

Committee on Natural Resources

Rob Bishop, Chairman
Markup Memorandum

January 29, 2016

To: All, Natural Resources Committee Members

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

Mark-Up: Markup on H.R. 1296 (Rep. Duncan Hunter, R-CA), To amend the San Luis Rey Indian Water Rights Settlement Act to clarify certain settlement terms, and for other purposes.
February 2-3, 2016 1324 Longworth HOB

H.R. 1296, (Rep. Duncan Hunter, R-CA), To amend the San Luis Rey Indian Water Rights Settlement Act to clarify certain settlement terms, and for other purposes

Bill Summary:

H.R. 1296 amends the San Luis Rey Indian Water Rights Settlement Act (P.L. 100-675) to reflect a recent agreement between the federal government and other parties in an attempt to bring about final resolution of decades of litigation and uncertainty.

Cosponsors:

Reps. Ken Calvert (R-CA), Tom Cole (R-OK), Raul Grijalva (D-AZ), Jared Huffman (D-CA), Scott Peters (D-CA), Dana Rohrabacher (R-CA), Loretta Sanchez (D-CA) and Juan Vargas (D-CA).

Background:

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 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 Tribes can also file Winters claims against

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

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

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

⁴ <http://www.bia.gov/FAQs/>

the United States and non-federal parties. These legal claims 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. The San Luis Rey Indian Water Settlement Act, enacted into law in 1988, reflects one such settlement. While most have involved federal funding, recent settlements have not involved federal authorization of appropriations.⁷

In light of questions over federal funding of future Indian water rights settlements, Chairman Bishop (R-UT) sent a letter earlier this year to Secretary of the Interior Jewell and then-Attorney General Holder (Administration) outlining the process the Natural Resources Committee intends to follow when considering Indian water rights legislation.⁸ The letter stipulates 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.⁹ While the settlement amended by H.R. 1296 pre-dates the Chairman's letter and funding has already been appropriated by Congress, the Administration responded to the letter regarding the bill.

H.R. 1296 seeks bring closure to the San Luis Rey Indian Water Settlement and decades of related litigation. In 1969, the La Jolla, Rincon, San Pasqual, Pauma, and Pala Bands of Mission Indians (the Bands) sued the City of Escondido and the Vista Irrigation district (Local Entities) on the grounds that their reserved water rights were signed over by the federal government to the Local Entities. Decades of litigation ensued until 1988, when Congress enacted the San Luis Rey Indian Water Rights Settlement Act¹⁰ (the 1988 Settlement Act).

The 1988 Settlement Act provided a framework of terms for a settlement agreement and directed the Secretary of the Interior to provide 16,000 acre-feet of water annually to the tribes. The 1988 Settlement Act also established a San Luis Rey Tribal Development Fund (Fund) and authorized \$30 million in federal funding to be appropriated to the Fund for the Settlement's purposes. The 1988 Settlement Act becomes effective only when the United States, the Bands and the Local Entities enter into "a settlement agreement providing for the complete resolution of all claims, controversies, and issues involved".¹¹

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 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>

⁹ *Id.*

¹⁰ P.L. 100-675, approved 11/17/88

¹¹ P.L. 100-675, approved 11/17/88, Section 104

One of the main resolution hurdles has been, until recently, whether the water would be counted as supplemental to the Bands' needs or whether it would count against their base Winters Doctrine rights. That controversy stalled the closure of the settlement until January 2015, when the parties negotiated a settlement agreement that amends the 1988 Settlement Act, contingent upon Congress enacting legislation. The agreement stipulated that the water would be deemed supplemental water, keeping the Bands' Winters Doctrine rights intact. However, the agreement also relieved the federal government as a supporting party to the Bands Winters Doctrine rights, effectively resolving some future federal liability.¹²

In response to Chairman Bishop's aforementioned letter, the Administration submitted a response to the Committee on September 11, 2015 conveying support for the January 2015 Settlement Agreement and H.R. 1296. The letter indicated that H.R. 1296 is substantively identical to the draft Amendment and that implementation of the 2014 Settlement Agreement and draft Amendment "does not involve any new financial authorizations but merely allows the 1988 Settlement Act to reach fruition."¹³ In addition, the letter articulated that all parties have signed the 2015 Settlement Agreement and stated that once legislation is enacted they will move to dismiss specific litigation in federal district court.¹⁴

The Bands, the San Luis Rey Indian Water Authority, the Local Entities and the Administration support this bipartisan bill.

Major Provisions of H.R. 1296:

Section 1 of the bill amends the San Luis Rey Indian Water Rights Settlement Act (P.L. 100-675) by approving and ratifying all provisions of the January 30, 2015 Settlement Agreement approved by the parties and the United States. The Interior Secretary and the Attorney General are authorized to execute and implement the agreement and any amendments approved by the parties that are necessary to make it consistent with this Act (such execution shall not constitute a major Federal action under the National Environmental Policy Act). The Bands will continue to possess federally reserved rights and other rights held in trust by the United States. However, the United States shall not be a required party and any decision by the United States regarding participation in any such proceeding shall not be subject to judicial review or give rise to any claim for relief against the United States in these water rights claims.

Cost:

The Congressional Budget Office has not completed a cost estimate of this bill at this time. However, the bill has been drafted so that no additional federal appropriations will result from its provisions.

¹² Settlement Agreement between the United States, the Bands, the San Luis Rey Indian Water Authority, the City of Escondido and the Vista Irrigation District. December 22, 2015, Section 7.1.

¹³ 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>

¹⁴ Letter from the Department of the Interior and the Department of Justice to Chairman Bishop in support of the 2014 Settlement Agreement and H.R. 1296 dated September 11, 2015.

Administration Position:

The Administration testified that it supports the Settlement Agreement if “Congress enacts legislation substantively identical to the draft amendment to the 1988 Settlement Act that the Settlement Parties agreed upon in Exhibit C to the Settlement Agreement...H.R. 1296 is substantively identical to the draft Amendment.”¹⁵

Anticipated Amendments:

None.

Effect on Current Law (Ramseyer)

Current Law as Amended by H.R. 1296

[text to be added highlighted in yellow]

Public Law 100-675

100th Congress

An Act to provide for the settlement of water rights claims of the La Jolla, Rincon, San Pasqual, Pauma, and Pala Bands of Mission Indians in San Diego County, California, to authorize the lining of the All American Canal, and for other purposes.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled,

TITLE I—SAN LUIS REY INDIAN WATER RIGHTS SETTLEMENT ACT

SEC. 101. SHORT TITLE.

This title may be cited as the "San Luis Rey Indian Water Rights Settlement Act".

SEC. 102. DEFINITIONS.

For purposes of this title:

(1) BANDS.—The term "Bands" means the La Jolla, Rincon, San Pasqual, Pauma, and Pala Bands of Mission Indians which are recognized by the Secretary of the Interior as the governing bodies of their respective reservations in San Diego County, California.

¹⁵ Submitted testimony of Ms. Letty Belin, Counselor to the Deputy Secretary of the U.S. Department of the Interior, to the Subcommittee on Water, Power and Oceans, 114th Congr., Legislative Hearing on H.R. 1296, October 28, 2015, p.1

(2) FUND.—The term "Fund" means the San Luis Rey Tribal Development Fund established by section 105.

(3) INDIAN WATER AUTHORITY.—The term "Indian Water Authority" means the San Luis Rey River Indian Water Authority, an intertribal Indian entity established by the Bands.

(4) LOCAL ENTITIES.—The term "local entities" means the city of Escondido, California; the Escondido Mutual Water Company; and the Vista Irrigation District.

(5) SETTLEMENT AGREEMENT.—The term "settlement agreement" means the agreement to be entered into by the United States, the Bands, and the local entities which will resolve all claims, controversies, and issues involved in all the pending proceedings among the parties.

(6) SECRETARY.—The term "Secretary" means the Secretary of the Interior.

(7) SUPPLEMENTAL WATER.—The term "supplemental water" means water from a source other than the San Luis Rey River.

SEC. 103. CONGRESSIONAL FINDINGS; LOCAL CONTRIBUTIONS; PURPOSE.

(a) FINDINGS.—The Congress finds the following:

(1) The Reservations established by the United States for the La Jolla, Rincon, San Pasqual, Pauma, and Pala Bands of Mission Indians on or near the San Luis Rey River in San Diego County, California, need a reliable source of water.

(2) Diversions of water from the San Luis Rey River for the benefit of the local entities commenced in the early 1890s and PUBLIC LAW 100-675—NOV. 17, 1988 102 STAT. 4001 continue to be an important source of supply to those communities.

(3) The inadequacy of the San Luis Rey River to supply the needs of both the Bands and the local entities has given rise to litigation to determine the rights of various parties to water from the San Luis Rey River.

(4) The pendency of the litigation has—

(A) severely impaired the Bands' efforts to achieve economic development on their respective reservations,

(B) contributed to the continuation of high rates of unemployment among the members of the Bands,

(C) increased the extent to which the Bands are financially dependent on the Federal Government, and

(D) impeded the Bands and the local entities from taking effective action to develop and conserve scarce water resources and to preserve those resources for their highest and best uses.

(5) In the absence of a negotiated settlement—

(A) the litigation, which was initiated almost 20 years ago, is likely to continue for many years,

(B) the economy of the region and the development of the reservations will continue to be adversely affected by the water rights dispute, and

(C) the implementation of a plan for improved water management and conservation will continue to be delayed.

(6) An agreement in principle has been reached under which a comprehensive settlement of the litigation would be achieved, the Bands' claims would be fairly and justly resolved, the Federal Government's trust responsibility to the Bands would be fulfilled, and the local entities and the Bands would make fair and reasonable contributions.

(7) The United States should contribute to the settlement by providing funding and delivery of water from a supplemental source. Water developed through conjunctive use of groundwater on public lands in southern California or water to be reclaimed from lining the previously unlined portions of the All American Canal can provide an appropriate supplemental water source.

(b) PURPOSE.—It is the purpose of this title to provide for the settlement of the reserved water rights claims of the La Jolla, Rincon, San Pasqual, Pauma, and Pala Bands of Mission Indians in San Diego County, California, in a fair and just manner which—

(1) provides the Bands with a reliable water supply sufficient to meet their present and future needs;

(2) promotes conservation and the wise use of scarce water resources in the upper San Luis Rey River System;

(3) establishes the basis for a mutually beneficial, lasting, and cooperative partnership among the Bands and the local entities to replace the adversary relationships that have existed for several decades; and

(4) fosters the development of an independent economic base for the Bands.

SEC. 104. SETTLEMENT OF WATER RIGHTS DISPUTE.

Sections 106 and 109 of this Act shall take effect only when—

(1) the United States; the City of Escondido, California; the Escondido Mutual Water Company; the Vista Irrigation District; and the La Jolla, Rincon, San Pasqual, Pauma, and Pala Bands of Mission Indians have entered into a settlement agreement providing for the complete resolution of all claims, controversies, and issues involved in all of the pending proceedings among the parties in the United States District Court for the Southern District of California and the Federal Energy Regulatory Commission; and

(2) stipulated judgments or other appropriate final dispositions have been entered in said proceedings.

SEC. 105. SAN LUIS REY TRIBAL DEVELOPMENT FUND.

(a) ESTABLISHMENT OF FUND.—There is hereby established within the Treasury of the United States the "San Luis Rey Tribal Development Fund .

(b) AUTHORIZATION OF APPROPRIATIONS.—

(1) There is authorized to be appropriated to the San Luis Rey Tribal Development Fund \$30,000,000, together with interest accruing from the date of enactment of this Act at a rate determined by the Secretary of the Treasury taking into consideration the average market yield on outstanding Federal obligations of comparable maturity. Following execution of the settlement agreement, judgments, and other appropriate final dispositions specified in section 104, the Secretary of the Treasury shall allocate and make available such monies from the trust fund as are requested by the Indian Water Authority.

(2) Any monies not allocated to the Indian Water Authority and remaining in the fund authorized by this section shall be invested by the Secretary of the Treasury in interest-bearing deposits and securities in accordance with the Act of June 24, 1938 (25 U.S.C. 162a). Such interest shall be made available to the Indian Water Authority in the same manner as the monies identified in paragraph (1).

SEC. 106. DUTIES OF THE UNITED STATES FOR DEVELOPMENT OF SUPPLEMENTAL WATER

(a) OBUGATION TO ARRANGE FOR DEVELOPMENT OF WATER FOR BANDS AND LOCAL ENTITIES.—To provide a supplemental water supply for the benefit of the Bands and the local entities, subject to the provisions of the settlement agreement, the Secretary is authorized and directed to:

(1) arrange for the development of not more than a total of 16,000 acre-feet per year of supplemental water from public lands within the State of California outside the service area of the Central Valley Project; or

(2) arrange to obtain not more than a total of 16,000 acre-feet per year either from water conserved by the works authorized in title II of this Act, or through contract with the Metropolitan Water District of Southern California. Nothing in this section or any other provision of this title shall authorize the construction of any new dams, reservoirs or surface water storage facilities.

(b) **AUTHORITY TO UTILIZE EXISTING PROGRAMS AND PUBLIC LANDS.**—To carry out the provisions of subsection (a), the Secretary may, subject to the rights and interests of other parties and to the extent consistent with the requirements of the laws of the State of California and such other laws as may be applicable:

(1) utilize existing programs and authorities; and

(2) permit water to be pumped from beneath public lands and, in conjunction therewith, authorize a program to recharge some or all of the groundwater that is so pumped.

(c) **TERMS AND CONDITIONS OF WATER DELIVERIES.**—Such supplemental water shall be provided for use by the Bands on their reservation and the local entities in their service areas pursuant to the terms of the settlement agreement and shall be delivered at locations, on a schedule and under terms and conditions to be agreed upon by the Secretary, the Indian Water Authority, the local entities and any agencies participating in the delivery of the water. It may be exchanged for water from other sources for use on the Bands' reservations or in the local entities' service areas.

(d) **COST OF DEVELOPING AND DELIVERING WATER.**—The cost of developing and delivering supplemental water pursuant to this section shall not be borne by the United States, and no Federal appropriations are authorized for this purpose.

(e) **REPORT TO CONGRESS.**—Notwithstanding the provisions of section 104, within nine months following enactment of this Act, the Secretary shall report to the Committee on Interior and Insular Affairs of the House of Representatives and to the Committee on Energy and Natural Resources and the Select Committee on Indian Affairs of the Senate on (1) the Secretary's recommendations for providing a supplemental water source including a description of the works, their costs and impacts, and the method of financing; and (2) the proposed form of contract for delivery of supplemental water to the Bands and the local entities. When 60 calendar days have elapsed following submission of the Secretary's report, the Secretary shall execute the necessary contracts and carry out the recommended program unless otherwise directed by the Congress.

SEC. 107. ESTABLISHMENT, STATUS, AND GENERAL POWERS OF SAN LUIS REY RIVER INDIAN WATER AUTHORITY.

(a) ESTABLISHMENT OF INDIAN WATER AUTHORITY APPROVED AND RECOGNIZED.—

(1) IN GENERAL.—The establishment by the Bands of the San Luis Rey River Indian Water Authority as a permanent intertribal entity pursuant to duly adopted ordinances and the power of the Indian Water Authority to act for the Bands are hereby recognized and approved.

(2) LIMITATION ON POWER TO AMEND OR MODIFY ORDINANCES.— Any proposed modification or repeal of any ordinance referred to in paragraph (1) must be approved by the Secretary, except that no such approval may be granted unless the Secretary finds that the proposed modification or repeal will not interfere with or impair the ability of the Indian Water Authority to carry out its responsibilities and obligations pursuant to this Act and the settlement agreement.

(b) STATUS AND GENERAL POWERS OF INDIAN WATER AUTHORITY.—

(1) STATUS AS INDIAN ORGANIZATION.—To the extent provided in the ordinances of the Bands which established the Indian Water Authority, such Authority shall be treated as an Indian entity under Federal law with which the United States has a trust relationship.

(2) POWER TO ENTER INTO AGREEMENTS.—The Indian Water Authority may enter into such agreements as it may deem necessary to implement the provisions of this title and the settlement agreement.

(3) INVESTMENT POWER.— Notwithstanding paragraph (1) or any other provision of law, the Indian Water Authority shall have complete discretion to invest and manage its own funds: Provided, That the United States shall not be any obligation or liability regarding the investment, management or use of such funds.

(4) LIMITATION ON SPENDING AUTHORITY.—All funds of the Indian Water Authority which are not required for administrative or operational expenses of the Authority or to fulfill obligations of the Authority under this title, the settlement agreement, or any other agreement entered into by the Indian Water Authority shall be invested or used for economic development of the Bands, the Bands' reservation lands, and their members. Such funds may not be used for per capita payments to members of any Band.

(c) INDIAN WATER AUTHORITY TREATED AS TRIBAL GOVERNMENT FOR CERTAIN PURPOSES.—The Indian Water Authority shall be considered to be an Indian tribal government for purposes of section 7871(a)(4) of the Internal Revenue Code of 1986.

SEC 108. DELEGATION OF AUTHORITY.

The Secretary and the Attorney General of the United States, acting on behalf of the United States, and the Bands, acting through their duly authorized governing bodies, are authorized to enter into the settlement agreement. The Secretary is authorized to enter into such agreements and to take such measures as the Secretary may deem necessary or appropriate to fulfill the provisions of this title.

SEC 109. AUTHORITY OF THE FEDERAL ENERGY REGULATORY COMMISSION AND THE SECRETARY OF THE INTERIOR OVER POWER FACILITIES AND GOVERNMENT AND INDIAN LANDS.

(a) **POWER FACILITIES.**—Any license issued under the Act of June 10, 1920 (16 U.S.C. 791a et seq., commonly referred to as Part I of the Federal Power Act) for any part of the system that diverts the waters of the San Luis Rey River originating above the intake to the Escondido Canal—

(1) shall be subject to all of the terms, conditions, and provisions of the settlement agreement and this title; and

(2) shall not in any way interfere with, impair or affect the ability of the Bands, the local entities and the United States to implement, perform, and comply fully with all of the terms, conditions, and provisions of the settlement agreement.

(b) **INDIAN AND GOVERNMENT LANDS.**—Notwithstanding any provision of Part I of the Federal Power Act to the contrary, the Secretary is exclusively authorized, subject to subsection (c), to lease, grant rights-of-way across, or transfer title to, any Indian tribal or allotted land, or any other land subject to the authority of the Secretary, which is used, or may be useful, in connection with the operation, maintenance, repair, or replacement of the system to divert, convey, and store the waters of the San Luis Rey River originating above the intake to the Escondido Canal or the supplemental water supplied by the Secretary under this Act.

(c) **APPROVAL BY INDIAN BANDS; COMPENSATION TO INDIAN OWNERS.**— Any disposition of Indian tribal or allotted land by the Secretary under the subsection (b) shall be subject to the approval of the governing Indian Band. Any individual Indian owner or allottee whose land is disposed of by any action of the Secretary under subsection (b) shall be entitled to receive just compensation.

SEC. 110. RULES OF CONSTRUCTION.

(a) **EMINENT DOMAIN.**—No provision of this title shall be construed as authorizing the acquisition by the Federal Government of any water or power supply or any water conveyance or power transmission facility through the power of eminent domain or any other nonconsensual arrangement.

(b) STATUS AND AUTHORITY OF INDIAN WATER AUTHORITY.—No provision of this title shall be construed as creating any implication with respect to the status or authority which the Indian Water Authority would have under any other law or rule of law in the absence of this title.

SEC. 111. COMPLIANCE WITH BUDGET ACT.

To the extent any provision of this title provides new spending authority described in section 401(cX2XA) of the Congressional Budget Act of 1974, such authority shall be effective for any fiscal year only to such extent or in such amounts as are provided in advance in appropriation Acts.

SEC. 112. IMPLEMENTATION OF SETTLEMENT.

(a) Findings- Congress finds and recognizes as follows:

(1) The City of Escondido, California, the Vista Irrigation District, the San Luis Rey River Indian Water Authority, and the Bands have approved an agreement, dated December 5, 2014, resolving their disputes over the use of certain land and water rights in or near the San Luis Rey River watershed, the terms of which are consistent with this Act.

(2) The Bands, the San Luis Rey River Indian Water Authority, the City of Escondido, California, the Vista Irrigation District, and the United States have approved a Settlement Agreement dated January 30, 2015 (hereafter in this section referred to as the 'Settlement Agreement') that conforms to the requirements of this Act.

(b) Approval and Ratification- All provisions of the Settlement Agreement, including the waivers and releases of the liability of the United States, the provisions regarding allottees, and the provision entitled 'Effect of Settlement Agreement and Act,' are hereby approved and ratified.

(c) Authorizations- The Secretary and the Attorney General are authorized to execute, on behalf of the United States, the Settlement Agreement and any amendments approved by the parties as necessary to make the Settlement Agreement consistent with this Act. Such execution shall not constitute a major Federal action under the National Environmental Policy Act of 1969 (42 U.S.C. 4321 et seq.). The Secretary is further authorized and directed to take all steps that the Secretary may deem necessary or appropriate to implement the Settlement Agreement and this Act.

(d) Continued Federally Reserved And Other Water Rights-

(1) IN GENERAL- Notwithstanding any other provision of law, including any provisions in this Act, the Bands had, have, and continue to possess federally reserved rights and other water rights held in trust by the United States.

(2) FUTURE PROCEEDINGS- In any proceeding involving the assertion, enforcement, or defense of the rights described in this subsection, the United States, in its capacity as trustee for any Band, shall not be a required party and any decision by the United States regarding participation in any such proceeding shall not be subject to judicial review or give rise to any claim for relief against the United States.

(e) Allottees- Congress finds and confirms that the benefits to allottees in the Settlement Agreement, including the remedies and provisions requiring that any rights of allottees shall be satisfied from supplemental water and other water available to the Bands or the Indian Water Authority, are equitable and fully satisfy the water rights of the allottees.

(f) No Precedent- Nothing in this Act shall be construed or interpreted as a precedent for the litigation or settlement of Indian reserved water right