Subcommittee on Water, Power and Oceans
John Fleming, Chairman
Hearing Memorandum

June 21, 2016

To: All Subcommittee on Water, Power and Oceans Members

From: Majority Committee Staff
Subcommittee on Water, Power and Oceans (x58331)

Hearing: Legislative hearing on the Discussion Draft of H.R. ___, To authorize the Pechanga Band of Luiseño Mission Indians Water Rights Settlement, and for other purposes.
June 23, 2016 at 10:30 a.m. in 1334 Longworth HOB

Discussion Draft of H.R. _____, *"Pechanga Band of Luiseño Mission Indians Water Rights Settlement Act"*

Bill Summary:

The Discussion Draft of H.R. ____, entitled the *"Pechanga Band of Luiseño Mission Indians Water Rights Settlement Act"*, implements federal actions and authorizations related to a water rights settlement between the Pechanga Band of Luiseño Mission Indians (Pechanga or Band), the Rancho California Water District (RCWD) and other water districts and the United States. This hearing will also include consideration of three other legislative proposals.

Invited Witnesses: *(in alphabetical order)*

The Honorable Mark Macarro
Chairman, Pechanga Band of Luiseño Indians
Temecula, California

Ms. Dionne E. Thompson
Deputy Commissioner for External and Intergovernmental Affairs
Department of the Interior
Washington, DC

Background:

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 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] Winters claims can also be filed against 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. 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 Doc 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 (Administration) outlining the process the Natural Resources

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

Committee intends to follow when considering future Indian water rights legislation.[9] 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.[10]

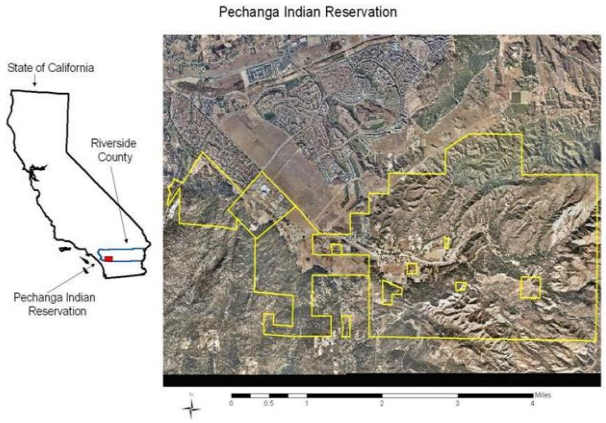
Specifically, one of the letter's requests is that the Administration specifically affirms that a settlement meets longstanding *Criteria and Procedures* "to ensure that the American taxpayer is deriving benefits from any such settlement prior to Committee consideration."[11] One of these criteria states 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]

The Administration sent a recent letter on the Pechanga settlement that is the subject of this Discussion Draft. 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 rust 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*."[13]

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.[14] Pechanga Creek, a tributary of the Santa Margarita River, runs through the length of the Reservation,[15] which was established by Treaty with the



Map 1 Pechanga Indian Reservation.
Source: Pechanga Environmental Department

[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.
[11] 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.
[12] Id, p. 3
[13] 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
[14] Id.
[15] Id.

United States on June 27, 1882.[16]

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).[17] 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 (Chuilla).[18] In 1963, the Court issued Interlocutory Judgment 41 (Judgment), an order affirming that each of the three Indian tribes have reserved rights to surface and groundwater in the Watershed.[19] The Judgment, however, did not quantify the tribe's water rights. Instead, all three tribes have a "decreed" federally reserved water right.[20]

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.[21] While these agreements addressed a number of disputes, the scope of these negotiations 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.[22] 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.[23] 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.[24] The Discussion Draft considered at this hearing represents subsequent negotiations on these issues.

[16] 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
[17] Id., p. 3
[18] Id.
[19] Id.
[20] 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
[21] Id.
[22] Id., p. 4
[23] 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
[24] Id., p. 3

Settlement Benefits (according to the letter)

On May 17, 2016, the Interior Department and the Department of Justice transmitted the aforementioned letter (May 17, 2016 Letter) and proposed the "Pechanga Band of Luiseño Mission Indians Water Rights Settlement Act" (Settlement Act) to Chairman Bishop.[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 United States related to water rights in, or water of, the Santa Margarita River Watershed that the United States asserted or could have asserted in 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.[27]

- 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]

Major Provisions of the Discussion Draft of H.R. ___ "*Pechanga Band of Luiseño Mission Indians Water Rights Settlement Act*":

- *Section 4* authorizes, ratifies and confirms the Pechanga Settlement Agreement entered into by the Pechanga Band of Luiseño Mission Indians, 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

[25] Id.
[26] Id., p. 4
[27] Id.
[28] Id., p. 5

Water Code that governs the storage, recovery and use of the Tribal Water Right, subject to the Department of the Interior's approval.

- *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 million 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 for this Discussion Draft but the authorizations in the bill add up to $28.5 million in federal funding.

Administration Position:

The Administration signaled its support for the Settlement Act in its May 17, 2016 Letter.

Effect on Current Law (Ramseyer):

Not applicable.