



## IS THE FAILURE TO ACKNOWLEDGE TRIBAL INTERESTS FUELING THE WATER CRISES?

BY HAROLD SHEPHERD

Although tribes comprise a large percentage of many rural communities in the West, most of the water in these areas has been allocated to non-Indian users.

The history of water use in the West is characterized by a reluctance of water management agencies and the general public to come to terms with the finite nature of this precious resource. This attitude is best illustrated by a recent lawsuit in which several Western Slope communities in Colorado sued the City of Denver to prevent it from securing new rights from the already over tapped Colorado River. During the trial, Colorado Conservation District Manager Eric Kuhn, who was a witness for the communities, testified that the amount of water the state can reliably

count on from the 1922 Colorado River Compact is no more than 150,000 acre-feet—considerably less than half of what would be needed for the 2.9 million people projected to arrive in the state over the next quarter century. While attorneys for the state immediately pounced on Kuhn's remarks as being too "pessimistic," just before the trial, an attorney for the Plaintiffs secured a copy of an internal document prepared by the state only eight days earlier which showed that Colorado had almost exactly the same amount of water available for development as Kuhn suggested and only about one-tenth of what the state, up until then, had been publicly saying was available.

Another reason for Colorado's rather optimistic predictions of available water for growth and development is the fact that not only did the commission that created the Compact over estimate the amount

of water available in the River but even though they knew that Mexico, the Navajo and other tribes had rights to the river, when it divvied up the presumed 15 million acre-feet annual flow, it didn't define the claims. There was still no mention of the claims of Indian tribes in 1944, when the assumed baseline was reset to 16.5 million acre-feet so that Mexico would get 1.5 million acre-feet per year, nor four years later, when the commission set the Upper Basin states' shares on a percentage basis rather than an absolute allocation.

The slight to the Tribes in the Compact occurred even though an 1850 treaty with the Navajo Nation, reinforced by a 1908 Supreme Court ruling, guaranteed water rights necessary for a permanent homeland. In 2003, the Navajo Nation sued the U.S. Department of the Interior seeking to force the U.S. government to, at last, quantify its rights. Some Navajos

say a strict interpretation of the treaty and ruling in *Winters v. United States*<sup>1</sup> shows the tribe's rights trump all others because they were affirmed before the Compact came into existence.

The lack of attention to tribal water rights in the development of state and federal water policies takes many forms. Under the Columbia River Water Management Project (CWRMP), for example, the Washington State legislature directed the Department of Ecology to secure adequate water supplies from the River for irrigation, municipal, industrial and instream flows.<sup>2</sup> The CWRMP's reference to instream flows, however, is overshadowed by the legislature's declaration "that a Columbia river basin water supply development program is needed, and directs the Department of Ecology to aggressively pursue the development of water supplies..."<sup>3</sup> The interests of tribes in the protection of subsistence and cultural practices in the state, therefore, have been getting lost in the fervor to divert water for consumptive uses.

Recently, for example, the Federal Bureau of Reclamation applied to Washington State for 82,500 acre-feet of water from Lake Roosevelt near the Colville Tribe Reservation in part to bolster municipal and industrial supplies and provide supplemental water to farmers. As part of the CWRMP, the state signed agreements with the Colville and Spokane tribal governments in which the state agreed to provide annual payments to the Tribes in exchange for their support for the project.

Although the applicable tribal governments officially support the Drawdown, Vision for Our Future (VFOF), a local conservation organization made up of members of the Colville Tribe, has joined others in challenging the Bureau's failure to analyze the impacts of the Lake Roosevelt Project in federal court. In general, VFOF claims the Bureau violated the National Environmental

Policy Act (NEPA)<sup>4</sup> by failing to conduct timely environmental analysis of such impacts and to draft a full Environmental Impact Statement (EIS).

Challenges to the Drawdown are based on federal regulations which require that the NEPA process must occur "early enough so that it can serve practically as an important contribution to the decision making process and will not be used to rationalize or justify decisions already made"<sup>5</sup> and that this should have occurred before the Bureau applied for and then received water rights from the state for the water in question. In addition, the federal government's trust duty to Indian Tribes higher standard of protection, potentially, enhances the obligation of federal agencies in relation to management of water, because while NEPA applies only to "major federal actions"<sup>6</sup> the trust obligation applies to any federal action potentially impacting tribal interests.<sup>7</sup> Therefore, when tribal water rights are affected the trust duty requires the Secretary to "ensure to the extent of his power" that all available water is used to satisfy the tribe's interest.<sup>8</sup>

As in the case of Lake Roosevelt, a common NEPA issue regarding DOI irrigation projects is the application of project water to irrigation or other purposes that may reduce instream flows needed by fish upon which the members of a tribe depend for subsistence and other uses. In many such cases, because the irrigator, as the requesting party, must pay for the NEPA analysis, the agency may be under a lot of pressure not to conduct a full environmental analysis even though the project may involve significant impacts.

Similarly, disproportionate impacts related to the development of water resources to the Winnemem Wintu Tribe of Northern California began back in 1933 when Congress adopted the Central Valley Project. This project directed the construction of Shasta Dam and authorized

the government to acquire tribal lands, sacred sites, ancestral villages and burial grounds along the lower McCloud River that would be flooded by the construction of the dam. Promises by the U.S. government to compensate tribal members for the 4,400 plus acres of allotment land inundated by the dam and to provide a cemetery for the relocation of 183 burials, were never fulfilled.

Now, the Federal Bureau of Reclamation wants to raise Shasta Dam another six feet which would sacrifice more of the free-flowing McCloud River, already flooded for 15 of its 35 miles, destroy more than 780 acres of land along the part of the McCloud River that still flows free, drown more WWT sacred sites, including graves and a rock used for sacred rituals, and flood McCloud canyon endangering wildlife and forests.

In addition, based on the State of California's desire to cut back on carbon producing sources of energy due to the effects such sources have on climate change, it has called on increased production of hydropower. One such project relates to Pacific General Electric's recent filing of an application for re-licensing of the McCloud-Pit Hydroelectric project located on the McCloud River near the Winnemem Wintu Village. However, the current operation of the Project, which focuses primarily on the maximization of profit to the company, has resulted in centralized control and impacts to: traditional and cultural uses; aquatic habitat and water rights that excludes the interest of the native community; a bureaucratic governmental regulation of water resources; and disconnected communities from responsibility and control over energy.

Finally, the Federal Bureau of Indian Affairs recently canceled an EIS for the proposed operation and maintenance of the Flathead Indian Irrigation Project located on the Flathead Indian Reservation

in northwestern Montana. The Secretary of the Interior is required to transfer the operations and management of the Project under the Flathead Indian Allotment Act, which authorized allotments of land to members of the Confederated Salish and Kootenai Tribes and construction of the Project for “the benefit of Indians” within the Flathead Reservation.<sup>9</sup>

When the Act was amended in 1908 it also authorized the construction of irrigation systems to serve homestead lands with the Reservation and provided for turnover of the operation and management of irrigation works serving non-Indian lands when certain Project construction repayment conditions had been met.<sup>10</sup> Upon turnover of the Project, the 1948 Act called for the operation and management of the Project under rules and regulations approved by the Secretary. The BIA, Tribes and non-Indian irrigators are developing proposed standard operating procedures for the Project and are proposing to contract the management of the Project under a Cooperating Management entity made up of representatives of non-Indian irrigators and the Tribes, with BIA providing oversight functions and maintaining its role as trustee. Some members of the Tribe believe, however, the assertion of the BIA that non-Indian irrigators should share co-management of the Flathead Irrigation Project, incorrectly, implies that the Project, somehow, nullified the Tribe’s guarantee of territorial jurisdiction in the Hellgate Treaty, and that it accepted as legal the taking of land when settlers moved onto the Reservation during the federal era of assimilation and termination.

Indeed, as in the case of the Hellgate and other treaty rights, the Department of Interior’s approach to protection of tribal water resources has been the result of political bargaining, which has often overshadowed the rational need for individual projects. The evolution of water management by the DOI has created a conflict of interest for the government that continues to significantly affect tribal interests. The agency has encouraged

appropriation of water and development of water projects by non-Indians at the same time that it was suppose to be preserving the same water for the needs of tribes.<sup>11</sup> Therefore, while Indian water rights are protected on paper by the courts and have been occasionally enforced by the Department of Justice, historically, tribes have had little support from DOI.<sup>12</sup> Without political power to secure appropriations for tribal reclamation programs, tribes have been largely unable to realize the same access to water as non-Indian communities.<sup>13</sup>

As a result, although tribes comprise a large percentage of many rural communities in the West, most of the water in these areas has been allocated to non-Indian users. Recognizing this dilemma several years ago, the Interior’s Report of the Working Group on the Endangered Species Act and Indian Water Rights proposed several measures to ensure that tribal water rights are not unfairly hampered by application of the federal Endangered Species Act (ESA).<sup>14</sup> In an effort to address looming conflicts caused by unrecognized treaty water rights in water management decisions related to the ESA, the Working Group Report recommends limiting future distribution of water rights to non-Indians, when endangered species and tribal water rights may be impacted, in order to prevent the appropriation of water needed for survival of listed species even before tribal rights can be exercised. Unfortunately, to date, the Department of Interior has taken no action to implement the Recommendations.

Based, in part, on the failure of the federal government to implement studies and recommendations like that of the Working Group Report, tribes are finding that once off-reservation users obtain a federal or state permit to appropriate water, the process is very difficult to reverse, even though the permits may violate tribal water rights or other laws. This is particularly true when additional interests are affected, or where requirements have been imposed, such as those stemming from the listing of

threatened and endangered fish species. When combined, therefore, with the race to service non-Indian water projects at the expense of tribal needs, such policies have all but completely excluded tribes from enjoying the benefits others receive from federal irrigation projects.

There may, however, be consequences to non-Indian water interests also for the failure of state and federal agencies to figure tribal rights into the water management equation. In the case of the Colorado River, for example, if the Upper Basin states violate their “delivery obligation” under the Compact, those making up the Lower Basin could make a legal “call” on the river causing the Upper Basin parties to shut down their own water users until river flows come back up. Under the doctrine of prior appropriation, this would mean that more junior users within the upper basin states would be shut down first; followed by increasingly senior rights until the delivery obligation was met.

The situation could get worse when, and if, tribal water claims are finally asserted. The Navajo Nation, for example, could claim up to 800,000 acre-feet of water from the Colorado River, which could have dramatic impacts on storage in Lake Powell and the Upper Basin State water allocations.

Similarly, the dramatic implications of the Nez Perce Tribe’s water rights demands as part of the Snake River Basin Adjudication (SRBA), which began in 1993, include the potential abdication of no less than virtually every other existing use of water within the Basin. Consequently, in almost every case, the filing of tribal claims represents the point of no return, because they automatically label all other water related concerns in the affected area as ‘junior appropriators.’

However, based on an understanding that the Winter’s Doctrine is merely court-made law and not backed by any statute or treaty and at the risk of appearing, ultimately, in front of an increasingly unsympathetic U.S. Supreme Court, most tribal leaders are



pursuing negotiations to assert their water rights rather than litigating. At the same time, satisfaction of tribal water rights rarely significantly impacts local water needs. The federal government, for example, is soon expected to sign an agreement with the Gila River Indian Community, which will be the largest Indian water settlement in U.S. history, affecting the rights of a dozen Arizona tribes.<sup>15</sup> Even though the water included in the agreement is equivalent to the total need for future growth in the cities of Phoenix and Tucson, through the use of leasing tribal water and other options, the arrangement between the Tribe and the Cities does not substantially hamper municipal needs or even signify the end of urban growth.

Tribal settlement agreements may not only be applied to provide assurances to non-Indian agricultural interest, but can protect stream flows needed for fisheries. A prime example is the SRBA in which the turning point in the negotiations occurred when non-Indian water right holders discovered that if they prevailed against the Nez Perce in the adjudication process, they would likely eventually have to leave undiverted the same water claimed by the Tribe in order to fulfill a federal biological opinion requiring instream flows for endangered species in the Snake River. In addition to providing water to agricultural interests while satisfying tribal water rights, therefore, the resulting SRBA settlement satisfies tribal treaty rights and needs for water to protect fishery habitat.

Many experts suggest that conflicts over water will become the greatest global crises over the next century. Such predictions make the responsibility of state and federal water managers to prevent conflict and catastrophic results of their actions all the more pertinent. Therefore, rather than ignoring or contesting tribal water rights when making water distribution decisions, governmental agencies should acknowledge the existence of tribal water rights and implement studies and recommendations suggesting that these tribal rights be quantified before water

diversions are authorized. Further, agencies should recognize the ability of using treaty water rights; to not only satisfy tribal and non-Indian water right disputes, but to address the public interest in the protection of fish and wildlife habitat. This will produce a much more desirable outcome than putting off the inevitable. ■

**About the Author**

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**Endnotes**

- <sup>1</sup>207 U.S. 564 (1908).
- <sup>2</sup>RCW 90.90.005, et seq.
- <sup>3</sup>RCW 90.90.005. (emphasis added).
- <sup>4</sup>42 U.S.C. §§ 4321-4370e (1994 & Supp. III 1997); See also, 40 C.F.R. § 1502.2.
- <sup>5</sup>40 C.F.R. § 1502.5 (1987)
- <sup>6</sup>42 U.S.C. § 4332(2)(c).
- <sup>7</sup>Pyramid Lake Paiute Tribe of Indians v. United States Navy, 898 F.2d 1410, 1420 (9th Cir. 1990).
- <sup>8</sup>40 C.F.R. § 1506.6 (1999).
- <sup>9</sup>33 Stat. 302.
- <sup>10</sup>35 Stat. 450.
- <sup>11</sup>See Harold Shepherd, Conflict Comes to Roost! The Bureau of Reclamation and the Federal Indian Trust Responsibility, 31 *Envtl. L.* 4, 901, 914 (2001).

<sup>12</sup>id.

<sup>13</sup>id.

<sup>14</sup>Final Report and Recommendations of The Working Group on the Endangered Species Act and Indian Water Rights, 65 *Fed. Reg.* 41,709-01 (July 6, 2000) (Working Group Report).

<sup>15</sup><http://www.gilariver.org/index.php/about-tribe/46-water-settlement/118-water-settlement>



Glen Canyon Dam, Arizona.