

Tribal Benefits from Tribal Water Rights

Colorado River Water Users Association

Caesar's Palace

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Margaret J. Vick, JSD

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.

Frank J. Trelease, *Policies for Water Law: Property Rights, Economic Forces, and Public Regulation*
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
 - $\approx 789,000$ af/y diverted
- Who receives the benefit from the unused Tribal PPRs?
 - $\approx 145,000$ 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.

Margaret J. Vick may be contacted at:

Margaret J. Vick, PLC

Tempe, Az

mjvick@gmail.com

602.814.7666