



Opportunities for Tribes to Preserve and Capitalize Tribal Water Resources

National Reservation Economic Summit

R. Scott Nuzum

March 23, 2016

What is Water?

- Water has different meanings and carries different significance depending on how one thinks about the resource:
 - Chemical
 - Biological
 - Spiritual/Cultural
 - Economic
 - Legal

How we think about water

■ Vital

- To life
- To polite society
- To functioning ecosystems
- To functioning communities

■ Geography matters

- In how we think about water generally
- In how we use water
- In how we structure legal regimes:
 - Prior appropriation regime – the first party to use for beneficial use maintains that right; if you don't use it, you lose it
 - Riparian regime – reasonable use of the water by a riparian owner is subject to the downstream riparian owners "riparian right" to receive waters undiminished in flow and quality; frequently tied to the land; cannot transfer water outside of the watershed

Why water is important

- Global population is increasing
- Global food security is decreasing
- The climate is changing
- Sea levels are rising
- User conflicts are increasing

All of these issues are putting increased pressure on an already fragile and finite resource which could ultimately lead to greater geopolitical instability

Tribes and water

- In the United States, tribes have a major role to play in the conversation over how we manage and use water:
 - [Certain] tribes possess significant water rights
 - Tribal communities rely on water's associated ecosystem services

How tribes can preserve their rights and capitalize on water resources

- Commercial ventures
- Water transfers/trading
- Water quality trading
- Water resources development/Infrastructure
- Wetland mitigation banking

How tribes can preserve their rights and capitalize on water resources – Commercial Ventures

- Bottled water – see, e.g., Morongo Band of Mission Indians venture with Nestle
- Recreational use fees

How tribes can preserve their rights and capitalize on water resources – Water Trading/Exchanges

■ What is it:

- The voluntary exchange or transfer of a quantifiable water allocation between a willing buyer and a willing seller
- The seller has a surplus of water
- The buyer has a water deficit
- Can be a permanent or temporary transaction

How tribes can preserve their rights and capitalize on water resources – Water Trading/Exchanges

- Advantages: Minimizes both water waste and the slow adoption of water conservation technologies
- Necessary conditions:
 - Willing buyer and seller
 - A vested right of use
 - The ability to use the water for a different purpose

How tribes can preserve their rights and capitalize on water resources – Water Trading/Exchanges

■ How can tribes take advantage:

- Increase water surplus through:
 - Water conservation measures and technology
 - Banking of water (underground storage)
 - Water conscious agricultural techniques
- Federal assistance:
 - E.g., DOI's Natural Resources Investment Center

■ Considerations:

- Impacts to endangered and threatened species
- Impacts to water quality
- Public trust consideration
- Infrastructure
- High transaction costs

How tribes can preserve their rights and capitalize on water resources – Water Quality Trading

■ What is it:

- A system that allows facilities that discharge wastewater to meet federal CWA or other state regulatory obligations by purchasing equivalent or larger pollution reductions from another source
- Generally established in locations for which there is a CWA-imposed Total Maximum Daily Load, which creates a “pollution budget”

How tribes can preserve their rights and capitalize on water resources – Water Quality Trading

■ Relevant parties:

- Purchaser: typically, a regulated entity (e.g., a wastewater treatment facility, a power plant)
- Seller: typically, an agricultural user who engages in nutrient reduction measures or a riparian owner who engages in ecosystem restoration and enhancement to improve water quality
- Regulator
- Credit exchange
- Financial and technical service provider

How tribes can preserve their rights and capitalize on water resources – Water Quality Trading

■ Process:

- Assess potential for water quality trading
- Determine what can be traded
- Determine how much can be traded
- Determine when a seller can trade
- Find a buyer
- Scope the trade agreement, assess liability
- Verify and certify conservation practice implementation
- Track and report reductions and trades

How tribes can preserve their rights and capitalize on water resources – Water Quality Trading

■ How tribes can take advantage:

■ Federal funding and programs:

- EPA Targeted Wastewater Grant Program
- NRCS Conservation Innovation Grants

■ Federal technical assistance:

- USDA
- USGS
- NOAA
- NMFS

How tribes can preserve their rights and capitalize on water resources – Water Resources Development/Infrastructure

■ What is it?

- The major rehabilitation and replacement of existing water infrastructure
- The development of new infrastructure needs

How tribes can preserve their rights and capitalize on water resources – Water Resources Development/Infrastructure

■ How tribes can take advantage:

■ Federal programs/partnerships:

- DOI's Natural Resources Investment Center

■ Tribal service providers:

- Tribal construction companies
- Tribal environmental engineering, monitoring firms

How tribes can preserve their rights and capitalize on water resources – Water Resources Development/Infrastructure

■ Considerations:

- Federal regulatory requirements: e.g., NEPA, ESA
- Cost

How tribes can preserve their rights and capitalize on water resources – Wetland Mitigation Banking

■ What is it:

- A wetland, stream, or other aquatic resource area that has been restored, established, enhanced, or (in certain circumstances) preserved for the purpose of providing compensation for unavoidable impacts to aquatic resources permitted under Section 404 or a similar state or local wetland regulations.
- May be created when a government agency, corporation, nonprofit organization, or other entity undertakes these activities under a formal agreement with a regulatory agency
- A form of "third-party" compensatory mitigation - the responsibility for compensatory mitigation implementation and success is assumed by a party other than the permittee.
- The transfer of liability is very attractive feature to CWA Section 404 permit-holders, who would otherwise be responsible for the design, construction, monitoring, ecological success, and long-term protection of the site.

How tribes can preserve their rights and capitalize on water resources – Wetland Mitigation Banking

■ Components:

- The bank site: the physical acreage restored, established, enhanced, or preserved
- The bank instrument: the formal agreement between the bank owners and regulators establishing liability, performance standards, management and monitoring requirements, and the terms of bank credit approval;
- The Interagency Review Team (IRT): the interagency team that provides regulatory review, approval, and oversight of the bank; and
- The service area: the geographic area in which permitted impacts can be compensated for at a given bank.

How tribes can preserve their rights and capitalize on water resources – Wetland Mitigation Banking

- How tribes can take advantage:
 - Federal funding and technical assistance:
 - EPA
 - NRCS

How tribes can preserve their rights and capitalize on water resources – Wetland Mitigation Banking

■ Considerations:

- State involvement - In the context of a mitigation bank, a state has no authority or jurisdiction over tribal lands. But for bank to have the greatest chance of success, one needs to allow impacting projects off the reservation to secure credits from the bank. Therefore, state authorities need a way to certify a bank as complying with a state's water quality certification. Some states have regulatory provisions on tribal banks which allow a state to certify the bank if the USACE also authorizes the bank.

How tribes can preserve their rights and capitalize on water resources – Wetland Mitigation Banking

■ Considerations (continued)

- Sovereign immunity - Because the mitigation responsibility is transferred from permittee to sponsor, there must be a limited waiver of sovereign immunity in order for USACE to enforce the mitigation bank instrument conditions.
- Cultural sensitivity and site protection - Need to balance a tribe's ability to use the bank land for traditional cultural practices, hunting, fishing, etc. Therefore, need to ensure that the mitigation bank instrument contains provisions allowing for those activities. Also need to ensure that there are provisions detailing cultural resource recovery. For non-tribal banks, these type of considerations would be dealt with through conservation easements, but that effectively entrusts the land to another entity. Therefore, tribes should look for opportunities to bring outside native entities – a tribal fishing commission, etc. – into the process to serve as grantee of an easement

Questions?



For more information

R. Scott Nuzum

202-298-1951

rsn@vnf.com
