

Committee on Natural Resources

Rob Bishop, Chairman
Markup Memorandum

September 16, 2016

To: All Natural Resources Committee Members

From: Majority Committee Staff
Subcommittee on Water, Power and Oceans (x5-8331)

Subject: H.R. 5984 (Rep. Ken Calvert, R-CA), To authorize the Pechanga Band of Luiseño Mission Indians Water Rights Settlement, and for other purposes.
September 21-22, 2016; 1334 Longworth House Office Building

H.R. 5984 (Rep. Ken Calvert, R-CA), “Pechanga Band of Luiseño Mission Indians Water Rights Settlement Act”

Bill Summary:

H.R. 5984 implements federal actions and authorizations related to a water rights settlement between the Pechanga Band of Luiseño Mission Indians (Pechanga or Band), local water districts and the United States.

Cosponsors:

Rep. Duncan Hunter (R-CA).

Background:

The bill is the result of a new congressional process to receive more information from the Executive Branch before the House considers Indian water rights settlements. Under this process, the Administration worked with the Natural Resources Committee Majority through correspondence to affirm that the proposed Pechanga Settlement Agreement (Settlement Agreement) represents a “net benefit” to the American taxpayer. This process helped result in an almost 50% reduction in Federal costs when compared to prior legislation introduced in the 111th Congress.

The Winters Doctrine, Indian Water Rights and Current Protocols for Legislative Consideration

The 1908 Supreme Court decision in *Winters v. United States*¹ (Winters Doctrine) held that the federal government implicitly reserved water rights sufficient to fulfill the purposes of an Indian reservation.² As a result, some tribal communities have sought federally reserved water rights claims under the Winters Doctrine. These rights, while implicitly reserved and generally

¹Winters v. United States, 207 U.S. 564, 575-77 (1908).

² Id

senior to other rights, can be controversial given western water scarcity and existing junior water rights. In addition, such Winters Doctrine rights are often not quantified.³ Since they are federally reserved water rights, and in light of the federal trust responsibility to tribes, the federal government can be a party to tribal Winters claims.⁴ These claims can also be filed against the United States and non-federal parties and are often filed in different court venues.⁵

Some of these claims have been resolved through negotiation. Congress has authorized, and the President approved, the vast majority of these settlements.⁶ Since 1978, there have been 29 Indian water rights settlements that have been approved by Congress. While most have involved federal funding, recent settlements have not involved federal authorization of appropriations.⁷

While many prior settlements involved federal funding as a way to help resolve disputes and finance tribal water infrastructure, there have been questions over the level of how much or whether federal funding should be allocated towards specific settlements. For example, in November 2010, former Natural Resources Committee Chairman Hastings (R-WA) expressed the need for such settlements, but indicated that “...at a time of record deficit spending and record federal debt, it is the duty of Congress to ask questions to ensure these settlements are in the best interest of taxpayers.”⁸

In light of these and other questions, current Natural Resources Committee Chairman Bishop sent a [letter](#) in February 2015 to Secretary of the Interior Sally Jewell and former Attorney General Eric Holder outlining the process the Natural Resources Committee intends to follow when considering future Indian water rights legislation.⁹ The letter stipulated that the Administration must convey support for a specific settlement, forward the settlement and the proposed authorizing language, specifically including federal spending levels and claims being resolved, before any Committee consideration can take place.¹⁰

One of the letter’s requests that the Administration specifically affirms that a settlement meets longstanding Federal *Criteria and Procedures* “to ensure that the American taxpayer is

³ Congressional Research Service “Indian Reserved Water Rights Under the *Winters* Doctrine: An Overview” Cynthia Brougher, Legislative Attorney, June 8, 2011; p. 4

⁴ <http://www.bia.gov/FAQs/>

⁵ Congressional Research Service “Indian Reserved Water Rights Under the *Winters* Doctrine: An Overview” Cynthia Brougher, Legislative Attorney, June 8, 2011; p. 6

⁶ “The Importance of Indian Water Rights Settlement Funding” by the Western States Water Council and the Native American Rights Fund; p. 2

⁷ Congressional Research Service. Indian Water Rights Settlements. (R44148, September 18, 2015), by Charles V. Stern. Web. <<http://www.crs.gov/reports/pdf/R44148>>; p. 5

⁸ <http://naturalresources.house.gov/newsroom/documentsingle.aspx?DocumentID=215938>

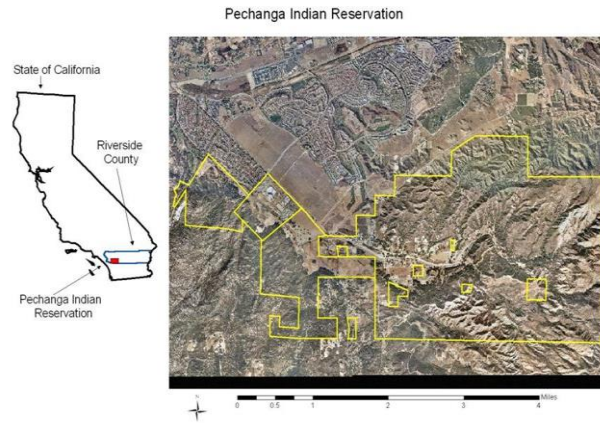
⁹ Letter from Chairman Bishop to the Department of the Interior and the Department of Justice in regards to Indian Water Rights Settlements dates February 26, 2015. Web. <http://naturalresources.house.gov/uploadedfiles/waterrightsletter2_26_15.pdf>

¹⁰ *Id.*

deriving benefits from any such settlement prior to Committee consideration.”¹¹ One of these criteria states that the “total cost of a settlement to all parties should not exceed the value of the existing claims as calculated by the Federal Government”.¹²

Settlement History

The Pechanga Reservation (Reservation), located northeast of San Diego near the city of Temecula in southern California, sits on over 6,000 acres (see Map 1) and consists of 1,370 tribal members.¹³ Pechanga Creek, a tributary of the Santa Margarita River, runs through the length of the Reservation,¹⁴ which was established by Treaty with the United States on June 27, 1882.¹⁵



Map 1 Pechanga Indian Reservation.
Source: Pechanga Environmental Department

In 1951, the United States initiated the *United States v. Fallbrook* litigation to protect the federal water rights of the United States in the Santa Margarita River Watershed (Watershed).¹⁶ In 1958, the *Fallbrook* litigation was expanded to include three Indian Tribes within the Watershed: the Pechanga, Ramona Band of Cahuilla Indians (Ramona) and the Cahuilla Band of Indians (Cahuilla).¹⁷ In 1963, the Court issued Interlocutory Judgment 41 (Judgment), an order affirming that each of the three Indian tribes has reserved rights to surface and groundwater in the Watershed.¹⁸ The Judgment, however, did not quantify the tribe’s water rights. Instead, all three tribes have a “decreed” federally reserved water right.¹⁹

The Pechanga Band subsequently entered into negotiations with the Watershed’s primary water users, including RCWD and the Eastern Municipal Water District (EMWD). These negotiations resulted in two agreements; the Groundwater Management Agreement between the Band and RCWD in 2006, and the Recycled Water Agreement between EMWD and the Band in 2007.²⁰ While these agreements addressed a number of disputes, the scope of these negotiations

¹¹ Letter from Chairman Bishop to the Department of the Interior and the Department of Justice in regards to Indian Water Rights Settlements dated February 26, 2015. Web. ; http://naturalresources.house.gov/uploadedfiles/waterrightsletter2_26_15.pdf>

¹² Id., p. 3

¹³ Id.

¹⁴ Id.

¹⁵ Prepared Testimony of Chairman Mark Macarro, Pechanga Band of Luiseno Indians, U.S. Senate Committee on Indian Affairs, 114th Congress, Oversight Hearing, May 20, 2015. p. 2

¹⁶ Id., p. 3

¹⁷ Id.

¹⁸ Id.

¹⁹ Letter from the Department of the Interior and the Department of Justice to Chairman Rob Bishop in regards to the Pechanga Band of Luiseno Mission Indians Water Rights Settlement Act dated May 17, 2016. p. 2

²⁰ Id.

did not address the broader scope of the Band's overall water rights or settle any claims related to the *Fallbrook* Decree.

In March 2008, the Pechanga requested that the Secretary of the Interior (Secretary) appoint a Federal Negotiating Team in order to seek settlement of its claims to water involving Pechanga, the United States and non-Federal third parties.²¹ A Federal Negotiating Team was appointed by the Secretary in August 2008 to both support Pechanga's efforts to negotiate its water rights claims while also resolving its claims against the United States regarding its trust responsibilities to the tribe.²² A settlement agreement and other third-party agreements were reached on April 8, 2016 between the Band, the United States and the RCWD. Federal legislation to authorize the Pechanga Settlement Agreement was first introduced in 2009, but there have been questions over cost, federal responsibilities and other matters.²³

Correspondence and Settlement Benefits (according to the letter)

In response to Chairman Bishop's February 2015 letter, the Administration transmitted a [letter](#) (May 17, 2016 Letter) and proposed "Pechanga Band of Luiseño Mission Indians Water Rights Settlement Act" (Settlement Act).²⁴ Although many of Chairman Bishop's requests were answered, the letter specifically stated:

"Although the Pechanga Settlement is a creative and forward-looking settlement that fulfills important Federal trust obligations, encourages cooperative and efficient water management, and provides important benefits to the American taxpayer, the Office of Management and Budget advises that it is still assessing and evaluating the information necessary for it to definitively conclude whether the proposed settlement meets all of the *Criteria and Procedures*."²⁵

According to the May 17, 2016 Letter, the Settlement Act:

- Recognizes and establishes a Tribal Water Right for the Band of up to 4,994 acre feet per year, an amount consistent with the *Fallbrook* Court's findings (the amount that under natural conditions is physically available for the Reservation), and settles all of the Band's water rights claims in the Santa Margarita River Watershed;²⁶
- The Tribe agrees to waive all claims against the U.S. related to water rights in, or water of, the Santa Margarita River Watershed that the U.S. asserted or could have asserted in

²¹ Id., p. 4

²² Letter from the Department of the Interior and the Department of Justice to Chairman Rob Bishop in regards to the Pechanga Band of Luiseño Mission Indians Water Rights Settlement Act dated May 17, 2016. p. 2

²³ Id., p. 3

²⁴ Id.

²⁵ Letter from the Department of the Interior and the Department of Justice to Chairman Rob Bishop in regards to the Pechanga Band of Luiseño Mission Indians Water Rights Settlement Act dated May 17, 2016. p. 1

²⁶ Id., p. 4

any proceedings. In addition, the Tribe agrees to waive all claims related to damages, losses, or injuries to water, water rights, land, or natural resources due to loss of water or water rights in the Watershed in exchange for a federal contribution of \$28.5 million; and²⁷

- The RCWD agrees to waive all claims for water rights in the Santa Margarita River Watershed that it has or could have asserted in any proceeding.²⁸

On June 23, 2016, the House Water, Power and Oceans Subcommittee (Subcommittee) held a hearing on a discussion draft of the proposed Settlement Agreement. At the conclusion of the hearing some questions were left unanswered. As a result, on July 1, 2016, Chairman Bishop sent a follow-up [letter](#) to the Administration requesting more information in regards to the Settlement Agreement and its net benefits to the American taxpayer. The Administration provided a clarifying response to Chairman Bishop in a July 22, 2016 [letter](#) affirming that the Pechanga Settlement Agreement represents a “net benefit to the American taxpayer as compared to the consequences and costs of not settling the litigation related to the Tribes’ water rights claims.”²⁹ On September 9, 2016, Rep. Ken Calvert (CA-42) introduced H.R. 5984, which is identical to the discussion draft considered by the Subcommittee at its June 23, 2016 legislative hearing.

Major Provisions of H.R. 5984:

- *Section 4* authorizes, ratifies and confirms the Pechanga Settlement Agreement entered into by the Band, the Rancho California Water District and the United States. The Section directs the Secretary of the Interior to execute the Settlement Agreement, and stipulates that the Settlement Agreement does not constitute a federal action under the National Environmental Policy Act of 1969.
- *Section 5* confirms a Tribal Water Right of up to 4,994 acre-feet of water per year that, under normal conditions, is physically available on the Reservation and requires the Tribal Water Right to be held in trust by the United States on behalf of the Band and the Allottees. In addition, the Settlement Agreement authorizes Allottees to lease their lands together with any water right. The Section also requires the Band to enact a Pechanga Water Code that governs the storage, recovery and use of the Tribal Water Right, subject to the Department of the Interior’s approval.

²⁷ Id.

²⁸ Id., p. 5

²⁹ Letter from the Department of the Interior and the Department of Justice to Chairman Rob Bishop in regards to the Pechanga Band of Luiseño Mission Indians Water Rights Settlement Act dated July 22, 2016

- *Section 6* confirms that the benefits provided to the Band and Allottees under the Settlement Agreement are in complete replacement of, complete substitution for, and full satisfaction of all claims against the United States.
- *Section 7* directs the Band and the United States (acting in its capacity as trustee for the Band) to waive all claims for water rights within the Santa Margarita River Watershed; waive specified claims against the Rancho California Water District; and authorizes the waiver of claims by the Band against the United States regarding specified water rights and damages.
- *Section 8* authorizes the Secretary of the Interior to provide funds for the construction of a Storage Pond and for the construction of other infrastructure necessary for various other agreements within the Settlement Agreement.
- *Section 9* establishes a Pechanga Settlement Fund in the United States Treasury. This Fund includes an authorization of \$28.5 million³⁰ for four different sub-accounts listed in *Section 11*.
- *Section 10* contains a number of miscellaneous provisions including the affirmation that nothing in this Act waives the sovereign immunity of the United States. In addition, nothing in the Settlement Act will adversely affect any tribes other than the Band, and the United States shall not submit any claim for reimbursement for carrying out this Act and the Settlement Agreement.
- *Section 12* voids this Act and any other actions no later than May 1, 2021 or the day after the later date agreed to by the Band and the Secretary if the Secretary does not publish applicable findings by April 30, 2021, or the alternative date. All appropriations and unexpended amounts will be returned to the general fund of the Treasury.

Cost:

The Congressional Budget Office has not completed a cost estimate of this bill at this time.

Administration Position:

The Administration signaled its support for the Settlement Agreement in its July 22, 2016 letter to Chairman Bishop.

Effect on Current Law (Ramseyer): Not Applicable.

³⁰ This amount has been reduced from \$53 million in prior legislation (H.R. 4285 in the 111th Congress).