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**Daniel McCool, Native Waters: Contemporary Indian Water Settlements and the Second Treaty Era**

## BOOK NOTE

**DANIEL MCCOOL, NATIVE WATERS: CONTEMPORARY INDIAN WATER SETTLEMENTS AND THE SECOND TREATY ERA**, The University of Arizona Press, Tucson (2002); 237pp; \$45.00; ISBN 0-8165-2227-8, hardcover.

*Native Waters* evaluates the cultural, economic, and ecological effects of Indian/Anglo water settlements. The “second treaty era” refers to settlement agreements between tribes and their Anglo neighbors over Indian water rights reserved during the creation of tribal reservations. Typically during settlements, tribes have given away a portion of their water rights in exchange for money that may enable tribes to develop their remaining water rights. *Native Waters* addresses the potential benefits of settlements over litigation, whether these benefits are in fact attainable, and even if the benefits are attainable whether they are goals participants should seek.

In the introductory chapter, McCool establishes that while settlements may bring about many positives, settlement participants must recognize unforeseen impacts on Indian culture. Here McCool tells the story of the Navajo people and the effect of the Navajo water rights settlement and the Glen Canyon Dam on the neighboring traditional Navajo culture. Primarily, the dam transformed the local Navajo community from a traditional ranching economy to one of “real jobs” located in nearby Page, the power plant, or at the dam. In essence, the effects of the Glen Canyon Dam were far more reaching than simply creating accessible water—it transformed the local economy to the detriment of the traditional way of life.

Additionally, the introductory chapter presents the span of cases that predated the settlement era and established the legal policy known as the *Winters* doctrine. Essentially, during western expansion, Anglo settlers assumed they alone possessed water rights in the arid western states, operating under the theory that the routine government priority of white objectives over Indian rights would trump any Indian claims to water. *Winters v. United States* was the first of a series of cases where the Court addressed whether, when creating the reservations in the initial treaty era in 1888, the United States reserved water rights for Indians. In its seminal 1908 decision, the Court concluded the government reserved Indian water rights at the time it created reservations. Although the *Winters* doctrine seemed to secure Indian water rights, tribes rarely saw any actual water due, mainly, to a lack of funding to develop their adjudicated water rights. The primary outcome of the *Winters* doctrine was ceaseless litigation, with attorneys the primary benefactors.

In chapter two, McCool introduces the settlement policy, which eventually became the predominant method of resolving Indian water rights. The settlement process began under the Carter administration as an alternative to lengthy, costly, and fruitless litigation. The settlement process offered Indians and Anglos many desired objectives not attainable through litigation: decreased costs, certainty, finality, monetary settlements that enabled Indians to develop their water rights, and comity between Indians and their neighbors. While settlements offered many positives, they presented negatives as well. Specifically, Indians renegotiated water rights that Indians and Anglos already negotiated in the first settlement era.

Chapter three addresses whether the settlement process is in actuality a preferable alternative to litigation, addressing the real costs and the typical outcomes. Overall, the settlement process probably costs the same as litigation. However, instead of Bureau of Indians Affairs' spending going to lawyers, money now goes directly to people in the West, enabling development of water rights. Hence, settlements have provided direct funding for tribal and Anglo development of water in the west.

In chapter four, McCool evaluates whether the settlement process has delivered the finality, and whether finality is an advantageous goal at all. Due to imprecise settlement language, of fourteen evaluated settlements, less than half had been implemented. Thus, many settlements have failed to deliver finality. Further, finality may not be desirable because what may be good water policy today may be outdated one hundred years from now.

Next, McCool investigates whether the settlement process has provided "wet water" to Indians. Wet water is water actually delivered and used by Indians as opposed to "paper water," which refers to adjudicated rights that the Indians could not develop due to lack of funding. The author estimates that the settlement process has doubled the amount of water that Indians actually receive. In essence, settlements have resulted in trade-offs in which Indians have given up some water rights for money to develop water programs. McCool concludes by speculating that with the inevitable increasing demand for water in the West such a permanent trade may be ill advised.

Chapter six addresses whether the settlement process has delivered the goal of comity between Indians and their neighbors. While all parties desire mediation, inadequate mediation procedures have hampered the objective of comity. Overall, in successful settlements Indians and Anglos have achieved comity at local levels. However, McCool believes the settlement process alone cannot bridge the cultural rift created by centuries of conflict between the Indians and their neighbors.

The environmental impact of settlements and the development of water in the West is evaluated in chapter seven. Through the settlement process, participants can address environmental goals, whereas through litigation courts can only resolve the immediate dispute between the two parties. Indians have frequently displayed a

desire to preserve environmental goals, especially through using instream flow for protecting fisheries. While Indian goals typically complement environmental objectives, the author recounts Indian attempts to develop their water rights that have conflicted with environmental policies.

In chapter eight, McCool discusses the idea of water marketing. Essentially, water marketing allows Indians to sell surplus water. Water marketing is a complex process. Geography, population concentrations, and the location of diversion rights affect the viability of water marketing. While there is certainly the demand for water marketing, there are also obstacles, such as the legality of water marketing and the ability of users to pay for the water. Further, an added difficulty is that because tribes often hold significant quantities of upstream water from large population concentrations, tribal water marketing may disrupt water delivery or availability to those population centers. Despite obstacles, many settlement provisions enable water marketing. Water marketing provisions typically require approval by the secretary of Interior, limit marketing to local areas, and subject Indians to state water laws. Hence, if Indians market water off tribal lands they become subject to state regulations.

McCool concludes by outlining how to improve the settlement process so participants can obtain desired goals as well as account for the unforeseen effects on tribal culture. Primarily, McCool advocates that Indians must maintain independence through gaining proficiency in developing water and legal expertise in negotiating advantageous water settlements. While water settlements may offer numerous goals such as certainty and finality, these goals may be a double-edged sword. In essence, the primary unspoken goal of settlements is survival, providing water to tribal lands so tribes can survive on the reservations created in the initial treaty era. While the second treaty era may provide certainty to tribal survival by providing much needed water, without care the second treaty could result in tribal cultural extinction.

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