



# **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**

# Historic Background (cont.)

- **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

***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***

- **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**

# Criteria and Procedures (cont.)

## **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
- **2004** AWSA- Use of Lower Colorado River Basin Development Fund to cover Arizona settlement costs. P.L. 108-451
- **2009** Establishment of Reclamation Water Settlement Fund. Includes funding limits and priorities. P.L. 111-11
- **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.**
  - ***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)**

# 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**