



United States Department of the Interior

OFFICE OF THE SOLICITOR
Washington, D.C. 20240

March 30, 1995

M-36982
Memorandum

To: Secretary

From: Solicitor *Stuart Lesby*

Subject: Entitlements to Water Under the Southern Arizona Water Rights Settlement Act (SAWRSA)

This memorandum is in response to questions that have arisen regarding the interpretation of the Southern Arizona Water Rights Settlement Act (SAWRSA), Pub. L. No. 96-293, Title III, 96 Stat. 1274 (1982). In order to proceed with the implementation of SAWRSA, the Department requires legal guidance on the nature of the rights in, and authority over, settlement water enjoyed by certain allottees of San Xavier District¹ (allottees) and the Tohono O'odham Nation (Nation).²

In considering this matter, I examined the legislative history of SAWRSA, available information on the history of the Tohono O'odham Nation, and relevant case law pertaining to allottee water rights. In addition, I solicited and reviewed comments from both the allottees and the Nation on these issues of significant importance to them. I also received and considered several other helpful comments on an earlier letter to members of Congress addressing these issues. Letter from Solicitor to Senators McCain and DeConcini, Senator-elect Kyl, and Congressmen Kolbe and Pastor, all of Arizona (Dec. 22, 1994).

I conclude that, with the limited exception of the right to convey settlement water, neither the text of SAWRSA nor its legislative history resolves the fundamental issue of relative entitlements of the Nation and the allottees to settlement water.

¹ The "San Xavier District," a political subdivision of the Tohono O'odham Nation, is coterminous with the "San Xavier Reservation" and the terms are used interchangeably. Of all the lands within the Tohono O'odham Nation, only the San Xavier Reservation was significantly allotted.

² The basic question presented here involves the relationship between the Tohono O'odham Nation and the allottees. Nothing in this Opinion addresses or is intended to provide guidance on the respective water rights or jurisdictional authority of Indian tribes vis-a-vis states or non-Indians.

Accordingly, the legal interests of the Nation and the allottees under SAWRSA must be what each has under legal principles generally applicable to federal Indian reserved water rights. The basic attributes of tribal and allottee interests in such water rights are as follows:

1. An Indian allottee has a right to a "just and equal distribution" of water for irrigation purposes.
2. Indian tribes possess broad regulatory power over reservation water resources, including those to which allottees have rights.
3. The quantity of water to which an allottee may be entitled is not subject to precise formulae.

I. BACKGROUND

A. SAWRSA

The Southern Arizona Water Rights Settlement was enacted to resolve Indian water rights claims arising within the San Xavier and Shuk Toak Districts of the Tohono O'odham Nation (formerly the Papago Tribe). The rights granted under SAWRSA were intended "to fully satisfy any and all claims of water rights or injuries to water rights (including water rights in both ground water and surface water)" within these two Districts.³

Briefly, SAWRSA provides that in exchange for waiver and release of existing and future Indian water rights claims: (1) the United States will deliver Central Arizona Project (CAP) or other replacement water to the San Xavier and Shuk Toak Districts; (2) the United States will bear the cost of rehabilitating or constructing irrigation systems to put the water to use; and (3) a limited measure of groundwater within the Districts may be withdrawn for use each year.

B. The Positions of the Nation and the Allottees

Since SAWRSA is, for the most part, silent on the manner in which these benefits are to be allocated, certain allottees of the San Xavier District and the Tohono O'odham Nation have advanced substantially different interpretations of their respective settlement entitlements. This disagreement has been a principal cause of an unfortunate delay in the implementation of SAWRSA. The result has been that many of the benefits of the settlement have not been realized within the time frames originally contemplated by Congress.

³ SAWRSA, section 307(e). The legislation did not settle all water rights claims within the Tohono O'odham Nation. Claims in the Sif Oidak, Gu Achi, and Hickwan Districts remain at issue in the ongoing Gila River general stream adjudication.

The key issue requiring resolution is the nature of the rights in, and authority over, settlement water enjoyed by the allottees and the Nation. While the allottees and the Nation agree that their respective interests in groundwater were unaffected by SAWRSA, they disagree on other matters. The respective positions of the allottees and the Nation may be summarized as follows:

The allottees contend that because the CAP or other replacement water provided by the settlement is a substitute for federal Indian reserved water rights appurtenant to allotted land, their property interests in that water must be equivalent to the rights they held in reserved water. They believe they are entitled to a ratable share of all settlement water (both confirmed groundwater rights and replacement water) based upon their ownership of practicably irrigable acreage within the San Xavier District. In their view, they have the right to use, lease, and otherwise exercise control over this water.

The Nation contends that the right to use all surface water and groundwater within the boundaries of the Nation, including the replacement water provided by SAWRSA, is held by the Nation for the benefit of its members. The Nation further contends that section 306 of SAWRSA⁴ expressly gives the Nation the right to lease and otherwise control all settlement water regardless of whether it is pumped from the ground or delivered by the United States as replacement water.

C. Reservation History

By Executive Order dated July 1, 1874, President Grant set aside approximately 71,000 acres in Arizona for the Papago Indian Reserve (commonly referred to as the San Xavier Reservation or the San Xavier District) "for the use of the Papago and such other Indians as it may be desirable to place thereon." 1 Charles J. Kappler, Laws and Treaties 805-06 (2nd ed. 1904). While the San Xavier Reservation itself has never been expanded, additional non-contiguous lands totaling approximately 2,774,370 acres were set aside for Papago Indians by several executive orders and acts of Congress between 1916 and 1939. These lands are commonly referred to as the "Papago Reservation" or the "Sells Papago Reservation." Both

⁴ 96 Stat. at 1279-80. The most pertinent passage is found in section 306(c)(1), which reads, in part:

The Papago Tribe shall have the right to devote all water supplies under this title, whether delivered by the Secretary or pumped by the tribe, to any use ... whether within or outside the Papago Reservation so long as such use is within the Tucson Active Management Area and that part of the Upper Santa Cruz Basin not within such area.

the San Xavier and Sells Papago Reservations are included within the territory of the Tohono O'odham Nation, a federally recognized Indian tribe operating under a constitution adopted on January 18, 1986, and approved by the Secretary on March 6, 1986, pursuant to 25 U.S.C. § 476. The Tohono O'odham Nation currently has approximately 18,538 members.

In 1890, when the San Xavier Reservation had approximately 363 residents, allotment commenced pursuant to the General Allotment Act, ch. 119, 24 Stat. 388 (1887) (codified as amended at 25 U.S.C. §§ 331-334, 339, 341, 342, 348, 349 & 381 (1982)). Between 1890 and 1917, the United States issued 292 trust allotments on the Reservation.⁵ Approximately 85 consisted of "arable" lands; the remainder were timber or mesa lands. The mesa lands were viewed as suitable only for grazing purposes. Annual Report of the Commissioner of Indian Affairs, 1893, 117-19. Approximately 41,566 acres were allotted, of which "arable" allotted lands comprised approximately 2289 acres. The "arable" allotments were grouped together around the Santa Cruz River in the northeast corner of the Reservation.

Even prior to non-Indian contact, the Tohono O'odham were an agricultural people. Historic records of farming in the San Xavier area date to at least the early 1700s. When allotment commenced in 1890, 400 acres were irrigated on the Reservation. By the turn of the century, irrigation had expanded to 1000 acres. Originally, the allotments were irrigated with water from the Santa Cruz River, but non-Indian development adjacent to the Reservation soon began to deplete the flow of the river. By the early 1900s, the allottees began to withdraw and use groundwater. For a time, combined use of groundwater and surface water allowed farming to continue. According to Bureau of Indian Affairs records, irrigated lands on the Reservation reached a maximum of 1781 acres in 1926. (If fallowing practices are taken into consideration, the maximum acreage may have been as high as 2100 acres.) In the 1940s Reservation farming went into a decline when, again due to non-Indian off-reservation development, groundwater supplies beneath the Reservation were depleted. The combined depletion of both surface water and groundwater supplies made Indian farming virtually impossible by the late 1970s.

In 1975, the United States filed suit in federal district court on behalf of the Tribe and the heirs of the original allottees of the San Xavier Reservation. The case, United States v. City of Tucson, Civ. 75-39 TUC-JAW (D. Ariz.), named the City of Tucson and over a thousand other non-Indian water users as defendants and sought to establish and protect the water rights of the Tribe and allottees.

Congress' enactment of SAWRSA seven years later was intended to resolve the claims made by the United States on behalf of Indians in City of Tucson so that the case could be dismissed. The case is still pending because the San Xavier allottees have opposed dismissal on account of their continuing concern about the adequacy of the benefits provided them

⁵ At present approximately 1275 Indians, most of whom are members of the Nation, hold interests in allotments on the Reservation.

