

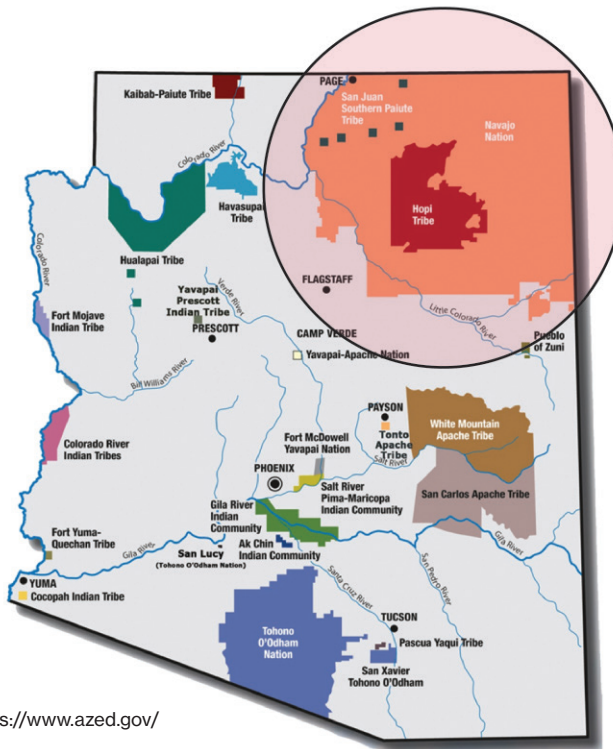
The Northeastern Arizona Indian Water Rights Settlement Agreement

In May 2024, the Navajo Nation, Hopi Tribe and San Juan Southern Paiute Tribe approved the proposed Northeastern Arizona Indian Water Rights Settlement Agreement (NAIWRSA). If implemented, this agreement would settle the three Tribal nations' water rights claims to the Colorado River, the Little Colorado River and groundwater sources in Northeastern Arizona.

An Indian water rights settlement is a voluntary multi-party agreement through which Tribal and non-tribal entities quantify Tribal and sometimes non-tribal water rights, waive and release water rights and environmental claims and fund and collaborate on various water infrastructure projects. An Indian water rights settlement may contain a variety of other terms, for example, regulating use of shared groundwater or authorizing leases of a Tribe's water resources.

Location of Northeastern Arizona Tribes

This historic NAIWRSA would enhance water access for tens of thousands of people in Northeastern Arizona, including those within the largest and most populous Indian reservation in the United States, and offer significant clarity regarding water rights for all Arizonans who share the Colorado River.



Source: Arizona Department of Education <https://www.azed.gov/oie/22-federally-recognized-tribes-arizona>.

Parties to the Settlement

Arizona Department of Transportation
Arizona Game and Fish Department
Arizona Public Service Co.
Arizona State Land Department
Atkinson Trading Co. Inc.
Aztec Land and Cattle Co Ltd
Aztec Land Company, LLC
Bar T Bar Ranch Co
Bar T Bar Ranch, Inc.
Central Arizona Water Cons. Dist.
Crater Ranch, LLC
Eagar
Flagstaff
Flying M Ranch, Inc.
Forest Lakes Dom. Water Improvement Dist.
Grover's Hill Irrig. Dist.
Holbrook
Hopi Tribe
J. Albert Brown Ranches, Inc.
Lakeside Irrig. Co.
Little Colorado Water Cons. Dist.
Meteor Crater Enter. Inc.
Navajo Nation
Pinetop-Lakeside Sanitary Dist.
Pioneer Irrig. Co.
Porter Springs, LLC
Salt River Project Agric. Improvement and Power Dist.
Salt River Valley Water Users' Assoc.
San Juan Southern Paiute Tribe
Show Low
Show Low/Pinetop-Woodland Irrig. Co.
Silver Creek Irrig. Dist.
Snowflake
Springerville
St. Johns
State of Arizona
Taylor
United States of America
Winslow

What water sources are involved?

Northeastern Arizona comprises three counties – Coconino, Apache and Navajo – which cover over one-third of the state’s land area and are the first, third and fourth geographically largest counties in the state.¹ Traversing their vast landscapes are the mainstem Colorado River and its tributary the Little Colorado River, which are the major surface water sources addressed in the proposed settlement agreement.

Disposition of Water Sources Included in the NAIWRSA

	Navajo Nation	Hopi Tribe	San Juan Southern Paiute Tribe
Mainstem Colorado River	Upper Basin: 44,700 AF ² Lower Basin: 3,600 AF	Upper Basin: 2,300 AF Lower Basin: 5,928 AF	350 AF from Navajo Tribal Utility Authority
Little Colorado River – Mainstem and Tributary waters (LCR)	All the LCR mainstem water that reaches the Navajo reservation with specific quantified amounts for historic Navajo irrigation projects All LCR tributary water that reaches the Navajo reservation	Existing uses, same limited new uses as non-Indian parties and certain limited rights to participate in new and enlarged reservoir projects with Navajo Nation	N/A
Groundwater	Coconino Aquifer: All that underlies the Navajo reservation Navajo Aquifer: All that underlies the Navajo reservation subject to agreement with Hopi to limit Navajo pumping to 8,400 AFY	Coconino Aquifer: All water that underlies Hopi reservation and pumping limitations at the Hart Ranch Navajo Aquifer: All that underlies the Hopi reservation subject to agreement with the Navajo Nation to limit Hopi pumping to 5,600 AFY	Groundwater sources could be used to fulfill the 350 AFY Mainstem Colorado River water delivery obligation
Other water sources	5 shared washes with the Hopi Tribe that are subject to intertribal agreement	5 shared washes with the Navajo Nation that are subject to intertribal agreement	On-reservation allotments will be settled with U.S.

Source: Arizona Sen. Mark Kelly, Northeastern Arizona Water Rights Settlement Agreement, <https://www.kelly.senate.gov/wp-content/uploads/2024/07/One-Page-Northeastern-Arizona-Indian-Water-Rights-Settlement-NAIWRSA-Act-of-2024-1.pdf>.

1 U.S. Census Bureau, *Arizona Profile* (2022) https://data.census.gov/profile?g=040XX00US04_050XX00US04001,04005,04017.
2 “AF” is an abbreviation for “acre-foot,” a water volumetric equaling 325,851 gallons.



Desert road and landscape near Tuba City

Key principles of Indian water rights settlements

A starting point for understanding Indian water rights is the foundational doctrine of federal reserved water rights, established by the United States Supreme Court in *Winters v. United States* (1908). This doctrine states that when the United States sets aside land for a particular purpose, such as an Indian reservation, it impliedly reserves rights to sufficient water to fulfill the purpose of the reservation.³ In most cases, the purpose of creating an Indian reservation is to establish the Tribe's permanent homeland. However, there can be additional reservation purposes that figure into the quantification of water rights. For example, when irrigated agriculture is one of the purposes of the reservation, the reserved water right may be relatively large.

In Arizona and most of the Western United States, rights to water from rivers and streams are subject to prior appropriation, a priority system that ensures that the rights of water users who got there earlier (i.e., "senior water users") are satisfied before more junior rights are fulfilled. Tribes' surface water rights are typically among the most senior rights in a system.⁴ Although a Tribe's water rights are "reserved" and, typically, senior, they still need to be legally quantified and defined just as do other water rights. The U.S. Ninth Circuit Court of Appeals has held that a Tribe's federal reserved water rights may also include rights to groundwater.⁵

3 *Winters v. United States*, 207 U.S. 564 (1908).

4 The priority date of Indian water rights depends on the type of right involved and whether the use of the water existed prior to the establishment of the reservation. If water was reserved for uses or purposes that did not exist prior to the reservation's establishment, the priority date is the date of the reservation's establishment.

5 *Agua Caliente Band of Cahuilla Indians v. Coachella Valley Water District*, 849 F.3d 1262 (9th Cir. 2017).

Usually, a Tribe secures its water rights through a court proceeding that results in a judicial decree or through a multi-party settlement, such as the NAIWRSA. Northeastern Arizona Tribes have long pursued determination of their water rights through both litigation and settlement negotiations.⁶

Negotiated settlements are often preferable to litigation because settlements provide benefits that litigation cannot.⁷ A judicial decree can quantify water rights and, theoretically, protect those “paper” water rights – but nothing more. Negotiated settlements, in contrast, can define a Tribe’s water rights and provide other benefits, such as water infrastructure funding necessary to gain physical access to the “wet” water. A negotiated settlement can include terms that provide flexibility with respect to the water supply, such as allowing alternative water supplies to be used to satisfy the right or authorizing a Tribe to lease its water. These aspects of a negotiated settlement create multi-party benefits. Essentially, a negotiated settlement achieves the finality of litigation and may provide otherwise unavailable financial resources to build the infrastructure necessary to access wet water.



Canyon de Chelly

6 In 1952, Arizona brought an action against California in the U.S. Supreme Court (which has exclusive jurisdiction over lawsuits between states) seeking a determination of Arizona’s Colorado River water apportionment. Twenty-five Tribes, including the Navajo Nation, were originally expected to join in the litigation; yet most sought leave to exit from litigation due to various reasons, including claims of lack of effective representation and conflicts of interest by their federal trustee. Ultimately, only five Tribes’ water rights claims were litigated. Around this same time, Tribes began asserting their water rights claims in state and federal courts.

7 Congressional Research Service, *Indian Water Rights Settlements* (October 13, 2023), <https://crsreports.congress.gov/product/pdf/R/R44148>.

Why is the NAIWRSA important?

It would enhance access to safe, clean drinking water supplies in Northeastern Arizona. The NAIWRSA is a unique Indian water rights settlement because it settles the rights of three different Tribal nations with different land status and water rights claims located within both the Upper and Lower Basins of the Colorado River Basin. The Navajo Nation has the largest Indian reservation in the United States yet a significant number of its residents do not have access to clean drinking water.⁸

- The Navajo Nation is also the only Tribe whose reservation lies within both the Upper and Lower Colorado River Basins: The 1922 Colorado River Compact apportions water between the Upper and Lower Basins and defines other rights and responsibilities of the seven Colorado Basin States.⁹
- In contrast, the San Juan Southern Paiute Tribe is the only federally recognized Tribe in Arizona that does not have its own designated reservation,¹⁰ complicating not only daily governance and planning but also the Tribe's ability to validate its water rights claims.¹¹
- As a neighbor to both the Navajo Nation and the San Juan Southern Paiute Tribe, the Hopi Tribe also contends with daily challenges of ensuring clean water access for its communities.¹² Much of the groundwater the Hopi Tribe relies on is contaminated with naturally occurring arsenic. Although the federal government funded and developed an arsenic remediation program for the Tribe, the cost of operation is very high.¹³ The NAIWRSA provides direct funding to help with costs associated with this remediation.

The proposed settlement agreement includes federal legislation to fund a pipeline and associated water pumping and storage infrastructure to import mainstem Colorado River water to portions of the Navajo and Hopi reservations, providing a secure water supply for tens of thousands of Arizonans.

The NAIWRSA would resolve litigation worries for Northeastern Arizonans. Tribal and non-tribal parties such as cities, towns, ranchers, farmers, mining companies and others have been seeking adjudication of water rights in Arizona state court since 1974. The Little Colorado River adjudication, initiated in 1978, is one of two general stream adjudications in the state to determine the nature, extent and relative priority of surface water rights.¹⁴ Determining Tribal water rights in Northeastern Arizona via settlement rather than through protracted court proceedings provides all parties certainty that is essential for water resource planning and associated economic development.

8 Dig Deep, *Navajo Water Project: About the Project* (2024) https://www.navajowaterproject.org/project-specifics?_gl=1*p680p0*_ga*MTE5NzM3OTk4Ni4xNzI1NjU5NTY4*_ga_NTF9CEP35Y*MTcyNTY1OTU2OC4xLjEuMTcyNTY1OTc4Mi42MC4wLjA.

9 University of Arizona, *Sharing Colorado River Water: History, Public Policy and the Colorado River Compact* (1997), <https://wrrc.arizona.edu/publication/sharing-colorado-river-water-history-public-policy-and-colorado-river-compact#:~:text=Colorado%20River%20Use%20Today,7.5%20maf%20each%20per%20year>.

10 United States Congress, H.R.2461 - *San Juan Southern Paiute Tribal Homelands Act of 2023* (April 3, 2023), <https://www.congress.gov/bill/118th-congress/house-bill/2461?q=%7B%22search%22%3A%22san+juan+southern+paiute%22%7D&s=1&r=1>.

11 Lillie Boudreaux, *Landless San Juan Southern Paiute Tribe could finally get its own homeland* (June 7, 2023), <https://cronkitenews.azpbs.org/2023/06/07/landless-san-juan-southern-paiute-tribe-could-finally-get-its-own-homeland/>.

12 Umar Farooq, *In Arizona Water Ruling, the Hopi Tribe Sees Limits on Its Future* (July 7, 2023), <https://www.propublica.org/article/arizona-water-ruling-hopi-tribe-limits-future>.

13 Hopi Tutuveni, *Hopi Tribe Dedicates Hopi Arsenic Mitigation Project* (August 17, 2022), <https://www.hopi-nsn.gov/wp-content/uploads/2022/08/Aug-17-issue-final.pdf>.

14 The Judicial Branch of Arizona Maricopa County, *Overview of General Stream Adjudications* (2024), <https://www.superiorcourt.maricopa.gov/SuperiorCourt/GeneralStreamAdjudication/faq.asp#2>.



Central Arizona Project canal bringing Colorado River mainstem water into Central and Southern Arizona

The NAIWRSA would provide new tools to address Colorado River shortages. A unique trait of the NAIWRSA is that it authorizes the Navajo Nation and Hopi Tribe to lease or exchange their water within Arizona, potentially benefiting other areas in the state in need of supplemental water resources.¹⁵ The proposed federal settlement legislation would allow the Navajo Nation and the Hopi Tribe to lease their Colorado River water to entities within Arizona, including to municipal water providers in Central Arizona. Phoenix, Tucson and many Central Arizona municipal water providers have access to Colorado River water delivered through the Central Arizona Project system, but this water is lower in priority than the Colorado River water used in Western Arizona and California, and therefore is first to be cut under Colorado River shortage conditions. Lease agreements with the Navajo Nation and/or Hopi Tribe to bring higher priority Colorado River water into Central Arizona could help mitigate the impacts of shortage in the most populous area of the state. The ability to lease is a significant benefit for the Tribes because it creates a reliable and substantial source of revenue, which can help strengthen Tribal economies and assure the operation and maintenance of the proposed water infrastructure projects. Additionally, leasing can be used to meet water infrastructure project costs in the event they exceed the original budget.

These lease agreements would entail inter-basin transfers of part of Arizona's Upper Basin Colorado River water apportionment to Central Arizona in the Lower Basin. In addition, the Navajo Nation would be able to divert some of its water in New Mexico and Utah for use by the Navajo Nation within their reservation in Arizona to help alleviate water scarcity using already built infrastructure in New Mexico.

¹⁵ The NAIWRSA also authorizes the Navajo Nation and Hopi Tribe to use their Colorado River water to accrue long term storage credits within the CAP service area. For more about long-term storage credits, see Kyl Center for Water Policy, Long-Term Storage Credits: Arizona's Innovative Water Banking System, <https://arccg.is/1zqKiK>.

Is everybody happy?

When it comes to water in the West, never! Some Upper Basin states, particularly Colorado, may be reluctant to support authorizing the Navajo Nation and the Hopi Tribe to lease Upper Basin water into the Lower Basin, because it potentially creates a more modern precedent for additional transactions across the boundary created by the 1922 Colorado River Compact. Upper Basin states probably do not want to open the door to specific transfers of Upper Basin water to the Lower Basin for fear that the Lower Basin states would eventually find a way to buy out available Upper Basin water supplies.¹⁶

In addition, at \$5 billion, the federal cost of the settlement is the largest ever for an Indian water rights settlement. However, this settlement covers an unusually large land area and population. In comparison with other Tribal water rights settlements, the NAIWRSA's costs per beneficiary are below average.

Proposed NAIWRSA Project Funding

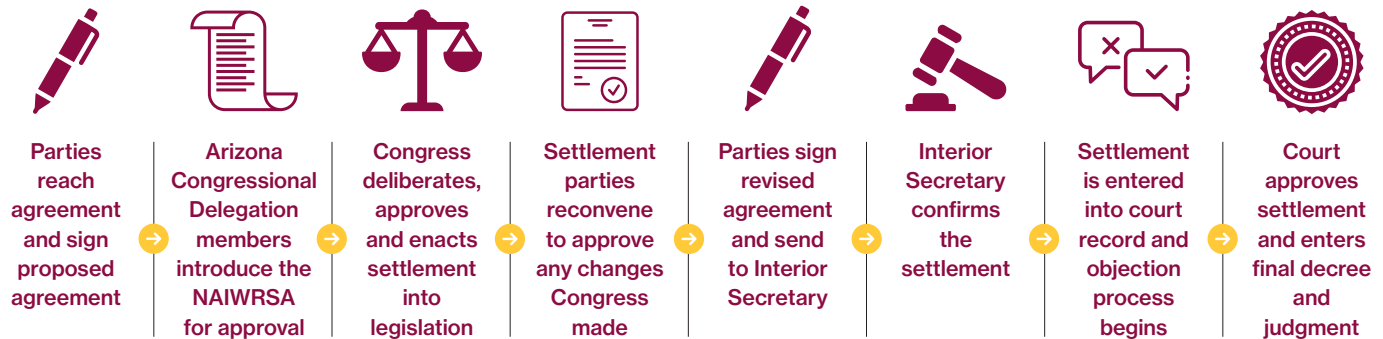
Navajo Nation Projects/Funds
\$2,746,700,000
Hopi Tribe Projects/Funds
\$508,500,000
San Juan Southern Paiute Tribe Projects/Funds
\$29,800,000
Joint Project – iiná bá – paa tuwaqat'si pipeline
\$1,715,000,000
TOTAL: \$5 Billion



Painted Desert badlands, Petrified Forest National Park

¹⁶ Article III(a) of the Colorado River Compact assigns each sub basin the right to 7.5 MAF/year for exclusive beneficial use and further mandates in Article VIII that “[a]ll other rights to beneficial use of waters of the Colorado River System shall be satisfied solely from the water apportioned to that Basin in which they are situated.

To become effective, 30 parties must approve the NAIWRSA and Congress must pass enabling legislation to ratify the Indian water rights claims, authorize the Tribes to lease their water¹⁷ and approve funding of the projects outlined under the proposed settlement.¹⁸ In addition, the adjudication court must consider objections from any party. Thereafter, if the court approves the settlement, it will enter a final decree and judgment.¹⁹



The Northeastern Arizona Indian Water Rights Settlement Act of 2024 was introduced into Congress on July 8, 2024, but it must go through lengthy and potentially contentious processes at the federal level. Success in Congress is never guaranteed, and Congress may propose changes to key terms of the proposed agreement for further consideration by the parties – some that may make the agreement unacceptable to some parties given the delicate nature of decades-long negotiations.

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Acknowledgements

Author: Cora Tso

Contributors/editors: Sarah Porter and Kathryn Sorensen

This project is co-sponsored by the Arizona Water Innovation Initiative, a multi-year partnership with the state led by Arizona State University's Julie Ann Wrigley Global Futures Laboratory in collaboration with the Ira A. Fulton Schools of Engineering.

¹⁷ Any conveyance of Indian land or water rights separable from the land requires congressional approval as dictated by the Nonintercourse Act, 25 U.S.C. § 177 (1982).

¹⁸ Congressional Research Service, *Indian Water Rights Settlements* (October 13, 2023), <https://crsreports.congress.gov/product/pdf/R/R44148>.

¹⁹ *Id.*