A publication of the Colorado River Research Group
"An independent, scientific voice for the future of the Colorado River"

THE EMERGING TRIBAL ROLE IN THE COLORADO RIVER BASIN

(August, 2019)

In an earlier Colorado River Research Group publication (*Tribes and Water in the Colorado River Basin*, June 2016), we noted how more than 2 dozen federally-recognized tribes in the basin hold rights to divert nearly a fifth of the river's average flow, with several additional claims unquantified or pending.[1] This assessment was drawn from the 2012 Basin Study which, admittedly, was a preliminary and incomplete review of tribal rights failing to consider tribal plans for additional development and how that development would affect existing uses. These *reserved water rights* came into existence when reservations were established, many in the late 1800s, so that Indians would be able to establish a viable homeland. Indian reserved water rights are not dependent on use and are not subject to abandonment; most remain undeveloped. The U.S. Supreme Court made clear the importance of tribal water claims in *Arizona v. California*, quantifying the rights of the five tribes with reservations directly along the Colorado mainstream in these two states to divert nearly one million acre-feet annually. Since that 1963 decision, many other tribal claims have been resolved—primarily using settlement agreements confirmed by Congress. Other significant claims, however, remain unresolved.

Despite the strength and magnitude of these water rights, tribes with reservations in the Colorado River Basin historically have not been active participants in basin water planning and decision making. However, over the past year, things appear to be changing. For example, while the Basin Study made no attempt to consider tribal plans for additional use of water under their rights or how that development would affect existing uses, it did set the table for a subsequent Tribal Water Study conducted jointly by Reclamation and the Ten Tribes Partnership. That study was issued in December, 2018.[2] Even more recently, Arizona's participation in the Drought Contingency Plan was made possible in large part due to the participation of the Gila River Indian Tribe and the Colorado River Indian Tribes (CRIT). Each tribe committed 50,000 acre-feet per year of tribal water for three years to be kept in Lake Mead to help maintain storage levels and reduce the threat of a legal shortage declaration. Arizona will pay each tribe $250 per acre-foot, or $12.5 million per year, for the water. With these milestones now in place, it is valuable to reexamine what we know of tribal water rights, and what the next steps might be in fully integrating tribes into Colorado River management.

The Ten Tribes Partnership Tribal Water Study

The focus of the Tribal Water Study is limited to the ten tribes in the Partnership: Chemehuevi, Cocopah, Colorado River Indian Tribes, Fort Mojave, Jicarilla Apache, Navajo, Quechan, Southern Ute, Ute, and Ute Mountain Ute. The study determined that these ten tribes alone hold legal rights to divert about 2.8

---

[1] https://www.coloradoriverresearchgroup.org/uploads/4/2/3/6/42362959/crrg_tribal_water_rights.pdf
[2] https://www.usbr.gov/lc/region/programs/crbstudy/tws/finalreport.html

million acre-feet/year of basin water, including nearly 800,000 acre-feet of unresolved claims. The study estimates that only half the 2.8 million acre-feet is currently being utilized. Full use of these rights could support a wide range of water futures for the ten tribes, but given the seniority of the rights in this oversubscribed basin, would necessarily displace many existing (non-tribal) uses. Given these issues, the Ten Tribes Partnership and Reclamation agreed the study should address seven specific objectives:

1. The role of tribal water throughout the Colorado River System
2. Incorporation of tribal water use into Reclamation's Colorado River Simulation System
3. Characterize existing water uses by the Ten Tribes
4. Characterize a range of potential water development futures for each tribe
5. Potential effects of development on existing non-tribal users
6. Tribal water development challenges
7. Opportunities for tribes to help address water uncertainties and imbalances

The strongest aspect of the study is its examination of each of the ten tribes: tribal history, culture, and geography; available water supplies and existing water uses; and the challenges to meeting tribal water use objectives. This information is perhaps most valuable for those tribes that still have large amounts of undeveloped water rights. The situation of four such tribes are reviewed in the sidebar (next page). In each of these cases, several familiar trends are observed:

- While for three of the tribes a portion of their rights has not been legally resolved, it does not appear that lack of legal quantification explains the limited level of water use.
- Agriculture is an important use on each of the reservations and may be a basis for some additional use. But existing irrigation systems tend to be old and in need of substantial improvements, water storage is very limited, and much of the irrigable land is only marginally valuable for agricultural use.
- The expansion of drinking water systems is an important need on all reservations.
- Financial and technical support are needed to help tribes meet these on-reservation needs.

These trends are important, but across the entirely of the Tribal Study cases, perhaps the more striking finding is that while the tribes share many of the same problems and challenges, their situations are distinctive and heavily influenced by local conditions, and their opportunities to benefit from their respective legal rights to water vary accordingly. As is always the case in water issues, local context matters.

For the larger community of Colorado River stakeholders, the most policy-salient theme emerging from the study is that the tribes intend to fully develop and use the water to which they are entitled. It acknowledged the adverse effects this development will have on displaced junior users—though the study report sought to soften the seriousness of these impacts by pointing out that planned non-Indian development of additional water in the Upper Basin and reduced flows associated with climate change would have even more pronounced adverse effects. The report identified nine areas involving "challenges and opportunities related to development of tribal water," as well as an initial wish list of potential action items. These findings were discussed further in a workshop in February 2019 hosted by the Water & Tribes Initiative.[3]

[3] http://naturalresourcespolicy.org/projects/water-tribes-colorado-river-basin.php

The Challenge of Tribal Water Development:

Four Examples

The lands of the Ute Indian Tribe of the Uintah and Ouray Reservation include a large area east of the Wasatch Mountains in Utah with multiple river drainages including the Green River. While the Utes have been able to put considerable amounts of water to use, primarily for irrigation, they still have large, unresolved claims to water that are complicated by competing interests both locally and along the rapidly growing Wasatch Front. The Utes have ambitious ideas for additional water development that would be attainable only with large amounts of outside capital investment and would necessarily require displacing many existing uses by non-Indian irrigators on lands within and adjacent to the reservation.

The Southern Ute reservation in southwest Colorado includes multiple rivers that are tributaries to the San Juan. The Tribe's reserved rights were fully resolved through a congressionally-approved settlement agreement, with specific sources of water identified to satisfy these rights. Yet the Tribe is currently diverting only about a third of its entitlement. Inadequate infrastructure for storing, diverting, and delivering water is a partial explanation for this limited use. Once again, full use would require substantial outside capital investment and would involve displacement of existing uses by non-Indians on adjacent lands.

Reservation lands for the Ute Mountain Utes are located in three states—Colorado, New Mexico, and Utah. The Tribe's reserved rights for reservation lands in Colorado were resolved in the same settlement agreement as the Southern Utes. The Tribe currently diverts only about a quarter of its total diversion rights. Some additional agricultural development appears possible, along with additional development for domestic water uses. The sources of water that could be used for this development in New Mexico and Utah, as well as the necessary funding, are uncertain.

The Navajo Reservation also extends into three states, with the added complication that the reservation straddles the upper and lower basins of the Colorado River. The Tribe's rights in New Mexico have been resolved, and the Tribe is using much of this water. The Navajo and the U.S. have finalized a settlement agreement quantifying rights to water for use on reservation lands in Utah but are awaiting Congressional approval. Tribal rights for lands in Arizona have not yet been resolved.

Most immediately, the tribes are concerned with ways to improve and enlarge water use on-reservation. The needs are clear, but the means to gain increased benefits from tribal water rights on-reservation are not now available. Improved access to funding and technical support/capacity among tribal members is necessary. Just among three tribes in the Partnership, about 760,000 acre-feet of diversion rights have not yet been legally resolved. Some tribes, such as the Jicarilla Apache and many of the Arizona tribes served by the Central Arizona Project, can lease water off-reservation (because of congressionally-authorized settlement agreements), including in deals such as aforementioned DCP arrangements with the Gila River Indian Tribe and CRIT, but many others can only use their rights on-reservation.[4] Many tribes would like to have more flexibility in the manner in which they can use their water rights, including the ability to use it for religious and environmental purposes. Despite control of at least 20 percent of the water rights in the basin, tribes are still too rarely engaged in state or basin water decision making.

The Road Forward Hinges on Meaningful Tribal Engagement

There is an understandable propensity to look for big solutions to big problems: a major federal program for Indian water development, for example, or a general congressional authorization for tribes to be able to use their water rights for any purpose, including off reservation. Yet there seems to be little political interest in such national-level action. More likely are incremental actions such as those taken by the Gila River Indian Community and CRIT in which they worked with the state in which their lands are located to meet state needs in return for desired tribal benefits. Non-Indian water users in the basin are facing increasingly uncertain futures, in which some of these users are being asked to reduce their uses, and in which some are facing the possibility that their uses will be legally curtailed. The states and their regional non-Indian water interests may be open to considering how tribal water could help with their problems in return for help with tribal needs.

The Tribal Water Study required the ten tribes to take a close look at existing tribal water uses and think directly about future water development. In this regard it was an important step forward, an exercise that required the tribes—with technical support from the Bureau of Reclamation—to gather data regarding existing water uses on each reservation, to begin to integrate tribal water uses into Reclamation's basin planning, and to consider more carefully opportunities and limitations associated with additional development of tribal water. It was a beginning. As the basin states and the U.S. look ahead to renegotiating the Interim Guidelines governing operation of Reclamation reservoirs on the river, we encourage a full exploration of options for the meaningful engagement of tribal water leaders in solutions providing an equitable and sustainable water future for all basin interests.

Find more Colorado River Research Group publications, member biographies and activities, and contact information at www.coloradoriverresearchgroup.org.

[4] *For more info, see*: Colby, Bonnie, and Ryan Young. 2018. Tribal water settlements: economic innovations for addressing water conflicts. *Western Economic Forum*, 16(1):38, May. http://www.waeaonline.org/WEForum/volume-16-no-1-spring-2018/page-38.pdf.