American Indian Water Rights in Arizona:

From Conflict to Settlement, 1950-2004

by

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ABSTRACT

The rights of American Indians occupy a unique position within the legal framework of water allocations in the western United States. However, in the formulation and execution of policies that controlled access to water in the desert Southwest, federal and local governments did not preserve the federal reserved water rights that attached to Indian reservations as part of their creation. Consequentially, Indian communities were unable to access the water supplies necessary to sustain the economic development of their reservations. This dissertation analyzes the legal and historical dimensions of the conflict over rights that occurred between Indian communities and non-Indian water users in Arizona during the second half of the twentieth century. Particular attention is paid to negotiations involving local, state, federal, and tribal parties, which led to the Congressional authorization of water rights settlements for several reservations in central Arizona. The historical, economic, and political forces that shaped the settlement process are analyzed in order to gain a better understanding of how water users managed uncertainty regarding their long-term water supplies. The Indian water rights settlement process was made possible through a reconfiguration of major institutional, legal, and policy arrangements that dictate the allocation of water supplies in Arizona.

DEDICATION

This work is dedicated to Noel J. Stowe

ACKNOWLEDGMENTS

The individuals who assisted in the completion of this work are too numerous to mention, however, several warrant special recognition for their significant contributions. Noel Stowe is directly responsible for nearly every step of my intellectual development and if it were not for his untimely passing he would have undoubtedly had a major shaping influence on this work. My dissertation committee, comprised of Dirk Hoerder, Paul Hirt, and Karen Smith, deserve much credit for helping to guide the evolution of my research and writing on this subject and each have contributed in unique ways to the final form of this dissertation.

The people within the Research Archives and Water Rights & Contracts departments at Salt River Project (SRP) helped to foster my understanding of water policies and institutions in Arizona. Shelly Dudley, Catherine May, and James LaBar each assisted in my immersion into the study of water. Dave Roberts and Fritz Beeson provided the access, support, and supervision that made much of the research in this work possible. Over twenty individuals, representing a range of water management entities, agreed to be interviewed as part of my research and each aided in my understanding of the topic. In particular, John Weldon of Salmon, Lewis & Weldon P.L.C. was generous with both his time and

knowledge in helping me understand the intricacies of the Indian water rights settlement process.

The ultimate credit for anything I am able to achieve must go to my friends and family. In particular, my wife, Lexi Killoren, who added an essential component to my intellectual journey: joy.

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PREFACE

The legal nature of Indian water rights, and the close proximity in time of the events under study, made the production of a detailed historical account difficult without accessing sources of information that are not part of the public record. Both private and public institutions have enacted policies that ensure much of the documentary sources of information on this topic will remain inaccessible to researchers well into the future. This includes the National Archives and Records Administration, which declined to make available certain records from the Classified Subject Files of the Department of Justice concerning Indian water rights issues in Arizona during the 1950s and 1960s. If materials from this period still retain their confidential status, one can only speculate when the records generated in the 1980s and 1990s will be made available for scholarly analysis. Therefore, this study relied greatly on the assistance of individuals and institutions that made available confidential sources, on a restricted basis, in order to further my research.

I made every effort to locate public records for key details and to document the source of critical information. However, in several instances, confidential sources were the only means of reconstructing a particular event or topic. Rather than omit information that was central to my analysis, I included the information without citations in order to retain the confidentiality of the parties

who were involved in the settlement process. I accept all responsibility for any errors of fact or assertion and these should not reflect on the individuals or institutions that opened their records.

I would like to recognize the assistance offered by several entities in making available their research materials. The Salt River Project granted me access to confidential records under a consulting agreement that allowed the Project to retain the confidential nature of its records and legal strategies while allowing me the freedom to pursue my research interests. Representatives from the Department of the Interior Solicitor's Office, Phoenix Field Office and the Arizona Department of Water Resources were also kind enough to make available files that are not readily available to the public. The Field Solicitor's files were particularly helpful in illuminating the actions of the federal government in Indian water rights litigation and settlement negotiations during this period.

I also made an effort to supplement the information available in the public record in order to provide a more inclusive view of the settlement process. I conducted interviews with over twenty individuals who represented local, state, federal, and tribal parties in settlement negotiations. The information, insights and perspectives related by these individuals during the interview process were critical to my analysis. Direct quotes are used periodically in the study, but in most instances the information gathered from these interviews is not cited.

Chapter 1

THE WATER RIGHTS REGIME IN ARIZONA AND THE WESTERN UNITED STATES

Introduction

An Indian water right, as the name suggests, is a concept that deals fundamentally with a legal entitlement to water. However, the value of a water right does not rest in its legal definition, but rather in the ability to act on that right and make use of water to further economic, social, and cultural ends. The history of water use by indigenous peoples in Arizona and other Western states during the late 19th and 20th centuries presents one of the clearest examples of access to water falling short of legal entitlements. The inability of Indian communities to access the single most important natural resource in an arid region restricted economic activity and contributed to a low standard of living on many Indian reservations. Understanding the reasons for the disparity between access and rights, and the subsequent divergence in the economic fortunes of Indian and non-Indian communities, requires an exploration of the major policies, institutions, and individuals that determined who was given access to the region's water supplies and how that water could be used.

In the development and implementation of water policies, the federal government, and later local governments, corporations, and individuals acting under its authority, did not recognize the unique legal rights of Indian communities. The failure of the federal government to fully comprehend the implicit water right it granted Indian reservations as part of their creation resulted in Indian populations receiving a small share of the benefits from federal investments in water storage and delivery infrastructure, which also helped to solidify a water allocation structure that did not fully account for or protect the reserved rights that attached to Indian reservations. Consequentially, the tremendous population growth and economic development of non-Indian communities in the Western United States occurred at the expense of Indian communities whose water rights remained as unrecognized legal claims.

The process of resolving Indian water rights claims in Arizona required first and foremost an acknowledged by the major local, state, and federal stakeholders that Indian water rights existed and needed to be fulfilled. However, a simple recognition of the Indian claims was not enough, particularly when these claims challenged the legal basis of water supplies being utilized by existing users. In order to satisfy Indian water rights without causing serious damage to existing users, the effected parties developed mechanisms that reconfigured water allocation arrangements in a way that redistributed the benefits derived from over

a century of investments in water storage and delivery infrastructure. On the surface, Indian water rights dealt primary with legal issues, but the process utilized to resolve tribal claims in Arizona considered social, economic, and political factors to enact fundamental changes in water distribution and management.

Considerations of Equity in Water Allocation

The process undertaken in Arizona and several other Western states during the late 20th century and early 21st century to recognize and ultimately fulfill Indian water rights claims highlights changing perceptions of equity among the stakeholder groups who dictate water allocation arrangements. While the role that equity plays in shaping policy actions is often not acknowledged explicitly by the various water management professionals in the state, it does offer a critical lens to analyze how changes in water allocation arrangements resulted from the challenges lodged by Indian communities. The process of resolving Indian claims demonstrates that perceptions of equity, held both by Indian and non-Indian entities, are not simply a reflection of the overall distribution of water, but rather are formed around complex judgments about how the rules that underlie water allocation and the assignment of rights are determined. Satisfying Indian water rights claims required water management entities and Indian communities in

Arizona to reconfigure the institutional structures that govern water allocation to align with changing perceptions of equity, justice, and fairness.

Conceptions of equity are formed around normative judgments that establish situational dynamics in all areas of social, cultural, and political life.[1] A survey conducted in Australia found that public perceptions of fairness in water allocation utilized both procedural and distributive forms of justice depending on whether any given decision was applied in a limited situation or universally.[2] Lauderdale writes that "[j]ustice, then, is a concept that is useful when we examine how it is constructed in different social and political situations and how it is used as a source of legitimation for the development and uses of rules such as law."[3] Thus, conceptions of equity are formed not only around final outcomes, but also the system of rules that determines how the outcomes are derived. The ability of different stakeholders to influence the procedural elements that dictate how policies and institutions operate and evolve over time is critical to

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[1] A. Dan Tarlock, "Environmental Protection: The Potential Misfit Between Equity and Efficiency," *University of Colorado Law Review* 63 (1992): 882.

[2] G.J. Syme, B.E. Nancarrow and J.A. McCreddin, "Defining the Components of Fairness in the Allocation of Water to Environmental and Human Uses," *Journal of Environmental Management* 57 (1999): 53.

[3] Pat Lauderdale, "Justice and Equity: A Critical Perspective," in Rutgerd Boelens, Gloria Davila and Rigoberta Menchu, eds., *Searching for Equity: Conceptions of Justice and Equity in Peasant Irrigation* (Assen, Netherlands: Van Gorcum, 1998), 7.

understanding the relative equity of a particular environment or system. The history of Indian water rights in Arizona offers a case study for analyzing how regional stakeholders responded to a long-standing inequity by reconfiguring water allocations to address a major category of unfulfilled rights.

The resolution of Indian water rights claims provides one of the best opportunities to analyze how federal, state, local, and tribal parties define priorities in policy formation and institutional reconfiguration. This study focuses on the individuals, institutions, practices, and policies that influenced the settlement process and has the potential to yield important insights into how social and political structures reflect stakeholders' conceptions of equity in other areas of water policy and management. The magnitude of the threat to existing water allocation arrangements presented by Indian claims resulted in a number of important trade-offs and reforms that realigned the power structures that govern water policy decisions. One outcome of this process was a growing realization on the part of policymakers that the region's water resources would not be able to support the full range of historic uses within existing cost and allocation structures. The negotiation of American Indian water rights claims offered a unique venue for regional stakeholders to reconsider the priorities that would be used to guide the future direction of water allocation and use. Equity was defined at various stages in this process as a method of navigating difficult trade-offs that

would yield a cumulative settlement more agreeable than the existing framework.

Water Rights Principles in the Western United States

The water rights of Indian reservations rest upon a different set of legal precedents than the rights of other water users in Arizona and the West. Indian water rights are derived from the principle of federal reserved rights, which is predicated on the notion that the federal government, in reserving a portion of the public domain for federal uses, implicitly reserves water to support the purposes for which the land was set aside.[4] In the case of most Indian reservations, the intent of Congress and the Executive Branch was to create permanent homelands for native peoples and to provide both water and land for the present and future needs of residents.[5] The federal government acts in its capacity as owner of the public domain to create a reservation and to withhold waters that would otherwise be available for appropriation by individuals in accordance with state laws.[6] However, the full measure of the water right set aside in creating an Indian

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[4] Felix S. Cohen, *Handbook of Federal Indian Law* (Washington D.C.: Government Printing Office, 1942), 216-217.

[5] Larry Long and Clay Smith, eds., *American Indian Law Deskbook: Conference of Western Attorneys General*, 4th ed. (Boulder: University of Colorado Press, 2008), 339-341.

[6] Federal ownership of public lands is derived from Article 4, Section 3 of the U.S. Constitution, commonly referred to as the Property Clause.

reservation was not specified. Since the rights are intended to meet both current and future needs, a portion of the water covered under the entitlement often remains unused for a period of time, which makes it vulnerable to appropriation by a later user if the right is not protected. The U.S. Congress and the President failed to adequately protect the underlying water rights for Indian reservations because they did not understand the nature of these rights.

Policy makers and water users overlooked federal reserved rights in large part because they did not adhere to the legal doctrine that governed the water allocation process for non-Indian populations in the West. Appropriations in most Western states are governed by the prior appropriation doctrine, which Donald Pisani referred to as "[t]he greatest legal innovation in the history of the arid West…"[7] because of the tremendous economic, political, and cultural changes it facilitated. Prior appropriation is based on the simplified principle of "first in time, first in right," which grants a priority right to the earliest user of a water source.[8] The system is designed to protect investments that are made to utilize an available water supply from diminishment by later users as long as the senior user

[7] Donald J. Pisani, *To Reclaim a Divided West: Water, Law, and Public Policy, 1848-1902* (Albuquerque: University of New Mexico Press, 1992), 11.

[8] Wells A. Hutchins, *Water Rights Laws in the Nineteen Western States* (Clark, NJ: Lawbook Exchange, 2004), 437-467.

continues to put the water to a beneficial use.[9] The system prioritizes the point in time at which appropriations are made instead of the purpose or value for which the water is used.[10]

The water rights of Indian communities were not recognized earlier because the case law that defined the nature of these rights was not established until the early twentieth century, well after most reservations were already created and non-Indian settlement and water resources utilization was occurring in the West.[11] The single most important legal decision in Indian water rights history came in the *Winters v. United States* case of 1908, which dealt with the Fort Belknap Indian Reservation in Montana.[12] The U.S. Supreme Court ruled that the federal

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[9] ARS 45-181(1) states: "Beneficial use includes but is not limited to use for domestic, municipal, recreation, wildlife, including fish, agricultural, mining, stockwatering and power purposes. ARS 45-141(B) states: "beneficial use shall be the basis, measure and limit to the use of water. An appropriator of water is entitled to beneficially use all of the water appropriated on less than all of the land to which the water right is appurtenant, and this beneficial use of the water appropriated does not result in the abandonment or forfeiture of all or any portion of the right." For a discussion of the beneficial use doctrine in the Western United States see Hutchins, *Water Rights Laws in the Nineteen Western States*, 9-11.

[10] Marc Reisner and Sarah Bates, *Overtapped Oasis: Reform or Revolution for Western Water* (Washington D.C.: Island Press, 1990), 64-65.

[11] Harold A. Ranquist, "The *Winters* Doctrine and How it Grew: Federal Reservation of Rights to the Use of Water," *Brigham Young University Law Review* 3 (1975): 639-724.

[12] For more background of the circumstances surrounding the *Winters* case see John Shurts*, Indian Reserved Water Rights: The Winters Doctrine in its Social and Legal Context, 1880s-1930s* (Norman: University of Oklahoma Press, 2000);

government intended to set aside water as part of the 1888 treaty that created the reservation, even though it was not mentioned explicitly. The court based its decision on the rationale that land in an arid region is of little value without appurtenant water rights. Therefore, the creation of the reservation carried with it an implicit right to the water flowing across the land. When Congress admitted Montana into the United States a year later, in 1889, and granted the state government authority to regulate water within its boundaries, the Fort Belknap reservation continued to retain its rights.[13] However, the water allocation structure of most Western states was well developed, and significant financial resources were expended on water infrastructure, by the time the *Winters* case was decided. The impact of the decision was therefore diminished because applying its provisions would require taking water away from individual who were already putting it to use, a decision the federal government was reluctant to make.[14]

Further weakening the immediate impact of the *Winters* decision was the unresolved question of whether the federal reserved rights principle applied to

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Norris Hundley, Jr., "The 'Winters' Decision and Indian Water Rights: A Mystery Reexamined," *Western History Quarterly* 13, no. 1 (1982): 17-42.

[13] Winters v. United States, 207 U.S. 564 (1908).

[14] David H. Getches, "Defending Indigenous Water Rights with the Laws of a Dominant Culture: The Case of the United States," in *Liquid Relations: Contested Water Rights and Legal Complexity*, Dik Roth, Rutgerd Boelens and Margreet Zwarteveen eds. (New Brunswick, NJ: Rutgers University Press, 2005), 47-50.

Indian reservations. In 1939 the U.S. Ninth Circuit Court of Appeals addressed this question and extended the implied water right to those reservations created by statute and executive order in the case of *United States v. Walker River Irrigation District*.[15] The court stated,

> In the *Winters* case...the basic question for determination was one of intent--whether the waters of the stream were intended to be reserved for the use of the Indians, or whether the lands only were reserved. We see no reason to believe that the intention to reserve need be evidenced by treaty or agreement. A statute or an executive order setting apart the reservation may be equally indicative of the intent.[16]

The extension of the reserved rights doctrine to all federal reservations, including Indian reservations, greatly expanded its reach because of the large quantity of federal land located within Western state boundaries.[17] After establishing that the federal reserved rights principle applied to all Indian reservations, the question still remained about the method that should be used to quantify these rights. This issue was not addressed in the *Winters* decision or in subsequent court rulings in the half century that followed. It was not until 1963, when Western development

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[15] United States v. Walker River Irrigation District, 104 F. 2d 334 (1939).

[16] Ibid.

[17] As of 1950, 69.43% of the total land area in Arizona was designated as federal lands. The percentage of federal lands in Idaho, Nevada, Oregon, Texas, Utah and Wyoming each exceeded 50% of the total land area. See H. R. Rep. No. 81-3116 (1950).

was accelerating at its fastest pace, that the U.S. Supreme Court in *Arizona v. California* handed down for the first time a standard for quantifying federal reserved rights claims.[18] Prior to this ruling, many Western water users still did not fully recognize the magnitude of the water rights claims that could be made on behalf of Indian communities or the effects these claims might have on water rights acquired under state laws.[19] The federal government contributed to the lack of recognition and understanding of federal reserved rights by adopting policies that supported the appropriation of Western water resources by non-Indians.

Western Land and Water Utilization

The basic tenants of the federal reserved rights and prior appropriation doctrines reflect differing approaches to the allocation and use of water in an arid environment. Federal reserved rights allow for the growth in future water use

[18] State of Arizona v. State of California et al., 373 U.S. 546 (1963).

[19] Many non-Indian water users in the West became concerned in the early 1950s about the extent of the federal authority to reserve water in light of several court decisions. Indian water rights claims represented just one type of federal claim that could be made on Western water sources. State officials opposed these claims on the basis that the federal government gave the authority to regulate water to the states. Proceedings from the annual meetings of the Colorado River Water Users Association [CRWUA] provide a good gauge of the level of concern on the part of non-Indian water users in Western states. See for example: Burnham Enersen, "State Versus Federal Water Rights: Speech before the CWRUA Annual Meeting," 1958, Salt River Project [SRP] Research Archives, Phoenix.

because they are intended to provide for the changing needs of people on a defined area of land. Water covered under these rights can be used for a variety of purposes and the place and type of use can change over time without affecting the underlying entitlement. In contrast, prior appropriation requires the continuous use of a fixed quantity of water because it assumes a scarcity of supply. In an effort to avoid waste, the prior appropriation system preserves the senior right insofar as it continues to be put to a beneficial use. The two doctrines are not fundamentally in opposition to one another. However if reserved rights are not recognized when the priority of rights is determined within the prior appropriation system then water users will use the full amount of water without accounting for the reserved rights. Allowing the two doctrines to proceed side-by-side made the task of enforcement almost impossible because there was no single standard that could be applied equally to determine the priority and quantity of rights.[20]

The differences in the two legal doctrines were amplified by government policies that supported the appropriation of water by non-Indians without regard for existing federal reserved rights. The source of this conflict traces its origins to a

[20] David R. Warner, "Federal Reserved Water Rights and Their Relationship to Appropriative Rights in the Western States," *Rocky Mountain Mineral Law Institute* 15 (1969): 399-420.

period almost a half-century prior to the *Winters* decision when the federal government adopted conflicting policies that sought to preserve some elements of Indian societies, if only on terms amenable to national priorities, through the creation of reservations, while promoting increased settlement by non-Indians and economic expansion through the transfer of large sections of the public domain to private ownership. By 1880 the federal government disposed of approximately forty percent of the public domain through various programs, including over 55,000,000 acres in the form of homesteads.[21] Richard Andrews writes that "[d]uring the nineteenth century, these 'public domain' lands were the single most important tool of government environmental and economic development policy."[22]

The federal government viewed the public domain as its most important asset for stimulating private investment in sparsely populated parts of the country and as a source of revenue for national programs.[23] Early policies focused almost entirely on transferring ownership of large amounts of land to private

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[21] *The Public Domain: Its History with Statistics* (Washington D.C.: Government Printing Office, 1881), 22.

[22] Richard N.L. Andrews, *Managing the Environment, Managing Ourselves: A History of American Environmental Policy* (New Haven: Yale University Press, 1999), 71.

[23] Willard W. Cochrane, *The Development of American Agriculture: A Historical Analysis*, 2nd ed. (Minneapolis: University of Minnesota Press, 1993), 173-174.

individuals and corporations and later to state and territorial governments.[24] The creation of Indian reservations occurred during this period of expanded settlement. As settlement activity increased the federal government took steps to restrict the area of native settlement through the creation of reservations. This typically meant designating an area of land far smaller than the territory recognized by native groups as being their traditional homeland or consolidating several groups onto one reservation.[25] Indian communities felt the effects of federal land policies acutely and could do little to prevent the precipitous appropriation of their traditional homelands and the loss or degradation of the natural resources they depended on for subsistence.

Two pieces of legislation in particular enabled the rapid disposal and settlement of the public domain. The Homestead Act of 1862 deeded up to 160 acres of land to private individuals in return for meeting residency and land improvement requirements.[26] The more important policy, from the standpoint of Western water rights, was the Desert Land Act of 1877, which allowed for the

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[24] Paul W. Gates, *History of Public Land Law Development* (Washington D.C.: William W. Gaunt & Sons, 1987).

[25] Francis Paul Prucha, *The Great Father: The United States Government and the American Indians* (Lincoln: University of Nebraska Press, 1984), 339-345, 562-581.

[26] *Homestead Act of 1862*, Pub. L. No. 37-64, 12 Stat. 392 (1862).

sale of up to 640 acres at twenty-five cents per acre as long as the owner reclaimed a portion of the land through the use of irrigation. In Arizona, the federal government transferred 264,649 acres of land to private ownership under the Desert Land Act from 1877 to 1914. By 1920 the total had increased to 318,834 acres.[27] Congress intended that the law promote the reclamation of arid land through private investment, but instead speculators and corporations exploited its provisions to gain control of vast water supplies. The lack of restrictions allowed individuals to file claims for narrow strips of land located adjacent to rivers and streams and to gain ownership of large tracts of land without making any attempt to develop irrigation systems. The legislation did not fulfill its intended purpose of converting desert lands over to agricultural uses.[28] The drawbacks in the Desert Land Act did help to stimulate interest among members of Congress about ways for the federal government to support Western reclamation.[29]

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[27] "Report of the Commissioner of the General Land Office," in *Reports of the Department of the Interior for the Fiscal Year Ended June 30, 1914, Vol. 1* (Washington D.C.: Government Printing Office, 1915), 175; *Report of the Commissioner of the General Land Office* (Washington D.C.: Government Printing Office, 1920), 108.

[28] John T. Ganoe, "The Desert Land Act in Operation, 1877-1891," *Agricultural History* 11, no. 2 (1937): 142-157; Gates, *History of Public Land*, 638-641.

[29] For example see John W. Powell, *Report on the Lands of the Arid Region of the United States* 2nd ed. (Washington D.C.: Government Printing Office, 1879).

The federal support of Western reclamation had the greatest impact on Indian water rights in Arizona and several other Western states. In 1902 Congress extended its support of Western settlement beyond the provision of cheap land to include the passage of the National Reclamation Act of 1902.[30] The law provided a revenue source and procedures for extending federal loans for the construction of storage dams, delivery infrastructure, and electrical power facilities, which enabled the expansion of agriculture on a scale that could not be supported solely by private investment. The infrastructure improvements built and paid for by the federal government made possible the growth in regions that were previously constrained by the natural variability of water supplies.[31]

In supporting the development of water projects, Congress blurred the line between federal and state management of water resources. Section eight of the Reclamation Act required the Secretary of the Interior to recognize existing water rights acquired under state land territorial law, but it did not require the federal government to reconcile competing claims between state and federal water rights prior to allocating the water from reclamation projects.[32] Instead, the U.S.

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[30] *National Reclamation Act of 1902,* Pub. L. 57-161, 32 Stat. 388 (1902).

[31] William D. Rowley, *The Bureau of Reclamation: Origins and Growth to 1954, vol. 1* (Denver: Bureau of Reclamation, U.S. Department of the Interior, 2006).

[32] S. Rep. No. 57-254, at 2 (1902).

Reclamation Service (predecessor to the U.S. Bureau of Reclamation) was made to follow the same procedures as any other appropriator in making a water rights claim under state law.[33] The federal government constructed several reclamation projects without considering the federal reserved rights claims to the water captured by these projects. Subjecting reclamation projects to state law contributed to an inherent conflict within the federal government, which in addition to its existing obligation to protect Indian water rights claims now was overseeing the construction and management of reclamation projects that delivered water to private landowners.[34] This conflict of interest diminished the willingness of federal officials to protect Indian water rights claims that had the potential to curtail the water supplies available to federal reclamation projects.

The Development of a Water Rights Structure in Arizona

The process of establishing a water rights structure in what is now the State of Arizona highlights many of the contradictions and competing interests apart within Western land and water policy. During the early decades of Euro-American settlement in the 1860s and 1870s the principles of prior appropriation,

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[33] Frank J. Trelease, "Reclamation Water Rights," *Rocky Mountain Law Review* 32 (1959-1960): 466-469.

[34] Donald J. Pisani, "State v. Nation: Federal Reclamation and Water Rights in the Progressive Era," *Pacific Historical Review* 51, no. 3 (1982): 265-282.

beneficial use, and the appurtenance of water to land, were applied unevenly in the absence of legal decisions that established the quantity and priority of rights. Several court adjudications to determine the water rights to the major rivers in the region occurred in the early twentieth century, which had the effect of solidifying water allocation arrangements. Federal attorneys asserted claims on behalf of several Indian reservations in several of these cases, they based the claims on existing water use on the reservations rather than the more expansive entitlements afforded under the *Winters* doctrine. As a result, the water allocated to Indian communities fell short of their full legal claims.

As one of its first actions, the Territorial Legislature of Arizona passed the Howell Code in 1864, which declared that all water sources were public property that could be used under the prior appropriation doctrine.[35] This declaration was significant not only in that it applied the principles of prior appropriation to the new Territory of Arizona, but also because it contained the implicit assumption that the new government possessed the authority to regulate the use of all water located.[36] The fact that several Indian reservations were already created in the

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[35] Dean E. Mann, *The Politics of Water in Arizona* (Tucson: University of Arizona Press, 1963) 31; Wells A. Hutchins, *Selected Problems in the Law of Water Rights in the West* (Washington D.C.: Government Printing Office, 1942), 183.

[36] Arizona was the first state or territory to make a declaration of the public ownership of water by statute. See Frank J. Trelease, "Government Ownership

Territory speaks to a lack of understanding about the existence of federal reserved rights and the impact of these rights on new appropriations.

The laws developed by the territorial and state governments of Arizona to regulate water use grew out a necessity to control the actions of private companies and cooperatives that were constructing irrigation systems to appropriate water supplies without any form of regulation. Private canal companies emerged in the late 1860s as a means to pool capital that could be used to construct and maintain irrigation works. These companies funded the construction of large irrigation canals by issuing stock that entitled holders to a certain share of the water that the company claimed on behalf of its water users. The stock circulated as a form of currency among farmers in the Salt River Valley as wealthy individuals bought up shares and leased water rights to landowners who did not own stock in a canal company.[37] Stockholders were obligated to pay annual assessments for the maintenance of ditches and irrigation works, and to employ a *zanjero* (watermaster) to regulate water deliveries. New canal companies organized at a rapid rate in the Salt River Valley from 1867 to the late 1880s. In the absence of a

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and Trusteeship of Water," *California Law Review* 45, no. 5 (1957): 641; Wells A. Hutchins, "Certain Features of the Water Law of Arizona," 1 November 1936, SRP Research Archives.

[37] Christine Lewis, "The Early History of the Tempe Canal Company," *Arizona and the West* 7, no. 3 (1965): 234-235; Merwin J. Murphy, "W.J. Murphy and the Arizona Canal Company," *Journal of Arizona History* 23 (1982): 139-170.

clear water rights structure, canal companies were free to claim large quantities of water even if they could not prove that they were putting the full amount of their claim to a beneficial use. This led to a situation where the claims far exceeded the physical water supply of the region.

As settlers constructed more canals to intercept the unregulated flow of central Arizona's rivers, controversy resulted over the issue of how to enforce a priority system that could regulate the water rights of individual landowners.[38] One of the earliest court decisions to address this issue was the case of *Michael Wormser v. The Salt River Valley Canal Company*. The ruling in the case, known as the Kibbey Decision, applied the principles of prior appropriation, and the requirement that water be put to a beneficial use, in establishing a priority system that tied water rights to the specific area of land on which the water was used.[39] The appurtenance of water to land would prove to be an important factor in solidifying the water rights structure in the Valley because it established a legal connection between specific quantities of water and the lands on which water

[38] H.R. Doc. No. 54-342 (1897); W.H. Code, *The Use of Water in Irrigation in Arizona, Bulletin 86* (Washington D.C.: U.S. Department of Agriculture, 1900).

[39] Michael Wormser v. The Salt River Valley Canal Company, no. 708, District Court of the Second Judicial District, Maricopa County, Territory of Arizona (1892).

could be used. However, the Kibbey Decision only addressed the claims of the canal companies and did not determine the rights of individual landowners.

Further uncertainty over water rights resulted from the lack of understanding about how much water was physically available in central Arizona. Agricultural engineer Alfred McClatchie characterized the situation in 1902 when he wrote that "[c]anals were constructed and appropriations of water declared, without any definite knowledge as to what the amount of the water supply was."[40] The lack of information about the exact quantity of the natural flow in the Salt River led McClatchie to conclude that "...the uncertainty of the water supply is thus greatly increased beyond that necessarily caused by natural conditions."[41] McClatchie identified a fundamental problem with the enforcement of the water rights system in Arizona: without understanding how much water was available in a watercourse it was impossible to establish a priority system among users. This system was not put into place until the prospect of a federal reclamation project made the determination of water rights essential.

Planning for the construction of Roosevelt Dam precipitated one of the first efforts to adjudicate the rights of individual water users on the Salt and Verde

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[40] Alfred J. McClatchie, *Utilizing Our Water Supply, Bulletin no. 43,* (Tucson: University of Arizona, Agricultural Experiment Station, 1902), 65.

[41] Ibid., 65.

rivers. In order to calculate the additional stored water that could be distributed to lands that were part of the reclamation project there needed to be a way to determine which lands possessed a right to the normal flow of the Salt and Verde rivers. After a failed attempt to negotiate a solution for the priority of lands within the Salt River Reservoir District (SRRD)[42] boundaries, litigation remained as the only method for resolving the conflicting claims of water users. In 1905 Patrick T. Hurley initiated a lawsuit against Charles F. Abbott and several other landowners in the Salt River Valley to determine his right to the Salt River.[43] The case proceeded initially with defendants bringing their claims before the court, but this failed to incorporate all the landowners within the Valley. The turning point came in 1907 when the United States filed a motion to intervene in the case and requested that all landowners within the boundaries of the reservoir district be made defendants in the case. The federal government, acting in its capacity as owner of several canals on the north side of the Salt River and as trustee of the Salt River Indian Reservation (Salt River Pima-Maricopa Indian Community) and the Camp McDowell Indian Reservation (Fort McDowell Indian Community),

[42] The Salt River Reservoir District (SRRD) encompasses the lands that were determined to be eligible to receive stored water from the Salt River Federal Reclamation Project. Not all lands within the SRRD received water, including lands on the Salt River Indian Reservation, which was located inside the boundaries of the SRRD.

[43] Hurley v. Abbott, Third Judicial District, Territory of Arizona (1910).

claimed rights to the normal flow of the Salt and Verde rivers. Federal attorneys sought to make the *Hurley v. Abbott* proceedings a comprehensive determination of all the rights to water from the Salt River below Roosevelt Dam.[44]

Over 4,800 landowners became a party to *Hurley v. Abbott* and the hearing of evidence took several years. On March 1, 1910, Judge Kent issued his decision and decree in the case, establishing the priority of lands within the SRRD through the use of a classification system based on the year of first use and the total acreage cultivated. Judge Kent did not address the *Winters* decision of 1908 or the issue of federal reserved rights in his ruling and instead based his determination solely on the law of prior appropriation. Federal attorneys did not consider a possible *Winters* claim on behalf of the Indian communities included in the suit and instead based their rights on existing use. The Kent Decree did not incorporate the claims of upstream users on the Salt and Verde rivers, which included several Indian reservations.[45] The residents of the Salt River Indian Reservation and the Camp McDowell Indian Reservation were the only tribes to have their rights quantified in the decree. The decree continues to be in effect, serving as the primary confirmation of the rights of water users to the normal flow of the Salt

[44] Karen L. Smith, *The Magnificent Experiment: Building the Salt River Reclamation Project, 1890-1917* (Tucson: University of Arizona Press, 1986), 127-130.

[45] Hurley v. Abbott, Third Judicial District, Territory of Arizona (1910).

and Verde rivers. However, the failure to include other Indian reservations and upstream water users in the case created an opening for later challenges that had the potential to disrupt the entire system of water rights in the Salt River Valley.

Conclusion

The Kent Decree solidified a water rights structure that did take into account the federal reserved rights of Indian communities in central Arizona. In the process, it created a legal connection between the entire water supply of the Salt and Verde rivers and specific area of land within the Salt River Valley, a connection that remains in tact to the present day. However, the full effect of the Kent Decree would likely not have been felt if not for the Salt River Valley Water Users Association (SRVWUA), the private corporation of landowners that put their land as collateral for the construction of Roosevelt Dam. The SRVWUA, a part of the modern Salt River Project (SRP),[46] relies on the Kent Decree to justify its claims to the Salt and Verde rivers. The federal government recognized the

[46] SRP is comprised of two entities with separate governing bodies; the Salt River Valley Water Users' Association [SRVWUA], a private corporation in charge of operating water storage and delivery facilities and making deliveries to lands within the boundaries of the SRRD, and the Salt River Project Agricultural Improvement and Power District [SRPAI&PD], a political subdivision of the state of Arizona that delivers electrical power. The name SRP will be used to refer to the actions of both entities unless a specific reference is made to one of the organizations.

validity of this claim in constructing the Salt River Reclamation Project and in a 1917 agreement that transferred operation of the reclamation project, including Roosevelt Dam and the water delivery and electrical systems, to the Association.[47] This further solidified the arrangement whereby the federal government sanctioned the Project's right to store and deliver water. This also complicated attempts in later years by federal attorneys to assert larger claims on behalf of Indian communities to the Salt and Verde rivers, which would require the federal government to admit that it gave away the same water to both the Indian reservations and reclamation water users. This conflict formed the basis for much of the controversy between SRP and Indian communities.

The relationship between the federal government, SRP, and the various Indian communities in Arizona, was the primary driver of the activity surrounding the resolution of Indian water rights claims during the twentieth century. In pushing for the full recognition of their federal reserved rights claims, Indian communities in central Arizona challenged the foundation of the existing water allocation structure, which SRP defended on the basis of its own existing claims. SRP actively defended this structure, and because of its significant financial and

[47] A 1917 agreement between the United States and the SRVWUA transferred operational management of the reclamation project to the Association. The government retained title to the reservoir and delivery facilities. See Contract between the United States of America and the Salt River Valley Water Users' Association, 6 September 1917, SRP Research Archives.

political resources, it was able to obstruct most efforts by Indian communities to receive a larger share of the region's water supplies. When SRP officials committed themselves to the negotiation process, Indian water rights settlements quickly followed. The process of resolving Indian claims was fundamentally an issue of reconciling the allocation structure put into place by the Kent Decree with the growing awareness that Indian communities possessed unfulfilled federal reserved rights claims.

Chapter 2

ARIZONA'S MID-CENTURY TRANSFORMATION AND INDIAN WATER RIGHTS CONFLICT PRIOR TO *ARIZONA V. CALIFORNIA*

Introduction

The 1950s proved to be a formative period for Indian water rights both in Arizona and nationwide. The elevation of this issue to regional and national significance was a consequence of several legal defenses in protection of federal water right claims put forward by attorneys from the Department of Justice (DOJ) and the Department of the Interior (DOI). Many of the key elements of the legal debate over federal water rights during the period were addressed in the litigation in *Arizona v. California*, which in addition to dealing with the interstate allocations of the Colorado River addressed the water rights claims of several reservations located along the mainstem of the river. The claims made by federal attorneys on behalf of Indian reservations in the case provided a critical test of the federal reserved rights doctrine and resulted in an important precedent for quantifying Indian water rights. Several federal court decisions during the decade further clarified the legal foundation of federal reserved rights and fueled a growing concern among Western state officials about the impact of Indian water rights claims.

At the heart of the legal battles that swirled during the 1950s were fundamental questions about how water should be allocated in a rapidly growing economy. Arizona, like many Western states, experienced a dramatic period of economic expansion following World War II that fundamentally altered the water demand picture in the state and stressed water allocation arrangements. The controversies that arose over Indian water rights in Arizona during the period dealt on the surface with legal issues, but were motivated fundamentally by a desire on the part of Indian communities to act on their *Winters* claims in pursuit of economic development programs on their reservations. The potential growth of reservation economies raised the prospect that Indian water rights would transition from legal claims into physical water uses that had the potential to disrupt existing users. Events during the decade demonstrate a growing sentiment among tribal leaders that their water use should not be restricted by legal decrees that they felt did not account for the full measure of their legal rights. In the process the status of Indian water rights issues was elevated from an abstract and somewhat obscure legal theory to an issue with the potential to transform the water allocation structure in Arizona and other Western states.

Water Rights in a Growing Economy

Water rights are often conceived solely in relation to legal decisions and government policies without a full appreciation for how economic and environmental conditions affect the dynamics of supply and demand that serve as an impetus for most water rights disputes. Legal and policy changes often serve as lagging indicators that reveal more about how institutions respond to the effects of environmental uncertainty and changing economic behaviors. A period of dramatic economic and population expansion in Arizona following World War II led to a rapid increase in water consumption that stressed the existing water allocation regime in the state. Disputes among water users, while present in earlier periods in the state's history, grew in complexity as a result of the greater diversity of stakeholder interests that hinged on water rights determinations. The growth of urban communities also raised the stakes for water shortages, which would no longer just affect agricultural products but also human populations.

The fact that Indian water rights emerged as a significant regional issue during this period of economic expansion was no coincidence. Indian communities sought to diversify and expand their reservation economies and water was an essential ingredient. The conflicts that arose over water use on Indian reservations during the 1950s were caused by questions about whether tribes had the legal authority to utilize greater amounts of water than they used in the past. Tribal

leaders asserted claims to this water under the *Winters* doctrine, but existing users claimed that these rights were either adjudicated under prior court decrees or unquantified entitlements that could not be acted upon without a legal decision that determining their relationship to other water rights claims. Rather than wage protracted legal battles, which federal officials were hesitant to commence, several tribes took steps to utilize their claimed rights and developing programs to make use of the water flowing across their reservations.

The actions of several Indian communities raised concerns among existing non-Indian water users because of the location of the reservations on the major watersheds that supplied central Arizona's urban and agricultural centers (see Figure 1). An extended period of declining runoff in the late 1940s and early 1950s from these watersheds, set against the backdrop of growing demand and declining water supply, caused downstream water users to pay closer attention to activities on the watersheds. The development of the Salt River Valley below the confluence of the Salt and Verde rivers relied on the construction of reservoirs to capture the water supply produced by these two large watersheds (see Figure 2). The Indian communities whose reservations covered a large portion of the watersheds were among the first to experience significant opposition to their planned developments because any increase in water use had the potential to impact downstream water supplies. The location of these reservations meant tribal residents could intercept

the flow of tributary stream before it ever reached downstream storage facilitates. The resulting controversies highlight the vulnerability of non-Indian downstream users who could not regulate water use on significant portions of the watersheds that supplied a majority of their surface water supplies.

Figure 1. Selected Indian Reservations and Watersheds in central Arizona

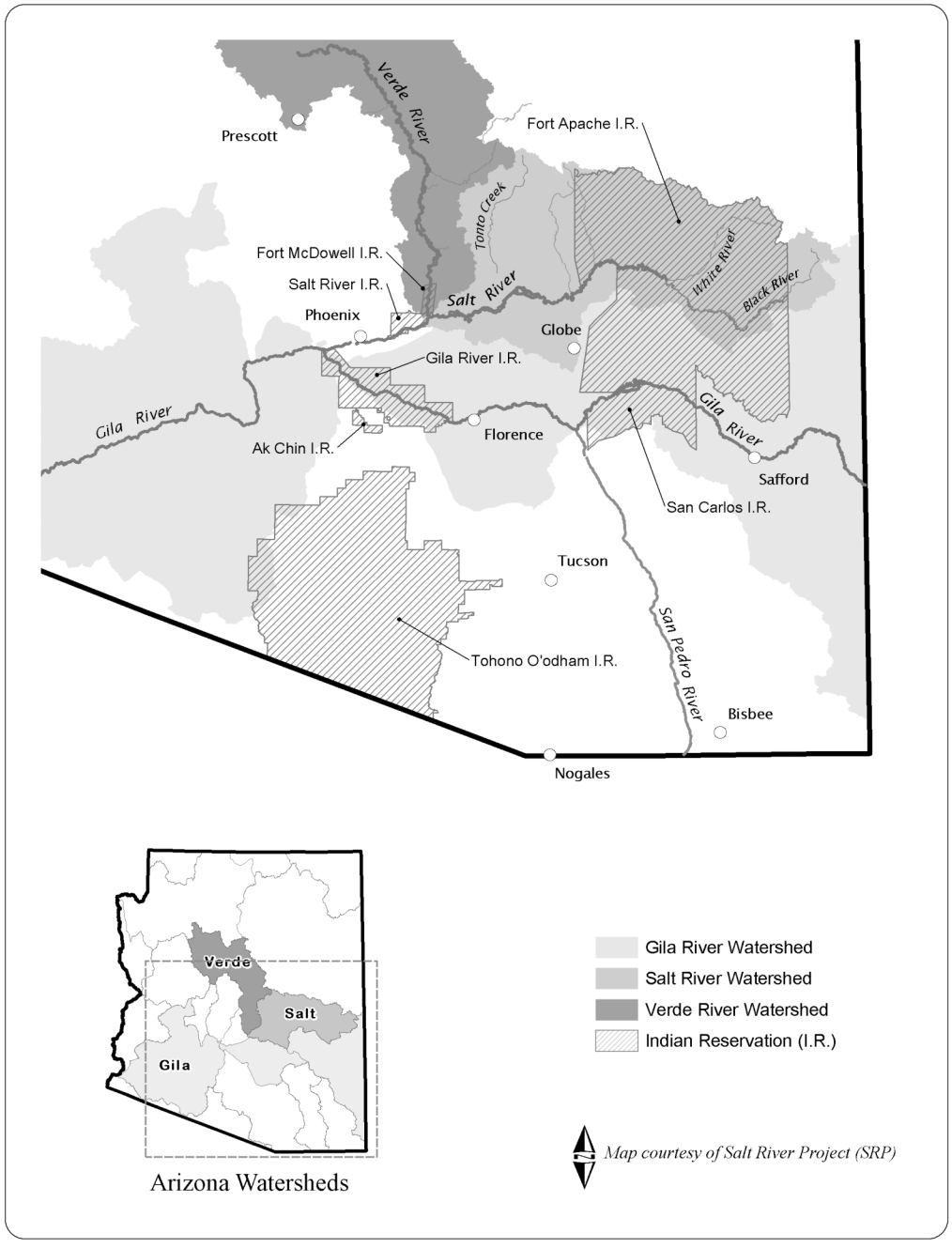
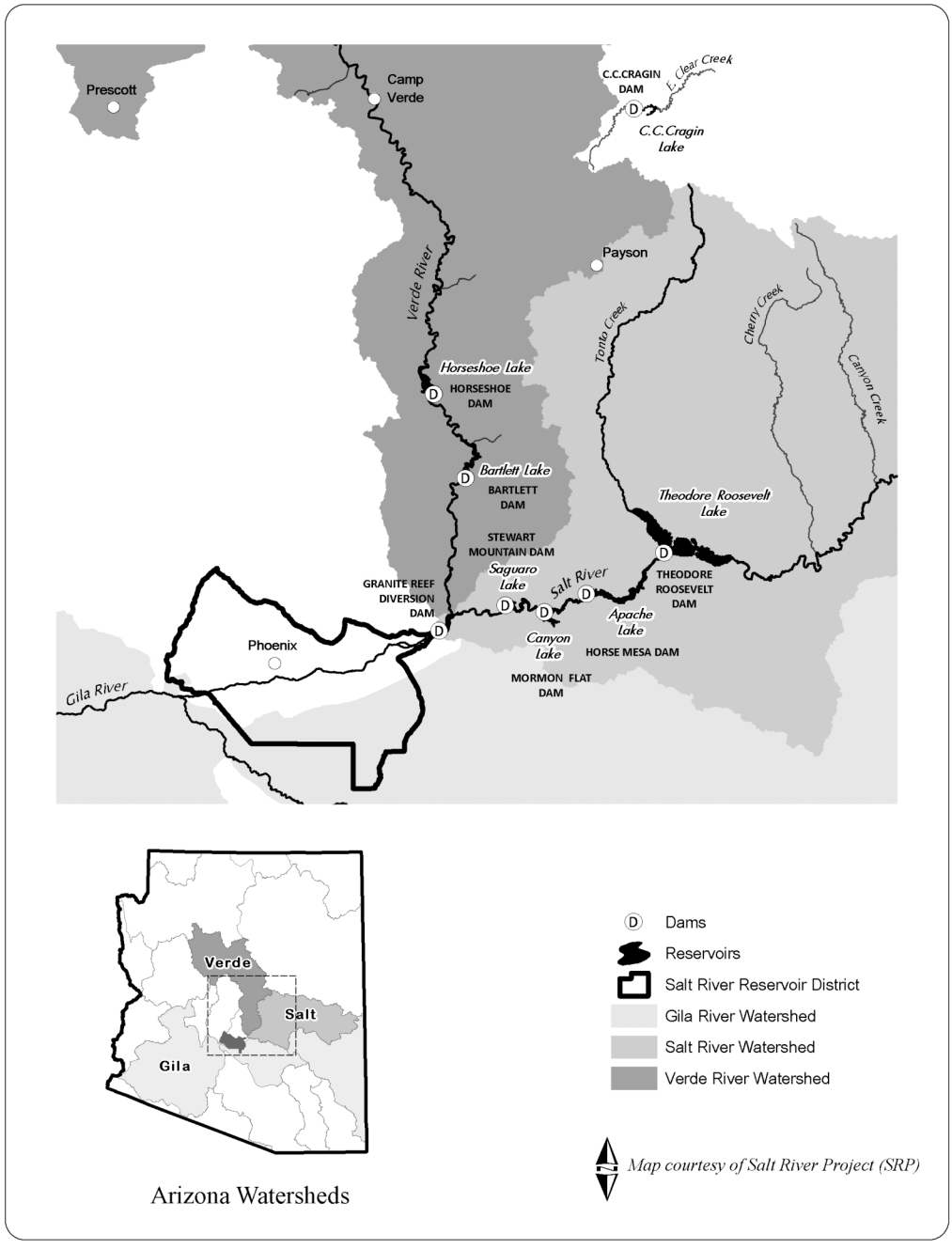


Figure 2. Selected Reservoirs and Dams in central Arizona



The Indian reservations located downstream in the developed river valleys of central Arizona confronted the opposite problem, an abundance of arable land, but little ability to access the water supplies stored upstream that could allow them to expand their agricultural production. Officials from these downstream reservations were among the first to challenge the legal basis of Arizona's water allocation structure because this represented the best avenue to gain access to more water. The central component of the economic development programs undertaken by watershed and valley tribes alike was to achieve a greater utilization of water resources based on their legal claims. As Indian communities took steps to develop their economies, they ran into legal and political obstacles from the existing water rights establishment.

Arizona Water Use at Mid-Century

The economic and demographic transformation that Arizona experienced after World War II laid the foundation for greater conflict over water supplies. Arizona's population grew in both size and concentration during this period as new residents migrated to urban areas. The City of Phoenix grew 311% during the 1950s, the fastest rate of any of the fifty largest urban areas in the United States.[1]

[1] Bradford Luckingham, *Phoenix: The History of a Southwestern Metropolis* (Tucson: University of Arizona Press, 1989), 153.

Urbanization altered the demand picture for water. Unlike agricultural fields, which could be fallowed in years of low water, urban users required a consistent and secure water supply to maintain domestic and industrial uses. This put pressure on the existing water management regime, which was organized to serve the needs of an agrarian economy, and resulted in new challenges in supplying water to urbanized lands in the Valley.[2]

The agricultural boom that followed World War II placed the greatest stress on Arizona's water supplies. Agriculture was and remains today the key component of Arizona's water demand picture. In 1950 agricultural accounted for 97% of all water use in the state.[3] During the period from 1940 to 1954, Arizona's agricultural economy grew at an unprecedented rate with the amount of irrigated acreage devoted to farming more than doubled.[4] Total water diversions from both surface and groundwater sources increased from three million acre-feet (af) to approximately 6.5 million af over the same period. The pace and magnitude of the

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[2] For an overview of the urban transformation of the Salt River Valley see Shelly C. Dudley, "From Growing Crops to Growing Cities: SRP's Transition for Ag to Urban," *Irrigation and Drainage Systems* 23 (2009): 63-77.

[3] A.D. Konieczki and J.A. Heilman, "Water Use Trends in the Desert Southwest, 1950-2000," U.S. Geological Survey Scientific Investigations Report 2004-5148, 28.

[4] *1950 Census of Agriculture, vol. 1, part 30: Arizona and New Mexico* (Washington D.C.: Government Printing Office [GPO], 1952), 171; *1974 Census of Agriculture, vol. 1, part 3: Arizona* (Washington D.C.: GPO, 1977), I-1.

growth that occurred between 1940 and 1954 is even more clear when compared to the period from 1954 to 1964 when the total amount of irrigated farmland in the state declined.[5]

Increased pumping of groundwater facilitated the rise in agricultural production in areas that did not have access to surface water supplies. Groundwater withdrawals in the nine basins of the Gila River and its tributaries increased over 253% during the 1940s.[6] A state groundwater law passed in 1948 to limit the overdraft of underground aquifers in critical areas did little to slow the reliance on groundwater.[7] The lack of strict regulation, coupled with declining power costs to operate pumps and improved well technology, kept the cost of pumping groundwater relatively flat during the 1940s and 1950s despite the increasing decline in water tables.[8] All these factors were part of a dramatic transformation in water use that took place in Arizona by the mid-1950s.

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[5] Maurice M. Kelso, William E. Martin, and Lawrence E. Mack, *Water Supplies and Economic Growth in an Arid Environment: An Arizona Case Study* (Tucson: University of Arizona Press, 1973), 24-25.

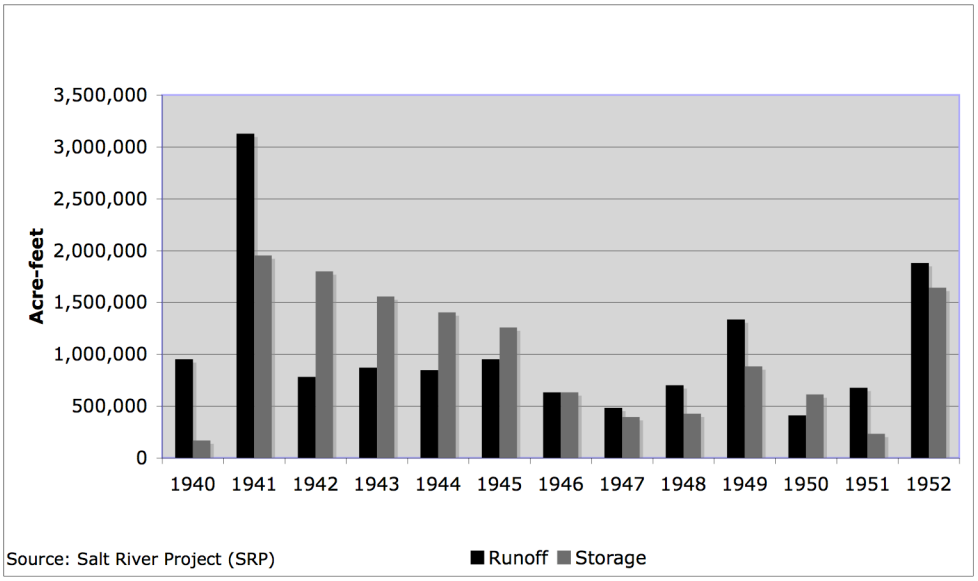
[6] W.G.V. Balchin and Norman Pye, "Recent Economic Trends in Arizona," *The Geographical Journal* 120, no. 2 (1954): 160.

[7] Robert G. Dunbar, "The Arizona Groundwater Controversy at Mid-Century," *Arizona and the West* 19, no. 1 (1977): 5-24.

[8] William E. Martin and Thomas Archer, "Cost of Pumping Irrigation Water in Arizona: 1891 to 1967," *Water Resources Research* 7, no. 1 (1971): 29-30.

The rise in irrigated farmland, groundwater pumping, and population, in the decades following World War II, contributed to the perception that water was becoming increasingly scarce. This viewpoint was reinforced not only by the state's rapid growth, but also by declines in seasonal runoff on the Gila, Salt, and Verde watersheds during the 1940s and 1950s as a result of a multi-year drought throughout the Southwest. SRP reservoirs dropped to a record low level in 1940 and after a year of high rainfall in 1941, runoff remained low for the rest of the decade. The storage level declined to approximately two percent of total capacity by August 1951 (see Figure 3).

Figure 3. Runoff from the Salt and Verde rivers/SRP Storage Levels, 1940-1951[9]



The Gila River experienced a similar reduction in seasonal runoff, which during 1950 and 1951 totaled only ten percent of the average.[10] The decline prompted a member of the Interstate Stream Commission to report to Congress in 1951 that Gila River farmers "...are suffering from the worst water shortage since white

[9] The storage levels reflect the total quantity of water stored in SRP reservoirs on May 1st of each year. This date typically coincides with the end of the annual runoff season. Water data provided by the Water Resource Operations Department, SRP.

[10] Katherine K. Hirschboeck and David M. Meko, *A Tree-Ring Based Assessment of Synchronous Extreme Streamflow Episodes in the Upper Colorado and Salt-Verde-Tonto River Basins* (Tucson: University of Arizona, Laboratory of Tree-Ring Research, 2005), 23.

occupancy in 1872."[11] The decline in runoff and reservoir storage levels fueled concerns about the ability of the region's water supplies to keep pace with growing demand.

Concerns about the adequacy of water supplies contributed to fears that water would eventually limit Arizona's future economic growth. The foundation of this fear was a belief that water supplies were limited by existing storage capabilities and physical availability and that all available sources were over-appropriated by existing users. Thus, there was a fear that any future increases in demand from urbanization, agricultural expansion, or manufacturing would be curtailed by the fact that all surface waters were allocated and groundwater was a finite and rapidly declining resource.[12] There are economic data to support the contrarian viewpoint that water was not the primary constraint on economic growth, but the perception of water scarcity remained strong among state official and regional water users.[13]

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[11] *The Central Arizona Project: Hearings on H.R. 1500 and H.R. 1501, Before the Committee on Interior and Insular Affairs*, 82nd Cong. 135 (1951) (statement of Jesse A. Udall, Interstate Stream Commission of Arizona).

[12] See for example: *The Central Arizona Project: Hearings on H.R. 934 and H.R. 935, Before the Subcommittee on Irrigation and Reclamation of the Committee on Public Lands*, 81st Cong. 103-124 (1949); *The Central Arizona Project: Hearings on H.R. 1500 and H.R. 1501, Before the Committee on Interior and Insular Affairs*, 82nd Cong. 191-223 (1951).

[13] One of the most thorough investigations of this issue is provided in Kelso et al., *Water Supplies and Economic Growth.*

This mindset is important for understanding the response to Indian water rights claims during the period. The earliest controversies over Indian water rights took place against the backdrop of heightened concerns among Western water users and elected officials about the sustainability of regional water supplies. These officials viewed Indian water rights as a new demand on the system rather than an existing entitlement that was only now being fulfilled. As tribal leaders took steps to act on their federal reserved water rights they confronted significant opposition not only to their specific plans, but also to the very prospect that they could increase their water use. The issue took on greater significance in the early 1950s as a result of several high-profile incidents that raised awareness about the magnitude of federal water rights claims.

Defending Federal Water Rights

The greater attention paid to Indian water rights claims during the 1950s resulted in part from federal government attorneys taking a more proactive stance in litigation over federal water rights. For the first time, federal attorneys made a concerted effort to defend the legal basis by which federal water rights were established. The legal defenses struck at the heart of the allocation structures in Western states like Arizona, which assigned rights without a full consideration of preexisting federal reserved rights claims. The actions of federal attorneys were important in setting the stage for Arizona tribes to assert federal reserved rights

claims. Without the support of federal attorneys, tribal officials did not have much leverage in trying to get non-Indian water users to take their claims seriously. Legal cases defining the extent of the federal authority over Western water resources raised awareness about Indian water rights claims.

One of the earliest cases centered on a motion filed by the DOJ in January 1951 that sought a determination of the federal government's water rights, on behalf of Camp Pendleton and several Navy installation, to the Santa Margarita River near San Diego, California. The government's petition in the case of *U.S. v. Fallbrook Public Utility District* included the claim of a "paramount right" to nearly all the river's annual flow, which involved several thousand water users who were named as defendants in the case.[14] The assertion of a paramount or superior right was the greatest point of controversy surrounding the case and it was this claim that brought objections from local water users and elected officials who feared it would provide a precedent that the federal government might carry over to other cases involving water rights on federal lands.[15] U.S. Senator from California, Samuel Yorty, expressed this concern when he declared, "I think we are going to have to watch all of the water cases like the Santa Margarita if we are

[14] United States v. Fallbrook Public Utility District et al., 101 F. Supp. 298 (1951).

[15] Carl G. Mueller, Jr., "Federal Ownership of Inland Waters: The Fallbrook Case," *Texas Law Review* 31 (1952-1953): 408; Ed Ainsworth "Federal Water Grab Threat Starts State's Biggest Suit," *Los Angeles Times*, May 16, 1951.

going to prevent a whittling away of what we have considered to be the law of water in the Western states."[16] In Congressional hearings held on the issue in 1951 and 1952 witnesses argued that the Santa Margarita case represented a dramatic departure from the historic deference to state authorities in water allocation and regulation matters.[17] If the federal government possessed a superior water right, it would have a significant impact in a state like Arizona, where federal lands occupied approximately 70% of the total land base.[18] The *Fallbrook* case touched on growing concerns among Western water users that heightened federal regulation of water rights might result in a reduction in their own water supplies.

Western legislators in Congress circulated legislative proposals during 1951 and 1952 that addressed the controversy between state and federal authorities generated by the *Fallbrook* case. Most of the bills included either a clear declaration of federal deference to state water laws or limiting in some fashion the federal government's ability to regulate water rights. The only piece of legislation to gain passage did not garner much attention, but it would prove to

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[16] *Adjudication of Water Rights: Hearings on S. 18, Before a Subcommittee of the Committee on the Judiciary*, 82nd Cong. 41 (1951).

[17] *Santa Margarita Water Rights Controversy, California: Hearings at Fallbrook, California before a Special Subcommittee on Irrigation and Reclamation of the Committee on Interior and Insular Affairs*, 82nd Cong. (1951).

[18] H. R. Rep. No. 81-3116 (1950).

have profound impacts on federal reserved rights, and Indian water rights in particular, in the decades that followed its passage. Patrick McCarran, U.S. Senator from Nevada, introduced a bill in 1951 that waived the federal government's sovereign immunity from being sued in cases involving a state's general adjudication of the water rights of an entire river system.[19] The DOJ objected to the legislation on the basis that "...such a general waiver would result in the piecemeal adjudication of water rights...and the joinder of the United States in many actions...."[20] Interior also filed an official objection to the legislation, but the bill was referred by the Senate Judiciary Committee in September 1951 with a favorable recommendation.[21]

The legislation gained final passage in 1952 as a rider to a Justice Department appropriation bill.[22] It took several decades for the legal ramifications of the McCarran amendment to be challenged in court and the full impact of the statute to be felt. Its passage meant that the federal government would now be required to assert its water rights claims in state adjudication proceedings. This proved to be a critical development in Indian water rights claims, which were now

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[19] James W. Dilworth and Frederic L. Kirgis, Jr., "Adjudication of Water Rights Claimed by the United States--Application of Common Law Remedies and the McCarran Amendment of 1952," *California Law Review* 48 (1960): 100-104.

[20] *Adjudication of Water Rights: Hearing before a Subcommittee of the Committee on the Judiciary*, 82nd Cong. 67 (1951).

[21] Ibid., 67-68; S. Rep. No. 82-755 (1951).

[22] Dilworth and Kirgis, "Adjudication of Water Rights," 94.

subject to determination by state courts. For state officials and water users, the McCarran amendment provided the mechanism to require the federal government to participate in state adjudications where federal water rights were at stake.

At the same time that Congress was debating the federal role in water resources regulation, SRP was considering initiating a water rights adjudication that would serve as an enforcement mechanism to prevent what it considered to be illegal diversions from the Salt and Verde rivers. SRP took limited action during the late 1940s to protest certain water uses on the watershed, but its management took the issue more seriously during the summer of 1951 when reservoir storage levels on the Salt and Verde rivers were close to record lows. In May of that year the SRP Board instructed its employees to monitor diversions on the Salt and Verde watersheds and contact users who were believed to be making illegal diversions and pursue legal action if necessary. Additionally, legal counsel suggested SRP reopen the Kent Decree, the 1910 Maricopa County Superior Court water rights adjudication of the Salt River, in order to determine all the rights on the Verde River.[23] The precise motivations behind the attorney's proposal to re-open the Kent Decree are not clear, but SRP management would have known about developments on the national level, like the *Fallbrook* case, and these federal actions likely played into SRP's thinking about defending its

[23] Minutes, SRVWUA Board of Governors, 7 May 1951, SRP Research Archives.

water rights generally in addition to the immediate water supply concerns brought on by the drought.

SRP lacked a clear enforcement mechanism to regulate water use on the Salt and Verde rivers because there was no adjudication that encompassed all water users on these river systems. The claims of users on the Upper Verde River system were not included within the framework of the Kent Decree, and the adjudication of the Salt River system did not include all water users, including several reservations on the Upper Salt River watershed. Dwindling supplies of water stored seemed to demand some bold action on the part of SRP to conserve and hold all the water it believed it had the right to use. By August 27th total storage in SRP reservoirs stood at 50,230 af, just above the previous low level set in 1940, and at a level that has not been reached since.[24] Not surprisingly, in September SRP announced at a meeting of upper Verde River water users its decision to pursue the reopening of the Kent Decree to adjudicate water rights on the Verde River.[25] Curiously however, after this announcement SRP chose not to pursue the Kent Decree litigation any further. According to SRP General Manager

[24] Water data supplied by Water Resource Operations Department, SRP.

[25] C.M. McMillen, "Water Users to Fight Illegal Diversions," *Los Angeles Times*, September 28, 1951.

Roderick McMullin, the cases already brought by SRP against individual users proved to be an effective deterrent for other illegal diverters.[26]

The highest runoff year in over a decade during 1952 was likely another motivating factor in SRP deciding not to pursue the case at that time. While SRP was considering whether to adjudicate Salt and Verde water rights, disagreements between Arizona and California over the Colorado River were increasing the prospects for an interstate legal battle over water rights. SRP was in the thick of this major effort, and most likely decided to defer the Verde River issue as the Colorado River moved center stage, occupying its attention along with most Arizonans.

The brewing legal controversy was connected to Arizona's efforts to obtain additional water supplies from the Colorado River. A plan that gained support in Congress in the late 1940s focused on transporting water from the river Arizona claimed a right to under the Boulder Canyon Project Act of 1928.[27] The state's allocation of 2.8 million acre-feet could not be fully utilized because there was no infrastructure to deliver the water to the areas of greatest demand in the center of the state. Arizona proposed a plan, offered by Arizona's powerful

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[26] Roderick J. McMullin, interview by Karen L. Smith, 1980, transcript, SRP Research Archives.

[27] *Boulder Canyon Project Act*, Pub. L. No. 70-642, 45 Stat. 1057 (1928).

senator Carl Hayden, and subsequently studied by the Bureau of Reclamation in 1949, to construct a conveyance system to deliver water through the Central Arizona Project (CAP) aqueduct.[28] The proposal met with considerable opposition, particularly from officials representing the State of California who challenged the extent of Arizona's legal entitlement to the river. California's much larger Congressional delegation was successful in stopping further consideration of CAP in the Congress pending the outcome of an adjudication of the rights of Arizona to the Colorado River.[29]

The State of Arizona responded to the postponement of consideration of the CAP by filing a complaint with the U.S. Supreme Court in December 1952 seeking a determination of its rights to the Colorado River. The case proceeded initially as an interstate conflict between Arizona, California, and several public utilities in California, until January 1953 when the United States intervened in the case to assert its claims on behalf of federal reservations, including those of Indian reservations.[30] The government's original petition contained an assertion that was similar to the *Fallbrook* case. In its capacity as federal trustee, federal attorneys claimed that Indian water rights were "prior and superior" to those of

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[28] H.R. Doc. No. 81-136 (1949).

[29] *The Central Arizona Project: Hearings on H.R. 1500 and H.R. 1501, Before the Committee on Interior and Insular Affairs*, 82nd Cong. 739-760 (1951).

[30] Arizona v. California, et al., 344 U.S. 919 (1953).

Arizona and California. State officials from the two states strongly protested the inclusion of this phrase and the Attorney General, bowing to pressure applied by state representatives and elected officials, removed it from the filing.[31] The removal of the phase demonstrated reluctance on the part of the federal attorneys to make expansive claims on behalf of the tribes. However, the DOJ attorneys did make water rights claims for Indian communities located on key tributaries well beyond the mainstream of the Colorado River, including the Gila River Basin in Arizona. The claims encompassed a 739,800 af diversion right for the tribes in the Gila River Basin, and 1,556,250 af for all Indian communities in Arizona.[32] The government's claims on behalf of Indian reservations located hundreds of miles from the Colorado River totaled over half of the water allotted to the State of Arizona under the Boulder Canyon Project.[33]

The prospect that the government's claims would be adjudicated as part of *Arizona v. California* raised several critical questions, including the effect on

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[31] Warren B. Francis, "Indian Preference in Colorado Case Dropped," *Los Angeles Times*, December 15, 1953; Warren B. Francis, "Indian Status in Colorado Case Shown," *Los Angeles Times*, December 4, 1953; Warren B. Francis, "U.S. Drops Plea on Colorado River," *Los Angeles Times*, November 10, 1953.

[32] Petition of Intervention on Behalf of the United States of America, *Arizona v. California et al.*, 344 U.S. 919 (1953).

[33] Under Section 4(a) of the Boulder Canyon Project Act, Arizona is entitled to 2,800,000 af of water for beneficial consumptive use. Arizona was also granted exclusive use of the Gila River and its tributaries within the boundaries of the state. The Salt and Verde rivers are tributaries of the Gila River.

tributaries to the Colorado River, especially the Salt, Verde and Gila systems. Questions arose concerning the process the government would use to represent the rights of SRP shareholders under federal reclamation law while also asserting claims on behalf of Indian communities, whose rights had the potential to be in conflict with SRP. Before the government could present evidence to support its claims in *Arizona v. California* several legal and political developments increased the tension between state and federal interests concerning federal involvement in Western water rights.

Defining the Federal-State Relationship in Water Regulation

The legal landscape for Indian water rights changed in the mid-1950s as a result of several court decisions on the issue of federal reserved rights. While most attorneys and politicians were familiar with the 1908 *Winters* decision and its enunciation of the principle that the federal government reserved water for future use along with land in creating Indian reservations, it was commonly assumed that federal reserved rights were not superior to the water rights already recognized under state law. Legal scholar Frank Trelease describes the mindset of many Western attorneys who operated on the belief that state water law took supremacy over federal uses:

> So the western water lawyer, though he may have had some nagging fear in the back of his mind that the United States might have constitutional power to use water without complying with state law, or even power to regulate its use, nevertheless felt quite

> safe behind the twin shields of the Reclamation Act and the Desert Land Act.[34]

This assumption was challenged in the 1955 U.S. Supreme Court decision in *Federal Power Commission (FPC) v. Oregon*, which addressed the federal government's ability to regulate water use without following state laws.[35] Another ruling the following year by the U.S. Ninth Circuit Court of Appeals further supported the contention that federal reserved rights were not subject to state regulation or control.[36] These two decisions, and the claims made by the federal government on behalf of Indian tribes in *Arizona v. California*, raised serious concerns among non-Indian water users, politicians, and lawyers about the scope of federal authority.

A precedent-setting decision on federal reserved rights was issued in June 1955 when the U.S. Supreme Court ruled on the case of *FPC v. Oregon*, commonly known as the *Pelton Dam* case. The decision affirmed the right of the federal government to regulate federal reserved lands and water without following state laws. The case dealt with the FPC's ability to issue a permit for the construction of a hydroelectric dam located on reserved land over the objections of state agencies. In its ruling the court stated that the Desert Land Act of 1877,

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[34] Frank J. Trelease, "Federal Reserved Water Rights SInce PLLRC," *Denver Law Journal* 54 (1977): 476.

[35] Federal Power Commission (FPC) v. Oregon, 349 U.S. 435 (1955).

[36] U.S. v. Ahtanum Irrigation District, 236 F. 2d. 321 (1956).

which was widely believed to have delegated power over water allocation to the states, did not apply to federal reserved lands.[37] Though the ruling did not deal directly with the issue of Indian water rights, many interpreted the decision as a broad confirmation of the federal government's supremacy over the allocation and regulation of water resources for Indian reservations.[38] The decision reinforced the argument that federal reserved water rights were separate from state laws governing the allocation of water. The U.S. Supreme Court's decision in *Pelton Dam* sparked renewed concerns among Western water interests about the effect of federal reserved rights on water rights acquired under state law.

The *Pelton Dam* ruling led to the introduction of a number of bills in Congress by Western senators and representatives who sought to require the federal government to recognize state water law. Several months prior to the Supreme Court's ruling in the *Pelton Dam* case, Frank Barrett, U.S. Senator from Wyoming, introduced a bill aimed at requiring the federal government and its agencies to recognize state water laws.[39] Similar legislation was introduced in the

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[37] FPC v. Oregon, 349 U.S. 435 (1955).

[38] Sho Sato, "Water Resources--Comments Upon the Federal-State Relationship," *California Law Review* 48 (1960): 51-52; James Munro, "The Pelton Decision: A New Riparianism?" *Oregon Law Review* 36 (1956-1957): 221-252.

[39] 101 Cong. Rec. 1,019 (1955).

House the following year.[40] The first hearings on the legislation were held before the House Committee on Interior and Insular Affairs in February 1956. In these hearings Chairman Clair Engle expressed an opinion held by many Western lawmakers:

> Our view is that the Pelton Dam case, taken in all of its implications, would have a disastrous effect upon the control utilization of the waters in the West. As we interpret the Pelton Dam case, not only in its direct language, but inferences to be drawn from it, wherever the Government reserves property in the public domain for a particular purpose, thereupon the Government becomes free and clear of any requirement of complying with State law with reference to the appropriation and use of water.[41]

Those who supported the legislation relied on a number of federal statutes, including the Desert Land Act of 1877 and the National Reclamation Act of 1902, which in their opinion gave preference to state law in the appropriation of public waters.[42] However, the DOJ perceived a conflict between the language in various federal statutes and the property clause of the Constitution, which gave Congress the authority over the public domain. In testimony before Congress, J. Lee Rankin, the official responsible for water resources litigation in the DOJ,

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[40] 102 Cong. Rec. 462 (1956).

[41] *Water Rights Settlement Act of 1956: Hearings on H.R. 8325, H.R. 8347, H.R. 8560, H.R. 9505, Before the Committee on Interior and Insular Affairs*, 84th Cong. 16 (1956).

[42] For a listing of this legislation see the memorandum from Committee Counsel George W. Abbott contained in *Water Rights Settlement Act of 1956*, 38-43.

portrayed the question at issue in the *Pelton Dam* case as one of competing jurisdictions between federal and state authorities, rather than, as many legislators feared, one where the federal government was trying to take away water rights already vested under state law. However, in objecting to the Barrett legislation, Rankin was concerned that it would require federal agencies to follow state regulations in carrying out their statutory responsibility to construct dams, preserve wildlife, and support conservation areas.[43] The official DOJ statement also expressed concern with the part of the proposed bill that stated, "[a]ll navigable and nonnavigable waters are reserved for appropriation under state law," [emphasis added] fearing this would open up for appropriation all the waters in Western states, including those already held behind federal dams.[44] Throughout the 1950s and early 1960s the DOJ continued to put forward the argument in litigation and testimony before Congress that the federal government needed to retain the authority to reserve and regulate water use on federal lands without following state laws. The Barrett legislation was voted out of the Senate Interior Committee in July 1956, but failed to gain passage.[45] Similar legislation was

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[43] W*ater Rights Settlement Act: Hearings on S. 862, Before the Subcommittee on Irrigation and Reclamation of the Committee on Interior and Insular Affairs,* 84th Cong. 243-286 (1956).

[44] Ibid., 55.

[45] 102 Cong. Rec. 102, 13,902 (1956).

introduced in Congress for the rest of the decade without any resolution as legislators and DOJ attorneys continued to debate the extent of federal control over water rights in the West.[46]

A year after the *Pelton Dam* decision the U.S. Ninth Circuit Court of Appeals ruled on the issue of federal jurisdiction over water resources in a case that directly involved the issue of Indian water rights. The case of *U.S. v. Ahtanum Irrigation District* involved the water rights guaranteed to the Confederated Tribes of Yakima Indians by an 1855 treaty with the federal government. The court reversed the earlier District Court decision, and in so doing, elaborated on several key issues that were left unresolved by the *Winters* case: the quantity of water rights reserved by the federal government and the question of who held jurisdiction over the adjudication of rights. In regards to the quantity of water reserved, Judge Pope wrote, "[t]he assertion that any reservation of water for the benefit of the Indians must be limited to the amount of quantity actually used beneficially within some period...[w]e find no basis for this."[47] Pope's statement rejects two basic tenants of the prior appropriation system followed in Arizona and other Western states, priority in time and beneficial use, saying they

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[46] Frank J. Trelease, "Federal Reserved Water Rights Since PLLRC," *Denver Law Journal* 54 (1977), 478.

[47] U.S. v. Ahtanum Irrigation District, 236 F. 2d. 321 (1956).

do not apply in the case of federal reserved rights. Regarding the ability of the state to regulate and adjudicate Indian water rights, Judge Pope wrote, "It is too clear to require exposition that the state water decree could have no effect upon the right of the U.S."[48] Combined with *Pelton Dam* and *Fallbrook*, the *Ahtanum* decision was handed down during a critical time for Western water rights as evidence was being presented in *Arizona v. California*.

Many western water users grew increasingly uncertain about their chances of prevailing in litigation concerning federal reserved rights in federal courts. This sentiment was expressed by SRP attorney J.A. Riggins, Jr., who in a speech to the Colorado River Water Users' Association (CRWUA) in 1956, warned that "before starting litigation which may end up in the Circuit Court of Appeals for this area--I suggest that you have your lawyers read this [*Ahtanum*] case and be pretty sure where they stand before Judge Pope takes a 'whack' at them."[49] The combination of legal decisions and legislative actions during the mid-1950s changed the landscape for Indian water rights litigation by challenging the belief that federal reserved rights were subject to state laws of prior appropriation and beneficial use. Western states officials worried that if the government could reserve water for

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[48] Ibid.

[49] J.A. Riggins, Jr., "The Indian Threat to Our Water Supply," 1956, Arizona Collection, Charles Trumbull Hayden Library [Hayden Library], Arizona State University [ASU], Tempe.

future use on federal lands it might limit or even displace existing users. The more fundamental issue dealt with the extent of state officials' authority to regulate water use. When viewed through this lens, the controversies over Indian water rights in Arizona during this period can be seen as an effort for state water users to gain control over water uses on Indian reservations in a manner that does not diminish their own rights.

Indian Water Rights Controversies in Arizona

While legal and legislative actions on the national level altered the landscape of federal reserved water rights, several incidents in Arizona focused attention on specific claims of Indian communities. Three events in particular illustrate the diversity of methods and avenues Indian leaders pursued in addressing their unmet water needs: the construction of Smith Park Dam on the White Mountain Apache Reservation (WMAT); groundwater pumping on the Gila River Indian Reservation (GRIC); and the Fort McDowell Yavapai Apache's proposed contract to sell water to the Paradise Valley Water Company (PVWC). Indian leaders in Arizona began to confront directly the restrictions placed on their water use by federal, state, and local officials in an effort to gain more control over the economic direction of their reservations. There efforts were based on the belief that their ability to govern the actions of their reservations should not be restricted by state laws. Federal officials at the DOJ and Interior approached

their trust responsibility to Indian communities tentatively during this period by both seeking to protect the full extent of Indian water rights while also trying to avoid conflict with non-Indian users. The major water users in Arizona, led principally by SRP, objected to new water uses on Indian reservations that would require additional water supplies out of a desire to secure and protect their own water supplies and prevent a major legal precedent that would confirm a large water entitlement for Indian communities, therefore putting the Project's water supplies at risk. The picture that emerges from the actions of this period shows Indian communities beginning to define the priorities that will guide their activism regarding water rights in the decades to come. The legal challenges initiated by local parties served as the starting point for the water rights adjudication process that took hold in the state during the 1970s and 1980s.

An Exercise of Tribal Sovereignty: The Smith Park Dam Incident

The proposal to construct Smith Park Dam (Hawley Lake) on the Fort Apache Indian Reservation was the psychological starting point for the Indian water rights controversy in Arizona. The fundamental source of conflict was not the construction of the dam itself, and the recreational lake it was intended to create, but rather the issue of whether the WMAT possessed a valid right to the waters flowing across its reservation that fed into the Salt River. The controversy over the construction of the dam tested the limits of the tribe's sovereignty in the face of challenges by non-Indian downstream users. The tribe's insistence on

building the dam in the absence of an adjudicated right presented a direct challenge to the principles on which the existing water allocation structure in the state was based and served as a precursor to many battles over Indian water rights in the coming years.

The principle players involved in the controversy were the Bureau of Indian Affairs (BIA), the tribe, and SRP. These three groups continued to be the primary constituencies that participated in the contestation of Indian water rights during the 1950s. Many intersecting issues were at play in the negotiations over Smith Park Dam, but the opposing understanding of water rights held by the various parties served as the fundamental source of disagreement. SRP sought to protect its existing water uses under the 1910 Kent Decree. The BIA was unwilling to launch a direct legal challenge of the decree, but like the tribe, was also not ready to concede that water uses on the reservation were restricted by the decree. The episode highlights an issue that would continue to dominate the interactions between tribal, federal, and local parties: how to determine the extent of Indian water rights while also recognizing the existing water rights structure established under state law.

The WMAT pursued the construction of Smith Park Dam for primarily economic reasons. They desired to expand their reservation economy by promoting tourism. One means for attracting more visitors was to construct recreational lakes, like the one that Smith Park Dam would create. The Tribal Council attempted to avoid a conflict over water rights from the very beginning,

which was displayed by their willingness to discuss their plans with SRP before starting construction on the dam. SRP adopted a position that would come to characterize its stance on Indian water rights negotiations for the next several decades. This approach entailed the full assertion and legal protection of claimed rights, which in this case including a claim to all the water that would be held by Smith Park Dam, combined with a consistent willingness to negotiate in order to avoid actual reductions in its water supply. SRP's strategy moved between litigation and negotiation depending on the magnitude of the perceived threat and the strength of its legal defense. The BIA, acting in its capacity as trustee for the Indian tribe, demonstrated a consistent reluctance to challenge SRP's legal assertions. BIA representatives failed to assert a right on behalf of the tribe to the waters of Trout Creek and sought to avoid the issues entirely by negotiating an agreement that would allow the dam to be constructed without addressing any underlining conflict between the rights of SRP and the tribe. By failing to assert the full extent of the WMAT water rights claims, the BIA reinforced SRP's claim that it possessed the superior right.

Differences in the interpretation of rights turned out to be the main stumbling block in the negotiations over Smith Park Dam. The claims made by DOJ attorneys on behalf of the WMAT and other Indian tribes in *Arizona v. California* were one factor that clouded the water rights picture in the state. SRP had in the past shown a willingness to accept the construction of recreational lakes on the watershed as evidenced by a contract it signed with the Arizona

Game and Fish Commission (AGFC) in July 1953. The agreement allowed the AGFC to increase the height of Big Lake Creek Dam in Apache County, which was located northeast of the proposed Smith Park Dam site, on the condition that the lake would be drained if SRP's total reservoir storage fell below 250,000 af.[50] This preserved SRP's ability to "call" for the water if it was needed and had the effect of increasing its overall water storage capacity. However, when WMAT Chairman Nelson Lupe sent a letter to SRP in July 1953 agreeing to similar restrictions on the proposed Smith Park Dam, the SRP Board denied the request.[51] Following a conference with BIA and tribal officials in April 1954, the SRP Board agreed to draft an agreement similar to that of Big Lake Creek Dam based principally on the fact that it would allow the Project to add to its storage capacity.[52] This allowed SRP to preserve its claim to all the water produced from the Salt and Verde watersheds while the tribe pursued its program of constructing recreational lakes.

BIA and tribal officials supported the draft agreement on the condition that if SRP called for the water, enough would remain in the lake to keep fish

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[50] Agreement between the SRVWUA and the Arizona Game and Fish Commission [AGFC], Big Lake Creek Dam, 13 July 1953, SRP Research Archives.

[51] Nelson Lupe, Sr. to Salt River Water Users Association, 16 June 1953, SRP Research Archives; Minutes, Board of Governors, SRVWUA, 13 July 1953, SRP Research Archives.

[52] Minutes, Board of Governors, SRVWUA, 13 July 1953.

alive.[53] SRP agreed to include the BIA's condition in the agreement and the negotiations would likely have concluded successfully at this point if not for a disagreement over language pertaining to water rights.[54] The language dealing with water rights in the preliminary Smith Park Dam agreement was modified only slightly from the language in the Big Lake Creek Dam contract. That agreement included a statement that recognized the "...vested right of the [Salt River Valley Water Users'] Association [SRP] and its shareholders in the water of Big Lake Creek...."[55] The proposed Smith Park Dam agreement made a small but significant change to this language by stating that SRP "...claimed a vested right [to the waters in Trout Creek]...,"[56] but in addition to this provision was a statement that the WMAT Tribal Council also claimed a vested right to the waters on the reservation.[57] The difference in wording is minor, but not inconsequential. In the Big Lake Creek Dam agreement it could be argued that the AGFC, in signing the agreement, supported SRP's claim to the water on the Salt River watershed. The Smith Park Dam agreement included a statement concerning

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[53] "Draft Agreement between the White Mountain Apache Tribe and the SRVWUA," 1954, SRP Research Archives; John Crow to SRVWUA, 17 September 1954, SRP Research Archives.

[54] J.F. Griswold to John Crow, 18 October 1954, SRP Research Archives.

[55] Big Lake Creek Dam Agreement, 13 July 1953, SRP Research Archives.

[56] "Draft Agreement," 1954.

[57] Ibid.

SRP's claim that was placed alongside a similar, and potentially conflicting claim, made on behalf of the tribe. The ultimate effect was that neither side forfeited their overall claim to water flowing across the reservation. However, the BIA superintendent for the Fort Apache Reservation wrote to the SRP Board objecting to the language on water rights in the agreement, saying that "…we do not feel that this project is one where conflict might arise between the parties regarding water rights. There would be some mutual benefits and we feel that an agreement without prejudice can be reached."[58] The SRP Board did not agree. Board Secretary J.F. Griswold wrote to Crow that "[m]y personal opinion is that the deletion of our reference to rights was the big stumbling block in your proposed agreement."[59] After several attempts to reword the agreement, SRP informed the tribe in March 1955 that it would not approve any agreement other than the original proposal.[60] The WMAT rejected this ultimatum and cut off discussions.[61]

Why was the language concerning water rights so critical to both sides in the negotiations, especially when the potential impact of the dam on the physical supply of water in the Salt River Valley was minimal? The breakdown in negotiations illustrates how the legal developments occurring at the regional and

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[58] John Crow to J.F. Griswold, 20 October 1954, SRP Research Archives.

[59] J.F. Griswold to John Crow, 22 October 1954, SRP Research Archives.

[60] J.F. Griswold to John Crow, 9 March 1955, SRP Research Archives.

[61] John Crow to J.F. Griswold, 16 March 1955, SRP Research Archives.

national level impacted the understanding of Indian water rights in Arizona. SRP attorney J.A. Riggins, Jr. pointed to the government's claims in *Arizona v. California* as being a major cause for the increased attention on the subject:

> I think that perhaps one of the underlying reasons why many of us in this [Colorado River Water Users] Association are interested in the problem of Indian claims to water rights is the affect of such claims on the current Colorado River litigation.[62]

Neither SRP nor the federal government wanted to back down from its position in the Smith Park Dam negotiations because of the possible effect it could have on the pending claims in *Arizona v. California*. Thus the relatively small project served as a battleground to defend each sides claims to the water from the Salt River. Two other incidents involving Indian reservations in Arizona during the mid-1950s also contributed to a growing concern among non-Indians about the potential impact of Indian water rights claims. These encounters, combined with the Smith Park Dam controversy, fueled the perception initially raised in *Arizona v. California* that Indian water rights presented a threat to the state's existing water users. For the Indian leaders, the government claims but forward in *Arizona v. California* fueled their desire to make use of additional water supplies even before their claims in the case were settled.

[62] J.A. Riggins, Jr., "The Indian Threat."

Testing the Boundaries of State Control: The Gila River Indian Community Groundwater Controversy

Much like the Smith Park Dam controversy, the economic development programs of the Gila River Indian Community (GRIC) resulted in a dispute over water rights during the early 1950s, but in this case the rights were to groundwater instead of surface water. The legal and political battles began shortly after the GRIC Tribal Council assumed control of the tribe's primary economic asset: the community farm. The operation was located on land within the San Carlos Irrigation Project (SCIP), a federal irrigation project authorized in 1924 and divided evenly between Indian and non-Indian farmers who received water from Coolidge Dam. The operation of SCIP was fraught with controversies and legal challenges since its completion in 1928. The main source of tension resulted from the fact that the Gila River rarely provided enough water to irrigate the 50,000 acres of Indian Project lands. When the Community took over operation of the tribal farming enterprise from the BIA in 1951, they made plans to drill irrigation wells to supplement the surface water supply they received from Coolidge Dam.[63] The plan was opposed by the DOI, which had initiated a lawsuit in 1951 against a landowner operating a private irrigation well in the non-Indian section of SCIP on the grounds that it violated the terms of the Project landowners' agreement. The

[63] Gila River Pima-Maricopa Community Council [GRP-MCC], Resolution GR No. 24, 1 August 1951, SRP Research Archives; GRP-MCC, Resolution No. 26, 7 September 1951, SRP Research Archives.

landowners' agreement governed the use of water within SCIP, but the attorney employed by the Tribal Council claimed that the tribe was entitled to preferential treatment under the legislation authorizing SCIP and the controversy that ensued provided the opportunity for the tribe to assert its groundwater rights under the federal reserved right doctrine.

The low water year of 1951 that plagued the watersheds of SRP as well as that of the Gila River system also proved to be a turning point in the regulation of groundwater use within SCIP. In that year the DOI Solicitor wrote to the U.S. Attorney General requesting that action be taken against Paul M. Brophy who was operating a private irrigation well within the boundaries of the Project. The Solicitor alleged that the well was in violation of landowners' agreements signed by Project farmers with the Secretary of the Interior as well as the 1935 Globe Equity Decree,[64] which adjudicated water rights on the Gila River.[65] Though Arizona law allowed landowners to operate private irrigation wells on their property, federal attorneys argued that the terms of the landowners' agreement

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[64] The Globe Equity Decree was the consent decree in the case of *United States v. Gila River Irrigation District* that adjudicated water rights on the Gila River, including the claims of the Gila River Indian Community. For information on the case and decree see Shelly C. Dudley, "Pima Indians, Water Rights, and the Federal Government in U.S. v. Gila Valley Irrigation District," master's thesis (Tempe: Arizona State University, 1996).

[65] Martin G. White to Attorney General, 12 July 1951, Record Group [RG] 60: Department of Justice [DOJ] Classified Subject Files, Box 360, National Archives and Records Center [NARA], College Park.

restricted the pumping of groundwater by individuals in the Project. The U.S. District Attorney filed suit against Brophy in late 1951 and after several motions the case was set for trial in June 1953.[66]

The initial briefs in the case dealt primarily with an interpretation of the language in the landowners' agreement and not the broader question of groundwater rights. However, this changed in 1954 when GRIC's independent counsel, Z. Simpson Cox, filed an *amicus curiae* brief in the case that claimed the Community had an exclusive right to operate irrigation wells inside the Project boundaries that non-Indian landowners did not posses. Cox based his claim on the 1924 act authorizing SCIP, which appeared to give preferential treatment to Indian lands in the delivery of Project water. The Community also claimed that the Project legislation did not restricted its right to pump groundwater from beneath its reservation. Cox's arguments were rejected in a lengthy legal opinion written by the DOI Solicitor and the Department proceeded with the case on the understanding that it would apply to all farmers within SCIP.[67]

The motivation behind Cox's filing of an *amicus* brief in the *Brophy* case is likely connected to the GRIC Tribal Council's decision to drill four new wells during the summer of 1953. The year was extremely dry and the water supply for

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[66] James E. Hunter to J. Edward Williams, 18 March 1953, RG 60, DOJ Classified Subject Files, Box 360, NARA.

[67] Solicitor to Commissioner of Indian Affairs, 28 April 1954, RG 60, DOJ Classified Subject Files, Box 360, NARA.

SCIP farmers was insufficient to serve the lands the Community planned to cultivate on the tribal farm. In a move that appears to be directly related to the government's position in the *Brophy* case, the GRIC Tribal Council withdrew several small parcels from inclusion in SCIP and proceeded to drill wells on those lands. The BIA did not know the wells were being drilled until after they were finished and despite reservations about the legality of the drilling they provided electrical power to operate the pumps.[68] When DOI officials in Washington D.C. learned about the wells they instructed the BIA Area Director to have them shut down.[69] The GRIC Council refused to abide by the request and passed a resolution instructing its attorney to file an injunction against the Secretary of the Interior to stop the Department from cutting off electrical power to the wells.[70] However, before legal action could be taken the Commissioner of Indian Affairs informed the BIA Area Director that the Community would be allowed to continue operating their wells temporarily.[71]

The government's action motivated the tribe to expand the issue from one dealing with the operation of several wells, to a question of whether the tribe had

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[68] L.L. Nelson to Ralph M. Gelvin, 9 February 1954, SRP Research Archives.

[69] Glenn L. Emmons to Z. Simpson Cox, 4 May 1954, RG 60, DOJ Classified Subject Files, Box 361, NARA.

[70] Lloyd Allison to Ralph M. Gelvin, 10 May 1954, SRP Research Archives.

[71] Glenn Emmons to Ralph M. Gelvin, SRP Research Archives; Glenn L. Emmons to Lloyd A. Allison, 1 June 1954, SRP Research Archives.

a legal right to pump groundwater on the reservation. In May 1954, the GRIC filed a suit against the Secretary of the Interior to keep the wells in operation.[72] Cox filed an amended complaint in July 1954, which included additional language that requested an adjudication of the rights of the Indian lands within SCIP.[73] The U.S. District Attorney filed a motion to dismiss the case, but before it could be ruled on, the District Court of Arizona handed down its decision in the *Brophy* case affirming the government's position that landowners in the Project did not have the right to operate private wells. Foreseeing the potential impact this decision might have on the operation of their own irrigation wells, Cox wrote a letter to U.S. Attorney General Herbert Brownell requesting that the decision be interpreted to have "...no bearing or effect upon the question of the rights of Indians to use water pumped from under their Reservation lands included in the Project."[74] The Department of the Interior opposed Cox's request, writing to the Attorney General that the judgment in *Brophy* should also affect the ability of GRIC to operate its own wells. Acting Solicitor Armstrong wrote that it was the DOI's policy "...to avoid the incorporation of language in the formal written

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[72] Complaint, Gila River Pima-Maricopa Indian Community v. Douglas McKay, 18 May 1954, RG 60, DOJ Classified Subject Files, Box 361, NARA.

[73] Amended Complaint, Gila River Pima-Maricopa Indian Community v. McKay, 17 July 1954, RG 60, DOJ Classified Subject Files, Box 361, NARA.

[74] Z. Simpson Cox to Herbert Brownell, 2 September 1954, RG 60, DOJ Classified Subject Files, Box 360, NARA.

judgment and decree which would give false hope to the Pima Indians in the project that their landowners' rights to underground water are superior to those of the non-Indian landowners."[75] Cox continued to pursue his argument that the tribe possessed a superior groundwater right in the case against the Secretary of the Interior until the U.S. District Attorney's motion to dismiss the case was granted in January 1955.[76] Not deterred by the dismissal, Cox informed the DOJ that the Community would install diesel engines and continue operating the wells without electrical power in order to, in the words of DOJ Attorney J. Lee Rankin, "...precipitate a proceeding which will in effect declare the rights of the Indians to pump in violation of project requirements."[77] Cox's strategy to bring about a legal determination of the tribe's groundwater rights was stymied when Assistant Secretary of the Interior Orme Lewis informed Cox that the BIA would keep supplying electrical power to the wells until the *Brophy* appeal to the U.S. Ninth Circuit Court of Appeals was ruled on.[78]

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[75] J. Reuel Armstrong to U.S. Attorney General, 27 September 1954, RG 60, DOJ Classified Subject Files, Box 360, NARA.

[76] Motion to Dismiss Amended Complaint, Gila River Pima-Maricopa Indian Community v. McKay, 17 August 1954, RG 60, DOJ Classified Subject Files, Box 361, NARA; J. Lee Rankin to J. Reuel Armstrong, 4 February 1955, RG 60, DOJ Classified Subject Files, Box 361, NARA.

[77] J. Lee Rankin to Jack D.H. Hays, 31 January 1955, RG 60, DOJ Classified Subject Files, Box 361, NARA.

[78] Orme Lewis to Z. Simpson Cox, 23 February 1955, RG 60, DOJ Classified Subject Files, Box 361, NARA.

The Community continued to seek an opportunity to test the legal basis of its groundwater claim, and in contrast to its position on groundwater use within SCIP, the DOI supported the tribe's efforts to operate wells in violation of state law.[79] In August 1955, a contract was approved by the DOI for the drilling of wells on the reservation outside SCIP boundaries. This action brought a letter of protest from Arizona Attorney General Robert Morrison who claimed it violated the state groundwater code.[80] Interior officials responded by saying that state laws regulating groundwater did not apply to federal Indian lands.[81] It appears that a deliberate attempt was made by DOI officials, prior to the approval of the well drilling contract, to test the legal basis of the Community's groundwater rights under state law. The DOI Solicitor's opinion claimed that the contract was legal

[79] The Arizona Groundwater Code of 1948 demarcated ten critical groundwater basins where groundwater levels were dropping. The law required that all new wells in these areas were subject to approval of the State Land Department. However, the law had little effect because of the lack of an enforcement mechanism. See Michael J. Pearce, "Balancing Competing Interests: The History of State and Federal Water Laws," in Bonnie G. Colby and Katherine L. Jacobs, eds., *Arizona Water Policy: Management Innovations in an Urbanizing, Arid Region* (Washington D.C.: Resources for the Future, 2007), 29.

[80] Richard Morrison to Douglas McKay, 29 September 1955, RG 60, DOJ Classified Subject Files, Box 360, NARA.

[81] Douglas McKay to Richard Morrison, 19 October 1955, RG 60, DOJ Classified Subject Files, Box 360, NARA.

and further recommended ways to structure the contract in order to bring about a legal challenge of the state's groundwater code.[82]

While the controversy continued over the right of the tribe to drill wells outside the SCIP boundaries, the U.S. Ninth Circuit Court of Appeals in February 1956 affirmed the earlier ruling in the *Brophy* case that restricted the operation of private wells in SCIP.[83] Following the decision, the DOI Solicitor recommended to the Attorney General that litigation be started to stop the GRIC from continuing to operate their wells located on Project lands.[84] However, the government was confronted with several obstacles in pursuing legal action against the tribe. First, any litigation had the potential to conflict with the positions taken by the DOJ on behalf of the tribe in *Arizona v. California*. By seeking to restrict the tribe from pumping groundwater within SCIP, the government might weaken its own groundwater claims in this case. Second, the tribe and its attorney had for several years objected to the determination of the Community's water rights as laid out in the 1935 Globe Equity Decree. DOJ attorney Walter Kiechel, Jr. pointed out that "[t]he institution of the injunction suit recommended [by the DOI Solicitor] would

[82] Edmund Fritz to Assistant Secretary Lewis, 3 August 1955, RG 60, DOJ Classified Subject Files, Box 360, NARA.

[83] Brophy v. United States, 231 F.2d 437 (1956).

[84] Edmund Fritz to Attorney General, 10 October 1956, RG 60, DOJ Classified Subject Files, Box 360, NARA.

give the Indians the immediate opportunity to contest the Decree directly...."[85] If the decree was reopened it would compromise the DOJ's ongoing efforts to defend the validity of the decree in *Arizona v. California*. DOJ attorneys were therefore reluctant to initiate a case that might allow the tribe to challenge the comprehensiveness of the decree in determining the tribe's federal reserved rights. The Community welcomed the legal challenge and made repeated requests to officials within Interior to test the legality of the tribe's groundwater program. Justice Department attorneys did not take any action against the tribe for the rest of the 1950s and early 1960s while *Arizona v. California* continued to be litigated.[86]

The interactions between the GRIC and DOI officials are similar in many respects to the controversy over Smith Park Dam although the circumstances are quite different. Officials within Interior and Justice were reluctant during this period to become involved in any issues that would force a legal determination of Indian water rights. While federal officials did take steps to protect tribal water rights from infringement, they were reluctant to support actions that would make use of the water that it claimed on behalf of the tribes in *Arizona v. California*.

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[85] Walter Kiechel, Jr. to David R. Warner, 17 December 1956, RG 60, DOJ Classified Subject Files, Box 360, NARA.

[86] David R. Warner to Frank J. Barry, 5 May 1961, RG 60, DOJ Classified Subject Files, Box 360, NARA; Perry W. Morton to George W. Abbott, 2 February 1959, RG 60, DOJ Classified Subject Files, Box 360, NARA; Edmund J. Fritz to Perry W. Morton, 22 May 1958, RG 60, DOJ Classified Subject Files, Box 360, NARA.

Without a ruling in that case, tribal officials were left to pursue their own avenues to utilize water resources without any federal support, and often with direct resistance. The actions of the Indian communities created a great deal of uncertainty for non-Indian water users within the state, who had few alternatives in trying to restrict new water developments on Indian reservations when the federal government refused to pay attention or take action. The cumulative result was a period of stalemate in which everything related to Indian water rights claims depended on the outcome of *Arizona v. California*, and the lack of clarity surrounding new water uses on Indian reservations fueled controversy and resentment between tribal authorities and other water users in the state.

The Transferability of Federal Water Rights: The Fort McDowell/Paradise Valley Water Company Contract

The controversy that resulted from a proposal made the Fort McDowell Indian Community (FMIC) to sell water to an off-reservation water company raised a different set of issues than the Smith Park Dam and Gila River incidents. However, the proposal reflects a similar desire by tribal leaders during to use water to promote economic growth. Controversy arose in August 1954 when the FMIC Tribal Council proposed a contract to sell water to the Paradise Valley Water Company (PVWC) to supply the residential community of Paradise Valley. The tribe was not using its full entitlement to the Verde River, which had already been adjudicated and quantified in the 1910 Kent Decree, and it sought to sell the

"excess" to the PVWC in return for money and infrastructure improvements on the reservation. SRP and federal attorneys raised legal questions about the proposal, chief among them the legality of transferring water off-reservation under an existing water right and the connection between groundwater and surface water rights. Aside from the legal questions, the proposal highlights the fact that the Tribal Council viewed this as an opportunity to improve their reservation economy and infrastructure. When confronted with opposition from SRP and federal authorities, the tribe continued to pursue the contract in order to assert a level of autonomy and self-determination. Coupled with the other events during the period, the controversy over the water contract shows a growing level of discontent among Indian communities towards restrictions on their water use.

In addition to receiving the excess surface water allocated to the tribe under the Kent Decree, the contract included a provision to drill wells on the reservation to supply domestic water to Paradise Valley and reservation homes. The plan met with immediate opposition from SRP who argued that the wells, because of their proximity to the Verde River, would draw water from the subflow of the river, which would mean the tribe would be pumping additional surface water, instead of pumping from a hydrologically separate groundwater basin.[87] SRP warned the Community that "...any loss of surface flow as a result of pumping from the underflow of the river will have to be deducted from the

[87] R.J. McMullin to Felix Pattea, 13 August 1954, SRP Research Archives.

surface water deliveries now being made by this Association to the Indian lands."[88] Since the FMIC received water deliveries from SRP in accordance with its Kent Decree rights, SRP was in a position to control the amount of water that was available to the Community even though it did not have the authority to determine water rights under the Decree. SRP General Manager Rod McMullin promised to seek a legal injunction to stop the project, because, in the words of BIA officials, "...it involves a principle which [SRP] might have to meet at other places on the watershed."[89] The concerns SRP officials expressed were echoed by federal representatives who also questioned the legal basis of the proposal and precedent it might set for other upstream water users.

BIA officials expressed a variety of concerns about the proposal, but particularly its potential effect on the pending claim made on behalf of the Community in *Arizona v. California*. If water was transferred off the reservation it could be argued that the tribe did not need its full entitlement under the Kent Decree, not to mention the larger claim intended to cover future uses that was made in *Arizona v. California*.[90] However, the Community did not share these concerns and in October 1955 the Tribal Council signed a contract approving the

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[88] R.J. McMullin to Ben Kill, 1 September. 1954, SRP Research Archives.

[89] R.H. Rupkey to L.L. Nelson, 7 October 1954, SRP Research Archives.

[90] C.H. Southworth to W.J. Truswell, 14 September 1954, SRP Research Archives.

proposal. The contract specified that the PVWC was entitled to all the "surplus" water not being used by the tribe under its Kent Decree rights and up to approximately 16,800 of groundwater annually. In return, the Company was required to construct a water system on the reservation that would provide domestic water to houses on the reservation and expand the tribe's irrigation system. Additionally, the tribe would be paid at a rate of approximately $10.00 for every million gallons of water delivered.[91] The contract needed to be approved by the Secretary of the Interior before it could take effect and in March 1956 it was forwarded by the Phoenix Area Office of the BIA to the Central Office in Washington D.C. for review.[92]

The Solicitor's Office at Interior raised several questions regarding the legality of the proposed contract. The primary objection was based on the opinion that the FMIC could not dispose of excess water under its Kent Decree right, but instead had to use that water on the reservation or allow it to flow to another downstream user. The Solicitor also expressed concerns about the legal ramifications of the contract, believing it would open the Community up for a challenge of its Kent Decree right from SRP or another water user who was party

[91] "Agreement between the Fort McDowell Mohave-Apache Community and the Paradise Valley Water Company," 28 October 1955, Goldwater Collection, Arizona Historical Foundation [AHF], Tempe.

[92] Area Director to Commissioner, Bureau of Indian Affairs, 7 March 1956, Department of the Interior [DOI], Field Solicitor's Office, Phoenix.

to the original litigation. For these reasons, the Solicitor stated, "....the contemplated sale of the 'surplus' surface waters is not only inadvisable, it is also illegal, in derogation of the provisions of the Kent Decree and might well result in the loss of some of the Indian water rights thereunder."[93] The DOJ concurred with this opinion and also recommended against approval of the contract on the grounds that it might jeopardize the government's claims in *Arizona v. California*.[94]

The federal government's rejection of the contract, and it subsequent failure to be executed, is not surprising, given the questions raised about its legality. However, an important element of the controversy is the FMIC Tribal Council's decision to sign the contract over the objections of SRP and BIA officials. The tribe's commitment to pursuing economic development on their own terms highlights the distrust of government officials that was apparent among many Indian communities at the time. The WMAT's construction of Smith Park Dam in spite of opposition from SRP and the ambivalence of the federal government was the initial event that tipped the water rights discussions toward litigation.

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[93] James Goodhue to J. Reuel Armstrong, 12 April 1956, DOI Field Solicitor's Office.

[94] J. Lee Rankin to J. Reuel Armstrong, 19 September 1956, DOI Field Solicitor's Office.

Flashpoint: Smith Park Dam and the Renewal of Water Rights Adjudications in Arizona

In September 1956 SRP officials learned that the WMAT were pursuing the construction of Smith Park Dam. SRP responded by filing two separate lawsuits. The first sought to stop the non-Indian contractor from continuing work on the dam.[95] The second, which followed less than a week later, was a petition to reopen the Kent Decree to adjudicate the rights not only of the WMAT, but also for Indian lands on the Verde River.[96] The speed of SRP's response hints at the fact that this move was contemplated prior to the construction of Smith Park Dam. The petition to reopen the Kent Decree was filed with the Superior Court on the very same day that the SRP Board authorized legal action.[97] Rather than being the result of a single event, the filing of the petition to reopen *Hurley v. Abbott* can be viewed as the culmination of several events that found their most immediate challenge in the form of Smith Park Dam.

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[95] Compliant No. 90402, SRVWUA v. Mulcaire, Superior Court of Arizona, Maricopa County, 13 September 1956, SRP Research Archives.

[96] "Petition for Enlargement of Decree and Order to Show Cause Why Petition for Enlargement of Decree Should not be Made, and Fixing Time for Hearing," Hurley v. Abbott, Superior Court of Arizona, Maricopa County, 25 September 1956, SRP Research Archives.

[97] Minutes, Board of Governors, SRVWUA, 24 September 1956, SRP Research Archives.

The controversy that erupted as a result of the construction on Smith Park Dam raised immediate concerns among the various agencies within Interior. The BIA had authorized the tribe to proceed with work on the dam, but the objection filed by SRP led attorneys within Interior to consider the Department's obligations under a 1917 contract that established SRP as the operator of the federal reclamation project.[98] U.S. Senator Carl Hayden raised this same concern with the Secretary of the Interior regarding the apparent conflict of interest within the Department in its obligations to both SRP and the WMAT.[99] The Secretary informed Hayden that while the Department considered its legal options local BIA officials were being instructed not to continue any work on the dam.[100] The Solicitor for the DOI recommended that the government file a motion to dismiss SRP's petition to open the Kent Decree under several legal arguments, including the contention that SRP could not represent all parties in the case, and that a trial concerning water rights would need to include all parties not just the two who were at conflict.[101] The DOJ attorneys filed a motion in November 1956 seeking

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[98] Area Director to Commissioner, Bureau of Indian Affairs, 28 September 1956, DOI Field Solicitor's Office.

[99] Carl Hayden to Fred A. Seaton, 11 October 1956, SRP Research Archives.

[100] Fred G. Aandahl to Carl Hayden, 29 October 1956, SRP Research Archives.

[101] James E. Goodhue to J. Reuel Armstrong, 18 October 1956, DOI Field Solicitor's Office; J. Reuel Armstrong to Perry W. Morton, 30 October 1956, DOI Field Solicitor's Office.

to dismiss the case on the basis of legal jurisdiction.[102] A hearing on the government's motion was delayed until the following summer as both parties prepared their cases. As the litigation over the reopening of the Kent Decree and the *Mulcaire* case progressed, the WMAT Tribal Council continued to push the BIA to allow them to continue work on Smith Park Dam.

The WMAT Tribal Council was not satisfied with the reasons given for stopping work on the dam. In response to objections raised by the tribe, the Assistant Commissioner of the BIA authorized the local Superintendent to distribute funds directly to the tribe in March 1957 so they could continue work on the basis that the contractor, not the tribe, was named in the litigation.[103] When SRP learned that work was continuing on the dam in May, President Victor Corbell immediately sent a telegram to Hayden asking again for his assistance in stopping the project.[104] Hayden wrote to the Secretary of the Interior asking him to explain the reasons for the work continuing on the dam.[105] The Secretary responded that the Department was not in a position to stop construction because

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[102] Motion to Dismiss Petition for Enlargement of Decree, Hurley v. Abbott, Superior Court of Arizona, Maricopa County, 23 November 1956, SRP Research Archives.

[103] Fred Massey to Frederick Haverland, 28 March 1957, DOI Field Solicitor's Office.

[104] Telegram, Victor Corbell to Carl Hayden, 29 May 1957, SRP Research Archives.

[105] Carl Hayden to Fred G. Aandahl, 31 May 1957, SRP Research Archives.

the funds were already approved under the tribal budget, and it was up to the DOJ to handle any litigation involving the tribe's water rights.[106] Prior to receiving this response, SRP secured a temporary restraining order from the Superior Court Judge in the *Hurley v. Abbott* to stop construction of the dam.[107] The judge also ordered the WMAT to release any water being held behind the dam, which was nearing completion.[108] However, when local law enforcement officials attempted to serve warrants on several WMAT and BIA officials named in the case they were barred from entering the reservation by armed Indian guards. The following day the front page of the *Arizona Republic* reported, "APACHES USE ARMED FORCE," and the incident quickly became a matter of public attention in the Valley.[109] Before tensions could increase any further, on June 10, 1957, U.S. attorneys filed a removal petition that resulted in the immediate transfer of SRP's case to federal court.[110] The transfer of *Hurley v. Abbott* to the federal courts

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[106] Fred G. Aandahl to Carl Hayden, 17 July 1957, SRP Research Archives.

[107] "Subpoena Duces Tecum," Superior Court of Arizona, Maricopa County, 4 June 1957, SRP Research Archives.

[108] "Apaches Told to Release Dam Water," *Arizona Republic*, June 5, 1957; "Petition for Temporary Restraining Order and Order to Show Cause," Hurley v. Abbott, Superior Court of Arizona, Maricopa County, 13 June 1957, SRP Research Archives.

[109] "Apaches Use Armed Force," *Arizona Republic*, June 5, 1957.

[110] "Water Rights Up to Federal Court" *Phoenix Gazette*, June 10, 1957; "Water Users, Apache Case Transferred," *Phoenix Gazette,* June 11, 1957.

stymied SRP's attempts to stop the WMAT from finishing the construction of Smith Park Dam later that year.[111] The dam's eventual completion presaged construction of other dams and recreational lakes on the WMAT during the next several years, much to the dismay of SRP. The GRIC continued to expand its groundwater pumping to provide additional, more secure water supplies for its farming operations. While these events are isolated from each other and none of them involved greater claims to water that might be available to them under the *Winters* doctrine, they announced to the federal government, the SRP and Arizona that they were not to be ignored and the development of their communities must be taken into consideration. The federal government, through its actions in *Arizona v. California*, *Pelton Dam* and *Fallbrook*, also sent a message, loud and clear, to non-Indian communities and water districts that federal reserved rights to water, whether for federal military facilities or for Indian reservations, were real.

Conclusion

The controversies that arose over Indian water rights in Arizona during the 1950s dealt fundamentally with the question of who had a right to access the water supplies that were essential to promote economic development. In challenging a system that did not account for most federal reserved rights claims, Indian communities asserted their right to utilize the water flowing across, and

[111] Ben Avery, "Water User Apache Dam Offer Stands," *Arizona Republic*, July 9, 1957.

underneath, their reservations. Non-Indian water users fiercely defended the existing water allocation arrangements that were responsible for the rapid economic growth that occurred during the 1940s and 1950s. This growth was made possible by the full utilization of surface water and groundwater that allowed for the expansion of agriculture and the growth of urban population. Indian communities also looked to benefit from the demographic and economic changes transforming Arizona's economy, but when they took concrete steps to utilize water based on their *Winters* claims they confronted significant opposition from SRP as well as state officials who sought to protect the existing water rights framework. The reluctance of federal attorneys to challenge this framework, based on the unfulfilled water rights claims on Indian communities, effectively sanctioned the continuation of existing water allocation arrangements.

In the following decades, important legal decisions nationwide raised awareness among state and federal officials about the extent of federal water rights claims and their potential impact on existing water users. A decision in *Arizona v. California* laid the groundwork for state, federal, and tribal parties to begin the process of quantifying Indian water rights claims, but SRP and others continued to be reluctant to give up any of the water that they were currently using. The negotiations that occurred involving Indian water rights failed to fully account for the magnitude of tribal claims and ignored the fact that these claims might result in existing users giving up their water. This presented the central

conflict to resolving Indian water rights claims that would only be solved by finding additional sources of water.

Chapter 3

FROM LITIGATION TO NEGOTIATION: INDIAN WATER RIGHTS IN THE WAKE OF *ARIZONA V. CALIFORNIA*

Introduction

When federal attorneys intervened in *Arizona v. California* in 1953, they widened the scope of the case beyond the original question of the respective entitlements of Arizona and California to the Colorado River to include the water rights for all federal reservations, including those of Indian reservations, within the Lower Colorado River Basin. This caught the attention of Western politicians and water users who worried that the growing body of legal precedent, which affirmed the federal government's authority to allocate water from interstate streams, might result in changes to the existing water arrangements. The legal controversies explored in the prior chapter grew in scope and significance during the late 1950s and 1960s as Indian attorneys became more active in pushing for legal action on their federal reserved water rights claims. The ruling in *Arizona v. California* in 1963, affirming the federal reserved rights doctrine and establishing a standard for quantifying these rights, led to an increase in both negotiation and litigation over questions of how to resolve Indian water rights disputes.

The Supreme Court's ruling in *Arizona v. California* removed a major roadblock to the process of resolving Indian water rights claims in Arizona by clarifying key questions about the nature of federal reserved water rights. Prior

attempts at settlement failed in large part because non-Indians did not have certainty about the legal basis of Indian rights and tribal officials were unable to compel federal attorneys to assert their claims in court. During the mid-1960s and early 1970s, representatives from the Interior and Justice departments entered discussions with SRP in an effort to settle the water rights claims of the WMAT, the San Carlos Apache Tribe (SCAT), and the Yavapai-Apache Nation (YAN). These negotiations led to the drafting of the Salt River Agreement, which established for the first time a fixed quantity of water that would be available to the reservations to meet their current and future water needs. However, the agreement failed to gain final approval after certain officials in the Interior Department argued against the settlement, which they saw as a giveaway of the reservations' federal reserved rights. The opposition in Washington D.C. led to the removal of the existing tribal support for the settlement.

The greater emphasis placed on tribal self-determination in federal Indian policy at the time the Salt River Agreement was being considered reshaped the national dialogue on Indian resource issues and resulted in changes in the federal approach to addressing Indian water rights claims. The differences between officials at the local and national level, and within the various agencies of the federal government, over the best approach for resolving Indian water rights claims ultimately worked against the completion of the Salt River Agreement and set back the process of negotiating Indian water rights for over a decade.

Early Attempts at Settlement

The earliest efforts to settle Indian water rights claims in Arizona stemmed from controversy surrounding the WMAT and the construction of Smith Park Dam. The legal challenge mounted by SRP in 1957 to stop construction of the dam was placed on hold after federal attorneys removed the case to federal court where it awaited the outcome in *Arizona v. California*. However, addressing the claims of the WMAT continued to be a top priority for SRP because of the reservation's strategic location on the Salt River watershed and the tribe's plans to construct additional recreational lakes. SRP officials presented a settlement proposal to DOI representatives in 1958 that relied on the use of conservation programs to meet tribal water needs. SRP proposed that the BIA either pay the cost of lining its canals or increase watershed programs in order to offset future water use on the reservation. The proposal relied on a strategy, supported both by SRP and federal representatives for the next decade, to resolve Indian water needs through the use of watershed modification techniques rather than addressing the underlying conflict in the water rights of SRP and the tribes. The federal government advocated strongly for this approach because its dual obligation to SRP, as the operator of federal dams, and to the tribe, as legal trustee for reservation lands, created a conflict of interest that made government officials reluctant to resolve Indian claims in court. Federal officials viewed the settlement

of differences between SRP and the WMAT as an inter-departmental issue, rather than a conflict between state and federal water rights law.[1] This perspective dominated the federal involvement on Indian water rights issues in the decades that followed.

The WMAT Tribal Council continued to be receptive to the possibility of negotiating a settlement with SRP over the construction of recreational lakes.[2] The prospects for using watershed programs to produce additional water as the basis for an agreement were particularly promising because the tribe had for many years carried out vegetation removal programs on the reservation aimed at increasing runoff and improving grasslands for tribal livestock.[3] Over 214,000 acres of piñon-juniper was removed between 1939 and 1965, according to BIA statistics.[4] These programs were expanded in 1958 when U.S. Senator Carl Hayden secured a $100,000 federal appropriation to support juniper eradication

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[1] Fred A. Seaton to R.J. McMullin, 21 April 1958, SRP Research Archives.

[2] Barry DeRose to R.J. McMullin, 29 April 1958, SRP Research Archives.

[3] George W. Hedden, "Management Practices on Indian Lands Affecting Watershed Conditions," in Watershed Management Division, *Arizona Watershed Program: Proceedings of First Meeting of Federal, State and Private Agencies Contributing to Arizona Watershed Research and Managemen*t (Phoenix: Arizona State Land Department, 1957), 17-20.

[4] George Hedden to Harold G. Wilm, 20 January 1965, DOI Field Solicitor's Office.

on the Fort Apache Indian Reservation.[5] SRP and other members of the Arizona Water Resources Committee, an inter-agency group that coordinated watershed programming throughout the state, because it offered the potential to increase their own water supplies.[6] The WMAT willingness to participate in watershed programs whose benefits were primarily for downstream users fostered a level of cooperation between the tribe and SRP at the time. This was evidenced by the fact that over a dozen members of the SRVWUA Board and management accepted the invitation of the Tribal Chairman to attend the dedication ceremony for Smith Park Dam in July 1958 (see Figure 4).[7] This sign of goodwill indicated a desire by both sides to move beyond the controversy over the construction and the dam in an effort to work out a settlement.

[5] Arizona Water Resources Committee, press release, 26 June 1958, SRP Research Archives.

[6] R.J. McMullin to Carl Hayden, 18 June 1958, SRP Research Archives.

[7] Nelson Lupe to R.J. McMullin, 28 June 1958, SRP Research Archives; R.J. McMullin to Nelson Lupe, 9 July 1958, SRP Research Archives.

Figure 4. Hawley Lake (Smith Park Dam), c. 1960

Photo Courtesy of Salt River Project Research Archives

The atmosphere of cooperation did not last for long as SRP became more concerned about the tribe's efforts to build new dams on the reservation. SRP monitored the progress of these developments through aerial surveys of the watershed and the discovery of construction activities on several new dams motivated SRP officials to continue to pursue their case in the courts. SRP attorney J.A. Riggins, Jr. wrote to the U.S. District Attorney for Arizona in the summer of 1960 requesting that the government act on SRP's petition to reopen

the Kent Decree to determine the WMAT claims.[8] However, the DOJ was unwilling to move on the petition in large part because of its pending claims in *Arizona v. California* even after the Special Master released a draft report and conclusions in December 1960 declaring that there is "...no occasion for declaring the extent of rights to water in the tributaries asserted for the benefit of Indians Reservations...."[9] Though it was now unlikely that the water rights of the WMAT and other Indian tribes in the Gila River Basin would not be adjudicated as part of *Arizona v. California*, the absence of a court ruling created an opportunity for the WMAT to continue their construction program without any legal ramifications.[10] From the opening of Hawley Lake (Smith Park Dam) in 1958 up through 1964 the tribe constructed seven additional lakes, most of which were significantly smaller than Hawley Lake, with the exception of Reservation Lake, which was constructed in 1964.[11] The tribe established the White Mountain Recreation Enterprise to manage these developments, which saw its revenues increase from

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[8] J.A. Riggins, Jr. to Jack D.M. Hays, 10 June 1960, SRP Research Archives.

[9] Simon K. Rifkind, *Special Master Report in the Supreme Court of the United States, October Term, 1960, State of Arizona v. State of California et al.*, 5 December 1960, p. 324, Colorado River Central Arizona Project Collection, ASU Hayden Library, http://digital.lib.asu.edu/index.php.

[10] "Fort Apache Development Committee to Meet" *Arizona Republic*, December 14, 1961.

[11] H. Wade Head to David R. Warner, 18 September 1964, SRP Research Archives.

less than $100,000 in 1957 to over $800,000 in 1961.[12] The rapid expansion of the tribe's recreation program worried SRP officials who could do little to stop the construction of additional lakes.

SRP was left to explore other options for adjudicating the water rights on the reservation. Among these options SRP considered the possibility of asking the Arizona State Land Department (SLD) to assume the authority afforded it under state law to adjudicate water rights. For several decades, SRP had filed objections to individual water rights applications before the State Land Department that it felt were appropriating water already covered under another right.[13] However, this strategy had little effect on Indian communities who claimed that their rights were not subject to state jurisdiction.[14] The inability of SRP or state officials to compel Indian communities to abide by state laws governing water rights created a stalemate that could not be resolved until there was a ruling in *Arizona v. California*. As the case progressed slowly during the 1950s and early 1960s, the WMAT continued their development activities.

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[12] "Preliminary Overall Economic Development Plan [OEDP]: Fort Apache Indian Reservation Redevelopment Area, Arizona," 1961, Arizona Collection, ASU Hayden Library.

[13] As of October 1963, the SRP Watershed Department reported that forty water rights cases were in various stages of completion. See Robert E. Moore to Henry Shipley, 30 October 1963, SRP Research Archives.

[14] This view was expressed by BIA representatives and several tribal attorneys at a meeting on state water rights legislation. See "Meeting on Water Rights, Manor Room, Hotel Adams" 6 June 1962, SRP Research Archives.

The WMAT's success in pursuing their development programs motivated other Indian tribes to start their own reservation projects. The federal government supported these efforts *de facto* by continuing to assert that the tribe's *Winters* rights allowed them to use water flowing across their reservations, even if these rights had not been adjudicated. A fresh controversy over developments on the watershed occurred in late 1962 when SRP learned that a dam was being constructed at Cienega Creek on the San Carlos Indian Reservation, which is located adjacent to the Fort Apache Indian Reservation. SRP responded by sending a protest directly to Secretary of the Interior Stewart Udall asking that the construction be stopped.[15] Udall rejected SRP's complaint in 1963, citing the right of the tribe to use water under the *Winters* doctrine.[16] SRP again considered its prospects for entering negotiations with the BIA with the hope of resolving the controversy with a contract that would allow for the release of water from the dam. SRP officials were worried that their attempts to stop reservation developments through litigation would continue to be unsuccessful. The failure of the respective parties to reach a settlement during this period demonstrates the important role that litigation plays in spurring negotiations. The stalemate caused by the pending litigation in *Arizona v. California* worked against the settlement of

[15] J.A. Riggins, Jr. to Stewart Udall, 21 December 1962, SRP Research Archives.

[16] Stewart Udall to J.A. Riggins, Jr., 12 March 1963, SRP Research Archives.

Indian claims by creating greater uncertainty about the legal process for non-Indians as Indian communities acted on their federal reserved rights claims.

Arizona v. California

There was no greater venue for the adjudication of water rights in the Southwest during the 1950s and early 1960s than the U.S. Supreme Court case of *Arizona v. California.*[17] Few cases paralleled *Arizona v. California* in scope and none had a greater impact on water allocation in the Southwest. The State of Arizona brought the case directly to the Supreme Court in 1952 to have its rights to the Colorado River determined in relation to California. When the United States was granted permission to join the case in 1953 the scope of the proceedings expanded to include claims on behalf of Indian reservations, federal reclamation projects, and other lands, all under the federal reserved rights doctrine.[18] The case progressed slowly during the 1950s as procedural issues consumed the proceedings. As a consequence many water rights decisions in the lower basin states were put on hold because of the systemic importance of any major shift in Colorado River allocations. For the majority of Indian reservations in the lower basin, the case provided the first opportunity to have their rights determined. Without a court ruling affirming their rights, most Indian

[17] Arizona v. California, 344 U.S. 919 (1952).

[18] Arizona v. California, 344 U.S. 919 (1953).

communities could not access the additional water necessary to grow their reservation economies.

The potential impact of the federal government's claims on existing water users in the lower basin was significant given the fact that twenty-nine Indian reservations, containing nearly 27,000,000 acres of land, were located within the basin.[19] In the State of Arizona, which has approximately twenty-five percent of its land area covered by Indian reservations, the DOI estimated in 1947 that approximately 1,700,000 af of water would be required annually to meet the future water needs of the tribes in the state, a total that was over half of Arizona's claim to the Colorado River.[20] Supplying water to Indian lands, the vast majority of which were undeveloped, presented a significant challenge to the existing water distribution structure in the basin states. In addition to the quantity of Indian water rights claims, the larger question in the case centered on the scope of federal control over Western water resources. Prior to the Supreme Court's decision in the *Pelton Dam* case of 1955, many Western politicians and water users were secure in the belief that state laws controlled the allocation and administration of water rights. The federal government's claim rested on a different legal rationale, that of federal reserved water rights, which did not adhere to the principles of prior appropriation and beneficial use that were the

[19] H.R. Doc. No. 80-419, at 261 (1947).

[20] Ibid., 267.

foundation of most water law in the West. If the government's claims were upheld, the result would be a much larger role for the federal government in water allocation decisions in the West. The Indian water rights claims in *Arizona v. California* took on added significance in this context as a proxy for testing the extent of federal control over water resources.[21]

In an attempt to avoid a potentially precedent-setting ruling on the question of federal reserved rights, state representatives lobbied the federal government to remove the consideration of Indian water rights from the case. These efforts began immediately after the federal government was granted permission to join the case in January 1953.[22] Representatives from the Upper Colorado River Commission (representing the states of Wyoming, Colorado, Utah and New Mexico) and the State of Arizona met with DOI officials in May 1953 in an effort to convince them to agree to a stipulation that would leave the question of Indian water rights for another case. The group argued that the inclusion of the Indian claims would force the Upper Basin states to join the case in order to defend against Indian claims in their own states, which could prolong the proceedings.[23] The DOJ, which was responsible for the prosecution of the case,

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[21] Frank J. Trelease, "Government Ownership and Trusteeship of Water," *California Law Review* 45, no. 5 (1957): 651-652.

[22] Arizona v. California, 344 U.S. 919 (1953).

[23] John Geoffrey Will to Carl Hayden, 14 May 1953, Colorado River Central Arizona Project Collection, ASU Hayden Library.

decided to include claims for Indian communities over the objections of state parties when they filed their petition of intervention in November 1953.[24] The federal government found itself in a difficult situation as a result of its many obligations to groups that relied on the Colorado River. In addition to the water rights of Indian reservations and other federal lands, the government had contracts under the Boulder Canyon Project Act to deliver water and power and a 1944 treaty with Mexico guaranteeing it a share of the river.[25] Any decision changing the allocation of the Colorado River could have a cascading effect on federal rights and obligations. A group of Western governors and representatives met with U.S. Attorney General Herbert Brownell following the filing of the government's petition in a last ditch effort to persuade him to drop the Indian claims. Brownell did not agree to the request and the DOJ decided to pursue the adjudication of Indian water rights over the protests of the state parties in the case.[26]

The federal government's legal representation became a major point of contention, even from those who supported the federal claims. The DOJ faced the

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[24] Arizona v. California, 344 U.S. 919 (1953).

[25] Warren B. Francis, "U.S. Asks Supreme Court Edict on Colorado Water," *Los Angeles Times,* November 3, 1953.

[26] Warren B. Francis, "Indian Status in Colorado Case Shown," *Los Angeles Times*, December 4, 1953; Warren B. Francis, "Indian Preference in Colorado Case Dropped," *Los Angeles Times*, December 15, 1953.

possibility that its claims on behalf of Indian reservations, reclamation projects, flood control projects, and national parks, would conflict with one another. Tribal advocates and representatives feared that the federal government's numerous obligations would cause it to underestimate the extent of Indian water rights. A protest was lodged in 1956 by a group of tribal attorneys who sought permission to represent the Indian parties independently of the federal attorneys.[27] The group was led by the attorney for the GRIC, Z. Simpson Cox, who challenged the government's impartiality and was particularly concerned by the recent removal of DOJ attorney William H. Veeder from the case, who was seen as a strong advocate for Indian water rights in the department.[28] Cox, and most of the other attorneys who sought the status of independent counsel, were also pursuing cases against the federal government on behalf of tribes for monetary damages under the Indian Claims Commission Act of 1946. This brought them up the same DOJ attorneys who defended the Indian claims in *Arizona v. California*.[29] This created a level of distrust between tribal and federal attorneys over the representation of the Indian claims. Special Master Simon Rifkind, who was appointed by the U.S. Supreme Court to hear evidence in the case, denied the request by the tribal

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[27] *Indian Trust Counsel: Hearings on S. 2035, Day 2, Before the Subcommittee on Indian Affairs*, *Comm. on Interior and Insular Affairs*, 92nd Cong. 88-97 (1971) (statement of Leo Vocu, National Congress of American Indians).

[28] Ibid., 100-102.

[29] *Indian Claims Commission Act,* Pub L. No. 79-726, 60 Stat. 1049 (1946).

counsel on the grounds that he did not have the authority to remove the federal government from its trustee capacity on behalf of the Indian tribes. The Special Master's decision removed the potential for conflict between federal and tribal attorneys in the case, but the perception of a conflict of interest continued to undermine the federal government's position on Indian water rights.

The turning point in the trial, as it concerned the Indian claims, came in August 1957 when Rifkind decided that he would not hear evidence relating to the claims of Indian reservations located on tributaries of the Colorado River. The decision removed the majority of the Indian claims from the case, but retained those reservations located adjacent to the Colorado River. Rifkind cited among his reasons for the decision the amount of time required to present evidence. However, the major impediment to the resolution of these claims was the difficulty of determining priority. If all the tributary claims were included in the case, the court would have to decide the relative priority of rights for water users located on all the tributaries of the Colorado River. This would require the court to not only determine the order of rights on a single stream, but also the relationship of those rights to the rights on others rivers that fed into the Colorado. This would mean that a water right on the Little Colorado River would have to be determined in relation to other rights on the Salt and Verde rivers, placing a tremendous burden on the court to hear evidence on all the water rights in the Lower Colorado River Basin, many of which were the subject of prior court decrees. Rifkind concluded that these determinations should be left for other cases

that involved all the users on a particular stream. The removal of the Indian claims on tributary streams was part of an effort to limit the number of issues in the adjudication.[30] While the decision ensured that *Arizona v. California* would not be the forum for adjudicating all water rights for Indian reservations in the Lower Colorado River Basin, the reservations located along the mainstream of the Colorado River were still part of the case. Since these water rights were based on the same federal reserved rights principle that applied to reservations on tributary streams, the possibility remained that a decision would be rendered that could apply to all Indian water rights.[31]

The Special Master's ruling had significant implications for the adjudication of water rights in Arizona, where the Gila River and its tributaries were the primary source of surface water. The removal of the tributary claims from consideration allowed SRP to pursue an adjudication of Indian water rights on the Salt and Verde river in state courts, where they felt they had better standing to argue that prior rulings, such as the 1910 Kent Decree, were *res judicata* or settled law. SRP attempted to initiate such a proceeding in 1957 following the controversy over Smith Park Dam but was prevented from doing so when the

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[30] Reporters' Transcript, Arizona v. California et al., No. 10 Original, 22 August 1957, Vol. 83-85, pp. 13,796-13,806 College of Law Library, ASU.

[31] Sidney Kartus, "Report to Arizona Legislative Council on May, July, and August, 1957 Trials Sessions in Arizona vs. California et al., No. 10 Original, U.S. Supreme Court, Including the California Affirmative Case and Beginning the Case of the United States for the Indian Tribes" 15 November 1957, Hayden Library, ASU.

federal attorneys removed the case to federal court where it remained in limbo pending the outcome of *Arizona v. California*. While an adjudication in state court did not guarantee a favorable outcome for non-Indian water users, SRP thought it was preferable to having the federal government represent both Indian and federal reclamation claims in the same case.

After a decade of litigation, the U.S. Supreme Court handed down its decision in *Arizona v. California* on June 3, 1963. The ruling was a major victory for Arizona, which had its rights to 2.8 million af of Colorado River water affirmed. The Court also decided the water entitlements for each of the five Indian reservations that bordered the Colorado River, allocating to those tribes approximately one million af of Arizona's 2.8 million af entitlement.[32] The ruling was significant for several reasons. The U.S. Supreme Court affirmed the power of the federal government to allocate water from navigable streams through Congressional action by ruling that the Boulder Canyon Project Act of 1928 divided the waters of the Colorado River amongst the lower basin states.[33] In so doing, the Court affirmed the finding of the Special Master that "...the law of prior appropriation, and the doctrine of equitable apportionment...do not control the issues in this case."[34] This language recognized the federal supremacy over the

[32] S. Doc. No. 88-20, at 46 (1963).

[33] Ibid., 46.

[34] Ibid., 12.

allocation of water on the public domain and rejected the very foundation of the prior appropriation doctrine that governed water use in most Western states. The exercise of this federal authority extended to the reservation of land and water for Indian communities. In making its determination, the Court for the first time established a standard for quantifying the federal reserved rights attached to Indian reservations. They concluded that "…the only feasible and fair way by which reserved water for the reservations can be measured is irrigable acreage."[35] This principle, which became known as the practicably irrigable acreage (PIA) standard, would serve as the basis for quantifying federal reserved rights for the next several decades.

In spite of the fact that most of the Indian claims were not settled as part of the case, the ruling set important and long-standing precedents concerning the interpretation of Indian water rights. The court's ruling also had large-scale implications for the economic development of Arizona and other states within the Colorado River basin. The decision established a standard for quantifying federal reserved rights that promised the majority of Indian communities a larger amount of water than they were currently using. The PIA standard became the foundation for much of the economic development planning that Indian tribes in Arizona pursued in the years after the decision. The decision also paved the way for new water infrastructure developments like the Central Arizona Project (CAP), which

[35] Ibid., 51.

was introduced in legislation as a federally funded reclamation project by Senator Carl Hayden the day after the Court's ruling.[36] The importation of large amounts of Colorado River water would eventually change the water supply picture in central Arizona and fuel the future growth in the state. Without a mechanism in place to get the water from the Colorado to the growing cities of Phoenix and Tucson, however, anxiety about drought and water certainty continued. The ruling was a mixed blessing for most Indian communities, whose rights remained undefined and who still lacked necessary infrastructure to access greater quantities of wet water. For all the important precedents that resulted from the court's ruling in *Arizona v. California*, and there were many, the prospect of future water rights litigation remained high and created economic uncertainty for both Indian and non-Indians water users in Arizona.

Water Rights in the Wake of *Arizona v. California*

The conclusion of *Arizona v. California* ushered in a new era for water rights adjudication in Arizona as the U.S. Supreme Court set the standard for determining Indian reserved rights in ruling that the doctrine of prior appropriation did not govern federal reserved rights. However, the Court chose not to determine the water rights on tributary rivers, leaving most of the Indian claims unresolved. SRP was at the forefront of the movement to begin an

[36] 109 Cong. Rec. 9,946 (1963).

adjudication of Indian claims through its efforts to initiate a comprehensive determination of the rights to the Salt and Verde rivers either through litigation or an administrative proceeding. In October 1963, a few months after the U.S. Supreme Court's ruling in *Arizona v. California*, the SRP Board instructed its attorneys to seek a legal or administrative determination of all the rights to the Verde River.[37] A few months later SRP filed a petition with the SLD asking for an adjudication of Verde River rights. However, State Land Commissioner O.M. Lassen did not feel that the Department should be responsible for this task, in part because of the tremendous time and expense it would entail. The SRP Board was unwilling to wait for the SLD to make a determination, and in September 1964 it instructed its attorneys to seek an adjudication by the courts.[38]

Before the legal process could get underway, political considerations again presented an obstacle to adjudicating water rights. After a meeting with representatives from the Bureau of Reclamation in October 1964, SRP postponed its efforts to adjudicate Verde River rights because of the "...disastrous effect such action could have on the progress of the Central Arizona Project..."[39] The U.S. Congress was again considering legislation to authorize construction of the CAP,

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[37] Minutes, Board of Governors, SRVWUA, 7 October 1964, SRP Research Archives.

[38] Minutes, Board of Governors, SRVWUA, 8 September 1964, SRP Research Archives.

[39] Henry Shipley to C.A. Pugh, 28 October 1964, SRP Research Archives.

which had been delayed since 1951 pending a determination of Arizona's right to the Colorado River. SRP supported the project and also recognized that another protracted legal battle over water rights could dissuade Congress from taking action. For the second time since 1951, SRP postponed its efforts to adjudicate Verde River water rights.

With the Verde River adjudication on hold, SRP shifted its attention to the litigation to determine Indian water rights in *Hurley v. Abbott*, which had been pending in federal court since 1957. The prospect of SRP restarting the litigation motivated the DOJ to seek a settlement. Riggins described the situation in a letter to Commissioner of Reclamation Floyd Dominy in January 1965:

> We revived the pending litigation, and subsequent to filing our brief on the pending motion, the Department of Justice suggested that we sit down and attempt to resolve the problem, since both organizations, i.e., the Indian tribe and the Salt River Project, are agencies of the Department of the Interior.[40]

Riggins went on to express his concern that the BIA would "...be sitting in the middle of every conference we have..."[41]; an apparent reference to Riggins' view that the BIA would be the difficult party in the negotiations. He went on to say that he hoped the Bureau of Reclamation would be " on 'our side of the table.'"[42] These comments reveal an important dynamic of the negotiations that proved to

[40] J.A. Riggins, Jr. to Floyd E. Dominy, 11 January 1965, SRP Research Archives.

[41] Ibid.

[42] Ibid.

be critical in the efforts to complete a settlement: dealing with the multiple layers of federal bureaucracy represented by the BIA, Reclamation, and the DOJ. SRP viewed the BIA as being more difficult to work with, while Reclamation was seen as an ally. In the negotiations that took place during 1965 and 1966, SRP dealt directly with representatives from the Justice Department, who were the driving force behind the attempts at settlement on the federal side. However, the differences between local BIA administrators and SRP officials over how to meet the water needs of the tribes were allowed to remain unresolved, which ultimately worked against the completion of a final settlement.

The DOJ's eagerness to settle the pending litigation in *Hurley v. Abbott* is indicative of its approach to addressing conflicts over Indian water rights at the time. The federal government had just secured a sizable quantity of water for the Indian reservations located adjacent to the Colorado River in *Arizona v. California*, and the PIA standard established an important precedent for the adjudication of the water rights for other reservations. However, the same DOJ attorneys who prosecuted *Arizona v. California* were reluctant to pursue an adjudication of the claims for the Indian communities on the Salt and Verde rivers, and chose instead to work on a settlement that avoided the issue of rights entirely. While a significant amount of water, the one million acre-feet awarded to the Colorado River mainstem tribes was fairly easy to do; the infrastructure for delivering Colorado River water to central Arizona was not in place, allocations had not been awarded, and so providing the water to the tribes to resolve their

Winters claims did not require taking water from another party. It was a different situation on the Salt and Verde rivers, where SRP essentially claimed all the water in both rivers. Determining the *Winters* rights of the Salt and Verde rivers tribes would certainly require taking water away from SRP, a federal reclamation project.

Some officials within the federal government advocated for a larger federal reserved rights claim to be made on behalf of the Indian tribes in Arizona. The Regional Solicitor for the DOI wrote that the decisions in *Winters* and *Arizona v. California*, "...warrant a claim being made for all irrigable acreage within the reservations."[43] This could only be accomplished through a larger adjudication that involved all the parties within a particular watershed. The DOJ chose to follow a more cautious approach that sidestepped the conflicts that resulted from the federal government's obligations to SRP and the Indian tribes. Instead of pursuing the resolution of Indian claims through litigation, the DOJ attorneys chose to try to negotiate a settlement with SRP that relied on the new water "salvaged" by vegetation manipulation programs on the watershed.

The Search for "New" Water: The Salvage Settlement

The principle of salvage was at the center of many of the water rights negotiations that took place between SRP and federal representatives during the

[43] John McB. Meade to Solicitor, 11 December 1964, DOI Field Solicitor's Office.

mid-1960s. Salvage is predicated on the notion that runoff into a river or stream can be increased by removing certain vegetation from watersheds and alluvial areas. However, to determine how much water can be salvaged it is necessary to understand consumptive use, which is the amount of water taken up by biological matter and evaporation and therefore not returned to a river or stream. Calculating the consumptive use of certain activities, such as crop irrigation or storing water in a reservoir, was a difficult task in the 1960s because of the lack of data that accounted for the variability across geographic areas and over time. In the 1940s Harry Blaney and Wayne Criddle popularized a method for estimating consumptive use in response to factors such as elevation, weather, and method of use.[44] The Blaney-Criddle method was developed as a tool of measurement, but it could also be used to inform practices that led to the conservation of water by identifying certain plants or water uses that consume more water.

The watershed programs undertaken by state and federal agencies in Arizona during the 1950s and 1960s were part of an effort to eradicate vegetation that was believed to consume a high amount of water and therefore increase the amount of runoff from the watersheds. These programs presented an attractive opportunity for non-Indians to resolve Indian water rights claims without giving

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[44] Harry F. Blaney and Wayne D. Criddle, *Determining Consumptive Use and Irrigation Water Requirements, Technical Bulletin No. 1275* (Washington D.C.: U.S. Department of Agriculture, 1962); Harry F. Blaney and Wayne D. Criddle, "Determining Water Requirements for Settling Water Disputes" *Natural Resources Journal* 29, no. 4 (1964-1965): 29-41.

up any of the water they were currently using. However, the science on which the salvage principles were based was questionable and it was not known the exact amount that was produced by these efforts or the long-term effects. The lack of a scientific basis to assess the impact of vegetation manipulation on water yields made the task of reaching settlement based on water salvage difficult. Tribal representatives eventually opposed settlements based on salvaged water because they felt it did not recognize the full extent of their reservation claims.

In March 1965, SRP and the DOJ worked on the development of a cooperative plan to carry out watershed programs on the Fort Apache Indian Reservation. The proposal was modeled after an earlier agreement between SRP and the U.S. Forest Service, signed in June 1964 that set up a cooperative watershed management program on national forest lands.[45] The BIA hired two technical consultants, Harold Wilm and Wayne Criddle, to assess the consumptive use of water on the Fort Apache and San Carlos reservations and determine how much water could be saved through vegetation removal.[46] Wilm submitted a report in April 1965 that estimated that 9,400 af was being salvaged by current programs and up to 31,100 af could be saved through an accelerated program. The amount was just above the 30,000 af ultimate diversion right that was claimed on

[45] Cooperative Agreement for Accelerating Watershed Management Practices within and upon the National Forests Bound by the Salt and Verde Watersheds, Arizona, 15 June 1964, SRP Research Archives.

[46] Memorandum, Walter Kiechel, 25 March 1965, DOI Field Solicitor's Office.

behalf of the WMAT in *Arizona v. California*, giving credence to the argument that salvage could offset all future uses.[47] The Wilm report proved to be a source of contention, especially its recommendations for an accelerated program of timber removal that exceeded what the BIA and the tribe had done in the past. SRP officials, who received a summary of the report's findings, requested a copy of the full report along with a timetable of proposed reservation developments so that they could determine whether "...water salvage operations [could] be correlated with the proposed water-consuming developments on the Reservation..."[48] The attorneys for the Justice Department did not object to either request, but BIA Assistant Area Director George Hedden argued against the release of the Wilm report and the creation of a timetable for proposed developments. Hedden believed this, "...would place the Salt River Project in a position to exert undue pressure upon the White Mountain Apache Tribe in particular and on the Bureau of Indian Affairs."[49] Hedden was worried that a development timetable "...could be used to prevent modifications in reservation

[47] H.G. Wilm, "Expected Water Salvage from Watershed Vegetation Management: Fort Apache and San Carlos Indian Reservations, Arizona," April 1965, DOI Field Solicitor's Office; Petition of Intervention on Behalf of the United States of America, Arizona v. California, 344 U.S. 919, (1953).

[48] Irving A. Jennings to David R. Warner, 14 April 1965, SRP Research Archives.

[49] George W. Hedden to Commissioner of Indian Affairs, 27 April 1965, DOI Field Solicitor's Office.

development"[50] and restrain the future planning capabilities of the tribe. The controversy generated by the report's recommendations exposed an early rift in the respective attitudes of the BIA and the DOJ in the negotiations. Justice was most interested in finding a resolution to the legal issues while the BIA was concerned about the long-term effects of a settlement predicated on extensive timber removal. The disagreements between officials within the federal government proved to be the major impediment to the settlement process.

The controversy generated by the Wilm report shifted the focus of the negotiations from the issue of water salvage to a question of whether SRP was being harmed by the existing water uses on the reservation. SRP claimed that any use of tributary waters, whether by constructing a dam or irrigating crops, impacted the amount of runoff in the river and therefore the water available to SRP shareholders. The BIA's position shifted between asserting *Winters* rights on behalf of the tribe to making the argument that certain activities, such as the construction of recreational lakes, did not impact SRP supplies. The issue of damages became critical to the negotiations during the deliberations over consumptive use. If the parties could not agree on how much water was being lost from the river by uses on the reservation, they would not be able to decide on how much would need to be salvaged in order to offset current and future uses. The DOI's Regional Solicitor acknowledged this in a letter to the BIA Area Director:

[50] Ibid.

> As you know, our claim to the right to use water is premised in part on the doctrine of salvage....If this premise is ultimately utilized as a basis for settlement, obviously the lower the unit of consumptive use of a particular activity the more activities there are which can be accommodated within the amount of water salvaged.[51]

The Solicitor's statement conceptualizes the settlement as a zero-sum equation, in which water salvage and water use could be balanced in such a way as to generate no net effect on downstream users. More importantly, especially from the perspective of the tribes affected, the federal government was not asserting any superior right or claim on behalf of the reservations, but was trying instead to balance water use and production. The Regional Solicitor affirmed this in a letter to the BIA Area Director:

> The 5,000 acre feet of salvage in excess of consumptive use could be used to offset additional consumptive uses whether caused by irrigation, filling of recreational lakes, or other uses without any damage to the Association and <u>without the necessity for adjudicating the extent of the water rights on this reservation</u> [emphasis added].[52]

The federal negotiators' approach represented an attempt to divorce the issue of water rights from water use in the settlement. This placed a higher level of importance on the technical data that would be used to support both the estimate of how much water would be required for future uses and how much could be

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[51] John McB. Meade to BIA Area Director, 19 May 1965, DOI Field Solicitor's Office.

[52] John McB. Meade to BIA Area Director, 19 May 1965, DOI Field Solicitor's Office [different from above citation].

saved through salvage. It also points to the federal government's continued reluctance to assert water rights claims on behalf of the Indian tribes in central Arizona.

The focus of the negotiations shifted to a consideration of the data that would be needed to predicate a settlement on water salvage. The BIA sent a copy of the Wilm report to SRP attorneys in June 1965, paving the way for the group to discuss the report's recommendations.[53] At a meeting attended by representatives from all the parties in July, the government attorneys reiterated their intention to not decide the question of water rights. It was agreed to pursue a settlement based on a salvage program, but SRP objected to the consumptive use totals presented by the government's technical consultant for evaporation and stream flow on the reservation. Since neither side possessed solid data, it was decided that a three-year collaborative study could yield the scientific data that would be necessary to reach a final settlement. SRP continued to press the tribe on its plans for new reservation developments, asking for a moratorium on future construction during the study period. This request was vigorously opposed by the BIA officials, who also objected to the idea of providing a list of proposed future developments. However, due in large part to the requests of DOJ attorneys, the parties agreed that the BIA would provide SRP with a list of proposed projects in the upcoming

[53] W. Wade Head to Irving A. Jennings, 23 June 1965, DOI Field Solicitor's Office.

three years.[54] The collaborative study and reservation development schedule formed the basis of a preliminary agreement for the Fort Apache and San Carlos Indian reservations in July 1965.[55]

The proposed agreement addressed the issue of damages by stating that SRP could not object to water uses on the reservations that were less than the quantity of water salvaged through vegetation removal.[56] SRP agreed to this concept only under the condition that they would participate in the planned research and be notified of future development activities on the reservations.[57] When the proposed agreement was distributed to various BIA officials in the summer of 1965 it resulted in a flurry of objections. The brunt of the criticism was targeted at a single sentence, which was similar to the one that led to the breakdown in the Smith Park Dam negotiations. The sentence stated SRP's claim that "[a]ll the waters of the Salt River and its tributaries have been appropriated pursuant to Arizona law...."[58] The inclusion of this language in the agreement raised the specter of water rights, which the DOJ attorneys had sought to avoid,

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[54] George Hedden to James Goodhue, 23 September 1965, DOI Field Solicitor's Office.

[55] David Warner to Irving Jennings, 22 July 1965, DOI Field Solicitor's Office.

[56] Ibid.

[57] Irving Jennings to David Warner, July 30, 1965, DOI Field Solicitor's Office.

[58] Commissioner of Indian Affairs to Associate Solicitor, Indian Affairs, 11 August 1965, DOI Field Solicitor's Office.

and emboldened those officials within the BIA who wanted to see the government assert larger claims on behalf of the reservations. The Commissioner of Indian Affairs wrote that, "[t]he primary objection to the agreement is directly related to the Winters Doctrine Rights of the Indian reservations."[59] A steady stream of objections followed from the Fort Apache Reservation Superintendent, the tribal attorney, and attorneys from Interior.[60] The negative reaction reinforced the differences within the federal government about the best way to protect Indian water rights and caused some BIA officials to question the fruitfulness of further negotiations.[61]

Disagreements among the federal representatives over the best method for reaching a settlement that would protect the tribes' *Winters* rights resulted in a change in the federal position regarding the use of salvage to offset water use. SRP attorney Irving Jennings expressed the nature of the change in a letter to DOJ attorney David Warner:

> If we now understand [the DOJ] position as disclosed in our conference in Washington earlier this month...the Department will not agree to limit the quantities of water to be used on the

[59] Ibid.

[60] Superintendent, Fort Apache Indian Agency to BIA Area Director, 13 August 1965, DOI Field Solicitor's Office; Regional Solicitor to Solicitor, Department of the Interior, 6 October 1965, DOI Field Solicitor's Office; Barry DeRose to Area Director, 15 August 1965, DOI Field Solicitor's Office.

[61] George Hedden to BIA Commissioner, 16 November 1965, DOI Field Solicitor's Office.

> reservations; that if the water salvaged does not equal water usage, you reserve the right to assert a legal claim for any additional water for any development on the reservations which seems economically feasible. This claim, if not agreed to by us, you propose to litigate.[62]

This represented a substantial shift in the government's position that left open the possibility of future claims being asserted under the federal reserved rights doctrine. This was unacceptable to SRP, whose primary reasons for pursuing the settlement were to remove the threat of future legal challenges to their water rights and the prospect of unlimited increases in water use on the reservations. The parties continued to try to work out a solution into early 1966, but with little success, and by February the two sides were back in court to decide the question of whether Indian claims could be adjudicated in *Hurley v. Abbott*.[63]

The breakdown in negotiations highlights the difficulty in reaching a settlement based on projected water savings without having the necessary data to ground assumptions about water demand, consumptive use, and water salvage. The need for trusted and verifiable data would prove to be critical in future Indian water rights negotiations. The task was complicated further by the federal government's efforts to avoid any consideration of water rights, which were at the center of the disagreement between SRP and the Indian reservations on the watershed. Divisions within the federal bureaucracy worked against the

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[62] Irving Jennings to David Warner, 30 December 1965, SRP Research Archives.

[63] Foster Buckner to Solicitor, 25 January 1966, DOI Field Solicitor's Office.

completion of a final settlement as representatives from the DOJ and the BIA tried to strike a balance between meeting the future water needs on the reservations with salvaged water while protecting the full extent of Indian water rights. SRP decided in January 1966 to pursue its case in the courts because of the important precedent the litigation could establish for their future dealings with other Indian tribes.[64] The question of whether Indian claims could be adjudicated in state court remained unresolved and a ruling on this question could have large implications for future negotiations.

A Return to the Negotiating Table

In February 1966, nearly a decade after SRP filed its original petition to reopen the Kent Decree, attorneys for the DOJ and SRP argued their case before the U.S. District Court of Arizona. The primary questions at issue in the case was whether the Kent Decree, which adjudicated water rights on the Salt River, could be expanded to include parties that were not included in the original case and whether the federal government was required to enter the proceedings on behalf of Indian reservations on the Salt and Verde rivers. Walter Kiechel, Jr., who argued the government's case, offered several reasons for why SRP's petition should be denied. The principle reason was that there "...has been no consent to

[64] Irving A. Jennings to David R. Warner, 19 January 1966, DOI Field Solicitor's Office.

such an adjudication either by the United States or by the White Mountain Apache Tribe."[65] Since the United States' sovereign immunity from suit had not been waived, SRP could not force the federal government to join the case on behalf of the WMAT or any other Indian tribe. SRP attorney Irving Jennings countered to this argument by stating that the government had already entered *Hurley v. Abbott* on behalf of the Salt River and Fort McDowell Indian communities and was therefore already a party to the case. Jennings also pointed to the 1952 McCarran amendment, which he argued had waived the federal government's sovereign immunity in state general stream adjudications.[66] The arguments presented by both sides attest to the fact that the issues in the case extended well beyond the individual water rights of the WMAT. The jurisdictional issues were central to the case because they would determine whether, and in what fashion, Indian water rights could be adjudicated in state courts.

The ruling issued by Judge Craig in July 1966 had broad implications for water rights adjudications in Arizona. Craig granted the government's motion to dismiss SRP's petition, however, he affirmed the right of the United States to be joined in a general stream adjudication under the McCarran amendment. This

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[65] Transcript of Hearing on Government's Motion to Dismiss, Hurley v. Abbott, No. Civ. 2665-PHX, U.S. District Court of Arizona, 11 February 1956, SRP Research Archives.

[66] Ibid, 39-41.

could not be done in the piecemeal fashion sought by SRP, but required "all landowners in the watershed" to be made parties to the litigation.[67] The decision was not a resounding victory for either side. The government prevailed in its attempt to avoid an adjudication of Indian water rights in the case, but by recognizing that the United States could be made a party to a state general stream adjudication the possibility remained that the federal government would have to represent Indian claims in future litigation. The SRP Board instructed staff to prepare to file a new petition by initiating an extensive data collection process that identified all the property owners in the Verde River Valley in order to make them parties to the litigation. The work continued for the rest of 1966 and 1967 until SRP was ready to file its petition in April 1968.[68] As SRP prepared to resume its efforts to litigate the water rights of the Salt and Verde rivers, an opportunity was again presented to negotiate a settlement of the Indian claims.

The prospect of renewed litigation provided the impetus for further negotiations between SRP and the BIA. SRP General Manager Rod McMullin met with BIA Assistant Area Director George Hedden, just days before the petition was to be filed, to discuss the possibility of reopening negotiations. The conversation focused on the prior attempts to settle and Hedden expressing his interest in settling the water rights question before litigation was resumed.

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[67] Hurley v. Abbott, 259 F. Supp. 669 (1966).

[68] "Salt River Project Explains Water Suit," *Verde Independent*, March 7, 1968.

McMullin and Hedden agreed to try a different approach that would limit the negotiating team to three representatives from each side and would exclude attorneys from the initial discussions. The 1954 draft agreement for Smith Park Dam would serve as the starting point for the negotiations, and as in prior meetings, the BIA representatives suggested that the issue of water rights be left out of the negotiations. At the first meeting attended by BIA and SRP representatives in May 1968, the group decided to not pursue a settlement based on the salvage concept that proved to be problematic in the earlier negotiations. An alternative concept put forward by McMullin represented an approach that was used repeatedly in future Indian water rights settlements. McMullin suggested that the group settle on a specific quantity of water for each of the reservations that would cover all current and future uses.[69] The approach was a precursor to the water budget, an organizing principle that would be utilized in nearly every Indian water rights settlement in Arizona in the decades that followed. By settling on a fixed quantity of water the parties avoided an open-ended settlement that could result in future controversy and guaranteed enough water to meet all future water needs on the reservations.

With the framework for the settlement established, the negotiations progressed rapidly in the following months as the parties worked out the quantity

[69] Meeting notes, 28 May 1968, SRP Research Archives; "Summary of Meeting No. 1: Representatives of the Salt River Projects, the Indians, and the Bureau of Indian Affairs," 28 May 1968, SRP Research Archives.

of water that each tribe would need. At the second meeting, the BIA presented their water requirements for the Fort Apache, San Carlos, Camp Verde, and Fort McDowell reservations (see Table 1).

Table 1: BIA Reservation Water Requirements		
Reservation	**Quantity (af/year)**	**Consumptive Use (af/year)**
Fort Apache	87,226	57,957
San Carlos	50,556	32,012
Camp Verde	1,080	648
Fort McDowell	7,100	4,260
Total	140,002	94,877

The projected requirements for the Camp Verde and Fort McDowell reservations were less than the claims made on behalf of those tribes in *Arizona v. California* while the quantities for the San Carlos and Fort Apache reservations were significantly higher.[70] SRP accepted the BIA's figures for the Camp Verde and Fort McDowell reservations, but countered with an offer of 30,000 af in total annual consumptive use for the Fort Apache reservation.[71] The BIA made a

[70] "Summary of Meeting No. 2: Representatives of the Salt River Project, the Indians, and the Bureau of Indian Affairs," 11 June 1968, SRP Research Archives.

[71] "Summary of Meeting No. 4: Representatives of the Salt River Project, the Indians, and the Bureau of Indian Affairs," 15 July 1968, SRP Research Archives.

counter proposal of 36,500 af for Fort Apache, 13,600 af for San Carlos, and 432 af for Camp Verde, in annual consumptive use. Fort McDowell was left out of the discussions because it had existing water rights under the Kent Decree. The BIA counter-offer, which was significantly less than their original proposal, was conditioned on the acceptance of water duties for agricultural and industrial uses and recreational lakes.[72] The calculation of the water duty was critical to the agreement because it would be used to determine how much water the tribe used annually. SRP accepted the BIA's counter-proposal and less than four months after the start of negotiations the parties signed a memorandum of understanding on September 6, 1968.[73]

The negotiations that led up to a preliminary agreement were significant on several fronts. The length of time it took to reach settlement was far less than any prior negotiations. Individuals at the local level reached the agreement without any involvement from federal representatives at the DOI or Justice. The tribal councils who represented the reservations in the agreement each passed a resolution approving the memorandum of understanding. However, obstacles to

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[72] "Summary of Meeting No. 6: Representatives of the Salt River Project, the Indians, and the Bureau of Indian Affairs," 21 August 1968, SRP Research Archives.

[73] Memorandum of Understanding between Representatives of the Bureau of Indian Affairs and the White Mountain Apache Tribe, San Carlos Apache, and Camp Verde Indian Tribes and the Salt River Valley Water Users' Association, 6 September 1968, SRP Research Archives.

the settlement emerged when it was sent for legal review. The Regional Solicitor for Interior raised several concerns about the proposed settlement that spurred a further round of negotiations on key technical issues.[74] The major areas of disagreement were the same issues concerning water rights that held up prior attempts at settlement during the 1950s and 1960s. The Interior Department lawyers wanted to leave the question of legal rights open-ended, because they continued to assert that Indian water rights were not subject to either the Kent Decree or a state general adjudication proceeding under the McCarran amendment. They were willing to support a final settlement of the water rights for the Indian tribes involved in the agreement, but they were weary of jeopardizing the legal claims of other Indian tribes who might continue to argue that state courts did not have jurisdiction over Indian water rights.[75] The legal challenges inherent in a settlement that did not mention water rights continued to delay the process of finalizing an agreement.

The ongoing debate over the wording of the settlement agreement did not stop the negotiations from continuing during 1968 and 1969. In December 1968 the SRP Board voted to postpone the filing of a general stream adjudication on the

[74] George Hedden to McMullin et al., 18 October 1968, SRP Research Archives.

[75] Frederic L. Kirgis to John McB. Meade, 21 November 1968, SRP Research Archives.

Verde River.[76] The move signaled a desire on the part of SRP to not jeopardize a settlement with the three Indian communities that signed on to the memorandum of understanding. However, a number of issues continued to stall the completion of a final agreement. The issue of salvage was again inserted into the discussions after federal representatives argued that the total quantity available to each tribe should not include water that was "produced" through salvage efforts. SRP opposed this contention and wanted a fixed quantity of to place a limit on future Indian water uses. The government attorneys were split on the issue. While some attorneys for the Indian tribes pushed for the inclusion of salvage water, Interior took the position that salvage should not be included in the settlement because "...all present and future needs of the Indians are adequately protected." The question of whether the water allocations in the agreement would be sufficient to meet all future demands became important at this stage in the negotiations. BIA attorneys were willing to omit any mention of salvage if the technical advisors could assure that the projected water entitlements were adequate.[77] After receiving these assurances, a final agreement was reached in September 1969, and the BIA, along with the support of each tribal attorney, agreed to submit the

[76] Robert E. Moore to Henry Shipley, 5 December 1968, SRP Research Archives.

[77] Frederic L. Kirgis to John McB. Meade, 23 June 1969, SRP Research Archives.

settlement for consideration by the respective tribal councils.[78] With the support of all three tribal councils, the settlement agreement was sent to the Commissioner of Indian Affairs in November 1969 for review.[79]

Changing Federal Indian Policy and the Salt River Agreement

The settlement, which became known as Salt River Agreement, reached the Central Office of the BIA during a period of bureaucratic and policy transition. The policy of terminating federal supervision over Indian affairs, which guided many Congressional actions on Indian issues since the early 1950s, was slowly being replaced with a new focus on giving Indian communities the resources they needed to grow their reservation economies, improve education and healthcare, and foster greater tribal self-government. President Nixon supported this policy of Indian self-determination when he entered office in 1969, and enacted reforms that included appointing a new Commissioner of Indian

[78] Frederic L. Kirgis to John McB. Meade, 29 August 1969, SRP Research Archives; John McB. Meade to Area Director, Bureau of Indian Affairs, Phoenix, 10 September 1969, SRP Research Archives.

[79] George Hedden to Commissioner of Indian Affairs, 25 November 1969, SRP Research Archives; see also documents relating to the Salt River Agreement in *Federal Protection of Indian Resources: Hearings before the Subcommittee on Administrative Practice and Procedure of the Senate Committee on the Judiciary, Part 5*, 92nd Cong. 1136 (1972).

Affairs and reorganizing the National Council on Indian Opportunity.[80] On July 8, 1970, Nixon addressed a special message to Congress on the issue of Indian affairs. He called for the policy of termination to be replaced with a focus on "...strengthen[ing] the Indian's sense of autonomy without threatening his sense of community."[81] Among the policy recommendations that Nixon outlined in his speech, the most important from the standpoint of Indian water rights was the call for the creation of an Indian Trust Council Authority, independent from the Departments of the Interior and Justice, that would be responsible for the legal representation of Indian claims to natural resources.[82] This was intended to address the conflict of interest that was inherent in the federal government's obligation to represent the legal claims of Indian tribes along with competing federal interests. Nixon's recommendation echoed a proposal made in 1969 by longtime DOJ attorney, William Veeder, who was among the most vocal critics of the federal government's handling of Indian water rights.[83] Veeder's career

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[80] Raymond V. Butler, "The Bureau of Indian Affairs: Activities Since 1945," A*nnals of the American Academy of Political and Social Science* 436 (March 1978): 57.

[81] "Special Message to the Congress on Indian Affairs, July 8, 1970" in *Public Papers of the Presidents of the United States, Richard Nixon: Containing the Public Messages, Speeches, and Statements of the President, 1970* (Washington D.C.: Government Printing Office, 1971), 93.

[82] Ibid., 100.

[83] William H. Veeder, "Federal Encroachment on Indian Water Rights and the Impairment of Reservation Development," in *Toward Economic Development for*

follows in many respects changes in the federal government's position on Indian water rights and he would end up playing a pivotal role in seeing that the Salt River Agreement was not approved.

William Veeder was at the center of many of the most important legal controversies involving the federal government's protection of federal reserved water rights during the 1950s and 1960s. Veeder worked for many years as an attorney in the Lands Division at the DOJ where he handled water rights cases. He was first involved in a national controversy in 1951 when he filed a complaint on behalf of the federal government claiming all the waters of the Santa Margarita River in California on behalf of Camp Pendleton and several Navy installations.[84] The *Fallbrook* case, as it became known, faced strong opposition from local water users and members of Congress who passed an appropriation bill that restricted the Department from continuing to spend money prosecuting the case. This action precipitated a series of unusual events, in which Veeder temporarily left the DOJ and continued to pursue the case on behalf of the Navy. The Navy later claimed it was not paying Veeder's salary and the incident became the subject of a

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Native American Communities: A Compendium of Papers Submitted to the Subcommittee on Economy in Government of the Joint Economic Comm., Vol. 2, 91st Cong. 463 (1969).

[84] United States v. Fallbrook Public Utility District, 101 F. Supp. 298 (1951).

Congressional investigation into the Department's actions.[85] The *Fallbrook* case was the first of several incidents in which Veeder's tactics resulted in controversy either within Justice or among members of Congress who objected to the Department's position on federal reserved water rights. Veeder left Justice sometime around 1965 and took a job with the BIA where he published a paper in 1969 that strongly criticized the federal government's actions in representing Indian water rights cases. The publication of the paper in a Congressional report drew attention within the BIA and among members of Congress who were also critical of the government's handling of the natural resources on Indian reservations.[86]

Veeder's outspoken views did not receive much support from the leadership at Interior and controversy again surrounded him in August 1971 when the BIA attempted to reassign him to the Phoenix area. Veeder opposed the move publicly and his case garnered national media attention along with protests from several Senators and tribal advocates who saw the reassignment as an attempt to

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[85] *U.S. v. Fallbrook Public Utility District et al.: Hearings before the Permanent Subcommittee on Investigations of the Committee on Government Operations*, 83rd Cong. 45-51 (1953).

[86] Neil Sheehan, "Federal Expert Says Bureaucratic Conflicts in Cabinet Agencies are Depriving Indians of Water Rights," *New York Times*, January 18, 1970.

silence his views on Indian water rights.[87] The controversy over Veeder's reassignment coincided with the review of the Salt River Agreement within the BIA. A few weeks after the announcement of the transfer, Veeder sent a memorandum to Deputy Commissioner John O. Crow vigorously protesting the Salt River Agreement. Veeder's primary objection to the settlement was that it would not prevent SRP from continuing with litigation to reopen the Kent Decree, which he felt would expose Indian communities to further legal action while also having the effect of capping their rights. Veeder further claimed that the United States was voluntarily waiving its sovereign immunity from suit on behalf of the Indian tribes, which he called "...an anomaly that transcends understanding."[88] Though he was present at some of the negotiating meetings between SRP and federal representatives in 1965, Veeder's comments demonstrate a lack of knowledge about the rationale for the agreement. SRP was attempting to remove the claims of the Indian communities from consideration in any future litigation and would have little reason to adjudicate these claims if they were already settled. Despite Veeder's strong objections, the BIA approved the Salt River Agreement with the addition of one amendment, which stated that "the Association and District agree that no proceeding will be instituted to enlarge or

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[87] William Blair, "3 Shifted in Indian Bureau; One a Critic of U.S. Policy," *New York Times*, August 11, 1971; "Transfer Rejected by U.S. Indian Aide," *New York Times*, August 14, 1971.

[88] William H. Veeder to John O. Crow, 27 August 1971, SRP Research Archives.

modify the Kent Decree...so as to affect the rights of the White Mountain, San Carlos and Yavapai Apache Tribes..."[89]

Veeder was not content with simply objecting to the agreement in writing, but according sought to appear before the tribal officials. Though Veeder was not allowed to appear in person, his memo to John Crow was leaked to the Tribal Council, which caused concerns about the Salt River Agreement among the members. At an Executive Committee meeting of the WMAT Tribal Council, the Vice Chairman asked whether the tribe could still back out of the agreement and requested that Veeder come speak to the Tribal Council. The BIA officials present at the meeting declined to make Veeder available, but following the meeting BIA attorney Harold Ranquist sent a memorandum to the Commissioner of Indian Affairs with several suggested changes to the agreement that reflected some of the concerns expressed by the Tribal Council. In addition to the issue of future litigation already raised by BIA staff, Ranquist again brought up the issue of salvage and whether it could be credited to the tribe's water allocation.[90] At a December 1971 meeting, attended by representatives from the BIA, tribal attorneys, and SRP management, it was agreed to omit any mention of salvage water in the agreement. The group also agreed on a process for ratifying the

[89] R.J. McMullin to Henry Shipley, 3 September 1971, SRP Research Archives.

[90] Harold A. Ranquist to Commissioner of Indian Affairs, 12 November 1971, SRP Research Archives.

settlement through a consent decree that would be filed after the DOI and Justice had signed off on the final agreement.[91] The settlement appeared to be back on track for approval, but political considerations continued to complicate the negotiations.

The public protests of William Veeder and other tribal advocates raised the profile of Indian water rights at the time. These concerns found support with U.S. Senator Edward Kennedy, who opened the first of several hearings in October 1971 on the topic of federal protection of Indian resources.[92] Kennedy's goal was to investigate the claims of conflicting interests within the federal bureaucracy and push for reforms. The first of several changes within the DOI was announced shortly before the opening of Kennedy's hearing when the BIA created the Office of Indian Water Rights, which was intended to address the calls for greater government involvement in assessing Indian water rights claims.[93] Kennedy extended his involvement to Arizona, where he held hearings in January 1972 on the Gila River and Colorado River Indian reservations. The purpose of the hearings was to gather information on the water rights claims the Arizona Indian tribes, including the pending Salt River Agreement. During the hearings,

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[91] Memorandum, Robert E. Moore, 9 December 1917, SRP Research Archives.

[92] *Federal Protection of Indian Resources: Hearings before the Subcommittee on Administrative Practice and Procedure of the Senate Committee on the Judiciary*, 92nd Cong. (1971).

[93] Ibid., 4.

the respective chairmen of the WMAT and YAN tribal councils requested that the federal government review the Salt River Agreement.[94] The request came at a time when the Agreement was in its final stages of approval. Riggins reported to the SRP Board that BIA attorney Harold Ranquist informed him that the DOI Solicitor approved the agreement but recent meetings between Senator Kennedy and Camp Verde and White Mountain Apache officials resulted in tribal members wanting to review the agreement further. Representatives from the BIA met with members of the respective tribal councils involved in the Salt River Agreement in March 1973 to discuss their concerns about the settlement.[95] Following the meeting, each of the tribes requested an independent study of the agreement.[96] The BIA approved funding for the study and the results estimated that the future water needs of the tribes quadrupled the total amount in the Salt River Agreement.[97] Ranquist wrote to the DOI Solicitor in September to inform him

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[94] *Federal Protection of Indian Resources: Hearings before the Subcommittee on Administrative Practice and Procedure of the Senate Comm. on the Judiciary, Part 5,* 92nd Cong. 1045 (1972).

[95] Notes, "Meeting re: Salt River Water Agreement," 16 March 1972, DOI Field Solicitor's Office.

[96] Harold A. Ranquist to Salt River Project, 19 May 1972, SRP Research Archives.

[97] VTN Consolidated Inc., *Multiple Objective Water Resources Study and Inventory Program: Fort Apache, San Carlos and Camp Verde-Yavapai Indian Reservations, Phase 1: Report on Water Supply and Demand*, 28 June 1974, DOI Field Solicitor's Office, II-28.

that the tribal councils had withdrawn their support for the settlement and requested a more detailed study.[98] The study took over a year to complete and by this time SRP was well on its way to considering other options to bring about a determination of Indian water rights. On April 26, 1974, SRP filed a petition with the SLD to adjudicate all the water rights on the Salt River, setting in motion a legal process that continues to this day.[99] The filing of this petition marked the beginning of a general stream adjudication on the Gila River and its tributaries that would come to involve most of the water users in central Arizona. The resumption of litigation set back efforts to negotiate Indian water rights for over a decade.

Conclusion

The Salt River Agreement ultimately fell victim to many of the same differences among federal agencies that plagued earlier attempts to reach a settlement in the 1950s and 1960s. However, to attribute the Agreement's failure solely to bureaucratic discord, or conflicts of interest among federal agencies, overlooks the larger transition that was occurring at the local, state, and federal level regarding the treatment of Indian communities. The Kennedy hearings were the first of several Congressional investigations that would take place in Arizona

[98] John H. Germeraad to Kent Frizzell, 15 November 1974, DOI Field Solicitor's Office.

[99] Robert E. Hurley to Andrew L. Bettwy, 29 April 1974, SRP Research Archives.

during the 1970s that directly challenged the federal government's past efforts to uphold tribal claims. This ushered in a new period in which federal attorneys increasingly realized that the federal reserved rights claims needed to be fully asserted and protected and they could not be ignored in the face of competing claims made by non-Indian water users. State and local water users resisted efforts to resolve Indian claims on the federal level and much of the litigation that occurred resulted from local efforts to control the process that would be used to adjudicate Indian water rights claims. With the exception of a few isolated settlements, the 1970s and early 1980s was not a period of intense negotiation as litigation ensued over key jurisdictional questions. Only after several U.S. Supreme Court rulings in the early 1980s did the opportunity present itself to again try to negotiate Indian claims.

The Salt River Agreement signaled the end of an era in the non-Indian approach to Indian water rights claims. Whereas state and local parties had previously not fully acknowledged that Indian water rights claims were superior in many instances to state water rights, now SRP spearheaded an effort to adjudicate all water rights in Arizona, including those of Indian communities. This was an important development because it recognized that Indian water rights were real and needed to be quantified. It also acknowledged that the extensive claims in Arizona could not be resolved solely by producing "new" water, but would require existing users to give up some of the water they were claimed. This realization ushered in a period of intense litigation as non-Indian and Indian

parties alike tried to determine the process that would be used to adjudicate Indian water rights claims. The events of the following period demonstrate one of the clearest examples of regional stakeholders trying to determine the rules of the game for reformulating water allocations.

Chapter 4

DIVIDING A LARGER WATER PIE: THE CENTRAL ARIZONA PROJECT AND WATER RIGHTS ADJUDICATIONS

Introduction

The change in the federal approach to Indian water rights was part of a larger shift in federal Indian policy that began in the early 1960s. The termination policies of the 1950s failed to improve the standard of living on most Indian reservations, while rapid population growth in the western United States threatened to further encroach on tribal natural resources. A new federal policy of tribal self-determination, pursued by the Kennedy, Johnson, and Nixon administrations, focused on giving Indian leaders the authority, resources, and assistance they needed to develop their own economic initiatives and plot the future direction of their reservations. Tribal leaders seized on the financial, technical, and administrative resources offered by federal agencies to address problems of high unemployment, and the inadequate public infrastructure, housing, and educational services that restricted reservation development for much of the twentieth century. Legislative and administrative reforms decentralized federal involvement with tribes from its historic center within the BIA to others agencies of the federal government. The result was that tribes were empowered to take a more active role in the management of their economic

affairs, which served as the basis for their claims for greater access to water resources.

The focus on economic development programming on Indian reservations changed the rationale underlying Indian water rights claims and challenged many of the principles that had dictated Arizona's water distribution structure. Tribal advocates no longer relied solely on the assertion of legal principles and instead sought to demonstrate how increasing water supplies would translate into economic growth on reservations. Most tribes in central Arizona focused their case for more water around initiatives to reestablish agriculture on their reservations, an important economic activity steeped in cultural and social significance. Indian farmers did not participate in the massive growth of irrigated agriculture in central Arizona during the 1940s and 1950s and by the late 1960s they were looking to expand their farming operations and take control of land management decisions from the BIA. While tribes endeavored to grow their agricultural base, the urbanization of Phoenix and Tucson presented challenges for the existing water allocation structure in Arizona. Indian water rights and the economic goals of Indian communities became part of a larger dialogue about how the state would meet its long-term water demands.

The heightened attention on the issue of Indian water rights also resulted from sweeping changes in federal water policy and resource management following the election of Jimmy Carter in 1976. In one of his first acts as President, Carter sent Congress a list of nineteen water projects to be eliminated

and several more that required further consideration. Included on the list was the CAP, a water delivery project over three decades in the making that was designed to allow Arizona to utilize its full entitlement to the Colorado River. The fate of the CAP became intertwined with the resolution of Indian water rights in Arizona when Administration officials attempted to use the Project as a bargaining chip in getting non-Indians to negotiate. Tribal leaders used this era of reform to lobby Congress and the DOI to allocate a major share of CAP water to support the expansion of Indian agriculture and resolve the tribes' *Winters* rights. This lobbying effort motivated some members of Congress to consider for the first time the use of legislative settlements to resolve Indian water rights claims as an alternative to protracted litigation. The debate over CAP allocations during this period presaged the central role that Project water would play in Indian water rights settlements. By the early 1980s, Indian water rights were a major source of uncertainty for Arizona's non-Indian water users and the first attempts to negotiate settlements gained traction as part of a broader effort to adjudicate all water rights in central Arizona.

The "War on Poverty" in Indian Country

Most Indian reservations in Arizona at mid-century were trapped in a self-perpetuating cycle of underdevelopment and poverty in which tribal members were increasingly dependent on resources found outside their reservations while the natural resources of their reservations remained underutilized. The resolution

of Indian water rights claims became part of a larger effort by tribal communities and the federal government to use the vast resources of Indian reservations to stimulate economic growth. Living conditions of many reservations were bleak, according to researchers from the University of Arizona who concluded that the "[r]eports of the condition of Arizona tribes...reveal uniformly low family incomes, situations of undeveloped or inadequate natural resources and high per capita incidence of welfare cases."[1] Unemployment rates, ranging from eighteen to forty-five percent, were the result of decades of underdevelopment and a lack of opportunities for tribal members.[2] For those who were employed, most were engaged in seasonal work outside the reservation and they relied either on government assistance or small farming plots to supplement their income.

The greatest source of employment for Indian workers was found in Arizona's agricultural industry, where economic conditions were causing a shift away from manual labor. Employment in the industry peaked in the early 1950s and declined steadily along with an increase in mechanization, particularly in

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[1] William H. Kelly, *Indians of the Southwest: A Survey of Indian Tribes and Indian Administration in Arizona* (Tucson: Bureau of Ethnic Research, 1953), 13.

[2] "O.E. Whelan Presentation to AEDC Group," in Memorandum, Clint E. Johnson to Special Task Force for Indian Reservation Development, 1 August 1967, SRP Research Archives.

cotton harvesting, which dominated the agricultural labor market.[3] By 1962 total employment was cut in half.[4] The Arizona Employment Service, which served as the main source of work placements for Indian workers after taking over this responsibility from the BIA in 1950, saw its agricultural placements decline by nearly two-thirds from 1962 to 1970.[5] Changes in Arizona's agricultural economy jeopardized the already-precarious position of Indian workers, who received the lowest per capita income of any ethnic group employed in agriculture.[6] The cumulative effect on Indians was a greater reliance either on diminishing economic opportunities off the reservations or on government assistance, both of which were outside their direct control.

Changes in federal Indian policy in the early 1960s were intended to break this cycle of poverty and dependence by giving tribal leaders the resources they needed to develop reservation economies. Prior programs to stimulate business

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[3] Statistics from the annual reports of the Arizona State Employment Service show that 92% of the cotton harvest was mechanized by 1962. This was a 46% increase from 1958.

[4] Farm Placement Section, "Agricultural Employment in Arizona, 1950-1964" (Phoenix: Arizona State Employment Service, 1964).

[5] *Eleventh Annual Report on the Expanded Employment Services to Reservation Indians in Arizona for the Calendar Year 1962* (Phoenix: Arizona State Employment Service, 1963). See also annual reports twelve through eighteen.

[6] Harland Padfield and William E. Martin, "Farmers, Workers, and Machines: Technological and Social Change in Farm Industries of Arizona" (Tucson: University of Arizona, Bureau of Business and Public Research, 1965), 167.

activity undertaken by the BIA during the 1950s failed to yield results, primarily because of the lack of critical infrastructure necessary to support industrial development.[7] In the summer of 1961, President John F. Kennedy's Task Force on Indian Affairs released a report outlining recommendations for setting Indian affairs on a "New Trail." The report called for programs that would attract industries to reservations and provide vocational training to tribal members. The task force also recommended that surveys be conducted to catalogue the natural resources of reservations and use this information to develop master development plans.[8] The task force's recommendations focused greater attention on the underutilization of tribal resources, both human and natural.

One of the task force's primary recommendations was incorporated into the Area Redevelopment Act of 1961, which gave the Department of Commerce wide-ranging authorities to provide assistance to designated "redevelopment

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[7] The BIA launched an Industrial Development Program in 1955. The program had limited success and an analysis of the program found that "[n]o industries have actually been established on or near Indian reservations as a result of the Industrial Development program. See Arthur M. Lee, "The Bureau of Indian Affairs' Industrial Development Program: An Analysis Prepared for the Secretary of the Interior," 1958, AHF.

[8] Raymond V. Butler, "The Bureau of Indian Affairs: Activities Since 1945," *Annals of the American Academy of Political and Social Science* 436 (1978): 55; Thomas Clarkin, *Federal Indian Policy in the Kennedy and Johnson Administrations, 1961-1969* (Albuquerque: University of New Mexico Press, 2001): 27-28.

areas" that suffered from persistent high unemployment and low income levels.[9] The high unemployment rates on Indian reservations made them ideal candidates for loans and grants from the newly-created Area Redevelopment Administration (ARA) that could be used to fund technical assistance and planning studies and to construct public works.[10] The ARA instituted a decentralized planning structure in which local officials were responsible for preparing an Overall Economic Development Plan (OEDP) that detailed the problems and opportunities in the redevelopment area. This administrative structure was a departure for Indian communities who traditionally relied on financial support and technical assistance almost exclusively from the BIA. In preparing their OEDPs, which for many Indian communities represented their first economic development plan, tribal leaders communicated their priorities directly to federal officials.

Indian communities in Arizona were quick to respond to the program; in the three years following the creation of the ARA, nine Indian reservations had plans approved.[11] The OEDPs prepared by two of the largest central Arizona tribes, the GRIC and the Salt River Pima-Maricopa Indian Community (SRPMIC), demonstrate the extent to which tribal leaders viewed agriculture as

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[9] *Area Redevelopment Act*, Pub. L. No. 87-27, 75 Stat. 47 (1961).

[10] S. Rep. No. 87-256 (1961) (Conf. Rep.).

[11] *Annual Report on the Area Redevelopment Administration, 1961-1962* (Washington D.C.: Department of Commerce, 1962), 37.

the key to their reservation's development. The GRIC plan identified "[i]rrigable land [as] probably the most important single natural resource of the GRRA [Gila River Redevelopment Area] being used at the present time." It also offered the greatest potential upside as 95% of tribal lands and 75% of allotted lands were not being farmed at the time the plan was written.[12] The GRIC recognized that farming this additional land would require a plan to "...furnish the area a water supply of suitable quantity and quality."[13] The plan prepared by the SRPMIC expressed a similar desire to expand reservation agriculture, stating that "[t]he Salt River Tribal Council feels that the key to the future development of the whole of the SRRA [Salt River Redevelopment Area] will be in the development of its agricultural lands."[14]

Most of the reservations in central Arizona were well suited for agriculture because they contained large quantities of flat, arable land and could access both surface water and groundwater supplies. They also confronted major obstacles. The primary challenge was in securing additional sources of water that could be used to bring new lands into production, but they also encountered difficulty in accessing credit to fund land and infrastructure improvements, complicated land

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[12] "Preliminary Over-all Economic Development Plan, Gila River Redevelopment Area, Sacaton, Arizona," 1962, p. 6, Arizona Collection, Hayden Library, ASU.

[13] Ibid., 13.

[14] "Preliminary Over-all Economic Development Plan, Salt River Reservation Redevelopment Area, Arizona," 1961, pp. 9-10, Arizona Collection, Hayden Library, ASU.

ownership and heirship issues that made the consolidation of lands difficult, and a need for technical assistance in managing their farming enterprises. Most of these obstacles were not remedied by federal assistance programs, which focused more on industrial development as the best method for employing Indian workers. As a result the desire expressed by tribal leaders to increase agricultural production did not find support within the ARA.

The priorities of tribal communities and federal officials were not aligned in the implementation of ARA programs and by 1965 Arizona had received only one grant, no loans, and minimal technical assistance and job training support.[15] The experience of Indian communities in Arizona mirrored a national trend that saw tribes receive approximately $4,000,000 in grants, loans, and training between 1961 and 1965 out of a total of $322,877,000 distributed nationally.[16] However, two pieces of federal legislation, passed in 1964 and 1965, did manage to spur a period of intense economic development activity on Arizona reservations. The Economic Opportunity Act of 1964 was the centerpiece of President Johnson's "War on Poverty." It created the Office of Economic Opportunity (OEO), which oversaw programs such as Head Start, Job Corps, Volunteers in Service to America (VISTA), and the Community Action Program.

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[15] *Annual Report on the Area Redevelopment Administration, 1964-1965* (Washington D.C.: Department of Commerce, 1965), 15.

[16] A. Bruce Johnson, "Federal Aid and Area Redevelopment" *Journal of Law and Economics* 14, no. 1 (1971): 278.

Appropriations were also made to fund a wide variety of employment training and grants to local authorities to alleviate poverty.[17] The Public Works and Economic Development Act of 1965, which modified and replaced the ARA with the Economic Development Administration (EDA), complimented this far-reaching legislation. The EDA was empowered to make grants and loans available to communities for public works and other facilities.[18] Both pieces of legislation picked up on the idea of local coordination pursued by the ARA, but they included more resources to fund a wider variety of programs and development projects.

The emphasis on local participation in the "War on Poverty" programs allowed Arizona tribes to coordinate their own activities and organize more effective coalitions. This process started with the creation of non-profit tribal development corporations that oversaw industrial developments on Indian reservations. These corporations were set up as joint ventures with neighboring municipalities in order to give tribes more flexibility in accessing credit and grant opportunities. In July 1965 the San Carlos Apache-Globe Development Corporation became the first state-chartered, non-profit development corporation

[17] S. Rep. No. 88-1218 (1964).

[18] Robert Estall, "Regional Planning in the United States: An Evaluation of Experience under the 1965 Economic Development Act," *Town Planning Review* 48, no. 4 (1977): 341-364.

of its kinds in the nation.[19] Other Arizona tribes quickly followed suit. In 1966 the SRPMIC formed a similar corporation and the GRIC created three separate corporations with neighboring cities.[20] The formation of tribal corporations was followed by efforts to unite the various tribes in Arizona into a single organization that would support the common goal of economic development. The Indian Development District of Arizona (IDDA) was created in August 1967 to provide technical assistance and access funding from the EDA. The fourteen participating tribes from throughout the state were divided into planning areas that allowed them to qualify as districts under the EDA legislation.[21] The creation of development corporations and inter-tribal advocacy groups was an important step in the process of fostering more cooperation among tribes, cities, and the state. It also represented a departure from a past where Indian tribes advocated for their interests individually. This growing interest in cooperating on issues of common interests helped tribes form coalitions that could communicate more effectively with local, state, and federal officials. For five central Arizona tribes, the IDDA

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[19] "O.E. Whelan Presentation to AEDC Group."

[20] Articles of Incorporation of Salt River Pima-Maricopa Development Corporation, 11 October 1966, SRP Research Archives; "City, Gila River Indian Community Form Development Corporation," *Chandler Arizonan*, October 26, 1966.

[21] Articles of Incorporation of Indian Development District of Arizona, 11 August 1967, Arizona Collection, ASU Hayden Library; "The Indian Development District of Arizona: An Interpretive Summary," 22 January 1968, Arizona Collection, Hayden Library, ASU.

planning district served as the starting point for a collaboration to settle their water rights claims. The South Central Planning Area of the IDDA was comprised of five tribes who shared the common goal of expanding agriculture on their reservations. The group, which became known as the five central Arizona tribes or the Five Tribes,[22] formed a coalition to lobby members of Congress to address their water situation. An important part of the justification used by the Five Tribes to build their case for additional water supplies was the success of the farming enterprise of the Ak-Chin Indian Community. In 1961 the Ak-Chin Tribal Council took over management of land that was previously leased to non-Indian farmers to start a tribal farm. The enterprise was so successful that by 1968 they were generating profits and none of the 21,840-acre reservation was under lease.[23] However, the farm, which relied entirely on groundwater, ran into difficulty when pumping by farmers outside the reservation caused groundwater levels to decline by approximately twenty feet per year.[24] This translated into higher costs to pump groundwater and diminished the tribe's ability to farm all the land available on

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[22] This group included the Ak-Chin Indian Community, Fort McDowell Indian Community, Gila River Indian Community, Papago Tribe (Tohono O'odham Nation), and the Salt River Pima-Maricopa Indian Community.

[23] *Indian Agriculture: Hearings Before the Select Comm. on Indian Affairs*, 101st Cong. 108 (1989) (statement of Leona M. Kakar, Chairman of the Ak-Chin Farm Board).

[24] Memorandum, Solicitor, U.S. Department of the Interior, 9 December 1976, in *Water for Five Central Arizona Indian Tribes for Farming Operations: Hearings Before the Select Comm. on Indian Affairs*, 95th Cong. 454-465 (1977).

the reservation.[25] The circumstances surrounding the Ak-Chin farm made a compelling case for action on Indian water rights because the tribe was self-sufficient by their own initiative and they were employing almost every tribal member in the farming enterprise. The Ak-Chin offered a tangible example of a tribe that was being hurt by the government's inability to protect tribal water supplies and their case was used by the Five Tribes to lobby federal officials to take action on their water rights.

If the success of the Ak-Chin's farming enterprise could be replicated on the larger Gila River, Salt River, and Tohono O'odham reservations, it would put the Five Tribes in a powerful position to demonstrate an immediate need for additional water supplies. In 1968 the GRIC Tribal Council reorganized their fledgling community farm along similar lines as the Ak-Chin; they hired a new farm manager, retired their outstanding debt, and outlining a plan to take over 14,000 acres of land that was being leased to non-Indians.[26] The potential for agriculture on the Gila River reservation was the largest of any of the Five Tribes because it was comprised of over 350,000 acres, approximately half of which was capable of being farmed. The tribe made it clear this was their goal in a 1972

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[25] *Indian Water Rights of the Five Central Arizona Tribes: Hearings Before the Comm. on Interior and Insular Affairs*, 94th Cong. 370-375 (1975) (statement of Wilbert J. Carlyle, Chairman of the Maricopa-Ak-Chin Indian Community).

[26] "Five Year Program for the Development of the Agricultural Economy of the Gila River and Ak-Chin Indian Reservations," box 152, folder 1, John J. Rhodes Papers, Arizona Collection, Hayden Library, ASU.

General Community Plan that estimated that 161,458 acres, or approximately 43% of the reservation land area, would be devoted to agriculture in the future.[27] At the time the plan was published, the tribe was only farming approximately 30,000 acres and the entire irrigated farmland of the Five Tribes amounted to just over 45,000 acres.[28] To accomplish such a dramatic increase in agricultural production, the Five Tribes set their sights on water from the CAP, which was authorized by Congress in 1968 to bring 1.2 million acre-feet (af) of Colorado River water to central Arizona. However, there were many interests competing for access to the CAP water and the process of determining an allocation structure consumed the issue of Indian water rights during the 1970s.

Tapping a New Water Source: Authorizing the Central Arizona Project

The resolution of *Arizona v. California* in 1963 paved the way for the consideration of water infrastructure developments in the Lower Colorado River Basin that were put on hold as a result of the legal controversy. Following the Supreme Court's ruling, considerable disagreement surfaced among members of Congress and the Administration about the best approach for authorizing new water development projects. Arizona's Congressional delegation was the first to

[27] "General Community Plan: Gila River Indian Community, Arizona" (Scottsdale: Van Cleve Associates, Inc., 1972), 45.

[28] Figures are drawn from the Bureau of Indian Affairs [BIA] crop reports in "CAP-Indian Water Project" (Phoenix: Board of Consultants, 1972), 32.

act; Senators Carl Hayden and Barry Goldwater introduced a bill to authorize construction of the CAP the day after the Supreme Court's decision. Congressmen Rhodes, Senner, and Udall, followed later with companion bills in the House.[29] While the Arizona delegation was eager to see their long-delayed project finally come to fruition, the Administration, with the support of Wayne Aspinall, chairman of the House Interior and Insular Affairs Committee, favored a comprehensive basin-wide plan that incorporated projects in several states.[30] In August 1963 Secretary of the Interior Stewart Udall unveiled the Pacific Southwest Water Plan (PSWP) on the day before hearings were set to begin on the CAP legislation.[31] The PSWP was a $4,000,000,000 proposal that called for the construction of new dams and power plants in five states, and water delivery aqueducts to augment the water supply of the Lower Basin.[32] Though the plan included the CAP, the Arizona delegation did not support the proposal, which

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[29] 109 Cong. Rec. 9,946 (1963); 109 Cong. Rec. 10,175 (1963).

[30] Rich Johnson, *The Central Arizona Project, 1918-1968* (Tucson: University of Arizona Press, 1977), 131.

[31] Johnson, *Central Arizona Project*, 146-147.

[32] *Central Arizona Project: Hearings before the Subcommittee on Irrigation and Reclamation of the Comm. on Interior and Insular Affairs*, 88th Cong. (1964).

Senator Hayden claimed California was using as "...an instrument of delay."[33] Hayden's assessment proved prescient as consideration of the CAP legislation was delayed by the controversy over the components of a regional water plan.[34]

The makings of a compromise were embodied in legislation introduced by Congressmen from Arizona and California in 1965. At the heart of the agreement was a commitment by Arizona that water delivered through the CAP would be at a lower priority than California's 4.4 million af entitlement. Though there was general agreement on the elements of the CAP, the parts of the legislation that called for the importation of water from the Pacific Northwest brought opposition from Henry Jackson, a Senator from Washington and chairman of the Senate Committee on Interior and Insular Affairs. A breakthrough came in 1967 when the Senate passed S. 1004, which authorized construction of the CAP along with five Upper Basin projects. The bill created the Lower Colorado River Basin Development Fund (LCRBDF) to collect excess power revenues from Hoover and Parker-Davis dams that could be used to fund the construction of the CAP and other water conservation and development projects.[35] It took until May 1968 for

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[33] *Central Arizona Project: Hearings Before the Subcommittee on Irrigation and Reclamation of the Comm. on Interior and Insular Affairs*, 88th Cong. 8 (1963).

[34] Chapin D. Clark, "Northwest-Southwest Water Diversion: Plans and Issues," *Willamette Law Journal* 3 (1964-1965): 220-223.

[35] S. Rep. No. 90-408 (1967).

the House to follow suit and pass legislation authorizing the CAP. The differences in the House and Senate versions meant that bill would have to be resolved by a conference committee.[36] The conference report issued in early September 1968 increased the capacity of the CAP aqueduct and adopted the House language that made permanent the priority of California's 4.4 million af entitlement. On September 30, 1968, President Lyndon Johnson signed the Colorado River Basin Project Act into law, marking the end of Arizona's long battle to authorize the CAP and the beginning of the controversy over how the state's Colorado River entitlement would be distributed.[37]

The CAP legislation did not appear on its surface to deliver any immediate benefits to Arizona Indian communities, but as time passed the Project proved to be the most significant bargaining chip in Indian water rights settlements. This is due to the fact that the water delivered through the CAP represented the last major source of unallocated surface water in the state. The difficulty in passing the Colorado River Basin Project Act signaled a change in the federal government's willingness to invest in large, financially-problematic water storage and diversion schemes and there was no guarantee additional water would be made available in

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[36] Johnson, *Central Arizona Project*, 220.

[37] *Colorado River Basin Project Act*, P.L. 90-537, 82 Stat. 885.

future from new development projects. The final legislation only incorporated a portion of the original PSWP, which called for two dams to be constructed in the Grand Canyon to serve as "cash registers" that could funnel revenues from power sales to other parts of the project.[38] The elimination of these dams was the result of fierce lobbying from environmental and conservation groups like the Sierra Club. Even Secretary Udall acknowledged that his grandiose basin-wide proposal would in all likelihood not come to fruition. In his book *The Quiet Crisis*, published in 1963, Udall wrote, "...it became increasingly clear to me in '61, '62, '63....[T]he big dam building era was over."[39] These developments were not lost on Arizona's water users and politicians who, after waging a decades-long battle to get the CAP authorized, quickly turned their attention to the question of how the water from the Project would be allocated. Indian tribes were eager to get a share of the CAP, and a provision in the authorizing legislation afforded them special status by allowing the delivery of water to Indian lands that did not have a recent history of irrigation, a condition that did not apply to other agricultural

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[38] Byron E. Pearson, "Salvation for Grand Canyon: Congress, the Sierra Club, and the Dam Controversy of 1966-1968," *Journal of the Southwest* 36, no. 2 (Summer, 1994): 159-175.

[39] Quoted in Robert Dean, "'Dam Building Had Some Magic Then': Stewart Udall, the Central Arizona Project, and the Evolution of the Pacific Southwest Water Plan, 1963-1968," *Pacific Historical Review* 66, no. 1 (Feb., 1997): 88.

lands.[40] The priorities that would be used to guide allocation decisions remained an area of significant disagreement among state, federal, and tribal representatives.

Dividing the Water Pie: Allocating the Central Arizona Project

The process of determining the allocation of the CAP dominated the dialogue on Indian water rights both in Arizona and Washington D.C. in the early 1970s. Competing viewpoints on whether Project water should be used to satisfy Indian claims divided the agencies of the DOI and highlighted the conflicts of interest that undermined the federal government's ability to fulfill its trust obligation to Indian communities. The CAP allocation process differed from prior attempts to settle Indian water rights claims because the Secretary of the Interior was in control of the distribution process and was thus in a position to deliver water directly to Indian tribes in satisfaction of their *Winters* claims. CAP water was also not being used by existing water users, which made it a more attractive source for satisfying Indian claims.

The authorizing legislation gave the Secretary broad discretion in making allocations and key issues, such as the priority of the various allocations and guidelines for sharing water during shortages, were not specifically addressed.

[40] This provision is found in Section 304(a). See H.R. Rep. No. 90-1861, at 6 (1968) (Conf. Rep.).

However, the Bureau of Reclamation (BOR)—the agency responsible for overseeing construction and management of the Project—opposed the idea of allocating a majority of the CAP supply to Indian uses. State and local officials in Arizona agreed and recommended to the Secretary that the Project be used to meet growing urban demand instead of providing irrigation water for the tribes. The debate that ensued highlights the tensions between urban water users and Indian tribes over the priorities that should guide the CAP allocation process.

In January 1969 Secretary Udall solicited expressions of interests from water users in Arizona who wanted to receive CAP water. The Five Tribes responded to Udall's solicitation with a combined request for 1,219,200 af of water for both irrigation and municipal and industrial (M&I) purposes.[41] Tribal leaders made it clear to federal officials that they viewed the allocation process as an opportunity to right past wrongs by supplying water to the tribes in fulfillment of their *Winters* rights claims. The GRIC expressed a sentiment shared by many tribal advocates at the time that "[t]he CAP...offers the dominant society an opportunity to compensate for the shabby treatment afforded Indian water rights in the past."[42] The situation could only be remedied, in the minds of

[41] "CAP-Indian Water Project," 13.

[42] "General Community Plan," 51.

many tribal advocates, by satisfying Indian claims first, before delivering water to other users. Legal rights were not the only basis for the Five Tribes' request. In testimony before Congress, the Farm Manager for the Ak-Chin offered a stark assessment of the consequences if the tribe did not receive CAP water, stating that "...our only chance to maintain our economy is the Central Arizona Project."[43] The tribes' argument for CAP water rested both on the assertion of superior legal claims and the necessity of water to further their economic development plans.

Fulfilling the Five Tribes' request would require nearly the entire projected annual CAP supply of 1.2 million af. According to BOR projections, under natural conditions this supply was expected to decline to 676,000 acre-feet per year (afy) by 2030.[44] The Five Tribes were not the only ones trying to gain access to a significant portion of the CAP, in fact their combined request amounted to only 24% of the total requests received by the Secretary. The magnitude of the expressed demand caused tension between Indian tribes, municipalities, and agricultural interests over who should receive priority in allocation decisions.

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[43] *Federal Protection of Indian Resources: Hearings Before the Subcommittee on Administrative Practice and Procedure of the Comm. on the Judiciary*, 92nd Cong. 1025 (1972) (statement of Wayne Sprawls, Farm Manager of Ak-Chin Farms).

[44] *Colorado River Basin Project Part II: Hearings Before the Subcommittee on Irrigation and Reclamation of the Comm. on Interior and Insular Affairs*, 90th Cong. 761 (1968).

In the hours of testimony before Congress in the years leading up to the authorization of the CAP, a steady stream of Arizona politicians, water managers, and businessmen characterized the Project as absolutely necessary to prevent a water crisis. Originally, this argument was couched in terms of its effect on Arizona's agricultural economy and the need to stop the groundwater overdraft being caused principally by irrigated agriculture, but as Arizona's cities urbanized at a tremendous rate following World War II, municipal leaders began to view the CAP as a future urban water supply.[45] The allocation process turned into a debate between agricultural and urban water users about the purpose of the Project, which was fueled by a lack of clarity in the authorizing legislation. Thus, tribal requests to use their CAP allocation for agriculture faced opposition both from urban users and non-Indian agricultural interests.

The Congress recognized that continued urbanization in Arizona would cause changes in the use of CAP water and that "[t]he transition from an agricultural economy dependent on irrigation to a strong, diversified industrial economy is inevitable. Industrial and municipal uses of water will, in the long run,

[45] W. Michael Hanemann, "The Central Arizona Project" (Working Paper No. 937, Department of Agricultural and Resource Economics and Policy, Division of Agricultural and Natural Resources, University of California Berkeley, 2002), http://are.berkeley.edu/~hanemann/cap.pdf.

support a larger and more affluent population..."[46] A provision in the authorizing legislation restricted the use of CAP water on non-Indian lands to those that had a recent history of irrigation, which ensured that as agricultural lands were taken out of production, due to the expansion of urban development, water would be freed up for M&I users.[47] The only way to stop this inevitable transition, apart from an unexpected stop to urban sprawl, was to dedicate a significant portion of the CAP supply to bring new agricultural lands under development on Indian reservations, where urbanization could be strictly regulated. The prospect of growing urban water demand was at the heart of the protests to the Five Tribes' request for a major stake of the CAP supply.

The belief that CAP water should be used to satisfy long-term urban demand garnered support from the two entities most responsible for the delivery and use of CAP water in Arizona. This included the Arizona Water Commission (AWC), a state agency created in 1971 to oversee many of the state's water management responsibilities, and the Central Arizona Water Conservation District (CAWCD), the legal entity created by the Arizona legislature in the same year to contract for the delivery of CAP water and repay the federal government. The

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[46] H.R. Rep. No. 90-1312, at 54 (1968).

[47] James P.F. Egbert, "Arizona Water Resource Management Problems Created by the Central Arizona Project," *Arizona Law Review* 14 (1972): 170.

AWC completed a series of studies concerning how CAP supplies could be allocated to the various sectors of Arizona's economy. Underlying their evaluation was the belief "...that water should be first allocated to meet all reasonable and effective M&I water demands..." before supplying water for agriculture.[48] Using this rationale, the Commission concluded that over fifty percent of the CAP supply should be devoted to M&I and recreational uses by 2030.[49] Water available in the early years of the project could be used to support agriculture as the state continued to urbanize. The Commission's stated objective in these studies was to maximize economic and social returns, but its recommendations relied on an assumption that agriculture should be phased out over time to give way to urban uses. This view was not reflected in the economic plans of tribal communities who sought to expand agricultural production on their reservations.

The Five Tribes objected to the evaluation process used by the AWC and requested their own independent study to make recommendations to the Secretary concerning allocations.[50] A consultant hired by the BIA to perform the analysis concluded that 974,800 af of CAP agricultural water was needed to established a

[48] "CAP-Indian Water Project," 10.

[49] Ibid., 12.

[50] Wes Steiner to Members of the Water Allocation Advisory Board, 28 April 1972, SRP Research Archives.

"stable economy" for the Five Tribes and that a minimum of 445,500 af should be allocated. Allocating the full 974,800 af would allow the Five Tribes to farm most of the arable land on their reservations and satisfy their *Winters* rights as calculated under the PIA standard.[51] The recommendations bolstered the tribe's request, but it did not change the thinking of state officials. After the release of the study, the AWC recommended to the Secretary that the tribes received a maximum of 17,700 af for M&I uses and 8.5% of the CAP supply devoted to agriculture use, or approximately 102,000 af during the early years of the Project.[52] The state's recommendation clearly reflects a belief that the CAP should not be used to satisfy Indian water rights claims.

The differences between state and tribal representatives became even more apparent as the respective sides sought to influence the Secretary's decision. Secretary of the Interior Rogers Morton issued his first major decision concerning the allocation process in December 1972 when he established a set of priorities for CAP irrigation water. Morton decided that CAP water delivered to Indian lands would not require reductions in groundwater use and that tribes "...shall receive a

[51] "CAP-Indian Water Project," 18.

[52] Douglas K. Miller, "The Use of Central Arizona Project Water in Indian Water Rights Settlements in Arizona," 13 February 2007, copy in author's possession.

relative advantage over non-Indian land..." in the allocation of irrigation water.[53] Arguably the most important decision, however, was the division of water between M&I and agricultural uses that was at the center of the differing recommendations of the AWC and the Indian tribes. Morton did not quantify a distribution in his 1972 decision, but he decided that in times of shortages M&I uses would be reduced only after all other uses were exhausted.[54] The decision seemed to affirm the AWC's method for maximizing benefits and was similar to a provision contained in the December 15, 1972 Master Repayment Contract between the United States and the CAWCD. Attorneys for the Five Tribes objected to the provision in the contract along with the BIA, who claimed that the decision was contrary to assurances made by the Secretary.[55] The decision was a setback of the Five Tribes whose request could not be satisfied if all M&I requests were fulfilled.

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[53] Department of the Interior, Office of the Secretary, Central Arizona Project, Arizona, Water-Use Priorities and Allocation of Irrigation Water, 37 Fed. Reg. 28,082 (Dec. 15, 1972).

[54] Ibid.

[55] Miller, "The Use of Central Arizona Project Water," 4; Memorandum, Commissioner of Indian Affairs to Solicitor, 24 September 1975 in *Indian Water Rights of the Five Central Arizona Tribes: Hearings Before the Committee on Interior and Insular Affairs*, 94th Cong. 36 (1975).

Following the announcement of the priorities that would guide the CAP allocation, the debate turned to the specific division of Project water. DOI officials were well aware of the Five Tribes *Winters* claims during their deliberation process. A memo from the Associate Solicitor of Indian Affairs to the DOI Solicitor in October 1973 calculated the extent of these claims at 977,400 afy, a figure that was less than 3,000 afy apart from the recommendation made by the Tribes' consultant. Despite the possibility of making a claim of this magnitude, the Associate Solicitor recommended that the Five Tribes receive 250,000-300,000 afy of CAP water and he also offered suggestions for stopping the tribes from "...challenging the construction or water allocation of the Central Arizona Project."[56] The recommended allocation was only slightly larger than the figure proposed by the Commissioner of Reclamation a few months earlier, which was predicated on a policy that no new lands be brought into production on Indian reservations using CAP water. Instead, the water could be used on lands that were currently "developed."[57] The question of how to define developed lands resulted in a series of meetings between representatives from Reclamation, the Five Tribes,

[56] Associate Solicitor for Indian Affairs to Solicitor, 16 October 1973, Record Group [RG] 142, box 42, folder 16, Arizona State Library, Archives, and Public Records [ASLAPR], Phoenix.

[57] Commissioner of Reclamation to Secretary of the Interior, 10 May 1973, RG 142, box 42, folder 16, ASLAPR; K.C. Pinkerton to Projects Manager, 3 April 1974, RG 142, box 42, folder 16, ASLAPR.

and state officials during 1974.[58] The Bureau's position to only consider allocations for developed lands appears to be in contradiction with the authorizing legislation that exempted Indian lands from the prohibition on bringing new lands into production. The decision severely limited the tribes' ability to use the CAP as a means to expand their agricultural base.

Years of deliberations involving tribal, state, and federal officials culminated in a recommended allocation for the irrigation of Indian lands by Secretary Morton on April 15, 1975. In issuing his decision, Morton accepted many of the policies put forward by the BOR and allocated a fixed quantity of 257,000 afy during the first twenty years of the project, a figure that represented twenty percent of the projected irrigation water supply (see Table 2).

[58] Larry D. Morton to Projects Manager, 4 April 1974, RG 142, box 42, folder 16, ASLAPR; Thomas G. Burbey to Projects Manager, 5 April 1974, RG 142, box 42, folder 16, ASLAPR.

Table 2: 1975 CAP Indian Allocation	
Reservation	**Annual Allocation (af/year)**
Ak-Chin	59,300
Gila River	176,000
Papago (Tohono O'odham)	8,200
Salt River	13,500
Fort McDowell	0
Total	257,000
Source: Federal Register	

After 2005, when the CAP supply was expected to decline, Indian tribes would receive a percentage of the total available for irrigation. Morton reiterated his earlier policy statement that M&I uses should receive first priority and therefore concluded that "[a]fter the first 20 years all irrigators in central Arizona, Indian and non-Indian alike, will have to look to other sources than the water supply which is now being allocated...to supplement their groundwater supply."[59] The Secretary's allocation for Indian lands was based on several factors, including the

[59] Department of the Interior, Office of the Secretary, Central Arizona Project, Arizona, Proposed Allocation of Project Water for Indian Irrigation Uses, 40 Fed. Reg. 17,297 (April 18, 1975).

estimated supply of groundwater available to each tribe to support all lands that were "...presently developed for irrigation on the Indian reservations...."[60] In accepting the policies put forward by BOR to provide water only for developed lands, the Secretary did not come close to approaching the quantity requested by the tribes.

The Secretary's proposed allocation elicited protests from representatives of the Five Tribes. Z. Simpson Cox, an attorney for the GRIC who led the Five Tribes' CAP allocation process, requested that Congressional oversight hearings be held on the matter. Senator Henry Jackson granted Cox's request and chaired hearings in Washington D.C. in October 1975.[61] The testimony before the Senate committee highlighted the fundamental difference between tribal representatives and DOI officials in their interpretations of the government's obligations to the tribes in the CAP allocation process. Loyde A. Allison, the spokesman for the Five Tribes at the hearings, requested that no final CAP allocation be made until the water rights of the Five Tribes were settled.[62] Interior officials attempted to

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[60] Ibid.

[61] Henry M. Jackson to Z. Simpson Cox, 11 September 1975, SRP Research Archives.

[62] *Indian Water Rights of the Five Central Arizona Tribes,* 94th Cong. 2-4 (1975).

divorce the issue of the CAP allocation from the settlement of the tribes' *Winters* rights:

> The Department did not intend that this proposed allocation should operate as a definition of legal rights, either to reduce or expand possible legal claims of any users; nor should the allocation be governed by these legal claims; rather the allocation was made, pursuant to Congressional authorization of the project, and the Congressional mandate to contract for project water, and to allocate this water for the benefit of all users....[63]

Part of the DOI's argument was based on the fact that the *Winters* claims of the Five Tribes were not to the Colorado River, and therefore the government had no obligation to satisfy these rights with the CAP supply. The fact that the Department had not addressed the water rights claims of the Five Tribes up that point was met only with promises to investigate the claims further. This did not stop the CAP process from moving forward and in October 1976 the Secretary's allocation was finalized without any resolution of the Five Tribes' claims.[64] The SRPMIC and GRIC attorneys responded by filing lawsuits against the Secretary

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[63] Ken M. Brown to Henry M. Jackson, 11 February 1976, in *Indian Water Rights of the Five Central Arizona Tribes,* 94th Cong. 563 (1975).

[64] Department of the Interior, Office of the Secretary, Central Arizona Project, Arizona, Allocation of Project Water for Indian Irrigation Uses, 41 Fed. Reg. 45883 (October 18, 1976).

of the Interior, CAWCD, and the AWC, among others.[65] The period of waiting for federal officials to act on Indian water rights claims was over and the tribes were eager to pursue their cases in court. The commencement of litigation did not bring an end to the tribes' efforts to resolve their claims through other means. In fact their situation garnered even more attention from members of Congress who viewed the CAP allocation process as inequitable.

A Legislative Approach: The Five Tribes Settlement Bill

Interior's promise to study the water rights claims of the central Arizona tribes was cold comfort for tribal advocates who had pushed the Department to assert these claims for decades. One of the most vocal critics of the federal government's handling of its tribal trust responsibility was Senator Edward Kennedy, who held hearings in Arizona in 1972 on Indian water rights issue.[66] Before the CAP allocation could be finalized, Kennedy introduced legislation that instructed the Secretary to acquire lands and divert the water rights to the Five Tribes. The acquisition of approximately 170,000 acres of land from non-Indian

[65] Salt River Pima Maricopa Indian Community v. Kleppe et al., CIV 76-796 PHX (1976); Gila River Indian Community v. United States et al., CIV 77-11 PHX (1977).

[66] *Federal Protection of Indian Resources: Hearings before the Subcommittee on Administrative Practice and Procedure of the Comm. on the Judiciary*, 92nd Cong. (1972).

water users would provide a firm supply of water to the tribes and eliminate any need for CAP water. The expected source of this water was in the Wellton-Mohawk Irrigation and Drainage District (WMIDD), located along the Colorado River near Yuma, Arizona. Kennedy reasoned that the settlement would actually save the government money by removing the need for a proposed desalination plant along the United States-Mexico border, which was being considered by Congress at the time to meet the terms of a 1944 treaty with Mexico. WMIDD contributed to the large amount of salt deposited into the river before it entered Mexico and Kennedy argued that retiring this land and transferring the rights to the Five Tribes would accomplish a dual purpose.[67] Kennedy's bill did not have any co-sponsors from Arizona's delegation and its introduction did not receive a warm reception from most non-Indian water users in Arizona. It did serve as an important first step in raising the potential for a legislative solution to Indian water rights claims.

The Kennedy bill amounted to a wish list for the Five Tribes. In addition to the acquisition of water rights to farm nearly every irrigable acre on their reservations, the bill included funds for the rehabilitation of irrigation infrastructure and directed the Secretary of the Interior to supply power at cost to operate groundwater pumps. Many of the contents of the bill were contained in a

[67] 122 Cong. Rec. 10,644 (1976)

proposal drafted by William Byler, an attorney for the Association of American Indian Affairs, and attorneys represented the Five Tribes.[68] In November 1975 Byler approached the staff of Morris Udall, a well-respected Representative from the Second District of southern Arizona and a long-time Indian advocate, about sponsoring legislation.[69] Udall was an influential member of the House and his support would go a long way in getting the necessary votes. Udall asked his brother, former Secretary of the Interior Stewart Udall, for his thoughts on the proposal, to which Stewart recommended that he not take any action because of the controversy it might generate.[70] Morris had announced his bid for the presidency earlier that summer and the political ramifications of his support likely factored into his decision to pass on the bill. The legislation did find strong support from several Democratic Senators including Philip Hart, Lee Metcalf, and Walter Mondale.[71] No hearings were held on the bill in 1976, but Kennedy used his position as chairman of the Subcommittee on Administrative Practice and

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[68] William Byler to Roger Lewis, 3 December 1975, MS 325, box 603, folder 6, Morris K. Udall Papers, University of Arizona (UA) Special Collections, Tucson.

[69] Roger Lewis to Morris K. Udall, 25 November 1975, MS 325, box 603, folder 6, Udall Papers, UA Special Collections.

[70] Stewart Udall to Roger Lewis et al., 1 December 1975, MS 325, box 603, folder 6, Udall Papers, UA Special Collections.

[71] 122 Cong. Rec. 19,446 (1976).

Procedure to continue raising the issue of Indian water rights.[72] Though no action was taken on the Kennedy bill during the 94th Congress, its introduction turned up the pressure on those who wanted to avoid the Indian water rights question.

The political landscape for Western water resources planning changed dramatically following the inauguration of Jimmy Carter as President in January 1977. During his campaign, Carter had spoken out against the construction of dams and public works projects that he felt were a waste of federal resources and damaging to the environment. One of his first major policy actions was to order a review of water projects that were either authorized or under construction by the BOR and the Army Corps of Engineers. Following the review, Carter submitted a proposed budget for fiscal year (FY) 1978 that recommended funding be eliminated for nineteen water infrastructure projects and another five, including the CAP, only be partially funded.[73] The proposal became known as the "hit list" and its release generated a great deal of controversy among members of Congress, state and local officials, and within Interior.[74]

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[72] *Indian Water Rights: Hearings before the Subcommittee on Administrative Practice and Procedure of the Committee on the Judiciary*, 94th Cong. (1976).

[73] S.J. Hadeen, "Several Water Resources Projects Survive Carter Cutback," *Journal of the Water Pollution Control Federal* 49, no. 5 (1977): 727-730.

[74] Paul E. Scheele, "President Carter and the Water Projects: A Case Study in Presidential and Congressional Decision-Making," *Presidential Studies Quarterly* 8, no. 4 (1978): 348-364.

Partly in response to the negative feedback to the "hit list", Carter transmitted a list of water policy initiatives to Congress in June 1978, covering issues such as water planning, conversation, and environmental protection.[75] The initiatives were the outgrowth of a water resources policy review initiated by the President in May 1977 and directed by the Office of Management and Budget (OMB), the Council on Environmental Quality (CEQ), and the Water Resources Council. As part of the study, DOI officials analyzed the current treatment of Indian water rights and recommended a number of policy actions, including the use of legislation and negotiated agreements as two methods for resolving Indian water rights claims.[76] The continued uncertainty surrounding key legal issues, such as the jurisdiction of state courts to adjudicate Indian water rights, made legislative approaches an attractive alternative to litigation for resolving Indian claims.

A legislative solution to the Indian water rights issues in Arizona began to gain traction in Congress in early 1977. In March Senator Kennedy reintroduced his Five Tribes settlement bill with only minor changes. However, the political climate had changed dramatically since the bill was first considered. Members of Arizona's delegation now saw an opportunity to preserve funding for the CAP by

[75] 124 Cong. Rec. 16,403 (1978).

[76] Forest J. Gerard, Thomas W. Fredericks, George S. Jennings and Scott McElroy, "National Indian Water Policy Review," 23 January 1978, SRP Research Archives.

highlighting its benefits for Arizona Indian communities. In a letter to the Secretary of the Interior, Arizona Senators Barry Goldwater and Dennis DeConcini wrote, "[w]e feel that very substantial benefits arise in favor of the Indians as a result of CAP and that substantial obligations of the United States can be satisfied through a legislative settlement of the water rights involving CAP."[77] Having the tribes perceived as beneficiaries of the CAP was critical for two reasons. First, it was important for justifying the federal expense of the Project because it allowed the federal government to meet some of its obligations to Indian tribes. Second, and perhaps most importantly from the perspective of Arizona's non-Indian water users, the portion of the CAP expenses associated with supplying water to Indian lands did not have to be reimbursed to the federal government. For Arizona's urban water users, who were counting on the availability of CAP water in the later years of the Project, allocating a portion to Indian uses was an acceptable trade-off to ensure the Project moved forward.

Representatives for the Five Tribes, recognizing the leverage they possessed in the ongoing debate over the CAP, came out in support of a modified version of the Project as a means to improve the prospects for passing a

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[77] Barry Goldwater and Dennis DeConcini to Cecil D. Andrus, 28 March 1977, in *Water for Five Central Arizona Indian Tribes for Farming Operations*, 95th Cong. 44 (1977).

settlement bill. In their official statement, the Five Tribes' stated,"...any future appropriation for funding of CAP should be tied to and be a portion of a Five Tribes Water Settlements Act appropriation."[78] When hearings opened on the Five Tribes settlement legislation in May 1977, many of Arizona's elected officials, who had previously voiced strong opposition to the bill, tempered their criticism with a willingness to consider legislative solutions to the tribes' water rights. The Kennedy bill remained highly objectionably to most of Arizona's delegation because of the dramatic impact it would have on the economy of the Yuma area, but more importantly because of the precedent it would set if the government were to acquire private land to resolve Indian water rights claims. Interior also came out in opposition to the bill, but voiced support for a legislative settlement and asked for additional time to work out a substitute bill.[79]

The Ak-Chin Water Rights Settlement

Alternative legislation did not end up coming from Interior, but rather in the form of a bill introduced by Senator DeConcini on May 23, 1977, to settle the water rights claims of the Ak-Chin reservation. The bill instructed the government

[78] "Statement of Five Central Arizona Indian Tribes Regarding CAP, Presented to Governor Castro," 9 March 1977, SRP Research Archives.

[79] *Water for Five Central Arizona Indian Tribes for Farming Operations*, 95th Cong. 53-71 (1977).

to deliver up to 100,000 af of groundwater from federal lands near the reservation, which would serve as a temporary supply until another source, presumably the tribe's CAP allocation, could be delivered.[80] The legislation offered an alternative approach to the Kennedy bill by focusing on resolving the claims of an individual tribe instead of a large group. The fact that DeConcini chose to introduce his bill on the same day that hearings opened on the Kennedy bill may have been symbolic, but it proved to be an important strategic move during the course of ongoing negotiations on the Five Tribes settlement. The Ak-Chin represented an attractive test of the suitability of the legislative approach to Indian water rights settlements because the tribe was operating a successful farm and there was clear evidence that the groundwater they relied on was being depleted by the heavy pumping in Pinal County. The Ak-Chin bill was also introduced at a time when a convergence of events was raising awareness about the need for groundwater regulation in central Arizona.

DeConcini introduced his Ak-Chin bill to settle the water rights claims of the tribe, but his more immediate concern in preempting a possible lawsuit to protect the reservation's groundwater.[81] This issue took on greater urgency in the

[80] 123 Cong. Rec. 16,100 (1977).

[81] Ibid.

wake of a 1975 lawsuit filed by the federal government, on behalf of the Papago (Tohono O'odham) tribe, against the City of Tucson, the State of Arizona, and over 1,600 private water users in the Upper Santa Cruz River Basin.[82] The action, which sought a determination of the water rights of reservation, focused specifically on the effects of nearby groundwater pumping on the tribe's water supply. Interest in the case increased following a ruling by the U.S. Supreme Court in June 1976 in *Cappaert v. United States*. The Court's decision was the first to affirm that federal reserved rights could be applied to groundwater and that uses outside a federal reservation could be restricted insofar as they inhibited the reserved rights of a federal reservation.[83] Following the ruling, the Ak-Chin Tribal Chairman wrote to the Secretary of the Interior demanded that the government take action to protect the tribe's water rights and specifically requested a legislative solution.[84] As Interior investigated its options, members of Arizona's delegation got behind the idea of a legislative solution that would prevent a legal battle that could have broad implications for groundwater users in the state.

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[82] United States v. City of Tucson, Civ. 75-39 TUC JAW (D. Ariz.).

[83] Cappaert et al. v. United States el al., 426 U.S. 128 (1976).

[84] Wilbert J. Carlyle to Thomas S. Kleppe, 16 July 1976, RG 59, box 6, ASLAPR.

The Ak-Chin settlement gained further traction after Morris Udall introduced companion legislation in the House in June 1977.[85] The Senate version moved quickly through committee and was passed in October, less than five months after being introduced.[86] The Ak-Chin bill did not encounter any significant opposition from members of Arizona's delegation, the Carter administration, or local officials, although most supported an amended version of the legislation that would require feasibility studies prior to guaranteeing delivery of the water. The Interior Solicitor and the AWC put their support behind an amended version of the bill along with the Maricopa-Stanfield Irrigation and Drainage District (MSIDD), who was the most likely target of any litigation concerning the tribe's groundwater rights.[87] Senator Barry Goldwater testified during the Senate hearings that "...logic and equity both demand that all legal claims be specifically resolved that arise out of the decline in the Ak-Chin's ground water..."[88] The fact that the Ak-Chin could show a demonstrable impact

[85] 123 Cong. Rec. 21,417 (1977).

[86] S. Rep. 95-460 (1977).

[87] Ibid.

[88] *Certain Water Rights Claims of the Ak-Chin Indian Community: Hearings on S. 1582, Before the Select Comm. on Indian Affairs*, 95th Cong. 17 (1977).

on their farming operations from groundwater decline, and the recent Supreme Court decision, worked in favor of a quick resolution.

The final Senate bill gave the Secretary several options in supplying water to the reservation. If the Secretary determined that it was feasible to pump groundwater from nearby federal lands, he was required to construct and maintain a conveyance system to deliver up to 85,000 afy to the tribe. If the Secretary could not guarantee a minimum supply of 60,000 afy, then he would be required to submit an alternative plan to Congress within 180 days of completing the feasibility study. As a condition of receiving a guaranteed supply of water, the tribe agreed to waive all legal claims to both surface water and groundwater.[89] The bill amounted to a complete and final settlement of the Ak-Chin's water rights that gave the tribe enough water to farm approximately 20,000 acres, a four-fold increase in their cultivated acreage in 1977. This represented a guaranteed supply of water, delivered in perpetuity, with the federal government bearing all the responsibility to operate and maintain the system that delivered water to the reservation. The fact that the Ak-Chin were the first to receive a legislative settlement of their water rights ended up working in their favor. Nobody was required to forfeit any water and the government bore the entire cost of the project. There was no precedent for putting together similar settlements and since

[89] S. Rep. No. 95-460 (1977).

all parties involved were eager to avoid litigation the tribe was free to assert a broad legal entitlement. The House version of the Ak-Chin bill came up for consideration in May 1978, but opposition led by Representative John E. Cunningham from the State of Washington was enough to defeat the bill under suspension of the House rules.[90] When the bill was considered the following month, it got the necessary votes to pass and the settlement became law in July 1978.[91]

The passage of the Ak-Chin settlement marked a milestone in Indian water rights history, but it did not prove to be the model on which later settlements were based. The circumstances surrounding the Ak-Chin farming enterprise and the convergence of legal actions surrounding tribal groundwater rights provided a limited window for a settlement to be moved through Congress with limited resistance. Later settlements would not be able to rely solely on the federal government to supply all the water and money, and would instead require concessions from existing water users whose rights were being challenged by Indian claims. The Ak-Chin settlement did signal a greater willingness on the part of the federal government to acknowledge Indian grievances and take steps to remedy the situation. In 1977 the GRIC became the first Indian tribe in the

[90] 124 Cong. Rec. 12,068 (1978).

[91] 124 Cong. Rec. 19,494 (1978).

country to receive a loan under the Small Reclamation Project Act (SRPA) to fund the rehabilitation of 5,000 acres of farmland and irrigation infrastructure. This concluded a process that started with the tribe's notice to apply for the loan in 1969.[92] Progress was also being made on the Salt River reservation, where a tribal farming enterprise was formed in 1971 that by 1974 had taken control of nearly 8,000 acres of land that was previously leased to non-Indian farmers.[93] The progress being made on many Arizona Indian reservations motivated tribes to continue pursuing their water rights claims.

Determining the Rules of the Game: The Jurisdictional Battle over State General Stream Adjudications

As legislation attempting to resolve Indian water rights claims circulated through Congress, a concurrent process was underway to quantify all water rights in the state, including those of federal entities and Indian reservation, through a general stream adjudication. The legal mechanism to adjudicate water rights on a basinwide level had existed for several decades, but a piece of federal legislation

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[92] *Water Resources Legislation: Hearings Before the Subcommitee on Water and Power of the Comm. on Energy and Natural Resources*, 99th Cong. 257-58 (1985) (statement of David J. Allee, Professor of Resource Economics at Cornell University).

[93] Paul J. Smith to Edward A. Lundberg, 22 August 1972, SRP Research Archives.

known as the McCarran amendment that was passed in 1952 waiving the United States' sovereignty immunity in legal proceedings that sought a comprehensive determination of all the rights to a particular river system. Many state officials interpreted this waiver as a requirement that federal attorneys participate and assert claims on behalf of Indian tribes and other federal installations in state courts, a contention that was strongly contested by tribal and federal attorneys who argued that federal courts had sole jurisdiction over Indian water rights. After the McCarran amendment became law, jurisdictional questions continued to be a source of uncertainty. State officials did not know whether they would be able to retain jurisdiction if federal attorneys removed cases involving Indian water rights to the federal court system. Finding answers to these questions took on greater urgency in the 1970s when states began to initiate general stream adjudications as part of an effort to quantify federal water rights.

The first major test of the applicability of the McCarran amendment to Indian water rights came in January 1976 when the U.S. Supreme Court heard arguments in *Colorado River Water Conservation District et al. v. United States* (also known as the *Akin* case). At issue in *Akin* was the question of whether a case to determine Indian water rights in federal court could be dismissed because there was a general stream adjudication pending in state court. The Supreme Court overturned the Appeals Court decision and granted the motion brought by local

water users to dismiss the federal case. In writing the opinion for the majority, Justice Brennan reasoned that the McCarran amendment did not remove federal court jurisdiction, but instead set up a concurrent jurisdiction where both state and federal courts had the authority to determine Indian water rights. Though both court systems retained jurisdiction, Brennan wrote that the "[t]he clear federal policy evinced by the [McCarran amendment] is the avoidance of piecemeal adjudication of water rights in a river system."[94] The court's ruling removed a major impediment to the water rights adjudication process moving forward in states throughout the West.

In order to be truly comprehensive adjudications, federal reserved rights needed to be determined in relation to state water rights. For water users who had long faced the prospect that unquantified federal rights might supplant their own rights, state adjudications provided the mechanism to force the federal government to represent its claims in court. Many tribal advocates reacted negatively to the decision, which they viewed as being contradictory to state constitutions, including that of Arizona, which appeared to give the federal government sole jurisdiction over Indian affairs.[95] Their principle goal was to avoid litigating their

[94] Colorado River Water Conservation District et al. v. United States, 424 U.S. 800 (1976).

[95] Robert H. Abrams, "Reserved Water Rights, Indian Rights and the Narrowing Scope of Federal Jurisdiction: The *Colorado River* Decision," *Stanford Law*

rights in state proceedings and it was this desire that formed the basis of several legal challenges that moved through the federal court system until the mid-1980s.

The perception that federal courts were more accommodating to Indian claims motivated tribal advocates to pursue litigation in the federal court system, while many Western water users favored state proceedings for the same reason. Underlying the states' argument was a belief that they should have the ability to regulate water use within their boundaries, including that of federal reservations. This belief generated a level of tension between state and federal officials and led to numerous debates over the distribution of authorities in the administration of a regional water rights structure.

The integration of federal and local management over Arizona's water resources dates back to the late nineteenth century and is evident in most of the large water infrastructure projects in the state. Perhaps the best example of the continued federal/local coordination is the history and organizational makeup of SRP. As the institution responsible for managing a water supply stored and delivered through federal facilities to private water user in the Phoenix metropolitan area, SRP exemplifies the combination of federal investment and local management. This made SRP more susceptible than others in the region to

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Review 30 (1977-1978): 1111-1148; Jack D. Palma, "Indian Water Rights: A State Perspective After *Akin*," *Nebraska Law Review* 57 (1978): 314-318.

challenges about its management practices. While every municipality, irrigation district, and water utility in Arizona possessed some level of risk to potential Indian water rights claims, a change in the water allocation structure resulting from the fulfillment of a large tribal claim could have a systemic impact on SRP's arrangements with water users throughout central Arizona. For these and other reasons, SRP has been the principle driver of the water rights adjudication process in Arizona since the early 1950s. After a failed attempt in 1966 to initiate a court determination, SRP began the lengthy process of filing a petition with the SLD, the entity responsible under Arizona law for determining water rights. This effort was sidelined as the Salt River Agreement moved through the federal approval process, but with the collapse of the agreement in 1972, SRP again became active in pursuing a state adjudication of water rights.

The official beginning of the general stream adjudication process in central Arizona began on April 26, 1974, when SRP filed a petition with the SLD to determine all the water rights on the Salt River above Granite Reef Dam. However, deliberations about the best strategy to bring about such a determination began shortly after the Superior Court denied SRP's request to reopen the Kent Decree in 1966. Surrounding these discussions were several foundational questions, including how the transition from agricultural to urban water within the SRP boundaries affected the underlying water rights of the Project.

Further complicating the situation were several ongoing disagreements between SRP and the City of Phoenix that dated back to the 1952 domestic water agreement. In the late 1960s SRP and the City of Phoenix were in conflict over the ownership of the sewage effluent being treated by Valley cities. SRP contended that effluent treated at the municipal treatment plant was wastewater that belonged to the lands with the Project. A coalition of five Valley cities protested this interpretation and organized a challenge to the acreage-based voting system used by the SRP to elect its Board of Governors and contemplated the possibility of blocking bonds passed by SRP to fund the construction of Navajo Generating Station (NGS). In 1969 the two sides reached an agreement whereby SRP removed its objections to the cities' claims of ownership of effluent and modified its voting structure. However, there continued to be a level of mistrust between SRP and the cities concerning challenges to the organization of SRP.

In spite of some lingering animosities, SRP approached the City of Phoenix about joining its petition to adjudication Salt and Verde water rights. SRP attorney Robert Hurley wrote to the Phoenix City attorney in June 1973 that a joint effort to protect the water rights of the Project, "represents an opportunity for the Association and the City of Phoenix to work together in a cooperative

effort."[96] The two parties were in the process of negotiating a contract whereby SRP and Arizona Public Service (APS) would purchase effluent from the municipal treatment plant for use at the nuclear power plant the two companies were planning. Both sides had questions about the legal status of effluent and the change of use of Project water and how those issues might factor into any adjudication of water rights. City officials advocated for having the change of use question resolved prior to the filing of a water rights adjudication, but SRP decided to proceed with its own petition.

Very little action resulted from SRP filing its Salt River petition with the Land Department in 1974. The costs associated with an adjudication presented a major obstacle to the case moving forward and the State Land Commissioner was reluctant to have the department bear the financial burden. There were also questions about the process the SLD should use to carry out a legal proceeding of this magnitude. Much time was spent in discussing the details of serving notice on potential claimants and the filing of claims, which ultimately delayed the process of beginning the determination. As state officials contemplated the best way to conduct the adjudication, several issues contributed to a renewed interest in water rights issues by SRP and tribal officials. The proposed CAP allocation was announced early in 1975 and Senate oversight hearings later that year raised the

[96] Robert E. Hurley to Joe R. Purcell, 4 June 1973, SRP Research Archives.

profile of Indian water rights in Arizona. In late-1975 attorneys for the SRPMIC sent letters to SRP attorneys inquiring about why certain reservation lands did not receive water from SRP despite the fact that they were within the boundaries of the original reclamation project.[97] SRP officials became concerned that federal or tribal attorneys were considering a reopening of the Kent Decree in order to adjudicate Indian claims. If the state could not demonstrate that a general adjudication was ongoing the case might be decided in federal court. SRP responded by filing a petition for adjudication of the Verde River early in 1976.[98]

The SRPMIC claims presented challenges for SRP that were not present with other central Arizona tribes. Tribal lands were not allowed to be join the original reclamation project because it was determined that a lien could not be placed on these lands, which was a requirement in order to ensure repayment for construction of the project. As a consequence the tribe did not receive any stored water even though some of the reservation was originally determined to be eligible. However, part of the reservation was included in the original Kent Decree, meaning the tribe could file a petition to reopen the decree at any time in order to

[97] Philip J. Shea to Robert E. Hurley, 17 October 1975, SRP Research Archives; Philip J. Shea to Robert E. Hurley, 10 December 1975, SRP Research Archives.

[98] Salt River Valley Water Users' Association, "Petition to Determine Conflicting Water Rights," In the Matter of the Determination of Conflicting Rights to the Use of Water from the Verde River and its Tributaries Including Oak Creek, Beaver Creek, West Clear Creek, and the East Verde River, Before the State Land Department of the State of Arizona, 24 February 1976, SRP Research Archives.

contest the administration of water rights. Reopening of the decree would not only mean a reconsideration of SRPMIC's rights to stored water, but could also raise other issues including the rights of upstream tribes, change of use, and SRP delivery contracts. SRP decided to continue pushing the state to begin its determination instead of seeking to reopen the Kent Decree. In late 1976 SRPMIC filed a lawsuit contesting the Secretary's CAP allocation and the GRIC followed with their own suit shortly after. The lawsuits raised the possibility that the tribes' might seek to have their water rights decided in federal courts and without a concurrent state proceeding water users in Arizona might be forced to participate.

Raising the Stakes for Adjudication

The threat of potential litigation prompted the City of Phoenix and other municipalities to reconsider their earlier decision not to join SRP's petition. In January 1977 representatives from the City of Phoenix approached SRP about joining their petition and offered to help lobby the Land Commissioner to start an adjudication.[99] A legal challenge from one of the Indian tribes or the federal government, who could argue that the deliveries were illegal under the original legislation authorizing the Salt River Reclamation Project, might jeopardize the

[99] A.J. Pfister to R.W. Teeples, 24 January 1977, SRP Research Archives.

domestic water agreement that were so critical to the Valley's municipal water supply. An important step in finalizing the domestic water agreement was getting the court that administered the Kent Decree to confirm the legality of the change in use of Project water from agricultural to urban. Confirming this change was an important part of solidifying the delivery arrangements between SRP and Valley municipalities and without it the tribes could claim that the deliveries made by SRP to urbanized lands were illegal.

Issues surrounding the basic structure of SRP's water deliveries took on greater urgency at this time because attorneys from Interior and several tribes were contemplating an action to reopen the Kent Decree and move the case to federal court in order to make expanded Indian water rights claims.[100] In preparing for this action, the Department focused their attention on contracts SRP signed for the delivery of water to municipalities and irrigation districts. Federal and tribal attorneys believed that SRP was delivering water to lands whose rights were inferior to the tribes and they were looking for information that they could use to base a claim that SRP had excess water.[101] The possibility of legal action pressed SRP to get some movement on their petition so they could demonstrate that a

[100] W.L. Warskow to Sid Wilson, 24 March 1977, SRP Research Archives.

[101] Philip J. Shea to A.J. Pfister, 4 August 1976, SRP Research Archives; Leo M. Krulitz to Assistant Secretary, 7 September 1977, SRP Research Archives.

general stream adjudication was underway. SRP simultaneously pursued court approval of the change of use of Project water as a way to fend off a potential challenge by the Indian tribes. SRP attorneys participated in the drafting of a report concerning the change of use that was submitted to the Superior Court by the Water Commissioner who was responsible for overseeing the Kent Decree.[102] The filing of the report in June 1977 prompted the DOI attorneys to continue their investigation into several contracts between SRP, Valley cities, and irrigation districts.[103] Interior Solicitor Leo Krulitz took an active interest in the issue and began pressing SRP management for answers concerning the availability of excess Project water.[104] However, the Department had up to this point not made clear how much water was needed to satisfy the claims for central Arizona tribes.

A major impediment to the resolution of Indian water rights claims was the lack of clear information on the extent of tribal claims in Arizona. The DOI had not settled on an amount of water that could be claimed by each tribe and there

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[102] "SRP Attorney Writes, Then Endorses Commissioner's Report," *Arizona Republic*, September 17, 1977; Earl Zarbin, "Court Asked to Alter 1910 Water Law in Light of Bigger City Demand," *Arizona Republic*, September 18, 1977.

[103] Water Commissioner's Report, 3 June 1977, Hurley v. Abbott, Superior Court of Arizona, Maricopa County.

[104] William G. Lavell to M. Byron Lewis, 15 September 1977, SRP Research Archives; Leo Krulitz to Assistant Secretary, 7 September 1977, SRP Research Archives.

were varying interpretations about how to apply the *Winters* doctrine. A breakthrough came in February 1978 when Solicitor Krulitz met with representatives from SRP, the AWC, and the tribes, to inform them that a single water rights bill for all the Central Arizona tribes was not viable and it would be up to each tribe to resolve their claims through negotiation or litigation. Krulitz brought with him to the meetings a list of the minimum and maximum water rights claims for each of the Five Tribes, which offered a starting point for negotiations by outlining what the Department thought were reasonable quantities for each tribe.[105] Not every tribe agreed with the Solicitor's assessment; the GRIC in particular were adamant about pursuing a resolution of their claims through litigation. In June GRIC attorneys filed a case against the mining company American Smelting and Refining Company (ASARCO) and several other water users that sought a determination of the tribe's rights within the San Pedro River watershed.[106] Though neither Arizona nor the United States were named as defendants, the case was seen by many as an important test of the tribe's federal reserved rights claims.[107] The tribe used the case as an opportunity to challenge the applicability of the Gila Decree, which it felt had not been a final

[105] Wesley E. Steiner to A.J. Pfister, 15 February 1978, SRP Research Archives.

[106] Gila River Indian Community v. ASARCO et al., Civ. 78-145 TUC MAR (1978).

[107] Thomas W. Fredericks to Solicitor, 15 June 1979, SRP Research Archives.

determination of their water rights. The GRIC's challenge of the Gila Decree offered a possible precedent for other tribes who might want to make similar charges against the comprehensiveness of the Kent Decree.

The increasing potential for litigation motivated central Arizona tribes to take steps to build legal teams that could develop water rights cases separately from the representation of the federal government. Many tribes were concerned that the government would be too conservative in the claims they asserted on behalf of the tribes and they wanted separate legal representation. The White Mountain Apache Tribe (WMAT) and the FMIC both retained lawyers from the Native American Rights Fund (NARF) to assist them in preparing their cases and the SRPMIC changed the composition of its legal team in the early 1970s.[108] The presence of separate tribal and federal legal teams generated a level of tension between the two sides. Arlinda Locklear, a NARF attorney who represented the FMIC, recalls that "...there was this constant tension between the Department of Justice lawyers and the tribal attorneys in terms of pushing the envelope to try to develop a set of legal principles that was as broad and as supportive as possible

[108] Daniel H. Israel to Forest Gerrard, 18 April 1978, DOI Field Solicitor's Office.

for tribes."[109] The relationship between tribes and the federal government would be a major factor in the discussions over how to resolve the tribes' water rights.

The best way for tribes to communicate their legal arguments and claims directly to SRP and other Valley water users was to participate in negotiations. The impetus for negotiations came in April 1978 when Solicitor Krulitz chaired a meeting between SRP, state water managers, and representatives from the FMIC and SRPMIC. At the meeting, SRP offered to negotiate with each tribe utilizing a two-stage process. The first stage would be devoted to fact-finding that focused on determining the water needs for each reservation and the available sources of water to meet those needs. The second stage would involve negotiations with the various water user groups who needed to participate in any proposed settlement.[110] The framework allowed all the parties to discuss the technical information that could be used to substantiate tribal claims and agree on a fixed quantity of water prior to discussing where the water would come from. The willingness to negotiation showed that all sides were serious about trying to resolve tribal claims through settlement rather than having to prove their claims in court.

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[109] Arlinda Locklear, in discussion with the author, 10 September 2010.

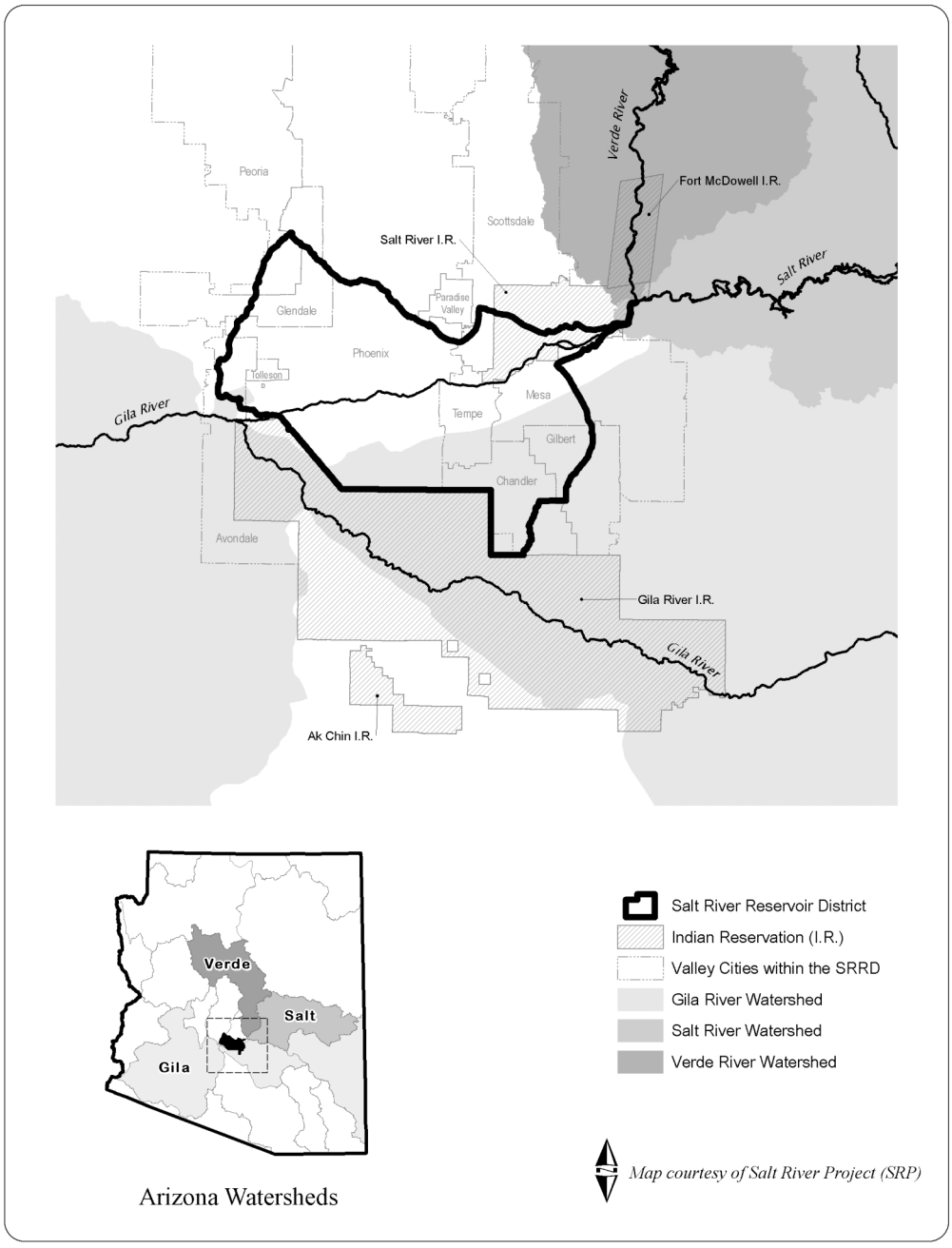
[110] Meeting notes, 18 April 1978, DOI Field Solicitor's Office.

Following the meeting, Interior announced that negotiations would commence between SRP and five tribes.[111] The group settled on a deadline of April 1, 1980 to complete the negotiations, at which point the Department would file lawsuits on behalf of the tribes in order to meet the statute of limitations for water rights cases set by Congress.[112] Discussions ensued with several of the tribes, but the greatest amount of activity surrounded the negotiations between SRP and the SRPMIC. Several factors contributed to the Salt River tribe receiving more immediate attention from SRP, but probably the single most important reason was the fact that part of the reservation was located within the boundaries of the SRRD (see Figure 3). The tribe had for several years protested the fact that reservation lands were not given the opportunity to join the Project and in August 1977 they asked the Secretary of the Interior to use his authority to designate the reservation lands within the SRRD as eligible to receive water from SRP. The Secretary delayed any action on the tribe's request, but he did not reject it outright, using it instead as a motivation for SRP to participate in negotiations with the tribe.

[111] The five tribes were the SRPMIC, FMIC, WMAT, San Carlos Apache Tribe (SCAT), and the Camp Verde Yavapai-Apache Tribe.

[112] Press release, Department of the Interior, "Five Arizona Indian Communities to Negotiate Water Claims with the Salt River Project," 19 April 1978.

Figure 5: Salt River Reservoir District and Salt River Valley Cities



Another factor spurring negotiations was the fact that the tribe was included in the Kent Decree, although they contended that the Decree did not adjudicate their *Winters* rights. This gave the tribe, or the federal government acting on their behalf, the option of trying to reopen the decree to expand their water rights. The combination of legal and administrative avenues available to the tribe helped to spur a dialogue with SRP. The principle decision confronted by both sides at the outset of the negotiations was either to focus on the water needs of the reservation or the availability of water supplies. The tribe was most focused on the latter issue because they thought that SRP had "excess" water that could be diverted to the reservation. The SRPMIC attorneys asked SRP to develop a list of potential water supplies as a starting point for the negotiations. SRP was more interested in quantifying the water needs of the tribe and solidifying the rationale that was used to determine those needs. SRP General Manger A.J. Pfister questioned whether the tribe's plan to use the water primarily for agricultural was feasible given the rapid urbanization of central Arizona and the economics of agriculture.[113] The differences in each side's approach to negotiations ended up undermining efforts to reach consensus by placing both side on the defensive; SRP tried to demonstrate that it did not have any excess water

[113] "Meeting with Salt River Indians at Bill Lavell's Office," 25 May 1978, DOI Field Solicitor's Office; Richard B. Jeffries, Notes, 31 May 1978, DOI Field Solicitor's Office.

and the tribe tried to justify its claims for additional water. In an effort to bridge this gap, both parties agreed to hire consultants who would determine the water needs of the reservation. The findings would then be compared and differences would be resolved.[114] This approach sought to provide a rationale for a water settlement that was based on technical evaluations instead of legal theories or perceptions of how much water was available.

Efforts to forge a settlement based on a technical rationale continued to be undermined by the uncertainty of the legal and political landscape surrounding Indian water rights issues. In January 1979 the Phoenix Field Solicitor for Interior sent SRP an outline of the issues raised by the government's review of SRP. If pursued in court, the items in the memo would have attacked many of the basic tenants of SRP's operations, including the forfeiture of water rights on Project lands through non-beneficial use and violations of the 160-acre limit imposed on farmers who received Reclamation water. The memo also raised questions about the domestic water contracts between SRP and the cities.[115] These were not new challenges for SRP, but the fact that they were raised by the Interior Department during the course of negotiations was troubling to SRP officials because of the

[114] Gerald Anton to John Artichoker, 26 September 1978, SRP Research Archives.

[115] William G. Lavell to A.J. Pfister, 18 January 1979, SRP Research Archives.

wide discretion the Secretary of the Interior over SRP facilities. Less than a month after the memo was sent to SRP, the SLD mailed out notices to all potential claimants in the Salt River adjudication. SRP had previously indicated to the tribes a desire to delay the adjudication while negotiations were ongoing and the receipt of the notice caused several of the tribes to end discussions.[116] The receipt of notice also led a number of tribes, including the SRPMIC, to file lawsuit that sought to move the adjudication to federal court. The tribes also filed suits challenging the jurisdiction of the state court to determine Indian water rights.

Conclusion

The CAP changed the dynamics of the Indian water rights debate in Arizona by raising the prospect that a large unallocated water supply could be used to satisfy Indian water rights claims without requiring existing entities to give up most of the water they were currently using. However, the fact that the CAP was unallocated did not mean it was uncontested. The allocation process undertaken by the Secretary of the Interior shows how the same powerful interest groups that benefited from the existing water allocation structure in Arizona sought to preserve the *status quo* while gaining access to additional supplies. H The increased scrutiny directed towards the costs and allocation of the Project

[116] A.J. Pfister to William G. Lavell, 8 February 1979, SRP Research Archives.

water by members of Congress and the Carter Administration forced Arizona officials to accept the fact that a portion of the CAP supply would be directed to Indian communities.

The growing momentum behind adjudication efforts in the state provided the catalyst that pushed forward the resolution of Indian claims either in court or at the negotiating table. Key decisions on where and how Indian water rights claims would be adjudicated was an important factor for both Indians and non-Indians who needed to determine the risks of pursuing an adjudication of their water rights in the court. Without the potential for legal action, there was little impetus for non-Indian parties to resolve Indian claims, as tribal advocates still did not possess enough influence in Congress and among state and local governments to effect a large legislative settlement. However, the Ak-Chin Indian Community water rights settlement did offer the prospect that tribal claims could be resolved on a case-by-case basis through a combination of multiple water sources and the contribution of federal financial support. The settlement was unique from later settlements in many respects, but it did offer a general outline for addressing the claims of a specific tribe.

Chapter 5

THE BEGINNING OF THE SETTLEMENT ERA: WATER RIGHTS ADJUDICATION AND THE MOVE TOWARDS NEGOTIATION

Introduction

Litigation over the process that would be used to adjudicate Indian water rights in Arizona consumed much of the period between 1978 and 1985. Representatives from the state's agricultural, mining, and municipal interests coalesced behind the general stream adjudication process and made key changes to its statutory structure in order to conform with the requirements of the McCarran amendment. This move triggered a response from tribal officials who were adamant that their claims be adjudicated in federal court. By the end of the 1970s, nearly ever tribe in central Arizona was engaged in litigation either to determine their water rights or challenge the jurisdiction of Arizona's adjudication. The legal debate concerning the question of whether state courts had jurisdiction over federal reserved rights made its way to the U.S. Supreme Court in 1983, where a ruling affirming the state process in the case of *Arizona v. San Carlos Apache Tribe* removed one of the last remaining barriers to Arizona's adjudication moving forward. By 1985 the stage was set for a comprehensive determination of the water rights on all major rivers in the state, raising the

prospect that Indian claims would finally be determined in relation to other water rights.

While considering their prospects in the impending adjudication, SRP management made a renewed effort to negotiate a settlement with the SRPMIC and the FMIC. SRP pursued settlements with these tribes because the location of their reservations near the confluence of the Salt and Verde rivers had the potential to significantly impact the water supplies delivered by the Project. Quantifying these rights would help to reduce the level of uncertainty for SRP in the Gila River Adjudication. Both tribes expressed a willingness to negotiate with SRP in the past, but the discussions were not fruitful in large part because SRP was unwilling to contribute enough water to make a settlement viable.

The negotiations differed from prior attempts to reach a consensus. SRP made a significant change in its negotiating position by offering to give the tribes access to stored water. This helped to spur concessions from the tribes and other water users in the Valley that proved critical to the overall settlement. As the tribes modified their own demands, a level of trust was established with SRP that served as the foundation for a regional coalition that pushed the settlement forward despite strong opposition from several agencies of the federal government. When the U.S. Congress passed the SRPMIC settlement in 1988, it was one of the first Indian water rights settlements in the country to be negotiated by local parties. It also provided a model that was emulated in future Indian water rights settlements in Arizona.

State General Stream Adjudications

SRP was both the principle supporter of the state adjudication process and an active participant in settlement negotiations with several tribes. Since filing its petition to begin the Salt River adjudication in 1974, management elicited the support of other non-Indian parties, especially the City of Phoenix, whose future water planning was inextricably linked to SRP. However, most non-Indians did not have the interest or the resources to lead the effort to adjudicate the majority of the water rights in the state. It was not until the late-1970s that the state's agricultural, mining, and municipal interests became more heavily involved. After decades of uncertainty about the extent of tribal water rights and the forum in which these rights would be determined, Arizona's main water interest groups began to see that state adjudication was the best method to compel the tribes and the federal government to quantify their claims. Interest in the general stream adjudication process increased following the filing of petitions to determine the rights on all five major river systems in the state. In 1978 Phelps Dodge Corporation filed petitions to adjudicate the rights on the Gila and Little Colorado rivers and ASARCO followed suit on the San Pedro River.[1] A major impediment

[1] "Arizona Department of Water Resources, "Gila River and Little Colorado River General Stream Adjudications," last modified November 18, 2010, accessed February 28, 2011, http://www.azwater.gov/AzDWR/SurfaceWater/Adjudications /GilaRiverandLittle ColoradoRiverGeneralStreamAdjudications.htm.

to these adjudications moving forward was the considerable expense that would be required to administer the proceedings. In June 1978 the State Land Commissioner informed representatives from SRP, Phelps Dodge, and ASARCO that he would like to pass these costs onto them. These entities responded by looking for other mechanisms to cover the costs of the adjudication. This effort was incorporated into a larger process aimed at amending the state's adjudication statutes.

The push to modify Arizona's adjudication laws gained momentum in February 1979 when SRP requested that the SLD proceed with the mailing of notices to potential claimants in the Salt River adjudication. The central Arizona tribes perceived this move as an attempt to resume litigation while settlement negotiations were still in progress. SRP General Manager A.J. Pfister sent a letter to tribal and federal representatives after the filing to apologize for not notifying them in advance, but most tribes chose to break-off negotiations.[2] In March 1979 four tribes filed petitions to move the adjudication from state to federal court, providing a test of their long-standing contention that the state proceedings did not have jurisdiction to determine federal reserved water rights.[3] Similar questions

[2] A.J. Pfister to W.G. Lavell, 8 February 1979, SRP Research Archives.

[3] Earl Zarbin, "Four Tribes Petition for Use of Water from Salt River," *Arizona Republic*, March 8, 1979. The four tribes to file petitions were the Gila River Indian Community (GRIC), Salt River Pima Maricopa Indian Community (SRPMIC), San Carlos Apache Tribe (SCAT), and the White Mountain Apache Tribe (WMAT).

were already being confronted in the litigation between the GRIC and ASARCO in their case involving the San Pedro River. The increased litigation was a result of the tribes and the state's major water users both seeking to have their rights determined in a venue that was more inclined towards their interests.

The contentious environment surrounding the state's water resources was complicated further by an ongoing debate over the regulation of groundwater. Following a controversial decision by the Arizona Supreme Court in the *Farmers Investment Co.* (*FICO*) case of 1977 restricting the transportation of groundwater, representatives from the mining industry and Arizona cities were successful in getting the Arizona Legislature to pass a law that overturned the ruling. A state Groundwater Management Study Commission created as part of this legislation was charged with developing recommendations for regulating groundwater use and addressing the problem of overdraft.[4] The commission was comprised of representatives from the mining, agricultural, and municipal interests, who controlled much of the substantive actions by the group. A proposal put forward by agricultural representatives in early 1979 sought to transfer the adjudication responsibilities from the SLD to the Superior Court. This move was intended to avoid a potential conflict of interest in which the state was both overseeing the adjudication and asserting claims on behalf of state lands. It was also designed to

[4] Jon L. Kyl, "The 1980 Groundwater Management Act: From Inception to Current Constitutional Challenge," *Colorado Law Review* 53 (1981-1982): 471-503.

ensure the state process would qualify as a general stream adjudication under the McCarran amendment. However, the original proposal failed to garner the support of the mining industry, whose backing would be critical to its passage.

The issue took on a greater urgency after the judge in the *GRIC v. ASARCO* case requested information from the parties on the state's possible conflict of interest.[5] The mining representatives removed their opposition to the proposed change a few days later and legislation was drafted and presented to the groundwater commission.[6] The proposed amendments contained a number of substantive changes to the adjudication framework. Responsibility for administering the adjudication was transferred from the SLD to a superior court "...in the county in which the largest number of potential claimants resides."[7] This changed the adjudication from an administrative to a judicial proceeding and guaranteed that it would be prosecuted in state courts. The amendments also set up a process that required all potential claimants to file a statement of claimant (SOC) with the court within ninety days of the date of service, which outlined the

[5] Court's Interrogatories, 13 March 1977, GRIC v. ASARCO, CIV 78-145-TUC-MAR.

[6] Earl Zarbin, "Court Authority is Sought in Resolving Water Rights," *Arizona Republic*, March 25, 1979.

[7] Senate Amendments to Senate Bill [SB], 34th Arizona Legislature, 1st sess. (1979).

quantity of water they claimed along with other documentation.[8] A fee structure was established as part of the SOC process that would cover the costs of appointing a special master to oversee the case. Additionally, the Arizona Water Commission (AWC) was given the responsibility to be the technical advisor to the court.[9] The proposed amendments amounted to a major restructuring of the adjudication process in the state.

The groundwater commission voted to approve the proposal on a fifteen to two vote in early April 1979. The sole Indian representative on the commission voted in opposition because of his belief that the Indian tribes would perceive the change as detrimental to their interests.[10] Indian leaders had come before the commission less than a month earlier to express their willingness to negotiate with state representatives.[11] The fact that the adjudication amendments were put forward without significant consideration or involvement from the Indian tribes further contributed to the contentious atmosphere between Indians and non-Indians at the time. The proposal was introduced as Senate Bill (SB) 1239 and it moved quickly through the legislature. The Senate Agriculture Committee passed

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[8] Ibid.

[9] Ibid.

[10] Minutes, Arizona Groundwater Management Study Commission, 2 April 1979, SRP Research Archives.

[11] Minutes, Arizona Groundwater Management Study Commission, 20 February 1979, SRP Research Archives.

it with a favorable recommendation three days after the groundwater commission gave their approval. On April 24th the Governor signed the bill, which had an emergency provision that allowed it to go into effect immediately. The passage of SB 1239 proved to be a critical component of the state's defense of the adjudication process in subsequent legal challenges.

Federal officials watched the progress of SB 1239 with concern. They viewed it as a confirmation that the major non-Indian water users in the state were poised to begin an adjudication that would incorporate Indian claims. A meeting of officials from the DOI and the DOJ was held three days after the passage of SB 1239 to consider legal and administrative options for addressing Indian water rights issues. Among the options considered at the meeting was a reopening of the Kent Decree to challenge various agreements between SRP and the cities, including domestic water contracts and claims to effluent.[12] The Interior Solicitor decided to push for negotiations between Indian and non-Indian parties while federal attorneys prepared for the possibility of litigation.[13]

Tribal leaders were also concerned about the impact of the amendments. Between the time when SB 1239 was introduced and when it became law, several tribes filed lawsuits in federal court asking for a determination of their water

[12] Thomas W. Fredericks to Solicitor, 26 April 1979, SRP Research Archives.

[13] Notes, Michael J. Clinton, 27 April 1979, SRP Research Archives.

rights.[14] FMIC attorney Arlinda Locklear explained that these suits were intended to satisfy the legal doctrine of abstention, which gave the federal courts jurisdiction over federal claims if the case was filed prior to a state court proceeding:

> ...it was our belief that if we filed our lawsuit to adjudicate just the Fort McDowell water right in federal court before the state passed the general stream adjudication compelling the tribes to litigate their rights in state court, we could preempt the state court adjudication and get a federal decree as to the Fort McDowell right.[15]

The question of whether federal courts would exercise their jurisdiction to adjudicate Indian water rights claims in Arizona would eventually be the cause of a legal battle concerning the state's adjudication statutes.[16]

Some Arizona tribes were not satisfied with pursuing only legal remedies and they pressured federal officials to take administrative actions that would address their water rights claims. On April 27th SRPMIC attorneys sent a letter to Secretary of the Interior Cecil Andrus objecting to a proposed $7.8 million loan from the BOR to the Roosevelt Water Conservation District (RWCD). The letter alleged that the 1924 contract between RWCD and SRP, which delivered water to

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[14] Thomas W. Fredericks to Solicitor, 26 April 1979, SRP Research Archives.

[15] Arlinda Locklear, in discussion with the author, September 10, 2010.

[16] Mikel L. Moore and John B. Weldon, Jr., "General Water-Rights Adjudication in Arizona: Yesterday, Today and Tomorrow," *Arizona Law Review* 27 (1985): 709-729.

the district in exchange for lining part of SRP's canal system, was illegal. The Community made it clear that their objections were part of a "...general challenge to SRP water deliveries to persons whose claims are based not upon water rights but upon contracts which are not authorized by the reclamation laws."[17] SRPMIC attorneys had for several years questioned the legality of certain arrangements between SRP and various municipalities and irrigation districts, but it was now taking steps to make these challenges more explicit. Andrus responded with a letter to RWCD that postponed a decision on their loan application until the claims of SRPMIC and the other central Arizona tribes were addressed.[18] Andrus also notified the Arizona Congressional delegation that he would consider a change in the allocation of CAP water if the Indian claims were not settled.[19] The allocation of the CAP was one of the largest bargaining chips that the Secretary had at his disposal in trying to force state and local parties to negotiate with Indian tribes.

Since the late-1960s, Indian leaders had attempted to tie the resolution of their water rights claims to the funding, construction, and distribution of the CAP. Tribal representatives were well aware of the importance of the CAP to Arizona's

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[17] Philip J. Shea to Cecil D. Andrus, 27 April 1979, SRP Research Archives.

[18] Cecil D. Andrus to K.C. Morrison, 19 June 1979, SRP Research Archives.

[19] Cecil D. Andrus to Morris K. Udall, 17 September 1979, SRP Research Archives.

future water planning and they knew it was an area where they could exert greater leverage because of the central role the federal government played in funding and constructing the project. During the summer of 1979, DOI officials began to investigate possible CAP allocation scenarios that would partially address tribal water claims.[20] Secretary Andrus used his authority to reallocate CAP water as motivation for non-Indians to participate in negotiations.[21] Arizona officials argued that the allocation process was being held hostage in order to force negotiations, but the Secretary was determined to use every resource at his disposal to facilitate settlement discussions.[22]

Andrus broadened his focus beyond the CAP allocation to potential administrative changes in the arrangements between the federal government and SRP. In a letter to Pfister, Andrus wrote that the Department was "...preparing to review administrative actions which we can take to protect the Government's interests in the Salt River Project and the Central Arizona Project. Resolution of Indian water rights will be an integral feature of this review."[23] Interior officials

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[20] Commissioner of Reclamation to Regional Director, Boulder City, Nevada, 15 August 1979, SRP Research Archives.

[21] Cecil D. Andrus to Morris K. Udall, 17 September 1979, SRP Research Archives; Cecil D. Andrus to Kel Fox, 11 October 1979, SRP Research Archives.

[22] Earl Zarbin, "U.S. Accused of Pressuring State on Indian Water Rights," *Arizona Republic*, July 14, 1979.

[23] Cecil D. Andrus to A.J. Pfister, 26 September 1979, SRP Research Archives.

set their sights on the agreement between Valley cities, APS, and SRP to sell municipal effluent for use at the proposed Palo Verde Nuclear Generating Station (PVNGS).[24] Some government representatives believed this water could be claimed by the federal government and used to satisfy Indian water demands. The actions of Andrus and other officials in the Interior Department caused concern among state and local officials in Arizona about the continued uncertainty caused by the Indian water rights issue.

SRP acted quickly to resume negotiations with SRPMIC after receiving Andrus' letter. SRPMIC was one of the only tribes who would agree to continue direct negotiations with SRP following the noticing of the Salt River adjudication.[25] The fact that consultants had already begun their work likely furthered a dialogue, whereas several other tribes had only held preliminary discussions with SRP. During the summer of 1979 the consultants hired by SRP and the tribe to determine the water demands on the reservation completed their studies.[26] In September Pfister sent a letter to Andrus expressing SRP's commitment to negotiate with the Indian communities.[27] Negotiations resumed in

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[24] Daniel M. Rosenfelt to Solicitor, 19 July 1979, SRP Research Archives.

[25] A.J. Pfister to Cecil D. Andrus, 28 September 1979, SRP Research Archives.

[26] A.J. Pfister to Cecil D. Andrus, 8 August 1979, SRP Research Archives; William L. Warskow to Herschel Andrews, 14 August 1979, SRP Research Archives.

[27] A.J. Pfister to Cecil D. Andrus, 9 July 1979, SRP Research Archives.

October and both sides reached a general agreement on the technical data collected by the consultants. It took only one month for staff from both sides to agree on the irrigable acreage that would be used as the basis for calculating the reservation's water demand.[28]

Reaching consensus on the technical data that would underpin a settlement did not lead to an agreement on the sources of water that could be used to meet this demand. SRP developed a list of ten options for meeting the tribe's water needs, ranging from conservation and improved management to sewage effluent, groundwater, and water from SRP reservoirs. Among the list of options was a proposal to allow reservation lands that were located within the boundaries of the original reclamation project to receive stored water from SRP. This issue emerged as the most contentious in the negotiations. SRPMIC wanted assurances from SRP on the quantity of water it would make available to tribal lands if they were included in the Project. SRP officials were unwilling to make any commitments because they wanted to see what other sources of water beyond SRP supplies could be used to meet the tribe's water demands. The inability to arrive at a firm commitment of SRP water was the issue that eventually undermined the negotiations.

[28] Roger Evans and William Warskow to Herschel Andrews and Jack Pfister, 6 November 1979, SRP Research Archives.

Secretary Andrus wrote to Pfister in December to inform him that he would consider administrative action to include the tribe in the Project "...in the event that the Project's position in the negotiations is against inclusion...."[29] This was not enough to compel the parties to reach a consensus and the negotiations officially ended in February 1980 when SRPMIC President Herschel Andrews sent a letter to Pfister that cited "...the extreme reluctance of the Salt River Project to deal with the inclusion of significant portions of the Salt River Pima-Maricopa Indian Community lands within the Project..." as the basis for his conclusion that SRP was no longer negotiating in good faith.[30] The following month, Andrews wrote to Secretary Andrus asking that he take administrative actions to include SRPMIC lands in the project. The letter requested the boundaries of the SRRD be expanded to include all the reservation lands and that certain contracts between SRP and municipal and agricultural users be overturned.[31]

The inclusion of reservation lands in the Project was not the only issue weighing on the negotiations. In January U.S. District Court Judge Valdemar Cordova dismissed cases brought by the tribes challenging the jurisdiction of the state adjudication process. Cordova also remanded the Salt River adjudication,

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[29] Cecil D. Andrus to A.J. Pfister, 27 December 1979, SRP Research Archives.

[30] Herschel Andrews to A.J. Pfister, 13 February 1980, SRP Research Archives.

[31] Herschel Andrews to Cecil D. Andrus, 27 March 1980, SRP Research Archives.

which had been removed to federal court, back to the state court. In making his ruling, Cordova concluded that Arizona's adjudication met the standards of the McCarran amendment and could incorporate federal reserved rights claims.[32] On the same day that Cordova issued his ruling, a large meeting of non-Indian water users, which including municipal, mining, and agricultural representatives was held at the SRP offices to discuss the status of Indian negotiations. The meeting speaks to a growing awareness among non-Indian parties that Indian claims needed serious attention. However, SRPMIC representatives objected to being excluded from the meeting, which they saw as a violation of the confidentiality of their negotiations with SRP, they chose to break off discussions a short time later.[33]

In August 1980 Secretary Andrus followed through with his earlier commitment and announced a significant change in the CAP allocation for Indian lands. Andrus raised the total quantity of water for Indian lands to 309,828 af from the 257,000 af announced in 1976. More significantly from the perspective of Indian tribes, this water would share the same priority with M&I allocations, which had previously been given a priority above both agricultural and Indian water. The Secretary also expressed for the first time his intention that "...CAP

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[32] In the Matter of the Determination of Conflicting Rights to the Use of Water from the Salt River Above Granite Reef Dam and its Tributaries, 484 F. Supp. 778 (Ariz. 1980).

[33] Herschel Andrews to A.J. Pfister, 13 February 1980, SRP Research Archives.

water will be used in the settlement of outstanding [Indian] claims."[34] The allocation of this high priority supply of water could now be used to offset the water rights claimed by the tribes under the *Winters* doctrine. Arizona officials responded to the 1980 proposed allocation by filing a lawsuit intended to stop the Secretary's allocation from taking effect. However, the state's protest was short-lived and the case was dropped after the Secretary signed delivery contracts with eleven of the twelve tribes that were eligible to receive CAP water.[35] The reallocation of the CAP was one of the last significant policy decisions Andrus made before leaving the Department in January 1981. Officials in the Reagan Administration did not apply the same level of pressure on the state's major water users to negotiate Indian claims.

The next several years were spent litigating the key jurisdictional questions raised by Arizona's adjudication statutes. After the Ninth Circuit Court of Appeals reversed Cordova's earlier ruling, *Arizona v. San Carlos Apache Tribe* was appealed to the U.S. Supreme Court. Arguments were heard on March 23, 1983, with Jon Kyl, an SRP attorney and future U.S. Congressman and Senator, arguing the case for the State of Arizona. Kyl focused his attention on the government's waiver of sovereign immunity in general stream adjudications

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[34] Department of the Interior, Office of the Secretary, Central Arizona Project, Arizona; Proposed Allocations of Project Water to Indian Tribes, 45 Fed. Reg. 52938 (August 8, 1980).

[35] Miller, "The Use of Central Arizona Project Water."

provided under the McCarran amendment and the Court's prior ruling in the *Akin* case that expressed a desire to avoid the piecemeal adjudication of claims that would result from having concurrent cases in state and federal court. The transfer of adjudication responsibilities from the SLD to the Superior Court in 1979 supported the state's argument that a general adjudication was already underway. According to Kyl, the only way to perform a comprehensive adjudication was to have a proceeding in state court where Indian claims could be resolved alongside all other claimants.[36] The tribes' argument rested on a clause in the constitutions of several western states, including Arizona, that granted the federal government jurisdiction over Indian affairs. It was the tribes' contention that this amounted to a waiver by the state of its ability to determine water rights under the federal reserved rights doctrine. The Court issued a 6-3 decision in July 1983 that sent the adjudication back to state court and removed one of the last major hurdles to the adjudication moving forward.[37]

[36] Official Transcript of Proceedings before the Supreme Court of the United States, 23 March 1983, Arizona, et al. v. San Carlos Apache Tribe of Arizona, et al., SRP Research Archives.

[37] Arizona, et al. v. San Carlos Apache Tribe of Arizona, et al., 463 U.S. 545 (1983).

The Opening of the Settlement Era

The opening of the settlement era was facilitated by the resolution of a number of the political and legal uncertainties that complicated efforts to address Indian claims. Several issues surrounding the construction and distribution of the CAP were resolved, including the finalization of the Andrus allocation in March 1983 and the signing of the Plan Six cost-sharing agreement in April 1985.[38] These developments paved the way for the first deliveries of CAP water to begin the following month.[39] The *San Carlos* decision brought to a close several decades of litigation concerning the jurisdiction of state courts to determine Indian water rights. With a legal mechanism now in place, the state's water users were in a better position to assess their claims and determine their litigation risks. After trying for over forty years to develop a legal means to compel Indian tribes to assert their claims in court, SRP chose to resume negotiations with the Salt River and Fort McDowell Indian communities at the very moment when the adjudication was poised to proceed. This development cannot be accounted for

[38] Department of the Interior, Office of the Secretary, Central Arizona Project, Arizona; Water Allocations and Water Service Contracting; Record of Decision, 48 Fed. Reg. 12446 (March 24, 1983).

[39] Jennifer E. Zuniga, U.S. Bureau of Reclamation History Program, "The Central Arizona Project," last modified October 2, 2009, accessed February 28, 2011, http://www.usbr.gov/projects/Project.jsp?proj_Name=Central%20Arizona%20Project&pageType=ProjectHistoryPage.

exclusively by the events described above, but rather was the result of a sustained commitment to the negotiation process.

The critical force behind negotiations was the strong desire by both SRP and SRPMIC to negotiate a settlement. The willingness to find common ground was more significant than any single political or legal development. In an interview conducted shortly after the SRPMIC settlement was finalized, Pfister described his approach to the resolution of Indian claims:

> I've always believed that you needed to resolve these by negotiation rather than by litigation, but that the best way to make certain that you could do that was to be very well prepared for litigation. It's kind of the same strategy that America used with its missiles. We had to have our missiles in the silos. If we didn't, I don't think we would have ever gotten the Indians to face up to what their real water rights were. Some of it was a question of negotiating from a position of significant strength in that we were well prepared to go forward with the litigation.[40]

The adjudication offered SRP officials the flexibility to negotiate with the tribes while leaving open the option to pursue litigation if discussions broke down. Both SRP and the tribes were aware of the stakes in the adjudication and this further motivated them to negotiate. If the tribes could prove their claims in court, it had the potential to cause a serious disruption in the existing water allocation structure in Arizona, but this would not necessarily put the tribes in any better position to achieve their goal of receiving water and the money to put it to use. The

[40] A.J. Pfister, interview by Karen L. Smith, May 3, 1991, transcript, SRP Research Archives.

impending adjudication offered both an opportunity and a motivation to achieve a settlement.

On September 30, 1983, Pfister sent a letter to SRPMIC President Gerald Anton expressing his desire to resume negotiations on the tribe's water rights claims.[41] On the surface this overture did not differ very much from SRP's past expressions of willingness to negotiate. If SRPMIC representatives saw Pfister's letter as an opportunity to start afresh, it was not evidenced by their decision to file a lawsuit against SRP a short time later that claimed the tribe was overcharged for electricity sold to them by the Project.[42] Pfister persisted with his attempts to demonstrate SRP's commitment to negotiation, offering to contact BOR to help the tribe work out issues associated with the delivery of its CAP allocation. However, both sides were well aware that it would take more than working on peripheral issues to solve the tribe's water rights claims. Any settlement would have to include water in a quantity and of a reliability that was satisfactory to meet the long-term needs of the tribe. To accomplish this both sides had to address SRPMIC's central complaint that reservation lands within the Project boundaries were not receiving stored water on the same basis as SRP shareholders. The inability to resolve this issue had led to the breakdown of prior discussions and it remained an essential component for any settlement.

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[41] A.J. Pfister to Gerald Anton, 30 September 1983, SRP Research Archives.

[42] Philip J. Shea to John R. Lassen, 1 December 1983, SRP Research Archives.

A year after Pfister made his initial offer to resume the negotiations, he sent a letter to Anton outlining SRP management's position on a possible settlement. The offer included many of the same elements contained in prior proposals including: offering to help obtain more CAP water, acquiring municipal effluent, assisting in conservation efforts, and helping with infrastructure improvements. Included on the list was also an offer to discuss how the tribe might receive SRP water.[43] In response to Pfister's letter, Anton made it known that the delivery of SRP water "...should be the prime focus of discussions."[44] SRP agreed to proceed along this path and the rest of 1984 and the first half of 1985 was spent laying the groundwork for a settlement offer.

After a series of negotiating sessions, SRPMIC attorneys sent SRP their proposed settlement in June 1985. The proposal was built around two key provisions: reservation lands within the SRRD would receive water on the same basis as member lands and the existing agreement between SRP and the United States, which determined the tribe's share of water stored behind Bartlett Dam, would be amended to provided additional water and greater flexibility. The offer relied upon SRP to provide the majority of the water that would be needed to effectuate a settlement.[45]

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[43] A.J. Pfister to Gerald Anton, 25 September 1984, SRP Research Archives.

[44] Gerald Anton to A.J. Pfister, 19 October 1984, SRP Research Archives.

[45] Philip J. Shea to Richard H. Silverman, 14 June 1985, SRP Research Archives.

It took nearly six months for SRP to develop their response to the SRPMIC offer, but when they did it represented a significant departure from prior offers. SRP agreed to treat the reservation lands located within the SRRD on the same basis as other member lands in nearly every respect. This would give the tribe a critical capability that it did not possess, the ability to store both their annual Kent Decree entitlement and additional water behind SRP dams. The lack of a storage option created a situation where the tribe was often not able to use their full allocation in a given year. SRP's offer would give the tribe more flexibility to pool their entitlements and utilize them during the periods when they were most needed. SRP also agreed to assist the tribe in finding water from other sources to supply reservation lands located outside the SRRD and to calculate the water demand for these lands using the PIA standard developed in *Arizona v. California*. If both parties could agree on the provisions of a settlement, the SRPMIC would waive all future claims to groundwater and surface water for the entire reservation. SRP's offer helped to spur further negotiations by giving the tribe access to enough stored water to supply approximately half of the irrigable acreage on their reservation.[46]

The most important element of SRP's proposal was not the quantity of water, but rather the principles it rested upon. In November 1985 the governing board of SRP, for the first time, approved a set of principles that management

[46] Richard H. Silverman to Richard B. Wilks and Philip J. Shea, 5 December 1985, SRP Research Archives.

could use to negotiate with the tribes. The first principle stated that reservation lands with the SRRD should be treated as other Project lands in regards to the distribution of stored water. This reinforced a long-standing policy, which SRP fiercely defended against protests from the cities and other water users, that Project water could only be used within the boundaries of the SRRD. The settlement offer presented to SRPMIC was predicated on the continuation of this policy.

By bringing reservation lands into the Project, SRP was agreeing to increase the total area of land that was eligible to receive water without increasing the quantity of water available to serve those lands. This would in the long run reduce the water that SRP could deliver to all lands within the Project. In its most simplified form, the proposal called for an increase in the number of lands with rights and entitlements without increasing the physical water supply. However, the settlement did provide SRP with additional benefits. SRP concluded that it would be better to deliver water to the tribe directly, and to be able to negotiate a specific quantity, rather than run the risk that SRPMIC would prove a PIA claim in court and receive an entitlement to SRP water without restrictions. The settlement offer represents an effort by SRP to maintain its autonomy, which was threatened by potential legal or administrative changes to the Project's operation. By bringing reservation lands into the Project, SRP protected its ability to continue managing the water supply by connecting their interests with those of the tribe.

Creating this interdependence helped to establish a coalition with the tribe that made the Project even more critical to the Valley's water supply picture. There also was the possibility that SRPMIC would not be able to utilize its full entitlement immediately because the necessary infrastructure was not in place to cultivate all the acreage the tribe was planning to farm. If the Community did not fully utilize its entitlement in any given year, the water would continue to be available to SRP to store and deliver to other member lands. Therefore, SRP was able to reduce the risk to its water supplies while retaining the ability to store the Community's unused entitlements. SRP's proposal represents an effort to maintain many of the core elements of its water management structure while eliminating uncertainty in its future water supplies.

SRPMIC attorneys remained skeptical that SRP would treat reservation lands in the same manner as other Project lands.[47] They contended that SRP lands received more water than management was admitting and they did not trust SRP to continue to manage water releases in a manner that was equitable to the tribe.[48] Tribal representatives argued that urbanization was decreasing the total water demand per acre, also known as the water duty, and that this process created excess water that could be delivered to the tribe. SRP officials countered by

[47] Philip J. Shea to Richard H. Silverman, 12 December 1985, SRP Research Archives.

[48] William Swan to Files, 13 January 1986, DOI Field Solicitor's Office.

saying that any decrease would only be temporary and as urban densities increased so too would the water duty. SRPMIC officials proposed other changes in the way SRP managed the water system that would in their opinion create additional water.[49] SRP representatives outlined the rationale they used to arrive at the settlement offer, but they would not agree to changes in how they operated the storage and delivery system.[50]

The greatest barriers at this point in the negotiations were not technical since both sides had already agreed on the amount of irrigable acreage on the reservation. A lack of trust between the two sides slowed the negotiating process. It took several months for everybody to get beyond the years of litigation and failed negotiations to achieve a mindset where they were prepared to work together. Michael Clinton, a DOI representative who entered the negotiations in early 1986, recalled:

> Those early meetings were very, very hostile. These attorneys on both sides had been at each other's throats in the courts both with strong, strong legal positions, both with strong precedents behind what they were doing. They initially wanted to argue their legal positions in the package. Turning those discussions away from the legal positions and into the substance of how a settlement might be structured took a lot of patience.[51]

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[49] Philip J. Shea to Richard H. Silverman, 12 February 1986, SRP Research Archives.

[50] William Swan to Files, 18 February 1986, DOI Field Solicitor's Office.

[51] Michael J. Clinton, in discussion with the author, July 27, 2010.

Clinton's appointment as the federal negotiator in the settlement discussions fulfilled the need both for a skilled mediator and a federal representative. His effectiveness in carrying out this role had as much to do with his personality as his position. SRPMIC attorney Richard Wilks recalled that "[i]t was [Clinton's] personality, him as a person, and the fact that he represented the United States"[52] that made him valuable to the negotiation process. Clinton developed his approach as the result of his involvement in several water disputes. He worked on the Colorado Ute and Animas La-Plata settlement in southern Colorado and negotiated a settlement with local parties in North Dakota on the Garrison Diversion Unit. He also was a career employee of the BOR, which contributed to his extensive knowledge of water issues in the West, and gave him credibility with SRP, who viewed Reclamation as allied with its interests. The addition of Clinton added a critical third party to the negotiations, which helped to relieve some of the tension between SRP and tribe.

The push to settle Indian claims received an additional boost from the resolution of one of the last remaining roadblocks to the completion of the CAP. The controversy revolved around alternatives to Orme Dam, which was originally planned for construction near the confluence of the Salt and Verde rivers, but after a great deal of public controversy it was eliminated by the Carter administration. Construction of the dam would have resulted in the flooding of a majority of the

[52] Richard Wilks, in discussion with the author, 11 November 2010.

lands on the Fort McDowell reservation. Several local entities explored alternatives to Orme as part of the Central Arizona Water Control Study (CAWCS) in the early 1980s. Plan Six emerged as the top candidate of the nine options presented in the CAWCS and in April 1984 Secretary of the Interior William Clark selected it as the preferred alternative.[53] Plan Six called for the construction of two new dams, Cliff Dam on the Verde River, which would be located between the existing Bartlett and Horseshoe dams, and Waddell Dam on the Agua Fria River, which would be enlarged and enhanced to provide regional storage for CAP water, and included modifications to Roosevelt and Stewart Mountain dams and bridge and road infrastructure to enhance flood control making the construction of the proposed Orme Dam unnecessary. However, the high costs associated with the CAP were attracting greater scrutiny and federal officials wanted local entities to cover a portion of the expense to construct Plan Six. In April 1986 an agreement was reached between the DOI, CAWCD, the Flood Control District of Maricopa County, SRP, and several Valley cities, that called for $339 million in upfront funding to be supplied by local parties.[54] Several Arizona tribes came out in opposition to Plan Six, arguing that no

[53] "Clark Approves a Plan to Expand Water Project in Central Arizona," *New York Times*, April 4, 1984.

[54] Kenneth G. Maxey and Norman H. Starler, "Cost Sharing in Transition: The Case of Plan 6, Central Arizona Project," *Water Resources Bulletin* 23, no. 5 (1987): 749-759.

additional federal funds should be expended on water infrastructure projects until their claims were resolved. Tribal representatives viewed the appropriation process for Plan Six as their only opportunity to stop the project from moving forward and force settlement discussions.[55]

Uncertainty over the funding of Plan Six further motivated SRP to continue settlement negotiations. SRP started negotiations with the FMIC a month after sending its counter-proposal to SRPMIC.[56] Both sides cited the ongoing discussions over Plan Six as a good opportunity to resolve the tribal claims.[57] Without a settlement, the tribes vowed to protest the ongoing appropriations. SRP officials were deliberate in their decision to address the claims of the Salt River and Fort McDowell tribes before negotiating with other tribes. Both reservations had entitlements under the Kent Decree that were being delivered by SRP and the tribes claimed water from the Salt and Verde rivers. The location of the reservations adjacent to these rivers gave them solid justification for a *Winters* claim that could effect SRP's water supply and management practices. What was needed at this point was a rationale for how to structure a water rights settlement.

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[55] *Energy and Water Development Appropriations for 1987: Hearings on H.R. 5162 before a Subcommittee of the Comm. on Appropriations*, 100th Cong., 1536 (1986) (statement of Gerald Anton, President of the Salt River Pima Maricopa Indian Community).

[56] A.J. Pfister to Norman Austin, 27 November 1985, SRP Research Archives.

[57] Norman Austin to A.J. Pfister, 11 December 1985, SRP Research Archives.

The overarching structure of the settlement could not come solely from the principles outlined by SRP. It became clear early in the negotiations that the parties needed to arrive at a maximum water demand before the sources of water could be solidified. A settlement proposed developed by Michael Clinton in February 1986 offered an organizing principle that helped to advance this principle. Clinton's proposal relied on a water budget, which established the total quantity of water the tribe would need to meet all future demands. The budget was calculated by multiplying the total number of irrigable acres on the reservation by a water duty per acre. Since the total amount of water in the settlement would be critical for all parties, the manner in which the budget was calculated was one of the most important considerations. In the SRPMIC settlement proposal, Clinton used a 4.5 af/acre water duty, multiplied by 27,200 irrigable acres, to arrive at a total water budget of 122,400 afy. The water duty Clinton used was much lower than the 6 af/acre that SRPMIC had originally claimed because his proposal was predicated on the federal government funding infrastructure improvements on the reservation.[58] The choice of a water duty was critical because it served as the multiplier that was used to arrive at the total SRPMIC demand. When the tribe agreed to a reduced water duty, it was in essence limiting its ability to claim additional water in the future. Solidifying the

[58] "Draft Agreement-in-Principle, Salt River Pima Maricopa Indian Community Water Rights Settlement," 25 March 1986, SRP Research Archives.

water budget in March 1986 established the total water supply that would be included in the settlement.[59]

The next stage in the SRPMIC negotiations was filling the 122,400 af water budget with the actual physical sources of water. After calculating the various sources and entitlements the tribe already had access to, added to the offer made by SRP, there still existed a gap of approximately 30,000 afy. Tribal representatives believed the majority of the water should come from SRP, since it was their supply that would be most directly affected by the fulfillment of the tribe's *Winters* claims. From the beginning of the negotiations, indeed since deliberations began with all the Indian tribes in the 1950s over water rights, SRP sought to limit the amount of water it would have to give up as part of a settlement. However, management also recognized the benefits for their own water planning if the Indian claims were resolved, which is why they took steps to involve additional parties in the negotiations in order to supply other sources of water. Adding parties to the negotiation would increase the potential for new sources of water to be brought to the table, thus reducing the eventual risk to SRP of losing Project water to satisfy tribal claims.[60]

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[59] Ibid.

[60] William H. Swan to Files, 11 April 1986, DOI Field Solicitor's Office; William H. Swan to Files, 1 May 1986, DOI Field Solicitor's Office.

From the very early stages of the negotiation, SRP pushed for the Valley cities, particularly the City of Phoenix, to be involved in the settlement discussions. SRP's reasoning for wanting to include the cities was two-fold. First, contributing SRP water would impact the cities' supplies, although SRP was not beholden to the cities since the water it delivered was tied to the land. Second, and more importantly, the cities' water needs were different from SRP and they had access to a greater variety of water sources that could be used to fill the gap in the water budget. SRPMIC representatives opposed the idea of including the cities in the negotiations for several months, arguing that the terms of SRP's involvement in a potential settlement should be solidified before additional parties were brought to the table. SRPMIC representatives finally acquiesced after a stalemate was reached in which SRP was unwilling to negotiate on additional sources of water without the involvement of other parties.[61]

In April 1986 the parties expanded the negotiations to include representatives from the RWCD located in the southeast Valley.[62] The tribe agreed to include RWCD in part because its water supplies were arguably the most exposed to a legal challenge from SRPMIC, who contended that their contract with SRP was illegal because their rights were inferior to those of the Salt River reservation. Consequently, RWCD was viewed as a fitting candidate to

[61] William H. Swan to Files, 1 May 1986, DOI Field Solicitor's Office.

[62] William H. Swan to Files, 2 May 1986, DOI Field Solicitor's Office.

close the shortfall in the water budget.[63] The inclusion of RWCD in the settlement discussions helped to solidify the arrangement between SRP and SRPMIC. RWCD wanted SRP officials to agree to an extension of their contract as a condition for contributing water to the settlement.[64] Since SRP had already provided water to the settlement, they had more of an incentive to see that other parties came along and they leveraged their existing relationships to make sure this happened. Despite their initial opposition, SRP agreed to extend the RWCD contract as part of the final settlement. RWCD promised to give up 4,000 af from its entitlement, which would later be increased to 8,000 af. RWCD's contribution to a settlement helped to further unite the group and provide hope that the water budget could be filled with the involvement of other parties.[65]

The shortfall in the water budget was narrowed further when SRP agreed to provide an additional stored water allotment to the tribe in response to a proposal SRPMIC put forward concerning surplus water. The tribe felt they should receive more water when SRP reservoirs were full in order to reduce groundwater pumping on the reservation.[66] SRP made a counter-proposal that

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[63] William H. Swan to Files, 22 May 1986, DOI Field Solicitor's Office; William H. Swan to Files, 5 June 1986, DOI Field Solicitor's Office.

[64] Roosevelt Water Conservation District [RWCD] to M. Clinton, 20 June 1986, DOI Field Solicitor's Office.

[65] William H. Swan to Files, 26 June 1986, DOI Field Solicitor's Office.

[66] William H. Swan to Files, 11 April 1986, DOI Field Solicitor's Office.

gave SRPMIC the option of receiving either a firm amount of 9,074 afy or a variable amount that was pegged to the annual storage levels in SRP's reservoirs. The proposal was part of SRP's strategy to use shortage- and surplus-sharing arrangements to dictate the amount of water the tribe receiving. The tribe accepted the offer because it would allow them to receive more water in times of surplus and to reduce groundwater pumping on the reservation during these wet years.

During periods of elevated supply SRP would increase its allocation to member lands and reduce its groundwater pumping. This principle was extended to the tribe's allocation whereby the tribe could reduce their reliance on groundwater during periods when SRP's reservoir levels were high. The tribe ultimately decided to accept the variable approach, which gave them the ability to receive up to 26,474 af, but could also reduce their stored water allotment to zero if SRP reservoirs fell below 350,000 af.[67] The additional stored water helped to close the deficit in the water budget and further reinforced the connection between SRPMIC and SRP prior to the introduction of other settlement parties.

Representatives from the Valley cities, CAWCD, and the state, were invited to join the settlement discussions in July 1986.[68] Adding parties to the negotiations complicated the discussions by increasing the number of demands on

[67] "Salt River Pima Maricopa Indian Community Water Rights Settlement Agreement," February 1988, SRP Research Archives.

[68] Michael J. Clinton to Roger S. Manning, 14 July 1986, SRP Research Archives.

the settlement process. The core group of SRP, SRPMIC, and the federal team, sought to contain the number of alternatives by uniting around the justification used to arrive at the water budget as well as the sources that were already pledged.[69] The City of Phoenix's initial stance in the negotiations reflects a lack of concern about potential legal claims. City representatives espoused the belief that they should receive more water in a settlement than they were giving up because of the differences in price, quality, and reliability between SRP stored water and CAP water.[70] The Arizona Municipal Water Users Association (AMWUA), a coalition made up of the Valley cities, expressed a similar sentiment in stating that "...each party contributing water to a settlement should expect to be made 'whole' through exchange agreements providing for replacement sources."[71] The cities' view that they should not be required to reduce their water supplies as part of a settlement was not shared by SRP or the tribe, who felt that the litigation risk presented by the tribal claims required sacrifices that would help to achieve a final settlement. Adhering to the cities' standard would place additional demands on the water budget by increasing the amount of water that was needed in order to satisfy both the tribes needs and replacement sources for the cities. However, losing the cities participation in the

[69] William H. Swan to Files, 6 August 1986, DOI Field Solicitor's Office.

[70] George Britton to Michael Clinton, 22 July 1986, SRP Research Archives.

[71] Roger S. Manning to Michael Clinton, 23 July 1986, SRP Research Archives.

settlement could seriously compromise the prospects for gaining final approval. Rather than arguing with the cities' premise for agreeing to a settlement, the negotiating group identified alternative strategies that could close the water budget while meeting the institutional and political demands placed on the settlement framework.

Closing the Water Budget

The introduction of the Valley cities, particularly the City of Phoenix, changed the overall dynamic of the negotiations in several important ways. The settlement was expanded beyond its original purpose of resolving the tribal claims to involve a broad restructuring of a variety of regional water allocation arrangements. SRP officials saw the potential for this development early in the negotiating process, which is why they insisted in their meetings with SRPMIC and the federal team that the cities needed to be part of any settlement. When the cities' representatives were finally included, it became clear that their approach to the settlement was quite different than SRP and the tribes. SRP was confronted with a choice to either use their leverage with the cities to push a settlement forward or hold to their original position and wait to see if the tribe and the federal representatives could garner the necessary support. Tribal attorneys were also aware that SRP needed to play a leadership role in getting the settlement finalized. This changed the dynamics of the relationship between SRP and tribes. Arlinda Locklear recalled that

> ...at the beginning of the negotiation with SRP there was absolutely no confidence that SRP could be trusted by the tribe to either negotiate fairly or to enforce the deal. But, I think over time the tribe came to understand where SRP was coming from in terms of its needs and interests with regard to water use; and, I think SRP came to appreciate Fort McDowell's as well. It took -- I mean, the whole negotiation process was, not only one of arriving at a set of numbers and terms for a settlement of water, but also building relationships among neighbors who are going to be users, joint-users of a limited resource for all time.[72]

The strengthening of the relationship between SRP and the tribes was critical to preserving the overall settlement framework. SRP would need to leverage its existing connections with the other participants in order to reach a final settlement.

The interconnectedness of central Arizona's water allocation structure placed further demands on the settlement parties to cooperate because of the web of contracts, entitlements, and prior agreements that controlled the distribution of water. This required the negotiating team to find innovative ways to close the water budget while preserving the core elements of the water allocation system. This interdependence created opportunity because it allowed settlement participants to develop new mechanisms for transferring water that would not have been possible without a robust water delivery network. The CAP system offered the greatest potential for flexibility because it allowed for the transfer of water from the Colorado River as well as among agricultural, municipal, and industrial users in central Arizona. This flexibility was critical to the negotiation

[72] Arlinda Locklear, in discussion with the author, September 10, 2010.

process as settlement participants looked to develop trade-offs that addressed institutional and locational constraints.

Among the myriad obstacles confronted by the settlement group was the locational challenge of getting different sources of water to the places it was needed. This issue was further complicated by the institutional constraint that required that SRP water not be transferred outside the SRRD. Consequently, the largest gap in the SRPMIC water budget was for the area outside this administrative boundary that split the irrigable acreage on the reservation in half. There was also a need to account for the quality, reliability, and cost disparities among the various waters supplies in the settlement. The solution chosen by the settlement participants was to develop exchange and transfer agreements that addressed issues of geography as well as price, water quality, supply certainty, and legal availability.

The agreement at the core of the SRPMIC settlement was known as the cities' water exchange. The original proposal drafted by Clinton in February 1986 called for the delivery of 20,000 af of SRP stored water to the tribe in exchange for an equal amount of CAP agricultural priority water being sent to the cities.[73] The plan was intended to solve the problem of supplying the reservation lands outside the SRRD while also substituting the SRP water that the cities would give up as part of the settlement. The exchange provided an added benefit to the cities

[73] "Draft Agreement-in-Principle, Salt River Pima Maricopa Indian Community Water Rights Settlement," 25 March 1986, SRP Research Archives.

that were looking for water supplies that could be used to meet the demand in those portions of their service territories that fell outside the SRRD. The exchange contained a phase-in provision that transferred the water to the tribe over time as SRP member lands within the municipal boundaries were urbanized. The cities would direct SRP to deliver to the tribe water from their domestic water accounts for the SRPMIC to use within the SRRD. As the exchange water was delivered, the tribe would be free to use an equal amount of its Bartlett Dam entitlement outside the reservoir district. If the tribe did not use all of its entitlement within a given year it would remain available in the cities' accounts. The exchange offered greater flexibility for both the tribe and the cities while trying to minimize the impact on their long-term water supplies.

Changes to the cities' exchange proposal were made after city representatives made it clear that they were not willing to accept a 1:1 exchange ratio for CAP water because of the differences in cost, quality, and reliability between the two sources. They proposed a modified arrangement that increased the amount of CAP water to 24,000 af while holding the tribal entitlement at the same level. They also demanded that the priority of the CAP water be increased from agricultural, which would be the first subjected to shortages, to the higher M&I classification.[74] The proposal was further modified after the cities' requested that water be acquired from the Wellton-Mohawk Irrigation and Drainage District

[74] George Britton to Michael Clinton, 22 July 1986, SRP Research Archives.

(WMIDD) on the Colorado River near Yuma, Arizona.[75] This move was intended to avoid a reduction in the overall CAP supply while fulfilling the cities' demand for a high-quality replacement for the SRP water. However, the new arrangement required money to purchase the WMIDD entitlements. The proposal, which had originally called for the reassignment of SRP's rejected CAP agricultural allocation, had evolved into a plan to have the federal government purchase water rights on the Colorado River to supply Valley cities. The complexity of the cities' exchange arrangement demonstrates the extent to which the negotiating team had to find creative ways to locate additional sources of water while conforming to the institutional constraints on the settlement.

Exchange arrangements also provided an effective means of trading different qualities of water. Municipal effluent offered a potentially abundant alternative water supply, but it could only be used for non-potable purposes. In the early 1980s, SRP and the City of Phoenix began exploring the possibility of setting up an exchange arrangement whereby the city would deliver municipal effluent to the Roosevelt Irrigation District (RID) to use in the irrigation of non-edible crops. RID would in turn deliver groundwater to SRP, who would make available additional stored water for Phoenix. An extensive feasibility study of the plan was conducted, but no action was ever taken.[76] SRP inserted the exchange

[75] William Swan to Files, 27 August 1986, DOI Field Solicitor's Office.

[76] William L. Chase to George W. Britton, 18 June 1986, SRP Research Archives.

into an early version of the settlement and when the City of Phoenix entered the negotiations they agreed to participate.[77] The city would provide 30,000 af of effluent to RID, who would then send 33,000 af of groundwater to SRP, and SRP would provide 20,000 af to the city and 10,000 af to the tribe.[78] In addition to filling out a portion of the water budget, the exchange demonstrated the growing importance of effluent and foreshadowed the use of similar arrangements in the years to come.

The final major transfer agreement in the SRPMIC settlement dealt with the leasing of the tribe's CAP allocation. Since signing their CAP delivery contract in 1980, several Arizona tribes had become worried about the costs associated with receiving this supply. The Salt River tribe estimated it would cost $54/af to deliver their CAP entitlement, which was as much as three times more than other sources. As early as 1983, SRPMIC explored possible exchange arrangements with other CAP water users, but these efforts were complicated by the lack of a distribution system on the reservation that could get the exchanged water to where it was needed.[79] A provision in SRPMIC's original settlement

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[77] George W. Britton to Michael J. Clinton, 22 July 1986, SRP Research Archives.

[78] "Salt River Pima Maricopa Indian Community Water Rights Settlement Agreement," February 1988, SRP Research Archives.

[79] Gerald Anton to Edward M. Hallenback, 1 July 1983, SRP Research Archives; Memorandum, SRPMIC, 19 March 1984, SRP Research Archives.

offer allowed the Community to market its CAP entitlement.[80] Fort McDowell was also exploring possible exchange agreements for its CAP allocation and tribal officials asked the BOR to assist them in working out an arrangement with another water user. The options available to Fort McDowell were even more limited than SRPMIC because they would have to utilize the SRP system to deliver any exchange water. The marketability of CAP water became a major issue in the negotiations as the tribes looked for ways to get value for their allocation.

The focus of the exchange discussions changed in August 1986 when the City of Phoenix proposed that SRPMIC lease their full CAP allocation to them. This was not permitted under the tribe's existing CAP delivery contract and the discussions turned to possible amendments to allow leasing within the CAWCD service territory. The prospect of the tribe leasing its CAP allocation raised a number of complicated issues concerning the tribe's ability to market other water contained in the settlement. SRP officials were adamant that Kent Decree and SRP stored water not be marketed to other water users. CAWCD and state officials expressed concern that the proposed leasing provisions would set a precedent for other CAP water users to market their water. They wanted to ensure that the water stayed with the CAWCD service territory so it would not affect the total supply or the project repayment. The City of Phoenix continued to push to

[80] Philip J. Shea to Richard H. Silverman, 14 June 1985, SRP Research Archives.

allow the tribe to have leasing authority for its CAP supplies, but they also made it clear that they would not accept a lease agreement that was less than 50 years. Another potential benefit for allowing the tribe to lease their CAP allocation was the fact that the revenue generated could be used to defray some of the development costs for the reservation's delivery system. The parties eventually agreed to support the marketability of the CAP water within the CAWCD service territory. This was the only water involved in the settlement that could be leased off the reservation.

SRPMIC and the City of Phoenix eventually reached an agreement that permitted the city to lease the tribe's full 13,300 af CAP allocation for a period of ninety-nine years at a cost of $16 million. In order to finalize the agreement, the tribe's contract with the federal government would have to be amended to allow leasing and extended to cover the entire lease period. The water Phoenix received as part of the agreement would be treated as Indian CAP water in terms of priority and its repayment obligations. The city was responsible for paying the annual operation, maintenance, and replacement (OM&R) costs estimated at $55/af while the federal government would pay the capital costs associated with constructing the Project thus reducing the overall costs to Phoenix.[81] The marketing of CAP water in the SRPMIC settlement set a precedent for future Indian settlements, which contained broader capabilities for the leasing and exchange of water off the

[81] Douglas K. Miller to Thomas C. Clark, 15 January 1987, SRP Research Archives.

reservation. As federal funding became even scarcer in later settlements, CAP leases were used as an important funding mechanism for reservation development.

Confirmation of Rights

The core elements of the water budget were crystallizing by the end of 1986. As the settlement parties considered the process they would use to effectuate the agreement, they needed to develop mechanisms to bind the various interests of those who were participating in the settlement. This process went beyond simply agreeing on the quantities and sources of water and included a confirmation of the rights, which guaranteed that the water included in the settlement would not be the subject of future legal challenges by those who were a party to the final agreement. In addition to resolving some of the uncertainty about future legal challenges, the settlement also provided the opportunity to have Congress affirm over a century of contracts, agreements, and water rights claims that served as the foundation for the water allocation structure in central Arizona. Many of these arrangements had never been the subject of a court decree and by confirming their validity the settlement parties were seeking to minimize the possibility that they ever would. The process used to affirm these arrangements speaks to the interdependencies between regional water users and the need to provide certainty on issues that extended beyond the specific tribal claims.

RWCD was one of the first entities to seek a confirmation of their rights as a condition for participating in the settlement because their water supply was arguably one of the most exposed to a legal challenge.[82] RWCD received its water by virtue of a 1924 contract with SRP, and a subsequent legal decision, which entitled the district to 5.6% of the agricultural water diverted at Granite Reef Dam in any given year. In return for this water, RWCD agreed to line several of SRP's canals. Certain elements of this contract were exposed to a potential legal challenge. First, there was considerable disagreement about whether RWCD possessed an appropriative right or a contract right. If the sole basis for their water right was the contract with SRP, then they would be one of the first to lose their water if one of the tribes could prove that they possessed a senior right. Another potential vulnerability resulted from the fact that RWCD's annual deliveries had not decreased with the urbanization of SRP lands. Some argued that RWCD was only entitled to a percentage of the water used for irrigation, therefore, as agriculture declined so too would RWCD's entitlement. These vulnerabilities led RWCD to seek a confirmation of their rights as the basis for contributing water to a settlement.

SRPMIC attorneys were well aware of the weaknesses in the RWCD claims and had previously expressed their desire to challenge the legal basis of the contract in court. However, during the course of the negotiations, they came to

[82] RWCD to M. Clinton, 20 June 1986, DOI Field Solicitor's Office.

realize that it would not be to their advantage to challenge the contract if RWCD was willing to contribute water to the settlement. Insulating RWCD from a potential legal challenge from another water user would have the effect of firming the supply that the tribe hoped to receive. Other parties to the settlement realized this fact and expressed reservations about confirming and extending the RWCD contract. The City of Phoenix initially opposed any validation of RWCD's rights, because as the largest single recipient of SRP water, Phoenix would stand to benefit if RWCD's contract was overturned and that water was returned to the overall SRP supply. However, Phoenix came to support the confirmation after it realized that the end of the contract would not necessarily mean more water for them. As the successors in interest to the District's water rights, the East Valley municipalities strongly supported RWCD's efforts to maintain these rights.[83] The City of Phoenix eventually removed their opposition to the confirmation.

Another obstacle that confronted all the settlement parties was the legality of the change in use of SRP and RWCD water supplies from agricultural to urban. More than any other single issue, this had the greatest potential to disrupt the water allocation picture in central Arizona by bringing into question the foundation on which many of the region's water rights were based. SRP officials were well aware of this and had for several years leading up to the settlement

[83] Kent Cooper to M. Clinton, 23 July 1986, DOI Field Solicitor's Office.

attempted to get a court to confirm the validity of this change.[84] When the issue was raised in the context of the settlement, it helped that nearly every water user in the Valley would stand to lose something if the change of use was ruled to be illegal. The cities and irrigation districts that relied on contracts with SRP would see the security of these water supplies brought into question. The only entities that might benefit from such a challenge would be an Indian tribe that was seeking to overturn the very basis on which the Valley's water rights were based. Neither the Salt River or Fort McDowell tribes were willing to engage in such a strategy because they realized that proving a legal right to water, which was already being used by other entities, might give them access to water, but would not include the financial resources that would allow them to put the water to use. A provision inserted in the SRPMIC agreement stated that no party to the settlement could object "...on the basis of change of use, nature of delivery, or on any other bases in any judicial or administrative proceeding."[85] Confirming the change of use addressed one of the core issues in the Valley's water rights structure.

The confirmation of rights presented a slippery slope for negotiators because as one entity received assurances against future legal challenges other

[84] Water Commissioner's Report, 3 June 1977, Hurley v. Abbott, Superior Court of Arizona, Maricopa County.

[85] "Salt River Pima Maricopa Indian Community Water Rights Settlement Agreement," February 1988, SRP Research Archives.

groups wanted similar treatment. Federal representatives were particularly concerned that the confirmation of rights and contracts might keep them from challenging the legality of certain arrangements on behalf of other tribes.[86] The situation was exacerbated by the long-standing practice of using contracts to structure water allocation arrangements. Jim Callahan, an attorney for the City of Phoenix, characterized the situation by saying,

> ...because so much water law is controlled by contract in Arizona you see the development of new methods of satisfying claims...when the parties that have something at stake get a hint that others are now catching on and say, "well let's keep a step ahead of them. Let's do another contract. We'll just envelope this contract within that contract."[87]

For this reason the settlement parties tried to limit the confirmation of contracts to those agreements that factored directly into the overall framework. For example, the City of Phoenix agreed to leave out a provision that would confirm its domestic water contract with SRP if the parties were willing to affirm the validity of the change of use of Project water.[88] The confirmation of rights functioned less to remove the possibility of future disagreements among water users than to limit the number of issues that could be raised in litigation. It also helped to solidify existing allocation arrangements by getting the Congress to sign off on prior contracts and agreements. Removing issues that had the potential to divide the

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[86] William H. Swan to Files, 10 April 1987, DOI Field Solicitor's Office.

[87] M. James Callahan, in discussion with the author, April 16, 2010.

[88] William L. Chase to File, 19 June 1987, SRP Research Archives.

settlement parties helped in creating an opening to focus on the resolution of the Indian claims.

Funding the Settlement

Consideration of the financial components of the settlement consumed the late stages of the negotiation process more than any other single issue. The allocation of money was just as critical to the success of the settlement as the water component because it would allow the tribe to put the water to use. When the agreement was first reached to use a lower water duty in calculating the water budget, it was predicated on the tribe receiving funding to construct a modern irrigation system. Without infrastructure improvements, the 4.5 af/acre water duty would not be sufficient to cultivate most crops. All the settlement parties were aware that development funding would have to be included in the final settlement, but early versions of the settlement agreement did not address the source or quantity of these financial contributions.[89] It was widely assumed that the federal government would cover a majority of the expense, but the issue was put aside until after the components of the water budget were in place. When it came time

[89] *Settlement of the Water Claims of the Salt River Pima Maricopa Indian Community in Maricopa County, Arizona: Hearings before the Select Comm. on Indian Affairs and the Comm. on Interior and Insular Affairs*, 100th Cong. 119 (1988) (statement of the Arizona cities).

to identify the specifics of the financial settlement, federal and local representatives were far apart.

The non-federal parties conducted a cost-sharing analysis to calculate the extent of the local and federal contributions in an effort to justify the expense of the settlement. The primary component of the local contribution was the water being surrendered by various entities as part of the settlement. SRP's consultants researched the costs associated with finding a replacement water supply and arrived at a value of $3,000/af. When added to the money involved in the CAP lease and commitments from SRPMIC and the State of Arizona, the total local contribution was calculated at $117 million, compared to an estimated federal commitment of $88 million.[90] When federal officials performed a similar analysis they arrived at a very different conclusion. The government did not believe that the local water supplies were worth $3,000/af and as a result the analysis resulted in a cost-share that was evenly divided between local and federal sources.[91] However, the distribution of costs was less important than the overall federal expense of the settlement.

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[90] Norman H. Starler and Kenneth G. Maxey, "Analysis of the Salt River Pima-Maricopa Indian Community Water Rights Settlement," in *Proceedings of the Symposium on Indian Water Rights and Water Resources Management* ed. William B. Lord and Mary G. Wallace, American Water Resources Association (June 1989): 109.

[91] Michael J. Clinton, "Salt River Pima-Maricopa Federal Cost Share Proposal," 11 August 1986, DOI Field Solicitor's Office.

The apparent 50-50 split in the settlement expenses did little to garner the support of officials in the Reagan administration who objected to the federal government funding nearly all the infrastructure improvements on the reservation. Officials within the Office of Management and Budget (OMB) voiced the strongest opposition to the overall settlement costs, which they argued were far greater than the litigation risk to the federal government presented by the SRPMIC claims.[92] Michael Clinton, who served as the primary conduit between the settlement group and the federal agencies, reported back to the group that the Administration was willing to support approximately $30 million for both the SRPMIC and FMIC settlements. This figure was well below the projected development costs of nearly $90 million for Salt River alone. The negotiating parties worried that the settlement might fall apart if the federal government would not meet the financial expectations of the group.[93]

Organizational changes within the Reagan administration further complicated efforts to increase the federal commitment. Ann McLaughlin, an Undersecretary in the Interior Department and Clinton's direct supervisor, resigned in January 1987. The reshuffling of assignments that followed resulted in Clinton leaving the negotiations for several months as the Department reevaluated

[92] William Swan to Files, 30 September 1986, DOI Field Solicitor's Office.

[93] William Swan to Files, 3 November 1986, DOI Field Solicitor's Office.

its position.[94] McLaughlin's departure came at a critical period in the negotiations as the agreement was being finalized and the stakeholders were beginning to discuss the process for seeking legislative approval. The group decided to solicit the assistance of members of the Arizona delegation in getting the Interior Department back into the negotiations. Further uncertainty resulted from the resignation of White House Chief of Staff Donald Regan in March following the Iran Contra scandal.[95] Clinton recalled the impact that Regan's departure had on the settlement:

> ...[the Department of the Interior's] ability to prevail at OMB got diminished, and OMB started reasserting itself in terms of what kinds of federal contributions ought to go into these settlements. Through that process of them asserting themselves, the U.S. contribution to the Salt River Pima settlement was set at a level, which was not consistent with what I had opened these negotiations up with as a criterion.[96]

DOI officials reentered the negotiation in April, but they did not alter the Administration's position on the financial contribution. It became increasingly apparent that the settlement group would either have to reduce their expectations or take the agreement directly to the Arizona Congressional delegation for approval.

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[94] David E. Lindgren to Solicitor, 1 April 1987, DOI Field Solicitor's Office.

[95] Bernard Weinraub, "Regan's Exit Was Inevitable, Baker's Entrance a Surprise," *New York Times*, March 1, 1987.

[96] Michael J. Clinton, in discussion with the author, July 27, 2010.

The issue came to a head on April 2, 1987 when Clinton reported to a meeting of the local parties that the Administration was willing to support a funding level of $45 million for both settlements.[97] The figure was based on a calculation of the federal government's perceived risk in litigation and what the Administration was willing to support in the budgetary process. The response of the local representatives was overwhelmingly negative. They concluded that the government's offer did not even constitute a starting point for further negotiations and it would be better to take their proposal directly to the Arizona Congressional delegation. Some members of the settlement group objected so strongly to the government's response that they asked the federal representatives to leave the meeting.[98] After the confrontation, the settlement group continued to maintain some dialogue with DOI officials, but the meeting was the last time that the Department was formerly represented in the negotiations. Clinton described later his thinking before attending that meeting:

> So I was sent out to Phoenix with a message that, first, I didn't believe in, and, secondly, it was inconsistent with what I had opened these discussions with, and, thirdly, I knew it would be rejected. So it was kind of a swan song that meeting. Here's the good news. We've all done good and we've got a good package put together, but the U.S.'s willingness to participate is not what I or the others expected....[99]

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[97] William Swan to Files, 10 April 1987, DOI Field Solicitor's Office.

[98] Ibid.

[99] Michael J. Clinton, in discussion with the author, July 27, 2010.

This episode brought an end to Clinton's representation of Interior in the negotiations and in June he retired from the Department after a twenty-five year career.[100] The local parties decided to push the settlement with the help of the Arizona Congressional delegation instead of reducing the financial contributions in line with Interior's estimates.

Authorization

The major components of the SRPMIC settlement were in place by January 1988 and the negotiating team prepared to submit the agreement for final approval by the local parties and consideration by Congress.[101] A delegation made up of representatives from SRP, RWCD, and the cities, traveled to Washington D.C. to talk with officials from Interior, Justice, and the Arizona delegation. The major obstacle to the settlement legislation continued to be the opposition led by OMB concerning the federal expense. Members of the delegation tried to convince Interior officials to support the settlement even if the level of government financing could not be agreed upon, but it became increasingly clear that Administration officials would come out in opposition to the settlement

[100] *Western Resources Wrap-Up*, Series 25, no. 24 (June 1987).

[101] "Salt River Pima-Maricopa Water Settlement Agreement," 15 January 1988, SRP Research Archives.

legislation.[102] In February the cities and SRP signed the final agreement and in early March legislation was introduced in Congress to authorize the settlement.[103]

The House and Senate held joint hearings on the settlement legislation later in March. Members of Arizona's Congressional delegation came out in strong support of the settlement. However, Assistant Secretary for Water and Science James Ziglar testified in opposition to the legislation and indicated that the Department would consider recommending a presidential veto. Ziglar directed the majority of his opposition to the financial costs of the settlement. Specifically, he questioned whether the Community could remain an agrarian society given the rapid urbanization of the Phoenix area. In light of this fact, he said the Department was not willing to contribute $63 million to develop an irrigation system on the reservation "...that may be abandoned in favor of other uses in the future."[104] Ziglar also objected to the federal government paying the costs of acquiring Colorado River rights for the cities' exchange water agreement while at the same time the tribe was leasing its CAP allocation to the City of Phoenix.[105]

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[102] D.M. Rappoport to A.J. Pfister et al., 21 March 1988, SRP Research Archives.

[103] Carl Young, "Salt River Tribe, 7 Cities Sign Water Pact," *Phoenix Gazette*, February 13, 1988.

[104] *Settlement of the Water Claims of the Salt River Pima Maricopa Indian Community in Maricopa County, Arizona: Hearings before the Select Comm. on Indian Affairs and the Comm. on Interior and Insular Affairs*, 100th Cong. 99 (1988).

[105] Ibid., 95-101.

Department officials strongly objected to the federal government paying to acquire additional supplies for the City of Phoenix. The cities' exchange and CAP lease became the principle obstacles to the passage of the settlement legislation because they were intended primarily to benefit the City of Phoenix and not the Community whose claims were being resolved.[106]

Federal officials' statements that they would not support the government's financial stake in the cities' exchange agreement threatened to dissolve the entire settlement. The City of Phoenix refused to provide money to buy lands in Wellton-Mohawk and without a funding mechanism, this core component of the settlement was brought into question. SRP and SRPMIC attorneys decided that they would approach the other Valley cities to see if they would be willing to put forward the money in return for getting a greater share of the cities' exchange water and a portion of the CAP lease.[107] As the agreement was written, the City of Phoenix received the vast majority of the water from the exchange and all of the water from the lease.[108] The other Valley cities agreed to step up with funding for both in return for a share of the water. This commitment came at a critical time in the authorization process. It helped to lower the overall federal financial commitment by approximately $13 million and simultaneously increased the local

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[106] Ken Maxey to Jim Ziglar, 6 April 1988, DOI Field Solicitor's Office.

[107] Richard Wilks, in discussion with the author, November 11, 2010.

[108] S*ettlement of the Water Claims*, 219-280.

contribution. The settlement parties agreed to several other concessions to reduce the federal commitment, the most significant being the removal of a $10 million claims' judgment in the agreement that would be pursued independently by the tribe. This reduced the overall federal contribution to approximately $60 million from the original level of $88 million.[109] The settlement group continued to work with federal officials through the summer of 1988 to address the Administration's concerns.[110]

Congressman John Rhodes and his staff spearheaded the process of developing amendments to the House legislation that would address the Administration's concerns.[111] DOI representatives indicated that they might be willing to accept a federal contribution below $60 million, which could be accomplished with the changes described above.[112] The bill was reported out of both the House and Senate committees in May 1988, but the prospects for the legislation remained uncertain. Arizona Senator Dennis DeConcini told the *Arizona Republic* after the committee's vote that "a veto is very likely."[113] On

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[109] Starler and Maxey, "Analysis," 109.

[110] William H. Swan to Files, 2 May 1988, DOI Field Solicitor's Office.

[111] Douglas K. Miller to William H. Swan, 24 May 1988, DOI Field Solicitor's Office.

[112] William H. Swan to Files, 5 May 1988, DOI Field Solicitor's Office.

[113] Dinah Wisenberg, "Valley Water Rights Bill Passes Senate Panel, but Veto is Threatened," *Arizona Republic*, May 27, 1988.

October 4, 1988 the House concurred with the Senate amendments and the settlement was passed on a voice vote of 411 to 8.[114] The President signed the bill nearly three weeks later and the SRPMIC settlement became law.[115]

Conclusion

The completion of the SRPMIC settlement was important in many respects for the process of resolving Indian water rights claims in Arizona. First and foremost, the agreement offered a model for how to structure a regional settlement that addressed tribal claims without disrupting existing water allocations arrangements, which was the top priority for the non-Indian water users who participated in the settlement. The strategy was only possible because the federal government agreed to put forward the financial resources that allowed the Community to put their water to use and the tribe agreed to accept a smaller quantity of water than it could claim under the PIA standard. The negotiators adopted a pragmatic approach that differed from prior efforts to resolve Indian claims, which focused on fulfilling the Community's long-term economic needs instead of each party arguing the full extent of its legal claims. The use of this approach highlights an important reality: water rights claims far exceeded the physical availability of water in the region and the only way to resolve these

[114] 134 Cong. Rec. 28142 (1988).

[115] P.L. 100-512, 102 Stat. 2549.

overlapping claims without compromising existing uses was to design a settlement that satisfied the tribes need by pooling the resources of a large number of water users.

The use of exchange and transfer agreements demonstrates how the negotiators sought to structure the settlement around specific exchanges of money and water. This approach provided a precedent that would be emulated in later settlements. Most of these agreements were added at the behest of non-Indian parties as a condition for their support of the settlement. The benefits that the non-Indian parties received as part of the settlement, including access to new water supplies and Congressional confirmation of existing rights and contracts, motivated them to push the settlement through Congress despite the opposition of federal officials. In the process, Indian and non-Indian parties forged working relationships that would prove to be important in resolving other regional water issues.

The SRPMIC settlement was also a testament to the viability of the negotiated settlement process. Several decades of conflict over Indian water rights led many to believe that the only place tribal claims could be finally determined was in the court system. The passage of the SRPMIC settlement showed that negotiations could be the basis for forming a coalition that redistributed region water supplies. This was an important for Indian communities because it provide hope that their claims could be addressed in such a way that their long-term water needs were satisfied and they would also receive the financial resources to put the

water to use. After nearly a century of winning paper rights, Indian leaders realized that the best approach to receiving physical water was to work within the existing water allocation structure.

Chapter 6

INDIAN WATER RIGHTS SETTLEMENTS AND THE POLITICS OF REALLOCATION

Introduction

The passage of the Salt River Pima settlement in 1988 marked a breakthrough in Indian water rights negotiations in Arizona. The agreement demonstrated that water supplies could be effectively reallocated to meet tribal needs without causing serious disruptions to existing users. In fact the settlement resulted in even more certainty for settling parties by eliminating legal risks to long-term water supplies and producing added benefits from water transfers and exchanges. The settlement also helped to eliminate some of the fears held by non-Indian water users about the impact of tribal claims and it provided a basis for mutual cooperation on other water management issues. The negotiating parties relied on a straightforward strategy of expanding the water pie in order to achieve this outcome. Some of this expansion was accomplished through the acquisition of new water supplies from the Colorado River, but the rest was produced from water transfers and efficiencies that could have been implemented even without an Indian water rights settlement. The primary achievement of the settlement, besides resolving the long-term water demands of the SRPMIC, was the opening of a dialogue among regional water users concerning the realignment of water

arrangements to promote greater utilization and efficiency, thereby expanding the potential uses from the same water supplies.

The primary focus of the reallocation effort in future Indian settlement was the CAP, which for all its purported benefits for Arizona farmers, turned out to be too expensive for agricultural use. Faced with the prospect of underutilization of CAP water and the growing capital costs that would be born most heavily by the cities, and the uncertainties this created for Arizona maintaining its legal claim of 2.8 million acre-feet of Colorado River water while California continued to take all that was not being used, Indian settlements became a vehicle to reallocate a greater share of CAP water to the tribes, preserve already appropriated state surface water to non-Indian users and in the process, shift a larger portion of the CAP capital costs to the federal government. This development brings the events of *Arizona v. California* full circle. The State of Arizona, which strongly opposed the claims put forward by federal attorneys on behalf of Indian tribes in the case, now supported the reallocation of a significant portion of the state's Colorado River entitlement to Indian tribes (see Table 3).

Table 3: CAP Indian Contracts*				
Reservation	**1975 Allocation**	**1983 Allocation**	**Settlement**	**Total**
Ak-Chin	58,300	58,300	23,700	75,000
Fort McDowell	4,300	4,300	13,933	18,233
Gila River	173,100	173,100	138,700	311,800
Salt River	13,300	13,300	0	13,300
San Carlos	0	12,700	48,945	61,645
Total	249,000	261,700	225,278	479,978
Source: Central Arizona Water Conservation District (CAWCD)				

This shift was only possible as part of a larger restructuring of the allocation framework among agricultural, urban, and Indian users. For the Indian communities who secured a greater share of the CAP supply, they not only received water that could be used to meet their long-term needs, they also gained access to a marketable resource that could generate revenue and provide greater flexibility in future water planning. The interplay between water and money has always been an important component of Indian water rights settlements in Arizona, but this dynamic was acutely displayed in the GRIC settlement, which was tied to the resolution of a dispute concerning the repayment of the costs to construct the CAP, a major benefit for all water users in Arizona. This

development shows the extent to which Indian water rights settlements provided a venue to enact large-scale changes in Arizona's water allocation structure.

Water Transfers

The reallocation of CAP water in Indian settlements was part of a larger trend towards transferring water between agricultural and urban users in Arizona during the 1970s and 1980s. Municipalities, land developers, and investors sought out water supplies to meet growing urban demand. Most of the acquisitions targeted groundwater supplies in rural parts of the state that could be transported through the CAP aqueduct to urban centers.[1] Transactions involving surface water were more limited because of the legal and institutional constraints concerning the place and type of use, but even these became more common. The City of Tucson undertook one of the first large-scale rural to urban transfers when it acquired over 20,000 acres in the Avra Valley northwest of the city in the early 1970s. The Salt River Valley cities of Mesa, Phoenix, and Scottsdale followed suit in the mid-1980s and acquired their own water farms.[2] Mesa purchased over 11,000 acres of land from the Hohokam Irrigation and Drainage District in Pinal County

[1] Alberta H. Charney and Gary C. Woodard, "Socioeconomic Impacts of Water Farming on Rural Areas of Origin in Arizona," *American Journal of Agricultural Economics* 72, no. 5 (1990): 1193.

[2] Committee on Western Water Management, Water Science and Technology Board, *Water Transfers in the West: Efficiency, Equity, and the Environment* (Washington D.C.: National Research Council, 1992), 197-200.

in 1985. The transaction gave the city access to groundwater supplies as well as a portion of the District's CAP allocation.[3] The City of Scottsdale purchased over 12,000 acres of land with surface water rights near the Bill Williams River in northwest Arizona and Phoenix acquired 14,000 acres in the McMullen Valley.[4] By the end of the 1980s, nearly $200 million had been spent on the acquisition of agricultural land exclusively for its water rights.[5]

A number of legal and economic developments increased the number of rural to urban water transfers during the 1980s. Increases in fundamental demand accompanied the rapid growth of the state, particularly in the major urban centers of Phoenix and Tucson. Between 1970 and 1980, Arizona's population more than doubled, rising from 1,770,900 to 2,718,215. By 1990 the total population of the state was 3,665,228.[6] Population growth led to an increase in underlying demand for water supplies and urbanization altered consumption patterns. The changing

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[3] *To Authorize the Secretary of the Interior to Acquire Certain Water Rights for the Settlement of Indian Water Rights Claims in the State of Arizona: Hearings on H.R. 4148 before the Committee on Interior and Insular Affairs*, 101st Cong., 52 (1991).

[4] *Fort McDowell Indian Water Rights Settlement Act of 1990: Joint Hearing before the Committee on Interior and Insular Affairs and the Select Committee on Indian Affairs*, 101st Cong., 201-202 (1991).

[5] Gary C. Woodard and Elizabeth Checchio, "The Legal Framework for Water Transfers in Arizona," *Arizona Law Review* 31 (1989): 721-723.

[6] Richard L. Forstall, U.S. Bureau of the Census, "Arizona, Population of Counties by Decennial Census 1990 to 1990," accessed March 16, 2011, http://www.census.gov/population/cencounts/az190090.txt.

water use picture can be witnessed in the decline in agricultural water use during the period, which continued to be the largest water-consuming sector in the state. Agricultural water use peaked in the late 1970s and declined to levels not seen since the 1960s.[7] The drop was also reflected in the amount of irrigated acreage in the state, which peaked in 1978 at approximately 1.2 million acres.[8] In some areas, like the urbanized lands within the SRP service territory, the decline in agricultural acreage progressed at a steady pace since the mid-1960s.[9] However, the reduction in agricultural lands was more pronounced in rural parts of Arizona because of economic conditions and changes in the state's regulatory structure.

Several legal developments increased water transfer activity and helped to facilitate the transition in agricultural water use. A series of rulings by the Arizona Supreme Court between 1969 and 1976 focused on Tucson's right to purchase and retire farmland in order to transfer the underlying groundwater to its service territory. The decisions affirmed the right of a landowner to transfer groundwater from retired farmland, but only in an amount equal to the consumptive use of the

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[7] A.D. Konieczki and J.A. Heilman, "Water Use Trends in the Desert Southwest, 1950-2000," U.S. Geological Survey Scientific Investigations Report 2004-5148, 9.

[8] U.S. Bureau of the Census, *1992 Census of Agriculture, vol. 1, part 3: Arizona* (Washington D.C.: Government Printing Office [GPO], 1994), 8.

[9] Robert S. Gooch, Paul A. Cherrington and Yvonne Reinink, "Salt River Project Experience in Conversion from Agriculture to Urban Water Use," *Irrigation and Drainage Systems* 21 (2007): 148-149.

land prior to fallowing. The subsequent decision in the *FICO* case of 1976 placed further restrictions on the transportation of groundwater away from the lands on which it was pumped by ruling that adjoining landowners could file claims for damages as a result of reductions in the groundwater supply.[10] The *FICO* decision generated a great deal of controversy and led to legislative reforms that sought to invalidate the ruling. The case played an important role in spurring regulatory changes that were part of the Arizona Groundwater Management Act (GMA) of 1980.[11]

The GMA was a key motivating force behind most water transfer activity in Arizona during the 1980s.[12] Among a host of new regulations, the law established Active Management Areas (AMA), overlying the major population centers in the state, where groundwater use was regulated in order to achieve by 2025 a conditional called "safe yield," defined in the law as the point at which withdrawals do not exceed natural and artificial recharge.[13] The Act also required

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[10] Desmond D. Connal, Jr., "A History of the Arizona Groundwater Management Act," *Arizona State Law Journal* (1982): 315-318.

[11] Jon L. Kyl, "The 1980 Groundwater Management Act: From Inception to Current Constitutional Challenge," *Colorado Law Review* 53 (1981-1982): 475-477.

[12] Woodard and Checchio, "Legal Framework," 724.

[13] The Pinal AMA is the only exception to this policy of safe yield. Groundwater withdrawals are regulated in this area to allow for planned depletion, or a managed drawdown of the aquifer.

new housing developments within an AMA to prove an assured water supply (AWS) of at least 100 years. This placed an additional demand on municipalities and land developers to seek out water supplies that could be used to meet the AWS requirement.[14] Groundwater use within the AMAs was regulated through the creation of several new classes of groundwater rights that were overseen by the newly formed Arizona Department of Water Resources (ADWR). By regulating groundwater use within the AMAs, while placing few restrictions on the lands outside these administrative boundaries, the law created an incentive for water users to look outside the AMAs for land that could be acquired for its groundwater supplies.[15]

The GMA placed further constraints on an agricultural sector that was already weakened by low commodity prices and declining federal farm subsidies in the early 1980s. With CAP water projected to cost $60-$80/af, groundwater offered the only cost-effective water supply for farmers who did not own land in irrigation districts with surface water rights. The cost of groundwater was heavily dependent on energy rates, which began to increase during the 1970s.[16] The result was a drop in irrigated acreage in areas dependent solely on groundwater. This decline was hastened by the fact that farmers eligible to receive water from SRP

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[14] *Water Transfers in the West*, 206.

[15] Woodard and Checchio, "Legal Framework," 724-726.

[16] Steven P. McLaughlin, "Economic Prospects for New Crops in the Southwest United States," *Economic Botany* 39, no. 4 (1985): 474-475.

and RWCD were directly in the path of the rapid urbanization occurring in the Phoenix metropolitan areas. Farmers within these districts, who paid some of the lowest costs for water in the state, often did not relocate to outlying areas reliant on groundwater after their lands were urbanized. By the mid-1980s the agricultural industry was experiencing a period of transition that challenged its dominant role within the region's water management structure. As a result, the push to reallocate supplies from agricultural users to urban and Indian interests became more pronounced. Many in Arizona's agricultural community vigorously opposed this development, but it would become the defining element of Indian water rights settlements.

The Federal Role in Reallocation: The Ak-Chin Settlement of 1984

The precedent of using reallocation to facilitate Indian water rights settlements was established several years prior to the Salt River Pima settlement. In 1983 the DOI and the Ak-Chin Indian Community negotiated a permanent water supply and benefits package for the reservation. The original settlement legislation passed in 1978 authorized the federal government to construct a well field on federal lands nearby the reservation, but when it was determined that these lands could not produce sufficient groundwater without affecting other users, the federal government was exposed to possible damage claims if it could

not deliver water to the tribe by January 1, 1984.[17] An agreement-in-principle reached by federal and tribal representatives in late 1983 directed the government to acquire a Colorado River water right, with a priority senior to the CAP, and pay the necessary expenses to deliver that water to the reservation. The new water source would be combined with the tribe's existing CAP entitlement to ensure a federally-guaranteed delivery of 72,000 af in wet years and 75,000 af in dry years. The settlement included provisions that allowed the tribe to receive damages if the water was not delivered in addition to providing approximately $45 million in agricultural development and flood protection assistance.[18] The proposed agreement was one of the most generous in Indian water rights settlement history, giving the tribe a guaranteed water supply delivered at no cost.

The agreement-in-principle drafted in 1983 did not identify a specific source of water to meet the tribe's water needs. This issue became a source of controversy when it came time to authorize the settlement. DOI officials looked for potential surface water sources from the Colorado River already covered under existing contracts between the federal government and Arizona users that were not being fully utilized.[19] This caused a great deal of angst among Arizona officials who argued that water not being used under existing Colorado River

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[17] H.R. Rep. No. 98-1026, at 6 (1984).
[18] "Agreement in Principle for Revised Ak-Chin Water Settlement," 23 September 1983, Arizona Department of Water Resources [ADWR], Phoenix.

[19] Jim Watt to Bruce Babbitt, 7 October 1983, ADWR.

contracts was already factored into the supply available to the CAP. Arizona Governor Bruce Babbitt wrote to Secretary of the Interior James Watt to express his opinion that "[t]he new agreement is based on the mistaken understanding that currently unused Colorado River contractual entitlements can be redirected...without adversely affecting CAP water supplies."[20] Federal officials continued to push ahead with the proposal despite these objections, arguing that the Secretary of the Interior had the authority to reallocate water not being put to a beneficial use. Water users in the Yuma area strenuously objected to the contention that beneficial use governed their contracts with the federal government in arguing that these entitlements were intended to allow for future growth in water demand. A potential showdown on the legal question was averted after the Secretary reached a tentative agreement with farmers in the Yuma area who were willing to give up a portion of their Colorado River entitlement in return for money and other considerations.[21]

Legislation introduced by Congressman Morris Udall the following year contained an agreement-in-principle that allowed the DOI to acquire water from the Yuma Mesa Division of the Gila Project.[22] In return for reducing its annual

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[20] Bruce Babbitt to James Watt, 1 November 1983, ADWR.

[21] H.R. Rep. No. 98-1026, at 19 (1984); T.C. Richmond to Betsy Rieke, 19 June 1991, ADWR.

[22] 130 Cong. Rec. 25,533.

Colorado River entitlement by 50,000 af, the District would receive over $9 million in federal grants for infrastructure improvements, forgiveness of all existing federal repayment obligations for its irrigation systems, and relief from the ownership and full-cost pricing provisions of the Reclamation Reform Act (RRA) of 1982.[23] Arizona officials continued to object to the proposed agreement, arguing that the Yuma Mesa entitlement was actually "phantom water" because it was not being used by farmers in the Project and was already factored into the CAP supply.[24] Interior conceded in its report to Congress that it "...cannot be known at this time how much of the fifty-thousand acre-feet of water committed to this settlement is unused..."[25] However, the Department pushed ahead with the agreement because it provided an opportunity to take an underutilized water supply and use it to meet the government's obligations to the Ak-Chin.

The Ak-Chin settlement bill moved quickly through Congress after Senator Barry Goldwater introduced amendments intended to address concerns

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[23] H.R. Rep. No. 98-1026, at 7 (1984). The Reclamation Reform Act of 1982 raised the allowable acreage that one landowner could irrigate using reclamation project water to 960 acres, with leasing allowances for up to 2080 acres. Acreage in excess of this amount was required to pay "full-cost," which included delivery, capital expenses, and interest costs. Though the legislation increased the allowed acreage under Reclamation law from 160 to 960, the bill was seen by many Western farmers as detrimental to their operations. See Alexandra M. Shafer, "The Reclamation Reform Act of 1982: Reform or Replacement?" *University of Pittsburgh Law Review* 45 (1983-1984): 662-670.

[24] T.C. Richmond to Betsy Rieke, 19 June 1991, ADWR.

[25] H.R. Rep. No. 98-1026, at 19 (1984).

raised by Babbitt and other Arizona officials. A provision inserted into the legislation stated that water acquired by the federal government in excess of the tribe's needs would be "...allocate[d] on an interim basis to the Central Arizona Project..."[26] The combination of the tribe's CAP allocation and the 50,000 af acquired from Yuma Mesa was expected to result in an annual excess quantity of approximately 33,000 af. Arizona officials wanted to ensure that this water would remain as part of the overall CAP supply.[27] Additionally, at the urging of the state officials, a trust fund was created as part of the bill that could be used to fund voluntary acquisitions of water throughout the state in order to supplement the CAP supply in drought years. The United States and CAWCD would each contribute $1 million to the fund. These amendments helped to assuage some of the concerns about the potential impact of the settlement on the CAP and allowed the bill to pass in October without significant opposition.[28]

The Ak-Chin settlement helped in establishing the precedent for using reallocation to satisfy tribal claims. This strategy would be employed in every Indian water rights settlement in Arizona in the years that followed. However, questions still remained as to whether the water supplies being transferred represented "paper rights" or whether they involved a contribution of physical

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[26] 130 Cong. Rec. 28670.

[27] H.R. Rep. No. 98-1026, at 12 (1984).

[28] T.C. Richmond to Betsy Rieke, 19 June 1991, ADWR; 130 Cong. Rec. 28,671.

water. Controversy continued to surround the issue of the Yuma Mesa water and whether it diminished the CAP supply, and therefore reduced the security of water already allocated to CAP users. This would become a major issue in later settlements when the excess Ak-Chin water was put forward as a possible supply to satisfy other tribal claims. Ultimately, the Ak-Chin settlement, much like its predecessor in 1978, was an anomaly. The federal government accepted the entire financial burden for acquiring additional supplies and executing the settlement while the non-Indian parties whose water was the most exposed to potential legal challenges from the tribe were not required to contribute any water to the settlement. Later settlements required a much larger contribution from local parties and were therefore the cause of more heated debate.

The New Era in Indian Settlement Negotiations

As the Salt River Pima settlement moved towards final passage in Congress during the late summer of 1988 a flurry of activity surrounded the negotiation of other tribal claims in Arizona. The FMIC returned to the negotiating table in April, after deciding to break-off discussions several months prior, and were preparing to introduce settlement legislation. In August SRP and the GRIC agreed to enter negotiations to discuss the Community's claims, which were the largest of any reservation in central Arizona. Later that year the SCAT formed a negotiating team, bringing the total to three tribes that were actively engaged in negotiations. The reason for this sudden burst of activity varied by

tribe and the objectives each hoped to achieve as part of the settlement process. Several tribes got involved in the legislative debate surrounding the SRPMIC settlement because they were worried about the implications for their own claims.[29] Others were more interested in using the legislation as a vehicle to advance their own initiatives.[30] Whatever the motivations, tribal representatives realized that they needed to be the catalyst for negotiations. The Salt River Pima settlement demonstrated what could be achieved through direct dialogue between Indian communities and non-Indian water users. The settlements that followed tested the viability of that framework as it applied to other reservations.

SRP's actions during this period are important for understanding the heightened interest in settlement as they remained a principle driver of the negotiating activity. SRP management realized the potential to resolve many of the major Indian claims on the Salt and Verde rivers and they began to implement a strategy for structuring settlements. A significant component of this strategy was the leveraging of SRP's water delivery infrastructure to facilitate CAP exchanges

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[29] Both the San Carlos Apache Tribe and the White Mountain Apache Tribe passed resolutions opposing the Salt River Pima Maricopa Indian Community settlement on the basis that it would negatively impact their own claims to water rights on the Salt River. See SCAT Resolution No. 88-15, 21 January 1988, SRP Research Archives; WMAT Resolution No. 05-88-131, 11 May 1998, SRP Research Archives.

[30] An example of this is the GRIC Governor Thomas White, who wrote to Congressman Udall requesting that language be added to the Salt River Pima settlement that would include some of the reservation's lands in the SRRD to make them eligible to receive stored water from SRP reservoirs. See Thomas R. White to Morris K. Udall, 1 June 1988, SRP Research Archives.

between tribes and other major water users. SRP's capacity allowed for greater flexibility in using reallocated CAP supplies as a key component of settlements, many of which would not have been possible without a means to transport water to tribes that were not connected to the CAP system. SRP also relied on the storage capacity of its reservoirs on the Salt and Verde rivers to continue its principle of using shortage and surplus sharing arrangements to dictate the amount of SRP water that it contributed to settlements. This allowed SRP to achieve its water management objectives while leveraging its infrastructure to free up additional water for settlements. These strategies could only be effective if other parties were willing to join the negotiations and offer the CAP water and other supplies that were needed to complete the settlements. SRP acted in a facilitator capacity, bringing other people to the table who could make the necessary contributions to fill out the water budgets.

Settling parties recognized the need for federal participation early in the negotiations to ease the process of gaining legislative approval. However, the federal presence was different from the Salt River Pima negotiations where Michael Clinton provided a facilitation role in addition to coordinating the Administration's response. The competing interests of agencies within the Interior Department worked against a unified federal front in settlement negotiations and changes in leadership resulted in the shifting of negotiation participants and priorities. Federal officials found themselves as a separate party in the negotiations whose interests and motivations were competing alongside those of

the other Indian and non-Indian representatives. Interior formed a Working Group on Indian Water Settlements to oversee federal settlement teams and coordinate the involvement of different federal agencies. In March 1990 the group released formal guidelines that outlined its process for approving a final settlement. Among the more notable criteria on the sixteen item list was the requirement that settlement costs not exceed the calculated legal exposure of tribal claims. A determination of the federal funding commitment would only be determined after a fact-finding process that culminated in a report to Interior, Justice, and OMB.[31] The level of federal funding to Indian settlements continued to be the major area of disagreement between federal representatives and local settling parties and this issue more than any other defined the federal role in settlement negotiations.

Central Arizona Project Reallocation and the Fort McDowell Indian Community Settlement

The FMIC negotiations were the most advanced of any tribal settlement in central Arizona during the summer of 1988. The Fort McDowell and Salt River Pima negotiations originally proceeded in tandem, but the FMIC Tribal Council decided to pull out of discussions because a consensus could not be reached

[31] Department of the Interior, 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. 9,223 (March 12, 1990).

among the tribal members.[32] When the tribe returned to the negotiating table in April the biggest issue they confronted was a 13,933 af hole in the water budget, which accounted for approximately one third of the overall settlement. Earlier discussions focused on acquiring water from WMIDD as part of the cities' exchange proposal contained in the SRPMIC settlement, but this option was eliminated after the District refused to make more water available.[33] The settlement group explored several alternatives, including the use of water from Phoenix and RWCD, but no consensus could be reached. An opportunity was presented during the summer of 1989 when farmers in the Harquahala Valley Irrigation District (HVID), located west of Phoenix, approached several Valley cities about the possibility of selling their land and water rights.[34] District farmers were heavily indebted and they also faced the prospect of having to repay a federal loan used to construct their irrigation system along with expenses associated with their CAP entitlement. Several members of the Arizona Congressional delegation wrote to Secretary of the Interior Manuel Lujan, Jr. to

[32] Arlinda Locklear, in discussion with the author, 10 September 2010.

[33] *Fort McDowell Indian Water Rights Hearings*, 75 (testimony of the Fort McDowell Indian Community).

[34] "Strapped Growers Consider Dealing Away Water Rights," *Prescott Courier*, April 28, 1989.

ask that he consider acquiring the District's CAP allocation in order to fill the gap in the Fort McDowell water budget.[35]

U.S. Congressmen Morris Udall and John Rhodes III introduced a bill the following February that authorized the Secretary of the Interior to negotiate with HVID about acquiring its CAP entitlement. In return the District would be relieved of a $26 million federal loan and have its contractual obligations to purchase CAP water eliminated.[36] Most of the District farmers supported the purchase because of the high cost of CAP water. As District director Franklin Rogers testified before Congress, "...it is tough to grow cotton on water that costs anywhere from $60 to $80 an acre-foot."[37] The legislation was designed as both a rescue package for District farmers and an opportunity to find an alternative water supply for the FMIC settlement. Congressman Rhodes believed the federal expense in acquiring the water rights was justified in light of a possible District default that would also cost the government financially. Rhodes testified,

> The possibility for default on [the HVID] contracts is a very real one, and if that eventually were to occur, the revenue would be lost anyway, and the United States would not have had the opportunity to acquire these water rights to apply to the Fort McDowell settlement.[38]

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[35] Dennis DeConcini et al. to Manuel Lujan, Jr., 23 May 1989, SRP Research Archives.

[36] 136 Cong. Rec. 2,885.

[37] *To Authorize the Secretary of the Interior Hearings,* 16.

[38] Ibid., 12.

District farmers were interested in more than relinquishing their CAP entitlement. They were also exploring the potential sale of their lands to CAWCD, which was looking to acquire groundwater supplies that could be used to supplement the CAP in drought years.[39] The bill received strong support from ADWR and CAWCD and it passed the House in June, but was not taken up in the Senate.[40] However, the core elements of the deal were inserted into FMIC settlement legislation introduced less than two weeks later.[41]

The Fort McDowell settlement came before Congress without a firm solution for the 13,933 af gap in the water budget. The authorizing legislation gave the Secretary of the Interior a menu of options to fill the deficit. In addition to the HVID proposal, the bill included a provision that allowed the excess Ak-Chin settlement water to be reallocated to the Fort McDowell tribe. The third proposal involved a complicated exchange of groundwater and CAP entitlements between the City of Prescott and several tribes.[42] Most of the major water users in central Arizona favored the HVID option because it allowed for an orderly transfer of the CAP entitlement from willing parties that lowered CAWCD's

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[39] Ibid., 38-39.

[40] 136 Cong. Rec. 12,654.

[41] 136 Cong. Rec. 14,110.

[42] *Fort McDowell Indian Water Rights Hearings*, 11.

federal repayment obligation.[43] The main opposition came from farmers and municipalities in Pinal County who were against the idea of converting the Harquahala CAP entitlement from an agricultural priority to the higher Indian priority.[44]

The supply of CAP non-Indian agricultural (NIA) water is the amount left over in any given year after making M&I and Indian priority deliveries. Pinal County farmers opposed the proposed reassignment of HVID's 7.7 percent share of NIA water because it would permanently reduce the total supply available to all non-Indian agricultural users. The largest CAP irrigation districts in Pinal County, which including MSIDD and the Central Arizona Irrigation and Drainage District (CAIDD), argued that the earlier Ak-Chin settlement and the proposed Harquahala acquisition established a precedent of diminishing the CAP agricultural supply to complete Indian settlements. Both districts invested large sums of money, a portion of which came from federal loans, to construct irrigation and delivery systems that would allow them to utilize their CAP entitlements. They argued that the reduction in the NIA supply jeopardized their financial viability.[45] MSIDD Chairman Norman Pretzer, whose district was allocated over twenty percent of the NIA supply, called the proposal a "water

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[43] Ibid., 153, 176, 184.

[44] Ibid., 329.

[45] Ibid., 332, 348.

grab" and expressed his view that the burden for settling Indian claims was being placed on the state's agricultural sector:

> We have a trail now that began with the Ak-Chin settlement, that has gone through the [Papago] down in Tucson through the Salt River-Pima bill. We have a Harquahala pending. We have one that's to be introduced called the San Carlos Apache....But what we are doing through all these various Indian bills is we're writing these Indian settlements on the back of irrigated agricultural in central Arizona.[46]

This perspective was not shared by other CAP users who would bear a significant portion of the repayment and operating costs of the Project if agricultural users were not able to pay for the water they were allocated.

Valley cities took strong exception to the objections put forward by farmers and municipalities in Pinal County. The crux of their argument was that farmers were not paying their fair share of CAP expenses while receiving a disproportionate share of the water. The Arizona Municipal Water Users Association (AMWUA) raised this point in a letter to Congressman Udall, saying that farmers in Pinal County were scheduled to receive "...approximately 47% of the CAP water delivered over the next 50 years, contribute only 8% to the CAP repayment obligation, pay only 3% of the CAP tax levy, and receive millions of dollars in CAP energy subsidies...."[47] The cities had the backing of ADWR and

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[46] Ibid., 355-356.

[47] Arizona Municipal Water Users Association [AMWUA] to Morris K. Udall, 12 July 1990, SRP Research Archives.

CAWCD, who supported the proposal because it addressed the prospect of underutilization, which was emerging as a major issue for CAP agricultural users in the late 1980s. These agricultural contractors could see the writing on the wall. M&I users were not content to cover the majority of the CAP costs without concessions from agricultural users, primarily in the form of water to complete Indian settlements.

Objections raised by federal officials had the greatest potential to derail the FMIC settlement legislation. Timothy Glidden, Chairman of the federal Working Group on Indian Water Settlements, expressed several concerns; chief among them was the fact that there was no final agreement that included financial contributions and water sources.[48] A number of amendments to the legislation helped to ease these concerns and secure final passage of the bill. A compromise was developed, in part to address the concerns of CAP agricultural users, which left open the possibility that the HVID CAP entitlement would not be converted to an Indian priority. The proposal gave the Secretary of the Interior the option of delivering the Harquahala water to the GRIC, which would then allow Fort McDowell to use a portion of its existing Indian priority allocation. The Ak-Chin excess water was also removed as an option in the settlement after state and local representatives voiced concerns and the SCAT threatened to terminate ongoing

[48] *Fort McDowell Indian Water Rights Hearings*, 37.

settlement negotiations if the option was retained.[49] An agreement on the financial component of the settlement was reached by giving the tribe access to federal loans to fund a portion of its infrastructure development. These compromises were intended to ease some of the residual impacts of the settlement on regional water users.

The legislation contained many of the principles advanced in the SRPMIC settlement. The tribe agreed to lease its 4,300 af CAP entitlement to the City of Phoenix for 99 years. This provided an additional source of revenue for the tribe and allowed the city to offset a portion of the SRP water it lost in the settlement. Several contracts and agreements were confirmed, including SRP's storage rights behind Bartlett and Horseshoe Dams on the Verde River and contracts between SRP and RWCD. These were approved over the objections of federal representatives in large part because of the precedent established in the SRPMIC settlement.[50] The final passage of the FMIC legislation in October 1990 reaffirmed many of the strategies utilized in earlier negotiated settlements. The process of finding additional water supplies to complete tribal water budgets was more difficult with each new settlement as regional supplies were stretched.

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[49] Joe P. Sparks to John McCain, 4 October 1990, DOI Field Solicitor's Office, Phoenix.

[50] H.R. Rep. No. 101-778, at 23 (1990); S. Rep. No. 101-479, at 7-16 (1990).

A Limited Approach to Settlement: The San Carlos Apache Tribe Settlement

The SCAT water rights claims presented a number of challenges not confronted in prior tribal settlements. The reservation covered portions of the Salt River and Gila River watersheds, which broadened the number of water users who had a stake in the settlement. Unlike the Salt River users, who had a chance to refine their approach to Indian water rights settlements in prior negotiations, the issues and relationships on the Gila River were much more complicated. Long-standing disagreements between GRIC and water users in the Upper Gila River Valley contributed to a toxic environment that was further complicated with the insertion of the San Carlos' claims to tributary waters on two watersheds. Locating water supplies also became more difficult as many of the readily available sources were taken up by prior settlements. The parties in the SCAT negotiations looked to reallocate CAP supplies as part of a final agreement, but this process was increasingly contentious. The process used to structure a settlement tested the viability of the model used in the Salt River Pima and Fort McDowell settlements and generated further tension among CAP users.

The SCAT initiated negotiations with SRP and RWCD in mid-1989 and discussions progressed quickly. The tribe was motivated to finalize an agreement due to the fact that its claims were scheduled to be the first investigated by ADWR as part of the Gila River Adjudication. This provided an impetus for the tribe to negotiate before the court assessment was completed, which might

constrain the types of the claims the tribe could make.[51] The tribe claimed rights to over 600,000 af of water from the Salt and Gila rivers while federal attorneys quantified the tribal claims at approximately 300,000 af. A settlement amount would need to come in well below both figures if it was to receive any support from non-Indian water users, since satisfying claims of this magnitude could not be accomplished without significant reductions in the water supplies available to downstream users.[52]

The initial negotiations between SRP and SCAT occurred without federal representation. SRP General Manager A.J. Pfister commented later that the tribe "...refused to expand the negotiating group until early this summer [of 1990]."[53] Maintaining a small settlement group allowed tribal officials to dictate the negotiating process and it furthered their goal of securing a quick passage of settlement legislation. The group was also motivated to find a speedy resolution because of the poor health of Congressman Udall who was suffering from

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[51] *San Carlos Apache Tribe Water Rights Settlement Act of 1990: Joint Hearing before the Select Committee on Indian Affairs and the Committee on Interior and Insular Affairs*, 101st Cong., 70, 80 (1992).

[52] "Assessment and Recommendations Related to Negotiations to Settle Water Claim of the San Carlos Apache Tribe," prepared by Branch of Water Resource Management, Development, and Protection, Phoenix Area Office, Bureau of Indian Affairs, 12 February 1991, DOI Field Solicitor's Office.

[53] A.J. Pfister to Jon Kyl, 30 August 1990, DOI Field Solicitor's Office.

Parkinson's disease.[54] The group believed that introducing legislation while Udall was still chairman of the House Interior Committee would improve its chances for passage.[55] The desire to complete a settlement in a short timeframe shaped the dynamics of the negotiation process. The intent of the settling parties was not to arrive at a final agreement, but instead to develop a "shell" bill that would serve as a mechanism to effectuate a settlement after the legislation was passed.[56] This approach borrowed somewhat from the Fort McDowell example, but to a much greater extent, as negotiations with some parties did not begin until after legislation was introduced.

The tribe did not request any federal involvement in the negotiations until February 1990 when a settlement framework was already in place.[57] When the federal team was invited to join the discussions, they voiced concerns about the speed of the negotiations and the fact that major parties were not participating, particularly water users in the Upper Gila River Valley, Phelps Dodge, and the cities of Globe and Safford. The tribe initially wanted to exclude these parties in an effort to decrease the number of issues and time that would be required to

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[54] Bill Sinclair to Lou Gallegos, 25 May 1990, DOI Field Solicitor's Office.

[55] William H. Swan to Files, 23 May 1990, DOI Field Solicitor's Office.

[56] William H. Swan to Files, June 14, 1990, DOI Field Solicitor's Office.

[57] Buck Kitcheyan to Manuel Lujan, 15 February 1990, DOI Field Solicitor's Office.

reach an agreement.[58] The draft settlement presented to the federal team relied heavily on CAP supplies to complete the water budget. In addition to the tribe's existing 12,700 af CAP allocation, the proposal included 33,300 af of excess water from the Ak-Chin settlement and a reallocation of a 14,655 af CAP entitlement rejected by Phelps Dodge. The San Carlos Irrigation and Drainage District (SCIDD), located adjacent to the GRIC, would be asked to contribute 10,000 af of water produced from the lining of its canals. The rest of the water would come from the direct diversion of tributaries of the Black, Gila, and Salt rivers that crossed the reservation and from groundwater.[59]

Tribal officials agreed to expand the negotiations to include Gila River users and Phelps Dodge in June 1990.[60] Congressmen Udall and Rhodes introduced legislation to authorize a settlement a short time later.[61] Rhodes remarked that "...the bill was introduced...strictly as a discussion vehicle to get some impetus behind this effort to resolve this Indian water claim...."[62] Discussions with the City of Globe produced the best results, but efforts to reach an agreement with Phelps Dodge and water users on the Gila River moved

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[58] William H. Swan to Files, 19 June 1990, DOI Field Solicitor's Office.

[59] Frank Jones to Bill Swan, 15 May 1990, DOI Field Solicitor's Office.

[60] Frank Jones to Bill Swan, 8 August 1990, DOI Field Solicitor's Office.

[61] 136 Cong. Rec. 22,529.

[62] *SCAT Water Rights Settlement Hearings*, 40.

slowly.[63] At Congressional hearings on the bill, the tribe requested an amendment be added that would limit the enforcement of the settlement only to those parties who were party to the final agreement. This was intended to assuage the concerns of GRIC and other Gila River water users that the quantification of SCAT's rights to tributary waters and groundwater would ultimately affect their own rights.[64] It also represented a strategy of pushing forward with a partial settlement instead of waiting to reach a consensus.

Several groups opposed the partial settlement approach. Like in the FMIC settlement, federal officials cited the lack of a final agreement as the principle reason for their opposition to the legislation.[65] The failure to include all affected parties, coupled with the speed in which the proposal was being put together, worried representatives from the state and CAWCD. Former Arizona Governor Bruce Babbitt commented that the lack of involvement from state and federal representatives created a vacuum that led "...the Apaches [to begin] an incremental process of negotiation and discussion, and it hasn't been cooking quite intensively enough, mainly because of inattention, if not neglect, of the

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[63] Frank Jones to Bill Swan, 20 June 1990, DOI Field Solicitor's Office; Frank Jones to Bill Swan, 16 August 1990, DOI Field Solicitor's Office.

[64] *SCAT Water Rights Settlement Hearings,* 75 (statement of Buck Kitcheyan, San Carlos Apache Tribe).

[65] Ibid., 44 (statement of Timothy Glidden, U.S. Department of the Interior).

traditional leadership parties..."[66] Babbitt's comments reflect a frustration that ADWR and other state representatives were not invited to participate in discussions until late in the process.[67]

Pushing for the early introduction of legislation proved to be an effective, albeit controversial, strategy for increasing interest in settlement discussions. The chairman of the federal negotiating team wrote shortly after the hearings that the negotiations were "...progressing at a rapid pace."[68] Meetings with the City of Safford and Phelps Dodge produced tentative agreements. This left the Upper Gila River Valley irrigation districts and SCIDD as the last two remaining groups that were not incorporated into the settlement.[69] Discussions with these two groups got underway in late September. The Upper Valley representatives wanted to focus primarily on conservation efforts that could produce greater efficiencies since they were not willing to concede that they were exposed to serious litigation risk from the tribe.[70] Similarly, SCIDD would not agree to the plan to give up 10,000 af of its water rights through conservation measures only in return for a

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[66] Ibid., 146.

[67] Ibid., 62 (statement of N.W. Plummer, Director, Arizona Department of Water Resources).

[68] Frank Jones to Bill Swan, 26 September 1990, DOI Field Solicitor's Office.

[69] Frank Jones to Bill Swan, 19 September 1990, DOI Field Solicitor's Office; William H. Swan to Files, 18 October 1990, DOI Field Solicitor's Office.

[70] William H. Swan to Files, 26 September 1990, DOI Field Solicitor's Office.

waiver of claims by the tribe.[71] The refusal of these two parties to sign onto the settlement weakened the overall agreement and the prospects for legislative approval.

The SCAT settlement was brought to a vote on the House floor less than a week prior to the adjournment of the 101st Congress. As Congressman Jon Kyl remarked it was being considered, "...literally at the 11th hour."[72] The legislation established a water budget of 152,435 af, approximately half of the quantity claimed by the federal government on behalf of the tribe. The majority of the water came from the Colorado River and tributaries and groundwater on the reservation. The federal government was asked to contribute $53 million to cover the delivery costs of the CAP water and reservation development programs. Members of the federal negotiating team concluded in their assessment that the financial contribution was "not unreasonable."[73] The success of the settlement to this point attests to the ability of the parties involved to form a strong coalition that included most of the major Salt River water users. However, the State of Arizona and CAWCD were opposed to aspects of the settlement and SCIDD and the Upper Gila Valley farmers refused to join the agreement. The bill passed the

[71] William H. Swan to Files, 4 October 1990, DOI Field Solicitor's Office.

[72] 136 Cong. Rec. 32,414.

[73] Bill Swan to Tim Glidden, 18 October 1990, DOI Field Solicitor's Office.

House but was never voted on by the Senate.[74] The settlement would have to wait for the next Congress.

The political landscape underwent a significant change in the next Congress as a result of the resignation of Congressman Morris Udall. In April Udall made the long-anticipated announcement that he would retire from Congress in light of his poor health.[75] Besides bringing to a close Udall's thirty-year career in the House, the more immediate issue was his resignation as chairman of the powerful House Interior and Insular Affairs Committee. From this position Udall guided several Indian water rights settlement bills to final passage, many of which might not have succeeded without his backing. Even more troubling for members of the Arizona Congressional delegation was the appointment of Congressman George Miller as Udall's replacement. Miller was the driving force behind the Reclamation Reform Act of 1982, which instituted several changes in the structure of federal irrigation projects. Many of Miller's policies worried Arizona's agricultural community and CAP users and he would prove to be a shaping influence in the SCAT settlement.[76]

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[74] 136 Cong. Rec. 32,415.

[75] Gewn Ifills, "Stricken Udall Says He Will Quit House," *New York Times*, April 20, 1991.

[76] Jeff Herr, "Incoming Interior Panel Chief Stirs Concern on Water Rights," *Arizona Daily Star*, April 22, 1991.

Before the SCAT legislation could be reintroduced, major water rights litigation resumed on the Gila River. In December several irrigation districts in the Upper Gila River Valley filed a motion in the Gila River Adjudication that sought a partial summary judgment on the question of whether the 1935 Globe Equity Decree was binding on all parties to the adjudication.[77] This would have the effect of limiting the potential claims of the SCAT and GRIC, both of which had rights quantified in the Decree. The tribes responded by filing their own cases in the U.S. District Court seeking the enforcement of certain provisions in the Decree that they felt were not being followed by the Upper Valley users. The litigation made a Gila River agreement on the SCAT claims even more of a remote possibility, but it did not stall the process of pushing forward with legislation to settle the Salt River claims.[78]

In January members of the Arizona Congressional delegation introduced SCAT settlement legislation in a form identical to the bill that failed to gain passage in the prior Congress.[79] At the same time the federal negotiating team was wrapping up its assessment report on the SCAT claims. The team members concluded that a settlement of the tribe's claims to the Gila River would not be feasible without the GRIC, which was in the process of negotiating its own

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[77] "Assessment and Recommendations of SCAT Claims."

[78] Ibid.

[79] 137 Cong. Rec. 2,519; 137 Cong. Rec. 2,595.

settlement that was still far from completion. The team recommended a partial settlement that included the San Carlos' claims to the Salt River, despite the fact that this ran afoul of the Department's policy for comprehensive settlements.[80] The political reality was that a comprehensive settlement was unlikely and the federal team recognized that it would be better to achieve a partial settlement than no settlement. The next challenge was to maintain the coalition of the Salt River water users and the tribe long enough to get legislation through Congress.

When hearings opened on the settlement legislation in March 1991 many of the same concerns directed towards earlier versions of the bill resurfaced. The major source of controversy centered on the inclusion of the Ak-Chin excess water. Representatives from ADWR, CAWCD, and the Pinal County irrigation districts, argued that including the 33,300 af of water left over from the government's acquisition of Yuma Mesa water rights would diminish the overall supply available to CAP users. Interior officials arrived a different conclusion. They believed that the Ak-Chin legislation left any excess water to be distributed at the discretion of the Secretary and not to other CAP users. Glidden concluded, "...without this source we assume that the settlement will fail, and we see no viable alternative solutions."[81] A potential trade-off was developed to persuade

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[80] "Assessment and Recommendations of SCAT Claims."

[81] Timothy W. Glidden to John McCain, 22 April 1991, DOI Field Solicitor's Office.

CAP agricultural users to remove their opposition to the inclusion of the Ak-Chin water. The proposal would grant a waiver of RRA provisions and full-cost pricing for several non-Indian irrigation districts in return for their agreement to drop their objections to the Ak-Chin water.[82] The RRA waiver had proved to be an effective trade-off in getting the Yuma area irrigation districts to remove their opposition to the Ak-Chin and SRPMIC settlements, and several of the districts indicated they would agree to the deal.[83] At the same time, ADWR was also considering whether to remove their opposition to the Ak-Chin excess option on the grounds that the water was not guaranteed to be part of the CAP supply.[84] An amendment approved by the Senate Select Committee on Indian Affairs granted the districts RRA and full-cost pricing relief.[85]

The change was enough to get the legislation passed by the Senate in October.[86] However, when the Senate bill came up for consideration on the House floor, Congressman Miller stripped the RRA relief provision from the legislation.

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[82] *SCAT Water Rights Settlement Hearings*, 87 (statement of Douglas Miller, Central Arizona Water Conservation District).

[83] William H. Swan to Joe Miller et al., 23 April 1991, DOI Field Solicitor's Office.

[84] T.C. Richmond to Betsy Rieke, 18 June 1991, ADWR.

[85] S. Rep. No. 102-133, at 9 (1991).

[86] 137 Cong. Rec. 14,573.

Miller was the primary supporter of the RRA and opposed efforts to limit its reach. SRP President John Lassen recalled later the events that followed:

> ...Mr. Miller refused to even discuss the inclusion of RRA relief in the bill for the CAP ag[ricultural] districts. During the next several days, I'm told Congressman Rhodes had numerous conversations with Mr. Miller concerning every seemingly possible alternative to the Senate version of Section 8(f) [which provided RRA relief], all to no avail. Finally, on the last day of the session, Mr. Miller offered to either take the bill to the House floor without Section 8(f), or let it sit in committee.[87]

Congressmen Kyl and Rhodes opposed the removal of the RRA waiver, but they realized that an amended bill was preferable to letting the settlement languish.[88] When the amended House bill was sent back to the Senate for consideration, Senator Dennis DeConcini put a hold on the bill and indicated that he would not support a settlement without RRA relief.[89] DeConcini supported the Pinal County districts' argument that RRA relief was a critical component of the settlement and he sought to force Miller to remove his objection. This issue consumed the majority of the deliberations on the bill in the months that followed and it would become the most visible representation of the tension that existed between CAP agricultural contractors and the other settling parties.

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[87] John R. Lassen to Norman Pretzer, 4 December 1992, SRP Research Archives.

[88] 137 Cong. Rec. 11,301.

[89] Larry Linser to Betsy Rieke, 4 December 1991, ADWR.

It took nearly a year for the SCAT settlement to gain final passage and during that time the divisions within Arizona's water management community were clearly on display. The settlement parties supported the RRA relief only insofar as it furthered the goal of getting the settlement legislation completed and they were willing to support a bill without this provision.[90] ADWR was in particularly difficult position because it had initially opposed the inclusion of the Ak-Chin excess water in the settlement. However, state officials now faced the prospect of alienating either the settlement parties or the CAP agricultural users depending on its position on RRA relief. ADWR Deputy Director Larry Linser wrote to Director Betsy Rieke in December that "...the State's position will be crucial in determining the fate of this settlement."[91] Rieke recommended to the Governor that the state support the bill without the RRA relief, but the state continued to indicate in discussions with DeConcini and his staff that it would oppose the settlement without some consideration for the districts.[92] The issue came down to a question of whether the agricultural districts, which were not even part of the original settlement group, should be able to hold up the process

[90] John R. Lassen to Norman Pretzer, 4 December 1992, SRP Research Archives.

[91] Larry Linser to Betsy Rieke, 4 December 1991, ADWR.

[92] Betsy Rieke to Fife Symington, 27 December 1991, ADWR; David S. Steele to Larry Linser, 9 April 1992, ADWR.

because they claimed a right to the Ak-Chin excess water.[93] Senator DeConcini continued his support for the RRA relief for much of 1992 and Congressman Miller similarly did not show any willingness to compromise on the issue. On the one year anniversary of the day the Senate passed the original SCAT legislation it passed an identifical bill as a sign that it reaffirmed its position on RRA relief.[94] However, Congressman Miller refused to send the bill to a conference committee since the only major difference between the two chambers was the issue of RRA relief.

The SCAT settlement legislation was eventually incorporated into the Reclamation Projects Authorization and Adjustment Act of 1992, without the inclusion of RRA relief for the Pinal County districts. The bill incorporated several major pieces of water policy legislation that among other things made significant changes to the Central Valley Project in California.[95] The bill was passed by Congress in early October 1992 and signed by the President later that month.[96] The inability for the Pinal County CAP agricultural districts to prevail in their opposition to the SCAT settlement was directly attributable to the

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[93] S. Rep. No. 102-133, at 9-11 (1991).

[94] 138 Cong. Rec. 20,703.

[95] Keith Schneiders, "Federal Law Changes California Water Policy," *New York Times*, November 1, 1992.

[96] *Reclamation Projects Authorization and Adjustment Act of 1992*, Pub. L. No. 102-575, 106 Stat. 4740 (1992).

deteriorating financial condition of the CAP agricultural users in the early 1990s. The high cost of CAP water resulted in a decline in water delivery to agricultural users beginning in the late 1980s.[97] With their use of the CAP water declining, their argument that the Ak-Chin excess water would diminish the overall supply lost much of its persuasiveness.

Central Arizona Project Reallocation and the Economics of Western Water Policy

Agricultural users of the CAP were in dire financial straits at the beginning of the 1990s. Deliveries to non-Indian agricultural users in 1991 were only half of the total delivered just two years prior.[98] Underutilization threatened to compromise the repayment capability of CAWCD, which owed the federal government approximately $2 billion, and to shift an even greater proportion of the Project costs onto urban water users and the federal government. CAWCD instituted price subsidies for agricultural users in 1992 in order to increase utilization. Under the program, CAP agricultural users agreed not to order water under their existing contracts, and they instead received access to excess water, which was left over after making deliveries to all other users, at a lower rate. The

[97] Paul N. Wilson, Economic Discovery in Federally Supported Irrigation Districts: A Tribute to William E. Martin and Friends," *Journal of Agricultural and Resource Economics* 22, no. 1 (1997): 69.

[98] Wilson, "Economic Discovery," 69; Enric Volante, "CAP Costs Likely to Balloon, UA Report Says," *Arizona Daily Star*, December 1, 1992.

subsidized CAP water did not solve the financial difficulties of the large CAP districts and by the end of 1994 several entered bankruptcy to seek refuge from provisions in their contracts and to attempt a restructuring of their private bond payments.[99] Most of the districts eventually agreed to waive their CAP contract rights under an arrangement that gave them continued access to a subsidized pool of agricultural water. By the mid-1990s a major restructuring of CAP allocation and repayment arrangements was underway.[100] This proved to be a critical development in the resolution of future Indian claims, mostly notably those of the GRIC, which relied heavily on reallocated CAP agricultural water to complete the settlement water budget.[101] In the process, a majority of CAP entitlements were transferred to Indian tribes as part of a larger effort to settle CAWCD's repayment obligation to the federal government.

The process of reallocating CAP water began with a provision added to the SRPMIC settlement that was intended to address the excess CAP water not under contract. Section 11(h) of the legislation required the Secretary of the Interior to request that ADWR "...recommend a reallocation of non-Indian

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[99] William D. Baker, "Chapter 9 Bankruptcy: A Haven for Central Arizona Project Irrigation Districts?" *Arizona State Law Journal* 27 (1995): 665-667.

[100] Wilson, "Economic Discovery," 69-74.

[101] For a discussion of the role of CAP water in resolving Indian water rights settlements see: John B. Weldon, Jr. and Lisa M. McKnight, "Future Indian Water Settlements in Arizona: The Race to the Bottom of the Waterhole?" *Arizona Law Review* 49 (2007): 441-467.

agricultural CAP water that has been offered to but not contracted for by potential non-Indian agricultural subcontractors."[102] After the recommendation was made, the Secretary was instructed to reallocate any available water to non-Indian agricultural users. The cities were a major force behind this push for a reallocation of CAP supplies, in part because they realized that they would bear a larger portion of the costs if agricultural users defaulted on their contracts. The reallocation also forced non-Indian agricultural users to decide if they were going to use their full entitlement of CAP water. If they would take on the costs associated with this water, then it could reallocate to meet future M&I demand.[103] Valley cities were also beginning to realize that the CAP could help to resolve Indian claims that threatened the security of their overall water supplies. Thomas Buschatzke, a water advisor for the City of Phoenix, recalls the change in mindset that began to take hold in the mid-1980s:

> I think what also changed the dynamics in the mid-80's was that the CAP was completed to Phoenix and the light at the end of the tunnel for the completion all the way to Tucson. And so, I think the City realized that not only were there risks to the City...that needed to be addressed, but I think they also saw that the completion of the CAP was going to create opportunities, perhaps,

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[102] Salt River Pima Maricopa Indian Community Water Rights Settlement Act of 1998, Pub. L. No. 100-512, 102 Stat. 2549 (1988).

[103] Arizona Municipal Water Users Association, "Discussion Paper: The Central Arizona Water Conservation District: Central Arizona Project Water Management Policies for the 90's," 24 February 1989, SRP Research Archives.

> to help settle those claims in ways that might not work without the CAP.[104]

The completion of the CAP offered an alternative water supply to satisfy Indian claims, but this could only be accomplished with significant changes to the existing CAP allocation arrangements.

In November 1990 ADWR Director N.W. Plummer completed the Department's recommendations for the reallocation of CAP agricultural water. The proposal relied primarily on small increases to existing users to distribute the excess supply. One of the most notable aspects of the proposal was the large increase for Pinal County irrigation districts, which stood to receive well over 50% of the total non-Indian agricultural supply.[105] If these districts needed additional water it was not evidenced by the fact that just days after ADWR submitted its recommendations the Queen Creek Irrigation District (QCID), New Magma Irrigation & Drainage District (NMIDD), and the San Tan Irrigation District (STID), all sent letters to the Gila River tribe offering to contribute a portion of their CAP entitlement as part of a settlement.[106] In return for releasing

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[104] Thomas Buschatzke (water advisor, City of Phoenix), in discussion with the author, 14 January 2010.

[105] N.W. Plummer to Parties Interested in CAP Agricultural Reallocation, 21 November 1990, DOI Field Solicitor's Office.

[106] Vernon L. Nicholas to Alan Cox, 8 January 1991, DOI Field Solicitor's Office; Robert F. Barcello to Rodney B. Lewis, 10 January 1991, DOI Field Solicitor's Office; Michael A. Curtis to Rodney B. Lewis, 11 January 1991, DOI Field Solicitor's Office.

these supplies the districts asked for considerations ranging from RRA and debt repayment relief to payments of up to $3,000/af.[107] This development shows that some irrigation districts did not need additional CAP water and instead saw the reallocation process as a means to give up some of their entitlement in return for other benefits.

Irrigation districts that proposed to give up reallocated water as part of Indian water rights settlements based their offer on the assumption that they were the only ones who could receive non-Indian agricultural water. Therefore, they felt that this water could only be made available for Indian settlements if they agreed to the reallocation, which in their minds presented an opportunity to gain some benefits as part of the process.[108] Some officials within the Interior Department did not share this view and believed that the federal government should not reallocate water that was going to be offered right back to them as part of Indian settlements. The Assistant Secretary for Indian Affairs recommended that any reallocated CAP water not contracted for by agricultural users should revert back to the Secretary of the Interior's discretion for making deliveries to any CAP user. This would prevent non-Indian districts from offering the water for Indian settlements and having it count towards the local contribution that would

[107] William H. Swan to Files, 30 January 1991, DOI Field Solicitor's Office.

[108] William H. Swan to Steve Magnussen, 4 April 1991, DOI Field Solicitor's Office.

be used to justify federal expenditures.[109] Secretary Lujan concurred with this viewpoint in his final decision on CAP reallocation in February 1992. CAP water would be offered first to agricultural users in accordance with the ADWR recommendations, but any amount left over would be left for the discretionary use of the Secretary.[110]

In reaching his decision the Secretary declined to act on requests made by several Indian tribes to reallocate a portion of the CAP agricultural supply for Indian settlements. The Secretary denied these requests on the grounds that the SRPMIC settlement only allowed him to reallocate water to non-Indian CAP agricultural users. However, by allowing supplies not under contract to revert back to his discretion, the Secretary left open the possibility that this water could be used for future Indian settlements. CAWCD and the Pinal County irrigation districts objected to the inclusion of a reversion provision on the grounds that it was contrary to existing law and contracts, but this view did not prevail with the Secretary.[111] Their objections represent another example of the non-Indian CAP users asserting an unalterable right to maintain a static agricultural supply even if they were not willing to pay the full cost to use the water. This perspective was

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[109] Assistant Secretary--Indian Affairs to Commissioner of Reclamation, 18 April 1991, DOI Field Solicitor's Office.

[110] Central Arizona Project Water Allocations and Water Service Contracting; Final Reallocation Decision, 57 Fed. Reg. 4470 (February 5, 1992).

[111] Ibid.

increasingly under attack as the pressures to reallocate CAP water to other uses superseded the efforts of non-Indian CAP contractors to retain control of the supply without paying for it.

Testing the Reallocation Model: The Gila River Indian Community Water Rights Settlement

The CAP reallocation process would become the defining element of the GRIC water rights settlement because it represented the best, and perhaps only, viable alternative for satisfying the Community's extensive claims without serious disruptions to existing users. The Community's claims presented the greatest challenge of any Indian settlement in central Arizona because its size and strategic importance to the region's water supplies were unmatched by prior settlements. In 1987 the federal government filed claims on behalf of the Gila River tribe totaling over 1,500,000 af.[112] The claim assumed water rights on multiple watersheds and was only slightly below the average annual discharge of the Gila, Salt, and Verde rivers combined. The justification for this extensive claim was the large body of irrigable acreage on the reservation, which the government estimated at nearly 200,000 acres, and the early priority date of water use on the reservation. However, the viability of claim rested on several assumptions that were very

[112] "Statement of Claimant Form for Other Uses', Lower Gila River Watershed, Superior Court of Maricopa County," 20 January 1987, ADWR.

much in dispute at the time. The claim assumed that the 1935 Globe Equity Decree, which quantified the rights of the tribe to the Gila River, was not settled law and it could be reopened to address the tribe's federal reserved rights. Many of the water users in central Arizona viewed the GRIC claim as unreasonable since it would displace a large number of current users.[113] Nonetheless, the tribe had extensive water rights and a well-documented history of irrigation use that presented a formidable challenge to other water users that could not be overlooked.

The size and complexity of the GRIC claims presented a significant challenge for any individual or institution that might take on the task of trying to facilitate a settlement. In early 1987 the tribe requested that the Secretary of the Interior appoint a federal negotiating team. The Secretary designated a team in May, but it did not make any significant progress in getting parties to the negotiating table.[114] SRP agreed to enter negotiations with the tribe in August 1988 and in response to a joint request with the Community a new federal team was appointed later that year.[115] Some parties questioned whether a federal

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[113] "Report on the Findings of Fact Related to Negotiations to Settle Water Claim of the Gila River Pima-Maricopa Indian Community," prepared by Branch of Water Resource Management, Development, and Protection, Phoenix Area Office, Bureau of Indians Affairs, December 1990, DOI Field Solicitor's Office.

[114] Ibid.

[115] John R. Lassen to Thomas R. White, 5 August 1988, SRP Research Archives; Thomas R. White and A.J. Pfister to Donald Paul Hodel, 3 October 1988, SRP

representative should mediate the negotiations because the government's trust responsibility to the tribe meant that it could not be impartial. The group decided to approach Michael Clinton, who was working as a private consultant, about acting as a mediator for the negotiations. However, Clinton was not able to take on the role because of the work his firm had performed for some of the Pinal County irrigation districts.[116] In contrast to some of the prior settlements, Community representatives realized that they would need to take the lead in pushing the negotiations forward. Rodney Lewis, the former General Counsel for GRIC, recalls,

> In this case, it is clear that our negotiations would not take place unless we took the lead in the settlement. We had to schedule the meetings, talk with people, reach out and grab people to come to meetings and sit down and negotiate with us, make sure they were serious or not serious, and go from there, and put together coalitions of people who wanted to settle.[117]

The leadership role taken by the Community was important for holding the settlement process together through the process of negotiating side agreements with the various parties. This would have presented a formidable task without one party managing the process and since the tribe was ultimately responsible for

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Research Archives; Earl E. Gjelde to Thomas R. White, 15 November 1988, DOI Field Solicitor's Office.

[116] "Report on GRIC Claims."

[117] Rodney Lewis, in discussion with the author, 12 April 2010.

agreeing to the final outcome, it was in their interest to work out the various agreements that would comprise the settlement.

The first challenge confronted by the settlement group was arriving at a consensus on the water budget. This task was particularly challenging in the case of the GRIC because the size of the water budget was significantly larger than prior settlements. At the first large-group negotiating meeting, which included most of the major water users on the Salt and Gila rivers, the tribe outlined a goal of receiving 791,100 af of water that to cover all future water uses on the reservation. The figure was based on a community general plan completed in 1985 that outlined the development trajectory of the reservation. Nearly 98% of the water budget would be devoted to the future development of agriculture on approximately 150,000 acres of reservation land.[118] Most of the other parties doubted whether this quantity of water could ever be secured, not to mention the question of whether the plan was economically viable.[119] The greatest obstacle to the negotiation moving forward was convincing the other parties that the water goal was achievable without causing serious dislocations to existing water users.

The Gila River water users were the most divided on the issue of whether to pursue negotiations. In an effort to forge ahead with a settlement, SRP, RWCD, and the Valley cities put forward a proposal in December 1989 to resolve the

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[118] "Report on GRIC Claims."

[119] William Swan to Files, 10 November 1988, DOI Field Solicitor's Office.

Community's claims to the Salt River. The proposal assumed a lower water demand for the reservation of 565,000 af, which was based on the agricultural development of 100,000 acres. In the proposal, the water demand would be met with existing entitlements and approximately 110,000 af of new water coming from the CAP supply and water users in Salt River and Upper Gila River valleys. The projected financial costs to support this development were estimated at $287 million. The Community rejected both the water and monetary elements of the proposal. The non-Indian parties held firm on their settlement offer, saying that it represented "...the maximum magnitude of water and money which can be provided to the GRIC as part of a comprehensive water rights settlement."[120] Little progress was made in the negotiations for the remainder of 1990 with both the Community and the federal team holding to the 719,000 af water budget goal.[121] The Salt River parties developed a new settlement proposal in early 1991 that reflected the expected availability of CAP water from several non-Indian irrigation districts. Due primarily to these additional supplies, the water budget was increased to 654,664 af. However, there was still a great deal of uncertainty about the future availability of CAP agricultural water.[122] In July the DOI

[120] Salt River Valley Representatives to GRIC Negotiating Team, 6 March 1990, SRP Research Archives.

[121] Barry W. Welch to Thomas R. White, 5 October 1990, DOI Field Solicitor's Office.

[122] Chris Kenney to Barry Welch, 20 February 1991, DOI Field Solicitor's Office.

authorized a negotiating position of 650,000 af that relied heavily on the use of CAP water.[123] This water budget began to solidify in late 1992 and it would be become the *de facto* target for the rest of the negotiations.[124]

The main challenge in meeting the water budget revolved around the quantity of CAP agricultural and M&I water that could be devoted to the settlement.[125] Resolving this issue depended on the outcome of the reallocation process underway within Interior. GRIC requested that the Secretary of the Interior give it 75% of the CAP agricultural water not under contract as part of his reallocation decision, but this request was denied. Several non-Indian agricultural users were interested in relinquishing their contracts as part of a settlement, but it was unclear whether this would be enough to satisfy all the GRIC demands. Further complicating the situation was the fact that the federal negotiating team opposed the addition of CAP supplies before the reallocation process was completed. They viewed the non-Indian districts attempts to surrender CAP water as giving water back to the federal government that it had just received in the

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[123] Timothy W. Glidden, "Gila River Reservation Water Rights Settlement, Preliminary Negotiation Position Authorization," 2 July 1991, DOI Field Solicitor's Office.

[124] "Preliminary Points of Agreement between GRIC and Federal Team, 15 December 1992, DOI Field Solicitor's Office.

[125] Mike Jackson to Arizona delegation staff, March 1993, ADWR.

1992 reallocation decision.[126] The heavy reliance on CAP water also raised the financial requirements for the settlement, since the tribe would be obligated to the pay the OM&R expenses associated with the delivery of this water. GRIC would only accept a large portion of the CAP supply if they received assurances that the federal government would help offset the delivery costs. This placed a large financial burden on the federal government not only to cover the repayment portion of the CAP water allocated to the Community, which would become non-reimbursable, but also pay a portion of the delivery costs.[127]

In 1993 it became clear to the settlement participants that CAP water was the most viable alternative to complete the water budget. When the federal negotiating team completed their recommendation for the settlement, they estimated that 221,036 af was needed from the CAP supply in addition to contributions from SRP, SCIDD, and the Upper Valleys. The Community's existing entitlements to Salt and Gila River water and its original CAP allocation, along with groundwater, would round out the water budget.[128] Completing the settlement was projected to cost the federal government approximately $450

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[126] Bill Swan to Joe Miller and Barry Welch, 16 December 1992, DOI Field Solicitor's Office.

[127] Bill Swan to Barry Welch and Joe Miller, 20 January 1992, DOI FIeld Solicitor's Office.

[128] "Federal Negotiating Team, Gila River Indian Community, Water Settlement Proposal/Options," April 1993, DOI Field Solicitor's Office.

million for water acquisition, CAP debt relief, and reservation development loans.[129] Securing contributions from other water users to fill out the water budget was the next challenge. Meetings were held between the Community and the individual parties, but these failed to lead to any final agreements. Without the major component of the settlement completed, it was difficult to get other parties to agree on how to close the budget. Settlement discussions stalled in late 1993. In November members of the Arizona Congressional delegation requested the assistance of Secretary of the Interior Bruce Babbitt in expediting settlement negotiations.[130] However, the reallocation process became even more complicated as the result of a dispute between CAWCD and the federal government over the extent of the District's repayment obligation.

The Water/Money Nexus in the Central Arizona Project Repayment Dispute

The urgency to find a solution to the underutilization of CAP water increased following the October 1, 1993 declaration by the Bureau of Reclamation that the first phase of the Project was substantially complete. The announcement triggered the start of CAWCD's repayment of its portion of the Project costs. This also meant that non-Indian CAP agricultural contractors would be required to pay a proportional share of the Project's OM&R costs under a

[129] Ibid.

[130] Dennis DeConcini et al. to Bruce Babbitt, 22 November 1993, DOI Field Solicitor's Office.

provision in their contracts known as "take-or-pay." Few districts were in the financial position to pay for the water under these contracts and the only reason they were able to continue utilizing CAP water was because of the subsidized rate they negotiated with CAWCD.[131] The take-or-pay provisions threatened the repayment capability of CAWCD. If irrigation districts were not able to meet their commitments, the District would be forced to use reserve funds, accumulated primarily from the sale of excess power revenues, to repay the federal government. However, the General Accounting Office (GAO) concluded that "...for the 1994 to 1999 period, projected revenues from power and water sales and interest income from investments of the reserve fund will not provide sufficient funding for the District to repay its debt and pay for annual O&M expenses."[132] If this projection become reality it would mean a default, either by the non-Indian irrigation districts, CAWCD, or both, which had the potential to cost the federal government nearly $2 billion.[133]

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[131] "CAP Aqueduct Completed, State Must Begin Repaying U.S." *Arizona Daily Star*, October 2, 1993.

[132] *Central Arizona Project: Oversight Hearings before the Subcommittee on Oversight and Investigations, Committee on Natural Resources*, 103rd Cong., 13 (1994).

[133] This figure includes the District's estimated repayment obligation of $1.8 billion along with $157 million in distribution system loans provided to CAP contractors that were in danger of default. see *Central Arizona Project: Oversight Hearings*, 17-22.

District Chairman Samuel Goddard testified at a CAP oversight hearing held in Phoenix in December 1993 that CAWCD was developing a plan that would "...hopefully forestall the financial collapse of the irrigation districts while further long-term solutions are developed."[134] The proposal was conditioned on the non-Indian agricultural contractors relinquishing their entitlements so that a portion of these supplies could be reallocated to M&I and Indian users. Agricultural districts would continue to receive subsidized CAP water on a temporary basis while M&I users and Indian communities took on a greater portion of the Project repayment.[135] The plan required the federal government to take on a greater share of the capital and OM&R costs by reserving a portion of the CAP supply for federal uses thereby making that portion of the Project non-reimbursable under the provisions of the authorizing legislation. The majority of the reallocated water would go towards the completion of Indian water settlements, but federal officials had not established how much water they wanted to be reserved. If the federal government could not arrive at a decision on how much water to reallocate to Indian tribes and other federal uses, CAWCD would "...assume than [sic] any water which is not under contract has been reserved by the Secretary...."[136] The District's plan created a link between the reallocation of

[134] Ibid., 86.

[135] Ibid, 86.

[136] Ibid., 100.

CAP water and the resolution of pending Indian water rights settlements. Congressman Miller concluded at the oversight hearings that "[i]t seems to me that the resolution of the issues surrounding the future of the Central Arizona Project and Indian water settlements have to be one and the same."[137] The binding together of these two disputes further delayed the settlement of the GRIC claims until the CAP issues were addressed.

The reallocation of CAP water to Indian tribes might have been a relatively straightforward process if it were not for a dispute between CAWCD and the federal government over the exact amount of the District's repayment obligation. Reclamation informed the District in October 1993 that cost overruns on the Project would increase the reimbursable expense to $2.2 billion from the prior repayment ceiling of $1.9 billion.[138] CAWCD contested Reclamation's authority to pass along these expenses and negotiations were held during 1994 and 1995 on the issue. One of the core elements of the dispute concerned the ability of CAWCD to market "excess" water that was available on an annual basis after deliveries were made under existing contracts. Federal representatives wanted to reserve a portion of this supply to complete Indian settlements, but the question was how much and whether the federal government was willing to pay for the water. Interior officials indicated that they wanted 165,000 af of M&I and

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[137] Ibid., 174.

[138] Central Arizona Water Conservation District [CAWCD] v. United States [U.S.], 32 F. Supp. 2d 1117 (1998).

NIA priority water along with the right of refusal to an additional 100,000 af of NIA water. This would raise the portion of the Project supply reserved for federal uses to 612,000 af.[139] CAWCD officials wanted the government to pay for this water, in addition to covering the annual OM&R costs to deliver the water, because they believed the District was free to market this excess water as they saw fit.[140] The two sides came close to an agreement during the summer of 1995, but questions concerning CAWCD's ability to market unallocated water and the exact quantity that would be retained for Indian settlements, led to a breakdown in the negotiations.[141] CAWCD proceeded to file a lawsuit seeking a court determination of several of the issues in dispute. In November 1998 the District Court ruled in favor of the District on the question of its repayment obligation.[142] The decision paved the way for future negotiations to resolve issues related to the reallocation of Project water.

In 1998 Secretary Babbitt asked U.S. Senator Jon Kyl to help in negotiating a resolution to the CAP repayment dispute.[143] Kyl would come to play

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[139] Bruce E. Babbitt to Samuel P. Goddard, 23 December 1994, SRP Research Archives.

[140] Samuel P. Goddard to Bruce E. Babbitt, 3 November 1994, SRP Research Archives.

[141] CAWCD v. U.S., 32 F. Supp. 2d 1117 (1998).

[142] Ibid.

[143] Jon Kyl, in discussion with the author, 12 July 2010.

a key role in facilitating a settlement that was connected to the resolution of the GRIC claims. The central issue in the negotiations continued to be the amount of water the federal government wanted to set aside for Indian settlements. The Arizona parties agreed to reallocate 200,000 af of NIA water while Interior was not willing to accept less than 240,000 af. Part of the local opposition to making a larger quantity of CAP water available was the widespread assumption that the tribes would lease a significant portion of this supply back to cities and other water users.[144] This uncertainty stemmed from the lack of clear information about how much water would be needed to settle future Indian claims. Both sides agreed to focus on this issue as a precursor to deciding on the final quantity to be reallocated.[145] As the negotiations progressed during 1998 and 1999 the GRIC settlement became even more intertwined in the reallocation process. Deputy Secretary of the Interior David Hayes informed ADWR Director Rita Pearson that Interior was not willing to "...accept a ceiling of 200,000 af of water for federal purposes unless we have a settlement with the Gila River Indian Community...."[146]

In May 2000 CAWCD and the United States reached an agreement that resolved the repayment dispute by providing water and a funding stream to settle

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[144] Jon Kyl to Bruce Babbitt, 22 May 1998, SRP Research Archives.

[145] Jon Kyl to Bruce Babbitt, 31 July 1998, SRP Research Archives.

[146] David J. Hayes to Rita Pearson, 14 July 1999, SRP Research Archives.

future Indian claims. The agreement gave the United States access to approximately 200,000 af of additional CAP water to use for federal purposes. CAWCD would be given the exclusive right to sell the remaining excess water and the United States could choose to purchase this water on the same basis as other users. The water dedicated as part of the agreement was freed up when several non-Indian CAP contractors agreed to relinquish their contract entitlements in return for forgiveness of the loans used to fund part of their distribution systems, known as 9(d) debt, and access to a subsidized pool of agricultural water from CAWCD.[147] This gave the non-Indian irrigation districts continued access to low-cost CAP water while reliving some of their debt burden. The districts felt compelled to reach a solution because the ten-year agreement that gave them access to the agricultural pool was due to end in 2003. The settlement would extend the duration of this supply to 2030.[148]

The agreement also set the District's repayment obligation at $1.6 billion. However, the most important development was the formation of a dedicated funding stream to pay back the federal loan as well as provide funding for Indian settlements. The funding mechanism was established as part of the Lower

[147] David J. Hayes to Rita Pearson Maguire, 18 January 2001, SRP Research Archives.

[148] Paul Orme (general counsel, Maricopa Stanfield Irrigation and Drainage District and Central Arizona Irrigation and Drainage District), in discussion with the author, 10 April 2010.

Colorado River Basin Development Fund (LCRBDF), which was originally created by the Colorado River Basin Project Act of 1968 to collect excess power revenues that were then deposited in the U.S. Treasury.[149] Revenues from the sale of excess power from Navajo Generating Station (NGS) and Hoover Dam would now be pooled in the LCRBDF and used to repay the federal government. Instead of going to the Treasury, additional revenues that accumulated in the fund would be used for a number of purposes, including the payment of OM&R expenses to deliver CAP water to Indian communities. The modifications to the fund were the central component to the resolution of the repayment dispute and the GRIC settlement because it created a dedicated funding stream to cover the costs of future Indian water rights settlements.[150] Senator Kyl recalled later that,

> ...the willingness to put that money into a fund for future Indian water settlements, including the Gila River Settlement to start with, was a big breakthrough for us, because that not only solved the litigation issue for the United States government [regarding the CAWCD lawsuit], it provided certainty to the state parties in terms of what they had yet to pay back, and provided a source of funding for the ultimate effectuation of Indian water settlements.[151]

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[149] Colorado River Basin Project Act of 1968, Pub. L. No. 90-537, 82 Stat. 885 (1968).

[150] "Revised Stipulation Regarding a Stay of Litigation, Resolution of Issues During the Stay and for Ultimate Judgment Upon the Satisfaction of Conditions," CAWCD v. U.S., 9 April 2003. Included as Exhibit 2.35 to "Amended and Restated Gila River Indian Community Water Rights Settlement Agreement," 21 October 2005, SRP Research Archives.

[151] Jon Kyl, in discussion with the author, 12 July 2010.

The changes in the LCRBDF were a critical development that addressed both the need for water and money. Without this change, the GRIC would not be willing to accept CAP water because the ongoing delivery costs would be too high. CAP users supported the settlement because it resolved the litigation over the District's financial issues while also addressing both the need to resolve Indian claims and to provide a means for non-Indian agricultural users to continue using CAP water. The agreement was entered as a stipulation in the litigation between CAWCD and the United States while Congress considered legislation to authorize the deal. Final approval of the agreement was conditioned on Congressional approval of the GRIC settlement and amendments to the Southern Arizona Water Rights Settlement Act (SAWRSA).[152]

The resolution of the CAWCD repayment dispute paved the way for the completion of the GRIC settlement by providing 102,000 af of new CAP agricultural water reallocated by the Secretary to fill the water budget. When this supply was combined with the tribe's existing entitlements, it accounted for approximately 70% of the 653,500 af water budget (see Figure 4). The other major contributions of water from settling parties were primarily in the form of CAP entitlements, SRP stored water, and effluent exchanges. Given the size of the water budget, the settlement is remarkable for the fact that did not displace existing water users. The settlement exemplifies the strategy utilized in prior

[152] David J. Hayes to Rita Pearson Maguire, 18 January 2001, SRP Research Archives.

settlements of expanding the pie to create a win-win scenario. It also represents a major change in the long-term utilization of the CAP supply, approximately 50% of which is now allowed to Indian tribes. The ultimate disposition of this water will be heavily dependent on the tribes' desire to lease a significant portion of CAP water to municipalities and other water users.

Figure 4. Gila River Indian Community Water Budget

SOURCE	AMOUNT (ACRE-FEET PER YEAR)
Community CAP Indian Priority Water	173,100 AFY
RWCD CAP Water	18,600 AFY
HVID CAP Water	18,100 AFY
Asarco CAP Water[a]	17,000 AFY
New CAP NIA Priority Water	102,000 AFY
Underground Water	156,700 AFY
Globe Equity Decree Water	125,000 AFY
Haggard Decree Water	5,900 AFY
RWCD Surface Water	4,500 AFY
SRP Stored Water[b]	20,000 AFY
Chandler Contributed Reclaimed Water	4,500 AFY
Mesa Reclaimed Water Exchange Premium	5,870 AFY
Chandler Reclaimed Water Exchange Premium	2,230 AFY
TOTAL (estimated average)	653,500 AFY

Source: Arizona Department of Water Resources

The Role of Water Marketing: Lease and Exchange Agreements

Lease and exchange agreements between GRIC and several Valley cities were critical components of the settlement framework. As was the case in prior settlements, the agreements provided the cities with an alternative water supply and the tribe with a source of revenue to support ongoing infrastructure needs. The settlement allowed the Community to lease any portion of its 328,800 af CAP entitlement giving it greater flexibility in deciding how to use these supplies. This development speaks to a growing acceptance of water marketing as a critical component not only of tribal settlements, but also in water allocation generally.

CAP lease agreements between the Community and four Valley cities (Goodyear, Peoria, Phoenix, and Scottsdale) were included in the settlement. The agreements covered a total of 41,000 af of CAP Indian priority water to be leased for a period of ninety-nine years.[153] Multiple payment options were offered to the cities with a base price being set at $1,203 per acre-foot.[154] The tribe also agreed to lease Phelps Dodge up to 22,000 af, with a guarantee of 12,000 af of CAP

[153] The CAP lease agreements are included under Exhibits 17.1A-17.1D, "Amended and Restated GRIC Settlement." The language of the lease agreements is identical except for the water quantity, which is as follows: 7,000 AFY to Goodyear, 7,000 AFY to Peoria, 15,000 AFY to Phoenix, and 12,000 AFY to Scottsdale.

[154] For exact costs, including OM&R, for Phoenix CAP lease see City of Phoenix, *Water Resources Acquisition Fee Update: Phase 1: Technical and Cost Data* (Phoenix: Red Oak Consulting, 2008), 30-31. Like the SRPMIC settlement, the lessees were required to pay OM&R costs, but not capital charges on the CAP water.

Indian priority water for an initial term of 50 years that was provided for a one-time payment of $4.8 million.[155] The agreement was designed to settle outstanding litigation between GRIC and Phelps-Dodge.[156] The cities that leased the Community's CAP water received the added benefit of having that water count towards their AWS. ADWR rules allow the cities to count 100% of the leased water towards their AWS designation for the first fifty years of the lease. In the 51st year, the cities are required to show evidence of negotiations with the tribe in order to continue to claim the lease water as part of their AWS.[157] When the GRIC leases come up for renegotiation the dynamics will have changed significantly, which could have wide-ranging implications for the cities' ability to meet their AWS. With the projected reductions in CAP supplies, the value of CAP Indian Priority water is likely to increase.

The lease provisions in the GRIC settlement are more than just a means to provide the Community with a revenue source, but they reflect important trade-offs that are at the foundation of the settlement. The first trade-off centers on the

[155] Exhibit 10.1 of "Amended and Restated GRIC Settlement."

[156] *Arizona Water Settlements Act of 2004*, Pub. L. No. 108-451 (2004).

[157] Arizona Revised Statutes (ARS) § 45-101, Article 7, R12-15-716 (F)(2); ARS § 45-101, Article 7, R12-15-718 (N).

inclusion of 2,000 af to 35,000 af of SRP water in the GRIC water budget.[158] SRP was able to leverage its infrastructure and transmission capacity as its primary contribution to the settlement. As part of the settlement, SRP agreed to accept delivery of the GRIC's CAP water, and to provide the Community with storage credits in SRP's reservoir system.[159] The ability to store credits gives GRIC an added level of security for their supplies, without the high capital expenses associated with constructing and maintaining reservoirs.

The municipal effluent exchanges included in the GRIC settlement demonstrate an even higher level of shared value between the Community and Valley cities. The exchanges are also indicative of the increasing value of effluent as a potential water source for satisfying future municipal demands for non-potable water. The GRIC settlement included two separate agreements between the Community and the cities of Chandler and Mesa to send 40,600 af of municipal effluent to the reservation in exchange for 32,500 af of CAP Indian Priority water.[160] The exchange is calculated using a 5:4 ratio that gives the Community a total of 8,100 af more water than the CAP water they lease. The

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[158] ADWR calculated an estimated annual yield of 20,500 AFY. See "Technical Assessment of the Gila River Indian Community Water Rights Settlement" (Phoenix: Arizona Department of Water Resources, 2006), 3-38.

[159] Rosalind H. Bark, "Water Reallocation by Settlement: Who Wins, Who Loses, Who Pays?" *bepress Legal Series* no. 1454 (2006): 18-19.

[160] See Exhibit 18.1, "Reclaimed Water Exchange Agreement" in *Arizona Water Settlements Act of 2004*, Pub. L. No. 108-451 (2004).

agreements extend in perpetuity, with the cities receiving their CAP water regardless of whether the GRIC continues to accept the effluent, as long as the water quality provisions of the agreement continued to be met. The exchanges provide value for both entities, with the GRIC receiving an increased quantity of water that can be used for some agricultural purposes, and the cities gaining an assured water supply in exchange for their effluent. The CAP water that the cities receive has the legal classification of effluent, which allows them more flexibility in determining between potable and non-potable uses.[161]

Forging the Basis for Future Settlements: The Arizona Water Settlements Act

The provisions of the *CAWCD v. U.S.* stipulation and the GRIC and SAWRSA settlements were included as separate titles of the Arizona Water Settlements Act (AWSA) introduced by Senators Kyl and McCain in October 2000. The legislation did not gain much traction until it was reintroduced in 2003, but in the interim, Senator Kyl spearheaded the Congressional action to develop the funding mechanism for the settlement. A provision added to a 2002 energy and water appropriation bill allowed revenues to accrue in the LCRBDF, instead of being deposited into the Treasury, until the provisions of the *CAWCD v. U.S.*

[161] Kathryn Sorenson (water resources coordinator, City of Mesa), in discussion with the author, 1 April 2009.

stipulation were satisfied.[162] Modifying the Fund was arguably the most critical component of the AWSA because it would provide a dedicated funding source to cover the GRIC settlement expenses while also leaving extra revenues for future Indian settlements. DOI estimated that $40-50 million would accrue annually in the Fund.[163] The AWSA authorized payments of $53 million to an OM&R Trust Fund that could be used to cover future delivery costs for GRIC's CAP allocation. Additionally, $147 million was authorized for the rehabilitation of the San Carlos Irrigation Project (SCIP) on the reservation.[164] Excess revenues would be used to cover the OM&R costs for other Indian tribes.[165] These financial components of the AWSA were critical given the uncertainty surrounding future Congressional appropriations for Indian settlements. In addition to setting aside money for future Indian settlements the AWSA also created a pool of CAP water for the same purpose. The bill authorized the Secretary of the Interior to hold 67,300 af of reallocated CAP agricultural water for future settlements.[166] This water was not

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[162] Energy and Water Appropriations Act of 2002, Pub. L. No. 107-66, 115 Stat. 486 (2001).

[163] *Arizona Water Settlements Act: Joint Hearings before the Subcommittee on Water and Power of the Committee on Energy and Natural Resources and the Committee on Indian Affairs*, 108th Cong., 16 (2003) (statement of Bennett Raley, Assistant Secretary, Water and Science, DOI).

[164] S. Rep. No. 108-360, at 73 (2004).

[165] Ibid, 74.

[166] Ibid., 71.

nearly enough to meet all the outstanding tribal claims in Arizona, but it did create a dedicated supply that could be leveraged in future settlements. The Senate passed AWSA in October 2004 and the House followed suit in November.[167]

Conclusion

The AWSA epitomizes the interdependence of money and water in resolving Indian water rights claims. The addition of federal financing was the critical component in making possible Indian settlements, which did not require existing water users in Arizona to give up anywhere near the amount of water they would potentially lose through litigation. These settlements were structured in such a way that the federal government accepted a large portion of the costs or ensuring that Indian communities would receive the resources they needed to put their water to use. The AWSA was the culmination of a period that saw the CAP used as the principle supply for satisfying Indian water rights claims. The act addressed the long-term allocation of CAP water and financing and made possible the GRIC settlement. In the process, the federal government took on a significant portion of the Project costs as well as providing additional money to help tribes pay for the water.

[167] 150 Cong. Rec. 11,127; 150 Cong. Rec. 9,793.

The AWSA demonstrates the extent to which regional water users forged common interests that facilitated the large scale restructuring of water allocation arrangements in the state. By supporting the allocation of approximately half of the CAP supply to Indian communities, Arizona's largest water users were tying their own long-term interests with those of tribal communities. The CAP supply was an attractive source of water to meet Indian claims because it was unallocated and expensive, but with the demand for water increasing, Indian communities will play an important role in future water policy decisions in Arizona.

Chapter 7

LESSONS FROM THE SETTLEMENT ERA

The Desire for Certainty

One of the most commonly cited benefits of the Indian water rights settlement process is that it helped to resolve the uncertainty that settling parties faced concerning their future water supplies. Analyzing settlements through the lens of uncertainty is a helpful tool for understanding what motivated Indians and non-Indians alike from the earliest water rights adjudications to the settlement process. Key elements of the final settlement framework demonstrate how the various parties sought to minimize risk to their long-term water supplies and create greater certainty by creating common interests. The success of the settlement process stemmed from the flexibility it offered regional water users in realigning water allocation and policy arrangements to reflect current priorities.

Accounting for uncertainty is a fundamental part of any planning process, but it is especially important when dealing with a natural resource that is critical to sustain human and economic livelihoods. Though it is not possible to eliminate all uncertainties, particularly those related to natural variability and calamitous events, many of the factors that determine the security of a water supply have little to do with its physical availability. Rather, the institutional, legal, and political constraints placed on the access to water are more subject to change. This

can result in uncertainty concerning the "rules of the game" and lead water users to exercise power in modifying these rules. The negotiated settlement of Indian water rights claims provides one of the best opportunities to analyze the roles uncertainty play in Arizona's water management and policy decision-making.

Addressing Supply Uncertainty

Water rights disputes typically occur against the backdrop of broader concerns about the ability of the regional water supplies to meet current and future demands. In this context, specific events become proxies for debating larger issues about water allocation arrangements and regional priorities. The conflict generated by the construction of Smith Park Dam and the proposed contract between the Paradise Valley Water Company and the FMIC are examples of this development. As Indian communities took concrete steps to develop the water supplies on their reservations, existing water users who relied on those same supplies used the projects to challenge the basis of the tribal water claims. Only after the CAP was authorized and the allocation process commenced did non-Indian parties begin to show a willingness to participate in more constructive dialogue about how Indian water needs could be met. Unlike the water supplies of the Gila, Salt, and Verde rivers, the CAP represented a large unallocated water supply that could be redistributed without taking water from an existing user. The fact that CAP water played such a major role in several Indian

water rights settlements speaks to its importance as an alternative water source to meet the long-term water needs of the tribes.

Negotiation v. Settlement

The precursor to any settlement is a choice between litigation and negotiation as the preferred problem-solving mechanism. Each process has benefits and drawbacks, and neither is mutually exclusive, but any decision to settle rather than litigate rests on an evaluation of the risks and opportunities presented by both processed. From the early conflicts over Indian water use in the 1950s until the present Indian and non-Indian parties alike have avoided litigation on the fundamental differences between federal reserved water rights and rights acquired under state law. This is apparent in the state response to *Arizona v. California*, where Western water users worried that a major legal decision might establish a precedent that threatened not only their existing supplies, but also the legal principles on which they were based. The major water users in central Arizona had two choices: litigate all the legal claims to water rights in the state and realign the allocation arrangements based on a court's decision, or realign water supplies in a negotiated settlement to preempt a court ruling, thus avoiding potential disruptions and minimizing the impact of future legal challenges. The choice was between confronting uncertainty in the courtroom or at the negotiating table. Negotiation was a means to avoid addressing the larger legal questions while still reducing uncertainty about water allocations.

The major non-Indian water users in Arizona pursued negotiations with the tribes because they believed they could have greater control over the process and final outcomes. This flexibility is an inherent benefit of the negotiation process and also one that is critical to effective water planning. Thomas Buschatzke, a water advisor for the City of Phoenix, explains:

> I think the City's preference…was always to try and negotiate something rather than to litigate because there was a more certain outcome and you didn't leave it up to the judge to maybe do something that you…absolutely couldn't live with, whereas in a settlement agreement, it was very unlikely you were going to end up with something that hurt you so bad that you absolutely couldn't live with it, because you would never sign the agreement in the first place.[1]

To understand the preference for negotiation and settlement it is necessary to consider the alternative approach of determining water rights through litigation. Litigation of water rights is only a viable option if all the parties are willing to accept the consequences of a ruling adverse to their position. When dealing with claims as larger as those put forward by Arizona tribes, the stakes were very high for all parties and any decision had the potential to either drastically reduce the water supplies of existing users or permanently restrict water uses on the reservation. Therefore, the desire to negotiate was not only about having greater control over the process and outcomes, it was fundamentally a decision to allocate water in ways that would not be possible if existing legal rights were the only criteria.

[1] Thomas Buschatzke, in discussion with the author, 14 January 2010.

The motivations driving Indian communities to negotiate are also important for understanding questions of timing and process. The stakes in litigation were much higher for Indian communities because an adverse ruling could permanently restrict their ability to access the water supplies that were critical for economic growth. Non-Indian water users were negotiating from a position of power because they controlled much of the state's water supplies. Their evaluation of risk was based more on what they stood to lose while Indian communities had to consider what they could gain either through litigation or negotiation. Negotiation offered the opportunity to receive other benefits besides water supplies, including financial assistance and the shared use of storage and delivery infrastructure. The decades of litigation over jurisdictional elements of the water rights adjudication process was more about laying the groundwork for a favorable outcome in litigation, but once these questions were resolved, most Indian communities realized that the benefits of negotiation were likely greater than litigation.

Once the decision was made to pursue negotiation a number of factors conspired to make the settlement negotiations an ideal venue for addressing several different types of uncertainty. First, the range of affected parties was large and included almost every sector of the economy and a range of institutional types from state and federal governments to small irrigation districts. This provided an opening for large-scale reforms that would not have been possible in disputes with a small number of water users. Second, the nature of Indian water rights claims

forced negotiators to focus on the long-term and find permanent solutions to resolve differences rather than short-term fixes. Third, the wide range of participants and the necessity to find permanent solutions resulted in a number of trade-offs that would likely not have been made outside the settlement framework. The constraints on the settlement process led the participants to develop innovative approaches for achieving objectives that went beyond the shifting of water supplies. The negotiation process gained momentum with each successive settlement as Indian communities and other regional players begin to see the benefits of the process and the range of problems that could be addressed.

Achieving Finality

Once the choice was made to pursue negotiation, the parties needed to resolve a number of fundamental issues before a settlement could be crafted. First and foremost the resolution of Indian claims needed to be final and enforceable. This was accomplished through a waiver of claims contained in each of the settlements that precluded future litigation by the tribes and other parties to the settlement. Finality was important for a number of reasons. It took an open-ended, unquantified legal claim and converted it into a specific quantity and source of water. Reaching a final quantity of water to satisfy tribal claims helped establish a basis for determining the rights of others by eliminating most competing claims to the same resource. In this way the settlements fit within the larger process of adjudicating all the water rights to the major rivers in the state.

Each successive settlement reduced the cumulative litigation risk presented by Indian claims lowering the potential impact of the claims. William Swan, a former DOI attorney, explained that "...the waiver of claims was...like bowling pins. It was getting rid of one bowling pin, you know. You'd say, 'I've got rid of that potential claimant, and I don't have to worry about that one anymore, and the Government on its behalf. But now I've got to deal with the others.'"[2] This will be an important development for the future prosecution of the Gila River Adjudication, and other basin-wide adjudications in Arizona, which are intended to arrive at a final determination of all the rights to a particular water source. The motivation to resolve Indian claims, before addressing those of other water users, was a purposeful decision. In this way the Indian settlements not only provided a specific quantity of water for the tribes, they also quantified their rights within the statewide adjudication process, thereby removing the number of potential claimants in the proceeding.[3]

The tribes were well aware that approving a final settlement would eliminate their ability to claim additional water in the future. This is why they

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[2] William Swan, in discussion with the author, 27 January 2010.

[3] In May 1991 the Supreme Court of Arizona adopted a special procedural order for approving Indian settlements as part of the adjudication process. This provided a legal mechanism for the Court to approve the terms of the settlements. See "Special Procedural Order for the Approval of Federal Water Rights Settlements, Including Those of Indian Tribes," In Re the General Adjudication of the Rights to Use Water in the Gila River System and Source, 16 May 1991, Supreme Court of the State of Arizona.

stressed the fact that the financial resources must accompany the water supplies they received. Nonetheless, the decision was a difficult one for many tribes to make. One force pushing the tribes to settle was the reality that finite water supplies might limit future claims even if they rested on a strong legal basis. Arlinda Locklear explains:

> ...the longer you wait, the fewer resources there are to actually satisfy the right and the more likely, at some point, that a court will say -- even though you have a theoretic right to an unlimited amount of water, we're going to take the realities into account and give you some percentage or some other adjustment of that theoretic right that takes into account the fact that systems are basically just overdrawn.[4]

The perception that water supplies were over allocated forced the tribes to consider whether their legal claims would prevail in court when satisfying these claims meant that existing users might be lose water they were currently using.

Expanding the Pie

The mechanism used throughout the settlement process to arrive at a final quantity was the water budget. This was more than just an accounting tool, but in many respects the best reflection of the consensus on the extent of the tribes' right. As Craig Sommers, a consultant for SRP explained, "... it's not just numbers that some consultant puts on a piece of paper. It somehow does reflect

[4] Arlinda Locklear, in discussion with the author, 10 September 2010.

their fundamental right."[5] In order for the water budget to be an effective tool for reaching consensus on the total quantity of water in the settlement it needed to be based on a defensible rationale. By agreeing to a target quantity the negotiating parties were able to experiment with multiple scenarios for meeting this supply. This allowed for greater flexibility and ultimately more creativity as exchanges and reallocation were used to fill the gap in the water budgets. It also helped the parties turn the tribe's overall right into specific sources and quantities of water. The water budget's ultimate success is the independence it created; without the certainty on where the water was coming from, it would be difficult to reach a consensus on the total quantity, and without a total quantity the settling parties would have no incentive to help in finding additional water to close the gap.

Nearly every settlement confronted the same obstacles in regards to the water budget, which was closing the gap between what the settling parties were willing to contribute and what the tribe needed to reach its water budget goal. In attempting to close this gap, the settling parties adopted strategies to expand the water pie. Michael Clinton describes how this process typically unfolded: "If everyone is to win, the pie must be expanded before it is cut. Typically, the way the pie is expanded is through adding money or real assets such as water, land,

[5] Craig Sommers, in discussion with the author, 21 December 2009.

power, or the agreement to defer for a period of time the use of assets."[6] At the core of this strategy is a philosophy of diminishing negative outcomes by increasing the available water supply. This dynamic can be described in several different ways. The cities expressed it in their desire to remain whole, which meant receiving other water supplies in exchange for the SRP water contributed to the settlement. The CAP agricultural users achieved a similar outcome by receiving a guaranteed supply of CAP water at a subsidized rate in exchange for relinquishing their contract entitlements. The tribes contributed to the process by agreeing to a lesser quantity of water than their rights may have allowed in return for receiving money to put that water use. This was made possible by leveraging infrastructure and money to increase access.

Creating Shared Interests

The management of water supplies creates a high degree of interdependence among users if for no other reason because it is a shared resource that is used and reused in a variety of ways. Nonetheless, cooperation has not always been a staple of water management in the state, particularly when it comes to protecting one's legal claim from an opposing view. Indian water rights present a rare example of an issue where nearly every water user in Arizona has a stake in

[6] Michael J. Clinton, "Needs Versus Rights: Settling Indian Water Disputes Through Consensus Negotiations, Remarks before the Annual Meeting of the CRWUA," 17 December 1985, SRP Research Archives.

the outcome. No sector of the economy was unaffected and users large and small stood to lose something if Indian communities were able to prove expansive claims in court. This created an incentive to involve a large spectrum of the water management community in developing negotiated outcomes.

The Indian settlement process offered an opportunity to form new coalitions among the major stakeholders that dictate much of Arizona's water management and policy. The immediate cause of this in realignment of the power structure was the need to integrate a new member, Indian tribes, which had historically had little say over water management decisions. Reallocating water supplies also meant a reallocation of power as the tribes would now have autonomy to manage their water portfolio in a way that reflected their interests. Although most interviewees did not refer to the change in these terms, a commonly cited benefit of the settlement process is that it improved relationship. "And when I speak about settlements, I always throw in that one of the big benefits of settlements has been the change in relationships, taking people that used to literally shoot at each other, and now they work together."[7] The improvement in relationships is manifest on a personal level. Representatives from the settling parties established a working rapport after years of negotiating sessions and joint lobbying before Congress. However, the forging of working

[7] Gregg Houtz, in discussion with the author, 11 December 2009.

relationships affected more than just personalities, it reflected a reconfiguring of the water management community.

Coalition building and the formation of multiple interests was an integral part of the settlement framework. The actions of SRP illustrate this point most clearly. Coalitions are a foundational aspect of the structure and organization of SRP. A management board, comprised chiefly of agriculturalists, manages a water system on behalf of the federal government that makes deliveries to municipalities. The integration of federal and local, agricultural and urban, is at the heart of SRP's make-up. Indian settlements presented an opportunity to expand this coalition by integrating another major group of users. The SRP water contributed to the settlements was conditioned on the continuation of several core concepts of the management structure: water must stay within the boundaries of the SRRD and deliveries are based on the sharing of surpluses and shortages. These conditions were not simply an attempt to achieve efficient management of a shared resource; they were an effort to expand the coalition and minimize future threats to its water supply.

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