

## **APPENDIX G: INDIAN WATER RIGHTS CLAIMS AND SETTLEMENTS**

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### INDIAN WATER RIGHTS CLAIMS AND SETTLEMENTS

The role of Indian reservations in Arizona water supply and management has become increasingly important. With approximately 28% of Arizona lands held in trust by the federal government on behalf of Native Americans, determination of Indian water rights and water use by Indian communities can have a significant impact on other State water users. Active Management Areas (AMA) affected by Indian water right claims include Phoenix, Pinal and Tucson. Non-AMAs affected by these claims include the Coconino Plateau, Little Colorado River, Lower San Pedro, Parker, Verde River and Yuma basins as well as northwestern Arizona and areas on the Mogollon Rim and along the upper Gila River.

In Arizona, as in most states, negotiation of Indian water rights claims has been litigation driven. Indian water right claims are based on “reserved water rights” for federal reservations established under the “Winters Doctrine.” When the federal government established Indian reservations it did not expressly claim associated water rights. In 1908, the U.S. Supreme Court in *Winters v. United States* found that a federal reservation includes an amount of water necessary to fulfill the reservation’s purpose. Priority dates are based on the date of the enactment of the treaty, act of Congress, or Executive Order establishing the reservation. In 1963, the U.S. Supreme Court in *Arizona v. California* further defined reserved water rights for Indian reservations by including the standard of practicably irrigable acreage (PIA) as a method of quantifying the right. In 2001, the Arizona Supreme Court in *Gila V* rejected PIA as the sole standard for quantification and found that Indian reserved rights must account for the present and future needs of the reservation as a tribal homeland. Although limited to the “minimal needs” of the reservation, quantification should consider several factors including historic and cultural water uses, tribal resources and economic base, development plans, and current and future populations.

Litigation to quantify Indian water rights claims is usually a lengthy and expensive process. Settlement of tribal claims benefits private and public parties by providing the water certainty necessary to plan long-term economic development. Also, settlement may be less expensive than litigation. However, the greatest benefit of settlements may be the goodwill created by neighboring communities working together for Arizona’s future.

When the settlement process begins, parties potentially impacted by the Indian water rights claims identify the sources of water necessary to satisfy the tribal needs. A federal negotiating team works with the parties to assure that federal requirements, including local cost contribution, are met. ADWR participates in the settlement discussion, offering technical assistance and ensuring state water laws and policies are followed.

When local parties agree on a settlement, the issue is taken to the United States Congress for approval and funding. Generally, the congressional act ratifies the agreement among the parties, authorizes congressional appropriations, and may require a state contribution. The parties then finalize the implementing agreement, seek any necessary state appropriation, and, as necessary, seek approval of the court in either the Gila River General Stream Adjudication or the Little Colorado General Stream Adjudication.

The remainder of this appendix is divided into four sections. Section G-1 lists Colorado River entitlements that were decreed to Arizona Indian tribes through *Arizona v. California*. Sections G-2 and G-3 describe Indian water right settlements in Arizona that were authorized by Congress and are currently under negotiation, respectively. Other tribes in Arizona with unresolved water right claims are listed in Section G-4

### **G.1 Colorado River Entitlements**

*Arizona v. California* decreed four Indian reservations along the Colorado River with entitlements to divert water from the river. The reservations and their annual Colorado River entitlements in acre-feet (AF) are listed below:

- Cocopah – 8,821 AF (Priority 1) and 2,026 AF (Priority 4)
- Colorado River Tribes – 662,402 AF (Priority 1)
- Fort Mohave – 103,535 AF (Priority 1)
- Fort Yuma – 6,350 AF (Priority 1).

### **G.2 Congressionally Authorized Settlements**

#### Ak Chin Indian Community

By Congressional action in 1978 and 1984, the Ak Chin Indian Community was awarded an annual entitlement to 75,000 AF (85,000 AF in wet years) of Central Arizona Project (CAP) and other Colorado River water. In 1992, Congress amended the 1984 Act to authorize the Community to lease any unused CAP water to off-reservation users within the Tucson, Pinal and Phoenix AMAs.

#### Tohono O’odham Nation

In 1982, the Southern Arizona Water Rights Settlement Act (SAWRSA) was enacted by Congress to address the water right claims of the San Xavier and Shuck Toak Districts of the Tohono O’odham Nation. SAWRSA awarded the districts an annual entitlement to 37,800 AF of CAP water and 28,200 AF of settlement water to be delivered by the Secretary of the Interior to the two districts. The districts may also pump annually up to 13,200 AF of groundwater from non-exempt wells. In addition to state and local financial contributions, the City of Tucson contributed 28,200 AF annually of effluent to be used by the Secretary to facilitate deliveries to the districts (through sale or exchange).

In December 2004 the President signed into law P.L. 108-451, the Arizona Water Settlements Act. Title III of the Act amended the 1982 SAWRSA and provided a mechanism to implement the settlement. The amendment identified the source of the settlement water as CAP Non-Indian Agricultural priority water. The Nation may lease its CAP water within the CAP service area. State law was amended to provide additional protection to groundwater resources on the San Xavier Reservation, and allow the Nation to store its CAP water in an in lieu fashion. The settlement was implemented in December 2007 and includes dismissal of claims against non-Indian parties in U.S. and State courts, and approval of the settlement by the Gila Adjudication Court for incorporation into the final decree in that case.

The Nation's water right claims will not be completely satisfied until the claims of the Sif Oidak District in Pinal County, commonly known as Chui Chu, are addressed. While that district currently has a contract for 8,000 AF of CAP water, it has stated a need of nearly 100,000 AF. The Nation has requested that a federal negotiating team be established so that negotiations can be commenced.

#### Salt River-Pima Maricopa Indian Community

In the Salt River-Pima Maricopa Indian Community Water Rights Settlement Act of 1988, Congress approved an agreement which gave the Community an annual entitlement to 122,400 AF of water plus storage rights behind Bartlett and modified Roosevelt Dams. The parties to the agreement were: Salt River Project (SRP), Roosevelt Water Conservation District (RWCD), Roosevelt Irrigation District, Chandler, Glendale, Mesa, Phoenix, Scottsdale, Tempe, Gilbert, the Central Arizona Water Conservation District (CAWCD), the United States and the State of Arizona.

Sources of water for the Community under the settlement include the Salt and Verde rivers, groundwater and CAP water. The Community is allowed to pump groundwater, but must achieve safe-yield when the East Salt River sub-basin in the Phoenix Active Management Area does so. The Community has leased its 13,000 AF CAP allocation to the Phoenix valley cities from 2000 to 2099. The Arizona State Legislature appropriated \$3 million, which was added to \$47 million from the United States for the Community's trust fund. This settlement was approved by the Gila River Adjudication Court for incorporation into the final decree in that case.

#### Fort McDowell Indian Community

In 1990, Congress ratified an agreement between the Fort McDowell Indian Community (FMIC) and neighboring non-Indian communities, including SRP, RWCD, Chandler, Mesa, Phoenix, Scottsdale, Tempe, Gilbert, CAWCD, the United States and the State of Arizona. Under that agreement, FMIC is provided an annual entitlement to 35,950 AF of water from the Verde River and CAP. The 18,233 AF of CAP in the water budget may be leased for 100 years or less off-reservation within Pima, Pinal, and Maricopa counties. A lease of 4,300 AF to Phoenix has already been signed. This settlement also provides for a minimum stream flow on the Lower Verde River of 100 cfs. In accordance with the 1990 Act, a development fund was created with \$23 million from the United States and with a \$2 million appropriation by the Arizona State Legislature. This settlement was approved by the Gila River Adjudication Court for incorporation into the final decree in that case.

#### San Carlos Apache Tribe

The water rights claims of the San Carlos Apache Tribe to the Salt River side of their reservation were settled through congressional enactment of the San Carlos Apache Tribe Settlement Act of 1992. The Tribe was awarded an annual entitlement to 71,435 AF of water from the CAP and Salt, Gila and Black rivers. The 64,135 AF of CAP water may be leased off-reservation within Pima, Maricopa, Pinal, Yavapai, Graham, and Greenlee counties. Groundwater may also be pumped from under the reservation.

Settlement parties include: SRP, RWCD, Phelps Dodge Corporation, the Buckeye Irrigation Company, the Buckeye Water Conservation and Drainage District, Chandler, Glendale, Globe, Mesa, Safford, Scottsdale, Tempe, Gilbert, Carefree, CAWCD, the United States and the State of Arizona. The agreement includes a 100-year lease with the City of Scottsdale for a portion of the Tribe's CAP water.

In 1994, the Arizona State Legislature appropriated \$3 million, which was added to \$38.4 million from the United States for the Tribe's development trust fund and in 1997, the Gila River Adjudication Court approved the settlement for incorporation into the final decree in that case. The water right claims of the San Carlos Apache Tribe to the Gila River side of the reservation will be the subject of separate negotiations or litigation.

#### Yavapai-Prescott Indian Tribe

In 1994, Congress enacted the Yavapai-Prescott Indian Tribe Water Settlement Act. The Act settled the Tribe's water rights claims by: 1) confirming the Tribe's right to pump groundwater within the boundaries of the reservation; 2) providing for relinquishment of the Tribe's CAP contract, the proceeds to be used for a water service contract with the City of Prescott; and 3) providing that the Tribe may divert a portion of water from Granite Creek currently diverted by the Chino Valley Irrigation District.

The Act also provided authorization to the Tribe and the City of Prescott to market their CAP water to the City of Scottsdale, which has been completed. The Act required a state appropriation of \$200,000, which was made in the 1994 session of the Arizona State Legislature and was added to the Tribe's CAP proceeds fund. The Gila River Adjudication Court approved this settlement for incorporation into the final decree in that case.

#### Zuni Indian Tribe

In June 2003, the President signed into law P.L. 108-34, the Zuni Indian Tribe Water Rights Settlement Act. The Act awards the tribe a right to use annually 5,500 AF of surface water from the Little Colorado River (LCR) and up to 1,500 AF of underground water, both for wetland restoration at the Zuni Heaven Reservation. It also grandfathers existing surface and ground water uses in the area, restricts future wells near the reservation and facilitates local state environmental programs. Parties to the settlement include SRP, Tucson Electric Power Company, local irrigation companies, cities and towns, the United States and the State of Arizona.

A total of \$26.9M was authorized by the settlement for water rights acquisition and wetlands restoration and maintenance work. The settlement was implemented in December 2006 and includes a broad waiver of Zuni claims against future water uses as well as approval by the LCR Adjudication Court for incorporation into the final decree in that case.

#### Gila River Indian Community

In December 2004 the President signed into law P.L. 108-451, the Arizona Water Settlements Act. Title II of the Act provided approval of the Gila River Indian Water Settlement Agreement. The settlement awarded the Community an annual entitlement to 653,500 AF of water from various sources including CAP allocations, effluent (through CAP exchange), groundwater, and surface water from the Gila, Verde and Salt rivers,. It also established a funding mechanism for on-reservation development of the Community's farming operations and gave leasing authority to the Community for its CAP water as long as the water is leased within Arizona. Parties to the settlement include many non-Indian neighbors: SRP, RWCD, San Carlos Irrigation and Drainage District, Hohokam Irrigation District, New Magma Irrigation District, Phoenix valley cities, Central Arizona Irrigation and Drainage District, Maricopa-Stanfield Irrigation District, Gila Valley Irrigation District, Franklin Irrigation District, upper Gila valley towns and cities, the

United States, CAWCD and the State of Arizona.

The Indian and non-Indian water users who are parties in the *United States v. Gila Valley Irrigation District, et al., Globe Equity No. 59* (entered June 29, 1935), also known as the Globe Equity Consent Decree, have been in continuing litigation over the management and interpretation of the Decree since 1935. The Settlement Agreement and Title II of the Act include settlement of these difficult issues. The State also enacted legislation to better protect certain water resources of the Community. The settlement was implemented in December 2007 and includes dismissal of Community claims in U.S. and State courts, and approval by the Gila River Adjudication Court for incorporation into the final decree in that case.

### **G.3 Current Settlement Negotiations**

#### White Mountain Apache Tribe

In January 2009, U.S. Senator Kyl (R-AZ) introduced legislation (S. 313) to settle the water right claims of the White Mountain Apache Tribe (WMAT) in the Salt River Basin. The WMAT Water Rights Quantification Act would authorize \$290M for water projects including a dam on the White River at Miner Flat, a treatment plant and pipeline to distribute potable water supply from the reservoir to most of the Fort Apache Indian Reservation, and other smaller projects. Under the settlement, WMAT would be entitled to an annual depletion of 27,000 AF of surface water from the White River and 25,000 AF of CAP water previously set aside for future Indian tribal settlements. Major parties to the settlement include WMAT, SRP, CAWCD, RWCD, and several Phoenix valley cities.

In September 2009, the Senate Indian Affairs Committee cleared S. 313 and in January 2010, the House passed a companion bill (H.R. 1065) introduced by U.S. Representative Kirkpatrick (D-AZ). S. 313 may be considered by the full Senate in late 2010.

#### Navajo Nation and Hopi Tribe

The Navajo Nation and Hopi Tribe have been negotiating with non-Indian water users in the Little Colorado River Basin, the State of Arizona and the federal government for several years in a settlement committee appointed by the LCR Adjudication Court during the 1990s. Negotiations broke down in 2000 and in 2003 the Navajo Nation filed a lawsuit against the Secretary of the Interior over its operation of the Colorado River. A Federal judge entered a stay in that case until October 2010 to allow negotiations with the United States, State of Arizona and intervening parties about possible Navajo Nation claims to the Colorado River.

Negotiations resumed a few years ago and are now nearing completion concerning Navajo and Hopi claims to both the mainstem Colorado River and the Little Colorado River. Drafting of federal and state legislation is currently underway for possible introduction in 2011 or 2012.

#### Yavapai Apache Tribe

A federal assessment level team has been assembled to consider the water right claims of the Yavapai Apache Tribe. Details on the team's activities and the status of any settlement negotiations are not available at this time.

#### **G.4 Unresolved Claims**

The water claims of the following Arizona Indian tribes are not subject to active settlement negotiations and remain unresolved at this time:

- Havasupai
- Hualapai
- Kaibab Paiute
- Pascua Yaqui
- San Carlos Apache (Gila River tributaries)
- Tohono O'odham (Sif Oidak District)
- Tonto Apache.

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