

NOTE

IN THE FEDERAL GOVERNMENT WE TRUST? FEDERAL FUNDING FOR TRIBAL WATER RIGHTS SETTLEMENTS AND THE TAOS PUEBLO INDIAN WATER RIGHTS SETTLEMENT ACT

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Today's relationship between federally recognized Indian tribes and the federal government is complex. Tribes must be able to decide how they wish to manage their water resources, and yet the federal-tribal trust relationship means tribes also rely on the federal government to act in their best interests regarding these water resources. As settlement continues to be a preferred approach to resolve tribal water rights disputes, the federal government must ensure that tribes have the appropriate tools to negotiate these settlement agreements without dictating the exact content of the settlements. Despite the federal-tribal trust responsibility, federal funding for such settlement negotiations is limited, and funding for settlement implementation continues to rely on a constrained Bureau of Indian Affairs budget. As a result, where there is inadequate federal funding for tribal water settlements, tribes may go decades without securing the water to which they are entitled.

This Note suggests that if the federal government is to fulfill its trust responsibility to tribes in securing their water rights, the federal government should train and encourage tribal members to play a more integral role in the negotiation teams that secure tribal water rights. By placing the exact contours of tribal water negotiations more thoroughly in the tribes' hands, the federal government would, over time, relieve some of its negotiation team funding burden as well as honor the federal goal of encouraging more meaningful tribal self-determination.

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INTRODUCTION: TRIBAL WATER RIGHTS AND THE FEDERAL-TRIBAL TRUST RELATIONSHIP

Today's relationship between federally recognized Indian tribes and the federal government is complex.¹ As the historical flip-flopping of U.S. congressional policy toward Indian tribes demonstrates, a significant tension dwells at the intersection of federal control or supervision over federally recognized Indian tribes and federal encouragement of tribal self-government.² This tension is particularly present in the context of tribal natural resource management.³ Tribes must be able to decide how they wish to manage their resources, and yet, because the federal government is the tribes' trustee for these natural resources,⁴ tribes must

¹ See *United States v. Lara*, 541 U.S. 193, 226 (2004) (Souter, J., dissenting) ("It is as true today as it was in 1886 that the relationship of Indian tribes to the National Government is 'an anomalous one and of a complex character.'" (quoting *United States v. Kagama*, 118 U.S. 375, 381 (1886))).

² Within the span of a century, the U.S. congressional policy toward Indian tribes went from full assimilation into white culture, to termination of Indian tribes, to self-determination. See RICHARD NIXON, MESSAGE FROM THE PRESIDENT OF THE UNITED STATES TRANSMITTING RECOMMENDATIONS FOR INDIAN POLICY, H.R. DOC. NO. 91-363, at 3 (2d Sess. 1970) ("[T]he goal of any new national policy toward the Indian people . . . [must be] to strengthen the Indian's sense of autonomy without threatening his sense of community."); Robert T. Anderson, *Indian Water Rights, Practical Reasoning, and Negotiated Settlements*, 98 CAL. L. REV. 1133, 1138 (2010) (explaining the congressional policy of assimilation and the 1934 Indian Reorganization Act in context of Indian water rights).

³ See, e.g., Judith Royster, *Indian Water and the Federal Trust: Some Proposals for Federal Action*, 46 NAT. RESOURCES J. 375, 375-76, 380 (2006) (explaining how the federal government holds tribal water rights in trust for the tribes and yet this does not automatically trigger full fiduciary duties).

⁴ See FELIX S. COHEN, HANDBOOK OF FEDERAL INDIAN LAW § 3.04, at 182-200 (Nell Jessup Newton et al. eds., 2005) [hereinafter HANDBOOK].

also be able to rely on the federal government to act in their best interests regarding these resources.

Water, a most valuable and increasingly contentious natural resource—especially in the arid Western region of the United States⁵—is one such natural resource that tribes rely on the federal government to adequately secure.⁶ As settlement continues to be a preferred approach to resolve tribal water rights disputes,⁷ the federal government must ensure that tribes have the appropriate tools to negotiate these settlement agreements without dictating the exact content of the settlements, as such would impede on tribes' inherent sovereign right to self-government.⁸ While tribes are able to participate in the settlement process to varying degrees, depending on their financial resources,⁹ many tribes still depend on the federal government to provide federal negotiation teams to help them effectively represent their tribal water interests in the negotiation

⁵ See BONNIE G. COLBY, JOHN E. THORSON & SARAH BRITTON, *NEGOTIATING TRIBAL WATER RIGHTS* xix (2005) (“The rapid growth of western cities, full appropriation of dependable river flows, declining groundwater levels, and increased environmental needs for water all lead to intense competition for limited water supplies and pressure to address tribal water claims.”).

⁶ See HANDBOOK, *supra* note 4, § 19.06, at 1220–21 (“The United States, in its role as trustee of Indian lands, is charged with the responsibility of administering trust property for the sole use and benefit of the Indian tribes To that end, Congress has recognized the federal government’s ‘trust responsibilities to protect Indian water rights and assist Tribes in the wise use of those resources.’” (quoting Western Water Policy Review Act of 1992, Pub. L. No. 102-575, title XXX, § 3002(9), *reprinted in* 43 U.S.C. § 371)); Royster, *supra* note 3, at 377 (explaining that the federal government has long been understood to be responsible for ensuring that tribes have adequate water because reservation lands “would have little value without the water necessary to make the reservation livable”).

⁷ See *Taos Pueblo Indian Water Rights Settlement Act of 2009 and Aamodt Litigation Settlement Act of 2009: Hearing on H.R. 3254 and H.R. 3342 Before the Subcomm. on Water and Power of the H. Comm. on Natural Resources*, 111th Cong. 15 (2009) (statement of Michael L. Connor, Comm’r, Bureau of Reclamation) [hereinafter *H.R. 3254 Statement*] (“[F]or over 20 years, federally recognized Indian tribes, states, local parties, and the Federal government have acknowledged that, when possible, negotiated Indian water rights settlements are preferable to protracted litigation over Indian water rights claims.”); COLBY ET AL., *supra* note 5, at xvi (“Since the 1980s, settlement negotiations have been an integral part of the process used by tribes, the federal government, and states in attempting to resolve Indian water rights claims.”).

⁸ See *Worcester v. Georgia*, 31 U.S. (6 Pet.) 515, 518 (1832) (recognizing that tribal nations did not surrender self-government just because Congress was responsible for “managing all their affairs”); *but see Montana v. United States*, 450 U.S. 544, 545–46 (1981) (“[T]hrough specific treaties and statutes, the Indian tribes have lost many of the attributes of sovereignty Exercise of tribal power beyond what is necessary to protect tribal self-government or to control internal relations is inconsistent with the dependent status of the tribes”).

⁹ See WESTERN GOVERNORS’ ASS’N, *WATER NEEDS AND STRATEGIES FOR A SUSTAINABLE FUTURE* 19 (2006) [hereinafter *WATER NEEDS AND STRATEGIES*] (“Funding for tribes’ attorneys and technical experts has been so severely reduced over the past few years that it [has made] it difficult for tribes to meaningfully participate in the [negotiation] process.”).

process.¹⁰ Despite this responsibility, federal funding for such settlement negotiations has been limited for years,¹¹ and funding for the implementation of settlement terms continues to rely on a constrained Bureau of Indian Affairs budget.¹² As a result, where there is inadequate federal funding for tribal water settlements, tribes may go decades without securing the water to which they are entitled.¹³

This Note suggests that if the federal government is to fulfill its trust responsibility to tribes in securing their water rights, it must approach this responsibility with a longer-term view than settlement-by-settlement negotiation. Instead of merely allocating inadequate funds to pay for federal negotiation teams, engineers, hydrologists, and economists to help the tribes during the negotiation process, the federal government should spend some of its resources to train and encourage tribal members to play a more integral part in the negotiation teams that the tribes otherwise depend on the federal government to provide. Over time, this approach would partially relieve the federal government's burden of funding full negotiation teams for the tribes, and also honor the federal goal of encouraging tribal self-determination by placing the exact contours of tribal water negotiations more thoroughly where they belong—in the tribes' hands.¹⁴

¹⁰ See DANIEL MCCOOL, *NATIVE WATERS: CONTEMPORARY INDIAN WATER SETTLEMENTS AND THE SECOND TREATY ERA* 56 (2002) (“By the early 1990s tribes were literally lining up for federal negotiation teams, but the Department of the Interior did not have the money to field all of the requested teams.”); see also COLBY ET AL., *supra* note 5, at 35 (explaining that while the federal government must fulfill its trust responsibility to tribes the federal government represents many conflicting interests in any one tribal water settlement, including: water rights of other federal reserves, such as national forests and parks, water quality under the federal Clean Water Act, endangered species under the federal Endangered Species Act, and taxpayers “by requiring reasonably priced settlements that include adequate state and local contributions of money and water”).

¹¹ See MCCOOL, *supra* note 10, at 56.

¹² See COLBY ET AL., *supra* note 5, at 70 (“The costs of Indian water settlements are absorbed out of the BIA’s budget, which means that settlement-related expenditures must be offset by reductions to services available to other Indian tribes. Because of the annual limit on the portion of the Interior Department’s budget that can be used for Indian water rights settlements, funding has proved inadequate.”).

¹³ See *id.* at 71 (explaining that even where a tribe receives a tribal water settlement agreement or congressionally approved act, this “merely authorizes the settlement and does not ensure its funding,” and settlements “typically are funded in stages through the annual congressional appropriations process, often over a period of years”).

¹⁴ See *id.* at 19 (“The most daunting challenge facing many tribes is the need to provide viable reservation economies for existing residents—especially the young. An important part of those future economies will be water resources.”); see also MCCOOL, *supra* note 10, at 54–55 (“Budget conscious officials . . . have long contended that . . . no settlement should cost more than the federal government’s legal exposure to claims and damages. [Some federal policymakers] argue that the [water] settlements are simply part of the government’s larger trust responsibility and should help fund long-term goals such as tribal economic development.”). Putting the representation of tribal water rights more completely in the hands of the tribes themselves would also help alleviate the concerns regarding the federal government’s

Part I explains the basic framework of the federal-tribal trust relationship, recognizing that while not always well defined, it is an important aspect of the federal-tribal legal relationship today. Part II focuses on the federal trust responsibility as applied specifically to tribal water rights, and Part III looks at this responsibility as related to tribal water rights settlements. After providing this legal context, Parts IV and V, respectively, explore the Taos Pueblo Indian Water Rights Settlement Agreement and the corresponding Taos Pueblo Indian Water Rights Settlement Act. These Parts will illustrate the nature of many tribal water rights settlements as well as demonstrate the need for a long-term view toward the federal trust responsibility as related to tribal water rights settlements. Despite the plethora of tribal water rights settlement agreements, this Note focuses on the Taos Pueblo Indian Water Rights Settlement because it is an example of a long-awaited settlement between many and diverse stakeholders, and one that also offers a clear example of the still-present federal hesitancy to fund these much-needed tribal water settlements.

Part VI proposes that if the federal government is going to meaningfully fulfill its trust responsibility to tribes in securing their water rights through settlement, it must approach this trust responsibility with a longer-term view of tribal water rights than it currently uses. This Note suggests that one way to express such a long-term approach could be by training and encouraging tribal members to play a more integral role in the negotiation teams, which the tribes often depend on the federal government to provide. This approach would, over time, both alleviate some of the burden on the federal government to fund federal negotiation teams for tribal water rights settlements, and more importantly, encourage the tribal self-government that will be necessary to ensure long-term tribal water security. Before concluding, Part VII explores some of the challenges of this approach, including comprehensive practical implementation, and potential federal resistance to integrating the tribes more thoroughly into the negotiation process while still funding the federal portion of the settlement's implementation. This Note concludes that despite these potential challenges, an approach toward tribal water rights settlements that operates with a longer-term view toward the federal-tribal trust relationship than that which the federal government currently uses, is a better policy approach to ensure that tribes receive all the water to which they are entitled.

I. THE FEDERAL-TRIBAL TRUST RESPONSIBILITY

Today's legal relationship between the federal government and federally recognized Indian tribes is in large part a trust relationship.¹⁵ While this federal-tribal trust relationship is not identical to a private trust relationship because the federal government can and must represent other interests apart from the interests of federally recognized tribes,¹⁶ important characteristics carry over from the private trust relationship to the federal-tribal trust relationship.¹⁷ Most basically, a private trust relationship is a "fiduciary relationship with respect to property, subjecting the person by whom the title to the property is held to equitable duties to deal with the property for the benefit of another person."¹⁸ This fiduciary relationship "demands an exceptionally high standard of moral conduct from the trustee toward the beneficiary."¹⁹

The federal-tribal trust relationship originates from treaties, statutes, and Supreme Court opinions, and has been explained in a variety of ways—from a special relationship predicated on the fact that the tribal "relation to the United States resembles that of a ward to his guardian,"²⁰ to more recent language of trustee and beneficiary.²¹ While it would be inconsistent with the realistic functioning of the federal government to require it to protect tribal interests to the exclusion of all other interests,

¹⁵ See *United States v. Mitchell* (*Mitchell II*), 463 U.S. 206, 225 (1983) ("[T]he undisputed existence of a general trust relationship between the United States and the Indian people . . . [is a] principle [that] has long dominated the Government's dealings with the Indians."). The Supreme Court confirmed this general trust relationship between the federal government and Indian tribes in *United States v. Navajo Nation*, 537 U.S. 488, 490 (2003).

¹⁶ See *Nevada v. United States*, 463 U.S. 110, 128 (1983) ("[T]he Government cannot follow the fastidious standards of a private fiduciary, who would breach his duties to his single beneficiary solely by representing potentially conflicting interests without the beneficiary's consent.").

¹⁷ See Mary Christina Wood, *Protecting the Attributes of Native Sovereignty: A New Trust Paradigm for Federal Actions Affecting Tribal Lands and Resources*, 1995 UTAH L. REV. 109, 125 (1995) ("While specific rules of private trust law are often misplaced in the public law context, the basic foundational premises of private trust law may be transferable . . . [to the federal-tribal trust relationship]."); *id.* at 115–16 (arguing that comparing the private trust model to the tribal trust model is often "too simplistic" because "Indian tribal interest nearly always implicates a host of factors relating to the tribe's sovereign status that are not encountered in the individual-beneficiary context").

¹⁸ RESTATEMENT (SECOND) OF TRUSTS § 2 (1959).

¹⁹ Ann C. Juliano, *Conflicted Justice: The Department of Justice's Conflict of Interest in Representing Native American Tribes*, 37 GA. L. REV. 1307, 1312 (2003) (citing GEORGE GLEASON BOGERT ET AL., *BOGERT'S TRUSTS AND TRUSTEES* § 1 (2d ed. 1984)); see also *White Mountain Apache Tribe v. United States*, 11 Cl. Ct. 614, 650 (1987) ("Although the rules governing the relationship between private fiduciaries and their beneficiaries do not apply necessarily with full vigor to the Government-Indian fiduciary relationship, it is entirely appropriate to utilize the general law of fiduciary relationships [to help characterize certain federal-tribal trust relationships].").

²⁰ *Cherokee Nation v. Georgia*, 30 U.S. (5 Pet.) 1, 17 (1831).

²¹ See HANDBOOK, *supra* note 4, § 5.04[4][a], at 419.

especially its own,²² the federal government nevertheless holds land and other property assets in trust for tribes²³ and, therefore, owes a duty as trustee to act in the tribes' best interest respecting these assets.²⁴ Some legal scholars argue that there is a disturbingly unavoidable conflict of interest inherent to the federal government's role as trustee to federally recognized tribes.²⁵ However, this federal trust responsibility, while often rationalized by paternalistic notions,²⁶ and at times used to justify congressional plenary power over tribal affairs,²⁷ has been, and continues to be, a vital component of the legal relationship between federally recognized tribes and the U.S. federal government.²⁸ It is easy to say that there is a federal-tribal trust relationship.²⁹ It is not as easy to define just what this trust relationship encompasses.

There are three main categories of the federal-tribal trust relationship that determine the scope of what triggers a trust responsibility, what kind of trust responsibility it is, and what is available to a tribe if it shows

²² See Juliano, *supra* note 19, at 1325–26 (explaining that the Department of Justice's Environment and Natural Resources Division (ENRD) has two sections that are responsible for civil litigation relating to tribes. The General Litigation Section litigates claims on behalf of the United States in defense of Indian tribes or individuals, and the Indian Resources Section litigates on behalf of Indian tribes and individuals. While this division ensures that the same federal attorney does not represent both parties, both sections ultimately answer to the same Attorney General who determines the position of the ENRD in the litigation). Although one legal scholar argued that the federal-tribal trust responsibility should incorporate a standard by which to ensure that the tribe's interests are prioritized over other countervailing federal interests, no such standard has been adopted. See Wood, *supra* note 17, at 116.

²³ See generally HANDBOOK, *supra* note 4, § 3.04, at 182–200 (discussing the definition and significance of "Indian Country.").

²⁴ See *id.* § 19.06, at 1220–21.

²⁵ See Juliano, *supra* note 19, at 1329.

²⁶ The Supreme Court repeatedly articulated the rationale for this trust relationship in blatantly paternalistic language. See, e.g., *United States v. Kagama*, 118 U.S. 375, 384 (1886) (finding that because the tribes were largely dependent on the United States, federal power over "these remnants of a race once powerful, now weak and diminished in numbers, is necessary to their protection"); *Cherokee Nation v. Georgia*, 30 U.S. (5 Pet.) 1, 17 (1831) (characterizing the tribes as "domestic dependent nations . . . in a state of pupillage").

²⁷ See *Kagama*, 118 U.S. 375, 384 (1886) ("From their very weakness and helplessness . . . there arises the duty of protection, and with it the power."); Kevin Gover, *An Indian Trust for the Twenty-First Century*, 46 NAT. RESOURCES J. 317, 318 (2006) ("By the end of [the nineteenth] century, [the trust relationship] had evolved into an intrusive means of denying Tribes control of their lands through the exercise of an unconstrained federal power to manage Indian property regardless of the desires of the Indians.").

²⁸ See HANDBOOK, *supra* note 4, § 5.04[4][a], at 419 ("Today the trust doctrine is one of the cornerstones of Indian law.").

²⁹ While the federal-tribal trust relationship is well established, it exists only so long as the federal government chooses to recognize a tribe. It is within Congress's plenary power over Indian affairs to abrogate the trust relationship entirely by terminating federal recognition of a tribe. See, e.g., *United States v. Lara*, 541 U.S. 193, 203 (2004) ("One can readily find examples in congressional decisions to recognize, or to terminate, the existence of individual tribes."); *Menominee Tribe of Indians v. United States*, 391 U.S. 404, 408 (1968) (discussing the Termination Act of 1954); 25 U.S.C. § 564 (1982) (terminating the "Federal supervision over the trust and restricted property of the Klamath Tribe of Indians").

that the federal government has breached this trust responsibility.³⁰ The first and broadest trust responsibility is called the “general” or “historic” trust responsibility.³¹ While a general trust relationship exists between the federal government and every federally recognized tribe,³² this general trust relationship is limited in practice, as it does not create a cause of action for money damages,³³ and “at most provides the rationale for reading statutes liberally.”³⁴ The second category of the federal trust responsibility is called a “bare” or “limited” trust, and only a specific statutory provision creating such a responsibility can trigger it.³⁵ Equitable relief is the most common form of recovery for breach of a limited trust responsibility, but money damages are also possible.³⁶ Whatever the form of the relief, the language that triggers the limited trust is not expansive enough to “impose any duties not encompassed within the limits of the trust,” as explicitly stated in the statutory provision.³⁷ The third and highest level of the federal trust responsibility is the “full fiduciary” responsibility.³⁸ Statutes, regulations, or management by the federal government trigger this full fiduciary responsibility, and the remedy for breach of this responsibility is money damages.³⁹ Where the language of the statute is ambiguous about whether it creates a trust responsibility, courts may construe the statutes in favor of the Indians, as consistent with the canons of statutory construction.⁴⁰ Even if there is no explicit statutory provision setting forth a federal trust responsibility, there may be a full fiduciary responsibility where a federal statutory or regulatory scheme authorizes comprehensive or pervasive control over a tribal resource, such as “timber management . . . oil and gas leasing, and management of Indian tribal and individual trust funds.”⁴¹

³⁰ See HANDBOOK, *supra* note 4, § 5.05[1][b], at 428–29.

³¹ See *id.*

³² See Juliano, *supra* note 19, at 1362.

³³ See HANDBOOK, *supra* note 4, § 5.05[1][b], at 429.

³⁴ Juliano, *supra* note 19, at 1362.

³⁵ See HANDBOOK, *supra* note 4, § 5.05[1][b], at 429.

³⁶ See *id.*

³⁷ *Id.*

³⁸ See *United States v. Mitchell (Mitchell II)*, 463 U.S. 206, 233 (1983) (quoting *United States v. Mitchell (Mitchell I)*, 445 U.S. 535, 542 (1980)).

³⁹ See HANDBOOK, *supra* note 4, at § 5.05[1][b], at 429.

⁴⁰ See *id.* § 5.05[1][b], at 429–430 (citing *Shoshone Indian Tribe of the Wind River Reservation v. United States*, 364 F.3d 1339, 1352 (Fed. Cir. 2004)); see also Jill De La Hunt, *The Canons of Indian Treaty and Statutory Construction: A Proposal for Codification*, 17 U. MICH. J. L. REFORM 681, 688 (1984) (“The canons of construction are more than discretionary rules of interpretation. These principles are substantive components of the trust relationship”); cf. *El Paso Natural Gas Co. v. United States*, Nos. 10-5080, 10-5090, 2011 WL 281035, at *6 (D.C. Cir. Jan. 28, 2011) (imposing limitations on when liberal construction is used: statute must be (1) ambiguous, and (2) “for the benefit” of Indians).

⁴¹ HANDBOOK, *supra* note 4, § 5.05[1][b], at 430.

In the 1983 decision of *United States v. Mitchell* (*Mitchell II*), the Supreme Court held that language authorizing a federal agency to manage resources, coupled with actual federal control over these resources, can trigger a full fiduciary trust responsibility, even where there is no explicit statutory provision, nor a comprehensive statutory or regulatory scheme establishing such a responsibility.⁴² In *Mitchell II*, the Court found a full fiduciary responsibility where the federal government had “comprehensive control over the harvesting of Indian timber” and “exercise[d] literally daily supervision over [its] harvesting and management.”⁴³ Therefore, where there is no explicit provision creating the federal trust responsibility a tribe must show that the federal government exercises comprehensive or pervasive control over a particular asset before it can hold the federal government legally accountable for breach of their full fiduciary responsibility.⁴⁴ Moreover, even where there may be a statutory scheme that involves federal government oversight, if the statute is designed to give tribes independent control over the resource management, it is quite difficult for tribes to show that such a statute entitles the tribe to compensation for resource mismanagement.⁴⁵ The scope of the federal trust responsibility contains more nuanced layers than this basic framework provides; nevertheless, a skeletal foundation is essential in order to explore how the federal trust responsibility intersects with tribal water rights and tribal water rights settlements.

II. THE FEDERAL TRUST RESPONSIBILITY AND TRIBAL WATER RIGHTS

Under the *Winters* doctrine, established by the Supreme Court in *Winters v. United States*, water rights are reserved rights and an asset that the federal government holds in trust for federally recognized tribes.⁴⁶

⁴² See *Mitchell II*, 463 U.S. at 225; see also *White Mountain Apache Tribe v. United States*, 11 Cl. Ct. 614, 650 (1987) (holding that where the federal government chose to administer a grazing land leasing program with the tribe, it undertook a full fiduciary responsibility as to such lands).

⁴³ *United States v. White Mountain Apache Tribe*, 537 U.S. 465, 474 (2003) (quoting *Mitchell II*, 463 U.S. at 209, 222).

⁴⁴ See *id.*

⁴⁵ See *Salt River Pima-Maricopa Indian Cmty. v. United States*, 26 Cl. Ct. 201, 204 (1992) (“Due to the much higher level of control the Indians in this case exercise over their lands, no fiduciary obligation or trust relationship attaches with respect to delivery of water to those lands.”); HANDBOOK, *supra* note 4, § 5.05[1][b], at 431. This exemplifies one of the great ironies of the federal-tribal trust relationship as it relates to tribal self-government. As one legal scholar explained, “[t]he more a Tribe is involved in management of the resource, the less likely the government can be held responsible for its role, even though it retains ultimate approval authority over all transactions involving an interest in trust land.” Gover, *supra* note 27, at 352.

⁴⁶ *Winters v. United States*, 207 U.S. 564, 577 (1908); HANDBOOK, *supra* note 4, § 19.06, at 1221 (“The underlying premise of the *Winters* doctrine is the government’s promise, implicit in the establishment of reservations, to make them livable and to enable the tribes to become self-sustaining.”).

These reserved water rights are, in part, intertwined with the reserved right to the land itself.⁴⁷ But even where there is no explicitly reserved trust land, water rights may still be reserved as trust assets if they are necessary to facilitate tribal practices, such as fishing.⁴⁸ Therefore, the Supreme Court has held that treaties reserving fishing rights for a tribe must also necessarily ensure access to the water, even if the federal government does not hold the land through which the water flows in trust for the tribe.⁴⁹ Despite the understanding⁵⁰ that tribal water rights are trust assets “as much as the land itself,”⁵¹ it is often difficult for a tribe to hold the federal government accountable for breaching its trust responsibility as related to these water rights.⁵² This legal challenge is largely due to the fact that tribal “water rights do not fall neatly into the Court’s categories for full enforceable fiduciary obligations.”⁵³ Legal scholar Nell Jessup Newton explains that because there are often no comprehensive statutory or regulatory schemes imposing duties on the federal govern-

⁴⁷ See *Winters v. United States*, 207 U.S. 564, 576 (1908) (“The Indians had command of the land and waters—command of all their beneficial use, whether kept for hunting . . . or turned to agriculture and the arts of civilization. Did they give up all this? Did they reduce the area of their occupation and give up the waters which made it valuable or adequate?”).

⁴⁸ See *United States v. Winans*, 198 U.S. 371, 381 (1905) (holding that the 1859 treaty between the United States and the Yakima Indians reserved the Yakima’s right to fish on the Columbia River, despite the need to cross over land that was not tribal trust land in order to access the river).

⁴⁹ See *id.*

⁵⁰ See Royster, *supra* note 3, at 375 (“There can be no doubt that tribal water rights form part of the trust corpus protected by the federal-tribal trust relationship.”). While this is a well-established rule today, for many years following the *Winters* decision it was not clear just how much water the tribes were entitled to. See John E. Thorson et al., *Dividing Western Waters: A Century of Adjudicating Rivers and Streams, Part II*, 9 U. DENV. WATER L. REV. 299, 306 (2006) (explaining how the *Winters* reserved-water-rights doctrine lay “almost dormant” for fifty years before the Supreme Court articulated the “practically irrigable acreage” (PIA) standard to determine the quantity of tribal reserved water in *Arizona v. California*, 373 U.S. 546, 601 (1963)); see also *Fort Mojave Indian Tribe v. United States*, 32 Fed. Cl. 29, 34–35 (1994). To make the PIA determination, experts “analyze the potential cost/benefit ratios of hypothetical irrigation projects . . . and the crops to be grown. . . . [I]f the return from the expected crops exceeds the costs of a project, that land is deemed practically irrigable . . .” *Id.*

⁵¹ Royster, *supra* note 3, at 375. But see *Grey v. United States*, 21 Cl. Ct. 285, 293 (1990), *aff’d*, No. 91-5001, 1991 U.S. App. LEXIS 11705 (Fed. Cir. May 24, 1991) (noting that water for irrigation is not a trust corpus because, unlike the timber in *Mitchell II*, the water does not need to be “managed in such a way as to conserve the asset while maximizing income” from the asset to then distribute as profit to the tribe).

⁵² See *Fort Mojave Indian Tribe*, 32 Fed. Cl. at 33, 36 (recognizing the tribe’s water rights as a “trust property . . . which the government, as trustee, has a duty to preserve” but finding no breach of this trust duty because the government had a “reasonable basis” for failing to secure water rights for 26,293 acres of tribal trust land); *White Mountain Apache Tribe of Arizona v. United States*, 11 Cl. Ct. 614, 644 (1987) (finding no breach of governmental trust duty even if the record had shown that the government “diverted [the tribe’s] water for the benefit of downstream users or otherwise suppressed exercise of [the tribe’s] *Winters* Doctrine rights” because the tribe failed to show any “continuing wrong”).

⁵³ Royster, *supra* note 3, at 379.

ment to manage tribal water, and because the federal government does not control tribal water on a daily basis, tribal water rights fall only within the “limited trust concept.”⁵⁴ This limited trust concept often leaves tribes with no express federal trust responsibility to protect their water rights. Not only is there a general absence of statutes establishing an explicit trust responsibility as to tribal water rights, but the United States Court of Federal Claims has established that the federal government has no obligation to develop irrigation infrastructure for tribes,⁵⁵ or to ensure that tribal allotments have irrigation water.⁵⁶ Given where tribal water rights often fall in the federal-tribal trust scheme, tribal water settlements play an important role in the development of tribal water rights.⁵⁷

III. THE FEDERAL TRUST RESPONSIBILITY AND TRIBAL WATER RIGHTS SETTLEMENTS

Tribes often prefer to resolve water conflicts via settlement, as opposed to litigation, for many of the same reasons that settlement is often preferable to litigation in other situations—it is generally less time-consuming⁵⁸ and less expensive.⁵⁹ Additionally, as the Commissioner of the federal Bureau of Reclamation has stated more than once, water “[s]ettlements improve water management by providing certainty not just as to the quantification of a tribe’s water rights but also as to the rights of all water users.”⁶⁰ Beyond the certainty benefits, these settlements also give tribes an opportunity to establish water development and water man-

⁵⁴ Nell Jessup Newton, *Indian Claims in the Courts of the Conqueror*, 41 AM. U. L. REV. 753, 807 (1992).

⁵⁵ See *Salt River Pima-Maricopa Indian Cmty. v. United States*, 26 Cl. Ct. 201, 204 (1992) (“Due to the much higher level of control the Indians . . . exercise over their lands, no fiduciary obligation or trust relationship attaches with respect to the delivery of water to those lands.”).

⁵⁶ See *Grey v. United States*, 21 Cl. Ct. 285, 293 (1990) (holding that “the General Allotment Act does not impose any duty on the Government to manage the water on each individual allotment”).

⁵⁷ See Royster, *supra* note 3, at 381 (“In some instances, provisions of water settlement acts may create actual federal control or establish a special relationship sufficient to give rise to enforceable fiduciary duties.”).

⁵⁸ *But see* Thorson et al., *supra* note 50, at 444 (“[N]egotiations often take a very long time to accomplish, nearly as long as litigation.”).

⁵⁹ See COLBY ET AL., *supra* note 5, at 88–89 (“In the early 1980s, the Justice Department estimated that an average of \$3 million was spent in preparation to litigate each Indian water rights case. . . . The costs of litigated settlements tend to be especially high, but the same type of technical studies and preparation usually are required for negotiations. In both litigation and negotiation, the parties typically retain attorneys, engineers, hydrologists, and other experts.”).

⁶⁰ *H.R. 3254 Statement*, *supra* note 7, at 15; *Crow Tribe Water Rights Settlement Act of 2009: Hearing on H.R. 3563 Before the Subcomm. on Water and Power of the H. Comm. on Natural Resources*, 111th Cong. (2009) (statement of Michael L. Connor, Commissioner, Bureau of Reclamation).

agement projects that will meet their specific water needs more accurately than would be possible by court order.⁶¹ For example, tribal water settlement agreements often establish the opportunity to market water off-reservation, facilitate agreements with neighboring private parties, create protections for tribal fisheries and wetlands, enact conservation measures for urban users, resolve co-existing non-water issues, deliver cash for tribal development, and establish water banking provisions.⁶² In contrast, litigation over water rights results in the “determination of paper rights to water with no funding for water development projects or delivery systems, and sometimes with limitations on water use.”⁶³

Despite the benefits of negotiation, settlements are not the panacea to tribal water rights conflicts, not leastly because settlement negotiations can sometimes take as long as litigation.⁶⁴ Moreover, where Congress, state legislatures, and tribal councils are responsible for funding and implementing the terms of a settlement, it may be years before the benefits of the agreement reach the involved parties.⁶⁵ Additionally, while settlements can provide tribes with more creative resolutions than what would be available to them in court, many tribes ultimately agree to receive a lesser amount of water than they would likely be able to get through litigation.⁶⁶ Moreover, as water quantification is “the central feature of every settlement act,”⁶⁷ a tribe that enters into the settlement negotiations without an established water quantity will often be in a weaker bargaining position than a tribe that understands how much water it is entitled to

⁶¹ Thorson et al., *supra* note 50, at 406–07 (“Rather than a narrow determination of water rights, settlements can include beneficial water management provisions that are beyond a court’s capacity to order.”); *see also* COLBY ET AL., *supra* note 5, at 45 (quoting Taos Pueblo tribal council member Nelson Cordova commenting that “[t]he important advantage that we felt negotiation has over litigation is the fact that the parties that are involved in the negotiations have the ability to craft an agreement whereby they can allocate the water that is available. Also, they have the ability to put that water to use, especially at the tribal level”); McCool, *supra* note 10, at 55 (explaining that it is not always an either-or situation with litigation and negotiation because “[o]ften the necessary precursor to negotiation is a litigation strategy aimed at winning recognition of the power of one or more parties. Such recognition may occur only after prolonged litigation”).

⁶² Thorson et al., *supra* note 50, at 407.

⁶³ HANDBOOK, *supra* note 4, at § 19.05[2], at 1211; *see also id.* (stating that litigation also presents “additional drawbacks” for tribes because it “takes place in a potentially hostile forum, in which pre-adjudication administrative determinations are often made by state agencies, and judicial determinations are made by state judges ultimately answerable to the voters”).

⁶⁴ Thorson et al., *supra* note 50, at 444.

⁶⁵ *See id.* at 445 (noting that parties “alternate between negotiations and litigation as they become disaffected with one or the other process” and as fully funded implementation “becomes more and more speculative”); *supra* note 13 and accompanying text.

⁶⁶ HANDBOOK, *supra* note 4, § 19.05[2], at 1219.

⁶⁷ *Id.* § 19.05[2], at 1213; *see id.* n.330 (“In most cases, the quantity of water is set forth in the settlement act itself.”).

at the start of the negotiation.⁶⁸ Some legal scholars find that the same federal trust responsibility, which protects tribal water as a trust asset, also extends to federal representation of tribes in settlement negotiations.⁶⁹ However, there is no statute requiring the federal government to provide tribes with a negotiation team to represent them in settlement negotiations.⁷⁰ The Western Water Policy Review Act of 1992 recognizes the federal government's "trust responsibilities to protect Indian water rights and assist Tribes in the wise use of those resources";⁷¹ however, given the federal trust responsibility scheme, mere recognition of a general trust responsibility may not guarantee full protection for tribes.⁷²

Settlement negotiations for tribal water rights are also subject to the vulnerabilities of federal funding.⁷³ While the federal government has preferred to determine tribal water rights through settlement instead of litigation,⁷⁴ there is still hesitancy to federally fund the negotiation process itself as well as the water development and management projects arising from the settlement agreements.⁷⁵ The federal government is not

⁶⁸ *Id.* § 19.05[2], at 1219 (citing JOHN A. FOLK-WILLIAMS, *WHAT INDIAN WATER MEANS TO THE NEW WEST* 70, 100 (Western Network 1982)).

⁶⁹ See Royster, *supra* note 3, at 378.

⁷⁰ See *id.* One might think such a statute obligating the government to provide representation is unnecessary given the past and current governmental support for tribal water rights settlement negotiations, but without a statute, this support does not hold much force because it does not create a trust responsibility that will be compensable if breached. For an example of government support for tribal water rights settlement negotiations, see *H.R. 3254 Statement*, *supra* note 7, at 15.

⁷¹ Western Water Policy Act of 1992, Pub. L. No. 102-575, tit. XXX, § 3002(9), 106 Stat. 4600.

⁷² See *HANDBOOK*, *supra* note 4, § 19.06, at 1221 ("For political and institutional reasons, the United States has failed to secure, protect, and develop adequate water supplies for many Indian tribes.").

⁷³ See Thorson et al., *supra* note 50, at 445 ("Reduced federal budgets are a real threat to the continued success of negotiated settlements."); *WATER NEEDS AND STRATEGIES*, *supra* note 9, at 18 (noting that the Department of the Interior "has been asserting that its contribution to settlements should be no more than its calculable legal exposure and that even this can be narrowly drawn so that often its financial obligation is little or none").

⁷⁴ See *H.R. 3254 Statement*, *supra* note 7, at 15 ("[F]or over 20 years, federally recognized Indian tribes, states, local parties, and the Federal government have acknowledged that, when possible, negotiated Indian water rights settlements are preferable to protracted litigation over Indian water rights claims."); 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) ("Indian water rights are vested property rights for which the United States has a trust responsibility, with the United States holding title to such water in trust for the benefit of the Indians. It is the policy of this administration . . . that disputes regarding Indian water rights should be resolved through negotiated settlements rather than litigation."); *WATER NEEDS AND STRATEGIES*, *supra* note 9, at 18 ("It has long been the accepted premise that meeting the cost of Indian water and infrastructure in Indian water rights settlements is the trust responsibility of the federal government.").

⁷⁵ *H.R. 3254 Statement*, *supra* note 7, at 17 (noting that the Department of the Interior had concerns regarding the "large Federal contribution" to the trust fund created by the pro-

responsible for funding every aspect of the settlement agreement;⁷⁶ however, if the federal government were to cease funding negotiation teams and withhold its share of the implementation costs for the water development and management projects, it would be akin to denying tribes the rights to their water altogether.⁷⁷

IV. THE TAOS PUEBLO INDIAN WATER RIGHTS SETTLEMENT AGREEMENT

Taos Pueblo, the northernmost of the nineteen New Mexico Pueblos, is located approximately seventy miles north of Santa Fe, New Mexico.⁷⁸ Taos Pueblo encompasses approximately 95,341 acres of land and includes the headwaters of the Rio Pueblo de Taos and the Rio Lucero.⁷⁹ Unlike most other federally recognized tribes, whose land the federal government holds in trust, the Taos Pueblo once owned their land in fee simple.⁸⁰ Despite this unique historical land title, in the 1913 decision of *United States v. Sandoval*, the Supreme Court found that the New Mexico Pueblos, “although sedentary rather than nomadic in their inclinations, and disposed to peace and industry, [were] nevertheless Indians in race, customs, and domestic government,”⁸¹ and therefore required “federal guardianship and protection.”⁸² *Sandoval* vindicated the Pueblo’s established position that all prior land transfers were invalid as violating the Nonintercourse Act of 1870.⁸³

posed Taos Pueblo Indian Water Rights Settlement Act); Thorson et al., *supra* note 50, at 445, n.964 (explaining that when former Deputy Secretary of the Interior David Hayes asked a congressman to support a \$3 million dollar negotiation budget increase, the congressman responded: “Why should we give you more money to negotiate when you’ll only bring us expensive settlements to fund?”).

⁷⁶ HANDBOOK, *supra* note 4, § 19.05[2], at 1214 (“For the most part, costs are shared among various parties, including the federal government, the tribes, the states, and local water users.”).

⁷⁷ WATER NEEDS AND STRATEGIES, *supra* note 9, at 19 (“To deny the tribes the funds necessary to ensure competent legal and hydrologic expertise is tantamount to denying them the right to defend a basic component of their physical and cultural survival.”).

⁷⁸ H.R. 3254 Statement, *supra* note 7, at 15.

⁷⁹ *Id.*

⁸⁰ *Id.* (“In 1858, Congress specifically confirmed many Pueblo land titles, including that of Taos Pueblo. . . . Subsequently, patents were issued to the Pueblos of New Mexico, which . . . quitclaimed any interest the United States had in the Pueblos’ land.”); see also COLBY ET AL., *supra* note 5, at 13 (“Settling Pueblo water rights is complex because determining the quantity of their rights requires a historical inquiry based on treaty rights and interpretation by three different sovereigns. Over the past six hundred years, the Pueblos were ‘ruled’ by Spain, Mexico, and then the United States. As each sovereign ceded power to the next, the new government redefined tribal rights.”).

⁸¹ *United States v. Sandoval*, 231 U.S. 28, 39 (1913).

⁸² *Id.* at 48; H.R. 3254 Statement, *supra* note 7, at 15.

⁸³ See *County of Oneida v. Oneida Indian Nation*, 470 U.S. 226, 231–32 (1985) (“[The Nonintercourse Act of 1870] prohibited the conveyance of Indian land except where such conveyances were entered pursuant to the treaty power of the United States.”).

The *Sandoval* decision created confusion regarding the Pueblo land title, which Congress sought to clarify with the Pueblo Lands Act of 1924.⁸⁴ The Pueblo Lands Act attempted to “settle the complicated questions of title and to secure for the Indians all of the lands which they are equitably entitled.”⁸⁵ However, because the Act allowed non-Indians to receive title to Pueblo land, as long as they showed they had used and occupied Pueblo land for a certain period of time, the Taos Pueblo lost 2,401.16 acres to non-Indian claims under the Act.⁸⁶ Furthermore, the compensation for this lost land was less than the “actual appraised values.”⁸⁷ Due to this massive land loss, Congress enacted the Pueblo Lands Act of 1933 to provide additional compensation for the Pueblo and expressly reserve prior Pueblo water rights.⁸⁸ While the 1924 and 1933 Acts attempted to restore the Pueblo’s loss of “economic base” and land title certainty, the title to the Pueblo’s water rights was still unsettled.⁸⁹

This water title uncertainty “has continued to plague the Taos Valley” and prompted a 1969 general stream adjudication of the Rio Pueblo de Taos and Rio Hondo stream systems and interrelated groundwater.⁹⁰ In 1989, the United States filed a statement of claims on behalf of the Taos Pueblo, which was later revised in 1997.⁹¹ The revised claim was for nearly “the entire flow and interrelated groundwater of the Rio Pueblo de Taos and the Rio Lucero.”⁹² According to the Commissioner of the Bureau of Reclamation, if the United States were to win on this claim for the Taos Pueblo, the “impact on non-Indian water users in the Taos Valley w[ould] be nothing short of devastating,”⁹³ because the non-Indian water users in the area could only use the water if the Taos Pueblo forewent exercising its own water title rights.⁹⁴ Due to the slow process of the general stream adjudication,⁹⁵ and the recognition that uncertainty over water rights could continue for decades, the negotiation process began and involved multiple parties: the Taos Pueblo, the United States, the State of New Mexico, the Taos Valley Acequia Association (repre-

⁸⁴ *H.R. 3254 Statement*, *supra* note 7, at 15.

⁸⁵ *Id.* (quoting Pueblo Lands Act of 1924, 43 Stat. 636).

⁸⁶ *Id.*

⁸⁷ *Id.*

⁸⁸ *Id.* at 15–16.

⁸⁹ *Id.* at 16.

⁹⁰ *Id.*

⁹¹ *Id.*

⁹² *Id.*

⁹³ *Id.*

⁹⁴ *Id.*

⁹⁵ *See id.* (noting that partial summary judgment motions were filed in 1991 and were fully briefed in 1995; however, the Court has taken no further action).

senting fifty-five community ditch associations),⁹⁶ the Town of Taos, the El Prado Water and Sanitation District (EPWSD),⁹⁷ and twelve Mutual Domestic Water Consumers Associations.⁹⁸ All parties finally signed a settlement agreement in the spring of 2006.⁹⁹

V. THE TAOS PUEBLO INDIAN WATER RIGHTS SETTLEMENT ACT

The Taos Pueblo Indian Water Rights Settlement Act ratifies the Settlement Agreement of 2006 (Settlement Agreement) between the United States, the Taos Pueblo, the State of New Mexico, the Taos Valley Acequia Association and its fifty-five member ditches, the town of Taos, the EPWSD, and the twelve Taos-area Mutual Domestic Water Consumers Associations.¹⁰⁰ The Settlement Act

directs the Secretary of the Interior, acting through the Commissioner of Reclamation, to provide: (1) grants and technical assistance to the Pueblo to construct, replace, or rehabilitate water infrastructure, to protect the environment associated with the Buffalo Pasture area, and to enhance watershed conditions; and (2) financial assistance to eligible non-Pueblo entities for mutual-benefit projects in accordance with the Agreement. Establishes in the Treasury the Taos Pueblo Water Development Fund. Authorizes the Pueblo to market its water rights under the Agreement. Directs the Secretary to enter into three repayment contracts for the delivery of specified amounts of San Juan-Chama Project water to the Pueblo, the town of Taos, and EPWSD. Provides for the waiver and release of claims against the parties to New Mexico

⁹⁶ See Press Release, Office of the State Engineer, Local Negotiating Parties Release Draft Taos Pueblo Water Rights Settlement Agreement (Mar. 31, 2006), available at <http://www.docstoc.com/docs/68245071/Local-Negotiating-Parties-Release-Draft-Taos-Pueblo-Water-Rights> (commenting that the Taos Valley Acequia Association represents several thousand Taos Valley irrigators and has been involved in the Abeyta negotiations since they started in October 1989).

⁹⁷ See *id.* (“El Prado Water and Sanitation District is a political subdivision of the state that provides services to close to 1200 people in around the community of El Prado, north of the Town of Taos.”).

⁹⁸ See *id.* (“The 12 Taos-area Mutual Domestic Water Consumers Associations are community water systems and political subdivisions of the state that provide domestic water to thousands of people in the rural non-Indian communities in the Taos Valley.”).

⁹⁹ See *id.*

¹⁰⁰ See *H.R. 3254 Official Summary*, OPEN CONGRESS, www.opencongress.org/bill/111-h3254/show# [hereinafter *H.R. 3254 Official Summary*] (follow “Official Summary: Read the Rest”) (last visited Apr. 1, 2011). The Taos Pueblo Indian Water Rights Settlement Act was included in the Claims Resettlement Act of 2010, which President Obama signed into law on December 8, 2010. See Claims Resettlement Act of 2010, Pub. L. No. 111-291, 124 Stat. 3064 (2010), available at <http://www.govtrack.us/congress/bill.xpd?bill=h111-4783>.

v. *Abeyta and New Mexico v. Arellano* in return for recognition of the Pueblo's water rights. Authorizes appropriations for FY2010-FY2016 for the Taos Pueblo Infrastructure and Watershed Fund, for the Taos Pueblo Water Development Fund, and for Mutual-Benefit Projects funding (to minimize adverse impacts on the Pueblo's water resources by moving future non-Indian ground water pumping away from the Pueblo's Buffalo Pasture and to implement the resolution of a dispute over the allocation of certain surface water flows between the Pueblo and non-Indian irrigation water right owners in the community of Arroyo Seco Arriba).¹⁰¹

The Settlement Act also creates a waiver of potential breach of trust and water-related claims that the Taos Pueblo may bring against the United States, including:

all claims for damages, losses or injuries to water rights or claims of interference with, diversion or taking of water (including but not limited to claims for injury to lands resulting from such damages, losses, injuries, interference with, diversion, or taking) in the Rio Grande mainstream or its tributaries or for lands within the Taos Valley that accrued at any time up to and including the Enforcement Date; and . . . all claims against the State of New Mexico, its agencies, or employees relating to the negotiation or the adoption of the Settlement Agreement.¹⁰²

This waiver, a standard provision in almost every tribal water rights settlement agreement,¹⁰³ helps define the boundaries of the tribe's water rights, and as a consequence, provides "states and non-Indian water users with certainty" concerning such boundaries.¹⁰⁴

While settlement agreements define the boundaries of the tribal water rights in relation to other non-Indian parties' rights, such recognition does not ensure that the tribe will automatically receive the water

¹⁰¹ *H.R. 3254 Official Summary*, *supra* note 100.

¹⁰² *See* Claims Resettlement Act of 2010 § 510(3); *see also* *H.R. 3254 Statement*, *supra* note 7, at 16 (stating that there were a number of potential claims against the United States related to its failure to effectively administer the Taos Pueblo water rights, and that while recovering damages against the United States was not a guarantee, these cases still have both fiscal and policy-related consequences).

¹⁰³ *See* COLBY ET AL., *supra* note 5, at 89–91 ("Almost every Indian water settlement requires the tribe to waive . . . damage claims against . . . the United States[] for failing as trustee to protect the tribe's water rights.").

¹⁰⁴ *Id.* at 91.

that the settlement guarantees.¹⁰⁵ Settlements often establish funds and projects—such as the Taos Pueblo Infrastructure and Watershed Fund, the Taos Pueblo Water Development Fund, and the Taos Pueblo Buffalo Pasture watershed project—all of which require time and money to successfully implement.¹⁰⁶ While the federal government is not the only entity responsible for funding tribal water rights settlements,¹⁰⁷ it is often the largest contributor,¹⁰⁸ and as such, federal funding of settlements is imperative to successful and sustainable implementation of the settlement provisions and projects.

Unfortunately, the federal government funds Indian water settlements on a discretionary basis. A settlement will only receive funds when there is a reduction in another area of the Interior Department's budget.¹⁰⁹ Finding that there was insufficient federal funds from the Interior Department, New Mexico Senator Pete Domenici sought to raise money through “the Reclamation Water Settlements Fund Act of 2007, which would authorize a ten-year funding source to generate an estimated 1.37 billion to pay for three [New Mexico Indian Water Rights] settlements,” including that of the Taos Pueblo.¹¹⁰ Senator Domenici intended the fund to help pay for “planning, designing, or construction activities of the U.S. Bureau of Reclamation.”¹¹¹ The Reclamation Water Settlements Fund Act (Fund), effective March 30, 2009, allows the Secretary of the Treasury to use money from the Fund on an annual basis as is

necessary to pay the Federal share of the remaining costs of implementing the Indian water rights settlement agreements entered into by the State of New Mexico in the Aamodt adjudication and the Abeyta adjudication, if such settlements are subsequently approved and author-

¹⁰⁵ *Id.* at 71.

¹⁰⁶ *See generally id.* at 69–75 (discussing the funding of Indian water settlement agreements).

¹⁰⁷ *See HANDBOOK, supra* note 4, § 19.05[2], at 1214.

¹⁰⁸ *See COLBY ET AL., supra* note 5, at 85 (“Most settlements have included money or in-kind contributions from the state government, local water users, and even the tribe, in addition to the usually much larger federal share.”).

¹⁰⁹ *See COLBY ET AL., supra* note 5, at 70; Submission from Western States Water Council, Senate Energy and Natural Resources Committee Water Conference, Water Conference Question 3, at 3–4 (Apr. 5, 2005) *available at* http://energy.senate.gov/public/_files/Question3SelectedParticipantSubmittals.pdf.

¹¹⁰ Kay Matthews, *Updates on Water Transfer Protests and Adjudications*, LA JICARITA NEWS, Aug. 2007, <http://www.lajicarita.org/07aug.htm> (last visited Apr. 7, 2011).

¹¹¹ *Id.*; *see also Domenici Seeks Money for Water Rights Cases*, ABQ JOURNAL, June 19, 2007, http://www.journalnorth.com/571907north_news06-19-07.htm (last visited Apr. 7, 2010) (explaining that the Fund would be supported by various sources, including leases and rents of federally-owned land in Western states, with federal oil and gas royalty payments contributing to about 40 percent annually to the Fund).

ized by an Act of Congress and the implementation period has not already expired.¹¹²

The maximum amount used for such settlements cannot exceed \$250 million, and the ability to draw such funds is not effective until January 1, 2020.¹¹³ The Fund will terminate on September 30, 2034, at which point the termination clause provides that any “unexpended and unobligated balance of the Fund shall be transferred to the appropriate fund of the Treasury.”¹¹⁴ Should there not be adequate federal funds elsewhere, this Fund provides additional money for the Taos Pueblo Indian Water Rights Settlement Act.¹¹⁵ The Fund also provides money for the settlement agreement between Arizona and the Navajo Nation concerning water rights claims in the Lower Colorado River basin,¹¹⁶ and certain other water rights settlements between Montana and the Blackfeet, Crow, Gros Ventre, and Assiniboine Tribes of the Fort Belknap Indian Reservation.¹¹⁷ While the Fund helps to ensure that the federal government will be able to pay its share of the Taos Pueblo Indian Water Rights Settlement Act’s implementation costs, the fact that such an additional fund is needed indicates the decade-long federal government’s hesitancy to pay its share of the settlement implementation costs without taking from other much-needed Indian programs.¹¹⁸

Without allocating funds that stand independent from the general annual budgets of the Bureau of Indian Affairs and the Bureau of Reclamation under the Department of the Interior, the federal funds for Indian water rights settlements must come from these general annual budgets, and as a result, necessarily take monies away from other Indian programs.¹¹⁹ A separate fund, such as the Reclamation Water Settlements Fund, might help ensure that “the Federal Government’s share of the cost of settlement of its own legal and trust liabilities to individual tribes is

¹¹² Reclamation Water Settlements Fund Act, 43 U.S.C. § 407(c)(3)(B)(ii)(I) (2009).

¹¹³ *Id.* § 407(c)(3)(B)(ii)(II).

¹¹⁴ *Id.* § 407(f).

¹¹⁵ *See id.* § 407(c)(3)(B)(ii)(I).

¹¹⁶ *Id.* § 407(c)(3)(B)(iv)(I).

¹¹⁷ *Id.* § 407(c)(3)(B)(iii)(I).

¹¹⁸ *See COLBY ET AL., supra* note 5, at 72 (“[A]ppropriations made to fulfill the federal government’s responsibilities in water rights settlements or land claims are lumped together under the Function 302 cap with spending for all other Indian and Department of Interior programs Thus, comparatively large appropriations for Indian water settlements or land claims effectively displace funding for other Indian and Interior programs under the Function 302 budget cap rule, and may appear to be imbalanced increases in programmatic funding for individual tribal programs.”).

¹¹⁹ *See McCool, supra* note 10, at 62 (explaining that in the end, Senator Babbitt’s attempt in the early 1990s to create a separate line item for Indian water settlements in the Bureau of Indian Affairs budget did not effectively mitigate the problem because “[f]rom a practical perspective, it is a zero-sum thing. Congress wants to spend only so much. There is x billion dollars available for Indian programs, so the settlements have to come out of that”).

not paid at the expense of programs serving all tribes.”¹²⁰ Unfortunately, passing a bill to ensure there is adequate and sufficiently independent funding for each and every Indian water rights settlement is neither an efficient, nor practical long-term solution to the lack of federal funding for Indian water rights settlements.¹²¹

VI. A LONG-TERM APPROACH TO THE FEDERAL TRUST RESPONSIBILITY AND TRIBAL WATER RIGHTS SETTLEMENTS

As this Note articulates, due to the unique legal relationship between federally recognized Indian tribes and the federal government, federally recognized tribes depend on the United States to assure they have adequate water, and the United States is consequently responsible for fulfilling its trust responsibility as to this natural resource.¹²² It is a matter of policy choice *how* the United States government fulfills this responsibility. Inherent in the policy choices that inform the federal government’s decision to provide tribes with federal negotiation teams for Indian water settlements is the tension in every federal trust responsibility-related decision—wanting to ensure an appropriate exercise of federal support without undermining tribal determination over tribal water rights. In order to meet this tension effectively, the federal government must take a more comprehensive approach to Indian water rights settlements than that reflected in the current tribal water rights settlement funding scheme.

There is no doubt that negotiation can be a costly process. Often litigation precedes negotiation,¹²³ as it did for the Taos Pueblo Indian Water Rights Settlement Agreement,¹²⁴ but even where it does not, “the cost of preparing for negotiation is virtually the same as preparing for a court case . . . [because] all the studies and preparatory work still have to be completed.”¹²⁵ Moreover, each party to the negotiation “must hire attorneys and sometimes engineers and economists, and occasionally facilitators, often at great expense.”¹²⁶ Due to these expenses, it makes

¹²⁰ COLBY ET AL., *supra* note 5, at 72.

¹²¹ *See id.* at 69 (“[T]he ad hoc nature of the settlement funding process . . . makes it nearly impossible to predict the cumulative costs to the federal government to satisfy Indian water entitlements.”).

¹²² *See* HANDBOOK, *supra* note 4, § 19.06, at 1221.

¹²³ *See* MCCOOL, *supra* note 10, at 56 (“[F]requently the non-Indian competing water users are not interested in reasonable negotiations and the threat of litigation is needed in order to get them to the bargaining table.”); *see also id.* at 55 (“Although some proponents of negotiation extol it as an alternative to the courts, nothing settles a dispute better than the combined force of the strong arm of the court . . . and active negotiation.”).

¹²⁴ H.R. 3254 Statement, *supra* note 7, at 16.

¹²⁵ MCCOOL, *supra* note 10, at 56 (“In litigation the money goes to lawyers; in negotiation it goes to engineers and economists”).

¹²⁶ *Id.*

little sense to require tribes, who often face compromised financial situations, to fund the negotiation teams and provide the necessary experts to participate in a water rights settlement. At the same time, in order to ensure tribal interests are advanced effectively during water rights settlements, it is imperative that the tribes have as much control over their side of the negotiation process as possible. Therefore, in order to give tribes more direct control over the negotiation process, the federal government could support tribal members in playing a more integral role in the negotiation teams; under the current approach, the tribes often simply depend on the federal government to fulfill this role.¹²⁷ The federal government would fulfill its trust responsibility to secure adequate water for tribes by redirecting some of the resources it currently expends on federal negotiation teams toward training tribal members who could then take more active roles in the legal, economic, engineering, and water allocation research that nearly every water rights settlement negotiation requires. This training in turn would alleviate some of the burden on the federal government to fund the entire tribal water rights negotiation teams because, over time, tribal members would be able to provide some of the preparation-based expertise that the federal government would otherwise have to provide.¹²⁸

By training tribal members to play a more integral role in the tribal water rights negotiation teams, the federal government would not relinquish its trust responsibility to litigate on behalf of the tribes if litigation became necessary,¹²⁹ nor would this shift dissolve its trust responsibility to fund the implementation of the settlement agreements. Moreover, recognizing the federal capacity to train tribal members to be part of the federal negotiation teams does not imply that there do not already exist well-trained, skilled, and sophisticated tribal negotiation teams that have been indispensable in Indian water rights settlements.¹³⁰ It would be na-

¹²⁷ See McCool, *supra* note 10, at 56.

¹²⁸ As the Department of the Interior's Bureau of Reclamation Regional Plains Program demonstrates, there are some current efforts to train tribal members in water-based skills such as water quality sampling and water supply evaluations. See *Native American Programs*, United States Bureau of Reclamation, http://www.usbr.gov/gp/native_american.cfm (last visited Apr. 6, 2011). This is precisely the kind of program that demonstrates the forward-looking approach whose fuller implementation in the tribal water rights settlement negotiation scheme would be most fruitful.

¹²⁹ See HANDBOOK, *supra* note 4, § 19.06, at 1223 ("The Justice Department is charged with representing both tribal and federal interests in water rights litigations; as trustee, the government is authorized not only to bring water rights claims on behalf of tribes, but to bind them in litigation.").

¹³⁰ See, e.g., Statement from Taos Pueblo Governor Paul T. Martinez, War Chief Luis Romero and the Taos Pueblo Tribal Council on the Taos Pueblo/*Abeyta* Indian Water Rights Settlement, (July 31, 2008), available at <http://www.taospueblo.com/pdf/WaterRightsSettlemetStatement.pdf> (expressing gratitude to the Pueblo negotiation team which included tribal attorneys, water task force members, and technical assistants).

ive to presume that all federally recognized tribes lack the resources to use their own negotiation teams to navigate the water rights settlement process. It would deny the federal-tribal trust relationship, however, to conclude that because some tribes can and do provide their own negotiation teams, the federal government no longer has the responsibility to ensure that tribes have the negotiating power necessary to secure their interests in tribal water rights settlements.¹³¹ This Note does not suggest that the federal government terminate the trust relationship in relation to Indian water rights settlement negotiations. Rather, it advances a reconceptualization of the manner in which the federal government fulfills this trust responsibility, with an eye toward giving more decision-making power to tribes by reallocating federal resources from strictly funding the federal negotiation teams to instead training and encouraging tribal members to play more active roles in these water rights negotiation teams.

VII. CHALLENGES: FEDERAL HESITANCY TO FUND AND COMPREHENSIVE PRACTICAL IMPLEMENTATION

In using federal resources to train tribal members to play more integral roles in the negotiation teams, the federal government must not abandon its trust responsibility as to tribal water rights.¹³² One of the ways to ensure that this would not happen is to recognize that the federal government would still be responsible for funding its portion of the implementation cost of the settlement. However, because the federal government would likely hesitate to fund agreements where it does not have extensive control over the settlement process, this might be an obstacle to the practical implementation of this Note's proposed policy shift.¹³³ While this is a real concern, some Indian policy analysts believe that it is the responsibility of the federal government to pay for the implementation costs of Indian water rights settlements irrespective of federal control over the negotiations because it is a moral duty born from

¹³¹ See COLBY ET AL., *supra* note 5, at 51 ("Many tribes have become very sophisticated about water rights issues and are undertaking very effective advocacy on their nations' behalf. Others, however, have not prioritized water rights issues, or they are suffering from limited institutional capability. Budget cuts in BIA programmatic funds to support the pursuit of tribal water rights have had a significant, negative effect on many tribes' ability to push forward with water rights claims." (quoting David Hayes, former chair of the Interior Department's Working Group on Indian Water Rights Settlements)).

¹³² This would be particularly important during any policy shift in the tribal water rights arena. See *id.* at 44 ("[In] manag[ing] tribal water resources . . . [i]f you depend on federal resources, the resources sometimes are just not there. Also, we all know that the federal government, even though it has a trust responsibility to the tribe—sometimes that trust responsibility is just not there." (quoting Taos Pueblo tribal council member Nelson Cordova)).

¹³³ *But see id.* at 87 (explaining that many consider federal funding of Indian water settlements to "fulfill the promise of permanent tribal homelands by honoring and protecting the reserved water rights of Indian tribes").

unfavorable, past Indian policies.¹³⁴ Even if the tribes played a more integral role in the tribal water rights negotiation teams, the federal government could ameliorate its funding hesitancy by maintaining a close relationship with the federally-trained tribal negotiation teams prior to and during the negotiation process. In reality, this would allow the federal government to continue to have the final word in the negotiations—as between the tribe and the federal government—because it would be the entity providing the negotiation and implementation funds. Nevertheless, engaging tribes more earnestly in the tribal water rights negotiation process would mean that the tribes would have more of an opportunity to determine the outcome of the negotiation process, and in so doing, develop the expertise that would enable them to exercise more self-determination in relation to the long-term future of their water resources. The particularities of the relationship between the federal government and the federally-trained tribal negotiation teams is beyond the scope of this Note; however, whatever the particularities, it is clear that in order for the proposed shift to succeed, there must be a willingness on both sides¹³⁵—tribal and federal—to maintain open communication as to water expectations, available funding, legal exposure, and all other elements that affect negotiation strategy and outcome.

In addition to requiring open communication prior to and during the negotiation process, both the tribes and the federal government must be willing to thoroughly transition to tribal members playing a more integral role in the federal water rights negotiation teams. Although Congress has the power to unilaterally shift Indian policy,¹³⁶ it would make little

¹³⁴ See McCool, *supra* note 10, at 64 (“There are many reasons why politicians support settlements. For some, it is an effort to honor trust responsibilities . . .”); Robert T. Anderson, *Indian Water Rights and the Federal Trust Responsibility*, 46 NAT. RESOURCES J. 399, 430–31 (2006) (“Since establishment of the Bureau of Reclamation in 1902, the federal government has enshrined the diversion of Indian water for non-Indian use as federal policy, and simply left the Indian tribes out of the development mix. In addition to its failure to develop water for Indian agricultural uses, the federal government did virtually nothing to ensure that water remained in-stream to satisfy the needs of fish and wildlife preserved in treaties and agreements.”).

¹³⁵ See Colby et al., *supra* note 5, at 45 (“[W]e need human resources, we need financial resources, we need a commitment from the tribe not only in terms of providing the two resources I named but also having a commitment to protect its water resources in the future. Without the technical capacity within the tribe to manage our water, this is not going to happen.” (quoting Taos Pueblo tribal council member Nelson Cordova)).

¹³⁶ See, e.g., *supra* note 29; see also *Lone Wolf v. Hitchcock*, 187 U.S. 553, 565–66 (1903) (“Plenary authority over the tribal relations of the Indians has been exercised by Congress from the beginning, and the power has always been deemed a political one, not subject to be controlled by the judicial department of the government The power exists to abrogate the provisions of an Indian treaty, though presumably such power will be exercised only when circumstances arise which will not only justify the government in disregarding the stipulations of the treaty, but may demand, in the interest of the country and the Indians themselves, that it should do so.”).

sense to force a tribe to use its own members to negotiate if the tribe judged that the federal negotiation team would be more effective in the negotiation process. It would make the most sense to engage federally-trained tribal negotiation teams on a discretionary basis, where the tribes wish to take advantage of the federal training, but not otherwise. Even where both sides are completely desirous of this significant policy shift, it would likely take decades to implement it because the appropriate federal and tribal parties would need to thoroughly integrate the shift into all aspects of the Indian water rights settlement funding process. Despite the significant time and effort this shift would require, it is precisely this long-term commitment to tribal involvement that this Note suggests is a desirable approach for the federal government to take toward tribal water rights negotiations.

CONCLUSION

As the global population grows, water will only be an increasingly prized resource. Tribes living in the Western region of the United States will continue to feel the political and environmental pressure that arises whenever multiple populations need a single resource.¹³⁷ The legal trust relationship between the federal government and federally recognized Indian tribes requires that the federal government fulfill its trust responsibility by providing and protecting water resources for tribes.¹³⁸ Although the federal governmental policy favors resolving Indian water rights disputes through settlement over litigation, the federal trust responsibility has not dissolved.¹³⁹ In the past, the federal government has attempted to fulfill this trust responsibility by using funds from the Bureau of Indian Affairs and the Bureau of Reclamation budgets, at the expense of other much-needed Indian programs.¹⁴⁰ Unfortunately, this settlement-funding scheme does not adequately fulfill the federal duty to provide and protect the water to which negotiating tribes are entitled.¹⁴¹ In order to more effectively fulfill its trust responsibility, while simultaneously relieving some of the federal funding burden, the federal govern-

¹³⁷ The scarcity of water in the West is complicated by the differing systems under which different communities claim their water. See, e.g., COLBY ET AL., *supra* note 5, at 95 (“On the one hand, tribes have a federal reserved right to an amount of water sufficient to achieve the purpose of their reservation of land. This right can lie dormant until the tribe is ready to use its water On the other hand, since the late nineteenth century, non-Indian irrigators in the West generally have developed water under a system of prior appropriation . . . [which] has given non-Indian irrigators every incentive to develop an area’s water resources as rapidly as possible, despite any unquantified tribal claims to that water.”).

¹³⁸ See HANDBOOK *supra* note 4, § 19.06, at 1221 (“Congress has recognized the federal government’s ‘trust responsibilities to protect Indian water rights’”).

¹³⁹ See *supra* note 74 and accompanying text.

¹⁴⁰ See *supra* note 118.

¹⁴¹ See *supra* note 72.

ment should approach Indian water rights settlements with a policy that takes a longer-term view than the current settlement-by-settlement funding scheme. The Taos Pueblo Indian Water Rights Settlement, a forty-year dispute¹⁴² that has only recently produced a congressionally approved Settlement Act,¹⁴³ which will require years to fully implement,¹⁴⁴ is a perfect example of the multi-stakeholder water disputes that occupy the legal landscape of tribal water rights in the Western United States today. As the Taos Pueblo Indian Water Rights Settlement and the subsequent Reclamation Water Settlements Fund of 2009 demonstrate, the federal government still struggles to fund Indian water rights settlements in a manner that adequately upholds the federal trust responsibility without overburdening the federal funding scheme.¹⁴⁵

This Note provided the basic framework of the federal-tribal trust relationship before explaining how the federal trust responsibility applies to tribal water rights and tribal water rights settlements. Focusing on the Taos Pueblo Indian Water Rights Settlement because it demonstrates the still-current federal hesitancy to fund tribal water settlements, this Note suggested that one way the federal government could more effectively fulfill its trust responsibility regarding tribal water rights settlements would be to train and encourage tribal members to play more integral roles in the federal negotiation teams that the tribes often depend on the federal government to provide.¹⁴⁶ Over time, this approach would both alleviate some of the burden on the federal government to fund federal negotiation for tribal water rights claims, and more importantly, would encourage the tribal self-government that will be necessary to ensure long-term tribal water security. This Note concludes that despite potential implementation challenges, an approach that takes a longer-term view toward tribal water rights settlements than that which the federal government currently uses is necessary to ensure that tribes receive all the water to which they are entitled.¹⁴⁷

¹⁴² See COLBY ET AL., *supra* note 5, at 45 (“[T]he [original] *Abeyta* case was filed in 1969.”).

¹⁴³ See *supra* note 100 and accompanying text.

¹⁴⁴ See COLBY ET AL., *supra* note 5, at 77 (“Carrying out all the provisions of Indian water settlements can take decades, and most settlements passed by Congress have not yet been fully implemented.”).

¹⁴⁵ See MCCOOL, *supra* note 10, at 63 (“The continuing effort to pass such legislation [to set aside separate funds for Indian water settlements] makes it evident that this serious problem persists.”).

¹⁴⁶ See also COLBY ET AL., *supra* note 5, at 44 (“[I]n order to manage tribal water resources, you need individuals that are trained in some of the areas I alluded to earlier[, such as history, mathematics, economics.]” (quoting Nelson Cordova, former Taos Pueblo tribal administrator, three-term tribal secretary, one-term Taos Pueblo governor, and lifetime tribal council member)).

¹⁴⁷ This is necessary not only for tribal water security, but for non-Indian water security as well. See WATER NEEDS AND STRATEGIES, *supra* note 9, at 19 (“[W]hile the number of

pending [tribal water rights] settlements is set, the cost of implementing them will continue to rise—meaning that postponing this duty only increases its cost to the nation, as it perpetuates the hardship to Indian people unable to enjoy the full use of their water rights and the inability of non-Indian governments to plan for water use in the absence of firm data on respective use entitlements.”).