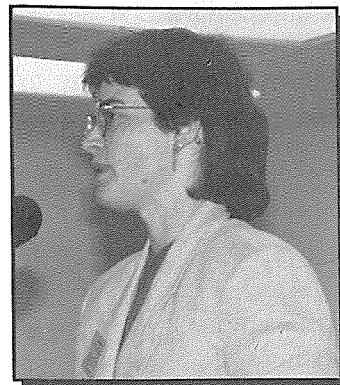


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APPROACHES TO INDIAN WATER RIGHTS SETTLEMENT

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I am a person who looks for positive omens, signs of the future. For instance, not spilling my coffee and getting all green traffic lights is an omen that I will have a great day at work.

So I was struck by the incredibly positive omen the world witnessed in the simple handshake between the leader of the Palestine Liberation Organization, Arafat, and the leader of Israel, Rabin. In a simple handshake we saw two peoples, divided for centuries by culture and religion, agree to try to live together in peace. It portends a willingness to set aside cultural and religious differences so that both sides may benefit from a new relationship. In that handshake, there is a recognition that Arab and Jew are in an inter-connected world; a recognition that they must learn to co-exist if they each are going to continue to exist at all.

As I was trying to figure out how this positive omen fits into my work, I received a letter from an old friend who was recalling the life of an author who died this summer. My friend quoted a piece written by Freya Stark in

1929 about her travels in the Middle East in a piece called "Baghdad Sketches":

I suppose that, after the passion of love, water rights have caused more trouble than anything else to the human species. Our word for rival, or rivalry, comes from the Latin *riva*—the banks or margin of a stream—and the justice of the derivation is proved at any rate in Iraq.

I verified in the *Oxford English Dictionary* the derivation of the word "rival." In common usage today it means "one who is in pursuit of the same object as another; one who strains to equal or outdo another in any respect." But, as Freya Stark correctly wrote, in Latin it meant "one living on the opposite bank of a stream from another."

What an incredible status water controversies have in history, that the very word for stream or life on opposite sides of a stream in the English language should come to be the word for not only competition for water but competition for

anything. Obviously, we who work in the water field, work with a natural resource that is much desired, much competed for. It has become the limiting factor of survival of cultures.

So I looked for a way to utilize the positive spirit evidenced in the handshake and my new understanding of water rivalry and I recalled yet another Middle East connection. In February 1991, at the height of the Persian Gulf War, I wrote a column for the Tucson paper that suggested several principles the U.S. should use to guide our activities in the world. I went back and read my article and was struck at how closely the principles I suggested apply to both international affairs and our own water disputes between Indian and non-Indians in the American West. They're sort of the "everything-I-need-to-know-I-learned-in-kindergarten" version of how to negotiate:

- respect each other as fellow human beings;
- recognize as legitimate, each other's forms and philosophies of government, religion, and society, even if we don't understand them and would not choose them for ourselves;
- treat others as we would want to be treated;
- listen to each other and try to understand the need of others;
- use only a fair share of the resources and work with each other to conserve or stretch the resources to meet all needs;
- think long-term, even if it means that some benefits will be non-immediate;
- do not focus on enemies because once we cast someone as an enemy it prevents us from recognizing joint problems and joint solutions;
- strive to resolve conflicts by non-violent means; and finally,
- act with the realization that the world is inter-related, and what happens in one area impacts all other areas.

Promotion of these principles requires education to a new way of thinking: to a thinking that promotes the benefits of cultural diversity, to a thinking that recognizes that my future is in your hands and your future is in mine.

In the natural resources arena our conflicts result in further destruction of the water, air, land and plant and animal life on which we all depend.

Nowhere is the destructive nature of conflict (or rivalry) more clearly visible than in the State of Washington. In the remainder of my talk, I will discuss two models for Indian water rights settlement, the Washington State model and the Arizona model.

I worked for the Attorney General and Governor's Office in Washington in the 1980s. It was a period of transition. For many years, Indian and non-Indian battled violently, physically and in the courts, over the tribal right to fish. People were jailed, buildings were occupied, boats were seized.

The federal court in *Boldt I* finally awarded to the Indians a right to harvest 50 percent of available salmon. There were, of course, many issues still to be argued over, but by then it was realized the salmon resource was in trouble.

The new governor wanted to get beyond court battles. His new agency heads forged alliances with the tribes to co-manage the resources. The few years of cooperative management (1986-1989) set the stage for dealing with *Boldt II*.

While the *Boldt I* decision gave the tribes the right to take 50 percent of harvestable fish, the *Boldt II* issue concerned whether the harvest rights give the tribe the right to demand habitat protection necessary for fish production. Habitat protection is primarily instream flows necessary for salmon migration. Rather than litigate the *Boldt II* issue, Washington State and tribes were in a position to use the new way of thinking about cooperative resource management. To facilitate cooperative resource management, in 1989 the governor signed a proclamation that the state would deal with tribes government-to-government and agency staff were sent to cultural diversity classes. A facilitation organization, Northwest Renewable Resources Center, was hired to facilitate discussions among state/tribe/local/government/utilities/agriculture/environmental groups to develop a statewide water planning process that involved the tribes.

Approaches to Indian Water Rights Settlement

I doubt that all those parties would have gotten together for hours and days and weekends if they hadn't realized that the fate of all of them hung in the resolution of water use. They knew they could either fight in the courts for years and delay development and environmental protection or become equal partners in a water planning process.

The result, the "Chelan Agreement" avoids quantification of rights and emphasizes planning and needs. These divergent interests have agreed to respect each other's interests on economic and population growth issues. They will listen and understand needs. They will deal as co-managers of resources for joint solutions to joint problems. This alliance is especially important as the Pacific Northwest battles the decline of the salmon resource. It has allowed for cooperation over the Endangered Species listing.

In Arizona, the emphasis in settlements of Indian water right claims has been on quantification of rights; finding the water budget to fill the right; and gaining congressional approval and money. In Arizona there are 19 Indian reservations with 20 million acres or 28 percent of state land base. Indian water claims easily surpass state surface water supply, most of which is presently used by other non-Indian parties. In Arizona there is a realization that for both Indian and non-Indian communities to proceed with economic planning, some certainty in water supply is needed.

Arizona's settlements have taken on the nature of contracts between Indian/non-Indian/federal government for water delivery, exchange and storage. Of five congressionally approved settlements, there are nine common elements:

1. There is need for **certainty**. Negotiations are litigation and adjudication driven.
2. **Importation of Colorado River water (Central Arizona Project water or other)** is a primary source of the settlement water budget. The earlier the settlement, the easier to fulfill the water budget. With CAP's current financial problems, CAP may not be affordable for future settlement. This depends on how the CAP cost repayment is restructured and how much of CAP costs the fed-

eral government will cover.

3. **Leasing of CAP water by tribes off-reservation** has been authorized within a 3-county area.
4. **Use of reclaimed water** is encouraged.
5. **Storage agreements** are utilized.
6. **Information exchanges** between state and tribe are promoted.
7. **Groundwater pumping is capped** in an effort to coordinate tribal use with the state's comprehensive groundwater management law.
8. **Tribal water-management plans** for on-reservation use are authorized.
9. Efforts are made to **coordinate tribal groundwater plans** with the state's groundwater plans.

In the settlement process, the Department of Water Resources' role has been limited to that needed to gain state appropriations and Congressional approval and that needed to alert parties to the state's water laws and policies.

Generally the federal government, tribes and non-Indians negotiate water budgets and storage agreements. The federal negotiating policy includes criteria for local cost sharing, partial and total settlement, and federal negotiating teams.

The parties go to Congress for approval and money. The parties then negotiate a detailed agreement to be signed by all parties to implement the congressionally approved settlement. The settlement is entered into the General Stream Adjudication for incorporation into a final decree. A court approval process is guided by the Supreme Court's Special Procedural Order For The Approval of Federal Water Rights Settlements.

Finally, the parties seek state funds. The benefits to the state include money savings by reducing or eliminating hydrologic survey reports for the adjudications; and court system costs and litigation expenses. State benefits may also include goodwill between the state and the tribes; achievement of a workable and enforceable solution; and access to federal monies.

There has not been an effort to bring Indians formally into a statewide planning process, other than to realize that quantification and satisfaction of Indian claims with the security of finality is in

T. C. Richmond

the best interest for economic planning of both Indian and non-Indian.

For details about individual Arizona Indian settlements, I strongly recommend *Indian Water Rights, Negotiating the Future* by Bonnie Colby and Elizabeth Checchio.

Arizona and Washington experiences show that there has to be an effort to share water resources with tribes and to bring tribes into state water management programs. Groundwater and surface water have to be managed cooperatively for the benefit of all citizens of the state.