

Indian water rights settlements and environmental flows in the Southwest U.S.

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[I am publishing this paper elsewhere and therefore will not provide it in its entirety. The presentation at the XIVth IWRA WWC will be a full summary of all my findings.]

Abstract

The settlement of outstanding water rights claims in the Southwest U.S. has transferred water entitlements, often in over-allocated river basins, from non-Indian water users or future water users, to tribal control. The management of these water entitlements within the spectrum of tribal water values from consumptive uses through environmental uses is investigated with respect to recent tribal water settlements in the Southwest U.S. The rapid build out in tribal water management of new entitlements, provides an opportunity to learn from a telescoped-process of adaptive water governance. Furthermore, we draw lessons about tribal water governance and the position of environmental flows in the spectrum of water values, from those cases where tribes are not participating in the water settlement process.

Keywords: Indigenous values, management

Introduction

The focus on Indigenous entitlements and not on Indigenous use is understandable in the U.S. context given that *Winters* rights, established in a Supreme Court decision in 1908, are federally-reserved trust water rights, based on the existence of Reservations. The quantification standard for these trust rights was established in another Supreme Court decision in 1963. The Practicably Irrigable Acreage standard favoured those tribes with large tracts of irrigable land but it does not prevent tribes using *Winters* water for other purposes once *Winters* rights are established. Nevertheless, the constraints on initial settlement inherent in this quantification standard were removed with the Homeland Test standard articulated by the Arizona Supreme Court in 2001. Under this test tribes can claim water rights for a range of uses, including future uses.

Methods

In this paper we review Native American water rights as conferred through litigation and settlement, with a particular focus on Colorado River Basin tribes with litigated or settled rights in the period 1963-2004.

Findings and discussion

Our analysis points to a sharp distinction between *Winters* rights in the Colorado River basin and those in the Columbia River basin which are strongly integrated with instream flows and salmon recovery. However, some tribes in Arizona are utilising the entirety or a portion of their *Winters* rights for settlement-specified sacred and cultural values via ecosystem restoration (Zuni) and for voluntary riparian restoration (Tohono O'odham) uses. In other cases, for instance the Gila River Indian Community's water rights settlement, settlement implementation directly supports instream flows in the Gila River and its tributaries for the benefit of all Arizona residents. Meanwhile on-Reservation uses are a mix of agricultural and contemporary uses such as for a golf/casino resort, water raceway, and innovative water banking. Off-Reservation use incorporates water leases and exchanges. This settlement relied on a portfolio of water and one outcome is a wide spectrum of uses and values. Upstream tribes are not participating in settlements in part because their water use is not injured by non-Indian diverters and because the settlement process is invasive of tribal privacy around water use, customary practice, and values.

Conclusion

We note geographic differences in the range of current uses of *Winters* rights between those tribes adjacent to the mainstem of the Colorado River and all others and between upstream and downstream tribes. Native American tribes are exempt from Endangered Species Act legislation yet some tribes are experimenting with environmental flows for riparian and wetland restoration that also confer other benefits such as groundwater recharge. We also note an evolution in the type and reliability of water made available to tribes since the 1963 Supreme Court decision. This evolution partly dictates final use but is also a response to contemporary Native American water values and a contemporary understanding of the complexities of water reallocation in over-allocated basins where future water resources are projected to be negatively impacted by climate change.

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