



Summer 1993

## Settlement of Indian Reserved Water Rights Claims

Michael J. Clinton

### Recommended Citation

Michael J. Clinton, *Settlement of Indian Reserved Water Rights Claims*, 33 Nat. Resources J. 665 (1993).  
Available at: <https://digitalrepository.unm.edu/nrj/vol33/iss3/5>

This Article is brought to you for free and open access by the Law Journals at UNM Digital Repository. It has been accepted for inclusion in Natural Resources Journal by an authorized editor of UNM Digital Repository. For more information, please contact [amywinter@unm.edu](mailto:amywinter@unm.edu), [lsloane@salud.unm.edu](mailto:lsloane@salud.unm.edu), [sarahrk@unm.edu](mailto:sarahrk@unm.edu).

**MICHAEL J. CLINTON\***

## **Settlement of Indian Reserved Water Rights Claims**

This family, gathered here this morning, has really evolved, grown, and matured over time. One of the things I find in Indian country is the oral tradition of Indian peoples and how they pass stories on from one year to another, one generation to another. I was an Irish kid; my mother was an Irish storyteller. I grew up with some of that same tradition. I am going to try to weave what we have seen and heard in the last few days into a fabric of a story that will show how you, as a family, are interacting to make the negotiated water right settlement program function. I am going to weave this fabric in three stages: (1) a short history on what happened before this symposium; (2) an encapsulation of what we have heard in the last two days; and (3) the challenges this family faces.

In this family, your children are the settlements that are being developed. Settlements have already brought tribal self-sufficiency, tribal economic development, and tribal self-government into reality for some reservations in the western states. That is the promise we are all working on, and those are the children that we, together, are helping to raise.

Let us talk about the history of this family. The idea of negotiated settlements is 30 years old. It came out of the recommendations of the National Water Commission. In the late 1970s, I was there when Ak-Chin I went through. Your first child had a hard time being born. It was rammed through the Congress with the opposition of most of the western states. When it got to President Carter's desk, the Department of the Interior, the Department of Justice, and the Office of Management and Budget all recommended veto. Only because it was an Indian issue and had the possibility of tribal economic development did Jimmy Carter sign that bill.

I was in the Carter administration as a staffer in the Bureau of Reclamation when Leo Krulitz, the Solicitor, Tom Fredericks, as Assistant Secretary for Indian Affairs, and Dan Beard, as Deputy Assistant Secretary, convened a group as part of the Carter Water Policy Review to start putting settlements together. Very interestingly, it was the tribes who came in at that point in time, stopped the process, and said, "Let's litigate."

---

\* Michael J. Clinton is Senior Vice President of Bookman-Edmonston Engineering, Inc. This address was the final talk at a symposium sponsored by the Western States Water Council and The Native American Rights Fund on Sept. 1-3, 1992, in Albuquerque, New Mexico.

The lights went out for a while after the Carter administration. It is kind of interesting how administrations get pushed into settlement work. Jo Clark and Jim Bush have talked about the Ad Hoc group on Indian Water Rights Settlements and how Interior Secretary Watt became interested in settlements. Then along came Ak-Chin II. Your eldest child was about to die. They couldn't find a source of water for that settlement. Very interestingly, a team of federal negotiators working with the tribe, and *not* the state of Arizona, found a source of water, and in seven days, in September of an election year, Ak-Chin II was passed over the strong objection of the state of Arizona. If you go to the Ak-Chin reservation today, you will see a community with no unemployment and almost no social service expenditures from the state or federal government. On the Ak-Chin reservation, the real fruits of your childrens' maturity are evident and abundant.

I was fortunate enough to work under Interior Under Secretary Ann McLaughlin in the Reagan administration, play a part in the Colorado-Ute and Salt River Pima-Maricopa settlements, and help to develop negotiating teams. Since then, we have seen a growing number of settlements that have come to fruition. With that growth has come lots of opportunities, but also lots of challenges.

During the last two days, we have heard 40 wonderful speakers. They have run the gamut from telling about gathering the background information and starting the negotiations, describing the process of getting them through the Congress, and finally, sharing with us how the programs were implemented. Some of the things we have learned in the last few days include the need for adequate technical data, the preparation that must precede either litigation or negotiation, and the distinct nature of each settlement.

We have talked about identifying the parties and the issues and how negotiators bind large groups. We have heard the experiences of people who brought everybody into the room at once, and that worked. We also have heard the experience of people who brought them in one at a time, and that worked. What we have found is that the key to bringing people together and binding them is in the relationships that are developed during the dialogue process of negotiations. Only through those relationships can you take an idea of a settlement and ultimately put together a binding court stipulation such as those we have seen filed in the last few years in a number of very important settlements.

We have talked about the generic negotiation process and things we could learn from other kinds of negotiations. And we can learn a lot. There are a lot of good textbooks available. One of the books I have used in my work, *Getting to Yes*, from the Harvard Dispute Resolution Project, is a real Bible for how to work these processes step-by-step and bring multiple parties to consensus.

We have talked about how to improve communications. I have worked in New Mexico during much of my professional career, and worked closely with the late Steve Reynolds, former state engineer. I also listened to the new state engineer, Eluid Martinez, and I was amazed to see the new tolerance, the openness, the new attitude that exists in this state. It has been such a radical change—going to Taos and sitting down for the first time with the tribal council, finding out what peoples' needs are, and how they can be recognized and brought in.

Communication is a one-on-one kind of thing. You can do it in big rooms. You can do it in conferences like this. But the real stuff takes place in the back rooms, over in the corners, last evening up at Acoma. That is where the communication takes place, because you get to know your neighbors, their values, their needs, how you can help them, and how they can help you. That is what settlements are built on; they are built on relationships, and relationships live and grow only through communication.

We have talked about water rights management in settlements. Management is the new challenge that settlements are facing. *Big Horn III* is apt demonstration that the courts are not the place to put management together. I hear talk of how Wind River management is actually being put together with equal technical capability on the Indian and non-Indian side—with those people sitting down and finding ways to make the system work, making water flow down the ditch so it gets to the lands of those who have the rights to the water. The Justice Department is attempting to push forward in the negotiation process the development of water management stipulations. I think this is necessary and essential, but I also question whether it is wise and prudent to bring that difficult morass into the negotiations early on. At best, it needs to be there, but the management strategies also need to be developed after the base of quantities and relationships between the parties have been identified.

We talked about off-reservation sale and lease. We heard two very interesting perceptions. One is a concern that leasing would transfer economic development from the junior appropriators who are now using undeveloped Indian water to people who have more economic power to buy it. We heard another perception that the tribes did not want water leasing to have more adverse effects on junior appropriators than would the use of tribal water rights on reservation. There is a dichotomy here. Without some kind of settlement or financial investments on reservations, much Indian water will stay in the stream and accrue to junior appropriators, many of whom have made investments to use that water. That dichotomy has to be resolved.

We see the dichotomy being resolved in the Missouri River Basin where the off-reservation leasing provisions of the Northern Cheyenne Settlement are being approved by the Congress. We see through the

Chelan agreements and the open communication process in the Columbia River system that people are talking about it. We even see the ten tribes and seven states in the Colorado River Basin starting to sit down at the table to try and find ways to resolve this dichotomy. But the dichotomy is still with us. It is going to be a real 'bugaboo' as we move farther into the marketing program.

It is very obvious that tribes having the rights to the water should have the benefit of the use of that water. Marketing is a way to do that. Our challenge is to find a way to protect investments of junior appropriators at an adequate level, but at the same time get the tribes the asset base that their water rights promise.

We heard about the frustrations which every settlement endures when it gets to Congress, how they get taken apart, and hopefully, put back together. In the congressional process, every time you go back to the administration or through a new committee, some portion of that settlement package can be changed to accommodate broader national goals and objectives.

We also heard this morning about the problems that exist with the funding of settlements and the administration's criteria and procedures for settlements. As Tim Glidden said, the criteria and procedures are kind of working—at least on the procedural side—from a federal perspective. Former OMB Manager Dave Gibbons hopes the criteria side would work, but recognizes that it is not. These are challenges which this family has to work on. We have to find ways that enable us to live with our friends at the Office of Management and Budget. I use the term 'friend' advisedly. We have to be friends with them. If they are our enemies, they can frustrate us for long, long periods of time, and we need to find ways to work with them.

Eddie Brown talked about the BIA budget offset problem, whereby other Indian programs—housing, health, roads—are being taxed to fund these settlements. These settlements are not part of an Indian obligation. They were created by the United States and need to be rectified through federal expenditures that don't count against Indian programs.

We also heard Dave Gibbons' suggestion that we really need to establish a programmatic way to fund these settlements that fits with other government programs. If you can put government bureaucrats in a functioning mold that is acceptable to the culture in which they live (just as a settlement has to be acceptable in *your* culture where *you* live), they will work with you. And together, *you will get it done*. That is a challenge and an opportunity which Dave Gibbons offered us today.

But, beware of bureaucracy. I am a bureaucrat. I have spent 25 years in the system. I made a career of learning how to work around the

system. That is an admonition which you have to take seriously. Bureaucratic processes sometimes put filters in the game.

One of the things we did on San Luis Rey that I want to suggest to other settlement parties is that we worked *with* the administration. At each change of direction in that program, the settlement parties went to see the staffers in the Office of Management and Budget and said, "We know the change is coming to you through the bureaucratic filters, but we want you to know what *we* intended." Through that dialogue, the San Luis Rey Settlement was one of the few which the administration never postured a veto sword against. I would suggest to settlement parties again that dialogue is necessary with those who have to be your friends if they really are going to be your friends.

There was another important group of speakers at this conference who must be recognized. We heard wonderful questions and comments from the audience. Without them, much of the poignancy of what this program is about would have been lost.

The last major point I want to make is that you must do your homework at home. The settlements which have problems in Washington are those where someone was zapped back home. The problem comes when the needs, interests and concerns of disenfranchised local parties never get on the table and never get integrated into the settlement process. When a small group of disenfranchised, unhappy people in southwest Colorado can frustrate the will of the Congress and an 80 percent local referendum, something is wrong. I know where that alienation came from. The Bureau of Reclamation caused it 15 years ago. They mobilized that opposition group which is still alive and well and dedicated to stopping the Animas-La Plata Project, and ultimately, the Colorado-Ute settlement.

Take an important lesson from Colorado-Ute. You must go back home and heal the animosity, bigotry, and racism that exist in your local communities. Those feelings exist not just between Indians and non-Indians. They are between neighboring communities, neighboring water users, neighboring tribes, the environmental communities, and other local interest groups. That is where settlements have to come together.

I ask you to go back home, make sure your homework is done. See that those old wounds that have been created through controversy, fights, and court cases have been healed—before you bring your settlement proposals to Washington. This is the challenge. This is where the opportunity is. You can heal your communities through settlements.

This family reunion that we have had this year—these 300 people—proves that we can work together. We have a lot of problems, but those problems present opportunities and challenges for each and every one of us. These children we are raising are our future. They are

the future of our families. They are the future of our communities. We need to nurture them and make sure they grow to maturity.

I live in Los Angeles. We had some horrendous riots earlier this year. As the National Guard was mobilizing, as the United States was bringing in the Army, as the fires were growing and raging throughout the community, racism was eating it alive. One person stopped that. He was a victim. His name was Rodney King, and he went on television and said, "Can't we all just get along?" This family is a victim of historical federal neglect and mistakes. This is the challenge I leave with you today. You must acknowledge that you, like Rodney King, are victims. This family must find ways to get along with its neighbors. Use these settlements as your vehicle to reach that healing, peace, and prosperity which we now know to be possible.

Thank you very much.