

# NARF

*Legal Review*

Native American Rights Fund

## President Bush Signs Fort McDowell Water Settlement Act

The Fort McDowell Indian Community is a tribe of Yavapai Indians. Their Reservation is located in the arid country northeast of Phoenix, Arizona. Although the Reservation straddles the Verde River, the Tribe's use of water has always been severely restricted. As a result, development on the Reservation has lagged behind that of surrounding communities.

In 1985, the Tribe began negotiating with local parties in an attempt to establish and ratify its water rights. A settlement agreement was reached in the spring of this year. And, on November 29, 1990, the President signed the Fort McDowell Indian Community Water Rights Settlement Act of 1990 (Pub. Law 101-628) which ratifies the agreement. Throughout the negotiation and settlement process, the Community was represented by Native American Rights Fund (NARF) attorney Richard Dauphinais and former NARF staff attorney Arlinda Locklear who is now in private practice in Maryland. The settlement provides the Tribe with water and sufficient capital to put the water to use. Under the settlement the Tribe receives, among other things, 36,350 acre-feet of water annually and approximately \$38 million from various sources. The settlement will allow the Tribe to make the Reservation into the homeland it was intended to be.

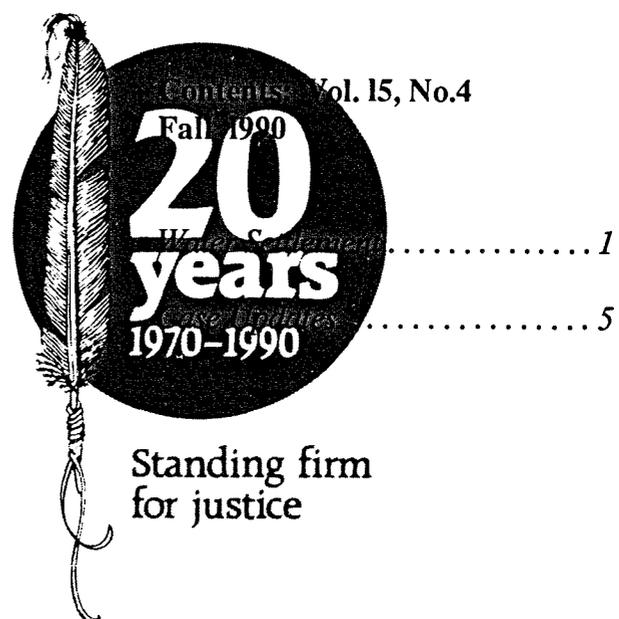
### Historical Background

The history of the Fort McDowell people shows constant and continued attempts to get them to

move from their lands. Despite the hardships, especially the inability to use nearby water, the Community retained a remarkable attachment to their land, refused to leave and eventually prevailed.

### Fort McDowell Reservation

The Community's aboriginal territory covered most of central Arizona including the present-day Ft. McDowell Reservation. As non-Indians moved into Arizona following the Civil War, there was pressure to place the Yavapai on a reservation. In 1873, they were moved to a



military post near Camp Verde. The personnel in charge of the reservation encouraged them to farm. The Indians began by digging a five-mile long irrigation ditch. The effort was observed by the post doctor, W. T. Corbusier, who later wrote;

*The digging of that ditch by hand with every conceivable sort of implement, from rusty and broken shovels to spoons is worthy of a place in the greatest annals of the West.*

The commander at Camp Verde felt that the Reservation would be self-supporting within a few years.

Only two years later, however, the Yavapai were marched from Camp Verde to the San Carlos Reservation in eastern Arizona. There they excavated an irrigation ditch on the Gila River and developed farms. Heavy flooding, however, made farming difficult and the Indians requested permission to leave San Carlos. On receiving permission, they returned to their homeland on the Verde River near the abandoned Fort McDowell.

The Yavapai discovered that non-Indians had settled on the best agricultural lands. They survived on the lands not used by non-Indians. In 1903, the Indians petitioned President Roosevelt for a reservation at Fort McDowell.

*We are not in a starving condition but for three years we have been living in miserable brush tepees on the barren hills, obliged to shift for a poverty-stricken existence while white and Mexican trespassers upon reserved public lands have occupied and enjoyed all the harvests from the only fruitful lands on the reservation. We left our reservation on the Gila River under passes from the Indian Agent because we had no water with which to irrigate the arid lands and we came to the Verde River, the home of our forefathers from which our people were forcibly removed many years ago, with the solemn promise from General Crook and other officers that if we served them as scouts and soldiers and were true to our trust we should sometime return and this land we love so well should be ours. How well we have kept our compact is well known and is a matter of record in the War Department. . . In view of these facts we most earnestly urge that we no longer be left to eke out a miserable existence on the arid hills but that action be taken at once and the bill [to create the Fort McDowell Reservation] passed or defeated. We desire nothing more than that we may be enabled to become self-supporting, self-respecting and independent American citizens.*

On September 15, 1903, the President signed an Executive Order setting aside those lands that had not been legally settled. In 1904, Congress appropriated \$50,000 for the purchase of the non-Indian claims on the Reservation. By 1905, all of the claims had been purchased and the 24,000 acre Reservation belonged to the Fort McDowell Indian Community.

### Efforts To Relocate The Tribe

Following their return to Ft. McDowell, the Indians immediately began farming. Irrigation was provided by the diversion of the Verde River into four existing canals. A great amount of physical labor was required to maintain the temporary diversion dams and the canals. The Ft. McDowell people did the work that was needed but also requested assistance from the government. They badly needed a permanent diversion structure so that they would not have to continually rebuild their brush and rock diversion dams.

The Tribe made numerous requests to the Bureau of Indian Affairs. They also requested help from Carlos Montezuma, a tribal member who became an Indian leader in the early 1900's. Montezuma and his attorney, Joseph Latimer, made any number of requests. The Chairmen of the House Committees on Indian Affairs and Expenditures in the Interior Department also wrote to the BIA requesting a diversion dam for the Ft. McDowell people.

The Bureau invariably refused. The refusals were based on the Bureau's unilateral determination that it would be better for the Ft. McDowell people to move from their 24,000 acre Reservation to 1400 acres on the Salt River Reservation. The Bureau had decided that it would cost less to provide an irrigation system for the Ft. McDowell people at Salt River than at Ft. McDowell.

In deciding as it did, the Bureau made the following assumptions; the Ft. McDowell people could be persuaded to move, the cost of moving would be less than if they stayed at Ft. McDowell and the Tribe's water rights could be transferred

from Ft. McDowell to Salt River. Each of those assumptions was incorrect.

Despite years of trying, the Bureau was never able to convince the Ft. McDowell people to move. In fact, the Bureau was aware from the start that the Ft. McDowell Yavapai did not get along with the Pima Indians at Salt River. Further, the Bureau underestimated the cost of moving the Tribe to Salt River. The Bureau did not take into account the \$50,000 that had already been spent to purchase non-Indian claims at Ft. McDowell. In addition, there was no provision for the cost of paying the Salt River Indians for the lands that would be given to the Ft. McDowells. Finally, when the Bureau tried to force the move after 20 years of attempting persuasion, it discovered that the state court would not allow a transfer of the Ft. McDowell water rights to the Salt River Reservation.

In other words, the reasoning behind the Bureau's decision to try to move the Tribe was in every respect wrong. Because, however, the Bureau didn't realize that fact until the late 1930's, it provided very little assistance to the Tribe at Ft. McDowell. A 1933 report indicates that for the 30 year period from 1904 through 1933 the Indian Irrigation Service spent only a little over \$7,000 at Ft. McDowell. A 1935 report states that of \$20,000 earmarked for work at Ft. McDowell, \$15,000 of that amount was diverted and expended on behalf of the Salt River Reservation. As a result, the Tribe faced extreme adversity in farming at Ft. McDowell. In addition, much of the Tribe's water simply flowed down the river and was used by downstream farmers "without one cent of compensation to the McDowell Indians or to the United States" in the words of a Bureau employee.

#### **Kent Decree -- Limited Water Rights**

In 1903, the Salt River Valley Water Users Association was formed. Under the National Reclamation Act, the Association and the federal government set up the Salt River Federal Reclamation Project (SRP) and built Roosevelt Dam. Because there was concern about the status of water rights in the area to be served by

the Project, a water rights suit, Hurley v. Abbott, was filed in the Arizona territorial court.

Although that court could neither adjudicate the Tribe's water rights nor prevent the Tribe's use of water, the United States Attorney voluntarily intervened on behalf of Ft. McDowell Indians. He agreed to a settlement of the Indians' rights in a 1910 judgment known as the Kent Decree.

The settlement was based upon the application of state water law to the Indians. The court awarded them 390 miners' inches (about 7,000 a.f.a.) because of their prior irrigation of 1300 acres on the Reservation. The court noted that it was the intention of the government to move them to Salt River and stated that when that occurred they would irrigate their lands there with stored water from Roosevelt Dam.

Two years before the Kent Decree was entered, the United States Supreme Court issued its decision in Winters v. United States, 207 U.S. 564 (1908). In that case, the United States represented the Indians of the Fort Belknap Reservation. The government argued that in setting aside the Reservation it also reserved water to the extent reasonably needed for irrigation. Despite the Winters decision, the U.S. Attorney representing the Ft. McDowells did not make a claim to federally reserved water rights in Hurley or amend the state law claim he had made. In addition, although the award of 390 m.i. was temporary, because the court knew the government intended to move the Ft. McDowells, the government did not seek additional water for the Tribe when it became clear that the Tribe would not be relocated.

#### **Failure to Provide Storage**

In the 1930's and 40's, two dams were constructed on the Verde River north of the Reservation. The dams were built pursuant to agreements between the SRP and the United States.

Before construction of the first dam, the Department of the Interior conducted an investigation. Special Agent Ernest Kipp submitted a report on August 11, 1936. He reported that SRP

had failed to deliver water to Indian lands and had appropriated that water for its own use. He recommended that before the construction of Verde projects, the government should amend all existing agreements with SRP to clearly set out its obligations to Indians and should require SRP to compensate the Indians for losses caused by SRP. Attached to the Kipp report were tables from the Water Commissioner for Maricopa County for the years 1925 through 1934 showing that Ft. McDowell never received, or was unable to use, even the 390 m.i. awarded in the Kent Decree.

Despite the report, Bartlett, and later Horse-shoe, dams were built. The Bartlett agreement even provided that 20% of the storage there would be used for the Salt River Reservation. Nothing was done by the government to provide either developed water for Ft. McDowell or storage for the Ft. McDowell Tribe's Kent Decree water.

#### **Federal Plans to Inundate the Reservation**

In 1901, the United States Geological Survey identified the confluence of the Salt and Verde Rivers (just below the Fort McDowell Reservation) as a dam site. That designation has haunted the Tribe since then.

In the 1950's, a proposal was made to build Maxwell Dam at the confluence. Because the Dam would have flooded lands at Ft. McDowell, the Commissioner of Indian Affairs was asked for his views. He strenuously objected stating that the proposed reservoir "would eliminate the use of this Indian reservation as a homesite" because the lands that would remain unflooded "are rocky hills without value for farming and incapable of supporting an economic number of cattle".

Only 11 years later, Congress authorized the use of Ft. McDowell lands for the Orme Dam reservoir. The Dam would have required the condemnation of 15,900 acres of the 24,000 acre Reservation. Although Orme Dam was never built, the planning process that the government went through has had severe impacts at Ft. McDowell. The lands that were to be within the conservation pool or within the area needed for

flood control were unavailable to the Tribe. In addition, the Orme Dam planning process had serious mental and physical effects.

*Clearly, the vast majority of the adults at Fort McDowell perceived the construction of the dam as more upsetting to them and as having more deleterious effects on their tribe as a people and culture, their ability to have a land that the tribe can call home, the survival of the tribe, the tribal government, and on all Indian people and tribes than the most distressing life events they had ever experienced - namely the death of a close friend and/or close family member.* Medical and Psychological Effects of the Threat of Compulsory Relocation for an American Indian Tribe, 2 American Indian and Alaska Native Mental Health Research Journal 11, 13 (1988). [Ex. 18.]

#### **Negotiation and Settlement**

In 1978, the State of Arizona began a general stream adjudication in state court. The United States and the Community filed water rights claims in the state proceeding. At about the same time the state court proceeding was initiated, the Community also filed suit in federal court seeking quantification of its federally reserved water right. After protracted litigation on the competing jurisdiction of the state and federal courts, the Supreme Court ruled that the federal court should defer to the state proceeding. *Arizona v. San Carlos Indian Tribe*, 463 U.S. 545 (1983). Because completion of the state court litigation was decades away and would be extremely costly, the Community and the local parties agreed to attempt to negotiate a settlement of the Community's federally reserved water right.

After five years of negotiations, a settlement was reached in March 1990. The settlement required ratification by Congress. Settlement bills were introduced in Congress in the summer of 1990. The final version of the settlement bill was passed by Congress on October 28, 1990, the last day of the legislative session. It was signed into law on November 29, 1990.

#### **Settlement Terms**

The settlement provides for a quantification of the Community's water rights and resolves claims between the Community and non-Indian parties.

It also provides for monetary contributions to the Tribe to enable it to use the water granted under the agreement. The major points of the settlement are summarized below.

The Tribe receives 36,350 acre-feet of water annually from various sources. The water will be exchanged by the Salt River Project so that the Tribe will be able to divert its 36,350 acre-feet of water directly from the Verde River. The Salt River Project will contract with the United States to provide storage of the Community's normal flow rights for a period of 25 years. The agreement guarantees the Tribe a minimum flow of 100 cubic feet per second in the Verde River through the Reservation at all times. The minimum flow will insure protection of the environment along the Verde River

The Community will receive \$23 million from the federal government and \$2 million from the State of Arizona for development on the Reservation. The Community will also receive a \$13

million loan (for a term of 50 years at no interest) from the federal government to assist the Tribe in putting its water rights to use. The federal government will grant the Tribe a permanent easement to land north of the Reservation to assure the Tribe access to its diversion works. Finally, the Secretary of the Interior's authority to take Reservation lands for reservoir purposes is withdrawn.

### Conclusion

The Fort McDowell settlement has beneficial results for everyone involved. The Community receives water and the capital to put it to use. The local non-Indian parties attain certainty in the exercise of their water rights. All of the parties avoid costly and divisive litigation and, more importantly, have the experience of working together to resolve shared problems.

## Case Updates

### President Bush Signs Native American Graves Protection and Repatriation Act

On November 23, 1990, President Bush signed the single most important piece of human rights legislation for Indian people which has been enacted by Congress since passage of the American Indian Religious Freedom Act of 1973. The new act called the Native American Graves Protection and Repatriation Act has four main components.

First, the law requires that federal agencies and private museums which receive federal funding must inventory their collections of Native American human remains and funerary objects. The tribe of origin must then be notified and, upon request of the tribe, the ancestral remains and funerary objects must be returned for reburial or other disposition by the tribe. Second, the legislation also makes clear that Indian tribes have ownership of cultural items which are excavated or discovered on federal or tribal land and that they have the right of disposition of Indian human remains discovered in these areas. Third, the legislation prohibits the trafficking in Native American human remains and cultural items. Lastly, the legislation requires that federal agencies and private museums which receive federal funds must create a summary of sacred objects or objects of cultural patrimony in their possession. If a tribe can prove a right of possession to these objects then the object must be returned upon request of the tribe.

The Native American Rights Fund, along with the National Congress of American Indians and the Association on American Indian Affairs formed a coalition to support this vital legislation. Along with support from hundreds of interested Indian tribes and individuals NARF has been able to ensure passage of this landmark legislation.

# NARF RESOURCES AND PUBLICATIONS

## THE NATIONAL INDIAN LAW LIBRARY

The National Indian Law Library (NILL) has developed a rich and unique collection of legal materials relating to Federal Indian law and the Native American. Since its founding in 1972, NILL continues to meet the needs of NARF attorneys and other practitioners of Indian law. The NILL collection consists of standard law library materials, such as law review materials, court opinions, and legal treatises, that are available in well-stocked law libraries. The uniqueness and irreplaceable core of the NILL collection is comprised of trial holdings and appellate materials of important cases relating to the development of Indian law. Those materials in the public domain, that is non-copyrighted, are available from NILL on a per-page-cost plus postage. Through NILL's dissemination of information to its patrons, NARF continues to meet its commitment to the development of Indian law.

## AVAILABLE FROM NILL

### The NILL Catalogue

One of NILL's major contributions to the field of Indian law is the creation of the National Indian Law Library Catalogue: An Index to Indian Legal Materials and Resources. The NILL Catalog lists all of NILL's holdings and includes a subject index, an author-title table, a plaintiff-defendant table and a numerical listing. This reference tool is probably the best current reference tool in this subject area. It is supplemented periodically and is designed for those who want to know what is available in any particular area of Indian law. (1,000 + pgs. Price: \$75).

## Bibliography on Indian Economic Development

Designed to provide aid on the development of essential legal tools for the protection and regulation of commercial activities on Indian reservations. This bibliography provides a listing of articles, books, memoranda, tribal codes, and other materials on Indian economic development. 2nd edition (60 pgs. Price: \$30). (NILL No. 005166)

## Indian Claims Commission Decisions

This 47-volume set reports all of the Indian Claims Commission decisions. An index through volume 38 is also available. The index contains subject, tribal and docket number listing. (47 volumes. Price \$1,175). (Index priced separately at \$25). (Available from the National Indian Law Library).

*Prices subject to change*

## INDIAN RIGHTS MANUAL

**A Manual for Protecting Indian Natural Resources.** Designed for lawyers who represent Indian tribes or tribal members in natural resource protection matters, the focus of this manual is on the protection of fish, game, water, timber, minerals, grazing lands, and archaeological and religious sites. Part I discusses the application of federal and common law to protect Indian natural resources. Part II consists of practice pointers: questions to ask when analyzing resource protection issues; strategy considerations; and the effective use of law advocates in resource protection. (151 pgs. Price \$25).

**A Manual on Tribal Regulatory Systems.** Focusing on the unique problems faced by Indian tribes in designing civil regulatory ordinances which