

Indian Water Settlements: Negotiating Tribal Claims to Water¹

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INTRODUCTION

For most of this century American Indian tribes have been going to court in an effort to protect their water rights. Their claims are almost always based on the doctrine established in the 1908 Supreme Court case of *Winters v. U.S.*, which held that Indian tribes have a right to water that was implicitly created when the reservation was established.² Thus, Indian reservations have a federally reserved water right to sufficient water to meet the purposes of the reservation.

In the years since *Winters* was handed down, literally hundreds of cases have been filed claiming reserved water rights. The tribes won many of these court battles, but this did not mean they could actually gain control over water resources. Rather, it often meant that tribes were awarded rights to water, but they did not have the financial means to develop and use that water. At the same time, the federal government was quite busy helping non-Indians develop and use the waters that were claimed by Indian tribes. Politically, it proved nearly impossible to stop these upstream water users from diverting rivers and streams that originally flowed through or past Indian reservations.³ Thus many of the court victories had a hollow ring to them. However, the constant threat of lawsuits kept many non-Indian water users apprehensive. After seventy years of acrimonious litigation, both sides began looking for an alternative to endless court battles.

In the late 1970s the Carter Administration began exploring the possibility of negotiating, rather than litigating, disputes over water between Indian tribes and other water users. The Reagan Administration followed this approach, and began a full-scale effort to settle numerous outstanding water claims involving Indian tribes. In 1978 the Ak-Chin Indian Community signed a settlement. Two years later the Papago tribe (now the Tohono O'odham Nation) agreed to a complicated settlement that involved thousands of claimants. Proponents of the settlement process declared that a new era in Indian-Anglo relations had dawned. Since then another dozen settlements have been completed.⁴

The allure of a settlement is still attracting a large number of tribes to the negotiating table. Currently the Department of Interior has thirty-two negotiating teams in the field, and other tribes are waiting for their turn. But recently the settlement process has experienced problems. The Western Governor's Association recently expressed concern over the lack of progress on settlements.⁵

This article will briefly examine some of the problems that have arisen. These difficulties are grouped into three subjects for discussion: implementation problems; funding limitations; and environmental conflict. A concluding section discusses the future of the settlement policy.

IMPLEMENTATION PROBLEMS

One of the alleged advantages of settlements is finality; once the agreement is signed, the parties can take comfort knowing their differences have been resolved. But in practice, there have been innumerable difficulties implementing the settlements. As one Indian attorney put it, "All too often we get up from the table, and we have a different understanding of what we have agreed to."⁶ Recently a spokesperson for the Department of the Interior admitted that many settlements were experiencing problems: "We have a large number of settlements that are not settled."⁷ At least half of the fourteen settlements signed to date are experiencing implementation difficulties:

- The San Luis Rey settlement still does not have a source of water.
- In the Fort McDowell settlement a source of water was identified but not purchased; now the parties are finding out that the price of this water is "extremely expensive."⁸
- It has become necessary to seek amendments to the Fort Peck compact due to conflicts over water marketing.

- The Yavapai-Prescott settlement, after only a year, ran into trouble over reimbursement.
- The Southern Arizona Water Rights Settlement Act of 1982 (Tohono O'odham) is immersed in conflict between the tribe and allottees; the original case has not been dismissed as a result.
- The Colorado Ute Settlement of 1988 was predicated on the construction of the Animas-La Plata Project, which has not been constructed due to a host of environmental and funding problems.
- The compact for the Uintah and Ouray Reservation in Utah has yet to be ratified by the Northern Ute tribe and the Utah state Legislature.
- A final court decree has yet to be issued for the Jicarilla Apache settlement.

The problems became so pervasive that the Department of Interior established implementation teams for each settlement in an effort to solve these problems. Despite these efforts, the average time it takes to implement a water settlement has increased dramatically. This has created a concern among some tribes that are currently negotiating that, even though they may sign a settlement in the near future, there is no guarantee that the provisions of the settlement will be carried out. However, the creation of individual implementation teams is a promising development, and may ultimately alleviate these vexatious problems.

FUNDING LIMITATIONS

One of the advantages of negotiating, rather than litigating, is that tribes can bargain for direct funding as part of the deal. Courts cannot allocate money, but the U.S. Congress, in passing a settlement act, can. Nearly every settlement has relied upon a federal allocation of funding to carry out the provisions of the settlement. This funding is usually applied to an economic development fund or water development activity. In essence, federal money has been the lubrication that has greased the settlement wheels. This makes it easier for the various parties to forget their differences and reach an agreement, but it also makes the settlement process vulnerable to federal budget cuts.

During the Reagan and Bush Administrations the funding for water settlements was carved out of other Indian programs. Thus the net gain for Indian country

was zero. When the Clinton Administration came to office, Secretary of Interior Bruce Babbitt attempted to remedy this unfair practice by establishing a separate water settlement line item in the budget. The initial funding for this item, \$200 million in fiscal year 1994, looked promising, but that amount has been gradually reduced. This funding is less than the proponents of settlements wanted, but at least the money was no longer being pulled directly out of other Indian accounts. And compared to historic spending levels, it was a dramatic improvement.

But the Republican take-over of Congress in 1994, and the increased emphasis on cutting domestic spending to balance the budget, have reduced the likelihood that Congress will continue to fund adequately the water settlements. For fiscal year 1996 the Clinton Administration requested \$136 million for the settlements. The House version of the appropriations bill for Interior provided \$114, and the Senate version dramatically reduced the amount to \$13.5 million. After President Clinton vetoed the Interior Appropriations bill for 1996, the Congress agreed to a spending level of \$118 million. For fiscal year 1997 the Clinton Administration requested \$132 million, but only received \$94.7 million. An Interior Department official recently advised American Indians: "Tribes must seize the opportunity now, because it is unlikely that Congress is going to continue to fund large water settlements."⁹ There have been no new settlements since the emphasis shifted to cost-containment.¹⁰

Another threat to settlement funding concerns a basic philosophical difference between different elements of the federal government. The Office of Management and Budget and some members of congress view settlements as a cost-cutting device; they want the cost of each settlement to be limited to the government's legal liability if the case were litigated. In contrast, the BIA and the Interior Department view the settlements as part of the trust responsibility; to them, the settlements should be funded at a level that adequately meets the government's moral obligations as trustee. Of course, this debate will become moot if the current Congress refuses to fund future settlements at a level that can garner agreement.

ENVIRONMENTAL CONFLICT

For many years, federal and state governments built environmentally damaging water projects that diverted water away from Indian reservations so it could be used by Anglos. Finally, water settlements provided an avenue

of funding for water development on Indian reservations. The big problem is timing; the age of big, expensive water projects is rapidly coming to a close. Instead, the government is concerned about the fate of endangered species, wetlands, wilderness, and recreation. Thus, when Indian tribes sometimes attempt to write a water development project into their settlement, they run headlong into environmental laws. As a result, there is an uneasy relationship between environmentalists and tribes. Environmental groups are stakeholders in nearly all of the settlements and usually have representatives at the negotiating table. At times they have worked closely with tribes to save habitat and sacred lands and protect native vegetation and animals, but in other situations they have been in direct conflict.¹¹

Perhaps the greatest conflict has occurred over the 1988 Colorado Ute water settlement. The linchpin of the settlement is a \$700 million water project that will pump water uphill at great cost in order to provide water for alfalfa farmers. This proposed project languished for decades until it was reinvented as an "Indian" project as part of the effort to settle the water claims of the Ute Mountain Ute and the Southern Ute tribes. Although most of the water from the proposed project would still go to non-Indians, the project's role in settling the Indians' reserved water claims created sufficient support to pass a re-authorization for the project as part of the 1988 settlement.

However, before construction could begin it was stopped by the U.S. Fish and Wildlife Service because of its impact on endangered species. The project also engendered law suits from the Sierra Club and other anti-project interest groups. Their position was bolstered when the Inspector General of the Interior Department issued a report in 1994 that concluded the Animas-La Plata Project was not economically feasible.¹² The project has still not commenced construction, to the great consternation of the Colorado Ute tribes. Judy Knight-Frank, Chairperson of the Ute Mountain Utes, recently expressed her frustration: "Presently our water settlement is not complete because of the environmental issues.... We constantly have environmental groups coming in and telling us what is best for us, and we have problems with this because they have not lived our life and they don't understand us."¹³ In 1996 Congress allocated \$10 million for the project. In 1997, after extensive negotiations, a scaled-back version of the project was proposed in an effort to secure continued congressional funding.

The Navajo Nation, currently negotiating a settlement for

the Little Colorado River, has also experienced conflict with environmental laws. The Endangered Species Act has had a direct impact on the tribe's water development plans.¹⁴ Recently the Navajo Nation abandoned plans to build a dam as part of its settlement on the Little Colorado River.¹⁵

Other tribes, however, have expressed unequivocal support for the Endangered Species Act and other environmental legislation. The Pyramid Lake Paiutes, who signed a settlement in 1990, relied heavily upon the Endangered Species Act to gain water for tribal fishing. The Nez Perce Tribe is working with environmentalists in an attempt to restore anadromous fish runs in central Idaho. The Warm Springs Tribe is working with the environmental Defense fund in a proactive, ecosystems approach to water management. And several tribes are working with environmental groups to develop water marketing strategies. John Leshy, the Solicitor General of the Department of the Interior, recently noted that an ongoing process of close consultation has been established for the tribes, the BIA, and other Interior Department agencies such as the Fish and Wildlife Service. The objective of this process is to reduce conflict and enhance understanding and cooperation.¹⁶

However, as long as Indian reservations remain less developed than non-Indian land, there will always be the potential for conflict as some tribal members move to develop these lands in an effort to improve tribal economic self-sufficiency. Conversely, tribal reverence for the land will also create support among tribal members to protect the land and all living things. These differing values will continue to play an important role in Indian water settlements.

CONCLUSION

Just a few years ago, negotiated settlements were seen as the wave of the future--a new era in Indian-Anglo relations that would heal centuries-old wounds and permit tribes and non-Indians to work together as neighbors. Now a more realistic attitude prevails. Some tribes have become disillusioned, realizing that negotiation means not only gaining something, but also giving up something. The chairwoman of the Ute Mountain Utes alluded to this recently: "We had language in the settlement that gave us what we wanted, but that got watered down because so many people wanted something."¹⁷ Another Indian spokesperson made an even blunter statement: "If we want something done for our lands, we have come to the conclusion that we

must do it ourselves.”¹⁸

Despite the problems with implementation, funding cuts, and environmental conflicts, tribes will continue to be interested in negotiation because the courts are much less receptive to Indian water claims than they were in the past. . Today it is very risky to take a reserved water rights claim to court, either at the state level or to the U.S. Supreme Court. Indian attorney Jeanne Whiteing spelled out this stark reality: “While the results of settlements are not completely encouraging, the risks of litigation appear much more significant than they have in the past. In some cases, tribal decisions are being

driven not by the fact that negotiations are so much better, but because the results of litigation are potentially so much worse.”¹⁹ Ultimately, the settlements are much more than just water settlements; they are, in a larger sense, sovereignty settlements because they decide issues of control and destiny. They involve water marketing, land acquisition and use, administrative control, and culturally sensitive water uses. And in nearly every settlement, the tribes must relinquish their right to future claims to reserved water rights--forever. Thus, the settlement era is, in effect, a second treaty-making era. The first treaty-making era was concerned with land; this one involves water. If reservations are going to serve as viable homelands, they must have both.

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ENDNOTES

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2. 207 U.S. 564 (1908).

3. See: Daniel McCool. *Command of the Waters: Iron Triangles, Federal Water Development, and Indian Water*. Tucson: University of Arizona Press, paperback re-issue, 1994.

4. For a description of the settlement policy and its impact see: Daniel McCool, “Indian Water Settlements: The Prerequisites of Successful Negotiation.” *Policy Studies Review* 21 (No. 2, 1993): 227-242; and McCool, “Intergovernmental Conflict and Indian Water Rights: An Assessment of Negotiated Settlements.” *Publius: The Journal of Federalism* 23 (Winter, 1993): 85-101; Jon Hare, *Indian Water Rights*, published by the Confederated Tribes of the Chehalis Reservation and the Bureau of Indian Affairs, 1996.

5. Western Governor’s Association, Resolution 95-E. June 26, 1995, Park City, Utah. Sponsors: Governors Symington and Lowry. Subject: Renewing Progress on Negotiated Indian Water Rights and land Settlements.

6. Comments of Dan Decker, attorney for the Confederated Salish and Kootenai Tribes, First Annual Symposium on Reserved Water Rights and Related Issues. Albuquerque, NM, January 26-28, 1994.

7. Comments of John Duffy, Chair of the Working Group on Indian Water Rights, Department of the Interior, Conference on Indian Water Rights sponsored by Stanford University of the Native American Rights Fund, Stanford University, September 9-10, 1994.

8. See comments made by Pamela Williams, delivering the remarks of John Duffy, Counselor to the Secretary of Interior Working Group, conference on the “Settlement of Indian Reserved Water Rights Claims,” sponsored by the Native American Rights Fund and the Western States Water Council, Portland, OR, September 6-8, 1995.

9. Ibid.
10. Interview with Christopher Kenney, U.S. Department of the Interior, Washington, D.C., June 10, 1996.
11. See: Laura Kirwan and Daniel McCool. "Environmentalists, Tribes, and Negotiated Water Settlements." Paper prepared for delivery at the annual meeting of the American Political Science Association, Aug. 31- Sept. 3, 1995, Chicago, IL.
12. Office of the Inspector General, Department of the Interior. Audit Report: Development Status of the Dolores and the Animas-La Plata Projects, Bureau of Reclamation. Report No. 94-I-884, July, 1994.
13. Remarks made at a conference on the "Settlement of Indian Reserved Water Rights Claims," sponsored by the Native American Rights Fund and the Western States Water Council, Portland, OR, September 6-8, 1995.
14. Comments by Stanley Pollack, Special Counsel for the Navajo Nations. Conference on Indian Water Rights sponsored by Stanford University and the Native American Rights Fund, Stanford University, September 9-10, 1994.
15. Interview with Stanley Pollack, Special Counsel for the Navajo Nation, Window Rock, Arizona, March 21, 1996.
16. Comments of John Leshy, Solicitor General, U. S. Department of the Interior. Conference on Indian Water Rights sponsored by Stanford University and the Native American Rights Fund, Stanford University, September 9-10, 1994.
17. Comments of Judy Knight-Frank, conference on the "Settlement of Indian Reserved Water Rights Claims," sponsored by the Native American Rights Fund and the Western States Water Council, Portland, OR, September 6-8, 1995.
18. Comments of Daniel Preston, Vice-Chairman of the San Xavier District of the Tohono O'odham nation, conference on the "Settlement of Indian Reserved Water Rights Claims," sponsored by the Native American Rights Fund and the Western States Water Council, Portland, OR, September 6-8, 1995.
19. "Whither Settlements: Current Policy & Issues, Emerging Trends & Future Needs." Paper delivered by Jeanne Whiteing, of Whiteing and Thompson, Boulder, CO. at the conference on Indian Water rights sponsored by Stanford University and the Native American Rights Fund, Stanford University, September 9-10, 1994.