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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. 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.

Since 1990, the Department of the Interior's policy has been that Indian water rights should be resolved through negotiated settlements rather than litigation. These agreements allow tribes to quantify their water rights on paper, while also procuring access to water through infrastructure and other related expenses. In addition to tribes and federal government representatives, settlement negotiations may involve states, water districts, and private water users, among others. After congressional approval, federal projects associated with approved Indian water rights settlements generally have been implemented by the Bureau of Reclamation (Reclamation) or the Bureau of Indian Affairs (BIA), pursuant to congressional directions.

Approval and implementation of Indian water rights settlements typically requires federal action—often in the form of congressional approval. As of October 2023, 39 Indian water rights settlements had been federally approved, with total estimated costs in excess of \$8.5 billion (nominal dollars). Of these, 35 settlements were approved and enacted by Congress and 4 were administratively approved by the U.S. Departments of Justice and the Interior. One new settlement was approved in the 117<sup>th</sup> Congress, and another existing settlement was amended. Additional new and amended settlements have been proposed in the 118<sup>th</sup> Congress.

Historically, federal funding for settlements generally has been provided through discretionary appropriations; Congress also has approved mandatory funding for some settlements. The Reclamation Water Settlements Fund was created in 2009 under P.L. 111-11 as a source of additional funding for existing and future settlements. It is scheduled to provide \$120 million per year in mandatory funding for settlements through FY2029, with the availability of these funds set to expire in FY2034. In 2021, Congress approved and appropriated \$2.5 billion for another Indian water rights fund, the Indian Water Rights Settlement Completion Fund, in the Infrastructure Investment and Jobs Act (P.L. 117-58).

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, approved, and funded. Many have noted that the resolution of Indian water rights settlements is a mutually beneficial means of resolving long-standing legal issues. Although there is little opposition to the generally stated principle that negotiated settlements are preferable to litigation, in some cases the executive branch and/or other water users oppose individual settlements (or elements thereof). Other questions include how to manage cost overruns associated with these settlements and what entity should have primary responsibility for settlement implementation and oversight.

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## Introduction

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. Since 1978, the federal government has entered into 39 water rights settlements with Indian tribes and other users, and 35 of these settlements have been congressionally approved. Negotiation of other settlements is ongoing.

Congressionally authorized settlements typically authorize funding, and in some cases provide direct/mandatory 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 with completed 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, overarching 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, 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.<sup>1</sup> 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; 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., creates an Indian reservation), it implicitly reserves water sufficient to fulfill the purpose of the reservation.<sup>4</sup>

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<sup>1</sup> For more information, see CRS In Focus IF11944, *Tribal Lands: An Overview*, by Mariel J. Murray.

<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. These rights are commonly referred to as *aboriginal* water rights.

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

<sup>4</sup> Historically, *Winters* doctrine has been applied mostly for surface waters, and the Supreme Court has not declared outright that groundwater is subject to the *Winters* doctrine. However, court cases have focused on the question of whether there is a federally reserved right to the groundwater resource for some tribes. For more information, see CRS Insight IN10857, *Federal Reserved Water Rights and Groundwater: Quantity, Quality, and Pore Space*, by Peter Folger.

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 rights are awarded 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 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 water 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 agree on terms for quantification of and access to tribal water allocations, among other things. These settlements are often attractive to the parties involved because their terms and conditions resolve long-standing uncertainty and they reduce conflict by avoiding litigation.<sup>5</sup> However, there remains disagreement as to whether settlements are the most appropriate means for resolving Indian water rights disputes.<sup>6</sup> Some settlement projects have been subject to increasing costs over time. These changes complicate analyses of the tradeoffs involved in negotiated settlements, and have in some cases resulted in the need for multiple congressional authorizations and increased federal funding requirements.

## 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.<sup>7</sup>

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<sup>5</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>6</sup> See “Debate over the “Certainty” of Settlements,” below.

<sup>7</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) (continued...)

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).<sup>8</sup> DOI adopted these criteria and procedures in 1990 to establish a framework to inform the Indian water rights settlement process. DOI also 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.<sup>9</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 is led by 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, four steps are associated with Indian water rights settlements: prenegotiation, negotiation, settlement, and implementation. The time between these steps 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. In some cases, this stage includes litigation and water rights adjudications that tribes partake in before

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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>8</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."

<sup>9</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>.

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>10</sup>

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.<sup>11</sup>

## 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 pursuing negotiations (based on an analysis of 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, working with DOJ, assesses 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 failing to reach a 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 to arise during the settlement process.

The actual negotiations process 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 may take years to resolve.<sup>12</sup> 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 assistance in support of Indian water rights claims and financial support for the federal government to defend and assert

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<sup>10</sup> 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.

<sup>11</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>12</sup> The negotiation process takes on average five years; however, settlements are negotiated on a case-specific basis, the negotiation duration 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.

Indian water rights.<sup>13</sup> Reclamation's Native American Affairs Program also facilitates the negotiation of water rights settlements by providing technical support and other assistance.<sup>14</sup> In 2016, OMB issued guidance that required 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.<sup>15</sup>

## Settlement

Once the negotiation phase is complete and parties have agreed to specific terms, the settlement typically is presented for congressional authorization.<sup>16</sup> In these cases, Congress must enact the settlement for it to become law and for projects outlined under the settlement to be eligible for federal funding. If the Administration determines that Congress is not required to approve the settlement, the settlements generally may be approved administratively by the Secretary of the Interior or the U.S. Attorney General or judicially by judicial decree.

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 and is decided on in the final version of the agreement. In some cases, other agencies (e.g., the U.S. Fish and Wildlife Service) contribute based on the particular terms of a settlement.

## 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. 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.

For settlements that began through litigation or adjudication, the settlement parties must reconvene to reconcile the original agreement with the congressionally approved terms of settlement, along with any additional changes. After the Secretary of the Interior signs the revised agreement, the adjudication court conducts a process in which it hears objections from any party. Once the court approves the settlement, it enters a final decree and judgment.

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<sup>13</sup> Testimony of Michael L. Connor, Commissioner, U.S. Bureau of Reclamation, 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.

<sup>14</sup> *Ibid.*

<sup>15</sup> Memo from John Pasquantino, 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.

<sup>16</sup> The executive branch typically refrains from submitting formal legislative proposals for settlements to Congress and instead comments on its support or opposition to individual settlements in testimony and/or letters of Administration position. In some cases, settlements have been introduced for congressional approval when the negotiation phase is still ongoing or under terms opposed by the Administration. See below section, "Executive Branch Opposition to Individual Settlements."

# Status of Individual Indian Water Rights Settlements

The federal government has been involved with Indian water rights settlements through assessment, negotiation, and implementation teams (for enacted settlements). As of early 2023, there were 20 negotiation teams working on pending settlements and 19 implementation teams carrying out approved settlements. Overall, the federal government has entered into 39 settlements since 1978, and Congress approved 35 of these settlements in enacted legislation. 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 and **Table 2** lists negotiation teams.

**Table 1. Enacted Indian Water Rights Settlements**  
(settlements by state and tribe)

Year	Settlement and Legislation	State	Tribes	Total Acre-Feet Awarded per Year	Authorized 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

Year	Settlement and Legislation	State	Tribes	Total Acre-Feet Awarded per Year	Authorized 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 <sup>a</sup>
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 (P.L. 117-342)	AZ	White Mountain Apache Tribe	99,000	\$857.2
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	Authorized Federal Cost (nominal \$ in millions)
2010	Aamodt Litigation Settlement Act, P.L. 111-291 (P.L. 116-260)	NM	Nambé, Pojoaque, San Ildefonso, and Tesuque Pueblos	6,467	\$311.3
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	\$420.0
2020	Montana Water Rights Protection Act, P.L. 116-260	MT	Confederated Salish-Kootenai Tribe	90,000	\$1,900.0
2020	Navajo-Utah Water Rights Settlement, P.L. 116-260	UT	Navajo Nation	81,500	\$210.4
2022	Hualapai Tribe Water Rights Settlement Act (P.L. 117-349)	AZ	Hualapai Tribe	3,414	\$317.0

**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. CRS accessed additional information and documents 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. Estimated costs reflect the most recently authorized costs and do not reflect adjustments for inflation or cost indexing. 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.

- 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. 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 Team	State	Tribe(s)
Abbott-Aragon	NM	Ohkay Owingeh, Pueblo of Santa Clara
Abousleman	NM	Pueblos of Jemez, Pueblo of Santa Ana, Pueblo of Zia
Agua Caliente	CA	Agua Caliente Band of Cahuilla Indians
Coeur d'Alene	ID	Coeur d'Alene Tribe
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
Havasupai	AZ	Havasupai Tribe
Lummi-Nooksack	WA	Lummi Tribe of the Lummi Reservation, Nooksack Indian Tribe
Navajo-Little Colorado	AZ	Navajo Nation, Hopi Tribe, San Juan Southern Paiute Tribe
Nez Perce-Palouse Basin	ID	Nez Perce Tribe
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:** Department of the Interior, Secretary's Indian Water Rights Office, May 2023.

## Issues Associated with Indian Water Rights Settlements

Once the stakeholders have agreed to initiate negotiation of a settlement, a number of issues may pose challenges to a successful negotiation and implementation of a settlement. Such challenges may include 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.<sup>17</sup> For federal policymakers, widely recognized challenges include identifying and enacting federal funding to implement settlements and doing so at a level that achieves cost savings relative to litigation. In response to concerns related to implementation costs, some settlements have been renegotiated over time to decrease their estimated federal costs. For instance, legislation to authorize the Blackfeet Compact was first introduced in 2010 and was subsequently renegotiated and revised, resulting in a reduction to estimated federal costs in 2016 by approximately \$230 million (nominal dollars) compared to the earlier versions of this legislation.<sup>18</sup> Partially in response to concerns related to justifying the costs of proposed settlements, OMB issued a memorandum to DOI and DOJ on June 23, 2016, outlining new steps to provide for increased involvement by OMB earlier in the settlement negotiation process. OMB also stated that it would require, among other things, that DOI and DOJ provide a description and quantification of the costs and benefits of proposed settlements before issuing a formal letter of Administration position.<sup>19</sup>

A related issue is the question of nonfederal cost shares, in particular cost-share requirements for state governments and local (i.e., non-tribal) 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.<sup>20</sup> Instead, individual settlements have included 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.<sup>21</sup> 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. 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 through 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 Indian water rights settlements have been funded are discussed below. These sections describe different structural approaches to funding Indian water rights settlements

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<sup>17</sup> These implementation costs are in addition to the costs associated with negotiating the settlements.

<sup>18</sup> 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*, 114<sup>th</sup> Congress, 2<sup>nd</sup> sess., May 24, 2016.

<sup>19</sup> See footnote 15.

<sup>20</sup> See below section, “Recent Indian Water Rights Settlement Legislation.”

<sup>21</sup> For more information, see “Frequently Asked Questions for the Pojoaque Basin Regional Water System EIS,” at <https://sites.google.com/site/pbwatereis/frequently-asked-questions>.

that Congress has approved, including when and how the funding is expected to be released (if applicable).

### **Discretionary Funding**

Discretionary spending (i.e., 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) the Pechanga Recycled Water Infrastructure account; (2) the Pechanga ESAA Delivery Capacity account; (3) the Pechanga Water Fund account; and (4) the 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.<sup>22</sup> These costs have ranged from several hundred thousand dollars for the Yavapai-Prescott Water Rights Settlement to \$1 billion for the Confederated Salish and Kootenai Tribes (CSKT) Settlement in Montana.

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.<sup>23</sup>

### **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. To date, mandatory funding for settlements generally has been through one or more of the following mechanisms: (1) funding from the Reclamation Water Settlements Fund, a dedicated fund created in 2010 for certain priority Indian water rights settlements; (2) funding from the Indian Water Settlements Completion Fund, a fund created in 2021 for all settlements authorized prior to that bill’s enactment; (3) funding for specific individual settlements; and (4) redirection of existing receipt accounts. 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 Secretary of the Treasury to deposit \$120 million into the fund for each of FY2020-FY2029 (for a total of \$1.2 billion).<sup>24</sup> The fund may be used to implement a water rights settlement agreement

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<sup>22</sup> Not all enacted settlements are associated with federal funding authorizations; some only require federal approval and/or authorize specific federal activities.

<sup>23</sup> P.L. 106-554, §303.

<sup>24</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.

approved by Congress that resolves, in whole or in part, litigation involving the United States. The fund also 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>25</sup> The act 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>26</sup> 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.<sup>27</sup>

Under the legislation, the amounts reserved for any settlements not approved by December 31, 2019, are available for other authorized uses of the fund. If funding remains after the authorized priority settlements are completed and before the expiration of the fund itself, those appropriations may be used for other authorized Indian water rights settlements. Although the last appropriations to the fund are set 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.<sup>28</sup>

### ***Indian Water Settlements Completion Fund***

In the Infrastructure Investment and Jobs Act (IIJA; P.L. 117-58), Congress authorized a new Treasury fund for Indian water rights settlements.<sup>29</sup> In Division G, Section 70101, of the IIJA, Congress established an Indian Water Rights Settlement Completion Fund and provided that on the date of the IIJA's enactment, the Secretary of the Treasury shall deposit \$2.5 billion into this fund, to remain available until expended. Subsection 70101(c) of the IIJA authorized the Secretary of the Interior to use these funds, "for transfers to funds or accounts authorized to receive discretionary appropriations, or to satisfy other obligations identified by the Secretary of the Interior, under an Indian water settlement approved and authorized by an Act of Congress before the date of enactment of this Act."<sup>30</sup> This provision authorized the Secretary of the Interior to transfer resources from the new fund to any enacted Indian water rights settlement based on secretarial discretion, limited only by the requirement that the settlement was enacted prior to November 15, 2021. Thirty-four of the 35 enacted settlements meet these criteria.<sup>31</sup> The fund appears to be available for use on any approved settlement, regardless of its initial funding

<sup>25</sup> 43 U.S.C. §407.

<sup>26</sup> Neither the Aamodt nor the Abeyta Settlements were authorized in P.L. 111-11; they were subsequently authorized in P.L. 111-291.

<sup>27</sup> Of these, the Navajo-Gallup, Aamodt, Abeyta, Blackfeet, and Crow Tribe Settlements have been approved.

<sup>28</sup> For more information on the proposed extension of this fund, see below section, "Recent Indian Water Rights Settlement Legislation."

<sup>29</sup> For more information on this legislation and implementation to date, see CRS Report R47032, *Bureau of Reclamation Provisions in the Infrastructure Investment and Jobs Act (P.L. 117-58)*, by Charles V. Stern and Anna E. Normand.

<sup>30</sup> P.L. 117-58, §70101(c).

<sup>31</sup> The Hualapai Tribe Water Rights Settlement is the one settlement that is ineligible for this funding; it was enacted in December 2022.

mechanism, so long as the use is approved by the Secretary. As of October 2023, DOI had allocated \$460 million from this fund for 14 settlements.<sup>32</sup>

### *Mandatory Appropriations for Individual Settlements*

Several individual settlements have received mandatory appropriations in recent years. For example, provisions in the Claims Resolution Act of 2010 (P.L. 111-291) authorized and provided direct/mandatory spending for four individual water rights settlements.<sup>33</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 the Aamodt Settlement and \$93 million in discretionary funding subject to appropriations, and appropriated \$82 million in mandatory funding;
- authorized the Abeyta Settlement and \$58 million in discretionary funding subject to appropriations, and appropriated \$66 million in mandatory funding;
- authorized the Crow Tribe Water Rights Settlement and \$158 million in discretionary funding subject to appropriations, and appropriated \$302 million in mandatory funding;
- authorized the White Mountain Apache Tribe water rights quantification and \$90 million in discretionary funding subject to appropriations, and appropriated mandatory funding of approximately \$203 million; 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, see previous section “Reclamation Water Settlements Fund”) to carry out the Navajo-Gallup Water Supply Project authorized in that same legislation.

More recently, the Montana Water Rights Protection Act, enacted in Division DD of the Consolidated Appropriations Act, FY2021 (P.L. 116-260), approved the Confederated Salish-Kootnai Tribe (CSKT) Water Rights Compact. Congress authorized a total of \$1.9 billion for this settlement, including \$90 million per year in mandatory funding from FY2021 to FY2030. Congress also stipulated that no funds from the Reclamation Water Settlements Fund could be made available for this settlement until 10 years after the enactment of P.L. 116-260 and required that any withdrawals thereafter be limited to no more than 50% of the fund’s balances.

### *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 funding mechanisms differ from traditional mandatory funds, in that they make available funding without further appropriations but 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

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<sup>32</sup> U.S. Department of the Interior, “Bipartisan Infrastructure Law Supports \$580 Million Investment to Fulfill Indian Water Rights Settlements,” press release, February 2, 2023, at <https://www.doi.gov/pressreleases/bipartisan-infrastructure-law-supports-580-million-investment-fulfill-indian-water>.

<sup>33</sup> Some of these settlements were among the priorities laid out in P.L. 111-11.

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 act 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 act stipulated that up to \$250 million in LCRBDF receipts be made available for future Indian water rights settlements in Arizona. If sufficient LCRBDF balances are not available for all of the act's priorities, then funds are to be awarded according to the order in which these priorities appear in the act.<sup>34</sup>

## Compliance with Environmental Laws

The environmental impact of settlements has been an issue for federal agencies, environmental groups, and tribes, among others. 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. In some cases, construction of settlement projects has been challenged under federal environmental laws, such as the National Environmental Policy Act of 1969 (NEPA; 42 U.S.C. §§4321 et seq), the Clean Water Act (CWA; 42 U.S.C. §§7401 et seq.), the Endangered Species Act of 1973 (ESA; 16 U.S.C. §§1531 et seq.), and the Safe Drinking Water Act (42 U.S.C. §§300f et seq).

For example, the Animas-La Plata project,<sup>35</sup> 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.<sup>36</sup> 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.<sup>37</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 with NEPA, CWA, and ESA.<sup>38</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).

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<sup>34</sup> For additional background on this settlement, see CRS memorandum on the Arizona Water Settlements Act, available to congressional clients from the author upon request.

<sup>35</sup> 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.

<sup>36</sup> In 1990, the U.S. Fish and Wildlife Service 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.

<sup>37</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>38</sup> Jedediah 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).

## Water Supply Issues

In addition to needing 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 sources from non-tribal users to tribes, 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.<sup>39</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, fish and wildlife) 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. 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.<sup>40</sup> 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.<sup>41</sup> As such, negotiations about the right to market, lease, or transfer water can be contentious and may result in restrictions on these activities in order to mitigate potential 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 litigation.

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 limit the abilities of tribes to develop in the future.<sup>42</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>43</sup> Some tribes 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 other tribes have spoken out against the idea of negotiated settlements entirely, as they oppose negotiating their claims in exchange for infrastructure funding. They view the process as akin to the “first treaty era,” when Indian tribes

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<sup>39</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>40</sup> Daniel McCool, *Native Waters: Contemporary Indian Water Settlements and the Second Treaty Era* (Tucson, AZ: University of Arizona Press, 2002), p. 170. Hereinafter McCool, *Native Waters*.

<sup>41</sup> McCool, *Native Waters*, pp. 168-169.

<sup>42</sup> McCool, *Native Waters*, pp. 81, 85.

<sup>43</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.

forfeited their lands.<sup>44</sup> They note that the courts may be more favorable to tribes and allow for greater gains through litigation.

Non-tribal 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 non-tribal water rights. For example, during consideration of the CSKT Water Compact, some water users in western Montana complained that the settlement recognized off-reservation water rights with the potential to significantly curtail non-tribal water rights beyond those quantified in the CSKT Compact.<sup>45</sup>

Debates regarding the certainty of settlements also encompass the certainty of federal funding to resolve individual settlements. Several settlements, including the White Mountain Apache Settlement and the Navajo-Gallup Settlement, have been subject to increasing costs over time that have required additional congressional action. The costs of the White Mountain Apache Settlement (originally authorized in P.L. 111-291) escalated in large part due to unforeseen seepage in a planned dam; as a result, the settlement authorization has been amended multiple times. Most recently, in P.L. 117-342, Congress authorized an additional \$530 million in funding for the settlement's Cost Overrun Subaccount to account for escalating costs.<sup>46</sup> Similarly, costs for the Navajo-Gallup Project (part of the Navajo Nation Water Rights Settlement in Northwestern New Mexico) have reportedly escalated, leading to a proposal in the 118<sup>th</sup> Congress to increase the project's cost ceiling by \$725.7 million.<sup>47</sup>

## Executive Branch Opposition to Individual Settlements

Executive branch support for settlements in general, or for settling the water rights claims of individual tribes, does not always translate into unqualified support for proposed settlement legislation. In some cases, settlements have been presented to Congress before they have undergone full Administration review and approval. In other cases, the executive branch may not have participated in the legislative drafting process. This can result in situations in which the executive branch supports approval of a bill that would resolve a tribe's water rights in general, while also opposing some of its specific legislative provisions. Common concerns along these lines include funding levels for a settlement and/or authorization of activities that the executive branch views as outside the scope of the federal role.

## Recent Indian Water Rights Settlement Legislation

Since 2009, Congress has approved 14 new Indian water rights settlements in seven acts. In some cases, Congress approved multiple settlements as parts of larger acts of Congress; in other cases, Congress enacted settlements as stand-alone legislation. The 117<sup>th</sup> Congress enacted one new settlement, the Hualapai Tribe Water Rights Settlement Act of 2022 (P.L. 117-349). As the number of settlements has increased, Congress also has considered and enacted amendments to reflect updated settlement costs and other changes. The 117<sup>th</sup> Congress enacted amendments to the White Mountain Apache Settlement in P.L. 117-342 that, among other things, increased the authorized costs for that settlement by \$530 million. The 117<sup>th</sup> Congress also enacted legislation

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<sup>44</sup> McCool, *Native Waters*, p. 85.

<sup>45</sup> See, for example, Al Olszewski, "Guest Opinion: Fight Against CSKT Water Compact," *Billings Gazette*, November 26, 2019.

<sup>46</sup> See P.L. 117-342, §1(c).

<sup>47</sup> See below section, "Proposed Settlements in the 118th Congress"

authorizing the Colorado River Indian Tribes to enter into agreements to lease their Colorado River water to other entities (P.L. 117-343).

## Proposed Settlements in the 118<sup>th</sup> Congress

Multiple new and amended settlements have been proposed in the 118<sup>th</sup> Congress. The Biden Administration has generally supported these proposals, several of which are discussed below. The Administration has recently testified in favor of allowing tribes to make decisions regarding how, when, and where to develop water infrastructure, in the form of tribal trust funds in lieu of specific water infrastructure projects.<sup>48</sup> Thus, several recent proposals have taken this approach.

Companion legislation in the House (H.R. 1304) and the Senate (S. 595) would authorize water rights settlements with several Pueblos in New Mexico: the Pueblos of Acoma and Laguna in the Rio San Jose Stream System and the Pueblos of Jemez and Zia in the Rio Jemez Stream System. These bills would ratify and confirm the Jemez and Zia Pueblos' water rights to over 9,000 acre-feet per year (AFY), including 6,055 AFY for Jemez Pueblo and 3,699.4 AFY for Zia Pueblo. Both bills would establish Trust Funds for the Pueblos in the form of a \$290 million fund for the Jemez Pueblo and \$200 million for Zia Pueblo, plus indexing for inflation. These funds would be capitalized through mandatory appropriations upon enactment of the settlement, and funding would be available for withdrawal by the Secretary of the Interior and eligible for transfer to the Pueblos, provided that the funds are used as outlined in the bills.<sup>49</sup>

S. 306 would authorize a new settlement with the Tule River Tribe of California. The legislation would resolve the Tribe's water rights claims for up to 5,828 AFY of flows, as described in a 2007 agreement with the Tribe. It would establish a mandatory Trust Fund of \$568 million (subject to indexing) for construction (\$518 million) and operations and maintenance (\$50 million) expenditures. It would also transfer approximately 825.66 acres of Bureau of Land Management Land, 1,837.46 acres of fee land owned by the Tribe, and approximately 9,037 acres of Forest Service land to the United States, to be held in trust for the Tribe.<sup>50</sup>

S. 1987 and H.R. 5088 would authorize a settlement with the Fort Belknap Indian Community (composed of the Gros Ventre and Assiniboine Tribes, or Tribes) in Montana based on a 2001 Compact approved by the Montana legislature. The legislation would confirm a water right for the Tribes of 446,000 AFY of surface water, plus groundwater, and would include an allocation of 20,000 AFY of storage from Tiber Reservoir (a Reclamation facility). The bill would authorize a total of \$1.17 billion in federal appropriations, with funding for BIA rehabilitation of the Fort Belknap Indian Irrigation Project (\$415.8 million) and Reclamation funding for the rehabilitation and expansion of Milk River Project facilities (\$300 million), as well as a trust fund (\$454 million) for the Tribes to be used for domestic water infrastructure and to construct a pipeline from Tiber Reservoir to the Reservation. The legislation would stipulate that approximately \$734

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<sup>48</sup> Statement of Bryan Newland, Assistant Secretary for Indian Affairs, Department of the Interior U.S. Congress, Senate Committee on Indian Affairs, *Legislative Hearing to Receive Testimony on S. 616, S. 1898 & S. 1987*, 118<sup>th</sup> Cong., 1<sup>st</sup> sess., July 12, 2023. Hereinafter, Newland Testimony, July 2023.

<sup>49</sup> Section 105(h) of both bills provides that funds may be used for acquiring water rights or water supply; planning, permitting, designing, engineering, constructing, reconstructing, replacing, rehabilitating, operating, or repairing water production, treatment, or delivery infrastructure, including for domestic and municipal use, on-farm improvements, or wastewater infrastructure; Pueblo Water Rights management and administration; watershed protection and enhancement, support of agriculture, water-related Pueblo community welfare and economic development; and environmental compliance in the development and construction of infrastructure in accordance with the title.

<sup>50</sup> Newland Testimony, July 2023.

million in funding for the settlement would be authorized as discretionary funding, while \$436 million would be mandatory funding.

Another proposal in the 118<sup>th</sup> Congress would amend an existing water rights settlement. S. 1898 and H.R. 3977, both entitled the Navajo-Gallup Water Supply Project Amendments Act of 2023, would make significant amendments to the Northwestern New Mexico Rural Water Projects Act (P.L. 111-11), which authorized the Navajo-Gallup Water Project (a key part of the Navajo Nation Water Rights Settlement, also authorized in P.L. 111-11). S. 1898 and H.R. 3977 would both increase the Navajo-Gallup Project's authorized cost ceiling from \$1.414 billion (October 2022 price levels) to \$2.138 billion.<sup>51</sup> DOI and stakeholders have argued that the increased authorization is needed based on cost estimates that rely on, among other things, more detailed feasibility-level design (as opposed to the original 2007 appraisal-level design estimate), which projects the need for an additional \$689.45 million to address this cost gap.<sup>52</sup> The bills would also make other changes to the original project authorization, including authorization of \$6.25 million in funding renewable energy development associated with the project and \$30 million for Navajo community connections to the project. The bills would also authorize the appropriation of \$250 million for an Operations, Maintenance, and Rehabilitation (OM&R) trust fund for the Navajo Nation,<sup>53</sup> as well as up to a maximum of \$10 million for an OM&R trust fund for the Jicarilla Apache Nation based on the results of an Ability to Pay Study. Finally, the bills would cap the City of Gallup's repayment obligation for the Navajo-Gallup Project at 25% of allocated construction costs (which Reclamation estimates would reduce the city's repayment obligation by \$33 million), and extend the completion deadline for the project from December 31, 2024, to December 31, 2029.<sup>54</sup>

## FY2024 Budget Request

The FY2024 President's budget proposed changes in how Reclamation funds its authorized Indian water rights settlements. For the first time in decades, the budget proposed no discretionary funding for construction in connection with individual Indian water rights settlements, noting these needs could be met by mandatory funding in the Reclamation Water Settlements Fund and the Indian Water Rights Settlement Completion Fund.<sup>55</sup> The Administration also proposed two new, as-yet-unnamed mandatory funds for Indian Water Rights Settlements. One of these funds would provide \$2.5 billion in mandatory funding to support additional funding for existing settlements and future settlements. The other fund would provide \$340 million (\$34 million per year over 10 years) to address ongoing operation, maintenance, and repair requirements for four projects associated with existing Indian water rights settlements: the Ak Chin Indian Water Rights Settlement Project, the Animas-La Plata Project (part of the Colorado Ute Settlement), the Columbia and Snake River Salmon Recovery Project (part of the Nez Perce Settlement), and the Navajo-Gallup Water Supply Project. With no discretionary funding requested and no source of mandatory funding currently available, recently approved settlements (e.g., the Hualapai Settlement) would not be funded for construction in FY2024 without additional congressional appropriations.

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<sup>51</sup> Newland Testimony, July 2023.

<sup>52</sup> Newland Testimony, July 2023.

<sup>53</sup> This authority is proposed based on the results of a 2020 ability to pay analysis by Reclamation which found that the Navajo Nation did not have the ability to pay for these facilities. See Newland Testimony, July 2023.

<sup>54</sup> See S. 1898 and H.R. 3977, §3(c)(2)(B), §4(a)(1)(B).

<sup>55</sup> Bureau of Reclamation, *Bureau of Reclamation FY2024 Budget Justifications*, pp. GS2-GS3.

## 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. Congress has enacted 35 settlements to date, and additional funding and amendments for ongoing settlements and authorizations of and appropriations for new settlements are likely to be requested in the future. In considering Indian water rights settlements, primary issues for Congress may include the cost, contents, and sufficiency of federally authorized efforts to settle tribal water rights claims, as well as the circumstances under which these settlements are considered and approved by authorizing committees and others (e.g., whether the executive branch formally supports all components of a proposed settlement). In addition, the preferred extent of federal involvement in implementing settlements, including the question of mandatory versus discretionary funding for settlements, nonfederal cost shares, and whether the federal government or tribes should take the lead in developing and constructing projects (including any related cost overruns), may be central to congressional consideration of future settlements.

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