DEPARTMENT OF THE INTERIOR

AGENCY: Department of the Interior.
ACTION: Policy Statement.

SUMMARY: It is the policy of this Administration, as set forth by President Bush on June 21, 1989, in his statement signing into law H.R. 932, the 1989 Puyallup Tribe of Indians Settlement Act, that disputes regarding Indian water rights should be resolved through negotiated settlements rather than litigation. Accordingly, the Department of the Interior adopts the following criteria and procedures to establish the basis for negotiation and settlement of claims concerning Indian water resources.

EFFECTIVE DATE: March 12, 1990.

ADDRESSES: Comments may be addressed to: Mr. Tim Glidden, Department of the Interior, M.S. 6217-MIB, 18th and C Streets, NW., Washington, DC 20240.

FOR FURTHER INFORMATION CONTACT: Mr. Tim Glidden, Chairman, Working Group on Indian Water Settlements, 202-243-7381.

SUPPLEMENTARY INFORMATION: These criteria and procedures were developed by the Working Group on Indian Water Settlements from the Department of the Interior.

These criteria and procedures supersede all prior Departmental policy regarding Indian water settlement negotiations. The criteria provide a framework for negotiating settlements so that (1) The United States will be able to participate in water settlements consistent with the Federal Government’s responsibilities as trustee to Indians; (2) Indians receive equivalent benefits for rights which they, and the United States as trustee, may release as part of a settlement; (3) Indians obtain the ability as part of each settlement to realize value from confirmed water rights resulting from settlement; and (4) The settlement contains appropriate cost-sharing by all parties benefiting from the settlement.

Criteria

1. These criteria are applicable to all negotiations involving Indian water rights claims settlements in which the Federal Government participates. Claims to be settled through negotiation may include, but are not limited to, claims:
   (a) By tribes and U.S. Government to quantify reserved Indian water rights.
   (b) By tribes against the U.S. Government.
   (c) By tribes and the U.S. Government against third parties.

2. The Department of the Interior will support legislation authorizing those agreements to which it is a signatory party.

3. Settlements should be completed in such a way that all outstanding water claims are resolved and finality is achieved.

4. The total cost of a settlement to all parties should not exceed the value of the existing claims as calculated by the Federal Government.

5. Federal contributions to a settlement should not exceed the sum of the following two elements:
   (a) First, calculable legal exposure—litigation cost and judgment obligations if the case is lost; Federal and non-Federal exposure should be calculated on a present value basis taking into account the size of the claim, the value of the water, timing of the award, likelihood of loss.
   (b) Second, additional costs related to Federal trust or programmatic responsibilities (assuming the U.S. obligation as trustee can be compared to existing precedents). Federal contributions relating to programmatic responsibilities should be justified as to why such contributions cannot be funded through the normal budget process.

6. Settlements should include non-Federal cost-sharing proportionate to the benefits received by the non-Federal parties.

7. Settlements should be structured to promote economic efficiency on reservations and tribal self-sufficiency.

8. Operating capabilities and various resources of the Federal and non-Federal parties to the claim and negotiations should be considered in structuring a settlement (e.g., operating criteria and water conservation in Federal and non-Federal projects).

9. If Federal cash contributions are part of a settlement and once such contributions are certified and deposited in the appropriate tribal treasury, the U.S. shall not bear any obligation or liability regarding the investment, management, or use of such funds.

10. Federal participation in Indian water rights negotiations should be conducive to long-term harmony and cooperation among all interested parties through respect for the sovereignty of the States and tribes in their respective jurisdictions.

11. Settlements should generally not include:
   (a) Local contributions derived from issuing bonds backed by or guaranteed by the Federal Government.
   (b) Crediting to the non-Federal share normal project revenues that would be received in absence of a cost share agreement.
   (c) Crediting non-Federal operation, maintenance, and rehabilitation (OM&R) payments to non-Federal construction cost obligations.
   (d) Imposition by the Federal Government of fees or charges requiring
authorization in order to finance the 
non-Federal share.

Federal subsidy of O&M costs of 
Indian and non-Indian parties,

U.S. participation in an 
economically justified irrigation 
investment; however investments for 
delivery of water for households, 
gardens, or domestic livestock may be 
exempted from this criterion.

Per-Capita distribution of trust 
funds.

Crediting to the Federal share 
existing annual program funding to 
tribes.

Penalties for failure to meet a 
construction schedule. Interest should 
not accrue unless the settlement does 
not get budgeted for as specified in 
item 15 below.

Exemptions from Reclamation law.

All tangible and intangible costs to 
the Federal Government and to non-
Federal parties, including the 
 forgiveness of non-Federal 
reimbursement requirements to the 
Federal Government and items 
contributed per item 8 above, should be 
included in calculating their respective 
contributions to the settlement.

All financial calculations shall use 
a discount rate equivalent to the current 
water resources planning discount rate 
as published annually in the Federal 
Register.

All contractual and statutory 
responsibilities of the Secretary that 
 affect or could be affected by a specific 
negotiation will be reviewed.

Settlement agreements should 
include the following standard language:
Federal financial contributions to a 
settlement will normally be budgeted for, 
subject to the availability of funds, 
by October 1 of the year following 
the year of enactment of the authorizing 
legislation (e.g. for a settlement enacted 
in law in August 1990, funding to 
the Federal contribution will normally be 
contained in the FY 1992 budget request 
and, if appropriate, be available for 

Settlements requiring the payment of 
substantial Federal contributions 
should include standard language 
providing for costs to be spread-out 
over more than one year.

Procedures

Phase I—Fact Finding

1. The Department of the Interior 
(Department) will consider initiation of 
formal claims settlement negotiations 
when the Indian tribe and non-Federal 
parties involved have formally 
requested negotiations of the Secretary of 
the Interior (Secretary).

2. The Department will consult with 
the Department of Justice (Justice) 
concerning the legal considerations in 
forming a negotiating team.

If Department decides to establish a 
team, the Office of Management and 
Budget (OMB) and Justice shall be 
notified, in writing. Justice should 
generally be a member of any 
negotiating team.

The Department's notification 
should include the rationale for potential 
negotiations, i.e., pending litigation and 
other background information about the 
claim already available, makeup of the 
team (reason that Justice is not a 
member of a team, if applicable), and 
non-Federal participants in the 
settlement process.

The date of the notification marks 
the beginning of the fact-finding period.

Not later than nine months after 
notification, a fact-finding report 
outlining the current status of litigation 
and other pertinent matters will be 
submitted by the team to the 
Department, OMB, and Justice. The fact-
finding report should include 
information that profiles the claim and 
potential negotiations. The report should 
come:

A listing of all involved parties and 
their positions.

The legal history, if any, of the 
claim, including such relevant matters as 
prior or potential litigation or court 
decisions, or rulings by the Indian 
Claims Commission.

A summary and evaluation of the 
claims asserted in the Indian 
Claims Commission.

Relevant information on the non-
Federal parties and their positions to the 
claim.

A geographical description of the 
reservoir and drainage basin 
involved, including maps and diagrams.

A review and analysis of pertinent 
existing contracts, statutes, regulations, 
and legal proceedings that may have an 
impact on the settlement.

A description and analysis of the 
history of the United States' trust 
activities on the Indian reservation.

During Phases I, II, and III, the 
Government (through the negotiating 
team or otherwise) will not concede or 
make representations on likely U.S. 
positions or considerations.

Phase II—Assessment and 
Recommendations

1. As soon as possible, the negotiating 
team, in concert with Justice, will 
conduct and present to the Department 
an assessment of the positions of all 
parties, and a recommended negotiating 
position. The purpose of the assessment 
is to (1) measure all costs assuming no 
settlement, and (2) measure complete 
settlement costs to all of the parties. The 
assessment should include:

a. Costs presuming no settlement— 
Estimates for quantifying costs 
associated with all pending or potential 
litigation in question, including claims 
against the United States and claims 
against other non-Federal parties 
before an assessment of the risk to 
all parties from any aspect of the 
claim and all pending litigation without 
a settlement. A best/worst/most likely 
probability analysis of the litigation 
outcome should be developed.

b. An analysis of the value of the 
water claim for the Indians.

c. Costs Presuming Settlement— 
quantification of alternative settlement 
costs to all parties. This includes an 
analysis showing how contributions, 
other than those strictly associated with 
litigation, could lead to settlement (e.g., 
facilities to use water, alternative uses 
of water, and alternative financial 
considerations).

2. All analysis in the assessment 
should be presented in present value 
terms using the planning rate used for 
evaluating Federal water resource 
projects.

Phase III—Briefings and Negotiating 
Position

1. The Working Group on Indian 
Water Settlements will present to the 
Secretary a recommended negotiating 
position. It should contain:

a. The recommended negotiating 
position and contributions by the Federal 
Government.

b. The strategy for funding the Federal 
contribution to the settlement.

c. Any legal or financial views of 
Justice or OMB.

d. Tentative position on major issues 
expected to arise.

2. Following the Secretary's approval 
of the Government's negotiating 
position, Justice and OMB will be 
notified before negotiations commence.

Phase IV—Negotiations Towards 
Settlement

1. OMB and Justice will be updated 
periodically on the status of 
negotiations.

2. If the proposed cost to the U.S. of 
settlement is outside the amount 
decided in Phase III, if the negotiations 
are beyond the estimated time 
(or break down), or if Interior proposes 
to make significant changes in the 
Government's proposed position or in 
the U.S. contribution to the settlement, 
the original recommendation and 
settlement position will be revised 
using the procedures identified above.
15 days after this publication the Commission also finds that: (1) A financially responsible person has offered financial assistance (through subsidy or purchase) to enable the rail service to be continued; and (2) It is likely that the assistance would fully compensate the railroad. Any financial assistance offer must be filed with the Commission and served on the applicant no later than March 22, 1990. The following notation must be typed in bold face on the lower left-hand corner of the envelope: "Rail Section, AB-OFA." Any offer previously made must be remade within this 10-day period. Information and procedures regarding financial assistance for continued rail service are contained in 49 U.S.C. 10905 and 49 CFR 1152.27.


By the Commission, Chairman Gudreau, Vice Chairman Phillips, Commissioners Simmons, Lamb, and Ermitt, Vice Chairman Phillips commented with a separate expression. Commissioners Simmons and Lamb disentangled with separate expressions.

Noreta R. McCue,
Secretary.

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[Finance Docket No. 31543]

Union Pacific Railroad Co. and
Missouri Pacific Railroad Co.—
Trackage Rights Over Lines of
Chicago and North Western
Transportation Co., Between
Fremont, NE/Council Bluffs, IA, and Chicago, IL;

AGENCY: Interstate Commerce
Commission.

ACTION: Notice of Decision No. 2.

SUMMARY: The Commission is accepting for consideration the application filed February 7, 1990, by Union Pacific Railroad Company (UPRR), Missouri Pacific Railroad Company (MPRR), and Chicago and North Western Transportation Company (CNW) for UPRR and MPRR, collectively referred to as UP, to acquire trackage rights over the lines of CNW between Fremont, NE/Council Bluffs, IA, and Chicago, IL. The applicants also seek a declaratory order that: (1) UP's corporate parent, Union Pacific Corporation, and its affiliates will not gain control of CNW as a result of exercises of the trackage rights and certain additional contingent rights for which they contracted. In connection with the Blackstone—CNW transaction; 