

COLORADO RIVER INDIAN TRIBES WATER RESILIENCY
ACT OF 2022

DECEMBER 22, 2022.—Ordered to be printed

Mr. SCHATZ, from the Committee on Indian Affairs,
submitted the following

R E P O R T

[To accompany S. 3308]

The Committee on Indian Affairs, to which was referred the bill (S. 3308) to authorize the Colorado River Indian Tribes to enter into lease or exchange agreements and storage agreements relating to water of the Colorado River allocated to the Colorado River Indian Tribes, and for other purposes, having considered the same, reports favorably thereon with an amendment, in the nature of a substitute, and recommends that the bill, as amended, do pass.

PURPOSE

S. 3308 authorizes the Colorado River Indian Tribes (CRIT) to enter into agreements to lease or exchange a portion of their water allocation for off-reservation use, or to store water in off-reservation facilities, subject to Secretarial approval. S. 3308 further provides that any off-reservation use or storage of the Tribes' allocated water must be located in the Lower Basin of the Colorado River in Arizona and not within Navajo, Apache, or Cochise counties.

BACKGROUND & NEED FOR LEGISLATION

In *Arizona v. California*, the U.S. Supreme Court confirmed CRIT's first-priority present perfected water rights in the State of Arizona.¹ These water rights are superior to many others in the state and are less vulnerable to restriction and curtailment in times of drought. However, because CRIT secured these rights through litigation rather than settlement, it is currently unable to engage in water leasing, exchange, storage, and conservation agreements on par with the 24 other Tribes—including eight Tribes in

¹ 547 U.S. 150 (1963).

Arizona—who had the opportunity to negotiate and affirm such ancillary rights through their negotiated water settlements with the federal government.² CRIT seeks legislation to address this disparity.

SUMMARY OF THE BILL

S. 3308 authorizes CRIT, subject to Secretarial approval, to lease, exchange, and store a portion of its consumptively used water³ off-reservation within the Lower Basin in the State, except in Navajo, Apache, and Cochise counties; authorizes CRIT, subject to Secretarial approval, to enter into agreements for conserved water, provided that any delivery of such water shall be limited to the Lower Basin in the State, except in Navajo Apache, and Cochise counties; defines the responsibilities of the Secretary of the Interior; directs CRIT, the State, and the Secretary to enter into agreements providing for information sharing and description of technical and accounting methodologies used for lease or exchange agreements; clarifies that the Act will have no effect on CRIT's decreed water allocation or interfere with or diminish any allottee entitlement to water; and clarifies that CRIT is solely entitled to benefit from earnings from a lease or exchange agreement.

LEGISLATIVE HISTORY

Senator Sinema (D–AZ) and Senator Kelly (D–AZ) introduced S. 3308 on December 2, 2021. The Senate referred the bill to the Senate Committee on Indian Affairs the same day. On March 23, 2022, the Committee held a legislative hearing. On November 16, 2022, the Committee held a mark-up and ordered the bill to be reported favorably with an amendment in the nature of a substitute.

U.S. Representative Neguse (D–CO) introduced H.R. 5118, the Continental Divide Trial Completion Act, along with Representa-

²Ak-Chin Indian Water Rights Settlement Act, Pub. L. 95–328, 92 Stat. 409 (1978), Pub. L. 98–530, 98 Stat. 2698 (1984), Pub. L. 102–497, 106 Stat. 3258 (1992), Pub. L. 106–285, 114 Stat. 878 (2000); Southern Arizona Water Rights Settlement Act, Pub. L. 97–293, 96 Stat. 1274 (1982), Pub. L. 102–497, 106 Stat. 3256 (1992); Salt River Pima-Maricopa Indian Community Water Rights Settlement Act of 1988, Pub. L. 100–512, 102 Stat. 2549 (1988); Fort Hall Indian Water Rights Act of 1990, Pub. L. 101–602, 104 Stat. 3049 (1990); Fallon Paiute Shoshone Indian Tribes Water Rights Settlement Act of 1990, Pub. L. 101–618, 104 Stat. 3289 (1990); Truckee-Carson-Pyramid Lake Water Rights Act, Pub. L. 101–618, 104 Stat. 3294 (1990); Fort McDowell Indian Community Water Rights Settlement Act of 1990, Pub. L. 101–628, 104 Stat. 4480 (1990); Northern Cheyenne Indian Reserved Water Rights Settlement Act of 1992, Pub. L. 102–374, 106 Stat. 1186 (1992); Jicarilla Apache Tribe Water Settlement Act of 1992, Pub. L. 102–441, 106 Stat. 2237 (1992); Ute Indian Rights Settlement Act of 1992, Pub. L. 102–575, 106 Stat. 4650 (1992); San Carlos Apache Tribe Water Rights Settlement Act, Pub. L. 102–575, 106 Stat. 4740 (1992), Pub. L. 103–435, 108 Stat. 4572 (1994), Pub. L. 105–18 §5003, 111 Stat. 181 (1997); Chippewa Cree Tribe of the Rocky Boy's Reservation Indian Reserved Water Rights Settlement Act of 1999, Pub. L. 106–163, 113 Stat. 1778 (1999); Shivwits Band of the Paiute Indian Tribe of Utah Water Rights Settlement Act, Pub. L. 106–263, 114 Stat. 737 (2000); Snake River Water Rights Act of 2004, Pub. L. 108–447, 118 Stat. 2809, 3431–41 (2004); Arizona Water Settlements Act of 2004, Pub. L. 108–451, 118 Stat. 3478 (2004); Soboba Band of Luiseño Indians Water Settlement Act, Pub. L. 110–297, 122 Stat. 2975 (2008); White Mountain Apache Tribe Water Rights Quantification Act of 2010, Pub. L. 111–291, 124 Stat. 3073 (2010); Crow Tribe Water Rights Settlement Act of 2010, Pub. L. 111–291, 124 Stat. 3097 (2010); Taos Pueblo Indian Water Rights Settlement Act, Pub. L. 111–291, 124 Stat. 3122 (2010); Blackfeet Water Rights Settlement, Pub. L. 114–322, 130 Stat. 1814 (2016); Pechanga Band of Luiseño Mission Indians Water Rights Settlement Act, Pub. L. 114–322, 130 Stat. 1755 (2016); Colorado Ute Indian Water Rights Settlement Act, Pub. L. 100–585; Yavapai-Prescott Indian Tribe Water Rights Settlement Act, Pub. L. 103–434; Omnibus Public Land Management Act of 2009, Title X Part III (Public Law 111–11).

³For the purposes of S. 3308, “Consumptive use” means the amount of water used within the boundaries of the reservation for a minimum of 4 of the 5 years immediately preceding the year of delivery of a portion of the decreed allocation according to a lease or exchange agreement or storage agreement.

tives Leger Fernandez (D–NM), Stansbury (D–NM), and Beyer (D–VA), on August 27, 2022. Title IV of Division B of H.R. 5118, is substantially similar to S. 3308. On the same day it was introduced, H.R. 5118 was referred to the House Committee on Natural Resources. On September 8, 2021, the bill was further referred to the House Committee on Natural Resources, Subcommittee on National Parks, Forest, and Public Lands. On November 9, 2021, the Subcommittee held a hearing. The Subcommittee discharged the bill on January 19, 2022, and on the same day, the House Committee on Natural Resources held a mark-up. Representative Neguse offered an amendment in the nature of a substitute, which was agreed to by voice vote. The bill was reported and placed on the Union Calendar, as amended, on July 18, 2022. The bill passed the House by a vote of 218 to 199 on July 29, 2022. H.R. 5188 was received in the Senate on August 2, 2022.

COMMITTEE AMENDMENT

During its consideration of S. 3308, the Committee adopted an amendment in the nature of a substitute. The amendment, among other things, permits the Tribes to enter into agreements for conserved water, in accordance with federal law and for a term not to exceed 100 years, including agreements for the creation of system conservation, storage of conserved water in Lake Mead, and other mechanisms for voluntarily leaving a portion of the Tribes’ reduced consumptive use in Lake Mead; update the definition of “consumptive use” to include any portion of the decreed allocation with a recent history of use by the Tribes within the exterior boundary of the Reservation, regardless of whether the portion had been used for at least four of the five years preceding delivery, and exclude intentionally created surpluses; prohibit the Tribes from leasing or storing water, or delivering conserved water off-reservation in the counties of Navajo, Apache, and Cochise in the State; clarify that the United States’ limitation of liability does not extend to claims relating to the requirements of section 8(a) involving compliance with the National Environmental Policy Act of 1969 (42 U.S.C. 4321 *et seq.*), the Endangered Species Act of 1973 (16 U.S.C. 1531 *et seq.*); and other applicable Federal environmental laws; prohibits the portion of the decreed allocation that is available for use in the State from being used, directly or indirectly, in the counties of Navajo, Apache, or Cochise in the State; and make related technical and conforming edits. The amendment is further described in the Section-by-Section analysis.

SECTION-BY-SECTION ANALYSIS OF S. 3308 AS ORDERED REPORTED

Section 1—Short title

This section sets forth the short title as the “Colorado River Indian Tribes Water Resiliency Act of 2022.”

Section 2—Purpose

This section clarifies that the purpose of the Act is to authorize CRIT to enter into water lease, exchange, storage, and conserved water agreements and to authorize the Secretary to approve such agreements.

Section 3—Definitions

This section provides definitions for terms used throughout the Act.

Section 4—Lease or Exchange Agreements

Section 4(a) authorizes CRIT, notwithstanding any provision of the Indian Trade and Intercourse Act or any other provision of law, to enter into lease or exchange agreements for a portion of its consumptively used water for use off-reservation, subject to the approval of the Secretary of the Interior and so long as that off-reservation use is within the Lower Basin of the State of Arizona and not within Navajo, Apache, or Cochise counties.

Section 4(b) limits the term of such lease or exchange agreements to 100 years or less.

Section 4(c) authorizes modification or renegotiation of a lease or exchange agreement at any time, subject to approval by the Secretary of the Interior, provided that the renegotiated lease or exchange agreement does not exceed 100 years.

Section 4(d) clarifies that any person entering into a lease or exchange agreement under this Act shall use the water in accordance with applicable state and federal law.

Section 5—Storage Agreements

Section 5(a) authorizes CRIT, subject to Secretarial approval, to enter into storage agreements, including with the Arizona Water Banking Authority or successor agency, for the storage of a portion of its consumptively used water or water received under an exchange at one or more off-reservation underground storage facilities, so long as the facility is within the Lower Basin of the State of Arizona and not within Navajo, Apache, or Cochise counties.

Section 5(b) authorizes modification or renegotiation of a storage agreement at any time, subject to approval by the Secretary of the Interior.

Section 5(c) clarifies that any storage agreement shall be in accordance with applicable federal and state law.

Section 5(d) authorizes CRIT to assign or sell any long-term storage credits accrued under a storage agreement in accordance with applicable state law.

Section 6—Agreements for Creation of Water for the Colorado River System for Storing Water in Lake Mead

Section 6(a) authorizes CRIT, notwithstanding the Indian Trade and Intercourse Act or other any other provision of law, and subject to Secretarial approval, to enter into conserved water agreements, so long as the conserved water is delivered within the Lower Basin and not within Navajo, Apache, or Cochise counties.

Section 6(b) limits the term of such conserved water agreements to 100 years or less.

Section 6(c) authorizes modification or renegotiation of a conserved water agreement at any time, subject to approval by the Secretary of the Interior.

Section 6(d) clarifies that any conserved water agreement shall be in accordance with applicable federal and state law.

Section 7—Secretarial Approval; Disapproval; Agreements

Section 7(a) authorizes the Secretary to approve or disapprove any lease, exchange, storage, or conserved water agreement or modification thereto.

Section 7(b) authorizes the Secretary to enter into lease, exchange, storage, or conserved water agreements, provided the Secretary pays fair market value for CRIT's reduced consumptive use.

Section 7(c) requires lease, exchange, and storage agreements to comply with the Act and the required procedural, technical, and accounting agreement between CRIT, the state, and the Secretary; requires conserved water agreements to comply with the Act and other applicable federal law; and prohibits permanent alienation of any portion of CRIT's decreed allocation through any lease, exchange, storage, or conserved water agreement, or any modifications thereto.

Section 7(d) clarifies that the requirement for Secretarial approval must meet the requirements of the Indian Trade and Intercourse Act.

Section 7(e) clarifies that nothing in the Act or any agreement shall diminish or abrogate the authority of the Secretary to act under federal law or regulation, including the Consolidated Decree.

Section 8—Responsibilities of the Secretary

Section 8(a) directs the Secretary to comply with the National Environmental Policy Act (NEPA), the Endangered Species Act, and all other applicable federal environmental laws and regulations.

Section 8(b) requires the Secretary to document any lease, exchange, storage, or conserved water agreement in the Water Accounting Report.

Section 9—Agreements between the CRIT and the State

Section 9(a) directs CRIT to enter into an agreement with the state outlining notice, information sharing, and collaboration requirements prior to entering into the first lease, exchange, or storage agreement.

Section 9(b) requires the agreement regarding notice, information sharing, and collaboration requirements to include a provision requiring CRIT to submit to the state all documents regarding a potential lease, exchange, or storage agreement.

Section 10—Agreements between the CRIT, the State, and the Secretary

Section 10(a) directs the Secretary, prior to approving the first lease, exchange, or storage agreement, to enter into an agreement with the state and CRIT describing procedural, technical, and accounting methodologies for any lease, exchange, or storage agreement, including quantification of the reduction in consumptive use and water accounting.

Section 10(b) clarifies that execution of the procedural, technical, and accounting methodologies agreement is not a major federal action for the purposes of NEPA.

Section 10(c) clarifies that nothing in the Act prohibits the Secretary from agreeing with CRIT and the state to modify a procedural, technical, and accounting methodologies agreement, so long

as the modification complies with the Act and does not require congressional approval under the Indian Trade and Intercourse Act or any other provision of law.

Section 11—No Effect on the CRIT Decreed Allocation

Section 11(a) directs that a lease, exchange, storage or conserved water agreement shall provide for the temporary use, storage, or conservation of a portion of the consumptive use off reservation and shall not permanently alienate the decreed allocation.

Section 11(b) clarifies that lease or exchange of a portion of consumptive use shall not affect its priority under the Consolidated Decree, and nonuse by a party to a lease, exchange, or storage agreement shall not result in forfeiture, abandonment, relinquishment, or other loss to CRIT of any portion of the decreed allocation.

Section 11(c) clarifies that the lease, exchange, or storage of a portion of the consumptive use shall not reduce or limit CRIT's right to use the remaining portion of the decreed allocation on the Reservation.

Section 11(d) clarifies that any water storage agreement entered into under the Act shall account for the quantity of off-reservation water storage in accordance with state law.

Section 12—Allottee Use of Water

Section 12(a) clarifies that the lease, exchange, storage, or conservation of a portion of the consumptive use shall not directly or indirectly interfere with or diminish any allottee's entitlement to water under federal or tribal law.

Section 12(b) directs the Secretary to protect the rights of allottees to a just and equitable distribution of water for irrigation purposes pursuant to Section 7 of the Indian General Allotment Act.

Section 12(c) directs allottees to exhaust all remedies under Tribal law before asserting a claim against the United States pursuant to the act or other applicable law.

Section 12(d) clarifies that an allottee may seek relief under the Act or other applicable law following exhaustion of Tribal law remedies.

Section 12(e) clarifies that an allottee may petition the Secretary for relief following exhaustion of remedies available under the Act or other applicable law.

Section 13—Consideration Paid to the CRIT

This section clarifies that the CRIT, not the United States, is entitled to all consideration due under any lease, exchange, storage, or conserved water agreement.

Section 14—Liability of the United States

Section 14(a) clarifies that the United States shall not be liable to CRIT or any party to a lease, exchange, storage, or conserved water agreement for any claim relating to the negotiation, execution, or approval of such agreement, including any claim relating to the terms included in the agreement, except for claims relating to compliance with NEPA, the Endangered Species Act, and all other applicable federal environmental laws and regulations.

Section 14(b) clarifies that the United States shall have no trust or other obligation to monitor, administer, or account for funds received by CRIT as consideration under a lease, exchange, storage, or conserved water agreement, or for CRIT's expenditure of such funds.

Section 15—Application

Section 15(a) clarifies that the Act only applies to the portion of the decreed allocation available for use in the state.

Section 15(b) clarifies that portion of the decreed allocation available for use in the state shall not be used, directly or indirectly, outside the Lower Basin in the state, or in Navajo, Apache, or Cochise counties.

Section 16—Rule of Construction

This section clarifies that nothing in the Act establishes, or shall be considered to establish, a precedent in any litigation involving, altering, affecting, or quantifying any water right with respect to the United States, any other Indian Tribe, band or community, any state or political subdivision, or any person.

COST AND BUDGETARY CONSIDERATIONS

The Congressional Budget Office estimate of the costs of S. 3308, as ordered reported, has been requested but was not received at the time the report was filed. When the Congressional Budget Office completes its cost estimate, it will be posted on the Internet at www.cbo.gov.

REGULATORY AND PAPERWORK IMPACT STATEMENT

Paragraph 11(b) of rule XXVI of the Standing Rules of the Senate requires each report accompanying a bill to evaluate the regulatory and paperwork impact that would be incurred in carrying out the bill. The Committee believes that S. 3308 will have minimal impact on regulatory or paperwork requirements.

EXECUTIVE COMMUNICATIONS

The Committee has received no communications from the Executive Branch regarding S. 3308.

CHANGES IN EXISTING LAW

On February 11, 2021 the Committee unanimously approved a motion to waive subsection 12 of rule XXVI of the Standing Rules of the Senate. In the opinion of the Committee, it is necessary to dispense with subsection 12 of rule XXVI of the Standing Rules of the Senate to expedite the business of the Senate.