

Indian massacre, 1861. Three hundred immigrants west bound, only five escaped. Erected by S&D [Sons and Daughters] of Idaho Pioneers, 1938." There is just one problem with the Almo massacre: it never happened. Relying upon wild rumors and imagination, and with a hope to increase tourism, a reporter concocted the whole thing in the early 1930s.⁶ The fictitious massacre at Almo worked a disservice to both history and the Shoshone people. It does, however, offer a telling lesson; if something is repeated often enough, it becomes reality in the minds of those who hear it, especially if they wish it to be true.

This book is an effort to assess whether water settlements live up to the oft-repeated claims for them; do the results actually match these claims? Have settlements achieved a level of justice and resolution that warrants a continuation of this policy? The litany of advantages are stated often, but it is necessary to take a close look to make sure these advantages actually accrue, or, like the Almo massacre, are merely the stuff of fertile minds and repeated incantations. There is no simple answer to this question; the record is mixed. But if the negotiation era continues, we must gain insights from past settlements that permit an improvement in both the way settlements are negotiated and the results achieved from them. This chapter first considers the *process* of negotiation and ways it might be improved, followed by a discussion of the overall *substantive* impact of settlements. A final vignette takes us to the Navajo Reservation to examine a negotiation in progress and the way it is perceived by local people.

We Talk, We Listen

When the settlement era first began, negotiators had to make up the process as they went along. It was a creative, innovative effort, and the negotiators deserve to be commended for their pioneering efforts; they initiated the second treaty era. But, like all governing processes, there is room for continued innovation and improvement. There are a number of factors to be considered as the negotiation process undergoes further refinement.

First, it is important to view negotiated water settlements as just one type of collaborative problem solving. States, counties, special districts, regional coalitions, and nongovernmental entities are using negotiation and creative problem-solving in an effort to improve understanding, provide a means of nonconfrontational communication, and resolve a score of difficult issues. Everything from anti-gang task forces to regional environmental cooperatives is using innovative institutional arrangements to get people to work together in a way that benefits all jurisdictions. A review of these coopera-

tive arrangements reveals a number of labels and concepts that are quite telling: intercommunity partnerships,⁷ intergovernmental management,⁸ multiple partnership configurations,⁹ and collaborative alliances.¹⁰ Most Indian water negotiations have used previous settlements as models, despite the disclaimers attached to many settlements stating they have no precedential value. In future settlements it may be useful to move beyond the traditional model of negotiation/settlement/implementation and explore these other venues of cooperative policy making. There is much that can be learned from other governing entities that are working through a collaborative, conflict-resolution process to solve long-term problems.

It is also important to realize that many issues in Indian country other than water are currently the subject of government-to-government negotiation and collaboration. In addition to the water settlements, there have been twenty-one land settlements.¹¹ Other issues are also the subject of tribal-state cooperation, including tourism,¹² economic issues,¹³ law enforcement, gaming, and some environmental problems.¹⁴ This is reflective of the widespread acceptance of cooperative negotiation as a preferred alternative to confrontation, competition, and litigation. It also reflects increasing acceptance of tribes as legitimate quasi-sovereign governments.

State, local, and federal governments are more likely to engage in cooperative agreements with tribal governments if they view tribes as professional, independent entities that are quite capable of handling their own affairs. Thus tribes can increase their effectiveness in water negotiations by developing their own water-related expertise and institutions. An important element in this process is the development of tribal water codes. For decades tribes were hamstrung in this area by a secretarial order, dating from 1975, that forbade those tribes with governments set up according to the Indian Reorganization Act from writing their own water codes. The intent was to create a planning vacuum that could be filled only by paternalistic federal bureaucrats or encroaching state water authorities. Bruce Babbitt finally lifted the secretarial order in 1996, thus giving tribes the autonomy they need to plan their own water future. The Navajo Nation, which was not subject to the ban, had already developed a comprehensive and sophisticated water code designed to "provide for a permanent homeland . . . ; to protect the health, the welfare and the economic security . . . ; [and] to develop, manage and preserve the water resources of the Navajo Nation."¹⁵ The Mni-Sose Intertribal Water Rights Coalition has developed a model water code to assist tribes in their planning efforts.¹⁶

However, it takes more than a well-designed water code and an understanding of water problems to succeed in the negotiation process; tribes must also develop their own independent legal and political expertise. History clearly

shows that the Justice Department and the Interior Department are often compromised in their ability to assist tribes. When tribes depend on individuals whose first loyalty is to their agency or department, or to personal remuneration, serious problems arise. A case in point concerns U.S. attorney Herbert Becker and water negotiations at the Zuni Reservation. Mr. Becker told negotiators for the Zuni tribe that he had filed the necessary papers to close the Zuni River basin and thus establish a moratorium on water development by non-Indians while negotiations were in progress. Mr. Becker repeatedly assured the tribe that the basin had been closed, and the tribe proceeded in negotiations under that assumption. But in August 1993, it was revealed that Mr. Becker had failed to file the necessary notifications; the basin was finally closed in 1994—ten years after the tribe had received assurances that this action had been completed. This caused serious problems in the continuing negotiations.¹⁷ In 1997, Mr. Becker encountered further problems; he pleaded guilty to felony charges of conflict of interest and filing false claims in another matter not related to the Zuni case.¹⁸ Although this kind of malfeasance is rare, it points out the advantages of tribes' hiring their own experts.

While tribes develop their water and legal expertise, they must simultaneously fight efforts to emasculate tribal autonomy. A prolonged effort has been made by some parties to diminish the legitimacy and significance of treaty rights. This effort is as old as Columbus, but a recent manifestation was led by the Wisconsin Counties Association, which proposed to "modernize" treaties, or in other words, render them ineffectual.¹⁹ Such talk polarizes people involved in the discussion and creates a tense, distrustful relationship. It is difficult to encourage a second treaty era while some parties still refuse to honor the first one.

In the battle to honor treaty rights, tribes have been fortunate to have a few stalwart defenders in Congress, including Senator Daniel Inouye, Democrat from Hawaii; Senator John McCain, Republican from Arizona; and Colorado's Senator Ben Nighthorse Campbell, currently a Republican. In contrast, former Senator Slade Gorton, Republican of Washington state, led several attacks on tribal sovereignty, including efforts to cut funding for Indian programs in an effort to force tribes to accept restrictions on their water use.²⁰ His defeat in 2000 was in part due to his anti-Indian activities. These anti-Indian efforts poison the atmosphere and make cooperation difficult. The lesson is clear; future negotiations need to take place in a larger political context of trust rather than confrontation. To attack Indian sovereignty on one level, and then plead for cooperation and collaboration in regard to water, is not conducive to successful settlements.

In future negotiations, water issues will become enmeshed in other issues affecting Indian country. As cooperative mechanisms become more common, the numerous issues on the table will become more integrated. Negotiations

over water rights, land rights, gaming, provision of local services, BIA funding, and scores of related issues may all appear on the same table. A limit on water rights may be traded for the return of a parcel of land. A deal over the administration of a water project may include a commitment for more funding for economic development, and so on. Issues left over from the first treaty era will become part of the negotiations of the second treaty era. Water rights can no longer be isolated from the general welfare of Indian tribes. Water negotiations will be more successful if conducted within a larger framework of cooperation and good will across all issues. Slashing BIA budgets and attacking Indian independence is certain to create strains that inhibit negotiations over water.

Sovereignty issues are not, however, limited to relations between tribes and non-Indian governments. Sub-tribal sovereignty may well become the sticking point in many future negotiations. One dimension of such sovereignty is the conflict between allottees and tribal governments, which continues to be an issue in both the Tohono O'odham and the Northern Ute settlements. Another aspect concerns tribal sub-divisions. For example, the Navajo Reservation is divided into 110 chapters; can one of them negotiate its own water settlement? Other reservations are home to more than one tribe; for example, the Shoshones and Bannocks share the Fort Hall Reservation, and the Eastern Shoshones and Arapahos share the Wind River Reservation. Can one of these tribes negotiate a water settlement independent of the other? The Northern Utes are divided into three distinct bands, each with a separate history; can any one of them conclude an independent negotiation? If Indians are sovereign, a relevant question is sovereign from whom? Many traditional tribal governments were very decentralized; a return to this traditional model of Indian governance could strengthen sub-tribal claims for autonomy. Just as Indian and non-Indian jurisdictions must learn to cooperate, so too must elements within tribes. Otherwise the entire fabric of cooperation may break down.

In sum, the process of negotiation is much more likely to succeed if it takes place within a larger context of cooperative relations. The best way to improve water settlements is to improve the overall climate of Indian policy and government-to-government cooperation.

Show Me the Water

The most enlightened cooperative process in the world is of little utility if it fails to bring results. The ultimate test of a good settlement is whether it actually delivers the goods. Well-meaning people have, on occasion, come together in a spirit of cooperation and written bad water settlements. In a sense, then,

the best way to evaluate the negotiation process is to look at the product. A brief summary of what the settlements have delivered will help us gain a clearer sense of the results of the second treaty era so far.

Clearly the biggest question revolves around water; did the tribes finally get a just and equitable amount of water, or have paper settlements led only to more paper water? There are two perspectives from which to view this issue. The first perspective, described in chapter 5, compares the water allocated under the settlements to historical water allocations. Without a doubt the settlements have dramatically increased the amount of water to which tribes can claim title. There are, of course, significant limitations to their use of that water, but nevertheless, the historic tradition of giving lip service to Indian water claims while ignoring them in substance may be coming to an end.

A second perspective offers a less sanguine view. It could be argued that the water, and even the associated funding, that has accrued to Indians via the settlements is a hollow victory because they won only what was already due them. In effect, the "win/win" calculus claimed by adherents of negotiation only provided tribes with some of the benefits promised in the first treaty era. If the government had consistently honored its trust responsibility, it would have developed Indian water resources with the same zeal with which it showered them on non-Indians. If the federal trust responsibility created by the first treaty era had created viable homelands for Indian people, the second treaty era would not be necessary. According to this perspective, the settlements are an admission that the nation has failed to honor its treaty commitments from the first era; the government is basically saying to tribes, "We'll give you part of what we promised if you agree to give up the rest of it." This is a cynical view of the process, but not without some merit. The realpolitik response suggests it does not matter what has been promised, it only matters what can be delivered.

A second substantive concern involves time. If settlements bring justice to the present generation but not future generations, then we have, in essence, negotiated a temporary justice. The well-known indigenous belief that decisions should be made with the next seven generations in mind is one criterion that could be applied. Again there are two perspectives. A more benign interpretation points to quantification of water rights as the best method of guaranteeing future generations that tribes will forever hold title to a legally defensible amount of water. The funding for water settlements also represents an investment in tribal infrastructure, economic development, and cultural preservation that will yield dividends for all future generations. The unprecedented government spending on water settlements has created new opportunities for tribes that simply would not have occurred otherwise.

But again, there is an alternative view that considers the money in settle-

ments as a sell-out similar to the sale of aboriginal lands in the first treaty era. After the money is spent, what will subsequent generations think of their settlement? Without a doubt the most shortsighted aspect of the settlements is the limitations on water marketing. In the long run, these limits will cost future generations many opportunities to use their tribal water in the manner that is most beneficial to them; it robs them of critical choices. Of course, it is easier to give up something that does not exist yet, but within seven generations it is quite likely that water markets will open a whole new era in the allocation of western water. The tribes that have agreed to severe marketing constraints will be left out of the gold rush.

Another consideration in regard to the substantive results of water settlements concerns the way in which water is used. Settlements that focus on large-scale irrigation are tying tribes to an economic era that is rapidly disappearing. For some tribes, a settlement may be viewed as a way to keep things from getting worse, but preserving the status quo will poorly serve tribes in a time of rapid change. Future water settlements must attempt the difficult combination of fitting Indian water uses into the New West while helping to preserve tribal traditions. This combination could, for example, mean emphasizing tourism rather than alfalfa; it could mean providing water for tourist facilities rather than mechanized farming. The issue of tourism in Indian country is a delicate one, but if properly managed it need not occur at the expense of traditional culture. Indeed, it is the preservation of Indian culture and Indian lands that will bring visitors.

Combining these goals—preserving Indian culture while adapting to the New West—will require an unprecedented level of creativity. For example, the Navajos have expressed an interest in creating their own rafting operation on the San Juan River. But the Bureau of Land Management claims it has sole control over rafting permits and recreation on the river, even though the San Juan flows through the reservation and forms its northern border. A claim for in-stream flows for a rafting operation might bring more benefits to the tribe than, say, a claim for more water for the corporate farming operations upstream at the Navajo Indian Irrigation Project, which has yet to turn a profit and employs few tribal members.²¹ The potential for recreation on the San Juan is significant (more than 11,000 people float the Utah portion annually), but the Navajo people derive no economic benefits from all this recreational activity.²²

The point is simply this: the greatest economic asset on Indian reservations may be the uniqueness of the land and its people. Non-Indian communities throughout the West are realizing that irrigated farming and extractive industries such as timber and mining no longer offer economic security; the future is in the amenity values of land and culture.²³ Preserving the landscape and cul-

ture of Indian people will require a different vision of the future; instream flow, marketing, cultural preservation, and recreation may replace large-scale farming and water for extractive industry as the preferred uses of water claimed in a settlement.²⁴ This vision will be true for both Indian and non-Indian parties in future negotiations.

A final point in regard to the substantive results of water settlements concerns the competition for water. The easiest water settlements have probably already been negotiated; future settlements will severely test our government's commitment to being "good neighbors" engaged in good-faith negotiations. As water grows more scarce, non-Indian parties may be less willing to concede any appreciable amounts of water to Indian reservations. But it is important to keep this water "scarcity" in perspective. The reason most water in the West is already allocated is that irrigated agriculture consumes more than 80 percent of it. In effect, we do not have a water shortage in the West; we have an oversupply of underpriced, subsidized water to irrigated farmland. In many western states, alfalfa, a low-value, high water-use crop, consumes much of the irrigation supply. On lands watered by Bureau of Reclamation projects, 23 percent of the acreage is planted in hay.²⁵

Much of this farming is possible only because of an elaborate system of multiple subsidies provided by the federal government; interest-free loans, below-cost water sales, extremely generous payback schedules, and subsidies to both grow—and not grow—certain crops have inflated western farming operations far beyond what is economically rational.²⁶ In a very real sense these subsidies are at the heart of the water "scarcity" issue that will severely limit future Indian water negotiations, especially if the government continues its no-harm-to-whites policy.

These subsidies are so gratuitous they defy belief, but they are the result of decades of special-interest lobbying and an archaic policy that has been deftly transformed from a social program for the New Eden into a massive transfer of public wealth to a small group of private businesses. The principal beneficiaries are corporate agribusinesses, and the amount of water consumed is staggering; Bureau of Reclamation projects delivered 29.8 million af of water in 1998, nearly all of it to agriculture.²⁷ This figure reveals an important truth about the water that is potentially available to Indian tribes in future negotiations; one way to make sufficient water available to Indian tribes is to bring some economic sanity to the federal water development program. A significant reduction in water subsidies would mean that only cost-effective farming operations would remain in business.²⁸ The many irrigation operations that currently lose money—if subsidies are figured into their costs—could not survive a dose of economic realism. Thus, rational market pricing of irrigation water would free

up enormous amounts of water, which would then be available for urban water users, recreational and environmental purposes, profitable farming operations, and yes, Indian tribes. Perhaps the no-harm-to-whites rule should be modified to a no-harm-to-taxpayers rule.

This approach fits well into the prevailing political climate. Smaller government and a reduction in government waste would create new opportunities for future water rights negotiators. Indian tribes could be awarded wet water rather than large monetary settlements; the water could then be used to generate income or to preserve traditional culture, or in whatever ways tribal members chose to use it. In addition, the no-harm rule would no longer serve as a stricture on future settlements because new water supplies would be available for allocation. The goal of such a policy is not to harm Anglo water users; most Anglos, especially taxpayers, would benefit. Rather, the goal is to bring water policy into the twenty-first century while honoring the government's historic trust responsibility to Indian tribes.

In the nineteenth and twentieth centuries the United States displayed a marked inability to keep the promises it made in the first treaty era. Perhaps in this century we will do better with the treaties of the second treaty era.

Conclusion

Water settlements have promised a great deal: certainty, finality, wet water, secure rights to a specific amount of water, federal funding, and peace and harmony brought about by "good faith" bargaining. That is a tall order, yet it is clear that, in some cases, some of these goals have been realized. What may look like an opportunity, however, may also offer hidden dangers. Just before riding off to eternity, Lt. Colonel George Custer penned a brief note to Captain Benteen, who was a few miles to the south: "Come on, big village. Be quick." Benteen, who apparently had a better eye for death traps than Custer, declined the invitation. There was indeed an opportunity at hand, but not the one that Custer envisioned. The lesson of the Little Bighorn is directly applicable to negotiated water settlements: Plan carefully, try to consider all possible ramifications, and walk away from those who promise much but speak little of the dangers.

This important juncture in time—the beginning of the new millennium—offers an opportunity to reassess the way our society relates to both water and Indian people. The idea of a permanent, viable homeland is at the heart of Indian policy today; perhaps the nation as a whole needs to consider such a

concept. One way to realize this goal may be to examine traditional American Indian metaphysics to see if there is a lesson that is relevant in the next millennium. In indigenous cosmology, there is no dividing line between the land and the people that inhabit it. It is this geographic orientation to space that differentiates the aboriginal worldview from the Anglo-European fixation on time. Indian people tend to organize their cognitive processes through spatial relationships, while Anglos think linearly. In the dominant society, the basic elements of existence are separate, each with its own time line — religion, humanity, life, death, earth, water. Each exists in its own separate dimension. But in the Indian construct of life, these elements are inseparable; the prosaic and the divine deftly coexist as different dimensions of the same thing. Perhaps such a holistic view would enable us to secure an Anglo water future while providing for a vision of sharing the land and the water with Indian people.

The ultimate goal is to avoid extinction. This threat may seem distant to the dominant culture, but for Indian people it has been a part of their existence since Christopher Columbus first arrived and declared that the peaceable Indians would make excellent slaves. Extinction was assumed to be the fate of Indian people until fairly recently. A western newspaper in 1874 editorialized about the fate of Indian people: "Humanitarians may weep for poor Lo, [the poor Indian,] and tell the wrongs he has suffered, but he is passing away. Their prayers, their entreaties, can not change the law of nature; can not arrest the causes which are carrying them on to their ultimate destiny — extinction."²⁹ A new approach to water policy in general, and particularly in regard to Indian tribes, will go a long way toward ensuring that both the dominant culture and the Indian people who live within it, will not disappear from this Earth. In such a context, future water settlements may well exceed past settlements in their quest to bring justice to a long-troubled area of policy.

Vignette: Pipe Dreams

We are sitting under a veranda built of scrap lumber and willow fronds, next to the home of the Canyon family. Their house, a simple concrete block structure, is a mile east of Cameron, Arizona, on the western edge of the Navajo Reservation. An austere, barren desert is splayed out before us. The remnants of abandoned uranium mines are visible in the distance. An enormous high-voltage power line runs within a hundred yards of their house, yet they have no electricity. The shallow canyon of the Little Colorado River is just south of their house, yet they have no running water. In the distance, a series of mesas form