



# Arizona General Stream Adjudication Bulletin

OFFICE OF THE SPECIAL MASTER • January - May 2001

## April 3, 2001 - Banner Day

On April 3, 2001, the newly appointed Special Master was sworn in and Judge Eddward P. Ballinger, Jr., held his first status conference as the presiding judge of the Gila River Adjudication.

Judge Ballinger presided at Special Master Schade's well attended swearing in ceremony. Chief Justice Thomas A. Zlaket gave the oath of office. Following the ceremony, Judge Ballinger held his first status conference as the presiding judge of the Gila River Adjudication.



Photo by: Brian R. Smith

*Judge Eddward P. Ballinger, Jr., presides at the swearing in of Special Master George A. Schade, Jr.*

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### Special Master Schade

On March 5, 2001, Special Master George A. Schade, Jr., began his duties. Special Master Schade received his undergraduate degree in Political Science from Stanford University in 1968, and a Juris Doctor degree from The American University Washington College of Law in 1971. He has studied hydrology and finance at Arizona State University, and has twice attended the National Judicial College, where he also was an advisor.

Arizona has been his home since 1972, when his legal career began as a Law Clerk for the Hon. Eino M. Jacobson of the Arizona Court of Appeals. He was a Staff Attorney for legal aid services and was in private practice. From 1980 to 1995, he was with the Arizona Department of Water Resources, serving as a Hearing Officer, Surface Water Section Manager, and Chief of the Litigation

Support Section of the Adjudications Division.

In January 1996, he was appointed an Administrative Law Judge in the newly created Arizona Office of Administrative Hearings. He held hearings in environmental, professional disciplinary, construction, and water resources matters. He has arbitrated civil litigation and a variety of numerous securities cases. He has authored legal and investment articles, and has contributed to a book on public lands management and a historical biography.

Special Master Schade is a member of the Administrative Law and Alternative Dispute Resolution Sections of the State Bar of Arizona. He is committed to the implementation of effective and useful means of dispute resolution. His off the field passion is Arizona State Baseball. ♠

# The Interlocutory Appeals

## Issue 2 (Subflow)

### Petition for Review Filed with U. S. Supreme Court

On March 19, 2001, Phelps Dodge Corporation and Arizona Public Service Company petitioned the U.S. Supreme Court to review the September 21, 2000, decision of the Arizona Supreme Court regarding subflow. The U.S. Supreme Court is not obligated to review state court decisions, hence these parties petitioned the Court for a writ of certiorari.

The Arizona Supreme Court addressed interlocutory appeal issue no. 2, which is determining what underground water constitutes appropriable subflow. The Arizona Supreme Court affirmed the superior court's definition of subflow as being the geologic unit of "the saturated floodplain Holocene alluvium." The Court's decision was reviewed in the August-December 2000 *Bulletin*.

Phelps Dodge and APS argue that the Arizona Supreme Court "retroactively changed long-standing judicial precedents concerning the nature of rights in underground water...[and] this retroactive change was such a sudden and unpredictable departure from the Supreme Court of Arizona's prior precedents that it has

effected a judicial taking of private property without compensation in violation of the takings clause of the Fifth Amendment to the United States Constitution." The takings clause states that private property shall not be taken for public use without just compensation. Petitioners argue that the subflow decision retroactively "turned its back on a century of Arizona water law," invalidating legally recognized water rights "upon which millions of Arizona residents depend" without having "offered any payment for the change."

ASARCO Incorporated filed a response supporting the petition for certiorari. The Gila River Indian Community (GRIC) and the Apache Tribes requested and received an extension of time until May 21, 2001, to file responses. The State of Arizona filed a waiver stating it will not file a response to the petition.

The best estimate is that the decision of the U.S. Supreme Court

granting or denying the petition will not be known until this summer. If the Court grants the petition, parties will have an opportunity to file briefs and request oral argument.

## Issue No. 3 (Standard for Quantifying Federal Reserved Rights)

### Arizona Supreme Court Hears Oral Argument

On February 21, 2001, the Arizona Supreme Court heard oral argument on interlocutory issue no. 3.

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Arizona General Stream Adjudication Bulletin is published by the Office of the Special Master. Some previous issues are available on our Web site:  
<http://www.supreme.state.az.us/wm>

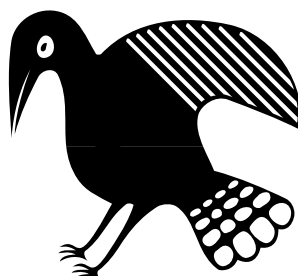
The information contained in this Bulletin is provided for informational and scheduling purposes only, and does not constitute a legal opinion by the Special Master on matters contained herein.

Volume 9  
Number 1

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## BULLETIN GOES ONLINE!

Beginning with the next issue, the *Arizona General Stream Adjudication Bulletin* will be published, free of charge, on the Special Master's Web site:

<<http://www.supreme.state.az.us/wm/>>.

This move will make the *Bulletin* available to a larger number of people and parties, achieving our objective of wider distribution. A single page without columns format will make the *Bulletin* easier to read, and putting the *Bulletin* online will save

*continued on page 8...*

# Gila River Proceedings

## Status Conference

At Judge Ballinger's first status conference on April 3, 2001, the following issues were heard:

## Gila Steering Committee

The Gila Steering Committee met on April 2, 2001. The Committee discussed various issues and concluded that although it has not recently been used as often as before, the Committee can continue to serve a useful purpose and aid the court. The Committee elected M. James Callahan, Esq., Chair and L. Anthony Fines, Esq., Assistant Chair. F. Patrick Barry, Esq., is the outgoing Chair.

## Updating Addresses and Statements of Claimant

Jan L. Ronald, Esq., who represents ADWR, reported that ADWR continues to revise and update the mailing list of claimants. Last year, Special Master Thorson and ADWR implemented a schedule for updating the mailing list.

ADWR is currently preparing a mailing to those persons who have initiated new water uses since 1991 in the Gila River watershed. This mailing will include a new use summons from the Gila River Adjudication Court that will provide the opportunity for all new surface water and groundwater users to file a statement of claimant. The mailing is expected to begin this summer, and may require several months to complete. Thereafter, ADWR intends to mail out new use summons on an annual basis. Judges Ballinger and Dawson have approved the summons form.

Mrs. Ronald reported that ADWR received the list of GRIC's allottees that was needed to complete the Community's Hydrographic Survey Report

(HSR) for Contested Case No. W1-203. ADWR anticipates completing the HSR by the end of this year.

On April 13, 2001, Special Master Schade met with Mrs. Ronald to review how far along ADWR was in the process of updating the claimants' databases and ADWR's preparation for mailing the new use summons. The discussions centered on the administrative manner of completing these tasks previously ordered by the superior courts.

## Settlement Efforts

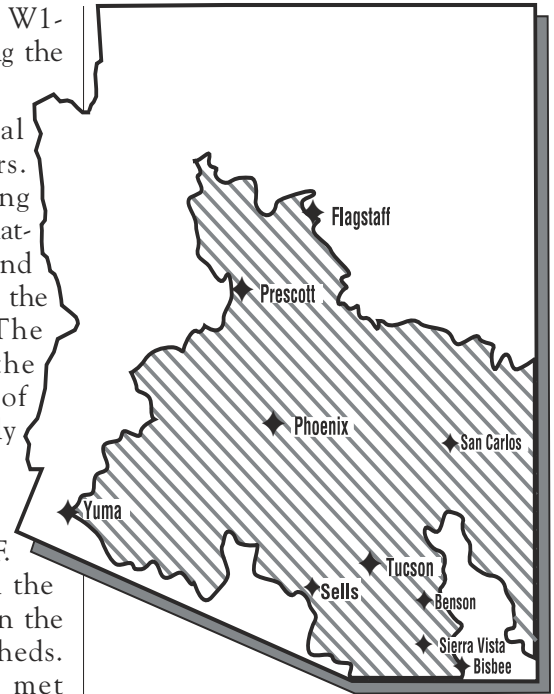
Rodney B. Lewis, Esq., and F. Patrick Barry, Esq., reported on the status of settlement discussions in the Upper and Lower Gila watersheds. The settlement parties have met regularly for extended periods of time. The participants are cautiously optimistic about the success of discussions.

Judge Ballinger indicated he wished to meet with Judge Michael C. Nelson, who was previously appointed settlement judge for claims involving certain parties in the Upper Gila River watershed. There was no objection to the judges meeting to discuss the status of settlement discussions.

On April 11, 2001, Judges Ballinger and Nelson and Special Master Schade met and generally reviewed the ongoing negotiations. The judges and the Special Master also became acquainted as Judge Ballinger and Special Master Schade begin their duties.

## Special Master Thorson's Report on Summary Adjudication of Small Uses Contested Case No. W1-11-19

In November 1994 and February 1995, Special Master John E. Thorson issued a "memorandum decision"



addressing a group of domestic, stockwatering, and stockpond cases in the San Pedro River watershed. The decision, which has become known as the "*de minimis* (or small uses) report," developed procedures for the possible summary adjudication of those cases. The report was one of the earliest results of the litigation of contested claims in the Gila River Adjudication.

Several parties filed objections to the report based on technical and legal grounds. The objections were left pending the resolution of the challenges to the 1995 legislation. In March 1999, Judge Susan R. Bolton (who was then presiding over the Gila River Adjudication) gave parties another opportunity to file or supplement objections. Supplemental objections to the report, responses, and replies were filed. Oral argument was requested.

Judge Ballinger indicated that the objections do not adequately specify which portions of the report should be

*continued on page 4...*



# Gila River Proceedings

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modified. Objections must be more specific and should identify the portions of the report they address.

Judge Ballinger set oral argument on the objections to the *de minimis* report on September 27, 2001, at 1:30 p.m. Supplement briefs shall be filed not later than September 6, 2001. A supplemental brief shall state with specificity the portions of the report an objection addresses and the changes sought in the report. Judge Ballinger's courtroom is on the 5th Floor at 101 West Jefferson, Phoenix.

## ***In re the Water Rights of the Gila River Indian Community***

### **Contested Case No. W1-203**

This case seeks to determine GRIC's water right claims. Special Master Thorson issued reports on June 30, 2000, and on December 28, 2000, ruling on four motions that asserted that certain contracts, state and federal proceedings, and proceedings under the federal Indian Claims Commission precluded or limited water right claims for the Gila River Indian Reservation. A summary of Special Master Thorson's recommendations is found in the August-December 2000 *Bulletin*.

The recommendations are before Judge Ballinger for review. He set oral argument on the June 30, 2000, report on November 27, 2001, at 9:30 a.m., to be followed by oral argument at 1:30 p.m. on the December 28, 2000, report.

## ***In re the Preclusive Effect of the Globe Equity Decree on Specified Parties***

### **Contested Case No. W1-206**

This contested case is an effort to examine the possible preclusive effect

of the *Globe Equity No. 59 Decree* on other parties in the Gila River Adjudication, including the San Carlos Indian Reservation and several Upper Gila River irrigators. The *Globe Equity Decree* is a 1935 federal court decree adjudicating water rights along the Upper Gila River. Contested Case No. W1-206 seeks to conclude the examination of the impact of the *Globe Equity Decree* on the Gila River Adjudication.

GRIC, San Carlos Apache Tribe, City of Safford, Gila Valley & Franklin Irrigation Districts, San Carlos Irrigation and Drainage District, Phelps Dodge, and ASARCO filed motions for summary judgment. The motions address the various claims asserted by other parties.

The City of Safford filed a motion to strike GRIC's motion for summary judgment. Safford has requested an expedited ruling on its motion.

At the request of the United States and GRIC, Judge Ballinger set the last day for filing responses to the summary judgment motions on June 1, 2001, and the last day for submitting replies on July 2, 2001. These dates were also set for GRIC to respond to the City of Safford's motion to strike GRIC's summary judgment motion, and for Safford to reply.

## **Availability of Disclosed Documents**

### **Contested Cases No. W1-203 and W1-206**

Since 1998, the office of the Special Master has received 187,498 pages of disclosures associated with these two contested cases. Parties may obtain copies of disclosed documents by calling the Special Master, who

then forwards the requested materials to a local copy service. The copies are picked up from and payment is made directly to the copy service.

ADWR scanned the disclosed documents onto eight compact discs. The set of CDs is available for sale for \$250.00 at the ADWR Bookstore, located at 500 North Third Street, Phoenix, tel. 602/417-2485, fax 602/417-2488.

## **Fort Huachuca Scheduling Conference**

### **Contested Case No. W1-11-605**

Fort Huachuca is a U. S. Army installation near Sierra Vista in south-eastern Arizona. Fort Huachuca has claimed federal reserved water rights for a military installation. In 1995, the fort's water right claims and objections were organized for resolution in Contested Case No. W1-11-605, but the case was stayed pending the outcome of the challenges to the 1995 legislation.

On May 21, 2001, Special Master Schade held a scheduling conference. The main issues discussed centered on the fort's plan to submit amended claims and ADWR's schedule to update the fort's watershed file reports.

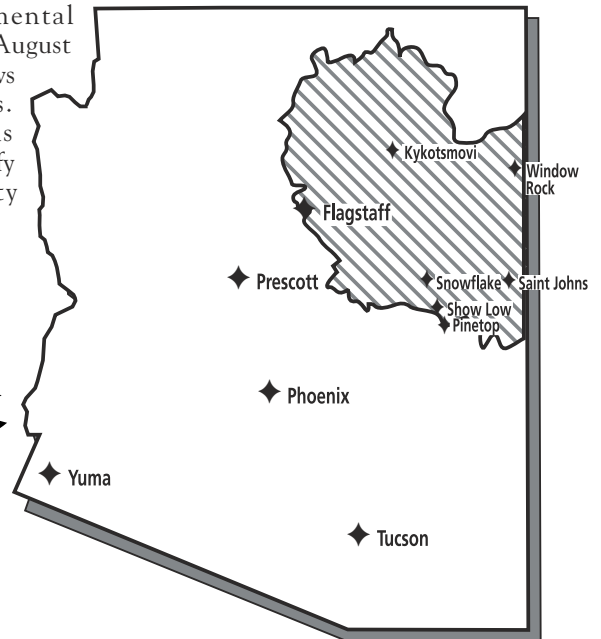
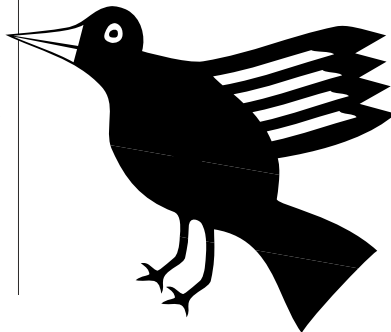
Fort Huachuca was given until November 30, 2001, to file amended water right claims. ADWR was directed to submit a written status report on January 31, 2002, reporting its progress on finalizing GRIC's HSR and the anticipated start and completion dates for updating the fort's watershed file reports. The City of Sierra Vista and the State of Arizona were given until June 8, 2001, to file a motion to intervene. The Bella Vista group of objectors was given until June 30, 2001, to clarify their status. ♠

# Little Colorado River Proceedings

Judge Edward L. Dawson will hold a status conference on Thursday, August 30, 2001, at 10:30 a.m., in the Apache County Superior Court in St. Johns, Arizona. The court has announced it wishes to hear reports from the parties on the following:

1. Status of settlement discussions.
2. Status of Special Master Thorson's report, issued in 1994, on the procedures for adjudicating stockponds and stockwatering and wildlife uses in the Silver Creek watershed.
3. Recommendations contained in a joint report filed by several parties and the Navajo Nation's supplemental comments to the joint report. The recommendations address procedures for litigating contested issues.

Parties may file supplemental memorandums on or before August 16, 2001, setting forth their views on any of these issues. Supplemental memorandums should be filed if they will clarify or explain with particularity specific issues. 💧



## Updating Addresses and Statements of Claimant

Judges Ballinger and Dawson issued pre-trial orders directing all claimants in the Gila and Little Colorado Adjudications to update their statements of claimant to show (1) a change of mailing address, (2) an assignment of a statement of claimant to another person, or (3) a transfer to another person of the property or water right associated with a statement of claimant.

Many claimants have sold their properties or water rights, but have not transferred their statements of claimant

for claimed water rights or maintained current mailing addresses. Without updated addresses and statements of claimant, current owners and their successors in interest will not receive notices of legal proceedings and of their possible need to participate in the adjudications.

Any person who has filed a statement of claimant in the Gila and Little Colorado Adjudications must notify ADWR of any of the following changes concerning that person's statement of claimant:

1. A change of address.
2. An assignment of a statement of claimant to another person.
3. A transfer to another person of all or part of the land for which a water right has been claimed.
4. A transfer to another person of all or part of the water right claimed, if the claimed water right has been severed and transferred to another

parcel of land.

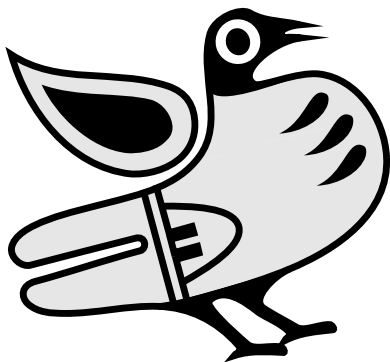
Notification of any of these changes must be filed with ADWR within thirty (30) days of the change. The courts have approved an easy to complete Assignment form, with instructions, to report a change. There is no charge or fee to submit a form.

The form and instructions are available at:

Arizona Dept. of Water Resources  
Adjudications  
500 North 3rd Street  
Phoenix, Arizona 85004

Claimants having questions about how to report a change can call ADWR at (602) 417-2442 or 1-800-352-8488.

Realtors, title agents, and attorneys should make sure that all real estate transfers include proper assignment of statements of claimant from sellers to buyers. 💧



# The Interlocutory Appeals

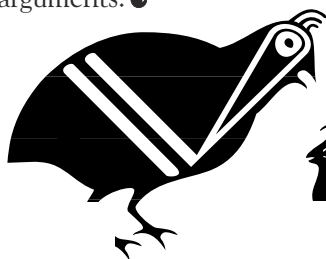
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The issue is "What is the appropriate standard to be applied in determining the amount of water reserved for federal lands?"

The proceedings leading to oral argument were described in the *Bulletin* issues of April-July 2000 and August-December 2000.

Justices Thomas A. Zlaket and Stanley G. Feldman and Court of Appeals Judges William E. Druke, Noel Fidel, and A. John Pelander heard the oral argument. Judges Druke, Fidel, and Pelander are justices *pro tempore* for Justices Charles E. Jones, Ruth V. McGregor, and Frederick J. Martone, who recused themselves from hearing this appeal.

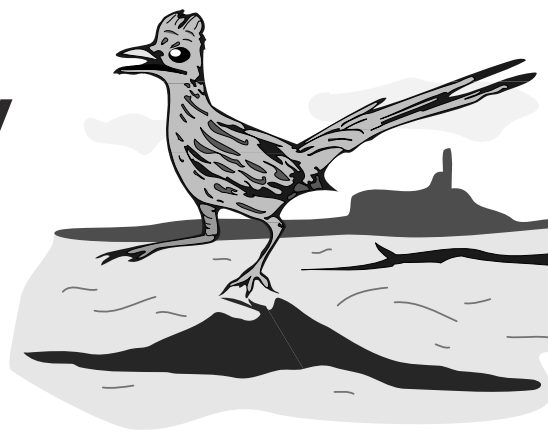
M. Byron Lewis, Esq. (State litigants), Rodney B. Lewis, Esq. (Tribal litigants), Joe P. Sparks, Esq. (Apache Tribes), Katherine L. Barton, Esq. (United States), and Scott B. McElroy, Esq. (Navajo Nation) presented the arguments. 💧



## Hydrology Tutorial for the Court

Judges Ballinger and Dawson and Special Master Schade will attend on May 24, 2001, a hydrology tutorial presented by the Arizona Department of Water Resources (ADWR). The tutorial will be an educational and informational

session for Judges Ballinger and Dawson and Special Master Schade, who are interested in learning the fundamentals of hydrology and other matters requiring technical expertise. The Court asked ADWR to present the tutorial. 💧

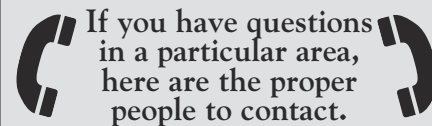


## Maricopa County Clerk Moving Adjudication Records

The Clerk of the Maricopa County Superior Court will move the adjudication files from the Records Management Center located at 3345 West Durango to a new customer services center located at 601 West Jackson Street, Phoenix. All adjudication records have been maintained at the Durango Center but now will be downtown.

The move will take place between May 31 and June 8, 2001. If you plan to review Gila River Adjudication files, you should avoid this period and wait until the new center opens on June 11, 2001. 💧

## Sources for Help



If you have questions in a particular area, here are the proper people to contact.

**Access the Arizona Judicial Department web page at**  
<http://www.supreme.state.az.us>  
and the  
**Arizona General Stream Adjudication web page**  
<http://www.supreme.state.az.us/wm/>

### Adjudications, HSRs, WFRs, Discovery

Adjudications Division  
AZ Dept. of Water Resources  
500 N. 3rd Street  
Phoenix, AZ 85004  
(602) 417-2442  
(Toll free in AZ) 1-800-352-8488

### Scheduling, Procedure

Kathy Dolge  
Office of the Special Master  
Arizona State Courts Building  
1501 W. Washington  
Suite 228  
Phoenix, AZ 85007  
(602) 542-9600  
TDD (602) 542-9545

### Pleadings - Gila River

Clerk's Office  
Maricopa County  
Superior Court  
Attn: Oscar Garcia  
Phone (602) 506-4139  
Fax (602) 506-7684

Customer Services Center  
601 W Jackson Street  
Phoenix, AZ 85003

### Pleadings - Little Colorado River

Clerk's Office  
Apache County Superior Court  
Apache County Courthouse  
P.O. Box 365  
St. Johns, AZ 85936  
(520) 337-4364  
Fax (520) 337-2771

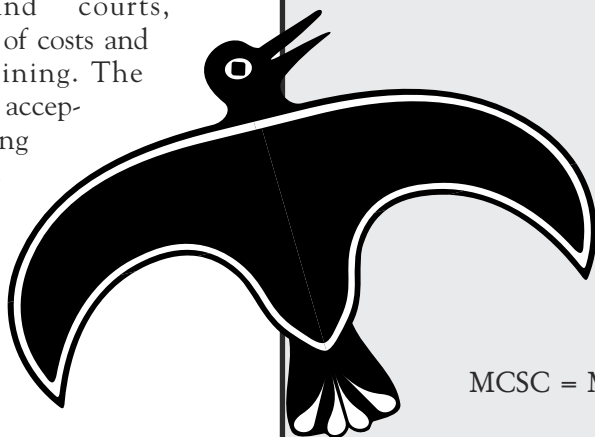
# Electronic Filing of Pleadings

Electronic filing is the process by which pleadings are filed with the clerk of the court electronically. Several national companies provide the services. A party would need to subscribe to the online service with which the court contracts. In the current state of the technology, a document is electronically delivered to the online service, which then electronically files the pleading with the court and sends a copy to the parties on the certificate of mailing. Fees vary among the current online services (by page or a flat fee).

Electronic filing is being used in several state courts, but its most extensive use appears to be in large class action litigations. Adoption of online filing may require rule amendments, court orders, and possibly statutory changes.

The Clerk of the Maricopa County Superior Court is studying the use of electronic filing. The Special Master and the Clerk's staff working on this project were given a presentation by CourtLink, one of the current online services, on the use of electronic filing.

Before electronic filing is implemented, there will be discussions with users and courts, extensive analysis of costs and benefits, and training. The technology and its acceptance are promising works in progress.



## CALENDAR

### June 1, 2001

Case No. W1-206 (GR)  
*In re the Preclusive Effect of the  
Globe Equity No. 59 Decree on  
Specified Parties*

**Due:** Responses to motions for summary judgment

**Due:** Responses to Safford's motion to strike the Gila River Indian Community's motion  
(see minute entry April 3, 2001)

### July 2, 2001

Case No. W1-206 (GR)  
*In re the Preclusive Effect of the  
Globe Equity No. 59 Decree on  
Specified Parties*

**Due:** Replies to motions for summary judgment

**Due:** Replies to Safford's motion to strike the Gila River Indian Community's motion  
(see minute entry April 3, 2001)

### August 16, 2001

Case No. 6417 (LCR)

**Due:** Supplemental memoranda re issues to be discussed at August 30 status conference  
(see minute entry April 20, 2001)

### August 30, 2001 – 10:30 a.m.

Case No. 6417 (LCR)  
Status Conference before Judge Dawson  
Apache County Courthouse, St. Johns  
(see minute entry Apr. 20, 2001)

### September 6, 2001

Case No. W1-11-19 (GR)  
*In re Sands Group of Cases*

**Due:** Supplemental briefs re *de minimis* report  
(see minute entry April 3, 2001)

### September 27, 2001 – 1:30 p.m.

Case No. W1-11-19 (GR)  
*In re Sands Group of Cases*  
Oral argument on *de minimis* report  
(see minute entry April 3, 2001)

### November 27, 2001

Case No. W1-203 (GR)  
*In re the Water Rights of the  
Gila River Indian Community*

**9:30 a.m.:** Oral argument on June 30, 2000, report on the preclusive effect of the *Globe Equity No. 59* decree

**1:30 p.m.:** Oral argument on December 28, 2000, report on the preclusive effect of other agreements and decrees  
MCSC, Courtroom 513  
(see minute entry April 3, 2001)

### Abbreviations:

GR = Gila River Adjudication  
LCR = Little Colorado River Adjudication  
MCSC = Maricopa County Superior Court, East Court Building, 101 W. Jefferson, Phoenix





# Arizona General Stream Adjudication Bulletin

Office of the Special Master  
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## Bulletin Goes Online

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administrative, production, and postage costs. We expect most subscribers will read the *Bulletin* on the Web site and print out articles of interest.

The *Bulletin* will be published a minimum of three times a year, but special reports will be issued to inform readers of significant rulings or breaking news.

The *Bulletin* will be available online in May, September, and January.

An important service being offered will be notification of publication. If you wish to be notified by email when a new issue of the *Bulletin* or a special report is available online, please complete and send this entire page to Kathy Dolge by mail or fax (602-542-9602); or e-mail <kdolge@supreme.sp.state.az.us>. Please return the form before **August 1, 2001**.

A letter is being sent to current subscribers explaining their choices. New or renewal subscription requests will not be sent out. ♡

## Arizona General Stream Adjudication Bulletin

**P L E A S E   S E N D   M E  
N O T I F I C A T I O N   O F  
O N - L I N E  
P U B L I C A T I O N**

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Fax: \_\_\_\_\_

Email: \_\_\_\_\_

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or a special report is posted on the Special Master's  
Web site. YES \_\_\_\_\_ (check here)