

Tribes, Water, and the  
Law  
a brief  
overview/introduction

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Presented to the WRRRC  
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by Heather Whiteman  
Runs Him

Director, Tribal Justice  
Clinic

University of Arizona  
Rogers College of Law

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“Globally, an estimated 884 million people lack access to safe drinking water. In the United States, only 0.6% of the population lacks access to drinking water and wastewater disposal.”

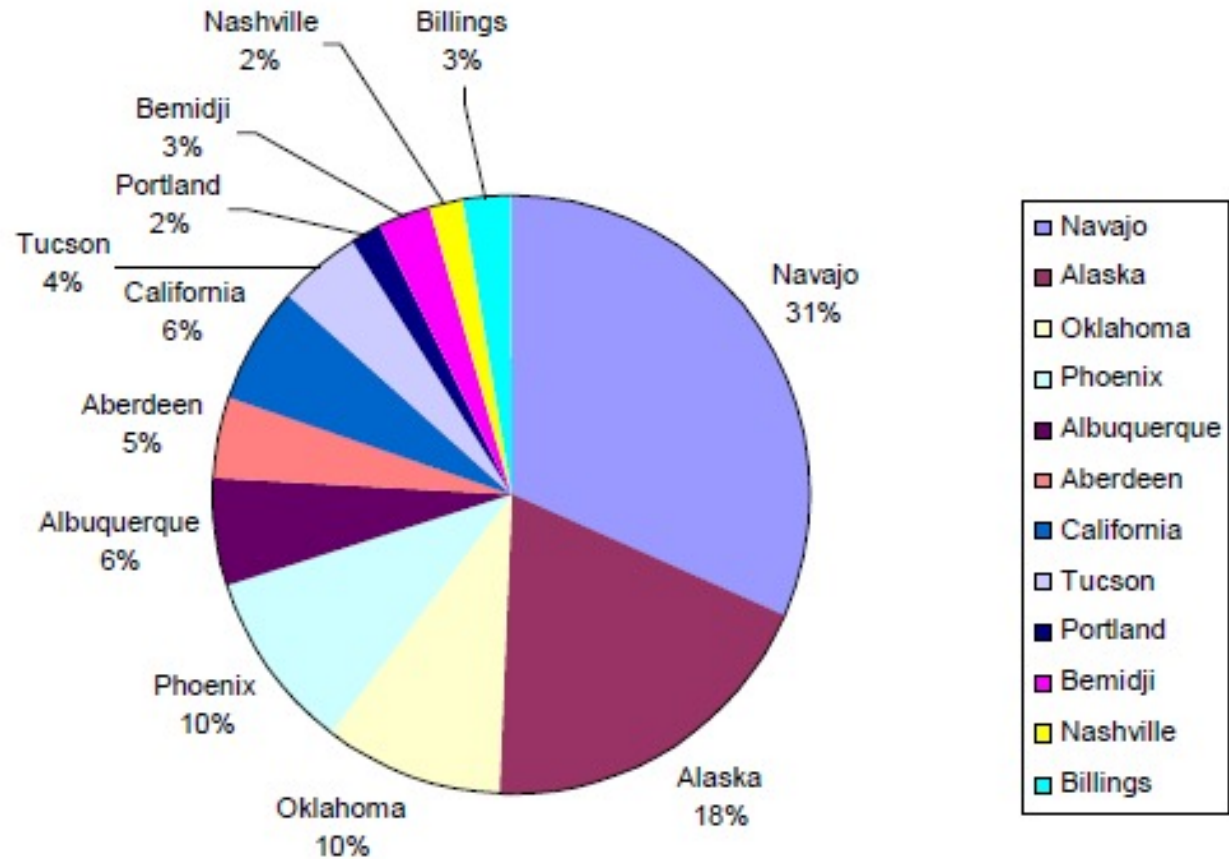


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Grossly disproportionately, 13% of American Indians lack access to drinking water and wastewater disposal. (2011)



Geographic  
Distribution of  
AI/AN Homes Which  
Lack Access to Safe  
Drinking Water and  
Wastewater  
Disposal



# Tribal Water Rights

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- Despite the difficulties facing overappropriated water systems, tribes need to protect their water interests.
- Many competing interests: municipal, industrial, conservation, recreation, agriculture, energy development.
- Pressure on scarce resource underscores the need for tribes to assert their rights and have a voice in processes allocating resources and funding for infrastructure projects.

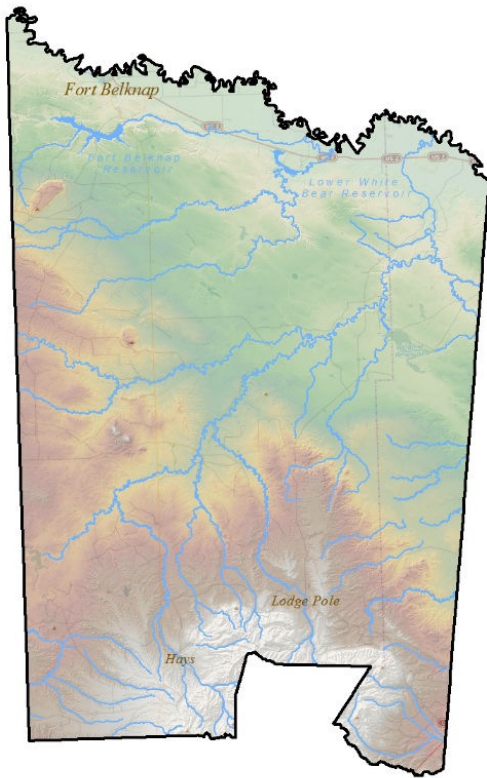


# *U.S. v. Winans*, 198 U.S. 371 (1905)

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- Background
- The Tribes ceded lands but reserved ongoing rights to utilize those lands and resources thereon, and thus entitled to protection of the ongoing viability of the rights reserved, and access to lands, activities, and resources couldn't be restricted or limited by non-Indians.





# *Winters v. U.S.*, 207 U.S. 564 (1908)

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- Background
- Established that purpose of a reservation creating a permanent homeland and agricultural lifestyle necessarily included sufficient water reserved for tribe/rez.



# *Winters* Doctrine and Reserved Rights of Indian Tribes

- In establishing an Indian Reservation, whether by treaty, executive order, or Congressional act, sufficient water was implicitly reserved to fulfill the purposes of the reservation.
- The priority date for these water rights is the date the reservation was established. This usually means a Tribe will have the senior water right within a basin, which may impact non-Indian water users upon enforcement of the right.
- Aboriginal Rights (*Winans*) are different from Reserved Rights, and have a priority date of time immemorial.

# Tribal Reserved Water Rights - Key Early Cases and Laws

- US v. Winans (1905)
- US v. Winters (1908)
- Confed. Tribes of Colville Reservation v. Walton (9<sup>th</sup> Cir. 1981)
- McCarran Amendment (1952)
- Arizona v. California (1963)
- Arizona v. San Carlos Apache Tribe (1983)





Where is  
the water?  
Should it  
matter?

- Groundwater is an increasingly important source for fulfillment of tribal water rights.
- Many reservations are located in arid regions with little to no surface water.
- “[W]hile we are unable to find controlling federal appellate authority explicitly holding that the *Winters* doctrine applies to groundwater, we now expressly hold that it does.” *Agua Caliente Band v. Coachella Valley Water District*, Case no. 15-55896, slip op. at 17 (March 7, 2017).

*AGUA CALIENTE BAND OF CAHUIILLA INDIANS v. COACHELLA VALLEY WATER DISTRICT, et al.*, 2019 WL 2610965,  
Case no. EDCV 13-00883 (E.D. Calif. 04/19/2019) (“*Agua II*”)

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## Phase II

- (1) whether the Tribe owns the pore space underlying its reservation;
- (2) whether there is a water quality component to the Tribe's federal reserved water right; and
- (3) the appropriate legal standard to quantify the Tribe's reserved water right.

“After considering all papers, the exhibits submitted therein, and the parties' arguments at the April 26, 2018 hearing and February 25, 2019 hearing, the Court finds the Tribe has standing to pursue the declaratory relief it seeks in its pore space claim **but does not have standing to pursue its quantification and quality claims.**”

Slip op. at \*1.

# AGUA II, cont'd

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- “The Court notes that although non-use does not destroy the Tribe's federally reserved water right, it affects whether the Tribe has standing to adjudicate the scope, extent, and character of that right.”
- “[T]he Tribe must provide evidence of injury to its ability to use sufficient water to fulfill the purposes of the reservation.”
- “[T]he Court finds that to satisfy the injury-in fact requirement for standing to quantify its Winters right, the Tribe must provide evidence that Defendants' actions actually or imminently harm the Tribe's ability to use sufficient water to fulfill the purposes of the reservation.”





# *Gila River Indian Community v. Cranford*, 2020 WL 2537435 No. CV-19-00407-TUC-SRB (D. Ariz. May 12, 2020)

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- August 14, 2019: GRIC filed a Complaint alleging that Defendants are unlawfully pumping Gila River water in derogation of its rights, and requesting that the court:
  - (1) declare that Defendants are irrigating their lands with waters of the Gila River without associated Decree rights;
  - (2) declare specifically which of Defendants' wells are pumping Gila River water;
  - (3) order that the Gila Water Commissioner cut off and seal Defendants' wells; and
  - (4) enjoin Defendants from diverting Gila River water to irrigate their lands.
- September 26, 2019: Defendants filed Motion to Dismiss, arguing that:
  - (1) the Court lacks jurisdiction to hear GRIC's claims, and
  - (2) in the alternative, the Court must abstain in deference to the ongoing Gila Adjudication.
- On October 28, 2019, GRIC filed its Response, arguing that:
  - (1) the Decree confers exclusive jurisdiction over the waters of the Gila River mainstem,
  - (2) the Gila Adjudication court lacks authority to issue an order inconsistent with the Decree, and
  - (3) abstention is neither permitted nor warranted.
- Court ordered additional briefing on the scope of jurisdiction 28 U.S.C. § 1362, confers.
- On April 3, 2020, parties filed supplemental briefs presenting arguments based on § 1362.
- Court finds that it has jurisdiction under 28 U.S.C. § 1362 and 28 U.S.C. § 1331 and neither the prior exclusive jurisdiction doctrine nor any abstention doctrine apply.

*Ak-chin Indian  
Community v.  
Maricopa-  
Stanfield  
Irrigation &  
Drainage  
District, Case  
2:20-cv-00489-  
JJT (D. Ariz.)*

- Filed March 6, 2020.
- “Ak-Chin seeks to permanently enjoin MSIDD and CAIDD from materially degrading the water delivered to Ak-Chin with poor quality groundwater and to ensure that Ak-Chin receives the quality of water it is entitled to receive under the Ak-Chin Settlement Act and related contracts.”
- “Under the 1984 Settlement Act, Ak-Chin is entitled to “a permanent water supply ... not less than seventy-five thousand acre-feet of surface water suitable for agricultural use” delivered “from the main project works of the [CAP] to the southeast corner of the Ak-Chin Indian Reservation.” 1984 Act § (2)(a).”
- 9/14/2020: District court denies Defendants’ Motion to Dismiss, but rules that the United States is a necessary party under FR19. Rules the US can be joined under contracts and Reclamation law, orders Plaintiff to join the US under Rule 19. Rejects Defendants arguments/defenses regarding ripeness/standing.
- 5/5/2021: U.S. Answer to Ak-chin claims filed, admitting many but not all of the allegations raised in the Tribe’s amended complaint.

# *Navajo Nation v. USDOJ*, No. 19-17088 2021 WL 1655885 (9<sup>th</sup> Cir. 2021)

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- Ninth Circuit reversed the District Court's dismissal and remanded with instructions to allow Navajo Nation to amend its complaint.
  - District court held that any attempt by the Nation to amend its complaint was futile because it lacked jurisdiction to decide the breach of trust claim due to the Supreme Court reserving jurisdiction over allocation of rights to the Colorado River in *Arizona v. California*.
- Ninth Circuit held that the Navajo Nation in this claim did not seek a judicial quantification of rights to the River, but rather asserted a breach of trust claim against the United States, which is different from a quantification claim that could have been asserted by the United States in *Arizona v. California*. This claim was not barred by res judicata, despite the federal government's representation of the Nation in *Arizona I*.
- The Ninth Circuit panel declined to address whether the Nation's *Winters* rights included rights to the mainstream of the Colorado River or to any other specific water resources at this stage of the litigation.
- United States has asked the Ninth Circuit to reconsider this decision, motion remains pending.

“Observational records and climate change projections provide abundant evidence that freshwater resources are vulnerable and have the potential to be strongly impacted by climate change, with wide-ranging consequences for human societies and ecosystems.”

## Looking Forward...



Decreasing Water Availability  
Continued Development in Cities  
Establishing Basic Water Infrastructure  
Financing of Water Projects in Debt  
Water Marketing  
Water for Fish  
Environmental Protection



# Closing thoughts

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- Contrast ideals and aspirations with the current reality and projections
  - Energy development impacts on water quality, water security
  - Water shortages and insufficient infrastructure
  - Climate Change and uncertainty
  - Risks of litigation
- Additional and alternate approaches
  - Co-management Agreements
  - Cooperation between stakeholders
  - Push for true self-determination in building indigenous water futures
  - Educating on sustainability, FPIC standard, resilience, and adaptability
  - Enhancing participation and new forms of advocacy and forging new allies