

# Protecting Indigenous Water Rights in the United States and Canada

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## Abstract

Access to clean water is a fundamental human right, yet Indigenous tribes in both the United States and Canada continue to face significant barriers in securing this basic necessity. This paper analyzes the current domestic and international legal frameworks applicable to the United States and Canada concerning Indigenous rights to clean water. In the United States Supreme Court ruling on *Arizona v. Navajo Nation*, it was established that the federal government has no obligation under the Treaty of Bosque Redondo to ensure access to clean water for Indigenous peoples through affirmative steps. The case raises concerns over the treaty interpretations, and how Indigenous rights are protected in judicial decisions. Similarly, a class action case brought by the Shamattawa First Nation in Canada challenged the government's failure to provide clean water to Indigenous communities. This paper explores the domestic legal instruments shaping Indigenous water rights across both jurisdictions. It also examines the international frameworks which create a human right to water and a state responsibility to protect Indigenous peoples' human rights. In light of these legal instruments, the paper makes a policy recommendation through international declaration amendments and renewed commitment to international obligations to support the right to access clean water owed to Indigenous peoples in the United States and Canada.

Keywords: Indigenous rights, clean water, environmental justice

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## I. Introduction

From the arrival of Juan Ponce de Leon in North America in the early 16th century to the 20th century, the Indigenous population of the continent was

reduced by up to 99 percent.<sup>1</sup> This was the result of

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<sup>1</sup> Ward Churchill. *A Little Matter of Genocide: Holocaust and Denial in the Americas 1492 to the Present* (San Francisco CA: City Lights Books, 1998), 129

violent conquest and colonization, leading into genocidal policies such as the Indian Removal Act of 1830, The Dawes Act of 1887 in the United States and the Indian Act of 1876, the residential school system, and the Missing and Murdered Indigenous Women and Girls crisis in Canada. Both jurisdictions have enacted policies allowing for what amounted to Indigenous child abduction by government authorities for the purpose of assimilation,<sup>2</sup> land dispossession in the form of pipelines through Indigenous lands and other such intrusions,<sup>3</sup> and voter disenfranchisement affecting Indigenous populations.<sup>4</sup>

Both the United States and Canada have attempted to make amends for these transgressions through forms of Indigenous rights protections. However, a recent battle is brewing in the legal sphere concerning the Indigenous right to water. This paper will elaborate on the current

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<sup>2</sup> Christie Renick, "The Nation's First Family Separation Policy: The Indian Child Welfare Act," *Imprint News*, October 9, 2018, <https://imprintnews.org/child-welfare-2/nations-first-family-separation-policy-indian-child-welfare-act/32431>;

Niigaanwewidam James Sinclair and Sharon Dainard, "Sixties Scoop," *The Canadian Encyclopedia*, last modified 2024, <https://www.thecanadianencyclopedia.ca/en/article/sixties-scoop>.

<sup>3</sup> Hannah Perls, "The Dakota Access Pipeline (DAPL)," *Harvard Environmental & Energy Law Program*, last modified October 14, 2024, <https://eelp.law.harvard.edu/tracker/dakota-access-pipeline/>; "Canada: Construction of pipeline on Indigenous territory endangers land defenders," Amnesty International, October 3, 2022, <https://www.amnesty.org/en/latest/news/2022/10/canada-pipeline-indigenous-territory-endangers-land-defenders/>.

<sup>4</sup> "Facilitating First Nations Voter Participation For The 43rd Federal General Election," Assembly of First Nations, 2020, <https://www.afn.ca/wp-content/uploads/2020/08/20-07-27-Final-Report-Draft-Facilitating-First-Nations-Voter.pdf>; Coryn Grange and Chelsea N. Jones, "Voting on Tribal Lands: Barriers to Native American Turnout," Brennan Center for Justice, November 19, 2024.

legal challenges concerning Indigenous access to clean water in Canada and the United States.

## I. The Current State of Affairs

In the 2023 case *Arizona v. Navajo Nation*, the Supreme Court of the United States established that the federal government had no obligation under the Treaty of Bosque Redondo (hereafter, "the Treaty") to take "affirmative steps" to ensure clean water access for Indigenous peoples.<sup>5</sup> This opinion was given on the basis that the Treaty solely afforded the "right to use needed water from various sources [which] arise on, border, cross, underlie, or are encompassed within" tribal lands<sup>6</sup>, and therefore by simply not interfering with the tribe's access to clean water, the federal government has fulfilled its obligations. However, this interpretation does not properly take into account established best practices or canon constructions utilized in former Court interpretation of such treaties with Indigenous tribes. In previous cases<sup>7</sup>, the Supreme Court has followed the following rules for the interpretation of tribal treaties: "(1) treaty language must be construed as the Indians would have understood it at the time of treaty negotiation; (2) doubtful or ambiguous expressions in a treaty should generally be resolved in favor of the Tribes; and (3) treaty provisions should be interpreted in light of the surrounding circumstances and history"<sup>8</sup>. The Court

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<sup>5</sup> *Arizona et al. v. Navajo Nation et al.*, 599 U.S. \_\_\_ (2023)

<sup>6</sup> *Ibid.*

<sup>7</sup> *Minnesota v. Mille Lacs Band of Chippewa Indians*, 526 U.S. 172, 196 (1999); *Oneida County, N.Y. v. Oneida Indian Nation of N.Y.*, 470 U.S. 226, 247 (1985); *Choctaw Nation of Indians v. United States*, 318 U.S. 423, 432 (1943).

<sup>8</sup> "Best practices for the protection and preservation of cultural resources on tribal lands," U.S. Department of the Interior, Bureau of Indian Affairs, 2017 [https://www.bia.gov/sites/default/files/media\\_document/best\\_practices\\_guide.pdf](https://www.bia.gov/sites/default/files/media_document/best_practices_guide.pdf)

acknowledges that the federal US government holds Native water rights “in trust”, but does not elaborate upon what obligations this entails for the government. This is, however, addressed in Justice Gorsuch’s dissent, as he explains:

*What is known is that the United States holds some of the Tribe’s water rights in trust. And it exercises control over many possible sources of water in which the Tribe may have rights, including the mainstream of the Colorado River. Accordingly, the government owes the Tribe a duty to manage the water it holds for the Tribe in a legally responsible manner.*<sup>10</sup>

If the Court were to consider the canon constructions, the broader concept of “property” as considered by Indigenous peoples at the time of the contract should have been considered. As mentioned by Gorsuch, the land afforded to the Navajo people is meant to serve as a “permanent home”, which creates broader obligations for the United States government to provide what is needed for the Navajo people to live on such land. This is (1) how the Indigenous people would have understood the idea of a permanent home to mean in such context; (2) the resolution which favors the tribe in light of the confusion; (3) a decision adopted in light of the surrounding circumstances of the Arizona droughts and the environmental changes to the tribal lands. This case was a devastating development for Indigenous people in the United States.

Simultaneously, a class action lawsuit was raised in 2022 by the Shamattawa First Nation in Canada, seeking, in addition to other things, “a declaration that Canada is liable to the Plaintiff and the Class members for damages caused by creating and failing to remedy conditions of inadequate access to potable water”<sup>11</sup>.

<sup>9</sup> Arizona v. Navajo Nation, 599 U.S. \_\_\_ (2023)

<sup>10</sup> Arizona v. Navajo Nation, 599 U.S. \_\_\_ (2023)

<sup>11</sup> Shamattawa First Nation v. Attorney General Of Canada, 2022, Canada Federal Court (Statement of

Prior to this suit, the Shamattawa community was one of many Indigenous groups under a boil water advisory since 2018, and the redress from the Canadian government was not deemed adequate by the affected peoples<sup>12</sup>.

In its statement of defense, Canada made the claim that “providing safe drinking water to First Nations members on reserve” was simply “a matter of good governance rather than as a result of a legal duty”<sup>13</sup>. Rather than strengthening the guarantee to clean water access, Canada attempts to create a precedent freeing it of legal obligations to actively provide clean water access to Indigenous communities.

These instances show a clear struggle against protecting Indigenous water rights through legal mechanisms in both the United States and Canada in recent years.

## II. National Frameworks

### 1.1 Canada

The Canadian Constitution explicitly recognizes the rights of Indigenous peoples<sup>14</sup>. These rights are further extrapolated in treaties with tribes, which include rights to health as negotiated verbally in the process of creating the Numbered Treaties, and such oral versions of

Claim)

<https://www.mccarthy.ca/sites/default/files/2022-12/T-1937-22%20Statement%20of%20Claim%20%28certified%20copy%29-%20Sep.%2022%2C%2022%2845817839.1%29.pdf>

<sup>12</sup> Brett Forester, “Canada has no legal obligation to provide First Nations with clean water, lawyers say,” *CBC*, October 7, 2024, <https://www.cbc.ca/news/indigenous/shamattawa-claims-action-drinking-water-1.7345254>

<sup>13</sup> Shamattawa First Nation v. Attorney General Of Canada, 2023, Canada Federal Court (Statement of Defense) <https://www.mccarthy.ca/sites/default/files/2024-09/AGC%20SOD%20-%20filed%20July%2031%2C%202023.pdf>

<sup>14</sup> Constitution Act, 1982, Part 2 § 35 (1982).

Treaties have been accepted as legally binding by Canadian courts<sup>15</sup>. This right to health includes a positive obligation for “the provision of medical services by the Crown to the First Nations citizens”<sup>16</sup>. The protection of health cannot be carried out effectively without taking into account a person’s access to clean water for drinking, cooking, and sanitation.

### 1.2 United States

In the United States, Indigenous water rights are established in case law. *Winters v United States* (1908) “provides water for the needs of Native Americans who reside on federally reserved lands” and provides that water rights reserved by the federal government for Indigenous peoples prevail over State law<sup>17</sup>. Both jurisdictions provide legal instruments with both explicit and implicit protections for Indigenous access to clean water.

## III. International Frameworks

### 1.1 International Covenant on Economic, Social and Cultural Rights

Both the United States and Canada have signed the International Covenant on Economic, Social and Cultural Rights (“the Covenant”), although the United States has not ratified it. Article 11 of the Covenant establishes the “right of everyone to an adequate standard of living for himself and his family”, and

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<sup>15</sup> Aimée Craft and Alice Lebihan, “The Treaty Right to Health: A sacred obligation.” *National Collaborating Centre for Indigenous Health*, (2021), 14

[https://www.nccih.ca/Publications/Lists/Publications/Attachments/10361/Treaty-Right-to-Health\\_EN\\_Web\\_2021-02-02.pdf](https://www.nccih.ca/Publications/Lists/Publications/Attachments/10361/Treaty-Right-to-Health_EN_Web_2021-02-02.pdf)

<sup>16</sup> Ibid.

<sup>17</sup> Peter J. Longo, “Winters Doctrine,” *University of Nebraska–Lincoln Encyclopedia of the Great Plains*, 2011, <http://plainshumanities.unl.edu/encyclopedia/doc/egp.wat.041>

Article 12 “the right of everyone to the enjoyment of the highest attainable standard of physical and mental health”<sup>18</sup>. Both of these rights imply an active role of the government in supporting its people, and therefore a positive obligation to protect these rights. Furthermore, the UN Committee on Economic, Social and Cultural Rights has clarified in no uncertain terms that these two rights given in Articles 11 and 12 of the Covenant include the “full realization of the right to water”, and that “the obligation includes, inter alia, according sufficient recognition of this right within the national political and legal systems, preferably by way of legislative implementation; adopting a national water strategy and plan of action to realize this right; ensuring that water is affordable for everyone; and facilitating improved and sustainable access to water”<sup>19</sup>. Having ratified the Covenant, the right to water should be implemented in Canada in order to fulfill its international legal obligations. Additionally, regardless of ratification status, it is advisable that the United States creates this right to water as a party to the Covenant and a key member of the United Nations.

### 1.2 UN Resolution A/Res/64/292

Additionally, the UN Resolution A/Res/64/292 regards “the right to safe and clean drinking water and sanitation as a human right that is essential for the full enjoyment of life and all human rights”, and “Calls upon States and international organizations to provide financial resources, capacity-building and technology

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<sup>18</sup> “International Covenant on Civil and Political Rights,” Opened for signature December 16, 1966, *Treaty Series* 999 : 171, <https://treaties.un.org/doc/Publication/UNTS/Volume%20999/volume-999-I-14668-English.pdf>

<sup>19</sup> ICESCR, *General Comment No. 15: The right to water (arts. 11 and 12)*, 29th Sess, Adopted 20 January 2003, E/C.12/2002/11, <https://humanrights.asn.au/ICESCR/GeneralComment15>

transfer, through international assistance and cooperation, in particular to developing countries, in order to scale up efforts to provide safe, clean, accessible and affordable drinking water and sanitation for all<sup>20</sup>.

### 1.3 UN Declaration on the Rights of Indigenous Peoples

The UN Declaration on the Rights of Indigenous Peoples (“the Declaration”) serves to establish the “minimum standards for the survival, dignity, and well-being of the Indigenous peoples of the world”<sup>21</sup>. Initially, both the United States and Canada were two of four states objecting to this Declaration, due to contentions over the concept of “free, prior and informed consent” for Indigenous tribes, and the meaning of “self-determination” for these peoples<sup>22</sup>. However, in 2010, both the United States and Canada endorsed the Declaration<sup>23</sup>.

The Declaration is not a legally binding instrument. However, as the established *minimum standards* for Indigenous protections, states are encouraged to implement this framework into their own legal system with consultation from Indigenous peoples within their jurisdictions, giving the chance to expand upon these rights and create solutions which are the most appropriate and effective for the people it serves to protect.

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<sup>20</sup> Resolution A/Res/64/292: The human right to water and sanitation, United Nations General Assembly (2010), <https://undocs.org/A/RES/64/292>.

<sup>21</sup> “United Nations Declaration on the Rights of Indigenous Peoples,” 13 September 2007, *Resolution adopted by the General Assembly 61/295*, <https://www.refworld.org/legal/resolution/unqa/2007/en/49353>, Article 43

<sup>22</sup> Madison Kavanaugh, “UNDRIP Drop: How Canada and the United States are Failing to Meet their International Obligations to Tribes,” *Michigan Journal of International Law*, November, 2018, <https://www.mjionline.org/undrip-drop-how-canada-and-the-united-states-are-failing-to-meet-their-international-obligations-to-tribes/>

<sup>23</sup> Ibid.

The Declaration expressly grants Indigenous peoples “the right to the full enjoyment, as a collective or as individuals, of all human rights and fundamental freedoms as recognized in [...] international human rights law”<sup>24</sup>. This necessarily includes the rights to an adequate standard of living and health as described above, to include a positive obligation upon the state to provide water rights.

However, the Declaration does not explicitly mention water rights for Indigenous peoples. It establishes land rights and rights to resources, largely focusing on the State’s obligation to refrain from interfering with these rights.

## IV. Policy Recommendation

In light of these new legal issues concerning affirmative water rights, water rights held in trust, and the role of the federal government in providing water to Indigenous peoples, a two-fold solution is needed. First, the UN Declaration on the Rights of Indigenous Peoples must be amended. Second, the United States and Canada must reaffirm their commitment to implementing the declaration into their legal systems with tangible legal consequences.

The UN Declaration on the Rights of Indigenous Peoples must be amended to specifically include the Indigenous right to clean water. As such, an established right to water in the declaration is noticeably missing, and is only implicitly protected through articles on related subjects. This is not enough. In order to ensure the survival of Indigenous peoples in the face of climate change concerns, it is necessary to confirm the States’ positive obligation to protect Indigenous water rights in an active manner.

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<sup>24</sup> “United Nations Declaration on the Rights of Indigenous Peoples”, Article 1

In addition to amendments to the Declaration, the United States and Canada must also play a role in these efforts. More than simply accepting the Declaration, the States must take active steps towards their commitment to supporting the Declaration. It is recommended that the United States and Canada enshrine the rights given in the Declaration into their national legal systems, to include Indigenous water rights and give for effective legal mechanisms to protect these rights. This codification should also include mechanisms for monitoring water quality and access in Indigenous communities, with regular reporting for transparency and accountability to the Canadian and American people, as well as the international community. Finally, if the rights provided for in the Declaration oppose previous acts or policies which served to oppress and subjugate Indigenous peoples, such acts or policies should be revised and amended to ensure that Indigenous rights are protected in a material way.

This policy will create the necessary framework to protect Indigenous access to clean water in Canada and the United States, promote environmental justice, and help both jurisdictions aspire towards their legal and moral obligations to Indigenous peoples.

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