

1-21-2018

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

Gianni Puglielli

Follow this and additional works at: <https://digitalcommons.du.edu/wlr>



Part of the [Law Commons](#)

---

### Custom Citation

Gianni Puglielli, Case Note, Navajo Nation v. Dep't of the Interior, 876 F.3d 1144 (9th Cir. 2017), 21 U. Denv. Water L. Rev. 309 (2018).

This Court Report is brought to you for free and open access by the University of Denver Sturm College of Law at Digital Commons @ DU. It has been accepted for inclusion in Water Law Review by an authorized editor of Digital Commons @ DU. For more information, please contact [jennifer.cox@du.edu](mailto:jennifer.cox@du.edu), [dig-commons@du.edu](mailto:dig-commons@du.edu).

---

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

# COURT REPORTS

## FEDERAL COURTS

### UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

*Navajo Nation v. Dep't of the Interior*, 876 F.3d 1144 (9th Cir. 2017) (holding that: (i) the Tribe lacked Article III standing by failing to demonstrate that its interests in acquiring an adequate supply of water would be threatened by the publication of an Environmental Impact Statement and related documents by the Secretary of the Interior regarding surplus guidelines for water from the Colorado River for use within the Lower Basin and storage of such surplus water; (ii) the Tribe lacked Article III standing by failing to demonstrate that it would suffer injury to: (a) its unquantified reserved water rights and (b) its generalized interest in water from the Department of the Interior's adoption of surplus and shortage guidelines for the waters of the Colorado River for allocations to Western states; and (iii) waiver of sovereign immunity applied to the Tribe's breach of trust claim against the United States).

The Navajo Nation ("the Nation") is a federally recognized Indian tribe that lives on the Navajo Reservation ("the Reservation"), which is the largest reservation in the United States and was established by treaty in 1864. Its area covers parts of Arizona, New Mexico, and Utah, and most of its western border is demarcated by the Colorado River ("the River"). The Department of the Interior ("DOI"), through the Bureau of Reclamation, controls the flow of the River's waters. Additionally, numerous statutes, Supreme Court decrees, interstate compacts, common law, and treaties affect the management of the River's waters, which together constitute "The Law of the River."

Seven states entered into the Colorado River Compact in 1922 ("1922 Compact"), which divided the River into two parts—the Upper and Lower Basin. The instant case concerns the Lower Basin only, which includes Arizona, California, and Nevada. Under the 1922 Compact, the Lower Basin is entitled to 7.5 million acre-feet per year ("maf") of water. The obligations of the United States to Indian tribes were not affected by this compact. The Boulder Canyon Project Act of 1928 allocated the 7.5 maf of water—4.4 to California, 2.8 to Arizona, and 0.3 to Nevada.

In 1964, a decree ("1964 Decree") was issued in *Arizona v. California* that authorized the Secretary of the Interior ("the Secretary") to determine whether there was a surplus or shortage of water. In times of surplus, the Secretary parceled out the relative shares each state would get; in times of shortage, the Secretary satisfied states' water rights in order of their priority dates. Any water that is left over after distribution must be apportioned in accordance with all applicable federal statutes and regulations, such as the Boulder Canyon Project Act.

In 2001, the Secretary of the Interior adopted the Colorado River Interim

Surplus Guidelines (“Surplus Guidelines”). Before adopting the Surplus Guidelines, the Secretary published an Environmental Impact Statement (“EIS”) that analyzed the environmental impacts of four alternatives to the Guidelines along with a “No-Action Alternative.” Ultimately, the Secretary decided that the Surplus Guidelines were the most preferred alternative. Coincidentally, the driest eight-year period in the River’s history followed the Secretary’s adoption of the Surplus Guidelines, so the Secretary implemented guidelines for shortages (“Shortage Guidelines”). The Secretary published another EIS for the Shortage Guidelines, which discussed Indian Trust Assets, including water rights. The EIS acknowledged that the Shortage Guidelines would have no substantive impact on any Indian Trust Assets.

The Nation filed its original complaint against DOI, the Secretary, the Bureau of Reclamation, and the Bureau of Indian Affairs in March of 2003. The Nation claimed that: (1) under the Administrative Procedure Act (“APA”) and the 2001 Surplus Guidelines, the Secretary violated the National Environmental Policy Act (“NEPA”) by failing to protect the Nation’s interests in and rights to water in the Lower Basin of the Colorado River; and (2) that the United States breached its trust obligations to the Nation by failing to protect the Nation’s water rights. Various state and local governments from California, Arizona, Nevada, and Colorado intervened as defendants. In October 2004, the district court stayed the proceedings to allow for settlement negotiations.

In 2013, the district court lifted the stay and restarted the litigation. The Nation amended its complaint twice to challenge the 2008 Shortage Guidelines. The district court granted defendants a motion to dismiss the second amended complaint without prejudice, holding that: (1) the Nation lacked Article III standing to file its NEPA claims; and (2) that its breach of trust claim against the United States was barred by sovereign immunity. The Nation appealed.

The United States Court of Appeals for the Ninth Circuit (“the Court”) first addressed whether the Secretary’s adoption of the Shortage and Surplus Guidelines violated the Nation’s unquantified *Winters* rights, which are rights to implicitly reserved waters for a reservation by the United States necessary to accomplish the purpose of the reservation. The Nation alleged that the Guidelines caused a procedural injury. To demonstrate a procedural injury, a plaintiff must show that: (i) the agency violated certain procedural rules; (ii) those rules protect a concrete interest of the plaintiff; and (iii) it is reasonably probable that the challenged action threatens that concrete interest. Additionally, the interest harmed must be specific to the plaintiff. The harm also does not need to be immediate, so long as there is a reasonable probability that the procedural violation will cause future injury.

The Nation contended that the Guidelines would make it “increasingly difficult” to secure and satisfy its water rights in the Lower Basin because the Guidelines created a system of third-party reliance upon the Colorado River in which entities besides the Nation rely on water supplies that belong to the Nation. Further, the Nation alleged that the United States would be disinclined to re-open the issue of water rights in the Colorado River because the Lower Basin states are satisfied. However, the Court concluded that the Nation’s arguments only demonstrate *practical* impairments of its interests instead of *legal* impairments. This, the Court held, is insufficient to constitute an injury sufficient for Article III standing.

Second, the Court determined whether the Guidelines caused an injury to the Nation's generalized interest in Lower Basin water. Although the Nation does not have decreed rights to Lower Basin water, it may still be eligible for standing because the need for water to sustain the Reservation is a cognizable interest that may provide standing under NEPA. The Nation's argument was simply that it would have less Lower Basin water available due to the Guidelines. It contended that the Surplus Guidelines would limit the Nation's supply by allocating all surplus water each year, and the Shortage Guidelines would limit the Nation's supply because its share is charged against Arizona's apportionment, which is already the smallest of the Lower Basin apportionments. The Nation feared that either excessive "Intentionally Created Surplus" ("ICS") development or an increased likelihood of a declared shortage will reduce the availability of water for its lands.

The Court held that the Nation has not suffered an injury to its generalized interest in water sufficient for Article III standing. First, the Guidelines merely prescribe the conditions necessary to declare either surplus or shortage—they do not make allotments of water themselves. Second, a statute—not the Guidelines—provides the prioritization scheme that disadvantages Arizona. Third, the Nation failed to demonstrate how the Guidelines would make it more likely that a shortage will be declared. Finally, the Nation's argument that excessive ICS development will limit its supply of water was flawed because the Guidelines only allow users to bank water for the purpose of banking it—users must offset their water consumption when any of it is banked.

Finally, the Court held that the Nation's breach of trust claim against the United States was not barred by sovereign immunity. Section 702 of the APA provides that a party who suffers a legal wrong as a result of agency action is not barred from filing suit against the agency or an officer thereof on the ground that it is against the United States.

There was a split in the Ninth Circuit regarding the interpretation of Section 702, so the Court consolidated the two interpretations into one rule. The Court concluded that: (1) Section 702 waives sovereign immunity for *all* non-monetary claims; and (2) Section 704's final agency action requirement is limited only to actions brought under the APA. Because the Nation sought non-monetary relief against DOI, DOI's sovereign immunity was waived.

Accordingly, the Court affirmed the district court's ruling that the Nation is not entitled to relief for its NEPA claims. However, the Court reversed the district court's ruling that the Nation's breach of trust claim was barred by sovereign immunity and remanded it to the district court for full consideration on the issue.

*Gianni Puglielli*

**UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT  
OF CALIFORNIA**

**San Luis & Delta-Mendota Water Auth. v. Jewell, NO. 1:15-CV-01290-LJO-GSA, 2017 WL 1375232 (E.D. Cal. Apr. 17, 2017) (holding that: (i) if an agency justifiably relied on a specific provision of a federal act to make Flow**