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ARIZONA V. CALIFORNIA: FINALITY AS A WATER MANAGEMENT TOOL

In the arid western region of the United States, water is especially critical to growth and development. The Colorado River, with its vast drainage area,\(^1\) has been called the single most important water source in the West.\(^2\) The rapid pace of development in this region has spurred competition for its limited water resources.\(^3\) Some studies project that given the continued all-out pace of energy development, the Colorado River's water supply may be exhausted by the end of the century.\(^4\)

Since the 1920's there have been conflicting claims to the water supply of the Colorado River.\(^5\) Included among the many claimants are the Indian tribes residing in the Colorado basin. In 1908, the United States Supreme Court ruled that the creation of Indian reservations by the federal government implied a simultaneous reservation of water for use on those lands.\(^6\)

\(^1\) The Colorado River drains an area of 242,000 square miles in seven states, an area equal to one-twelfth of the contiguous continental United States. Black & Taylor, Navajo Reserved Water Rights: Pulling the Plug on the Colorado River?, 20 NAT. RESOURCES J. 71 (1980).


\(^3\) Blundell, Colorado River, Vital to the Southwest, Travels Ever-Rockier Course, Wall St. J., Feb. 12, 1979, at 1, col. 1. Water has always been in short supply in this arid region of the United States. State officials note that the normal flow of most western streams has been fully appropriated, and in some cases overappropriated, for withdrawal uses. The demand for water, however, continues to increase, spurred by energy development and the protection of aesthetic values (fish and wildlife habitat, scenic beauty, and recreational uses) as well as ever-present irrigation and municipal demands. Surface water diversions exceed supply in four of the seven basins in the western United States. In addition, ground water supplies have been depleted over wide areas of the West. U.S. General Accounting Office, Reserved Water Rights for Federal and Indian Reservations: A Growing Controversy in Need of Resolution, 1-2 (CED 78-176, Nov. 16, 1978) [hereinafter cited as G.A.O. REPORT].

\(^4\) Blundell, supra note 3, at 16, col. 5. The writer also notes, however, that studies by the U.S. Bureau of Reclamation anticipate a slower pace of energy development, estimating there is enough water to last well into the 21st century.


\(^6\) Winters v. United States, 207 U.S. 564 (1908). This principle is known as the reserved water right, or Winters doctrine. It applies to all Indian reservations regardless of whether they have been created by treaty, an act of Congress, or executive order. See United States v. Walkers River Irrigation Project, 104 F.2d 334 (9th Cir. 1939). When public lands are withdrawn or reserved from the public domain, the quantity of water necessary to fulfill the purposes for which the land was withdrawn is simultaneously reserved. The Indian reservation thus acquires reserved water rights that vest on the date the reservation of
These reserved water rights are an important economic resource for the Indians, whose reservations occupy significant acreage in the Southwest.  

The water resources claimed by the Indians are also a major source of water for irrigation, industries, and communities outside the reservation.  

The undefined and potentially significant amounts of water needed for the reservations pose a threat to economies that depend on these water resources, and to the extent that the scope and nature of these water rights remain undefined, they are a source of bitter controversy.  

This controversy, in turn, has induced reliance on water allotments that have been fixed through litigation. In Arizona v. California, the Supreme Court addressed whether water rights reserved for the Indians in earlier litigation should be recalculated on the basis of evidence that the previous allotment should have been greater. The majority emphasized the delicate balance of water supply and demand, and in the interests of certainty and finality
refused to reconsider whether the Indians were entitled to a greater allotment.\textsuperscript{14}

\textit{Arizona v. California} is the latest Supreme Court pronouncement in a protracted dispute over the division of the Colorado River's water supply. In 1922, the states bordering the Colorado River drafted the Colorado River compact. Although the compact divided the river between upper and lower basin states, individual state allotments remained unresolved.\textsuperscript{15} An agreement was eventually reached on apportionment of the upper basin.\textsuperscript{16} The dispute over the lower-basin waters, however, resulted in litigation. In 1952, Arizona invoked the Supreme Court's original jurisdiction,\textsuperscript{7} seeking both to confirm her title to the Colorado River and to limit California's use.\textsuperscript{8} Nevada intervened and New Mexico and Arizona were later added as defendants.\textsuperscript{9} The United States also intervened in order to protect federal reserved water rights,\textsuperscript{2} including rights secured for the reservations of five Indian tribes.\textsuperscript{21}

The Court addressed whether the federal government had reserved water rights for the tribes it represented. In upholding the government's claim, the majority asserted that these rights should be measured by the amount of irrigable acreage within each Indian reservation.\textsuperscript{22} The Court

\begin{itemize}
  \item \textsuperscript{14} \textit{Arizona}, 103 S. Ct. at 1391-92.
  \item \textsuperscript{15} Trelease, \textit{supra} note 5, at 160. The seven states comprising the Colorado basin include Arizona, California, Colorado, Nevada, New Mexico, Utah, and Wyoming. The Colorado River compact split the dependable average flow of 15 million acre-feet equally between the upper and lower basin. This allayed the fears of the upper-basin states that earlier development in the lower basin would establish water use priorities that would limit future development in the upper basin. \textit{Id.}
  \item \textsuperscript{16} \textit{Id.} This agreement was spurred by the Bureau of Reclamation, which refused to start its postwar program until it was assured that its water projects fell within the share of the state in which they were built. \textit{Id.}
  \item \textsuperscript{17} U.S. CONST. art. III, § 2, cl. 2.
  \item \textsuperscript{18} \textit{Arizona v. California}, 373 U.S. 546 (1963).
  \item \textsuperscript{19} \textit{Id.}
  \item \textsuperscript{20} The enormous scope of the controversy produced "one of the great state trials of all time." Trelease, \textit{supra} note 5, at 165. The trial lasted 123 days spread over three years, producing 25,000 pages of transcript and a 433 page report by the special master. In all, the case was argued for 22 hours before the Supreme Court, resulting in almost 500 pages of transcript. \textit{Id.}
  \item \textsuperscript{21} The United States argued on behalf of the Colorado River, Chemehuevi, Cocopha, Fort Mojave, and Fort Yuma (Quechan) Indian Tribes. \textit{Arizona}, 103 S. Ct. at 1386.
  \item \textsuperscript{22} \textit{Arizona}, 373 U.S. at 601. There are several methods by which reserved water rights have been quantified under the reserved water rights doctrine as developed by the Supreme Court. The Court has stated that the amount of water reserved should be "that amount of water necessary to fulfill the purpose of the reservation." \textit{Cappaert v. United States}, 426 U.S. 128, 141 (1976). An early method of quantification employed by the Ninth Circuit allowed non-Indians to continue using surplus reserved water subject to eventual displacement by the Indians. \textit{Conrad Investment Co. v. United States}, 161 F. 829 (9th Cir. 1908).
\end{itemize}
issued a decree in 1964 in order to effectuate its holding.\textsuperscript{23} In article IX of this decree, the Court retained jurisdiction over the case for the purpose of further modification and order.\textsuperscript{24}

Because their interests had been represented by the government, the tribes had not taken part in the litigation.\textsuperscript{25} In 1977, however, the tribes sought to intervene as indispensable parties in order to raise additional claims.\textsuperscript{26} The tribes maintained that the government had underestimated the amount of irrigable acreage on their reservations,\textsuperscript{27} and as a result they received less water than they were entitled to receive.\textsuperscript{28} The United States conceded that the acreage had been miscalculated and joined the tribes’ plea. A special master appointed by the Court\textsuperscript{29} issued a report which

This approach assured the Indians of an adequate supply for their future needs but imposed a hardship upon non-Indian users.

Another approach which has been used is to limit the Indians’ reserved right to their present use and reasonably foreseeable needs at the time of the quantification. See, e.g., Tweedy v. Texas Co., 286 F. Supp. 383, 385 (D. Mont. 1968) (“need and use are prerequisite to any water rights on Indian reservations”). This approach has the advantage of certainty but tends to establish Indian reserved rights at artificially low levels. Note, \textit{A Proposal for the Quantification of Reserved Indian Water Rights}, 74 \textit{COLUM. L. REV.} 1299, 1314 (1974).

Another alternative is that adopted by the Supreme Court in the \textit{Arizona} decision. The Court followed the recommendation of the Special Master, stating, “How many Indians there will be and what their future needs will be can only be guessed. We have concluded, as did the Master, that the only feasible and fair way by which water rights can be measured is irrigable acreage.” \textit{Arizona v. California}, 373 U.S. 546, 601 (1963). Under this formulation, each acre of Indian land which can be irrigated economically is entitled to the amount of water necessary for such irrigation. For comment on the relative merits of these standards, see \textit{infra} note 114.


\textsuperscript{24} Article IX of the decree states:

Any of the parties may apply at the foot of this decree for amendment or for further relief. The Court retains jurisdiction of this suit for the purpose of any order, direction, or modification of the decree, or any supplementary decree, that may at any time be proper in relation to the subject matter in controversy.

\textit{Arizona}, 376 U.S. at 353.

\textsuperscript{25} \textit{See supra} note 21 and accompanying text.

\textsuperscript{26} \textit{Arizona}, 103 S. Ct. at 1387-88.

\textsuperscript{27} \textit{See} Barbash, \textit{supra} note 13. These claims were appurtenant to the “omitted lands.” Omitted lands are irrigable acreage within the recognized 1964 boundaries of the reservations for which the Indians maintain the United States failed to claim water rights in the earlier litigations. These omitted lands claims are the focus of this article.

\textsuperscript{28} The tribes also claimed additional water rights appurtenant to “boundary lands.” Boundary lands were disputed lands along reservation borders claimed by the tribes to have been finally determined to lie within the reservations under the meaning of the 1964 decree. The Court’s resolution of this claim is not discussed in this article.

\textsuperscript{29} In the 1979 Supplemental decree, the Court appointed Senior Judge Elbert P. Tuttle as special master. \textit{Arizona}, 439 U.S. at 436-37.
concluded that the tribes were entitled to the additional allotment.\(^{30}\)

Writing for a five-Justice majority,\(^{31}\) Justice White acknowledged that although the Court had the power to reopen the case, in the interests of finality the decree would not be modified. The Court noted a major purpose of the litigation was to set fixed standards on which all parties might rely. Justice White emphasized that the principle of finality was especially important where water rights are concerned.\(^{32}\)

In his dissent, Justice Brennan criticized the inequitable result reached by the majority and asserted that the tribes should be allowed to defend their claims to greater allotments. He noted that the federal courts have traditionally consented to reconsider a prior ruling where a manifest injustice could be corrected. Justice Brennan also stressed that the litigation had been far from final when the tribes raised their claims. Therefore, he concluded that an adjustment could be made with little or no prejudice to the interests of the other parties involved.\(^{33}\)

This Note will examine the development of the federal reserved water rights doctrine. Emphasis will be placed on prior cases arising under the Supreme Court’s original jurisdiction and their effect on the \textit{Arizona} decision. An analysis of the history of the tribes’ claims will suggest that the Court properly applied the principle of finality to the issue at hand. Finally, the potential impact of \textit{Arizona} on future Indian reserved water rights litigation will be discussed.

I. \textbf{FEDERAL RESERVED WATER RIGHTS, ORIGINAL JURISDICTION, AND FINALITY: A REVIEW}

\textit{A. The Development of the Federal Reserved Water Rights Doctrine}

The reserved water rights doctrine was developed by the Supreme Court in \textit{Winters v. United States}.\(^{34}\) In \textit{Winters}, an Indian irrigation project on a Montana reservation was unable to obtain sufficient water because of upstream off-reservation diversions by private parties. The federal government brought suit to prevent those parties from impeding the flow of water to the reservation. Winters argued that, pursuant to Montana law and cus-
tom, his prior appropriation had to be recognized before any water could be granted to either the United States or the Indians. He maintained that his prior appropriation gave him a vested right to continue to divert and use this water, and that the vested right was superior to that of all subsequent claimants. To settle the dispute, the Court looked to the 1888 treaty that had established the reservation. Although this agreement failed to address the issue of water rights, the Court noted that the governmental interest had been to enable the Indians to convert from a nomadic to a pastoral state. Justice McKenna emphasized that the reservation lands were arid and nearly worthless without water. Therefore, the Court held that the creation of the Indian reservation implied a simultaneous reservation of water sufficient to fulfill its purpose.

More than fifty years after the Winters decision, the Supreme Court was again asked to address the reserved water rights doctrine. In its original hearing of Arizona v. California in 1963, with respect to water rights in the lower Colorado basin, the Court specifically reaffirmed the Winters doctrine. The federal government had asserted reserved water rights claims on behalf of five Indian tribes, several national forests and parks, and the Boulder Canyon Project Act. In addition to upholding the reserved water rights claimed by the government on behalf of the Indians, the Court also upheld for the first time reserved water rights claims for non-Indian interests, such as national forests. The Court dispelled some

35. Id. at 565-69.
37. 207 U.S. at 576.
38. Id.
39. Id. at 576-77.
40. Comment, Paleface, Redskin, and the Great White Chiefs in Washington: Drawing the Battle Lines Over Western Water Rights, 17 SAN DIEGO L. REV. 449, 455 (1980). The Supreme Court found an implied reservation of water for a Crow Indian reservation in United States v. Powers, but did not define the nature or extent of that right. 305 U.S. 527 (1939). The major issue in Powers concerned the distribution of the reserved water right among the Indians living on the reservation. Id.; see also United States v. Walker River Irrigation Dist., 104 F.2d 334 (9th Cir. 1939) (Indian reserved water rights could be impliedly created by executive order as well as by treaty or agreement).
42. See supra note 21.
44. Arizona, 373 U.S. at 601. The Court based the extension of the Winters doctrine beyond the context of Indian reservations on the Special Master's conclusion that the principles expressed in Winters were equally applicable to lands set aside by the United States for other purposes. It is now recognized that water rights may be impliedly reserved for any lands which the federal government has reserved or withdrawn from the public domain. Federal reservations differ from other public lands in that they are not subject to private appropriation and disposal under the public land laws. These reservations include national
of the uncertainty surrounding the scope of Indian reserved rights by decreeing fixed allotments for the tribes involved. Over the objections of the states, the Court concluded that both the Winters doctrine and considerations of feasibility and equity dictated that the Indians' share include enough water to satisfy both their present and future needs. Therefore, the Court calculated the Indian allotment based on the amount of irrigable acreage within their respective reservations.

The reserved water rights doctrine gathered additional support in Cappaert v. United States. In Cappaert, the dispute centered on Devil's Hole, an underground cavern inhabited by a rare species of desert fish. In order to preserve its historic and scientific values, Devil's Hole had been reserved in 1952 as a national monument. In 1968, the Cappaerts began pumping ground water from the same aquifer that supplied water to Devil's Hole. Because the fish population in Devil's Hole became severely endangered by the pumping, the federal government brought suit to restrain the Cappaerts' pumping activity. In a unanimous decision, the Court held that an implied reservation of water, sufficient to maintain the water level within Devil's Hole, was within the purposes of the reservation of the land as a national monument. This was the first case in which the Supreme Court held that ground water, as well as surface water, could be reserved and thus protected from diversion.

Until the mid-seventies, each Supreme Court holding on the substantive nature of the federal reserved water rights doctrine had resulted in a

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46. Arizona, 373 U.S. at 600-01.
48. Devil's Hole supported a population of unique fish traceable to the Pleistocene Era, cyprinodon diabolis, commonly known as the Devil's Hole pupfish. Id. at 133.
49. President Truman reserved Devil's Hole under the American Antiquities Preservation Act of 1906. Id. at 131. This Act authorizes the President to declare as national monuments "objects of historic or scientific interest that are situated upon the lands owned or controlled by the Government of the United States." 16 U.S.C. § 431 (1982).
50. Cappaert, 426 U.S. at 133-35.
51. Id. at 147.
52. Id. at 142-43. Several cases in the lower courts had applied the reserved water rights doctrine to ground water prior to the Cappaert decision. See, e.g., Tweedy v. Texas Co., 286 F. Supp. 383 (D. Mont. 1968); United States v. Fallbrook Pub. Util. Dist., 165 F. Supp. 806 (S.D. Cal. 1958), rev'd on other grounds, 347 F.2d 48 (9th Cir. 1965).
broadening of these rights. In *United States v. New Mexico*, the Court reversed this trend, and limited expansive federal water rights claims appurtenant to the Gila National Forest. The area involved had been reserved under the Organic Administration Act of 1897. The government asserted that it had reserved water rights for use in the forest for several purposes, including aesthetics, recreation, wildlife preservation, and stock watering. The New Mexico Supreme Court concluded that the United States had reserved sufficient water to fulfill the purposes for which the land had originally been withdrawn. The court asserted, however, that aesthetics, recreation, wildlife preservation, and stock watering were not among those purposes. The Supreme Court affirmed the decision of New Mexico's high court, and limited the government's reserved water rights to the amount necessary to preserve timber in the forest or to secure more favorable watershed flows. The majority found that the other purposes for which the United States had claimed reserved water rights were not encompassed within the original purpose of the reservation of land. By applying a restrictive interpretation of purposes sufficient to activate the reserved water rights doctrine, the Court hinted that greater recognition of state and private concerns in future reserved water rights cases would be forthcoming.

The recently decided case of *Nevada v. United States* serves to illustrate the nature of the Indian reserved water rights dilemma. This dispute focused on Pyramid lake, located in the Nevada desert near Reno. The lake is fed by water from the Truckee River and has no outlet. Heavy utilization of the Truckee's waters had caused the level of the lake to drop

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53. Three Supreme Court decisions prior to *Cappaert* dealt with procedural questions within the reserved water rights doctrine. These cases determined that federal reserved water rights claims should be adjudicated in state court water litigation rather than special federal court proceedings. See *Colorado River Water Conservation Dist. v. United States*, 424 U.S. 800 (1976); *United States v. District Court for Water Div. No. 5*, 401 U.S. 527 (1971); *United States v. District Court for Eagle County*, 401 U.S. 520 (1971).


55. *See supra* note 44 and accompanying text.


57. *New Mexico*, 438 U.S. at 704-05.

58. *Id.* at 718.

59. A four-Justice dissent authored by Justice Powell applied a somewhat broader construction of the Organic Act in finding wildlife preservation to be a legitimate purpose of the reservation. *Id.* at 718-25.


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some seventy feet and its size to shrink by 20,000 acres. This in turn threatened the existence of the lake’s fishery, which is the primary source of income for the Pyramid Lake Indian Tribe. Many non-Indian interests in the area also depend upon the Truckee River for water. Because the region is arid and has no readily available alternate source of water, these interests could be substantially damaged if they were forced to seek water elsewhere.

In 1973, the United States and the Pyramid Lake Tribe brought an action to obtain sufficient water rights to maintain the level of Pyramid Lake. The Court addressed whether the Indians were barred from asserting new claims because their reserved water rights claims had been previously adjudicated in an earlier case, the Orr Ditch litigation.

In Orr Ditch, the government sought a decree to ascertain the water rights of all users of Truckee River water. The United States, as plaintiff, represented two interests: the Truckee-Carson Irrigation District, which required water for a large irrigation project, and the Pyramid Lake Tribe, which claimed a federally reserved water right. In the Orr Ditch decree, issued in 1944, the Tribe’s reserved water allotment had been limited to a small amount of irrigation water. In representing the Tribe in Orr Ditch, the United States had failed to assert a claim for enough water to maintain the Tribe’s Pyramid Lake fishery. After an extensive trial, the district court held that the principle of res judicata barred the Indians from maintaining a suit to obtain more water. The United States Court of Appeals for the Ninth Circuit affirmed the decision in part and reversed in part. The court agreed that Orr Ditch precluded the United States and the Tribe from maintaining a suit against the Orr Ditch defendants, their successors in interest, and subsequent appropriators of the Truckee River, citing the

63. Nevada, 103 S. Ct. at 2913 & n.7.
64. Tribal representatives testified that the fishery contributed approximately $100,000 annually to the tribe’s income and employed 40 members of the tribe on a full-time basis. G.A.O. REPORT, supra note 3, at 36.
65. Off-reservation interests dependent upon the Truckee River for water include approximately 130,000 residents of Reno, Nevada, the Newlands irrigation project, which diverts 200,000 acre-feet of water per year from the river, and the Stillwater Wildlife Refuge, which depends upon return flows from the Newlands project for its water. Id.
66. Id.
67. United States v. Truckee-Carson Irrigation Dist., 649 F.2d 1286 (9th Cir. 1981), rehe’d, denied, 666 F.2d 351 (9th Cir. 1982).
69. Truckee-Carson Irrigation Dist., 649 F.2d at 1289.
70. Id.
71. Id.
72. Id.
operation of res judicata. It observed, however, that neither the Tribe nor the irrigation district were parties in Orr Ditch, but were instead represented by the United States. The court emphasized that the pleadings in Orr Ditch did not specifically allege adversity between the claims asserted on behalf of the reservation and those asserted on behalf of the irrigation district.73 The court further noted that the rules of res judicata are based on an adversary system of procedure.74 This, together with the fact that a reserved water rights claim for fishery purposes had not been litigated in Orr Ditch, led the court to hold that the Tribe could proceed in an action against the irrigation district for more water.75

The irrigation district appealed to the Supreme Court, which unanimously reversed the holding of the court of appeals.76 The Court held that the interests of the Tribe and irrigation district were sufficiently adverse to bind both parties under the Orr Ditch decree by the operation of res judicata. Moreover, the Court noted that the cause of action asserted by the Tribe and the government was the same cause of action asserted in Orr Ditch.77 Thus, the Orr Ditch decree was equally binding upon all parties to the earlier litigation as well as to subsequent appropriators of water of the Truckee River.78

A concurring opinion by Justice Brennan noted that the scarce western water supply prevented the satisfaction of all water claims.79 Brennan asserted that no matter how even-handed the ruling might be, the law was powerless to avoid large measures of loss and disappointment in the face of such fundamental natural limitations. Thus, despite the strong claims of the Indians, the Court could not displace the thousands of farmers who had relied on the judicial allocation of water made decades before.80 Justice Brennan suggested, however, that the Indians were entitled to compensation where their water rights were appropriated for the benefit of others.81

73. Nevada, 103 S. Ct. at 2922.
74. Truckee-Carson Irrigation Dist., 649 F.2d at 1309.
75. Id. In accordance with their ruling, the Ninth Circuit stipulated that any additional water rights awarded to the tribe must come from the rights decreed to the government in 1944. This permitted neither the government nor the tribe to expand their water rights beyond the water rights awarded to the government in the Orr Ditch decree. Id. at 1313.
76. Nevada, 103 S. Ct. at 2907.
77. Id. at 2925-26.
78. Id. at 2926.
79. Id. (Brennan, J., concurring).
80. Id.
81. Id. Justice Brennan stated that the law “can and should fix responsibility for loss and destruction that should have been avoided, and it can and should require that those whose water rights are appropriated for the benefit of others receive appropriate compensation.” See infra note 153 and accompanying text.
B. Modification of Water Rights Decrees in Response to Changed Circumstances

Among the disputes litigated under the Supreme Court’s original jurisdiction are two in which the Court retained jurisdiction and subsequently modified the original decree. In each case, the Court had retained jurisdiction through provisions virtually identical to article IX in Arizona. When changing conditions rendered the decrees inappropriate for their original purpose, the Court stepped in to make the needed modifications. In Wisconsin v. Illinois, several states bordering on the Great Lakes sought to enjoin the diversion of water from Lake Michigan. Under a permit from the Secretary of War, the City of Chicago had been diverting up to 8,500 cubic feet of water per second from the lake for sanitary purposes. The states claimed that this diversion lowered the water level of the lakes a full six inches resulting in injury to their citizens. The Court agreed, finding that the Secretary of War had exceeded his authority. In a decree issued in 1930, the Court mandated a gradual reduction in the diversions to 1,500 cubic feet per second. The Court issued new decrees in 1956 and 1957 that temporarily modified the original order in response to low water conditions on the Mississippi River. Finally, in 1967 the Court issued another decree that superseded its previous order. This decree purported to set final limits for all diversions of water from Lake Michigan.

New Jersey v. New York also concerned a multistate dispute over the diversion of water. In 1931, the State of New Jersey sued the State and City of New York to enjoin the latter from diverting water from the tributaries of the Delaware river. Pennsylvania later intervened to protect

82. 278 U.S. 367 (1928).
83. Id. at 410.
84. Id. at 407.
85. Id. at 420.
87. Wisconsin v. Illinois, 352 U.S. 983 (1957), and 352 U.S. 945 (1956), modifying 281 U.S. 696 (1930). These decrees authorized temporary diversions up to 8,500 gallons per second to correct an emergency in navigation caused by the low level of the Mississippi River. Following the expiration of these orders, the original 1930 decree retained full force and effect.
88. 388 U.S. 426 (1967), modifying 278 U.S. 367 (1929). Paragraph 7 of this decree provides that:
   Any of the parties hereto may apply at the foot of this decree for any other or further action or relief, and this Court retains jurisdiction of the suits in Nos. 1, 2, and 3, Original Docket, for the purpose of making any order, or direction, or modification of this decree, or any supplemental decree, which it may deem at any time to be proper in relation to the subject matter in controversy.
   Id. at 430.
89. 283 U.S. 336 (1931).
its interest in the river.\textsuperscript{90} In its decree,\textsuperscript{91} the Supreme Court permitted New York to divert up to 440 million gallons of water a day from the Delaware watershed. As in Wisconsin, the Court retained jurisdiction over the case, giving any party the right to apply for further action or relief.\textsuperscript{92} This decree was superseded in 1954 by a decree taking into account changes in the watershed brought about by the construction of dams and reservoirs in New York.\textsuperscript{93} Once again, the Court retained jurisdiction over the matter.\textsuperscript{94}

Both Wisconsin and New Jersey were interstate water controversies subject to the doctrine of equitable apportionment.\textsuperscript{95} The Supreme Court modified these decrees when their operation became inequitable due to conditions arising after the decrees had been issued. In neither case did the Court set any standards concerning when such modifications should be made. In Arizona v. California, the Court faced the issue of whether modification remains an appropriate response where one party alleges error in factual determinations made before the decree was issued.

II. Arizona v. California

A. What Price Finality: The Court Divides

In Arizona v. California,\textsuperscript{96} the United States Supreme Court addressed whether water rights adjudicated in 1963 should now be modified because of information suggesting that the prior allocations had been erroneous. The special master concluded that the 1964 decree should be modified to award the Indian tribes water rights reflective of the true amount of irrigable acreage within their reservations.\textsuperscript{97} The Arizona majority concluded otherwise, however, and sustained the exceptions of the states and private agencies to the special master's report.\textsuperscript{98} The dissenters asserted that the

\begin{itemize}
\item \textsuperscript{90} Id. at 338-39.
\item \textsuperscript{91} 283 U.S. 805, enforcing 283 U.S. 336 (1931).
\item \textsuperscript{92} Id. at 807.
\item \textsuperscript{93} 347 U.S. 995 (1954).
\item \textsuperscript{94} Id. at 1005.
\item \textsuperscript{95} Equitable apportionment is a judicially created doctrine applied to the resolution of interstate water disputes. See Kansas v. Colorado, 206 U.S. 46 (1907) (each state is entitled to equitable apportionment of benefits from the flow of a river).
\item \textsuperscript{96} 103 S. Ct. 1382 (1983).
\item \textsuperscript{97} The special master's report found that, even under the state's legal theories, at least 18,500 acres of the omitted lands were irrigable and thus would have supported an award of additional water rights if they had been identified in 1963. Arizona, 103 S. Ct. at 1404. See supra note 27. The report concluded the tribes should be awarded 196,000 more acre-feet of water per year for the overlooked omitted lands, and 122,000 acre-feet for the enlarged boundary lands. Mann, supra note 8, at 1, col. 4; see supra note 28.
\item \textsuperscript{98} 103 S. Ct. at 1396.
\end{itemize}
irrigable acreage issue had not been fully and fairly litigated in 1963, and that consequently this litigation remained far from final in 1977 when the tribes raised their claim for additional water.

Writing for the majority, Justice White acknowledged that article IX of the 1964 decree gave the Court the power to reopen the matter, but noted that it did not compel the Court to do so. He also acknowledged that the doctrines of res judicata, collateral estoppel, and law of the case were not controlling, and looked instead to the general principles of finality and repose upon which these doctrines are founded. Reading article IX in light of these principles, Justice White concluded that the article should be applied restrictively. He interpreted article IX as a safety net designed to ensure that the Court had not precluded itself from adjusting the decree in response to unforeseeable changes in circumstances. He cited the Court's use of similar provisions in Wisconsin v. Illinois and New Jersey v. New York in support of his interpretation.

The majority viewed considerations of finality especially compelling in the context of this particular litigation. It noted that the doctrine of prior appropriation had been developed in response to the need for certainty in the holding and exercise of water rights. Justice White emphasized that a great deal of reliance is placed upon water rights adjudications. The majority referred to its earlier opinion in United States v. New Mexico, which stated that an increase in federal reserved water rights might require a gallon-for-gallon reduction in water available to other users in time of shortage. To reconsider the Indian's renewed claims, the majority emphasized, could upset the delicate balance of water use established along

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99. Id. at 1408-09.

100. Id. at 1406.

101. Id. at 1391.

102. Id.

103. Id. at 1393.

104. Id. at 1394; see supra notes 82 & 89 and accompanying text.

105. Under the doctrine of prior appropriation, the individual who first appropriates water and puts it to beneficial use acquires a vested right to continue to divert and use that quantity of water against all claimants junior to him in point of time. This principle has also been expressed as "first in time, first in right." Arizona, 373 U.S. at 555. Under this doctrine, potential water users may determine existing water rights and the availability of unappropriated water left for new projects, thus bringing a level of certainty to water planning. Because federal reserved water rights need not be applied to a beneficial use to be retained, they are in some ways incompatible with the prior appropriation doctrine. G.A.O. REPORT, supra note 3, at 6.

106. See supra note 11.

107. See supra notes 54-60 and accompanying text.

108. New Mexico, 438 U.S. at 705.
the Colorado River.\textsuperscript{109}

In its review of the history of \textit{Arizona v. California}, the Court concluded that the earlier determination of water allotments had been intended to be final.\textsuperscript{110} It noted that the practicably irrigable acreage standard\textsuperscript{111} was selected in response to the Court's interest in a fixed allotment that would take the future needs of the Indians into account.\textsuperscript{112} Justice White noted that the use of the standard had been vigorously contested by the states and emphasized that the Indian victory on this issue had been founded on the need for a stable allocation system.\textsuperscript{113} He stressed that this standard remains an object of controversy.\textsuperscript{114} White compared opening the decree at this point in order to recalculate the amount of irrigable acreage as akin to opening a Pandora's box, in that all aspects of the first decree, including the irrigable acreage standard itself, could then be subject to relitigation and adjustment.\textsuperscript{115}

\textsuperscript{109} \textit{Arizona}, 103 S. Ct. at 1393 & n.14.
\textsuperscript{110} The special master concluded that a reservation of water sufficient to supply all of the practicably irrigable acreage on each reservation would "establish water rights of fixed magnitude and priority so as to provide certainty for both the United States and non-Indian users." \textit{Arizona}, 103 S. Ct. at 1394 & n.15. See \textit{Arizona}, 373 U.S. at 601.
\textsuperscript{111} See supra note 22.
\textsuperscript{112} \textit{Arizona}, 103 S. Ct. at 1390.
\textsuperscript{113} Id.
\textsuperscript{114} See supra note 22. For critical views of the irrigable acreage standard, see Note, \textit{A Proposal for the Quantification of Reserved Indian Water Rights}, 74 \textit{COLUM. L. REV.} 1299 (1974). This Note criticizes the irrigable acreage standard as impractical given the large amounts of irrigable lands upon Indian reservations and the limits of water availability. The standard is also criticized as imposing artificial limits upon reservations that use water for nonagricultural or mixed purposes. The writer recommends quantification based on the present use and needs of the Indians as the most reasonable approach. Id. at 1312-14. See also Shrago, \textit{Emerging Indian Water Rights: An Analysis of Recent Judicial and Legislative Developments}, 26 \textit{ROCKY MTN. MIN. L. INST.} 1105 (1980). If the practicably irrigable acreage standard were applied uniformly throughout Arizona, Shrago wrote, the Indian tribes would ostensibly be entitled to more than ten times the amount of the annual dependable water supply, assuming only one-third of the reservation lands are "practicably irrigable." He suggests that the doctrine of equitable apportionment should be applied to conflicts between federally reserved water rights and state water rights. Id. at 1115-17. But see Veder, \textit{Water Rights in the Coal Fields of the Yellowstone River Basin}, 40 \textit{LAW. & CONTEMP. PROBS.} 77 (1976). Veder maintains that limiting Indian reserved water rights to the purpose for which the reservation was made unduly restricts water rights. He argues that the Supreme Court's holding in \textit{Winters} extends to industrial as well as irrigation rights. Id. at 89-90; see Veder, \textit{Indian Prior and Paramount Rights to the Use of Water}, 16 \textit{ROCKY MTN. MIN. L. INST.} 631 (1971).
\textsuperscript{115} \textit{Arizona}, 103 S. Ct. at 1395. Justice White linked the irrigable acreage standard itself to the principle of finality. Therefore, under the majority view, the irrigable acreage standard may be abandoned where the finality of earlier allocations is weakened. The Pandora's box metaphor represents the majority's view that the tribes should be satisfied with the substantial rights won in the earlier litigation, and that to press for larger claims may result in risk to what has already been won.
Finally, Justice White rejected the contention that the absence of the tribes in the original trial mitigates the finality of the 1964 allocation. He found no evidence in the record that the government's representation of the tribes had been either legally inadequate or compromised by a conflict of interest. To the contrary, he reasoned that the substantial water allocations the tribes had been awarded reflected upon the competency of the government as a representative of Indian interests.

Justice Brennan, concurring in part and dissenting in part, criticized the majority for the excessive weight it placed upon the principle of finality. He evaluated the tribes' claims in the context of issues considered at an earlier stage of an ongoing litigation. The dissent asserted that this litigation was far from final when the tribes raised their claims for additional water in 1977. In support of its assertion, the dissent noted that the Court did not confirm a list of state present perfected rights until 1979. Brennan described these rights as critical to the original decree's allocation system. He recognized that there is a formal point of final

117. Id. at 1396.
118. The Court had awarded the five tribes approximately one million acre-feet of reserved water annually. The annual supply at the time of this award was estimated to be six or seven million acre-feet, giving the tribes some 15% of the average flow of the Colorado River. American Indian Law Symposium, 15 Tulsa L.J. 711 (1980). At the time this award was made the total population of the five tribes was only 3,304 persons, a very small portion of the population of the Colorado Basin. Shrago, supra note 114, at 1114.
119. Justice Brennan joined part III of the Court's opinion, which granted the tribes permission to join in this action. Arizona, 103 S. Ct. at 1403 (Brennan, J., concurring in part and dissenting in part).
120. Id. at 1404.
121. Id. at 1405.
122. The Fort Mojave, Chemehuevi, and Fort Yuma (Quechan) Indian Tribes moved for leave to intervene in 1977. By April 10, 1978, the Colorado River and Cocopah Indian Tribes had also filed petitions for intervention. The United States, which initially opposed the tribes' intervention, joined the tribes in December 1978 in moving for a supplemental decree. Id. at 1388.
123. In the context of this litigation, present perfected rights are those rights to use Colorado mainstream flows which vested before the effective date of the Boulder Canyon Project Act, supra note 43, at § 617. The reserved water rights allocated to the tribes are included in these present perfected rights. The 1964 decree in Arizona contained a partial list of present perfected rights which did not include those present perfected rights acquired under state law. The full list of present perfected rights was confirmed by the Court in 1979. Arizona v. California, 439 U.S. 419 (1979), enforcing 373 U.S. 546 (1963); see Arizona, 103 S. Ct. at 1386-87.
124. The Secretary of the Interior must satisfy present perfected rights to their full extent, even during drought years. Thus, the more present perfected rights there are, the less certain it is that other users will receive a specific amount of water, especially in years when flows are lower than normal levels. Id. at 1405 & n.2.
judgment, where considerations of certainty and reliance take on greater strength than they had before the judgment. He maintained, however, that this point had not yet been reached when the tribes sought to intervene in this litigation.

Justice Brennan conceded that finality remains an important policy even before final judgment has been reached. He noted, however, that the weight given to consideration of finality at this stage of litigation is left largely to a court’s best judgment. The dissent observed that neither the tribes nor the states are currently using all of the water they received in the 1964 allotments. Partly on this basis, the special master predicted that adjustments in the 1964 decree would not significantly prejudice the states. Justice Brennan concluded that because of the timing of the tribes’ claim, the ongoing nature of the litigation, and the lack of immediate economic disruption if water rights were adjusted, the interests of finality did not merit the overriding importance that the majority had attached to them.

The dissent also asserted that failure to consider the omitted land claims would result in a manifest injustice to the tribes. Where a previous decision is clearly erroneous and would result in manifest injustice, the law of the case doctrine permits a court to override that decision. If the 1964 decree was not corrected, Justice Brennan warned, the tribes would forever lose water rights to which they were entitled under the 1963 decision. He did not dispute the majority’s contention that the government’s earlier representation of the tribes was not compromised by a conflict of interest or otherwise legally inadequate. Rather, he reasoned that the government’s failure to present evidence on all of the potentially irrigable lands

125. Arizona, 103 S. Ct. at 1404.
126. Id. at 1406.
127. Id. at 1404-05.
128. Id. at 1404.
129. Id. at 1409. Of the approximately one million acre-feet awarded to the tribes in Arizona v. California, only 200,000 had been put to use at the time of the trial. Meyers, Book Review, 77 Yale L.J. 1036, 1042 n.15 (1968). The Fort Mojave Indian Tribe first began to use its allotment in 1975. From 1975 until 1981, the Tribes collectively diverted 77% of the water to which they were entitled under the 1981 decree. Arizona, 103 S. Ct. at 1409 & n.9.
130. Arizona, 103 S. Ct. at 1409.
131. Id. at 1391 n.8. Under law of the case doctrine, a court may depart from a prior holding where one of the following circumstances exists: substantially different evidence is presented upon a subsequent trial, controlling authority has since reached a different conclusion of law to be applied to such issues, or the earlier decision was erroneous and would result in a manifest injustice. Short v. United States, 661 F.2d 150, 154 (Cl. Ct. 1981); see United States v. Turtle Mtn. Band of Chippewa Indians, 612 F.2d 517, 521 (Cl. Ct. Cl. 1979); White v. Murtha, 377 F.2d 428 (5th Cir. 1967). See 103 S. Ct. at 1395 & n.19.
132. Arizona, 103 S. Ct. at 1407.
within the tribes' reservations weakened the majority's assertion that the irrigability of the omitted lands was fully and fairly litigated in 1963.\textsuperscript{133} In sum, the dissent found no justification for denying the tribes a hearing on the omitted lands claims.\textsuperscript{134}

\textbf{B. Arizona v. California: the Implications for Future Indian Reserved Water Rights Litigation}

In his dissent, Justice Brennan cautioned against making the assumption that the irrigability of the reservation lands had been fully and fairly litigated in 1963.\textsuperscript{135} It is undeniable, however, that the United States had ample opportunity to present evidence on the amounts of irrigable acreage in the original proceeding. Furthermore, the dissent presented nothing to indicate that the government's failure to produce fully accurate evidence on the irrigable acreage issue was due to a conflict of interest.\textsuperscript{136}

The United States attributed the error to the complexity of the litigation. The special master's report prepared for the 1963 case equated practicably irrigable acreage with economic feasibility; a finding that annual benefits from irrigation would exceed costs.\textsuperscript{137} Given the imprecise nature of this standard,\textsuperscript{138} and the general complexity, length, and expense of comprehensive water rights cases such as \textit{Arizona v. California},\textsuperscript{139} the government's explanation seems plausible. The state parties claimed that the smaller claim was made for tactical reasons because the irrigable acreage standard would seem more reasonable, and therefore would be more likely to be accepted.\textsuperscript{140} Whatever the explanation, it is apparent that the issue of irrigable acreage was fully litigated in 1963.\textsuperscript{141} The technicality that evidence was not presented on the omitted lands does not change this assessment. Indeed, both the government and the special master realized in 1963 that there may be additional irrigable lands within the reserv-

\begin{footnotesize}
\textsuperscript{133} \textit{Id.} at 1408-09.
\textsuperscript{134} \textit{Id.} at 1409 (Brennan, J., dissenting).
\textsuperscript{135} \textit{Id.}
\textsuperscript{136} \textit{Id.} at 1408-09.


\textsuperscript{138} \textit{Id.} at 521-22. The writers note the uncertainties inherent in measuring the feasibility of a right that is "reserved" through time with a standard that exists at a particular moment in time.

\textsuperscript{139} \textit{See supra} note 40, at 479.

\textsuperscript{140} \textit{Arizona}, 103 S. Ct. at 1390.

\textsuperscript{141} The American Law Institute states that "the principle of finality has its strongest justification where the parties have had full opportunity to litigate a controversy. . . ." \textit{Restatement (Second) of Judgments} § 15, comment a (Tent. Draft No. 5, 1978).
\end{footnotesize}
The dissent also asserted that the case was far from final when the tribes entered the lawsuit. While it is true the Court did not confirm a list of present perfected rights until 1979, this does not mitigate the finality of issues settled in 1964. Under the dissent's reasoning, the Supreme Court could not issue a final decree until every aspect of a dispute has been settled. In comprehensive water rights cases such as Arizona, this would directly undermine the certainty which is a primary goal of such decisions, and delay further the issuance of decrees already subject to extended litigation.

These facts alone would dictate the outcome were this not a case of original jurisdiction, with a decree that included a provision for retention of jurisdiction for the purposes of modification. As revealed by a review of prior cases, there is little direct precedent to guide the Court in this area. It is apparent, however, that some threshold point must be reached before Supreme Court decrees are reopened, lest they be unduly weakened. In both Wisconsin v. Illinois and New Jersey v. New York, the Court modified its decrees in response to changed conditions that made the continued operation of the decrees inequitable. Moreover, these cases were governed by judicial principle which holds that states should enjoy equitable apportionment of benefits from river flow. In deciding upon the practicably irrigable acreage standard, the Arizona Court had declined to apply the doctrine of equitable apportionment to the tribes' claims. Thus, these cases provide some guidelines as to when it is appropriate to reopen prior decrees for adjustment.

The question of whether the tribes will suffer a manifest injustice as a result of this decision is a more difficult one. As a result of the Court's decision, the tribes will lose valuable water rights to which they had previously been entitled. The majority noted that, to date, the tribes are not yet able to use all the water allocated to them in 1964. When the serious

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143. Id. at 1405.
144. See supra notes 123-24.
146. Arizona, 103 S. Ct. at 1391 & n.7. The Court cited to the Restatement (Second) of Judgments: "A judgment may be final in a res judicata sense as to part of an action although litigation continues as to the rest." Restatement (Second) of Judgments § 13, comment e (1980); see also 103 S. Ct. 1393 & n.12.
147. See supra note 24.
148. See supra notes 82-95 and accompanying text.
149. See supra note 95.
150. Arizona, 103 S. Ct. at 1395.
151. Id. at 1407.
152. Id. at 1395 & n.19. See supra note 129 and accompanying text. Although the Indi-
water shortages throughout the West are considered, the majority asserted, this does not qualify as a manifest injustice. Nevertheless, from the standpoint of the tribes, it would seem that justice is taking a backseat to finality. The irrigable acreage standard, selected by the Court as the most feasible and fair method of quantification, does not achieve fairness when it is applied on the basis of incorrect facts. It is difficult to see how justice is well served by refusing to adjust the Indians' water appropriation to reflect the Court's original intent. Even if this decision is conceded to work a manifest injustice, however, it is uncertain at best whether law of the case principles should be applied to the situation of original jurisdiction.

Although it is not difficult to sympathize with the position of the tribes, the dissent's assertion that the issue of irrigable acreage has yet to be fully litigated is weak. Having had their day in court, the tribes' recourse, if any, lies not in pursuing further a thirty-year-old litigation, but in an action against the federal government as a representative of their interests.

Indian organizations have been quick to criticize the result of Arizona v. California. The Court's decision, however, may not represent a total

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153. Arizona, 103 S. Ct. at 1395 & n.19.
154. Law of the case doctrine posits that when a court settles upon a rule of law, that decision should continue to govern the same issues in subsequent stages in the same case. IB J. Moore, J. Lucas & T. Currier, Moore's Federal Practice § 0.404 (1983). The Court noted, however, that, law of the case doctrine was understandably crafted with the course of ordinary litigation in mind. Such litigation proceeds through preliminary stages, generally matures at trial, and produces a judgment, to which after appeal, the binding finality of res judicata and collateral estoppel will attach. To extrapolate wholesale law of the case into the situation of our original jurisdiction, where jurisdiction to accommodate changed circumstances is often retained, would weaken to an intolerable extent the finality of our Decrees in original actions, particularly in a case such as this turning on statutory rather than Court-fashioned equitable criteria.

defeat for Indian interests. While the Court's holding precluded the plain-
tiff tribes from gaining additional water rights, it also provided an endor-
sement of the practicably irrigable acreage standard as a vehicle for the
quantification of Indian reserved rights. The use of this standard, op-
posed by the states, may have a significant impact on Indian claims that
remain undefined. The most significant of these claims is that of the Nav-
ajo Tribe. Located within the Colorado basin, the 25,000 square-mile
Navajo reservation is the largest in the country. The potential Navajo
Winters rights, based on the practicably irrigable acreage standard, are
staggering. The Court, however, has demonstrated a strong sense of
pragmatism in recent reserved water rights cases. As Justice Brennan
noted in Nevada, the Court is fully aware of the limitations imposed by a
scarce water supply. In future litigation in which the available water
supply is inadequate to satisfy valid competing claims, neither party is
likely to receive the full amount of its claim. Thus, despite decades of
litigation, peace in the Colorado basin may prove more distant than ever.

III. CONCLUSION

In Arizona v. California, the Supreme Court determined that the prin-
ciple of finality precluded relitigation of Indian reserved water rights claims.
The policy questions of whether judicial finality should be sacrificed in the
interests of fairness to the Indians can be debated endlessly. The Court,
however, seems to approach the problem presented by Arizona v. Califor-
nia as one of wise water management, recognizing that where demand ex-
ceeds supply, some interests must suffer. The majority adopts an even-
handed approach to the case, seeking to parcel out the burdens of western
water scarcity more evenly. Given the heightened interest in certainty in-

157. As the Supreme Court's most recent ruling on the standard for quantification of
Indian reserved rights, the Court's continued reliance on the irrigable acreage standard will
have a broad impact. This standard was adopted by the Court, however, upon the recom-
pendation of a particular special master and for application to this particular litigation.
Given this, Arizona v. California does not represent a definitive ruling on this subject, espe-
cially in view of the stress a blanket application of this standard could place on water sup-
plies elsewhere. See supra notes 114 & 118, infra note 160. For criticism of this standard as
either too restrictive or too expansive, see supra note 114.
158. Arizona, 103 S. Ct. at 1395. The Winters doctrine itself has been opposed by the
western states since its creation. Comment, supra note 40, at 451.
159. Black & Taylor, supra note 1, at 73.
160. Id. at 74. The authors estimate that even using a conservative estimate of the practi-
cably irrigable acreage within the reservation, the tribal entitlement would be approximately
two million acre-feet of water annually. Under the decree in Arizona v. California, the entire
state of Arizona receives only 2.8 million acre-feet annually. Id.
161. See supra note 79 and accompanying text.
herent in water rights litigation, the principle of finality becomes an effective water management tool.

The recent decision in Arizona v. California suggests that the Supreme Court is no longer as likely to endorse expansive reserved rights in water rights litigation. In future reserved water rights litigation, a high premium will be placed upon quantification of water rights and on maintaining prior water allotments. Thus, where water rights are fixed by decree, they are not likely to be enlarged. Although this represents a shift away from the policies advocated by Indians, Arizona v. California does provide support for the irrigable acreage standard widely opposed by the states. This may ultimately benefit the many tribes whose water rights remain undefined. Given the importance of water to economic development in the West, and the limited nature of water resources, the Court's decision in Arizona v. California may ultimately serve to exacerbate, rather than to reduce, tensions among competing water users in the Southwest. These same factors, however, underscore the necessity of determining with finality relative rights to this region's scarce water supply.

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