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# DEATH OF A MONSTER: LAWS MAY FINALLY KILL GILA RIVER ADJUDICATION

Lindsay Murphy\*

*Simply put, there is not enough water to go around.*<sup>1</sup>

The Gila River was once one of the greatest, most important rivers in the American Southwest. Combined with its tributaries, the Gila helped to drain an area larger than the nation of France.<sup>2</sup> Today, the Gila is only slightly more than a decrepit, million-year-old stream, dragging itself through the south of Arizona before finally paying tribute to the mighty Colorado just east of Yuma.<sup>3</sup> Its annual water production is less than one-twenty-fifth of the annual water production of the Mississippi River, but even a small amount of water is priceless in the desert.<sup>4</sup> The litigation regarding the Colorado River is legendary and noteworthy.<sup>5</sup> However, the tiny Gila has had its own protracted litigation, as the state, towns, Indian reservations, and the Federal Government feud over rights to Gila's precious water in the arid desert. Even though the Gila partially disappears in some years due to over usage and drought, the water it provides creates costly, high-stakes litigation beginning in the 1970s.<sup>6</sup>

The key player in this feud is the Gila River Indian Community<sup>7</sup> (the Community), which, if the Arizona Water Settlement Act<sup>8</sup> survives committee and receives an affirmative vote, will finally settle twenty years of litigation regarding rights to the Gila River. Contention among the Community and farmers, cities, and mining companies led this litigation.<sup>9</sup>

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1. *In re* The Gen. Adjudication of All Rights to Use Water in the Gila River Sys. & Source, 857 P.2d 1236, 1247 (Ariz. 1993) (*Gila River II*).

2. GREGORY MCNAMEE, *GILA: THE LIFE AND DEATH OF AN AMERICAN RIVER* 6 (1994).

3. *Id.* at 7.

4. *Id.* at 19.

5. *See, e.g.*, Heather R. Brinton, *Arizona v. California: Riding the Wave of Federal Riparianism*, 13 *VILL. ENVTL. L.J.* 59 (2002); *Arizona v. California*, 373 U.S. 546 (1963); *Arizona v. California*, 460 U.S. 605 (1983).

6. MCNAMEE, *supra* note 2, at 7.

7. The GRIC includes members of the Maricopa and Pima Tribes. Arizona Water Settlements Act, S. 437, 108th Cong., § 2.15 (2003).

8. This act was also introduced in the House as the Arizona Water Settlements Act, H.R. 885, 108th Cong. (2003).

9. Robert Gehrke, Associated Press, *Legislation Would Settle Decades of Disputes Over*

Senators Jon Kyl and John McCain introduced the Arizona Water Settlements Act to authorize the implementation of the Gila River Indian Community Water Rights Settlement (Settlement).<sup>10</sup> The Settlement will allow the Community to lease its water gained from the Central Arizona Project (CAP) to Arizona towns.<sup>11</sup> The CAP is a federally funded reclamation project that creates a 336-mile canal to allow the capture and storage of millions of gallons of water in Arizona; however, much of this water is inaccessible without adequate pipelines.<sup>12</sup> The water stored already belongs, in part, to the Community; it was simply unable to access and store this water prior to the CAP.<sup>13</sup>

The Settlement also provides funds for the Community to build a water pipeline connecting it to CAP sources — something it was unable to do in the past.<sup>14</sup> The Community will gain nearly \$200 million from the Federal government in exchange for the loss of approximately three-quarters of its current water allotment.<sup>15</sup> Despite this loss, the Community will still retain access to approximately 210 billion gallons of water annually, which is enough to support the basic needs of nearly two million people.<sup>16</sup>

The Gila River adjudication settlement will aid local towns in budget planning because when the Community leases water, it must be delivered to prevent breach of the lease contract.<sup>17</sup> As a result, town planners will no longer be forced to rely solely on local groundwater because Gila water is a

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Arizona Water (Sept. 24, 2002).

10. Arizona Water Settlements Act tit. II, § 202(b)(1).

11. *Id.* tit. II, § 205(a)(2).

12. Daniel B. Wood, *Tribes May Shift Delicate Water Balance in West*, CHRISTIAN SCI. MONITOR, paras. 9, 11, Oct. 26, 1999, available at 1999 WL 5383265.

13. Arizona Water Settlements Act tit. I, § 104(a)(1)(A). The Community will be reallocated 102,000 acre-feet of CAP water. *Id.* § 104(a)(1)(A)(i); see also Arizona Water Settlements Act tit. III, § 303(19) (defining delivery and distribution system).

14. *Id.* tit. II, § 208. The Gila River Indian Community Water OM&R Trust Fund will allocate \$53 million to the Community for CAP water maintenance and delivery costs. *Id.* § 208(b).

15. Tim Vanderpool, *In Arizona, a Watershed Deal on Water*, CHRISTIAN SCI. MONITOR, Aug. 16, 2002, para. 18, available at 2002 WL 6427462.

16. *Id.* para. 14. While this appears to be a large amount of water, it would be negligible in moister climates. The Gila carries about three to four million acre-feet annually, while the Colorado River carries between ten and twelve million acre-feet annually, and the Mississippi carries 100 to 120 million acre-feet annually. MCNAMEE, *supra* note 2, at 19. Two-hundred-and-ten billion gallons of water is approximately 482,000 acre-feet. An acre-foot is generally considered to be enough water to support a family of four for one year. See *infra* note 87.

17. RESTATEMENT (SECOND) OF THE LAW OF CONTRACTS § 1 (1981).

certainty.<sup>18</sup> When a town relies on its own wells for supply, drought and the rights of towns upstream necessarily make that reliance a gamble. The Settlement will give certainty to Arizona town planners, but as drought strikes western states with increasing frequency and duration, the relinquishment of Community claims against the State, the Federal Government, and other water projects may endanger the Community's future subsistence.<sup>19</sup> The Settlement requires that all current and future litigation regarding the Gila River be extinguished and waived.<sup>20</sup>

The Community's financial security, combined with the security accorded Arizona towns, must be carefully weighed against the potential destruction of the Community, should current drought conditions continue or worsen. The money of today, combined with a waiver of future litigation, may lead the Gila River Community into an even drier state of affairs than it is in today.

### *History of American Indian Water Rights*

In the Western United States, water is a rare commodity.<sup>21</sup> This led to a bifurcated water rights system, combining the doctrine of prior appropriation with the common law doctrine of reasonable or beneficial use.<sup>22</sup> Prior appropriation dominates controls in Arizona, because reasonable use is based on the idea of water percolating through soil onto land—not a common phenomenon in the desert.<sup>23</sup> With prior appropriation, essentially, the earlier landowner can use as much or as little water as he likes. This can lead to drought and pollution of junior appropriators, and feuds between neighbors and states.

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18. Sam Capana, mayor of Scottsdale, Arizona, said the Settlement could allow a fifty percent increase in the population of Scottsdale. Steve Yozwiak, *Geronimo's Descendants Win Battle over Future*, DESERET NEWS (Salt Lake City), Apr. 25, 1999, at A21, available at 1999 WL 15642288.

19. MCNAMEE, *supra* note 2, at 6. Rivers in the American Southwest run a cycle of drought, "failing" every five years or so, on a cycle of more massive, infrequent droughts every twenty to thirty years. *Id.*

20. Arizona Water Settlements Act tit. II, §§ 206-207.

21. Diane K. Brownlee, *The Public Vote in the Game of Water Wars: An Unquenchable Thirst to Define and Implement "Public Values" in Western Water Laws*, 70 UMKC L. REV. 647, 647 (2002).

22. A. Dan Tarlock, *The Future of Prior Appropriation in the New West*, 41 NAT. RESOURCES J. 769, 769 (2001)

23. *In re The Gen. Adjudication of All Rights to Use Water in the Gila River Sys. & Source*, 857 P.2d 1236, 1240 (Ariz. 1993) (*Gila River II*).

Additionally, the scarcity of water in Western states makes a system of prior appropriation economically unattractive. A market theory of water allocation could take the place of prior appropriation to allow economics to determine water possession instead of history.<sup>24</sup> In 1963, *Arizona v. California* became the first case involving Colorado River water rights. In *Arizona v. California*, state prior appropriation gave way to a federal contractual theory of water usage on the Colorado River, wherein Congress decided the fair apportionment of the river.<sup>25</sup>

However, the doctrine of prior appropriation does not generally apply to American Indian water rights. In *Winters v. United States* the Supreme Court created the doctrine of reserved water rights, which states that when the United States creates an Indian reservation, it implicitly reserves the water necessary to sustain the residents of that reservation.<sup>26</sup> *Winters* involved a controversy between the Fort Belknap Indian Reservation and Empire Cattle Company, Matheson Ditch Company, and Cook's Irrigation Company, who wished to dam the Milk River for irrigation.<sup>27</sup> The Milk River was non-navigable, but the reservation and the U.S. used it extensively.<sup>28</sup>

In May 1888, the United States created the Fort Belknap Reservation on an arid patch of land bordered by the Milk River.<sup>29</sup> The U.S. created the reservation as a permanent home for the Gros Ventre and Assiniboing Indian tribes.<sup>30</sup> The defendant companies claimed that when this land was ceded, the Indians present did not retain their rights to the water of the Milk because they did not specifically reserve them in the treaty creating the Reservation.<sup>31</sup> Because these rights were not specifically reserved, the companies claimed they had received the water rights by putting the Milk River water to beneficial use, through irrigation and general land improvements.<sup>32</sup> Water is considered legally appropriated when it is put to beneficial use.<sup>33</sup> The companies also claimed that when Montana Territory became the State of

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24. Tarlock, *supra* note 22, at 775.

25. *Arizona v. California*, 373 U.S. 546, 565 (1963).

26. *Winters v. United States*, 207 U.S. 564, 577 (1908).

27. *Id.* at 568-69.

28. *Id.*

29. *In re The Gen. Adjudication of All Rights to Use Water in the Gila River Sys. & Source*, 35 P.3d 68, 71 (Ariz. 2001) (*Gila River V*).

30. *Winters*, 207 U.S. at 565.

31. *Id.* at 576.

32. *Id.* at 569.

33. *Gila River V*, 35 P.3d at 71.

Montana in 1889, the admission of the State into the Union repealed any possible reservation of water rights by the Fort Belknap Indians.<sup>34</sup>

The Court was not swayed by either argument, stating instead that, “[i]t would be extreme to believe that within a year Congress destroyed the reservation and took from the Indians the consideration of their grant, leaving them a barren waste . . . .”<sup>35</sup> The underlying logic of *Winters* is that the United States would not create a homeland without intending that it be livable. While the Indians did not expressly reserve their rights to the waters, their fiduciary relationship and treaty with the United States government implied that such reservation was present.<sup>36</sup> When an Indian reservation is created, the water necessary to sustain those living on the reservation is implicitly reserved.<sup>37</sup> In *Winters*, the Court determined that water rights vest when the reservation was created, not when the water is put to beneficial use.<sup>38</sup> The nature of a federally reserved water right is not dependant on beneficial usage, and the right preempts later state claims regardless of the usage.<sup>39</sup>

The result of the *Winters* rule of reserved water rights is that American Indian Reservations maintain rights to water that are superior to the rights of others who would otherwise have a legitimate claim to the water. These water rights are “preemptive,” and remain whether the water is used or not.<sup>40</sup> As sovereign nations prior to the establishment of the United States, Indian tribes have water claims senior to claims of any other landowner.

The *Winters* doctrine is not unlimited. While tribes retain greater water rights, the water reserved is only that amount of water necessary to fulfill the purpose of the Indian reservation. The loophole in this limitation is that any method utilized in arriving at this amount must satisfy the needs of the reservation as a homeland today, as well as in the future.<sup>41</sup> This is why the Gila River Indian Community has such a lucrative opportunity present in the prospective Act. This opportunity is the result of years of strife and litigation, but may lead to one of the most profitable deals any American Indian community has made through the sale of its natural resources.

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34. *Winters*, 207 U.S. at 577.

35. *Id.*

36. *Id.*

37. *Id.*

38. *Id.*

39. *In re The Gen. Adjudication of All Rights to Use Water in the Gila River Sys. & Source*, 35 P.3d 68, 71 (Ariz. 2001) (*Gila River V*).

40. *Id.* at 72.

41. *Winters*, 207 U.S. at 77.

### *History of Gila River Litigation*

The first case involving the adjudication of the Gila River system was brought in 1974 to the Arizona State Land Department, as a petition by the Salt River Valley Water Users Association to determine rights to the Salt, Verde, and San Pedro Rivers; the case was later expanded to include the Gila, Santa Cruz, and Agua Fria Rivers.<sup>42</sup> The cases were consolidated not because of judicial efficiency or a common question, but because the nature of water rights in the desert is such every drop given affects another party's rights.<sup>43</sup> This humble petition led to five major decisions dealing with various issues of the water rights to the Gila River. These decisions have not solidly tackled the distribution of the water itself; they have generally covered issues like jurisdiction and semantics. Because the ultimate distribution will not be effected judicially, the legislatures of Arizona and the United States must determine the substantive issues of allocation for the parties.

#### *Gila River I*

In 1992, the Supreme Court of Arizona decided *Gila River I*, which involved a question of civil procedure.<sup>44</sup> As a result of the adjudication that began in 1974, the Arizona State Land Department had to notify 849,000 potential claimants about their stake in upcoming water adjudication.<sup>45</sup> The Supreme Court held the methods of service and summons comported with the Due Process Clauses of both the Fourteenth Amendment to the United States Constitution and the Arizona Constitution.<sup>46</sup>

#### *Gila River II*

*Gila River II* dealt with more substantive issues, asking whether percolating underground water was part of a stream, which would make it appropriable.<sup>47</sup> The trial court held that such water was part of the stream's "subflow" and therefore, pumping of *any* of this subflow was a diversion of other's water rights.<sup>48</sup> When water is pumped from a well, that well creates pressure within the aquifer, which can take water from nearby streams and rivers and

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42. *In re* Rights to Use of Gila River, 830 P.2d 442, 444 (Ariz. 1992) (*Gila River I*).

43. *Id.* at 445 n.1.

44. *Id.* at 444.

45. *Id.* at 446.

46. *Id.* at 453.

47. *In re* The Gen. Adjudication of All Rights to Use Water in the Gila River Sys. & Source, 857 P.2d 1236, 1238 (Ariz. 1993) (*Gila River II*).

48. *Id.* at 1239 (emphasis added).

significantly decrease water flow.<sup>49</sup> This is what is known as the “losing stream” phenomenon.<sup>50</sup> This diversion clearly shows why groundwater needs as much consideration as surface water when deciding water rights. One’s right to groundwater may infringe on another’s right to surface water, if not carefully managed.

The Arizona Supreme Court disagreed with the diversion argument, saying that in order for water to be considered subflow, that water had to be “more closely related to the stream than the surrounding alluvium . . . .”<sup>51</sup> The subflow are “those waters which slowly find their way through the . . . bed of the stream, or the lands under or immediately adjacent to the stream, and are themselves a part of the surface stream.”<sup>52</sup> As a part of the stream, the court decided that such subflow was appropriable, but this did not mean that *all underground water* is appropriable.<sup>53</sup>

### *Gila River III*

In *Gila River III*, the Supreme Court of Arizona also dealt with groundwater and surface water, but it was the first case to specifically address the *Winters* doctrine and reserved water rights on Indian reservations.<sup>54</sup> *Gila River III* asked whether reserved water rights extend to underground water that is *not* subject to prior appropriation in Arizona.<sup>55</sup> The Court decided that while the extension of reserved water rights to groundwater was not explicit, the reservation of water itself was not source-specific, but need-specific.<sup>56</sup> Therefore, the reservation of water rights applies to all the waters *necessary* to accomplish the needs of the reservation.<sup>57</sup>

Additionally, the reserved right to groundwater is not as broad as the right to surface water. The Court stated that “[a] reserved right to groundwater may only be found where other waters are inadequate to accomplish the purpose of a reservation.”<sup>58</sup> According to the court, the “purpose” and “need” must exist presently, as well as in the future, in order to protect the rights of tribes

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49. *In re The Gen. Adjudication of All Rights to Use Water in the Gila River Sys. and Source*, 989 P.2d 739, 743-44 (Ariz. 1999) (*Gila River III*).

50. *United States v. Gila Valley Irrigation Dist.*, 920 F. Supp. 1444, 1451 (D. Ariz. 1996).

51. *Gila River II*, 857 P.2d at 1245.

52. *Id.*

53. *Id.* at 1241 (emphasis added).

54. *Gila River III*, 989 P.2d at 741.

55. *Id.* (emphasis added).

56. *Id.* at 747.

57. *Id.* (emphasis added).

58. *Id.* at 748.



that lack the technology and finances to take full advantage of the current stores of an aquifer.<sup>59</sup>

To protect these needs the Court reiterated that the only groundwater that may be afforded protection as appropriated are those waters designated as “subflow” in *Gila River II*.<sup>60</sup> However, once the groundwater is determined necessary, and becomes reserved, federal law may be applied to protect that groundwater from diversion.<sup>61</sup> The preemptive nature of reserved water rights gives power to those with such rights to sell and lease excess water, rather than allowing it to go to others downstream.<sup>62</sup>

#### *Gila River IV*

*Gila River IV* again dealt with the issue of “subflow,” in an attempt to determine whether the definition given in *Gila River II* was acceptable.<sup>63</sup> The Arizona Supreme Court decided that if drawing from the subsurface water tends to appreciably and directly deplete the flow of the surface water, it is subflow; however, if it does not deplete the surface water, the water is “percolating” and not appropriable.<sup>64</sup> The Court’s definition of subflow was based on exhaustive research and evidence, including historical comparisons of the rivers of the area, scientific evaluation of the nature of water and physics, and chemical analysis of water and the composition of its impurities.<sup>65</sup>

#### *Gila River V*

*Gila River V* again asked what standard should be applied when determining how much water is reserved for federal lands, as was earlier noted in *Gila River III*. The purpose of a federal reservation of land determines the use of the water on it.<sup>66</sup> However, the question of what exactly was the purpose of Indian Reservations remains. Indian reservations were created to give Native American tribes a permanent homeland and allow them sovereign

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59. *Id.*

60. See discussion *supra* text accompanying notes 47-48.

61. *In re The Gen. Adjudication of All Rights to Use Water in the Gila River Sys. & Source*, 989 P.2d 739, 750 (Ariz. 1999) (*Gila River III*).

62. *In re The Gen. Adjudication of All Rights to Use Water in the Gila River Sys. & Source*, 35 P.3d 68, 72 (Ariz. 2001) (*Gila River V*).

63. *In re The General Adjudication of All Rights to Use Water in the Gila River System & Source*, 9 P.3d 1069 (Ariz. 2000) (*Gila River IV*).

64. *Id.* at 1074.

65. *Id.* at 1076-77.

66. *United States v. Adair*, 723 F.2d 1394, 1419 (9th Cir. 1983).

powers as their own nations.<sup>67</sup> Alternately, reservations were created to allow White settlers to take control of former Indian lands and aid in the assimilation of Indians and destruction of Indian culture.<sup>68</sup>

To determine the purpose of the reservation, the court looked at the current lifestyles of the inhabitants and the evolution of the tribe's economy.<sup>69</sup> It is impossible to determine the purpose of the reservation based on archaic water usage; the agrarian Indian has left the Southwest. Instead, the Court decided that the purpose of the reservation was to serve as a permanent homeland to the tribe.<sup>70</sup> The primary usage of the water is to create a permanent homeland, but one of the issues in *Gila River V* is how water should be allocated when it is used for a secondary purpose on the reservation.<sup>71</sup> The controversy lies in the question of whether the implied reservation of water used for primary purposes is also applicable to water used for secondary purposes.<sup>72</sup> The court decided to concentrate on allocation of primary purpose water because the distinction between primary and secondary usage was not relevant here. The definition of primary usage on Indian Reservations is broad, and always includes water used to establish a homeland.<sup>73</sup> This decision made the actual usage of the water practically irrelevant; thus, the important consideration became the amount of water necessary for a permanent homeland.<sup>74</sup>

To calculate this amount, the trial court in *Gila River V* determined the amount of water necessary to irrigate all the "practically irrigable acreage" (PIA) of the reservation was the tribe's entitlement.<sup>75</sup> The Arizona Supreme Court stated its mistrust of the PIA standard because it forces tribes to remain agrarian despite the risk of crop failure, discriminates against tribes that cannot irrigate due to geographical concerns, and can result in wasted water and other resources.<sup>76</sup> The PIA standard creates an "[i]nequity [that] is unacceptable and inconsistent with the idea of a permanent homeland."<sup>77</sup>

Instead of the PIA, the Court adopted a new standard of allocation on a reservation-by-reservation basis, created through an examination of the tribe's

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67. *Gila River V*, 55 P.3d at 74.

68. *Id.* at 75 n.3.

69. *Id.* at 76.

70. *Id.* at 72, 74.

71. *Id.* at 73.

72. *Id.* at 76.

73. *Id.* at 74, 77.

74. *Id.* at 76.

75. *Id.* at 77.

76. *Id.* at 78-79.

77. *Id.* at 78.

economy, traditions, population, culture, geography, and past water usage.<sup>78</sup> This allocation was made with such scrutiny because it was an allocation not only for the tribe's present, but also its future needs.<sup>79</sup> The reservation acreage may have originally been intended to be used for farming, but this should not be the standard for quantifying the water rights of nations.<sup>80</sup>

### *Other Related Litigation*

While *Gila River I-V* are the main line of cases involving the dispute relating to the Settlement, there have been many cases involving the Gila that are not in the *Gila River* line. In *United States v. Gila Valley Irrigation District*, the United States acted on behalf of the Gila River Indian Community and the San Carlos Apache Tribe in pursuit of their claim that upstream diversions made the water of the Gila River essentially worthless by the time it reached the reservation.<sup>81</sup> The court examined the effects of groundwater pumping (including the "losing stream" phenomenon) on salinity and pollution, and determined that the methods of irrigation and diversion used by upstream parties violated the Apache's senior appropriated right.<sup>82</sup>

The Gila River Indian Community claimed that, as an older reservation, its rights were superior to the upstream Apache and Irrigation District rights. The court disagreed, stating that while the Apache right was senior to the Irrigation District's, the Community had forfeited its right to the water by not using it.<sup>83</sup> Under new Arizona law, the Community could have stored this water if it came from the CAP.<sup>84</sup> This storage ability allows the Community to retain rights over and possession of water it has not used, thus allowing it to sell and lease the water that is not necessary for the living conditions of the reservation.

### *Legislative Action*

In Arizona and at the Federal level, bills have been introduced to help settle the adjudication of the Gila River System and finalize the negotiations for water rights in the Southwest. Arizona recently passed an Indian water rights

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78. *Id.* at 79-80.

79. *Id.*

80. *Id.* at 79.

81. *United States v. Gila Valley Irrigation District*, 920 F. Supp. 1444, 1449 (D. Ariz. 1996).

82. *Id.* at 1451.

83. *Id.* at 1460-61.

84. ARIZ. REV. STAT. ANN. § 45-841.01 (2002).

settlement act, and Senator Jon Kyl of Arizona introduced legislation in the United States Senate to authorize the Gila River Indian Community water rights settlement.<sup>85</sup> This bill is in committee as of this writing.

Arizona's new law requires Indian communities with class action lawsuits that have been pending for five years or more to dismiss those suits with prejudice in exchange for long-term storage of CAP waters.<sup>86</sup> This will allow communities to retain the water they are allotted, up to ten thousand acre-feet, rather than letting it go to parties downstream.<sup>87</sup>

While Arizona's law is not Community-specific, the bill in Congress is. Introduced in the House and Senate on March 25, 2003, the Arizona Water Settlements Act aims to provide for many related things, including the allocation of CAP water, the development of the Lower Colorado River Basin, funding for this allocation and development, and the settlement of the Gila River Indian Community water rights litigation.<sup>88</sup>

This is not the first time the Arizona Water Rights Settlement Act has been introduced in Congress. Senator Jon Kyl of Arizona introduced a similar bill in 1999, but after being read twice and referred to the Committee on Indian Affairs, it never received a vote.<sup>89</sup> Senator John McCain reintroduced the bill in 2002, and it also failed to make it out of committee. Senator Kyl then introduced a bill "[t]o provide for adjustments to the CAP 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," February 25, 2003, and Representative J.D. Hayworth of Arizona also introduced a parallel measure in the House on the same day.<sup>90</sup> The new bills are nearly the same as the 2002 bills, and were referred to the House Committee on Resources' Water and Power

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85. *Id.* Sen. Jon Kyl introduced the bill as the Arizona Water Settlements Act, S. 437, 108th Cong. § 1 (2003). Rep. J.D. Hayworth also introduced the bill in the House as the Arizona Water Settlements Act, H.R. 885, 108th Cong. § 1 (2003).

86. ARIZ. REV. STAT. ANN. § 45-841.01 (2002).

87. *Id.*; MCNAMEE, *supra* note 2, at 19. An acre-foot is the amount of water it would take to cover a square acre with one foot of water, or sustain an average American family of four for one year. This is approximately 345,000 gallons. *Id.*

88. Arizona Water Settlements Act, S. 437, 108th Cong. § 1 (2003). In the House, Representative Hayworth introduced it as the Arizona Water Settlements Act, H.R. 885, 108th Cong. § 1 (2003).

89. Gila River Indian Community-Phelps Dodge Corporation Water Rights Settlement Act of 1999, S. 421, 106th Cong. (1999).

90. S. 437, 108th Cong. (2003); H.R. 885, 108th Cong. (2003).

Subcommittee and the Senate's Committee on Energy and Natural Resources.<sup>91</sup> In his introductory remarks, Senator McCain stated,

This legislation is vitally important to Arizona's future because these settlements will bring greater certainty and stability to Arizona's water supply by completing the allocation of CAP water supplies. . . . The Arizona Water Settlements Act will be a historic accomplishment that will benefit all citizens of Arizona, the tribal communities, and the United States.<sup>92</sup>

This bill has an extensive and frustrating history, fitting its subject matter.<sup>93</sup> In light of controversies over the war in Iraq, judicial appointments, Homeland Defense, and healthcare issues, it is not surprising these bills have not survived their respective committees to become law. However, they must reach the floor eventually, to provide for conclusion of water litigation and certainty in state and federal budget planning.

When Senator McCain first proposed the Settlement, both he and Senator Kyl were minority members of the Senate. Because of the November 2002 election, when Republicans gained majorities in both houses of Congress, it is possible that Senator Kyl's bill will receive more favorable treatment in this or future sessions.<sup>94</sup> This legislation is necessary to improve the quality of life for the Community and citizens of the Southwest, and must be passed affect the lives of thousands of people in the Southwest and end decades of litigation.

### *Potential Results of the Settlement*

The most obvious result from the Settlement is economic. The right to sell water will give the Community a potentially lucrative economic base. "In this field, we not only confer private rights and interests but deal in the very survival of our society and its economy."<sup>95</sup> This right to sell truly does deal with the very survival of the Community because it offers economic self-

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91. S. 437.

92. S. 2707.

93. *Id.* The bill was introduced by Senator McCain in the 107th Congress, where it received no votes.

94. Philip Brasher, Associated Press, *Slim Republic Majority in Congress Means Little Action Likely* (Nov. 10, 2002), available at <http://www.cnn.com/2000/ALLPOLITICS/stories/11/10/election.farmers.ap/> (last visited Sept. 11, 2003).

95. *In re* The Gen. Adjudication of All Rights to Use Water in the Gila River Sys. & Source, 857 P.2d 1236, 1247 (Ariz. 1993) (*Gila River III*).

sufficiency that is rarely accomplished without gaming or hunting and fishing.<sup>96</sup> However, it may be argued that by selling its own natural resources, and foregoing future claims regarding those natural resources, the acceptance of this settlement is not the most prescient economic plan possible.

Given the current state of the Southwest, water is not the most reliable natural resource.<sup>97</sup> According to The National Climatic Data Center, “[d]ry conditions have been persistent [in Arizona], with 16 of the last 17 months averaging drier than normal. Drought impacts have been severe.”<sup>98</sup> Drought decreases supply while demand stays steady or even rises, resulting in exorbitant selling prices for water.<sup>99</sup> This demand must be met though the use of contracted water. The water sold must be delivered, regardless of the condition of the selling reservation. Theoretically, in a severe drought, it is possible for a group to oversell its appropriated water. In this worst-case scenario, the Community will have to breach its contracts for the survival of its people.

The Community need not refrain from selling its water, within reason. After leasing or selling, it should take the funds received and put them back into the community to establish an economic base that is not dependent on the sale of natural resources. In recent tradition, reservations have made money on gaming and the tax advantages of the reservation.<sup>100</sup> Indian Reservation

96. S. 437, 108th Cong. (2003), available at <http://www.thomas.loc.gov> (last visited Sept. 11, 2003).

97. The National Climatic Data Center, <http://www.ncdc.noaa.gov/oa/ncdc.html>, has information on precipitation levels and drought indicators throughout the country. Arizona drought news is available at *NCDC: Climate of 2003 — January — Arizona Drought*, <http://www.ncdc.noaa.gov/oa/climate/research/2003/jan/st002dv00pcp200301.html> (last visited Sept. 15, 2003).

98. *NCDC: Climate of 2003 — January — Arizona Drought*, <http://www.ncdc.noaa.gov/oa/climate/research/2003/jan/st002dv00pcp200301.html> (last visited Sept. 15, 2003).

99. Shaun McKinnon, *Cheap Water Could Become Thing of Past As Supplies Dwindle*, ARIZ. REPUBLIC, Jan. 22, 2003, at A8, available at 2003 WL 4053193.

100. According to Gabriel S. Galanda:

Arizona tribes are aggressively creating and operating new businesses in the areas of real estate development, banking and finance, media, telecommunications, wholesale and retail trade, tourism, and gaming.

Consider these facts:

- Arizona tribes occupy nearly 22 million acres of reservation lands across the state.
- Arizona gaming tribes employ nearly 15,000 Indian and non-Indian and employees. By comparison, Honeywell International employs 15,000 people in Tempe.
- Arizona gaming tribes also contributed more than \$40 million in state and

economics are almost synonymous with casinos and cheap cigarettes. The Community should not have to resort to vice in gambling or prostitution through water sales to create a stable economy. If the Community can invest in the reservation in ways that would lure companies to build plants and stores on the land, it may be able to create an economy that is similar to the economies of successful cities across the country. Unfortunately, the geography and climate of southern Arizona tend to make it less appealing than a more temperate environment, but surely this is a better solution than becoming another ruined tribal casino experiment, or depleting natural resources in a frantic race against Mother Nature.

The Arizona Water Settlements Act provides for methods of leasing water, and it also provides<sup>101</sup> quantitative limits. Unpredictable water levels in the Gila River can lead to a dangerous overselling of water in wetter years.<sup>102</sup> The Act ensures a minimum of 60,648 acre-feet of agricultural water to the relevant tribes during water shortages.<sup>103</sup> This will help prevent overselling and resultant water limitations.

Water restrictions are demoralizing for citizens and dangerous for towns, when parks wilt from a verdant green to a prickly brown, as was evident in Colorado during the summer of 2002.<sup>104</sup> Voluntary and mandatory watering restrictions placed on citizens by their towns led to brown lawns, empty aquifers, vacant pools, and some of the most destructive fires in Colorado history.<sup>105</sup> A dry lawn on the side of a mountain is kindling to a fire that destroys a neighborhood. While last year's drought was monumental, the cool winter weather does not mean that the drought is over. Restrictions could continue through 2003 and beyond.<sup>106</sup>

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local taxes and \$28 million in federal and state payroll taxes.

● Tribal gaming generates \$468 million per year for Arizona, in direct and indirect economic activity.

Gabriel S. Galanda, *Arizona Indian Law: What You Should Know*, ARIZ. ATT'Y, Jan. 2003, at 24, 24; *see also* Okla. Tax Comm'n v. Citizen Band Potawatomie Tribe of Okla., 498 U.S. 505, 513 (1991) (holding that Public Law 280, which grants state criminal jurisdiction over Indian lands, is not sufficient to confer authority on a State to extend its taxation authority over Indians and Indian reservations, in a cigarette taxation case).

101. Arizona Water Settlements Act tit. I, § 105.

102. *See* MCNAMEE, *supra* note 2, at 6.

103. Arizona Water Settlements Act tit. I, § 105.

104. Eric Hubler, *Schoolyard Access May Dry Up: DPS Plans After-Hours Curbs on Sports Fields*, DENVER POST, Jan. 16, 2003, at A1.

105. John J. Sanko, *Governor Turns Up Pressure on Water; Chief Exec Tells Legislators to Lead or Get Out of Way*, ROCKY MOUNTAIN NEWS (Denver), Jan. 17, 2003, at 5A.

106. *Id.* Senator Kyl talks about the fire danger caused by the droughts in his weekly

The Gila River was once a great and powerful river, but today, it is only slightly more than a stream.<sup>107</sup> If the appropriation of so much of its flow to the Community is to be successful, the Community must realize the importance of respect for the river. It cannot be so overburdened by the new allocation that it results in a completely dry riverbed. Such a fate would be contrary to the long-term goals of the Community and the needs of surrounding towns. The settlement places a great amount of responsibility on the Community and its members, and the Community must accept that responsibility with wisdom and foresight. Otherwise, the Gila River may cease to exist.

### *Conclusion*

While the Arizona Water Settlements Act could lead to the destruction of a river and a way of life, it is necessary to settle the litigation and pending claims involving the Gila River. The need for certainty in this arena cannot be underestimated; it is literally a life-or-death situation. This bill can settle a contentious subject, but it can also lead to the stripping of already strained natural resources. It could result in the end of a way of life for an entire community, or it could result in the betterment of that community's standard of living. Despite the potential downfall, perhaps the settlement, should it ever be implemented, will make Mark Twain's famous quote "Whiskey's for drinkin', water's for fightin'" untrue, and the Gila River Indian community will be able to afford Evian.<sup>108</sup>

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column. Sen. Jon Kyl, *The Next Fire Season*, <http://kyl.senate.gov/record.cfm?id=191796> (Mar. 14, 2003).

107. See *supra* notes 2-4, 16.

108. Nicholas Targ, *Water Law on the Public Lands: Facing a Fork in the River*, NAT. RESOURCES & ENV'T, Summer 1997, at 14.



