era has emerged in response to the limitations of paper water rights. Tribal governments are increasingly turning from courtroom battles to practical efforts to translate their paper rights into tangible benefits for the reservation."[23] The deputy attorney general for Colorado declared that negotiated settlements were a way of "averting a water rights war."[24]

Can the settlement policy actually fulfill such a promise? Can centuries-old enmities be assuaged by a new approach to resolving conflict over water? In order to answer that question, which is the central goal of this book, it was first necessary to examine the past in chapter 1 and this chapter; we do not know if policy has improved unless we first know what was gained through past policies. Then we need a thorough understanding of the objectives of the new process and how they are going to be achieved. This chapter examines the settlement policy by discussing the process itself: what does a "good" negotiation process look like? Then it identifies the expected outcomes of that process: what are the elements of a "successful" settlement?

Good Faith Bargaining

What is a negotiated settlement? What kind of bargaining takes place? How does it compare to other methods of achieving an outcome? What decision-making procedures are used?[25]

There are a number of ways to resolve conflict. Most public conflict is resolved through a competitive political process. Other conflicts take place within the confines of the judicial process. And occasionally, when these methods fail, opponents resort to violence. All three of these methods have been used in the struggle over Indian land and water. The "Indian wars" lasted for several hundred years, an enormous and complex legal doctrine was developed by the courts, and the political process produced innumerable laws regarding Indian people. None of these methods yielded significant amounts of water for Indian reservations.

Within the last twenty-five years an effort has been made to develop a different approach to resolve conflicts over natural resources, often labeled alternative dispute resolution (ADR), that emphasizes direct participation, consensus building, collaborative problem-solving, and a focus on interests rather than positions. Roger Fisher and William Ury turned these ideas into the best-seller *Getting to Yes*.[26] As the conceptual foundation for ADR improved, its popularity and application broadened dramatically.[27] It has been used to resolve conflicts ranging from divorce to international disputes.[28] ADR centers and institutes sprang up across the country and government agencies developed their own conflict resolution capabilities. It was only a matter of time before these new procedures would be applied to one of the more vexatious public conflicts, the water war between Indians and Anglos.

There are numerous proponents of the negotiation/settlement approach to resolving conflicts over Indian water. Most of them contrast the new approach with the failure of past litigation strategies: "The costs of litigation can be tens of millions of dollars for each side and can perpetuate bitterness with non-Indian communities. Thus, parties to many of these Indian water rights conflicts are opting for the negotiating table, as they grow acutely aware of the immense financial burdens and lost opportunities caused by lengthy litigation. Negotiated solutions also have the capacity to deal with practical problems of using and developing common water resources to the advantage of both Indians and non-Indians."[29] This emphasis on practical solutions that can be tailored to fit specific situations is a prominent theme in the settlement literature. Courts are adversarial in nature, producing winners and losers, and generating a great deal of animosity. But settlements create the opportunity to establish constructive relationships: "The most valuable result of a negotiated settlement is the establishment of commercial and governmental relationships which remain after the negotiations are concluded. In most cases, water rights negotiations are the first substantive opportunity for the local non-Indian community to begin to understand and appreciate the needs and capabilities of their Indian neighbors."[30]

However, negotiated settlements are not appropriate for all conflict situations, including some of the current battles over Indian water rights: "Negotiations potentially offer Indian and non-Indian entities more timely clarification of water rights, in a non-adversarial setting, and give all parties greater control over the eventual outcome. However, negotiations are not a panacea. Unless *basic conditions* are set forth concerning the power differentials between the negotiating entities, the existence of a power base from which to negotiate, and the entities' ability to understand and advocate their own interests, 'negotiations may not be an effective mechanism for the resolution of disputes" (emphasis mine).[31]

The potential success of negotiated settlements is influenced by how well these "basic conditions" are met. Researchers have found many attributes of the conflict-resolution process that affect the outcome and hence the success of the negotiation. There are five attributes of the process that are particularly relevant to Indian water rights negotiations. These five procedural attributes establish a standard—an ideal—of what a "good" negotiation should look like. It is nearly impossible to meet all of them in all situations, but the ADR lit-

erature emphasizes them as factors that significantly contribute to the success of negotiated settlements. The ensuing chapters provide a sense of how well Indian water settlements meet these standards.

First, negotiators need to know what the alternatives to negotiation might bring them.[32] ADR works best when participants see it as their best hope for a favorable solution. This requires an understanding of what might be won or lost by each party in various conflict-resolution venues. Peterson Zah, former chairman of the Navajo Nation, made note of this: "The Beginning point in any negotiation is the knowledge of what you have and what your opponent has. Without that knowledge, any negotiation is a charade."[33] In regard to Indian water rights, the primary alternative to negotiation has been litigation. Without a doubt, past litigation has been a disappointment to all concerned. If we compare the promise of negotiation with past litigation, then it appears to be the best available alternative. In addition, recent court trends do not bode well for Indian claims to water. As Walter Rusinek has noted, "the road ahead for reserved water rights may be risky."[34] Of course, no one can truly predict future trends in case law or court personnel, nor can we assume that Congress will not intervene in some way. However, for the best-available-alternative standard to be met, negotiators must always be cognizant of possible trends in case law and the possibility that at some future point, courts may be more receptive to Indian reserved water claims.

A second attribute concerns the probability that settlements can be successfully implemented,[35] which requires that settlements be adequately funded, that all major issues be resolved, and that all parties agree on the interpretation of the settlement. It also requires a procedure for working out post-settlement difficulties and ensuring appropriate follow-up.

A third attribute of successful negotiations concerns the need for full participation by all affected parties. The literature on ADR universally cites the need for every significant stakeholder to be at the table.[36] But for Indian water rights cases, this is virtually impossible due to the sheer complexity of issues and the number of affected parties. In the Big Horn cases there were 20,000 parties. In the case that led to the Southern Arizona settlement there were 70,000 parties. The Gila and Salt River cases involved more than 80,000 parties. And the Snake River Basin adjudication attracted 175,000 claims.[37] John Folk-Williams suggests this problem may be resolved by creating a continuum of parties depending upon the impact the settlement will have on them.[38] However, if an important player is left out—or walks out—the settlement is likely to be plagued with future problems.

A fourth attribute concerns procedure. In all negotiations the first item on the agenda must be the process of negotiation itself. In any dispute-resolution effort, the design of the procedure to be used is nearly as important as the dispute itself.[39] In Indian water negotiations there are two sets of procedures that must be agreed upon: the rules of negotiation and the process by which the settlement is administered.

And finally, all negotiations must be consensual. One major difference between litigation and negotiation is the degree of coercion; no one has ever been subpoenaed to a negotiation. All negotiations must be entered into freely: "Negotiation is a voluntary process involving two or more individuals or groups who seek to attain some or all of their objectives through mutual consent. . . . Decisions cease to be negotiated when they are imposed on the participating parties by an outside authority. For negotiation to exist, the parties must believe that they are participants by choice rather than by compulsion."[40]

In sum, for a settlement to have a significant chance of success, all parties must view negotiation as a voluntary process that presents opportunities that are not available through other dispute-resolution venues—opportunities that are realistic and achievable.

If these conditions are met, then what can negotiators expect to gain from a settlement? What are the expected outcomes of negotiating rather than litigating Indian water rights conflicts? The literature on negotiated settlements identifies four expected advantages to that process:

- Time and Money. Litigation over Indian water rights can drag on for decades, sometimes generations, and consume enormous amounts of money in legal fees and preparation costs. The expectation is that a negotiated settlement can be reached more quickly with a concomitant reduction in legal costs.
- Finality and Certainty. A quantification of all water rights can remove the big question mark of reserved water rights that might be claimed in the future and allow all parties to proceed with the knowledge that their water rights are protected by the settlement. The objective in a settlement is to resolve all outstanding water issues, not just those that involve narrow legal questions.
- Wet Water. Settlements need not be limited to purely legal issues. This scope allows them to involve a much wider array of issues and solutions. This flexibility can result in the commitment of financial resources and the development of water resources, leading to wet water rather than merely the paper water victories that so often accrue from litigation.
- Comity. After decades of open hostility and legal confrontation, a settlement can bring parties together to work out a solution that offers something for everyone. Indians and Anglos become partners in a process rather than adversaries in a court case. The hope is that old enemies will begin to view one another as neighbors.

In the chapters that follow, each of these expected advantages is discussed in detail in order to assess the extent to which the settlement policy has lived up to its promise. No settlement can achieve perfection in all four of these areas. However, compared to the constraints of prolonged litigation, settlements offer the possibility of a significant improvement over the past.

Conclusion

There is a stark contrast between the federal government's abject parsimony when funding Indian water development and its gratuitous generosity when funding non-Indian water development. For decades the Winters Doctrine remained a hollow promise, and the BIA's Indian irrigation program became a symbol of the federal government's lack of commitment. In the meantime, the water development program for non-Indians continued at a dizzying pace.[41] Big dams and reservoirs were perceived as the vital core of western development, the essential base ingredient of the New Eden. An estimated 30,000 dams were built to divert 475 million af of water in the seventeen western states.[42] No expense was spared as western politicians used federal money to create an irrigation empire—an empire that often stopped at the reservation boundary. Today the Bureau of Reclamation operates 348 reservoirs that provide water for ten million acres of farmland and 31 million people.[43] In addition, the U.S. Army Corps of Engineers operates another 218 dams in its three western divisions.[44] But the BIA has never finished an irrigation project.

The appeal of negotiated settlements rests largely on this history; almost anything would be an improvement over the past. Non-Indian water users became tired of having the threat of Winters hanging over their heads like an anvil on a string. And Indian tribes were tired of winning hollow victories in court and fearful that their only allies, the courts, might turn against them. Pushed by fear, frustration, and a sense that the whole western water situation was slipping from their grasp, whites and Indians sat down at the table and began talking. The dark shadow of 500 years of war, genocide, and broken promises lay across the table; could the negotiators somehow overcome this shadow with a new vision of the future?

Can settlements replace this legacy of enmity with a new era, magically taming old animosities? The search for a panacea is as old as the human race—the elixir that miraculously melts away all problems. This search has always proven futile. Water settlements are not a panacea, although some people have perhaps oversold them as the magic bullet of western water. The beginning of the settlement period was characterized by a heady combination of naiveté and