court determined that tribes were entitled to enough water to irrigate all the practicably irrigable acreage on their reservations.⁷⁹

C. *General Adjudication Processes*

In 1953, Congress enacted the McCarran Amendment, which allowed for states to adjudicate federal reserved water rights.⁸⁰ Even though the statute does not expressly mention reserved tribal water rights, the Supreme Court has interpreted the amendment to include the federal government's reserved rights for tribal nations.⁸¹ As a result, state courts can adjudicate tribal reserved water rights under their judicial systems. If states want to adjudicate Indian reserved water rights, they must institute a general adjudication that includes all water rights holders.⁸²

Arizona allows for quantification to measure the present and future uses of water on Indian reservations.⁸³ In *Gila River*, the Arizona court contrasted non-Indian federal reserved rights to Indian federal reserved rights by noting the

⁷³ *Arizona v. California*, 373 U.S. 546, 600 (1963).

⁷⁴ *Id.* at 595-96.

⁷⁵ Hoover, *supra* note 29, at 25.

⁷⁶ *Arizona v. California*, 373 U.S. 546, at 599-600.

⁷⁷ *Id.* at 600.

⁷⁸ *Id.* at 597.

⁷⁹ *Id.* at 600-601.

⁸⁰ 43 U.S.C. § 666 (1953).

⁸¹ *Colo. River Conservation Dist. v. United States*, 424 U.S. 800, 809-813 (1976).

⁸² *Dugan v. Rank*, 372 U.S. 609, 618 (1963) (quoting S. Rep. No. 755, 82d Cong., 1st Sess. (1951) (general adjudication involves "all of the rights of various owners on a given stream").

⁸³ *In re the Gen. Adjudication of All Rights to Use Water in the Gila River Syst. & Source*, 35 P.3d 68, 77 (Ariz. 2001) [hereinafter *Gila River*].

federal government's role as trustee to "act for the Indians' benefit."⁸⁴ Agreeing with the premise of the Winters Doctrine that the intent of establishing an Indian reservation is to create a "'livable' environment," Arizona questioned the utility of examining historical records to prove federal reserved Indian water rights and maintained tribes under *Winters* retained reserved water rights for their minimum needs.⁸⁵ Rejecting the standard of practicably irrigable acreage, the Arizona court noted the inequity of applying this standard when tribes live in diverse terrains and agriculture can be an impractical and costly endeavor.⁸⁶ Instead, Arizona applied a fact intensive inquiry based on these non-exhaustive factors to quantify tribal water rights: (1) tribal history with deference to traditions and activities requiring water use; (2) tribal cultural practices heeding special note to how long practice in use, nature, and significance; (3) "tribal land's geography, topography, and natural resources, including groundwater availability;" (4) tribal economic development plans; (5) historic water use; and (6) present and projected tribal population.⁸⁷ As the Navajo Nation is located in Arizona, the tribe's quantification efforts may fall under the *Gila River* factorial inquiry.

IV. NAVAJO NATION'S NEXT STEPS TO SECURE WATER

As they face climate change and rapid population growth, tribes and non-Indians living near the Colorado River Basin are racing to claim the little water remaining.⁸⁸ However, both water rights adjudication and settlement agreements require a painstaking, lengthy process. This process often leaves tribes as the last parties to receive their water rights claims, despite using the land on which the water lies far before other interested parties.⁸⁹ Water is a human right, yet the Navajo Nation confronts poor access to water and sanitation issues, causing high rates of diseases and death.⁹⁰ To alleviate these concerns, the Navajo Nation must acquire funding to build water infrastructure and to maintain existing sanitation

⁸⁴ *Id.* at 74.

⁸⁵ *Id.* at 77.

⁸⁶ *Id.* at 78.

⁸⁷ *Id.* at 79-81.

⁸⁸ Hilary C. Thompkins, *The Future of Tribal Water: Ensuring the Promise of a Permanent Homeland*, FOUND. FOR NATURAL RESOURCES AND ENERGY LAW, WATER LAW INSTITUTE 3-1, 3 (2020).

⁸⁹ Amy Cordalis & Daniel Cordalis, *Indian Water Rights: How Arizona v. California Left an Unwanted Cloud over the Colorado River Basin*, 5 ARIZ. J. ENV'T L. & POL'Y 333, 335-36 (2014) [hereinafter Cordalis].

⁹⁰ United Nations, *Human Rights to Water and Sanitation*, UN WATER, <https://www.unwater.org/water-facts/human-rights-water-and-sanitation>; *Water as a Trust Resource: Examining Access in Native Communities: Oversight Hearing, Before the S. Comm. on Indian Affairs*, 118th Cong. 2 (2023) (statement of Benjamin Smith, Deputy Director, Indian Health Serv., U.S. Dep't of Health & Human Servs.) [hereinafter Smith] ("The IHS estimated in FY 2022 that every \$1 in funding provided for sanitation facilities resulted in \$0.68 in avoided medical cost related to inpatient and outpatient visits related to respiratory, skin and soft tissue, and gastro enteric disease.").

and water systems.⁹¹ However, funding such projects can prove an expensive endeavor given the rural character of the Navajo reservation, leading to numerous challenges, including “difficult terrain and short construction seasons,” rising inflation costs for construction and shipment of products, and a shortage of construction workers.⁹² Tribal revenue typically cannot sustain the operational costs of sanitation facilities, even though 30% of American Indian homes lack satisfactory sanitation standards.⁹³

Facing critical water scarcity and sanitation issues, the Navajo Nation sought to protect its water rights claims and hold the federal government responsible for failing to fulfill its promises to the tribe.⁹⁴ The recent Supreme Court decision in *Arizona v. Navajo Nation* limits the tribe’s strategies in ensuring essential access to water for its people.⁹⁵ Even though the Court recognized that the creation of the reservation reserved water for the Navajo people’s use, it failed to hold the federal government responsible for devising a plan to secure the Navajo Nation’s water needs.⁹⁶ When the Court seemed to suggest dealing with Congress and the Executive branch as the better means of effectuating the Navajo Nation’s goals, it also ignored the urgency of the tribe’s situation.⁹⁷

The Navajo Nation must employ a three-prong approach to secure water so the tribe may continue traditional farming and livestock raising and mitigate concerns of climate change and environmental pollution. First, the Navajo Nation may adjudicate its water rights in the Colorado River by intervening in *Arizona v. California*.⁹⁸ Next, the Navajo Nation may attempt to strike a deal with states located in the Colorado River Basin to build critical water infrastructure. Last, the Navajo Nation must advocate for Congress to apportion funds for the Navajo Nation to build new water infrastructure and maintain any existing water infrastructure.

A. Navajo Nation’s Reserved Water Rights and Intervention in Arizona v. California

The Navajo Nation’s reserved Indian water rights have never been fully adjudicated.⁹⁹ Recently, the Navajo Nation agreed to release its claims against

⁹¹ Tanana, *supra* note 5, at 6.

⁹² *Id.* at 3, 39, 41.

⁹³ Smith, *supra* note 90, at 14.

⁹⁴ Navajo Nation’s Brief, *supra* note 20, at 3.

⁹⁵ Becenti, *supra* note 57 (“Navajo Nation President Buu Nygren said during a Friday news conference that the ruling doesn’t say the tribe will never secure water rights but made it a little tougher.”).

⁹⁶ *Arizona v. Navajo Nation*, 599 U.S. 555, 569-70 (2023).

⁹⁷ *Id.* at 566-67.

⁹⁸ *Id.* at 568-69. The Court mentioned that the Navajo Nation can “intervene in cases that affect their claimed interests” to satisfy the tribe’s water needs.

⁹⁹ *Id.* at 581 (Gorsuch, J., dissenting) (“That deficit owes in part to the fact that no one has ever assessed what water rights the Navajo possess. For instance, [a]lthough the Navajo Reservation is

states and the federal government regarding the Colorado River Basin. However, this agreement is contingent on the passage of the Northeastern Arizona Indian Water Rights Settlement Act of 2024. If adjudicated, the Court will likely rule that the Navajo Nation has an interest in the Colorado River Basin because of the Winters Doctrine, even though the federal government had previously opposed efforts by the Navajo Nation to intervene in *Arizona v. California*.¹⁰⁰ The Court will review the Treaty of 1868, which established the Navajo Reservation, to determine whether the tribe reserved water rights.¹⁰¹ Construing the treaty record and any textual ambiguities in the treaty favorably for the Navajo Nation implies the tribe reserved water rights.¹⁰²

Based on the treaty record, the purpose of the Navajo Reservation included returning to a “pastoral” lifestyle.¹⁰³ The Navajo Nation believed entering a second treaty with the United States would provide its people with a “permanent home” and the water needed to sustain its traditional farming practices.¹⁰⁴ Historically, the Navajo Nation cultivated lavish farms and raised great herds of livestock.¹⁰⁵ However, upon the tribe’s removal to the barren Bosque Redondo Reservation, many livestock died, and crops failed.¹⁰⁶ The treaty records show Barboncito, the Navajo Nation’s representative, repeatedly mentioned the importance of water for crop growing and that he insisted on returning to the tribe’s traditional homelands nestled by “four mountains and four rivers.”¹⁰⁷ This evidence proves that when the tribe negotiated with the United States on its land cession and suspension of hostilities, the tribe also reserved its water rights. The evidence is even more substantial than in the case of the Fort Belknap tribe in *Winters v. United States*. Unlike the Fort Belknap tribe in *Winters*, on whom

adjacent to the Colorado River, the Navajo Nation’s rights to use water from the Colorado River’ have never been adjudicated.”); Hoover, *supra* note 29, at 25; see also Anna Smith & Mark Olalde, *States Opposed Tribes’ Access to Colorado River 70 years ago. History is Repeating Itself*, HIGH COUNTRY NEWS (Oct. 17, 2023) <https://www.hcn.org/articles/waiting-for-water-states-opposed-tribes-access-to-the-colorado-river-70-years-ago-history-is-repeating-itself> (“Many of the 30 federally recognized tribes in the Colorado River Basin still have been unable to access water to which they’re entitled. And Arizona for years has taken a uniquely aggressive stance against tribes’ attempts to use their water, a recent ProPublica and High Country News investigation found.”).

¹⁰⁰ *Arizona v. Navajo Nation*, 599 U.S. at 582 (Gorsuch, J., dissenting).

¹⁰¹ *Arizona v. California*, 373 U.S. 546, 597-598 (1963).

¹⁰² COHEN’S, *supra* note 62, at 113-14; WILLIAM CANBY, JR., *AMERICAN INDIAN LAW IN A NUTSHELL*, 132-33, (7 ed. 2020).

¹⁰³ *Arizona v. Navajo Nation*, 599 U.S. at 578 (Gorsuch, J., dissenting) (“The Navajo would have none of it. Their lead negotiator, Barboncito, refused to ‘go to any other country except [his] own.’ . . . Any place else, he said, could ‘turn out another Bosque Redondo.’ . . . [O]utside [our] own country,’ Barboncito told Sherman, ‘we cannot raise a crop, but in it we can raise a crop almost anywhere.’ . . . [W]e know this land does not like us,’ he said of Bosque Redondo, and ‘neither does the water.’ . . . Along the way, he spoke of ‘the heart of Navajo country,’ which he described as including a place where ‘the water flows in abundance.’”).

¹⁰⁴ Navajo Nation’s Brief, *supra* note 20, at 1-2.

¹⁰⁵ *Id.* at 1.

¹⁰⁶ *Arizona v. Navajo Nation*, 599 U.S. at 575-78 (Gorsuch, J., dissenting).

¹⁰⁷ Navajo Nation’s Brief, *supra* note 20, at 6.

the federal government imposed “pastoral and civilized” habits, the Navajo Nation sought to establish their reservation to continue their traditions as “pastoral” people who cultivated farms and raised livestock.¹⁰⁸

For quantification purposes, the tribe is at least entitled to the practically irrigable acreage standard established in *Arizona v. California*.¹⁰⁹ In other instances, the Navajo Nation’s reserved water rights claims may include future uses, besides the uses expressly provided in the 1868 treaty, meaning the tribe does not have to rely solely on the quantification of all practicably irrigable acreage.¹¹⁰

When applying Arizona’s factorial test from *Gila River*, Navajo Nation is entitled to both present and future uses in the portion of the reservation located in Arizona.¹¹¹ The treaty record shows the Navajo Nation’s history of traditional farming and raising livestock; all activities requiring water use.¹¹² As the Ninth Circuit found in *Agua Caliente*, Navajo Nation may also be entitled to appurtenant ground water because the Navajo reservation is dry and surface water is scarce, the survival of the reservation depends on groundwater.¹¹³ Even though the Navajo Nation maintains the largest tribal population in the country and that population is likely to grow,¹¹⁴ young, educated Navajo tribal citizens want to return home to help their people, but the tribe lacks the community housing and water systems necessary for these young people to establish homes on the reservation.¹¹⁵ Providing housing and water for tribal citizens is an essential part of economic development.¹¹⁶ Measuring the tribe’s historic water use will prove

¹⁰⁸ *Winters v. U.S.*, 207 U.S. 564, 575-78; *Arizona v. Navajo Nation*, 599 U.S. at 575-79 (Gorsuch, J., dissenting).

¹⁰⁹ *Arizona v. California*, 373 U.S. at 600-01 (1963).

¹¹⁰ *Gila River*, *supra* note 83, at 77; *Skeem v. U.S.*, 273 F. 93, 94-95 (1921).

¹¹¹ *Gila River*, *supra* note 83, at 79-81.

¹¹² *Gila River*, *supra* note 83, at 79; *Arizona v. Navajo Nation*, 599 U.S. at 575 (Gorsuch, J., dissenting).

¹¹³ *Agua Caliente Band of Cahuilla Indians v. Coachella Valley Water Dist.*, 849 F.3d 1262, 1265 (9th Cir. 2017); *see generally* Crystal Tulley-Cordova, et al., *Navajo Nation, USA, Precipitation Variability from 2002 to 2015*, 163 J. OF WATER RESEARCH & ED., 109, 109-23 (2018) <https://doi.org/10.1111/j.1936-704X.2018.03273.x>.

¹¹⁴ *Gila River*, *supra* note 83, at 80; U.S. Census Bureau estimates 166,545 residents on the Navajo reservation in Arizona, Utah, and New Mexico. U.S. Dep’t of Commerce, *2018-2022 American Community Survey 5-year Estimates*, U.S. CENSUS BUREAU, <https://www.census.gov/tribal/?st=49&aianihh=2430> (last visited Oct. 30, 2024). *But see* Kelsey Leonard et al., *Water back: A Review Centering Rematriation and Indigenous Water Research Sovereignty*, 16 ANN. WATER ALTS. REV., 374, 399 (2023) (“Although Water rights are reserved under the Winters Doctrine, quantity estimates during settlement negotiations are based on population growth and economic development. Some Tribal Nations (i.e., reservations) may see population declines because of inadequate infrastructure, development, and housing, and due to opportunities that attract citizens to move off-reservation, whether part- or full-time. Relying on Water quantity for settlements is also subject to poor US Census reporting and does not fully consider the future plans of Tribal Communities to establish permanent homelands.”).

¹¹⁵ Becenti, *supra* note 57.

¹¹⁶ *Gila River*, *supra* note 83, at 80.

the tribe's needs for water to continue agricultural practices and other uses.¹¹⁷ Further, water is significant to the Navajo people, like other indigenous people, who adhere to the idiom water is life:

Importantly, the Diné believe water must be discussed with caution, including avoiding arguments about it. . . . Arguing about water is disrespectful and not honorable and can cause negativity to come back to the Navajo Nation and hurt its people. . . . “No one can own it; No one can sell it; No one can buy it.” . . . “Our ancestors told us to be careful about how we use water—not to fight over it, use it equally and collaboratively, it is sacred and important.” . . . Specifically, fighting about water will tarnish traditional ceremonies. “For example, . . . if someone . . . doesn't have the water from [a] little spring due to the adverse [e]ffect of water rights issues, it could force him to change his ways (he wouldn't have pure water or the plants/medicine)” to perform the Waterway ceremony. Thus, the Navajo Nation, operating under these principles, asks the federal government to think critically and plan to meet its water needs.¹¹⁸

In any litigation in Arizona, the tribe should bring a strong case for its minimum needs based on present and future uses. Even though the Court would likely rule in favor of the Navajo Nation if the tribe were to intervene in *Arizona v. California*, the adjudication process is long and arduous, and it does not solve the problem of critical water infrastructure since it only offers a quantification.¹¹⁹ Therefore, the Navajo Nation must continue to seek other routes to secure funding to build and maintain water infrastructure, like collaborating with key states in the Colorado River Basin and lobbying in Washington, D.C.

B. *The Navajo Nation's Settlement Process in the Colorado River Basin*

Navajo Nation has completed water settlement negotiations with states to quantify its rights to the Colorado River Basin. The Navajo reservation is enormous and spread across three states, meaning the tribe negotiated settlements with three sovereigns: Utah, New Mexico, and Arizona.¹²⁰ However, even though settlement “provides certainty as to the rights of all water users who are parties to the disputes,” the process may take a long time for the Navajo Nation to

¹¹⁷ *Id.* at 80; Leonard, *supra* note 114, at 407. (“Several place names on the Navajo Nation refer to groundwater sources that have been the primary source of Water for Indigenous communities since time immemorial.”).

¹¹⁸ Gila River, *supra* note 83, at 79-80; Brief for Diné Hataalii Association, Inc. as Amicus Curiae Supporting Respondents, *Arizona v. Navajo Nation*, 599 U.S. 555 (2023) (No. 21-4184 & 22-51) (citing Miranda Warburton, *We Don't Own Nature, Nature Owns Us: The Ceremonial and Esoteric Nature of Water in the Little Colorado River Basin and Diné Bikeyah* 186-191 (July 1, 2020) (unpublished manuscript) (on file with author)).

¹¹⁹ ROBERT ANDERSON, ET AL., *AMERICAN INDIAN LAW CASES AND COMMENTARY* at 803-804 (West Academic Publ'g, 4th ed. 2020); *see also* Cordalis, *supra* note 89, at 352.

¹²⁰ *Arizona v. Navajo Nation*, 599 U.S. at 559.

experience any benefits.¹²¹ Further, in settling its claims, the Navajo Nation may receive “a reduced quantity of water.”¹²² Even with these drawbacks, the Navajo Nation pursued water settlements because courts have proven less friendly to tribal water claims.¹²³

For years, Arizona proved a formidable opponent to the Navajo Nation’s water rights claims and its plans to build water infrastructure across the reservation.¹²⁴ Indeed, the Navajo Nation had previously secured water rights settlements with New Mexico and Utah, while Arizona refused to cooperate, leaving much of Navajo Nation without a quantification of its water.¹²⁵ The Arizona Water Settlements Act required tribes to enter negotiated settlements with Arizona regarding their water rights to secure any delivery contract for water through the Central Arizona Project.¹²⁶ The Navajo Nation pursued a settlement with Arizona, stalling litigation on the tribe’s quantification of its water rights.¹²⁷ Initial negotiations failed, and the Navajo Nation renewed its claims in 2013.¹²⁸ But this year, the Navajo Nation and Arizona completed the largest water rights settlement in United States history, the Northeastern Arizona Indian Water Rights Settlement.¹²⁹ Congress has yet to approve this settlement.¹³⁰ The Navajo Nation can use the Court’s holding in *Arizona v. Navajo Nation* to spur Congress to approve the water settlement as it recognized the tribe’s reserved water rights, and such rights precede the priority systems of these states.¹³¹ Once approved, the

¹²¹ See *Id.*; See also U.S. Dep’t of Interior, *Bipartisan Infrastructure Law Supports \$580 Million Investment to Fulfill Indian Water Rights Settlements*, Press Release (Feb. 2, 2023), <https://www.doi.gov/pressreleases/bipartisan-infrastructure-law-supports-580-million-investment-fulfill-indian-water>.

¹²² See Leonard, *supra* note 114, at 399.

¹²³ See *Id.*; See also Navajo Nation Water Rights Commission, *Navajo Water Rights Overview* (2023), <https://nnwrc.navajo-nsn.gov/Public-Education/Navajo-Water-Rights-Overview> (“Litigation vs. Settlement: Despite the problems with settlement implementation, such as funding cuts and environmental conflicts, Tribes continue to be interested in negotiating because the courts are much less receptive to Tribal water claims than they were in the past. Today, it is very risky to take a reserved water rights claim to court, either at the state level or to the U.S. Supreme Court.”).

¹²⁴ Smith and Olalde, *supra* note 99.

¹²⁵ See Becenti, *supra* note 57 (“‘I think the people, the leaders of the Navajo Nation, envision water infrastructure across the Navajo Nation through these settlements,’ Bitsoi said. ‘Whether it’s the one in New Mexico or the Utah Navajo Water Rights Settlement, those would build infrastructure in those regions, but because of the court case today from the high court, it’s improbable that my Diné relatives in Arizona may not even have the opportunity for water.’”).

¹²⁶ Hoover, *supra* note 29, at 26.

¹²⁷ *Id.*

¹²⁸ *Id.*

¹²⁹ Arlyssa Becenti, *Hobbs Signs Historic Navajo-Hopi-Paiute Water Settlement, Sending Measure to Congress*, ARIZONA REPUBLIC (Nov. 21, 2024), <https://www.azcentral.com/story/news/local/arizona-water/2024/11/21/hobbs-signs-navajo-hopi-paiute-water-settlement/76427961007/>.

¹³⁰ See U.S. Dep’t of Interior, *Enacted Indian Water Rights Settlements* (Jun. 2024), <https://www.doi.gov/siwro/enacted-indian-water-rights-settlements>.

¹³¹ See generally, *Arizona v. Navajo Nation*, 599 U.S. at 569-70; Brief of Tribal Nations, *supra* note 54, at 27 (citing *Indian Water Settlements: Hearing Before the H. Comm. on Nat. Res.*, 110th

settlement allocates \$1.715 billion to the Iná bá – paa tuwaqat'si Pipeline Implementation Fund and \$2.7467 billion to Navajo Nation Water Settlement Trust Fund.¹³² These funds provide the Navajo Nation with resources to build critical water infrastructure, and agricultural conservation and renewable energy projects.¹³³

Collaborating to ensure all water rights holders earn their fair share, the federal government, New Mexico, Utah, and the Navajo Nation have entered several compacts. The most recent water settlement between Utah and the Navajo Nation provides the tribe the “right to use 81,500 acre-feet of water per year from the San Juan River” and “\$200 million in federal funding... and \$8 million in state funding for water infrastructure development on the reservation.”¹³⁴ This settlement ensures the 5,000 tribal citizens living in the Utah portion of the Navajo reservation access to potential water infrastructure.¹³⁵ Another settlement, the Navajo-Gallup Water Supply Project, constructs pipelines and other water apparatus “to provide a long-term sustainable water supply to meet the future (40-year) population needs of approximately 250,000 people in these communities through the annual delivery of 37,764 acre-feet of water from the San Juan Basin.”¹³⁶ However, both of these settlements deal with quantification of Navajo Nation's rights in the San Juan River Basin and not the Colorado River Basin.

The water settlement process may not solve the problems for critical water infrastructure on Navajo Nation land. States are likely reluctant to invest in water infrastructure on reservations, especially since the federal government has long played the role of guardian over tribal interests.¹³⁷ Water infrastructure can be costly, and states may invest and build water infrastructure in large metropolitan areas before the more rural Navajo Reservation.¹³⁸ Unlike states with large tax

Cong. 7 (Apr. 16, 2008) (statement of Michael Bogert, Chairman, Working Group on Indian Water Settlements)) (“Those rights often predate the priority systems adopted by non Indian communities throughout the American West, and therefore can ‘serve as a needed spur towards cooperation. Indian water rights negotiations have the potential to resolve long-simmering tensions and bring neighboring communities together to face a common future.’”).

¹³² *Summary of the Proposed Northeastern Arizona Indian Water Rights Settlement Agreement for Public Discussion Purposes*, NAVAJO NATION 6-7 (May 2024), <https://nnwrc.navajonnsn.gov/Portals/0/Files/Arizona%20Settlement/2024-02-28%20-%20SUMMARY%20of%20the%20NE%20AZ%20Indian%20Water%20Settlement%20Agreement%20-%20FINAL.pdf>.

¹³³ *Id.*; See also Northeastern Arizona Indian Water Rights Settlement Act of 2024, S.4633, 118th Cong. §§ 8-10 (2023-2024), <https://www.congress.gov/bill/118th-congress/senate-bill/4633/text>.

¹³⁴ U.S. Dep't of Interior, *Press Release: President Biden's Bipartisan Infrastructure Law Funds Newly Executed Navajo-Utah Water Rights Settlement* (May 27, 2022), <https://www.doi.gov/pressreleases/president-bidens-bipartisan-infrastructure-law-funds-newly-executed-navajo-utah-water>.

¹³⁵ *Id.*

¹³⁶ *Navajo Gallup Water Supply Project*, U.S. Bureau of Reclamation, <https://www.usbr.gov/uc/progact/navajo-gallup/index.html> (last updated Sept. 5, 2024).

¹³⁷ Smith & Olalde, *supra* note 99.

¹³⁸ See generally Leonard, *supra* note 114, at 393 (“Water colonialism is interwoven with advancements and development of infrastructure. Diné geographer Andrew Curley argues that

bases, the Navajo Nation needs more monetary resources to build and maintain critical water infrastructure.¹³⁹ For example, Utah is building a two-billion-dollar pipeline to divert water from the Colorado River Basin.¹⁴⁰ The Navajo Nation recently allocated fifty million dollars from its budget towards building water infrastructure a part of Phase I of the Iná bá – Paa tuwaqat’si Pipeline, formerly known as the Western Navajo Pipeline.¹⁴¹ But even with this allocation, the Navajo Nation likely cannot sustain the required maintenance of the water systems on its own.¹⁴² The Navajo Nation has negotiated in its settlements for some funding to build critical water infrastructure on the reservation by allowing for leasing of tribal water rights.¹⁴³ However, the Navajo Nation must continue advocating to Congress and the Executive branch for funds to fully meet the tribe’s needs.

C. *The Navajo Nation’s Advocacy in Washington, D.C.*

Lobbying the federal government for congressional support to build water infrastructure directly solves the Navajo Nation’s problem of access to running

infrastructure development in the arid southwest of the US cannot be disentangled from Indigenous Peoples’ loss of Water. In fact, the colonial design to civili[z]e the southwest required the manipulation of Water away from Indigenous Peoples into the cosmopolitan capitalist schemes that created sprawling desert cities such as Phoenix, Arizona and Las Vegas, Nevada.”) (citing Andrew Curley, *Infrastructure As Colonial Beachheads: The Central Arizona Project and the Taking of Navajo Resources*, 39(3) ENV’T & PLAN. D: SOC’Y & SPACE 387 (2021), <https://doi.org/10.1177/0263775821991537>).

¹³⁹ Tanana, *supra* note 5, at 9.

¹⁴⁰ Bill Weir, *The Fastest Growing Metro in the US is Looking to a Shrinking Reservoir to Keep the Boom Going*, CNN NEWS (Feb. 28, 2023), <https://www.cnn.com/2023/02/28/us/st-george-utah-water-lake-powell-pipeline-climate/index.html>; *see also* Utah Rivers Council, *Lake Powell Pipeline*, <https://utahrivers.org/lake-powell-pipeline> (last visited Nov. 6, 2024) (“This \$2.4 billion project would pump 28 billion gallons of water 2,000 feet uphill across 140 miles of desert to provide just 160,000 residents in Southwest Utah with more water—primarily for watering their lawns... This huge project would divert Colorado River water immediately upstream of the Grand Canyon, further diminishing flows for a river that no longer reaches the ocean.”).

¹⁴¹ Becenti, *supra* note 57 (“‘We showed the state of Arizona we are able to use our own money to bring water into communities,’ said former Navajo Nation President Jonathan Nez, who signed the resolution. ‘The Western Navajo Pipeline, without a settlement we put in our own money into a water line project to show everyone we are not going to wait for a settlement. We are going to build the infrastructure if need be with our own resources.’”).

¹⁴² Tanana, *supra* note 5, at 9 (“While certain Tribes have been able to initially construct suitable water infrastructure, O&M of the systems has proven to be difficult... Like other Tribes, the Jicarilla Apache Nation is unable to utilize traditional means of collecting revenue to support O&M— e.g., taxing Tribal lands. Infrastructure O&M, therefore, must be separately budgeted for year after year. When budgets are tight, allocations for O&M often suffer, repairs are delayed, and established infrastructure starts to degrade.”).

¹⁴³ Navajo Nation Water Rights Commission, *Navajo Water Rights Overview* (2023), <https://nnwrc.navajo-nsn.gov/Public-Education/Navajo-Water-Rights-Overview> (“Water Leasing: Navajo’s water rights claims include future needs. If the Nation currently has no use for the water, they may lease this water to non-Tribal users to create income”).

water.¹⁴⁴ Lobbying comes with potential issues that the Navajo Nation will need to navigate: the federal government's historic unwillingness to spend money in Indian Country, the lost threat of litigation since the federal government is now on notice that it likely will not be held liable under a general trust duty due to the *Arizona v. Navajo Nation* ruling, and a potential trade-off of other services.¹⁴⁵ For Congress to take notice, the Navajo Nation must effectively tell its story to the world. Like other tribes, the Navajo Nation's story has largely been ignored by mass media "undermin[ing] public and government interest."¹⁴⁶ Media can be a persuasive tool to tell the environmental injustice Navajo Nation faces, especially when the story is told by Navajo Nation journalists who experienced these harms firsthand.¹⁴⁷ Outside lobbying in Washington, D.C., Navajo Nation tribal citizens may run for Congress and other state races to represent the direct interests of their people.¹⁴⁸

Many tribes like the Navajo Nation live in areas with unsafe drinking water conditions because of extractive resource mining.¹⁴⁹ The federal government mined the Navajo reservation for years leaving large "mine pits with radioactive tailings and debris" infiltrating the tribe's water apparatus.¹⁵⁰ A Navajo Nation elder, named Percy Deal, recalled his early years and the Navajo Nation's prosperity before Peabody Coal contaminated the ground water around Black Mesa:

My family and neighbors raised sheep and other animals for food and other economic purposes, and we still do. As a boy in my early years, I tended to herd sheep. I remember many different native plants for our animals for the wildlife, herbs for medicine, food for ourselves, and for ceremonies. We planted crops in our field, and it brought many vegetables. There were no windmills anywhere, however there were several places in the washes, at the

¹⁴⁴ See generally, Maggie Blackhawk, *Legislative Constitutionalism and Federal Indian Law*, 132 *YALE L.J.* 2205, 2247-48 (2023).

¹⁴⁵ For a look into historic issues with federal budget spending in Indian Country, see generally, U.S. Comm'n on Civil Rights, *Broken Promises: Continuing Federal Funding Shortfall For Native Americans* 169 (2018), <https://www.usccr.gov/files/pubs/2018/12-20-Broken-Promises.pdf>.

¹⁴⁶ Leonard, *supra* note 114, at 403.

¹⁴⁷ For an in-depth story of the Navajo Nation's fight for water told by a Navajo Nation tribal citizen, see Charly Etsitty, *Reclaimed: The Lifeblood of the Navajo Nation*, ABC AUDIO (2023) <https://open.spotify.com/episode/2cT6qmpgRvMmxVGgsw4ERl>.

¹⁴⁸ See generally, Chrissie Castro, et al., *Address the Strengths, Structural Barriers and Opportunities to Getting Native Americans into Elected Leadership*, ADVANCE NATIVE POLITICAL LEADERSHIP, 8-9 (Oct. 2016), <https://advancenativepl.org/wp-content/uploads/2021/03/ANPL-Political-Power-09-22-16.pdf>.

¹⁴⁹ See Tanana, *supra* note 5, at 7; see also Leonard, *supra* note 114, at 404. ("Unfortunately, this pattern of Water harm also emerged in the 2015 Gold King Mine Spill, which resulted in the release of three million gallons of acid mine drainage into the Animas and San Juan Rivers within the Colorado River Basin, harming Water critical for the livelihoods of citizens of the Southern Ute, Indian Tribe, the Navajo Nation, the Ute Mountain Ute Indian Tribe, and the Jicarilla Apache Tribe among other Tribes in the basin.")

¹⁵⁰ Leonard, *supra* note 114, at 404.

base of the mountains and elsewhere, where there was water available year-round. The air was clean, and we were blessed with plenty of moisture year-round. Life was wonderful.

...

Today, the natural springs are still dry, many native plants are gone together with the wildlife. Cornfields do not produce crops, corn used to grow six to seven feet tall, today it either does not grow or it will only get a foot high and not produce any crop. The ground is very dry, obnoxious weeds took over. The weather has drastically changed; they call it climate change. It's caused by the extractive and power plant industries. The coal mines and power plant are closed, their lease term has expired; they are in the process of moving out. It's now time for reclamation of areas disturbed and recharging and replacing water used.¹⁵¹

Reading Percy's account of his childhood and the current state of his homelands would leave any person to think critically about the Navajo Nation's problems and hopefully galvanize public action.

The Navajo Nation must advocate for funds, not only to build critical water infrastructure, but for the necessary costs of maintenance. Such allocations should include funds for technical assistance training to develop tribal capacity in supporting maintenance, including projects to assist tribes with grant applications.¹⁵² The Biden administration's recent Access to Capital Initiative will provide tribes with the necessary leeway to use funds based on their needs by creating a central database for tribes "to easily navigate and access the financial opportunities provide[d] across the federal government" and assessment of tribal funding needs.¹⁵³

V. CONCLUSION

Climate change and environmental injustices place immense pressure on the Navajo Nation to secure clean drinking water for its people. Water in the Southwest, specifically in the Colorado River Basin, is depleting quickly because of "chronic overuse of water resources and a historic drought."¹⁵⁴ Scientists predict that more pandemics will materialize as another unfortunate consequence

¹⁵¹ Letter from Percy Deal, Navajo Nation Elder, to Amy Ryser, U.S. Dept of Interior, Office of Surface Mining and Reclamation Enforcement (Sept. 25, 2023), <https://www.indian.senate.gov/wp-content/uploads/2023-09-27-HRG-Testimony-Tanana.pdf>.

¹⁵² Tanana, *supra* note 5, at 11.

¹⁵³ U.S. Dep't of Interior, *Press Release: White House Council on Native American Affairs Takes Steps to Increase Access to Capital Across Indian Country* (Dec. 6, 2023), <https://www.doi.gov/pressreleases/white-house-council-native-american-affairs-takes-steps-increase-access->.

¹⁵⁴ Joshua Partlow, *The Colorado River Drought Crisis: How Did This Happen? Can it be Fixed?*, WASHINGTON POST (Feb. 5, 2023), <https://www.washingtonpost.com/climate-environment/2023/02/05/colorado-river-drought-explained/>.

of climate change.¹⁵⁵ More pandemics mean more pressure for the Navajo Nation to secure clean, running water to ensure healthy conditions so the tribe can protect lives.¹⁵⁶ For the Navajo Nation to alleviate these water concerns, it must continue to fight for water and follow the encouraging message offered by current Navajo Nation President Nygren, “we are going to move forward. We didn’t lose anything as the Navajo people. The way I see it is, it actually re-energizes us as a nation to regroup and re-strategize, and come back together to actually strengthen us as a Navajo Nation.”¹⁵⁷ The Navajo Nation can employ a three-prong strategy to ensure its people gain access to critical water and sanitation infrastructure: adjudicate its rights to the Colorado River Basin, work with states to build critical water infrastructure, and lobby for approval of its water rights settlements on the Colorado River Basin and for increased funding at the federal level, while sharing its story with the country. Fighting for the tribe’s water rights also begins the movement of water back, “restor[ing] [] humanity’s responsibility to care for Water and the recognition of Indigenous Peoples’ inherent relationships, connections, rights and responsibilities to Water.”¹⁵⁸

¹⁵⁵ Tulio De Oliveira & Houriiyah Tegally, *Will Climate Change Amplify Epidemics and Give Rise to Pandemics?*, 381 SCIENCE No. 6660 (Aug. 25, 2023), <https://doi.org/10.1126/science.adk4500> (“However, there is overwhelming evidence that climate change is fueling disease outbreaks and epidemics and that it is not a matter of if, but when, such events will precipitate another pandemic.”).

¹⁵⁶ See generally Smith, *supra* note 90, at 4 (“Research supported by the Centers for Disease Control and Prevention states populations in regions with a lower proportion of homes with water service, reflect significantly higher hospitalization rates for pneumonia, influenza, and respiratory syncytial virus. Researchers associated the increasing illnesses with the restricted access to clean water for hand washing and hygiene. The IJA supports the construction of water, wastewater, and solid waste facilities in American Indian and Alaska Native tribes and communities. The IHS support for these facilities is an integral component of IHS disease prevention activities.”).

¹⁵⁷ Becenti, *supra* note 57.

¹⁵⁸ Leonard, *supra* note 114, at 379.