INDIAN WATER RIGHTS SETTLEMENTS

Tribal Consultation
October 26, 2014
Historic Background

• Basis of Indian water rights is the Federal reserved water rights doctrine established in *United States v. Winters* in 1908

  – establishment of a reservation impliedly reserves the amount of water necessary to accomplish the purposes of the reservation (homeland purpose)

  – past, present and future uses included

  – rights are not lost by non-use

  – governed by Federal and not state law

  – held in trust by the Federal Government
• Despite the *Winters’* decision, Indian water was not a Federal priority and Indian water rights were left largely unprotected in the decades after 1908.

• By contrast, Federal policy and expenditures supported extensive development of water resources to benefit non-Indian communities across the West.

• During this period, more than 30,000 dams were built to control and divert water in the West.
Early Efforts to Establish Water Rights

• *Winters* rights were a cloud over western non-Indian water rights

• The push to quantify *Winters* rights began in the 1960s

• The McCarran jurisdiction fight (state vs Federal courts) created a rush to litigate but the results were disappointing
Settlement Era Begins

• In the 1970s, tribes, states, local parties, and the Federal Government began questioning the utility of litigation as the way to resolve water rights disputes

• Negotiated settlements, rather than protracted litigation, became the preferred approach to resolving Indian water rights conflicts
Completed Settlements

• Department of the Interior (DOI) has completed 31 Indian water rights settlements since 1978

  – Congressionally Approved → 27

  – Administratively Approved by DOI & Department of Justice (DOJ) → 4
Settlement Negotiations

• Settlement negotiations frequently evolve from litigation but can also occur without litigation

• DOI 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 Settlements

• **Wet Water**
  Provide “wet water” to tribes; litigation provides “paper water”

• **Win-Win**
  Provide water to tribes while protecting existing non-Indian water users

• **Local Solutions**
  Allow parties to develop and implement creative solutions to water use problems based on local knowledge and values
Benefits of Settlements (cont.)

• **Certainty and Economic Development**
  – Provide certainty to tribes and neighboring communities, support economic development for tribes, and replace historic tension with cooperation

• **Trust Responsibility**
  – Consistent with the Federal trust responsibility and Federal policy of promoting Indian self-determination and economic self-sufficiency
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
Federal Settlement Process (cont.)

• 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

• Upon direction from the Working Group, SIWRO establishes Federal teams to lead settlement negotiations and implementation
Federal Settlement Process (cont.)

• Teams are comprised of representatives from:
  – Bureau of Indian Affairs
  – Bureau of Reclamation
  – Solicitor’s Office
  – Fish and Wildlife Service
  – Department of Justice
  – Other Federal agencies (within or outside the DOI) with significant interests in the settlement)

• Currently the DOI has 38 teams in the field; 17 Negotiation Teams and 21 Implementation Teams
Criteria and Procedures


• Provide guidelines for Administration’s participation in settlements

• Include factors to be considered in deciding Federal contribution to settlement cost share

• Require 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
Four-Phase Settlement Procedure

• Phase I – Fact Finding

• Phase II – Assessments and Recommendations

• Phase III – Briefings and Negotiation Positions

• Phase IV – Negotiation
Criteria and Procedures (cont.)

- **Phase I – Fact Finding**
  Develop information necessary to support settlement; identify parties and their positions; evaluate claims; describe geography of the reservation and drainage basin; analyze contracts, statutes, regulations, legal precedent, and history of reservation water use

- **Phase II – Assessments and Recommendations**
  Assess costs presuming settlement and cost of settlement to all the parties; analyze value of tribal water claim; recommend a negotiating position
Criteria and Procedures (cont.)

• Phase III – Briefings and Negotiation Positions
  Working Group establishes Federal negotiating position, including Federal funding strategy and positions on major issues

• Phase IV – Negotiation
  Negotiations commence; Office of Management & Budget (OMB) and DOJ are briefed periodically; negotiating position revised if appropriate
Federal Settlement Legislation

• Basic parameters of the settlement and legislation approved by Working Group and OMB

• Legislation drafted and introduced

• Hearings scheduled

• DOI prepares initial draft testimony which is then reviewed and revised through the OMB clearance process before being submitted to Congress
Settlement Funding

- 1993  DOI proposed a $200 million Indian Land and Water Settlement Fund. Proposal failed like previous attempts to establish a comprehensive, permanent settlement fund.


- 2010  Mandatory money for enacted Indian water settlements provided by Congress in Claims Settlement Act, P.L. 111-291
Final Thoughts

• Continued growth and prosperity of the West depends on certainty of water supply; the pressure to secure water rights will continue

• Litigation remains risky. Supreme Court cases since Arizona v. California in 1963 have generally been negative towards tribal water rights.

Final Thoughts (cont.)

• Federal funding required by Indian water settlements has significantly increased over time.

• Roughly a billion dollars expended between mid 1980s and 2002.

• In 2010 $1 billion was authorized for four settlements.

• Another round of costly settlements is in late stages of negotiations.