

MEMORANDUM

TO: Henry Bierlink, Whatcom Ag Water Board
CC: Bill Clarke
FROM: Ramsey Kropf
SUBJECT: Considerations for Beginning Dialog to Negotiate Indian Water Rights Settlements in the Nooksack Basin, Washington
DATE: July 18, 2022

I. Overview of Indian Water Rights Settlements.

There are multiple benefits for negotiated outcomes in basins with unadjudicated tribal federal reserved rights. A federal Indian water rights settlement process can include broad natural resource objectives; unlike a state adjudication. Indian water settlements can address solutions for habitat, storage, groundwater management, and other land and water management concepts that can benefit many parties. A Court's authority is very specific/narrow, limited to quantifying water rights. Indian water rights settlements are the most frequent vehicle to resolve adjudications where tribal claims are litigated.

The list below explains some benefits that occur when states and local parties, along with federal and Tribal users focus on achieving an Indian water rights settlement.

- A. Since the 1980, Tribes, states and the federal government have used negotiated settlements in efforts to resolve Indian water rights claims. "Negotiation can fill gaps in the litigation with specific factual determinations or can take over once the parties are convened by a state's adjudication process."¹ Indian water rights settlements can occur in a manner that is least disruptive to existing water uses, while achieving Tribal water goals.

¹ Colby, Bonnie G., Thorson, John E., Britton, Sarah, Negotiating Tribal Water Rights, Fulfilling Promises in the Arid West, at xvi (Univ. Arizona Press, 2005).

- B. An Indian water rights settlement agreement will quantify and recognize federal and tribal reserved water rights. Adjudications routinely implement the agreed upon determinations into final judgments and decrees, and then can bind entire basins.
- C. Importantly, Indian water rights settlements also allow for significant federal funding to implement water projects and plans that increase the basin's ability to fully use limited water supplies, while providing certainty to and protecting non-federal state-based water uses.
- D. Adjudication courts routinely stay adjudication proceedings entirely to allow for settlement efforts, or to implement settlement agreement steps. Often, Indian water rights settlement agreements recognize tribal water rights and priority dates, and there is agreement to not enforce some or all of the senior tribal rights in exchange for other benefits in the settlement.
- E. In an era of climate change and extreme weather fluctuations, a legislated Indian water rights settlement can implement "an ongoing process of decision-making, based on water measurement and accounting designed to continuously manage and improve the allocation of water"² Allocations can be made to water use rights, instream flows, minimum reservoir pool elevations, and other creative areas pursuant to adaptive management principles by agreement. This adaptability is in stark contrast to the results of an adjudication.
- F. Benefits of settlement outweigh costs and acrimony of lengthy adjudications and litigation.
- G. The United States policy since at least 1990 has been to negotiate and settle Indian water rights claims, rather than litigate.³ This policy is relatively constant throughout different political administrations.

² The Montana Department of Natural Resources & Conservation, The CSKT Water Compact has been enacted (Apr. 4, 2022), <https://storymaps.arcgis.com/stories/4faba73d1eca46678cf091f2636329ec> (last visited July 12, 2022); and Mont. Code Ann ¶85-20-1902 (2021), https://leg.mt.gov/bills/mca/title_0850/chapter_0200/part_0190/section_0020/0850-0200-0190-0020.html.

³ Department of the Interior Working Group in Indian Water Settlements; 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) <https://www.doi.gov/sites/doi.gov/files/criteria-and-procedures-for-the-participation-of-the-federal-government-in-negotiations-for-the-settlement-of-indian-water-rights-claims.pdf>.

- H. The Western States Water Council has adopted and reaffirmed resolutions to prefer negotiated settlement proceedings to determine Indian water rights. Washington is a member of the Western States Water Council.⁴
- I. All Indian water rights settlements are unique, hydrologically, culturally, locally. This creates the potential to use the federal settlement process to address specific local conditions and challenges, including natural resource objectives broader than the narrow focus of the Court's role to establish the priority date and valid quantity of every water right. While court adjudications can quantify water rights, they are limited in scope and so a federal settlement process could address broader locally-shared objectives. For example, in Wyoming's Big Horn River adjudication, a decree for approximately 50 percent of the Big Horn River granted water to the Eastern Shoshone and Northern Arapaho Tribes. However, there has not been money or agreements to work toward instream flow concepts, update infrastructure for irrigation and conservation, or for other innovative water sharing concepts.
- J. The main context for resolving Indian water rights refers to the *Winters* doctrine, which looks to existing federal Indian land reservations.⁵ In addition, fishing rights have been looked at through the lens of the historic *Winans* case,⁶ which determined tribal claims for water based on treaties identifying hunting and fishing rights. While these legal doctrines guide litigation over water rights, they can be building blocks for settlements.
- K. The list of 34 enacted Indian water rights settlements can be found on the Department of Interior's website.⁷

II. Examples of Negotiated Indian Water Rights Settlements.

The following examples illustrate where Indian water rights settlements were negotiated and successfully passed by Congress. These settlements outline three scenarios where, by agreement of the parties, settlement efforts occurred (A) before adjudication proceedings began (Idaho example), (B) within a year of filing an adjudication (Oklahoma example), and (C) entirely instead of an adjudication (Montana example). Each successfully resolved water matters for all the parties without acrimony, time and expense of filing claims and staking out legal positions.

⁴ See Western State Water Council's Resolution Position #454, originally adopted in 2003, <https://westernstateswater.org/resolutions/2020/position454/>.

⁵ *Winters v. United States*, 207 U.S. 564 (1908).

⁶ *United States v. Winans*, 198 U.S. 371 (1905).

⁷ U.S. Department of the Interior, Secretary's Indian Water Rights Office, *Enacted Indian Water Rights Settlements*, <https://www.doi.gov/siwro/enacted-indian-water-rights-settlements>.

A. Shoshone-Bannock Tribes of the Fort Hall Indian Reservation, Idaho.

1. The adjudication began for the Shoshone-Bannock Tribes on November 19, 1987.⁸
2. The 1990 Fort Hall Indian Water Rights Agreement was submitted to the Court in lieu of a claim as provided by Idaho Code Section 42.1409 (6) (1990), and was signed into law on November 16, 1990 by President George H. Bush
3. The settlement involved five years of “intense, good-faith”⁹ negotiation among the parties with competing claims to the waters of the Upper Snake River Basin in Idaho.
4. The State of Idaho reviewed adjudications in Wyoming, Colorado and Montana before commencing its Snake River Basin Adjudication. Coordination between the Tribes and the State resulted in a joint agreement to find a negotiated settlement that protected existing state water users and ensured the Tribes a wet water supply. This negotiation began *before the initiation of the Snake River basin general stream adjudication*. The parties sought to have an open process, and to use existing water resources to the extent possible. The settlement was based on a consensus building process.
5. Testimony of the Shoshone-Bannock Tribe before Congress stated: “During the five years of intense negotiations, the parties developed a mutual trust and common understanding the respective concerns and constraints that had to be squarely addressed to achieve a workable compromise.”¹⁰ In addition, the outcome of the negotiations addressed the

⁸ Idaho Snake River Basin Adjudication. <https://idwr.idaho.gov/water-rights/adjudication/srba/documents/>

⁹ John Woolley, Gerhard Peters, *George Bush, Statement on Signing the Fort Hall Indian Water Rights Act of 1990*, The American Presidency Project (Nov. 16, 1990), Online at <https://www.presidency.ucsb.edu/documents/statement-signing-the-fort-hall-indian-water-rights-act-1990> (last visited July 12, 2022).

¹⁰ See written testimony of Shoshone and Bannock Tribe, United States. Congress. Senate. Committee on Energy and Natural Resources. Subcommittee on Water and Power., United States. Congress. Senate. Select Committee on Indian Affairs. (1991). *Fort Hall Indian Water Rights Act of 1990: joint hearing before the Subcommittee on Water and Power of the Committee on Energy and Natural Resources, and the Select Committee on Indian Affairs, United States Senate, One Hundred First Congress, second session on S. 2870 ... September 13, 1990*. Washington: U.S. G.P.O.: for sale by the Supt. of Docs., Congressional Sales Office, U.S. G.P.O., pp. 44-50, <https://babel.hathitrust.org/cgi/pt?id=pst.000017582315&view=1up&seq=49&skin=2021> (last visited July 12, 2022).

Tribes concerns; “As a result, the Agreement is a balanced compromise which recognizes and respects the authorities of the separate sovereigns, the responsibilities [which accompany the exercise of such sovereign powers, and the hydrologic and economic inter-relationships of water user[s] within the Snake River Basin.”¹¹

6. The State’s Deputy Attorney General, and Chief, Natural Resources Division, Clive Strong provided congressional testimony as follows: “[A]s we have gone forward in this process, it has been a consensus building process and we will continue to use that process, because it is only through consensus that we can effectively reach an agreement that will work to the benefit of all parties.”¹²
7. The State of Idaho also described the settlement as a way to protect existing state water uses. “If the Tribal water rights had been quantified through litigation, existing water uses might have been displaced. The parties recognized that displacement of these existing uses would be detrimental to everyone; thus, the parties adopted at the outset of the negotiation a mutual goal of fashioning an Agreement that would protect all existing uses while providing the Tribes with a wet water supply.”¹³ “Another key ingredient to the settlement was the willingness of the parties to accept the reality that development of a new water supply to satisfy the Tribal water needs was not a viable option under current conditions. Instead, the parties examined existing resources and uses and then began the process of crafting an agreement that would fit these pieces together.”¹⁴

B. Oklahoma:

A more recent example of an Indian water rights settlement comes from Oklahoma. Litigation over tribal water rights claims in Oklahoma began formally began in 2011, with litigation filed in federal court by two tribal nations, the Choctaw Nation of Oklahoma and the Chickasaw Nation, against the State of Oklahoma and City of Oklahoma City. The Tribes claimed regulatory control and ownership of all water in 22 counties in southeastern Oklahoma. The Kiamichi River was the main water resource in the disputed area. Oklahoma City’s request

¹¹ *Id.*

¹² See oral and written testimony of Clive Strong, *id.*, at 39, <https://babel.hathitrust.org/cgi/pt?id=pst.000017582315&view=1up&seq=40>

¹³ *Id.*, at p. 40.

¹⁴ *Id.*

for a water transfer from the Kiamichi River basin to transport water to the City precipitated the Tribes' actions.

In response, and after the Tribes refused initial attempts at settlement, the State filed a second law suit. Oklahoma's first general stream adjudication was filed in the Oklahoma Supreme Court in February 2012. The United States then removed the case to federal district court, to be heard by the same judge presiding over the Tribal litigation. Litigation in federal and state court consumed the parties' resources for about one year. By the end of 2012, the State, Tribes and City began negotiations and the case was stayed. The negotiations began *before* any individual claims in the adjudication were filed at all (though Oklahoma City had previously filed a permit application with the state agency). The federal government entered the negotiations after the first three years of mediation between the State, Tribes, and City.

In August 2016, within five years of beginning negotiations, the State of Oklahoma, City of Oklahoma City, the Choctaw Nation of Oklahoma, and the Chickasaw Nation reached a water settlement agreement. The parties harnessed a unique political landscape and secured congressional approval within four months of executing the settlement agreement in the Water Infrastructure Improvements for the Nation Act (WIIN Act).¹⁵ After Congress enacted the settlement, the State conducted a process to work through Oklahoma City's permit application in the State's administrative process, but no other court adjudication efforts were undertaken (nor were they necessary). By reaching the settlement, the parties avoided decades of litigation and expenses associated with a formal adjudication and ensured greater certainty regarding water management in southeast Oklahoma. The settlement resolved long-standing questions and multiple court actions over water rights ownership and regulatory authority over the Nations' historic treaty areas while simultaneously preserving and protecting existing water right uses.

The settlement provides the Nations with a meaningful and active role in water management decisions and the ability to appoint members to a commission and technical committee that will determine water allocation and distribution. This was a priority for the Nations, according to Chickasaw Governor Bill Anoatubby, who stated: "As we move into the future, our nations . . . will have a meaningful and active voice in the management of water resources . . . We wished for that, and now we have it."¹⁶ The settlement also incorporates a funding scheme that prioritizes improving water infrastructure on the Nations' lands.

¹⁵ P.L. 114-322, §3608, 130 Stat. 1796 (2016).

¹⁶ Joe Wertz, Logan Layden, *Inside the Landmark State and Tribal Agreement That Ends Standoff Over Water in Southeast Oklahoma*, STATE IMPACT OKLAHOMA (August 12, 2016, 12:11 PM),

As a result of the settlement, the State of Oklahoma retained primary authority over water regulation, something the Nations had objected to in the initial litigation, and Oklahoma City secured an easement for water conveyance across the Nations' lands. All parties to the settlement agreed to contribute significant sums of money to conservation efforts to support critical recreation, fish, and wildlife uses.

C. Montana:

In 2020, Congress approved a water rights settlement between the Confederated Salish and Kootenai Tribes ("CSKT") and the State of Montana. Montana takes a unique approach to resolving tribal water rights claims. In 1979, the State codified the *Winters* doctrine as state law and established the Reserved Water Rights Compact Commission to negotiate tribal water settlements. The Reserved Water Rights Compact Commission (RWRCC) implemented Montana's policy to systematically negotiate Indian Tribes' federal reserved water rights rather than litigate. "Recognizing many federal reserves have very senior priority dates, in negotiations, the RWRCC through various methods focused on protecting water rights under state law to the maximum extent possible."¹⁷ The negotiations for CSKT resulted in a state and Tribal compact in 2015. The 2020 legislation accepted the compact, and quantified the Tribes' water rights for all time. In doing so, Congress contributed nearly \$2 billion in federal funding to improve water infrastructure and support conservation efforts in the CSKT water basins. The congressional settlement approval also, provided certainty for all Montana water users. Other benefits of this very recent settlement which could be instructive in the Nooksack Basin include:

1. A process to measure and allocate water, and to provide within-year adjustments in response to climatic and hydrologic conditions;
2. Protection of valid existing water uses decreed or permitted in State court;
3. Recognized existing Tribal uses, including cultural and religious uses;
4. Establishment of a joint State/Tribal board to administer reservation water use under reservation-specific law;

<https://stateimpact.npr.org/oklahoma/2016/08/12/inside-the-landmark-state-and-tribal-agreement-that-ends-standoff-over-water-in-southeast-oklahoma/> (last visited July 12, 2022).

¹⁷ <http://dnrc.mt.gov/divisions/water/water-compact-implementation-program#:~:text=The%201979%20Montana%20Legislature%20established,reserved%20water%20rights%20within%20Montana.>

5. A negotiated application of priority administration to protect Tribal water rights and existing users;
6. Provisions where water saved by efficient practices is to be split between instream flows and irrigation uses after target instream flows are met;
7. A process to permit new water uses;
8. Recognition of Tribal instream flow rights on and off the reservation;
9. Resolution of over 10,000 water rights claims across the State that would have otherwise been litigated;
10. Importantly, the inclusion of water leasing provisions to provide Tribes with multiple avenues to develop their water resources and to make additional water available to off-reservation users;
11. The settlement includes a schedule for the implementation of operational improvements and rehabilitation and betterment projects, and a process to incrementally increase instream flows as these projects are implemented;¹⁸ and
12. State law which allows for certain previously unrecorded State-based water uses on the reservation to be registered with the State.

According to a spokesperson for CSKT, a negotiated settlement route was chosen because “some tribes have gone the court route, and those tribes are still in court” for much smaller claims.¹⁹ An attorney for the Tribes commented that this settlement “really epitomizes the creativity that can be involved in a negotiated settlement as opposed to a decision by a court.”²⁰

¹⁸ The Montana Department of Natural Resources & Conservation, Water Rights Compacts, <https://mtdnrc.maps.arcgis.com/apps/MapJournal/index.html?appid=63c5e165d5e34681a3cc3b7a615ab442> (last visited July 12, 2022); and Mont. Code Ann § 85-20-1901(2021), https://leg.mt.gov/bills/mca/title_0850/chapter_0200/part_0190/section_0010/0850-0200-0190-0010.html.

¹⁹ Chez Oxendine, *Confederated Salish and Kootenai Tribes secure ‘remarkable’ \$1.9 billion water rights settlement*, TRIBAL BUSINESS NEWS (January 14, 2021), <https://tribalbusinessnews.com/sections/sovereignty/13321-confederated-salish-and-kootenai-tribes-secure-remarkable-1-9-billion-water-rights-settlement> (last visited July 12, 2022).

²⁰ Mark Armao, *A Montana Tribe Finalizes a Historic \$1.9 Billion Settlement*, MOTHER JONES, (Sept. 29, 2021), <https://www.motherjones.com/environment/2021/09/montana-confederated-salish-kootenai-tribe-historic-water-rights-settlement/> (last visited July 12, 2022).

In May 2015, during a hearing before the U.S. Senate’s Committee on Indian Affairs, a Montana attorney responsible for representing the State in Indian water settlement negotiations explained that there are “two ways to resolve Indian water rights claims: litigation or negotiation,” and “litigation is costly, divisive, zero-sum, and protracted.”²¹ He further explained that, oftentimes, “there are historical grievances, and significant legacies of mistrust between tribes and states, and between tribes and their non-Indian neighbors, that must be overcome.”²² As a result, “litigation often serves to deepen these divisions, while a successful settlement can help heal them—by reducing the potential for actual conflict over water resources and allowing for a more collaborative future, and by improving lines of communication and fostering a climate of better mutual understanding.”²³ A major benefit of negotiated settlements to a state and its non-Indian water users is that the parties reach “quantification agreements in a way that protects all of [the] individual, state-based water users,” which “spares all those individual water users from needing to lawyer up [and] from engaging in a relationship of conflict with a tribe.”²⁴

During the hearing, the Montana attorney also pointed out that, in settlement negotiations, “the parties’ technical resources can be deployed to better practical effect.”²⁵ Parties frequently share resources to achieve a single technical approach, versus each party creating competing technical approaches. Indeed, an attorney with the Native American Rights Fund noted during the hearing that “complex water rights litigation has cost tribes millions of dollars in technical and legal costs . . . with no apparent end in sight.”²⁶

During the Congressional hearing, Vernon Finley, Chairman of the CSKT of the Flathead Reservation Tribal Council, asserted that “Indian water settlements save the American taxpayer the cost of uncertainty of expensive, protracted, and complex litigation” and “allow the parties to obtain benefits that cannot be achieved through litigation.”²⁷ He also pointed out that the settlement “provides for shared shortages of water in dry years, rather than simply requiring all water

²¹ United States. Congress. Senate. Committee on Indian Affairs, *ADDRESSING THE NEEDS OF NATIVE COMMUNITIES THROUGH INDIAN WATER RIGHTS SETTLEMENTS*, Hearing before the Committee on Indian Affairs, United States Senate, One Hundred Fourteenth Congress, first session on S. 114-62 (May 20, 2015) Washington: U.S. G.P.O., pp. 44-50, <https://www.govinfo.gov/content/pkg/CHRG-114shrg96066/html/CHRG-114shrg96066.htm>, (last visited July 12, 2022).

²² *Id.* at 29.

²³ *Id.* at 29.

²⁴ *Id.* at 53.

²⁵ *Id.* at 30.

²⁶ *Id.* at 36.

²⁷ *Id.* at 59.

to go to the senior water rights holder.” This provision was a significant concession made by the CSKT.²⁸

After Congress passed legislation to authorize the State/Tribal compact, CSKT Chair Shelly Fryant said the agreement to divvy up water will allow the tribe to "rehabilitate and modernize the Flathead Indian Irrigation Project and restore damages to fish and wildlife habitat caused by the project, while simultaneously protecting farmers and ranchers who depend on irrigation for their livelihoods." The project's scope includes 15 dams and reservoirs and 1,300 miles of canals. She added that implementation of the settlement "will create thousands of good-paying jobs and help boost our regional economy."²⁹ Fryant went on to state "This means we can avoid decades of acrimonious litigation on streams across much of Montana and protect many streams with sufficient amounts of water to ensure fish can survive and Montana's residents can recreate and fish as they have for generations."

III. Conclusion.

A parallel path for any adjudication in the Western United States can be to prefer and pursue an Indian water rights settlement, which implements state and federal policies. Such a negotiation path can leverage the certainty of a court adjudication, and provide federal funding to implement creative and responsive programs to “increase the pie” rather than fight over water resources. Further, the settlement process can include issues beyond the limited scope of quantifying water rights through litigation. Water supply infrastructure, habitat restoration, multi-benefit water storage, and land and water resource management strategies necessary to adapt to climate change impact could all be on the table in a federal settlement process. Where parties focus primarily on achieving a settlement, then settlements have historically provided benefits to all parties, and happen much faster and more efficiently than waiting for years of adjudication activities.

²⁸ *Id.* at 60.

²⁹ Kylie Mohr, The House Committee on Natural Resources, *Omnibus Includes Historic Water Rights Settlement*, (Dec. 23, 2020), <https://naturalresources.house.gov/media/in-the-news/omnibus-includes-historic-water-rights-settlement>.