

Navajo-Hopi Little Colorado River Water Rights Settlement Act of 2012, S. B. 2109: *Potential Impacts on Hopi* March 12, 2012

Presented by :

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Village of Shungopavi, Bear Clan

Our Discussion Tonight

- Highlights of Senate Bill 2109
- Dangerous Provisions of Senate Bill 2109
- Little Colorado River General Stream Adjudication
- Winters Doctrine
- 1848 Treaty of Guadalupe Hidalgo
- Traditional Hopi Village Rights
- What Can We do About This?



Little Colorado River

What is Dangerous About S.B. 2109?

- Requires permanent waiver of Hopi's water rights
- Requires permanent waiver of Hopi Allottees' water rights
- Severely limits Hopi's right to greater water quantity
- Will prevent Hopi from filing future damage claims
- No funding guarantees for Groundwater Projects
- Removes liability of federal government for failure to appropriate funds

What is Dangerous About S.B. 2109?

- Heavily favors non-Indian interests
- Provides water rights to Navajo Generating Station
- Ensures continuation of Peabody Coal mining
- Infringes on Hopi villages' inherent aboriginal rights
- Eliminated Western Navajo Pipeline
- Raises questions on Hopi's rights to the Colorado River Water

Agreement-in-Principle

- Hopi tribal officials concurred to Agreement-in-Principle without prior consultation with tribal members
- Hopi members have not concurred in Agreement-in-Principle
- Hopi Chairman Shingoitewa claims: *“We are very happy that we’ve gotten to this point where are able to get things done, and the benefit is for our people”*.

Agreement-in-Principle

- Hopi tribal officials may not have legal authority to authorize release and introduction of S.B. 2109
 - May have violated Hopi Tribal Constitution
 - May have violated Village “Inherent Aboriginal Sovereignty”
 - May have violated individual water rights of Allottees

Our Water Situation Today



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Dried Sacred Springs

- Navajo Aquifer lies under our Reservations (90% is over 10,000 to 35,000 yrs old)
- Navajo Aquifer is our primary source for drinking water
- Navajo Aquifer has been irreparably damaged
- Our sacred springs have dried up or are drying up
- Our drinking water supply is contaminated and limited

Water Rights Case History

- Two General Stream Adjudications in Arizona
 - Gila & Little Colorado River
- Arizona *v.* California - 1963
- LCR General Stream Adjudication (Phelps Dodge Case)
- Several other cases filed by Indian tribes including Hopi and Navajo



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Little Colorado River Plateau

Water Rights Negotiations



*Grand Falls
Little Colorado River*

- Water Rights negotiations have been going for several years (over 30 years)
- Involves about 33 parties
- Covers Little Colorado River
- Lower Basin of Colorado River
- To Quantify Water Rights
- Acre Feet of Water is about 326,000 gallons of water

Water Rights Negotiations



Little Colorado River

- Little Colorado River & Lower Colorado River includes:
 - Reservoirs
 - All tributaries
 - All underground water
- Litigation in Arizona Superior Court for Apache County
“General Adjudication of All Rights to Use Water in the Little Colorado River System and Source (CIV No. 6417)”
- Only Zuni Pueblo settled for LCR Water Rights so far

Who is Affected by the Settlement?

- Would settle lawsuit against defendants:
 - Bureau of Reclamation
 - Southern Nevada Water Authority
 - Colorado River Commission of Nevada
 - State of Arizona
 - State of Nevada
 - Central Arizona Water Conservation District
 - Southern California Metropolitan Water District
 - Imperial Irrigation District
 - Coachella Valley Water District
 - Arizona Power Authority
 - Salt River Valley Water Users Association

Who are Negotiating Water Rights?

- United States Government
- State of Arizona
- Hopi Tribe
- Navajo Nation
- Central Arizona Water Conservation District
- Salt River Project Agricultural Improvement and Power District
- Salt River Valley Water Users' Association
- Arizona Public Service
- Arizona State Game and Fish Commission
- Arizona Towns:
 - Flagstaff
 - Winslow
 - Holbrook
 - Taylor
 - Snowflake
 - Show Low
 - Eagar
 - Springerville
- Arizona State Land Department
- Arizona State Department of Transportation

Who are Negotiating Water Rights?

- Catalyst Paper Inc.
(Snowflake)
- Bar T Bar Ranch Inc.
- Crater Ranch, LLC
- Flying M Ranch, LLC
- Aztec Land and Cattle
Company, Ltd.
- Aztec Land Company, LLC
- Lyman Irrigation Company
- Pioneer Irrigation Company
- Showlow/Pinetop-
Woodland Irrigation
Company
- Silver Creek Irrigation
District
- Lakeside Irrigation Company
- Forest Lakes Domestic Water
Improvement District
- Pinetop-Lakeside Sanitary
District
- Euell Lyle Barnes
- Navapache Hospital District

Settled and Pending Water Rights Negotiations

- From 1978 to 2007 Congress ratified 20 Indian Water Rights Settlements into Law, including:
 - Ak-Chin Indian Community (1978)
 - Tohono O'Odham – San Xavier (1982)
 - Salt River Pima Maricopa ((1988)
 - Fort McDowell (1990)
 - Yavapai Prescott Indian Tribe (1993)
 - Gila River Indian Community – Tohono O'Odham (2004)
 - White Mountain Apache (2010)
- Several Pending Including:
 - Navajo Nation (Involved in 4 settlement discussions)
 - Hopi Tribe

How Some Tribes Benefited from Water Rights Settlements

- Quantified Tribal Water Rights (Winters Rights)
- Tribes can use Water Rights in number of ways
 - Domestic Uses
 - Industrial Uses
 - Economic Development
 - Water Banking
 - Water Marketing
 - Water Leasing
 - Water Exchanges

S.B. 2109 would limit and prevent Hopi from taking advantage of the above benefits

What is a Water Right?

- A group of rights designed to protect the use and enjoyment of water that travels in streams, rivers, lakes, and ponds, gathers on the surface of the earth, or collects underground
- Rights come from ownership of land bordering the banks of a watercourse or from a person's actual use of a watercourse
- Treated like rights to property (can be conveyed, mortgaged)

What is Winters Doctrine?

- “*Winters vs. United States*” - January 6, 1908 Decision.
 - Fort Belknap Indian Reservation – Milk River of Montana
 - Decision: Court found in favor of the United States affirming that Indian tribes held implied water rights through their agreement with the United States that took priority over latter nearby settlers
 - “*First in Time – First in Right*” or “Prior Appropriations”
 - Argument: When Congress established the Fort Belknap Indian Reservation, it implicitly intended to reserve enough water to sustain the tribe (treaties, executive orders, etc.)

What is Winters Doctrine?

- Federal Reserved Water Rights may remain unused for many years
- States cannot prevent the eventual exercise of these federal property rights in water
- Reserved Water Rights are quantified in several ways
 - Adjudication
 - Practicably Irrigable Acreage (PIA) Standard (*Arizona v. California*)
 - 2001 Arizona Supreme Court -Arizona tribes have prior rights and not held to PIA standard

Prior Appropriations Doctrine

- Water belongs to first user who appropriates (take control) it for beneficial use
- User (appropriator) is guaranteed the right to continue to take water from that source as long as the water continues to be put to beneficial use
- Use of water in Western states is governed by Doctrine of Prior Appropriation known as “Colorado Doctrine”
 - No one may own the water in a stream, all persons, corporations, municipalities have a right to use water for beneficial purposes
 - *“First in Time – First in Right”*

What Funding Does Hopi Get under S.B. 2109?



Shungopavi

- **\$113.0** Hopi Groundwater Project Account Million less:
 - **\$25.0** from Lower Colorado River Basin Account
 - **\$1.0** Million from State of Arizona
- **\$5.0** Million Hopi for O&M Trust Account
- **\$5.0** Million for N-Aquifer Account
- **\$10.4** Million for Pasture Canyon

But No Guarantees of Any Kind. Funding is... "Subject to Appropriations"

Troublesome Provisions: Must Waive Water Rights

- To approve the Water Rights Settlement Agreement, Hopi must waive Aboriginal Rights (Winters Rights)
- Proposed Agreement contains a provision for a:
“*waiver and release of claims for water rights, injury to water rights, and injury to water quality from time immemorial and thereafter, forever”...*

This means Hopi's and Hopi Allottees' rights may be extinguished forever!

Troublesome Provisions: Hopi Must Waive Water Rights

- Hopi Tribe must waive and release any claims against the State of Arizona, the United States Government, the Navajo Nation, and their political subdivisions for:
 - *Past, present and future Claims for Water Rights arising from time immemorial and, thereafter, forever that are based on aboriginal occupancy of land by the Hopi Tribe, the Members of the Hopi Tribe or their predecessors*
 - *Past and present Claims for Injury to Water Rights and Injury to Water Quality for Hopi Land arising from time immemorial through the LCR Enforceability Date*

Troublesome Provisions: Hopi Must Waive Water Rights

- Waivers and Release of Claims Continued:
 - *Past, present and future Claims for Injury to Water Rights and Injury to Water Quality arising from time immemorial and, thereafter, forever that are based on aboriginal occupancy of land by the Hopi Tribe, the Members of the Hopi Tribe or their predecessors*
 - *Claims for Injury to Water Rights and Injury to Water Quality arising after the LCR Enforceability Date for Hopi Land resulting from Diversion*

Troublesome Provisions: Injury to Water Right & Water Quality of Lower Colorado River

- Proposed Water Settlement Agreement defines:
 - *Injury to Water Rights* - “Interference with, diminution of, or deprivation of the right of any entity to Lower Colorado River water under applicable law.”

Notice the reference to the “Lower Colorado River”

Troublesome Provisions: Injury to Water Right & Water Quality of Lower Colorado River

- Proposed Water Settlement Agreement defines:
 - *Injury to Water Quality of Lower Colorado River Water* - “Any diminution or degradation of the quality of Lower Colorado River water due to a change in the salinity or concentration of naturally occurring chemical constituents of Lower Colorado River water; and any effect of such change ... if the changes are due to the withdrawal, diversion or use of Lower Colorado River water.”

Troublesome Provisions: Lower Colorado River Defined

- Proposed Water Settlement Agreement defines:
 - Lower Colorado River – “the Colorado River downstream from Lee Ferry within the United States, including the reservoirs thereon”

Brings in entire Lower Basin Colorado River System

Troublesome Provisions: Lower Colorado River Water Defined

- Proposed Water Settlement Agreement defines:
 - Lower Colorado River Water “the waters of the Colorado River downstream from Lee Ferry within the United States, including (1) the waters of the reservoirs thereon; (2) the waters of all tributaries to the Colorado River at or below Lee Ferry within in the United States, other than tributaries located within Arizona, tributaries located within the Western Navajo Colorado River Basin; and tributaries of the Little Colorado River located in New Mexico; (3) all Underground Water that is hydraulically connected to the Colorado River at or below Lee Ferry within the United States; and (4) all Underground Water that is hydraulically connected to tributaries to the Colorado River at or below Lee Ferry within the United States, other than tributaries within Arizona, and tributaries of the Little Colorado River located in New Mexico.

Taking a “Minimalist Approach”

- Senator Jon Kyl’s Statement when he introduced S.B. 2109:

“Legally, the Navajo Nation and the Hopi Tribe may assert claims to larger quantities of water, but as seen here, they do not have the means to make use of those water supplies in a safe and productive manner. Among water-law practitioners, the tribes may be said to have ‘paper’ water, as opposed to ‘wet’ water. Those claims are far reaching, extending beyond the mesas and plateaus of northern Arizona calling into question water uses in California and Nevada”

Discounts and takes away Hopi’s legal, aboriginal and superior rights to the waters in the Little Colorado River system – and perhaps the Lower Colorado River system

Troublesome Provisions: Requires Waivers

- Limits Hopi's Rights to Groundwater on Little Colorado
- Seeks waiver of Rights to Lower Colorado River
- Does not Acknowledge Rights to Surface Waters on Little Colorado
- Does not Acknowledge Hopi's Winters Rights
- Does not Acknowledge Hopi's 1848 Treaty of Guadalupe Hidalgo Rights
- Requires Hopi to withdraw pending lawsuits and claims

Troublesome Provisions: Benefits Non-Indian Entities

- Bill heavily favors non-Indian interests
- Gives Water Rights to Navajo Generating Station (34,000 afy for extended life of NGS)
- Requires Peabody Continued Access to Coal and Water Resources
- S.B. 2109 may supersede Environmental Protection Agency's authority to implement environmental rules

Hopi may lose all sovereign rights or authority over coal leases (and NGS)!

Troublesome Provisions: Favors Non-Indian Interests

- Kyl appears to be carrying out the priorities of Salt River Project and Central Arizona Project
- S.B. 2109 appears to ensure M&I Priority Water and Fixed OM&R Charge for Central Arizona Project
- S.B. 2109 may now allow Central Arizona Water Conservation District to assume Bureau of Reclamation's share of Navajo Generating Station

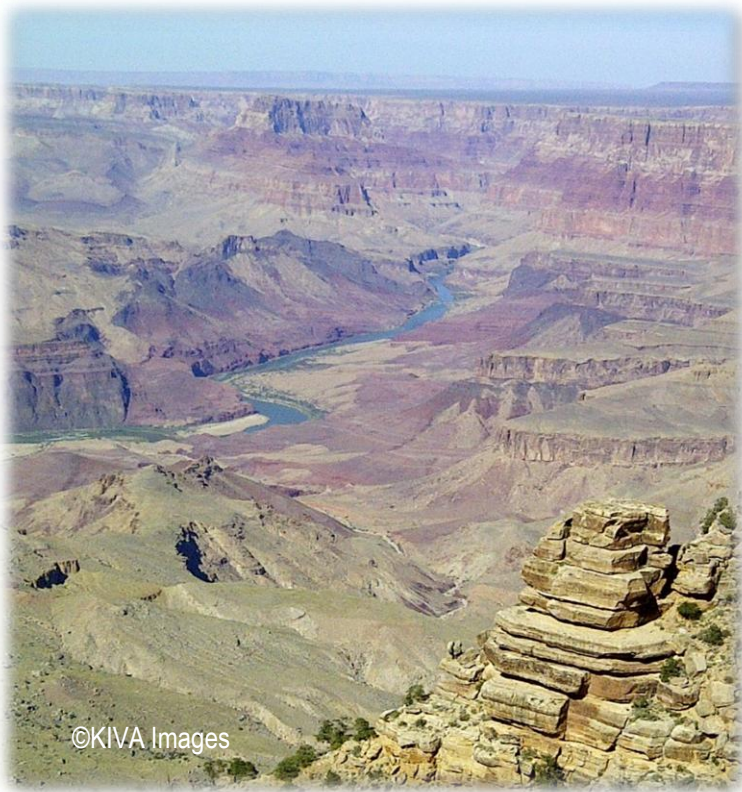
Senator Kyl said S.B. 2109 ... "provides immeasurable benefits to non-Indian communities throughout Arizona, California, and Nevada"

Troublesome Provisions: Funding

- Does not Guarantee Funding of Groundwater Projects
- Does not Provide Funding for O&M of Groundwater Projects once Title is Transferred to Hopi Tribe
- United States cannot held liable if Congress does not provide funding
- Without Guaranteed Funding, this becomes mere “Paper Right”

Hopi Cannot Sue Federal Government if Congress fails to provide funding!

Raises Questions how this bill affects Water Rights on other Hopi Property



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Colorado River

- Appears to Limit Water Rights under following Hopi Property
 - Hopi Cibola Water
 - Hopi Ranches
 - Hopi New Lands Water
 - Rights to other water uses along the Little Colorado River

Raises Important Questions



Lower Moencopi Village

- Who really owns Winters Rights?
- Who really owns 1848 Treaty of Guadalupe Hidalgo Rights?
- Refer to *Winters v. United States*
- Who can Waive Water Rights?

Hopi Central Government?
Traditional Hopi Villages?
Hopi People?

Hopi Villages Have Aboriginal (Winters) Rights



*Petroglyphs Mark Clan Migrations
"Itaa' Tuvoi'la"*

- *Hisat Senom* occupied Colorado River Plateau since time immemorial
 - *Anasazi, Moqui, Sinaqua, Hopi*
- Archaeological sites document historical occupation – Clan Migrations
- Hopi villages settled by *Hisat Senom*

Hopi Villages Have Hidalgo Rights



1848 Treaty of Guadalupe de Hidalgo

- **1848** Treaty of Guadalupe
Hidalgo recognized property rights of Hopi and New Mexico Pueblos
- **1882** Hopi Executive Order
Reservation Established

No Hopi Central Tribal
Government until 1936

Hopi "Tribe" is a union of self-governing villages...

Hopi Villages Have Winters Rights



*Historic Photo of Traditional
Hopi Village*

- **1680** Pueblo Revolt
- **1882** Hopi Executive Order Reservation
- **1908** Winters v. United States
- **1936** Hopi Tribal Constitution
- **2010** Hopi Appellate Court. Villages have “*Inherent Aboriginal Sovereignty*”

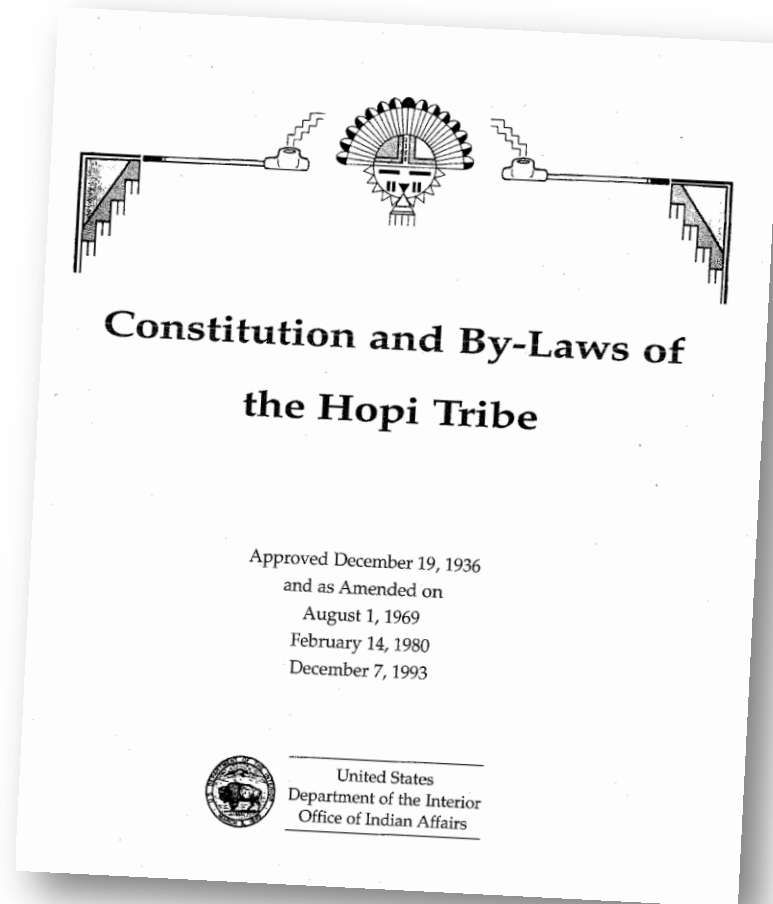
Tribal Member Concerns

- Waiver and release of claims may prevent tribe and individuals from filing damage claims for:
 - Damage to N-Aquifer
 - Springs drying up
 - Affect traditional ceremonies
 - Decreasing water supply
 - Damage to water quality
 - No reclamation of mined area and N-Aquifer



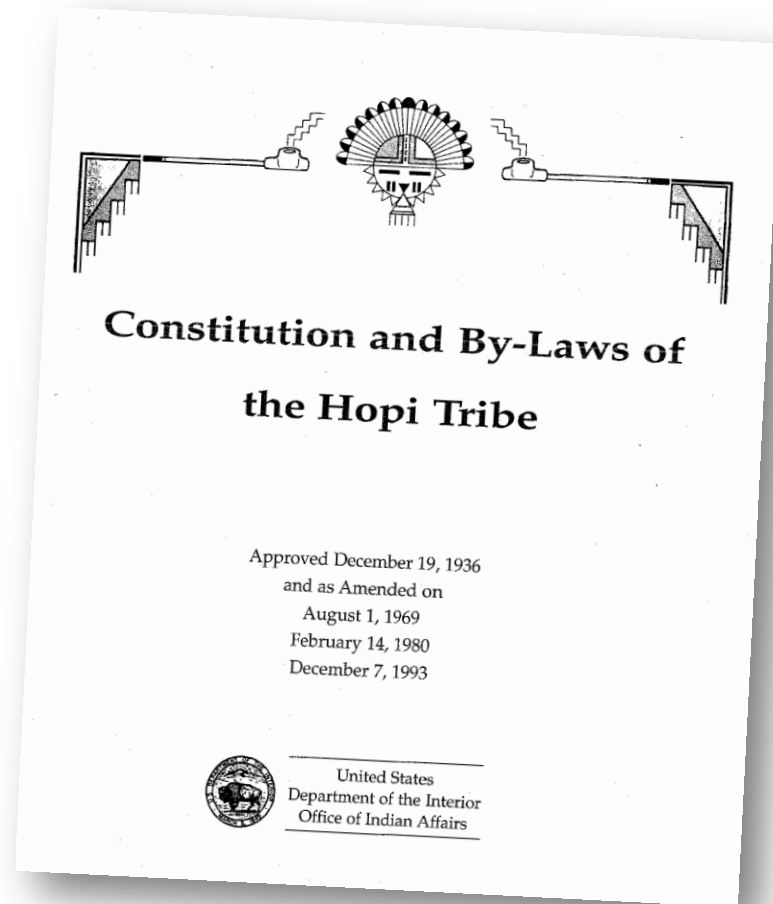
Hopi Dry Spring

Hopi Tribal Constitution



- Hopi Constitution requires tribal council *“to represent and speak for the Hopi Tribe in all matters for the welfare of the tribe...negotiate with Federal, State and local governments...to prevent the sale, disposition...of tribal lands and tribal property...to protect ...traditions, and ceremonies of the Hopi Indians”*

Village Reserved Powers



- Hopi villages did not transfer or delegate aboriginal, ancestral, reserved water rights to Hopi central government in the Hopi Constitution
- Aboriginal, ancestral, and reserved water rights are reserved to traditional villages
 - Inherent powers are reserved to villages

What can Hopi Senom do about the Proposed Settlement Agreement?

- Impose on Hopi Tribal Council to hold a Special Meeting on S.B. 2109:
 - Provide public testimony on S.B. 2109
 - Mandate Hopi Tribal Council to Reject S.B. 2109
 - Carry out the Will of the Hopi and Tewa Senom
 - Require full tribal member consultation on any future water rights negotiations/approvals
 - Hold elected tribal government officials accountable

What can Hopi Senom do about the Proposed Settlement Agreement?

- Impose on Hopi Tribal Council to place immediate Moratorium on further negotiation on S.B. 2109
- Require that future water rights cannot be settled without tribal referendum vote
- Impose on Hopi Tribal Council to Require Interior Secretary to “*Declare Material Damage to the Navajo Aquifer*”

What can Hopi Senom do about the Proposed Settlement Agreement?

- If Hopi Chairman, Water & Energy Team and Hopi Tribal Council fail to listen to Hopi and Tewa Senom:
 - File injunction in Hopi Courts to enjoin Hopi Tribal Council on further negotiations and agreements on S.B. 2109
 - File legal action in Hopi Courts to recognize and enforce Villages' "*Aboriginal, Ancestral*" and "*Reserved*" water rights

Why Should We Oppose Senator Kyl's Senate Bill 2109?

- *It's about Protecting our Sovereignty*
- *It's about Preserving our Culture*
- *It's about Honoring our Covenant*



Thank you for your time!



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