Unlimited Limitations: The Navajos' Winters Rights Deemed Worthless in the 2012 Navajo–Hopi Little Colorado River Settlement

Melanie K. Yazzie

Wicazo Sa Review, Volume 28, Number 1, Spring 2013, pp. 26-37 (Article)

Published by University of Minnesota Press

For additional information about this article
http://muse.jhu.edu/journals/wic/summary/v028/28.1.yazzie.html
Water rights are to the late twentieth century what land rights were to the late nineteenth century.

Anonymous

**QUANTIFICATION MEANS MINIMIZATION**

In recent weeks, the Navajo Nation government (hereafter referred to as “the Nation”) has been on the march supporting the controversial Navajo–Hopi Little Colorado River Settlement (hereafter referred to as “the Settlement”) and its companion, Senate Bill 2109. A press release by Navajo President Ben Shelly dated April 17, 2012, stated, “Under the settlement the Navajo Nation has the right to use ALL of the water arising on, running through, or under the Navajo Reservation, without limits except with respect to water sources shared with the Hopi Tribe. . . . The Nations’ water rights . . . are not being ‘quantified’ in a sense that a specific limit is being put on their use.”¹

The Assistant Attorney General for the Navajo Nation, Stanley Pollack, similarly declared in an April 26 interview with the Navajo Times that “this settlement doesn’t have limits for the Navajo Nation, that’s what makes it so unique. In fact, other parties to the agreement are limited.”²

What both of these statements obscure is that the water to which the Navajo Nation can lay claim—and use—under the terms of the
Settlement is, in fact, quantified. Not only does Section 4.5.2 of the Settlement limit the Little Colorado River (LCR) surface water that can be made usable through diversion, but Sections 4.4.1 and 4.4.2 also limit the Nation’s use of water that has not already been appropriated for non-Indian use as of the Settlement’s effective date.

The notion of unlimited water promoted by the Nation is based on an antiquated and skewed interpretation of the Winters Doctrine of water rights (hereafter referred to as “Winters rights”). Established in a 1908 U.S. Supreme Court case, Winters v. United States, the Winters Doctrine holds that Indian tribes have prior and paramount rights to all water that originates on, borders, or crosses a reservation. Such rights are effective on the date of a reservation’s creation by federal authority and are considered unquantifiable in light of the Court’s determination that the amount of water to be reserved for Indian tribes is “uncircumscribed,” so as to allow for the beneficial and perpetual development of a permanent homeland.

Winters rights have been applied and clarified in a number of federal and state Supreme Court cases intended to settle disputes over water entitled to federal reservations, of which Indian reservations are a unique type because of the legally binding nature of the U.S. trust responsibility to treaty-formed Indian tribes and lands. The Arizona Supreme Court has been charged with adjudicating most of these cases in direct relation to the state’s total Lower Colorado River (Lower CR) entitlement of just over 2.8 million acre feet per year (AFY). With minor exceptions, these subsequent cases have revised Winters rights in a way that protects existing municipal, irrigation, and industry usage of Arizona’s water entitlements for the express purpose of further economic growth in the region.

The Arizona Supreme Court’s most recent decision in the Gila River Adjudication (Gila V), for example, concluded that because Winters rights reserve only the amount of water necessary to fulfill the purpose of a federally created reservation, such rights must be determined according to a “minimal need” requirement.

Although neither the defendants nor the plaintiffs in the two cases the Court cited in its minimal need decision—United States v. New Mexico (1978) and Cappaert v. United States (1976)—were federally recognized tribes, the 2001 Gila V decision nevertheless used these cases to set a precedent for future water contests to which Indian tribes might be party. Why? The Court’s explicit purpose was to effectively position non-Indian rights previously established in other settlements or litigations as equal to tribal Winters rights, even if these are chronologically subordinate to such rights. As Chief Justice Thomas A. Zlaket stated in his majority opinion, “We believe that such a minimalist approach demonstrates appropriate sensitivity and consideration of existing users’ water rights” while also providing a “basis for measuring tribal entitlements.”
When placed in the context of (a) the potential shortage of millions of AFY of this finite resource to provide for the region’s exponential water usage demands, and (b) nonstop mega-development in Arizona and Southern California that requires unabated access to Colorado River water, the minimal need precedent of Gila V becomes crystal clear: any and all tribal Winters rights are subject to unlimited limitation by a jurisprudence that prioritizes non-Indian commerce over the prior and superior legal status of tribally conferred treaties.\(^7\)

Thus the success of the Settlement and it companion, Senate Bill 2109, necessarily depends on the Nation agreeing to waive and release all “past, present, and future claims for water rights for Navajo land and land of the Navajo Nation” that potentially exceed quantifiable claim amounts that might jeopardize existing non-Indian appropriations being used for economic development.\(^8\)

In other words, Gila V crystallizes a key paradox in Indian water rights law. On the one hand, the liberal interpretation of Winters rights offered in the Nation’s recent publicity construes such rights as un-circumscribed, prior, and paramount, right in line with the 1908 decision. On the other, the legally binding, conservative interpretation in the Gila V decision sets a precedent of limitation by which quantification can and will be calculated according to the least amount of water a tribe might use in the future. The Settlement is a case in point, if for no other reason than the stipulations it authorizes regarding the Nation’s upcoming claims to the Lower—not just Little—Colorado River.

### THE SETTLEMENT MINIMIZES NAVAJO CLAIMS TO THE LOWER COLORADO RIVER

The logic of quantification-as-minimization that underwrites the current Settlement might help to explain the following: why the Navajo Nation is being offered a relatively generous settlement of 160,000 out of 220,000 AFY of LCR surface water and “unlimited” C-Aquifer groundwater, even though the poor quality of these two sources is well documented,\(^9\) the ambiguous language in the Settlement about LCR non-Indian upstream allocation and its potential infringement on the 160,000 AFY downstream figure; and no mention of a 2004 Memorandum of Understanding signed by then-President Joe Shirley that allowed Peabody to explore the suitability of the C-Aquifer for a 6,000 AFY drawdown to operate the Black Mesa Pipeline, a figure that soars above the Water Rights Commission’s current 1,200 AFY estimate of Peabody’s N-Aquifer use and which would significantly minimize the “unlimited” AFY of C-Aquifer water purported in the Settlement to be available for the Nation’s future domestic and municipal use.\(^10\)

It would seem that the official line of Shelly’s administration,
including information disseminated by Assistant Attorney General 
Pollack and the Water Rights Commission, has a hidden implication: 
that the Nation is receiving “unlimited” LCR and C-Aquifer water in 
exchange for the tribe’s acceptance of a very specific (i.e., highly limited 
or minimized) quantity of Lower Colorado River Basin (LCRB) water to 
be finalized in a forthcoming settlement.

The exchange under question is premised on the Nation’s waiver 
of a potentially massive Winters rights claim to what some have specu-
lated is as much as 5 million AFY of the LCRB’s overall 7.5 million AFY 
of assignable Colorado River water. This claim was made in Navajo 
Nation v. Department of Interior, a 2003 lawsuit that the Nation filed in 
order to determine its rights to LCRB water.11

Filed on behalf of the Nation by Mr. Pollack, the federal law-
suit alleged that the Department had breached its trust obligations in 
policy decisions concerning the LCRB. The complaint also alleged that 
quantification of the Nation’s rights to LCRB water could result in a de-
termination that its rights are superior to those subject to contracts with 
the Secretary of Interior, which is charged with allocating water on behalf 
of and between the seven Colorado River states. It would thereby 
threaten the ability to deliver Central Arizona Project (CAP) water to 
non-Indian contractors.12 After several major CAP and mainstream 
LCRB water contractors intervened in the lawsuit—including the State 
of Arizona, the Imperial Irrigation District of Southern California, the 
State of Nevada, and the Salt River Project—the Nation entered into 
negotiations with these parties to quantify its claims in relation to their 
existing usage demands.

Although the Shelly administration is quick to point out that the 
proposed Settlement “does not settle Navajo claims to . . . the Lower 
Colorado River,” this language is misleading, the Settlement establishes a 
unequivocal and legally binding groundwork for what will mostly likely 
be the last water settlement the Nation will ever negotiate.13 According 
to the Settlement, the Nation agrees to dismiss the 2003 lawsuit— 
and all the Winters rights claims potentially requested therein—in ex-
change for 24,589 AFY of LCRB water set aside for the tribe in Section 

**NAVAJO GENERATING STATION AND**

**THE LOWER COLORADO RIVER**

The Settlement also entitles the Navajo Nation to 6,411 AFY of San Juan 
River water set aside for the tribe in *Gila V*, provided that the Nation 
renews its lease with the Navajo Generating Station (NGS) through 
2044. Consequently, the lease renewal would ensure that 34,100 AFY of 
Arizona’s overall 50,000 AFY allocation of Upper Colorado River Basin 
(UCRB) water would remain available for NGS use through 2044.15 As
many know, NGS is a coal-fired power plant in Page, Arizona, that is operated by one of the largest Colorado River water users—the Salt River Project (SRP). What fewer may know is that NGS designates 24.3 percent of its annual output to the CAP, which fully relies on electricity produced at NGS to distribute 1.5 million AFY of Colorado River water—over half of Arizona’s overall 2.8 million AFY allocation.

This is noteworthy if for no other reason than that the SRP clearly has a vested interest in settling Navajo claims to the LCRB in a way that ensures the integrity and longevity of NGS operations—and thus CAP operations—to guarantee water delivery to non-Indian contractors like those mentioned above. Not surprisingly, such a settlement will require the strict minimization of the Nation’s Winters rights claims to the 15 million AFY of assignable water in both the Upper and Lower Colorado River Basins pursuant to the minimal need precedent introduced in Gila V.

Thus the NGS stipulation in Section 13.14 of the Settlement seems to have more to do with alleviating the economically driven concerns of non-Indian CAP and LCRB contractors—and thereby opening a broad path for the special interests of these parties in the upcoming LCRB settlement—than it does with anything specifically related to the Little Colorado River. This is yet another aspect of both the Settlement and its companion, Senate Bill 2109, that contradicts the language of unlimited water use presented by Shelly and Pollack.

**NAVAJO WINTERS RIGHTS:**
**ESTABLISHED IN 1868, NOT 1968**

Further evidence of minimization can be found in the Settlement’s decisions regarding the delivery of future LCRB water to the Nation. Both the 24,589 AFY of LCRB water and the 6,411 AFY of San Juan River water are cobbled out of priority rights that are allocated according to a six-tier priority system by which water from the Colorado River is distributed. As stipulated in Sections 13.4 and 14.0 of the Settlement, both amounts have been reserved for the Nation out of CAP’s non-Indian agricultural allocations, which are considered fourth priority rights under this system. According to the Arizona Department of Water Resources, “Fourth priority rights are held by water users with contracts, Secretarial Reservations, or other rights established with the United States after September 30, 1968.”

It is obvious to all that a reservation for the Navajo people was established by federal authority prior to September 31, 1968, a date that refers to congressional authorization of the Colorado River Basin Project (CRBP). Accordingly, the Nation possesses Winters entitlements to Colorado River water that “are determined under different rules than
the quantity and priority of prior appropriation water rights” of the kind proffered by both the Arizona Department of Water Resources and the CAP. In other words, the tribe’s Winters rights “arise without regard to equities that may favor competing water users,” and primarily those users with first through sixth priority rights established after the tribe’s 1868 treaty with the United States.

Yet, if it wants the 31,000 AFY of water to which it will be entitled in the upcoming LCRB settlement to be delivered through the CAP, the Nation must agree to characterize its Colorado River water rights as fourth priority. The Settlement’s radical, hundred-year minimization of the tribe’s Colorado River Winters rights is unequivocal, and will be legally binding once Congress authorizes the Settlement.

**The Model of Minimization Raises Critical Questions**

As it stands, the March 2012 draft of the Settlement effectively extinguishes the Nation’s Winters rights; rights that might afford the Nation abundant and expansive claims to millions of AFY of Colorado River water for future development and livelihood. To invoke a familiar comparison, the Settlement has chopped up the Nation’s water into quantifiable fractions not unlike those employed to determine tribal citizenship according to blood quantum policies.

What does this mean for the future livelihood and survival of the Nation and its people? First, even the conservative interpretation of Winters rights offered in *Gila V* pales in comparison to the colossal diminishment of actually usable Lower Colorado River water that the Nation will receive according to the Settlement, which is a mere 31,000 AFY of the 1.5 million AFY of available CAP water. This amount is equivalent to 1.1 percent of the overall 2.8 million AFY of LCRB water to which Arizona is entitled, and 0.5 percent of the overall 7.5 AFY of assignable LCRB water.

The disturbingly small numbers aside, is this enough water for the future of the Nation’s various subsistence and development needs? In light of widely predicted water shortages beginning in the near future, are the allocation projections for all LCRB users—not just the Navajo Nation—realistic? How much are other parties to these agreements waiving in comparison to the Navajo Nation? Where are the sixty-plus exhibits that accompany the Settlement, all of which contain the allocation quanta that would answer the previous question? Second, neither the Shelly administration nor Senators Kyl and McCain have publicly acknowledged that the 1968 CRBP required the Navajo Nation to pass a tribal resolution to waive all of its Upper and Lower Colorado River Basin water rights for fifty years (through 2018, approximately)
in exchange for a paltry 50,000 AFY of Arizona’s UCRB entitlements, 34,100 of which went to NGS.²⁰

What happens if a Navajo Lower Colorado River Basin settlement is authorized before 2018? Subsequent to 2018? Why, according to Mr. Pollack, is a settlement the only worthy option, especially considering that the case history evidence overwhelmingly points to a need to challenge previous decisions, like the fifty-year waiver or Gila V, that have all but abolished the Nation’s Winters rights?

CONCLUSION: A DIRECT APPEAL TO REPRESENTATIVES OF DINÉ

As I have attempted to argue, the liberal interpretation of Winters rights offered in Shelly’s press release and Pollack’s interview is misleading and unrealistic. Is such an interpretation simply rhetorical, yet another example of politicking intended to deceive a people into buying an illusion—rather than a reality—of certainty? Or does it represent a gross misunderstanding by Shelly and Pollack of the complex realities and histories at work in this Settlement?

Based on the evidence herein, I have no choice but to conclude that the answer resides in an affirmative response to the former, for Mr. Pollack drafted, negotiated, and executed the Nation’s inclusion in the same 2001 Gila V adjudication that established the minimal need precedent that he has since employed in the Settlement, and which he will no doubt employ in the upcoming Lower Colorado River settlement.

In fact, Mr. Pollack has negotiated all of the tribe’s water rights over the past twenty-five years with agreement from the Nation’s government representatives—including Executive and Council representatives—who have come and gone in the same amount of time. It is reasonable to conclude, then, that he, as the primary architect of the Nation’s modern water law, knows more than anyone else about the complex realities and histories at work in this Settlement.

I am thus compelled to additionally conclude that the current Settlement is yet another attempt by complicit parties to surrender the tribe’s sovereignty to the economic interests of both outsiders and insiders who have clear contempt for a tribal legal standing that stands between them and the fulfillment of an insatiable desire for unfettered growth and territorial acquisition.

According to the Winters Doctrine, water is irrevocably tied to the productive economic base on which Indigenous self-determination in the United States is premised.²¹ The Settlement does address economic development interests. The problem is that it allows for sweeping growth for every party but the Navajo Nation, which may not sell,
lease, transfer or in any way use off of “Navajo land” any of the water to which it is entitled in the Settlement, including LCRB water.\textsuperscript{22}

Mr. Pollack crafted and composed this Settlement. In his April 26 interview with the \textit{Navajo Times} he stated, “This settlement is the ultimate act of sovereignty.”\textsuperscript{23} In line with this duplicitous interpretation of tribal sovereignty, the Navajo–Hopi Little Colorado River Settlement of 2012 and its companion, Senate Bill 2109, will require the Navajo Nation to forfeit—forever—any substantive (read: economic) capacity to self-determination or sovereign exercise it might still retain after more than three centuries of systematic elimination by both outside forces and those like Mr. Pollack within the tribal government who simply parrot these forces out of misguided ignorance or intentional deceit.

This issue begs for a radical re-seizure and re-vitalization of tribal sovereignty for the twenty-first century.

Indeed, if we, as a sovereign tribal nation, enforce rights such as those outlined in the \textit{Winters} Doctrine—rather than meekly pay lip service to them in political rhetoric—we have the \textit{actual} power to convince big guns like the Salt River Project, Peabody, and the State of California to be our partners (rather than our presumed superiors) in carving out a future for our people.

A good place to start is by rejecting the Settlement and the Bill, instead demanding a renegotiation of our water claims according to an interpretation of the \textit{Winters} Doctrine that casts our rights as those that “arise without regard to equities that may favor competing water users.” This will require several lawsuits that challenge the legality of previous settlements and litigation, which will, of course, require many more years of struggle.

Most important, however, it will require that we accept that the real reason why so much attention has been paid by others to the Navajo Nation, and why millions of dollars have been doled out by powerful entities like the Salt River Project and Peabody to fund costly water litigation, is because we, our treaties, and our \textit{Winters} rights pose a very, very real threat to those who seek to destroy any real chance we have of survival—which is predicated on access to clean, usable water—by replacing us with golf courses and subdivisions.

The Navajo Nation must have the courage to take hold of the power granted to it by \textit{Nahadhzán Shimá dóó Diyín Diné’é} (Mother Earth and the Holy Ones) and fight these newest agents of our elimination: the Army Corps of Engineers, the Bureau of Reclamation, the San Juan–Chama Diversion Project, the Salt River Project, the State of Arizona. We must take a stand against a violent system of power that has always desired our disappearance, whether through water laws, physical displacement, racial categorization, or bureaucratic supervision.\textsuperscript{24}

Here I end with an April 26 statement made by Navajo Nation
Vice President Rex Lee Jim at the final town hall meeting in Ft. Defiance, Arizona: “Whatever we choose, we have to live with the consequences.” Indeed.

**CODA: OCTOBER 2012**

On July 5, 2012, the Navajo Nation Tribal Council unequivocally rejected the NHLCRS with a vote of fifteen to six, with three in absentia. During the same session, Council Delegate Katherine Benally (Dennehotso, Chinchilbeto, and Kayenta) introduced a second resolution (Legislation No. 0149-12) that opposed, first, the multiple and vague waivers of future claims to water rights that pepper the Settlement, and, second, NGS lease extensions of any kind. Benally’s resolution, which was approved with a vote of fifteen to one (with eight abstentions), stipulated that “parties come back to the table and start renegotiations,” including Navajo citizens who were largely circumvented and trivialized during the town hall meetings held by the Office of the President and Navajo Nation Water Rights Commission during the spring of 2012.

The passionate opposition expressed by these citizens at town hall meetings, at protests that continued from the spring into the summer, and in countless posts, photographs, and links that erupted on the Internet, is the latest instance of Navajos’ long-held dissatisfaction with the tribal government’s history of collusion with non-Indian interests, and especially in areas related to economic development. As a number of town hall attendees argued, current events surrounding the NHLCRS recalled earlier eras when Navajo Nation officials made long-term sacrifices for the benefit of outside development in the Southwest. As a corrective to this style of leadership and assessment, Diné citizens across the board demanded inclusive, transparent negotiations between all parties invested in the Settlement’s ultimate outcome.

On a larger scale, these demands arrested the status quo of tribal governance in Diné Bikéyah; citizens came out in the thousands to insist that all Executive, Council, and other legal decisions reflect the opinions of the people, the standard dismissal of which by the government many in opposition identified as having roots in the anti-sovereign racism and colonialism inherent in federal superintendence of Navajo life. During comments from the Council regarding the vote, delegate Russell Begaye (Shiprock) offered a statement that evokes the spirit of public opposition to such legacies and practices: “Today is a critical day for our nation, and I strongly believe that it is a beginning of a new era in Navajo life. . . . Let it be said loud and clear to leaders in Washington that we, the Navajo people, are capable of doing what we want and from this day forward we will determine our own future.” As Settlement negotiations take new form, Diné citizens like me embrace
measured anticipation that elected officials will honor this exceptional moment to re-seize and re-vitalize Diné sovereignty for the twenty-first century.

I close with a final word of gratitude to those Council delegates who opposed the Settlement: thank you, deeply, for refusing a system of power that believes we are subhuman. By valuing and claiming a definition of sovereignty that puts our interests—our lives—first, you have exercised the power that our ancestors fought to guarantee for us; you carry it forward. So, too, do the many Diné who opposed the Settlement with vigor, discernment, eloquence, and that special combination of intractability and skepticism of authority for which Navajos are well-known: you inspire and move me always to be a better human. Abé'bee.’

**Author Biography**

Melanie K. Yazzie is a bilagáana (Scottish/Irish) born for Ma’iideesh-gizhii. Her chei is bilagáana and her nałí is Tótsőhni. She is a fourth-year doctoral student in American studies at the University of New Mexico. She has received numerous prestigious awards, including the Chief Manuelito Scholarship and the Gates Millennium Scholarship. Most recently, she was awarded the Ford Foundation Predoctoral Diversity Fellowship.

**Notes**

This essay was written in May 2012 to provide a critical and research-based assessment of the NHLCRS. At the time, the climate of political bargaining and persuasion that dominated public debate about the Settlement compromised the availability of such information to the Navajo public or tribal council. Along with a multiply authored editorial published in the *Navajo Times* (May 17, 2012) and the *Navajo-Hopi Observer* (May 22, 2012), the essay was written for and furnished to each of the twenty-four delegates of the Navajo Nation Tribal Council for consideration prior to its vote on the Settlement.


3 “Untitled Fact Sheet,” *Navajo Longest Walk Steering Committee, National Indian Youth Council* (June 1978).


Section (105)(a)(1)(A)(i–iv), Senate Bill 2109 (February 2012).

I am reminded of the 100 million gallons of radioactive water containing uranium tailings that, in 1979, leaked into the Puerco and Little Colorado Rivers from a tailing pond owned by Kerr-McGee Company and United Nuclear Corporation.

Sections 4.4.1, 4.4.2, and 4.5.1, NHLCRS (February 2012); for Peabody’s interest in the C-Aquifer, see “To Nizhoni Ani to Co-host Second Peoples Forum,” *Diné CARE Newsletter* 5, no. 3 (2004); for the Peabody drawdown figure of N-Aquifer groundwater proffered by the Water Rights Commission, see Slide 28, “N-Aquifer Underlies Navajo and Hopi,” of *Navajo–Hopi Little Colorado Water Rights Settlement: Report to the Navajo People*, April 2012. PowerPoint presented by Navajo Nation government officials at Ft. Defiance NHLCRS Town Hall Meeting, Ft. Defiance Chapter House (April 26, 2012).

Although the lawsuit is on file with the district court in Phoenix, there is no way to review it for specific claim amounts unless and until the Navajo Nation Attorney General’s office makes it publicly available.


For information regarding the future LCRB settlement, see Section 14.0, "Retention of Lower Colorado River Water for Future Lower Colorado River Settlement," NHLCRS (March 2012).

Section 13.14, NHLCRS (March 2012).


Ibid.


Sections 4.15.1 and 5.9, NHLCRS (March 2012).

Mountz, “Water Attorney.”


Author’s Notes, Ft. Defiance NHLCRS Town Hall Meeting,
The six delegates in opposition are: George Apachito (Alamo, Ramah, Tohajiilee); Lorenzo Bates (T’iistoh Sikaad, Nenahnezad, Upper Fruitland, Tse’ Daa’ Kaan, Newcomb, San Juan); Mel Begay (Coyote Canyon, Mexican Springs, Naschitti, Tohatchi, Bahastl’a’a’); Johnny Naize, Speaker of the Twenty-Second Council (Tachee/Blue Gap, Many Farms, Nazini, Tselani/Cottonwood, Low Mountain); Danny Simpson (Becenti, Lake Valley, Nahodishgish, Standing Rock, Whiterock, Huerfano, Nazini, Crownpoint); and Edmund Yazzie (Churchrock, Iyanbito, Mariano Lake, Pinedale, Smith Lake, Thoreau).


I am indebted to John Redhouse for providing primary documents that contain invaluable information on the history of Navajo water politics. I would not have been able to construct this analysis without them. I also want to thank my colleagues Khalil A. Johnson and Teresa Montoya for their advice and input on the various drafts of this essay. I am deeply grateful to Drs. Lloyd Lee and Jennifer Nez Denetdale for their brilliant guidance regarding the complex terrain of Diné politics and experience. Finally, to my family and community mentors, your indelible love is the compass that makes everything in my life possible. Ahé hee’, all of you.