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## 2005 Indian Water Rights Settlement Conference Keynote Address

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**2005 INDIAN WATER RIGHTS SETTLEMENT  
CONFERENCE KEYNOTE ADDRESS**

BARBARA COSENS<sup>†</sup>

*In September 2005, Native American Rights Fund and Western States Water Council brought the Indian Water Rights Settlement Conference to Moscow, Idaho. Native American Rights Fund is the oldest and largest nonprofit dedicated to asserting and defending Native American interests nationwide, and the Western States Water Council is composed of representatives appointed by the governors of eighteen western states, including Idaho. The conference brings together panel members representing tribal, state, federal agency, congressional, local, and environmental interests to discuss, argue, and at times resolve current issues facing the many efforts to settle Indian water rights in the western United States. Twenty one settlements have been achieved. Approximately that many remain. Those remaining are difficult and many involve contentious issues such as endangered species, water marketing, water quality, tribal – state jurisdiction, interstate allocation of water, and conjunctive management of ground and surface water. The federal will to fund Indian water settlements was high during the Bush I administration, began to drop precipitously during the Clinton administration, and has disappeared altogether during the Bush II administration. This made for lively and heated discussion of federal policy during the Moscow conference. In addition, the recently approved Nez Perce water settlement was highlighted on the second day of the conference with speakers representing the Tribe, the Idaho attorney general's office, and the Department of the Interior. Professor Barbara Cosens of the University of Idaho, College of Law, who has spent the past fifteen years working on water settlements, and is currently mediating efforts to settle water allocation on the Walker River in California and Nevada, delivered the following keynote address.*

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† Associate Professor, University of Idaho, College of Law. Former Assistant Professor, Environmental Studies Program, San Francisco State University. Mediator for the Walker River dispute. Former legal counsel, Montana Reserved Water Rights Compact Commission. Lead counsel on negotiations to settle the reserved water rights of the Fort Belknap Reservation, the Chippewa Cree of the Rocky Boy's Reservation, the National Park Service, and the U.S. Fish and Wildlife Service, in Montana. LL.M. Lewis and Clark College, Northwestern School of Law, J.D. University of California, Hastings College of the Law, M.S. Geology, University of Washington, B.S. Geology, University of California, Davis.

I would like to begin with a tone of optimism by acknowledging some of our successes – both because a pause to take stock is important in itself, and because it will highlight why this process of settlement is important. I will then turn to some of the key points to keep in mind as we move forward on the remaining settlements.

Twenty-one settlements have been through congressional or court approval, or both.<sup>1</sup> Many are in various stages of implementation. These settlements have given rise to a greater tribal voice in western water and have begun to reverse the disparity between federal dollars spent on non-Indian water projects and Indian water projects.<sup>2</sup>

For non-Indian water users, settlement has removed a cloud of uncertainty over their water rights. Non-Indians have also seen benefits, not only from settlement water projects, but also through improvements in efficiency, coordination of management in basins with multiple jurisdictions, and in relations with their neighbors.

The two benefits of choosing settlement over litigation referred to most often are:

1. Wet Water: the greater likelihood that the tribe will see actual water rather than paper rights, and

2. Tailored Solutions: the ability to tailor the solution to the needs of the particular tribe and of the basin in which it resides.

You need only look to the diversity of the twenty-one settlements to see that negotiators have taken full advantage of these benefits. Some examples include Montana, where there was an unsafe state dam on the Tongue River that threatened downstream communities,<sup>3</sup> including some in which Northern Cheyenne is spoken – a language generally unknown to emergency evacuation services. The aftermath of Hurricane Katrina has reminded us that it is the marginalized populations that bear the brunt of a major disaster. The Tongue River dam has been repaired and enlarged. The increased pool belongs to the

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1. See NEGOTIATING TRIBAL WATER RIGHTS: FULFILLING PROMISES IN THE ARID WEST, xxiii tbl.1.1, (Bonnie G. Colby, et. al. eds., 2005). Not all of the twenty-one settlements listed in Table 1.1 are, strictly speaking, water right settlements. For example, the Truckee-Carson-Pyramid Lake settlement addresses endangered species and tribal trust issues. Truckee-Carson-Pyramid Lake Water Rights Settlement Act, Pub. L. No. 101-618, 104 Stat. 3294 (1990). At the same time, not all “water right” settlements are confined to issues of water rights. For example, the Nez Perce settlement includes a tribal role in salmon fish hatcheries and provisions addressing endangered species issues. The point being, in providing real solutions, it is no longer possible to segregate water rights from other attributes of a water system such as water quality or aquatic life.

2. Daniel McCool, *Winters Comes Home to Roost*, in FLUID ARGUMENTS: FIVE CENTURIES OF WESTERN WATER CONFLICT 120, 121, 123 (Char Miller ed., 2001) (discussing disproportionate spending on non-Indian water projects).

3. Northern Cheyenne Indian Reserved Water Rights Settlement Act of 1992, Pub. L. No. 102-374, 106 Stat. 1186.

Northern Cheyenne Tribe.<sup>4</sup> This is wet water and a specifically tailored solution.

Another example resides in Nevada, where Pyramid Lake once hosted a particular species of cutthroat trout. The trout disappeared from the Lake by the 1940's.<sup>5</sup> The Lake is now stocked with a hatchery population of Lahonton cutthroat trout.<sup>6</sup> The fish need high spring flows and cool temperatures to enter the river to spawn. The settlement provides for negotiation of an operating agreement to manage the five federal reservoirs and several private reservoirs in the basin in ways that allow enhancement of flows to the Lake during spawning, and provide a drought water supply for the growing Reno-Sparks area.<sup>7</sup> As if they sought to prove this will work, in 1997, a particularly wet year, the Lahonton cutthroat trout entered the Truckee River to spawn.<sup>8</sup> This is wet water and a specifically tailored solution.

The Nez Perce settlement recognizes the importance of salmon in the tribe's history and culture by giving the Tribe a greater role in the major hatcheries in the area. The settlement provides for instream flow protection and habitat restoration on many of the historic spawning streams in the Salmon and Clearwater basins, and it accounts for current land use patterns.<sup>9</sup> This is wet water and a specifically tailored solution.

Over time, Indian water settlements have become increasingly complex, taking on issues of basin-wide concern, and thus requiring greater funding to implement. A cynical view would label this as opportunistic – a wrapping of projects in the Indian blanket.<sup>10</sup> I am not a

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4. Barbara Cosens, *Northern Cheyenne Compact*, in NEGOTIATING TRIBAL WATER RIGHTS: FULFILLING PROMISES IN THE ARID WEST, 124, (Bonnie G. Colby, et. al., eds., 2005) (discussing The Northern Cheyenne Compact); MONT. CODE ANN. § 85-20-301 (2005) (ratified by Northern Cheyenne Indian Tribe Reserved Water Rights Act of 1992, Pub. L. No. 102-374, 106 Stat. 1186).

5. NEV. DIV. OF WATER RES., TRUCKEE RIVER CHRONOLOGY: CHRONOLOGICAL HISTORY OF LAKE TAHOE AND THE TRUCKEE RIVER AND RELATED WATER ISSUES, available at <http://water.nv.gov/Water%20planning/truckee/truckee1.htm>.

6. NEV. DIV. OF WATER RES., *supra* note 5.

7. Truckee-Carson-Pyramid Lake Water Rights Settlement Act of 1990, Pub. L. No. 101-618, 104 Stat. 3294, 3298-99, 3305, 3307, 3313. See also, Barbara Cosens, *Farmers, Fish, Tribal Power, and Poker: Reallocating Water in the Truckee River Basin, Nevada and California*, 10 HASTINGS W.-NW. J. ENVTL. L. & POL'Y 89, 91, 122, 126, 128-30 (2003).

8. Chad R. Gourley, *Restoration of the Lower Truckee River Ecosystem: Challenges and Opportunities*, 18 J. LAND RESOURCES & ENVT'L L. 113, 118 (1998).

9. Snake River Water Rights Act of 2004, Pub. L. No. 108-447, 118 Stat. 3431.

10. A project is said to be "wrapped in the Indian blanket" if federal funding is obtained for non-Indian benefits under the guise of an Indian project. See, e.g., Gail Binkley, *A-LP gets federal A-OK*, HIGH COUNTRY NEWS, Aug. 27, 2001 (indicating that opponents to the proposed Animas-La Plata project, which would have resulted in substantial non-Indian benefits, suggest that it was wrapped in the Indian blanket to make it politically acceptable), available at [http://www.hcn.org/servlets/hcn.Article?article\\_id=10675](http://www.hcn.org/servlets/hcn.Article?article_id=10675).

cynic, and I submit to you that this is a necessary result of the desire and the need to provide wet water. Furthermore, it has the potential to provide long-lasting benefits throughout the West in water infrastructure, restored habitat, and improved coordination, management and dispute resolution across tribal and state jurisdictional boundaries.

Litigation resulting in a paper water right need not address the many obstacles to delivery of that water or the economic and community impacts of its loss. Settlement must. We need look no further than one of the twenty-one settlements – the Colorado Ute and the failed Animas-La Plata and Animas-La Plata light – to know that issues considered extraneous to water allocation, such as endangered species, must be addressed to provide wet water.<sup>11</sup> We need look no further than the Wind River litigation to know that adjudications, which will merely define a right,<sup>12</sup> not its use or administration, will be followed by another lawsuit when attempts are made to put it to use.<sup>13</sup> The message: wet water requires comprehensive solutions. The direction we are taking in settlement indicates that we have learned this much. But we are not finished. How can we continue not only to show success, but to use our experience to achieve better solutions?

In distilling my own experience, I came up with six key points concerning settlement. Why six? Maybe because ten was too many for the time Craig<sup>14</sup> allotted me and I could not cut it to five, maybe because in the end, it is that simple – and as you know, that complex. Most of what we need to focus on as we move forward can, in my opinion, be captured in six points.

#### **POINT 1: UNCERTAINTY IS NECESSARY – UNCERTAINTY IS AN ISSUE**

Uncertainty is necessary because it is the unknown that gives parties the political will to settle. It is the fact that we do not know if the practicable irrigable acreage standard, the measure many use to quantify the Indian water right, will survive another trip to the Supreme

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11. Colorado Ute Indian Water Rights Settlement Act of 1988, Pub. L. No. 100-585, 102 Stat. 2973. See also, Scott McElroy, *Colorado Ute Water Rights Settlement*, in *NEGOTIATING TRIBAL WATER RIGHTS: FULFILLING PROMISES IN THE ARID WEST*, 138, 138-44 (Bonnie G. Colby, et. al. eds., 2005).

12. See, e.g., *In re Rights to Use Water in the Big Horn River*, (*Big Horn I*) 753 P.2d 76, 122 (Wyo. 1988), *aff'd* 492 U.S. 406, 407 (1989) (upholding the quantification of the tribal water right based on the practicably irrigable acreage method for agricultural purposes).

13. See, e.g., *In re Rights to Use Water in the Big Horn River* (*Big Horn III*) 835 P.2d 273 (Wyo. 1992). See also Ramsey Kropf, *Wind River Litigation*, in *NEGOTIATING TRIBAL WATER RIGHTS: FULFILLING PROMISES IN THE ARID WEST*, 107, 109 (Bonnie G. Colby, et. al. eds., 2005) (noting that the change in use of the tribal water right could only take place pursuant to state law).

14. Craig Bell is the Executive Director of Western States Water Council.

Court, one without Sandra Day O'Connor to recuse herself, and if not, who will come out better in what replaces it.<sup>15</sup> It is the uncertainty in just how far the McCarran amendment will be interpreted to go in eroding tribal jurisdiction or how strong that jurisdiction remains that allows us to work out practical cooperative solutions.<sup>16</sup> It is the uncertainty in how the Supreme Court will view instream flow claims for salmon habitat out of the right to fish in the "usual and accustomed places" that moves the state of Idaho to protect instream flow in the Nez Perce settlement.<sup>17</sup>

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15. Justice Thurgood Marshall's papers reveal that just prior to Justice O'Connor's recusal from *Big Horn I*, due to a conflict of interest created by a family ranch with water claims in the Gila River adjudication, she had written a majority opinion that would have altered the PIA standard. Justice O'Connor would have required "sensitivity" to private development and reduced a PIA award if the proposed projects lacked a "reasonable likelihood" of actually being built. *Wyoming v. United States*, U.S. Supreme Court Second Draft Opinion No. 88-309, at 17-18 (June 1989), reprinted in Andrew C. Mergen & Sylvia F. Liu, *A Misplaced Sensitivity: The Draft Opinions in Wyoming v. United States*, 68 U. COLO. L. REV. 683, 725-40 (1997). See also Barbara Cosens, *The Measure of Indian Water Rights: The Arizona Homeland Standard, Gila River Adjudication*, 42 NAT. RESOURCES J. 835, 845 (2002).

16. The McCarran Amendment states that:

Consent is given to join the United States as a defendant in any suit (1) for the adjudication of rights to the use of water of a river system or other source, or (2) for the administration of such rights, where it appears that the United States is the owner of or is in the process of acquiring water rights by appropriation under State law, by purchase, by exchange, or otherwise, and the United States is a necessary party to such suit. The United States, when a party to any such suit, shall (1) be deemed to have waived any right to plead that the State laws are inapplicable or that the United States is not amenable thereto by reason of its sovereignty, and (2) shall be subject to the judgments, orders, and decrees of the court having jurisdiction.

43 U.S.C. § 666(a) (2000) (emphasis added). Interpreting the McCarran Amendment to allow state court adjudication of water rights left open the question of how those rights should be administered once adjudicated. The Ninth Circuit held that a tribe has jurisdiction over administration, including a change in use of its water rights, when the water source is located wholly within a reservation. *Collville Confederated Tribes v. Walton*, 647 F.2d 42, 52-53 (9th Cir. 1981). However, the Ninth Circuit has also recognized state jurisdiction over non-Indian water use on a reservation when the water source is also on land outside the reservation. *United States v. Anderson*, 736 F.2d 1358, 1366 (9th Cir. 1984). The Wyoming Supreme Court took the constraints on tribal administration one step further. In response to a challenge to tribal dedication of a portion of the water right of the Wind River Reservation to instream flow, the court concluded that the change could only occur pursuant to state law. *In re the General Adjudication of all Rights to Use Water in the Big Horn River System, (Big Horn III)* 835 P.2d 273, 279 (Wyo. 1992).

17. *United States v. Winans*, 198 U.S. 371, 384 (1905) (holding that the language reserving the right to fish in the usual and accustomed places in ceded land includes a right of access to those sites). *Washington v. Washington State Commercial Passenger Vessel Fishing Ass'n*, 443 U.S. 658, 674-75 (1979) (holding the right to fish in the usual and accustomed places also includes a right to a fair share of fish). A federal district court held that the same language gives the treaty tribes the right to 50% of the harvestable fish. *United States v. Washington*, 384 F. Supp. 312, 343 (W.D. Wash. 1974)

Uncertainty is the room within which negotiation occurs and real solutions are found. It, therefore, drives the process.

Uncertainty is also a substantive issue. The subject of our negotiations – water – has a will of its own. No matter what your hydrologist tells you, an average year does not exist in nature. Instead, there is too much water or too little. So we measure it, look at historic records, develop models, and in the end it is our best guess given the tools at hand and the information available whether the future water supply will adequately serve the solution chosen.<sup>18</sup> To complicate matters, we have the uncertainty of the water supply impacts of climate change.

Two things you should pay attention to in settlements to address the substantive issue of uncertainty:

First, provide for distribution of risk of an inadequate water supply. By distribution of risk I mean: are there incentives or harms that will make all parties equally interested in modifying solutions if the water supply is inadequate?

Second, provide a means to adapt without re-opening litigation. Water supply changes, values change, needs change, and technology for water use and climate prediction changes. Due to the very nature of the resource, a durable settlement must have the means to adapt to change.<sup>19</sup>

## POINT 2: TRUST IS NECESSARY – TRUST IS AN ISSUE

In the end, negotiations are highly personal. It is the rapport people at the table build that determines a successful outcome. In a simplistic way, this is because language is imprecise. If I take everything you say in its worst possible light, we will never have a meeting of the minds. Sufficient trust must be built between the negotiators to know that when one says: “my client cannot go that far,” others know it is not a bluff.

How is trust built? Time. Time and follow through on every representation you make. Time, follow through on every representation and rapid contact of parties and offering of solutions when you find you misspoke – when your client cannot do what you represented they could. This happens more often than you would like when represent-

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*aff'd* 520 F.2d 676, 677 (9th Cir. 1975). In 1999, the Snake River Basin Adjudication court ruled that the Nez Perce Tribe does not have water rights to instream flow related to off-reservation treaty rights to fish at the usual and accustomed places. *In re SRBA*, Case No. 39576 at 47 (Idaho Dist.-5th Nov. 10, 1999). The Nez Perce settlement renders moot any ultimate appeal of that issue to the United States Supreme Court.

18. See, e.g., Barbara Cosens, *The Role of Hydrology in the Resolution of Water Disputes*, J. CONTEMP. WATER RESEARCH AND EDUC. (forthcoming).

19. See Barbara Cosens, *Water Dispute Resolution in the West: Process Elements for the Modern Era in Basin-wide Problem Solving*, 33 ENVTL. L. 949, 979, 985 (2003) (analyzing the elements necessary for a durable settlement).

ing a governmental client. Can the process be sped up? Yes, but only through honest, open interaction. There are no tricks, games or role plays that can supplant a commitment to speaking the truth and withholding nothing of importance to the other parties.

Yet while lack of trust at the table must be overcome to move forward, lack of trust that another government will follow through or interpret an agreement as negotiators intend fifty years down the road should never be overcome – it should be dealt with squarely as an issue. Enforcement, verification of compliance, and a means to resolve disputes are necessary components of any agreement. Trust for those at the table must not be confused with trust for a future sovereign government.

### **POINT 3: SETTLEMENT AGREEMENT IS VOLUNTARY – LITIGATION OUTCOME IS IMPOSED BY A THIRD PARTY**

We all know this. In fact, it is such an obvious statement that we forget the implications when we enter a settlement process. No solution that, if agreed to by the political representatives will result in loss of their next election, is worth wasting the time to bring to the table.<sup>20</sup> It is not always possible to identify where the line is drawn between a difficult solution that will require leadership to achieve and a solution that will sink its proponents. But if the only politically acceptable solution to your client is retribution, to win it all, or to maintain the status quo – go to court. That is what an objective party is for. To make the hard decisions political entities cannot make. Sometimes with water, that is necessary. What settlement allows is control to tailor a solution. But some questions require third party intervention. Recognize the difference and do not waste precious resources seeking impossible voluntary outcomes.

### **POINT 4: SOVEREIGNTY OVER NATURAL RESOURCES IS CONTROL OF THOSE RESOURCES – IN A SHARED WATER SHED, TO GIVE UP A DEGREE OF CONTROL IS TO EXERCISE SOVEREIGNTY**

Sovereignty, is frequently discussed and poorly understood in tribal/state negotiations. What is sovereignty in the context of a natural resource? In discussions with representatives of state and tribal governments, it is possible to hear as many definitions for sovereignty as there are governments claiming to possess it. But a common thread runs through the responses: sovereignty in the context of a natural resource means control. Control to develop, use, not use, restore, de-

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20. See generally, Barbara Cosens, *The 1997 Water Rights Settlement Between the State of Montana and the Chippewa Cree Tribe of the Rocky Boy's Reservation: The Role of Community and of the Trustee*. 16 UCLA J. ENVTL L. & POL'Y. 255, 287-89 (1998).

cide who has access, decide who has use rights, and under what conditions.

Consider that definition, sovereignty means control, in the context of water. In most instances water crosses political boundaries. Is control of water within political boundaries, when there are other sovereigns both upstream and downstream, meaningful control? The fugitive nature of the resource, and the fact that we ignored John Wesley Powell's recommendation to draw political boundaries on a watershed basis,<sup>21</sup> means that only through shared action do we gain true control. A sovereign willing to relinquish some control within its own boundaries in exchange for a measure of control within the boundaries of another sovereign, exercises true sovereignty over the water resource.

Put in other words: diplomacy is an exercise of sovereignty.

### POINT 5: FEDS, IT IS YOUR FAULT

This is not to say it is the fault of federal team members.<sup>22</sup> I have seen you work tirelessly. Without the commitment of people like Rich Aldrich, Scott Gunthner, John Lange, Susan Schneider, Tom Strelkel, Cathy Wilson, Betsy Reike, Pam Williams and David Hayes, we would not have twenty-one settlements to celebrate. What is meant by "feds, it is your fault," is that where western water is today is largely due to federal policy. States claim to control the water within their borders. This is a fiction. Any sovereignty states have over water is, as for tribes, of diminished stature.

Federal policy controlled the colonization of the west from the diminishment of tribal land holdings to Reclamation Law.<sup>23</sup> Even where no Reclamation project exists, the Homestead Act<sup>24</sup> and the 1872 Min-

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21. WALLACE STEGNER, *BEYOND THE HUNDREDTH MERIDIAN* 227 (1954). *See also* MARC REISNER, *CADILLAC DESERT: THE AMERICAN WEST AND ITS DISAPPEARING WATER* 49 (1987) (noting that Powell recommended that state boundaries follow the boundaries of the major water basins).

22. Teams are formed pursuant to Criteria and Procedures for Participation of the Federal Government in Negotiations for Settlement of Indian Water Right Claims to assure coordination of the various federal interests in the particular water resource at issue. Criteria and Procedures for Participation of the Federal Government in Negotiations for Settlement of Indian Water Right Claims Federal, 55 Fed. Reg. 9223 (March 12, 1990).

23. Reclamation Act, 43 U.S.C. §§ 371-600e (2000). Since its inception, the Bureau of Reclamation has constructed more than 600 dams and reservoirs in seventeen western states. U.S. DEP'T OF THE INTERIOR, BUREAU OF RECLAMATION, UPPER COLORADO REGION: ABOUT US, <http://www.usbr.gov/uc/aboutus/> (last visited May 2, 2006).

24. Homestead Act of 1862, 12 Stat. 392, (codified as amended in scattered sections of 43 U.S.C.). The Homestead Act opened public lands to homesteads of 160 acres and required establishment of a patent within five years. 43 U.S.C. §§ 161, 164 (2000) (repealed 1976).

ing Act<sup>25</sup> controlled the pattern, nature, and speed of land development, which, in an arid region, controls water development. In the face of national policy to promote this development, Indian resource development, including water, lagged far behind that of their neighbors.<sup>26</sup>

The Dawes Act resulted in substantial non-Indian ownership within reservation boundaries.<sup>27</sup> The allotment era ended<sup>28</sup> with an initial attempt to restore tribal land through purchase,<sup>29</sup> but the flow of federal dollars to restore Indian land ended with the greater national financial needs of World War II. In the prosperity that followed World War II, the effort to purchase land never resumed. The federal role has become even more complex in recent years with the passage of the federal Clean Water Act ("CWA")<sup>30</sup> and the federal Endangered Species Act ("ESA"),<sup>31</sup> which may place instream demands on this heavily used water resource.

Acts of Congress are an expression of national policy and national interest. Therefore, it is our collective responsibility as a nation to seek solutions. It is appropriate for financing to include state or local cost share, but this does not preclude a broader view of national interest. This requires two changes to the current approach.

First, Congressional review and establishment of a funding source that does not pit tribe against tribe or create incentive to wrap all projects in the Indian blanket due to the narrow view that only the trust obligation creates a national interest, and second, Scrap the Criteria and Procedures.<sup>32</sup> *The Criteria and Procedures for the Participation of the Federal Government in Negotiations for the Settlement of Indian Water Right*

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25. General Mining Act of 1872, 17 Stat. 91, (codified as amended in 30 U.S.C. §§ 21-54) The General Mining Law established the location of mining claims on public lands and the process for patenting claims. 30 U.S.C. §§ 22-39 (2000).

26. McCool, *supra* note 2, at 121.

27. Dawes Act or Indian General Allotment Act of 1887, Pub. L. No. 106-462, 114 Stat. 2007, (codified as amended in 25 U.S.C. § 331-358). The Dawes act provided for assignment of allotments to individual Indians and opening of surplus land to homesteading. Indian allotments could eventually go into fee ownership and be sold. *Id.* § 331. The end result was to cut Indian land holdings from 138,000,000 acres in 1887 to 48,000,000 acres in 1934 when the allotment era ended. *The Purposes and Operation of the Wheeler-Howard Indian Rights Bill*, 73d Cong. 3 (1934) (a memorandum of explanation submitted to the Members of the Senate and House committees on Indian Affairs by John Collier, Commissioner of Indian Affairs).

28. Indian Reorganization Act, 48 Stat. 984, (codified at 25 U.S.C. § 461 (2000)).

29. Act to Conserve and Develop Indian Lands and Resources, Pub. L. No. 73-383, 48 Stat. 984 (1934).

30. 33 U.S.C. §§ 1251-1387 (2000).

31. 16 U.S.C. §§ 1531-1544 (2000).

32. Working Group in Indian Water Settlements; Criteria and Procedures for the Participation of the Federal Government in Negotiations for the Settlement of Indian Water Right Claims, 55 Fed. Reg. 9223 (Mar. 12, 1990).

*Claims*, promulgated by the Bush I administration,<sup>33</sup> were a good faith attempt to provide a means for Interior to speak with one voice in settlement. However, similar to federal funding, the *Criteria and Procedures* narrowly address only the federal role as trustee. As noted above, solving a problem in one part of a basin without addressing the basin as a whole may result in a settlement of limited durability that fails to provide a tribe with wet water. The issues on the table have necessarily broadened. No mechanism exists to provide federal negotiators with both guidelines and authority to weigh one federal interest against another. The federal role has become increasingly complex with the passage of the CWA and the ESA. The U.S. Supreme Court has noted that the federal government may wear many hats.<sup>34</sup> However, as historian Patricia Limerick said, "by 1980 . . . the Secretary of the Interior wore more hats than a head could support."<sup>35</sup>

As an example, in the Walker River basin in California and Nevada, where the author is the mediator, three tribes claim water: the Walker River Paiute, the Yerington Paiute and the Bridgeport Indian Colony.<sup>36</sup> Claims exist for the Marine Mountain Warfare Training Center in the headwaters, and the Hawthorne Army Depot at the terminus of the basin. It has been a long time since Interior and the War Department resided under one roof. In between these Department of Defense claims are United States Forest Service claims – also not under Interior for historic reasons. There are Bureau of Land Management lands with claims in the basin. Listed aquatic species occur in the terminal lake<sup>37</sup> requiring both critical habitat designation under the ESA<sup>38</sup> and a

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33. In his official statement on signing the Puyallup Tribe of Indians Settlement Act, President George Bush stated:

The Administration expects to continue to work toward settlement of legitimate Indian land and water rights claims to which the Federal Government is a party. . . .

Indian land and water rights settlements involve a complicated blend of law, treaties, court decisions, history, social policies, technology, and practicality. These interrelated factors make it difficult to formulate hard-and-fast rules to determine exact settlement contributions by the various parties involved in a specific claim.

In recognition of these difficulties, this Administration is committed to establishing criteria and procedures to guide future Indian land and water claim settlement negotiations including provision for Administration participation in such negotiations.

Statement on signing the Puyallup Tribe of Indians Settlement Act of 1989, 1 PUB. PAPERS 771, 772 (June 21, 1989).

34. See *Nevada v. United States*, 463 U.S. 110, 135-38 n.15 (1983).

35. PATRICIA NELSON LIMERICK, *THE LEGACY OF CONQUEST: THE UNBROKEN PAST OF THE AMERICAN WEST* 307 (1987).

36. See *United States v. Walker River Irrigation Dist.*, 11 F. Supp. 158 (D. Nev. 1935), *rev'd*, 104 F.2d 334 (9th Cir. 1939).

37. Lahonton Cutthroat Trout in Walker Lake are a designated threatened species under the ESA. Endangered and Threatened Wildlife, 50 C.F.R. § 17.11 (2005); U.S.

particular water quality under the CWA.<sup>39</sup> It is only the creativity and willingness to step outside the box that has so far allowed the federal team to hold it together, but they have no guidelines to govern trade-offs among these interests should they be proposed in the course of negotiations.

The *Criteria and Procedures* must be replaced with a broader construct to accommodate basin-wide concerns that raise or impact federal interests – all of which impact whether a settlement will result in wet water to a tribe.

FISH AND WILDLIFE SERVICE, RECOVERY PLAN FOR THE LAHONTAN CUTTHROAT TROUT 12 (1995), available at [http://ecos.fws.gov/docs/recovery\\_plans/1995/950130.pdf](http://ecos.fws.gov/docs/recovery_plans/1995/950130.pdf).

38. The ESA requires the Secretary to designate critical habitat for species designated as endangered or threatened. 16 U.S.C. § 1533(a) (3) (2000).

39. On July 28, 2004, Nevada Division of Environmental Protection issued the following notice of proposed action:

Pursuant to Section 303(d) of the Clean Water Act, the State of Nevada is required to develop a list of impaired waterbodies that need additional work beyond existing controls to achieve or maintain water quality standards. For those waters included on this 303(d) List, the State of Nevada is required to develop Total Maximum Daily Loads (TMDLs).

On October 16, 2001, Mineral County and the Walker Lake Working Group filed a civil action in federal district court against EPA under the Clean Water Act alleging that the EPA had failed to take necessary steps to save Walker Lake. On November 22, 2002, the parties entered into a Consent Decree agreeing to the following actions:

1. If Nevada fails to include Walker Lake on the 2002 303(d) List for total dissolved solids (TDS), EPA will either:
  - a. Determine that Walker Lake needs to be listed for TDS and amend Nevada's 303(d) List; or
  - b. Determine that Walker Lake need not be listed for TDS and provide a copy of its decision to the Plaintiffs.
2. If Walker Lake is placed on Nevada's 2002 303(d) List for TDS, EPA agrees to establish a Walker Lake TDS TMDL by March 15, 2005, unless Nevada establishes and EPA approves a TMDL prior to March 15, 2005.

Prior to the issuance of the Consent Decree, the Nevada Division of Environmental Protection (NDEP) had already included Walker Lake on its 2002 303(d) List (dated October 2002). After discussions with EPA, NDEP agreed to develop a Walker Lake TDS TMDL in accordance with the Consent Decree.

NEVADA DEPARTMENT OF ENVIRONMENTAL PROTECTION, NOTICE OF PROPOSED ACTION, <http://ndep.nv.gov/admin/public19.htm> (last visited Apr. 4, 2006). On February 22, 2005, NDEP issued a TMDL of 12,000 TDS for the beneficial use of aquatic life, including the Lahontan Cutthroat Trout. The draft TMDL was approved by EPA on March 8, 2005. NEVADA DEPARTMENT OF ENVIRONMENTAL PROTECTION, TOTAL MAXIMUM DAILY LOADS OF WALKER LAKE 12 available at [http://ndep.nv.gov/bwqp/walker\\_lake\\_tmdl.pdf](http://ndep.nv.gov/bwqp/walker_lake_tmdl.pdf).

### POINT 6: FINALITY IS IMPOSSIBLE – FINALITY IS UNDESIRABLE

Lawyers often come to the table with the goal of finality – let this be the solution to last for all time. However, negotiations involve two important variables we deal with: water and human beings. For example, the Ak-Chin settlement authorized in 1978<sup>40</sup> went back to Congress twice in 1984<sup>41</sup> due to water supply problems, and in 1992<sup>42</sup> to allow water marketing. Alternatively, consider the Animas-La Plata, Animas-La Plata Light, and Animas-La Plata Ultralight, these represent a settlement modified again and again due to endangered species issues.<sup>43</sup>

Each of the modifications to these settlements reflects the need to respond to water supply or human changes. A solution that assumes no change in these variables will not withstand the test of time. This is not to say that finality in terms of the litigation that has brought the parties to the table in the form of dismissal with prejudice is not desirable to all parties, but accomplishing that should not preclude a settlement that can adapt to change.

A settlement that will serve the needs not only of this generation, but also of future generations, must include mechanisms and the necessary institutions to allow modification of water infrastructure, change in use, and dispute resolution as time passes. Such adaptation can be constructed as part of a settlement rather than a re-opening of a settlement. Without it, you may have bought your client a future lawsuit.

To summarize the six points:

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40. Settlement of Ak-Chin Water Rights Claims, Pub. L. No. 95-328, 92 Stat. 409 (1978). The original Ak-Chin settlement identified a quantity of water, but merely directed a study by the Department of the Interior to identify the source from federal lands. Pub. L. No. 95-328, 92 Stat. 409, 409-10.

41. Pub. L. No. 98-530, 98 Stat 2698 (1984). The 1984 amendments became necessary when it was clear that the water supply contemplated by the settlement was insufficient.

42. Pub. L. No.102-497, 106 Stat. 3255 (1992). The 1992 amendment allowed the tribe to lease its water for up to 100 years within certain specified groundwater management areas. State requirements that developers prove a 100 year water supply for new development spurred local support for the amendment. 10,000 acre-feet were quickly leased to the Del Webb Corporation for a planned community. *NEGOTIATING TRIBAL WATER RIGHTS: FULFILLING PROMISES IN THE ARID WEST*, 114-15, (Bonnie G. Colby, et. al., eds., 2005).

43. Colorado Ute Indian Water Rights Settlement Act of 1988, Pub. L. No. 100-585, 102 Stat. 2973 (1988). See also McElroy, *supra* note 11, at 139. The initial Colorado Ute settlement called for reservoir construction known as Animas-La Plata that would serve both Indian and non-Indian needs. Endangered species issues and environmental opposition led to two attempts to scale back on the project by eliminating much of the non-Indian component. These attempts were referred to among those in the Indian water rights community as “Animas-La Plata Light” and “Animas-La Plata Ultralight.”

1. Uncertainty is necessary – it is the room in which we negotiate. Uncertainty must also be addressed as an issue by spreading risk and allowing adaptation to change.
2. Trust at the table is necessary, but should not be confused with trust of future governments.
3. Settlement agreement is voluntary – do not waste time on solutions that are clearly politically impossible.
4. Sovereignty over natural resources is control of those resources, and yet in a shared watershed, to give up a degree of control is to exercise sovereignty.
5. Feds, it is your fault – meaning, it is our collective fault.
6. Finality is impossible, and in fact, undesirable. This is water and we are human.

In the twenty-one settlements accomplished to date, there is reason to celebrate. Yet the process of Indian water right settlement is only half done. The distribution of benefits in Indian Country from water settlements is, therefore, uneven. It is the hardest half of the settlements that remain at a time when there is the least political will to fund. Yet completion is essential. Today, despite success in achieving settlement, twenty percent of American Indian households on reservations lack modern plumbing.<sup>44</sup>

From the twenty-one settlements achieved we have learned about the process, the science, the law, the politics, and most of all, about each other. If you believe as I do that the measure of a life is what we leave to make the burden on future generations lighter, whether in the values and opportunities you give your children or in what you give to your community, then collectively the people in this room have quite a legacy: twenty-one plus settlements encompassing much of the west. You are to be commended.

But we cannot stop there. Let's pause to celebrate and take this opportunity to learn from those twenty-one efforts. The next three days are an opportunity, not to find fault for the failure to solve the remaining problems, but to trade ideas on how to address them. You have gathered in this room many of the leading experts and decision makers on Indian water right settlements. And because, as I noted earlier, these settlements now address basin-wide issues, many of those influencing all aspects of water in the west are in this room. Take advantage of that. To quote Justice Hobbs of Colorado: "in scarcity lies the opportunity for community."<sup>45</sup>

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44. NEGOTIATING TRIBAL WATER RIGHTS: FULFILLING PROMISES IN THE ARID WEST, 155 (Bonnie G. Colby, et. al., eds., 2005).

45. Gregory J. Hobbs, Jr., Book Review, 6 U. DENV. WATER L. REV. 137, 140 (2002).

