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BIDEN AND HAALAND ABANDON TRUST RESPONSIBILITY TO INDIAN LANDS AND WATERS

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President Joe Biden conceded at the opening session of the two-day White House Tribal Nations Summit that the federal government hasn't always lived up to its "solemn trust and treaty obligation" to American Indian tribes. In his remarks to tribal leaders, President Biden promised that his administration is taking steps to remedy that failure. Yet, the Ute Indian Tribe of the Uintah and Ouray Reservation contends the Biden Administration itself is responsible for seeking to end federal trust obligations to tribes in two critical and over-arching areas—first, restoring tribal lands to trust status, a federal policy that's been in existence since the Indian Reorganization Act of 1934 (IRA), and second, in protecting and preserving Indian water rights as required by treaties and more than a century of legal precedent.

In two pending lawsuits, the Biden Administration is currently asserting to the U.S. Supreme Court that the United States does not have an "affirmative, judicially enforceable duty to assess and address [an Indian tribe's] need for water." Biden and Haaland are also claiming in the Federal District Court in Washington, D.C. that the Administration has "plenary power" to transfer Indian lands to non-Indian ownership without Congressional authorization.

Biden and Haaland's actions threaten the foundation of the nation-to-nation relationship between Indian tribes and the United States, and the Federal government's trust responsibility to Indian tribes. This relationship was built on treaties, agreements, and acts of Congress. While the United States routinely engaged in economic warfare against tribes, used duress and starvation to force tribes into treaties and agreements, and routinely violated these treaties, under Biden, Haaland, and modern federal Indian law, Indian tribes looked to a new era where tribal lands, waters, self-determination, and sovereignty would be protected and restored.

The Biden-Harris campaign even pledged to Indian country that this time would be different. In the October 2020 "Biden-Harris Plan for Tribal Nations," they committed to:

- Uphold the U.S.'s trust responsibility to tribal nations;
- Restore lands and protect the natural and cultural resources within them; and,
- Restore strong federal support for Indian water rights settlements and coordinate the actions of all relevant federal agencies to use their programs, authorities, and resources to support tribal water needs and economic development activities.

Instead, Biden and Haaland are now asking the Supreme Court to overturn more than one hundred years of federal law holding that the lands reserved by Indian tribes in treaties and agreements with the United States include the waters necessary for a tribe to make a homeland. They are also seeking new authority for the Administration to take Indian lands without authorization from Congress. Biden and Haaland must direct the Department of Justice to uphold and defend the Federal government's commitments and trust responsibility to Indian tribes in federal court.

The Ute Indian Tribe Business Committee commented that “Biden and Haaland promised to stand with Indian tribes as we fight to restore and protect our lands, waters, and resources. They promised to open doors to a new era of federal and tribal relations. Instead, doors are being boarded up and no one is home.”

Rather than taking strong proactive actions to uphold and enforce the Federal government’s treaty and trust responsibilities, Biden and Haaland are sheepishly attempting to limit the Federal government’s trust responsibility. They have turned to the same courts that recently overturned two hundred years of federal Indian law in *Oklahoma v. Castro-Huerta*. Just six months ago, Justice Brett Kavanaugh turned Indian Country and federal Indian law on its head when the Court ruled in *Castro-Huerta* that “...Indian country is part of a state, not separate from a State, ...” Instead of fighting against this outrageous attack on the United States’ nation-to-nation relationship with Indian tribes, Biden and Haaland are taking their own actions to limit tribal lands and waters.

In one case, all they had to do was comply with a Ninth Circuit Court of Appeals decision that the treaty rights recognized in *Winters v. United States*, 207 U.S. 564 (1908) include the reservation of waters necessary to make a tribal homeland. However, in a Supreme Court case captioned *Arizona v. Navajo Nation*, case nos. 21-1484 and 22-51 (consolidated), Biden and Haaland now side with nearly every non-Indian water user in the Lower Colorado River Basin and argue that the Federal government has no trust responsibility to protect Indian water rights. Their position is a 180-degree turn from the Federal government’s advocacy in the 1908 *Winters* case.

Biden and Haaland are now inviting the Supreme Court, which has shown that it is not bound by its own precedent, to eliminate any trust obligation on the part of the Federal government to protect and preserve federally reserved Indian water rights and water-related infrastructure. This would return Indian tribes to a pre-*Winters* landscape in which politically and economically powerful non-Indian water users are given free rein to divert and appropriate Indian waters away from Indian reservations and tribal uses. That outcome will be devastating to Indian reservations established in treaties and agreements with the United States, tribal self-sustainability, and the continued economic viability of Indian tribes.

The Ute Indian Tribe knows all too well the importance of water for establishing a homeland. The Tribe has an apportionment of more than 500,000 acre-feet per year in the Upper Colorado River Basin. However, over decades, the Federal government has mismanaged the Tribe’s reserved water rights including illegal Indian water transfers and exchanges, wasting water at the inefficient and dilapidated federal Uintah Indian Irrigation Project, and informal agreements by the Bureau of Indian Affairs (BIA) that advantage the non-Indian state water users who share the water sources on the Reservation.

Biden and Haaland must follow through with their commitments to Indian Country, fulfill their federal trust responsibility, and stand for the protection and utilization of Indian water rights.

Even Indian lands remain under threat of taking under this Administration. In another case before the Federal District Court in Washington, D.C., *Ute Indian Tribe v. United States*, case no. 18-546, Biden and Haaland have so far refused to take the simple and protective step of restoring tribal lands under Section 3 of the IRA. Instead, they argue that in 1948 the Federal government had the

authority to administratively transfer Indian lands from the BIA to the Bureau of Land Management (BLM). Under BLM oversight, the United States took billions of dollars in oil and gas revenue that were reserved and set-aside for the Ute Indian Tribe.

There is no act of Congress approving the taking of these tribal lands, and federal courts and the Supreme Court have conclusively determined that these Reservation lands have never been diminished nor disestablished. The Tenth Circuit Court of Appeals even went so far as to say in an *en banc* decision that allotment of the Reservation “doesn’t disturb the ownership of the land by the tribal group.”

Yet, Biden and Haaland have refused to take action to restore these tribal lands to trust status under Section 3 of the IRA. Instead, they are now arguing in federal court that the Executive Branch has unreviewable discretionary authority to take tribal trust lands in violation of treaties, agreements, and acts of Congress. In other words, the Administration is seeking the same “plenary power” as Congress.

In *Lone Wolf v. Hitchcock*, 187 U.S. 553 (1903), the Supreme Court held that Congress has virtually unreviewable “plenary power” to violate or nullify treaties with tribes, including provisions establishing that the land on a reservation is owned in trust as the tribe’s permanent homeland. That horrendous and racist decision led to the loss of vast amounts of tribal trust lands, but even in *Lone Wolf*, the “plenary power” to take tribal lands required Congressional approval. Today, Biden and Haaland are arguing that the Federal government has the authority to take tribal lands without Congressional authority.

The Business Committee commented, “We hear all these headlines about the Administration’s actions for Indian tribes, but where are they on fulfilling the Federal government’s primary commitments to Indian tribes? Where are they on their trust responsibility to secure our homelands and protect our waters? Not just administratively, but also in court. The trust responsibility does not end on the courthouse steps. Biden and Haaland must direct the Department of Justice to fulfill the United States’ commitments to Indian tribes.”

The Tribe’s Business Committee also cited the White House Tribal Nations Summit as another example of the Biden Administration’s disregard for the nation-to-nation and trust relationship between the United States and Indian tribes. The Summit provided no opportunity for actual dialogue between tribal leaders and administration officials. In addition, after informing tribes that the Summit would be limited to one governmental representative per tribe, a number of special interest groups, organizations and non-government individuals were also allowed to attend the event and speak on panels, and some tribes were allowed to attend with multiple tribal leaders.

About the Ute Indian Tribe - The Ute Indian Tribe resides on the Uintah and Ouray Reservation in northeastern Utah. Three bands of Utes comprise the Ute Indian Tribe: the Whiteriver Band, the Uncompahgre Band, and the Uintah Band. The Tribe has a membership of more than three thousand individuals, with over half living on the Uintah and Ouray Reservation. The Ute Indian Tribe operates its own tribal government and oversees significant oil and gas deposits on its 4.5-million-acre Reservation. The Tribal Business Committee is the governing council of the Tribe.

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