

Comments by Ed Millard at the January 23, 2023 CWCB Board Meeting  
[\*\*Attorney General's Report, Legal Briefing, and Executive Session\*\*](#) - 1:45-1:50

[Dec 5, University of Arizona, Confluence: The Colorado River at the Compact's Centennial](#)

I was listening to a Colorado River conference on December 5th when someone on a tribal panel, probably Jason Robison, mentioned a Supreme Court Case that might overturn Winters, the whole basis for tribal water rights. This shocked me but I didn't have time to track it down.

Around December 20th I read a tweet from a tribal lawyer pointing to [briefs that had been filed in a Supreme Court case](#), involving the Navajo Nation. One of the briefs was from Colorado.

Over the holiday I started reading them.

**The requested relief goes far beyond considering whether the Navajo Nation needs water. It would also require the Secretary to operate the Mainstream in a manner that ensures the Navajo Nation receives whatever water the Secretary might determine the Navajo Nation needs.** Functionally, such an enforceable right is difficult, if not impossible, to distinguish from a quantified reserved right. No matter if water is consumed under a quantified reserved right or the Secretary's judicially enforceable determination, it will have the same effect on other users.

As problematic as the Supreme Court and Congress have been in resolving these rights, empowering and compelling a political appointee to do it unilaterally is much worse.

**For all water users governed by the Law of the River, including Colorado's two recognized Indian Tribes, significant uncertainty or disruption in the distribution of compact apportionments that would flow from the decision below threatens established water rights in all of the Basin States**

**Permitting the piecemeal adjudication of rights to the Mainstream, as the decision below allows, creates both immediate and long-term disruptions to the coordinated management of the Colorado River. There is no reason to inflict these harms on a river system already stretched beyond its capacity**

## [Tribal Water Rights to Play Role in Colorado River's Dry Future\(Bloomberg News\)](#)

### Threat to Non Tribal Water Users with Existing Water Rights in the Colorado Basin

*Jay Weiner, of counsel at Rosette LLP who serves as water counsel for the Quechan Indian Tribe and the Tonto Apache Tribe."*

***"That means that farmers, cities and other non-tribal water users have been using water for free that rightfully belongs to a tribe, and that has gone unrecognized"***

*Jason Robison, University of Wyoming, "It's a regional challenge, we don't know how much additional water use might be authorized under those unrecognized tribal water rights."*

*Jay Weiner again:*

***"The implications of that are stark: Some people in the West are going to have to get by with using less, or even no water, from the Colorado River"***

Both Robison and Weiner sit on the Ten Tribes Leadership Team. Weiner made a similar threat during QA after a panel with Steve Wolff and Jim Lochhead at University of Arizona last year. He specifically targeted SW Colorado water users as Colorado's Ute tribes expand their use.

## Leadership Team

|                                                 |                                                  |                                                         |
|-------------------------------------------------|--------------------------------------------------|---------------------------------------------------------|
| Bidtah Becker, Navajo Nation                    | Anne Castle, University of Colorado              | Mike Connor<br>WilmerHale (ex-officio)                  |
| Leland Begay, Ute Mountain Ute                  | Peter Culp, Culp & Kelly                         | Julia Guarino<br>University of Colorado<br>(ex-officio) |
| Lorelei Cloud, Southern Ute Tribe               | Celene Hawkins<br>The Nature Conservancy         | Sharon Megdal<br>University of Arizona<br>(ex-officio)  |
| Maria Dadgar<br>Inter Tribal Council of Arizona | Becky Mitchell, CWCB                             | Mike Wight<br>Catena Foundation (ex officio)            |
| Jason John, Navajo Nation                       | Colby Pellegrino, SNWA                           |                                                         |
| Nora McDowell<br>Fort Mojave Indian Tribe       | Jason Robison<br>University of Wyoming           |                                                         |
| Margaret Vick<br>Colorado River Indian Tribes   | Garrit Voggesser<br>National Wildlife Federation |                                                         |
| Jay Weiner, Quechan Tribe                       | John Weisheit, Living Rivers                     |                                                         |

I was shocked for three reasons:

- I'd never heard of this case and I follow Colorado River issues closely, though not as much as I used to. It further proved something I'd learned at my last SW Basin Roundtable meeting in 2021 to my regret. Tribal water rights in Colorado and especially SW operate under Flight Club rules.

***"The first rule of Fight Club is: you do not talk about Fight Club"***

Mike Preston, who works for the Ute Mountain Ute tribe now, actually told everyone at my last Roundtable meeting, these are sensitive issues and people like me aren't allowed to talk about them. At this meeting, after which I was fired, I was trying to defend a policy from the 2015 Water Plan, written by Southwestern WCD, from being deleted from our Basin Implementation Plan by our local contractor:

**"The Roundtable recognizes the downstream challenges faced by water users in southwest Colorado due to continued development and pressures from users in the states of New Mexico, Utah, Arizona, and the Lower Basin; protect interests in southwest Colorado, while complying with existing Compact obligations. The entitlement to portions of Colorado River flows for New Mexico, Utah, and Arizona may be based on deliveries from southwest Colorado."**

- This 9th circuit opinion and the Colorado brief confirms **all the concerns that led me to defend this policy and that I had about tribal water rights and the Ten Tribes leadership team in 2020 and 2021**. I was especially concerned about persons with fiduciary duties to protect Colorado's water supply serving on the Ten Tribes Leadership Team and working with tribes in other states, like the Navajo, to expand their compact entitlement and use. This was not a financial conflict of interest concern, it was one of fiduciary duty.
- During a break in a Roundtable meeting in 2019 I'd been discussing my Law of the River research with a CWCB Director. The Director replied with:

**"Laws can be Changed"**

It chilled me to the bone, I'd been furiously studying the Law of the River to find angles we could use and this CWCB Director declared it all meaningless. This 9th circuit opinion proved this CWCB Director wasn't kidding. Tribes and their allies are in fact trying to rewrite the Law of the River to resolve all their outstanding water rights claims immediately at the expense of everyone else on the Colorado.

Another excerpt from the Bloomberg News article:

*Heather Tanana, a law professor at the University of Utah who is Navajo, said tribes' lack of resources to tap Colorado River water for their residents has had devastating public health consequences.*

*As many as 40% of Navajo residents **don't have access to running water and have to haul it to their homes, which created a public health crisis on the Navajo Reservation during the Covid-19 pandemic**, she said.*

***"If their water rights had been settled and quantified, and actually delivered, then hundreds—thousands—of lives would be saved during the pandemic," Tanana said. "It's a life or death matter connected to public health."***

From the 9th circuit opinion in the Navajo Nation case

particularly essential for healthy human societies.<sup>2</sup> Further, beyond the general import of water for societies, in the specific case of the Navajo Nation, news reports have indicated that the Nation's shortage of water have in part caused exacerbation of the risks from COVID-19. Many homes on the Reservation lack running water, making it difficult for tribal members to wash their hands regularly. See Ian Lovett et. al, *Covid-19 Stalks Large Families in Rural America*, Wall St. J. (June 7, 2020), <https://www.wsj.com/articles/covid-19-households-spread-coronavirus-families-navajo-california-second-wave-11591553896>. The Nation has as a result been particularly affected by the current pandemic, with a death rate significantly higher than that of many other parts of the country. See *id.*<sup>3</sup>

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<sup>2</sup> It is by no accident that many of the world's ancient civilizations were born in places such as the Tigris-Euphrates delta, and the valleys of the Nile, Indus, and Yellow Rivers. Pierre-Louis Viollet, *Water Engineering in Ancient Civilizations*9 (Forrest M. Holly trans., 2017). The engineers of classical Rome built a vast network of aqueducts that, at its peak, spanned over 250 miles in length. During the Last Gothic War, King Vitiges led an army of Ostrogoths to the gates of Rome itself. The invaders encircled the city and blocked off the aqueducts, keenly aware that the Romans could not survive a prolonged siege without access to water. See Peter J. Aicher, *Guide to the Aqueducts of Ancient Rome* 6 (1995). In more recent times, Israel, faced with a paucity of water, has developed techniques for managing wastewater and pioneered desalinization techniques. In 2011, Israel desalinated 296 million cubic meters (MCM) of water out of sea water, and forty-five MCM out of brackish water. *Water Policy in Israel* 5 (Nir Becker ed., 2013).

<sup>3</sup> The vast majority of deaths on the Reservation due to COVID-19 are among people aged sixty and older, including the hataahii, traditional

medicine men and women entrusted with preserving the Nation's cultural heritage. Jack Healy, *Tribal Elders Are Dying From the Pandemic, Causing a Cultural Crisis for American Indians*, N.Y. Times (Jan. 12, 2021), <https://www.nytimes.com/2021/01/12/us/tribal-elders-native-americans-coronavirus.html>.

[Covid-19 Stalks Large Families in Rural America](#) (Wall Street Journal \$\$)

Only one sentence mentions water and hand washing

*None of the structures have running water, not uncommon on the reservation, making it difficult to wash hands regularly.*

*Most of the article is about two other causes:*

***A Wall Street Journal analysis found that, across the country, the virus has spread more widely in places with the most crowded households, not necessarily places with the largest or densest populations.***

[Tribal Elders Are Dying From the Pandemic, Causing a Cultural Crisis for American Indians](#)(NYTimes \$\$)

***But people came, seeking help with their grief or prayers for ailing relatives. And the healers got sick.***

## **Crisis Exploitation of the Covid Pandemic**

I first heard the hand washing argument from a CWCB Director, in the summer of 2020 just a few months after the Navajo Covid outbreak began in March. I'd called to try to resolve a series of ongoing conflicts before they got further out of hand. Instead the Director went off on a tangent about social justice, the severe outbreak on the Navajo Nation and that it was caused by not having water to wash their hands. I didn't say much, in my head I was applying some basic logic:

- If that was a primary cause, the Navajo Nation and their affluent benefactors like the Walton Family, TNC et al with their vast resources could've distributed hand sanitizer, gloves and masks to every home. If they had this crisis could've been solved immediately for a couple million dollars. Some volunteers did this but it wasn't enough.
- Or; Hand washing wasn't a primary cause and this tragedy and those deaths are being exploited by the Ten Tribes, the Walton Family Foundation and their many affiliates to:
  - Win water settlements
  - Win billions in infrastructure money for pipelines
  - Win litigation like this 9th circuit opinion

This was the point at which I developed the concern that persons with a fiduciary duty to Coloradans, to protect Colorado's Water Supply, might be prioritizing the water rights of tribes in other states, like the Navajo, over Colorado. Later in 2020 I asked Commissioner Mitchell about

a clearly defined wall to separate and clarify these conflicting interests. The Colorado River is a zero sum game, especially now, people shouldn't be playing multiple conflicting hands at that table.

This hand washing argument is nearly impossible to counter. Anyone who questions it risks instant social, political and career suicide. I'm the only one willing to accept those consequences, so here I am tilting at this windmill again.

As long as no one questions this narrative, it keeps working and they will keep using it to steamroll all opposition in their efforts to redistribute the Colorado River from Ag to tribes and cities.

This argument was apparently used in the 9th circuit to win the opinion in the Navajo Case to redistribute the Colorado River.

## **Conclusion**

To conclude; the issue with the wall between CWCB, UCRC and Ten Tribes continues. One of the three applicants for the Division 7 CWCB seat is from one of Colorado's Ute Tribes and has been a long time member of Ten Tribes Leadership Team. Most of the tribes argue they are sovereigns. I agree. They should be treated like another Sovereign, Mexico, with bilateral treaty negotiations over these difficult issues. They probably shouldn't be sitting on state boards and disenfranchising Colorado's citizens.

I further ask CWCB and our Attorney General again to establish a clearly defined wall between Colorado water directors and commissioners on one side and Ten Tribes and Tribes in other states, especially those who are developing new compact uses and entitlements, at our expense on the other.

END



I think this argument was used by Chairman Nez in testimony to Congress for the massive infrastructure bill for Tribal water projects.

I suspect, but can't prove it was used to push through the Utah Navajo water rights settlement through congress over the Holidays in 2020, 81,000+ af.

I see this argument every month or so from journalists on the Colorado River beat, often funded directly or indirectly by the Walton Family Foundation; some have quoted Anne Castle, the new UCRC Federal Chair.

I heard it in a Western Resource Advocates panel from Anne Castle last year, which is also funded by the Walton Family Foundation.

Anne Castle and others will respond that there are academic papers supporting their claims. Again... if this was the cause it could've been resolved quickly and inexpensively by these affluent organizations and lives could've been saved.

The likely causes for the severity of the outbreak:

- A March 7, 2020 church service, with attendees from six church chapters. Someone was apparently infected with Covid and it spread all over the reservation overnight
- Crowded multigenerational homes, which prevented social distancing, quarantining of the sick, and especially isolation of seniors from younger persons who were infected (See Wall Street Journal)
- Poor access to health care from IHS (See Wall Street Journal)
- Using traditional healers whose methods were not only useless against this disease but spread it further. Elderly native healers would spend time in closed spaces with infected people without proper PPE and become infected themselves.
- A reason I can't say in our politically correct world.

At my last SWBRT meeting before I was fired I was trying to defend this policy from being deleted from our Basin Implementation Plan by our local contractor:

**"The Roundtable recognizes the downstream challenges faced by water users in southwest Colorado due to continued development and pressures from users in the states of New Mexico, Utah, Arizona, and the Lower Basin; protect interests in southwest Colorado, while complying with existing Compact obligations. The entitlement to portions of Colorado River flows for New Mexico, Utah, and Arizona may be based on deliveries from southwest Colorado."**

I didn't write this policy Southwestern WCD did in the John Porter era in 2015. They marked it as "Of Strategic Importance". I only amended it by including Utah and Arizona.

This was probably one of the most out of order Roundtable meetings in Roundtable history:

- It was being chaired by a contractor working for CWCB and Brown and Caldwell, and also Rivernetwork who was not a Roundtable member
- This contractor had a mission to discourage me, a Roundtable member and an elected IBCC representative, from speaking at Roundtable meetings.
- This inappropriate chair rewrote the agenda at the last minute without Roundtable member approval
- The agenda change was to add four people from the Ute Tribes, three of whom weren't roundtable members, in a 20 minute agenda item to furiously attack me for defending this policy which I didn't write and was from the 2015 Water Plan SW BIP:
  - One was Mike Preston who works for Ute Mountain now who opened my first Roundtable meeting in January 2019 by telling the whole Roundtable I was a conspiracy theorist and wasn't welcome at "his" Roundtable. This began a multiyear harassment campaign to try to get me to quit. When I was fired a neighbor who'd been on the Roundtable for the first couple years said:
    - **"I don't know how you took it as long as you did. I couldn't have"**
  - Kathy Rall, who arrived recently from the City of Scottsdale where she managed Colorado River issues and was a major stakeholder in the Central Arizona Project. Her self professed mission was to market the Southern Ute's water probably to the Lower Basin... and the Central Arizona Project. I can assure I was a thorn in the side of CAP, still am, so they were glad to see me fired.
- After this meeting unnamed persons mounted a pressure campaign on my County Commissioners to fire me which they did. The two commissioners who'd appointed me in 2018 and defended me from these assaults had been term-limited in January 2021 so I was defenseless against this campaign. I was fine with it, I was indeed fed up with CWCB, SWBRT, IBCC and Colorado's water bureaucracy in general

Duties of CWCB Directors many of which are related to water supply protection of water rights of Coloradans. These are why there is a Water Supply Protection role in CWCB Staff. This is the basis of a fiduciary duty conflict of interest if you Colorado Directors and UCRC Commissioner are doing basically the same thing for tribes or any other entity in other states:

#### 37-60-106. Duties of the board - legislative declaration.

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**(1)** It is the duty of the board to promote the conservation of the waters of the state of Colorado in order to secure the greatest utilization of such waters and the utmost prevention of floods; and in particular, and without limiting the general character of this section, the board has the power and it is its duty:

- (a)** To foster and encourage irrigation districts, public irrigation districts, water users' associations, conservancy districts, drainage districts, mutual reservoir companies, mutual irrigation companies, grazing districts, and any other agencies which are formed under the laws of the state of Colorado, or of the United States, for the conservation, development, and utilization of the waters of Colorado;
- (b)** To assist any such agencies in their financing, but not to lend or pledge the credit or faith of the state of Colorado in aid thereof, or to attempt to make the state responsible for any of the debts, contracts, obligations, or liabilities thereof;
- (c)** To devise and formulate methods, means, and plans for bringing about the greater utilization of the waters of the state and the prevention of flood damages therefrom, and to designate and approve storm or floodwater runoff channels or basins, and to make such designations available to legislative bodies of cities and incorporated towns, to county planning commissions, and to boards of adjustment of cities, incorporated towns, and counties of this state;
- (d)** To gather data and information looking toward the greater utilization of the waters of the state and the prevention of floods and for this purpose to make investigations and surveys;
- (e)** To cooperate with the United States and the agencies thereof, and with other states for the purpose of bringing about the greater utilization of the waters of the state of Colorado and the prevention of flood damages;
- (f)** To cooperate with the United States, or any of the agencies thereof, in the making of preliminary surveys, and sharing the expense thereof, when necessary, respecting the engineering and economic feasibility of any proposed water conservation or flood control project within the state of Colorado, designed for the purpose of bringing about greater utilization of the waters of this state;
- (g)** To formulate and prepare drafts of legislation, state and federal, designed to assist in securing greater beneficial use and utilization of the waters of the state and protection from flood damages;
- (h)** To investigate and assist in formulating a response to the plans, purposes, procedures, requirements, laws, proposed laws, or other activities of the federal government and other states which affect or might affect the use or development of the water resources of this state;
- (i)** To confer with and appear before the officers, representatives, boards, bureaus, committees, commissions, or other agencies of other states, or of the federal government, for the purpose of protecting and asserting the authority, interests, and rights of the state of Colorado and its citizens with respect to the waters of the interstate streams in this state;

<https://www.nytimes.com/2021/01/12/us/tribal-elders-native-americans-coronavirus.html>

The death of tribal elders, especially natural healers mentioned in the opinion, had little to do with water. It was caused by people who were often over 65 using methods that were wildly inappropriate to treat a highly transmissible disease, without proper PPE, and becoming infected themselves.

*On the Navajo Nation, where 565 of the reservation's 869 deaths are among people 60 and older, the pandemic has devastated the ranks of hataalii, traditional medicine men and women. When the virus exploded across the Navajo Nation, traditional healers who use prayer, songs and herbs as treatments tried to protect themselves with masks and gloves. They wrapped ceremonial objects in plastic. They set hand sanitizer outside traditional hogan dwellings.*

*But people came, seeking help with their grief or prayers for ailing relatives. And the healers got sick.*

## Unquantified Water Rights

At my last SWBRT meeting the Ute tribes attacked me for defending a policy they felt interfered with development of their water rights. They said they have unquantified rights in New Mexico and Utah and the SWWCD written policy I was defending would interfere. These rights will fall under the 9th circuit opinion. Mysteriously these rights aren't listed on this chart of unresolved rights from a Water and Tribes policy brief, only the quantified Uintah and Ouray rights being litigated are listed. I think a CWCB director plugged this report and its importance at a CWCB board meeting when it first came out April 9, 2021.

### [The Status of Tribal Water Rights in the Colorado River Basin](#)

Table 3 - Unresolved Tribal Water Rights

| Tribe                           | State | Status <sup>56</sup>                                 | Total Acre-Feet/Year  |
|---------------------------------|-------|------------------------------------------------------|-----------------------|
| Havasupai                       | AZ    | Outstanding                                          | Not available         |
| Hopi                            | AZ    | Outstanding                                          | Not available         |
| Hualupai                        | AZ    | Settlement pending congressional action              | 3,414 to 4,000        |
| Kaibab Paiute Band              | AZ/UT | Outstanding                                          | Not available         |
| Navajo Nation                   | AZ    | Settlement negotiations ongoing                      | Not available         |
| Pascua Yaqui                    | AZ    | Outstanding <sup>57</sup>                            | Not available         |
| San Carlos Apache Tribe         | AZ    | Outstanding                                          | Not available         |
| San Juan Southern Paiute Tribe  | AZ/UT | Outstanding                                          | 22,326 <sup>58</sup>  |
| Tohono O'odham Nation           | AZ    | Settlement negotiations ongoing (Sif Oidak District) | 8,000                 |
| Tonto Apache Tribe              | AZ    | Settlement negotiations ongoing                      | Not available         |
| Ute Indian Tribe (Uintah-Ouray) | UT    | Pending litigation                                   | 370,370 <sup>59</sup> |
| Yavapai-Apache Nation           | AZ    | Settlement negotiations ongoing <sup>60</sup>        | Not available         |
| <b>Total</b>                    |       |                                                      | <b>404,696</b>        |

Table 2 - Recognized Rights for Upper Basin Tribes<sup>49</sup>

| Reservation/Tribe               | State | Process                                                               | Total Acre-Feet/Year  |
|---------------------------------|-------|-----------------------------------------------------------------------|-----------------------|
| Ute Indian Tribe (Uintah-Ouray) | UT    | Federally Adjudicated Water Rights                                    | 179,315 <sup>50</sup> |
| Southern Ute Indian Tribe       | CO    | Colorado Ute Indian Water Rights Settlement Act of 1988 <sup>51</sup> | 128,939               |
| Ute Mountain Ute Tribe          | CO    | Colorado Ute Indian Water Rights Settlement Act of 1988 <sup>52</sup> | 100,184               |
| Jicarilla Apache Nation         | NM    | Jicarilla Apache Tribe Water Settlement Act of 1992 <sup>53</sup>     | 45,683                |
| Navajo Nation                   | NM    | Northwest New Mexico Rural Water Project Act <sup>54</sup>            | 606,660               |
| Navajo Nation                   | UT    | Navajo-Utah Water Rights Settlement <sup>55</sup>                     | 81,500 depletion      |
| <b>Total</b>                    |       |                                                                       | <b>1,142,281</b>      |

### [Ute Indian Tribe of Uintah & Ouray Reservation v. United States Dep't of Interior](#)

[Coronavirus has been devastating to the Navajo Nation, and help for a complex fight has been slow](#)

**“Health officials believe the largest Navajo outbreak originated at a March 7 religious gathering on the reservation hosted by a church, where Helena Begay worshiped as a child.**

**“Why did the church do that when they were told no large gatherings before that?” Helena Begay said. “It spread like wildfire after that.”**

[COVID-19 outbreak on the Navajo Nation linked to church rally](#)

**NAVAJO & APACHE COUNTIES — *The serious outbreak of COVID-19 on the Navajo Nation appears to have originated at a church rally in the community of Chilchinbito, located in northeast Navajo County, near the Apache County line.***

*According to a report on the Navajo Times website on March 22, the outbreak is linked to a rally held at the Chilchinbito Church of the Nazarene held on March 7.*

*“Several people who attended the rally or who had family members who did later tested positive for the virus. Before they could be tested, two people — one in LeChee, Arizona and one in Chilchinbito died of respiratory symptoms, according to local sources,” the report stated.*

*“Dozens of people from at least six Western Navajo Chapters — Cameron, Chilchinbito, Coppermine, Kaibeto, LeChee, Navajo Mountain — and from other places were at that rally, according to a number of people familiar with the gathering,” according to the report.*

*On Monday, the number of cases on the Navajo Nation reached 29.*

*The Navajo Nation is the largest Native American reservation in the U.S. and includes portions of western New Mexico, southern Utah and three counties in Arizona —Apache, Navajo and Coconino.*

*The number of cases confirmed in Navajo County today is 32, according to the Arizona Department of Health Services. So far, no cases have been reported in Navajo or Apache counties outside of the Navajo Nation.*