

Chapter 8

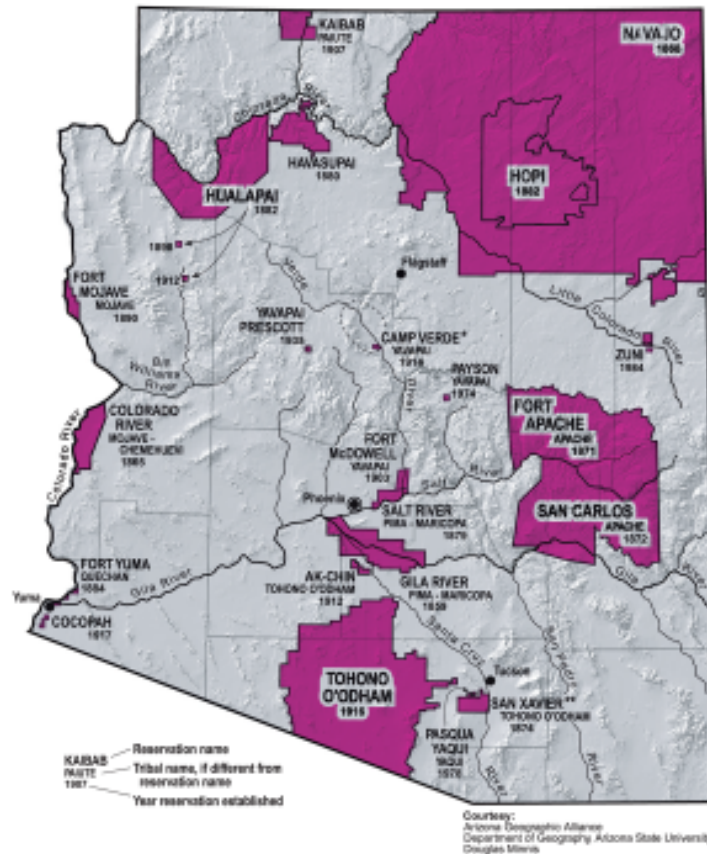
TRIBAL WATER SETTLEMENTS IN ARIZONA

BONNIE G. COLBY

Indian water settlements will play a crucial role in shaping the future of tribal and non-Indian communities in Arizona. Numerous factors are creating unprecedented pressure to resolve tribal water claims, including the rapid growth of Arizona cities, full appropriation of dependable surface water supplies, declining groundwater levels and environmental opposition to new water development projects. Arizona Indian tribes control large amounts of land and have vast entitlements to water resources. Nineteen Indian reservations account for 20 million acres (28 percent) of the state's land base (Figure 8.1). Some observers have calculated that the water entitlements of Arizona tribes, many of which remain to be quantified, easily surpass the state's surface water supplies, all of which presently are used by other parties.

A complex and sometimes contradictory body of federal and state laws and policies governs the water rights of tribes and non-Indian water users. For decades, litigation was the traditional method to quantify tribal water rights throughout the western United States. In Arizona, the state initiated a specific form of litigation—general stream adjudication—in order to clarify water rights and quantify tribal and federal reserved water rights. Tribal water settlement discussions occur in the context of Arizona's adjudications. The negotiating process in Arizona, while more *ad hoc* and private than in states like Montana, is productive. Parties in Arizona have achieved eight settlements, more than any other state. The leadership of influential members of Congress has helped many of Arizona's settlements. For example, Senator Barry Goldwater and Representative John Rhodes were influential in securing the first tribal water settlement in the United States, the Ak-Chin Settlement.

Figure 8.1
Arizona Indian Reservations



THE CONTEXT FOR TRIBAL WATER SETTLEMENTS

The Winters Doctrine established the reserved rights doctrine, setting the priority date of water rights for reservations at the date the reservation was established, and the volume of the right based on the purpose of the reservation. In its 1963 decision *Arizona v. California*, the United States Supreme Court reaffirmed the *Winters* doctrine of reserved water rights associated with tribal reservations and established “practically irrigable acreage” (PIA) as a standard for quantifying reserved water rights. This litigation was prompted by Arizona’s need for a determination of its share of water from the Colorado River in order to obtain federal appropriations for the Central Arizona Project (CAP). The United States intervened to assert, among other things, the reserved water rights of the Chemehuevi, Cocopah, Yuma, Colorado River and Fort Mohave Indian reservations on the lower reaches of the mainstem of the Colorado River. These five

reservations have quantified rights to over 900,000 acre-feet per year, with early priority dates making these some of the most reliably and potentially valuable water rights in the southwest *if* freely marketable.

In seeking to use water for the benefit of tribal members, Indian tribes in the arid West face a gauntlet of complex federal environmental laws with the potential to limit much-needed water development on reservations. The construction of community water supply facilities, taken for granted in the rest of the country, is essential to Indian reservations. Water development has only slowly advanced in Indian country, so the rivers and streams that can satisfy tribal water needs frequently also provide the last remaining useful habitat for aquatic species on the brink of extinction. On the Navajo Reservation, for example, approximately 40 percent of the population lacks a potable domestic water supply. While there is a widely perceived value in conserving endangered species and maintaining the habitat on which those species depend, this provides little comfort to tribal members who haul water to their homes. Despite the seniority of tribal reserved rights, Indian tribes encounter difficulties in using their water supplies due to the Endangered Species Act and other applicable federal environmental laws.

These issues are acute in Arizona. Non-Indian communities have understandably sought to maximize the use of water, including transportation of water over great distances or between basins and construction of massive water storage projects. These activities required extensive federal funding and took place with limited attention to environmental consequences. Projects such as the CAP and the San Juan-Chama Project provide water to support large municipal populations and maintain economic growth throughout the regions that they serve.

However, Indian tribes that seek to use water can find themselves at odds with those who oppose the development of new water supplies in the West due to environmental consequences. Existing water supplies commonly are committed to current non-Indian uses that are impractical to dislodge in a negotiations setting.

With the confirmation of the reserved rights doctrine in *Arizona v. California* and the increasing demands for water to meet growing populations and other uses in the area, it became

apparent that the question of tribal water rights could not be deferred forever. Identifying the appropriate judicial forum for hearing cases concerning tribal water rights has been a key issue in Indian water settlement efforts. Under the legal doctrine of sovereign immunity, the federal government and tribes as sovereigns, historically could not be brought into state court to have their water rights determined. This frustrated state attempts to quantify and prioritize all water rights in general stream adjudications of basins where federal reserved water rights exist. In 1952 Congress passed the McCarran Amendment that allowed the federal government to be brought into state general stream adjudications, thereby waiving its sovereign immunity in such matters. Later, the Supreme Court ruled that the McCarran Amendment also applied to state adjudications of Indian reserved water rights, which are held in trust by the United States. The McCarran Amendment and related court rulings do *not* mean that *Winters* rights are quantified according to state law, but only that the extent of the federal reserved water rights can be determined in state court proceedings.

Adjudications are court determinations of water rights volumes and priorities. There are two general stream adjudications ongoing in Arizona: the Gila River Adjudication, covering the southern and central portions of the state and the Little Colorado River Adjudication, covering the northeastern portion of the state. These two cases involve claims to water asserted by individual users as well as municipalities, industrial users, irrigation districts, the State of Arizona and the federal government on behalf of national forests, national parks, wilderness areas and numerous Indian tribes. Both adjudications are over twenty years old. Costs to participants and to federal and state taxpayers have been high and progress has been uneven.

The goal of both adjudications is to assure a comprehensive final determination of two types of water rights: (1) rights subject to the state doctrine of prior appropriation and (2) rights subject to claims based on federal law, including claims for national forests, national parks, wilderness areas and particularly the extent and priority of rights for Indian tribes. Because of the potential magnitude of Indian water rights, uncertainty has existed for some time as to the impact of these rights upon other users. The adjudications are intended to provide a process through

which a certain and lasting determination of Indian rights and the rights of federal land reserves can be achieved, thereby assuring other water users of the relative value and security of their own water uses. Summons were issued in both adjudications and served on potential claimants in each watershed—a million summons in all. The summons required a claimant to file a statement with the Arizona Department of Water Resources (ADWR) if the person claimed a water use in the watershed. More than 24,000 parties in the Gila River Adjudication filed more than 83,500 statements of claimant and over 3,100 parties filed more than 11,300 claims in the Little Colorado River Adjudication.

Legal issues have been the primary cause of delays in the adjudications process. The general adjudication statutes went through substantial legislative changes in 1995. The constitutionality of these amendments was litigated before the Arizona Supreme Court, causing delay in adjudication proceedings until 1999. The Court ruled some provisions of the 1995 legislation unconstitutional, upheld some and required that some provisions applied only prospectively.

The Arizona Supreme Court also has heard arguments on and ruled on several substantial, long-standing legal issues. Two of these decisions are especially relevant to tribal water rights. In 1999, the Arizona Supreme Court held that federal reserved rights extend to groundwater to the extent groundwater is necessary to accomplish the purpose of a reservation. In 2001, the Arizona Supreme Court held that

- The purpose of a federal Indian reservation is to serve as a “permanent home and abiding place” to the people living there,
- The practicably irrigable acreage standard is not the exclusive measure to quantify water rights on Indian lands,
- Quantifying an Indian reserved right is a fact-intensive, reservation-specific inquiry that must address numerous factors, such as a tribe’s land use plans, history, culture, geography, topography, natural resources, economic base, past water use, present and projected future population and any others deemed relevant,
- Proposed uses must be reasonably feasible, and

- The amount of water adjudicated must be tailored to the reservation's minimal need.

Following these rulings, major parties continue to engage in active efforts to resolve Indian and federal reserved rights by negotiated settlement.

In *Arizona v. California*, the United States Supreme Court noted that the quantification of reserved water rights, but not the use of the water, is determined by the purposes for which the reservation was created. Since that time, tribes have used their *Winters* rights for a variety of purposes on their reservations. Negotiated settlements often stipulate specific allowable uses. In the Southern Arizona Water Rights Settlement Act (SAWRSA), for example, the settlement legislation allows the Tohono O'odham Nation's reserved water rights to be used "for any use, including but not limited to agriculture, municipal, industrial, commercial, mining or recreational use." This language is typical of other settlements. While the use of *Winters* rights on the reservation generally has been free of controversy, transferring water use off the reservation has proven contentious.

Tribes have not been authorized to permanently alienate (sell) their reserved water rights, but can, with congressional approval, lease water for use off reservations. Some Indian law scholars disagree on this point, arguing that congressional approval of off-reservation water leases is not required. Nevertheless, Congress has delegated to the Secretary of the Interior the authority to approve leases of Indian land to non-Indians, and some interpret this to include the water needed to fulfill the purpose of the lease. Off-reservation leasing provisions are included in many of Arizona's negotiated settlements. They generate income for tribes, offset the impact of the settlement on local non-Indian water users and, in some instances, help provide consistency with state water management goals. Where off-reservation leasing of tribal water is contemplated in settlement negotiations, the negotiating parties must decide on the extent of protection extended to junior water rights. Protection of non-Indian water users has been addressed in a variety of ways in negotiated settlements. In most Arizona settlements, tribes may lease only their CAP entitlements and only within designated portions of the state.

Tribal water settlements have provided water, under long-term leases, to Arizona cities. Cities in the Phoenix metropolitan area have leased thousands of acre-feet of water from several Arizona tribes, under provisions negotiated as part of overall settlements of tribal water rights. These leases provide a long-term water supply for growing cities and much-needed revenues for tribal governments.

There have been eight negotiated settlements of tribal water rights in Arizona, and several more settlements are in active negotiations (Table 8.1). Appendix P provides more detailed information on the settlements and also on tribal rights confirmed through litigation in *Arizona v. California*. Congressional belt tightening has had an effect on ongoing Indian water rights negotiations. Although over twenty active negotiations have been in process around the West for years, Congress has approved very few settlements since 1994. Arizona was fortunate to get so many settlements through Congress and at least partially funded in the 1970s, 1980s and early 1990s. However, unresolved claims remaining in the Gila River Adjudication and the Little Colorado River Adjudication are overwhelming with respect to the magnitudes of water involved, the complexity of the issues and the expense of settlement provisions proposed by various parties

TABLE 8.1
ARIZONA SETTLEMENTS AND PENDING NEGOTIATIONS
 (as of March 2004)

Settlement (date authorized by Congress)	Pending Negotiations
Arizona vs. California (1963)	Gila River Indian Community
Ak-Chin (1978)	San Carlos Apache Tribe (Gila River drainage)
Southern Arizona Water Rights Settlement (SAWRSA) (Tohono O'odham) (1982)	Little Colorado (Navajo, Hopi San Juan Paiute)
Salt River Pima-Maricopa Indian Community (1988)	White Mountain Apache
Fort McDowell Indian Community (1990)	
San Carlos Apache Tribe (San River drainage) (1992)	
Yavapai-Prescott Tribe (1994)	
Pueblo of Zuni (Zuni Heaven) (2003)	

The state's comprehensive Groundwater Management Act (GMA) has shaped the character of settlements in Arizona. This legislation, enacted in 1980, is designed to eliminate ground-

water overdraft in selected areas of the state through strict limits on groundwater pumping, mandatory conservation measures and increased reliance on renewable water sources. The state insists that Indian water settlements be consistent with these goals, emphasizing the benefits to tribes and other water users of decreased reliance on diminishing groundwater resources. The constraints imposed by the GMA have resulted in increasingly complex provisions, as evident from comparing earlier and later litigated and negotiated settlements.

Most of the Arizona settlements authorized by Congress in the last twenty years include these key features:

- Provide federal project water to tribes through the CAP;
- Explicitly authorize leasing of tribal CAP water to water users in designated areas within Arizona; and
- Set groundwater pumping limits for the reservation.

OVERVIEW OF SELECTED ARIZONA SETTLEMENTS

The Arizona water adjudications, for all their complexity, delay and expense, have provided impetus for a series of innovative and important Indian water right settlements. One of these, the Salt River Pima-Maricopa Indian Community Settlement (1991), was the first Indian water settlement to be successfully incorporated into a final general stream adjudication decree. Appendix P examines in detail several representative Arizona settlements: Ak-Chin, Salt River Pima-Maricopa, Yavapai- Prescott, Southern Arizona Water Rights Settlement and the Zuni Heaven Settlement. Because of the magnitude of the Gila River Indian Community Settlement and its potential for approval in the short term, it is addressed below.

Current Status of the Gila River Adjudication

In recent years, the principal activity in the Gila River adjudication involves the water rights claims of the Gila River Indian Community (GRIC). Parties in the adjudication entered into settlement negotiations to accomplish a myriad of goals. The GRIC settlement is closely tied

with an agreement between the Central Arizona Water Conservation District (CAWCD) and the Bureau of Reclamation over repayment for CAP costs. In fact, part of the money paid by CAWCD into the Lower Colorado River Development Fund also will be used to implement the settlement of the GRIC's water rights. In exchange for the GRIC accepting a reduced amount of reserved right water, \$200 million from the CAWCD and CAP repayment money will be redirected toward construction costs of a CAP water delivery system onto the Gila River Indian Reservation. Thus, the GRIC would accept a *Winters* allocation of 653,500 acre-feet per year, of which 328,500 acre-feet would be met by CAP water.

Senator Kyl, accompanied by Senator McCain, introduced The Arizona Water Settlements Act in the 107th Congress. A revision of a bill introduced in 2000, the new bill incorporates further negotiations. The new bill has three headings: the Central Arizona Project Settlement, the Gila River Indian Community Water Rights Settlement and the Southern Arizona Water Rights Settlement (SAWRSA). There is no heading for an agreement with the San Carlos Apache Tribe. However, the bill does reference an "Upper Gila" settlement between the Gila River Indian Community and the irrigation districts of the Safford Valley. In addition, the new bill specifically addresses after-acquired trust lands in both the GRIC and the SAWRSA sections. A second major adjustment occurred in the SAWRSA provision of the bill. The new bill states that the pumping right obtained by the Tohono O'odham Nation in the 1982 settlement is not a reserved right to groundwater, but is a right that hinges on the state enforcing well-spacing and pumping protections in the areas surrounding the Nation. The GRIC obtained provisions that limit future increases in groundwater pumping by non-Indian water users located near their reservation. Further, the bill addresses mitigation provisions during sustained drought conditions as well as equitable apportionment of water during drought shortages.

SUMMARY

Arizona now has a quarter-century of experience in negotiating Indian water right settlements. The experiences recounted in this chapter demonstrate the innovative approaches that

have been employed both to settle past uncertainties and disputes and to plan for the future. Many lessons may be drawn from this rich body of experiences. Settlements take many years and, even when finally approved, the settling parties must give sustained attention to implementation. For agreements to be implemented, they require money for water development or, in some cases, for environmental restoration. Funding is always difficult to secure, especially in an era where state, federal and tribal budgets are stretched thin.

As states, tribes, and federal agencies have gained more experience in negotiating water settlements, problems overlooked in earlier agreements may be avoided. However, only the passage of time can disclose the unique, unanticipated problems of every agreement. Settlements should include procedures for addressing these future problems, and negotiators and their successors must monitor implementation and stay committed to the goals and processes of the agreement.

Most importantly, people make these agreements. Leaders among all the diverse interests have reached out to bring others into the process. Specialists have generated and compiled hydrologic, legal, engineering and economic data. Negotiators have stayed at the table during exhausting, intense negotiations. Elected officials have approved the resulting accords and appropriated money. Even after the excitement of successful legislation fades, people stay committed to the settlement to ensure that water development occurs, watershed improvements are made, unanticipated problems are addressed, needed funds are appropriated and future disagreements are expeditiously and fairly resolved. Fundamentally, Indian water right settlements are about people and creating durable interpersonal relationships in Arizona watersheds.