



The Water Report™

Water Rights, Water Quality & Water Solutions in the West

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INDIAN WATER RIGHT NEGOTIATIONS

INTERIOR'S CONSIDERATIONS WHEN APPOINTING FEDERAL NEGOTIATION TEAMS

by Duane Mecham, Office of the Regional Solicitor
US Department of the Interior (Portland, OR)

INTRODUCTION

West of the 100th Meridian, a water resource issue or dispute rarely arises that does not implicate Indian rights or interests in water. From claims for instream flow protections for tribal fisheries in the Northwest, to securing irrigation water supplies for new agricultural development in the Southwest, or to providing adequate municipal water supplies for all tribal members, the docket of pending tribal water issues remains large. The vast majority of these tribal water issues arise because — even as the full scope of most tribes' rights to water remains unresolved — existing water supplies to which tribes arguably have a right have been and continue to be allocated to non-tribal water uses.

Since at least the 1908 decision in *Winters v. United States*, 207 U.S. 564 (1908), tribes, states and the federal government have been working in various forums to resolve outstanding tribal reserved water right claims. In more recent times, this effort has shifted from adversarial litigation to multi-party negotiations that seek to bring the relevant governments and other stakeholders to the table.

Over the past three decades, the United States, primarily through the Departments of the Interior and Justice, has been an active participant in numerous Indian water right negotiations. The federal government is, however, uniquely positioned with respect to Indian water negotiations. Whereas an individual tribe will be focused on its own water claims, and a state will be focused primarily on the claims of those tribes and tribal reservations located within its boundaries, the federal government, as trustee for Indian tribes, is presumably a necessary participant in all Indian water negotiations. With several hundred federally recognized tribes and reservations, ensuring effective federal participation in all negotiations that may be initiated would be a daunting task.

With ever limited federal resources available for potential tribal water negotiations, the Department of the Interior (Interior) recently took an important step to ensure that federal resources are properly marshaled and prioritized. On February 3, 2010, Interior published a memorandum ("February 2010 Memorandum") identifying and explaining ten key factors that it would consider when determining whether to appoint a new federal negotiation team for a particular Indian water right negotiation. These "New Team Factors" — compiled in a single source for the first time — establish a rational framework for addressing requests from tribes and states for new federal negotiation teams. Accordingly, it is important that states, tribes, and other stakeholders contemplating requesting a federal team have a working knowledge of the New Team Factors.

This article, after a brief background on tribal water right negotiations and federal involvement in these negotiations, provides a detailed review of the New Team Factors.

Tribal Negotiation Teams

State Adjudication

Trustee's Role

Litigation v. Negotiation

INDIAN WATER RIGHTS: THE TREND TOWARD NEGOTIATIONS

Since at least the time of the *Winters* decision, and gaining ever greater momentum during the 20th Century, virtually every Western state, numerous different Indian tribes and the United States have been meeting in federal and state courts to resolve outstanding Indian reserved water right claims. While a number of the earlier tribal water right cases were heard in federal court, the effort to resolve these claims gained further impetus as a result of states initiating comprehensive general stream adjudications in state courts. In compliance with the federal McCarran Amendment, 43 U.S.C. sec. 666, states have jurisdiction to determine all federal and tribal reserved water right claims within their borders. *See, e.g., Arizona v. San Carlos Apache Tribe*, 463 U.S. 545 (1983); *State ex rel. Greely v. Confederated Salish & Kootenai Tribes of the Flathead Reservation*, 712 P.2d 754 (Mont. 1985).

The role of the United States with respect to adjudicating Indian reserved water rights is relatively straightforward: as trustee, the federal government has an obligation to appear in cases where jurisdiction to adjudicate tribal reserved water rights has been established, and must assert and defend all credible claims for tribal water rights within the river basin being adjudicated. Further, this assertion and defense of tribal water claims is not an abstract legal exercise; through the Departments of Justice and the Interior, the United States must retain a wide range of experts to provide technical foundation for claims for water for instream flows, future irrigation of tribal lands, or domestic and various municipal water rights. Studies can take years to complete and experts are subject to the close scrutiny of non-federal parties. As explained below when discussing the New Team Factors, this federal litigation role is also central to the federal role in tribal water negotiations.

In cases involving multiple parties and difficult legal issues, both state and federal courts have made a valiant run at resolving tribal water claims through litigation. *See, e.g., Arizona v. California*, 373 U.S. 546, 600 (1963); *Washington Dep't of Ecology v. Yakima Reservation Irrigation District*, 850 P.2d 1306 (Wash. 1993). By the end of the 1970s, however, the inherent limitations of proceeding exclusively to a litigated result became more apparent to the participants in these cases. Beginning in earnest in the 1980s, states became proactive in seeking to incorporate alternative dispute resolution pathways in state court adjudications by providing measures such as automatic stays of litigation for negotiations to proceed. *See, Colby et al., Negotiating Tribal Water Rights – Fulfilling Promises in the Arid West*, 2005, University of Arizona Press.

INDIAN WATER RIGHT NEGOTIATIONS: FEDERAL PARTICIPATION

Providing for stays in the adjudications has allowed parties to participate in negotiations without prejudicing their litigation case. With this breathing room, the parties have dedicated personnel and resources to the negotiations instead of litigation. The Interior and Justice Departments have been active participants in several Indian water right negotiations over the past three decades.

As negotiations became more active and frequent, Interior began to establish protocol and other ground rules for federal participation in the negotiations. In 1990, Interior adopted the *Criteria and Procedures for the Participation of the Federal Government in Negotiations for the Settlement of Indian Water Rights Claims*, 55 Fed. Reg. 9223 (March 12, 1990). The *Criteria and Procedures* remain the basis for federal involvement in Indian water right negotiations. To provide overall policy oversight on proposed Indian water settlements and related matters, Interior established the Working Group on Indian Water Settlements, which is comprised of all assistant secretaries and the Solicitor. Currently, the Chair of the Working Group is Letty Belin, Counselor to the Deputy Secretary. In addition, the Secretary's Indian Water Rights Office, directed by Pamela Williams, oversees over 40 federal teams concerned with Indian water rights negotiations and other Indian water issues. Other important aspects of the federal participation will be highlighted in the course of discussing the New Team Factors below.

NEW TEAM FACTORS

Currently, there are 17 federal negotiation teams appointed under the auspices of Interior's working group on Indian water settlements. Interior continues to receive several requests from tribes, states, and others to appoint additional teams.

On February 3, 2010, the director of the Interior Secretary's Office of Indian Water Rights, Pamela Williams, issued a memorandum (February 2010 Memorandum) setting out ten factors that Interior would consider when addressing requests that a federal Indian water rights negotiation team be appointed. The February 3, 2010 memorandum is available by contacting *The Water Report* to request a copy (541/ 343-8504 or TheWaterReport@yahoo.com). The memorandum reports that "[O]n January 20th, 2010, the [Interior Department's] Working Group on Indian Water Settlements met and adopted the following factors to be considered in appointing new [federal] negotiation teams."

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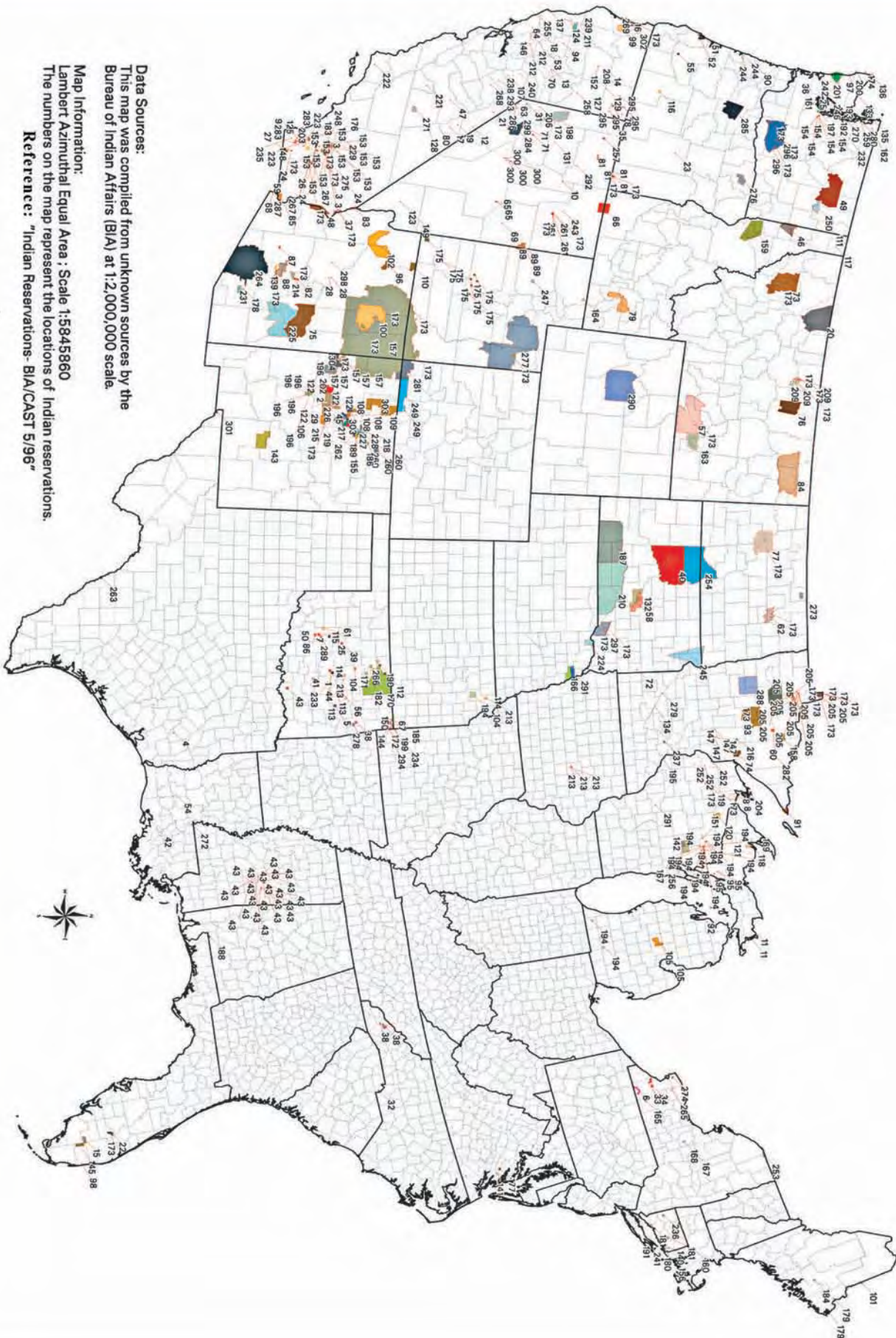
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Indian Reservations in the Continental United States

The numbers on the map represent the locations of Indian reservations.



Data Sources:

This map was compiled from unknown sources by the Bureau of Indian Affairs (BIA) at 1:2,000,000 scale.

Map Information:

Lambert Azimuthal Equal Area : Scale 1:5845860

The numbers on the map represent the locations of Indian reservations.

Reference: "Indian Reservations- BIA/CAST 5/96"

Tribal Negotiation Teams

Memorandum Guidance

The February 2010 Memorandum notes that “[m]any of these factors have been used by the [Interior] Department in its decision making in the past.” This is the first time, however, that these New Team Factors have been collected into a single Departmental guidance document. The memorandum also provides supplementary information for each factor that explains the relative importance of the factors and provides guidance on how they will be applied. For anyone contemplating requesting the appointment of a federal team, the author recommends a careful review of the February 2010 Memorandum. Most importantly, the February 2010 Memorandum clarifies that no single factor should be considered determinative in the decision making process and that Interior will maintain maximum flexibility in team appointment decisions.

With this general principle in mind, this article introduces and briefly reviews each of the ten New Team Factors. As part of this introduction and to illustrate the application of the factors, the article also refers to the recent experience of the Confederated Tribes of the Umatilla Reservation (Umatilla Tribes), which along with other entities submitted to Interior in 2012 a request for the appointment of a federal team to participate in the negotiation of the Umatilla Tribes’ water claims.

Factor No. 1:

Is there a pending general stream adjudication or other litigation?

Threshold Question

This first factor poses a threshold question for the federal government when considering whether to appoint a new federal negotiation team. As noted above, if a general stream adjudication has been initiated with jurisdiction to adjudicate tribal water claims, the United States as trustee must be on point to assert and defend those claims until final judgment is reached, whether or not the claims are negotiated. Over the years, it has been standard practice that, when settlement talks are proposed to resolve tribal water right claims pending in an adjudication, Interior will appoint a federal negotiation team. However, other key factors discussed below could influence the timing of the team appointment, such as whether the issues and timing are ripe for active negotiations.

Settlement Finality

The preference for negotiating Indian water right claims already pending in an adjudication makes sense because a settlement — once reached — will be brought to the adjudication court for final judicial approval as the tribe’s adjudicated water right. This right will in turn be included in the final enforceable water rights decree for the concerned water basin. With this result, the federal government will have met its trust obligations to see the tribal claims to a final judicial determination. As stated in the February 2010 Memorandum, “the finality of settlement demand by the Department as the trustee of Indian resources can best be achieved by the entry of a final decree in a general stream adjudication.”

Tribal Claims

In an adjudication, water right claimants are required to assert their entitlements to water rights and are allowed to object to other claims. This judicial review of claims serves to sharpen the respective parties’ sense of the relative risks of pursuing or litigating against the tribal claims. Often, the United States and the tribe are asserting the earliest priority date within the basin and claiming rights to significant amounts of additional water sources to meet future or previously unmet tribal water rights. If successful in the adjudication, these tribal rights do not legally negate other junior water rights, but could likely curtail the water supplies available to meet those junior rights during times of water shortages.

The February 2010 Memorandum makes clear that the lack of a pending adjudication is not in and of itself a bar to appointment of a federal negotiation team. What is further clarified, however, is that if no adjudication is pending, the parties will still have to factor in the need to reach a final settlement of the tribal claims as part of the negotiation. The implications of a lack of a pending adjudication were recently addressed as part of Interior’s consideration of a request to appoint a federal negotiation team for the Umatilla basin.

No Pending Litigation

The Umatilla Reservation, created by treaty in 1855, is located within the Umatilla River basin in northeast Oregon and is the homeland of the Umatilla Tribes. Over the past several years, the Umatilla Tribes, in concert with local parties, laid the groundwork for a negotiation of the Tribes’ water right claims. There is not, however, a pending general stream adjudication, and, in fact, there is little likelihood that one will be initiated anytime soon: water rights in the Umatilla basin were adjudicated in the early 1900s and the State of Oregon’s legal position is that all of the Umatilla Tribes’ water rights were adjudicated at that time. Though the Umatilla Tribes and the federal government do not agree with the Oregon’s position, there is little prospect of any party initiating a new adjudication.

Reclamation Contracts

Oregon has acknowledged that the Umatilla Tribes have inadequate water resources and joined in the Tribes’ request for a federal negotiation team. Tribal, State, and federal representatives, working together, identified available mechanisms that could allow the parties to reach a final, enforceable settlement, such as State law authority to enter into agreements with tribes and the potential that at least some of the Umatilla Tribes’ water rights could be held as contracts in a nearby Bureau of Reclamation irrigation project. This

Tribal Negotiation Teams

Binding Settlement

Pressure to Develop

Local Stakeholders' Commitment

Claims Development

effort provided Interior with enough justification to appoint a federal negotiation team even without the prospect of a basin-wide adjudication.

Factor No. 2:

Is there an identified mechanism to bind necessary parties to the settlement, such as a court decree in a general stream adjudication?

As the February 2010 Memorandum notes, Factor No. 2 is closely related to the issue of finality discussed above, and mechanisms to bind parties are inherently built into the adjudication process. To date, Indian water right negotiations outside the scope of a pending general stream adjudication have been very rare. There is the potential, however, that states and other parties, recognizing the great expense and energy associated with recent basin-wide adjudications, will be turning to Interior to negotiate claims without a pending adjudication. In the absence of a pending adjudication, this factor will be given close scrutiny. This was the case with the recent consideration of the Umatilla Tribes' request discussed above, and was the prime motivation for the parties to that negotiation to carefully consider the full range of legal mechanisms that could be implemented and that would have the same functional effect of binding the parties normally found in an adjudication.

Factor No. 3:

[What is] the scope of the detriment being suffered by the tribe and immediacy of harm to trust resources?

One would be hard-pressed to find an Indian reservation where adjoining non-Indian water resource development has not impacted tribal water and natural resources. The February 2010 Memorandum states that the "scope of detriment and necessity for immediate action should be carefully considered." In many cases there is pressure to develop the few remaining water resources within the basin, even if the rights to those resources are clouded by claims of tribal ownership. This competition for limited water sources can significantly compound the difficulty to reach settlement of the unresolved tribal water claims in the basin, and is likely to be weighed as significant as Interior addresses this factor.

Factor No. 4:

Are necessary parties committed to the settlement process?

As with politics, all Indian water settlements are local. The February 2010 memorandum notes that "[i]n order for a settlement to be successful, the primary water users in the basin must be interested in joining a settlement process and willing to compromise and seek consensus." To ensure a high level of commitment to negotiations, Interior, since issuance of the *Criteria and Procedures*, has adhered to the requirement that it will only "consider initiation of formal claims settlement negotiations when the Indian tribe and non-Federal parties involved have formally requested negotiations of the Secretary of the Interior." With the potential of being involved in several negotiations at any given time, it is imperative that Interior have assurances from the local parties that negotiations can be productive.

Traditionally, in situations where an adjudication has been initiated, the "necessary parties" are those who have filed water claims in the adjudication and who have standing to contest tribal water right claims. These parties are critical because, if there is not agreement among the claimants who are aligned against the tribal claims, any settlement will be subject to challenge in the adjudication court. If there is not a pending adjudication, the tribe proposing a federal negotiation team may have a higher bar to meet when identifying and confirming that other interested and affected parties are committed to the process.

Factor No. 5:

What is the level of factual and legal development of the tribal water claim?

As previously discussed, the United States as trustee must assert and defend tribal water right claims in a general stream adjudication, and this obligation includes the investment of significant legal and technical resources to support the claims. Turning to negotiations, the February 2010 Memorandum points out that "[b]efore the Department can gauge its own position in settlement, we must have some sense of the extent of the trust resource (e.g., the tribe's water rights) including the factual and legal underpinnings of the tribe's claims. Some level of claims development is also necessary for the tribe itself to assess potential settlement opportunities."

Often, this "claims development" has been done in the course of an adjudication. If, however, parties wish to negotiate at the start of an adjudication, or if there is not a pending adjudication, parties requesting a federal negotiation team will need to have specific plans on how to ensure that there can be adequate development of the claims in the negotiations.

Tribal Negotiation Teams

The parties preparing to negotiate the Umatilla Tribes' claims in northeast Oregon faced this issue some years ago. The Bureau of Indian Affairs and the Umatilla Tribes had prepared some studies which, although not exhaustive, did address current and future Tribal consumptive water uses. The Umatilla Tribes also had invested their own resources and had worked with federal and state agencies to develop hydrological and biological information to support Tribal claims for instream flows for their on- and off-Reservation treaty fisheries.

Supply Study

Finally, the Umatilla Tribes took the additional step in 2007 to request that the US Bureau of Reclamation prepare a basin-wide water supply study to examine all existing and potential water sources within the basin that could be considered for the negotiations. This study was completed in 2011. Together, this body of information provided a solid sense of the technical and legal underpinnings of the Umatilla Tribal water claims.

Non-Federal Cost Share

Factor No. 6:

Are the parties willing and able to commit to settlement cost sharing?

Interior's *Criteria and Procedures* make clear that the Department (and, by extension, the Administration) takes the position that there must be non-federal funding for settlement costs. Significant benefits accrue to non-federal and non-tribal entities in Indian water settlements. For example, virtually every settlement explicitly provides exemptions and protections for existing non-Indian water users holding state-law based water rights. Absent settlement, these rights likely would be junior to the tribal water rights. In addition, new or improved water resource projects, such as new irrigation facilities, often are proposed as part of an Indian water settlement, and these new projects often benefit both tribal and non-tribal water users. An appropriate non-federal contribution to these costs will be part of the negotiations.

That said, the issue of what should be the proper level of non-federal cost share is difficult to determine at the outset of a negotiation when the federal government is contemplating appointment of a federal negotiation team. Nonetheless, Interior will be looking for acknowledgement and commitment from the other parties that non-federal cost-share will need to be part of the negotiated solution.

Public Interest

Factor No. 7:

What is the level of public interest in settlement (State, local, congressional)?

Implicit in this factor is the fact that virtually all Indian water settlements — to become completely effective — require the legislative approval of all three involved governments. In many instances, as happened in the recent request for a federal team for Umatilla water right negotiations, members of the concerned state's Congressional delegation will send to the Secretary letters of support for the appointment of a federal team. Also, as noted in the February 2010 Memorandum, this evaluation is closely related to Factor No. 4, above, regarding committed parties.

Dispute Resolution

Factor No. 8:

Is it likely that the dispute can be resolved or is it anticipated that lengthy negotiation will result?

Several factors can influence the timeline of what ultimately will be a successful Indian water right negotiation, although these timeframes are almost always measured in years. It is the sense of the author that in the future, the weight that Interior gives to this factor will be greatest in situations where, all other things equal, circumstances appear to be ripe for reaching a settlement in the relatively near term if the federal government were to become engaged. In their recent request for a federal team, the Umatilla Tribes presented a good case that, due to their and other parties' efforts *prior* to the negotiations, settlement could be achieved within two years. These prior efforts included: narrowing-down the issues; identifying likely water sources for new tribal water rights; and engaging all appropriate stakeholders.

Other Issues: ESA

Factor No. 9:

Are there other Departmental interests or disputes that might also be resolved?

The question posed in this factor recognizes the breadth of potential water resource issues and disputes that may be raised or proposed for resolution in the course of a tribal water right negotiation — plus the fact that this broad range of issues can affect other federal programs or interests. The February 2010 Memorandum explains that if “other Department interests can be resolved simultaneously with an Indian water rights settlement, that is a factor that should be taken into consideration.”

While the range of potential federal interests is broad, one emerging interest is worthy of particular notice. Throughout the West, the number of aquatic species listed for protection under the federal Endangered Species Act (ESA) continues to grow. The issue of how resolving tribal water rights might impact ESA-listed species (either positively or negatively) is one that has to be integrated into virtually

**Tribal
Negotiation
Teams****Federal
Staffing**

every Indian water negotiation. Interior has taken great strides to include on its Indian water negotiation teams individuals from the US Fish & Wildlife Service and, as appropriate, the National Marine Fisheries Service (part of the Department of Commerce) to assist with those issues. This development better ensures that ESA issues can be factored into the negotiations in a timely way.

Factor No. 10:**Are Departmental resources, both personnel and financial, available to support the negotiation?**

Within Interior, only a small handful of employees within the Secretary's Indian Water Rights Office are dedicated full time to Indian water right negotiations, and these employees must deal with a full range of issues for all settlements. Interior, in establishing teams, looks to all of its bureaus to staff the teams as they are established. To the extent available, most funding to support federal negotiations comes from the Bureau of Indian Affairs and the Bureau of Reclamation. As the roster of new federal teams continues to grow, these resources will continue to be stretched.

CONCLUSION

The accelerating trend toward resolving outstanding Indian water right claims through negotiation is a welcome one. As this trend continues, and the federal government receives increasing numbers of requests to appoint federal negotiation teams, considerations of how to prioritize federal resources for this effort will become paramount. The New Team Factors, in combination with the *Criteria and Procedures*, provide to non-federal parties a clearer understanding of the proper role and responsibilities of the federal government in the negotiations. For tribes and other parties contemplating settlement negotiations, the publication of the New Team Factors by Interior provides important guidance for preparing to make a case to the Department that their negotiations have matured to the point that a federal negotiation team is warranted.

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