

Tribal Water Right Settlements: An Overview

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Tribal Water Rights

- Basis of most Indian water rights is the Federal reserved water rights doctrine established by the Supreme Court in *United States v. Winters* in 1908.
 - When Congress reserves land for a federal purpose it impliedly reserves the amount of water necessary to accomplish the purposes of the reservation (homeland purpose)
 - Past, present, and future uses included
 - Rights are not lost by non-use
 - Governed by Federal and not State law
 - Held in trust by the Federal Government



Pueblo Water Rights

- Pueblos have both reservation lands and grant lands
- Grant lands were not set aside by reservations or treaties
 - But may still have aboriginal reserved water rights that come within the reasoning of Winans and Winters
 - Section 9 of the May 31, 1933 Act (48 Stat. 103) acknowledged a "prior right to the use of water from streams running through or bordering on their respective pueblos for domestic, stock, and irrigation purposes"
 - Past, present, and future uses included
 - Rights are not lost by non-use
 - Governed by Federal and not State law
 - Held in trust by the Federal Government
 - Doctrine still evolving and quantification standard not yet settled law



Historic Context

- Despite the Winters decision, Indian water rights were largely left undeveloped and unprotected in the decades after 1908
- By contrast, Federal policy and expenditures supported extensive development of water resources to benefit non-Indian communities across the West
 - Reclamation currently maintains and operates 294 reservoirs, 489 dams, and 53 hydroelectric power plants
 - Reclamation provides 20% of Western farmers with irrigation water



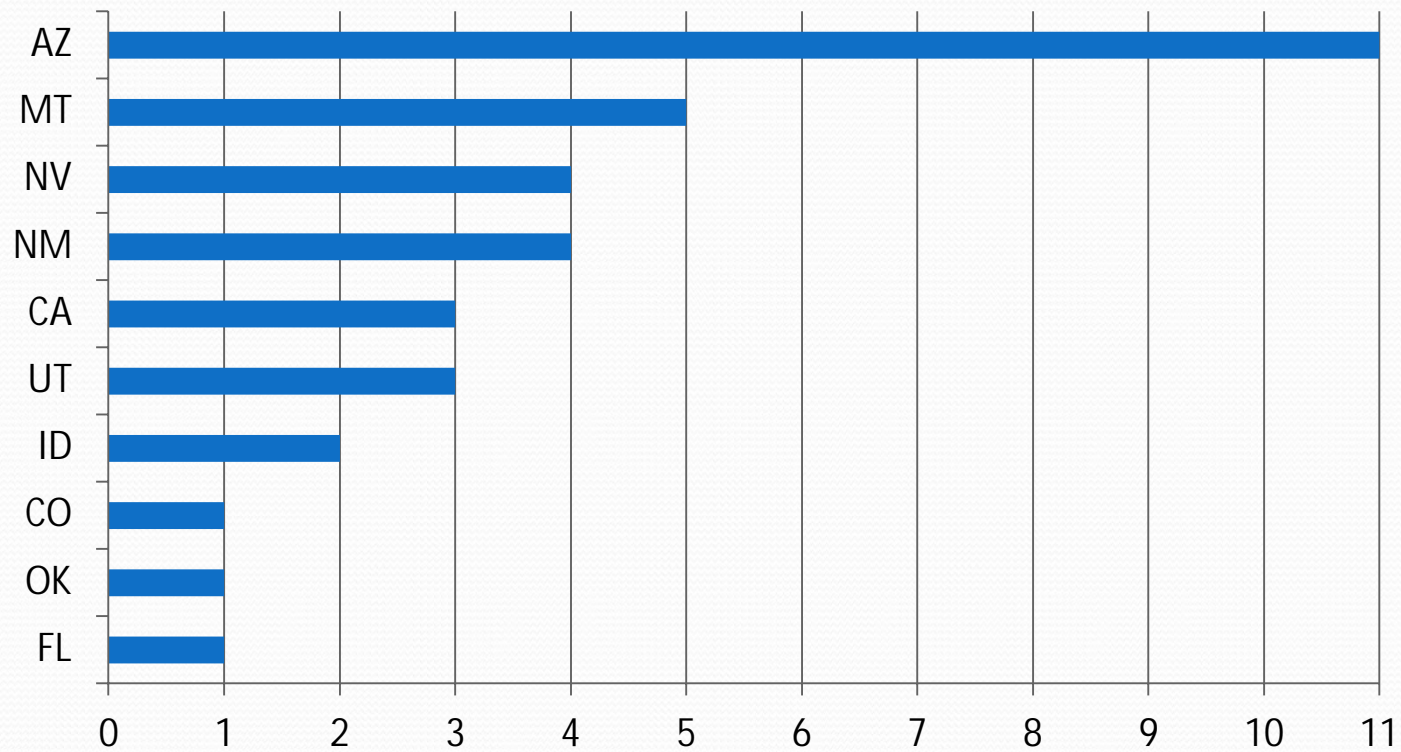
Settlement Era



- In the 1970s, Tribes, States, local parties, and the Federal government began questioning the utility of litigation as the way of resolving water rights disputes
- Negotiated settlements, rather than protracted litigation, became the preferred approach to resolving Indian water rights conflicts
- DOI has completed 39 Indian water rights settlements since 1978
 - Congressionally Approved → 35
 - Administratively Approved by DOI & DOJ → 4



Indian Water Rights Settlements with Federal Legislation, by State



Settlement Negotiations

- Settlement negotiations frequently evolve from general stream adjudications but can occur without litigation in some circumstances
- DOI provides technical and other assistance to Tribes
- Settlement agreements vary from multi-party agreements to compacts among States, Tribes, and the Federal government
- When an agreement is reached, parties typically seek Federal approval in the form of legislation
- “Stars must align” for settlement to succeed and work can go on for decades



Incentives to Settle

- Tribes – quantify water rights; use bargaining power of claims to negotiate a settlement that provides funding for water infrastructure development, economic development, protection and revitalization of cultural resources, or ecosystem restoration
- Non-Federal Entities – continued and assured use of water otherwise threatened by tribal claims; opportunities to obtain benefits not available in litigation (e.g., reduction in repayments for existing projects, new or rehabilitated infrastructure serving both Indians and non-Indians, etc.)
- Federal Government – fulfill trust responsibilities; resolve Indian water claims and potential breach of trust claims in a less disruptive way than litigation



Factors that Influence Settlement

- Bargaining power of the entities
- Extent to which key stakeholders are involved
- Extent to which existing non-Indian water rights holders can maintain status quo on water use
- Availability of adequate water supplies or mechanisms to expand them
- Realistic deadlines that will cause pain if not met
- Federal, State and tribal politics



Settlement Components

- Quantification of tribal water right
- Binding mechanisms, usually a decree
- Funding
- Water marketing
- Waivers
- Resource management agreements
- Water Administration
- State legislation if necessary



The 6 Middle Rio Grande Pueblos

- The Pueblos requested DOI appoint a Federal Team in 2016, 2017 and 2021.
- In 2022, DOI appointed a Federal Assessment Team to "assess the opportunities that may be available to define and secure the Coalition Pueblos' water rights, including an appropriate binding mechanism that would resolve their water rights and bring certainty to other Rio Grande communities."
- The Pueblos, the Federal Team and NM have been meeting for the past two years.
- The Pueblos and NM are requesting that DOI appoint a Federal Negotiation Team, which will bring federal funding and allow the parties to begin the negotiation process.

