

# FUTURE INDIAN WATER SETTLEMENTS IN ARIZONA: THE RACE TO THE BOTTOM OF THE WATERHOLE?<sup>†</sup>

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Former Secretary of the Interior Bruce Babbitt once characterized the Lower Colorado River Basin and its water resources as “the last waterhole.”<sup>1</sup> This characterization aptly describes the Central Arizona Project (“CAP”), and the role that CAP water supplies have played in the settlement of Indian water claims in Arizona over the past twenty-five years.

With the passage of the Colorado River Basin Project Act in 1968, Congress authorized the construction of the CAP, a system of pumps, canals and laterals bringing over 1.4 million acre-feet of Colorado River water supplies to central and southern Arizona, including Phoenix and Tucson.<sup>2</sup> While farmers,

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1. Bruce Babbitt, *Buffaloes at the Last Waterhole*, in 2005 COLORADO RIVER PROJECT SYMPOSIUM PROCEEDINGS 72, 74 (2005).

2. See Colorado Basin Project Act, Pub. L. No. 90-537, 82 Stat. 885 (1968) (codified as amended in scattered sections of 43 U.S.C.).

cities, towns, and industry were significant beneficiaries of the CAP, Indian tribes in central and southern Arizona may have benefited as much or even more. Indeed, the crowning achievement of the CAP may have been its pivotal role in the settlement of tribal water rights claims based on the federal reserved rights doctrine.

With the completion of construction of the CAP, and for the next quarter-century thereafter, CAP supplies were the critical components of the water budgets for Indian water settlements in Arizona. The availability of this water, which was not being fully utilized at the time, provided a new source of supply to meet the tribes' needs, thereby reducing or alleviating the need for neighboring non-Indian water users to curtail their use of local supplies in order to achieve a settlement.<sup>3</sup> Under these conditions, the resolution of tribal claims through settlement could be viewed as the most beneficial outcome, one that avoided litigation and assured dependable water supplies for the tribe without requiring reductions in water use by neighboring non-Indian appropriators.

Twenty-five years later, on the heels of the urbanization of Phoenix, Tucson, and surrounding areas, and with the culmination of numerous Indian water settlements that include a significant CAP component, very little CAP water remains unallocated and available to facilitate the settlement of the remaining unresolved Indian water claims in Arizona. These unresolved claims include, among others, those of the White Mountain Apache, the San Carlos Apache (Gila River only), the Navajo Nation, the Hopi, the Camp Verde Yavapai-Apache, the Tonto Apache, the Havasupai, the Hualapai, the Kaibab-Paiute, the San Juan Paiute, and the Pascua-Yaqui tribes. The claims of these tribes, largely based on the federal reserved rights doctrine, exceed the amount of unallocated CAP water by several orders of magnitude. In order to settle the claims of these remaining tribes, new approaches, and potentially deeper compromises, are likely to be required by all parties.

This Article examines the integral role of CAP supplies in the settlement of Indian reserved water rights claims in Arizona thus far, then explores what alternatives remain for future Indian water settlements, now that CAP supplies are all but exhausted. At the outset, it examines the nature of the tribes' federal reserved rights claims, and the adverse relationship of those claims to the water rights of neighboring non-Indian users based on the prior appropriation doctrine. This Article then describes the CAP water allocation structure, and discusses how CAP supplies were used in past Indian water settlements to resolve competing claims to inadequate local water supplies between the tribes and their neighbors. It describes how, with the culmination of each settlement, and most recently with the passage of the Arizona Water Settlements Act of 2004, the available CAP supply for future Indian settlements has dwindled to less than 100,000 acre-feet. Finally, this Article explores what opportunities remain for the settlement of unresolved tribal claims to water, now that available CAP supplies have been depleted.

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3. On some occasions, CAP water would be delivered directly to the Tribe under the terms of the settlement. In other settlements, a non-Indian water user would provide local water supplies to the tribe, in exchange for the delivery of a like amount of CAP water.

## I. THE PROBLEM: AN INADEQUATE WATER SUPPLY AND THE TRIBES' SENIOR CLAIMS UNDER THE FEDERAL RESERVED RIGHTS DOCTRINE

### A. *The Federal Reserved Rights Doctrine*

Water rights for Indian reservations are generally based on the federal reserved rights doctrine. The doctrine essentially provides that when the federal government reserves and sets apart land for an Indian reservation or other federal purposes, it also impliedly reserves "appurtenant water, then unappropriated," for use on the reservation to the extent necessary to accomplish its primary purpose.<sup>4</sup> The priority date for the Indian reserved right dates back to the date of the reservation by treaty, by act of Congress, or by executive order.<sup>5</sup> Given the early dates of creation of many Indian reservations, this "implied reservation of water" has the practical effect of giving the tribes a right that is senior to most of the water rights of neighboring water users based on the prior appropriation doctrine.

The federal reserved rights doctrine was first applied to Indian tribes by the United States Supreme Court in the case of *Winters v. United States*.<sup>6</sup> In *Winters*, the federal government brought suit on behalf of the Assiniboine and Gros Ventre Indian Tribes of the Fort Belknap Reservation to halt upstream diversions from the Milk River by non-Indians. The Fort Belknap Reservation was created by a treaty executed in 1888 between the tribes and the United States. The treaty did not mention water rights. Nevertheless, the Supreme Court concluded that, in entering into the treaty, the federal government and the tribes impliedly reserved sufficient water from the Milk River (which formed one border of the Reservation) to make the Reservation lands usable for agricultural purposes.<sup>7</sup> This implied reservation of water, dating back to 1888, took precedence over the non-Indian appropriators' more junior water rights.<sup>8</sup>

The implied reservation of rights principle articulated in *Winters* is applicable to all Indian reservations, whether such reservations were created by

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4. *Cappaert v. United States*, 426 U.S. 128, 138 (1976) (quoted in *United States v. New Mexico*, 438 U.S. 696, 700 (1978)).

5. *Id.*

6. 207 U.S. 564 (1908).

7. *Id.* at 575-77.

8. In the western United States, water rights under state law are generally governed by the doctrine of prior appropriation. The doctrine may best be summarized by the maxim "first in time, first in right," meaning that the person who first appropriates and uses water in compliance with procedures prescribed by state law has the better right to use that water against all persons who subsequently appropriate water. In *Winters*, the Supreme Court found that the Fort Belknap Reservation's water rights were based on the 1888 Treaty, and that the Tribes were exempt from the state law requirements for perfection of a water right. The priority date for the Tribes' reserved rights was 1888, the date of the treaty. Because the Tribes' rights pre-dated the priority dates of the non-Indian appropriations in the case, these appropriators were required to cease upstream diversions from the Milk River until the Tribes' rights were satisfied. *Id.*

treaty, statute, or executive order.<sup>9</sup> Unlike appropriative rights, federal reserved rights are not subject to abandonment or forfeiture for non-use.<sup>10</sup>

Litigation over the attributes of federal reserved rights often focuses on the purposes of the reservation and the quantity of water needed to satisfy those purposes. Cases decided by the United States Supreme Court since *Winters* have provided more guidance to the courts regarding the legal principles to be used in making these determinations. In *Arizona v. California*, the Court concluded that for Indian reservations on the Colorado River, which were created to permit the Indians to maintain a livelihood as farmers, the amount of water reserved was that sufficient to irrigate all of the "practicably irrigable acreage" ("PIA") on those reservations.<sup>11</sup> The quantification of Indian rights under this standard made actual or past use of water on the reservation irrelevant, and left open the very real possibility that the full exercise of a tribe's reserved water rights could necessitate a "gallon for gallon" reduction in water use by appropriators relying upon the same source.<sup>12</sup>

### ***B. Arizona Litigation to Determine Tribal Reserved Rights***

In the years following the decision in *Arizona v. California*, Indian tribes in Arizona, as well as their non-Indian neighbors, undertook concerted efforts to institute litigation to attain an adjudication of the tribes' water right claims. Two water rights adjudications initiated during that period, the Gila River Adjudication and the Little Colorado River Adjudication, remain pending before the Arizona state courts to this day. As summarized below, thousands of claims to water have been filed in the adjudications since their inception; yet, the quantities of water claimed by Indian tribes, standing alone, exceed the annual flow of these rivers.

The Gila River Adjudication covers the central and southern portions of Arizona,<sup>13</sup> while the Little Colorado River Adjudication covers the portions of northern Arizona. The number of claims in these adjudications totals over 60,000 in the Gila Adjudication and over 10,000 in the Little Colorado Adjudication.<sup>14</sup> Without question, the most extensive claims in both of these cases have been advanced by or on behalf of fourteen Indian tribes. In the Gila Adjudication, for example, twelve Indian tribes, or the United States acting on their behalf, have claimed in excess of 3.3 million acre-feet annually of the flow of the Gila River and its tributaries.<sup>15</sup> Similarly, in the Little Colorado Adjudication, the Hopi and

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9. See *Arizona v. California*, 373 U.S. 546, 598-600 (1963).

10. See *United States v. Anderson*, 736 F.2d 1358, 1361-62 (9th Cir. 1984).

11. 373 U.S. at 600.

12. *United States v. New Mexico*, 438 U.S. 696, 705 (1978).

13. This adjudication is pending in the Maricopa County Superior Court. The jurisdictional issues arising from this case were presented to the Court in *Arizona v. San Carlos Apache Tribe of Arizona*, 463 U.S. 545, *reh'g denied*, 464 U.S. 874 (1983).

14. The Arizona Department of Water Resources keeps records of these claims in its Repository of Adjudication filings.

15. See Statement of Claimant, United States *ex rel.* White Mountain Apache Tribe, No. 39-12168 (Ariz. Water Comm'n Jan. 4, 1985); Statement of Claimant, San Carlos Apache Tribe, Nos. 39-12167, 39-12676 (Ariz. Super. Ct. Maricopa County 1985); Statement of Claimant, Tonto Apache Tribe, No. 39-50058 (Ariz. Super. Ct. Maricopa

Navajo Indian tribes have claimed more than 380,000 acre-feet annually from the surface flow of the Little Colorado River Basin.<sup>16</sup>

The relatively meager amount of water available to satisfy these claims is insufficient in the extreme, given the amounts of water claimed by the United States and the tribes under the reserved rights doctrine, not to mention the claims of other existing water users. Because of the arid climate existing throughout most of Arizona, in conjunction with extensive economic development in Central Arizona, particularly in the Phoenix and Tucson areas, “[v]irtually all surface water has been appropriated.”<sup>17</sup> Diversions from the Gila River in the 1984 water

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County Nov. 27, 1985); Statement of Claimant, Fort McDowell Indian Cmty., No. 39-50060 (Ariz. Super. Ct. Maricopa County May 21, 1993); Statement of Claimant, Camp Verde Indian Tribe, No. 39-59952 (date unknown); Statement of Claimant, United States *ex rel.* Yavapai-Prescott Tribe, No. 39-54011 (date unknown); Statement of Claimant, U.S. Dep’t of the Interior, Bureau of Indian Affairs, *ex rel.* Salt River Pima-Maricopa Indian Tribe and Allottees, No. 39-54028 (Ariz. Super. Ct. Maricopa County Nov. 29, 1985); Statement of Claimant, United States *ex rel.* Salt River Pima-Maricopa Indian Cmty., No. 39-35088 (Ariz. Super. Ct. Maricopa County Jan. 29, 1987); Statement of Claimant, U.S. Dep’t of the Interior, Bureau of Indian Affairs *ex rel.* Hualapai Indian Tribe, No. 39-54027 (Ariz. Super. Ct. Maricopa County Nov. 23, 1985); Statement of Claimant, Gila River Indian Cmty., No. 39-37360 (Ariz. Super. Ct. Maricopa County Jan. 20, 1987); Statement of Claimant, Gila River Indian Cmty., No. 39-05478 (Ariz. Water Comm’n July 11, 1980); Statement of Claimant, United States *ex rel.* Gila Bend Indian Reservation Tohono O’odham Nation, No. 39-35090 (Ariz. Super. Ct. Maricopa County Mar. 25, 1987); Statement of Claimant, United States *ex rel.* Maricopa Ak-Chin Indian Cmty., No. 39-35089 (Ariz. Super. Ct. Maricopa County Mar. 25, 1987); Statement of Claimant, United States *ex rel.* Florence Village, Papago Reservation, No. 39-35091 (Ariz. Super. Ct. Maricopa County Mar. 25, 1987); Statement of Claimant, United States *ex rel.* Tohono O’odham (Papago) San Xavier Indian Cmty., No. 39-74335 (Ariz. Super. Ct. Maricopa County July 29, 1987); Statement of Claimant, United States *ex rel.* Tohono O’odham (Papago) Schuk Toak Dist. of the Sells Papago Reservation, No. 39-74336 (Ariz. Super. Ct. Maricopa County July 29, 1987); Statement of Claimant, United States *ex rel.* Tohono O’odham (Papago at Sells) Indian Cmty., No. 39-74333 (Ariz. Super. Ct. Maricopa County July 29, 1987); Statement of Claimant, United States *ex rel.* Pascua Yaqui Tribe, No. 39-74334 (Ariz. Super. Ct. Maricopa County July 29, 1987); Statement of Claimant, United States *ex rel.* Gila River Pima-Maricopa Indian Cmty., No. 39-35092 (Ariz. Super. Ct. Maricopa County Jan. 20, 1987). All claim numbers have been recorded by the Arizona Department of Water Resources, and copies are on file in the Department’s Repository of Adjudication filings. These amounts do not include claims for amounts necessary to fill new reservoirs or claims for the development and use of substantial amounts of ground water.

16. See Statement of Claimant, The Navajo Nation, No. 39-91442 (Ariz. Super. Ct. *ex rel.* County of Apache Nov. 27, 1985); Statement of the Claimant, Hopi Tribe, No. 39-91443 (Ariz. Super. Ct. *ex rel.* County of Apache Nov. 29, 1985). Both claim numbers have been recorded by the Arizona Department of Water Resources. These amounts do not include claims for amounts necessary to fill new reservoirs or claims for the development and use of substantial amounts of ground water.

17. U.S. GEOLOGICAL SURVEY, WATER SUPPLY PAPER NO. 2300, NATIONAL WATER SUMMARY 1985: HYDROLOGIC EVENTS AND SURFACE WATER RESOURCES 145 (1986) [hereinafter USGS PAPER]; see Report of Special Master Simon H. Rifkind at 337, *Arizona v. California* (Dec. 5, 1960) [hereinafter Rifkind Report], available at <http://digital.lib.asu.edu> (follow “Browse” hyperlink; then select item 55) (“The Gila River,

year, for example, totaled 1,317,000 acre-feet, representing "the entire flow from the basin."<sup>18</sup> With regard to the Little Colorado River, present uses of the river have overwhelmed the water supply of 179,000 acre-feet annually,<sup>19</sup> and, as a result, "the river has no flow at times each year."<sup>20</sup>

These statistics starkly illustrate the difficulties presented by the reserved water rights claims asserted by Arizona Indian tribes and the United States on their behalf, which are based largely upon the PIA standard, discussed above. Putting aside the water rights claims of non-Indian irrigators, industries and municipalities, the United States' and the tribes' claims are grossly in excess of the total available water supply. Moreover, because most Indian reservations in Arizona were created a few years prior to the development of extensive surface water use by non-Indians, the water rights associated with many of these reservations would likely be assigned dates of priority which are senior to those of most non-Indian claimants. Consequently, in the absence of a settlement, and with full exercise of the tribes' rights, these claimants might find themselves with little or no water left to meet their water needs.

The disparity between available local water supplies and the excessive demands of the tribes for those supplies inevitably led to the hunt for an alternative source of supply to close that significant gap. The CAP, in the process of construction in the 1970s and 1980s, when the water adjudications were beginning to heat up, was the obvious candidate.

## II. THE CAP ALLOCATION STRUCTURE—HISTORY AND BACKGROUND

The first allocations of CAP water were made to Indian tribes. In 1976, the Secretary of the Interior ("Secretary") made an initial allocation of CAP water to five tribes;<sup>21</sup> in late 1980, the Secretary revised and expanded this allocation. Under the 1980 notice of water allocation, a total of 309,828 acre-feet of CAP water was allocated to twelve Indian reservations,<sup>22</sup> "with the stipulation that in times of shortages, the Indian supply will be reduced on a proportional basis with the municipal and industrial ("M&I") supply."<sup>23</sup> The Gila River Indian

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San Francisco River, and San Simon Creek are overappropriated, supply being insufficient to satisfy existing needs.").

18. USGS PAPER, *supra* note 17, at 146.

19. This amount is taken from an estimate by the United States Department of Agriculture, Soil Conservation Service, of the average annual flow of the Little Colorado River at Cameron Station, Arizona. See SOIL CONSERVATION SERV., U.S. DEP'T OF AGRIC., REPORT ON WATER USE IN THE LITTLE COLORADO RIVER BASIN 5-17 (1981).

20. USGS PAPER, *supra* note 17, at 146.

21. Central Arizona Project, Ariz.: Allocation of Project Water for Indian Use, 41 Fed. Reg. 45,883, 45,888 (Oct. 18, 1976).

22. The twelve Indian tribes receiving allocations for their reservations were the Ak-Chin, Gila River, Salt River, Chuichu, Fort McDowell, Camp Verde, San Carlos, San Xavier, Schuk Toak, Pascua Yaqui, Tonto Apache, and Yavapai.

23. Central Arizona Project Allocation, 45 Fed. Reg. 81,265, 81,265, 81,272 tbl. (Dec. 10, 1980) (Summary of Allocations and Priorities to Indian Tribes).

Reservation and the Ak-Chin Reservation received the largest allocations, 117,100 acre-feet and 56,000 acre-feet, respectively.<sup>24</sup>

In 1983, the Secretary made a more comprehensive allocation of CAP water that included Indian tribes, M&I users, and a remaining amount for non-Indian agricultural water users. The 1983 notice of allocation retained the amount of 309,828 acre-feet annually for Indian tribes, and also allocated 640,000 acre-feet of CAP water annually to M&I users.<sup>25</sup> Any remaining supply was allocated to non-Indian irrigation users, on a percentage share basis.<sup>26</sup> Allocations were conditioned upon the execution of water service contracts between the Secretary and individual tribes, M&I and non-Indian agricultural users. All water not contracted for was to be retained under the jurisdiction of the Secretary, and “marketed on an interim basis to expedite repayment of the CAP.”<sup>27</sup> The 1983 notice also described how shortages of CAP water would be shared among contractors. In general, Indian and M&I allocations would share a first priority to water, and any shortage would first be borne by miscellaneous uses and non-Indian irrigation uses on a pro rata share basis.<sup>28</sup>

Over the next several years, water service contracts were executed for most of the CAP supplies allocated under the 1983 notice. After completion of the initial subcontracting process, however, “29.3 percent of the non-Indian agricultural supply and 65,647 acre-feet of M&I water was not under contract.”<sup>29</sup>

In 1992, the Secretary issued a notice of reallocation of 29.3 percent of CAP non-Indian agricultural water that remained uncontracted.<sup>30</sup> In the notice, the Secretary described the nature of the junior priority of non-Indian agricultural allocations, in relation to priorities for Indian and M&I allocations, as follows:

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24. *See id.*

25. Central Arizona Project: Water Allocation and Water Service Contracting; Record of Decision, 48 Fed. Reg. 12,446, 12,447 (Mar. 24, 1983).

26. *Id.* at 12,449. An approximate estimate of the total available CAP supply in an average year has been estimated at about 1.415 million acre-feet annually. *See* Allocation of Water Supply and Expected Long-Term Contract Execution, Central Arizona Project, Arizona, 64 Fed. Reg. 46,720, 46,721 (Aug. 26, 1999).

27. Central Arizona Project: Water Allocation and Water Service Contracting; Record of Decision, 48 Fed. Reg. at 12,447.

28. *Id.*

29. *See* Central Arizona Project; Water Allocations, 71 Fed. Reg. 50,449, 50,450 (Aug. 25, 2006) (summarizing the history of the CAP contracting process).

30. Central Arizona Project (CAP) Water Allocations and Water Service Contracting; Final Reallocation Decision, 57 Fed. Reg. 4470 (Feb. 5, 1992). In the Salt River Pima-Maricopa Indian Community Water Rights Settlement Act of 1988, Pub. L. No. 100-512, 102 Stat. 2549, discussed further in Part III of this Article, *infra*, Congress required the Secretary to reallocate the uncontracted water for non-Indian agricultural purposes after first receiving a recommended allocation of the water from the Arizona Department of Water Resources (“ADWR”). ADWR provided its reallocation recommendation to the Secretary in January of 1991, and in June of 1991, the Secretary published a notice of proposed allocation and requested public comment. Central Arizona Project (CAP) Water Allocations and Water Service Contracting, 56 Fed. Reg. 28,404 (June 20, 1991).

The water supply allocated to each of the 23 non-Indian agricultural users was stated in terms of a percentage of the total non-Indian agricultural supply. That supply will amount to about 900,000 acre-feet per year, initially, and is predicted to decline to about 490,000 acre-feet per year, 50 years hence. In shortage years, it will drop to zero. The actual amount available will be determined on an annual basis and will vary depending upon a number of factors, including but not limited to hydrologic conditions on the Colorado River and demand for water by users with higher priorities. The percentage represents each allottee's portion of the total irrigated acreage, with an adjustment to reflect any other surface water supply available to the allottee.<sup>31</sup>

Reallocations made under the 1992 notice of final reallocation were to specific individual users, and were conditioned upon the execution of a water service contract. Significantly, the 1992 notice also provided that "[a]ny non-Indian agricultural water reallocations that remain uncommitted after the completion of the contracting process shall revert to the Secretary for discretionary use in Indian water rights settlements and other purposes."<sup>32</sup>

The Secretary's decision in 1992 to make this uncommitted, "uncontracted" water available for Indian settlement purposes recognized the fact that existing CAP allocations were already being used as bargaining chips in the settlement of tribal water claims, and that uncontracted water could provide an additional source of supply for future settlements. These early settlements were often composed of existing tribal CAP allocations, as well as unused CAP allocations contributed from non-Indian parties to these settlements. These settlements, and subsequent tribal settlements utilizing more complex arrangements involving the use and exchange of non-Indian agricultural and M&I CAP supplies, are discussed in the next section.

The 1992 notice reallocated only non-Indian agricultural priority water; 65,647 acre-feet of M&I priority water also remained uncontracted. In 1999, the Arizona Department of Water Resources recommended a reallocation of these remaining M&I supplies to the Secretary; however, no final reallocation of these supplies was reached. The passage of the Arizona Water Settlements Act of 2004, discussed in Parts III and IV of this article, effected a final reallocation of this water to M&I users.

With this backdrop in mind, we now turn to the individual Indian settlements that, from the early 1980s until 2004, used CAP supplies as "important building blocks," making possible the satisfaction of tribal water budget goals, and thereby facilitating settlement.<sup>33</sup>

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31. Central Arizona Project (CAP) Water Allocations and Water Service Contracting; Final Reallocation Decision, 57 Fed. Reg. at 4471.

32. *Id.* at 4470.

33. Central Arizona Project (CAP) Water Allocations and Water Service Contracting with Indian Tribes, 56 Fed. Reg. 29,706 (June 28, 1991).



### III. CAP WATER AND INDIAN SETTLEMENTS—IN THE RIGHT PLACE AT THE RIGHT TIME

#### A. *Early Indian Settlements Using Indian Priority CAP Water and Colorado River Water*

##### 1. *Southern Arizona Water Settlement Act of 1982*<sup>34</sup>

The Tohono O'odham Nation ("the Nation") (formerly the Papago Tribe) reside in southern Arizona on the San Xavier Reservation, along the Santa Cruz River south of Tucson, and the Sells (or Main) Reservation, extending from the international boundary nearly to Casa Grande, and between Ajo and Tucson. In 1975, the Papago Tribe, the United States, and two Indian allottees sued the City of Tucson and various southern Arizona mining and agricultural water users in the Upper Santa Cruz Basin, claiming damages and seeking to enjoin groundwater pumping by the defendants. Concerns that the litigation might create uncertainty over the future of Tucson drove the local entities to participate in water settlement negotiations with the tribe and the United States. In 1982, a settlement was reached, and Congress passed the Southern Arizona Water Settlement Act of 1982 embodying the settlement.<sup>35</sup>

The settlement, which covered only portions of the Nation's reservations, entitled the Nation to receive, without charge, farm improvements, the right to 66,000 acre-feet of water annually, the right to withdraw 10,000 acre-feet of groundwater annually, and a \$15 million trust fund.<sup>36</sup> The 66,000 acre-feet of water provided to the Nation under the settlement included 37,800 acre-feet of CAP water allocated to the Nation for the San Xavier Reservation and eastern Schuk Toak district of the Sells Reservation.<sup>37</sup> The Nation was not required to pay operation and maintenance charges or capital charges for this water. After the dismissal of *United States v. Tucson*, the United States was to acquire and deliver the remaining 28,200 acre-feet of water to the reservation.<sup>38</sup> If the United States failed to deliver any portion of the 66,000 acre-feet after October 1992, the 1982 Settlement Act required the payment of damages by the United States to the Nation equal to the value of the undelivered quantity of water.<sup>39</sup> The 1982 Settlement Act also gave the Nation the right to "sell, exchange, or temporarily dispose of water, but the [Nation] may not permanently alienate any water right."<sup>40</sup>

Other provisions of the settlement required the City of Tucson to transfer 28,200 acre-feet of effluent water to the United States and, with the state and other local entities, to contribute a total of \$5.25 million to a cooperative fund.<sup>41</sup> The

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34. Portions of this section are derived from Title III SAWRSA Amendments Briefing Paper (Jan. 22, 2003) (on file with authors), prepared by the settlement parties.

35. Pub. L. No. 97-293; 96 Stat. 1261.

36. *Id.*

37. *Id.* § 303(a), 96 Stat. at 1275-76.

38. *Id.* §§ 305(a), 307(a)(1)(C), 96 Stat. at 1278, 1281.

39. *Id.* § 304(c), 96 Stat. at 1277 (amended in 1992 to extend the deadline to June 30, 1993).

40. *Id.* § 306(c)(2), 96 Stat. at 1280.

41. *Id.* §§ 307(a)(1)(A), 313(b)(1), 96 Stat. at 1281, 1284.

fund was to help the United States pay the ongoing costs of implementing the settlement. The San Xavier allottees were to satisfy their claims out of water provided to the Nation in the settlement.

After the city, state, and local interests timely performed all of their obligations under the settlement, the Nation agreed to dismiss the case. The allottee landowners, however, objected to particular aspects of the 1982 Act and opposed dismissal of the litigation.

In 1993, individual allottees filed a class action lawsuit, *Alvarez v. City of Tucson*, seeking to enjoin groundwater pumping by the City of Tucson and others, and claiming more than \$200 million in damages from past pumping.<sup>42</sup> Individual San Xavier Reservation allottees also filed a lawsuit in 1993 against the United States, *Adams v. United States*.<sup>43</sup> The suit asserted breach of trust claims against the federal government with respect to the allottees' land and water resources and requested declaratory and injunctive relief. Disposition of these suits was suspended to allow the parties to negotiate amendments to the settlement that would resolve the outstanding disputes.

More than ten years after the filing of these suits, the parties agreed to a final resolution of their differences, embodied in Title III of the Southern Arizona Water Rights Settlement Amendments Act of 2004.<sup>44</sup> Among other matters, the Arizona Water Settlements Act reallocates to the Nation 28,200 acre-feet of water from the federal share of uncontracted non-Indian agricultural CAP water<sup>45</sup> to be used as the source of water to satisfy the Secretary's obligation under the 1982 Settlement Act to acquire and deliver 28,200 acre-feet of water to the reservation upon dismissal of the *United States v. Tucson* litigation.<sup>46</sup>

As ultimately constituted, the Southern Arizona Water Rights Settlement thus relied heavily upon two distinct components of CAP water—first, the Nation's own CAP allocation, and second, non-Indian agricultural CAP water previously allocated to other users. This combination of Indian and non-Indian priority CAP allocations featured in many of the other Arizona Indian water settlements described below and bridged the gap between the negotiating positions of the Indian and non-Indian parties to the Southern Arizona settlement, ultimately making possible a final settlement of these claims.

## 2. The Ak-Chin Settlement

The Ak-Chin Reservation is located approximately thirty miles south of Phoenix and consists of 21,840 acres surrounding the village of Ak-Chin. The

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42. See Complaint, *Alvarez v. City of Tucson*, Civ. No. 93-00039 (D. Ariz. Jan. 25, 1993) (later amended).

43. See Complaint, *Adams v. United States*, Civ. No. 93-00240 (D. Ariz. Apr. 21, 1993).

44. Pub. L. No. 108-451, § 301, 118 Stat. 3478, 3535–73.

45. The provisions of the Arizona Water Settlements Act effecting the reallocation of this water to the Nation and other entities are discussed in greater detail in Part IV of this article.

46. Arizona Water Settlements Act, Pub. L. No. 108-451, § 104(a)(1)(A)(ii), 118 Stat. 3478, 3487 (2004).

reservation is encompassed by the Maricopa-Stanfield Irrigation District and is just south of the Gila River Indian Reservation.

The Ak-Chin Water Rights Settlement Act of 1984 was the product of a settlement agreement between the United States and the Ak-Chin Community ("the Community"), which "form[ed] the basis for further discussions with the Arizona Congressional delegation, the State of Arizona, the Central Arizona Water Conservation District and other affected entities."<sup>47</sup> Like the Southern Arizona Water Rights Settlement, the Ak-Chin Settlement relied upon multiple Colorado River components; however, unlike the Southern Arizona Settlement, the Ak-Chin Settlement included a main stem Colorado River component.

Under the Ak-Chin Settlement, the United States was required to supply to the Community 75,000 acre-feet of water annually in normal and wet years and 72,000 acre-feet annually in dry years<sup>48</sup> from a combined source of the Community's Indian priority CAP allocation of 58,300 acre-feet and 50,000 acre-feet of higher priority main-stem Colorado River water from the Yuma Mesa Division of the Gila Reclamation Project, transported to the reservation via the CAP distribution system.<sup>49</sup> Additionally, when sufficient water and capacity in the CAP aqueduct was available, the settlement provided that the Community could request up to an additional 10,000 acre-feet per year from the United States.<sup>50</sup> In exchange for these supplies, the Community agreed to restrict pumping of groundwater to dry or shortage years in order to firm up the delivery of their 75,000 acre-feet of CAP and Colorado River water, and for domestic and municipal uses. All costs for construction, operation, maintenance and replacement associated with these supplies were made non-reimbursable expenses of the United States.<sup>51</sup>

The 1984 settlement act did not provide for leasing of settlement water. A 1992 amendment specifically permitted the sale, exchange, or temporary disposal of settlement water within the Pinal County Active Management Area, as

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47. H.R. REP. NO. 98-1026, at 8 (1984); *see also* Ak-Chin Community Water Rights Settlement Act of 1984, Pub. L. No. 98-530, 98 Stat. 2698.

48. Ak-Chin Community Water Rights Settlement Act of 1984, Pub. L. No. 98-530, § 2(a), (c), 98 Stat. 2698 at 2698-99 (specifying that a shortage year is a year in which the Secretary determines there is a shortage in accordance with the Colorado River Basin Project Act, 43 U.S.C. § 1521(b) (2000), and in which there is insufficient supply to satisfy the Indian priority and non-Indian municipal and industrial priority contract rights).

49. Ak-Chin Community Water Rights Settlement Act of 1984, Pub. L. No. 98-530, § 2(f), 98 Stat. at 2699. Out of a total allocation of 300,000 acre-feet of annual beneficial consumptive use in the Yuma Mesa Division, three irrigation districts within the Division agreed to forego a total of 50,000 acre-feet of annual beneficial consumptive uses. H.R. REP. NO. 98-1026, at 7. Corresponding acreage under irrigation was reduced to a total of 37,187 acres under irrigation. In exchange, the three districts received a total of \$9.4 million in federal appropriations for agricultural system improvement, a discharge of all remaining repayment obligations owed to the United States, and an exemption from the ownership and full cost pricing provisions of federal reclamation law. H.R. REP. NO. 98-1026, at 7.

50. Ak-Chin Community Water Rights Settlement Act of 1984, Pub. L. No. 98-530, § 2(b), 98 Stat. at 2698-99.

51. *Id.* § 2(e), 98 Stat. at 2699.

designated by Arizona law, but the Community was prohibited from permanently alienating any water right.<sup>52</sup> Further, any water from the combination of sources described in the Act that was in excess of the Community's entitlement would be made "available for allocation to other water users in central Arizona."<sup>53</sup>

***B. Later Settlements—Combining Local Supplies, CAP Water and Colorado River Water***

Beginning in the late 1980s and through 2004, numerous Indian water settlements were completed using a combination of local water supplies, CAP water, and main-stem Colorado River water. In earlier settlements, local supplies were contributed by non-Indian water users out of their existing appropriate rights.<sup>54</sup> Later settlements went further, recognizing a right by the tribe itself to certain local supplies.<sup>55</sup> In each case, CAP water was an integral component of the settlement water budget, making a negotiated resolution of the tribe's claims possible when the parties were otherwise far apart.

Four such settlements are described in detail in this section, in chronological order: the Salt River Pima-Maricopa Indian Community Water Rights Settlement (1988), the Fort McDowell Indian Community Water Rights Settlement (1990), the San Carlos Apache Tribe Water Rights Settlement (1992) and the Gila River Indian Community Water Rights Settlement (2004).

*1. Salt River Pima-Maricopa Indian Community Settlement*

a. Overview

The Salt River Pima-Maricopa Indian Community's ("the Indian Community's") Reservation was created by executive order on June 14, 1879. The reservation, constituting approximately 53,000 acres of land, is situated north and east of the Phoenix metropolitan area. The Salt River traverses the reservation from east to west; the Verde River empties into the Salt River on the north end of the reservation.

In the mid-1980s, the United States filed reserved rights claims in the Gila River Adjudication on the Indian Community's behalf for more than 185,000 acre-feet of Salt and Verde River water, in addition to an unquantified amount of groundwater.<sup>56</sup> The Indian Community had also asserted its water rights claims in

52. Act of Oct. 24, 1992, Pub. L. No. 102-497, § 10, 106 Stat. 3255, 3258. This provision was later amended to provide the tribe broader leasing authority for the water. Act of Oct. 10, 2000, Pub. L. No. 106-285, 114 Stat. 878, 878-79.

53. H.R. REP. NO. 98-1026, at 5.

54. See, e.g., Salt River Pima-Maricopa Indian Community Water Rights Settlement Agreement (Feb. 12 1988), discussed *infra* Part III.B.1.

55. See, for example, the San Carlos Apache Tribe Water Rights Settlement Agreement and the Gila River Indian Community Water Rights Settlements discussed *infra* Part III.B.3.

56. See Statement of Claimant, U.S. Dep't of the Interior, Bureau of Indian Affairs *ex rel.* Salt River Pima-Maricopa Indian Tribe & Allottees, No. 39-54028 (Ariz. Super. Ct. Maricopa County Nov. 29, 1985); Statement of Claimant, United States *ex rel.*

litigation pending in the United States District Court and the United States Court of Claims.<sup>57</sup> The magnitude of these claims threatened the economic development of the Phoenix metropolitan area, and, if resolved in favor of the Indian Community, could have resulted in a water shortage in the Valley cities of Phoenix, Scottsdale, Tempe, Mesa, Chandler, Glendale and Gilbert. At the same time, a judicial determination of the Indian Community's water rights might have taken several years to accomplish, at great expense to the Indian Community, the United States, and other parties. In the interim, the Indian Community would have a relatively small quantity of water available for its use.

The Salt River Pima-Maricopa Indian Community Water Rights Settlement Agreement resolved the concerns of both the Indian Community and its non-Indian neighbors by providing the Indian Community with a permanent and dependable water supply, as well as the necessary funds to utilize that resource, in exchange for the Indian Community's waiver of any additional water rights claims or claims for money damages for past interference with its water rights. Parties to the settlement include the Indian Community, the United States on its behalf, the Salt River Project ("SRP"), the Roosevelt Water Conservation District, the Roosevelt Irrigation District, and the Valley cities referenced above. Congress enacted legislation approving the settlement in 1988.<sup>58</sup>

The settlement agreement sets a maximum annual water entitlement for the Indian Community of 122,400 acre-feet.<sup>59</sup> Many of the water resources to be used in the settlement come from outside of the Gila River System and Source (for example, CAP and Colorado River water). As a result, the impact of the settlement upon neighboring appropriators has been considerably reduced.

In the absence of the settlement agreement, the majority of the Indian Community's water rights might be awarded a priority date of 1879 (the date of creation of the reservation), or perhaps even earlier. The settlement agreement subordinates the Indian Community's early priority date to the priority dates associated with the respective water rights of each contributing party to the agreement. The only exception to this is the Indian Community's entitlement to 18,776 acre-feet of Salt River water under the 1910 Kent Decree.<sup>60</sup> The settlement retains the early priority assigned to this right under that decree.

Groundwater resources also played a part in the settlement; however, the settlement agreement requires the Indian Community to limit groundwater pumping on the reservation to a calculated safe yield amount under the Arizona

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Salt River Pima-Maricopa Indian Cmty., No. 39-35088 (Ariz. Super. Ct. Maricopa County Jan. 29, 1987).

57. See Complaint, Salt River Pima-Maricopa Indian Community v. Aguilar, Civ. No. 82-2162 (D. Ariz. Dec. 23, 1982).

58. Salt River Pima-Maricopa Indian Community Water Rights Settlement Act of 1988, Pub. L. No. 100-512, 102 Stat. 2549.

59. See Salt River Pima-Maricopa Indian Community Water Rights Settlement Agreement ¶ 6.2 (Feb. 12, 1988).

60. See Hurley v. Abbott (*Kent Decree*), Arizona Territorial Court, Cause No. 4564 (Mar. 1, 1910) (decision and decree); Salt River Pima-Maricopa Indian Community Water Rights Settlement Agreement ¶ 7.0 (Feb. 12, 1988).

Groundwater Code at such time as other groundwater users in the East Salt River Basin of the Phoenix Active Management Area reach safe yield.<sup>61</sup>

In addition to providing the Indian Community with a dependable water supply, the settlement agreement also provides for the contribution of over \$58 million by the United States and \$3 million by the State of Arizona, for renovation of the Indian Community's existing water delivery system, subjugation of additional agricultural lands on the reservation, and for other water, economic, and Indian Community development projects.<sup>62</sup>

In addition to the sizable contributions of local supplies by the neighboring non-Indian parties, two components of the settlement water budget feature supplies from the Colorado River. Some of the water is supplied by the CAP, while a second component utilizes main stem Colorado River water.

#### b. CAP Water Used in the Settlement

In December 1980, the Indian Community contracted with the United States to receive 13,300 acre-feet per year of Indian priority CAP water.<sup>63</sup> While counted by settlement parties as a source of water contributing to the satisfaction of the Indian Community's maximum annual water entitlement, this water would be most expensive for the Indian Community to use for agricultural purposes on its reservation. At the same time, the Valley cities participating in the settlement expressed a strong interest in leasing this entitlement from the Indian Community on a long-term basis. As part of the settlement, the Indian Community agreed to lease its CAP entitlement to the Valley cities for a term of 99 years, commencing in the year 2000 for a one-time payment of \$16,000,000.<sup>64</sup> This money was placed in a trust fund to be used by the Indian Community for water development projects and for other economic and community development purposes. This lease is the only exception to the settlement's blanket prohibition of the marketing or use of the Indian Community's water off the reservation, and it is limited to use within the local watershed, where the CAP water was originally intended to be used.

#### c. Main Stem Colorado River Water

After considering the water available to the Indian Community from local surface water supplies, groundwater and CAP water, it was readily apparent that the maximum annual water entitlement initially agreed upon could not be met without importing water from outside the Salt and Verde watersheds. The cities' river water exchange operates to provide the Indian Community with an additional water source—the Colorado River. Under this exchange agreement between Salt River Pima-Maricopa Indian Community, the Valley cities, and the Salt River Project ("SRP"), 20,000 acre-feet of water then being used by the Wellton-

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61. Salt River Pima-Maricopa Indian Community Water Rights Settlement Agreement ¶ 13.0 (Feb. 12, 1988).

62. *Id.* ¶ 20.1.

63. See Central Arizona Project Indian Water Delivery Contract Between the United States and the Salt River Pima-Maricopa Indian Community § 4.5 (Dec. 11, 1980).

64. Salt River Pima-Maricopa Indian Community Water Rights Settlement Agreement ¶ 19.0 & exhibits 3.h.1 to 3.h.7, 3.m.1 to 3.m.7 (Feb. 12, 1988).

Mohawk Irrigation District along the Colorado River was made available to the Valley cities through the purchase and retirement of farmland within the district. In exchange, the Valley cities and SRP agreed to release 20,000 acre-feet of water from SRP's reservoirs for use on the Community's lands within the Salt River Reservoir District. This water is being made available to the Community as additional agricultural lands within the Salt River Reservoir District and within the Valley cities are urbanized.

## 2. Fort McDowell Indian Community Settlement

### a. Overview

The Fort McDowell Indian Reservation is located 23 miles northeast of the Phoenix area, upstream from the confluence of the Salt and Verde Rivers; the Verde River runs north to south through the reservation, which borders the community of Fountain Hills.<sup>65</sup> The lands within the reservation were reserved by executive order of President Theodore Roosevelt on September 15, 1903.<sup>66</sup>

In the early 1980s, the United States asserted federal reserved rights claims on behalf of the tribe in the Gila River Adjudication in the amount of 31,500 acre-feet annually from the Verde River and other sources. The Fort McDowell Indian Community ("Fort McDowell Community" or "Community") filed its own claim in the adjudication for 48,000 acre-feet annually, and, at the same time, filed an action in federal district court seeking a quantification of its federal reserved rights claims.<sup>67</sup> As was the case with the Salt River-Pima Maricopa Indian Community's claims, the claims on behalf of the Fort McDowell Community raised concerns among local non-Indian water users who might be affected by a substantial court award to the Community of water from the Verde River. Negotiations to resolve the Fort McDowell Community's claims commenced in 1985, and involved substantially the same parties as the Salt River Pima-Maricopa settlement.<sup>68</sup> The parties reached an agreement on the terms of the settlement in 1990, and on November 28, President George H. W. Bush signed into law the Fort McDowell Indian Community Water Rights Settlement Act.<sup>69</sup>

Under the settlement agreement, in exchange for a waiver of the Fort McDowell Community's past, present, and future claims for water rights or injuries to water rights, the Community is provided with an annual entitlement to 36,350 acre-feet of water, to be used for irrigation and other economic development on the reservation. The Fort McDowell Community's entitlement is derived from a number of sources, including contributions from parties to the agreement whose appropriative rights claims are subject to determination by the

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65. S. REP. NO. 101-479, at 2 (1990).

66. *Id.*

67. *Id.* at 6-7.

68. Compare Salt River Pima-Maricopa Indian Community Water Rights Settlement Agreement (Feb. 12, 1988), with Fort McDowell Indian Community Water Rights Settlement Agreement (Jan. 15, 1993).

69. Fort McDowell Indian Community Water Rights Settlement Act of 1990, Pub. L. No. 101-628, 104 Stat. 4469, 4480 (1990).

court in the Gila River Adjudication. The priority dates for the contributions of these appropriators shall be as determined in the Gila River Adjudication.

In addition to the water provided under the settlement, the 1990 Settlement Act also authorized the appropriation of \$23 million, as well as a \$13 million loan to the Fort McDowell Community pursuant to the Small Reclamation Projects Act, to implement the terms of the negotiated agreement.<sup>70</sup> An additional \$2 million was contributed to the settlement by the State of Arizona.<sup>71</sup> These funds were deposited into a trust fund for use in the design and construction of facilities to permit the use of the Fort McDowell Community's water entitlement, and for economic and community development on the tribe's reservation.<sup>72</sup>

As was the case with the Salt River Pima-Maricopa settlement, the Fort McDowell settlement water budget relied on CAP water; indeed, two crucial components of the water budget were supplied by CAP. The first was the Fort McDowell Community's own Indian priority CAP allocation; the second, referred to in the settlement agreement and the Act as "Other Water," involved the subsequent acquisition by the United States of CAP supplies from non-Indian contractors. The approach of using non-Indian CAP water to settle Indian reserved rights claims was a departure from earlier settlements described in this article, which relied only on Indian priority water or main stem Colorado River water.<sup>73</sup> It was not the last time this approach would be used.

#### b. Fort McDowell Indian Community CAP Allocation

On December 11, 1980, the United States and the Fort McDowell Community entered into a CAP water delivery contract providing for the annual delivery to the Community of 4,300 acre-feet of CAP water.<sup>74</sup> Except to the extent that the Community's entitlement is leased to other users, SRP agreed to accept delivery of the Community's CAP entitlement as exchange water entitling the Community to an annual diversion right from the Verde River not to exceed 4,526 acre-feet.

The settlement agreement permits the Fort McDowell Community to lease its allocation of 4,300 acre-feet of CAP water, for use in Pima, Maricopa, or Pinal counties in the State of Arizona, at fair market value for a term not to exceed 100 years.<sup>75</sup> The Community is also permitted to lease, under these same terms, the 13,933 acre-feet of water acquired by the United States on its behalf, except that

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70. *Id.* § 408(b), (e), 104 Stat. at 4489.

71. *Id.* § 408(a)(2), 104 Stat. at 4489.

72. S. REP. NO. 101-479 (1990).

73. Note that the non-Indian agricultural CAP water component of the Southern Arizona Water Rights Settlement was not added until later, as part of the Arizona Water Settlements Act of 2004. By this time, the use of non-Indian CAP supplies to settle Indian water claims had become commonplace.

74. Central Arizona Project Indian Water Delivery Contract Between the United States and the Fort McDowell Mohave-Apache Indian Community, Dec. 11, 1980, Section 4.5.

75. Fort McDowell Indian Community Water Settlement Agreement ¶¶ 12.0, 20.0 (Jan. 15, 1993).



no Salt or Verde River water acquired by the United States to satisfy the Community's entitlement to 13,933 acre-feet may be sold, leased, transferred, or otherwise used off the Fort McDowell reservation.<sup>76</sup>

With the above-noted exceptions, no water made available to the Fort McDowell Community under the settlement agreement or the Settlement Act may be sold, leased, transferred, or otherwise used off the community's reservation.

c. Other Water to be Acquired by the United States

The settlement agreement required the United States Secretary of the Interior to acquire, for the benefit of the Fort McDowell Community, rights to 13,933 acre-feet of water annually, hereinafter referred to as "Other Water," from one or a combination of the following sources: (1) CAP water previously allocated to and permanently relinquished by the Harquahala Valley Irrigation District ("HVID"); and (2) CAP M&I water and CAP Indian priority water previously allocated to and permanently relinquished by the City of Prescott, the Yavapai Prescott Tribe, the Yavapai-Apache Indian Community of the Camp Verde Reservation, the Cottonwood Water Company, or the Camp Verde Water Company.<sup>77</sup> In the event that the Secretary was unable to acquire rights to 13,933 acre-feet annually from the sources described above, solely or in combination, the agreement required the Secretary to acquire water, from all sources at the disposal of the United States within the State of Arizona, in amounts necessary to satisfy the Fort McDowell Community's entitlement to Other Water.<sup>78</sup>

Except for CAP water previously allocated to the HVID, all rights to water acquired by the United States in satisfaction of the Community's entitlement to Other Water would have a priority equivalent to CAP M&I or CAP Indian priority. Any water acquired by the Secretary from the HVID could be converted from its original CAP agricultural priority to CAP Indian priority, or could be exchanged with other CAP contractors or subcontractors in return for CAP water having a CAP municipal and industrial or CAP Indian priority.

The United States subsequently met its obligation to acquire the Other Water provided for in the settlement agreement through the acquisition of CAP water previously allocated to HVID.<sup>79</sup> Because its reservation is not adjacent to the CAP diversion works, the tribe is physically unable to accept delivery of CAP water for use on the reservation. Therefore, with the exception of water that is leased by the Fort McDowell Community to other water users, all CAP water acquired by the United States in satisfaction of the tribe's entitlement to Other Water will be delivered through the CAP aqueduct to SRP as exchange water. SRP will accept delivery of the tribe's entitlement to Other Water in the amount of

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76. *Id.* ¶ 15.0.

77. *Id.* ¶ 11.0.

78. *Id.*

79. Statement of Findings, Implementation of the Fort McDowell Indian Community Water Rights Settlement Act of 1990, Public Law 101-628, 59 Fed. Reg. 5609-02 (Feb. 7, 1994).

13,933 acre-feet as exchange water entitling the tribe to a maximum annual diversion from the Verde River of 14,666 acre-feet.<sup>80</sup>

### 3. *San Carlos Apache Settlement*

The San Carlos Apache Reservation is located in East Central Arizona on approximately 1,826,500 acres in Gila, Graham, and Pinal counties. The reservation was established by Executive Order in 1873.<sup>81</sup> The San Carlos Apache Indian Tribe (“the Tribe”) has approximately 10,000 members. The reservation is located in both the Salt and Gila River drainage areas. The Black River, a tributary to the Salt River, runs east to west along the reservation’s northern border.

The United States filed claims on behalf of the Tribe for 292,406 acre-feet of water for all purposes including irrigation, domestic, municipal, stock watering, industrial, mining, and recreation.<sup>82</sup> These claims included 98,790 acre-feet from the Salt and Black Rivers, 174,526 acre-feet from the Gila River, and 19,590 acre-feet from the San Pedro River.<sup>83</sup>

In 1992, Congress passed the San Carlos Apache Tribe Water Rights Settlement Act,<sup>84</sup> authorizing the execution by the Tribe and the United States of an agreement settling the Tribe’s water right claim to the Salt, Black, and San Pedro rivers. Parties to the settlement agreement, which did not resolve the Tribe’s claims to the Gila River, included, among others, the Tribe, the United States, SRP, the Roosevelt Water Conservation District, and most of the Valley cities.<sup>85</sup>

Under the settlement, the Tribe received the rights to 71,445 acre-feet annually of surface water for use on its reservation.<sup>86</sup> In a departure from earlier settlements, the Tribe’s annual entitlement to 7,300 acre-feet of water from the Black River was not a contribution from the appropriative rights of local parties, but instead was recognized as an independent water right of the Tribe with an 1871 priority date.<sup>87</sup> The 1992 Act also appropriated \$38,400,000, for use by the Tribe “to put to beneficial use the Tribe’s water entitlement, to defray the cost to the Tribe of [Central Arizona Project] operation, maintenance and replacement

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80. Fort McDowell Indian Community Water Settlement Agreement, ¶¶ 6.0, 7.0, 11.0 (Jan. 15, 1993).

81. See the San Carlos Apache Tribe Water Rights Settlement Act of 1992, Pub. L. No. 102-575, § 3703(6), 106 Stat. 4600, 4742, which provides that the tribe’s reservation was “established by the Executive orders of November 9, 1871, and December 14, 1872, as modified by subsequent Executive orders and Acts of Congress including the Executive order of August 5, 1873.”

82. See Statements of Claimant, United States *ex rel.* San Carlos Apache Tribe, Nos. 39-12676, 39-63614, 39-64257, 39-64258, 39-64259 (dates unknown).

83. *Id.*

84. Pub. L. No. 102-575, § 3703(6), 106 Stat. at 4740.

85. The City of Phoenix was not a party to the San Carlos Apache Tribe Water Rights Settlement.

86. San Carlos Apache Tribe Water Rights Settlement Agreement ¶ 4.0 (Mar. 30, 1999).

87. *Id.* ¶ 5.0.

charges as appropriate, and for other economic and community development purposes."<sup>88</sup>

In addition to the Black River entitlement, groundwater, and unrestricted use of all Black River tributaries on the reservation, the settlement included an unprecedented amount of Colorado River water, including both the Tribe's own Indian priority CAP allocation, excess water from the 1984 Ak-Chin Settlement, and multiple contributions of non-Indian CAP water previously allocated to others.

Of the 71,445 acre-feet provided under the settlement, 33,300 acre-feet of water comes from excess water from the Ak-Chin Indian water settlement, 14,655 acre-feet of CAP M&I water previously allocated to the Phelps Dodge Corporation, 3,480 acre-feet of CAP M&I water previously allocated to the City of Globe, and 12,700 acre-feet of CAP water which is the Tribe's existing CAP Indian priority allocation.<sup>89</sup>

#### 4. Gila River Indian Community Settlement

The Gila River Indian Reservation was created by an Act of Congress in 1859 and was enlarged by seven separate Executive Orders in 1876, 1879, 1882, 1883, 1911, 1913 and 1915.<sup>90</sup> Currently, the reservation encompasses approximately 377,000 acres of land in central Arizona. Most of these lands are located in the Gila River watershed. A small portion of the 1879 enlargement, however, borders the Salt River near its confluence with the Gila River.

Both the Gila River Indian Community ("Gila River Community" or "Community") and the United States on its behalf filed water right claims in the Gila River Adjudication based on aboriginal occupation of the reservation and the federal reserved rights doctrine.<sup>91</sup> The United States, on behalf of the Gila River Community, claimed a time immemorial right to over 1.5 million acre-feet of water from the Gila and Salt Rivers, as well as 20 million acre-feet of groundwater.<sup>92</sup> The Gila River Community's initial claim in the adjudication, filed in the late 1980s, likewise claimed a time immemorial water right to over 1.5 million acre-feet annually from water sources throughout the Gila River watershed, including the Salt and Verde Rivers.<sup>93</sup> The Gila River Community subsequently amended its claims, however, asserting the right to more than 2.7

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88. Pub. L. No. 102-575, § 3707, 106 Stat. at 4748.

89. San Carlos Apache Tribe Water Rights Settlement Agreement ¶¶ 4.0, 9.0, 10.0, 11.0 (Mar. 30, 1999).

90. See Arizona Water Settlements Act, Pub. L. No. 108-451, § 2(42), 118 Stat. 3478, 3483 (2004).

91. See Statement of Claimant, Gila River Indian Cmty., Nos. 39-05478, 39-12652, 39-24083, 39-36340, 39-37360, 39-41142, 39-60083, 39-79815 (originally filed Jan. 20, 1987); Statement of Claimant, United States *ex rel.* Gila River Pima-Maricopa Indian Cmty., No. 39-35092 (Ariz. Super. Ct. Maricopa County Jan. 20, 1987).

92. See Statement of Claimant, United States *ex rel.* Gila River Pima-Maricopa Indian Cmty., No. 39-35092 (Ariz. Super. Ct. Maricopa County Jan. 20, 1987).

93. See Statement of Claimant, Gila River Indian Cmty., Nos. 39-05478, 39-12652, 39-24083, 39-36340, 39-37360, 39-41142, 39-60083, 39-79815 (originally filed Jan. 20, 1987).

million acre-feet of water annually from the Gila River, its tributaries, and groundwater.<sup>94</sup>

The sheer magnitude of these claims, and the sources of supply from which they would be satisfied, caused a great deal of concern among water users throughout the basin. In order to avoid an uncertain outcome through litigation and assure the dependability of water supplies to the more than 3 million residents of Maricopa, Yavapai, and Pinal Counties in central Arizona, local parties initiated water settlement negotiations with the Community and the United States in 1989. The negotiations proceeded over the next 14 years, and were contentious and difficult. Ultimately, a comprehensive settlement of the Community's water rights was reached and approved by Congress in Title II of the Arizona Water Settlements Act of 2004.<sup>95</sup>

The Gila River Indian Community Water Rights Settlement is unquestionably the most ambitious and far reaching of any Indian water rights settlement in Arizona, with Indian and non-Indian CAP water supplies once again playing an integral role. Parties to the settlement agreement include the United States, the Gila River Community, the State of Arizona, SRP, the Valley cities, Phelps Dodge Corporation, and numerous other irrigation districts, cities, towns, and municipal water providers in both the Salt and Gila River watersheds.<sup>96</sup> An application for approval of the settlement is presently pending before the Gila River Adjudication court.

#### a. Overview

The settlement agreement entitles the Gila River Community to an average of 653,500 acre-feet of water annually.<sup>97</sup> Sources of supply that will be used to satisfy this entitlement include, among others, the Community's existing decreed rights under the *Globe Equity*, *Benson-Allison*, and *Haggard* court decrees, plus CAP water and substantial amounts of groundwater pumped from beneath the Gila River Indian Reservation.<sup>98</sup> As was the case with the Salt River Pima-Maricopa settlement, the settlement also provides for the contribution of local water supplies from non-Indian appropriators. The attributes of these water rights, which continue to be held by the non-Indian appropriators, will be determined in the due course of the adjudication. In addition to water supplies, the Act of Congress approving the settlement provides the Gila River Community with federal funding in the amount of \$200 million for rehabilitation of existing facilities and construction of extensions to those facilities, defrayal of operation, maintenance, and replacement costs associated with the delivery of the Gila River Community's CAP water entitlement, rehabilitation of past subsidence damages to

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94. *Id.*

95. Pub. L. No. 108-451, 118 Stat. 3478 (2004).

96. *See* Amended and Restated Gila River Indian Community Water Rights Settlement Agreement (Oct. 21, 2005).

97. *Id.* ¶ 4.1.

98. *Id.*

lands within the Gila River Indian Reservation, and implementation of a water quality monitoring program.<sup>99</sup>

In exchange for the benefits provided under the Settlement Agreement, the Gila River Community, its members and allottees, and the United States on their behalf, shall execute a comprehensive waiver and release of claims for water rights, injuries to water rights, and injuries to water quality, among others, as provided in the exhibits to the Settlement Agreement.<sup>100</sup> The other settling parties also shall execute waivers and releases of claims that such parties may have against the Gila River Community, its members or allottees, and the United States on their behalf, as specified in the agreement.<sup>101</sup>

#### b. CAP Components of the Settlement

CAP water supplies play a vital role in satisfying the requirements of the Gila River Community settlement water budget. The settlement entitles the Community to a total of 328,800 acre-feet annually of water from the CAP, subject to the availability of the water and the priorities of the respective allocations comprising the Community's entitlement.<sup>102</sup> In addition to the Community's original Indian priority CAP entitlement, multiple entities with contractual rights to CAP water agreed to assign their CAP allocations to the Indian Community, as a vehicle for settling the Community's objections to appropriative rights also held by these entities. Additionally, the Arizona Water Settlements Act itself reallocates 102,000 acre-feet of uncontracted non-Indian agricultural CAP supplies to the Indian Community.<sup>103</sup>

The individual components of the Gila River Community's entitlement to CAP water are: (a) the Community's original CAP Indian Priority Water allocation (173,100 acre-feet); (b) Roosevelt Water Conservation District CAP Water (18,600 acre-feet); (c) CAP water formerly allocated to Harquahala Valley Irrigation District (18,100 acre-feet); (d) Asarco CAP Water (17,000 acre-feet) if an agreement is reached between Asarco and the Community; and (e) new CAP non-Indian Agricultural Priority Water (102,000 acre-feet).<sup>104</sup>

The Gila River Community may lease or exchange all or a portion of its CAP entitlement, but, as provided in the Arizona Water Settlements Act, none of its entitlement may be permanently transferred, nor may the community lease,

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99. Arizona Water Settlements Act, Pub. L. No. 108-451, §§ 203(d), 214, 118 Stat. 3478, 3500-01, 3534 (2004).

100. Amended and Restated Gila River Indian Community Water Rights Settlement Agreement ¶ 25.0 (Oct. 21, 2005).

101. *Id.* ¶ 25.1.

102. *See id.* ¶¶ 8.3.1-8.3.5.

103. Arizona Water Settlements Act, Pub. L. No. 108-451, § 104(a)(1)(A)(i), 118 Stat. at 3487.

104. Amended and Restated Gila River Indian Community Water Rights Settlement Agreement ¶¶ 8.3.1-8.3.5 (Oct. 21, 2005).

exchange, forbear, or otherwise transfer its CAP entitlement for use outside the State of Arizona.<sup>105</sup>

Subject to certain monthly and annual volume limitations, SRP has agreed to take delivery of CAP water to which the Community is entitled for use by SRP shareholders, in exchange for the storage of the same amount of Salt and Verde River water in SRP reservoirs for eventual use by the Community. This exchange is subject to the ability of SRP to divert and beneficially use the CAP water to which the Community is entitled. SRP will deliver exchange water ordered by the Community via the SRP water delivery system only after determining that the system capacity is not needed to fulfill water delivery obligations of SRP that predate the settlement.

SRP has also agreed to accept delivery of CAP water to which the Community is entitled for direct delivery to the reservation, via SRP's water delivery system.<sup>106</sup> The direct delivery of this water to the Community will also be subject to the limits of SRP's water delivery system capacity.

### *C. Summary*

Over the past twenty-five years, CAP water supplies have been increasingly crucial to the settlement of Indian reserved water rights claims in Arizona. While settlements in the early 1980s modestly included only the tribe's Indian priority CAP allocation in the settlement water budget, later settlements also relied heavily on CAP supplies contributed by non-Indian contractors. With the passage of the Arizona Water Settlements Act of 2004, the use of CAP supplies to settle Indian water claims was taken to a new level, as Congress reallocated uncontracted non-Indian agricultural priority water to two tribes. But the Act also set a limit on the amount of CAP water that could be used to settle Indian water claims in the future. Additionally, the Act allocated a finite amount of funding—\$250 million (plus interest)—to future Indian water settlements in Arizona.<sup>107</sup> In the face of this firm allocation, obtaining additional funds from Congress to implement future settlements is likely to prove difficult; as a result, the \$250 million (plus interest) allocation may become, in practical effect, the ceiling on available funding for such settlements. These provisions of the Act, and their effect on future Indian water settlements, are discussed in the next section.

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105. Arizona Water Settlements Act, Pub. L. No. 108-451, § 104(a)(1)(B)(iii), 118 Stat. at 3488.

106. Amended and Restated Gila River Indian Community Water Rights Settlement Agreement ¶ 14.0 (Oct. 21, 2005).

107. Arizona Water Settlements Act, Pub. L. No. 108-451, § 107(a), 118 Stat. 3478 (amending 43 U.S.C. § 1543(f)(2)(D)(vi) (2000)).

**IV. FINAL DIVISION OF CAP WATER AMONG INDIAN AND NON-  
INDIAN USERS AND ALLOCATION OF MONEY FOR FUTURE  
SETTLEMENTS—TITLE I OF THE ARIZONA WATER SETTLEMENTS  
ACT OF 2004**

***A. Post-1992 Reallocation—Subcontracts Not Executed, Financial Disputes Arise***

The 1992 reallocation decision with respect to non-Indian agricultural priority water contemplated that new or amended CAP subcontracts for water service would be offered and executed soon thereafter.<sup>108</sup> But, for several reasons, CAP subcontracts for the reallocated water were not executed as anticipated: “(1) Some entities could not meet the financial feasibility requirements for receipt of CAP water; (2) lack of agreement on the form of the CAP water service subcontract to offer the entities; and (3) financial difficulties of the CAP non-Indian agricultural sector.”<sup>109</sup>

During this same period, negotiations were ongoing between the United States Bureau of Reclamation and the Central Arizona Water Conservation District (“CAWCD”), operator of the CAP, to resolve various financial repayment and operational disputes. Importantly, “long-term utilization of the CAP water available for reallocation under the 1992 decision and from the uncontracted M&I water was a central issue in [these] negotiations.”<sup>110</sup> When attempts at negotiations failed, issues regarding water contracting were included in litigation along with other claims filed by CAWCD against the United States. Subsequently, the parties entered into a repayment stipulation settling all issues in the suit; however, implementation of the repayment stipulation required the enactment of new federal legislation addressing the division of waters of the CAP. Title I of the Arizona Water Settlements Act provides for this division.<sup>111</sup>

***B. Reallocation and Division of CAP Water Supplies under the Arizona Water Settlements Act Among Indian and Non-Indian Contractors***

Title I of the Arizona Water Settlements Act provides for the reallocation of uncontracted non-Indian agricultural priority water, as follows:

The Secretary shall reallocate 197,500 acre-feet of agricultural priority water made available pursuant to the master agreement for use by Arizona Indian tribes, of which—

- (i) 102,000 acre-feet shall be reallocated to the Gila River Indian Community;
- (ii) 28,200 acre-feet shall be reallocated to the Tohono O’odham Nation; and

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108. Central Arizona Project (CAP), Arizona; Water Allocations, 71 Fed. Reg. 50,449-02 (Aug. 25, 2006).

109. *Id.*

110. *Id.*

111. Arizona Water Settlements Act, Pub. L. No. 108-451, § 104(a)(1)(A), 118 Stat. at 3487-92.

(iii) subject to the conditions specified in subparagraph (B), 67,300 acre-feet shall be reallocated to Arizona Indian tribes.<sup>112</sup>

The conditions to the reallocation referred to in subsection (iii) of section 104(a)(1)(A) are: (1) the water reallocated to Arizona Indian Tribes “shall be used to resolve Indian water claims in Arizona, and may be allocated by the Secretary to Arizona Indian Tribes in fulfillment of future Arizona Indian water rights settlement agreements approved by an Act of Congress;”<sup>113</sup> (2) of the 67,300 acre-feet retained for reallocation to Arizona Indian tribes, 6,411 acre-feet shall be retained by the Secretary “for use for a future water rights settlement agreement approved by an Act of Congress that settles the Navajo Nation’s claims to water in Arizona;”<sup>114</sup> and (3) “the agricultural priority water shall not, without specific authorization by Act of Congress, be leased, exchanged, forborne, or otherwise transferred by an Arizona Indian tribe, for any direct or indirect use outside the reservation of the Arizona Indian tribe.”<sup>115</sup>

In addition to requiring the reallocation of 197,500 acre-feet of non-Indian agricultural priority water to Indian tribes, Title I of the Arizona Water Settlements Act directs the Secretary to reallocate the remaining uncontracted agricultural priority water, in an amount up to 96,295 acre-feet, to the Arizona Department of Water Resources “to be held under contract in trust for further allocation.”<sup>116</sup> The Secretary will ultimately reallocate the water after a recommendation for reallocation is submitted by the Arizona Department of Water Resources to the Secretary, and reviews of the proposed allocation are carried out in compliance with federal law.<sup>117</sup> Title I also directs the Secretary to reallocate the 65,647 acre-feet of uncontracted M&I water to 20 entities, specifically referred to in the Act.<sup>118</sup>

Finally, Title I of the Arizona Water Settlements Act effects a final division of CAP water supplies as between Indian and non-Indian contractors, in accordance with the above-described statutory reallocation. Thus, under Section 104(c)(1)(A) of the Act:

The total amount of entitlements under long-term contracts (as defined in the repayment stipulation) for the delivery of Central Arizona Project water in the State shall not exceed 1,415,000 acre-feet, of which—

(i) 650,724 acre-feet shall be—

(I) under contract to Arizona Indian tribes; or

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112. *Id.*

113. *Id.* § 104(a)(1)(B)(i), 118 Stat. at 3487.

114. *Id.* § 104(a)(1)(B)(ii), 118 Stat. at 3487–88. If the Congress does not approve a settlement of the Navajo Nation’s claims before December 31, 2030, this water will be made available for the settlement of other Arizona Indian Tribes’ claims. *Id.*

115. *Id.* § 104(a)(1)(B)(iii), 118 Stat. at 3488.

116. *Id.* § 104(a)(2)(B), 118 Stat. at 3488.

117. *Id.* § 104(a)(2)(C), 118 Stat. at 3488–89.

118. *Id.* § 104(a)(2)(D), 118 Stat. at 3489.



(II) available to the Secretary for allocation to Arizona Indian tribes; and

(ii) 764,276 acre-feet shall be under contract or available for allocation to—

(I) non-Indian municipal and industrial entities;

(II) the Arizona Department of Water Resources; and

(III) non-Indian agricultural entities.<sup>119</sup>

Title I then declares that the division of CAP water between Indian and non-Indian uses cannot be circumvented by water transfers:

Except pursuant to the master agreement, Central Arizona Project water may not be transferred from—

(i) a use authorized under paragraph (1)(A)(i) to a use authorized under paragraph (1)(A)(ii); or

(ii) a use authorized under paragraph (1)(A)(ii) to a use authorized under paragraph (1)(A)(i).<sup>120</sup>

The only exception to this blanket prohibition on transfers is for the lease of CAP by an Arizona Indian tribe to a non-Indian M&I or agricultural user “under an Indian water rights settlement approved by an Act of Congress.”<sup>121</sup>

In August 2006, the Secretary of the Interior published a final decision reallocating the non-Indian M&I water supplies and implementing division of the total CAP supply between federal and non-federal uses as provided for in Title I of the Act.<sup>122</sup> With the publication of this decision, a final allocation of CAP water was achieved, “with a CAP supply permanently designated for Indian uses and a CAP supply permanently designated for non-Indian M&I or agricultural uses.”<sup>123</sup> Unquestionably, the most far reaching impact of the final allocation is the ceiling that it imposes on the quantities of CAP water that may be used in the future to settle Indian water claims. Following the final allocation, in addition to 1,218 acre-feet of remaining HVID water, only 67,300 acre-feet of uncontracted CAP water remains available for use in settling these claims.

### ***C. Allocation of Funding From Lower Basin Development Fund for Future Indian Water Settlements***

In addition to the CAP water allocations made under the Arizona Water Settlements Act of 2004, Title I of the Act takes the additional step of allocating a finite amount of revenues from the Lower Colorado River Basin Development Fund<sup>124</sup>—“not more than” \$250 million (plus interest)—to be credited to “the

119. *Id.* § 104(c)(1)(A), 118 Stat. at 3490.

120. *Id.* § 104(c)(2)(A), 118 Stat. at 3490.

121. *Id.* § 104(c)(2)(B)(i), 118 Stat. at 3490–91.

122. Central Arizona Project (CAP), Arizona; Water Allocations, 71 Fed. Reg. 50,449-02 (Aug. 25, 2006).

123. *Id.*

124. The Lower Colorado River Basin Development Fund was created by Congress in Section 403 of the Colorado River Basin Project Act of 1968. 43 U.S.C. § 1543

Future Indian Water Settlement Subaccount of the Lower Colorado Basin Development Fund, for use for Indian water rights settlements in Arizona approved by Congress after the date of enactment of this Act."<sup>125</sup> The limiting language of this provision could be construed as placing a cap on the available funding for future Indian water settlements in Arizona. Having made this limited allocation specifically for this purpose, Congress is likely to be reluctant in the future to appropriate additional funds for future Arizona Indian settlements. For all practical purposes, then, the \$250 million (plus interest) allocation in Title I of the Act may operate as a cap on available funding for such settlements. The presence of this cap will severely restrict the resources available for future allocations, making settlements even more difficult to reach.

*D. The Aftermath—What's Left to Settle and Where Do We Go from Here?*

With the claims of so many Arizona Indian tribes still unresolved, and history revealing the central role that CAP supplies have played in settling past tribal water claims, it would appear that with the passage of the Arizona Water Settlements Act we have, indeed, reached the bottom of the CAP waterhole. With CAP supplies all but off the settlement negotiating table, and funding for future settlements extremely limited, ominous questions loom. First, which tribes are likely to reap the benefits of the last of the CAP supplies remaining by quickly settling their water claims? Presently, negotiations are ongoing to settle the claims of, among others, the White Mountain Apache Tribe, the Camp Verde Yavapai-Apache Nation, the Navajo Nation, and the Hopi Tribe. It is clear that the amount of uncontracted CAP water remaining is not enough to meet the settlement needs of these tribes, let alone others who are not currently pursuing settlement.

For those tribes who lose the race to the bottom, what approaches remain for facilitating the settlement of their claims? Water transfers from other sources, such as main stem Colorado River water, may become a more common component of settlement water budgets in the future. However, Indian tribes attempting to obtain water from this source are likely to face stiff competition from cities, towns and industrial users in Central Arizona, who likewise are facing an increased demand for water that easily outstrips the available supply.<sup>126</sup> The settlement of these remaining tribes' claims will be difficult to accomplish without significantly greater curtailment in the use of local water supplies by their non-Indian neighbors. If the degree of sacrifice becomes too much to swallow, it seems likely that tribal claims will be litigated more frequently, as agreements become harder to reach.

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(2000). Revenues from operations of the facilities of the Project are deposited into the fund for various uses specified in the statute.

125. Pub. L. No. 108-451, § 107(a), 118 Stat. at 3495 (amending 43 U.S.C. § 1543(f)(2)(D)(vi)).

126. A remaining obstacle would be to find capacity in the CAP to transport the water to Central Arizona.

### CONCLUSION

The CAP's integral role in the settlement of Indian water claims over the past quarter century was likely not contemplated at the time Congress passed the Colorado River Basin Project Act in 1968. But the CAP provided a new source of water, a new waterhole, and, as Secretary Babbitt noted, the "last waterhole" to satisfy the federal reserved rights claims of the tribes, which vastly exceeded the local supply. Now that these supplies too have been exhausted, tribes and local water users must grapple with hard issues and few alternatives. When all is said and done, there still is not enough water to meet everyone's demands. Future settlements, if any, likely will require much greater compromises on all sides in order to come to fruition.

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