Navajo Nation Reservation
(credit: KNAU)

Today the U.S. Supreme Court hears oral arguments in the last natural resources cases on its docket this Term: Arizona v. Navajo Nation and U.S. Department of the Interior v. Navajo Nation. These consolidated cases are consequential for several reasons: to determine the scope of the federal government's trust obligations to Native American tribes; to decide whether the Navajo Nation should have access to enough water on its arid reservation to provide the Navajo people a viable economy and decent lifestyle; and to resolve whether already-overtaxed water supplies in the Colorado River Basin will ultimately have to accommodate yet another "straw in the river."

The reservation of the Navajo Nation is–by far–the largest in the United States, both in terms of the reservation's size and the number of Native Americans living there. Remarkably, however, and despite the fact that the federal government negotiated two important 19th century treaties with the Navajo Nation, the United States has never seen fit to expressly provide federal water rights to the Nation to make its expansive reservation fully habitable.

The result of that longstanding federal inaction has been dramatic and disastrous: According to Native American water rights experts, members of the Navajo Nation living on their reservation endure major water shortages on a scale unknown to most Americans. On average, each member of the Navajo Nation must make do with only 10 gallons of water per day–one tenth of the amount most Americans consume for domestic use. And there is virtually no water available for the Nation to serve the uses of their reservation contemplated in its longstanding treaties with the United States: to irrigate and cultivate the Nation's tribal lands for the benefit of the Navajo people.

In 2003, the Navajo Nation filed suit in federal court, claiming that the federal government had breached its trust obligations to the Nation by not granting it adequate water rights from the Colorado River system managed by the Department of the Interior. The states of Arizona, Colorado and Nevada promptly intervened in the case, concerned that a ruling in favor of the Nation could ultimately reduce their own water rights to the Colorado River.

In 2021, the Ninth Circuit Court of Appeals ruled in favor of the Navajo Nation, unanimously concluding that the Nation was within its rights to pursue its breach-of-trust claims against the federal government. The Ninth Circuit upheld the Nation's ability to seek a federal order directing the U.S. Department of the Interior to develop a plan to meet the Nation's water needs and to manage the Colorado River flows so as not to interfere with that plan. Both the federal government and the intervenor states then successfully sought U.S. Supreme Court review.

The cases now before the Supreme Court raise two key issues: 1) whether the Navajo Nation can state a viable claim for breach of the federal government's trust duties to the Nation, based on the Nation's as-yet-unquantified, implied rights to water as recognized by the Supreme Court's iconic 1909 *Winters v. United States* decision; and 2) whether the Ninth Circuit's decision so holding infringes upon the Supreme Court's retained and exclusive jurisdiction over the allocation of water from the Colorado's mainstream under the Court's 1963 *Arizona v. California* and related decisions.

The justices' consideration of these arguments will take place against an extraordinary backdrop: the Colorado River system–upon which seven states, two nations and numerous Native American tribes depend–is facing critical and unprecedented water shortages. Due to a megadrought in that system over the past two decades, there is simply not enough water to satisfy the needs of all existing claimants to Colorado River waters. To date, the seven Colorado River Basin states–including California–have not been able to agree as to how those shortages should be apportioned among themselves. If that political gridlock continues, the Department of the Interior may have to impose its own set of water cutbacks upon the states–an action that would likely trigger additional litigation by disaffected states against the federal government and one another.

A review of the factual and legal history of the Navajo Nation's claims before the Supreme Court strongly suggests that the equities of its position are compelling. It is settled that Native American water rights are the most "senior" of all such water

rights, and take priority over both those of states and individual water users. And it's well documented that the federal government refused to assert water rights to the Colorado River on behalf of the Navajo Nation before the Supreme Court in 1963, and simultaneously blocked the Nation's efforts to assert its own water rights claims before the justices in the same proceedings.

But the federal government and the intervening states may have the law on their side–that law being the "Law of the River," a complex, century-old set of interstate compacts, U.S. Supreme Court decisions and federal legislation that together control how the dwindling water supplies of the Colorado River system are to be allocated. While the Navajo Nation argues that it is not currently seeking a formal adjudication of its water rights to the Colorado River, the federal government maintains that this is in practical effect exactly what the Nation is attempting to achieve. And the government's arguments may well resonate with a conservative majority of the justices.

Today's arguments before the justices should therefore be a fascinating amalgam of Western history, Native American rights, and the most complex system of water rights to be found in the entire United States.

The Navajo Nation's rights to adequate water supplies to sustain its people and its reservation have been largely ignored by the U.S. government and federal courts for over 150 years. The case being argued today provides the justices with an opportunity to begin correcting these historic injustices. But whether the justices will act to redress those injustices appears questionable at best.