

## CASE NOTE:

# DEATH KNELL RINGS FOR THE PIA?: *IN RE GENERAL ADJUDICATION OF ALL RIGHTS TO USE WATER IN GILA RIVER SYSTEM AND SOURCE*

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“[I]n the west, whiskey is for drinkin' and water is for fightin.”<sup>1</sup>

### I. INTRODUCTION

At issue in *In re General Adjudication of All Rights to Use Water in Gila River System and Source*<sup>2</sup> (*Gila River V*) is the appropriate standard to be applied in determining the amount of water reserved for federal Indian lands.<sup>3</sup> Although Arizona utilizes the doctrine of prior appropriation to determine state water rights,<sup>4</sup> *Winters v. United States*<sup>5</sup> prevents this doctrine from applying to federal reservations.<sup>6</sup> Instead, *Winters* holds that federal reservations implicitly reserve

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1. *In re General Adjudication of All Rights to Use Water in Gila River System and Source*, 35 P.3d 68, 81 (Ariz. 2001) [hereinafter *Gila River V*] (quoting Nicholas Targ, *Water Law on the Public Lands: Facing a Fork in the River*, 12 NAT. RESOURCES & ENV'T 14 (1997)). This quote is generally attributed to Mark Twain. *Id.*

2. 35 P.3d 68 (Ariz. 2001).

3. *Id.* at 71.

4. Under Arizona law, appropriable water belongs to the public and is distributed based on the doctrine of prior appropriation. *Id.* (citing ARIZ. REV. STAT. § 45-141(C) (Supp. 2000)) (water shall revert to the public and shall again be subject to appropriation). In addition, “[p]rior appropriation adheres to a seniority system determined by the date on which the user initially puts water to a beneficial use.” *Id.* (citing ARIZ. REV. STAT. § 45-151 (A) (Supp. 2000)).

5. 207 U.S. 564 (1908).

6. *Id.* at 577 (“The power of the government to reserve the waters and exempt them from appropriation under the state laws is not denied, and could not be.”) (citing *U.S. v. Rio Grande Dam & Irrig. Co.* 174 U.S. 702 (1899); *U.S. v. Winans*, 198 U.S. 371 (1905)).

unappropriated water<sup>7</sup> to the extent necessary to accomplish the reservation's purpose.<sup>8</sup>

Despite the general holding in *Winters*, the United States Supreme Court has not established a specific test to ensure proper application of the *Winters* doctrine and almost seventy years after *Winters*, it continues to state the rule generally. For example, in *Cappaert v. United States*,<sup>9</sup> the Court held that federal water rights only reserved an amount of water "necessary to fulfill the purpose of the reservation, no more."<sup>10</sup> With no specific test before them, lower courts were forced to reach their own conclusions, and many began by attempting to discern a reservation's purpose.

## II. RESERVATION PURPOSE: DISTINCTIONS BETWEEN INDIAN AND NON-INDIAN LAND

When the Arizona Supreme Court defined purpose, it distinguished between federal Indian and non-Indian lands.<sup>11</sup> This distinction ensures that Indian water rights operate in accordance with the basic principles of Indian law.<sup>12</sup> For example, the federal government is already required to act as a beneficial trustee of Indian lands.<sup>13</sup> Also, the judiciary is charged with interpreting treaties, statutes and executive orders in Indians' favor.<sup>14</sup> Additionally, the general public maintains a responsibility to further Indian self-sufficiency.<sup>15</sup>

Thus, the court decided that a trier of fact could discern the purpose of non-Indian reservations solely from reservation documents and authorizing legislation.<sup>16</sup> However, Indian reservations warranted a broader interpretation of purpose.<sup>17</sup> The court concluded that the primary purpose of Indian reservations

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7. Under Arizona law, "[p]rior appropriation adheres to a seniority system determined by the date on which the user initially puts water to a beneficial use. According to state law, the person 'first appropriating the water shall have the better right.'" *Gila River V*, 35 P.3d at 71 (citing ARIZ. REV. STAT. § 45-151(A) (Supp. 2000)). However, beginning with *Winters*, "the Supreme Court has consistently held that 'when the Federal Government withdraws its land from the public domain and reserves it for a federal purpose, the Government, by implication, reserves appurtenant water then unappropriated to the extent needed to accomplish the purpose of the reservation.'" *Id.* (citing *Cappaert v. U.S.*, 426 U.S. 128, 138 (1976)).

8. *Id.* Further, such water is reserved regardless of the grantee's actual use. *Id.*

9. 426 U.S. 128, 141 (1976).

10. *Id.* at 141 (citing *Arizona v. California*, 373 U.S. 546, 600-01 (1963)).

11. *Gila River V*, 35 P.3d at 73-74.

12. *Id.* at 74.

13. *Id.* (citing *United States v. Mitchell*, 463 U.S. 206, 225-26 (1983)).

14. *Id.* (citing *County of Yakima v. Confederated Tribes & Bands of the Yakima Indian Nation*, 502 U.S. 251, 269 (1992)).

15. *Id.* (citing *State of Montana ex rel. Greely v. Confederated Salish and Kootenai Tribes of Flathead Reservation*, 712 P.2d 754, 768 (Mont. 1985)).

16. *Id.* From this information the trier of fact decides whether, and to what extent, water is necessary to fulfill the reservation's purpose. *Id.* (citing *Greely*, 712 P.2d at 767).

17. *Id.*

was to provide Indians with a “permanent home and abiding place.”<sup>18</sup> With purpose decided, the court could then analyze which test should be used to determine the appropriate amount of water granted to Indian reservations.

### III. PRIMARY-SECONDARY PURPOSE TEST

The court first considered the primary-secondary purpose test. This test enforces the holding of *United States v. New Mexico*<sup>19</sup> that water should only be reserved for federal lands to the extent it fulfills the primary purpose of the reservation.<sup>20</sup> However, the court decided this test was futile for Indian lands because a permanent home and abiding place contemplated “future needs and changes in use.”<sup>21</sup> Under this broad purpose, almost every water use would qualify as a primary purpose.<sup>22</sup>

### IV. PRACTICABLY IRRIGABLE ACREAGE TEST

The court then considered the practicably irrigable acreage (PIA) test.<sup>23</sup> The PIA test involves a two-step process.<sup>24</sup> First, it must be proven, through methods of arability and engineering, that crops can be grown on the reservation.<sup>25</sup> Second, irrigation must be economically feasible, meaning a cost-benefit analysis comparing likely costs and financial returns must ensue.<sup>26</sup> Only if returns outweigh costs will reservations attain water rights under the PIA test.<sup>27</sup>

The court rejected the PIA test for a number of reasons. First, PIA measurements do not promote Indian modernization.<sup>28</sup> PIA encourages Indians to

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18. *Id.* (citing *Winters*, 207 U.S. at 565; *Arizona v. California*, 373 U.S. 546, 599 (1963)).

19. 438 U.S. 696 (1978).

20. *Id.* at 702.

21. *Gila River V*, 35 P.3d at 73 (citing *Greely*, 712 P.2d at 767).

22. *Id.* at 77. The Arizona Supreme Court stated:

[W]e believe the significant differences between Indian and non-Indian reservations preclude application of the [primary-secondary purpose] test to the former. . . . Parenthetically, even if the [primary-secondary purpose] test were to 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 secondary, purpose.

*Id.*

23. *Id.* at 77.

24. *Id.* at 77–78.

25. *Id.* at 77 (citing *In re General Adjudication of All Rights to Use Water in the Big Horn River System*, 753 P.2d 76, 101 (Wyo. 1988)).

26. *Id.* at 78 (citing *Arizona v. California*, 460 U.S. 605 (1983)).

27. *Id.* (citing Martha C. Franks, *The Uses of the Practicably Irrigable Acreage Standard in the Quantification of Reserved Water Rights*, 31 NAT. RESOURCES J. 549, 553 (1991)).

28. *Id.* at 76 (citing U.S. Census Bureau, *Historical Statistics of the United States, Colonial Times to 1970*, 240, 457 (1975)) (relying on an Indian reservation’s PIA ignores the fact that agriculture comprises less than five percent of the United States’ current occupational pursuits). As additional proof, the Court recognized that no federal project planned in accordance with the Principles and Guidelines, as adopted by the Water

focus their efforts on agriculture, although Indian skills may be better directed elsewhere.<sup>29</sup> Agricultural pursuits were especially likely to result in wasted energy in Arizona, where much of the climate is arid and unsuitable for agriculture.<sup>30</sup> Further, PIA resulted in an inequitable distribution of water rights based solely on a tribe's geographical location.<sup>31</sup> Tribes based in Arizona's alluvial plains would be granted more water than tribes in mountainous regions, regardless of actual need.<sup>32</sup> The court also criticized PIA for potentially awarding too much water to reservations, because the test considered every irrigable acre.<sup>33</sup>

### V. NEED-BASED MEASUREMENT

After addressing the deficiencies in the primary-secondary and PIA tests, the court held that a "fact-intensive inquir[y] . . . on a reservation-by-reservation basis" was appropriate.<sup>34</sup> In reaching this decision, the court recognized that it was entering "essentially uncharted territory."<sup>35</sup> Because of the faults in the other tests,<sup>36</sup> the court felt this was "the only way federally reserved rights [could] be tailored to meet each reservation's minimal need."<sup>37</sup> By considering a "myriad of factors" relating to a particular Indian reservation, the trial court could properly quantify reserved water rights.<sup>38</sup>

To clarify its holding, the court provided non-exclusive examples of proper factors for consideration. These included a master land use plan, which determines the amount of water necessary for different reservation purposes.<sup>39</sup> Also, evidence of the tribe's history and traditions,<sup>40</sup> cultural preservation,<sup>41</sup> geography, topography and natural resources,<sup>42</sup> a tribe's economic base,<sup>43</sup> past water uses,<sup>44</sup> suitability of water requests to the particular homeland,<sup>45</sup> and present and projected future population<sup>46</sup> were included for Arizona court consideration.<sup>47</sup>

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Resources Council of the Federal Government, has been able to show a positive benefit/cost ratio from 1981 to 1991. *Id.* at 78 (citing Franks, *supra* note 27, at 578).

29. *Id.*

30. *Id.* at 78.

31. *Id.*

32. *Id.*

33. *Id.* at 79.

34. *Id.* (citing *In re* General Adjudication of all Rights to Use Water in the Gila River System and Source, 989 P.2d 739, 748 (Ariz. 1999)).

35. *Id.*

36. *Id.* Despite the fact that the PIA test was not suitable for Indian reservations, the court recognized that "no satisfactory substitute [had] emerged." *Id.* (quoting Dan A. Tarlock, *One River, Three Sovereigns: Indian and Interstate Water Rights*, 22 LAND & WATER L.REV. 631, 659 (1987)).

37. *Id.*

38. *Id.*

39. *Id.*

40. *Id.*

41. *Id.* at 79–80.

42. *Id.* at 80. In this regard, the PIA test still applies if agricultural or irrigation projects are included as part of the Indian homeland reservation plan. *Id.*

43. *Id.*

44. *Id.*

The court's decision allows lower courts great latitude in determining what factors are appropriate for consideration.<sup>48</sup> However, the court does require that the proposed uses be "reasonably feasible."<sup>49</sup> To achieve this result, the court set forth a two-part test.<sup>50</sup> First, "development projects must be achievable from a practical standpoint."<sup>51</sup> Second, the projects must be economically sound.<sup>52</sup>

## VI. CONCLUSION

The Arizona Supreme Court's decision to quantify Indian water rights on a reservation-by-reservation basis assists in fulfilling the purpose of Indian reservations.<sup>53</sup> However, because the purpose of Indian reservations is broad, the court's recognition that not many types of water rights will fall outside of this broad purview still applies. Hence, it appears the main check Arizona courts hold over the amount of water reserved for Indian lands lies in quantity, not type. It remains to be seen if this check will allow the equitable adjudication of water rights on Indian lands.

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45. *Id.* at 80.

46. *Id.*

47. Requests for federally reserved water rights must also include actual and proposed uses, accompanied by party recommendations of feasibility and necessity in fulfilling the homeland purpose. *Id.* at 79.

48. *Id.* at 81.

49. *Id.*

50. *Id.*

51. *Id.*

52. *Id.*

53. *Id.* at 79.