

# Articles

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## A Century of Uncertainty and the New Politics of Indian Water Settlements: How Tribes and States Can Overcome the Chilling Effect of the PAYGO Act

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## INTRODUCTION

Over a century has passed since the Supreme Court first recognized the Gros Ventre and Assiniboine Tribes' reserved water rights to the Milk River in the landmark case *Winters v. United States*.<sup>1</sup> The precedent established in *Winters* has benefitted numerous other tribes, who have used their reserved water rights as leverage to obtain favorable settlements in state water adjudications.<sup>2</sup> Now, the Gros Ventre and Assiniboine Tribes have themselves achieved a compromise with the State of Montana that would finally determine the extent of the Tribes' water rights after a century of uncertainty regarding the quantity of water to which they are entitled.<sup>3</sup> But the settlement faces a final obstacle—it must receive congressional approval and federal funding to provide water delivery systems for the Tribes in exchange for the Tribes' waiver of additional claims to the Milk River.<sup>4</sup> So far, Congress has approved twenty-seven Indian water settlements.<sup>5</sup> However, the Gros Ventre and Assiniboine Tribes and the State of Montana will face a greater challenge in obtaining approval than states and tribes faced in earlier settlements. The recently passed Pay-as-You-Go (PAYGO) Act<sup>6</sup> requires that congressional spending, including funding of Indian water settlements, be offset by reducing other spending or increasing revenue.<sup>7</sup>

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<sup>1</sup> 207 U.S. 564 (1908).

<sup>2</sup> See, e.g., Claims Resolution Act of 2010, H.R. 4783, 111th Cong. (2010) (enacted) (containing four settlements concerning seven tribes' *Winters* water rights).

<sup>3</sup> See Gros Ventre and Assiniboine Tribes of the Fort Belknap Indian Community Water Rights Settlement Act of 2013, S. 1394, 113th Cong. (2013). The settlement recognizes the Tribes' rights to 645 cubic feet per second of water under the *Winters* decision. *Id.* § 8(a)(1)(B)(i)(I).

<sup>4</sup> See *id.* § 10 (discussing waivers and releases of claims); *id.* § 11(c)(1), (j)(1) (providing for mandatory appropriations for water resources development).

<sup>5</sup> W. STATES WATER COUNCIL, SETTLEMENTS APPROVED BY CONGRESS (2011), available at <http://www.westgov.org/wswc/SETTABLE%202011%20%2808-15-11%29.pdf>.

<sup>6</sup> Pub. L. No. 111-139, 124 Stat. 8 (2010) (codified in scattered sections of 2 U.S.C.).

<sup>7</sup> 2 U.S.C. § 934(b) (2012) (requiring the President to issue an order to reduce direct spending programs to offset debit).

The requirements of the PAYGO Act could have a chilling effect on Indian water settlements,<sup>8</sup> which have provided a practical avenue for resolving bitter and lengthy litigation.<sup>9</sup> Thus, this article seeks to identify factors that will allow tribes to create the political momentum needed to obtain federal funding despite PAYGO requirements. After Part I provides a historical overview of Indian water rights settlements, Part II examines how the Supreme Court's jurisprudence on Indian reserved water rights has led to significant uncertainty and has thus given rise to "a strong trend favoring congressionally approved Indian water settlements."<sup>10</sup> Part III describes how Indian water settlements not only overcome the doctrinal uncertainty discussed in Part II but also provides a number of benefits to non-tribal and tribal parties that would not be achievable through litigation. Part IV then explains statutory PAYGO requirements. It also identifies factors contributing to the recent success tribes and states had in obtaining funding for four Indian water settlements while meeting PAYGO requirements. Part V applies these factors to determine how three recently proposed settlements, including the Gros Ventre and Assiniboine water rights settlement, may be able to overcome the obstacle of PAYGO.

## I

### THE LEGAL BACKGROUND OF INDIAN WATER RIGHTS SETTLEMENTS

The Supreme Court's decisions in the area of Indian reserved water rights have been sparse.<sup>11</sup> The Court has largely been willing to leave the adjudication of *Winters* water rights in the hands of state courts.<sup>12</sup>

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<sup>8</sup> See Ryan A. Smith, *Indian Water Settlements: Outlook for the 112th Congress and Beyond*, WATER REP., Aug. 15, 2011, at 2, 3–4.

<sup>9</sup> Robert T. Anderson, *Indian Water Rights, Practical Reasoning, and Negotiated Settlements*, 98 CALIF. L. REV. 1133, 1134 (2010).

<sup>10</sup> *Id.* at 1136.

<sup>11</sup> *Id.* "Over the past century, the Court has only handed down two substantive decisions on the nature and scope of Indian reserved water rights . . ." *Id.* (citing *Arizona v. California (Arizona I)*, 373 U.S. 546 (1963); *Winters v. United States*, 207 U.S. 564 (1908)). However, the Court has decided a number of procedural and jurisdictional questions surrounding tribal water rights. *Id.* (citing *United States v. Idaho*, 508 U.S. 1 (1993); *Arizona v. San Carlos Apache Tribe*, 463 U.S. 545 (1983); *Nevada v. United States*, 463 U.S. 110 (1983); *Arizona v. California*, 460 U.S. 605 (1983); *Colo. River Water Conservation Dist. v. United States*, 424 U.S. 800 (1976)).

<sup>12</sup> See *San Carlos Apache Tribe*, 463 U.S. at 567–70 (determining that federal courts may decline to exercise jurisdiction over a case concerning Indian reserved water rights when those rights are at issue in an ongoing general adjudication in state court); *Colo.*

This abdication of direct federal judicial oversight has destined the *Winters* doctrine to a lack of uniformity among states,<sup>13</sup> though federal circuit courts have at times weighed in on the matter.<sup>14</sup> Section A explores the unwieldy framework that has emerged from the few Supreme Court decisions on Indian reserved water rights. Section B then examines the federal trust duty in relation to tribal water rights to determine what obligation, if any, the federal government has to protect or develop tribal water.

### A. *The Law of Indian Reserved Water Rights*

Water rights derived from state law under the doctrine of prior appropriation are generally easier to adjudicate than *Winters* rights because state rights are oftentimes already registered with state agencies and quantified more easily through the doctrine of beneficial use.<sup>15</sup> Indian reserved water rights pose greater problems for states and private parties in adjudications for three reasons. First, Indian reserved rights generally take precedence over most other water rights because the reserved rights have the same priority date as the date the reservation was founded, or earlier for reserved aboriginal rights.<sup>16</sup> Second, Indian reserved rights are not subject to forfeiture under state law.<sup>17</sup> Third, they are not tied to actual beneficial use and are thus

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*River Water Conservation Dist.*, 424 U.S. at 810–12 (determining that the federal government's waiver of sovereign immunity under the McCarran Amendment for general adjudications permitted state courts to adjudicate Indian reserved water rights by suing the United States as a tribe's trustee); Michael C. Blumm et al., *The Mirage of Indian Reserved Water Rights and Western Streamflow Restoration in the McCarran Amendment Era: A Promise Unfulfilled*, 36 ENVTL. L. 1157, 1157–58 (2006).

<sup>13</sup> Compare *Big Horn River*, 753 P.2d 76, 100–01 (Wyo. 1988) (quantifying *Winters* rights based on practically irrigable acreage of the reservation), *aff'd sub nom. by an equally divided court*, *Wyoming v. United States*, 492 U.S. 406 (1989) (O'Connor, J., not participating), and *abrogated by Vaughn v. State*, 962 P.2d 149 (Wyo. 1998), and *State ex rel. Greely v. Confederated Salish & Kootenai Tribes*, 712 P.2d 754, 764 (Mont. 1985) (similarly using the Practically Irrigable Acreage (PIA) standard to quantify *Winters* rights), with *Gila River Sys. & Source*, 35 P.3d 68 (Ariz. 2001) (rejecting the PIA standard as a single-factor test and applying a flexible multi-factor analysis known as the "homeland" standard to quantify *Winters* rights).

<sup>14</sup> *E.g.*, *United States v. Adair*, 723 F.2d 1394 (9th Cir. 1983).

<sup>15</sup> See generally A. DAN TARLOCK, *LAW OF WATER RIGHTS AND RESOURCES* § 5:66 (2010) (discussing the prior appropriation system).

<sup>16</sup> *E.g.*, *Arizona I*, 373 U.S. at 600; *Adair*, 723 F.2d 1394; *Dep't of Ecology v. Yakima Reservation Irrigation Dist.*, 850 P.2d 1306 (Wash. 1993).

<sup>17</sup> See, *e.g.*, *United States v. City & Cnty. of Denver*, 656 P.2d 1, 34–35 (Colo. 1982) ("Federal reserved water rights are immune from Colorado's non-use requirement to the extent necessary to fulfill the purposes of the reservation.").

difficult to quantify.<sup>18</sup> Rather, they are quantified by determining the practically irrigable acreage of the reservation or, according to one court, by using an open-ended, multiple-factor test.<sup>19</sup>

The history of Indian federal reserved water rights begins with the landmark case, *Winters*.<sup>20</sup> In *Winters*, the federal government sought to enjoin, on behalf of the tribes that resided in the Fort Belknap Reservation, diversions of water from the Milk River by settlers upstream of the reservation.<sup>21</sup> Although the settlers had invested heavily in and relied on these diversions,<sup>22</sup> the settlers' reliance interests did not affect the Court's analysis. The Supreme Court concluded that by creating the Fort Belknap Reservation, the federal government had impliedly reserved an amount of water sufficient to fulfill the purpose of the reservation.<sup>23</sup> The Court emphasized that without this water, the land would be "a barren waste."<sup>24</sup> To reach this conclusion, the Court relied on the Indian canon of interpretation that a court should interpret an agreement based on how tribes would have understood it.<sup>25</sup> The Court, therefore, determined that the tribes retained significant water rights under the treaty and accordingly affirmed an injunction on the settlers' diversions.<sup>26</sup>

Fifty-five years later in *Arizona v. California*, the Court set out a standard for quantification of *Winters* water rights for land that was useful for irrigation and agriculture.<sup>27</sup> Agreeing with the water master in that case, the Court adopted the practicably irrigable acreage (PIA) standard.<sup>28</sup> Under the PIA standard, a tribe is generally entitled to

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<sup>18</sup> Robert T. Anderson, *Indian Water Rights and the Federal Trust Responsibility*, 46 NAT. RESOURCES J. 399, 414 (2006) (citing *United States v. Walker River Irrigation Dist.*, 104 F.2d 334, 338–39 (9th Cir. 1939)).

<sup>19</sup> *Gila River Sys. & Source*, 35 P.3d 68, 79–81 (Ariz. 2001).

<sup>20</sup> *Winters v. United States*, 207 U.S. 564 (1908).

<sup>21</sup> *Id.* at 565.

<sup>22</sup> *Id.* at 569.

<sup>23</sup> *Id.* at 575–78. Alternatively, some language in *Winters* indicates that the Indians already had these water rights and that congressional action was required to usurp these water rights. Anderson, *supra* note 9, at 1142; *see also Winters*, 207 U.S. at 576 ("The Indians had command of the . . . waters . . . of all their beneficial use, whether kept for hunting, 'and grazing roving herds of stock,' or turned to agriculture and the arts of civilization. Did they give up all this?").

<sup>24</sup> *Winters*, 207 U.S. at 577.

<sup>25</sup> *Id.* at 576–77.

<sup>26</sup> *Id.* at 578.

<sup>27</sup> 373 U.S. 546 (1963).

<sup>28</sup> *Id.* at 600–01.

water that it has used or could use to irrigate lands that are reasonably capable of sustaining agriculture.<sup>29</sup> Thus, to determine a tribe's reserved rights, the standard took into account a tribe's present and future needs for water.<sup>30</sup> The Court also rejected Arizona's contention that Indian water rights should be limited to only "reasonably foreseeable needs" based on the population of the reservation.<sup>31</sup> Because it remained uncertain how many Indians would be present on the reservation in the future, using irrigable acreage provided more certainty in measuring water rights.<sup>32</sup> Had the Court determined that *Winters* water rights expanded as the population grew, it would have been impossible for parties to determine how much water is available for appropriation in the future.<sup>33</sup>

In *Wyoming v. United States*,<sup>34</sup> the Supreme Court could have revisited the PIA standard for quantification. After the Wyoming Supreme Court used the PIA standard to quantify and award substantial Indian reserved water rights in the Big Horn adjudication,<sup>35</sup> the State appealed to the Supreme Court and argued that the PIA standard should be discarded because it gave tribes an "unjustified windfall."<sup>36</sup> After oral argument, however, Justice O'Connor recused herself from the case, leading to an affirmance without an opinion by an equally divided Court.<sup>37</sup> Researchers later obtained a draft of what would have been Justice O'Connor's opinion<sup>38</sup> for the majority position.<sup>39</sup> In this draft opinion, Justice O'Connor would have significantly revised the PIA standard by factoring in non-Indian expectations when quantifying *Winters* water

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<sup>29</sup> See *Gila River Sys. & Source*, 35 P.3d 68, 81 (Ariz. 2001); *Big Horn River*, 753 P.2d 76, 101 (Wyo. 1988); Andrew C. Mergen & Sylvia F. Liu, *A Misplaced Sensitivity: The Draft Opinions in Wyoming v. United States*, 68 U. COLO. L. REV. 683, 696 (1997).

<sup>30</sup> *Arizona I*, 373 U.S. at 600.

<sup>31</sup> *Id.* at 600–01.

<sup>32</sup> *Id.* at 601.

<sup>33</sup> Anderson, *supra* note 9, at 1143.

<sup>34</sup> 492 U.S. 406 (1989).

<sup>35</sup> *Big Horn River*, 753 P.2d 76, 101–12 (Wyo. 1988).

<sup>36</sup> Charles Carvell, *Indian Reserved Water Rights: Impending Conflict or Coming Rapprochement Between the State of North Dakota and North Dakota Indian Tribes*, 85 N.D. L. REV. 1, 34 (2009).

<sup>37</sup> *Wyoming*, 492 U.S. at 407. Justice O'Connor recused herself after learning that her family's ranch was involved in a water adjudication in Arizona that concerned Indian water rights. Carvell, *supra* note 36.

<sup>38</sup> Mergen & Liu, *supra* note 29, at app. (reprinting Justice O'Connor's draft opinion).

<sup>39</sup> Carvell, *supra* note 36; Mergen & Liu, *supra* note 29, at 704.

rights.<sup>40</sup> Additionally, Justice O'Connor reasoned that practically irrigable acreage should be determined based on "a 'practical' assessment . . . of the reasonable likelihood that future irrigation projects . . . will actually be built."<sup>41</sup> Justice O'Connor's approach to quantification has become known as the "Sensitivity Doctrine" because it emphasizes sensitivity to non-Indian expectations.<sup>42</sup> Although the draft opinion lacks precedential effect, private parties have used similar arguments in litigation to minimize *Winters* water rights. Some courts have been willing to consider these arguments.<sup>43</sup> Indeed, the Arizona Supreme Court seemed to approve of the Sensitivity Doctrine when it stated that tailoring a tribe's reserved water rights to its minimal need "demonstrates appropriate sensitivity and consideration of existing users' water rights."<sup>44</sup>

In contrast to the Supreme Court's standard for quantifying Indian water rights based on practically irrigable acreage, the Court has been more willing to limit federal reserved water rights when the water will be used for federal (nontribal) purposes.<sup>45</sup> In *Cappaert v. United States*, the Court recognized the federal government's reserved water rights to maintain habitat for a fish species at a national monument.<sup>46</sup> It concluded, however, that the water right should be tailored to the federal government's "minimal need."<sup>47</sup> In *United States v. New*

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<sup>40</sup> Carvell, *supra* note 36, at 33–34; *see also* Gila River Sys. & Source, 35 P.3d 68, 81 (Ariz. 2001) (recognizing litigants' arguments that "courts should act with sensitivity toward existing state water users when quantifying tribal water rights").

<sup>41</sup> Mergen & Liu, *supra* note 29, at app. at 738 (reprinting Justice O'Connor's draft opinion).

<sup>42</sup> Barbara A. Cosens, *The Measure of Indian Water Rights: The Arizona Homeland Standard, Gila River Adjudication*, 42 NAT. RESOURCES J. 835, 849 n.74 (2002) ("Although the majority opinion does not use the term 'sensitivity,' [the majority opinion] is considered the source of the Sensitivity Doctrine."). However, non-Indian expectations may not be justified insofar as non-Indians encouraged or were aware of encroachment on Indian rights and thus may not be worthy of "sensitivity." *See* Ann E. Tweedy, *Unjustifiable Expectations: Laying to Rest the Ghosts of Allotment-Era Settlers*, 36 SEATTLE U. L. REV. 129, 187–89 (2012) (rejecting non-Indian expectations as unjustified in the context of tribal jurisdiction); *see also* Ezra Rosser, *Protecting Non-Indians from Harm? The Property Consequences of Indians*, 87 OR. L. REV. 175, 218–19 (2008) (questioning the innocence of non-Indian expectations and emphasizing courts' roles in forming those expectations through the rule of law).

<sup>43</sup> *See* Gila River Sys. & Source, 35 P.3d at 81.

<sup>44</sup> *Id.*

<sup>45</sup> *See* *United States v. New Mexico*, 438 U.S. 696 (1978); *Cappaert v. United States*, 426 U.S. 128 (1976).

<sup>46</sup> *Cappaert*, 426 U.S. at 138–42.

<sup>47</sup> *Id.* at 141.

*Mexico*, Justice Rehnquist, writing for a majority of the Court, followed *Cappaert*'s lead and narrowly construed a non-Indian reserved water right for a national forest.<sup>48</sup> The Court limited the federal government's water right to only the water required to support the primary purpose of the reservation, which was, in that case, to promote nearby mining and industry.<sup>49</sup>

The Court in *Cappaert* and *New Mexico* gave no indication that the reasoning in those cases should apply to Indian reserved water rights. Indeed, scholars have noted that the narrow approach in *New Mexico* should be less applicable in the context of Indian reserved water rights because the Indian canons of construction require resolution of ambiguities in favor of tribes.<sup>50</sup> Since Indian reserved water rights are usually based on a tribe's reservation of water in treaties and executive orders, the quantification of these rights should be interpreted broadly in favor of tribes, the same way other ambiguities in treaties are interpreted under the Indian canons.<sup>51</sup> Limiting water rights to the "minimal need" of an Indian reservation or applying a narrow reading of the "primary purpose" standard to Indian reservations would be contrary to these canons.

Nevertheless, the "narrowing trend in the non-Indian reserved rights cases" has at times "infected the Indian reserved rights area with some uncertainty."<sup>52</sup> Some courts have been willing to extend the *New Mexico* and *Cappaert* precedent to Indian reserved water rights cases.<sup>53</sup> In *United States v. Adair*, for example, the Ninth Circuit stated that *New Mexico* and *Cappaert* provide "useful guidelines" in analyzing a claim for Indian reserved water rights.<sup>54</sup> The *Adair* court adopted a similar standard to the *Cappaert* Court's "minimal need" approach and determined that the tribe in that case was only entitled to enough water to support a "moderate living."<sup>55</sup>

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<sup>48</sup> 438 U.S. at 701–02, 712, 718. Thus, water rights for "secondary" purposes of a federal reservation would have to be acquired under state law. *Id.* at 701.

<sup>49</sup> *Id.* at 701–02, 712, 718.

<sup>50</sup> See, e.g., Anderson, *supra* note 9, at 1151.

<sup>51</sup> See *id.*

<sup>52</sup> Robert T. Anderson, *Indian Water Rights: Litigation and Settlements*, 42 TULSA L. REV. 23, 26 (2006).

<sup>53</sup> See *United States v. Adair*, 723 F.2d 1394, 1408–09 (9th Cir. 1983).

<sup>54</sup> *Id.* at 1408.

<sup>55</sup> *Id.* at 1415 (extending *Washington v. Wash. State Commercial Passenger Fishing Vessel Ass'n*, 443 U.S. 658, 686 (1979)); see also Carvell, *supra* note 36, at 33 (discussing potential application of the "moderate living" standard in quantifying Indian reserved water rights).

Although the Arizona Supreme Court rejected application of the *New Mexico* primary purpose test to the Indian reserved water rights, it nevertheless applied other principles established in non-Indian reserved rights cases, such as the “minimal need” standard in *Cappaert*, to quantify Indian water rights.<sup>56</sup>

In addition to tailoring a tribe’s water rights to its minimal need, the Arizona Supreme Court also rejected application of the PIA standard as a single-factor test.<sup>57</sup> To effectuate a reservation’s purpose of providing a homeland for tribes, the court adopted a “more flexible analysis, which takes modern circumstances into account and permits courts in some cases to award less water than is demonstrated under the PIA measure.”<sup>58</sup> The Arizona court’s approach demonstrates that state courts will often find ways to limit Indian water rights when the local economy is at risk.<sup>59</sup> Still, at least one tribe has creatively used the Arizona court’s “homeland purpose” analysis to seek a larger water right than the PIA standard might have supported.<sup>60</sup> The tribe argued that the court should “find sufficient water was reserved to provide for all domestic, agricultural, community, commercial, and industrial purposes.”<sup>61</sup>

Although quantification remains the dominant source of uncertainty in Indian water law,<sup>62</sup> other legal issues include whether *Winters* rights apply to groundwater and include a water quality component. At least one court concluded that the *Winters* doctrine does indeed apply to groundwater rights, but that a federal reserved groundwater right should only be recognized when surface water is insufficient to support the reservation’s need.<sup>63</sup> Another court has determined that water rights generally, and therefore Indian reserved

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<sup>56</sup> *Gila River Sys. & Source*, 35 P.3d 68, 77 & n.6, 80, 81 (Ariz. 2001).

<sup>57</sup> *Id.* at 79.

<sup>58</sup> Anderson, *supra* note 18, at 427; *see Gila River Sys. & Source*, 35 P.3d at 79–81.

<sup>59</sup> *See Blumm et al.*, *supra* note 12, at 1158.

<sup>60</sup> *United States v. Washington*, 375 F. Supp. 2d 1050, 1062 (W.D. Wash. 2005), *vacated pursuant to settlement sub nom. U.S. ex rel. Lummi Indian Nation v. Washington*, No. C01-0047Z, 2007 WL 4190400 (W.D. Wash. Nov. 20, 2007).

<sup>61</sup> *Id.*

<sup>62</sup> *See Anderson*, *supra* note 9, at 1148–49.

<sup>63</sup> *In re Gen. Adjudication of All Rights to Use Water in Gila River Sys. & Source*, 989 P.2d 739, 748 (Ariz. 1999); *see also Cappaert v. United States*, 426 U.S. 128, 142–43 (1976) (determining that a plaintiff could protect a federal reserved water right from harm due to groundwater withdrawals by obtaining an injunction preventing the withdrawals).

water rights, have an enforceable water quality component.<sup>64</sup> Accordingly, that court permitted a tribe to pursue an injunction against irrigation districts whose practices increased the normal salinity of river water, harming the tribe's ability to irrigate and grow certain salt-sensitive crops.<sup>65</sup>

In addition to *Winters* water rights, a tribe may have aboriginal water rights as the Ninth Circuit and the Washington Supreme Court recognized in *Adair*<sup>66</sup> and *Acquavella*,<sup>67</sup> respectively. In contrast to *Winters* rights, which have a priority date equal to the execution date of the treaty, executive order, statute, or agreement recognizing the reservation, aboriginal water rights have a priority date of time immemorial.<sup>68</sup> Thus, while it is possible for some non-Indian water rights to have a priority date earlier than a treaty or similar agreement, aboriginal water rights predate all other rights, including other federal reserved rights. Aboriginal rights, however, may pose less of a threat to other water users because they are unlikely to constitute out-of-stream, consumptive uses.<sup>69</sup> Indeed, both the *Adair* and *Acquavella* courts recognized aboriginal water rights to support hunting and fishing.<sup>70</sup>

A tribe's entitlement to reserved or aboriginal water rights does not, however, guarantee that the tribe will be able to obtain the water or protect it from encroachment by other water users. Thus, tribes have at times invoked the federal trust duty to seek the federal government's help in developing and enforcing their water rights. These efforts have yielded mixed results.

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<sup>64</sup> See *United States v. Gila Valley Irrigation Dist.*, 920 F. Supp. 1444, 1454–55 (D. Ariz. 1996), *aff'd*, 117 F.3d 425 (9th Cir. 1997).

<sup>65</sup> *Id.*

<sup>66</sup> *United States v. Adair*, 723 F.2d 1394, 1414 (9th Cir. 1983).

<sup>67</sup> *Dep't of Ecology v. Yakima Reservation Irrigation Dist.*, (Acquavella) 850 P.2d 1306, 1310 (Wash. 1993).

<sup>68</sup> *Adair*, 723 F.2d at 1414; *Yakima Reservation Irrigation Dist.*, 850 P.2d at 1310.

<sup>69</sup> Mike O'Hagan, *Ciotti II - Better to Adjudicate than Litigate*, 23 PUB. LAND & RESOURCES L. REV. 193, 198 (2002) ("Unlike *Winters* rights, *Adair* rights are generally nonconsumptive . . .").

<sup>70</sup> *Adair*, 723 F.2d at 1414; *Yakima Reservation Irrigation Dist.*, 850 P.2d at 1310. Note, however, that some tribes, such as the Hohokam tribe in Central Arizona, prehistorically used large canal systems, thus making it possible that these tribes could claim significant aboriginal out-of-stream water rights for agricultural purposes. See, e.g., ENVIRONMENTAL CHANGE AND HUMAN ADAPTATION IN THE ANCIENT AMERICAN SOUTHWEST 80 (David E. Doyel & Jeffrey S. Dean eds., 2006).

### B. The Trust Duty in Relation to Water Rights

Generally, “tribal water rights form part of the trust corpus protected by the federal-tribal trust relationship.”<sup>71</sup> Indeed, in congressionally approved water right settlement acts, legislators commonly referred to water rights as “held in trust” for tribes.<sup>72</sup> For example, the Western Water Policy Review Act of 1992 stated that “the Federal Government recognizes its trust responsibilities to protect Indian water rights and assist Tribes in the wise use of those resources.”<sup>73</sup> The Department of the Interior has similarly acknowledged, in guidelines concerning Indian water rights settlements, that “Indian water rights are vested property rights for which the United States has a trust responsibility, with the United States holding legal title to such water in trust for the benefit of the Indians.”<sup>74</sup> Cases also indicate that water rights are included in the trust relationship between the United States and the tribes.<sup>75</sup>

Despite the government’s recognition of its trust responsibility with respect to tribal water rights, this responsibility is not always enforceable in an action for damages<sup>76</sup> or for injunctive relief.<sup>77</sup> For a federal trust duty to be enforceable in an action for damages, there must be “a comprehensive statutory/regulatory scheme giving the

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<sup>71</sup> Judith V. Royster, *Indian Water and the Federal Trust: Some Proposals for Federal Action*, 46 NAT. RESOURCES J. 375, 375 (2006); see generally Erin B. Agee, Note, *In the Federal Government We Trust? Federal Funding for Tribal Water Rights Settlements and the Taos Pueblo Indian Water Rights Settlement Act*, 21 CORNELL J.L. & PUB. POL’Y 201, 211–14 (2011).

<sup>72</sup> Royster, *supra* note 71, at 376 (citing Gila River Indian Community Water Rights Settlement Act of 2004, Pub. L. No. 108-451, tit. II, § 204(a)(2), 118 Stat. 3478, 3502; Snake River Water Rights Act of 2004, Pub. L. No. 108-447, div. J, tit. X, § 7(a)(1)(A), 118 Stat. 2809, 3434; Confederated Tribes of the Warm Springs Reservation Water Rights Settlement Agreement, 1997, art. IV, § B, Pub. L. No. 107-102, § 2(a), 115 Stat. 974, 974).

<sup>73</sup> Reclamation Projects Authorization and Adjustment Act of 1992, Pub. L. No. 102-575, § 3002(9), 106 Stat. 4600, 4694 (codified by reference at 43 U.S.C. § 371 (2000)).

<sup>74</sup> Working Group in Indian Water Settlements; Criteria and Procedures for the Participation of the Federal Government in Negotiations for the Settlement of Indian Water Rights Claims, 55 Fed. Reg. 9223 (Dep’t of Interior Mar. 12, 1990).

<sup>75</sup> See Royster, *supra* note 71, at 376–77 (citing *Fort Mojave Indian Tribe v. United States*, 23 Cl. Ct. 417, 426 (1991) and *Pyramid Lake Paiute Tribe of Indians v. Morton*, 354 F. Supp. 252 (D.D.C. 1972)) (stating that “the government, as trustee, has a duty to preserve” tribal water rights). *But see* *Grey v. United States*, 21 Cl. Ct. 285 (1990), *aff’d*, 935 F.2d 281 (Fed. Cir. 1991) (determining that government had no duty to help allottees deliver water to allotted lands).

<sup>76</sup> Royster, *supra* note 71, at 379. Note that a tribe may, however, recover damages for loss of water rights. *Id.*

<sup>77</sup> *Shoshone Bannock Tribes v. Reno*, 56 F.3d 1476, 1478 (D.C. Cir. 1995).

government full control, or a textual source establishing that the resources are held in trust, along with actual federal control of the resource.”<sup>78</sup> Because “[t]here is no scheme imposing comprehensive duties on the Secretary of the Interior to manage tribal water,” some scholars have concluded that the government has only a “limited trust” relationship with tribes concerning management of tribal water rights.<sup>79</sup> Further, even where a tribal water right exists, actual federal control over the resource is lacking because “the Government does not manage tribal water resources on a day-to-day basis.”<sup>80</sup> Indeed, the claims court determined that the federal government has no duty to develop infrastructure to provide water to tribes.<sup>81</sup> More recently, the Ninth Circuit denied injunctive relief to the Gros Ventre Tribe when it sued the federal government for breaching its trust duty by authorizing mining operations that would pollute water to which the Tribe held rights.<sup>82</sup> Courts have, however, indicated that the federal government might be held liable for improperly diminishing tribal water rights if the representation was inadequate.<sup>83</sup> Nevertheless, most cases and scholarship indicate that the federal trust duty is not an effective tool to compel the federal government to proactively protect or promote Indian access to water. Still, in the legislative arena, the

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<sup>78</sup> Royster, *supra* note 71, at 379–80 (citing *United States v. White Mountain Apache Tribe*, 537 U.S. 465, 473–75 (2003); *United States v. Mitchell*, 463 U.S. 206, 224–25 (1983)); *see also* *United States v. Navajo Nation*, 556 U.S. 287, 296–301 (2009); *United States v. Navajo Nation*, 537 U.S. 488, 503 (2003).

<sup>79</sup> Nell Jessup Newton, *Indian Claims in the Courts of the Conqueror*, 41 AM. U. L. REV. 753, 807 (1992).

<sup>80</sup> *Id.*

<sup>81</sup> *Salt River Pima-Maricopa Indian Cmty. v. United States*, 26 Cl. Ct. 201, 204 (1992) (“Due to the much higher level of control the Indians . . . exercise over their lands, no fiduciary obligation or trust relationship attaches with respect to the delivery of water to those lands.”); *Grey v. United States*, 21 Cl. Ct. 285, 293 (1990) (“[T]he General Allotment Act does not impose any duty on the Government to manage the water on each individual allotment.”).

<sup>82</sup> *Gros Ventre Tribe v. United States*, 469 F.3d 801, 803, 815 (9th Cir. 2006); *see also* *Shoshone Bannock Tribes*, 56 F.3d at 1478.

<sup>83</sup> *See Arizona v. California*, 460 U.S. 605, 628 n.20 (1983) (“[I]n an appropriate case the Tribes’ remedy for inadequate representation by the Government may lie in the Court of Claims.”), *decision supplemented by* 466 U.S. 144 (1984); *In re Gen. Adjudication of All Rights to Use Water In Gila River Sys. & Source*, 127 P.3d 882, 901 n.21 (Ariz. 2006). For a comprehensive discussion of the San Carlos Apache Tribe water rights litigation, see Daniel Lee, *Statutes of Ill Repose and Threshold Canons of Construction: A Unified Approach to Ambiguity After San Carlos Apache Tribe v. United States*, 36 SEATTLE U. L. REV. 1997 (2013) and Daniel Lee & Jacob J. Stender, *An Unreserved Attack on Reserved Water Rights: The Story of the San Carlos Apache Tribe’s Water Rights (or Lack Thereof)*, 1 AM. INDIAN L.J. 413 (2013).

government's trust duty has provided a strong basis for favoring federal support of Indian water rights, including congressional funding of Indian water settlements.<sup>84</sup>

## II

### THE MULTILATERAL BENEFITS OF INDIAN WATER RIGHTS SETTLEMENTS

States, tribes, private parties, and the federal government can all avoid much of the doctrinal confusion discussed in Part I by settling Indian water rights claims.<sup>85</sup> First, parties can avoid the uncertainty of what quantification standard a court might apply to Indian water rights, be it the PIA standard, the homeland purpose test, or yet another standard. Even if a state has already chosen to adhere to the PIA standard or the homeland purpose test, settlement avoids the substantial uncertainty surrounding whether a court would determine that land is reasonably irrigable under the PIA standard, or how a court would apply the malleable factors of the homeland purpose test. Second, settlement avoids the uncertainty of whether a court would apply the Sensitivity Doctrine to limit a tribe's water rights. Third, it avoids potential confusion over whether to follow the minimalist approach in *Cappaert* or the primary-purpose test in *New Mexico*. Finally, instead of relying on the limited precedent on the water quality component of reserved water rights and the application of the *Winters* doctrine to groundwater, settling parties can specifically address groundwater and water quality issues as a part of the settlement.<sup>86</sup>

Reducing these legal uncertainties through settlement benefits all parties involved. While tribes avoid the possibility of a court taking a narrow approach to these issues, private parties and states avoid determinations of tribal water rights that substantially reduce the amount of water available to non-Indian parties. Other shared benefits of settlement include reducing the time and cost of litigation for all

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<sup>84</sup> See Royster, *supra* note 71, at 375–76; Smith, *supra* note 8, at 5.

<sup>85</sup> See John B. Weldon, Jr. & Lisa M. McKnight, *Future Indian Water Settlements in Arizona: The Race to the Bottom of the Waterhole?*, 49 ARIZ. L. REV. 441, 449, 460 (2007) (discussing negotiated settlements that avoided the uncertainty of litigation).

<sup>86</sup> See Judith V. Royster, *Indian Tribal Rights to Groundwater*, 15 KAN. J.L. & PUB. POL'Y 489, 500–01 (2006) (“Of the twenty or so water settlement acts since 1978, more than half contain some provisions concerning tribal rights to groundwater.”); Judith V. Royster, *A Primer on Indian Water Rights: More Questions Than Answers*, 30 TULSA L.J. 61, 85, 100 (1994) (discussing water quality).

parties, including the federal government, which has a trust responsibility to represent tribes in water adjudications.<sup>87</sup> Without settlement, the costs of litigation and time delay can be substantial. For example, more than thirty years after *Acquavella* was filed and after numerous decisions by the Washington Supreme Court, there has still been no final decree for the Yakima River adjudication.<sup>88</sup>

Settlements also provide a number of benefits that are unique to the different parties involved. Private parties and states may favor settlement because tribes are usually willing to reduce their claims in part or agree to lease tribal water rights for a period of time to nontribal entities in return for infrastructure funding.<sup>89</sup> Thus, settlements often free up significant amounts of water for private users. Settlement can also provide federal approval of tribal water marketing, which protects the interests of municipalities that can then lease tribal water to satisfy the needs of growing communities.<sup>90</sup> Without a federally approved settlement, the Nonintercourse Act's ban on real estate transactions between tribes and states could prevent a municipality from buying or leasing the rights.<sup>91</sup> Thus, water marketing provides a "means of ensuring that water is put to the most economic and beneficial use."<sup>92</sup>

The federal government should also prefer settlement to litigation because waivers included in the settlement can shield the federal government from liability for a failure to fulfill treaty, statutory, or contractual duties. Although tribes have generally been unsuccessful in obtaining damages for the federal government's failure to develop tribal water rights, the government's improper diminishment of water rights remains an area of potential liability.<sup>93</sup> A settlement provides the federal government an avenue to fulfill its obligations as a trustee

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<sup>87</sup> See *Indian Water Rights: Promoting the Negotiation and Implementation of Water Settlements in Indian Country: Hearing Before the S. Comm. on Indian Affairs*, 112th Cong. 1 (2012) [hereinafter *Hearing*], available at <http://www.gpo.gov/fdsys/pkg/CHRG-112shrg75973/pdf/CHRG-112shrg75973.pdf>.

<sup>88</sup> Jeff Kray, *Acquavella—Washington's 36-Year Old Water Rights Adjudication Nears an End*, MARTEN L. (Apr. 16, 2013), <http://www.martenlaw.com/newsletter/20130416-acquavella-adjudication-near-end#sthash.GHu8V7a9.dpuf>.

<sup>89</sup> Smith, *supra* note 8, at 2.

<sup>90</sup> *Hearing*, *supra* note 87, at 38, 41 (statement of Judith V. Royster, Professor/Co-Director, Native American Law Center).

<sup>91</sup> 25 U.S.C. § 177 (2006).

<sup>92</sup> *Hearing*, *supra* note 87, at 41 (statement of Judith V. Royster, Professor/Co-Director, Native American Law Center).

<sup>93</sup> See *supra* notes 81–83 and accompanying text.

by funding or building infrastructure to provide tribes with the water to which they hold rights.

Conversely, tribes benefit from settlements because settlements often provide for federal infrastructure funding and other authorizations, while even successful litigation would leave a tribe with nothing more than a “paper water right” that does not help the tribes physically secure water.<sup>94</sup> Using the leverage of unquantified *Winters* rights in a settlement, tribes can convert paper rights into “wet” water rights by obtaining federal funding for water delivery systems.<sup>95</sup> Tribes can also tailor settlements to their specific needs even when these needs would usually be outside the scope of litigation in a general adjudication.<sup>96</sup> For example, tribes have used settlements to bypass a moratorium that the Secretary of the Interior placed on approval of tribal water codes in 1975.<sup>97</sup> Additionally, tribes can use settlements to “facilitate agreements with neighboring private parties, create protections for tribal fisheries and wetlands, enact conservation measures for urban users, resolve co-existing non-water issues, deliver cash for tribal development, and establish water banking provisions.”<sup>98</sup>

Moreover, these settlements have intangible but significant benefits for all parties in that they foster collaboration, unlike the adversarial process of litigation.<sup>99</sup> In the long history of abrogation, diminishment, and encroachment on tribal rights, this cooperation may be invaluable in reconciling states with tribes. Due to the new requirements of PAYGO, political cooperation is now more crucial than ever in achieving the common goal of obtaining congressional approval.

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<sup>94</sup> See Agee, *supra* note 71, at 212 (citing FELIX S. COHEN, HANDBOOK OF FEDERAL INDIAN LAW § 19.05[2], at 1219 (Nell Jessup Newton et al. eds., 2005)).

<sup>95</sup> *Hearing*, *supra* note 87, at 40 (statement of Judith V. Royster, Professor/Co-Director, Native American Law Center).

<sup>96</sup> *Id.* at 41.

<sup>97</sup> *Id.*; Royster, *supra* note 71, at 383–84. The moratorium was implemented in anticipation of regulations that were never issued. *Id.* “At least six water rights settlement acts authorize or require the tribes to adopt water codes.” *Id.* at 383.

<sup>98</sup> Agee, *supra* note 71, at 212 (citing John E. Thorson et al., *Dividing Western Waters: A Century of Adjudicating Rivers and Streams, Part II*, 9 U. DENV. WATER L. REV. 299, 407 (2006)).

<sup>99</sup> *Hearing*, *supra* note 87, at 26 (statement of Maria O’Brien, Legal Committee Chair, Western States Water Council).

## III

## INDIAN WATER SETTLEMENTS IN THE ERA OF PAYGO

Despite the substantial benefits that Indian water settlements offer to all parties involved, they face significant obstacles in obtaining congressional approval. Section A below explains one of the largest obstacles for Indian water settlements: meeting PAYGO Act requirements that new legislation offset direct spending by diminishing other spending or otherwise increasing revenues. Section B explores one recent success story in the passage of the Claims Resolution Act of 2010, which included four Indian water settlements, garnered widespread political support, and met PAYGO requirements.

*A. Requirements of the PAYGO Act*

Without the significant incentive of federally funded water delivery systems, tribes may opt to forego settlement. The PAYGO Act makes it more difficult to obtain federal funding, thus threatening future Indian water settlements. The PAYGO Act<sup>100</sup> requires that “any direct spending and revenue provisions in a bill not increase the federal deficit.”<sup>101</sup> Direct spending “includes federal government spending on entitlement programs as well as other budget outlays controlled by laws other than appropriation acts.”<sup>102</sup> Direct spending provisions automatically make funding available for the designated purpose and are not contingent on provision of the funding in an appropriations act.<sup>103</sup> However, direct spending need not be accompanied by other spending reductions under PAYGO if the spending is designated as “emergency legislation.”<sup>104</sup>

The PAYGO Act does not place the same limitations on legislation that “merely authorizes an appropriation” but “does not actually appropriate any funds.”<sup>105</sup> After passing the initial authorization act, Congress may or may not provide for the funding in a later appropriations act.<sup>106</sup> Appropriations acts are legislation that fund

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<sup>100</sup> Pub. L. No. 111-139, 124 Stat. 8 (2010) (codified beginning at 2 U.S.C. § 931 and scattered sections thereafter).

<sup>101</sup> Smith, *supra* note 8, at 3.

<sup>102</sup> *Id.* (quoting D. ANDREW AUSTIN & MINDY LEVIT, CONG. RESEARCH SERV., RL33074, MANDATORY SPENDING SINCE 1962, at 1 (2010)).

<sup>103</sup> *Id.*

<sup>104</sup> 2 U.S.C. § 933(g) (2012).

<sup>105</sup> Smith, *supra* note 8, at 3.

<sup>106</sup> *Id.*

“routine activities commonly associated with such federal government functions as running executive branch agencies, congressional offices and agencies, and international operations of the government.”<sup>107</sup> Because legislation that authorizes spending does not immediately appropriate funds, it essentially defers the necessity of meeting PAYGO requirements until Congress passes later appropriation acts and actually releases the funds.<sup>108</sup> Nevertheless, political pressure may force legislators to offset authorization as well as direct spending at the time of a settlement’s passage, or forego both authorization and direct spending.<sup>109</sup> Despite political pressure to offset authorization and the PAYGO Act’s requirements for offsetting direct spending, a number of tribes were able to obtain federal funding for Indian water settlements in the Claims Resolution Act of 2010.

### *B. One Success Story: The Claims Resolution Act of 2010*

In compliance with PAYGO requirements, Congress passed the Claims Resolution Act of 2010, which incorporated four Indian water rights settlements and two unrelated settlements, and included both direct spending and authorizations.<sup>110</sup> To meet PAYGO requirements, Congress offset the direct spending by “(1) reduc[ing] [other] federal direct spending by approximately \$4.9 billion from 2011-2020 by reforming the Unemployment Compensation Program; and (2) increas[ing] revenue to the US Treasury by approximately \$2 billion by extending Customs Users Fees.”<sup>111</sup> According to an estimate from the Congressional Budget Office, the Claims Resolution Act will actually “reduce the federal deficit by \$1 million within the 10-year budget window notwithstanding the direct spending contained in the bill.”<sup>112</sup>

Even with these offsets, it is possible that the Act would not have gone through but for a number of other factors. The inclusion of

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<sup>107</sup> *Id.* (quoting D. ANDREW AUSTIN, CONG. RESEARCH SERV., RL34424, TRENDS IN DISCRETIONARY SPENDING 1 (2009)).

<sup>108</sup> *See* 2 U.S.C. § 934(b) (requiring that the President consider budget debit only for the current year in enforcing PAYGO requirements).

<sup>109</sup> Smith, *supra* note 8, at 3.

<sup>110</sup> Claims Resolution Act of 2010, Pub. L. No. 111–291, 124 Stat. 3064.

<sup>111</sup> Smith, *supra* note 8, at 3.

<sup>112</sup> *Id.* To gain support from certain senators, the Claims Resolution Act was also changed to lower the authorization level for Indian water settlements in a 2008 Act that had “authorized \$1 billion for congressionally approved Indian water settlements.” *Id.*

multiple water settlements gave the Act broad bipartisan support at its introduction because both states with Republican representatives and states with Democratic representatives stood to benefit from the federal funding.<sup>113</sup> The water settlements were also attached to the large *Cobell* settlement concerning the United States' mismanagement of Native American trust funds and settlement of the *Pigford II* discrimination lawsuit brought by African-American farmers.<sup>114</sup> Although the *Cobell* and *Pigford II* settlements were similarly subject to PAYGO and therefore increased the amount of spending reductions needed to pass the legislation,<sup>115</sup> these settlements added political momentum to the Act. Indeed, the Obama administration had already indicated that it would prioritize passage of these two settlements, especially the *Cobell* settlement.<sup>116</sup> As one commentator noted, “[w]ithout the combination of factors discussed above, the package of water settlements would probably not have become law.”<sup>117</sup>

The passage of the Claims Resolution Act of 2010 suggests that, in the wake of the PAYGO Act, tribes, states, and parties wishing to obtain federal approval of an Indian water rights settlement, in some circumstances, may gain an advantage by combining multiple settlements and high priority legislation into one act. Had the agreements in the 2010 Act been settled individually, they might have garnered less support because the benefits of individual settlements

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<sup>113</sup> *Id.* The settlements included in the Claims Resolution Act were sponsored by the following representatives:

Sen. Kyl (R-AZ), Sen. McCain (R-AZ), Rep. Kirkpatrick (D-AZ), Rep. Shadegg (R-AZ), Rep. Flake (R-AZ), Rep. Pastor (D-AZ), Rep. Grijalva (D-AZ), Rep. Giffords (D-AZ), Rep. Mitchell (D-AZ), and Rep. Franks (R-AZ) sponsored the White Mountain Apache Tribe's water settlement; Sen. Tester (D-MT), Sen. Baucus (D-MT), and Rep. Rehberg (R-MT) sponsored the Crow settlement; and Sen. Bingaman (D-NM), Sen. Udall (D-NM), Rep. Lujan (D-NM), and Rep. Heinrich (D-NM) sponsored the Aamodt and Taos settlements.

*Id.*

<sup>114</sup> *Id.*

<sup>115</sup> See CONGRESSIONAL BUDGET OFFICE, ESTIMATE OF THE STATUTORY PAY-AS-YOU-GO EFFECTS FOR H.R. 4783, THE CLAIMS RESOLUTIONS ACT OF 2010, AS PASSED BY THE SENATE ON NOVEMBER 19, 2010 (2010), available at <http://www.cbo.gov/sites/default/files/cbofiles/ftpdocs/119xx/doc11977/hr4783.pdf>. One representative had proposed declaring the *Pigford II* settlement a national emergency, which would have brought the settlement within an exemption to the PAYGO Act. *Black Farmers Call on Congress to Pay Racial Bias Settlement*, CNN (Apr. 21, 2010, 6:14 PM), <http://www.cnn.com/2010/POLITICS/04/21/black.farmers.lawsuit/index.html>.

<sup>116</sup> Smith, *supra* note 8, at 3.

<sup>117</sup> *Id.*

accrue largely in one state. Although it may not be possible to duplicate the extremely favorable circumstances surrounding the 2010 legislation, the three Indian water settlements that are currently pending in Congress may yet be able to leverage some of the strategies that led legislators to pass the Claims Resolution Act.

#### IV PENDING INDIAN WATER SETTLEMENTS

Since 2010, three additional Indian water settlements have been proposed to Congress. First, the State of Montana, the Gros Ventre and Assiniboine Tribes, and the United States have sought to settle Indian water rights to the Milk River that were previously reserved to support the Fort Belknap Reservation.<sup>118</sup> Second, the State of Montana, the United States, and the Blackfeet Tribe are seeking to settle the Tribe's rights to the St. Mary River.<sup>119</sup> Bills containing these settlements have been referred to Senate and House committees, but neither has reached the Senate or House floor.<sup>120</sup> Third, the State of Arizona, the United States, and the Navajo and Hopi Tribes have sought to settle the Tribes' reserved rights to the Little Colorado River.<sup>121</sup> However, this settlement failed to pass in the 112th Congress and has yet to be reintroduced in the 113th.<sup>122</sup>

While the proposed Fort Belknap settlement contains slightly more than \$310 million in mandatory federal funding and authorization for around \$236 million,<sup>123</sup> the proposed Blackfeet settlement includes authorization of at least \$218 million,<sup>124</sup> with the state providing another \$20 million.<sup>125</sup> The Navajo-Hopi settlement bill would have

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<sup>118</sup> Gros Ventre and Assiniboine Tribes of the Fort Belknap Indian Community Water Rights Settlement Act of 2013, S. 1394, 113th Cong. (2013); *see also* MONT. CODE ANN. § 85-20-1001 (West, Westlaw through the 2013 Sess.) (ratifying the Fort Belknap-Montana compact in 2001).

<sup>119</sup> Blackfeet Water Rights Settlement Act of 2013, S. 434, 113th Cong. (2013).

<sup>120</sup> *See id.*

<sup>121</sup> Navajo-Hopi Little Colorado River Water Rights Settlement Act of 2012, S. 2109, 112th Cong., § 104 (2012).

<sup>122</sup> *See Bill Summary & Status, 112th Congress (2011–2012), S.2109*, THOMAS, <http://thomas.loc.gov/cgi-bin/bdquery/z?d112:s.02109>: (last visited Dec. 31, 2013).

<sup>123</sup> S. 1394, 113th Cong. § 11(j).

<sup>124</sup> S. 434, 113th Cong. § 14(b), (c).

<sup>125</sup> *Id.* § 5(e), (d)(2)(E). Although the Fort Belknap settlement provides for a State contribution that focuses on amending the Milk River project to release sufficient water for the Tribe, the settlement otherwise provides only for funding requests that the Secretary may make to the State. S. 1394, 113th Cong. § 8(d)(1)(A).

authorized \$358.7 million in federal funding.<sup>126</sup> Although the proposed Navajo-Hopi settlement did not appropriate funds subject to PAYGO offset requirements, the waiver of the Tribes' claims to water rights would have been contingent on actual provision of the funds.<sup>127</sup> Thus, the settlement would have been effective only if Congress later passed an appropriation act allocating money for water infrastructure.

Particularly, the Navajo-Hopi settlement bill faced unique challenges because the Navajo Tribe initially rejected the settlement.<sup>128</sup> In July 2012, the Navajo Tribal Council "voted 15-6 against the settlement," putting a stop to congressional legislation, which required the approval of the Navajo and Hopi Tribes.<sup>129</sup> The approval may have failed because "[c]ritics saw the settlement as an attack on their aboriginal rights and tilted toward corporate interests."<sup>130</sup> Opposition also stemmed from a provision in the bill allowing the Navajo Tribe to access Colorado River water if the Tribe extended a lease of its land for a coal power plant.<sup>131</sup> Although the Hopi Tribe initially approved the settlement, the Tribe later withdrew its support.<sup>132</sup> Gathering congressional support was especially unlikely after these rejections because the settlement required approval of both Tribes.<sup>133</sup> Efforts by former Secretary of the Interior

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<sup>126</sup> S. 2109, 112th Cong. § 104; STANLEY M. POLLACK, *NAVAJO-HOPI LITTLE COLORADO RIVER WATER RIGHTS SETTLEMENT 15* (2012) (presented at the Oct. 8, 2012 Law Seminars International: Tribal Rights, Sovereignty, & Economic Development in Las Vegas, NV) (on file with author).

<sup>127</sup> S. 2109, 112th Cong. § 105; POLLACK, *supra* note 126, at 15.

<sup>128</sup> Ryan Clark, *Navajo Lawmakers Reject Proposed Water-Rights Settlement*, TUCSON SENTINEL (July 5, 2012, 9:50 PM), [http://www.tucsonsentinel.com/local/report/070512\\_navajo\\_water/navajo-lawmakers-reject-proposed-water-rights-settlement/](http://www.tucsonsentinel.com/local/report/070512_navajo_water/navajo-lawmakers-reject-proposed-water-rights-settlement/).

<sup>129</sup> Felicia Fonseca, *Navajo Council Rejects Water Rights Settlement*, AZCENTRAL.COM (July 6, 2012, 8:49 AM), <http://www.azcentral.com/news/articles/20120705PNI0706-wir-arizona-navajo-water-rights-settlement-rejected.html>.

<sup>130</sup> *Id.*

<sup>131</sup> *Id.*

<sup>132</sup> Mekita Rivas, *Hopi Withdraws Support of Water Rights Settlement*, KGUN9 (Dec. 28, 2012), <http://www.jm.com/kgun9/news/185033671.html>.

<sup>133</sup> The Navajo's failure to approve the settlement has given rise to intertribal tensions between the Navajo and Hopi. In a letter to Deputy Secretary of the Interior David Hayes, Hopi Tribal Chairman LeRoy Shingoitewa stated,

[W]e are most gravely concerned about any implications that the right of the Hopi people to have clean and reliable water depends on the tender mercies of the Navajo Tribe toward the Hopi people. . . . We know of no other tribe in the country whose rights to water hinge upon, and may be held ransom by, the political machinations of another tribe.

Ken Salazar and Deputy Secretary of the Interior David Hayes to revive Navajo and Hopi leaders' support for the settlement proved unsuccessful.<sup>134</sup>

Prior to the bill's failure, the Navajo Tribe's attorney, Stanley M. Pollack, identified a number of factors in favor of approving the Little Colorado River settlement.<sup>135</sup> The settlement would have ended over three decades of litigation concerning the Tribes' water rights to the Little Colorado River.<sup>136</sup> Additionally, it would have resolved disputes over groundwater rights, which would have otherwise posed a substantial challenge in litigation.<sup>137</sup> Finally, the federal funding provided for in the settlement was geared toward meeting a basic human need for the Tribes—provision of drinking water.<sup>138</sup>

Nevertheless, the factors against approval outweighed those in favor. First, the legislation was introduced prior to a final agreement between the Tribes and the State, and legislators were unmotivated to approve a settlement that did not already have the approval of the Tribes.<sup>139</sup> Additionally, the settlement only addressed rights to the Little Colorado River, not the Tribes' potentially more substantial claims to the larger Colorado River.<sup>140</sup> Thus, legislators may prefer to wait for a more comprehensive settlement instead of piecemeal approval of multiple settlements. Finally, the settlement included anti-marketing terms providing less flexibility in using and transferring

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Anne Minard, *Interior Provides Latest Confusion in Little Colorado River Issue*, INDIANCOUNTRYTODAYMEDIANETWORK.COM (Nov. 2, 2012), <http://indiancountrytodaymedianetwork.com/mobile/article/interior-provides-latest-confusion-in-little-colorado-river-issue-142218>.

<sup>134</sup> *Secretary of Interior Salazar Holds Water Rights Settlement Meeting with Navajo and Hopi Leaders*, NAVAJO-HOPI OBSERVER (Nov. 20, 2012, 11:33 AM), <http://www.navajohopiobserver.com/m/Articles.aspx?ArticleID=15023>.

<sup>135</sup> POLLACK, *supra* note 126, at 4.

<sup>136</sup> *Id.*

<sup>137</sup> *Id.*

<sup>138</sup> *Id.*

<sup>139</sup> *Id.* at 15. Although the Montana legislature has approved the Blackfeet settlement, the compact will only go up for the approval of the Tribe after congressional approval. *Baucus, Tester Introduce Blackfeet Water Rights Settlement to Resolve Century-Old Conflict, Support Economic Growth*, MAX BAUCUS (Feb. 23, 2011), [http://www.baucus.senate.gov/?p=press\\_release&id=365](http://www.baucus.senate.gov/?p=press_release&id=365).

<sup>140</sup> Pollack also notes that the Tribes' waivers of rights are convoluted. POLLACK, *supra* note 126, at 15. This could pose an obstacle if it is unclear to legislators what the Tribes have waived under the settlement or at what point the waivers become effective.

some of the water.<sup>141</sup> These terms could have prevented maximum beneficial use by denying growing cities the opportunity to lease the Tribes' water surplus.

In addition to Pollack's factors, the circumstances that favored passage of the Claims Resolution Act of 2010 provide a useful standard by which to measure the likelihood of obtaining congressional funding and approval for pending settlements. At the outset, the 2010 settlements had the sponsorship and thus the political support of three states' senators and representatives.<sup>142</sup> In contrast to the 2010 Act, even if all of the three pending settlements had been consolidated into one act, only two states—Montana and Arizona—would have had an incentive to pass the legislation because the Blackfeet and Fort Belknap settlements both concern Montana.<sup>143</sup> Still, future water settlements might not need the same breadth of support for congressional approval that the 2010 legislation had—indeed, the 2010 Act passed with unanimous Senate approval.<sup>144</sup> The pending settlements need only garner a simple majority in each house and the President's signature to become law.

Crucial to passage of the Claims Resolution Act of 2010 was the attachment of the *Cobell* settlement, which affected numerous tribes and thus gathered broader support across many states, as well as the support of the President. For the pending Montana water settlements, there is also some potential for attachment of trust duty settlements. In April 2012, the Obama administration announced its commitment “to resolve 41 long-standing disputes with Indian tribal governments over the federal mismanagement of trust funds and resources.”<sup>145</sup>

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<sup>141</sup> Navajo-Hopi Little Colorado River Water Rights Settlement Act of 2012, S. 2109, 112th Cong. § 106(e) (2012); POLLACK, *supra* note 126, at 15.

<sup>142</sup> Although four water settlements were at issue, two of them were in New Mexico. *See supra* note 113. While the Aamodt and Taos settlements were both sponsored by New Mexico congressmen, Arizona senators sponsored the White Mountain Apache settlement, and Montana senators sponsored the Crow settlement. *Id.*

<sup>143</sup> Although Congress's fiscal ingenuity was a significant factor in addressing PAYGO requirements, determining the source of spending offsets for the pending settlements is beyond the scope of this article. It is worth noting, however, that even with the increase in federal revenue that accompanied the settlements, the 2010 settlements faced other substantial obstacles to their passage.

<sup>144</sup> *Both House and Senate Pass Crow Settlement*, BIG HORN COUNTRY NEWS (Dec. 2, 2012), <http://www.bighorncountrynews.com/archive/2010/week%2048/story4.html>.

<sup>145</sup> Rob Capriccioso, *Obama Moves to Settle 41 Tribal Trust Cases for \$1 Billion*, INDIAN COUNTRY TODAY MEDIANETWORK.COM (Apr. 11, 2012), [http://indiancountrytodaymedianetwork.com/article/obama-moves-to-settle-41-tribal-trust-cases-for-\\$1-billion-107735](http://indiancountrytodaymedianetwork.com/article/obama-moves-to-settle-41-tribal-trust-cases-for-$1-billion-107735).

According to Ignacia Moreno, Assistant Attorney General at the U.S. Department of Justice, “[these] settlements will amount to a combined total of \$1.023 billion.”<sup>146</sup> Notably, among these forty-one trust duty claim settlements is one involving the Assiniboine Tribe and another involving the Blackfeet Tribe.<sup>147</sup> Thus, the Tribes could potentially leverage their trust duty claims to obtain congressional funding and approval for water rights settlements. Additionally, they could reach out to other tribes to create a coalition that would seek comprehensive legislation settling all or a large number of these trust duty claims along with the Tribes’ water rights.

Most importantly, in pending settlements, tribes and states have at their disposal the same powerful arguments that inspired passage of the 2010 water settlements and many prior settlements. Both the 2010 settlements and the pending water settlements focus on providing clean drinking water to tribes.<sup>148</sup> There should be little debate that meeting this basic human need is a worthwhile use of federal funding and an important part of the federal government’s role as a trustee of tribes. Meeting PAYGO requirements should not stand in the way of provision of clean drinking water to tribes, especially when the federal government is receiving substantial value in return—namely, tribes’ waivers of claims for additional water and of potential breach-of-trust claims against the United States. Finally, legislators could determine that the health implications for tribes that lack clean drinking water merit declaration of an emergency.<sup>149</sup> Such a declaration would exempt the settlement legislation from PAYGO requirements, at least insofar as it provides federal funding for water delivery infrastructure.<sup>150</sup>

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<sup>146</sup> *Id.*

<sup>147</sup> *Id.*

<sup>148</sup> POLLACK, *supra* note 126, at 4; WHITE HOUSE, ACHIEVING A BRIGHTER FUTURE FOR TRIBAL NATIONS: 2011 WHITE HOUSE TRIBAL NATIONS CONFERENCE PROGRESS REPORT 14 (2011), available at [http://www.whitehouse.gov/sites/default/files/2011whitnc\\_report.pdf](http://www.whitehouse.gov/sites/default/files/2011whitnc_report.pdf).

<sup>149</sup> The PAYGO Act does not specify what circumstances are sufficient to merit emergency designation, but merely provides that “a provision shall be considered an emergency designation if it designates any item as an emergency requirement pursuant to this subsection.” 2 U.S.C. § 933(g)(3)(C) (2012).

<sup>150</sup> *Id.*

## CONCLUSION

Although new PAYGO requirements pose an obstacle to future Indian water settlements, the Claims Resolution Act of 2010 provides hope that legislators will continue to recognize the value of water settlements for tribes, states, private parties, and the federal government. It may be impossible to completely duplicate the favorable political circumstances that led to passage of the 2010 Act. However, states and tribes still have a number of powerful political mechanisms to advance settlements, along with strong legal, economic, political, and moral arguments. Legislators must also realize the inequity that results if settlement proposals fail due to PAYGO requirements when other tribes benefit from similar settlements simply because they settled their claims before PAYGO was enacted.

Thus, Indian water settlements must not be viewed as isolated legislation advancing the goals of individual tribes, but as part of a larger movement toward (1) providing for the basic needs of tribes; (2) reconciling a long and unfortunate history of exploiting tribal resources; (3) promoting economic development for tribal, state, federal, and private constituencies; and (4) ending decades of water rights litigation and the uncertainty that such litigation spawns. A long-term congressional commitment to funding Indian water settlements will be a substantial step toward meeting these objectives.