"Tó éí iiná"—Water is Life: Repairing the Indian Trust Doctrine With an "Environmental Justice-Plus" Agency Approach

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The federal Indian trust responsibility is a legal obligation stemming from the unique government-to-government relationship between the federal government and pre-constitutional, sovereign Native Nations.[1] *This moral and fiduciary duty requires the United States to support Tribal self-determination in a way that protects Tribal treaty rights, assets, lands, natural resources, and more. But the Supreme Court's decision in Arizona v. Navajo Nation casts doubt on the federal judiciary's willingness to uphold the trust doctrine and provide duly needed recourse to Native Nations, absent specific circumstances.*[2] *Amidst a serious public health crisis and increasingly dry conditions due to climate change, the Navajo Nation sought quantification of its water rights to the Colorado River. The Nation argued that the trust doctrine obligates the federal government to quantify those water rights. But the Bureau of Reclamation has historically excluded Natives from discussions regarding the Colorado River Compact. In June 2023, the highest court failed to provide the Navajo people with redress. Does this decision mean that the trust doctrine is broken beyond repair? I argue no. The case did not eviscerate the Navajo Nation's right to water quantification. The courts are failing to uphold the responsibility as intended. This Note calls on federal administrative agencies to view the Indian*

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1. In this Note, the term "pre-constitutional" describes the deep history of Native Nations in the present-day United States, which dates back prior to the founding of the country. The Supreme Court has made clear that because Tribal powers of self-government and self-determination "existed prior to the Constitution," Tribes "were not bound by the Constitution." Elizabeth A. Reese, *The Other American Law*, 73 STAN. L. REV. 555, 566-67 (2021) (citing Talton v. Mayes, 163 U.S. 376, 384 (1896)). Moreover, pre-constitutional sovereignty gives effect to the political inherent right to self-government, which is another core principle of federal Indian law.

2. *See generally* Arizona v. Navajo Nation [hereafter *Arizona III*], 599 U.S. 555 (2023).

trust responsibility under an "environmental justice plus" lens to legally enforce the trust doctrine with solutions for the Navajo.

INTRODUCTION

While falling almost entirely within the Colorado River ("the River") Basin, nearly a third of Navajo Nation ("Navajo" or "the Nation") residents live without access to clean, reliable drinking water in the arid Southwestern United States. Water insecurity severely impacts the Navajo reservation residents, causing

negative public health and economic effects.[3] Indians[4] living on the reservation drive for miles a day to haul pumped groundwater in jugs, barrels, or other containers for cooking, cleaning, and washing.[5] As anthropogenic climate change exacerbates desertification, securing the right to divert water from the Colorado River is imperative to the Tribe's and its members' continued well-being.[6]

The Navajo's claims derive from the trust doctrine (hereafter also referred to as the "trust relationship" or "trust responsibility"), a federal common law doctrine expressed in numerous treaties and statutes. It establishes a moral and fiduciary obligation on the part of the federal government to support the well-being of Native Nations.[7] The Treaty of 1868 ("1868 Treaty") between the Navajo and the U.S. both created the Navajo reservation and established the trust relationship between the federal government and the Nation. In doing so, the federal government appointed itself as trustee, and the Nation as beneficiary.

Federal common law is clear that breach of trust claims against the federal government raise federal questions.[8] The trust responsibility relationship is akin to a private fiduciary relationship in contract law.[9] Although one of the most significant "bedrock" principles in federal Indian law, it is a paternal premise for the relationship between the U.S. and sovereign Native Nations.[10]

For decades, the Navajo have fought for access to surface water to pipe to more remote locations across the approximately "27,000 square-mile reservation" spanning three states.[11] The reservation lies "almost entirely within

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3. Detailed *infra*, Section I.

4. The term "Indian" is a legal term of art employed in the field of federal Indian law. FELIX S. COHEN, ET AL., 1 COHEN'S HANDBOOK OF FEDERAL INDIAN LAW § 3.01 (2023). Many Indigenous peoples identify themselves using different terminology and primarily identify themselves as constituents of bands or other familial or cultural groups, but the term "Indian" is most commonly used in federal law. *Id.* at n.1. In this Note, I use "Indian(s)," "Nation(s)," and "Tribe(s)" to refer to "group[s] of native people with whom the federal government has established some kind of political relationship." *Id.* § 3.02(2). I also capitalize "Navajo," "Nation(s)," "Tribe," "Tribal," and "Indian(s)" to pay respect for the pre-constitutional sovereignty and inherent right to self-government of Indigenous peoples.

5. Michael Phillis, *Navajo Nation Wants US Government to Account for Tribe's Water Needs*, AZCENTRAL (Mar. 17, 2023, 2:28 PM), https://perma.cc/G28J-G6WP.

6. *See, e.g.*, *The Drying U.S. West*, NASA EARTH OBSERVATORY, https://perma.cc/ENE5-APLJ (last visited Mar. 26, 2024).

7. COHEN, *supra* note 4, § 5.04(3)(a).

8. COHEN, *supra* note 4, § 5.05(1)(a)); *See, e.g.*, Cobell v. Babbitt, 30 F. Supp. 2d 24, 31, 39 n.14 (D.D.C. 1998) (stating that federal question jurisdiction can be based on "the federal common law of Indian trust management"); Vizenor v. Babbitt, 927 F. Supp. 1193, 1198-99 (D. Minn. 1996) (holding that the question of whether a trust relationship between a Tribe and the U.S. obligates the U.S. to appoint independent trustee to oversee and prevent alleged mismanagement of Tribal funds of Tribal business committees is a federal question); White v. Matthews, 420 F. Supp. 882, 887-88 (D.S.D. 1976) (holding that a federal question was raised when the guardian of a mentally ill ward claimed the federal government had a trust obligation to provide her with medical care).

9. *See generally* United States v. Mitchell, [hereafter *Mitchell II*], 463 U.S. 206 (1983).

10. *See* Daniel I. Rey-Bear & Matthew L. Fletcher, *We Need Protection from Our Protectors: The Nature, Issues, and Future of the Federal Trust Responsibility to Indians*, 6 MICH. J. ENV'T & ADMIN. L. 397 (2017).

11. Phillis, *supra* note 5.

the Colorado River Basin, and three . . . rivers—the Colorado, the Little Colorado, and the San Juan—border the reservation."[12] The Nation successfully negotiated water settlements from the San Juan River in New Mexico and Utah, both of which draw from the Colorado River's Upper Basin.[13] But the Nation is yet to reach an agreement with either Arizona or the federal government for water rights from the Colorado River's Lower Basin.[14]

To date, the Nation's protracted efforts to secure decreed water rights to the Colorado River have failed in the courts. In 2014, the Nation brought a suit against the Department of the Interior ("Interior"), the Interior Secretary, the Bureau of Reclamation ("Reclamation"), the Bureau of Indian Affairs (BIA), and various water districts. The Nation alleged that the federal government "failed in its trust obligation to assert and protect" the Navajo's water rights and "violated the National Environmental Policy Act (NEPA) and the Administrative Procedure Act (APA) by undertaking actions to manage . . . [the] Colorado River's Lower Basin" flow.[15] The 1868 Treaty establishing the Navajo reservation promised that the land would serve as a "permanent home" for the Tribe and its people.[16] But the Navajo argued that its designated reservation cannot be a permanent home without sufficient access to water.[17] The Nation therefore asked the court for injunctive and declaratory relief compelling the federal defendants to determine the water required, and devise a plan to meet the Nation's needs.[18]

The Ninth Circuit agreed in 2017, holding that the federal government has an affirmative duty under the trust doctrine to quantify the Nation's water rights.[19] But in June 2023, the Supreme Court reversed.[20] Writing for the majority, Justice Kavanaugh rejected the Ninth Circuit's understanding of what the trust doctrine requires of the federal government.[21] Because the 1868 Treaty does not contain specific language regarding an affirmative obligation on the U.S. government to supply water, he found no affirmative duty to quantify the Nation's water rights.[22] The judicial system failed the Navajo.

Considering the Supreme Court's determination, what federal institution can best provide the Nation with an appropriate remedy? While the federal government could address the situation through executive or congressional

12. *Arizona III*, 599 U.S. at 561.

13. *See id.* at 562.

14. *See id.* at 581-84 (Gorsuch, J., dissenting).

15. Navajo Nation v. U.S. Dep't of the Interior, 43 F. Supp. 3d 1019 (D. Ariz. 2014) (Westlaw synopsis), *aff'd in part, rev'd in part*, 876 F.3d 1144 (9th Cir. 2017).

16. Treaty Between the United States of America and the Navajo Tribe of Indians, art. XIII, June 1, 1868, 15 Stat. 668, https://perma.cc/7JHJ-9Q9M.

17. *Arizona III*, 599 U.S. at 558-59.

18. *Id.* at 584 (Gorsuch, J., dissenting).

19. *See generally* Navajo Nation v. Dep't of the Interior, 876 F.3d 1144 (9th Cir. 2017).

20. *Arizona III*, 599 U.S. at 569-70, *rev'g* 26 F.4th 794 (9th Cir. 2022) (specifically, the Supreme Court reversed the Ninth Circuit's subsequent instruction to allow the Nation to amend its complaint).

21. *Id.*

22. *Id.* at 563-65.

action, this Note asserts that administrative agencies are the most properly equipped institutions to do so. As argued in this Note, agencies have a moral obligation to do so under the principles of environmental justice (EJ) and a legal obligation to do so under the trust doctrine. Reclamation and the BIA are the most aptly suited institutions to quantify Navajo water rights. Reclamation is responsible for general water appropriation across the Colorado Basin, and the BIA is responsible for various Indian affairs, including water rights disputes. Together, these federal agencies carry vast institutional knowledge. Further, the Secretary of the Interior retains power as the Lower Basin "Water Master," but has historically excluded Indians from Colorado River Compact negotiations.[23] The Interior should therefore mend a doctrine that it has played a role in breaking.

The Navajo Nation is just one of thirty federally recognized Tribes in the Colorado River Basin.[24] Each Tribe's culture, organization, legal status, and resources are complex and different, with unique histories and present-day challenges. But Indians are relevant stakeholders in ongoing Colorado River management. And both current and future Tribal public health and economic prosperity depends on reserved and quantified water rights.[25] With their established expertise and federally-mandated duties, Reclamation and the BIA are both best equipped and required to take the differing needs of Tribes into account.

Moreover, the time is ripe to act. President Biden and Vice President Harris campaigned on confronting longstanding environmental injustices and inequities, and EJ remains a top priority for the White House.[26] During his first week in office, President Biden signed Executive Order 14008, *Tackling the Climate Crisis at Home and Abroad*.[27] Given the history of pervasive environmental injustice against Indians, their injustices should be some of the first to be rectified. Many federal agencies issue non-binding EJ guidance, but there is currently no statutory mandate for including EJ in executive branch processes or legislation.[28] Moreover, they must make several important water management decisions for governing and operating Colorado River facilities and

23. *See Hoover Dam: Frequently Asked Questions and Answers*, BUREAU OF RECLAMATION, https://perma.cc/PSN4-J8T5 (last updated Mar. 12, 2015).

24. *Tribes*, COLO. RIVER BASIN WATER & TRIBES INITIATIVE, https://perma.cc/LLH2-QC7T (last visited Dec. 16, 2023).

25. The circumstances and issues described in this Note are factually and legally situational to the Navajo Nation. But importantly, water insecurity is just one problem that the Nation encounters. This Note does not speak for all Indians living in the Colorado River Basin, nor may it necessarily speak broadly for all Navajo people. Instead, this Note argues for a way to hold the United States accountable for its failure to ensure that the Navajo reservation is a sustainable, prosperous, and livable homeland for Navajo Indians, to uphold the trust doctrine, and respect Native sovereignty.

26. *Environmental Justice*, THE WHITE HOUSE, https://perma.cc/69YL-KH6V (last visited Dec. 16, 2023).

27. *Id.* (noting that through this Executive Order, President Biden launched "the most ambitious environmental justice agenda ever undertaken by the Federal Government.").

28. *See, e.g.*, *Technical Guidance for Assessing Environmental Justice in Regulatory Analysis*, EPA, https://perma.cc/9H7S-TS7K (last updated Mar. 13, 2023).

management of the Colorado River and its facilities before the end of 2026.[29] The time to act is now: agencies should capitalize on the current administration's interest in EJ and address environmental injustice on the Navajo reservation by quantifying the Nation's water rights and articulating a plan to provide water to Tribal residents.

Using the Navajo water crisis as a case study in the failure of the courts to provide judicial recourse, this Note argues for the adoption of an EJ-plus framework to supplement the Indian trust doctrine. Within such a framework, an EJ-informed policy approach would be a floor from which Tribal-specific needs, characterized as 'plus factors,' would entitle greater federal action under the trust responsibility. Section I compares the traditional Navajo creation story and the dismal state of water on the reservation today. Section II describes the Nation's historical interaction with the federal government. Section III describes the trust doctrine, the Nation's *Winters* rights, and a contentious method of water quantification. Section IV chronicles the Nation's legal challenge at the Supreme Court in *Arizona v. Navajo Nation* (*Arizona III*). Section V provides an overview of the Colorado River Compact and the historic exclusion of Indians in the River's management. It also details the Interior's post-2026 scoping process to manage the river. Section VI discusses potential ways the federal government might solve the Navajo Nation's water crisis—including presidential, congressional, and administrative actions—and explains why administrative agencies are best suited to provide solutions. Section VI addresses the potential risks of moving away from judicial solutions. Section VII argues for the adoption of a modern EJ-plus lens to better inform the content of the trust doctrine. This Note concludes with final thoughts regarding the scope of this inquiry and shares preliminary considerations for future research.

I. WATER & CULTURE IN NAVAJO HISTORY

Water is sacred to the Navajo people. Their creation story exemplifies how they are spiritually connected to the land and its waters. Understanding this innate and religious bond to nature is necessary to fully appreciate the current water crisis and the Navajo perspective in the 1868 Treaty negotiations, explained *infra*, Section II.

A. The Role of Water in Navajo Culture and Oral Tradition

The role of land and water in Navajo religion and oral tradition contrasts starkly with the water insecurity Tribal members face on the reservation today. The Navajo creation story Diné Bahane' describes the journey of the Diné, or Holy People, through four worlds.[30] The first world, where the spirit people and

29. *Scoping – Colorado River Post 2026 Operations*, BUREAU OF RECLAMATION, https://perma.cc/H6LF-T9XX (last updated Dec. 7, 2023).

30. Aaron Mike, *Navajo Rising: An Indigenous Emergence Story*, AM. ALPINE CLUB (Oct. 3, 2023), https://americanalpineclub.org/news/2023/10/3/navajo-rising.

Holy People lived, was black and full of chaotic darkness.[31] It was there that both male and female Holy People were formed and started their journey. They then moved through the blue second world, "precipitated by their own transgressions," and emerged into the yellow third world, which contained great rivers.[32] There, "Female River …. crossed the land from north to south" and "Male River flowed east to west." The location where the rivers crossed is known as "Tó Almáozlí (Crossing of the Waters)."[33] Arriving in the fourth white world, the Diné assumed human form.[34] This is where Navajo live today.[35] Explicitly including water in the creation story situates its importance to the Navajo people.

Through their walk through the worlds, the Diné brought with them "deities, vegetation, and animals."[36] According to Navajo belief, the "First Man gathered soil from the mountains in the third world and used it to form the four main sacred mountains."[37] He placed the Four Sacred Mountains at the four cardinal directions.[38] He positioned four stones at their bases and blew on the stones (black, white, blue, and yellow) to create the first "hogan,"[39] or dwelling. Mount Blanca (White Shell Mountain) in southern Colorado represents the East.[40] Mount Taylor (Blue Bead Mountain), Northeast of Grants, New Mexico represents the South.[41] The San Francisco Peaks (Yellow Abalone Shell Mountain) near Flagstaff, Arizona represent the West.[42] Mount Hesperus (Obsidian Mountain) near Durango, Colorado represents the North.[43] These four mountains and their associated colors not only represent the boundaries of the Navajo's ancestral homelands, but also watch over the people.[44] Many Navajo consider them "nature's highest council."[45] Navajo Indians are spiritually connected to the land and the waters within their four mountains. This worldview is paramount to understanding the Navajo Nation's perspective in the 1868 Treaty negotiations.[46]

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31. JENNIFER NEZ DENETDALE, RECLAIMING DINÉ HISTORY, U. OF ARIZ. PRESS 135 (June 2007).
32. *Id*. at 135; *see also* Mike, *supra* note 30.
33. Mike, *supra* note 30.
34. *Id.*
35. *Id.*
36. *See id.* (explaining the Navajo and English names for the four sacred mountains: "Sis Naajini (Blanca Peak), Tsoozil (Mount Taylor), Dook'o'ooslid (the San Francisco peaks), and Diné Nitsaa (Mount Hesperus)").
37. DENETDALE, *supra* note 31, at 135.
38. Mike, *supra* note 30.
39. Harold Carey Jr., *The Navajo Four Sacred Colors*, NAVAJO PEOPLE (Jan. 7, 2015), https://perma.cc/55GB-WE78.
40. *Four Sacred Mountains*, NAT. HIST. MUSEUM OF UTAH, https://perma.cc/RMD5-8M5Z (last visited Dec. 16, 2023).
41. *Id.*
42. *Id.*
43. *Id.*
44. *See The importance of NAU's land acknowledgment*, N. ARIZ. UNIV. (Jan. 4, 2023), https://nau.edu/stories/land-acknowledgement/ (last visited Sept. 28, 2024).
45. *Id.*
46. *Infra*, Section III.

More detailed stories of the Fourth World refer to Male Rain as a black cloud who brings thunder and lightning.[47] Female Rain, or blue, yellow, and white clouds, is the gentle rain that waters the planet and sustains life.[48] Tonenili (Tó Neinilii), also called the Water Sprinkler, is the Navajo god of water who is responsible for rain. In oral tradition and the sand painting ceremony, the Water Sprinkler carries a jar of collected water by his side.[49] By sprinkling collected water from his jar in the direction of the Four Sacred Mountains, he creates rain. Additionally, in the traditional Navajo wedding ceremony, the bride and groom pour water on each other's hands to symbolize their new marriage.[50]

These stories show how essential water is to Navajo religious belief, oral tradition, culture, and custom. Rooting the forthcoming public health crisis and legal analysis in traditional narratives is vital. Navajo author Jennifer Nez Denetdale describes how during the traumatic colonization period, ancestors "relied on the traditional narratives for spiritual and physical renewal."[51] The stories are still told today and are a "vehicle for reaffirming community."[52] But today, the water described in those narratives is scarce.

B. Current Navajo Reservation Water Conditions and Impacts

The disparity in water access between white and Southwestern Indian communities is astounding. The Navajo reservation spans roughly seventeen million acres, or 27,413 square miles, in Arizona, Utah, and New Mexico.[53] It is the largest Indian reservation in the United States.[54] The Supreme Court has described the Navajo's ancestral homelands as "arid," reasoning that "[i]f the water necessary to sustain life is to be had, it must come from the Colorado River or its tributaries."[55] While three out of every one thousand white households lack plumbing, fifty-eight out of every one thousand Indian households lack plumbing.[56] Those residents must drive for miles to draw groundwater in jugs

47. Sandoval, Hastin Tlo'tsi hee (Old Man Buffalo Grass), *The Creation or Age of Beginning*, *in* NAVAHO INDIAN MYTHS 1, 10 (Aileen O'Bryan ed., Sam Akeah trans., Dover Books 1993) (originally published as SMITHSONIAN INST., BUREAU OF AM. ETHNOLOGY, THE DÎNÉ: ORIGIN MYTHS OF THE NAVAHO INDIANS (1956)).

48. *Id.*

49. Glenna Nielsen-Grimm, *Largest Navajo Pitch Basket*, NAT. HIST. MUSEUM OF UTAH (Dec. 21, 2016), https://perma.cc/T737-3CZJ.

50. Mika, *The Navajo Wedding Ceremony: A Beautiful and Sacred Event*, INDIAN COUNTRY EXTENSIONS (Sept. 30, 2022), https://perma.cc/68YD-JJQW.

51. DENETDALE, *supra* note 31, at 134.

52. *Id*.

53. *Administrative Boundaries*, INDIAN COUNTRY GRASSROOTS SUPPORT, https://perma.cc/RP4D-GEF9, (last visited Dec. 16, 2023).

54. *Id.*

55. *See* Arizona v. California, 373 U.S. 546, 598 (1963).

56. DIGDEEP & US WATER ALLIANCE, CLOSING THE WATER ACCESS GAP IN THE UNITED STATES: A NATIONAL ACTION PLAN 23 (2019), https://perma.cc/MBN8-ZXRT; *see also* Brief for DigDeep Right to Water Project and Utah Tribal Relief Foundation as Amici Curiae in Support of Respondents at 7, *Arizona III*, 599 U.S. 555 (2023), https://perma.cc/UVM8-96V9 [hereinafter DigDeep and UTRF Amici Brief].

and barrels, relying on hauled water for drinking, cooking, bathing, cleaning, and any other household needs.[57] Some people rely on unregulated wells and run the risk of consuming water contaminated by the 521 abandoned uranium mines located on the Nation.[58] The Environmental Protection Agency (EPA) considers unregulated drinking water sources as the greatest public health risk on the Nation.[59]

Water insecurity exacerbates existing public health disparities between the Navajo Nation and surrounding white communities.[60] The connection between water and public health is so vital that "the United Nations, several countries, and some U.S. states have recognized the human right to water."[61] For decades, public health experts have documented how water insecurity and lack of clean water and sanitation in Indian country give rise to high morbidity and mortality rates.[62] "Poor water quality has been associated with lower mental and social development in children,"[63] and "families in the water access gap are thirty times more likely to contract [waterborne] illnesses than those living with basic services."[64] Water insecurity contributes to other chronic health issues, including diabetes and obesity.[65]

This forces many reservation residents to prioritize water conservation over healthy food consumption, such as opting for less nutritious foods that do not require as much water to prepare.[66] Further, soda, juice, and other sugary beverages are easier to access and cheaper than potable water.[67] Consequentially,

57. *See* Laurel Morales, *Many Native Americans Can't Get Clean Water, Report Finds*, NPR (Nov. 18, 2019, 5:01 AM), https://perma.cc/6SHN-LP8Q.

58. *Id.*

59. *Id.*

60. *Fact Sheets: Disparities*, INDIAN HEALTH SERV., U.S. DEP'T OF HEALTH AND HUM. SERVS. (Oct. 2019), https://perma.cc/6AD6-PLGQ (describing how American Indian and Alaska Native people "have long experienced lower health status when compared to other Americans," including decreased life expectancy and the suffering of a disproportionately high rate of disease, among other health disparities).

61. DigDeep and UTRF Amici Brief, *supra* note 56, at 23 (citing G.A. Res. 64/292, U.N. Doc. A/RES/64/292 (July 28, 2010); World Health Org., *National Systems to. Support Drinking Water, Sanitation and Hygiene: Global Status Report 2019*, at 48-55 (2019)); *see also* California Water Code § 106.3 (recognizing that "every human being has the right to safe, clean, affordable, and accessible water adequate for human consumption, cooking, and sanitary purposes").

62. DigDeep and UTRF Amici Brief, *supra* note 56, at 24.

63. *Id.* at 24-25 (citing Faissal Tarrass & Meryem Benjelloun, *The Effects of Water Shortages on Health and Human Development*, 132 PERSPECTIVES PUB. HEALTH 240, 241 (2012); Sara Nozadi et al., *Prenatal Metal Exposures and Infants' Developmental Outcomes in a Navajo Population*, 19 INT'L J. ENV'T RSCH. & PUB. HEALTH 425 (2021)).

64. DigDeep and UTRF Amici Brief, *supra* note 56, at 24 (citing DigDeep, *Draining: The Economic Impact of America's Hidden Water Crisis* 39 (2002), https://perma.cc/QLA6-EA4M).

65. *Id.* at 25.

66. *Id.* (citing Heather Tanana et al., *Universal Access to Clean Water for Tribes in the Colorado River Basin*, WATER & TRIBES INITIATIVE 15 (2021)).

67. *Id.*

many Navajo children experience disproportionately high levels of childhood obesity.[68]

Reduced water access intensified the effects of the COVID-19 pandemic and exemplifies how water scarcity compounds existing inequities. Since water is a communally hauled resource, reservation dwellers struggled to meet proper social distancing and quarantine guidelines.[69] Many homes also lack indoor plumbing, increasing susceptibility to and deaths from COVID-19.[70]

Water insecurity also exacerbates existing economic disparities. First, lack of water economically burdens "individual and community resources" by forcing residents to spend enormous amounts of money and time hauling water to meet basic household needs.[71] Families hauling water must pay for gasoline for their cars, car maintenance, and barrels to hold the water. Moreover, the water itself is a commodity that must be purchased, and its price varies between sellers.[72] These efforts necessarily divert money from other household, personal, and professional expenses.

Second, water insecurity poses challenges for Navajo residents conducting business on the reservation. Water fuels virtually all industry sectors, ranging from farming to engineering to education.[73] In the Southwest, the Colorado River catalyzes the local economy, contributing to annual gross state product and income for all seven Colorado River Basin states.[74] The Navajo Nation's two top agricultural outputs are livestock and forage hay, which represent 21 percent and 67 percent of all agricultural sales and crop acreage, respectively.[75] Of course, both rely on water to grow. Therefore, water insecurity and reduced access to the Colorado River likely play a part in "lost gross product, employment, and income" for the Navajo Nation.[76]

As climate change progresses and desertification intensifies, the situation is set to worsen. The Southwest currently faces some of the driest conditions the

68. *Id.* (citing Dennis M. Styne, *Childhood Obesity in American Indians*, 16 J. PUB. HEALTH MGMT. & PRAC. 381, 381-87 (2010) (explaining how Navajo children "residing on the reservation suffer the highest rates of early childhood obesity" in the United States)).

69. *Id.* at 25-26 (citing Desi Rodriguez-Lonebear et al., *American Indian Reservations and COVID-19: Correlates of Early Infection Rates in the Pandemic*, 26 J. PUB. HEALTH MANAG. PRACT. 371 (2020) ("finding an association between lack of indoor plumbing and COVID-19 infection rates on reservations")).

70. *Id.*

71. *Id.* at 30.

72. *See id.* at 31 (citing OFF. OF THE PRESIDENT AND VICE PRESIDENT, E. AGENCY COUNCIL REP., PRESIDENT NEZ PROVIDES TESTIMONY IN SUPPORT OF CONGRESSIONAL BILLS THAT WILL DELIVER MORE CLEAN WATER TO NAVAJO COMMUNITIES (June 4, 2022)).

73. *Id.* at 30 (citing AM. SOC'Y CIV. ENG'RS, THE ECONOMIC BENEFITS OF INVESTING IN WATER INFRASTRUCTURE: HOW A FAILURE TO ACT WOULD AFFECT THE U.S. ECONOMIC RECOVERY 17 (2020)).

74. *See generally* TIM JAMES ET AL., W.P. CAREY SCH. OF BUS., ARIZ. STATE UNIV., THE ECONOMIC IMPORTANCE OF THE COLORADO RIVER TO THE BASIN REGION (2014), https://perma.cc/9P7H-57HA.

75. DigDeep and UTRF Amici Brief, *supra* note 56, at 30-31 (citing TATIANA DRUGOVA ET AL., *The Economic Impacts of Drought on Navajo Nation*, 52 J. FOOD DISTRIB. RSCH. 32 (2021)).

76. *Id.* at 30.

area has experienced in centuries due to a decades-long drought.[77] As population and agricultural outputs soar, competition for use of the region's water supply intensifies.[78] Yet the Colorado River, which supplies water to forty million people across the Southwest, is already overdrawn.[79] And the seven states party to the Colorado River Basin Compact have never considered the interests of the Navajo Nation in their negotiations, nor the interests of several other federally recognized and non-federally recognized Tribes in the Basin.[80]

II. HISTORY OF THE NAVAJO NATION'S RELATIONS WITH THE UNITED STATES

Understanding the Navajo reservation's creation and the Southwest's history of regional water management is crucial for understanding the present water crisis. Such complex, multifaceted histories can be told from many perspectives, but all too often, the Native perspective is neglected.

Indian Tribes are "unique [political groups] possessing… sovereignty over both their members and their [T]erritory."[81] As such, they often enter into treaties with the United States as sovereign Nations but are geographically within the boundaries of present-day America. Part A first explains the treaties relevant to the Navajo Nation water crisis, including the treaty that created the Navajo reservation. Part B describes the problematic treaty negotiation process. Finally, Part C clarifies how the 1868 Treaty should be interpreted, according to the federal Indian law canons of construction.

A. Overview of the Navajo Nation's Two Treaties

The Nation has two treaties with the federal government critical to the underlying dispute: the Treaty of 1849 and the Treaty of 1868.[82] The Treaty of 1849 placed the Nation "under the exclusive jurisdiction and protection of the . . . United States[,] . . . forever."[83] The 1849 Treaty instigated a plan to map out

77. Henry Fountain, *What Is a Megadrought?*, N.Y. TIMES (Aug. 19, 2021), https://www.nytimes.com/article/what-is-a-megadrought.html#:~:text=Much%20of%20the%20Southwest%20is,maintains%20its%20long%2Dterm%20grip.

78. *Id.*

79. Bruce Babbitt, *We Can Save the Colorado River*, HIGH COUNTRY NEWS (May 13, 2020), https://perma.cc/TH2M-5CQN.

80. *Colorado River Compact*, WATER EDUC. FOUND., https://perma.cc/L58S-TKHM (last visited Dec. 16, 2023).

81. United States v. Mazurie, 419 U.S. 544, 557 (1975). Note that *Mazurie* describes Indian tribes as possessing "attributes of" sovereignty in this quote; however, other cases articulate absolute tribal sovereignty in their holdings. *See* Worcester v. Georgia, 31 U.S. 515, 519 (1832).

82. Both treaties were signed post-Mexican American War. The Treaty of Guadalupe Hidalgo in 1848 formally ended the war and added approximately 525,000 miles of territory to the present-day American Southwest. *The Long Walk*, SMITHSONIAN NATIONAL MUSEUM OF THE AMERICAN INDIAN, https://perma.cc/4T62-CL3G (last visited Apr. 25, 2024). Following the culmination of the war, it was the policy of the United States to encourage white settlers to move out west towards California. Pro-settlement policies led to mass dispossession of Native land and violence, as Indians fought against American endeavors to take their land. *Id.*

83. *See* Treaty Between the United States of America and the Navajo Tribe of Indians, art. I, Sept. 9, 1849, 9 Stat. 974 https://treaties.okstate.edu/treaties/treaty-with-the-navaho-1849-0583.

future boundaries for the Nation's reservation, designated as the Tribe's "permanent homeland."[84] The 1849 Treaty was "to receive a liberal construction, at all times and in all places . . . as to secure the permanent prosperity and happiness of [the Navajo people]."[85]

But resistance to colonial settlement persisted. Beginning in 1863, the U.S. Army embarked on a "scorched-earth campaign" to eradicate perceived Native insubordination.[86] Following brutal attacks designed to beat the Navajo into submission, thousands of Tribal members were rounded up and forced to walk 450 miles to the Bosque Redondo internment camp at Fort Sumner, New Mexico.[87] This march came to be known as the "Long Walk."[88] Navajos were imprisoned at Hweeldi, the Diné name for Bosque Redondo, from 1864 to 1868.[89] Both exiled and held hostage in this prison camp, the Navajo entered into a second treaty.[90]

To force the Navajo people to adopt an Anglo-American agrarian lifestyle, the 1868 Treaty formally delineated reservation boundaries and divided the land into allotments.[91] The United States agreed to buy 15,000 sheep and goats and 500 beef cattle for the Nation,[92] and give land, seeds, and other "agricultural implements" to each head of the family, so long as the Indians abandoned their semi-nomadic culture and become pastoralists.[93]

B. The 1868 Treaty's Inherently Problematic Negotiation Process

There are several problematic aspects of the 1868 Treaty. First, significant language barriers obscured communication between Navajo and federal

84. *Id.* at art. IX.

85. *Id.* at art. XI.

86. *See The Long Walk*, *supra* note 82 (detailing how Major General James H. Carleton sent Kit Carson to set fire to Navajo villages, killed farm animals, and demolished springs in an attempt to starve the Tribe); *see also* John Burnett, *The Navajo Nation's Own 'Trail of Tears,'* NPR (June 15, 2005), https://perma.cc/3QW5-LVJB (explaining how this violent campaign was meant to "solve" the "Navajo problem").

87. *See* Burnett, *supra* note 86 (describing the horrific circumstances of the Long Walk, such as the shooting of slow walkers and the drowning of Navajos at the Rio Grande River crossing); *see also Arizona III*, 599 U.S. at 560 (detailing how during the two decades immediately following the signing of the Treaty of 1849, the U.S. "forcibly moved" the Navajo people from their homelands to a "relatively barren area" in New Mexico called the Bosque Redondo Reservation").

88. Burnett, *supra* note 86.

89. *See Bosque Redondo*, SMITHSONIAN NAT'L MUSEUM OF THE AM. INDIAN, https://perma.cc/5LMJ-BEQM (last visited Apr. 25, 2024) (accounting the attempted forced assimilation of the Navajo people into Anglo-American culture, pursuant to the federal Indian assimilation policy of the nineteenth century).

90. *See generally* Treaty Between the United States of America and the Navajo Tribe of Indians, June 1, 1868, 15 Stat. 668, https://perma.cc/7JHJ-9Q9M.

91. *See* Brief for Diné Hatalii Association, Inc. as Amicus Curiae in Support of Respondents at 6, Navajo Nation v. Dep't of the Interior, 876 F.3d 1144 (9th Cir. 2017), https://perma.cc/JL3S-VHLM [hereinafter Diné Hatalii Amicus Brief].

92. Treaty Between the United States of America and the Navajo Tribe of Indians, art. XII, June 1, 1868, 15 Stat. 668, https://perma.cc/7JHJ-9Q9M.

93. Treaty Between the United States of America and the Navajo Tribe of Indians, art. VII, June 1, 1868, 15 Stat. 668, https://perma.cc/7JHJ-9Q9M.

government negotiators. Second, the negotiation process failed to incorporate differing conceptions of water as property between the Navajo people and the federal government. Finally, the negotiation process did not account for Navajo law or cultural beliefs about water. This legal and cultural understanding is essential to fully appreciate how the Navajo understood the 1868 Treaty's meaning, and how the treaty should be interpreted today.

The 1868 Treaty was negotiated using two interpreters—one fluent in Navajo and Spanish, and another fluent in Spanish and English.[94] This trilingual negotiation process meant that much was, quite literally, lost in translation. Chief Barboncito, the head Navajo negotiator, relied on a shaky understanding of a promise to return "home" without clear understanding of the treaty's exact provisions.[95] However, historians and legal scholars agree that the Navajo negotiators bargained for "a return to their traditional homelands—to live within their four sacred mountains and their rivers and streams."[96]

In relying on the United States' promises of protection in exchange for peace, the signatories believed that a return home would also mean a return to water. Chief Barboncito referenced the Navajo creation story in his negotiations, explaining that "four mountains and four rivers were pointed to us, inside of which we should live, [and] that was to be our country."[97] This account of the treaty negotiations aligns with the legend retold in Section I. Chief Barboncito explained how the Navajo "Holy People" had instructed the Tribe to remain within the boundaries of the Rio Grande, the Rio San Juan, and the Rio Colorado. Accordingly, the detained Indians believed "their violation of this restriction was responsible for their [] suffering"[98] at Bosque Redondo.[99] The Navajo understood a promise of return to life within the boundaries of the rivers to include the right to access their waters.

Even today, the Navajo believe that water should be respected and "discussed with caution" because "No one can own it; No one can sell it; No one

94. Diné Hatallii Amicus Brief, *supra* note 91, at 7 (citing John L. Kessell, *General Sherman and the Navajo Treaty of 1868: A Basic and Expedient Misunderstanding*, 12 W. HIST. Q. 251, 261-66 (July 1, 1981) (describing "the dual translation process of negotiating the Reservation boundaries provisions of the 1868 Treaty, first from English to Spanish with one interpreter, James C. Sutherland; then from Spanish to Navajo via another interpreter, Jesus Arviso")).

95. *Id.* at 7, 13-14 (citing Kessel, *supra* note 94, at 261).

96. *Id.* at 7; *see also infra*, Section I.A. (detailing the Navajo's four sacred mountains and the cultural importance of water).

97. *Id.* at 22 (citing Treaty Between the United States of America and the Navajo Tribe of Indians, With a Record of the Discussions that Led to its Signing, 2, Aug. 12, 1868 (1968) [hereinafter 1868 Treaty with Record of the Discussions]).

98. *Id.* at 13 (citing Katherine Marie Birmingham Osburn, *The Navajo at the Bosque Redondo: Cooperation, Resistance, and Initiative, 1864-1868*, 60 N.M. HIST. REV. 399, 407-08 (1985)).

99. This can be understood by laments regarding water quality in Bosque Redondo compared to water in Navajo land that was shared during the negotiations. *Id.* at 9 (citing Treaty Between the United States of American and the Navajo Tribe of Indians, With a Record of the Discussions that Led to its Signing, 3, Aug. 12, 1868 (1968) ("I thought at one time the whole world was the same as my own country but I got fooled . . . outside my own country we cannot raise a crop, but in it we can raise a crop almost anywhere, . . . we know this land does not like us neither does the water.")).

can buy it."[100] The concept of arguing over water is disrespectful and dishonorable.[101] Further, fighting over water "tarnish[es] traditional ceremonies" since only "pure water" is used to perform the Waterway ceremony.[102] This reverence for water as a collective resource underlies the collaborative nature with which water is hauled and shared today.[103]

The Navajo Nation Code also states that "water and the sacred mountains embody planning" and that "thinking is the foundation of planning."[104] In its brief before the Supreme Court in *Arizona v. Navajo Nation*, amicus counsel Diné Hatallii Association, Inc. argued how planning and critical thinking for the future are principles personified in "the Reservation itself," per the Chief's descriptions during the 1868 Treaty discussions.[105] This nuanced, spiritual, and conservation-focused conception of nature exemplifies the differences between Indigenous and white culture. Such mismatching of cultural beliefs also demonstrates how semantic misconceptions occur within negotiation, leading to devastating practical consequences.

C. Best Practices for Interpreting Treaties

Since the early twentieth century, the Supreme Court has consistently held that treaties between the United States and Tribes should be "interpreted liberally in favor of the Indians,"[106] and ambiguities should be "resolved in their favor."[107] Recently, the Supreme Court explained that cases involving Indian treaty interpretations "base their reasoning in part upon the fact that the treaty negotiations were conducted in, and the treaty was written in, languages that put the [Tribes] at a significant disadvantage."[108] An understanding of the creation story and traditional cultural and legal principles informs how the Navajo signatories would have understood the treaties and the ways in which the United States would fulfill its promises.

Courts ordinarily apply specific canons of construction relating to Indian affairs during their interpretation of treaties or statutes enacted for the benefit or regulation of Indians.[109] The treaty interpretation canon instructs courts that

100. *Id.* at 22 (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 (July 1, 2020) (unpublished manuscript) (on file with author)).

101. *Id.*

102. *Id*. at 23.

103. As explained *infra*, Section I.

104. 1 N.N.C. NAVAJO NATION CODE ANN. tit. 1, § 201. (2010).

105. Diné Hatallii Association, Inc. Amicus Brief, *supra* note 91, at 22.

106. Minnesota v. Mille Lacs Band of Chippewa Indians, 526 U.S. 172, 200 (1999) (citing Choctaw Nation v. United States, 318 U.S. 423, 432 (1943)).

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

108. Wash. State Dep't of Licensing v. Cougar Den, Inc., 586 U.S. 347, 360 (2019).

109. *See, e.g.*, Alex Tallchief Skibine, *Textualism and the Indian Canons of Statutory Construction*, 55 U. MICH. J. L. REFORM 267, 268 (2022) (outlining five general Indian canons of statutory construction, including "the canons of treaty interpretation, treaty abrogation, [T]ribal sovereign immunity, [T]ribal sovereignty, and Indian ambiguity"). The Indian law canons can be interpreted as akin to the Supreme Court's canons of interpretations that protect federalism concerns. *See* COHEN, *supra* note 4, § 2.02(2)

"[t]he circumstances surrounding the negotiation and execution" of Indian treaties should inform their interpretation.[110] Treaties must be interpreted "in light of the parties' intentions, with any ambiguities resolved in favor of the Indians," and with exact treaty language "construed in the sense in which they would naturally be understood by the Indians."[111] The 1868 Treaty should therefore be read in light of the duress and trilingual process which the Navajo representatives negotiated under to simply return home to their land and its waters.

III. THE INDIAN TRUST DOCTRINE, *WINTERS* RIGHTS, AND THE PRACTICABLE IRRIGATED ACREAGE (PIA) STANDARD

The legal history of Tribal water rights is long and complex. But the nation-to-nation relationship and trust responsibility are core principles animating the current Navajo water crisis. Part A describes the historical underpinnings of the trust doctrine, one of the most central principles of federal Indian law. Part B describes how according to the famous *Winters* decision, Indian reserved water rights may prevail over appropriative rights within the first-in-time, first-in-right regime. Part C illustrates how the practicably irrigable acreage standard constrains Tribal reserved water rights for agricultural purposes within a reservation.

A. The Indian Trust Doctrine

The trust doctrine is a legally enforceable federal common law doctrine that establishes a moral and fiduciary obligation on the part of the federal government to protect and support the treaty rights, lands, assets, and resources of federally recognized Tribes.[112] Those duties include "moral obligations of the highest responsibility and trust . . . in the acts of those who represent it in dealing with the Indians."[113]

Early Supreme Court cases utilized concepts from international law to both further America's colonial agenda and entrench Native power in American jurisprudence.[114] For example, *Johnson v. M'Intosh* established the doctrine of discovery in American property law, which justified a common law restraint on alienation of Tribal land.[115] But the Court also found that Tribes had a "legal as well as a just ownership interest" in their land, in addition to the sovereign right

(citing Gregory v. Ashcroft, 501 U.S. 452 (1991); Atascadero State Hosp. v. Scanlon, 473 U.S. 234 (1985)).

110. *See, e.g.*, Pawnee Indian Tribe of Okla. v. United States, 109 F.Supp. 860, 889 (Fed. Cl. 1953).

111. Herrera v. Wyoming, 587 U.S. 329, 345 (2019) (citations omitted) (internal quotations omitted).

112. Cohen's Handbook of Federal Indian Law § 5.05(1)(a) (2019); *see also Fact Sheet: American Indians and Alaska Natives – the Trust Responsibility*, U.S. DEP'T OF HEALTH AND HUM. SERVS., ADMIN. FOR NATIVE AMS., https://perma.cc/TEL2-JW2J (last visited Dec. 16, 2023).

113. Seminole Nation v. United States, 316 U.S. 286, 297 (1942).

114. *See* COHEN, *supra* note 4, § 5.04(3)(a).

115. Johnson v. M'Intosh, 21 U.S. 543 (1823).

to govern land use practices for those falling under their authority.[116] In *Cherokee Nation v. Georgia*, Chief Justice Marshall declared Tribes "domestic dependent nations."[117] He analogized Tribes to the "feudatory or tributary states of Europe," and described the federal-Tribal relationship as akin to the relationship of a "ward to his guardian."[118] *Cherokee Nation* set the foundation for recognizing the government-to-government relationship between Tribes and the federal government as a unique trust relationship with a "concomitant federal duty to protect [T]ribal rights to exist as self-governing entities."[119]

Finally, in the second *Cherokee* case, *Worcester v. Georgia*, Chief Justice Marshall likened the relationship between Tribes and the early U.S. government to the relationship between the U.S. and foreign nations, finding that the treaty was formed "on the model of treaties between the crowned heads of Europe."[120] Marshall also cited the trust doctrine, thereby entrenching the Indian law canons of construction in the government's obligation to support Tribal sovereignty.[121] Some even view Justice Marshall's anchoring of the canons of construction in Tribal sovereignty as an effort to reconcile the issues that the "nonconsensual inclusion" of Tribes in the newly-formed United States had introduced.[122]

The first issue with the trust doctrine is that while it recognizes Tribes as sovereign, it is also rooted in cultural racism and paternalism. The federal government has historically viewed Indian ways of life as inferior to that of white Americans. A 1977 Senate report of the American Indian Policy Review Commission described the purpose behind the trust doctrine as not only "to ensure the survival and welfare of Indian [T]ribes and people," but also to "raise the standard of living and social well-being of the Indian people to a level comparable to the non-Indian society."[123] While well-intended, this definition demonstrates the inherent issue of treating Anglo-American settlements as the standard to which other societies should aspire.

A second issue arises from the fact that, although Native Nations are pre-constitutional sovereigns, Congress has placed most Tribal land and other property under the control of federal agencies.[124] Accordingly, courts have recognized that when Congress delegates to federal officials the power to manage Tribal land, their actions with respect to those resources must be "judged by the most exacting fiduciary standards."[125] Such resources include water.

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116. *Id.* at 574, 593.

117. 30 U.S. 1, 17 (1831).

118. *Id*.

119. *See* COHEN, *supra* note 4, § 5.04(3)(a).

120. Worcester v. Georgia, 31 U.S. 515, 550 (1832).

121. *See* Cohen's Handbook of Federal Indian Law § 3.01(2) (2019) (citing Worcester v. Georgia, 31 U.S. 515 (1832)).

122. *See id*., (citing Philip P. Frickey, *Marshalling Past and Present: Colonialism, Constitutionalism, and Interpretation in Federal Indian Law*, 107 HARV. L. REV. 381, 393-417 (1993)).

123. *Fact Sheet: American Indians and Alaska Natives – the Trust Responsibility*, *supra* note 112.

124. *See* COHEN, *supra* note 4, § 5.04(3)(a).

125. *Id.* (citing Seminole Nation v. United States, 316 U.S. 286, 297, & 297 n.12 (1942)).

Further, the Supreme Court has held that those dealings should "be judged by the most exacting fiduciary standards."[126] The fiduciary model of the doctrine was further articulated in *United States v. Mitchell*, where the Supreme Court likened the trust relationship to a private fiduciary relationship.[127] Professor Mary C. Wood describes the responsibility as a "sacred promise, made to induce massive land cessions, that the retained homelands would be protected to support [T]ribal lifeways and generations into the future."[128] Professor Wood's characterization reflects settler state colonial underpinnings, whereby the promise of homeland protection for lands retained by Tribes was an important exchange within the treatymaking process, through which the U.S. obtained vast lands in the present-day American Southwest.[129]

The trust responsibility's colonial beginnings perhaps explain why the early twentieth century Supreme Court deferred to the discretion of the federal government in choosing how to execute the duty of protection. Congress has often used the trust responsibility as a "sword" for the U.S. rather than a "shield" for Tribes.[130] Meaning, Congress has historically used the trust responsibility to further its own political agenda rather than to protect Tribal interests.[131] Through an EJ-plus lens, articulated in Section VII, the trust responsibility can be interpreted to include more obligations to protect Native homelands and environmental resources, including water.

B. The Navajo Nation's Winters *Rights*

Indian reserved water rights were first recognized by the Supreme Court in *Winters v. United States* in 1908.[132] "Under the *Winters* doctrine, when Congress reserves land [for an Indian reservation], Congress also reserves water sufficient to fulfill the purpose of the reservation."[133]

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126. *Id.*

127. United States v. Mitchell, 463 U.S. 206, 224, 226 (1983) ("Because the statutes and regulations at issue in this case clearly establish fiduciary obligations of the Government in the management and operation of Indian lands and resources, they can fairly be interpreted as mandating compensation by the Federal Government for damages sustained. Given the existence of a trust relationship, it naturally follows that the Government should be liable in damages for the breach of its fiduciary duties. It is well established that a trustee is accountable in damages for breaches of trust.").

128. Mary C. Wood, *Indian Trust Responsibility: Protecting Tribal Lands and Resources Through Claims of Injunctive Relief Against Federal Agencies*, 39 TULSA L. REV. 355, 368 (2003).

129. *See* Reid Peyton Chambers, *Judicial Enforcement of the Federal Trust Responsibility to Indians*, 27 STAN. L. REV. 1213, 1224-27 (1975) (asserting that the trust obligation goes beyond a mere "moral obligation, without justiciable standards for its enforcement"); Nathan R. Margold, *Introduction* to Felix S. Cohen, Handbook of Federal Indian Law vii, xii (1942).

130. William C. Canby, Jr., *The Special Relationship Between the Federal Government and the Tribes, in* AMERICAN INDIAN LAW IN A NUTSHELL 43 (West Pub. Co. 1981).

131. *See* Section VI.B for a greater explanation of *Lone Wolf v. Hitchcock*, 187 U.S. 553, 568 (1903).

132. *See Winters*, 207 U.S. at 576-77.

133. Cynthia Brougher, *Indian Reserved Water Rights Under the Winters Doctrine: An Overview*, CONG. RSCH. SERV. (June 8, 2011), https://perma.cc/A5WG-LQSJ.

In *Winters*, the Court examined water rights created on the Blackfeet and Fort Belknap reservations in Montana.[134] At the time of the creation of the reservations, the United States had encouraged Indian assimilation into white culture by allocating individual parcels of land to develop.[135] Although the Indians had inhabited the entire Milk River drainage system since time immemorial, by the late 1890s, they found themselves competing for water usage with non-Native farmers who had settled upstream.[136] The BIA ultimately sued on behalf of the Tribes, contending that the Tribes had superior rights to the Milk River waters and that retaining the full flow of the river was "essential and necessary" to fulfill "the purposes for which the reservation was created."[137]

The Court held in favor of the Tribes, deciding the priority date of rights as that of the creation of the reservation. Reasoning that the intent of the Indians must have been to retain necessary water rights when they agreed to cede land to the United States, the Court found that water diverted by non-Natives upstream was not available for continued use. In that instance, the BIA responsibly exercised its role of trustee. Today, the federal government still considers *Winters* rights as "vested property rights for which the [United States] has a trust responsibility."[138] The federal government thus holds legal title to land and water in trust "for the benefit of the Indians."[139]

The Court further refined *Winters* with the primary purpose standard, under which water rights may only be reserved to the extent necessary to fulfill the primary purpose of a reservation.[140] For example, the Navajo reservation's primary purpose is to serve as a permanent home for Tribal members; under this standard, water may be reserved to the extent necessary to support a permanent homeland. Lower courts have also held that *Winters* rights extend beyond surface water to groundwater, though the Supreme Court has not yet addressed this question.[141] Therefore, groundwater on the Navajo reservation may also be reserved for the Tribe in order to support the purpose of the reservation.

The history of the Navajo Nation closely mirrors the facts of *Winters*. In both circumstances, the federal government developed policies seeking to transform the Indians from nomadic peoples to pastoralists. Both histories are rooted in the culturally racist ideology that nomadic living made Indians

134. *Winters*, 207 U.S. at 565, 567.

135. *See id.* at 576 (describing how since the creation of the reservation, the United States has "encourage[d]" Indians living on the reservation "to habits of industry" to "promote their civilization and improvement", and that "it was the policy of the government … to change those [nomadic] habits"); *see also infra* note 237.

136. *See id.* at 565-67.

137. *Id.* at 567.

138. Criteria and Procedures for the Participation of the Federal Government in Negotiations for the Settlement of Indian Water Rights Claims, 55 Fed. Reg. 9223, 9223 (Mar. 12, 1990).

139. *Id.*

140. *See* Brougher, *supra* note 133, at 3.

141. *See* Agua Caliente Band of Cahuilla Indians v. Coachella Valley Water Dist., 849 F.3d 1262, 1273 (9th Cir. 2017); Catherine Schluter, Indian Reserved Rights to Groundwater: Victory for Tribes, for Now, 32 GEO. ENV'T L. REV. 729, 731-33 (2020) (recounting conflicting state court decisions regarding whether rights outlined in *Winters* extend to groundwater).

"uncivilized." But the *Winters* court went so far as to rule on the issue of water quantification in regard to the Fort Belknap treaty, whereas the Navajo court did not.[142] At the Ninth Circuit, the court reasoned that in enacting the 1868 Treaty, the U.S. "reserve[d] appurtenant water[,] then unappropriated to the extent needed to accomplish the purpose of the reservation."[143] The unquantified water rights of the Navajo Nation are considered an Indian Trust Asset (ITA).[144]

C. The PIA Standard

Decades after *Winters*, the Supreme Court in *Arizona v. California* approved a special master's decision regarding reserved water rights that quantified water based on its intended purpose.[145] Amidst the interstate water rights dispute, the special master endorsed the usage of the "practicably irrigable acreage" standard ("PIA"). This quantification method fixes the amount of state water Indian reservations receive as a reserved right to the acreage of the reservation that can be "feasibl[y]" irrigated from that water.[146] Continuing use of the PIA standard reflects the legacy of *Winters*, which tied reserved water rights to the agricultural purposes of creating the reservation.[147]

But in 2001, the Arizona Supreme Court expanded the accepted quantification measurement for determining water rights on Tribal lands. In *In re Gila River*, the court rejected the PIA standard out of a concern that it could "treat [T]ribes inequitably based on their geographic location."[148] The court reasoned that the PIA standard does not reflect a shift away from agricultural lifestyles on many reservations today, and counting every potentially irrigable acre posed a "risk" of "an overabundance of water" on some reservations.[149]

Instead of the PIA standard, the court offered several factors to consider in water rights quantification, including: 1) a Tribe's history and culture, including "[w]ater uses that have particular cultural significance"; 2) "the [T]ribal land's

142. *See Winters*, 207 U.S. at 575-78. Justice McKenna described how the case turned on the Treaty of 1888, which created the Fort Belknap Reservation. The Court reasoned that, although it was up for debate as to whether the Indians ceded their waters in addition to their lands to enter into agreement, the "rule of interpretation" of Indian treaties is that ambiguities will be "resolved from the standpoint of the Indians." *Id.* at 576. Therefore, the Court chose to support the interference that would support the purpose of the treaty, which was to transform the Indians from nomadic people into pastoralists. Since the lands were "practically valueless" without irrigation, the Court found it impossible to believe that the Indians would have agreed to cede the land if they understood themselves to also be ceding the water rights. *Id.* at 576-78.

143. Navajo Nation v. U.S. Dep't of the Interior, 26 F.4th 794, 801 (9th Cir. 2022), rev'd sub nom. *Arizona III*, 599 U.S. 555 (2023) (citing Cappaert v. United States, 426 U.S. 128, 138 (1976); *Winters*, 207 U.S. at 576).

144. Diné Hatallii Amicus Brief, *supra* note 91, at 9-10 (citing *Final Environmental Impact Statement, Colorado River Interim Guidelines for Lower Basin Shortages and Coordinated Operations for Lake Powell and Lake Mead*, 3-96 (Oct. 2007)).

145. *California*, 373 U.S. at 599-601.

146. *Id*. at 601.

147. *See generally Winters.*

148. In re Gen. Adjudication of All Rts. to Use Water In Gila River Sys. & Source, 35 P.3d 68, 78 (Ariz. 2001).

149. *Id.* at 78.

geography, topography, and natural resources"; 3) the Tribe's "current economic station" and the proposed economic development to the extent it involves a need for water; 4) "past water use on a reservation"; and 5) the Tribe's "present and projected future population."[150] An understanding of the PIA standard and factors potentially replacing that quantification measure is vital to understand the scope of the Navajo Nation's unqualified reserved water rights and how such water can be quantified in the future. For example, the Navajo certainly tied reserved water rights to agriculture in their opposition brief filed before the Supreme Court.[151] But *In re Gila River*'s finding that the quantity of water reserved must satisfy both present and future needs of the reservation further supports the Navajo Nation's legal and moral claim under the trust doctrine.[152]

IV. ARIZONA V. NAVAJO NATION (ARIZONA III)

Amidst the water crisis, the Navajo Nation sued the federal government in 2003 to compel the Secretary of the Interior to assess the Nation's water needs on its reservation, develop a plan to secure the needed water, and manage the Lower Colorado River to avoid harming the Nation's unquantified water rights.[153] The Nation cited the 1868 Treaty that established the reservation as positive law creating a "permanent home" for the Nation.[154] They argued that the "permanent home" language meant that the United States agreed to secure water for the Nation and that the treaty language imposed a federal fiduciary duty.[155] Also citing the 1868 Treaty's requirement that the U.S. supply seeds and "agricultural implements" for three years, the Nation argued that the express provisions necessarily implied that the U.S. also had an affirmative duty to secure water for those agricultural materials.[156] Additionally, the Nation contended that federal control over their reserved water rights aligns with the view that the U.S. retains a trust obligation to the Navajo Nation.[157]

Three states—Arizona, Colorado, and Nevada—and several stakeholders intervened. They perceived a threat to the water allocations previously decided in *Arizona v. California*, which assigned water from the Lower Colorado River to Arizona, California, Nevada, and five Indian Tribes.[158] In *Arizona v. California*, Navajo Nation was among the twenty-five Tribes represented by the federal government. There, the Supreme Court limited allocations to the River's

150. *Id*. at 79-81.

151. *See* Brief of Respondent Navajo Nation in Opposition Filed at 6, No. 21-1484, *Arizona III*, 599 U.S. 555 (2023) (No. 21-1484) (explaining how the Court of Appeals held that, by establishing a reservation as a "permanent homeland suitable for farming," those treaty provisions "promised a Nation a right to sufficient water" under the *Winters* doctrine).

152. *In re Gila River*, 35 P.3d at 77.

153. *See Arizona III*, 599 U.S. at 558-63.

154. *Id.* at 567.

155. *Id.* at 567-69 (citing Arizona v. California, 460 U.S. 605, 615 (1983)).

156. *See id.* at 560.

157. *See id*. at 555 (syllabus) (explaining that the Navajo asserted that the U.S.'s control over the reserved water rights "supports the view that the United States owes trust duties" as well).

158. *California*, 373 U.S. at 564-65.

main stream (excluding its tributaries), reasoning that the Boulder Canyon Project Act[159] "dealt exclusively with mainstream water."[160] Instead, the claims brought on behalf of the Nation in *California* concerned unqualified rights to the Little Colorado River, a tributary of the Colorado River that crosses a portion of the Navajo Reservation.[161] Thus, the Navajo were not granted rights to the Lower Colorado mainstream.[162]

The litigation spanned two decades while the Navajo's water scarcity problem continued to worsen.[163] In 2022, the Ninth Circuit Court of Appeals held that the federal government has a fiduciary duty to the Navajo Nation and remanded the case with instructions to the District Court to "fully consider the [breach of trust] claims."[164] Arizona, Colorado, Nevada, and various water districts within those states filed a petition for certiorari, challenging the lower court's jurisdiction over the Nation's complaint and the Tribe's claim that the U.S. must quantify the Nation's Colorado River water. Separately, the federal defendants filed another petition for certiorari regarding the Ninth Circuit's holding that a "fiduciary duty exists." The Court granted both petitions and consolidated the cases before hearing oral argument in March 2023.

In 2023, the Supreme Court held five-to-four in the consolidated cases of *Arizona v. Navajo Nation* and *Navajo Nation v. U.S. Department of the Interior* that the federal government can only incur a fiduciary duty to a Tribe if it expressly accepts that duty via treaty, statute, or regulation. Writing for the majority, Justice Kavanaugh found that the United States does not have a judicially enforceable duty to the Navajo Nation because the 1868 Treaty "contains no language imposing a duty on the United States to take affirmative steps to secure water for the Tribe."[165] His reasoning relied on *United States v. Jicarilla Apache Nation*, which held that to assert such a duty, a Tribe must establish that "the text of a treaty, statute, or regulation impose[s]" that duty on the U.S.[166] Justice Kavanaugh further held that the U.S. owes judicially enforceable duties to a Tribe "only to the extent it expressly accepts those

159. 45 Stat. 1057 codified at 43 U.S.C. §§ 617-619(b) (1928).

160. Rita Maguire and Nicole Klobas, *The Supreme Court's Decision in Arizona v. Navajo Nation: A Tale of Scarce Water and Treaty Rights in the Southwest*, AM. BAR ASS'N (Nov. 1, 2023), https://www.americanbar.org/groups/environment_energy_resources/publications/trends/2023-2024/november-december-2023/supreme-courts-decision-in-arizona-v-navajo-nation/ (last visited Dec. 16, 2023) (citing *California*, 373 U.S. at 567-75).

161. *See California*, 373 U.S. at 567-75.

162. *See id.*

163. The complaint was dismissed twice by the U.S. District of Arizona for lack of subject matter jurisdiction, and twice the Ninth Circuit remanded the case. *Id.* In 2017, the Ninth Circuit affirmed the lower court's dismissal of the complaint's original NEPA claims but held that the Nation's complaint properly stated a breach of trust claim premised on federal reserved rights pursuant to *Winters*, treaties with the United States, and the Secretary's "pervasive control" over the Lower Colorado River. *Id.*

164. Navajo Nation, 26 F.4th 794, 804 (9th Cir. 2022).

165. *Arizona III*, 599 U.S. at 555 (citing United States v. Navajo Nation, 537 U.S. 488, 506 (2003)).

166. *Id.* at 565-66 (citing United States v. Jicarilla Apache Nation, 564 U.S. 162, 173-74, 177-78 (2011)).

responsibilities."[167] In other words, Justice Kavanaugh viewed any affirmative duty, even quantification of water rights or construction of water delivery infrastructure, would be an expansion of the 1868 Treaty. He reasoned that "Indian treaties cannot be rewritten or expanded beyond their clear terms."[168]

In response to the Nation's *Winters* rights argument, Justice Kavanaugh reasoned that *Winters* only recognizes the federal government's implicit reservation of water from groundwater or rivers that "border, cross, underlie, or are encompassed within the reservation."[169] Therefore, even if the 1868 Treaty had imposed an affirmative duty on the U.S. to provide water to the Nation, that duty would only apply to water sources within or directly next to the Navajo reservation. Because the 1868 Treaty did not explicitly create any affirmative duty, Justice Kavanaugh held that the Nation's *Winters* claim was without merit.[170] This holding should be interpreted narrowly to only encompass the specific request for injunctive relief that the Supreme Court struck down. Expanding the holding would further endanger future Navajo claims to water rights.

But Justice Kavanaugh misunderstood the Nation's request. He believed that the Nation sought to recognize affirmative duties *beyond* mere water rights quantification. The United States argued that a ruling in favor of the Navajo would force the federal government to not only assess and quantify the Nation's water rights, but also to build water delivery infrastructure. "Just as the 1868 treaty didn't impose on the United States a duty to build roads or bridges, or to harvest timber, or to mine coal, the 1868 treaty didn't impose on the United States a duty to construct pipelines, pumps or wells to deliver water."[171] This misunderstanding of the Nation's narrow ask of the Court ultimately doomed the case.

In contrast, Justice Gorsuch's dissent offered a more historically informed opinion of how the Navajo would have interpreted the 1868 Treaty from its true context. The Nation simply sought to compel the United States to determine the water necessary to "fulfill the promise[s] made to them" in the 1868 Treaty.[172] The majority recognized neither the relevant violence leading up to the signing of the 1868 Treaty, detailed *infra*, Section II, nor the historic, economic, cultural, and religious importance of water for the Navajo people, detailed *infra*, Section I. In failing to uphold the trust responsibility within the context of the 1868 Treaty negotiations, Justice Kavanaugh broke from both precedent and the

167. *Id.* at 564 (quoting *Jicarilla*, 564 U.S. at 177).

168. *Id*. at 565 (quoting Choctaw Nation v. United States, 318 U.S. 423, 432 (1943)).

169. *Id.* at 560-61 (citing Winters v. United States, 207 U.S. 564, 576 (1904)).

170. *Id.* at 567.

171. Becky Sullivan, *The Supreme Court wrestles with questions over the Navajo Nation's water rights*, NPR (Mar. 20, 2023), https://perma.cc/CCP8-5JUS.

172. *Arizona III*, 599 U.S. at 594 (Gorsuch, J., dissenting) (citing the Navajo's Response Brief to the Court).

Indian canons of construction.[173] Instead, the majority focused on what a positive ruling would mean for the federal government.

The Supreme Court's decision concerns the judicial enforceability of the Indian trust doctrine writ large in analogous situations where specific treaty language does not exist. Justice Kavanaugh reasoned that absent a Congressionally created conventional trust relationship with a Tribe "as to a particular trust asset," the Supreme Court will not "apply common-law trust principles" to deduce obligations absent from the text of a treaty, statute, or regulation.[174] This is worrisome given the role that federal common law has played in Indian law. Since Tribal governments predate the creation of the Anglo-American legal system, federal common law has been made freely in the field of federal Indian law, perhaps more so than in other legal fields.[175] Justice Kavanaugh's ruling flatly ignores this tradition. It is therefore unclear how the trust doctrine can be employed in analogous situations to hold the U.S. accountable, absent the existence of specific treaty language.[176] Considering the ongoing uncertainty, this Note asserts that the best federal institutions to enforce the trust doctrine and provide the Navajo with redress are administrative agencies.[177]

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173. *See supra*, Section II.C.

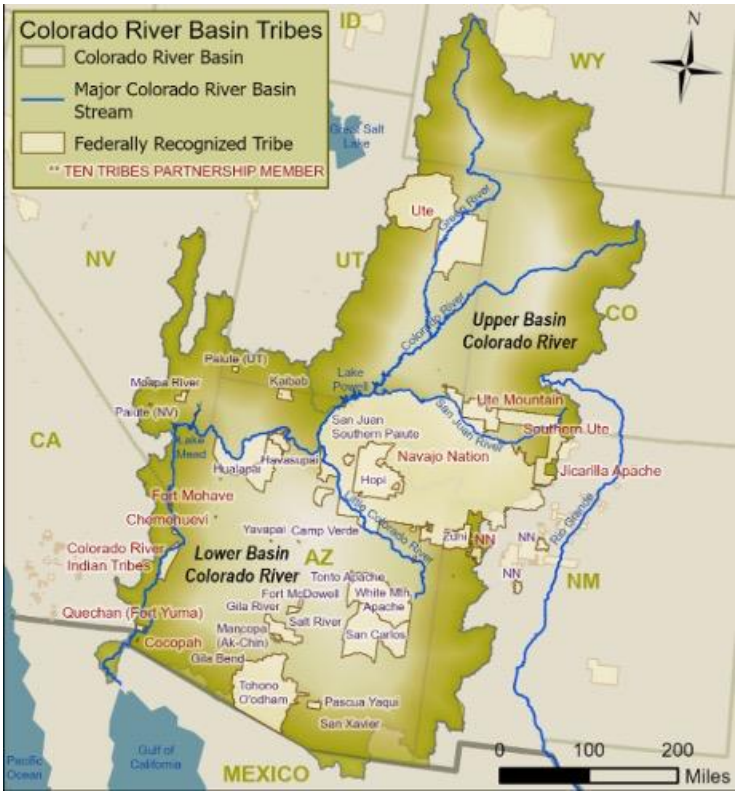
174. *Arizona III*, 599 U.S. at 565-66 (citing United States v. Jicarilla Apache Nation, 564 U.S. 162, 178 (2011)).

175. This is out of respect of Native sovereignty since North American Tribes existed and governed themselves before the creation of the United States and its legal system. American diplomacy and rule of law therefore incorporated the existence of pre-constitutional sovereigns. Professors Seth Davis, Eric Biber, and Elena Kempf refer to this paradigm as the historical international law "model of treaties." Seth Davis, Eric Biber & Elena Kempf, *Persisting Sovereignties*, 170 U. PENN. L. REV. 549, 553 (Feb. 2022). In 1775, prior to the American Revolution, the Second Continental Congress of the thirteen American colonies met with speakers from the Lupwaaeenoawuk, the Great Council of the western Delawares, the Haudenosaunee Confederacy, the Shawnee Nation, the Ottawa Nation, and the Wyandot Nation. *Id.* at 551-52. Then in the fall of 1778, three Tribal representatives from the Delaware Nation again met with agents of the "United States of North-America" to negotiate a treaty. *Id.* at 552 (citing Treaty with the Delawares, Sept. 17, 1778, 7 Stat. 13). The Delawares "sought a military alliance" and "the promise of mutual assistance and protection from the United States" in exchange for declaring Delaware's support and allowing the "free passage for American troops" through Delaware territory. *Id.* at 552 (citing Richard D. Pomp, *The Unfilled Promise of the Indian Commerce Clause and State Taxation*, 63 TAX LAW. 897, 924 & n.93 (2010)). This treaty, known as the "Treaty of Fort Pitt," acknowledged the Delawares as a "nation" and "pledged the parties to a mutual 'confederation' between 'states.'" *Id.* (citing Treaty with the Delawares, arts. IV & V). Just over fifty years later, in *Worcester v. Georgia*, the Marshall Court referenced the history of U.S. treaties with Tribes in its holding that "Georgia could not legislative over the lands of the Cherokee Nation, a sovereign nation." *Id.* at 553 (citing Worcester v. Georgia, 31 U.S. at 549 (1832)). Federal common law therefore has been made expansively, more so on other areas of law, because of the distinct nation-to-nation relationship between the United States and sovereign Tribes. This relationship is rooted in an international relations understanding.

176. Requiring specific treaty language is a textualist argument. Given the makeup of the current Supreme Court and the conservative justices' propensities for accepting textualist arguments, Indian law scholars and litigants should understand what textualism means for which Tribes can and cannot bring trust doctrine claims. Depending on relevant treaty language, some Tribes will be able to bring claims and others potentially won't. This inherently creates inequality amongst federally recognized Tribes and widens the gap even more so between federally recognized and non-federally recognized Tribes.

177. Further argued *infra*, Sections VI-VII.

V. THE COLORADO RIVER COMPACT OF 1922 AND ITS ONGOING MANAGEMENT



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Lawsuits are not the sole mechanisms by which the Nation can quantify its water rights. Compacts, settlements, and congressional and presidential actions offer solutions. But historically, these avenues have proven ineffective for providing water to the Nation. Tribes were excluded from the Colorado River Compact.[179] Tribal water settlements fell short and even federal reclamation projects authorized by Congress did not translate into usable, "wet" water for the Navajo. But the needs of the Navajo Nation and other Tribal stakeholders can be included in future Compact management.

The Colorado River Compact of 1922 ("the Compact") divided the river into the Upper Basin (Colorado, New Mexico, Utah, and Wyoming) and the Lower Basin (Arizona, California, and Nevada). The division lay at Lee Ferry,

178. *Tribal Water Rights Overview*, Navajo Nation Water Rights Comm'n, https://nnwrc.navajo-nsn.gov/Public-Education/Tribal-Water-Rights-Overview (last visited Jan. 12, 2025).

179. Colorado River Compact (1922), https://www.usbr.gov/lc/region/pao/pdfiles/crcompct.pdf (last visited Jan. 21, 2025).

Arizona.[180] Pursuant to federal law, Reclamation manages the basins' water.[181] The Compact allotted annual consumptive use of 7.5 million acre-feet ("MAF") to both basins "in perpetuity."[182] The Law of the River—the rules, regulations, laws, treaties, and other binding agreements that control the river's waters—governs the Colorado River watershed.[183] The 1963 Supreme Court decision in *Arizona v. California* further established several important elements of the Law of the River.[184]

Arizona v. California confirmed that Congress designated the Secretary of the Interior as the Water Master for the Lower Basin,[185] authorizing the federal government to deliver all water below the Hoover Dam.[186] The Water Master has "sufficient power . . . to direct, manage, and coordinate" the complex network of water uses in the entire Lower Basin. Often, the Water Master is tasked with administering a coordinated management plan that considers the various conflicting needs of the people and institutions of all Lower Basin states.[187] Importantly, Secretary Debra Haaland, a member of the Pueblo of Laguna, is the first Native woman confirmed as a cabinet secretary.[188] Under her leadership as Water Master, Tribes have reason to hope that their objections[189] will be listened to.[190]

The states failed to consult with Tribes during the creation of the Compact, and lawmakers wrote the Law of the River with erroneous hydrological predictions. Lawmakers allocated water using hydrologic data that indicated annual river flow at Lee Ferry as 16.4 MAF, but the flow fluctuates greatly, between 4.4 million to more than 22 MAF annually.[191] Today, the river and its

180. CONG. RSCH. SERV., MANAGEMENT OF THE COLORADO RIVER: WATER ALLOCATIONS, DROUGHT, AND THE FEDERAL ROLE Introduction (2024), https://crsreports.congress.gov/product/pdf/R/R45546/24 (last updated Sept. 7, 2022).

181. *Id.*

182. *Colorado River Compact*, *supra* note 80.

183. *Navajo Water Rights Overview*, NAVAJO NATION WATER RIGHTS COMM'N, https://perma.cc/J74L-23S3 (last visited Apr. 26, 2024).

184. *See, e.g.*, *California*, 373 U.S. 546 at 585-86 (granting the Secretary of the Interior the authority to apportion surpluses and shortages among Lower Basin states).

185. CONG. RSCH. SERV., MANAGEMENT, *supra* note 180, at Introduction.

186. *Id.*

187. *Supreme Court Clears the Way for the Central Arizona Project*, U.S. DEP'T OF THE INTERIOR, https://perma.cc/3TS3-TK7V (last visited Dec. 16, 2023).

188. *Secretary Deb Haaland*, U.S. DEP'T OF THE INTERIOR, https://perma.cc/366N-SWF3 (last visited Apr. 26, 2024).

189. *See* Michael Elizabeth Sakas, *Historically Left out of Colorado River negotiations, 20 tribes urge Interior Secretary Haaland to include their voices*, CPR NEWS (Nov. 25, 2021), https://perma.cc/L7RQ-KAQQ (detailing the complaints of the twenty Tribes in the Colorado Basin, all urging Secretary Haaland to include Native voices in the upcoming negotiations).

190. *See, e.g.*, Secretary Haaland's recent visit to the Grand Canyon, where she and other federal officials met with Tribal leaders to discuss the creation of the Baaj Nwaavjo I'tah Kukevi Grand Canyon National Monument. *Secretary Haaland highlights locally led conservation efforts in visit to Grand Canyon Region*, U.S. DEP'T OF THE INTERIOR, https://perma.cc/ALA4-D36Y (last updated May 22, 2023). During her visit, Secretary Haaland met with members of the Grand Canyon Tribal Coalition regarding their endeavors to safeguard the land's cultural and historic value to local Tribes. *Id.*

191. *Colorado River Compact*, *supra* note 80.

tributaries are overdrawn by over a MAF annually, despite water use reduction efforts.[192] The federal government now pays farmers, cities, and Tribes in California, Arizona, and Nevada for voluntary water cuts.[193] Secretary Haaland has called the Southwest's current drought "one of the most significant challenges facing our country."[194] While each state that is party to the Compact has specific allocations, the Compact's only reference to Indian water rights is a single sentence that "nothing in the document should be understood to affect the United States government's obligations to [T]ribal water rights."[195]

Such a bare-bones statement regarding Tribal water rights is laughably inadequate. Parties participating in the original Compact negotiations divided the water without Tribal consultation. Indeed, Indians could not even vote at the time the Compact was negotiated.[196] By the time American society acknowledged Indian voices, it was too late for them to meaningfully join the discussion. The federal government must rectify the historic and ongoing structural injustice of intentionally excluding Tribal interests and needs in the Compact.

The world that Native Nations operate in today is vastly different from when the Compact was negotiated. Although the Interior has reiterated its commitment to ensuring that all peoples in the basin receive adequate assistance and support to build resilient and sustainable communities, it is hard to imagine how Tribal interests can be considered without revising the Colorado River Compact.

A. Indian Water Rights Settlements

In its effort to fulfill the trust responsibility, the federal government prioritizes the advancing of decreed Tribal water rights through Indian water rights settlements. Since 1990, the Interior's policy regarding undetermined water rights has been to resolve such rights through negotiated settlements instead of litigation. Quantification involves "identifying the amount of water to which users hold rights within the existing systems of water allocations in various areas in the West."[197] Settlements formally document Tribal water rights on paper and facilitate the funding of water delivery infrastructure.[198] Reaching

192. Babbitt, *supra* note 79. Additionally, the Colorado River Basin has historically crossed into Mexico, but the original Compact failed to include Mexico in its original allocations. Later, the United States committed 1.5 MAF of the river's annual flow to Mexico through the Mexican Water Treaty of 1944. *See* Treaty Between the United States of America and Mexico, Signed Feb. 3, 1944, Ratified Nov. 8, 1945, Proclaimed Nov. 27, 1945. This only adds to the over-allocation problem.

193. Ella Nilsen, *Biden administration outlines plan to pay for Colorado River water cuts as crisis looms*, CNN (Oct. 12, 2022), https://perma.cc/6HZH-EUC5 (explaining how the Inflation Reduction Act's $4 billion in drought relief funds is primarily focused on encouraging water use reduction in California, Arizona, and Nevada).

194. *Id.*

195. *Colorado River Compact*, *supra* note 80.

196. It wasn't until the Snyder Act of 1924, which granted citizenship to Indians born in the United States, that Indians could partake in the Fifteenth Amendment's guarantee to right to vote. *Voting Rights for Native Americans*, LIB. OF CONG, https://perma.cc/3KCK-E6EP (last visited Apr. 26, 2024).

197. CHARLES V. STERN, CONG. RSCH. SERV., INDIAN WATER RIGHTS SETTLEMENTS 2 (2023).

198. *Id.*

settlement is critical to enshrining water rights and procuring water distribution, especially since Tribal declaration of water rights is often met with hostility from states, which commonly view Tribal water rights as a threat to existing state allocations made according to the concept of prior appropriation.[199]

The settlement negotiation process is lengthy and involves many stakeholders besides the Tribe and federal government, such as states, water districts, and private users. Congress must approve a settlement prior to implementation. Settlements are funded in various ways through discretionary funding authorizations, direct, or mandatory spending.[200] President Biden's 2021 Bipartisan Infrastructure Law provides more than $13 billion to Tribal communities and supplements the Reclamation Water Fund.[201] Of that total, $2.5 billion funds the execution of the Indian Water Rights Settlement Completion Fund, which, in turn, established the Indian Water Rights Settlement Fund within the Infrastructure Investment and Jobs Act (P.L. 117-58).[202] The process to reach a settlement carries high transaction costs for all those involved but yields potentially high welfare for both Tribes and the federal government.

While an imperfect process, settlements serve as a meeting of the minds between stakeholders to allocate water rights and resources in a tangible way. Indian water rights litigation is costly for all parties and can potentially take several decades to resolve. Further, litigation often fails to secure palpable "wet water" for Tribes.[203] Courts more often award "paper water" rights at the culmination of litigation. In other words, Tribes may be awarded a legal claim to water without the financial resources necessary to actually construct water delivery infrastructure.[204] Since Tribal public health and economic prosperity depend on acquiring wet water, reaching a settlement is a good way to reduce uncertainty surrounding water rights.

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199. Under the system of prior appropriation, the water right holder who is first in time to make "beneficial use" of the water holds senior priority status. *See* 1-11 WATERS AND WATER RIGHTS § 11.04(a) (LexisNexis 2009). Users who make "beneficial use" later have junior priority. *See id.* In accordance with the *Winters* doctrine, many Tribal water rights were impliedly reserved by the Tribe with a date corresponding to the date of the establishment of the Tribe's reservation, through treaty. *See Winters*, 207 U.S. at 576-77. This often means that Tribal water rights carry a priority date that is older, and accordingly more senior, than most water rights perfected under state law. Tribal water rights thus may be viewed, and often are viewed, as a threat to state water rights systems. *See, e.g.*, *In re the General Adjudication of All Rights to Use Water in the Big Horn River System*, 835 P.2d 273, 286 (Wyo. 1992) (Cardine, J. concurring in part) ("The reserved right looks backward for priority purposes to the establishment date of the reservation. Thus, reserved rights escape many of the limitations imposed by the prior appropriation system. Since they are in derogation of this system, by which all other appropriators must live, their scope should be carefully limited to avoid undue prejudice to those who receive their rights under state law."), cited in Taylor Graham, *Resolving Conflicts Between Tribal and State Regulatory Authority Over Water*, 112 CAL. L. REV. 101 (2024).

200. STERN, *supra* note 197, at 10.

201. *Interior Department Welcomes Significant Progress for Indian Water Rights Settlements*, U.S. DEP'T OF THE INTERIOR (Jan. 5, 2023) https://perma.cc/TSG3-KQLH.

202. *Id.*

203. STERN, *supra* note 197, at 2.

204. *Id.* at 2.

The Navajo Nation has reached settlements for water from the San Juan River in New Mexico and Utah, both of which draw from the Colorado River's Upper Basin.[205] The Northwestern New Mexico Rural Water Projects Act (Navajo-Gallup Water Supply Project / Navajo Nation Water Rights), P.L. 111-11 of 2009 resulted in 535,5330 acre-feet of water per year awarded to the Nation.[206] Then, in 2020, the Navajo-Utah Water Rights Settlement, P.L. 116-260, resulted in an additional 81,500 acre-feet annually.[207] Together, these settlements have cost the federal government nearly $1.2 billion.[208] But the Nation has yet to reach agreement with Arizona and the federal government for water rights from the Colorado River's Lower Basin.

With the size of the Navajo reservation, these settlements fail to meet the Nation's needs. In addition to the transaction costs previously discussed,[209] some Indians object to settlements' perceived certainty, arguing that settlements require Tribes to "speculate about their future water needs and then set that speculation in concrete."[210] Further, settlement negotiations often raise further inquiry over whether to allow for the "marketing, leasing, or transfer of [T]ribal water."[211] Water transfer itself raises further questions since some Indians repudiate water transfer from a religious and cultural perspective.[212] All these relevant inquiries add to the transaction costs and draw out negotiations. Given the vast economic, public health, and human rights concerns on the Navajo reservation, there ought to be a more concrete, efficient means to adjudicate Tribal water rights. The generally applicable framework proposed in Section VII is aimed at more equitably and efficiently structuring settlement decision making processes.

B. Central Arizona Project Water Reserved for Tribes

In 1968, President Johnson signed the Colorado River Basin Project Act, which authorized Reclamation to construct the Central Arizona Project (CAP). The system would provide for 1.5 MAF of Arizona's allotted water to be delivered to the most populated areas of the state and reduce the use of groundwater. A study commissioned by the CAP at Arizona State University found that Colorado River water delivered by the CAP supported Arizona's gross state product with $2 trillion in economic benefits since water deliveries

205. *Id.* at 7-8.

206. *Id.* at 7.

207. *Id.* at 8.

208. *See id.* at 7-8 (stating that the 2009 settlement in New Mexico cost $984.1 million, while the 2020 settlement in Utah cost $210.4 million, making the combined sum $1,194.5 million).

209. Including, but not limited to, congressional approval, federal funding availability, and the time and costs associated with lengthy negotiations processes.

210. DANIEL MCCOOL, NATIVE WATERS: CONTEMPORARY INDIAN WATER SETTLEMENTS AND THE SECOND TREATY ERA 81, 85 (Tucson, AZ: Univ. of Ariz. Press, 2002).

211. STERN, *supra* note 197, at 15.

212. *See* MCCOOL, *supra* note 210 (explaining the belief that water is "fundamentally attached to [T]ribal life and identity").

began.[213] The CAP's water delivery supply is vital for maintaining Arizona's economic output and employment. However, the CAP created a system of unequal water distribution for federally recognized Tribes.

Fourteen of the twenty-two federally recognized Tribes in Arizona have either fully resolved, adjudicated, or partially resolved water rights claims.[214] Several of them receive water from the CAP system.[215] The 2004 Arizona Water Settlements Act allocated 67,000 acre-feet for settlements. Of this total, 33,107 acre-feet remain to fund future settlements since the White Mountain Apache received 23,782 acre-feet, 6,411 acre-feet were reserved for the Navajo Nation, and 4,000 acre-feet were granted to the Hualapai Tribe in its pending settlement.[216] Although 6,411 acre-feet were reserved for the Navajo on paper, the Nation is among several Native Nations with currently unresolved settlement negotiations under the CAP.[217]

Without a fully resolved CAP settlement in Arizona, the Navajo Nation cannot access the CAP's critical reserved water, funding, or infrastructure support mechanisms. The reservation is also located far North of the CAP service areas, which terminate on the outskirts of Phoenix.[218] Despite the Nation's 6,411 acre-feet reserved, the CAP has not built out infrastructure to facilitate water access for the Nation. While intended to support Tribes, CAP ultimately fails to support Navajo welfare, leaving the Nation to contend with another potential dead end.

C. Ongoing Bureau of Reclamation Scoping and Future Environmental Impact Statement Development

In June of 2023, the seven states that share the Colorado River struck a deal to temporarily cut water use to avert dangerously low water levels in Lake Mead.[219] California, Arizona, and Nevada agreed to reduce water consumption, and the deal was comparatively uncomplicated to attain because some users are being compensated through the Inflation Reduction Act (IRA) in exchange for not accepting water.[220] But federal IRA funding is only set to last through

213. *See CAP Economic Impact*, CENT. ARIZ. PROJECT, https://perma.cc/VM6D-EQHR (last visited Dec. 16, 2023), (explaining that GSP is akin to gross domestic product for the United States writ large and represents the dollar value of all goods and services produced in the region).

214. *Tribal Water Rights*, CENT. ARIZ. PROJECT, https://perma.cc/2KLG-4L23 (last visited Dec. 16, 2023).

215. *Id*.

216. *Id*.

217. *Id*.

218. *See CAP Allocations*, CENT. ARIZ. PROJECT, https://perma.cc/8PHG-E6R8 (last visited Dec. 16, 2023).

219. A. Martínez & Luke Runyon, *Colorado River states are ready to work on a longer term deal to share water*, NPR (June 9, 2023) https://perma.cc/7QTP-4387.

220. *Id.*

2026.[221] Currently, Reclamation is leading a multiyear process to draft a new operating plan for the Colorado River that will regulate the river for decades.[222]

Climate change has warped the river's hydrology, leading to drier conditions. The system must be operated more sustainably in the future to distribute water amongst all basin state users, which will require a more nuanced understanding of future climatic conditions and supply and demand. This understanding is shared by Camille Calimlin Touton, Commissioner of the Bureau of Reclamation, who stated that the river's management plan "needs to be adaptable to a future with unpredictable climate conditions."[223] Moreover, there is broad consensus that the thirty Native Nations in the basin cannot be excluded from negotiations since Tribes' legal rights to water must be considered.[224]

On June 16, 2023, Reclamation published a Notice of Intent to prepare an Environmental Impact Statement (EIS) in the Federal Register, thereby initiating a sixty-day public scoping period.[225] Reclamation requested public scoping documents concerning a myriad of issues that the agency should consider in the River's post-2026 operations and management.[226] Reclamation received 24,290 scoping submittals and commented on a broad range of matters for the post-2026 process and EIS analysis.[227] Sixteen Tribes and Tribal entities, including the Navajo Nation, submitted comments.[228]

In response to Tribal requests that Reclamation better include Tribes in the decision-making process, Reclamation established the Federal-Tribes-States Group. The group's express purpose is to "promot[e] equitable information sharing and discussion among the sovereign governments in the Basin." Reclamation also offered opportunities for basin stakeholders to learn about the underlying concepts needed to participate effectively in the "development of alternatives."[229] This is a good step towards meaningful inclusion of Tribal leaders moving forward. But given the narrow information-sharing purview of the group, there is no apparent intent to rectify Navajo Nation's water apportionment to date.

Reclamation anticipates that the draft EIS will be completed by the end of 2024 and will be available for public comment.[230] Reclamation anticipates that

221. *Id.*

222. *Scoping – Colorado River Post 2026 Operations*, *supra* note 29.

223. Alex Hager, *New Colorado River rules will be hard to agree on. A new report shows just how tricky it could be*, KUNC (Oct. 19, 2023), https://perma.cc/S9LU-KGFD.

224. Martínez & Runyon, *supra* note 219.

225. *Scoping – Colorado River Post 2026 Operations*, *supra* note 29.

226. *Id.*

227. *Id.*

228. *Scoping – Summary of the Federal Register Notice Input Received*, U.S. BUREAU OF RECLAMATION, https://perma.cc/S7Z9-M2BE (last visited Dec. 16, 2023).

229. *Alternatives Development*, U.S. BUREAU OF RECLAMATION, https://www.usbr.gov/ColoradoRiverBasin/post2026/alternatives/index.html (last visited Mar. 10, 2025).

230. BUREAU OF RECLAMATION, U.S. DEP'T OF THE INTERIOR, SCOPING REPORT FOR POST-2026 COLORADO RIVER RESERVOIR OPERATIONS ES-2 (2023) https://www.usbr.gov/ColoradoRiverBasin/documents/post2026/scoping/Post2026Operations_ScopingReport_October2023_508.pdf.

a final EIS will be available in late 2025, followed by a Record of Decision in early 2026. According to Reclamation, the post-2026 process must finish prior to the development of the 2027 Annual Operating Plan for the Colorado River Reservoirs.[231] As explained in Section VII, the Navajo Nation can use upcoming administrative opportunities to achieve water security and corrective justice.

VI. MOVING AWAY FROM THE COURTS TO FIND REDRESS

Courts have failed to provide the Navajo Nation with redress. Considering water's vast public health, economic, and cultural importance explained *supra*, Section I, another institution must ensure justice and dignity prevail in Indian Country.

This Section evaluates potential actions that the federal government could take, including executive orders by the President, congressional action, and action by administrative agencies. It concludes that federal agencies, specifically Reclamation and the BIA, are the best institutions to make effective change because they hold strong agency expertise regarding Colorado River Basin disputes and Indian affairs.

A. Executive Orders

The President could issue an executive order concerning the trust doctrine. But such orders are generally not judicially enforceable. Early executive orders were issued for a wide variety of purposes, including the "withdrawal of public lands for Indian use," "for the erection of lighthouses," and "supplementing acts of Congress."[232] But until President Roosevelt approved the Federal Register Act in 1935, requiring presidential proclamations and executive orders to be published in the Federal Register,[233] executive orders were released without enumeration and were treated somewhat informally by the presidents.

Presidents have exercised power through executive orders by declaring martial law, enforcing the laws of the United States, and removing executive officers.[234] But Congress limits presidential power, so neither the president nor an agency head[235] acting at the directive of an executive order may infringe upon a statutory provision.[236] Further, case law regarding instances of government enforcement to uphold an executive order is sparse.[237]

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231. *Id.*

232. *Id.* at 44 (citing United States v. Midwest Oil Co., 236 U.S. 459, 470 (1915)).

233. *Id.* at 46 (citing 49 Stat. 501 (1953), 44 U.S.C. § 305 (1935)).

234. *Id.* at 50.

235. *Id.* (citing Wolsey v. Chapman, 101 U.S. 755 (1879)) ("[A]n act of a department head, within the field of his jurisdiction, is considered in law to be an act of the president, even though there has been no specific written delegation from the president, and even though only presidential action is authorized.").

236. *Id.* (citing Kendall v. United States, 12 Pet. 524 (1838), United States v. Guy Capps, Inc., 204 F.2d 655 (4th Cir. 1953)).

237. *Id.* at 53 (citing United States v. Pink, 315 U.S. 203 (1942); United States v. Belmont, 301 U.S. 324 (1937); and United States v. Carpenter, 113 F. Supp. 327 (E.D.N.Y. 1949), as "[s]ome cases in which the government was forced to take the initiative").

Two notable executive orders relate to EJ. In 1994, President Clinton directed federal agencies to recognize and confront the disproportionately high and adverse public health or environmental effects of agency actions on minority and low-income populations, "to the greatest extent practicable" and authorized by law, with E.O. 12898, *Federal Actions to Address Environmental Justice in Minority Populations and Low-Income Populations.*[238] E.O. 12898 also compelled agencies to develop EJ implementation strategies and to "promote nondiscrimination in federal programs that affect human health and the environment."[239] Then in April 2023, President Biden encouraged the federal government to double down on those commitments outlined in E.O. 12898 and deliver on EJ goals to communities across the country with E.O. 14096, *Revitalizing Our Nation's Commitment to Environmental Justice for All*.[240] Both executive orders exemplify the executive branch's soft power commitments to EJ. But such statements are inherently limited in implementation because they are not legally binding.

Further, both executive orders failed to spur federal action for the Navajo Nation. Water security is indisputably a public health and environmental issue, especially as climate change progresses.[241] Tribes are certainly EJ communities. They have borne a significant brunt of environmental harm since the creation of the United States. The Navajo Nation has specifically sought relief for decades, making it an ideal recipient of EJ-related support. Yet, executive orders have failed to provide redress to the Nation and there may be limits to what the President can demand in an E.O.

If President Biden were to issue an E.O. tomorrow that said the executive branch was committed to ensuring that the Navajo Nation received its portion of the Colorado River, then in theory, federal officials or administrative agencies would have to act to effectuate those directions. But executive orders can also be challenged as invalid exercises of the President's constitutional authority.[242] Furthermore, the President who issues the E.O. can revoke it, or an incumbent President can invoke the E.O. of his predecessor, making executive orders unstable.[243] But apart from the issue of enforceability, it is politically infeasible to hope that President Biden would issue such an order, especially as the upcoming elections draw this attention elsewhere. Therefore, executive orders regarding quantification of the Navajo Nation's water rights are likely neither effective nor timely methods of ensuring Navajo water rights.

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238. *Summary of Executive Order 12898 – Federal Actions to Address Environmental Justice in Minority Populations and Low-Income Populations*, EPA, https://perma.cc/39WW-QSA6 (last visited Dec. 16, 2023).

239. *Id.*

240. *Id.*

241. As explained *supra*, Section I.

242. *General FAQs on Executive Orders*, AM. BAR ASS'N (Nov. 28, 2021), https://www.americanbar.org/groups/public_education/resources/teacher_portal/educational_resources/executive_orders/.

243. *Id.*

B. Congressional Actions

Although Congress also owes moral and fiduciary duties to Native Nations under the trust doctrine, no court has ever enforced such a duty.[244] In fact, Congress has abused its plenary power under its Indian affairs duties to *undermine* Tribal rights.[245] Congress's duty is one of moral and political obligation, which is unreliable.

First, the Supreme Court has historically declined to review nefarious Congressional actions with respect to Tribes. In fact, Congress's power to regulate commerce with Tribes is not curtailed by a requirement that all legislation further the trust responsibility.[246] For example, in *Lone Wolf v. Hitchcock*, the Supreme Court held that Congress' plenary power empowered it to allot Tribal lands on the Kiowa-Comanche-Apache reservation, despite an earlier treaty requiring the Tribe's consent for any distribution of land.[247] The Court reasoned that merely because Congress had the freedom to act "urgently," it could not be required to obtain Tribal consent. Disturbingly:

> Plenary authority over the [T]ribal relations of the Indians has been exercised by Congress from the beginning, and the power has always been deemed a political one, not subject to be controlled by the judicial department of the government.[248]

The Court's apparent holding that "Indian claims challenging congressional and executive branch decisions on Indian affairs were not subject to judicial review" exemplifies the Court's "extreme deference" granted to federal Indian affairs policies in the nineteenth century.[249]

Second, Congress has historically used the trust responsibility as a "sword" to further its own political agenda rather than a "shield" to protect the interests of Native Nations.[250] Given Congress' settler colonial policy agenda in the nineteenth century, the *Lone Wolf* Court's presumption that Congress was acting

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244. William C. Canby, Jr., *The Special Relationship Between the Federal Government and the Tribes, in* AMERICAN INDIAN LAW IN A NUTSHELL 39-40 (West Pub. Co. 1981).

245. Three Supreme Court cases, commonly known as the 'plenary power trilogy,' articulated the extent of congressional and executive power over "Indian affairs . . . lands, and even . . . lives—almost always without the consent of Indian people or Indian nations." Matthew L.M. Fletcher, *A Short History of Indian Law in the Supreme Court,* AM. BAR ASS'N (Oct. 1, 2014), https://www.americanbar.org/groups/crsj/publications/human_rights_magazine_home/2014_vol_40/vol—40—no—1—tribal-sovereignty/short_history_of_indian_law/. These foundational cases, including Ex parte Crow Dog, 109 U.S. 556 (1883); United States v. Kagama, 118 U.S. 375 (1886); and Lone Wolf v. Hitchcock, 187 U.S. 553 (1903), furthered the exploitative and culturally destructive policy goals of Congress in the nineteenth century—namely, to dispossess Native peoples of their land and resources and to stifle, if not destroy, their cultures.

246. *Lone Wolf*, 187 U.S. at 564-65.

247. *Id.*

248. *Id*.

249. Matthew L.M. Fletcher, *A Short History of Indian Law in the Supreme Court,* AM. BAR ASS'N (Oct. 01, 2014), https://www.americanbar.org/groups/crsj/publications/human_rights_magazine_home/2014_vol_40/vol—40—no—1—tribal-sovereignty/short_history_of_indian_law/ (interpreting *Lone Wolf's* holding).

250. William C. Canby, Jr., *The Special Relationship Between the Federal Government and the Tribes, in* AMERICAN INDIAN LAW IN A NUTSHELL 43 (West Pub. Co. 1981).

in good faith is optimistic, if not misguided. The 1887 General Allotment Act led to a huge loss of Native land by encouraging non-Native landowners to enter and hold title to land originally set aside for Indian reservations. Under the Act, the United States surveyed reservations and divided them into individualized parcels of land. Some parcels were assigned to individual Indians before "surplus" lands were sold to non-Native settlers. The General Allotment Act therefore resulted in a "checkerboarding" of reservation land, another example of Congress wielding its power to hurt Tribes rather than to protect Tribal sovereignty.[251]

Finally, it is infeasible to believe that Congress will pass effective legislation anytime soon. Congress has the power to pass a statute mandating that all federally recognized Tribes be granted the water they are owed under *Winters*. But passing such a statute is unlikely due to political opposition. Although members of Congress are federal actors, representatives are ultimately beholden to the wishes of their constituents, and state water interests ultimately conflict with Native water rights. Especially under the appropriative rights scheme in the West, the senior rights-holding status of Tribes inherently threatens current statewide water allocations. Perhaps recently elected Native American, Alaska Native, and Native Hawaiian representatives in the House will give Native communities more of a voice directly on the House floor.[252] But ultimately, the Navajo Nation has spoken out regarding its water insecurity for decades, and Congress has looked the other way.[253] Further, given the vast variety of concerns Congress faces daily and the sluggish pace with which Congress acts, even if Congress does act, it will move slowly.

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251. *See* John P. Lavelle, *Chapter 16: Beating a Path of Retreat from Treaty Rights and Tribal Sovereignty: The Story of Montana v. United States*, in INDIAN LAW STORIES 539 (Carole E. Goldberg, Kevin K. Washburn & Phillip P. Frickey eds., 2011), cited in Taylor Graham, *Resolving Conflicts Between Tribal and State Regulatory Authority Over Water*, 112 CAL. L. REV. 101 (2024) (describing the Act as "a revolutionary federal policy geared at breaking up reservations into a multitude of separate Indian-owned parcels (or allotments) and permitting white settlers to purchase the remaining so-called 'surplus' lands").

252. *See* Jaclyn Diaz, *U.S. Congress reaches a milestone in Indigenous representation*, NPR (Sept. 20, 2022), https://perma.cc/PNB3-CDJA (detailing Representative Mary Peltola's September 2022 win in the House, confirming her as the first Alaska Native and woman elected to the House for Alaska. At the time, Rep. Peltola was one of six Indians serving as representatives in the House).

253. *See, e.g.*, Lux Butler, *Senators urged to step up after Supreme Court ruling on Navajo water rights*, CRONKITE NEWS (Sept. 27, 2023), https://perma.cc/AF5U-XPNU. In September of 2023, Navajo Nation Council Speaker Crystalyne Curley testified before the Senate Indian Affairs Committee that lack of water access is first and foremost a human rights issue and that *Arizona v. Navajo Nation* was about understanding what water the government has been holding in trust for the Navajo. In the same hearing, Heather Tanana, testifying for the NGO, Universal Access to Clean Water for Tribal Communities Project, noted that the Navajo were not asking for an expansion of their rights, but simply quantification. *Id.* The fact that these women had to repeat such a watered-down version of the obligations under the trust doctrine exemplifies Congress's failure to respond to the crisis.

C. Administrative Agencies

Administrative agencies are the best institutional actors to provide recourse that upholds the trust responsibility. Plus, the Supreme Court has demonstrated a willingness to hold federal agencies accountable for breaches of the trust relationship. For example, in *United States v. Mitchell* (*Mitchell II*), members of the Quinault Nation sued the United States for damages for mismanagement of forest resources.[254] The Supreme Court held that a trust duty arose from statutes and regulations that expressly authorized or directed the Secretary of the Interior to manage forests on Indian lands.[255] Then, in *United States v. White Mountain Apache Tribe*, it held the United States was subject to a fiduciary duty to maintain and preserve Fort Apache, since the Interior held the fort in trust "for the benefit of the Tribe" on whose reservation it was located.[256]

Mitchell II and *White Mountain Apache Tribe* establish precedent for instances where the Supreme Court has held the Interior accountable for breaches of the trust responsibility. However, one must also note that these cases are distinct from the present Navajo context. The federal timber management statutes and regulations upon which the *Mitchell II* respondents based their money claims explicitly gave the United States full trustee responsibility.[257] The Court found that through a regulatory scheme that "addressed virtually every aspect of forest management," the federal government assumed "full responsibility" to "manage Indian resources and land" for the benefit of the Quinault Nation.[258] Therefore, Interior's fiduciary obligations "mandat[ed] compensation . . . for damages sustained."[259] But the Navajo Nation lacks specific treaty, statutory, or regulatory language regarding water that it could reference in an analogous damages claim.

Similarly, in *White Mountain Apache*, the Act stating that the government held the Fort for the benefit of the Tribe went beyond a "bare trust" since it expressly defined a fiduciary relationship.[260] Thereafter, the United States took advantage of its authority to utilize the Fort and occupied or made use of it daily. The fact that the property occupied by the government was "expressly subject to a trust" supported the inference that "an obligation to preserve the property improvements was incumbent on the [g]overnment as trustee."[261] *White Mountain Apache* is perhaps the most axiomatic example of a trustee (the Interior) holding something (the Fort) in possession for a beneficiary (the Tribe). Unfortunately, the Navajo Nation has no comparable water delivery infrastructure that the Interior holds expressly in trust for the benefit of the Nation.

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254. *Mitchell II*, 463 U.S. at 207.
255. *Id.* at 225-28.
256. 537 U.S. 465, 484 (2003).
257. *Mitchell II*, 463 U.S. at 224.
258. *Id.* at 220, 224.
259. *Id.* at 226.
260. 537 U.S. at 465.
261. *Id.* at 467.

But aside from special instances, the courts are overall most likely to uphold the trust responsibility in cases involving administrative agencies. In being held accountable by the judicial branch, the executive branch necessarily constrains its own discretion. But agencies already limit their discretion through the passing of regulations. If anything, this demonstrates how much more trust we should have in federal agencies to carry out what is morally right and legally owed. Federal agencies are therefore the most appropriate institutions to provide redress to the Navajo Nation.

Trusting federal agencies involves moving away from judicial solutions, which carries inherent risk. Federal agencies are creatures of statute, without the power to make federal common law. This means that agencies do not typically act pursuant to common law doctrines since their authority is derived from statutes. Agencies enforce rules and regulations they promulgate by conducting investigations to monitor compliance. Some agencies can pursue formal legal action for alleged violations of the rules, regulations, or statutes.[262] But agencies cannot typically pursue matters that are outside the statute's scope in an administrative proceeding, nor can they impose new procedures or penalties that statutes do not provide for. The separation of powers between the agencies and courts means that Reclamation and the BIA are somewhat limited in their ability to enforce the trust doctrine through rules or regulations.[263] But Reclamation, the BIA, and Interior, in general, could and should use their statutory authority to act in alignment with the trust doctrine's requirements.

Reclamation's mission, "to manage, develop, and protect water and related resources in an environmentally and economically sound manner in the interest of the American public,"[264] accords with the trust doctrine. Reclamation can understand the trust doctrine as a tool to achieve its goal of serving the interests of the American people, including Indians. Reclamation also seeks to "embrace a culture of respect for people through [its] own ethical behavior."[265] To act ethically in the face of historically disastrous treatment of Native peoples in the

262. For example, EPA has the authority to file enforcement actions against violators of many federal statutes, including Clean Water Act § 303(d) and Clean Air Act § 209.

263. The Bureau of Reclamation derives its power from the Reclamation Act of 1902, which halted speculation of land and authorized the government to construct irrigation infrastructure to develop arid land in the western United States. Then in 1982, the Reclamation Reform Act increased the land ownership allocation for most landowners and began charging full-cost pricing for use of Reclamation irrigation water. *See generally* Reclamation Reform Act of 1982, Pub. L. No. 97-293, 96 Stat. 1261. Other regulations concerning acreage limitation rules and regulations may be found at 43 C.F.R. §§ 426-28. *See generally About Us – Mission*, U.S. BUREAU OF RECLAMATION, https://perma.cc/UVZ6-RBA7 (last visited Dec. 16, 2023). Additionally, Article 1, Section 8 of the U.S. Constitution articulates Congress' powers over Indian affairs, "to regulate commerce with foreign nations, and among the several States, and with Indian tribes." The BIA was established in 1824 by then-Secretary of war John C. Calhoun in order to oversee and carry out the federal government's trade and treaty relationships with Tribes. The BIA was given statutory authority by the act of July 9, 1832 (4 Stat. 564, Chap. 174). Then in 1848, the BIA was transferred to the new Department of the Interior. *See generally Mission Statement*, U.S. DEP'T OF THE INTERIOR: INDIAN AFFAIRS, https://perma.cc/7VBV-ZF29 (last visited Dec. 16, 2023).

264. *About Us – Mission*, U.S. BUREAU OF RECLAMATION, https://perma.cc/UVZ6-RBA7 (last visited Dec. 16, 2023).

265. *Id.*

United States would be to fully embrace the trust doctrine and uphold its legality through agency action.

Similarly, the BIA's mission is to "enhance the quality of life, to promote economic opportunity, and to carry out the responsibility to protect and improve the trust assets of American Indians, Indian tribes and Alaska Natives."[266] As the principal federal agency acting on behalf of Native peoples, the BIA is indisputably charged with protecting the trust doctrine. The BIA even has an office dedicated to this role. The Office of Trust Services assists Tribal governments and allottees in "managing, protecting, and developing . . . trust lands and natural resources," as well as furthering the "stewardship of [Indian] cultural, spiritual, and traditional resources."[267]

Interior's overarching mission is to "conserve[] and manage[] the Nation's natural resources and cultural heritage for the benefit and enjoyment of the American people" and to "honor[] the Nation's trust responsibilities or special commitments to American Indians, Alaska Natives, and affiliated island communities to help them prosper." Its mission statement explicitly names and reaffirms the trust responsibility, demonstrating the respect afforded to the trust doctrine.

Moreover, agencies have broad discretion under their governing statutes. Although parties can challenge the validity of agency discretion or the circumstances in which agencies employ their discretion, the legislative and judicial branches often defer to executive power and relative subject matter expertise within federal agencies.[268] Administrative law's broad deference to agencies could change as the major questions doctrine evolves.[269] Although how the major questions doctrine might shape how agencies implement the trust responsibility is outside the scope of this Note, there is reason to believe that these agencies can act within the bounds of the still-developing doctrine.

In *West Virginia v. EPA*, the Court relied on the major questions doctrine, which provides that in certain "extraordinary" cases, administrative agencies must have "clear congressional authorization" to make decisions of "vast economic and political significance."[270] The Court did not provide a specific test for what constitutes an extraordinary case. But it discussed factors to look for, such as whether an agency relies on ambiguous statutory text to claim a significant expansion of power and whether the agency lacks subject matter

266. *Mission Statement*, U.S. DEP'T OF THE INTERIOR: INDIAN AFFAIRS, https://perma.cc/7VBV-ZF29 (last visited Dec. 16, 2023).

267. Office of Trust Services, U.S. DEP'T OF THE INTERIOR: INDIAN AFFAIRS, https://perma.cc/4V5M-HGV (last visited Dec. 16, 2023).

268. Skidmore v. Swift & Co., 323 US 134, 140 (1944) (explaining that courts should determine the amount of deference to give an agency depending on "the thoroughness evident in its consideration, the validity of its reasoning, its consistency with earlier and later pronouncements, and all those factors which give it power to persuade, if lacking power to control").

269. *See generally* Loper Bright Enterprises v. Raimondo, 603 U.S. 369 (2024).

270. *See* THE MAJOR QUESTIONS DOCTRINE, CONG. RSCH. SERV. (2022), (last updated Nov. 2, 2022).

expertise.[271] This broad doctrine needs further clarification. But it surely increases the scope of challenges that could be brought against an agency.

The states that rely on the Colorado River will likely argue that any agency action allocating water to the Navajo Nation will have "vast economic and political significance" since that water allocation will necessarily divert water away from their state. However, there is reason to believe that any agency action in this context is both less economically significant than that in *West Virginia* and more explicitly authorized by existing statutory authority and Supreme Court precedent.[272]

VII. ARTICULATING A MODERN FEDERAL RESPONSIBILITY DOCTRINE USING AN ENVIRONMENTAL JUSTICE LENS

Inherent Tribal sovereignty is a core guiding principle within federal Indian law.[273] The U.S. federal government historically recognized pre-constitutional Tribal sovereignty.[274] Nevertheless, Tribes do not have absolute authority within the jurisdiction of their territories; rather, Tribes are "subject to the overarching authority and jurisdiction of the federal government."[275] This Section asserts

271. *See* West Virginia v. EPA 597 U.S. 697, 723-34 (2022).

272. Any Interior action including the Navajo Nation in the development of long-term Colorado River management guidelines is dissimilar from the circumstances in *West Virginia*. That case challenged EPA authority on the dramatic expansion of renewable energy, which the Court characterized as a major departure from the way America's economy is run. But here, there would be no dramatic change. In fact, there is sufficient legislative authority from *Winters* that is over 100 years old backing up the case's holding, that when Congress reserves land for a reservation, it also reserves water sufficient to fulfill the purposes of the reservation. 207 U.S. at 576-57. Therefore, the Interior should include the Nation in discussions that will implicate its water rights. Quantifying the Nation's water rights would require resources from the Interior, but the national economy would not be drastically remade, as it purportedly would have been had EPA triumphed in *West Virginia*. Just over 140,000 people live on the Navajo reservation. *Navajo Nation*, CENSUS REPORTER, https://censusreporter.org/profiles/25200US2430R-navajo-nation-reservation/ (last visited Sept. 28, 2024). A quantification of rights to the Colorado River, and the water diversions thereafter, would improve the lives of all those people. Quantification and meaningful inclusion of Native voices in the post-2026 management will also bolster the region's economy. While the seven states that are party to the Compact will likely argue that diverting water to the Navajo will necessarily reduce water allocated to the states, changing who has access to water in Navajo country will not remake the economy of the entire nation. Finally, in *West Virginia*, the Court found that EPA attempted to regulate against the coal industry, something that only Congress could decide. Similarly, here, the states could argue that the Interior is taking an action that only Congress can authorize. But at its core, the Compact is a simple contract between states. Unlike a regulation, the states included in the Compact can negotiate and reach an agreeable set of terms. This situation differs from the Court's view of EPA's renewable Clean Power Plan that was struck down in *West Virginia*. Instead, the Interior will simply uphold its trust responsibility, which has been enshrined in federal common law for over a hundred years.

273. *See* Matthew L.M. Fletcher, *A Short History of Indian Law in the Supreme Court*, AM. BAR ASS'N (Oct. 1, 2014), https://www.americanbar.org/groups/crsj/publications/human_rights_magazine_home/2014_vol_40/vol—40—no—1—tribal-sovereignty/short_history_of_indian_law/ (noting that "Indian [N]ations retain inherent sovereign powers, subject to divestiture only be agreement or by Congress").

274. As fully explained *supra*, Section IV.

275. Judith Royster, *The Legacy of Allotment*, 27 ARIZ. ST. L.J. 1, 2 (1995) (citing Nell Jessup Newton, *Federal Power Over Indians: Its Sources, Scope, and Limitations*, 132 U. PA. L. REV. 195

how the trust relationship is broken and proposes an environmental justice lens that could be used to repair it. Administrative agencies should apply an environmental justice-plus framework when making decisions that impact Tribes.

A. The Broken Trust Doctrine

Tribes are pre-constitutional, "distinct, independent political communities."[276] Therefore, certain rights are accorded to federally-recognized Native Nations out of an understanding that such Tribes signed treaties reserving rights to self-governance, among other conditions. In 1924, the government granted citizenship to all Indians born in the United States, subjecting them to its laws, authorities, and rights. But Tribal members also have dual citizenship to their respective Nations. Out of respect for Native sovereignty, Indians enjoy certain "usufructuary rights," like hunting, fishing, and gathering rights, that are property rights.[277] Such resource rights, together with Tribal sovereignty, self-determination, and self-governance, are core principles of Indian cultural and economic autonomy.

Despite Tribal sovereignty, the trust doctrine assigns the U.S. federal government as the trustee in a relationship with Indians, who are beneficiaries. As discussed in Section III, this trust doctrine has historically been used to marginalize the independence and dignity of Tribes. The Supreme Court has described Tribes as "wards of the nation . . . *dependent* on the United States," who "from their very weakness and helplessness . . . there arises the duty of protection."[278] This is a culturally racist premise from which courts have historically understood the obligations of the federal government, necessitating a modern reframing of the doctrine.

Federal land control is the legacy of an outdated, racist presumption that Indians are incapable of managing their own lands. Justice demands that a modern perspective govern new policies because an originalist conception of the trust doctrine can be wielded problematically. Established in 1824, the Bureau of Indian Affairs is responsible for the administration and management of 68.5 million surface acres and 57 million acres of subsurface minerals estates held in trust by the United States for Indian Tribes and Alaska Natives.[279] Just over 94 percent of all BIA-recognized land is held in trust.[280] Despite this huge

(1984)); s*ee also* Oliphant v. Suquamish Indian Tribe, 435 U.S. 191 (1978) (holding that Tribes have been implicitly divested of authority to prosecute crimes committed by non-Indians within their territories).

276. *See* Worcester v. Georgia, 31 U.S. 515, 519 (1832).

277. The 'usufruct' concept is a temporary right to use and enjoy the property of another, without changing the character of that property, under Roman-based legal systems. The term never made it into English common law, although certain general similarities can be found in the common law concept of estate. *Usufruct*, BRITANNICA, https://perma.cc/T7U6-9MFR (last visited Dec. 16, 2023).

278. United States v. Kagama, 118 U.S. 375, 384-85 (1886).

279. *BIA Land Area Totals for US Native Lands*, NATIVE LAND INFO. SYS., https://perma.cc/9V8W-99E5 (last visited Dec. 16, 2023).

280. *Id.*

responsibility, there is little transparency or accountability regarding the BIA's execution of its trustee responsibilities.[281] Lack of Tribal autonomy over land and resources within the land means that Tribes can have little, if any, control over managerial decisions. This risks their lands' long-term sustainability and economic viability. Homeownership, natural resource management, and business development on Indian lands are thus "severely hinder[ed]" by government oversight.[282]

Differing understandings of the trust doctrine make it difficult to determine the exact moral and fiduciary obligations of the federal government. The U.S. Constitution contains no explicit description of a fiduciary relationship to Indians, but it does articulate the congressional power to regulate commerce with the Indian Tribes in Art. I, § 8, cl. 3, the presidential power to make treaties in Art. II, § 2, cl. 2, and the congressional power to make regulations governing the territory belonging to the United States, Art. IV, § 3, cl. 2.[283] The court interprets these powers to authorize the federal government's role as a trustee.[284]

In the broadest sense, the relationship includes "legal duties, moral obligations, understandings and expectancies" ensuing from the complicated relationship between Tribes and the federal government.[285] In the narrowest sense, the relationship "approximates that of a trustee and beneficiary," with the trustee subject in some ambiguous degree to legally enforceable responsibilities.[286] As explained *supra*, Section VI, the degree to which courts

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281. *Id.*

282. *Issues*, INDIAN LAND TENURE FOUND., https://perma.cc/H3Q5-Z3JT (last visited Dec. 16, 2023).

283. William C. Canby, Jr., *The Special Relationship Between the Federal Government and the Tribes, in* AMERICAN INDIAN LAW IN A NUTSHELL 40-41 (West Pub. Co. 1981).

284. *Id.* at 41.

285. *Id.* at 39.

286. *Id*. In light of differing understandings of the trust relationship, lessons from private fiduciary law can provide useful insight. For example, singer and pop culture icon Britney Spears' conservatorship dispute highlighted how trustees can improperly manage the finances, business decisions, and personal affairs of those the conservatorships are meant to protect. A conservatorship relationship is where a conservator is appointed by a court to manage a person's affairs who is "unable to handle them due to their mental capacity, age, or physical disability." *Conservatorship*, LEGAL INFO. INST., https://perma.cc/GN8E-BY59 (last visited Dec. 16, 2023). Spear's arrangement authorized her father to control her estate and her financial affairs, as well as her person. The conservatorship barred Spears from making and exercising a variety of intimate life choices, including who to date and how to decorate her home. Liz Day, Samantha Stark, and Joe Coscarelli, *Britney Spears Quietly Pushed for Years to End Her Conservatorship*, N.Y. TIMES (published June 22, 2021, updated Nov. 2, 2021), https://perma.cc/2JCZ-VKY8 (last visited Apr. 28, 2024). In 2019, Spears told the court that she had felt "forced by the conservatorship into a stay at a mental health facility" and "to perform against her will." *Id.* Spears' attorney cited her father's "potential self-dealing" in connection with Spears' estate assets as reasons for the conservatorship's prompt termination. Joe Coscarelli, *Britney Spears: End Conservatorship, But Remove My Father First*, N.Y. TIMES, (published Sept. 22, 2021, updated Nov. 12, 2021), https://perma.cc/HRY4-PNTH (last visited Apr. 28, 2024). Then in 2021, Judge Penny terminated the conservatorship. *Id.* While there are key differences between a private conservatorship and the Indian trust doctrine, the underlying premise is similar. Under both a private conservatorship and the trust doctrine relationship, the conservatee and beneficiary are considered incapacitated and unable to handle their own financial or daily life responsibilities. Just as Spears' court found that the father failed to advocate and act in accordance with Britney's best interest, the Supreme Court failed to advocate on behalf of the Navajo

are willing to enforce the trust responsibility in part depends upon the branch of government involved.

B. Adopting an Environmental Justice Lens to Reframe the Trust Doctrine

Due to either express intention or methodical disregard, communities of color and economically impoverished communities have historically borne the brunt of the worst environmental harms in this nation. The EJ movement gained traction with the Civil Rights Movement of the 1960s out of the recognition that systemic racism and colonialism fostered the systemic inequalities that persist today.[287] EPA defines EJ as "the fair treatment and meaningful involvement of all people regardless of race, color, national origin, or income, with respect to the development, implementation, and enforcement of environmental laws, regulations, and policies."[288] EPA says that EJ will be "achieved" when everyone enjoys "the same degree of protection from environmental and health hazards" and "[e]qual access to the decision-making process to have a healthy environment in which to live, learn, and work."[289]

Past U.S. policies and actions, particularly Native land dispossession and forced migration, have burdened Tribes more with environmental harms than other groups of people. According to researchers from Yale University, Colorado State University, and the University of Michigan, Native Nations have lost 98.9 percent of historical land since European settlers began colonizing the continent.[290] Further, 42.1 percent of Tribes have no federal- or state-recognized present-day Tribal land base, and many Tribes were forced onto new lands shared by multiple Nations despite cultural differences or historic rivalries.[291] The

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Nation and provide the Tribe with water quantification, which would be in its best interest. The court ultimately found that Spears' conservatorship was no longer needed, thereby releasing her of its control. But the Supreme Court's decision does not uproot the entire trust relationship between the federal government and the Navajo Nation; it merely shows how broken the trust is.

287. *Environmental Justice*, EPA, https://perma.cc/JPR8-BEKW (last visited Dec. 16, 2023) (citing the Memphis Sanitation Strike of 1968, which advocated for fair pay and better working conditions for Memphis garbage workers; investigated by Rev. Dr. Martin Luther King, Jr., this was the first time Black Americans mobilized a national, broad-based group to oppose environmental injustices).

288. *Id.*

289. *Id.*

290. JUSTIN FARRELL ET AL., *Effects of Land Dispossession and Forced Migration on Indigenous Peoples in North America*, 374 SCIENCE 578, 578 (2021) DOI: 10.1126/science.abe34943.

291. *Id.*; *see also, e.g.*, the history of the Modoc Nation, the Nation of my ancestors. The Treaty of Council Grove, signed in October of 1864, terminated the rights of the Modoc, Klamath, and Yahooskin Band of Snake Indians and established a joint reservation in Oregon. In exchange for peace, the Modocs agreed to cede their lands to the United States government and live alongside the Klamath, their traditional enemy. But the combination of conflict amongst the Modocs and Klamaths and failure to receive adequate provisions they had agreed to receive in the Treaty led a band of Modocs to leave the reservation. Captain Jack's band returned to homelands in the Lost River area of Northern California and requested a separate Modoc reservation. But the federal government refused. Instead, the Commissioner's Office of Indian Affairs directed a military order to return the "defiant Modoc" to the shared reservation in Oregon, "peacefully if you can, forcibly if you must." The Battle of Lost River started the Modoc War, much of which was fought on the rocky terrain of what is now the Lava Beds National Monument at Tulelake, CA. During the nearly eight-month Modoc War, Captain Jack's band of no more than sixty men fought over a thousand U.S. soldiers. The Modoc lost only six men by direct combat while the U.S. Army suffered forty-

study's migration analysis indicates that present-day reservations are generally far from historical homelands, averaging a distance of 150 miles.[292] Further, from 1944 to 1986, nearly thirty million tons of uranium ore were extracted from Navajo lands under leases with the Nation; EPA is still cleaning up the abandoned mines.[293] For the foregoing reasons and many more, the Navajo Nation, as well as many other Tribes, are indisputably EJ communities.

The thirty federally recognized Tribes in the Colorado River basin are some of the western United States' oldest water users, many of whom operate in the Lower Basin. Yet, these Nations have historically been excluded from high-level policy discussions regarding water management amongst the various stakeholders. Today, the federal government can create a more equitable and sustainable management system for the Colorado River that will use EJ principles to provide content to the trust doctrine. As part of the post-2026 scoping process and beyond, Interior must engage with Tribes more meaningfully than it has in the past. One option is to treat Tribes akin to states. Treating Tribes akin to states will achieve *equality*—rather than formal *equity*—since Interior would give the same resources and opportunities for engagement to all relevant stakeholders in the basin.

Treating Tribes as states would not achieve full equity since many Native Nations lack the administrative capacity that states have. Many Native Nations also lack the economic resources, sheer labor force, and technical expertise that state governments have. Assuming that providing the same procedural opportunities for all stakeholders in the basin will lead to the same outcomes is equity-blind optimism. Additionally, Tribes must catch up to the level of engagement that states have enjoyed in the Compact for decades. Interior should consider ways to account for lost time by accelerating Tribal consultation methods.

Interior could draw inspiration from successful Tribal co-management schemes to facilitate meaningful Navajo Nation participation. For example, the Columbia River Inter-Tribal Fish Commission (CRITFC) is widely viewed as a success in building Tribal capacity to participate effectively in the management

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five casualties, including General E.R.S. Canby, the sole U.S. General to lose his life in an Indian War. The war cost the federal government half a million dollars; today, that would be roughly $8,500,000. Had the federal government created the separate Modoc reservation, it would have cost only $10,000, or $180,000 in present currency. The war ended on June 1, 1873, when Captain Jack and five other warriors, Schonchin John, Black Jim, Boston Charley, Barncho, and Slolux, became the only Indians in American history to be tried by a Military Commission for war crimes. Captain Jack, Schonchin John, Black Jim, and Boston Charley were hanged. Barncho and Slolux were imprisoned for life at Alcatraz Island. 155 Modoc were then forcibly transported by train in cattle cars about 2,000 miles from Fort Klamath, Oregon to Oklahoma. 153 survived the journey. *See generally History*, MODOC NATION, https://perma.cc/EDR5-TLL4 (last visited Dec. 16, 2023).

292. Justin Farrell et al., *Effects of Land Dispossession and Forced Migration on Indigenous Peoples in North America*, 374 SCIENCE (2021), DOI: 10.1126/science.abe34943.

293. *Navajo Nation: Cleaning Up Abandoned Uranium Mines*, EPA, https://perma.cc/KNC7-5ZX4 (last visited Dec. 16, 2023).

of the Columbia River.[294] Salmon is of the utmost historic, cultural, and environmental significance to the Tribes along the Columbia River.[295] Salmon is one of the "First Foods" "honored" in Tribal ceremonies.[296] Salmon also supports the health of Pacific Northwest ecosystems, a fact acknowledged in Native tradition and backed by science today.[297] The CRITFC therefore combines Indigenous and western ideologies to effectively manage the Columbia River. Interior should study the CRITFC model and apply what lessons it learns to the Colorado River's management.

Finally, it is also worth considering whether, as trustee, the Interior should provide special funding for Tribes to participate in Compact processes. One in four Indians endure poverty, with a median income of approximately two-thirds that of non-Hispanic whites.[298] Indian communities continue to face structural barriers to achieving economic security, largely due to the legacy of land dispossession, removal, forced assimilation, violent oppression, and unkept trust obligations. Chairman Don Beyer of the Joint Economic Committee in the Senate describes how such disparities "contribute to intergenerational poverty and deprivation."[299] Plus, Native Nations have less funding to finance competing public health, economic, cultural, and educational priorities. Interior can support Tribal prosperity by listening and appropriately responding to the Tribes that have identified water scarcity as a top priority, such as the Navajo.

Justice Kavanaugh's finding of no judicially enforceable obligation owed to the Navajo Nation should not leave agencies to believe there is no responsibility at all. The key underlying message is that the courts are unlikely to provide the much-needed remedy, which is a more robust trust responsibility. But failure of the courts does not keep federal agencies from providing just and expedited recourse. In this way, the executive branch both can and should articulate a more robust trust doctrine, which includes both procedural and substantive measures. Given the timing of the post-2026 scoping process, the time is ripe.

C. An "EJ-Plus" Administrative Solution

An EJ-informed policy approach should be a baseline from which trust doctrine obligations can be fulfilled. But the specific needs of individual Native communities, characterized as 'plus factors,' are also entitled to greater action

294. *See generally The Columbia Estuary*, COLUMBIA RIVER INTER-TRIBAL FISH COMM'N, https://perma.cc/7MD2-8ZTF (last visited Dec. 15, 2023).

295. *Tribal Salmon Culture*, COLUMBIA RIVER INTER-TRIBAL FISH COMM'N, https://perma.cc/JPZ6-T63P (last visited Dec. 15, 2023).

296. *Id*.

297. *Id*.

298. Adam Crepelle, *Federal Policies Trap Tribes in Poverty*, AM. BAR ASS'N (Jan. 6, 2023), https://www.americanbar.org/groups/crsj/publications/human_rights_magazine_home/wealth-disparities-in-civil-rights/federal-policies-trap-tribes-in-poverty/.

299. Chairman Don Beyer, *Native American Communities Continue to Face Barriers to Opportunity that Stifle Economic Mobility*, JOINT ECON. COMM. DEMOCRATS, https://perma.cc/4L9A-5QPX (last visited Apr. 26, 2024).

because of the trust responsibility. Such plus factors could include (at a baseline) cultural claims, religious claims, and Native legal concepts that work to support those claims. The framework as articulated in this Note is intentionally broad to account for changing priorities over time and circumstance. This is because of the dynamic nature of federal-Tribal relations and evolving Tribal concerns. Importantly, the EJ-informed trust doctrine advocated for in this Note does not water down the nation-to-nation relationship or reconceptualize the entire trust responsibility; rather, the proposed framework adds more content to the existing doctrine.

The water crisis on Navajo Nation should be understood not only as an EJ issue, but also as a situation in which the federal government must act above and beyond to fulfill its trust obligations. By considering plus factors that are unique to specific EJ communities, Reclamation and the BIA can better employ an EJ lens to argue for and implement projects that will achieve restorative justice. For example, cultural claims have historically been excluded from EJ issues. These vital practices, such as the Navajo wedding ceremony involving water, described *supra*, Section I, ought to be respected and protected. The federal government can also begin repairing the trust responsibility by investing resources in understanding Indigenous connections between ecological sanctity and the law. Such connections can then inform future Tribal consultation. Traditional Navajo law regarding balance and harmony,[300] as well as traditional Navajo sustainability concepts, could be additional plus factors that should be respected and upheld under the scope of future U.S. federal administrative actions. Perhaps one day, such co-mingling of the Anglo-American and Native legal systems could even be analyzed together to bolster Tribal consultation in environmental scoping.

Moreover, as explained *supra*, Section I, water is central to the Navajo creation story and present-day religious ceremony and tradition. Water is vital to the Nation not only from a human rights, public health, and economic perspective, but also from a cultural and religious perspective. Therefore, another plus factor could be the importance of water in religion and oral tradition.

Developing long-term guidelines for the Colorado River should be approached through the EJ-plus lens. The ongoing management and future negotiations within the Compact should include procedurally and substantively equitable ways for the Navajo Nation and other Tribes to contribute and negotiate.

Reclamation's scoping document and the creation of the Federal-Tribes-States Group, with the goal of "promoting equitable information sharing and discussion among the sovereign governments in the Basin,"[301] is procedurally a good start. The public comment period following the release of the completed

300. *See generally* Diné Hataalii Amicus Brief, *supra* note 91 (explaining how Navajo law incorporates cultural beliefs regarding balance and disharmony).

301. SCOPING REPORT FOR POST-2026 COLORADO RIVER RESERVOIR OPERATIONS, *supra* note 230, at ES-1.

draft EIS, anticipated by the end of 2024, is another successful procedural mechanism. The EIS will likely discuss where water will be taken. Then, future determinations will be made regarding which stakeholders are granted how much water. Indeed, Reclamation anticipates "several opportunities for government-to-government consultations with Tribal entities having entitlements to or contracts for Colorado River water, and with those that may be affected by or have interests in the proposed federal action."[302] Recognition of stakeholders other than Tribes with decreed water rights is a good starting point.

But Interior still misses a substantive EJ-plus analysis that is important to articulate. The U.S. is legally and morally obligated to recognize and fulfill trust responsibilities to the Navajo. The Supreme Court has failed to provide redress. Given the judiciary's failure, the myriad plus factors identified under the EJ-plus lens and the ongoing harm to the Navajo people resulting from water scarcity, the Interior should quantify the Nation's water rights.

Importantly, Tribes are governmental and political entities, not racial groups. This has been the keystone federal Indian law principle embedded in American jurisprudence for centuries. Over a century of legal developments regarding the status of Tribes preceded the Supreme Court's 1977 decision in *Morton v. Mancari*, which explicitly recognized the political classification principle.[303] As explained *supra*, Tribal members are dual citizens of the United States and of their federally recognized Tribe. The suggested EJ-plus framework is therefore a race-blind proposal that should withstand constitutional challenges.[304]

This Note uses the development of long-term guidelines for managing the Colorado River as an example of a set of decisions that should be approached through the EJ-plus lens. This necessarily requires the executive branch and Congress to work together. Congress holds infrastructure funding, and federal agencies can provide and implement the EJ-plus framework. Perhaps then,

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302. *Id.* at 4.

303. Chief Justice John Marshall was the first American judge to articulate the existence of a "unique legal relationship" between the federal government and Indian Tribes, as established through treaties. *Letter from Andrew Huff to Robert T. Coulter*, INDIAN L. RES. CTR., at 2 (May 3, 2018), https://perma.cc/7FSZ-RRH7. Marshall's reliance on the Indian Commerce Clause also distinguished Tribes from foreign nations, denominating them as "domestic dependent nations," in *Cherokee Nation v. Georgia*, explained more fully *supra*. *Id*. Marshall's formulation of the special relationship supported the duty to safeguard Tribal self-determination. *Id*. But from the late 1800s to 1934, the federal government used its "plenary power" to pursue policies aimed at the destruction of Tribes as distinct political entities (e.g., in 1887, Congress passed the General Allotment Act, which resulted in catastrophic loss of Indian lands, and during this time the federal government also managed Tribes and their Reservations with bureaucratic paternalism). *Id*. at 3. It was not until 1934, with Congress' passing of the Indian Reorganization Act, in which the principal of Indian self-determination positively rerouted. *Id*. at 3-4. Then, "the policy of support for Indian self-government found legal support in Felix Cohen's seminal *Handbook of Federal Indian Law*, published in 1942." *Id*. Cohen, like Marshall, "grounded the federal legal relationship with [T]ribes primarily in the treaty-making power of Congress and the Executive." *Id*. at 4. Thirty years later, *Morton* "anchored the federal-tribal relationship in the Constitution and imbued it with Marshall's concept of a "duty of protection" shielding Tribal self-government. *Id*. at 7.

304. As in other constitutional cases regarding Native Nations, the appropriate level of scrutiny applied is rational basis.

Congress should and could publicly announce that it will disapprove of current Colorado River Compact management to incentivize negotiating an updated Compact. Congressional disapproval of the Compact is risky, as it could result in political stalemate, leaving all stakeholders in the Basin without a clear path forward. But such public disapproval, absent adoption of the proposed EJ-plus framework, potentially offers a higher degree of freedom in terms of incorporation of Tribal interests into the Compact writ large.

CONCLUSION

This Note focused on the Navajo Nation's unqualified right to divert water from the Colorado River, the decreed rights of the Nation versus undecreed rights, and how administrative agencies can employ an EJ-plus lens to provide the Nation with administrative solutions. Administrative agencies are at risk of capture by politically motivated officials. Although acting on environmental justice issues is always the morally right thing to do, the second Trump presidency and conservative control of all three governmental branches put environmental justice as a politically popular concept at risk. The time is therefore now, and the Interior should not allow this chance to demonstrate the importance of EJ to pass it by.

The EJ-plus framework proposed in this Note could apply outside of the water context and may be used to provide recourse for other crises on the Navajo Nation, other Tribes, and in the broadest sense, all Indians. The *Winters* doctrine cannot resolve water scarcity issues for all Tribes, especially Tribes that lack federal recognition. This Note applied the proposed EJ-plus framework in a situation that has more clarity than others: the case study of the Navajo Nation, which is a federally recognized Tribe with a reservation and some unquantified, undecreed water rights. But the EJ-plus lens could and should be applied elsewhere.

The Navajo water insecurity issue is one example from which to apply the EJ-plus lens more broadly. There is huge diversity amongst Indigenous communities, so each Nation is entitled to being understood on an individual basis, both procedurally and substantively, under an EJ-plus lens. Native peoples have historically been viewed as a monolith. This harmful narrative perpetuates culturally racist and misunderstood federal policies that neglect tangible, long-term Tribal needs.

Additionally, future research on water quantification should include an analysis of the ecological integrity of the Colorado River. Climate change warps the Colorado River's hydrology with drier conditions.[305] The system must operate more sustainably in the future, and that will take a more nuanced understanding of supply and demand within the basin at large. Water quantification is typically based on human consumption, not what is most sustainable for the environment or for the flora and fauna living in the Colorado

305. *See* Fountain, *supra* note 77.

River. The health of the River is another important element that must be part of the ongoing and future discussions of the River's management, especially as climate change progresses.

The Navajo and Indians writ large have uniquely suffered at the hands of the federal government. The combined history of land dispossession, historical revisionism, loss of culture, forced assimilation, and present water crisis is impactful and begs for recourse. Viewed in this light, adopting the proposed EJ-plus lens means understanding the federal Indian trust responsibility as an affirmative duty to correct past harms and protect both ecologically vital and culturally significant natural resources for generations to come.