



# United States Department of the Interior

OFFICE OF THE SOLICITOR

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## Memorandum

To: David Hayes, Deputy Secretary

From: John D. Leshy, Solicitor *John D. Leshy*

Subject: Tribal Water Rights Settlement and Allottees

### Introduction

As you know, for some time we have, in the water rights context, been dealing with some of the complex issues regarding the relationship between tribal governments and allottees, and the responsibility of the United States in such matters. Past settlements of Indian water rights have not dealt with these issues in any uniform way; some settlements do not address them at all. In my judgment, this is increasingly unacceptable. Among other things, the Secretary has a trust responsibility and statutory duties to both tribes and allottees that cannot be ignored.

Therefore, by letter dated September 25, 2000, I requested comments from Indian tribes and other interested persons with respect to a proposed policy regarding Indian water rights settlements involving allotted lands. Numerous tribes, individual allottees and representatives of allottees responded to our September 25<sup>th</sup> letter, offering a variety of views which we believe are representative of Indian country as a whole.

After careful review and consideration of these responses, I believe these issues ought to be addressed in future Indian water rights settlement discussions in as consistent and uniform a way as possible. To that end, I offer the following legal guidance to the Secretary's Indian Water Rights Office and the Working Group on Indian Water Rights Settlements. This guidance is designed to assist the Department in the negotiation of current and future Indian water rights negotiations, in order to promote comprehensive Indian water rights settlements while at the same time offering basic federal law protections to individual allottees to whom the United States owes a trust responsibility along with the trust responsibility it owes the tribes.

### Limitations

Let me first emphasize what this guidance does not do. It states general principles, and is not intended to address every substantive or procedural aspect of settlements involving allottees. For example, a number of tribes and allottees who commented requested specific direction regarding whether and how allottees or allottee organizations ought to participate in the negotiation process. This question, like some others, is best handled on a case-by-case basis, giving due

consideration to the specific circumstances of the settlement being negotiated. Second, this it is not intended to be applied retrospectively to settlements already in place, nor to be expanded to govern other issues involving allottees or the relationship between tribal and federal regulatory authority. Third, it is not intended to, and does not rescind, the January 15, 1975, memorandum from Secretary Morton directing the Bureau of Indian Affairs to disapprove any tribal ordinance, resolution, code or other enactment purporting to regulate the use of water on Indian reservations (the so-called "water code moratorium").

### General Principles

This guidance is based on applicable statutes, Supreme Court and lower federal court decisions, and Solicitor's Opinions. The starting point is section 7 of the General Allotment Act (25 U.S.C. 381) which reads, in pertinent part:

In cases where the use of water for irrigation is necessary to render the lands within any Indian reservation available for agricultural purposes, the Secretary of the Interior is authorized to prescribe such rules and regulations as he may deem necessary to secure a just and equal distribution thereof among the Indians residing upon any such reservations.

The Supreme Court long ago read the General Allotment Act as entitling allottees to water: "[W]hen allotments of land were duly made for exclusive use and thereafter conveyed in fee, the right to use some portion of tribal waters essential for cultivation passed to the owners." United States v. Powers, 305 U.S. 527, 532 (1939). See also United States v. Anderson, 736 F.2d 358 (9th Cir. 1984); Walton v. United States, 647 F.2d 42 (9th Cir. 1981) (Walton II); 460 F.Supp. 1320 (W.D.Wash. 1978) (Walton I); Skeem v. United States, 273 F. 93 (9th Cir. 1921).

I addressed many of the questions on the application of this statute and the general principles involved in Solicitor's Opinion M-36982, Entitlements to Water Under the Southern Arizona Water Rights Settlement Act (SAWRSA) (March 30, 1995). The legal interpretations set forth in M-36982 - for example, that 25 U.S.C. § 381 is applicable only to irrigation water - form the basis the guidance set out below, and the guidance must be read in conjunction with it. Furthermore, while section 7 of the General Allotment Act authorizes the Secretary to exercise his responsibility through regulations, it is more in keeping with the policy of promoting tribal self-determination to give tribes primary responsibility to safeguard the interests of allottees, so long as the Secretary ensures that sufficient standards and processes to protect allottee interests are included. The fundamental goal should be, therefore, to defer to tribal governmental decisionmaking on water rights matters, so long as those decisions meet the standards in federal law for protecting the interests of allottees.

### Guidance

In order to assist the United States in carrying out its trust responsibility to allottees, the following minimum protections should be included in any Indian water rights settlement involving allotted lands:

1. The settlement should expressly acknowledge that 25 U.S.C. § 381 is applicable to all water rights granted or confirmed by the settlement that are in satisfaction of allottees' rights to irrigation water.
2. The settlement may contain a provision to the effect that a tribe shall have the right, subject to applicable federal law, to manage, regulate and control the on-reservation use of all of the water rights granted or confirmed by the settlement; if so, it must also require that, within a set period of time following execution of the settlement, the tribe enact a comprehensive water code governing all water rights granted or confirmed by the settlement. To be effective, the code should contain (a) a procedure by which any allottee may request and receive an equitable distribution of irrigation water for use on his or her allotted lands; and (b) a decision making process that gives the allottee due process of law in deciding on such requests, including a process for appeal and hearing before an impartial judge or tribunal; and (c) a provision that the code does not take effect until the Secretary of the Interior has approved those parts of it, or any subsequent amendments thereto, that address irrigation water use by allottees.
3. The settlement should provide generally that (a) the water rights and other benefits in the settlement are intended to be in replacement of and substitute for all claims of water rights and past or present claims for injuries to water rights of the tribe, all individual members of the tribe, and all allottees within the Reservation as against the settling parties; (b) the United States waives and releases any past or present claims it may have for water rights or injuries to water rights held by allottees; and (c) no further actions may be brought against the United States or other parties to the settlement based on claims by allottees for water rights or injuries to water rights they may hold.

The third principle requires some explanation. Unlike settlements involving only tribal trust lands and water rights, allotted lands and allottees' interests in water are not common assets, but individual assets. Therefore, only the United States as trustee and the individual allottee (and not a tribal government) can waive or release claims to those assets. A single Indian water rights settlement may involve hundreds or thousands of allotted interests. As a practical matter, securing waivers and releases from individual allottees in such cases may be very difficult and time-consuming, delaying final, comprehensive settlement of water rights claims. In such cases, then, the only realistic course is for Congress to settle allottee claims as part of the overall settlement. The general rule is that the United States may, as trustee, substitute one form of trust asset for another as long as the value of the assets is approximate. See, e.g., Three Tribes of the Fort Berthold Reservation v. United States, 390 F.2d 686 (D.C. Cir. 1968).

The Office of the Solicitor's Division of Indian Affairs is available to answer any questions and to otherwise assist the Secretary's Indian Water Rights Office and the Working Group on Indian Water Rights Settlements concerning this matter.

cc: Assistant Attorney General, Environment and Natural Resources Division