Written Testimony
Chairman Mark Macarro
Pechanga Band of Luiseño Mission Indians
House Natural Resources
Subcommittee on Water and Power
H.R. 5413
September 16, 2010

Good morning Chairwoman Napolitano, Ranking Member McClintock, and members of the Subcommittee. Thank you for scheduling a hearing on H.R. 5413 and the opportunity to provide testimony on behalf of the Pechanga Band of Luiseño Mission Indians.

I would first like to thank Congressman Joe Baca, along with co-sponsors Congressman Dan Boren, Congressman Raul Grijalva, Congressman Mike Honda, Congressman Dale Kildee, Congressman Ben Ray Lujam, and Congresswoman Laura Richardson, for their introduction and strong support of this important piece of legislation.

This water settlement has been decades in the making. It will settle once and for all the Band's longstanding water claims in the Santa Margarita River Watershed and provide the resources to meet the Band's current and future water needs. Not only does the settlement provide certainty as to the Band's water rights but it also provides certainty for all water users in the Santa Margarita River Watershed. This settlement is the product of a great deal of effort by all of the parties and reflects a desire by the parties to settle their differences through negotiation rather than litigation.

I. BACKGROUND

A. Background on the Pechanga Band

The Pechanga Band of Luiseño Mission Indians (the "Band" or "Pechanga") is a federally recognized Indian tribe with a reservation of over 6,000 acres located northeast of San Diego, California, near the city of Temecula.[1] Pechanga Creek, a tributary of the Santa Margarita River, runs through the length of the Pechanga Reservation.

The Band has called the Temecula Valley home for more than 10,000 years. Ten thousand years from now tribal elders will share with tribal youth, as they do today, the story of the Band's creation in this place. Since time immemorial, through periods of plenty, scarcity and adversity, the Pechanga people have governed ourselves and cared for our lands.

The history of the Band begins with our ancestral home village of Temeeku, which was a center for all the Payomkawichum, or Luiseño people. After the establishment of the state of California in 1850, a group of Temecula Valley ranchers petitioned the District Court in San Francisco for a Decree of Ejection of Indians living on the land in Temecula Valley, which the

[1] *See* Map of Pechanga Reservation (attached as Exhibit 1).

court granted in 1873. In 1875 the sheriff of San Diego County began three days of evictions. The Luiseño people were taken into the hills south of the Temecula River.

Being strong of spirit, most of our dispossessed ancestors moved upstream to a small, secluded valley, where they built new homes and re-established their lives. A spring located two miles upstream in a canyon provided them with water; the spring we have always called Pechaa'a (from pechaq = to drip). This spring is the namesake for Pechaa'anga or Pechaanga, which means "at Pechaa'a, at the place where water drips."

On June 27, 1882, seven years after being evicted, the President of the United States issued an Executive Order establishing the Pechanga Indian Reservation.[2] Several subsequent trust acquisitions were made in 1893,[3] 1907,[4] 1931,[5] 1971,[6]1988,[7] and 2008,[8] each one increasing the size of the reservation. At present, the total land area of the Pechanga Reservation is 6,724 acres.

Water is central to who we are as a people. Today, our tribal government operations, such as our environmental monitoring and natural resource management programs, exist to fully honor and protect the land and our culture upon it. In particular, we are concerned about watershed and wellhead protection for our surface and ground water resources and the availability of water for our community. Accordingly, it is of utmost importance to the Band that our water rights are federally recognized in order to protect our water in the basin and ensure that the basin will continue to provide for generations of Pechanga people in the future.

B. History of Pechanga's Efforts to Protect its Water Rights

The Band has been engaged in a struggle for recognition and protection of our federally reserved water rights for decades. In 1951, the United States initiated litigation over water rights in the Santa Margarita River Watershed known as *United States v. Fallbrook*.[9] The *Fallbrook* litigation eventually expanded to include all water users within the Santa Margarita Watershed, including three Indian Tribes – Pechanga, Ramona Band of Cahuilla Indians ("Ramona"), and Cahuilla Band of Indians ("Cahuilla").

The United States, as trustee, represented all three Tribes before the *Fallbrook* Court. At trial, the United States made a factual presentation to the Court based on a report (prepared by the United States in 1958) that demonstrated the United States' formal position on the practically

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[2] Executive Order (June 27, 1882).

[3] Trust Patent (Aug. 29, 1893).

[4] Executive Order (Jan. 9, 1907) and Little Temecula Grant, Lot E (Mar. 11, 1907)(commonly referred to as the Kelsey Tract).

[5] Trust Patent (May 25, 1931).

[6] Trust Patent (Aug. 12, 1971).

[7] Southern California Indian Land Transfer Act, P.L. 110-581 (Nov. 1, 1988).

[8] Pechanga Band of Luiseno Mission Indians Land Transfer Act, P.L. 110-383 (Oct. 10, 2008).

[9] *United States v. Fallbrook Public Utility District et al.*, Civ. No. 3:51-cv-01247 (S.D.C.A.).

irrigable acres claim for Pechanga, which the United States asserted was 4,994 AFY.[10] In a series of Interlocutory Judgments that were eventually wrapped into the Court's Modified Final Judgment and Decree,[11] the Court examined and established water rights for various water users involved in the case. In Interlocutory Judgment 41 ("IJ 41"),[12] the Court concluded that each of the three Tribes has a recognized federally reserved water right without specifying the amount of each of the Tribe's water right. The Court accepted the United States' presentation of practically irrigable acres at Pechanga in the amount of 4,994 AFY on a prima facie basis. Although the Court did examine some facts in IJ 41 and developed "prima facie" findings with respect to each of the Tribes' quantifiable water rights, final quantified rights were never established as a matter of law. As a result of IJ 41, all three Tribes have "Decreed" but "unquantified" federally reserved water rights.[13]

In 1974, Pechanga filed a motion with the *Fallbrook* Court to intervene as a plaintiff-intervenor and a party to the proceeding on its own behalf. In 1975 the Court granted Pechanga's Motion and Pechanga filed a complaint to enjoin certain defendants from using more than their respective entitlements under the *Fallbrook* Decree. This complaint was subsequently resolved and the Band has remained a party to the *Fallbrook* proceedings ever since. Pechanga has not filed a motion to finally quantify its federally reserved water rights.

Until recently, we sought to avoid litigation and instead work with those entities around Pechanga to develop mutual private agreements for sharing the limited water resources in our basin. Specifically, in an effort to collaboratively develop a means of providing assured water supplies and cooperative management of a common water basin, the Band adopted an approach of negotiation and reconciliation with the primary water users in its portion of the Santa Margarita River Watershed, primarily the Rancho California Water District ("RCWD") and the Eastern Municipal Water District ("EMWD").

These efforts at negotiated management of water resources were successful and resulted in the Groundwater Management Agreement between the Band and RCWD in 2006, and a Recycled Water Agreement between EMWD and the Band in 2007, with the recycled water being delivered to the Band by RCWD. Both of these agreements have been successfully implemented and are in effect today. Significantly, though successful, neither of these agreements sought to address the scope of the Band's overall water rights to the Santa Margarita River Watershed or settle its various claims related to the *Fallbrook* Decree.

Beginning in 2006 and continuing throughout 2007, the other two tribes in the Santa Margarita River Watershed, Ramona Band of Cahuilla Indians and Cahuilla Band of Indians

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[10] Pechanga did not have an opportunity to participate at trial, but believes that the Band's water right could have been even greater than 4,994 AFY.

[11] Modified Final Judgment and Decree, *United States v. Fallbrook Public Utility District et al.*, Civ. No. 3:51-cv-01247 (S.D.C.A.)(Apr. 6, 1966).

[12] Interlocutory Judgment 41, *United States v. Fallbrook Public Utility District et al.*, Civ. No. 3:51-cv-01247 (S.D.C.A.)(Nov. 8, 1962) (attached as Exhibit 2).

[13] The Court in *Fallbrook* fixed the quantity of Pechanga's federally reserved right at 4,994 AFY, on a prima facie basis.

sought to intervene in the *Fallbrook* case to, among other things, quantify their respective water rights to the Santa Margarita River Watershed.[14] These efforts intersected the Band's otherwise successful efforts at negotiated management of joint water supplies and forced the Band to address in *Fallbrook* the scope of its own claims to water or risk being injured by the actions of the other two Tribes.[15]

In addition to participating as a litigant in the proceedings initiated by Ramona and Cahuilla, the Band also immediately started efforts to reach a settlement of its claims to water and claims for injuries to water rights relating to the Santa Margarita River Watershed. As part of its efforts to seek settlement of its claims to water, on March 13, 2008, Pechanga requested that the Secretary of the Interior seek settlement of the water rights claims involving Pechanga, the United States, and non-Federal third parties through the formation of a Federal Negotiation Team under the Criteria and Procedures for Participation of the Federal Government in Negotiations for the Settlement of Indian Water Rights Claims.[16] The Secretary agreed to form a Federal Negotiation Team on August 1, 2008.

Since that time Pechanga has been working closely with the Federal Negotiation Team to effectively negotiate the terms of the settlement with the other parties and to resolve its claims against the United States in connection with the development and protection of Pechanga's water rights. Pechanga and the Federal Negotiation Team carefully examined the overarching Settlement Agreement, along with the exhibits, and have continued to have a productive dialogue to resolve questions and concerns that the Federal Negotiation Team raised. The Federal Negotiation Team has presented its assessment report to the Administration Working Group, comprised of policy members from the Administration. Pechanga has also met numerous times with members of the Administration Working Group to discuss possible Administration concerns. In Pechanga's perspective, all of these meetings with the Federal Negotiation Team and the Administration Working Group have been extremely productive. Pechanga is committed to continuing these discussions with the Administration to resolve, if possible, any remaining Administration's concerns.

This settlement legislation before the Subcommittee is the result of the Band's settlement efforts. Pechanga continues to meet with Magistrate Judge Brooks, who was assigned by the *Fallbrook* Court to oversee the settlement negotiations among Pechanga, RCWD and the United States. Most recently, at the request of the court, Pechanga filed a proposed process for approval of the Pechanga Settlement Agreement, as the court will eventually need to approve the settlement as approved by Congress. The court is carefully and actively supervising the settlement process and is very supportive of approving the Pechanga settlement in the near future.

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[14] Ramona and Cahuilla are located within the Anza-Cahuilla Sub-Basin of the Santa Margarita River Watershed while Pechanga is located within the Wolf Valley Sub-Basin of the Santa Margarita River Watershed.

[15] Pechanga periodically filed status reports with the *Fallbrook* court apprising the Court of its progress towards reaching settlement. Pechanga also filed documents with the Court requesting that Pechanga be afforded the opportunity to weigh in when the Court considered issues of law and legal interpretations of IJ 41 with respect to Ramona and Cahuilla.

[16] 55 Fed. Reg. 9223.

C. Legislative History

As the Subcommittee is aware, on December 11, 2009, Congresswoman Bono Mack (R-CA), along with co-sponsors Congressman Calvert (R-CA), Congressman Issa (R-CA), Congresswoman Richardson (D-CA), Congressman Grijalva (D-AZ) and Congressman Baca (D-CA) introduced H.R. 4285 in the House. On January 26, 2010, Senator Boxer (D-CA), along with co-sponsor Senator Feinstein (D-CA) introduced an identical bill in the Senate, S. 2956. Subsequently, H.R. 5413, the bill now before the Subcommittee was reintroduced in the House by Congressman Baca, along with co-sponsors Congressman Boren (D-OK), Congressman Grijalva, Congressman Honda (D-CA), Congressman Kildee (D-MI), Congressman Lujan (D-NM) and Congresswoman Richardson in an effort to resolve some of the issues that the Administration raised with the legislation.

On July 22, 2010, the Senate Committee on Indian Affairs held a hearing on S. 2956, at which Pechanga and RCWD provided testimony. Since that time, Pechanga and RCWD have continued to work with the Administration to address their concerns.

II. STRUCTURE OF SETTLEMENT

The Pechanga Settlement Agreement is a comprehensive settlement agreement among the United States, RCWD and EMWD, that incorporates a number of agreements as exhibits to the overarching settlement agreement. The Pechanga Settlement Agreement includes the following agreements as exhibits:

A. Amended and Restated Groundwater Management Agreement ("Amended GMA");

B. Recycled Water Agreement and Amendment No. 1 to the Recycled Water Agreement;

C. Recycled Water Transfer Agreement;

D. Recycled Water Scheduling Agreement;

E. Recycled Water Infrastructure Agreement;

F. Extension of Service Area Agreement;

G. ESAA Capacity Agreement; and

H. ESAA Water Delivery Agreement.

Together, the Pechanga Settlement Agreement and corresponding exhibits provide the necessary agreements to resolve Pechanga's longstanding claims to water rights in the Santa Margarita River Watershed, secure necessary water supplies to meet Pechanga's current and future water needs and provide sufficient terms to make the settlement work for RCWD and its customers. H.R. 5413 approves the Pechanga Settlement Agreement, including all its exhibits.

A. Recognition of Tribal Water Right

A critical element of the settlement is recognition of the Band's federal reserved right to water (the "Tribal Water Right"). Both the Pechanga Settlement Agreement and this federal

legislation recognize the Band's Tribal Water Right as being the same as it was established on a "prima facie" basis in the original *Fallbrook* Decree in 1965, which is equal to 4,994 acre feet of water per year for the benefit of the Band and allottees that may be used for any purpose on the Pechanga Reservation.[17]

The Tribal Water Right is broken down by priority date as follows:

1) the priority date for 3,019 AFY of the Tribal Water Right shall be June 27, 1882;
2) the priority date for 182 AFY of the Tribal Water Right shall be August 29, 1893;
3) the priority date for 729 AFY of the Tribal Water Right shall be January 9, 1907;
4) the priority date for 563 AFY of the Tribal Water Right shall be March 11, 1907; and
5) the priority date for 501 AFY of the Tribal Water Right shall be May 25, 1931.

The United States has analyzed the water rights for the Pechanga Reservation on at least two occasions. First, in 1958, the Bureau of Indian Affairs provided a water rights study of the Pechanga Indian Reservation within the Santa Margarita River Watershed.[18] Second, in 1997, the United States' hydrological expert provided a report summarizing his findings of a Practicably Irrigable Acreage ("PIA") study (irrigation water claim) for the Pechanga Reservation.[19] Both reports support the prima facie finding of at least 4,994 AFY for the Pechanga Reservation and further support the need for supplementary water supplies in addition to groundwater on the Pechanga Reservation.

The Tribal Water Right will also be adopted and confirmed by decree by the *Fallbrook* federal district court. This is especially important for the Band as it constitutes the full recognition of its water entitlements under the *Fallbrook* Decree.

B. Protection of Allottee Rights

During negotiations, Pechanga worked closely with the Federal Negotiation Team to ensure that the allottee rights on the Pechanga Reservation were accurately protected in H.R. First, pursuant to Section 5(a) of H.R. 5413, allottees will receive benefits that are equivalent to or exceed the benefits they currently possess.[20] The language in Section 5(d) of the bill reflects this dialogue and is the language that the Department requested be included to protect allottee rights. This language is consistent with the language included in other settlements, past and present, to protect allottee rights around the country. In accordance with Section 5(d) of H.R.

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[17] The Band's analysis revealed that its water right claims for its existing reservation exceed 4,994 acre-feet, analysis challenged by RCWD, among others. The Band's settlement fixes its water rights entitlements in the Santa Margarita River Basin at 4,994 acre-feet per year in recognition of the fact that this amount is judicially established on a prima facie basis and therefore a number that could form the basis for ready agreement by all parties to the settlement.

[18] *See* 1958 Bureau of Indian Affairs Water Rights Studies, October 28, 1958 (attached as Exhibit 3).

[19] The PIA study findings are confidential.

[20] *See* Sec. 5(a).

5413, 25 U.S.C. 381 (governing use of water for irrigation purposes) shall specifically apply to the allottees' rights. Under H.R. 5413, the Tribal Water Code also provides protections for allottees—the Tribal Water Code must provide that:

- tribal allocations of water to allottees shall be satisfied with water from the Tribal Water Right;
- charges for delivery of water for irrigation purposes for allottees be assessed on a just and equitable basis;
- there is a process for an allottee to request that the Band provide water for irrigation use to the allottee;
- there is a due process system for the Band to consider a request by an allottee (appeal and adjudication of any denied or disputed distribution of water and resolution of any contested administrative decision).[21]

The inclusion of these provisions reflects the United States' most recent allottee language as was included in other recent Indian water settlements. As a result, the allottee language is consistent with other Indian water settlements pending before Congress, and provides allottees with the same protections provided to other tribal allottees.

C. Contractual Acceptance of Guaranteed Water Sources to Fulfill the Tribal Water Right

Unfortunately, there is insufficient groundwater within the Santa Margarita River Watershed to fulfill the entire Tribal Water Right.[22] To account for the limited water sources within the Santa Margarita River Watershed, additional water sources are needed to fulfill the Tribal Water Right. Accordingly, pursuant to the Pechanga Settlement Agreement and the corresponding exhibits, though the Tribal Water Right is confirmed and decreed, the Band's actual water needs will be fulfilled through a number of contractual agreements. The Band further agrees that it shall not enforce its Tribal Water Right so long as it receives its water in accordance with these various contractual arrangements.

There are three major components of the settlement:

1. Amended Groundwater Management Agreement ("Amended GMA")

The Amended GMA , between Pechanga and RCWD, is an integral part of the Pechanga Settlement Agreement, as it sets forth the terms and conditions governing the parties' joint

[21] *See* Sec. 5(f).

[22] The need to import water to the Reservation is a fact that has been recognized by the federal team for a long period of time. Over pumping in the basin has significantly reduced water levels over time, which is one cause for the insufficient groundwater to satisfy the Band's federally reserved water rights. One important aspect of the settlement is the establishment of groundwater pumping limits to protect the basin now and in the future.

management of groundwater pumping from the Wolf Valley Basin and establishes an allocation of the safe yield of the basin. As part of the Amended GMA, the parties established, through technical review, that the safe yield of the Wolf Valley Basin is 2,100 AFY. The parties agreed that Pechanga is entitled to 75% (1575 AFY) of the basin and RCWD is entitled to 25% (525 AFY) of the basin. Additionally, in an effort to raise the level of water in the Wolf Valley Basin and provide storage water in years of water shortage, the Amended GMA establishes a Carryover Account between Pechanga and RCWD that provides for use of the Wolf Valley Basin as a storage aquifer for a defined amount of water to be used in shortage years. Thus, the Amended GMA not only satisfies 1575 acre feet of water per year of the Tribal Water Right, but it also provides benefits to the entire region by improving the water levels in the Wolf Valley Basin.

2. Recycled Water Agreements

Another essential element of the Pechanga Settlement Agreement is RCWD's ability to use Pechanga's recycled water in partial consideration for their surrender of a portion of their current potable water supply as pumped from the Wolf Valley Basin. In particular, Amendment No. 1 to Pechanga's Recycled Water Agreement[23] allows RCWD to utilize the unused portion of the entitlement Pechanga currently has pursuant to the Recycled Water Agreement and provides an extension of the term of the Recycled Water Agreement for 50 years with 2 additional 20 year extensions.

In conjunction with Amendment No. 1, the Pechanga Settlement Agreement incorporates the Recycled Water Transfer Agreement, the Recycled Water Scheduling Agreement and the Recycled Water Infrastructure Agreement. Together, these three agreements provide for the mechanisms and infrastructure necessary to provide RCWD with the ability to utilize Pechanga's unused portion of recycled water. More specifically, the Recycled Water Transfer Agreement provides that Pechanga agrees to transfer a portion (not less than 300 AFY, and not more than 475 AFY) of the EMWD recycled water Pechanga is entitled to RCWD. The Recycled Water Infrastructure Agreement provides for the development and construction of a Storage Pond and Demineralization and Brine Disposal Project, both of which are necessary for RCWD to utilize the recycled water allocated to it pursuant to the settlement. Lastly, the Recycled Water Scheduling Agreement provides the protocol for ordering and delivering the portion of Pechanga's allocation of EMWD recycled water to RCWD.

3. Imported Water Agreements

Because the water supplies in the Band's portion of the Santa Margarita Basin are either too depleted to fulfill the Band's entire water needs in the medium to long term or are being used by other parties (primarily RCWD), the Band has agreed to not enforce its Tribal Water Right against other water users and instead use replacement water for the majority of its water uses in future. Accordingly, another significant component of the Pechanga Settlement Agreement is comprised of the agreements necessary to provide MWD imported potable water to Pechanga to provide for the Band's water needs on a permanent basis. The Extension of Service Area

[23] The Recycled Water Agreement, between Pechanga and EMWD, was executed on January 8, 2007 and provides Pechanga with 1,000 AFY of recycled water from EMWD.

Agreement ("ESAA"), is the primary agreement for providing MWD water to be used on the Reservation. The ESAA is a contractual agreement among Pechanga, EMWD and MWD that extends MWD's existing service area within the Band's Reservation to a larger portion of the Reservation, such that Pechanga will receive MWD water to augment its local pumped supplies.

In order to implement the ESAA, two additional agreements were necessary—the ESAA Capacity Agreement and the ESAA Water Delivery Agreement. The ESAA Capacity Agreement establishes the terms and conditions for RCWD to provide water delivery capacity of the ESAA water to Pechanga. The ESAA Water Delivery Agreement addresses service issues and billing issues related to the delivery of ESAA water to Pechanga.

III. JUSTIFICATION OF FEDERAL CONTRIBUTION

Pechanga recognizes that the United States is always concerned in Indian water settlements with the overall cost of an Indian water rights settlement, and more specifically, the Federal contribution to such settlements. The Band further recognizes that Federal funds are limited and that we are living in extremely difficult economic times. Accordingly, Pechanga has worked very hard to ensure that the Federal contribution to the Pechanga Settlement Agreement is justified and properly reflects the United States' liability and programmatic responsibility to the Band.

A. Federal Programmatic Responsibility to the Band

The Criteria and Procedures for the Participation of the Federal Government in Negotiations for the Settlement of Indian Water Rights Claims ("Criteria and Procedures") provides that Federal contributions to a settlement may include costs related to the Federal trust or programmatic responsibilities.[24] The United States argued in the *Fallbrook* proceedings that Pechanga has an entitlement to 4,994 acre feet per year in the Santa Margarita River Watershed, and the court adopted the United States' position on a prima facie basis. Moreover, as recognized by the United States, local water supplies, both on the Reservation and in adjacent areas were adequate and capable of being developed in an economically feasible manner to fulfill at least the 4,994 acre-feet per year that the United States had argued for in the *Fallbrook* proceedings in 1958.

As discussed above, the Band must obtain some imported water from MWD as a replacement for its entitlement to local water from the Santa Margarita River Watershed. In accordance with the Criteria and Procedures the United States has a programmatic responsibility to ensure that the Band's federally reserved water right entitlement is fulfilled through replacement water if existing water on or near the Pechanga Reservation is not currently available. The United States must also ensure that there is sufficient infrastructure for the Band to receive the replacement water. The primary source of replacement water in this case is water from the MWD pursuant to the ESAA.

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[24] *See* Working Group in Indian Water Settlements; Criteria and Procedures for the Participation of the Federal Government in Negotiations for the Settlement of Indian Water Rights Claims, 55 Fed. Reg. 9223 (Mar. 12, 1990).

In order for the Band to receive replacement water, the parties must enhance the capacity for delivery of ESAA Water (water from MWD) through infrastructure development as necessary to allow for deliveries to the Band. The parties negotiated a number of agreements, the various components of which achieve this goal.

Accordingly, the Pechanga Water Settlement Act provides funding for the necessary infrastructure to fulfill the United States' trust and programmatic responsibility to deliver adequate replacement water to the Band to fulfill its entitlement. The Pechanga Water Settlement Act also provides for a subsidy fund that will bring down somewhat the cost of the expensive ESAA Water, which is an element that is consistent with the United States' contribution to most other Indian water rights settlements.

B. Potential Federal Liability to the Band

In addition to its programmatic responsibilities, the federal government has an obligation to every federally recognized Indian tribe to protect its land and water resources. Indeed, a core principle of Federal Indian law is that when the United States sets aside and reserves land for Indian tribes, such reservation includes all the water necessary to make their reservations livable as permanent homelands.[25] The United States in turn holds these reserved water rights in trust for an Indian Tribe.[26]

Congress has expressly found that "the Federal Government recognizes its trust responsibilities to protect Indian water rights and assist Tribes in the wise use of those resources."[27] The Department of Interior has similarly found that "Indian water rights are vested property rights for which the United States has a trust responsibility, with the United States holding legal title to such water in trust for the benefit of the Indians."[28] Courts have also recognized the federal trust responsibility for Indian water rights.[29]

Accordingly, a tribe may recover substantial monetary damages from the United States if it can be shown that the tribe suffered a loss of water or water rights.[30]

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[25] *See generally, Winters v. United States*, 207 U.S. 564 (1908); *In re General Adjudication of All Rights to Use Water in the Gila River System and Source ("Gila V")*, 35 P.3d 68 (Ariz. 2001).

[26] *Id.*

[27] *See e.g.* Reclamation Projects Authorization and Adjustment Act of 1992, Pub. L. No. 102-575, § 3002(9), 106 Stat. 4600, 4695 (codified by reference at 43 U.S.C. § 371 (2000)).

[28] *See* Working Group in Indian Water Settlements; Criteria and Procedures for the Participation of the Federal Government in Negotiations for the Settlement of Indian Water Rights Claims, 55 Fed. Reg. 9223 (Mar. 12, 1990).

[29] *See Pyramid Lake Paiute Tribe of Indians v. Morton*, 354 F.Supp. 252 (D.D.C. 1972).

[30] *See e.g. N. Paiute Nation v. United States*, 30 Ind. Cl. Comm'n. 210, 215-217 (1973); *Pyramid Lake Paiute Tribe v. United States*, 36 Ind. Cl. Comm'n. 256 (1975); *see also*, Cohen's Handbook of Federal Indian Law § 19.06, at 1225 n. 400. For instance, in *Pyramid Lake Paiute Tribe*, the court held that the Secretary of Interior was obligated to fulfill its trust responsibility to the tribe in allocating the excess waters of the Truckee River between the federal reclamation project and the reservation and not to reconcile competing claims to water. In *Gila River Pima-Maricopa Indian Community v. United States*, the tribe was able to establish its right to relief based on the federal government's failure to take action when upstream diversions interfered with the water supply to the Gila River

Since establishing the Pechanga Reservation, the United States has systematically failed to protect and adequately manage the Band's water resources. This failure has resulted in the loss of Tribal water use and other Reservation resources, and has prevented the Band from fulfilling the purposes of the Reservation. In addition to this general overarching claim, which has the potential on its own, of reaching into the tens of millions of dollars, the Band also has numerous, very specific claims that it is waiving, with an estimated potential value for each, that, in combination with the United States' programmatic responsibility to the Tribe as outlined above, provides substantial justification for the overall Federal contribution.

We discuss these claims and the potential monetary liability of the Federal Government below.

1. The Band's claims for mismanagement and failure to protect and promote the Band's water resources

In *Fallbrook*, the court held in IJ 41, that the United States "intended to reserve, and did reserve rights to the waters of the Santa Margarita River stream system which under natural conditions would be physically available on the Pechanga Indian Reservation, including rights to the use of ground waters sufficient for the present and future needs of the Indians residing thereon with priority dates of June 27, 1882, for those lands established by the Executive Order of that date; January 9, 1907 for those lands transferred by the Executive Order of that date; August 29, 1893 for those lands added to the Reservation by Patent on that date; and May 25, 1931, for those lands added to the Reservation by Patent of that date."[31] Based on IJ 41, the United States recognized reserved water rights for the Pechanga. Similar to the *Gila River* case,[32] the federal government has a compensable fiduciary duty to Pechanga with respect to the Band's water rights.

Indeed, although the government has failed to satisfy this obligation, its actions indicate that it has recognized this duty. For instance, the United States through the Bureau of Indian Affairs ("BIA") recognized that Pechanga had a paramount right to water which impacted BIA's actions on behalf of the Band.[33] Further, as part of this special relationship, Pechanga requested

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Reservation. The Claims Court specifically held that "the actions taken by the United States in establishing the reservation in 1859 and in enlarging it thereafter, together with repeated recognition of the need to preserve or restore the water supply utilized by the Pimas and Maricopas in maintaining their commendable self-sufficient status, are consistent only with the existence of a special relationship between these Indians and the United States concerning the protection of their lands and the water supply they utilized on these lands."

[31] *Supra* note 11 at 13-14 .

[32] *Id.*

[33] *See* Pechanga Summary at 41 (Letter from BIA Sacramento Area Director to Regional Director which protested that the Regional Director's Report on the Santa Margarita Project of 1970 "did not recognize the rights of Indian reservations to underground water supplies that had been established in Winters v. United States, 1908, 207 US 564 and confirmed in several subsequent cases.…and that the Indians had a paramount right.").

on numerous occasions for the BIA to conduct water supply studies and take other action in order to protect the Band's water rights and water supply.[34]

In the face of the Band's requests however, the United States Government took no action to protect the Band's water rights or if they did finally take action, it was delayed to the point where the action was ineffective. For instance, in response to the Band's resolution with respect to Rancho California's pumping activities, the Interior Department officially requested the Justice Department to advise Rancho California that its pumping activities were in violation of a 1940 Stipulated Agreement.[35] The Justice Department however declined to advise Rancho California of its unlawful action because of an objection by the United States Navy. Furthermore, the Bureau of Reclamation's plans for construction of the Santa Margarita Project on the Santa Margarita River to benefit the Fallbrook Public Utility District and Camp Pendleton included an allowance of only 1,000 acre feet of water from the Murrieta-Temecula groundwater basin for Pechanga Reservation, despite the BIA's estimation that the reservation would need 5,000 acre feet.[36]

In response to the Santa Margarita Project's failure to adequately account for the Pechanga's water rights, the Band passed two resolutions with respect to their water supply. The first requested that the Secretary of Interior "withhold approval of the Santa Margarita Project until adequate provision has been made for protection and development of the Pechanga Band's *Winters* Doctrine rights."[37] The second asked the United States Attorney General to reopen *United States v. Fallbrook* "to restructure the decree in accordance with the instructions from the Ninth Circuit of Appeal to the end that the decree may become, as it was intended, an instrument for the protection of the Winters Doctrine rights of the Pechanga Band."[38]

The BIA Sacramento Area Director agreed with the Band.[39] He recommended that "the Secretary demand Justice to stop all pumping of the groundwater now in violation of the existing decree and stipulation until such time as the Pechanga Band and the Secretary have documentary evidence that the pumping by Rancho California is not affecting the groundwater rights of the

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[34] For example, on November 18, 1969, the Pechanga Band passed a resolution calling upon the BIA to conduct an economic development and land use study of the reservation, to inform RCWD that it was not permitted, under the terms of the 1940 Stipulated Agreement to pump water from the Temecula Murrieta ground water basin, and that the Band would oppose any modification of that Judgment until the Band's water rights and water supply were at least as well protected as under that judgment and the Band was provided with the means to make beneficial use of the water needed to fulfill its economic and land use goals. *See* Pechanga Summary at 38-39.

[35] On December 26, 1940, a judgment was rendered in the Superior Court of the State of California on a case between Rancho Santa Margarita, a corporation, *Plaintiff v. N.R. Vail et al.* (Vail family descendants), Defendants, with Guy Bogart et al, (individuals with riparian rights to Santa Margarita River waters), as Intervenors. The court found that defendants, plaintiffs, and intervenors had rights to the waters of the Temecula-Santa Margarita and its tributaries. It spelled out the rights of each, and provided that a number of gaging stations and meters be set up to measure the flow of water. *See* Pechanga Water Summary at 29.

[36] *Id.* at 45.

[37] *Id.*

[38] *Id.*

[39] *Id.* at 47 ("We are in complete agreement with the Band.").

Pechanga Band. The United States as trustee for these water rights has no alternative!"[40] In response to the BIA Area Director's recommendation, the Solicitor's Office stated that "[t]he Department of Justice points out that where the Department of Defense is the beneficial holder of the right and refuses to have that right interfered with that the Untied States can bring the action only if we can demonstrate that the reserved right of the Indians is being jeopardized."[41] Again, the Sacramento Area Director recommended that the Secretary of Interior demand that the Justice Department stop groundwater pumping until it was proved that the pumping had not affected the groundwater rights of the Indians.[42] It was not until January 26, 1973 that funds were finally made available for United States Geological Services to undertake a water resources study of Pechanga Reservation.[43]

Given this clear history of the U.S. Government's failure to protect the Band's water rights, the Pechanga Band, and several other California tribes in similar circumstances, successfully sued the federal government in the Indian Claims Commission for, among other things, its failure to protect and preserve the plaintiffs' reserved water rights from non-Indian interference, failure to provide or maintain necessary reservation irrigation systems, and the improper taking of aboriginal water rights. The case was settled in 1993 when six of the Tribes, including Pechanga, accepted $7,500,000.00 in settlement of the pending claims. Notwithstanding the payment of this claim in satisfaction of these breaches of trust, since 1993, the government has continued to breach its trust obligation to the Band by failing to protect and preserve the plaintiffs' reserved water rights from non-Indian interference and by failing to provide necessary water to the Pechanga Reservation. In other words, the government has not protected the Band's water rights despite its admitted failure to do so.

This failure has now been compounded by the fact that since 1993, there has been tremendous population growth in the area. Accordingly, significant additional non-Indian diversions and groundwater pumping from the Band's water resources has damaged the primary aquifer that would otherwise help serve the water needs of the Reservation. In particular, continuous over-pumping beyond the yearly safe yield by non-Indian parties has damaged the aquifer and severely limited the amount of water the Band can now pump itself to serve the purposes of the Reservation. As a result, the Band has had to enter into a series of agreements on its own, without the assistance of the United States, to secure an adequate water supply for the Pechanga homeland but is still short of fulfilling the purposes of the Reservation.[44]

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[40] *Id.*

[41] *Id.*

[42] *Id.* at 49 ("Why does the burden of proof rest with the Indian people when it is the trustee's obligation to protect these rights?").

[43] *Id.* at 52.

[44] For instance, in 2006, the Band entered into the Groundwater Management Agreement with Rancho California Water District to provide for management of the Wolf Valley Water Basin and in 2007 the Band entered into the Recycled Water Agreement with Eastern Municipal Water District to provide for 1,000 AFY of recycled water to the Band.

The aggregate sum of the potential exposure and liability of the United States stretches into the hundreds of millions for these claims. Nevertheless, the Band conservatively estimates that these claims would likely result in a potential recovery of $72 million.

2. Trust Accounting Claim Pending in the United States District Court for the District of Columbia

On December 26, 2006, Pechanga filed a general trust accounting claim against the United States in the District Court for the District of Columbia. *See* Docket No. 06-2206, U.S. District Court for the District of Columbia, Dec. 26, 2006. In its amended complaint, the Band added more details regarding its claims for trust accounting, including reference to the judgment it received in Docket 80-A-2. In addition to its claims for general trust fund and property mismanagement, which are substantial, the Band alleged that the government breached its fiduciary duties by failing to properly invest the funds it received in the ICC judgment for Docket 80-A-2. *See First Amended Complaint*, Docket No. 06-2206, Feb. 12, 2008, at 12.

While the Band is not seeking money damages in this action, the potential liability of the government is substantial and would likely set the stage for a large monetary award, either as equitable relief in the District Court, or as part of a separate action in the Court of Federal Claims. Wherever a recovery is had, the Band conservatively estimates that the Government's liability would stretch into the millions. In particular, the original ICC judgment fund of $439,420.00, properly managed and invested, should be over $4,000,000.00. Instead, there is only approximately $700,000 in the account at present. Thus, liability for this mismanagement is at least $3,300,000 at present and will continue to grow as the government continues to resist the Band's efforts to reform its trust fund management system.

Moreover, the general trust and property mismanagement claims will likely prove even more costly to the government given the pervasive history of mismanagement, especially with the damage to the aquifer sustained since 1993.

3. A claim for the water the Band is giving up under the *Fallbrook* adjudication decree

Despite the government's failure to adequately represent the Band's interest in the *Fallbrook* adjudication and its failure to fully quantify and deliver water to the Pechanga Reservation, the Band has "paper" water rights under the final *Fallbrook* Decree. In IJ 41 (November, 8 1962), which became part of the final decree, the court held that Pechanga, and other nearby Tribes, had a federally reserved water right on their respective reservations. Specifically, the Court decreed that Pechanga had a "prima facie" entitlement to approximately 4,994 acre-feet of water per year for the Pechanga Reservation. Despite this legal entitlement, the Band has not received their entitlement in the form of actual water.

Under the proposed settlement, the Band will be waiving all of the claims described above against the United States to the lands described in IJ 41. The Band is also waiving claims for additional acreage that was not part of the Reservation at the time of IJ 41. As a result, the Band is giving up the right to adjudicate its water rights for the additional land, rights that would equate to a similar "prima facie" entitlement as IJ 41. Accordingly, the Tribal Water Right could

potentially be more than twice the 4,994 AFY for which the Band is settling under the proposed settlement. The Band estimates that the value of these claims to water rights for the additional land being included in the Settlement is $45-50 million.

C. The Band's Waivers against the United States

As part of the settlement, and subject to the retention of claims, the Pechanga Settlement Agreement and the legislation provide that the parties agree to waive their respective claims to water rights, claims to injuries to water rights, and claims to subsidence damage.

The Pechanga Settlement Agreement further provides that the Band will not seek enforcement of the Tribal Water Right as long as the Pechanga Settlement Agreement, including any of its Exhibits, remains in force and effect. With respect to its claims against the United States, subject to the retention of rights, the Band is waiving the following claims:

(1) all claims against the United States, its agencies, or employees relating to claims for water rights in or water of the Santa Margarita River Watershed or any other river systems outside of the Santa Margarita River Watershed that the United States acting in its capacity as trustee for the Band asserted, or could have asserted, in any proceeding, including but not limited to *Fallbrook*;

(2) all claims against the United States, its agencies, or employees relating to damages, losses, or injuries to water, water rights, land, or natural resources due to loss of water or water rights (including but not limited to damages, losses or injuries to hunting, fishing, gathering or cultural rights due to loss of water or water rights; claims relating to interference with, diversion or taking of water or water rights; or claims relating to failure to protect, acquire, replace, or develop water, water rights or water infrastructure) in the Santa Margarita River Watershed that first accrued at any time up to and including June 30, 2009;

(3) all claims against the United States, its agencies, or employees encompassed within the case *Pechanga Band of Luiseño Indians v. Salazar*, Civ. No. 1:06-cv-02206 (D.D.C.);

(4) all claims against the United States, its agencies, or employees relating to the pending litigation of claims relating to the Band's water rights in *Fallbrook*; and

(5) all claims against the United States, its agencies, or employees relating to the negotiation, execution or the adoption of the Pechanga Settlement Agreement, exhibits thereto, or the Act.

Thus, in exchange for the benefits received in the Pechanga Settlement Agreement and the Pechanga Water Rights Settlement Act, the Pechanga Settlement Agreement represents a

complete replacement of, substitution for, and full satisfaction of, all the claims by Pechanga and the United States on behalf of Pechanga and allotees as set forth above.

In recent discussions with the Administration Working Group, the Department raised issues with the content of the waivers. Pechanga is willing to further engage in these discussions regarding revising the waiver package if the United States is able to demonstrate that as a result, the scope of the waivers more accurately corresponds to the Federal contribution.

D. Breakdown of Federal Contribution

In exchange for the Band's waivers against the United States and in recognition of the United States programmatic responsibility to the Band, the total Federal contribution as authorized by the H.R. 5413 is $50,242,000. The Federal contribution is comprised of 3 major components:

1. Pechanga Recycled Water Infrastructure--$6,960,000.

Section 11(a)(1) and Section 8(c) provide that funds from the Pechanga Recycled Water Infrastructure Account will be used to pay for the Storage Pond ($2,500,000) and the Demineralization and Brine Disposal Project ($4,460,000), as are required under the Recycled Water Infrastructure Agreement to fulfill Pechanga's obligations to provide RCWD with a share of Pechanga's recycled water which Pechanga receives pursuant to the Recycled Water Agreement with EMWD.

2. Pechanga ESAA Delivery Capacity--$17,900.000.

Section 11(a)(2) and Section 8(d) provide that funds from the Pechanga ESAA Delivery Capacity Account will be used to pay for Interim Capacity ($1,000,000) and Permanent Capacity ($16,900,000) in accordance with the ESAA Capacity Agreement in order for RCWD to provide the requisite capacity to deliver groundwater and ESAA water to Pechanga.

To fulfill Pechanga's full entitlement of 4,994 AFY, Pechanga will need the Wolf Valley Basin groundwater and MWD imported potable water. In order to receive delivery of MWD imported potable, the MWD water would need to be delivered to Pechanga through offsite conveyance capacity. Available import delivery capacity in the region is limited, and thus posed a challenge. However, the parties were able to negotiate the ESAA Capacity Agreement such that RCWD will ensure that requisite capacity exists in RCWD's system to deliver Wolf Valley ground water and MWD imported water to Pechanga. Together, the Interim Capacity and Permanent Capacity funds will finance the necessary RCWD conveyance capacity. If RCWD is unable to ensure that there is sufficient capacity for groundwater and MWD deliveries to Pechanga, the Settlement Act provides that the funds in the ESAA Delivery Capacity Account shall be available to Pechanga to find alternative capacity.

3. Pechanga Water Fund--$25,382,000.

Section 11(a)(3) of the Act authorizes an appropriation of $25,382,000 for deposit in the Pechanga Water Fund Account. In accordance with Section 9(d)(3)(D) of the Act, the Pechanga Water Fund Account will be used for: (1) payment of the EMWD Connection Fee

(approximately $332,000); (2) payment of the MWD Connection Fee (approximately $1,900,000); and (3) any expenses, charges or fees incurred by Pechanga in connection with the delivery or use of water pursuant to the Settlement Agreement.

In order to receive MWD water there are certain fees associated with connection to EMWD and MWD, in addition to the cost of the expensive MWD water. Hence, the Pechanga Water Fund Account provides the funds necessary for Pechanga to receive MWD water. Those fees are as follows:

a. EMWD Connection Fee

The EMWD Connection Fee, approximately $332,000, will be paid to EMWD as an in-lieu payment instead of standby charges which normally would be collected on an annual basis through the owner's property tax bill. Rather than have any fees that could be considered a tax on Pechanga, EMWD has agreed to a one-time payment by Pechanga for connection to EMWD.

b. MWD Connection Fee

Similar to the EMWD Connection Fee, MWD normally provides extension of their service through annexations. Rather than go through a normal annexation because of tribal sovereignty concerns, however, the ESAA will be governed by the terms and conditions of the agreement such that Pechanga will contractually commit to adhere to rules and regulations applicable to its activities as a customer of EMWD and MWD but that additional terms and conditions will be included to avoid infringement of Pechanga's sovereignty whereby EMWD and MWD will have alternative means to exercise their responsibilities. Under the ESAA Pechanga has agreed to pay a one-time connection fee that amounts to approximately $1,900,000.

c. Expenses, Fees, and Charges Associated with MWD Replacement Water

As discussed above, as a result of the depletion of the Santa Margarita Basin water supply, Pechanga must obtain imported water from MWD as a replacement for its water from the Santa Margarita Basin. The United States has a programmatic responsibility to ensure that Pechanga's entitlement is fulfilled through replacement water, such as the MWD imported water, if existing water is unavailable.[45] The Pechanga Water Fund provides a subsidy to bring down the cost of the expensive MWD imported water. The Pechanga Water Fund will provide funds to cover 25% of the cost of MWD water. This percentage is much less than that provided in other Tribal water settlements. In comparison, the Arizona Water Settlement Tribes receive 58-60% of the cost for Central Arizona Project water, their alternate water supply. Further, while the

[45] For example, the Gila River Indian Community Water Rights Settlement Act of 2004 (Pub. L. 108-451) included the Lower Colorado River Basin Development Fund that provided for a payment "to pay annually the fixed operation, maintenance, and replacement charges associated with the delivery of Central Arizona Project water held under long-term contracts for use by Arizona Indian tribes (as defined in section 2 of the Arizona Water Settlements Act) in accordance with clause 8(d)(i)(1)(i) of the Repayment Stipulation (as defined in section 2 of the Arizona Water Settlement Act)". *See* Sec. 107 (a)(2)(A).

absolute cost of MWD water is significantly higher than that in neighboring states, the percentage to be provided by the Pechanga Water Fund is significantly lower than comparable settlements in further recognition of the unique economic times we are experiencing.

IV. NON-FEDERAL CONTRIBUTION

Pechanga is cognizant that in addition to the Federal contribution, the non-Federal contribution to an Indian water settlement should be proportionate to the benefits received by the non-Federal parties under the settlement. The Band has insisted on such non-Federal contribution from non-Indian parties throughout the negotiations for this settlement and successfully obtained, with the support and assistance of the Federal Negotiation Team, substantial non-Federal contributions to the settlement.

For purposes of the Subcommittee's understanding, we outline each of the non-Federal contributions to the settlement, including Pechanga's own contribution to the settlement.

A. RCWD Contribution

As discussed above, the Pechanga Settlement Agreement is a carefully structured settlement with the United States, RCWD and EMWD. Substantial efforts were made by all parties in order to reach settlement. One of the largest issues of contention during negotiations was the allocation of the groundwater in the Wolf Valley Basin. The previous Groundwater Management Agreement allocated 50% of the water to each party. For Pechanga, it was absolutely critical that the Settlement Agreement provide the Band with the majority of the safe yield. Thus, RCWD agreed to allocate an additional 25% of the Wolf Valley Basin to Pechanga as part of the settlement. Additionally, RCWD will wheel the MWD water under the ESAA to Pechanga in perpetuity and RCWD agrees to provide desalination and brine disposal for water utilized in the Wolf Valley, which will improve groundwater quality in the Wolf Valley Basin for both RCWD and Pechanga. RCWD's contribution to the Pechanga Settlement Agreement, therefore, involves more than a foregoing of its assertion of water rights, but, rather, involves the implementation of a partnership to utilize, convey and improve the quality of both local and imported water for both RCWD and Pechanga.

The monetary quantification of RCWD's contribution, measured exclusively upon its agreement to forego the right to 25% of groundwater in the Wolf Valley Basin, has been calculated at $33,630,332. This calculation assumes that 25% of the Wolf Valley Basin equals 525 acre feet per year, one-fourth of the agreed upon amount of the safe yield in the Wolf Valley Basin. It further assumes that RCWD's contribution will be equal to the rate it must pay for MWD water (as replacement for its share of groundwater from the Wolf Valley Basin), inflated at 3% per year, and an effective earnings rate on the amount expended of 3.5%. Utilizing these assumptions, the present value of RCWD's contribution is $33,630,332.

B. Pechanga Contribution

As with many other Indian water rights settlements, the Pechanga Water Fund Account provides for a subsidy payment that partially fulfills the United States' programmatic responsibility to provide Pechanga with replacement water.

The Pechanga Water Fund Account amount was developed using the following financial assumptions:

- The Account is to be used to partially subsidize the cost of MWD water to reduce the cost of the water using interest earned by the account.

- The Account will pay twenty-five percent (25%) of the cost of the water and Pechanga will pay seventy-five percent (75%).

- The cost of MWD water was projected based on the published rates for an acre-foot of MWD Tier 2 Treated Water plus the EMWD charge of $127.80 in 2010, escalated at four percent (4%) per year thereafter.

- The Account is projected to accrue interest at an average four percent (4%) rate of return.

- The amount of MWD water to be purchased each year was based on a general estimate of the projected water use in the proposed MWD service area (*i.e.*, commercial enterprises in the service area such as the Casino/Hotel complex, administrative facilities, golf course potable water needs, and cultural, educational, and recreational facilities that lie within the proposed MWD service area) that cannot be met from other sources.

While most subsidy funds for Tribes provide funds that will bring the cost of the imported water in line with local water, the Pechanga Water Settlement only seeks to subsidize 25% of MWD water such that Pechanga is bearing 75% of the cost of imported water.

C. EMWD Contribution

While the Band has not completely calculated EMWD's contribution to the Settlement, EMWD's contribution is certainly proportionate to the benefits it will receive from the Settlement. Namely, the ESAA with MWD and EMWD is an absolutely critical component of the Settlement, without which it would be impossible to fulfill the Band's water entitlements. Moreover, EMWD agreed to extend the term of the Recycled Water Agreement with Pechanga and allow Pechanga to sell its unused portion of recycled water to RCWD, both of which were necessary to effectively settle with RCWD. In return for these contributions, EMWD will receive $332,000 as Pechanga's connection fee to EMWD (discussed in further detail above). This benefit to EMWD is proportionate to the efforts EMWD has made in securing the ESAA with MWD and the amendments to the Recycled Water Agreement.

D. MWD Contribution

Although MWD is not a party to the actual Settlement Agreement, MWD is a party to the ESAA, which as discussed above, is an exhibit to the Settlement Agreement. The ESAA is essentially the contractual equivalent of an annexation to MWD and EMWD, with the Band's sovereignty issues protected by contract in the ESAA. In 2009, Governor Schwarzenegger issued a State of Emergency for the State of California's drought situation. In response, MWD

issued a press release recognizing the severe water supply challenges in California. MWD's press release further stated that MWD has taken a number of critical steps to address the drought, including the reduction of water supplies to member agencies and mandatory water conservation. As a result of California's drought and MWD's efforts to address these problems it is unlikely that MWD will be approving any annexations in the near future.

Accordingly, the ESAA with MWD and EMWD, which has already been approved in principle by the MWD Board is extremely important, without such agreement it would be nearly impossible for Pechanga to "annex" to MWD and receive water supplies to fulfill the Band's water entitlements. Moreover, under the ESAA, Pechanga will become a customer of MWD just like any other customer, such that Pechanga will be able to acquire water from MWD for its future water needs as those needs change. Therefore, as part of the Settlement and in order to fulfill the ESAA, MWD will receive $1,900,000 as a connection fee from Pechanga to MWD. The value of becoming part of MWD's service area capable of receiving MWD water is invaluable and undoubtedly represents a proportionate contribution to the benefit, if any, MWD will receive.

V. Conclusion

As outlined above, the Band is settling its longstanding claims against the United States and other parties, and is accepting less water than it could otherwise obtain in exchange for a commitment for the delivery of "wet" water in replacement for its "paper" water rights. The Federal contribution is commensurate with the Federal government's unfulfilled responsibilities with respect to the Band's water rights and its liabilities relating to the same.

Chairwoman Napolitano and members of this Subcommittee, in closing, I would like to thank the Subcommittee for holding a hearing on this important piece of legislation.