

How to Make Sure Native American Tribes Benefit from Water Rights Settlements

Water is the quintessential western issue. Who controls water, how much is exploited and how much remains in streams are questions upon which the economic, environmental and social well-being of the region depend.

Because water is important to all of us, westerners should be well informed about critical water issues. Providing citizens with solid information and informed analysis is the obligation of news media.

Unfortunately, western news media have failed to adequately inform the public about the plethora of tribal water agreements which – at the urging of the Western Governors' Association and others – the federal government has been facilitating for over 25 years.

The first settlement involving tribal water rights was approved by Congress in 1978. Since then, 26 tribal water settlements have been completed; Congress approved 23 agreements; two did not require congressional approval. The remainder is pending final approval.

Twenty-five tribes are currently in ongoing negotiations; more than a hundreds others have unresolved claims that are not yet being negotiated.

While each settlement should be judged on its own merits, the pattern of tribal water settlements involves tribes relinquishing substantial, legally-strong water claims in exchange for the modern equivalent of a fistful of beads – usually in the form of tribal government funding. Sometimes tribe's also gain land, or access to government facilities. In some cases, tribal communities have received actual (wet) water – an amount which is typically a fraction of the water claims relinquished. In some negotiations the federal government has championed the interests of irrigators within federal irrigation projects over the interests of tribes to which they owe a trustee's fiduciary duty.

One of the nation's prestigious Native America organizations – Boulder-based Native American Rights Fund (NARF) – believes tribes have done well by the settlements. NARF is an original promoter of negotiated tribal water settlements and represents tribes in settlement negotiations.

Among the “benefits” to tribes typically mentioned by settlement promoters are the avoidance of “long and costly litigation,” the “opportunity to exercise tribal sovereignty” and “a greater sense of the structure and efficacy of the long-term relationships between the parties.” In other words, tribes get acceptance from federal, state and local water bureaucracies; a seat at the table.

When someone is extolling the value of intangibles like “understanding” and “the exercise of sovereignty” one better watch out because it is likely that someone has their hand in your pocket and is extracting something more tangible than “understanding.”

In a few settlements tribes received guaranteed minimum flows in rivers and streams to protect treaty and reserved fishing rights. Minimum flows are likely not sufficient to restore the abundant fisheries to which tribes with fishing rights are entitled. Settling for minimum flows may, for example, prevent extinction but preclude recovery of salmon and other valuable fisheries.

Tribal members have been slow to realize their leaders are negotiating away water rights, which are substantially more valuable than considerations received. That may be changing. Last year the Navajo Tribal Council faced strong grassroots opposition to a settlement in which the tribe would relinquish rights to most water in the Little Colorado River in exchange for a pipeline to bring water to two Navajo towns.

Grassroots members also objected to conditioning pipeline construction on the tribe approving a lease renewal for Peabody Coal's Navajo Generating Station through 2044. Activist members say Peabody depletes the aquifer, poisons the land and generates health-destroying air pollution. Under grassroots pressure, the tribal council voted last July not to approve the settlement.

There is a way to get a fix on whether tribal water settlements are in the interest of affected tribes. Economists can put a dollar value on what would be received and what would be given up; they can discount future costs and benefits to arrive at the current net value to settling parties.

Whether or not a tribal water settlement is on balance in the interest of tribal members is a judgment each tribe will make according to its own traditions, values and laws. An impartial accounting of costs and benefits would, however, assure “informed consent” and should be mandated by Congress.

As for the rest of us, we deserve more from western news outlets than the mindless parroting of gushy government press releases and the editorial cheerleading we've seen. All westerners have a right to be fully and accurately informed when deals are made which profoundly affect the future of our region – including how much water remains in rivers and streams.

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