

## Federal Reserved Water Rights: Gila River Indian Community Settlement

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The Akimel O'odham (Pima) Indians and their ancestors, the HuHuGum, practiced irrigated agriculture in central Arizona for over two thousand years. In the late 1700s, the Peeposh (Maricopa) Indians formed a political, economic, and military confederation with the O'odham. The Pima-Maricopa Confederation was affluent before the arrival of Euro-Americans. Following their arrival, the Euro-Americans diverted the Gila and Salt Rivers, which deprived the Confederation of water it needed to sustain its agriculture. Consequently, the members of the Confederation were reduced to poverty, malnutrition, and endemic diabetes. The economic basis of Pimas and Maricopas were effectively destroyed by the illegal diversions.

The restoration of water to Pimas and Maricopas is unparalleled in the history of Native Americans in the United States and is especially dramatic in the arid Southwest. The determination, tenacity, and patience of Pimas and Maricopas in litigation and negotiations caused this amazing turn of events to occur.

The Gila River Indian Reservation was established for the Pimas and Maricopas in 1859 and expanded seven times between 1876 and 1915. The Gila River Indian Community has battled for many decades to regain part of the water that was once theirs in order to reacquire economic independence and return to their agrarian lifestyle. The most recent of the Community's battles to regain its lost water is the General Adjudication of All Rights to Use Water in the Gila River System and Source (Gila River Adjudication), first filed in 1974. The *Winters* federally reserved water rights doctrine is an important component of the Community's legal efforts. The Community has followed a dual path of assertive litigation and arduous negotiation in its

endeavors to reclaim its water. It has successfully prevailed in many of the treacherous shoals of water rights litigation and is close to entering the safe harbor of a complete settlement of its water rights claims.

We will discuss the history of the Gila River Indian Community's impending water rights settlement and outline the steps that remain in bringing this long and tortured process to fruition. In order to understand the backdrop against which negotiations were conducted, it is important to discuss Arizona water law and the *Winters* doctrine and then examine the procedures that have taken place to date in the Gila River Adjudication.

### Arizona Water Law

Mark Twain explained that "Whisky is for drinking — Water is for fighting." The problem with water in the arid western part of the United States is that there just isn't enough of it. "The essence of western water law is that water, not land, is the scarce resource."<sup>1</sup> In the State of Arizona, water is public property and private parties may only own the right to use the water.<sup>2</sup> Private parties acquire the right to use water through the prior appropriation doctrine.<sup>3</sup>

The essence of prior appropriation is "first in time is first in right," that is, the person first appropriating the water has the better right. A senior appropriator has the right to take all of its "diversion undiminished in quantity and quality" before a junior appropriator can take any water.<sup>4</sup> The water appropriated must be put to a beneficial use.<sup>5</sup> Such beneficial uses include: domestic, municipal, irrigation, stock watering, water power, recreation, wildlife, nonrecoverable water storage, and mining.<sup>6</sup>

Eastern states, where water shortages are less frequent, use the riparian doctrine to allocate the use of water between conflicting claimants. Simply put, a party who owns land adjoining a water source may make reasonable use of that water, so long as the use does not injure a downstream party or interfere with a downstream riparian owner's use of water. Under the riparian doctrine, if there is an occasional shortage of water, the users share the shortage pro rata. As a territory, Arizona unequivocally rejected the riparian doctrine.<sup>7</sup> With the adoption of its constitution, and embracing prior appropriation, the State of Arizona declared that "[t]he common law doctrine of riparian water rights shall not obtain or be of any force or effect in the State."<sup>8</sup>

Arizona's version of the prior appropriation doctrine has one unusual notion. In most prior appropriation states, the doctrine applies to both surface and underground water. As law professor Robert Glennon discusses elsewhere in this issue, Arizona has a divided system in which some underground water is appropriable and other underground water is not. While this split system was recognized early in Arizona's judicial history, its first "clear" definition was provided in *Maricopa County Municipal Water Conservation District v. Southwest Cotton Co.*<sup>9</sup> Underground water considered to be so closely related to the surface flow as to be a part of the stream is called "subflow" and is subject to prior appropriation. Underground water considered not to be closely related to the surface flow is called "percolating water" and is not subject to prior appropriation. The obvious question is: How do you tell the different types of underground water apart? The test stated in *Southwest Cotton* was:

Does drawing off the subsurface water tend to diminish appreciably and directly the flow of the surface stream? If it does, it is subflow, and subject to the same rules of appropriation as the surface stream itself; if it does not, then, although it may originally come from the waters of such stream, it is not, strictly speaking, a part thereof, but is subject to the rules applying to percolating waters.<sup>10</sup>

Early on, Arizona courts recognized that a distinction between subflow and percolating waters "completely overlook[ed] the hydrological cycle."<sup>11</sup>

Because percolating water is not subject to prior appropriation, Smith cannot prevent Jones from taking percolating water from beneath Jones' land, even though that taking prevents Smith from using his water. The limit to the right to capture and use percolating water is that the water must be used for a beneficial purpose on the land from which it is drawn.<sup>12</sup> Like appropriable water, percolating water is not subject to private ownership and "the right of the owner of the overlying land is simply to the usufruct of the water."<sup>13</sup>

## Winters Federally Reserved Water Rights Doctrine

For a wide variety of legal, political, and economic reasons, the prior appropriation doctrine has generally been of limited benefit to Indian tribes in their efforts to protect their rights to use water. In contrast, the *Winters* federally reserved water rights doctrine has become an extremely important tool in Indian water rights litigation. The *Winters* doctrine arose from *Winters v. United States*,<sup>14</sup> which was an effort by the United States to quantify and protect the water rights of the Fort Belknap Indian Reservation.

The United States created the Fort Belknap Indian Reservation, in Montana, to serve as a permanent home and abiding place for Gros Ventre and Assiniboine Indians. The Milk River runs through the reservation. After the reservation was created, but before the United States filed suit to protect the Indians' rights to use water, numerous non-Indian settlers appropriated the use of virtually all the water. If the water rights of the reservation were limited to prior appropriation rights, the Gros Ventre and Assiniboine Indians would have been left high and dry.

The United States Supreme Court noted that the Indians had occupied and used a much larger area than the reservation, and that this wider area had been adequate to support them in a nomadic lifestyle. The Court was aware of the federal policy compelling Indians to exchange a pastoral lifestyle and that, on the arid lands of the reservation, this could be accomplished through irrigated agriculture. The Supreme Court concluded:

The power of the government to reserve the waters and exempt them from appropriation under the state laws is not denied, and could

not be. That the government did reserve them we have decided, and for a use which would be necessarily continued through the years.<sup>15</sup>

The *Winters* doctrine<sup>16</sup> is different from, but interrelated with, the prior appropriation doctrine. The quantity and priority of *Winters* water rights are determined under different rules than the quantity and priority of prior appropriation water rights. Indian and other federal reservations and non-federal parties, however, almost always take their water from common sources. Once the rights are established, under their respective rules, they are administered together. The following are the important facts that are unique to *Winters* rights .

(1) “Reserved rights are ‘federal water rights’ and ‘are not dependent upon state law or state procedures.’ . . . This merely reflects the tension between the doctrines of prior appropriation and Indian reserved rights. When reserved rights are properly implied, they arise without regard to equities that may favor competing water users.”<sup>17</sup>

(2) Prior appropriation rights are always a matter of express intent. “[A]ppropriation is the intent to take [water], accompanied by some open, physical demonstration of the intent, and for some valuable use.”<sup>18</sup> *Winters* rights are implied. There does not need to be any express intention to reserve water contained in the statute or executive order creating the Indian reservation. Reservation of water rights is implied through the creation or expansion of an Indian reservation.<sup>19</sup>

(3) While the date of a right under prior appropriation is the date upon which the water was first put to beneficial use, the date of a right under the *Winters* doctrine is the date on which the Indian reservation was created or expanded. If a prior appropriation right existed prior to the date of the creation of the reservation, it is senior to the *Winters* right. If a prior appropriation right did not come into existence until after the date of the creation of the reservation, it is junior to the *Winters* right, even if the date and amount of the *Winters* right was not actually quantified until many years later.<sup>20</sup> The *Winters* right comes into existence as of the date of the creation of the Indian reservation, without the necessity of diversion or beneficial use.<sup>21</sup>

(4) Prior appropriation water rights can be lost if they are not used for a specified period of time (five years in Arizona).<sup>22</sup> *Winters* rights are not lost by non-use, prior to or following their quantification by a competent court. “The reserved rights are open ended and do not depend on actual use to be maintained. Water is therefore available whenever needed to fulfill the purposes of the reservation.”<sup>23</sup> “Therefore, reserved water rights are not lost by laches, estoppel or adverse possession.”<sup>24</sup>

(5) The quantity of a prior appropriation water right is measured by the amount of water that was initially put to beneficial use. If Jones started using 60 acre-feet of water on ten acres of land in 1910, she would have a right to use 60 acre-feet with a 1910 priority. She would have the right to take her full 60 acre-feet before an appropriator with a 1911 priority could take any water. However, she would not be allowed to take 70 acre-feet unless she acquired a priority right (with a new priority date) for the additional ten acre-feet.

The amount of water reserved for an Indian reservation is the amount needed “to satisfy the future as well as the present needs of the Indian Reservations.”<sup>25</sup> Because an Indian reservation is intended to be a permanent home and abiding place for its Indian inhabitants, the amount of water reserved cannot be based on present needs. As the United States Supreme Court explained: “How many Indians there will be and what their future needs will be can only be guessed.”<sup>26</sup> The standard for quantification of water rights for Indian reservations set by the *Arizona v. California Court* was “enough water . . . to irrigate all the practicably irrigable acreage on the reservation.”<sup>27</sup>

## Gila River Adjudication

The filing of a petition in 1974, to adjudicate water rights of the Salt River initiated the General Adjudication of All Rights to Use Water in the Gila River System and Source. The case was expanded to include the Upper Agua Fria, Upper Gila, Lower Gila, and Upper Santa Cruz Rivers.<sup>28</sup> This initiated the most significant and decisive action with regard to water rights in the history of Arizona. The Gila River Adjudication court grappled with not only the tens of thousands of non-Indian water rights claims,

but also began to weigh and adjudicate the water rights of Indian tribes in Arizona. This far reaching and comprehensive litigation will be remembered as the critical pivotal point in the development of water law in Arizona.

“Water litigation is a weed that flowers in the arid West.”<sup>29</sup> If Jones has a water right with a 1910 priority and Smith has a water right with a 1923 priority, Jones should be able to take all of her water before Smith takes any of his water. A process needs to be available for determining the quantity and priority of each of their rights, and, thereafter, for enforcing those quantified rights. From such needs, litigation arises. “A water rights adjudication is a proceeding to determine the respective priorities of water rights on a stream system for purposes of administration. [Citation omitted.] A decree does not confer, but rather confirms a pre-existing water right.”<sup>30</sup>

Before the initiation of the Gila River Adjudication, there were numerous local water decrees quantifying the respective water rights of water users along various isolated segments of the Gila River and its tributaries. These prior decrees included: Kent Decree, Haggard Decree; Benson-Allison Decree; Ling Decree; Lockwood Decree; Doan Decree; Jenkes Decree; Shute Decree; San Pedro Decision; *Clifford v. Larrieu*; *Hill v. Lenerman*; *Dyke v. Caldwell*; *Miller v. Douglas*; *Boquillas Land and Cattle Company v. Saint David Cooperative Comm. and Dev. Association*; *Wolf v. Turner*; *Pyeatt v. Huachuca Queen Mining Company*; *Clarkson and Clarkson v. Wilcox*; and the Globe Equity Decree.

All of the waters of the Gila River system are interconnected. Streams flow into the Black River which joins the White River, to form the Salt River, which is joined by the Verde River, which then joins the Gila River. If a party with a 1993 prior appropriation right takes water out of the Verde River, that user reduces the amount of water that is available to fill the senior water rights of a party taking Salt River water with a 1910 priority. There are insurmountable problems with a series of isolated water decrees. Without river system administration, an upstream appropriator with a 1911 priority right (quantified by *Boquillas Land and Cattle Company v. Saint David Cooperative Comm. and Dev. Association*) can take water in advance of a downstream appropriator with an immemorial water right (quantified by the Globe

Equity Decree). Equally problematic is the fact that massive numbers of water users in the Gila River system have never had their water rights claims adjudicated by any court.

There is only one process that can allow for a fair and equitable allocation of the appropriable water of an entire river system and source — a general adjudication.

A general adjudication is a court decree which lists every appropriation of water in a particular river basin. The decree states the name of the appropriator, the date of the priority of the water rights, the amount and purpose of the appropriation, the place of diversion of the water, the dates and times of the water use, and the place of use.”<sup>31</sup>

The Arizona Supreme Court recognized the necessity for a general adjudication:

The necessity of consolidation and expansion of the proceedings is dictated by practical considerations unrelated to and, in fact, quite different from judicial efficiency. It might indeed be more efficient to conduct separate adjudications, each with fewer parties. Reality tells us, however, that in a state with vast amounts of arid desert land, and with insufficient water to provide all inhabitants with all that they need — let alone desire — the allocation of water to one claimant, asserting rights to a stream that is a tributary to another, will inevitably result in a smaller allocation to another claimant to either the tributary or the main stream.<sup>32</sup>

The court also recognized that no general adjudication could be effective “if federal water claims, especially those of the Indians, [were] excluded from the proceeding.”<sup>33</sup>

The United States Congress made federal participation in certain water rights litigation mandatory through the adoption of the McCarran Amendment.<sup>34</sup> This statute provides that “[c]onsent is given to join the United States as a defendant in any suit (1) for the adjudication of rights to the use of water of a river system or other source.” The Arizona Legislature authorized the institution and conduct of a general adjudication to determine “the nature, extent and relative priority of the water rights

of all persons in the river system and source.”<sup>35</sup> In compliance with the requirements of the McCarran Amendment, Arizona Revised Statutes § 45-251(7) decrees and required “that when rights to the use of water or dates of appropriation have previously been determined in a prior decree of a court, the court shall accept the determination of such rights and dates of appropriation as found in the prior decree unless such rights have been abandoned.”<sup>36</sup>

In 1976, the Gila River Indian Community filed claims to have its water rights quantified under the *Winters* doctrine, the prior appropriation doctrine, and the aboriginal rights doctrine. The Community filed claims for 1,500,000 acre-feet of water to be used on the 370,000+ acres of land within the Gila River Indian Reservation (GRIR). The United States, as trustee for the Gila River Indian Community, also filed claims for 1,500,000 acre-feet of water.

The progress in the Gila River Adjudication has been glacial. While settlements of water rights claims have been presented to and approved by the trial court, not one contested claim has been adjudicated since 1974. The trial court has rendered decisions on a multitude of issues that have significant, widespread applicability to all parties in the adjudication — including procedural processes, *Winters* claims and subflow.

*Gila I* dealt with a plethora of procedural issues. Three of the interlocutory appeals before the Arizona Supreme Court dealt with subflow and percolating water: In re General Adjudication of All Rights to Use Water in the Gila River System and Source (*Gila II*),<sup>37</sup> In re General Adjudication of All Rights to Use Water in the Gila River System and Source (*Gila III*),<sup>38</sup> and In re General Adjudication of All Rights to Use Water in the Gila River System and Source (*Gila IV*).<sup>39</sup>

In *Gila III*, the Arizona Supreme Court determined that, while the subflow/ percolating water bifurcated system could limit the enforcement rights of state prior appropriation claims, the doctrine does not limit the enforcement of *Winters* rights. Recognizing that “the notion of subflow is an artifice,”<sup>40</sup> the *Gila III* Court determined that the arbitrary definitions a state gives to water, based upon its location, could not restrict the water rights of an Indian or federal reservation.

[I]f the United States implicitly intended, when it established reservations, to reserve sufficient unappropriated water to meet the reservations’ needs, it must have intended that reservation of water to come from whatever particular sources each reservation had at hand. The significant question for the purpose of the reserved rights doctrine is not whether the water runs above or below the ground but whether it is necessary to accomplish the purpose of the reservation.<sup>41</sup>

In *Southwest Cotton*, the Arizona Supreme Court provided the standard by which to determine whether underground water was subflow or percolating: “Does drawing off the subsurface water tend to diminish appreciably and directly the flow of the surface stream?”<sup>42</sup> Unfortunately, the court did not give the means by which anybody could apply that standard. Determining whether underground water was subflow or percolating went unresolved for decades.

The advent of Arizona’s two general stream adjudications (in addition to the Gila River Adjudication, the state is adjudicating the Little Colorado River) brought this issue to a head. In 1987, the trial court determined that the test for subflow was whether a well’s pumping for ninety days would deplete the stream flow by 50% of the amount of water pumped. *Gila II* unceremoniously rejected this test as arbitrary and remanded the matter with a directive to try again. *Gila II* told the trial court to consider criteria such as flow direction, water level elevation, the gradation of water levels over a stream reach, the chemical composition and the lack of hydraulic pressure from tributary aquifer and basin fill recharge.

On remand, the trial court held a ten- day hearing and considered the criteria set out by *Gila II*. The trial court provided a workable and reasonably accurate definition of the subflow zone — the saturated floodplain Holocene alluvium.<sup>43</sup> In simple terms, the flood- plain Holocene alluvium is the area adjacent to a river that has been flooded and washed over approximately the last ten thousand years. The constant washing process has removed the fine particles, leaving coarse sand and gravel. Water flows more easily through these loose soils than it does through the cemented soils of the older alluvium. Finding that “the ruling comports with hydrological reality as it is currently understood,” *Gila IV* affirmed “the trial court’s order in its entirety.”<sup>44</sup>

While the interlocutory appeals were winding their way through the Arizona Supreme Court, the trial court attempted to make progress. The trial court observed that the *Winters* rights claims of the United States and the various Indian tribes were generally very senior based on their creation dates. Reasoning that it made sense to resolve the impact of these early, potentially large water rights before proceeding on to smaller, junior water rights claims, the trial court decided to begin processing federal and Indian reservation claims. The Gila River Indian Community volunteered to have its water rights claims adjudicated first.

The trial court identified two initial issues it wanted resolved before taking evidence on the relative priority and water duty for each acre of GRIR land with water rights claims. One issue was whether there were any prior decrees or agreements that limited the water rights claims for GRIR or restricted the ability of the Community or the United States to advance those claims. This process resulted in seven motions for summary judgment, claiming that there were fifteen decrees or agreements that limited water rights for GRIR.

Summary judgment was denied on thirteen of the fifteen decrees and agreements. Summary judgment was granted on the claim that the Indian Claims Commission Decision in Docket 236-D, deciding that the Community was not entitled to damages for loss of water from the Salt River prior to 1949, precluded the Community and the United States from making *Winters* claims to the surface flow of the Salt River. Summary judgment was also granted on the claim that the Globe Equity Decree precluded the Community from seeking additional water for the 50,000 acres of land in the San Carlos Indian Irrigation Project. The court denied the claim that the Globe Equity Decree precluded the Community from making claims against any parties (other than those in Globe Equity) for the remaining 320,000 acres of land in GRIR. Both of those decisions are currently on interlocutory appeal before the Arizona Supreme Court.

The second process the trial court authorized, with regard to the Community's and United States' claims for water rights for GRIR, was an analysis of the "purpose" for the creation and subsequent expansions of the Gila River Indian Reservation. The Community's opponents argued that various expansions of GRIR were solely for the purpose of grazing or were only intended to provide a buffer

between the Pima-Maricopa Indians and non-Indians and, therefore, the Community was entitled to minimal or no water for the lands contained in those expansions. This process was rendered moot by In re General Adjudication of All Rights to Use Water in the Gila River System and Source (*Gila V*).<sup>45</sup>

In *United States v. New Mexico*,<sup>46</sup> the United States Supreme Court determined that the *Winters* doctrine only reserved water for the "primary purpose" of a federal reservation and that, if a federal reservation needed water for a secondary purpose, it had to acquire a water right pursuant to state law. In *Gila V*, the Arizona Supreme Court determined that Indian reservations, unlike federal reservations, were not subject to a primary vs. secondary purpose test. "Indian reservations, however, are different. In its role as trustee of such lands, the government must act on the Indians' benefit. . . . The purposes of Indian reserved rights . . . are given broader interpretation in order to further the federal goal of Indian self-sufficiency."<sup>47</sup> *Gila V* determined that the purpose for the creation of Indian reservations was to serve "as a 'permanent home and abiding place' for the Indian people as explained in *Winters*. . . . Such a construction is necessary for the tribes to achieve the twin goals of Indian self-determination and economic self-sufficiency."<sup>48</sup>

*Gila V* rejected "practicably irrigable acreage" as the sole standard by which Indian reservation *Winters* rights would be measured. The court recognized that Indian tribes and communities would use their *Winters* waters for agricultural production, commercial development, industrial, residential, and recreational uses, as well as cultural purposes, natural resource development, and wilderness. *Gila V* listed a number of non-exclusive factors to be considered in quantifying the water rights for an Indian reservation, including a tribe's history and culture, the lands' geography, topography, and natural resources, the tribe's economic base, past water use, and present and projected population.<sup>49</sup>

Following the Supreme Court's decision in *Gila V*, the trial court discontinued the process leading to a determination of the "purpose" for the Gila River Indian Reservation. Recognizing the significant progress that was being made to resolve the Gila River Indian Community's water rights claims, the trial court stayed the prosecution of the Community's claims in order to move on to other issues that were less likely to be resolved without trials.

## GRIC Water Rights Settlement Process

The Community followed a two-track process in dealing with its water rights claims — vigorous litigation and resolute negotiation. From the beginning, the Community realized that it would not be able to achieve a fair and reasonable settlement if it could not convince the opposing parties that its *Winters*, prior appropriation, and aboriginal water rights claims were real and substantial threats to their water supplies. No one was going to negotiate a settlement that provided the Community with enough water to meet the needs of its members, and enough money to build the superstructure necessary to deliver and use the water, unless the Community could establish that it had a legitimate chance of winning an even greater water supply through the Gila River Adjudication.

The Community also recognized that it would have to be able to establish a defensible water budget and to demonstrate that it could and would use the water that was received through settlement. To that end, in 1985, the Community developed a Master Plan. The Master Plan set out how the Community intended to use the water, deliver the water, pay for the delivery system (including its future operation and maintenance costs), and the economic return the Community expected from its water resources.

Over the past two decades, the Community has spent incalculable hours meeting with representatives of major water users — cities, counties, the State of Arizona, mines, irrigation districts, power companies, water companies, a host of federal agencies, and other Indian tribes — working to develop the Gila River Indian Community Settlement Agreement. The process involved determining and agreeing to:

- the water supplies to be used to meet the 653,500 acre-foot water budget;
- the sources of funding to pay for the construction, operation, and maintenance cost of acquiring and delivering the Community's water;
- the changes other parties throughout the State would make in their water use to protect the Community's water supply; and
- the conditions upon which the Community would grant waivers to other water users — thereby giving up the Community's litigation efforts against those settling parties.

It is difficult to describe the complexity of negotiating with scores of large water users, who often had conflicting needs and wishes. Often, the Community had to mediate disputes between other water users in order to get agreement on the Community's settlement needs. Even after substantive issues were resolved, countless hours were spent on the precise wording and punctuation of each paragraph. All parties were legitimately concerned about the possibility of unclear or ambiguous language that would cause real problems in the future.

The Community, and its multitude of associate negotiators, finally produced a 320- page settlement agreement with 75 exhibits and numerous attachments to those exhibits that resolved most of the issues between most of the parties. The Community and its throng of fellow travelers then negotiated and drafted a 266 page bill that was introduced in the Senate and House of Representatives. Following numerous hearings and amendments, the bill was passed and signed into law by President Bush on December 10, 2004.

Thereafter, the Community and the other interested parties negotiated and drafted legislation to be introduced into the Arizona Legislature to implement the various provisions necessary to protect the Community's water supplies, including limitations on ground water pumping in the areas adjoining the Gila River Indian Reservation and restrictions on further agricultural development on the Gila River and its tributaries upstream of Ashurst-Hayden Diversion Dam.

Having accomplished these enormous tasks, the Community has a vast array of activities still to accomplish before its settlement becomes official. Some issues in the settlement agreement have not been completely finalized, and some of the major participants in the process have not yet signed onto the agreement. There are some of these parties whose involvement is not crucial to the implementation of the settlement. However, resolution of their claims would greatly benefit the Community and those who have settled with the Community. Those negotiations continue.

The Community is currently reviewing the settlement agreement with various parties and making changes that are required to conform to the provisions in the settlement legislation. Following final completion of this process, the settlement agreement will be presented to the Secretary of the Interior for formal federal approval. The Community must obtain environmental clearances from the appropriate federal agencies for the various construction activity that will accompany delivery of the Community's settlement water. Finally, the Community and its new-found allies will present the Gila River Indian Community Settlement Agreement to the Gila River Adjudication Court for its review and approval. Parties who object to the settlement agreement may, at that time, express their objections.

## Conclusion

For over a century, the Gila River Indian Community has been striving to regain the use of water that was taken from it by upstream diversions. For the past thirty years, the Community has fought for its federal and state water rights in the arena of the Gila River Adjudication and the Globe Equity Decree. Ultimately, a negotiated settlement was developed and water rights and claims were finally settled. For the past twenty years, the Community has been in full-time discussions, seeking to negotiate a resolution of its water rights claims that would provide the Community with the water necessary for its future survival, while providing the non-Indian parties with the certainty that they can divide the water that remains among them. The process has been long and painful, but the end is in sight. The Community looks forward to the day when water again flows plentifully in its irrigation ditches and some of the natural habitat on the Gila River Indian Reservation is re-established.

## Author Bios and Contact Information

**RODNEY B. LEWIS** has been the General Counsel for the Gila River Indian Community for over thirty years. As General Counsel, Rod directed all aspects of the legal representation of the Community, including its water rights litigation. Rod was the chief negotiator for the Gila River Indian Community's Water Rights Settlement Agreement, the largest Indian water rights settlement in history. Rod received his Bachelor of Arts

Degree in 1962 from Trinity University, San Antonio, Texas; Master of Arts in History, Arizona State University in 1972; and his Juris Doctor Degree from the School of Law, University of California, Los Angeles in 1972.

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## Notes

1. *West Maricopa Combine, Inc., v. Arizona Dep't of Water Resources*, 26 P.3d 1171, 1178 (Ariz. App. 2001).
2. *Adams v. Salt River Valley Water Users' Ass'n*, 80 P.2d 1060, 1066 (Ariz. 1939).
3. ARIZ. REV. STAT. § 45-141(A) (2005).
4. *Pima Farms Co. v. Proctor*, 245 P. 369, 372 (Ariz. 1926).
5. ARIZ. REV. STAT. § 45-141(A).
6. *Id.* § 45-151(A).
7. *Clough v. Wing*, 17 P. 453, 456 (Ariz. 1888).
8. ARIZ. CONST. art 17, § 1.
9. 4 P.2d 369, 383 (1931) (*Southwest Cotton*).
10. *Id.* at 380-81.
11. *Brasher v. Gibson*, 406 P.2d 441, 448 (Ariz. 1965).
12. *Town of Chino Valley v. City of Prescott*, 638 P.2d 1324, 1328 (Ariz. 1982).
13. *Id.*
14. 207 U.S. 564 (1908).
15. *Id.* at 577.
16. The "rules" for *Winters* rights are generally the same for Indian reservations and other federal reservations. The differences center on the fact that Indian reservations were created to be a homeland for Indians, under the United States' duties as trustee, where other federal reservations were created for the United States' own purposes. As noted by the Ninth Circuit, "we are mindful that the reservation was created for the Indians, not for the benefit of the government." We discuss the *Winters* doctrine as it applies to Indian reservations.
17. *Colville Confederated Tribes v. Walton*, 752 F.2d 397, 405 (9th Cir. 1985) (*Walton III*).
18. *Clough*, 17 P. at 457.
19. *Arizona v. California*, 373 U.S. 546, 600 (1963).
20. *Colville Confederated Tribes v. Walton*, 647 F.2d 42 (9th Cir. 1981) (*Walton II*).



21. *United States v. Jesse*, 744 P.2d 491 (Colo. 1987). See also National Water Commission, *Water Policies for the Future: Final Report to the President and to the Congress* at 464 (1973).
22. ARIZ. REV. STAT. § 45-141(C).
23. *Colville Confederated Tribes v. Walton*, 460 F. Supp. 1320, 1326 (D.C. Wash. 1978) (Walton I).
24. *Id.*
25. *Arizona v. California*, 373 U.S. at 600.
26. *Id.* at 601.
27. *Id.*
28. Another adjudication filed pursuant to ARIZ. REV. STAT. § 45-252(A) is the General Adjudication of All Rights to Use Water in the Little Colorado River System and Source (Apache County).
29. *United States v. Orr Water Ditch Co.*, 256 F. 3d 935, 940 (9th Cir. 2001).
30. *City of Lafayette v. New Anderson Ditch Company*, 962 P.2d 955 (Colo. 1998).
31. *Cowboys, Indians and Reserved Water Rights*, 28 *Land & Water L. Rev.* 467 (1993).
32. *In re Rights to Use of the Gila River*, 830 P.2d 441, 443 n. 1 (Ariz. 1992) (*Gila I*).
33. *United States v. Superior Court*, 697 P.2d at 664 (Ariz. 1996).
34. 43 U.S.C. § 666(a) (2005).
35. ARIZ. REV. STAT. § 45-252(A).
36. *Id.* § 45-257(B)(1).
37. 856 P.2d 1236 (Ariz. 1993).
38. 989 P.2d 739 (Ariz. 1999).
39. 9 P.3d 1069 (Ariz. 2000).
40. 989 P.2d at 742.
41. *Id.* at 748.
42. 4 P.2d at 380.
43. The trial court also determined that a well was subject to the jurisdiction of the Gila River Adjudication if the “cone of depression caused by its pumping has now extended to a point where it reaches an adjacent ‘subflow’ zone, and by continual pumping will cause a loss of such ‘subflow’ as to affect the quantity of the stream.” 9 P.3d at 1082.
44. 9 P.3d at 1073.
45. 35 P.3d 68 (Ariz. 2001).
46. 438 U.S. 696 (1978).
47. 35 P.3d at 74.
48. *Id.* at 68.
49. *Id.* at 79-80.