

TEN TRIBES PARTNERSHIP'S PROPOSED OPTION: VOLUNTARY TRIBAL WATER TRANSFERS

In past work with the Bureau of Reclamation ("BOR"), the Ten Tribes Partnership has emphasized the BOR's trust responsibility to protect and to develop for the benefit of member Tribes the water rights reserved for the benefit of the Tribes under federal law ("reserved rights"). *See, e.g.* Letter from Jessica R. Aberly to David J. Hayes, Deputy Secretary of the Interior (Jan. 8, 2001). The Ten Tribes Partnership reiterates BOR's trust responsibility here and asserts that the BOR, in carrying out a study of the supply and demand of the Colorado River Basin water ("Basin Study"), is legally required to ensure that the reserved rights of each of the member Tribes are recognized and protected in the BOR's representation of the current use and future imbalances in the water supply and demand in the Basin.

The Ten Tribes Partnership asserts here that the Basin Study must recognize that the member Tribes are the rightful owners of their full water entitlements (both the developed and undeveloped portions, and both the quantified and unquantified entitlements) to yield greater predictability to models of future imbalances in the Basin. At the February 8, 2012 meeting between the Ten Tribes Partnership and the BOR in Parker, Arizona, BOR representatives stated that the modeling work for options to resolve future supply and demand imbalances would assume that any undeveloped portions of reserved rights are not available to resolve any future imbalances in the Basin. The member Tribes appreciate this BOR action to ensure that the future options modeling work does not contemplate the use of undeveloped tribal water entitlements without the consent of the appropriate Tribe. The member Tribes look forward to working individually with the BOR to ensure that the BOR model properly represents and protects the full water entitlement of each member Tribe. The Ten Tribes Partnership asserts that the BOR modeling work and storylines for the water supply assessment (identifying the supply and demand imbalances) must also reflect the extent to which the demands of other water users cannot be met without utilizing any undeveloped portions of tribal water entitlements. We would like to schedule a meeting between BOR and the Ten Tribes Partnership technical group as soon as possible to determine the most feasible way to accomplish such analysis.

Assuming that BOR has adequately modeled or otherwise accounted for full tribal ownership of each water entitlement and has identified the potential use of any undeveloped tribal water by others, the Ten Tribes Partnership proposes that BOR assess how voluntary transfers of tribal water might be used to assist in meeting future imbalances. This assessment should not be constrained by any particular interpretation of existing law and policy in the Colorado River Basin.

Each member Tribe has the sovereign right and authority to regulate the use of its water resources, and currently each Tribe has committed a portion of its water rights to uses within its Reservation boundaries. Each Tribe will have a different policy and different issues with respect to the various options for use of its waters. There are a number of voluntary tribal transfers which one or more of the Tribes are exploring, or may wish to explore, to utilize their water entitlements for the ultimate benefit of their members. The voluntary tribal transfers will likely include, but are not limited to, water banking, water marketing, leasing and forbearance agreements. These transfers could be to any existing user of Colorado River water without regard to geographic limits. The analysis should include the extent to which each Tribe's ability to use its water rights on any of its lands without regard to State boundaries would assist in meeting demands in the Basin as a whole.

These proposed tribal water transfers are largely conceptual at this time. However, States and other entities have implemented a variety of programs to improve the efficiency of water use in ways that previously would have been considered unacceptable under the Law of the River. There are also successful water transfer arrangements in place in the Colorado River Basin involving tribal water and non-Indian communities. For example, the litigation between the United States and the Quechan Indian Tribe, on the one hand, and the states of California and Arizona and the Metropolitan Water District (MWD), *et al.* on the other, illuminated the fact that the Tribe was entitled to water beyond its current needs while at the same time providing water to agencies, such as MWD, which was in dire need of water given drought conditions and increasing water needs. Thus, as part of the overall settlement of Quechan's entitlement, an agreement was achieved between Quechan and MWD to allow MWD to receive the benefit of unutilized water allocation in any given year. In a unique action, the United States concurred in this agreement which allows tribal water to be exchanged and utilized by nontribal users for a cash payment. The Agreement, approved by the United States Supreme Court in the 2006 decree, provides essentially that the Tribe may, at its sole option, choose to forebear (*i.e.*, not use) its allocation and assign that allocation to MWD for an "add on" to MWD's allocation. This option is solely at the Tribe's discretion and may be utilized on a year-to-year basis. The initial quantity of water available under the Agreement is 13,000 acre feet a year with an additional 7,000 acre feet available in 2035.

Also, the Jicarilla Apache Nation has settlement water that it leases to a number of different entities for off reservation use subject to the approval authority of the Secretary of the Interior, and the Nation exports for depletion out of the Colorado River Basin 6,500 acre feet for use in the Rio Grande Basin. In addition to leasing settlement water, the Nation, through its Water Administration Office, permits bulk sale of decreed water. This water is available to users in and outside of the Colorado River Basin. Using this approach eliminates the necessity of having to obtain Secretary of the Interior approval, which is required for leases of water for off reservation use, because no interest in the Nation's water rights is being conveyed. This

approach increases the efficient use of water by those in need. This procedure will continue to be used by the Nation in the future.

These examples demonstrate that voluntary tribal water transfers can be used to meet the needs of Colorado River Basin users as well as out of basin users. Voluntary tribal water transfers could occur to the benefit of existing Colorado River Basin users if the proper agreements are put into place. The Ten Tribes Partnership is now asking BOR to help assess how voluntary tribal water transfers could be used to improve the reliability of the water supply in the Basin.

As a final note, the Ten Tribes Partnership emphasizes that these options are designed for voluntary tribal transfers only. In no case should the development of these options mandate transfers of any particular tribal resource from any of the member Tribes. The Ten Tribes Partnership invites BOR to enter into long-term discussions with the Ten Tribe Partnership to work through these various options. As an interim step, we would like to schedule a meeting as soon as possible between BOR and the Ten Tribes Partnership technical group to determine how best to analyze and pursue these options.