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### Federal Facilitation of Water Rights Negotiations in the West

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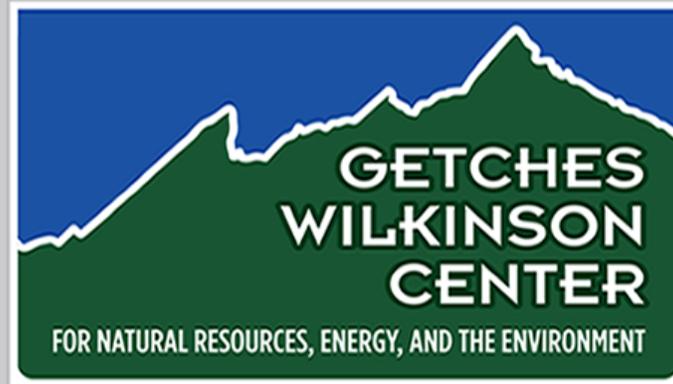
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**FEDERAL FACILITATION OF WATER RIGHTS  
NEGOTIATIONS IN THE WEST**

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Strategies in Western Water Law and Policy:  
Courts, Coercion and Collaboration  
June 8–11, 1999

NATURAL RESOURCES LAW CENTER  
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# FEDERAL FACILITATION OF WATER RIGHTS NEGOTIATIONS IN THE WEST

By Mike Connor<sup>1</sup>

## I. OPENING REMARKS

Thank you for the opportunity to speak here today. It is an honor to be able to fill-in for Deputy Secretary David Hayes and certainly an honor to speak at this Conference under any circumstances.

My topic today is Federal facilitation of water rights negotiations in the West. This is an area of tremendous activity for the Department of the Interior. Fortunately, the investment of time and effort is paying off, resulting in some exciting opportunities developing in several ongoing negotiations which I'll share with you today. In particular, I'll focus on those negotiations involving Indian water right claims, since that's what I'm primarily involved with in the Secretary's Indian Water Rights Office.

## II. NEGOTIATION PROCESS & THE SEVEN STAGES OF GRIEF

Before describing some of the specifics associated with the Federal role in Indian Water Right negotiations, I'd like to make a few personal observations about the negotiation process--actually the pre-negotiation process. Unfortunately, unlike life in general, 90% of a successful negotiation is more than just showing up. A number of factors must come together and the timing has to be just right for the Parties before negotiations are "ripe."

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<sup>1</sup> The remarks presented here are the speaker's only. They do not necessarily represent any official position of the Department of the Interior.

In my own experience, the process leading to serious negotiations is similar in a lot of circumstances and can be analogized to--of all things--the seven stages of grief. I say that a little tongue in cheek but also with some level of seriousness. Indian water right claims are a threat to existing water uses and the issues are contentious and emotional too. Thus, at least in my own mind--the analogy is not so far-fetched.

So let me identify the seven stages, at least the ones I'm familiar with, and provide some examples of what I'm talking about. These seven are (1) Shock; (2) Denial; (3) Anger; (4) Manipulation; (5) Sadness; (6) Adjustment; and (7) Acceptance or Resolution.

(1) SHOCK - We're in an era where most of the "shock" of Indian water right claims has already taken place. It probably begin in 1908 with the Winters doctrine but really set in with the Arizona v. California decision in 1963 which established PIA as the standard for quantifying Indian water rights (IWR). Local shock usually sets in with the initiation of an adjudication of the local watershed and the filing of IWR claims as part of that adjudication. I should make note, however, of some "new" shock that still occurs to individual water users in most adjudications. That shock occurs due to the role of the federal government in asserting IWR claims and the obligation to be an aggressive advocate of those claims pursuant to the United States' trust responsibility to Indian Tribes.

(2) DENIAL - Notwithstanding Winters & its progeny, there is soon the recognition that the adjudication is not going anywhere fast. Typically, there is several years of litigation over procedure before anything happens. In short, it becomes apparent that the status quo will continue for some time.

(3) ANGER - Sooner or later, though, something triggers a recognition that Tribal water right claims are still a threat and that the Tribes, and the United States as trustee, will continue to pursue and protect those claims. Sometimes that something is outside the adjudication.

-- For example, during the course of the ongoing adjudication of the Rio Pueblo de Taos

in New Mexico, a number of change of use applications were being filed with the State Engineer. The Pueblo of Taos and the Bureau of Indian Affairs felt compelled to participate as objectors in the State administrative proceedings in order to protect the Pueblo's water rights. The result was that the Town of Taos was unable to transfer water rights it needed for municipal purposes.

-- A similar circumstance occurred in Montana where the Confederated Salish & Kootenai Tribes of the Flathead Indian Reservation protected their water rights claims by effectively participating in the State administrative process to preclude the issuance of new water right permits to non-Indians within the reservation. This was litigated to the Montana Supreme Court and is known as the Ciotti case (1996).

-- Sometimes the adjudication itself triggers the Anger Stage. In the Little Colorado River adjudication in Arizona, the court in the early 1990s tried to jump-start the proceedings in earnest by attempting to adjudicate the rights within one small watershed of the entire basin (Silver Creek). Approximately 1800 claims were filed in this one watershed and in response, over 3500 objections were filed--most by the 4 Tribes who are parties to the litigation and the United States on their behalf.

(4) MANIPULATION - Rather than deal with the existing situation, there may be attempts to change the playing field. The US and Tribes have tried this in their unsuccessful attempts to limit the scope of the McCarran amendment. States and state parties have tried similar strategies. For example:

-- In Arizona, the legislature enacted a comprehensive revision of the Arizona adjudication statute. Most of the changes were favorable to state water right holders and unfavorable to IWR claims. The constitutionality of the amendments were challenged and the Arizona Supreme Court recently ruled in favor of the Tribes.

-- In Montana, after the Ciotti case, the legislature amended the state code & specifically overturned Ciotti. The Tribes challenged and I believe that case was argued before the

Montana Supreme Court in January of this year. Stay Tuned.

-- Finally, there is concern among Tribes that State attempts (either statutory or otherwise) to engage in watershed or regional planning are really calculated to quantify and limit IWRs outside the lengthy and expensive adjudication process. Washington & New Mexico are examples of States where this approach is moving forward.

(5) SADNESS - This is the stage where my analogy might fail, at least chronologically. I agree there's another stage here but I wouldn't characterize it so much as sadness but instead, Anger Phase II. Obviously, things haven't gone the way some parties had hoped. Additionally, there may have been more litigation (e.g. motions for summary judgment) and the rhetoric may be flying back in forth in the form of legal briefs. There may even have been initial attempts to engage in settlement negotiations but they're likely more posturing than productive.

(6) ADJUSTMENT - At long last the tide starts to turn & the value of settlement begins to become apparent. This could be for any number of reasons for this: (1) Litigation may have simply become too burdensome; (2) all the parties may feel some level of risk due to the litigation; (3) the engineers, hydrologists, and biologists may have had time to do their work and have identified potential solutions that everyone can live with.; or perhaps more simply (4) a large federally-financed solution (as was the case in a number of earlier settlements) appears possible.

In any event, serious negotiations begin to take place.

(7) ACCEPTANCE or RESOLUTION - The structure of a solution has been put together and the 2 stages of Anger are long past. The dynamics have changed entirely and the parties, at least in some cases, advocate for each other to some extent. In a lot of situations, the only perceived impediment to a settlement is the Federal government. This is likely true. Settlements are getting very complex these days and are now scrutinized by all levels of government. The settlements no longer involve just the Departments of the Interior and Justice and the local Congressional delegation but now also include OMB, EPA, CEQ, as well as fiscal conservatives and environmental advocates on Capital Hill.

Notwithstanding the complexity, once the Parties come together, momentum builds, and settlement prospects become very real.

With that, I'll turn to some specifics regarding the Federal role in Indian Water Rights Negotiations. Notwithstanding some level of involvement in the process I just described, it is really once the process unfolds that federal participation becomes crucial and an absolute necessity.

### **III. FEDERAL ROLE**

The federal role is premised on the strong belief that settlement rather than litigation is the best resolution of IWR claims--if not from a quantification standpoint (obviously some compromise will occur) at least from an administration & utilization standpoint. Typically, settlements resolve practical issues which remain unresolved in litigation. In addition, resources are usually made available which facilitate the use of water by settling Tribes. Even in the adjudications which appear successful, such as those involving the Wind River and Yakama Reservations, the Tribes and US are sometimes left wondering what exactly they've established through litigation. Any vagueness in the decrees will likely result in future challenges as the Tribes attempt to allocate water in satisfaction of Tribal goals--goals not necessarily in accord with traditional western water law.

As noted, though, the timing has to be right for settlements to come together. Accordingly there exists a need for an ongoing program to allow the federal government to assist in the settlement effort and to monitor it for such time as federal buy-in is necessary.

Since 1990, with the establishment of *Criteria & Procedures for Participation of the Federal Government in Negotiations for Settlement of Indian Water Rights Claims*. 55 Fed. Reg. 9233 (1990), the Department has relied primarily on the establishment of federal negotiating teams (primarily at the local level) to carry-out the government's role in IWR settlements. At present, there are 18 negotiation teams established by the Department. There are also several teams which are responsible for the implementation of existing settlements.

The stated goals of the federal government in IWR settlements are to:

1. Enable the US to participate in negotiations consistent with its trust responsibility;
2. Ensure that Tribes and allottees receive equivalent benefits for rights which they, and the US as trustee, release in settlement;
3. Ensure that Tribes and allottees obtain the ability to realize value from a settlement which confirms Indian water rights; and
4. Ensure that the settlement contains appropriate cost-sharing by all parties benefiting from the settlement.

The *Criteria & Procedures* also define the teams responsibilities which are primarily to (1) engage in fact-finding; and to (2) assess & make recommendations regarding the positions of all the parties and potential negotiating positions for the US. The *Criteria and Procedures* also identify the general standards for settlements such as the need for finality, how to determine an appropriate level of federal contribution; types of federal contribution which are specifically discouraged, and the process for coordinating with both DOJ and OMB.

The teams report to the Working Group on Indian Water Settlements which is chaired by the

Deputy Secretary of the Interior & includes all of the Assistant Secretaries (5) and the Solicitor. The Working Group is responsible for making recommendations to the Secretary of the Interior on negotiation positions and approval of settlements.

The primary support for the working group is the Secretary's Indian Water Rights Office (SIWRO) which consists of four attorneys, one policy analyst, and administrative support staff. The attorneys serve as liaisons to the negotiation teams in the field which means they give policy direction; enable the government to take a more proactive role at appropriate times during the settlement process, and coordinate funding needs with the BIA & BOR. In sum, the SIWRO serves to connect the DC policy- makers with the teams.

#### **IV. CURRENT ACTIVITIES**

At the start of the 2nd Term of the Administration, there was obvious concern that no new Indian right settlements had been enacted. This situation was due to several reasons, including:

- dwindling water supplies &
- budget restrictions

In response, a number of consultations with Tribes & others were initiated beginning in 1996 to discuss these problems. Most everyone was tough on the government's role & it was made clear that unless there was progress--regardless of the reasons or excuses--history would be a harsh judge of the Administration's role in protecting & facilitating the use of IWRs during this era.

The Secretary responded by reaffirming the special role played by the Secretary's Office in water rights settlement activities (that being coordinating the resources of all the relevant agencies) & assigning liaisons from the Secretary's Office for each team to establish a direct link between the teams and the Washington-based policy makers. This was a direct response to some of the criticism heard during the consultations. The Secretary also hired David Hayes as his Counselor

on Indian water rights issues and with the support of the SIWRO, they elevated these issues within the Administration and garnered support for their resolution.

As a result, since the start of the 2nd term, there has been a significant amount of activity and accomplishments in the area of Indian Water Rights: e.g.

A. In Nov. 1997, Secretary Babbitt & Governor Kitzhauber signed a Final Settlement Agreement on the water rights of the Confederated Tribes of Warm Springs Reservation in Oregon.

B. In Oct. 1997, the U.S., the State of Montana, and the Chippewa Cree Tribe of the Rocky Boys reservation reached an agreement-in-principle on the Tribe's water rights. That settlement has been pending in Congress since that time and the Administration is optimistic that this settlement will be enacted this year [Hearings have been scheduled for this summer in both the House & Senate].

C. In April 1998 and February 1999, the U.S. and Jicarilla Apache Tribe secured final decrees of the Tribe's water rights in 2 separate adjudications (Rio Chama and San Juan River) in New Mexico, thereby achieving final implementation of the Jicarilla Apache Water Rights Settlement Act of 1992.

D. On March 31, the Secretary and various state parties in Arizona signed a final agreement to fully implement the San Carlos Apache Tribe Water Rights Settlement Act of 1992.

**\*\* Implementation Activity Related to Existing “Settlements” has been a major focus of the United States efforts during this Administration \*\***

In addition, the Department has a number of ongoing initiatives some of which we are optimistic will result in settlements before the Secretary leaves office:

A. *Gila River Indian Community/Central Arizona Project Settlement* -- This is a huge settlement which would settle the Gila's claims to over 1.2 Maf of water in central Arizona. This is actually 4 settlements: (1) Gila River Indian Community's claims; (2) Allocation of CAP water between state and federal parties; (3) financial issues between the US and the CAWCD; & just for good measure -- (4) settlement of the issues remaining from the Southern Arizona Water Rights Settlement Act (SAWRSA) involving the Tohono O'odham Nation. We may also be able to settle water rights issues on the upper Gila river system (Globe Equity) which involve the Gila River Indian Community & the San Carlos Apache Tribe. And if that's not enough, this settlement will set the stage for additional IWR settlements in Arizona due to the resolution of CAP water allocation issues.

B. Last August, after some contentious hearings on Capital Hill regarding proposed legislation known as ALP-Lite, the Administration unveiled a proposal to achieve full implementation of the Colorado Ute Water Rights Settlement Act -- a proposal which would also resolve the issues associated with the controversial Animas LaPlata Project. We have initiated NEPA compliance on the Administration proposal and are moving forward in an effort to resolve this matter once and for all.

C. Lummi Tribe Water Rights Settlement in the State of Washington -- (groundwater issues primarily) Counselor to the Secretary Bob Anderson is very optimistic that this settlement is achievable during this Administration.

D. Shivwits Band of Paiute Indians - Small settlement which has just recently produced some

very workable proposals for settlement & one in which the Utah Congressional delegation is very interested in.

E. Other Settlements in which progress substantial progress is still being made: Little Colorado River adjudication in Arizona (Navajo, Hopi, & Zuni Pueblo); Taos Pueblo water rights claims; and the Soboba Band of Mission Indians in Southern California; and just recently, the claims of the Walker River Paiute Tribe in Nevada.

Of course, as I referenced earlier, even once the parties reach agreement, a full and final settlement is not assured (e.g. Rocky Boys). In this era, it is absolutely critical that the Tribes, non-Indian parties, State, and Federal government all work together to achieve final enactment of the settlement. Only then will the results negotiated for by the stakeholders--the exact process by which these matters should be resolved--be secured and implemented for the benefit of all.