

115TH CONGRESS
1ST SESSION

S. 2154

To approve the Kickapoo Tribe Water Rights Settlement Agreement, and
for other purposes.

IN THE SENATE OF THE UNITED STATES

NOVEMBER 16, 2017

Mr. MORAN introduced the following bill; which was read twice and referred
to the Committee on Indian Affairs

A BILL

To approve the Kickapoo Tribe Water Rights Settlement
Agreement, and for other purposes.

1 *Be it enacted by the Senate and House of Representa-*
2 *tives of the United States of America in Congress assembled,*

3 **SECTION 1. SHORT TITLE.**

4 (a) SHORT TITLE; TABLE OF CONTENTS.—This Act
5 may be cited as the “Kickapoo Tribe in Kansas Water
6 Rights Settlement Agreement Act”.

7 (b) TABLE OF CONTENTS.—The table of contents for
8 this Act is as follows:

- Sec. 1. Short title.
- Sec. 2. Purposes.
- Sec. 3. Definitions.
- Sec. 4. Approval of the Kickapoo Tribe Water Rights Settlement Agreement.
- Sec. 5. Kickapoo Tribe Water Rights.

Sec. 6. Effect of Kickapoo Tribe Water Rights Settlement Agreement and Act.

Sec. 7. Water facilities.

Sec. 8. Waiver and release of claims; retention of claims.

Sec. 9. Judicial proceedings.

Sec. 10. Miscellaneous provisions.

1 **SEC. 2. PURPOSES.**

2 The purposes of this Act are—

3 (1) to achieve a fair, equitable, and final settle-
4 ment of claims to water rights in the Delaware River
5 Basin in Kansas for—

6 (A) the Tribe;

7 (B) its members and allottees; and

8 (C) the United States, acting in its capac-
9 ity as trustee for the Tribe and its members
10 and allottees;

11 (2) to authorize, ratify, and confirm provisions
12 of the Kickapoo Tribe Water Rights Settlement
13 Agreement pertaining to the Tribal water rights ne-
14 gotiated by the Tribe, the State of Kansas, and the
15 United States, and prior to the passage of this Act,
16 entered into by the Tribe and the State of Kansas;

17 (3) to authorize and direct the Secretary—

18 (A) to execute the Kickapoo Tribe Water
19 Rights Settlement Agreement; and

20 (B) to take any other action necessary to
21 carry out the Kickapoo Tribe Water Rights Set-
22 tlement Agreement in accordance with this Act;
23 and

1 (4) to direct the Natural Resources Conserva-
2 tion Service of the Department of Agriculture to
3 take certain actions under the authority of the Wa-
4 tershed Protection and Flood Prevention Act (16
5 U.S.C. 1001 et seq.) and other actions consistent
6 with this Act.

7 **SEC. 3. DEFINITIONS.**

8 In this Act:

9 (1) ACT.—The term “Act” means the Act of
10 Congress to authorize the United States to enter
11 into the Kickapoo Tribe Water Rights Settlement
12 Agreement and to execute the obligations set forth
13 herein, and for other purposes set forth herein.

14 (2) ALLOTTED LANDS.—The term “allotted
15 lands” means lands within the boundaries of the
16 Reservation that were allotted to individual Kick-
17 apoo Tribe members in accordance with a treaty or
18 Federal statute, and that are held in trust by the
19 United States for the benefit of one or more mem-
20 bers or successors in interest thereto.

21 (3) ALLOTTEE.—The term “allottee” means an
22 individual who holds a beneficial real property inter-
23 est in an Indian allotment that is—

24 (A) located within the Reservation; and

25 (B) held in trust by the United States.

1 (4) COURT.—The term “Court” means the
2 United States District Court for the District of Kan-
3 sas unless otherwise specified herein.

4 (5) DELAWARE RIVER BASIN.—The term
5 “Delaware River Basin” means that area of land,
6 depicted on the map attached as Exhibit 1 to the
7 Kickapoo Tribe Water Rights Settlement Agree-
8 ment, within which the Chief Engineer will admin-
9 ister nondomestic Kansas water rights to protect the
10 Tribal water rights.

11 (6) ENFORCEABILITY DATE.—The term “en-
12 forceability date” means the date on which the Sec-
13 retary publishes in the Federal Register the state-
14 ment of findings described in section 6(c).

15 (7) INDIAN TRIBE.—The term “Indian Tribe”
16 has the meaning given the term in section 4 of the
17 Indian Self-Determination and Education Assistance
18 Act (25 U.S.C. 5304).

19 (8) KANSAS WATER RIGHTS.—The term “Kan-
20 sas water rights” means a property right in the use
21 of water obtained under Kansas law.

22 (9) KICKAPOO TRIBE WATER RIGHTS SETTLE-
23 MENT AGREEMENT.—The term “Kickapoo Tribe
24 Water Rights Settlement Agreement” means the
25 Agreement executed by and between the Tribe and

1 the State of Kansas on September 9, 2016, that is
2 the subject of this approving legislation.

3 (10) MEMBER.—The term “member” means
4 any person duly enrolled as a member of the Tribe.

5 (11) RESERVATION.—The term “Reserva-
6 tion”—

7 (A) means the land depicted on the map
8 attached to the Kickapoo Tribe Water Rights
9 Settlement Agreement as Exhibit I; and

10 (B) shall be used solely for the purposes of
11 the Kickapoo Tribe Water Rights Settlement
12 Agreement, this Act, and any judgment or de-
13 cree issued by the Court approving the Kick-
14 apoo Tribe Water Rights Settlement Agree-
15 ment.

16 (12) SECRETARY.—The term “Secretary”
17 means the Secretary of the Interior.

18 (13) STATE OF KANSAS.—The term “State of
19 Kansas” means the Kansas State government and
20 all of its officers, agents, agencies, departments, and
21 divisions.

22 (14) TRIBAL WATER RIGHTS.—The term “Trib-
23 al water rights” means the water rights ratified,
24 confirmed, and declared to be valid for the benefit

1 of the Tribe and its members and allottees, as set
 2 forth and described in section 5.

3 (15) **TRIBE.**—The term “Tribe” means the
 4 Kickapoo Tribe in Kansas, a Federally recognized
 5 sovereign Indian Tribe that functions as a cus-
 6 tomary and traditional Indian Tribe, acting on be-
 7 half of itself and its members, but not acting on be-
 8 half of members in their capacities as allottees.

9 **SEC. 4. APPROVAL OF THE KICKAPOO TRIBE WATER**
 10 **RIGHTS SETTLEMENT AGREEMENT.**

11 (a) **RATIFICATION OF KICKAPOO TRIBE WATER**
 12 **RIGHTS SETTLEMENT AGREEMENT.**—

13 (1) **IN GENERAL.**—Except as modified by this
 14 Act, and to the extent that the Kickapoo Tribe
 15 Water Rights Settlement Agreement does not con-
 16 flict with this Act, the Kickapoo Tribe Water Rights
 17 Settlement Agreement is authorized, ratified, and
 18 confirmed.

19 (2) **AMENDMENTS.**—Any amendment to the
 20 Kickapoo Tribe Water Rights Settlement Agreement
 21 is authorized, ratified, and confirmed, to the extent
 22 that the amendment is executed to make the Kick-
 23 apoo Tribe Water Rights Settlement Agreement con-
 24 sistent with this Act.

1 (b) EXECUTION OF KICKAPOO TRIBE WATER
2 RIGHTS SETTLEMENT AGREEMENT.—

3 (1) IN GENERAL.—To the extent that the Kick-
4 apoo Tribe Water Rights Settlement Agreement does
5 not conflict with this Act, the Secretary is directed
6 to and promptly shall execute—

7 (A) the Kickapoo Tribe Water Rights Set-
8 tlement Agreement (including any exhibit to the
9 Kickapoo Tribe Water Rights Settlement
10 Agreement requiring the signature of the Sec-
11 retary); and

12 (B) any amendment to the Kickapoo Tribe
13 Water Rights Settlement Agreement necessary
14 to make the Kickapoo Tribe Water Rights Set-
15 tlement Agreement consistent with this Act.

16 (2) MODIFICATIONS.—Nothing in this Act pre-
17 cludes the Secretary from approving modifications to
18 exhibits to the Kickapoo Tribe Water Rights Settle-
19 ment Agreement not inconsistent with this Act, to
20 the extent those modifications do not otherwise re-
21 quire congressional approval pursuant to section
22 2116 of the Revised Statutes (25 U.S.C. 177) or
23 other applicable Federal law.

24 (c) ENVIRONMENTAL COMPLIANCE.—

1 (1) IN GENERAL.—In implementing the Kick-
2 apoo Tribe Water Rights Settlement Agreement, to
3 the extent required the Secretary, shall promptly
4 comply with all applicable requirements of—

5 (A) the National Environmental Policy Act
6 of 1969 (42 U.S.C. 4321 et seq.);

7 (B) the Endangered Species Act of 1973
8 (16 U.S.C. 1531 et seq.);

9 (C) all other applicable Federal environ-
10 mental laws; and

11 (D) all regulations promulgated under the
12 laws described in subparagraphs (A) through
13 (C).

14 (2) COMPLIANCE WITH FEDERAL LAWS.—

15 (A) COMPLIANCE.—The Secretary is di-
16 rected to carry out all Federal compliance nec-
17 essary to implement the Kickapoo Tribe Water
18 Rights Settlement Agreement.

19 (B) NEPA.—Execution of the Kickapoo
20 Tribe Water Rights Settlement Agreement by
21 the Secretary under this section shall not con-
22 stitute a major Federal action under the Na-
23 tional Environmental Policy Act of 1969 (42
24 U.S.C. 4321 et seq.).

1 (3) LEAD AGENCY.—The Bureau of Indian Af-
2 fairs shall be designated as the lead agency with re-
3 spect to environmental compliance pursuant to this
4 section.

5 **SEC. 5. KICKAPOO TRIBE WATER RIGHTS.**

6 (a) INTENT OF CONGRESS.—It is the intent of Con-
7 gress to provide to each allottee benefits that are equal
8 to or exceed the benefits allottees possess as of the date
9 of enactment of this Act, taking into consideration—

10 (1) the potential risks, cost, and time delay as-
11 sociated with litigation that would be resolved by the
12 Kickapoo Tribe Water Rights Settlement Agreement
13 and this Act;

14 (2) the availability of water from the Tribal
15 water rights as set forth in the Kickapoo Tribe
16 Water Rights Settlement Agreement; and

17 (3) the applicability of section 7 of the Act of
18 February 8, 1887 (25 U.S.C. 381), and this Act to
19 protect the interests of allottees.

20 (b) CONFIRMATION OF TRIBAL WATER RIGHTS.—

21 (1) IN GENERAL.—A consumptive Tribal water
22 right of up to 4,705 acre-feet of water per year is
23 confirmed in accordance with the terms and condi-
24 tions of the Kickapoo Tribe Water Rights Settle-
25 ment Agreement.

1 (2) USE.—Subject to the terms and conditions
2 of the Kickapoo Tribe Water Rights Settlement
3 Agreement, this Act, and applicable Federal law, the
4 Tribe may use the Tribal water rights for any pur-
5 pose.

6 (c) HOLDING IN TRUST.—The Tribal water rights,
7 as set forth in subsection (b), shall—

8 (1) be held in trust by the United States on be-
9 half of the Tribe and its members and allottees in
10 accordance with this section;

11 (2) include the priority date set forth in the
12 Kickapoo Tribe Water Rights Settlement Agree-
13 ment; and

14 (3) not be subject to forfeiture or abandonment.

15 (d) ALLOTTEES.—

16 (1) APPLICABILITY OF ACT OF FEBRUARY 8,
17 1887.—The provisions of section 7 of the Act of Feb-
18 ruary 8, 1887 (25 U.S.C. 381), relating to the use
19 of water for irrigation purposes shall apply to the
20 Tribal water rights.

21 (2) ENTITLEMENT TO WATER.—Any entitle-
22 ment to water for allotted land located within the ex-
23 terior boundaries of the Reservation under Federal
24 law shall be satisfied from the Tribal water rights.

1 (3) ALLOCATIONS.—Allotted land located within
2 the exterior boundaries of the Reservation shall be
3 entitled to a just and suitable allocation of water for
4 irrigation and domestic purposes from the Tribal
5 water rights.

6 (4) MEMBERS.—Members who do not own in-
7 terests in allotted land shall nonetheless be entitled
8 to the use of a portion of the Tribal water rights
9 pursuant to the terms and conditions of the Kick-
10 apoo Tribe Water Rights Settlement Agreement and
11 the Tribal Water Code.

12 (5) EXHAUSTION OF REMEDIES.—Before as-
13 serting any claim against the United States under
14 section 7 of the Act of February 8, 1887 (25 U.S.C.
15 381), or any other applicable law, a member or allot-
16 tee shall exhaust remedies available under the Tribal
17 Water Code or other applicable Tribal law.

18 (6) CLAIMS.—Following exhaustion of remedies
19 available under the Tribal Water Code or other ap-
20 plicable tribal law, a member or allottee may seek
21 relief under section 7 of the Act of February 8,
22 1887 (25 U.S.C. 381), or other applicable law.

23 (7) AUTHORITY.—The Secretary shall have the
24 authority to protect the rights of members or
25 allottees as specified in this section.

1 (e) AUTHORITY OF TRIBE.—

2 (1) IN GENERAL.—Except as provided in para-
3 graph (2), the Tribe shall have authority to use, al-
4 locate, distribute, and lease the Tribal water rights
5 on or off the Reservation in accordance with—

6 (A) the Kickapoo Tribe Water Rights Set-
7 tlement Agreement;

8 (B) the Tribal Water Code or other appli-
9 cable tribal law; and

10 (C) applicable Federal law.

11 (2) LEASES BY ALLOTTEES.—

12 (A) IN GENERAL.—An allottee may lease
13 any interest in land held by the allottee, to-
14 gether with any water rights determined to be
15 appurtenant to that interest in land.

16 (B) WATER RIGHTS APPURTENANT.—Any
17 water rights determined to be appurtenant to
18 an interest in land leased by an allottee shall be
19 used on or off the Reservation, consistent with
20 the Kickapoo Tribe Water Rights Settlement
21 Agreement.

22 (C) WATER RIGHTS APPORTIONED.—
23 Water apportioned from the Tribal water rights
24 may be leased off Reservation pursuant to the

1 terms and conditions of the Kickapoo Tribe
2 Water Rights Settlement Agreement.

3 (f) TRIBAL WATER CODE.—

4 (1) IN GENERAL.—Not later than 3 years after
5 the enforceability date, the Tribe shall enact a Trib-
6 al Water Code, that provides for—

7 (A) the management, regulation, and gov-
8 ernance of all uses of the Tribal water rights in
9 accordance with the Kickapoo Tribe Water
10 Rights Settlement Agreement; and

11 (B) establishment by the Tribe of condi-
12 tions, permit requirements, and other limita-
13 tions relating to the diversion, storage, and use
14 of the Tribal water rights in accordance with
15 the Kickapoo Tribe Water Rights Settlement
16 Agreement.

17 (2) INCLUSIONS.—The Tribal Water Code shall
18 provide—

19 (A) that allocations of water to members
20 or allottees shall be satisfied with water from
21 the Tribal water rights;

22 (B) that charges for delivery of water for
23 irrigation purposes for allottees shall be as-
24 sessed in accordance with section 7 of the Act
25 of February 8, 1887 (25 U.S.C. 381);

1 (C) the process by which a member or al-
2 lottee may request that the Tribe provide water
3 for irrigation or domestic purposes in accord-
4 ance with this Act;

5 (D) a due process system for the consider-
6 ation and determination by the Tribe of any re-
7 quest by a member or allottee for an allocation
8 of such water for irrigation or domestic pur-
9 poses on allotted land, including a process for—

10 (i) appeal and adjudication of any de-
11 nied or disputed distribution of water; and

12 (ii) resolution of any contested admin-
13 istrative decision; and

14 (E) a requirement that any member or al-
15 lottee with a claim relating to the enforcement
16 of rights of the member or allottee under the
17 Tribal Water Code or relating to the amount of
18 water allocated to land of the allottee must first
19 exhaust remedies available to the member or al-
20 lottee under Tribal law and the Tribal Water
21 Code before initiating an action against the
22 United States or petitioning the Secretary pur-
23 suant to subsection (d)(5).

24 (3) ACTION BY SECRETARY.—

1 (A) IN GENERAL.—The Secretary shall ad-
2 minister the Tribal water rights until the Tribal
3 Water Code is enacted and approved under this
4 section.

5 (B) APPROVAL.—Any provision of the
6 Tribal Water Code and any amendment to the
7 Tribal Water Code that affects the rights of
8 members or allottees—

9 (i) shall be subject to the approval of
10 the Secretary; and

11 (ii) shall not be valid until approved
12 by the Secretary.

13 (C) APPROVAL PERIOD.—The Secretary
14 shall approve or disapprove the Tribal Water
15 Code within a reasonable period of time after
16 the date on which the Tribe submits the Tribal
17 Water Code to the Secretary for approval.

18 (g) EFFECT.—Except as otherwise specifically pro-
19 vided in this section, nothing in this Act—

20 (1) authorizes any action by a member or allot-
21 tee (or any successor in interest to an allottee)
22 against any individual or entity, or against the
23 Tribe, under Federal, State, Tribal, or local law; or

1 (2) alters or affects the status of any action
2 pursuant to section 1491(a) of title 28, United
3 States Code.

4 **SEC. 6. EFFECT OF KICKAPOO TRIBE WATER RIGHTS SET-**
5 **TLEMENT AGREEMENT AND ACT.**

6 (a) ADMINISTRATION OF KANSAS WATER RIGHTS.—
7 The State of Kansas shall administer all Kansas water
8 rights in the Delaware River Basin in conformity with Ar-
9 ticle 7 of the Kickapoo Tribe Water Rights Settlement
10 Agreement, the Memorandum of Agreement and other ex-
11 hibits referenced therein and attached thereto, and this
12 Act.

13 (b) EFFECT OF KICKAPOO TRIBE WATER RIGHTS
14 SETTLEMENT AGREEMENT AND ACT.—Nothing in the
15 Kickapoo Tribe Water Rights Settlement Agreement or
16 this Act—

17 (1) affects the ability of the United States, act-
18 ing as sovereign, to take actions authorized by law,
19 including any laws relating to health, safety, or the
20 environment, including—

21 (A) the Comprehensive Environmental Re-
22 sponse, Compensation, and Liability Act of
23 1980 (42 U.S.C. 9601 et seq.);

24 (B) the Safe Drinking Water Act (42
25 U.S.C. 300f et seq.);

1 (C) the Federal Water Pollution Control
2 Act (33 U.S.C. 1251 et seq.); and

3 (D) any regulations implementing the Acts
4 described in subparagraphs (A) through (C);

5 (2) affects the ability of the United States to
6 take actions acting as trustee for any other Indian
7 Tribe or a member or allottee of any other Indian
8 Tribe;

9 (3) confers jurisdiction on any State court—

10 (A) to interpret Federal law regarding
11 health, safety, or the environment;

12 (B) to determine the duties of the United
13 States or other parties pursuant to Federal law
14 regarding health, safety, or the environment;
15 and

16 (C) to conduct judicial review of Federal
17 agency action;

18 (4) waives any claim of a member of the Tribe
19 in an individual capacity that does not derive from
20 a right of the Tribe; or

21 (5) affects the requirement of any party to the
22 Kickapoo Tribe Water Rights Settlement Agreement
23 or any of the exhibits to the Kickapoo Tribe Water
24 Rights Settlement Agreement to comply with the
25 National Environmental Policy Act of 1969 (42

1 U.S.C. 4321 et seq.) prior to performing the respec-
2 tive obligations of that party under the Kickapoo
3 Tribe Water Rights Settlement Agreement.

4 (c) ENFORCEABILITY DATE.—The enforceability date
5 shall be the date on which the Secretary publishes in the
6 Federal Register a statement of findings that the Court
7 has approved and entered a judgment and decree approv-
8 ing the Kickapoo Tribe Water Rights Settlement Agree-
9 ment.

10 **SEC. 7. WATER FACILITIES.**

11 The Secretary of Agriculture, as delegated to the Di-
12 rector of the Natural Resources Conservation Service, in
13 consultation with the Secretary as delegated to the Sec-
14 retary's Indian Water Rights Office, is hereby directed—

15 (1) to commence a study of the Upper Dela-
16 ware and Tributaries Watershed project, as author-
17 ized by the Committee on Environment and Public
18 Works of the Senate (Senate Report 105–13; April
19 22, 1997); and

20 (2) not later than 2 years after the date of en-
21 actment of this Act, make recommendations to Con-
22 gress with respect to material alterations or changes
23 in the Plan necessary to effectuate, in part, the
24 Tribal water rights approved, ratified, and confirmed

1 by the Kickapoo Tribe Water Rights Settlement
2 Agreement and this Act.

3 **SEC. 8. WAIVER AND RELEASE OF CLAIMS; RETENTION OF**
4 **CLAIMS.**

5 As described in Article 12 of the Kickapoo Tribe
6 Water Rights Settlement Agreement—

7 (1) upon the enactment of this Act, the Tribe
8 and the United States agree to waive claims to
9 water rights in the Delaware River Basin; and

10 (2) nothing in this Act resolves or waives any
11 claims for damages or losses by the Tribe against
12 the United States, for injuries to water rights or
13 claims of interference with, diversion, or taking of
14 water (including claims for injury to lands resulting
15 from such damages, losses, injuries, interference
16 with, diversion, or taking) in the Delaware River
17 Basin for failure to establish, quantify, acquire, de-
18 velop, enforce, or protect such water rights.

19 **SEC. 9. JUDICIAL PROCEEDINGS.**

20 Upon the date of enactment of this Act, the judicial
21 proceedings described in Articles 10 and 11 of the Kick-
22 apoo Tribe Water Rights Settlement Agreement shall be
23 and are hereby authorized to be commenced.

1 **SEC. 10. MISCELLANEOUS PROVISIONS.**

2 (a) WAIVER OF SOVEREIGN IMMUNITY BY THE
3 UNITED STATES.—Except as provided in subsections (a)
4 through (e) of section 208 of the Department of Justice
5 Appropriation Act, 1953 (43 U.S.C. 666) and the Kick-
6 apoo Tribe Water Rights Settlement Agreement, nothing
7 in this Act waives the sovereign immunity of the United
8 States.

9 (b) OTHER TRIBES NOT ADVERSELY AFFECTED.—
10 Nothing in this Act quantifies or diminishes any land or
11 water rights, or any claim or entitlement to land or water,
12 of an Indian Tribe, band, or community other than the
13 Tribe.

14 (c) LIMITATION ON CLAIMS FOR REIMBURSEMENT.—
15 With respect to Indian land within the Reservation—

16 (1) the United States shall not submit against
17 any Indian-owned land located within the Reserva-
18 tion any claim for reimbursement of the cost to the
19 United States of carrying out this Act and the Kick-
20 apoo Tribe Water Rights Settlement Agreement; and

21 (2) no assessment of any Indian-owned land lo-
22 cated within the Reservation shall be made regard-
23 ing that cost.

24 (d) EFFECT ON CURRENT LAW.—Nothing in this
25 section affects any provision of law (including regulations)
26 in effect on the day before the date of enactment of this

1 Act with respect to pre-enforcement review of any Federal
2 environmental enforcement action.

3 (e) NO USE OF CONDEMNATION OR EMINENT DO-
4 MAIN.—Land or interests in land may not be acquired by
5 condemnation or eminent domain under this Act or for
6 the purposes of this Act.

○