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Tribes and Water in the Colorado River Basin

Colorado River Research Group

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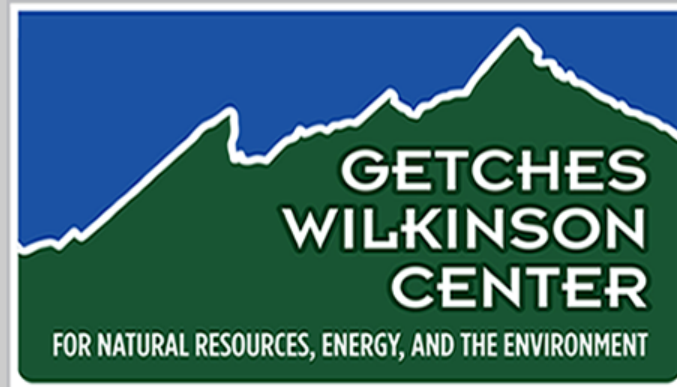
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Tribes with reservations in the Colorado River Basin currently have quantified rights to divert about 20 percent of the basin's annual average water supply, while over a dozen others still have outstanding claims. Yet, as the Colorado River Research Group has noted before, existing uses of basin water already exceed reliable supplies, even though many tribes are not fully using the water already allocated to them. Understandably, tribes want and deserve to enjoy the full benefits of their rights. Other water users, however, are concerned about how tribal water rights and uses integrate with already existing and planned future non-Indian uses of basin water. These competing interests have long been viewed as on a collision course. But, in fact, much progress has been made over the fifty plus years since *Arizona v. California* (1963) to satisfy tribal rights without displacing other existing uses. It has not been easy.

Making additional progress will also be difficult, but is an essential step forward in basin management. This reality jumped from the pages of the 2012 Colorado River Basin Water Supply and Demand Study ("Basin Study"), and is being explored further in an ongoing joint study by the Bureau of Reclamation and the Ten Tribes Partnership, now tentatively scheduled for completion in December 2016. Given the salience of tribal rights—both to tribal and non-Indian users—this article provides an introduction to what we currently know about tribal water rights in the basin. This article provides context for emerging policy discussions focused on providing tribes with more flexibility and opportunity in the use of their water, perhaps through voluntary transfer mechanisms such as leasing and forbearance agreements.

The Special Nature of Tribal Water Rights

The U.S. Supreme Court first recognized tribal reserved water rights in the 1908 decision, *Winters v. United States*. The rights exist at the formation of the reservation because of the necessity of water to establish a permanent homeland on these lands. These rights exist independent of use and cannot be lost by nonuse. Tribal water rights were also acknowledged in the 1922 Colorado River Compact, but no specific allocations were made until 1963. In *Arizona v. California*, the Court reaffirmed tribal reserved rights and quantified rights for tribes with reservations adjacent to the Colorado River in Arizona, California, and Nevada. Further, the Court directed that water consumed under tribal rights be counted as part of the allocation made to the state in which the reservation is located. Since this decision, other tribes in the basin and throughout the American West have been working—with widely varying degrees of success—to get their rights quantified and to find the means to be able to put these rights to use.

Quantified Rights

The Basin Study usefully divided its discussion of tribal rights into three parts: those along the mainstem in the Lower Basin, those in Central Arizona with rights to water from the Central Arizona Project, and those in the Upper Basin. Collectively, the report identified established tribal diversion rights of 2.9 million acre-feet per year (maf/yr)—of the total river flow of nearly 15 maf/yr—as summarized below.¹

¹ The summary of quantified water rights is found in the Basin Study's *Appendix C9*, available at: <http://www.usbr.gov/lc/region/programs/crbstudy/finalreport/Technical%20Report%20C%20->

The Colorado Mainstream Reservations

The first reservations in the basin to have their rights quantified were the Chemehuevi, the Cocopah, the Ft. Yuma (Quechan), the Ft. Mohave, and the Colorado River Indian Reservation. The U.S. Supreme Court in *Arizona v. California* established total diversion rights of about 952,000 acre-feet per year or consumptive use rights based on a maximum number of irrigated acres, whichever is less. About 75% of this water is for use on the Colorado River Indian Reservation, primarily in Arizona. While the Court used the “practicably irrigable acreage” standard to quantify these rights, it made clear that the tribes are free to use the water on reservation for whatever uses they determine. These tribal rights are regarded as having been fully perfected before the 1922 Compact and are first in line to be satisfied even when there is insufficient water for uses under rights established after the Compact. As shown in the table below, total diversions in 2015 to the five reservations exceeded 790,000 acre-feet, about 161,000 acre-feet less than their declared rights.

State	Reservation / tribe	Diversion Right (af/yr)	Estimated Use in 2015 (af/yr)	
			Diversions	Consumption
California	Chemehuevi	11,340	221	119
Arizona	Cocopah	10,847	2,569	1,684
Arizona	Colorado River	662,402	595,889	300,860
California	Colorado River	56,846	5,095	2,970
Arizona	Ft. Mohave	103,535	69,515	37,275
California	Ft. Mohave	16,720	15,164	8,157
Nevada	Ft. Mohave	12,534	4,683	3,137
California	Ft. Yuma / Quechan	71,616	96,403	47,621
Arizona	Ft. Yuma / Quechan	6,350	1,286	1,017
<i>TOTALS</i>		952,190	790,825	402,840

Central Arizona Tribes

There are ten tribes with reservations in central and southern Arizona interior from the Colorado River but within the Colorado River basin. Most of these tribes now hold quantified water rights, established through Congressionally-approved settlement agreements, and are seeking to put these rights to use. In many cases, their ability to do so has only been made possible by the existence of the Central Arizona Project and through contracts for CAP and other water authorized under these settlement agreements. The following table summarizes the quantified rights for each of these tribes. Much of this water is already consumed, often by non-Indian users under leasing agreements. Many of the tribes are increasing on-reservation uses as well.

[%20Water%20Demand%20Assessment/TR-C_Appendix9_FINAL.pdf](#). Diversion and consumption (depletion) values presented in this report were compiled from the *Colorado River Accounting and Water Use Report: Arizona, California, and Nevada*. Calendar Year 2015. U.S. Bureau of Reclamation; May, 2016; at <http://www.usbr.gov/lc/region/g4000/4200Rpts/DecreeRpt/2015/2015.pdf>.

Reservation / tribe	Settlement Act (where applicable)	Diversion Entitlement (af/yr)	Source
Ak Chin	Ak Chin Settlement Act of 1978 (as amended)	50,000	Mainstream
		25,000	CAP (Indian)
Ft. McDowell/ Yavapai	Fort McDowell Indian Community Water Rights Settlement Act of 1990	18,233	CAP (Indian)
Gila River Indian Community / Pima and Maricopa	2004 Gila River Indian Community Water Rights Settlement Act	208,200	CAP (Indian/M&I)
		120,600	CAP (Ag)
Pascua Yaqui	* Rights are unquantified; water delivery contract with US (1980)	500	CAP (Indian)
Salt River Pima-Maricopa	Salt River Pima-Maricopa Indian Community Water Rights Settlement Act (1988)	13,300	CAP (Indian)
		22,000	Wellton-Mohawk
San Carlos Apache	San Carlos Apache Tribe Water Rights Settlement Act of 1992	12,700	CAP (Indian)
		18,145	CAP (M&I)
		33,300	From Ak Chin
Tohono O'Odham ²	Southern Arizona Water Rights Settlement Act of 1982/2004	28,200	CAP (Ag)
		37,800	CAP (Indian)
Tonto Apache	* Rights are unquantified; water delivery contract with US (1980)	128	CAP (Indian)
White Mountain Apache	White Mountain Apache Tribe Water Rights Quantification Act of 2010	25,000	CAP (Indian)
Yavapai-Apache	* Rights are unquantified; water delivery contract with US (1980)	1,200	CAP (Indian)
Yavapai-Prescott	Yavapai-Prescott Indian Tribe Water Rights Settlement Act of 1994	500	CAP (Indian)
<i>Total</i>		614,806	

Upper Basin Tribes

There are five tribes with reservations wholly or partially located in the Upper Colorado River Basin. Four of the tribes—Jicarilla Apache, Southern Ute, Ute Mountain Ute, and Navajo—are party to water settlements that quantify at least some of their rights and establish legal rights to divert and use the water from specified sources. One of the tribes—the Ute Indian Tribe of the Uintah and Ouray Reservation—is party to a long-pending settlement agreement. In addition, the Navajo Nation and the Ute Mountain Ute have claims that are still outstanding. The following table summarizes this information.

In the Basin Study (Appendix C-9), the Southern Ute and Ute Mountain Ute water use estimates and projections are embedded within overall state of Colorado totals. Of the remaining Upper Basin tribal rights listed in the table, diversions and depletions in 2015 equal 75% of the rights listed, with the largest unused rights (roughly 100,000 af) associated with the Navajo Nation in New Mexico.

² The Tribe has an additional annual entitlement of 8,000 af/yr of CAP Indian priority water for use in the Sif Oidak District established in a 1980 Water Delivery Contract.

State	Reservation / tribe	Settlement Agreement	Size of the Rights (af/yr)	
			Diversions	Depletions
New Mexico	Jicarilla Apache	Jicarilla Apache Tribe Water Rights Settlement Act of 1992	45,683	34,195
New Mexico	Navajo	Northwestern New Mexico Rural Water Project Act (2009)	606,660	325,670
Colorado	Southern Ute	Colorado Ute Indian Water Rights Settlement Act of 1988	137,090	74,318
Colorado	Ute Mountain Ute	Colorado Ute Indian Water Rights Settlement Act of 1988	88,358	51,081
Utah	Ute Indian Tribe of the Uintah and Ouray Reservation	Revised Ute Indian Compact of 1990 (not ratified)	480,594	258,943
<i>Totals</i>			1,358,385	744,207

Outstanding / Unresolved Tribal Claims

According to Reclamation’s Basin Study, there are 13 tribes with some or all of their claims still unresolved. Three of these tribes (Navajo Nation, Ute Indian Tribe of the Uintah and Ouray Reservation, and Ute Mountain Ute Tribe) are in the Upper Basin. Ten (Havasupai Tribe, Hopi Tribe, Hualapai Tribe, Kaibab Band of Paiute Indians, Navajo Nation, Pascua Yaqui Tribe, San Carlos Apache Tribe, San Juan Southern Paiute Tribe, Tohono O’odham Nation, Tonto Apache Tribe, and Yavapai Apache Nation) are in the Lower Basin. A few of these claims are close to resolution while many others are not.

The Path Forward

The story of tribal water use in the Colorado River Basin is checkered, with some tribes having quantified rights and functioning projects, others with clear rights but without the infrastructure needed to benefit from those rights, and still others lacking both quantified rights and the opportunity to put them to use. Moving forward with efforts to provide the Colorado River tribes with the water needed to sustain communities and build economies is both a legal and moral imperative. The challenge is to do so in a way that embraces creative, flexible, and efficient uses of water, often in partnership with non-Indian water users. Most of the modern progress has come through negotiated settlements, some of which empower the tribes to lease water to off reservation users.

Long delayed, but now increasing, uses of tribal water are occurring at a time when existing uses already exceed reliable supplies of water. Negotiated settlement agreements have worked through some of these issues already, but much more remains to be done. In this regard, we are encouraged by the increasingly collaborative tone of Colorado River policy-making, and by the ongoing tribal study emerging from the leadership of the Ten Tribes Partnership and the Bureau of Reclamation. We hope that effort can be a springboard to more meaningful engagement of all Colorado River tribes.

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