

1-1-2010

Water Settlements: Can They Ever be Final?

Kathlyn Bullis

Follow this and additional works at: <https://digitalcommons.du.edu/wlr>



Part of the [Law Commons](#)

Custom Citation

Kathlyn Bullis, Conference Report, Water Settlements: Can They Ever be Final?, 13 U. Denv. Water L. Rev. 479 (2010).

This Conference Report is brought to you for free and open access by the University of Denver Sturm College of Law at Digital Commons @ DU. It has been accepted for inclusion in Water Law Review by an authorized editor of Digital Commons @ DU. For more information, please contact jennifer.cox@du.edu, dig-commons@du.edu.

Water Settlements: Can They Ever be Final?

be a more prominent strategy in the administrative policy.

Cynthia Koehler, a Senior Consulting Attorney with the Environmental Defense Fund, then spoke regarding her work on the California Bay Delta issue. She synthesized four major points from her experiences working with the federal agencies, which she believed were indicative of how the Obama administration was influencing federal agency work. First, Ms. Koehler stressed a renewed effort in the administration to coordinate federal agencies. Second, the Obama administration is stressing the importance of partnerships and collaboration between federal agencies, stakeholders, and the states. This emphasis on partnership often manifests where federal agencies can provide either financial assistance or technical assistance. Third, the Obama administration is directing agencies to focus on concrete actions, which have broad support. In other words, the administration is directing the agencies to move forward on projects in which the interested parties generally agree upon the outcome. Finally, Ms. Koehler noted that the Obama administration has been avoiding conflict as a tool for resolving water disputes. Ms. Koehler identified this policy as a way of pulling the federal agencies out of the "cycle of conflict." As an example, she noted that in the California Bay Delta dispute, the invasive species issue is much less controversial than other problems. Therefore the federal agencies focus on a resolution on issues that the parties agree upon, instead of only focusing on issues which the parties cannot yet agree upon. As a final point, Ms. Koehler noted that in terms of water policy, the Obama administration has been actively grappling with the water issues; but from a practical perspective, many of the difficult or attenuated decisions within the Obama water policy have yet to be addressed.

Ryan McLane

WATER SETTLEMENTS: CAN THEY EVER BE FINAL?

Settlement is the preferred method to resolve disputes, especially disputes over water, as it is a shared resource. This panel explored the potential legal and practical challenges that face negotiators in settlement agreements and the issues that settlement implementers encounter, and asked the question: can water settlements ever be final?

Settlement negotiations often begin among water right holders because their adjudication has staggered and the parties want finality or they realize that a settlement agreement will better address their needs of water. Typically, in these cases, after years of settlement negotiations, the final settlement is made public, where it requires legislative action by an Indian Tribe, the State, or the United States Congress. At this point, non-parties often become involved.

Sarah Bond, Assistant Attorney General, began her presentation discussing the necessity of settlements for states who are seeking to participate in federally funded projects, and for states and tribes who

are seeking expensive infrastructure for water solutions to reserved water rights claims. She noted that, in the past, the United States has been unwilling to fund water projects unless the involved states and tribes can reach an agreement on the water in the sources.

Bond continued to discuss the history of the Yellowstone River Compact, an interstate stream compact among Montana, Wyoming, and North Dakota, which was approved by the United States. The compact was entered on December 8, 1950, and each state later legislatively ratified the Compact. Montana and Wyoming had been negotiating this settlement for almost twenty years before the Compact was signed, but an agreement always failed because Montana and Wyoming had different ways for implementing prior appropriation.

The current dispute regarding the Yellowstone River Compact is about the pre-Compact rights, which the parties left unquantified. The drought in the early 2000s resulted in Montana believing that its pre-1950 rights were not being satisfied, while Wyoming's post-1950 rights were receiving their water. Montana viewed the Compact as not allowing Wyoming to take such rights, if Montana was not receiving its pre-1950 water. However, Wyoming viewed the legislative history and the lack of specific division of pre-Compact water as indicators that the pre-1950 water rights were essentially excluded.

Bond concluded by discussing how parties' interpretations of compacts can change over time, while the agreements themselves usually remain intact. The United States has supported the development of the nation's water resources and the environmental consequences of building large federal dams. Because of this, Bond seems certain that parties will ultimately settle or comply with the ultimate decisions, whatever they may be.

Melinda Kassen, Director of Trout Unlimited's Western Water Project, explored the alternative of pursuing settlement rather than litigation in the context of water rights in the West. Kassen discussed three projects: the Black Canyon of the Gunnison River Reserved Right, the Chester Dam Hydropower License, and Montana's Forest Service Water Rights Compact.

In 1933, President Hoover designated the Black Canyon of the Gunnison River as a National Monument. In 1999, Congress upgraded the Black Canyon to a National Park. In 2001, the U.S. filed an application to quantify and perfect the Black Canyon reserved right. Based on studies, the National Park Service sought year-round base flows, an annual spring peak flow and "shoulder flows" to transition between base and peak. Over 300 parties joined the water court case, many to object to the application, while some Non-Governmental Organizations ("NGOs") filed in support.

However, in 2003 the Department of Interior and the State of Colorado announced that the United States would abandon most of the reserved right. The NGOs saw this as ignoring the ecological needs of the Black Canyon, and they asked the water court to stay proceedings to

allow them time to challenge the agreement. The water court upheld the stay. In federal court, the NGOs argued that the United States violated the National Environmental Policy Act ("NEPA"), and the federal court held in their favor, invalidating the agreement. Kassen felt that federal and state governments usually exclude NGOs from "a seat at the table." However, by "pulling up a chair," the NGOs were able to gain the respect of the other parties, and have since been more included in settlement negotiations.

Regarding the Chester Dam Hydropower License, Kassen noted that the negotiation was a successful example where the parties talked about interests rather than their positions, respected each others' bottom lines, and worked together to find a solution that achieved each party's goals. Kassen concluded by noting that regardless of whether NGOs legally have to have a "seat at the table," when parties allow NGOs to be involved in settlement negotiations, it will affect the outcome in a meaningful way.

Carl Ullman, Director of the Water Project for the Klamath Tribes in Oregon, discussed the Klamath Basin Project. He examined the background of the Klamath Tribes' water rights, the political interests joined in the struggle of dealing with policy changes, the policy initiatives that are aimed at resolving some of the Basin's resource issues, and the challenge of fitting the litigation demands of the adjudication into the negotiation of policy issues. He noted that most parties to the Klamath Basin Project are committed to a path to end litigation and to work on a settlement agreement that will provide new opportunities for all water-dependent communities in the Klamath Basin.

Kathlyn Bullis

KEYNOTE ADDRESS: INTERIOR WATER ISSUES: A YEAR OF TRANSITION AND PLANS FOR THE FUTURE

David J. Hayes, Deputy Secretary of the Interior, reminded the attendees that lawyers are problem solvers, which is so important in water issues. Water is integral to what is happening at the Department of Interior ("Interior"). Secretary of the Interior, Ken Salazar, has created, with the President's support, five priorities for Interior that all include water: (1) Energy and Climate Change; (2) Treasured Landscapes; (3) Reconnecting Youth to the Outdoors; (4) Repairing Relationships with the First Americans; and (5) Water.

First, Hayes explained Interior's priority surrounding energy and climate change. During this administration, there is a refocus on renewable energy. Currently, solar energy, which uses water in its production, is prohibited on public lands, but this administration is moving aggressively toward implementing it. The goal includes achieving five to ten thousand megawatts of energy on public lands by the end of 2011. Interior also wants to increase offshore wind energy