Tribal Benefits from Tribal Water Rights

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Whenever the scarcity of the resource operates as a limiting factor on economic development, allocation of rights to the resource in some and duties to respect those rights in others becomes a necessity.


5 *Natural Resources Journal* 1 (1965)
Arizona v California

- Determined Present Perfected Rights for 5 Lower Basin Tribes
  - Ft. Mohave (Az and Ca)
  - Chemehuevi (Ca)
  - Colorado River (Az and Ca)
  - Quechan-Ft. Yuma (Az and Ca)
  - Cocopah (Az)

- Present Perfected Right to divert:
  - 951,050 af/y
Tribal Reserved Water Rights

- Attributes
  - Sufficient water to satisfy the purposes for which the reservation was established
  - Quantity to be used over time
    - Present and future needs
- Fit into system of prior appropriation
  - Priority date—establishment of reservation
  - Decreed amount determined by PIA
Tribal Reserved Water Rights

- Tribal water right is NOT:
  - Based on tribal population
  - Based on current use
  - Lost for non-use
  - Subject to State law requirements
2012 Tribal Use

- Present Perfected Rights to divert
  - 951,050 af/y
- 2012 BoR Accounting Report
  - ≈789,000 af/y diverted
- Who receives the benefit from the unused Tribal PPRs?
  - ≈145,000 to 165,000 af/y
Lower Basin River Management Initiatives

Flexibility and Adaptation to Changing Conditions
River Management Initiatives

• Shortage criteria and Intentionally Created Surplus

• Intentionally Created Unused Apportionment
  • Off-stream Storage

• IBWC Minute 319—Intentionally Created Mexican Apportionment
  • Conversion of ICMA to ICS
Intentionally Created Surplus

• Tribes and shortages
  • Priority dates ranging from 1873 to 1917
  • Unlikely to be affected by shortage*

• ICS created by:
  • Improved efficiencies, extraordinary conservation, importation
  • Minimize or avoid shortages, increase surface elevations of Lakes, and
  • “Assure any Contractor that invests in conservation or augmentation to create ICS that no other Contractor will claim the ICS created…”

* Except those Tribes receiving water from the CAP.
Intentionally Created Unused Apportionment & Offstream Storage

- 43 CFR Part 414
  - Limited to “State-authorized entities”
  - Increase the “efficiency, flexibility, and certainty in CR management....”
- Nevada bank water in Arizona
- Permits a State to maintain rights to water not used or redefines “use” as banking
IBWC Minute 319

- Intentionally Created Mexican Allocation
- Permits storage and carry-over of unused allocation from year-to-year
  - Mexico may receive the benefit of its full allocation even though not fully utilized each year
Conversion of ICMA to ICS

- Pilot project Section 6 of Minute 319
  - Infrastructure development in Mexico funded by US
  - Use of ICMA for environmental purposes
  - Credit for water stored and transfer of benefits to the US: ICMA converted to ICS
Commonalities of Initiatives

- Flexibility in use of “rights” and “allocations”
  - Carry-over of water “rights” from year-to-year
- Change in accounting year and water use
  - “Use” may be storage, banking, or transfer
- Interstate/international cooperation for flexibility in accounting
Tribal Rights & Flexibility

- Fallowing and forbearance in California
  - Taking land out of production to make water available to other users
- 2006 Az v Ca Settlement for Quechan
  - Forbearance agreement to make water available to other users until the land is put into production
  - The economic benefit of the water right stays with the Tribe
Unused Tribal Allocations

• Identify the benefits of unused Tribal PPR
  • Lake surface elevation
  • Instream flow
  • Use by lower priority rights—CAP

• Use the New Initiatives to properly account for the benefits from Tribal PPRs
  • Unused Allocations, ICTA, Offstream storage, etc
  • Benefit of right stays with Tribes
Concluding remarks

• Legal duty to respect Tribal rights
• Respect of rights does not limit optimization of use
  • Changes in use from private to public or among private uses should recognize the legal rights that are utilized
• New initiatives can and should be adaptable and available to Tribes
Thank you.

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