

The Native American Rights Fund (NARF) and Western States Water Council (WSWC) cosponsored their 18th biennial Symposium on the Settlement of Indian Reserved Water Rights Claims on August 8-9. Held virtually, the first day included a panel on the recent Supreme Court ruling in *Arizona v. Navajo Nation* and *U.S. Department of the Interior v. Navajo Nation* (#21-1484), as well as a series of presentations on settlement implementation, policies, and legislation.

The panel on the recent Supreme Court ruling included: Paul Spruhan, Assistant Attorney General, Navajo Nation Department of Justice; John Smeltzer, Attorney, U.S. Department of Justice; and Lisa McKnight, Of Counsel, Salmon, Lewis and Weldon. Spruhan agreed with Justice Gorsuch's dissent: "His dissent is pretty astonishing, in pretty much articulating exactly the point of view of the Nation." Although he called this a disappointing ruling for the Navajo Nation, Spruhan did not believe it would have major implications for other court cases. Smeltzer said that the majority ruling confirms a Supreme Court perspective of limited federal involvement as trustees, as well as positively reaffirming the *Winters* and Federal Trust Doctrines. He argued that the United States' trust authority is intended as the "backstop" to support Tribes exercising their own authority. McKnight said that the case was about the Separation of Powers between Congress and the Supreme Court. By virtue of the *Winters* Doctrine, a right to water can be implied and quantified by a judge. However, a federal duty of trust to secure access to that water cannot be implied, because there must be specific parameters to know whether that obligation has been met. Such obligations must be explicit in the treaty in order to be enforceable, and the Navajo Treaty of 1868 did not meet that standard.

Commissioner Camille Touton, Bureau of Reclamation (USBR), provided an update on infrastructure funding and implementation as part of authorized settlements. She also discussed managing Reclamation projects through drought. Touton focused on partnerships, and what has been achieved through collaboration with NARF, WSWC, and the USBR. She discussed ways the tribal partnerships and investments are fulfilling their purpose to "provide certainty" and to "serve these communities with a reliable water supply, not just for human health and safety, but for the economy of these places." She provided an update on the Navajo-Gallup Water Supply Project, reporting that the Cutter lateral is delivering water to homes, and there are 250 of the 300 miles of planned pipeline in the ground. She noted the first Colorado River partnership discussion hosted by USBR on August 10, in Phoenix, Arizona. "We've invited all seven Basin States and the thirty sovereign nations in the Colorado River Basin to start the conversation for what the guidelines look like for operating the Colorado River system starting post-2026. It really is a historic moment and sets the tone for collaboration within the Basin."

Speaking on the Administration's settlement policy were: Lynn Trujillo, Sr. Counselor to the U.S. Secretary of the Department of the Interior (DOI); and Pamela Williams, Director, Secretary's Indian Water Rights Office. Trujillo outlined the principles guiding the Administration's negotiations, indicating three primary settlement concerns: (1) reliance on appraisal-level studies to appropriate funds for settlement projects, resulting in later amendments; (2) the use of fund-based settlements as opposed to project-based settlements; and (3) growing demands for new settlement teams and DOI resources to meet that demand. "The Biden-Harris Administration recognizes that water is essential for people to lead healthy, safe and fulfilling lives on Tribal lands. We know that water is among the most sacred and valuable resources for Tribal nations.... Indian water rights settlements play a pivotal role in this Administration's commitment to putting equity at the center of everything that we do.... Here at the Interior, we have a clear charge from the President and Secretary Haaland to protect Tribal reserved water rights and improve water access and water quality on Tribal lands."

Williams reported that DOI has completed 39 Indian water rights settlements since 1978, with 35 congressionally approved, and the other four administratively approved. Williams anticipated that several settlements would be approved in the 118th Congress during the Presidential election year. She provided an overview of general concepts such as incentives to work toward settlements, the processes and components of a typical settlement, and the role of tribes in reaching settlement. When asked about the potential implications of *Arizona v. Navajo Nation*, Williams said: "I read that case very narrowly. It was talking about a duty to assess and come up with a plan. I can tell you that the Navajo Nation is continuing to explore settlement. We've been working on a settlement for many, many years with the State of Arizona and the local parties. That hasn't stopped."

Steve Moore, NARF Attorney, responded to the Administration's presentation from a tribal perspective, and focused his remarks on the potential impact of the Supreme Court ruling in *Arizona v. Navajo Nation*. Moore expressed concern about the enforceability of the *Winters* Doctrine moving forward. He emphasized a need for greater outreach and communication in regards to decisions and consultations. With respect to the progress that has been made, Moore commented that it has not been enough to meet the water crisis and called for collaboration: "We need to work together to find a better path forward to avoid the destruction of tribal communities and cultures in the face of growing human populations and climate change."

Michelle Bushman, WSWC Deputy Director/General Counsel, highlighted the long-term efforts of the WSWC and NARF to establish a permanent settlement fund for authorized settlements. She talked about the need for a permanent funding mechanism, similar to the \$1.2B Reclamation Water Settlement Fund (RWSF) (P.L. 111-11) or the more recent \$2.5B Indian Water Rights Settlement Completion Fund (P.L. 117-58). Ann Rodgers noted that when the settlement of the Acoma-Laguna Pueblos shifted from a project-based settlement to a fund-based settlement, they were informed that they would not be eligible for funds through the RWSF due to statutory language specifically limiting expenditures to Reclamation projects authorized for settlements.

The congressional panel speakers included Jennifer Romero, Majority Staff Director/Chief Counsel, Senate Indian Affairs; Annick Miller, Staff Director, Subcommittee on Water, Wildlife and Fisheries, House Natural Resources; and Matthew Muirragui, Deputy Staff Director, House Natural Resources Committee. Muirragui gave an update on new funding sources for settlements. He mentioned \$2.5B in the Infrastructure Investment and Jobs Act (IIJA) (H.R.3684) allotted to pay off settlements already approved in 2021. He also pointed out \$550M in the Inflation Reduction Act (IRA) (H.R.5376) intended to successfully implement recently passed bills. Miller focused on House processes, noting that former Rep. Rob Bishop's (R-UT) criteria for holding hearings on settlements when he chaired Natural Resources are not likely to return. She predicted the current "Cut-Go" requirement, with offsetting reductions in authorized spending and appropriations, will be the biggest hurdle for settlements in the future.

Romero gave an update on several bills: the Rio San José and Rio Jemez Water Settlements Act (S. 595); the Tule River Tribe Reserved Water Rights Settlement Act (S. 306); the Fort Belknap Indian Community Water Rights Settlement Act (S. 1987); and the Navajo-Gallup Water Supply Project Amendments Act (S. 1898). She suggested three primary considerations when preparing a settlement bill: (1) discretionary vs. mandatory spending; (2) non-federal cost sharing; and (3) whether the project is fund-based or project-based.

Tribal representatives responding to the congressional panel included Samantha Skenandore, Of Counsel, Quarles and Brady (Tule River); Ann Berkley Rodgers, Attorney, Chestnut Law Offices, P.A. (Acoma/Laguna); David Yepa, Attorney, New Mexico Law Group (Jemez/Zia); and Joanne Harmon Curry, Partner, Patterson Earnhart Real Bird & Wilson LLP (Ft. Belknap Indian Community). Skenandore provided a timeline of the Tule River Tribe's efforts to actualize a settlement agreement made in 2007. Technical studies led the Tribe to seek amendments through the proposed 2022 Tule River Water Settlement Act (S. 4879). Rodgers noted that the Acoma/Laguna settlement has gone through much the same agreement and study process as Tule River. Rodgers also shared the importance of getting the entire community on board, which helped them secure congressional sponsorship. Yepa chronicled the Jemez/Zia Pueblo settlement efforts and their work to continually bring parties back to negotiations. He cited the Tribes' historical relationships as a reason for success in settlement. Curry discussed the Fort Belknap settlement and compact. "We as a team worked hard and had to be nimble to go from a hearing, to markup, to Senate passage in three weeks. This comes with attention and commitment to the congressional process. We can't say enough about the assistance that was given by both our delegations, House staff and congressional staff in the Senate that we worked with."

KeAloha Douma, Douma Law PLLC (White Mountain Apache) talked about their approach to Congress to amend the White Mountain Apache Tribe Water Rights Quantification Act of 2010 (H.R. 1065). Part of the Claims Resolution Act of 2012 (P.L. 111-291) authorized funding for the White Mountain Apache Rural Water System. However, a later viability assessment identified complications in the water project and established the need for further time and funding. The amendments to the 2010 Act (S.3168/H.R. 5880) passed in December 2022, and were signed into law in January (P.L. 117-342). Douma emphasized the Tribe's engagement with Congress and others throughout the process.

The Colorado River panel included: Jason Hauter, Akin Gump, representing the Gila River Indian Community (GRIC); and Nicole Klobas, Chief Counsel, Arizona Department of Water Resources. Klobas gave an overview of the challenges facing Colorado River-dependent communities. Klobas highlighted issues of importance to Arizona with special consideration to the Drought Contingency Plan (DCP) and Colorado River Post-2026 Operations. She emphasized the need to seek basin-wide solutions and recognized Tribes as a vital component of conjunctive management. Hauter gave an overview of the GRIC's rights to Colorado River water under their settlement, and the impact of proposed DCP cuts on the Community. Hauter outlined the alternative approach that was developed when GRIC was included in the planning process. Specifically, GRIC would take payment in lieu of delivery of Colorado River water. GRIC committed 200,000 acre-feet/year of conserved waters through various mechanisms both paid and unpaid.

The second day of the Symposium included a panel on the Hualapai Tribe's negotiations and settlement, and focused on planning tools and initiatives in regard to climate change. The panel on the Hualapai settlement featured: Mary Pavel, Partner at Sonosky, Chambers, Sachse, Endreson & Perry, LLP; Sarah LeFlore, Policy Analyst, Secretary's Indian Water Rights Office; and Jeff Heilman, Legal Counsel, Arizona Department of Water Resources.

Pavel gave an account of the challenges in passing the Hualapai Tribe Water Rights Settlement Act (P.L. 117-349). The Act was reported by the Senate Committee on Indian Affairs in November 2022, leaving six weeks to secure approval from the House and Senate. The Tribe sought inclusion in the Consolidated Appropriations Act of 2022 (P.L. 117-103), but were ultimately excluded at the last minute. Pavel recalled watching the floor webcast as the Senate unexpectedly voted on the bill as a standalone measure under unanimous consent. Not expecting the bill to be presented as a standalone measure, Pavel questioned whether her firm had engaged the House sufficiently. On December 22, 2022, the Hualapai settlement passed 360 - 55, despite the minority leader voting against it. Pavel advised: "Take the time. Meet with as many members as you can. Tell them about your settlement and ask them to vote yes when the time comes. My failure to do so could have cost me dearly.... If I leave you with anything it is to remain persistent, but not rigid, in how you achieve your goals.... Stay persistent. Stay true. And approach the matter with as much integrity as you can have."

LeFlore outlined the Hualapai settlement terms and negotiations. She outlined initial concerns and steps taken to ensure protection of tribal groundwater rights into the future. Heilmann gave an update on the status of pending Arizona settlements, as well as Arizona's role in and policies toward settlements. Amidst precarious water conditions, the State of Arizona is committed to reach comprehensive settlements with Tribes and maintain flexibility in negotiations.

The next panel talked about future water supply planning for Tribes in the face of climate change. Panel speakers included: Crystal Tulley-Cordova, Navajo Nation Department of Water Resources; Nikki Tulley, National Aeronautics and Space Administration (NASA), Indigenous Peoples Initiative; and Gretel Follingstad and Crystal Stiles, National Oceanic and Atmospheric Association (NOAA), National Integrated Drought Information System (NIDIS). Tulley-Cordova talked about the Nation's work building an interconnected public water system and diversified water portfolio. The Tribe is developing methods of treating unregulated water sources (contaminated with uranium and dissolved solids) for rural and agricultural use.

Tulley spoke on new ways of measuring and mapping evapotranspiration and accessing data from NASA. Tulley introduced tools such as the Applied Remote Sensing Training Program (ARSET), DEVELOP, SERVIR, the Indigenous Peoples Initiative (IPI), and the Navajo Nation Drought Severity Evaluation Tool (DSET). Stiles talked about NIDIS, which coordinates drought planning data and resources among federal, state, and tribal agencies. NIDIS hosts the U.S. Drought Portal at drought.gov and drought.gov/tribal. NIDIS will be offering a grant competition in FY24 focused on building tribal drought resilience. Follingstad discussed NIDIS' Drought Early Warning System (DEWS), a platform which aims to inform decision-making by providing regional drought risk assessments. Users can input local data to view regional climate history, conditions, and modeling.

Devin Rhinerson, Partner, PACE LLP, provided an overview of the Colorado River Indian Tribes (CRIT) Water Resiliency Act (P.L. 117-343). He explained the Tribes' focus on leasing as an option to shore up Arizona water supplies against drought. CRIT agreed to only lease water that had been previously consumptively used. Under that principle, and with a waiver of the Indian Non-Intercourse Act, the Tribe is now able to engage with the Department of the Interior and water users in the State of Arizona to develop a system for leasing, storage, and conservation of CRIT water.

Tony Willardson, Executive Director, WSWC, provided an overview of the WSWC's mission and challenges facing western states. He reminded everyone that States and Tribes are not stakeholders but sovereign entities with a responsibility to manage their water resources. Willardson introduced data resources available to decision makers including Landsat thermal imaging, the WSWC's Water Data Exchange Program (WaDE), and Western States Water Data Access and Analysis Tool (WestDAAT). Willardson emphasized a need for investment by federal agencies in drought forecasting. He also touched on the formation of the Internet of Water Coalition (IoW) to encourage change by building sustainable networks and developing modern data infrastructure to support decision-making.

Adel Abdallah, WaDE Program Manager, WSWC, demonstrated online navigation of WestDAAT and explained WaDE's operational principles for the management of data. Data sharing should be Findable, Accessible, Interoperable, and Reusable (FAIR). He introduced the WaDE Water Right Landing Pages, a tool which links WestDAAT water rights objects to state data. He also introduced a tool under development that allows users to view up- or downstream water rights, U.S. Geological Survey streamgages and Environmental Protection Agency monitoring stations and water quality data from any given point on a river or stream. For more information go to westdaat.westernstateswater.org.