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# Indian Water Rights Settlements

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## Summary

In the second half of the 19<sup>th</sup> 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 their reservations were established. This means that many tribes have water rights senior to those of non-Indian users with established water rights and access. However, although many Indian reservations hold senior water rights, 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 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 2015, there have been 33 federally approved Indian water rights settlements. Twenty-nine of these settlements have been enacted by Congress, and four have been approved by the U.S. Departments of Justice and the Interior. 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.

One of the primary challenges facing Indian water rights 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 scarce federal funding for these projects can be difficult.

At issue for Congress is whether to approve proposed new Indian water rights settlements and whether to fund new and ongoing 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 settlements (either in general or with regard to specific activities within settlements).

This report provides an overview of Indian water rights settlements. It analyzes issues surrounding water rights settlements and the negotiation process, as well as implementation challenges and related issues for Congress.

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## Introduction

Since 1978, the federal government has entered into 33 water rights settlements with 36 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.

This report provides background on Indian water rights settlements and an overview of the settlement process. It analyzes issues related to Indian water rights, with a focus on the role of the federal government within the context of Indian water rights settlements. It examines these issues in a legislative context, including proposed legislation in the 114<sup>th</sup> Congress.

## 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.<sup>1</sup> 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.<sup>2</sup> Indian reserved water rights were first recognized by the Supreme Court in *Winters v. United States* in 1908.<sup>3</sup> 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.<sup>4</sup>

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

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<sup>1</sup> For more information on the United States' relationship with Indian tribes, see CRS Report CRS Legal Sidebar WSLG253, *The United States Relationship with Indian Tribes and Federal Indian Policy*, by Jane M. Smith.

<sup>2</sup> Separately, some tribes also have *time immemorial* rights to water resources based on tribal water uses that preceded the establishment of reservations.

<sup>3</sup> *Winters v. United States*, 207 U.S. 564, 575-77 (1908).

<sup>4</sup> For more information on rights stemming from *Winters v. United States*, see CRS Report RL32198, *Indian Reserved Water Rights Under the Winters Doctrine: An Overview*, by Cynthia Brown.

water rights were acquired.<sup>5</sup> Under the *Winters* doctrine and the western system of prior 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.<sup>6</sup> However, there remains disagreement among some as to whether litigation or settlements are most appropriate for resolving Indian water rights disputes.<sup>7</sup>

## 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.<sup>8</sup>

The federal government’s involvement in the Indian water rights settlement process is guided by regulation, specifically a 1990 policy statement, “Criteria and Procedures for the Participation of the Federal Government in Negotiations for the Settlement of Indian Water Rights Claims.”<sup>9</sup> This

<sup>5</sup> See footnote 4.

<sup>6</sup> 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.

<sup>7</sup> See “Debates over the Benefits of Certainty,” below.

<sup>8</sup> 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>.

<sup>9</sup> 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.”

statement by the Department of the Interior (DOI) established 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 agencies tasked with pre-negotiation, 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 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 and settlement policies. Second, the Secretary of the Interior’s Indian Water Rights Office (SIWRO) is responsible for coordinating Indian water rights settlements and interfacing with settlement and implementation teams in the field. The SIWRO is led by a director who reports to the chairman of the working group.<sup>10</sup>

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 on Indian Water Settlements (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 federal policies on settlement and, when possible, help to develop the parameters of a settlement.

## Steps in Settlement Process

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

### Pre-negotiation

Pre-negotiation 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.<sup>11</sup>

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<sup>10</sup> 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>.

<sup>11</sup> 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 pre-negotiation 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.<sup>12</sup>

## Federal Process for Pre-negotiation

The fact-finding phase of the federal pre-negotiation 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 agencies (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.<sup>13</sup> 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

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<sup>12</sup> In some cases, "Criteria and Procedures" may be viewed as a general guide to the pre-negotiation process. The actual structure and nature of the process may vary depending on the background of the settlement and the stakeholders involved.

<sup>13</sup> 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, 114<sup>th</sup> Congress, 1<sup>st</sup> sess., May 20, 2015. Hereinafter Weiner, 2015.



and assert Indian water rights.<sup>14</sup> Reclamation's Native American Affairs Program also facilitates the negotiation of water rights settlements by providing technical support and other assistance.<sup>15</sup>

## Settlement

Once the negotiation phase has been completed and the parties agree to specific terms, the settlement is presented for congressional authorization (as applicable). 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 does not approve the settlement, the settlements generally are approved administratively by the Secretary of the Interior or the U.S. Attorney General or judicially by judicial decree.

## Implementation

Once a settlement is enacted by Congress or approved in one of the aforementioned ways, 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 enacted settlement.<sup>16</sup>

For settlements that began through litigation or adjudication, the settlement parties must reconvene to reconcile the original agreement with the enacted 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.<sup>17</sup>

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.<sup>18</sup>

## Status of Individual Indian Water Rights Settlements

The federal government has been involved with Indian water rights settlements through negotiation teams and implementations teams (for enacted settlements) since 1990. As of July 2015, there were 19 negotiation teams.<sup>19</sup> Additionally, there are 20 implementation teams

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<sup>14</sup> 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, 114<sup>th</sup> Congress, 1<sup>st</sup> sess., May 20, 2015. Hereinafter Connor, 2015.

<sup>15</sup> Ibid.

<sup>16</sup> Ibid.

<sup>17</sup> Darcy C. Bushnell, "American Indian Water Rights Settlements," 2012, at [http://uttoncenter.unm.edu/pdfs/American\\_Indian\\_Water\\_Right\\_Settlements.pdf](http://uttoncenter.unm.edu/pdfs/American_Indian_Water_Right_Settlements.pdf).

<sup>18</sup> In the past, such agencies have included FWS and Bureau of Land Management.

<sup>19</sup> Email communication with the Secretary's Indian Water Rights Office, July 27, 2015.

appointed for ongoing settlements. Overall, the federal government has entered into 33 settlements since 1978, with Congress enacting 29 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** lists enacted settlements. **Table 2** below lists the settlements with negotiation teams appointed as of July 2015 (i.e., settlements that could eventually come before Congress). Finally, **Figure 1** below shows the locations of ongoing negotiations, congressionally proposed settlements, and enacted settlements throughout the United States.

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

(settlements by state and tribe)

Year	Settlement and Legislation	State	Tribes	Total Acre-Feet Awarded per Year	Total Federal Cost (\$ 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	N/A	None
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	CA	La Jolla, San Pasquale, Pauma, Pala Bands of Mission Indians	N/A	\$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	N/A	\$65.0
1990 (2006)	Fort Mc Dowell 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
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

Year	Settlement and Legislation	State	Tribes	Total Acre-Feet Awarded per Year	Total Federal Cost (\$ millions)
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	\$421.3
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

Year	Settlement and Legislation	State	Tribes	Total Acre-Feet Awarded per Year	Total Federal Cost (\$ millions)
2010	Crow Tribe Water Rights Settlement Act of 2010, P.L. 111-291	MT	Crow Tribe	697,000	\$461.0
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	N/A	N/A
2014	Bill Williams River Water Rights Settlement Act of 2014, P.L. 113-223	AZ	Hualapai Tribe	N/A	N/A

**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*, 114<sup>th</sup> Congress, 1<sup>st</sup> sess., May 20, 2015; Bonnie G. Colby, John E. Thorson, and Sarah Britton, *Negotiating Tribal Water Rights: Fulfilling Promises in the Arid West*, 1<sup>st</sup> 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:** Multiple public laws listed in the table signify amendments to laws, with amendments and corresponding years in parentheses. The federal cost of settlements is as 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://repository.unm.edu/handle/1928/21727>.

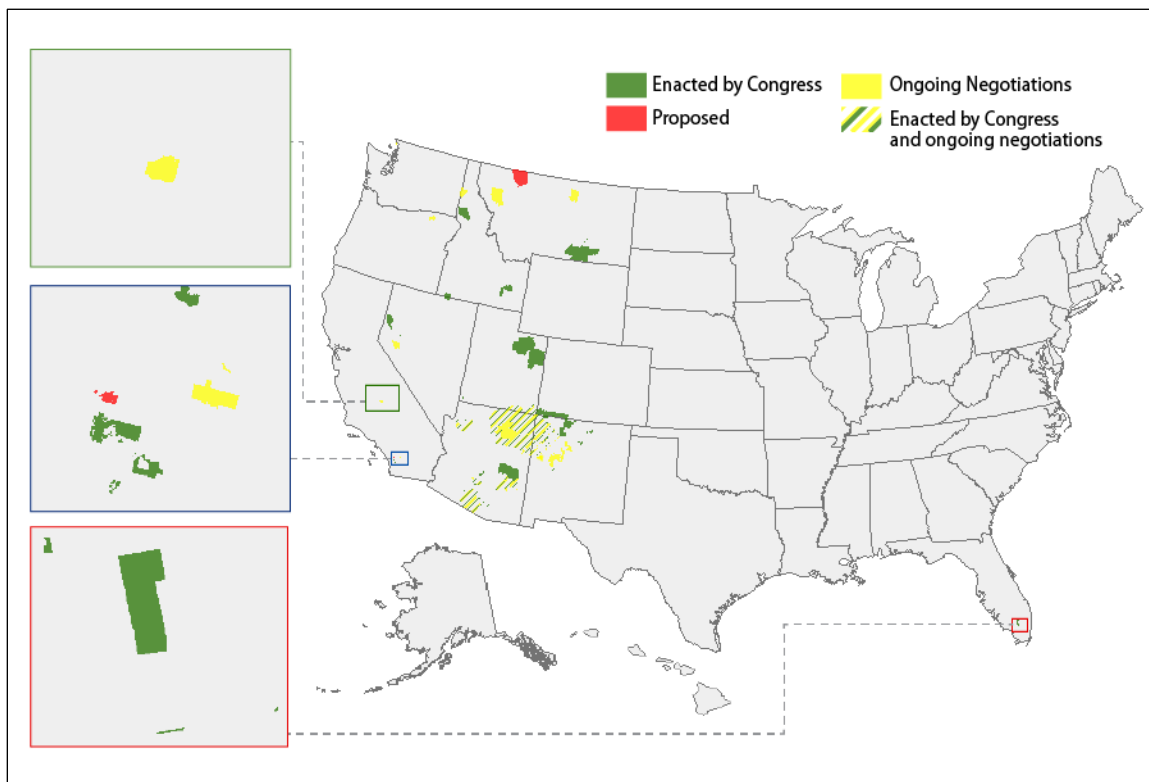
**Table 2. Indian Water Rights Settlements with Negotiation Teams Appointed**

Negotiation	State	Tribe(s)
Abousleman	NM	Pueblos of Jemez, Pueblo of Santa Ana, Pueblo of Zia
Blackfeet	MT	Blackfeet Tribe (Rocky Mountain)
Coeur d'Alene	ID	Coeur d'Alene Tribe
Fallbrook	CA	Cahuilla Band of Mission Indians, Pechanga Band of Luiseno Mission Indians, Ramona Band
Flathead	MT	Confederated Salish and Kootenai Tribes of the Flathead Reservation
Fort Belknap	MT	Gros Ventre and Assiniboine Tribes
Kerr McGee	NM	Pueblos of Acoma and Laguna and Navajo Nation
Hualapai	AZ	Hualapai Tribe
Little Colorado River	AZ	Navajo Nation, Hopi Tribe, San Juan Southern Paiute Tribe
Lummi	WA	Lummi Tribe and Nooksack Tribe
Navajo	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:** Email communication with the SIWRO, July 27, 2015.

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

**Figure 1. Indian Reservations with Water Rights Settlements or Negotiations**



**Source:** CRS, with DOI data.

**Notes:** Reservations with enacted settlements and ongoing negotiations may be situations in which the conditions of existing settlements are being renegotiated; new areas, projects, and/or tribes are undergoing negotiations; or a combination.

## Issues in the Consideration of Indian Water Rights Settlements

Once the stakeholders have agreed to negotiate a settlement, there are a number of issues that may pose challenges to a successful negotiation and implementation of a settlement. Such challenges may include finding a source of adequate funding for both the negotiations process and the implementation of settlements, as well as issues within settlements, such as compliance with environmental regulations and identification of sources and conditions for water delivery.

### Funding

In addition to the cost of actively maintaining negotiation teams, 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. As of FY2015, the federal government had authorized

more than \$3.5 billion dollars in federal expenditures to construct and operate projects to deliver this water.<sup>20</sup>

One of the most widely recognized challenges for potential water rights settlements is identifying and enacting an adequate funding source and structure to implement the settlement. Recent congressionally authorized Indian water rights settlements have been funded in various ways, including through discretionary funding authorizations (i.e., authorizations that require 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 while several others have been funded with mandatory spending from a single account, the Reclamation Water Settlements Fund (see “Omnibus Public Land Management Act of 2009 (P.L. 111-11),” below). The timing of the release of these funds and the exact mix of discretionary and mandatory appropriations has varied widely among settlements and in some cases may depend on additional congressional action.

Selected examples of different approaches to funding recent Indian water rights settlements are discussed below. These sections describe examples of different structural approaches to funding these settlements, including when and how the funding is expected to be released (if applicable). A discussion of another source that is mentioned occasionally in this context, the DOJ Judgment Fund in the Department of the Treasury, also appears below.

### Discretionary Funding Examples

Discretionary spending, or spending that is subject to appropriations, historically has been the most prominent source of funding for congressionally approved Indian water rights settlements. In some cases, Congress has authorized the appropriations of specific sums for individual settlements. For example, the Snake River Water Rights Act of 2004 (P.L. 108-447) approved the Nez Perce Settlement. This legislation established funds for fisheries and domestic water supply that were to receive future discretionary appropriations from Congress. The discretionary authorization for the Nez Perce Tribe Water and Fisheries Fund totaled \$59.8 million over the FY2007-FY2013 time period, and the total discretionary authorization for the Nez Perce Tribe Domestic Water Supply Fund over the FY2007-FY2011 period was \$22.9 million.

In other cases, Congress has chosen to authorize discretionary appropriations of “such sums as may be necessary.” 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 it authorized Reclamation to construct these facilities using such sums as may be necessary.<sup>21</sup> Although a total construction cost for this project is not currently available, it likely is considerable. The total cost for this project was estimated at \$500 million in 2003.<sup>22</sup>

### Combined Mandatory/Discretionary Funding Examples

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

<sup>20</sup> CRS estimate of appropriations authorized under congressionally enacted settlements.

<sup>21</sup> P.L. 106-554, Section 303.

<sup>22</sup> Bureau of Reclamation, *Animas La Plata Construction Cost Estimates*, Nov. 2003, at <https://www.usbr.gov/uc/progact/animas/pdfs/alpreport.pdf>.



### ***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).<sup>23</sup> 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.<sup>24</sup> 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;<sup>25</sup> and
- Second-tier priority is assigned to the settlements for the Crow Tribe, the Blackfoot 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.<sup>26</sup>

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 under the act. Thus, if there is any “leftover” funding, these funds could be available for other authorized Indian water rights 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.<sup>27</sup> 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

<sup>23</sup> 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.

<sup>24</sup> 43 U.S.C. §407.

<sup>25</sup> 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 (P.L. 111-291),” below).

<sup>26</sup> Of these, the Navajo-Gallup, Aamodt, Abeyta, and Crow Tribe Settlements have been approved.

<sup>27</sup> Some of these settlements were among the priorities laid out in P.L. 111-11.

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.<sup>28</sup>

## Other Funding Examples

### *Redirection of Receipt Accounts*

Other water rights settlements have been funded through additional mechanisms, including redirection of funds accruing to existing receipt accounts. For example, the Arizona Water Rights Settlement Act (P.L. 108-451) authorized water rights settlements for the Gila River Indian Community to use funds that otherwise would have been designated for use by the Colorado River Storage Project Act. For the Gila Settlement, P.L. 108-451 required that certain portions of revenues going into the Lower Colorado River Basin Development Fund from the Central Arizona Project must be made available annually, without further appropriation (i.e., mandatory funding), and must result in deposits totaling \$53 million, in aggregate, in the Gila River Indian Community Operations Maintenance and Rehabilitation Trust Fund. The same legislation also authorized discretionary appropriations of approximately \$200 million.<sup>29</sup>

### *Judgment Fund*<sup>30</sup>

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.<sup>31</sup> 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.<sup>32</sup> Second, the payment must be certified by the

<sup>28</sup> The figures included in this section are CRS estimates of the amounts provided based on the enrolled version of the bill. They should not be considered final scores or appropriations allocated for these purposes.

<sup>29</sup> S. Rept. 108-360, p. 65.

<sup>30</sup> This section was written by Vivian Chu, legislative attorney in the American Law Division.

<sup>31</sup> 31 U.S.C. §1304. Congress established the Judgment Fund in 1956 (70 Stat. 694).

<sup>32</sup> *McDonald v. Schweiker*, 726 F.2d 311, 313 (7<sup>th</sup> Cir. 1983). See also Comptroller General Opinion, B-279886 (Apr. (continued...))

Secretary of the Treasury, who has delegated administration of the Judgment Fund to the Bureau of the Fiscal Service.<sup>33</sup> Finally, payment of the judgment, award, or settlement either must be authorized by certain statutes<sup>34</sup> or must be a final judgment rendered by a district court, the Court of International Trade, or the U.S. Court of Federal Claims.<sup>35</sup> 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.”<sup>36</sup>

Many judgments are paid from the Judgment Fund because the operating appropriations of federal agencies are “generally not available to pay judgments.”<sup>37</sup>

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 Federal Claims generally can hear suits brought by Indian tribes.<sup>38</sup> 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.<sup>39</sup> 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.<sup>40</sup> For purposes of this transfer, the act also states that the statutory conditions of the Judgment Fund have been met.<sup>41</sup> 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

(...continued)

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).

<sup>33</sup> 31 C.F.R. Part 256.

[http://www.fiscal.treasury.gov/fsservices/gov/pmt/jdgFund/judgementFund\\_home.htm](http://www.fiscal.treasury.gov/fsservices/gov/pmt/jdgFund/judgementFund_home.htm)

<sup>34</sup> 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]).

<sup>35</sup> 31 U.S.C. §1304(a)(3) (citing 28 U.S.C. §§2414, 2517).

<sup>36</sup> *Ibid.*

<sup>37</sup> Bureau of the Fiscal Service, *Judgment Fund: Background*, at <http://www.fiscal.treasury.gov/fsservices/gov/pmt/jdgFund/background.htm>.

<sup>38</sup> 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).

<sup>39</sup> 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. See CRS Report RL34628, *The Indian Trust Fund Litigation: An Overview of Cobell v. Salazar*, by Jane M. Smith.

<sup>40</sup> P.L. 111-291, §101(e)(1)(C)(i).

<sup>41</sup> P.L. 111-291, §101(e)(1)(C)(ii). The act further directed the Secretary 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)).

appropriations (see reference to this legislation in the previous section, “Combined Mandatory/Discretionary Funding Examples”), 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.<sup>42</sup> 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.”<sup>43</sup> 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.”<sup>44</sup>

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.<sup>45</sup> 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.<sup>46</sup> 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.

## Considerations in Funding Indian Water Rights Settlements

Some have contended that by appropriating funds toward the development of water resources, the federal government is honoring its trust responsibilities to the tribes.<sup>47</sup> However, some may raise the concern whether discretionary spending for projects in specific states or districts constitutes earmarks, or congressionally directed spending.

<sup>42</sup> P.L. 111-291§312(b)(2).

<sup>43</sup> P.L. 111-291§312(b)(3).

<sup>44</sup> See Office of Management and Budget, *Fiscal Year 2015 Analytical Perspectives: Budget of the U.S. Government*, p. 373, at [https://www.whitehouse.gov/sites/default/files/omb/budget/fy2016/assets/ap\\_26\\_funds.pdf](https://www.whitehouse.gov/sites/default/files/omb/budget/fy2016/assets/ap_26_funds.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.

<sup>45</sup> 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).

<sup>46</sup> GAO, *Principles of Appropriation (GAO Red Book)*, third edition, volume III, Chapter 14, “Claims Against and By the United States,” pp. 14-39.

<sup>47</sup> Connor, 2015, p. 6. See also Testimony of Maria O’Brien, in U.S. Congress, Senate Committee on Indian Affairs, *Oversight Hearing on Indian Water Rights: Promoting the Negotiation and Implementation of Water Settlements in Indian Country*, hearings, 112<sup>th</sup> Congress, 2<sup>nd</sup> sess., March 15, 2012, p. 4.

Some have also challenged whether settlements are more cost-effective than litigation. Litigation generally has cost the federal and state governments millions of dollars in legal fees, but negotiated settlements may involve similar fees in addition to costs related to technical studies,<sup>48</sup> administrative duties, and implementation, which often involves the construction of new water projects. Still others have contended that resolving water rights disputes and delivering wet water is a significant priority and the federal government is obligated to do so under its trust responsibilities. In addition, some may argue that the multilateral benefits of settlement provide more utility and are preferable to the zero-sum results of litigation.

As noted, a particular concern is how Indian water rights settlements are funded. The Statutory Pay-As-You-Go Act of 2010 (PAYGO Act; P.L. 111-139) requires that direct spending does not raise the federal deficit and that such spending must be balanced, or offset by proportionate reductions in existing spending.<sup>49</sup> Practically speaking, this provision can mean that in some cases spending for settlements may be possible only through offsets to DOI programs or other areas. Some tribes have spoken out against this approach, equating it to addressing past injustices on the part of the federal government at the cost of existing Indian programs.<sup>50</sup> Others have raised the possibility that direct spending toward Indian water rights settlements should be exempt from the requirements of the PAYGO Act if Congress considers the lack of clean drinking water on reservations a risk to the public health necessitating “emergency legislation.”<sup>51</sup>

## 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<sup>52</sup> (NEPA; P.L. 91-190), the Clean Water Act<sup>53</sup> (CWA; P.L. 92-500), the Endangered Species Act of 1973<sup>54</sup> (ESA; P.L. 93-205), and the Safe Drinking Water Act<sup>55</sup> (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, authorized under 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.<sup>56</sup> Additionally, the U.S. Environmental Protection Agency raised concerns that the project would negatively affect water quality and wetlands in

<sup>48</sup> Typically, these studies include an assessment of water budgets, existing and future water uses, soil conditions, feasibility studies of projects, etc.

<sup>49</sup> CRS Report R41157, *The Statutory Pay-As-You-Go Act of 2010: Summary and Legislative History*, by Bill Heniff Jr.

<sup>50</sup> Daniel McCool, *Native Waters: Contemporary Indian Water Settlements and the Second Treaty Era* (Tucson, AZ: University of Arizona Press, 2002), p. 62-64. Hereinafter McCool, 2002.

<sup>51</sup> Daniel K. Lee, “A Century of Uncertainty and the New Politics of Indian Water Settlements: How Tribes and States Overcome the Chilling Effect of the PAYGO Act,” vol. 92, no. 3 (2014), pp. 640, 647.

<sup>52</sup> 42 U.S.C. §4321.

<sup>53</sup> 42 U.S.C. §7401.

<sup>54</sup> 16 U.S.C. §1531.

<sup>55</sup> 42 U.S.C. §300f.

<sup>56</sup> 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.

New Mexico. These and other concerns stalled construction of the project for a decade.<sup>57</sup> 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.<sup>58</sup> Other enacted settlements that initially 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 from existing projects to tribes, such as with selected tribes in Arizona and the Central Arizona Project under the Arizona Water Settlements Act of 2004 (P.L. 108-251). In some cases, settlements have provided funds for tribes to acquire water from willing sellers.<sup>59</sup> 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 whether to allow for the ability to market, lease, or transfer reserved water. As of 2015, 20 of the 29 congressionally enacted settlements permitted some form of marketing, leasing, or transferring ranging from limited off-reservation leasing to being subject to various state laws to less restrictive forms of marketing.<sup>60</sup> 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 providing for water marketing in settlements for several reasons. 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.<sup>61</sup> 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.<sup>62</sup> 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.

<sup>57</sup> 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.

<sup>58</sup> 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](http://www.usbr.gov/history/ProjectHistories/Animas_La_Plata%20D1%20%5B1%5D.pdf).

<sup>59</sup> 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.

<sup>61</sup> McCool, p. 170.

<sup>62</sup> McCool, pp.168-169.



## Debates over the Benefits of Certainty

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.<sup>63</sup> 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.<sup>64</sup> 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.<sup>65</sup> They note that in the future, the courts may be more favorable and allow for greater gains through litigation.

## 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 2015, the federal government has been involved in the negotiation of more than 50 Indian water rights settlements. As previously noted, 33 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

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<sup>63</sup> McCool, pp. 81, 85.

<sup>64</sup> Bonnie G. Colby, John E. Thorson, and Sarah Britton, *Negotiating Tribal Water Rights: Fulfilling Promises in the Arid West*, 1<sup>st</sup> ed. (Tucson: University of Arizona Press, 2005), p. 13. Hereinafter Colby et al.

<sup>65</sup> McCool, p. 85.

access (or potential access) to tribal water resources. However, many of these projects are ongoing, so it is not possible to characterize their end result. 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 outcomes of specific settlements. Others may contend that other means (i.e., litigation) are a more appropriate venue for solving these issues.

For additional details regarding the contents of individual settlements enacted by Congress, see **Table 1** of this report.

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

CRS calculates that to date, more than \$3.5 billion has been authorized for Indian water rights settlements, and a significant portion of this funding has been appropriated.<sup>66</sup> These appropriations have been provided to Reclamation, BIA, the Bureau of Land Management, and the U.S. Fish and Wildlife Service. In its FY2016 budget proposal, Reclamation requested approximately \$130.7 million for Indian water rights settlement projects and BIA requested \$67.7 million.

## **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 the stakeholders, authorize reallocation and delivery of water from existing projects, and authorize construction and funding for new water projects. 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.<sup>67</sup> 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 case, the Zuni Indian Tribe waived certain claims to water to gain federal funds to purchase water rights from willing sellers.<sup>68</sup> And, in many cases, settlements have authorized conditions for water

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<sup>66</sup> CRS estimate of appropriations authorized under congressionally enacted settlements.

<sup>67</sup> The Truckee-Carson-Pyramid Lake Water Rights Act (P.L. 106-618) 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.

<sup>68</sup> P.L. 108-34.



marketing and leasing for tribes, although the degree to which this is allowed varies per settlement.

## **How Many Potential Indian Water Rights Settlements Are There?**

There are 277 federally recognized tribes in the western United States (excluding Alaska). DOI currently is involved in negotiations for 19 settlements and has settled 33 others. Although most Indian water rights settlements to date have been in the West, DOI has reported an increased interest in settlements by tribes east of the 100<sup>th</sup> meridian.<sup>69</sup> There are no estimates of the potential costs for these settlements.

Some have raised the concern that the number of completed settlements to date may mislead as to the actual prospects of continued approval of future settlements. They contend that past settlements may have been relatively easy to complete compared with the issues likely to be encountered by the potential complexity of future settlements. In addition, given the drawn-out time frame of many settlements, others have voiced concerns that although there has been relatively widespread support for many Indian water rights settlements in the past, the potential loss of institutional knowledge and stakeholders open to negotiation could lead to uncertainty regarding the feasibility of ongoing settlement completion and implementation.

## **Indian Water Rights Legislation in the 114<sup>th</sup> Congress**

To date, two Indian water rights settlements have been introduced in the 114<sup>th</sup> Congress: S. 1125, the Blackfeet Water Rights Settlement Act of 2015, and S.1983, the Pechanga Band of Luiseno Mission Indians Water Rights Settlements Act. Additionally, S. 1365, the Authorized Rural Water Project Settlement Completion Act, would provide mandatory funding to be made available to Indian water rights settlement projects in general.<sup>70</sup> Each bill is discussed below.

S. 1125 would ratify the Blackfeet-Montana Water Rights Compact and would direct the Secretary of the Interior to implement the compact. Under S. 1125, the water rights of the Blackfeet Tribe would be up to 5,000 acre-feet a year from St. Mary's Unit (a Reclamation project) and 50,000 acre-feet per year of water stored in Lake Elwell. S. 1125 would establish the Blackfeet Settlement Fund, the sole use of which would be to carry out the activities proposed in the bill. The bill would establish seven accounts with a total authorization of appropriations of more than \$420 million.<sup>71</sup>

Under S. 1125, the Blackfeet Tribe would have the authority to allocate, distribute, and lease its tribal water rights for any use on the reservation in accordance with the compact, the legislation,

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<sup>69</sup> Connor, 2015.

<sup>70</sup> Among other things, from 2015 to 2035 the bill would transfer \$35 million annually that otherwise would be made available to the Bureau of Reclamation's Reclamation Fund to a new account for Indian water rights settlements.

<sup>71</sup> The accounts and projects within the Blackfeet Settlement Fund and corresponding amounts that would be authorized in S. 1125 are as follows: the Administration and Energy Account (\$28.9 million); Operations Maintenance and Rehabilitation Account (\$27.7 million); St. Mary Account (\$27.8 million); Blackfeet Water, Storage, and Development Projects Account (\$178.3 million); Municipal, Rural and Irrigation System Account (\$76.2 million); Blackfeet Irrigation Project Deferred Maintenance, Four Horns Dam Safety, and Rehabilitation and Enhancement of the Four Horns Feeder Canal, Dam, and Reservoir Improvements Account (\$54.9 million); and St. Mary/Milk Water Management and Activities Fund (\$26.7 million).

and applicable federal laws.<sup>72</sup> As part of S. 1125, if the St. Mary's Unit is rehabilitated, the Blackfeet Tribe would have the exclusive right to develop and market hydropower from the unit, subject to development authorization by the Commissioner of Reclamation.

As part of the settlement, the bill provides that the Blackfeet Tribe would waive and release all water rights claims against the United States that have been or could be asserted in any proceeding, including in a state stream adjudication, and all claims against the United States relating to damages, losses, or injuries as well as failures to implement water rights.<sup>73</sup> According to S. 1125, if the Secretary fails to publish a statement of findings under Section 18(e)<sup>74</sup> by January 21, 2025, the proposed bill would be repealed and any action, contract, or agreement entered into in the bill would be void. At that point, amounts made to the Blackfeet Settlement Fund would revert to the general fund of the U.S. Treasury. Finally, the bill states that the U.S. would not be held liable for failure to carry out obligations or activities authorized by the bill if adequate appropriations are not provided expressly by Congress or if there are not enough monies available in the Reclamation Water Settlements Fund.<sup>75</sup>

S.1983 would ratify the Pechanga Settlement Agreement and direct the Secretary of the Interior to implement the agreement. Under S.1983, the water rights of the Pechanga Band of Luiseno Mission Indians would be up to 4,994 acre-feet a year. S.1983 would establish the Pechanga Settlement Fund, with the sole purpose of carrying out the agreements authorized by the bill. The bill would establish four accounts, with a total authorization of appropriations of \$28.5 million.<sup>76</sup>

Under S.1983, the Pechanga Band would have the authority to allocate, distribute, and lease its tribal water rights for uses on the reservation in accordance with the Settlement Agreement and applicable federal laws. Additionally, the bill states that the Pechanga Band shall enact a water code, subject to the approval of the Secretary of the Interior.

As part of the settlement, the Pechanga Band would waive claims to water rights within the Santa Margarita River Watershed as well as claims to injuries to water rights against the United States and the Rancho California Water District. The Pechanga Band would retain claims for water rights outside the jurisdiction of the U.S. District Court for the Southern District of California as well as any claims against entities other than the U.S. and the Rancho California Water District. According to S.1983, if the Secretary fails to publish a statement of findings under Section 7(e)<sup>77</sup> by April 30, 2021, the proposed law would be repealed and any action, contract, or agreement

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<sup>72</sup> Off-reservation allocation, distribution, and leasing is subject to the approval of the Secretary of the Interior.

<sup>73</sup> However, the Blackfeet Tribe would retain claims related to activities affecting the quality of water under the Comprehensive Environmental Response, Compensation, and Liability Act of 1980 (P.L. 96-510), the Safe Drinking Water Act (P.L. 93-523), and the Federal Water Pollution Control Act (P.L. 92-500), among others.

<sup>74</sup> The statement of findings includes that the Montana Water Court has approved of the compact; all federal amounts have been appropriated; the state has appropriated any necessary payments; the tribe has ratified and approved of the act and the compact; the Secretary has allocated 50,000 acre-feet of stored water in Lake Elwell; and the appropriate waivers and releases have been executed by the Secretary.

<sup>75</sup> The fund was established under §10501(a) of P.L. 111-11.

<sup>76</sup> The accounts and projects within the Pechanga Settlement Fund and corresponding amounts that would be authorized in S.1983 are as follows: the Pechanga Recycled Water Infrastructure Account (\$2.7 million); Pechanga Extension of Service Area Agreement Delivery Capacity Account (\$17.9 million); St. Mary Account (\$27.8 million); Blackfeet Water, Storage, and Development Projects Account (\$178.3 million); Pechanga Water Fund Account (\$5.5 million); and Pechanga Water Quality Account (\$2.5 million). S.1983 includes an Anti-Deficiency provision stating that these funds are to be used as specifically authorized in the bill.

<sup>77</sup> The statement of findings includes that the U.S. District Court for the Southern District of California has approved of the Agreement; all federal amounts have been deposited into the Fund; and the appropriate waivers and releases have been executed by the Pechanga Band and the Secretary.

entered into would be void. At that point, amounts made to the Pechanga Settlement Fund would revert to the general fund of the U.S. Treasury.

S. 1365 would establish dedicated funding for ongoing and newly authorized rural water projects and for water and hydropower-related settlement agreements with Indian tribes. This funding would be available without further appropriation over the FY2015-FY2035 period. The bill would establish a new fund in the Treasury, the Reclamation Rural Water Construction and Settlement Implementation Fund, and transfer to it \$115 million annually from 2015 to 2035. Of that funding, \$35 million annually would be transferred to a newly created Infrastructure and Settlement Completion Account.<sup>78</sup> The bill designates this account for funding compensation of certain monetary claims of Indian Tribes whose land has been used for the generation of hydropower or to complete work on approved Indian water rights settlements and other similar tribal agreements. Funding provided under the bill would be available without further appropriation (i.e., mandatory funding).

Other settlements have been introduced in previous Congresses but have not been enacted and have yet to be re-introduced in the 114<sup>th</sup> Congress. This includes the Confederated Kootenai and Salish Tribes and Fort Belknap settlements in Montana.<sup>79</sup> In 2015 testimony, DOI also cited “active” negotiations involving the Tonto Apache Tribe and Hualapai Tribe in Arizona.<sup>80</sup>

## Other Recent Legislation

Since 2009, Congress has enacted six Indian water rights settlements involving nine tribes, at a federal cost of more than \$2 billion. These settlements were enacted in four bills: P.L. 111-11; P.L. 111-291; P.L. 113-169 (the Pyramid Lake Paiute-Fish Springs Ranch Settlement Act), and P.L. 113-223 (the Bill Williams River Water Rights Settlement Act of 2014).

In the 113<sup>th</sup> Congress, four settlements were proposed but not enacted: the Pechanga Band of Luiseno Mission Indians Water Rights Settlement Act (S. 1219/H.R. 2508); the Gros Ventre and Assiniboine Tribes of the Fort Belknap Indian Community Water Rights Settlement Act of 2013 (S. 1394); and the Blackfeet Water Rights Settlement Act of 2013 (S. 434).

## Conclusion

Long-standing disputes over water rights and use involving Indian tribes likely will 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. To date, Congress has enacted 29 settlements and appropriated in excess of \$2 billion. Additional funding for ongoing settlements (and authorization of and appropriations for new settlements) likely will be requested in the future. In considering Indian water rights settlements, primary issues for Congress may include the cost,

<sup>78</sup> The remaining \$80 million annually would be transferred to a Reclamation Rural Water Project Account, for work on rural water projects authorized as of the date of the enactment of the bill or those authorized for study under the Rural Water Supply Act of 2006 (P.L. 109-451) and subsequently authorized for construction after the enactment of the Authorized Rural Water Project Settlement Completion Act (S. 1365). Some of these projects appear to have tribal components.

<sup>79</sup> Testimony of Mark Macarro, in U.S. Congress, Senate Committee on Indian Affairs, *Addressing the Needs of Native Communities through Indian Water Rights Settlements*, 114<sup>th</sup> Congress, 1<sup>st</sup> sess., May 20, 2015; Weiner, 2015.

<sup>80</sup> Connor, 2015.

type, and sufficiency of federally authorized efforts to settle tribal water rights claims. Other issues, such as compliance with federal environmental statutes and disagreements over specific provisions in individual settlements, also may arise in the context of these settlements.

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