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Indian Water Rights: Litigation and Settlements

Robert T. Anderson
University of Washington School of Law

INDIAN WATER RIGHTS: LITIGATION AND SETTLEMENTS

Robert T. Anderson*

I. INTRODUCTION

Indian water rights have a one-hundred-year pedigree in federal law[1] although historically the federal government expended the lion's share of its resources on developing non-Indian water use.[2] While there was little development of water resources for tribes in the aftermath of the Supreme Court's landmark decision in *Winters v. United States*,[3] an increase in litigation and potential threats to extant non-Indian uses led to the settlement of a number of Indian water rights controversies in the late twentieth and early twenty-first centuries. Recent tallies put the total number of congressionally approved settlements at twenty,[4] supplemented by at least two other agreements that were not subject to congressional ratification.[5] In addition, there are approximately twenty-seven tribes involved in nineteen settlement negotiations.[6] For

* Associate Professor of Law and Director of the Native American Law Center, University of Washington School of Law, Seattle, Washington.

1. *See* John Shurts, *Indian Reserved Water Rights: The* Winters *Doctrine in Its Social and Legal Context, 1880s–1930s* (U. Okla. Press 2000).

2. The National Water Commission in 1973 concluded that "[i]n the history of the United States Government's treatment of Indian tribes, its failure to protect Indian water rights for use on the Reservations it set aside for them is one of the sorrier chapters." Natl. Water Commn., *Water Policies for the Future: Final Report to the President and to the Congress of the United States* 475 (Govt. Prtg. Off. 1973); *see also* Robert T. Anderson, *Indian Water Rights and the Federal Trust Responsibility*, 46 Nat. Resources J. 399 (2006).

3. 207 U.S. 564 (1908). For a collection of most of the Indian water rights cases, see *Cohen's Handbook of Federal Indian Law* § 19 at 1212 n. 327 (Newton et al. eds., Lexis 2005) [hereinafter *Cohen*].

4. Congress has approved twenty Indian water right settlements since 1978. *See Cohen*, *supra* n. 3, at 1212. In addition to the eighteen settlements cited in *Cohen*, Congress in 2004 approved settlements for the Nez Perce Tribe and the Gila River Indian Community. Snake River Water Rights Act of 2004, Pub. L. 108-447, 118 Stat. 3431 (2004); Gila River Indian Community Water Rights Settlement Act of 2004, Pub L. 108-451, 118 Stat. 3499 (2004).

5. These include the Fort Peck Compact and a settlement at Warm Springs. Cohen, *supra* n. 3, at 1212 n. 327.

6. The negotiation figure is derived from the list of *Federal Water Rights Negotiation Teams for Indian Water Rights Settlements* (Oct. 18, 2006) kept by the Secretary of the Interior's Indian Water Rights Office. The tribes involved are the Pueblos of Nambe, Pojoaque, San Ildefonso, Tesuque, Jemez, Zia, Acoma, Laguna, Taos, Santa Ana and Zuni, Blackfeet Tribe, Crow Tribe, Shoshone-Paiute Tribes, Confederated Salish and Kootenai Tribes, Gros Ventre and Assiniboine Tribes, Hopi Tribe, San Juan Southern Paiute Tribe, Navajo Nation, Lummi Nation, Soboba Band of Luiseno Indians, Tule River Indian Tribe, San Carlos Apache Tribe, Walker River Paiute Indian Tribe, Bridgeport Indian Colony, Yerington Paiute Tribe, and White Mountain Apache Tribe. A useful table setting forth the status of all Western state general stream adjudications is found in John E. Thorson et al., *Dividing Western Waters: A Century of Adjudicating Rivers and Streams, Part II*, 9

better or worse, the majority of Indian water rights cases are now heard in state courts pursuant to the McCarran Amendment.[7] Recent scholarship covers a variety of Indian water rights topics and generally extols the virtues of Indian water settlements.[8]

This article provides a brief overview of the law of Indian and federal reserved water rights and continues with an examination of the Snake River Water Rights Act. The Act serves as a vehicle for discussion of what is right and what is wrong with the current Indian water rights settlement process. Finally, the article suggests that the Administration modify the portion of its criteria and procedures for Indian water settlements dealing with federal financial contributions. These criteria and procedures need to more accurately reflect the realities of past settlements and promote more successes like the Snake River Water Rights Act.

II. OVERVIEW OF INDIAN WATER RIGHTS

A. The Law of Reserved Water Rights

The federal reserved water rights doctrine is rooted in *Winters v. United States*.[9] In *Winters*, the Court construed a congressionally ratified agreement between the Indians of the Fort Belknap Reservation and the United States.[10] Non-Indians who had settled upstream of the reservation claimed paramount rights to use water from the Milk River based on the state law of prior appropriation.[11] If the Indians were to grow crops as contemplated by the agreement creating the reservation, however, they would need water being used by the non-Indians. The United States filed suit and claimed that Congress had reserved the water as of 1888 to fulfill the purpose for establishing the reservation: to turn the Indians into farmers and to serve as a homeland for the tribes.

The Supreme Court ruled that the federal government had the power to exempt waters from appropriation under state water law and that the United States intended to reserve the waters of the Milk River to fulfill the purposes of the agreement between the Indians and the United States.[12] The Court accordingly upheld an injunction limiting

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U. Denver Water L. Rev. 299, 439–42 (2006).

7. 43 U.S.C. § 666 (2000). For a succinct history of the amendment, see John E. Thorson et al., *Dividing Western Waters: A Century of Adjudicating Rivers and Streams*, 8 U. Denver Water L. Rev. 355, 449–58 (2005).

8. *See* Daniel McCool, *Native Waters: Contemporary Indian Water Settlements and the Second Treaty Era* (U. Ariz. Press 2002); *Negotiating Tribal Water Rights: Fulfilling Promises in the Arid West* (Bonnie G. Colby et al. eds., U. Ariz. Press 2005); *Tribal Water Rights: Essays in Contemporary Law, Policy, and Economics* (John Thorson et al. eds., U. Ariz. Press 2006); *but see Cohen*, *supra* n. 3, at 1218–20 (pointing out some adverse aspects of settlements).

9. 207 U.S. 564.

10. Act of May 1, 1888, ch. 213, 25 Stat. 113 (1888).

11. All of the Western states follow some form of the prior appropriation doctrine.

> Under that doctrine, one acquires a right to water by diverting it from its natural source and applying it to some beneficial use. Continued beneficial use of the water is required in order to maintain the right. In periods of shortage, priority among confirmed rights is determined according to the date of initial diversion.

Colo. River Water Conserv. Dist. v. U.S., 424 U.S. 800, 805 (1976); *see generally Waters and Water Rights* vol. 2, § 12.02 (Robert E. Beck ed., repl. ed., Lexis 2001).

12. *Winters*, 207 U.S. at 576–77; *see generally Cohen*, *supra* n. 3 at 1168–76.

non-Indian use to the extent it interfered with increasing needs of the tribes. Other early- to mid-twentieth-century cases also recognized implied Indian reserved water rights and similarly did not finally quantify the amount reserved.[13]

In *Arizona v. California*,[14] the Court applied the reserved rights doctrine to land set aside as federal reservations for non-Indian purposes.[15] The Supreme Court ruled that "the principle underlying the reservation of water rights for Indian Reservations was equally applicable to other federal establishments such as National Recreation Areas and National Forests"[16] and agreed that "the United States intended to reserve water sufficient for the future requirements of the Lake Mead National Recreation Area, the Havasu Lake National Wildlife Refuge, the Imperial National Wildlife Refuge and the Gila National Forest."[17] Next, in *Cappaert v. United States*,[18] the Court concluded that the establishment of Devil's Hole National Monument carried with it an implied reservation of water:

> [W]hen the Federal Government withdraws its land from the public domain and reserves it for a federal purpose, the Government, by implication, reserves appurtenant water then unappropriated to the extent needed to accomplish the purpose of the reservation. In so doing the United States acquires a reserved right in unappropriated water which vests on the date of the reservation and is superior to the rights of future appropriators.[19]

The Court in *United States v. New Mexico*[20] signaled a shift in its treatment of non-Indian reserved rights. The Court narrowly construed reserved water rights for national forests by making it clear that such rights would only be implied where needed to fulfill the "specific [primary] purposes" of the reservation and only if the primary purposes would be "entirely defeated" without an implied reservation of water.[21] It accordingly held that water was reserved in national forests "to preserve the timber or to

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13. *See U.S. v. Ahtanum Irrigation Dist.*, 236 F.2d 321 (9th Cir. 1956); *Conrad Inv. Co. v. U.S.*, 161 F. 829 (9th Cir. 1908). In both *Ahtanum* and *Conrad*, the Ninth Circuit Court of Appeals recognized reserved rights that could increase as tribal needs expanded.

14. 373 U.S. 546 (1963).

15. The Court also announced the practicably irrigable acreage (PIA) doctrine which allowed a "once and for all time" quantification of reserved water rights for several Indian reservations:

> We also agree with the Master's conclusion as to the quantity of water intended to be reserved. He found that the water was intended to satisfy the future as well as the present needs of the Indian Reservations and ruled that enough water was reserved to irrigate all the practicably irrigable acreage on the reservations. Arizona, on the other hand, contends that the quantity of water reserved should be measured by the Indians' "reasonably foreseeable needs," which, in fact, means by the number of Indians. How many Indians there will be and what their future needs will be can only be guessed. We have concluded, as did the Master, that the only feasible and fair way by which reserved water for the reservations can be measured is irrigable acreage.

Id. at 600–01. For a discussion of the PIA standard, see *Cohen*, *supra* note 3, at 1185–86.

16. *Arizona*, 373 U.S at 601. Water may be reserved for a federal purpose without a corresponding reservation of land. *Federal "Non-Reserved" Water Rights*, 6 Op. Off. Leg. Counsel 328, 363 (1982); *see also* John D. Leshy, *Water Rights for New Federal Land Conservation Programs: A Turn-of-the-Century Evaluation*, 4 U. Denver Water L. Rev. 271, 288 (2001).

17. *Arizona*, 373 U.S. at 601.

18. 426 U.S. 128 (1976).

19. *Id.* at 138.

20. 438 U.S. 696 (1978).

21. *See id.* at 700. Federal rights to water may be expressly reserved as well as implied. *See Potlatch Corp. v. U.S.*, 12 P.3d 1256, 1258 (Idaho 2000).

secure favorable water flows for private and public uses under state law."[22]

These Supreme Court decisions have made it clear that it is the federal action of setting land aside for a particular purpose—including a tribal reservation approved by Congress—that results in a simultaneous withdrawal of sufficient water to carry out those federal purposes. The water is set aside by implication as a matter of law, but a narrowing trend in the non-Indian reserved rights cases has infected the Indian reserved rights area with some uncertainty.

B. Ambiguity in the Law and its Application

Ten years ago Professor Judith Royster wrote an article about Indian reserved water rights titled, *A Primer on Indian Water Rights: More Questions than Answers*.[23] Courts in the intervening years have published dozens of opinions dealing with Indian reserved water rights, but it is safe to say that there are still more questions than answers.[24] The United States Supreme Court has not decided a substantive Indian water rights case since the 1989 affirmance by a four-to-four vote of the Wyoming Supreme Court's ruling on the application of the practicably irrigable acreage doctrine.[25] There was no opinion for the Court although draft majority and dissent opinions were circulated within the Court and have become public.[26] The draft majority opinion would have cautioned courts to be "sensitive" to non-Indian water use when determining the amount reserved for an Indian tribe.[27] How would the current Supreme Court answer the question presented? No one knows, but the tension in the draft opinions invites speculation.

One area of significant debate that derives directly from non-Indian reserved rights cases involves the approach for determining the purposes of an Indian reservation. All seem to agree that the issue in every reserved rights case is whether by treaty or statute the United States, the tribe, or both intended to reserve water for tribal use.[28] The Supreme Court recently reiterated the principle that, when interpreting treaties, courts must "look beyond the written words to the larger context that frames the Treaty, including 'the history of the treaty, the negotiations, and the practical construction

22. *New Mexico*, 438 U.S. at 718. For a comprehensive review of federal reserved water rights litigation after *New Mexico*, see George Cameron Coggins & Robert L. Glicksman, *Public Natural Resources Law* vol. 1, § 5:36 (West Supp. 2006).

23. 30 Tulsa L.J. 61 (1994).

24. *See* Barbara Cosens, *2005 Indian Water Rights Keynote Address*, 9 U. Denver Water L. Rev. 285, 288–90 (2006) (pointing out how uncertainty facilitates negotiations and settlements); Barbara Cosens, *Truth or Consequences: Settling Water Disputes in the Face of Uncertainty*, 42 Idaho L. Rev. 717 (2006) [hereinafter Cosens, *Truth or Consequences*] (discussing the role of legal and scientific uncertainty in settlements).

25. *Wyo. v. U.S.*, 492 U.S. 406 (1989). The only question before the Supreme Court was whether the Wyoming Supreme Court's application of the PIA standard was correct. *See* Pet. Cert., 1988 WL 1094117 at *i (Aug. 18, 1988) ("In the absence of any demonstrated necessity for additional water to fulfill reservation purposes and in the presence of substantial state water rights long in use on the Reservation, may a reserved water right be implied for all practicably irrigable lands within a Reservation set aside for a specific tribe?").

26. *See* Andrew C. Mergen & Sylvia F. Liu, *A Misplaced Sensitivity: The Draft Opinions in* Wyoming v. United States, 68 U. Colo. L. Rev. 683 (1997).

27. *See id.* at 706–08.

28. For a discussion of whether the tribes or the United States did the reserving in any given case, see Anderson, *supra* note 2, at 412–14, and *Cohen*, *supra* note 3, at 1179–80.

adopted by the parties.'"[29]

For years, courts, scholars, tribes, and the federal government have interpreted the "purposes" of Indian reservations in a generous manner.

> The various treaties and statutes creating reservations speak in terms of providing a permanent home for the Indian or of setting aside a place for him to live free from encroachment by non-Indians. It appears that this language reveals an intention to permit the Indian to do the same thing with the reserved lands of his home as the white man does with his lands, such as to irrigate the irrigable acres, develop the minerals, create communities, preserve the environment for fish and game, preserve minimum streamflows, provide for recreation, and establish industries to the extent that the lands lend themselves to these types of development.[30]

In contrast, the Supreme Court ruled that *non-Indian* federal reserved rights will only be implied where needed to fulfill the primary purposes of the reservation and only if that primary purpose would be entirely defeated without an implied reservation of water.[31]

Courts have not been consistent when evaluating the purposes of Indian reservations, with some following a broad approach[32] while others have narrowly construed the purposes for establishing Indian reservations.[33] The Ninth Circuit Court of Appeals has been internally inconsistent in articulating the approach, but its decisions on the merits favor a broad interpretation of Indian reserved rights.[34] In *Colville Confederated Tribes v. Walton*,[35] the court stated:

> We apply the *New Mexico* test here. The specific purposes of an Indian reservation, however, were often unarticulated. The general purpose, to provide a home for the Indians, is a broad one and must be liberally construed. We are mindful that the reservation was created for the Indians, not for the benefit of the government.[36]

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29. *Minn. v. Mille Lacs Band of Chippewa*, 526 U.S. 172, 197 (1999) (quoting *Choctaw Nation v. U.S.*, 318 U.S. 423, 432 (1943)); *see also U.S. v. Wash.*, 157 F.3d 630, 642–43 (9th Cir.1998) (outlining canons of treaty construction and noting that treaty interpretation is a mixed question of law and fact); *U.S. v. Lummi Indian Tribe*, 841 F.2d 317, 319 (9th Cir. 1988).

30. Harold A. Ranquist, *The* Winters *Doctrine and How It Grew: Federal Reservation of Rights to the Use of Water*, 1975 BYU L. Rev. 639, 659 (footnotes omitted). This is known as the "homeland" approach. *See* Cohen, *supra* n. 3, at 1180–84 (collecting cases and authorities); *Waters and Water Rights* vol. 4, § 37.02(c) (1991 ed., 2004 repl. vol., Lexis 2004) (collecting cases and authorities).

31. *See supra* n. 21 and accompanying text.

32. *See e.g. In re All Rights to Use Water in the Gila River System*, 35 P.3d 68, 77–79 (Ariz. 2001) (endorsing the homeland approach).

33. *See e.g. In re All Rights to Use Water in the Big Horn River System*, 753 P.2d 76, 99 (Wyo. 1988), *aff'd sub nom. Wyoming*, 492 U.S. 406 (applying primary purpose test strictly).

34. In *United States v. Adair*, the Ninth Circuit stated that "*New Mexico* and *Cappaert*, while not directly applicable to *Winters* doctrine rights on Indian reservations establish several useful guidelines." 723 F.2d 1394, 1408 (9th Cir. 1983) (internal citations omitted) (footnote omitted). In the next breath, the court stated the opposite: "While the purpose for which the federal government reserves other types of lands may be strictly construed, the purposes of Indian reservations are necessarily entitled to broader interpretation if the goal of Indian self-sufficiency is to be attained." *Id.* at 1408 n. 13 (quoting William C. Canby, Jr., *American Indian Law in a Nutshell* 245–46 (4th ed., West 1981) (internal citations omitted).

35. 647 F.2d 42 (9th Cir. 1981).

36. *Id.* at 47 (footnotes omitted). The test actually applied by the court, however, was not the *New Mexico* test. The language noting the homeland purpose and need to liberally construe Indian rights following the first quoted sentence is flatly inconsistent with the parsimonious *New Mexico* test for non-Indian federal reserved rights.

After concluding that the reservation, like most in the West, had been set aside for agricultural purposes, the court supplemented its award of water under the practicably irrigable acreage (PIA) standard with water for instream flows to support tribal fisheries.[37] Likewise, in *United States v. Adair*,[38] the court rejected the argument that an Indian reservation could have but a single, agricultural purpose[39] and recognized reserved water rights for instream flows.[40] Thus, while it is clear that reservations established with an agricultural purpose have reserved rights for irrigation, the application of the test is not at all certain, and it is not settled whether a straight PIA approach or a homeland approach will be most beneficial to tribal claims in any given case.[41]

Another area of interesting development involves reserved right claims to groundwater. In a display of remarkable candor, the Wyoming Supreme Court rejected a tribal claim to groundwater although it admitted that "[t]he logic which supports a reservation of surface water to fulfill the purpose of the reservation also supports reservation of groundwater."[42] The Wyoming Supreme Court refused to adhere to logic, however, after noting that no court had ever held that the doctrine applied to groundwater.[43] No other reason for rejecting the claim was given.[44] Three courts have since found that the Indian reserved rights may extend to groundwater. In a case limited to a dispute over groundwater ownership on a portion of the Lummi reservation, a federal district court determined that the reserved water rights doctrine extends to groundwater.[45] The Montana Supreme Court reasoned

> if the United States implicitly intended, when it established reservations, to reserve sufficient unappropriated water to meet the reservations' needs, it must have intended that reservation of water to come from whatever particular sources each reservation had at hand. The significant question for the purpose of the reserved rights doctrine is not whether the water runs above or below the ground but whether it is necessary to accomplish the purpose of the reservation.[46]

The Arizona Supreme Court also rejected the unreasoned conclusion of the Wyoming Supreme Court and held that the reserved water rights doctrine applies to groundwater.[47]

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37. *Id.* at 48. The court also stated that Congress envisioned agricultural pursuits as only a first step in the "civilizing" process. *Id.* at 47 n. 9 (citing 11 Cong. Rec. 905 (1881)). "This vision of progress implies a flexibility of purpose." *Id.*

38. 723 F.2d 1394.

39. *Id.* at 1410 ("Neither *Cappaert* nor *New Mexico* requires us . . . to identify a single essential purpose which the parties to the 1864 Treaty intended the Klamath Reservation to serve.").

40. Decisions dealing with tribal claims to instream flows are collected in Anderson, *supra* note 2, at 426 n. 175.

41. *See id.* at 427–29.

42. *Big Horn*, 753 P.2d at 99.

43. *Id.*

44. Royster diplomatically noted that "While the Wyoming court's rejection was not adequately explained and finds little if any support in the existing case law or among commentators, it remains the only direct holding on the application of the *Winters* doctrine to groundwater." Royster, *supra* n. 23, at 70 (footnote omitted).

45. *U.S. v. Wash.*, 375 F. Supp. 2d 1050, 1068 n. 8 (W.D. Wash. 2005).

46. *Confederated Salish & Kootenai Tribes of the Flathead Reservation v. Stults*, 59 P.3d 1093, 1099 (Mont. 2002).

47. *In re All Rights to Use Water in the Gila River System*, 989 P.2d 739, 748 (Ariz. 1999).

None of the courts actually quantified a tribe's right to groundwater because all three were only at the declaratory judgment stage.

There is also continuing litigation over the water rights of individual allotment holders and non-Indians who have acquired land that was allotted. It is well settled that tribal reserved water rights attach to allotments where water is necessary to fulfill the purposes to be served by allotment.[48] The Secretary of the Interior has an obligation to ensure a just and equitable distribution to allottees when necessary to make the land productive for agriculture.[49] Most litigation centers on the extent to which a non-Indian successor to an allotment retains a reserved water right. [50] In *Walton*,[51] the court defined the nature and extent of a non-Indian successor to an allotment's rights:

> The non-Indian successor acquires a right to water being appropriated by the Indian allottee at the time title passes. The non-Indian also acquires a right, with a date-of-reservation priority date, to water that he or she appropriates with reasonable diligence after the passage of title. If the full measure of the Indian's reserved water right is not acquired by this means and maintained by continued use, it is lost to the non-Indian successor.[52]

Most of the recent litigation in this area has come out of the Big Horn River adjudication in Wyoming,[53] with the most recent case allowing due diligence requirements to be suspended for a substantial period while awaiting construction of a Wind River irrigation project.[54]

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48. *U.S. v. Powers*, 305 U.S. 527, 532 (1939) ("[W]hen allotments were made for exclusive use and thereafter conveyed in fee, the right to use some portion of tribal waters essential for cultivation passed to the owners."); *see also Skeem v. U.S.*, 273 F. 93 (9th Cir. 1921).

49. *See* 25 U.S.C. § 381 (2000).

> In cases where the use of water for irrigation is necessary to render the lands within any Indian reservation available for agricultural purposes, the Secretary of the Interior is authorized to prescribe such rules and regulations as he may deem necessary to secure a just and equal distribution thereof among the Indians residing upon any such reservation; and no other appropriation or grant of water by any riparian proprietor shall be authorized or permitted to the damage of any other riparian proprietor.

25 U.S.C. § 381 (2000).

50. *See generally Cohen*, *supra* n. 3, at 1194–98 (discussing allotment water rights and the rights of non-Indian successors).

51. 647 F.2d at 51.

52. *Id.* The court noted that "[t]his conclusion is supported by our decision in *United States v. Ahtanum Irrigation District*. *Ahtanum* held that non-Indian purchasers of allotted lands are entitled to 'participate ratably' with Indian allottees in the use of reserved water." *Id.* (internal citations omitted). The rights are generally known as *Walton* rights. *See generally* Cohen, *supra* n. 3, at 1194–98.

53. *In re General Adjudication of All Rights to Use Water in the Big Horn River System*, 899 P.2d 848 (Wyo. 1995); *In re General Adjudication of All Rights to Use Water in the Big Horn River System*, 803 P.2d 61 (Wyo. 1990); *Big Horn*, 753 P.2d 76, 112–14; *see Adair*, 723 F.2d 1394 (*Walton* rights subservient to tribal instream flow rights based on priority dates).

54. *In re General Adjudication of All Rights to Use Water in Big Horn River System*, 48 P.3d 1040 (Wyo. 2002).

> We hold, under the circumstances of this case and presuming irrigation was not possible absent the project, in order to establish beneficial use of the reserved water within a reasonable time to retain the federal reserved right, the unsuccessful claimants must demonstrate their efforts to put the lands under irrigation within a reasonable time and with due diligence, as defined by state law, *after the federal project facilities became available to the properties.*

Id. at 1055 (emphasis in original).

Issues involving allotments can complicate Indian water rights settlements due to the potential conflicts between individual Indian allottees and the tribal claims, as well as the manner of dealing with non-Indian successors. The Solicitor of the Department of the Interior[55] opined that

> [t]he basic attributes of tribal and allottee interests in such water rights are as follows: 1. An Indian allottee has a right to a "just and equal distribution" of water for irrigation purposes. 2. Indian tribes possess broad regulatory power over reservation water resources, including those to which allottees have rights. 3. The quantity of water to which an allottee may be entitled is not subject to precise formulae.[56]

These vague standards encourage resolution through settlement legislation as demonstrated by the following example.

III. THE SNAKE RIVER SETTLEMENT EXAMPLE

Congress passed the Snake River Water Rights Act of 2004 "to achieve a fair, equitable, and final settlement of all claims of the Nez Perce Tribe, its members, and allottees and the United States on behalf of the Tribe, its members, and allottees to the water of the Snake River Basin within Idaho."[57] The settlement was achieved despite a trial court ruling that rejected all claims by the Tribe and the United States for instream flows to support the Tribe's right to fish at all "usual and accustomed stations."[58] While the court's reasoning had many serious flaws[59] and an appeal was taken, the parties to the adjudication were already heavily invested in negotiations to resolve not just tribal water rights disputes but also to deal with Endangered Species Act matters, which gravely concerned non-Indian water users in Idaho.[60] The settlement involved three major components, with the first two serving as the incentive for the State of Idaho and private water users to support a favorable settlement of tribal claims. First was the desire for security for Upper Snake River water users pursuant to a thirty-year negotiated flow

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55. *Entitlements to Water under the Southern Arizona Water Rights Settlement Act (SAWRSA)*, Sol. Op. No. M-36982 (Mar. 30, 1995).

56. *Id.*; *see Tribal Water Rights*, *supra* n. 8, at 95–114 (discussing allotment water rights in litigation and settlement contexts).

57. Pub. L. No. 108-447 at § 2(2), 118 Stat. at 3432. The Snake River Water Rights Act was passed as part of the fiscal year 2005 Consolidated Appropriations Act, a 657-page statute. The adjudication was commenced in 1987. *In re Snake River Basin Water System*, 764 P.2d 78, 81 (Idaho 1988). For a discussion of the settlement from the perspective of most parties, including the mediator, see Francis E. McGovern, *Mediation of the Snake River Basin Adjudication*, 42 Idaho L. Rev. 547 (2006). The heart of the settlement is a "mediator's term sheet," which is incorporated by reference into the legislation. Pub. L. No. 108-47 at § 3(1), 118 Stat. at 3432. The term sheet is included in the Senate Report on the legislation. S. Rep. No. 108-389, 14 (2004).

58. *In re SRBA*, Consol. Subcase 03-10022, No. 39576 (Idaho 5th Dist., Twin Falls Co., Nov. 10, 1999) (available at http://www.srba.state.id.us/FORMS/sumjudg.PDF). Article III of the Nez Perce Treaty provides:

> The exclusive right of taking fish in all the streams where running through or bordering said reservation is further secured to said Indians; as also the right of taking fish at all usual and accustomed places in common with citizens of the Territory; and of erecting temporary buildings for curing, together with the privilege of hunting, gathering roots and berries, and pasturing their horses and cattle upon open and unclaimed land.

Treaty with the Nez Perce, 12 Stat. 957, 958 (1855).

59. Cosens, *Truth or Consequences*, *supra* n. 24, at 730–31.

60. Serious negotiations had begun in 1998 with the appointment of a mediator by the court. Ann R. Klee & Duane Mecham, *The Nez Perce Indian Water Right Settlement—Federal Perspective*, 42 Idaho L. Rev. 595, 602 (2006).

augmentation plan.[61] Second was agreement on the fairly specific plan for an agreement under § 6 of the Endangered Species Act for habitat protection and restoration in the Salmon and Clearwater Basins.[62] Having satisfied those desires, private water users and the State supported a tribal settlement with the following primary components.

The Settlement Act and "mediator's term sheet" provide:

1. water for a variety of tribal uses on the reservation;[63]

2. recognition of allotment water rights and a due process requirement for tribal regulation of such rights;[64]

3. for the transfer of on-reservation land valued at $7 million (estimated to be approximately 11,000 acres) from the federal Bureau of Land Management to the tribe;[65]

4. a right to access and use of approximately six hundred springs and fountains on federal lands in off-reservation areas;[66]

5. tribal control of 200,000 acre-feet of water from Dworshak reservoir;

6. authorization of nearly $90 million for tribal water- and habitat-related improvements;[67] and

7. instream flow minimums at over two hundred "locations selected by the Tribe as a matter of biological and cultural priority."[68]

There is an additional $38 million allocated for a Salmon and Clearwater River Basins Habitat Fund.[69]

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61. *Mediator's Term Sheet*, *supra* n. 57, at § III; Klee & Mecham, *supra* n. 60, at 614–18.

62. *Mediator's Term Sheet*, *supra* n. 57, at § II(B)–(D); Klee & Mecham, *supra* n. 60, at 624–29.

63. Pub. L. No. 108-447 at § 7, 118 Stat. at 3434. The Tribe's right is a "multiple use right" of 50,000 acre-feet with an 1855 priority date to the extent water is taken from the main stem of the Clearwater River and is subordinated to non-Indian water rights extant on the date of the settlement in tributaries to the Clearwater. *Mediator's Term Sheet*, *supra* n. 57, at § 1(A). The water may be used "for irrigation, DCMI [domestic, commercial, municipal, and industrial], hatchery and cultural uses, at the discretion of the Tribe." *Id.* It may also be leased to third parties through the state water bank. Pub. L. No. 108-447 at § 7(g), 118 Stat. at 3435; *Mediator's Term Sheet*, *supra* n. 57, at § 1(A).

64. Pub. L. No. 108-447 at § 7(a)(3), 118 Stat. at 3434.

65. Pub. L. No. 108-447 at § 6, 118 Stat. at 3433; *Mediator's Term Sheet*, *supra* n. 57, at § 1(F).

66. Pub. L. No. 108-447 at § 7(a)(2). The estimate is from K. Heidi Gudgell, Steven C. Moore & Geoffrey Whiting, *The Nez Perce Tribe's Perspective on the Settlement of Its Water Rights Claims in the Snake River Basin Adjudication*, 42 Idaho L. Rev. 563, 590 (2006).

67. The two funds are defined in the legislation:

> There are established in the Treasury of the United States—(1) a fund to be known as the "Nez Perce Tribe Water and Fisheries Fund," to be used to pay or reimburse costs incurred by the Tribe in acquiring land and water rights, restoring or improving fish habitat, or for fish production, agricultural development, cultural preservation, water resource development, or fisheries-related projects; and (2) a fund to be known as the "Nez Perce Domestic Water Supply Fund," to be used to pay the costs for design and construction of water supply and sewer systems for tribal communities, including a water quality testing laboratory.

Pub. L. No. 108-447 at § 8 (b), 118 Stat. at 3436.

68. Gudgell et al., *supra* n. 66, at 590. The instream flow rights are held by the State of Idaho in trust for the public with a priority date of April 20, 2004. *Id.* The State may also grant water for future domestic, commercial, municipal, and industrial uses. *Mediator's Term Sheet*, *supra* n. 57, at § II(A).

69. Pub. L. No. 108-447 at § 9, 118 Stat. at 3437. While the funds will be administered by the Secretary of the Interior, approximately $12 million will be controlled by the Tribe with the remaining $26 million allocated to the State of Idaho. *Id.*

The settlement agreement provides an excellent outcome for all parties involved. It accomplishes far more in terms of benefits for the Tribe that would have been possible in litigation because it returns land to the Tribe and provides funds to improve water and sanitation systems. It also funds habitat restoration projects throughout the basin. Moreover, one reason the settlement seems so favorable is because it provided an escape from a state court system hostile to federal and Indian water rights.[70] The stakes for Indian tribes are too high for the United States to participate solely in a reactive mode and seek settlement as a way out of desperate situations. The National Water Commission in 1973 documented the federal government's miserable performance with respect to the protection of Indian water rights.[71] The commission made some concrete recommendations for improvement, prompted in part by the fact that the federal government had promoted and subsidized non-Indian water development at the expense of vested tribal rights.[72] Yet the settlement process in place during the first Bush Administration is governed—in theory at least—by guidelines that were developed without consultation with the affected tribes.[73] This is despite the fact that the guidelines themselves declare that "Indian water rights are vested property rights for which the United States has a trust responsibility, with the United States holding legal title to such water in trust for the benefit of the Indians."[74]

A major concern in the settlement process is the amount of the federal monetary contribution to resolve the dispute. The Senate Report to the Snake River Settlement Act demonstrates Congress's awareness of the need for federal funds to settle litigation and remedy past injustices:

> A significant additional shortcoming from the tribal perspective is that although a decree in a general stream adjudication might recognize an Indian tribe's rights to substantial quantities of water with an early priority date, this may do little, if anything, to deliver real (or "wet") water to dry Indian lands.
>
> The shortcomings of the general stream adjudication process as a device for water rights dispute resolution have led to an increasing number of agreed-to water rights settlements on streams in the western States—where the parties, including Indian tribes, negotiate and compromise among themselves as to quantity, priority dates and other issues, and where the Federal government contributes money to the settlement in order to achieve various goals that could not otherwise be achieved within the confines of a general stream adjudication, such as monetary and other compensation to the Indian tribe, including construction of water delivery systems that bring "wet" water to the Indian lands as well as other tangible benefits to the tribe or its members.[75]

The federal contribution to settle the Nez Perce claims would be in the

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70. *See* Michael C. Blumm et al., *Judicial Termination of Treaty Water Rights: The Snake River Case*, 36 Idaho L. Rev. 449 (2000); *Waters and Water Rights*, *supra* n. 30, at § 37.03(a)(6) n. 459 (discussing politically motivated vote switching).

71. *See* Natl. Water Commn., *supra* n. 2.

72. *See id.*

73. Criteria and Procedures for the Participation of the Federal Government in Negotiations for the Settlement of Indian Water Rights Claims, 55 Fed. Reg. 9223 (Mar. 12, 1990).

74. *Id.*

75. Sen. Rep. 108-389, at 2–3.

neighborhood of $130 million, with $90 million to the Tribe for water- and fishery-related projects.[76] How did the federal government determine that the amount of money in the bill was justified? The Criteria and Procedures for the Participation of the Federal Government in Negotiations for the Settlement of Indian Water Rights Claims provide that:

> Federal contributions to a settlement should not exceed the sum of the following two elements: a. First, calculable legal exposure—litigation cost and judgment obligations if the case is lost; Federal and non-Federal exposure should be calculated on a present value basis taking into account the size of the claim, value of the water, timing of the award, [and] likelihood of loss. b. Second, additional costs related to Federal trust or programmatic responsibilities (assuming the U.S. obligation as trustee can be compared to existing precedence.)—Federal contributions relating to programmatic responsibilities should be justified as to why such contributions cannot be funded through the normal budget process.[77]

How this language is converted into the government's position in any given settlement context is not really known, but many suspect that it is more a matter of whether the Administration has the political will to advance a settlement with a large federal contribution than some sort of a principled economic calculation.[78] And of course, the Administration's political will is dependent on factors such as the influence and power of the affected state's congressional delegation and whether other sectors of the water use community are in strong support of the settlement and stand to obtain significant benefits from the settlement. The powerful coalition of Idaho water users, the Nez Perce Tribe, and other industry groups provided a strong foundation for enactment of the legislation, but even so the manner in which it became law was serendipitous.[79] Nowhere in the course of these events is it revealed how the Administration determined that the federal contribution to the settlement passed muster under the criteria and procedures noted above.[80] It is commonly understood that the federal position on the

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76. Pub. L. 108-447 at §§ 8(h), 9(d). The settlement also provides for the transfer of $7 million of land to the Tribe. Pub. L. 108-447 at § 6(a)(3), 118 Stat. at 3433. *See also* Gudgell et al., *supra* n. 66, at 591–92. In addition, it is estimated that water users in the Upper Snake River will receive $57 million in rental payments from the Bureau of Reclamation. Steven W. Strack, *Pandora's Box or Golden Opportunity? Using the Settlement of Indian Reserved Water Right Claims to Affirm State Sovereignty over Idaho Water and Promote Intergovernmental Cooperation*, 42 Idaho L. Rev. 633, 688 (2006).

77. 55 Fed. Reg. at 9223.

78. *See* Anderson, *supra* n. 2, at 436–37; Barbara A. Cosens, *The 1997 Water Rights Settlement between the State of Montana and the Chippewa Cree Tribe of the Rocky Boy's Reservation: The Role of Community and of the Trustee*, 16 UCLA J. Envtl. L. & Policy 255, 257 (1998).

79. Idaho's chief negotiator described the manner in which the settlement was slipped at the last minute into a 657-page appropriation bill:

> Thus, in the final hours of a "Lame Duck" session, it was assured that the Congress would "approve, ratify, and confirm" the Nez Perce Settlement Agreement as a part of an essential spending package for the federal government. In legislative parlance (borrowing from a sports analogy) this was the equivalent of throwing a Hail Mary pass with no time on the clock for a game-winning legislative touchdown.

Laurence Michael Bogert, *The Future Is No Place to Place Your Better Days: Sovereignty, Certainty, Opportunity, and Governor Kempthorne's Shaping of the Nez Perce Agreement*, 42 Idaho L. Rev. 673, 690–91 (2006).

80. The Department of the Interior simply stated in testimony to the Senate Committee on Indian Affairs that it "believe[d] that the federal participation and contribution contemplated in [the legislation] is appropriate

funding issue is driven by the Office of Management and Budget and that the figures associated with federal calculable legal exposure are subject to a wide range of estimates. Frequently, it appropriately includes the federal government's legal exposure based on its past failures to protect Indian water rights. In addition, "federal contributions relating to programmatic responsibilities" are frequently rolled into a settlement because, as in the Nez Perce settlement, it is politically expedient to do so.[81]

The current Secretary of the Interior, Dirk Kempthorne, was the governor of Idaho when the Snake River Settlement Act became law. His lead negotiator for water rights matters in Idaho, Counselor Michael Bogert, is now the lead policy official in the Secretary's office. Recent remarks from Bogert mention the financial contribution limitations of the Criteria and Procedures, but the Snake River experience may cause there to be more flexibility and creativity employed in forthcoming settlements. Bogert stated:

> We will also be considering a more holistic problem-solving approach to those issues, and some settlements could include discussion of strategic approaches to the endangered species act and the clean water act.
>
> We will also consider non-monetary elements such as land transfers, habitat management and facility operations. These were key ingredients to the success of the Nez Perce agreement.[82]

This apparent endorsement of non-monetary contributions to facilitate settlement of water rights disputes is a welcome development. Likewise, the recognition of federal expenditures as appropriate to further habitat improvements and facilitate resolution of at

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to resolve the Nez Perce water rights and the related issues resolved by the Nez Perce settlement agreement." Sen. Comm. on Indian Affairs, *The Snake River Water Rights Act of 2004: Hearings on S. 2605*, S. Hrg. 108-636, 73, 76 (July 20, 2004) (statement of Michael D. Olson, Counselor to the Assistant Secretary for Indian Affairs) (transcript available at http://www.gpo.gov/congress/senate/senate13ch108.html; *search* "Snake River").

81. Michael Bogert, Counselor to the Secretary, Department of the Interior, provided a frank discussion of these dynamics:

> Also, we acknowledge the conundrum of involving the federal government at early stages of discussions. We know there is a constant competition for resources: people, funds for modeling, studies, policy support, and other essential ingredients. And we know that any official federal position must be coordinated with the Department of Justice and the Office of Management and Budget. These dynamics sometimes produce a scenario in which the parties come to agreement without the support or full participation of the United States Government and later result in a significant federal price tag. Sometimes we hear that the parties will rely on Congress to "roll" the department into achieving success. While we have great respect for our co-equal branch of government, this is not always the best game plan for the sovereignty, certainty, and opportunity that should be the hallmark of those settlements I mentioned earlier. We need to understand that the secretary will consider the value of settlements beyond mere "costs." The department's 1990 policy guidance tells us that the total cost of a settlement to all parties should not exceed the value of existing claims as calculated by the federal government, and that is our policy. Further, we know that federal contributions should not exceed the calculated legal exposure as well as costs related to federal trust and programmatic responsibilities. The secretary believes that non-federal cost-share should be proportionate to the benefits received by the non-federal parties, unless a different cost ratio is justified.

Michael Bogert, Speech, *Sovereignty, Certainty & Opportunity: Secretary Kempthorne's Vision for Tribal Water Rights Settlements in the West* (Northwest Tribal Water Rights Conf., U. Or., Oct. 27, 2006).

82. *Id.* The creative framework for the settlement was established in the last two years of the Clinton Administration and carried forward by the Bush Administration.

least portions of Endangered Species Act controversies is a step forward. The federal contribution should point the way for future settlements. The fact is that the Snake River Settlement also funded a tribal domestic water system, funded a tribal fisheries and water program, and turned over federal land, a total of $102 million in value to the Nez Perce Tribe. It would be fascinating to see how the federal government's "calculable legal exposure" led to arrival at this figure (plus $26 million for the State of Idaho) under the Criteria and Procedures.

It is time to call it like it is and simply drop the pretext of a pseudo-economic analysis of the value of certain claims and simply acknowledge that Indian water settlements happen when all parties—including Congress and the Administration—see fit to get behind a particular proposal. This would not give *carte blanche* to those seeking gold-plated settlements, but it would remove an artificial barrier to Indian water settlements and place the focus on the merits of disputes. The creative Snake River approach demonstrates how two different federal administrations were able to support a settlement that provides substantial benefits to the Nez Perce Tribe, protects the interests of state water right holders, and promotes salmon habitat protection. Future administrations should hold its creativity forth as a model for other settlements.