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Gila River IX and State Trust Lands: Setting Boundaries for the Federal Reserved Water Rights Doctrine

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CASE NOTES

GILA RIVER IX AND STATE TRUST LANDS: SETTING BOUNDARIES FOR THE FEDERAL RESERVED WATER RIGHTS DOCTRINE

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I. INTRODUCTION

The Arizona Supreme Court (“Court”) recently rejected the State of Arizona’s appeal to recognize implied federal reserved water rights for Arizona’s State Trust Lands.¹ The Court’s decision is the latest in a series of cases the Court heard in the Gila River System Adjudication and the Little Colorado River Adjudication (collectively, “Adjudications”).² The Arizona Legislature

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1. *In re* General Adjudication of All Rights to Use Water in Gila River System & Source (*Gila River IX*), 289 P.3d 936, 938 (Ariz. 2012).

2. See *id.*; *In re* General Adjudication of All Rights to Use Water in Gila River System & Source (*Gila River VIII*), 224 P.3d 178, 182 (Ariz. 2010); *In re* General Adjudication of All Rights to Use Water in Gila River System (*Gila River VII*), 173 P.3d 440, 441 (Ariz. 2007); *In re* General Adjudication of All Rights to Use Water in Gila River System & Source (*Gila River VI*), 127 P.3d 882, 884 (Ariz. 2006); *In re* General Adjudication of All Rights to Use Water in Gila River System & Source (*Gila River V*), 35 P.3d 68, 70 (Ariz. 2001); *In re* General Adjudication of All Rights to Use Water in Gila River System & Source (*Gila River IV*), 9 P.3d 1069, 1072 (Ariz. 2000); *In re* General Adjudication of All Rights to Use Water in Gila River System & Source (*Gila River III*), 989 P.2d 739, 741 (Ariz. 1999); *In re* General Adjudication of All

tasked the state courts with administering the Adjudications, which are comprehensive Arizona water cases intended to identify and quantify every individual water right within a river system.³

In *In re General Adjudication of All Rights to Use Water in Gila River System and Source* ("*Gila River IX*"), the Court held Congress did not withhold or reserve State Trust Lands for a federal purpose when it granted such lands to Arizona to raise revenue for schools, nor did Congress intend to reserve water rights along with the land grant.⁴ Thus, the state's water right claim failed to pass the threshold requirements for a federal reserved water right.⁵

The federal reserved water rights doctrine is a powerful concept that, when invoked, steps outside the traditional notions of state-based water rights systems. Arizona water law uses the prior appropriation doctrine to administer surface water rights.⁶ Prior appropriation developed from the needs of gold miners and farmers, and it encourages the efficient development and use of water in the arid West.⁷ Relying on a "first in time-first in right" seniority system, those with the earliest appropriation date (the date the appropriator diverted the water and put it to use) have rights senior to those who appropriated at a later time.⁸ Thus, a senior appropriator may divert the full amount of its water right before a junior appropriator may draw from the stream.⁹ Additionally, an appropriator must put a water right to a beneficial use and continue to use the full extent of its water right in order to keep the right.¹⁰ Judicial interpretation of "beneficial use" has changed over time. While beneficial use originally constituted agricultural, industrial, and municipal uses, most state courts have since recognized uses like recreation and environmental protection.¹¹

In 1908, the US Supreme Court first recognized the implied federal reserved water right doctrine when it provided an Indian reservation with the water necessary to survive in the arid West.¹² In contrast to Arizona's prior appropriation system, the federal reserved water rights doctrine sets the priority date for most reservations at the time of the federal land reservation, but requires no actual use of the water to vest the water right; the right exists in

Rights to Use Water in Gila River System & Source (*Gila River II*), 857 P.2d 1236, 1238 (Ariz. 1993); *In re Rights to Use of Gila River* (*Gila River II*), 830 P.2d 442, 444 (Ariz. 1992).

3. ARIZ. REV. STAT. ANN. § 45-252(a) (2013); E. Brendan Shane, *Water Rights and Gila River III: The Winters Doctrine Goes Underground*, 4 U. DENV. WATER L. REV. 397, 404 (2001).

4. *Gila River IX*, 289 P.3d at 945.

5. *Id.*

6. ARIZ. CONST. art. XVII, § 2.

7. Sharon Medgal, Joanna Nadeau & Tiffany Tom, *The Forgotten Sector: Arizona Water Law and the Environment*, 1 ARIZ. J. ENVTL. L. & POL'Y 243, 265 (2011).

8. John E. Thorson et al., *Dividing Western Waters: A Century of Adjudicating Rivers and Streams*, 8 U. DENV. WATER L. REV. 355, 379, 389 (2005).

9. *Huning v. Porter*, 54 P. 584, 586 (Ariz. 1898).

10. *Phelps Dodge Corp. v. Ariz. Dep't of Water Res.*, 118 P.3d 1110, 1115 (Ariz. Ct. App. 2005).

11. Medgal, *supra* note 7, at 267.

12. *Winters v. United States*, 207 U.S. 564, 576 (1908); see *United States v. New Mexico*, 438 U.S. 696, 699 (1978).

perpetuity.¹³ Thus, the doctrine provides a valuable tool for meeting the water needs of federally withdrawn land; needs the federal government cannot always anticipate at the time it makes the reservation.¹⁴ However, the recognition of implied water rights, after an unaware junior water user has appropriated water, can also prove disruptive and costly to those junior water users.¹⁵

This Note discusses the context in which the Court decided *Gila River IX* and suggests the underlying policies of the federal reserved rights doctrine supports and illuminates the Court's decision in that case.

II. ARIZONA STATE TRUST LANDS

By 1910, Congress had granted the State of Arizona nearly eleven million acres of State Trust Lands to raise revenue for state schools.¹⁶ The Arizona Land Department ("Land Department") administers these State Trust Lands on behalf of the state.¹⁷ The Organic Act of 1850 established the Territory of Arizona and granted sections six and thirty-six of each township to the Territory to fund public schools.¹⁸ On June 20, 1910, Arizona achieved statehood through the State Enabling Act.¹⁹ The Act affirmed the earlier-granted sections and further assigned sections two and thirty-two of each township to Arizona's State Trust Lands.²⁰ The State Enabling Act requires the State to hold the lands in trust for public schools and that "lease and sale requirements . . . may be enforced by the federal government, the state, or any Arizona citizen."²¹ Furthermore, Congress intended State Trust Lands to generate revenue for public schools through the sale, lease, and use of the granted land.²² Currently, the Land Department administers 5.1 million acres in the Gila River Basin and 1.4 million acres in the Little Colorado River Basin.²³

13. See *In re General Adjudication of All Rights to Use Water in Gila River System & Source (Gila River V)*, 35 P.3d 68, 73-74 (Ariz. 2001); *Cappaert v. United States*, 426 U.S. 128, 138 (1976).

14. See *Arizona v. San Carlos Apache Tribe of Arizona*, 463 U.S. 545, 573-74 (1983); *United States v. New Mexico*, 438 U.S. at 718; *Cappaert*, 426 U.S. at 138; *Arizona v. California*, 373 U.S. 546, 601 (1963).

15. Richard B. Collins, *The Future Course of the Winter's Doctrine*, 56 U. COLO. L. REV. 481, 481-82 (1985).

16. ARIZ. STATE LAND DEP'T, ANNUAL REPORT 2010-2011 3 (2011), available at <http://www.azland.gov/report.htm>.

17. *Id.*

18. *Id.*

19. *Id.*

20. *Id.*

21. *In re General Adjudication of All Rights to Use Water in Gila River System & Source (Gila River IX)*, 289 P.3d 936, 939 (Ariz. 2012) (citing Enabling Act of June 20, 1910, ch. 310, §§ 28, 36, 36 Stat. 557, 574 (1908)).

22. *Lassen v. Arizona ex rel. Ariz. Highway Dep't*, 385 U.S. 458, 460 (1967).

23. *Gila River IX*, 389 P.3d at 939.

III. THE GILA RIVER SYSTEM AND THE LITTLE COLORADO RIVER SYSTEM GENERAL STREAM ADJUDICATIONS

Nearly forty years ago, between 1974 and 1980, the Phelps Dodge Corporation and the Salt River Valley Water Users' Association filed petitions with the Arizona State Land Department ("ASLD") requesting a determination of water rights on the Gila River and the Little Colorado River.²⁴ In 1979, the Arizona Legislature transferred the petitions to Maricopa County Superior Court ("Superior Court"), and in 1981, the Arizona Supreme Court consolidated the petitions into multiple river-specific adjudications.²⁵ Since then, the Court assigned a single water judge to preside over the Adjudications and a special master to conduct initial hearings and file reports with the Superior Court for all subsequent petitions on both river systems.²⁶ As of September 2012, more than 82,000 claims have been filed in the Gila River Adjudication and 14,000 claims filed in the Little Colorado Adjudication.²⁷

Arizona law requires general adjudications to identify the "extent and relative priority of the water rights of all persons in the river system and source."²⁸ Many Western States have initiated ambitious general stream adjudications over the past century, with the hope of providing a single forum to resolve water rights conflicts and increase certainty and manage the pressures of increasing populations.²⁹ Indeed, as early as 1910, the *Kent Decree* settled water rights in Arizona's Salt and Verde River systems and the *Globe Equity Decree of 1935* quantified rights on the Gila River.³⁰

The Adjudications (Gila River and Little Colorado River systems) have not yet reached the point of identifying the extent of individual water rights.³¹ Instead, the Adjudications have thus far focused on the numerous preliminary matters arising among the competing interests.³² These matters include decisions on the constitutionality of Arizona statutes governing general stream adjudications and jurisdictional questions.³³ While the Arizona Legislature intended the Adjudications to provide more consistency and enforcement of water rights, in reality, a multiple decade-long adjudication process has put many water rights holders in a state of limbo.³⁴ Until the Adjudications are settled, there is no administrative process to enforce water rights against another

24. Joseph M. Feller, *The Adjudication that Ate Arizona Water Law*, 49 ARIZ. L. REV. 405, 417 (2007).

25. ARIZ. REV. STAT. ANN. § 45-252 (1979); *General Stream Adjudication: Overview of General Stream Adjudication*, MARICOPA CNTY. SUPERIOR COURT, <http://www.superiorcourt.maricopa.gov/SuperiorCourt/GeneralStreamAdjudication/faq.asp#2> (last visited Apr. 12, 2013).

26. *Id.*

27. *Gila River IX*, 289 P.3d at 939.

28. ARIZ. REV. STAT. ANN. § 45-252(a) (2013).

29. Thorson, *supra* note 8, at 389.

30. Feller, *supra* note 24, at 414.

31. MARICOPA CNTY. SUPERIOR COURT, *supra* note 25.

32. Feller, *supra* note 24, at 426.

33. MARICOPA CNTY. SUPERIOR COURT, *supra* note 25.

34. Feller, *supra* note 24, at 426-27.

user, because the Superior Court has not yet identified the extent of individual water rights.³⁵

IV. THE *WINTERS* DOCTRINE: FEDERAL RESERVED WATER RIGHTS

Implied federal reserved water rights are an exception to the general rule that state law governs water rights in the West.³⁶ In *Winters v. United States*, the US Supreme Court recognized, for the first time, the doctrine of reserved water rights by holding that water rights were essential for the survival of the Fort Belknap Indian Reservation.³⁷ In addition to implied federal reserved water rights for Native American reservations, the United States Supreme Court has recognized reserved water rights for other types of federal reservations.³⁸ These include reserved water rights for national forests,³⁹ national monuments,⁴⁰ wildlife refuges, and other types of federal reservations.⁴¹

Federal reserved water rights are an especially powerful right because water rights reserved by the federal government have a priority date relating to when the federal government made the reservation.⁴² Indeed, in contrast to state law under the prior appropriation doctrine, federal reserved water rights do not require the water be put to beneficial use, and thus the right cannot be abandoned due to nonuse.⁴³ Furthermore, the quantity of water reserved by such a reservation is not exclusively measured by historical consumptive use, but by the amount of water necessary to fulfill the reservation's primary purpose.⁴⁴ As the US Supreme Court stated in *United States v. New Mexico*, "without the water the purpose of the reservation would be entirely defeated."⁴⁵ In addition, Congress must reserve land in a manner that "implies Congress' intention to reserve water sufficient to accomplish congressional purposes."⁴⁶ Thus, the reservation at issue must have both a federal purpose requiring water and Congressional intent that the reservation use water to achieve its purpose.

35. *Id.* at 427.

36. *In re* General Adjudication of All Rights to Use Water in Gila River System & Source (*Gila River IX*), 289 P.3d 936, 941 (Ariz. 2012).

37. *Id.* (citing *Winters v. United States*, 207 U.S. 564, 576-77 (1908)).

38. See *infra* notes 39-41 and accompanying text.

39. *United States v. New Mexico*, 438 U.S. 696, 718 (1978).

40. *Cappaert v. United States*, 426 U.S. 128, 138 (1976).

41. *Arizona v. California*, 373 U.S. 546, 601 (1963).

42. See *id.*; *United States v. Adair*, 723 F.2d 1394, 1415 (9th Cir. 1983).

43. *In re* General Adjudication of All Rights to Use Water in Gila River System & Source (*Gila River V*), 35 P.3d 68, 72 (Ariz. 2001) (however a court will typically quantify historical use of water at the time of a reservation as a *strong* indicator of what quantity should be).

44. *United States v. Jesse*, 744 P.2d 491, 493-94 (Colo. 1987). Unlike non-Indian reservations, reserved water rights for Indian reservations also include consideration of "future needs and changes" when determining the quantity of water reserved. *Gila River V*, 35 P.3d at 73-74 (but the reservation must still prove its anticipated future needs).

45. *United States v. New Mexico*, 438 U.S. at 700.

46. Thorson, *supra* note 8, at 460.

V. PROCEDURAL BACKGROUND

The State of Arizona initiated the proceedings leading to the *Gila River IX* decision by filing a motion for partial summary judgment to recognize federal reserved water rights for State Trust Lands ("Motion").⁴⁷ The State filed the Motion in the Little Colorado River System Adjudication in 1992, and, under direction from the Superior Court, also filed the same Motion in the Gila River System Adjudication in 2004.⁴⁸ With both Adjudications now considering the issue of State Trust Lands, numerous water rights users in the region opposed the Motion.⁴⁹ In 2005, the Superior Court directed the Special Master to hold a hearing on the Motion and submit findings of fact, conclusions of law, and recommendations.⁵⁰

The Special Master submitted his report to the Superior Court in 2007 and rejected the contention that State Trust Lands have accompanying federal reserved water rights.⁵¹ The Special Master determined that no withdrawal took place and that State Trust Lands do not administer a federal purpose.⁵² In 2010, the Superior Court adopted the Special Master's report and denied the Motion.⁵³ The State of Arizona filed an interlocutory appeal from the Superior Court's order and the Arizona Supreme Court granted review based on the issue's "statewide importance."⁵⁴

VI. ARIZONA SUPREME COURT DECISION

The Arizona Supreme Court ultimately affirmed the Superior Court's order, holding that federal reserved water rights are inapplicable for State Trust Land.⁵⁵ After analyzing the applicable rule of construction at issue, the Court reached its decision by considering: (i) the nature of the land withdrawal from the public domain; (ii) any reservation for a federal purpose; and (iii) congressional intent to reserve water.

A. APPLICABLE RULE OF CONSTRUCTION

As an initial matter, the Court considered how it must construe the federal legislation granting Trust Lands to Arizona.⁵⁶ The Court rejected the State's

47. Report of the Special Master at 4, *Gila River IX*, 289 P.3d 936 (Ariz. 2012) (No. WC-11-0001-IR).

48. *Id.* at 4-5.

49. *Id.* at 4. Those opposed included Abitibi Consolidated Sales Corporation, Arizona Public Service, Phelps Dodge Corporation, Aztec Land and Cattle Company, Hopi Tribe, Navajo Nation, and the United States. *Id.*

50. *Id.* at 5.

51. *Id.* at 76.

52. *Id.* at 65-75.

53. Apache County Superior Court Order at 1-2, *Gila River IX*, 289 P.3d 936 (Ariz. 2012) (CV 6417-100).

54. *In re* General Adjudication of All Rights to Use Water in Gila River System & Source (*Gila River IX*), 289 P.3d 936, 940 (Ariz. 2012).

55. *Id.* at 938.

56. *Id.* at 940.

argument that the Superior Court construed the federal legislation at issue too narrowly.⁵⁷ The general rule requires a court to construe a federal land grant narrowly, because “nothing passes by mere implication.”⁵⁸ There is a limited exception providing courts may liberally construe federal legislation “designed to aid the common schools of the state.”⁵⁹ However, this exception only applies if a narrow interpretation of the federal grant would defeat the grant’s purpose.⁶⁰ As Arizona’s State Trust Lands have been generating revenue for state schools (its primary purpose) for more than one hundred years without implied water rights, the Court determined that the common schools exception did not apply.⁶¹ Thus, the Court applied the traditional, narrow construction to its examination of the federal land grant to Arizona.⁶² The Court noted courts should be careful when applying implied federal rights because of “the doctrine’s disruptive effect in prior appropriation jurisdictions.”⁶³

B. NO WITHDRAWAL OR RESERVATION FOR A FEDERAL PURPOSE

The Court concluded the Organic and Enabling Acts granting State Trusts Lands to Arizona did not adequately withdraw or reserve lands.⁶⁴ Specifically, in *Gila River IX*, the Court employed its four-part test to analyze the Superior Court’s decision.⁶⁵ First, do the reserving documents and underlying legislation indicate a withdrawal from the public domain?⁶⁶ Second, does the withdrawal serve a precise federal purpose?⁶⁷ If both threshold questions are satisfied, then, third, a court must analyze “whether water is essential for the primary purpose of the reservation.”⁶⁸ If water is necessary to carry out the federal purpose, then, fourth, the court determines the quantity of water reserved by analyzing the minimal amount of water required to satisfy that purpose.⁶⁹

1. No Withdrawal from the Public Domain

The Court turned to the documents granting Arizona State Trust Lands from the federal government to examine whether Arizona’s State Trust Lands were withdrawn from the public domain. A federal withdrawal is the “removal or segregation of the lands from the operation of the general land laws as the

57. *Id.*

58. *Id.* (quoting *Knoxville Water Co. v. Knoxville*, 200 U.S. 22, 33-34 (1906)).

59. *Id.* (quoting *Wyoming v. United States*, 255 U.S. 489, 508 (1921)).

60. *Id.* (citing *Lyon v. Gila River Indian Cmty.*, 626 F.3d 1059, 1072-73 (9th Cir. 2010); *Utah v. Andrus*, 486 F. Supp. 995, 1002 (D. Utah 1979)).

61. *Id.* at 940-41.

62. *Id.* at 941.

63. *Id.* (citing *United States v. City & Cnty. of Denver*, 656 P.2d. 1, 26 (Colo. 1982); *State ex rel. State Eng’r v. Comm’r of Pub. Lands (N.M. Comm’r)*, 200 P.3d 86, 95 (N.M. Ct. App. 2008)).

64. *Id.* at 942.

65. *Id.* at 941-42.

66. *Id.*

67. *Id.*

68. *Id.*

69. *Id.*

initial step in the dedication of the lands to the predetermined purpose.”⁷⁰ Furthermore, a withdrawal is intended to “retain the land and preclude disposal.”⁷¹ The Enabling Act provides that “in addition to sections sixteen and thirty-six, heretofore *reserved* for the Territory of Arizona [by the Organic Act], sections two and thirty-two in every township . . . are hereby *granted* to the State for the support of common schools.”⁷² However, a statute using the term “reserve” or “withdraw” does not necessarily mean Congress intended to withdraw the land from the public domain.⁷³

When the State Trust Lands passed to the State of Arizona, the federal government did not retain ownership of the land.⁷⁴ The Enabling Act provides lease and sale requirements that the federal government may choose to enforce.⁷⁵ However, beneficiary schools always remain under the exclusive control of the state.⁷⁶ The Court held this limited federal power to oversight is insignificant compared to the state’s “great discretion concerning the disposition of trust lands.”⁷⁷ In addition, both the US Supreme Court and the Ninth Circuit have held administrators may not sell withdrawn land out of federal custody.⁷⁸ The Enabling Act allows the state to sell its State Trust Land to the highest bidder at public auction.⁷⁹ Thus, Congress did not withdraw Arizona’s State Trust Lands from the public domain because the federal government did not own the land and expected the state to sell the land to generate revenue.⁸⁰

2. No Reservation for a Federal Purpose

A federal reservation “dedicates land to a specific public use,” and that use must be federal in nature to invoke the federal reserved water rights doctrine.⁸¹ The Court rejected the State’s argument that, because Congress identified funding public schools as the grant’s purpose, Congress reserved the State Trust Lands for a federal purpose.⁸² Although it recognized the important public interest of supporting public schools, the Court noted that states have al-

70. *Id.* at 942-43.

71. *Id.* at 943.

72. *Id.* at 942.

73. *Id.* (citing *S. Utah Wilderness Alliance v. Bureau of Land Mgmt.*, 425 F.3d 735, 784 (10th Cir. 2005)).

74. *Id.*

75. *Id.* at 939.

76. *Id.* at 945.

77. *Id.* at 944.

78. *Id.* at 943; *see also* *Arizona v. California*, 373 U.S. 546, 598 (1963) (“[w]e have no doubt about the power of the United States under [the Constitution] to reserve water rights for its reservations and its property”); *Winters v. United States*, 143 F. 740, 748 (9th Cir. 1906) (“when the lands of the government have been legally appropriated or reserved for any purpose, they become severed from the public lands, and . . . no subsequent law or sale should be construed to embrace or operate upon them.”).

79. *Gila River IX*, 289 P.3d at 943.

80. *Id.*

81. *Id.* (citing *S. Utah Wilderness Alliance v. Bureau of Land Mgmt.*, 425 F.3d 735, 785 (10th Cir. 2005); *Cappaert v. United States*, 426 U.S. 128, 138 (1976)).

82. *Id.*

ways maintained the power to regulate education.⁸³ Thus, the Court concluded that supporting public schools is not a legitimate federal purpose.⁸⁴ Furthermore, the Court relied heavily on a New Mexico Court of Appeals case, *New Mexico ex rel. State Engineer v. Commissioner of Public Lands* (“*New Mexico Commissioner*”), which also considered whether New Mexico’s State Trust Lands had implied federal water rights.⁸⁵ In *New Mexico Commissioner*, the Court of Appeals held the federal reserved water rights doctrine does not apply to State Trust Land, as the government did not withdraw the land from the public domain for a federal purpose.⁸⁶ In its opinion, the court in *New Mexico Commissioner* reasoned that although “the support of common schools is a matter of national interest, [it] cannot conclude that it is also a federal purpose . . . [as] continuing federal ownership of the reserved lands appears to be a prerequisite.”⁸⁷

Finally, the Court in *Gila River IX* noted Congress clearly reserved other land through the Enabling Act for a federal purpose.⁸⁸ The Enabling Act states land capable of developing water power is “reserved to the United States” and “no lands so reserved and excepted shall be subject to any disposition whatsoever.”⁸⁹ Unlike education, development of interstate water power falls under federal jurisdiction under the Commerce Clause.⁹⁰ Furthermore, consistent with the prohibition on selling withheld land, the Enabling Act actively encourages the sale of Trust Lands, while prohibiting the sale of water power lands.⁹¹ The Court used this section of the Enabling Act to determine Congress had the expertise to make a clear reservation for a federal purpose, and intentionally chose not to similarly reserve Trust Lands.⁹²

C. CONGRESSIONAL INTENT TO RESERVE WATER RIGHTS

Likewise, the Court held Congress did not intend to reserve water rights for Arizona State Trust Lands.⁹³ The Court rejected the State’s argument that the relationship between the federal government and states is similar to the relationship between the federal government and Indian tribes.⁹⁴ The Court observed that the federal-state relationship is different because land grants to states are not negotiated agreements or treaties that Indian tribes rely upon.⁹⁵ Therefore, the Court concluded lands granted to states by the federal govern-

83. *Id.* (citing *United States v. Lopez*, 514 U.S. 549, 564 (1995); *Cooper v. Roberts*, 59 U.S. 173, 181-82 (1855)).

84. *Id.*

85. *Gila River IX*, 289 P.3d at 942 (citing and discussing *State ex rel. State Eng’r v. Comm’r of Pub. Lands (N.M. Comm’r)*, 200 P.3d 86, 97-98 (N.M. Ct. App. 2008)).

86. *N.M. Comm’r*, 200 P.3d at 97-98.

87. *Id.* at 97.

88. *Gila River IX*, 289 P.3d at 944.

89. *Id.*

90. *See Federal Power Comm’n v. Union Elec. Co.*, 381 U.S. 90, 94-95 (1965).

91. *Gila River IX*, 289 P.3d at 944.

92. *Id.* at 945.

93. *Id.*

94. *Id.*

95. *Id.*

ment are not entitled to the same rights as Indian reservations, for which courts routinely find implied federal reserved water rights under the *Winters* Doctrine.⁹⁶ Furthermore, the Court also rejected the State's argument that Congress knew of the region's aridity and so intended to provide water to enhance land's productivity, and thus its value.⁹⁷ The Court found compelling the fact the Enabling Act increased the grant of land in each township from two to four sections for Arizona.⁹⁸ Legislative history indicates Congress viewed increasing the land grant as a means to compensate Arizona for the lower value of the land.⁹⁹ Thus, the Court held Congress reacted to the lower quality of the school Trust Lands by doubling the amount of land granted, rather than granting water rights with the land.¹⁰⁰

VII. POLICY IMPLICATIONS

The Court recognized necessary limitations of the federal reserved water right doctrine in *Gila River IX*. The doctrine is powerful and potentially disruptive to state appropriative water rights. Thus, courts must tread carefully when asked to extend the scope of the federal reserved water right doctrine.

While the State admirably sought to gain additional revenue for its public schools in *Gila River IX*, the cost to Arizona citizens was simply too high. If the Court had allowed the State to claim reserved water rights for State Trust Lands, these claims could dramatically undercut existing rights in Arizona's prior appropriation system. The Court declined to extend the scope of the doctrine, correctly finding the State Trust Lands did not meet the basic threshold requirements of the federal reserved water rights doctrine. *Gila River IX*, together with *New Mexico Commissioner*, rejects the use of federal reserved rights doctrine on State Trust Lands.¹⁰¹ Both Arizona and New Mexico now have a bright-line rule regarding State Trust Lands that other states are likely to accept.

Yet, the Court in *Gila River IX* did not need to discuss the policy and logistical implications underpinning its decision, because the State's arguments failed to meet the basic reservation threshold requirements. The federal reserved water rights doctrine is constantly evolving and its boundaries are not entirely clear to many observers.¹⁰² The State's argument in *Gila River IX* was a significant stretch under the doctrine's existing case law, but demonstrates how the elements of federal reserved water rights doctrine operate to preclude such claims.

96. *Id.*

97. *Id.*

98. *Id.*

99. *Id.*

100. *Id.*

101. *Id.* at 938; State *ex rel.* State Eng'r v. Comm'r of Pub. Lands (*N.M. Comm't*), 200 P.3d 86, 95 (N.M. Ct. App. 2008).

102. Debbie Leonard, *Doctrinal Uncertainty in the Law of Federal Reserved Water Rights: The Potential Impact on Renewable Energy Development*, 50 NAT. RESOURCES J. 611, 612 (2010).

The Court followed a four-part test to determine whether Congress impliedly reserved water rights.¹⁰³ The last two parts of the test question whether water is necessary for the primary purpose of the reservation and how much water is necessary for that purpose.¹⁰⁴ These steps promote important policies. They reflect a judicial intent to protect other water rights holders from over-appropriation by federal water rights.¹⁰⁵ However, the Court did not apply these steps after finding Congress did not withdraw or reserve the land for a federal purpose and Congress did not intend to create a federal reservation.

When inquiring after the third element, whether water is essential for the purpose of the reservation, the answer is likely a resounding no. Water is not inherently necessary to raise revenue for public schools by selling or using the State Trust Land. The Land Department has raised revenue with this land for the past one hundred years without federal water rights.¹⁰⁶ Thus, as a public policy matter, courts should not recognize senior water rights to a property that has proven its utility can survive without such rights. Such an action would be contrary to the policy set forth in *United States v. New Mexico*: the reserved rights doctrine will not claim water rights unless absolutely necessary because it upsets other appropriator's rights in the same stream.¹⁰⁷

An even more drastic problem arises when examining how much water should be set aside for State Trust Lands. If the Court had indeed found implied federal water rights for State Trust Lands, the "minimal need" of water is potentially unquantifiable in this case. If the purpose of the State Trust Land is to raise revenue, the greater the reserved water right, the greater the revenue. Surely the State did not intend to appropriate all the water in the Gila River and the Little Colorado River, but this highlights the slippery-slope problems inherent in the existence of the federal reserved water right doctrine.¹⁰⁸ The doctrine requires a quantified amount to avoid this issue of a theoretically unlimited water right, which could be catastrophic to other appropriators.

It is through analyzing these two final factors that the State's claims truly become unreasonable and dangerous to otherwise established property rights in Arizona. *Winters* set forth the federal reserved water rights doctrine in order to protect and nurture reservations that would otherwise fail their intended purposes.¹⁰⁹ Arizona's State Trust Lands continue serving their purpose today, and continue to raise revenue for public schools. The State attempted to maneuver around policies that support the implied reserved water rights doctrine by asking for federal water rights to serve the now state-owned Trust Land. *Gila River IX* recognizes an important boundary on the federal reserved water

103. *Gila River IX*, 289 P.3d at 941-42.

104. *Id.*

105. *See In re General Adjudication of All Rights to Use Water in Gila River System & Source (Gila River V)*, 35 P.3d 68, 70 (Ariz. 2001).

106. ANNUAL REPORT 2010-2011, *supra* note 16, at 4, 7.

107. *United States v. New Mexico*, 438 U.S. 696, 701 (1978).

108. Walter Rusinek, *A Preview of Coming Attractions? Wyoming v. United States and the Reserved Rights Doctrine*, 17 *ECOLOGY L.Q.* 355, 360 (1990).

109. *Winters v. United States*, 207 U.S. 564, 576 (1908); *see United States v. New Mexico*, 438 U.S. at 699.

right doctrine; a decision that is further supported by the doctrine's full analysis and its policy implications.

VIII. CONCLUSION

The Court in *Gila River IX* clearly rejects the application of the federal reserved water rights doctrine to State Trust Lands. The Court based its decision on its findings that Arizona's State Trust Lands were not withdrawn from the federal domain or reserved for a federal purpose, nor did Congress intend to provide water rights for those lands. However, the Court's decision also aligns with the protective policy implications underpinning the federal reserved water rights doctrine.