



# United States Department of the Interior

OFFICE OF THE SECRETARY  
Washington, D.C. 20240

Memorandum

FEB - 3 2010

To: All Team Members

From: Pamela Williams, Director, Office of Indian Water Rights

Subject: Factors to Consider in Appointing New Teams

On January 20th, 2010, the Working Group on Indian Water Settlements met and adopted the following factors to be considered in appointing new negotiation teams. Many of these factors have been used by the Department in its decision making in the past. No single factor should be considered determinative in the decision making process and the Department will maintain maximum flexibility in team appointment decisions.

Factors to Consider:

1. Is there pending general stream adjudication or other litigation?

On-going litigation does not have to be a prerequisite to the settlement of Indian water rights claims. However, the finality of settlement demanded by the Department as the trustee of Indian resources can best be achieved by the entry of a final decree in general stream adjudication. A pending adjudication also provides a level of risk and uncertainty to the parties that can create an impetus to discuss settlement. There are, however, situations in which finality may be achieved in other ways. For example, if supplemental water is supplied to a tribe through a contractual arrangement, it may not be necessary to bind each and every local water user by a court decree. Separate litigation and subsequent court-ordered mediation efforts may also provide another means to settlement.

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

Closely related to the issue of finality is whether the parties have identified and are willing to commit to a binding settlement mechanism. The most obvious settlement mechanism is the entry of a final decree in general stream adjudication. If this mechanism is not contemplated, what alternative is proposed?

3. The scope of the detriment being suffered by the Tribe and immediacy of harm to trust resources.

In the absence of fully adjudicated rights, tribal water rights and trust resources dependent upon those water rights often suffer because of the over-appropriation of water by other water users.

A settlement may offer the most effective and swift method of fulfilling the Department's trust responsibility to protect and preserve tribal property rights and the associated natural resources. The scope of detriment and necessity for immediate action should be carefully considered.

4. Are necessary parties committed to the settlement process?

In 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. All relevant stakeholders must be engaged to ensure that a settlement can be achieved and made binding on necessary parties.

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

Before the Department adequately 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. Such information is generally available in the context of on-going litigation. If the information is not available, there will be significant costs to obtain it.

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

Typically Indian water settlements require substantial financial commitments in order to provide wet water to a tribe in a way that does not unduly harm non-Indian users.

Recognizing the benefits to all parties from settlement, the Criteria recommend that non-Indian cost sharing be a component of all settlements. Appropriate cost sharing has been exceedingly difficult to obtain.

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

Closely related to the commitment of the settlement parties is the level of interest in the settlement at state, local and congressional levels. While congressional involvement is not necessary in the negotiation process itself, a final settlement cannot be enacted without the support and interest of relevant congressional representatives.

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

Certain situations may provide opportunities for successful and relatively quick resolution of water disputes. For instance, issues may have matured to a level ripe for conclusion, situations may present relatively few parties in interest and/or issues in dispute, or circumstances may have evolved to a point where the parties are sharply focused on resolution of disputed issues. Any of these circumstances can expedite settlement negotiations. At the same time, settlement initiatives involving many parties and complex issues also have been successful and often demand a settlement solution rather than litigation.

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

A primary reason that the Department uses a team approach in negotiating Indian water settlements is to ascertain and address all relevant Departmental interests or concerns during the settlement negotiation process to ensure no “surprises” at the conclusion of negotiations.

If other Departmental interests can be resolved simultaneously with an Indian water rights settlement, that is a factor that should be taken into consideration.

10. Are Departmental resources, both personnel and financial, available to support the negotiation?

The Departmental agencies with interests that may be affected by a settlement are expected to provide and financially support an agency representative to serve on negotiation teams. Often one individual represents an agency on multiple teams because of that individual’s professional abilities and expertise. . These individuals must also fulfill their other work responsibilities.

The Department must consider the availability of appropriate staffing and financial support for team activities.