

4-1-2013

Moving Forward with Indian Water Rights Settlements

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Moffitt, Melinda, "Moving Forward with Indian Water Rights Settlements" (2013). *Environmental Dispute Resolution Program*. 13.
<http://dc.law.utah.edu/edr/13>

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Student Conflict Assessments

Students taking *Environmental Conflict Resolution* conduct a conflict assessment based on a student-selected real-life environmental or natural resource conflict. They analyze the nature, source and history of the conflict, identify potential stakeholders and potential issues. If the conflict is, or has been, subject to a dispute resolution process, the student writes a case study identifying best practices and lessons learned, and gives suggestions of what could have been done differently and why (looking back). If the conflict is not currently, and has not been, subject to a dispute resolution process, the student designs a dispute resolution process (looking forward). Some students do a combined case study and future process design.

Students' papers posted on the [EDR Program website](#) include an Executive Summary. For case studies (looking back), this highlights the best practices and lessons learned. For dispute resolution process designs (looking forward), this provides a summary of the essential process components. The primary purpose of posting these student assessments is to disseminate the "best practices" and "lessons learned" in each paper.

Disclaimers:

- The assessment reports reflect the student authors' opinions, and do not reflect the views or opinions of the University of Utah, any of its affiliated entities, or any individuals interviewed as part of the assessment.
- Unlike a conflict or situation assessment conducted by a professional third party neutral, the students' work does not include interviews of *all* stakeholder interests. While every attempt has been made to include the full range of perspectives in the analysis, it is possible that some perspectives have been omitted.
- The assessment reports are posted as they were written by the students and therefore reflect a snapshot-in-time. Facts and perspectives can change; for ongoing conflicts, the reader is encouraged to do additional research to confirm that the situation described in the assessment remains current.
- For questions about factual issues, the reader is encouraged to refer to underlying resource documents.

Environmental Dispute Resolution Program

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Moving Forward with Indian Water Rights Settlements
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Moving Forward with Indian Water Rights Settlements

By Melinda Moffitt¹

I. Introduction

The history of Indian tribes is intrinsically linked to the history of water and water rights in this country. Life and the vitality of Indian tribes have been and always will be dependent on having an adequate supply of water. One scholar eloquently described the interrelationship of tribes and water in the following excerpt:

Water remains the most vitally important resource of nearly all Indian tribes. It is the touchstone of Native American cultures, linking today's and tomorrow's Indians with their early fellow tribesmen who drank, fished, and drew irrigation water from the same waterways. . . . When tribes were confined to reservations, water became vital to their survival there. Some were no longer able to roam and hunt over vast areas, others were restricted in their traditional fishing opportunities. They had to make the most of reservations where much of the land was barren and dry, and where water for fishing or crop irrigation was scarce. It is clear that for centuries Indians have had their essential needs sustained by the waters available to them. And it is also clear that the future of Indian reservations as permanent homelands depends on water. Indian economic survival today depends on having enough water for irrigation, industry, and domestic use; on having water clean enough to sustain fisheries and spiritual needs; and, indeed, on having the ability to sell water to non-Indians for off-reservation uses.²

It is clear that for tribes to survive and ultimately thrive they need water, and they need to have control over their water rights. The same was true for settlers who came to the West. Everyone depended on this scarce resource for survival. Water has always been a commodity creating significant conflict between users, and “[i]f any lesson emerges from the water wars of the West,

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² David H. Getches, Management and Marketing of Indian Water: From Conflict to Pragmatism, 58 U. Colo. L. Rev. 515, 515–16 (1988).

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it is that ignoring Indian water rights only ensures and escalates conflict.”³ Not all conflicts will be avoided by recognizing and accounting for Indian water rights, but it can bring greater certainty and benefits to both tribes and other users dependent on these water supplies.⁴

Because tribes need water to exist, under the system of Anglo American law, this means that they need water rights, and they need to be able to use their water rights to ensure tribal self-sufficiency and economic growth in the modern world. Despite court recognition of tribal water rights, negotiated settlements have proven to be the best way for tribes to receive “wet” water rights.⁵ This paper explores the history of Indian reserved water rights, a current Indian water rights settlement, and how to best proceed with Indian water rights settlements in the future.

II. History of Indian Reserved Water Rights

The Supreme Court first recognized Indian reserved water rights in *Winters v. United States* in 1908.⁶ *Winters* involved a dispute over waters of the Milk River in Montana.⁷ The tribes and non-Indian users both claimed to have superior rights to use of the water.⁸ The Supreme Court ruled in favor of the tribes on the theory that the agreement with the tribes, creating the Fort Belknap Reservation, “was intended to reserve water to fulfill the agricultural purposes set out in the ratified agreement and to provide ‘permanent homes’ for the Indians on

³ Judith V. Royster, A Primer on Indian Water Rights: More Questions Than Answers, 30 Tulsa L.J. 61, 62 (1994).

⁴ Id.

⁵ “Wet” water rights refer to water that can actually be used, as opposed to “paper” water rights which refer to legal rights decreed by a court but not guaranteed to actually deliver water.

⁶ Robert T. Anderson, Indian Water Rights and the Federal Trust Responsibility, 46 Nat. Resources J. 399, 399 (2006).

⁷ Winters v. U. S., 207 U.S. 564, 565 (1908).

⁸ Id. at 565–69.

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the various reservations.”⁹ The Court found it significant that in construction of the agreement between the tribes and the United States, the designated reservation was:

part of a very much larger tract which the Indians had the right to occupy and use, and which was adequate for the habits and wants of a nomadic and uncivilized people. It was the policy of the government, it was the desire of the Indians, to change those habits and to become a pastoral and civilized people. If they should become such, the original tract was too extensive; but a smaller tract would be inadequate without a change of conditions. The lands were arid, and, without irrigation, were practically valueless. And yet, it is contended, the means of irrigation were deliberately given up by the Indians and deliberately accepted by the government.¹⁰

Thus, when creating the reservation, the United States and the Indians intended to reserve the waters of the Milk River to fulfill the purposes of the reservation.¹¹ This reserved water right differs from water rights under state prior appropriation systems because it does not depend on the tribe actually using the water and is not subject to state law doctrines of forfeiture for non-use.¹² The generally accepted priority date of a reserved water right under the *Winters* doctrine is the date the reservation was established.¹³

The *Winters* case did not determine the full quantity of water reserved for the Indians, and the question remained open for many years.¹⁴ By the middle of the twentieth century it was clear that reserved water rights for Indians included sufficient water for irrigation purposes and that the amount of water would increase as the tribe’s needs increased.¹⁵ Because this increase

⁹ Anderson, *supra* note 6, at 410.

¹⁰ *Winters*, 207 U.S. at 576.

¹¹ *Id.* at 576–77.

¹² Anderson, *supra* note 6, at 414.

¹³ *Id.* at 412.

¹⁴ *Id.* at 414.

¹⁵ *Id.* at 416; see also *US v. Ahtanum Irrigation District*, 236 F.2d 321, 327 (9th Cir. 1956) (“[T]he paramount right of the Indians to the waters of Ahtanum Creek was not limited to the use of the Indians at any given date but this right extended to the ultimate needs of the Indians as

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could not be predicted, rights acquired under a state's prior appropriation system were on "shaky ground."¹⁶ Appropriators under state law could establish rights relative to one another, but they could never be certain if a tribe, up or downstream, had a superior water right and to what quantity of water.¹⁷

It was not until 1963 that the Supreme Court, in *Arizona v. California*,¹⁸ announced the standard by which Indian reserved water rights would be quantified to satisfy present and future needs, specifically of tribes along the Colorado River. In this case, Arizona sued California to determine their respective rights to waters of the Colorado River and its tributaries.¹⁹ As part of the Court's determination, it necessarily had to determine the amount of water reserved to the various Indian Reservations along the Colorado River. The Court recognized that "when the United States created these reservations . . . it reserved not only the land but also the use of enough water from the Colorado to irrigate the irrigable portions of the reserved lands,"²⁰ thereby adopting the "practicably irrigable acreage" ("PIA") standard for determining the quantity of water reserved for Indian Reservations.²¹ "[T]he PIA test awards water for present and historical irrigation, for those tribal lands capable of sustaining irrigation in the future, and for growing crops in an economically feasible manner."²² A two-part analysis is used to

those needs and requirements should grow to keep pace with the development of Indian agriculture upon the reservation.").

¹⁶ Anderson, *supra* note 6, at 416.

¹⁷ Robert T. Anderson, *Indian Water Rights, Practical Reasoning, and Negotiated Settlements*, 98 Cal. L. Rev. 1133, 1140 (2010).

¹⁸ *Arizona v. California*, 373 U.S. 546 (1963).

¹⁹ *Id.* at 551.

²⁰ *Id.* at 596.

²¹ *Id.* at 601.

²² Anderson, *supra* note 17, at 1143.

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determine the PIA on a reservation. First, the land must be physically capable of sustained irrigation. Second, the land must be economically capable of irrigation at a reasonable cost.²³

Many dispute whether the PIA standard is an appropriate standard for calculating how much water is reserved for each Indian Reservation because it only takes into consideration water for irrigation.²⁴ This can create uncertainty for parties in a general stream adjudication, especially because the PIA standard appears to be on shaky ground.²⁵ Once tribal water rights are quantified, tribes should be able to use their reserved water rights in any way that is beneficial to the tribe.

Despite court rulings, for many tribes their water rights remain paper only rights. In part, this is because the economics of water is complex, and many tribes do not have the means to develop the necessary infrastructure to put their water rights to use.²⁶ For many years, the federal government's fervor in developing non-Indian irrigation interests left tribal needs for water suffering.²⁷ Additionally, there are numerous legal issues that remain unresolved by the courts leaving much uncertainty concerning reserved water rights. Moreover, litigation to determine tribes' rights has proven to be lengthy and expensive, often resulting in paper rights to water but delivering no actual water to the reservations; this has resulted in an increase of

²³ Royster, *supra* note 3, at 75.

²⁴ See Galen Lemei, *Abandoning the PIA Standard: A Comment on Gila V*, 9 Mich. J. Race & L. 235, 266 (2003); see also Anderson, *supra* note 16, at 1151–52.

²⁵ See Lemei, *supra* note 24, at 247–48.

²⁶ Edmund J. Goodman, *Indian Tribal Sovereignty and Water Resources: Watersheds, Ecosystems and Tribal Co-Management*, 20 J. Land Resources & Env'tl. L. 185, 208 (2000).

²⁷ Anderson, *supra* note 6, at 430.

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negotiated settlements between states and tribes, quantifying the tribes' water rights.²⁸ These negotiated settlements are generally more flexible, faster, and cheaper than litigation.²⁹

There are advantages and disadvantages for tribes that use this approach. Perhaps the greatest advantage is that settlements can result in tribes receiving "wet" water rather than mere paper water rights, and states gain the desired certainty by having tribal water rights quantified.³⁰ Additionally, tribes are often able to negotiate for other aspects of water rights that have not yet been resolved by the courts, such as use of groundwater, non-irrigation uses, and off-reservation marketing of their water rights.³¹ But in exchange for these benefits, tribes often give up some measure of their legal rights to water, oftentimes ending up with less than the full quantity and priority of water a court would have awarded under the PIA standard and *Winters* doctrine.³² Advocates of these settlement agreements suggest that "successful water rights settlements may not only provide both tribes and states with the water they need, but foster an increased spirit of general governmental cooperation."³³ "The settlement era is an opportunity to explore new ways to build relationships, new ways to avoid conflict, and new ways to approach old problems."³⁴

Many states and tribes have determined that the benefits of these settlements outweigh the costs, and numerous successfully negotiated water rights settlements are now in place.³⁵ This paper analyzes a current negotiated settlement between the State of New Mexico (the "State"),

²⁸ Royster, *supra* note 3, at 100.

²⁹ *Id.*

³⁰ *Id.*

³¹ *Id.*

³² *Id.*

³³ *Id.* at 101.

³⁴ DANIEL MCCOOL, *NATIVE WATERS: CONTEMPORARY WATER SETTLEMENTS AND THE SECOND TREATY ERA 43* (The University of Arizona Press 2002).

³⁵ COHEN'S HANDBOOK OF FEDERAL INDIAN LAW § 19.05, at 3 (Nell Jessup Newton ed., LexisNexis 2012).

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the federal government, and the Navajo Nation, drawing out best practices that can be used in future Indian water rights settlements.

III. History of the San Juan River Basin Navajo Nation Water Rights Settlement

This assessment of the negotiation process between the Navajo Nation, the State, and the federal government was conducted primarily through traditional research methods, relying heavily on documents filed in the general stream adjudication of the San Juan River Basin. Limited interviews were conducted with the parties but were constrained due to the fact that the Settlement Agreement is currently subject to litigation.³⁶

There has been deep-rooted distrust between the Navajo Nation and the State and the United States government stemming from the era when the Navajo were confined to what we now refer to as the Navajo Reservation.³⁷ The dispute over the tribe's water rights, in particular, has been ongoing for decades. As early as 1934, the Navajo Nation asked that the "Government take the necessary steps to protect the water rights of the Indians."³⁸ In 1945, the tribe "earnestly" requested the Secretary of Interior "provide all possible irrigation from the San Juan and the Animas Rivers for the benefit of the Navajo people."³⁹ "One thing that is the life-blood to the Navajo is the San Juan River."⁴⁰ In 1950, Commissioner Harper promised the Navajo Nation that the Bureau of Indian Affairs and Bureau of Reclamation would continue to study

³⁶ As of November 11, 2012, the court approved the settlement decrees. However, the decision of the court is currently pending before the New Mexico Court of Appeals.

³⁷ PETER IVERSON, *DINÉ A HISTORY OF THE NAVAJOS* 37–115 (University of New Mexico Press 2002).

³⁸ Navajo Nation, Resolution Concerning Diversion of the Waters of the Navajo River (July 12, 1934), available at http://www.ose.state.nm.us/LAP/NNWRS/legal_nnwrs.html.

³⁹ Navajo Tribal Council Proceedings, Navajo Nation 104 (July 13, 1945) available at http://www.ose.state.nm.us/LAP/NNWRS/legal_nnwrs.html.

⁴⁰ Navajo Tribal Council Proceedings, Navajo Nation 57–58 (Sept. 13, 1950) available at http://www.ose.state.nm.us/LAP/NNWRS/legal_nnwrs.html.

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diverting water from the San Juan River to irrigate acreage for the tribe.⁴¹ At the same time, the tribe's attorney indicated that the tribe would need Congress to appropriate money to the tribe in order to divert the water.⁴² In 1951, the Navajo Nation sent a letter to the Senate and House of Representatives regarding the use of the water of the San Juan River.⁴³ The letter describes the desperate situation of the tribe and asked for Congress to support development of Navajo water rights.⁴⁴

Ever since the Navajos were released from captivity and placed on the reservation in 1868, they have waited patiently, sometimes through desperate drought conditions when both cattle and Indians suffered and died, for the government of the United States to live up to Article V of the Treaty of 1868 which promised to "every head of a family . . . who desires to commence farming" one hundred and sixty acres. . . . The promise when made was incapable of fulfillment because no such quantity of agricultural lands existed within the reservation as the government must have known, but the Navajos could not know. Only by full usage of the waters of the San Juan on the Navajo Reservation can the government at long last keep faith in a measurable degree with its promise.

. . . .
The weight of authority [*Winters v. U.S.*] is therefore decidedly with us in insisting on the fullest possible application of these waters to the Navajo Reservation lands.

. . . .
We therefore . . . urge you to support firmly what we regard as our moral and legal right to the fullest possible development of the San Juan for the Navajo and Shiprock-Farmington area.⁴⁵

The Navajo Nation desperately needed water to survive and would need the help of Congress to receive that water. Because of the lack of infrastructure necessary to deliver water to the Navajo

⁴¹ Id. at 58.

⁴² Id. at 61.

⁴³ Letter from Sam Ahkeah, Chairman, Navajo Tribal Council, to Members of the Senate and of the House of Representatives (Mar. 23, 1951) available at http://www.ose.state.nm.us/LAP/NNWRS/legal_nnwrs.html.

⁴⁴ Id.

⁴⁵ Id.

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Nation, downstream non- Indian water users have profited for years by using the Navajo Nation’s unappropriated waters.

In 1975, the State commenced a general stream adjudication for the San Juan River Basin to determine and quantify all water rights in the basin.⁴⁶ The federal government filed a Supplemental Answer in response to this adjudication claiming water rights on behalf of the Navajo Nation and other tribes.⁴⁷ More than 20 years after litigation began, in 1997, the Navajo Nation and the State initiated settlement negotiations regarding the tribe’s water rights.⁴⁸ “The success of the Jicarilla Apache settlement provided a precedent for pursuing this approach for the Navajo Nation’s water rights.”⁴⁹ In 2005, the Navajo Nation and the State signed the *San Juan River Basin in New Mexico, Navajo Nation Water Rights Settlement Agreement* (“Settlement Agreement”).⁵⁰ In 2009, Congress ratified the Settlement Agreement by enacting the Northwestern New Mexico Rural Water Projects Act, and in December 2010, the Secretary of Interior signed the Settlement Agreement.⁵¹ Now the parties have petitioned the state court to approve the Settlement Agreement, which sets forth the Navajo Nation’s water rights in the San Juan River Basin of New Mexico.⁵² The State stated that “the proposed Navajo Nation water

⁴⁶ Notice of Expedited *Inter Se* Proceeding to Adjudicate the Water Rights of the Navajo Nation at 2, San Juan River General Stream Adjudication, No. CV-75-184 (11th Jud. Dis. Ct. N.M. 2011) available at http://www.ose.state.nm.us/LAP/NNWRS/legal_nnwrs.html.

⁴⁷ Id.

⁴⁸ Id.

⁴⁹ State of New Mexico’s Revised Statement of Legal and Factual Bases for Settlement at 5, San Juan River General Stream Adjudication, No. CV-75-184 (11th Jud. Dis. Ct. N.M. Sept. 7, 2012) available at http://www.ose.state.nm.us/LAP/NNWRS/legal_nnwrs.html [hereinafter State’s Revised Statement].

⁵⁰ Notice of Expedited *Inter Se* Proceeding, supra note 46, at 2.

⁵¹ Id.

⁵² State’s Revised Statement, supra note 49, at 7.

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rights settlement reconciles the conflict between federal and state law and diffuses the significant risk to existing state law-based water rights owners.”⁵³

IV. Opportunity to Settle

In general, serious negotiation efforts in the Indian water rights arena have been motivated by litigation or pending administrative decisions that threaten parties’ access to water resources.⁵⁴ This was precisely the case in the San Juan River Basin. A general stream adjudication had already been filed, and the State worried their access to water resources was at risk because of the *Winters* doctrine.⁵⁵ In a letter from the Navajo Nation to New Mexico’s governor in 1996, the Navajo Nation expressed their desire to explore the possibility of negotiating a settlement of their water rights, reasoning that “[a]n adjudicated resolution of our water rights promises to be extremely costly and contentious.”⁵⁶ Litigation had indeed already proven that it would be lengthy. The State had commenced a general stream adjudication for the San Juan River Basin twenty years previously, but by 1996 little progress had been made towards resolving the tribal water rights.⁵⁷ “For too long, the Navajo Nation’s water rights in the San Juan River Basin of New Mexico have remained unquantified, creating a cloud over water

⁵³ *Id.* at 2–3.

⁵⁴ BONNIE G. COLBY, JOHN E. THORSON, AND SARAH BRITTON, *NEGOTIATING TRIBAL WATER RIGHTS: FULFILLING PROMISES IN THE ARID WEST* 57 (The University of Arizona Press 2005).

⁵⁵ State’s Revised Statement, *supra* note 49, at 4.

⁵⁶ Letter from Albert A. Hale, Pres. of the Navajo Nation, to Gary Johnson, Governor of New Mexico, Resolution of the Navajo Nation’s Water Rights to the San Juan River (Sept. 9, 1996), available at http://www.ose.state.nm.us/LAP/NNWRS/legal_nnwrs.html [hereinafter Letter from Pres. Hale].

⁵⁷ *Id.* (“[T]he general stream adjudication for the San Juan River has been virtually dormant since it was filed in 1975.”).

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development in the basin.”⁵⁸ In the first draft of the Settlement Agreement the parties acknowledged further the following reasons for negotiating an agreement.

Recognizing that final resolution of the proceedings in the San Juan River Adjudication may take many years, entail great expense, prolong uncertainty concerning the availability of water supplies, and seriously impair the long-term economic well-being of all water users in the San Juan River Basin in New Mexico, the Parties to this Agreement desire to arrive at a settlement regarding the water rights of the Navajo Nation and to seek entry of a partial final decree of those rights in the San Juan River Adjudication, setting forth the Navajo Nation's right to use and administer waters of the San Juan River Basin in New Mexico.⁵⁹

Both the State and the tribe wanted certainty regarding their respective rights to use the waters of the San Juan River. The State was particularly concerned because the Navajo Nation is the largest user of water in New Mexico, with the bulk of the water coming from the San Juan River.⁶⁰

The State was additionally motivated to settle because without reaching a settlement the Navajo Nation likely would be adjudicated water rights, under the *Winters* doctrine, in a significantly greater quantity than the amount proposed by the settlement.⁶¹ In an already adjudicated case of water rights for tribes along the Lower Colorado River, the Supreme Court

⁵⁸ Id.

⁵⁹ Discussion Draft – Navajo Nation Water Rights Settlement (Dec. 5, 2003) available at http://www.ose.state.nm.us/LAP/NNWRS/legal_nnwrs.html [hereinafter Dec. 2003 Draft].

⁶⁰ STANLEY M. POLLACK, INDIAN WATER RIGHTS SETTLEMENTS: BRINGING CERTAINTY TO UNCERTAIN WATER RESOURCES 142 (New Mexico Water Resources Research Institute Oct. 2005) available at <http://wrri.nmsu.edu/publish/watcon/proc50/pollack.pdf>.

⁶¹ State's Revised Statement, supra note 49, at 4, 12 (“In total, the US Claims assert a right to 245,072 afy of depletions more than would be recognized under the Proposed Decree. There is not enough water available within the apportionment made to the State of New Mexico by the Upper Colorado River Basin Compact to meet such a large demand without reducing the water available for other existing water rights in the San Juan River Basin.”); See also The United States' Statement of Claims of Water Rights in the New Mexico San Juan River Basin on Behalf of the Navajo Nation at 23–24, San Juan River General Stream Adjudication, No. CV-75-184 (11th Jud. Dis. Ct. N.M. Dec. 29, 2010) available at http://www.ose.state.nm.us/LAP/NNWRS/legal_nnwrs.html.

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awarded the tribes over a million acre-feet per year of water with a priority date before June 1929.⁶² “Recognizing the significant risk that . . . the Navajo Nation could be adjudicated water rights beyond their currently authorized or existing amounts, with a senior priority, the State sought to quantify and recognize Navajo reserved rights based on existing uses and authorizations while simultaneously including protections for existing state-based water rights.”⁶³

The Navajo Nation was motivated to settle in order to receive federal funding to bring “wet” water to the reservation, which would provide much needed domestic and municipal water to the tribe.⁶⁴ The United States government was motivated to settle because “[i]n fulfillment of its trust responsibility to Indian tribes and to promote tribal sovereignty and economic self-sufficiency, it is the policy of the United States to settle water rights claims of Indian tribes without lengthy and costly litigation.”⁶⁵ David Hayes, Deputy Secretary for the Department of Interior, stated, “Settlement negotiations foster a holistic, problem-solving approach that contrasts with the zero-sum logic of the courtroom, replacing abstract application of legal rules that may have unintended consequences for communities with a unique opportunity for creative, place-based solutions reflecting local knowledge and values.”⁶⁶

⁶² State’s Revised Statement, *supra* note 49, at 8–9. *See Arizona*, 373 U.S. at 596–601.

⁶³ State’s Revised Statement at 9.

⁶⁴ *Id.* at 22.

⁶⁵ Dec. 2003 Draft, *supra* note 59.

⁶⁶ Indian Water Rights: Promoting the Negotiation and Implementation of Water Settlements in Indian Country: Hearing Before the S. Comm. on Indian Affairs (Mar. 15, 2012) (testimony of David J. Hayes, Deputy Secretary, United States Dept. of the Interior) available at <http://www.indian.senate.gov/hearings/loader.cfm?csModule=security/getfile&pageid=10584> [hereinafter Testimony of David Hayes].

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Settlement allows the parties to be directly involved in shaping the resolution instead of leaving “their fate to be decided by the stroke of a judge’s pen.”⁶⁷ By negotiating settlement of the Navajo Nation’s water rights, all parties to the negotiation would gain greater certainty coupled with the possibility of addressing issues important to the parties but which are outside the scope of litigation or are legally uncertain. The only alternative to negotiation for any of the parties is to continue litigation of the Navajo’s water rights in the general stream adjudication.

V. The Settlement Process

This particular settlement process began with an invitation from Navajo Nation President Albert Hale (“President Hale”) to New Mexico Governor Gary Johnson (“Governor Johnson”) in September 1996.⁶⁸ President Hale expressed a willingness of the Navajo Nation to explore the possibility of a negotiated settlement with the State regarding the Navajo Nation’s water rights to the San Juan River in New Mexico.⁶⁹ President Hale also suggested that “productive discussions can best proceed if claims by the Navajo Nation to ‘every drop of water’ in the river and claims by the State of New Mexico that Navajo rights have already been quantified are not brought to the negotiation table.”⁷⁰ The State accepted the invitation, and the process began with a series of meetings.⁷¹ In July 1997, President Hale and Governor Johnson executed *A Memorandum of Agreement between the State of New Mexico and the Navajo Nation to Commence Discussions to Determine the Water Rights of the Navajo Nation in the San Juan River Stream System through*

⁶⁷ Id.

⁶⁸ JOHN LEEPER, REPORT ON SAN JUAN RIVER BASIN IN NEW MEXICO NAVAJO NATION WATER RIGHTS SETTLEMENT AGREEMENT 1 (Feb. 2013) available at http://uttoncenter.unm.edu/ombudsman/san-juan-discovery/NSD-336.01_2013-02-12_NN3rdSuppDiscLeeperRpt.pdf.

⁶⁹ Letter from Pres. Hale, supra note 56.

⁷⁰ Id.

⁷¹ LEEPER, supra note 68, at 2.

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Negotiation, in which they agreed to begin discussions between the State and the Navajo Nation “to determine whether a negotiated decree determining the Navajo Nation’s water rights in the San Juan River System in New Mexico is possible.”⁷² A facilitator was used for these initial discussions, and the discussions proved successful.⁷³ The discussions originally began with only the Navajo Nation and the State, with each party designating a team of participants.⁷⁴ The Navajo Nation’s team included attorneys from their Department of Justice and technical staff from the Water Management Branch.⁷⁵ Navajo Council Delegates also participated in the initial meetings and in subsequent discussions that required the participation of the principals.⁷⁶ The State’s team included representatives from both the State Engineer and the Interstate Stream Commission.⁷⁷

In October 2001, the Navajo Nation and the State agreed to proceed with formal negotiations and executed *A Memorandum of Agreement between the State of New Mexico and the Navajo Nation to Advance Discussions to Quantify the Water Rights of the Navajo Nation in the San Juan River Stream System through Negotiation*, agreeing that:⁷⁸

1. Each party should devote additional resources to pursue a negotiated settlement . . .
2. The State and the Navajo Nation should take advantage of the Federal Assessment Team to vigorously pursue further negotiations . . .

⁷² LEEPER, *supra* note 68, at 2; *A Memorandum of Agreement between the State of New Mexico and the Navajo Nation to Commence Discussions to Determine the Water Rights of the Navajo Nation in the San Juan River Stream System through Negotiation* (July 23, 1997) available at http://www.ose.state.nm.us/LAP/NNWRS/legal_nnwrs.html.

⁷³ Email from Stanley Pollack, Att’y for the Navajo Nation, to Melinda Moffitt (Mar. 11, 2013, 14:43 MST) (on file with author); LEEPER, *supra* note 68, at 2.

⁷⁴ Email from Stanley Pollack, *supra* note 73.

⁷⁵ *Id.*

⁷⁶ *Id.*

⁷⁷ *Id.*

⁷⁸ LEEPER, *supra* note 68, at 2.

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3. . . . the discussions may be terminated by either party upon written notice to the other.
4. The State of New Mexico and the Navajo Nation should cooperate to the greatest extent possible to ensure the settlement discussions continue . . .
5. The State of New Mexico and the Navajo Nation should cooperate to the greatest extent possible to ensure the development of the proposed Navajo Gallup Water Supply Project is consistent with a settlement of the Navajo Nation's water rights claims in the San Juan Basin.⁷⁹

At this point in the negotiations, the Navajo Nation and the State requested a Federal Negotiation Team, which was convened in October 2002.⁸⁰ The Federal Negotiation Team included multi-disciplinary representatives from the Department of Interior (“DOI”), the Bureau of Indian Affairs (“BIA”), the Bureau of Reclamation (“BOR”), the Fish and Wildlife Service (“FWS”), and the Department of Justice (“DOJ”).⁸¹ The three parties – the Navajo Nation, the State, and the United States government – “engaged in deliberative facilitated negotiations that addressed a wide range of complex issues and disciplines.”⁸²

These negotiations culminated in a draft settlement agreement that was released to the public for comment in December 2003.⁸³ Once the drafting phase was reached, the parties no longer used a facilitator.⁸⁴ With the release of the December 2003 draft, the State and the Navajo Nation held numerous public meetings with the respective stakeholders.⁸⁵ In reply to the public comments received, the State prepared and published a written response explaining which issues

⁷⁹ *Id.* at 2–3.

⁸⁰ *Id.* at 3.

⁸¹ Email from Stanley Pollack, *supra* note 73.

⁸² LEEPER, *supra* note 68, at 3.

⁸³ LEEPER, *supra* note 68, at 3; Dec. 2003 Draft, *supra* note 59.

⁸⁴ Email from Stanley Pollack, *supra* note 73.

⁸⁵ LEEPER, *supra* note 66, at 3; Press Release, Public Comment Sought on Proposed Water Rights Settlement Agreement by the State of New Mexico and the Navajo Nation for the San Juan River Basin (Dec. 5, 2003) available at http://www.ose.state.nm.us/LAP/NNWRS/legal_nnwrs.html [hereinafter Public Comment Sought].

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led to revisions in the draft settlement agreement.⁸⁶ Changes were then negotiated in regard to the December 2003 draft, taking into consideration the public comments, and a revised draft was released for further public comment on July 9, 2004.⁸⁷ The State specifically sent a letter to the San Juan Agricultural Water Users Association Board in August 2004 responding to the Board's concerns.⁸⁸ A final draft of the proposed Settlement Agreement was released for public comment in December 2004, and the State again issued a written response to the public comments.⁸⁹ The revised final draft of the Settlement Agreement was presented for approval by the Navajo Nation Council in December 2004, and subsequently executed in April 2005 by the State and the Navajo Nation.⁹⁰ Although members of the public were not formally included as a party to the negotiations, they were involved throughout the process in the following ways:

The San Juan Agricultural Water Users and other non-Indian participants have had an opportunity to be involved in the Navajo Settlement activities from a legal perspective (filing motions and otherwise participating in Court proceedings), an administrative perspective (providing input to the State and receiving information from the State regarding settlement terms), a political perspective (correspondence and meetings with federal and state legislators and through congressional testimony), and a public perspective (submitting newspaper editorials and participation in public forums).⁹¹

⁸⁶ State's Revised Statement, *supra* note 49, at 5–6; Draft – Navajo Nation Water Rights Settlement (July 9, 2004) available at http://www.ose.state.nm.us/LAP/NNWRS/legal_nnwrs.html [hereinafter July 2004 Draft].

⁸⁷ LEEPER, *supra* note 68, at 3; State's Revised Statement, *supra* note 49, at 5.

⁸⁸ Memorandum from John Whipple, Staff Engineer, New Mexico Interstate Stream Commission to the San Juan Agric. Water Users Ass'n Bd. (Aug. 9, 2004) available at http://www.ose.state.nm.us/LAP/NNWRS/legal_nnwrs.html.

⁸⁹ State's Revised Statement, *supra* note 49, at 6; Revised Draft – Navajo Nation Water Rights Settlement, Responses to Public Comments Received on Drafts of the San Juan River Basin in New Mexico Navajo Nation Water Rights Settlement (Dec. 10, 2004) available at http://www.ose.state.nm.us/LAP/NNWRS/legal_nnwrs.html.

⁹⁰ LEEPER, *supra* note 68, at 3.

⁹¹ Jim Dunlop, Timeline of the San Juan Agric. Waters Users Ass'n Participation in Activities Relation to the Navajo Nation Water Rights Settlement (Oct. 24, 2007) available at http://www.ose.state.nm.us/LAP/NNWRS/legal_nnwrs.html.

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Once the Navajo Nation and the State signed the Settlement Agreement, the next step was for Settlement Legislation to be introduced and for Congress to approve the settlement.⁹² The Settlement Legislation was introduced in Congress by the New Mexico Congressional delegation in December 2006.⁹³ “From December 2006 through March 2009, the Settlement Legislation underwent numerous revisions to address a wide variety of legislative concerns raised by stakeholders within and outside of the San Juan River Basin, and within and outside the State of New Mexico.”⁹⁴ Congress finally approved the Settlement Legislation (P.L. 111-11), and the President of the United States signed it into law on March 30, 2009, nearly 14 years after President Hale extended the invitation to Governor Johnson to begin negotiation discussions.⁹⁵ In December 2010, Secretary of the Interior Salazar, New Mexico Governor Richardson, and Navajo Nation President Shirley signed the revised, final Settlement Agreement.⁹⁶ The Settlement Agreement includes the following: a partial final decree for entry in the San Juan River stream adjudication setting forth the water rights of the Navajo Nation for waters of the San Juan River in New Mexico; a settlement act from Congress authorizing the Navajo-Gallup Water Supply to secure “wet” water to the Navajo Nation; and a contract to provide the Navajo Nation deliveries under BOR projects.⁹⁷

⁹² LEEPER, *supra* note 68, at 3; State’s Revised Statement, *supra* note 49, at 6.

⁹³ LEEPER, *supra* note 68, at 3.

⁹⁴ *Id.* at 4.

⁹⁵ *Id.* at 5.

⁹⁶ *Id.*

⁹⁷ Public Comment Sought, *supra* note 85.

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Since approval of the Settlement Agreement, a massive amount of work has been completed to implement the Settlement Agreement.⁹⁸ “Literally dozens of support agreements involving numerous State, Federal and Tribal agencies have been executed.”⁹⁹ Because the Navajo Nation’s water rights were already subject to court jurisdiction in the San Juan River Basin general stream adjudication, the Settlement Agreement was submitted to the court for approval in January 2011 and is currently pending, due to challenges by other water users, before the Eleventh Judicial District Court of San Juan County, New Mexico.¹⁰⁰

Overall, the parties to the Settlement Agreement agree that the process was a success. One expert agrees because he feels “[t]he Settlement Agreement was crafted in this real world setting, and it was intended to be responsive to these difficult real world circumstances.”¹⁰¹ The Chairman of the Navajo Nation Water Rights Commission commented that “[t]he settlement agreement opens a new chapter in the relationship between the Navajo Nation and the State of New Mexico. The cooperation and good faith negotiation that enabled us to reach agreement will serve as a model for other states and Indian Nations.”¹⁰² Attorney General, Patricia Madrid, remarked, “I applaud this important settlement . . . [it] shows that sovereign nations can work together to achieve a mutually beneficial agreement. There is little doubt that working together with mutual respect is preferable to meeting in court as adversaries.”¹⁰³

VI. Lessons Learned from the Settlement Agreement

⁹⁸ LEEPER, *supra* note 68, at 5.

⁹⁹ *Id.*

¹⁰⁰ State’s Revised Statement, *supra* note 49, at 7.

¹⁰¹ LEEPER, *supra* note 68, at 6.

¹⁰² Public Comment Sought, *supra* note 85.

¹⁰³ *Id.*

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Despite the advantages recited above, any settlement agreement involves certain risks.¹⁰⁴ Tribes risk obtaining less water than a court may award them under the *Winters* doctrine in exchange for other benefits which are difficult to quantify.¹⁰⁵ Non-Indian communities that have been using unappropriated tribal water without compensation to the tribes risk losing this status-quo.¹⁰⁶ The state and federal governments risk being asked to provide the money to build costly infrastructure that will allow tribes to use their water rights while continuing to allow existing water users access to water, as well.¹⁰⁷

Additionally, it is difficult for parties, such as these, with such a long history of conflict to sit down at the table and productively negotiate. It takes a substantial amount of time to gain the trust necessary for a successful negotiation, and if the necessary trust is not established then the relationships among the parties may be further harmed. One party to the above-described Settlement Agreement explained that “these negotiations have been very, very difficult. They have also taken quite some time. For the first couple of years, the state and the tribe met several times, and with each meeting there was a better understanding of each other’s positions and needs.”¹⁰⁸ Fortunately, the parties were able to overcome this obstacle and develop the necessary trust to negotiate an agreement beneficial to both the State and the Navajo Nation.

Clearly, the state and tribe are always necessary parties to Indian water rights settlements; the federal government may also be a necessary party due to its trust responsibility to protect

¹⁰⁴ Indian Water Rights Settlements: Hearing Before the H. Comm. on Natural Resources, 110th Cong. (Apr. 16, 2008) (statement of Michael Bogert, Chairman, Working Group on Indian Water Settlements) available at http://www.doi.gov/ocl/hearings/110/IndianWaterRights_041608.cfm [hereinafter Statement of Michael Bogert].

¹⁰⁵ Id.

¹⁰⁶ Id.

¹⁰⁷ Id.

¹⁰⁸ POLLACK, supra note 60, at 143.

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Indian resources such as water.¹⁰⁹ When the federal government is included as a party to the negotiations there are specific hurdles to overcome. DOI has published Criteria and Procedures for the Participation of the Federal Government in Negotiations for the Settlement of Indian Water Rights Claims (“Criteria and Procedures”).¹¹⁰ While the Criteria and Procedures state that “[i]t is the policy of this Administration . . . that disputes regarding Indian water rights should be resolved through negotiated settlements rather than litigation,” they provide rigid guidelines for participation of the federal government in Indian water rights negotiations.¹¹¹ For example:

The total cost of a settlement to all parties should not exceed the value of the existing claims as calculated by the Federal Government.

. . . .
Settlements should include nonfederal cost-sharing proportionate to the benefits received by the non-Federal parties.

. . . .
If Department decides to establish a team, the Office of Management and Budget (OMB) and Justice shall be notified, in writing. Justice should generally be a member of any negotiating team.

. . . .
OMB and Justice will be updated periodically on the status of negotiations.¹¹²

These Criteria and Procedures add additional processes and parties to the settlement negotiations. Not only will DOI be part of the negotiations, but OMB and DOJ must also be involved. And depending on the settlement, other federal entities may also participate, such as BIA, BOR, and FWS. The more federal departments involved, the longer and more difficult the process may become because there are more opinions on proposed ideas and more bureaucracy to approve any proposals. Also, parties outside the federal government are not constrained by the Criteria

¹⁰⁹ See Ann R. Klee, Duane Mecham, The Nez Perce Indian Water Right Settlement-Federal Perspective, 42 Idaho L. Rev. 595, 598 (2006) (The federal government is obligated to assert and defend all water right claims that it feels the Indian tribe is entitled to.).

¹¹⁰ 55 Fed. Reg. 9,223 (Mar. 12, 1990).

¹¹¹ Id.

¹¹² Id.

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and Procedures, for example those requiring that costs of settlement not exceed the value of existing claims, and thus may have greater flexibility in negotiating. “Non-federal parties generally regard these [Criteria and Procedures] as unhelpful tools in promoting settlements, except to the extent they express a general federal policy promoting settlement of Indian water right claims.”¹¹³ However, the federal government usually provides the means for constructing many projects included in settlements, and it may be difficult for the parties to implement their agreement without the aid of the federal government. In the above-described Settlement Agreement, the federal government agreed to provide substantial funding for the Navajo-Gallup project which would bring much needed domestic water to the people of the Navajo Nation.¹¹⁴ The Settlement Agreement also provides federal funding to repair non-Indian irrigation ditches in the San Juan River Basin.¹¹⁵ Neither the Navajo-Gallup project nor such extensive repair of irrigation ditches would have been possible without the participation of the federal government in the settlement negotiations.

There are numerous additional procedural risks. One such risk in the settlement negotiations for the Navajo Nation’s water rights was that once the parties reached an agreement, the Settlement Agreement still had to be approved by Congress. “Local commitment to the settlement agreement must be enduring to overcome the many hurdles it is certain to face in Washington, D.C.”¹¹⁶ Congressional approval can be a long and arduous process. In the end, Congress may decide not to approve the settlement or may approve the settlement but only after

¹¹³ Anderson, *supra* note 17, at 1157.

¹¹⁴ State’s Revised Statement, *supra* note 49, at 22.

¹¹⁵ Reasons for Non-Navajo Parties to Support the San Juan River Basin in New Mexico Navajo Nation Water Rights Settlement Agreement 4 (Nov. 5, 2007) available at http://www.ose.state.nm.us/LAP/NNWRS/legal_nnwrs.html.

¹¹⁶ COLBY ET AL., *supra* note 54, at 65.

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making changes to it. This can be extremely frustrating to parties who have worked together for years to reach an agreement. One scholar commented that “[t]his process can be so frustrating that negotiators often resort to humor in trying to describe what it is like to spend months working out an agreement, and then take it to Congress only to have numerous parties tear at it ‘like buzzards at a road kill.’”¹¹⁷ In the above-described Settlement Agreement, the New Mexico Congressional delegation introduced the Settlement Legislation in December 2006, but it was not approved until March 2009 after numerous revisions, adding over two years to the settlement process.¹¹⁸

Another risk for the above-described Settlement Agreement was the potential for outside parties to challenge the agreement. Because the Navajo Nation’s water rights are a part of the pending general stream adjudication of the San Juan River Basin, the negotiated settlement must be approved by the court before taking effect. Thus, those asserting water rights in the San Juan River Basin general stream adjudication have standing to object to the Settlement Agreement.¹¹⁹ Such objections may prevent implementation of the Settlement Agreement after many years of negotiation, thus negating the efforts and compromises of the negotiating parties.

In fact, numerous parties not privy to the negotiations have now challenged the Settlement Agreement because they believe it gives the Navajo Nation more water than needed and will jeopardize water availability for non-Indian water users, including farmers and cities.¹²⁰

¹¹⁷ MCCOOL, *supra* note 34, at 80.

¹¹⁸ LEEPER, *supra* note 68, at 3–4.

¹¹⁹ COLBY ET AL., *supra* note 54, at 77.

¹²⁰ Jenny Kane, San Juan County water users oppose Navajo Nation in settlement case, The Daily Times Farmington, New Mexico, Feb. 6, 2013, http://www.daily-times.com/ci_22537967/san-juan-county-water-users-oppose-navajo-nation; John Fleck, Water tug of war goes on, ABQ Journal, Feb. 10, 2013,

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At least one of the parties that participated in the negotiations feels that the Settlement Agreement provides much greater protection for the challenging parties' water rights than if the Settlement Agreement fails and the claims are litigated. During negotiations, the settling parties maintained as a principal goal the issue of protecting existing uses of water in the San Juan River Basin.¹²¹ The Settlement Agreement provides certain protections for non-Indian water users without significantly impairing the water rights of the Navajo Nation.¹²² Because the Navajo water rights have seniority over most of the other water rights in the San Juan River Basin, in dry years the Navajo Nation would have preference to use water flows over junior irrigators.¹²³ However, the Settlement Agreement provides that when there is not enough water to satisfy all upstream and downstream water rights, the Navajo Nation will utilize water from the Navajo Reservoir before placing a call on junior water rights.¹²⁴

Additionally, throughout the negotiation process, the State and the Navajo Nation solicited public comments and made changes to the Settlement Agreement in an attempt to eliminate objections, but nonetheless, other holders of water rights in the San Juan River Basin are now challenging the Settlement Agreement. Counsel representing one of the parties to the Settlement Agreement remarked that "many of the parties that received the benefit of these modifications [to the drafts of the Settlement Agreement] are still objecting. In retrospect we should have required written commitments to support the settlement in return for the modifications."

<http://www.abqjournal.com/main/2013/02/10/news/water-tug-of-war-goes-on.html>; see also Notice of Expedited *Inter Se* Proceeding, supra note 46.

¹²¹ State's Revised Statement, supra note 49, at 9.

¹²² POLLACK, supra note 60, at 145; State's Revised Statement, supra note 49, at 3.

¹²³ POLLACK, supra note 60, at 145.

¹²⁴ Id.

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It is a tragedy that the State, the Navajo Nation, and the United States government were able to develop sufficient trust and negotiate a settlement of the Navajo Nation's water rights despite decades of distrust, and now the whole process may be for naught because of challenges to the Settlement Agreement. The parties to the agreement likely chose not to include representatives from specific public interests in the negotiations because the State and federal governments, in theory, represent the public's interests and bringing additional parties to the table would have made negotiations more difficult. In addition, the parties to the negotiation were only concerned with settling the Navajo Nation's rights to waters of the San Juan River Basin.¹²⁵ The parties were not trying to resolve the rights of all water users in the basin, so they may have felt it was unnecessary to include representatives of other water rights holders. The public, including the water rights holders in the San Juan River Basin, was given numerous opportunities to comment on the proposed settlement before the parties came to a final agreement and submitted the Settlement Agreement to Congress.

One of the primary reasons for negotiating the Settlement Agreement was to resolve the Navajo Nation's water rights without continuing with the litigation process. Challenges to the Settlement Agreement have now placed the parties right back into the litigation process, the general stream adjudication, from which they had purposefully removed the claims, possibly negating the entire settlement process.

The Settlement Agreement successfully addressed many of the underlying reasons that motivated the parties to initiate negotiation discussions. In the beginning, all parties hoped for greater certainty regarding the water rights of the Navajo Nation, which in turn would provide

¹²⁵ Dec. 2003 Draft, supra note 59.

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certainty to other holders of water rights in the San Juan River Basin. The Settlement Agreement provides this certainty by specifying the total amount of water the Navajo Nation has the right to divert and use, and assigns a priority date to the water rights associated with each project included in the Settlement Agreement.¹²⁶ Without the Settlement Agreement, the Navajo Nation's water rights will remain a cloud of uncertainty over all water rights in the San Juan River Basin until finally adjudicated by the court, which "is a crapshoot for all the parties."¹²⁷ No one can predict how much or little water the court may award the Navajo Nation or how long the litigation may continue.

The Settlement Agreement also provides for the necessary infrastructure to deliver "wet" water rights to the Navajo Nation through multiple water projects funded in large part by Congressional appropriations.¹²⁸ The negotiation process allowed for the parties to be directly involved in crafting a flexible solution to provide the Navajo Nation with water while also protecting existing water users. Because the Settlement Agreement addresses the main concerns of each of the parties to the negotiation and resulted in a practical solution for providing water rights to the Navajo Nation in a way that was satisfactory to the parties, the negotiation was a success.

VII. Going Forward

¹²⁶ Detailed Summary of Navajo Water Rights to be Adjudicated by the Proposed Navajo Settlement Decrees 1–2 (May 1, 2011) available at http://www.ose.state.nm.us/LAP/NNWRS/legal_nnwrs.html.

¹²⁷ POLLACK, supra note 60, at 145.

¹²⁸ State's Revised Statement, supra note 49, at 6–7; Detailed Summary of Navajo Water Rights, supra note 126, at Appendix A.

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Indian water rights settlements have become the preferred alternative for resolving tribal water rights. Congress has already enacted at least 27 Indian water rights settlements, and tribes have concluded a few additional settlements without congressional approval.¹²⁹ Michael Bogert, Chairman of the Working Group on Indian Water Settlements for the DOI, stated, “My experience shows that instead of being a threatening Sword of Damocles hanging over State water rights regimes, Indian water rights can serve as a needed spur towards cooperation. Indian water rights negotiations have the potential to resolve long-simmering tensions and bring neighboring communities together to face a common future.”¹³⁰

But successful negotiations do not happen merely out of a desire to resolve a water rights conflict. Looking back on the negotiation process of the above-described Settlement Agreement, there are numerous lessons that can be applied to future negotiations. To begin with, it is vital that both the affected tribe and state are party to the negotiations. The federal government will most likely also need to be included, because they generally provide a large portion of the money for infrastructure to deliver water to the tribe and because the federal government owes a trust responsibility to the tribe to protect water resources. Additionally, it is critical to involve the public in a meaningful way in the negotiation process to limit the possibility of outside parties challenging the agreement once it is submitted to the court for final approval. Litigation and negotiated settlements are the only options for quantifying Indian water rights. Thus, the parties should all be willing to negotiate because of the uncertainty that hangs over the water rights of a river basin when Indian water rights are left unresolved, unless a party sees litigation as a better alternative for furthering their objectives.

¹²⁹ COHEN’S HANDBOOK, *supra* note 35, at 3 n.48 and n.49.

¹³⁰ Statement of Michael Bogert, *supra* note 104.

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Meaningful involvement of the public means including a party who can represent the interests of water rights holders in the relevant river basin in the actual negotiation discussions. In the above Settlement Agreement, it was not enough simply to allow the public opportunities to comment on the drafts throughout the negotiation process and to hold public meetings, because in the end the other water rights holders still challenged the Settlement Agreement. In addition to including the affected water rights holders in the negotiation discussions, the parties should be prepared to spend a substantial amount of time and energy in garnering support of the agreement from the general public so as to limit the likelihood of post-negotiation challenges.¹³¹

Generally, either the state or the tribe will convene the negotiations. Because there is a long history of distrust between most tribes and the federal and state governments, a facilitator is valuable in keeping the negotiation discussions moving forward. It may also be helpful for the parties to execute a formal memorandum of agreement, as the State and Navajo Nation did, outlining the procedures to be followed in the negotiation discussions, including ground rules. Parties must be willing to let go of deeply-held positions for successful negotiation discussions to take place. “Focusing on inflexible, immediate and often deeply held positions reduces creativity and restricts the exploration of possible solutions to conflict.”¹³² This can be illustrated by Navajo Nation President Hale’s suggestion in a letter to Governor Johnson that “productive discussions can best proceed if claims by the Navajo Nation to ‘every drop of water’

¹³¹ LESSONS FROM NINE MILE CANYON: ACHIEVING CONSENSUS OVER ENERGY DEVELOPMENT ON THE PUBLIC LANDS, 57 RMMLF-INST 3-1 (2011), 3-23.

¹³² ANTONIA ENGEL AND BENDIKT KORF, NEGOTIATION AND MEDIATION TECHNIQUES FOR NATURAL RESOURCE MANAGEMENT 115 (Food and Agricultural Organization of the United Nations 2005).

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in the river and claims by the State of New Mexico that Navajo rights have already been quantified are not brought to the negotiation table.”¹³³

Negotiations may become unwieldy if the parties try to negotiate all water rights in a river basin. It is best to only focus on defining the affected tribe’s water rights, which will then remove uncertainty regarding the water rights of other water users in the river basin. The main goal of negotiations is to actually quantify the tribe’s water rights, but other aspects of the water right should also be negotiated, such as whether the tribe may market their water rights, whether to include claims to water by allottees (those with private land holdings within the reservation boundaries), use of groundwater, and use of tribal water for other beneficial uses besides irrigation. The parties will also need to be sure to include necessary infrastructure to deliver the water to the tribe as part of the agreement, as well as determining the priority date of the water rights.

Consensus should be the rule of decision-making. “Consensus protects the rights of all participants and assures that none will be forced into an agreement simply by majority rule.”¹³⁴ The goal of negotiation is not just to get all parties to sign the agreement; but also to define a solution that can be implemented through the negotiated agreement.¹³⁵ Thus, during the negotiation process the potential problems of implementation must be addressed.¹³⁶ “The legality of measures agreed to, sources of funding, political ratification processes, identification of agencies responsible for carrying out the terms of the agreement and . . . specification of the

¹³³ Letter from Pres. Hale, *supra* note 56.

¹³⁴ John A. Folk-Williams, The Use of Negotiated Agreements to Resolve Water Disputes Involving Indian Rights, 28 Nat. Resources J. 63, 74 (1988).

¹³⁵ Id.

¹³⁶ Id.

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sources and availability of water must all be considered if future problems and related disputes are not to haunt the settlement.”¹³⁷

Because settlement agreements are only subject to court approval if the water rights are already subject to court jurisdiction, it may be beneficial to negotiate an agreement between the State and the tribe before a general stream adjudication has been filed. Although litigation oftentimes motivates parties to begin the negotiation process, it is not necessary or even the best decision to wait until a general stream adjudication has been filed to begin the process.

Education, especially for members of the public, on the validity of tribal claims to water rights likely will be necessary to motivate parties to negotiate before the threat of litigation. Parties who negotiate outside of the adjudication proceedings may have greater flexibility because any agreement they negotiate will not have to be approved by a court, which should provide additional motivation to negotiate before a general stream adjudication has been filed.

States and tribes will also want to consider whether to petition Congress to enact their settlement into law. The advantage to involving Congress is that Congress can provide money appropriations for needed infrastructure and other projects that may be included in a water rights settlement. But, on the other hand, Congressional approval requires additional time and resources, and Congress may choose to change provisions of the settlement that the parties worked long and hard to come to agreement on. If the parties decide they want Congressional approval, then it would be beneficial to meet with a representative from Congress regularly during the negotiation discussions so that someone will be prepared to champion the settlement through Congress when the time comes.

¹³⁷ Id.

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Successful negotiations can only happen if all parties trust one another. Generally, the parties to an Indian water rights settlement have long histories of distrust. Thus, these parties must come to negotiations with open minds and a willingness to set aside centuries-old disputes. The parties must also realize that it will take time to develop the necessary trust and should not be discouraged if it is not established in the first few meetings. Because parties are only represented by a few individuals, individuals actually participating in the negotiation discussions should be those committed to and most likely to develop trust with the other parties. As shown above, this is possible and can lead to negotiation of a mutually beneficial agreement. Developing this trust can also lead to greater cooperation between the participating tribe and governments in other areas in the future.

VIII. Conclusion

Although water rights have long been a source of conflict, particularly in the Western United States, the future does not have to include long, drawn-out court battles where a judge determines how much water each party is entitled to. Many successful Indian water rights settlements have already been negotiated, and more are possible as States and tribes come together to negotiate for the good of all parties. More practical, flexible solutions are available to parties who are willing to sit down together, develop the necessary trust, and negotiate the settlement of Indian water rights.