



INDIAN WATER RIGHTS SETTLEMENTS

A Retrospective

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How Did We Get Here?

- The victory in Winters in 1908 was overshadowed by decades of Federal support and funding for developing water supplies for a growing West
- During that era 30,000 dams were built to control and divert water
- Developing Indian water was ignored and water rights were largely unprotected

How Did We Get Here? (cont.)

- Nonetheless, Winters rights remained as a cloud over western water rights
- The push to quantify Winters rights began in the 1960s
- After establishing the PIA standard in *Arizona v. California* in 1963, Supreme Court rulings on Winters rights became more negative
- The McCarran jurisdiction fight (state vs federal courts) created a rush to litigate but the results were disappointing

How Did We Get Here? (cont.)

- In the 1970s, tribes, states, local parties, and the Federal government began questioning the utility of litigation as the way of resolving water rights disputes
- Negotiated settlements, rather than protracted litigation, became the preferred approach to resolving Indian water rights conflicts
- Department has completed 31 Indian water rights settlements since 1978
 - Congressionally Approved → 27
 - Administratively Approved by DOI & DOJ → 4

Federal Settlement Process

The Working Group on Indian Water Settlements

- Established by the Department of the Interior in 1989
- Comprised of all Assistant Secretaries and the Solicitor
- Responsible for making recommendations to the Secretary of the Interior regarding water settlements and settlement policies
- Presided over by a Chairman who is usually a counselor to the Secretary or Deputy Secretary
- Secretary's Indian Water Rights Office (SIWRO), under the direction of the Chairman of the Working Group, coordinates Indian water rights settlements and interfaces with settlement teams in the field

Federal Settlement Process (cont.)

- Upon direction from the Working Group, SIWRO establishes Federal teams to lead negotiations and the implementation of settlements
- Teams are comprised of representatives from:
 - Bureau of Indian Affairs
 - Bureau of Reclamation
 - Solicitor's Office
 - Fish and Wildlife Service
 - Department of Justice
 - Any other Federal agencies (within or outside the Interior Department) with significant interests in the settlement)
- Currently the Department has 38 teams in the field; 17 Negotiation Teams and 21 Implementation Teams

Criteria and Procedures

The Criteria & Procedures for Participation of Federal Government in Negotiating for Settlement of Indian Water Rights Claims, 55 Fed. Reg. 9223-9225, Mar. 12, 1990

- Provides guidelines for Administration's participation in settlements
- Includes the factors to be considered in deciding Federal contribution to settlement cost share
- Requires non-Federal cost sharing
- Flexible enough to adapt to the unique circumstances of each negotiation
- Followed by every Administration since 1990, but with differing interpretations

Settlement Negotiations

- Settlement negotiations frequently evolve from general stream adjudications but can occur without an underlying general stream adjudication
- The Department provides technical and other assistance to the tribes
- Settlement agreements vary from multi-party agreements to compacts among the state, tribe, and Federal government
- When agreement is reached, parties typically seek Federal approval in the form of Federal legislation

Benefits of Negotiated Settlements

- Wet Water
 - Litigation does not get “wet water” to tribes and perpetuates uncertainty that can continue even after the litigation has finished – most, if not all, settlements provide wet water to Tribes while at the same time protecting existing non-Indian water uses
- Local Solutions
 - In addition to defining tribal water rights, negotiation allows the parties to develop and implement creative solutions to water use problems – solutions that reflect local knowledge and values
- Certainty and Economic Development
 - Settlements provide certainty to tribes and neighboring communities, support economic development for Tribes and their neighbors, and replace historic tension with cooperation
- Trust Responsibility
 - Settlements are consistent with the Federal trust responsibility and Federal policy of promoting Indian self-determination and economic self-sufficiency

WHAT HAS HAPPENED
IN THE LAST 20 YEARS?

Negotiation Timeframes

1993

- 18 Federal Teams
- Avg. negotiation period 5 years
- Factors Causing Slow Negotiation
 - Local Politics and Parties Unwillingness to Engage
 - Insufficient Litigation Pressure or Anticipated Rulings
 - Personnel Turnover in Federal, Tribal, and State Parties

2013

- 17 Federal Teams
- 5+ year negotiations are more common
 - Easy settlements done first?
- Same Factors Causing Delays but some successes
 - 3 Settlements in New Mexico
 - Warm Springs Settled w/o Litigation Pressure
 - Major settlements in Montana and Arizona despite the slow pace of litigation

Ripeness Issues

1993

- Issues facing DOI
 - Appointing Fact Finding Teams
 - Difficulty dealing with claims outside general stream adjudications
 - Facts are insufficiently developed and require more time and money
 - Lack of litigation pressure
 - How to achieve finality without a court decree to bind all water users in a system

2013

- Fact Finding Teams are still plagued by undeveloped claims and potential solutions
- DOI appoints teams in absence of general stream adjudications
 - Soboba is an example of success
 - Negotiations are still more difficult and slow

Lessons Learned

1993

- Lessons we had learned by 1993
 - Going to Congress with incomplete settlements only delays pain
 - Water supply problems in San Luis Rey and Fort McDowell
 - Key players not at the table can block implementation
 - SAWRSA allottees and Fort Hall non-Indian irrigators

2013

- Have we learned from past mistakes? Yes and No
 - No water settlement without a water supply up front
 - Key players carefully considered and other Federal Departments (NOAA, Forest Service, etc) more often included

Lessons Learned (Cont.)

1993

- Important assumptions omitted in settlement agreement or Act slows implementation
 - Colorado Ute (silence on on-farm distribution systems)
 - Northern Cheyenne (cost sharing not sufficiently spelled out)
 - Yavapai-Prescott (reimbursability of Indian construction debt unclear)
- No matter how you plan, there will be problems

2013

- Omitting important assumptions still a problem
- New Lessons:
 - Inadequate Construction cost estimates - Animas La Plata
 - Scope of settlement and waivers must be clear – San Luis Rey and Ute
 - All settlement documents must be drafted before Congress acts - San Carlos
- No matter how you plan, there will be problems

Facilitating the Settlement Process

1993

- Establishing and staffing the Secretary's Indian Water Rights Office to facilitate communication between Washington D.C. and Teams in the field
- New directives to Team Chairs
 - Annual reports and roadmaps for success
 - More proactive role; do not sit and wait
 - Establish timeframes for substantial progress
 - Incentive program for Team Chairs who do a good job

2013

- Secretary's Indian Water Rights Office – A stunning success or better than nothing?
- New Directives to Team Chairs
 - Annual reports and roadmaps don't seem to work
 - More proactive role - still struggling
 - Timeframes for progress do not seem to work even when the court is establishing deadlines - Aamodt and Abousleman
 - Incentives for Team Chairs- a failed initiative. Even small bonus awards now unavailable. Morale issues with Teams have increased

Settlement Funding

1993

- Proposed establishment of \$200 million Indian Land and Water Rights Settlement Fund

2013

- \$200 million Indian Land and Water Settlement Fund failed as have other attempts to establish a standing settlement fund
- Funding settlements remains the largest obstacle to success
- Settlements getting more expensive
 - Navajo San Juan – \$1 billion
 - Crow - \$460 million
- AWSA- Use of Lower Colorado River Basin Development Fund to cover settlement costs, P.L. 108-451
- Success in using the Reclamation Fund, P.L. 111-11
- Mandatory money provided by Congress in Claims Settlement Act, P.L. 111-291

1993 Predictions Have Come True

- Funds available to cover the costs of negotiation will be reduced by Congress
 - Will effect tribal settlement participation (consultants and attorneys)
 - Will impact all studies needed in negotiation
- There will be more competition between studies necessary for litigation and those needed for negotiation
- Reduction in agency personnel will mean fewer people to serve on teams
- Loss of institutional knowledge through retirements and staff reductions will reduce the number of experienced negotiators/technical staff.

Issues on the Horizon

- Securing Tribal and State Approval of a Settlement
 - The Navajo Little Colorado River experience
 - Confederated Salish & Kootenai Tribes of the Flathead Reservation – Montana Compact
- Principles and Guidelines for Water and Land Related Resources Implementation Studies, 78 Fed. Reg. 18562-18563, March 17, 2013
- Water marketing in light of the HEARTH Act, P. L. 112-151

The Future

- Money is always an issue

“We are facing some very great challenges in seeing that Indian tribes receive the substantial economic benefit that the federal Indian reserved water rights doctrine can confer. While it has always been important for tribes to realize this economic potential, it has become even more important in the face of Congress's proposed drastic cuts in federal support for tribes. Now, more than ever, tribes need to seize the opportunity inherent in their reserved water rights to become economically self sufficient.” – Pamela Williams circa 1993

- \$219.6 million Indian water rights settlement related funding included in the President's FY 2014 budget
- \$3.4 million increase for BIA water programs includes \$1million “to conduct a comprehensive Department-wide evaluation to strengthen engagement, management, and analytical capabilities of the Indian Water Rights Office and other bureaus and offices that work on these issues”
- Demand for new settlements is not slowing

Final Thoughts

- Continued growth and prosperity of the West depends on certainty of water supply and the pressure to secure water rights will continue
- Doing nothing is not an option as history has shown
- Litigation remains risky. Supreme Court cases since *Arizona v. California* in 1963 have generally been negative. *U.S. v. New Mexico*, 438 U.S. 697 (1978); *Nevada v. U.S.*, 463 U.S. 110 (1983); *Arizona v. California III*, 460 U.S. 605 (1983); *Wyoming v. U.S.*, 492 U.S. 406 (1989)
- Settlements have significantly increased Federal funding on Indian water – roughly a billion dollars expended between mid 1980s and 2002
 - In 2010 a billion dollars were authorized for four settlements; another round of settlements of the same size is teeing up
- Political support for settlements ranges from pork barrel politics to upholding a moral commitment

Final Thoughts (cont.)

“This water rights agreement is as important to the future survival of the White Mountain Apache Tribe as the peace we negotiated with the United States Army in 1871 to remain on our aboriginal land.”

Ronnie Lupe

White Mountain Apache Tribe

July 31, 2013

Final Thoughts (cont'd)

- Are Water Rights Settlements the Second Treaty Era?
- If so, to avoid the tragedies of the first Treaty Era Indian country is going to need strong and courageous leadership. Making historic decisions about the fate of your people and your land is a tremendous responsibility.