

# *Native American Tribal Rights: How Arizona's Looming Water-Shortage Threatens Tribal Sovereignty.*

**By Jonathan Placito**

## **Introduction**

On November 20, 1969, a coalition of Native Americans part of the American Indian Movement (AIM) seized the island of Alcatraz. For 19 months, up to 200 Native Americans called Alcatraz home in protest to the United States government.<sup>1</sup> The seizure of the island of Alcatraz, the former renowned prison site, was intended to demonstrate the harsh conditions Natives confronted each day on American reservations. “Alcatraz...symbolized conditions on reservations: it has no running water; it has inadequate sanitation facilities; there is no industry; and the soil is rocky and unproductive.”<sup>2</sup>

Part of the protest included a dark humor towards U.S./Indian relations throughout the years. The Indians offered to purchase the island of Alcatraz from the federal government for “\$24 in glass beads and red cloth.”<sup>3</sup> They also justified their seizure of Alcatraz based on a Sioux Treaty from 1868 giving Indians rights to surplus American land.<sup>4</sup> On Thanksgiving Day, Wampanoag Indians held a National Day of Mourning.<sup>5</sup>

Despite ongoing negotiations throughout the 19 months, the Indian occupation of Alcatraz ended in tragedy and fizzled out.<sup>6</sup> Late into the occupation, Mohawk leader, Richard Oakes' 12 year-old daughter died after falling down a flight of stairs.<sup>7</sup> Drug abuse and poor living

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1 Zachary D. Clopton, “14 Little Indians: A Critical Examination of the Public Reaction to the Indian Occupation of Alcatraz. 49<sup>th</sup> Parallel.[http://www.49thparallel.bham.ac.uk/back/issue8/clopton.htm#\\_edn5](http://www.49thparallel.bham.ac.uk/back/issue8/clopton.htm#_edn5).

2 *The Native American Power Movement*. Digital History.  
[http://www.digitalhistory.uh.edu/database/article\\_display.cfm?HHID=387](http://www.digitalhistory.uh.edu/database/article_display.cfm?HHID=387).

3 *Id.*

4 *Supra*, at Note 1; *Alcatraz is not an Island!* PBS. <http://www.pbs.org/itvs/alcatrazisnotanisland/timeline.html>.

5 *Supra*, at Note 2.

6 *Supra*, at Note 3.

7 *Id.*

conditions were also prevalent on the island. Finally, after cutting off water supplies and communication with the island, the U.S. Government ended the occupation the same way it had halted Native American occupation of land for centuries, with guns and force.<sup>8</sup>

Today, the Indian occupation of Alcatraz seems like a relic of the past; however, the conditions of reservations that led to the protest, although improved, are still present. In 2006, 38% to 63% of Indians living on reservations were at or below the poverty line.<sup>9</sup> 30% of Indian housing is overcrowded, while less than half of Indian housing is connected to a sewage system.<sup>10</sup> Access to water is also a major issue for Indian reservations. For example, on the Navajo Reservation in Arizona, “approximately 40% of the population lacks a potable domestic water supply.”<sup>11</sup>

These poor living conditions, especially the lack of water, seriously threaten Native American sovereignty. Native American sovereignty is inextricably tied to their sense of “community” and authority on reservation lands.<sup>12</sup> Leaving the reservation is not unlike leaving a nation-state for Native Americans, as their territorial authority dissipates as they leave the reservation.<sup>13</sup> Therefore, “tribal environmental policy must respond to existing...environmental problems on the reservation” in order to preserve cultural autonomy.<sup>14</sup>

As tribal sovereignty is inextricably linked to existence on the reservation, the possibility of a water shortage in Arizona poses unique challenges to Native American life.<sup>15</sup> Despite efforts by the Arizona legislature to find a solution regarding Indian water rights, legislation has proven

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8 *Id.*

9 *Jobs*, Native American Aid. (2006). Available at [http://www.nrcprograms.org/site/PageServer?pagename=naa\\_livingconditions](http://www.nrcprograms.org/site/PageServer?pagename=naa_livingconditions).

10 *Id.*

11 Bonnie Colby, *Chapter 8: Tribal Water Settlements in Arizona*. Arizona Water Policy. (2007).

12 Rebecca Tsosie, *Land, Culture, and Community: Envisioning Native American Sovereignty and National Identity in the 21<sup>st</sup> Century*. 2 International Social Science Review. 180. (2001).

13 *See, Id.*

14 *See, Id.*, at 190.

15 *Supra*, at Note 12.

ineffective in the past, and current changes are necessary. These changes are vital to preserving Native American sovereignty, as climate change places Arizona's water supply in a questionable future.

This study focuses on one of the most major pieces of recent legislation addressing Native American water rights, the Arizona Water Settlement Act (AWSA), and how its faults may leave many Arizona tribes without sufficient water, threatening their tribal sovereignty.<sup>16</sup>

### **Thesis/Roadmap**

In 2004, the Arizona legislature passed the AWSA<sup>17</sup> in an attempt to settle Indian water rights, specifically those effecting the Tohono O'odham Nation and Gila Indian tribe.<sup>18</sup> The predominant reason behind the passage of AWSA was to address issues in the settlement of the Southern Arizona Water Rights Settlement Act of 1982, which precluded its implementation.<sup>19</sup> The AWSA corrects issues, such as revising the Tohono O'odham Settlement Agreement to eliminate legal conflicts, finalizing allocations of acre-feet of agricultural priority water to tribes, and obtaining additional funding necessary for implementation.<sup>20</sup> Despite these revisions, however, the AWSA still has flaws that may lead to future litigation between Native American tribes and possibly the exhaustion of tribal water before all Arizona tribes can settle their claims. For this reason, the Arizona legislature should revise the 2004 AWSA to remedy these potential issues.

This study will first look at the history of Native American tribes in Arizona and whether

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<sup>16</sup> *Arizona Water Settlement Act of 2004*, Pub. L. § 108-451.

<sup>17</sup> *Id.*

<sup>18</sup> *Bill Would Settle Tribal Water Rights*. Vol. 11, 1 (Sept.-Oct. 2002), <http://ag.arizona.edu/AZWATER/awr/septoct02/feature2.html>

<sup>19</sup> Federal Register: Vol. 72, 240 (December 14, 2007). <http://regulations.vlex.com/vid/settlement-2004-findings-southern-arizona-34109846>. (The 1982 Act was essentially the 2004 AWSA's predecessor).

<sup>20</sup> *Id.*

their early existence has an effect on their right to water rights in Arizona over other groups. Next, this study will look at the water shortage issues in Arizona, due to population growth, climate, and existing waterbeds, as well as the methods Arizona is using to handle water issues, including a discussion of the Central Arizona Project (CAP). Third, this study will analyze the legal history on Native American water rights. Fourth, the study will analyze both the 1982 Southern Arizona Water Rights Settlement Act and the 2004 AWSA. Fifth, the study will describe the problems that exist with the 2004 AWSA. Lastly, the study will make suggestions to avoid the issues that still impact Native American tribal water rights in Arizona.

### **I. Native American Tribal Existence in Arizona**

The large proportion of Native American tribes in Arizona in conjunction with Arizona's arid climate has made water-rights a much larger problem in Arizona than other states. Native American tribes in Arizona currently take up 28% of the states land-base.<sup>21</sup> These tribes, many of which are spread out away from Arizona's major metropolitan cities, require a certain proportion of water to survive. However, in a climate such as Arizona's with limited resources, one might ask the question: where are tribal water rights derived? To determine this, it is important to first look at Arizona's law on water use and then investigate the history of Native American tribes in Arizona.

Under Arizona Law, surface water rights are settled by the "first in time, first in right" rule.<sup>22</sup> For Native American tribes, the priority date for water rights is the date the treaty or executive order forming the tribal reservation is signed.<sup>23</sup> As tribal reservations were generally

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21 Bonnie Colby, *Chapter 8: Tribal Water Settlements in Arizona*. Arizona Water Policy. (2007).

22 A.R.S. § 45-151

23 Dana Smith, *Doctrinal Anachronism?: Revisiting the Practicably Irrigable Acreage Standard in Light of International Law for the Rights of Indigenous Peoples*. 22 Ariz. J. Int'l & Comp. Law 691

formed before non-Indian users began using water, Native American's have a "higher priority date" for water rights.<sup>24</sup> Recognition of priority water rights to Native American tribes is based on Supreme Court cases dating back to 1907, establishing that along with recognizing the rights of tribal reservations is the appropriation of sufficient water to support that reservation.<sup>25</sup> Therefore, any Native American tribe recognized as present before non-Indian settlers has a claim to water-rights.

Arizona has a rich history of indigenous Indian tribes existing before the appearance of American settlers. The Apache tribe of the southwest held a claim to land, including parts of Arizona, starting in at least the late 1500's.<sup>26</sup> The Hopi Indians, who came from the Pueblo Indians of the 11<sup>th</sup> century, currently live in northeast Arizona.<sup>27</sup> The Navajo Reservation, the largest reservation in the United States, consisting of 16 million acres, is home to approximately 140,000 Navajo Indians, whose ancestors moved southwest over 1,000 years ago.<sup>28</sup>

For the most part, it is undisputed that Native American reservations were recognized before Americans were putting Arizona water to use. For example, the Colorado River Indian Tribe has senior rights to the water of the Colorado River, a water source that comprises one-third of the water resources in Arizona.<sup>29</sup> However, even if a Native American treaty for a tribal reservation is signed following the use of Arizona water by non-Indians, their water-rights will only last as long as they are putting the water to continual use.

It has been argued that the priority water rights of Native American's are too great and

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(Fall, 2005).

24 *Id.* Also note that Indian Tribes don't lose water rights due to non-use.

25 *Winter v. US*, 207 US 564 (1908).

26 Emma Uzzelly, *Apache Indians Defended Homelands in Southwest. Borderlands*. Available at [http://dnn.epcc.edu/nwlibrary/borderlands/18\\_apache.htm](http://dnn.epcc.edu/nwlibrary/borderlands/18_apache.htm).

27 Pam Eck, *Hopi Indians*. (April 15, 1998) Available at <http://inkido.indiana.edu/w310work/romac/hopi.htm>.

28 Pam Eck, *Navajo Indians*, (April 15, 1998). Available at <http://inkido.indiana.edu/w310work/romac/navajo.htm>.

29 Arizona's Native American Tribes. Economic Development Research Project. <http://edrp.arid.arizona.edu/tribes.html>.

disproportionate to the water needs of other Arizonians. A recent article by Clay Landry, a Director of a leading water rights advisory firm, argues that Indian tribes in the West now hold the last “untapped water buckets.”<sup>30</sup> “Through a series of settlement agreements, more than 25 tribes have gained senior water rights that are essentially unused.”<sup>31</sup> Many of these tribes, especially those with active or long-term water leasing agreements, have begun leasing out their unused water to generate revenue.<sup>32</sup> Landry states that since tribes are generally located in rural areas, making it difficult to lease water, these tribes may experience the greatest economic surge through attracting water intensive industry, which would create revenue and jobs.<sup>33</sup> Although this is great for tribes who have established water-rights, such as the Tohono O’odham Nation, AK-Chin Indian Community, Gila River Indian Community, and San Carlos Apache, many other tribes do not have such strong water leasing opportunities.<sup>34</sup> It begs the question: are some Arizona Indian tribes not receiving adequate water supplies?<sup>35</sup>

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30 Clay Landry, *Tribal Water Rights: The West's Last Big Bucket of Water*. (March 2011). Available at <http://www.americanwaterintel.com/archive/2/3/opinion/tribal-water-rights-wests-last-big-bucket-water.html>.

31 *Id.*

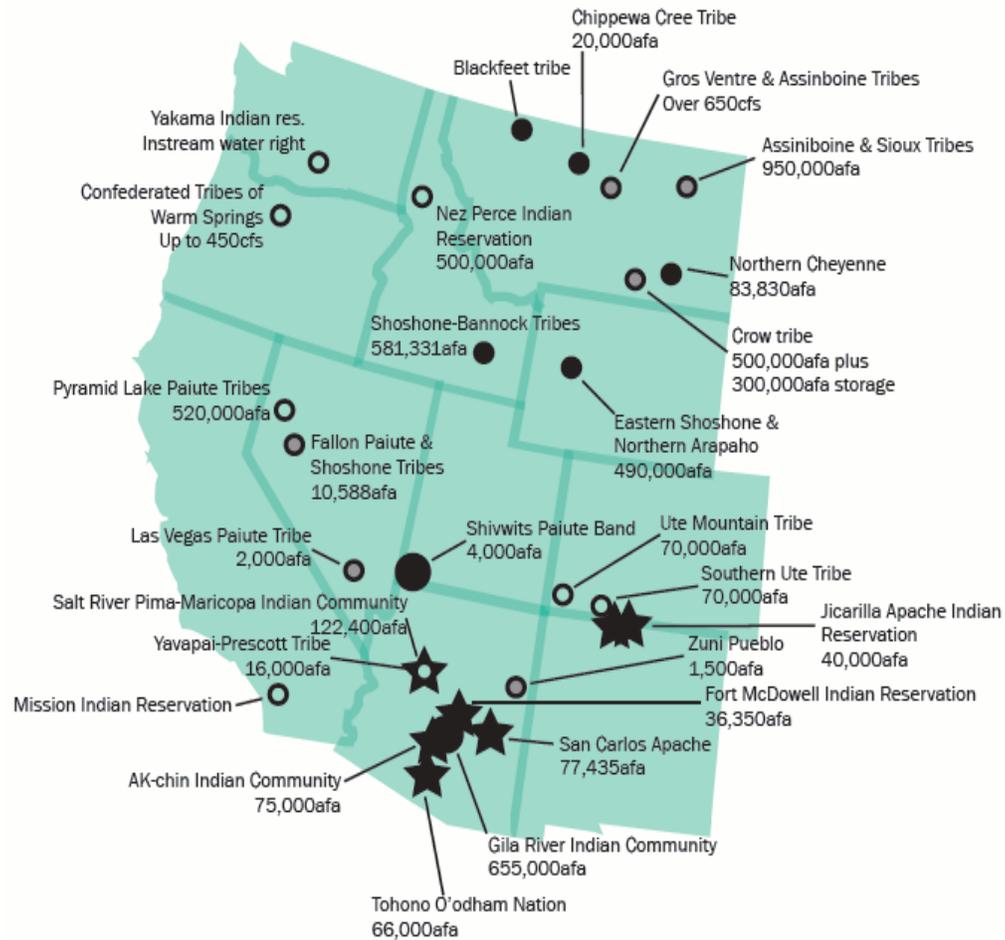
32 *Id.*

33 *Id.*

34 *Id.*

35 *Id.*

## WESTERN TRIBAL WATER RIGHTS



### Level of Tribal Water Marketing

- NA Settlement not finalized or leasing activity not available
- None: No leasing activity
- Low: annual lease or short-term lease agreements
- Moderate: actively marketing water or limited long term lease agreements
- ★ High: Large long-term industrial or municipal lease agreements

afa = acre feet annually  
cfs = cubic feet per second

## II. The Threat of a Water Shortage in Arizona, its Impact on Natives, and Preventative Measures

A looming water shortage in Arizona's near future is due predominantly to four major issues. First, the steady increase of population into Arizona's thriving metropolis' of Phoenix and Tucson places a major demand on the water levels.<sup>37</sup> Second, the arid climate in Arizona makes the need for water greater, as there is little rainfall and the size of indigenous water beds are not being replenished.<sup>38</sup> Third, there is a lack of major waterbeds that can satisfy the water needs of Arizona's growing population.<sup>39</sup> Lastly, unpredictable climate changes threaten the stable flow of water in Arizona.<sup>40</sup>

Additionally, the large number of Native American inhabitants and tribes in the state of Arizona means that a water shortage in Arizona would have a greater impact on Native's than in any other state that is at-risk of a water shortage. To combat this threat, Arizona has created the Central Arizona Project (CAP).

### *Population Growth is having a Major Impact on Arizona's Water Supply*

With a 25% population growth between 2000 and 2008, Arizona is the second fastest growing state in the nation, creating a significant demand for water.<sup>41</sup> Moreover, the estimated population of 6.6 million is expected to grow by 5 million by 2030.<sup>42</sup> The fact that the majority of the population resides in the arid cities of Tucson and Phoenix is a double-edged sword, as it makes transporting water easier on one hand, but Phoenix and Tucson are the driest major cities

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36 *Id.*

37 *Arizona Water Facts*, Water Sense. (Last updated: April 14, 2011) Available at [http://www.epa.gov/WaterSense/water\\_efficiency/arizona.html](http://www.epa.gov/WaterSense/water_efficiency/arizona.html).

38 *Id.*

39 *Id.*

40 *Id.*; *Climate Change to Reduce US West Water Supply-Report*. BBC News. Available at <http://www.bbc.co.uk/news/world-us-canada-13190689>.

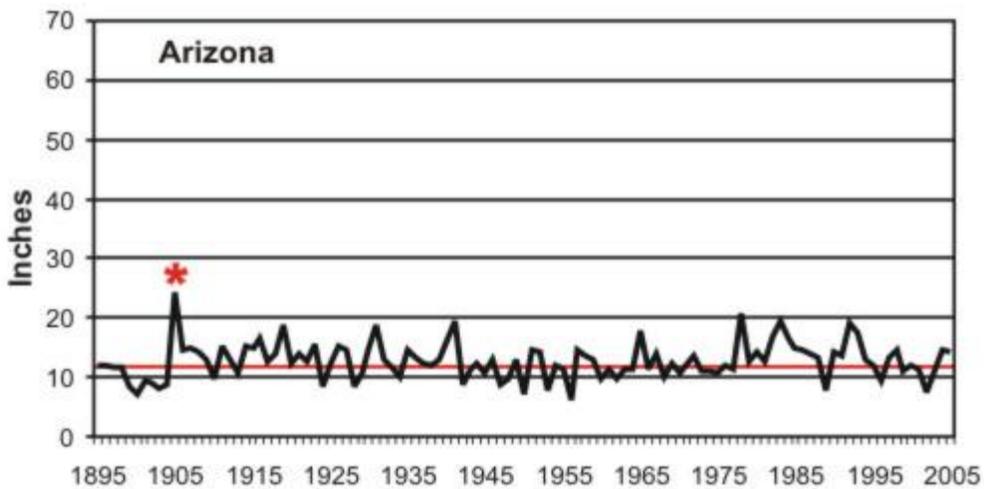
41 *Supra*, at Note 37.

42 *Id.*

in Arizona.<sup>43</sup> “Water demand continues to increase with population growth, exceeding the sustainable freshwater supply in some areas.”<sup>44</sup>

*Arizona's Climate Means Little Rainfall and Unsustainable Waterbeds*

Low annual rainfall along with waterbeds continually facing drought conditions exacerbates the threat of a water shortage in Arizona. In Phoenix and Tucson, there is only an average annual rainfall between 8 and 12 inches.<sup>45</sup> Along the Colorado River, rainfall has a lower range of 3 to 6 inches annually.<sup>46</sup> An interesting comparison of Maine and Arizona's rainfall over the last hundred years shows that Maine's driest year yielded 30 inches of rainfall, while Arizona's wettest year yielded 24 inches of rainfall.<sup>47</sup> With such little rainfall, Arizona's waterbeds face continuous drought and struggle to sustain the populous that relies on it.<sup>48</sup>



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43 *Id.*

44 *Id.*

45 *Id.*

46 *Id.*

47 *Maine and Arizona Rainfall Totals*. Available at [http://www.drought.unl.edu/kids/images/Maine\\_Arizona.htm](http://www.drought.unl.edu/kids/images/Maine_Arizona.htm).

48 *Supra*, at Note 37.

49 *Supra*, at Note 47.

### *The Major Waterbeds in Arizona Struggle to Sustain the Growing Population*

Although Arizona has many freshwater sources, including the Colorado, Salt, Verde, and Gila Rivers, these sources are at-risk due to Arizona's climate and a growing population.<sup>50</sup> The greatest source of renewable water comes from the Colorado River.<sup>51</sup> Those cities and towns far away from the Colorado River are the most vulnerable to a water-shortage.<sup>52</sup> What makes matters worse is that groundwater is being pumped faster than it can be replenished.<sup>53</sup> When that groundwater is used up, the drain on freshwater sources might threaten Arizona's rivers and waterbeds.

### *Climate Change Makes Arizona's Water Supply Unpredictable*

Lastly, climate change could “cut water flow in several of the American West's largest river basins up to 20%.”<sup>54</sup> The Colorado River is one of the rivers that was determined to be at risk.<sup>55</sup> Factors that could influence a cut in water supply include an increase in average temperature and a further decrease in precipitation.<sup>56</sup> Climate changes could affect water supplies to numerous different users throughout the state.

### *The Threat of a Water Shortage Affects Arizona's Native Americans Greatly*

Although 93% of Arizona's counties are “at-risk” of a water shortage, including more than half that are at an “extreme risk,” other states, such as Florida and Texas also have a high

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50 *Supra*, at Note 37.

51 *Id.*

52 *Id.*

53 *Id.*

54 *Supra*, at Note 40.

55 *Id.*

56 *Id.*

percentage of “at risk” counties.<sup>57</sup> For example, 98% of 249 counties in Texas are “at risk” of a water shortage and 96% of 64 counties in Florida are “at risk.”<sup>58</sup> However, the water shortage in Arizona raises serious issues regarding tribal sovereignty that are not nearly as prevalent in other states. According to the 2006 census, Arizona currently has 261, 168 Native American's living in the state, second only to Oklahoma.<sup>59</sup> This may have changed based on recent census data, as in 2006 there was only approximately a 1,000 difference.

A water shortage in a state with a large number of Native American's threatens the tribal sovereignty of those Natives. Just as “land...ensures the “cultural survival” of Indian people as distinct groups and nations,” the ability to have sufficient water is essential to the preservation of Indian tribes.<sup>60</sup> Without sufficient water-rights, Native tribes are essentially forced to abandon their tribal sovereignty to survive. As the land and the rivers Natives inhabit also play a major spiritual role in their tribal sovereignty, a water-shortage affecting a water source a certain tribe associates with spiritually can occur.<sup>61</sup>

*The Central Arizona Project Canal and other Methods are being Developed to Prevent a Water Shortage.*

Currently, the Colorado River is the state of Arizona's largest distributor of water.<sup>62</sup> The Central Arizona Project (CAP) canal delivers the water from the Colorado River across the state of Arizona.<sup>63</sup> Construction of the CAP canal was authorized through passage of the Colorado

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57 <http://www.nrdc.org/globalwarming/watersustainability/files/StateSummary.pdf>

58 *Id.*

59 2006 United States Census data.

60 Rebecca Tsosie, *Envisioning Native American Sovereignty and National Identity in the 21<sup>st</sup> Century*. At 184. University of Arizona (2001).

61 *Id.*

62 Nancy L. Pontius, *Arizona Prepares for Possibility of Future Water Shortages*, America.gov Archive. 27 May, 2009 <http://www.america.gov/st/webchat-english/2009/May/20090521174435HMnietsuA0.2685968.html>.

63 *Id.*

River Basin Project Act in 1968.<sup>64</sup> The CAP works through “a system of pumps, canals, and laterals,” bringing water from the Colorado River to cities, towns, farmers, and Native American tribes throughout Arizona.<sup>65</sup> The CAP has made it possible for Arizona to fully utilize the water provided by the Colorado River and also to start using renewable surface water, rather than always having to pump groundwater at an exponentially fast rate.<sup>66</sup>

Arizona has also taken other measures to safeguard the State’s water supply. One way was to create the Arizona Water Banking Authority to store “unused shares of Colorado River water in underground aquifers.”<sup>67</sup> One challenge to maintaining the Arizona Water Banking Authority, however, has been receiving adequate funding for it during harsh economic times.<sup>68</sup> Another measure originally intended to help sustain the water supply was to create the Orme Dam.<sup>69</sup> Despite all these steps, with climate change and increasing temperatures and populations in Arizona, a massive problem with water shortages is not out of the question.<sup>70</sup>

### **III. Legal History of Native American Water Rights**

The United States began recognizing the rights of Native Americans to water rights starting over 100 years ago in *Winters v. United States*.<sup>71</sup> In *Winters*, the Court developed the implied reservation of rights principle, which essentially says that a Native American's stake in

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64 John B. Weldon, Jr., *Future Indian Water Settlements in Arizona: The Race to the Bottom of the Waterhole?* 49 Ariz. L. Rev. 441 (Summer 2007).

65 *Id.* at 442.

66 *Id.*

67 *Supra*, at Note 62. .

68 *Id.*

69 *Id.*

70 Shannon McKinnon, *Climate Shift Poses Threat to Water Supply*. Arizona Republic. July 21, 2010. <http://www.azcentral.com/arizonarepublic/news/articles/2010/07/21/20100721climate-shift-to-hurt-water-supply.html>.

71 *Winter v. US*, 207 US 564 (1908).

water rights is based on when there was a treaty recognizing the tribes reservation.<sup>72</sup> The court held that any land recognition rights that went with a treaty establishing a reservation also implicitly recognized sufficient water-rights as well.<sup>73</sup>

In *Arizona v. California*, the Court further shaped its interpretation of Native American water rights, this time expanding their rights greatly.<sup>74</sup> In this case, the Court confronted the question of how much water Native American tribes surrounding the Colorado River should be entitled to.<sup>75</sup> The court held that, like in the case of *Winters v. U.S.*, the Native American tribe had an implied reservation of right to the water near where they had settled.<sup>76</sup> However, in *Arizona v. California*, the Court not only said that the tribes were entitled to “sufficient water rights,” but “sufficient water to irrigate all the practicably irrigable acreage (PIA) on the reservation,” regardless of whether it was being used or not.<sup>77</sup>

Lastly, in *In re Gen. Adjudication of All Rights to Use Water in Gila River Sys. and Source*, the Court investigated the issue of whether or not groundwater was also governed by the doctrine of implied reservation of right.<sup>78</sup> In this case, the Court determined that groundwater, like the surface water described in *Winters*, also was governed by the doctrine.<sup>79</sup> The Court concluded that although the holding might seem at odds with prior decisions by the Court, “the question is one of hydrology, not legal compartmentalization,” and the groundwater under Native

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<sup>72</sup> *Id.*

<sup>73</sup> *Id.*

<sup>74</sup> *Arizona v. California*, 373 U.S. 546 (1963).

<sup>75</sup> *Id.*

<sup>76</sup> *Winters*, at 564.

<sup>77</sup> *Winter v. US*, 207 US 564 (1908); *Arizona v. California*, 373 U.S. 546 (1963); John B. Weldon, Jr. *Future Indian Water Settlements in Arizona : The Race to the Bottom of the Waterhole*. 49 Ariz. L. Rev. 441, at 444 (Summer, 2007).

<sup>78</sup> *In Re Gen. Adjudication of All Rights to Use Water in Gila River Sys. and Source*, 989 P.2d 739, 748 (Ariz. 1999).

<sup>79</sup> *Id.*

American tribe's lands left those Natives with a reserved right to the waters.<sup>80</sup>

Although the law surrounding Native American water-rights is not complex, effectively implementing the law has been troublesome.<sup>81</sup> First, “although the *Winters* doctrine seemed to secure Indian water rights, tribes rarely saw any actual water due, mainly, to a lack of funding to develop their adjudicated water rights.”<sup>82</sup> With the development of the CAP, tribes finally had the feasibility to claim the water promised. Nevertheless, as tribal water agreements were established many stakeholders brought forth claims to the water, leading to endless appeals and challenges regarding who owned it.<sup>83</sup>

#### **IV. The 1982 Southern Arizona Water Rights Act and the 2004 Arizona Water Settlement Act**

##### *The 1982 Southern Arizona Water Rights Act*

To help manage issues involving claims to water rights, Congress passed the 1982 Southern Arizona Water Rights Act.<sup>84</sup> “The Act provided a general framework for a comprehensive arrangement to resolve many of the water issues facing Arizona and Indian communities in the state,” but did not focus on issues revolving around implementation of the Act.<sup>85</sup> It was passed in response to a lawsuit against the City of Tucson by the current Tohono O'odham Nation, the United States, and two Indian allottees to enjoin groundwater pumping by the City of Tucson.<sup>86</sup> After reaching a settlement embodied in the 1982 Act, the two Indian

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80 *Id.* at 750.

81 *See, Supra*, at Note 64, 449.

82 Heather Chamberlain, *Daniel McCool, Native's Waters: Contemporary Indian Water Settlements and the Second Treaty Era*. 7 U. Denv. Water L. Rev. 129. (Fall 2003).

83 *See, Supra*, at Note 64, 449-450.

84 Southern Arizona Water Rights settlement Act, Pub. L. § 97-293 (1982).

85 *Secretary Norton Signs Water Rights Agreement for Tohono O'odham Nation*, Department of Interior. (March 20, 2006). [http://www.doi.gov/archive/news/06\\_News\\_Releases/060330a.htm](http://www.doi.gov/archive/news/06_News_Releases/060330a.htm).

86 *Supra*, at Note 64.

allottees opposed dismissal of the suit and filed a class action lawsuit, “claiming more than \$200 million in damage from past pumping.”<sup>87</sup>

### *The 2004 AWSA*

In 2004, the AWSA was passed, correcting many of the major issues with its 1982 counterpart.<sup>88</sup>

The preamble of the AWSA states:

*“To provide for adjustments to the Central Arizona Project in Arizona, to authorize the Gila River Indian Community water rights settlement, to reauthorize and amend the Southern Arizona Water Rights Settlement Act of 1982, and for other purposes.”<sup>89</sup>*

The AWSA allocated a set amount of acre-feet of water to the Gila River Indian Tribe and the Tohono O'odham Indian Tribes.<sup>90</sup> The Act also gave the Secretary the power to enforce what the statute guaranteed and allocated additional funds to pay for the project.<sup>91</sup> Most importantly, however, the AWSA held that only 67,300 acre-feet would be reserved for other Arizona Indian tribes “approved by an Act of Congress.”<sup>92</sup> If not approved by an Act of Congress, “the Secretary shall not allocate any such water until December 31, 2030.”<sup>93</sup>

### *Critiques of the 2004 Arizona Water Settlement Act*

Although the AWSA has predominantly been a great accomplishment, there are a few major problems with the AWSA currently. First, the AWSA only allocates water-rights for the Tohono O'odham Tribe and the Gila River Indian Tribe.<sup>94</sup> Second, the AWSA also set a CAP

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<sup>87</sup> *Id.*, at 450.

<sup>88</sup> Arizona Water Settlement Act of 2004, Pub. L. § 108-451 (Dec. 10, 2004).

<sup>89</sup> *Id.*, at 2.

<sup>90</sup> *Id.*, at 11.

<sup>91</sup> *Id.*

<sup>92</sup> *Id.*

<sup>93</sup> *Id.*

<sup>94</sup> *Supra*, at Note 80.

limit on all other Native American claims for water rights.<sup>95</sup> Lastly, the AWSA set a limit on the funding allowable for future Native American water rights disputes.<sup>96</sup>

The 2004 AWSA was essentially meant to resolve the issues surrounding the 1982 Southern Arizona Water Rights Settlement Act and, therefore, allocates a great portion of water just to two tribes in Arizona.<sup>97</sup> Under the AWSA, 102,000 acre-feet of agricultural priority water is allocated to the Gila River Indian Community, while 28,200 acre-feet is allocated to the Tohono O'odham Nation.<sup>98</sup> The water allocated to these tribes are not subject to Section 104 (a)(1)(B) Conditions, which disallows leasing of the allocated water outside the tribe.<sup>99</sup> Aside from these allocations and other prior settlements, such as the Ak-Chin Water Settlement and San Carlos Apache Water Settlement, no other tribe received a set allocation of water through the AWSA.<sup>100</sup>

The AWSA also sets a ceiling on the amount of water that can be used to settle future Indian water claims.<sup>101</sup> The AWSA states, following the allocations to the Gila River and Tohono O'odham tribes, that “67,300 acre-feet shall be reallocated to Arizona Indian tribes.”<sup>102</sup> The statute continues by stating that allocation of this water must be used in order to resolve future Arizona Indian water settlements, 6,411 acre-feet will be put aside for use on future Navajo Nation settlements, and the water cannot be leased without congressional approval.<sup>103</sup> This means, that the remaining Arizona tribes, including the Navajo Nation (the largest reservation in the United States), the Hopi, the White Mountain Apache, the Camp Verde Yavapai-Apache, the

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95 *Supra*, at Note 64.

96 *Id.*

97 *Supra*, at Note 78.

98 *Supra*, at Note 64, 463-464.

99 *Supra*, at Note 88.

100 *Id.* At 451, 458. Section 104(a)(1)(B)(ii) placed 6,411 acre-feet of water on reserve for a future congressional water rights act settling a Navajo Nation water claim. However, the water was not allocated through the AWSA.

101 *Id.*, at 465.

102 *Id.*, at 464.

103 *Id.*

Tonto Apache, the Havasupai, the Hualapai, the Kaibab-Paiute, the San Juan Paiute, and the Pascua-Yaqui tribes all will have to fight over the remaining 67,300 acre-feet of water left.<sup>104</sup>

The last problem with the AWSA is that it sets a limit on the amount of revenue used to settle future Indian water settlements.<sup>105</sup> Title I of the AWSA states that “not more than 250 million (plus interest) [is]...for use for Indian water rights settlements in Arizona approved by Congress after the date of enactment of this Act.”<sup>106</sup> This cap on funds for settlement of tribal water-rights will very likely hinder the ability of tribes to reach fair settlements for infringements on future water-rights.<sup>107</sup> Moreover, as the AWSA limits the remaining water for all tribes in Arizona to a measly 67,300 acre-feet, future tribal water claims that cannot be settled monetarily or through the allocation of water are very likely to occur.

#### **V. Suggestions for a more Effective Implementation of the Act**

In order to prevent future water-shortages within Native American tribes, the following changes should be considered: (1) the AWSA should abolish the 250 million (plus interest) ceiling it has placed on future Indian water-rights settlements; (2) Future congressional Indian water rights agreements to lease the remaining 67,300 acre-feet should be allowed to lease the water to other Native American tribes in Arizona, and; (3) the AWSA should not include a ceiling on CAP water allowed to be used for future Indian water settlements.

#### *The AWSA Should Abolish the 250 Million Ceiling*

The AWSA should not have set a 250 million ceiling for use on settling water rights, as it will not

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<sup>104</sup>*Id.*, at 442.

<sup>105</sup>*Id.*, at 465-466.

<sup>106</sup> *Id.*

<sup>107</sup> *Id.*, at 466.

cover all the expenses needed to settle future water disputes. Past Indian water settlements have shown that settlements offered to Indians tribes have often added up to substantial sums of money in excess of 250 million. The Salt River Pima-Maricopa Indian Community Water Rights Settlement Agreement, provided for over 61 million dollars.<sup>108</sup> The Fort McDowell Indian Reservation received compensation of 25 million from their settlement agreement.<sup>109</sup> The 1992 San Carlos Apache Tribe Water Rights Settlement Act appropriated 38 million.<sup>110</sup> The Gila River Indian Community Water Rights Settlement appropriated 200 million dollars as part of the settlement.<sup>111</sup>

As can be seen based on just four prior Indian water rights settlements, which add up to 324 million, a 250 million ceiling will likely restrict the amount of resources for future settlements. This is especially true as the Navajo Nation still has yet to definitely settle its water rights, which could be expensive.

*Section 104 (a)(1)(B)(iii) Conditions Should be Revised to Allow Water Leasing to Other Indian Tribes*

Section 104(a)(1)(B)(iii) provides that “the agricultural priority water shall not ...be leased, exchanged, forborne, or otherwise transferred” by a tribe outside the reservation.<sup>112</sup> This condition only affects future Indian water settlements using the 67,300 acre-feet allocation.<sup>113</sup> Water allocations provided to the Gila River and Tohono O’odham tribes were not subject to this condition and, therefore, could lease their water.<sup>114</sup>

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108 *Id.*, at 454.

109 *Id.*, at 455.

110 *Id.*, at 458.

111 *Id.*, at 460.

112 *Supra*, at Note 88.

113 *Id.*

114 *Id.*

Congress should amend the AWSA to allow those tribes receiving future allocations to lease CAP water to other tribes. By allowing this, the water would have a greater chance of being used when needed most by Arizona Indian tribes. Furthermore, if AWSA was amended, it could also subject the Gila River and Tohono O'odham to this condition. This would ensure that water provided to those two tribes reached other Native American tribes instead of rich municipalities.

*The AWSA should not Limit Future Water Settlements to 67,300 Acre-feet*

The limit of 67,300 acre-feet of CAP allocations to settle future Indian water settlements is too small to meet the water needs of the remaining Indian tribes in Arizona. The AWSA itself allocated approximately twice that much to resolve just two tribal water agreements.<sup>115</sup> With several remaining Indian tribes vying to settle their water rights, it is doubtful that the 67,300 allocation will provide all these tribes with sufficient water.

The inability of AWSA's 67,300 limit to meet future Indian water needs is especially true as the Navajo Nation, the largest Indian reservation in the United States, has yet to reach a settlement in Arizona regarding their water rights.<sup>116</sup> In 2003, the Navajo Nation filed a lawsuit to “quantify its reserved water rights to the Colorado River in Arizona.”<sup>117</sup> This pending water agreement is a “significant claim...to be reckoned with,” as New Mexico just settled a water claim with the Navajo Nation for 600,000 Acre-feet per year and over 800 million in federal funds.<sup>118</sup> “This leaves Arizona with possibly fewer options, considering the Navajo can argue that any settlement in Arizona must at least be in the ballpark of the New Mexico deal.”<sup>119</sup>

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115 *Id.* 130,200 Acre-Feet allocated to the Gila River and Tohono O'odham tribes.

116 Jeff Candrian, *Building with Blinders on: How Policymakers Ignored Indian Water Rights to the Colorado, Setting the Stage for the Navajo Claim*. 20 *Colo. J. Int'l. Envtl. L. & Pol'y.* 159. (Winter 2011).

117 *Id.*, at 182.

118 *Id.*

119 *Id.*, at 183.

## **VI. Conclusion: Does the 2004 AWSA Threaten Tribal Sovereignty?**

Congress needs to revise the 2004 AWSA in order to fairly provide for future Indian water agreements. If the water right of any one of Arizona's indigenous tribes are abridged, that tribe's ability to remain tied to the land and reservation will be severely affected. In a time when future access to water is in doubt, Arizona and the federal government should atone for past wrongs by creating a more comprehensive and fair water settlement agreement. If not, perhaps a new American Indian Movement will start protesting, as they did on Alcatraz 40 years ago.