U.S. Senate Committee on Indian Affairs
Oversight Hearing on
Water as a Trust Resource: Examining Access in Native Communities
Initiative Lead Heather Tanana, Universal Access to Clean Water for Tribal Communities
September 27, 2023

Introduction

On behalf of the initiative on Universal Access to Clean Water for Tribal Communities (UACW), thank you for holding this hearing and the opportunity to provide testimony. UACW is composed of Tribal members, water experts, and non-profit organizations working together to enhance Tribal capacity and secure access to clean, safe drinking water for all Native communities in the United States.[1]

Access to clean water is a human right. Clean water is foundational for human health, growing economies, and a basic level of support for communities. As such, access to water is fundamental to the exercise of tribal sovereignty. However, an estimated 48% of households on Native American reservations do not have access to reliable water sources, clean drinking water, or adequate sanitation.[2] The lack of access to clean and safe drinking water in Tribal communities reflects historical and persisting racial inequities that have resulted in health and socioeconomic disparities. The federal government, often through treaties, promised to establish reservations as permanent homelands for Tribes.[3] A permanent, livable, and prosperous homeland cannot exist without this minimum requirement of life—access to an adequate and healthful supply of drinking water. Unfortunately, the federal government has largely failed to fulfill its duty to ensure clean water access for Tribes. Congress could remedy this failure by explicitly reaffirming its trust responsibility to Tribes, supporting Tribal capacity, and assisting in the realization of Tribal water rights.

Native American households are more likely to lack adequate water services than any other group in the United States. Existing water infrastructure on reservations continues to deteriorate and inadequate water quality remains pervasive across Indian Country. According to the U.S. Water Alliance, while Black and Latinx households are almost twice as likely as white households to lack indoor plumbing, Native American households are about *19 times* as likely.[4]

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[1] Universal Access to Clean Water for Tribal Communities, https://tribalcleanwater.org.
[2] Democratic Staff, House Committee on Natural Resources, *Water Delayed is Water Denied: How Congress has Blocked Access to Water for Native Families* (Oct. 2016), https://democrats-naturalresources.house.gov/water-delayed-is-water-denied.
[3] See e.g., Treaty Between the United States of America and the Navajo Tribe of Indian art. XI, Sept. 9, 1849, 9 Stat. 974. See also Treaty with the Apache art. XI, July 1, 1852, 10 Stat. 979.
[4] DigDeep-US Water Alliance, "Closing the Water Access Gap in the United States," 2019, https://www.digdeep.org/close-the-water-gap; Jay Willis, *The Hidden Racial Inequities of Water Access in America*, *GQ*, November 25, 2019, https://www.gq.com/story/hidden-racial-inequities-water-access.

Without a safe, reliable, affordable, and easily accessible water supply, Tribal households are unable to meet basic personal hygiene, food preparation, domestic cleaning, and other needs required for good health. Indeed, without access to water, tribal nations are unable to truly exist and fully exercise their sovereign rights. The harsh reality is that the U.S.'s failure to prioritize and meaningfully address tribal water rights and access essentially perpetuates pre-1800s extermination policies.

As part of UACW, we have looked closely at the various federal programs that address the provision of clean water and associated infrastructure in Indian Country. These programs are based on the federal government's treaty and trust responsibilities to Tribes and have improved conditions for some Native American communities. However, several barriers exist which prevent Tribes from fully realizing the benefits of these programs. This testimony addresses the severe water insecurity challenges many Tribes continue to experience and the federal responsibility to assist Tribes in overcoming those challenges. UACW has produced two reports to date, *Universal Access to Clean Water for Tribes in the Colorado River Basin* and *Recommendations for Operational, Administrative, Policy, and Regulatory Reform*, which we request be entered into the record of this hearing.[5]

Federal Trust Responsibility to Tribes

The federal government has an underlying trust responsibility to Tribes. The trust responsibility is a "fiduciary obligation . . . to protect Tribal treaty rights, lands, assets, and resources, as well as a duty to carry out the mandates of federal Indian law."[6] To be "judged by the most exacting fiduciary standards," the federal government has "charged itself with moral obligations of the highest responsibility and trust.[7] Indeed, "[n]early every piece of modern legislation dealing with Indian tribes contains a statement reaffirming the trust relationship between tribes and the federal government."[8]

Permanent Homelands Require Water

The federal trust responsibility includes fulfilling the promise of a permanent homeland. Each Tribe has its own unique history, traditions, and community. However, many Tribes share common experiences stemming from colonization, including forced removal from their homelands, treaty making with the federal government, and establishment of reservations. When the United States established reservations, it did so to provide a permanent home for each Tribe that would support

[5] Portions of this testimony are taken from UACW's findings and reports and Professor Tanana's scholarship, *Securing a Permanent Homeland: The Federal Government's Responsibility to Provide Clean Water Access to Tribal Communities*, 69 The Federal Lawyer 2 (Mar./Apr. 2022).
[6] Bureau of Indian Affairs, What Is the Federal Indian Trust Responsibility? http://www.bia.gov/FAQs/index.htm.
[7] Seminole Nation v. United States, 316 U.S. 286, 297 (1942).
[8] Cohen's Handbook of Federal Indian Law § 5.04[3][a] (Nell Jessup Newton ed., 2012).

their people forever. "The key to carrying out that promise is water—a fact that the tribal leadership has always known but which the United States has sometimes forgotten."[9]

In *Winters v. United States*,[10] the U.S. Supreme Court addressed Tribal water rights, holding that when reservations were created, the United States and Tribes reserved water rights—enough to fulfill the purposes of the reservation, including the residential, economic, and governmental needs of the Tribe. At the heart of the *Winters* decision is the United States' trust obligation to provide true homelands to Tribes. There is no substitute for water. "Access to a clean, reliable supply of water is basic to human health,"[11] and clearly a necessary component to making a homeland habitable and permanent.

The *Winters* doctrine is an important component of Tribal water access because it provides a secured and legally defensible right to obtain water—particularly in the western United States, where water generally is awarded under a system of prior appropriation. Under the doctrine of prior appropriation, "water is allocated to users based on the order in which water rights were acquired."[12] "The doctrine's basic command that 'first in time is first in right' incentivized rapid development and use of scarce water resources with little regard for conservation, efficiency, or equitable allocation."[13] Federally reserved Indian water rights have been recognized as impliedly included in a Tribe's foundational agreements with the federal government.[14] But, these rights are often overlooked by states, even though Tribal rights often have more senior priority dates than other state-based users in prior appropriation states.

The federal government also has a treaty and trust responsibility "to ensure the highest possible health status for Indians" and to provide healthcare services to Tribes.[15] The link between water and survival is so strong that the United Nations, several countries, and a few states have recognized a human right to water.[16] Lack of water access exposes individuals to preventable

[9] Colorado Ute Settlement Act Amendments of 1998: Hearing on H.R. 3478 Before the U.S. H. Natural Res. Comm., 105th Cong. (July 28, 1998) (testimony of Clements Frost, Chairman, Southern Ute Indian Tribe).
[10] 207 U.S. 564 (1908).
[11] U.S. Bureau of Reclamation, Colorado River Basin Ten Tribes Partnership, Tribal Water Study at 7-10 (2018).
[12] Congressional Research Serv., *Indian Water Rights Settlements* (Mar. 28, 2023) at 5, https://crsreports.congress.gov/product/pdf/R/R44148.
[13] Brief of Tribal Nations and Indian Organizations as Amici Curiae in Support of Respondents, No. 21-1484 (U.S.), June 22, 2023, https://www.supremecourt.gov/DocketPDF/21/21-1484/254374/20230208173956207_43203%20pdf%20Whitemanrunshim%20br.pdf.
[14] 207 U.S. 564 (1908).
[15] Indian Health Care Improvement Act, Pub. L. 94-437 §§ 2, 601.
[16] G.A. Res. 64/292, The Human Right to Water and Sanitation, (July 28, 2010). *See also* Global Analysis and Assessment of Sanitation and Drinking-Water (GLAAS), *National Systems to Support Drinking-Water Sanitation and Hygiene: Global Status Report 2019*, World Health Organization, at 48–55 (2019). Massachusetts and Pennsylvania recognize the right to water in their state constitutions, and California and Virginia have been successful in passing legislation recognizing this right. Mass. Const., art. XCII; Pa. Const., art. 1, § 27; Assemb. B. 685, 2011-12 Leg. Sess. (Cal. 2012) (codified at Cal. Water Code § 106.3); Assemb. B. 401, 2015-16 Leg. Reg. Sess. (Cal. 2015).; H.R.J. Res. 538, 2021 Leg., Spec. Sess. (Va. 2021).

health risks and can contribute to malnutrition and diarrheal disease, among other illnesses.[17] "For decades, experts have documented how lack of access to clean water and sanitation in Indian Country contributes to high rates of morbidity and mortality among American Indians and Alaska Natives." Notwithstanding the strong connection between water access and public health, the federal government has contributed to health disparities and other inequities in Tribal communities by prioritizing nontribal water projects in the past. A century ago, the U.S. government invested in modern water and sanitation systems as a means of eradicating waterborne diseases, but largely bypassed reservations.[18]

Fulfilling the Trust Responsibility

The late 1960s/early 1970s ushered in the current federal Indian policy era of self-determination. This era purports to strengthen Tribal sovereignty and promote Tribal self-determination. The federal government must implement the trust relationship with the foundational goals of the self-determination era in mind, including respecting Tribal sovereignty, capacitating Tribal sovereigns, and, more broadly, facilitating the continued existence of Native peoples within the United States. Ensuring Tribal access to clean water is essential to those goals.

Following the U.S. Supreme Court's decision in *Arizona v. Navajo Nation*, it is critical that Congress reaffirm the trust responsibility to Tribes and its commitment to the survival of Tribal Communities. The Court found that the Navajo treaties did not establish a conventional trust relationship with respect to accessing water for the Tribe. As a result, the Navajo treaties did not require the United States "to take affirmative steps to secure water for the Navajos."[19] But, the Court recognized that Congress may enact—and often has enacted—laws to assist Tribes with their water needs. Congress should therefore express an intent in any legislative action that the United States take affirmative steps to secure water for Tribes, including assessing a Tribe's water needs, developing a plan to secure needed water, and facilitating access to that water. "Under the Constitution, Congress and the President have the responsibility to update federal law as they see fit[.]"[20] Now is the time to do so.

UACW supports passage of the Tribal Access to Clean Water Act and the Senate Resolution recognizing the critical importance of access to reliable, clean drinking water for Native Americans and affirming the responsibility of the Federal Government to ensure such water access.

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[17] Ctrs. for Disease Control and Prevention, *Food and Waterborne Diarrheal Disease* (Dec.21, 2020), https://www.cdc.gov/climateandhealth/effects/food_waterborne.htm. *See also* World Health Organization, *Drinking Water*, https://www.who.int/news-room/fact-sheets/detail/drinking-water.

[18] U.S. House of Representatives Comm. on Appropriations, Subcomm. on Energy and Water Develop., 116th Cong. (Mar. 10, 2021) (testimony of Bidtah Becker, Navajo Nation); *see also* Nat'l Water Comm'n, Water Policies for the Future 476 (1973) ("[I]n the water-short West, billions of dollars have been invested, much of it by the Federal Government, in water resource projects benefiting non-Indians but using water in which the Indians have a priority of right if they choose to develop water projects of their own in the future.").

[19] Arizona v. Navajo Nation, No. 21-1484 at 2 (June 22, 2023).

[20] *Id*.

Importantly, the resolution calls on the Executive Branch to employ a "whole of government" approach to ensure access to reliable, clean drinking water to households on Indian reservations, in Alaska Native villages, and in Native Hawaiian communities.

Congress also must provide a better, more reliable process by which federal reserved Indian water rights can be recognized, quantified, and tribes compensated through fair and expedient settlement. Through the Secretary of the Interior's Indian Water Rights Office (SIWRO), Tribes across the country have an opportunity to explore settlement of their water right claims and obtain much needed funding to address infrastructure and access issues, in addition to the legal certainty needed to maintain and enforce water rights when they come into competition with other uses.[21] However, of the 574 federally recognized tribes, only 39 have achieved settlement.[22] Of these Tribes with settled water rights, a still smaller set have received the funding they agreed to in exchange for vast amounts of water to which they would otherwise still have a legal claim.[23] The Indian Water Rights Settlement Completion Fund and the Reclamation Water Settlements Fund have served as the sources of federal dollars for these settlements, but rely on the priorities of a given administration for funding. If made permanent, the way settlements are achieved would become more durable and efficient.

Failure to help Tribes secure water access cannot be reconciled with the general trust responsibility of providing a permanent homeland to Tribes and promoting the survival and welfare of their communities. "Ensuring access to water and sanitation for all people is not simply a question of water resources, technology and infrastructure, but also of setting priorities, tackling poverty and inequality, addressing societal power imbalances, and above all, political will."[24]

Tribal Water Needs Today

Household water security is defined as "the safe and reliable access to sufficient quantity and quality of water for household consumption, production, and cleanliness."[25] "In the United States, potable water infrastructure is broadly assumed to be 'universal' in its coverage, to the point where the U.S. Census Bureau has recently considered dropping its plumbing question from the [American Community Survey] questionnaire."[26] However, despite public perception, "universalized water infrastructure remains an incomplete promise for different populations in different places across the nation[.]"[27] This is particularly true for Native Americans, who are

[21] U.S. Dep't of Interior, Secretary's Indian Water Rights Office, https://www.doi.gov/siwro.
[22] U.S. Dep't of Interior, Secretary's Indian Water Rights Office, *Enacted Indian Water Rights Settlements,* https://www.doi.gov/siwro/enacted-indian-water-rights-settlements.
[23] *Indian Water Rights Settlements*; *see also* FY 2022 Allocation of Funding for Indian Water Rights Settlements, https://www.doi.gov/sites/doi.gov/files/fy-2022-bil-iwrs-allocations.pdf.
[24] U.N., Outcome of the International Experts' Meeting on the Right to Water, Paris, France, July 7-8, 2009, at 2.
[25] Shiloh Deitz & Katie Meehan, *Plumbing Poverty: Mapping Hot Spots of Racial and Geographic Inequality in U.S. Household Water Insecurity*, 109 Annals Am. Ass'n Geographers 1 (2019) [hereinafter *Plumbing Poverty*].
[26] *Id*. at 1, 7 (2019).
[27] *Id*. at 8.

generally the first occupants, but often the last to receive the promises of a permanent homeland. For example, within the Colorado River Basin, it is largely Tribal communities that lack piped water services and suffer from plumbing poverty, including the Navajo Nation, Hopi Tribe, White Mountain Apache Tribe, Ute Mountain Ute Tribe, and Southern Ute Indian Tribe.

From a Tribal perspective, there are four interrelated aspects to ensuring and maintaining water security for their communities:

- **Service** – there is a reliable piped water system connecting to the household;
- **Quality** – the water available to the household meets minimum acceptable quality standards;
- **Infrastructure** – existing water and sanitation infrastructure are sufficient and in good condition to meet community needs; and
- **Maintenance** – the operation and maintenance (O&M) requirements and associated costs to support existing water and sanitation infrastructure are met;

As discussed below, Tribes encounter challenges in each of these areas.

Service

The rural location of many Tribal reservations and homelands presents unique challenges to the construction and maintenance of water systems. Connecting remote homes to a centralized piped water system results in a higher cost per connection. There are also practical design and construction concerns that must be taken into account, such as difficult terrain and short construction seasons. However, "[r]urality is not the sole or even best predictor of plumbing poverty"—race is the most significant predictor of plumbing access.[28] Native American communities are "equally likely to lack complete plumbing whether they are high- or low- income, and whether they live in urban or rural areas."[29] And, living in a Native household dramatically increases the odds of being plumbing poor.[30]

The Navajo Nation, the largest and most populous reservation in the country, has significant piped water access gaps.[31] Navajo residents are 67 times more likely than other Americans to live without access to running water.[32] As a result, many households are required to haul water from communal wells—a costly and time-consuming burden.

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[28] *Id*. at 9.
[29] U.S. Water Alliance and DigDeep, Closing the Water Access Gap in the United States: A National Action Plan 22 (2019) [hereinafter *Closing the Water Access Gap*].
[30] *Plumbing Poverty* at 1, 3; *Closing the Water Access Gap*, at 22.
[31] DigDeep, Brief of DigDeep Right to Water Project and Utah Tribal Relief Foundation as Amici Curiae in Support of Respondents, No. 21-1484 (U.S.), June 22, 2023, http://www.supremecourt.gov/DocketPDF/21/21-1484/254361/20230208163233914_DigDeep%20UTRF%20Amicus%20Brief%20-%20final.pdf.
[32] DigDeep, Navajo Water Project, https://www.navajowaterproject.org/project-specifics.

Water Quality

Inadequate, unsafe water quality is another barrier to clean and secure water access, where an estimated 1 in 10 Tribal members lacking access to reliable clean tap water and basic sanitation.[33] Although a home may have access to piped water and indoor plumbing, the accessibility is negated if the water is contaminated and unsafe for consumption. The geographic profile and history of mining in the West has led to elevated levels of contaminants, such as arsenic and uranium, in groundwater sources.[34] Agricultural runoff has also caused nitrate and bacteria contamination that can be particularly troubling for Tribal resources and uses of water. Concentrations of these contaminants above drinking water standards in unregulated water sources pose health risks to the local community. In addition, water quality issues also exist in regulated water sources. In its first Indian Policy, the Environmental Protection Agency (EPA) recognized regulatory gaps that exist in Indian Country with respect to water quality protection:

> [W]ithout some modification, our programs, as designed, often fail to function adequately on Indian lands. This raises the serious possibility that, in the absence of some special alternative response by EPA, the environment of Indian reservations will be less effectively protected than the environment elsewhere. Such a result is unacceptable. The spirit of our federal trust responsibility and the clear intent of Congress demand full and equal protection of the environment of the entire nation without exceptions or gaps.[35]

Although there have been several legislative and regulatory changes since the EPA Indian Policy was first issued in 1980,[36] the water quality gap in Indian Country has persisted and inadequate water quality is pervasive. For example, in Nebraska, the Santee Sioux Nation has been under a no-drink order from the EPA since 2019 for manganese contamination in their drinking water wells. Tribal members have used funding from the Bureau of Indian Affairs to buy bottled water, but it will soon run out and there is no long-term solution on the horizon.[37] Similarly, the Hopi Tribe has struggled with arsenic contamination in its water supply since its drinking water systems were first installed in the 1960s. The Tribe estimates that approximately 75 percent of people living

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[33] Lakhani, Nina, The Guardian, *Tribes without clean water demand an end to decades of US government neglect.* April 28, 2021.

[34] Jani C. Ingram, et al., *Uranium and Arsenic Unregulated Water Issues on Navajo Lands*, J. Vacuum Sci. Tech. A. 38(3) (2020). Percy Deal is a Navajo citizen and lifetime resident of Black Mesa, Arizona, which is where Peabody Energy operated a coal mine for several decades. His personal story, outlined in a letter to the Office of Surface Mining Reclamation and Enforcement identifies the environmental degradation experienced in the area and the impact it has had on water quality and community health. UACW requests that Mr. Percy's letter be entered into the record.

[35] Envt. Protection Agency, EPA Policy For Program Implementation on Indian Lands 3 (Dec. 19, 1980).

[36] Safe Drinking Water Act Amendments of 1986, Pub.L. No. 99-339, 42 U.S.C. § 300j-11(a); Clean Water Act Amendments of 1987, Pub. L. No. 100-4, 33 U.S.C. § 1377(e).

[37] Nebraska Public Media. *'Everyone's sympathetic,' But after 4 years without safe drinking water, sympathy isn't enough for the Santee Sioux Nation*. (September 11, 2023), https://nebraskapublicmedia.org/en/news/news-articles/everyones-sympathetic-but-after-4-years-without-safe-drinking-water-sympathy-isnt-enough-for-the-santee-sioux-nation/.

on Hopi land are drinking contaminated water. Such contamination poses serious health risks, including diabetes, skin discoloration, cancer, blindness, and partial paralysis.

Water Infrastructure

Water infrastructure refers to the network of structures (e.g., pumps, pipes) and facilities (e.g., treatment plants, storage facilities) required to deliver water services. A large proportion of water systems were built over a century ago and either have reached the end of their expected lifespan, or are not able to handle additional demands associated with growing populations, increased treatment requirements, and the impacts of climate change.[38] Aging infrastructure also contributes to unnecessary water loss. "Drinking water systems currently lose at least six billion gallons of treated water per day, or 2.1 trillion gallons per year."[39] This water loss is particularly felt in the Western United States where water is already a scarce resource. Additionally, as infrastructure deteriorates, risk of water contamination and non-potable water delivery increases, which can lead to additional challenges to secure a reliable water supply.[40]

Tribal communities typically face even greater challenges and woefully inadequate water infrastructure. Investment in water infrastructure has not kept up with population growth and other needs. Such underinvestment in physical infrastructure harms "the social, physical, and mental wellbeing" of Tribal communities and impairs their ability to thrive.[41] A significant portion of existing Tribal infrastructure was installed over the course of many decades, beginning in the late 1800s. The high costs associated with outdated technology and infrastructure repairs can limit a Tribe's ability to realize the full potential value of its water and meet the growing needs of its community.

The Warm Springs Indian Reservation in Oregon has lacked reliable clean drinking water for decades. In December 2022, the EPA and the Indian Health Service (IHS) completed a formal agreement that provided more than $23 million to build a new water treatment plant at the Reservation. Nearly all the funding is the result of the Infrastructure Investment and Jobs Act (IIJA).

Operation and Maintenance (O&M)

The ability to continually operate and maintain functional water delivery infrastructure is critical for providing communities with clean and safe water access. Similar to water infrastructure costs, O&M costs have also increased over time and are outpacing available funding across the United

[38] American Society of Civil Engineers, The Economic Benefits of Investing in Water Infrastructure 6 (2020).
[39] *Id*. at 10.
[40] Deborah Vacs Renwick, et al., *Potential Public Health Impacts of Deteriorating Distribution System Infrastructure*, 111 J. Am. Water Works Association 2, 42–53 (2019).
[41] National Congress of American Indians, Tribal Infrastructure: Investing in Indian Country for a Stronger America 4 (2017), https://www.ncai.org/NCAI-InfrastructureReport-FINAL.pdf.

States.[42] The rise in O&M costs is partly associated with aging infrastructure—it is more costly to operate and maintain systems that are near or have exceeded their expected lifespan. The shortage of trained and qualified individuals to undertake the planning and construction, and long-term O&M of infrastructure projects compounds the lack of funding available for infrastructure projects in Indian Country.[43]

"There are many federal programs authorized and funded to support water infrastructure construction and technical assistance, but they have limited authority or funding to support direct operation and maintenance of the facilities provided."[44] Ironically, both the Indian Sanitation Facilities Act (ISFA) and the Indian Health Care Improvement Act authorize IHS to provide O&M activities for existing water and sanitation facilities.[45] However, Congress has never appropriated funding to provide those services.

While certain Tribes have been able to initially construct suitable water infrastructure, O&M of the systems has proven to be difficult. The Jicarilla Apache Nation has experienced the challenges associated with providing ongoing support for O&M of Tribal infrastructure. Like other Tribes, the Jicarilla Apache Nation is unable to utilize traditional means of collecting revenue to support O&M— e.g., taxing Tribal lands. Infrastructure O&M, therefore, must be separately budgeted for year after year. When budgets are tight, allocations for O&M often suffer, repairs are delayed, and established infrastructure starts to degrade. The Jicarilla Apache Nation has seen this happen to its water delivery system, and water services to the community has been threatened.

Maximizing Funding for Tribal Water Infrastructure

In recognition of its treaty and trust responsibilities, the federal government has established several programs under various agencies to support Tribal water infrastructure and clean water access. The primary agencies include the Indian Health Services (IHS), Environmental Protection Agency (EPA), United States Department of Agriculture (USDA), and Bureau of Reclamation (Reclamation). Historically, these programs have been grossly underfunded compared to Tribal

[42] American Society of Civil Engineers, The Economic Benefits of Investing in Water Infrastructure 12 (2020).
[43] National Congress of American Indians, Tribal Infrastructure: Investing in Indian Country for a Stronger America 4 (2017), https://www.ncai.org/NCAI-InfrastructureReport-FINAL.pdf.
[44] Bloomberg American Health Initiative, Getting Out Ahead of Water Infrastructure Challenges: Q&A with Bloomberg Fellow David Harvey (Aug. 6, 2020), https://americanhealth.jhu.edu/ news/getting-out-ahead-water-infrastructure-challenges-qabloomberg- fellow-david-harvey.
[45] The Indian Sanitation Facilities Act authorizes the Surgeon General "to construct, improve, extend, or otherwise provide and maintain by contract or otherwise, essential sanitation facilities[.]" Pub. L. No. 86-121, 73 Stat. 267 (1959) (codified at 42 U.S.C. § 2004a(a)). Pursuant to the Indian Health Care Improvement Act, the Secretary is authorized to provide "(A) Financial assistance to Indian Tribes and communities in the establishment, training, and equipping of utility organizations to operate and maintain Indian sanitation facilities; (B) Ongoing technical assistance and training in the management of utility organizations which operate and maintain sanitation facilities; (C) Operation and maintenance assistance for, and emergency repairs to, Tribal sanitation facilities when necessary to avoid health hazard or to protect the Federal investment in sanitation facilities" as well as "financial assistance to Indian Tribes and communities in an amount equal to the costs of operating, managing, and maintaining the facilities provided[.]" Pub. L. No. 94-437 (1976) (codified at 25U.S.C. §§ 1632(b)(2), (e)(1)).

needs. However, the Infrastructure Investment and Jobs Act (IIJA) and Inflation Reduction Act (IRA) have provided much needed funding to fulfill the federal trust responsibility to Tribes, including the following:

- **Indian Health Services** - IHS received $3.5 billion from IIJA for its Sanitation Facilities Construction Program, which designs and constructs water, wastewater, and solid waste facilities for Native American homes. This funding level accounts for the end of year 2020 estimate of currently identified projects in the Sanitation Deficiency System (SDS), although an Office of Inspector General report noted several challenges to implementing this funding.[46]
- **Environmental Protection Agency** - EPA funds drinking water and wastewater infrastructure largely through two Tribal set-aside programs for the Safe Drinking Water Act (SDWA-TSA) and Clean Water Act (CWISA), respectively. IIJA increased appropriation to both programs. From fiscal years 2022-2026, EPA anticipates investing over $254 million in Tribal wastewater infrastructure improvements, and over $614 million in Tribal drinking water infrastructure improvements.[47] Under the IRA, Congress also appropriated billions into several environmental justice programs administered by the EPA. However, it remains to be seen how those will be implemented or how they might improve Tribal access to water.
- **Bureau of Reclamation** - Reclamation has primarily been involved in Tribal water projects because of federal Indian water rights settlements or other specific Congressional direction. IIJA provided $8.3 billion to Reclamation, including $3.2 billion for aging infrastructure projects, $1 billion for rural water projects.[48] Although not Tribal specific, this funding could potentially benefit Native communities. IIJA also provided $2.5 billion to the Secretary of the Interior for a newly created Indian Water Rights Settlement Completion Fund. It is expected that a portion of this funding will be directed to implementation of previously authorized Indian water rights settlements, while other funding will be distributed directly to Tribes for settlement implementation. The IRA appropriated additional funding for new programmatic authority; specifically, $550 million for disadvantaged communities domestic water supply projects (including planning, design, and construction) and $12.5 million for financial assistance to address

[46] HHS Office of Inspector General Report, Initial Observations of IHS Capacity to Manage Supplemental $3.5 Billion Appropriated to SFS Projects (2022), https://oig.hhs.gov/oei/reports/OEI-06-22-00320.pdf.
[47] Memorandum re: Implementation of the Tribal Water Infrastructure Appropriations in the Bipartisan Infrastructure Law from Radhika Fox, EPA, to Reg'l Water Div. Dirs. et al., (May 27, 2022), at 3, https://www.epa.gov/system/files/documents/2022-05/Final%20Tribal%20Set-Asides%20Memo_May%202022.pdf.
[48] Congressional Research Serv., *Bureau of Reclamation Provisions in the Infrastructure Investment and Jobs Act (P.L. 117-58)* (2022), https://crsreports.congress.gov/product/pdf/R/R47032.

drinking water shortages and mitigate loss of trust resources due to drought for Tribes impacted by the operation of a Reclamation project.

Need for Tribal Capacity Building

In order to providing drinking water and sanitation as quickly as possible to those currently lacking these basic services, the federal government must focus on building Tribal capacity through technical assistance and O&M support. Many Tribes lack a dedicated water resource staff, program, or department. Additionally, identifying and successfully applying for the various forms of federal funding available is an arduous and time-consuming task. Tribal governments, which are often already at capacity in addressing other facets of governance, must also track and prepare applications for funding programs across several federal agencies. Many Tribes lack a qualified grant writer or sufficient staff to handle the research and application process. And, even if Tribes are apprised of funding opportunities, the amounts offered may not be sufficient to merit an application.

While some technical assistance (TA) is available to assist Tribes in various parts of the application process, TA providers are often unable to fully serve Tribal water needs. Many providers are not culturally competent or knowledgeable about the Tribe's unique needs. Furthermore, providers often work in silos. EPA's technical assistance providers, for example, are not necessarily familiar with all the other federal programs available to Tribes. Tribal governments, then, may be required to work with a different provider in each agency for every funding opportunity. In a similar vein, no agencies have mapped out or otherwise explained to Tribes how all of these federal programs can fit together to support water infrastructure projects.

Notably, USDA did not receive funding for its Tribal water infrastructure programs under IIJA or IRA. However, the Tribal Access to Clean Water Act of 2023, H.R. 4746 and S. 2385, seeks to address Tribal capacity challenges, in part through USDA authorizations. The bill would authorize the USDA to make grants and loans for technical and financial assistance as well as for construction; and authorize increased funding for USDA's Rural Development Community Facilities Grant and Loan Program of $100 million per year for five years and $30 million per year specifically for technical assistance. Such assistance would help ensure that Native communities are treated equitably and appropriately when considered for grants and loans.

To that end, UAWC has also supported reauthorizing of the USDA Water & Waste Disposal Technical Assistance & Training Grant Program to the maximum amount (Section 306(a)(14)(A)) of the Consolidated Farm and Rural Development Act 7 U.S.C. 1921 et seq.), with a set-aside of no less than 10% of the funding directed to expanded technical assistance and capacity building for Tribes.

Conclusion

Thank you for the opportunity to testify on water access in Tribal Communities and to share our recommendations on how the federal government can fulfill its trust responsibility to Tribes.

Amy Ryser **September 25, 2023**

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Ms. Ryser:

Please accept this comment letter regarding the consideration by OSMRE bond release (Phased I N11 and J21 and Phase II J19 and J21) as requested by the Peabody Mine.

My name is Percy Deal, retired and 74 years old and lifetime resident of Black Mesa, just south of Peabody Lease area. My parents (both gone) and their parents going back many generations always resided in the area. My family and neighbors raised sheep and other animals for food and other economic purposes, and we still do. As a boy in my early years, I tended to herd sheep. I remember many different native plants for our animals for the wildlife, herbs for medicine, food for ourselves, and for ceremonies. We planted crops in our field, and it brought many vegetables. There were no windmills anywhere, however there were several places in the washes, at the base of the mountains and elsewhere, where there was water available year-round. The air was clean, and we were blessed with plenty of moisture year-round. Life was wonderful.

My mother told me, the community received visitors from Window Rock and some white men in late 60's to tell them there will be coal mining with big machines, the community will in return receive money and jobs. The operation will last 50 years. They were never told about the use of ground water. It wasn't until years later, people noticed their springs were drying up, native plants were disappearing and changing. That's when they started to ask questions, they were finally told the mining operation was pumping millions and millions of gallons of ground water. The people were never told it was never explained to them how much water, they didn't understand what an acer foot of water was, and they never gave consent to the use of their water.

Today, the natural springs are still dry, many native plants are gone together with the wildlife. Cornfields do not produce crops, corn used to grow six to

seven feet tall, today it either does not grow or it will only get a foot high and not produce any crop. The ground is very dry, obnoxious weeds took over. The weather has drastically changed; they call it climate change. It's caused by the extractive and power plant industries. The coal mines and power plant are closed, their lease term has expired; they are in the process of moving out. It's now time for reclamation of areas disturbed and recharging and replacing water used.

OSMRE held public meetings, to hear from the public. I attended most of those meetings including site visits to the mined areas to share my concerns. In listening to the impact communities, in addition to their unsatisfactory comments on the reclamation just about everyone spoke very strongly about the water, which OSMRE seems to have very little concerns, as a matter of fact they provided us a one page on water (N-aquifer) indicating very minimal impact on the aquifer from mining. This is very disheartening and very disturbing that an arm of our trustee would take opposition to the people whom they are charged with protecting and instead side with the destroyer of land and water.

In the 40+ years Peabody Coal been in operation, it paid royalties to the Navajo Nation. If you drive through the Black Mesa area, you will not seem any benefit from the revenue received. Peabody instead destroyed all local businesses with their lack of support. Doing away with all local jobs immediately outside the lease area.

Today, after the closure of the mine and power plant we are seeing new challenges, new forces all wanting to take what's left of our ground water to benefit outside interest. We don't know how much of the N-aquifer is left and if it's safe from contamination. We are aware, USEPA did a study a few years ago on the Hopi reservation and found high levels of arsenic in the aquifer they were drinking, we share the same water with the Hopis. The Navajo Nation will not tell us if the water we are using is also contaminated. We are also aware; U.S. Geological Survey did a study and determine Peabody has used 63% of the ground water to support its operation. We don't have a river or large reservoir nearby, all we have is the aquifers, it's our sole source.

Briefly, the new challenges and forces are Nature and People First, an industry from Phoenix who applied for preliminary permits with the Federal Energy Regulatory Commission for three pumped storage energy projects at the northern edge of Black Mesa to produce energy for Phoenix and other cities south of the reservation. The project requires 450,000 acer-feet of water and it's looking at Black Mesa aquifer for a period of 100 years. Next, the Hopi Tribe claimed over 90,000 acer-feet of water from the Little Colorado River, the Arizona Superior Court awarded them less than 30,000 AF from the aquifers and run offs from rain and snow. And it appears none from the river. All run off comes from Black Mesa. Navajo Department of Justice told us the Hopi decision is a preview of what's coming to Navajo (Black Mesa). The other force is the water shortage in Arizona, particularly from Colorado River which the state of Arizona didn't allow the Navajo tribe any share. The recent Supreme Court decision did not help at all, instead the tribe will have to get its share from the state through litigation and/or negotiation which will take years. I don't see any entity in Arizona that would share their water with the Navajo Nation. Above all these challenges are climate change and drought.

I strongly recommend the federal government (OSMRE) take a stronger stand to protect the interests of the local communities, protect natural resources and not let Peabody mine receive the bond money. Once they receive it, the people will be left with all the issues; failed reclamation, not knowing how much water is left and not knowing if the water is free from contamination, failure to provide recharge system, failure to provide reservoirs for wildlife, not knowing how much health and economic impact they created. The restoration should not be limited to the 64,000-acer lease area but must include surrounding areas. The remaining bond money should be used to study all the impacts and look at restoring all areas and should be used to provide a true economic transition.

The federal government must fully exercise its trust responsibility and ensure the land is returned as received.

Thank you,

Percy Deal, Big Mountain