SLIDES: Gila River Indian Community Water Settlement

Rodney B. Lewis

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GILA RIVER INDIAN COMMUNITY
WATER SETTLEMENT

Hard Times On The Colorado River
June 8 – June 10, 2005

Rodney B. Lewis, General Counsel
Gila River Indian Community
Introduction

1. I am participating today as a practitioner not on behalf of the Gila River Indian Community.

2. I bring a unique perspective as an in-house counsel for an Indian tribe for over 30 years.
Historical Perspective

1. The Gila River Indian Reservation was established by Congress in 1859.
2. Pimas (Akimel-O’Odham) and Maricopas (Pee-Posh) comprise the tribes of the Community.
3. Our ancestors, the ancient HuHuKam, farmed the Gila and Salt River Valleys since time immemorial.
4. Over 500 miles of canals were dug to irrigate our fields.

5. Diversion of water upstream on the Gila River caused famine and drought beginning in the 1880s.

6. Pimas and Maricopas have the highest documented rate of diabetes of any ethnic group in the world.
Pee Posh
“The People”
The middle Gila was lush

“All of these rancherias on either bank of the river and on the islands enjoy broad areas for the cultivation of crops. These Indians raise corn, beans, squash, and cotton. Those of Sudac-sson raise wheat by irrigation.”

Father Jacobo Sedymayr, 1744
But most of all we had productive farmland.

Our “fields of wheat were so large that, standing in the middle of them, one cannot see the ends because of their length. They are wide, too, embracing the whole width of the valley on both sides, and the maize fields are of similar proportions.”

Juan Bautista de Anza, May 1774
The Army of the West passed through in November 1846

“For the whole distance [through the Pima villages], we passed through cultivated grounds, over a luxuriantly rich soil. The plain appeared to extend in every direction 15 or 20 miles.”

Lt. William Emory, passing through the Pima Villages in November 1846
“Bread is to eat, not to sell; take what you want.”

Pima chief responding to Kit Carson’s request to purchase food for the Army of the West, 1846
California Gold Rush, 1849-1851

An estimated 40,000 visitors came through our villages.
Our villages were a welcomed relief from the desert.

Some emigrants paid Pima guides $10 to lead them through the riparian canopy and floodplain thicket to the river (and the villages alongside it).
Production of corn

“Looking towards the river, fences and deep green blades of maize were plainly visible, showing that although at this moment they were inactive, yet they were not always idle.”

Emigrant William Hunter, speaking of the Pima villages, 1849.
Our people faced hard times. Life was difficult and hard. By the early 1890s, there was an insufficient flow of water in the river to farm our fields.
A Pima Calendar Stick

1896-97 “The river practically dry. The Blackwater Indians were forced to leave homes to sell wood.”

The Calendar Stick of Juan Thomas, translated in 1931
The national media focused on the Pima crisis in 1900

“That 6,000 Pima Indians, always the consistent and active friends of the white man, should be reduced from a condition of wealth and great prosperity to actual starvation through neglect of the federal government ... seems a ... killing of friends.”

“Indians Starving to Death: Six Thousands Perishing on Gila Reservation in Arizona Because of Failure of Crops, Chicago Tribune, 1900
Appealing to government officials

To get government rations, many of our people had to ford the river to reach the agency in Sacaton.
Background-Years of Litigation

• The Gila River Indian Community’s claims for water and damages have been litigated for approximately 100 years.

• Litigation has been costly to all parties.

• Rights to water in central Arizona are uncertain for all water users pending the outcome of litigation.
ARIZONA WATER SETTLEMENTS ACT

Striving for Settlement

• Gila River Indian Community, in good faith, has negotiated a water settlement. This process has taken over 20 years

• For the past 7 years, the Community, Federal and non-Indian parties have participated in an especially concerted effort to structure and draft a settlement agreement document
Master Plan Acreage

Potential and Desired Agricultural Lands Outside Historic Irrigated Lands
Gila River Indian Community
Gila II

• In re the General Adjudication of All Rights to Use Water in the Gila River System and Source, 175 Ariz. 382, 857 P 2d 1236 (1993) The Court rejected the 50%/90 day rule and remanded the issue to determine the criteria for separating appropriable subflow from percolating water
GILA III 989 P. 2d 739, 1999

- Federal reserved water rights doctrine applies not only to surface water but also to groundwater.
- Holders of federal reserved water rights may invoke federal law to protect their groundwater from subsequent diversion even if the holders would enjoy greater protection than holders of state law water rights.
1. Two thirds of the land is federal and Indian held
2. State courts must apply federal substantive law to measure federal rights in state adjudications.
3. The federal reserved rights doctrine applies not only to federal enclaves but also Indian reservations.
4. The United States intended, when it established reservations, to reserve sufficient unappropriated water to meet the reservations’ needs, it must have intended that reservation of water to come from whatever particular sources each reservation had at hand. For instance groundwater.
GILA IV

In re the General Adjudication of All Rights to Use Water in the Gila River System and Source, 198 Ariz. 330, 9 P.3rd 1069 (2000)

1. Subflow is defined as the saturated floodplain Holocene alluvium.

2. All wells located within the lateral limits of the subflow zone are subject to this adjudication.
3. Wells outside the subflow zone, but pumping water from a stream or subflow as determined by the cone of depression test, are included in the adjudication.
GILA V
(Practically irrigable acreage)

• The General Adjudication of All rights to Use Water in the Gila river System and Source, 201 Ariz. 307, 35 P. 3d 68 (2001)

• The general purpose of a reservation is to provide a home for the Indians and that purpose is broad and must be liberally construed.
PIA

• The PIA standard is not the exclusive standard to measure Winter’s right water.
• Must consider a tribe’s history, religion, rituals, and culture.
• Also consider a tribal land’s geography, topography, and natural resources, including groundwater availability.
... continued PIA

- A tribe’s economic base, the most efficient use of water, physical infrastructure, human resources, technology, raw materials, financial resources, and capital.
- Past water use
- A tribe’s present and projected population
Because it:

- Settles longstanding dispute between the US and the CAWCD (State of Arizona)
  - Repayment obligation of CAWCD
  - Division of CAP water between the US and CAWCD
- Provides the framework for future Arizona Indian water settlements through the Lower Colorado Basin Development Fund
ARIZONA WATER SETTLEMENTS ACT

• Provides fixed OM&R funding for tribes with existing CAP contracts

• Settles water rights and damage claims of the Gila River Indian Community
ARIZONA WATER SETTLEMENTS ACT

Why is the fixed OM&R fund so important?

• CAP water is substituted for Winters’ Rights water so as not to hurt local water users.
• Tribes want “wet” water at a cost equivalent to local water supplies.
Basis for the Gila River Indian Community Water Settlement

- Settlement is in satisfaction of Gila River’s claims for prior water and injury.
- State litigation case pending settlement agreement and potential claims exist against Federal Government.
Federal Government in the General Stream Adjudication agrees that the Community has a legitimate claim to 1,531,200 acre-ft/year. Potential liability of the Federal Government for the Community’s water rights claims has been calculated by the Department of the Interior at roughly $2.12 billion. Settlement will resolve all of the Community’s claims for water and all claims for past injuries to water rights.
… continued Basis for the GRIC Water Settlement

- Settlement will provide certain monetary benefits.
- Settlement Water Budget is 653,500 acre-feet of water per year, or 40% of water right claim.
- Federal Government obligation is $200 million, or 9% of Federal litigation exposure.
The Community’s Globe Equity Rights are associated with lands in the San Carlos Irrigation Project (SCIIP), which serves both Indian and Non-Indian lands.

- 100,546 acres on the Gila River Indian Reservation
- 100,000 acres in the San Carlos Irrigation and Drainage District (SCIDD)
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<tr>
<th>Category</th>
<th>Amount</th>
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<tr>
<td>Underground Water</td>
<td>156,700</td>
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<tr>
<td>Globe Equity Decree</td>
<td>125,000</td>
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<tr>
<td>Community CAP Indian Priority Water</td>
<td>173,100</td>
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<tr>
<td>RWCD CAP Water</td>
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<tr>
<td>RWCD Surface Water</td>
<td>4,500</td>
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<td>HVID CAP Water</td>
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<td>(contingent)</td>
<td>18,100</td>
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<td>ASARCO CAP Water</td>
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<tr>
<td>Water Budget</td>
<td>653,500</td>
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<tr>
<td>SRP Stored Water</td>
<td>20,000</td>
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<tr>
<td>Chandler Contributed Reclaimed Water</td>
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<td>Chandler Reclaimed Water Exchange Prem.</td>
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<td>Mesa Reclaimed Water Exchange Prem.</td>
<td>5,870</td>
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<td>New CAP NIA Priority Water</td>
<td>102,000</td>
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<tr>
<td>Haggard Decree Water</td>
<td>5,900</td>
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**Water Budget Summary**

<table>
<thead>
<tr>
<th>Description</th>
<th>Amount</th>
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<tr>
<td>Existing Supply</td>
<td>460,700</td>
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<tr>
<td>Pending in Settlement</td>
<td>192,800</td>
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<tr>
<td>Community Water Budget AFY</td>
<td>653,500</td>
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ARIZONA WATER SETTLEMENTS ACT

Water Budget Existing Supply

Globe Equity #59 125,000 AF
Underground water (SCIIP) 32,000 AF
Underground water (non-SCIIP) 124,700 AF
Community CAP Contract 173,100 AF
Haggard Decree 5,900 AF

Existing Supply 460,700 AF
ARIZONA WATER SETTLEMENTS ACT

Water Budget-Pending in Settlement

<table>
<thead>
<tr>
<th>Description</th>
<th>Amount</th>
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<tr>
<td>HVID Indian Priority Water</td>
<td>18,100 AF</td>
</tr>
<tr>
<td>CAP - NIA firmed to M&amp;I</td>
<td>15,000 AF</td>
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<tr>
<td>CAP - NIA</td>
<td>87,000 AF</td>
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<tr>
<td>SRP Salt River Stored Water</td>
<td>20,000 AF</td>
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<tr>
<td>Exchange water premium</td>
<td>8,100 AF</td>
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<tr>
<td><strong>Subtotal</strong></td>
<td><strong>148,200 AF</strong></td>
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…(Cont’d) Water Budget-Pending in Settlement

RWCD - CAP Non-Indian Ag 18,600 AF
RWCD - Salt River Water 4,500 AF
ASARCO - CAP M&I 17,000 AF
Chandler Reclaimed Water 4,500 AF
Subtotal 44,600 AF
Previous Subtotal 148,200 AF
Total Pending 192,800 AF
ARIZONA WATER SETTLEMENTS ACT

Water OM&R Trust Fund and SCIP Rehabilitation Fund

• $200 million will be allocated to the Community with
• $53 million to establish the OM&R Trust Fund to defray OM&R costs associated with the delivery of CAP water to the Community
• $147 million to rehabilitate the SCIP Joint Works and SCIP Indian Works
Settlement provides more certain funding for CAP-IDD facilities for GRIC

• Funding to be provided to GRIC for continued construction of the Pima-Maricopa Irrigation Project (P-MIP) pursuant to repayment contract executed with BOR on July 20, 1998.
• Currently funded by annual appropriations
• $313 Million (indexed) remains to be funded as of 2004.
Settlement provides funding for rehabilitation of San Carlos Indian Irrigation Project facilities

- $147 Million to be used by the Community to rehabilitate delivery and distribution works of SCIIP that were either never constructed as contemplated or have fallen into disrepair contrary to US trust obligation.
ARIZONA WATER SETTLEMENTS ACT

- Settlement provides protection for Reservation groundwater from pumping near the Reservation
- Community shall not seek to *amend* GE-59 to *increase* its GE-59 rights
- Community GE-59 rights shall be binding upon all parties to the Gila River Adjudication Proceedings
Implementing Arizona State Legislation-HB2728 has passed the Arizona State Legislature and signed into law by Governor Napolitano.

- CAP Water Firming Program-15,000 afy for the Community
- Upper Gila river Watershed Maintenance Program
- Land Acquisition Authorization
- Well Drilling Limits
ARIZONA WATER SETTLEMENTS ACT

• Adjudication Court approval and issuance of judgment
Community is to enact a tribal water code that:

- Provides for an equitable distribution of water, including a process by which any Allottee may request and be provided water for irrigation use in accordance with 25 U.S.C. §381
- Provides for due process in the event that a Community Allottee or Member disagrees with a water distribution decision
Community Water Quality Monitoring Program

- Funding in the amount of $3,400,000 is to be made available for the establishment of this program. (See Chandler and Mesa water exchanges)

- The program is to be used to protect the Community from Injuries to Water Quality that may occur after the Enforceability Date Community.

- Funding for subsidence damages in the amount of $4,000,000.
The purpose of the Arizona Water Rights Settlement Act is to provide a framework for settlement of Arizona Indian water rights claims. Thus, although the Act provides for the settlement of two Arizona Indian water rights claims, including one of the very largest, it also will assist the State to expeditiously settle other very significant claims, especially that of the Navajo, and also fund existing obligations of the United States as a result of past settlements.
The Act provides both water resources, 67,300 afy, in the form of CAP water, and ultimately 250 million dollars to settling tribes to facilitate future Indian water rights settlements.
All of the 67,300 afy that is made available for future Indian Settlements is also entitled to the time-limited subsidy settlement to offset the very high cost of the CAP water they are being offered as part of this framework. Without this initial offset on the cost of CAP water, settling Tribes have little, if any, incentive to settle. Thus, the payment for Fixed OM&R for CAP water for settling Tribes is a critical component of this overall package.
The Act utilizes the repayments by Arizona to the federal government, which are spread out over the next 40 years, to fund this Indian water rights settlement framework. The money for these repayments come from Arizona CAP water users. It is paid into the Lower Colorado Basin Development Fund (LCBDF).