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# Arizona Supreme Court Designates Reservations as Permanent Homelands and Adopts a Balancing Approach to Quantifying Reserved Rights

In the most recent chapter of the ongoing general adjudication of all water rights on the Gila River system (referred to herein as *Gila V*),<sup>1</sup> the Arizona Supreme Court made two momentous conclusions regarding federal reserved rights. First, the court declared that the purpose of Indian reservations was to provide permanent homelands for tribes displaced by the influx of white settlers onto their ancestral lands.<sup>2</sup> Second, the court refused to adopt practically irrigable acreage (PIA) as the exclusive standard for quantifying federal reserved rights, opting instead for an approach that balances a number of different factors as they relate to each individual tribe.<sup>3</sup> Although this decision is consistent with the court's express desire to infuse more up-to-date influences into the often anachronistic field of water law,<sup>4</sup> it failed to establish a meaningful standard by which the trial court can equitably determine the full extent of reserved rights afforded Indian tribes.

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1. On December 11, 1990, the Arizona Supreme Court granted interlocutory review of six issues decided by the trial court in the Gila River general stream adjudication. *In re the Gen. Adjudication of All Rights to Use Water in the Gila River Sys. and Source*, Nos. WC-90-0001-IR & WC-79-0001 (Ariz. Dec. 11, 1990) (orders concerning petitions for interlocutory review), available at <http://www.supreme.state.az.us/wm/InterlocutoryAppeals.htm>. *Gila V*, the decision reviewed in this note, answers issue 3: "What is the appropriate standard to be applied in determining the amount of water reserved for federal lands?" *In re the Gen. Adjudication of All Rights to Use Water in the Gila River Sys. and Source*, 35 P.3d 68, 71 (Ariz. 2001) [*Gila V*].

2. *Gila V*, 35 P.3d at 74 (Ariz. 2001).

3. *Id.* at 79.

4. See *id.* at 78-79; *In re the Gen. Adjudication of All Rights to Use Water in the Gila River Sys. and Source*, 989 P.2d 739 (Ariz. 1999) (*Gila III*), cert. denied, 530 U.S. 1250 (2000) (refusing to differentiate between surface and groundwater when identifying waters to be protected by the reserved rights doctrine, despite Arizona's common law rules that have treated ground and surface water as separate systems).

The reserved rights concept, known as the *Winters* doctrine for the Supreme Court decision that established it, dictates that in setting aside federal Indian reservations, the United States impliedly reserved sufficient water to fulfill the purposes of the reservation.<sup>5</sup> Federal reserved rights differ from those acquired under Arizona prior appropriation law in that they vest on the date a reservation was created—not when the water was first put to beneficial use—and cannot be lost through non-use.<sup>6</sup> Importantly, the measure of the right is limited to appurtenant water unappropriated at the time the reservation was created “to the extent needed to accomplish the purpose of the reservation.”<sup>7</sup>

In *Gila V*, the Arizona Supreme Court sought to clarify the purposes of Indian reservations in the Gila River watershed and enunciate the mechanism by which courts could quantify the water necessary to satisfy those purposes. Since most Indian reservations were created with the intention that tribes would develop into agrarian societies, courts have historically adopted what is known as the practically irrigable acreage (PIA) standard to measure reserved rights.<sup>8</sup> PIA consists of “those acres susceptible to sustained irrigation at reasonable costs.”<sup>9</sup> To secure reserved water rights using the PIA framework, tribes must show that crops can be grown on their land and that irrigating such land is economically feasible.<sup>10</sup> Courts then determine how much water is necessary to conduct agricultural operations in order to define the exact water right conferred when the reservation was created. Despite general acceptance of this standard,<sup>11</sup> the Arizona Supreme Court refused to adopt it exclusively, finding that PIA implicitly limits an Indian reservation’s purpose to agriculture, thereby denying the “Indian peoples . . . the same style of evolution as other people [and] the benefits of modern civilization.”<sup>12</sup>

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5. *Winters v. United States*, 207 U.S. 564 (1908).

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

7. *Id.*

8. *See Arizona v. California*, 373 U.S. 546, 600 (1963) (*Arizona I*); *Colville Confederated Tribes v. Walton*, 647 F.2d 42, 47-48 (9th Cir. 1981); *In re the Gen. Adjudication of all Rights to Use Water in the Big Horn River Sys.*, 753 P.2d 76, 100-01 (Wyo. 1988) (*Big Horn I*).

9. *Big Horn I*, 753 P.2d at 101.

10. *Id.*

11. *See id.*

12. *In re the Gen. Adjudication of All Rights to Use Water in the Gila River Sys. and Source*, 35 P.3d 68, 76 (Ariz. 2001) (*Gila V*) (quoting *Big Horn I*, 753 P.2d at 119 (Thomas, J., dissenting)).

The court's disinclination towards adopting the PIA standard as the sole means of quantifying reserved rights derives from its vision of reservations as permanent homelands in which Indian society can maximize economic self-sufficiency and tribal self-determination.<sup>13</sup> Noting that the "purpose of a federal reservation of land defines the scope and nature of impliedly reserved water rights,"<sup>14</sup> the court dismissed the historical notion that reservations were created solely to achieve agricultural objectives. Rather, the court relied on language from *Winters* that identified Indian reservations as places that provide a "permanent home and abiding place."<sup>15</sup> This conclusion jettisoned the arguments of state litigants, which urged that the trial court scrutinize the documents creating each reservation to glean its individual purpose. The court opted instead for a single broad purpose that might support multiple water uses by a reservation.

The court determined that an examination of historical documents would be counterproductive for a number of reasons. First, many reservations were pieced together over time, creating "an arbitrary patchwork of water rights [which] would be unworkable and inconsistent with the concept of a permanent, unified homeland."<sup>16</sup> In addition, since congressional intent regarding the purposes of Indian reservations must be implied, the court stressed that history is of limited value for determining reserved rights.<sup>17</sup> The court emphasized, moreover, that since courts should construe Indian treaties as the Indians would have understood them, the focus on congressional motives rather than tribal intent is off the mark.<sup>18</sup> Finally, the court noted that historical documents often fail to identify the true reasons underlying the creation of Indian reservations—that is, to subordinate tribes and make way for white settlement.<sup>19</sup>

In addition to rejecting an historical analysis of a reservation's purpose, the court likewise refused to adopt the primary-secondary purpose test espoused in *United States v. New Mexico*.<sup>20</sup> Recognizing significant differences between Indian

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13. See *id.* at 119.

14. *Id.* at 73 (quoting *United States v. Adair*, 723 F.2d 1394, 1419 (9th Cir. 1983)).

15. *Id.* at 74 (quoting *Winters*, 207 U.S. at 565).

16. *Id.* at 74.

17. *Id.* at 75.

18. *Id.*

19. *Id.*

20. 438 U.S. 696, 715 (1978) (declining to find a reserved right for recreation, aesthetics, wildlife preservation, or cattle grazing in a national forest because these

and non-Indian federal reservations, the court found the primary-secondary purpose test to be inappropriate for the trustee relationship between the United States and Indian tribes.<sup>21</sup> The court further distinguished *Gila V* from *New Mexico* by noting that even if the test did apply, "tribes would be entitled to the full measure of their reserved rights because water use necessary to the establishment of a permanent homeland is a primary, not a secondary, purpose."<sup>22</sup>

Once the court established that reservations were created in order to establish permanent homelands, it was justified in refusing the exclusive use of the PIA standard to measure reserved rights. The justices believed that the PIA standard implicitly locks tribes into maintaining inefficient agricultural economies, thereby precluding economic diversification.<sup>23</sup> In addition, across-the-board application of PIA, the court opined, is potentially inequitable, favoring those tribes that reside in flat alluvial plains rich in arable land at the expense of reservations in mountainous regions.<sup>24</sup> Finally, the court concluded that the PIA standard could result in tribes' receiving water in excess of their minimal needs, the ceiling on reserved rights articulated in Supreme Court jurisprudence.<sup>25</sup>

In lieu of the PIA standard, the court recommended a reservation-by-reservation approach to quantifying reserved rights that balances a number of equally relevant factors. These factors may include: a tribe's historical water use, tribal culture, geography, topography and natural resources (including groundwater availability), current economic base, and population.<sup>26</sup> The court considered this multi-faceted approach to be most fitting for quantifying the water necessary to achieve the homeland objective.<sup>27</sup> To calculate an actual number, the court stressed, "The most important thing is that the lower court should have before it actual and proposed uses, accompanied by the parties' recommendations regarding feasibility and the

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were secondary purposes of national forests while the primary purposes of a national forest, as delineated by the Organic Administration Act of 1897, were to "secur[e] favorable conditions of water flows, and to furnish a continuous supply of timber"). *Id.* at 706 (quoting 16 U.S.C. § 475).

21. *Gila V*, 35 P.3d at 77.

22. *Id.*

23. *Id.* at 76.

24. *Id.* at 78.

25. *Id.*; see also *Cappaert v. United States*, 426 U.S. 128, 141 (1976).

26. *Gila V*, 25 P.3d at 79-80.

27. *Id.* at 79.

amount of water necessary to accomplish the homeland purpose."<sup>28</sup>

While assessing a tribe's present resources is certainly helpful in fulfilling this goal, focusing on past use rather than the potential for future economic growth critically limits tribal development. In incorrectly assuming that a tribe's "historic use of water may indicate how a tribe has valued it,"<sup>29</sup> the court ignored the dearth of government investment in water projects that might have benefited reservations. Only a small fraction of federal subsidies for western water projects ever reached reservations. In fact, supposed Indian irrigation projects were often built to benefit non-Indian successors to allottees.<sup>30</sup> Under the court's proposal, tribes will be penalized for historical biases that promoted white settlement while subjugating tribal rights and interests.

Although the court should be commended in its efforts to square the quantification standard with the homeland purpose it delineated, it has attempted to align the legal regime with the modern economic truths facing tribes at the expense of employable jurisprudence and based on inaccurate assumptions. The court erroneously assumed that quantification under PIA necessitated development of water resources solely for agriculture rather than other uses that could sustain a permanent homeland. There is nothing inherent in PIA doctrine that requires the utilization of reserved water rights solely for agricultural purposes. Rather, even if the reserved right is quantified using PIA, tribes should be free to use the water in whatever manner they choose, including industrial development or water export. Although it is seemingly irrational to use the PIA

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28. *Id.*

29. *Id.* at 80.

30. Monique C. Shay, Comment, *Promises of a Viable Homeland, Reality of Selective Reclamation: A Study of the Relationship Between the Winters Doctrine and Federal Water Development in the Western United States*, 19 *ECOLOGY L.Q.* 547, 557-59 (1992). For example, between 1960 and 1978, federal investment in Bureau of Indian Affairs water projects was 1.7% of investment in Bureau of Reclamation projects. See *id.* at 558. For data comparing investment in Indian and non-Indian water projects, see *id.* Indian allottees who gained title to land as a result of the General Allotment Act of 1877 (Act of Feb. 8, 1877, ch. 119, 24 Stat. 388) often subsequently sold their interests to non-Indians, thus creating non-Indian in-holdings within reservation boundaries. See *id.* at 556. Justice Brennan, in a draft dissent that was never published in *Wyoming v. United States*, emphasized that a sensitivity analysis for quantifying reserved rights proposed by the majority would punish Indians for the lack of government investment in water projects for them. See Andrew Mergen & Sylvia Liu, *A Mismatched Sensitivity: The Draft Opinions in Wyoming v. United States*, 68 *U. COLO. L. REV.* 683, 708 (1997).

standard for quantifying rights that may never be used for agriculture and PIA may disfavor tribes with little arable land, overall, simply by being readily applicable by a trial court, it is beneficial to tribal interests. Without the PIA standard, the trial court lacks meaningful guidelines for quantifying the reserved rights of tribes involved in the Gila River adjudication.

Moreover, the Arizona Supreme Court decision infuses additional uncertainty for tribes regarding the extent to which historical biases will impact the final determination of their reserved rights. Despite recognizing past prejudice against Indian interests, the court facilitated continued discrimination against tribes by allowing historical water consumption and a tribe's existing economic base to dictate how much water a tribe would receive under its reserved right. Given the trial court's significant discretion in the balancing approach, it remains unclear how much past favoritism towards state rights holders will play a role in the present adjudication.

Ultimately, the Arizona Supreme Court laid down a decision that both helps and hinders Gila River tribes. By broadly defining the purpose of reservations as permanent homelands, the court expanded the variety of water uses that will be available to reservations in the Gila River watershed. The court aptly discarded the necessity for a historical analysis to determine the individual purpose of each reservation. Instead, tribes will be free to engage in water-consumptive enterprises consistent with the notion of a permanent homeland.

At the same time, while the homeland determination is seemingly advantageous to tribal interests, the balancing standard adopted by the court to quantify rights that meet the needs of a homeland may ultimately leave reservations with little actual water for development. The factors the court suggested for consideration weigh heavily against tribes because they focus on past water use and present economic vitality, both of which are a consequence of historical biases against Native Americans. While trying to align the legal regime with modern practicalities, the court may have consigned tribes to a limited level of economic development. In addition, the uncertainty inherent in a balancing approach that relies on trial court discretion markedly reduces the leverage of those tribes that had significant claims under the PIA standard. Ultimately, it is unclear how this shift in bargaining power will play out in the Gila River adjudication. The court's decision urged the parties to "work together in a spirit of

cooperation.”<sup>31</sup> Perhaps the shake up caused by this decision will be the necessary catalyst for the parties to reach a negotiated settlement.

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31. *Gila V*, 35 P.3d at 81.

