



**NATURAL
RESOURCES**
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WATER DELAYED IS WATER DENIED

How Congress has Blocked Access to Water for Native Families

**A report by the Democratic staff of the
House Committee on Natural Resources**

NOTE: This report has not been officially adopted by the Committee on Natural Resources and may not necessarily reflect the views of its members

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Executive Summary

Over a half million people - nearly 48% of tribal homes - in Native communities across the United States do not have access to reliable water sources, clean drinking water, or basic sanitation. Homes lack running water or flush toilets. Those that do have running water often struggle with water contamination. Insufficient water and sanitation systems facilitate the spread of disease, impede economic development, and cause school closures on reservations.

Tribes often hold the most senior water rights in many river basins. Under federal law, the federal government must protect these tribal water rights. However, for more than a century, the federal government has failed to fulfill this role and, in many cases, actively undermined tribal water rights to provide water to non-Indian neighbors. To encourage people to move West in the 1900s, the federal government provided land and infrastructure, building the pipes and systems needed to bring heavily subsidized irrigation and drinking water to settlers. This water frequently came at tribes' expense. As a result, today, many tribes still lack access to water.

Tribes have the option to sue for access to their water. But even when lawsuits are won, tribes are likely to be left with only "paper water" – a situation in which a tribe has a legal right to water but does not have the money for the infrastructure to deliver water to their reservation. Tribes can also sue the federal government for not protecting their water rights and failing to fulfill the federal government's trust responsibility to tribes. These legal claims could cost the federal government billions of dollars.

There is a solution. Water rights settlements allow tribes, states, the federal government, and non-Indian water users to come together to resolve water claims. Through water rights settlements, tribes often waive their claims against the federal government as well as a portion of their claimed water rights in exchange for funding in the near-term that will allow them to build the infrastructure necessary to bring clean water to their people. Settlements provide tribes with the water that is legally theirs.

Settlements have numerous benefits that make them the preferred method of resolving water rights issues. They bring certainty about existing water uses to state governments and non-Indian water users. Water settlements save U.S. taxpayers money because tribes waive their significant legal claims against the federal government for failing to protect tribal water rights in exchange for funding to develop their water. The process also allows accommodations to be made for non-Indian neighbors who rely on water rightfully owned by the tribes.

Despite these benefits, Congress has made it difficult for tribes and states to finalize water settlements. Congress must approve most water rights settlements for them to take effect. Unfortunately, Congressional Republicans have a history of standing in the way of Indian water rights settlements. In the 38 years since the first water settlement was approved, only 17 percent of settlements have been enacted when Republicans held the majority of both houses of Congress. In contrast, 72 percent of settlements were enacted when Democrats controlled both houses. Ten percent were enacted during times of split leadership.

This pattern has worsened in recent years. In the six years since Republicans took control of the House in the 2010 election, Congress has not funded a single Indian water rights settlement despite numerous settlement bills being introduced. A new process instituted by Representative Rob Bishop (R-UT) when he became Chairman of the House Committee on Natural Resources in 2015 has created an additional hurdle for settlement approval in the U.S. House of Representatives.

Meanwhile, tribal families suffer. Their communities need water to improve their health, provide consistent education for their children, and promote economic development. Congressional Republicans must prioritize and enact water settlements for tribes.

Over 660,000 American Indian and Alaska Native men, women, and children lack access to clean and reliable water sources or basic sanitation.

Lack of access makes thousands sick, causes schools to close, and blocks tribal economic development.



According to data from the Indian Health Service (IHS), nearly half (48%) of all homes on tribal land lack access to adequate drinking water, sewage, or solid waste disposal facilities.¹ Many of these 190,697 homes lack basic services like clean, running water; flush toilets; showers or baths; and kitchen sinks.² Others need some form of new or improved water or sewage facility. By comparison, less than 1% of homes lack some or all sanitation facilities in the U.S. as a whole.³

Though the IHS does not track the number of people affected, the U.S. Census Bureau reports that American Indians and Alaska Natives had an average household size of 3.47 people (including both reservation and off-reservation trust land),⁴ yielding an estimate of 662,000. The actual number is likely significantly higher as reservation homes tend to be even more densely populated than off-reservation homes. Due to decades of housing shortfalls on reservations, Native families are two-and-a-half times more likely to live in an overcrowded home than the general population.⁵

48%

of all homes on tribal land lack access to adequate drinking water, sewage, or solid waste disposal facilities.

The IHS reports tribal home water and sewage access by deficiency level.⁶ Homes with deficiencies in categories 2-5 are considered to have inadequate access to drinking water, sewage, or solid waste disposal facilities:



Deficiency Level 5: An American Indian or Alaska Native home or community that lacks both a safe water supply system and a sewage disposal system. Example: a home that does not have running water *and* does not have flush toilets.

Deficiency Level 4: An American Indian or Alaska Native home or community that lacks either a safe water supply system or a sewage disposal system. Example: a home that does not have running water *or* does not have flush toilets.

Deficiency Level 3: An American Indian or Alaska Native home or community that has an inadequate or partial water supply and a sewage disposal facility that does not comply with applicable water supply and pollution control laws, or has no solid waste disposal facility. Example: a home in which there is not enough water to maintain the minimum water pressure required to prevent contamination and there is no connection to an adequately functioning sewer or septic system.



Deficiency Level 2: An American Indian or Alaska Native home or community with a sanitation system that complies with all applicable water supply and pollution control laws, and in which the deficiencies relate to capital improvements that are necessary to improve the facilities in order to meet the needs of such tribe or community for domestic sanitation facilities. The term “sanitation system” refers to both water supply and sewage and solid waste disposal systems. Examples: Significantly deteriorated water mains, facilities with brown water or water that smells badly enough to violate secondary drinking water standards, or sewers that overflow often enough to “cause infrequent problems related to Public Health Standards.”⁷

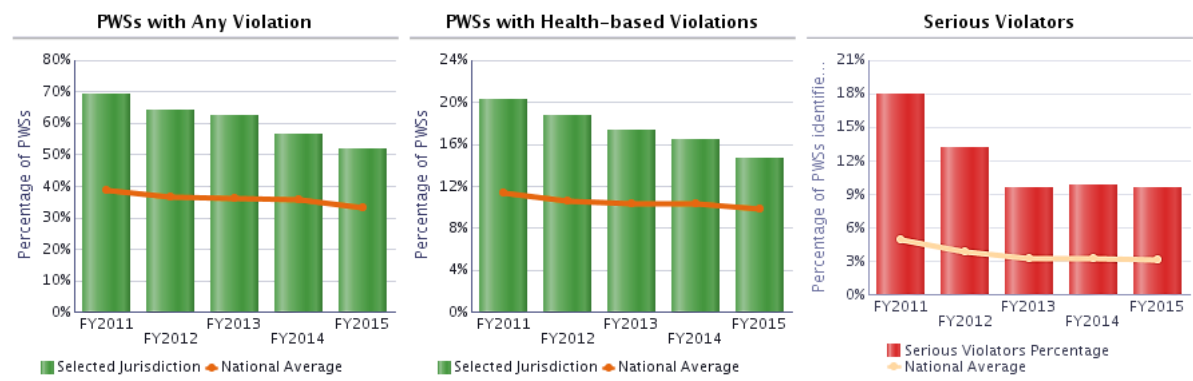
Deficiency Level 1: An American Indian or Alaska Native home or community with a sanitation system which complies with all applicable water supply and pollution control laws, and in which the deficiencies relate to routine replacement, repair, or maintenance needs. Example: a system in which well caps, backup pumps, and/or minor leaks, among others, need to be repaired.

Deficiency Level 0: No deficiencies to correct.

These deficiency levels, which are used by the IHS to help prioritize their resources for providing assistance, illustrate the nature of the difficulties faced by Native families every day.

Even among those with access to running water or sanitation, many rely on water systems that are not in compliance with the law(s) designed to protect health. According to data from the Environmental Protection Agency, tribal public water systems (shown in Fig. 1 as PWS) have more violations, more health-based violations, and more serious violations than the national average.⁸ The disparity is most often due to a lack of funding for operation and maintenance.⁹ Incoming revenues for tribes can be limited; the tax base mostly nonexistent; and levels of poverty and unemployment high on many reservations.¹⁰

Figure 1. Tribal Drinking Water System Violations Compared to the National Average



Note: The jurisdiction selected was “All Tribes.”
 Source: Enforcement and Compliance History Online (ECHO), *Analyze Trends: Drinking Water Dashboard*, Environmental Protection Agency.

The Drinking Water State Revolving Fund and the Clean Water Act State Revolving Fund are intended to provide financial support to states and tribes to ensure they can provide safe water.¹¹ However, tribes consistently receive the least amount of funding per dollar of need. For example, in Fiscal Year 2012

tribes received \$0.75 per every \$100 of need under the Drinking Water State Revolving Fund.¹² The next-lowest funding level by need goes to Louisiana, which received more than three times that amount. The highest, Alaska, received more than forty times that amount.¹³

Lack of access to clean and reliable water has direct implications for tribes and Native families. Three of the largest include impacts to **health, education, and economic development** of tribes and their families.



HEALTH: Inadequate access to clean water and sanitation on reservations leads to health problems, including cancer, ulcers, stomach issues, pneumonia, and other illnesses.

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.¹⁴ The IHS notes that "[a] recent cost benefit analysis indicated that for every dollar IHS spends on sanitation facilities to serve eligible existing homes, at least a twentyfold return in health benefits is achieved."¹⁵

The following case studies paint a picture of the difficulties Native communities face:

A 2008 study by the Centers for Disease Control and Prevention found that Alaska Natives who lived in regions where few people had access to pressurized in-home water service had significantly higher rates of hospitalization for pneumonia, influenza, skin or soft tissue infection, and respiratory syncytial virus.¹⁶ The report concluded that "pressurized, in-home water service is an important determinant of health status and contributes to reducing transmission of these communicable diseases."¹⁷

For the Santee Sioux Nation and the Omaha Tribe of Nebraska, water quality often does not meet EPA standards. Over a quarter of the wells on both reservations are contaminated with high levels of nitrate-nitrogen and coliform bacteria,¹⁹ causing blood disorders and intestinal issues. For example, high nitrate levels in drinking water cause methemoglobinemia, also known as Blue Baby Syndrome, which affects babies who drink water with high nitrates by preventing sufficient oxygen from reaching the body and the brain.²⁰

Wells, springs, and soils tested on the Pine Ridge Reservation in South Dakota were contaminated by levels of bacteria that indicate potential fecal contamination, arsenic, lead and/or sources of radiation like uranium that exceeded legal limits.¹⁸ Many of the water sources tested are not required to be tested or regulated because they do not serve enough homes or people.

On the Crow Reservation in Montana, researchers found that surface water and groundwater used for drinking was contaminated with bacteria that can cause pulmonary disease, pneumonia, stomach problems, diarrhea, ulcers, and Legionnaire's disease.²¹ Wells were also found to have high levels of arsenic, manganese, and uranium.²²

As a study of American Indians from Arizona found, "Modestly elevated exposure to inorganic arsenic in drinking water, as estimated by urinary arsenic concentration, may predict type 2 diabetes in southwestern American Indians."²³

Those without access to clean water and basic sanitation are more vulnerable to resulting health problems because of limited access to health care.

The federal government has a legal obligation to provide health care to American Indians and Alaska Natives—the only populations in the United States born with this legal right.²⁴ Yet the federal government spends less on health care for American Indians and Alaska Natives than on any other population. As a result, reservation clinics and hospitals are often understaffed, overcrowded, and in need of repair.²⁵

Table 1. Health Care Spending for Various Federal Programs²⁶

Agency Health Care Service	Spending Per Person
Indian Health Service (2015)	\$3,136
Medicaid (2014)	\$7,315
Bureau of Prisons (2015)	\$6,944
Veterans Administration (2015)	\$8,760
Medicare (2014)	\$12,179

Toxic History: Uranium, Contaminated Water, and Cancer in the Navajo Nation

The Safe Drinking Water Act sets limits for allowable water contaminants, protecting millions of people from unsafe water. But it does not cover everyone. Those who rely on private wells, which includes many tribal families that lack access to public water systems, are not covered by the Act; they are on their own.



Uranium, a radioactive metal, is the primary ingredient used in nuclear weapons and nuclear power reactors. During the United States' nuclear arms race with the Soviet Union, the Navajo Nation became the center of the country's uranium production. Between 1944 and 1986, hundreds of uranium mines popped up in the Navajo Nation, producing approximately four million tons of uranium ore.²⁷ Today, more than 500 abandoned uranium mines dot the Navajo reservation.²⁸ Five federal agencies in coordination with the Navajo Nation have developed a plan to clean up the mines.²⁹ According to one estimate from 2014, at

current funding levels, it would take 100 years to complete the task.³⁰ In the meantime, uranium-contaminated dust blows across the Navajo Nation and seeps into groundwater.³¹

Uranium can be deadly when ingested through drinking water or inhaled through activities like showering or cooking. Chronic exposure to uranium has been linked to numerous health impacts, including kidney issues, cancer and liver disease.³² It is toxic in two distinct ways. First, it acts as a source of radioactivity, emitting radiation that can pass through the human body, causing damage in the process. Second, it is a metal like lead or mercury and has similar toxicological effects.

Approximately 30-40% of those living in the Navajo Nation lack access to running water. The Navajo Nation estimates that 54,000 Navajos haul their water from backyard wells and stock ponds.³³ Testing of unregulated Navajo Nation water sources done by federal and tribal agencies has consistently found that many of these sources do not meet federal drinking

water standards for uranium or other radioactive particles. But they are not covered by the Safe Drinking Water Act, which means there is no way to enforce the upper limits. For example, sampling of 240 unregulated water sources found that more than 12% exceeded federal drinking water standards for radionuclides, including uranium.³⁴ Some tested as high as 700 micrograms per liter for uranium.³⁵ The federal standard for uranium is 30 micrograms per liter.³⁶

A 2014 investigative series by *The Arizona Republic* reported that Milton Yazzie and his mother Della, citizens of the Navajo Nation, watched three family members die from kidney problems—“a common result of chronic exposure to uranium”—within a year: Yazzie’s sister in September 2005, his father in November 2005 and his brother in June 2006.³⁷ The Yazzies grew up drinking water from a well less than a mile from their home—“one that the EPA has since tested and found on the border of violating federal drinking water standards for

uranium and arsenic.”³⁸ Among those residents who know their wells are poisoned by uranium or radioactive particles, many now haul in clean water from the outside. According to *The Arizona Republic*, for Yazzie and his mom, this means four to eight hours spent driving to and from Flagstaff each week to fill up plastic barrels with clean water.³⁹ Hauling in water can take hours each week, time that could be spent working or going to school. It also means these families rely on less; Members of the Navajo Nation use around 7 gallons of water per day for all of their household needs, from cooking to cleaning to sanitation. For comparison, the average American uses 80-100 gallons of water per day.⁴⁰

In other cases, even hauling is not an option. Cars are not available, the distances are just too far, or health issues keep the family home.⁴¹ In these cases, as *The Arizona Republic* found, many continue to rely on nearby wells, even if they are contaminated.⁴²



EDUCATION: Schools cannot operate without clean water and sanitation.

Native youth have the lowest achievement scores and the lowest high school graduation rate of any racial/ethnic demographic group in the United States.⁴³ Inadequate school water supplies contribute to existing education disparities for Native children.

Reservation schools and school facilities are often neglected. Essentials such as heat, running water, and a safe learning environment are often missing.⁴⁴ According to a White House report, of the 183 Bureau of Indian Education schools, “34 percent (63 schools) are in poor condition, and 27 percent are over 40 years old.”⁴⁵

When schools cannot provide clean water and sanitation because of unreliable water systems, as is common on the Blackfeet Reservation in Montana,⁴⁶ they often have to close. With old water treatment plants and no money for upgrades, it can be difficult to keep equipment in working condition.⁴⁷ Education time is also decreased if compromised access to water and sanitation prevents hand washing or other sanitary practices, which facilitates the spread of communicable diseases like influenza or diarrheal diseases. Water-related school closures can contribute to the education gap, taking away valuable learning time.⁴⁸



ECONOMY: Economic development requires water and sanitation.

According to the Native American Rights Fund and the Western States Water Council, the absence of reliable and clean water supplies “has contributed to [poverty], unemployment and mortality rates on reservations that are much higher than those of adjacent non-Indian communities.”⁴⁹ The median household income for single-race American Indian and Alaska Native households was \$37,227 in 2014, compared to an overall median household income of \$53,657 for the United States as a whole.⁵⁰ More than 28 percent of American Indians and Alaska Natives lived in poverty in 2014, the highest rate for any ethnic group in the United States.⁵¹ By contrast, the poverty rate for the United States as a whole was around 15 percent—almost half the rate for Natives. In at least 10 states, more than 50 percent of Natives were unemployed in 2010.⁵² For Natives living on reservations, these numbers are often even higher.⁵³ Some tribes report unemployment rates of 80 percent or higher with close to 50 percent or more of their population living in poverty.⁵⁴

< 28%

of American Indians and Alaska Natives lived in poverty in 2014, the highest rate for any ethnic group in the U.S.

< 50%

of Natives were unemployed in 2016 in at least 10 states.

Tribes need access to water and sanitation in order to encourage economic development and create jobs and prosperity for their people. Many reservations are located in rural areas where agriculture is one of the primary job options. Without water, tribes cannot provide the irrigation needed to develop their land.

Access to water is also necessary for tribes to attract businesses and investment in tribal communities. A workplace cannot function without secure water and sanitation services. When a community lacks the resources to cover basic water system maintenance costs, such as maintaining storage tanks or replacing aging water pumps, there is an increased risk of poor water quality and unreliable water service. Businesses may be forced to choose between closing the doors while water issues are fixed or spending their own resources on alternative water sources, both of which increase business costs.⁵⁵ Companies consider access to water when deciding where to invest or locate business facilities.⁵⁶

The Tule River Tribe in California

For the Tule River Tribe in California, lack of access to a reliable and adequate water supply has prevented the Tribe from providing housing,⁵⁷ taking advantage of economic development opportunities, and providing essential services like fire protection, all of which are necessary to encourage businesses to build and invest in their community.⁵⁸ Economic development is a major necessity for the Tribe, whose unemployment and mortality rates are 50 percent higher than the surrounding Tulare County.⁵⁹

How did we get here?

The federal government has a legal responsibility to protect tribal water rights. It has routinely failed to meet this responsibility.

“[M]any of the intractable problems faced in the arid West today are the result of more than a century of federal neglect of tribal water needs and a corresponding encouragement of non-Indian development. As a consequence, the tribes and other parties to litigation look to the United States to help settle conflicts that, in the view of the non-federal parties, the federal government did the most to create in the first instance.”⁶⁰

— Professor Robert T. Anderson, Harvard Law School and the University of Washington School of Law

The Federal Government’s Legal Responsibility

The creation of reservations and the federal government’s corresponding trust responsibility are at the heart of water rights.

The Creation of Reservations

According to the Bureau of Indian Affairs, “A federal Indian reservation is an area of land reserved for a tribe or tribes under treaty or other agreement with the United States, executive order, or federal statute or administrative action as permanent tribal homelands.”⁶¹ On a reservation, “the federal government holds title to the land in trust on behalf of the tribe.”⁶² Reservations were created in the United States during the late 1700s and throughout the 1800s. Some reservations are the remnants of a tribe’s original land base, but many others were created by the forcible relocation of Indian people from their ancestral homelands. In most cases, the negotiations were conducted—either explicitly or implicitly—under threat of U.S. military force. Tribes were often forced to turn over millions of acres of their land to the United States in exchange for certain rights, benefits and protections, including the continued right of self-governance.

Tribal Water Rights

Per treaties and rules of reservation establishment, when reservations were created, all tribal rights on the reservation were preserved except for those the tribe expressly gave to the federal government.⁶³ This includes rights to the reservation’s natural resources. Unless the tribe expressly gave up their natural resources to the United States, a reservation’s natural resources belong to the tribe.⁶⁴ At the turn of the 1900s there was a question as to whether this doctrine included water rights. Did the establishment of reservations come with a right to water?

In the 1908 *Winters v. United States* ruling, the Supreme Court affirmed that reservations retain their water rights. The Court held that when the federal government reserved lands for an Indian reservation, the federal government also implicitly reserved sufficient water to support the purposes of the reservation.⁶⁵ Practically, this ruling means that tribes with reservations have a right to water. These water rights were reserved as of the date of the reservation’s

establishment.⁶⁶ In the West, this often means that tribes have the most senior water rights.

How much water do tribes have a legal right to? In 1963, the Supreme Court provided some clarity about how much water is reserved. In *Arizona v. California*, the Court held that Congress intended to reserve enough water “to satisfy the future as well as the present needs” of the reservation and ruled that “enough water was reserved to irrigate all the practicably irrigable acreage on the reservations.”⁶⁷ The “practicably irrigable acreage” standard is still used to quantify tribal water rights today on reservations created for agricultural purposes.⁶⁸ Some of those same tribes also reserved their lands to maintain fisheries or other water dependent species, such as wild rice or other plants. Those reservations require sufficient water to maintain those resources.⁶⁹

**The Federal
Government's
Trust
Responsibility**

According to federal law, the United States government holds title to Indian lands in “trust” on behalf of tribes and individuals.⁷⁰ Trust is a legal term describing an arrangement in which someone owns property in name but holds the property for the benefit or use by others. The federal government has certain responsibilities as the “trustee” for tribes, including the obligation to protect tribes’ right to access and use their natural resources such as water.

"Indian water rights are vested property rights for which the United States has a trust responsibility, with the United States holding legal title to such water in trust for the benefit of the Indians."

– Department of the Interior's 1990 Criteria and Procedures for Indian Water Rights Settlements

Appropriative vs. Riparian System

The United States has two major systems of water rights: the “riparian” system used in the water-abundant states in the East and the “prior appropriation” system common in water-scarce Western states.⁷¹

Riparian System

Under the riparian system, “the owner of land that borders a lake or stream has the right to the reasonable use of the water.”⁷² The right runs with the land, meaning that the right is tied to the land and not the owner. It continues whether or not the owner exercises the right.

Prior Appropriation System

Under the prior appropriation system, in contrast, the right to water does not belong to the landowner adjacent to the water source. Instead it “belongs to the first user who appropriates [the water] and puts it to beneficial use.”⁷³ The user, also known as the “appropriator,” is guaranteed the same amount of water each year so long as he or she continues to put the water to beneficial use. Appropriation rights are based on seniority. In cases of shortage, the most recent appropriators lose their rights to water before older appropriators.

Indian water rights were created outside of these two state systems and exist independently of them. Tribes cannot lose their right to water through non-use, forfeiture or abandonment.

Over the past century, the federal government has failed its trust responsibility to protect tribal water rights, and in many cases has actively subverted tribal claims.

*“Despite the clear ruling of [the 1908 *Winters v. United States* Supreme Court ruling], Indian water rights were largely ignored for many decades thereafter. The United States was far more interested in encouraging non-Indian settlement than it was in developing and protecting Indian water resources. Indeed, during those years the United States represented the tribes in several water rights adjudications that severely compromised the tribes’ *Winters* rights.”*

– The Honorable William C. Canby, Jr., United States Court of Appeals for the Ninth Circuit⁷⁴

Despite the federal government’s role as trustee for tribal water rights, the federal government has often failed to protect these rights. Throughout the past century, non-Indians have developed, used and appropriated water surrounding and connected to reservations. The *Winters* case grew out of just such a situation.

The Fort Belknap Reservation was created by Congress in 1888. Located along the Milk River, the reservation contained arid but farmable land. Reservation residents relied on the Milk River to irrigate the land and raise livestock. However, by the early 1900s, non-Indians had settled the land around the



reservation and built dams and reservoirs upstream that diverted water away from the reservation—water that the tribe had the legal right to use. When the water use of the settlers upstream interfered with the tribe’s uses, the federal government stepped in and brought a lawsuit in 1905 to fulfill its trust responsibility and protect the tribe’s right to water.

The situation behind *Winters* was common in the 1800s and 1900s. Tribal waters were frequently diverted and appropriated by other users. Unfortunately, the *Winters* case represents one of the few times when the federal government stepped in to protect tribal water rights. Until the 1970s, the federal government frequently failed to assert and protect tribal rights.⁷⁵

In fact, in many cases, the federal government not only failed to protect tribal water rights, it actively helped non-Indians take and use tribal water. As the National Water Commission noted in a 1973 report, during most of the 50-year period following *Winters*, the United States pursued a “policy of encouraging the settlement of the West and the creation of family-sized farms on its arid lands.”⁷⁶ However, “this policy was pursued with little or no regard for Indian water rights and the *Winters* doctrine.”⁷⁷ As the Commission wrote:

With the encouragement, or at least the cooperation, of the Secretary of the Interior—the very office entrusted with protection of all Indian rights—many large irrigation projects were constructed on streams that flowed through or bordered Indian reservations. With few exceptions the projects were planned and built by the Federal Government without any attempt to define, let alone protect, prior rights that Indian tribes might have had in the waters used for the projects.⁷⁸

Over the past century, infrastructure programs such as the Reclamation Act have provided funding for irrigation and water supply projects in Western states.⁷⁹ According to the Department of Interior, for most of the 20th century “Indian water rights were largely left undeveloped and unprotected [by the federal government].”⁸⁰ At the same time, “[f]ederal policy and expenditures supported extensive development of water resources to benefit non-Indian communities across the West.”⁸¹ Those expenditures often came at the expense of tribal water rights.⁸² Even today, it is frequently difficult for tribes to compete for limited government funds, even when those funds would go towards the provision of basic services like running water in homes.⁸³

“In the history of the United States Government’s treatment of Indian tribes, its failure to protect Indian water rights for use on the Reservations it set aside for them is one of the sorrier chapters.”

– National Water Commission, *Water Policies for the Future: Final Report to the President and to the Congress of the United States* 475 (1973)

The Path Forward: Water Settlements

Water settlements solve both water quantity and water quality issues for tribes.

Indian water rights settlements offer a solution to secure both:

- 1) Consistent **water quantity** for tribes, and
- 2) the funds needed to improve water access and **water quality**.

During water settlements, the tribe, the state, the federal government, water districts, private water users, and others come together to negotiate and quantify the amount of water reserved for the tribe, resolve any conflicts between rights-holders, and determine specific terms for water allocation.⁸⁴ Water settlements also frequently resolve tribal claims against the federal government for failing to meet its obligations as the trustee for tribal water resources, also known as “breach of trust” claims. In exchange, tribes receive the money or resources they need from the federal government to improve water quality and provide clean water for their people. Once negotiation has finished and terms are agreed to, the settlement is presented to Congress for authorization. Congress typically must enact the settlement for it to become law.⁸⁵ Congress must also appropriate any funds associated with water settlements.

Tribes have two options to secure water: (1) let a court decide (2) agree to a settlement.

Although tribes have strong water rights, they often cannot assert them until their water rights are quantified. As Judge Canby, a judge for the Court of Appeals for the Ninth Circuit and one of the preeminent experts in Indian law, explains, “[c]ompeting users and the Indians themselves know that a reservation is entitled to enough water to irrigate its practicably irrigable acreage, but no one knows exactly how much water that is.”⁸⁶ Determining how many acres of land are irrigable and how much water it would take to irrigate that land is time-consuming and expensive. As a result, tribes, surrounding non-Indians, and state governments often do not know how much water is reserved for reservations and from what sources. This creates uncertainty, especially in the West. Tribes do not know how much water they have a right to use; non-Indian users do not know if their rights will be superseded by more senior tribal water rights; and states do not know how much water is available for future appropriation. Many Indian water rights remain unquantified to this day.

Litigation

Litigation provides a process through which tribes can quantify their water rights. Lawsuits can be brought by the United States on behalf of tribes or by tribes themselves. Even if a tribe brings its own suit, the United States as trustee must participate to protect the trust asset. However, litigation is expensive, time-consuming, and divisive. Litigation of tribal water rights can involve thousands of parties, including surrounding state water rights holders.⁸⁷ Service of process alone—a procedure where parties are notified of the litigation—can cost hundreds of thousands of dollars. Trial costs are even higher once the millions of dollars needed for studies, expert reports, attorney fees and other costs are tallied.⁸⁸ The adjudication is often complex and controversial and can last decades.⁸⁹ Litigation also exposes the federal government to “breach of trust” claims that can cost taxpayers billions. Each of these concerns alone is enough to prevent tribes from using lawsuits as a way to assert water rights. Together, they can amount to a brick wall.

Water Settlements

Water settlements, on the other hand, are often cheaper, faster, more flexible and less divisive. Settlements avoid the high costs of litigation and are ultimately the more affordable way for tribes, states, the federal government, and non-Indian water users to resolve water rights claims. Although settlements can take decades to finalize, they often resolve rights faster than litigation. Settlements also encourage parties to work together to solve water rights issues, enabling parties to design custom, cooperative solutions that fit their needs. Furthermore, and perhaps most importantly, water settlements often provide the funding necessary for tribes to build infrastructure and turn “paper water”—the tribe’s legal claim to water on paper—into “wet water,” water the tribe can actually use.

Tribes have two options to secure funding to improve water access and water quality: (1) federal government assistance or (2) water settlements.

Even when water rights have been quantified, unless tribes have the funds necessary to build and maintain water infrastructure, they will not be able to make use of their water rights or improve water quality. Many tribes lack the resources necessary to build and maintain expensive infrastructure projects.

Federal Agency Assistance

One way tribes can secure funding is through federal agency assistance. Five federal agencies have primary responsibility for water and sanitation infrastructure projects in Indian Country: the Department of Health and Human Services, the Environmental Protection Agency, the Department of the Interior, the Department of Housing and Urban Development, and the Department of Agriculture.⁹⁰ Of these, the Indian Health Service in the Department of Health and Human Services provides the majority of the funding. Under the Indian Sanitation Facilities Act of 1959, the Indian Health Service is obligated to “provide sanitation facilities such as safe drinking water and sewage systems to Indian homes.”⁹¹

The Indian Health Service receives far less funding from Congress than is required to ensure access to clean water and sanitation. The agency estimates that the current cost to provide the infrastructure needed for all homes to access drinking water and sanitation is approximately \$2.7 billion (“cost estimate”).⁹² However, for FY2016, Congress appropriated only \$99.4 million—less than 4 percent of the outstanding need.⁹³ For the previous four years, funding levels were between \$75 million and \$80 million.⁹⁴ The Indian Health Service reports that it can generally find an additional \$0.30-\$0.50 per dollar in funding from other agencies such as the Environmental Protection Agency,⁹⁵ but access to clean water and sanitation projects are still woefully underfunded. In fact, at current funding levels, the Indian Health Service cannot keep up with growing demand. As existing water and sanitation systems age and break down each year, the Indian Health Service’s cost estimate only grows. From 2005 to 2015, the Indian Health Service’s cost estimate increased over 80 percent.⁹⁶

Water Settlements

Water settlements can help address these issues by providing funds necessary to build and maintain water infrastructure. During water settlement negotiations, tribes will often agree to a lower water quantity than they have a right to and/or waive potentially costly “breach of trust” claims against the federal government in exchange for federal funding.⁹⁷ This funding is often used to perform water quality monitoring; build and maintain water treatment plants; install pipes, valves and other materials needed to deliver the water; and install irrigation systems, among other items. For example, the Crow Tribe Water Rights Settlement specifies that the federal funds will be used to design and construct a municipal, rural and industrial water system for the reservation, including a “water treatment plant, pipelines, storage tanks, pumping stations, pressure reducing valves, electrical transmission facilities, and other items (including real property and easements necessary to deliver potable water to the Reservation).”⁹⁸ The Chippewa Cree Tribe’s water rights settlement includes funds that will be used to develop water quality discharge monitoring wells and a water quality monitoring program.

In addition to tribal benefits, water settlements ultimately save taxpayers money. Under Department of the Interior policy guidance, the federal government’s monetary contribution to water settlements cannot exceed the sum of (a) “calculable legal exposure,” defined as “litigation cost and judgment obligations” if a case were to be brought and lost and (b) “additional costs related to Federal trust or programmatic responsibilities.”⁹⁹ Therefore, water settlements result in the federal government paying out less money than it otherwise may have owed if the case were litigated *and* tribes gain access to water infrastructure funds faster than they would have through lawsuits or federal agency programs.

The Gila River Indian Community

The Gila River Indian Community’s 2004 water settlement restored water, farming, and hope to their community. More than a century ago the Gila River began to dry up because it was siphoned off by farmers upstream.¹⁰⁰ As result, the Gila River Indian Community lost the water they had relied on for thousands of years to farm their land.¹⁰¹ Famine, starvation and poverty followed.¹⁰² Today, farming is growing. The settlement restored much-needed water and irrigation infrastructure to the community. By the time the irrigation infrastructure is finished, the community will be able to double their amount of farming, bringing jobs, economic development, and healthy foods to the reservation.¹⁰³

Indian water rights settlements offer a number of benefits:¹⁰⁴

- 1) Water settlements often provide **funding for infrastructure construction and maintenance** in exchange for reduced tribal water use and waiver of “breach of trust” claims. This funding allows tribes to turn “paper” water rights into actual water that can be used for drinking, irrigation and economic development.
- 2) Water settlements are often **cheaper** for parties than litigation. Settlements save tribes, states and U.S. taxpayers millions of dollars in avoided litigation costs. In addition, water settlements often resolve potential tribal breach of trust claims against the federal government, which could cost the government billions of dollars.
- 3) Water settlements allow tribes, non-Indians, and the state to negotiate a **tailored solution** that benefits all parties and meets specific needs.
- 4) Water settlements **quantify water rights**. Quantification secures tribal rights to badly needed water for their people.
- 5) The quantification of water rights **creates certainty** for tribes, states, and non-Indian water users. For example, the proposed Confederated Salish and Kootenai Water Settlement would clarify water rights in a region larger than every state on the eastern seaboard. Certainty in how much water each party can use is increasingly important with growing drought in the West. Water settlements also give states and tribes increased certainty and control over the outcome of water rights claims compared to litigation.
- 6) Although settlements can take decades, they are often **faster** than litigation and address more of the most critical issues for tribes than piecemeal federal funding.
- 7) Water settlements build **positive relationships** between tribes, states, the federal government and non-Indian water users. These relationships are especially important for water since it is a shared resource.
- 8) Water settlements also **fulfill the federal government's trust responsibility and legal obligation** to protect tribal water rights.

Negotiated settlements have been the preferred avenue to resolve tribal water rights by tribes, states, and the federal government since the 1970s.¹⁰⁵

Water Settlements: A Partisan Issue?

Congress and, too often, Congressional Republicans have blocked Indian water rights settlements.

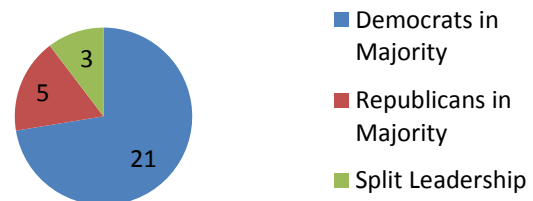
For more than 30 years, tribes, states, members of Congress and various presidential administrations have touted water settlements as the preferred avenue to resolve Indian water rights.¹⁰⁶ Yet as of October 2016, the federal government has only approved 33 Indian water rights settlements with 36 tribes.¹⁰⁷ This averages out to less than one settlement per year over the 38 year-period since the first settlement was enacted. With 19 settlements currently awaiting authorization or still in the negotiation phase, and many other potential negotiations likely to come, there is a long way to go.¹⁰⁸

Why doesn't Congress approve more settlements?

Congress has long recognized the many benefits of Indian water rights settlements. In the 1994 Yavapai-Prescott Indian Tribe Water Rights Settlement, Congress found that “quantification of rights to water and development of [the] facilities needed to utilize tribal water supplies effectively is essential to the development of viable Indian reservation economies.”¹⁰⁹ Congress stated that it supported the settlement because it furthered the “goals of Federal Indian policy”; “fulfill[ed] the trust responsibility of the United States to the Tribe”; and “enable[d] the Tribe to utilize fully its water entitlements in developing a diverse, efficient reservation economy.”¹¹⁰ Congress has reiterated these findings in other Indian water rights settlements.¹¹¹

Despite the overwhelming benefit of settlements to tribes, states and the federal government, both anecdotal evidence¹¹² and a basic quantitative analysis indicate that authorization of new settlements is often a partisan issue. Of the 29 settlements enacted by Congress, 21 were enacted when Democrats held the majority of both houses of Congress. Only 5 were enacted when Republicans controlled both houses.¹¹³ Three were enacted during times of split leadership.¹¹⁴ During the past 38 years since the first water settlement was approved, Democrats controlled both houses for fifteen years, Republicans controlled both houses for 14 years, and control was split for 10 years.¹¹⁵

Settlements Enacted by Congress



Process issues play some role in the low number of settlements. Settlement negotiations are complex and can take years or even decades to complete. However, numerous settlements have made it through the elaborate process only to be held up by Congressional approval. As the Tribal Water Working Group,¹¹⁶ an affiliation of water rights experts and tribal, federal and state government entities, argues, whether a settlement is ultimately enacted by Congress “depends on current economic, political and sponsorship conditions”¹¹⁷ more than it does on the specifics of a given settlement. Partisan differences and the impact of the current political climate on the approval process “can be a source of acute frustration for all parties involved given the many years of hard work necessary to forge a

compromise.”¹¹⁸ After years of collaborative work between states, tribes and federal officials, congressional partisanship can block or stall agreements that would bring clean water, health, economic development and certainty to thousands of people.

Since Republicans gained control of the House in 2011, Congress has not funded a single Indian water rights settlement.

The past six years have highlighted the partisan nature of Indian water rights settlements. During 2009 and 2010, the Democratic majority in both houses of Congress—with the support of the Obama Administration—approved six Indian water rights settlements, more than 20 percent of the Congressionally enacted settlements to date. These settlements provide water and resources to the Navajo Nation; the Shoshone and Paiute Tribe of Duck Valley; the White Mountain Apache Tribe; the Crow Tribe; the Nambe, Pojoaque, San Ildefonso and Tesuque Pueblos; and the Taos Pueblo Tribe, benefiting hundreds of thousands of people.

Since Republicans took control of the House of Representatives in 2011, Indian water rights settlements have stalled. Congress has not funded a single Indian water rights settlement in almost six years.¹¹⁹ When Republicans took the majority of the House of Representatives in 2011, House Republicans enacted an earmark moratorium that banned funding requests by a Member of Congress for a specific project.¹²⁰ Some have blamed the earmark moratorium for the House of Representatives’ inaction on Indian water rights settlements.



Since Republicans took control of the House, Congress has not funded a single Indian water rights settlement.

It is important to note, however, that water rights settlements are *not* earmarks.¹²¹ Water settlements do not provide funds to projects or companies that otherwise would have had to go through a competitive bidding or award process. Indian water rights settlements also resolve the federal government’s trust obligation—a legal obligation—to tribes. Legal settlements—including Indian water rights settlements—are not earmarks.¹²²

The new “Bishop process” adds unnecessary delay and complexity.

After urging from tribes, Western governors and others to address the inaction on approving water settlements, Chairman Rob Bishop (R-Utah) created a new settlement approval process shortly after assuming his chairmanship of the House Committee on Natural Resources, which has primary jurisdiction over Indian water rights settlements in the House of Representatives.¹²³

In a February 2015 letter to the Department of the Interior and the Department of Justice (“the Departments”), Chairman Bishop laid out the new process for Committee approval of Indian water rights settlements.¹²⁴ Under the new “Bishop process,” the Departments must confirm in a statement that the proposed settlement meets the March 12, 1990, “Criteria and Procedures for the Participation of the Federal Government in Negotiations for the Settlement of Indian Water Rights Claims.”¹²⁵

The new process has a number of additional requirements, including one that all parties must approve the legislative text in writing before it goes to Congress and a written affirmation from the Office of

Management and Budget and the Department of Justice that the settlement represents a net benefit for the Treasury compared to the litigation alternative.¹²⁶ Some of the requirements are already required by statute as outlined in the Bishop letter.¹²⁷ Others are simply redundant.

These new requirements add unnecessary length and complexity to an already complex, multi-year process. Indeed, many Western water lawyers and experts in Indian Country have expressed concern that the new process is an intentional roadblock to water rights settlements.¹²⁸ Others argue that aspects of the new process pose unnecessary difficulties for the departments. For example, some have argued that “requiring the Department of Justice to affirm a deal was good for taxpayers would be tantamount to admitting legal liability . . . something no lawyer would agree to do.”¹²⁹ Simply put, the Bishop process adds more red tape to the approval process for Indian water settlements.

Blackfeet Settlement

For the Blackfeet Tribe, this is a familiar story. The Blackfeet-Montana Water Rights Compact has been waiting for Congressional approval for more than six years. First agreed to in 2007—almost a decade ago—and overwhelmingly approved by the Montana Legislature in 2009 after 20 years of negotiation,¹³⁰ the settlement has been introduced in the House four times: in 2010, 2011, 2013¹³¹ and 2016. The settlement has yet to be enacted.

After the administration complied with the Bishop process and affirmed that the settlement would result in “very significant benefits for the Federal Government and the American taxpayer,”¹³² Chairman Bishop sent a letter on July 1, 2016, requesting even more information from the departments of Justice and Interior.¹³³ The departments replied with more information on July 22, 2016, and reiterated that the administration has complied with the Bishop process.¹³⁴ Still, Chairman Bishop has not announced plans to pass the Blackfeet Indian Water Rights Settlement out of the House Natural Resources Committee before the end of the 114th Congress.

“The funding to construct, rehabilitate, and expand the Tribe’s municipal water system will ensure all major population centers on the Reservation have reliable and safe drinking water supply for 50 years into the future.”

– John Bezdek, Counselor to the Deputy Secretary, U.S. Department of the Interior¹³⁵

In the meantime, thousands of people on the Blackfeet Reservation pay the price for Congressional inaction. The reservation must still contend with unsafe drinking water, school closures, and low levels of water available for economic development. At least 30 percent of Reservation households “live in housing that lacks complete plumbing or kitchen facilities.”¹³⁶ The Reservation also “struggles with high unemployment, extreme poverty, and a lack of employment opportunities.”¹³⁷ Blackfeet Reservation is the fifth-poorest reservation in the United States, with poverty levels close to 40 percent and unemployment at more than 20%.¹³⁸ The settlement would provide needed funding¹³⁹ for the Blackfeet to construct or update its drinking water system, water storage projects, and irrigation infrastructure.¹⁴⁰ According to testimony from the Department of the Interior, these projects would “provide lasting benefits for the Tribe and its members, by protecting public health and creating substantial numbers of temporary and permanent employment opportunities on the Reservation[.]”¹⁴¹

Other settlements have been introduced in previous Congresses, but were not enacted and have not been re-introduced in the 114th Congress.¹⁴²

Conclusion

The House of Representatives has only days left in session before the end of the 114th Congress. The administration has complied with the Bishop process for the pending Blackfeet and Pechanga Indian water rights settlements. These settlements are ready for enactment and have already been approved by the United States Senate.

If House Republicans are serious about supporting Indian water settlements, they should approve the Blackfeet and Pechanga settlements immediately and begin work on the many more settlements that will come before Congress in the future. Doing so would show that Republicans in the House are serious about protecting taxpayers, cutting red tape, fulfilling the federal government's legal obligation to the tribes, and finally allowing Native families to have access to the basic water and sanitation services they deserve.

NOTES

¹ These homes are ranked as deficiency levels 2-5. Email from Indian Health Service to House Committee on Natural Resources Minority Staff on August 2, 2016; see also Indian Health Service, *Fiscal Year 2017: Justification of Estimates for Appropriations Committees*, Department of Health and Human Services, CJ-169 (Jan. 11, 2016),

<https://www.ihs.gov/budgetformulation/includes/themes/newihstheme/documents/FY2017CongressionalJustification.pdf>. In the United States as a whole, less than 1% of homes lack some or all sanitation facilities. American Housing Survey, *AHS 2013 National Summary Tables*, U.S. Census Bureau, <http://www.census.gov/programs-surveys/ahs/data/2013/ahs-2013-summary-tables/national-summary-report-and-tables---ahs-2013.html> (last visited Aug. 8, 2016) (putting the number at less than 0.2% of homes when exclusive use homes are excluded); see also *Meeting the Access Goal*, U.S. Environmental Protection Agency 4 (2008), <https://www.epa.gov/sites/production/files/2015-07/documents/meeting-the-access-goal-strategies-for-increasing-access-to-safe-drinking-water-and-wastewater-treatment-american-indian-alaska-native-villages.pdf> (finding that 0.6% of non-Native homes in the United States lacked safe drinking water and safe wastewater disposal infrastructure as of 2005).

² Email from Indian Health Service to House Committee on Natural Resources Minority Staff on August 2, 2016; see also Indian Health Service, *Fiscal Year 2017: Justification of Estimates for Appropriations Committees*, Department of Health and Human Services, CJ-169 (Jan. 11, 2016), <https://www.ihs.gov/budgetformulation/includes/themes/newihstheme/documents/FY2017CongressionalJustification.pdf>.

These homes are ranked as deficiency levels 2-5.

³ *AHS 2015 National Summary Tables*, U.S. Census Bureau, https://factfinder.census.gov/faces/tableservices/jsf/pages/productview.xhtml?pid=ACS_15_1YR_S2504&prodType=table (last visited Sept. 30, 2016) (putting the number at less than 0.4% of homes when exclusive use homes are excluded); see also *Meeting the Access Goal*, U.S. Environmental Protection Agency 4 (2008), <https://www.epa.gov/sites/production/files/2015-07/documents/meeting-the-access-goal-strategies-for-increasing-access-to-safe-drinking-water-and-wastewater-treatment-american-indian-alaska-native-villages.pdf> (finding that 0.6% of non-Native homes in the United States lacked safe drinking water and safe wastewater disposal infrastructure as of 2005).

⁴ U.S. Census Bureau, *United States: 2010 Summary Population and Housing Characteristics*, U.S. Department of Commerce, table 36 (2013), <http://www.census.gov/prod/cen2010/cph-1-1.pdf>.

⁵ Terri Ludwig, *The Hidden Housing Crisis in Indian Country*, The Huffington Post (May 2, 2013), http://www.huffingtonpost.com/terri-ludwig/native-american-housing_b_3193289.html.

⁶ Email from Indian Health Service to House Committee on Natural Resources Minority Staff on August 4, 2016; see also 25 U.S.C. § 1632,

https://www.ihs.gov/ihsia/includes/themes/newihstheme/display_objects/documents/home/USCode_Title25_Chapter%2018.pdf. Examples drawn from Indian Health Service, *SDS Guidelines—Appendix E: Guidance on Assigning Deficiency Levels*, Department of Health and Human Services (April 2003), provided via email from Indian Health Service on August 16, 2016.

⁷ Indian Health Service, *SDS Guidelines—Appendix E: Guidance on Assigning Deficiency Levels*, Department of Health and Human Services (April 2003), provided via email from Indian Health Service on August 16, 2016.

⁸ ECHO, *Analyze Trends: Drinking Water Dashboard*, Environmental Protection Agency, <https://echo.epa.gov/trends/comparative-maps-dashboards/drinking-water-dashboard?region=&view=performance&criteria=adv&tribe=All> (last visited Aug. 8, 2016).

⁹ *Fiscal Year 2017 Indian Country Budget Request: Upholding the Promises Respecting Tribal Governance: For the Good of the People*, National Congress of American Indians 94 (2016), <http://www.ncai.org/resources/ncai-publications/NCAI-2017-BudgetReport-Layout-FINAL.pdf> (stating that “Tribal compliance with drinking water standards is consistently below those of other community water systems due to lack of funding for operations and maintenance.”). This finding was confirmed in a call between the Environmental Protection Agency and the House Committee on Natural Resources Minority Staff on July 26, 2016.

¹⁰ See, e.g., *Taxation*, National Congress of American Indians, <http://www.ncai.org/policy-issues/tribal-governance/taxation> (Aug. 11, 2016).

¹¹ See *Drinking Water State Revolving Fund (DWSRF)*, U.S. Environmental Protection Agency, <https://www.epa.gov/drinkingwatersrf> (last visited Aug. 11, 2016); *Clean Water State Revolving Fund (CWSRF)*, U.S. Environmental Protection Agency, <https://www.epa.gov/cwsrf> (last visited Aug. 11, 2016).

¹² *Fiscal Year 2017 Indian Country Budget Request: Upholding the Promises Respecting Tribal Governance: For the Good of the People*, National Congress of American Indians 94 (2016), <http://www.ncai.org/resources/ncai-publications/NCAI-2017-BudgetReport-Layout-FINAL.pdf>.

¹³ *Fiscal Year 2017 Indian Country Budget Request: Upholding the Promises Respecting Tribal Governance: For the Good of the People*, National Congress of American Indians 94 (2016), <http://www.ncai.org/resources/ncai-publications/NCAI-2017-BudgetReport-Layout-FINAL.pdf>.

¹⁴ See, e.g., National Institutes of Health, *1974: Families with Sanitary Sewer, Clean Water Are Healthier*, Department of Health & Human Services, <https://www.nlm.nih.gov/nativevoices/timeline/605.html> (last visited Aug. 8, 2016) (noting that the Comptroller General reported to Congress in 1974 that “American Indian and Alaska Native families who live in healthful

homes, with sanitary sewage disposal and safe piped water, place fewer demands on the Indian Health Service's primary health care delivery system than families living in unhealthful conditions"); National Institutes of Health, 1988: *Clean Drinking Water, Sanitary Sewers Reduce American Indian Deaths*, Department of Health & Human Services, <https://www.nlm.nih.gov/nativevoices/timeline/564.html> (last visited Aug. 8, 2016) (noting that in 1988 improvements in clean drinking water and sanitary sewers were linked to a reduction in American Indian deaths); *Safe Water and Waste Disposal Facilities*, U.S. Indian Health Service, <https://www.ihs.gov/newsroom/factsheets/safewater/> (last visited Sep. 12, 2016).

¹⁵ *Safe Water and Waste Disposal Facilities*, U.S. Indian Health Service, <https://www.ihs.gov/newsroom/factsheets/safewater/> (last visited Sep. 12, 2016).

¹⁶ Thomas W. Hennessy, Troy Ritter, Robert C. Holman, Dana L. Bruden, Krista L. Yorita, Lisa Bulkow, James E. Cheek, Rosalyn J. Singleton, and Jeff Smith, *The Relationship Between In-Home Water Service and the Risk of Respiratory Tract, Skin, and Gastrointestinal Tract Infections Among Rural Alaska Natives*, 98(11) *American Journal of Public Health* 2072-2078 (Nov. 2008), <http://www.ncbi.nlm.nih.gov/pmc/articles/PMC2636427/>.

¹⁷ Thomas W. Hennessy, Troy Ritter, Robert C. Holman, Dana L. Bruden, Krista L. Yorita, Lisa Bulkow, James E. Cheek, Rosalyn J. Singleton, and Jeff Smith, *The Relationship Between In-Home Water Service and the Risk of Respiratory Tract, Skin, and Gastrointestinal Tract Infections Among Rural Alaska Natives*, 98(11) *American Journal of Public Health* 2072-2078 (Nov. 2008), <http://www.ncbi.nlm.nih.gov/pmc/articles/PMC2636427/>.

¹⁸ Catherine J. Botzum, et al., *Uranium Contamination in Drinking Water in Pine Ridge Reservation, Southwestern South Dakota*, 2011 GSA Annual Meeting (2011), <http://www.nrc.gov/docs/ML1526/ML15261A863.pdf> (finding uranium contamination in drinking water); Allen J. Heakin, *Water Quality of Selected Springs and Public-Supply Wells, Pine Ridge Indian Reservation, South Dakota, 1992-97*, U.S. Geological Survey Water-Resources Investigations Report 99-4063 (2000), <http://pubs.usgs.gov/wri/wri994063/wri994063.pdf> (finding lead, arsenic, bacteria, uranium and other contaminants in springs and public-supply wells in Pine Ridge); Carson Vaughan, *Natives Struggle To Stay One With the Land*, Native Daughters, University of Nebraska-Lincoln, <http://cojmc.unl.edu/native-daughters/environmentalists/natives-struggle-to-stay-one-with-the-land> (last visited Aug. 8, 2016); see also Charmaine White Face, *Report on Water Tests for Radioactive Contamination*, Defenders of the Black Hills (March 2011), <http://www.defendblackhills.org/document/waterreport32011.pdf> (finding radioactive contaminants in tested water sources);

¹⁹ Mission 2012: Clean Water, *Reservation Water Rights*, Massachusetts Institute of Technology, <http://web.mit.edu/12.000/www/m2012/finalwebsite/problem/waterrights.shtml> (last visited Aug. 8, 2016).

²⁰ Lorna Fewtrell, *Drinking-Water Nitrate, Methemoglobinemia, and Global Burden of Disease: A Discussion*, 112(14) *Environmental Health Perspectives* 1371-1374 (Oct. 2004), <http://www.ncbi.nlm.nih.gov/pmc/articles/PMC1247562/>.

²¹ Melynda Harrison, *MSU/Crow Project Helps Diagnose Water Issues on Reservation* (Aug. 11, 2010), <http://www.montana.edu/news/8686/msu-crow-project-helps-diagnose-water-issues-on-reservation>.

²² Melynda Harrison, *MSU/Crow Project Helps Diagnose Water Issues on Reservation* (Aug. 11, 2010), <http://www.montana.edu/news/8686/msu-crow-project-helps-diagnose-water-issues-on-reservation>; Margaret J. Eggers et al., *Potential Health Risks from Uranium in Home Well Water: An Investigation by the Apsaalooke (Crow) Tribal Research Group*, 5 *Geosciences* 67-94 (2015), <http://www.mdpi.com/2076-3263/5/1/67/pdf>.

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²⁴ National Institutes of Health, 2005: *U.S. Spends More on Health Care for Prisoners Than Indians*, Department of Health & Human Services, <https://www.nlm.nih.gov/nativevoices/timeline/620.html> (last visited Aug. 8, 2016). This right stems from the federal government's trust obligation to tribal nations.

²⁵ National Institutes of Health, 2009: *Reservation Clinics, Hospitals Overcrowded and In Need of Repair*, Department of Health & Human Services, <https://www.nlm.nih.gov/nativevoices/timeline/610.html> (last visited Aug. 8, 2016).

²⁶ Data provided by the Congressional Research Service based on information from the Indian Health Service. Email from Congressional Research Service to House Committee on Natural Resources Minority Staff on August 8, 2016. See also *Fiscal Year 2017 Indian Country Budget Request: Upholding the Promises Respecting Tribal Governance: For the Good of the People*, National Congress of American Indians 53 (2016), <http://www.ncai.org/resources/ncai-publications/NCAI-2017-BudgetReport-Layout-FINAL.pdf> (providing similar numbers); Truffer, C., Wolfe, C., Rennie, K., 2015 *Actuarial Report on the Financial Outlook for Medicaid*, Centers for Medicare and Medicaid Services, <https://www.medicare.gov/medicaid-chip-program-information/by-topics/financing-and-reimbursement/downloads/medicaid-actuarial-report-2015.pdf> (last visited September 12, 2016).

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³⁴ *Providing Safe Drinking Water in Areas with Abandoned Uranium Mines*, U.S. Environmental Protection Agency, <https://www.epa.gov/navajo-nation-uranium-cleanup/providing-safe-drinking-water-areas-abandoned-uranium-mines> (last updated Aug. 4, 2016). Not all of the water sources tested are used for human consumption; some are only used for livestock consumption. More than 12 percent of the water sources sampled exceeded other federal drinking water standards. For example, a 2008 study by the U.S. Environmental Protection Agency found that over 70 percent—34 out of the 48—of water sources sampled exceeded the action levels for contaminants such as aluminum, arsenic, copper, iron, lead, manganese, selenium, and uranium. Superfund Technical Assessment and Response Team Region 9, *Navajo Nation Drinking Water Source Sampling, February-March 2008*, U.S. Environmental Protection Agency (Aug. 28, 2008), <https://www.epa.gov/sites/production/files/2016-06/documents/2008-08-28-navajo-drinking-water-source-sampling.pdf>; see also James VanDerslice, *Drinking Water Infrastructure and Environmental Disparities: Evidence and Methodological Considerations*, 101(Suppl 1) American Journal of Public Health S109-S114 (Dec. 2011), <http://www.ncbi.nlm.nih.gov/pmc/articles/PMC3222486/> (discussing other sampling results).

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³⁶ *Ground Water and Drinking Water, Table of Regulated Drinking Water Contaminants*, U.S. Environmental Protection Agency, <https://www.epa.gov/ground-water-and-drinking-water/table-regulated-drinking-water-contaminants> (last visited Aug. 8, 2016).

³⁷ Brandon Loomis, *Abandoned Uranium Mines Continue to Haunt Navajos on Reservation*, The Arizona Republic (Aug. 4, 2014), <http://www.azcentral.com/story/news/arizona/investigations/2014/08/04/uranium-mining-navajos-devastating-health-effects/13591333/>; Brandon Loomis, *With Uranium Poisoning Wells, Navajos Must Drive Miles to Get Drinking Water*, The Arizona Republic (Aug. 5, 2014), <http://www.azcentral.com/story/news/arizona/investigations/2014/08/05/uranium-mining-poison-wells-safe-drinking-water/13635345/>.

³⁸ Brandon Loomis, *Abandoned uranium mines continue to haunt Navajos on reservation*, The Arizona Republic (Aug. 5, 2014), <http://www.azcentral.com/story/news/arizona/investigations/2014/08/04/uranium-mining-navajos-devastating-health-effects/13591333/>.

³⁹ Brandon Loomis, *With Uranium Poisoning Wells, Navajos Must Drive Miles to Get Drinking Water*, The Arizona Republic (Aug. 5, 2014), <http://www.azcentral.com/story/news/arizona/investigations/2014/08/05/uranium-mining-poison-wells-safe-drinking-water/13635345/>.

⁴⁰ Kit O'Connell, *Native Communities across North America Lack Access to Clean Water*, MintPress News (Oct. 12, 2015), <http://www.mintpressnews.com/native-communities-across-north-america-lack-access-to-clean-water/210252/>; USGS Water Science School, *Water Questions & Answers*, U.S. Geological Survey, <http://water.usgs.gov/edu/qa-home-percapita.html> (last updated May 2, 2016).

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- ⁴¹ Kit O’Connell, *Native Communities Across North America Lack Access to Clean Water*, MintPress News (Oct. 12, 2015), <http://www.mintpressnews.com/native-communities-across-north-america-lack-access-to-clean-water/210252/>; Brandon Loomis, *With Uranium Poisoning Wells, Navajos Must Drive Miles to Get Drinking Water*, The Arizona Republic (Aug. 5, 2014), <http://www.azcentral.com/story/news/arizona/investigations/2014/08/05/uranium-mining-poison-wells-safe-drinking-water/13635345/>.
- ⁴² Brandon Loomis, *With Uranium Poisoning Wells, Navajos Must Drive Miles to Get Drinking Water*, The Arizona Republic (Aug. 5, 2014), <http://www.azcentral.com/story/news/arizona/investigations/2014/08/05/uranium-mining-poison-wells-safe-drinking-water/13635345/>.
- ⁴³ See 2014 *Native Youth Report*, Executive Office of the President (Dec. 2014), https://www.whitehouse.gov/sites/default/files/docs/20141129nativeyouthreport_final.pdf; Lauren Camera, *Native American Students Left Behind: Native Youth Post the Worst Achievement Scores and Lowest Graduation Rates of Any Student Subgroup*, U.S. News (Nov. 6, 2015), <http://www.usnews.com/news/articles/2015/11/06/native-american-students-left-behind>.
- ⁴⁴ See, e.g., Lauren Camera, *Native American Students Left Behind: Native Youth Post the Worst Achievement Scores and Lowest Graduation Rates of Any Student Subgroup*, U.S. News (Nov. 6, 2015), <http://www.usnews.com/news/articles/2015/11/06/native-american-students-left-behind> for a description of some of the issues Native schools face.
- ⁴⁵ 2014 *Native Youth Report*, Executive Office of the President 16-17 (Dec. 2014), https://www.whitehouse.gov/sites/default/files/docs/20141129nativeyouthreport_final.pdf
- ⁴⁶ Statement of John Bezdek, Counselor to the Deputy Secretary, United States Department of the Interior Before the House Subcommittee on Water, Power and Oceans, Committee on Natural Resources Hearing on the Blackfeet Water Rights Settlement Act of 2016, at 4 (May 24, 2016), http://naturalresources.house.gov/uploadedfiles/testimony_bezdek_h.r..pdf; Interview with Heather Whiteman Runs Him, Staff Attorney, Native American Rights Fund, by House Committee on Natural Resources Minority Staff about the Crow Reservation. Many of the issues on the Crow Reservation took place before 2010. Congress approved the Crow Reservation’s water settlement in 2010. The Crow Nation used funding provided through the settlement to fix issues with their municipal water system.
- ⁴⁷ Statement of John Bezdek, Counselor to the Deputy Secretary, United States Department of the Interior Before the House Subcommittee on Water, Power and Oceans, Committee on Natural Resources Hearing on the Blackfeet Water Rights Settlement Act of 2016, at 4 (May 24, 2016), http://naturalresources.house.gov/uploadedfiles/testimony_bezdek_h.r..pdf (the Blackfeet Tribe had to issue a “boil order” for more than a decade in a major population center until the Tribe was able to cobble together grants, loans, and its own funds to update part of its system.”).
- ⁴⁸ See, e.g., *Lack of Safe Water and Sanitation in Schools Affects Children’s Learning—And Their Lives*, UNICEF, http://www.unicef.org/media/media_53234.html (last updated April 5, 2010) discussing how lack of access to clean water and sanitation in schools in the developing world affects children’s learning.
- ⁴⁹ *The Importance of Indian Water Rights Settlement Funding*, Western States Water Council & Native American Rights Fund (Oct. 2014), http://www.eenews.net/assets/2015/05/18/document_daily_02.pdf.
- ⁵⁰ *FFF: American Indian and Alaska Native Heritage Month: November 2015*, U.S. Census Bureau (Nov. 2, 2015), <http://www.census.gov/newsroom/facts-for-features/2015/cb15-ff22.html>.
- ⁵¹ *FFF: American Indian and Alaska Native Heritage Month: November 2015*, U.S. Census Bureau (Nov. 2, 2015), <http://www.census.gov/newsroom/facts-for-features/2015/cb15-ff22.html>.
- ⁵² These states include Alaska, Arizona, California, Maine, Minnesota, Montana, New Mexico, North Dakota, South Dakota, and Utah. Office of the Assistant Secretary – Indian Affairs, *2013 American Indian Population and Labor Force Report*, U.S. Department of the Interior 10 (Jan. 16, 2014), <http://www.bia.gov/cs/groups/public/documents/text/idc1-024782.pdf>.
- ⁵³ http://www.nrcprograms.org/site/PageServer?pagename=naa_livingconditions.
- ⁵⁴ See, e.g., *The Poverty Cycle*, Running Strong for American Indian Youth, <http://indianyouth.org/american-indian-life/poverty-cycle> (last visited Aug. 8, 2016); Trymaine Lee, *Pine Ridge: A Broken System Failing America’s Most Forgotten Children*, MSNBC (May 28, 2014), <http://www.msnbc.com/msnbc/failing-americas-most-forgotten-children>; Office of the Assistant Secretary – Indian Affairs, *2013 American Indian Population and Labor Force Report*, U.S. Department of the Interior 42-25 (Jan. 16, 2014), <http://www.bia.gov/cs/groups/public/documents/text/idc1-024782.pdf>; Jens Manuel Krogstad, *One-in-Four Native Americans and Alaska Natives Are Living in Poverty*, Pew Research Center (June 13, 2014), <http://www.pewresearch.org/fact-tank/2014/06/13/1-in-4-native-americans-and-alaska-natives-are-living-in-poverty/> (putting the poverty rate for Standing Rock Sioux Reservation at 43% in 2012); President Barack Obama, *On My Upcoming Trip to Indian Country*, Indian Country Today (June 5, 2015), <https://indiancountrytodaymedianetwork.com/2014/06/05/my-upcoming-trip-indian-country> (stating that poverty rates are nearly 60% in some places).
- ⁵⁵ For example, businesses on the Blackfeet Reservation in Montana have been disrupted in the past “because of the unreliability of municipal water systems.” Statement of John Bezdek, Counselor to the Deputy Secretary, United States

Department of the Interior Before the House Subcommittee on Water, Power and Oceans, Committee on Natural Resources Hearing on the Blackfeet Water Rights Settlement Act of 2016, at 4 (May 24, 2016), http://naturalresources.house.gov/uploadedfiles/testimony_bezdek_h.r..pdf.

⁵⁶ See, e.g., *Economic Implications*, Growing Blue, <http://growingblue.com/implications-of-growth/economic-implications/> (last visited Aug. 8, 2016); Jessica McGlyn, *Water Valuation: Building the Business Case*, Growing Blue, <http://growingblue.com/blog/economics/water-valuation-building-the-business-case/> (last visited Aug. 8, 2016).

⁵⁷ Due to lack of water, the Tribe has been unable to act on hundreds of housing applications for tribal members. *The Importance of Indian Water Rights Settlement Funding*, Western States Water Council & Native American Rights Fund (Oct. 2014), http://www.eenews.net/assets/2015/05/18/document_daily_02.pdf.

⁵⁸ *The Importance of Indian Water Rights Settlement Funding*, Western States Water Council & Native American Rights Fund (Oct. 2014), http://www.eenews.net/assets/2015/05/18/document_daily_02.pdf.

⁵⁹ *The Importance of Indian Water Rights Settlement Funding*, Western States Water Council & Native American Rights Fund (Oct. 2014), http://www.eenews.net/assets/2015/05/18/document_daily_02.pdf.

⁶⁰ Robert T. Anderson, *Indian Water Rights, Practical Reasoning, and Negotiated Settlements*, 98 Cal. L. Rev. 1133, 1157 (2010), <http://scholarship.law.berkeley.edu/californialawreview/vol98/iss4/3>.

⁶¹ Bureau of Indian Affairs, *Frequently Asked Questions*, Department of the Interior, <http://www.bia.gov/FAQs/> (last visited Oct. 6, 2016).

⁶² Bureau of Indian Affairs, *Frequently Asked Questions*, Department of the Interior, <http://www.bia.gov/FAQs/> (last visited Oct. 6, 2016).

⁶³ Bonnie G. Colby, et al., *Negotiating Tribal Water Rights: Fulfilling Promises in the Arid West*, 10 (2005).

⁶⁴ Bonnie G. Colby, et al., *Negotiating Tribal Water Rights: Fulfilling Promises in the Arid West*, 10 (2005).

⁶⁵ *Winters v. United States*, 207 U.S. 564 (1908); see also WILLIAM C. CANBY, JR., *AMERICAN INDIAN LAW IN A NUTSHELL*, 476 (5th ed., 2009).

⁶⁶ WILLIAM C. CANBY, JR., *AMERICAN INDIAN LAW IN A NUTSHELL*, 478 (5th ed., 2009).

⁶⁷ *Arizona v. California*, 373 U.S. 546, 600 (1963)

⁶⁸ It should be noted that the volume of water may also be measured by other standards, such as the “flows necessary to sustain a valuable species of fish relied upon by the tribe for sustenance.” National Water Commission, *Water Policies for the Future: Final Report to the President and to the Congress of the United States* 477 (1973).

⁶⁹ *United States v. Adair*, 723 F.2d 1394 (9th Cir. 1984), cert. denied, 467 U.S. 1252.

⁷⁰ Over 90 million acres of land were taken from tribes through various federal government policies in in the early 1900s. Today, the federal government holds approximately 56.2 million acres of land in trust. Bureau of Indian Affairs, *Frequently Asked Questions*, Department of the Interior, <http://www.bia.gov/FAQs/> (last visited Aug. 10, 2016).

⁷¹ WILLIAM C. CANBY, JR., *AMERICAN INDIAN LAW IN A NUTSHELL*, 473 (5th ed., 2009).

⁷² WILLIAM C. CANBY, JR., *AMERICAN INDIAN LAW IN A NUTSHELL*, 473 (5th ed., 2009).

⁷³ WILLIAM C. CANBY, JR., *AMERICAN INDIAN LAW IN A NUTSHELL*, 474 (5th ed., 2009).

⁷⁴ WILLIAM C. CANBY, JR., *AMERICAN INDIAN LAW IN A NUTSHELL*, 476-77 (5th ed., 2009).

⁷⁵ Robert T. Anderson, *Indian Water Rights, Practical Reasoning, and Negotiated Settlements*, 98 Cal. L. Rev. 1133, 1133 (2010), <http://scholarship.law.berkeley.edu/californialawreview/vol98/iss4/3>.

⁷⁶ National Water Commission, *Water Policies for the Future: Final Report to the President and to the Congress of the United States* 474 (1973).

⁷⁷ National Water Commission, *Water Policies for the Future: Final Report to the President and to the Congress of the United States* 474 (1973).

⁷⁸ National Water Commission, *Water Policies for the Future: Final Report to the President and to the Congress of the United States* 474-75 (1973).

⁷⁹ Charles V. Stern, *Indian Water Rights Settlements*, Congressional Research Service (2016), <http://www.crs.gov/reports/pdf/R44148>.

⁸⁰ Letty Belin and Pamela Williams, *Indian Water Rights Settlements*, Native American Rights Fund Water Rights Symposium (2015). <http://www.narf.org/nill/documents/water/2015/belin-williams.pptx>.

⁸¹ Letty Belin and Pamela Williams, *Indian Water Rights Settlements*, Native American Rights Fund Water Rights Symposium (2015). <http://www.narf.org/nill/documents/water/2015/belin-williams.pptx>.

⁸² See National Water Commission, *Water Policies for the Future: Final Report to the President and to the Congress of the United States* 476 (1973) (finding that “The Nation is therefore confronted . . . with this dilemma: in the water-short West, billions of dollars have been invested, much of it by the Federal Government, in water resource projects benefitting non-Indians but using water in which Indians have a priority of right . . .”).

⁸³ See, e.g., Tom Risen, *Left Behind: For Some Native American Communities Facing Water Problems, Hope Circles the Drain*, U.S. News (June 16, 2016), <http://www.usnews.com/news/articles/2016-06-16/some-native-americans-lack-access-to-safe-clean-water>.

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- ⁸⁴ Charles V. Stern, *Indian Water Rights Settlements*, Congressional Research Service (2016), <http://www.crs.gov/reports/pdf/R44148>.
- ⁸⁵ In a limited number of cases, the Department of Justice and the Department of the Interior have approved the settlement. Charles V. Stern, *Indian Water Rights Settlements*, Congressional Research Service (2016), <http://www.crs.gov/reports/pdf/R44148>.
- ⁸⁶ WILLIAM C. CANBY, JR., *AMERICAN INDIAN LAW IN A NUTSHELL*, 484 (5th ed., 2009).
- ⁸⁷ Litigation of tribal water rights frequently becomes part of a massive general-stream adjudication during which all claims to a given river system are tried in court. Robert T. Anderson, *Indian Water Rights, Practical Reasoning, and Negotiated Settlements*, 98 Cal. L. Rev. 1133, 1133 (2010), <http://scholarship.law.berkeley.edu/californialawreview/vol98/iss4/3>.
- ⁸⁸ See *Water in Indian Country: Challenges and Opportunities*, Tribal Water Working Group (2012), http://uttoncenter.unm.edu/pdfs/2012White_Paper.pdf.
- ⁸⁹ As one example, litigation over tribal water rights for the San Ildefonso, Tesuque, Nambe and Pojoaque Pueblos first began in 1966 in the *New Mexico v. Aamodt* case. Negotiations began in 2000 and the case was finally settled in 2010. Charles V. Stern, *Indian Water Rights Settlements*, Congressional Research Service (2016), <http://www.crs.gov/reports/pdf/R44148>.
- ⁹⁰ *Water in Indian Country: Challenges and Opportunities*, Tribal Water Working Group (2012), http://uttoncenter.unm.edu/pdfs/2012White_Paper.pdf.
- ⁹¹ National Institutes of Health, *2009: Many Reservation Homes Lack Clean Drinking Water*, Department of Health & Human Services, <https://www.nlm.nih.gov/nativevoices/timeline/616.html> (last visited Aug. 8, 2016).
- ⁹² Email from Indian Health Service to House Committee on Natural Resources Minority Staff on August 2, 2016.
- ⁹³ Indian Health Service, *Fiscal Year 2017: Justification of Estimates for Appropriations Committees*, Department of Health and Human Services, CJ-170 (Jan. 11, 2016), <https://www.ihs.gov/budgetformulation/includes/themes/newihstheme/documents/FY2017CongressionalJustification.pdf>.
- ⁹⁴ Indian Health Service, *Fiscal Year 2017: Justification of Estimates for Appropriations Committees*, Department of Health and Human Services, CJ-170 (Jan. 11, 2016), <https://www.ihs.gov/budgetformulation/includes/themes/newihstheme/documents/FY2017CongressionalJustification.pdf>.
- ⁹⁵ Call with Indian Health Service and House Committee on Natural Resources Minority Staff on July 15, 2016. For example, in FY2015, Indian Health Service received \$40.4 million in contributed funds from other agencies. Email from Indian Health Service to House Committee on Natural Resources Minority Staff on August 2, 2016.
- ⁹⁶ Indian Health Service, *Fiscal Year 2017: Justification of Estimates for Appropriations Committees*, Department of Health and Human Services, CJ-170 (Jan. 11, 2016), <https://www.ihs.gov/budgetformulation/includes/themes/newihstheme/documents/FY2017CongressionalJustification.pdf>.
- ⁹⁷ Research by the Congressional Research Service found that 24 out of 29 Congressionally enacted settlements included funding for infrastructure. Of the five settlements that did not include funding for infrastructure, three did not include any federal monetary contribution and one included a federal contribution of just \$0.2 million. Memorandum from the Congressional Research Service to House Committee on Natural Resources Minority Staff on August 11, 2016.
- ⁹⁸ Claims Resolution Act of 2010, Pub. L. 111-291, 124 Stat. 3064 (Dec. 8, 2010), <https://www.congress.gov/111/plaws/publ291/PLAW-111publ291.pdf>
- ⁹⁹ Department of the Interior, Criteria and Procedures for the Participation of the Federal Government in Negotiations for the Settlement of Indian Water Rights Groups, 55 Fed. Reg. 9223, March 12, 1990, at http://www.usbr.gov/native/policy/12mar1990_fedreg_indianwaterrights.pdf.
- ¹⁰⁰ Randal C. Archibold, *Indians' Water Rights Give Hope for Better Health*, N.Y. Times (Aug. 30, 2008), http://www.nytimes.com/2008/08/31/us/31diabetes.html?_r=0; see also Jovana J. Brown, *When Our Water Returns: Gila River Indian Community and Diabetes* (2009), <http://evergreen.edu/tribal/docs/Brown%20Gil%20River%20Case%20When%20Our%20Water%20returns%2012%2030%2009.pdf>.
- ¹⁰¹ See Rod Lewis, Water Resources Research Center, *Gila River Indian Community: Indigenous Perspectives on Sustainable Water Rights*, University of Arizona (June 9-10, 2015), <https://wrrc.arizona.edu/sites/wrrc.arizona.edu/files/pdfs/Rod-Lewis-Tribal%20Water-Rights.pdf>; *Gila River Water Shortage: A Productive Partnership between Gila River Indian Community and Salt River Project*, Western Governors' Association, http://westgov.org/images/FINAL_Gila_River_Water_Storage.pdf (last visited Aug. 4, 2016).
- ¹⁰² E. Lee Thompson, *Overview and Historical Development Pima-Maricopa Irrigation Project*, Arizona Chapter of the American Society of Farm Managers and Rural Appraisers (2004), <https://asfmraaz.com/papers/2004/04%20Lee's%20Appraisers%20meeting%20address%202004.pdf>.
- ¹⁰³ Randal C. Archibold, *Indians' Water Rights Give Hope for Better Health*, N.Y. Times (Aug. 30, 2008), http://www.nytimes.com/2008/08/31/us/31diabetes.html?_r=0.
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Water Council in Support of Indian Water Rights Settlements, Scottsdale, Arizona on Oct. 10, 2014, http://www.westernstateswater.org/wp-content/uploads/2012/10/376_Indian-Water-Rights-Settlements_2014Oct10-1.pdf.

¹⁰⁵ For example, organizations such as the National Congress of American Indians, the Native American Rights Fund, and the Western States Water Council, an organization of 18 western states, have consistently supported negotiated settlement of Indian water rights claims. See Resolution of the Western States Water Council in Support of Indian Water Rights Settlements, Scottsdale, Arizona on Oct. 10, 2014, http://www.westernstateswater.org/wp-content/uploads/2012/10/376_Indian-Water-Rights-Settlements_2014Oct10-1.pdf; see also Comptroller General of the United States, *Reserved Water Rights For Federal and Indian Reservations: A Growing Controversy in Need of Resolution*, U.S. General Accounting Office (Nov. 16, 1978), <http://www.gao.gov/products/CED-78-176> (1978).

¹⁰⁶ See, e.g., Charles V. Stern, *Indian Water Rights Settlements*, Congressional Research Service (2016), <http://www.crs.gov/reports/pdf/R44148> (stating that “Over the last 50 years, negotiated settlements have been the preferred course for many tribes”); Yavapai-Prescott Indian Tribe Water Rights Settlement Act of 1994, P.L. 103-434 (P.L. 104-91) (1994), <http://www.azwater.gov/AzDWR/SurfaceWater/Adjudications/documents/Yavapai-Prescott%20Settlement%20Agreement%20and%20Exhibits.pdf> (stating that “it is the policy of the United States . . . to settle, wherever possible, the water rights claims of Indian tribes without lengthy and costly litigation”); Statement of Michael L. Connor, Commissioner Bureau of Reclamation U.S. Department of the Interior Before the Committee on Natural Resources Subcommittee on Water and Power H.R. 3563, at 1 (September 22, 2009), <http://naturalresources.house.gov/uploadedfiles/connortestimony09.22.09.pdf>.

¹⁰⁷ Charles V. Stern, *Indian Water Rights Settlements*, Congressional Research Service (2016), <http://www.crs.gov/reports/pdf/R44148>.

¹⁰⁸ Even when litigation is added to the mix, there are still less than 100 tribes who have resolved their water claims. As of 2011, less than 50 tribes had resolved their water claims through litigation. *Tribal Leaders Briefing Book*, National Congress of American Indians, 81 (Dec. 2014), http://www.ncai.org/conferences-events/ncai-events/WHTNC_-_Final_briefing_book_2014-11-21.pdf.

¹⁰⁹ Yavapai-Prescott Indian Tribe Water Rights Settlement Act of 1994, P.L. 103-434 (P.L. 104-91) (1994), <http://www.azwater.gov/AzDWR/SurfaceWater/Adjudications/documents/Yavapai-Prescott%20Settlement%20Agreement%20and%20Exhibits.pdf>.

¹¹⁰ Yavapai-Prescott Indian Tribe Water Rights Settlement Act of 1994, P.L. 103-434 (P.L. 104-91) (1994), <http://www.azwater.gov/AzDWR/SurfaceWater/Adjudications/documents/Yavapai-Prescott%20Settlement%20Agreement%20and%20Exhibits.pdf>.

¹¹¹ See, e.g., Omnibus Public Land Management Act of 2009, Pub. L. No. 111-11, § 10801(2), 123 Stat. 991 (stating in the Shoshone-Paiute Tribes of the Duck Valley Reservation Water Rights Settlement that “quantifying rights to water and development of facilities needed to use tribal water supplies is essential to the development of viable Indian reservation economies and the establishment of a permanent reservation homeland.”).

¹¹² See, e.g., Robert T. Anderson, *Indian Water Rights, Practical Reasoning, and Negotiated Settlements*, 98 Cal. L. Rev. 1133, 1157-58 (2010), <http://scholarship.law.berkeley.edu/californialawreview/vol98/iss4/3>; Robert T. Anderson, *Indian Water Rights: Litigation and Settlements*, 42 Tulsa L. Rev. 23, 33-35 (2006), <http://digitalcommons.law.utulsa.edu/cgi/viewcontent.cgi?article=2554&context=tlr>.

¹¹³ All five settlements enacted during Republican control were enacted during a five year period from 1999 to 2004. Three of these five settlements were enacted when the Senate was narrowly divided 51 (Republicans) to 49 (Democrats with one Independent caucusing with Democrats). One of the twenty-one settlements enacted during Democratic years was also enacted during a similar 51 (Democrats with two Independents caucusing with Democrats) to 49 (Republicans) divide.

¹¹⁴ Two of the three settlements enacted during split years—also the two most recent federally enacted settlements—did not include any federal monetary contributions. Therefore, they are not considered “major” settlements. See Charles V. Stern, *Indian Water Rights Settlements*, Congressional Research Service (2016), <http://www.crs.gov/reports/pdf/R44148>.

¹¹⁵ The Senate was split for two of the Democrat-controlled years and two of the Republican-controlled years.

¹¹⁶ The Tribal Water Working Group “is an informal affiliation of tribal, federal and state entities, nongovernmental organizations, professionals and academic experts involved with tribal water rights and water issues in Indian Country. Organizers include: the National Congress of American Indians (NCAI), the Native American Rights Fund (NARF), the Utton Center, the Sandia National Laboratories and the U.S. Institute for Environmental Conflict Resolution.” *Water in Indian Country: Challenges and Opportunities*, Tribal Water Working Group 3 (2012), http://uttoncenter.unm.edu/pdfs/2012White_Paper.pdf.

¹¹⁷ *Water in Indian Country: Challenges and Opportunities*, Tribal Water Working Group (2012), http://uttoncenter.unm.edu/pdfs/2012White_Paper.pdf.

¹¹⁸ *Water in Indian Country: Challenges and Opportunities*, Tribal Water Working Group (2012), http://uttoncenter.unm.edu/pdfs/2012White_Paper.pdf.

¹¹⁹ Two minor settlements were approved in 2014 for the Pyramid Lake Paiute Tribe and the Hualapai Tribe; however, neither one came with a federal contribution. See Charles V. Stern, *Indian Water Rights Settlements*, Congressional Research Service

(2016), <http://www.crs.gov/reports/pdf/R44148> (stating that “no major Indian water rights settlements have been enacted since 2010.”).

¹²⁰ Rules of the House Republican Conference for the 112th Congress (Dec. 8, 2010),

<http://www.gop.gov/resources/library/documents/rules/112th-Conference-Rules-As-adopted.pdf> (stating “It is the policy of the House Republican Conference that no Member shall request a congressional earmark, limited tax benefit, or limited tariff benefit, as such terms have been described in the Rules of the House.”); Rules of the House Republican Conference for the 114th Congress (2014), <http://www.gop.gov/app/uploads/2014/11/114-Conference-Rules-113-Comp-Print1.pdf>; Kevin Boland, *GOP Bans Earmarks: When Will Democrats Listen to the American People*, Speaker of the House (Nov. 17, 2010), <http://www.speaker.gov/general/gop-bans-earmarks-when-will-democrats-listen-american-people>; Don Seymour, *House Republicans Renew Earmark Ban for 113th Congress*, Speaker of the House (Nov. 16, 2012),

<http://www.speaker.gov/general/house-republicans-renew-earmark-ban-113th-congress>. House Rule XXI, Clause 9(e) defines the term “congressional earmark” as “a provision or report language included primarily at the request of a Member, Delegate, Resident Commissioner, or Senator providing, authorizing or recommending a specific amount of discretionary budget authority, credit authority, or other spending authority for a contract, loan, loan guarantee, grant, loan authority or other expenditure with or to an entity, or targeted to a specific state, locality, or Congressional district, other than through a statutory or administrative formula-driven or competitive award process.” Rules of the House of Representatives for the 114th Congress, Rule XXI, Clause 9(e) (Jan. 6, 2015), <http://clerk.house.gov/legislative/house-rules.pdf>.

¹²¹ *The Importance of Indian Water Rights Settlement Funding*, Western States Water Council & Native American Rights Fund (Oct. 2014), http://www.eenews.net/assets/2015/05/18/document_daily_02.pdf; *Tule River Indian Tribe Settlement Briefing Materials*, Native American Rights Fund (2013),

http://www.narf.org/nill/documents/NARF_water_settlements/Tule/20130800briefing_materials.PDF.

¹²² Americans for Tax Reform, a conservative political advocacy group, appears to agree, stating “We would agree with others, too, that legal settlements made by the United States government and approved through legislation are neither part of the letter nor the spirit of the earmark ban. These legal settlements have saved taxpayers millions of dollars in litigation costs and denied windfalls to the trial lawyer bar. They ultimately result in less government spending, not more. They do not benefit particular Members of Congress like wasteful pork barrel earmarks do.” See Ryan Ellis, *Earmark Ban Essential for Taxpayers in New Congress*, Americans for Tax Reform (Nov. 26, 2014), <https://www.atr.org/earmark-ban-essential-taxpayers-new-congress>.

¹²³ See Annie Snider, *Struggling Tribe Pins Hopes on Congress*, E&E News (Dec. 24, 2015),

<http://www.eenews.net/stories/1060030004/print>.

¹²⁴ Letter from Rob Bishop, Chairman, House Natural Resources Committee, to Eric Holder, Attorney General, and Sally Jewell, Secretary of the Interior, February 26, 2015, at

http://naturalresources.house.gov/uploadedfiles/waterrightsletter2_26_15.pdf.

¹²⁵ Department of the Interior, Criteria and Procedures for the Participation of the Federal Government in Negotiations for the Settlement of Indian Water Rights Groups, 55 Fed. Reg. 9223, March 12, 1990, at

http://www.usbr.gov/native/policy/12mar1990_fedreg_indianwaterrights.pdf.

¹²⁶ Letter from Rob Bishop, Chairman, House Natural Resources Committee, to Eric Holder, Attorney General, and Sally Jewell, Secretary of the Interior, February 26, 2015, at

http://naturalresources.house.gov/uploadedfiles/waterrightsletter2_26_15.pdf; Charles V. Stern, *Indian Water Rights Settlements*, Congressional Research Service (2016), <http://www.crs.gov/reports/pdf/R44148>.

¹²⁷ Letter from Rob Bishop, Chairman, House Natural Resources Committee, to Eric Holder, Attorney General, and Sally Jewell, Secretary of the Interior, February 26, 2015, at

http://naturalresources.house.gov/uploadedfiles/waterrightsletter2_26_15.pdf.

¹²⁸ Annie Snider, *Struggling Tribe Pins Hopes on Congress*, E&E News (Dec. 24, 2015),

<http://www.eenews.net/stories/1060030004/print> (stating that “the way the congressional efforts fell apart [for the Klamath River Basin Compact in 2015] left many in the water world wondering how serious Bishop and other key lawmakers really are about advancing settlements.”).

¹²⁹ Annie Snider, *Struggling Tribe Pins Hopes on Congress*, E&E News (Dec. 24, 2015),

<http://www.eenews.net/stories/1060030004/print>.

¹³⁰ Statement of John Bezdek, Counselor to the Deputy Secretary, United States Department of the Interior Before the House Subcommittee on Water, Power and Oceans, Committee on Natural Resources Hearing on the Blackfeet Water Rights Settlement Act of 2016, at 3 (May 24, 2016),

http://naturalresources.house.gov/uploadedfiles/testimony_bezdek_h.r._.pdf.

¹³¹ Charles V. Stern, *Indian Water Rights Settlements*, Congressional Research Service (2016),

<http://www.crs.gov/reports/pdf/R44148>;

Annie Snider, *Struggling Tribe Pins Hopes on Congress*, E&E News (Dec. 24, 2015),

<http://www.eenews.net/stories/1060030004/print>.

¹³² Statement of John Bezdek, Counselor to the Deputy Secretary, United States Department of the Interior Before the House Subcommittee on Water, Power and Oceans, Committee on Natural Resources Hearing on the Blackfeet Water Rights Settlement Act of 2016, at 5 (May 24, 2016), http://naturalresources.house.gov/uploadedfiles/testimony_bezdek_h.r._.pdf; see also Oral Statement of John Bezdek, Counselor to the Deputy Secretary, United States Department of the Interior Before the House Subcommittee on Water, Power and Oceans, Committee on Natural Resources Hearing on the Blackfeet Water Rights Settlement Act of 2016 (May 24, 2016), <http://naturalresources.house.gov/calendar/eventsingle.aspx?EventID=400473> (stating that “the cost of this settlement, when compared to the federal benefits received, reflect a settlement that is in the best interest of the Tribe, the State, and the American taxpayer.”).

¹³³ Letter from Rob Bishop, Chairman, House Natural Resources Committee, to Loretta Lynch, Attorney General, and Sally Jewell, Secretary of the Interior, July 1, 2016, http://naturalresources.house.gov/UploadedFiles/Bishop_Follow-up_Letter_on_Pechanga_and_Blackfeet_Settlements_07.01.16.pdf.

¹³⁴ Letter to Rob Bishop, Chairman, House Natural Resources Committee, from Loretta Lynch, Attorney General, and Sally Jewell, Secretary of the Interior, July 22, 2016.

¹³⁵ Statement of John Bezdek, Counselor to the Deputy Secretary, United States Department of the Interior Before the House Subcommittee on Water, Power and Oceans, Committee on Natural Resources Hearing on the Blackfeet Water Rights Settlement Act of 2016, at 4 (May 24, 2016),

http://naturalresources.house.gov/uploadedfiles/testimony_bezdek_h.r._.pdf.

¹³⁶ Statement of John Bezdek, Counselor to the Deputy Secretary, United States Department of the Interior Before the House Subcommittee on Water, Power and Oceans, Committee on Natural Resources Hearing on the Blackfeet Water Rights Settlement Act of 2016, at 4 (May 24, 2016),

http://naturalresources.house.gov/uploadedfiles/testimony_bezdek_h.r._.pdf.

¹³⁷ Statement of John Bezdek, Counselor to the Deputy Secretary, United States Department of the Interior Before the House Subcommittee on Water, Power and Oceans, Committee on Natural Resources Hearing on the Blackfeet Water Rights Settlement Act of 2016 (May 24, 2016), at 4

http://naturalresources.house.gov/uploadedfiles/testimony_bezdek_h.r._.pdf.

¹³⁸ Statement of John Bezdek, Counselor to the Deputy Secretary, United States Department of the Interior Before the House Subcommittee on Water, Power and Oceans, Committee on Natural Resources Hearing on the Blackfeet Water Rights Settlement Act of 2016, at 4 (May 24, 2016),

http://naturalresources.house.gov/uploadedfiles/testimony_bezdek_h.r._.pdf.

¹³⁹ According to reports by Harry Barnes, Chairman of the Blackfeet Tribal Business Council, the Tribe’s estimated revenues for Fiscal Year 2016 are approximately \$12.65 million with estimated expenses over \$18 million. Chairman Harry Barnes, *Chairman’s Report: BTBC Adopts 2016 Budget*, Glacier Reporter (Oct. 7, 2015),

http://www.cutbankpioneerpress.com/glacier_reporter/news/article_261baa7c-6c67-11e5-a2e5-9303e5a32536.html. The Indian Health Service’s Sanitation Tracking and Reporting System database includes over \$4.3 million in estimated project costs for needed upgrades to existing sanitation and drinking water infrastructure in Blackfeet Indian Reservation. Sanitation Tracking and Reporting System, *Public SDS One-line Report: Fiscal Year 2016*, Indian Health Service (Jan. 6, 2016),

<https://wstars.ihs.gov/index.cfm?fuseaction=Reports.publicSdsOneLine>. According to the draft Water Rights Settlement, the design and construction of the municipal, rural and industrial water system alone could cost \$76.2 million. S. 1125, 114th Cong., 2d Session, Blackfeet Water Rights Settlement Act of 2015, Section 11, April 28, 2015, <http://blackfeetnation.com/wp-content/uploads/2015/08/Current-Bill-2.3.16.pdf>.

¹⁴⁰ Elizabeth Shogren, *Montana Tribe’s Water Deal Clears Major Senate Milestone*, High Country News (Feb. 5, 2016), <https://www.hcn.org/articles/montana-tribes-water-rights-settlement-clears-major-milestone-in-senate>.

¹⁴¹ Statement of John Bezdek, Counselor to the Deputy Secretary, United States Department of the Interior Before the House Subcommittee on Water, Power and Oceans, Committee on Natural Resources Hearing on the Blackfeet Water Rights Settlement Act of 2016, at 3 (May 24, 2016),

http://naturalresources.house.gov/uploadedfiles/testimony_bezdek_h.r._.pdf.

¹⁴² See Charles V. Stern, *Indian Water Rights Settlements*, Congressional Research Service (2016), <http://www.crs.gov/reports/pdf/R44148>.