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INTRODUCTION

Disputes about the nature of Indian rights in water resources are widespread throughout the western United States. Studies in 1982 and 1984 enumerated more than fifty cases in fourteen western states in which a wide variety of issues were in litigation.[1] These issues include the quantification of Indian rights to both surface and groundwater, jurisdiction over the administration of rights, water pollution originating off-reservation and affecting Indian water use, fishing rights, damages to tribes from non-Indian diversions of water subject to Indian claims and many other problems.[2] Because of the typical length, cost and polarization surrounding water rights litigation involving Indian rights, several efforts to resolve these cases through the use of negotiation have been made.

Attempts to negotiate solutions to controversies relating to American Indian water rights and resource management encounter a number of problems that have made difficult the common use of negotiated settlement. First, these cases involve a resource which is vested with great symbolic and cultural as well as economic importance. Several studies have documented the extent to which water is regarded as different from other natural resources,[3] one that represents for many water users the

1. J. FOLK-WILLIAMS, WHAT INDIAN WATER MEANS TO THE WEST (1982), and L. Burton, American Indian Water Rights in the Western United States (1984) (doctoral dissertation).

2. Several cases bear upon Indian water rights without dealing explicitly with water rights, including Montana v. U.S., 450 U.S. 544 (1981) and Confederated Salish and Kootenai Tribes v. Namen, 665 F.2d 951 (1982), 9th Cir. *cert. den.*, 459 U.S. 977 (1982) (regarding ownership of beds of navigable watercourses) U.S. v. Washington—Phase II, 694 F.2d 1374 9th Cir. *vacated* 759 F.2d 1353 (regarding Indian right to environmental protection of fishery habitat); and Holly v. Totus 655 F. Supp. 548 (E.D.Wash. 1983) *aff'd* 812 F.2d 714 (9th Cir. 1987) (regarding tribal right to regulate non-Indian users of surplus water on and off-reservation). Regarding Indian rights to water of high quality, see Treuer, *An Indian Right to Water Undiminished in Quality,* HAMLINE L. REV. 347-68 and H. Ranquist, *What Color the Water: Does the Indians' Reserved Water Right Include Protection of Water Quality?*, speech prepared for the 7th Annual Conference on contemporary American Indian Issues, UCLA. For a discussion of development of Indian water rights to hydropower siting, see DuBey and Schlosser, *Indian Resources and Hydropower Development,* Symposium on Small Hydropower and Fisheries, American Fisheries Society (1985). The relationship of Indian reserved rights and a U.S. Forest Management plan is discussed in Northwest Indian Cemetery Protective Association v. Peterson 565 F. Supp. 586 (N.D. Cal. 1983), *modified,* 795 F.2d 688 (9th Cir. 1986), *cert. granted,* 107 S.Ct. 1971 (1987).

3. Kelso, *The Water is Different Syndrome or What is Wrong with the Water Industry,* Proceedings of the Third Annual Conference of the American Water Works Association, Urbana, Illinois (1967); A. MAAS AND R. ANDERSON, AND THE DESERT SHALL REJOICE (1978); F. BROWN & H. INGRAM, WATER AND POVERTY IN THE SOUTHWEST (1985).

very basis of community existence. Consequently, it is often difficult or impossible for community leaders to appear to be bargaining about what is seen not as a commodity but almost as a fundamental value.

Second, these disputes regularly involve at least three levels of government (state, federal and Indian) and take place in a context of dispute over the relative limits of the authority of each level in relation to the others. Third, where they are linked to comprehensive adjudication processes, they may engage the interests of tens of thousands of individual water rights holders, creating serious problems of representation in a negotiation process. Fourth, Indian tribes, and in some circumstances states and the federal government, assert rights in two roles simultaneously. They are at once proprietary owners of valuable property rights and governments asserting jurisdictional authority over the administration and management of water sources. These two roles are usually intertwined, yet each gives rise to a separate set of problems that may require different forms of agreement.

A fifth problem is scarcity of supply. A 1984 study[4] prepared by the Western States Water Council for the Western Governors Association attempted to quantify the scope of Indian claims to water. While recognizing that there was little uniformity regarding either methods of quantification or consistency of studies made from state to state, the study nevertheless indicated that the potential claims of the tribes in fifteen states accounted for a significant fraction, sometimes more than the total available, of the unused water resources in each state.[5] According to the Water Resources Council, water use in the West ranges from 62 to 304 percent of available surface supplies in average years and is at or above available supply in dry years.[6] Disputes about Indian water rights, therefore, not only determine whether available supplies of unappropriated water will be under Indian or non-Indian control but also may require the re-allocation of water from existing non-Indian to Indian uses.

Despite the complexity of these cases, there are several negotiation processes underway in the western states and a few examples of ratified agreements now in various stages of implementation.[7] Arizona has been the scene of two negotiated agreements in the past decade, and Montana has recently concluded a compact with the Fort Peck Tribes while con-

4. WESTERN GOVERNOR'S POLICY OFFICE, INDIAN WATER RIGHTS IN THE WEST (1984) [hereinafter INDIAN WATER RIGHTS].

5. *Id.* at 94-95.

6. 3 U.S. WATER RESOURCES COUNCIL, THE NATION'S WATER RESOURCES (1975).

7. On July 14, 1982 the Secretary of the Interior announced a federal policy of seeking negotiated settlements in Indian water rights cases. Interior formed a Federal Water Policy Advisory Group to work on negotiating settlements. The Western Regional Council and The Western Governors' Policy office developed positions supporting the use of negotiation in 1982-83.

tinuing to negotiate with several other tribes in the state. Utah negotiated a compact with the Ute Tribe in 1980 that expanded the scope of a 1965 agreement, but it has not been ratified by the Indian community. Recently, the two Ute tribes in Colorado concluded an agreement to resolve water rights issues with the state and non-Indian water users, but this has not been adopted as yet as a congressional enactment. Similarly, a major dispute in California has been resolved through negotiation at the local level, but the agreement awaits congressional ratification.

According to an official of the Department of the Interior, six negotiation efforts were formally underway in March 1987, and several others were under consideration. These include negotiations in Idaho, New Mexico, Nevada, Arizona and Montana.

These cases are numerous enough to permit review of common elements. Since few agreements have been reached and none fully implemented, this article will not presume to draw conclusions on the basis of this experience but rather to summarize key problems and offer suggestions about negotiation process that might be helpful to parties considering or engaged in negotiating Indian water cases.

The article also emphasizes that each case must be examined independently before a judgment is reached on whether or not negotiation can be used successfully. Ultimately, the fact that all these cases involve Indian water rights is less important than the objectives of the specific parties in each situation. Faced with similar problems but different objectives and circumstances, comparable parties in different states could well make opposite choices about the feasibility and desirability of using a negotiation strategy.

INDIAN AND NON-INDIAN RIGHTS TO WATER: CAUSE OF CONFLICT AND APPROACHES TO DECISIONMAKING

Most conflict about natural resources originates in efforts to put resources to new uses or to change some aspect of the way in which resources are controlled. In either case, there is a perception that existing uses of the resource in question are threatened. In the case of water, that perception can also arouse feelings that cultural values and community existence are also threatened. Where Indians and non-Indians clash on the issue of access to water, basic values and legal principles on both sides are set forth in sharp relief.

Indian governments have approached the subject of water resources with attitudes paralleling those of the treaty era of the past century. Numerous Indian leaders have expressed the view that questions about water rights relate to the survival of the tribes both economically and culturally, just as questions about the reservation of lands by treaty in

earlier times had a decisive effect on the ability of the tribes to continue their existence and their cultural identity.[8]

In the view of many tribal leaders, water rights were vested at the time treaties were concluded or relate back to aboriginal water use.[9] The problem from this point of view is not to establish and define the rights but simply to have them recognized and accepted by the non-Indian world. The Supreme Court has directly addressed the substance of Indian water rights in only two decisions, but these cases are crucial to the current disputes about the subject.

The first case, *Winters v. United States*,[10] held that the federal government reserved water when it set aside land from the public domain for use by the Indians. By implication, the reservation of land required a water right sufficient to fulfill the purposes for which the reservation had been created. These rights could not be lost by non-use, could expand over time if new uses demanded additional water and had priority as of the date on which the reservation was created. The first two of these elements contrast sharply with state water rights law, based on the prior appropriation doctrine. This doctrine recognizes rights to water use based on continued application of measured quantities of water to specific beneficial use. If the use is discontinued, the right is subject to forfeiture, and any expansion of the water right is possible only through a new application and creation of a separate right at a later period in time.[11]

The third element of the Winters right, the priority date, enables Indian reserved rights to be consistent with the state systems to some extent. State water law of prior appropriation uses the principle of first in time is first in right. In other words, those users who established their rights first have the prior right to use supplies in times of scarcity. When there is insufficient water, the prior appropriation doctrine requires that the more junior rights holders are removed from the distribution list until all senior rights are satisfied. This aspect of the system is designed to provide as much security as possible to rights holders, based on their order in the priority list. Because most, but by no means all, Indian reservations were created before significant non-Indian settlement and water use, the reserved rights doctrine establishes the seniority of most Indian rights over most non-Indian rights. However, the fact that Indian water use can expand over time but still command the early priority date associated with the

8. THE AMERICAN INDIAN LAWYER TRAINING PROGRAM, INC., INDIAN WATER POLICY IN A CHANGING ENVIRONMENT, 56-58, 68-73 (1982).

9. *See* Merrill, *Aboriginal Water Rights*, 20 NAT. RES. J. 45-70 (1980).

10. 207 U.S. 564 (1980).

11. 5 F. TRELEASE, FEDERAL STATE RELATIONS IN WATER LAWS, 21-38, 104-130 (Nat'l Water Comm'n 1971).

creation of the reservation makes it difficult for non-Indian rights holders to know if their supplies are secure or not.[12]

The existence of these parallel but conflicting methods for establishing water rights, one for Indians under federal law and one for non-Indians under state law, has had the effect of creating simultaneous Indian and non-Indian claims to the same bodies of water. This was possible because most Indian rights were never quantified or put to use and because states allowed non-Indians to establish appropriative rights to waters that could be subject to Indian claims. Consequently in recent decades, Indians have asserted claims to waters already put to use by others. Under federal law their rights were created at the time their reservations were established but have rarely been quantified. The state and Indian rights are both valid, but the Indian rights, if now put to use, could displace any non-Indian water users with priority dates junior to those of the Indians. The key question raised by the Winters Doctrine is how one goes about quantifying an established but unused right. This question was addressed in the second major Supreme Court case on the issue.

That case, *Arizona v. California*,[13] extended the Winters Doctrine to all federal reservations and also adopted a standard for quantification of the reserved rights of certain tribes on the mainstem of the lower Colorado River. That standard related to the amount of practicably irrigable acreage that existed on each reservation. The idea behind this standard was that it represented a way to remove the uncertainty about the possible expansion of Indian rights over time by relating future use to a number that could be determined in an adjudication process, a number moreover that was based on the purposes of the reservation as well as the amount of land set aside for Indian use.

The practicably irrigable acreage standard has been used widely in estimating the potential extent of Indian claims, but it is a standard that may have limited relevance to many reservations. Under the Supreme Court's decision in *U.S. v. New Mexico*,[14] a case involving federal reserved rights to waters within a national forest, the court indicated that the controlling factor in quantification was the primary use for which the reservation of land had been made. Several Indian reservations were set aside to protect hunting and fishing areas rather than for agriculture, and recent lower court decisions have recognized Indian water rights for this purpose. The key issue in utilizing a standard for quantification is determining the purpose for which the reservation was created. That may be

12. INDIAN WATER RIGHTS, *supra* note 4, at 121-24.
13. 373 U.S. 546, 600 (1963).
14. 438 U.S. 696 (1978).

agriculture or hunting and fishing or the maintenance of a permanent homeland or a combination of these and other goals.[15]

Numerous issues stemming from the major Winters decisions have been in litigation for the past three decades. States have been declared to have concurrent jurisdiction with federal courts in the adjudication of reserved rights and, if the states have initiated comprehensive stream adjudication processes, are generally to be deferred to by the federal courts.[16] Among the many unresolved issues about Indian water rights are: the applicability of the Winters Doctrine to groundwater, the ability of Indians to use or lease their water off-reservation, the precise standards for quantification, including the applicability of economic feasibility criteria under the practicably irrigable acreage method, the extent of Indian and state jurisdiction regarding non-Indian water use on reservation lands, the status of water rights owned originally by individual Indian property owners and later transferred to non-Indians and the existence of an environmental protection right to assure water quality for Indian water use.[17]

State and private non-Indian representatives have often characterized the Winters Doctrine as an aberration from another line of Supreme Court cases and congressional enactments which defer to the states' authority to create systems of water rights and administration.[18] The states are concerned that Indian jurisdiction over and ownership of water rights will fragment efforts at comprehensive planning, management and conservation of water resources. They consequently seek pre-eminence in administration as well as the adjudication of rights. They also want to protect existing non-Indian uses of water from diminishment by virtue of Indian claims and to preserve as much control as possible over unallocated waters within their boundaries.[19]

The federal government has played a crucial but ambiguous role. In addition to its charge of protecting Indian water rights, it also has responsibilities to store and deliver water to numerous non-Indian irrigation and conservancy districts as well as to other federal reservations, such as wildlife refuges, the needs of which may conflict with the rights of the tribes. In the past, federal interests in resolving Indian water disputes have often related to the desire to remove constraints on the construction of congressionally authorized reclamation projects.

Indian and state interests, however, have seen federal actions or inac-

15. For a discussion of such issues, see Collins, *The Future Course of the Winters Doctrine*, 56 U. COLO. L. REV. 481 (1985).

16. Arizona v. San Carlos Apache Tribe of Arizona, 103 S. Ct. 3201 (1983).

17. *See generally* Collins, *supra* note 15.

18. Bell, *A State Perspective*, STATE LEGISLATURES 21 (1982).

19. INDIAN WATER RIGHTS, *supra* note 4, at 121-24; & Thorson, *Resolving Conflicts through Intergovernmental Agreements: The Pros and Cons of Negotiated Agreements*, at 6-7, INDIAN WATER 1985 (Miklas & Shupe ed.) (1986).

tions as largely responsible for current conflict and argue that the federal government should bear most or all of the cost for resolving these disputes. The federal government has indicated that while it may have responsibility for having encouraged non-Indian uses of water susceptible to Indian claims, it will not accept sole financial responsibility now for correcting those problems. It has a major interest in limiting the overall federal liability to tribes for damages arising from its failure to deliver water supplies promised under negotiated settlements and to insure that local non-Indian parties and states as well as the federal government share the costs of such settlements.[20]

Private non-Indian interest groups are quite diverse. Some are water users whose state-created rights to water are jeopardized by the assertion of Indian claims. They may face potential property and investment losses if Indians are successful and, in some cases, find title companies unwilling to insure water rights subject to challenge in litigation. These water rights holders form an important political constituency pressuring elected leaders to resolve the issues for the sake of economic expediency. Often, these are agricultural communities with their own cultural traditions and life styles which are threatened should water be lost to Indian use. In addition to economic motivation, then, they often have cultural values at stake in water disputes.

This convergence of conflicting theories, rights and responsibilities of the Indian, state, federal and non-Indian water user perspectives has made resolution of questions about Indian water rights by negotiation extremely difficult. Yet there has been widespread criticism of the alternatives. The typical stream adjudication law suit can take decades to complete, leave in an uncertain state for that time the legal title to water of thousands of claimants, cost millions of dollars for all parties, polarize communities and leave unanswered all but the issues of bare title to water rights.[21] Another problem cited with adjudication grows out of judicial standards used to quantify Indian rights and to decide major cases. The use of the practicably irrigable acreage standard encourages the tribes to state maximum claims at the outset, and the "principle of finality" discerned by the Supreme Court in a late phase of *Arizona v. California* as well as the doctrine of *res judicata* make it difficult for tribes to re-open decrees once they have been issued. Their claims must be fully stated the first time they are presented in court.[22]

20. News release from Department of Interior (July 14, 1982).

21. *See* C. Marseille, *Conflict Management: Negotiating Indian Water Rights*, Lincoln Institute of Land Policy and Western Legislative Conference (1983), and statements of James Bush in SENATE COMM. ON ENERGY AND NATURAL RESOURCES, 98th Cong., 2d Sess., INDIAN RESERVED WATER RIGHTS 280 (Comm. Print 1984) [hereinafter RESERVED WATER RIGHTS].

22. Ranquist, *supra* note 2, at 2.

Several criticisms of negotiation have also been made. Some have observed that the problem can be solved with enough money and enough water, but where both are in short supply there is little likelihood that negotiated solutions can be found.[23] Some tribes have seen negotiation as a policy of the Interior Department intended to compromise Indian water rights or, where negotiation is related to the state adjudication process, as a way of bringing tribes under state jurisdiction.[24] Some claim the fact that Indian rights are already vested, if not yet quantified, makes it unconstitutional for the trustee of the tribes to agree to any settlement which reduces the Indian entitlement below that achievable through the Winters Doctrine.

Whatever the difficulty in either the adjudication or negotiation process, the self-interest of the parties is the ultimate arbiter of which procedural path will be utilized. The question is not always presented as a simple choice between two methods. The following section reviews some of the key issues surrounding the appropriate use of a negotiation strategy.

CHOOSING THE NEGOTIATION STRATEGY

Negotiation is not an end in itself but simply a means for achieving the goals of parties in conflict. Each side must have a strategy of which negotiation is one element. Having a strategy means having clear goals as to what is desired.[25]

Strategies to secure rights to the use of water can use many options: litigation, inter-governmental compacts, legislation, and contracts are four of the most important. Each of these can and has involved negotiation. Each can accomplish a somewhat different aim, and the exact vehicle used will depend on the specific goals of the parties. For example, litigation may be initiated to obtain a declaration of priorities and rights in order to remove doubt about the nature of entitlements to specific water sources. This is especially important if there are elements of law that have not been clearly established and if clarification of these legal principles is a major goal of one or more of the parties. It is, of course, possible that the litigation process can be shortened through negotiation of a stipulation.

A contract could be the vehicle if the parties are not concerned about resolving once and for all the questions of legal entitlement but simply want to reach an agreement about a specific water supply problem. Legislation might be important if the parties need additional funding sources

23. RESERVED WATER RIGHTS, *supra* note 21, at 144.

24. *Id.* at 211-17.

25. Crowfoot, *Negotiations: An Effective Tool for Citizen Organization?*, in NEGOTIATIONS FOR PUBLIC INTEREST GROUPS 37-42 (Northern Rockies Action Group, 1980).

to meet their goals or new legal authorities. Compacts may be used to resolve permanently a range of jurisdictional as well as quantification problems among different levels of government.

Whatever the route one takes to arrive at a strategic decision to use negotiation, this choice depends on the perception and the evaluation of costs and benefits in relation to specific goals made by each party. It is necessary that a thorough evaluation take place. Any side which has not done such a careful assessment of specific goals and the costs and benefits of various strategies for achieving them should probably postpone involvement in a negotiation process.

The right to negotiate has to be won by establishing the fact that the parties cannot ignore each other. Often the necessary precursor to negotiation is a litigation strategy aimed at winning recognition of the power of one or more parties. Such recognition may occur only after prolonged litigation in which it becomes clear that the costs of continuing to fight in court are greater than the costs of seeking a negotiated solution. All must recognize one another's power to influence the course of decision-making before they will take each other seriously as negotiating partners.[26]

If it has been determined that a negotiation strategy is in the best interest of the parties, it is important to distinguish among the possible vehicles that can be used for dispute settlement. Differing circumstances and goals will suggest different vehicles.

One can think of settlements as falling into two major categories: 1) where the problem is to address a specific water use issue, and the parties confront each other as competing or potentially competing water users; and 2) where two or more jurisdictions confront each other with conflicting views of the limits of their authority over water, without reference to its immediate uses. The first category relates to the tribal, state or federal parties as proprietary owners of rights and water users and the second to their role as governments. These two are often intertwined but it is important to keep them conceptually distinct.

There are several forms that negotiated agreements can take: Compact, negotiated adjudication decree, stipulated decree in non-adjudication lawsuit, contract, legislative compromise, agreement of advisory nature. It is crucial to bear in mind that certain vehicles are designed to deal with special circumstances.

A compact, in the context of water resources, is an inter-governmental agreement that reserves water for the exclusive use of one jurisdiction free of challenges by potentially competing jurisdictions.[26] Often the private water user has nothing to do with the negotiation of such a doc-

26. Cormick, *The Theory and Practice of Environmental Mediation*, 2 ENVTL. PROF. 27-28 (1980).

ument. Its aim in the context of Indian water rights is comparable to that of an interstate compact: to resolve jurisdictional disputes about who controls the creation of rights to water use for given volumes of water from sources that cross jurisdictional boundaries. In Indian cases, the compact can also serve the function of specifying the sources, time limits, points of diversion and uses of water by tribes in their role as proprietary owners of water rights. Virtually any other issue that is in dispute between the federal, state, and Indian levels of government can also be decided, though to date compacts have primarily been tools for defining Indian and state rights and relationships.

Contrasted with compacts are agreements that resolve a narrower range of disputes between an Indian community and other water users. For example, the Pyramid Lake Paiute Tribe settled a water pollution lawsuit against the cities of Reno and Sparks and the Environmental Protection Agency with a stipulated agreement under which the cities agreed to adopt water conservation measures.[27] The Gila River Pima Maricopa Indian Community and the Kennecott Copper Corporation resolved a dispute over water rights used by the corporation through a contractual agreement without reference to the rights of other water users in the stream system.[28] Many specific agreements like these are possible that would have no effect on the many unresolved issues about water rights and management.

It should not be assumed, then, that each dispute involving an Indian tribe requires any particular form of agreement. Each situation must be evaluated in relation to the specific goals to be achieved.

Some of the key procedural aspects of negotiation follow from a simple definition. *Negotiation is a voluntary decisionmaking process in which the parties bargain directly, though not necessarily face to face, to reach an agreement that is capable of implementation.*[29] This process can be assisted by a neutral party who is sufficiently trusted by the disputants to manage or facilitate the process but who has no power to impose a settlement. Professionally assisted negotiation is also called mediation.

Voluntary

As a voluntary process, negotiation must be attractive to each party, that is, each must see the prospect of specific gains that could not be achieved in a less costly fashion through some other process. A common

27. Pyramid Lake Paiute Tribe of Indians v. Reno Sparks, No. CV-LV-82-389 (D. Nev.) (Nov. 1984).

28. Water Rights Settlement and Exchange Agreement, Gila River Indian Community, Kennecott Copper Corp.—United States of America (private document, not publicly available, Jan. 1977).

29. Cormick, *supra* note 26, at 27.

barrier to the initiation of negotiations is the perception by one side that the other(s) has nothing to offer or that its own interests would be impaired by concessions the other side might demand. If one party coerces another to a negotiating table or attempts to keep it there by coercion, the prospects for a viable agreement or long-term contract are not enhanced. Each party must feel free to abandon the process before final agreement if it believes its rights are jeopardized in some way.

Bargain

The parties must be ready and willing to make concessions to one another. If there is no room for give and take, there can be no negotiation. Yet bargaining does not necessarily mean that the parties must take some fraction of what they have defined as their goal. It requires that the parties be flexible and creative in finding elements that will satisfy one another's needs without compromising basic values. All sides must perceive that gains are possible. One side cannot enter the process expecting only to give or receive concessions without reciprocal offers.[30]

Parties

To achieve an agreement, one must take care to identify all the parties who have power to affect the outcome of the process. The parties to a lawsuit may not always comprise the full group of parties in this sense. Other groups may believe they have important interests engaged by the prospect of a negotiated settlement. If they are excluded, they may well challenge the agreement in court.[31] Downstream states may balk at an agreement reached between a tribe and an upstream state if it affects access to water throughout a basin. Environmental groups may fight a water project that seems like the perfect solution to a water dispute involving a tribe and non-Indian agricultural water users. Careful decisions must be made about the representation of affected parties so that all are satisfied that their interests will be accurately stated and fully protected during the process. And each negotiator or negotiating team must have clear authority to speak on behalf of its constituents.[32]

Reach an Agreement

The parties must understand that they are aiming at a legally binding contract or agreement in written form which they must sign. The nego-

30. J. MCCARTHY, NEGOTIATING SETTLEMENTS 26-29 (1985).

31. Susskind, Richardson & Hildebrand, *Resolving Environmental Disputes, Environmental Impact Assessment Project*, Mass. Inst. of Technology 26-29 (1978); & J. MCCARTHY, *supra* note 30, at 18-20.

32. W. SIMKIN, MEDIATION AND THE DYNAMICS OF COLLECTIVE BARGAINING, 173-76 (1971).

tiators must either have the power to take such a step or fully disclose to other parties the ratification steps that will follow negotiations. Since the agreement of all parties is essential, consensus is the rule of decisionmaking. Consensus protects the rights of all participants and assures that none will be forced into an agreement simply by majority rule and that rights of recourse to other processes will not be foreclosed until the commitment to the agreement is made.[33] Of course, the parties may not reach consensus on all points but must be sure that those issues touching on the viability of the agreement have been settled.

Capable of Implementation

The goal of negotiation is not simply to get all parties to sign on the dotted line. It is to implement a solution that is defined in an agreement. Therefore the potential problems of implementation should be addressed during the negotiation process. The legality of measures agreed to, sources of funding, political ratification processes, identification of agencies responsible for carrying out the terms of the agreement and, in a water case, specification of the sources and availability of water must all be considered if future problems and related disputes are not to haunt the settlement.[34]

Finally, the definition implies that the process must be planned carefully beforehand. Precise ground rules should be adopted by the parties, and the issues of location, process management and the press should be explicitly dealt with.

Every time an agreement is negotiated among the different parties each side must in turn develop its own internal agreement.[35] The failure to do this is the most common reason such negotiations have failed (setting aside those cases where discussions never reached the stage of true negotiations). If one or both sides never develops internal consensus on negotiating positions, goals and expected outcomes, it is unlikely that the negotiators will have the authority to proceed or, if they do conclude a tentative agreement, that it will ever be ratified. Therefore, those considering use of this strategy must give as much attention to building consensus within their own groups as to exploring the negotiable and non-negotiable issues with the other side.

CASE STUDIES IN THE USE OF NEGOTIATED AGREEMENTS

This section summarizes a number of cases in which agreements have

33. Harter, *Negotiating Regulations*, 71 GEO. L.J. 92-97 (1982) is an excellent discussion of consensus. *See also* Gusman and Harter, *Mediated Solutions to Environmental Risks*, 7 ANN. REV. PUB. HEALTH 293-312 (1986).

34. J. MCCARTHY, *supra* note 30, at 62-70.

35. Dunlap, *The Negotiations Alternative in Dispute Resolution*, 29 VILL. L. REV. 1430-33 (1983-84).

been concluded, although not always ratified and implemented. Summaries of the completed agreements highlight: 1) factors inducing the parties to negotiate, 2) the specific benefits sought, and 3) the nature of the agreement reached. The section following this summary examines some of the common elements, legal problems and conditions that helped or hindered successful use of negotiation strategies.

Navajo Nation

Upper Basin Portion of Colorado River in Arizona

In 1968, the Navajo Nation negotiated an agreement to permit use of mainstem Colorado River water for a major coal-fired power plant to be located on reservation land but operated by a non-Indian company. The tribe was interested in obtaining the economic benefits from having the plant located on the reservation, and availability of water was a critical factor in the negotiations.[36]

The power of the tribe stemmed from the fact that it had Winters rights claims to most of the water in the upper basin portion of the Colorado River in Arizona. Under the Upper Colorado River Basin Compact, Arizona was allocated 50,000 acre-feet of water in the upper basin, yet most of the land within that portion of the basin was located on the Navajo Reservation. Virtually all existing water use in that area was confined to Navajo lands. Any claims by the Navajo Nation to upper basin Colorado River waters could conflict with Arizona's entitlement and could jeopardize water availability for the power project. It was therefore essential for the non-Indian parties to reach an agreement about water with the tribe.

The tribe was interested in obtaining a number of benefits. These included Navajo preference in employment in construction and operation of the plant and the associated coal mining project, use of Navajo coal in the power plant, location of the plant on lands leased from the tribe, the availability of electricity to the tribal utility, a share for the tribe of water imported in the future into the upper basin and other benefits.[37] The tribe obtained most of its objectives in return for a pledge not to make demands on the 50,000 acre-feet of water allocated to Arizona by the Upper Colorado River Basin Compact exceeding the 50,000 acre-feet allocation and to reserve for use of the power plant 34,100 acre-feet of that amount. The limitation on Navajo claims to Colorado River water in the upper basin within Arizona was to last the life of the power plant or fifty years, whichever occurred first. This agreement was embodied in

36. Price and Weatherford, *Indian Water Rights in Theory and Practice: Navajo Experience in the Colorado River Basin*, 40 LAW & CONTEMP. PROBS., at 97-131 (Winter 1976).

37. *Problems of Electrical Power Production in the Southwest, Hearings Before the Senate Comm. on Interior and Insular Affairs*, 92nd Cong., 1st Sess. 1755-69, 1773-90 (1971).

a Navajo tribal council resolution[38] and also reflected in a lease and right of way granted by the Navajo Nation.[39] A Bureau of Reclamation water service delivery contract was executed, and state legislation approved the appropriation for the power plant. In 1969 the tribal council passed a second resolution (CJW-50-69) amending the earlier one by adding a provision that the agreement regarding the 50,000 acre-feet did not constitute a waiver or relinquishment of the present or prospective water rights of the Navajo Tribe.[40]

This agreement was clearly of limited purpose and did not address a wide range of issues regarding administration of water rights or the general water rights of the tribe. There was no quantification of the tribal right at all but simply a dedication of waters that could be claimed by the tribe to a specific purpose and a temporary limitation of claims the tribe might make to waters of one segment of the Colorado River flowing through the Navajo Reservation.

San Juan River in New Mexico

The Navajos negotiated an agreement in 1962 regarding waters allocated to New Mexico under the Upper Colorado River Basin Compact. The state was attempting to secure passage of a bill authorizing construction of the San Juan Chama Diversion Project, a transbasin facility that would enable New Mexico to use its Colorado River water in the Rio Grande basin, where its major cities and irrigation districts are located. The Navajos were seeking an irrigation project to use water in the San Juan basin and were in a position, through Winters Doctrine claims, to block for many years access by the state to waters of the San Juan River.[41] Negotiations were necessary not only to permit the diversion of specific quantities of water for Indian and non-Indian use but also to resolve a question about the sharing of water during times of shortage. Because of the early date of establishment of the original Navajo reservation in New Mexico, Navajo rights would have priority over non-Indian rights, and New Mexico felt this would jeopardize the viability of the San Juan Chama Project.

An agreement was reached and incorporated in a federal statute[42] which authorized construction of both the San Juan Chama Diversion and the

38. Navajo Tribal General Resolution No. CD-108-68 (Dec. 11, 1968).

39. Navajo Tribal General Resolution No. ACS-213-69 (Sept. 4, 1969).

40. For a discussion of the legal effect of these resolutions and the legal documents surrounding the water rights issue see Back and Taylor, *Navajo Water Rights: Pulling the Plug on the Colorado River?* 20 NAT. RES. J. 86-89 (1980). For a discussion of the bargaining process see Price and Weatherford, *supra*, note 36, at 109-19.

41. *See* Price and Weatherford, *supra* note 36, at 120-22.

42. 43 U.S.C.A. §§615ii-yy, 620-620f (Supp. 1979).

Navajo Indian Irrigation Project. The legislation quantified the waters to be diverted for the non-Indians under San Juan Chama (as well as for some projects for Pueblo Indians in the Rio Grande basin) and authorized the diversion of 508,000 acre-feet of water per year for the Navajo Indian Irrigation Project (NIIP). The act also incorporated a Navajo agreement to qualify the priority of the Winters rights by sharing shortages between the San Juan Chama Diversion Project and the Navajo Indian Irrigation Project proportionate to their respective diversion requirements. The legislation said nothing about waiving Winters claims in the future.

The Bureau of Reclamation, charged with building the NIIP facilities, later determined that a more efficient irrigation system than originally planned needed a diversion of only 370,000 acre-feet instead of the 508,000. Since then there has been continuing controversy between the tribe, the Bureau, and the state over whether the tribe can divert more than 370,000 acre-feet, whether the NIIP water can be used for other purposes than agriculture, and at what level the consumptive use for the tribe should be set.[43] The tribe is now in adjudication in state court over Winters Doctrine rights to the San Juan River, and some of these issues may be settled in the context of that suit.

Both the Navajo agreements succeeded in bringing specific economic benefits to the tribe but did not finally resolve water rights issues.

Ak-Chin Indian Community

Ak-Chin, located thirty miles south of Phoenix, operated a successful farming project for some time using groundwater supplies. As groundwater pumping by surrounding non-Indian farms steadily lowered the water table and consequently reduced the acreage that could be farmed on the reservation, the Indian community threatened litigation on water rights. The tribe resolved on a strategy of negotiation instead and worked out an agreement with the Department of the Interior, later embodied in legislation,[44] that both settled the water rights claims of the tribe and created a mechanism to pay for a water delivery system to the reservation.

The legislation of 1978 provided that: the Secretary of the Interior deliver to the Ak-Chin Indian Community a permanent water supply of 85,000 acre-feet within twenty-five years; the Secretary deliver an interim supply of water until the permanent supply is available; the tribe could take action against the United States for failure to deliver water and could

43. For a discussion of unresolved issues see DuMars and Ingram, *Congressional Quantification of Indian Reserved Water Rights: A Definitive Solution or a Mirage?*, 20 NAT. RES. J. 17-43 (Jan. 1980).

44. Ak-Chin Indian Community Water Rights Settlement Act. Pub. L. No. 95-328, 92 Stat. 407, 1982).

seek compensation equivalent to the replacement value of the water; and the tribe would waive all other rights and claims to water relating to past, present or future actions. This agreement was implemented by means of a contract which defined a phased delivery schedule for the emergency water supply, beginning with 20,300 acre-feet to be delivered in 1980 and reaching a volume of 85,000 acre-feet by 1986.[45]

A major problem of implementation arose when it was discovered that the planned source of groundwater on federal lands to be used for the temporary water supply could not be used without damaging water rights of the Tohono O'odam Tribe.[46] In its search for alternative sources, the Department of the Interior then proposed a controversial step of modifying Colorado River water delivery contracts it had with cities and irrigation districts in order to obtain the needed water,[47] but those non-Indian entities threatened lawsuits.[48] The federal government failure to deliver water to Ak-Chin within four years of the enactment of the 1978 legislation exposed the government to a damage claim equal to the replacement cost of the water promised in the phased delivery schedule of the contract.

Eventually, the Department of the Interior re-negotiated the agreement with Ak-Chin, the state of Arizona and non-Indian water users,[49] and Congress passed new legislation confirming this in 1984.[50] Under the new terms, Ak-Chin accepted a lower quantification in return for cash benefits and an accelerated water delivery schedule. By January 1, 1988, the federal government was to deliver 75,000 acre-feet of surface water suitable to agricultural use. This amount could be reduced to 72,000 acre-feet in times of shortage or increased by 10,000 acre-feet if the water were available.

To make the delivery possible, another agreement was negotiated with non-Indian irrigation districts by which they made available water for Ak-Chin in return for substantial financial benefits. Three irrigation dis-

45. U.S. Department of the Interior, Contract between the United States and the Ak-Chin Indian Community to Provide Water and to Settle Claims to Water, ¶7 (May 20, 1980). Bureau of Indian Affairs document, published in Environmental Impact Statement, 1981, for *Ak-Chin Water Supply Project*, Department of the Interior.

46. Comments of the Papago Indian Tribe and the Sif Oidak District of the Papago Tribe in the Environmental Impact Statement on the Ak-Chin Water Supply Project (Apr. 29, 1981) (unpublished testimony submitted at hearing Apr. 29, 1981, on Draft Environmental Impact Statement, for *Ak-Chin Water Supply Project*).

47. *See* memorandum from Assistant Solicitor, Branch of Water and Power Div. of Indian Affairs to Associate Solicitor, Indian Affairs & Associate Solicitor, Energy and Resources (Jan. 30, 1984).

48. *See* letter from Frederick J. Martone to William Horn, Deputy Under Secretary of the Interior, quoted on behalf of the City of Yuma (Mar. 19, 1984).

49. HOUSE COMM. ON INTERIOR AND INSULAR AFFAIRS, WATER RIGHTS OF THE AK-CHIN INDIAN COMMUNITY, H.R. REP. NO. 1026, 98th Cong., 2nd Sess. (1984).

50. Ak-Chin Community Water Rights, Pub. L. No. 98-530, 98 Stat. 2698 (1984), an act relating to the water rights of the Ak-Chin Indian Community.

tricts of the Yuma Mesa Division of the Gila Project on the mainstem of the Colorado River agreed to reduce their entitlements by 50,000 acre-feet. This water is not part of the Central Arizona Project (CAP), though it would be delivered to the Ak-Chin area by CAP facilities. The remainder of the water for Ak-Chin would come from the community's allocation from waters of the Central Arizona Project. The difference between the two sources is that CAP water is subordinated in times of shortage to California's entitlement from the Colorado River. The water transferred from the irrigation districts is thus a more secure supply.

The new legislation specifies that the water can be used for any use on or off the reservation but only within a groundwater management area defined under state law. The Secretary must also establish a water management plan for the Ak-Chin reservation which is to have the same effect as any plan developed under state law. As noted below with regard to the Tohono O'odam settlement, this provision meets an important concern of the state about regulatory consistency in managing water basins that include both state and Indian lands. This concern grew out of Arizona's enactment of a comprehensive groundwater management statute in 1980, two years after the original Ak-Chin settlement, which requires the state to develop management plans and to impose conservation requirements to meet the goal of balancing groundwater withdrawals and recharge by the year 2025.[51]

Tohono O'odam Tribe

The Southern Arizona Water Rights Settlement Act of 1982 resolved water rights claims of the Tohono O'odam (formerly known as Papago) in the Tucson region. There are many parallels between the Ak-Chin and Tohono O'odam agreements. Like Ak-Chin, the Tohono O'odam people found their lands drying up because of non-Indian groundwater pumping, and the tribe eventually negotiated an agreement that provided for federal construction of a water delivery system.

The Tohono O'odam Tribe occupies three reservations: the Sells Reservation, by far the largest in area, which lies to the west of Tucson and part of which falls within the Tucson basin; the Gila Bend Reservation to the north on the mainstem of the Gila River; and the San Xavier Reservation just south of Tucson on the Santa Cruz River. The settlement refers principally to the San Xavier Reservation and the Shuk Toak District of the Sells Reservation. It does not address other potential water entitlements of the Tohono O'odam Tribe.

The Tohono O'odam Tribe established its power in the water affairs of

51. ARIZ. REV. STAT. ANN. §§ 45-401 to 637 (Supp. 1984-85).

the Tucson area by filing, in conjunction with the United States, a lawsuit making extensive claims to groundwater in the Tucson aquifer.[52] Water is so scarce in this region that any substantial new claims to groundwater would have created pressures on Tucson's ability to sustain urban growth as well as the access to water of local irrigation districts and mines.[53]

The first step toward Indian/non-Indian cooperation on water came with the creation of a study committee in which the major parties were represented. The study process evolved into a negotiation in which the attorney representing the Tohono O'odam Tribe and Congressman Morris Udall and his staff played crucial roles. Successive drafts of proposed settlement legislation were passed among the parties until all agreed on a text. This was then passed by Congress but vetoed by President Reagan. Reagan's principal problems with the bill were the lack of a local cost sharing formula and what was considered to be excessive liability of the federal government. Further negotiations with the Department of Interior established the level of funding that had to be provided by state and local parties and also changed the liability formula. The need for this second round of negotiations indicated the limited participation of federal representatives in the earlier drafting process.

The final bill, known as the Southern Arizona Water Rights Settlement Act,[54] quantified the water that would be made available to the portion of the Tohono O'odam Reservation within the Tucson water basin, identified sources of that water (as the original Ak-Chin bill had not fully done), required the Department of Interior to develop a water use and conservation plan that contained provisions equivalent to those under state law, created mechanisms for funding the water delivery system and providing other benefits to the tribe and permitted off-reservation leasing of the water by the tribe. Implementation is now underway for this agreement. Local cost sharing contributions have been provided, and contracts implementing several parts of the agreement are being negotiated.

The three sources of water for the agreement are: Colorado River water delivered by means of the Central Arizona Project carriage facilities to two different sections of the reservation (27,000 acre-feet per year to the San Xavier Reservation and 10,800 acre-feet per year to the Shuk Toak district of the Sells Reservation), 10,000 acre-feet of groundwater per year pumped from beneath the San Xavier Reservation, and 23,000 acre-feet per year of water suitable for agricultural use for San Xavier and 5,200 acre-feet of water per year for agricultural use to Shuk Toak. The

52. Tribal and federal suits filed in 1975 were consolidated in United States and Papago Indian Tribe v. City of Tucson, No. CIV 75-39 (D. Ariz. 1980).

53. For background and interpretation of the Papago settlement see F. L. BROWN & H. INGRAM, see *supra* note 3, at 104-77.

54. Pub. L. No. 97-293, § 315, 96 Stat. 1261 (1982).

latter 28,200 acre-feet is to be obtained from reclaimed water delivered to the Secretary of the Interior. The Act contemplates that the Secretary would exchange this water, which would be physically difficult to convey to Tohono O'odam lands, for other water from specific sources: contracted but unused water from the Central Arizona Project, water available through the CAP as a result of augmentation made possible by subsequent acts of Congress, water obtained with private lands that have irrigation rights appurtenant to them under state law, or reclaimed water.[55]

If water is unavailable from these sources to meet the Secretarial obligation to deliver water to the Tohono O'odam, then the federal government becomes liable for damages. These are equal to replacement costs of water where a delivery system has not yet been constructed or to the value of the water if a delivery system is in place, but there is an annual ceiling on the amount that can be paid by the federal government. This equals the amount available from a Cooperative Fund established by the Act with contributions from the federal, state and city governments and by major mining agricultural companies using water in the Tucson basin.

The Act permits the Tohono O'odam to use water for any purpose and to lease it for off-reservation use. There are provisions which indicate that the settlement does not establish legal precedent about the applicability of the Winters Doctrine to groundwater or about the off-reservation use or leasing of reserved water rights.

In return for the federal obligation to deliver water, to pay for delivery systems, to establish an economic development trust fund and other benefits of the act, the Tohono O'odam Tribe is required to waive all further present and future claims to water within the Tucson area as well as to seek dismissal of the lawsuit filed in 1974. These provisions, of course, satisfy the basic concerns of the non-Indian community and governments that the Indian water right in this basin be finally quantified. The state was also concerned about consistency in water management on and off-reservation locations. Under the state's Groundwater Management Act,[56] the Tucson region was designated as the Tucson Active Management Area and subjected to the development of state water management plans designed to regulate the use of all water sources to achieve a balance of groundwater withdrawals with natural recharge. The state management plans are expected to impose progressively more rigorous conservation requirements as time goes on, yet if there were no comparable regulation of water on Indian lands the state objective might be difficult to achieve.

The legislation refers to this problem in a provision requiring the Sec-

55. *See* H.R. CONF. REP. NO. 855, 97th Cong., 2nd Sess. 37, 44-46 (1982) (regarding sections 305 and 307 of the Act).

56. *See supra* note 51.

retary of the Interior to establish a water management plan for the affected Tohono O'odam lands "which, except as is necessary to be consistent with the provisions of this title, will have the same effect as any management plan developed under Arizona law." This clause has already been subject to differing interpretations but was not intended to subject the tribe to state jurisdiction or to reduce the amounts of water the tribe can use.[57]

The Act does not contain any dispute resolution mechanism for future use and is intended to be implemented by a series of contracts between the Secretary of the Interior, the tribe, the City of Tucson, and various private parties.[58]

Fort Peck Tribes

To date, the most comprehensive settlement of water rights is the agreement achieved in Montana by the state and the Assiniboine and Sioux tribes of the Fort Peck Reservation. The motivation for concluding a compact was complex and related to several factors: water rights litigation, the potential for an interstate allocation of waters of the Missouri Basin, and Montana's interest in water marketing proposals. All these factors suggested that quantification of the tribal water right was in the best interest of the state.[59]

The United States began a program of litigating Indian water rights for all Montana tribes in 1975 and filed two lawsuits[60] in 1979 on behalf of the Fort Peck tribes in federal court. Fort Peck is located in the northeastern part of the state adjacent to the mainstem of the Missouri River; the reservation is also crossed by several tributaries of the Missouri. Congressional hearings held in 1979 recorded widespread non-Indian concern about the impact of this litigation program.[61] In that same year, Montana created its own comprehensive adjudication program, including creation of a compact commission to negotiate with Indian tribes and federal agencies, and attempted to have the forum for adjudication changed to state court.[62]

57. *See* H.R. CONF. REP. NO. 855, *supra* note 55, at 42.

58. For an interesting discussion of the Papago ability to use the water for economic development, see Laney, *Transferability Under the Papago Water Rights Settlement*, 26 ARIZ. L. REV. 421-43 (1984).

59. *See* WRIGHT WATER ENGINEERS & F. TRELEASE, A WATER STRATEGY FOR MONTANA, at ch. 5 (Montana Department of Natural Resources 1982) [hereinafter STRATEGY], & MONTANA LEGISLATURE, REPORT OF THE SELECT COMMITTEE ON WATER MARKETING, at ch. IV (Jan. 1985), [hereinafter WATER MARKETING].

60. Northern Cheyenne Tribe v. Tongue River Water Users (D. Mont. 1979) 484 F. Supp. 31 (D. Mont. 1979), *rev'd*, 668 F.2d 1080 (11th Cir. 1982), *rev'd* 463 U.S. 545 (1983).

61. SENATE SELECT COMMITTEE ON INDIAN AFFAIRS, INDIAN WATER RIGHTS IN MONTANA (1979).

62. MONT. CODE ANN. §§ 85-2-211 to 243, § 2-15-212 (1983).

Although the litigation effort was important in motivating Montana to settle Indian water claims, there were other factors contributing to the state's interest in negotiation. There is abundant stored water in the portion of the Missouri basin where Fort Peck is located, but the states of the basin have been preparing themselves for a major interstate allocation of Missouri waters for some time. Montana published a study in 1982 which outlined a number of possible approaches the state could follow in seeking to protect its claims to waters of the Missouri Basin. Regarding the relevance of Indian water rights to a possible interstate allocation in this basin, the report said:

> The State of Montana has legitimate and necessary objectives in negotiating and quantifying Indian and federal reserved rights which objectives are a part of the strategies for an interstate water allocation. Among them is the fact that, when incorporated in the statewide adjudication, a substantial portion of Montana's existing rights will have been identified and quantified. It is important to note that the negotiations for the reserved rights compacts should recognize that the amounts of water allocated to the Indian tribes and federal agencies may be a part of the share allocated to the state in any future interstate water allocation process. In addition, reserved water rights allocations within the state should represent quantities which can be reasonably and practicably put to use in the future. This is important for two reasons. First, a general standard of reasonableness and practicability will probably be used in any interstate allocation proceeding or negotiations to identify potential future uses. . . . Second, should there be an interstate allocation, the state will want to be able to put its full allocation to beneficial use at some time in the future to maximize the economic and social benefit from such an allocation. Therefore, to maximize the benefit to the state as a whole from the reserved rights compacts, it may be prudent in the future under certain circumstances to allow such reserved rights allocations to be used off a reservation.[63]

There have been major changes in Montana water law in recent years and a generally enhanced effort by the state to identify its potential water claims and position itself to profit from potential interstate water markets. The state legislature created a Select Committee on Water Marketing which presented a lengthy report to the legislature at the beginning of its 49th session early in 1985. This study reviewed the relevance of Indian water claims to the state's hopes for water marketing and concluded that "uncertainty as to federal and Indian water rights interferes with the evaluation of water marketing proposals. Generally, these outstanding

63. STRATEGY, *supra* note 59, at vi-10, 11.

claims make more difficult the determination of whether the state has surplus waters for sale and where they might be located. Specifically, Indian tribes themselves may become sellers and lessors of water—thereby competing with the state in the regional water market. . . . Everyone will gain by a conclusion of conflict over the issue."[64]

These general factors have been important in creating a positive climate for the state's response to efforts to negotiate Indian water rights. Unlike the situation in Arizona, there exists a large supply of unused and unallocated water in the Fort Peck Reservoir on the mainstem of the Missouri River near the Fort Peck Reservation. Although subject to competing claims from other states, the supply presented an opportunity for potentially satisfying the tribes' needs without requiring other existing water users to lose their access to water.

The state created the Montana Reserved Water Rights Compact Commission in 1979 as part of its adjudication program. The Commission was primarily a creation of the legislature, and its membership emphasized persons with influence that would be useful in securing legislative approval of any negotiated compacts. The commission was authorized to negotiate with all tribes and federal agencies and imposed a deadline for the initiation of talks which related to the onset of the adjudication process in state courts. The Fort Peck tribes were among the first to express interest in beginning negotiations and actually agreed to a compact with the commission by late 1982, in time to be submitted for approval to the Montana legislative session in 1983.[65]

Even though the commission had approved this compact and was prepared to submit it for ratification, other agencies of state government expressed reservations about several sections of the agreement. These agencies also felt that the state would be in a stronger negotiating position if it waited for the Supreme Court to issue an opinion in the *Adsit* case regarding state jurisdiction over the adjudication process.[66] (Later in the year, the Supreme Court's decision in this case recognized the jurisdiction of the state to adjudicate Indian water rights. This court held that state enabling act provisions purporting to waive jurisdiction over Indian lands did not prevent the assertion of concurrent state jurisdiction over federal and Indian water rights under the McCarran Amendment of 1952.)[67]

Ultimately, the state chose not to submit the proposal to its 1983 legislative session and indicated its desire to re-negotiate some elements,

64. WATER MARKETING, *supra* note 59, at iv-18, 19.

65. *See supra* note 19.

66. *Id.* at 20.

67. *See* Arizona v. San Carlos Apache Tribe of Arizona, No. 81-2147, Montana v. Northern Cheyenne Tribe, 463 U.S. 874 (1983).

but the tribes refused to consider changes. Negotiations were suspended for over a year during which time the continued existence of the commission was debated.[68] Eventually the state and the tribes worked out an agreement that allowed negotiations to resume in the fall of 1984. From that point, agreement was reached within six months on a new compact, and the legislature approved it during the 1985 legislative session.[69]

The Fort Peck-Montana compact quantifies the maximum diversion and consumptive use permitted the tribe. The tribe may divert the lesser of 1,050,472 acre-feet or enough water to supply consumptive use of 525,236 acre-feet (Article III). The principal source of this water is to be the mainstem of the Missouri, and maximum diversions are specified for different seasons of the year. Most Indian uses on tributaries of the Missouri within the reservation are subordinated to existing non-Indian beneficial uses under state law and to federal rights for a wildlife refuge. Some non-Indian uses, especially those based on water rights obtained from Indian allottees, are counted against the tribal allocation, but these are to be quantified by the tribes and not by the state court adjudication. The tribe has authority under the agreement to establish instream flows for fish and wildlife on the Missouri tributaries, and these are also counted as consumptive uses under the Indian right.

Regarding jurisdiction, the compact recognizes the tribe's administration of its water right within the reservation and requires that this be done in accordance with a code approved by the Secretary of the Interior (Article V B (1) and (2)). The state has jurisdiction over all rights, which arise under state law, whether on or off the reservation which are not part of the tribal water right (Article V C (1)).

Water can be used for any purpose on the reservation, but uses of the tribal water right off the reservation must conform to state law of beneficial use. Any export of tribal water outside the state must be in compliance with all valid state laws limiting export of water outside the state. (Article III G) The tribe must give notice to the state of diversions and uses outside the reservation and prove that they meet a number of conditions, including a showing that they will not affect any state appropriative right that has not been abandoned (Article III K).

The tribes can lease water off the reservation but only to a limit that is tied to the state's legislative authority to market water. The tribe must allow the state an equal partnership in off-reservation water marketing opportunities, and the state must do the same for the tribe. These provisions reflect the importance of water marketing to the state. Montana

68. Thorson, *supra* note 19, at 20-12.
69. MONT. CODE ANN. § 85-20-201 (1987).

enacted in the same legislative session which approved this compact, a comprehensive new bill on marketing and other aspects of water law.[70]

The compact makes no provision for funding of tribal projects or for construction of water delivery facilities. It does create a compact board of three persons to resolve conflicts relating to ground and surface water in the future. One member is selected by the tribes, one by the Governor and the third by the first two members (Article VI). State courts and agencies will have no role in resolving disputes.

The compact has been administratively approved by the Department of the Interior and the Department of Justice and is being made part of a decree in the state court adjudication. This, in the view of the parties, makes unnecessary any explicit approval of the compact by Congress. However, Congress must approve the marketing of Indian water rights. The state represented the interests of non-Indian water users who have an opportunity to challenge the agreement in court under the compact commission statute. It should be noted that downstream states and tribes in the Missouri Basin were not a part of the negotiating process.

California Mission Bands

The La Jolla, Rincon, San Pasqual, Pauma and Pala Bands of Mission Indians in San Diego County, California, have recently negotiated an agreement with the City of Escondido, the Vista Irrigation District and the Escondido Mutual Water Company regarding water rights. This negotiated settlement is embodied in a legislative proposal that failed passage in the 99th Congress but has been reintroduced in the 100th. The five bands filed three separate lawsuits challenging different aspects of agreements consented to by the Secretary of the Interior in the early part of this century which permitted non-Indian use of San Luis Rey River waters claimed by the Indians. In one action the bands sued in the Court of Claims for compensation relating to the federal failure to protect water rights.[71] In another case, the five bands sought invalidation of the contracts between Interior and the non-Indian water agencies.[72] The third case related to renewal of a hydropower license issued in 1924 to the non-Indian entities.[73]

The Indians have had success in the litigation effort, but have been negotiating for several years. An earlier agreement was reached in 1979, but proposed legislation to implement that settlement lost the support of

70. 1985 Mont. Laws 573 (codified at various sections of MONT. CODE ANN. arts. 75, 85 (1987)).

71. Baron Long v. United States, 217 Ct. Cl. 668 (1978).

72. Rincon Band of Indians v. Escondido Mutual Water Company Nos. 69-217-S, 72-276-S, 72-271-S (S.D. Cal. 1979).

73. Escondido Mutual Water Company v. La Jolla, Rincon, San Pasqual, Pauma and Pala Bands of Mission Indians, 468 U.S. 1267 (1985).

the City of Escondido and the Escondido Mutual Water Company.[74] By the end of 1985, a completely different agreement was reached, and that is the subject of the new proposed legislation. An unusual feature of this situation is that the five bands have formed a single entity to receive and manage waters for them. This is the San Luis Rey Indian Water Authority.

The new agreement was introduced in the House of Representatives at the end of 1985. In this version, the bill calls for the annual delivery by the Secretary of the Interior of 22,700 acre-feet of water from the Bureau of Reclamation's Central Valley Project to the San Luis Rey Indian Water Authority. This water is to be proportionately shared in times of shortage, and the Secretary is under no obligation to build new delivery facilities. This water is provided in partial fulfillment of the bands' reserved water rights claims.[75] The Indian Water Authority is empowered to put water to any beneficial use and may "lease, sell, exchange, control, and manage" water or power resources on or off the reservation.[76] There is a provision asserting that no part of the Act can be construed as altering or affecting the determination of the issue of whether or not reserved water rights may be used or sold off an Indian reservation.[77] The bill also alludes to an agreement among the parties to the effect that the non-Indian entities will be obligated to purchase water surplus to Indian needs at a price that is at least 80 percent of the local entities' cost of obtaining water from their alternative source. Thus, although the bill does not provide a federal funding mechanism, it does create a market which can meet the bands' financial needs. The bill is made contingent on final resolution of all claims in pending cases and the entering of stipulated judgments in these cases.[78]

Colorado Ute Tribes

On December 10, 1986, fifteen parties signed a final settlement agreement concerning Colorado Ute Indian water rights. The two tribes involved in this settlement are the Southern Ute and the Ute Mountain Ute, occupying contiguous reservations in the southwestern part of the state in the San Juan River basin, part of the Upper Colorado River system. An adjudication of the water rights of the tribes had been in progress since 1972,[79] but it had been clear to the parties for some time that resolution

74. *Settlement of San Luis Rey River Water Claims: Hearings on S. 1507 Before the Senate Select Comm. on Indian Affairs*, 96th Cong., 2nd Sess. 16 (1980).

75. H.R. 3958, 99th CONG., 1st Sess. 9-10 (1985).

76. *Id.* at 14-15.

77. *Id.* at 16-17.

78. *Id.* at 8-9.

79. In the Matter of the Application for Water Rights of the United States of America in Colorado Water Division No. 7, State of Colorado, Civ. Nos. W-1603-76 and W-1603-76A-J (filed Apr. 8, 1976). An earlier federal suit was dismissed in favor of adjudication in state court. *See infra* note 80.

of the claims could be resolved to the satisfaction of the tribes and the non-Indian water users through construction of the Animas-La Plata federal reclamation project.[80]

The adjudication case was fought on procedural grounds for several years, and a major Supreme Court case[81] determined that it would be tried in state water court. After 1976 very little progress was made on the litigation, apparently in the expectation that Animas-La Plata would provide the answer to the problem of competing claims. Without Animas-La Plata, one estimate of the impact of Indian water claims projected elimination of non-Indian agriculture in two drainages as well as impacts to municipal water in two others.[82]

In late 1985, Governor Richard Lamm convened a task force of the principal parties to attempt a negotiated settlement. The Department of Natural Resources and the Attorney General took the active roles representing the State of Colorado. Seven conservancy districts and canal companies were represented in addition to the two Indian tribes. Additionally, the City of Durango, the Town of Pagosa Springs, and a private developer took part in the negotiations.

The Department of the Interior was initially represented, but the local parties eventually asked that they be allowed to develop their own agreement which could then be reviewed by Interior. A professional facilitator was retained to help as a process manager only. The initial deadline for the negotiations was June 30, 1986, a date specified in a congressional appropriation relating to Animas-La Plata and regarded by the parties as crucial for the future funding of the project.

Notably absent from the discussions were the environmental and recreational groups at both the local and national levels which had been opposing the Animas-La Plata Project for years. A public hearing was held at one point during the negotiations, and the environmental interests took part. Apparently, these interests were not regarded as essential to a negotiated settlement by the other parties.

In April, 1986, an agreement was reached by the local parties and forwarded to Interior. There ensued a period of re-negotiation as the Reagan Administration refined cost-sharing and other principles that were essential to winning its support for substantial federal funding. The June deadline was met by the parties, but the final drafting process continued for another six months as disagreement continued over several minor issues.

The agreement, then, involved securing federal support for a reclamation project estimated to cost close to $600 million in a period when

80. Southern Ute Tribal Council, Letter and Fact Sheet (public letter, Sept. 26, 1983).
81. Colorado River Conservation District v. United States, 424 U.S. 800 (1976).
82. DURANGO PROJECTS OFFICE, BUREAU OF RECLAMATION, ANIMAS LA PLATA PROJECT 4 (undated).

the Congress and the Reagan Administration were both backing away from the funding of such projects.[83] The final hurdle for the agreement is congressional adoption of an act embodying its terms. Legislation was submitted to Congress in the summer of 1987.

The agreement itself relies completely on Animas-La Plata as well as on the Dolores Project, the principal features of which had been completed by the time negotiations began. It quantifies tribal "project reserved rights," that is reserved rights to water supplied by either Animas-La Plata or Dolores, in terms of maximum diversions for irrigation and for municipal and industrial uses. The priority dates for these rights are recognized as 1868, the treaty dates by which the two reservations were established, but the rights are subordinated to all rights decreed and senior to the two projects. Furthermore, they "shall share on a *pro rata* basis the priority" of the projects. In other words, Indians and non-Indians will share all shortages proportionally. The non-project related rights of the tribes are also quantified and specified as to use, source and parcels of land where applied.

The state assumes jurisdiction over water deliveries up to the headgates of the Indian distribution systems and also over all transfers of tribal rights to new uses. The tribes are permitted to sell water both in-state and outside the state in keeping with state and federal law, provided Congress gives its consent through legislation adopting the elements of the agreement. The federal and state governments also agree to provide tribal development funds in the amount of $60.5 million, the federal share, of course, contingent on congressional appropriation.

The agreement is contingent on adoption of the agreement by the Colorado water court and by the 100th Congress. Revision of the agreement is possible only by joint consent of the parties, and there are several provisions ensuring the finality of the arrangements.[84]

Ute Tribe

The Ute Tribe found itself in the 1950s and 1960s in a position with regard to the Central Utah Project somewhat similar to that of the Navajos regarding the San Juan Chama Diversion Project. Resolution of Ute water claims in the Duchesne River area of the Uinta Basin was important for completion of Utah's major transbasin diversion project intended to enable the state to make use of its share of water under the Upper Colorado River Compact.[85]

83. Shabecoff, *After 85 Years, the Era of Big Dams Nears End*, N.Y. Times, Jan. 24, 1987.

84. *See generally* STATE OF COLORADO, COLORADO UTE INDIAN WATER RIGHTS: FINAL SETTLEMENT AGREEMENT (Dec. 10, 1986) (regarding provisions of settlement).

85. *See* BUREAU OF RECLAMATION, FINAL ENVIRONMENTAL IMPACT STATEMENT CENTRAL UTAH PROJECT BONNEVILLE UNIT 5.17-5.19 (1973) [hereinafter FEIS]; Fetzer, *The Ute Indian Water Compact*, 2 J. ENERGY L. & POL'Y 182-86 [hereinafter Fetzer].

In 1950, negotiations began between the tribe, the Bureau of Reclamation and state parties regarding the relationship of Ute water rights and the Central Utah Project (CUP). An engineering report (the Decker Report), quantified Ute water rights and organized the tribe's irrigable acreage into seven land classes.[86] In 1961, the Duchesne River Area Study Committee was formed with representatives of the Ute Tribe, local non-Indian water users, the Bureau of Indian Affairs, the Utah Water and Power Board, the Upper Colorado River Commission and the Bureau of Reclamation. This committee performed several studies and made a set of recommendations in 1962 which formed the basis for a negotiated agreement formalized in 1965.[87]

Known as the Deferral Agreement, the arrangement provided that the Utes would defer, not abandon, the development of irrigable acreage that could be served with water from the Duchesne River. The deferral was to last until 2005 and would facilitate use of water needed for the Bonneville Unit of the Central Utah Project.[88] It was contemplated that the Ute lands would be served by the Ute Indian Unit of the CUP, the ultimate phase of the project. The agreement called for projects to mitigate impacts on fish and wildlife; permitted Indian uses of water for purposes other than irrigation; and recognized an 1861 priority date for the five major classes of lands on the reservation, as they had been tabulated in the Decker Report.[89] The Deferral Agreement was also recognized in the Colorado River Basin Project Act of 1968.[90]

In the 1970s, however, the tribal council became dissatisfied with this agreement, especially since the slow pace of funding and construction for the project made completion of the Indian unit seem remote. There were several other problems at the time between the state and the tribe, and the state legislature designated four committees of negotiators to work simultaneously on the major issue areas. Only the committee dealing with water was able to develop a tentative agreement. This was the Ute Indian Water Compact which was ratified by the state in 1980 but which has not been ratified by either the tribe or by Congress.[91]

This compact called for recognition by the state of the Ute right to deplete 248,943 acre-feet of water per year. The amount of water is expressed as both a depletion and a gross diversion and is considered a

86. Fetzer, *supra* note 85, at 191.

87. FEIS, *supra* note 85, at 23-24. (Contract 14-06-W-194 among the Bureau of Reclamation, the Bureau of Indian Affairs, the Ute Indian Tribe and the Central Utah Water Conservancy District.)

88. Deferral Agreement §§ 3, 5, Dept. of Interior Contract No. 14-06-W-194 (1965).

89. Deferral Agreement §§ 4, 6, 9, Dept. of Interior Contract No. 14-06-W-194 (1965).

90. Colorado River Basin Project Act, Title V, § 501(a), 43 U.S.C.A. § 1501, Pub. L. No. 90-537; 82 Stat. 885.

91. Ute Indian Water Compact, UTAH CODE ANN. § 73-21-2 (1980).

part of the Utah share of the Colorado River. The compact spells out exactly how much water can be taken at each diversion point and provides that the state would have jurisdiction over delivery of water up to the point of intake into the Indian facilities. The tribe and the U.S. would have jurisdiction after that point. The agreement also indicates the use of water at each diversion point and requires the Indians to go through the state transfer and change of use process for any changes in those purposes, unless the changes are confined to the same canal system. There is no provision in the agreement for funds for the tribe or for construction of any facilities for Indian use.

The state legislature ratified this agreement in 1980, but the Ute tribal referendum was inconclusive. The turnout for the vote was less than that needed for a valid referendum, and a new referendum has not been scheduled. Further negotiations have been held from time to time but have not as yet resulted in a new or revised agreement. The Deferral Agreement of 1965 remains in effect.

Pyramid Lake Paiute Tribe

The Pyramid Lake Paiute Reservation surrounds Pyramid Lake, which is the terminal point of the Truckee River system. The Truckee rises in California's Sierra Nevada mountains and flows from Lake Tahoe to Pyramid Lake. After 1915 when water was provided to the Newlands Reclamation Project, the level of the lake declined as water users increased withdrawals from the system. The tribe has attempted by several means to maintain the level of the lake for protection of fisheries and for religious and cultural purposes. The tribe initiated a series of lawsuits litigating almost every aspect of the problem. In the early 1970s they successfully sued the Department of the Interior regarding the water management policies governing releases of water from upstream reservoirs. This case established the principle that the Secretary had to give priority to Indian needs in establishing procedures for water delivery.[92]

The litigation as a whole revolves around a series of sometimes conflicting responsibilities that have been imposed on the Secretary of the Interior by the Congress. The Secretary of the Interior must manage the system's reservoirs not only to protect Indian rights but also to ensure that two endangered species of fish in Pyramid Lake are not harmed. The Secretary, however, also has responsibilities to provide water under contract to fulfill the congressional purposes of several reclamation acts to deliver water for agricultural, municipal and industrial needs. Much of

92. Pyramid Lake Paiute Tribe of Indians v. Morton, 354 F. Supp. 252 (D.D.C.).

the litigation alleges the failure of the Secretary to meet one or another of these obligations.

Some aspects of the water rights litigation were resolved by a 1983 decision of the Supreme Court.[93] In that case, the Court refused a tribal effort to relitigate elements of a 1944 decree[94] under which the tribe received limited rights for irrigation but none for fisheries protection. Nevertheless, the tribe has had success with other lawsuits. One of these attempted to address the impact on Pyramid Lake of increased water usage in Reno and Sparks, the major cities upstream of the lake, as well as water pollution coming from the sewage treatment plant operated jointly by the two cities.

The latter suit,[95] brought against the cities and EPA, was settled through negotiation. The agreement, entered as a stipulated decree in the lawsuit, committed the cities to a series of water conservation measures and improved water pollution monitoring. While this did not provide a new water supply for the tribe, it achieved the tribal goal of committing a major water user in the Truckee system to a new level of conservation to mitigate the impacts of urban growth on the fisheries habitat.

More recently, the tribal council and the numerous other parties involved in this case have attempted to negotiate an agreement that goes to the heart of the water rights problem. Negotiations were originally convened by the Bureau of Reclamation in 1981. An agreement was reached in 1985 and incorporated into proposed congressional legislation.[96] This was a complex document that included the text of the California-Nevada Interstate Compact as well as the Pyramid Lake agreement.There were congressional hearings on the bill, but the Pyramid Lake Paiute Community disapproved the agreement in a referendum while authorizing continued negotiations.[97] An effort to secure congressional ratification of the California-Nevada Compact without the tribal agreement failed in the last session of the 99th Congress in 1986. The Department of the Interior attempted to revive talks early in 1987 and analyzed a number of options for enhancing water supplies, but thus far the parties have not resumed direct negotiations.

COMMON PROBLEMS AND ELEMENTS

The eleven agreements and proposed agreements discussed in the pre-

93. Nevada v. United States, 463 U.S. 110 (1983).

94. United States v. Orr Ditch Water Company, No. A-3 (D. Nev. 1944).

95. Pyramid Lake Paiute Tribe v. Reno, No. CV.LV 82-389 (D. Nev. 1983).

96. S. 1558, 99th Cong., 1st Sess. (1985).

97. Pyramid Lake Paiute Tribe, Statement of Principles, Objectives and Goals of the Pyramid Lake Paiute Tribe Concerning Settlement Negotiation, Involving Pyramid Lake and Truckee River Water and Fishing Matters (unpublished and undated statement).

ceding section fall into two general categories. The first category encompasses agreements, in whatever form, that give final resolution to water rights and at least limited jurisdictional issues. The Fort Peck and proposed Utah Ute agreements are inter-governmental compacts addressing broad issues of jurisdiction as well as quantifying and specifying the sources and uses of the entire tribal water right. Intended to be equally final, if different in form, are the Colorado Ute agreement, the Ak-Chin agreements and legislation, the Southern Arizona Water Rights Settlement Act and the agreement and proposed legislation relating to the five bands of Mission Indians in southern California. The two Navajo agreements, the Ute Deferral Agreement and the Pyramid Lake-Reno-Sparks settlement, comprise a second category designed to achieve much more limited goals in relation to specific water use problems.[98]

Relevant to both types of agreements are several elements and problems which are discussed below. First is the problem of defining goals; second is the impact of incentives to negotiate; third is a set of issues concerning representation and accountability; fourth is the way in which the federal role is handled; fifth is the importance of the distribution of water benefits; and sixth is the problem of management of the process.

Goals

One of the critical elements necessary for success in a negotiation process is that each party have clear goals that can be achieved through negotiation. If a tribe's or a state's goal is to establish a new legal principle relating to the Winters Doctrine, litigation is the process that should be used because it is capable of providing a binding legal precedent. If the goals, however, are to achieve specific practical solutions to problems of how to share and administer water sources, then negotiation may be a possible strategy, provided the parties are willing to engage in good faith bargaining. Each of the situations cited above involved goals that were perceived by the parties as related to needs that had to be satisfied in the near term, for example, construction of major water projects, elimination of legal uncertainty to facilitate water marketing, minimizing the transactional costs of defining water rights.

If goals are not clearly established by the parties or if there is serious disagreement on one side about what the goals are, then negotiation may fail for the simple reason that the party without clear goals may never know when it has achieved all it needs. Without a specific goal in mind, there is no standard by which to evaluate proposed agreements. Negotiators may agree to terms that are repudiated by their constituents, or one party may give away too much, or it may never achieve internal

98. For a similar classification, see L. Burton, *supra* note 1, at 126-30.

consensus about the desirability of accepting or rejecting the other side's proposals. This can lead to frustration and alienation of the other parties and expose one's own side to possible misjudgment about what is in its best interest.

Incentives, Conditions and Deadlines for Negotiation

Because the value of property interests in water is so high, parties are often reluctant to make binding decisions voluntarily unless pressures and conditions are such as to require that decisions be made within a limited time frame. There must be incentives for the parties to bargain, that is, the prospect of specific gains, conditions conducive to satisfying the needs of the parties (such as the availability of adequate water supplies) and realistic deadlines which, if not met, will result in clearly understood penalties.[99] Such factors comprise generally those conditions which enter into the parties' strategic calculation of the costs and benefits of pursuing a negotiation process.

Deadlines are perhaps the most important factor in producing final agreement. A deadline is a point in time after which the potential costs and benefits to the parties will change markedly. The onset of adjudication in state court, the termination date of a congressional session and the time pressure for concluding a business arrangement have served as effective limits on some of the negotiation processes cited above. It provides the opportunity and the pressure for the parties either to conclude an agreement or risk foregoing benefits and increasing costs.[100] Commonly, agreements are reached in the final hours or moments before expiration of a deadline. Without a deadline that is regarded as valid by all parties (that is, one that cannot be changed without imposing significant costs on the parties), negotiations can be prolonged indefinitely and ultimately may yield no conclusion.

While incentives, conditions and deadlines are crucial to the success of a negotiation process, one cannot define a set of factors that will serve this function in every case. The specific factors will vary depending on the goals, perceptions and interests of the parties. For example, litigation was a strong incentive for negotiation in the Tohono O'odam case but was not a factor in the Navajo negotiations.

Representation and Accountability

One of the most important decisions about a negotiation process is the determination of which parties must be included and how they will be represented. As noted above, parties are generally defined as those with

99. Cormick, *supra* note 26, at 28-29.
100. Harter, *supra* note 33, at 47-48.

both an interest in the outcome of the case and some level of power to influence that outcome. Once all parties have been identified, there is a range of methods for representing their interests in negotiations. Each party may insist on having a negotiating team at the table, some may form coalitions to bargain through a single team, others may be satisfied simply to be kept informed of the progress of talks.

Closely related to the issue of representation is accountability of negotiators to their constituents. The Fort Peck, Ute and Pyramid Lake agreements encountered problems because negotiators for one side were contradicted by their constituents, superiors or ratifying agencies. It is essential that each party disclose the nature of its internal decisionmaking process in so far as this affects the ability of negotiators to make commitments. And each party must be certain that negotiators have specific instructions on what decisions they can make. Nothing is more destructive of trust at the negotiation table than revealing that the real power to make decisions is remote from the scene of discussions.

The Federal Role

Although most of the disputes that have given rise to the agreements described in this article have their origins in competition for water at the state, tribal and local level, the federal government has a crucial role for three major reasons. As pointed out earlier, the United States is owner of the ultimate fee under American law of waters reserved for Indian use, and its consent is required to agreements with state and private entities about the disposition of these property rights. Second, the United States has played an important role, principally through construction of water projects, in creating the conditions that made competition between Indian and non-Indian water users possible. It is often looked upon as having a responsibility for facilitating settlement and limiting costs imposed on local parties.[101] Third, the federal government has the ability to pay for solutions to water problems and often the necessary legal authority for implementing agreements.

Where the federal government is expected to meet the costs of settlement, in whole or part, or where new authority is needed for a federal official to implement the settlement, congressional legislation is usually the vehicle for achieving federal consent. While Congress often defers to legislative proposals of local concern that are supported by a state's full congressional delegation, there are cases where congressional scrutiny of a proposed settlement can introduce many new factors and uncertainties. Settlements that cost a great deal or that are looked upon as dangerous precedents for other states or that may directly affect other areas of the

101. RESERVED WATER RIGHTS, *supra* note 21, at 9, 167, 211.

country that were not represented in the negotiation process may be subjected to a new and searching review. This, of course, is the proper function of Congress, to represent fully all possible national interests that may be at stake in a proposed bill. Parties whose agreements are likely to face congressional review have generally anticipated and taken into account within the negotiation process the concerns of other states and national constituencies. Without such consideration, congressional approval may be thrown into question.

Some agreements have had only federal administrative consent. The Fort Peck Compact was approved by the Interior and Justice Departments but not submitted to Congress. Instead it is being made part of water court decrees in the Montana adjudication process. Certain elements of the agreement, in particular the marketing of water rights by the tribes, must be authorized by Congress, but legislation has not yet been submitted. The Pyramid Lake-Reno Sparks Agreement was approved by EPA, a party to the lawsuit, and took effect as a stipulated federal court decree. The Ute Deferral Agreement was signed by federal agencies and took effect in the form of a contract among the parties. The Navajo Power Plant Agreement was adopted through both a tribal council resolution and a contract with a federal agency.[102]

The variety in the types of agreements, the circumstances that give rise to them and the specific legal requirements of each case have precluded thus far a uniform approach to federal approval. But federal approval is necessary, and the way in which it is obtained is extremely important to the ultimate feasibility and success of most agreements.

Distribution of Water Benefits

Driving most of the negotiated agreements reviewed here is a specific goal to put water to use, whether by Indians or non-Indians, or to protect existing uses or to preserve the ability to use water for specific future purposes. There is an important reason underlying this link between these cases and water use. Were the parties only attempting to define water rights in the abstract, they might well find little reason to negotiate. If the various sides have to divide a limited right to water which is already fully appropriated under state law, one side will gain at the expense of the others. It is a win-lose situation.

There must be some prospect that the benefits of resource use can be shared in such a way that all parties will achieve basic objectives.[103] This

102. *See* Back and Taylor, *supra* note 40, at 87-88 (discussion of effect of tribal council resolution lacking approval by Secretary of the Interior).

103. *See* Mann, *The Politics of Water Resource Development in The Upper Colorado River Basin*, Lake Powell Research Project 27-28 (Sept. 1974) (characterization of water politics with respect to distribution of benefits).

does not imply that there must be an abundant supply of unallocated water, as there was in the case of the Fort Peck Tribes and Montana. Arizona has had two major settlements despite the fact that it has a water deficit problem and that part of the supply promised to the Indians had to be obtained through a re-allocation or exchange. The parties must be able to perceive an allocation of benefits that is mutually satisfactory and be flexible about the form in which the benefits are realized. For some tribes, water delivery will be more important than water rights. For some states, participation in off-reservation water decisions by Indians is more important than the level of quantification of Indian rights. Non-Indian water users may be willing to trade some of their rights for financial benefits. However the variables are balanced, there must be a sufficient number of factors relating to water rights and water use to permit the simultaneous resolution of the problems faced by all the parties.[104]

Assistance for the Negotiation Process

Because the stakes in water negotiations are so high, it is often difficult for the parties to initiate and sustain the negotiation entirely on their own. There is often one party who is able to play the role of facilitator to initiate the process and to help keep it going when an impasse is reached. In Indian water cases, this role has been played by members of Congress, by a governor and by other elected officials. This section will examine the reasons for this assistance and examine the possibility of meeting this need through use of professional facilitators as well as influential parties.

Most negotiation processes are helped at various stages by someone whose judgment, influence and neutral interest in a fair settlement is respected by all the parties. Such a person can facilitate organization of the process and maintain and restore communication when problems arise.[105] In the Indian cases reviewed in this article, Congressman Morris Udall played this role in relation to the Tohono O'odam case, though his importance went far beyond that of a facilitator. Congressman Barnes and his staff played a comparable role in resolving the California Mission Bands' water claims. Governor Lamm of Colorado convened the initial meetings that led to negotiation of the Ute tribal water adjudication. Members of Congress have played important roles in most of the cases that have resulted in federal legislation. In the other cases there was either no mediator or the role was played sporadically by persons closely related to the parties. The assistance of a dispute resolution professional has been used in only one case of this type, although professional mediation has

104. *See* J. SEBENIUS, NEGOTIATING THE LAW OF THE SEA 113-44 (1984) (regarding negotiating to take advantage of different and multiple needs and concerns of parties.)

105. H. RAIFFA, THE ART AND SCIENCE OF NEGOTIATION 218-19 (1982).

been employed widely in other types of natural resource and environmental disputes around the country.[106]

Most parties considering negotiation readily see the value of a respected "third" party in convening a group to initiate discussions. At this stage, Indians and non-Indians may have been in litigation for many years and may find it difficult to initiate the process on their own. Their constituents might see an offer to negotiate as a backing away from earlier commitments; or relations among the parties may simply be so hostile as to prevent any of them from opening discussions without the aid of another person or institution not directly connected to the conflict. There is another point at which most negotiators involved in Indian water cases recognize the need for outside assistance. That arises in dealing with an impasse in bargaining, a breakdown of communication or outright hostility among the parties. A third-party can again work with the negotiating teams, help correct misunderstandings, remind all of the positive benefits that could come from the process or the costs of failure and perhaps convene further sessions to explore new options.

Apart from these well known points where the need for outside intervention is commonly recognized, there are other functions relating to the negotiation process that can sometimes be performed most efficiently by someone who does not have a direct interest in how the substantive issues are resolved.

In any negotiation process, ground rules for efficient use of time must be agreed to by the parties. The rights of participants must be safeguarded through these ground rules, and guidance on their drafting and implementation can often be obtained from persons experienced in negotiation process. Dispassionate facilitation of meetings is important to ensure productive use of time. Each negotiation process has many purely managerial functions that have to be performed carefully to prevent alienation and misunderstanding. The logistics of meetings and scheduling, taking into account the particular needs and resources of each party, must be handled in a neutral fashion. Circulation of written materials, note-taking on potential terms of agreement, and maintenance of communication among the parties between meetings is important. Advice from a disinterested source can also be useful in drafting agendas, framing the terms of discussion and developing ideas about the sequencing of negotiation tasks.

Most of these aspects of negotiation procedure will be attended to by someone during any fruitful process. The question is can or should the

106. *See generally* G. BINGHAM, RESOLVING ENVIRONMENTAL DISPUTES: A DECADE OF EXPERIENCE 13-63 (The Conservation Foundation, 1986).

parties seek outside help to deal with these issues so they can remain focused on their primary role as negotiators?

In recent years, professional mediation has become an important element in the environmental and natural resources field.[107] A mediator is someone who helps parties reach agreement. Mediators are not empowered by the parties to impose decisions and often they do not make substantive suggestions about possible settlement. Mediators typically perform many functions. They are experts in procedure, can identify potential problems, manage the process for parties who are primarily concerned about the substance of the negotiations, act as a buffer when relations are tense, help re-establish communication if discussions become deadlocked or break off altogether, and dispassionately facilitate meetings to keep them orderly and productive. They can also carry out an assessment on whether or not negotiation is likely to be fruitful before the parties formally convene.[108]

The functions of a mediator are likely to be carried out in some fashion even if a mediator is not used. Management of the process of communication, logistics and organization of a negotiation process must be given careful attention, in addition to the issues of representation, ground rules, drafting and review of implementation problems. With or without a dispute resolution professional, a negotiation process requires careful management and organization to have the best chance of success.[109] Use of a mediator can help the parties concentrate on the business of negotiating an agreement by ensuring that the structure of the process itself will not be a hindrance.

The very fact that a professional mediator has been employed in only one Indian water case, and then only as a process advisor,[110] suggests that there is resistance to having these functions carried out by professionals despite the increasing use of mediators in other types of natural resource and environmental disputes.[111] Among possible reasons for this resistance are a lack of recognition that the role itself requires the assistance of a professional, reluctance to assign a significant role to anyone not already well-known to the parties and a feeling that someone with the role of mediator/facilitator/process manager will be taking some degree of control over the process away from the parties.

Our only conclusion here is that the parties need to examine the full

107. BINGHAM, *supra* note 106, at 1-4.

108. *See generally* Colosi, *Negotiation in the Public and Private Sectors*, 27 AM. BEHAV. SCI. 229-53 (1983); D. KOLB, THE MEDIATORS (1985) (discussion of the roles and tactics of mediators).

109. BINGHAM, *supra* note 106, at 10.

110. Personal communication with John Huyler, mediator at Denver, Colo. (Feb. 12, 1986).

111. BINGHAM, *supra* note 106, at 28-44.

range of procedural and communication problems and agree among themselves on the best way of handling them. Not to make some provision for dealing with them is to invite problems at later stages.

EVALUATING NEGOTIATED SETTLEMENTS

The increasing frequency with which negotiation is being used to resolve controversies involving Indian water rights suggests that the parties to such cases are coming to view this alternative as one that can help them achieve their goals. Whether or not that hope will be realized in practice remains to be seen as recently ratified settlements are implemented and as new proposed settlements meet the early tests of congressional scrutiny, tribal referendum, state legislative votes or judicial review. What measures or instruments can be used to begin the process of evaluating how well negotiated settlements are working? This section looks at the ability of ratification methods to raise long-term issues of fairness.

It is often the case in negotiations, whether involving Indian rights or other issues, that there is a disparity in the power and resources available to the various parties.[112] State and federal agencies generally have more personnel, funding and information resources than do Indian tribal governments. Often Indians are dependent on the federal government for funding to develop their negotiating positions, and, in the past, tribal governments have had very limited abilities to obtain information from sources that were not parties to the negotiations. Price and Weatherford discussed this problem in relation to the Navajo negotiations about water for the Navajo Generating Station and the Navajo Indian Irrigation Project.[113] Brown and Ingram have reviewed related issues in a study of the Southern Arizona Water Rights Settlement Act.[114]

Disparity in available resources does not necessarily mean that the parties have not achieved a relative balance of power with respect to the issue under negotiation. In fact, the reverse is often true. The Tohono O'odam established power with their lawsuit against Tucson. The Navajos have had power regarding water that has affected the planning of federal and state agencies alike. The Pyramid Lake Paiute Tribe and the California Mission Bands are examples of small tribes that have established an important position respecting water because of a long and determined litigation strategy. Clearly, the tribes involved in the negotiation processes reviewed above were parties that had to be dealt with by more powerful agencies.

Non-Indian parties can be in this same position. A small irrigation

112. *See generally* Fisher, *Negotiating Power*, 27 AM. BEHAV. SCI. 149-66 (1983).
113. *See generally* Price & Weatherford, *supra* note 36.
114. *See generally* F. L. BROWN & H. INGRAM, *supra* note 53.

district or individuals who find themselves involved in a complex water adjudication generally have less ability than tribes to command the attention of decisionmakers and protect their interests through direct representation in a negotiation process. Typically, their solution has been to band together, employ common legal representation and pressure elected politicians to facilitate resolution of Indian claims. Often, they are not represented at the table, as in the Fort Peck negotiations, but must rely either on the state to protect their interests or on ratification and appeal procedures.

To carry out negotiations, these parties must also have funding, leadership, professional expertise and information resources. Perhaps the most difficult aspect of negotiations for relatively powerless parties is deciding whether or not they have made the best deal possible.

The evaluation of the ultimate success of any strategy used by a party to define water rights and access to the benefits of water use takes many years for three major reasons. First, the value of resources changes over time, and concessions made in light of present knowledge may turn out to have been premature if future conditions result in a much higher value for the resource in question. Second, agreements themselves take a long time to implement; it is much easier to assess the viability of near-term implementation than the ultimate wisdom of the underlying agreement before the long-term effects are well understood.

Third, it is problematic to choose standards for evaluation. Each party has certain objectives which may apparently be satisfied by an agreement, but these objectives may be repudiated as short-sighted by succeeding political administrations or by later generations. The most significant short-term evaluation process usually occurs in the ratification of agreements by the affected constituents. This provides the opportunity for the parties themselves to review the terms agreed to by their negotiators and complete their internal bargaining process. Two major agreements (Ute and Pyramid Lake) have not passed community ratification tests. Three (Southern Arizona Water Rights Settlement Act, California Mission Bands and Fort Peck) had a history of rejection by non-Indian parties before ultimate success in negotiation.

The existence of a ratification process recognized as legitimate by constituents is perhaps the most important safeguard that a general disparity in resources and power will not translate into a bad deal for one of the parties. In the case of Indian parties, there is a further safeguard found in the law of Indian property. That is the federal role as trustee for that property, a role which requires the government to act according to exacting standards for the protection of Indian water rights.[115] The Pyr-

115. F. COHEN, HANDBOOK OF FEDERAL INDIAN LAW, 220-28 (R. Strickland ed. 1982).

amid Lake litigation, for example, has shown that the Secretary of the Interior cannot adopt water management rules for the benefit of a non-Indian irrigation district that fail to protect Indian interests in water.[116] Litigation can be an effective tool used by tribal governments to ensure that federal protection of Indian rights is carried out. Of course, these very protections of Indian interests can raise doubts in the minds of non-Indian parties about the finality of agreements reached with tribes since they may be subject to legal challenge as being inconsistent with these safeguards.

Disparity in the relative power of the parties, then, is common in these cases but not indicative of an inability of weaker parties to build power with respect to water issues and to achieve their objectives through negotiation. Evaluating how effectively that power has been used in defining the benefits or costs of any agreement can be tested in the short run by internal ratification processes used by each party and in the long run by monitoring and review of the effects of the agreement over time.

The parties who have least access to resources and who have played little or no role in negotiations of Indian water issues are the individual water users, both Indian and non-Indian. They are typically represented in negotiations by their governments. Non-Indian individual water users have been protected in agreements thus far to the extent that they have not had to reduce their use of water or their water rights. Individual Indian water users may or may not be fully protected. The recourse of individuals in both cases is generally through the court systems of their own jurisdictions. At this early stage in implementing the agreements thus far negotiated, it is not yet possible to determine if individual rights have been adequately protected.

The existence of a legitimate ratification process and the definition of clear goals and strategy are important procedural safeguards by which parties with relatively less power and resources test the effectiveness of negotiated agreements. The rights of dissident elements within each party are protected principally through their ability to litigate and contest the legality of an agreement. While it is possible for more powerful parties to coerce or control information to the extent that agreements unfavorable to weaker parties can be accepted by negotiators, they expose themselves to the risk that the effort to reach agreement will be set back by the rejection of a proposal through the ratification process or subsequent litigation if it is perceived as unfair by those to whom the negotiators are accountable.

CONCLUSION

It is difficult, and perhaps counter-productive, to attempt to generate

116. *See supra* note 78.

a model of the ideal water rights agreement since the specific issues, needs and interests of the parties will determine what can and should be resolved through negotiation in each case. The agreement of the parties may also be modified by the political realities and constraints imposed by the process of legislative ratification.

Negotiation is one of many strategies by which parties attempt to create greater certainty about the allocation of resources. The likelihood of its success depends upon whether or not the parties have accurately assessed their own needs, the political context, and their ability and willingness to work jointly with other parties to secure mutual gains. Its principal virtue is very likely its flexibility in responding to the real goals of the parties. The success of negotiated agreements in resolving conflict about Indian water rights cannot be evaluated fully for many years, but the increasing use of this approach suggests the need for practical and innovative mechanisms to facilitate stable and equitable decisions about water allocation.