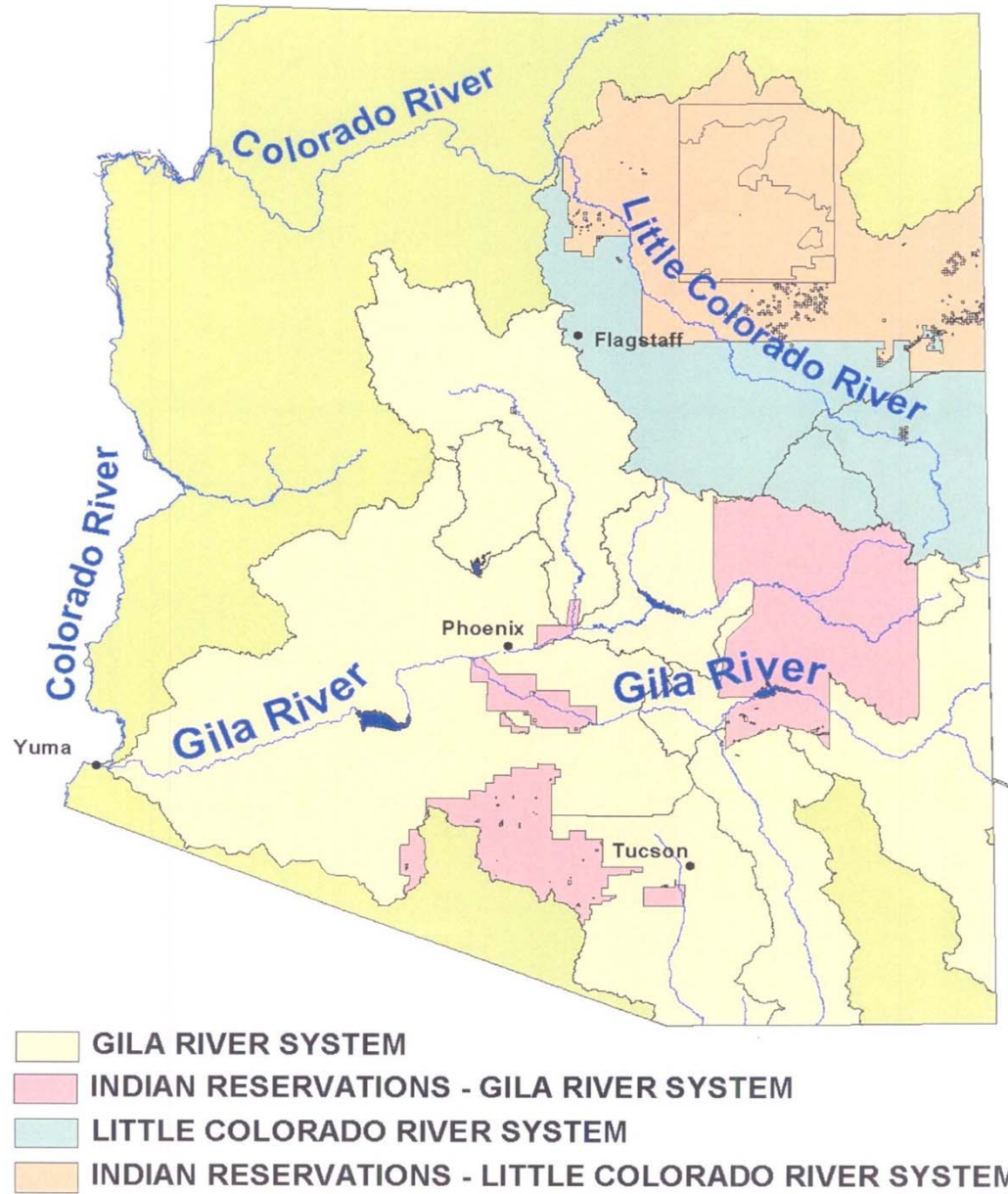


NEGOTIATING INDIAN WATER RIGHT SETTLEMENTS

Identifying Parties and Issues
and
How Negotiations Bind (and Benefit)
Larger Groups

ARIZONA STREAM ADJUDICATIONS



Origins of the Adjudications

- 1974 – Salt River Project files petition with Arizona State Land Department seeking adjudication of water rights in the Salt River.
 - Salt River proceedings were later consolidated with proceedings on other tributaries of the Gila River and the consolidated cases were transferred to Maricopa County Superior Court.
 - More than 85,000 separate claims have been filed by nearly 30,000 claimants.
- 1978 – Phelps Dodge Corporation files petition with Arizona State Land Department to adjudicate all rights to water in the Little Colorado River watershed.
 - Case was later transferred to Apache County Superior Court.
 - More than 14,000 claims filed by nearly 5,000 claimants

Jurisdiction of Arizona Courts

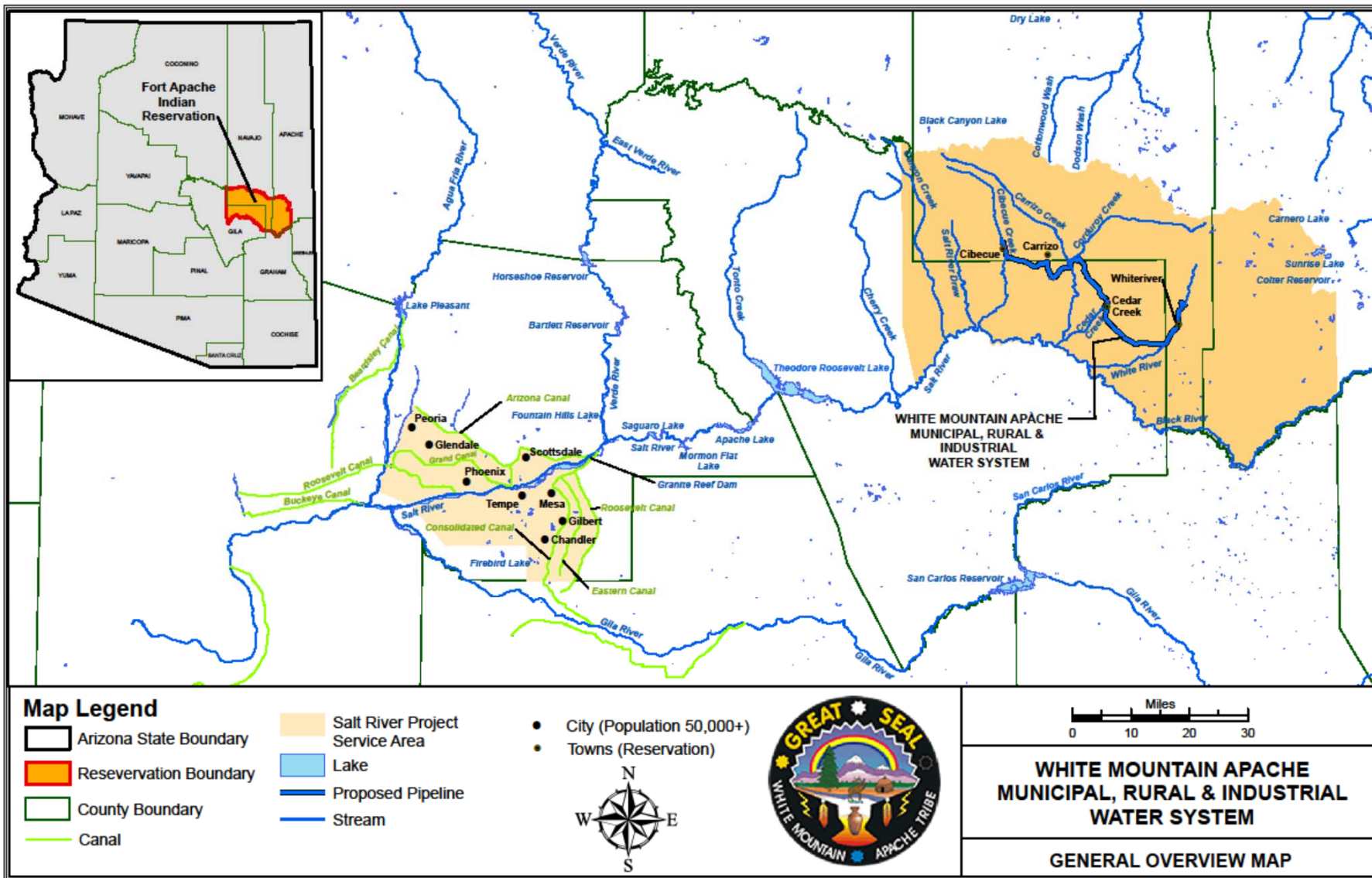
- Arizona Courts have jurisdiction to adjudicate water rights of Indian Tribes – *Arizona v. San Carlos Apache Tribe*, 463 U.S. 545 (1983); *United States v. Superior Court*, 697 P.2d 658 (1985).
- Decisions were based on Congressional waiver of sovereign immunity (McCarran Amendment) and Arizona constitution.
- This took more than a decade to resolve following initial petitions to adjudicate Salt River.

Indian Water Right Settlements

- Tribal water right claims are some of the largest claims in Arizona.
 - Collectively, the claims significantly exceed the total annual water budget in Arizona.
 - Because they are based on the federal reserved water right doctrine and are not quantified, these claims present a serious risk to state law-based water right holders.
 - To address this risk and minimize uncertainty for both Indian and non-Indian claimants, settlements have been the preferred way to resolve these claims.

Essential Elements of a Successful Settlement

- Patience
 - Successful settlements require years of effort
- Flexibility
 - All participants need to be prepared to compromise
- Creativity
 - On water supplies, water projects and funding sources.
- Carrots and Sticks



Location Map



Arizona Supreme Court Interlocutory Review Decisions

- “*Gila III*,” 989 P.2d 739 (1999). The court decided:
 - The federal reserved water rights doctrine applies to percolating groundwater in Arizona “where other waters are inadequate to accomplish the purpose of the reservation.”
 - Holders of federal reserved rights can invoke federal law to protect reserved groundwater from depletion when state law is insufficient.
 - Standard is not “zero impact” – any injunctions must be “appropriately tailored to minimal need.”

Arizona Supreme Court Interlocutory Review Decisions

- “*Gila V,*” 35 P.3d 68 (2001). Court establishes the standard for quantifying Indian reserved water rights:
 - The “essential purpose of Indian reservations is to provide Native American people with a ‘permanent home and abiding place.’”
 - Sufficient water is reserved to meet “minimal need” of the reservation, but this must be enough to “satisfy both present and future needs of the reservation as a livable homeland.”
 - Any “reasonably feasible” development proposal can be used to quantify the water right – must be “practical” and “economically sound.”

Gila V continued – federal reserved water rights

- Court also explained how Indian reservations are different from other federal reservations (*e.g.*, national forests, national parks, etc.):
 - The “primary purpose for which the federal government reserves non-Indian land is strictly construed after careful examination.”
 - Only water “essential for the primary purposes of the [non-Indian] reservation” is reserved. Must show “that without water the purposes of the reservation would be entirely defeated.”
 - Any water for “secondary purposes” must be obtained pursuant to state law.

Identifying Issues/Parties/Negotiations

- **WMAT Quantification Issues:**
 - Quantification by settlement or by litigation?
 - “Wet Water” vs Paper Water Rights
 - Priority date of WMAT reserved water rights
 - Water budget for WMAT water rights claim-economic feasibility
 - Quantification standard, i.e. PIA? Homeland purpose? Primary Purpose of reservation?
 - Methodology to measure diversion and depletion

Issues (continued)

- Right to divert surface water; groundwater alternatives
- Buffer zone along Northern boundary to protect reservation groundwater-Coconino aquifer
- Sensitivity doctrine-impact on downstream non-Indian water supply

Issues (continued)

- Quantification of Tribal claims in context of historical policy of suppression of Indian water rights development- “someone's gotta pay”
- Tribal claims of federal conflict of interest and suppression of Indian water rights development that State Court cannot resolve
- Relevance of Tribal breach of trust claims vs. federal government in quantification process- Tribal Tort Liability Paper

Issues (continued)

- Tribal damage claims against State parties
- Administration of Indian quantified water rights on Reservation
- Drafting the WMAT Quantification Agreement
- Drafting the WMAT Water Rights Quantification Act
- Federal funding for “wet water” development and the importance of Tribal Tort Liability Paper
- Finding a Congressional sponsor-unified approach
- Administration Support Letter

Parties and stakeholders

- WMAT Tribal Council
- United States through principal agents BIA and DOJ
- Salt River Reclamation Project(SRP)
- Downstream cities and Irrigation Districts in Phoenix Valley
- Central Arizona Water Conservation District(CAWCD)
- State of Arizona-Arizona Department Water Resources
- Irrigation Districts

parties and stakeholders (continued)

- Confidentiality agreements regarding meetings and draft quantification documents
- Role of Secretary's Federal Negotiation Team- the trust obligation tempered by potential tort liability & divided loyalty
- Tribal Awareness of federal conflicts of interest
- Mutual waivers and release of damage claims
- Affirmation of downstream water rights

Binding larger groups

- SRP takes leadership role for state parties
- WMAT Tribal Council Binds Tribal Membership
- Phoenix Valley cities & SRP participation-field trip diplomacy
- Binding the United States with federal legislation
- State court McCarran amendment judgments and decrees binding larger groups of claimants
- State Court Decrees and Judgments Quantifying WMAT Water Rights
- WMAT Judgment and decree not binding on other Arizona Indian tribes because of trust obligation of the United States to other tribes

Binding larger groups (continued)

- Implementation of WMAT Water Rights Act-satisfying pre-conditions to Enforceability
- Enforceability Date of WMAT Water Rights Act of 2010-satisfaction of requirements:
 - Transfer of Mandatory appropriations to Secretary for benefit of WMAT
 - Approval to begin construction of a reservation wide drinking water system, including reservoir, treatment plant and 60 mile pipeline
 - Approval of CAP water delivery contract and leases
 - Approval by state court of Quantification Agreement, judgments and decrees approved of and signed by settling parties

END