

AMERICAN INDIAN WATER RIGHT SETTLEMENTS



Lake Nighthorse
Settlement of Ute Mountain Ute and Southern Ute Indian Tribes of Colorado Water Rights
Courtesy of the US Bureau of Reclamation

“Settlement negotiations foster a holistic, problem-solving approach that contrasts with the zero-sum logic of the courtroom, replacing abstract application of legal rules that may have unintended consequences for communities with a unique opportunity for creative, place-based solutions reflecting local knowledge and values.” David J. Hayes, Deputy Secretary, US Dept. of Interior before the US Senate Committee on Indian Affairs -Indian Water Rights: Promoting the Negotiation and Implementation of Water Settlements in Indian Country March 15, 2012.

INTRODUCTION

Resolving American Indian water rights is an important undertaking for the economies, community relations and water management of tribes, states and local communities. Water rights are generally formalized through stream system water right adjudications. These large, slow moving cases are usually filed in state court, involve all water users on a designated stream system within the state’s boundaries, apply both federal and state law, often address new legal questions, require extensive technical work, take decades to complete and are very expensive. While non-reservation claimants obtain their water rights under state law, most American Indian water rights are determined under the *Winters* Doctrine which arose out of the federal case, *Winters v. United States (Winters)*. The Pueblos of New Mexico can have their water rights determined under the *Winters* Doctrine and/or under the Mechem Doctrine, found in the *New Mexico v. Aamodt (Aamodt)*. The Mechem Doctrine holds that Pueblos retained their aboriginal rights to water by virtue of having been Mexican citizens and enjoying the protections afforded by the Treaty of Guadalupe Hidalgo. Tribes and Pueblos may also hold state law rights and/or aboriginal rights reserved by a tribe through treaty as defined by *United States v. Winans*. Determination of any American Indian water right can take decades, the court awards only a water right, and the tribe may not have resources to develop and use the right awarded. Since all adjudication parties are vulnerable to the uncertainties of trial, tribes, the United States, states, stakeholders and courts have turned to settlement to resolve difficult questions about tribal rights and to create community solutions.

BACKGROUND

In the nineteenth century as European Americans pressed westward, the United States government moved or assigned tribal peoples from across the continent to lands set aside from the public domain, generally in the west. It established reservations through treaties, presidential executive orders, and grants from previous sovereigns. While reserving the land, the enabling documents did not usually address water needs of the people assigned to the lands and, eventually, conflicts arose between users on the reservations and users off the reservations.

Winters, the first case to go to the United States Supreme Court, involved the upstream settlers and the tribes and bands of the Fort Belknap reservation. The dispute was over the allocation of water in the Milk River in north central Montana. In 1908, the Court held that when Congress set aside lands for a



reservation, it also impliedly reserved sufficient water to fulfill the purposes of the reservation. The Court set the water right priority date as the reservation's date of establishment. This ruling ensured that the newly recognized federal water right could be administered under the prior appropriation doctrine along with water rights developed and recognized under state law. These American Indian rights became known as federal reserved water rights or *Winters* rights.

Milk River, Montana
Courtesy of the US Bureau of Reclamation

Previously, the *Winans* Court held in 1905 that the Yakama Tribe reserved unto itself "the (aboriginal) right of taking fish at all usual and accustomed places" and that as a result, non-Indians could not bar the Tribe's access even to off-reservation locations. Much later in 1983 in *United States v. Adair*, the 9th Circuit recognized that under certain circumstances the priority of a water right can be immemorial or first in time, regardless of the date of the reservation. Tribes view these rights as a part of the bargain received when they relinquished vast tracts of land and resources.

The *Winters* court, however, did not quantify the Fort Belknap right beyond "sufficient water to fulfill the reservation's purpose". Between 1963 and 1983, the Supreme Court resolved the quantification issue for agricultural reservations in the *Arizona v. California* decisions by adopting the 'practicably irrigable acreage' (PIA) standard recommended by the Special Master. The contours of that standard have been litigated ever since.

In 1952, Congress passed the McCarran Act which waived the sovereign immunity of the United States and tribes for the purpose of conducting stream system adjudications in state court. Today, most of these cases are located there. Many tribes believe that this venue is hostile to their rights and interests, particularly since many of the judges are elected by popular vote.

American Indian tribes have substantial federal law based claims to water for the support of viable, livable reservation homelands. The total claims of Arizona tribes exceed the total water budget for the state. The claims of the Navajo on the San Juan River in New Mexico approach 1 billion acre-feet of diversion right per year. Many tribes lack access to potable drinking water, others need access to water to support lifestyles involving agriculture, hunting, gathering and fishing, and all need access for cultural and spiritual life ways. Since many reservations were created before intensive European American settlement, the priority dates of tribal rights tend to be the most senior on the stream systems on which they are located. Thus, under the prior appropriation doctrine, tribal needs are satisfied before those of junior users. Communities around reservations have come to rely on water that has been available to them because these rights have been unquantified and tribes have lacked resources to develop uses. Unlike state-law water rights, tribes are not required to put *Winters* water rights to beneficial use to maintain the rights, which causes confusion among those who also rely on the resource. When tribal water rights are being determined, strife can arise between reservation and non-reservation residents because water is necessary to both the lives and cultures of both groups and changes in the water use *status quo* presents enormous challenges. These challenges lead to delayed socio-economic development for tribes and make management of limited water resources very difficult.

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- *Winters v. United States*, 207 U.S. 564 (1908)

LITIGATION

Although litigation is the 'traditional' means of formalizing water rights, increasingly parties are turning to settlements to determine American Indian water rights. Litigation, for the most part, has not been a

satisfactory experience. The process requires huge amounts of time and money, develops and results in great uncertainty, is destructive to community relations, and although a result is obtained from a court, a court can only award a described water right without answering related questions which plague involved communities. Further, unlike Congress, courts cannot increase financial resources available to tribes and communities. Two New Mexico cases illustrate these points.

The *Aamodt* case, filed in 1966, is the oldest ongoing case in federal court in the nation. The parties worked on issues regarding the water rights of four Pueblos - Nambe, Pojoaque, San Ildefonso and Tesuque - in the Rio Pojoaque stream system from the first years of the case. In 2000, the parties agreed to set aside litigation and try settlement at which they succeeded.

Tribes can be disappointed by litigation results. In *New Mexico v. Lewis*, the Mescalero Apache Tribe water rights, the Tribe claimed 17,705.4 acre-feet per year, mainly under a PIA theory, and an immemorial priority or a treaty date of 1852. The trial court rejected the PIA claim on the basis of economic feasibility and quantified the right at current uses plus 950 acre-feet annually for future non-agricultural uses, that is, 2,322.4 acre-feet per year with a priority date of 1873 based on the date of creation of the reservation. The New Mexico Court of Appeals upheld the lower court's quantification but found the priority date to be 1852, based on a treaty. The Tribe received a decreed right from the *Lewis* Court for about 13% of its claims with no means of putting the water to use. Later, the Tribe pursued authority from Congress for leasing its decreed rights for economic benefit. By December 2011, H.R. 1416 Mescalero Apache Tribe Leasing Authorization Act was reported to the U.S. House of Representatives, where it remains.

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SETTLEMENT

For more than thirty years, many governments and organizations have recognized the value of resolving tribal water right claims through settlement rather than through litigation. These include tribes, states, local parties, the federal government and organizations such as Native American Rights Fund (NARF), the National Congress of American Indians, the American Bar Association, the Western States Water Council and Western Governors Association. Settlements are viewed as opportunities for tribes to obtain water for health and safety, for economic development, and for support of cultural and spiritual practices.

Congressional approval can bring funding for putting the water to use. In the *Aamodt* and Navajo (New



Salmon

**Courtesy of the US
Fish and Wildlife
Service**

Mexico) settlements, the Pueblos and Nation negotiated construction of potable drinking water treatment plants and delivery systems. The settlements of the Ak-Chin Indian Community of Papago Indians of the Maricopa (Arizona), Fallon Paiute Shoshone Indian Tribes (Nevada) and other tribes provide millions for tribal development. Several settlements, such as that of the Northern Cheyenne Indian Tribe (Montana) provide for leasing and marketing of tribal water rights. The Nez Perce Tribe's (Idaho) settlement preserved cultural practices by providing protections for fish and Tribal fishing rights. The settlement includes adjudication of

minimum instream flows to the State on 207 streams to preserve fish habitat, requires agreements between the State and Tribe for the shared management of fish hatcheries, provides funds for habitat improvement, and other similar agreements. The Taos Pueblo (New Mexico) secured protection for its spiritually important Buffalo pasture.

State and local parties also share in the benefits of settlement by crafting practical solutions for their communities' water supply needs while protecting local values and economies. Settlements can address not only water quantity issues, but also concerns about conservation, water quality and water management. In the San Luis Rey Indian Water Rights Settlement Act of 1988 (California), conservation of seepage losses achieved by lining the All American Canal lessens the impact of the Tribes' water allotment on the local supply. In the Chippewa Cree Tribe of the Rocky Boy's Reservation Indian Reserved Water Rights Settlement Act of 1999 (Montana), the State is contributing \$150,000 to be used, in part, for water quality discharge monitoring wells and a monitoring program. The Northwestern New Mexico Rural Water Projects Act (Navajo), includes pipelines to deliver water to the City of Gallup and the Jicarilla Apache Nation, as well as funds to rehabilitate



All American Canal

Courtesy of the US Bureau of Reclamation

Indian and non-Indian ditch systems. The Fort Hall Indian Water Rights Act of 1990 (Idaho) creates a three-member intergovernmental board to mediate or resolve disputes. The *Aamodt* Litigation Settlement Act allows the County of Santa Fe to 'piggy back' on the new Pueblos' water system to serve non-Indian customers and provides for an intergovernmental water authority to manage the system. These kinds of cross-community solutions generate broader support in Congress and state legislatures.

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- Taos Pueblo Indian Water Rights Settlement Act, Pub.L. 111-291, 124 Stat. 3064 (2010)

SETTLEMENT PROCESS

American Indian water right determinations most often begin in water right adjudications, however, as the Seminole Indian Land Claims Settlement Act of 1987 (Florida) shows, litigation is not always necessary. The following is a generalized description of the process. Litigation can be a precursor to settlement as in the *Aamodt* case or it may resume if settlement fails as happened recently in the *Abousleman* case (New Mexico) involving the rights of the Pueblos of Jemez, Santa Ana and Zia. Litigation can also continue during settlement talks, but may severely tax the resources of the parties.

Parties first request a federal negotiation team which is made up of representatives of the Office of the Secretary of the Interior, the Bureau of Indian Affairs, the Office of the Solicitor, the Department of Justice and Fish and Wildlife Service. Once the team is appointed and negotiations begin, a court may enter a confidentiality order limiting what can reveal outside of the negotiation room. In Montana, however, all proceedings are open to the public. The court will continue to monitor progress and apply pressure if necessary. Once a settlement agreement has been reached, reviewed and signed by the principals, it must go to Congress if federal funding is required. Not only must the settlement undergo federal scrutiny, it also must be presented to the Tribal and state governments for approval.

Once a settlement act is signed by the President, the implementation phase of the settlement begins. The settlement parties and federal implementation team reconvene to conform the original agreement to the federal act and to draft any additional agreements required before the Secretary of the Interior can sign off. Once the Secretary has signed, the adjudication court resumes its duties and conducts an *inter se* process in which it hears and considers any objections from any party. Assuming that the court approves the settlement, it enters a final decree and judgment. If there is construction involved, the

United States Bureau of Reclamation acts as project manager. Typically, all work on a settlement must be substantially completed by a date certain or the settlement fails. The implementation phase can last from 5 to 15 years. It is said, by the experienced, that the real work begins when the implementation phase is initiated.

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CHALLENGES

The experiences of many parties offer a look at some of the challenges faced in negotiating settlements and moving them through Congress. Settlement is a long and expensive process. It may take years of negotiation, technical studies and public involvement. In the *Aamodt* situation, the parties began litigation in 1969 and negotiation in 2000, completed the Settlement Agreement in 2006 and President Obama signed the Act into law in 2010. The Crow Tribe Apsáalooke Nation Settlement became law at the same time following decades of litigation which began in 1975 and negotiation which resolved in 1999.

The parties at the table are critical; while a government to government panel may be preferred by some, others call for the participation of interested local parties. Absent key players can block progress through Congress or later implementation. Failure to keep the public and State officials informed can result in delay. Failure to fully consider the settlement's effects can cause significant delay as adjustments to the agreement are developed. In the *Aamodt* case, a provision in the first proposed agreement required non-Indians to hook up to a water supply system and shut down their domestic wells. Public outrage was so intense that the parties returned to the negotiation table for two years to make that provision voluntary. Settlements must have the support of the affected state's Congressional delegation, and the interest of a member who can guide the legislation through the congressional process.

Funding is perhaps one of the greatest challenges to negotiating and implementing a tribal water rights settlement. While water rights are in litigation or negotiation, the United States Bureau of Indian Affairs (BIA) provides technical and factual support for the claims and major financial support for the United States to pursue tribal rights as a part of its trust responsibility. The Bureau of Reclamation also provides technical support for these settlements and assists tribal governments to develop, manage and protect their water resources. The funding for the Bureaus' activities comes from their budgets. Later, funds are required for construction and payments to tribes to settle aspects of their claims.

Previously this funding was obtained through the Department of Interior's discretionary appropriations. In 2010, Congress passed the Statutory Pay-As-You – Go Act. This legislation requires offsets for direct funding in order to avoid increases in projected deficits. The Claims Resolution Act, which includes the Aamodt, Taos, White Mountain Apache, and Crow settlements, provided millions in direct funding while providing for the required offsets. The BIA and Reclamation's budgets have experienced a steady decline since 2004 and the offsets needed for settlement funding comes at the expense of other, possibly essential programs within these Bureaus. The FY 13 Reclamation budget includes a request for \$46.5, to establish an Indian Water Rights Settlement (IWRS) account to fund implementation of several settlements.

To meet these challenges, the federal government established a policy that settlements must contain non-federal cost-sharing provisions appropriate to the other parties' received benefits in an effort to leverage scarce federal dollars. As state and local budgets become increasingly limited, this policy could cause a settlement to fail. Many organizations seek a commitment, a federal budgetary policy, to ensure that any settlement authorized by Congress will be funded without corresponding offsets to other essential tribal or Department of Interior programs. With ever-growing budgetary austerity, it is unlikely that the federal government will be able to accommodate these requests.

The second greatest challenge is locating water for the settlements. Many settlements require that water be brought into the existing system in order to ease the tensions and expectations created where tribal water rights with early priorities are being introduced into existing local water management schemes. Both the *Aamodt* and the Taos settlement rely upon imported water to ease the effect on local non-Indian inhabitants. As water sources are maximized and as climate change progresses, water will become more precious and more scarce, necessitating new solutions to supplying both tribes and non-Indian users.

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CONCLUSION

To date, twenty-eight settlements have achieved a federal settlement act and are involved in implementation. Sixteen settlements are in progress with two, the Blackfeet Water Rights Settlement of 2011 (Montana), S.399/H.R. 3301, and the Navajo-Hopi Little Colorado River Water Settlement (Arizona), S.2109/H.R. 4067 having been introduced in the 112th Congress. Many more tribes' water rights remain to be addressed, including tribes with claims on the Colorado River, the more than 100 California tribes with federal recognition, the Oklahoma tribes which share two rivers and many more in the Midwest, East, Alaska and Hawaii.

Negotiated settlement is the preferred means of these claims. The process is long and expensive, but it is believed to be less so than litigation. Settlements help the federal government to fulfill its trust obligations and promise to tribes that their reservations would provide a homeland. They can end decades of community strife and bring more certainty to future planning and water management. They may bring clean water to people who have never known it in their homes. They allow tribes to preserve their cultural and spiritual heritage. They can bring an opportunity for economic development. Settlements also allow communities flexibility to work out water supply and other problems in ways that make sense and support non-Indian needs as well as those of tribes.

But settlements can also be hard. Concessions are given by people who have already given up so much and from people who have built their lives on water which has always been available. Settlements require long and hard work to create and to implement. And they require money and water in an age when everyone involved has less.

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