

## The Legacy and the Promise of the Settlement of Indian Reserved Right Water Claims

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At the Heard Museum in Phoenix Arizona, on a panel in the entry to the artifacts area, there is a statement by an Indian from the Taos Pueblo in the appeal for the return of Blue Lake:<sup>1</sup>

We have lived upon this land from days beyond history's records, far past any living memory, deep into the time of legend. The story of my people and the story of this place are one single story. No man can think of us without thinking of this place. We are always joined together.

Frank Tenorio, Tribal Leader of the San Felipe Pueblo, made the following observation:

There has been a lot said about the sacredness of our land, which is our body, and the value of our culture, which is our soul. But water is the blood of our tribes, and if its life-giving flow is stopped, or it is polluted, all else will die and the many thousands of years of our communal existence will come to an end.

In treaty negotiations with the Chippewas Indians in 1826, Thomas L. McKenney told the tribes:

You are never to forget that this is a great gift. It comes from your GREAT FATHER himself, who sends it to you by our hands. It is a new heart. Your GREAT FATHER has told us to come up here, and put it in the breast of his great Chippeway children. No bad blood belongs to this heart. It is an American heart, and is full of good blood; and if you will open your ears and listen well, and never forget your GREAT FATHER'S message, it will make you all happy.<sup>2</sup>

Recently, in the Sunday supplement to the Washington Post, the Washington Post Magazine, Senator John McCain, immediate past Chairman of the Senate Committee on Indian Affairs, states that when *Dances*

*with Wolves* came out, everyone wanted on the Indian committee; now, they can't get a quorum for the lack of interest in Indian affairs. This propensity for cycles was observed in 1989, during testimony before the Select Committee on Indian Affairs in the United States Senate. Former special consultant to President Nixon, Mr. Leonard Garment, observed that interest in Indian affairs was much like the reoccurrence of the infestation of cicadas in the Washington area at the time. Like the cicadas, every 17 years or so, the United States takes notice and makes a big racket about Indian issues then lets the feeling recede.

What the above references acknowledge is the futility of wishing Indians away, and the propensity of the United States to make and break grand promises, and then do no penance. Through history the United States has schizophrenically extolled the virtues of Indians and Indian culture to represent many aspects of our heritage and mythology - towns, cities and states named for Indians or from Indian language descriptions, the movies; never mind the Washington Redskins or the Atlanta Braves. All the while praying that Indians would quietly go away. In that vein, the United States has chosen to selectively forget its legal and contractual obligations contained in its treaties with Indian tribes. This convenient blindness to treaty obligations is one of the more hypocritical elements of federal Indian policy. Policy makers tend to prefer to foster the erroneous perception that all Indian issues revolve around welfare issues - or worse - issues of redress for past Indian suffering. All that has been asked of the United States by Indians is for the United States to live up to its contractual and fiduciary obligations.

Not only does the United States not fulfill those fiduciary functions and obligations to Indians, but there is a distinct lack of cultural understanding from the Federal Government in dealing with Indians and Indian tribes that contributes in large degree to the failure. There is a tendency - and this includes BIA - to think of Indian tribes in terms of how they behave and relate in their

activities with the Federal Government. This myopia has not only frustrated the Federal Government's ability to dialogue with Indian tribes, but has limited the ability of Indian tribes to communicate the full breadth and scope of their needs. While it is true that the experience of the last 125 to 150 years has influenced the Indian understanding and culture, it is also true that much of the traditional culture and structure of Indian tribes remains intact, notwithstanding the historical efforts of the United States to extinguish those cultures.

So we see that Federal officials, politicians and Indians all understand that the United States barely lives up to its obligations to Indians. It is within this context that the Federal Government began in the early 80's to seriously address the issue of settling Indian reserved water rights claims. The earliest efforts began in the Reagan administration as result of efforts to resolve Indian water issues in Arizona. There was a concern regarding how the Federal Government was to reconcile resolving the inequities of the Ak Chin settlement, the Southern Arizona Water Right Settlement, with the potential impacts on the Central Arizona Project. At the same time in another arena, the Justice department was actively pursuing the Wind River claims before the State courts in Wyoming. In both cases, because of the potential disruption to non-Indian water users and the States' legal apparatus for water, there were extensive discussions among federal, state, local, and Indian representatives as to how to foster negotiated settlements of Indian water claims. Both events were related in their similar effect on non-Indian water users. Both events served to raise the anxiety of non-Indian water users and the Federal Government regarding the adverse impacts of meeting the water rights claims of Indian tribes. After decades of using water unchallenged, non-Indian water users saw the potential for extensive disruption to longstanding corporate and family businesses. In many cases, the non-Indians never had a notion that what they perceived as property rights were subject to dissolution. The states saw a major challenge to what they believed to be their sovereign rights.

Any discussion about Indian water settlements requires a statement about the value of negotiated settlements. It is important to understand what a negotiated settlement contributes to an Indian water rights claim that litigating the claim does not. First, dispense with the past statements as to the reduced cost of negotiated settlements versus litigation. While my numbers come from imprecise data, it was estimated that the Wind River litigation ( first settled in 1990) cost the Federal

Government approximately \$14.0 million. A survey of past settlements will confirm that the litigation was decidedly less costly than negotiated settlements. In addition to the settlement funding, negotiated settlements require similar complexity in technical work and investigations, such that there is no real cost savings in prosecuting a settlement. Therefore, it should be taken as a given that pursuing negotiated settlements requires the same financial effort as litigating the same claim.

So, why negotiate. Consider the outcome of the Wind River litigation. After the Wyoming courts ruled in 1990, there was an immediate effort to appeal. The Wyoming Supreme Court affirmed the water allocations, and the parties began to fight over interpretation of the court opinion and administrative issues that were created by the case but were not settled in the case, since those issues were not under consideration. As a result, 3 more years of litigation ensued, including a trip to the United States Supreme Court. Is the issue settled? No, but negotiations are ongoing. Therefore, one large advantage of negotiated settlements is the opportunity to resolve many of the outstanding administrative issues that accompany the use of water by the tribe. As the water rights are quantified, the issues of jurisdiction in administration, procedures for sharing shortages, etc. can be addressed. The most valuable result of a negotiated settlement is the establishment of commercial and governmental relationships which remain after the negotiations are concluded. In most cases, water rights negotiations are the first substantive opportunity for the local non-Indian community to begin to understand and appreciate the needs and capabilities of their Indian neighbors. While the foregoing illustrates the value of negotiated settlements, litigation retains a threshold consideration. Without litigation, there is little compulsion to negotiate. A noted example is the Warm Springs negotiation in Oregon. With the absence of a general stream adjudication or similar court proceeding to raise the intensity of the negotiations, the talks have gone on for 15 years, and are still in progress.

The Reagan Administration established the policy that negotiated settlements were preferable to litigation. In that spirit, Ann McLaughlin, Under Secretary for the Department of the Interior, chose to make Indian water settlements one of her main initiatives. She was assisted in her efforts by Mr. Mike Clinton, a man not only large in person, but in ambition and vision. During that period, a model was evolving that would provide structure to Indian water settlement negotiations whereby the Department could integrate all its resources, and address

more than one settlement at a time. The challenge was to determine how to bring settlement issues to the policy decision makers, and how to structure the policy debate.

An early indication of Administration thinking came in 1982 with the President's veto of the first Southern Arizona Water Rights Settlement Act. In his justification for the veto, President Reagan articulated the principle that the Federal Government should not support negotiated settlements in which the Federal Government is not a participant, nor should the Federal Government support settlements that do not require non-Indians contributing an equitable share of the costs.

The participation of the Under Secretary added an additional dimension to the negotiation effort. While high level officials in the Department had negotiated settlements in the past, never before had the Office of the Secretary brought its full weight to the effort. This was important for two reasons. First, the Secretary was saying that Indian water rights settlements were important. This had the effect of the putting Departmental agencies on notice that they, in addition to BIA, had to take Indian water rights seriously. Second, Ann McLaughlin did not suffer fools graciously. Her interest set the agenda in this issue and energized the entire Departmental resources towards its success. With the partnership of Assistant Secretary for Indian Affairs, Ross Swimmer and BIA Deputy Commissioner Pat Ragsdale, an intellectual team not seen before was created.

With this policy team in place, the Administration negotiated the follow-on Ak Chin settlement in 1984, and the Colorado Ute settlement in 1986. These settlements began to establish the model of joining Indian settlements to Reclamation projects. Since Reclamation controls much of the water movement in many basins in the West, this evolution was a natural and ironic one. In fact, the Colorado Ute settlement has almost lost its identity in its relationship with the Bureau of Reclamation's Animas-La Plata Project in southwestern Colorado. While there is endless debate as to the feasibility of a Reclamation project, and the appropriateness of the water rights settlement, there is no more graphic illustration of the value - and distortion of value - that the marriage of a non-Indian project with Indian water right settlements can present. It is in this case that the reality of the politics of non-Indian water users in Indian water settlements is best illustrated. Without the added benefit of settling the Ute Mountain Ute and Southern Ute tribes water rights claims, Animas-

La Plata would not be a viable project today - but non-Indian parties have their project.<sup>3</sup>

By 1988, the Department had laid the groundwork to settle a number of Indian water settlements. However, by this time Ann McLaughlin had gone on to become Secretary of Labor and Mike Clinton had left the Federal Government to pursue a career in private industry. As a result, there were a number of issues "hanging" between the Department and OMB. One issue was OMB's response to a November 10, 1986 memorandum from Secretary Hodel to James Miller, Director of OMB. In that memorandum, the Secretary laid out the nucleus of policy and procedures in negotiating financial settlements in the water arena. While the memorandum dealt largely with the larger issue of cost-sharing on Reclamation projects, it also had broad application to financial issues for Indian water rights settlements. While the memorandum prescribed a number of policies which were designed to protect the Federal Government, the overarching theme was coordination and communication with OMB on settlement activities. Another issue was the constant insistence from OMB that a set group of criteria and procedures be established to guide federal participation in Indian water rights negotiations.

All the effort through 1988 had offered some lessons. One lesson learned was the need for coordination of activities within the Department of the Interior and the Federal Government. When the components of a settlement were coming into focus, depending upon what those elements were, e.g. diminishment of the trust asset, use of Reclamation facilities, provisions for using public lands, etc. the different policy offices - each Assistant Secretary - had to be briefed and consulted. Given the schedules of the Assistant Secretaries, the coordination cost significant and critical time. This loss of time was critical because of the elements that typically accompany the need for policy guidance, and further negotiations for the settlement.

Another lesson learned concerned the conflict that was inherent in coordinating and persuading external agencies, particularly OMB, of the advisability of the settlement. OMB has long taken the position that the United States should not fund a settlement for an amount greater than the United States' legal liability, which due to statute of limitations, was usually zero. Further, the Department of Justice was a primary partner, due to its interests in the claims, and the requirement for the Attorney General to sign the stipulations to the courts when the claims were extinguished. The model and the

goal were becoming clear. If the Department of the Interior could create an apparatus that would focus all the policy constituents in the Department of the Interior on a propose Indian water rights settlement, the Secretary would have the benefit of a coordinated, documented and defensible settlement.

All of the experiences and lessons from the Reagan Administration were fresh and current when the Bush Administration arrived in 1989. One of the earliest mandates from the Bush White house was for Secretary Lujan and the Department of the Interior to establish an overarching water policy structure. At the same time, the Office of the Assistant Secretary - Indian Affairs, as well as the Division of Indian Affairs in the Solicitor's Office, was agitating for a Indian water committee, or a similar structure for Indian water settlements. In addition, OMB was calling for continued discussions regarding firm policies for negotiating Indian water rights settlements. As a result, the Working Group on Indian Water Settlements was established, and Mr. Tim Glidden, Counselor to the Secretary, was made its Chair.

Talks with the Office of Management and Budget regarding the valuation of settlements and the budgeting of settlements had begun late in 1988. With the arrival of Secretary Lujan, talks had been tabled during the transition period. With the creation of the Working Group, discussions with OMB were renewed. There had been a longstanding debate between Interior and OMB regarding the appropriateness of Indian settlements that possessed Federal contributions above and beyond legal liabilities constrained by statute of limitations. The Department had long taken the position that settlements that settled longstanding claims in which the parties paid for the benefits received was appropriate. In the June 21, 1989 signing statement by President Bush on the Puyallup land settlement, the President committed to a set of criteria and procedures for Indian water and land settlements.

On March 12, 1990, Mr. Glidden published a policy statement to be known as the *Criteria and Procedures for Participation of the Federal Government in Negotiations for the Settlement of Indian Water Rights Claims*. The Criteria and Procedures were negotiated with OMB and the Department of Justice to form the skeleton for the water rights effort in the Federal Government. As a general matter, they were roundly criticized by non-Indians and Indian country alike. There is not sufficient space to analyze the meanings and value of the *Criteria and Procedures*, except to say that, while they have been

universally condemned, no one to date has had the courage to undo or amend them, not because they are perfect, but because they allow flexibility where needed, and sometimes it is best to accept "yes" for an answer.

What evolved in the Bush Administration was a structure designed to negotiate as many as 20 settlements at one time. The intent was to put enough teams in the field that Indian country could see movement towards their individual claims. In order to facilitate that effort, a number of procedures were created to integrate the negotiation process with the larger Federal Governmental apparatus. First, a Fact-Finding Report was mandated that was designed to evaluate the potential for a successful negotiation, and to lay the factual groundwork for subsequent analysis of a settlement. Ultimately, it was decided that the Fact-Finding Report should be developed in consensus with all stakeholders in the negotiations. With the publication of the Fact-Finding report, the Working Group was initially briefed and informed about the potential for settlement. Also at that time, the negotiation team was given first-time instructions on the negotiation.

Following the Fact-Finding Report, given the appropriate time, and depending upon complexity and resources, an Assessment Report was provided by the team. This confidential report was generally a worst case/best case assessment of the outcome of the negotiations, and was the basis for a final charge to the negotiation team to complete the negotiations. Since this report contained the basis for recommending a Federal position, it was the subject of a great deal of analysis by the Department, OMB, and Justice. It usually caused the greatest amount of debate. Ultimately the debates distilled down to the contrast between a Federal position that adhered rigidly to academic criteria established in the abstract versus the realities of a position that would facilitate consensus for settlement among all the parties.

Anyone who has ever negotiated anything knows that negotiations never follow clean linear paths. However, with the *Criteria and Procedures*, the ideal had been established. As a result, the burden for justifying waiver or exception to the Criteria and Procedures was placed on the team chairs and were exceedingly heavy. Any exception was thoughtfully considered by the Working Group. The first settlement to be negotiated completely under the *Criteria and Procedures* was the Northern Cheyenne Settlement. Until the arrival of the Clinton Administration, the Indian water rights process was a

continual refinement of the Working Group and *Criteria and Procedures* process.

In the period from 1982 to 1992, the Federal Government negotiated and legislated 14 Indian water settlements. No two were exactly alike, but all sought to structure settlements in such a way as to limit the adverse impacts that redistribution of water entails, leave tribes with wet water which would foster economic development on the reservations, and resolve, for all time, the water claims. These settlements were designed to minimize detriment to all concerned; a fact that illustrates the central point of Indian water rights settlements; the settlements are as much for the benefit of non-Indian water users as for the tribes.

How well did the original Working Group process work? By most accounts, the Working Group served its purpose. In fact, in some ways the Working Group succeeded too well. By 1990, the Federal Government was having sufficient success in negotiating settlements, that many tribes who had been traditionally skeptical and suspicious that settlements were subterfuge to rob tribes of water, were beginning to believe that the United States was capable of rectifying past mistakes, albeit belatedly and at a slow pace. As a result, request for negotiation teams began to accelerate. While the new trust was positive, it was becoming apparent that the Department had a problem.

Actually, a number of problems. It became obvious that the Department, OMB, and Justice were capable of addressing only a limited number of settlements at any one time. Funding was not keeping up with the increased demand for technical studies and analysis needed for negotiations. Funding was not sufficient to support the participation of the tribes. The Department was having trouble finding experienced chairs for the negotiation teams capable of carrying the increased negotiation schedules. The Administration and the Congress were limited in their ability to analyze an increasing number of simultaneous negotiations. And OMB - as well as the Congress - was getting very uncomfortable with the financial demands that increased settlement costs put on the budget. By 1992, there were discussions regarding how to better manage an increasing number of requests for negotiations.

In 1993, the Clinton Administration arrived. While Secretary Babbitt had served as Governor of the State of Arizona, and an attorney who represented a tribe in a water rights settlement, the Department was slow to

develop a policy and plan for addressing settlement of Indian water rights claims. There is a number of reasons for the slow start.

One of the reasons may not be clearly evident to those who follow Indian policy in the Federal Government. Unlike past Secretaries, Secretary Babbitt took a new and different approach to the roles of the Department's Assistant Secretaries. While the Assistant Secretaries have traditionally been the translators of Administration policy to the Department's agencies, with the Babbitt Administration, that role was given to the Agency heads. The Assistant Secretaries were now charged with special projects that were of paramount importance to the Secretary. So, you have Assistant Secretary Rieke representing the Administration in resolving the Bay-Delta solution, and Assistant Secretary Frampton representing the Secretary in the resolution of the Everglades issues. In the case of Indian water rights, John Duffy, Counselor to the Secretary, dealt with all policy matters related to Indian water rights. The critical point here is that each functional role in the Department was compartmentalized to be administered by these individuals, who were rarely challenged in their roles. Therefore, when John Duffy challenged the reallocation of water contracted to the City of Kingman in order to reserve water for Arizona Indian water negotiations, the confusion between the larger policy issues on the lower Colorado River became exacerbated through ignorance and the lack of a structure to resolve conflicting policies. The conflicts that ensued with the larger policy questions regarding the Secretary's role as water master for the Colorado River quickly overshadowed the need for water for tribes in Arizona. As a result, the Secretary lost an opportunity for water in a notoriously water short area. In other words, the Working Group which could have provided counsel on this issue, has not been of real value because the management philosophy asserted that there was no need to coordinate among the different policy groups in the Department.

Another reason for lack of achievement is the fact that those settlements that were "in the pipeline" during the 80's and 90's had been consummated. It is a long gestating process for a settlement to come to final fruition. During that period, the team, the Departments of Interior and Justice, focus enormous amount of energy on completing a settlement. This approach was a natural result of economizing resources on the highest priority settlements. Until those settlements were completed, other settlements were necessarily put on a slow tract until resources were made available. With the kind of

intensity and energy that accompanied those settlements, it is reasonable to assume that there would be a breather while the Federal Government took stock of its progress, refreshed itself, dormant efforts were energized, and an overall policy assessment was conducted. Therefore, settlements would take a hiatus while negotiations that were on the slow track would ramped up for high intensity effort.

Another reason for lack of settlements in the Clinton Administration is the unspoken policy of spending as few Federal funds as possible in Indian water settlements. While this policy, which has not been expressly articulated, is a defensible fiscal policy, such a policy clearly dampens any progress in Indian negotiations. This is primarily the case because, 1) all non-federal parties believe the United States is duplicitous in the conflict, 2) the tribes believe that the United States, as trustee, has an obligation to provide facilities with the settlements, and 3) without Federal funding, the benefit to non-Indian water users to negotiate is diminished. It is also true that Congress has complained about the cost of negotiated settlements, which is not to say that, all parties do not extol the virtues of negotiated settlements.

The most compelling reason that the Clinton Administration has not found success in the Indian water settlements is the lack of will to make settlements happen. At its most basic level, a negotiated settlement is like making sausage. You don't know what's in it, and you don't want to know how its made. It is not a pretty picture. If the Administration is not dedicated to the concept of negotiated settlements, it can not suffer incongruity and irrational decision making that accompanies participation in negotiated settlements, and particularly Indian water rights settlements. And budgetary policy is part and parcel of the decision to make settlements happen.

So where do negotiated Indian water settlements go from here? It is not clear. The politics of the budget debate have obscured the realities of Federal budget and finance; never mind the fiduciary responsibility to Indians. The institutional knowledge is slipping away; both in the Executive Branch and the Congress. With the arrival of Slade Gorton and the Republicans, though not all, the adversarial character of the Congress has significantly risen. Finally, the politics and the tension of water in the West is steadily rising. While the availability and viability of water for growth, commerce, and the environment in the West is debatable, there is no debate

about the amount of conflict that will be created as those issues are resolved.

In one overriding respect, the Federal Government is the entity most responsible for the conflicts involving water between Indians and non-Indians in the West. The Federal Government in the late 19th century was the authoritative source for assessing the water needs of Indians, understanding the meaning and intent of the treaties, and possessing the power to prevent the ultimate conflicts which would develop without vigilance by the United States. However, not only did the Federal Government fail to say, "non-Indian water users can't use this water because it is needed for Indian reservations", but the Federal Government created programs - such as the Reclamation program - which usurped Indians ability to put their water to use, or to have the benefits of those waters for other life sustaining purposes. In other words, the Federal Government is responsible. Not because the Federal Government is a welfare agency, not because the Federal Government should redress sins of the past 125 years - although that is not a bad argument - but because the Federal Government has a treaty, contractual, fiduciary, trustee obligation which it has yet to fulfill.

So what does the Clinton Administration do for the future? First and foremost, the Administration needs to decide if it wants to pursue negotiated settlements. If not, it should say so, and raise the litigation budgets of BIA and Justice. At the risk of having deja vu all over again, it was increased litigation risk that drove stakeholders to negotiated settlements in the first place. But maybe such understandings as the value of negotiated settlements have to cycle in order to reinforce the need for pursuing them. Otherwise, the Administration should get serious with funding and putting committed, experienced individuals in charge of energizing the effort.

In order to have a credible Indian water rights trust asset protection effort, the Administration needs to commit \$25.0 million a year to lay the technical groundwork that is necessary for prosecuting or negotiating the claims cases. While there are other Departmental structures that can work just as well, until something is decided, the Department should reestablish the Working Group on Indian Water Settlements as the Departmental partnership and team that it was designed to be. Further, the Assistant Secretaries of the Department of the Interior should be consulted as major policy counselors.

What does the Congress do for the future? Acknowledge its sacred promises to Indian peoples. John McCain has

done so. Daniel Inhoye has done so. I presume Ben Nighthorse Campbell has done so. In his heyday as Secretary, James Watt made one of his predictably inane statements which betrayed a decided lack of understanding for what he was charged with managing. He stated that Indian policies were illustrations of the United States' failure at socialism. He could not see that historical Indian policies were and are illustrations of the United States' failure at being consistent and moral in its dealings with other human beings, and living up to contractual obligations. Indians want self-determination; they want the respect in self-government granted their ancestors. How is that different from other Americans?

Not much, except in one overarching respect. If Indian peoples are to retain their culture without paying the enormous price exacted over the last 150 to 200 years, the Federal Government - ultimately Congress - has to live up to its promises. Something in short supply in recent years.<sup>4</sup>

(The opinions expressed herein are solely those of Mr. Kenney, and are his responsibility. No statements contained herein are meant to be official representations of the policy or positions of the Bureau of Reclamation, the Department of the Interior, or the United States Government.)

#### **ENDNOTES**

1, *The People*, Stephan Trimble

2. *The Great Father, The United States Government and American Indians*

3. The observation ignores the current discussions ongoing in Colorado concerning the fate of the Animas-La Plata Project. Any change will have to reconcile the benefits of the settlement to the Colorado Utes.

4. There may be those who have read the preceding who believe that I have been overly harsh on the federal government. I agree that, in some instances, Indians have contributed as much to their problems as the failures of the United States to fulfill its fiduciary role. While I do not deny that Indians have had options in their existence, the overwhelming evidence testifies to the overwhelming contribution of the United States to tribal suffering and loss.