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It's Time to Revise the *Criteria and Procedures* Governing Indian Water Rights Settlements.

Vanessa L. Ray-Hodge
Sonosky, Chambers, Sachse, Endreson & Perry LLP

ABSTRACT

In June of 2016, the Office of Management and Budget ("OMB") issued a memorandum impacting the water settlement process under the Criteria and Procedures for the Participation of the Federal Government in Negotiations for the Settlement of Indian Water Rights Claims, 55 Fed. Reg. 9,223 (Mar. 12, 1990) ("Criteria and Procedures"). Due to a lack of transparency and consultation in issuing the memorandum, Indian country called for its immediate withdrawal and sought consultation. In response, the Department of the Interior's Secretary's Indian Water Rights Office ("SIWRO") initiated consultations relating to the Criteria and Procedures. The SIWRO posed four questions relating to the past and future usefulness of the Criteria and Procedures, including seeking suggestions for revisions. This paper responds to these four questions by examining how the Criteria and Procedures are used in recent settlement negotiations and suggesting revisions that will make them more transparent and aid in moving water settlements forward.

I. Historical Background

The United States has a unique trust relationship with Indian tribes. In carrying out its trust responsibility, the federal government "has charged itself with moral obligations of the highest responsibility and trust." *Seminole Nation v. United States*, 316 U.S. 286, 296 (1942). This basic principle extends to Indian water rights, which are vested property rights held in trust by the United States for the benefit of Indian tribes. Cohen's Handbook of Federal Indian Law § 1905 at 1241 (2012). As such, the United States has an obligation to preserve, protect and enforce those rights.[1]

Unfortunately, since 1908 when Indian reserved water rights were first recognized by the Supreme Court in *Winters v. United States*, 207 U.S. 564 (1908), not much progress has been made in protecting and enforcing tribal rights to water across much of the west. Most Indian tribes have yet to quantify or settle their water rights, both of which can only be done with the participation of the United States. The failure of the United States in advancing and protecting Indian water rights has left Indian tribes far behind their non-Indian neighbors on many socio-economic levels. For example, in many tribal communities across the United States, Indian tribes

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[1] *See e.g., Pyramid Lake Paiute Tribe of Indians v. Morton*, 354 F. Supp. 252, 256 (D.D.C. 1973).
[2] *See e.g.,* Indian Health Service, *Fiscal Year 2017: Justification of Estimates for Appropriations Committees,* Department of Health and Human Services, CJ-169 (Jan. 2016), https://www.ihs.gov/budgetformulaation/includes/themes/newihstheme/documents/FY2017CongressionalJustification.pdf; American Housing Survey, *AHS 2013 National Summary Tables,* U.S. Census Bureau,

lack adequate or reliable access to clean drinking water or basic sanitation.[2] Even where some water infrastructure exists, tribes often face water contamination or chronic issues related to outdated and dilapidated water infrastructure.[3]

As water demands in the west increase, Indian tribes face increasing pressures to resolve their water rights claims in order provide sustainable homelands for their members. Resolution of Indian water rights claims through settlement is critical to tribal self-determination and tribal self-sufficiency. Settlements also provide benefits to states and non-Indian because, for example, they can include creative solutions to water resource planning in an over-appropriated or water short basin. To be successful, however, continued attention must be given to encouraging and promoting Indian water settlements and, as discussed below, there is an urgent need to review and revise the *Criteria and Procedures* to promote more settlements moving forward successfully.

II. The *Criteria and Procedures* must be revised.

The SIWRO posed the following four questions for its water settlement consultations that ended on January 30, 2017:

> (1) Do the *Criteria and Procedures* need to be reviewed and reconsidered given that the *Criteria and Procedures* were promulgated in 1990, prior to negotiation and completion of the great majority of enacted Indian water settlements;
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> (2) Have the *Criteria and Procedures* been useful in achieving Indian water rights settlements? Have they been applied consistently and fairly?
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> (3) If reconsidered, should both the substantive criteria and the procedures, including process through various Federal agencies, be re-examined?
>
> (4) What criteria or procedures should be revised? Why should they be revised? What is the best mechanism to accomplish the revision?"

Dear Tribal Leader Letter from Acting Assistant Secretary Lawrence S. Roberts at 2 (Dec. 9, 2016). Although not addressed in order, this paper responds to these four questions by examining how the *Criteria and Procedures* are currently applied.

A. 1990 Criteria & Procedures

The *Criteria and Procedures* outline four procedures that guide participation by the United States in Indian water rights settlement negotiations: (1) Fact- Finding; (2) Assessment and Recommendations; (3) Briefings and Negotiating Position; and (4) Negotiations Towards Settlement. As part of the process, sixteen criteria are provided and "appl[y] to all negotiations

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[2] *See e.g.,* Indian Health Service, *Fiscal Year 2017: Justification of Estimates for Appropriations Committees,* Department of Health and Human Services, CJ-169 (Jan. 2016), https://www.ihs.gov/budgetformulaation/includes/themes/newihstheme/documents/FY2017CongressionalJustification.pdf; American Housing Survey, *AHS 2013 National Summary Tables,* U.S. Census Bureau, http://www.census.gov/programs-surveys/ahs/data/2013/ahs-2013-summary-tables/national-summary-report-and-tables---ahs-2013.html; *Meeting the Access Goal,* U.S. Environmental Protection Agency 4 (2008), https://www.epa.gov/sites/production/files/2015-07/documents/meeting-the-access-goa-strategies-for-increasing-access-to-safe-drinking-water-and-wastewater-treatment-american-indian-alaska-native-villages.pdf.

[3] *Id.*

involving Indian water rights claims settlements in which the Federal Government participates." 55 Fed. Reg. at 9,223. "The criteria provide a framework for negotiating settlements" with the following four goals in mind:

> (1) [t]he United States will be able to participate in water settlements consistent with the Federal Government's responsibilities as trustee to Indians;
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> (2) Indians receive equivalent benefits for rights which they, and the United States as trustee, may release as part of a settlement;
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> (3) Indians obtain the ability as part of each settlement to realize value from confirmed water rights resulting from settlement; and
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> (4) [t]he settlement contains appropriate cost-sharing by all parties benefiting from the settlement.[4]

The *Criteria and Procedures*, however, were not developed with any tribal consultation. As a result, they fail to account for differences in historic policies impacting tribes, each of which have faced unique historical dealings with the United States. Nor do they give sufficient weight to the United States' trust responsibility. In addition, application of the *Criteria and Procedures* often fails to recognize the complexity of tribal-state relations with respect to water rights – a shared and limited natural resource – that impacts settlement negotiations. The *Criteria and Procedures* focus from a more technical perspective, on procedures and criteria for guiding the settlement process that may, in the abstract, make sense for agencies (both for planning and budgetary purposes). But practical application over the last 26 years has shown that all settlements are different and there is a need to ensure flexibility in their application.

Moreover, as explained in Section III, the application of some of the criteria have changed or morphed over time as a result of federal policy or lessons learned from enacted settlements. Others have been subject to conflicting interpretations by different agencies or Administrations. This can result in an ad hoc process in which tribes are either not made aware of the United States' expectations until late in the negotiation process or tribes are required to follow certain procedures or meet certain criteria that are not required for all tribes.

These problems have led to a lack of transparency about the water settlement process and inconsistent application of the *Criteria and Procedures*. Criticisms regarding their inconsistent application is not meant to imply that they must be applied the same in all settlements, but there is a difference between sometimes using them a general guide and other times imposing requirements on one tribal settlement where the same is not imposed on another tribal settlement. Revision of the *Criteria and Procedures* will significantly aid in resolving these issues and provide the transparency that is needed at time when water settlements are critical to ensuring tribal self-sufficiency and economic development.

B. OMB's Role and the Impact of the OMB Memorandum

The *Criteria and Procedures* provide for the inclusion of OMB during three of the four phases in the settlement process. During Phase 1, when Interior decides to establish a negotiation team, the procedures require that OMB be notified, in writing with an explanation of the rationale for potential negotiations and be provided with a copy of Interior's fact-finding report outlining

[4] *Id.*

the current status of any litigation and other pertinent matters. During Phase 3, before negotiations commence, the legal or financial views of OMB must be included in a recommended negotiating position presented to the Secretary. And during Phase 4's on-going negotiations, OMB must be periodically updated on the status of negotiations.

Notwithstanding that the *Criteria and Procedures* already balance the role of OMB with that of the Departments of the Interior ("Interior") and Justice ("Justice"), on June 23, 2016, OMB issued a Memorandum to Interior and Justice outlining steps to "improve the process that guides negotiation and review of Indian water settlements."[5] The OMB Memorandum was issued without any consultation or notice to Indian tribes in direct contravention of White House policy. *See* President Obama's November 5, 2009 Memorandum to the Heads of Executive Departments and Agencies on Tribal Consultation; Executive Order 13175 on Consultation and Coordination with Indian Tribal Governments (Nov. 6, 2000). For that reason alone, the June 3, 2016, OMB Memorandum should be withdrawn.

Moreover, the OMB Memorandum unilaterally changes the role of OMB in the settlement process in the following four ways:

- 'Interior, Justice and OMB' will establish a regular process for detailed discussions on individual proposed settlements as they are being discussed or negotiated and incorporate OMB feedback in the negotiations.

- A fact-finding report outlining the current status of litigation and other pertinent matters will be submitted by the negotiating team to OMB, including quantification, to the extent possible, of each of the elements listed in the *Criteria and Procedures*.

- Any recommendation to the Secretary of the Interior on a negotiating position should contain the views of OMB [and] OMB should be notified of Secretarial approval of a negotiating position before negotiations commence.

- 'Interior and Justice' will provide individual quarterly written status updates on each settlement under negotiation and document how the proposed terms being negotiated are consistent with each element of the *Criteria and Procedures*.[6]

These changes threaten to drastically alter the *Criteria and Procedures* and would inject OMB into the day-to-day progress of negotiations. For example, the OMB Memorandum unilaterally increases the role of OMB without requiring OMB to be directly accountable to tribes and states, by for example, participating in the actual negotiations by serving on the federal negotiating team. Interior and Justice on the other hand, are both represented on the federal teams involved in day-to-day negotiations allowing for decisions to be made in the context of the particular give and take with settling parties that occurs throughout the negotiation process. *Criteria and Procedures* at 9,224.

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[5] *See* Executive Office of the President, Office of Management and Budget Memorandum: "Review Process for Proposed Indian Water Rights Settlements," From John Pasquantino and Janet Irwin through Ali Zaidi, Associate Director, Natural Resources, Energy, and Science to Letty Belin, Senior Counselor to the Deputy Secretary, Department of the Interior and Sam Hirsch, Principal Deputy Assistant Attorney General, Department of Justice (June 23, 2016) ("OMB Memorandum").

[6] *Id.*

The *Criteria and Procedures* already provide for adequate participation of OMB in the water settlement process, including that OMB will be periodically updated on the status of negotiations. *Id.* To add another layer of process that essentially provides for OMB micro-management of day-to-day negotiations outside of the already time-consuming work done by a federal team will only slow down the negotiation process. Moreover, outside of federal funding contributions to a water settlement, and the justifications for such funding, most aspects of a settlement, which involve settlement of substantive legal claims and water rights, fall outside the statutory purview and expertise of OMB.

Congress has entrusted broad management of Indian affairs, by statute, to the Secretary of the Interior, *see* 25 U.S.C. §§ 2, 9. And the Attorney General is responsible for managing and settling litigation where the United States is a party. OMB implements Presidential policy and is responsible for budget oversight and legislative clearance and coordination. OMB has no statutory authority to substantively evaluate, negotiate or settle legal claims of Indian tribes. At best, OMB's authority with respect to Indian water settlements is limited to evaluating the budgetary impacts of a settlement and clearing legislative testimony to ensure consistency of agency legislative views and proposals with Presidential policy.[7]

While OMB's financial views should be sought on settlements, its views must take into consideration the longstanding policy of the executive branch that supports Indian water rights settlements. Moreover, there needs to be recognition that both Interior and Justice have the substantive expertise and statutory authority to negotiate the complex aspects of a settlement and determine, in coordination with tribes, when concessions are necessary to achieve the best settlement deal.

The OMB Memorandum also implies that all positions in a negotiation are presented to the Secretary for approval and therefore OMB must be notified and given an opportunity to respond in advance to every negotiating position for every settlement. But this is not how the process works in practice. Generally, most federal teams have the flexibility and authority, within existing legal and policy requirements, to negotiate various elements of a water settlement with tribes and other settling parties without ever taking specific negotiation positions to the Secretary. Even where a particular negotiating position must be approved by the Secretary, the *Criteria and Procedures* already provide that OMB views will be obtained. No more is needed.

Lastly, the OMB Memorandum seeks to apply the *Criteria and Procedures* as if they were a rigid rule. But the *Criteria and Procedures* act as a guide throughout negotiations and a settlement cannot be comprehensively evaluated under the *Criteria and Procedures* until a there is a complete package that represents the best deal that could be achieved given the rights and claims of all settling parties (as opposed to a constant evaluation throughout negotiations). This may lead to deals being struck during negotiations that result in not all of the *Criteria and Procedures* being completely applicable or followed in a given settlement.

III. Proposed Revisions to the *Criteria and Procedures.*

[7] *See* "The Mission and Structure of the Office of Management and Budget," https://www.whitehouse.gov/omb/organization_mission/ (last visited July 14, 2016) (part of OMB's mission is budget development and execution and legislative clearance and coordination); OMB Circular No. A-19 (Sept. 2-, 1979) (legislative clearance role of OMB).

General. The *Criteria and Procedures* must expressly state at the outset that they are to be used as guidelines and that some, but not all, of the criteria may be applicable in a given water settlement. This would recognize that every water settlement is unique and crafted to meet particular circumstances at play in those negotiations.

A. Criteria

Criterion 1. Indian water rights settlements are complex multi-party negotiations that resolve significant legal claims that Indian tribes have against the United States; claims held by United States as trustee for tribes; and third party claims against the United States or by the United States and tribes against third parties. Congressional action is needed for resolution of these legal claims because the United States requires substantial waivers that would not otherwise not be permissible in any single legal action where a tribe or third party seeks to adjudicate its water rights claims.

Interior and Justice have for years been informally requiring that tribes agree to specific comprehensive waivers and these are often referred to by federal negotiating teams as "model waivers." The model waivers are not written in any policy document, rather tribes are asked to look at the waiver sections in prior settlements. To the extent that Interior and Justice will continue to require that tribes include "model waivers," in their settlement, this criterion should reflect that requirement and expressly provide that there may be particular circumstances that justify the retention of specific claims.

Criterion 3. This criterion should be revised to allow for partial settlements where there are unique circumstances justifying such as approach. This occurred recently in the Bill Williams River Settlement, where a partial settlement for the Hualapai Tribe was achieved and necessary to allow the parties to continue to negotiate towards a comprehensive water settlement. *See e.g.,* Bill Williams River Water Rights Settlement Act of 2014, Pub. L. No. 113-223, 128 Stat. 2096. In the Bill Williams River Settlement, there were timing issues related to important state based water rights that would have been lost if the United States would have required the parties to have a comprehensive settlement before allowing the claims at issue in the partial settlement to be resolved.

Criteria 4, 5 & 6 (generally). In practice, these criteria, which all relate to liability or cost, have been applied by various federal officials as requiring a state monetary contribution, prohibiting non-federal "benefits," attributing little value to the benefit of achieving a water settlement and viewing federal liability narrowly. Testimony of Interior officials over the last decade illustrates that one of the most consistent objections to a proposed settlement relates to cost.[8] Thus, despite the fact that these are three out of sixteen criteria that guide a settlement, it is these criteria that appear to drive consideration and support of a water settlement. The current application of these criteria hinder settlements and they need to be revised to more accurately reflect federal legal and moral obligations. There must also be recognition that when a water

[8] For example, although Congress ultimately passed the Crow Tribe, Taos Pueblo and other tribal water settlements, in the Claims Resolution Act of 2010, the Department's testimony prior to passage of those water settlements continued to express concerns regarding cost. *See e.g.,* Testimony of Michael L. Connor, Commissioner, Bureau of Reclamation, on H.R. 3254, Taos Pueblo Indian Water Rights Settlement Act (Sept. 9, 2009) ("We would like to continue to work with the parties and the sponsors to address certain concerns . . . such as appropriate non-Federal cost share, that could make this a settlement that the Administration could wholeheartedly support.").

settlement is reached it is the result of complex negotiations that results in benefits to all parties, otherwise there would be no settlement.[9]

Criterion 4. This criterion should be revised to more accurately reflect that a water settlement provides more value to the American taxpayer than simply litigation cost savings. For example, water settlements provide much needed certainty in states where water resources are needed for the social and economic advancement of Indian tribes, but are often limited, over allocated or already used by non-Indians.[10] In addition, water settlements provide direct and indirect benefits to American taxpayers in the form of jobs creation, water leasing opportunities that provide non-Indian communities with an assured water supply from the tribal water right, and environmental benefits by improving dilapidated infrastructure that results in water loss reductions.[11] Thus, calculating the appropriate cost of a settlement should take into consideration not just the cost savings, but the overall benefits that a settlement will provide as well.

Criterion 5. Several revisions are needed to criterion 5 for determining the appropriate federal contribution. At the outset, there should be recognition that there is no one formula that can adequately determine the appropriate amount of a settlement for all tribes. Rather, this criterion should set forth the standards justifying a federal contribution recognizing that the actual monetary amount will subject to negotiation between the United States and tribes.

Criterion 5(a) needs to be revised to focus only on legal exposure. This criterion needs to adequately recognize the United States' position in recent settlements that requires comprehensive waivers. Tribes should receive value for the claims being waived. Moreover, even though the United States may have an established litigation position with respect to certain types of claims, any analysis of the litigation cost and risk associated with claims being waived by a tribe must also consider that the United States may not prevail on its litigation position or related affirmative defenses. If there were such certainty, the United States would not need such comprehensive waivers. Tribes should not be required to accept little to no value for tribal claims when it is the United States, as trustee, that is requiring that a settlement contain express waivers.

A new criterion 5(b) should be added that values the benefits of reaching a settlement to the United States. This analysis should look at not only the value of quantifying a tribe's water rights, but also other benefits to the tribe (i.e., wet water supply, environmental, social, and cultural benefits) achieved as a result of reaching a settlement, because the United States also benefits as tribes are able to increase self-sufficiency and self-determination. The tribal benefits of a water settlement should then be balanced against whether the federal cost of achieving those benefits is reasonable and consistent with the trust responsibility after weighing each of the elements in criterion 5.

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[9] *See e.g.*, Annie Snider, *Tribes hold wild card in high-stakes supply game,* E&E News (Dec. 22, 2015), found at: http://www.eenews.net/stories/1060029881 (last accessed Jan. 8, 2017).

[10] *See e.g.,* Statement of John Tester, Hearing Before the Senate Committee on Indian Affairs, "Indian Water Rights: Promoting the Negotiation and Implementation of Water Settlements in Indian Country," S. Hrg. 112-634, (at 15) (Mar. 15, 2012) ("In Montana's case, in an area that needs all the economic opportunity that we can help provide them with and water is foundational resource for economic development.").

[11] *See e.g.*, Opening Statement of Daniel K. Akaka, Hearing Before the Senate Committee on Indian Affairs, "Indian Water Rights: Promoting the Negotiation and Implementation of Water Settlements in Indian Country," S. Hrg. 112-634, (at 3) (Mar. 15, 2012) ("Negotiating to reach a water settlement in Indian water rights claims is advantageous for all parties. . . Negotiations may also foster better working relationships between all parties.").

The current criterion 5(b) should be renumbered as 5(c) and revised to require, in connection with the trust responsibility inquiry, examination of the historical context that led to the particular tribe's water issues, including providing a damage value associated with the impacts that federal actions or inaction had on the tribe's water and water related resources. This would rightly recognize that the trust responsibility is not only a legal, but moral responsibility of the United States. Water rights issues faced by Indian tribes are generally a result of particular Indian policies that resulted in the opening up of reservation lands, failings by the United States to protect and defend tribal water resources from appropriation by others and, in some cases, completely removing a tribe from their homeland. The cost of a federal settlement should recognize what tribes have lost, because in many settlements, tribes are trying to re-build what has been lost to ensure that they have a permanent and viable homeland.

For example, in the case of the Gila River Indian Community, non-Indians completely dried up the mainstem of the Gila River on which the Community had depended since time immemorial – a situation which was so extreme that in the early 1900s, national news media reported thousands perishing on the Gila River Reservation due to lack of water available for use by Indians to grow crops.[12] A major component of the Gila River Indian Community Water Settlement Act of 2004 was to restore a portion of the Gila River's flow above ground in recognition of the Community's cultural reliance and dependence on the river, in addition to bringing back native plants and animals traditionally relied upon by Community members.[13]

Renumbered criterion 5(c) should also clarify that when including programmatic costs in a settlement, the programmatic costs should be explained. For example, if the settlement includes the expenditure of federal settlements funds on an irrigation project owned by the BIA, federal studies along with any applicable tribal expert studies should be provided that explain the work needed and associated costs. If there are issues relating to an agency backlog or safety or health concerns, that information should also be provided as justification for inclusion of the project in the settlement. A discount or credit should be reflected in the total federal cost for those costs associated with programmatic responsibilities.

A new criterion 5(d) should be added to expressly recognize that a water settlement can include, as part of the federal contribution, an OM&R trust fund that cab be used by tribes to subsidize OM&R costs of a new project. As noted in criterion 11(e) below, this allows time for tribes to build capacity to operate and maintain new systems.

Criterion 6. Recent trends in water settlements illustrate that there is no one size fits all model with respect to state contributions to water settlements. Arizona settlements, for example, tend to provide little to no monetary contribution by the state, while Montana has contributed funds, at varying amounts, to every compact ratifying an Indian water settlement. There must be recognition that states will have their own views about what constitutes an appropriate state contribution and other trade-offs may need to occur within the context of a settlement.[14]

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[12] *See e.g.,* David H. DeJong, Gila River Indian Community, *Water Rights Retrospective: The Historical Context and Meaning of the Gila River Indian Community Water Settlement Act of 2004*.

[13] *See e.g.,* http://www.eastvalleytribune.com/money/article_27013886-2b14-11e2-bf0d-0019bb2963f4.html.

[14] *See e.g.*, Remarks of Senator Tester, Hearing Before the Senate Committee on Indian Affairs, "Indian Water Rights: Promoting the Negotiation and Implementation of Water Settlements in Indian Country," S. Hrg. 112-634, (at 19) (Mar. 15, 2012) ("DOI opposed one of my settlement bills because, at least the reason given, inefficient non-Federal or State cost share. Obviously the State of Montana thought their share was plenty adequate. . . .the State share shouldn't have been the problem . . . .").

This criterion needs to be revised to make clear that this requirement is flexible and does not place the ultimate burden on tribes to get unrealistic state contributions. Indeed, many settlements provide non-monetary contributions or concessions by states and other non-Indian parties that must be attributed value for purposes of the non-Indian share. As noted by President George H.W. Bush in signing the Puyallup Tribe's water settlement:

> We . . . strive to ensure that all responsible parties make appropriate contributions to a settlement . . . . Indian land and water rights settlements involve a complicated blend of law, treaties, court decisions, social policies, technology, and practicality. These interrelated factors make it difficult to formulate hard-and-fast rules to determine exact settlement contributions by various parties in a specific claim.

Statement of President George H.W. Bush on Signing the Puyallup Tribe of Indian Settlement Act of 1989 (Jun. 21, 1989).

Criterion 7. This criterion should be revised to reflect modern Indian policy, which recognizes and promotes sovereignty, self-determination and economic development.

Criterion 9. In the last several years, Indian water settlement legislation has been structured to distinguish between the type of funds that are created under a settlement. These funds are commonly referred to by Interior officials as either (1) "secretarial funds" or (2) "trust funds." Only trust funds can be withdrawn by a tribe as part of a settlement and, if withdrawn, the United States bears no liability for expenditure of the funds. Secretarial funds, however, cannot be withdrawn and are generally for use by the Secretary to ensure that settlement projects are completed. Recent language in settlement legislation addressing these two types of funds is increasingly, but informally, required by Interior as part of settlements. This criterion should be revised to formally reflect this new approach.

Criterion 11(e) & (f). This criterion needs to be revised to (1) eliminate the prohibition on providing OM&R Funds to Indian tribes in subsection (e) and (2) to make clear that certain water uses are exempt from an economic cost justification. Recent water settlements have allowed for the creation of trust fund accounts to subsidize OM&R costs for Indian tribes after a project is built. This allows time for tribes to build operating capacity.

In addition, subsection (f) prohibits U.S. participation in an "economically unjustified irrigation investment," but allows that certain water uses (i.e., households, garden, or domestic livestock uses) "*may be*" exempt from this criterion. The exemption should make clear that the listed water uses are mandatory exemptions.

Criterion 13. This criterion should not be strictly applied in Indian water settlements. Discounting is used by federal agencies to "evaluate water and related land resource plans for the purpose of discounting future benefits and computing costs or otherwise converting benefits and costs to the common-time basis." 80 Fed. Reg. 78,763 (Dec. 17, 2015). A discount rate can have a major impact on the outcome of benefit cost-analysis. For project with relatively high near-term costs but large long-term benefits, for example, the discount rate has more impact and can often lead to the project failing on a cost-benefit analysis. *See e.g.,* CRS Report for Congress, Benefit-Cost and the Discount Rate for the Corps of Engineers' Water Resource Projects: Theory and Practice, CRS10-11 (June 23, 2003). For a variety of reasons this can unfairly impact review and justification of water infrastructure projects in an Indian water settlement.

For example, existing federal projects targeted in an Indian water settlement oftentimes have high near-term costs to rehabilitate, modernize or otherwise improve these projects because of the significant lack of or shortfall in federal funding over the course of decades. This has resulted in dilapidated systems that require a disproportionate amount of upfront funding to update a project compared to any short-term benefits. However, the long-term benefits of the projects can be significant and will often likely provide benefits over and above the original intent of the system. For example, improvements to irrigation systems can have not only water use benefits for irrigation, but important environmental benefits like increased water efficiency resulting in higher in-stream flows, or restoration of important cultural or spiritual sites (as in the Gila River Water Settlement). But the water resources planning discount rate does not necessarily account for these benefits, which, if quantified, can change the determination of whether a project cost is justified. This criterion therefore should provide some flexibility to ensure these types of benefits are included in any cost-benefit analysis of a project where the water resource discount rate is utilized.

Criterion 15. The standard language provided in this criterion is not generally used in water settlement legislation. When funds are appropriated and/or budgeted by an agency is dependent on whether Congress provides mandatory or discretionary funding in a settlement. If Congress provides mandatory funds there is no need to include discretionary funding language or require that costs be spread out over multiple years. *See e.g.,* Crow Tribe Water Rights Settlement, Pub. L. No. 111-291, 124 Stat. 3097, 3120, Sec 414 (a)(1) & (b)(1) (Dec. 8, 2010) (providing for "mandatory appropriation" and requiring treasury to transfer the funds "[o]ut of any funds un the Treasury not otherwise appropriated"). Even when Congress provides discretionary funding, recently enacted settlements do not contain the language provided in criterion 15, but simply state that the funds for the settlement are "authorized to be appropriated." *See e.g.,* Blackfeet Water Settlement, Pub. L. No. 114-322, Tit. III, Subtitle. G, Sec. 3718 (2016) (discretionary funding language providing that "there are authorized to be appropriated to the Secretary" funds for the settlement). This criterion needs to be revised to reflect current practice.

Criterion 16. The language that federal "costs be spread-out over more than one year" provided in criterion 16 is no longer applicable. As noted above, where mandatory funds are provided, those funds are immediately made available to the Secretary. And where discretionary funds are provided, recent settlements do not contain the language provided in this criterion. This criterion should be deleted.

IV. Conclusion

To summarize, while the *Criteria and Procedures* for the most part, can provide a useful and positive guide for negotiating and achieving Indian water settlements. However, their application in recent settlements support the conclusion that it is time to revise the *Criteria and Procedures* because they do not adequately reflect recent policies imposed on Indian tribes by the United States in negotiating water settlements. And changes are needed to ensure transparency and that the United States' trust responsibility to Indian tribes is fully evaluated and fairly applied in all settlements.