



INDIAN WATER RIGHTS SETTLEMENTS

Tribal Consultation 2016



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 (1990)

- Provide guidelines for Administration's participation in settlements
- Include factors to be considered in deciding Federal contribution to settlement cost share
- Followed by every Administration since 1990, but with differing interpretations

Criteria and Procedures

Framework for negotiating settlements

- The United States participates in negotiations consistent with the trust responsibilities
- Tribes should receive equivalent benefits for rights released as part of a settlement
- Tribes should realize value from confirmed water rights
- The settlement contains appropriate cost-sharing by all parties benefiting from the settlement (Preamble)

Criteria and Procedures

The Procedures include four phases

- Phase I—Fact Finding
- Phase II—Assessment and Recommendations
- Phase III—Briefings and Negotiating Position
- Phase IV—Negotiations Towards Settlement

Criteria and Procedures

Phase I – Fact Finding

- Develop information necessary to support settlement
- Identify parties and their positions
- Evaluate claims
- Describe geography/hydrology of the reservation and drainage basin
- Analyze contracts, statutes, regulations, legal precedent, and history of reservation water use

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Phase II—Assessment and Recommendations

The Federal negotiating team, in concert with Justice, conducts an assessment of the positions of all parties, assessing

- All costs presuming no settlement

- All costs presuming settlement.

- The best/worst/most likely outcome of litigation

- The value of the Tribe's water claim

The Team, in concert with Justice, presents to the Working Group a recommended negotiating position based on the above analysis.

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Phase III – Briefings and Negotiating Position

The Working Group presents to the Secretary for decision a recommended negotiating position, including

- Federal contribution

- Strategy for funding the Federal contribution

- Legal or financial views of Justice or OMB

- Tentative position on major Issues

Criteria and Procedures

Phase IV – Negotiations Towards Settlement

Team negotiates with parties consistent with Secretary's decision

Justice and the OMB are briefed periodically

Negotiating position revised if appropriate

Briefings may be given to the Congressional delegations and the Committees consistent with the Government's negotiating position

Criteria and Procedures

There are 16 Criteria including:

- The Criteria apply to all negotiations involving Indian water rights claims settlements in which the Federal Government participates (Criterion 1)
- The goal is to resolve all outstanding water claims and achieve finality (Criterion 3)

Criteria and Procedures

Criteria 4, 5, and 6 focus on costs.

- **Criterion 4.** “The total cost of a settlement to all parties should not exceed the value of the existing claims as calculated by the Federal Government.”
 - ✓ Costs of all pending or potential litigation, including claims against the United States and claims against other non-Federal parties
 - ✓ Potential offsets
 - ✓ Risks to all parties in the absence of a settlement

Criteria and Procedures

- **Criterion 5.** “Federal contributions to a settlement should not exceed the sum of the following two elements”

“Calculable legal exposure” - potential liability of the Federal Government and non-federal entities

“Programmatic costs” - such costs are appropriate for consideration because they are costs that, with or without the settlement, the Federal Government would expend

Criteria and Procedures

- Criteria 4 and 5 (a) and (b) are challenging for a number of reasons
 - Not well written and hard to understand
 - Tie Federal funding to Federal “legal exposure”
 - Legal exposure generally does not account for equitable or historical circumstances that inform a Tribe’s experience with the United States as relates to water

Criteria and Procedures

Criterion 6. Provides that non-Federal cost- sharing should be equal to the benefits received by the non- Federal parties.

The underlying principle is that each settling party should contribute to the settlement and the contribution should be proportionate to the benefits the settlement party would receive from the settlement.

States, local water users, and other entities are expected to bear their fair share of the total costs of a settlement.

The non-Federal cost-share may come in forms other than cash.

Criteria and Procedures

Criterion 6. Non-federal Cost share is an important Federal concern

- Of the 26 settlements enacted by Congress
 - ✓ 8 of the 26 settlements had 0% cost sharing;
 - ✓ 6 settlements had cost shares between 0% and 5%;
 - ✓ 10 settlements had a cost share between 5% and 30%.


Congressional Support of Indian Water Rights Settlements – Bishop Factors

Congressman Rob Bishop, Chairman, House Natural Resources Committee, sent the February 2015 letter to Justice and Interior regarding requirements for Committee consideration of Indian water settlement legislation:

1. Does the proposed settlement adhere to the current criteria and procedures?
2. Does the settlement meet Criteria 4 and 5(a) and (b) such that the settlement represents a net benefit to the American taxpayer as compared to the consequences and costs of not settling?
3. Does the Administration specifically support the federal financial authorization included in the proposed legislative text?

Bishop Factors (cont.)

4. If litigation is pending, has the Attorney General or his/her designee conveyed to a court and all settling parties have agreed, in writing, to the settlement pending a legislative resolution
5. The settling parties have approved, in writing, proposed legislative text and have shared it with the relevant court
6. List of claims being settled
7. The settlement and proposed legislation does not include financial authorizations for claims already settled by Congress or claims that have no legal basis

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- All but 4 of the 33 of existing settlements were enacted after publication of the Criteria and Procedures
 - Lessons learned from implementing settlements inform subsequent negotiations
 - Settlements are getting larger and more complex
 - Settlements are getting more expensive
 - Need for settlement teams is increasing



Consultation Question #1

Do the *Criteria and Procedures* need to be reviewed and reconsidered given that the *Criteria and Procedures* were promulgated in 1990, prior to negotiation and completion of the great majority of enacted Indian water settlements?



Consultation Question #2

Have the *Criteria and Procedures* been useful to achieve Indian water rights settlements? Have they been applied consistently and fairly?



Consultation Question #3

If reconsidered, should both the substantive criteria and the procedures, including process through various Federal agencies, be re-examined?



Consultation Question #4

What criteria or procedures should be revised?
Why should they be revised? What is the best
mechanism to accomplish the revision?



COMMENTS?

Written comments will be received until January 31, 2017

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