

Universal Access to Clean Water for Tribes in the Colorado River Basin

Executive Summary



Universal Access to Clean Water for Tribes in the Colorado River Basin

About this Report

This report was produced for the Water & Tribes Initiative: Colorado River Basin by Heather Tanana (Lead Author), JD/MPH, Assistant Professor of Law (Research) & Stegner Fellow, Wallace Stegner Center – S.J. Quinney College of Law – University of Utah; Jaime Garcia, JD, Water Fellow, Getches-Wilkinson Center – University of Colorado; Ana Olaya, JD/LLM, Managing Director, CK Blueshift, LLC; Chelsea Colwyn, JD/MELP, Water Fellow, Getches-Wilkinson Center – University of Colorado; Hanna Larsen (JD expected 2022), Wallace Stegner Center – S.J. Quinney College of Law – University of Utah; Ryan Williams (JD expected 2022), Wallace Stegner Center – S.J. Quinney College of Law – University of Utah; and Jonathan King, Attorney, Squire Patton Boggs.

There is no official consensus regarding the terminology used related to Indigenous peoples or when to capitalize certain terms. In this report, Native American and American Indian/Alaska Native are used as well as general capitalization of the words Tribe and Tribal as a sign of respect.

Disclaimer: *The report is subject to ongoing data collection and may be revised as new information is received. URLs provided were operational at the time of writing but may have subsequently been changed or deactivated.*

Photo/art Credits:

Front cover art - Indigenous Artist Chad L Yellowjohn | Shoshone-Bannock / Spokane Tribe

Website: <https://www.lilcoyote.com> | Instagram: @Lil_Coyote

3 - Dave Showalter

4 - Dave Showalter

5 - Top: John Weisheit, Bottom: Nikki Tulley

8 - John Weisheit

10 - JoAnn Smith

Back - Daryl Vigil

The full report is available [here](#).

© April 2021 Water & Tribes Initiative | Colorado River Basin

Foreword



Colorado River Basin Native American Tribal Leaders

This is a timely and much needed report. Clean water is fundamental to life, but many of our people have never had an opportunity to experience this basic and essential service, one that is taken for granted in most American communities. Many of our family members, our elders, and our children have lost their lives during the COVID-19 pandemic because clean and safe water was not available. The necessity and the urgency of having access to safe water sources has been starkly demonstrated during this trying time.

Helping to provide clean water to us, throughout Indian Country, benefits everyone, and its absence correspondingly jeopardizes the health of the entire United States of America. As the pandemic has made clear, any hot spot for the virus inevitably and inexorably spreads to other areas, both neighboring and far flung. With our homes in Indian Country many times more likely than homes in white communities to lack indoor plumbing, our nation's resources must be quickly focused on addressing this inequity for the protection of all.

The United States government has long promised all Native American Tribes a “permanent homeland,” a “livable reservation,” and a home “conducive to the health and prosperity of the Indians.” But these promises are broken when we do not have clean water to drink, to cook with, and to wash as required to avoid the spread of this deadly disease. Both the Tribes and the United States envisioned our homelands as places where our people can thrive, as they had done from time immemorial. It is long past time to make that vision a reality. Access to safe and clean water must be made available now. Promises made must be kept and access provided to this most basic of human needs—clean water.

Tó éí iiná até [Water is Life],
Jonathan Nez | President, Navajo Nation

Paatuwaqatsi [Water is Life],
Timothy Nuvangyaoma | Chairman, Hopi Tribe

Payy new aakut [Water is Life],
Manuel Heart | Chairman, Ute Mountain Ute Tribe and Ten Tribes Partnership

Xa 'iipayk [Water is Life],
Jordan D. Joaquin | President, Fort Yuma Quechan Indian Tribe



Foreword

Senator Michael F. Bennet

“I believe that every American has a fundamental right to breathe clean air and drink clean water. I know that we haven’t fulfilled that right yet.”

—Joe Biden, Wilmington, Delaware, Sept. 14, 2020

It is unacceptable that in the 21st Century, some of our fellow Americans must travel for miles to collect water that is safe for drinking and everyday use.

Access to clean water is a human right. It is essential for people to live with dignity and foundational to virtually every other human right. Nevertheless, many American Indian and Alaska Native communities still lack access to clean water. By some estimates, 48% of households on Native American reservations do not have clean water or adequate sanitation. Native homes are 19 times more likely than white households to lack indoor plumbing. I’m told that in more remote areas of the Ute Mountain Ute reservation, it is now custom to bring bottled water as a greeting gift because water contamination is such a challenge.

When the federal government established reservations for Native American Tribes, it promised a permanent and livable homeland

for those it had displaced from their ancestral lands. The continued lack of access to clean and safe water for many Native American Tribes betrays this fiduciary responsibility. The federal government can wait no longer. The lack of access to clean water on reservations is a stain on our Republic, and we must strive urgently to fulfill this unmet responsibility.

This report details challenges of clean water access for the 30 Tribes in the Colorado River Basin and provides a thoughtful path forward. Although the various treaties and laws addressing the federal government’s responsibilities to Colorado River Basin Tribes are well-documented, this report is the first ever to describe the specific barriers preventing households on reservations from accessing clean water and assesses the numerous federal programs designed to correct this long-standing problem. Finally, the report offers recommendations that can help these programs achieve their intended purpose.

I commend the Water & Tribes Initiative for this vital contribution.

Michael F. Bennet
United States Senator

Executive Summary



Introduction

The coronavirus pandemic has tragically highlighted the vast and long standing inequities facing Tribal communities, including disparities in water access. The Water & Tribes Initiative (WTI) launched the Universal Access to Clean Water project to raise awareness and understanding about the lack of water security in Native American communities within the Colorado River Basin (CRB), and to engage leaders to solve the problem. As part of that initiative, WTI commissioned this report to describe current conditions among CRB Tribes, examine existing federal assistance programs, and develop policy recommendations to address Tribal community water needs. Key recommendations include adopting a whole of government approach and fully funding federal programs related to Tribal drinking water projects. A window of opportunity has opened to address water insecurity in Indian country. It is critical that action be taken before that window closes and these issues are ignored for several more generations.

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 main factors contributing to this elevated rate of incidence. According to the U.S. Water Alliance, Native American households are 19 times more

“In the arid West, it is clear—no lands can be a permanent homeland without an adequate supply of water, especially potable water. . . . Safe drinking water is a basic need, and the consequences of lack of access to reliable potable water supplies can be staggering.”

—Jonathan Nez, President, Navajo Nation¹



likely than white households to lack indoor plumbing. Without a safe, reliable, affordable, and easily accessible water supply, these households are unable to meet basic personal hygiene, food preparation, domestic cleaning, and other needs required for good health.

“Water is essential to every aspect of household and community life and the economy.”² Yet, many Tribal communities within the CRB still do not have access to clean and safe water. This lack of access reflects historical and persisting racial inequities that have resulted in health and socioeconomic disparities. “Race is the strongest predictor of water and sanitation access,” with Native Americans more likely than any other group to face water access issues.³

This report begins by assessing the current water related needs of the 30 CRB Tribes.⁴ Several factors contribute to water insecurity for Tribes, including the isolated nature of some reservations, lack of adequate infrastructure, and lack of clean water sources. Although, the exact nature and cause(s) of water insecurity vary from Tribe to Tribe, we have identified four broad challenges to water security, shared by many on-reservation communities.

Barriers to Providing Access to Clean Water for Tribes

Native American households are more likely to lack piped water services than any other racial group. 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.

Inadequate water quality is pervasive in Indian country. Clean water access includes the ability to utilize the water for its intended purposes. Some Tribes may have developed the necessary infrastructure to bring piped water into all of the community households. However, for a variety of reasons, that water may not be suitable for human consumption due to quality concerns. The Hopi Tribe has struggled with arsenic contamination in its water supply since its drinking water systems were first installed in the 1960s. The Tribe estimates that approximately 75 percent of people living on Hopi land are drinking contaminated water. Such contamination poses serious health risks, including diabetes, skin discoloration, cancer, blindness, and partial paralysis.

Existing water infrastructure is deteriorating or inadequate. Native Americans are a young and growing population. However, investment in water infrastructure has not kept up with population growth and other needs. Such underinvestment harms “the social, physical, and mental wellbeing” of Tribal communities and impairs their ability to thrive.⁵ “Closing the investment gap would improve the condition and performance of water systems, leading to supply-side and demand-side benefits to the economy.”⁶ For the Colorado River Indian Tribes (CRIT), deteriorating infrastructure has hindered their water delivery system and negatively impacted their economic development. A significant portion of CRIT’s water comes through infrastructure installed over the course of many decades, beginning in the 1870s. The high costs associated with outdated technology and infrastructure repairs has limited CRIT’s ability to realize the full potential value of its water and meet the growing needs of its community.

Operation and maintenance (O&M) of water systems is a critical component of ensuring long-term water security. While certain CRB Tribes have been able to initially construct suitable water infrastructure, O&M of the systems has proven to be difficult. The Jicarilla Apache Nation has experienced the challenges associated with providing ongoing support for O&M of Tribal infrastructure. Like other Tribes, the Jicarilla Apache Nation is unable to utilize traditional means of collecting revenue to support O&M—e.g., taxing Tribal lands. Infrastructure O&M, therefore, must be separately budgeted for year after year. When budgets are tight, allocations for O&M often suffer, repairs are delayed, and established infrastructure starts to degrade. The Jicarilla Apache Nation has seen this happen to its water delivery system, and water services to the community have been threatened.

The challenges described above existed prior to the pandemic. 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.⁷ Given that one in three Navajo homes does not have running water, it is not surprising that the Navajo Nation has suffered one of the highest infection rates in the country. The White Mountain Apache Tribe has also been disproportionately impacted by the pandemic, in part due to limited water access, and all of the CRB Tribes have experienced some degree of health, economic, and other impacts that have exacerbated pre-existing challenges. Beyond water security, the pandemic has 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.

The stark and disproportionate lack of access

to clean water on reservations is particularly egregious because the federal government has treaty and trust responsibilities to provide clean water to Tribes. In exchange for the cession of millions of acres of lands, Tribes received certain promises from the federal government. These promises often included the establishment of a reservation as a permanent homeland for Tribes. Based upon an underlying trust responsibility, the federal government has a duty “to protect Tribal treaty rights, lands, assets, and resources[.]”⁸

In *Winters v. United States*, the U.S. Supreme Court addressed Tribal water rights, holding that when reservations were created, the United States and Tribes reserved water rights—enough to fulfill the purposes of the reservation, from domestic to agricultural to hunting and fishing. 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. “Access to a clean, reliable supply of water is basic to human health,”⁹ and clearly a necessary component to making a homeland habitable and permanent.

Several of the CRB Tribes entered into treaties with the federal government. In these treaties, the federal government promised to establish a reservation as a permanent home for the Tribe and to enact laws “as may be deemed conducive to the prosperity and happiness of [the] Indians.”¹⁰ Unfortunately, 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. However, in at least partial recognition and fulfillment of its treaty and trust responsibility to provide access to clean water for Tribes, various federal agencies have established programs that provide support for water related projects.

Primary Federal Agencies Involved in Water Related Projects

The Indian Health Service's (IHS) Sanitation Facilities Construction (SFC) Program has been substantially involved in building water infrastructure in Indian country. Under the SFC Program, federal funds are used to design and construct water, wastewater, and solid waste facilities. However, the significant, ongoing funding deficit has hindered the advancement of a number of infrastructure projects. As a whole, IHS has been chronically underfunded. The SFC Program is no exception, receiving only a fraction of its total needs in IHS appropriations.

The Environmental Protection Agency (EPA) plays a key role in ensuring water quality in Indian country. The EPA is responsible for enforcing federal clean water and safe drinking water standards under the Clean Water Act (CWA) and the Safe Drinking Water Act (SDWA). The EPA is also able to fund drinking water and wastewater infrastructure through Tribal set-aside programs for both the CWA and SDWA. These grants can be used to provide Tribes with access to safe drinking water and sanitation, but

generally focus on improving water quality, as opposed to increasing individual delivery of water services. As a result, the EPA has limited ability to expand water access unrelated to water quality standards. The process to obtain EPA funding also varies by Region within the CRB. EPA Regions 6 (New Mexico) and 8 (Colorado, Utah, Wyoming) administer the DWIG-TSA program in conjunction with IHS, funding projects identified and prioritized by the IHS SFC Program. In contrast, EPA Region 9 (Arizona, California, Nevada) has established its own solicitation process and provides DWIG-TSA funding both directly to Tribes and through IHS.

The U.S. Department of Agriculture's (USDA) Rural Development program can help improve the quality of life in rural areas by providing financial programs to support essential public facilities and services, including water and sewer systems. Water and Waste Disposal Grants (Section 306c) provide the best opportunity for Tribes to secure grant money to build drinking water and waste disposal facilities. The USDA has a history of working with Tribes to access funding under its programs, but underwriting requirements and extensive pre-development work may deter some Tribes from applying.



The U.S. Bureau of Reclamation (BOR) has primarily been involved in water projects as a result of federal Indian water rights settlements or other specific Congressional direction. The BOR is also authorized to provide technical assistance and offers competitive funding to improve water conservation and management. However, the small amount of project funding available under the BOR's program limits the agency's role in Tribal water infrastructure projects.

While existing federal programs have made some headway in addressing the water crisis in Indian country, significant progress has remained elusive. This report identifies a number of legal and institutional barriers to providing clean water that will need to be addressed in order to advance the water needs of Tribes. Recognizing that much work remains to truly understand the many dimensions of this problem, some preliminary recommendations are identified to address these barriers.

Recommendations for Providing Access to Clean Water for Tribes

The federal government should adopt a “whole of government” approach to address the unacceptable lack of access to drinking water and sanitation for Tribal communities.

The federal government's current approach to providing drinking water and sanitation to Tribes is haphazard and inefficient. Currently, at least seven different federal agencies with at least 23 different programs provide some type of drinking water or sanitation funding for Tribes. The federal government should pursue a coordinated whole of government approach to develop a strategy to address this problem quickly and effectively.

To accomplish this, the federal government must fulfill its treaty and trust responsibilities to Tribes by supporting and fully funding water access initiatives in Indian country, which requires leadership and commitment to these issues at the federal level. Additionally, pooling and optimizing federal funding will allow the Tribes to maximize the various funding programs and achieve the greatest possible uptake and usage for Tribal water projects.

The federal agencies with drinking water and sanitation programs should work in close consultation with Tribes to identify shortcomings and refine the project selection process. Revision of the criteria for prioritizing and funding water projects can ensure long-term needs are met and remedy the current patchwork approach to securing drinking water access in Tribal communities. Moreover, as sovereign entities, Tribes have inherent authority to govern their land and people. They are best suited to identify and prioritize projects to meet the needs of their community and promote the health, safety, and well-being of their citizens.

The whole of government approach should enhance Tribal capacity and promote self-governance. Increasing Tribal awareness of available agency programs and funding technical assistance for completing the applications would simplify the entire process for Tribes. Projects should provide for technical support to increase development capacity within the Tribal community. Increased capacity will promote successful completion and Tribal control of projects, and help overcome challenges to supporting O&M of those projects into the future. Additionally, the federal government should fund collaborative projects between Tribal and state and local governments, which will further advance Tribal capacity.

Endnotes

¹ *The Navajo Utah Water Rights Settlement Act of 2019: Hearing on H.R. 644 Before the U.S. H. Natural Resources Comm.*, 116th Cong. 3 (June 26, 2019) (testimony of Jonathan Nez, President, Navajo Nation).

² American Society of Civil Engineers, *The Economic Benefits of Investing in Water Infrastructure* at 3 (2020) [hereinafter *Economic Benefits*].

³ U.S. Water Alliance and DigDeep, *Closing the Water Access Gap in the United States: A National Action Plan* 22 (2019).

⁴ The 30 CRB Tribes include: Ak-Chin Indian Community, Chemehuevi Indian Tribe, Cocopah Indian Tribe, Colorado River Indian Tribes, Fort McDowell Yavapai Nation, Fort Mojave Indian Tribe, Gila River Indian Community, Havasupai Tribe, Hopi Tribe, Hualapai Indian Tribe, Jicarilla Apache Nation, Kaibab Band of Paiute Indians, Las Vegas Tribe of Paiute Indians, Moapa Band of Paiute Indians, White Mountain Apache, Navajo Nation, Pascua Yaqui Tribe, Quechan Indian Tribe, Salt River Pima-Maricopa Indian

Community, San Carlos Apache Tribe, San Juan Southern Paiute Tribe, Shivwits Band of Paiute Indian Tribe of Utah (Constituent Band of the Paiute Indian Tribe of Utah), Southern Ute Indian Tribe, Tohono O'odham Nation, Tonto Apache Tribe, Ute Indian Tribe, Ute Mountain Ute, Yavapai-Apache Nation, Yavapai-Prescott Indian Tribe, and Pueblo of Zuni.

⁵ *Economic Benefits*, *supra* note 2, at 3.

⁶ *Id.* at 28.

⁷ Desi Rodriguez-Lonebear, et al., *American Indian Reservations and COVID-19: Correlates of Early Infection Rates in the Pandemic*, *J. Pub. Health Mgmt. Prac.* 26(4) (2020).

⁸ Bureau of Indian Affairs, *What is the Federal Indian Trust Responsibility?*, <http://www.bia.gov/FAQs/index.htm>.

⁹ U.S. Bureau of Reclamation, *Colorado River Basin Ten Tribes Partnership Tribal Water Study* at 7–10 (2018).

¹⁰ Treaty with the Navaho art. IX, Sept. 9, 1849, 9 Stat. 974.



For More Information

The Water & Tribes Initiative was catalyzed in 2017 to enhance the capacity of Tribes to advance their needs and interests with respect to water management in the Basin, and to advance sustainable water management through collaborative problem-solving. The Initiative is guided by a broad-based Leadership Team and funded through in-kind contributions of Tribes and many other organizations as well as funding from the Babbitt Center for Land and Water Policy, the Catena Foundation, and the Walton Family Foundation. For more information, please go to <http://naturalresourcespolicy.org/projects/water-tribes-colorado-river-basin.php>.

Leadership Team

Bidtah Becker, *Navajo Tribal Utility Authority*

Leland Begay, *Ute Mountain Ute*

Lorelei Cloud, *Southern Ute Tribe*

Maria Dadgar, *Inter Tribal Council of Arizona (Jay Tomkus, alternate)*

Jason John, *Navajo Nation (Crystal Tulley-Cordova, alternate)*

Nora McDowell, *Fort Mojave Indian Tribe*

Margaret Vick, *Colorado River Indian Tribes*

Jay Weiner, *Quechan Tribe*

Anne Castle, *Getches-Wilkinson Center, University of Colorado*

Peter Culp, *Culp & Kelly, LLP (Mary Kelly, alternate)*

Becky Mitchel, *Colorado Water Conservation Board*

Colby Pellegrino, *Southern Nevada Water Authority*

Jason Robison, *University of Wyoming, College of Law*

Garrit Voggeser, *National Wildlife Federation*

John Weisheit, *Living Rivers*

Julia Guarino, *University of Colorado (ex-officio)*

Sharon Megdal, *University of Arizona (ex-officio)*

Mike Wight, *Catena Foundation (ex officio)*

Daryl Vigil, *Jicarilla Apache Nation, co-facilitator*

Matthew McKinney, *Center for Natural Resources & Environmental Policy, co-facilitator*



Water & Tribes Initiative | Colorado River Basin