



THE IMPORTANCE OF INDIAN WATER RIGHTS SETTLEMENT FUNDING*

For over 30 years, the Western States Water Council and the Native American Rights Fund have worked together to support the negotiated settlement of Indian reserved water rights claims.¹ While Congress has authorized 28 Indian water rights settlements, the water rights claims of many more tribes remain un-quantified and the cost and complexity of resolving these rights is increasing sharply. However, obtaining federal funding to promote and implement the negotiated resolution of these claims has proven to be difficult. Providing the federal funding needed to support settlements is a trust obligation that is critical to the well-being of Indian Country, the West, and the nation as a whole. Funding is also necessary to settle major claims against the United States that would otherwise result in costly, protracted, and divisive litigation.

I. THE PRIOR APPROPRIATION DOCTRINE AND INDIAN WATER RIGHTS

For well over a century, the doctrine of prior appropriation has governed the allocation of water in most western states. Under this system, the right to divert water from a stream is based on the notion of “first in time, first in right,” which means that the first party to physically divert and use water for “beneficial use” has priority to use the water. Thus, senior water right holders with earlier priority dates (the date the water was first put to beneficial use) can force users with junior priority dates to curtail or stop their use in times of shortage.

Most non-Indian water development in the West occurred after the federal government entered into treaties with Indian tribes to establish permanent homelands, or reservations, for the tribes. These treaties typically did not quantify or even expressly recognize the tribes’ water rights. The U.S. Supreme Court addressed this issue in its 1908 decision in *Winters v. United States*,² holding that tribal treaties created implied water rights to adequate water to satisfy the purpose of a tribe’s reservation. These federal reserved rights, or “*Winters* rights,” exist as federal enclaves within state legal systems and differ from water rights created under state laws because they are not limited by beneficial use requirements; are indeterminate in quantity until adjudicated; are measured by the present and future supplies needed to fulfill the purpose of a reservation instead of past uses; and have priority dates that correspond to at least the date the federal government created the reservation.

II. THE NEED TO RESOLVE INDIAN WATER RIGHTS CLAIMS

Tribes often lack the funding and resources needed to adjudicate their *Winters* rights. This has created a lack of water supply and related infrastructure throughout Indian Country that prevents tribal governments from protecting the health, welfare, and safety of their communities.

* The staff of the Western States Water Council (WSWC) and the Native American Rights Fund (NARF) prepared this paper in October 2014. Although both organizations are on record as collectively supporting Indian water rights settlements and settlement funding, the views expressed herein are the authors’ and do not necessarily reflect the views of the individual members of the two organizations.

For example, over 40% of tribal members in the Navajo Nation haul water for domestic use, and this lack of potable water has caused various illnesses.³ Members of the Kickapoo Tribe of Kansas,⁴ the Chippewa Cree of Montana, and others also haul water for basic domestic needs.

The absence of adequate and reliable potable water supplies has contributed to unemployment and mortality rates on reservations that are much higher than those of adjacent non-Indian communities. In California, the lack of an adequate water supply has prevented the Tule River Tribe from providing fire protection, housing, and economic opportunities to tribal members. The Tribe has unemployment and mortality rates that are 50% higher than Tulare County as a whole, and has been unable to act on hundreds of housing applications.⁵

Further, resolving *Winters* rights claims is critical for western states, because tribal rights typically have priority dates that are senior to non-Indian uses, and therefore have the potential to displace established state-issued rights. This is especially problematic where tribal rights pertain to river systems that are fully appropriated by non-Indian users. The un-quantified nature of many tribal rights creates great uncertainty with regard to existing state-based uses and can impede local, state, and regional economic development. Given increasing stresses to water supplies due to prolonged drought, reduced snowpacks, and other factors, quantifying Indian water rights claims and determining their impacts on state-issued rights is essential for western states to address increasing water demands related to the West's growing population.

III. WHY SETTLEMENTS ARE PREFERRED

Settlements are the preferred manner of resolving Indian water rights claims. First, they give states and tribes certainty and control over the outcome of water rights adjudications for tribal claims, whereas litigated outcomes are fraught with uncertainty. Second, settlements build positive relationships between states, tribes, and the federal government, which are essential because water is a shared resource that all parties must cooperatively manage after adjudication. Third, Indian water rights claims are extremely complex and settlements enable tribes and non-Indian neighbors to take a comprehensive approach, allowing them to craft mutually beneficial solutions tailored to their specific needs, including the development of water infrastructure that increases available water supplies for all users. Fourth, settlements can provide mechanisms that enable tribes to turn quantified rights into "wet water," while litigation typically provides tribes with "paper rights" only. Fifth, settlements are often less costly and less time-consuming than litigation, which can last for decades and can be extremely expensive for all parties.

IV. THE NEED FOR FEDERAL FUNDING

The federal government holds Indian water rights in trust for the benefit of the tribes and is joined as a party in all water rights adjudications involving tribes. This means that the federal government has a fiduciary duty to protect tribal water rights and has a major responsibility (particularly the Department of the Interior) to help tribes adjudicate their rights and ensure that settlements are funded and implemented. It also means that each settlement must be authorized by Congress and approved by the President.

In many cases, tribes have significant breach of trust claims against the federal government for failing to protect their water rights. Generally, as part of a settlement, tribes will waive these claims and a portion of their claimed water rights in consideration for federal funding to build needed drinking water infrastructure, water supply projects, and tribal fishery

restoration projects. Consequently, the obligation to fund settlements is analogous to, and no less serious than, the United States' obligation to pay judgments rendered against it.

Nevertheless, interpretations of the federal trust responsibility vary from one administration to another and require intensive discussions often on a settlement-by-settlement basis. Some prior administrations have taken a narrow view of this trust responsibility and of settlements that benefit non-Indians, asserting that federal contributions should be no more than the United States' calculable legal exposure, which is difficult to determine. It has long been an accepted premise that the federal government should bear the primary responsibility for funding tribal settlements. Congress should consider the federal government's fiduciary duty towards the tribes and ensure that appropriations for authorized settlements are sufficient to ensure fair and honorable resolutions of tribal claims. Such an approach not only serves the interests of the United States in ensuring successful resolution of tribal rights, but assists western states in resolving these difficult and potentially disruptive claims.

A. Funding During the Settlement Process

Tribes need federal funding to retain attorneys and undertake the complex and costly technical studies that are a necessary prerequisite to any negotiation. Tribes also rely on federal negotiating teams appointed by the Department of the Interior's Indian Water Rights Office, which provide a unified federal voice and furthers the settlement process, a matter of crucial importance for states as well. Denying funds for these programs is tantamount to denying tribes the ability to adjudicate their water rights. Thus, Congress and the Administration should fully fund the Indian Water Rights Office and provide tribes, as well as their appointed negotiating teams, with sufficient resources to participate in the settlement process.

B. Authorizing Funding to Implement a Settlement

In the arid West, where water is scarce and tribal rights often pertain to fully-appropriated stream systems, settlements typically require the construction of water storage and delivery projects to allow all water users to use existing water supplies more advantageously. These projects generally do not reallocate water from existing non-Indian water users, but allow tribes to develop water supplies in exchange for foregone claims to additional water. Without federal monetary resources to build these projects, settlements are simply not possible in many cases.

While federal support is essential to settlements, a number of western states have acknowledged that they should bear an appropriate share of settlement costs. To this end, western states have appropriated tens of millions of dollars for existing settlements and devoted significant in-kind resources, including the administrative resources associated with the negotiation process and the value of foregone water rights.

C. Appropriating Funding For Settlements

Congressionally-authorized settlements are being funded, but there is a need for increasing appropriations. Moreover, Congress has adopted a moratorium on earmarks, which is how some characterize funding for Indian water rights settlements. But settlements are *not* earmarks benefiting a specific state or congressional district. Rather they represent serious trust (and moral) obligations of the United States. They involve a quid-pro-quo in which tribes receive federal funding in exchange for waiving tribal water-related claims against the federal

government. If Congress is unable to implement settlements as a result of earmark reform, litigation will be the primary means of resolving tribal water right claims. This could result in decades of associated legal expenses and court-ordered judgments against the United States that would likely exceed the total costs of settlement, thereby increasing costs for federal taxpayers.

In addition, current budgetary policy (pay go) requires water rights settlement funding to be offset by a corresponding reduction in some other discretionary program. It is difficult for the Administration, states, and tribes to negotiate settlements knowing that funding is uncertain or may only occur at the expense of some other essential tribal or Interior Department program.

Congress should consider the unique legal nature of settlements, namely that the United States is receiving something of significant value in exchange for appropriating settlement funds and fulfilling its tribal trust responsibility, thereby avoiding potentially costly litigation.

D. The Reclamation Fund

The Council and NARF have long supported using the Reclamation Fund to fund authorized settlements. Congress created the Fund as part of the Reclamation Act of 1902 to finance federal water and power projects in the seventeen western states.⁶ The Fund's receipts are derived from water and power sales, project repayments, and receipts from public land sales and leases in the seventeen western states, as well as oil and mineral-leasing related royalties. However, the receipts that accrue to the Fund each year are only available for expenditure pursuant to annual appropriations acts. Over the years, rising energy prices and declining federal appropriations from the Fund for Bureau of Reclamation purposes have resulted in an increasingly large unobligated balance that is expected to total \$14.3 billion by the end of FY 2015.⁷ Contrary to Congress' original intent, much of the unobligated balance is being used to support other federal purposes instead of western water development.

Title X of the Omnibus Public Lands Management Act of 2009 will expand the Fund's authorized uses by establishing a Reclamation Water Settlements Fund (RWSF) in the U.S. Treasury to finance Reclamation projects that are part of Congressionally-approved Indian water right settlements. The RWSF will receive up to \$120 million per year from Fund transfers, which are prioritized for settlements in New Mexico, Montana, and Arizona.⁸ Because of "pay go" requirements, authorized transfers to the RWSF were delayed until FY 2020, creating a significant gap in funding for projects associated with authorized settlements, the costs of which may increase significantly by FY 2020. In addition, Congress only authorized the RWSF to be funded for 10 years, and authorized disbursements from the RWSF only through 2034.

The Congress and the Administration should fully support the use of the funds that accrue to the Reclamation Fund for their intended purpose of supporting western water development, including water infrastructure projects that are part of authorized Indian water rights settlements. One way to ensure stability in settlement implementation would be to make both the authorized annual transfers to the RWSF and the ability to expend monies from the RWSF permanent. Such funding should not be subject to further appropriation or spending offsets.

V. **THE CONSEQUENCES OF NOT FUNDING SETTLEMENTS**

If settlements are not authorized and funded, tribes may have no choice but to litigate their water rights claims, which would be very problematic. It may result in tribes obtaining

“paper rights,” but without a way to turn those rights into “wet water” to sustain and develop their communities. Litigated outcomes could also displace established state-issued water rights that are essential to meet non-Indian industrial, residential, and municipal needs in the West, causing great economic and social turmoil.

For instance, the Navajo Nation’s settlement with New Mexico, which Congress has authorized, provides the Nation with an amount of water within New Mexico’s Colorado River Compact allocation. The settlement still requires court-approval and could fail for a lack of appropriated funds. If it fails, the Navajo Nation would have no choice but to litigate its water rights claims. The United States has already filed claims on behalf of the Navajo Nation that exceed New Mexico’s Colorado River apportionment under the Compact. If the United States and the Navajo Nation were to prevail on these claims, the allocation of water between the seven Colorado River Basin states could be jeopardized, disrupting the entire Southwestern economy.⁹

Montana has also reached settlements with the Fort Belknap and Blackfeet Tribes as part of a state-wide adjudication process aimed at resolving all water rights claims in the state. However, until Congress authorizes these settlements, state-issued water rights in basins where these tribes have claims will remain in limbo. If Congress delays authorization, the tribes may litigate their claims in court, which could disrupt established non-Indian uses.

In addition to the previously mentioned costs associated with litigated outcomes, postponing the implementation of Indian water rights settlements will be far more expensive for the federal government in the long-run because growing water demands, decreasing water supplies, construction cost inflation and other factors will only increase the costs of resolving these claims.

VI. CONCLUSION

The national obligation to Indian water rights settlements is a finite list that grows shorter with each settlement. Nevertheless, the cost of implementing settlements will continue to rise the longer it is delayed. Postponing this duty only increases costs to the federal government, perpetuates hardships to Indians, and creates uncertainty for all water users, hindering effective state and regional water planning and development.

Endnotes

¹ The WSWC is a water policy advisory body affiliated with the Western Governors’ Association that consists of representatives appointed by the governors of eighteen western states. NARF is a legal defense fund for Native American tribes, organizations, and individuals.

² 207 U.S. 564 (1908).

³ *Concerning S. 1771 – Northwest New Mexico Rural Water Projects Act: Hearing on S. 1771 Before the S. Comm. on Energy and Natural Resources*, 110th Cong. 8 (2007) (statement of Joe Shirley, Jr., President, Navajo Nation).

⁴ *Testimony of John Echohawk on behalf of the Native American Rights Fund: Oversight Hearing on Indian Water Rights Settlements Before the Subcomm. on Water and Power of the H. Comm. on Natural Resources*, 110th Cong. 7-8 (2008) (statement of John Echohawk, Executive Director, NARF) [hereinafter Echohawk Testimony].

⁵ *In Support of S. 789, the Tule River Tribe Water Development Act: Hearing to Receive Testimony on S. 637, S. 789, S. 1080, and S. 1453 Before the Subcomm. on Water and Power of the S. Comm. on Energy and Natural Resources*, 111th Cong. 7 (2009) (statement of Ryan Garfield, Chairman, Tule River Tribe); Echohawk Testimony, *supra* note 4, at 7.

⁶ Reclamation Act, Pub. L. 57-161, 32 Stat. 388 (1902).

⁷ THE APPENDIX, BUDGET OF THE UNITED STATES GOVERNMENT, FISCAL YEAR 2015, 655 (March 2014),

<http://www.whitehouse.gov/sites/default/files/omb/budget/fy2015/assets/int.pdf>.

⁸ Omnibus Public Lands Management Act, Pub. L. No. 111-11, 123 Stat. 991 (2009). Section 10501 of Title X requires the Secretary of the Treasury to deposit \$120 million into the fund for fiscal years 2020-2029. It prioritizes this funding for: (1) the Navajo-Gallup Water Supply Project and the Taos and Aamodt settlements in New Mexico; (2) settlement agreements between Montana with the Blackfeet Tribe, the Crow Tribe, or the Gros Ventre and Assiniboine Tribes of the Fort Belknap Indian Reservation if a settlement(s) is subsequently approved and authorized by an act of Congress; and (3) a settlement agreement between Arizona and the Navajo Nation.

⁹ The Colorado River Basin states are: Arizona, California, Colorado, Nevada, New Mexico, Utah and Wyoming. Even if a court determined that the Compact limits the Navajo Nation's claims to amounts within New Mexico's apportionment, the Nation would still have a substantial claim against the federal government for lost water rights.