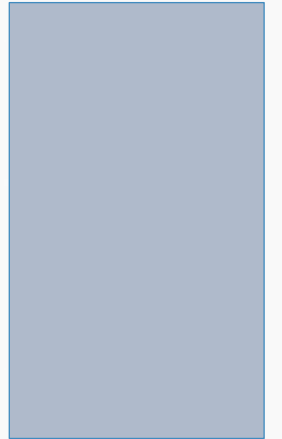


# ADVANCING WATER EQUITY IN INDIAN COUNTRY

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# MY BACKGROUND



# WATER EQUITY IN INDIAN COUNTRY

I.

- Easy & reliable access to safe, clean, affordable drinking water
- Further development & application of federal and/or tribal laws & regulations to safeguard & ensure high quality water.

II.

- Fair share in economic, social & environmental benefits of clean water & stable water infrastructure
- Settlement of water claims & ability to fully exercise tribal water rights

III.

- Resiliency in the face of climate change
- Strategically increasing water efficiency, water recycling, and adequate development/repair of rural water projects.

# TRIBAL RESERVED WATER RIGHTS – THE CASES

## *United States v. Winans (1905)*

- Reserved rights doctrine: Any rights that are not specifically addressed in a treaty are reserved to the tribe.

## *Winters v. United States (1908)*

- Forms the foundation of Indian water rights.
- 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.
- Only reserves water to the extent necessary to accomplish the purpose of the reservation, and it only reserves water if it is appurtenant to the withdrawn land

## *Arizona v. California (1963)*

- Held that the water rights were effectively reserved at the time of creation of the reservations.
- Tribes entitled to enough water to irrigate all the practicably irrigable acreage on the reservations.



# THE LIFEBLOOD OF THE RESERVATION



“It is impossible to believe that when Congress created the great Colorado River Indian Reservation and when the Executive Department of this Nation created the other reservations they were unaware that most of the lands were of the desert kind—hot, scorching sands—and that water from the river would be essential to the life of the Indian people and to the animals they hunted and the crops they raised.”

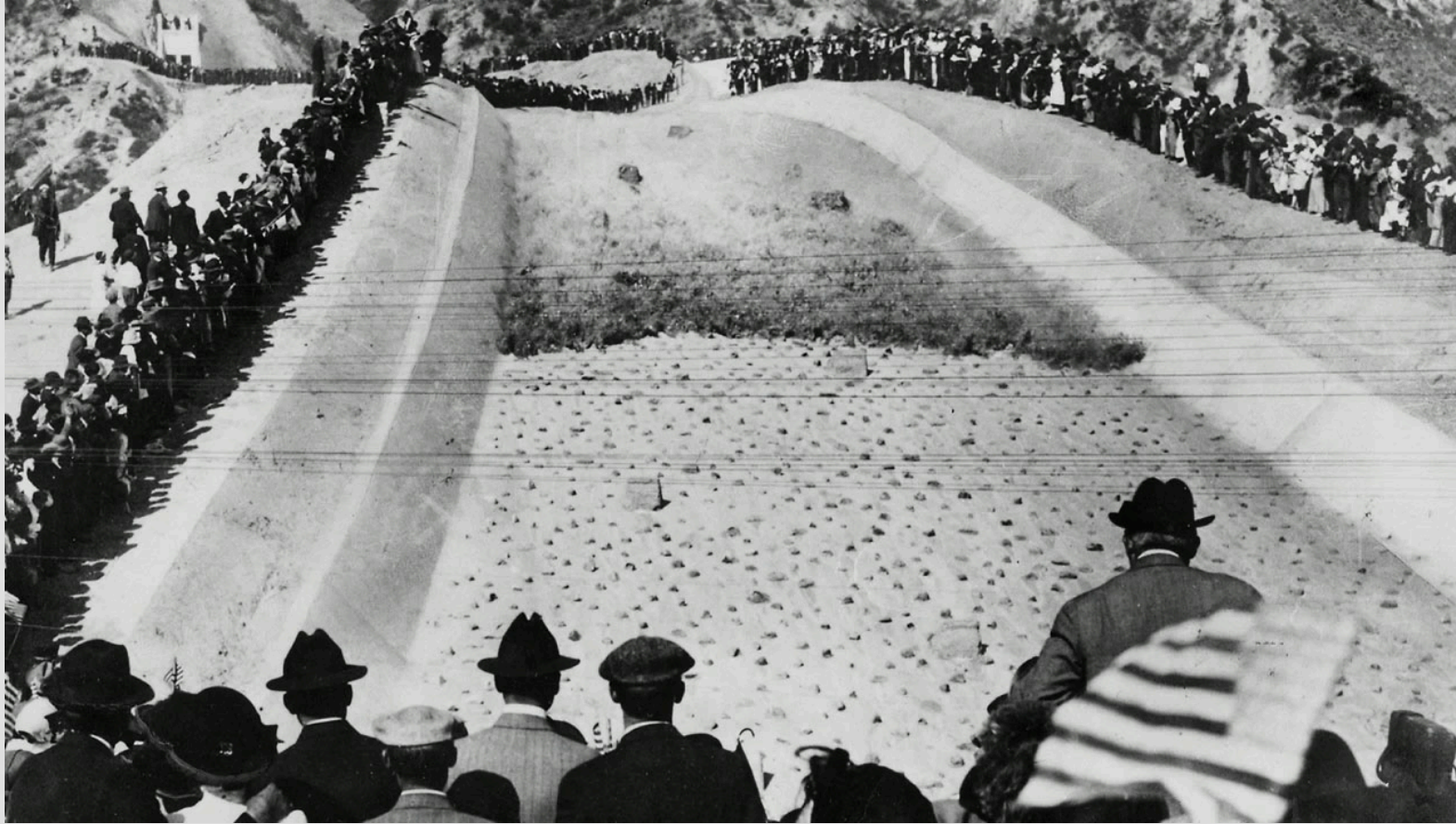
*Arizona v. California*, 373 U.S. 546 (1963).

# THE FEDERAL TRUST RESPONSIBILITY & PROTECTING TRIBAL RESERVED WATER RIGHTS

- Federal government has long promised to tribes permanent homelands, livable reservations, and homes conducive to the health & prosperity of Native peoples.
- But for most of the 20<sup>th</sup> century, Indian water rights were largely left undeveloped & unprotected by the federal government.
- Instead, federal policy & expenditures supported development of water infrastructure to benefit non-Indian communities, often at the expense of tribal water rights.



## “THERE IT IS. TAKE IT.”



A crowd of 30,000 watched the first water cascade through the aqueduct in the San Fernando Valley. | Los Angeles Department of Water and Power

“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 (1973)



# THE “WATER ACCESS GAP” IN INDIAN COUNTRY



- Native American households are 19 times more likely than white households to lack indoor plumbing.
- IHS estimates there is a backlog of over 1,500 needed sanitation facilities construction projects & estimates it would take about \$3.1 billion to provide all American Indians & Alaska Natives with safe drinking water & adequate sewage systems.

Navajo member Shanna Yazzie unpacks water and other supplies on her reservation in Cameron, Ariz., during the early part of the pandemic in March 2020. (Gina Ferazzi / Los Angeles Times)



# THE IMPACTS

- Inadequate access to pure water is a major cause of the high rate of mortality suffered by Native Americans.
  - Lack of clean water and basic sanitation infrastructure either causes illness itself or contributes to the spread of illness.
- Insufficient water infrastructure not only facilitates the spread of disease, but also impedes economic development and causes school closures on reservations.
  - Water infrastructure & sanitation facilities are an essential element of thriving businesses and a healthy workforce.

# (SOME) HISTORY OF INFRASTRUCTURE LEGISLATION

- Starting in 1867 and through the early 1900's, Congress began authorizing funding for construction of Indian irrigation projects
- 1959 - Indian Sanitation Facilities Construction Act, Public Law 86-121
- 1987 - Clean Water Act - State Revolving Fund
- 2014 - Water Infrastructure Finance and Innovation Act
- 2016 - Water Infrastructure Improvements for the Nation Act
- 2018 – America's Water Infrastructure Act
- 2021 - American Rescue Plan and Infrastructure Law

# HISTORICALLY INADEQUATE FUNDING

- FY2012 - tribes received \$0.75 per every \$100 of need under the Drinking Water State Revolving Fund.
- 2009 - federal government spent over \$3 billion on water projects in foreign countries and less than 1% of that amount, around \$2.29 million, to support tribal access to safe drinking water across all five agencies in 2006.
- Yet every dollar spent on sanitation facilities in Indian homes produces over a twentyfold return in health benefits achieved.

# FUNDING SOURCES – FOR FUTURE REFERENCE

- Indian Health Service - Sanitation Facilities Construction Program
- U.S. Environmental Protection Agency
  - Drinking Water Infrastructure Grants - Tribal Set Aside
  - Clean Water Act - Tribal Set Aside
  - Water Infrastructure Improvements for the Nation Act (WIIN) Grant Programs.
  - Public Water System Supervision Tribal Support Grants
  - Underground Injection Control Tribal Assistance Grants
- U.S. Department of Agriculture's Rural Development program
- U.S. Bureau of Reclamation
- U.S. Department of Housing and Urban Development
- U.S. Department of the Interior



# INFRASTRUCTURE INVESTMENT AND JOBS ACT

- Largest investment in clean drinking water & wastewater infrastructure in US history
  - Invests more than \$13 billion into tribal communities and makes tribes eligible for billions in investments.
  - \$2.5 billion to implement the Indian Water Rights Settlement Completion Fund
  - \$466 million to BIA for infrastructure projects and climate resiliency initiatives.



# OTHER EXAMPLES - PROPOSED LEGISLATION

- S. 2369 - Tribal Access to Clean Water Act
- S. 421 - Western Tribal Water Infrastructure Act of 2021
- S. 3308 – Colorado River Indian Tribes Water Resiliency Act of 2021
  - Authorizes CRIT to transfer water off-reservation for water storage, habitat restoration and to communities impacted by drought.
- S. 3168 – A bill to amend the White Mountain Apache Tribe Water Rights Quantification Act of 2010
  - Extends deadline to complete White Mountain Apache Rural Water System and Miner Flat Dam Project

# CLEAN WATER ACT, SAFE DRINKING WATER ACT & EPA'S ROLE

- Congress amended the Federal Water Pollution Control Act of 1948 to become the law now known as the Clean Water Act in 1972.
- Congress also passed the Safe Drinking Water Act in 1974, among a series of other environmental laws, to counteract the very clear impacts of pollution that the country was seeing.
- U.S. Environmental Protection Agency, through its Office of Water, is responsible for rulemaking efforts & directly implementing Clean Water Act & Safe Drinking Water act programs in Indian Country where tribes don't have delegated authority.

# TREATMENT AS A STATE (“TAS”) AUTHORITY

- Section 518 of the Clean Water Act authorizes EPA to treat eligible Indian tribes with reservations in a similar manner to states
- 40 C.F.R. § 131.8 sets the eligibility criteria:
  - (1) the tribe is federally-recognized;
  - (2) the tribe has a governing body carrying out substantial governmental duties & powers;
  - (3) water quality standards program pertains to water resources within the tribe's reservation; and
  - (4) the tribe is capable of carrying out the functions of an effective water quality standards program.



# EXAMPLES - WATER QUALITY CASES

## *Hopi Tribe v. United States (2015)*

- Hopi Tribe attempted to argue that the US must provide the tribe w/ safe water pursuant to the trust relationship but the federal appellate court rejected the claim because no statute explicitly obligated the United States to provide the Tribe w/ safe water.

## *Agua Caliente Band of Cahuilla Indians v. Coachella Valley Water Dist. (2020)*

- District Court found that there was not enough evidence presented to show that the change in the water would preclude the Tribe from being able to use its reserved water rights for the reservation's purpose.

## *City of Albuquerque v. Browner (1996)*

- Tenth Circuit found that the EPA's interpretation that tribes can establish water quality standards that are more stringent than those imposed by the federal gov't was permissible because it's in accord with powers inherent in Indian tribal sovereignty.

# MORTON MORATORIUM ON TRIBAL WATER CODES

- 1975 - Secretary of the Interior Rogers Morton issued a Moratorium on approval of tribal water ordinances, codes or resolutions that would regulate the use of water on Indian reservations.
- April 7, 2022, **Secretary Haaland reversed this memorandum**, making it easier for the DOI to review and approve tribal water codes.



# TRIBAL WATER CODES

- Water Codes can help tribal governments regulate water usage & other activities impacting water resources
- Potential Elements of Tribal Water Codes
  - Statement of Tribe's Ownership of Water Rights
  - Tribal Water Permits, Licenses, Restrictions
    - Consumptive Uses
    - Cultural Uses
  - Administration & Enforcement Provisions
  - Water Quality Standards

# EXAMPLES OF TRIBAL WATER CODES

- Navajo Nation Water Code
- Shoshone-Bannock Tribal Water Resource Code
- Crow Tribal Water Code
- Standing Rock Tribal Water Code
- Tribal Water Code of the Seminole Tribe of Florida
- Water Quality Standards of the Colville Law and Order Code
- Pueblo of Isleta Water Quality Standards



# THANK YOU!

- Questions?
- Your thoughts on how we strategically advance water equity in Indian Country moving forward?

