

2017

Western States Water Conference and Native American Rights Fund 15th Biennial Symposium on the Settlement of Indian Reserved Water Rights Claims

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religious freedom claims.

Massive infrastructure projects such as the Dakota Access Pipeline have become such a stimulating case study for historians, scientists, economists, and a variety of other academics because of the complexity and nature of the affair. The legal debate over Dakota Access is multifaceted because it is, at its core, a water rights issue, but one that is encircled by a multitude of religious and cultural concerns. However, the most powerful laws the Tribe had on their side were the NHPA and RFRA, otherwise known by DePountis as the “look before you leap” laws.

At the end of the panel discussion I asked, “Even if the pipeline had planned to cross tribal land, would it have been possible to reroute the pipeline, or would it have been too late?” Professor Birdsong answered by saying, “If our country can extract buildings from the dust in the middle of a desert to develop a city [Las Vegas], then we can certainly re-route a pipeline at the expense of human justice.” This answer emphasized the fact that nothing is set in stone, and the government undoubtedly had the power to re-route the pipeline so that it could have avoided critical sites of historical significance. While the story of the “black snake” highlights significant failures in the United States legal system, the fight is not over. In many ways, the Dakota Access Pipeline has influenced attorneys and other legal academics to find new ways to litigate an issue like this so that Native Americans and other silenced minorities in the United States receive a fair opportunity to be represented in the legal system.

Haley McCullough

**WESTERN STATES WATER CONFERENCE AND NATIVE AMERICAN RIGHTS
FUND 15TH BIENNIAL SYMPOSIUM ON THE SETTLEMENT OF INDIAN
RESERVED WATER RIGHTS CLAIMS**

Great Falls, Montana

August 8-10, 2017

Every other year since 1991, the Western States Water Conference (“WSWC”) and the Native American Rights Fund (“NARF”) hold a symposium to discuss the complexities of settling tribal water claims and to celebrate successes from the recent years. During the three-day symposium, various panels discussed the specific details of recent settlements and the logistics of negotiating and passing Indian reserved settlements in the contemporary political climate.

The location of the WSWC-NARF Symposium changes each year to coincide with a recent settlement.¹ This year, the Symposium highlighted the passage of the Blackfeet Water Rights Settlement (“Blackfeet Settlement”).² Congress passed the Blackfeet Settlement as part of the Water Infrastructure

1. This year’s symposium was held in Great Falls, Montana, about two hours southeast of the Blackfeet tribal headquarters of Browning, Montana. The early August symposium coincided with peak tourist season in Glacier National Park, which is adjacent to the Blackfeet Reservation in northwest Montana. The busy tourist season precluded available hotel and conference space on the reservation.

2. Water Infrastructure Improvement for the Nation Act, Pub. L. No. 114-322, §§ 3701-24, 130 Stat. 1628, 1814-45 (2016) (“WIIN Act”).

Improvements for the Nation Act ("WIIN Act")³ as their last action of the session in December 2016. In addition to the Blackfeet Settlement, the WIIN Act approved the settlements of three other tribal water rights: the Pechanga Band of Luiseño Mission Indians, five tribes from San Diego County, California, and the Choctaw and Chickasaw settlements.⁴ Representatives from the tribal, state, and/or federal negotiating teams of each of these settlements presented in Great Falls, Montana. Despite passage in the same bill, the Symposium presenters stressed the unique historical contexts, negotiation histories, and impacts of the four settlements. While each Indian water rights settlement is unlike any other settlement, mutual respect and cooperation by the parties are the key ingredients to any successful negotiation. In that spirit, this note will highlight the four settlements of the WIIN Act, presenting the individuality of these four historic deals and the cooperative successes of the negotiating teams from each settlement.

BLACKFEET SETTLEMENT

Attorneys from Brownstein Hyatt Farber Schreck, the Montana Office of the Attorney General, the Department of the Interior, and the Department of Justice discussed the process of their negotiations and the logistics of the Blackfeet Settlement, while tribal leaders presented the Blackfeet historical and cultural perspectives leading up to and throughout the negotiations.

The Blackfeet Settlement represents over thirty years of litigation, discussion, and compromise in a complicated legal context. The Blackfeet initially resisted the compacting process beginning in the 1970s over concerns of tribal sovereignty and state intrusion, but after years of stilted litigation, the Tribe agreed to negotiate in the 1980s. The Blackfeet-Montana Water Rights Compact established tribal rights on all surface and groundwater within the exterior boundaries of the reservation, subject only to previously established state rights on a few rivers that support irrigation in highly profitable agricultural lands, which are protected from calls by the Tribe. There were previous decrees and even international treaties the negotiating teams had to account for in the compact as well.⁵ Although overall nearly ninety-five percent of the water from six basins is now under tribal jurisdiction, it is important to give the tribe opportunities to bring drinking water to reservation communities and market water off-reservation for revenue. These future projects, however, are not strictly delineated in the compact: the parties worked hard to create sufficient flexibility for forthcoming tribal governments to meet the needs of the tribe in the future, rather than tying funding to predetermined plans.

3. *Id.*

4. *See generally* WIIN Act §§ 3401-13, 3605-08, 130 Stat. at 1755-71, 1793-14; Because of the federal oversight of tribes' limited sovereignty and tribal interests, Indian reserved water rights settlements must be approved by congressional legislation, per Congress's plenary power over Indian affairs. *United States v. Kagama*, 118 U.S. 375 (1886).

5. Birch Creek, which is the southern boundary of the reservation, is subject to a 1908 decree contemporaneous with *Winters*, but it failed to recognize the Blackfeets' reserved rights. *Conrad Investment v. United States*, 161 F. 829 (9th Cir. 1908); The St. Mary River and the Milk River are subject to the 1909 Boundary Waters Treaty, Treaty between the United States and Great Britain relating to boundary waters between the United States and Canada. U.K.-U.S., Jan. 11, 1909, 36 Stat. 2448.

Another unique aspect of the compact is the recognition of tribal water rights in the Lewis and Clark National Forest and Glacier National Park: the Blackfeet ceded the lands in 1895 but did not cede their reserved water rights, which are now formally protected. At \$422 million in federal funds, the Blackfeet Settlement represents the largest federal allocation in an Indian reserved water rights settlement to date.⁶

The presenters again and again expressed gratitude, respect, and admiration for the hard work and dedication of the negotiating parties over the years. The negotiations were born out of contentious litigation and required deliberate cultivation of trusting relationships between the Montana Compacting Commission, tribal leaders, and federal stakeholders from various agencies. It took nearly nine years after the conclusion of negotiations between the parties in 2007 to get federal recognition in 2016.

CHOCTAW-CHICKASAW-OKLAHOMA CITY-OKLAHOMA SETTLEMENT

Senior Counsel for the Chickasaw Nation discussed the particularly unique agreement—both in terms of process and outcome—between the Choctaw Nation, the Chickasaw Nation, Oklahoma City, and the state of Oklahoma that resolved long-standing questions over water rights and regulatory authority in the historic treaty areas of the Choctaw and Chickasaw nations. This settlement⁷—the first Indian water rights settlement in the state that is home to thirty-nine federally recognized tribes—came together in lightning speed compared to the usual course of Indian reserved water rights negotiations, which, in many cases, can take decades to finalize. Tribal and state officials worked through five years of state and federal litigation and negotiation to develop the plan, which allows Oklahoma City to draw water from nearby Lake Sardis for municipal use with limits to protect valuable tourist attractions and ecological resources. In return, the tribes renounced any reserved rights to the water, but gained a seat at the table for future decisions about the use of the water at the state level.

The agreement created a five-person commission, comprised of representatives from the city, state, and both tribal governments, to oversee future out-of-state transfers of water in the settlement area as approved by the state legislature, which covers twenty-two counties of southeast Oklahoma—the most water-rich region of the state. These resources are the backbone of vibrant tourism and recreation markets that generate significant economic activity in the area. Thus, this commission was also charged with ensuring that future consumptive use does not unduly compromise the recreational value of the waters. This mutual desire to protect cultural, recreational, and ecological resources formed the foundation for successful negotiation and mutual respect between the tribes and the state and city governments, who, prior to negotiations, had strained relationships.

6. The Blackfeet Settlement allocates \$420.2 million from the federal government. The Confederated Salish-Kootenai Compact, approved by the Montana state legislature in 2015 and currently pending before Congress, asks the federal government to invest \$2.3 billion dollars. See Corin Cates-Carney, *Interior Balks at Cost of CSKT Water Compact*, MONT. PUB. RADIO (June 29, 2016), <http://mtpr.org/post/interior-balks-cost-cskt-water-compact>.

7. WIIN Act § 3608, 130 Stat. at 1796–14.

By renouncing claims to reserved rights, the settlement came to Congress without the need for any federal appropriations. Because of this lack of financial input, the congressional review process was very quick: the negotiation team announced their settlement in August 2016 and it was approved in the WIIN Act only four months later. Counsel for the Chickasaw Nation noted that, while this settlement was particularly unique in its speed and lack of federal reserved rights, it demonstrates what parties can accomplish if they approach a common interest with creativity and a desire to negotiate a solution.

SAN LUIS REY SETTLEMENT

The last two Indian reserved water rights settlements included in the WIIN Act both hail from southern California. In a series of cases from the 1960s, 70s, and 80s, the La Jolla Band of Luiseño Mission Indians, Pauma Band of Luiseño Mission Indians, Rincon Band of Luiseño Mission Indians, and San Pasqual Band of Mission Indians (collectively, the “California Tribes”) challenged diversions of water from San Luis Rey River to profitable agricultural areas in Escondido and Vista. These diversions left the reservations, once abundant in water, wildlife, and vegetation, high and dry since the late 1890s. Temet Aguilar, chairman of Pauma Band of Luiseño Mission Indians, remarked on a panel focused on identification of stakeholders for successful negotiation groups, that his people watched the explosion of exceedingly prosperous agriculture and residential areas in southern California from their parched and deeply economically depressed missions. Without reliable access to water since the diversions began nearly 130 years ago, the California Tribes lacked drinking water for their peoples, water for agriculture, and water for economic development.

The California Tribes, federal government, city governments, and irrigation districts involved in litigation reached a partial settlement in 1988, which earmarked federal funds to create and operate the San Luis Rey Water Authority to regulate the river. However, questions still existed about how to allocate an already fully used river: the California Tribes received paper rights, but no wet water came to the reservations.⁸ The parties persisted and eventually lined an already existing canal to prevent seepage, creating an additional 100,000 acre feet per year—more than enough to satisfy the California Tribes’ reserved rights—which now allows the California Tribes to sell excess water back to the municipalities, generating a much needed source of additional revenue. In 2014, when the parties presented this settlement to Congress hoping to access the millions of federal funds set aside in the 1988 settlement, new budgetary constraints and considerations forced the parties to comply with new requirements by amending the 1988 settlement, which ultimately passed in the WIIN Act.⁹ Because the amendments made it possible to access the already allocated money, no new or additional federal funding was necessary. The 1988 fund with interest now amounts to \$60 million available to the California Tribes for infrastructure.

For Aguilar and his tribal counterparts, this fight for water spanned generations. He expressed deep sadness that many of the tribal leaders who initiated

8. WIIN Act § 3605, 130 Stat. at 1793-94.

9. *Id.*

the process so long ago have passed away and were not able to see the culmination of their hard work. According to Aguilar, the conclusion of their efforts reinforced his peoples' rightful place in 21st century Southern California for generations to come. "We're not going anywhere," Aguilar said.

PECHANGA SETTLEMENT

The final Indian reserved water rights settlement passed in the 2016 WIIN Act resolved the oldest civil lawsuit in the country. In 1951, the federal government sued thousands of landowners and several Indian tribes in the Temecula Valley of Southern California to secure its exclusive use of the Santa Margarita River for the Camp Pendleton military base. In 1963, a federal court issued a decree affirming—but not quantifying—many rights including tribal reserved rights. In 2007, the Cahuilla Band of Indians, the Ramona Band of Cahuilla Indians, and the Pechanga Band of Luiseño Indians all filed motions to quantify their reserved rights in the watershed. Being a particularly complicated lawsuit, a technical consultant addressed the Pechanga settlement on a panel dedicated to the importance of technical information in legal negotiations.

The Cahuilla and Ramona are still negotiating, but the Pechanga received nearly 5,000 acre feet of quantified reserved rights and \$28 million in federal appropriations to build necessary infrastructure to bring that water to the people as part of their settlement approved in the WIIN Act.¹⁰ The parties reached their settlement in 2008, just one year after the Pechanga moved for quantification, but the arduous process of federal approval took another eight years. The agreement is a unique collaboration between the sovereign Tribe and local state water providers to manage water in the basin: the Tribe agreed that water allocated to them by the eastern water district outside this settlement would count towards its reserved rights. Individual allottees are also protected and may access the high-quality groundwater for drinking or agricultural uses.

Overall, the WIIN Act put the cherry on top of the Indian water rights sundae of the Obama Administration: under the policy directives of President Barack Obama, twelve Indian water rights settlements were completed during his tenure, more than any other administration to date. While the quantity is impressive, the quality of each settlement is what really matters: water is a vital component to public health and economic development that is at the heart of many tribes' quest for recognition of their reserved rights, and negotiations serve as a means for tribes to access necessary resources while developing positive relationships with state and federal counterparts.

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10. *Id.* §§ 3401–13, 130 Stat. at 1755–71.

