The Reservation Water Crisis: American Indians and Third World Water Conditions

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I. INTRODUCTION

The water crisis in Flint, Michigan, grabbed national headlines and produced immediate action.[1] Indeed, federal legislators, high-ranking government officials, and even President Obama named the Flint water crisis as the primary catalyst for the Water Infrastructure Improvements for the Nation Act of 2016.[2] As Senator Debbie Stabenow said, "The

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1. Andrew Farr, *Obama Signs WIIN Act Authorizing Flint Funding, Water Finance & Management*, WATER FIN. & MGMT. (Dec. 19, 2016), https://waterfm.com/president-signs-wiin-act/ ("The WIIN legislation . . . will provide $100 million for lead removal projects in Flint through the Drinking Water State Revolving Fund and another $20 million to EPA to begin issuing loans under the WIFIA program."); *Flint Drinking Water Response*, EPA (June 8, 2018), https://www.epa.gov/flint.

2. Ron Fonger, *EPA Makes It Official, Sends $100 Million to Michigan for Flint Water Crisis*, MLIVE (Mar. 17, 2017), https://www.mlive.com/news/flint/index.ssf/2017/03/epa_makes_it_official_100_mill.html ("The people of Flint and all Americans deserve a more responsive federal government . . . . EPA will especially focus on helping Michigan improve Flint's water infrastructure as part of our larger goal of improving America's water infrastructure." (quoting EPA Administrator Scott Pruitt)); Press Release, Congressman Dan Kildee, House Passes $170 Million Flint Aid Package Championed by Congressman Dan Kildee (Dec. 8, 2016), https://dankildee.house.gov/media/press-releases/house-passes-170-million-flint-aid-package-championed-congressman-dan-kildee; Press Release, U.S. Senate Comm. on Env't & Pub. Works, Inhofe Applauds Final Passage of WIIN Act (Dec. 9, 2016), https://www.epw.senate.gov/public/index.cfm/2016/12/inhofe-applauds-final-passage-of-wiin-act ("This water infrastructure bill is important to our country's economic vitality while also serving as a lifeline for disadvantaged communities like Flint, Michigan." (quoting Senator Jim Inhofe)); President Barrack Obama, Statement by the President on the Water Infrastructure Improvements for the Nation (WIIN) Act (Dec. 16, 2016)

people of Flint have waited far too long for their water system to be fixed so they can have confidence that their water is safe!"[3] However, American Indian[4] communities have waited even longer for safe water.

Though oil pipelines have recently brought attention to tribal water supplies,[5] Indian country water supplies have been insufficient and polluted for generations.[6] For example, government officials knew the Navajo Nation's drinking water supply contained toxic levels of uranium for well over a decade, yet the Navajo Nation was not notified. In contrast to Flint, no federal resources were directed to the aid of the Navajo nor was there any national outrage.[7] Sadly, the Navajo Nation is far from being the only tribe with water problems. Houses on many reservations

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https://obamawhitehouse.archives.gov/the-press-office/2016/12/16/statement-president-water-infrastructure-improvements-nation-wiin-act (stating "help for Flint is a priority for this Administration").

3. Press Release, Congressman Dan Kildee, House Passes $170 Million Flint Aid Package Championed by Congressman Dan Kildee (Dec. 8, 2016), https://dankildee.house.gov/media/press-releases/house-passes-170-million-flint-aid-package-championed-congressman-dan-kildee.

4. This Article uses the term "Indian" rather than "Native American" to denote the indigenous peoples of the United States—Native Hawaiians excepted. "Indian" is used because it is the proper legal term (*see, e.g.,* 25 U.S.C. § 25 (2018)), and "Indian" is the preferred term of Indians themselves. *See, e.g.*, MISS. BAND CHOCTAW INDIANS, http://www.choctaw.org/ (last visited Feb. 4, 2019); POARCH BAND CREEK INDIANS, http://pci-nsn.gov/westminster/index.html (last visited Feb. 4, 2019); SOUTHERN UTE INDIAN TRIBE, https://www.southernute-nsn.gov/ (last visited Feb. 4, 2019); SALT RIVER PIMA-MARICOPA INDIAN COMMUNITY, https://www.srpmic-nsn.gov/ (last visited Feb. 4, 2019).

5. Adam Crepelle, *Standing Rock in the Swamp: Oil, the Environment, and the United Houma Nation's Struggle for Federal Recognition*, 64 LOYOLA L. REV. 141, 183 (2018) [hereinafter Crepelle, *Standing Rock*] ("Furthermore, the Bayou Bridge Pipeline will pass beneath the Bayou Lafourche, which is a major source of drinking water for the Houma."); Vanessa Romo, *Native American Tribes File Lawsuit Seeking to Invalidate Keystone CXL Pipeline Permit*, NPR (Sep. 10, 2018), https://www.npr.org/2018/09/10/646523140/native-american-tribes-file-lawsuit-seeking-to-invalidate-keystone-xl-pipeline-p ("The Fort Belknap Indian Community of Montana and the Rosebud Sioux Tribe of South Dakota contend there was no effort to study how the 1,200-mile pipeline project through their respective territories would affect their water systems and sacred lands."); Chris Jordan-Bloch, *U.S. Tribes Applaud Court Decision Rejecting Trans Mountain Pipeline*, EARTH JUST. (Aug. 30, 2018), https://earthjustice.org/news/press/2018/u-s-tribes-applaud-court-decision-rejecting-transmountain-pipeline; Andy Balaskovitz, *Michigan Tribes Say Line 5 Pipeline Tunnel Plan Ignores Treaty Rights*, BRIDGE MAG. (Nov. 2, 2018), https://www.bridgemi.com/michigan-environment-watch/michigan-tribes-say-line-5-pipeline-tunnel-plan-ignores-treaty-rights;.

6. 18 U.S.C. § 1151 (2018).

7. Johnnye Lewis, Joseph Hoover & Debra MacKenzie, *Mining and Environmental Health Disparities in Native American Communities*, 4 CURRENT ENVTL. HEALTH REP. 130, 133-34 (2017), https://www.ncbi.nlm.nih.gov/pmc/articles/PMC5429369/pdf/40572_2017_Article_140.pdf.

lack running water and basic sanitation facilities like sinks, and many Indian country residents do not have access to safe drinking water.[8]

The remainder of this Article proceeds as follows: Part II discusses the relationship between tribal sovereignty and tribal water rights; Part III provides an overview of environmental law as it pertains to Indian tribes; Part IV examines tribal authority under the Clean Water Act and the Safe Drinking Water Act; Part V provides an overview of water quality in Indian country today; and Part VI offers two paths to improve water quality and access on Indian reservations.

II. TRIBAL SOVEREIGNTY AND TRIBAL WATER RIGHTS

Indian tribes possess a sovereignty that predates the formation of the United States,[9] and tribes operated as full sovereigns well after its founding.[10] Euro-American contact, through disease and vast numerical

8. Tom Risen, *Left Behind: For Some Native American Communities Facing Water Problems, Hope Circles the Drain,* U.S. NEWS & WORLD REP. (June 16, 2016), https://www.usnews.com/news/articles/2016-06-16/some-native-americans-lack-access-to-safe-clean-water ("Many homes on rural Native American reservations and in Alaskan Native villages lack access to clean water or sanitation . . . ."); Lauren Kaljur & Macee Beheler, *Native American Tribes Fight for Clean Water and More Money*, TROUBLED WATER (Aug. 14, 2017), https://troubledwater.news21.com/native-american-tribes-fight-for-clean-water-and-more-money/ [hereinafter Kaljur & Beheler, *Native American Tribes Fight for Clean Water*]; *2009: Many Reservation Homes Lack Clean Drinking Water*, U.S. NAT'L LIBR. MED., https://www.nlm.nih.gov/nativevoices/timeline/616.html (last visited Feb. 3, 2019) ("Safe drinking water and sanitary sewage disposal are unavailable in 13 percent of American Indian/Alaska Native homes on reservations, compared with 1 percent of the U.S. population.").

9. Santa Clara Pueblo v. Martinez, 436 U.S. 49, 56 (1978) ("As separate sovereigns pre-existing the Constitution, tribes have historically been regarded as unconstrained by those constitutional provisions framed specifically as limitations on federal or state authority."); United States v. Wheeler, 435 U.S. 313, 322-23 (1978) (noting that tribes were sovereigns prior to the arrival of Europeans); McClanahan v. Ariz. Tax Comm'n, 411 U.S. 164, 172-73 (1973) ("It must always be remembered that the various Indian tribes were once independent and sovereign nations, and that their claim to sovereignty long predates that of our own Government."); Hilary B. Miller, *The Future of Tribal Lending Under the Consumer Financial Protection Bureau*, BUS. L. TODAY (Mar. 2013), http://www.american bar.org/publications/blt/2013/03/04_miller.html ("Indian tribes were sovereign nations prior to the founding of the United States."); Nathalie Martin & Joshua Schwartz, *The Alliance Between Payday Lenders and Tribes: Are Both Tribal Sovereignty and Consumer Protection at Risk?*, 69 WASH. & LEE L. REV. 751, 768 (2012) ("Indian governments have inherent sovereignty which is not derived from any other government but rather from the people themselves.").

10. For example, the United States recognized tribal authority to prosecute American citizens. Treaty with the Delawares, U.S.-Del., Sept. 17, 1778, art. IV; Treaty of Hopewell, U.S.-Choc., Jan. 3, 1786, art. IV. Moreover, the United States entreating with tribes affirmed their status as nations because treaties are agreements between nations. *See, e.g.*, Worcester v. Georgia, 31 U.S. 515, 540 (1832) ("That the treaties, subsisting between the United States, and the Cherokees, acknowledge their right as a sovereign nation to govern themselves and all persons who have

superiority, diminished tribal power.[11] Nevertheless, the United States continued to recognize tribes as nations.[12] Tribes maintained their national character when they agreed to be relocated to reservations. Water rights are a core aspect of tribal sovereignty.[13]

Reservations were intended to serve as permanent homes for Indian tribes,[14] and human habitation is impossible without water. Though not explicitly mentioned in the treaties that created reservations, the Supreme

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settled within their territory, free from any right of legislative interference by the several states composing the United States of America.").

11. *The Story of . . . Smallpox—and Other Deadly Eurasian Germs*, PBS, https://www.pbs.org/gunsgermssteel/variables/smallpox.html (last visited Feb. 3, 2019) ("They [American Indians] had never experienced smallpox, measles or flu before, and the viruses tore through the continent, killing an estimated 90% of Native Americans."); *The Impact of European Diseases on Native Americans*, ENCYCLOPEDIA.COM, https://www.encyclopedia.com/science/encyclopedias-almanacs-transcripts-and-maps/impact-european-diseases-native-americans (last visited Feb. 3, 2019) ("Between 1492 and 1650 the Native American population may have declined by as much as 90% as the result of virgin-soil epidemics (outbreaks among populations that have not previously encountered the disease), compound epidemics, crop failures and food shortages."); John W. Kincheloe, III, *American Indians at European Contact*, NCPEDIA, https://www.ncpedia.org/history/early/contact (last visited Feb. 3, 2019) ("Experts believe that as much as 90 percent of the American Indian population may have died from illnesses introduced to America by Europeans.").

12. Cherokee Nation v. Georgia, 30 U.S. 1 (1831); Cherokee Tobacco, 78 U.S. 616, 621 (1870) ("Treaties with Indian nations within the jurisdiction of the United States, whatever considerations of humanity and good faith may be involved and require their faithful observance, cannot be more obligatory."); Kansas Indians, 72 U.S. 737, 756 (1867) ("Ever since this their tribal organization has remained as it was before. They have elective chiefs and an elective council; meeting at stated periods; keeping a record of their proceedings; with powers regulated by custom; by which they punish offences, adjust differences, and exercise a general oversight over the affairs of the nation. This people have their own customs and laws by which they are governed.").

13. City of Albuquerque v. Browner, 97 F.3d 415, 418 (10th Cir. 1996) ("Through the amendment Congress merged two of the four critical elements necessary for tribal sovereignty—water rights and government jurisdiction—by granting tribes jurisdiction to regulate their water resources in the same manner as states."); Paula Goodman Maccabee, *Tribal Authority to Protect Water Resources and Reserved Rights Under Clean Water Act Section 401*, 41 WM. MITCHELL L. REV. 618, 622-23 (2015) ("[A]pplication of tribal Clean Water Act authority to all reservation waters has been widely recognized as critical to the political integrity, economic security, health, and welfare of tribes.").

14. *See* United States v. Shoshone Tribe, 304 U.S. 111, 113 (1938) ("The Indians agreed that they would make the reservation their permanent home."); Treaty of Fort Laramie, U.S.-Sioux, Apr. 29, 1868, art. XV ("The Indians herein named agree that when the agency house or other buildings shall be constructed on the reservation named, they will regard said reservation their permanent home, and they will make no permanent settlement elsewhere . . . ."); Treaty of Fort Sumner, U.S.-Nav., June 1, 1868, art. XIII ("The tribe herein named, by their representatives, parties to this treaty, agree to make the reservation herein described their permanent home . . . ."); Save the Valley, LLC, v. Santa Ynez Band of Chumash Indians, CV 15-02463-RGK, 2015 WL 12552060, at *1 (C.D. Cal. July 2, 2015) ("[I]n the 1938 quitclaim deed Plaintiff attached to its Complaint, the Church transferred the Parcel to the Secretary of the Interior of the United States for the express purpose of 'the establishment of a permanent Indian Reservation for the perpetual use and occupancy of the Santa Ynez band of Mission Indians . . . .'").

Court has held that water rights were reserved for Indian tribes on the date a tribe's reservation was created.[15] The rationale behind the Court's ruling is that the purpose of reservations was to convert Indians into farmers; thus, tribes need water rights to irrigate crops grown on barren reservation lands.[16] Tribes having water rights commensurate with the creation of their reservation is extremely significant because most western states apportion water rights based on the doctrine of prior appropriation, meaning the initial water user has priority use of water and subsequent users have junior priority.[17] Indian reservations were often the original water users in their area translating to high priority;[18] indeed, tribal water rights can even "carry a priority date of time immemorial."[19]

Regarding water quantity, the Supreme Court has held that tribes are entitled to sufficient water "to irrigate all the practicably irrigable acreage

15. Winters v. United States, 207 U.S. 564, 577 (1908) ("That the government did reserve them we have decided, and for a use which would be necessarily continued through years. This was done May 1, 1888, and it would be extreme to believe that within a year Congress destroyed the reservation and took from the Indians the consideration of their grant, leaving them a barren waste,—took from them the means of continuing their old habits, yet did not leave them the power to change to new ones.").

16. *Id.* at 576-577.

17. Colorado v. New Mexico, 459 U.S. 176, 179 n.4 (1982) ("Under the prior appropriation doctrine, recognized in most of the western states, water rights are acquired by diverting water and applying it for a beneficial purpose. A distinctive feature of the prior appropriation doctrine is the *rule of priority*, under which the relative rights of water users are ranked in the order of their seniority."); 78 AM. JUR. 2D *Waters* § 372 (Jan. 2019) ("Under the doctrine, as between persons claiming water by appropriation, the first person to divert unappropriated water and to apply it to a beneficial use has a water right superior to subsequent appropriators from the same water resource, or in other words, the person first in time is first in right.").

18. Justin Nyberg, *The Promise of Indian Water Leasing: An Examination of One Tribe's Success at Brokering Its Surplus Water Rights*, 55 NAT. RESOURCES J. 181, 184 (2015) [hereinafter Nyberg, *The Promise*] ("[B]ecause the priority dates of these reserved rights were based on the date Congress created each reservation, these Indian water rights were often senior to all other users in the system."); DEMOCRATIC STAFF OF THE HOUSE COMM. ON NAT. RES., WATER DELAYED IS WATER DENIED: HOW CONGRESS HAS BLOCKED ACCESS TO WATER FOR NATIVE FAMILIES 8 (Oct. 10, 2016), http://blackfeetnation.com/wp-content/uploads/2016/10/House-NRC-Water-Report-Minority-10-10-16.pdf [hereinafter DEMOCRATIC STAFF, WATER DELAYED] ("In the West, this often means that tribes have the most senior water rights."); Robert T. Anderson, *Water Rights, Water Quality, and Regulatory Jurisdiction in Indian Country*, 34 STAN. ENVTL. L.J. 195, 204 (2015) ("[T]ribal water rights generally are senior in priority to non-Indian uses established under state prior appropriation law as such rights are ranked by date of first use.").

19. Klamath Water Users Protective Ass'n v. Patterson, 204 F.3d 1206, 1214 (9th Cir. 1999), *opinion amended on denial of reh'g*, 203 F.3d 1175 (9th Cir. 2000); TRIBAL WATER WORKING GRP., WATER IN INDIAN COUNTRY: CHALLENGES AND OPPORTUNITIES 7 (2012), http://uttoncenter.unm.edu/pdfs/2012White_Paper.pdf [hereinafter WATER IN INDIAN COUNTRY] ("Priority is determined not by application of water to a beneficial use, but by the date on which a reservation was established—usually the earliest in the river basins—or on aboriginal occupation, that is occupation prior to the entry of Europeans, which is always first.").

on the reservations."[20] Tribes also retain water rights for fishing[21] and other purposes.[22] The quantity of water is not based on the tribe's current needs; rather, the Court has noted tribes have the right to enough water to

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20. Arizona v. California, 373 U.S. 546, 600 (1963), *judgment entered sub nom.* Arizona v. California, 376 U.S. 340 (1964), *amended sub nom.* Arizona v. California, 383 U.S. 268 (1966), *and amended sub nom.* Arizona v. California, 466 U.S. 144 (1984).

21. Alaska Pac. Fisheries Co. v. United States, 248 U.S. 78, 89 (1918) ("The Indians could not sustain themselves from the use of the upland alone. The use of the adjacent fishing grounds was equally essential. Without this the colony could not prosper in that location. The Indians naturally looked on the fishing grounds as part of the islands and proceeded on that theory in soliciting the reservation. They had done much for themselves and were striving to do more. Evidently Congress intended to conform its action to their situation and needs. It did not reserve merely the site of their village, or the island on which they were dwelling, but the whole of what is known as Annette Islands, and referred to it as a single body of lands."); Pyramid Lake Paiute Tribe of Indians v. Morton, 354 F. Supp. 252, 254 (D.D.C. 1972), *supplemented*, 360 F. Supp. 669 (D.D.C. 1973), *rev'd*, 499 F.2d 1095 (D.C. Cir. 1974) ("This Lake has been the Tribe's principal source of livelihood. Members of the Tribe have always lived on its shores and have fished its waters for food. Following directives of the Department of Interior in 1859, which were confirmed by Executive Order signed by President Grant in 1874, the Lake, together with land surrounding the Lake and the immediate valley of the Truckee River which feeds into the Lake, have been reserved for the Tribe and set aside from the public domain."); Colville Confederated Tribes v. Walton, 647 F.2d 42, 48 (9th Cir. 1981) ("We agree with the district court that preservation of the tribe's access to fishing grounds was one purpose for the creation of the Colville Reservation. Under the circumstances, we find an implied reservation of water from No Name Creek for the development and maintenance of replacement fishing grounds.").

22. Arizona v. California, 439 U.S. 419, 422, 99 S. Ct. 995, 996, 58 L. Ed. 2d 627 (1979), *amended*, 466 U.S. 144 (1984) (noting the allocation of a quantity of water rights "shall not constitute a restriction of the usage of them to irrigation or other agricultural application"); *Walton*, 647 F.2d at 49 ("Finally, we note that permitting the Indians to determine how to use reserved water is consistent with the general purpose for the creation of an Indian reservation providing a homeland for the survival and growth of the Indians and their way of life."); State of New Mexico, Santa Fe County and City of Santa Fe's Joint Memorandum in Support of Settlement at 24, New Mexico v. R. Lee Aamodt, No. CV-66-6639 (Nov. 6, 2014), http://www.ose.state.nm.us/Legal/Adjudication/Aamodt/2014/11-November/9913%2011-06-14%20STATE%20OF%20NEW%20MEXICO%20SANTA%20FE%20COUNTY%20AND%20CITY%20OF%20SANTA%20FE'S%20JOINT%20MEMORANDUM%20IN%20SUPPORT%20OF%20SETTLEMENT.pdf ("The only Federal Reserved or Winters rights proposed by the settlement are 4.82 AFY for San Ildefonso with a 1939 priority for grazing purposes on the San Ildefonso Eastern Reservation . . . ." (citations omitted)); *In re* General Adjudication of All Rights, 35 P.3d 68, 76 (Ariz. 2001) ("Just as the nation's economy has evolved, nothing should prevent tribes from diversifying their economies if they so choose and are reasonably able to do so. The permanent homeland concept allows for this flexibility and practicality."); United States v. Washington, 375 F. Supp. 2d 1050, 1070 (W.D. Wash. 2005), *vacated pursuant to settlement sub nom.* U.S. *ex rel.* Lummi Indian Nation v. Washington, No. C01-0047Z, 2007 WL 4190400 (W.D. Wash. Nov. 20, 2007), *aff'd sub nom.* U.S. *ex rel.* Lummi Nation v. Dawson, 328 F. App'x 462 (9th Cir. 2009) ("Once the water rights of the Lummi have been quantified, the water may be used for any purpose, including domestic, commercial, and industrial purposes."); DEMOCRATIC STAFF, WATER DELAYED, *supra* note 18, at 8 ("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.").

meet their future needs as well.[23] Nevertheless, most tribes do not use the full amount of water they are entitled to,[24] but tribal water rights are not diminished by nonuse—that is, tribal water rights are not "use it or lose it."[25] Tribes may not use all of their water rights for a variety of reasons, such as a lack of infrastructure;[26] consequently, some tribes lease their water rights.[27] As Justin Nyberg notes, tribes that lease their water rights "simply get paid to not use water that they would not or could not use anyway."[28]

The quantity of water tribes are entitled to says nothing of its quality. The following Part delves into tribal environmental rights, particularly

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23. *See* cases cited *supra* note 20 ("We also agree with the Master's conclusion as to the quantity of water intended to be reserved. He found that the water was intended to satisfy the future as well as the present needs of the Indian Reservations and ruled that enough water was reserved to irrigate all the practicably irrigable acreage on the reservations.").

24. Matter of Beneficial Water Use Permit Numbers 66459-76L, Ciotti; 64988-G76L, Starner, 278 Mont. 50, 57, (1996), *as amended on denial of reh'g* (Sept. 24, 1996) ("Most reservations have used only a fraction of their reserved water."); Nyberg, *The Promise*, *supra* note 18, at 186 ("Even if tribes complete the adjudication process, they may not have the capital necessary to realize any benefit from their newly quantified rights given the immense costs to build water delivery and storage infrastructure and the historic reluctance of the federal government to provide financial assistance."); Kaljur & Beheler, *Native American Tribes Fight for Clean Water*, *supra* note 8 ("The federal government carved reservations in remote and confined pockets of the U.S., making it difficult to provide reliable infrastructure. They often lack the money to improve their water systems themselves, which means they have to navigate a complicated puzzle of government agencies to shore up funding.").

25. DEMOCRATIC STAFF, WATER DELAYED, *supra* note 18, at 9 ("Tribes cannot lose their right to water through non-use, forfeiture, or abandonment."); WILLIAM C. CANBY, JR., AMERICAN INDIAN LAW IN A NUTSHELL 499 (2015) ("Winters rights to water are not lost by non-use."); MATTHEW L.M. FLETCHER, FEDERAL INDIAN LAW 491 [hereinafter FLETCHER, FEDERAL INDIAN LAW] ("But Indian and federal reserved water rights, it appears, cannot be forfeited by abandonment or through other creature of state law.").

26. Nyberg, *The Promise*, *supra* note 18, at 186 ("Even if tribes complete the adjudication process, they may not have the capital necessary to realize any benefit from their newly quantified rights given the immense costs to build water delivery and storage infrastructure and the historic reluctance of the federal government to provide financial assistance."); DEMOCRATIC STAFF, WATER DELAYED, *supra* note 18, executive summary ("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.").

27. Erin Agee, *In the Federal Government We Trust? Federal Funding for Tribal Water Rights Settlements and the Taos Pueblo Indian Water Rights*, 21 CORNELL J.L. & PUB. POL'Y 201, 212 (2011) [hereinafter Agee, *In the Federal Government*] (noting that some tribes "market water off-reservation"); Lee Herold Storey, *Leasing Indian Water Off the Reservation: A Use Consistent with the Reservation's Purpose*, 76 CAL. L. REV. 179 (1988); U.S. DEP'T OF THE INTERIOR, OFFICE OF THE SOLICITOR, M-36982, ENTITLEMENTS TO WATER UNDER THE SOUTHERN ARIZONA WATER RIGHTS SETTLEMENT ACT (SAWRSA), 1995 WL 18241763, at *5 (Mar. 30, 1995) ("It is also beyond dispute that allottees have the right to lease the water to which they are entitled, at least for use on the allotted land as part of an otherwise authorized lease of that land.").

28. Nyberg, *The Promise*, *supra* note 18, at 190.

under the Clean Water Act (CWA) and the Safe Drinking Water Act (SDWA).

III. TRIBAL WATER PROTECTION POWERS

During the 1970s, the United States Indian policy shifted from tribal termination[29] to tribal self-determination.[30] Also, during the 1970s, the federal government began enacting comprehensive environmental laws,[31] and the United States Environmental Protection Agency (EPA) was one of the first federal agencies to embrace tribal self-determination.[32] Accordingly, the EPA's policy, to this very day, is to have "meaningful communication and coordination between EPA and tribal officials prior to EPA taking actions or implementing decisions that may affect tribes."[33] Though the EPA consults with tribes, federal environmental laws generally apply to Indian country.[34] Nonetheless, federal environmental

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29. Indian Relocation Act of 1956, Pub. L. No. 959, 70 Stat. 986 (1956). Public Law 83-280 was passed in 1953. It transferred federal criminal jurisdiction over Indian reservations in six states to the states themselves without providing any federal funds, making it an unfunded mandate. That is, Public Law 83-280 was designed to reduce federal expenditures. *See* Ada Pecos Melton & Jerry Gardner, *Public Law 280: Issues and Concerns for Victims of Crime in Indian Country*, AM. INDIAN DEV. ASS'N, LLC, http://www.aidainc.net/publications/pl280.htm (last visited Feb. 3, 2019) ("State dissatisfaction has focused upon the failure of the Act to provide federal funding for states assuming authority under Public Law 280. The states were handed jurisdiction, but denied the funds necessary to finance it (in today's language—an 'unfunded mandate')."); Crepelle, *Standing Rock*, *supra* note 5, at 150-51 ("During this abysmal era, the federal government terminated its relationship with over 100 tribes.").

30. Richard Nixon, President, Special Message to the Congress on Indian Affairs (July 8, 1970); Indian Self-Determination and Education Assistance Act of 1975, Pub. L. No. 93-638.

31. *Environmental Law Enacted by the American Federal Government and Applicable in Indian Country—Introduction*, 3 COMP. ENVTL. L. & REG. § 56A:8 ("In short, in one decade [the 1970s], the federal government undertook a substantial role in regulating all types of environmental pollution, including air pollution, water pollution, solid waste, and chemicals.").

32. EPA, POLICY FOR THE ADMINISTRATION OF ENVIRONMENTAL PROGRAMS ON INDIAN RESERVATIONS (1984 INDIAN POLICY), https://www.epa.gov/sites/production/files/2015-04/documents/indian-policy-84.pdf (last visited Feb. 3, 2019) ("The U.S. Environmental Protection Agency was one of the first federal agencies with a formal policy specifying how it would interact with tribal governments and consider tribal interests in carrying out its programs to protect human health and the environment.").

33. EPA, EPA POLICY ON CONSULTATION AND COORDINATION WITH INDIAN TRIBES 1 (May 4, 2011).

34. Judith Royster & F.S. Fausett, *Control of the Reservation Environment: Tribal Primacy, Federal Delegation, and the Limits of State Intrusion*, 64 WASH. L. REV. 581, 583 n.4 (1989) ("The merits of this issue will not be debated fully here; to facilitate the present discussion only, the authors have accepted that federal environmental laws of general applicability to the United States at large apply with equal force to native governments."); Elizabeth A. Kronk Warner, *Returning to the Tribal Environmental "Laboratory": An Examination of Environmental Enforcement Techniques in Indian Country*, 6 MICH. J. ENVTL. & ADMIN. L. 341, 349 (2017) ("Because federal environmental laws are usually considered to be laws of general application,

laws of general applicability do not apply to Indian country if the law infringes on a tribe's inherent sovereignty, conflicts with a treaty provision or other federal law, or the law in question was not intended to apply to Indian country.[35]

Congress followed the EPA's lead and began amending environmental laws to strengthen tribal sovereignty in the 1980s.[36] Accordingly, the Clean Air Act;[37] CWA;[38] Comprehensive Environmental Response, Compensation, and Liability Act;[39] SDWA;[40] and the Surface Mining Control and Reclamation Act[41] expressly treat "tribes as states." Under the Federal Insecticide, Fungicide, and Rodenticide Act, tribes are treated like states for some purposes[42] but not under the Act's enforcement provisions.[43] The Resource Conservation and Recovery Act (RCRA) treats tribes as municipalities rather than states;[44] consequently, a federal

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federal courts have generally found that they apply in Indian country unless their application would directly interfere with tribal sovereignty."); Jana L. Walker & Kevin Gover, *Commercial Solid and Hazardous Waste Disposal Projects on Indian Lands*, 10 YALE J. ON REG. 229, 233 (1993) ("However, because the federal environmental laws can be effective only with uniform application, courts are likely to hold that environmental laws do apply to tribes and Indian country.").

35. Environmental Law Enacted by the American Federal Government and Applicable in Indian Country, *supra* note 31; Solis v. Matheson, 563 F.3d 425, 430 (9th Cir. 2009) ("However, a statute of general applicability that is silent on the issue of applicability to Indian tribes, like the FLSA, does not apply to Indian tribes if: (1) the law touches exclusive rights of self-governance in purely intramural matters; (2) the application of the law to the tribe would abrogate rights guaranteed by Indian treaties; or (3) there is proof by legislative history or some other means that Congress intended the law not to apply to Indians on their reservations. In any of these three situations, Congress must expressly apply a statute to Indians before we will hold that it reaches them."); AMERICAN INDIAN LAW DESKBOOK § 1:6 (2018) ("The Ninth Circuit Court of Appeals, however, followed by other circuits, has adopted an analytical approach that allows an exception to this presumptive rule when the statute contains no express provision for such application and when '(1) the law touches 'exclusive rights of self-governance in purely intramural matters[,]' (2) the application of the law to the tribe would 'abrogate rights guaranteed by Indian treaties[,]' or (3) there is proof 'by legislative history or some other means that Congress intended [the law] not to apply to Indians on their reservations.'").

36. *See, e.g.*, Safe Drinking Water Act (SDWA), 42 U.S.C. §§ 300f-300j-ll (2018); Clean Water Act (CWA), 33 U.S.C.A. §§ 1251-1387 (2018); Clean Air Act (CAA), 42 U.S.C. §§ 7401-7642 (2018).

37. 42 U.S.C. § 7601(d)(A).

38. 33 U.S.C. § 1377 (2018).

39. 42 U.S.C. § 9626(a).

40. *Id.* § 6903(13).

41. 30 U.S.C. § 1235(k) (2018).

42. 7 U.S.C. § 136u(a) (2018).

43. EPA, *Federal Insecticide, Fungicide, and Rodenticide Act (FIFRA) and Federal Facilities*, https://www.epa.gov/enforcement/federal-insecticide-fungicide-and-rodenticide-act-fifra-and-federal-facilities#Tribal%20Enforcement (last visited Feb. 3, 2019) ("FIFRA does not specifically address Tribal enforcement of FIFRA regulations. However, under FIFRA, and at the discretion of EPA, a limited Tribal role similar to the State's role may be allowed.").

44. 42 U.S.C. § 6903(13)(A).

appellate court has forbidden the EPA to treat tribes as states under the RCRA.[45] Neither the Toxic Substances Control Act[46] nor the Emergency Planning and Community Right-to-Know Act[47] address tribes; however, the EPA treats tribes as states under these Acts.[48] Under environmental tribes-as-states provisions, it is absolutely clear that tribes have the authority to exclude pollutants from their reservations.[49]

IV. TRIBAL AUTHORITY TO PROTECT THEIR WATER UNDER THE CWA AND SDWA

To be treated as states under the CWA and SDWA, tribes must meet four criteria. First, the tribe must be federally recognized;[50] that is, the tribe must have a direct government-to-government relationship with the United States.[51] The tribe's government must be capable of "carrying out substantial governmental duties and power,"[52] and the body of water the tribe is regulating must be located within the borders of the tribe's reservation.[53] Finally, the EPA Regional Administrator must declare the

45. Backcountry Against Dumps v. EPA, 100 F.3d 147, 150 (D.C. Cir. 1996) ("These clear statements of Congressional intent to treat Indian tribes as states stand in marked contrast to RCRA's equally clear requirement that 'states'—not municipalities, and therefore not Indian tribes—must submit permitting plans for EPA's review.").

46. 15 U.S.C. §§ 2601-2629 (2018).

47. 42 U.S.C. §§ 11101-11050.

48. Environmental Law Enacted by the American Federal Government and Applicable in Indian Country—Introduction, *supra* note 31 ("[A]lthough both the Emergency Planning and Community Right-to-Know Act and lead-based paint program under the Toxic Substance Control Act are silent as to how tribes are to be treated, the EPA treats tribes as states under both programs.").

49. Nance v. EPA, 645 F.2d 701, 715 (9th Cir. 1981) ("[A] tribe may exercise control, in conjunction with the EPA, over the entrance of pollutants onto the reservation. We do not, however, decide whether the Indians would possess independent authority to maintain their air quality."); Brendale v. Confederated Tribes & Bands of Yakima Nation, 492 U.S. 408, 435 (1989) (Steven, J., concurring) ("Even in the absence of a treaty provision expressly granting such authority, Indian tribes maintain the sovereign power of exclusion unless otherwise curtailed.").

50. 40 U.S.C. § 131.8(a)(1) (2018); 33 U.S.C. § 1377(h)(2) (2018).

51. Statement, William J. Clinton, President, Government-to-Government Relations with Native American Tribal Governments (Apr. 29, 1994), https://www. justice.gov/archive/otj/ Presidential_Statements/presdoc1.htm ("The purpose of these principles is to clarify our responsibility to ensure that the Federal Government operates within a government-to-government relationship with federally recognized Native American tribes."); Barack Obama, Presidential Memorandum on Tribal Consultations (Nov. 5, 2009), https://obama whitehouse.archives.gov/the-press-office/memorandum-tribal-consultation-signedpresident (noting the government-to-government relationship between tribes and the United States).

52. 40 U.S.C. § 131.8(a)(2); 33 U.S.C. § 1377(e)(1).

53. 40 U.S.C. § 131.8(a)(3); 33 U.S.C. § 1377(e)(2).

tribe capable of implementing the water quality standards program consistently with the purposes of the CWA and the SDWA.[54]

Currently, eighty-five tribes are EPA-approved to exercise regulatory authority under Tribes Approved for Treatment as a State (TAS) provisions of the CWA.[55] The Hualapai Tribe has used the CWA to alter off-reservation livestock grazing practices, which has had a positive effect on the tribe's water.[56] The Hoopa Valley Tribe has developed water quality standards as well as different water use designations for on-reservation waterbodies.[57] Hoopa's water quality standards were designed to prevent soil runoff from contaminating reservation streams with the hope of improving the health and number of salmon and other marine animals.[58] The Seminole Tribe of Florida has developed water quality standards for each of its five reservations.[59] The Seminole's water management has reduced the amount of nutrients entering reservation waterbodies; hence, the Seminoles have improved the water quality on their reservations.[60] The Sokaogon Chippewa Community implemented the CWA not to improve its reservation waters; instead, the tribe has been using the CWA to preserve the pristine quality of the lakes on its reservation in the face of off-reservation pollution threats.[61]

State and local governments have challenged tribal water quality standards under the CWA, and courts have affirmed tribal water standards. The landmark decision in this regard occurred in *City of Albuquerque v. Browner*[62] in 1996. In *Browner*, Albuquerque challenged the EPA's ability to approve the downstream Isleta Pueblo's more stringent water quality standards asserting tribal water quality standards cannot have an impact

54. 40. U.S.C. § 131.8(a)(4); 33 U.S.C. § 1377(e)(3).

55. *Tribes Approved for Treatment as a State (TAS)*, EPA, https://www.epa.gov/tribal/tribes-approved-treatment-state-tas (last visited Feb. 11, 2019).

56. EPA, EPA-823-R-06-006, CASE STUDIES IN TRIBAL WATER QUALITY STANDARDS PROGRAMS: THE HUALAPAI TRIBE (July 2006), https://www.epa.gov/sites/production/files/2014-11/documents/casestudy-hualupai.pdf.

57. EPA, EPA-823-R-06-004, CASE STUDIES IN TRIBAL WATER QUALITY STANDARDS PROGRAMS: THE HOOPA VALLEY TRIBE (July 2006), https://www.epa.gov/sites/production/files/2014-11/documents/casestudy-hoopa.pdf.

58. *Id.*

59. EPA, CASE STUDY: THE SEMINOLE TRIBE OF FLORIDA USES WATER QUALITY STANDARDS TO SOLVE A NUTRIENT PROBLEM, https://www.epa.gov/sites/production/files/2014-11/documents/casestudy-seminole.pdf (last visited Feb. 3, 2019).

60. *Id.*

61. EPA, EPA-823-R-06-005, CASE STUDIES IN TRIBAL WATER QUALITY STANDARDS PROGRAMS: THE SOKAOGON CHIPPEWA COMMUNITY (July 2006), https://www.epa.gov/sites/production/files/2014-11/documents/casestudy-sokaogon.pdf.

62. 97 F.3d 415 (10th Cir. 1996).

beyond the reservation's borders.[63] However, the Tenth Circuit rejected Albuquerque's assertion, declaring, "[T]he EPA's construction of the 1987 amendment to the Clean Water Act—that tribes may establish water quality standards that are more stringent than those imposed by the federal government—is permissible because it is in accord with powers inherent in Indian tribal sovereignty."[64] Though stringent tribal water quality standards may hinder off-reservation economic development, tribal water quality standards under the CWA have been upheld when the waterbody being regulated is entirely within the tribe's reservation.[65] Tribal water quality standards under the CWA have been affirmed even when the regulation directly impacts privately owned fee-land within a reservation.[66]

At present, the Navajo Nation is the only tribe exercising primary enforcement authority under the SDWA, and the Navajo Nation has primacy over 160 water systems on its reservation,[67] which is the size of West Virginia.[68] Nevertheless, all of Indian country is clearly subject to the SDWA's application.[69] For the other 572 federally recognized tribes that are not treated as a state under the SDWA,[70] the EPA works with these tribes to improve the quality of drinking water in the one-thousand-plus

63. *Id.* at 421.

64. *Id*. at 423.

65. Wisconsin v. EPA, 266 F.3d 741 (7th Cir. 2001).

66. Montana v. EPA, 137 F.3d 1135 (9th Cir. 1998).

67. Press Release, EPA, U.S. EPA Approves Expansion of Navajo Nation Regulatory Authority over Water Systems (Aug. 15, 2018), https://www.epa.gov/newsreleases/us-epa-approves-expansion-navajo-nation-regulatory-authority-over-drinking-water ("Since 2000, Navajo Nation has remained the only tribe in the country to have regulatory authority for its drinking water program, and now regulates 168 separate water systems serving 177,000 people.").

68. *About the Navajo Nation*, NAVAJO NATION WASH. OFF., http://www.nnwo.org/content/about-navajo-nation (last visited Feb. 3, 2019) ("The Nation is larger than 10 of the 50 states in America and approximately the size of West Virginia.")

69. Philips Petroleum v. EPA, 803 F.2d 545, 555 (10th Cir. 1986) ("We conclude, therefore, that there is no sound policy reason to exclude Indian lands from the SDWA's application, and every reason to include them."); *EPA's Role in Safe Drinking Water on Tribal Lands*, EPA (May 16, 2018), https://www.epa.gov/tribaldrinkingwater/epas-role-safe-drinking-water-tribal-lands#tab-2 ("It is the responsibility of tribal governments and tribal utilities to maintain and operate the system in compliance with EPA's NPDWRs and other program requirements.").

70. Indian Entities Recognized and Eligible to Receive Services from the United States Bureau of Indian Affairs, 83 Fed. Reg. 34,863 (July 23, 2018), https://www.gpo.gov/fdsys/pkg/FR-2018-07-23/pdf/2018-15679.pdf ("This notice publishes the current list of 573 Tribal entities recognized and eligible for funding and services from the Bureau of Indian Affairs (BIA) by virtue of their status as Indian Tribes.").

drinking water systems in Indian country.[71] The EPA is tasked with ensuring tribal water sources are in compliance with the SDWA requirements[72] and conducts sanitary surveys of the public water systems in all of Indian country with the exception of those on the Navajo Nation.[73]

V. THE SORRY STATE OF WATER IN INDIAN COUNTRY

Though tribes have the right to water and can obtain the authority to improve it, tribes struggle to access water. On the Navajo Nation, for example, the average Navajo is able to use only seven gallons of water a day while the average American uses approximately 100 gallons of water a day.[74] Likewise, approximately half of tribal homes lack clean drinking water or even access to a reliable source of water.[75] Houses in Indian country commonly lack kitchen sinks, showers or bath tubs, flush toilets,

71. *EPA's Role in Safe Drinking Water on Tribal Lands*, *supra* note 69; *Tribal Public Water System Supervision Program*, EPA (June 12, 2017), https://www.epa.gov/tribaldrinking water/tribal-public-water-system-supervision-program ("In cases where tribes do not assume primacy, EPA serves as the primacy agent and implements the PWSS program. There are over 1,000 public water systems serving over 1 million people in Indian country where the EPA has primacy responsibilities.").

72. *EPA's Role in Safe Drinking Water on Tribal Lands*, *supra* note 69.

73. *Id.* ("EPA performs the surveys on tribal lands where EPA is the primacy agency."); 40 C.F.R. § 142.2 (2018) ("Sanitary survey means an onsite review of the water source, facilities, equipment, operation and maintenance of a public water system for the purpose of evaluating the adequacy of such source, facilities, equipment, operation and maintenance for producing and distributing safe drinking water.").

74. *The Water Lady: A Savior Among the Navajo*, CBS NEWS (Aug. 16, 2015), https:// www.cbsnews.com/news/the-water-lady-a-savior-among-the-navajo/ ("Unlike the rest of us, who use about 100 gallons of water a day, Nina has been getting by on only about seven . . . ."); Cameron Keady, *Navajo Woman Trucks Water 75 Miles a Day to People on Parched Reservation*, HUFFPOST (Sept. 8, 2015), https://www.huffingtonpost.com/entry/water-lady-hydrates-hundreds-of-navajo-homes-on-dry-reservation_us_55e9b892e4b03784e275aa21 ("[T]he average American uses 80-100 gallons of water a day, whereas, Navajo families survive on just 7 gallons."); Fernando Santos, *On Parched Navajo Reservation, 'Water Lady' Brings Liquid Gold*, N.Y. TIMES (July 13, 2015), https://www.nytimes.com/2015/07/14/us/on-parched-navajo-reservation-water-lady-brings-liquid-gold.html ("On average, Navajo families live on seven gallons of water per day. In California, the average is 362 gallons, according to a 2011 study sponsored by the state's Department of Water Resources.").

75. DEMOCRATIC STAFF, WATER DELAYED, *supra* note 18, 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."); George McGraw, *For These Americans, Clean Water Is a Luxury*, N.Y. TIMES (Oct. 20, 2016), https://www.nytimes.com/2016/10/20/opinion/for-these-americans-clean-water-is-a-luxury.html ("Nearly 24,000 Native American and Alaska Native households somehow manage without access to running water or basic sanitation, according to 2015 figures from the Indian Health Service, living in what my organization calls 'water poverty.' About 188,000 such households were in need of some form of water and sanitation facilities improvement.").

and even running water.[76] Outside of Indian country, less than one percent of homes in the United States lack adequate sanitation structures like kitchen sinks.[77] The large number of homes with poor access to water in Indian country is doubly concerning because American Indians are more than twice as likely to live in overcrowded homes as are non-Indian families.[78]

The lack of clean water and basic sanitation structures like sinks and toilets contributes to the spread of illnesses,[79] and this has devastating impacts on the health of American Indians. In fact, it has long been known that inadequate access to pure water for consumption and cleaning is a major cause of the high rate of mortality suffered by American Indians.[80]

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76. DEMOCRATIC STAFF, WATER DELAYED, *supra* note 18, at 1 ("Many of these 190,697 homes lack basic services like clean, running water; flush toilets; showers or baths; and kitchen sinks."); Hopi Tribe v. EPA, 851 F.3d 957, 959 (9th Cir. 2017) ("[On the Hopi Reservation,] thirty-five percent of homes lack a complete kitchen. Residents of the Hopi Tribe are forty times more likely than the average American to lack running water."); Christina Laughlin, *Flint Is Not the Only Water Crisis America Ignored*, HUFFPOST (Feb. 23, 2017), https://www.huffingtonpost.com/christina-laughlin/flint-is-not-the-only-one_b_9287798.html ("The Navajo are 60 times more likely than other Americans to live without running water or a toilet.").

77. DEMOCRATIC STAFF, WATER DELAYED, *supra* note 18, at 1 ("By comparison, less than 1% of homes lack some or all sanitation facilities in the U.S. as a whole."); *2009: Many Reservation Homes Lack Clean Drinking Water*, *supra* note 8 ("Safe drinking water and sanitary sewage disposal are unavailable in 13 percent of American Indian/Alaska Native homes on reservations, compared with 1 percent for the overall U.S. population.").

78. DEMOCRATIC STAFF, WATER DELAYED, *supra* note 18, at 1 ("Native families are two-and-a-half times more likely to live in an overcrowded home than the general population."); Craig Harris & Dennis Wagner, *HUD: Housing Conditions for Native Americans Much Worse than Rest of U.S.,* REPUBLIC (Jan. 19, 2017), https://www.azcentral.com/story/news/local/arizona-investigations/2017/01/19/new-hud-reports-find-housing-conditions-worse-among-native-americans/96783368/ ("Overcrowding and other physical-condition problems were present in 34 percent of households in tribal areas, compared with 7 percent of all U.S. households."); *Housing & Infrastructure*, NAT'L CONGRESS AM. INDIANS, http://www.ncai.org/policy-issues/economic-development-commerce/housing-infrastructure (last visited Feb. 3, 2019) ("Forty percent of on-reservation housing is considered substandard (compared to 6 percent outside of Indian Country) and nearly one-third of homes on reservations are overcrowded.").

79. DEMOCRATIC STAFF, WATER DELAYED, *supra* note 18, at 3 ("Inadequate access to clean water and sanitation on reservations leads to health problems, including cancer, ulcers, stomach issues, pneumonia, and other illnesses."); *Global WASH Fast Facts*, CENTERS FOR DISEASE CONTROL & PREVENTION (Apr. 11, 2016), https://www.cdc.gov/healthywater/global/wash_statistics.html ("Water, sanitation and hygiene has the potential to prevent at least 9.1% of the global disease burden and 6.3% of all deaths."); *Unsafe Drinking Water, Sanitation and Waste Management*, WORLD HEALTH ORG., https://www.who.int/sustainable-development/cities/health-risks/water-sanitation/en/ (last visited Feb. 4, 2019) ("Diseases due to poor drinking-water access, unimproved sanitation, and poor hygiene practices cause 4.0% of all deaths and 5.7% of all disability or ill health in the world.").

80. DEMOCRATIC STAFF, WATER DELAYED, *supra* note 18, at 3 ("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.").

Reservation residents in Nebraska are likely to get their drinking water from wells contaminated with coliform bacteria and high levels of nitrates, which cause blood, intestinal, and developmental disorders.[81] South Dakota's Pine Ridge Reservation has water contaminated by lead, fecal matter, arsenic, and even uranium.[82] The water on the Navajo Nation has been so contaminated by uranium mining[83] that the Navajo suffer their own unique radiation-induced disease—Navajo Neuropathy.[84] Other American Indian communities face similar health problems because they lack access to clean water.[85]

The pathetic water quality in much of Indian country[86] is a result of poverty. Despite the prevalence of the rich casino Indian stereotype,[87]

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81. *Id.*; *Researchers Find Low Water Quality on Nebraska Reservations*, U. ARK. NEWS (Apr. 4, 2000), https://news.uark.edu/articles/11190/researchers-find-low-water-quality-on-nebraska-reservations ("University of Arkansas researchers have found that the percentage of contaminated wells on two American Indian reservations in Nebraska exceeds state and national averages.").

82. DEMOCRATIC STAFF, WATER DELAYED, *supra* note 18, at 3; Cecily Hilleary, *Native Americans Ask: What About Our Water Supply?*, VOICE AM. NEWS (Feb. 13, 2016), https://www.voanews.com/a/native-americans-ask-what-about-our-water-supply/3188737.html ("Ninety-eight wells have had to be closed on Pine Ridge because of unusually high rates of cancer, kidney disease and other health problems, said White Plume. She's convinced that uranium is to blame, and she grows frustrated over suggestions that poor diet or smoking could be a factor."); *Uranium Mining Causes Health Problems for Natives*, LAKOTA PEOPLE'S L. PROJECT (Mar. 30, 2015), https://www.lakotalaw.org/news/2015-03-30/uranium-mining-causes-health-problems-for-natives ("Fallout from the toxic uranium spill near near the Pine Ridge Reservation continues to adversely affect the Native American population living nearby.").

83. For a history of uranium mining on the Navajo Nation, see Doug Brugge & Rob Goble, *The History of Uranium Mining and the Navajo People*, 92 AM. J. PUB. HEALTH 1410 (2002), https://www.ncbi.nlm.nih.gov/pmc/articles/PMC3222290/pdf/0921410.pdf.

84. Laurel Morales, *For Some Native Americans, Uranium Contamination Feels Like Discrimination*, NPR (Nov. 14, 2017), https://www.npr.org/sections/health-shots/2017/11/14/562856213/for-some-native-americans-uranium-contamination-feels-like-discrimination; John F. Rosen & Paul Mushak, *Metal and Radiation-Induced Toxic Neuropathy (TN) in Two Navajo Sisters*, 45 PEDIATRIC RES. 346A (1999), https://www.nature.com/articles/pr19992172.

85. DEMOCRATIC STAFF, WATER DELAYED, *supra* note 18, at 3; Risen, *supra* note 8 (noting in the Alaskan Native Village of Kivalina there is "a very high rate of strep throat, bad colds and other illnesses that come with poor sanitation and lack of access to clean water").

86. EPA, PROVIDING SAFE DRINKING WATER IN AMERICA: 2013 NATIONAL PUBLIC WATER SYSTEMS COMPLIANCE REPORT 20 (2013), https://www.epa.gov/sites/production/files/2015-06/documents/sdwacom2013.pdf ("In 2013, EPA and the Navajo Nation reported that 46 percent of PWSs (456 systems) in Indian country had a significant violation of some type. Since 2009, this rate has dropped from 52 to 42 percent."); DEMOCRATIC STAFF, WATER DELAYED, *supra* note 18, at 2 ("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 have more violations, more health-based violations, and more serious violations than the national average.").

87. L.A. Franck, *Rich Indians*, BLUE CORN COMICS (Feb. 7, 2006), http://www.bluecorncomics.com/richna.htm; *Redface!*, RED-FACE.US, https://red-face.us/ (last visited Feb. 12, 2019); Walter C. Fleming, *Myths and Stereotypes About Native Americans*, PHI DELTA KAPPAN

American Indians have the highest rate of poverty in the United States.[88] In fact, seven of the eight poorest counties in the United States are majority American Indian[89] even though American Indians are approximately only one percent of the United States population.[90] Poverty is high on reservations because the average tribal unemployment rate is fifty percent.[91] The high unemployment rate is the result of paternalistic federal policies that create a dense business-killing bureaucracy in Indian country.[92] The lack of jobs makes taxing reservation commerce

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(Nov. 2006), http://www.pdkmembers.org/members_online/publications/Archive/pdf/k0611fle.pdf ("By relying on stereotypes to describe Native Americans, whites come to believe that Indians are drunks, get free money from the government, and are made wealthy from casino revenue.").

88. SUZANNE MACARTNEY ET AL., AM. CMTY. SURVEY BRIEFS 3, POVERTY RATES FOR SELECTED GROUPS DETAILED RACE AND HISPANIC GROUPS BY STATE AND PLACE: 2007-2011 (Feb. 2013).

89. S. REP. NO. 111-118, at 2 (2010) (Conf. Rep.).

90. TINA NORRIS ET AL., C2010BR-10, THE AMERICAN INDIAN AND ALASKA NATIVE POPULATION: 2010, U.S. CENSUS BUREAU 4 (Jan. 2012). However, just who qualifies as an American Indian is tricky. *See* Adam Crepelle, *Concealed Carry to Reduce Sexual Violence Against American Indian Women*, 26 KAN. J.L. & PUB. POL'Y 236, 244 (2017) ("Tribes' inability to assert criminal jurisdiction over non-Indians is further muddled by the fact that determining who is an 'Indian' is a complicated process. 'Indian' has several definitions under federal law."); Alex Tallchief Skibine, *Indians, Race, and Criminal Jurisdiction in Indian Country*, 10 ALB. GOV'T L. REV. 49 (2017) ("Not only is there no consensus among the Circuits concerning who qualifies as an 'Indian' . . . but there has recently been a debate among jurists about whether the classification of 'Indian' for the purposes of these criminal laws amounts to a racial classification calling upon courts to review such classifications using strict scrutiny."); Paul Spruhan, *Warren, Trump, and the Question of Native American Identity*, HARV. L. REV. BLOG (Feb. 27, 2018), https://blog.harvardlawreview.org/warren-trump-and-the-question-of-native-american-identity/.

91. *Unemployment on Indian Reservations at 50 Percent: The Urgent Need to Create Jobs in Indian Country: Hearing Before the S. Comm. on Indian Affairs*, 111th Cong. 1 (2010) (statement of Hon. Byron L. Dorgan, Chairman, S. Comm. on Indian Affairs); Ariana Bustos, *Despite Gains, Native American Unemployment Still Lags Behind Nation*, CRONKITE NEWS (May 9, 2018), https://cronkitenews.azpbs.org/2018/05/09/despite-gains-native-american-employment-still-lags-behind-nation/ ("Tribal unemployment then stood at 40 percent, the president said, more than 10 times the national average."); Vincent Schilling, *Terrible Statistics: 15 Native Tribes with Unemployment Rates Over 80 Percent*, INDIAN COUNTRY TODAY (Aug. 29, 2013), https://newsmaven.io/indiancountrytoday/archive/getting-jobbed-15-tribes-with-unemployment-rates-over-80-percent-iAV-3u_770-C6fEcCc3lfA/.

92. ROBERT J. MILLER, RESERVATION "CAPITALISM" 40 (2012) ("[T]ribes and Indian owners cannot sell, lease, develop, or mortgage such assets for loans without the express approval of the federal government."); Adam Crepelle & Walter E. Block, *Property Rights and Freedom: The Keys to Improving Life in Indian Country*, 23 WASH. & LEE J. C.R. & SOC. JUST. 315, 331 (2017) ("Bureaucracy and shaky property rights have prevented an estimated 1.5 trillion dollars in reservation natural resources from being developed."); Nat'l Congress of Am. Indians, Res. #ECWA-17-001 (2017), http://www.ncai.org/attachments/Resolution_gViOVNAzPgsFGlLlRoHtZsQBgugqJOczceEMptpGhPCBRxXfmmW_ECWS-17-001%20resolution.pdf ("The federal government has historically maintained a paternalistic bureaucracy intended to prevent development of tribal lands and funnel natural resources to surrounding non-Indian communities.").

uneconomical, and the remarkably nonsensical state of Indian law tax jurisprudence makes it all but impossible for tribes to tax non-Indians who spend money on reservations.[93]

Although federal law hamstrings tribal efforts to improve their own water quality, the federal government has a trust relationship with Indian tribes.[94] The trust relationship obligates the United States to look after the welfare of Indians and tribes.[95] Nevertheless, the United States claims the trust duty does not encompass the right to provide tribes with water.[96] As

93. *See* Ramah Navajo Sch. Bd., Inc., v. Bureau of Revenue of N.M., 458 U.S. 832, 837 (1982) ("Although there is no definitive formula for resolving the question whether a State may exercise its authority over tribal members or reservation activities . . . ."); Erik M. Jensen, *Taxation and Doing Business in Indian Country*, 60 ME. L. REV. 1, 3 (2008) ("This situation has many causes, none of which is easily remedied, but one important reason is uncertainty about the powers of federal, state, and tribal governments to impose their taxes on transactions within, and those doing business in, Indian country."); Kelly Croman & Jonathan Taylor, *Why Beggar Thy Indian Neighbor?* 6 (JOPNA 2016-1), http://nni.arizona.edu/application/files/8914/6254/9090/2016_Croman_why_beggar_thy_Indian_neighbor.pdf ("Even where clear rules exist, the law quickly becomes complicated . . .").

94. Seminole Nation v. United States, 316 U.S. 286, 296-297 (1942) ("In carrying out its treaty obligations with the Indian tribes the Government is something more than a mere contracting party. Under a humane and self-imposed policy which has found expression in many acts of Congress and numerous decisions of this Court, it has charged itself with moral obligations of the highest responsibility and trust."); United States v. Mitchell, 463 U.S. 206, 225 (1983) ("Our construction of these statutes and regulations is reinforced by the undisputed existence of a general trust relationship between the United States and the Indian people."); United States v. Jicarilla Apache Nation, 564 U.S. 162, 176 (2011) ("Congress has expressed this policy in a series of statutes that have defined and redefined the trust relationship between the United States and the Indian tribes.").

95. FLETCHER, FEDERAL INDIAN LAW, *supra* note 25, at 181-82 ("The general trust relationship simply obligates and authorizes the federal government to protect tribal and Indian property rights, preserve and enhance tribal self-governance, guarantee law and order in Indian country, and provide government services to Indian people."); MILLER, *supra* note 92, at 40 ("This [trust] duty requires Congress and the executive branch to exercise the responsibilities of a guardian on behalf of Indians and tribes."); *Frequently Asked Questions*, U.S. DEP'T INTERIOR, BUREAU INDIAN AFF., https://www.bia.gov/frequently-asked-questions (last visited Jan. 27, 2019) ("The federal Indian trust responsibility is also a legally enforceable fiduciary obligation on the part of the United States to protect tribal treaty rights, lands, assets, and resources, as well as a duty to carry out the mandates of federal law with respect to American Indian and Alaska Native tribes and villages.").

96. Hopi Tribe v. United States, 782 F.3d 662 (Fed. Cir. 2015); Grey v. United States, 21 Cl. Ct. 285 (Cl. Ct. 1990), *aff'd*, 935 F.2d 281 (Fed. Cir. 1991), *and aff'd sub nom.* Abel v. United States, 935 F.2d 281 (Fed. Cir. 1991) ("General Allotment Act dealing with irrigated agricultural allotments, regulations governing irrigation of Indian lands, reclamation laws providing for construction and operation of water storage and time release projects on federal lands, and Salt River Pima-Maricopa Indian Community Water Rights Settlement Act did not create fiduciary relationship between United States and Indian holders of allotments on reservation and did not require Government to deliver water to allotted lands."); Salt River Pima-Maricopa Indian Cmty. v. United States, 26 Cl. Ct. 201, 204 (Cl. Ct. 1992) ("The water management statutes and regulations at issue in this case do not grant the Government the same extensive custody over the

a result, the United States drastically underfunds tribal water safety—tribes receive only $0.75 for every $100 needed from the Safe Drinking Water Revolving Fund, which is less than a third of what the least-funded state receives.[97] The United States consistently spends substantially more money improving water safety in foreign countries than it does improving drinking water quality on Indian reservations,[98] and this is the reason that many of the United States' first peoples live in third-world water poverty in the twenty-first century.[99]

VI. SOLUTIONS

This Part proposes two paths towards improving water quality for tribes. One is making water quality an explicit component of the tribal trust relationship. The other is turning to international law for redress for the pathetic water conditions on reservations.

A. The Trust Relationship and Water Rights

The United States trust relationship with tribes is nearly 200 years old. The trust relationship between tribes and federal government has its

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Indian lands that the timber statutes granted to the Government in the Mitchell cases [do]. Due to the much higher level of control the Indians in this case exercise over their lands, no fiduciary obligation or trust relationship attaches with respect to the delivery of water to those lands.").

97. NAT'L CONG. OF AM. INDIANS, TRIBAL INFRASTRUCTURE: INVESTING IN INDIAN COUNTRY FOR A STRONGER AMERICA 4 (2017), http://www.ncai.org/attachments/PolicyPaper_RslnCGsUDiatRYTpPXKwThNYoACnjDoBOrdDlBSRcheKxwJZDCx_NCAI-InfrastructureReport-FINAL.pdf; WATER DELAYED, DEMOCRATIC STAFF, *supra* note 18, at 2-3 ("For example, in Fiscal Year 2012 tribes received $0.75 per every $100 of need under the Drinking Water State Revolving Fund. 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.").

98. *See* WATER IN INDIAN COUNTRY, *supra* note 19, at 21 ("For example, in 2009, the 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.").

99. Sari Horwitz & Katie Zezima, *How the Stories of Native American Youths Made Obama Cry in the Oval Office*, WASH. POST (Dec. 3, 2014), https://www.washingtonpost.com/news/post-politics/wp/2014/12/03/how-a-trip-to-north-dakota-spurred-obama-to-act-on-native-american-issues/?utm_term=.f0baa2f33464 ("Dorgan said that children on reservations are growing up in Third World conditions, in dilapidated housing mostly built by the Department of Housing and Urban Development decades ago."); Harlan McKosato, *Fighting Third-World Conditions for NM Tribes*, INDIAN COUNTRY TODAY (July 7, 2015), https://newsmaven.io/indiancountrytoday/archive/fighting-third-world-conditions-for-nm-tribes-SezweXSjiUiERR9b12U2wA/ ("Some of the poorer tribal communities in New Mexico have been compared to Third World countries because of their economic struggles and their lack of basic modern water and energy systems.").

origins in international law[100] but took its sui generis paternalistic twist when Justice John Marshall wrote of the Cherokee Nation in 1831:

> They may, more correctly, perhaps, be denominated domestic dependent nations. They occupy a territory to which we assert a title independent of their will, which must take effect in point of possession when their right of possession ceases. Meanwhile they are in a state of pupilage. Their relation to the United States resembles that of a ward to his guardian.[101]

Because the United States was the tribes' guardian, the federal government was authorized to enact legislation in the realm of Indian affairs that was not authorized by the text of the Constitution.[102] Likewise, the United States was able to violate treaties made with tribes and steal tribal resources on the grounds that the United States was presumed to be acting in the best interest of tribes.[103]

However, for the past fifty years, the tribal trust relationship has been viewed in a more positive light by tribes. In fact, Congress routinely acknowledges the trust relationship in legislation designed for the benefit of tribes.[104] The executive branch has affirmed the trust relationship as

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100. FLETCHER, FEDERAL INDIAN LAW, *supra* note 25, at 175 ("The relationship of Indian tribes to the United States is founded on 'the settled doctrine of the law of nations' that when a stronger sovereign assumes authority over a weaker sovereign, the stronger one assumes a duty of protection for the weaker one, which does not surrender its right to self-government."); Kevin K. Washburn, *What the Future Holds: The Changing Landscape of Federal Indian Policy*, 130 HARV. L. REV. F. 200, 208 (2017) ("Chief Justice Marshall divined his formulation of the trust responsibility from international law and early federal statutes, such as the Indian Trade and Intercourse laws, which federalized relations with Indian tribes and provided for significant federal oversight of trade with Indians."); *Fulfilling the Federal Trust Responsibility: The Foundation of the Government-to-Government Relationship*, *Hearing Before the S. Committee on Indian Affairs*, 112th Cong. 637 (May 17, 2012) (statement of Sen. Daniel K. Akaka) https://www.gpo.gov/fdsys/pkg/CHRG-112shrg76551/pdf/CHRG-112shrg76551.pdf ("All branches of the Government, the Congress, Administration and the courts acknowledge the uniqueness of the Federal trust relationship. It is a relationship that has its origins in international law . . . .").

101. Cherokee Nation v. Georgia, 30 U.S. 1, 17 (1831).

102. United States v. Kagama, 118 U.S. 375, 379 (1886).

103. Lone Wolf v. Hitchcock, 187 U.S. 553, 568 (1903) ("We must presume that Congress acted in perfect good faith in the dealings with the Indians of which complaint is made, and that the legislative branch of the government exercised its best judgment in the premises. In any event, as Congress possessed full power in the matter, the judiciary cannot question or inquire into the motives which prompted the enactment of this legislation."); Tee-Hit-Ton Indians v. United States, 348 U.S. 272, 290 (1955) ("The line of cases adjudicating Indian rights on American soil leads to the conclusion that Indian occupancy, not specifically recognized as ownership by action authorized by Congress, may be extinguished by the Government without compensation.").

104. Tribal Law and Order Act of 2010, Pub. L. No. 111-211, § 202(a)(1) (2010) ("[T]he United States has distinct legal, treaty, and trust obligations to provide for the public safety of Indian country."); 25 U.S.C. § 2702(2) (2018) (" [T]o provide a statutory basis for the regulation of gaming by an Indian tribe adequate to shield it from organized crime and other corrupting influences, to ensure that the Indian tribe is the primary beneficiary of the gaming operation . . . .");

well.[105] By virtue of the trust relationship, the United States has an obligation to provide tribes with housing,[106] education,[107] health care,[108] and other services.[109] Access to safe water is vital to the fulfillment of the aforementioned trust obligations; thus, ensuring that reservations have

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id. § 2401(1) ("[T]he Federal Government has a historical relationship and unique legal and moral responsibility to Indian tribes and their members").

105. EXEC. OFFICE OF THE PRESIDENT, A RENEWED ERA OF FEDERAL-TRIBAL RELATIONS 5 (Jan. 2017), https://obamawhitehouse.archives.gov/sites/default/files/docs/whncaa_report.pdf ("Over the past eight years, the Administration has strengthened the nation-to-nation relationship by striving to uphold the federal government's treaty and trust responsibilities to Tribal nations."); Administration of William J. Clinton, Memorandum on Government-to-Government Relations with Native American Tribal Governments 936 (Apr. 29, 1994), https://www.gpo.gov/fdsys/pkg/WCPD-1994-05-02/pdf/WCPD-1994-05-02-Pg936.pdf ("The United States Government has a unique legal relationship with Native American tribal governments as set forth in the Constitution of the United States, treaties, statutes, and court decisions. As executive departments and agencies undertake activities affecting Native American tribal rights or trust resources, such activities should be implemented in a knowledgeable, sensitive manner respectful of tribal sovereignty."); Nixon, *supra* note 30; Statement of President Ronald W. Reagan on American Indian Policy (Jan. 24, 1983), https://www.tribalconsultation.arizona.edu/docs/Executive%20Branch/idc-002004.pdf ("In support of our policy, we shall continue to fulfill the federal trust responsibility for the physical and financial resources we hold in trust for the tribes and their members. The fulfillment of this unique responsibility will be accomplished in accordance with the highest standards.").

106. 25 U.S.C. § 4101(4)-(6); FLETCHER, FEDERAL INDIAN LAW, *supra* note 25, at 191 ("Several Indian treaties provide for housing and shelter.").

107. 25 U.S.C. § 5301(b)(2) ("[T]he Federal responsibility for and assistance to education of Indian children has not effected the desired level of educational achievement or created the diverse opportunities and personal satisfaction which education can and should provide . . . "); Exec. Order No. 13096, 63 Fed. Reg. 42,683 (Aug. 6, 1998), https://www.gpo.gov/fdsys/pkg/WCPD-1998-08-10/pdf/WCPD-1998-08-10.pdf ("The Federal Government has a special, historic responsibility for the education of American Indian and Alaska Native students."); Raymond Cross, *American Indian Education: The Terror of History and the Nation's Debt to the Indian Peoples*, 21 U. ARK. LITTLE ROCK L. REV. 941, 950 (1999) ("Over 110 Indian treaties stipulated that the federal government shall provide an education to the members of the signatory tribes.").

108. 25 U.S.C. § 1601(1) ("Federal health services to maintain and improve the health of the Indians are consonant with and required by the Federal Government's historical and unique legal relationship with, and resulting responsibility to, the American Indian people."); INDIAN HEALTH SERV., BASIS FOR HEALTH SERVICES (Jan. 2015), https://www.ihs.gov/newsroom/includes/themes/responsive2017/display_objects/documents/factsheets/BasisforHealthServices.pdf ("The trust relationship establishes a responsibility for a variety of services and benefits to Indian people based on their status as Indians, including health care."); FLETCHER, FEDERAL INDIAN LAW, *supra* note 25, at 190 ("The federal duty to provide healthcare to Indian people originates in many Indian treaties.").

109. *See* Tribal Law and Order Act of 2010, Pub. L. No. 111-211, § 202(a)(1) ("[T]he United States has distinct legal, treaty, and trust obligations to provide for the public safety of Indian country."); 25 U.S.C. § 1901(3) ("Congress finds . . . that there is no resource that is more vital to the continued existence and integrity of Indian tribes than their children and that the United States has a direct interest, as trustee, in protecting Indian children who are members of or are eligible for membership in an Indian tribe . . . ."); 30 U.S.C. § 1701(b)(4) ("It is the purpose of this chapter . . . to fulfill the trust responsibility of the United States for the administration of Indian oil and gas resources.").

sufficient quantities of safe water should fall within the federal government's trust relationship with Indian tribes.

The trust relationship is legally enforceable,[110] but the Supreme Court has been staunchly anti-Indian since the 1970s.[111] Indeed, Indian law jurisprudence remains flagrantly racist.[112] The Court's anti-Indian views have seeped into the tribal trust relationship.[113] A major blow to the trust relationship came when the Court ruled the United States was not liable for the Secretary of the Interior's mismanagement and outright corruption

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110. United States v. Mitchell, 463 U.S. 206, 226 (1983) ("Because the statutes and regulations at issue in this case clearly establish fiduciary obligations of the Government in the management and operation of Indian lands and resources, they can fairly be interpreted as mandating compensation by the Federal Government for damages sustained. Given the existence of a trust relationship, it naturally follows that the Government should be liable in damages for the breach of its fiduciary duties. It is well established that a trustee is accountable in damages for breaches of trust."); United States v. White Mountain Apache Tribe, 537 U.S. 465, 475 (2003) ("While it is true that the 1960 Act does not, like the statutes cited in that case, expressly subject the Government to duties of management and conservation, the fact that the property occupied by the United States is expressly subject to a trust supports a fair inference that an obligation to preserve the property improvements was incumbent on the United States as trustee. This is so because elementary trust law, after all, confirms the commonsense assumption that a fiduciary actually administering trust property may not allow it to fall into ruin on his watch.").

111. FRANK POMMERSHEIM, BROKEN LANDSCAPE: INDIANS, INDIAN TRIBES, AND THE CONSTITUTION 297 (2009) (discussing the Supreme Court's massive erosion of tribal sovereignty in *Oliphant v. Suquamish Indian Tribe* and *Montana v. United States*, and noting that the Court's decisions in those cases were entirely unmoored from the Constitution or any other statute); Samuel E. Ennis, *Implicit Divestiture and the Supreme Court's (Re)Construction of the Indian Canons*, 35 VT. L. REV. 623, 627 (2011) ("[T]he Court has essentially stripped tribal sovereignty beyond intra-tribal relations and 'has transformed itself from the court of the conqueror into the court as the conqueror.'"); Matthew L.M. Fletcher, *Statutory Divestiture of Tribal Sovereignty*, 64 FED. LAW. 38, 39 (Apr. 2017) (discussing the Supreme Court's role in the erosion of tribal sovereignty).

112. City of Sherrill v. Oneida Indian Nation of N.Y., 544 U.S. 197, 203 n.1 (2005) (explicitly citing the "doctrine of discovery" as a rationale for the tribe losing rights to its land); United States v. Sioux Nation of Indians, 448 U.S. 371, 437 (1980) (Rehnquist, J., dissenting) (claiming the Sioux Indians "lived only for the day, recognized no rights of property, robbed or killed anyone if they thought they could get away with it, inflicted cruelty without a qualm, and endured torture without flinching"); CAROLE GOLDBERG & KEVIN K. WASHBURN, INDIAN LAW STORIES 2 (Carole Goldberg, Kevin K. Washburn & Philip P. Frickey eds., 2011) ("For a legal system that offers itself to the world as a paragon of the rule of law and respect for human rights (the scar of slavery having been healed, presumably, by the balm of civil rights), Indian Law presents a jarring contradiction."); Stacy L. Leeds, *The More Things Stay the Same: Waiting on Indian Law's* Brown v. Board of Education, 38 TULSA L. REV. 73, 75 (2002) ("This analysis will demonstrate how racism, at times shockingly blatant, remains pervasive in decisions from Lone Wolf through the 2001 Term of the United States Supreme Court.").

113. *Fulfilling the Federal Trust Responsibility: The Foundation of the Government-to-Government Relationship, Hearing Before the S. Committee on Indian Affairs*, 112th Cong. 637 (May 17, 2012) (statement of Sen. Tom Udall), https://www.gpo.gov/fdsys/pkg/CHRG-112shrg76551/pdf/CHRG-112shrg76551.pdf ("[I]n recent years the Supreme Court has made rulings that have significantly impacted the relationship between Tribes and the Federal Government to the detriment of Tribes and erosion of trust responsibility.").

in two cases involving Navajo Nation coal.[114] In 2011, the Supreme Court held common law attorney-client privilege principles in trust relationships do not govern the trust relationship between the United States and Indian tribes; thus, the Jicarilla Apache Nation (JAN) could not access over 100 documents relevant to whether the United States had mismanaged the JAN's finances in violation of the trust relationship.[115]

To recover for trust violations, tribes must now show there is a substantive source of law creating a fiduciary duty and that the substantive source of law provides for financial compensation in the event of a violation.[116] Water rights are not explicitly mentioned in treaties nor is there legislation that incorporates water into the trust relationship.[117] Consequently, recovering for water-based trust violations is exceedingly difficult for tribes. The Hopi Tribe discovered this when it filed suit against the United States seeking funds to provide safe drinking water on its reservation.[118] The Hopi pointed to numerous laws that imply the United States must provide the tribe with safe water pursuant to the trust

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114. United States v. Navajo Nation, 537 U.S. 488, 493 (2003); United States v. Navajo Nation, 556 U.S. 287, 289 (2009); William Claiborne, *Navajos Sue Giant Coal Producer*, WASH. POST (June 24, 1999), https://www.washingtonpost.com/archive/politics/1999/06/24/navajos-sue-giant-coal-producer/5cd201e3-56fa-4eb1-881e-7d4ed5be89de/?utm_term=.1beda226fee3; Barry Meier, *Navajo Lawsuits Contend U.S. Government Failed the Tribe in Mining Royalty Deals*, N.Y. TIMES (July 18, 1999), https://www.nytimes.com/1999/07/18/us/navajo-lawsuits-contend-us-government-failed-the-tribe-in-mining-royalty-deals.html.

115. United States v. Jicarilla Apache Nation, 564 U.S. 162, 165 (2011).

116. *Navajo Nation*, 556 U.S. at 290-91 ("As we explained in *Navajo I*, there are thus two hurdles that must be cleared before a tribe can invoke jurisdiction under the Indian Tucker Act. First, the tribe 'must identify a substantive source of law that establishes specific fiduciary or other duties, and allege that the Government has failed faithfully to perform those duties . . . .' If that threshold is passed, the court must then determine whether the relevant source of substantive law 'can fairly be interpreted as mandating compensation for damages sustained as a result of a breach of the duties [the governing law] impose[s].' At the second stage, principles of trust law might be relevant 'in drawing the inference that Congress intended damages to remedy a breach.'" (alteration in original) (citations omitted)).

117. Agee, *In the Federal Government*, *supra* note 27, at 211 ("Not only is there a general absence of statutes establishing an explicit trust responsibility as to tribal water rights, but the United States Court of Federal Claims has established that the federal government has no obligation to develop irrigation infrastructure for tribes, or to ensure that tribal allotments have irrigation water."); Nell Jessup Newton, *Indian Claims in the Courts of the Conqueror*, 41 AM. U. L. REV. 753, 807 (1992) ("There appears to be some conflict over the extent to which the Government's trust relationship requires it to manage tribal water resources, but the reason is that management of water rights is best analyzed as falling within the limited trust concept. There is no scheme imposing comprehensive duties on the Secretary of the Interior to manage tribal water."); Judith V. Royster, *Indian Water and the Federal Trust: Some Proposals for Federal Action*, 46 NAT. RES. J. 375, 380 (2006) ("In breach of trust cases involving water, then, the greatest difficulty facing Indian tribes may lie in showing a statutory or regulatory duty that the government has breached.").

118. Hopi Tribe v. United States, 782 F.3d 662, 665 (Fed. Cir. 2015).

relationship;[119] nonetheless, the federal appellate court rejected the tribe's plea for safe water because no statute explicitly obligated the United States to provide the Hopi with safe water.[120] Contrarily, a federal court ruled the residents of Flint, Michigan, are entitled to deliveries of bottled water until proper water filtration systems are installed in Flint.[121]

The judicial branch's failure to uphold the trust relationship is particularly disheartening because the Indian law canons of construction require that treaties and other laws be liberally construed in favor of Indians.[122] Reservations were created to be the perpetual homes of tribes.[123] Any commonsense construction of this purpose demands that reservations be provided with a sufficient quantity of safe water. Hopefully two of the Supreme Court's most recently appointed Justices,

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119. *Id.* at 668 ("The Hopi Tribe points to several sources of law to establish this duty . . . .").

120. *Id.* at 671 ("In sum, the sources of law relied on by the Hopi Tribe do not establish a specific fiduciary obligation on the United States to ensure adequate water quality on the Hopi Reservation. Because the Hopi Tribe has failed to 'identify a specific, applicable, trust-creating statute or regulation that the [United States] violated' . . . we do not need to reach the second step of the jurisdictional inquiry—whether the specific obligation is money mandating. We conclude the Court of Federal Claims does not have jurisdiction over the Hopi Tribe's claim under the Indian Tucker Act." (citations omitted)).

121. Concerned Pastors for Soc. Action v. Khouri, 220 F. Supp. 3d 823, 826 (E.D. Mich. 2016).

122. Cty. of Oneida v. Oneida Indian Nation of N.Y., 470 U.S. 226, 247 (1985) ("The canons of construction applicable in Indian law are rooted in the unique trust relationship between the United States and the Indians. Thus, it is well established that treaties should be construed liberally in favor of the Indians . . . with ambiguous provisions interpreted to their benefit . . . . The Court has applied similar canons of construction in nontreaty matters." (citations omitted)); N. Cheyenne Tribe v. Hollowbreast, 425 U.S. 649, 655 n.7 (1976) ("[S]tatutes passed for the benefit of the Indians are to be liberally construed and all doubts are to be resolved in their favor."); Minnesota v. Mille Lacs Band of Chippewa Indians, 526 U.S. 172, 200 (1999) ("We have held that Indian treaties are to be interpreted liberally in favor of the Indians . . . and that any ambiguities are to be resolved in their favor." (citations omitted)); South Carolina v. Catawba Tribe, Inc., 476 U.S. 498, 520 (1986) ("In determining whether the 1959 Division of Assets Act exempts the Catawbas' claim from this general principle, analysis must begin with the firmly established rule—which the Court today implicitly reaffirms . . . that ambiguities in statutes regulating Indian affairs are to be construed in the Indians' favor." (citations omitted)).

123. *See* U.S. v. Shoshone Tribe, 304 U.S. 111, 113 (1938) ("The Indians agreed that they would make the reservation their permanent home."); Treaty of Fort Laramie, *supra* note 14, art. XV ("The Indians herein named agree that when the agency house and other buildings shall be constructed on the reservation named, they will regard said reservation their permanent home, and they will make no permanent settlement elsewhere."); Treaty Between the United States of America and the Navajo Tribe of Indians, *supra* note 14, art. XIII ("The tribe herein named, by their representatives, parties to this treaty, agree to make the reservation herein described their permanent home . . . ."); Save the Valley, LLC, v. Santa Ynez Band of Chumash Indians, CV 15-02463-RGK, 2015 WL 12552060, *1 (C.D. Cal. July 2, 2015) ("[I]n the 1938 quitclaim deed Plaintiff attached to its Complaint, the Church transferred the Parcel to the Secretary of the Interior of the United States for the express purpose of 'the establishment of a permanent Indian Reservation for the perpetual use and occupancy of the Santa Ynez band of Mission Indians . . . .'").

Sonia Sotomayor and Neil Gorsuch, will remind the other Justices of the canons of construction[124] and end the Court's anti-tribal sovereignty streak.[125]

Absent the Supreme Court correcting its own Indian law trust jurisprudence, it is imperative that Congress affirm tribes' right to water pursuant to the trust relationship. Accordingly, Congress must allocate funding to improve the water infrastructure in Indian country. No extra expenditures need be added to the federal budget to provide reservations with safe water; rather, funds can be diverted from providing foreign countries with water infrastructure until reservations have sufficient infrastructure to provide their populations with baseline levels of safe water. A benefit of increasing funding for reservation water quality will be drastically reduced federal expenditures as every dollar spent on

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124. *Justice Sotomayor Studied Indian Law After Joining Top Court*, INDIANZ.COM (Sept. 22, 2014), https://www.indianz.com/News/2014/09/22/justice-sotomayor-studied-indi.asp ("Justice Sonia Sotomayor has emerged as a strong voice for Indian Country since joining the U.S. Supreme Court."); Anna V. Smith, *The Next Supreme Court Pick Could Shape Indian Law for Decades*, HIGH COUNTRY NEWS (Aug.8, 2018), https://www.hcn.org/issues/50.15/tribal-affairs-the-next-supreme-court-pick-could-shape-indian-law-for-decades ("Justices Sonia Sotomayor and Neil Gorsuch have a thorough understanding of Indian law . . . ."); Matthew L.M. Fletcher, *Sotomayor Could Make a Difference*, TURTLE TALK (Aug. 16, 2009), https://turtletalk.wordpress.com/2009/08/16/ict-editorial-on-justice-sotomayor-and-indian-country/ ("Indian Country is celebrating the confirmation of Justice Sonia Sotomayor to the United States Supreme Court—and rightfully so."); Native Am. Rights Fund, Memorandum: The Nomination of Neil Gorsuch to the Supreme Court of the United States—An Indian Law Perspective (Mar. 16, 2017), https://sct.narf.org/articles/indian_law_jurispurdence/gorsuch-indian-law.pdf ("Judge Gorsuch has significant experience with federal Indian law, appears to be attentive to detail, and respectful to the fundamental principles of tribal sovereignty and the federal trust responsibility."); Letter from Brian Cladoosby, President, Nat'l Congress of Am. Indians, and John Echohawk, Executive Director, Nat'l Congress of Am. Indians, to Senators Charles Grassley and Dianne Feinstein, Regarding Support for Confirmation of Judge Neil Gorsuch (Mar. 24, 2017), https://www.scribd.com/document/343176679/NCAI-NARF-Gorsuch-Letter.

125. Ennis, *supra* note 111, at 626 ("Post-*Oliphant*, the Supreme Court has led an expansive attack on tribal sovereignty, meant to isolate Indian authority within reservations and protect non-Indians from the unfamiliarity of tribal government. This often involves the Court blatantly ignoring clear statutory or treaty language to arrive at its preferred normative conclusions, thus avoiding the application of the canons at the expense of tribal self-governance."); Matthew L.M. Fletcher, *The Supreme Court and Federal Indian Policy*, 85 NEB. L. REV. 121, 127-28 (2006) ("But the explicit rejection of the political-question doctrine in Weeks was a signal of a parallel phenomenon—the increasing tendency of the Court to make policy in the field of federal Indian law. The Court's entrance into the field of federal Indian policy is unwelcome, largely because the Court's policy choices are frequently uneducated in terms of their on-the-ground impacts, but also because they are in direct contravention of explicit congressional and Executive Branch policy choices."); Philip P. Frickey, *A Common Law for Our Age of Colonialism: The Judicial Divestiture of Indian Tribal Authority over Nonmembers*, 109 YALE L.J. 1, 7 (1999) ("A half-millennium after the colonial process began, in our time of great skepticism concerning colonization, our least democratic branch has become our most enthusiastic colonial agent.").

sanitation facilities in Indian homes produces over a twentyfold return in health benefits achieved.[126]

Furthermore, Congress should remove barriers to tribal economic development. Many aspects of federal bureaucracy stifle tribal economies and need to be rolled back;[127] however, taxation would be the easiest area for a legislative fix. Currently, states are allowed to tax on reservation economic activity,[128] but states do not have to provide services to tribes in proportion to the levy, resulting in gross disparities between the amount taken from Indian country and the benefit to the tribe.[129] If tribes are able to tax, they will be able provide their own water infrastructure and ensure their citizens have safe drinking water.

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126. INDIAN HEALTH SERVICE, SAFE WATER AND WASTER DISPOSAL FACILITIES (Sept. 2016), https://www.ihs.gov/newsroom/includes/themes/responsive2017/display_objects/documents/factsheets/SafeWaterandWasteDisposalFacilities.pdf; *Global WASH Fast Facts, supra* note 79 ("Water and sanitation interventions are cost-effective across all world regions. These interventions were demonstrated to produce economic benefits ranging from US$5 to US$46 per US$1 invested."); U.N. Dep't of Econ. & Soc. Affairs, International Decade for Action "Water for Life" 2005-2015, Financing Water (Feb. 7, 2014), http://www.un.org/waterforlifedecade/financing.shtml ("Achieving the water and sanitation MDG target could bring economic benefits, ranging from US$3 to US$34 per US$1 invested, depending on the region. Additional improvement of drinking-water quality (e.g. point-of-use treatment), if sustained, could lead to a benefit ranging from US$5 to US$60 per US$1 invested.").

127. *See, e.g.,* 25 C.F.R. § 152.34 (2018) (requiring the Secretary of the Interior to approve mortgages on trust land); *id.* § 140.1 (requiring a license to trade with Indian tribes); Crepelle & Block, *Property Rights and Freedom*, *supra* note 92, at 327 ("A]cquiring a permit to engage in energy development on tribal lands requires companies go through forty-nine steps and gain the approval of four federal agencies; in sharp contrast, only four steps are necessary for companies doing business outside of Indian country.").

128. Cotton Petroleum Corp. v. New Mexico, 490 U.S. 163, 189 (1989) (acknowledging that allowing states to tax on-reservation economic activity puts a higher tax burden on entities doing business on the reservation as opposed to those doing business off reservation); Washington v. Confederated Tribes of Colville Indian Reservation, 447 U.S. 134, 151 (1980) (explaining that states can impose taxes on reservation purchases "even if it seriously disadvantages or eliminates the Indian retailer's business with non-Indians").

129. *Cotton Petroleum Corp.*, 490 U.S. at 185 ("Indeed, Cotton concedes that, from 1981 through 1985, New Mexico provided its operations with services costing $89,384, but argues that the cost of these services is disproportionate to the $2,293,953 in taxes the State collected from Cotton."); Tulalip Tribes v. Washington, No. 15-CV-940 BJR, 2018 WL 4811893, at *4 (W.D. Wash. Oct. 4, 2018) (holding the state and county could assess over a combined $40 million a year in taxes on a tribal enterprise located on the reservation that the Tulalip Tribes provide all the governmental services to, even though the tribe was essentially barred from taxing due to the state and county taxes); Croman & Taylor, *supra* note 93 ("[On the Fort Berthold Reservation] observe that in 2011 alone, North Dakota collected $82 million in taxes from energy development [on the reservation] but spent less than $2 million on state roads and zero on tribal and BIA roads.) (internal citation omitted).

B. International Law

The courts of the conqueror[130] have not been kind to American Indians nor are the other two branches of government likely to be receptive to American Indian water needs.[131] Therefore, tribes should consider turning to international law to gain access to water because water has been considered a human right under international law since 1977.[132] Following the Mar del Plata Action Plan, several other international human rights instruments have explicitly recognized access to safe and sanitary water as a human right.[133] Other human rights instruments implicitly recognize access to safe and sanitary water as a human right,[134] and safe drinking

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130. The phrase was coined by Justice John Marshall in *Johnson v. McIntosh*, 21 U.S. 543, 588 (1823) ("Conquest gives a title which the Courts of the conqueror cannot deny, whatever the private and speculative opinions of individuals may be, respecting the original justice of the claim which has been successfully asserted."). The phrase has lived on in infamy. *See, e.g.*, WALTER R. ECHO-HAWK, IN THE COURTS OF THE CONQUEROR: THE 10 WORST INDIAN LAW CASES EVER DECIDED (2010); Newton, *supra* note 117, at 753.

131. If these branches were interested in improving water quality and access in Indian country, one assumes they would have taken action at some time during the nation's existence.

132. U.N. Dep't of Int'l Econ. & Soc. Affairs, United Nations Water Conference, Mar Del Plata Action Plan 63 (Mar. 14-25, 1977), https://www.internationalwaterlaw.org/bibliography/UN/UN_Mar%20del%20Plata%20Action%20Plan_1977.pdf ("All peoples, whatever their stage of development and their social and economic conditions, have the right to have access to drinking water in quantities and of a quality equal to their basic needs . . . .").

133. *See, e.g.,* U.N. GEN. ASSEMBLY, CONVENTION ON THE ELIMINATION OF ALL FORMS OF DISCRIMINATION AGAINST WOMEN art. 14(2)(h) (June 30 to July 25, 2003) ("To enjoy adequate living conditions, particularly in relation to housing, sanitation, electricity and water supply, transport and communications."); U.N. GEN. ASSEMBLY, CONVENTION ON THE RIGHTS OF THE CHILD art. 24(2)(c) (Nov. 20, 1989) (" To combat disease and malnutrition, including within the framework of primary health care, through, *inter alia* . . . the provision of adequate nutritious foods and clean drinking-water . . ."); U.N. Office for the Coordination of Humanitarian Affairs, Guiding Principles on Internal Displacement, Principle 18 (Sept. 2004) ("At the minimum, regardless of the circumstances, and without discrimination, competent authorities shall provide internally displaced persons with and ensure safe access to: (a) Essential food and potable water . . . (d) Essential medical services and sanitation."); *see also* U.N. Gen. Assembly, Human Rights Council, Annual Report of the United Nations High Commissioner for Human Rights and Reports of the Office of the United Nations High Commissioner for Human Rights and the Secretary-General, Report of the United Nations High Commissioner for Human Rights on the Scope and Content of the Relevant Human Rights Obligations Related to Equitable Access to Safe Drinking Water and Sanitation Under International Human Rights Instruments, U.N. Doc. A/HRC/6/3 (Aug. 16, 2007), https://documents-dds-ny.un.org/doc/UNDOC/GEN/G07/136/55/PDF/G0713655.pdf?OpenElement [hereinafter Annual Report of the U.N.].

134. Annual Report of the U.N., *supra* note 133, at 5 ("Implicit reference in human rights treaties: the close connection between access to safe drinking water and sanitation and a range of other human rights is implicitly addressed in various treaties, notably in relation to the right to life, the prohibition of torture, the right to health, the right to education, the right to adequate housing, the right to food and the right to an adequate standard of living."); U.N. Human Rights, The Right to Water Fact Sheet No. 35, at 5 (2010), https://www.ohchr.org/Documents/Publications/FactSheet35en.pdf ("Obligations related to access to safe drinking water and sanitation are also implicit in a

water has been recognized as a human right by courts outside of the United States.[135]

Additionally, indigenous rights are gaining greater respect in the international community as evinced by the nearly unanimous support received by the 2007 United Nations Declaration on the Rights of Indigenous Peoples (UNDRIP).[136] Despite originally opposing the UNDRIP, the United States and its three other opponents now officially support the Declaration.[137] The UNDRIP's effect within the United States, however, is symbolic because the United States' courts are not bound by the document.[138] Nevertheless, the United States participates in international tribunals,[139] and American Indians most certainly qualify as

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number of other international human rights treaties and are derived from obligations pertaining to the promotion and protection of other human rights, including the rights to life, adequate housing, education, food, health, work and cultural life."); SALMAN M.A. SALMAN & SIOBHAN MCINERNEY-LANKFORD, WORLD BANK, THE HUMAN RIGHT TO WATER: LEGAL AND POLICY DIMENSIONS 85 (2004), http://documents.worldbank.org/curated/en/219811468157522364/pdf/302290PAPER0Human0right0to0H20.pdf ("We identify that right in a variety of instruments, both international and domestic. In some of those instruments the right is provided for explicitly, in others implicitly . . . .").

135. Annual Report of the U.N., *supra* note 133, at 8, 20, 24.

136. G.A. Res. 61/295, U.N. Declaration on the Rights of Indigenous Peoples (UNDRIP) (Sept. 13, 2007), https://www.un.org/development/desa/indigenouspeoples/declaration-on-the-rights-of-indigenous-peoples.html (noting the vote tally was 144 votes in support, 11 abstentions, and 4 in opposition).

137. *Id*. ("Nine years have passed since the U.N. Declaration on the Rights of Indigenous Peoples was adopted by the General Assembly. Since then, the four countries voting against have reversed their position and now support the Declaration.").

138. *Written Testimony of the U.S. Dept. of State Before the S. Comm. on Indian Affairs on the U.N. Declaration on the Rights of Indigenous Peoples* (July 9, 2011), https://www.state.gov/documents/organization/194027.pdf ("As explained in the Announcement document that accompanied President Obama's remarks, the Declaration is 'not legally binding or a statement of current international law' but has 'both moral and political force.'"). Courts in the United States have refused to enforce the UNDRIP. *See* Singletary v. IRS N.C., No. 5:17-CV-231-FL, 2017 WL 7736168, at *1, *2 (E.D.N.C. Sept. 19, 2017), *report and recommendation adopted*, No. 5:17-CV-231-FL, 2018 WL 1006451 (E.D.N.C. Jan. 30, 2018) (noting the UNDRIP "is widely viewed as not creating new rights"); Bey v. Malec, No. 18-CV-02626-SI, 2018 WL 4585472, at *1, *2 (N.D. Cal. Sept. 25, 2018) ("Neither the UDHR nor the UNDRIP is binding in federal court."); Standing Rock Sioux Tribe v. U.S. Army Corps of Eng'rs, 301 F. Supp. 3d 50, 60 (D.D.C. 2018) ("[C]ourts have consistently held that UNDRIP is a non-binding declaration that does not create a federal cause of action.").

139. Sean D. Murphy, *The United States and the International Court of Justice: Coping with Antinomies*, U.S. & INT'L CTS. & TRIBUNALS 1 (2008), https://scholarship.law.gwu.edu/cgi/viewcontent.cgi?article=1902&context=faculty_publications ("The United States has been and remains an active participant in cases before the Court, appearing before it several times, more than any other state, even in recent years."); Andrew L. Strauss, *The Legal Option: Suing the United States in International Forums for Global Warming Emissions*, 33 ENVTL. L. REP. 10,185 (Envtl. Law Inst. 2003), https://ecommons.udayton.edu/cgi/viewcontent.cgi?referer=https://www.google.com/&httpsredir=1&article=1076&context=law_fac_pub ("[T]he United States itself could be

indigenous under the UNDRIP guidelines.[140] Hence, tribes should consider suing the United States in an international tribunal in order to seek redress for the pathetic water conditions in Indian country. The Dann Sisters provide a model.

The Dann Sisters saga begins in 1863 with the Treaty of Ruby Valley wherein the United States sought safe passage for white settlers through Western Shoshone land—rather than extinction of the tribe's aboriginal land title—in present-day Nevada.[141] In exchange for allowing travelers safe passage, the United States agreed to pay the Western Shoshone $5,000 per year for twenty years; however, the United States only made the payment during the first year of the treaty.[142] The treaty was broken, but significantly, the Western Shoshone did not relinquish title to their land.[143]

In 1951, various Shoshone tribes filed suit seeking damages arising from the wrongful taking of their land by the United States.[144] The Temoak Bands of Western Shoshone claimed to speak for the entire

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called to task before an international tribunal."); *Chronological List of Dispute Cases*, WTO https://www.wto.org/english/tratop_e/dispu_e/dispu_status_e.htm (last visited Jan. 28, 2019) (listing several cases involving the United States that have gone before the WTO dispute settlement body).

140. G.A. Res. 61/295, *supra* note 136, art. 3 ("Indigenous peoples have the right to self-determination. By virtue of that right they freely determine their political status and freely pursue their economic, social and cultural development"). In line with self-determination, "self-identification" is the hallmark criteria for indigenousness under international law. *See* UNDRIP, The U.N. Declaration on the Rights of Indigenous Peoples: A Manual for National Human Rights Institutions 7 (2013), https://www.ohchr.org/documents/issues/ipeoples/undripmanualfornhris.pdf ("Despite the ongoing debate, the key criterion of self-identification as the expression of the right to self-determination of indigenous peoples is widely recognized today."). American Indian tribes with reservations are federally recognized, meaning the U.S. government acknowledges these tribes' citizens as indigenous. Things get murkier when a tribe is not federally recognized, such as the United Houma Nation, wherein the United States cedes the "tribe" is composed of Indians but refuses to recognize the "tribe" as a legitimate "tribe." *See* Crepelle, *Standing Rock*, *supra* note 5, at 141.

141. Allison M. Dussias, *Squaw Drudges, Farm Wives, and the Dann Sisters' Last Stand: American Indian Women's Resistance to Domestication and the Denial of Their Property Rights*, 77 N.C. L. REV. 637, 709-10 (1999); United States v. Dann, 572 F.2d 222, 224 (9th Cir. 1978) ("The commissioners were instructed specifically, on July 22, 1862, 'that they were not expected to negotiate for the extinction of the Indian title but for the security of roads over the lands and `a definite acknowledgement as well of the boundaries of the entire country that they [the Indians] claim.'").

142. *Id.*

143. INDIAN LAW RES. CTR., THE DANN CASE BEFORE THE INTER-AMERICAN COMMISSION ON HUMAN RIGHTS: A SUMMARY OF THE COMMISSION'S REPORT AND ITS SIGNIFICANCE FOR INDIAN LAND RIGHTS 3 (July 2006), http://www.msubillings.edu/cas/NAMS/taliman/1%2015%20Dann%20Case%20Inter-American%20Comm%20on%20Human%20Rights%20summary.pdf ("The Treaty did not transfer title to any of these lands to the United States.").

144. United States v. Dann, 572 F.2d 222, 224 (9th Cir. 1978).

Western Shoshone in the matter.[145] The Sisters attempted to intervene in 1974, contending the Western Shoshone retained title to their land as set forth in the Treaty of Ruby Valley, but the court denied their effort.[146]

Despite the Dann Sisters having ranched on Western Shoshone treaty land for over three decades without hassle, the United States filed a trespass action against the Dann Sisters in 1974 asserting they were grazing on public lands in violation of federal law.[147] The Dann Sisters defended the lawfulness of their grazing by asserting their aboriginal title to the land had never been extinguished.[148] The case reached the United States Supreme Court, which rejected their argument in 1985. The Court concluded the Dann Sisters' aboriginal title had been extinguished because the United States placed $26 million in a trust account for the Western Shoshone, which effectively purchased the land.[149]

Twenty-six million dollars is a substantial sum of money, but it equates to fifteen cents per acre.[150] The Western Shoshone have not accepted the money; consequently, the value of the account is now over $136 million.[151] Carrie Dann said that she did not take the money because, "I wouldn't take a million dollars per acre [for Western Shoshone land]. . . . If I did, I would be selling my pride, my honor, my dignity, my birthright, everything that says I'm a Western Shoshone."[152] Accordingly, she and her sister did not surrender after the United States Supreme Court. They turned to international law.

145. *Id.*

146. *Id.* at 225.

147. United States v. Dann, 706 F.2d 919, 921 (9th Cir. 1983).

148. United States v. Dann, 470 U.S. 39, 43 (1985) ("[T]he Danns claimed that the land has been in the possession of their family from time immemorial and that their aboriginal title to the land precluded the Government from requiring grazing permits.").

149. *Id.* ("In short, the Indian Claims Commission ordered the Government *qua* judgment debtor to pay $26 million to the Government *qua* trustee for the Tribe as the beneficiary. Once the money was deposited into the trust account, payment was effected.").

150. INDIAN LAW RES. CTR., *supra* note 143, at 3 ("The ICC awarded the Western Shoshone $26 million, roughly 15 cents per acre, as compensation for this taking.").

151. Phyllis Raybin Emert, *Whose Land Is It Anyway?*, 2 RESPECT 3 (Spring 2003), https://njsbf.org/wp-content/uploads/2017/03/Respect-Spring-2003.pdf; Charlie LeDuff, *U.S. Agents Seize Horses of 2 Defiant Indian Sisters*, N.Y. TIMES (Feb. 2003), https://www.nytimes.com/2003/02/07/us/us-agents-seize-horses-of-2-defiant-indian-sisters.html ("With interest, the award has now grown to more than $136 million, or some $20,000 a tribal member.").

152. Dussias, *supra* note 141, at 723.

The Dann Sisters sought justice in the Inter-American Commission on Human Rights (IACHR),[153] of which the United States is a member.[154] The Sisters invoked six articles of the American Declaration of the Rights and Duties of Man.[155] In defense, the United States claimed the Dann Sisters' human rights had not been violated.[156] The United States further posited that neither the Dann Sisters nor any other Western Shoshone retained land rights as a result of the United States placing money in an account on the tribe's behalf.[157] The IACHR found that the United States transgressed the American Declaration of the Rights and Duties of Man by failing to provide the Danns with a fair trial,[158] violating their property rights,[159] and denying the Danns the equal protection of the law.[160] In conclusion, the IACHR recommended that the United States "[r]eview its laws, procedures, and practices to ensure that the property rights of indigenous persons are determined in accordance with the rights established in the American Declaration, including Articles II, XVIII, and XXIII of the Declaration."[161]

Other indigenous groups have received major victories in international tribunals.[162] Nonetheless, moral force is all international victories provide; that is, the decisions of international tribunals seldom

153. *Western Shoshone*, U. A., JAMES E. ROGERS C.L., https://law.arizona.edu/western-shoshone (last visited Jan. 28, 2019) ("After exhausting domestic remedies, Carrie Dann of the Dann Traditional Family turned to the Inter-American Commission on Human Rights (IACHR).").

154. *Member State: United States of America*, ORG. AM. STATES, http://www.oas.org/en/member_states/member_state.asp?sCode=USA (last visited Jan. 28, 2019).

155. Case 11.140, Mary and Carrie Dann—United States, Inter-Am. Comm'n H.R., Report No. 75/02, ¶ 2 (Dec. 27, 2002), https://law.arizona.edu/sites/default/files/Mary%20and%20Carrie%20Dann%20v.%20United%20States%2C%20Inter-Am.%20C.H.R.%2C%20Case%20No.%2011.140%2C%20Report%20No.%2075-02%20.pdf [hereinafter IACHR] ("Based upon these circumstances, the Petitioners allege that the State is responsible for violations of Articles II, III, VI, XIV, XVIII and XXIII of the American Declaration of the Rights and Duties of Man (the 'American Declaration').").

156. *Id.* ¶ 3.

157. *Id.*

158. *Id.* ¶ 142 ("[I]t cannot be said that the Danns' claims to property rights in the Western Shoshone ancestral lands were determined through an effective and fair process in compliance with the norms and principles under Articles XVIII and XXIII of the American Declaration.").

159. *Id.* ¶ 144.

160. *Id.* ¶ 145.

161. *Id.* ¶ 173.

162. *See, e.g.*, Case of the Saramaka People v. Suriname, Inter-Am. Comm'n H.R. (Nov. 28, 2007), http://www.corteidh.or.cr/docs/casos/articulos/seriec_172_ing.pdf; Case of the Mayagna (Sumo) Awas Tingni Community v. Nicaragua, Inter-American Court of Human Rights, (Aug. 31, 2001), http://www.corteidh.or.cr/docs/casos/articulos/seriec_79_ing.pdf.

compel legal action within a nation.[163] This is particularly troubling for American Indians because the United Nations has described the United States' current Indian policy as "out of step with contemporary legal developments in indigenous rights."[164] In fact, the United States told the IACHR that it would not enforce its decision in the Dann Sisters' case.[165] After the IACHR decree, the United States continued performing armed raids of the Danns' ranch and seizing their livestock.[166] The IACHR suggestion that the United States reform its Indian policy to better comport with the American Declaration of the Rights and Duties of Man has fallen stillborn as well. Thus, the odds of tribes securing water for their reservations in international courts in the near future are slim.

VII. CONCLUSION

As Americans become more concerned about drinking water safety, American Indians need to be included in the discussion. Tribes have established rights to adequate water supplies for their reservations, and Congress has authorized tribes to prosecute threats to their water. Nonetheless, the tremendous poverty that afflicts reservations leaves many tribes with a power they have no means to exercise. Congress or the Supreme Court can solve the water crisis in Indian country by affirming the tribal trust relationship. The United States has a sacred obligation to look after the welfare of tribes. Ensuring that tribes have access to safe

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163. Michael J. Berlin, *U.S. Vetoes Nicaraguan Resolution on Compliance with Court Decision*, WASH. POST (Aug. 1, 1986); Human Rights Comment, Non-Implementation of the Court's Judgments: Our Shared Responsibility, COUNCIL EUROPE (Aug. 23, 2016), https://www.coe.int/en/web/commissioner/-/non-implementation-of-the-court-s-judgments-our-shared-responsibility?desktop=true ("Prolonged non-implementation of the judgments of the Court is a challenge to the Court's authority and thus to the Convention system as a whole."); Roger-Claude Liwanga, *From Commitment to Compliance: Enforceability of Remedial Orders of African Human Rights Bodies*, 41 BROOK. J. INT'L L. 99, 101-02 (2015) ("However, with no coercive power to enforce their decisions, the ACtHPR and the African Commission, as well as international courts, rely on the good faith of the States to implement their remedial orders.").

164. Comm. on the Elimination of Racial Discrimination, International Convention on the Elimination of All Forms of Racial Discrimination, Fifty-Ninth Session Summary of the 1475th Meeting, CERD/C/SR/1475, at 9 (2001).

165. IACHR, *supra* note 155, ¶ 176 ("Based upon these submissions, the United States stated that it 'respectfully declines to take any further actions to comply with the Commission's recommendations.'").

166. LeDuff, *supra* note 151 ("[A]gents of the federal Bureau of Land Management, state inspectors and hired cowboys spread out across the Pine Valley and began rounding up 800 or so horses belonging to the sisters, Carrie and Mary Dann."). The United States seized 161 horses in March of 1992 and 269 horses in November of 1992 from the Danns. *See* IACHR, *supra* note 155, ¶ 42.

drinking water should be foremost amongst the United States' duties as a trustee.

If the United States fails to address the safe water crisis in Indian country, tribes should turn to the international community. International law may not be binding in the United States; however, an international lawsuit over the terrible water situation in Indian country may shame the United States into addressing Indian country's water problem. It is well-known that the United States has broken numerous treaties with the tribes. Lesser known is that many American Indians in the contemporary United States lack access to water. An international lawsuit may bring light to the plight many Indians still endure. American Indians deserve access to water, and hopefully the international community will realize this even if the United States does not.