

The Native American Rights Fund (NARF) and Western States Water Council (WSWC) cosponsored their 17th biennial Symposium on the Settlement of Indian Reserved Water Rights Claims on August 24-25, held virtually for the first time due to COVID-19 concerns.

John Echohawk, NARF Executive Director, noted that NARF and WSWC have worked together since 1981 as part of an Ad Hoc Group on Indian water rights settlements. NARF started in 1970, coinciding with the end of the Termination Era that pushed tribes to assimilate and sought unsuccessfully to terminate the federal trust responsibility and a new beginning with greater Indian self-determination policies that brought tribal treaties to the forefront.

Echohawk provided a brief overview of *Winters v. U.S.*, 207 US 564 (1908), which held that when Indian reservations were set up by Congress, there was an implied reservation of water for the tribes sufficient for present and future uses. This gave the tribes in many cases a senior water right over most other uses of water in the West. NARF worked with tribes to file cases claiming their water rights held in trust by the federal government. This got the attention of the federal government as a trustee with the obligation to help the tribes protect and assert those rights, and also got the attention of the states. NARF and WSWC and others began talking about these long-term cases to quantify water rights with their priority dates, and the potential alternative of settlements. In the 1980s, tribes, states, private parties, and the federal government began the negotiation process for several settlements, and the Department of the Interior established the Secretary's Indian Water Rights Office. He said that NARF is pleased to be able to work with WSWC on this continuing issue, and that the symposia every two years offer an opportunity to get everyone together to talk about recent progress and what's ahead, and how we can work together to complete more settlements.

Tony Willardson, WSWC Executive Director, noted that between population growth and drought, we can see the stress on water resources in the West, "...and it is challenging to come together and find ways for all of our people to move forward." He said the partnership with NARF has been very productive and beneficial, and that WSWC looks forward to continuing these discussions.

Following longstanding tradition, tribal members offered prayers at the beginning of each day.

The first day of the symposium offered an abbreviated schedule highlighting four settlements authorized by the 116th Congress. The Consolidated Appropriations Act (Pub. L. 116-260) contained provisions authorizing: (1) the Navajo Utah Water Rights Settlement; (2) the compact between the Confederated Salish and Kootenai Tribes and Montana; (3) the 611(g) Agreement modifications to the Aamodt settlement; and (4) the federal study of the multipurpose dam described in the Upper Delaware and Tributaries Watershed Plan to support the settlement of the Kickapoo Tribe's water rights claims in Kansas.

Speakers on the Navajo Nation-Utah panel included Stanley Pollack, Contract Attorney, Navajo Nation Department of Justice; Norman Johnson, Natural Resources Division Director, Utah Attorney General's Office; and Justin Record, Water Rights Coordinator, Bureau of Reclamation. Pollack noted that the settlement resolves Navajo Nation water rights claims in the Upper Basin of the Colorado River. He shared a quote from Jerry Olds, the Utah State Engineer at the time of the first negotiation meeting with the Navajo Nation, which led to the 2003 Memorandum of Understanding: "Our goal in these negotiations is to ensure that the Navajo Nation obtains all the water it needs for a permanent homeland. When the Navajo Nation thrives and prospers on its reservation, the State thrives and prospers." The Navajo Nation and Utah initially envisioned a project-based settlement, and identified water infrastructure projects that would best serve the Navajo Nation. In 2014, the Navajo Nation Department of Water Resources prepared a white paper on the planning and design of those projects.

Record noted that between 2015 and 2017, this transitioned to a fund-based settlement. This required a value planning study to determine what projects would be feasible and the appropriate amount for a water development fund, and the Nation's technical experts were critical in this process. The Navajo Nation will decide in the future which projects need to be built to best meet its water needs in Utah.

Johnson explained that the settlement solved a significant Colorado River issue by quantifying a large number of claims in the Upper Basin and also provided certainty for existing water users in the Uintah Basin and on the San Juan

and Price Rivers, as well as the Central Utah Project along the Wasatch Front. He emphasized that the most important lesson they learned in the lengthy settlement process was to communicate and educate. Other lessons included the need for patience, the importance of technicians, the ability to put things into context, the need to build trust and to focus on what matters, and the importance of protecting tribal, federal, and non-federal interests in order to reach a settlement agreement everyone could support.

The Confederated Salish and Kootenai Tribes-Montana panel included: Ryan Rusche and Rhonda Swaney, Attorneys, Confederated Salish and Kootenai Tribes; Jennifer Frozena, Attorney, Office of the Solicitor, Department of the Interior; and Jay Weiner, Administrative Law Judge, Montana Department of Natural Resources and Conservation. Rusche noted that the CSKT settlement had its roots in the tribes' longstanding reliance on fish and wildlife, and several decades with over 30 lawsuits, many of which pertained to the tribes' efforts to protect habitat, in particular for the bull trout, a staple for subsistence purposes. The compact provides for instream flows to protect these fish and wildlife habitats. Improvements to the federal Flathead Indian Irrigation Project (FIIP) and its aging infrastructure were also a critical component of the settlement agreement. He added that FIIP is only about 40-50% efficient, so that 50-60% of the water that is diverted never actually waters crops, but returns to the Flathead River System in a much-degraded state. He said that all of the tribal water rights contained in the compact were a result of significant study and analysis by the tribes as well as the federal government. It also protects all the valid existing uses permitted by Montana prior to the compact.

Frozena explained that the federal government was well aware of FIIP deficiencies for many years, which influenced the federal perspective of the settlement. They had an Inspector General's report that had tracked the assessments paid by FIIP water users and indicated that assessments had not been raised sufficiently to address all the deferred infrastructure maintenance. From the federal perspective, significant improvements to the infrastructure and mitigation of project impacts was a huge component of the settlement. When the federal government assessed what it would cost to decommission the entire FIIP or to fund its improvements, the benefits and costs weighed in favor of funding the settlement.

Weiner described the process of compact approval by the Montana Legislature and Courts, allowing the compact to also bind third parties on the river system. He noted that the Montana Supreme Court views these compacts as consent decrees, with approval dependent upon: (1) whether the settlement was the result of arm's length negotiations between competently represented parties; and (2) whether anything in the compact is inconsistent with controlling law.

Rusche echoed the critical importance of educating folks on the finer details of the settlement, particularly for discussions among members of Congress that would take place without the tribal members in the room to answer questions.

Weiner noted that, from Montana's perspective, many of the supporters of the compact were those who make their living using the water, who saw the compact as striking a really good balance between recognizing the tribes' significant legal entitlements to the water and protecting existing users. Much of the vocal opposition was more ideological, with opposition to the Reserved Water Rights Doctrine or the existence of the tribes, or concerns that the compact represented a federal water grab. FIIP management was also an issue as most of the project irrigates allotted lands now owned by non-CSKT members.

Swaney the Flathead Reservation is a beautiful place with a lot of water resources, and it is a place that others have wanted to occupy. She noted that they consider all descendants of the tribes family, and federal law and policy not the tribes make a distinction based on bloodline ratios. As a community, everybody's needs for water must be addressed.

On the Aamodt panel, speakers included: Arianne Singer, General Counsel, New Mexico Office of the State Engineer; Alice Walker, Attorney for the Pueblo of Nambé; Richard Hughes, Attorney for the Pueblo of Tesuque; Peter Chestnut, Attorney for the Pueblo of San Ildefonso; Jennifer Walters, Civil Engineer, Bureau of Reclamation; and Josh Mann, Policy Analyst, Secretary's Indian Water Rights Office, Department of the Interior. The Aamodt settlement included New Mexico, the City and County of Santa Fe, the United States, individual claimants, and the four Pueblos of Nambé, Pojoaque, San Ildefonso, and Tesuque. After 35 years of litigation, in 1999 the parties agreed to pursue a negotiated settlement. The initial 2009 cost sharing agreement, and the 2010 settlement approved by Congress in 2010, led to several more steps over the next decade before the court entered its final decree in 2017.

Construction on the Pojoaque Basin Regional Water System, a central component of the settlement, was set to begin in 2018, but funding issues caused delays. The original project design was only conceptual and substantially underestimated the true costs. Mann noted that the appraisal level study was insufficient, but that Reclamation lacked the necessary Congressional authority to do a feasibility study, which is much more expensive. When Reclamation made a detailed examination after the 2010 settlement authorization, the actual cost of the project design more than doubled. The settlement parties re-entered negotiations in 2018-2019. A Section 611(g) agreement covered additional financial contributions from the parties; reduced the initial water production and scope of the project; and extended the substantial completion deadline and made a major change in the definitions of substantial completion. Support from the Pueblos, the Administration (particularly the Office of Management and Budget), and other settlement partners (particularly Santa Fe County) was critical to getting Congress to approve an amendment to the settlement in 2020. In August 2020, Reclamation allowed limited construction to begin on the regional water system, while waiting for additional federal funding authorization.

The Pueblos noted some of the lessons they learned from the lengthy settlement process: (1) settlement projects require careful design, with competent cost figures; (2) if a settlement project must be fund-based, the tribes must take all steps to ensure sufficient funding for the project; and (3) tribes should insist on significant control over project design and contracting. Mann added that any project-based settlement really needs a feasibility study to get a good cost estimate, and those can take years to complete, delaying settlement. But the alternative of fund-based settlements means making sure that the tribe has enough funds to complete the projects they are considering building.

Singer said one of the lessons the state learned was that they needed to do a much better job of educating people about the benefits of the settlement, and engaging in public outreach early on. They also found that not everyone wanted to be a party to the settlement. In order to bind third parties, they had to create water district-specific rules under their Active Water Resource Management framework, which is an alternative form of administering priority water rights in New Mexico for various high priority stream systems. She said an important thing to consider in negotiating settlements is understanding how will it actually works on the ground and what the roles and responsibilities of the parties will be to minimize conflict during the implementation phase of the settlement. She said they are still learning as they go. She emphasized New Mexico's commitment to these important settlements, and noted the significance of the legislature's doubling the state's contribution toward the regional water system.

The Kickapoo-Kansas panel included: Kickapoo Chairman Lester Randall; David Barfield, Kansas Water Resources Consulting, LLC (and former Chief Engineer, Kansas Division of Water Resources); Scott Bergstrom, Assistant Solicitor, U.S. Department of the Interior; and Burke Griggs, Associate Professor, Washburn University School of Law. Chairman Randall expressed appreciation for the respectful and meaningful partnership that has been created between the Kickapoo Tribe and Kansas on water management in the Delaware River Basin, which has long-lasting value between both sovereigns. In December 2020, Congress approved legislation directing the Natural Resources Conservation Service (NRCS) to do a preliminary feasibility study on a water storage project on Plum Creek, a tributary to the Delaware River on the Kickapoo Reservation. The tribe has relied on a small dam and treatment plant, built back in the 1970s with a small federal grant, but both structures have required multiple repairs and they are inadequate to meet the tribe's current and future needs. They began planning for a larger water storage project in the 1980s, and the Plum Creek project was proposed back in the 1990s.

The proposed reservoir near the headwaters of the Delaware River Basin would provide a reliable supply of surface water in a region where groundwater resources are limited and droughts are common. The Kickapoo Tribe and Kansas quantified the amount of reservoir storage that could support the Tribe's direct flow needs, but the federal government needed to do a study, which required federal funding and authorization. The settlement agreement itself has not been approved by Congress, but the Kickapoo Tribe and Kansas have agreed to terms, including how the settlement will be implemented over time. The Kickapoo Tribe and Kansas signed the agreement in 2016, but the U.S. Departments of the Interior and Justice won't sign the agreement until it is approved by Congress, although they did participate in the negotiation process. The settlement includes a Memorandum of Agreement that establishes monitoring, communications, and action levels based on streamflows and storage levels in reservoirs to protect the tribal water right. The MOA includes a mechanism for annual reviews so that it remains current and relevant as the tribe develops storage.

Chairman Randall noted that the federal government has not offered much support in its role as a trustee to protect their water resources, and the Kickapoo Tribe is not the only tribe in that situation. "There really should have been started, decades ago, a serious federal program to protect and develop the water rights of the tribes. Decades later, most Western rivers are over-developed by our non-Indian neighbors, and it's harder with each passing day to protect tribal water rights without serious support from the federal government. Congress is paying more attention to national

infrastructure these days, but once again the tribes will be lucky to get crumbs. I don't see it changing in my lifetime. Hopefully, hopefully down the road, we'll see some changes with some of these cases that are coming up. And I appreciate the people that spoke before us because the information was very valuable to me, and I'm sure to most of the people listening today."

Bergstrom explained the complicated position of the United States in litigation when it is both trustee for the tribes and has an obligation to vigorously defend the interests of the United States. This becomes particularly difficult where a tribe needs more affirmative and progressive action from the federal government, but there is a need to take a consistent position on sovereign immunity issues, the interpretation of the McCarran amendment, and even positions on the Administrative Procedure Act. It puts the United States in an awkward spot. The Departments of the Interior and Justice were involved in the settlement process to offer guidance on the federal perspective, including ensuring that the tribe would get the benefits it needs, while meeting the requirements of the 1990 Criteria and Procedures, and providing finality.

The second day of the virtual Symposium began with presentations on the Biden Administration's water settlement policy, and speakers included Elizabeth Klein, Senior Counselor to the Secretary of Interior, and Chair of the Working Group on Indian Water Settlements; Tanya Trujillo, Principal Deputy Assistant Secretary for Water and Science,; and Pamela Williams, Director, Secretary's Indian Water Rights Office. Pam noted that the Department of the Interior has completed 38 Indian water rights settlements since 1978, with 34 of them Congressionally approved, and the other four Administratively approved. She discussed: (1) some of the incentives to settle from tribal, federal, and non-federal perspectives; (2) several factors that influence settlement negotiations; (3) important components of settlements; and (4) the federal settlement process, including the 1990 Criteria and Procedures. She talked about the roles of the settlement parties and of Congress. Also, she addressed the increasing costs of settlements over time and how those costs are funded.

Williams noted that there are four tribes with pending and anticipated settlement legislation in the 117th Congress. Legislation that has already been introduced includes: (1) the Gros Ventre and Assiniboine Tribes of the Fort Belknap Indian Community Water Rights Settlement Act (S. 1911); and (2) the Technical Correction to the Shoshone-Paiute Tribes of the Duck Valley Reservation Water Rights Settlement Act (S. 648/H.R. 1849). Pending legislation not yet introduced in this Congress includes: (3) the Hualapai Tribe Water Rights Settlement Act; and (4) an Amendment to the Navajo Gallup Water Supply Project. There is also pending litigation relating to the water rights of about 65 Indian tribes in 12 states, and more requests for federal litigation assistance is pending. "With over 200 Tribes in the West who need access to clean, reliable water and with extreme drought conditions in those States with these Tribes, it is inevitable that DOI will continue to see a growth in the number of Tribes who will assert their rights to the water on their reservations. Settlement requests will continue."

U.S. Representative Melanie Stansbury (D-NM) shared some remarks at the beginning of the Congressional panel, followed by presentations by and discussion with staff members from the House Natural Resources Subcommittee on Water, Oceans and Wildlife - Matthew Muirragui, Majority Staff Director; and Kiel Weaver, Senior Policy Advisor and Minority Staff Director. Muirragui explained some of the challenges to getting Congressional approval of settlements, including: (1) unreliable future funding streams with inadequate discretionary funds; (2) overly restrictive calculations of settlement benefits, which he noted are often deployed as a means of objecting to settlements or for other political leverage; and (3) the 10-year baseline cost assessments from the Congressional Budget Office. The current Congress is attempting to develop a bipartisan infrastructure framework and appropriate funding for existing settlements. Additional deposits into the Reclamation Water Settlement Fund would: (a) ensure a predictable, reliable funding stream for future settlements that is not subject to unpredictable annual appropriations; (b) help address frequent settlement negotiation challenges associated with uncertainty over future federal funding; and (c) alleviate pressure on the Department of the Interior's discretionary appropriations to implement Indian water rights settlements. He noted that Reclamation's annual spending on settlements continues to increase as a percentage of the Water and Related Resources account.

Both Muirragui and Weaver emphasized the importance of tribal member presence on Capitol Hill to continuously educate new members of Congress. It is important to provide both historical context and how these settlements will meet the present and future water needs of the tribes. It is critical to have the support of the tribes, the state, the federal Administration, and other settlement parties. Broad support from other government entities and organizations can be meaningful as well. One thing that can derail the legislative process is when different constituents impacted by the settlement are reaching out to members of Congress with competing interests and inconsistent perspectives on the

settlement. Getting through the legislative process requires persistence and patience, and a recognition that sometimes all the stars need to align to get settlements approved.

Communication with members of Congress that is often effective describes the importance of the settlements for tribal economic development, public health, long-term water supply reliability and certainty for western communities, support of treaty rights and tribal sovereignty, meeting federal trust responsibilities, and the net benefit for taxpayers.

The concluding presentation on Universal Access to Clean Water for Tribal Communities was offered by Bidtah Becker, Associate Attorney, Navajo Tribal Utility Authority, and Heather Tanana, Assistant Research Professor of Law, University of Utah. The COVID-19 pandemic underscored the consequences of a widespread lack of drinking water infrastructure for tribal communities, as well as the lack of funding for operation and maintenance of existing water systems. Several federal agencies have tribal drinking water programs, including the Department of Interior's Indian Health Services, the Environmental Protection Agency, the Bureau of Reclamation, the Department of Agriculture, and others. Unfortunately, these programs are not set up to coordinate and work together to meet the substantial needs in Indian communities. The Colorado River Water & Tribes Initiative is advocating a whole of government approach to get funding at a level sufficient to meet unmet needs by leveraging existing programs to improve access to reliable, clean drinking water. Legislation has been introduced in the Congress offering both funding for and coordination of several critical programs across multiple agencies.