



# From the Ground Up— A Different Look at the Law of the River

- COLORADO RIVER WATER USERS ASSOCIATION
- 2023 ANNUAL CONFERENCE
- CONSTRUCTING A RESILIENT FUTURE:  
REBUILDING FROM THE GROUND UP

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# What do I mean “from the ground up?”

- Laws may be described as from the top down or from the bottom up
- Previous presentations on the Law of the Colorado River often focused on the top down
  - Governmental actions:
    - 100 years of the 1922 Compact
    - Federal actions and state reactions to the federal actions
- Water use is local
  - Water users developed the western legal system of prior appropriation
  - Water users lobbied for and demanded construction of CR infrastructure
  - Water users organize themselves into districts, associations, or projects. Some may have taxing authority, most have authority to assess user fees



# Why this perspective?

- This is the conference of the Colorado River Water USERS Association
- The impacts of climate change are felt at the ground level and are not the same for all water users
- Building a resilient future depends on the adaptations that fit the legal rights and obligations of the water users
- Excluding tribal governments, most state governments and the United States are not significant users of water, yet they have significant influence over how water is allocated and used
  - We experienced a Draft Supplemental EIS in the spring that includes action Alternative #2 that imposes a uniform reduction in consumptive use that does not consider the legal differences among the rights of water users



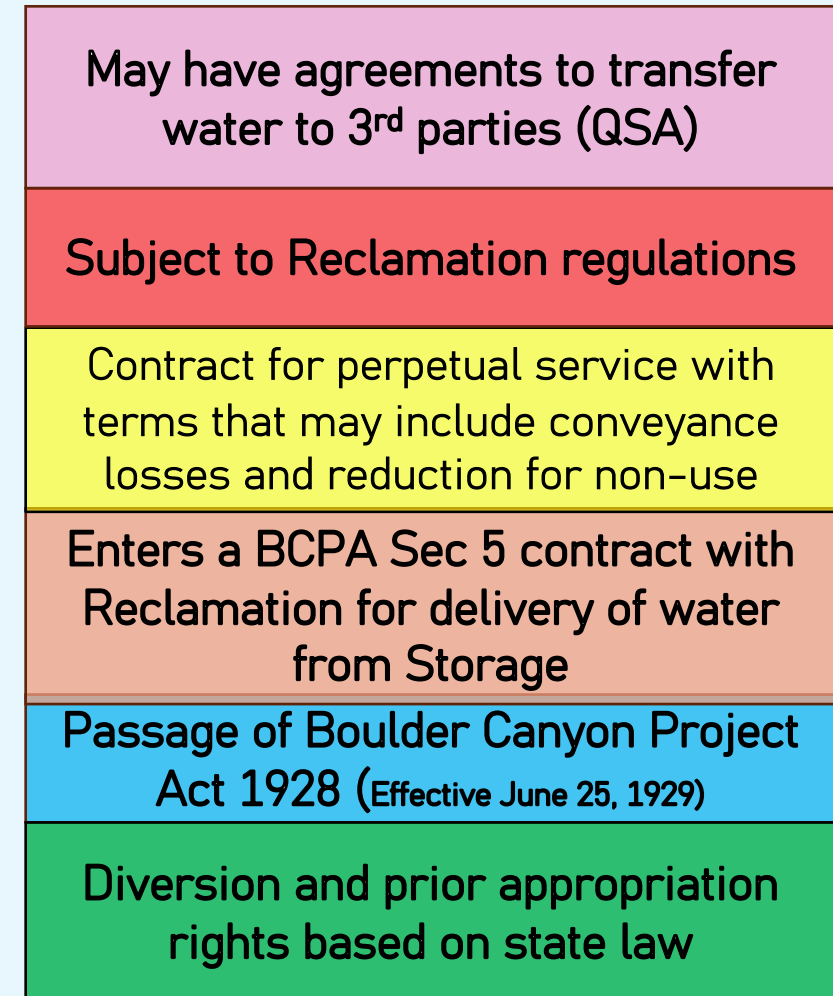
# Overview of presentation:

- **Focus on Lower Basin**—area of my work and the part of the basin where water users are most affected by current proposals to address shortages
- **First:** Lay-out examples of different types of water rights from "the ground up"
- **Second:** Discuss an historical Supreme Court case that helps explain how the top-down and bottom-up laws fit together: *Hinderlider v. La Plata River & Cherry Creek Ditch Co*
- **Third:** Discuss a major Supreme Court case from 2023 dealing with the Colorado River; *Arizona v. Navajo Nation* focusing on a single phrase-- "the United States obligation to secure water" that is repeated 17 times in the majority opinion



## Non-Indian Present Perfected Right (PPR)

- Az v. Ca Decree lists the pre- June 1929 LB PPR's in order of priority (including mainstream reserved rights)
- Appendix:
  - “(4) Any water right listed herein may be exercised only for beneficial uses.”
  - “(5) In the event of a determination of insufficient mainstream water to satisfy PPRs” indicates the requirement to deliver to PPRs first



## Section 5 Contracts– – Not PPRs

May include:

- Repayment obligations for Reclamation irrigation projects
- Reclamation contract may be with irrigation entity formed under state law or an individual water user

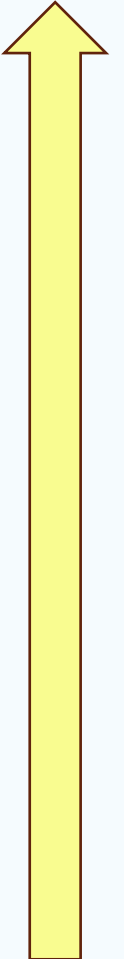
A water district or water users in the district may have contracts to transfer water to 3<sup>rd</sup> parties (QSA) or for system conservation

Contracts are subject to Reclamation regulations

Reclamation contract for perpetual service may be with a water district or the water users with terms that may include accounting for conveyance losses, and reduction for non-use

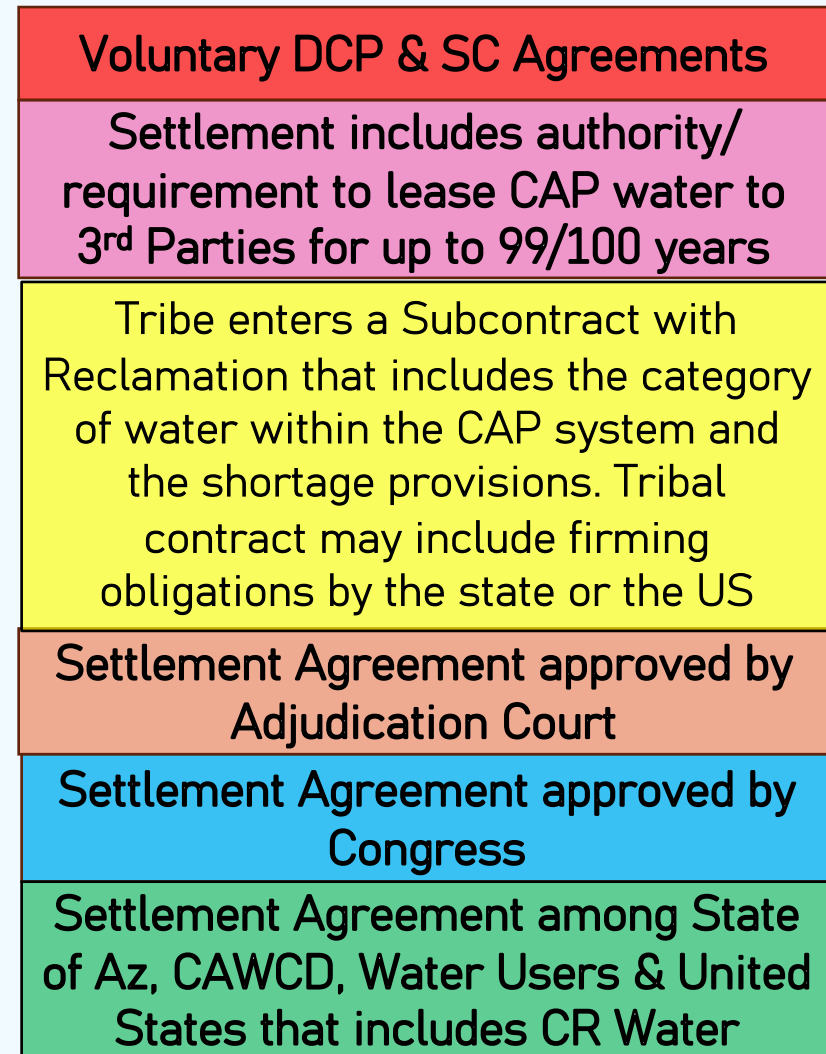
Enters BCPA Sec 5 contract with Reclamation for delivery of water from Storage

Passage of Boulder Canyon Project Act 1929



## Tribal Settlement in Az that includes Colorado River Water delivered through the CAP

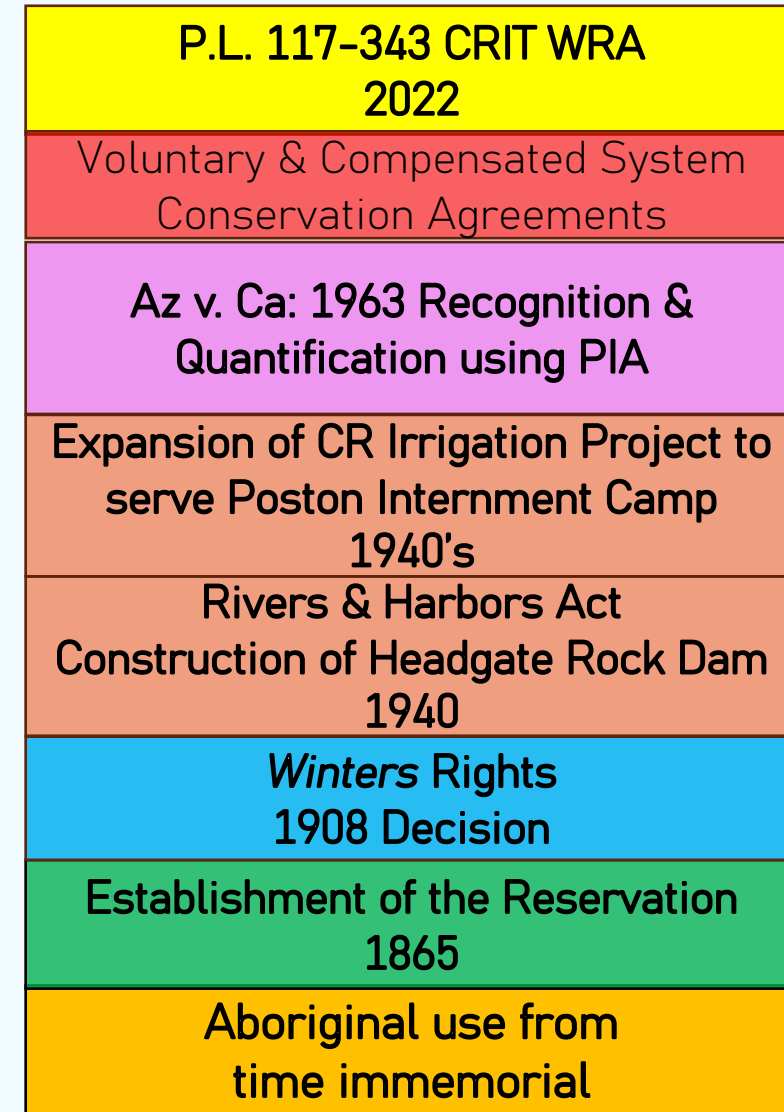
- Reserved rights to tributaries, not mainstream: Salt, Gila, Verde and Little Colorado Rivers or an on-Reservation tributary
- Most are not on the CR mainstream
- Colorado River water is “replacement” water delivered through the CAP and subject to CAP Master Repayment Contract
- Subject to CR Basin Project Act shortage requirements



## Colorado River Indian Tribes—Az

What is missing?

- No BCPA Sec. 5 Contract with Reclamation
- Not a Reclamation irrigation district
  - Headgate Rock Dam built under Rivers and Harbors Act
  - The Colorado River Irrigation Project is a federal project NOT held in trust and maintained and operated by BIA
- The 1922 Compact, that includes Art. VII: “Nothing in this compact shall be construed as affecting the obligation of the US to Indian tribes”
- Shortage sharing
  - Az v Ca Appendix (5)“(5) In the event of a determination of insufficient mainstream water to satisfy PPRs ...the Secretary shall...first provide for the satisfaction in full of all rights of the [five LB Tribes]

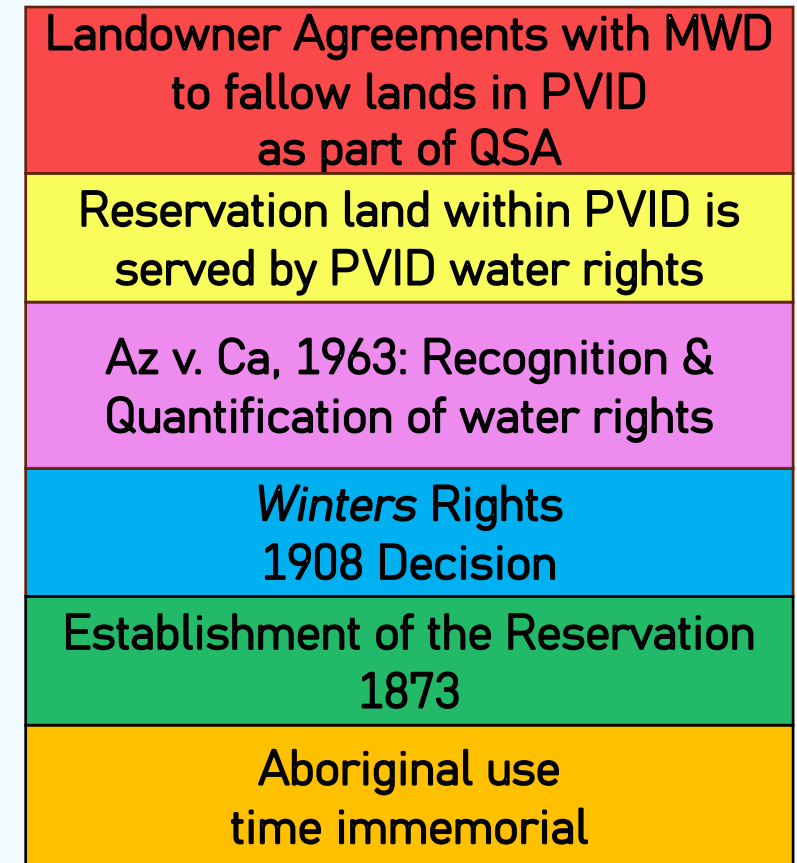




## Colorado River Indian Tribes—CA

What is different?

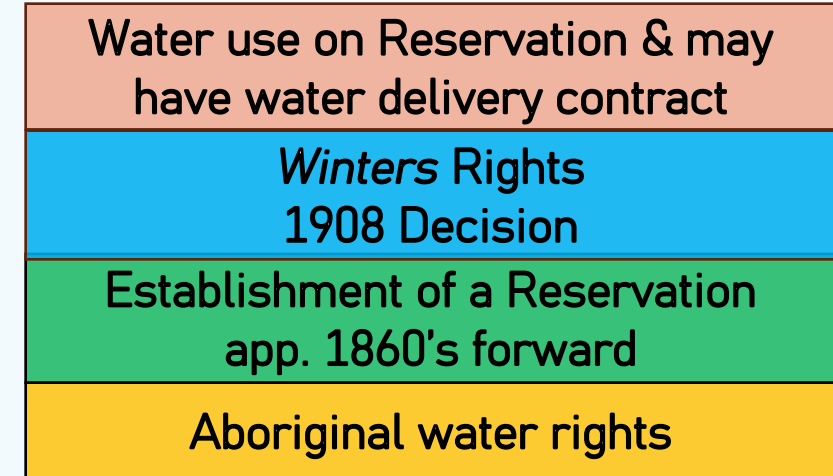
- No irrigation project
- Some of the reservation land within the reservation is served by Palo Verde Irrigation District
  - The CRIT have QSA agreements that include a fallowing agreement with MWD



## Tribes without adjudicated or settled water rights

“When the United States establishes a tribal reservation, the reservation generally includes (among other things) ...the right to use needed water on the reservation, referred to as reserved water rights.”\*

\*Az v. Navajo Nation, 143 S.Ct. 1804 (2023)



## Colorado River: Between the Dams

- The hydrology in 2022 indicated the possibility of a dry River below Glen Canyon Dam
- Early discussions were focused on protection of the infrastructure and power production at Glen Canyon Dam
- The water released from lower elevations of Lake Powell is warmer changing the fish habitat further risking endangered species
- 1992 Grand Canyon Protection Act established the adaptive management process and states:

“The Secretary shall operate...Glen Canyon Dam...in such a manner as to project, mitigate adverse impacts to and improve the values for which GCNP... [was] established, including ...natural and cultural resources and visitor use.”




## Different laws for different Water Users & Draft SEIS Alternative 2

- Tribal **reserved** water rights on the mainstream and by CAP subcontract are for present AND future uses
  - Not lost for non-use
- Not all tribal water users have a contract with Reclamation
- Az v Ca establishes categories and priorities in relation to deliveries if “insufficient supply”

- Alternative 2, DRAFT SEIS April 2023

Action Alternative 2 includes assumptions for reduced releases from Glen Canyon Dam and additional Lower Basin shortages that are not based exclusively on the concept of priority. While both the 2007 Interim Guidelines and the 2019 DCPs encompass reductions that reflect the priority system, the additional reductions identified in Action Alternative 2 for the remainder of the interim period would be distributed in the same percentage across all Lower Basin water users.





## Impacts on Water Users from the withdrawn Draft SEIS Alt. 2

Reclamation proposed making the same percentage consumptive Use reduction for all LB water users


- CU is not measured the same for all water users: mainstream v transported water
- Mainstream users have return flow to the River creating a larger reduction to diversions

- Created potential winners & losers by lessening shortage impacts for low priority water rights and increasing impacts for high priority water users
- Created instability in the entire basin—Can Reclamation do this to me?
- Water transfers as an adaptation to climate change are not as effective if the priority system is ignored
- Alt 2 may not comply with the requirements of the injunctions imposed in the Az v. Ca Decree
  - Part II “The United States [is] severally enjoined ... B) from releasing water controlled by the United States for irrigation and domestic use in the States of Az, Ca, and NV, except as [set forth in the Decree]



# Fitting the pieces together: the La Plata River Compact litigation as an example

A review of the 1938 case of *Hinderlider v. La Plata River and Cherry Creek Ditch Company* that is being discussed extensively in the Rio Grande litigation among Texas, New Mexico, Colorado and the United States



# Equitable Apportionment of the La Plata River

- Colorado is upstream of NM on the La Plata River, an ephemeral stream
- The States agreed on an equitable apportionment as set forth in the La Plata River Compact
- During low flows the delivery of the full flow alternates between the states

## Law Plata River Compact November 27, 1922 Preamble

*The state of Colorado and the state of New Mexico, desiring to provide for the equitable distribution of the waters of the La Plata river, and to remove all causes of present and future controversy between them with respect thereto and being moved by considerations of interstate comity, pursuant to acts of their respective legislatures, have resolved to conclude a compact for these purposes and have named as their commissioners:*  
*Delph E. Carpenter, for the state of Colorado; and*  
*Stephen B. Davis, Jr., for the state of New Mexico;*  
*Who have agreed upon the following articles:*

## Fitting “the laws” of the River together—


### Hinderlider v. La Plata River & Cherry Creek Ditch Co, 304 U.S. 92 (1938)

- Water rights holders brought claims against Colorado State Engineer Hinderlider
- Alleged Hinderlider violated state law by not delivering water to ditch companies as required by state court decree
- Hinderlider asserted the requirements of the 1923 La Plata River Compact as defense stating that he is required to alternate deliveries to users in Co and NM during low flow periods

“It may be assumed that the right adjudicated by the decree of January 12, 1898 is a property right, indefeasible so far as concerns the State of Colorado, its citizens, and any other person claiming water rights there.

But the Colorado decree could not confer upon the Ditch Company rights in excess of Colorado’s share of the water of the stream; and its share was only an equitable portion thereof.”






## Article II Equitable Apportionment

The waters of the La Plata river are hereby equitably apportioned between the signatory states, including the citizens thereof....

3. Whenever the flow of the river is so low that in the judgment of the state engineers of the states, the greatest beneficial use of its waters may be secured by distributing all of its waters successively to the lands in each state in alternating periods...



### *Hinderlider* holding

- “The [Compact] apportionment is binding upon the citizens of each State and all water claimants, even where the State had granted the water rights before it entered in the compact.”
- The Colorado decree awarding water to the Ditch Company could award no more water than the amount of Colorado's equitable share.



# Arizona v. Navajo Nation: A Troubling Phrase

“The [Navajo Nation] argue[s] that the United States must take affirmative steps to secure water for the Tribe—for example, by assessing the Tribe’s water needs, developing a plan to secure the needed water, and potentially building pipelines, pumps, wells, or other water infrastructure.” *Arizona v. Navajo Nation*, majority opinion

# The majority uses the phrase “to secure water” 17 times. What does it mean?

- “The 1868 treaty reserved necessary water to accomplish the purpose of the Navajo Reservation. See *Winters v. United States*, 207 U.S. 564, 576–577”
  - “When the United States establishes a tribal reservation, the reservation generally includes (among other things) the land, the minerals below the land’s surface, the timber on the land, and the right to use needed water on the reservation, referred to as reserved water rights. (citations omitted)”
  - “Each of those rights[land, minerals, timber and water} is a stick in the bundle of property rights that makes up a reservation.”
  - *Az v. Navajo Nation*, majority opinion
- “[T]he text of the treaty says nothing to [the]effect” “[that the United States must take affirmative steps to secure water for the Tribe”
  - “[T]he historical record does not suggest that the United States agreed to undertake affirmative efforts to secure water for the Navajos— any more than the United States agreed to farm land, mine minerals, harvest timber, build roads, or construct bridges on the reservation.”
  - *Az v. Navajo Nation*, majority opinion

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If *Winters* is the law applied in the Navajo case,  
what needs to be secured?  
(Maybe quantified??)

And who is arguing that “the United States has to agree to farm land, mine minerals, harvest timber, build roads, or construct bridges on the reservation” if the water needs are assessed and a plan is developed?

How ironic or cruel to use this phraseology regarding the United States mining minerals on the Navajo Reservation.



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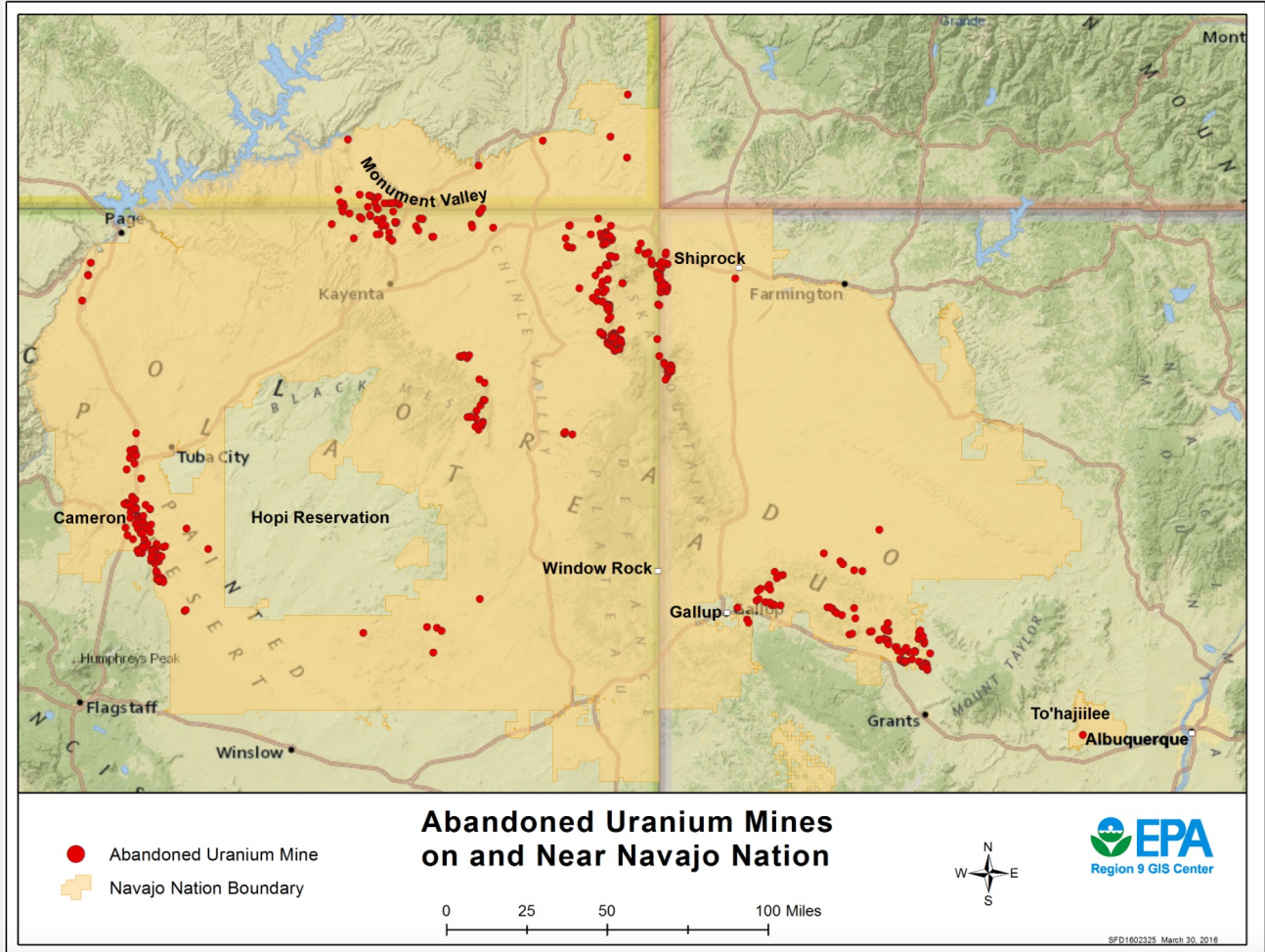
"Between 1944 and 1986 nearly 30 million tons of uranium ore were extracted from the Navajo lands..." all under agreements approved by the United States and benefitting the United States

Mining companies dug approximately 1,000 uranium mines on Navajo lands

EPA map is of the abandoned mine sites

## Legacy of death and contaminated groundwater

EPA website includes directions for how to haul water from non-contaminated sources





## Black Mesa Coal Slurry Pipeline to serve Mohave Generating Station

Peabody Coal operated mines at Black Mesa on the Navajo and Hopi Reservations from the 1960's under agreements fostered by the United States

Groundwater was pumped from reservation aquifers by Peabody to create the coal slurry that was delivered by pipeline to Mohave Generating Station in Laughlin, Nv

The water extracted from the slurry and used to operate MGS

The pipeline used 1.3 billion gallons or app. **4000 AF/Y** for 40 years from the Navajo Aquifer lowering water tables for domestic wells and drying natural springs

MGS was operated by S.Cal Edison, LADWP, Nevada Power and SRP

BLACK MESA COAL MINE AND PIPELINE, ARIZONA





# Navajo Generating Station (NGS)

## 1971 – 2019

Arizona has an allocation of 50KAF of Upper Basin Colorado River water

Salt River Project (SRP), the owner/operator of NGS, contracted with the State of Arizona and Reclamation for delivery of **26,000AF/y from the CR mainstream for use at NGS on the Navajo Reservation for the benefit of third parties**

SRP built a pipeline for the water delivery across reservation land to serve NGS

Power from NGS was used to pump water from the LB mainstream for delivery through CAP



USBR available at <https://www.usbr.gov/ngs/>

# Final comments re: Az v. Navajo Nation

- The land and water on the Navajo Reservation are “owned” by the United States for the benefit of the Navajo Nation. Again creating another cognitive dissonance:
  - *“By contrast, the term “trust” also has a well understood meaning at law: a relationship in which a trustee has legally enforceable duties to manage a discrete trust corpus for certain beneficiaries. At times, the Federal Government has expressly created such discrete legal trusts for Indians—by, for example, placing parcels of land . . .into trust.”*
    - What is the reservation created by the 1868 Treaty?
  - *“Trust could refer merely to the trust that Indians place in the United States”*
- The party to the case before the Supreme Court is the Navajo Nation. Not “the Navajos” and not the “Navajo Tribe.”



## Summary of the view from the Ground Up

The climate in the basin has changed at the top (macro) level with less run-off to reservoirs and at the ground (micro) level as hotter temperatures and drier soils require more water per plant and more water to meet energy demands



Understanding the particulars of the different rights and obligations of each group of Colorado River water users is key to the development of adaptation strategies for a resilient future



THANK YOU



## References:

- General law of the River
  - CRWUA.org; About; Law of the River: <https://www.crwua.org/law-of-the-river.html>
  - Bureau of Reclamation, Lower Colorado Region: <https://www.usbr.gov/lc/region/pao/lawofrvr.html>
  - Water Education Foundation, Colorado River: <https://www.watereducation.org/aquapedia/colorado-river>
- Fitting the pieces together:
  - LA PLATA RIVER COMPACT, N.M.S.A. § 72-15-16 and C.R.S.A. § 37-63-101
  - *Hinderlider v. La Plata River & Cherry Creek Ditch Co.*, 304 U.S. 92 (1938); *Hinderlider v. La Plata River & Cherry Creek Ditch Co.*, 101 Colo.73 (1937)
  - Special Master Third Interim Report available at: <https://ecf.ca8.uscourts.gov/files/smDocuments/2023.07.03.BurnsBr.pdf>
  - Kenneth W. Knox, The La Plata Compact: Administration of an Ephemeral River in the arid Southwest, 5 U. DENV. WATER L. REV. 104 (2001)
- Navajo Nation
  - Arizona, et al. v. Navajo Nation, et al., 599 U.S. 555; 143 S.Ct. 1804 (2023)
  - Navajo Nation v. U.S. Department of Interior, 26 F.4<sup>th</sup> 794 (9<sup>th</sup> Cir. 2022)