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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 among tribes, the federal government, states, water districts, and private water users, and 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 estimated 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 in perpetuity the Reclamation Water Settlements Fund, which is currently scheduled to provide $120 million per year in mandatory funds for these settlements through FY2029.

Several individual Indian water rights settlements have recently been considered and approved by Congress, including three that were enacted during the 114th Congress. In addition to opposition to some proposed settlements, one of the primary challenges facing new settlements is the availability of federal funds and the related question of cost-shares among federal, state, local, and tribal interests.

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 among 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 whether to enact new settlements completing negotiations but also questions related to the current process for negotiating and recommending settlements for authorization. Some of the challenges raised by these settlements pertain to the provision of federal funding and cost-shares associated with individual settlements, over-arching principles and expectations guiding ongoing and future settlements, and opposition to some settlements or specific parts of settlements by some groups.

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), it implicitly reserves water sufficient to fulfill the purpose of the reservation.

In the years since the *Winters* decision, disputes have arisen between non-Indian water users and Indians attempting to assert their water rights, 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 this system, the *Winters* water rights of tribes

[1] Separately, some tribes also have *time immemorial* rights to water resources based on tribal water uses that preceded the establishment of reservations. These rights are commonly referred to as "aboriginal" water rights.

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

are often senior to those of non-Indian water rights holders because they date to the creation of the reservation (i.e., prior to the awarding of most state water rights). However, most tribal water rights were not quantified when reservations were established, meaning that they must often be adjudicated under protracted processes pursuant to state water law. There is also disagreement in many cases over the quantification of tribal water rights and at whose expense reallocations should be made. These and other disputes have typically been addressed through litigation 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 have recently 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 are often 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 is often 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

[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 "Debate over 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

1990 to establish a framework to inform the Indian water rights settlement process and expressed 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, 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 chair 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 are typically 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]

for the Settlement of Indian Water Rights Groups," 55 *Federal Register* 9223, March 12, 1990. Hereinafter "Criteria and Procedures."

[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 approval in the 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 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, 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 is generally 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 may generally 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 is usually 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 is typically 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 (2016)	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 (1996)	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 are generally 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.

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 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. Each of these issues is discussed below in more detail.

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

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

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]

A related issue is the question of nonfederal cost-shares, in particular cost-share requirements for state governments and local (i.e., nontribal) water users, as well as those for tribes (in some cases). No overarching cost-sharing principles have been publicly identified by recent Administrations outside of the desire for "appropriate" cost-shares by beneficiaries.[21] Instead, individual settlements have had widely variable cost-shares. The magnitude of these cost-shares appears to often be based on the type of activities involved in the settlement and the potential for parties to benefit from these activities. For example, the Aamodt Settlement, enacted in 2010, has one of the larger statutorily identified nonfederal cost-shares ($116.9 million). However, these costs are reflective of state and county shares for the construction of a County Distribution component of a larger Regional Water System intended to supply both tribal and non-tribal users.[22] Other settlements have typically included nonfederal cost-shares of a lower magnitude or no nonfederal cost-share requirement at all.

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 "Mandatory 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 has also 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.

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[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.

[21] See below section, "Recent Indian Water Rights Settlement Legislation."

[22] For more information, see "Frequently Asked Questions for the Pojoaque Basin Regional Water System EIS," available at https://sites.google.com/site/pbwatereis/frequently-asked-questions.

Examples of Funding Sources

Discretionary Funding

Discretionary spending, or spending that is subject to appropriations, has historically 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; (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. Authorizations of federal discretionary funding for individual settlements, when they have been provided, have varied widely.[23] These costs have ranged from as little as $200,000 (P.L. 103-434, Yavapai-Prescott Water Rights Settlement Act of 2004) to $870 million (at January 2007 price levels) for the Navajo Gallup Water Supply Project (authorized as part of the Navajo Nation Water Rights Settlement under P.L. 111-11).

Congress has also 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.[24]

Mandatory Funding

Congress also has authorized mandatory funding for Indian water rights settlements. In some cases, these mandatory appropriations have been made in concert with discretionary funding authorizations. Mandatory funding has generally been in the form of one of the following options: (1) funding from the Reclamation Water Settlements Fund, a dedicated fund created in 2010 for Indian water rights settlements; (2) mandatory funding for specific individual settlements; and (3) redirection of existing receipt accounts. Additionally, under certain circumstances, settlements might be funded out of the Judgment Fund, a pre-existing fund with a permanent appropriation that was established to pay for judgments against the United States. (However, to date, no water rights settlements have been approved for funding from this fund.) Each of these options is discussed below in more detail.

Reclamation Water Settlements Fund

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

[23] Not all enacted settlements are associated with federal funding authorizations; some have only required federal approval and/or authorized specific federal activities.

[24] P.L. 106-554, §303.

Secretary of the Treasury to deposit $120 million into the fund for each of FY2020-FY2029 (for a total of $1.2 billion).[25] 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.[26] 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;[27] 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.[28]

If Congress does not approve and authorize any of the individual settlements with priority under the legislation by December 31, 2019, the amounts reserved for those settlements are to revert to the Reclamation Water Settlement Fund and may be used for any other authorized use of the fund under the act. Thus, if funding remains left in the fund after the authorized priority settlements are funded, and before the expiration of the fund itself, those appropriations could be used for other authorized Indian water rights settlements. While the last appropriations to the fund are currently to be made in FY2029, the fund itself is scheduled to terminate on September 30, 2034, with unexpended balances to be transferred to the Treasury at that time.[29]

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

Provisions in the Claims Resolution Act of 2010 (P.L. 111-291) authorized and provided direct/mandatory spending for four individual water rights settlements.[30] 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;

[25] 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.

[26] 43 U.S.C. §407.

[27] 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).

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

[29] For more information on the proposed extension of this fund, see below section, "Reclamation Water Settlements Fund Extension."

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

- 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.

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 rights settlements required funding for 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.[31]

Other Funding Sources: 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.[32] 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.[33] Second, the payment must be certified by the

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

[32] 31 U.S.C. §1304. Congress established the Judgment Fund in 1956 (70 Stat. 694).

[33] 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

Secretary of the Treasury, who has delegated administration of the Judgment Fund to the Bureau of the Fiscal Service.[34] Finally, payment of the judgment, award, or settlement either must be authorized by certain statutes[35] or must be a final judgment rendered by a district court, the Court of International Trade, or the U.S. Court of Federal Claims.[36] 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."[37]

Many judgments are paid from the Judgment Fund because the operating appropriations of federal agencies are "generally not available to pay judgments."[38] The government has historically 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 Federal Claims can generally hear suits brought by Indian tribes.[39] 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.[40] 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.[41] For purposes of this transfer, the act also states that the statutory conditions of the Judgment Fund have been met.[42] 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. Specifically, this language indicated that funds will be transferred, without a separate appropriation, from the U.S. Treasury General Fund.

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 agency's use of the funds.[43] For example, if an agency had already spent an appropriated sum on

Judgment Fund).

[34] 31 C.F.R. Part 256, http://www.fiscal.treasury.gov/fsservices/gov/pmt/jdgFund/judgementFund_home.htm.

[35] 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]).

[36] 31 U.S.C. §1304(a)(3) (citing 28 U.S.C. §§2414, 2517).

[37] Ibid.

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

[39] 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).

[40] 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.

[41] P.L. 111-291, §101(e)(1)(C)(i).

[42] 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)).

[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).

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.

Other Issues Common to the Consideration of Indian Water Rights Settlements

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

[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

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) 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 might otherwise be available for free to downstream water users and thus could potentially 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.

Debate over 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

Reclamation Projects, 2013, p. 21, at http://www.usbr.gov/history/ProjectHistories/Animas_La_Plata%20D1%20%5B1%5D.pdf.

[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.

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 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 may also raise their own concerns with Indian water rights settlements. Some water users have complained that provisions in 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 proposed 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.[60]

Recent Indian Water Rights Settlement Legislation

Since 2009, Congress has enacted nine Indian water rights settlements 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 were not associated with any new federal funding authorizations or appropriations. Since the 2010 enactment of P.L. 111-291, two settlements authorizing new federal funds have been enacted: the Pechanga Band of Luiseno Mission Indians Settlement in California (authorizing a total of $28.5 million in new federal funds) and the Blackfeet Settlement in Montana (authorizing a total of $420 million in new federal funds).

One 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).[61] In 2019, the Trump Administration stated that the support for legislation to authorize settlements is guided by four general principles set forth in the aforementioned 1990 *Criteria and Procedures* document: (1) settlements must be consistent with the United States' trust responsibilities; (2) Indian tribes must receive equivalent benefits in exchange for the rights they, and the United States as trustee, release as part of a

[57] McCool, pp. 81, 85.

[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.

[60] See, for example, Al Olszewski, "Guest opinion: Fight against CSKT Water Compact," *Billings Gazette*, November 26, 2019.

[61] 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.

settlement; (3) Indian tribes must obtain the ability to realize value from confirmed water rights; (4) settlements must contain an appropriate cost-share by all parties benefiting from the settlement.[62]

Several settlements that have been introduced in legislation in the 116th Congress are discussed below. Other settlements that have been introduced in prior Congresses may be introduced in legislation in the 116th Congress, as may other settlements that have completed the negotiation phase and/or are ready for congressional approval. Additionally, over-arching legislation pertaining to settlements (e.g., extension of the mandatory funding under the Reclamation Water Settlements Fund) may also be considered by 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 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 Operations, Maintenance, and Rehabilitation (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.[63] 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.[64]

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.[65] While the Navajo

[62] Testimony of Alan Mikkelsen in U.S. Congress, House Committee on Natural Resources, Water, Oceans, and Wildlife Subcommittee, *Legislative hearing on H.R. 644, H.R. 2459, and H.R. 3292*, 116th Cong., 1st sess., June 26, 2019. Hereinafter "Mikkelsen 2019 Testimony."

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

[64] 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."

[65] U.S. Congress, Senate Committee on Indian Affairs, To Approve the Settlement of the Water Rights Claims of the

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.

Hualapai Tribe Water Rights Settlement

H.R. 2459 and S. 1277, both titled the Hualapai Tribe Water Rights Settlement Act of 2017, would approve a settlement agreement to quantify Colorado River rights for the Hualapai Tribe in Northern Arizona. The settlement is the second phase in settling the tribe's water rights. The first phase was enacted in the Bill Williams Water Rights Settlement Act of 2014 (P.L. 113-123). The bill would authorize a total of $173.5 million for the Secretary of the Interior, through Reclamation, to implement the settlement, including design and construction of the Hualapai Water Project. The project would construct a pipeline to supply water for municipal, commercial, and industrial uses on the Hualapai Reservation, which includes the Grand Canyon West resort.[66] Operations and maintenance obligations would be transferred to the Hualapai tribe after construction is complete. The negotiated settlement would reallocate 4,000 acre-feet per year of Central Arizona Project water (i.e., water from the Colorado River) for tribal access, with no less than 3,414 acre-feet per year delivered through the project.[67] The Hualapai Tribe, the United States, and the State of Arizona would subsequently waive and release most claims associated with this settlement.[68] It is supported by the Hualapai Tribe, the State of Arizona, and a number of private entities that are parties to the settlement.[69]

In June 2019, the Trump Administration testified that it had serious concerns with the proposed legislation.[70] Among other things, the Administration testified that it had concerns related to the size of the project and the accuracy of cost estimates in the settlement (the Administration stated that costs would likely "greatly exceed" the authorization proposal).[71] The Administration also raised legal concerns associated with the "deleterious precedent" that would be set by the settlement's waiver of tribal groundwater rights protections whereby tribes and the United States might otherwise object to groundwater uses outside of the Reservation that would affect tribal water rights.[72]

Aamodt Settlement Amendments

H.R. 3292, the Aamodt Litigation Settlement Completion Act, would amend the Aamodt Settlement Litigation Act, originally enacted in P.L. 111-291 in 2010. The original act authorized

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Navajo Nation in Utah, to Authorize 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).

[66] The resort reportedly receives over 1 million visitors annually and is located 35 miles from the nearest groundwater supply. Testimony of Dr. Damon Clarke in U.S. Congress, Senate Committee on Indian Affairs, *Legislative Hearing to Receive Testimony on the Following Bills: S.2636, S.3216, S.3222, S.3300*, hearings, 114th Congress, 2nd sess., September 14, 2016.

[67] Testimony of Dr. Damon Clarke, Chairman, Hualalapi Tribe, in U.S. Congress, House Committee on Natural Resources, Water, Oceans, and Wildlife Subcommittee, *Legislative Hearing on H.R. 644, H.R. 2459, and H.R. 3292*, 116th Cong., 1st sess., June 26, 2019. Hereinafter "Clarke 2019 Testimony."

[68] See §7(a) of the bill.

[69] Clarke 2019 Testimony.

[70] Mikkelsen 2019 Testimony. Previous Administrations have testified against similar legislation in the 114th and 115th Congress.

[71] Mikkelsen 2019 Testimony. The Trump Administration also noted that it supported "fund-based" settlements in lieu of construction project authorizations such as that proposed in the Hualapai legislation.

[72] Mikkelsen 2019 Testimony.

expenditure of discretionary and mandatory funds for construction of a project, the Pojoaque Basin Regional Water System, which would provide water to the tribes involved in the settlement (the pueblos of Tesuque, Nambe, Pojoaque and San Ildefonso) and other related entities. The 2010 authorization approved a total of $177.3 million (in 2006 dollars, or $213 million at 2018 price levels) for the Regional Water System, of which the United States is responsible for $106.4 million ($139.8 million in 2018 dollars). According to Reclamation, the total cost to design and construct the system is now $406 million, or $193 million more than the 2010 authorized amount adjusted to 2018 price levels.[73] Pursuant to Section 611(g) of P.L. 111-291, if costs of the project are in excess of available amounts, the Secretary is to initiate negotiations on the proper nonfederal cost-share. According to Reclamation, the draft 611(g) document would agree to $137 million in *additional* federal funding, plus $56 million in nonfederal funding, which together would make up the $193 million shortfall.

H.R. 3292 would authorize an additional $150 million in federal expenditures, from 2018 to 2028, define the aforementioned 611(g) agreement, and direct implementation of that document. In 2019 testimony, the Trump Administration raised several concerns with the legislation, including its lack of several "critical provisions" that the nonfederal sponsors had agreed to in the draft 611(g) agreement and the increase in the proposed federal cost share from $137 million in the draft agreement to $150 million in the bill.[74]

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 annually through FY2029. The bill would allow these transfers to continue and would not alter the priority tiers 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, projects to rehabilitate existing water delivery systems, or projects to restore fish and wildlife habitat affected by Reclamation projects. In the context of this extension, Congress may also be interested in the use of current mandatory funding allocations through the Reclamation Water Settlements Fund.

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 four 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

[73] Mikkelsen 2019 Testimony.

[74] Mikkelsen 2019 Testimony.

approved by authorizing committees and others (i.e., whether the settlements are accompanied by formal statements of Administration support, cost estimates). 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 a central question under consideration in future settlements under consideration by Congress.

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