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The Unfulfilled Promise of Indian Water Rights Settlements

Heather J. Tanana and Elisabeth Paxton Parker

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When the Ute Bands signed the treaty establishing the Ute Reservation in 1868, the United States promised the Ute people that the Reservation would be a permanent home that would support our people forever. The key to carrying out that promise is water—a fact that the Tribal leadership has always known but which the United States has sometimes forgotten. —Clement

Frost, Chairman, Southern Ute
Indian Tribe

Water is critical to all aspects of individual and community health. And yet, an estimated 48% of Native American homes in the United States lack safe drinking water, reliable water sources, or basic sanitation. U.S. House of Representatives, Nat. Res. Comm., *Water Delayed Is Water Denied* (2017). Conversely, less than 1% of the population in the United States lacks access to safe water. *Indian Water Rights: Promoting the Negotiation and Implementation of Water Settlements in Indian Country*, Sen. Hearing 112-634, at 11 (2012). The pervasiveness of water insecurity across tribal communities gained national attention during the COVID-19 pandemic. Native Americans experienced disproportionate rates of COVID-19, and this elevated incidence rate was partly attributed to the lack of clean water access. Desi Rodriguez-Lonebear et al., *American Indian Reservations and COVID-19: Correlates of Early Infection Rates in the Pandemic*, 26 J. Pub. Health Mgmt. Prac. 371 (2020).

While recent legislative action, such as the Infrastructure Investment and Jobs Act, has provided much-needed financial resources to support tribal water infrastructure projects, protected and secured tribal rights to water

remain somewhat elusive. Tribes throughout the West have significant water rights through treaty and trust claims, many of which have yet to be quantified. This article provides background on federal Indian reserved water rights, explores the promise and limits of Indian water rights settlements, and provides recommendations for how such settlements can be used as a tool to further tribal interests in water.

Water Is Life

Water is necessary to obtain the highest attainable standard of physical and mental health. As a result, the United Nations and several countries have recognized the right to water as a fundamental human right. Beyond the physical health implications, water also carries spiritual and cultural significance for many tribes. Some tribal beneficial uses reflect cultural and traditional uses of water, which often are not covered by existing beneficial uses. The state of California has engaged with California tribes in order to include tribal beneficial uses (e.g., the consumption of noncommercial fish or shellfish) in their basin-planning process. To date, the State Water Board has established the following beneficial use definitions to protect activities specific to tribes and their use of Californian waters: Tribal Tradition and Culture, Tribal

Subsistence Fishing, and Subsistence Fishing.
However, California's actions are the exception.

Today, water security remains a challenge on tribal lands. The lack of water access in tribal communities is tied to past federal policies and reflects historical and persisting racial inequities. "Race is the strongest predictor of water and sanitation access," and Native Americans are more likely than any other racial group to face water access issues. U.S. Water Alliance & DigDeep, *Closing the Water Access Gap in the United States: A National Action Plan*, at 22 (2019). The federal government has special treaty and trust responsibilities to tribes. In a series of cases known as the *Marshall* trilogy, the U.S. Supreme Court recognized tribal sovereignty—the ability of tribes to govern their land and people—but established a special relationship between the federal government and tribes, similar to that of a guardian and ward, or trustee and beneficiary. See, e.g., *Cherokee Nation v. Georgia*, 30 U.S. 1, 4 (1831).

Over the course of several decades, the federal government pushed Native Americans westward to open up land to white settlers. In exchange for the cessation of millions of acres of land, the federal government typically entered into treaties and made certain promises to tribes. Many of

these treaties included the establishment of reservations as a permanent homeland for the tribes and included provisions requiring Congress to pass laws conducive to the permanent prosperity and happiness of the tribe. *See, e.g.*, Treaty with the Navajo, art. IX (Sept. 9, 1849). In *Winters v. United States*, 207 U.S. 564 (1908), the U.S. Supreme Court found that establishment of a reservation also included sufficient tribal water rights to fulfill the purpose of the reservation, including the residential, economic development, and governmental needs of the tribe. Access to a clean, reliable supply of water is necessary for any homeland to be habitable and for any community to thrive.

Notwithstanding its duty to provide clean water access for tribes, the federal government often has failed to protect tribal water rights while encouraging and supporting nontribal water development. “[I]n the water-short West, billions of dollars have been invested, much of it by the Federal Government, in water resource projects benefiting non-Indians but using water in which the Indians have a priority of right if they choose to develop water projects of their own in the future.” Nat’l Water Comm’n, *Water Policies for the Future* 476 (1973). However, the federal government’s failure to fulfill its responsibilities in the past does not absolve it of the duty to act in the present. The U.S. Supreme Court has affirmed

the federal government's obligation to uphold its treaty promises with tribes, notwithstanding its prior failure to do so. "Unlawful acts, performed long enough and with sufficient vigor, are never enough to amend the law. To hold otherwise would be to elevate the most brazen and longstanding injustices over the law, both rewarding wrong and failing those in the right." *McGirt v. Oklahoma*, 140 S. Ct. 2452, 2482 (2020). Given the public health, economic, and cultural implications, water security must be recognized as both a human right and a treaty right, necessary for the continued prosperity of tribes and their members.

The fulfillment of the human and treaty right to water should not be conditioned upon the quantification of water rights. Indeed, can you imagine if your water was shut off pending resolution of all water rights in the region? However, as discussed below, tribal water rights settlements can be used as a tool to facilitate clean water access for tribal communities.

An Introduction to Indian Water Rights Settlements

The Western Water Policy Review Advisory Commission—tasked by Congress with

developing recommendations for western water management for the first two decades of the 21st century—acknowledged that “tribal water needs often have been neglected, despite the legal and moral obligations that underpin them.” U.S. W. Water Pol’y Rev. Advisory Comm’n, *Water in the West: Challenge for the Next Century*, at i (1998). The Commission found that water is likely the most valuable asset for tribes with the potential to drive the most change, and that the extensive size of tribal water rights “should not be underestimated.” Nevertheless, the quantification and development of tribal water rights pursuant to the *Winters* doctrine presents challenges for tribes, as a significant portion of tribal water rights remain unquantified. Even for quantified claims, lack of funding for water projects often results in the inability to put such claims to beneficial use. In other instances, water necessary to satisfy tribal rights under *Winters* has been fully appropriated prior to quantification of tribal reserved water rights, and states have been recalcitrant in refusing to reduce junior appropriators in favor of senior tribal rights.

Tribes may pursue quantification of their water rights in one of two ways: through litigation (adjudication) or negotiated settlements. In 1973, the National Water Commission recommended that the Secretary of the Interior define and quantify Indian water rights, and when

warranted, recommended that litigation be initiated by the United States on behalf of tribes to adjudicate tribal water rights.

Litigation of tribal water rights requires enormous expenditures of time and money to embark on an uncertain adjudication, often in state courts. *See Colo. River Water Conservation Dist. v. United States*, 424 U.S. 800 (1976). In general, water rights litigation is not a quick process, and tribal water rights litigation is even slower. Even a positive outcome in adjudication often results in a resource unusable for many tribes due to lack of funding to develop the water resources. As a result, litigation has not resulted in “wet” water for many tribes.

In the late 1970s, tribes and the federal government explored alternative methods of quantifying tribal water rights, leading to the development of Indian water rights settlements. Indian water rights settlements, also known as tribal water rights settlements or negotiated settlements, involve negotiations between tribes, the federal government, states, water districts, and private water users to quantify a tribe’s water rights. Because quantification alone often results in a lack of access to wet water, negotiated settlements often include funding authorization for infrastructure and related expenses necessary

for tribes to facilitate access and development of their water resources. Some negotiated settlements have incorporated other benefits, such as provisions relating to environmental protection and restoration.

The federal government is involved in the settlement process pursuant to its trust responsibilities. The federal government established the Secretary's Indian Water Rights Office (SIWRO) to "manage, negotiate, and oversee implementation of settlements of Indian water rights claims." U.S. Dep't of the Int., Secretary's Indian Water Rights Office. SIWRO encourages participation of tribes, states, and local water users in order to facilitate negotiations and implement settlements. Federal projects associated with approved Indian water rights settlements are generally implemented by the Bureau of Reclamation or Bureau of Indian Affairs (BIA), pursuant to congressional directives.

The tribal water settlement process generally involves four broad steps: pre-negotiation, negotiation, settlement, and implementation. The time between the last three phases can span years, particularly during the negotiation phase. Once negotiation is completed, tribal water settlements typically require congressional authorization in order to implement the terms of

the settlement and procure federal funding. In cases where congressional approval is not required, settlements may be approved administratively by the secretary of the interior or the U.S. attorney general, or, alternatively, by judicial decree.

Tribal water settlements allow tribes to specify application of the *Winters* doctrine to avoid uncertainties surrounding beneficial use. Settlements likewise improve the odds that tribes will see wet water because agreements are often paired with financial packages that afford tribes the opportunity to develop their water, including the opportunity for economic development.

Challenges with Tribal Water Rights Settlements

Over the past four decades, tribal water rights settlements have become the preferred method for tribal reserved water rights quantification and resolution. However, this method is not without its challenges. The Western Water Policy Review Advisory Committee highlighted the shortcomings when they noted that “negotiated settlements are not an easy solution.” *Water in the West, supra*, at 3-49. Successful tribal water settlements require parties to negotiate in good

faith; but in reality, negotiations are often plagued by political maneuvering and delays. For instance, some states have used settlement negotiations to try to pressure tribes into waiving their future rights and other claims. Due to their ad hoc nature, settlements typically must be ratified by Congress, and generally involve judicial recognition to be effective. Settlements including infrastructure projects also require significant federal funding, which can be restricted due to budgetary constraints. While originally touted as faster than adjudication, the tribal water settlement process has slowed significantly over the past 25 years.

Since Congress first approved the Ak-Chin Indian Water Rights Settlement Act in 1978, the first settlement of tribal water rights claims, only 38 of the 574 federally recognized tribes have obtained a formal water rights settlement, and 34 of these settlements have been approved by Congress. Charles V. Stern, Cong. Rsch. Serv., *Indian Water Rights Settlements* (2022).

Water Settlements Should Not Delay Access to Potable Water

The federal government promised tribes a permanent homeland, conducive to the health and prosperity of their tribal members. The current administration has reiterated its commitment to honoring its treaty and trust responsibilities to tribes. Pres. Memorandum, White House Briefing Room, Memorandum on Tribal Consultation and Strengthening Nation-to-Nation Relationships (Jan. 26, 2021).

Negotiated water settlements should not be a condition to fulfilling the right to safe drinking water. Native American households are 19 times more likely than white households to lack indoor plumbing. *Closing the Water Access Gap in the United States, supra*, at 14. Navajo households, in particular, are 67 times more likely than other Americans to live without access to running water. *The Navajo Water Project*; DigDeep.

Nonetheless, water settlements can (and have) included water infrastructure projects and can provide economic development, workforce training, and technical support to tribes. As part of the 2009 Navajo Nation San Juan River Settlement, Congress authorized the Bureau of Reclamation to construct the Navajo Gallup Water Supply Project (NGWSP) to provide water to the Navajo Nation, Jicarilla Apache Nation, and the City of Gallup, New Mexico. While NGWSP

will provide clean water access to many Native American families in New Mexico, it did not address water security issues faced in other areas of the Navajo Nation. It took over a decade and a pandemic for a settlement to be reached regarding Navajo Nation's water rights in the state of Utah.

In December of 2020, following widespread media coverage of the lack of clean water on the Navajo Nation Reservation during the COVID-19 pandemic, Congress passed the Navajo Utah Water Rights Settlement Act. After approval in the U.S. House of Representatives, the Senate expedited their vote and passage of an appropriation package that included approval of the Act. On May 27, 2022, the Navajo Nation signed an agreement formalizing the settlement. At the signing ceremony on the Navajo Nation, U.S. Interior Secretary Deb Haaland noted the importance of the settlement for the tribe and their future: "As we seek to strengthen Indigenous communities and support tribal self-governance, today's action and all of these investments will help provide the Navajo Nation with autonomy and flexibility to design and build appropriate water projects that will address current and future water needs." Associated Press, *Navajo Sign Water Rights Settlement with Utah, Feds*, Indian Country Today (May 27, 2022).

Water Settlements Must Include Use-Based Flexibility

The impacts of climate change are increasingly being felt across the country, with tribal communities disproportionately experiencing climate-related threats. Water settlements must include use-based flexibility to allow tribes to respond to the demands of climate change. Tribes are active participants in addressing climate change through innovative adaptation and mitigation strategies. Incorporating traditional ecological knowledge provides tribes with unique opportunities to use this knowledge in climate change responses. Likewise, the inclusion of tribal communities in the implementation process facilitates community involvement as well as creative solutions to address climate change. Another priority that sets tribes apart from other climate change actors is that tribal climate plans include efforts to preserve cultural resources. M. Hepler & E. Kronk-Warner, *Learning from Tribal Innovations: Lessons in Climate Change Adaptation*, 49 *Env't L. Rep. News & Analysis* 11130 (2019).

In the increasingly arid American southwest, the overallocation of water rights paired with the impacts of climate change is creating strains on

water systems. Reallocating water rights in favor of tribal water rights claims results in improved water supply reliability for all water users, even though such reallocation may seem counterintuitive to some, particularly to state actors. The 2004 Arizona Water Settlements Act exemplifies how Indian water rights settlements can enhance water supply reliability for all users within the region. Rosalind H. Bark & Katherine L. Jacobs, *Indian Water Rights Settlements and Water Management Innovations: The Role of the Arizona Water Settlements Act*, 45 Water Res. Rsch. W05417 (2009). The Act included several innovative provisions, including alternative water sources, surface and groundwater protections, and tribal authority to constrain off-reservation water use.

Access to water drives the economy for many tribes through agriculture, energy production, fisheries, grazing, and general support for towns and communities. Accordingly, tribal water settlement must include flexibility to promote economic development. Many water rights in the Colorado River Basin alone, encompassing millions of acre-feet, are unresolved. Settling these unresolved rights would not only settle a legal right, but could also play a role in increasing economic development opportunities for tribal communities.

As part of its water settlements, the Jicarilla Apache Nation in New Mexico retained the authority to market water for off-reservation use to generate revenue. Jicarilla Apache Nation was able to leverage its revenue from off-reservation water leases to support tribal infrastructure and garner congressional support for the Jicarilla Apache Reservation Rural Water System Act. While this has been beneficial for the Jicarilla Apache Nation, very few tribes have the authority to market water for off-reservation use and, therefore, are deprived of a potential funding source for further economic development, including infrastructure projects.

Another example of potential economic development relating to tribal water settlements is the Colorado River Indian Tribes' (CRIT) proposed federal legislation to lease, exchange, and store a portion of its water rights. The Colorado River Indian Tribes Water Resiliency Act of 2021 received unanimous endorsement of the Central Arizona Project Governing Board. The bill, introduced by Senator Mark Kelly and co-sponsored by Senator Kyrsten Sinema, would authorize CRIT to lease a portion of its Arizona Colorado River allocation off-reservation for use within Arizona for drought relief and protection of natural habitats along the river. CRIT has the first priority decreed water right to divert 719,248 acre-feet per year for lands in Arizona and

California; and CRIT has access to wet water, rather than simply paper water rights, rendering leasing of its water feasible. Due to the Tribe's conservation efforts and farming efficiencies, CRIT retains enough water to accomplish the dual goals of serving tribal lands and leasing water. Currently, CRIT is using part of its allocation to assist the state of Arizona in maintaining levels in Lake Mead, which would continue with the bill's passage. Tribal Chairwoman Amelia Flores explained, "[b]ecause we have been serious about conserving water, we have the ability to protect the life of the Colorado River as well as providing short term drought relief to entities that need it. Conservation is paramount for CRIT and the [Central Arizona Project] and we hope S.3308 becomes law so we can all work together and protect the life of the Colorado River." Press Release, Colo. River Indian Tribes, Central Arizona Project Governing Board Supports Landmark Federal Legislation That Allows the Colorado River Indian Tribes to Lease Its Colorado River Water and Provide Drought Relief for Arizona (Jan. 2022).

Water Settlements and Their Implementation Must Be Expedited

While less protracted than litigation, tribal water rights settlements can be burdensome and lengthy. For example, negotiations by the Fort Peck Tribe in Montana took 20 years from inception of negotiations to approval of the settlement compact by the state court. Thomas Fredericks, *Developing a National Indian Water Rights Policy, in Best Practices for Protecting Natural Resources on Tribal Lands* (2015). The tribal water rights settlement process must be expedited, particularly in light of the tribes that have not yet been able to quantify their water rights.

The negotiation process, which often is the most drawn-out portion of the process, can be condensed through efforts by federal, state, tribal, and private parties. SIWRO can implement strategies to increase efficiency and cooperation during negotiations and encourage expedited implementation of settlements. Congress can expedite their ratification of proposed water rights settlements and passage of appropriations packages, as seen with the Navajo Utah Water Rights Settlement Act. While the expedited settlement of the Navajo Utah Water Rights Settlement Act provides reason to celebrate, whether the settlement would have been expedited without the extensive and excoriating media attention is debatable. Future tribal water rights settlements should be similarly prioritized

and enacted without the need for widespread media attention and public pressure.

The delay in completing infrastructure projects associated with settlements is also a challenge. For example, construction on the NGWSP began in 2012 and is projected to be completed by year-end of 2024. However, project conception and planning began decades earlier in the 1950s. Establishing a strong working relationship between federal and tribal employees on the ground is critical to success.

Projects are also more likely to stay on target when creative solutions are used to address challenges, such as collaborating with sister agencies. As part of the NGWSP, the BIA and Navajo Nation worked with another federal agency (the Indian Health Service (IHS)) to help design a portion of the pipeline. Using a portion of its program funding and expertise, IHS was able to build connections from the trunkline to part of an existing Navajo utility-operated water distribution system. As a result, water is able to reach unserved homes sooner, before completion of the rest of the NGWSP.

As climate change threatens an already-scarce resource, quantifying tribal water rights is critical

to providing additional certainty to an uncertain future. In order to protect the future of their communities, it is critical that tribal water rights move from merely theoretical paper rights to actualized water rights.

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