

# “Our Winters’ Rights”: Challenging Colonial Water Laws

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## Abstract

Much of the scholarship on Indigenous water rights in the United States focuses on legal and political rights awarded or denied in water settlements. This article highlights the voice of settlement opponents within Diné communities over the proposed Little Colorado River Settlement in 2012 between the Navajo Nation and Arizona. Using interviews with key actors, observations of water hearings, and a mini focus group with settlement opponents, my research finds that the proposed water settlement produced contradictory logics, practices, and frameworks that combined two “traditions of Indigenous resistance,” one rooted in the language of self-determination and sovereignty and the other in emerging notions of decolonization. This hybridity of seeking increased water recognition within colonial law, while advocating for decolonial waterscapes, speaks to the complicated and fundamentally entangled political landscapes of Indigenous peoples. Ultimately, in opposing the water settlement, Diné opponents and community members demonstrate that they seek to rectify the injustice of ongoing settler colonialism and realize their collective capabilities as nations, not “Indians,” “tribes,” or “minorities” within and against the authorities of the colonial state.

On April 5, 2012, US senators Jon Kyl and John McCain from Arizona met with Navajo Nation Council delegates in the western Diné community of Tuba City. Their intent was to persuade lawmakers to settle Navajo claims to the Little Colorado River, a dry and shallow waterway that originates high in the mountains of central Arizona and concludes at the confluence of the main Colorado River, just north of the Grand Canyon. The settlement established the terms by which the Navajo Nation would forever “resolve” its collective claims to the river in exchange for small water infrastructure and remaining waters after upstream diversions are taken into account.

Although the tribal government was initially in favor of the agreement, much of the Diné community rejected it and mobilized outside of the meeting to express their collective frustration and discontent.<sup>1</sup> They criticized governing

1. I use the term Diné, the proper name for people whom colonists have called “Navajo.” Navajo is a colonial word. It is misunderstood and mispronounced Tewa that was first used by the Spanish in the seventeenth century to refer to the Diné people. It is still the official name for the “Navajo Nation,” the political authority, created in 1937, to oversee 1868 treaty rights between the Diné people and the United States. In this article, Diné refers to the actual people, whereas Navajo refers to the tribal government.

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officials and reminded them that "water is life." Much of the narrative of water rights and Indian water settlements in the United States focuses on the legal-political "rights" to water that tribes maintain within western water laws (Burton 1991; Colby et al. 2005; Curley 2019b; McCool 2006; Perramond 2018; Thorson et al. 2006). These are important studies because they document the structuring of water use in practice. But the emergent perspectives of water and law among community actors is sometimes missing from these narratives, that is, the grounded understandings and decolonial strategies that both use and negate colonial laws.

Recently, Yazzie and Baldy (2018) emphasized the "decolonization" of waterscapes as a pathway to radical Indigenous knowledge and practices around water. For Yazzie and Baldy, decolonization is not simply a metaphor, as Tuck and Yang (2012) put it, or a practice of "awareness raising" (Smith 2013); it is material struggle. My research finds that this struggle produces contradictory logics, practices, and frameworks that combine traditions of Indigenous resistance with a dominating discourse of rights to water. In highlighting the dialog, debate, and discourse over the future of the Little Colorado River, this article seeks to document ongoing, expanding, and changing notions of water governance for Indigenous peoples today, notions that speak to both rights and decolonization. The central point is that Diné water governance transcends the colonial limitations of western water law through use of both pragmatic and decolonial practices. Diné advocates work to maximize water quantification while supporting the idea of traditional water uses for sustainable lifeways. This hybridity of seeking increased water recognition within colonial law, while advocating for decolonial waterscapes, speaks to the complicated and fundamentally entangled political landscape of Indigenous communities that our critical politics sometimes ignores, misses, or downplays.

This article highlights the voices of the Diné people who resisted what appeared to be the inevitability and finality of a water settlement. Their critiques provide an important understanding for how we might interpret water settlements and decolonization between Indigenous peoples and colonizing states. Schlosberg and Carruthers (2010), for example, find that questions of justice for Indigenous peoples are not concerned simply with distribution of resources but also with the "capability" of the resources to fulfill the well-being of a people at the level of the collective. They emphasize that justice for Indigenous peoples is community based and capabilities centered. Like Cipler et al. (2013), they build on Sen's (2009) notion of justice related to achieving the fulfillment of people's capabilities. However, this approach misses the historic critique of unrectified settler colonial theft that is repeated in Indian water settlements. Indian water rights were designed to fulfill the colonial purpose of reservations. They were not meant to resolve senses of injustice or wrongful dispossession inherent within the structure of U.S. colonial governance. Although Diné critics speak in the language of law and legalism when they exclaim "our *winters'* rights," referencing an important Supreme Court decision that I will discuss

later, they are also speaking beyond the law and to these broader notions of justice that cannot be resolved in a water settlement. It is not the particulars of the settlement that mobilize Diné resistance but the inherent sense of injustice that water settlements reproduce.

In the presentation of this argument, I follow Diné thinking and planning philosophies.<sup>2</sup> Diné opposition to the Little Colorado River Settlement was not simply a shared understanding among actors; it was an intellectual process. First, there was thinking and planning—highlighted in the section titled *nitsáhákees dóó nahat’á*. In this section, I show how opposition to the water settlement was built on two ideological trends and frameworks in Indigenous activism, nation building, and decolonization. These trends framed the argument against the proposed water settlement and addressed the larger notion of injustice in the colonization of Indigenous water sources. Afterward, I highlight how Diné people acted and lived out this thinking and planning in action—collective opposition to the settlement. Action was called *iina*, which also refers to “life,” *toh éí iíná* or “water is life.” Finally, *siihasin* calls on us to reflect on what was learned and derive some preliminary conclusions. I conclude that the struggle was an effort to reclaim and revitalize Diné lifeways.

My research suggests that Indigenous opponents to water settlements built their frameworks on a sense of rights and recognition that is rooted in ideas of traditional knowledge and historic practices on the land. Proponents understood these practices as better suited for sustainable living than existing quantification schemes provide. Their frameworks blended statist and aboriginal conceptualizations of water into a bundle of complicated and contradictory ideas of inherent Indigenous water rights. Both nation building and decolonial notions of Indigenous water governance undermined the legitimacy of colonial water laws while positing a sense of inherent rights to the water in the interest of increasing the amount of water the Navajo Nation was owed. The *de-* in *decolonial* did not completely negate colonial institutions as a site of struggle and advocacy. Rather, opponents reworked and repurposed colonial infrastructures toward Indigenous lifeways and decolonial nation building.

## Methodology

I base my findings on interviews and observations with tribal organizers, activists, community members, and lawyers. These interviews were conducted in 2012 during the settlement debate. I used purposeful sampling in selecting my interview participants. In total, I conducted fourteen in-depth interviews with leaders, lawyers, activists, and Diné community members. I also observed and participated in five public events related to the settlement. After the debate was concluded and the political outcomes were certain, I conducted a mini focus group with opponents who translated their work against the settlement into a new campaign to defend “the confluence” of the Little Colorado River and Colorado River. They spoke

2. <https://www.dinecollege.edu/>

about the inherent importance of water. Most of my observations and analyses come from living in the area from January 2012 until January 2013. I traveled with settlement opponents to public forums and discussed aspects of the settlement with them over the hundreds of miles and many hours between these places. I conversed with Diné scholars and critics informally, while formally interviewing Navajo Nation officials and lawyers. It was through this process that I was able to identify the difference in frameworks and understandings of the actors involved in constructing the meaning of the settlement.

## Water Rights and Water Colonization

Everyday Diné people challenged the terms of the water settlement because they felt it undermined a collective sense of inherent Diné "winters' rights," a reference to the now famous 1908 US Supreme Court decision that is the legal basis for quantifying "reserved" "Indian" water rights. Winters' limited water to the "purpose" of the reservation under colonial water law. It was not, as some characterize, a recognition of inherent rights to water. It was a much narrower guarantee of water for lands that the Supreme Court considered (and still considers) federal territory (Shurts 2000). It spoke to terms of treaties and not inherent Indigenous rights. In their activism, Diné organizers and community members transmuted this legal reference into a rallying cry. They claimed that Diné people ought to have rights under existing water laws that respect their historic occupancy and relationship with the environment. Diné activists reworked the meaning of *winters'* to refer to both legal-political recognition of rights and a way to decolonize systems of water governance. In other words, Diné water activists sought to gain the maximum rights within existing water regimes while acknowledging the colonial origins of the law.

Single mothers, part-time students, community organizers, and both unemployed and underemployed Diné people traveled hundreds of miles from where they worked and lived to where lawmakers held community forums on the terms of the settlement in order to express this sentiment. In my observations of the water hearings, I saw that members of the Diné public showed skepticism, worry, frustration, and cynicism concerning the actions of the tribal government. In public testimony and private conversations, they expressed concern about what water would remain for the future in a settlement that preserved colonial inequalities. For Diné proponents of the settlement, most who worked for the tribal government, the allocation of the Little Colorado River would have secured desperately needed water and infrastructure for reservation communities. It would have helped to fulfill the purpose of the reservation under existing legal requirements and might have contributed to the improved well-being of Diné communities.

For Diné critics, water settlements were also colonial mechanisms meant to minimize Indigenous water rights (Jones 2011; Yazzie 2013). Earlier scholarship on "tribal water rights" characterized these agreements as a form of

colonial dispossession (Back and Taylor 1980; Burton 1991; Wilkinson 1985). More recent work, however, tends to avoid critique in favor of a realistic tone. Today, lawyers and some scholars, many of whom are not members of Indigenous nations, suggest that tribes ought to settle water claims in order to avoid costly litigation and the unpredictability of court rulings (Cornell et al. 2008; Thorson et al. 2006).

Water settlements are also ontological constructions that convert rivers into notions of “acre-feet,” divorcing water from the land, species, and kinship networks. Indigenous peoples across the world oppose these kinds of colonial limitations while working to maintain prior resource “jurisdictions” (Pasternak 2017). Indigenous water governance, which differs from colonial approaches, prioritizes precapitalist and precolonial knowledge and practices that sustain communities, economies, and life on the land (Daigle 2018; McGregor 2012; Wilson 2014). In response to Indigenous activism, some colonial states are starting to recognize Indigenous rights to water that move beyond simple utilitarian logics, including notions of personhood and nonhuman rights (Bakker 2018; Lightfoot 2016; Ruru 2018; Todd 2018). But state-led processes of recognition can undermine historic practices associated with the use of water and the land while concretizing colonial dispossession. Critical Indigenous scholars argue that a politics of recognition fundamentally undermines Indigenous lifeways (Coulthard 2014). Audra Simpson (2014), for example, shows how Mohawk communities contest the spatial claims and colonial authorities of Canada and the United States through strategies of refusal. Other Indigenous critics go further to challenge the authority of tribal governments and their use of “sovereignty” as a continuation of larger processes of colonization (Alfred 2006). Some suggest that a way toward decolonial practices is through a “resurgence” of Indigenous lifeways, including worldviews, ethics, and governance (Alfred and Corntassel 2005; Corntassel 2012). Leanne Simpson (2016, 22) writes that “Indigenous resurgence, in its most radical form, is nation building, not nation-state building, but nation building, again, in the context of grounded normativity by centring, amplifying, animating, and actualizing the processes of grounded normativity as flight paths or fugitive escapes from the violences of settler-colonialism.”

In the United States, Indigenous resurgence and notions of cultural renewal have inevitably interlinked, intersected, and become “entangled” in practices of nation-state building (Cornell 1988; Dennison 2012; Nagel 1997; Lambert 2007). In some cases, “resurgence” works through and against colonial structures. It can be a way to expand ideas of sovereignty and incorporate Indigenous ontologies into institutions of governance. For more than thirty years, the Navajo Nation has worked to inscribe notions of “fundamental law” into the governing structures of the Navajo Nation (Austin 2009; Lee 2013). Navajo Nation lawmakers have also embedded unique Diné governing ethics, traditions, and principles into Navajo statutory law, despite the colonial origins of this law and system of government. These form contradictory “politics of tradition” that

can be as reactionary as they can be liberating (Denetdale 2006). Today, the authority of the Navajo Nation and the decisions it makes are the arenas of government and nongovernmental politics and protest (Powell 2017; Powell and Curley 2008). Diné activists challenge the policies of the tribal government while promoting traditional understandings of water and land (Lister and Curley 2017; Powell 2015). In 2012, opposition to the Little Colorado River Settlement called for the tribe to use its authority to reject the agreement. Although the council's authority has colonial origins, the Navajo Nation Council eventually voted down the settlement in response to the protests documented here.<sup>3</sup> This resource colonialism was successfully challenged and rejected by Diné people defending their rights to water. The settlement died in Congress from inaction.

### *Construction of Colonial Water Laws*

White settlers moved into the region only after the United States forcefully removed Diné and Apache peoples onto reservations and away from the origin of the Little Colorado River in Arizona's White Mountains.<sup>4</sup> From the beginning, the colonial political and legal structures of water governance disadvantaged Indigenous nations. Water colonization was part of a larger project of settler colonialism in the United States and Canada. Like land and territory, settlers intruded onto Indigenous water systems. In western states and provinces, where the climate is drier, settlers displaced Indigenous communities and diverted limited waterways into expanding agricultural fields and livestock watering holes (see also Norman, this issue). They built towns and dams while denying the flow of water downstream to Indigenous peoples, who were forced onto reservations.

By the 1920s, western states needed to legalize their theft of western water sources. The Colorado Compact of 1922 unilaterally allocated the entirety of the Colorado River and its tributaries to the seven "western" states who met in Santa Fe to divide the river. Subsequent state water law ignored prior Indigenous claims and usage of water sources and was built on this agreement. Hydrologic estimates at the time were crude and incomplete. The Colorado River was overestimated and overallocated (Abruzzi 1995; Weatherford and Brown 1986). Indigenous rights to the river or any of its tributaries were purposefully ignored, even though the US Supreme Court had ruled that tribes were entitled to water only fourteen years earlier.

3. <https://navajotimes.com/news/2012/0712/070512water.php>, last accessed June 26, 2019.

4. Throughout this article, I use the term *white* to refer to peoples who are considered white in US racial formations, whereas *settler* refers to people engaged in the dispossession and occupation of Indigenous lands. Often, *white* and *settler* overlap, but not always. *White* speaks to presumed racial difference, whereas *settler* refers to political difference. I also use the terms *Indigenous* and *tribe* seemingly interchangeably, but *tribe* refers to the political/racial categorization of Indigenous peoples in "US federal Indian law," how it is commonly referenced. In other words, it is a particular Indigenous experience unique to the United States that shapes Indigenous identities, politics, and approaches toward decolonization.

The origin of Indigenous entanglements within colonial water laws goes back to the *Winters* US Supreme Court decision in 1908. White ranchers in Montana denied the Milk River to downstream Nakoda and Aaniiih peoples, who were forced onto the Fort Belknap reservation. Winter (“*Winters*” was a clerical error), the main plaintiff in the case, argued that tribes had forfeited their rights to surface water when they signed punitive treaties with the United States. Winter and others argued that reservations only guaranteed land, not water (McCool 2006). The Supreme Court eventually rejected this argument and ruled that reservations, as federal lands, maintained “reserved” water rights (Shurts 2000). Following this decision, Indigenous nations asserted stronger water claims through the US court system using this logic.

In western states and provinces, water laws became expressions of nineteenth-century utilitarian logics of resource exploitation and commodification. These laws “produced” or constructed nature according to the ontology of the settler colonialist and exerted claims over Indigenous jurisdictions (cf. Nadasdy 2007; Pasternak 2017). Water laws generated new sociopolitical, cultural, and legal realities (Jepson 2012). They differ from state to state, or province to province, but they construct new environmental realities around them. From the perspective of white settlers, western waters were erratic and infrequent. Sometimes riverbeds ran with water, especially during monsoon seasons, but most of the year, they were dry. Western water governance required a radical reorientation of how water was understood and accounted for (McCool 2006; Shurts 2000). Moving away from riparian systems in the east, western water law worked to make water both legible and quantifiable (Wilkinson 1985). To this day, the legibility of water is a regular concern for hydrologists, who have concluded that the waters are over-allocated. These waters are also declining because of decreasing snowfall in the winter and increased evaporation in the summer linked to damming and processes of climate change.

Since the late 1970s, water “settlements” have become the standard legal-political mechanism through which Indigenous nations gain any “right” of access to western waters (Thorson et al. 2006). The Supreme Court ruled in 1971 that the 1952 McCarran amendment, which waived US sovereign immunity in the case of water rights adjudication, also applied to water rights litigation between tribes and states. State courts were made the venue of litigation, despite the fact that they are less supportive of Indigenous authorities. Tribes compete with state governments for control over the same resources. Consequently, tribal governments feel pressure to settle their water claims instead of risking what little rights they might get through litigation.

Water settlements are among the last enclosures of Indigenous resources on the continent (Curley 2019b). Much of the scholarship on “tribal” water rights has focused on the legal opportunities for tribes to resolve water claims under US and state water laws. However, there is a deficit in how we understand local reactions to water laws and “settlements.” Part of the reasoning for settling water

claims has to do with the future reliability of water supplies for expanding towns and cities in western states. The increasing threat of climate change on the lands and waters of a hotter, drier Southwest has intensified the concerns of Indigenous community members, activists, and tribal officials alike. Patterns of settlement in the region never resolved water claims for Indigenous peoples because Indigenous peoples were initially excluded from making claims to surface water sources (Jones 2011). Today, state governments are anxious to resolve Indigenous water claims because, in theory, Indigenous communities have "senior" or superior rights.<sup>5</sup> Such claims could disrupt the nature of water commodification and consumption in Arizona that currently supports ranchers, agribusiness, and urban expansion. There is a political economy to water distribution in the US Southwest that disfavors tribes, and Indigenous peoples are aware of it.

The Navajo Nation has been relatively late in settling its water claims. Other tribes, such as the Gila River, Apache nations and the Pueblo of Zuni, have entered into settlements with the state of Arizona over the past two decades. Since 1985, the Navajo Nation has maintained water rights attorneys to work on settlements and litigation. However, the tribe did not create an independent "water rights unit" until 2002. Perhaps the creation of the unit signaled the desire to settle rather than litigate Navajo water claims. Despite more than thirty years of water rights litigation, the Navajo Nation has only settled one water case—the San Juan River Settlement in 2005. Water settlements are new for the Navajo Nation and are a form of "new federalism," an era in which the federal government encourages tribes to negotiate "compacts" with states for rights to develop casinos or water resources (Corntassel and Witmer 2008). Gordon (2015) documents the mechanisms by which federated governments, such as Canada or Australia, balance obligations to climate change frameworks with diverse and divergent regional interests. In a settler colonial context, though, new federalism translates into prioritizing regional governments and colonizing interests over tribes.

All water settlements between tribes and states require congressional approval. The entire process gives states strong advantage over tribes because they influence the political process and money ultimately allocated in water settlements. The Little Colorado River Settlement Act of 2012 included not only the settlement but also provisions to extend the life of the Navajo Generating Station, a controversial power plant on the western end of the reservation, for another twenty-five years (Curley 2019a). The main rationale that Navajo Nation lawyers gave for the settlement was a sense of political certainty. They did not believe that the Navajo Nation had a better chance of challenging state water claims in state courts. Tribal lawyers believed that new agreements were

5. Many state water laws in the western United States incorporate the legal doctrine of *prior appropriation*. This approach to water allocation awards the first documented user of surface waters "senior" claims to the water. Subsequent users are awarded less and less seniority. In times of drought, the users with the strongest senior claims have the right to fulfill their use of the water before anyone else, and perhaps at the expense of everyone else.



the only sure pathway to getting rights. For this reason, Navajo Nation lawyers strongly recommended “settling” water rights claims.

Another incentive was the promise of infrastructure development. Many water settlements come with federal monies for the planning and construction of critical water infrastructure. But these agreements require tribes to forever relinquish greater claims to their water. It is the only way the federal government is willing to spend money on infrastructure within reservations. The prospect of immediate “wet” water, or water that is tangible with promises of infrastructure development is enough to convince tribal lawmakers to agree to terms that are binding forever. Many Diné challenge the idea of quickly and permanently settling water claims for less than they believe are the tribe’s inherent rights. Tribal officials, however, feel that these settlements are the best chances for Indigenous nations to maximize their water claims in the context of the colonializing state. In the next section, I will demonstrate how opponents construct their divergent and much different interpretation of rights in their opposition to water settlements. Justice is linked not to well-being but to revitalization.

### **Nitsáhákees dóó nahat’á: Thinking and Planning Diné Water Governance**

When I started fieldwork in January 2012, Navajo people were already discussing the proposed settlement and its terms. This was before any official action related to the agreement had occurred. It was an issue Diné activists, elected tribal officials, and community members regularly talked about. There was something about water that resonated among Diné people beyond other kinds of resources, even land. Water is life. It is the origin of many Diné place-names, clans, and communities. The negotiation between the Navajo Nation and the state of Arizona was supposed to be secret. Yet people outside of power already knew about it. Tribal officials told their relatives, who in turn told their friends. It was an open secret among Diné people who followed Navajo Nation politics that John McCain and Jon Kyl were scheduled to meet with the Navajo Nation Council and Navajo Nation president in Tuba City.

Immediately, Diné activists organized a protest against the “secret” meeting. Interviews at the time reveal that organizers were not aware of the terms of the settlement, since the agreement was confidential. But Diné activists opposed the meeting because they suspected the senators would pressure tribes to accept bad terms. The circumstance of the meeting bred suspicion. It reminded people of past deals when tribal lawmakers were swindled over the value of tribal resources. This was true, for example, in the coal leases that the Navajo Nation signed in the 1960s with Peabody Coal, when the tribe received thirty-six cents per ton of coal (Ambler 1990).

The first event organized against the settlement was a “water conference” on March 29, 2012, in an auditorium of a boarding school called Rocky Ridge. This was a gathering of hundreds of participants. The main speakers were former

tribal officials, such as former chairman of the Hopi Tribe Ben Nuvamsa and former Navajo Nation chairman Peter McDonald.<sup>6</sup> Both speakers opposed the settlement. McDonald used an analogy of a thief stealing sheep and then trying to sell them back to you for a profit. He focused on the historic injustice inherent in the water rights framework. Organizers invited people they knew who were opposed to the deal and who would challenge the terms of it. Diné and Hopi people presented arguments against the settlement. But these voices were later excluded during the official forums that the Navajo Nation Office of the President and Vice President sponsored, giving a sense of how tribal officials wanted to construct the debate.

### *"Our Winters' Rights"*

It was during this water conference when I first heard a speaker refer to "our winters' rights." Winters', as was discussed earlier, was a reference to colonial law. However, speakers thought of it as both rights to quantified water under existing water frameworks and Indigenous rights to water that transcend these laws. In the process, Diné water activists built on two different traditions of Indigenous activism. The first was the self-determination movements of the 1960s and 1970s, culminating in the founding of the American Indian Movement and the defense of Wounded Knee in 1973 (Cobb and Fowler 2007; Shreve 2012; Smith and Warrior 1996). This movement exposed long-standing neglect and racist attitudes toward Indigenous nations in the United States. It forced new laws to guarantee rights of "self-determination" for "federally recognized" Indigenous nations (Wilkinson 2005). It was evident that the older generation of activists and organizers relied on this tradition. They used the rhetoric of sovereignty and self-determination to reinterpret the meaning of *winters'*. The second, newer tradition was the politics of decolonization that informed many of the younger activists and organizers at the forum. Their reframing of self-determination through everyday acts of decolonization profoundly changed the way younger Indigenous scholars, activists, and organizers approached the question (Curley 2018). Estes (2019, 21) argues that today's activism is rooted in "traditions of Indigenous resistance" that "draw upon earlier struggles and incorporate elements of them into their own experience." In the case of Diné politics of decolonization, not only do organizers, activists, and community members build on past rhetoric but they also challenge and change its meaning. These traditions of Indigenous resistance have cleavages in approach and politics. These cleavages were exposed in the mobilization for and against the settlement in the Navajo Nation.

The two positions were distinct but contained strong areas of overlap. The first thread, the "nation-building" position, opposed the settlement because it

6. [www.navajotimes.com/news/2012/0312/032912water.php](http://www.navajotimes.com/news/2012/0312/032912water.php), last accessed June 26, 2019.

reduced what was assumed to be the tribe's much larger inherent rights to water. This position assumed the logic of quantification by basing its claims on *winters'* and colonial water law. It made claims for political parity in the international system of states, which undermines the premise of US colonialism as politically superior to the rights of tribes (Wilkins and Lomawaima 2001). From my observation, it was the older men who once served as tribal lawmakers who gravitated toward this position. The former lawmakers had fought for Indigenous national self-determination in the 1970s and 1980s. They have come to understand tribal control over resources through formal political and legal institutions as the prime goal of "sovereignty." In 1975, Peter MacDonald founded the Council of Energy Resource Tribes (CERT) to challenge US hegemony over resources on tribal lands (Allison 2015). To them, the maximum quantification of water rights for the Navajo Nation was the meaning of inherent rights to water. In this reading, *winters'* was akin to treaty rights. The nation-building position insisted on more water rights under existing quantification schemes.

The decolonial position was broader in meaning and often diverged from the nation-building framework. A decolonial critique of the settlement came from younger Diné from Indigenous and environmental groups. Their main point was that the Little Colorado River Settlement was understood as a geopolitical giveaway to Arizona and the city of Phoenix. Although the Little Colorado River did not directly impact waters going to Phoenix, as Navajo Nation water lawyers quickly pointed out, younger activists and organizers understood the larger geopolitical significance of water in Arizona. Their grounded theory on water settlements spoke to history of colonialism and the capitalist existential need to settle water rights. They directed attention to the political inequalities and power differences between tribes and states that lawyers and elected officials purposely ignored.

The decolonial position recognized that this political inequality had environmental ramifications. It diverted natural water flows into unnatural storage banks and starved downstream Indigenous communities of life-sustaining waters. For example, shortly after the water rights forum, activist Klee Benally organized a march through downtown Flagstaff to oppose the water rights settlement as a violation of Indigenous belief systems. He brought attention to the use of effluent wastewater for snowmaking on Dook'o'oolíid, one of the sacred mountains to the Diné and Hopi peoples.<sup>7</sup> He and others used the language of human rights to claim that the ski resort and the Little Colorado River Water Settlement Act violated human rights and rights against nonhuman relatives. They were opposed not only to the specific projects and the injustices that these projects perpetuated but also to "the production of nature" that was in service of capitalist accumulation at the expense of the right of animals. They were critical of development as a source of destruction of Diné and Hopi lifeways.

7. [www.nytimes.com/2012/09/27/us/arizona-ski-resorts-sewage-plan-creates-uproar.html](http://www.nytimes.com/2012/09/27/us/arizona-ski-resorts-sewage-plan-creates-uproar.html), last accessed June 26, 2019.

## Tó éí ííńá: Challenging Colonial Water Laws

By the time the April 5th meeting occurred, hundreds of Diné protestors were motivated to challenge Kyl and McCain in Tuba City.<sup>8</sup> After about an hour of dialog between tribal lawmakers and Kyl and McCain, the two senators suddenly left. They disappeared in their black SUVs and would not return again. It was now time for the lawmakers to face the hundreds of Diné people who opposed the settlement and had just witnessed their leaders' deference to powerful colonists. The crowd started chanting. They called then-president Ben Shelly names. One young man refused to shake Shelly's hand, and Shelly told him that he was not really Diné because he denied a gesture of goodwill. Shelly became increasingly frustrated. He was supposed to address the crowd from a stage and proclaim that he was on the path to securing Diné water rights. He might have expected the meeting to look good for him. But the crowd was more and more upset and calling for the protection of Diné water. Shelly took to a stage and lectured the people about respect. The crowd heckled him. Shelly left in frustration. Navajo Nation Council delegates spoke to the crowd and tried to assure them that the settlement was not complete. They said the public would have an opportunity to speak to it. But the public remained skeptical. Caroline Johnson, an opponent of the water settlement, said,

I have been a strong advocate to preserve our resources here on Indian land. It's a lifetime commitment for me. If you are to look at the history of the Indigenous people on this continent, we've been struggling for years at a time. And there are things that come, say for instance, coal, the natural resource that is being taken, water, and that's going to be one of our strongest demands, is preserving what is there. Because if there is no water, there is no guarantee of life prevailing. That is my strongest stand. What is going to be there for my children? What is going to be there for my grandchildren?

Johnson related the future of the Diné people to future access to water. Water is life, and without water, "there is no guarantee of life prevailing." Louise Benally, another opponent, said,

And we are here advocating on behalf of all living species including those that can't speak and so these waters have been here long before the colonial ways have come here and we want to continue to use these waters without limits or regulations because it is a natural resource that was always here and for the state governments and state officials and tribal governmental people to lay down rules and regulations and sell it all out away from us isn't ... acceptable.

Anna Frasier, a Navajo environmental activist, said, "We are people that plant corn and whatnot and we can't do that if they take all the water right away from us. And then we want the water for our grandchildren for the future

8. Excerpts from opponents were based on journalist Shelley Smithson's unpublished interviews with protesters at the Tuba City event.

generation." These are environmental sustainability frameworks to interpret water settlements and quantification, but the language of "inherent," "Indigenous," or "aboriginal rights" emerges from the statements of settlement opponents. Marshall Johnson, another well-known Navajo environmental organizer focused on the loss of rights in his remarks: "We are basically wavering our original rights, our first priority rights. Our first reserve rights. I mean, the United States won in court on our behalf, in the Winters' doctrine ruling. . . . We are getting ready to send that down the river." Former Navajo Nation president and grassroots activist Milton Bluehouse Sr. said, "I want to know what criteria was used to quantify the water that they are trying to give us. I think it should be quantified based on the daily uses we have. And then respect the Winters' doctrine—reserve water that was given to us." These references to inherent rights speak to the sovereignty-nationalism understanding of water, rights, and resources.

For proponents of the settlement at Tuba City, it would guarantee water rights for the Diné people, rights that were in jeopardy of being lost if not quantified. Those who favored the water rights settlement sincerely believed they were doing the right thing for the Diné people. Shortly before meeting with Senators Kyl and McCain in Tuba City, Shelly said, "We are going to give water to our people. You need water, and I will do it." In Shelly's mind, the Diné people could accept or reject the final form of the water settlement through a referendum vote, and this would be fair and democratic. Yet the tribe and the state had already negotiated the terms of the settlement, and there was nothing the Diné people could do to amend it. This was the problem some opponents brought up. They could only accept or reject the settlement in its final form absent consideration of features of the settlement that they found disagreeable. Diné people would continue to express this disagreement in hastily scheduled public forums that were also trying to temper a collective criticism of the settlement and its process.

### *Water "Hearings"*

Water rights inspired an existential threat to the tribal government. Navajo Nation officials feared for their safety from their own people. Usually public officials travel with no security and regularly meet with people without police protection. The water settlement was an exception. The strong feelings Diné people showed toward water inspired fear in some Navajo Nation officials. Over the summer of 2012, the Navajo Nation Office of the President and Vice President organized a series of water rights hearings where "the people" would have an opportunity to tell tribal lawmakers, specifically the Navajo Water Rights Commission, how they felt about the water settlement. In total, tribal officials organized five public hearings. They were in the communities of Tuba City, Piñon, Leupp, Oak Springs, and Fort Defiance. Only Leupp was along the Little Colorado River. The other communities stood to benefit from small water infrastructure tied to the settlement. I attended three of the forums. The Shelly

administration organized the first hearing in Tuba City. Although there were enough people to fill a gymnasium, organizers insisted on the much smaller "chapter house." President Shelly felt his safety was at risk. His people wanted to control the crowd. All forum participants were required to go through a metal detector before entering the chapter house. Capacity quickly filled. Many were turned away. Signs were banned. Protest around the chapter house was restricted.

The hearing lasted nearly five hours. The Navajo Water Rights Commission, five political appointees who were supposed to represent the public in water rights negotiations, hosted the hearings. They invited President Shelly to speak alongside other Navajo officials in support of the settlement. The forums were part of the commission's mandate to inform and educate the Diné public on the complicated legalese of water rights settlements. But it was clear to participants that the presentations were biased in favor of the settlement. The presentations highlighted only the positive aspects of the settlement. They avoided discussing what rights the tribe would relinquish as part of the settlement. Whenever anyone questioned the costs, forum officials downplayed its risk.

At root concern for people was the permanence of the settlement. The settlement spoke to Diné people's relationship with water forever. However, the public was only given a handful of highly restricted meetings with biased presentations to assess the terms of the settlement. The Navajo Nation was asked to decide quickly on the issues to keep pace with Congress, where the settlement bill was under consideration as part of a centennial birthday gift for Arizona. At the Oak Springs hearing, Diné environmental organizer Deon Ben asked, "Why are they bringing this Senate bill on us so quick and making us make a decision so quick. . . . You sugar-coated this to bring to the people, but you left a lot of things out." Raymond Berchman, former Navajo Nation Council delegate, said, "The reason we have this forum, politics. . . . I grade the presentation from one to ten, to me personally, a one. I have been working on water for the last thirty-five years, with the Navajo Nation [government] and with NTUA [Navajo Tribal Utility Authority]. . . . To me I don't believe it, compared to a statement that was made somewhere along the line, they are twisted. Lawyers. How come there is a Senate bill already going forward? It is not fair to us to give us three minutes. If you are not in the water business, you don't understand it. . . . And these are my people here from Oak Springs."

The first forum was held and organized in Tuba City. It was packed. Most of the audience spoke only Diné bizaad (the Diné language). Many spoke against the settlement. They reiterated critiques I had heard earlier when talking with opponents. They said the settlement would forever relinquish claims to the Little Colorado River in exchange for subpar rights to the river. Although proponents felt that only environmental groups were voicing opposition to the settlement, I saw people at the Tuba City, Leupp, and Oak Springs forums who were not part of any environmental organization and who were there because they were concerned with what was happening to Diné water. They

were simply opposed to the settlement. They could not explain the terms of the agreement or the legal context in which it was made, but they intuitively knew that the Navajo Nation was getting a bad deal. One forum participant in Oak Springs, a man who appeared to be in his early fifties, was handed the microphone after waiting in a long queue to speak. He expressed what many of us were thinking at the time: the forums were simply trying to sell us on the terms of the settlement and were not meant to inform us about them or give us space to respond. The audience burst into applause. This was in a community where proponents assumed people would be more supportive of the settlement.

The hearings were highly restrictive with regard to who could participate in the conversation and what they could say. Organizers in the Office of the President and Vice President disallowed signs or T-shirts against the settlement. They restricted commentary to Diné speakers, although the agreement and corresponding congressional legislation were entirely in English. This put both Diné and non-Diné speakers at a disadvantage. Diné speakers had to rely on official interpretations of the settlement from those who already supported it, while non-Diné speakers were refused participation. Comments were restricted to three minutes per person. This feature did not go over well in communities where, following their own governing practices, people's right to speak did not have time restrictions and public comments often exceeded more than ten minutes.

For many participants, their concerns were both about sovereignty and the environment. Diné people mobilized to question the future of Navajo water under the legal parameters of a water settlement. Translators simplified the legalisms involved, which was the focus of the presentations. The Navajo Water Rights Commission and a few Navajo Nation Council delegates tried to translate the meaning of this settlement into Diné bizaad. This made things more confusing for people. They did not directly translate the legal language of the settlement; they simplified it. And simplification left out important considerations. Presenters failed to address many parts of the settlement, such as the relinquishment of the Navajo Nation's ability to move land into trust. Although this information was given to Navajo Nation Council delegates through confidential memos, it was not discussed during the forums. Moving land into trust is the only way for tribes, under federal law, to expand the size of their reservations. This is important for people who have been violently displaced from their traditional lands and only now have the means to recover some of those lands. The settlement would have restricted the process.

The prospect of a permanent forfeiture of Diné rights to water was enough to motivate everyday Diné people to show up and voice disagreement with the proposed settlement. Whether or not opponents believed that Diné people should move toward maximization of water quantification under existing law, or whether the tribe should fundamentally challenge the colonial premise of water law in the first place, opponents felt that the settlement needed to be stopped and that the Navajo Nation and Diné people had to defend their water.

After the public hearings, the Navajo Nation Council voted on the proposed settlement. The council rejected it 15–6 in early July 2012. Shelly was clearly frustrated with the process. He tried to distance himself from the outcome. The Hopi Tribe also rejected it. It could not go forward without consent from the governing bodies of the two nations, governing bodies that the US government had created. The settlement had died. Through mobilization around a collective right to water and sense of impending injustice, the Diné people defeated the proposed settlement agreement.

### **Siihasin: Reflecting on the Settlement's Meaning**

Diné people who were opposed to the Little Colorado Settlement asserted a combined claim of legal-political rights defined in western water law alongside an appeal to historic aboriginal rights. "Our winters' rights" was a combination of the two frameworks. Previous generations of Indigenous activists had worked tirelessly to challenge the foundations of colonial structures. In so doing, they defined Indigenous peoples as nations and not simply as racial minorities. They worked to enhance the "rights" of tribes in the US federal system, often under the rhetoric of "self-determination" and "sovereignty." In interviews and observations, I witnessed claims associated with this framework. Diné people believed that their inherent rights to the region's surface waters was compromised by the terms of the settlement. However, they were not necessarily opposed to a new and different agreement (or litigated court victory) that would increase the water quantified and guaranteed to the Navajo Nation.

On the other hand, there was a strong thread of activism based in an ideology of decolonization. Decolonization challenged many premises of "western water law," including the notion that people deserved rights to the water if they colonized water sources and used it "productively," which usually meant unsustainably. Settlement opponents looked to Indigenous philosophies of water that were pre-existent and fundamentally discordant to quantification schemes and notions of water rights. This speaks to what Coulthard and Simpson (2016) refer to as "grounded normativity" or notions of Diné resource governance that are rooted in ethics of care and responsibility for all peoples and nonhuman peoples who use the water. Dams, diversions, large farms, and even some forms of ranching would violate these alternative principles of resource governance. Yazzie and Baldy (2018) argue that these politics of decolonization are defined by political struggle and radical relationality with nonhuman actors like water (see also Todd 2018).

The question of rights and justice for Indigenous peoples is concerned not only with the distribution of resources but also with the "capability" of the resources to fulfill the well-being of a people. Schlosberg and Carruthers (2010) identified similar tendencies in their comparative research in Chile and the Navajo Nation. They found that justice for Indigenous peoples is community based and capabilities centered. Ciplet et al. (2013 used a version of this



capabilities argument, rooted in Sen's Idea of Justice, to evaluate the priorities of the United Nations Framework Convention on Climate Change. They found that the language of adaptation fulfilled Sen's more nuanced framework on justice. However, politically, the convention favored the interests of powerful nations—perhaps showing the limitations of this sense of rights and justice. Ciplet et al. (2013) conclude that Sen's "realization-focused" theory of justice attended to the "actual behavior of actors" who work to mitigate but not transcend global inequalities. In the case of the Little Colorado River Settlement, Diné opponents and community members demonstrate that they are attentive to Sen's "capability" or "realization-focused" notion of justice but fundamentally desire something much more categorical. They seek to rectify the injustice of ongoing settler colonialism and realize their collective capabilities as nations, not "Indians," "tribes," or "minorities" who are meant to step aside for the greater good of the colonial state.

The water settlement failed. Kyl eventually retired from the Senate, and McCain died in 2018. State representatives and tribal officials still talk about resolving claims to the Little Colorado River, but little has advanced in the last seven years. Proponents of the settlement characterized Diné opponents as "uninformed" and said that they did not fully understand the limitations of western water law. Diné opponents of the settlement did not misunderstand western water law; they challenged its legitimacy. Within the forums, tribal officials wanted to limit the conversation to narrow dimensions of the settlement, but Diné opponents chose to historicize it as a struggle against colonial injustice. The appeal to "our winters' rights" worked in the language of self-determination, sovereignty, rights, and decolonization. It spoke to deeper rights and responsibility to water that settlements simply ignored. In the end, the struggle is to reclaim and revitalize Diné lifeways.

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