

SJ Quinney College of Law, University of Utah

## Utah Law Digital Commons

---

Utah Law Faculty Scholarship

Utah Law Scholarship

---

8-14-2021

### Identifying Barriers in USDA Programs and Services; Advancing Racial Justice and Equity and Support for Underserved Communities at USDA

Anne Castle

Heather Tanana

Bidtah Becker

Chelsea Colwyn

Jaime Garcia

*See next page for additional authors*

Follow this and additional works at: <https://dc.law.utah.edu/scholarship>



Part of the [Energy and Utilities Law Commons](#), [Indigenous, Indian, and Aboriginal Law Commons](#), and the [Water Law Commons](#)

---

---

**Authors**

Anne Castle, Heather Tanana, Bidtah Becker, Chelsea Colwyn, Jaime Garcia, and Ana Olaya

August 14, 2021

Re: Identifying Barriers in USDA Programs and Services; Advancing Racial Justice and Equity and Support for Underserved Communities at USDA

Dear Elizabeth C. Archuleta,

We appreciate the opportunity to comment on the U.S. Department of Agriculture's (USDA) request for information pertaining to Identifying Barriers in the USDA Programs and Services; Advancing Racial Justice and Equity and Support for Underserved Communities at USDA.

We work on the initiative on [Universal Access to Clean Water for Tribal Communities](#). As part of that initiative, we have looked closely at the various federal programs, including those at USDA, that address the provision of clean water and associated infrastructure in Indian country. [Our report](#) on our findings was published in April 2021.

A lack of access to clean and safe drinking water in Tribal communities reflects historical and persisting racial inequities that have resulted in health and socioeconomic disparities. The federal government, through various treaties made with Tribes, promised to establish reservations as permanent homelands for Tribal communities and to enact laws "as may be deemed conducive to the prosperity and happiness of [the] Indians."<sup>1</sup> Unfortunately, the federal government has largely failed to fulfill its duty to provide access to clean water for Tribes. As a result, American Indian/Alaska Native (AI/AN) households are more likely to lack adequate water services than any other racial group. Existing water infrastructure on reservations continues to deteriorate and inadequate water quality remains pervasive across Indian country. According to the U.S. Water Alliance, Native American households are 19 times more likely than white households to lack indoor plumbing. Without a safe, reliable, affordable, and easily accessible water supply, Tribal households are unable to meet basic personal hygiene, food preparation, domestic cleaning, and other needs required for good health.

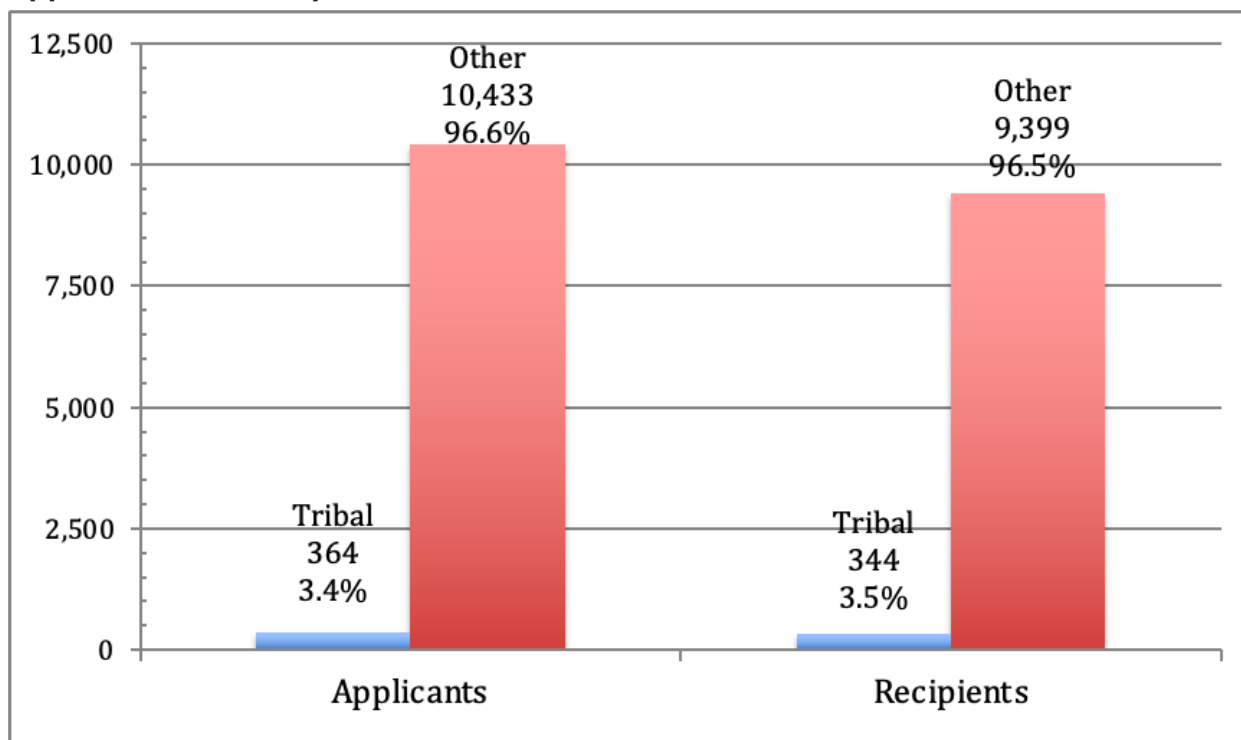
The United States Department of Agriculture (USDA) provides a number of programs that could improve access to clean drinking water for Tribes. While these programs have improved conditions for some tribes, several barriers exist which prevent Tribes from fully realizing the benefits of these programs.

---

<sup>1</sup> Treaty with the Navajo art. IX, Sept. 9, 1849, 9 Stat. 974.

According to USDA’s own data,<sup>2</sup> from 2010-2020, Tribes represent only 3.4% of applications across all of USDA’s drinking water and wastewater programs (see Figure 1). Given that AI/AN households are 19 times more likely than white households to lack adequate drinking water and sanitation, and that a high percentage of AI/AN people live in rural areas, we would expect that Tribes would be applying in far higher numbers for USDA’s programs that are specifically available to rural communities.

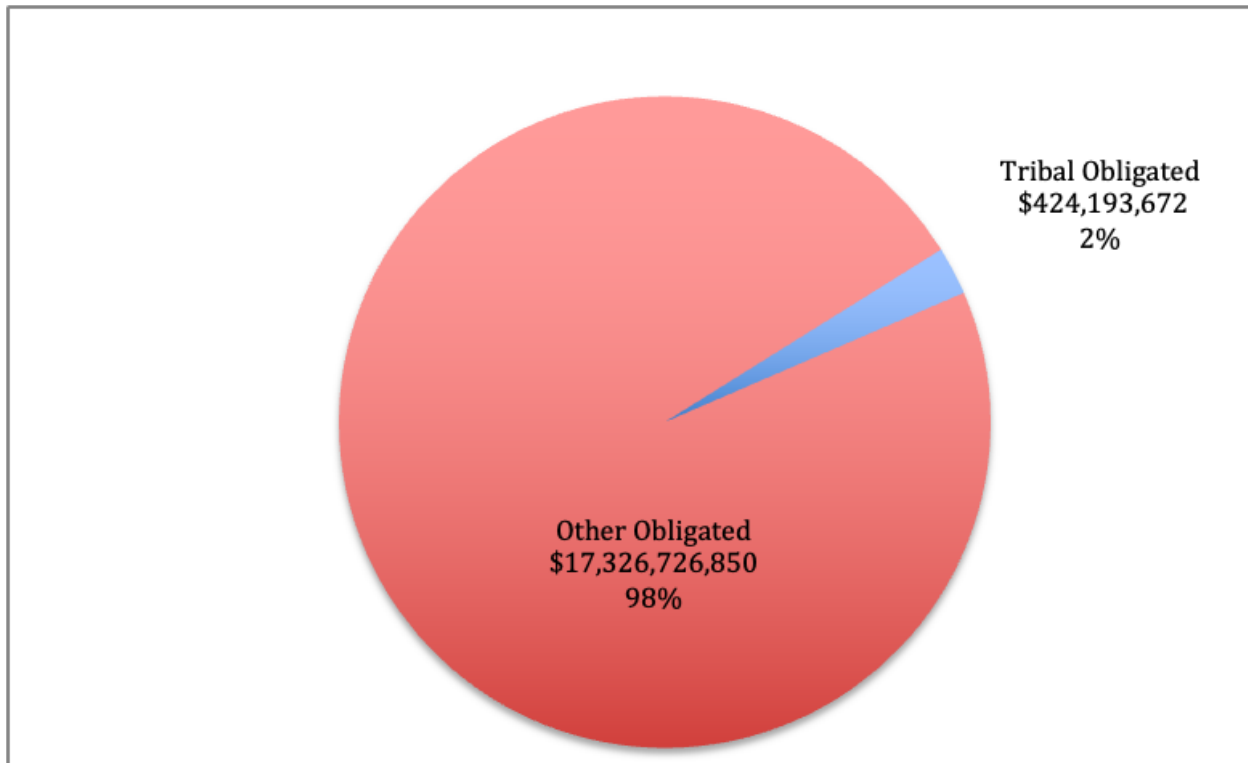
**Figure 1: 2010 - 2020 USDA Water & Sanitation Programs: Total and Tribal Applicants and Recipients**



In addition to having lower application numbers than expected, Tribes overall receive less funding per application when compared to other applicant groups. Tribes represent 3.4% of all applications, but receive only 2% of funding (see Figure 2).

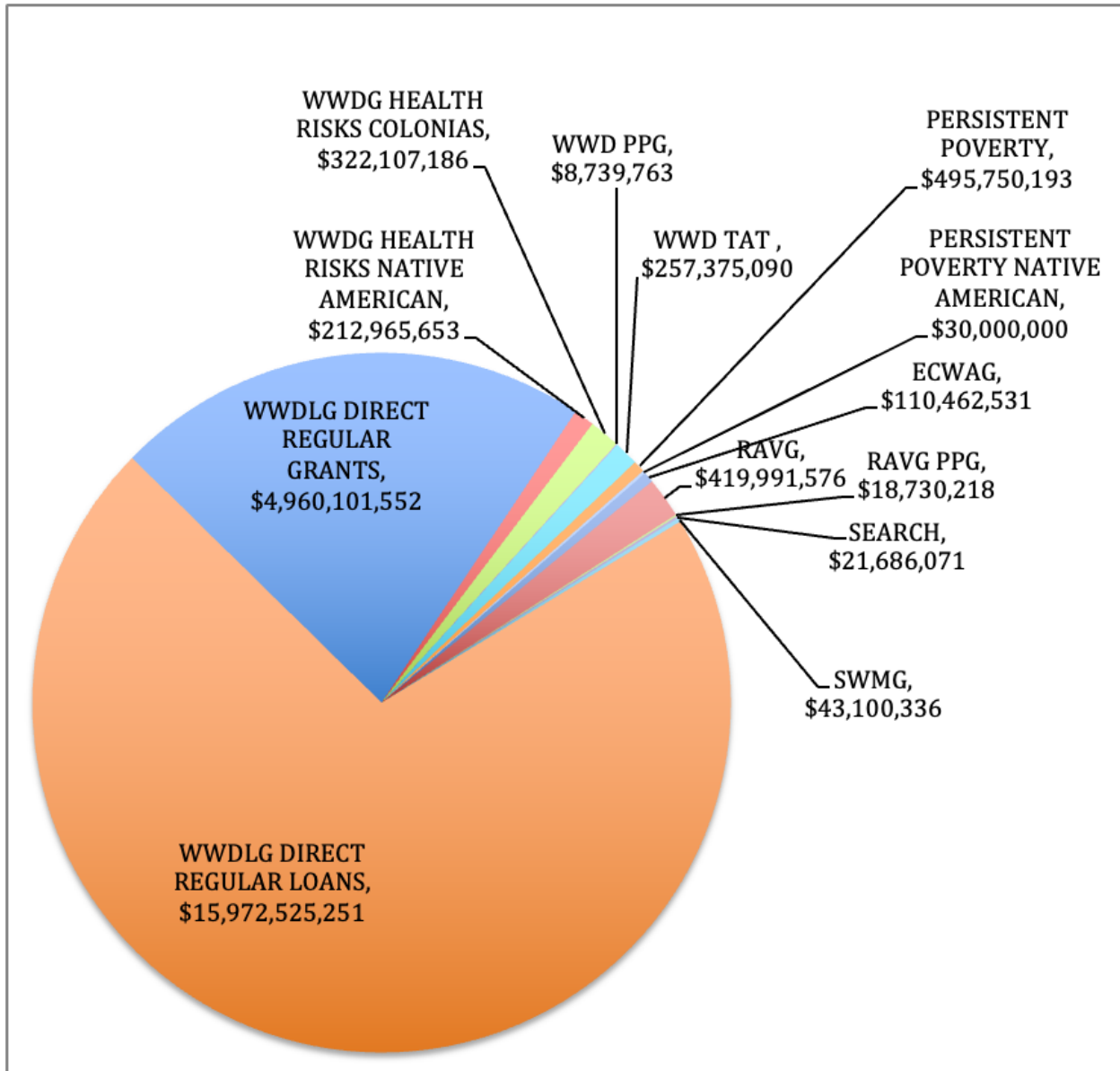
<sup>2</sup> The initiative on Universal Access to Clean Water received this data via a FOIA request.

**Figure 2: 2010 - 2020 USDA Water & Sanitation Programs: Final Tribal & Other Obligated Funding**



While Tribes do receive larger awards for some USDA grant programs, in the programs that represent the vast majority of USDA funding, Tribes consistently receive smaller awards than the average. For instance, for Water and Waste Disposal Loans & Grants (WWDLG), which comprised the vast majority--93%--of all of USDA's funding for water and wastewater (see Figure 3), Tribal awards were only 79% of the average award size (see Table 1).

Figure 3: 2010 - 2020 USDA Water & Sanitation Programs: Allotments by Program



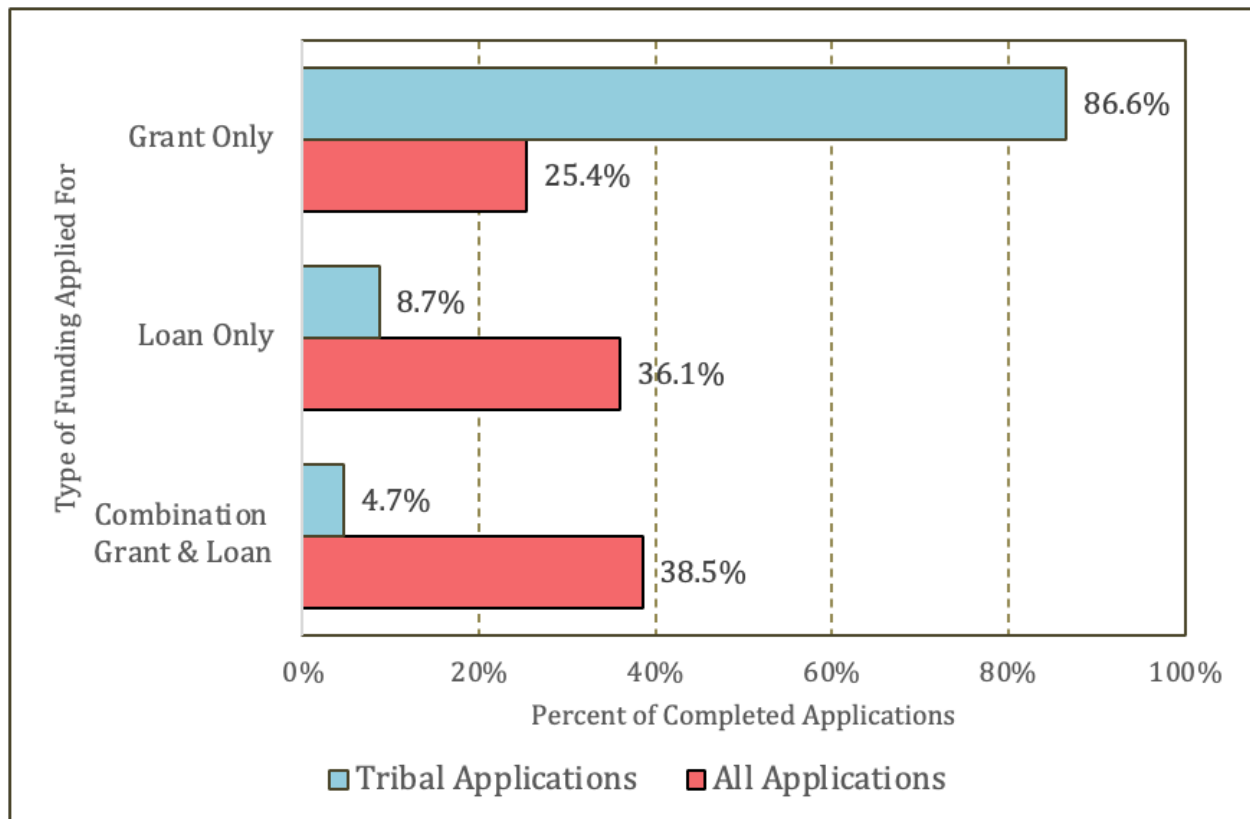
**Table 1: Average USDA Program Awards, 2010 to 2020, All Recipients and Tribal Recipients**

<b>USDA Program</b>	<b>Average Award - All Recipients</b>	<b>Average Award - Tribal Recipients</b>	<b>Average Tribal as % of Average All Awards</b>
ECWAG	\$250,230	\$363,993	145%
RAVG	\$2,045,369	\$2,370,979	116%
RAVG PPG	\$264,709	\$136,313	51%
SEARCH	\$26,477	\$35,821	135%
SWMG	\$120,594	\$137,526	114%
WWDLG Direct Regular - Loans and Grants	\$2,316,453	\$1,819,981	79%
WWDG Health Risks Native American	\$1,151,594	\$1,166,309	101%
WWDG Health Risks Colonias	\$2,068,563	\$1,198,894	58%
WWD PPG	\$21,092	\$18,095	86%
WWD TAT	\$1,091,664	\$201,383	18%
Persistent Poverty	\$2,246,736	\$6,979,277	311%
Persistent Poverty Native American	\$1,500,000	\$1,641,002	109%

Current USDA allocation structures for grant funding fail to apportion funding to properly support Tribal needs or respond to Tribal applications. Nearly 90% of Tribal applications are for grants rather than loans, and Tribes apply for grant funding in far greater

numbers than other applicant groups (87% of Tribal applications compared to 36% overall) (see Figure 4). Despite this demonstrable expression of Tribal grant funding needs over loans, 70% of USDA Water and Sanitation Program funding is for WWDLG loan program, whereas only 22% of funding is allotted for grants (see Figure 1). The vast majority of funding, as it is currently structured, is neither appealing nor accessible to Tribal communities and their water and waste needs.

**Figure 4: 2010 - 2020 USDA Water & Sanitation Programs: Total and Tribal Applicants and Recipients**



*Re-evaluation of USDA regulations to facilitate Tribal water infrastructure projects*

The USDA Rural Development program can help improve the quality of life in rural areas by providing financial programs to support essential public facilities and services, including water and sewer systems. Water and Waste Disposal Grants (Section 306(c)) provide the best opportunity for Tribes to secure grant money to build drinking water and waste disposal facilities.



*Remove the underwriting requirement for Tribal applicants for 306(c) grants*

Water and Waste Disposal Grants (Section 306(c))<sup>3</sup> provide grant money to build drinking water and waste disposal facilities. The USDA has a history of working with Tribes to facilitate access to funding under its programs, but underwriting requirements and extensive pre-development work may deter some Tribes from applying for Section 306(c) grants. While the program allows for a 100 percent grant fund award, the USDA is required by its agency regulations to complete the underwriting process of a traditional lender. During this process, the USDA reviews the Tribe's assets and debts and, in instances where a Tribe has consistent cash flow, the USDA must consider the Tribe for loan dollars (which must be repaid to the federal government), separately from grant dollars (which are not repaid to the federal government).

We recommend the Racial Equity Commission take steps to remove the underwriting requirement in the USDA regulations for tribal applicants for 306(c) grants. The USDA regulations should allow for grant awards to Tribal applicants under its 306(c) program and explicitly state that such review and awards are exempt from the underwriting process required under other programs and/or for non-tribal applicants.

*Implement a scoring factor to assign points for projects that serve Native American homes lacking drinking water or sanitation*

The USDA uses a different set of scoring factors to assign points when evaluating project applications for its tribal water program, including rural population and income levels. However, USDA does not have a scoring factor to assign points to a project based on whether it will serve homes that lack safe drinking water or wastewater disposal, as it does with another program with similar goals. Instead, USDA officials said they use discretionary points to score projects on this basis, but these points may not be awarded consistently or at all. As a result, USDA may not have reasonable assurance that it consistently evaluates project applications in a way that aligns with agency policy to fund projects that address the most severe sanitation deficiencies.

We recommend the Under Secretary for Rural Development implement a scoring factor that awards points for proposed Native American program grant projects that address health risks from a lack of access to safe drinking water and wastewater disposal, as it does with the Colonias grant program. As of March 2021, USDA stated it is in the process of creating a scoring bulletin specifically for the Native American program, and that this scoring bulletin will include a health and sanitary scoring element that is similar to the criteria used to evaluate applications to the Colonias grant program. We will continue to monitor the actions that USDA has taken in response to this recommendation and evaluate them when complete.

---

<sup>3</sup> The comments and recommendations for Section 306(c) grants are equally applicable to grants available under Section 306(d) for Rural and Native Villages in Alaska.

### *Increasing per-project award limitations*

306(c) grants are currently capped at \$2 million per project. In some circumstances, Tribes may be able to secure more funding by separating larger projects into individual projects or by accessing leftover funds at the end of application cycles. These limitations, however, ignore the realities of the unmet needs of Tribes for immediate improvements to drinking water infrastructure.

USDA typically funds all projects for which a complete application has been submitted, even if the project must be pushed to a later funding cycle. Using the above recommended changes to project scoring, USDA should increase the per-project award cap as funding levels increase, and should additionally consider multi-year commitments as a way to increase the overall award amount.

### *Improve the technical assistance and training programs available to Tribes*

USDA provides technical assistance to Tribes via third parties. Primarily, USDA contracts with the National Rural Water Association (NRWA) to provide technical assistance to rural water operators, including Tribes. Rural Development State offices and the State Affiliates of the NRWA work together to provide technical assistance when requested, which can include assistance with operations, management, and/or financial issues. Additionally, USDA awards Technical Assistance and Training (TAT) grants to organizations which provide training for water operators. While these grants are awarded to several different organizations each year, past recipients have used the awards to provide training to Tribes throughout different states.

The Circuit Rider program and TAT Grants represent an opportunity to improve tribal capacity. Like many of the funding sources available to Tribes, however, these technical assistance programs fail to address the realities of operating Tribal drinking water systems. One area where Tribes would benefit from technical assistance is in the application process itself. Tribal governments may not have staff with the technical expertise, either as a grant writer or as an engineer, to complete the application process quickly and efficiently. This issue is compounded by lack of available program staff to walk Tribal applicants through the application process, and the focus of third-party training organizations on the day-to-day operation of drinking water systems. Furthermore, the Circuit Rider program is premised on having an existing water utility or qualified operator. While some Tribes may have a public works department or a Tribal utility, many Tribal governments do not have adequate staff to fully support drinking water systems.

We recommend the USDA prioritize TAT grant recipients to address the unmet needs of Tribal governments and water utilities. The primary need is for technical assistance to improve Tribes ability to submit competitive and complete applications for 306(c) grants,

and potentially other USDA programs. Additional focus should be placed on assisting Tribes with the process of formalizing the management, operation, and maintenance of drinking water systems.

The initiative on Universal Access to Clean Water supports the work of the Racial Equity Commission and the USDA efforts to advance racial justice for Tribal communities. We look forward to engaging in continued contributions to these efforts. Thank you for your time and consideration.

Sincerely,

Anne Castle  
Getches-Wilkinson Center  
University of Colorado Law School

Bidtah Becker  
Navajo Tribal Utility Authority

Heather Tanana  
Assistant Professor of Law (Research) & Stegner Fellow  
Wallace Stegner Center  
S.J. Quinney College of Law  
University of Utah

Chelsea Colwyn  
Water Fellow  
Getches-Wilkinson Center  
University of Colorado Law School

Jaime Garcia  
Water Fellow  
Getches-Wilkinson Center  
University of Colorado Law School

Ana Olaya  
Managing Director  
CK Blueshift, LLC