RESOLVED. That the American Bar Association endorses the use of negotiation and settlement processes to resolve Indian reserved water right claims provided the concerned Indian Tribes elect to pursue such processes, as well as the availability of adequate technical resources as an important precondition for achieving successful settlements, and specifically urges Congress and the Administration to support these settlement processes by:

1. Continuing to make the negotiation of Indian water right settlements a high priority of the U.S. Department of the Interior and the U.S. Department of Justice;

2. Appointing and funding federal negotiating teams in every river system or basin where settlement prospects are favorable and requiring federal negotiating teams to regularly elicit and incorporate, consistent with the federal trust responsibility, the views of the Tribes involved when formulating federal negotiating positions and to bear a fair share of mediation costs and technical and legal work directly supporting settlement discussions;

3. Providing timely and adequate funds so that Indian Tribes have the legal and technical expertise necessary to participate effectively in settlement processes and ensuring, in conjunction with state governments, that other water users also have necessary legal and technical resources;

4. Appropriating adequate funds for the settlements themselves and for federal teams to assist in implementing the settlements; and

5. Ensuring that the resources necessary for negotiating settlements and for settlements themselves do not compete with other Department of the Interior funding priorities.

FURTHER RESOLVED. That when evaluating proposed settlements, the federal government should consider not just avoided federal litigation costs, but other factors as well including (a) the opportunity to address historic injustices, with the goal of fulfilling the continuing federal trust obligation to support viable tribal communities; and (b) the settlement’s potential benefit to local, State, and national economies.
REPORT

SUPPORTING THE SETTLEMENT OF INDIAN WATER RIGHT CLAIMS AND THE IMPLEMENTATION OF THOSE SETTLEMENTS

SUBMITTED BY THE SECTION OF ENVIRONMENT, ENERGY, AND RESOURCES

As the result of American westward expansion, Indian people in both the eastern states and western territories were assigned or relocated to reservations that, in most cases, are located in the West. These reservations were created by treaties between the United States and Indian Tribes or as the result of presidential executive orders.

The treaties and executive orders were usually silent as to any water rights assigned to an Indian reservation. As non-Indians settled in the vicinity of Indian reservations, conflicts arose as to each group’s respective rights to use nearby rivers, creeks and springs. In its historic Winters v. United States [207 U.S. 564 (1908)] decision, the U.S. Supreme Court announced what is now known as the federal reserved water rights doctrine. The doctrine provides that when the federal government establishes an Indian reservation, it impliedly reserves water to fulfill the reservation’s purpose. The federal reserved water rights doctrine also extends to federal agency reservations, such as national parks and military bases. Arizona v. California, 373 U.S. 546 (1963).

The federal reserved water rights doctrine does not define the amount of water that is associated with a particular Indian or federal agency reservation. These federal rights, however, often have senior status under the law; and, if they are not quantified, water management in a river system or basin often becomes difficult.

The specific quantification of these federal reserved water rights is usually accomplished by litigation or settlement. When these federal reserved water rights are quantified by litigation, it usually is in the context of a general stream adjudication, brought in state or federal court, and affecting hundreds if not thousands of water users in a river system or basin. This litigation is expensive for all parties; contributes to conflicts among water users (especially between a Tribe and the United States as its trustee and non-Indian water users); and typically takes decades to complete. Even a completed general stream adjudication does little to assist Tribes in utilizing their water rights and improving their reservation economies. At present, litigation concerning reserved water rights for Indian reservations is pending or anticipated in virtually every western state. The assertion of these tribal reserved rights may also impact the management of the Missouri River system, affecting many Midwestern states.
Major parties in many stream adjudications have turned to settlement as a necessary alternative to divisive and expensive water rights litigation. Because of the size and complexity of river systems and basins, even the negotiation of a settlement involves many parties and requires significant technical and legal work, often the assistance of a settlement judge or mediator, federal and state legislative approval and funding, and court ratification. Despite these difficulties, creative settlements have been achieved in several basins (e.g., Northern Cheyenne compact in Montana, Salt River Pima-Maricopa Indian Community settlement in Arizona), benefiting Indian and non-Indian water users alike through the recognition of reserved water rights, protection of existing water uses, and financial assistance to Tribes for water and economic development. In some instances, these settlements result from government-to-government negotiations (as in the case of compacts in Montana). In other instances, federal, state, and tribal governments participate with other water users in developing the agreements.

Regardless of the approach, these settlements are not possible without a strong federal commitment to negotiate, adequate resources to negotiate, executive and congressional approval of the settlements, and funding to implement the settlement. Also, settlements cannot be effectively implemented without a continuing partnership among the United States, Tribe, State and water users in the river system.

More than twenty negotiations of Indian water rights are now underway, and the claims of another ten to twenty Tribes are candidates for negotiation and settlement. Senator Pete Domenici (NM), who has been involved in efforts to secure adequate funding for these settlements, reports:

Given the complexities of the issues associated with the claims, the vagaries of the negotiating and legislative processes, and the levels of resources available to pursue them, settlement of most of these claims is likely at best to take between 10 and 20 years, at a probable cost of between $2 to $5 billion.

Questions and Answers Regarding the Domenici Amendment to the Budget Act (April 24, 2001).

The proposed policy addresses the necessary federal role by urging Congress and the Administration to support settlement processes by:

1. Continuing to make the negotiation of Indian water right settlements a high priority of the U.S. Department of the Interior and the U.S. Department of Justice. This emphasis is appropriate because competing federal policies in the past, concerning Tribes and western settlement, have contributed greatly to the water conflicts that now must be resolved.
2. Appointing a sufficient number of federal negotiating teams to allow
discussions to proceed promptly and simultaneously in every river system or basin
where promising settlement discussions are underway. In formulating federal
negotiating positions, the federal negotiating teams should regularly solicit and consider
the views of the involved Tribes.

3. Providing timely and adequate funds to the federal negotiating teams so
that they may undertake the legal and technical work necessary to participate
effectively in settlement discussions.

4. Providing timely and adequate funds to Indian Tribes allowing them to
secure the legal and technical expertise necessary to participate effectively in ongoing
settlement processes. Indeed, successful settlements can only be achieved if the
negotiating parties have sufficient technical and legal expertise to participate
meaningfully. Federal and state governments alike should ensure that both Indian and
non-Indian parties have adequate technical and legal support during settlement
processes.

5. Bearing a fair share of mediation costs including mediators' fees and
expenses and technical and legal work directly supporting the settlement process.

6. When evaluating proposed settlements, considering not only avoided
federal litigation costs but also the opportunity to address historic injustices and fulfill
the continuing federal trust obligation to support viable tribal communities, and the
settlement's potential benefit to local, State, and national economies.

7. Ensuring that settlement funds do not compete with other needed
Department of the Interior funds. In the past, settlement negotiations have been
threatened when funding for the structural and other solutions necessary to provide
water has been charged against the Bureau of Indian Affairs' budget. The availability of
funds committed to tribal settlements—and not intruding on other BIA necessities—
would greatly aid the ongoing water rights settlement effort. Congress should make
sufficient funds available, through appropriations or other appropriate means, to satisfy
federal commitments undertaken in congressionally approved Indian water right
settlements. Legislation addressing this issue, the Fiscal Integrity of Indian Settlements
Protection Act, S.1186, was introduced by Senator Pete Domenici (NM) during 2001.

8. Providing for the prompt and complete implementation of approved
Indian water rights settlements by establishing and funding federal implementation
teams. These teams should work closely with the appropriate Tribes, State, and other
water users to ensure that the federal obligations under the settlement are fulfilled and
unanticipated problems are addressed.
Other influential organizations also have endorsed measures to improve the funding of Indian water right settlement efforts. They include the Western Governors’ Association, the Western States Water Council (representing seventeen states), and the National Congress of American Indians [Resolution #LDY-01-123, “Support for Senator Domenici’s Legislation to Adjust the Federal Budget Caps to Fund Tribal Water and Land Claim Settlements” (May 2001)].

The negotiation of Indian water right settlements is, in most instances, the preferred alternative to litigation. In the case of Tribes, the choice of negotiation, litigation, or the status quo remains theirs alone; and nothing in this proposed policy suggests otherwise. For governments and parties choosing to negotiate, we believe the recommendations set forth in this proposed policy will help Tribes satisfy their water right claims and utilize their water resources, assist in tribal economic development, mitigate the impacts on non-Indians, and improve the prospects for cooperative water resource management in many river systems and basins.

Dated: August 2002

Sheila S. Holts
Chair
Section of Environment, Energy, and Resources
1. **Summary of Recommendation(s).** The Section proposes a resolution supporting adequate federal efforts to assist in the settlement of longstanding Indian water right claims, predominately in the western states. The resolution requests that the U.S. Departments of Interior and Justice give high priority to these settlement efforts. The resolution also asks Congress to provide adequate funding for the negotiation and implementation of these settlements and to do so in a manner that does not take money away from other Department of the Interior programs, especially those of the Bureau of Indian Affairs.

2. **Approval by Submitting Entity.** This proposed resolution was approved for submission to the ABA House of Delegates at a regular meeting of the Council of the Section of Environment, Energy, and Resources, at a meeting held on April 28, 2002, in Santa Fe, New Mexico. It was previously approved by the Council at a meeting held on April 29, 2001, in Aventura, Florida.

3. Has this or a similar recommendation been submitted to the House of Delegates previously? Yes, this same recommendation was forwarded by the Rules and Calendar Committee for consideration by the House of Delegates at its August 2001 session (Report 111). Because of last minute concerns expressed by the Section of Individual Rights and Responsibilities (IRR), our Section agreed to withdraw the recommendation to allow further discussion. Alternative language subsequently submitted by IRR members proceeds from a different premise on these issues and is, regretfully, unacceptable to our Section.

4. What existing Association policies are relevant to this recommendation and how would they be affected by its adoption? None of which we are aware.

5. What urgency exists which requires action at this meeting of the House?
The negotiation of Indian water right settlements, followed by the necessary federal, state, and tribal governmental approvals, can take five to ten years to complete. Continuity in these settlement efforts is important since they are likely to span more than one presidential Administration. The current Administration should be encouraged to continue and improve on the federal settlement efforts that were initiated in the 1980s by the Reagan and Bush Administrations and continued in the 1990s by the Clinton Administration.

6. Status of Legislation. (If applicable.) Senator Pete V. Domenici (NM) has introduced the "Fiscal Integrity of Indian Settlements Protection Act," S.1186, cosponsored by eleven other Senators, to improve the process for funding Indian water right settlements. Under the existing Budget Act, the funding of Indian water right settlements "effectively displace[s] . . . programmatic funding for tribal programs, thereby making Indian and other Interior programs bear the Federal Government's share of the cost of the settlements." Questions & Answers Regarding the Domenici Amendment to the Budget Act (April 24, 2001). The Domenici amendment would provide an annual adjustment of $200 million to the budget caps to allow these settlements to be funded without penalizing other Department of the Interior programs.

7. Cost to the Association. (Both direct and indirect costs.) If the proposed resolution is adopted by the House of Delegates, the contents should be communicated to key members of Congress. The only anticipated Association cost would be in mailing or otherwise transmitting the resolution to these congressional members and staff.

8. Disclosure of Interest. (If applicable.) When this proposal was adopted, no member of the Council of the Section of Environment, Energy, and Resources indicated a conflict of interest or abstained. We are not aware that any Council member had a conflict of interest. The proposed resolution originated in the ABA Water Resources Committee, the membership of which represent a variety of clients in water rights litigation (governments, Tribes, commercial concerns, and individuals). The principal author of the proposal, John E. Thorson, served from 1990-2000 as the Special Master for the Arizona General Stream Adjudications, proceedings in which Indian water right claims were both litigated and settled.

9. Referrals. During Spring 2001, a draft of the proposed resolution was sent to the following ABA entities: Dispute Resolution; General Practice, Solo & Small Firms; Government & Public Sector Lawyers; Judicial Division; Law Student
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Division; Litigation; Public Utility, Communications & Transportation Law; Real Property, Probate & Trust Law; Senior Lawyers Division; State and Local Government Law; Young Lawyers Division; Standing Committee on Environmental Law; Coordinating Group on Energy Law; and the Council on Racial and Ethnic Justice. We asked them to consider cosponsorship of the proposed policy. Several of the sections or divisions advised us they were studying the request, but we heard back from only a few of them. The Senior Lawyers Division did decline our request. During the August 2001 Annual Meeting, members of the Section of Individual Rights and Responsibilities raised concerns that resulted in our Section temporarily withdrawing the proposal (see item 3, supra). We are now discussing possible cosponsorship with the Section of Dispute Resolution.

10. Contact Person. (Prior to the meeting.) John E. Thorson, 6625 Exeter Dr., Oakland, CA 94611 (510) 482-9910 <johnethorson@earthlink.net>.

11. Contact Person. (Who will present the report to the House.) R. Kinnan Goleman, Brown McCarroll LLP, 111 Congress Ave., Suite 1400, Austin, TX 78701 (512) 479-9767 <kgoleman@mailbmc.com>.