

Tribes Persist to get Fair Shake

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Former Navajo tribal chairman, Peterson Zah summed up the cynicism Indian people tend to have regarding water rights: “When I was a kid in geography class, I was taught that water flows downhill. What I’ve learned since is that water flows to money and power, wherever they may be.”

Water keeps a fishery alive in the Northwest, allows wild rice to thrive in the Great Lakes region, and lets people from the Southwest to the Rockies to the Great Plains live with dignity. Rights to sufficient quantities of water are reserved under *Winters versus the United States*, a 1908 court decision that created the reserved rights doctrine. Winters upheld the idea that when federal policymakers signed Indian treaties that established reservations in the mid- to late-19th century, enough water would be reserved to meet the needs of the Indian communities who would dwell on the reservations. While a seemingly unquestionable tenet in theory, in practice, gaining access to flows that meet water quality standards have been another matter for tribal people that live—as the Sioux scholar Vine DeLoria, Jr. noted—in “nations within.”

Gila Victory Sets the Stage

As early as 1935, though, the San Carlos Apache tribe in Arizona won a water quality victory in *U.S. versus Gila Valley Irrigation District*. Upstream irrigators were returning flows to the Gila River so high in salt that downstream tribal farmers could not irrigate with the water. The federal court ordered irrigators to share natural flows with the tribe. Indeed, rather than draining the entire river into their canals as non-Indian agriculturists had been accustomed to doing during dry seasons, the bench mandated that 50 percent of the river’s natural, unsalinized flows was to be left in the river bed for tribal use.

During much of the 20th century, beleaguered tribes had their hands full simply holding on to remnants of culture and land base. Taking water rights battles into the courts was largely out of

the picture. Only after Indian veterans from World War II took advantage of the GI Bill to attend college, and then subsequently returned home to leadership positions, did tribes start making headway.

The Indian Self-Determination and Education Act of 1975 opened the door to further autonomy just as the environmental movement was capturing the imagination of Americans. In 1987 Congress amended the Clean Air Act (CAA). In so doing the legislative body granted tribes—sovereign nations under federal law—equal standing with states on water quality issues.

Thus, when the gaming industry got off the ground in the 1990s and tribal coffers swelled with casino profits, the stage was set. Indians across the country secured legal and scientific advisors, and began the arduous process of restoring what once was considered a given—the right to adequate amounts of clean water.

Tiny Tribe Takes on Albuquerque

Formal tribal governor of Isleta, Verna Teller, speaks of her tiny, 2,500-member pueblo located on the Rio Grande six miles downstream from Albuquerque. Having 55 million gallons of wastewater from the 450,000 urban residents dumped into the river daily was not the tribe’s idea of fair, particularly when it came to arsenic contamination.

Among various restrictions on a range of contaminants, Teller and her tribal colleagues set a 17 parts per billion (ppb) limit on arsenic, a figure that caused city officials to drop out of talks aimed at a negotiated settlement. To court they went, citing U.S. Environmental Protection Agency (EPA) standards of 50 ppb, which were dropped to 10 ppb in 2001, as well as arguing that Albuquerque should not be responsible for either natural levels of arsenic or pollution from industries upstream from the city itself. In 1998, however, the 10th Federal Court of Appeals in Denver handed down a stunning victory in favor of the Isletas.



“We jumped at it right away because it was the only opportunity we had to do something about the pollution legally,” said Teller.

When All Else Fails, Buy Them Out

Aside from first attempting to negotiate a settlement and then duking it out in court, the tribes have gotten as creative as their opponents in playing the water quality game. In a radical departure from business as usual, the Mole Lake Chippewa (Ojibwe) and the Forest County Potawatomi tribes simply bought the notorious Nicolet Minerals Company and the lands associated with the proposed mining site in 2003.

The purchase effectively closed a two-decade plus bid by developers to mine the large zinc-copper sulfide deposit one mile upstream from the wild rice beds on the Mole Lake Chippewa reservation, five miles downwind of the Forest County Potawatomi reservation, and 40 miles via the Wolf River upstream of the Menominee nation.

Initially owned by Exxon—which did little to inspire trust in the Indians, especially after a company biologist mistook the Chippewa’s wild rice for a “bunch of lake weeds”—Nicolet was bought and sold by several mining corporations from the global community, each coming forward with innovative ways to resolve pollution issues. Storing pyrite and contaminated water in underground seepage cells was one departure from the original proposal to discharge treated wastewater into the Wisconsin River via a 3.8-mile pipeline. Burying other toxics under blankets of grout was another. But the tribes said “no go.” Hours after they bought the land, the tribes withdrew all pending mining permits in state and federal offices.

Cows and Salmon

Not all water quality battles between the tribes and other interests require such a major investment of cash—they often require patience and diligence. The Tulalip tribe on Puget Sound in Washington state found that to be true when they needed to

deal with run-off from neighboring dairy farms that fouled their salmon streams.

For much of the past century, the Tulalips were at odds with dairy farmers who just kept piling it higher and deeper. In 2005, though, the tribe, in company with the farmers, researched building a biogas plant that uses methane from manure to produce power. If all goes as planned and potential funding comes through, instead of tainting water, manure will be converted into saleable products that will benefit both the tribe and farming community.

“We started small, dealing with stream restoration and negotiating with timber industries. Now with this latest agreement with the farmers, we’ve come a long way,” said Terry Williams, tribal commissioner of fisheries, about the progress the Tulalips have made since the mid-1970s.

Montana’s Tongue River

Farther east, but still in the West where the extractive industries hold powerful economic sway, the Northern Cheyenne locked horns with natural gas



companies. Large volumes of salty groundwater from gas extraction were dumped directly into the Tongue River and needed regulating—by the tribe, not just the state.

Montana adopted salinity and sodium standards in 2003, but “the tribe’s standards are a little stricter,” said Joe Walks Along Jr., water quality coordinator for the tribe’s Environmental Protection Department, explaining why in 2002, the tribe applied to the EPA for “treatment as a state” under the CAA amendment.

While Montana’s Department of Environmental Quality notes that it’s optimistic about resolving differences with the tribe that will make EPA interference unnecessary, Walks Along pointed out that the Northern Cheyenne are committed to taking advantage of laws established on behalf of Indian sovereignty. “I don’t think we’ve ever agreed to us adopting the state’s standards,” said Walks Along.

That Cool Drink of Water

The U.S. may enjoy an enviable standard for drinking water, but when it comes to conditions on reservations, that is not the case, according to research from the University of Arkansas in 2000. Although no national surveys have been completed, data from the Santee Sioux and Omaha tribes in Nebraska point to inequities that

researchers Shelly McGinnis and Ralph Davis think might reflect larger, national trends.

In particular, wells in varying states of disrepair that are in close proximity to livestock are one of the issues on reservations. High levels of nitrate and nitrogen, known to cause non-Hodgkins lymphoma and blue-baby syndrome (a disorder that produces breathing difficulties in infants under six months old) are one problem. Coliform bacteria, which can cause typhoid fever, viral and bacterial gastroenteritis, and hepatitis A, is the other.

“Most people on the reservation cannot afford alternatives since the tribe only gets a minimal slice of federal dollars for environmental management programs,” said Felix Kitto, environmental technician for the Santee Sioux. That said, Kitto thinks the university study is a good thing. Tribal members have been able to boost their environmental knowledge and employment opportunities within the reservation,” he said.

McGinnis agreed that engaging tribal members was part of the intent: “The goal of these studies is to build tribal self-sufficiency so that the tribes will carry out their own environmental monitoring and management.”

Resolving problems from city effluent, mining conglomerates, natural gas extraction, cow [poop] in streams, and just finding cash to repair old wells, demonstrate how tribes across the country are showing that they want to have a voice in water quality decisions. To the University of Colorado law scholar, Charles Wilkinson, it’s merely business as usual for tribes that have been coming into their own since the 1970s.

“Nobody has given Indian people anything over the past 35 years, not anything—not the federal government or state governments—no one,” Wilkinson said. “Indian people insisted on and fought for every acre and cup of clean water, salmon, Sun Dance, and sovereign rights and achieved them out of their own wisdom, persistence, and courage—not anyone else’s.”

For more information about Indian water rights, visit the Native American Rights Fund Web site at narf.org. Another Web site that offers information is the Western Governors’ Association at www.westgov.org/wga/initiatives/iwr/index.htm.

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