

Implementing Indian Water Rights Settlements

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What is an Implementation Team?

- DOI establishes a Federal Implementation Team after a settlement agreement is entered into by the parties and enacted by Congress.
- The Team is charged with ensuring that all necessary actions are taken to make the agreement effective and enforceable.
- For congressionally enacted settlements, the statute guides the work of the Implementation Team.

Who is on the Team?

- Often team membership overlaps with the Negotiation Team but there are times when different members are appointed (i.e. if constructing major water infrastructure, team would include representatives who have construction project experience).
- Team membership varies with the DOI interests implicated in a settlement.
- Typical membership would be BIA, BOR, SOL, DOJ, and FWS. But any combination of Federal representatives can be appointed depending on the circumstances.

What does the Team Do?

- “Duties of Implementation Team Members” is provided to all team representatives.
- Ensure that the settlement is achieved in full.
- Teams utilize the expertise and ideas of team members in implementing the settlement.
- Team members share their expertise and perspective on technical, factual and policy matters as implementation proceeds.
- Team members are expected to identify agency or bureau resources to assist the team. Resources can include developing data, providing services or other expertise, and funding.

Relationship among Teams and Agencies

- Team members are responsible for identifying issues that are of interest to the agencies they represent, communicating those issues to their agencies and bringing agency interests or concerns to the attention of the team.
- However, team members do not merely function as advocates for their agencies, but as representatives of the Secretary charged with the achieving a settlement that inures to the benefit of the Department as a whole.

What Actions Are Involved in Implementation?

- Duties and activities vary from settlement to settlement.
- Basic activities include:
 - conforming settlement agreements to enacted legislation,
 - finalizing water contracts,
 - finalizing court decrees,
 - assuring that funding needs are made known in the budgetary process, and
 - assuring that required projects are initiated and completed.

How Does DOI Monitor the Teams?

- Until recently, intensive work on one Indian Water Rights Settlement at a time was the norm.
- Claims Resolution Act of 2010 (“the Act”), Pub. L. 111-291, Dec. 8, 2010, changed things.
- CRA contains 4 Indian water rights settlements - White Mountain Apache, Crow, Taos Pueblo, and Aamodt (Pueblos of Tesuque, Nambe, Pojoaque, and San Ildefonso).
- DOI is juggling these settlements along with the others on the Implementation Team list.
- SIWRO holds monthly calls with the teams to discuss overlapping issues and concerns.
- Each team has created a table, chart or task list of implementation activities along with estimated time frames.

How long does implementation take?

- On average less than 5 years.
- If major construction is involved it can be 10 to 15 years or longer.
- An “enforceability date” is common for settlements and is a major milestone.
 - Generally the date of a Federal Register notice that declares all conditions precedent have occurred.
 - Typically marks the date when waivers become effective, trust fund money is made available and the settlement is deemed legally enforceable.

Is Implementation Ever Over?

- Hard to say.
- We struggle with this issue as evidenced by the many “old” teams still on our list.
- An “enforceability date” is final in many ways, but doesn’t mean that other issues won’t arise where a team problem solving approach is called for.

Settlement Problems Become Implementation Problems

- If there are problems with the underlying settlement, implementation will be significantly delayed and DOI resources are diverted from new negotiations.
- No one wins; no one is happy.
- Sometimes returning to Congress is the only answer.

Current Implementation Challenges

- Delegations of Authority.
- Indexing and Funding.

Delegation of Authority

- Settlements give the Secretary of the Interior authority or directions to carry out numerous actions or tasks.
- Sometimes a settlement may specify that a particular DOI official is charged with carrying out an action.
- We are seeing this more as Congress makes known its intent to make a particular agency responsible for settlement work, especially on a budgetary level.
- The most common congressional directive is to the Commissioner of Reclamation and is related to carrying out construction.
- When the settlement simply directs the Secretary to take action, the first question for DOI is whether actions of that nature have already been delegated to an agency or if new delegations are necessary.
- Budgetary responsibility often comes with delegated authority.

Indexing and Funding

- A critical first step for DOI is dealing with the issue of settlement funding.
- Most settlements call for funding to be provided as set forth the Criteria and Procedures:
 - Federal financial contributions to a settlement will normally be budgeted for, subject to availability of funds, by October 1 of the year following the enactment of the authorizing legislation.
 - Generally a two year lag in funding.

CRA Settlements- Immediate Funding

- CRA settlement funding differs from standard funding in an unprecedented and very good way.
- Congress authorized immediate and mandatory appropriations for a number of settlement purposes:
 - “Out of any funds in the Treasury not otherwise appropriated, the Secretary of the Treasury shall transfer to the Secretary [of the Interior]...” a specified amount.
- This “mandatory funding” is outside of the annual appropriations process that the Department follows to formulate its annual or discretionary budget and requires no further Congressional for the money to be available.
- In addition, annual or “discretionary” authorizations were included.
- Indexing of funds to adjust for inflation over time was also authorized on certain funds.

Great Concept – How Does it Work?

- Good Question.
- “Mandatory funding” plus indexing presented two legal issues on:
 - 1. Must all the mandatory funds be transferred in a lump sum?
 - 2. Does indexing occur over time or only once upon transfer of the funds?
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Lessons Learned Over Time

- Incomplete settlements will have to be completed in implementation and will be very difficult and unpleasantly delayed;
- Best to secure sources of settlement water because contemplated sources can become unavailable and water becomes expensive after legislation is passed;
- Key players not at the table can block implementation;
- Language should be as clear and explicit as possible. No lawyer games.

Conclusion

- No matter how hard you try, unforeseen problems can and will arise; and
- Implementation is as much or more work than negotiation.