Written Testimony
Chairman Mark Macarro
Pechanga Band of Luiseño Mission Indians
House Natural Resources Subcommittee on Water, Power and Oceans
Legislative Hearing

June 23, 2016
10:30 a.m.

Good afternoon Chairman Fleming, Ranking Member Huffman, and members of the Subcommittee. Thank you for scheduling a hearing on the Pechanga Band of Luiseño Mission Indians Water Settlement ("Pechanga Water Settlement") and for the opportunity to provide testimony again on behalf of the Pechanga Band of Luiseño Mission Indians ("Pechanga" or the "Band"). As this Committee is keenly aware, Pechanga has been working to pass our Water Settlement in Congress since 2009. We are hopeful that we are now in the final phases of those efforts.

In a State where water resources are extremely scarce and continue to drop to alarming levels, the Pechanga Water Settlement is especially critical for Pechanga 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 settle once and for Pechanga's longstanding water claims in the Santa Margarita River Watershed, as well as its claims against the United States in connection therewith. The settlement provides the resources to meet Pechanga's current and future water needs and provide Pechanga with "wet" water. It also provides certainty for all water users in the Santa Margarita River Watershed. This settlement is the product of a great deal of effort by all of the parties and reflects a desire by the parties to settle their differences through negotiation rather than litigation.

We are pleased to be moving forward under the Committee's new process for considering Indian water rights settlements. While the process has proved to be difficult, we believe that we have met the requirements under the Committee process and as such we would hope that the Pechanga Water Settlement will now move quickly through Congress. We appreciate the opportunity today to share how the Pechanga Water Settlement will address the needs of our tribal community through its enactment and implementation and answer any questions you have about our water settlement.

I. BACKGROUND

A. Background on the Pechanga Band

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.

The Band has called the Temecula Valley home for more than 10,000 years. Ten thousand years from now tribal elders will share with tribal youth, as they do today, the story of

the Band's creation in this place. Since time immemorial, through periods of plenty, scarcity and adversity, the Pechanga people have governed ourselves and cared for our lands.

The history of the Band begins with our ancestral home village of Temeeku, which was a center for all the Payomkawichum, or Luiseño people. After the establishment of the state of California in 1850, a group of Temecula Valley ranchers petitioned the District Court in San Francisco for a Decree of Ejection of Indians living on the land in Temecula Valley, which the 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.[1] Several subsequent trust acquisitions were made in 1893,[2] 1907,[3] 1931,[4] 1971,[5]1988,[6] and 2008,[7] each one increasing the size of the reservation. At present, the total land area of the Pechanga Reservation is 6,724 acres.

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

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

The Band has been engaged in a struggle for recognition and protection of our federally reserved water rights for decades. In 1951, the United States initiated litigation over water rights in the Santa Margarita River Watershed known as *United States v. Fallbrook*.[8] The *Fallbrook*

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

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

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

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

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

[6] Southern California Indian Land Transfer Act, Pub. L. No. 110-581 (Nov. 1, 1988).

[7] Pechanga Band of Luiseño Mission Indians Land Transfer Act, Pub. L. No. 110-383 (Oct. 10, 2008).

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

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,[9] 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, the United States' failed to press the Band's claims forward and 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.[10]

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.

Until 2007, we sought to avoid further 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 for both water rights and damages from our trustee, the United States.

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

[9] 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).

[10] The Court in *Fallbrook* fixed the quantity of Pechanga's federally reserved right at 4,994 AFY, on a prima facie basis. The fact that the United States only provided a half measure of protection to the Band's federal reserved water rights in this way is a central element in our claims against them as our trustee.

sought to intervene in the *Fallbrook* case to, among other things, quantify their respective water rights to the Santa Margarita River Watershed.[11] 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.[12]

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 the Participation of the Federal Government in Negotiations for the Settlement of Indian Water Rights Claims.[13] 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. As part of the new Committee process for considering Indian water settlements, we further worked with the Administration to discuss and address their outstanding concerns with the legislation and settlement. As you are aware, on May 17, 2016, the Departments of Interior and Justice transmitted their letter ("Department Pechanga Letter") to the House Natural Resources Committee indicating their support of the Pechanga Water Settlement with the revisions included in the legislative text. The Department Pechanga Letter noted various elements of the Committee process that had not been met; however, since that time we worked with the Administration to satisfy two of the outstanding requirements and we understand that the Administration will fulfill the final requirement in the near future by transmitting a second letter to the Committee for its consideration.[14]

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[11] 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.

[12] 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.

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

[14] In the Department Pechanga Letter, the letter noted that the parties had agreed to the legislative text but were working on technical edits to the text of their settlement agreement. Subsequently, Pechanga and Rancho California Water District have subsequently resolved those technical issues with the United States. The letter also noted that the settling parties plan to file a joint status report with the *Fallbrook* Court to alert the Court that the settling parties have reached a settlement. On June 16, 2016, Pechanga, the United States, acting through the Department of Justice, and Rancho California Water District filed a Joint Status Report with the *Fallbrook* Court and attached copies of the legislative text and settlement agreement that reflects the technical revisions that were made. Accordingly, we can confirm that you should consider there to be no outstanding issues at this time.

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 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 a period of several months 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 Pechanga Water Settlement. 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 Cardenas, Congressman Cole, Congressman Cook, Congressman Denham, Congressman Grijalva, Congressman Hunter, Congressman Issa, Congressman Kildee, Congressman LaMalfa, Congresswoman McCollum, Congressman Ruiz, and Congressman 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

On August 5, 2015, Senator Boxer, with Senator Feinstein joining as a co-sponsor, introduced S. 1983. The Senate Committee on Indians Affairs held an oversight hearing on the

Pechanga Water Settlement. On February 3, 2016, the Senate Committee on Indian Affairs reported S. 1983 out of the Committee, as amended. The discussion draft before the Subcommittee today is the same version as S. 1983 reported version, with a few additional revisions to address the Administration's remaining concerns with the legislative text.

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.

[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.

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 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. After decades of over pumping by non-Indian water users, water levels in the basin had dropped considerably. 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 provides 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 Agreement[16] 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

[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.

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 function. First, funds from the Pechanga Recycled Water Infrastructure Account will be used to pay 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 for the physical delivery of the ESAA water to Pechanga. The ESAA Water Delivery Agreement addresses service issues and billing issues related to RCWD's 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.[17] To fulfill Pechanga's full entitlement of

[17] Based on construction cost estimates prepared at the time of negotiations on this element of the settlement, the cost to construct pipeline capacity to deliver the ESAA water outside of the RCWD system would have been significantly higher than the combined cost of the Interim and Permanent Capacity being provided by RCWD ($23.5 million). This is why the parties chose to enhance the existing RCWD system to be able to provide the lowest cost for this essential delivery capacity.

4,994 AFY,[18] Pechanga will need the Wolf Valley Basin groundwater and MWD imported potable water. In order to receive delivery of MWD imported potable, the MWD water would need to be delivered to Pechanga through offsite conveyance capacity. Available import delivery capacity in the region is limited, and thus posed a challenge. However, the parties were able to negotiate the ESAA Capacity Agreement such that RCWD will ensure that requisite capacity exists in RCWD's system to deliver Wolf Valley ground water and MWD imported water to Pechanga. Together, the Interim Capacity and Permanent Capacity funds will finance the necessary RCWD conveyance capacity. If RCWD is unable to ensure that there is sufficient capacity for groundwater and MWD deliveries to Pechanga, the Settlement Act provides that the funds in the ESAA Delivery Capacity Account shall be available to Pechanga to find alternative capacity. 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; (2) payment of the MWD Connection Fee (the combined Connection Fees for EMWD and MWD is approximately $2,896,442); and (3) a very small portion of the expenses, charges or fees incurred by Pechanga in connection with the delivery or use of water pursuant to the Settlement Agreement.[19] 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 a portion of the funds necessary for Pechanga to receive MWD water.

The EMWD Connection Fee 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. Rather than go through a normal annexation because of tribal sovereignty concerns, however, the ESAA will be governed by the terms and conditions of the agreement such that Pechanga will contractually commit to adhere to rules and regulations applicable to its activities as a customer of EMWD and MWD but that additional terms and conditions will be included to avoid infringement of Pechanga's sovereignty whereby EMWD and MWD will have alternative means to exercise their responsibilities.

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,

[18] The United States' responsibility to provide such delivery capacity is based on both its potential liability to the Band in litigation that the Band could bring against the United States for its failure to protect and develop the Band's federal reserved water rights, and on the United States' programmatic responsibility to the Band as trustee for the Band, its members and its reservation.

[19] The Band will bear the overwhelming majority of the costs associated with the delivery of MWD imported water over time.

if existing water is unavailable.[20] 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 is a necessary element to providing a balanced water supply. The additional imported water resulting from the use of MWD water to fulfill the Band's water entitlement will inevitably increase the level of salinity in a basin that is already suffering from a very high level of salinity in its groundwater. The Pechanga Water Quality Account is intended to help offset the effect of this additional MWD water 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.

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.[21] 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:

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[20] For example, the Gila River Indian Community Water Rights Settlement Act of 2004 (Pub. L. No. 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).

[21] *See* Sec. 5(a) of S. 1219 of the 113th Congress.

- 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).[22]

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. JUSTIFICATION OF FEDERAL CONTRIBUTION

Pechanga recognizes that the United States is always concerned in Indian water settlements with the overall cost of an Indian water rights settlement, and more specifically, the Federal contribution to such settlements. The Band further recognizes that Federal funds are limited and their expenditure must be well justified. Given the Committee's new process for considering Indian water rights settlements, it has become even more critical to ensure that each Indian water settlement is a net benefit to the United States and the American taxpayers. Accordingly, Pechanga has worked very hard to ensure that the Federal contribution to the Pechanga Settlement Agreement is justified and fairly reflects the United States' combined potential liability and programmatic responsibility to the Band. We strongly believe that the total cost of the Pechanga Water Settlement, a relatively small amount at $28.5 million (scored by CBO at $33 million), does not exceed the existing claims. In sum, the benefits to the United States of settling Pechanga's claims far outweigh the costs of not settling with Pechanga.

A. Federal Programmatic Responsibility to the Band

The Criteria and Procedures for the Participation of the Federal Government in Negotiations for the Settlement of Indian Water Rights Claims ("Criteria and Procedures") provides that Federal contributions to a settlement may include costs related to the Federal trust or programmatic responsibilities.[23] The United States argued in the *Fallbrook* proceedings that

[22] *See* Sec. 5(f)(2)(D).

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

Pechanga has an entitlement to 4,994 acre feet per year in the Santa Margarita River Watershed, and the court adopted the United States' position on a prima facie basis. Moreover, as recognized by the United States, local water supplies, both on the Reservation and in adjacent areas were adequate and capable of being developed in an economically feasible manner to fulfill at least the 4,994 acre-feet per year that the United States had argued for in the *Fallbrook* proceedings in 1958.

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

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

Accordingly, the Pechanga Water Settlement Act provides funding for the necessary infrastructure to fulfill the United States' trust and programmatic responsibility to deliver adequate replacement water to the Band to fulfill its entitlement. The Pechanga Water Settlement Act also provides for a subsidy fund that will bring down somewhat the cost of the expensive ESAA Water, which is an element that is consistent with the United States' contribution to most other Indian water rights settlements.[24]

Absent this settlement, the United States' programmatic responsibility would be far higher than the total federal contribution for this element of the settlement. The federal contribution for this element of the settlement equals approximately $23 million ($17.9 million for capacity and $5.4 million for the Pechanga Water Fund). The federal programmatic responsibility for water for the Band absent the settlement would have been at least $23.5 million for building a pipeline to deliver the water to the Band, plus the cost of acquiring the water rights to fulfill the Band's reserved water rights ($57,880,000) or the annual delivery cost of such water estimated over a 100 year period ($289,400,000).[25]

[24] *See e.g.,* Arizona Water Settlements Act of 2004, Pub. L. No. 108-451, § 107; Claims Resolution act of 2010, Title IV, Crow Tribe Water Rights Settlement of 2010, Pub. L. No. 111-291, §§ 411(c)(3) & (4).

[25] The cost of importing MWD water is at least $1,000 an acre foot per year with that amount only increasing in the future. With respect to replacement water cost, the difficulty is that Pechanga is located in a market where the water resource is so scarce that there is quite literally no benchmark or comparable sales to identify. According to the Band's economist, anecdotal evidence indicates a market price of at least $20,000 per acre foot and perhaps significantly higher, if water could be found at all.

Programmatic Responsibility Comparison

Type of cost	Federal savings resulting from settlement	Federal contribution to settlement	Potential net savings to federal government
Programmatic federal costs			
• Infrastructure	$23,500,000[26]	$17,900,000	$5,600,000
• Acquisition of water rights or lease	$57,800,000 to $289,400,000	$11,600,000	$46,280,000 to $277,800,000
TOTALS	$81,380,000 to $312,900,000	$28,500,000	$51,880,000 to $283,400,000

B. Potential Federal Liability

In addition to its programmatic responsibilities, the federal government has an obligation to every federally recognized Indian tribe to protect its land and water resources. Indeed, a core principle of Federal Indian law is that when the United States sets aside and reserves land for Indian tribes, such reservation includes all the water necessary to make their reservations livable as permanent homelands.[27] The United States in turn holds these reserved water rights in trust for an Indian Tribe.[28]

Congress has expressly found that "the Federal Government recognizes its trust responsibilities to protect Indian water rights and assist Tribes in the wise use of those resources."[29] The Department of Interior has similarly found that "Indian water rights are vested property rights for which the United States has a trust responsibility, with the United States

[26] The construction cost of the necessary infrastructure was estimated at $23 million in 2008 dollars. A current construction cost estimate for the infrastructure was calculated by applying the Bureau of Reclamation's Construction Cost Trends index for steel pipelines to the 2008 cost estimate. The resulting 2016 construction cost estimate is $26.1 million. After adjustment for the prospects for success in this claim potential United States loss, the 2016 estimates is $23.5 million.

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

[28] *Id.*

[29] *See e.g.* 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)).

holding legal title to such water in trust for the benefit of the Indians."[30] Courts have also recognized the federal trust responsibility for Indian water rights.[31]

Accordingly, a tribe may recover substantial monetary damages from the United States if it can be shown that the tribe suffered a loss of water or water rights.[32]

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

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

In *United States v. Fallbrook Public Utility District, et al*, the court held in Interlocutory Judgment No. 41, that the United States "intended to reserve and did reserve rights to the use of the waters of the Santa Margarita River stream system which under natural conditions would be available on the Pechanga Indian Reservation including rights to the use of ground waters sufficient for the present and future needs of the Indians residing thereon with priority dates of June 27, 1882, for those lands established by the Executive Order of that date; January 9, 1907 for those lands transferred by the Executive Order of that date; August 29, 1893 for those lands added to the reservation by Patent on that date; and May 25, 1931, for those lands added to the reservation by Patent of that date."[33] Based on IJ 41, the United States recognized reserved water rights for the Pechanga. Similar to the Gila River case, it is very likely that the federal

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

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

[32] *See e.g. N. Paiute Nation v. United States*, 30 Ind. Cl. Comm'n. 210, 215-217 (1973); *Pyramid Lake Paiute Tribe v. United States*, 36 Ind. Cl. Comm'n. 256 (1975); *see also*, Cohen's Handbook of Federal Indian Law § 19.06, at n.29(2015). For instance, in *Pyramid Lake Paiute Tribe*, the court held that the Secretary of Interior was obligated to fulfill its trust responsibility to the tribe in allocating the excess waters of the Truckee River between the federal reclamation project and the reservation and not to reconcile competing claims to water. In *Gila River Pima-Maricopa Indian Community v. United States*, 684 F.2d 852 (Ct. Cl. 1982), the tribe was able to establish its right to relief based on the federal government's failure to take action when upstream diversions interfered with the water supply to the Gila River Reservation. The Claims Court specifically held that "the actions taken by the United States in establishing the reservation in 1859 and in enlarging it thereafter, together with repeated recognition of the need to preserve or restore the water supply utilized by the Pimas and Maricopas in maintaining their commendable self-sufficient status, are consistent only with the existence of a special relationship between these Indians and the United States concerning the protection of their lands and the water supply they utilized on these lands."

[33] Interlocutory Judgment No. 41 ("IJ 41"), *United States v. Fallbrook Public Utility District, et al.*, Civ. No. 3:51-cv-01247 (S.D.C.A.) (Nov. 8, 1962) at 3266.

government could be found to have a compensable fiduciary duty to Pechanga with respect to the Band's water rights.

The United States failed to satisfy its fiduciary obligations to Pechanga, while its actions indicate that the United States recognized this duty. For instance, Pechanga described how the United States through the Bureau of Indian Affairs ("BIA") recognized that Pechanga had a paramount right to water which impacted BIA's actions on behalf of the Band. Further, as part of this special relationship, over the years Pechanga has requested on numerous occasions for the BIA to conduct water supply studies and take other action in order to protect the Band's water rights and water supply.

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

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

The BIA Sacramento Area Director agreed with the Band. He recommended that "the Secretary demand Justice to stop all pumping of the groundwater now in violation of the existing decree and stipulation until such time as the Pechanga Band and the Secretary have documentary evidence that the pumping by Rancho California is not affecting the groundwater rights of the Pechanga Band. The United States as trustee for these water rights has no alternative!" In response to the BIA Area Director's recommendation, the Solicitor's Office stated that "The Department of Justice points out that where the Department of Defense is the beneficial holder of the right and refuses to have that right interfered with that the United States can bring the action only if we can demonstrate that the reserved right of the Indians is being jeopardized." The Sacramento Area Director recommended that the Secretary of Interior demand that the Justice Department stop groundwater pumping until it was proved that the pumping had not affected the groundwater rights of the Indians. It was not until January 26, 1973 that funds were finally made available for United States Geological Services to undertake a water resources study of Pechanga Reservation.

The Band also referenced previous litigation in which Pechanga and several other California tribes in similar circumstances, successfully sued the federal government in the Indian Claims Commission for, among other things, its failure to protect and preserve the plaintiffs' reserved water rights from non-Indian interference, failure to provide or maintain necessary reservation irrigation systems, and the improper taking of aboriginal water rights. The case was settled in 1993 when six of the Tribes, including Pechanga, accepted $7,500,000.00 in settlement of the pending claims. It could be argued that notwithstanding the payment of this claim in satisfaction of these breaches of trust, since 1993, the government has continued to breach its trust obligation to the Band by failing to protect and preserve the plaintiffs' reserved water rights from non-Indian interference and by failing to provide necessary water to the Pechanga Reservation.

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

2. Estimated value of Band's claims against the United States

Together, the historical actions and at times lack of action, on behalf of Pechanga, has left the United States vulnerable to litigation. If settlement is not reached it is likely that the Band would pursue the following claims, among possibly others, alleging a continuing uncured breach of trust since at least 1993 giving rise to claims such as:

1. A claim against the United States for failure to enhance, protect and quantify the reserved rights established by IJ 41 since at least 1993. (Value of claim would likely be the same as the value of the accounting claim below, namely the cost of replacement water for the period in question ($79.5 million) plus lost economic activity).

2. A claim against the United States for failure to adjudicate and protect the Band's state law water rights in the *Fallbrook* adjudication since at least 1993. (Value of claim would be the same as the value of the accounting claim below, namely the cost of replacement water for the period in question ($79.5 million), plus lost economic activity).

3. A claim against the United States for failure to adjudicate and protect the Band's aboriginal water rights in the *Fallbrook* adjudication since at least 1993. (Value of claim would be the same as the value of the accounting claim below, namely the cost of replacement water for the period in question ($79.5 million), plus lost economic activity).

4. A claim against the United States for failure to enhance, protect and quantify the Band's federally reserved water rights (as set forth in 1-4 above) on all Pechanga trust land acquired after the *Fallbrook* decree, which includes the Great Oak Ranch and Zone V. (Not yet quantified).

5. A claim for an accounting of Pechanga's federal reserved water entitlement. (Value of claim would be the cost of replacement water for the period in question ($79.5 million), plus lost economic activity).[34]

[34] As with other tribal trust assets, such as land or mineral resources, the United States has a fiduciary obligation to protect and manage the water rights of the Band. Tribes have successfully sought accountings from the United States for such trust assets in the same manner in which they have sought accounting for tribal trust funds. *See Gila River v. Jewell* (case involving U.S. failure to account for rights-of-way). In this instance, the United States established through its own efforts a federally reserved water right, on a prima facie basis only, of 4,994 AFY. The prima facie nature of the entitlement means that it is presumed by all parties to be valid unless further challenged by a third party (other than the United States, which established the right by its own litigation efforts on behalf of the Band and therefore the United States, as trustee, cannot as a matter of equity now argue that the right, which the United States never bothered to perfect, is not a valid right). The prima facie entitlement of 4,994 AFY, while binding on the United States as to the Band's legal entitlement, is, by its very nature, however, not fully binding on any other party to the *Fallbrook* Adjudication. This means that the Band itself has never had the ability to either develop economic uses for the water, nor to prevent others from using it. This was one of the primary bases for the Band's action against the United States, which resulted in a settlement by the United States, thereby putting the United States again on notice as trustee that its failure to act was damaging the Band's interests and development. Because the Band's water entitlement would be held as binding on the United States, the trustee that made the case for establishing it but did not press the case to conclusion, the Band would have the right to seek an accounting by the United States in federal district court for what happened to the balance of the Band's water entitlement for the period between 2001 and the date on which the claim would ultimately be resolved, which, based on prior experience would likely be several years after the case was filed. We have estimated that this case, as one with significant ramifications for U.S. liability and precedent, would be one that the United States would litigate fully, and that a resolution would take at least 9 years. Should the Band prevail in establishing that the United States as trustee is bound, for purposes of an accounting only, an equitable action, by the prima facie reserved water right amount, 4,994 AFY, then it would be responsible as trustee for either demonstrating that the Band used the water for its own purposes, or find replacement water to replace the water it could not otherwise account for. The value of the unaccounted for water for which the United States could be held liable in an accounting action would be the cost for providing the water to the Band when the water should have been provided and then brought to present value, assuming, of course, that the Band opts for a payment in lieu of replacement water. Thus, the cost of this claim to the United States, if there is no settlement would be calculated by subtracting the amount of water actually used by the Band in any given year, beginning in 2001 and ending in 2025, from the prima facie entitlement amount (4,994 AFY) times the cost of replacement water in that year, adjusted to reflect 2016 dollars. The cost of replacement water is based on the only available supply, which is water from the Metropolitan Water District of Southern California (MWD). The total value of the deficit over this period amounts to an estimated present value of $88.6 million dollars; adjusted for the assumed probability of U.S. legal loss, the present value of the deficit is $79.5 million. The approach described above reflects the cost of purchasing replacement water supplies to fulfill historic water deficits, but it does not address the Band's lost potential for various economic development activities resulting from those deficits. In the past 20 years, the Band has undertaken a number of economic development projects and is involved in large and small commercial business activity, as well as agricultural operations. However, the Band's economic development activities would likely have been greater, given the availability of additional Band water supplies. Of course, water alone cannot create economic opportunities or benefits, but the availability of water supplies is essential to support many types of projects. An economic development study completed for the Pechanga reports Band supported employment and income in the local area, as well as regional purchases made by the Band in 2003. In that year, total purchases of goods and services on the Pechanga Reservation amounted to $75.4 million; that activity was supported by total Band water production of 725 AF. If the value of the Band's

6. A claim against the United States to fulfill the Band's full entitlement to its federal reserved right. (Value of claim would range from $57,880,000, the amount estimated to acquire the water rights necessary to fulfill the balance of the Band's water rights, to $289,400,000, the amount estimated to lease and deliver a similar amount of water over 100 years).[35]

While it is uncertain whether the Band would be successful on some or all of these claims, the aggregate sum of the potential exposure and liability of the United States could conservatively be valued at a total potential recovery of between $137,380,000 and $368,900,000, not including the cost to the Band of lost economic activity resulting from the lack of water for economic development.[36]

3. Estimate of savings to United States of litigation costs

The Pechanga Water Settlement, like all Indian water settlements, involves complex issues, some of first impression, all of which could potentially entail litigation on a multi-year basis. Already, the United States has incurred significant costs associated with representing Pechanga in the *Fallbrook* litigation. The claims alleged by Pechanga could entail multiple legal fora, including U.S. Federal District Court and the U.S. Court of Claims. In some instances, the United States would likely be involved as the trustee for the Band and the allottees on the Reservation. In others, the United States will be involved as a defendant in a claim for damages.

The Band has been aggressive in recent years in pursuing its settlement, engaging national counsel and independent experts to prosecute its settlement efforts. If these settlement efforts were to fail, we should assume that the Band would redouble their efforts in a litigation front, seeking to both force the United States to assist the Band in prosecuting its claims and

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local purchases (on a per AF basis) were applied to the 2016 water deficit, the value of the deficit in that year alone would amount to over $612 million in economic activity. The value of even a fraction of the deficit amounts to millions of dollars of lost economic activity every year.

[35] A major component of litigation that would ensue should there not be a settlement with the Band is the Band's prosecution in the *Fallbrook* Adjudication of its claims to water. The starting point for the Band's claim would be the U.S. trustee's position in the prior litigation which was 4,994 AFY. A critical element of the litigation with third parties, primarily RCWD, would likely be what is the water supply available to the Reservation and when should it have been determined. While this issue has been litigated in other cases, it remains a matter of substantial uncertainty. The U.S. position, however, is one that the Band would argue was established in its initial complaint filed in the *Fallbrook* Adjudication (an amount actually slightly higher than 4,994 AFY). The Band's position is that the amount of available supply would have to have been determined at the time the Reservation was established by Executive Orders. The complexity of this litigation would be almost overwhelming, given the nature of water law in California, the Mexican Cession overlay, and the varying dates of reservation of rights by the various Executive Orders.

If the Band were to prevail in its claim in the *Fallbrook* Adjudication for the amount of water set forth in the US trustee's position in the prior litigation, which was 4,994 AFY, the parties agree that the current available supply, which has been essentially cut in half by over use of the Basin, is only 2,100 AFY. This would mean that the Band would be entitled to, and the United States would have an obligation to deliver, an additional 2,894 AFY, beginning at or around the date on which a judgment in the case is finally rendered.

[36] This amount is based on an estimate that the Band obtained from an outside economist experienced in the valuation of water rights claims and damages.

enforcing the Band's and allottees' rights in the interim. The Band is also likely to seek to sue the United States directly in a number of fora.

Assuming the Band has the necessary resources to prosecute its various claims to their end, the United States would be subject to significant litigation costs to prosecute the Band's and allottees' claims, and to defend its own position. At a minimum, such litigation would involve a multitude of experts, including forensic accounting firms, agronomist, hydrologists, economists, historical experts, as well as significant litigation support to scan and code a large quantity of documents and develop legal strategy.

While difficult to estimate how aggressive the Band's efforts would be in litigating its claims, litigation costs could be broken down into three categories of litigation: (1) the litigation related to Pechanga claims against the United States for damages; (2) litigation costs related to Pechanga's claims for an accounting of its Federally Reserved water entitlement; and (3) litigation costs related to litigation in the *Fallbrook* Adjudication to quantify Pechanga's entitlement to water. We believe that a conservative estimate of the three potential litigation paths would involve the following costs, including attorneys' fees and expert witnesses:

1. Damages litigation. Litigating this claim could easily cost the United States $1 million a year for seven (7) years, for a total of $7 million.

2. Accounting claim litigation. Litigating this claim could easily cost the United States $500,000 for five (5) years, for a total of $2.5 million.

3. Litigating Pechanga's entitlement. Litigating this claim could easily cost the United States $1 million for nine (9) years, for a total of $9 million.

In total, settling the Pechanga Water Settlement, thereby avoiding the costs outlined above, results in a savings to the United States alone of $18.5 million.

4. Comparison of cost of federal contribution to federal costs avoided by settlement

As summarized in the chart below, taken together, enacting the Pechanga Water Settlement would constitute a significant savings to the federal government, clearly meeting Criteria 4 and 5 of the Criteria and Procedures.

Litigation Comparison

Type of cost	Federal savings resulting from	Federal contribution to	Potential net savings to federal

	settlement	settlement	government
Estimated federal damages • Future replacement water • Accounting for water resources lost to tribe in past	 $57,880,000 to $289,400,000 $79,500,000		
Litigation costs	$18,500,000		
TOTALS	$155,880,000 to $387,400,000	$28,500,000	$127,380,000 to $358,900,000

As discussed above, the total cost of the settlement does not exceed the value of the existing claims that are being settled. Further, the federal contribution of $28.5 million for the Pechanga Water Settlement does not exceed the sum of calculable legal exposure combined with the additional costs related to the United States' programmatic and trust responsibilities. Pechanga clearly meets all of these requirements.

VI. NON-FEDERAL CONTRIBUTION

Pechanga is cognizant that in addition to the Federal contribution, the Criteria and Procedures provide that 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 contributions from non-Indian parties throughout the negotiations for this settlement and successfully obtained, with the support and assistance of the Federal Negotiation Team, substantial non-Federal contributions to the settlement.

For purposes of the 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 $32,030,815. 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 $32,030,815. Of course that does not take into consideration the cost to RCWD if the settlement were to go away. RCWD would incur significant litigation and expert costs associated with litigating their *Fallbrook* decreed rights in opposition to Pechanga's *Fallbrook* decreed rights and if Pechanga were to prevail RCWD would be forced to purchase additional expensive MWD water to meet its customers' needs.

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 provide a very small portion of the cost of MWD water to reduce the cost of the water, primarily 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 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 by the MWD Board pending legislative resolution, 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 $2,896,442 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.

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 provide for our tribal membership and customers.

While the new Committee process has proved to be a daunting, timely and difficult process it has created a path forward to us that has not been available in the last few Congresses. Navigating the new Committee process resulted in multiple revisions to the legislative text and settlement agreement to address the Administration's concerns. The documents in front of you are the result of numerous negotiations amongst the parties, which have been conveyed to the *Fallbrook* court as of June 16, 2016.

We are cognizant that the Office of Management and Budget is still in the process of reviewing the Pechanga Water Settlement to determine whether it meets the Criteria and Procedures. Pechanga has done everything in its power to be helpful and provide additional information to facilitate the Office of Management and Budget's final review and sign off of our settlement. We are hopeful that the Administration will transmit a revised letter to the Committee indicating its support of the Pechanga Water Settlement, including Pechanga's adherence to the Criteria and Procedure, in the near future.

Once a revised letter is transmitted, 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.