


Tribal water rights claims complicate Oklahoma's water planning efforts

Oklahoma's pre-statehood history as a relocation territory for American Indian tribes has created a legal labyrinth for anyone trying to determine water rights to streams and reservoirs in the state.

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Negotiate or battle it out through the legal system.

That's the dilemma facing Oklahoma political leaders and American Indian tribes when it comes to resolving conflicting water rights claims.

Oklahoma's pre-statehood history as a relocation territory for tribes has created a legal labyrinth for anyone trying to determine water rights to streams and reservoirs in the state.

Clashes over water rights are common in many states, but nowhere are the problems more difficult to resolve than Oklahoma.

“As well and long-recognized by the state of Oklahoma, 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 and jurisdiction over water within the state's geographic limits,” University of Oklahoma law professor Lindsay Robertson stated in a report prepared for the Oklahoma Water Resources Board.

Robertson recommends that the state negotiate with tribes to resolve water rights issues.

Bill Anoatubby, governor of the Chickasaw Nation, said negotiations would be welcomed.

“It is vitally important that the tribal and state governments work together to develop a plan for sustainable management and equitable distribution of our water resources,” Anoatubby said.

That doesn't mean negotiations will be easy.

“The fact that many tribes will have claims adverse to each other will make any negotiations challenging for the tribes,” Robertson said.

Level of uncertainty

In cases where lands were allotted to individual tribal members, tribal citizens may have individual water rights claims that exceed the claims of their tribes, Robertson said. That could compound the difficulty of negotiations, he said.

The prospect of negotiating with multiple tribes and perhaps even individual tribal members with diverse interests may sound overwhelming, but the alternative is a federal adjudication process that may be even more difficult, said Dean Couch, general counsel for the Oklahoma Water Resources Board.

There is a case being adjudicated in Arizona that is still going on after 30 or 40 years, he said.

A lengthy legal conflict would not be in the best interest of Oklahomans, said Kyle Arthur, director of planning for the Oklahoma Comprehensive Water Plan that is being developed by the Oklahoma Water Resources Board.

“We certainly recognize there is a level of uncertainty as to this issue,” Arthur said. “We believe it is in the best interest of everybody in Oklahoma to negotiate it. The water plan, itself, is limited in its ability to resolve it. It can and should, however, raise the issue yet again and offer a path forward toward resolution. I believe this plan does that more aggressively than any in the past.”

Stephen Greetham, attorney for the Chickasaw Nation, agreed that litigation is not the best answer.

“No one ultimately ever wins those fights,” he said. “They go on for generations until folks finally come to their senses and sit down and try to figure out something that works for both sides.”

“We don't want the zero sum game,” he said. “We have to prepare for it, but we don't want that.”

Previous concerns

Tribal members are concerned because the state often has tried to ignore tribal water rights claims in the past, he said.

Just last summer, the Oklahoma Water Resources Board members riled Chickasaw and Choctaw Nation tribal leaders by agreeing to sell Oklahoma City the storage rights to 90 percent of Sardis Lake in southeast Oklahoma without obtaining consent from the tribes.

The tribes responded with a letter to state and city leaders warning that continued

action on the Sardis Lake deal without tribal involvement risked “the triggering of complex federal law litigation.”

The issue remains in limbo. Although Oklahoma City purchased the water storage rights, it has not yet obtained the type of water rights necessary to transport water out of the region to Oklahoma City where it could be used for consumption. Drinking water from Sardis Lake is not expected to be needed for 20 to 30 more years, said Jim Couch, Oklahoma City manager.

The tribes contend the water rights aren't the state's to sell. The Chickasaw and Choctaw Nations believe treaties grant them joint ownership of water rights in south central and southeastern Oklahoma, Greetham said.

“Our legal position is it's ours — you don't have anything,” Greetham said. “If forced to go to the courtroom, we would have no choice but to assert that position.”

The Cherokee Nation asserts a similar claim to water rights within its Oklahoma tribal territory, which includes much of northeastern Oklahoma.

“We never gave up any of the water rights within our geographical boundaries. As the federal court has recognized, it is up to the state of Oklahoma to assert what water rights it has, not us,” said Diane Hammons, attorney general for the Cherokee Nation.

Adamant claims of ownership do not mean tribes are unwilling to negotiate.

In fact, the Chickasaw Nation has gone to great lengths to produce a series of commercials in which Chickasaw tribal member Neal McCaleb discusses the importance of water to both tribal and nontribal members and the benefits of cooperation. McCaleb is a former Oklahoma transportation secretary and former director of the federal Bureau of Indian Affairs.

Setting goals

Greetham said the Chickasaw Nation has three fundamental goals it wants to accomplish through negotiations:

It wants the state to acknowledge it needs to negotiate water rights issues with the tribes on a government-to-government basis.

The tribe wants to make sure that before any water is transported out of a region, an adequate amount of water will remain to meet not only future consumptive needs of the tribe, but also recreational and other needs.

The tribe believes a consensus needs to be reached on the definition of surplus water and if water is to be exported, the economic and environmental impacts need to be addressed in a way that is acceptable.

“Our primary goal is to protect our water future,” he said.

Choctaw Nation Chief Gregory E. Pyle praised individuals involved in the state's comprehensive water plan for their efforts to gather detailed information about water assets and needs in various parts of the state.

“The Choctaw Nation is seeking the best data possible so that informed and responsible decisions can be made regarding the future use of water in Oklahoma,” Pyle said in a prepared statement. “I feel that the initial study is a step in the right direction to gathering this vital information, yet additional studies for more specific facts must be completed. This issue is much too critical for anyone to be guessing at the impact — it is important that we have experts in the field do targeted, specific research and studies on any long-term effects.”

Hammons said the Cherokee Nation believes in cooperation and participated in the state water plan to the greatest extent possible.

“Like the other tribes, we wish that the state had included the tribes earlier, and to a greater degree, as governmental partners,” she said.

Anoatubby said the stakes are high.

“Citizens of the Chickasaw Nation, like all Oklahomans, have a vital interest in maintaining the conditions necessary to ensure a strong economy and a thriving natural environment for our children and grandchildren,” he said. “We must take the time to understand how we will meet our needs for household, agricultural and industrial use so crucial for economic development, while preserving adequate water levels in our lakes, streams and aquifers to maintain our quality of life as it relates to tourism, recreation, wildlife and the natural beauty of our state.”



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