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# Indian Water Rights Settlements

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# Summary

In the second half of the 19th century, the federal government pursued a policy of confining Indian tribes to reservations. These reservations were either a portion of a tribe's aboriginal land or an area of land taken out of the public domain and set aside for a tribe. The federal statutes and treaties reserving such land for Indian reservations typically did not address the water needs of these reservations, a fact that has given rise to questions and disputes regarding Indian reserved water rights. Dating to a 1908 Supreme Court ruling, courts generally have held that many tribes have a reserved right to water sufficient to fulfill the purpose of their reservations and that this right took effect on the date the reservations were established. This means that, in the context of a state water law system of prior appropriations, which is common in many U.S. western states, many tribes have water rights senior to those of non-Indian users with water rights and access established subsequent to the Indian reservations' creation. Although many Indian tribes hold senior water rights through their reservations, the quantification of these rights is undetermined in many cases.

Tribes have pursued quantification of their water rights through both litigation and negotiated settlements. The settlements involve negotiation between tribes, the federal government, states, water districts, and private water users, among others. They aim to resolve conflict between rights holders and allow the parties to determine specific terms of water allocation and use with certainty. Over the last 50 years, negotiated settlements have been the preferred course for most tribes because they are often less lengthy and costly than litigation. Additionally, many stakeholders have noted that these negotiated agreements are more likely to allow tribes not only to quantify their water rights on paper but also to procure access to these resources in the form of infrastructure and other related expenses, at least in some cases.

After being negotiated, approval and implementation of Indian water rights settlements require federal action. As of 2019, 36 Indian water rights settlements had been federally approved, with total costs in excess of $5.8 billion. Of these, 32 settlements were approved and enacted by Congress and 4 were administratively approved by the U.S. Departments of Justice and the Interior. After being congressionally authorized, federal projects associated with approved Indian water rights settlements generally have been implemented by the Bureau of Reclamation or the Bureau of Indian Affairs (both within the Department of the Interior), pursuant to congressional directions. Congress has appropriated discretionary and mandatory funding (and, in some cases, both) for these activities, including in recent appropriations bills. In the 116th Congress, H.R. 1904 proposes to extend certain mandatory funds for these settlements in perpetuity (the funding currently expires in FY2029).

Several individual Indian water rights settlements recently have been considered and enacted, including three that were enacted during the 114th Congress. A primary challenge facing new settlements is the availability of federal funds to implement ongoing and future agreements. Indian water rights settlements often involve the construction of major new water infrastructure to allow tribal communities to access water they hold rights to, and obtaining federal funding for these projects can be difficult. As a result, some settlements have been renegotiated to reduce their federal costs.

At issue is under what circumstances (if any) Congress should approve new Indian water rights settlements and whether Congress should fund (and in some cases amend) existing settlements. Some argue that resolution of Indian water rights settlements is a mutually beneficial means to resolve long-standing legal issues, provide certainty of water deliveries, and reduce the federal government's liability. Others argue against authorization and funding of new settlements, either on general principle or with regard to specific individual settlements and activities.

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# Introduction

Since 1978, the federal government has entered into 36 water rights settlements with 40 individual Indian tribes. These Indian water rights settlements are a means of resolving ongoing disputes related to Indian water rights between tribes, federal and state governments, and other parties (e.g., water rights holders). The federal government is involved in these settlements pursuant to its tribal trust responsibilities. Many of these settlements have been authorized by Congress to provide funding for projects that allow tribes to access and develop their water resources. At issue for Congress is not only the new settlements completing negotiations but also how well the current process for negotiating and recommending settlements for authorization is working. Some of the challenges raised by these settlements pertain to satisfying the federal trust responsibility related to tribal water rights, the provision of federal funding associated with the universe of these settlements, and the principles and expectations guiding ongoing and future negotiation of new settlements and renegotiation of past settlements.

This report provides background on Indian water rights settlements and an overview of the settlement process. It provides background on Indian water rights, describes the settlement process, and summarizes enacted and potential settlements to date. It also analyzes issues related to Indian water rights, with a focus on the role of the federal government and challenges faced in negotiating and implementing Indian water rights settlements. Finally, it focuses on settlements in a legislative context, including enacted and proposed legislation.

# Background

Indian water rights are vested property rights and resources for which the United States has a trust responsibility. The federal trust responsibility is a legal obligation of the United States dictating that the federal government must protect Indian resources and assets and manage them in the Indians' best interest. Historically, the United States has addressed its trust responsibility by acting as trustee in managing reserved lands, waters, resources, and assets for Indian tribes and by providing legal counsel and representation to Indians in the courts to protect such rights, resources, and assets. Specifically in regard to Indian water rights settlements, the United States has fulfilled its trust responsibility to Indian tribes by assisting tribes with their claims to reserved water rights through litigation, negotiations, and/or implementation of settlements.

The specifics of Indian water rights claims vary, but typically these claims arise out of the right of many tribes to water resources dating to the establishment of their reservations.[1] Indian reserved water rights were first recognized by the Supreme Court in *Winters v. United States* in 1908.[2] Under the *Winters* doctrine, when Congress reserves land (i.e., for an Indian reservation), Congress implicitly reserves water sufficient to fulfill the purpose of the reservation.

In the years since the *Winters* decision, disputes have arisen between Indians asserting their water rights and non-Indian water users, particularly in the western United States. In that region, the establishment of Indian reservations (and, therefore, of Indian water rights) generally predated settlement by non-Indians and the related large-scale development by the federal government of water resources for non-Indian users. In most western states, water allocation takes place under a system of prior appropriation in which water is allocated to users based on the order in which water rights were acquired. Under the *Winters* doctrine and the western system of prior

[1] Separately, some tribes also have *time immemorial* rights to water resources based on tribal water uses that preceded the establishment of reservations.

[2] Winters v. United States, 207 U.S. 564, 575-77 (1908).

appropriation, the water rights of tribes often are senior to those of non-Indian water rights holders because Indian water rights generally date to the creation of the reservation. However, despite the priority of Indian reserved water rights, non-Indian populations frequently have greater access to and allocations of water through infrastructure. This discrepancy leads to disputes that typically have been litigated or, more recently, resolved by negotiated settlements.

Litigation of Indian water rights is a costly process that may take several decades to complete. Even then, Indian water rights holders may not see tangible water resources and may be awarded only *paper water*—that is, they may be awarded a legal claim to water but lack the financial capital to develop those water resources. This situation occurs because, unlike Congress, the courts cannot provide tangible *wet water* by authorizing new water projects and/or water-transfer infrastructure (including funding for project development) that would allow the tribes to exploit their rights.

As a result, negotiated settlements recently have been the preferred means of resolving many Indian water rights disputes. Negotiated settlements afford tribes and other interested stakeholders an opportunity to discuss and come to terms on quantification of and access to tribal water allocations, among other things. These settlements often are attractive because they include terms and conditions that resolve long-standing uncertainty and put an end to conflict by avoiding litigation.[3] However, there remains disagreement among some as to whether litigation or settlements are most appropriate for resolving Indian water rights disputes.[4]

# Settlement Structure and Process

The primary issue regarding settlement for Indian reserved water rights is *quantification*—identifying the amount of water to which users hold rights within the existing systems of water allocation in various areas in the West. However, quantification alone often is not sufficient to secure resources for tribes. Thus, the negotiation process frequently also involves provisions to construct water infrastructure that increases access to newly quantified resources. In addition to providing access to wet water, some negotiated settlements have provided other benefits and legal rights aligned with tribal values. For instance, some tribal settlements have included provisions for environmental protection and restoration.[5]

The federal government's involvement in the Indian water rights settlement process is guided by a 1990 policy statement established during the George H. W. Bush Administration, "Criteria and Procedures for the Participation of the Federal Government in Negotiations for the Settlement of Indian Water Rights Claims" by the Working Group on Indian Water Settlements (Working Group) from the Department of the Interior (DOI).[6] DOI adopted the criteria and procedures in 1990 to establish a framework to inform the Indian water rights settlement process and expressed

[3] In many cases, the function of congressionally enacted settlements is to ratify and implement terms and conditions that are detailed more thoroughly in agreements and compacts between stakeholders or in a tribal water code.

[4] See "Debating the "Certainty" of Settlements," below.

[5] For example, the Snake River Water Rights Act of 2004 (P.L. 108-447) included a salmon management and habitat restoration program. In another instance, the Truckee-Carson-Pyramid Lake Water Rights Act (P.L. 101-618) established a fish recovery program under the provisions of the Endangered Species Act, consistent with the tribe's historic use and reliance on two fish, the cui-ui and the Lahontan trout. For more information, see U.S. Fish and Wildlife Service (FWS), *Digest of Federal Resource Laws of Interest to the U.S. Fish and Wildlife Service: Pyramid Lake/Truckee-Carson Water Rights Settlement*, at https://www.fws.gov/laws/lawsdigest/PYRAMID.HTML.

[6] Department of the Interior, "Criteria and Procedures for the Participation of the Federal Government in Negotiations for the Settlement of Indian Water Rights Groups," 55 *Federal Register* 9223, March 12, 1990. Hereinafter "Criteria and Procedures."

the position that negotiated settlements, rather than litigation, are the preferred method of addressing Indian water rights. As discussed in the below section "Steps in Settlement Process," the primary federal entities tasked with prenegotiation, negotiation, and implementation duties for Indian water rights settlements are DOI, the Department of Justice (DOJ), and the Office of Management and Budget (OMB).

DOI has the majority of responsibilities related to participating in and approving Indian water rights settlements. Within DOI, two entities coordinate Indian water settlement policy. First, the Working Group on Indian Water Settlements, established administratively in 1989 and comprised of all Assistant Secretaries and the Solicitor (and typically chaired by a counselor to the Secretary or Deputy Secretary), is responsible for making recommendations to the Secretary of the Interior regarding water rights settlements, including overarching policy guidance for settlements. Second, the Secretary of the Interior's Indian Water Rights Office (SIWRO) is responsible for oversight and coordination of Indian water rights settlements, including interfacing with negotiation and implementation teams for individual settlements, as well as tribes and other stakeholders. The SIWRO is led by a director who reports to the chair of the Working Group.[7]

DOI also appoints teams to work on individual Indian water rights settlements during the various stages of the settlement process (see below section, "Steps in Settlement Process"). Each team includes a chairman who is designated by the chair of the Working Group (i.e., the counselor to the Secretary) and who represents the Secretary in all settlement activities. Federal teams typically are composed of representatives from the Bureau of Indian Affairs (BIA), Bureau of Reclamation (Reclamation), U.S. Fish and Wildlife Service, Office of the Solicitor, and DOJ. The teams explain general federal policies on settlement and, when possible, help to develop the parameters of a particular settlement.

# Steps in Settlement Process

Broadly speaking, there are four steps associated with Indian water rights settlements: prenegotiation, negotiation, settlement, and implementation. The time between negotiation, settlement, and implementation can take several years. Each step, including relevant federal involvement, is discussed below.

## Prenegotiation

Prenegotiation includes any of the steps before formal settlement negotiations begin. This stage includes, in some cases, litigation and water rights adjudications that tribes have taken part in before deciding to pursue negotiated settlements. For instance, one of the longest-running cases in Indian water rights history, *New Mexico v. Aamodt*, was first filed in 1966; multiparty negotiations began in 2000 and took more than a decade to complete.[8]

[7] For specific information related to the Secretary of the Interior's Indian Water Rights Office public mission and personnel, see http://www.doi.gov//siwro/index.cfm.

[8] The final settlement was signed by all stakeholders in March 2013, following congressional enactment of the Omnibus Public Land Management Act of 2009 (P.L. 111-11), 124 Stat. 3064, 3134-3156, the Aamodt Litigation Settlement Act.

The federal government also has its own prenegotiation framework that may involve a number of phases, such as fact-finding, assessment, and briefings. More information on these roles (based on DOI's "Criteria and Procedures" statement) is provided below.[9]

## Federal Process for Prenegotiation

The fact-finding phase of the federal prenegotiation process is prompted by a formal request for negotiations with the Secretary of the Interior by Indian tribes and nonfederal parties. During this time, consultations take place between DOI and DOJ, which examine the legal considerations of forming a negotiation team. If the Secretary decides to establish a team, OMB is notified with a rationale for potential negotiations (based on potential litigation and background information of the claim). No later than nine months after notification, the team submits a fact-finding report containing background information, a summary and evaluation of the claims, and an analysis of the issues of the potential settlement to the relevant federal entities (DOI, DOJ, and OMB).

During the second phase, the negotiating team works with DOJ to assess the positions of all parties and develops a recommended federal negotiating position. The assessment should quantify all costs for each potential outcome, including settlement and no settlement. These costs can range from the costs for litigation to the value of the water claim itself.

During the third phase, the Working Group on Indian Water Settlements presents a recommended negotiating position to the Secretary. In addition to submitting a position, the working group recommends the funding contribution of the federal government, puts forth a strategy for funding the contribution, presents any views of DOJ and OMB, and outlines positions on major issues expected during the settlement process.

The actual negotiations process (see "Negotiation," below) is the next phase for the Working Group on Indian Settlements, in which OMB and DOJ are updated periodically. If there are proposed changes to the settlement, such as in cost or conditions, the negotiating position is revised following the procedures of the previous phases.

## Negotiation

The negotiation phase can be prolonged and may take years to resolve.[10] During this process, the federal negotiation team works with the parties to reach a settlement. The process generally is overseen by the aforementioned DOI offices, as well as by the BIA's Branch of Water Resources and Water Rights Negotiation/Litigation Program, which provide technical and factual work in support of Indian water rights claims and financial support for the federal government to defend and assert Indian water rights.[11] Reclamation's Native American Affairs Program also facilitates the negotiation of water rights settlements by providing technical support and other assistance.[12]

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[9] In some cases, "Criteria and Procedures" may be viewed as a general guide to the prenegotiation process. The actual structure and nature of the process may vary depending on the background of the settlement and the stakeholders involved.

[10] The average negotiation process takes five years; however, settlements are negotiated on a case-specific basis, the duration of which may be highly variable. Testimony of Jay Weiner, in U.S. Congress, Senate Committee on Indian Affairs, *Addressing the Needs of Native Communities through Indian Water Rights Settlements*, hearings, 114th Congress, 1st sess., May 20, 2015. Hereinafter Weiner, 2015.

[11] Testimony of Michael L. Connor, in U.S. Congress, Senate Committee on Indian Affairs, *Addressing the Needs of Native Communities through Indian Water Rights Settlements*, hearings, 114th Congress, 1st sess., May 20, 2015. Hereinafter Connor, 2015.

[12] Ibid.

In 2016, OMB issued guidance that it be more involved in the negotiation process, and it has laid out a set of requirements for DOI and DOJ to provide regular written updates on individual settlements.[13]

### Settlement

Once the negotiation phase has been completed and parties have agreed to specific terms, the settlement is typically presented for congressional authorization (as applicable).[14] In these cases, Congress typically must enact the settlement for it to become law and for projects outlined under the settlement to be eligible for federal funding. If Congress is not required to approve the settlement, the settlements generally may be approved administratively by the Secretary of the Interior or the U.S. Attorney General or judicially by judicial decree.

### Implementation

Once a settlement is approved (either administratively or by Congress), the SIWRO oversees its implementation through federal implementation teams. Federal implementation teams function much like federal negotiation teams, only with a focus on helping the Indian tribe(s) and other parties implement the settlement.

For settlements that began through litigation or adjudication, the settlement parties must reconvene to reconcile the original agreement with the settlement, along with any additional changes. After the Secretary of the Interior signs the revised agreement, the adjudication court conducts an inter se process in which it hears objections from any party. Once the court approves the settlement, it enters a final decree and judgment. The actual implementation usually is carried out by one or more federal agencies (typically Reclamation or BIA, based on terms of the agreement) that act as project manager.[15]

Altogether, the "Criteria and Procedures" statement stresses that the cost of settlement should not exceed the sum of calculable legal exposure and any additional costs related to federal trust responsibility and should promote comity, economic efficiency, and tribal self-sufficiency. Funding for the settlement itself typically is provided through Reclamation and/or BIA. However, in some cases other agencies contribute based on the particular terms of a settlement.[16]

## Status of Individual Indian Water Rights Settlements

The federal government has been involved with Indian water rights settlements through assessment, negotiation, and implementations teams (for enacted settlements) since 1990. As of

[13] Memo from John Pasquqantino, Deputy Associate Director, Energy, Science and Water Division, Office of Management and Budget, and Janet Irwin, Deputy Associate Director, Natural Resources Division, Office of Management and Budget to Letty Belin, Senior Counselor to the Deputy Secretary, Department of the Interior, June 23, 2016.

[14] In the past, the Administration has refrained from submitting formal legislative proposals for settlements to Congress and has instead commented on its support or opposition to individual settlements in testimony and/or letters of Administration position.

[15] Darcy C. Bushnell, "American Indian Water Rights Settlements," 2012, at http://uttoncenter.unm.edu/pdfs/American_Indian_Water_Right_Settlements.pdf.

[16] In the past, such agencies have included FWS and Bureau of Land Management.

2018, there were 21 ongoing negotiation teams working on settlements projected to cost more than $2 billion.[17] Additionally, there are 23 implementation teams active for carrying out approved settlements. Overall, the federal government has entered into 36 settlements since 1978, with Congress enacting 32 of these settlements. The remaining settlements were approved administratively by the Secretary of the Interior or the U.S. Attorney General or by judicial decree.

**Table 1** below lists enacted settlements as of the date of this report, while **Table 2** lists negotiation teams as of 2017 (the last time this information was made available).

**Table 1. Enacted Indian Water Rights Settlements**

(settlements by state and tribe)

| Year | Settlement and Legislation | State | Tribes | Total Acre-Feet Awarded per Year | Estimated Federal Cost (nominal $ in millions) |
|---|---|---|---|---|---|
| 1978 (1984, 1992, 2000) | Ak-Chin Indian Water Rights Settlement Act, P.L. 95-328 (P.L. 98-530, P.L. 102-497, P.L. 106-285) | AZ | Ak-Chin Indian Community of Papago Indians of the Maricopa | 85,000 | $101.1 |
| 1982 (1992) | Southern Arizona Water Rights Settlement Act, P.L. 97-293 (P.L. 102-497) | AZ | San Xavier and Schuk Toak Districts, Tohono O'Odham Nation | 66,000 | $39.8 |
| 1987 | Seminole Indian Land Claims Settlement Act of 1987, P.L. 100-228 | FL | Seminole Tribe of Florida | NA | NA |
| 1988 | Salt River Pima-Maricopa Indian Community Water Rights Settlement Act of 1988, P.L. 100-512 | AZ | Salt River Pima-Maricopa Indian Community of the Salt River Reservation | 122,400 | $47.5 |
| 1988 (2000) | Colorado Ute Water Rights Settlement of 1988, P.L. 100-585 (P.L. 106-554) | CO | Southern Ute, Ute Mountain Ute Tribes (and Navajo Nation) | 70,000 | $49.5 |
| 1988 | San Luis Rey Indian Water Rights Settlement Act of 1988, P.L. 100-675 (P.L. 114-322) | CA | La Jolla, San Pasquale, Pauma, Pala Bands of Mission Indians | NA | $30.0 |
| 1990 | Fort Hall Indian Water Rights Act of 1990, P.L. 101-602 | ID | Fort Hall Shoshone-Bannock Tribes | 581,331 | $22.0 |
| 1990 | Fallon Paiute Shoshone Indian Water Rights Settlement Act of 1990, P.L. 101-618 | NV | Paiute-Shoshone Tribe of the Fallon Reservation and Colony | 10,588 | $43.0 |
| 1990 | Truckee-Carson-Pyramid Lake Water Rights Act, P.L. 101-618 | NV/CA | Pyramid Lake Paiute Tribe | NA | $65.0 |
| 1990 (2006) | Fort McDowell Indian Community Water Rights Settlement Act of 1990, P.L. 101-628 (P.L. 109-373) | AZ | Fort McDowell Indian Community | 36,350 | $23.0 |

[17]Statement of Alan Mikkelsen, Senior Advisor to the Secretary, "Hearing on S. 2154, Kickapoo Tribe in Kansas Water Rights Settlement Agreement Act," U.S. Congress, Senate Committee on Indian Affairs, 115th Cong., 2nd sess., July 18, 2018.

| Year | Settlement and Legislation | State | Tribes | Total Acre-Feet Awarded per Year | Estimated Federal Cost (nominal $ in millions) |
|---|---|---|---|---|---|
| 1992 | Northern Cheyenne Indian Reserved Water Rights Settlement Act of 1992, P.L. 102-374 | MT | Northern Cheyenne Indian Tribe | 83,830 | $73.0 |
| 1992 (1998) | Jicarilla Apache Tribe Water Settlement Act of 1992, P.L. 102-441 (P.L. 105-256) | NM | Jicarilla Apache Indian Tribe | 40,000 | $6.0 |
| 1992 (1994, 1997, 2004) | San Carlos Apache Tribe Water Rights Settlement Act, P.L. 102-575 (P.L. 103-435, P.L. 105-18, P.L. 108-451) | AZ | San Carlos Apache Indian Tribe | 67,965 | $41.4 |
| 1992 | Ute Indian Rights Settlement Act of 1992, P.L. 102-575 | UT | Northern Ute Indian Tribe; Ute Indian Tribe of the Uintah and Ouray Reservation | 481,035 | $198.5 |
| 1994 | Yavapai-Prescott Indian Tribe Water Rights Settlement Act of 1994, P.L. 103-434 (P.L. 104-91) | AZ | Yavapai-Prescott Indian Tribe | 1,550 | $0.2 |
| 1999 | Chippewa Cree Tribe of the Rocky Boy's Reservation Indian Reserved Water Rights Settlement Act of 1999, P.L. 106-163 | MT | Chippewa Cree Indian Tribe | 20,000 | $46.0 |
| 2000 | Shivwits Band of the Paiute Indian Tribe of Utah Water Rights Settlement Act, P.L. 106-263 | UT | Shivwits Band of Paiute Indians | 4,000 | $24.0 |
| 2003 | Zuni Indian Tribe Water Rights Settlement Act of 2003, P.L. 108-34 | AZ | Zuni Indian Tribe | 10,600 | $19.3 |
| 2004 | Snake River Water Rights Act of 2004, P.L. 108-447 | ID | Nez Perce Tribe | 50,000 | $121.3 |
| 2004 | Arizona Water Settlements Act of 2004, P.L. 108-451 | AZ | Gila River Indian Community, Tohono O'odham Nation | 653,500 | $2,328.3[a] |
| 2008 | Soboba Band of Luiseño Indians Settlement Act, P.L. 110-297 | CA | Soboba Band of Luiseño Indians | 9,000 | $21.0 |
| 2009 | Northwestern New Mexico Rural Water Projects Act (Navajo-Gallup Water Supply Project/Navajo Nation Water Rights), P.L. 111-11 | NM | Navajo Nation | 535,330 | $984.1 |
| 2009 | Shoshone-Paiute Tribes of Duck Valley Water Rights Settlement Act, P.L. 111-11 | ID/ NV | Shoshone and Paiute Tribe of Duck Valley | 114,082 | $60.0 |
| 2010 | White Mountain Apache Tribe Water Rights Quantification Act of 2010, P.L. 111-291 | AZ | White Mountain Apache Tribe | 99,000 | $327.2 |
| 2010 | Crow Tribe Water Rights Settlement Act of 2010, P.L. 111-291 | MT | Crow Tribe | 697,000 | $461.0 |

| Year | Settlement and Legislation | State | Tribes | Total Acre-Feet Awarded per Year | Estimated Federal Cost (nominal $ in millions) |
|---|---|---|---|---|---|
| 2010 | Aamodt Litigation Settlement Act, P.L. 111-291 | NM | Nambé, Pojoaque, San Ildefonso, and Tesuque Pueblos | 6,467 | $174.3 |
| 2010 | Taos Pueblo Indian Water Rights Settlement Act, P.L. 111-291 | NM | Taos Pueblo Tribe | 9,628 | $124.0 |
| 2014 | Pyramid Lake Paiute Tribe–Fish Springs Ranch Settlement Act, P.L. 113-169 | NV | Pyramid Lake Paiute Tribe | NA | NA |
| 2014 | Bill Williams River Water Rights Settlement Act of 2014, P.L. 113-223 | AZ | Hualapai Tribe | NA | NA |
| 2016 | Pechanga Band of Luiseño Mission Indians Water Rights Settlement Act, P.L. 114-322 | CA | Pechanga Band of Luiseño Mission Indians | 4,994 | $28.5 |
| 2016 | Choctaw Nation of Oklahoma and the Chickasaw Nation Water Settlement, P.L. 114-322 | OK | Choctaw Nation of Oklahoma and Chickasaw Nation | NA | NA |
| 2016 | Blackfeet Water Rights Settlement Act, P.L. 114-322 | MT | Blackfeet Tribe | 50,000 | $420 |

**Sources:** Congressional Research Service (CRS), with information from the Department of the Interior (DOI) and the Secretary's Indian Water Rights Office (SIWRO); Attachments to Testimony of Steven C. Moore, in U.S. Congress, Senate Committee on Indian Affairs, hearings, *Addressing the Needs of Native Communities through Indian Water Rights Settlements*, 114th Congress, 1st sess., May 20, 2015; Bonnie G. Colby, John E. Thorson, and Sarah Britton, *Negotiating Tribal Water Rights: Fulfilling Promises in the Arid West*, 1st ed. (Tucson: University of Arizona Press, 2005), pp. 171-176. Additional information and documents were accessed through the Native American Water Rights Settlement Project (NAWRS), University of New Mexico, NM.

**Notes:** NA = Not applicable. Multiple public laws listed in the table signify amendments to laws, with amendments and corresponding years in parentheses. The federal cost of settlements is an estimate based on the amounts specifically authorized in enacted laws, though some settlements have unknown or unidentified sources of funding and these costs are not reflected in the chart. The column showing acre-feet awarded is based on amounts approved through congressionally enacted settlements and reflects total amounts as detailed in settlement agreements between stakeholders and interstate tribal compacts as well in federal legislation. These amounts generally are subject to specific conditions and allocations per use and tribe. For more information, see NAWRS at http://digitalrepository.unm.edu/nawrs/.

a. The Congressional Budget Office originally estimated that the 10-year cost of the legislation from FY2005 to FY2014 would be $445 million. However, the total costs of the bill beyond the 10-year window are considerably more than this amount and depend centrally on available balances in the Lower Colorado River Basin Development Fund. Based on information from the Bureau of Reclamation in January 2017, CRS estimated that approximately $2.328 billion was expected to be made available from the fund through FY2046. For more information, see below section, "Redirection of Existing Receipt Accounts."

## Table 2. Indian Water Rights Settlements with Negotiation Teams Appointed

| Common Name of Negotiation | State | Tribe(s) |
|---|---|---|
| Abousleman | NM | Pueblos of Jemez, Pueblo of Santa Ana, Pueblo of Zia |
| Agua Caliente | CA | Agua Caliente Band of Cahuila Indians |

| Common Name of Negotiation | State | Tribe(s) |
|---|---|---|
| Coeur d'Alene | ID | Coeur d'Alene Tribe |
| CSKT | MT | Confederated Salish and Kootenai Tribes of the Flathead Reservation |
| Fallbrook | CA | Cahuilla Band of Mission Indians, Pechanga Band of Luiseno Mission Indians, Ramona Band |
| Fort Belknap | MT | Gros Ventre and Assiniboine Tribes |
| Kerr McGee | NM | Pueblos of Acoma and Laguna and Navajo Nation |
| Kickapoo | KS | Kickapoo Tribe |
| Hualapai | AZ | Hualapai Tribe |
| Havasupai | AZ | Havasupai Tribe |
| Lummi | WA | Lummi Tribe and Nooksack Tribe |
| Navajo-Little Colorado | AZ | Navajo Nation, Hopi Tribe, San Juan Southern Paiute Tribe |
| Navajo-Utah | UT | Navajo Nation |
| Tohono O'odham | AZ | Tohono O'odham Nation |
| Tonto Apache | AZ | Tonto Apache Tribe |
| Tule River | CA | Tule River Indian Tribe |
| Upper Gila River/San Carlos | AZ | San Carlos Apache Tribe and Gila River Indian Community |
| Umatilla | OR | Confederated Tribes of the Umatilla Indian |
| Walker River | NV | Walker River Paiute Indian Tribe, Bridgeport Indian Colony, Yerington Paiute Tribe |
| Yavapai-Apache | AZ | Yavapai-Apache Nation |
| Zuni/Ramah Navajo | NM | Pueblo of Zuni and Ramah Navajo Nation |

**Source:** SIWRO, June 15, 2018.

**Note:** This list of teams is subject to frequent change and may contain inactive negotiations.

# Issues in the Consideration of Indian Water Rights Settlements

Once the stakeholders have agreed to initiate negotiation of a settlement, a number of issues may pose challenges to a successful negotiation and implementation of a settlement. Such challenges may include defining and finding a source of adequate funding for a settlement and contending with other issues within settlements, such as compliance with environmental regulations and identification of sources and conditions for water delivery. Congress may be asked to weigh in on one or more of these issues as they are considered.

## Funding

### Considerations in Funding Indian Water Rights Settlements

The delivery of wet water (as opposed to paper water) to tribes that have enacted settlement agreements frequently requires significant financial resources and long-term investments by the

federal government, often in the form of new projects and infrastructure.[18] For federal policymakers, a widely recognized challenge is identifying and enacting federal funding to implement settlements while also resulting in cost-savings relative to litigation. In response to concerns related to implementation costs, some settlements have been renegotiated over time to decrease their estimated federal costs. For instance, legislation to authorize the Blackfeet Compact was first introduced in 2010 and was subsequently renegotiated and revised, resulting in a reduction to estimated federal costs by approximately $230 million (nominal dollars) compared to the version of this legislation that was introduced in 2016.[19] Partially in response to concerns related to justifying the costs of proposed settlements, OMB issued a memo to DOI and DOJ on June 23, 2016, outlining new steps that would provide for greater involvement by OMB earlier in the settlement negotiation process. OMB also stated that it would require, among other things, a description and quantification of the costs and benefits of proposed settlements by DOI and DOJ prior to a formal letter of Administration position.[20]

After a preferred federal contribution is identified and agreed upon, other challenges include identifying the source and structure of federal funding proposed for authorization. Recent congressionally authorized Indian water rights settlements have been funded in various ways, including through discretionary funding authorizations (i.e., authorizations that require annual appropriations by Congress); direct or mandatory funding (i.e., spending authorizations that do not require further appropriations); and combinations of both. In regard to mandatory funding, some settlements have been funded individually and several others have been funded with mandatory spending from a single account, the Reclamation Water Settlements Fund (see "Combined Mandatory/Discretionary Funding," below). Additionally, some have tapped preexisting or related federal receipt accounts as the source for mandatory funding. The timing of the release of funds also has varied widely among settlements and may in some cases depend on expected future actions (e.g., contingent on completion of plans and/or certain nonfederal activities).

Selected examples of how recent Indian water rights settlements have been funded are discussed below. These sections describe different structural approaches to funding Indian water rights settlements that have been approved by Congress in the past, including when and how the funding is expected to be released (if applicable). They also discuss another source that is sometimes mentioned in this context, the DOJ Judgment Fund in the Department of the Treasury.

## Examples of Funding Sources

### Discretionary Funding

Discretionary spending, or spending that is subject to appropriations, historically has been the most common source of funding for congressionally approved Indian water rights settlements. In many cases, Congress has authorized the appropriations of specific sums for individual settlements, including individual funds within the settlement. For example, the Pechanga Band of Luiseño Mission Indians Water Rights Settlement Act (P.L. 114-322, Title III, Subtitle D) approved the Pechanga Water Rights Settlement. This legislation established the Pechanga Settlement Fund and four accounts within it: (1) Pechanga Recycled Water Infrastructure account;

[18] These implementation costs are in addition to the costs associated with negotiating the settlements.

[19] Testimony of John Bezdek, Senior Adviser to the Deputy Secretary of the U.S. Department of the Interior, in U.S. Congress, House Natural Resources Committee, Subcommittee on Water and Power, *Legislative Hearing on Water Settlements*, 114th Congress, 2nd sess., May 24, 2016.

[20] See footnote 13.

(2) Pechanga ESAA Delivery Capacity account; (3) Pechanga Water Fund account; and (4) Pechanga Water Quality account. These accounts are authorized to receive future discretionary appropriations from Congress totaling to $28.5 million, and the funds must be spent by April 30, 2030.

Congress also has chosen to authorize discretionary appropriations of "such sums as may be necessary" at times. For instance, the Colorado Ute Settlement Act Amendments of 2000 (Title III, P.L. 106-554) authorized the implementation and the operations and maintenance of the Animas-La Plata project and authorized Reclamation to construct these facilities using such sums as may be necessary.[21]

## Combined Mandatory/Discretionary Funding

Two major pieces of settlement legislation in the 111th Congress authorized a combination of mandatory and discretionary spending for Indian water rights settlement and are discussed below.

### *Omnibus Public Land Management Act of 2009 (P.L. 111-11)*

Title X of the Omnibus Public Land Management Act of 2009 (P.L. 111-11) authorized mandatory spending for accounts with broadly designated purposes aligning with Indian water rights settlements. It also included discretionary funding for a number of settlements. This legislation created a new Treasury Fund, the Reclamation Water Settlements Fund, and scheduled funds to be deposited and available in this account beginning in 2020. The act directed the Secretary of the Treasury to deposit $120 million into the fund for each of the fiscal years 2020 through 2029 (for a total of $1.2 billion).[22] The fund may be used to implement a water rights settlement agreement approved by Congress that resolves, in whole or in part, litigation involving the United States, and it may be used if the settlement agreement or implementing legislation requires Reclamation to provide financial assistance for or to plan, design, or construct a water project.[23] The act also assigned tiers of priority to access these funds in the following order:

- First-tier priority is assigned to the Navajo-Gallup Water Supply Project (a key element of the Navajo Nation Water Rights Settlement), the Aamodt Settlement, and the Abeyta Settlement;[24] and
- Second-tier priority is assigned to the settlements for the Crow Tribe, the Blackfeet Tribe, and the Tribes of the Fort Belknap reservation, as well as the Navajo Nation in its water rights settlement over claims in the Lower Colorado River basin.[25]

If Congress does not approve and authorize projects that are given priority under the legislation by December 31, 2019, the amounts reserved for the priorities are to revert to the Reclamation Water Settlement Fund for any other authorized use of the fund under the act. Thus, if there were any "leftover" funding, these funds could be available for other authorized Indian water rights

[21] P.L. 106-554, §303.

[22] The funds were directed from the revenues that otherwise would be deposited into the Reclamation Water Settlements Fund and were made available without any further appropriations.

[23] 43 U.S.C. §407.

[24] Neither the Aamodt nor the Abeyta Settlements were authorized in P.L. 111-11; they were subsequently authorized in P.L. 111-291 (see "Claims Resolution Act of 2010 " below).

[25] Of these, the Navajo-Gallup, Aamodt, Abeyta, Blackfeet, and Crow Tribe Settlements have been approved.

settlements. The fund itself is scheduled to terminate on September 30, 2034, and the unexpended and unobligated balance of the fund will be transferred to the Treasury at that time.

In addition to the mandatory funds noted above, P.L. 111-11 also authorized $870 million in discretionary appropriations for the Navajo-Gallup project.

### *Claims Resolution Act of 2010 (P.L. 111-291)*

Although P.L. 111-11 provided an appropriation of mandatory funding to be used by several settlements at a future date, provisions in the Claims Resolution Act of 2010 (P.L. 111-291) authorized and provided direct or mandatory spending for four individual water rights settlements.[26] P.L. 111-291 also included discretionary funding for some of these settlements and additional mandatory funding for the Navajo-Gallup project (authorized in P.L. 111-11). Among other things, P.L. 111-291

- authorized and appropriated approximately $82 million in mandatory funding for the Aamodt Settlement in a newly created Aamodt Settlement Pueblos' Fund and authorized an additional $93 million in discretionary funding subject to appropriations;
- authorized the Abeyta Settlement, appropriated $66 million in mandatory funds for implementation of that agreement in a newly created Taos Pueblos' Water Development Fund, and authorized an additional $58 million in discretionary funding subject to appropriations;
- authorized the Crow Tribe Water Rights Settlement, appropriated $302 million in mandatory funding for that agreement, and authorized an additional $158 million in discretionary funding subject to appropriations;
- authorized the White Mountain Apache Tribe water rights quantification, appropriated mandatory funding of approximately $203 million to multiple sources to carry out that settlement, and authorized an additional $90 million in discretionary appropriations; and
- authorized and appropriated a total of $180 million from FY2012 to FY2014 in mandatory funding to the Reclamation Water Settlements Fund established under P.L. 111-11 to carry out the Navajo-Gallup Water Supply Project authorized in that same legislation.[27]

## Other Funding Sources

### *Redirection of Existing Receipt Accounts*

Other water rights settlements have been funded through additional mechanisms, including redirection of funds accruing to existing federal receipt accounts. These funds may differ from traditional mandatory funds in that they make available funding without further appropriations but they also depend on the amount of funding accruing to such an account. For example, the Arizona Water Settlements Act (P.L. 108-451) authorized water rights settlements for the Gila River Indian Community (GRIC) and the Tohono O'odham Nation, respectively. Both water

[26] Some of these settlements were among the priorities laid out in P.L. 111-11.

[27] The figures included in this section are CRS estimates (real dollars) of the amounts provided based on the enrolled version of the bill. They should not be considered estimates of the enacted bills or appropriations allocated for these purposes.

rights settlements required funding for delivery infrastructure associated with water deliveries from the Central Arizona Project (CAP). To fund these costs, P.L. 108-451 required that certain CAP repayments and other receipts that accrue to the previously existing Lower Colorado River Basin Development Fund (LCRBDF, which averages receipts of approximately $55 million per year) be made available annually, without further appropriation (i.e., mandatory funding) for multiple purposes related to the GRIC and Tohono O'odham settlements. For instance, the bill required that after FY2010, deposits totaling $53 million be made into a newly established Gila River Indian Community Operations Maintenance and Rehabilitation Trust Fund, to assist in paying for costs associated with the delivery of CAP water. In addition to a number of other settlement-related spending provisions, the bill stipulated that up to $250 million in LCRBDF receipts be made available for future Indian water rights settlements in Arizona. However, if sufficient LCRBDF balances are not available for any of the bill's priorities, then funding is to be awarded according to the order in which these priorities appear in the bill.[28]

### *Judgment Fund*

Another potential source of payment for Indian water rights settlements could be the Judgment Fund, which is a permanent indefinite appropriation available to pay all judgments against the United States that are "not otherwise provided for" by another funding source.[29] Certain criteria must be met for a payment to come out of the Judgment Fund. First, the judgment must be monetary and final, so that payments are not made from the Judgment Fund when there is a chance the award could be changed or overturned.[30] Second, the payment must be certified by the Secretary of the Treasury, who has delegated administration of the Judgment Fund to the Bureau of the Fiscal Service.[31] Finally, payment of the judgment, award, or settlement either must be authorized by certain statutes[32] or must be a final judgment rendered by a district court, the Court of International Trade, or the U.S. Court of Federal Claims.[33] Alternatively, payment can stem from a compromise settlement negotiated by the Attorney General (or any authorized person) if such settlement arises under actual litigation or is in "defense of imminent litigation or suits against the United States."[34]

Many judgments are paid from the Judgment Fund because the operating appropriations of federal agencies are "generally not available to pay judgments."[35]

The government historically has entered into compromise settlements with Indians and Indian tribes on a variety of legal issues, and both the federal district courts and the U.S. Court of

[28] For additional background on this settlement, see CRS memo on the Arizona Water Settlements Act, available to congressional clients from the author upon request.

[29] 31 U.S.C. §1304. Congress established the Judgment Fund in 1956 (70 Stat. 694).

[30] McDonald v. Schweiker, 726 F.2d 311, 313 (7th Cir. 1983). See also Comptroller General Opinion, B-279886 (Apr. 28, 1998) (concluding that a court order directing the United States to pay the costs of supervising an election rerun was "more in the nature of injunctive relief than a monetary award of damages" and therefore not payable from the Judgment Fund).

[31] 31 C.F.R. Part 256. http://www.fiscal.treasury.gov/fsservices/gov/pmt/jdgFund/judgementFund_home.htm.

[32] 31 U.S.C. §1304(a)(3) (including statutes such as 31 U.S.C. §3723 [Small Claims Act]; 10 U.S.C. §2733 [Military Claims Act]; 28 U.S.C. §§2672, 2677 [Federal Tort Claims Act]).

[33] 31 U.S.C. §1304(a)(3) (citing 28 U.S.C. §§2414, 2517).

[34] Ibid.

[35] Bureau of the Fiscal Service, *Judgment Fund: Background*, at http://www.fiscal.treasury.gov/fsservices/gov/pmt/jdgFund/background.htm.

Federal Claims generally can hear suits brought by Indian tribes.[36] The Judgment Fund has been used to pay for some of these settlements. For example, Title I of the Claims Resolution Act of 2010 (CRA; P.L. 111-291) authorizes and implements the settlement reached in the *Cobell v. Salazar* litigation.[37] Under the act, Congress directed the Secretary of the Treasury to establish a Trust Land Consolidation Fund and deposit into it $1.9 billion "out of the amounts appropriated to pay final judgments, awards, and compromise settlements" under the Judgment Fund.[38] For purposes of this transfer, the act also states that the statutory conditions of the Judgment Fund have been met.[39] Notably, although the CRA included a number of separate water rights settlements with specific Indian tribes, it appears to have set up other funding mechanisms for the Indian tribes' water rights settlements, as it did not specifically direct payment from the Judgment Fund.

For example, although Title III of the CRA authorized mandatory funding of approximately $203 million to multiple sources to carry out the White Mountain Apache Tribe (WMAT) Water Rights Quantification Agreement and authorized an additional $90 million in discretionary appropriations (see reference to this legislation in the previous section, "Combined Mandatory/Discretionary Funding"), it established various funds from which these moneys could be used. One such fund is the WMAT Settlement Fund, for which Congress authorized $78.5 million to be appropriated to the Secretary of the Treasury.[40] This language indicates that Congress must act separately to appropriate funds so that the Secretary may then transfer $78.5 million into the WMAT Settlement Fund. The CRA established a second fund, the WMAT Maintenance Fund, for which Congress mandated appropriations by directing the Secretary to transfer $50 million "out of any funds in the Treasury not otherwise appropriated."[41] This language indicates that the funds will be transferred, without a separate appropriation, from the U.S. Treasury General Fund, which is "the largest fund in the Government ... [and] is used for all programs that are not supported by trust, special, or revolving funds."[42]

As mentioned above, if there is another source of funding provided for by appropriation or statute, regardless of the actual funding level, then payment from the Judgment Fund is precluded. Courts look for an appropriation that has programmatic specificity, regardless of the

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[36] See, for example, 28 U.S.C. §1362 (Indian tribes and federal district court jurisdiction); 28 U.S.C. §1505 (Indian claims in the U.S. Court of Federal Claims).

[37] P.L. 111-291, Title I (2010). The Cobell v. Salazar litigation was brought by Elouise Cobell on behalf of herself and similarly situated Indians for an accounting of funds held by the federal government in Individual Indian Monies (IIM) accounts.

[38] P.L. 111-291, §101(e)(1)(C)(i).

[39] P.L. 111-291, §101(e)(1)(C)(ii). The act further directed the Secretary of the Treasury to deposit into the Trust Administration Adjustment Fund of the Settlement Account $100 million "out of the amounts appropriated to pay final judgments, awards, and compromise settlements" under the Judgment Fund. Similarly, the act stated that statutory conditions of the Judgment Fund have been met for purposes of this transfer. (§101(j)).

[40] P.L. 111-291, §312(b)(2).

[41] P.L. 111-291, §312(b)(3).

[42] See Office of Management and Budget, *Fiscal Year 2015 Analytical Perspectives: Budget of the U.S. Government*, p. 373, at https://www.gpo.gov/fdsys/pkg/BUDGET-2015-PER/pdf/BUDGET-2015-PER.pdf.

Guidance from the Government Accountability Office (GAO) indicates that when Congress provides private relief for a claim through a private or public law and "directs payment by the Secretary of the Treasury 'out of any money in the Treasury not otherwise appropriated' and does not indicate any more specific source of funds for payment, [that] payment is charged to the permanent and indefinite account 20x1706 (Relief of Individuals and Others Obtained By Private and Public Laws) and is made directly by the Treasury Department." GAO Red Book, pp. 14-29, 14-30. It is unclear whether the "permanent and indefinite account" referenced is the Judgment Fund and whether implementation of water settlement agreements by law would be considered granting private relief.

agency's use of the funds.[43] For example, if an agency already had spent an appropriated sum on other litigation or expended the money elsewhere (as in many of the above examples of Indian water rights settlements), then payment from the Judgment Fund for all or part of the award may be precluded. Under these circumstances, the agency would have to seek an additional appropriation from Congress.[44] In the future, whether the Judgment Fund may be used for payments related to Indian water settlement agreements seems to depend on the nature of the claim, the substantive law at issue, existing sources of funding, and the forum in which the award is made.

## Compliance with Environmental Laws

The environmental impact of settlements has been an issue for federal agencies, environmental groups, and tribes, among others. In some cases, construction of settlement projects has been challenged under federal environmental laws, such as the National Environmental Policy Act of 1969[45] (NEPA; P.L. 91-190), the Clean Water Act[46] (CWA; P.L. 92-500), the Endangered Species Act of 1973[47] (ESA; P.L. 93-205), and the Safe Drinking Water Act[48] (P.L. 93-523). Because some settlements involve construction of new water projects (such as reservoirs, dams, pipelines, and related facilities), some have argued that settlements pose negative consequences for water quality, endangered species, and sensitive habitats.

For example, the Animas-La Plata project,[49] originally authorized in the Colorado River Basin Project Act of 1968 (P.L. 84-485) and later incorporated into the Colorado Ute Water Rights Settlement Act of 1988 (P.L. 100-585), faced opposition from several groups over the alleged violation of various environmental laws.[50] Additionally, the U.S. Environmental Protection Agency raised concerns that the project would negatively affect water quality and wetlands in New Mexico. These and other concerns stalled construction of the project for a decade.[51] The Colorado Ute Settlement Act Amendments of 2000 (P.L. 106-554) amended the original settlement to address these concerns by significantly reducing the size and purposes of the project and codifying compliance to NEPA, CWA, and ESA.[52] Other enacted settlements that initially

[43] For example, courts have held that annual appropriations to the Land and Water Conservation Fund must be used where there is a land condemnation judgment against the U.S. Park Service. United States v. 14,770.65 Acres of Land, More or Less, Situated in Richland County, State of S.C., 616 F. Supp. 1235, 1248-1253 (D.S.C. 1985).

[44] GAO, *Principles of Appropriation (GAO Red Book)*, third edition, volume III, Chapter 14, "Claims Against and By the United States," pp. 14-39.

[45] 42 U.S.C. §4321.

[46] 42 U.S.C. §7401.

[47] 16 U.S.C. §1531.

[48] 42 U.S.C. §300f.

[49] The project, located in southwestern Colorado and northwestern New Mexico, consists of a 270 foot dam, a lake with 123,000 acre-feet of storage, a pumping plant and pipeline to deliver water to the Navajo nation, among other things.

[50] In 1990, the FWS issued a draft biological opinion on the potential threat to the Colorado pikeminnow, an endangered fish species. Similarly, the Sierra Club Legal Defense Fund claimed that the Animas-La Plata project would harm the Colorado pikeminnow as well as the razorback sucker. McCool, 2002, p. 146.

[51] During this time, Reclamation completed several supplemental environmental impact statements and made changes to the project based on reasonable and prudent alternatives suggested by FWS. For more information, see Brian A. Ellison, "Bureaucratic Politics, the Bureau of Reclamation, and the Animas-La Plata Project," *Natural Resources Journal*, vol. 49, no. 2 (Spring 2009), pp. 381-389.

[52] Jebediah S. Rogers and Andrew H. Gahan, *Animas-La Plata Project*, U.S. Bureau of Reclamation, History of Reclamation Projects, 2013, p. 21, at http://www.usbr.gov/history/ProjectHistories/Animas_La_Plata%20D1%20%5B1%5D.pdf.

encountered opposition stemming from environmental concerns include the Jicarilla Apache Tribe Water Settlement Act of 1992 (P.L. 102-441) and the Yavapai-Prescott Indian Tribe Water Rights Settlement Act of 1994 (P.L. 103-434).

## Water Supply Issues

In addition to the need to quantify reserved water rights, a key difficulty during the negotiation process is identifying a water source to fulfill reserved water rights. Generally, this is done through reallocating water to tribes from existing sources, as was done for selected tribes in Arizona and the Central Arizona Project under the Arizona Water Settlements Act of 2004 (P.L. 108-451). In some cases, settlements have provided funds for tribes to acquire water from willing sellers.[53] In addition to identifying and quantifying a water source, settlements can address the type of water (i.e., groundwater, surface water, effluent water, stored water) and the types of uses that are held under reserved water rights (e.g., domestic, municipal, irrigation, instream flows, hunting and fish, etc.) as well as water quality issues.

Another common issue addressed within settlements is the question of whether to allow for the marketing, leasing, or transfer of tribal water. Twenty-one of the 32 congressionally enacted settlements permitted some form of marketing, leasing, or transferring, ranging from limited off-reservation leasing to less restrictive forms of marketing.[54] This exchange of water can provide dual benefits of better water reliability in areas of scarce supplies and economic incentives to tribes. At the same time, some tribes and state users oppose any allowance for water marketing in settlements. Some members within tribes object to the exchange of water on religious and cultural grounds, due to the belief that water is fundamentally attached to tribal life and identity.[55] Some non-Indians oppose allowances for water marketing in these agreements when marketing has the potential to increase the price of water that otherwise might be available for free to downstream water users and thus potentially could harm regional economies.[56] As such, negotiating the right to market, lease, or transfer water can be a contentious issue that results in several restrictions to mitigate potential negative impacts.

## Debating the "Certainty" of Settlements

The certainty of Indian water rights settlements is commonly cited as a multilateral benefit for the stakeholders involved. Supporters regularly argue that mutual benefits accrue as a result of these agreements: tribes secure certainty in the form of water resources and legal protection, local users and water districts receive greater certainty and stability regarding their water supplies, and the federal and state governments are cleared from the burden of potential liability.

Some tribal communities have objected to settlements based on these principles. They have argued that the specific, permanent quantification of their water rights through settlements may serve to limit the abilities of tribes to develop in the future.[57] Similarly, some have argued against settlements as they may limit tribes to a particular set of uses (e.g., agriculture) and prevent

[53] One such example of this is the Zuni Indian Tribe Water Rights Settlement Act (P.L. 108-34), in which the Zuni Indian Tribe Water Rights Development Fund was created for the tribe to purchase or acquire water rights rather than realize its federal reserved water rights as is common for other settlements.

[54] CRS analysis of congressionally enacted settlements and available settlement agreements and compacts.

[55] McCool, p. 170.

[56] McCool, pp.168-169.

[57] McCool, pp. 81, 85.

potential opportunities for greater economic yields in the future.[58] Some contend that to avoid use-based limitations, water rights settlements should focus on allowing water leasing and marketing (see discussion in "Water Supply Issues," above) so tribes can control and use their water resources with greater flexibility. Still others have spoken out against the idea of negotiated settlements entirely, as they oppose negotiating their claims in exchange for lesser water rights and money. They view the process as akin to the "first treaty era," when Indian tribes forfeited their lands.[59] They note that in the future, the courts may be more favorable and allow for greater gains through litigation.

Nontribal users also may raise their own concerns with the certainty of water rights settlements. Some water users have complained that provisions in certain settlements have the potential to maintain or even increase uncertainty associated with their water rights. For example, some water users in western Montana have raised concerns that the Confederated Salish and Kootenai Tribes (CSKT) Water Compact recognizes off-reservation water rights with the potential to significantly curtail nontribal water rights beyond those quantified in the CSKT Compact.

# Legislative Questions

Several common questions that are raised often in regard to Indian water rights settlements are discussed below.

## Why Is the Federal Government Involved in Indian Water Rights Settlements?

Although settlements essentially act as a quid pro quo relationship among the many stakeholders involved, the federal government's role in all stages of the settlement process serves as a way to fulfill its trust responsibility to the tribes to secure, protect, and manage the tribes' water rights. Furthermore, many tribes have breach-of-trust claims against the federal government. Settlements (including those that provide for federal resources and funding for new water infrastructure) provide an opportunity for tribes to formally waive these claims and potentially resolve these disputes.

## Has Negotiating Settlements Been Successful?

It is difficult to make broad characterizations of the impact of Indian water rights settlements. As of 2019, the federal government has been involved in the negotiation of more than 50 Indian water rights settlements. As previously noted, 36 of these negotiations have resulted in federal settlements with tribes and others. Whether these settlements have been successful depends in part on the metric used to define success. In most cases, the settlements have secured rights and access (or potential access) to tribal water resources. However, many of the projects to provide this access are ongoing, so it is not possible to characterize their end result for tribes and the federal government. Further, the extent to which settlements eventually achieve their anticipated benefits likely will vary among individual settlements. Some (including both Indian and non-Indian users) who support negotiating settlements in general may disagree with the contents or

[58] Bonnie G. Colby, John E. Thorson, and Sarah Britton, *Negotiating Tribal Water Rights: Fulfilling Promises in the Arid West*, 1st ed. (Tucson: University of Arizona Press, 2005), p. 13. Hereinafter Colby et al.

[59] McCool, p. 85.

outcomes of specific settlements. Others may contend that other means (i.e., litigation) are more appropriate for solving these issues.

## What Is the Funding Status of Current Enacted Settlements?

Due to the mix of discretionary and mandatory funds involved, it can be difficult to track the funding status of Indian water rights settlements. CRS estimates that as of FY2019, the federal government had appropriated more than $2.9 billion in nominal discretionary funding to implement Indian water rights settlements, plus an additional $4.3 billion in mandatory funds that have been made available or are expected to be made available in future years pursuant to authorizing legislation.[60] These appropriations have been provided to multiple agencies, including Reclamation, BIA, the Bureau of Land Management, and the U.S. Fish and Wildlife Service. The total amount of authorized Indian water rights settlements is not formally tracked by the Administration. In early 2019, DOI estimated that Reclamation had a backlog of $1.3 billion in "authorized but unfunded" Indian water rights settlements.[61] Presumably, any future authorized settlements without associated mandatory funding commitments would add to this total.

## What Types of Activities Typically Are Authorized in Indian Water Rights Settlements?

Settlements are negotiated on a case-by-case basis, so the details of each settlement vary and are related to specific issues between tribes and water users in a given area. Generally, most settlements ratify agreements and compacts that have been reached by stakeholders; authorize reallocation and delivery of water from existing sources; and authorize construction and funding for new water projects that are built by Reclamation (and in many cases, transferred to the tribes). In addition to providing access to water, most settlements have resulted in tribal development funds into which the Secretary of the Interior makes scheduled payments for the purpose of economic development and to cover various costs of managing water projects.

As previously stated, quantification and types of use are general issues within settlements, although additional benefits can be prominent factors as well. For example, numerous settlements have been negotiated to include provisions that would establish programs for fish and wildlife protection as well as ecosystem restoration.[62] In other cases, tribes and settlements have focused less on specific quantification and more on securing greater control of their rights or pursuing alternative forms of gaining water rights—for example, P.L. 100-228 approved an agreement that would allow the Seminole Tribe of Florida to administer its water rights and possess jurisdiction to manage its water resources with a water district at no cost to the federal government. In another

[60] Congressional Research Service analysis of Department of Interior data.

[61] This is the estimated discretionary funding requirement to complete authorized settlements, after mandatory funds and other authorized funding streams are taking into account. Bureau of Reclamation, "FY2020 President's Budget Stakeholder's Briefing," March 19, 2019.

[62] The Truckee-Carson-Pyramid Lake Water Rights Act (P.L. 101-618) established a fund to promote fish recovery efforts for the cui-ui, a threatened species and culturally significant fish to the Pyramid Lake Paiute tribe. The Snake River Water Rights Act of 2004 (P.L. 108-447) established two funds for restoring and improving fish habitats, with a particular focus on instream flow protection for salmon. In addition to these settlements, the Shivwits Band of the Paiute Indian Tribe of Utah Water Rights Settlement Act (P.L. 106-263) and the Zuni Indian Tribe Water Rights Settlement Act of 2003 (P.L. 108-34) included provisions and funding for habitat acquisition and wetland restoration, respectively.

case, the Zuni Indian Tribe waived certain claims to water to gain federal funds to purchase water rights from willing sellers.[63] And, in many cases, settlements have authorized conditions for water marketing and leasing for tribes, although the degree to which this is allowed varies by settlement.

# Recent Indian Water Rights Settlement Legislation

Since 2009, Congress has enacted nine Indian water rights settlements involving 13 tribes, at an authorized federal cost of more than $2 billion. These settlements were enacted in four bills: P.L. 111-291 (The Claims Resolution Act of 2010); P.L. 113-169 (the Pyramid Lake Paiute-Fish Springs Ranch Settlement Act); P.L. 113-223 (the Bill Williams River Water Rights Settlement Act of 2014); and P.L. 114-322 (the Water Infrastructure Improvements for the Nation Act, or WIIN). Several of these settlements, including those enacted by the 113th Congress and the Choctaw Nation and Chickasaw Nation Water Settlement Act included in WIIN, were not associated with any new federal funding authorizations or appropriations.

An issue related to Indian water rights settlements in recent Congresses has been the circumstances under which this type of legislation is to be transmitted and considered. During the 115th Congress, the chairman of the House Natural Resources Committee sent a letter to the Attorney General and the Secretary of the Interior outlining the committee's process and expectations for considering Indian water rights settlement legislation (this process was similar to that used by the committee dating in the 114th Congress).[64]These requirements included the following:

- A statement by the relevant departments (i.e., DOI and DOJ) affirming that each proposed settlement adheres to current executive branch criteria and procedures.
- Specific affirmation by the departments that the cost of a settlement to all parties does not exceed the value of the existing claims as calculated by the federal government and that federal contributions do not exceed the sum of calculable legal exposure and federal trust or programmatic responsibilities.
- Conveyance to a court by DOJ and agreement in writing by all settling parties to the settlement, pending a legislative resolution.
- Approval in writing by the departments of the legislative text needed to codify the settlement.
- Consent to being available to testify by DOJ.
- Listing of the legal claims being settled by both departments.

It is unclear to what extent any of these requirements will continue to apply in the 116th Congress.

## Navajo Utah Settlement

In the 116th Congress, H.R. 644 and S. 1207 would both approve a settlement resolving water rights claims of the Navajo Nation on the San Juan River in the Upper Colorado River Basin in Utah. It would authorize the Secretary of the Interior to establish a Navajo Water Development

[63] P.L. 108-34.

[64] Letter from Rob Bishop, Chairman, House Natural Resources Committee, to Jeff Sessions, Attorney General, and Ryan Zinke, Secretary of the Interior, April 17, 2017, at https://naturalresources.house.gov/uploadedfiles/04.27.17_ltr_to_ag_sessions_and_secretary_zinke_re_indian_water_rights_s.... pdf. Hereinafter, Bishop Letter.

Trust Fund and would authorize appropriations (plus any interest on these deposits) for two accounts to be established within the fund:

1. The Navajo Water Development Projects Account, which would be authorized to receive appropriations of $198.3 million, adjusted for inflation, for municipal water supply projects.
2. The Navajo OM&R Account, which would be authorized to receive appropriations of $11.1 million for water supply facility operations and maintenance activities.

In addition, $1 million in nontrust fund appropriations would be authorized for the Department of the Interior to implement the settlements. The bill would reserve tribal access (through the project) to as much as 81,500 acre-feet per year from water sources adjacent to or within the Navajo Nation's reservation in Utah. This depletion would be subtracted from the State of Utah's Colorado River allocation. In return, parties (including the Navajo Nation, the United States, and the State of Utah) would waive and release most claims associated with this settlement.[65] Additionally, the Navajo Nation has agreed to subordinate its water rights under the settlement to existing, non-Indian uses. According to the Navajo Nation, this could result in water shortages for the tribe 11% to 46% of the time when its full 81,500 acre-feet water right is put to use.[66]

Earlier versions of the Navajo Utah Settlement legislation (e.g., introduced versions in the 115th Congress) adhered to the historically common practice of authorizing funds for Reclamation to construct new water resource facilities for the tribe. However, the fund-based approach evidenced in the current version of the legislation, in which the department would release funds from the Trust Fund to the Navajo Nation for expenditures as needed, represents a notable departure from this model. Advocates of the approach believe it may help to avoid cost overruns and would have the added benefit of supplementing available funds by accumulating interest.[67] While the Navajo Nation supports this approach for this proposed settlement, it is unclear if other tribes with pending water-rights claims would support such a fund-based template for future settlements.

## Reclamation Water Settlements Fund Extension

Congress is also considering the extension of mandatory funding for the Reclamation Water Settlement Fund, which was originally enacted in 2009. In the 116th Congress, H.R. 1904 and S. 886 would both extend the aforementioned $120 million per year in mandatory funds for the Reclamation Water Rights Settlement Fund to make these amounts available in perpetuity. The annual transfer to this fund is currently set to begin in FY2020 and occur annual through FY2029. The bill would allow these transfers to continue, and would not alter the priority tiers laid out currently laid out for the fund. In absence of specific prioritized settlements, funding would be available for other settlement agreements that require the planning, design and construction of water supply infrastructure, project.to rehabilitate existing water delivery systems, or projects restore fish and wildlife habitat affected by Reclamation projects.

[65] Pursuant to the legislation, the State of New Mexico would reserve rights to certain claims. See §10(e) of the bill.

[66] U.S. Congress, Senate Committee on Indian Affairs, *Hearing before the Senate Committee on Indian Affairs*, Hearing on S. 664 and S. 1770, 115th Cong., 1st sess., December 6, 2017, S. Hrg. 115-179 (Washington: GPO, 2018). Hereinafter "S. Hrg. 115-179."

[67] U.S. Congress, Senate Committee on Indian Affairs, *To Approve the Settlement of the Water Rights Claims of the Navajo Nation in Utah, to Authoirze Construction of Projects in Connection Therewith, and for Other Purposes*, Report to Accompany S. 664, 115th Cong., 2nd sess., November 29, 2018, S. Rept. 115-401 (Washington: GPO, 2018).

# Conclusion

Long-standing disputes over water rights and use involving Indian tribes continue to be negotiated and settled by the executive branch and are thus likely to be an ongoing issue for Congress. This matter includes implementation of ongoing Indian water rights settlements, negotiation of new settlements, and consideration of these settlements for potential enactment and subsequent funding. As of the end of the 115th Congress, 32 settlements had been enacted since 1978, and 4 settlements had been approved administratively. Additional funding for ongoing settlements and authorization of and appropriations for new settlements are likely to be requested in the future. In considering Indian water rights settlements, primary issues for Congress may include the cost, contents, and sufficiency of federally authorized efforts to settle tribal water rights claims, as well as the circumstances under which these settlements are considered and approved by authorizing committees and others (i.e., whether the settlements are accompanied by formal statements of Administration support, cost estimates, etc.). In addition, the preferred extent of federal involvement in implementing settlements, including the question of whether the federal government or tribes should take the lead in developing and constructing projects, may be of interest to Congress.

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