Chapter 6: Taking our Water Rights to Court

When the Florence Canal Company was organized in 1886 for the purpose of constructing a canal to take most of the remaining water of the Gila River, we asked the Indian agent in Sacaton to stop this illegal diversion. The Indian Office asked the US Justice Department to intervene on our behalf, but it made little effort to assist us, even though the Florence Canal Company had prepared itself to go to court to protect its landowners' rights. This inactivity helped usher in the years of famine for our people.

Part of the challenge for us a century ago was that state laws—over which we had no influence—governed water rights issues. Arizona joined with the other Western states in 1897 by enacting its own prior appropriation law. This law was generally known as the "first in time, first in right" law, meaning whoever filed the first claim and actually put the water to beneficial use was given the rights to the water. This law clearly violated our rights. Since we were not citizens we had no input into this law and had to rely on the federal government to "protect" our rights. Unfortunately, the Indian Office—having a legal trust responsibility to protect our rights—was of the opinion that we no longer had any rights to the waters of the Gila. The government simply ignored our rights to the use of the water even though we were in fact first in time and had irrigated our lands since time immemorial. Nonetheless, the water was given to others in disregard of our rights.

We weren't the only Indian tribe to experience the loss of water. Most tribes across the West experienced similar, although perhaps not quite as severe, circumstances. We actually suffered through years of starvation. But there was a court decision making its way up the federal ladder, eventually reaching the United States Supreme Court in October 1907. This case came from the Fort Belknap Gros Ventre-Assiniboine Reservation in Montana, with both tribes

dependent on the waters of the Milk River. Local off-reservation irrigators argued the treaties of 1868 and 1888, which recognized the reservation, said nothing about water. Therefore, in the opinion of these off-reservation irrigators, the tribes were not entitled to any water from the Milk River, which ran across the reservation much like the Gila does over our lands. The federal courts upheld the tribes' right and each time the case was appealed to the next higher court. In 1907, the case reached the Supreme Court.

The Supreme Court agreed with the attorneys representing the Fort Belknap tribes and for the first time Indian tribes had legal rights to water. This established the principle of reserved rights. This meant that Indian tribes had reserved to themselves enough water to make their lands a home. No tribe, the court acknowledged, would ever have agreed to limit themselves to reserved lands without it being understood—or implied—that they had also reserved enough water to make their diminished lands a safe and comfortable home. This ruling, despite not coming from our Community, gave us paper rights to millions of acre-feet of water. But, we had no way to get the water to our land because upstream diversions left the river largely dry. This was one reason the government built the new irrigation system for us as we saw in chapter 5. In 1924, Congress approved of the San Carlos Irrigation Project (SCIP) and in 1928 merged all of these smaller irrigation projects into the SCIP system.

After Coolidge Dam was authorized the federal government intervened in our behalf to legally protect our water. While nearly forty years after we had originally asked the government to intervene, the government finally did so in 1925 by filing a lawsuit on our behalf called the *United States of America vs. Gila Valley Irrigation District*. As our legal trustee, the United States had to act on our behalf, leading us to believe justice would finally be served and our lands would once again receive the life-giving water they needed to provide for our wellbeing.

When the federal government agreed to build Coolidge Dam in 1924, we were to get our water first before all other users. But this turned out to be yet another broken promise. When the *United States vs. Gila Valley Irrigation District* decision was announced, our water was given away once again. This decision is better known as the Globe Equity 59 ruling. But the federal attorneys who were supposed to represent us and protect our water instead gave the San Carlos Irrigation and Drainage District a share of our immemorial and storage rights to the waters of the Gila River. They then gave Upper Valley farmers the right to divert water in disregard of our water priorities.

We objected to this decision and, in June of 1935, some of our leading men rode on horseback to the federal court in Tucson to stop this give away of our water. Judge Albert M. Sames refused to allow our leaders to testify in court and made them wait in the hall as he issued the Globe Equity 59 decision and ignored our pleas. The court that was to be impartial and fair had again disregarded our rights. This ensured that we would continue to litigate in the courts for decades to come since we understood that water was critical to our survival as a people.

Despite its promises, the San Carlos Irrigation Project was not as successful as people thought it would be. When the water master issued the first water call each year, we were often unsure if we would have a second call later in the year. If insufficient water were available, our crops simply dried up and died. This was discouraging to many of our farmers. This was more disheartening because upstream farmers ignored the intent of the Globe Equity ruling by drilling thousands of wells over the next several decades and pumping water from the ground. Since stream flows and groundwater are closely related, this groundwater pumping limited our share of water downstream. The courts did not accept our arguments regarding this connection until 2002. In the end, continued upstream groundwater pumping destroyed the flow of the Gila River.

There were repeated challenges to the Globe Equity ruling by all parties, the first one already in 1939. Over the next seventy years we continued to fight for our rights. We even filed suit under the provisions of the Indian Claims Commission Act of 1946. But despite dozens of legal cases and the expenditure of millions of dollars, we still had no water for our fields.

When the US Congress authorized the Central Arizona Project Act, in 1968, it began the process of bringing Colorado River water to south-central Arizona. Some people viewed the CAP as a possible source of in-lieu water that might satisfy our water claims. In other words, since the CAP would bring new water to central Arizona perhaps our claims could be satisfied by Colorado River water.

Our Community leaders adopted a two-pronged legal approach to restore our water. Our first approach was to litigate in the courts. This is what we had done since the 1920s. But this was expensive and time consuming and even if we won a ruling, it could be tied up in the courts for years. For this reason, we adopted a second approach in the 1980s. Under this approach, we agreed to sit down with outside parties and try to negotiate an agreement that would be fair and equitable to all. Despite what had happened to our people, we still wanted to be good neighbors. We understood what water deprivation was and how it impacts people. While we wanted to be fair and protect our rightful claims to the water, we realized we had neighbors who also needed water. In the end, we believed a negotiated settlement would be the most beneficial and equitable way to settle our claims.

To litigate our rights, we used the courts. While federal law governs the matter of Indian water rights, the actual hearings are held in state courts. This meant, of course, that our water claims after 1952 were held in state courts. Mr. Simpson Cox agreed to represent us as our legal counsel, taking the case when few others would have done so. We continued to rely on outside

legal counsel until 1997, when we established our own Office of Water Rights and hired our own attorneys.

In the meantime, the General Water Adjudication hearings began in 1976. All water rights in Arizona were to be decided. Many judges came and went and numerous issues were litigated but after twenty-nine years the first contested water right had yet to be decided. We did secure some victories. In 1983 we were finally allowed to represent ourselves in the Globe Equity 59 action, meaning we no longer had to rely on federal approval of our attorneys. We also filed suit that year in another effort to stop upstream diverters from stealing our water. Many trials were held on the matter of Globe Equity 59 and many issues were tried in court. Every time upstream farmers were required to reduce their diversions. Instead, they increased their groundwater use.

In 1990, the court placed a stay—or a temporary refusal to have a trial—on the critical issue of upstream groundwater for a few months until the Arizona Supreme Court ruled on the sub flow of the Gila River. In the meantime, upstream groundwater pumping was allowed to continue. The few months the court had requested stretched into ten years. But, finally, in 2000, the Arizona Supreme Court ruled and the sub flow was defined. The Globe Equity 59 stay was lifted and our day in court had finally arrived.

A trial was held in 2002 and this time we did not have to sit in the hall outside the courtroom as we did in 1935. We demonstrated—just as independent observers had confirmed—that Globe Equity 59 covered upstream agricultural wells. But rather than issue a ruling in our favor, Judge Coughenour withdrew from the case. A new judge was assigned to the case but we still had no ruling. In the meantime, groundwater pumping continued as our water supply continued to dwindle.

At the same time, our water negotiating team continued to meet with outside parties for the return of our water. We began talking about Central Arizona Project water in 1969. In 1982, thirteen years later, a water delivery contract was presented to our Community for 179,300 acre-feet of CAP water. After deliberating over this proposal, it was rejected by the Council because it would require us to pay for the water up front—something no other water user in Arizona had to do—and a portion of it would automatically convert to effluent water in 2008.

As we moved closer to the day when our water might be restored, we created a Master Plan of our Community for future development. This included a plan that would rehabilitate and develop up to 146,330 acres of agricultural land. Of course, to develop this land we needed a resolution to our water rights. In October 1990, our Community Council approved of a resolution appointing a water negotiating team. The Council then appointed Dana Norris as chairman, Roderick Sunn, Anselm Shelde, Harlan Bohnee, Ardell Ruiz and E. Lee Thompson. Then Governor Thomas White and Lieutenant Governor William Rhodes were ex-officio members of the team. This team was then authorized to negotiate with outside interests to bring about a settlement of our water rights.

The drought of 1990 was destructive to Arizona farmers, including ours, helping our leaders recognize the importance of a permanent water supply. This led us to accept a plan to tap into the CAP distribution system by having Gila River Farms Construction build the CAP interconnect east of Coolidge. This interconnect tied into the Pima Lateral and delivered Colorado River water to our land for the first time; it very likely saved the agricultural economy of our Community. It also awakened our leaders to the importance of a reliable source of water. In 1992, we reached an agreement with the federal Bureau of Reclamation to deliver 177,000 acre-feet of CAP water to our reservation.

With a supply of water and with the hope of a full water settlement, agriculture gained a new importance. While agriculture has always been important to our culture and economy, we also knew that agriculture was the best and surest way to put our settlement water to use when it arrived. Even though we do not fall under the state "use or loss it" doctrine, we decided we needed to put all of our water to use as soon as it arrived. Agriculture is the only way to put our settlement water to use. Once it is physically here on the reservation, we can convert its use from agricultural to municipal and industrial uses as needed.

After many years of hard work, our water negotiating team reached a negotiated settlement with dozens of cities, towns, corporations and irrigation districts. Congress then enacted the settlement bill into law in November 2004. President George W. Bush then signed the bill into law on December 10, 2004. This legislative agreement provided water that the courts had refused to confirm. It also provided money to build—and in some cases to rebuild—a water distribution system that the courts could never have provided.

Our historic water rights settlement is the largest Indian water settlement in the history of North America. It will provide a total water supply of 653,500 acre-feet of water annually. This is enough water to cover the entire reservation to a depth of eighteen inches. In addition, the law will provide $200,000,000 to help us buy down the cost of CAP water and rebuild the old San Carlos Irrigation Project. Today truly marks the beginning of a more secure future for our people and we owe it all to the diligence and perseverance of our leaders and the many friends of ours who have helped make this day a reality.