# BASIN-WIDE WORKSHOP SUMMARY

**CONVENED BY THE**
**WORKING GROUP ON WATER & TRIBES IN THE COLORADO RIVER BASIN**

February 13-14, 2019
We-Ko-Pa, Fort McDowell, Arizona

## OVERVIEW

Approximately 75 people, representing tribes, state and federal governments, conservation groups, watershed groups, and universities, participated in a two-day workshop. The objectives of the workshop were to:

1. Clarify tribal needs, interests, priorities, and next steps with respect to the Tribal Water Study;

2. Generate one or more proposals to encourage tribal water sharing to help achieve the objectives of the Upper and Lower Basin Drought Contingency Plans;

3. Create a short list of potential on-the-ground demonstration projects where tribes could work with watershed groups, conservation NGOs, and others to pursue mutual interests;

4. Develop suggestions for the process to review, evaluate, and update the 2007 Interim Guidelines; and

5. Learn about emerging resources to address tribal and basin-wide needs and interests.

Attachment # 1 is the final agenda for the workshop, and Attachment # 2 is a list of confirmed and invited participants. Attachment # 3, which is *Working Paper # 1: The Emerging Role of Tribes in Governing the Colorado River*, presents an overview of the legal and institutional framework that shapes tribal water use and management in the basin.

This workshop summary synthesizes the presentations and conversations at the workshop. It is supplemented with some additional information based on the various materials prepared in advance of the workshop, as well as feedback received on a draft of this workshop summary.

## TRIBAL WATER STUDY: IMPLICATIONS AND NEXT STEPS

Daryl Vigil (Jicarilla Apache Nation and Ten Tribes Partnership) and Pam Adams (US Bureau of Reclamation) kicked-off the workshop by reviewing the findings and conclusions of the Tribal Water Study (see Attachment # 4). After a brief review of the structure and contents of the study, they reviewed the aggregate needs, interests, and priorities of the Ten Tribes by reviewing Table 9-A and the Tribal Action Survey (see Attachment #5).

Following this high-level review, one person from each of the following tribes emphasized their particular tribe's needs, interests, priorities, and next steps:

- Ute Indian Tribe
    - Develop infrastructure for water delivery
    - Build and/or use water storage

- Ute Mountain Ute Tribe
    - Build relationships & partnerships
    - Integrate sacred & spiritual value of water into decisions (e.g., San Juan River endangered species recovery program)

- Southern Ute Indian Tribe
    - Provide opportunities for tribal water sharing (e.g., leasing)
    - Engage with decision-makers throughout the basin

- Jicarilla Apache Nation
    - Provide opportunities for tribal water sharing; follow the demand for water, even if it means sharing across state boundaries and between the Upper and Lower basin
    - This is the only way to realize the economic value of the tribe's water
    - Move beyond legal and institutional constraints

- Navajo Nation
    - Provide water for basic human needs (drinking water, irrigation, food, etc.)
    - Secure water rights; build support to implement Utah water rights settlement
    - Provide jobs and stability for citizens and communities, particularly in light of the shutdown of the Navajo Generating Station

- Colorado River Indian Tribes
    - Provide water for basic human needs (drinking water, irrigation, food, etc.)
    - Provide jobs and stability for citizens and communities
    - Develop and improve infrastructure for water delivery
    - Build relationships and partnerships to move things forward with Arizona decision-makers as well as in Congress

- Fort Mojave Indian Tribe
    - Support equitable use & development
    - Protect, sustain, and restore the river ecosystem, in part by integrating the sacred and spiritual values of water into decisions

- Quechan Indian Tribe
    - Promote and support sustainable use of water
    - Satisfy basic tribal needs and interests
    - "Save the water"

- White Mountain Apache (not a member of the Ten Tribes Partnership)
    - Provide water for basic human needs (drinking water, irrigation, food, etc.)
    - Protect, sustain, and restore the river ecosystem, in part by integrating the sacred and spiritual values of water into decisions
    - Engage with decision-makers throughout the basin; build relationships and partnerships

The Chemehuevi and Cocopah tribes were not able to attend the workshop, and therefore there was no one there to speak to their particular needs, interests, and priorities.

During the discussion on integrating the sacred and spiritual values of water into decisions, several participants suggested such values need to somehow be quantified or otherwise documented, for example as water quality parameters, minimum stream flows, and perhaps measures of ecosystem services. Translating the sacred and spiritual values of water into more objective standards would not only assist water managers and decision-makers, but also provide a meaningful way for tribes to influence river management.

Most if not all of the tribes agreed that "water is life," it is the essence of their communities and way of life. One premise of the Ten Tribes Partnership is that they lead from a spiritual mandate to protect the river. The tribes also seemed to agree that it is important to not only address water use and management, but also to protect, sustain, and restore the river ecosystem. One person raised the question, "what kind of value do non-tribal people put on the river?"

## THE ROLE OF TRIBAL WATER SHARING IN THE DROUGHT CONTINGENCY PLAN

Building on the discussion about the implications and next steps for the Tribal Water Study, the participants moved on to focus on the potential role of tribal water sharing in the Upper and Lower Basin Drought Contingency Plans (DCPs), which were adopted on March 19, 2019.

This DCPs comprise a set of agreements intended to bolster water storage in Lake Mead and Lake Powell—in order to avoid curtailing water uses and diminished hydropower generation and revenues—as well as to outline how shortages will be administered along

the Lower Colorado River in the event they are declared between now and 2026. As recently explained at the Colorado River Water Users Association annual gathering:

- The Upper Basin DCP is designed to: (a) protect critical elevations at Lake Powell and help assure continued compliance with the 1922 Colorado River Compact and continued hydropower generation and revenue from Glen Canyon Dam; and (b) authorize storage of conserved water in the Upper Basin that could help establish the foundation for a Demand Management Program that may be developed in the future.

- The Lower Basin DCP is designed to (a) require Arizona, California and Nevada to contribute additional water to Lake Mead storage at predetermined elevations; and (b) create additional flexibility to incentivize additional voluntary conservation of water to be stored in Lake Mead.

As the basin states look for ways to use less water, the Tribal Water Study suggests that at least some tribes are potentially interested in using as well as sharing their water rights. While the interests of states and tribes may be perceived as being in inherent tension, they may also create a unique opportunity to facilitate tribes' ability to share their water with other water users in the basin in mutually beneficial ways.

Margaret Vick, (Colorado River Indian Tribes) and Larry MacDonnell (University of Colorado) introduced and co-facilitated this session. They used a set of straw-man proposals (one for the Upper basin and one for the Lower basin) to generate discussion and clarify the arguments for and against tribal water sharing to meet both basin-wide and tribal needs and interests. For a detailed description of each straw-man proposal, see Attachment # 6.

During the dialogue, several themes emerged:

1. There are some good examples of tribes sharing water through leasing and other arrangements, including CRIT, Gila River Indian Community, Jicarilla, and The Navajo Agricultural Products Industry.

2. The constraints to tribal water sharing seem to revolve around the following issues:

    a. To participate in the Upper Basin's Demand Management Program and similar conservation programs, all water—tribal water and otherwise—must be "developed and used" before it can be deemed eligible for conservation and associated funding under the program. Another way of saying this is that "unused water is system water." Non-Indian water users currently benefiting from unused tribal water have few incentives to compensate tribes for it. Similarly, many tribes lack adequate resources to develop and use their water so as to enable them to participate in the program.

b. As a general rule, a tribe's water (as well as other water allocated to each state) may only be shared within the state where its reservation is located. It is rare to share tribal water across state boundaries or across the Upper Basin and Lower Basin. Exceptions to the rule include (1) use of Jicarilla Apache water (Upper Basin) via contract in Gallup, New Mexico (Lower Basin); and (2) subject to settlement of its claims in Arizona, the Navajo Nation will be entitled to deliver roughly 6,000 acre-feet per year of the water right under the San Juan River settlement with New Mexico (Upper Basin) to Window Rock, Arizona (in the Lower Basin). The general rule, however, limits the ability of many tribes to share water where it is most needed, largely in the Lower Basin.

c. In general, tribes lack of funding or access to capital impedes their ability to develop their water rights. So, even if they wanted to develop water in order to conserve and share it, they have a limited capacity to do so.

d. Shepherding conserved water past intervening users is a challenge for any conserved water moving to downstream storage but is not a sufficient reason to avoid tribal water sharing arrangements.

3. The rationale for tribal water sharing revolves around the following issues:

a. Enable tribes to fully "develop and utilize" their water rights by sharing unused water with other water users in the basin. In part this is a simple matter of "equity," which can be thought of as fairness in terms of (1) the scope of parties afforded opportunities to participate in water-related decision-making processes, and (2) the distributional rules used to allocate water among these parties.

To the extent they are not fully developed, tribal reserved water rights (TRWR) can sit in awkward tension with state law-based appropriative rights because TRWR are generally measured based on a PIA or homeland standard rather than actual historical beneficial use and are not constrained by the requirement of ongoing beneficial use. (This requirement, however, also does not apply to municipal water rights that meet certain criteria under the Growing Communities Doctrine.) TWRW have priority dates, which may be their most valuable attribute and enable their integration with states' prior appropriation systems. Moreover, from the perspective of other water users, at such time as a tribe puts all of its water rights to use, those rights appear functionally similar to state law-based appropriative rights in the prior appropriation system (though there remain several significant legal differences).

b. For a variety of reasons, many tribes throughout the basin currently have unused water rights. Given structural imbalance between water supply and demand in the Basin, if tribes fully develop their rights to water, others who

currently use that water will face curtailment – or the need to compensate tribes for water they are now simply able to take out of priority. The DCP is a temporary fix and does not adequately address the fundamental problem that demand for water in the basin continues to increase while supply has decreased in recent years in an unprecedented way. Given that many tribes have a desire to expand current water use at the same time that the hydrology of the basin is pushing everyone else to look at reducing current levels of use, existing water users should sit-down with tribes to create more durable, long-term solutions that satisfy multiple needs and interests.

c. The seniority of water rights is a basic fact of western water law, and tribal water rights are some of the most senior and certain water rights in the basin. Non-tribal water users should be willing to pay for the certainty that access to tribal water rights would afford them.

d. The status quo also creates a perverse incentive system for tribes who want to use and/or share "unused" water. Currently, the most obvious pathway for tribes to convert unused water to used water is to construct potentially inefficient and expensive irrigation infrastructure so that water becomes "used" and potentially available to share – which could render the infrastructure superfluous.

4. In terms of <u>moving forward</u>, several pathways emerged:

a. If tribal leaders agree, develop water with expectation and/or condition of sharing in times of shortage. This type of arrangement could allow other water users to participate in funding tribal infrastructure for water development with a reciprocal option to contract for water sharing in the future. This type of scenario would benefit both tribes and the basin as a whole.

b. Consider establishing a parallel program to the system conservation pilot program that would allow tribes to devote unused portions of their water rights to system conservation or other sorts of "banked" water in exchange for compensation. This structure would avoid the system conservation program's exclusive application to "developed and used" water rights. To fund this parallel program, consider the possibility of pooling funding from entities that are interested in augmenting instream flows throughout the basin (e.g., environmental NGOs).

To further clarify this path forward, here are some additional notes from the conversation and feedback from the draft workshop summary (please note that the purpose of this summary is to attempt to capture the range of perspectives on this issue, not to necessarily resolve all of the questions and/or nuances of this path forward):

i. While some of the unused tribal water constitutes instream flows, some of it is put toward consumptive use by non-tribal water users without any compensation to the tribes. In relation to both types of water, the proposal's basic idea is the same: enable tribes to generate revenue by leasing unused portions of their water rights through the pooled funding arrangement.

ii. To be clear, this proposal contemplates a leasing program for unused tribal water, *not* permanent transfers of that water. Thus, the proposal would constitute a path toward tribal water and broader economic development, rather than an arrangement requiring tribes to forgo future rights to develop.

iii. Federal approval of a program of this type seemingly would be necessary under the Non-Intercourse Act.

iv. Some people point out that this proposal may be a net zero proposition in terms of water supply. It generates some funding for the tribes, but it is not clear how it benefits the system given that currently unused tribal water already remains available to other users. Nor is it clear how this option would add any additional flows, particularly for the states that want to maintain storage elevations.

Other people respond by arguing that unused tribal water does not always remain instream, but rather is commonly consumptively used by non-Indian water users (again, for free). Leasing this unused tribal water for instream flows – in lieu of existing consumptive uses – would yield system water.

In response, some people argue that system water is not the same as instream flow – system water is available to the major users in at least the lower basin states who have sponge contracts – that is, the ability to take whatever water other water right users don't as the Colorado flows downstream. System conservation water, by contrast, is not available to the sponge contract holders.

Still other people point out that the precise amount of conservation savings (system water) yielded by this proposed program is unclear. The amount would depend upon (1) the scope and terms of instream-flow leases formed by tribes; and (2) the corresponding reductions in consumptive use by existing water users that historically have utilized tribal water subsumed within the instream-flow leases."

v. Treating unused tribal water as instream flows does not change over-all water availability. However, if an unused tribal water allocation is

considered an instream flow, that may be considered a "use" under state law and the water would no longer be "unused" tribal water. This type of arrangement would allow compensation to the tribe for this "use" and prevent the sponge contract holders in the lower basin and the next on the priority list in the upper basin from continuing to use the previously unused tribal water.

The timescale for instream flows should also be considered. Many designated instream flows are designed to meet ESA mitigation requirements or for other habitat restoration. The tribes will need to consider this "use" in relation to other uses that might create more economic value for the tribe.

c. Start conversations within individual states; be pragmatic. The role of states is well-established and founded in the 1922 Colorado River Compact. According to the Upper Colorado River Basin Compact and *Arizona v. California* Decree, consumptive use by tribes must be accounted for within the overall water budget of the state where a tribe's reservation is located. Therefore, the most pragmatic way forward is to work with states to explore options for tribal water sharing.

d. Realign incentives for tribal water sharing. For example, recognize the tremendous value of senior water rights and make unused tribal water eligible to participate in the system conservation pilot program (or something like it). Allow experiments in sharing water across state boundaries and across the Upper and Lower basins. Promote and support forbearance agreements where tribes forgo future develop and use of water in return for compensation.

e. Propose strategic failures, that is, things that make sense except for the Law of the River:
    1. Take the long-view (100 years) – DCP is short-term (2026)
    2. Attempt to articulate our collective desired future.
    3. Respect the uniqueness of tribal water rights.
    4. Ensure that tribes have a seat at the table.

## HARNESSING RESOURCES TO FOSTER A SUSTAINABLE COLORADO RIVER

Several ongoing initiatives within the basin may be useful to advance the needs and interests of tribes and other water users in the basin. During this session, the leaders of various initiatives discussed the resources they bring to the basin:

- Jack Schmidt (Utah State University) discussed *Future of the Colorado River*, a project to model the environmental impacts of alternative water management

paradigms. He emphasized the need to better integrate water use and management with river ecosystem needs and values, to start by clarifying what we want in terms of water management and ecosystem protection, and to assess the trade-offs among alternative paradigms. See Attachment # 7 for more information.

- Kathy Jacobs (University of Arizona) discussed Colorado River Science Conversations, an ongoing effort that complements what Jack Schmidt is doing by integrating physical and social science into the conversation. See Attachment # 8 for more information.

- Larry MacDonnell (University of Colorado), representing Doug Kenney who could not participate in the workshop, discussed the *Colorado River Research Group* and annual conference on water law and policy at the Getches-Wilkinson Center, which increasingly focuses on the Colorado River. See Attachment # 9 for more information.

- Jim Holway (Babbitt Center) discussed *exploratory scenario planning* and a funding opportunity for tribes to work with the Babbitt Center and the Sonoran Institute to use scenario planning to address land and water management. This funded process could be used by tribes to explore scenarios for incorporating tribal water values into the DCP or the renegotiation of the 2007 Guidelines. . See Attachment # 10 for more information.

## FACILITATING ON-THE-GROUND PROJECTS

Building on the conversation about tribal needs, interests, and priorities, this session provided five vignettes of how tribes are working with watershed groups, conservation NGOs, and others to pursue mutual interests on-the-ground. Celene Hawkins (The Nature Conservancy) and Jason John (Navajo Nation) co-facilitated this session. Each of the vignettes focused on a mix of water management activities (e.g., water delivery systems/infrastructure, water measuring devices, water shepherding strategies, etc.) as well as projects to restore the river ecosystem. They also addressed, to varying degrees what catalyzes, enables, constrains, and sustains such partnerships. For more information see Attachment # 11.

- Jason John, Navajo Nation
    - The Navajo people, like other tribes, want to see things happening on the ground.
    - But the capacity to do on-the-ground projects varies among tribes; there is often a tension between building internal capacity vs. hiring outside consultants vs. partnering with others – tribes should do all three!
    - Most on-the-ground projects are catalyzed by a particular need or opportunity, but the process to get things done is often open-ended; it can be hard to know where to start and what the end looks like.

- The three most common constraints are (1) getting the right people at the table; (2) securing funding; and (3) navigating government procedures and bureaucracy.

- Mike Wight, Southwest Conservation Corps -- Ancestral Lands Program
  - See Attachment # 11 for detailed information.

- Nora McDowell, Fort Mohave Indian Tribe – Tribal Vision for Protecting the Colorado River
  - See Attachment # 11 for detailed information.

- Melanie Tluczek, Gila Watershed Partnership
  - See http://www.gwpaz.org for more information.

- David DeJong, Gila River Indian Community, Pima-Maricopa Irrigation Project
  - See the updated Attachment # 11 for detailed information, including a copy of DeJong's PowerPoint presentation.
  - Among other things, this case illustrates the importance of having a clear goal in order to make progress; in this case, the tribal council's vision, adopted 20 or so years ago, of a restored and healthy Gila River and the progress that has been made to realize that vision.

## MOVING FORWARD: SUGGESTIONS FOR THE DESIGN OF THE PROCESS TO REVIEW, EVALUATE, & UPDATE THE 2007 INTERIM GUIDELINES

The recent completion of the Tribal Water Study and the pending completion of the Drought Contingency Plan provide a foundation and sense of momentum to review, evaluate, and update the 2007 Interim Guidelines. The DCP is designed to be a bridge to support the 2007 Interim Guidelines through 2026. The implementation of the DCP and perhaps the Tribal Water Study will inform development of the post-2026 Interim Guidelines.

According to the 2007 Interim Guidelines, the Secretary of the Interior shall initiate a process no later than December 31, 2020 to review, evaluate (and presumably update) the 2007 Interim Guidelines. This pending process should build on the lessons learned from other recent public processes in the basin (2007 Interim Guidelines, Minute 319 Pulse Flow, Basin Study, Minute 323 Water Scarcity Contingency Plan, Tribal Basin Study, and the DCP Process), and could provide a unique opportunity to advance both basin-wide and tribal needs and interests.

Jay Weiner (Quechan Tribe) and Peter Culp (Culp & Kelly) co-facilitated this session. After reviewing the merits of recent planning and decision-making processes in the basin (see Attachment # 12 for a review of these processes), they presented the following straw-man

proposal to generate discussion and provoke additional suggestions on the process to review, evaluation, and update the 2007 Interim Guidelines:

*Background: In the 2007 Guidelines, the NEPA process seemed to provide a useful framework to engage a broad range of interests, encourage public participation, and foster buy-in. This process was benefited by significant "pre-process" discussions among the Basin States and at other levels. Similarly, the Basin Study's process design of stakeholder input supported and guided by federal technical resources created opportunities for substantial input and collaboration between traditional and non-traditional stakeholders. However, neither of these processes managed to engage tribes to the extent desirable. The Tribal Water Study seemed to create a better structure for tribal engagement and development of capacity for engagement, but in isolation from other interests.*

*Discussion topic: Use a formal NEPA framework, including a robust pre-scoping process, for the 2020-2026 discussion. Supplement it with stakeholder participation processes similar to those used in the two Basin studies to improve collaboration and participation by a broad range of interests, including tribes.*

After explaining the straw-man proposal, the participants made the following observations and suggestions:

- Nearly everyone seemed to agree that the straw-man proposal is heading in the right direction:
    - We have learned a lot from recent planning and decision-making processes, and need to keep in mind that the DCP is a temporary band-aid;
    - Create an informal multi-stakeholder process (a pre-scoping process) to supplement the more formal, state-driven process;
    - Include tribes and diverse stakeholder representatives (anything less will be fatally flawed);
    - Provide scientific and technical resources for tribal participation via the BOR, as well as the university-based resources (see Schmidt and Jacobs presentations discussed above);
    - Build and facilitate tribal capacity, both internal to individual tribes and associations like the Ten Tribes Partnership as well as external in terms of outreach and education.
    - In addition to building a common understanding about the system and alternative management scenarios in the future, generate options and recommendations that can be integrated into the more formal, state-driven process.

- This type of process assumes that the federal government will create and administer a good-faith NEPA process, including a robust pre-scoping stakeholder process.
    - While most participants have full faith and confidence in the BOR staff within the basin to initiate and manage such a process, nearly everyone seemed to

agree that things may get more political and more uncertain at the national level;
    - According to several participants, the new guidelines for NEPA do not provide sufficient time for scientific and technical analysis, negotiation, and public participation. (Although it was not discussed at the workshop, apparently the Interior NEPA guidelines contemplate extension of the presumed time and page limits. The appropriate Assistant Secretary has to approve. Perhaps there should be an early letter to the Assistant Secretary for Water and Science, signed by multiple parties including tribes, stating that the process must be allowed considerably more time and requesting approval of a greatly extended period); and
    - Therefore, catalyze this type of informal stakeholder process/pre-scoping prior to initiating the formal NEPA analysis process.

- Several comments and questions emerged regarding the design of a process to engage tribes and stakeholders, and what would enable the process to be successful:
    - Clearly define the purpose and scope of the stakeholder process; cast a wide-enough net to capture both water use and management objectives as well as river ecosystem needs and interests, including the sacred and spiritual values of water (but be careful not to bite off more than we can chew); and keep in mind that the Interim Guidelines post 2026 need to provide operational rules for the system;
    - Include all interests in the process;
    - Establish more than one option for the basin's 29 tribes to participate and share their needs, interests, and priorities – e.g., (1) consult with tribes about how to best represent the 29 tribes in the basin in the parallel stakeholder process; (2) engage in government-to-government consultations among tribes and the federal government; (3) encourage tribes to consult directly with officials from the state within which their reservation is located (given that states will likely be the primary negotiators); and (4) rely on the federal government to serve as trustees of tribal needs, interests, and priorities;
    - There is no guidebook for how to mobilize and engage tribes
        - Tribes do not have a uniform voice
        - Even when they are invited, tribes often do not show-up, though that does not necessarily mean that they are not interested
        - Keep in mind that if you know one tribe you know one tribe
        - Don't lose hope; keep trying
        - Keep in mind that tribes have the responsibility of states and the capacity of local governments
    - Build the capacity of individual tribes as well as existing tribal associations (i.e., Ten Tribes Partnership and ITCA Water Policy Committee) to effectively engage)

- Create awareness and understanding of this process, and seek input, advice, and support from elected representatives in Congress, including Arizona Representative Raul Grijalva Chair, House Natural Resources Committee.

- The basin and its future depends on the relationships among diverse water managers and water users.
    - All interests and voices can and should be engaged
    - It is essential to show-up and participate in workshops like this to help shape the future
    - Demonstrate kindness and openness to others as you listen, learn, and share
    - Build on existing networks within the basin