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### **Securing a Permanent Homeland: The Federal Government's Responsibility to Provide Clean Water Access to Tribal Communities**

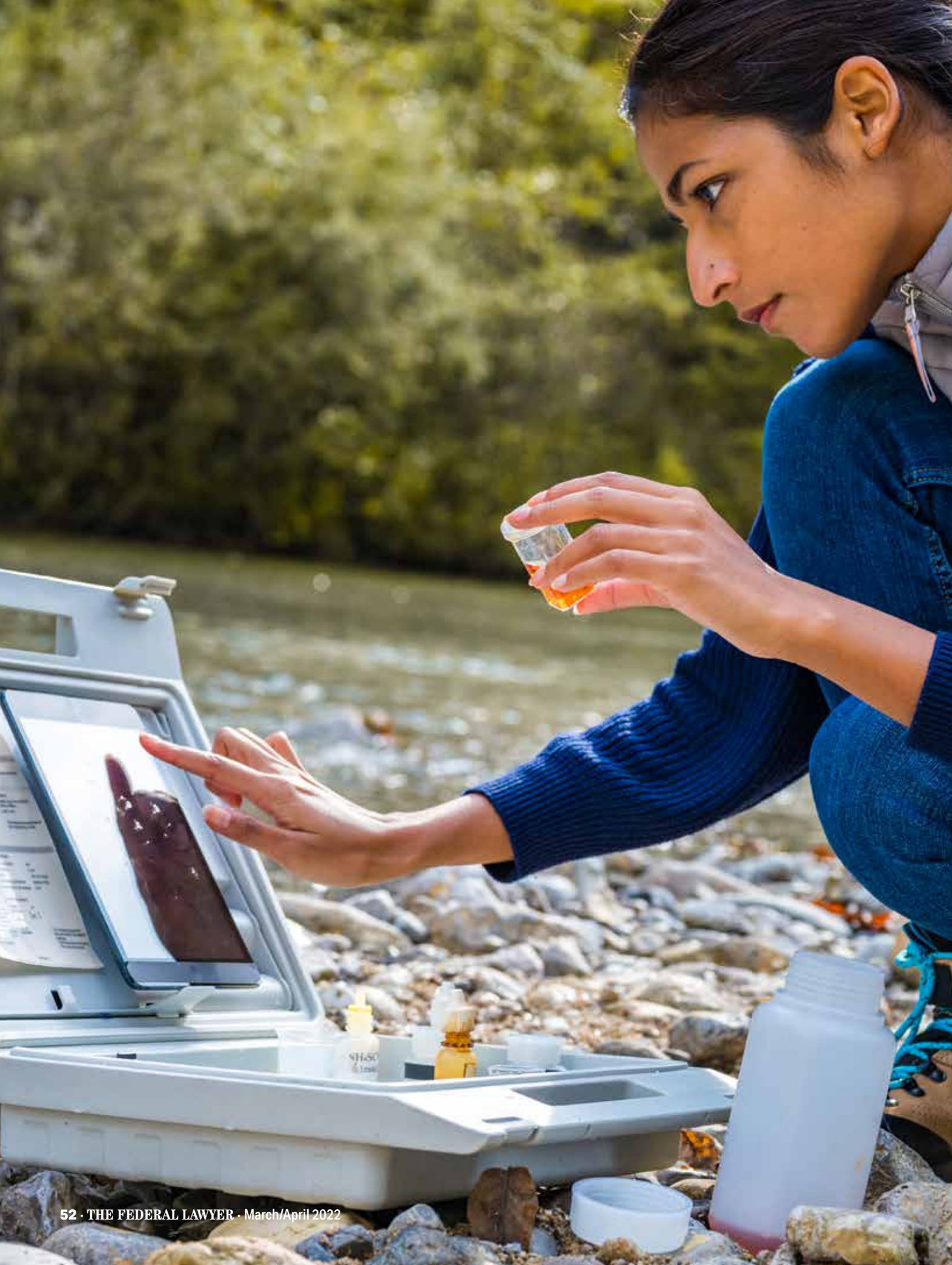
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# Securing a Permanent Homeland: The Federal Government's Responsibility to Provide Clean Water Access to Tribal Communities

HEATHER J. TANANA

**W**ater is life—critical to the health, socioeconomic, and cultural needs of any community. Every household in the United States needs and deserves access to clean, reliable, and affordable drinking water. Yet, tribal communities face high rates of water insecurity. More than a half million people—nearly 48 percent of tribal homes in Native communities across the United States—do not have access to reliable water sources, clean drinking water, or basic sanitation. In comparison, as a whole, less than 1 percent of households in the United States lack these facilities.<sup>1</sup> This persistent problem became a matter of life or death during the COVID-19 pandemic, as the lack of running water increased the risk of transmission of the virus.<sup>2</sup> This article addresses the lack of clean water access experienced in Indian Country today. Various challenges to water access are highlighted, followed by a discussion of the federal government's responsibility to ensure clean water access for tribes. The article concludes by identifying federal actions to fulfill this responsibility, including the recent commitment of unprecedented funds to support tribal water infrastructure.

## Water Access in Indian Country

Lack of water access in tribal communities can take four different but related forms: (1) lack of piped water service, (2) poor water quality, (3) deteriorating or inadequate water infrastructure, and (4) unsupported operation and maintenance (O&M).

First, Native American households are 19 times more likely than white households in the United States to lack indoor plumbing with running water.<sup>3</sup> Navajo residents, in particular, are 67 times less likely than other Americans to live with access to running water.<sup>4</sup> In one neighborhood in Coconino County, Ariz.—an area that includes portions of five different reservations—73 percent of households lack a plumbing connection.<sup>5</sup> These families must haul water, often from long distances and at significantly greater cost than plumbed water, to meet their basic domestic needs.

Second, substandard water quality is pervasive in Indian Country. The Hopi Tribe, which has struggled with arsenic contamination since the 1960s, estimates that approximately 75 percent of people living on Hopi land are drinking contaminated water.<sup>6</sup> A recent study on the Crow reservation revealed that 39 percent of tribal family wells are unsafe for long-term consumption. However, faced with limited water options, 80 percent of families drink and cook with untreated well water, despite the associated health risks.<sup>7</sup>

Third, infrastructure investments have not kept up with tribal needs. Native Americans are one of the youngest and fastest growing populations. Because of deteriorating infrastructure, many tribes struggle to support their growing communities. The Colorado River Indian Tribes, among others, have water systems dating back to the late 1800s and early 1900s. Improvements and expansions are

required to ensure that water delivery and quality are not put at risk.

Finally, tribes face structural challenges in supporting the O&M requirements of existing water systems.<sup>8</sup> The Quechan Tribe has highlighted challenges supporting O&M costs to avoid disruptions to water service to their community. Their homes have clean water delivered through indoor plumbing. But to continue providing clean water, they need a reliable meter reading and billing system and a method of enforcement for nonpayment to continue these services. Supporting O&M requires capital and expertise, both of which can be challenging for tribes. Tribes cannot rely on traditional revenue streams (e.g., taxation of their lands) due to the nature of their governance. And, Indian Health Service (IHS), the only agency with authorization to support O&M,<sup>9</sup> has never actually been funded to do so. As a result, tribes must navigate limited federal technical assistance programs for operator training and financial assistance. When O&M funding is inadequate or unobtainable, the water system inevitably deteriorates.

Overcoming all four challenges is necessary to achieve and maintain water security.

### The Right to Clean Water

Many other countries, along with the United Nations, have recognized the urgency of water access by passing laws or resolutions on the basic human right to clean water and sanitation. In the United States, the federal government has treaty and trust responsibilities to ensure clean and safe water access to tribal communities. Each tribe has its own unique history, traditions, and community. However, many tribes share common experiences stemming from colonization, including forced removal from their homelands, treaty-making with the federal government, and establishment of reservations. When the United States established reservations, it did so to provide a permanent home for each tribe that would support their people forever. “The key to carrying out that promise is water—a fact that the tribal leadership has always known but which the United States has sometimes forgotten.”<sup>10</sup>

Treaties did not always specifically address the water needs of reservations. However, in *Winters v. United States*,<sup>11</sup> the U.S. Supreme Court held that tribes have a reserved right to water sufficient to fulfill the purposes of their reservation, including the residential development, economic development, and governmental needs of the tribe. Moreover, the federal government has an underlying trust responsibility “to protect Tribal treaty rights, lands, assets, and resources, as well as a duty to carry out the mandates of federal Indian law.”<sup>12</sup> The trust responsibility is different from statutory or regulatory mandates, which the U.S. Supreme Court recognized when it noted that “[i]f the fiduciary duty applied to nothing more than the activities already controlled by other specific legal duties, it would serve no purpose.”<sup>13</sup> While courts have previously reviewed the federal government’s trust responsibility related to drinking water on reservations, these analyses have generally focused on drinking water quality but not broad access to clean water.<sup>14</sup>

Nonetheless, it is undisputed that treaties, executive orders, and other documents that established reservations promised a permanent homeland for tribes, and access to clean and safe water is an integral part of any homeland. Under federal common law, courts have “long construed treaties between the United States and Indian Tribes in favor of the Indians.”<sup>15</sup> In addition to this canon of federal Indian law, many treaties specifically state that their provisions must be liberally construed. “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.”<sup>16</sup> The promises expressed in the treaties between the United States and tribes can reasonably be interpreted to require the federal government to ensure and fund access to clean water on reservations. In particular, treaty language requiring the federal government to create laws that ensure the permanent “prosperity” and “happiness” of the tribes should be interpreted to include water security.<sup>17</sup> Failure to provide basic water service cannot be reconciled with the general trust responsibility of ensuring the survival and welfare of tribes and their communities.

The federal government also has a treaty and trust responsibility “to ensure the highest possible health status for Indians” and to provide healthcare services to tribes.<sup>18</sup> Notwithstanding the strong connection between water access and public health, the federal government has contributed to health disparities and other inequities in tribal communities by prioritizing non-tribal water projects in the past. A century ago, the U.S. government invested in modern water and sanitation systems as a means of eradicating waterborne diseases. But government investment in water infrastructure over the past century has largely bypassed reservations.<sup>19</sup> “Ensuring access to water and sanitation for all people is not simply a question of water resources, technology and infrastructure, but also of setting priorities, tackling poverty and inequality, addressing societal power imbalances, and above all, political will.”<sup>20</sup>

Recent actions by the Biden administration and Congress indicate that we are entering a new era of federal–tribal relations—one where the federal government delivers on its promises. Achieving universal access to clean and safe water aligns with each of the four priorities of the current administration: COVID-19; Economic Recovery; Racial Equity; and Climate Change.<sup>21</sup> First, clean water access in Indian Country is necessary to follow the sanitation procedures recommended by health professionals to protect Native Americans from COVID-19 and other public health threats. Building water infrastructure in Indian Country will also promote economic recovery and address income injustice by creating jobs and resilient communities at the same time. Racial equity will also improve as we remove barriers that prevent Native communities from thriving and reduce the existing disparity in public health, educational attainment, and economic prosperity. Finally, universal clean water access will help create more resilient water systems on reservations to withstand the impacts of climate change.

### Fulfilling the Federal Responsibility to Provide Clean Water Access

At least seven different federal agencies with over 20 different programs provide some type of funding for tribal drinking water or sanitation projects.<sup>22</sup> Each agency has unique strengths and challenges in effectively implementing its programs to address some or all of the four forms of lack of access to clean drinking water in Indian Country. Every program provides different types of assistance and levels of funding, and each has its own eligibility, cost share, and application requirements.<sup>23</sup> The IHS is responsible for delivering healthcare services to tribes and, through its Sanitation Facilities Construction Program, provides Native American homes with domestic water supply and wastewater facilities. The Environmental Protection Agency ensures that drinking water is potable and assists communities in constructing and repairing water and wastewater systems through its Drinking Wa-

ter Infrastructure Grants–Tribal Set-Aside (DWIG–TSA) and Clean Water Indian Set-Aside (CWISA) programs.

The U.S. Department of Agriculture’s Rural Development Division seeks to improve the economy and quality of life for rural Americans, in part through its water-focused programs. The Department of Agriculture’s section 306(c) and 306(d) programs provide funding for the construction of drinking water and wastewater systems in tribal communities. The Bureau of Reclamation helps the western states meet water needs and balance multiple competing uses of water. The Bureau of Reclamation is integrally involved in the implementation of tribal water rights settlements, funds a tribal technical assistance program, and, through its Rural Water Supply program, has constructed water projects that serve tribal communities. The mission of the Bureau of Indian Affairs is to enhance the quality of life, promote economic opportunity, and carry out the responsibility to protect and improve the trust assets of tribes.<sup>24</sup> The Bureau of Indian Affairs has been a critical component in tribal water rights settlements and adjudications that frequently result in construction of domestic water infrastructure, and it provides economic development and workforce training as well as technical support. Limited historical funding for these programs has forced responsible agencies to prioritize and circumscribe the projects and efforts to which their funding has been directed. However, with the passage of the Infrastructure Investment and Jobs Act and other legislation, these limitations are no longer necessary or appropriate.

The Infrastructure Investment and Jobs Act provided unprecedented funding for infrastructure in Indian Country, creating a historic opportunity for the federal government to more fully realize its responsibility to provide clean drinking water and sanitation services to Native Americans. For the first time since the Sanitation Facilities Construction Program was created in 1959, Congress fully funded the program at \$3.5 billion.<sup>25</sup> The Environmental Protection Agency’s tribal set-asides for clean water and safe drinking water received approximately \$700 million that can benefit tribes (\$234 million each for CWISA and DWIG–TSA, as well as funding for the Indian Reservation Drinking Water Program and Operational Sustainability of Small Public Water Systems).<sup>26</sup> BOR also received \$2.5 billion to complete tribal water right settlements that already have been authorized by Congress and frequently include funding for tribal water infrastructure, in addition to funding for other water access related projects, such as water storage, recycling, and reuse.<sup>27</sup>

The administration has advocated for a “whole of government” approach to other issues in which the responsibilities of several departments and agencies overlap, including combating climate change and protecting public and environmental health.<sup>28</sup> The same type of approach is warranted to ensure that the newly appropriated funds get to the tribal communities they are meant to serve. To deploy this intentional and coordinated approach, the Biden administration must (1) formally establish the goal of achieving universal clean water access for tribes; (2) direct federal agencies to work together, pooling their resources and optimizing their expertise; and (3) task an interagency working group to carry out the mission by establishing a process that allows agencies to draw on their strengths, facilitates agency collaboration, and holds agency leadership accountable for progress toward the ultimate goal. Successful implementation of a whole of government approach is critical to providing adequate drinking water and sanitation to tribes. Additionally, there are changes that each agency can make to its existing drinking water

and sanitation programs to make these programs more accessible to tribes and more effective in their implementation. For example, IHS could revisit its definition of an “Indian community” to cover all base infrastructure within a reservation, including schools and hospitals, and to better account for and support future tribal growth.<sup>29</sup>

Now is the time to get all American citizens access to clean water. Native Americans must not be left behind again. This will ensure that the inequitable impact we’ve seen during the COVID-19 pandemic will not be repeated in the future. ☺

*This article is based on the work of the Water & Tribes Initiative–Universal Access to Clean Water for Tribal Communities, available at <https://tribal-cleanwater.org>. Contributing authors to the Water & Tribes Initiative reports include Bidiah Becker (California Environmental Protection Agency); Anne Castle (Getches-Wilkinson Center/University of Colorado); Ana Olaya (CK Blueshift, LLC); Jaime Garcia (Getches-Wilkinson Center/University of Colorado); and Chelsea Colwyn (Getches-Wilkinson Center /University of Colorado).*



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## Endnotes

<sup>1</sup>DEMOCRATIC STAFF OF THE H. COMM. ON NAT. RES., WATER DELAYED IS WATER DENIED (Oct. 10, 2016), [https://naturalresources.house.gov/imo/media/doc/House%20Water%20Report\\_FINAL.pdf](https://naturalresources.house.gov/imo/media/doc/House%20Water%20Report_FINAL.pdf).

<sup>2</sup>Desi Rodriguez-Lonebear et al., *American Indian Reservations and COVID-19: Correlates of Early Infection Rates in the Pandemic*, 26 J. PUB. HEALTH MGMT. PRAC. 371 (2020).

<sup>3</sup>DIG DEEP & U.S. WATER ALL., CLOSING THE WATER ACCESS GAP IN THE UNITED STATES: A NATIONAL ACTION PLAN (2019), [http://uswateralliance.org/sites/uswateralliance.org/files/publications/Closing%20the%20Water%20Access%20Gap%20in%20the%20United%20States\\_DIGITAL.pdf](http://uswateralliance.org/sites/uswateralliance.org/files/publications/Closing%20the%20Water%20Access%20Gap%20in%20the%20United%20States_DIGITAL.pdf).

<sup>4</sup>DigDeep, *About the Navajo Water Project*, <https://www.navajowaterproject.org/project-specifics> (last visited Feb. 15, 2022).

<sup>5</sup>Shiloh Deitz & Katie Meehan, *Plumbing Poverty: Mapping Hot Spots of Racial and Geographic Inequality in U.S. Household Water Insecurity*, 109 ANNALS AM. ASS’N GEOGRAPHERS 1 (2019).

<sup>6</sup>U.S. House of Representatives Comm. on Appropriations, Subcomm. on Interior, Environment, & Related Agencies, 115th Cong. \_\_\_\_ (Mar. 7, 2019) (testimony of Timothy Nuvangyaoma, Chairman, Hopi Tribe), <https://www.congress.gov/116/meeting/house/109008/witnesses/HHRG-116-AP06-Wstate-NuvangyaomaT-20190307.pdf>; Rowan Lynam, “It Eats You.” *Cancer-causing Arsenic Plagues Hopi Tribe*, THE PROGRESSIVE MAGAZINE (Apr. 28, 2018), <https://progressive.org/dispatches/it-eats-you-cancer-causing-arsenic-plagues-hopi-tribe-180428/>; Mary Katherine Wildeman, *Arsenic in Hopis’ Water Twice the EPA Limit, and It May be Making Them Sick*, THE REPUBLIC (Aug. 24, 2016).

<sup>7</sup>Christine Martin et al., *Our Relationship to Water and Experience of Water Insecurity among Apsáalooke (Crow Indian) People, Montana*, 18 INT. J. ENV’T. RES. PUB. HEALTH 582 (2021).