

QUENCHING THE THIRST OF A NATION: RETURNING WATER TO THE NAVAJO PEOPLE

Introduction

Fresh water is perhaps the most precious natural resource on Earth. This is especially true for arid regions, such as the American Southwest, where freshwater sources are scarce. Despite being fully aware of the limited availability of water, policymakers adopted a “build first, ask questions later” attitude during the rapid development of the Southwest, choosing to turn a blind eye to the real threat of a future water crisis.¹ To make matters worse, when the Colorado River resources were divided, parties with potentially enormous water claims were left out of negotiations.² Specifically, Navajo Nation and many other regional American Indian tribes were overlooked during this process. Ignoring the claims of the American Indian communities may have been to the immediate benefit of Colorado River developers and expanding Southwestern metropolises, but their need for instant gratification could ultimately undermine the interests that users were initially trying to protect.³

The Navajo Nation is in the process of settling water rights claims to the Colorado and Little Colorado Rivers that could completely uproot the existing system of Colorado River allocation.⁴ On one hand, if the claim is successful, the Southwest could face a serious water crisis if parties fail to respond responsibly.⁵ On the other hand, this settlement represents an opportunity for Southwestern cities to address past shortcomings by proactively implementing sustainable water policies and infrastructure. Despite the real threat of a water shortage, the Navajo Nation should not be punished for the irresponsible water usage of the twentieth century. The Navajo claims to the Colorado and Little Colorado Rivers are long overdue, and the region will have to make adjustments to its own water habits to ensure that the Navajo people finally have access to water that is rightfully theirs.

I. A Dry Nation

The Navajo Nation, which stretches across Northern Arizona, New Mexico, and Southern Utah, is the largest American Indian reservation in the United States by both area and population;⁶ arguably, it is also the driest.⁷ It is estimated that nearly forty percent of the Nation’s population has no access to a potable water supply, and many citizens still receive water from tanks delivered by truck.⁸ The water is often contaminated and improperly treated, which leads to the contraction of water-borne illness.⁹ To make matters worse, the unsafe water is prohibitively expensive and costs nearly fifty times more to deliver to the reservation than it costs to deliver to neighboring cities.¹⁰ This crisis could be remediable by granting the Navajo Nation water rights to nearby rivers.

II. The Reserved Rights Doctrine

American Indian communities find a legal basis to assert their water rights in the reserved rights doctrine, which states that when the United States reserves federal land it also impliedly reserves sufficient water supply to fulfill the purpose for which the reservation was created.¹¹ Thus, when an American Indian tribe agreed to enter into a treaty with the United States to reserve certain lands as a community in which tribe members would live, it was implied that enough water would be set aside to support the community's residents.¹² Despite federal recognition of the reserved rights doctrine, American Indian communities were ignored during the rapid development of Western states during the 20th century because of conflicting regional law.¹³ By the time tribes could assert their legal rights to water in federal court, most of the available water had been claimed.¹⁴

During the first half of the 20th century, American Indian water rights were continually ignored. Finally, in 1963, the Supreme Court attempted to resolve the conflict between the reserved rights doctrine and the doctrine of appropriation in *Arizona v. California*.¹⁵ The court held that the United States reserved water rights for American Indians effective at the time that the reservations were created. For the Navajo Nation, this means that their reserved right to the Colorado and Little Colorado Rivers extends back to 1868,¹⁶ which preceded *Wyoming v. Colorado*¹⁷ and the Colorado River Compact.¹⁸ In other words, Navajo water rights are superior to any non-Indian rights appropriated after 1868 regardless of whether or not the water has been exploited.¹⁹ *Arizona v. California* sparked a series of tribal water-rights litigation, and became a source of empowerment for tribes that had been previously ignored.²⁰ The reserved rights doctrine has served as a basis for most American Indian water claims, and is now the backbone of the Navajo Nation's claim to waters in the Colorado and Little Colorado Rivers.²¹

III. Bringing Water to the Community

The Navajo Nation has experienced recent success in New Mexico in securing rights to the San Juan River Basin.²² This victory, while crucial, will not meet all of the Nation's water needs.²³ However, the Nation hopes that its San Juan victory will put the pressure on Arizona to settle claims that the Navajo have to the Colorado Rivers. The Northeastern Arizona Indian Water Rights Settlement is a proposed agreement to settle two legal proceedings²⁴ concerning the Navajo Nation's water rights in the Lower Colorado Basin.²⁵ The first proceeding regarding the Colorado River had been settled, but is now re-open for negotiation. The Colorado River settlement initially allocated 31,000 acre-feet of water to the Navajo Nation per year and proposed the creation of a \$515 million pipeline to deliver water from Lake Powell to the Navajo Nation.²⁶ Negotiators have since removed the pipeline from the deal, and the Navajo Nation is currently unwilling to settle its Colorado River claims without it.²⁷ As a result, the Colorado River settlement has been sent back for revisions and the focus has shifted to the Little Colorado River.

If approved, the Little Colorado River Settlement will provide the Navajo people with access to all the unallocated surface water in the Little Colorado that passes through the Nation.²⁸ The precise level of waters not appropriated has yet to be determined, but the settlement could provide the Navajo with several thousands of acre-feet per year.²⁹ The agreement also gives the Navajo Nation and the Hopi Tribe an unlimited right to N-Aquifer groundwater for domestic and municipal use, but limits industrial use.³⁰ Navajos would have unlimited access to groundwater in the C-Aquifer, with the exception of the Leupp Area.³¹ Parties have also settled on \$US 200 million in federal funding for new wells, pumps, and pipes to create and transport groundwater to the Southwestern-most part of the reservation.³²

The last major hurdle to the Little Colorado River settlement is securing U.S. Congressional passage. Parties involved in the settlement hope to have the Little Colorado agreement completed before the end of 2012, which marks the beginning of Arizona Senator Jon Kyl's Congressional retirement.³³ Senator Kyl has been a crucial advocate of American Indian water rights and has helped guide several water-rights settlements through Congress. Navajo leaders fear that without Kyl's representation, the agreement will not be properly advocated in Congress.³⁴ For this reason, Navajo Nation's attorneys are rushing to submit the Little Colorado agreement to Congress in early 2012.

IV. Conclusion

If the proposed Little Colorado River settlement is successful, the United States will be one step closer to fulfilling its implied obligation of ensuring that the Navajo Nation is capable of serving as livable, permanent home. This would be a monumental victory for the Navajo people, and it would improve the lives of members residing on the reservation,

particularly those living in remote areas. It could also serve as a stepping-stone to a new era of water conservation in the Southwest. Allocation of water to the Navajo Nation would force States to confront the inevitable truth that they were avoiding: water habits need to change. In order to accurately assess the severity of the situation though, water needs to be properly quantified, and that cannot occur until all parties with water claims are accounted for. Once policymakers understand how little water they are actually dealing with, they will be unable to ignore the gravity of the situation.

Footnotes

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¹ Jeff Candrian, Note, *Building with Blinders On: How Policymakers Ignored Indian Water Rights to the Colorado, Setting the Stage for the Navajo Claim*, 22 *Colo. J. Int'l Envtl. L. & Pol'y* 159, 159-60 (Winter 2011).

² *Id.* at 160.

³ *Id.*

⁴ *Id.*

⁵ *See id.* at 160-61.

⁶ U.S. Census Bureau, U.S. Dep't of Commerce, *We the People: American Indians and Alaska Natives in the United States*, CENSR-28 (Feb. 2006), available at <http://www.census.gov/prod/2006pubs/censr-28.pdf>.

⁷ Dan Killoren, *Water Law: Racing an Arizona Senators Retirement, Dry Navajo Nation Draws Closer to Securing More Water*, *Circle of Blue* (Nov. 17, 2011, 9:16), <http://www.circleofblue.org/waternews/2011/world/water-law-racing-an-arizona-senators-retirement-dry-navajo-nation-draws-closer-to-securing-more-water/>.

⁸ *Id.*

⁹ *Id.*

¹⁰ *See id.*

¹¹ *Winters v. United States*, 207 U.S. 564, 576-77 (1908).

¹² Rebecca H. Hiers, *Water: A Human Right or a Human Responsibility?*, 47 *Willamette L. Rev.* 467, 469 (Spring 2011).

¹³ *See Wyoming v. Colorado*, 259 U.S. 419 (1922) (holding that the doctrine of prior appropriation grants superior water rights to the first party to use the water for beneficial use).

¹⁴ Hiers, *supra* note 12, at 470.

15 Arizona v. California, 374 U.S. 819 (1963).

16 Treaty with the Navaho, Jun. 1, 1868, 15 Stat. 667 (establishing the Navajo Nation).

17 Wyoming v. Colorado, 259 U.S. 419.

18 See generally Colorado River Compact, 70 Cong. Rec. 324 (1928), available at
<http://www.usbr.gov/lc/region/g1000/pdfiles/crcompct.pdf>.

19 Candrian, *supra* note 1, at 171.

20 Dan Tarlock, *Rediscovering Sustainable Development Law: Article: Do Water Law and Policy Promote Sustainable Water Use?*,
28 Pace Envtl. L. Rev. 642, 665 (Spring 2011).

21 Killoren, *supra* note 7.

22 Candrian, *supra* note 1, at 181-82.

23 *Id.*

24 See generally Navajo Nation v. U.S. Dep't of Interior, CIV 03 0507 PCT PGR (D. Ariz); See also In re Gen. Adjudication to Use
Water from Little Colorado River Sys. & Source, S-0100-CV-6417 (Apache Cnty. Super. Ct. 1996).

25 See generally Northeastern Arizona Indian Water Rights Agreement, Proposed Navajo Nation Council Res. No. 0422-10 (21st
Navajo Nation Council 2010), available at <http://nnwrc.org/docs/20100716settlementagreement.pdf>.

26 Summary of Draft Settlement Agreement, Navajo Nation Water Rights Comm'n (Sept. 2010), available at
<http://nnwrc.org/docs/2010-09-30%20NNWRC%20Summary%20of%20the%20Water%20Rights%20Settlement.pdf>.

27 Felicia Fonseca, *Navajos Focus on Little Colorado River Settlement*, The Daily Courier, Aug. 28, 2011,
<http://www.dcourier.com/Main.asp?SectionID=1&SubSectionID=1&ArticleID=97438>.

28 Summary of Draft Settlement Agreement, *supra* note 26.

29 Killoren, *supra* note 7.

30 Summary of Draft Settlement Agreement, *supra* note 26.

31 *Id.*

32 Killoren, *supra* note 7.

33 *Id.*

