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The Future of Indian Water Rights Settlements in An Age of Uncertainty

users from the two regions has shaped the history of water law in Colorado. This tension between the two regions is exacerbated by Colorado's geographical dichotomy as the western regions of Colorado has a low population and is primarily rural agricultural, and the eastern regions of Colorado has a high population and is generally urban. Furthermore, the urban population in the eastern regions of Colorado has increased drastically in recent years. Such a growth puts pressure on the state to allocate enough water to supply the urban populations. This kind of water allocation negatively impacts water rights holders residing in western Colorado. The political battle between the agricultural west and the urban east is constant and greatly affects statewide water use planning and conservation efforts.

After Eklund's overview on the nature of Colorado's water infrastructure, Schempp gave a brief conclusion to summarize the panel discussion. Schempp emphasized the primary purpose of water conservation – to return more water to the stream or, alternatively, to maintain a higher volume of water flowing in stream. The key to water conservation is not to reduce the amount water rights holders may use but rather to use the amount of water they already have in more efficient ways so as to promote a higher return of water to the stream. Current agricultural water conservation projects have mostly been tested on a smaller scale, with individual private farmers. But the results have been positive and overall very promising. Schempp ended the discussion by characterizing successful water conservation as a collaborative effort; states must work together to change laws that are outdated and outmoded, implement new technology and innovative strategies to promote water conservation, and give farmers incentives to utilize their water more efficiently and to produce less waste.

Tina Xu

THIRTY-FIFTH ANNUAL AMERICAN BAR ASSOCIATION WATER LAW CONFERENCE

Los Angeles, CA

March 28-29, 2017

THE FUTURE OF INDIAN WATER RIGHT SETTLEMENTS IN AN AGE OF UNCERTAINTY

Jennifer Gimbel, a senior research scientist at Colorado State University, moderated the panel discussion entitled, "The Future of Indian Water Right Settlements in an Age of Uncertainty." Gimbel began her introduction by acknowledging that certainty is the main goal when identifying water rights; states and water users want to know what belongs to Indians and how they want to use it. Gimbel introduced two of the most pressing sources of uncertainty—funding and resources. Over the last few years, states "ponied up" a considerable amount for successful settlements. Nonetheless, states want to maintain control over water, making it difficult to determine how water rights should be administered.

Pamela Williams, Director of the Secretary's Indian Water Rights Office in the U.S. Department of Interior ("Department of Interior"), began her discussion by quoting Secretary Ryan Zinke:

I believe Indian water right settlements are a critical part of the United States government's responsibility for tribes across the country. During my time as a Montana congressman, I fought [to ratify] the Blackfeet Nation's water compact because water is both life to the Tribe and also a key resource for the surrounding community. Not only is water an economic driver, it is an important component of [Blackfeet Nation's] culture and traditions. As Secretary of the Interior, I recognize the importance of maturing these resources.

Williams then said that water right settlements are not over, they will continue. By Williams's count, over the past thirty years, Congress enacted thirty-one settlements. The Department of Interior is "hard at work" on the eighteen settlement negotiations in place and are implementing the recently enacted settlements.

Williams continued by discussing the way in which the Department of Interior handles Indian water right settlements. A group called "Working Group on Indian Water Right Settlements," which is composed of high-level decision makers, including all assistant secretaries and the Solicitor, makes recommendations to the Secretary of Interior regarding Indian water right settlements. The Secretary's Indian Water Rights Office coordinates Indian water rights settlements through teams in the field that include representatives from, *inter alia*, the U.S. Bureau of Indian Affairs, the U.S. Bureau of Reclamation, the Solicitor's Office, and the U.S. Department of Justice.

In 1990, the Criteria and Procedures for Participation of Federal Government in Negotiating for Settlement of Indian Water Rights Claims was published in the Federal Register. Williams clarified that these Criteria and Procedures are not regulations, but rather they are guidelines agencies and administrations follow to determine what settlements it will support and the extent of federal contributions. Since the 1990 publication, every administration has applied the Criteria and Procedures with varied interpretations. Williams acknowledged that some individuals think they are poorly written, while others think they are a masterpiece of flexibility.

Williams then discussed a recent development regarding negotiating water rights settlements. In February 2015, Representative Rob Bishop, Chairman of the United States House Natural Resources Committee, sent a letter to the Department of Interior and the Department of Justice outlining the process that the House Resources Committee would follow when entertaining Indian water rights settlements. Specifically, he requested a formal statement from the Department of Interior and Department of Justice affirming post-settlement compliance with his additional criteria that emphasize compliance with the 1990 Criteria and Procedures focusing on financial aspects of settlements. The Department of Interior complied and provided statements on binding water right settlements, including the four passed in the 114th Congress. Those four included Blackfeet Water Rights Settlement Act—a "tremendous victory," Pechanga Band of Luiseno Mission Indians Water Rights Settlement Act, amendments to the San Luis Rey Indian Water Rights Settlement Act, and the Chocktaw Nation of Oklahoma and Chickasaw Nation Water Settlement. Williams noted the Bishop process is functioning—although it is not followed in the Senate, it is followed in the House.

Vanessa Ray Hodge, an attorney at Sonosky, Chambers, Sachse, Endreson & Perry, continued the discussion by focusing on the Criteria and Procedures

applied to Indian water rights settlements. The 1990 Criteria and Procedures purport to guide Indian water rights settlement negotiations. Hodge noted that the sixteen criteria were developed in response to a Federal executive branch desire to have a more principled negotiating role and intended to outline general policy goals that water settlements should reflect. These include substantive goals such as federal waivers, legal claims, appropriate financial contribution (including federal government and non-Indian parties), and procedural goals such as how to budget the settlements, types of funds to create settlement, and calculating infrastructure cost.

At the time the 1990 Criteria and Procedures were developed, Congress passed few settlements. Indian water rights settlements significantly increased and, over time, the Department of Interior and Department of Justice developed a specific approach to their application of criteria and procedures for settlements. Hodge opined that Department of Interior generally applies those procedures to all Indian water rights settlements, notwithstanding factual histories or circumstances related to individual tribes and their specific negotiations. In that regard, Hodge believes that, although the 1990 Criteria and Procedures are useful, they should be updated to reflect a more holistic approach to Indian water rights settlements.

Maria O'Brien of Modrall Sperling in Albuquerque, NM, took a step back from the technical discussion and first asked, "Why should we care about Indian water rights settlements?" The answer, she said, "Start[s] with the premise that Indian water rights require a source and certainty of access to supplied water to sustain homelands and economic development."

Indian water rights settlements play a significant role by acting as a mechanism for solving a "complex conquest over water." Thus, O'Brien continued, irrespective of ever-changing administrations, we will continue needing Indian water right settlements. Conflicts over water are consistent, and a myriad tribes throughout the United States are still without water rights settlements.

Settlements allow flexible, creative approaches and solutions to issues involving infrastructure and water allocation—issues that could not be addressed by simply quantifying Indian water rights in the context of litigation. Settlements, as opposed to litigation, unite states, the federal government, tribes, and other significant water users, which can provide varied resources not limited to financial contributions, such as modeling resources and technical assistance. These broad contributions enable the settlements to move forward and solve disputes over Indian water rights as well as local concerns about the water supply in a way that is not possible when resorting to litigation.

O'Brien then discussed a recent success in Indian water rights settlement arena—Oklahoma's first Indian water right settlement between Choctaw Nation of Oklahoma and Chickasaw Nation. Congress enacted this Indian water right settlement in December 2016, after five years of negotiation. It started with litigation, but Oklahoma and the Tribes decided to "roll up their sleeves" and reach a settlement. The federal government participated in the negotiation and was instrumental in its success. O'Brien considers every settlement to be unique, and in this one, Oklahoma and the Tribes needed work through policy issues that sourced their mutual conflict for many decades. Although settlements are unique, common issues do prevail, such as a mutual desire to reach a resolution and identify core principles at issue. It can take a substantial

amount of time for parties to articulate their individual needs. Even so, settlements are favored over litigation because they encourage resolution rather than frame settlements as purely adversarial.

Next, Williams discussed the way in which the federal government funds these settlements. In 2009, from the same Omnibus Appropriations bill that enacted the Navajo Water Rights Settlement Act, Congress created a reservation settlement fund that is apportioned from the Bureau of Reclamation fund containing billions of dollars. The reservation settlement fund only applies to settlements with a Bureau of Reclamation component and does not relieve financial pressure on the Bureau of Indian Affairs. The reservation settlement fund is intended to last until 2029 and provide roughly \$120 million per year for certain identified settlements. These include the Crow and Blackfeet Tribes in Montana that settled for roughly \$400 million each, and the Navajo Tribe in Arizona that settled for one billion dollars.

Finally, O'Brien extended the dialogue by differentiating the types of available funding. She first explained that congressionally enacted settlements rely on discretionary funding which only authorizes appropriations for each individual settlement. This discretionary funding is given to the Bureau of Indian Affairs and the Bureau of Reclamation (when projects involve a water settlement component) when the agencies ask for funds in their programmatic budget to fulfill financial obligations when settlements are enacted.

On the other hand, the 2010 Claims Resolution Settlement Act provided mandatory congressional funding for Indian water rights settlements enacted under this statute. For Congress to appropriate mandatory funding, it must find a same-year offset, meaning Congress reallocates funding from one program into another needing the mandatory funds. One of the first Indian water settlements receiving mandatory funding was the Crow Tribe Water Rights Settlement Act, which is almost fully funded, unlike the discretionary funding for the Pechanga and Blackfeet Tribes water rights settlements which are funded over time.

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THE PUBLIC TRUST DOCTRINE: A MODERN DEBATE OVER A CLASSIC DOCTRINE

Three speakers came together to discuss their views on the public trust doctrine as it applies to the current state of water law. Jennifer Harder moderated the discussion. She is a professor of law at the University of the Pacific, McGeorge School of Law, in Sacramento, California. The first part of the discussion was led by Buzz Thompson of O'Melveny & Myers, who is also a professor at Stanford Law School. He was followed by J. Craig Smith of Smith Hartvigsen, PLLC, located in Salt Lake City, Utah. Cynthia Koehler, co-founder and executive director of WaterNow Alliance, a non-profit organization based in San Francisco, concluded the discussion.