



Oklahoma Comprehensive Water Plan Supplemental Report

Tribal Water Issues & Recommendations

February 2011

This study was funded through an agreement with the Oklahoma Water Resources Board under its authority to update the Oklahoma Comprehensive Water Plan, the state's long-range water planning strategy. Results from this and other studies have been incorporated where appropriate in the OCWP's technical and policy considerations. The general goal of the 2012 OCWP Update is to ensure reliable water supplies for all Oklahomans through integrated and coordinated water resources planning and to provide information so that water providers, policy-makers, and water users can make informed decisions concerning the use and management of Oklahoma's water resources.

Oklahoma Comprehensive Water Plan



Tribal Water Issues and Recommendations

The following report was commissioned by the Oklahoma Water Resources Board through a contract with Dr. Lindsay Robertson, University of Tulsa Professor of Law, to liaison with representatives of Oklahoma's Indian tribes for the purpose of identifying the state's pertinent water-related tribal issues and offer appropriate recommendations concerning water rights claims and mutual water interests.

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Date: February 28, 2011

Report on Tribal Issues and Concerns

As well- and long-recognized by the State of Oklahoma, the presence in the state of almost 40 federally-recognized tribal governments, some or all of which may have valid, federally-enforceable, treaty-based claims to water, has resulted in uncertainty with regard to issues relating to ownership of and jurisdiction over water within the State's geographic limits. These claims arise primarily from alleged reserved rights recognized in treaties between the tribes and the United States. Although no such rights have been judicially found to exist in Oklahoma, such rights have been recognized by federal courts in litigation in other states, and tribes in Oklahoma have expressed confidence that their federal treaties would similarly be found to incorporate reserved water rights. Advocates for the Five Nations (the Cherokee Nation, the Chickasaw Nation, the Choctaw Nation, the Muscogee (Creek) Nation, and the Seminole Nation) have made the related argument that they have an even stronger claim based on treaty provisions granting those Nations their lands in fee simple. Like the Oklahoma tribal reserved rights claims, this claim has not been fully litigated.

This uncertainty, and an explicit recognition that "there is a need to resolve Indian and other reserved water rights claims," prompted inclusion in the 1995 Update of the Oklahoma Comprehensive Water Plan of a recommendation that the Oklahoma Water Resources Board

“request the Oklahoma Water Advisory Committee and selected tribal representatives to explore Indian water rights and quality issues in Oklahoma” and “develop a mutually acceptable negotiation system or process to fairly resolve current and future water rights issues.”¹ No such system had been developed at the time plans were put in place for the completion of the current comprehensive water plan. Consequently, tribal governments, which had in the intervening years become increasingly focused on securing their natural resources rights, expressed concern at the outset of the current process that their interests were being ignored. On October 14, 2008, the Oklahoma Water Resources Board retained me to meet with tribal officials and members to communicate the process and purpose of the comprehensive water planning effort and to ascertain precise tribal concerns and help coordinate a means of addressing them. In executing this charge, I conducted more than 20 meetings with groups of tribal officials and citizens interested in water issues and organized a series of informational seminars in each region of the state, which were hosted by tribes and attended by members of, I believe, every tribe in the state. Each meeting and seminar afforded participants an opportunity to express concerns about the planning process and the plan itself. These were as follows.

I. Process concerns.

A. Provision of information on anticipated use.

Many tribes expressed reluctance to provide information on anticipated use, fearing that any such information would be used against them in a future quantification proceeding (i.e., a

¹Planning Division, Oklahoma Water Resources Board, UPDATE OF THE OKLAHOMA COMPREHENSIVE WATER PLAN 1995 (February 1997), pp. 119 and 138.

judicial proceeding to determine the quantity of water to which a tribe was entitled) . The suggestion that a legal reservation might accompany submission of such information did not completely mollify concerns, although it did encourage some tribes to participate.

B. Citizens meetings.

The planning process centered on providing opportunity for input from individual Oklahoma citizens. While recognized as a commendable means for obtaining citizen support, the method made it, in the end, impossible for tribes to participate in the process. Each citizens meeting culminated with a vote on the group's work product. Tribes, as governments, could not give such consent without legislative process. Tribes were also concerned that formal participation in the process would be construed as support for the end product, and lacking control over that product, they feared it might include suggestions that would prove adverse to future water rights claims they might make. In the end, some individual tribal members did attend planning sessions, some as participants and some as observers, but in each case the participants attended as individuals expressing personal opinions. Information on tribal water rights claims was made available, both by these individuals and by an expert on Indian Water Issues, but individual participation in the state process was not viewed by tribes as the best means of addressing tribal concerns. Tribes expressed a preference for formal government-to-government negotiations outside the citizens meeting process. That said, there was recognition of the difficulty, given the state's need to assess resources, of attempting to resolve tribal water issues prior to commencing the planning process, which would have been the best means of

protecting the tribes' interests. In the end, an informal consensus appeared to develop in favor of tribes' focusing on beginning to define and assess their own resources, based on their treaty claims, and developing a framework for negotiating with the state in line with the 1995 Plan recommendation, so that the current situation might be avoided in future.

II. Future Relations Issues.

A. Government-to-Government Negotiations.

The Town Hall recommendation closely paralleled the 1995 recommendation, and represents what I believe to be the shared sense of the great majority of tribes whose citizens actively followed the planning process. The Town Hall concluded that "State and tribal issues must be resolved through meaningful government-to-government negotiations, preservation and building upon history of 'good neighbor' relations, and implementation of the specific recommendation made on the subject in the 1995 state water plan so that the state and tribes can work cooperatively and more efficiently to resolve water issues."² The advantages of

²2010 Oklahoma Academy Town Hall, WATER FINAL REPORT (May 23-26, 2010), p. 10.

The Town Hall also concluded that "Tribal governments should be involved in the development of the 50 Year Water Plan so as to best address tribal water issues. The recommendation from the 2003 Town Hall regarding the creation of an Annual Governor's Listening Conference should be adopted and implemented. The creation of a cabinet level position to address

negotiation over the alternative - litigation - were made apparent at the Town Hall. Litigation is divisive, and the ultimate decision of right is made by neither party, rendering mutual buy-in effectively impossible. Solution-oriented negotiation, on the other hand, affords the opportunity for mutual advantage, with litigation remaining as an alternative should agreement prove impossible.

Negotiation of water rights issues – including issues of both ownership and jurisdiction – can be extraordinarily complex in the best of circumstances, not least in the creation of a process in which to conduct it. Tribal rights are largely treaty-based, which means the scope of a claimed right depends on the provisions of the relevant treaty and the subsequent history of that treaty - i.e., whether it has been amended or abrogated. One suggested method of structuring negotiations of rights that arose during meetings with tribal officials was to base such negotiations on treaty language, with the State holding rounds with groups of tribes parties to treaties sharing common language. Another suggested method was to divide the state into basins and conduct multi-party negotiations with all tribes in the same basin.

Various models for the form of state participation were suggested, including most commonly the Montana Reserved Rights Compact Commission model. The Montana Commission was created by the Montana legislature in 1979 to, *inter alia*, compact with tribes for the equitable division and apportionment of waters within the state.³ The Montana

compacts was considered; however, no consensus regarding the creation of such a position was reached.” *Id.*

³MONTANA CODE ANNOTATED 85-2-702.

Commission includes nine members, two appointed by the Speaker of the House, two by the President of the Senate, one by the Attorney General's office and four by the Governor's office. Commission members serve four year terms, and the Commission is supported by a six-member legal and technical staff. It was also assumed that the State could conduct such negotiations within its existing legal framework as well.

The fact that many tribes will have claims adverse to each other will make any negotiations challenging for the tribes. Further compounding this challenge will be the fact that individual tribal citizens in tribes the lands of which were allotted may have individual claims to water rights superior to collective claims the tribes may advance. This complexity argues for commencing the process as soon as possible. It also argues for compromise in the negotiations themselves. One suggested possible outcome was agreement that ownership issues be left unresolved and that jurisdictional responsibilities be either shared or delegated. Either result would resolve uncertainty, which was a commonly expressed goal. Leaving ownership issues unresolved in specific instances, however, may complicate prospective water sales initiatives.

It was recognized that not all tribes would choose to participate. This was not seen as a reason not to work for claims resolution with those tribes that would choose to participate.

B. Consultations.

Many tribal officials expressed a desire for the establishment of a framework for regular consultation with tribes on state water issues. Consultation is a major element in current federal-tribal relations. Various federal tribal consultation guidelines were suggested as a possible model.

RECOMMENDATIONS:

1. That the State determine who within state government has the authority to approve a process for negotiation of water rights issues with tribes, who within state government has the authority to conduct such negotiations, and what the approval process is once negotiations are complete.
2. That the State assemble a team fully authorized to meet with tribal representatives to devise a process for the discussion and resolution of tribal water rights claims.
3. That upon the determination of process, the State appoint a fully authorized negotiating team to begin discussions with tribal representatives.
4. That upon the conclusion of negotiations (either individual, group or otherwise, as determined by the process planners), the results be submitted for such State approval as is required.
5. That the State consider the implementation of regular consultation protocols.