

Written Testimony
Chairman Mark Macarro
Pechanga Band of Luiseño Indians
Senate Committee on Indian Affairs
Oversight Hearing on "Addressing the Needs of Native Communities
Through Indian Water Rights Settlements."

May 20, 2015
2:15 p.m.

Good afternoon Chairman Barrasso, Vice Chairman Tester, and members of the Committee. Thank you for scheduling an Oversight Hearing on “Addressing the Needs of Native Communities Through Indian Water Rights Settlements” and inviting the Pechanga Band of Luiseño Indians to testify.¹ As this Committee is keenly aware, the Pechanga Band of Luiseño Indians has been working to pass our Water Settlement in Congress since 2009.

In a State where water resources are extremely scarce and continue to drop to alarming levels, the Pechanga Water Settlement is especially critical for the Band and our tribal membership. The Pechanga Water Settlement and the underlying agreements to the overarching settlement agreement were drafted to achieve a creative way to not only settle once and for all the Band’s longstanding water claims in the Santa Margarita River Watershed, but also to provide the resources to meet the Band’s current and future water needs and provide the Band with “wet” water. Importantly, the Pechanga Water Settlement also provides certainty for all water users in the Santa Margarita River Watershed. This settlement is the product of a great deal of effort by all of the parties and reflects a desire by the parties to settle their differences through negotiation rather than litigation and creates a win-win scenario.

Of course each Indian Water Settlement is unique and involves its own set of obstacles, yet there are some overarching issues that impact all Indian Water Settlements—namely, the Administration’s support of Indian Water Settlements and Congress’ commitment to identify ways to pay for them. We appreciate the opportunity today to share some examples of how the Pechanga Water Settlement will address the needs of our tribal community through its enactment and implementation and to speak to some of the obstacles we have encountered.

I. BACKGROUND

A. Background on the Pechanga Band

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

¹ While our federally recognized name is the Pechanga Band of Luiseño Mission Indians, we mostly use Pechanga Band of Luiseño Indians to refer to ourselves in recent years.

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

The history of the Band begins with our ancestral home village of Temeeeku, which was a center for all the Payomkawichum, or Luiseño people. After the establishment of the state of California in 1850, a group of Temecula Valley ranchers petitioned the District Court in San Francisco for a Decree of Ejection of Indians living on the land in Temecula Valley, which the court granted in 1873. In 1875, the sheriff of San Diego County began three days of evictions. The Luiseño people were taken into the hills south of the Temecula River.

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

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

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

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

² Executive Order (June 27, 1882).

³ Trust Patent (Aug. 29, 1893).

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

⁵ Trust Patent (May 25, 1931).

⁶ Trust Patent (Aug. 12, 1971).

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

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

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

The United States, as trustee, represented all three Tribes before the *Fallbrook* Court. In a series of Interlocutory Judgments that were eventually wrapped into the Court’s Modified Final Judgment and Decree,¹⁰ the Court examined and established water rights for various water users involved in the case. In Interlocutory Judgment 41 (“IJ 41”), the Court concluded that each of the three Tribes has a recognized federally reserved water right without specifying the amount of each of the Tribe’s water right. Although the Court did examine some facts in IJ 41 and developed “prima facie” findings with respect to each of the Tribes’ quantifiable water rights, final quantified rights were never established as a matter of law. As a result of IJ 41, all three Tribes have “Decreed” but “unquantified” federally reserved water rights.¹¹

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

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

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

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

¹⁰ Modified Final Judgment and Decree, *United States v. Fallbrook Public Utility District et al.*, Civ. No. 3:51-cv-01247 (S.D.C.A.)(Apr. 6, 1966).

¹¹ The Court in *Fallbrook* fixed the quantity of Pechanga’s federally reserved right at 4,994 AFY, on a prima facie basis.

Beginning in 2006 and continuing throughout 2007, the other two tribes in the Santa Margarita River Watershed, Ramona Band of Cahuilla Indians and Cahuilla Band of Indians, sought to intervene in the *Fallbrook* case to, among other things, quantify their respective water rights to the Santa Margarita River Watershed.¹² These efforts intersected the Band's otherwise successful efforts at negotiated management of joint water supplies and forced the Band to address in *Fallbrook* the scope of its own claims to water or risk being injured by the actions of the other two Tribes.¹³

In addition to participating as a litigant in the proceedings initiated by Ramona and Cahuilla, the Band also immediately started efforts to reach a settlement of its claims to water and claims for injuries to water rights relating to the Santa Margarita River Watershed. As part of its efforts to seek settlement of its claims to water, on March 13, 2008, Pechanga requested that the Secretary of the Interior seek settlement of the water rights claims involving Pechanga, the United States, and non-Federal third parties through the formation of a Federal Negotiation Team under the Criteria and Procedures for Participation of the Federal Government in Negotiations for the Settlement of Indian Water Rights Claims.¹⁴ The Secretary agreed to form a Federal Negotiation Team on August 1, 2008.

Since that time Pechanga has been working closely with the Federal Negotiation Team to effectively negotiate the terms of the settlement with the other parties and to resolve its claims against the United States in connection with the development and protection of Pechanga's water rights. Pechanga has also met with members of the Administration Working Group to discuss the Administration's outstanding concerns.

Pechanga has continued to meet with the Administration to discuss and address their outstanding concerns with the legislation and settlement, and feels confident that we will be able to achieve the Administration's support of the Pechanga Water Settlement in the near future. Pechanga also continues to work with the other settling parties, including RCWD, EMWD and MWD, to ensure that all of the parties remain supportive and committed to the Pechanga Water Settlement. Enactment of the Pechanga Water Settlement would benefit all of the parties to the Agreement and subagreements.

C. Legislative History

1. 111th Congress

The Pechanga Water Rights Settlement Act was first introduced in the 111th Congress. On December 11, 2009, Congresswoman Bono Mack, along with co-sponsors Congressman

¹² Ramona and Cahuilla are located within the Anza-Cahuilla Sub-Basin of the Santa Margarita River Watershed while Pechanga is located within the Wolf Valley Sub-Basin of the Santa Margarita River Watershed.

¹³ Pechanga periodically filed status reports with the *Fallbrook* court apprising the Court of its progress towards reaching settlement. Pechanga also filed documents with the Court requesting that Pechanga be afforded the opportunity to weigh in when the Court considered issues of law and legal interpretations of IJ 41 with respect to Ramona and Cahuilla.

¹⁴ 55 Fed. Reg. 9223.

Calvert, Congressman Issa, Congresswoman Richardson, Congressman Grijalva and Congressman Baca introduced H.R. 4285 in the House. On January 26, 2010, Senator Boxer, along with co-sponsor Senator Feinstein introduced an identical bill in the Senate, S. 2956. Subsequently, the bill was reintroduced in the House by Congressman Baca, along with co-sponsors Congressman Boren, Congressman Grijalva, Congressman Honda, Congressman Kildee, Congressman Lujan and Congresswoman Richardson in an effort to resolve some of the issues that the Administration raised with the legislation.

The Senate Committee on Indian Affairs held a hearing on S. 2956 on July 22, 2010 and ordered the bill to be reported favorably out of committee with amendments on November 18, 2010. The House Natural Resources Subcommittee on Water and Power held a hearing on H.R. 5413 on September 16, 2010.

At the close of the 111th Congress, the Band chose to pull back from seeking Congressional enactment of the bill in order to answer questions that tribal members and allottees had raised during the legislative process. It was critical to the Band that its membership and allottees be fully informed of the aspects and details of the legislation and settlement agreement. Thus, over the past three years the Band held a number of tribal member meetings to more fully discuss and explain the Pechanga Water Settlement and the benefits afforded under the legislation. The Band held a tribal membership vote on March 24, 2013, in which tribal members voted overwhelmingly in support of the proposed water settlement currently pending before the Committee. The Band felt this was a necessary and important step and as a result is now prepared to move forward to enact this legislation as expeditiously as possible.

2. 113th Congress

On June 25, 2013, Senator Boxer, with Senator Feinstein joining as a co-sponsor, introduced S. 1219. On June 26, 2013, Congressman Calvert, joined by twelve co-sponsors, Congressman Tony Cardenas, Congressman Tom Cole, Congressman Paul Cook, Congressman Jeff Denham, Congressman Raul Grijalva, Congressman Duncan Hunter, Congressman Darell Issa, Congressman Daniel Kildee, Congressman Doug LaMalfa, Congresswoman Betty McCollum, Congressman Raul Ruiz, and Congressman David Valadao, introduced H.R. 2508, the companion measure to S. 1219. The Senate Committee on Indian Affairs held a hearing on S. 1219 on September 10, 2013 and the bill was marked out of Committee as amended on April 2, 2014.

3. 114th Congress

The Pechanga Water Rights Settlement Act has not yet been introduced in the Senate or House during the 114th Congress, however, the settling parties remain supportive and have signed a letter in support of introduction of the bill again. Pechanga and Rancho California Water District are currently working with the bill's sponsors in the House and Senate, and plan to introduce the bill shortly.

II. STRUCTURE OF SETTLEMENT

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

- A. Amended and Restated Groundwater Management Agreement (“Amended GMA”);
- B. Recycled Water Agreement and Amendment No. 1 to the Recycled Water Agreement;
- C. Recycled Water Transfer Agreement;
- D. Recycled Water Scheduling Agreement;
- E. Recycled Water Infrastructure Agreement;
- F. Extension of Service Area Agreement;
- G. ESAA Capacity Agreement; and
- H. ESAA Water Delivery Agreement.

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

Unfortunately, there is insufficient groundwater within the Santa Margarita River Watershed to fulfill the Band’s claims to water.¹⁵ To account for the limited water sources within the Santa Margarita River Watershed, the parties approached the Settlement negotiation process with an innovative attitude. The parties looked at all of the available water resources in the area, including groundwater, recycled water and imported water. The parties structured the Pechanga Water Settlement to utilize all of these water resources in such a way that not only fulfills Pechanga’s water rights but also provides attractive provisions for the water purveyors in the Basin and in California. Accordingly, the Pechanga Water Settlement includes a number of contractual agreements with RCWD, EMWD and MWD that brings together a variety of water sources through a resourceful approach.

There are three major components of the settlement:

A. Amended Groundwater Management Agreement (“Amended GMA”)

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

¹⁵ The need to import water to the Reservation is a fact that has been recognized by the federal team for a long period of time. Over pumping in the basin has significantly reduced water levels over time, which is one cause for the insufficient groundwater to satisfy the Band’s federally reserved water rights. One important aspect of the settlement is the establishment of groundwater pumping limits to protect the basin now and in the future.

management of groundwater pumping from the Wolf Valley Basin and establishes an allocation of the safe yield of the basin. As discussed above, in 2006 Pechanga and RCWD entered into the Groundwater Management Agreement to manage the water in the Wolf Valley Basin. The parties established the safe yield of 2,100 AFY and provided each party with a 50% entitlement. Thus, under the existing Groundwater Management Agreement each party is entitled to 1,050 AFY. When the parties began negotiating the Pechanga Water Settlement, however, Pechanga stressed the importance of an additional entitlement of groundwater. As a result of significant negotiations between the parties they agreed that once the Pechanga Water Settlement is passed, under the Amended GMA, Pechanga will be entitled to 75% (1,575 AFY) of the basin and RCWD will be entitled to 25% (525 AFY) of the basin. Additionally, in an effort to raise the level of water in the Wolf Valley Basin and provide storage water in years of water shortage, the Amended GMA establishes a Carryover Account between Pechanga and RCWD that provides for use of the Wolf Valley Basin as a storage aquifer for a defined amount of water to be used in shortage years. Thus, the Amended GMA not only satisfies 1,575 acre feet of water per year of the Band's entitlement to water, it also provides benefits to the entire region by improving the water levels in the Wolf Valley Basin.

B. Recycled Water Agreements

Another essential element of the Pechanga Settlement Agreement that complements the Amended GMA is RCWD's ability to use Pechanga's recycled water in partial consideration for their surrender of a portion of their current potable groundwater supply as pumped from the Wolf Valley Basin. In particular, Amendment No. 1 to Pechanga's Recycled Water Agreement¹⁶ allows RCWD to utilize the unused portion of the entitlement Pechanga currently has pursuant to the Recycled Water Agreement and provides an extension of the term of the Recycled Water Agreement for 50 years with 2 additional 20 year extensions.

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

The Pechanga Water Settlement legislation, once passed, will provide the requisite funds to create the necessary infrastructure to make the recycled water agreements that are critical to the deal. Funds from the Pechanga Recycled Water Infrastructure Account will be used to pay

¹⁶ The Recycled Water Agreement, between Pechanga and EMWD, was executed on January 8, 2007 and provides Pechanga with 1,000 AFY of recycled water from EMWD.

for the Storage Pond (\$2,656,374), as are necessary under the Recycled Water Infrastructure Agreement to fulfill Pechanga's obligations to provide RCWD with a share of Pechanga's recycled water which Pechanga receives pursuant to the Recycled Water Agreement with EMWD.

C. Imported Water Agreements

Because the water supplies in the Band's portion of the Santa Margarita Basin are either too depleted to fulfill the Band's entire water needs in the medium to long term or are being used by other parties (primarily RCWD), the Band has agreed to use replacement water for the majority of its water uses in the future. Accordingly, another significant component of the Pechanga Settlement Agreement is comprised of the agreements necessary to provide MWD imported potable water to Pechanga to provide for the Band's water needs on a permanent basis. The Extension of Service Area Agreement ("ESAA"), is the primary agreement for providing MWD water to be used on the Reservation. The ESAA is a contractual agreement among Pechanga, EMWD, and MWD, that extends MWD's existing service area within the Band's Reservation to a larger portion of the Reservation, such that Pechanga will receive MWD water to augment its local pumped supplies.

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

The legislation provides funds from the Pechanga ESAA Delivery Capacity Account to pay for Interim Capacity (\$1,000,000) and Permanent Capacity (\$16,900,000) in accordance with the ESAA Capacity Agreement in order for RCWD to provide the requisite capacity to deliver groundwater and ESAA water to Pechanga. To fulfill Pechanga's full entitlement of 4,994 AFY, Pechanga will need the Wolf Valley Basin groundwater and MWD imported potable water. In order to receive delivery of MWD imported potable, the MWD water would need to be delivered to Pechanga through offsite conveyance capacity. Available import delivery capacity in the region is limited, and thus posed a challenge. However, the parties were able to negotiate the ESAA Capacity Agreement such that RCWD will ensure that requisite capacity exists in RCWD's system to deliver Wolf Valley groundwater and MWD imported water to Pechanga. Together, the Interim Capacity and Permanent Capacity funds will finance the necessary RCWD conveyance capacity. If RCWD is unable to ensure that there is sufficient capacity for groundwater and MWD deliveries to Pechanga, the Settlement Act provides that the funds in the ESAA Delivery Capacity Account shall be available to Pechanga to find alternative capacity. In the event that RCWD is unable to provide sufficient capacity, Pechanga would be forced to build its own infrastructure to deliver the imported water.

The legislation also authorizes \$5,483,653 in the Pechanga Water Fund Account for: (1) payment of the EMWD Connection Fee (approximately \$332,000); (2) payment of the MWD Connection Fee (approximately \$1,900,000); and (3) any expenses, charges or fees incurred by Pechanga in connection with the delivery or use of water pursuant to the Settlement Agreement.

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

The EMWD Connection Fee, approximately \$332,000, will be paid to EMWD as an in-lieu payment instead of standby charges which normally would be collected on an annual basis through the owner's property tax bill. Rather than have any fees that could be considered a tax on Pechanga, EMWD has agreed to a one-time payment by Pechanga for connection to EMWD. Similar to the EMWD Connection Fee, MWD normally provides extension of their service through annexations. Due to tribal sovereignty concerns, instead of going through a normal annexation, the ESAA will be governed by the terms and conditions of the agreement such that Pechanga will contractually commit to adhere to rules and regulations applicable to its activities as a customer of EMWD and MWD. Additional terms and conditions will be included to avoid infringement of Pechanga's sovereignty whereby EMWD and MWD will have alternative means to exercise their responsibilities. Under the ESAA, Pechanga has agreed to pay a one-time connection fee that amounts to approximately \$1,900,000.

As discussed above, as a result of the depletion of the Santa Margarita Basin water supply, Pechanga must obtain imported water from MWD as a replacement for its water from the Santa Margarita Basin. The United States has a programmatic responsibility to ensure that Pechanga's entitlement is fulfilled through replacement water, such as the MWD imported water, if existing water is unavailable.¹⁷ The Pechanga Water Fund provides funds to bring down the cost of the expensive MWD imported water.

Lastly, the legislation provides for a Pechanga Water Quality Account in the amount of \$2,460,000 to pay for critical infrastructure and programs that will bring down the salinity in the basin, which of course benefits all users in the basin. The Band and RCWD are both committed to reducing the levels of brine and salinity in the Wolf Valley Basin, especially given the fact that the imported water from MWD has a higher salinity level than the groundwater in the Wolf Valley Basin.

III. RECOGNITION OF TRIBAL WATER RIGHT

In addition to the contractual elements of the Pechanga Water Settlement that provide the "wet" water to the Band and make the overall agreement work for the other parties to the Pechanga Water Settlement, a critical element of the Settlement is recognition of the Band's federal reserved right to water (the "Tribal Water Right"). Both the Pechanga Settlement Agreement and the federal legislation recognize the Band's Tribal Water Right as being the same as it was established on a "prima facie" basis in the original *Fallbrook* Decree in 1965 of up to 4,994 AFY.

¹⁷ For example, the Gila River Indian Community Water Rights Settlement Act of 2004 (Pub. L. 108-451) included the Lower Colorado River Basin Development Fund that provided for a payment "to pay annually the fixed operation, maintenance, and replacement charges associated with the delivery of Central Arizona Project water held under long-term contracts for use by Arizona Indian tribes (as defined in section 2 of the Arizona Water Settlements Act) in accordance with clause 8(d)(i)(1)(i) of the Repayment Stipulation (as defined in section 2 of the Arizona Water Settlement Act)". See Sec. 107 (a)(2)(A).

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

IV. PROTECTION OF ALLOTTEE RIGHTS

No Indian Water Settlement would be complete without specific provisions that explicitly protect allottees. The Pechanga Water Settlement is no exception. Pechanga has worked closely with the Federal Negotiation Team to ensure that the allottee rights on the Pechanga Reservation are adequately protected. First, allottees will receive benefits that are equivalent to or exceed the benefits they currently possess.¹⁸ Furthermore, in accordance with Section 5(d) of S. 1219, 25 U.S.C. 381 (governing use of water for irrigation purposes) shall specifically apply to the allottees' rights. Under the legislation, the Tribal Water Code to be adopted by the Band must provide explicit protections for allottees—the Tribal Water Code must provide that:

- tribal allocations of water to allottees shall be satisfied with water from the Tribal Water Right;
- charges for delivery of water for irrigation purposes for allottees be assessed on a just and equitable basis;
- there is a process for an allottee to request that the Band provide water for irrigation use to the allottee;
- there is a due process system for the Band to consider a request by an allottee (appeal and adjudication of any denied or disputed distribution of water and resolution of any contested administrative decision).¹⁹

The inclusion of these provisions reflects the United States' most recent allottee language as was included in other recent Indian Water Settlements. As a result, the allottee language is consistent with other Indian Water Settlements pending before Congress, and provides allottees with the same protections provided to other tribal allottees. Again, explicit protections for allottees are another example of how Indian Water Settlements address the needs of Native Communities.

V. NON-FEDERAL CONTRIBUTION

Pechanga is cognizant that in addition to the Federal contribution, the non-Federal contribution to an Indian water settlement should be proportionate to the benefits received by the non-Federal parties under the settlement. The Band has insisted on such non-Federal contribution from non-Indian parties throughout the negotiations for this settlement and

¹⁸ See Sec. 5(a) of S. 1219 of the 113th Congress.

¹⁹ See Sec. 5(f).

successfully obtained, with the support and assistance of the Federal Negotiation Team, substantial non-Federal contributions to the settlement.

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

A. RCWD Contribution

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

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

B. Pechanga Contribution

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

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

- The Account is to be used to partially subsidize the cost of MWD water to reduce the cost of the water using interest earned by the account.
- The cost of MWD water was projected based on the published rates for an acre-foot of MWD Tier 2 Treated Water plus the EMWD charge of \$127.80 in 2010, escalated at four percent (4%) per year thereafter.

- The Account is projected to accrue interest at an average four percent (4%) rate of return.
- The amount of MWD water to be purchased each year was based on a general estimate of the projected water use in the proposed MWD service area that cannot be met from other sources.

While most subsidy funds for Tribes provide funds that will bring the cost of the imported water in line with local water, the Pechanga Water Settlement only seeks to subsidize 10% of MWD water such that Pechanga is bearing 90% of the cost of imported water.

C. EMWD Contribution

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

D. MWD Contribution

Like EMWD, MWD is not a party to the actual Settlement Agreement, however, MWD is a party to the ESAA, which as discussed above, is an exhibit to the Settlement Agreement. The ESAA is essentially the contractual equivalent of an annexation to MWD and EMWD, with the Band's sovereignty issues protected by contract in the ESAA. In 2009, Governor Schwarzenegger issued a State of Emergency for the State of California's drought situation. In response, MWD issued a press release recognizing the severe water supply challenges in California. MWD's press release further stated that MWD has taken a number of critical steps to address the drought, including the reduction of water supplies to member agencies and mandatory water conservation. As a result of California's drought and MWD's efforts to address these problems it is unlikely that MWD will be approving any annexations in the near future.

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

VI. CONGRESSIONAL AND ADMINISTRATIVE SUPPORT

One of the biggest problems that Pechanga has encountered in passing our Water Settlement is how the Administration will ultimately fund it. While our settlement is very small, only \$28.5 million in federal authorizations, especially in comparison to many Indian Water Settlements, that has still continued to be the looming issue. The question of the day seems to be: How will Indian Water Settlements be funded?

Important to this question are two elements. First, the Administration must find ways to finalize negotiations on Indian Water Settlements to a point where they can publicly and through written letter “support” the water settlements. In 2010, the Department of Interior was able to issue support letters for the Indian Water Settlements that were passed as part of the Claims Resolution Act that effectively resulted in Congressional passage of the package. That commitment and support must continue and remain a priority for the Administration. Additionally, the Department should identify funding in the President’s Budget to pay for Indian Water Settlements.

Second, Congress can take a supportive role in identifying potential offsets for the Indian Water Settlements or work with the Administration to support funding in the President’s Budget. Together, the Administration and Congress play a critical role in making these Indian Water Settlements a reality and bringing the benefits of such settlements to the Native Communities.

VII. CONCLUSION

As outlined above, the Band is settling its longstanding claims against the United States and other parties, and is accepting less water than it could otherwise obtain in exchange for a commitment for the delivery of “wet” water in replacement for its “paper” water rights. The negotiation process with RCWD, EMWD, MWD and the United States has been a long process that was aimed at examining the unique concerns and priorities of each party and implementing those priorities through contractual agreements that benefit everyone involved. Living in Southern California the Pechanga Band and our settling parties are faced with the constant struggle to identify available water resources and provides for our tribal membership and customers. We remain optimistic that Congress will enact the Pechanga Water Settlement to provide certainty to Pechanga and other Californians that are impacted by this settlement.

There is no one size fits all approach to Indian Water Settlements but there should be a commitment from the Administration and Congress to support and enact Federal legislation that resolve Indian Communities long-standing claims to water while also providing certainty to the non-Indians in the area and importantly find the funding to pay for them. Again, the Band views our Water Settlement as a win-win situation that will enable us to provide water to our tribal members for generations to come without having to pursue costly and time-consuming litigation.

In closing, Chairman Barrasso and members of this Committee, I would like to thank the Committee for holding an oversight hearing on this important issue in Indian Country. We appreciate the Committee’s interest in hearing how Indian Water Settlements can address the needs of Indian Country and we welcome the opportunity to answer any questions that you may

have with respect to the Pechanga Water Settlement and how we are proposing to accomplish just that result.