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**TRIBAL WATER RIGHTS AND TRIBAL HEALTH: THE KLAMATH TRIBES AND THE NAVAJO NATION DURING THE COVID-19 PANDEMIC**

ROBIN KUNDIS CRAIG\*

ABSTRACT

*Public health measures to combat COVID-19, especially in the first year before vaccines became widely available, required individuals to be able to access fresh water while remaining isolated from most of their fellow human beings. For the approximately 500,000 households in the United States and over two million Americans who lacked access to reliable indoor running water, these COVID-19 measures presented a considerable added challenge on top of the existing risks to their health from an insecure water supply.*

*Many of these people were Native Americans, whose Tribes often lack fully adjudicated, quantified, and deliverable rights to fresh water. To highlight the critical role that water rights played in Tribes' capacities to cope with the pandemic, this essay compares the Klamath Tribes in Oregon, who after 40 years of litigation have relatively securely established themselves as the senior water rights holders in the Klamath River Basin, to the Diné (Navajo Nation), whose reservation—the largest in the United States—covers well over 27,500 square miles of Arizona, Utah, and New Mexico but largely lacks quantified water rights or the means to deliver water to households. While access to water was not the sole factor in these two Tribes' vastly different experiences with COVID-19, it was an important one, underscoring the need for states and the federal government to stop procrastinating in actualizing the water rights for Tribes that have been legally recognized since 1908.*

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## I. INTRODUCTION

Public health measures to combat COVID-19 required individuals to be able to access fresh water while remaining isolated from most of their fellow human beings, especially in the first year (roughly March 2020 to March 2021) before vaccines became widely available.<sup>1</sup> This access was not a problem for most Americans. As researchers summarized in 2021:

The United Nations Sustainable Development Goals Tracker, which tracks progress toward meeting Sustainable Development Goal Number 6—calling for universal access to potable water and sanitation for all by 2030—estimates that 99.2% of the US population has continuous access to potable water and 88.9% has access to sanitation. By percentages and the lived experience of most Americans, this appears accurate. The American Community Survey shows that from 2014 to 2018 only an estimated 0.41% of occupied US households lacked access to complete plumbing—meaning access to hot and cold water, a sink with a faucet, and a bath or shower.<sup>2</sup>

However, given the size of the United States, 0.41% is not a trivial number of people left struggling to comply with pandemic protocols, but instead “corresponds to 489,836 households spread unevenly across the country . . . .”<sup>3</sup> Thus, “millions live in counties where more than 1 out of 100 occupied households lack complete plumbing,”<sup>4</sup> and “more than two million Americans live without running water and basic indoor plumbing, and many more without sanitation.”<sup>5</sup>

Many of these people are Native Americans.<sup>6</sup> This pervasive inequity for Native Americans was recognized as a significant public health issue even before the pandemic. Indeed, “because reservations are less likely to have clean and reliable water, [Native Americans] experience higher mortality, poverty, and unemployment rates.”<sup>7</sup> “Native American households are 19 times more likely than white households to lack indoor plumbing,”<sup>8</sup> with the result that “58 out of every 1,000 Native American households lack complete plumbing, as

1. See discussion *infra* Part II.

2. J. Tom Mueller & Stephen Gasteyer, *The Widespread and Unjust Drinking Water and Clean Water Crisis in the United States*, 12 NATURE COMM'NS, June 22, 2021, at 2, Art. No. 3544 (citations omitted).

3. *Id.* Poor water quality adds even more environmental injustice, but this essay focuses primarily on basic access to water, to which the water rights analysis is most relevant.

4. *Id.* at 5.

5. ZOË ROLLER ET AL., DIG DEEP & US WATER ALLIANCE, CLOSING THE WATER ACCESS GAP IN THE UNITED STATES: A NATIONAL ACCESS PLAN 8 (2019).

6. Mueller & Gasteyer, *supra* note 2, at 4, 5 (finding a positive and significant correlation between indigeneity and lack of complete plumbing); ROLLER ET AL., *supra* note 5, at 8 (noting that “tribal communities” are prominent in the communities with water access problems), 22 (concluding that “race is the variable most strongly associated with access”).

7. ROLLER ET AL., *supra* note 5, at 22 (citation omitted).

8. *Id.* at 13.

opposed to three out of every 1,000 white households.”<sup>9</sup> Native Americans are also significantly less likely to have access to indoor running water than Black or Latinx people.<sup>10</sup> Finally, socioeconomic status is largely irrelevant to Native American access to water; instead, Native Americans “are equally likely to lack complete plumbing whether they are high- or low-income, and whether they live in urban or rural areas.”<sup>11</sup>

The problem of *legal* access to water often only exacerbates the household water access issue for Native Americans who live on a federally established reservation for one of the 574 federally recognized Tribes.<sup>12</sup> To use and consume water in the United States, a person, government, or business entity must have a water right, and the acquisition and exercise of these water rights are the primary focus of water law.<sup>13</sup> Unless they have their own wells, most households get their water from municipal utilities, which, as of 2015, serve about eighty-seven percent of the U.S. population.<sup>14</sup> Thus, it is generally these public water supply utilities (not individual households) that hold the relevant water rights to provide household drinking water, and for most water utilities these water rights derive from the relevant state’s water law.<sup>15</sup>

For many Native Americans, however, the rules for drinking water access are different. Federally recognized Tribes get their water as a result of a special kind of right: a federal reserved water right, also known as a *Winters* right.<sup>16</sup> Moreover, while most states have well-defined procedures for applying for or recognizing a water right,<sup>17</sup> *Winters* rights are a U.S. Supreme Court construction with no accompanying federal administrative apparatus.<sup>18</sup> As a result, most Tribes must both reify and quantify their otherwise amorphous *Winters* rights before they can even think about providing water to the

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9. *Id.* at 22 (citation omitted).

10. *Id.* (noting that while “African-American and Latinx households are nearly twice as likely to lack complete plumbing than white households, . . . Native American households are 19 times more likely.”).

11. *Id.* (citation omitted).

12. *Federally Recognized Indian Tribes and Resources for Native Americans*, USA.GOV <https://www.usa.gov/tribes> (last updated Jan. 7, 2022). For a map of tribal reservations and Native Alaskan villages and corporations, see BUR. OF INDIAN AFF., DEP’T OF THE INTERIOR, INDIAN LANDS OF FEDERALLY RECOGNIZED TRIBES OF THE UNITED STATES (June 2016), <https://www.bia.gov/sites/default/files/dup/assets/bia/ots/webteam/pdf/idc1-028635.pdf>.

13. ROBERT W. ADLER, ROBIN KUNDIS CRAIG & NOAH D. HALL, *MODERN WATER LAW: PRIVATE PROPERTY, PUBLIC RIGHTS, AND ENVIRONMENTAL PROTECTIONS* 1 (2d ed. 2018).

14. *Public Supply Water Use*, U.S. GEOLOGICAL SURV. (Mar. 1, 2019), <https://www.usgs.gov/mission-areas/water-resources/science/public-supply-water-use>.

15. *E.g.*, Janis E. Carpenter, *Water for Growing Communities: Refining Tradition in the Pacific Northwest*, 27 ENV’T L. 127, 129–30 (1997) (describing some of the special issues facing municipalities regarding their need for water rights for water supply).

16. See discussion *infra* Part III.

17. ADLER, CRAIG & HALL, *supra* note 133, at 281–343.

18. See discussion *infra* Part III.

households within their reservation borders.<sup>19</sup> Making *Winters* rights usable, in turn, generally requires either litigation or a water rights settlement with the relevant state.<sup>20</sup>

To highlight the critical role that water rights played in Tribes' capacities to cope with the COVID-19 pandemic, this Essay compares the Klamath Tribes in Oregon, who after forty years of litigation have relatively securely established themselves as the senior water rights holders in the Klamath River Basin, to the Diné (Navajo) Nation, whose reservation—the largest in the United States, covering well over 27,500 square miles of Arizona, Utah, and New Mexico—largely lacks quantified water rights or the means to deliver water to households. This Essay proceeds in four parts. Part II reviews the public health mandates and recommendations that made individualized household access to water particularly critical during the COVID-19 pandemic. Part III provides a short primer on *Winters* rights and the difficulties that Tribes can face in actualizing those rights. Part IV then actively compares the Klamath Tribes to the Diné, providing background on the status of their *Winters* rights before assessing the Tribes' capacity to adequately respond to the COVID-19 pandemic. This essay concludes that, while access to water was not the sole factor in these two Tribes' vastly different experiences with COVID-19, it was an important one, underscoring the need for states and the federal government to finally acknowledge and quantify the water rights that Tribes have been legally guaranteed since the Supreme Court's 1908 *Winters* decision.

## II. THE NEED FOR HOUSEHOLD-LEVEL ACCESS TO WATER DURING COVID-19

Although the COVID-19 pandemic began in December 2019, it did not become a public health emergency for most Americans until March 2020.<sup>21</sup> At that point, states and the federal government recommended and imposed disease prevention measures for most Americans: “In the absence of vaccines or treatments, the primary defense has been to reduce the risk of SARS-CoV-2 exposure through non-pharmaceutical interventions (NPIs) such as school closures, social distancing, isolation and quarantine, and use of personal masks.”<sup>22</sup> Beginning in the second week of March 2020, Shelter-in-Place Orders (“SIPOs”) became the new normal for most people in the United States,<sup>23</sup> a

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19. *Id.*

20. The Klamath Tribes and Diné Nation, discussed *infra* Part IV, provide two different examples of what it can take to make legal *Winters* rights usable as a practical matter.

21. Holly Elser et al., *The Impact of the First COVID-19 Shelter-in-Place Announcement on Social Distancing, Difficulty in Daily Activities, and Levels of Concern in the San Francisco Bay Area: A Cross-Sectional Social Media Survey*, 16 PLOS ONE, Jan. 14, 2021, at 2, e0244819.

22. *Id.* (citations omitted).

23. “On March 19, 2020, California was the first U.S. state to enact a statewide shelter-in-place order (SIPO), following an announcement on March 16, 2020 of a SIPO for seven San

period of full or semi-isolation that lasted anywhere from four to nine months, depending on location.

Of course, sheltering in place works only if the essentials of life are within easy reach, and grocery shopping was many people's necessary exception to sheltering at home.<sup>24</sup> Securing drinking water, however, was often assumed to be an in-home activity. For example, the California Water Resources Control Board emphasized that "[w]ith shelter-in-place orders in place across California, people should know that they do not need to leave their homes to get bottled water when their tap water is readily available and safe."<sup>25</sup> Moreover, "[t]here is no evidence that COVID-19 survives the disinfection process for drinking water or wastewater. California's comprehensive safe drinking water standards include disinfection processes for drinking water which are extremely effective against viruses, including COVID-19."<sup>26</sup>

Building on the assumption that most Americans had access to indoor taps, both the federal government and the state of California made it clear that "[t]he provision of potable water is an essential function."<sup>27</sup> According to the California State Water Resources Control Board:

Public Water Systems (PWSs) should strive to operate as normally as possible, with as few disruptions as possible. Responsibilities to the public do not stop when disaster strikes, and customers need assurance that their tap water still meets state and federal drinking water standards. PWS operations are designated as essential functions and staff and suppliers are not restricted by any current orders.<sup>28</sup>

Finally, the day after Governor Gavin Newsom issued the state SIPO, the Board also made it clear through guidance that continued compliance with all water quality laws was expected.<sup>29</sup>

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Francisco Bay Area counties effective on 12:01 AM on March 17, 2020. In the following weeks, 42 states and the District of Columbia passed such orders." *Id.* (citations omitted).

24. Residents of California's Bay Area, for example, initially reported difficulties in finding food. *Id.* at 3.

25. *COVID-19 Information for Public Water Systems and Affected Communities*, CAL. STATE WATER RES. CONTROL BD., [https://www.waterboards.ca.gov/drinking\\_water/certlic/drinking\\_water/covid-19.html](https://www.waterboards.ca.gov/drinking_water/certlic/drinking_water/covid-19.html) (last updated Sept. 27, 2022). Similarly, the Association of Safe Drinking Water Administrators ("ASDWA") stressed that "Americans can use and drink water from their tap as usual." *COVID-19 and Drinking Water*, ASS'N OF SAFE DRINKING WATER ADM'RS, <https://www.asdwa.org/covid19/> (last visited Aug. 16, 2022).

26. CAL. STATE WATER RES. CONTROL BD., *supra* note 25.

27. *Id.* See also *Drinking Water*, U.S. ENV'T PROT. AGENCY, <https://www.epa.gov/report-environment/drinking-water> (last updated Sept. 28, 2021) (discussing the importance of drinking water).

28. CAL. STATE WATER RES. CONTROL BD., *supra* note 25.

29. CAL. STATE WATER RES. CONTROL BD., COMPLIANCE WITH WATER BOARD REQUIREMENTS DURING THE CORONAVIRUS 2019 (COVID-19) EMERGENCY (Mar. 20, 2020). See

Of course, the pandemic protocols created follow-on issues, as ongoing supply chain issues make clear.<sup>30</sup> For drinking water, one of the major follow-on issues involves municipal water supply to the nation's many large office buildings that went unused during the pandemic:

The extensive COVID-19 “stay-at-home” orders across the country have resulted in many commercial buildings (offices, hotels, stadiums, medical facilities, etc.) with reduced or no water use. Stagnant water in these buildings can cause conditions that increase the risk for growth and spread of *Legionella* and other biofilm-associated bacteria, lead to low or undetectable levels of disinfectant (such as chlorine or chloramine), and create unsafe levels of lead and copper. Because of these conditions, there are special considerations for building water systems that continue to operate in low water flow environments as well as actions that will need to be considered when buildings reopen to ensure safe water.<sup>31</sup>

At the individual household level, however, the message was strong and clear: *Drink your tap water while you shelter in place.*

However, as Part I discussed, many Native Americans lack indoor plumbing and tap water. As one report noted,

Tribal communities face high rates of water insecurity. While the exact number is unknown, a 2016 Congressional report estimated that “[o]ver 660,000 American Indian and Alaska Native men, women, and children lack access to clean and reliable water sources or basic sanitation.” Using the same means of calculation, that number increased in 2018 to more than 710,000 individuals . . . .<sup>32</sup>

“The lack of federal leadership has resulted in piecemeal attempts to address water security, with Indian country trailing behind the rest of the United States.”<sup>33</sup>

Those facts were not irrelevant to how Tribes weathered the pandemic. “According to the Centers for Disease Control and Prevention (CDC), American Indians and Alaska Natives (AI/AN) are at least 3.5 times more likely than white persons to contract COVID-19. Limited access to running water is one of the

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also J. Tom Boer & Olivia Molodanof, *Compliance with State Water Board Requirements and Permits During California's Shelter-in-Place Order Associated with COVID-19*, NICKEL REP. (Mar. 20, 2020), <https://www.huntonnickelreportblog.com/2020/03/compliance-with-state-water-board-requirements-and-permits-during-californias-shelter-in-place-order-associated-with-covid-19/> (discussing the Board's guidance).

30. Peter Iglinski, *Expect Another Year of Supply Chain Issues*, UNIV. ROCHESTER NEWS CTR. (June 27, 2022), <https://www.rochester.edu/newscenter/what-is-supply-chain-issues-explained-525302/>.

31. ASS'N OF SAFE DRINKING WATER ADM'RS, *supra* note 25.

32. HEATHER TANANA ET AL., WATER & TRIBES INITIATIVE, UNIVERSAL ACCESS TO CLEAN WATER FOR TRIBES IN THE COLORADO RIVER BASIN 7 (Apr. 2021).

33. *Id.* at 8.

main factors contributing to this elevated rate of incidence.”<sup>34</sup> As the Water & Tribes Initiative detailed in 2021:

The COVID-19 pandemic has highlighted the dire need for universal clean water. To help minimize the risk of contracting COVID-19, the CDC recommends avoiding close contact with others, washing hands frequently for at least 20 seconds each time, and cleaning surfaces with soap and water. However, these protective measures are not feasible when Tribal members must ration hauled water to two to three gallons per person per day. If there is not enough water at the community source, residents must rely on other households with piped water access, further risking transmission and contraction of COVID-19.<sup>35</sup>

However, “the pandemic has [also] highlighted other historical inequities, such as the lack of utility services in general, underfunded and limited public health services, food deserts, housing shortages, and limited economic opportunities.”<sup>36</sup>

### III. A QUICK PRIMER ON FEDERAL RESERVED WATER RIGHTS FOR TRIBES

Indian Law—a term of art—is one of the most complex fields of law in the United States,<sup>37</sup> and hence any general introduction must skip some of the details, even important ones. In broad legal brushstrokes, however, federally recognized Tribes remain sovereign nations:<sup>38</sup>

Indian tribes are “domestic dependent nations” that exercise “inherent sovereign authority.” *Oklahoma Tax Comm’n v. Citizen Band Potawatomi Tribe of Okla.*, 498 U.S. 505, 509 . . . (1991) (*Potawatomi*) (quoting *Cherokee Nation*

34. *Id.* at 1. See *also id.* at 3 (“When COVID-19 spread into Indian country, many Tribal communities were hit particularly hard because of their lack of water access. A recent analysis reveals a strong association between COVID-19 incidence rates and the lack of indoor plumbing on reservations.” (citation omitted)).

35. *Id.* at 8.

36. TANANA ET AL., *supra* note 32, at 3. See *also id.* at 10 (providing details regarding some of these other issues).

37. See, e.g., Elizabeth Ann Kronk Warner, *Ethics and Indian Country*, 63 FED. LAW., Apr. 2016, at 4 (“Indian law is a complicated field”); Ann E. Tweedy, *Connecting the Dots Between the Constitution, the Marshall Trilogy, and United States v. Lara: Notes Toward a Blueprint for the Next Legislative Restoration of Tribal Sovereignty*, 42 U. MICH. J.L. REFORM 651, 714 n. 299 (2009) (lamenting the “incredible complexity of Indian law”); Elizabeth Ann Kronk & Heather Dawn Thompson, *Modern Realities of the “Jurisdictional Maze” in Indian Country: Case Studies on Methamphetamine Use and the Pressures to Ensure Homeland Security*, 54 FED. LAW., Mar./Apr. 2007, at 48–49 (briefly describing the particularly convoluted issue of criminal jurisdiction).

38. *Washington v. Wash. State Com. Passenger Fishing Vessel Ass’n*, 443 U.S. 658, 675 (1979) (“A treaty . . . between the United States and an Indian tribe[] is essentially a contract between two sovereign nations.”); *Lone Wolf v. Hitchcock*, 187 U.S. 553, 567 (1902) (noting Indian tribes “owe no allegiance to the United States”).



v. *Georgia*, 5 Pet. 1, 17 (1831)). As dependents, the tribes are subject to plenary control by Congress. See *United States v. Lara*, 541 U.S. 193, 200 (2004) (“[T]he Constitution grants Congress” powers “we have consistently described as ‘plenary and exclusive’” to “legislate in respect to Indian tribes”). And yet they remain “separate sovereigns pre-existing the Constitution.” *Santa Clara Pueblo v. Martinez*, 436 U.S. 49, 56 (1978). Thus, unless and “until Congress acts, the tribes retain” their historic sovereign authority. *United States v. Wheeler*, 435 U.S. 313, 323 (1978).<sup>39</sup>

Thus, within their reservation boundaries, Tribes can manage most of their own affairs. Moreover, while the federal government has fiduciary trust responsibilities to Tribes,<sup>40</sup> “the United States is not generally responsible for management of Tribal water resources.”<sup>41</sup>

At the heart of many Tribes’ contemporary authorities and rights is a treaty with the federal government. “When Tribes entered into treaties with the federal government, they agreed to be under the exclusive jurisdiction and protection of the United States. As a result, treaties often include provisions whereby the federal government agreed to establish a reservation as a permanent home for the Tribe . . . .”<sup>42</sup> However, “[t]reaties typically did not address the water needs of the reservation.”<sup>43</sup>

As a result, most tribal water rights are based on the *Winters* doctrine, derived from the Supreme Court’s 1908 decision in *Winters v. United States*.<sup>44</sup> On May 1, 1888, the United States created through treaty the Fort Belknap Indian Reservation in the territory of Montana for the Gros Ventre and Assiniboine Tribes.<sup>45</sup> Montana was admitted to the United States on February 22, 1889.<sup>46</sup> A competition arose between the Tribes and the new (predominantly white) settlers around the reservation as the settlers diverted increasing amounts of water from the Milk River, which forms one border of the reservation, for irrigation, household use, stock watering, and so forth.<sup>47</sup> The United States brought suit on behalf of the Tribes, arguing that the Tribes’ right to the water was superior to the settlers’ rights.<sup>48</sup>

The Supreme Court agreed, holding that when the United States reserves land for federal purposes, such as a tribal homeland, that reservation includes sufficient water to fulfill the reservation’s purposes.<sup>49</sup> Its decision turned on

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39. *Michigan v. Bay Mills Indian Cmty.*, 572 U.S. 782, 788 (2014).

40. *TANANA ET AL.*, *supra* note 32, at 23.

41. *Id.* at 24.

42. *Id.* at 23.

43. *Id.*

44. *Winters v. United States*, 207 U.S. 564, 564 (1908).

45. *Id.* at 565.

46. *Id.* at 577.

47. *Id.* at 565–70.

48. *Id.* at 565.

49. *Winters*, 207 U.S. at 577.

construction of the 1888 treaty. Noting that the Reservation was only a small part of the tract of land that Tribes previously wandered in a semi-nomadic lifestyle, and that the lands reserved “were arid and, without irrigation, were practically valueless,” the Court found it inconceivable that the treaty’s silence about water meant that the Tribes had voluntarily relinquished all water rights:

We realize that there is a conflict of implications, but that which makes for the retention of the waters is of greater force than that which makes for their cession. The Indians had command of the lands and the waters—command of all their beneficial use, whether kept for hunting, “and grazing roving herds of stock,” or turned to agriculture and the arts of civilization. Did they give up all this? Did they reduce the area of their occupation and give up the waters which made it valuable or adequate? . . . By a rule of interpretation of agreements and treaties with the Indians, ambiguities occurring will be resolved from the standpoint of the Indians. And the rule should certainly be applied to determine between two inferences, one of which would support the purpose of the agreement and the other impair or defeat it.<sup>50</sup>

Moreover, the fact that the United States created the reservation in 1888 defeated Montana’s claims to have full control of the Milk River.<sup>51</sup>

“The *Winters* decision was a moral statement as well as a legal ruling, for the heart of Indian water rights involves the United States’ trust obligation to provide true homelands to Tribes.”<sup>52</sup> Nevertheless, the United States’ view of its trust responsibility to Tribes has vacillated wildly over the course of U.S. history. The result has been that “the federal government has largely failed to fulfill its duty to provide access to clean water for Tribes, and in many cases, actively undermined Tribal water rights by constructing projects and providing water principally, or entirely for the benefit of non-Indians.”<sup>53</sup> For many Tribes, *Winters* rights remain inchoate legal rights until some additional legal process—generally litigation or settlement—quantifies and, in the West’s prior appropriation system, acknowledges the generally very early priority of that water right.<sup>54</sup> Only after that additional process do successful Tribes actually secure access to water.<sup>55</sup>

Therein lies part of the problem: particularly in the arid West, implementing federal reserved water rights, including *Winters* rights for Tribes, almost always

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50. *Id.* at 576–77.

51. *Id.* at 577–78.

52. TANANA ET AL., *supra* note 32, at 3.

53. *Id.* See also *id.* at 24 (noting that these projects use water to which the Tribes would have a priority right). *Winters* rights take at their date of priority the date of the reservation, regardless of when the Tribe actually begins to use the water. *Arizona v. California*, 373 U.S. 546, 600 (1963); *Arizona v. California*, 530 U.S. 392, 398 (2000).

54. CHARLES V. STERN, CONG. RSCH. SERV., INDIAN WATER RIGHTS SETTLEMENTS, 1–2 (2019).

55. *Id.*

places the Tribes at or toward the front of the line for scarce water resources. While the Tribes have legally always been there, the formal acknowledgement of the *Winters* right can feel like a real loss to the people and businesses that have been relying on the water in the interim.<sup>56</sup> As the Supreme Court noted in 1978:

Recognition of Congress' power to reserve water for land which is itself set apart from the public domain . . . does not answer the question of the amount of water which has been reserved or the purposes for which the water may be used. Substantial portions of the public domain *have* been withdrawn and reserved by the United States for use as Indian reservations, forest reserves, national parks, and national monuments. And water is frequently necessary to achieve the purposes for which these reservations are made. But Congress has seldom expressly reserved water for use on these withdrawn lands. *If water were abundant, Congress' silence would pose no problem. In the arid parts of the West, however, claims to water for use on federal reservations inescapably vie with other public and private claims for the limited quantities to be found in the rivers and streams. This competition is compounded by the sheer quantity of reserved lands in the Western States, which lands form brightly colored swaths across the maps of these States.*<sup>57</sup>

This competition with states, in conjunction with Congress' later decision to give state courts jurisdiction to adjudicate Tribes' *Winters* rights,<sup>58</sup> has left many Tribes without practical and meaningful access to the water to which they are legally entitled.<sup>59</sup>

How to quantify a *Winters* water right is a subject worthy of its own book. When the Supreme Court first confronted the quantification issue head-on, it adopted the "practicably irrigable acreage," or PIA standard, tying the amount of water a Tribe received to the land it could irrigate for farming.<sup>60</sup> In context, the PIA standard expanded *Winters* rights and defeated Arizona's argument that the quantification should reflect the Tribe's "reasonably foreseeable needs" based on the number people on the reservation.<sup>61</sup> However, it remains unclear whether the PIA standard is the *only* quantification standard for *Winters* rights,

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56. See Richard B. Collins, *The Future Course of the Winters Doctrine*, 56 UNIV. COLO. L. REV. 481, 488 (1985) ("Undeveloped and unquantified *Winters* rights are abstract, which makes it easy for junior users to dismiss *Winters* rights as the 'Indian problem.' Quantified water rights seem much more a real commodity, which competing users must reckon with.").

57. *United States v. New Mexico*, 438 U.S. 696, 699 (1978) (first emphasis in original; last emphasis added).

58. ADLER, CRAIG & HALL, *supra* note 133, at 469–73, 480–83.

59. See STERN, *supra* note 544 (noting that while "the water rights of tribes often are senior to those of non-Indian water rights holders . . . non-Indian populations frequently have greater access to and allocations of water"); Celene Hawkins, *Beyond Quantification: Implementing and Sustaining Tribal Water Settlements*, 16 UNIV. DEV. WATER L. REV. 229, 231–32 (2013).

60. See *Arizona*, 373 U.S. at 600–01 (1963) (using the PIA standard for the first time).

61. *Id.*

or whether contemporary quantification can reflect twentieth- and now twenty-first-century views of how much water a “homeland” needs, particularly for gaming casinos and hotels.<sup>62</sup>

#### IV. TWO TRIBES, THEIR WATER RIGHTS, AND THE COVID-19 PANDEMIC

##### A. *The Klamath Tribes of Oregon*

###### 1. Introduction to the Klamath Tribes

The Klamath Tribes consist of “the Klamath, the Modoc and the Yahooskin-Paiute people, known as mukluks and numu (the people).”<sup>63</sup> Unlike the many displaced Tribes in the United States, these Tribes have occupied the Klamath River Basin in Oregon “from time beyond memory.”<sup>64</sup>

The six tribes of the Klamaths were bound together by ties of loyalty and Family, they lived along the Klamath Marsh, on the banks of Agency Lake, near the mouth of the Lower Williamson River, on Pelican Bay, beside the Link River, and in the uplands of the Sprague River Valley. The Modoc’s lands included the Lower Lost River, around Clear Lake, and the territory that extended south as far as the mountains beyond Goose Lake. The Yahooskin Bands occupied the area east of the Yamsay Mountain, south of Lakeview, and north of Fort Rock. Everything we needed was contained within these lands.<sup>65</sup>

Fur trappers first arrived in the Klamath Tribes’ territory in 1826, followed by “missionaries, settlers, and ranchers. After decades of hostilities with the invaders, the Klamath Tribes ceded more than 23 million acres of land in 1864[,] and we entered the reservation era.”<sup>66</sup>

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62. *Compare In re Rights to Use Water in Big Horn River*, 753 P.2d 76, 85–86, 99 (Wyo. 1988) (construing the treaty establishing the Wind River Indian Reservation as reserving water rights largely for agricultural and related subsistence purposes), *with In re Rights to Use Water in Gila River*, 35 P.3d 68, 74, 81 (Ariz. 2001) (holding that the reservation’s purpose was to provide a permanent homeland that was not limited to agriculture and subject to changing conditions and economies). The U.S. Supreme Court affirmed the Wyoming Supreme Court’s decision in the Wind River case through a 4–4 vote and without opinion, providing little guidance as to whether the PIA standard is mandated for all Tribes or just when the relevant treaty stresses agriculture. *Wyoming v. United States*, 492 U.S. 406, 407 (1989) (Justice O’Connor recused herself from the case).

63. *Klamath Tribal History*, KLAMATH TRIBES, <https://klamathtribes.org/history/> (last visited Sept. 9, 2022).

64. *Id.* See also *American Indian Displacement and Relocation*, GA. STATE UNIV. LIBR., <https://exhibits.library.gsu.edu/current/exhibits/show/health-is-a-human-right/displacement/american-indians> (last visited Sept. 24, 2022) (discussing the displacement of Indian tribes in the United States).

65. KLAMATH TRIBES, *supra* note 63.

66. *Id.*

Congress ratified the 1864 Treaty between the United States and the Klamath and Moadoc Tribes and Yahooskin Band of Snake Indians in 1870.<sup>67</sup> The treaty contains several important provisions relevant to the Tribes' water rights. For instance, Article I gave the Klamath Tribes the exclusive right to hunt, fish, and gather on their reservation.<sup>68</sup> Article II provided the tribes with funds to convert their lifestyle to agriculture.<sup>69</sup>

In the late nineteenth and early twentieth centuries, the Tribes prospered by selling timber to the U.S. Army, settlers, and the railroads.<sup>70</sup> As a result,

By the 1950's the Klamath Tribes were one of the wealthiest Tribes in the United States. We owned and judiciously managed for long term yield, the largest remaining stand of Ponderosa pine in the west. We were entirely self-sufficient. We were the only tribes in the United States that paid for all the federal, state and private services used by our members.<sup>71</sup>

Nevertheless, Congress acted twice to reduce the Tribes' homeland. First:

In the 1901 Agreement, the United States agreed to pay the Tribe \$537,007.20 for 621,824 acres of reservation land. In return, the Tribe agreed in Article I to "cede, surrender, grant, and convey to the United States all their claim, right, title and interest in and to" that land. The reservation was thereby diminished to approximately two-thirds of its original size as described in the 1864 Treaty.<sup>72</sup>

Congress ratified this agreement in 1906.<sup>73</sup>

Second, and more destructively, in 1954, Congress terminated the Tribe for three decades:

In 1954, the Klamath Tribes were terminated from federal recognition as a tribe by an act of congress. During the process of termination, the elected Tribal representatives consistently opposed termination. There was, in addition, a report from the Bureau of Indian Affairs (BIA) which concluded that the Klamath Tribes were NOT ready for termination and recommended against it. Despite this consistent official opposition from the Tribes and the BIA, congress adopted the Klamath Termination Act . . . . Not only did we see the end of federal recognition and supplemental human services, but tragically our reservation land base of approximately 1.8 million acres was taken by condemnation and the Klamaths were terminated as a Tribe.<sup>74</sup>

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67. Treaty Between the United States of America and the Klamath and Moadoc Tribes and Yahooskin Band of Snake Indians, Oct. 14, 1864, 16 Stat. 707, 707.

68. *Id.* at 708.

69. *Id.*

70. KLAMATH TRIBES, *supra* note 63.

71. *Klamath Tribal History*, THE KLAMATH TRIBES (2022), <https://klamathtribes.org/history/>.

72. *Or. Dep't of Fish & Wildlife v. Klamath Indian Tribe*, 473 U.S. 753, 760 (1985) (footnote omitted).

73. Act of June 21, 1906, ch. 3504, 34 Stat. 325, 367.

74. KLAMATH TRIBES, *supra* note 63. The termination occurred pursuant to the Klamath Termination Act (Act of August 13, 1954), Pub. L. No. 587, 68 Stat. 718, and became effective in

The 1901 reservation diminishment and the 1954 termination complicated the Tribes' legal status and rights, including water rights. However, the Tribes fought back, and, in their own words, "[i]n 1986, we were successful in regaining Restoration of Federal Recognition for our Tribes. Although our land base was not returned to us, we were directed to compose a plan to regain economic self-sufficiency."<sup>75</sup> As part of that plan, in 1997, the Klamath Tribes opened the Kla-Mo-Ya Casino.<sup>76</sup>

## 2. The Klamath Tribes' Water Rights: Forty Years of Litigation

Despite the Tribes' termination, former members began to litigate in the 1970s to preserve their rights under the 1864 treaty. In the first round, *Kimball v. Callahan*, members who withdrew after termination sought "a declaratory judgment declaring their right to hunt, trap, and fish within their ancestral Klamath Indian Reservation free of Oregon fish and game regulations, pursuant to the Treaty of October 14, 1864" and "an injunction restraining defendants, officers of the State of Oregon, from applying and enforcing Oregon fish and game regulations against them within the boundaries of the old reservation."<sup>77</sup> The U.S. Court of Appeals for the Ninth Circuit first noted that the U.S. District Court for the District of Oregon had declared in 1956 that the treaty gave such rights to the Tribes.<sup>78</sup> It then agreed that "the treaty provides exclusive rights to hunt and trap, as well as fish, free of state regulation."<sup>79</sup> Finally, following Supreme Court precedent, it concluded that these treaty rights survived termination,<sup>80</sup> save only that private landowners could exclude former tribal

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1961 (codified at 25 U.S.C. §§ 564–564x; these sections were omitted from the U.S. Code after 2015). Moreover, pursuant to this termination many tribal members "elected to withdraw from the tribe and have their interest in tribal property converted into money and paid to them. 25 U.S.C. § 564d(a)(2). In order to pay the withdrawing members of the tribe, part of the original tribal property was sold, the greater part being taken by the United States. It now forms a part of the Winema National Forest and the Klamath Forest National Wildlife Refuge." *Kimball v. Callahan*, 493 F.2d 564, 565 (9th Cir. 1974), *cert. denied*, 419 U.S. 1019 (1974) [hereinafter *Kimball I*]. As a result of this purchase and another purchase of land made by the United States in 1958, "the Government became the owner of approximately 70% of the former reservation lands. The balance of the reservation is in private, Indian and non-Indian, ownership either through allotment or sale of reservation lands at the time of termination." *United States v. Adair*, 723 F.2d 1394, 1398 (9th Cir. 1983).

75. KLAMATH TRIBES, *supra* note 63. The restoration was accomplished through the Klamath Indian Tribe Restoration Act, Pub. L. No. 99-398, 100 Stat. 849, 849–52 (1986) (codified as 25 U.S.C. §§ 566-566h and in scattered other provisions of the U.S. Code).

76. KLAMATH TRIBES, *supra* note 63.

77. *Kimball I*, 493 F.2d at 565.

78. *Id.* at 566 (citing *Klamath & Modoc Tribes v. Maison*, 139 F. Supp. 634 (D. Or. 1956)).

79. *Id.*

80. *Id.* at 567–68 (quoting 18 U.S.C. § 1162).

members from former reservation lands that had passed into private ownership.<sup>81</sup>

Five years later, the Ninth Circuit affirmed its own ruling in a challenge by the State of Oregon and extended it to both the Klamath Indian Game Commission and to descendants of Tribal members who withdrew from the Tribes at termination.<sup>82</sup> The Ninth Circuit did recognize, however, that the state had limited authority to regulate the tribal rights for conservation purposes.<sup>83</sup>

In 1982, the Klamath Tribes sued the Oregon Department of Fish & Wildlife, seeking a further injunction to exercise hunting and fishing rights free of state regulation on the lands ceded in 1901, but this time they lost.<sup>84</sup> The U.S. Supreme Court concluded that:

[T]he language of the 1864 Treaty indicates that the Tribe's rights to hunt and fish were restricted to the reservation. The broad language used in the 1901 Agreement, virtually identical to that used to extinguish off-reservation rights in the 1864 Treaty, accomplished a diminution of the reservation boundaries, and no language in the 1901 Agreement evidences any intent to preserve special off-reservation hunting or fishing rights for the Tribe.<sup>85</sup>

As a result, the Tribes' hunting, and fishing rights—which also largely defined their water rights—were limited to the boundaries of the former reservation as diminished by the 1901 agreement.<sup>86</sup>

At roughly the same time, the battles for the Klamath Tribes' water rights began. In September 1975, the United States filed suit in the U.S. District Court for the District of Oregon seeking a declaration of water rights, while in January 1976, the State of Oregon initiated a state-court general stream adjudication in the Klamath Basin to determine all water rights in that basin.<sup>87</sup> Both the State of Oregon and the Klamath Tribes intervened in the federal lawsuit, and Oregon sought to dismiss the case on the basis of *Colorado River* abstention, a Supreme Court doctrine that generally favors state-court general stream adjudications over piecemeal adjudications of water rights in federal court.<sup>88</sup> The Ninth Circuit, however, refused to dismiss in favor of the state adjudication, noting

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81. *Id.* at 569.

82. *Kimball v. Callahan*, 590 F.2d 768, 770–76 (9th Cir. 1979), *cert. denied*, 444 U.S. 826 (1979) [hereinafter *Kimball II*].

83. *Id.* at 778.

84. *Or. Dep't of Fish & Wildlife*, 473 U.S. at 762.

85. *Id.* at 770.

86. *Id.* at 774.

87. *United States v. Adair*, 723 F.2d 1394, 1398–99 (9th Cir. 1983).

88. *Id.* at 1399 (citing *Colo. River Water Conservation Dist. v. United States*, 424 U.S. 800 (1976)). See also Owen W. Gallogly, Note, *Colorado River Abstention: A Practical Reassessment*, 106 VA. L. REV. 199, 203 (2020) (describing the *Colorado River* doctrine).

that the federal lawsuit had been filed first and, more importantly, that the state adjudication was still in the initial investigation phase after seven years.<sup>89</sup>

The Ninth Circuit then proceeded to declare that the Klamath Tribes had senior water rights in the Klamath Basin system.<sup>90</sup> Less importantly, individual Indian landowners received the traditional *Winters* rights—that is, water rights for agricultural needs with a priority date of 1864, the date of the treaty and reservation.<sup>91</sup> More importantly, the Ninth Circuit concluded “that at the time the Klamath Reservation was established, the Government and the Tribe intended to reserve a quantity of the water flowing through the reservation not only for the purpose of supporting Klamath agriculture, but also for the purpose of maintaining the Tribe’s treaty right to hunt and fish on reservation lands.”<sup>92</sup> The water right for hunting and fishing “consists of the right to prevent other appropriators from depleting the streams waters below a protected level in any area where the non-consumptive right applies.”<sup>93</sup> Moreover, given that this right carried into the treaty the Tribes’ aboriginal rights, it has a priority date of “time immemorial.”<sup>94</sup> Thus, this very senior water right is essentially an instream flow right for the benefit of fish in the Klamath River Basin, like suckers and salmon. Finally, these are *tribal* water rights: “The hunting and fishing rights themselves belong to the Tribe and may not be transferred to a third party.”<sup>95</sup>

Nevertheless, the Ninth Circuit did not quantify either of the Klamath Tribes’ constellations of water rights.<sup>96</sup> Instead, quantification was delayed until 2013, when the state of Oregon finally finished up the Klamath Basin Adjudication that it began in 1976.<sup>97</sup> The decree gave the Klamath Tribes very large, as well as the most senior (“time immemorial”), water rights in the Basin,<sup>98</sup> allowing the Tribes to “call” the river three months later to enforce those

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89. *Adair*, 723 F.2d at 1404–05.

90. *Id.* at 1414.

91. *Id.* at 1415–16.

92. *Id.* at 1410.

93. *Id.* at 1411.

94. *Adair*, 723 F.2d at 1414. This water right memorialized the Tribes’ aboriginal rights, which were preserved by but pre-existed the treaty. *Id.* at 1412–13. In contrast, the Tribes’ water rights for irrigation and domestic purposes were reserved by the treaty itself and carried a priority date of 1864, to be quantified according to the PIA standard. *Id.* at 1414.

95. *Id.* at 1418.

96. See *Klamath Tribes’ Water Rights*, NATIVE AM. RTS. FUND <https://www.narf.org/cases/klamath-tribes-water-rights/> (last visited Sept. 10, 2022) (noting the Tribes’ rights were recognized “in *United States v. Adair*, but the courts left quantification of the water rights to Oregon’s Klamath Basin Adjudication”).

97. *Id.*

98. Scott Learn, *Oregon Gives Tribes Top Claims to Water in Much of Klamath Basin*, THE OREGONIAN (Mar. 8, 2013, 12:08 AM), [https://www.oregonlive.com/environment/2013/03/oregon\\_gives\\_tribes\\_top\\_claims.html](https://www.oregonlive.com/environment/2013/03/oregon_gives_tribes_top_claims.html).



rights.<sup>99</sup> The Oregon states courts have continued to uphold these rights against later challenges.<sup>100</sup> Even so, while the water rights adjudications have made the Klamath Tribes serious players in the region, a twenty-two-year historic drought is also limiting the water available to both fish and humans, regardless of seniority.<sup>101</sup>

### 3. The Klamath Tribes During COVID-19

The Klamath Tribes thus entered the coronavirus pandemic with two major advantages: they were relatively wealthy, and they had senior, large, adjudicated and quantified water rights.<sup>102</sup> Not coincidentally, a 2021 study of the Tribes' responses to COVID-19 concluded that:

[D]espite the fact that structural inequities including income disparities have shaped racial and ethnic impact of epidemics around the world, the timely response, establishment of partnerships and proactive control of the epidemic resulted in minimal impact among the Klamath Tribal and other [Native American] populations served by the tribal facilities.<sup>103</sup>

Noting that “[t]he Klamath Tribes are unusual in that individual economic advancement is encouraged,” rather than all wealth being communal, the study also noted the Tribes’ own health systems and “integrative medical approach.”<sup>104</sup> The Tribes’ governmental structure includes the Klamath Tribal Health & Family Services (KTH&FS), and the Tribes operate a Wellness Center in Chiloquin, Oregon.<sup>105</sup>

At the beginning of the pandemic, the KTH&FS “activated an Emergency Preparedness Incident Management Team . . . which managed a swift response to the outbreak. . . .”<sup>106</sup> The Tribes also “took appropriate leadership steps to promote personal hygiene, social distancing, quarantine and isolation housing,

99. *Klamath Tribes Call In Their Water Rights*, OR. PUB. BROAD. (June 10, 2013, 3:52 PM), <https://www.opb.org/news/article/klamath-tribes-call-in-their-water-rights/>.

100. Court’s Opinion and Conclusions of Law on Phase 3, Part 1, Group C Motions, In re Waters of the Klamath River Basin, No. WA1300001, at 2–17 (Or. Cir. Ct. Feb. 24, 2021), <https://narf.org/nill/documents/20210224klamath-wogan-opinion.pdf>.

101. Gillian Flaccus, *Farmers, Tribes in Klamath Basin Get the Grim News on This Year’s Water Restrictions*, OR. PUB. BROAD. (Apr. 11, 2022, 4:19 PM), <https://www.opb.org/article/2022/04/11/farms-fish-klamath-basin-drought-water-restrictions/>.

102. Obinna Oleribe et al., *Klamath Tribal Response to the Pandemic of COVID-19 Among Klamath Tribal Community in Oregon, USA*, 10 GLOB. ADVANCES IN HEALTH & MED., July 15, 2021, at 2, PMID 34350066 (describing the Tribes’ “relatively unique position on individual wealth”); Learn, *supra* note 98 (noting “the Klamath Tribes have top claims to water in much of the Klamath Basin”).

103. Oleribe et al., *supra* note 102, at 5.

104. *Id.* at 2.

105. *Id.*

106. *Id.*

and culturally appropriate healthcare preparedness.”<sup>107</sup> Steps included drive-up COVID-19 testing at the Medical Center using rapid testing machines that the Tribes procured.<sup>108</sup> Videoconferencing replaced in-person meetings, and at the Indian Health Services clinic, the Tribes “transition[ed] all exam rooms and dental procedure areas to negative air pressure rooms” and installed touchless faucets.<sup>109</sup> The Tribes communicated COVID-19 information through brochures, emails, and social media.<sup>110</sup> Patients with COVID-19 symptoms were separated from other patients, and “positive and high-risk exposure cases were isolated and quarantined.”<sup>111</sup> Importantly, the Tribes provided those in isolation with everything they needed—“contact-free pharmacy delivery,” groceries, cleaning and hygiene supplies, and recreational vehicles for unhoused individuals who had to quarantine or isolate,<sup>112</sup> at no cost to those individuals.<sup>113</sup> They also “enacted policies to prevent congregate activities at burials, weddings, and traditional ceremonies.”<sup>114</sup>

The Klamath Tribes did not experience their first COVID-19 death until very late November 2020.<sup>115</sup> Moreover, when vaccines became available in late December, the team at KTH&FS “launched a pro-vaccine campaign through social media and also sent emails with critical information to their patients, including their partner organizations,” to combat some of the myths that were spreading about the vaccines.<sup>116</sup>

Notably, during the pandemic, the Klamath Tribes were also contending with wildfires and working with the Oregon Department of Transportation on wetlands restoration.<sup>117</sup> These combinations of efforts would not have been possible without secure water rights. As the 2021 study noted, the social determinants of health for most Native Americans include “lack of running

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107. *Id.*

108. Oleribe et al., *supra* note 102, at 2–3.

109. *Id.* at 3.

110. *Id.*

111. *Id.*

112. *Id.*

113. Oleribe et al., *supra* note 102, at 3.

114. *Id.*

115. Brian Gailey, *Klamath Tribal Members Mourn Two COVID-19 Related Deaths, 50 New Cases Today*, KLAMATH FALLS NEWS (Dec. 3, 2020), <https://www.klamathfallsnews.org/news/klamath-tribal-members-mourn-two-covid-19-related-deaths>.

116. Joe Castel, *Klamath Tribal “Vaccine Warriors” Unite Their Community Against COVID-19*, FED. EMERGENCY MGMT. AGENCY (Apr. 19, 2021, 2:48 PM), <https://www.fema.gov/blog/klamath-tribal-vaccine-warriors-unite-their-community-against-covid-19>.

117. *Oregon’s Bootleg Fire—Largest Fire in the United States Burns on Klamath Treaty Lands*, KLAMATH NEWS, Apr.–July 2021, at 1, 6, <https://klamathtribes.org/wp-content/uploads/2022/03/2nd-Qtr-2021.pdf>; Or. Dep’t of Transp. Comm’ns Team, *Wetlands Transformation*, KLAMATH NEWS, Apr.–July 2021, at 6, <https://klamathtribes.org/wp-content/uploads/2022/03/2nd-Qtr-2021.pdf>.

water,” leading to “inadequate hand-washing” and other water-based health preservation measures.<sup>118</sup> The Klamath Tribes escaped those limitations, contributing to—in conjunction with wealth and a well-financed and trained health care system—the pandemic’s relatively limited impact on the tribal community.

## B. *The Diné Nation*

### 1. Introduction to the Diné Nation

“The Navajo prefer to be called the ‘Diné’ meaning ‘The People’ or ‘Children of the Holy People’.”<sup>119</sup> The Diné are the largest group of Native Americans in the United States, and, like the Klamath Tribes, they occupy a reservation within their traditional homelands, what is now the Four Corners area of the American Southwest.<sup>120</sup> Although the Spanish explorer Don Francisco Vásquez de Coronado probably interacted with both the Hopi and Diné in 1540,<sup>121</sup> the Diné’s first *recorded* encounter with Europeans (also Spanish explorers) occurred in 1583, leading to a confusion of tribal identity, particularly with respect to “Apache” and “Navajo.”<sup>122</sup>

The Diné lands became part of the United States in 1848, as part of the Treaty of Guadalupe Hildalgo that ended the Mexican-American War.<sup>123</sup> The Diné had developed a lifestyle based on raiding, which the United States sought to end.<sup>124</sup> Initially, rather than resorting purely to military might, General William Kearney sought to end Navajo raiding through treaty, not realizing that the Navajo were not a single united Tribe.<sup>125</sup> Thus, while some Navajo leaders entered into a treaty with the federal government on September 9, 1849,<sup>126</sup> which Congress ratified, other Diné did not honor its terms.<sup>127</sup> After a short period of peace, the Diné attacked the federal government’s Fort Defiance and lost—although the withdrawal of federal troops in 1861 (so that they could fight in the

118. Oleribe et al., *supra* note 102, at 2.

119. *Yá’át’ééh! Welcome*, NAVAJO PEOPLE – THE DINÉ, <http://navajopeople.org/> (last visited Aug. 18, 2022).

120. Harold Carey, Jr., *Ancient Navajo and Native Americans Migrations*, NAVAJO PEOPLE (May 23, 2012), <http://navajopeople.org/blog/ancient-navajo-and-native-americas-migrations/>; *Navajo, Native American & Indigenous Studies*, DOMINICAN UNIV., <https://research.dom.edu/NativeAmericanStudies/navajo> (last visited Sept. 25, 2022).

121. Harold Carey, Jr., *First Contact with the Navajo—1540*, NAVAJO PEOPLE (May 24, 2012), <http://navajopeople.org/blog/first-contact-with-the-navajo-1540/>

122. *Id.*

123. Harold Carey, Jr., *The Americans and the Navajo*, NAVAJO PEOPLE (Apr. 22, 2014), <http://navajopeople.org/blog/the-americans-and-the-navajo/>.

124. *Id.*

125. *Id.*

126. TANANA ET AL., *supra* note 32, at 25 fig. 10.

127. Carey, Jr., *supra* note 123.

Civil War) suggested to the Diné that maybe the invaders had had enough.<sup>128</sup> They had not. Beginning on March 6, 1864, U.S. troops marched 2400 Diné to Fort Sumner, 300 miles away.<sup>129</sup> Along the way, 197 Diné died.<sup>130</sup> More forced marches followed, and eventually 8000 Diné were held captive at Fort Sumner.<sup>131</sup> After initially deciding to send the Diné to Oklahoma, the federal government eventually agreed to send the captive Diné back to their homeland if they agreed to live peaceably, to send their children to schools, and to allow a railroad to be built across Diné lands.<sup>132</sup>

“Treaties were signed by all the Navajo leaders on June 1, 1868,”<sup>133</sup> and the 1868 treaty established the Navajo Nation’s current reservation. As noted in the Introduction, the Navajo Nation’s reservation is the largest tribal homeland in the United States, covering roughly 27,500 square miles of Arizona, Utah, and New Mexico.<sup>134</sup> Its western border is the Colorado River, right before the river enters Grand Canyon National Park.<sup>135</sup>

## 2. The Navajo Nation’s Water Rights

Unlike the Klamath Tribes, the Diné did not accumulate wealth after the conflicts with settlers and the U.S. Army died down, as is evidenced in their lack of water. As noted, households with incomplete or no plumbing are not spread evenly across the country, and their locations significantly correlate with, *inter alia*, “greater portions of indigenous people (American Indian, Alaska Natives, Native Hawaiian, and Other Pacific Islanders) . . . .”<sup>136</sup> More specifically, outside of Alaska, the biggest counties with the largest indoor water access problems fall squarely within the Navajo Nation.<sup>137</sup>

128. *Id.*

129. Harold Carey, Jr., *Navajo Long Walk to Bosque Redondo*, NAVAJO PEOPLE (Mar. 7, 2014), <http://navajopeople.org/blog/navajo-long-walk-to-bosque-redondo/>.

130. *Id.*

131. *Id.*

132. *Id.*

133. *Id.*

134. Fernanda Santos, *Navajo Leader Drops His Support for Slaughter of Wild Horse on the Reservation*, N.Y. TIMES (Oct. 7, 2013), <https://www.nytimes.com/2013/10/08/us/navajo-leader-drops-his-support-for-slaughter-of-wild-horses-on-the-reservation.html>.

135. Sarah Bohl Gerke, *Navajo Reservation*, NATURE, CULT. & HIST. AT THE GRAND CANYON, <https://grcahistory.org/sites/beyond-park-boundaries/navajo-reservation/> (last visited Sept. 9, 2022).

136. Mueller & Gasteyer, *supra* note 2, at 4.

137. Compare Mueller & Gasteyer, *supra* note 2, at 3 & fig. 1 (showing that 3 to 35 percent of households lack full indoor plumbing in northeastern Arizona and southeastern Utah and noting that “[i]ncomplete plumbing is clustered in the *Four Corners*, Alaska, Puerto Rico, the borderlands of Texas, and parts of Appalachia” (emphasis added)), with *Where Is the Navajo Nation?*, NAVAJO NATION, <https://navajobusiness.com/fastFacts/LocationMap.htm> (last visited Sept. 25, 2022) (showing the Navajo Nation reservation in the same location).

The Navajo Nation's lack of access to water was recognized as both an environmental justice and health issue even before COVID-19. As a 2021 report noted:

The Navajo Nation, the largest and most populous reservation in the country, has significant piped water access gaps. Navajo residents are 67 times more likely than other Americans to live without access to running water. As a result, many households are required to haul water from communal wells—a costly and time-consuming burden that has put Tribal members at risk during the pandemic as they balance social distancing recommendations with the requirement to meet basic daily needs.<sup>138</sup>

One in three Navajo homes does not have running water,<sup>139</sup> and “roughly 30 to 40 percent of residents . . . must haul water long distances to meet basic household needs. Moreover, the cost of hauled water is at least 71 times more expensive than piped water.”<sup>140</sup>

The lack of piped water has long had insidious effects on Diné health. For example, “[i]n order to conserve their scarce water supply, Navajo residents are often forced to make accommodations that are detrimental to their health,” such as opting to eat less healthy foods that require less water to prepare or drinking sugary beverages that are less expensive than hauled water.<sup>141</sup>

“The Navajo Nation has estimated that \$4.5 billion is needed to address the widespread lack of water access on the reservation.”<sup>142</sup> Before it can build the water infrastructure that it desperately needs, however, the Nation needs to secure its *Winters* rights.

The Diné Nation “possesses extensive water rights, but these rights are largely unquantified.”<sup>143</sup> The Tribe's water rights are also jurisdictionally complicated:

The lands of the Navajo Nation are located within the four sacred mountains. Navajo lands are located in three states and multiple water basins and sub-basins.

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138. TANANA ET AL., *supra* note 32, at 2.

139. *Id.* at 3.

140. *Id.* at 15. Specifically, “Navajo families that need to haul water spend \$43,000 per acre-foot of water, while the average American water user spends only \$600 per acre-foot of water.” *Id.* An acre-foot is a common measure of agricultural water supplies in the West and describes the amount of water it takes to cover an acre of land with one foot of water—roughly 326,000 gallons. *What's An Acre-Foot?*, WATER EDUC. FOUND. (viewed Aug. 19, 2022), <https://www.watereducation.org/general-information/whats-acre-foot>.

141. TANANA ET AL., *supra* note 32, at 15.

142. *Id.* at 16 (citation omitted).

143. *Water Rights*, NAVAJO NATION WATER RTS. COMM'N, <https://nnwrc.navajo-nsn.gov/Water-Rights> (last visited Sept. 25, 2022).

The major basins are the Upper and Lower Basins of the Colorado River and the Rio Grande Basin. Water rights are typically determined by basin.<sup>144</sup>

The Nation is pursuing these water rights across multiple basins in three states, through both litigation and settlement. In terms of litigation, for example, the Navajo Nation is a party in five general stream adjudications.<sup>145</sup>

While settlement is generally the quicker and less expensive quantification route for Tribes,<sup>146</sup> the Navajo Nation's processes (at least one per state) have taken decades.<sup>147</sup> Indeed, the Diné had completed only one such settlement before the COVID-19 pandemic began.<sup>148</sup> On April 19, 2005, the Navajo Nation and the State of New Mexico signed a settlement agreement to recognize the Tribe's water rights in the San Juan River, which President Obama signed into federal law in 2009, and the Navajo Nation's water rights in the San Juan River were formally adjudicated in November 2013.<sup>149</sup>

More recently, in May 2022, and apparently partly in apologetic reaction to what COVID-19 did to the Diné (as will be discussed in the next section), the Navajo Nation, the State of Utah, and the federal government completed the Navajo Utah Water Rights Settlement Agreement (pre-authorized by Congress in 2020).<sup>150</sup> This settlement "confirms the Navajo Nation's right to deplete 81,500 acre-feet of water per year from Utah's Colorado River Basin apportionment and authorizes around \$220 million for water structure projects."<sup>151</sup>

As the Utah settlement indicates, most of the Navajo Reservation lies within the drainage basin of the Colorado River, which forms the Reservation's west

144. *Home*, NAVAJO NATION WATER RTS. COMM'N, <https://nnwrc.navajo-nsn.gov/Water-Rights> (last visited Sept. 25, 2022).

145. NAVAJO NATION WATER RTS. COMM'N, *supra* note 143.

146. CONG. RSCH. SERV., *supra* note 54, at 2–3; Hawkins, *supra* note 57, at 231–32.

147. See NAVAJO NATION WATER RIGHTS COMM'N, *supra* note 143 (noting general stream adjudications take place on a "state-by-state basis"); David Stearns & Jeremy Wood, *Winters Water Rights Revived After Navajo Nation Case*, JDSUPRA (Apr. 12, 2022), <https://www.jdsupra.com/legalnews/winters-water-rights-revived-after-1499841/> (discussing the Supreme Court entering the 1964 Decree "[a]fter a decade of litigation" on the issue of Colorado River water apportionment in *Arizona v. California*, 376 U.S. 340, 341 (1964), amended *sub nom. Arizona v. California*, 383 U.S. 268 (1966), and amended *sub nom. Arizona v. California*, 466 U.S. 144 (1984)).

148. *Navajo Nation Water Rights Settlement*, N.M. OFF. OF THE STATE ENG'R (last visited Sept. 26, 2022), <https://www.ose.state.nm.us/Legal/settlements/NNWRS>.

149. *Id.*

150. Press Release, Office of the Speaker, 24th Navajo Nation Council, The Navajo Utah Water Rights Settlement Act Finalized by the Navajo Nation, State of Utah, and the Interior Department (May 27, 2022), [https://nnwrc.navajo-nsn.gov/Portals/0/HOME/PAGE/Homepage%20News/2022/Navajo%20Utah%20Water%20Rights\\_2022.05.27.pdf](https://nnwrc.navajo-nsn.gov/Portals/0/HOME/PAGE/Homepage%20News/2022/Navajo%20Utah%20Water%20Rights_2022.05.27.pdf).

151. *Id.* Utah's share of the Colorado River is 23 percent of 7.5 million acre-feet a year (less downstream delivery obligations), or roughly 1.725 million acre-feet per year. D. LARRY ANDERSON, *THE COLORADO RIVER: UTAH'S PERSPECTIVE* 4 (2d ed. 2002), <https://water.utah.gov/wp-content/uploads/2019/01/TheColoradoRiverart.pdf>.

boundary<sup>152</sup>—and most of that water is in Arizona. The most extensive, and longest, Colorado River water rights lawsuit, *Arizona v. California*,<sup>153</sup> failed to quantify the Navajo Nation’s water rights to the Colorado River and its tributaries in the U.S. Supreme Court’s final 1964 Decree:

In proceedings before a Special Master, the United States asserted claims to various water sources in the Colorado River Basin on behalf of twenty-five tribes. But the United States only asserted claims to the Colorado River *mainstream* on behalf of five tribes, and the Nation was not among them. Instead, the United States at that time limited the Nation’s claim to the Little Colorado River, one of the tributaries in the Colorado River system. The Nation, along with other tribes, sought the appointment of a Special Assistant Attorney General to represent their interests, but their request was denied. The Nation also sought to intervene in proceedings before the Special Master, but its motion to intervene was denied at the United States’ urging.<sup>154</sup>

“The 1964 Decree . . . determined the *Winters* rights of . . . five tribes for whom the federal government asserted federally reserved rights.”<sup>155</sup> “However, the Supreme Court declined to adjudicate the claims of the twenty other tribes for whom the United States asserted claims, including the Nation’s.”<sup>156</sup> In particular, the *Arizona v. California* decree “excluded the Little Colorado River—and therefore the Nation’s claim—from the adjudication, along with other tributaries in the river system.”<sup>157</sup> Finally, in Article IX of the 1964 Decree, the Supreme Court provided that:

Any of the parties may apply at the foot of this decree for its amendment or for further relief. The Court retains jurisdiction of this suit for the purpose of any order, direction, or modification of the decree, or any supplementary decree, that may at any time be deemed proper in relation to the subject matter in controversy.<sup>158</sup>

Rather than try to re-open the *Arizona v. California* litigation, however, the Nation filed a new lawsuit in 2003, attempting to tie the federal trust responsibility to Tribes to the Nation’s need for water.<sup>159</sup> Specifically:

[T]he Navajo Nation (the Nation) sued the Department of the Interior (Interior), the Secretary of the Interior (the Secretary), the Bureau of Reclamation, and the Bureau of Indian Affairs (collectively, the Federal Appellees), bringing claims

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152. *Navajo Nation v. U.S. Dep’t of the Interior*, 26 F.4th 794, 800 (9th Cir. 2022), *cert. granted*, 143 S.Ct. 398 (Nov. 4, 2022) [hereinafter *Navajo Nation II*].

153. *Arizona v. California*, 373 U.S. 546 (1963) [hereinafter *Arizona I*]; *Arizona v. California*, 376 U.S. 340 (1964) [hereinafter 1964 Decree].

154. *Navajo Nation II*, 26 F.4th at 801 (citations omitted).

155. *Id.* (citing 1964 Decree, 376 U.S. at 344–45).

156. *Id.* at 803 (citing *Arizona I*, 373 U.S. at 595).

157. *Id.* at 801 (citing 1964 Decree, 376 U.S. at 352–53).

158. 1964 Decree, 376 U.S. at 353.

159. *Navajo Nation II*, 26 F.4th at 799.

under the National Environmental Policy Act (NEPA) and a breach of trust claim for failure to consider the Nation's as-yet-undetermined water rights in managing the Colorado River. Several parties, including Arizona, Nevada, and various state water, irrigation, and agricultural districts and authorities (collectively, the Intervenor(s)), intervened to protect their interests in the Colorado's waters.<sup>160</sup>

In 2017, the Ninth Circuit concluded that the Nation could not bring its NEPA claim but that the tribal trust claim could proceed.<sup>161</sup> On remand from that decision, and in light of the Nation's motion to amend its breach of trust claims, the district court decided that the Nation's trust claims for water rights were barred by *res judicata* as a result of the water rights decrees in *Arizona v. California*.<sup>162</sup>

The Ninth Circuit disagreed. The Navajo Nation was not seeking to adjudicate its water rights in the Colorado River; instead, it was seeking "an injunction ordering the Federal Appellees to investigate the Nation's needs for water, to develop a plan to meet those needs, and to exercise its authority over the management of the Colorado River consistent with that plan."<sup>163</sup> Because "the Nation's claim is not determined by any specific provision in the 1964 Decree, as none addresses the Navajo Nation's water rights[,] the Nation's breach of trust claim thus falls outside the scope of the Decree, and our jurisdiction is proper."<sup>164</sup>

The Ninth Circuit then held that:

[U]nder *Winters*, Federal Appellees have a duty to protect the Nation's water supply that arises, in part, from specific provisions in the 1868 Treaty that contemplated farming by the members of the Reservation. The Treaty provides that individual members of the Nation may select plots of land if they "desire to commence farming." 1868 Treaty, art. V. Tribal members who took up farming would be entitled to "seeds and agricultural implements" to help make this transition. *Id.* art. VII. The Treaty's farming-related provisions, which sought to encourage the Nation's transition to an agrarian lifestyle, would have been meaningless unless the Nation had sufficient access to water.<sup>165</sup>

Thus, in combination with the 1868 treaty, the *Winters* doctrine created trust obligations to the Nation that the federal government has a duty to fulfill, and "[t]he Nation's breach of trust claim is also strengthened and reinforced by the Secretary's pervasive control over the Colorado River."<sup>166</sup> As a result, the

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160. *Id.*

161. *Navajo Nation v. Dep't of Interior*, 876 F.3d 1144, 1174 (9th Cir. 2017).

162. *Navajo Nation II*, 26 F.4th at 799–800.

163. *Id.* at 805–06.

164. *Id.* at 806.

165. *Id.* at 810–11.

166. *Id.* at 812 (explaining this control comes largely through the Boulder Canyon Project Act and the Supreme Court's 1963 conclusion that the Act gives the Secretary of the Interior extensive



federal government has a trust “duty to protect and preserve the Nation’s right to water.”<sup>167</sup>

As in the 2022 Utah water rights settlement with the Navajo Nation, the Ninth Circuit’s awareness of what COVID-19 had done to the Nation expressly informed its decision, the end part of which is worth quoting at length:

We recognize that no court has yet quantified the Nation’s *Winters* rights. But the fault for the exceedingly long delay in that respect, if any, lies with Federal Appellees. As trustee, the federal government has the power to not only bring water rights claims on behalf of the tribes, but also to bind them in litigation. When the Nation tried to intervene in *Arizona v. California*, the federal government opposed the Nation’s motion. And in the more than half of a century since the Supreme Court issued its 1964 Decree, the Nation has never had its *Winters* rights adjudicated or quantified by any court. This result is but one example of what a commentator has described as the federal government’s failure “to secure, protect, and develop adequate water supplies for many Indian tribes.” Cohen’s Handbook § 19.06. Indeed, “[i]n the history of the United States Government’s treatment of Indian tribes, its failure to protect Indian water rights for use on the reservations it set aside for them is one of the sorrier chapters.” *Id.* (citing National Water Comm’n, *Water Policies for the Future: Final Report to the President and to the Congress of the United States*, 474–75 (1973)).

The Supreme Court could not have intended to hamstring the *Winters* doctrine—which has remained good law for more than one hundred years—by preventing tribes from seeking vindication of their water rights by the federal government when the government has failed to discharge its duties as trustee. Such a perverse reading of the Court’s precedents would render ineffectual the federal government’s promise to “charge[] itself with moral obligations of the highest responsibility and trust,” *Seminole Nation v. United States*, 316 U.S. 286, 297 . . . (1942), by ensuring that the tribes of this country can make their reservation lands livable. *This principle takes on even more importance in an era in which the COVID-19 pandemic renders reservation lands more dangerous to tribal members—particularly when they lack adequate water for health and safety purposes.*<sup>168</sup>

As a result, the Navajo Nation could amend its complaint to pursue its breach of trust claim against the U.S. Department of the Interior.<sup>169</sup>

On November 4, 2022, the U.S. Supreme Court granted both the State of Arizona’s and the Department of the Interior’s petitions for certiorari.<sup>170</sup> Regardless, of eventual outcome, however, both this litigation and the Utah

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allocation authority in the Lower Basin of the Colorado River, which is where most of Arizona and the Navajo Nation sit).

167. *Id.* at 811.

168. *Id.* at 813 (emphasis added) (citations omitted).

169. *Id.* at 814.

170. *Dept. of the Interior v. Navajo Nation & Arizona v. Navajo Nation*. 143 S.Ct. 398 (Nov. 4, 2022).

water rights settlement came too late to help the Diné battle the COVID-19 pandemic.

### 3. The Diné Nation During COVID-19

During the coronavirus pandemic, the Diné’s profound water insecurity thoroughly undermined the Navajo Nation’s ability to undertake proper COVID-19 precautions. Thus, “[i]n March 2020, COVID-19 started ravaging the Navajo Nation, turning it into a national hot spot for the virus. The infection rate among Diné (Navajo people) was aggravated by several issues, including chronic underlying illnesses, food and water insecurity, and a lack of electricity among a third of households.”<sup>171</sup> Measures *were* implemented; for example, “[d]uring the COVID-19 pandemic, Diné families have had to endure more curfews than any other people in the United States. The Navajo Nation instituted a 57-hour weekend lockdown from Friday evening to Monday morning as well as nightly curfews . . . .”<sup>172</sup> Billboards in Navajo instructed the Diné to wash their hands, wear masks, socially distance, and stay home.<sup>173</sup> However, because essential activities included both getting food and hauling water, and because of the long distances involved, many Diné had no choice but to spend hours in close company.<sup>174</sup> Moreover, “[w]ithout running water, the frequent washing of hands—prescribed by the CDC—is difficult at best.”<sup>175</sup>

Not coincidentally, the Navajo Nation had one of the highest COVID-19 infection rates in the nation.<sup>176</sup> By mid-April 2020, “there had been 1,104 confirmed COVID-19 cases and 45 deaths in the Navajo Nation . . . .”<sup>177</sup>

In May 2020, at the peak of COVID-19 infections in New York City, the Navajo Nation exceeded New York State for the highest infection rate, with 2,304 cases per 100,000 people, compared to 1,806 cases per 100,000 in New York. As of March 25, 2021, the Navajo Nation has had 30,031 confirmed cases and 1,243 deaths. With approximately 173,000 members residing on the reservation, the Navajo Nation is currently experiencing 17,359 cases per 100,000, nearly twice the national rate.<sup>178</sup>

171. Donovan Quintero, *The COVID-19 Outbreak in the Navajo Nation*, AM. INDIAN, Summer 2021, at 10, <https://www.americanindianmagazine.org/story/the-covid-19-outbreak-in-the-navajo-nation>.

172. *Diné Family on Horseback* (photograph), in *id.* at 10–11.

173. *Public Health Message* (photograph), in Quintero, *supra* note 171, at 13.

174. *See id.* (noting the hours of driving required for many Diné to perform these essential activities).

175. *Delivering Drinking Water* (photograph), in Quintero, *supra* note 171, at 14.

176. TANANA ET AL., *supra* note 32, at 9.

177. *Addressing the Navajo Nation* (photograph), in Quintero, *supra* note 171, at 15.

178. TANANA ET AL., *supra* note 32, at 9.

By mid-June 2021, the death toll topped 1,300 people.<sup>179</sup> At that point, however, the vaccines were being distributed and, “[a]s of mid-June 2021, nearly 250,000 doses had been administered across the Navajo Nation and nearly 115,000 Diné had been fully immunized.”<sup>180</sup> Nevertheless, COVID-19 was not done with the Diné: by late October 2022, the Navajo Nation had registered 75,873 positive cases of COVID-19 and 1,934 COVID-19-related deaths.<sup>181</sup> Moreover, emergency orders remain in effect.<sup>182</sup>

As with the Klamath Tribes, water rights—or the lack thereof—do not tell the complete story of differential health outcomes between the two sets of Tribes. Even so, when “[t]estifying before the House of Representatives, [Navajo Nation] President Nez stated that “[t]he outbreak of COVID-19 on the Navajo Nation has largely been attributed to lack of water in the homes of Navajo people . . . clean water is a sacred and scarce commodity.”<sup>183</sup>

## V. CONCLUSION

As the plight of the Navajo, the 2022 Navajo-Utah Water Rights Settlement, and the Ninth Circuit’s 2022 decision in *Navajo Nation v. U.S. Department of the Interior* all suggest, the coronavirus pandemic highlighted the importance of tribal access to water in promoting and preserving the health of Native Americans. That access, in turn, often starts with securing and implementing tribal water rights. While the final outcome of the Navajo Nation’s quest for Colorado River Basin water—as limited as that supply is becoming—may turn on future decisions of the U.S. Supreme Court, the Ninth Circuit’s decision to tie the federal government’s tribal trust duties to *Winters* rights provides a new pathway to invigorating those rights. Regardless of the future outcome of that particular case, however, COVID-19 made clear that Native American Tribes need their water rights, and they need them now.

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179. *Addressing the Navajo Nation*, *supra* note 177.

180. *Getting Vaccinated* (photograph), in Quintero, *supra* note 171, at 19.

181. *Dikos Ntsaaigii-19 (COVID-19)*, NAVAJO HEALTH, <https://ndoh.navajo-nsn.gov/Covid-19> (last visited Oct. 28, 2022).

182. *See* NAVAJO REOPENING STATUS, NAVAJO NATION, <https://navajoreopening.navajo-nsn.gov/> (last visited Sept. 26, 2022) (discussing the Navajo Nation’s reopening plans).

183. TANANA ET AL., *supra* note 32, at 9.