STATE AND FEDERAL LAW IN CONFLICT OVER INDIAN AND OTHER FEDERAL RESERVED WATER RIGHTS

Richard N. Morrison*

I. INTRODUCTION

In *Winters v. United States*,[1] the United States Supreme Court found that a federal reservation includes the right to water in an amount to fulfill the reservation's purpose with priority from the date of treaty, act of Congress, or executive order establishing the reservation.[2] This reserved rights doctrine also has been used to claim federal water rights for other federal (non-Indian) lands, such as military bases, national parks and monuments, and national forests.[3]

Many commentators say the *Winters* Doctrine was dormant from 1908 until 1963, when the United States Supreme Court decided *Arizona v. California*.[4] Since 1963, numerous articles, speeches, seminars, and other presentations have focused on the *Winters* Doctrine and the problems associated with it. In this sense, a paper on the resolution of Indian or other federal reserved water rights claims would not be particularly timely or helpful, unless it illustrated recent problems raised in litigating the conflicts between state and federal laws. However, since most of the pertinent literature was published, a new generation of lawyers is now confronting the problem

---

* Richard N. Morrison is an attorney with Jennings, Strouss, and Salmon, PLC, in Phoenix, Arizona.

1. Winters v. United States, 207 U.S. 564 (1908).
2. *See id.* at 576-77.
3. *See* Arizona v. California, 373 U.S. 546, 601 (1963).
4. *See id.* at 599-601.

of federal reserved water rights. A brief summary of the *Winters* Doctrine and the Doctrine of Prior Appropriation will set the stage for a description of recent experience in adjudicating claims arising from these doctrines. In conclusion, this Article will describe ideas for streamlining the adjudication of conflicting claims, facilitating negotiated settlement between affected parties, and promoting an expansion of water uses with the highest economic values.

II. APPLICATION OF THE WINTERS DOCTRINE

In *Winters*, the Supreme Court decided that the federal government, in establishing the Fort Belknap Indian Reservation, impliedly reserved enough water to satisfy reservation purposes.[5] In making its decision, the Supreme Court invoked the "Rule of Interpretation of Agreements and Treaties with the Indians" by stating that "ambiguities occurring will be resolved from the standpoint of the Indians."[6]

Unlike state water rights, which are based on the Prior Appropriation Doctrine, the validity of reserved rights does not depend on whether the rights have been used previously.[7] The quantity of the federal reserved right is measured by the purpose of the reservation rather than by the beneficial use of water.[8] The priority date for a federal reserved water right is the date the reservation was created rather than the date of the first beneficial use.[9] Although the purpose of a reservation may be unclear, the Supreme Court in *Arizona v. California* upheld a finding of the Special Master that the measure of the reserved right for five Colorado River Indian tribes was to be the amount of water necessary to irrigate all the "practicable irrigable acreage" (PIA) on the reservation.[10] Having decided upon that statement of the measure of the reserved right, the Court left unanswered a host of questions necessarily considered in quantifying the claim of a particular reservation. The following questions are illustrative of the many that remain unanswered by the decided cases:

1. In the adjudication of federal reserved rights claims, must a trial court make a case by case determination of the purposes of the reservation to be served?
2. Is the determination of the amount of practicably irrigable areas to be based on current agricultural technology or on the technology existing at the time a reservation was established?

---

5. *See Winters*, 207 U.S. at 577.

6. *Id.* at 576.

7. *See* Jennele Morris O'Hair, *Federal Reserve Water Rights* (May 4, 1995) (unpublished manuscript, on file with the *Drake Journal of Agricultural Law).*

8. *See* Rita P. Pearson, *Water Law*, *in* ARIZ. ENVTL. L. MANUAL § 3.2.3.5 (Nicholas J. Wallwork ed., 1995) (Envtl. & Nat. Resources L. Sec., Continuing Legal Education) (on file with *Drake Journal of Agricultural Law*).

9. *See Arizona*, 373 U.S. at 600.

10. *See id.* at 549.

3. Is the determination of the number of practicably irrigable acres to be made on the basis of an economic test of feasibility? If so, what are the elements of that test? Should the PIA standard be applied differently to fertile versus barren reservations?
4. What level of irrigation efficiency should be required or assumed on the reservation, particularly if the reservation has access to ground water resources underlying the reservation which are not subject to regulation by state water authorities who severely restrict groundwater pumping on nearby non-Indian lands?

In protecting the federal reserved rights, the federal government has assumed a role in the adjudication of river systems with conflicting water rights claims. At least in the author's experience, the federal government participates in a general stream adjudication as any other claimant. Usually, the adjudications are in state court. Ordinarily, the United States or any Indian tribe could not be a party to a state court proceeding to adjudicate water rights because of sovereign immunity.[11] However, the McCarran Amendment[12] enables the United States to be joined in state court proceedings to adjudicate water rights, provided the state court proceedings are comprehensive.[13] Federal reserved water rights are within the scope of the McCarran Amendment's waiver of sovereign immunity on behalf of the United States.[14]

Typically, in a general stream adjudication, the U.S. government will claim two types of water rights on behalf of federal agencies and Indian reservations: Federal reserved water rights and state law appropriative water rights (for example, where the Bureau of Reclamation, Bureau of Land Management, Forest Service, or other federal agency complied with applicable state law to obtain the right to appropriate water for the benefit of the federal lands involved). Often the federal reserved rights claims will include claims to groundwater needed for purposes of the

---

[11]. *See* Michael J. Brophy, Status of the Arizona Adjudications 3 (May 4, 1995) (unpublished manuscript on file with the *Drake Journal of Agricultural Law*).

[12]. 43 U.S.C. § 666 (1994).

[13]. *See id.* § 666(a). The McCarran Amendment states:

> Consent is given to join the United States as a defendant in any suit (1) for the adjudication of rights to the use of water of the river system or other source, or (2) for the administration of such rights, where it appears that the United States is the owner of or is in the process of acquiring water rights by appropriation under State law, by purchase, by exchange, or otherwise, and the United States is a necessary party to such suit. The United States, when a party to any such suit, shall (1) be deemed to have waived any right to plead that the State laws are inapplicable or that the United States is not amenable thereto by reason of its sovereignty, and (2) shall be subject to the judgments, orders, and decrees of the court having jurisdiction, and may obtain review thereof, in the same manner and to the same extent as a private individual under like circumstances: *Provided*, That no judgment for costs shall be entered against the United States in any such suit.

Id.

[14]. *See* United States v. District Court for County of Eagle, 401 U.S. 520, 522-23 (1971); United States v. District Court for Water Division No. 5, 401 U.S. 527, 529 (1971).

reservations. However, this claim is particularly controversial in states such as Arizona where groundwater is considered to be non-appropriable and the adjudication is intended to adjudicate only the appropriative rights claims of the major river systems and their tributaries.[15]

III. THE DOCTRINE OF PRIOR APPROPRIATION

There are two basic doctrines of surface water law in the United States. In the East and midwestern sections of the United States, most states adopted a version of the Doctrine of Riparian Rights, under which the "person owning land on the bank of a stream has, by reason of the land ownership, the right to make a reasonable and beneficial use of the water of the stream on the land through which it flows."[16] In the arid West, the states generally have preferred the Doctrine of Prior Appropriation over the Doctrine of Riparian Rights.[17] The Doctrine of Prior Appropriation is often described by the principle of "'first in time, first in right,' meaning that a person who first uses the waters of the stream has the better right to use those waters as against all subsequent users," whether the subsequent user is upstream or downstream.[18]

In theory, in a year in which there is a shortage of surface water, those who appropriated and used water first will receive water before those with subsequent appropriations. The amount of water to which an appropriator is entitled is measured by the amount of water has used for a beneficial purpose.[19] Failure to use the water for an unreasonable period of time may result in the loss of the appropriator's water right.[20]

IV. THE NEED FOR ADJUDICATION AND/OR SETTLEMENT

Appropriative rights have been subject to very little supervision or enforcement, at least in Arizona. By the early 1940s, many of Arizona's streams were fully appropriated, and during drought years there was insufficient surface water to satisfy the demands of all users. Because there was no active administration of water rights, the senior rights of downstream appropriators were often disregarded by upstream junior diverters. After *Arizona v. California*,[21] Indian tribes and communities began asserting claims to Arizona streams in excess of the existing use on the reservations, and with priority dates senior to those of most non-Indian appropriators. The existing users recognized that the water resources of the West were then largely consumed by non-Indians, and that a prudent approach would be to

---

15. *See Arizona*, 373 U.S. at 565.

16. M. Byron Lewis, Arizona Doctrine of Prior Appropriation 1, 1 (May 4, 1995) (unpublished manuscript, on file with the *Drake Journal of Agricultural Law*).

17. *See id*.

18. *See id.*

19. *See* ARIZ. REV. STAT. ANN. § 45-141(B) (West 1994 & Supp. 1996).

20. *See id.* §§ 45-141(C), 45-188, 45-189.

negotiate a settlement of the conflicting claims. Implicit in this recognition was the belief that the judiciary is not equipped to conduct the socio-economic analysis that the parties would conduct in determining planning objectives and self-sufficiency goals. Without knowledge of where and why the water is needed, the results of litigation certainly will fail to meet planning objectives.[22] Besides, all parties to litigation seek certainty in results. Water settlements can provide stable and lasting certainty to water users regarding future water supplies.[23]

All parties to litigation have incentives for settlement, but Indian tribes in particular have been affected by the recognition that a water right does not necessarily include the right to the capital investment needed to put the water to beneficial use or to realize the economic benefit of the entitlement.[24] In the usual case, a negotiated water rights settlement involves a compromise of the water rights claim by the Indian community in exchange for the contribution of some water and substantial capital (usually by the United States) to create storage facilities and diversionary works, and to subjugate Indian land for agricultural irrigation and other uses to which the water will be put.

The federal government, through the Department of Interior, has developed settlement guidelines to provide a framework from which its negotiation teams are to participate in settlement discussions.[25] The goals of the criteria are to ensure that (1) the United States will be able to participate in water settlements consistent with its trust obligations; (2) Indians receive equivalent benefits from the rights that they may release as part of a settlement; (3) Indians obtain the ability to realize value from confirmed water rights; and (4) the settlement contains appropriate cost sharing by all parties benefiting from the settlement.[26]

V. NATURE, FUNCTION, AND EXPERIENCE OF ADJUDICATION

A water rights adjudication is an action to determine all respective water rights on a stream system.[27] In the process, a court may

---

21. Arizona v. California, 373 U.S. 546 (1963).

22. *See generally* A.J. Pfister, *Resolution of Indian Water Claims*, *in* ARIZ. WATERLINE (Salt River Project, Phoenix, Ariz.), Winter 1984, at 2-6 (asserting the nature of Indian water claims).

23. *See generally* ELIZABETH CHECCHIO & BONNIE R. COLBY, INDIAN WATER RIGHTS: NEGOTIATING THE FUTURE 21-32 (1993).

24. *See* Monroe E. Price & Gary D. Weatherford, *Indian Water Rights in Theory and Practice: Navajo Experience in the Colorado River Basin*, 40 LAW & CONTEMP. PROBS. 97, 97 (1976).

25. Working Group in Indian Water Settlements; Criteria and Procedures for the Participation of the Federal Government in Negotiations for the Settlement of Indian Water Rights Claims, 55 Fed. Reg. 9223 (1990).

26. *See id.*

27. *See* Stuart T. Waldrip, Note, *Water Rights--Finality of General Adjudication Proceedings in the Seventeen Western States*, 1996 UTAH L. REV. 152 (providing a history of the origins of the western adjudication statutes).

> (1) Confirm those rights evidenced by previous court decrees when those rights have not been forfeited, abandoned or otherwise lost; (2) Adjudicate the validity of all canceled and uncancelled permits; certificates of construction or licenses or other documents or orders purported to be granted by or under the authority of the state . . . and not previously adjudicated; (3) Determine the extent and priority of . . . [a party] in interest in any water right or right to use water of the river system . . . not otherwise represented by the aforementioned permits, licenses, certificates, documents, orders, or decrees; [and] (4) Establish, in whatever form determined to be appropriate by the court, one or more tabulations or lists of water rights . . . which may include a notation of the water right or right to use water adjudged to each party, the priority, the amount or rate, the purpose, the periods or place of use, and, as water is used for irrigation, the specific tracts of land to which the water right shall be appurtenant . . . .[28]

The Supreme Court of Colorado has held that an adjudication decree does not create any new rights, but only confirms pre-existing rights.[29]

The author's experience is in Arizona, where, as presently constituted, the Gila River and Little Colorado River Adjudications comprise more than 75,000 claims on nine subwater sheds, including sixteen Indian reservations, numerous national forests, parks and wilderness areas, and the metropolitan areas of Phoenix, Tucson, and Flagstaff.

The Gila Adjudication originated with the filing of a petition in 1974 with the Arizona State Land Department.[30] About 960,000 summonses were served by registered mail from 1979 to 1986 on all landowners in the Gila Basin.[31] Landowners then filed statements of claimant with the Maricopa County Superior Court to evidence their water rights claims.[32] Even landowners who claimed only groundwater rights were encouraged to file statements because their groundwater rights might be subject to claims based on federal law.[33]

As recently observed in a report of the *Western States Water Council*, "[t]he complicated and contentious nature of general adjudications results in significant expenditures of both time and money."[34] "In Arizona, nineteen years of proceedings

---

28. A. DAN TARLOCK, LAW OF WATER RIGHTS AND RESOURCES § 7.02 (Clark Boardman Callaghan 1996).

29. *See* Cline v. Whitten, 355 P.2d 306, 308 (Colo. 1960) (citing Cresson Consolidated Gold Mining & Milling Co. v. Whitten, 338 P.2d 278, 283 (Colo. 1959)).

30. *See* Brophy, *supra* note 11 at 1.

31. *See id.*

32. *See id.*

33. *See id.*

34. Ricky Shepherd Torrey et al., Tribal Water Marketing 6 (May 28, 1996)(report prepared in conjunction with the 1995 Symposium on the Settlement of Indian Water Rights Claims) (unpublished manuscript, on file with the *Western States Water Council and Native American Rights Fund* and the *Drake Journal of Agricultural Law*).

have not yet produced one adjudicated water right"[35] and some estimates have the expenditures to date exceeding one hundred million dollars.[36]

Perhaps of equal significance, litigation of the contested cases in the Arizona proceedings has generated a lengthy list of complex issues. The result prompted several interlocutory appeals to the Arizona Supreme Court, legislative changes designed to streamline the adjudication procedure and reduce its cost, and subsequent appeals by the United States and several Indian tribes contending that the legislative changes destroyed the jurisdiction of the Arizona Superior Court to adjudicate the proceedings. In essence, in spite of all that has gone into the adjudication, the proceedings essentially have ground to a halt.

VI. ATTEMPTS TO SIMPLIFY ADJUDICATION

This section will describe several new approaches to streamlining adjudication and facilitating settlement of conflicting claims.

In the effort to simplify the adjudication statutes and the procedures for investigation, objection and hearing of contested cases (with the objective of significantly reducing litigation costs associated with the adjudication process and expediting the process of the general stream adjudication), the Arizona State Legislature acted in 1995 to amend Arizona's adjudication statutes in several important respects.[37] Among them are the following:

> 1. The Director of the Arizona Department of Water Resources (ADWR) is required to render technical assistance to the adjudication court by identifying "de minimis" uses in hydrographic survey reports (HSR) produced by the Department to tabulate the existing water uses.[38]
> 2. The director's report to the court or the Special Master must include the director's proposed water right attributes for each water right claim or use investigated.[39]
> 3. Unless described in a prior decree, ADWR is permitted to quantify irrigation rights as follows:
>
> a. A water duty of six-acre feet per acre for lands below 3,000 feet in elevation.
> b. A water duty of five-acre feet per acre per year for lands located from 3,000 feet to 5,000 in elevation.
> c. A water duty of four-acre feet for lands at elevation above 5,000 feet.[40]

---

35. Torrey et al., *supra* note 34, at 6.
36. *See* Brophy, *supra* note 11 at 10.
37. *See* Waters-Right to Use, ch. 9, 1995 Ariz. Sess. Laws 17.
38. *See* ARIZ. REV. STAT. ANN. § 45-256(A), (B) (West 1994 & Supp. 1996).
39. *See id.* § 45-256(B).

4. A claimant may prove an entitlement to a greater quantity of water.[41]

5. Information describing water rights of 500 acre-feet or less per year for any type of use is summarily admitted into evidence. If no conflicting evidence is offered, the proposed right becomes a right in the adjudication decree.[42]

6. Claimants who agree with the proposed attributes of their rights (as they are described in the HSR) may rely on the report as evidence of their water right.[43]

7. A new provision establishes a procedure for the summary adjudication of "de minimis" water uses.[44] For example:

a. Stockponds with an applicable prior filing with a claimed capacity of fifteen acre-feet or less are de minimis.

b. Domestic uses with an applicable prior filing and with a claimed annual use of three acre-feet or less are de minimis.

c. These uses (and also small business de minimis uses and stock watering uses) are not subject to objections by third parties; only the claimants of the right may object to the description of the right in the HSR.

d. De minimis uses are incorporated in the decree and become decreed rights.

It was estimated that these de minimis provisions would streamline the adjudication of about 47,000 small claims in the Gila River Adjudication.[45]

After Arizona's legislature passed the amendments to the adjudication statute, certain Indian tribes and the United States objected to the changes. They argued that the amendments deprived the Arizona courts of McCarran Amendment jurisdiction over the United States and tribal claims, and that the amendments might violate the separation of powers doctrine or deprive the United States and the tribes of due process and equal protection of the laws.[46] The Arizona Supreme Court accepted jurisdiction on the tribe's special action petition and remanded the petition to Judge Susan Bolton of the Maricopa County Superior Court for further

---

40. *See id.* § 45-256(A)(6).

41. *See id.* § 45-256(B).

42. *See id.* § 45-256(D).

43. *See id.* § 45-256(F).

44. *See* ARIZ. REV. STAT. ANN. § 45-258 (West Supp. 1996).

45. Brophy, *supra* note 11 at 16.

46. Mark A. McGinnis & Lisa M. McKnight, *Natural Resources & Public Lands Development*, ENRLS Update (Ariz. B. Envtl. & Nat. Resources L. Sec. Newsletter), Sept. 1995, at 11.

proceedings.[47] Oral argument on the tribe's petition was heard in May 1996 on whether the amended statute violates the separation of powers clause of the Arizona State Constitution, and whether the legislation violates due process, equal protection, the supremacy or property clauses of the United States or Arizona Constitutions, and on issues relating to whether the superior court's McCarran Amendment jurisdiction is affected by (1) any of the changes in ADWR's role in the adjudications; (2) any changes in the evidentiary rules; or (3) the de minimis provisions of the affected statutes.

On August 30, 1996, Judge Bolton of the Superior Court of Arizona, issued a decision on the constitutionality of House Bill 2276, amending Arizona's adjudication statute.[48] The court invalidated and severed a number of the amendments because they violated due process, the separation of powers doctrine, or both. The court explained it can retain jurisdiction under the McCarran Amendment because the amendments affecting the comprehensiveness of the adjudication were invalidated on other constitutional grounds.[49] The court did not address whether any of the provisions violated the Equal Protection, Supremacy or Property Clauses of the Arizona and United States Constitutions. Rather, the court explained that upon striking down a number of the amendments, these constitutional issues were moot.[50]

The court invalidated, on several grounds, the amendments specifying the quantities of water decreed for certain de minimis uses.[51] The court struck down the de minimis use provisions because they violated due process and the separation of powers doctrine, and would deprive the court of jurisdiction under the McCarran Amendment.[52] The court explained that the de minimis use provisions violated the separation of powers doctrine because they invaded the judiciary's power to determine water rights after an evidentiary hearing based on "beneficial use."[53] Likewise, the court explained that delaying a determination of the cumulative impact of de minimis uses in a watershed until after a final decree did not present the parties before the court with a fair hearing and, thus, violated due process.[54] For the same reason, the court stated that a delay in a contest to de minimis uses until severance and transfer or change in use proceedings would violate due process.[55] Finally, the court explained that the de minimis use provisions would deprive the court of

---

47. *See id.*

48. *See In re* the General Adjudication of All Rights to Use Waters in the Gila River System & Source, No. CV-95-0161-SA (Ariz. Super. Ct. Aug. 30, 1996).

49. *See id.* at 44.

50. *See id.* at 53.

51. *See id.* at 18.

52. *See id.*

53. *See id.*

54. *See id.* at 20.

55. *See id.*

jurisdiction over the United States and the Indian tribes because the provisions destroy the comprehensiveness requirement of the McCarran Amendment.[56]

Furthermore, the court invalidated provisions specifying water quantities for on-farm water duties (based on elevation) and diversion and storage facilities (based on maximum capacity) on the grounds that they violated the separation of powers doctrine.[57] The court explained that the quantities decreed for on-farm water uses and for diversion and reservoir facilities must be judicially determined based on beneficial use, not on quantities selected for convenience in streamlining the adjudication.[58]

The court upheld certain procedural amendments to the adjudication statute including the provision granting the superior court, rather than the Supreme Court, the authority to appoint the Special Master.[59] The court also upheld "reopener" provisions extending the time for filing statements of claims, statements of claimants, and the time for amending statements of claimants.[60] The court explained that these provisions do not affect or impair any vested water rights.[61]

In perhaps the most significant amendment, the court upheld a change to the role of the director of the Arizona Department of Water Resources in the adjudication.[62] Essentially, the court upheld the provision requiring the director to propose to the court or Special Master water right attributes for each individual water right claim or use investigated in the director's report.[63] The court reasoned that this requirement was well within the quasi-judicial functions constitutionally permitted of an administrative agency.[64] The court explained that "so long as judicial review is permitted, claimants are permitted to file timely, specific . . . objections to [the director's] recommendations, and a fair and reasonable opportunity to present evidence in support of or opposition to DWR's recommendations," the due process and the separation of powers doctrine are not violated.[65]

Finally, the court invalidated the provisions requiring the summary admission of evidence of water rights of 500 acre feet or less, and requirements that objecting parties present clear and convincing evidence to rebut certain presumptions in favor of prior filings.[66] The court found that these provisions violated the due process and separation of powers doctrines.[67]

---

56. *See id.* at 21.
57. *See id.*
58. *See id.*
59. *See id.* at 27.
60. *See id.* at 24.
61. *See id.* at 26.
62. *See id.* at 33.
63. *See id.*
64. *See id.*
65. *Id.*
66. *See id.* at 34-35.
67. *See id.* at 34.

In the meantime, the Arizona Supreme Court is still considering several issues raised in interlocutory appeals from the general adjudication. These include:

> [1] what is the appropriate standard to be applied in determining the amount of water reserved for federal lands; [2] is non-appropriable groundwater subject to federal reserved rights; [3] do federal reserved rights holders enjoy greater protection from groundwater pumping than holders of state law rights; [4] must claims of conflicting water use or interference with water rights be resolved as part of the general adjudication?[68].

The Arizona Supreme Court decided in 1993 that the superior court improperly adopted a "bright line" test for determining whether underground water is appropriable under state law.[69] On remand, the superior court entered an order adopting as the area within which appropriable subflow exists, the entire younger alluvium.[70] In addition, the superior court's order includes as wells which pump appropriable subflow, all wells whose cones of depression intercept water on its way to the stream.[71] The Arizona Supreme Court granted review of the superior court's modified appropriable groundwater standard on September 28, 1994, and we are still awaiting its decision on this revised test.

With respect to Arizona's attempt to streamline the adjudication, it is not yet clear that a new, workable approach has been found. The state and federal interests involved in the adjudication have identified new issues and conflicts about which to argue.

VII. TOWARD A NEW PARADIGM; NEW CONFLICTS

Recently, in an apparent attempt to find new ways to promote settlements, the Western States Water Council and Native American Rights Fund co-sponsored a report on tribal water marketing.[72] The report notes that at least fifty-five tribes[73] are now engaged in general water adjudications, and, as noted before, once a decree is rendered, "tribes can often face . . . problems in translating decreed water rights into delivered water."[74] In essence, the report urges close examination of tribal water marketing as a way of supporting unprecedented growth in western economies while creating new incentives for negotiated settlements between Indian and non-

---

68. Brophy, *supra* note 11 at 8.

69. *See In re* General Adjudication of all Rights to Use Waters in the Gila River System & Source, 857 P.2d 1236, 1245-46 (Ariz. 1993).

70. *See id.* at 1247.

71. *See id.* at 1247-48.

72. *See* Torrey et al., *supra* note 34, at 1.

73. *See id.* at 6 (citing Tim Glidden, Speech before the Arizona Water 2000 Conference at Sedona, Arizona (1992)).

74. *Id.* at 6.

Indian claimants.[75] The report notes that "[d]eclines in federal funding for settlement of litigation of tribal water rights claims is another factor favoring tribal water marketing."[76] Several recent "settlements have used tribal water marketing agreements to help fund the settlement process."[77]

However, the notion of tribal water marketing raises conflicts between state and federal law and policy. From a federal perspective, the marketing of tribal water under voluntary agreements can promote the survival and self-determination of tribes. From a state perspective, many would argue that appurtenant water rights, including water rights accepted in satisfaction of *Winters* rights claims, should not be marketed for use off of reservations. Such marketing would cause substantial displacement of non-Indian economies by jeopardizing existing capital investment and future economic opportunity. At the very minimum, western states can be expected to want approval rights over tribal water marketing. To the extent that the states have identified public interest criteria that affect water allocation decisions, proposed water transfers may or may not be approved. Public interest criteria may include factors such as recreation, fish and wildlife habitat, aquatic life, navigation, water quality, aesthetic beauty, access to public waters, discouraging waste, and promoting conservation. Sometimes, as in Arizona, substantial economic impacts flow from the allocation of water resources, determining among other things whether major cities such as Phoenix and Tucson can continue to grow. Unfortunately, from an agricultural perspective, the politics of water transfers can be complex and threatening.

In the 1980s, it was widely expected in Arizona that non-Indian agriculture gradually would shift operations from privately held lands to Indian reservations. This was in large part the result of a recognition of the bona fides of the federal reserved rights claims, but it also reflected the constraints enacted into law within the 1980 Groundwater Management Act,[78] which forced non-Indian pumpers to adopt stringent conservation practices including, if necessary, the retirement of farm land from production so that sufficient groundwater resources will be available for Arizona cities.[79] To the extent that a non-Indian farmer wants to rely upon the availability of Indian water resources to relocate a farming operation to reservation lands, the existence of a federal reserved water right claim is not adverse to that farmer's interest; neither is the usual state law bias against water transfers of appurtenant water rights for use off of the reservations. However, the existence of a federal reserved water rights claim can be the primary or at least a principle reason for the non-Indian farmer wanting to relocate in the first place.

Finally, the Western Governors Association and the Western States Water Council have issued a document titled *Pioneering New Solutions: Directing our*

---

75. *See id.* at 9.
76. *Id.* at 10.
77. *Id.*
78. *See* ARIZ. REV. STAT. ANN. § 45-401 (West 1994 & Supp. 1996).
79. *See id.*

Destiny, proposing a set of six principles to be considered in western water resources management and policy development.[80] These principles have come to be known as the "Park City Principles" and represent a new paradigm for resolving water claims conflicts.[81] The six principles are as follows:

> 1. There should be meaningful legal and administrative recognition of diverse interests in water resource values.
> 2. Problems should be approached in a holistic or systemic way that recognizes cross-cutting issues, cross-border impacts and concerns, and the multiple needs within the broader "problemshed"—the area that encompasses the problem and all the affected interests. The capacity to exercise governmental authority of problemshed, especially basin-wide, levels must be provided to enable and facilitate direct interactions and accommodate interests among affected parties.
> 3. The policy framework should be responsive to economic, social, and environmental considerations. Policies must be flexible and yet provide some level of predictability. In addition, they must be able to adapt to changing conditions, needs, and values; accommodate complexity; and allow managers to act in the face of uncertainty.
> 4. Authority and accountability should be decentralized within policy parameters. This includes a general federal policy of recognizing and supporting the pivotal role of states in water management as well as delegation to states and tribes of specific water-related federal programs patterned after the model of water quality enforcement.
> 5. Negotiation and market-like approaches, as well as performance standards, are preferred over command and control patterns.
> 6. Broad-based state and basin participation in federal program policy development and administration is encouraged, as is comparable federal participation in state forums and processes.[82]

The Park City Principles, according to Professor Charles T. DuMars, may have limited application in the context of general stream adjudications.[83] As Professor DuMars has pointed out:

> Within an adjudication context, not only can the parties not reason together, they cannot even speak. Nor can they share data or expert opinions. Only after the parties to the adjudication have spent a great deal of the money, does joint policy participation begin. If the negotiations remain within the

---

80. *See* T. Bahr, *The Park City Principles: A New Paradigm for Managing Western Water,* 31 LAND & WATER L. REV. 299, 299 (1996).

81. *See* D. Craig Bell et al., *Retooling Western Water Management: The Park City Principles*, 31 LAND & WATER L. REV. 303 (1996) (exploring background and process leading to the Park City paradigm and enumerating the principles).

82. *Id.* at 305-7.

83. Charles T. Dumars, *Application of the Park City Principles to Federal-State Conflicts*, 31 LAND & WATER L. REV. 313, 314-15 (1996).

> adjudication, the issues may turn on solving the immediate problem of quantifying rights, rather than finding long-term planning solutions for the basin as a whole. However, if in the pre-litigation stage the federal government, the tribes and the state entities can engage in good faith negotiations, joint policy participation may occur.[84]

In other words, the Park City Principles appear to be best adapted to regional water planning processes that preempt conflict, rather than to conflicts that have already generated litigation.

---

84. *Id.* at 328.