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## Sword or Submission? American Indian Natural Resource Claims Settlement Legislation

Benjamin A. Kahn  
*The Conundrum Group, LLP*

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# **SWORD OR SUBMISSION? AMERICAN INDIAN NATURAL RESOURCE CLAIMS SETTLEMENT LEGISLATION**

*Benjamin A. Kahn\**

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\* Founder and Partner, The Conundrum Group, LLP; J.D. University of Michigan Law School.

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### I. Introduction

Some view the relationship between indigenous peoples and later settlers as mere byproducts of natural expansion, benevolent philanthropy, divine religious inspiration, global exploration, paternal supervision, or other justifications devoid of nefarious intent.<sup>1</sup> But others see such forgiving rationales as nothing more than smokescreens designed to obscure a conscious plan to colonize and eventually eliminate indigenous communities.<sup>2</sup>

Another viewpoint explains the relationship in terms of simple economics. It is no secret that natural resources translate into money and allow for a community's survival. Because natural resources are so vital, an economic battle for control over those natural resources often results between indigenous and settler communities.<sup>3</sup> Possession of land is crucial

1. See, e.g., AUGIE FLERAS & JEAN LEONARD ELLIOTT, *THE NATIONS WITHIN: ABORIGINAL-STATE RELATIONS IN CANADA, THE UNITED STATES, AND NEW ZEALAND* 3-4 (1992); VINE DELORIA, JR., *BEHIND THE TRAIL OF BROKEN TREATIES: AN INDIAN DECLARATION OF INDEPENDENCE* 85, 89, 92-94 (1974) [hereinafter DELORIA, *BEHIND THE TRAIL*]; JOHN C. MOHAWK & OREN R. LYONS, *Introduction* to OREN R. LYONS ET AL., *EXILED IN THE LAND OF THE FREE: DEMOCRACY, INDIAN NATIONS, AND THE U.S. CONSTITUTION* 3 (1992); R. DAVID EDMUNDS, *National Expansion from the Indian Perspective*, in *INDIANS IN AMERICAN HISTORY* 159 (Frederick E. Hoxie ed., 1988).

2. See, e.g., VINE DELORIA, JR., *OF UTMOST GOOD FAITH*, 1-2, 6-7, 36-37 (1971); FLERAS & ELLIOTT, *supra* note 1; FRANCIS JENNINGS, *THE INVASION OF AMERICA: INDIANS, COLONIALISM, AND THE CANT OF CONQUEST* 5-8 (1975); CAROL ARCHIE, *MAORI SOVEREIGNTY: THE PAKEHA PERSPECTIVE* 145 (1995) (interview with Steven Young); see also DAVID H. GETCHES ET AL., *FEDERAL INDIAN LAW: CASES AND MATERIALS* 74 (6th ed. 2011) ("The Colonists required the creation of legal and political relationships with the tribes in order to legitimate land transactions."); LLOYD BURTON, *AMERICAN INDIAN WATER RIGHTS AND THE LIMITS OF THE LAW* 5 (1991) ("Euro-Americans originally used the law in combination with military might to strip indigenous peoples of most of their natural resources.").

3. See, e.g., Benjamin A. Kahn, *The Legal Framework Surrounding Maori Claims to Water Resources in New Zealand: In Contrast to the American Indian Experience*, 35 *STAN. J. INT'L L.* 49, 52 & nn.6-15 (1999) [hereinafter Kahn, *The Legal Framework*]; Benjamin A. Kahn, *A Place Called Home: Native Sovereignty Through Statehood and Political Participation*, 53 *NAT. RESOURCES J.* (forthcoming 2013) (manuscript at 3) (on file with author) [hereinafter Kahn, *A Place Called Home*]; Benjamin A. Kahn, *Separate and Unequal: Environmental Regulatory Management on Indian Reservations*, 35 *ENVIRONS* 203

to the survival of independent indigenous nations, since it allows for self-determination over matters of internal jurisdiction and the right to secure, manage, and develop a sustainable economic base. Possession of water, a natural resource necessary for sustainable life, is similarly crucial to tribal self-determination.<sup>4</sup> Because these rights to natural resources are a basis for both political and economic power, the inevitable struggle for control over those resources is not surprising. Such control is simply vital to the continuing existence of communities that strive for independent political representation and economic sustainability.<sup>5</sup>

Settlers often use formal mechanisms, such as governmental and legal frameworks, in an effort to exercise control over tribal natural resources.<sup>6</sup> These legal frameworks reflect the dominant government's policy agenda of assuming formal rights over natural resources that were previously under indigenous dominion.<sup>7</sup> The dominant government's attempt to gain control

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(2012) [hereinafter Kahn, *Separate and Unequal*]; see also Dan Philpott, *Sovereignty*, STANFORD ENCYCLOPEDIA OF PHILOSOPHY (May 31, 2010), <http://plato.stanford.edu/entries/sovereignty/> (“A final ingredient of sovereignty is territoriality, also a feature of political authority in modernity. Territoriality is a principle by which members of a community are to be defined. It specifies that their membership derives from their residence within borders. . . . Most vividly contrasting with territoriality is a wandering tribe, whose authority structure is completely disassociated with a particular piece of land. . . . Supreme authority within a territory — this is the general definition of sovereignty. Historical manifestations of sovereignty are almost always specific instances of this general definition.”).

4. Compare FLERAS & ELLIOT, *supra* note 1, at 2 (“Land is the economic bedrock for the renewal of aboriginal peoples as a distinct society or nation.”), and DELORIA, *BEHIND THE TRAIL*, *supra* note 1, at 163, 165, 178, and Whaimutu Dewes, *Fisheries - A Case Study of an Outcome*, in *TREATY SETTLEMENTS: THE UNFINISHED BUSINESS* 134 (Geoff McLay ed., 1995) (stating that natural resources and knowledge “set the upper bounds on economic development”), with Michael Parfit, *The Chaos of Supply*, “*Sharing the Wealth of Water*”, in *Water: The Power, Promise, and Turmoil of North America's Fresh Water*, NAT'L GEO., Nov. 1993, at 18-36, and Barbara Kingsolver, *Fresh Water in Water: Our Thirsty World*, NAT'L GEO., Apr. 2010, at 36-59.

5. Charles F. Wilkinson, *To Feel the Summer in the Spring: The Treaty Fishing Rights of the Wisconsin Chippewa*, 1991 WIS. L. REV. 375, 393; see also BURTON, *supra* note 2, at 18; DELORIA, *BEHIND THE TRAIL*, *supra* note 1, at 110.

6. Kahn, *The Legal Framework*, *supra* note 3, at 50; Kahn, *A Place Called Home*, *supra* note 3, at manuscript 2.

7. Kahn, *A Place Called Home*, *supra* note 3, at manuscript 2; see also JAMES EDWARD FITZGERALD, *THE NATIVE POLICY OF NEW ZEALAND: A SPEECH DELIVERED IN THE HOUSE OF REPRESENTATIVES OF NEW ZEALAND, AUGUST 6, 1862*, at 32 (McKenzie & Muir, 1862) (“[A] great part of [the Maori] mistrust these [legal, governmental, and political] institutions which you are inventing for them . . . and it is natural that they should mistrust institutions which they suppose are invented for our benefit, not for theirs. Should we not think exactly the same in their place?”).

over indigenous natural resources depends on the legitimacy of legal frameworks like treaties, contracts, constitutions, and statutes to support what often boils down to a loss of the indigenous peoples' control over natural resources.<sup>8</sup>

When it comes to allocating natural resources, subsequent settlers have used the law they bring from afar — i.e., westernized legal methods — to document and justify their division of indigenous economic assets.<sup>9</sup> Once indigenous people find that natural resource rights are subject to both the imported legal norms and allocation schemes of the settlers, they have to develop coping and enforcement strategies to deal with the foreign constructs. While indigenous peoples were often accustomed to occupying territory and exercising ownership over natural resources, the imported legal norms of the settlers required external evidence, such as a written contract or treaty that defined, allocated, and divided natural resource rights subject to some type of judicial enforcement.<sup>10</sup>

But these protection and enforcement options fall within a spectrum of legal mechanisms that were forced upon indigenous peoples. Indigenous norms did not reflect property ownership in the same way. Due to this disparity, indigenous peoples were often left with a stacked deck, and so one approach to enforcing indigenous natural resource rights has been to work within the settler-established system by using the dominant culture's legal parameters as both a shield and a sword in the battle for natural resource control and protection.<sup>11</sup> The settlers may have designed legal constructs to their benefit, but indigenous people are adaptable, and those same foreign legal parameters can be applied offensively in the ongoing quest for preservation of indigenous natural resource rights.

It is vital for indigenous groups to have control over natural resources, as such control is a foundation for both economic and political self-sufficiency. This article analyzes a specific approach indigenous groups can utilize to maintain control over natural resources, which involves working within the imported statutory process to settle and resolve

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8. *Tamihana Korokai v. Solicitor-General* (1912) 32 N.Z.L.R. 321, 333 (CA); Kahn, *The Legal Framework*, *supra* note 3, at 50-52; Kahn, *A Place Called Home*, *supra* note 3, at manuscript 5; see also FITZGERALD, *supra* note 7.

9. See Kahn, *The Legal Framework*, *supra* note 3, at 52; Kahn, *A Place Called Home*, *supra* note 3, at manuscript 6.

10. See Kahn, *The Legal Framework*, *supra* note 3, at 52; Kahn, *A Place Called Home*, *supra* note 3, at manuscript 6.

11. Kahn, *Separate and Unequal*, *supra* note 3, at 205-06, 228-29; Kahn, *The Legal Framework*, *supra* note 3, at 168; Kahn, *A Place Called Home*, *supra* note 3, at manuscript 7, 68, 81.

indigenous natural resource claims. At times, indigenous groups have simply given in to the imported legal construct to maintain the political and economic independence that is critical to natural resource control.<sup>12</sup> This article focuses on one way that indigenous people can work within the dominant statutory system, while still obtaining favorable results in resolving natural resource claims — i.e., the legislative claims settlement process.<sup>13</sup>

In the past few decades, there has been an increase in the number of negotiated legislative settlements. Legislative settlements avoid potential claims and prevent actual litigation from proceeding. To properly analyze the legislative claims settlement process, this article examines the fulcrum of American Indian natural resource claims settlement legislation activity, which occurred during the 101st Congress from 1989 through 1990. A detailed history of water-related claims settlements proposals during that period for the Zuni, Fort McDowell Yavapai, Fort Hall Shoshone Bannock, Pyramid Lake Paiute, Fallon Paiute Shoshone, Ute, and San Carlos Apache Indian tribes illustrates the problems and advantages of such legislative settlements.

Analyzing these natural resource claims from the 101st Congress helps to illustrate the key components of any successful settlement. Congressional enthusiasm for legislative claims settlements with Indian tribes has since ebbed, and the hope for comprehensive Indian natural resource claims settlement legislation has faded entirely (as opposed to piecemeal resolutions). This article concludes with a summary of legislative claims settlement developments, and a view of the best path forward: the federal government should increase the rate of Indian natural resource legislative claims settlements as an efficient way to bring economic closure to historic and costly battles for resource control with Indian tribes. This is true, even though some may view legislative claims settlements as tribal capitulation to the dominant legal system.

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12. Kahn, *A Place Called Home*, *supra* note 3, at manuscript 7, 68, 81.

13. See, e.g., Robert T. Anderson, *Indian Water Rights: Litigation and Settlements*, 42 *TULSA L. REV.* 23 (2006); Charles DuMars & Helen Ingram, *Congressional Quantification of Indian Reserved Water Rights: A Definitive Solution or a Mirage?*, 20 *NAT. RESOURCES J.* 17 (1980); Daniel McCool, *Intergovernmental Conflict and Indian Water Rights: An Assessment of Negotiated Settlements*, 23 *PUBLIUS: J. FEDERALISM* 85 (1993); Gina McGovern, *Settlement or Adjudication: Resolving Indian Reserved Rights*, 36 *ARIZ. L. REV.* 195 (1994).

## II. Indian Natural Resource Claims Resolution Options

Migration and the expansion of western urban areas have combined to cause population levels in the American West to reach an unprecedented high. This population boom has been accompanied by an increase in the use of an already scarce commodity in the west — water,<sup>14</sup> the “lifeblood” of the west.<sup>15</sup> Indeed, with irrigation accounting for over 90% of western water consumption, the very health of the land and survival of people hinges on an allocation of sufficient water rights.<sup>16</sup>

American Indians used water resources for centuries before the arrival of European settlers.<sup>17</sup> For example, the Zunis had fully functioning sedentary communities that required reliable water sources:

Long before the Europeans dreamed that there could possibly be another side to the world of which they believed themselves to be the integral part, [the Zuni] had [ ] little cities of sun dried brick and stone . . . inhabited by the descendants of those who dwelt there before the New World was known to the Old.<sup>18</sup>

Any allocation of water resources therefore must include the water rights of Indian nations. The federal government has long been stigmatized with a reputation for giving Indians the short end of the stick,<sup>19</sup> a reputation that is likely to continue in the area of water rights despite the remarkable success of the 101st Congress.

While the allocation of water rights is a state issue, the federal government becomes involved in cases of Indian or intra-state rights. The most important legal precedent for Indian water rights is *Winters v. United States*.<sup>20</sup> This case established that Indian nations were entitled to sufficient water for irrigation and other purposes by necessary implication, even if those rights were not spelled out in the treaties between the federal

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14. Parfit, *supra* note 4, at 18-36; Kingsolver, *supra* note 4, at 36-59.

15. ERNEST A. ENGLEBERT & ANN FOLEY SCHEURING, *WATER SCARCITY IMPACTS ON WESTERN AGRICULTURE passim* (1984).

16. Ann E. Amundson, *Recent Judicial Decisions Involving Indian Water Rights*, in *INDIAN WATER 1985: COLLECTED ESSAYS 4* (Christine L. Miklas & Steven J. Shupe eds., 1985) [hereinafter *INDIAN WATER 1985*].

17. *WATER RIGHTS — SCARCE RESOURCE ALLOCATION, BUREAUCRACY, AND THE ENVIRONMENT 49* (Terry L. Anderson ed., 1983) (“Irrigation of arid lands in the West began before American settlement of the frontier. Indians were irrigating their lands when the Spaniards first explored California.”).

18. FRANK ROBERTS, *THE ZUNI INDIANS 1* (1920-21).

19. *Id.* n.2.

20. 207 U.S. 564 (1908).

government and the Indian tribes.<sup>21</sup> As Indian nations have increased tribal economic self-sufficiency and self-determination, tribal leaders and lawyers have recognized the value of pressuring state and federal governments for *Winters* rights. Indian water rights advocates characterize this process as the transformation from “paper” water to actual “wet” water.<sup>22</sup> Questions remain, however, as to how best to convert such paper rights to actual use.

There are at least three options in pursuing a settlement of Indian water rights claims. A Congressional Research Service report for Congress elaborates on these choices:

What are the prospects for solution to the remaining claims? In the first place, negotiated, out-of-court settlements between the executive branch and the tribes (subject to approval by Congress) are being explored . . . Second, congressional action, independent of negotiation, is possible. Third, resolution through the courts remains as an alternative should the first two avenues not be pursued to successful conclusion.<sup>23</sup>

Congressional action based only on lobbying and without negotiation, however, would all but exclude Indian representatives from the very process of determining their own future. Negotiated settlement subject to congressional approval is therefore one of the only resolution options short of litigation.

The litigation option poses several problems. An Interior Department representative has noted, “the increasingly apparent expense, delay, uncertainty, and inadequacy of litigation have frustrated too many Indian water claimants.”<sup>24</sup> These litigation problems in turn led to an increase in congressional settlements.<sup>25</sup> On top of the cost and time-constraints that litigation carries, the accumulation of past victories and mounting court claims by eastern American Indian nations contributed to a backlash in the courtroom against Indian interests after 1978.<sup>26</sup> Thus, when Indian tribes

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21. WILLIAM C. CANBY, JR., *AMERICAN INDIAN LAW IN A NUTSHELL* 280 (2d ed. 1988).

22. *INDIAN WATER* 1985, *supra* note 16, at ix.

23. RICHARD S. JONES, CONG. RESEARCH SERV., 87-227 GOV, *AMERICAN INDIAN POLICY: BACKGROUND, NATURE, HISTORY, CURRENT ISSUES, FUTURE TRENDS* 59 (1987).

24. Frank K. Richardson, *Interior's View of Indian Water Law*, in *INDIAN WATER* 1985, *supra* note 16, at 82.

25. *Id.* at 26 (“[A] contemporary interest in negotiation stems from several inherent weaknesses in litigation which are proving problematic to all parties. Litigation is time consuming. Litigation is expensive.”).

26. EMMA R. GROSS, *CONTEMPORARY FEDERAL POLICY TOWARD AMERICAN INDIANS* 88-89 (1989).



started losing natural resources cases in the Supreme Court during the 1980s and 1990s, settlement became the most viable option.<sup>27</sup>

Eventually, both the Reagan and Bush administrations initiated a formal United States policy of resolving American Indian water rights through negotiation rather than litigation. The federal criteria for such a settlement have included a finality to legal claims, federal cost that does not exceed the potential of existing claims, federal cost that does not exceed the legal risk, some degree of state and local cost sharing, obtaining a settlement that promotes tribal economic self-sufficiency, and participation of the Department of the Interior and Bureau of Indian Affairs in the settlement.<sup>28</sup>

There are millions of American Indians in this country, separated into approximately 400 distinct nations. Only a fraction of these nations have witnessed any settlement of *Winters* rights, although there have been as many as 100 legal cases pending simultaneously based on *Winters* rights.<sup>29</sup> The pace of these settlements is slow and tedious, and there is an obvious need to speed up the process. Former Chairman of the Navajo Nation, Peter Zah, has summarized the Indian perspective:

[Federal] administration representatives come to Navajo Country and talk about self-determination and "economic self-sufficiency." But those are just words to justify the decreased federal spending on the Navajo Reservation. They will remain just words, if we are denied the tools to develop our economy. And water is clearly a necessary tool for that development.<sup>30</sup>

Disgust with a slow legal process has led many Indian nations to pursue a congressionally ratified settlement rather than a complete *Winters* rights allotment in the courts.

But legislative settlement efforts entail complications as well. Indian representatives who have lobbied for water rights settlements find themselves embroiled in a new competition for federal funds when they attempt to broker a legislative settlement. Still, settlements of Indian water rights through the legislative process once appeared to represent a positive trend in the resolution of Indian water rights. Out of seven attempted Indian water-related claims bills in the 101st Congress, for example, five

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27. Interview with Steven M. Tullberg, Staff Attorney, Indian Law Resource Center (Dec. 12, 1990) (on file with author).

28. Working Group in Indian Water Settlements, 55 Fed. Reg. 9223-01 (Mar. 12, 1990).

29. *Winters v. United States*, 207 U.S. 564 (1908).

30. Peterson Zah, *Water: Key to Tribal Economic Development*, in *INDIAN WATER 1985*, *supra* note 16, at 75-76.

passed within the provisions of four separate bills.<sup>31</sup> The legislative settlement trend must be utilized to bring closure to Indian water rights claims today.

### *III. Zuni Claims Settlement*

Congress passed the Zuni Claims Settlement Act in October of 1990 and President George Bush signed it as Public Law 101-486 on October 31, 1990. The legislation was prompted by ongoing and costly litigation between the Zuni Indians of New Mexico and the federal government. In 1981, the Zunis filed a suit in the United States Claims Court against the United States for its alleged failure to fulfill the requirements of the trust relationship and protect Zuni resources. The dispute had been in litigation for nearly ten years.<sup>32</sup>

#### *A. History of the Claims*

Although Zuni ancestors inhabited over fifteen million acres of land as early as 5000 B.C., the Zuni land base eventually shrunk to an area of 408,000 acres in western New Mexico.<sup>33</sup> In the meantime, the Zuni population doubled from 1500 tribal members in 1879 to approximately 3000 by the end of the twentieth century.<sup>34</sup> In 1598, Spain recognized the existing Zuni province.<sup>35</sup> When Mexico gained independence in 1821, the new government continued to apply Spanish law to the Zunis and other Indians.<sup>36</sup> When the United States obtained New Mexico in 1848 under the Treaty of Guadalupe Hidalgo, the newly acquired land included Zuni aboriginal land holdings.<sup>37</sup> But Zuni property rights remained valid under Spanish and Mexican law, even after the United States acquired New Mexico.<sup>38</sup>

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31. See discussion *infra* Parts III-VIII.

32. S. REP. NO. 101-306, at 2 (1990) (referring to consolidated claims, Ct. of Cl. No. 327-81L and 224-8L).

33. H.R. REP. NO. 101-727, at 2-6 (1990); S. REP. NO. 101-306, at 2 (1990).

34. TREATIES, LAND CESSIONS, AND OTHER U.S. CONGRESSIONAL DOCUMENTS RELATIVE TO AMERICAN INDIAN TRIBES: ZUNI INDIAN PUEBLO, NEW MEXICO 99 (George Emory Fay compiler & ed., 1971) [hereinafter FAY]; DOROTHEA C. LEIGHTON & JOHN ADAIR, PEOPLE OF THE MIDDLE PLACE 6 (1966).

35. H.R. REP. NO. 101-727, at 4.

36. *Id.*

37. *Id.* (referring to the Treaty of Peace, Friendship, Limits and Settlement, Feb. 2, 1848, U.S.-Mex., art. VIII, 9 Stat. 922, 929 [hereinafter Treaty of Guadalupe Hidalgo])

38. Mountain States Tel. and Tel. Co. v. Pueblo of Santa Ana, 472 U.S. 237, 250-52 (1984).

During the late nineteenth century, however, the Attorney General of New Mexico failed to recommend a confirmation of Zuni title to the U.S. Congress.<sup>39</sup> At the same time, the federal government was unable to prevent settlers from destructive logging practices, water conversions, adjacent overgrazing, destruction of ancient archaeological sites, trespassing, or the illegal seizure of minerals, salt, and coal on Zuni land.<sup>40</sup> These encroachments continued throughout the nineteenth and twentieth centuries, causing soil erosion, the loss of vital natural resources, and degradation of the Zuni agricultural base. Indeed, since the mid-1800s, the Zunis have witnessed a staggering 90% loss in their productive land base.<sup>41</sup>

Part of the reason for this loss was a need for irrigation water, which is scarce in the western United States.<sup>42</sup> Zuni irrigation has remained relatively constant since the mid-1960s, when the tribe was irrigating 6300 acres out of a 400,000-acre land base.<sup>43</sup> Without the ability to expand irrigable acreage and have sufficient water, however, Zunis were without a clear path to successful economic development.

#### *B. Proposed Legislative Settlement*

Both Senate Bill 2203 and House Bill 4143 extinguished pending U.S. Claims Court cases by providing a monetary settlement without finding the United States government liable.<sup>44</sup> This legislation established a Zuni Indian Resource Development Trust Fund with a sum of \$25 million to be invested by the Secretary of the Interior with no administrative deductions or charges.<sup>45</sup> In addition, Zunis and the Interior Department would develop a comprehensive Zuni resource development plan that would include programs for sustainable resources, watershed rehabilitation, land acquisition, cooperative technical ventures with the Bureau of Indian Affairs, and the funding and training of Zuni Indians to fill professional implementation positions.<sup>46</sup>

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39. *See id.*; H.R. REP. NO. 101-727.

40. S. REP. NO. 101-306, at 2-3 (1990).

41. *Id.*

42. Parfit, *supra* note 4, at 18-36; Kingsolver, *supra* note 4, at 36-59.

43. LEIGHTON & ADAIR, *supra* note 34, at 5. This amounted to 9182 acre-feet of irrigated land. *Id.*

44. Zuni Claims Settlement Act of 1990, S. 2203, 101st Cong. (1990); Zuni Claims Settlement Act of 1990, H.R. 4143, 101st Cong. (1990).

45. S. 2203; H.R. 4143.

46. S. 2203; H.R. 4143.

Both the Senate and the House included limitations on the use of Zuni settlement proceeds.<sup>47</sup> Out of the \$25 million trust fund allotment, the Zuni could use a maximum of \$8 million for the purchase, access maintenance, defense of the “Zuni heaven” religious lands, the formulation of the Zuni resource development plan up to \$6 million annually for two years, and attorney and legal costs for the Zuni U.S. Claims Court cases.<sup>48</sup> Further, no funds could be used to make direct per capita payments to Zuni tribal members.<sup>49</sup>

Improved watersheds and a monetary settlement, which could be used to acquire or enhance existing water rights, would be a valuable asset for the Zuni Indian community.<sup>50</sup> An 1879 Smithsonian Bureau of Ethnology collecting party member, Frank Hamilton Cushing, documented the importance of water to the Zuni nation, describing how “[t]he country of the Zunis is so desert and dry, that . . . the possession of water for drinking and cooking purposes alone, has been counted a blessing.”<sup>51</sup> With the federal goal of a stable reservation economy in mind, improved water rights could provide not only sustenance for the Zuni nation but a leasable, income-generating commodity as well.

### *C. Controversial Issues in Settlement Legislation*

There were two major controversial issues regarding Senate Bill 2203 and House Bill 4143. The first involved the extent and validity of Zuni compensation demands, and the second revolved around the retroactive recognition of Zuni land title.

Zuni experts estimated the cost of the damages to their homeland and the failure of the United States to protect Zuni Pueblo resources at a minimum of \$48 million.<sup>52</sup> The proposed \$25 million figure represented a compromise to avoid tedious litigation for the ten-year old U.S. Claims

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47. S. 2203; H.R. 4143.

48. The Act relating to "Zuni heaven" land passed on August 28, 1984. A Bill to Convey Certain Land to the Zuni Indian Tribe for Religious Purposes, Pub. L. No. 98-408, 98 Stat. 1533 (1984), *reprinted in* 1984 U.S.C.C.A.N. 98.

49. S. REP. NO. 101-306, at 3 (1990). Importantly, the Bills do not apply to or offset any settlement of U.S. Claims Court No. 161-79L, but do retroactively recognize Zuni title for the purpose of compensation to the 15 million acres of land that were included in the Cl. Ct. 161-79L case. *Id.* at 5.

50. *Id.*

51. JESSE GREEN, ZUNI SELECTED WRITINGS OF FRANK HAMILTON CUSHING 5, 254 (1979).

52. S. REP. NO. 101-306, at 3.

Court cases.<sup>53</sup> Although Zuni experts conceded that climactic fluctuations had an influence on the deterioration of the Zuni land base, the Zunis maintained that an expanding population in the vicinity caused major problems.<sup>54</sup>

Zuni experts pointed to three instances of historical evidence to support Zuni claims.<sup>55</sup> After the United States obtained New Mexico, western settlers engaged in destructive overgrazing near the Zuni reservation.<sup>56</sup> When the transcontinental railroad arrived across New Mexican lands, the railroad removed vast amounts of timber without any regard to replanting or other erosion preventive measures.<sup>57</sup> Finally, a series of failed dams on the Zuni River — seven out of eight of which were federally constructed — caused extensive damage by contributing to the erosion problem.<sup>58</sup> Thus, overgrazing, timber removal, and dam construction combined with other factors to cause deep channel incisions in the alluvial valleys of the Zuni River drainage area, which included most of the Zuni reservation. Zuni experts estimated damages figures as follows:<sup>59</sup>

Land damages	\$18,333,333.00
Loss of water resources	20,880,470.00
Salt losses	2,669,950.00
Coal losses	903,000.00
Timber losses	153,600.00
Trespassing	167,325.00
Archaeological damage	<u>30,270,000.00</u>
 TOTAL	 \$73,377,678.00

Despite the Zuni expert's willingness to abandon the over \$70 million claim and settle for \$25 million, the federal government steadfastly refused to compromise and threatened pending Zuni legislation with a presidential veto.

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53. *Id.*

54. H.R. REP. NO. 101-727, at 6, 8 (1990).

55. *Id.*

56. *Id.*

57. *Id.*

58. *Id.*

59. *Id.* at 7-10. The archaeological damages figures reflected only 362 of 1824 possibly damaged sites. The trespassing figure reflected approximately \$500 in annual damages. *Id.* at 10.

The Zuni estimate of over a \$20 million loss of water resources is especially troubling considering the Zuni's needs and the geographical land base. The Zunis use of land for elaborate floodwater irrigation systems and waffle gardens along the banks of the Zuni River can be traced back over centuries to agricultural techniques practiced by Zuni ancestors.<sup>60</sup> Zuni cultivation of corn expanded with the introduction of wheat, oats, and grain by Franciscan missions from 1629 to 1682, who left written accounts of Zuni women planting peach trees, onions, peppers, chili, beans, and squash in the waffle gardens along the banks of the River.<sup>61</sup> In 1885, the Zuni area Federal Indian Agent, Dolores Romero, reported that the tribe had been using the same seeds for agricultural purposes for centuries.<sup>62</sup> Likewise, Reverend Taylor F. Early's 1879 Annual Report of the Zuni Day School contained documentation that the Zunis had been cultivating wheat and corn for at least 200 to 300 years.<sup>63</sup> An 1899 report of United States Indian Agent N.S. Walpole even underscored the secret to agricultural activity on Zuni lands, noting that, "[n]owhere can crops be raised without irrigation."<sup>64</sup>

The federal government presented a much different argument regarding the issues covered in the U.S. Claims Court cases.<sup>65</sup> In a statement to the Senate Select Committee on Indian Affairs representing the administration's views, a Deputy Assistant Attorney General from the Justice Department opposed both Senate Bill 2203 and House Bill 4143.<sup>66</sup> The Deputy proclaimed that a Zuni settlement via congressional legislation was unfair to other Indian tribes who had to litigate.<sup>67</sup> He emphasized that a monetary settlement in the absence of court-imposed liability also set a dangerous precedent, one "unwarranted" and "unfair" for future negotiations between the federal government and Indian nations.<sup>68</sup> The Deputy worried whether the Zuni claims justified damages, and maintained that the Zuni claims were unwarranted because erosion damage began occurring prior to U.S. involvement as part of "a naturally occurring type

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60. T.J. FERGUSON & E. RICHARD HART, *ZUNI ATLAS* 37-38 (1985).

61. LEIGHTON & ADAIR, *supra* note 34, at 17-21, 23 (stating that Zuni were farmers centuries before the arrival of the Spaniards).

62. FAY, *supra* note 34, at 126.

63. *Id.* at 104.

64. *Id.* at 205.

65. *Id.*; see also S. REP. NO. 101-306, at 2-10 (1990).

66. S. REP. NO. 101-306, at 7-10.

67. *Id.* at 8.

68. *Id.*

common in the Southwest.<sup>69</sup> He therefore concluded that the \$25 million settlement proposal was an arbitrary and burdensome gratuity for the American taxpayers to bear.<sup>70</sup>

In a statement to the same committee, the Department of the Interior's Deputy Assistant Secretary for Indian Affairs in Trust and Economic Development also opposed Senate Bill 2203 and House Bill 4750.<sup>71</sup> The Interior Department representative opposed the bills because they purportedly taxed limited federal resources at the expense of other Indian tribes.<sup>72</sup> The Interior Department felt that the existing Bureau of Indian Affairs programs were sufficient for the Zuni, and that other grant programs were available through departments such as Agriculture and Health and Human Services.<sup>73</sup>

The views of both federal government representatives were echoed in the minority viewpoint of the House Committee on Interior and Insular Views.<sup>74</sup> The minority view on the Committee felt that Congress should not preempt claims courts where historical and scientific expert evidence was at issue, that the proposed legislation carried a substantial price tag, that applying a different standard in negotiations with the Zuni than to the other nineteen Pueblos would set a dangerous precedent, and that the Department of Justice had made clear that the Department would recommend President Bush's disapproval if the Bill passed.<sup>75</sup>

But based on the 1908 *Winters* case and precedent for liberal interpretation of treaties in favor of American Indians, the Zunis had a strong legal argument for senior water rights.<sup>76</sup> In addition, a Zuni senior water right would include the amount of water needed to irrigate their entire acreage and not just areas of agricultural use.<sup>77</sup>

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69. *Id.* at 9.

70. *Id.*

71. *Id.* at 10.

72. *Id.*

73. *Id.*

74. *Id.* The minority constituents on the Committee were Reps. John J. Rhodes III (R-AZ), Robert L. Lagomarsino (R-CA), Don Young (R-AK), Larry E. Craig (R-ID), and Barbara F. Vucanovich (R-NV). H.R. REP. NO. 101-727, at 24-25 (1990).

75. *Id.*

76. *Winters v. United States*, 207 U.S. 564, 569-70 (1908); *Tulee v. Washington*, 315 U.S. 681, 684-85 (1942).

77. *Arizona v. California*, 460 U.S. 605, 609-10, 641 (1983); *Arizona v. California*, 373 U.S. 546, 596-600 (1963).

*IV. Fort McDowell Indian Community Water rights Settlement*

On October 1, 1990, the House passed House Bill 5063, the Fort McDowell Indian Community Water Rights Settlement Act,<sup>78</sup> which included the text of House Bill 2570, the Arizona Desert Wilderness Act.<sup>79</sup> The House passed the Arizona Desert Wilderness Act on February 28, 1990, and the Senate passed the Act on October 27, 1990.<sup>80</sup> The President signed the Act as Public Law 101-628 on November 28, 1990.<sup>81</sup>

The legislation was prompted by water claims litigation filed on behalf of the Fort McDowell Indians, which threatened the water supply of over 1.5 million residents of the greater Phoenix metropolitan area.<sup>82</sup> The Act ratified a settlement agreement between the Fort McDowell Indians and others that had been under negotiation for over five years, and the Secretary of the Interior was designated to implement the Act.<sup>83</sup> The interested parties included the Fort McDowell Indian community, the State of Arizona, the Salt River Project Agricultural Improvement and Power District, the Salt River Valley Water User's Association, the Roosevelt Water Conservation District, the Arizona cities of Chandler, Glendale, Mesa, Phoenix, Scottsdale, and Tempe, the Arizona town of Gilbert, and the Central Arizona Water Conservation District.<sup>84</sup> The settlement in the bills completely satisfied and extinguished all current and potential claims under federal and state laws regarding Fort McDowell Indians' water rights, including ground, surface, and effluent water.<sup>85</sup>

In 1978, Arizona initiated general stream adjudication in the Arizona Supreme Court regarding water rights to the Gila River and its tributaries — including the Verde River that runs through the Fort

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78. Fort McDowell Indian Community Water Rights Settlement Act of 1990, H.R. 5063, 101st Cong. (1990). Representative Udall (D-AZ) and Representative Rhodes (R-AZ) co-sponsored House Bill 5063. *Id.* On July 25, 1990 Senator McCain (R-AZ) introduced Senate Bill 2900, an identical bill, and placed House Bill 5063 on the calendar for the Senate on October 2, 1990, where it died in adjournment. *See* H.R. REP. NO. 101-727, at 20.

79. Arizona Desert Wilderness Act of 1990, H.R. 2570, 101st Cong., Pub. L. No. 101-628, 104 Stat. 4469 (1990).

80. H.R. 2570, 101st Cong., 136 CONG. REC. D1436-02 (1990).

81. Arizona Desert Wilderness Act of 1990, Pub. L. No. 101-628, 104 Stat. 4469 (1990).

82. Fort McDowell Indian Community Water Rights Settlement Act of 1990, S. 2900, 101st Cong., at 26-27 (1990).

83. *Id.* § 2(b).

84. *Id.* § 3(a).

85. *Id.* The Act did not permit any future suits other than those that dealt with enforcement or authorization of the Act itself. *Id.* § 9(a).



McDowell reservation.<sup>86</sup> At the same time, there was a parallel federal court suit underway attempting to determine quantification for the distribution of associated federally reserved water rights.<sup>87</sup> The Supreme Court eventually deferred this decision to the state courts.<sup>88</sup>

By 1985, the federal government and the Fort McDowell Indian community still differed widely on any appropriate allocation and/or compensation.<sup>89</sup> Yavapai Indian Doctor Carlos Montezuma warned as early as the 1930s of the prospect that Fort McDowell and other Yavapai Indians would resent settlers for cheating Indians of their natural resource birthrights, warning that “[m]aybe you have intoxicated us to sleep . . . and Rip Van Winkle like, we came back after many years and see the real as though after a dream.”<sup>90</sup> The prospect of costly and lengthy litigation led to five years of negotiation and the eventual Fort McDowell legislative settlement.

#### *A. History of the Fort McDowell Indian Community Water Rights Claim*

The aboriginal territory of the Yavapai Indians covered most of central Arizona, including the present Fort McDowell reservation.<sup>91</sup> The Northeastern Yavapai in the Prescott region surrounding Fort McDowell were known as the “Wikutepa.”<sup>92</sup>

As pressure mounted from non-Indian settlers, the Department of the Army (“DOA”) moved the Yavapai in 1873 to a military post near Camp Verde and encouraged them to farm.<sup>93</sup> The Yavapai had a history of water usage and farming, and the Southeastern Yavapai had cultivated pink maize, pumpkins, watermelons, and gourds.<sup>94</sup> The Yavapai dug a five-mile irrigation ditch by hand, only to be moved in 1875 by the DOA to the San Carlos Reservation near the Gila River in eastern Arizona.<sup>95</sup> The Yavapai wanted to move back near the Verde River to an abandoned military post

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86. *Id.* § 2(a)(6); see also S. 2900; S. REP. NO. 101-479, at 6 (1990).

87. *Arizona v. San Carlos Apache Tribe*, 463 U.S. 545, 549 (1983).

88. *Id.* at 570.

89. S. REP. NO. 101-479, at 6 (1990).

90. PETER IVERSON, CARLOS MONTEZUMA AND THE CHANGING WORLD OF AMERICAN INDIANS 39 (1982).

91. E.W. Gifford, *The Southeastern Yavapai*, in 29 UNIVERSITY OF CALIFORNIA PUBLICATIONS IN AMERICAN ARCHAEOLOGY AND ETHNOLOGY 177 (1932).

92. *Id.*

93. S. REP. NO. 101-479, at 1.

94. Gifford, *supra* note 91, at 214.

95. S. REP. NO. 101-479, at 1-2.

called Fort McDowell, and petitioned President Theodore Roosevelt in 1903 to create a Fort McDowell Indian Reservation there.<sup>96</sup>

On September 15, 1903, Roosevelt signed an Executive Order setting aside non-settled land at Fort McDowell for the Yavapai Indians, and Congress later appropriated \$50 million for the purchase of non-Indian claims.<sup>97</sup> This purchase process concluded by 1905, and resulted in the 24,680 acre Fort McDowell reservation stretching two miles to the east and west across the Verde River for a span of ten miles in a location only twenty-three miles northeast of Phoenix.<sup>98</sup>

Once relocated to Fort McDowell, the Yavapai needed permanent irrigation and found support from the Chairman of the House Committee on Indian Affairs, Representative John H. Stephens.<sup>99</sup> But the Bureau of Indian Affairs ("BIA") refused to support the request because it wanted to move the Fort McDowell Yavapai to the 1400 acre Salt River Reservation, even though the Yavapai would have to share the Reservation with their "deadly enemies," the Salt River Pima Indians.<sup>100</sup> After twenty years of stalling on irrigation assistance, the BIA attempted to force the Yavapai to move to Salt River but aborted the effort when a state court would not transfer Fort McDowell water rights.<sup>101</sup> In the meantime, nothing was accomplished in terms of agricultural systems for the Yavapai as the federal government was distracted by a plan of forced exodus instead.

A 1935 Department of the Interior report found that out of \$20,000 the BIA earmarked for work on the Fort McDowell reservation, the federal government diverted \$15,000 to the Salt River Reservation.<sup>102</sup> Further, the federal government only spent \$7000 on development programs at Fort McDowell in the thirty years after formation of the Reservation.<sup>103</sup> For decades, the BIA Salt River relocation plan for the Yavapai thus provided a rationale for neglectful federal assistance in developing permanent irrigation systems at Fort McDowell.

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96. *Id.* at 2.

97. *Id.*

98. *Id.*

99. *Id.* at 3.

100. IVERSON, *supra* note 90, at 121. "If, in the end, the Yavapai were to be removed, their money spent on new irrigation works would be dollars wasted until the money was invested, farming would continue to decline and land would continue to be unproductive." *Id.* at 125-26.

101. S. REP. NO. 101-479, at 3.

102. *Id.*

103. *Id.*

Future federal plans for dam construction and land use in Fort McDowell territory suggest the reasons underpinning federal efforts to remove the Fort McDowell Indian community.<sup>104</sup> In 1903, non-Indian landowners in the Salt River valley organized a Salt River Water User's Association ("SRWUA") and contracted with the Salt River Pimas and the federal government to build Roosevelt Dam under the Reclamation Act of 1902.<sup>105</sup> The 1904 contract for repayment noted that only members of the SRWUA would receive water from the project.<sup>106</sup> This led to a lawsuit over Yavapai water rights in 1905.<sup>107</sup>

The United States Attorney representing the Fort McDowell Yavapai ignored the 1908 *Winters* decision granting reservation water rights by necessary implication, and included in his presentation warning of imminent BIA plans to relocate the Yavapai to Salt River.<sup>108</sup> Judge Edward Kent temporarily awarded the Fort McDowell Yavapai only 7060 acre-feet of flow water needed to irrigate land already used for agriculture — a mere 1300 acres.<sup>109</sup> This "Kent Decree" resulted in an artificially low water allotment for the 24,680 acre Fort McDowell Reservation.<sup>110</sup>

In 1935, the federal government agreed to build Bartlett Dam upstream from Fort McDowell on the Verde River.<sup>111</sup> A 1936 Interior Department Division of Investigative Affairs report noted that the prior Salt River Project had failed to deliver the Fort McDowell "Kent Decree" water.<sup>112</sup> Western Yavapai were cultivating pumpkins, beans, maize, watermelon, tobacco, fruits, and medicinal plants in 1936, but the southeastern Yavapai at Fort McDowell did not have the irrigation rights necessary to continue or expand their farming.<sup>113</sup> The federal government subsequently built both Bartlett and later Horseshoe Dams.<sup>114</sup> The Bartlett Dam agreement allotted

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104. MARTHA C. KNACK & OMER C. STEWART, AS LONG AS THE RIVER SHALL RUN: AN ETHNOLOGY OF THE PYRAMID LAKE INDIAN RESERVATION 163 (1984) ("[T]he presence of resources, and the rights to exploit them, have never been separate from an advocacy of abandonment of reservation lands in the West.").

105. S. REP. NO. 101-479, at 3.

106. *Id.*

107. *Id.*

108. *Compare* *Winters v. United States*, 207 U.S. 564, 577 (1908), with S. REP. NO. 101-479, at 4.

109. S. REP. NO. 101-479, at 4.

110. *Id.*

111. *Id.*

112. *Id.*

113. Gifford, *supra* note 91, at 263.

114. S. REP. NO. 101-479, at 5.

20% of its water storage to the Salt River Reservation, but none to the Fort McDowell Reservation.<sup>115</sup>

In 1968 the Colorado River Basin Project Act passed — including a proposal for Orme Dam at the Salt and Verde Rivers' confluence as an integral element of the Central Arizona Project ("CAP").<sup>116</sup> Section 302 of the Act authorized the Secretary of the Interior to condemn 15,900 Fort McDowell Yavapai Reservation acres for the Dam's reservoir.<sup>117</sup> Planning for the Orme Dam continued until 1977, when President Jimmy Carter recommended cancellation of the project and prompted a congressional search for an alternative site that lasted a decade.<sup>118</sup> But from 1968 to 1977, all Fort McDowell development plans were omitted from federal assistance programs due to pending plans for the Orme Dam.<sup>119</sup>

#### *B. Relationship to House Bill 4148 — Harquahala Valley*

Senate Bill 2900 and House Bill 5063, as amended, were the result of House Bill 4148, the Harquahala Valley legislation. House Bill 4148 instructed the Secretary of the Interior to contract for the permanent relinquishment of the Harquahala Valley Irrigation District ("HVID") CAP agricultural water.<sup>120</sup> The Secretary could utilize the HVID or any other source of federal water for a Fort McDowell settlement.<sup>121</sup> The Secretary was supposed to use the water first for the settlement of Fort McDowell Indian community water claims, and then for other Indian communities with claims to the Salt or Verde Rivers. The Secretary could use any excess water to settle Gila River water rights claims of other Indian communities.<sup>122</sup> In turn, the Secretary would reduce HVID's CAP obligations.<sup>123</sup> The federal government did not have to appropriate any additional funds under the HVID option, but the Congressional Budget

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115. *Id.*

116. *Id.*

117. *Id.*

118. *Id.*

119. *Id.*

120. H.R. 4148, 101st Cong. § 1 (1990).

121. *Id.* The Secretary could use up to a maximum of 33,263 acre-feet of HVID water as either agricultural CAP water or CAP Indian priority water. *Id.* § 1(a).

122. *Id.* § 1(b).

123. *Id.* § 1(c)(ii).

Office ("CBO") estimated a \$26 million federal loss in contractual CAP revenue.<sup>124</sup>

Farmers first drilled for irrigation wells in the Harquahala Valley eighty miles west of Phoenix in 1958.<sup>125</sup> Eventually, increased water costs, accumulated debt, and market conditions for the Districts' principal crop of cotton combined to threaten the fiscal health of area farmers.<sup>126</sup> The loans and contracts that the District had with the federal government were in danger of default.<sup>127</sup> Many of the farms had been foreclosed, or faced foreclosure if the legislation did not pass.<sup>128</sup> Indeed, all but one of the landowners placed their lands in escrow in anticipation of retiring or moving their farming operations.<sup>129</sup> Senate Bill 2900 and House Bill 5063 as amended relieved the farmers of their overwhelming debt and provided a land and water source for federal negotiations with Indian communities like Fort McDowell.<sup>130</sup>

### *C. Proposed Legislative Settlement*

House Bill 5063 and Senate Bill 2900 served to quantify the Fort McDowell Indian community's water rights at approximately 36,350 acre-feet annually, including Salt River Project and Roosevelt Water Conservation District water and storage contributions (6730 and 3368 acre-feet respectively), existing Fort McDowell CAP water (4526 acre-feet), and water awarded in the 1910 "Kent Decree" (7060 acre-feet).<sup>131</sup> This annual water allotment was large enough to irrigate 4000 acres for agricultural purposes and develop 18,350 acres for urban and other uses.<sup>132</sup> Storage areas provided by the Salt River Project on the Verde River behind

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124. An Act to Authorize the Secretary of the Interior to Acquire Certain Water Rights for the Settlement of Indian Water Rights Claims in the State of Arizona, H.R. 4148, 101st Cong. (1990); H.R. REP. NO. 101-496, at 5 (1990).

125. H.R. REP. NO. 101-496, at 5.

126. *Id.*

127. 136 CONG. REC. H3363 (daily ed. June 6, 1990).

128. *Id.*

129. *Id.*

130. H.R. REP. NO. 101-496, at 5.

131. *Id.*; see also Colorado River Basin Project Act of 1968, Pub. L. No. 90-537, 82 Stat. 885, tit. III (1968) (CAP water); Hurley v. Abbot, No. 4564 Decree (3d Dist., Maricopa County, Ariz., Mar. 1, 1910) (defining "Kent Decree" water); 43 U.S.C. § 931 (2006) (Water Conservation District water/storage).

132. S. REP. NO. 101-479, at 7 (1990).

Horseshoe and Bartlett Dams would have allowed the Fort McDowell Indian community to fully utilize those water rights.<sup>133</sup>

The settlement also included a requirement that neighboring non-Indian communities transfer rights to an additional 13,933 acre-feet of surface water to the Fort McDowell Indian community, provide means for maintaining existing Indian supplies, and make substantial financial contributions to a development fund.<sup>134</sup> The federal government was to help implement and finance the settlement.<sup>135</sup> In particular, the Secretary of the Interior would contractually acquire water for the Fort McDowell Indian community from one or a combination of the following sources: municipal, industrial, or Indian priority CAP water permanently relinquished by the HVID, the City of Prescott, the Yavapai-Prescott Tribe, the Yavapai-Apache Indian community of Camp Verde Reservation, the Cottonwood Water Company, or the Camp Verde Water Company (also known as the "Prescott Option").<sup>136</sup> The Fort McDowell Indian community could also lease any of the CAP water for 100 years to Pima, Final, or Maricopa Counties in Arizona.<sup>137</sup> Otherwise, the Fort McDowell could not sell, lease, or transfer any allotted CAP water off the reservation.<sup>138</sup>

The proposed settlement foreshadowed future legislative settlements of Indian natural resource claims.<sup>139</sup> Any extra water acquired would be used for other Indian claims settlements in the Salt and Verde River systems.<sup>140</sup> In addition, the Secretary was required to complete a study within 180 days after the Act's enactment regarding possible water rights settlements for the

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133. *Id.*

134. Fort McDowell Indian Community Water Rights Settlement Act of 1990, S. 2900, 101st Cong., § 6(a).

135. *Id.*

136. *Id.* The options included any other water resource at the disposal of the United States government. *Id.* As long as 7000 acre-feet of the CAP water was from sources other than HVID, the Secretary could purchase water rights from willing sellers in the Big Chino Valley of the Verde River watershed to replace water rights given up by involved parties under the "Prescott Option." *Id.* at 45. The "Prescott Option" could be exercised as long as the collection, conveyance, diversion, and delivery system to nearby Sullivan Lake would not adversely affect the flow of the Verde River or jeopardize threatened or endangered species such as the Spikedace Fish. *Id.* A maximum of \$30 million was allotted for the "Prescott Option," including delivery costs and continual monitoring for environmental effects. *Id.* at 41.

137. S. 2900 § 7(a)(2), (d); S. REP. NO. 101-479, at 17.

138. S. 2900 § 7(g).

139. *Id.*

140. *Id.* § 6(a).

nearby Yavapai-Prescott Indian tribe and the Yavapai-Apache Indian community.<sup>141</sup>

The proposed settlement also recognized the value of Fort McDowell Indian water rights. The Act created a CAP delivery contract between the federal government and the Fort McDowell Indian community regarding 4300 acre-feet of CAP Indian priority water.<sup>142</sup> The Fort McDowell Indian community would lease this water to the City of Phoenix during the extension period in exchange for \$5,172,000.<sup>143</sup>

Finally, the proposed settlement established a Fort McDowell Indian Community Development Fund that would include future water lease revenues, a \$2 million contribution from the State of Arizona, \$23 million for the design and implementation of water facilities and other economic and community development, and a \$13 million federal loan with no interest under the provisions of the Small Reclamation Projects Act.<sup>144</sup> The balance of the loan could fall below \$1 million, and the Fort McDowell Indian community would administer the fund, not the Secretary of the Interior.<sup>145</sup>

#### *D. Controversial Issues in Settlement Legislation*

When introducing Senate Bill 2900 on July 25, 1990, Senator McCain outlined several controversial issues in the original Bill and its counterpart, House Bill 5063.<sup>146</sup> The first controversial issue regarded the validity of Fort McDowell Yavapai water claims and the appropriate amount of any federal contribution to the settlement effort. The second issue concerned a proposal to use excess water from the 1984 settlement of Ak Chin Indian water rights to supplement the Fort McDowell settlement. Additional controversies included the environmental effects that water diversion would have if such action was necessary to settle Fort McDowell water rights claims, the feasibility of a proposed "Prescott Option," and federal validation of implicated water storage rights.<sup>147</sup>

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141. *Id.*; S. REP. NO. 101-479, at 16.

142. S. 2900 § 6(a).

143. S. REP. NO. 101-479, at 16.

144. S. 2900 § 8.

145. S. REP. NO. 101-479, at 16. The Bills were also tied to provisions of the Salt River Pima-Maricopa Indian Community Water Rights Settlement Act of 1988, Pub. L. No. 100-512, 102 Stat. 2549 (1988), *reprinted in* 1988 U.S.C.C.A.N. 102.

146. 136 CONG. REC. S10633 (daily ed. July 26, 1990).

147. *Id.*

By the 1980s, the Fort McDowell Yavapai needed money. In 1989, the total revenue for the Fort McDowell Indian community totaled just under \$2.5 million.<sup>148</sup> Out of this income, 33% came from BIA funding and the town bingo hall generated the other 40%.<sup>149</sup>

The tribal leaders of Fort McDowell thus began a process of maximizing natural resource rights for economic stability. Still, a reliable and sufficient water supply was needed to continue the plans. Once the Yavapai secured Fort McDowell water rights, tribal leaders envisioned land usage and allotment at Fort McDowell as follows:

	ACRES
Agriculture	4,100
Community development	419
Industrial use	454
Residential areas	2,174
Recreational and resort areas	3,233
Open space wilderness	<u>14,684</u>
 TOTAL	 25,064 <sup>150</sup>

Without an adequate settlement of water rights, however, the Fort McDowell Indian community would be unable to sustain a viable reservation economy.<sup>151</sup>

During claims litigation in 1985, the Fort McDowell Indian community maintained that its water allotment totaled 48,000 acre-feet annually.<sup>152</sup> In negotiations with local surrounding governments, the Fort McDowell maintained that this water claim could total 53,000 acre-feet annually absent a legislative settlement.<sup>153</sup>

Although the federal cost could not be pinpointed until the Secretary of the Interior decided which of the options he would exercise in obtaining the necessary 13,933 acre-feet of surrounding water rights, the approximate proposed ratio of local and federal cost sharing was 50/50. The Fort

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148. S. REP. NO. 101-479, at 5-6.

149. *Id.*

150. *Id.* at 6.

151. *Id.*

152. *Id.*

153. *Id.*



McDowell Indian community estimated the federal contribution at \$23 million.<sup>154</sup>

Local parties weighed in during the legislative process on the controversial issues of federal contribution and the scope of Fort McDowell Indian water rights. The Director of the Arizona Department of Water Resources testified at the Joint Hearing on July 17, 1990, and reiterated that the State of Arizona supported negotiation rather than litigation in settling Indian water rights claims.<sup>155</sup> He told the Committees that the Governor of Arizona would support an appropriation of \$2 million to serve as the State's contribution to the Fort McDowell Indian community development trust fund.<sup>156</sup>

The City of Phoenix also submitted testimony, claiming a "close working relationship on water" with the Fort McDowell Indian community.<sup>157</sup> Back in 1922, the two governments completed an agreement that allowed the City to develop an infiltration gallery on the Verde River with a thirty-mile redwood pipeline stretching back to Phoenix.<sup>158</sup> However, recent disputes over the allocation of surface water led Phoenix officials to support a legislative settlement instead of lengthy and expensive litigation.<sup>159</sup>

Phoenix officials felt the federal contribution to the settlement should be the acquisition of rights to 13,933 annual acre-feet of water, a \$23 million contribution to the Fort McDowell Indian community development trust fund, and a \$13 million loan.<sup>160</sup> The City of Phoenix's estimates included a state contribution of the rights to approximately 12,000 acre-feet of annual water as well as city lease payments on the 4300 acre-feet of Fort

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154. 136 CONG. REC. S10633, at 54. This excepted the cost of no-interest loan. The no-interest terms of the \$13 million federal loan were because the federal government otherwise would have been required to spend approximately \$7 million on CAP water delivery systems to the Reservation in the absence of a legislative settlement. S. REP. NO. 101-479, at 17.

155. *Fort McDowell Indian Comm. Water Rights Settlement Act of 1990: Joint Hearing on H.R. 5063 Before House Comm. on Insular Affairs & Sen. Select Comm. on Indian Affairs*, 101st Cong. 172 (1990) [hereinafter *Hearings*] (statement of N.W. Plummer, Ariz. Dep't of Water Res.). The Department spent over two million dollars a year at the time on technical studies for the adjudications of water-claims suits. *Id.*

156. *Id.* at 156. Plummer could not speak for the Arizona legislature. *Id.*

157. *Id.* at 172 (statement of Phoenix, AZ city officials).

158. *Id.*

159. *Id.*

160. *Id.* at 172-75.

McDowell Indian Community Colorado River CAP water entitlement.<sup>161</sup> Despite the enormous fiscal implications, the City Council of Phoenix passed a resolution with the support of the Phoenix Mayor on July 11, 1990, affirming unanimous support for the legislation and knighting Senate Bill 2900 and House Bill 5063 as emergency measures given water shortages.<sup>162</sup>

The federal government opposed both Senate Bill 2900 and House Bill 5063, however. According to the House Report, there was an official congressional and administrative policy to resolve Indian water rights claims by negotiation rather than litigation whenever possible.<sup>163</sup> Despite this policy, the Administration had serious reservations about the bills that threatened adoption into law. Director of the CBO, Robert D. Reishauer, estimated the necessary federal contribution as follows: an authorization of \$55.2 million from 1991 to 1995, actual distributions of \$54.4 million from 1991 to 1995, and an additional \$17.2 million to complete water construction and acquisition activities from 1996 to 2000.<sup>164</sup> This included the cost of a \$13 million loan, which would be paid back over a fifty-year period with no interest.<sup>165</sup> The tentative CBO federal contribution estimate therefore was approximately \$71 million.<sup>166</sup> In addition, the Office of Management and Budget ("OMB") opined in conclusory fashion that the bills "would not be in accord with the program of the President."<sup>167</sup>

On September 20, 1990, Interior Secretary Lujan sent a letter to the House and Senate Committees that recommended presidential veto of either bill.<sup>168</sup> The Department of the Interior felt that the legislation could harm other Indian water claims and that the federal contribution of approximately

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161. *Id.* at 176. Phoenix officials estimated that if the local contribution of 12,000 annual acre-feet of water came from remote farm lands purchased by Phoenix, Mesa, or Scottsdale, the cost would be \$3000-\$4000 per acre-foot. *Id.* at 175. If the water source was from the reclamation of municipal sewage waste-water, the cost would be \$5000-\$6000 per acre-foot. *Id.* at 176. These estimates included the cost of purifying CAP or groundwater supplies to the higher quality level found in the Verde River that runs through Fort McDowell. *Id.* This range combined with the Phoenix lease payments of \$5,200,000 and the State trust fund contribution of \$2 million to lead Phoenix officials to estimate the net local settlement contribution to total at least \$43 million. *Id.*

162. *Id.*

163. Fort McDowell Indian Community Water Rights Settlement Act of 1990, H.R. 5063, 101st Cong. (1990); H.R. REP. NO. 101-778, at 1 (1990).

164. S. REP. NO. 101-479, at 28 (1990).

165. *Id.*

166. *Id.*

167. *Id.* at 34.

168. *Id.* at 31-33.

\$70 million was disproportionate and unfair to taxpayers.<sup>169</sup> Further, the Department of the Interior worried that, without a finalized agreement, objectionable provisions or unknown costs could emerge during implementation.<sup>170</sup> The Department of the Interior believed that water rights issues should be decided in court.<sup>171</sup> If legislation served to grant rather than confirm a federal water right, the Department of the Interior also worried about confrontations with other interested parties.<sup>172</sup> These concerns prompted certain members of the Committee to recommend executive disapproval of Senate Bill 2900 and House Bill 5063.<sup>173</sup>

The second controversial legislative issue concerned a proposal to use excess water from the 1984 legislative settlement of Ak Chin Indian water claims to supplement the Fort McDowell settlement.<sup>174</sup> Both amended bills eliminated this clause from the final legislation because uneasiness with the "Ak Chin surplus" clause attributed to fears that one Indian claims settlement could adversely affect another.<sup>175</sup> The Fort McDowell Indian community had no official position on the "Ak Chin surplus" clause. One can surmise that the priority of the Fort McDowell Indian community was to secure their annual water rights, rather than resolving sourcing questions for those rights.

In any case, widespread disapproval of the "Ak Chin surplus" surfaced at the July 17, 1990 Joint Hearing. The Arizona Department of Water Resources opposed the use of "the so-called surplus Ak-Chin Indian community water" as a supply source.<sup>176</sup> The City of Prescott also testified that the Ak Chin option was fraught with difficulty.<sup>177</sup> Additional negative testimony came from municipal and agricultural entities in Maricopa and Pinal counties and the San Carlos Apache tribe.<sup>178</sup> Finally, a Department of

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169. *Id.*

170. *Id.* at 30-31.

171. *Id.* at 31.

172. *Id.*

173. *Id.* at 30.

174. *See e.g.*, An Act Relating to the Water Rights of the Ak-Chin Indian Community, Pub. L. No. 98-530, 98 Stat. 2698, *reprinted in* 1984 U.S.C.C.A.N. 98.

175. S. REP. NO. 101-479, at 34. Remarkably, the record does not reflect that the Ak Chin themselves were even officially consulted regarding this supposed "surplus."

176. *Hearings, supra* note 155, at 42 (statement of Timothy W. Glidden, Counselor to the Sec'y, Dep't of the Interior).

177. *Id.* at 225 (statement of Robert C. Morgan, Mayor, Prescott, Ariz.).

178. S. REP. NO. 101-479, at 13.

the Interior representative testified that the Ak Chin option was unreliable and would require other legislative amendments.<sup>179</sup>

The proposed Fort McDowell Yavapai legislative settlement also had to account for environmental concerns related to involved water diversions. The Fort McDowell Yavapai and the surrounding parties to the settlement recognized the need to comply with all existing law and national Environmental Protection Agency (“EPA”) guidelines in completing the settlement terms. For example, both amended bills contained language that prohibited the pumping of groundwater without complete compliance with environmental and endangered species laws.<sup>180</sup>

Ninety-five percent of Arizona’s riparian habitat had been lost since 1900, with most of the remaining 5% surrounding parts of the Verde River.<sup>181</sup> This riparian habitat included endangered bald eagles, the proposed endangered razorback sucker, endangered Colorado squawfish, and the back minnow.<sup>182</sup> The State of Arizona had listed nine other species that lived within the riparian habitat as endangered or threatened.<sup>183</sup> The Department of the Interior felt that environmental concerns along the Verde River needed more attention.<sup>184</sup> Congress eventually included provisions to this effect in both amended committee versions of Senate Bill 2900 and House Bill 5063.<sup>185</sup>

The proposed “Prescott Option” was also a controversial aspect of the legislative claims settlement debate for the Fort McDowell Yavapai. The “Prescott Option” envisioned a situation in which several Arizona communities relinquished rights to CAP water if unable to fully utilize it due to geographic placement to the more strategically placed Fort McDowell reservation in exchange for federal assistance in locating replacement water in the nearby Big Chino Valley.<sup>186</sup> The Mayor of Prescott testified at the July 17, 1990 joint hearing that if no change to existing law and CAP distributions occurred, the City of Prescott would have no more accessible water after 2005.<sup>187</sup>

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179. *Hearings, supra* note 155, at 47 (statement of Counselor Glidden).

180. S. REP. NO. 101-479, at 22.

181. *Id.* at 14.

182. *Id.* at 15

183. *Id.*

184. *Hearings, supra* note 155, at 48 (statement of Counselor Glidden).

185. S. REP. NO. 101-479, 33.

186. *Hearings, supra* note 155, at 225 (statement of Mayor Morgan)

187. *Id.* The Mayor of Prescott devoted a great deal of his testimony to the “Prescott Option” at the July 17, 1990, joint hearing. *Id.* The Mayor therefore emphasized the City’s desire to contribute over \$20 million to the cost of the “Prescott Option,” noting that such a

The Mayor of Prescott elaborated on the "Prescott Option" with a detailed plan.<sup>188</sup> The City of Prescott had already spent \$500,000 on exploratory studies in the Big Chino Valley.<sup>189</sup> The City could purchase water rights and land of the Davis Ranch estate in the Big Chino Valley for \$15 million.<sup>190</sup> The necessary federal contribution would be to construct wells and pipelines to stretch seventeen miles from Davis Ranch to Sullivan Lake at the head of the Verde River. Cottonwood Water Company, Camp Verde Water Company, and the Camp Verde Yavapai-Apache Tribe would construct EPA approved pipelines from Sullivan Lake to their lower Verde Valley destinations.<sup>191</sup> Finally, the City of Prescott would build its own delivery system.<sup>192</sup> The Mayor of Prescott testified, complete with tentative schedules, work proposals for continued hydro-geologic investigations in the Big Chino valley, and a cost breakdown.<sup>193</sup> This "Prescott Option" could have served as the foundation to settle the water rights claims of the Prescott Yavapai and Camp Verde Yavapai-Apache Indian communities as well.<sup>194</sup> But the Mayor's dream for a "Prescott option" required an additional \$30 million to the proposed federal price tag for the Fort McDowell settlement.<sup>195</sup>

In the Administration's opposition to the bills, an Interior Department representative testified that the Prescott Option would be too expensive.<sup>196</sup>

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contribution would also eliminate the question of any illegal selling of CAP water. *Id.* By exercising the Prescott Option, the federal government could avoid the environmental concerns entailed in diverting CAP water (the Harquahala option) or the outrage which would be generated by the hundreds of entities wanting additional CAP water if a simple reallocation occurred (the Ak Chin option). *Id.* at 232.

188. The Mayor envisioned local water contributions totaling 12,059 acre-feet as follows: City of Prescott (7127 acre-fee); Prescott Yavapai Indians (500 acre-feet); Cottonwood Water Company (1789 acre-feet); Camp Verde Water Company (1443 acre-feet); and, Camp Verde Yavapai-Apache Tribe (1,200 acre-feet).

189. *Id.* at 234.

190. *Id.* at 225, 234.

191. *Id.*

192. *Hearings, supra* note 155, at 227 (statement of City of Prescott Mayor) (description of 'Prescott Option' as Source of Additional Water for Fort McDowell Indian Community Settlement).

193. *Id.* at 5. The Mayor provided a cost breakdown totaling \$55,400,000 consisting of a contribution from the City of Prescott in the amount of \$20,800,000; contributions from Lower Verde Valley communities of \$4,600,000; and, federal government contributions of \$30,000,000.

194. *Id.*

195. Interview with Eric Eberhardt, Staff Director/Council to Minority Members, Senate Select Committee on Indian Affairs (Oct. 19, 1990).

196. *See Hearings, supra* note 155, at 47-48 (statement of Counselor Glidden).

The \$5000 cost per acre-foot of Prescott Option water would “limit the amount of water” that could be obtained from the source.<sup>197</sup>

Finally, the proposed Fort McDowell Yavapai legislative claims settlement had to address water storage rights.<sup>198</sup> The confirmation and creation of reliable storage rights for Kent Decree water would allow the Fort McDowell Indian community to take full advantage of their seasonal water rights in times of high demand and drought.<sup>199</sup>

The Administration, however, opposed the confirmation of water rights that could impact property interests of parties not involved in the settlement.<sup>200</sup> In addition, the federal government opposed congressional validation of storage rights on the Verde River in compliance with a long-standing federal policy allowing state courts to adjudicate water rights.<sup>201</sup> Congress therefore included language specifying that the legislation did not apply to existing contracts of parties who were not included in the

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197. *Id.*

198. Section 4 of both Senate Bill 2900 and House Bill 5063 served to ratify existing Verde River water storage agreements. Fort McDowell Indian Community Water Rights Settlement Act of 1990, S. 2900, 101st Cong. (1990). In addition, section 4 authorized the Secretary of the Interior to contract for up to 3200 additional acre-feet of water storage rights behind Bartlett and Horseshoe Dams. Such a contract would allow the Fort McDowell Indian community to take advantage of their entire “Kent Decree” water rights allotment. *Id.* Without this storage right, over one quarter of the Kent Decree water would travel downstream unused in periods of low demand such as the winter months. S. REP. NO. 101-479, at 10 (1990).

199. Subsection 4 was necessary to confirm the validity of existing Verde River water storage rights claims on Bartlett and Horseshoe Dams, so the federal government could meet water rights and storage obligations to both the Fort McDowell Yavapai Indians and the Salt River Pima-Maricopa Indian community. *Hearings, supra* note 155, at 184 (statement of Richard H. Silverman); *see also* Salt River Pima-Maricopa Indian Community Water Rights Settlement Act of 1988, Pub. L. No. 100-512, 102 Stat. 2549 (1988), *reprinted in* 1988 U.S.C.C.A.N. 102.

200. S. REP. NO. 101-479, at 31.

201. *Hearings, supra* note 155, at 42 (testimony of Counselor Glidden. This congressional consent to suit (as trustees of Indian nations) in state courts over matters of water adjudication is based on the provisions of the McCarran Amendment of 1952. 43 U.S.C. § 471 (2006); *see also* Colorado River Water Conservation District v. United States, 424 U.S. 800 (1976) (upholding McCarran Amendment); Arizona v. San Carlos Apache Tribe, 463 U.S. 545 (1983) (same).

settlement.<sup>202</sup> With these and other changes, Congress eventually passed the proposed legislation as part of the Arizona Desert Wilderness Act.<sup>203</sup>

#### *V. Fort Hall Indian Water Rights Settlement*

The 101st Congress also passed Indian water rights settlement legislation involving the Fort Hall Indian Tribe. The House of Representatives considered House Bill 5308, the Fort Hall Indian Water Rights Settlement Act of 1990, and the Senate counterpart was Senate Bill 2870.<sup>204</sup> Congress passed the Act in October of 1990 and the President signed it on November 16, 1990, as Public Law 101-602.<sup>205</sup>

The Fort Hall legislation was prompted by a series of long and costly legal battles between state and tribal interests over water rights claims.<sup>206</sup> In 1985, the Idaho legislature called for the Idaho Department of Water Resources to develop a plan for the general adjudication of water rights within the Snake River Basin — including a mandate favoring settlement of tribal water rights through negotiation rather than litigation.<sup>207</sup> On August 30, 1985, the Shoshone-Bannock tribe and the State of Idaho created a *Memorandum of Understanding* that described negotiation guidelines.<sup>208</sup> The federal government eventually joined the negotiation, and the interested parties reached an agreement in principle on September 1, 1989.<sup>209</sup> The interested parties reached a final agreement on all material terms on July 10, 1990 that satisfied federal, state, and tribal interests.<sup>210</sup> This agreement served as the basis for the language included in the Act.<sup>211</sup>

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202. S. REP. NO. 101-479, at 31-33.

203. Senator McCain introduced the Fort McDowell Indian Community Water Rights Settlement Act of 1990, S. 2900, 101st Cong., on July 25, 1990, which was an identical bill. The Bill was on the Senate calendar by October 2, 1990, but it died in adjournment. *Id.*

204. Fort Hall Indian Water Rights Act of 1990, S. 2870, 101st Cong., Pub. L. No. 101-602 (1990).

205. Senate Bill 2870 was sponsored and introduced by Senator McClure (R-ID) and Senator Symms (R-ID). Congress incorporated the outstanding terms of Senate Bill 2870 into the unsuccessful Reclamation Projects Authorization and Adjustment Act of 1989, H.R. 2567, 101st Cong. (1989).

206. H.R. REP. NO. 101-336, 101st Cong., at 2 (1990).

207. *Id.*

208. *Id.* The guidelines were negotiations that were government-to-government in good-faith, and recognized a decision-sharing relationship. *Id.*

209. Fort Hall Indian Water Rights Act of 1990, H.R. 5308, 101st Cong., §§ 3-4 (as passed by House & Senate Jan. 23, 1990); H.R. REP. NO. 101-831, at 2 (1990).

210. H.R. REP. NO. 101-831, at 2.

211. *Id.* at 3.

The Fort Hall Water Claims Settlement Act of 1990 therefore served as a model for future Indian water claims settlements.<sup>212</sup> Five years of negotiation led to an acceptable agreement and helped avoid the torturous litigation option. In addition, the Executive Branch was involved in the settlement discussions and thus endorsed the final agreement.<sup>213</sup> Federal involvement in the process served to eliminate opposition and the ensuing controversies that often doom the fate of Indian water claims settlement legislation.

#### *A. History of the Claims*

President Andrew Johnson issued an Executive Order in 1867, creating the Fort Hall Reservation for the Shoshone and Bannock tribes<sup>214</sup> near Pocatello, in southeastern Idaho.<sup>215</sup> On February 24, 1869, the Senate ratified the Second Treaty of Fort Bridger and recognized the Shoshone-Bannock Tribe's permanent home on a Fort Hall Reservation of approximately 1.8 million acres.<sup>216</sup> Surveying errors and later federal land cessions reduced the Reservation to its current size of approximately 544,000 acres.<sup>217</sup> The Shoshone-Bannock tribe numbered 1450 strong in 1900, and has more than doubled in size since.<sup>218</sup> The tribe owns 47% of the reservation land and individual American Indians own 43%.<sup>219</sup> Water rights are vital to ensuring economic self-sufficiency on the Reservation, as the Shoshone-Bannock use water for irrigation, domestic, commercial, municipal, industrial, hydropower, recreation, stock watering, fish reproduction, and instream flow purposes.<sup>220</sup> Instream flows help rejuvenate the population of salmon and steelhead trout, which have cultural, dietary, commercial, and recreational importance to the Shoshone-Bannock people.<sup>221</sup>

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212. H.R. 5308; H.R. REP. NO. 101-831, at 2.

213. *Id.* The federal government representatives included officials from the Office of Management and Budget and the United States Departments of Interior and Justice. *Id.*

214. H.R. REP. NO. 101-831, at 2.

215. *Id.*

216. *Id.*

217. *Id.*

218. *Id.*

219. *Id.*

220. *Id.* at 9.

221. *Id.* at 7; accord Interview with Harry Sachse, Law Firm of Sonosky, Chambers, and Sachse, Washington, D.C. (Nov. 2, 1990); see also S. REP. NO. 101-499, at 1, 88 (1990).



### *B. Proposed Legislative Settlement*

Both House Bill 5308 and Senate Bill 2870 included waivers of all existing or future Shoshone-Bannock water rights claims within the Upper Snake River Basin as well as any land or water depreciation claims related to the American Falls Reservoir.<sup>222</sup> The Bills also quantified the Tribe's *Winters* doctrine and other water rights at a total of 581,031 acre-feet annually.<sup>223</sup> This water would consist of 150,000 annual acre-feet of Blackfoot River flow, 115,000 annual acre-feet of Snake River flow, as well as smaller allotments from Sand Creek, Ross Fork Creek, Lincoln Creek, Bannock Creek, Portneut River, and groundwater found within the boundaries of the Fort Hall Reservation.<sup>224</sup> Existing tribal water storage-rights in American Falls Reservoir (46,931 acre feet annually (2.81 % of capacity)) and Palisades Reservoir (83,900 acre-feet annually (7% of capacity)) were retained in the Bill.<sup>225</sup> For times when the Tribe's water rights entitlement was not met by the natural flow of the Blackfoot River, supplemental water storage rights in Blackfoot Reservoir and Grays Lake for 150,000 annual acre-feet were established.<sup>226</sup>

In addition, the bills included a \$10 million economic development fund for the Fort Hall Indians to be paid over three years.<sup>227</sup> The amended House Bill 5308 also provided \$7 million in funding over three years for a Reservation water management system.<sup>228</sup> Finally, the bills appropriated \$5 million for a land acquisition in the Grays Lake area for the Fort Hall Indian Irrigation Project.<sup>229</sup> The bills barred the Tribe from distributing any of the funds on a per-capita basis.<sup>230</sup>

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222. H.R. REP. NO. 101-831, at 2-9. The Upper Snake River Basin consists of all the Snake River waters and tributaries found above Hells Canyon Dam in Idaho. *Id.*

223. 136 CONG. REC. S9978 (daily ed. Oct. 1, 1990).

224. H.R. REP. NO. 101-831, at 7. Fort Hall Indian Irrigation Project users would continue to receive their water allotment despite the settlement. *Id.* at 3-4.

225. *Id.* at 7.

226. *Id.*

227. Fort Hall Indian Water Rights Act of 1990, H.R. 5308, 101st Cong., at 8-9 (1990).

228. *Id.*

229. *Id.* The proposed land acquisition would help slow the erosion process on the shores of Grays Lake, thus ensure continuing water storage possibilities in the Lake, provide the Shoshone-Bannock tribe with additional grazing rights, and expand the Grays Lake Wildlife Refuge to include a habitat suitable for migratory birds and whooping cranes. *Id.*

230. *Id.*

*C. Controversial Issues in Settlement Legislation*

There were four major controversial issues surrounding the settlement. The first issue regarded the procedural strategy of incorporating Senate Bill 2870 into the House Bill 2567 reclamation legislation with the hope of speeding up the approval process. The second controversial issue concerned storage rights uses, and the third revolved around water rights deferments in times of low flow. The last controversial item hinged on the cost distribution between federal, state and local parties.

First, the proposed Fort Hall legislative claims settlement had to be reconciled with House Bill 2567, the Reclamation Projects Authorization and Adjustment Act of 1990. The original House Bill 2567 consisted of eleven water-related projects that dealt with technical water issues such as authorization ceilings, service area extensions, reformulations, design, construction, maintenance, treatment and salinity, waste reclamation plants, storage and carrying capacity amendments, and an aqueduct renaming.<sup>231</sup> Many of the projects were once the subject of individual bills, and Congress had grouped these disparate projects together to simplify the legislative process. A Senate Committee amendment included Indian water rights settlements for the Fort Hall and Pyramid Lake reservations in the Bill.<sup>232</sup> Several of the projects included in the Reclamation Act had already passed both the House and the Senate, so the addition of Fort Hall and Pyramid Lake projects into House Bill 2567 was an attempt to integrate the passage of Indian water claims settlements into a larger reclamation bill.<sup>233</sup> The Senate never voted on the amended Reclamation Act and only passed House Bill 5308 as amended.<sup>234</sup>

House Bill 5308 contained restrictions on the potential use of existing Shoshone-Bannock storage-rights.<sup>235</sup> Any water within existing storage rights could be used for instream flows for the purpose of maintaining the fish population,<sup>236</sup> allowing the Shoshone-Bannock to protect and enhance native fish runs in the middle and lower Snake River.<sup>237</sup> The Tribe also could use the 130,831 acre-feet of existing water storage-rights in the

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231. H.R. 2567, 101st Cong., at 1-36 (1990).

232. *Id.* at 47, 87.

233. *Id.* at 48. House Bill 2567 tried to resolve Pyramid Lake water rights claims in addition to Fort Hall claims, even though the Pyramid Lake matter was very controversial. *Id.*; see also *infra* Part VI.

234. S. REP. NO. 101-499, at III (1990).

235. H.R. REP. NO. 101-831, at 7 (1990).

236. *Id.*

237. *Id.*

American Falls and Palisades reservoirs to irrigate up to 33,938 acres of Fort Hall land.<sup>238</sup> Any land that the Shoshone-Bannock Tribe wished to irrigate beyond 33,938 acres was contingent on additional water use not harming other non-Indian users.<sup>239</sup> According to the language in House Bill 5308, the Tribe could rent or lease existing tribal water storage rights through the Shoshone-Bannock Water Bank to users outside of the Reservation,<sup>240</sup> providing a financial boost to the Reservation's economy and self-sufficiency.

The Bill also addressed supplemental water storage rights needs that were the subject of some controversy. The Tribe could only use 15,000 acre-feet annually of the additional Blackfoot River Basin water storage rights for instream flows.<sup>241</sup> This allowed the Shoshone-Bannock to maintain fish populations beyond the Snake River, while capping the instream flow to ensure the Tribe did not use water excessively in times of low flow.<sup>242</sup> The Tribe could only transfer, lease, or rent these supplemental water storage rights within the Reservation, where they were not subject to state or federal taxation.<sup>243</sup>

The proposed Fort Hall legislative settlement also had to account for appropriate water rights deferments during periods of low flow. Language in House Bill 5308 provided that the Shoshone-Bannock Tribe's right to 150,000 annual acre-feet of Blackfoot River water would be replaced by Blackfoot River Basin (Blackfoot Reservoir and Grays Lake) supplemental water storage rights in times of low flow.<sup>244</sup> During these times, the Tribe has agreed to give priority to its Blackfoot River water rights allotment to non-Indian Snake River Basin Adjudication ("SRBA") users.<sup>245</sup> Depending

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238. *Id.* at 7-8.

239. *Id.* This was to ensure that the Tribe was not excessively irrigating in drought times when reservoir water was scarcer and non-Indian users need their full water storage-rights. *Id.*

240. H.R. 5308, 101st Cong. (1990). The Tribe could only rent water coming from the Palisades Reservoir to users within the Snake River Basin above Milner Dam, however. The purpose of this provision was to address water shortage concerns amongst non-Indian users in the Upper Snake River Basin. *Id.*

241. 136 CONG. REC. S9978 (daily ed. July 18, 1990) (any such flows had to be used within the reaches of the Blackfoot River).

242. *Id.* These supplemental water storage rights could be used only when the Tribe's entitlement was not met by natural Blackfoot River flows. *Id.*

243. *Id.*

244. 136 CONG. REC. at S9979.

245. *Id.* Any extra water rights from the Bannock Creek Basin general adjudication would flow to the Tribe as well, unless that interfered with SRBA uses. *Id.*

on the Tribe's use of its Snake River water rights allotment, non-Indian Snake River water users would receive proportionate access to a maximum of 19,000 annual acre-feet of unallocated federal storage space in the Palisades Reservoir, and 80,000 annual acre-feet of unallocated federal storage space in the Ririe Reservoir.<sup>246</sup> Maximum yield of these two storage spaces could provide non-Indian users with enough water to irrigate 40,000 acres annually.<sup>247</sup> Last, the Shoshone-Bannock Tribe would gradually phase in 15,000 acre-feet of the Tribe's annual Snake River water storage rights to provide non-Indian users time to adjust to a future with lower levels of water availability.<sup>248</sup>

Finally, the proposed Fort Hall legislative claims settlement involved predictable controversies over cost total and funding contributions. Originally, the bills called for a \$22 million federal contribution paid over a twenty-year period.<sup>249</sup> The amended House Bill 5308 appropriated this same sum over a three-year period.<sup>250</sup> This amended effort reflected a compromise between federal concerns over the need for long-term economic fiscal responsibility and a tribal desire to receive a conclusive settlement that would not be diluted by incremental installments.<sup>251</sup> The CBO calculated the federal responsibility as \$22 million over three years, without including the loss of leasing revenues for unallocated water storage space.<sup>252</sup> The State of Idaho would contribute a total of \$500,000, with half of this sum consisting of in-kind services for implementation and half to pay federal filing fees for associated water adjudication needs.<sup>253</sup> Local government loss of water rights raised the state/local contribution to as much as \$25 million.<sup>254</sup> Indian and non-Indian users would also have to pay for operation and maintenance costs in developing their water rights.<sup>255</sup>

In introducing the bill, Senator McClure opined, "the parties have crafted an agreement that results in a true win-win situation."<sup>256</sup> Considering the Administration's efforts in helping to craft the amended legislation, it came

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246. *Id.*

247. *Id.*

248. *Id.*

249. H.R. REP. NO. 101-831, at 1 (1990).

250. *Id.* In addition, the federal government would contribute 100,000 acre-feet of unallocated water storage space for non-Indian users. *Id.*

251. *Id.* at 1-2.

252. *Id.* at 14.

253. S. REP. NO. 101-499, at 88-89 (1990).

254. *Id.* at 89.

255. *Id.* at 88-89.

256. 136 CONG. REC. S9978, S9979 (daily ed. Oct. 1, 1990).

as no surprise that the President eventually approved and signed House Bill 5308 into law.

### *VI. Fallon Paiute Shoshone and Pyramid Lake Water Settlement*

The 101st Congress also passed settlement legislation relating to water rights of the Fallon Pointe Shoshones and the Pyramid Lake Paiute Tribe. Congress passed the Act in October and the President approved the Act on November 16, 1990 as Public Law 101-618.<sup>257</sup>

The amended legislation separated the Act into two titles.<sup>258</sup> Both titles revolved around issues surrounding the Newlands Project. The Truckee-Carson Irrigation District operated the Newlands Project and supplied irrigation water for 60,000 acres of land near Fallon, Nevada.<sup>259</sup> The Newlands Project used Truckee and Carson River water stored in Lake Tahoe and the Lahontan Reservoir on the Carson River.<sup>260</sup>

The first title addressed a water rights settlement for the Fallon Paiute Shoshone Indian Tribe, and included a dismissal of all Fallon Paiute Shoshone water claims.<sup>261</sup> The next title was a committee amendment that provided water rights settlement of the Truckee and Carson Rivers and Pyramid Lake.<sup>262</sup> The provisions of this title were included in the amended House Bill 2567.<sup>263</sup> This title, like previous Truckee-Carson-Pyramid Lake legislation, served to ratify and expand upon a controversial 1970 agreement between the States of Nevada and California, the Pyramid Lake Paiute Tribe, and other users over allocation of Truckee, Walker, and Carson Rivers in the Lake Tahoe Basin.<sup>264</sup> Senator Reid pointed out that the problem of water availability in the West was "mounting toward crisis proportions" and required some sort of resolution with respect to the Pyramid Lake Paiute Tribe water rights.<sup>265</sup>

When Newlands Project water diversions diminished the level of Pyramid Lake and simultaneously reduced the output of tribal fisheries, the

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257. S. REP. NO. 101-555, at 8 (1990). Senator Reid (D-NV) and Senator Inouye (D-HW) introduced Senate Bill 3084 on September 20, 1990. *Id.*

258. Fallon Paiute Shoshone Indian Tribes Water Rights Settlement Act of 1990, S. 3084, 101st Cong. (1990); 136 CONG. REC. S13509 (daily ed. Sept. 20, 1990).

259. S. REP. NO. 101-499, at 48; 136 CONG. REC. S13508-03 (1990).

260. S. REP. 101-499, at 49.

261. S. 3084, 101st Cong., tit. I (1990). STOPPED HERE

262. *Id.* tit. II; S. REP. NO. 101-555, at 8.

263. S. REP. NO. 101-499, at 48.

264. *Id.*

265. 135 CONG. REC. S10296 (daily ed. Aug. 4, 1989).

Pyramid Lake Paiute Tribe filed a series of lawsuits asserting a *Winters* right for additional water rights necessary to sustain the Lake's original surface level. Those suits involved fishery water rights, and environmental impacts on the area. Those suits eventually allowed the Tribe to receive the beneficial legislative settlement as outlined in Senate Bill 3084.

*A. Title 1: Fallon Paiute Shoshone Water Rights Settlement*

*1. History of the Claims*

The General Allotment Act of 1887 allowed 31,000 acres to be allotted by 1895 for the Fallon Paiute Shoshone Indian Tribe in an area ten miles east of Fallon, Nevada.<sup>266</sup> The Secretary of the Interior began plans to build the Newlands Project on land that overlapped the Fallon Paiute Shoshone Indian reservation.<sup>267</sup> In 1906, the federal government offered the Fallon Paiute Shoshone Indian Tribe ten acres of irrigated land for every 160 acres of non-irrigated land that the Tribe gave up to make room for the Newlands Project.<sup>268</sup> All in all, individual tribal members gave up more than 30,000 acres in exchange for 4640 acres that would be irrigated by the Project.<sup>269</sup> The land exchange included at least 1600 acres that were not irrigable due to poor drainage, typography, soil quality, or salt presence.<sup>270</sup>

In any case, the promise of Newlands Project irrigation water never arrived.<sup>271</sup> The Fallon Paiute Shoshone Tribe never received any kind of Newlands Project irrigation system until the passage of Public Law 95-337 in 1978, which directed the Secretary of the Interior to formulate a plan for the improvement and construction of an irrigation system that could cultivate at least 1800 acres for agriculture on the Fallon Paiute Shoshone Reservation.<sup>272</sup> The Reservation currently occupies an area totaling 8120 acres (3480 acres owned by the tribe and 4640 acres individually owned).<sup>273</sup> Because the federal government never enforced Public Law 95-337, and because new regulations conflicted with the old legislation, the Tribe had to

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266. S. REP. NO. 101-499, at 56.

267. *Id.*

268. *Id.*

269. S. REP. NO. 101-555, at 2 (1990).

270. *Id.*

271. *Id.*

272. An Act to Declare That All Right, Title, and Interest of the United States in Two Thousand Seven Hundred Acres More or Less, Are Hereby Held in Trust for the Paiute and Shoshone Tribes of the Fallon Indian Reservation and Colony, Pub. L. No. 95-337, 92 Stat. 455, 455 (1978).

273. S. REP. NO. 101-499, at 56.

pursue either costly litigation or a legislative settlement to resolve its outstanding water rights issues.

## 2. Proposed Legislative Settlement

Title 1 of Senate Bill 3084 served to extinguish tribal litigation over the federal failure to comply with Public Law 95-337 and disputes over the Tribe's other water rights claims, in exchange for a \$43 million Fallon Paiute Shoshone Tribal Settlement Fund.<sup>274</sup> The Tribe could spend only 20% of the principal of the Fund on securing water rights or land purchases, with subsequent interest payments deposited to restore the original principal.<sup>275</sup> The Tribe could use interest that accumulated on fully intact principal, however, for long-term economic development, tribal government and community services, per capita distributions to tribal members, existing irrigation systems, and additional land or water rights acquisitions.<sup>276</sup> Tribal government representatives and the Secretary of the Interior would cooperate in creating a Tribal Economic Development Plan.<sup>277</sup> The Tribe also retained the right to object to any future revisions in Newlands Project regulations.<sup>278</sup>

## 3. Controversial Issues in Settlement Legislation

Although the Secretary of the Interior expressed some concern over the settlement cost, Title 1 of Senate Bill 3084 was relatively controversy-free. The Department of the Interior was opposed to the discrete allowance for distribution of settlement funds on a per capita basis, even though per capita distributions would apply to only 20% of any accrued interest beyond the original principal in the Development Fund.<sup>279</sup> Almost all of the 850 members of the Fallon Paiute Shoshone Reservation lived on the Reservation, where the average per capita individual income was one third of the nation's average and the average per capita family income was less than one half of the norm.<sup>280</sup> The only alternative that the federal government had to the Fallon Paiute Shoshone Economic Development Fund was to compensate the Tribe with expanded irrigation for agriculture

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274. S. REP. NO. 101-555, at 2.

275. Fallon Paiute Shoshone Indian Tribes Water Rights Settlement Act of 1990, S. 3084, 101st Cong. (1990).

276. *Id.*

277. *Id.*

278. *Id.*

279. S. REP. NO. 101-555, at 2-3.

280. S. REP. NO. 101-499, at 56 (1990).

that would have come at the expense of other uses like the Pyramid Lake Paiute Tribe fishery or the Lahontan Wetlands.<sup>281</sup>

In 1988, the Department of the Interior estimated the cost of fulfilling the federal government's responsibilities in Public Law 95-337 at \$30 million with additional annual maintenance and operating costs of \$100,000 to \$150,000.<sup>282</sup> A University of Nevada at Reno study estimated the costs associated with the original 1906 Newlands Project land acquisition over time at \$100 million to \$150 million.<sup>283</sup> With these enormous cost estimates in mind and the lack of any suitable alternative, the only controversy about Title 1 was its association with Title 2 — the proposed Truckee-Carson-Pyramid Lake Water Rights Settlement.

### *B. Title 2: Truckee-Carson-Pyramid Lake Water Settlement*

#### *1. History of the Claims*

In 1859, the Secretary of the Interior reserved an historic homeland of 475,000 acres surrounding and including Pyramid Lake and the Lower Truckee River for the Pyramid Lake Paiute Tribe.<sup>284</sup> The Truckee and Carson Rivers run parallel to each other in an easterly direction, with the Truckee River running from Lake Tahoe to Pyramid Lake and the Carson River running from Lake Tahoe to the Stillwater Wildlife Management Area and Carson Sink (both of which are a part of the Lahontan Valley Wetlands).<sup>285</sup> The States of Nevada and California both use water from the Rivers, and have contested associated water rights since the 1800s.<sup>286</sup>

In 1950, negotiations began and the states reached an allocation agreement in 1968.<sup>287</sup> Pyramid Lake Paiute Indian Tribe water rights settled independently in two earlier cases. The *Alpine* case dealt with Carson River, and *Orr Ditch* cases dealt with the Truckee River. Because the tribal water rights were already established, the ongoing negotiations centered on state allocations of water rights.<sup>288</sup> The Nevada Legislature

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281. *Id.* at 57.

282. *Id.*

283. *Id.*

284. *Id.* at 50.

285. See *Lahontan Basin Area Office Map of Truckee and Carson River Basins*, BUREAU OF RECLAMATION, U.S. DEP'T OF THE INTERIOR, available at <http://www.usbr.gov/mp/lbao/map.html> (last updated July 25, 2011).

286. S. REP. NO. 101-499, at 58.

287. *Id.*

288. *United States v. Alpine Land & Reservoir*, 503 F. Supp. 877 (D. Nev. 1980), *modified*, 687 F.2d 851 (9th Cir. 1983), *cert denied*, 104 U.S. 193 (1983); *United States v.*



ratified the agreement in 1969, and California followed in 1970.<sup>289</sup> The two States have been acting in voluntary compliance with the settlement allocation ever since, and at least eight bills seeking congressional ratification of this water rights allocation emerged after 1971.<sup>290</sup> But even though Pyramid Lake Paiute *Winters* rights were established, litigation filed by the Tribe stood in the way of Congress ratifying the Nevada and California agreement.<sup>291</sup>

When the federal government built the Newlands Reclamation Project in 1906 and diverted Truckee River waters, water levels in Pyramid Lake began to drop.<sup>292</sup> A delta eventually emerged at the mouth of Pyramid Lake, making it nearly impossible for the native Cui-ui fish and the Lahontan Cutthroat trout to spawn and reproduce in lake waters.<sup>293</sup> Subsequent litigation filed by the Pyramid Lake Paiute Tribe centered around the harmful environmental effects of the Newlands Project on Pyramid Lake.<sup>294</sup> Indeed, Truckee River diversions for the Newland's Project caused Pyramid Lake to drop over one hundred feet since the establishment of the Reservation.<sup>295</sup> As the Truckee-Carson Irrigation District and other Truckee River water users in Nevada and California faced litigation threats from the Tribe, they reduced water diversions and increased the efficiency of the Newlands Project.<sup>296</sup> Still, reduced diversions had little effect on the dropping water levels of a thirsty Pyramid Lake and the increased efficiency unwittingly led to an additional environmental hazard.<sup>297</sup> The original Newlands Project had eliminated vast tracts of wetlands, and substituted agricultural drainage for natural flows in remaining areas.<sup>298</sup> The Lahontan Valley Wetlands, part of the Stillwater Wildlife Management Area along with the Stillwater National Wildlife Refuge and Carson Lake and Pasture, dramatically shrunk and was

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Orr Water Ditch Co., Docket No. A3 (D. Nev. Sept. 8, 1944), available at <http://water-law.com/decrees/Orditchdecreed.pdf>.

289. S. REP. NO. 101-499, at 48.

290. *Id.*

291. *Id.*

292. *Id.* at 50.

293. *Id.*

294. *Id.*

295. KNACK & STEWART, *supra* note 104, at 42.

296. S. REP. NO. 101-499, at 50. The Truckee-Carson Irrigation District is the operator of the Newlands Project.

297. *Id.*

298. *Id.*

only sustained by agricultural drainage spills from the Newlands Project.<sup>299</sup> Thus, increased efficiency at the Newlands Project meant even less water for the sensitive and ecologically valuable Lahontan Valley Wetlands.<sup>300</sup>

## *2. Proposed Legislative Settlement*

Title 2 also sought to extinguish pending litigation that existed between the Tribe and local, state, and federal governments. The Bill established a development fund for the Tribe, served to ratify and expand Truckee and Carson River water allocation rights first formulated in the *Alpine* and *Orr Ditch* decrees, and instructed the Secretary to confront the environmental issues raised by the Pyramid Lake Paiute Tribe.<sup>301</sup>

Once the tribal government developed a long-term economic plan that was approved by the Secretary of the Interior, the Tribe would receive access to a \$50 million Pyramid Lake Paiute Economic Development Fund.<sup>302</sup> In addition, the Secretary would establish a Pyramid Lake Paiute Fisheries Trust Fund totaling \$25 million.<sup>303</sup> The Tribe could not compromise either the principal or 25% of the interest on the fishery fund, but could fully utilize the remaining interest for fishery improvement programs.<sup>304</sup>

Title 2 also confirmed the Tribe's "Alpine Decree" water rights allocation for the Carson River and its tributaries.<sup>305</sup> The Bill established a maximum annual diversion level for the Lake Tahoe Basin of 34,000 acre-feet, with 23,000 acre-feet for use by California within the Lake Tahoe Basin and 11,000 acre-feet allocated for Nevada use in the Basin.<sup>306</sup> Other approved water diversions included 3000 acre-feet annually from Marlette Lake for Nevada use, and a maximum of 561 acre-feet annually from Lake Tahoe for Nevada use as well.<sup>307</sup> State law or existing court allocations would allocate Echo Lake in California, North Creek in Nevada, and the

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299. *Id.*

300. *Id.*

301. Fallon Paiute Shoshone Indian Tribes Water Rights Settlement Act of 1990, S. 3084, 101st Cong., §§ 201-203 (1990).

302. *Id.* § 102(B), (C)(1)(a).

303. *Id.* § 208(a)(2).

304. *Id.*

305. *Id.* The Bill also allocated a maximum of 1300 acre-feet of Carson River waters to the State of California, and an extra 2131 acre-feet for the State of Nevada. *Id.*

306. *Id.* This maximum annual diversion level would not apply to any water used to make artificial snow for ski resorts within the Lake Tahoe Basin. *Id.*

307. *Id.* Unmetered resident diversions were estimated at only 4/10ths of an acre-foot per resident annually, and thus did not pose a great concern. *Id.*

interstate Truckee River, including the Orr Ditch Decree for the Truckee River.<sup>308</sup> Finally, the Bill confirmed a forty-year lease of Pyramid Lake Paiute Tribe water rights as drought protection for the Nevada urban centers of Reno and Sparks.<sup>309</sup> These two municipalities were totally dependent on the flow of the Truckee River for their water, and were witnessing an unprecedented "critical drought period."<sup>310</sup> The settlement in Title 2 essentially ratified a preliminary agreement between California, Nevada, the Pyramid Lake Paiute Indian Tribe, the United States federal government, and the Sierra Pacific Power Company.<sup>311</sup>

Title 2 also contained several provisions relating to environmental issues. First, the Secretary of the Interior had to comply with the Endangered Species Act by developing a plan within one year for the recovery of Cui-cui fish and Lahontan Cutthroat trout within the Pyramid Lake and Truckee River ecosystem.<sup>312</sup> In addition, the Bill included a maximum allocation of \$4 million annually over the following four years for the Secretary of the Interior to purchase water rights to benefit wetlands protection efforts in federal and state wildlife areas in the Lahontan Valley and the Fernley Sink in Nevada.<sup>313</sup> The Bill also required the Secretary to conclude a study within two years evaluating whether the Lahontan Valley Wetlands and the Stillwater National Wildlife Refuge should become a permanent National Wildlife Refuge or a Federal Wildlife Management Area.<sup>314</sup> Finally, the Bill recognized Anaho Island, within the borders of Pyramid Lake, as part of the Pyramid Lake Paiute Reservation and as an integral component of the National Wildlife Refuge system.

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308. Truckee-Carson-Pyramid Lake Water Rights Settlement Act, S. 1554, 101st Cong., § 102 (1989).

309. S. REP. NO. 101-499, at 21 (1990); 135 CONG. REC. S10296, S10301 (daily ed. Aug. 4, 1989).

310. 135 CONG. REC. at S10301 (stating that the level of drought was unknown since that of 1928-35).

311. S. REP. NO. 101-499, at 24. This company provides water to Reno, Sparks, and parts of Washoe county as well as electricity to northern Nevada and east central California. 135 CONG. REC. at S10301.

312. S. REP. NO. 101-499, at 17.

313. *Id.* at 14, 17.

314. *Id.* at 15-16. The Bill also contained a provision that funds would be appropriated for the Naval Air Station five miles east of Fallon, Nevada to replace its alfalfa and pasture oriented "agricultural outlease program" of leasing 3000 irrigated acres of land along runways to farmers with an alternative that would satisfy Navy dust abatement and fire safety regulations. *Id.* Any extra water rights that materialized from any alternative would be transferred to the Pyramid Lake Indian Reservation for fishery purposes. *Id.*

### *3. Controversial Issues in Settlement Legislation*

Two controversial issues with Title 2 were environmental issues and the Pyramid Lake settlement cost. The general federal government consensus was a recommendation of executive veto, although several representatives such as the Assistant Secretary for Water and Science in the Department of the Interior expressed willingness to negotiate a final settlement.<sup>315</sup>

The environmental controversy centered around two concerns. The first was the recovery plan for the Cui-ui and Lahontan Cutthroat trout of Pyramid Lake. The second concern was the degradation of the Lahontan Valley Wetlands.

The Pyramid Lake Paiute Tribe and Fishery had certain objectives regarding the lower Truckee River up to and including the terminus delta at the mouth of Pyramid Lake and the Lake itself.<sup>316</sup> These included restoring riparian habitat and vegetation cover, stabilizing the River to minimize erosion, improving the spawning and migratory habitat for Cui-ui fish and Lahontan Cutthroat trout, and improving or replacing facilities to help fish pass the delta at the mouth of the Truckee River to reach Derby Dam and upstream spawning habitats.<sup>317</sup> The Tribe wished to achieve all of these objectives without harming the Lahontan Valley Wetlands.<sup>318</sup> The restoration of suitable habitat for the Cui-ui and Lahontan Cutthroat Trout and the maintenance of fragile wetlands were important legislative priorities, as 20% of the surrounding Churchill County economy directly relied on tourism and fish and bird-related recreational activities at the time.<sup>319</sup>

Also, Pyramid Lake was evaporating at an alarming pace of four feet per year (approximately 440,000 acre-feet annually).<sup>320</sup> For the Lake to maintain its great depth of 360 feet and surface area of 115,000 acres, it needed a consistent flow from the Truckee River to replace evaporated water.<sup>321</sup> Newlands Project diversions dramatically disrupted this balance between input and evaporation that had combined to maintain a consistent level for Pyramid Lake.<sup>322</sup> From 1920 to 1938, the Lake level dropped over

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315. *Id.*

316. Truckee-Carson-Pyramid Lake Water Rights Settlement Act, H.R. 3941, 101st Cong., § 701(d) (1990).

317. *Id.* § 402(a).

318. *Id.* § 701(d).

319. *Id.* § 301(b)(2).

320. KNACK & STEWART, *supra* note 104, at 272.

321. *Id.*

322. *Id.*

forty feet, reducing the surface area by 20,000 acres and forming a delta at the mouth of Pyramid Lake that prevented fish from reaching Truckee River spawning grounds.<sup>323</sup> This dramatic drop in surface levels was due to the fact that from 1925 to 1967, the Newlands Project annually diverted over 50% of the Truckee River flow, or approximately 260,000 acre-feet, to the Derby Dam.<sup>324</sup> A BIA investigation of Pyramid Lake in 1940 revealed that the administration was "one of the most flagrant examples" of a neglect of trust responsibilities, disregard for Indian rights, and waste of natural resources.<sup>325</sup> When the Cui-ui became endangered in 1970, the Secretary was obligated to use 220,000 acre-feet of storage space in Stampede Reservoir for the sole purposes of maintaining the meager population of Pyramid Lake fish. The use of Stampede Reservoir did not solve the root environmental problems at Pyramid Lake, however, and the municipalities of Reno and Sparks lost important water rights storage space.<sup>326</sup>

A series of subsequent general Operating Criteria and Procedures ("OCAP") regulations governing the allocation of Truckee and Carson River water rights did little to alleviate the environmental problems.<sup>327</sup> The federal government understood the need for a recovery plan for the Cui-ui and Lahontan Cutthroat trout as required by the Endangered Species Act, but objected to the fiscal burden of an additional tribal development fund.<sup>328</sup>

The Stillwater Wetlands of the Truckee/Carson area support millions of migratory waterfowl that use the eastern edge of the Pacific Flyway as a resting place in their seasonal travels.<sup>329</sup> Diversions to the Newlands Project had caused these Wetlands to reduce from 113,000 acres to only 15,000 acres in 1987.<sup>330</sup> The Newlands Project either eliminated the water source for these Wetlands, or substituted decreasing agricultural drainage as Project efficiency increased.

Included in the Stillwater Wildlife Management Area are the Lahontan Valley Wetlands, located at the terminus of the Carson River.<sup>331</sup> The

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323. *Id.* at 178.

324. *Id.* at 271, 273

325. *Id.* at 320-21.

326. S. REP. NO. 101-499, at 52-53 (1990) (citing Carson-Truckee Water Conservancy Dist. v. Clarke, 741 F. 2d 257 (9th Cir. 1984)).

327. *Id.*

328. *Id.*

329. *Id.* at 55. Indeed, the Convention on Wetlands of International Importance had recently nominated the Stillwater area as a wetland of international importance. *Id.*

330. *Id.* at 54.

331. See *Lahontan Basin Area Office Map of Truckee and Carson River Basins*, *supra* note 285.

Lahontan Valley Wetlands had dried up from historic levels of 50,000 acres to a meager 3000 acres.<sup>332</sup> The remaining area contained concentrated mineral deposits that had become toxic.<sup>333</sup> Nevada's Senator Reid noted, "Where there were once scores of thousands of acres of luxuriant wetlands and millions of shorebirds and waterfowl, there are now only stagnant pools."<sup>334</sup> These natural but toxic levels of trace elements, including arsenic, boron, lithium, mercury, selenium, and molybdenum, caused increased bioaccumulation, deformities, botulism, avian cholera, and death among fish and waterfowl that visited the Lahontan Valley Wetlands.<sup>335</sup> In addition, the greater concentration of fish and fowl caused by the shrinking habitat led to the possibility of disease transmission in fish and waterfowl previously untouched by the toxins.<sup>336</sup> The State of Nevada had even sent its citizens a warning not to eat ducks that might have visited the Lahontan Valley Wetlands.<sup>337</sup>

The Interior Department expressed concern in a letter to Idaho's Senator McClure that the Bill contained water rights transfer selection processes that were vague and less authoritative than existing Fish and Wildlife Service regulations. The Assistant Secretary worried that these amended regulations might harm federal efforts at restoring the Wetlands, or allow the Tribe to compromise environmental guidelines in utilizing water resource rights.<sup>338</sup>

At a hearing regarding the Wetlands in Reno, the Nevada Department of Wildlife Director gave a stern warning that "[i]f the Lahontan Valley Wetlands are lost, it will be the greatest natural resource disaster in this century in Nevada."<sup>339</sup>

In addition to the national loss of a valuable resource, the Pyramid Lake Paiute Tribe historically benefitted from the diverse waterfowl population in the Lahontan Valley Wetlands via cultural, economic, and sustenance uses. Historian Martha Knack has recorded Paiute accounts of how the skies above Pyramid Lake once "darkened" with snow geese, Canadian geese, mallards, pintails, canvasbacks, goldeneyes, teal, stilts, avocets, curlews, killdeer, and pelicans in flight towards the Lahontan Valley

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332. KNACK & STEWART, *supra* note 104, at 272.

333. *Id.*

334. 135 CONG. REC. S10296, S10297 (daily ed. Aug. 4, 1989).

335. S. REP. NO. 101-499, at 55.

336. *Id.*

337. *Id.*

338. *Id.* at 80.

339. 135 CONG. REC. at S10297.

Wetlands. In addition to the food source potential that migratory fowl once represented to Pyramid Lake Paiutes, the Tribe used cattail fibers, swamp cane, marsh rushes, and willow for clothing, baskets, and other purposes.<sup>340</sup> In fact, it was these dramatic levels of waterfowl in the Lahontan Valley Wetlands that led to its dedication along with only three other sites as a Western Hemisphere Shorebird Reserve.<sup>341</sup>

The second major controversy involved settlement cost.<sup>342</sup> The Pyramid Lake Paiute Tribe felt that the settlement was fair in light of the history of federal mismanagement of tribal interests, and in exchange for the dismissal of pending legal actions relating to federal failures to enforce national environmental laws. The federal government felt that the Tribe would reap enough benefits from the restoration of the Lahontan Valley Wetlands, however, and that the additional expenditure of a settlement fund was unnecessary.<sup>343</sup> The CBO estimated a federal cost of \$75 million for the proposed trust and fishery funds, with an additional \$16 million from 1991 to 1995 for environmental studies and \$2 million over twenty years for the cancellation of repayment contracts.<sup>344</sup> Office Director Robert Reischauer also warned of the possibility of an additional \$50 million to \$100 million federal obligations to mitigate water quality or wildlife habitat damage issues.<sup>345</sup>

Certain members of the federal government felt that the proposed settlement funds were excessive considering that Pyramid Lake Paiute Tribe water rights were already settled.<sup>346</sup> The federal government believed that the lawsuits were subject to dismissal because the proposed legislative settlement did not pose enough of a financial risk to warrant such a large payment to the Tribe.<sup>347</sup> Interior Department representations also noted existing federal commitments to Pyramid Lake water quality issues.<sup>348</sup> The

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340. KNACK & STEWART, *supra* note 104, at 10, 17.

341. S. REP. NO. 101-499, at 55.

342. *Id. passim*.

343. *Id.* at 113.

344. *Id.* at 93.

345. *Id.* at 91.

346. *Id.* at 114.

347. *Id.* at 114-18.

348. *Id.* at 114. The existing federal commitments included the Orr Ditch water rights decree, federal government payment of \$7.5 million in 1975, conversion of the Stampede Dam and Reservoir for the exclusive use of enhancing and allowing spawning fish runs, existing federal commitments to the Pyramid Lake fisheries that totaled \$20 million over the next fifteen years, federal funding of fish production at the Lahontan National Fish Hatchery, preparation costs for environmental recovery plans, and a \$7.6 million allocation

Interior instead proposed a \$5 million settlement for the Tribe in exchange for a release of all tribal claims, including those regarding alleged federal failures to enforce the Endangered Species Act.<sup>349</sup>

Federal representatives also believed that the benchmark replacement water cost of \$1000 to \$2000 per foot was extremely high, and represented annual costs in perpetuity rather than as one-time water recoupment costs.<sup>350</sup> The federal government felt that monetary damages should be calculated based on fish losses and not water losses.<sup>351</sup> All of these reasons led the Department of Justice, the OMB, and the Department of the Interior to recommend executive disapproval of the Pyramid Lake Paiute legislative settlement proposal.<sup>352</sup>

### *VII. Ute (UT) Indian Water Claims Settlement*

The 101st Congress also tried to resolve Ute Indian water rights claims in Utah through a legislative settlement proposal. This legislative effort took the form of House Bill 1285 and Senate Bill 536, the Ute Indian Water Settlement Act of 1989.<sup>353</sup> Congress ultimately incorporated the key components of House Bill 1285 and Senate Bill 536 into House Bill 3960, known as the Central Utah Project Completion Act and Reclamation Projects Authorization and Adjustment Act of 1990.<sup>354</sup>

The bills addressed the Utah Ute Indians' water rights claims, specifically those of the Uintah and Ouray reservation,<sup>355</sup> and sought to resolve claims stemming from a 1965 agreement between the federal

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for fish ladder and spawning runs at the Marble Bluff Dam, increased Newlands efficiency due to OCAP regulations, and federal payment of attorney fees for the Tribe's litigation efforts. *Id.* at 114-17.

349. *Id.* at 114.

350. H.R. REP. NO. 101-499, at 114-20 (1990).

351. *Id.*

352. *Id.* at 118-20.

353. 135 CONG. REC. S2352 (daily ed. Mar. 8, 1989). Senator Garn (R-UT) and Senator Hatch (R-UT) proposed Senate Bill 536, and it died in the committee process. S. REP. NO. 101-499, at 114. Representative Nielson (R-UT) introduced Ute Indian Water Settlement Act of 1989, H.R. 1285, 101st Cong. (1989). Representative Hansen (R-UT) and Representative Owens (D-UT) co-sponsored the Bill. *Id.*

354. Central Utah Project Completion Act, H.R. 3960, 101st Cong. (1990). The House of Representatives passed House Bill 3960 on October 15, 1990, but the Bill died on the Senate calendar — dashing any hopes for a piece of successful Ute (UT) Indian water rights settlement legislation in the 101st Congress. H.R. REP. NO. 101-764, at pt. I (1990).

355. S. REP. NO. 101-499, at 114.



government and the Ute Tribe.<sup>356</sup> This agreement compromised the Ute's *Winters* rights to Central Utah Project waters in exchange for alternative *Winters* delivery rights, and required mitigation by a January 1, 2005, target date.<sup>357</sup> The 2005 deadline was both a federal burden and incentive for congressional action. Although the Ute settlement had a concrete deadline, it could be put off for fifteen years during the 101st Congress without violating any major legal issues.

### A. History of the Claims

The Ute Indians had a long record of communal living in what is now Utah, as well as parts of western Colorado, northern New Mexico, and northern Arizona.<sup>358</sup> Utah Indian Agent Garland Hurt recorded evidence of irrigated Ute agricultural practices in his reports from the 1850s.<sup>359</sup>

The Uintah and Ouray Reservations are in northeast Utah at the foot of the Uinta Mountains in Uinta Basin.<sup>360</sup> The reservations total 4 million acres, combining fee land, national forest, Bureau of Land Management land, and 1 million acres of trust land.<sup>361</sup> On October 3, 1861, the federal government recognized the Uintah Reservation by Executive Order — with enough water rights to irrigate all agriculturally practical reservation acreage.<sup>362</sup> The federal government established the Ouray Reservation in 1882, and by the 1990s, these two reservations were the home of 3,400 Ute of Utah Indians.<sup>363</sup> Rock Creek and the Duchesne, Lake Fork, Uinta, and Whiterocks Rivers all pass through the reservations to the Green River and on to the Colorado River.<sup>364</sup> Under the provisions of the 1965 Agreement, however, the federal government diverted most of these water resources to the Bonneville Unit of the Central Utah Project for the Salt Lake City urban area and southern Utah agricultural lands.<sup>365</sup>

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356. *Id.* § 1901(a)(2).

357. 135 CONG. REC. H539-03 (daily ed. Mar. 7, 1989). Representative Owens (D-UT) and Representative Nielson (R-UT) had introduced similar legislation in 1988. S. REP. NO. 101-499, at 114.

358. S. LYMAN TYLER, *THE UTE PEOPLE: A BIOGRAPHICAL CHECKLIST I* (1964).

359. Gottfried O. Lang, *The Whiterock Utes in Transition*, in 15 UNIVERSITY OF UTAH ANTHROPOLOGICAL PAPERS 13 (1953).

360. H.R. REP. NO. 101-764, at 51 (1990).

361. *Id.*

362. A Bill to Settle Issues Relating to Ute Indian Water Rights, and for Other Purposes, S. 536, 101st Cong., § (3)(1) (1989).

363. H.R. REP. NO. 101-764, at 51.

364. *Id.*

365. *Id.*

The 1965 Agreement between the United States government, the Ute tribe, and the Central Utah Water Conservancy District included a provision that three additional units would be built as part of the Central Utah Project to provide the Ute Indians with sufficient water supply in lieu of tribal *Winters* rights so that water could be diverted to the Bonneville unit.<sup>366</sup> Despite this 1965 Agreement, the federal government stalled the construction of the promised Upalco and Uintah units because it was unable to find adequate or economically feasible reservoir sites.<sup>367</sup> Congress never authorized the third Ute unit, and there were no plans to proceed with construction.<sup>368</sup> Meanwhile, the Ute Indians were without a reliable water supply and had filed litigation regarding alleged federal breaches of the 1965 Agreement.<sup>369</sup>

The proposed legislative settlement would have given the Tribe a \$150 million trust fund, close to 250,000 annual acre-feet in water rights, and a series of other benefits as compensation for the federal use of 15,252 acres of Ute irrigable farmland and gross water diversions of 61,008 annual acre-feet to the Bonneville unit since the 1965 Agreement.<sup>370</sup> In introducing the Bill, Senator Garn of Utah declared that the settlement would force the federal government to keep its word to the Ute people.<sup>371</sup>

### *B. Proposed Legislative Settlement*

The settlement would have extinguished several Ute claims based on the federal government's failure to comply with the 1965 Agreement between the United States government, the Ute tribe, and the Central Utah Water Conservancy District (the project operator).<sup>372</sup> Although the legislative deadline was 2005, the lack of any preliminary federal action or even revised cost estimates made it clear that the federal government and the Central Utah Project operator could not fulfill their obligations under the 1965 Agreement. The bills, therefore, sought \$514,550,000 to pay for a

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366. *Id.* The three additional units would be called the Uintah, Upalco and Ute. *Id.*

367. *Id.*

368. Central Utah Project Completion Act, H.R. 3960, 101st Cong., § 401 (1990).

369. *Id.*

370. Bill to Settle Issues Relating to Ute Indian Water Rights, and for Other Purposes, S. 536, 101st Cong., § 5(a) (1989). The 1965 Agreement, in turn, would be dissolved. S. REP. NO. 101-499, at 33 (1990).

371. 135 CONG. REC. S2352 (daily ed. Mar. 8, 1989) (statement of Sen. E.J. Garn).

372. Bill to Settle Issues Relating to Ute Indian Water Rights, and for Other Purposes § 3(2)-(12).

variety of Ute water needs in exchange for resolution of the Tribes' *Winters* rights, pending litigation and the original 1965 Agreement.<sup>373</sup>

The legislation aimed to settle all claims stemming from *Winters* rights or the 1965 Agreement and quantify Ute tribal water rights at a total of 248,943 annual acre-feet from the Colorado River System.<sup>374</sup> In addition, the Tribes would receive water rights to 10,000 acre-feet annually from the Green River for municipal and industrial purposes.<sup>375</sup> All told, these water rights would allow for the possibility of 120,157 irrigable acres on the Ute Reservations.<sup>376</sup>

### C. *Controversial Issues in Settlement Legislation*

The enormous cost of the Bill was the most controversial element of the proposed Ute settlement. The complexity of the legislation and the inclusion of provisions that were not directly related to the Ute water allotment were also controversial during the legislative process.

The Utes felt that the completion of the Central Utah Project as envisioned in the 1965 Agreement was at risk.<sup>377</sup> The federal government had estimated the cost of completing the Uintah, Upalco, and Ute Units at over \$2 billion in 1988.<sup>378</sup> The Tribes wanted some sort of resolution to their water rights dilemma without waiting for inevitable federal failure by the 2005 implementation deadline.<sup>379</sup> The Tribes felt that the cost of the settlement was fair in light of the water losses the Utes had endured and current cost estimates for Central Utah Project construction completion.<sup>380</sup> In addition, the Tribes expressed concern that actual completion of the Project could harm local trout fisheries, destroy wetlands and riparian habitats, diminish the amount of big game winter range, create excessive water discharges and have negative water-quality impacts due to irrigation drainage flows.<sup>381</sup>

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373. *Id.* § 4.

374. *Id.* art. III.

375. *Id.*

376. *Id.* at 15-16. The Tribes could not transfer any of these water rights without the approval of the Secretary of the Interior.

377. S. 536 § 3 (1990).

378. *Id.* § 3(8).

379. *Id.* § 3(2).

380. *Id.* §3(12).

381. H. REP. NO. 101-764, at 51 (1990).

The original bills included proposed cost allocations totaling \$514,550,000 plus water rights for the Ute tribe.<sup>382</sup> The Director of the CBO, Robert Reishchauer, estimated the cost of an Ute Indian water rights settlement, as amended, at close to \$200 million with 35% of the cost absorbed by state and local interests.<sup>383</sup>

Both of these possible settlement amounts were unacceptable from the federal government standpoint.<sup>384</sup> The Senate Report on the 1990 Reclamation Act included what appeared to be a thinly veiled criticism of the proposed Ute legislation:

The agreement [Fort Hall] does not require construction of any new water storage facilities. Unlike some recent Indian water settlements involving Federal contributions of hundreds of millions of dollars for construction of water projects of questionable economic justification and substantial environmental costs, the parties to this agreement developed creative exchanges of water supplies which more efficiently use available water resources with no added financial or environmental cost.<sup>385</sup>

Eventually, however, Congress had to deal with unsettled Ute water rights and supported a legislative claims settlement. In 1992, Congress settled the Ute water rights dispute for a settlement totaling \$198.5 million.<sup>386</sup>

### *VIII. San Carlos Apache Water Rights Settlement*

Finally, the 101st Congress unsuccessfully tried to pass water rights claims settlement legislation relating to the San Carlos Apache Tribe of Arizona.<sup>387</sup> The House of Representatives passed House Bill 5539 on

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382. A Bill to Settle Issues Relating to Ute Indian Water Rights, and for Other Purposes, S. 536, § 4; Indian Water Settlement Act of 1989, H.R. 1285, 101st Cong., § 4 (1989).

383. H.R. REP. NO. 101-764, at 57.

384. *Id.*

385. S. REP. NO. 101-499, at 88 (1990).

386. GETCHES ET AL., *supra* note 2, at 828.

387. San Carlos Apache Water Rights Settlement, H.R. 5539, 101st Cong. (1990). Representative Udall (D-AZ) and Representative Rhodes (R-AZ) introduced the San Carlos Apache Water Rights Settlement on August 3, 1990. 136 CONG. REC. H7171 (daily ed. Aug. 3, 1990) (statement of Sen. Tom Udall). The congressmen also introduced a predecessor to the Bill on June 28, 1990, i.e., San Carlos Apache Tribe Water Rights Settlement Act of 1990, H.R. 5223, 101st Cong. (1990). Congress took no action on House Bill 5223. H.R. REP. NO. 101-918, at 14 (1990).

October 22, 1990, but the Bill died in the Senate,<sup>388</sup> effectively killing any chance for the San Carlos Apache Tribe to obtain legislative settlement of their water rights in the 101st Congress.

House Bill 5539 proposed to settle San Carlos Apache water rights claims litigation.<sup>389</sup> In 1935, the "Gila Decree" Agreement quantified the water rights of the San Carlos Apache Tribe.<sup>390</sup> Subsequent upstream diversions made it impossible to implement the Gila Decree Agreement, and the State of Arizona attempted to settle the matter by initiating General Stream Adjudication of the Gila River in 1978.<sup>391</sup> After years of negotiations, federal, state, local, and tribal representatives crafted the proposed agreement included in the settlement legislation.<sup>392</sup>

#### *A. History of the Claims*

The aboriginal territory of the Apache Indians covered much of what is eastern Arizona today.<sup>393</sup> Early Spanish accounts documented Apaches living on small farms with irrigated agriculture and engaged in hunting, gathering, and nomadic activities.<sup>394</sup> On July 1, 1852, the federal government agreed to authorize a reservation for the Tribe.<sup>395</sup> After years of federal and migrant efforts to confine, relocate, and encroach upon the San Carlos Apache, President Ulysses Grant finally created a reservation for the Tribe in 1871.<sup>396</sup> The federal government modified the reservation boundaries in 1973, settling on a total of 1,826,500 acres in the Gila, Graham, and Pinal Counties of east central Arizona.<sup>397</sup> The reservation is bound on the north by the Salt and Black Rivers, and is intersected in the southern portion by the Gila River.<sup>398</sup>

Non-Indian settlers had stolen San Carlos Apache water rights, putting the health of the Tribe's crops at risk in the 1880s.<sup>399</sup> During this period, speculators discovered coal in the area. Both the influx of miners and the

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388. San Carlos Apache Water Rights Settlement, H.R. 5539, 101st Cong. (1990).

389. *Id.* § 2(a)(5).

390. H.R. REP. NO. 101-918, at 12-13.

391. *Id.* at 13.

392. H.R. 5539 § 2(a)(8).

393. H.R. REP. NO. 101-918, at 8.

394. *Id.*

395. *Id.* at 9.

396. *Id.*

397. *Id.* at 10.

398. *Id.*

399. *Id.* at 11.

existing needs of non-Indian settlers increased strains on water supplies.<sup>400</sup> In 1910, the federal government sought water rights for the nearby Fort McDowell community in the infamous Kent Decree case.<sup>401</sup> The federal government overlooked the rights of the San Carlos Apache at the time, however, and the Tribe received no benefits from either the Salt River Project or any other legally quantified water rights under the *Winters* precedent.<sup>402</sup>

In 1924, Congress therefore authorized the San Carlos Project to alleviate the water rights problems of the Tribe.<sup>403</sup> The federal government built the main reservoir of the Project behind the Coolidge Dam on the Gila River.<sup>404</sup> And although the best irrigated farmland of the San Carlos Apache Tribe flooded during construction of the Dam, the Tribe never received any water or water storage rights upon completion.<sup>405</sup>

Frustration over this inequity mounted until federal, state, local, and tribal parties entered into a “Gila Decree” agreement in 1935, granting the San Carlos Apache Tribe 6000 acre-feet of annual water rights.<sup>406</sup> This minimal annual water rights allotment — reduced from 36,000 acre-feet to 6000 acre-feet just before conclusion — was unrealistic and could not quench one million acres of irrigable land on the San Carlos Apache Reservation.<sup>407</sup> Additionally, upstream diversions kept the Gila River dry anyway, making it impossible for the Tribe to receive its meager Gila Decree water rights.<sup>408</sup>

The Tribe therefore filed a series of claims and the State of Arizona attempted to settle the issue by initiating General Stream Adjudication of the Gila River in 1978.<sup>409</sup> The federal government represented the Tribe as a trustee and requested 292,406 annual acre-feet in water rights in this adjudication of the Gila River.<sup>410</sup> The pending litigation threatened the

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400. *Id.*

401. *Id.* at 12.

402. CANBY, *supra* note 21, at 280.

403. H.R. REP. NO. 101-918, at 12.

404. *Id.*

405. *Id.*

406. *Id.*

407. *Id.* at 13.

408. *Id.*

409. *Id.*

410. *Id.* The Tribe attempted to bring the matter to federal court and was rejected in the 1983 Supreme Court decision of *Arizona v. San Carlos Apache Tribe*, 463 U.S. 545, 547 (1983).

assured water supply of over one million non-Indians living in the Salt and Gila River Valleys.<sup>411</sup>

### *B. Proposed Legislative Settlement*

House Bill 5539 included a settlement that would have extinguished all present and future water rights related claims raised by the San Carlos Apache Tribe.<sup>412</sup> The proposed settlement quantified the San Carlos Apache Tribe's water rights at 153,000 annual acre-feet, including 6000 acre-feet from the Gila Decree, 58,735 acre-feet of local Central Arizona Project water, the existing San Carlos Apache 12,700 CAP allocation, 50,000 acre-feet of on-reservation tributary water from the Black, Salt, San Pedro, and Gila Rivers, and 25,000 acre-feet of on-reservation groundwater rights.<sup>413</sup> Moreover, the federal government would be responsible for constructing delivery systems for the water to reach the boundaries of the San Carlos Apache Tribe's Reservation.<sup>414</sup>

In addition, House Bill 5539 called for the establishment of a \$36,200,000 San Carlos Apache Tribe Development Trust Fund.<sup>415</sup> The Tribe could use both the principal and the interest of the fund for long-term economic development programs.<sup>416</sup> However, the Tribe could not distribute the funds on a per-capita basis.<sup>417</sup>

### *C. Controversial Issues in Settlement Legislation*

House Bill 5539 did not contain many controversial issues and was purely a victim of a late start in the 101st Congress, as the associated legislative process did not begin until August of 1990. Problems in House Bill 5539, like the Ak Chin contribution provisions, may have emerged

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411. H.R. REP. NO. 101-918, at 8.

412. *Id.* at 20-21. This sweeping legal tradeoff stands in contrast to very specific legal waivers outlined in other Indian claims settlement legislation in the 101st Congress. *Id.* at 14-15.

413. *Id.* at 14. The 58,735 annual acre-feet of CAP water would be transferred from non-Indian local communities, including 14,655 acre-feet of municipal and industrial CAP water previously allocated to the local Phelps Dodge corporation; 3480 acre-feet of municipal and industrial CAP water previously allocated to the city of Globe, AZ; 7300 acre-feet of CAP water from local water project operators, Salt River Project and the Roosevelt Water Conservation District; and any leftover water from the Ak-Chin Indian Community. *Id.*

414. *Id.* at 15.

415. *Id.* at 14.

416. *Id.*

417. *Id.* at 14-15.

with more time; but the only controversial issue Congress actually debated was the associated federal cost.<sup>418</sup>

The San Carlos Apache Tribe was willing to slash in half the claims it was making in the Arizona General Stream Adjudication of the Gila River to expedite the process and receipt of a trust fund.<sup>419</sup> The Tribe felt that the bill's benefits were fair compensation for hundreds of years of hardships due to federal failures to secure *Winters* rights for the San Carlos Apache.<sup>420</sup>

The federal government expressed a willingness to negotiate, but felt that the cost of the settlement as proposed was too high.<sup>421</sup> The CBO estimated the federal cost at approximately \$40 million.<sup>422</sup> After accounting for debt relief and the loss of water contract repayments, the federal cost could have been as high as \$53.1 million.<sup>423</sup> Because the Tribe could lease the 51,000 CAP acre-feet for as much as \$62 million in annual income, the federal government wanted to reduce the proposed trust fund by the cost of the settlement.<sup>424</sup>

But the relatively modest settlement size and the concomitant press of litigation eventually forced a legislative settlement of the San Carlos Apache's water rights claims.<sup>425</sup> Indeed, the 102nd Congress passed settlement legislation that provided the Tribe with approximately 76,860 acre-feet of water rights and funded settlement with \$38,400,000.<sup>426</sup> Thus, the Tribe ultimately took less water rights, but the federal government had to pay more in resolution dollars.

### *IX. Conclusion: Indian Natural Resource Claims Settlement Two Decades Later*

The 101st Congress took over a fledgling legislative initiative, Indian natural resource claims resolution, and gave it some credibility and legs moving forward. The settlements generally traded federal and local dollars

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418. *Id.* The settlement included an Arizona State contribution of \$3 million, and local cost contributions of \$500,000 from the Phelps Dodge Corporation and \$100,000 from the City of Safford, Arizona, to ease the fiscal burden on the federal government. *Id.*

419. *Id.* at 14.

420. *Id.* at 15.

421. *Id.* at 15-16.

422. *Id.* at 26-27.

423. *Id.*

424. *Id.* at 15.

425. GETCHES ET AL., *supra* note 2, at 829. Other sources chipped in an additional three million dollars. *Id.*

426. Reclamation Projects Authorization and Adjustment Act of 1992, H.R. 429, Pub. L. No. 102-575, §§ 3702(a)(9), 3704, 3707 (1992).



for reduced and quantified tribal water rights and resolution of any legal claims. Successful legislation could not include any issues that were not directly tied to Indian natural resources, as each of these tangential issues involved a new set of political special interest forces and complicated the process. Other similarities in the settlements were federal involvement in negotiation and the promotion of tribal economic self-sufficiency.

The Fort Hall Water Claims Settlement Act of 1990 was a good model for future negotiations regarding Indian water rights. Federal, local, state, and tribal parties negotiated an agreement without resorting to costly litigation. The settlement awarded the Shoshone-Bannock with a substantial financial award and quantified their water and water storage rights once and for all. The Bill included clauses that helped ease the transition of non-Indians to loss of water rights, established specific procedures for compromising limited resources in times of low flow, and even improved the environmental quality of the Grays Lake habitat. Any discussion surrounding controversial elements of the Bill was in the context of governmental partners working towards a mutual goal. Indeed, Committee testimony was devoid of the strikingly different policy positions that tribal, state, local, and federal representatives so often present in arguing over details included in Indian claims settlement legislation.

The Fallon Paiute Shoshone proposal was another model piece of Indian claims settlement legislation. Free of controversy and considered fiscally reasonable by federal government representatives, Title 1 of Senate Bill 3084 by itself would have been all but assured of executive approval. The packaging of the Fallon Paiute Shoshone settlement with the Pyramid Lake Paiute Tribe settlement, however, was a legislative maneuver of enormous risk. Although the Pyramid Lake settlement proposal addressed environmental issues that tribal, state, local, and federal representatives widely agreed upon, the settlement cost was highly controversial. As it turned out, Title 1 was a strong enough settlement to carry the costly and controversial Pyramid Lake provisions of Title 2 into public law.

The cost of completing the federal government's obligations under the 1965 Agreement with the Ute Indians of Utah was many times higher than that of the proposed settlement costs included in Senate Bill 536 and House Bill 1285 claims settlement legislation. Enormous costs had prevented the Utes from receiving promised water entitlements. A legislative settlement was an obvious solution, as Representative Nielson indicated in his introduction of House Bill 1285, "There comes a time when promises must

move from mere words to decisive action.<sup>427</sup> Despite Indian and non-Indian support for the bills and obvious failure under the 1965 Agreement, the federal government considered the proposed Ute settlement too costly. The cost was far above that of any other previous Indian water-related claims legislative settlement. Because the 1965 Agreement called for completion of the programs by 2005, the federal government had some breathing room for procrastination. The federal government's interest in proposed Indian claims settlements remained reactive, motivated only by pending litigation and mounting legal pressure for a settlement. Eventually, the parties got to a settlement point by the 102nd Congress.

Likewise, the proposed San Carlos Apache Tribe water rights settlement appeared to be a sound legislative initiative that was unfortunately shackled by the constraints of time. Although controversial issues such as the Ak-Chin provisions emerged during a full legislative process, House Bill 5539 was a solid foundation for a potential water rights claims settlement for the San Carlos Apache Tribe. And ultimately, again, Congress settled claims of the San Carlos Apache Tribe through legislation in the 102nd Congress.<sup>428</sup>

The fact that the 101st Congress passed Indian water-claims settlements for five Indian nations and only rejected two related bills is remarkable, and was by far the most progress that Congress had achieved in settling Indian water claims. The legislative maneuvering, resolution of controversial issues, and total cost allotment were very impressive. The 102nd Congress, in turn, completed the unfinished work of the 101st Congress.

Although subsequent legislative claims settlement initiatives have remained piecemeal in nature, and although there is no congressional appetite for the costs and complexities of comprehensive Indian natural resource claims settlement legislation, the trend toward real advancement continues. This trend reflects both a long-term federal interest in bringing closure to outstanding Indian natural resource claims, and a disdain for the cost and uncertainty inherent in judicial resolution.

Indeed, there have been dozens of Indian natural resource legislative settlements since the 101st Congress catalyzed the approach. The 102nd Congress passed the unfinished Ute and San Carlos Apache settlements, along with two other water settlements.<sup>429</sup> In fact, there were fourteen subsequent negotiated legislative claims settlements with Indian tribes as of

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427. 135 CONG. REC. H5400 (daily ed. Mar. 7, 1989) (statement of Rep. Howard C. Nielson).

428. GETCHES ET AL., *supra* note 2, at 823.

429. *Id.*

2010.<sup>430</sup> By 2010, legislative claims settlements affecting more than forty Indian tribes had been negotiated<sup>431</sup> involving more than \$1.1 billion in funding dollars.<sup>432</sup> Legislative claims settlements with Indian tribes “can be exceptions to the modern wisdom that the era of building large federal waters projects is over.”<sup>433</sup>

The prospects for comprehensive Indian natural resource claims settlement legislation may be slow going and incremental, but unresolved Indian natural resource claims must be addressed. As such, the federal government and involved local interests are incentivized to seek resolution, and legislative claims settlements are one viable option. For tribes, legislative settlements resolve uncertainties and save time, money and effort.<sup>434</sup>

An analysis of Indian water-related claims legislation over the past two decades reveals several patterns. The extinguishment of *Winters* claims hinges on the fulfillment of those rights or a substantial monetary settlement. If Indian nations cannot obtain full water rights along with their lease revenue potential, then they must receive a settlement fund to purchase such rights and/or generate income for the tribe. However, any piece of Indian claims legislation that appears expensive is too politically burdensome to pass Congress. Congress generally will not justify large settlement expenditures for a small population Indian nation.

The federal government would prefer to litigate and not pay any kind of settlement, but a claims bill that contains a federal payment of less than \$100 million is a tiny cost allocation in comparison with the enormous federal budget and helps avoid the political fallout associated with vetoing an Indian claims bill. The Indian claims bill becomes yet another small pork barrel project in the federal budget.<sup>435</sup> Federal representatives may voice opposition to the cost of a bill and then support it anyway, because “talking purse strings” is simply a negotiating strategy with Indian tribes and Congress.<sup>436</sup>

When the controversy surrounding an Indian claims bill is only a monetary debate over proportionality, the bill stands a good chance of being passed. But once a bill contains a costly settlement in excess of \$100

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430. *Id.* at 828-29.

431. *Id.* at 826.

432. *Id.* at 828-29.

433. *Id.* at 826.

434. *Id.* at 822.

435. Interview with Steven M. Tullberg, *supra* note 27.

436. *Id.*

million or includes controversial issues that are not intrinsically related to Indian water rights, it becomes linked to political baggage that overwhelms congressional focus.

In spite of these settlements, many Indian nations still remain without water rights settlements. Water is a “matter of life and death” in the West and over 400 Indian nations have not settled their *Winters* claims.<sup>437</sup> The federal government therefore needs to make a more broad-based effort to deal with American Indian water rights in general rather than slowly passing patchwork legislation. The political and economic costs of comprehensive American Indian water rights settlement would be enormous, but considering the amount of Indian nations with pending *Winters* litigation, the current legislative settlement pace is unacceptable from the standpoint of responsible fiscal management and resolution of contingent liabilities.

At a minimum, the amount of annual successful Indian water rights legislative settlements should increase. Tribes are able to use legislative settlements to deflect erosions in or attacks on tribal water rights, or as one weapon in the arsenal designed to obtain greater rights. For a few tribes, the benefits have been enormous; but the majority of American Indians do not reap the benefits of these settlements. At the early part of this century, Carlos Montezuma eerily predicted that if the federal government did not “heed and do what is right . . . they will have litigators . . . to contend with in the future because the next generation of Indians will be lawyers.”<sup>438</sup>

Another problem is with the federally preferred negotiation process itself. At the outset, it may appear that the government’s willingness to negotiate is nothing but good news for American Indian nations. However, a singular policy of negotiation can limit or compromise a tribe’s potential to litigate based on the *Winters* doctrine.<sup>439</sup> In addition, federal criteria for negotiation such as finality of pending court cases and a settlement that does not exceed legal risks are based on the assumption that there is pending litigation. In a classic Catch-22, tribal representatives must litigate to avoid litigation through a legislative settlement. The federal government calls the shots by determining what is controversial and what will stall the passing of a bill in legislative settlements, despite the fact that it is the American Indians who hold the legal upper hand — armed with the *Winters* doctrine. This paradox has caused lawyer Steven Tullberg to call the

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437. JONES, *supra* note 23, at 69.

438. IVERSON, *supra* note 90, at 122.

439. Zah, *supra* note 30, at 77.

*Winters* strategy a “wooden sword,” since the government possesses an even bigger sword than Congress’ plenary power to terminate recognition of Indian governments at will.<sup>440</sup> Indeed, some would argue that legislative claims settlements are simply the penultimate submission of tribes in the face of federal dominance.

The history of settlements between the federal government and Indian nations is a sorry one indeed, and there are certainly no assurances for the enactment or implementation of any future legislative settlements. Navajo Chairman Peter Zah notes, “The experience of the tribes which have reached settlements has been bad. Why should we follow that road, which forces us to give up our valuable water rights in return for paper projects which are never built.”<sup>441</sup>

Still, the federal government has indeed continued to peck away at American Indian natural resource claims legislative settlements on an as-necessary basis. The resolution of water rights allows Indian nations to continue the process of maintaining tribal self-sufficiency through the utilization of legal natural resource rights. Passamaquoddy leader John Stevens’ reaction to a land settlement that his Nation reached was, “Now we have a future, not just a past.”<sup>442</sup>

But the settlement of Indian water rights must progress faster. Although competing interests for water and federal money inhibit the pace of resolution, the federal government can take a more active role in initiating settlement legislation. Beyond Washington, there is a more pressing need than that of the political game, according to author John Folk-Williams:

The governments can argue endlessly about where the authority of one ends and that of the other begins, but the tribal members and the non-Indian citizens want to see a little more than that. They want to know that they have an economic and a cultural future securely based in careful water use and management.<sup>443</sup>

Representatives of the federal government did a good, albeit self-interested, job regarding Indian water-related claims for the Zuni, Fort McDowell Yavapai, Fort Hall, Pyramid Lake Paiute, Fallon Shoshone-Bannock, Ute, and San Carlos Apache Tribes in the 101st and 102nd Congress. Since then, Congress has continued legislative settlements,

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440. Interview with Steven M. Tullberg, *supra* note 27.

441. Richardson, *supra* note 24, at 79.

442. Robert H. White, *Indians’ New Harvest*, N.Y. TIMES, Nov. 22, 1990, at A27.

443. John A. Folk-Williams, *State and Indian Governments: Are New Relationships Regarding Water Possible?*, in INDIAN WATER 1985, *supra* note 16, at 72.

making inroads through the margins of the larger American Indian natural resource claims problem. But the federal government must defy historical patterns now by settling water and resource claims of more than 400 remaining American Indian nations.

