

## **The Water and Tribes Initiative: A Conversation with Anne Castle**

### **Additional Questions and Answers**

**How might water markets across the Basin (with the USA/BIA/Interior as a buyer? CAP as seller) help deal with the problem of water access? The USA, in its trust responsibility, could enter the markets. That might be more politically palatable in some states than just a “whole of government” approach. What are the limits of the efficacy of markets here?**

AJC: I don't see access to drinking water as requiring a market transaction. Tribes are owed this water as part of the federal trust and treaty responsibility. It should slot into the existing system and not require an offset.

**How do you reconcile tribal sovereignty with U.S. federal involvement? Would a statement from the White House apply and help move funds to tribes that are not federally recognized? Is tribal sovereignty a barrier for tribes that wish to access public funding sources? If so, is there a way to work through it?**

AJC: Any federal agency working with tribes on clean drinking water needs has to respect tribal sovereignty. That includes the defining of the problem, design of the solution, and whatever construction is required. That may take different forms, including federal "638" contracts with tribes that funnel funding and allow them to hire engineers and construction contractors.

**As the nation starts to attempt to tackle aging infrastructure for all sectors/communications especially including Native American communities, what are your thoughts on incorporating the ongoing and future risks of climate change? In other words, how do we fix “today’s problem” and incorporate resilience to prevent “tomorrow’s problem” due to climate change?**

AJC: This is a really important point. Systems constructed with new federal funding need to be resilient in the face of climate change. Direct federal funding to contractors can require climate-resilient design and construction. Tribal consultation is key here.

**Will there be adequate water supplies available on Reservations (especially for Western Nations) that can support growth of Native communities? If not, that might drive more people to leave Reservations and move to cities, which creates a loss of Native identity.**

AJC: "Adequate water supplies" implicates both physical and legal availability. Tribes have reserved water rights in water scarce western states, so the legal availability should be assured. Physical availability will vary considerably. That's why each community's needs have to be

evaluated separately. Deep wells or long pipelines may be required. The question about emerging technology and disaggregated systems is relevant here.

**Are there particular states that have had more success than others?**

AJC: California is starting down this path, but is also dealing with internal roadblocks to getting things done on the ground. Because the primary funding is federal and these programs are historically way underfunded, I don't know that there are any particular states that have made more progress than others.

**Do the states have some responsibility here?**

AJC: The treaty and trust responsibilities to tribes to provide a permanent, livable homeland are primarily federal. Individual states may have undertaken particular responsibilities to their tribes.

**It seems like it will be extremely expensive to pipe water to widely separated residences. Are there thoughts about closer piping to community places or is it all or nothing for water delivery?**

AJC: Remote areas will indeed be expensive to connect to central water systems. In some cases, it may be necessary to consider other options. We would like to ensure that those cases are evaluated and funded based on the same criteria that would be used in deciding about getting water to a rural white community.

**What role will tribal governments have in designing and allocating new water sources? Will these actions be done for the tribes or will the tribes have real agency in solving the problem for tribal members?**

AJC: Tribes need to be in the driver's seat when it comes to defining the problem and evaluating the solutions. One of the issues we're trying to hammer on is the need to support tribal capacity to take charge. That could mean funding for the tribes to hire engineering design professionals, grant writers, certified operator training, or any of the many types of expertise that would allow them to get to the solution that is right for them.

**What do you see as the most effective and respectful structures for intergovernmental engagement? How might the interagency task force help streamline a multi-faceted response, despite current bureaucratic barriers?**

AJC: Our group is in the process of writing a report with recommendations on these exact issues. You're right that it is complex. But we're envisioning an interagency task force composed of all the agencies with jurisdiction that invites tribes to come to it with their specific problems, and then the various resources of the federal agencies take responsibility for determining what

programs and expertise can best create a solution and make that available to the tribe. Building capacity in the tribe to make informed decisions about how to proceed is key.

**You mentioned that proposed legislation would sidestep the contentious issue of tribal reserved water rights claims (probably for good reason). However, many existing tribal water settlements remain unfunded. Would the legislation fund those underfunded existing settlements where they pertain to drinking water access? I assume based on your presentation that it would not fund ongoing efforts to resolve tribal reserved rights claims? Are you worried that leaving tribal reserved rights unresolved may pose a barrier to implementing the drinking water infrastructure projects you discussed?**

AJC: Our small group is focusing on clean drinking water access and S. 2369 only deals with that issue. But you're absolutely correct that there are funding needs for existing and future settlements. The bipartisan bill would provide an additional \$2.5 billion for a tribal water settlement fund. That would be added to existing funding for settlements in the Reclamation Indian Water Rights Settlement Fund, which is also proposed to be plussed up in various pieces of pending legislation. There may also be additional funding for tribal water settlements in the \$3.5 trillion budget reconciliation package, but I don't have great visibility into that.

**How do you have better coordination between the Bureau of Indian Affairs, Bureau of Reclamation, the Secretary of Interior and the Western States Engineers?**

AJC: Good question! The interagency task force that we're recommending is intended to provide better coordination among the federal agencies. They will necessarily have to interact with the State Engineers (or equivalent) in each state. Even more important, though, is meaningful interaction and consultation with the tribes and building capacity for the tribes to take the lead.

**Regarding agency/interagency administrative barriers: do you have an example of one or two barriers and possible fixes?**

AJC: Yes. This is the subject of a report we're working on now that will be available in November with multiple such examples and recommended fixes. One example is that the Indian Health Service has adopted a restrictive interpretation of its authorization to provide clean water systems to Native communities by providing funding only to projects that will serve Native homes directly and requiring communities to find matching funds for the other structures in the community that will be served by the water and wastewater infrastructure. This means they won't support the provision of water to a school, hospital, or community center, all of which are essential to a functioning community. Finding matching funds is a huge barrier for tribes. This is an internal IHS restriction (most likely a reaction to very limited funding) and could be eliminated in a full funding environment.

**In the Colorado River basin, have diversions of water for agriculture or other uses taken water from streams that tribes had depended on? How can situations like that be fixed?**

AJC: I don't think so. Tribes frequently have senior priority water rights that take precedence over more junior rights. But tribes also have unused water rights (part of their settled or decreed entitlement that has not yet been put to use) and, as a practical matter, that unused portion of the right is currently being used by ag interests or other water users. Ensuring that tribes are able to develop their unused water is a big issue in the Colorado River basin.