

Prepared by: Duane Mecham, Senior Attorney  
Department of the Interior  
Office of the Regional Solicitor  
Pacific Northwest Region, Portland Oregon

## TRIBAL WATER RIGHT SETTLEMENTS

### A. Introduction

Comprehensive tribal water right settlements that resolve all of a tribe's water right claims and are approved by Congress have become the model for addressing tribal water rights over the past twenty years. States and water user interests have pushed for final resolution of outstanding Indian water claims stemming from the original 1908 U.S. Supreme Court decision in *Winters v. United States*, 207 U.S. 564 (1908) and its progeny. By the early 1980s, the Supreme Court had clarified that, under the McCarran Amendment (43 U.S.C. §666), state courts have jurisdiction over all federal and Indian *Winters* reserved water rights. See *Arizona v. San Carlos Apache Tribe*, 463 US 545 (1983). Accordingly, when a state initiates a general stream adjudication that complies with the McCarran Amendment, the United States as trustee is obligated to pursue and defend all legally justifiable Tribal water right claims for all current and future water. Tribes also often appear on their own behalf in these adjudications.

Early experiences litigating Indian reserved water right claims proved expensive and frustrating as well as inconclusive on key matters such as water right administration. This led many parties to pursue settlement of these claims.

While each of the completed Indian water settlements has unique characteristics, successful negotiations have universally been grounded in these key principles:

- A settlement is reached where the existing water rights of current water users in the basin are recognized and kept whole.
- The parties have at their disposal available and adequate water resources that can be secured for current and future water needs for the tribe.
- The parties reach a “comprehensive” settlement that provides certainty for all parties within the basin or basins in which the Indian reserved water right claims are located.
- The parties reach agreement on legal mechanisms that secure enforceable water rights to the tribe and provide for tribal administration of its water resource.
- Congressional funding for the settlement provided to the tribe is justified by the compromise of the claims.

### B. Involvement of the Department of the Interior in Indian Water Rights Settlements

The Interior Department, working closely with the US Department of Justice, has the lead to negotiate on behalf of the United States with tribes, states and others to resolve tribal water right claims. The federal government is uniquely positioned with respect to Indian water negotiations.

Whereas an individual tribe will be focused on its own water claims, and a state will be focused primarily on the claims of those tribes and tribal reservations located within its boundaries, the federal government, as trustee for all Indian tribes, is presumably a necessary participant in all Indian water negotiations. With several hundred federally recognized tribes and reservations, ensuring effective federal participation in all negotiations is a daunting task.

Currently, Secretary of the Interior Sally Jewell has designated Letty Belin, Counselor to Deputy Secretary Mike Connor, to be the Department's lead for tribal water right issues. As part of this responsibility, she chairs the Department's Working Group on Indian Water Settlements. The Working Group, which is comprised of all assistant secretaries and the Solicitor, has the policy lead for Departmental positions on proposed Indian water settlements and related matters. In addition, the Secretary's Indian Water Rights Office, directed by Pamela Williams, oversees over 40 federal negotiation and other teams. The federal negotiation team for the Flathead Indian water negotiations reports to the Secretary's Indian Water Rights Office and to the Working Group on Indian Water Settlements.

In 1990, Interior published in the Federal Register the Criteria and Procedures that federal negotiation teams are to follow when negotiating tribal water settlements. The Criteria and Procedures remain the basis for federal involvement in Indian water right negotiations.