

ARIZONA TRIBAL WATER RIGHTS NEGOTIATIONS



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Arizona Indian Tribes

- There are 22 Federally recognized Indian tribes in Arizona (6th highest among all states).
- The total population of all Indian Tribes in Arizona (as of 2010) is 234,891 (3rd highest among all states).
- The total area of all Indian reservations in Arizona is approximately 20 million acres (second only to Alaska).

Arizona Indian Tribes

- Reservation size and number of tribal members per reservation in Arizona range from:
 - 85 acres and a population of 120 for the Tonto Apache Tribe.
 - 8,119.2 sq. miles and a population of 101,835 for the Navajo Nation in Northeastern Arizona.

Arizona Indian Tribes

- Arizona ranks first among all states in the percentage of tribal land in the state – 27.7%. Alaska is the second highest at 10.7%.
- A total of 69% of the land in Arizona is a combination of federal and tribal land.

Arizona Indian Tribes



Indian Water Rights

- *Winters v. United States* (1908) - U.S. Supreme Court held:
 - When the federal government set aside land for an Indian reservation, it also impliedly reserved sufficient water to fulfill the purposes of the reservation (“reserved water right”).
 - The priority date of an Indian tribe’s reserved water right is the date of the reservation’s establishment, regardless of when the tribe first begins using the water.

Quantification of Indian Water Rights

- *Arizona v. California* (1963) - U.S. Supreme Court held that the only feasible and fair way by which the reserved water rights of the Indian reservations adjacent to the Lower Colorado River could be measured was by the amount of water necessary to irrigate all of the practicably irrigable acreage (PIA) on the reservations.

Quantification of Indian Water Rights

- Arizona Supreme Court (General Stream Adjudications):
 - *Gila V* (2001) – PIA is not the exclusive quantification measure for determining water rights on Indian lands.
 - A tribal reservation must be allocated water necessary to achieve its purpose as a permanent homeland, tailored to the reservations minimal needs.
 - Determining the amount of water necessary to accomplish a reservation's purpose is a fact-intensive inquiry that must be made on a reservation-by-reservation basis.

Quantification of Indian Water Rights

- *Gila V* (2001) (Cont'd) – A trial court should consider at least the following factors in quantifying a tribe's water rights:
 - The tribe's culture ("Water uses that have particular cultural significance should be respected, where possible.").
 - The tribal land's geography, topography, and natural resources, including groundwater availability.
 - The tribe's economic base (e.g., physical infrastructure, human resources, including the present and potential employment base, technology, raw materials, financial resources, and capital).
 - Past water use on the tribe's reservation.
 - The tribe's present and projected future population.

Indian Water Rights – Groundwater

- Arizona Supreme Court (General Stream Adjudications):
 - *Gila III* (1999) - The federal reserved water rights doctrine applies not only to surface water but to groundwater.
 - A reserved right to groundwater may only be found where other waters are inadequate to accomplish the purpose of a reservation.
 - Once a federal reservation establishes a reserved right to groundwater, it may invoke federal law to protect its groundwater from subsequent diversion by holders of state law water rights.

Resolving Indian Water Rights Claims

- Indian water rights claims create significant uncertainty for other water users in the state because of:
 - The early priority dates for Indian water rights (date of establishment of reservations).
 - Potentially large volumes of water associated with Indian water rights.

Resolving Indian Water Rights Claims – Litigation or Settlement

- There are two ways to resolve Indian Water rights claims – litigation or settlement.
- Settlement is preferred for both the tribes and state water users because:
 - Litigation is time consuming and expensive.
 - Litigation is risky.
 - For tribes, litigation may result in an award of water, but no infrastructure to divert and use the water. Congress usually appropriates money for infrastructure in a settlement.

Arizona Tribes With Water Rights Through Litigation

- In *Arizona v. California* (1963), the U.S. Supreme Court awarded the following volumes of mainstem Colorado River water to the following Arizona tribes:
 - Cocopah Tribe – 7,681 AF (1917 priority date)
 - Colorado River Indian Tribes – 662,402 AF (1865-1874)
 - Fort Mojave Indian Tribe – 103,535 AF (1890-1911)
 - Fort Yuma (Quechan) Indian Tribe – 6,350 AF (1884)
- **Total amount awarded** – 779,968 AF (27% of Arizona's 2.8 million AF share of the Colorado River)

Arizona Tribes With Water Rights Through Settlement

- Nine Arizona tribes have water rights through a Congressionally approved settlement:
 - Ak Chin Indian Community (1984)
 - Tohono O'odham Nation (partial settlement) (1982/2004)
 - Salt River-Pima Maricopa Indian Community (1988)
 - Fort McDowell Yavapai Nation (1990)
 - San Carlos Apache Tribe (partial settlement) (1992)
 - Yavapai-Prescott Indian Tribe (1994)
 - Zuni Indian Tribe (2003)
 - Gila River Indian Community (2004)
 - White Mountain Apache Tribe (2010)

Common Elements of Tribal Water Rights Settlements

- Congressional approval (required for all settlements)
- An allocation of Colorado River water – in most cases Central Arizona Project (CAP) water.
- The right to lease the CAP water to non-Indian users.
- The right to a volume of groundwater and surface water on the reservation.
- The construction of infrastructure to withdraw or divert the water and deliver it to locations on the reservation.
- Creation of a protection zone adjacent to the reservation where pumping by others is restricted (two settlements).

Arizona Tribes With Outstanding Water Rights Claims

- Eleven Arizona Tribes have outstanding water rights claims:
 - Havasupai Tribe
 - Hualapai Tribe
 - Hopi Tribe
 - Kaibab Paiute Tribe
 - Navajo Nation
 - Pasqua Yaqui Tribe
 - San Carlos Tribe (claims to Gila River)
 - San Juan Southern Paiute Tribe
 - Tohono O'odham Nation (claims in central Arizona)
 - Tonto Apache Tribe
 - Yavapai Apache Nation

Main Issues for Settling Claims

- Quantity of water appropriate to settle tribe's claims
 - Water budget for projected domestic, commercial, municipal and industrial demands of tribal members
- Water supplies available for settlement (CAP water, groundwater, in-state surface water, effluent)
- Money for infrastructure to withdraw and deliver water
- Other issues:
 - Prohibition on tribe bringing additional lands into trust without Congressional approval
 - Right to market water supplies
 - Protection of groundwater supplies from other pumpers

Water Supplies for Future Tribal Settlements

- Groundwater and surface water on or near the reservation
 - Some tribes have large amounts of groundwater or in-state surface water supplies on or near their reservation but lack the infrastructure to access and deliver it.
 - Other tribes have little groundwater or in-state surface water supplies.

Water Supplies for Future Tribal Settlements

- CAP water
 - 2004 Arizona Water Settlements Act (Public Law 108-451) set aside 197,500 AF of agricultural priority CAP water for future tribal settlements in Arizona.
 - 102,000 AF used for Gila River Indian Community settlement.
 - 28,200 AF used for Tohono O'odham Nation settlement.
 - 23,782 AF used for White Mountain Apache Tribe settlement.
 - **43,518 AF** remain for future settlements.

Water Supplies for Future Tribal Settlements

- CAP water (cont'd)
 - The Ag priority CAP water is lower priority than municipal and industrial CAP water.
 - 2004 Arizona Water Settlements Act requires State and Federal government to “firm” a portion of the Ag priority water to M&I priority.
- Other water supplies for future settlements - ????

Money for Future Tribal Settlements

- Money for water supply infrastructure and OM&R costs comes primarily from appropriations by Congress.
- In past settlements, the State of Arizona has contributed a small amount toward those costs (\$2-3 million).
- 2004 Arizona Water Settlements Act created sub-account in the Lower Colorado River Basin Development Fund.
 - The account is funded with monies derived from sale of power and energy in Arizona and from payments made by the Central Arizona Water Conservation District for repayment of CAP canal.
 - Monies in the account may be used to pay the costs of delivering CAP water to Indian tribes in Arizona and constructing distribution systems to deliver CAP water to Indian tribes.

Money for Future Tribal Settlements

- Obtaining Congressional appropriations for future tribal settlements will be challenging because of:
 - Current economic and political conditions.
 - “Direct” (or mandatory) spending by Congress on tribal settlements generally require offsets from other authorized spending.

Current Status of Tribal Settlement Negotiations in Arizona

- Tribal settlements currently being negotiated:
 - Hualapai Tribe (adjacent to Grand Canyon in northwest AZ).
 - Tonto Apache Tribe (near Payson, AZ in central AZ).
- Tribal settlements previously under negotiations but not currently being negotiated:
 - Navajo Nation
 - Hopi Tribe

Arizona Tribal Water Rights Negotiations

Questions