

Arizona General Stream Adjudication Bulletin

OFFICE OF THE SPECIAL MASTER • MARCH 1997

Preliminary Reservation HSR Released, Challenged

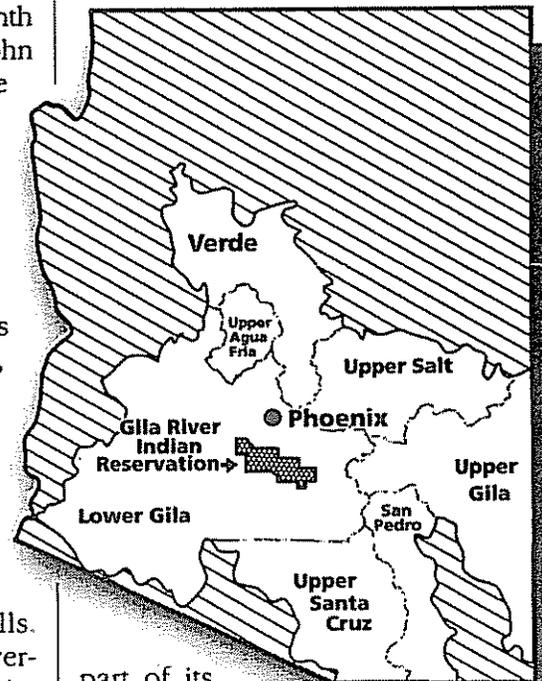
On January 30, the Department of Water Resources filed its Preliminary Hydrographic Survey Report for the Gila River Indian Reservation, located immediately south of the Phoenix metropolitan area (see map). The report was prepared pursuant to the department's statutory role in the adjudications. Comments on the preliminary report may be submitted to the department until April 30, 1997. Thereafter, the report will be revised and finalized by the department. Once the final HSR is filed with the court, a 180-day formal objection period commences (see Feb. 1997 Bulletin).

The Preliminary HSR for the Gila River Indian Reservation is presented in two volumes containing almost 300 pages of text and tables, plus 8 oversized plates. The document was prepared over a 19-month period by a DWR team led by John Munderloh, manager of the department's adjudications section.

The first volume of the report begins with a discussion of methodology which is followed by chapters on current water uses, classification and estimates of arable land on the reservation, comparative economic analysis, and a description of physical water supply. Eight appendices contain more detailed analytic information and inventories of filings, decrees, municipal water providers, industrial and commercial concerns, and wells. The second volume contains oversized maps including a composite satellite image of the reservation, colored-coded land use patterns, well locations, groundwater elevation contours, thickness of saturated basin fill, soils classifications, location of arable soils, and an overlay of the Indian Community's master land use plan on the map of arable soils.

In discussing its methods, the department indicates that it "has chosen to focus only on the federal reserve rights claimed by the [Indian Community] as measured by the practicably irrigable acreage stan-

dard" (PIA) and has not addressed claims based on other legal principles. Also, the department has not designed an irrigation project as



part of its report, indicating that such work should be done by "agricultural engineers familiar with the overall objective" of the landowner.

In the chapters that follow, the department reports that agricultural uses on the reservation required almost 279,000 ac-ft of water in 1994, and 5,800 ac-ft of water were used for municipal, industrial, and cultural purposes in the same year.

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HSR Challenged

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The department calculates that 179,000 acres of land are available for cultivation on the reservation. Considering only the lands that the Indian Community apparently plans to develop, the total annual irrigation requirement for existing and proposed cultivation would be between 676,000 and 877,000 ac-ft (depending on irrigation efficiency).

The department goes on to indicate that physical water availability may be "one potential limiting factor for future agricultural development on the reservation." The department reports that 505,500 ac-ft/yr is potentially available from a combination of the following sources: currently

developed groundwater (113,800 ac-ft/yr), additional groundwater without overdraft (27,100 ac-ft/yr), currently developed surface water (140,600 ac-ft/yr), potential future surface water (27,400 ac-ft/yr), other currently developed water sources (23,500 ac-ft/yr), and future Central Arizona Project water resources (173,100 ac-ft/yr). The department also indicates that groundwater extractions over a 100-year period, which might dewater the source, could yield an additional 190,000 ac-ft/yr to the water potentially available to the reservation.

Challenges to HSR

The preliminary Gila River Indian Reservation HSR became the target of several challenges shortly after it was released on Jan. 30. On Feb. 4, Judge Susan Bolton announced that she would hear oral arguments on several long-postponed motions filed by the San Carlos Apache Tribe, Tonto Apache Tribe, and Yavapai Apache Nation. In these motions, the Apache Tribes request the court to reinstate the HSR format for Indian lands that was in place before Judge Bolton announced an abbreviated format in August 1995. In her recent minute entry, Judge Bolton asks the Apache Tribes to delineate how the format of the Gila River Indian Reservation HSR will disadvantage the Apache Tribes. Judge Bolton also ordered the Steering Committee to meet in advance of the April 11, 1997, hearing in order to advise the court of time necessary to prepare expert reports needed to litigate the final Gila River Indian Reservation HSR.

On Feb. 21, the United States moved the court to cancel its April 11 hearing, declare the preliminary Gila River Indian Reservation HSR a "draft," and allow more detailed briefing on the adequacy of the current HSR format for Indian lands. The United States also argues that the HSR does not satisfy the adjudi-

cation statute or Judge Bolton's August 1995 order concerning the HSR. In particular, the United States concludes that the department "has failed to follow even a basic outline of the technical requirements of a PIA analysis."

The Apache Tribes have joined the United States' motion. They also renew their motion for an evidentiary hearing on HSR format and request the court to stay the informal comment period on the preliminary HSR until these pending motions have been decided. In an additional pleading, the Apache Tribes enumerate their objections to the structure and substance of the preliminary HSR. The Gila River Indian Community, however, opposes the United States' motion preferring "that any errors or deficiencies in the preliminary Reservation HSR be addressed in comments during the comment period..." The Indian Community also requests the court to clarify that the HSR format is not precedent for the San Carlos Apache Indian Reservation. ♠

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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.

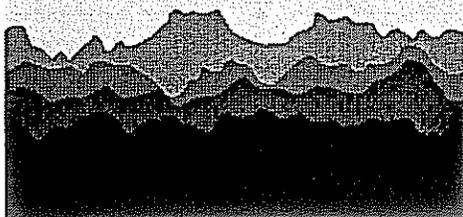
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John E. Thorson, Special Master
Kathy Dolge, Assistant to Special Master



Office of Special Master
1501 W. Washington Street
Suite 228
Phoenix, Arizona 85007
(602) 542-9600
FAX (602) 542-9602

Design/Production: Sam Samalik



HSR Availability

The Preliminary HSR for the Gila River Indian Reservation may be viewed at the following locations:

Arizona Department of Water Resources

Pinal Active Management Area
1000 East Racine
Casa Grande, AZ 85222

Arizona Department of Water Resources

Tucson Active Management Area
400 West Congress, Suite 518
Tucson, AZ 85701-1374

Arizona Historical Foundation

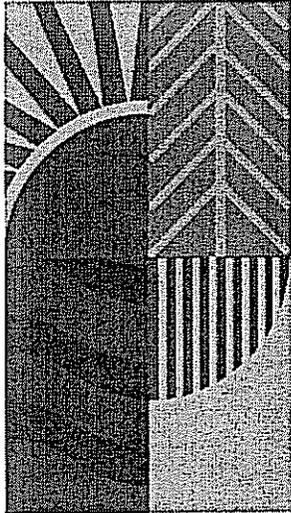
Hayden Library, 4th Floor
Arizona State University
P.O. Box 871006
Tempe, AZ 85287-1006

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ABA Water Law Conference

General Stream Adjudications Panel Discussion Summarized

A panel discussing general stream adjudications opened the American Bar Association's 15th Annual Water Law Conference, held in San Diego on Feb. 20-21, 1997. This article summarizes the comments of four attorneys who spoke as a panel on general stream adjudications. Charlotte Benson, Assistant Attorney General from Phoenix, discussed the state party perspective, based on her experience in Arizona's two adjudications and her previous work in New Mexico. Stanley Pollack, Special Counsel for Water Rights for the Navajo Nation, shared his perspective, based on his representation of the Navajo Nation in both New Mexico and Arizona. Jeff Fereday, an attorney in private practice from Boise, described the perspective of private parties participating in Idaho's Snake River Basin Adjudication. Finally, John Lange, counsel with the U.S. Department of Justice, brought out the federal viewpoint, from his experiences in Montana, Utah, Colorado, Oregon, and Nevada.



Frustrations Encountered in General Stream Adjudications

Each panelist expressed frustrations with laborious, lengthy, and costly western stream adjudications. Progress has been elusive in many states, and the simple goal of quantifying and prioritizing water rights has proved difficult to achieve. After twenty or more years of litigation in many western states, the panelists pointed out that few adjudications are complete. Benson and Fereday both questioned the judicial system's ability to "integrate federal and

tribal rights with state-based rights." Both Benson and Fereday discussed using a more administrative system to improve efficiency.

The federal and tribal perspective did not echo the call for an administrative system. Lange reminded the conference participants that Colorado's system, the most judicial model in all western states, has accomplished the most complete adjudication of water rights. Pollack urged that negotiation is the ultimate forum to resolve the tensions between Indian and state water users. The panel discussed other frustrations: lack of finality and certainty in water rights, high costs of litigation, re-examination of the basic tenets of water law, and the inability or unwillingness to ratchet down overstated state water rights. Frustrations with legislation which changed adjudication statutes mid-stream were seen as political solutions for only some of the players. Both Idaho and Arizona are struggling with the repercussions of shifting adjudications statutes.

Glimmers of Hope

Despite shared concerns about the progress and processes of general stream adjudications, each panelist also proposed solutions or pointed to successes. Pollack reflected on the negotiation efforts he has experienced, concluding that even when some issues are litigated, there will always be an element of negotiation present when dealing with integrated federal and state water rights. Benson urged tackling smaller, more manageable stream segments and focusing on substan-

tive claims to water systems, rather than on small users.

Lange pointed to the Montana system, which sets aside the litigation of federal and Indian claims and uses a compact commission (created by statute) to negotiate such rights. Adjudication of state water rights is occurring in Montana in tandem with the settlement of many Indian and federal rights. The most recent compact is anticipated to cover the water rights of the Chippewa Cree Tribe of the Rocky Boy's Reservation. Other successes include compacts for the Fort Peck Indian Reservation, the Northern Cheyenne Reservation, Yellowstone National Park, Glacier National Park, and Little Big Horn National Monument. The successful settlement of water rights for Utah's Zion National Park, completed in 1996, was also highlighted. Finally, one point urged by Fereday was that success might come by focusing adjudications on physics and on water, rather than spend such effort on determining law. ♪

Each panelist provided written course materials to the conference participants, and copies of the papers can be purchased by contacting the American Bar Association, Section of Natural Resources, Energy, and Environmental Law at (312) 988-5577.

The panel was moderated by Ramsey L. Kropf, Special Master for Wyoming's Big Horn River adjudication. Ms. Kropf contributed this article to the Bulletin.



Little Colorado River Proceedings

Marathon Settlement Conference Underway

An unusual "marathon" style settlement conference began in Show Low on Monday, March 3. Called by Settlement Judge Michael Nelson, the mediated negotiations were scheduled to last two weeks. They were designed to break an impasse in an effort to settle major issues in the Little Colorado River adjudication—particularly the claims of Indian tribes and federal agencies. The negotiations have been underway since 1994.

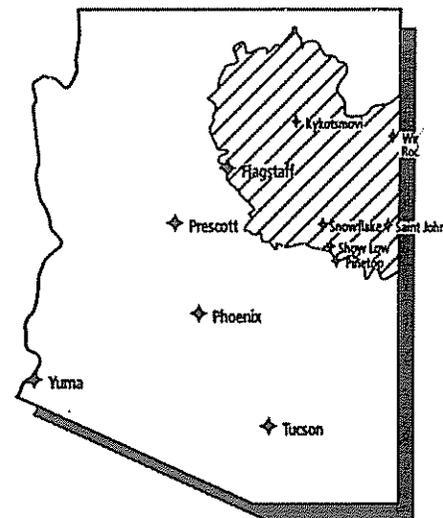
The major parties in the Little Colorado River adjudication—United States, state, tribes, and state-law water users—participated in the settlement conference. Specific times were scheduled for the discussion of some issues so that the concerned parties did not have to remain in Show Low for the entire period.

The negotiating parties have been ordered by Judge Allen Minker, the assigned judge for the adjudication, to file a status report

on the negotiations by April 18. A hearing on settlement efforts will be held at the Courthouse in St. Johns at 9:30 a.m. on Friday, May 2. Judge Minker has previously indicated that he will order a return to litigation for the issues and parties who do not settle.

Discovery Issue Remains Unresolved

A motion by Phelps Dodge Corporation seeking a court order requiring that three federal employees agree to be bound by a protective order has been partially granted by the superior court (*see* Dec. 1996 & Feb. 1997 *Bulletin*). Judge Roger Kaufman, who heard the motion at the request of Judge Minker, ruled on Feb. 4 that the attorney for the United States must execute an agreement to be bound by a 1994 order issued to protect information claimed confidential by Phelps Dodge. Judge Kaufman, however, declined to order two federal employees, who are not attorneys,



to execute the agreement as they "are not officers of the court."

Shortly after Judge Kaufman's decision, the United States' attorney submitted a signed agreement to be bound by the protective order but asked for reconsideration of part of the decision. Specifically, the United States argued that it is improper to require the federal attorney to execute a separate stipulation concerning the confidential information. The United States indicated that (whether it nor its attorney should be required "to enter a stipulation it is on record as opposing." On Feb. 19, Judge Kaufman stated he would reconsider this portion of his earlier ruling and asked for further briefing and proposed orders. ♪

Supreme Court Action Awaited

The Arizona Supreme Court apparently met in conference on Feb. 26 to consider whether to review Judge Susan Bolton's Aug. 1996 decision on challenges to adjudication legislation passed in 1995. An order indicating how the court intends to proceed had not been issued by the deadline for this issue of the *Bulletin*.

Calendar

March 28 -- 10:00 a.m.

Case No. W-1, W-2, W-3, W-4 (GR)
58th Meeting of the Gila River Adjudication Steering Committee

April 11 -- 1:30 p.m.

Hearing before Judge Bolton
MCSC Courtroom # 402
(*see* Feb. 4, 1997, minute entry)

April 18

Case No. 6417 (ICR)
Settlement Committee status report due to Judge Minker

May 2 -- 9:30 a.m.

Status conference in St. Johns
(*see* Sept. 27, 1996, minute entry)

Abbreviations:

GR = Gila River adjudication
ICR = Little Colorado River adjudication
MCSC = Maricopa County Superior Court, 201 W. Jefferson, Phoenix

All are open to the public

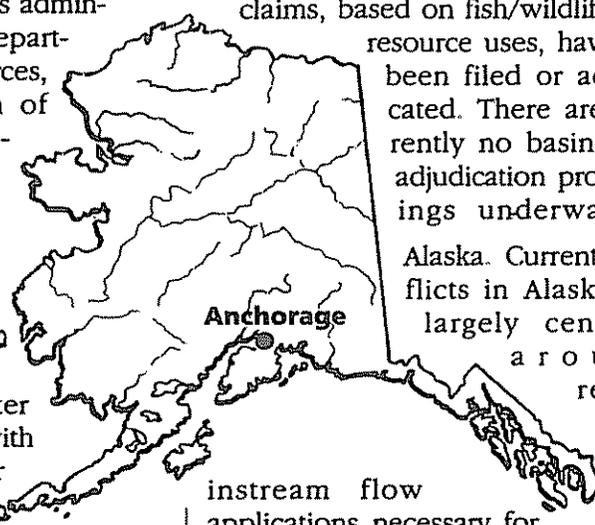
Adjudications in Other Western States: Alaska

The 1966 Water Use Act established Alaska's water policy. This act, which was greatly influenced by water law scholar Frank Trelease, treats groundwater and surface water as one. The act is administered by Alaska's Department of Natural Resources, through its Division of Water, under regulations adopted by the Department's Commissioner. The Commissioner of the Department of Natural Resources establishes the state's overall water management policy, with advice from the Water Resources Board, a seven-member citizen board established to advise the governor on water policy issues.

Alaska's adjudication statute allows for a parallel administrative and judicial system with a preference for administrative proceedings under the Commissioner of the Department of Natural Resources. Administrative proceedings can lead to a determination of existing water rights or the adjudication of a river system or other hydrologically distinct source. The Commissioner can also accept a reference from state or federal court and administratively adjudicate the dispute. In the normal case, the department administers the necessary fact-finding activities and then issues orders binding on all water users. The orders are appealable to the courts. The judicial adjudication path follows generally the same procedures. If the federal government is involved in an adjudication as a claimant, the adjudication must begin in court rather

than before the agency.

There is great competition for water between mining interests and subsistence users. Yet, many of Alaska's potential instream-flow claims, based on fish/wildlife and resource uses, have not been filed or adjudicated. There are currently no basin-wide adjudication proceedings underway in Alaska. Current conflicts in Alaska are largely centered around recent



instream flow applications necessary for water market sales. Since 1992 amendments to the water code, there has been an increased emphasis on the potential for water "marketing." While there are no significant water exports from Alaska yet, this issue has the potential to create a federal-state water conflict.

Another recent federal-state conflict raises the issue of whether "public lands" subject to federal management under the Alaska National Interest Lands Conservation Act include or exclude navigable waters. To include navigable waters as a result of reserved rights would allow for significantly greater federal management in Alaska. In a 1995 decision (*Alaska v. Babbitt*), the U.S. Court of Appeals, Ninth Circuit, indicated the public lands include navigable waters in which the United States possesses reserved rights. The U.S. Supreme Court subsequently declined to review the holding.

Despite a large federal presence in Alaska, the application of the fed-

eral reserved rights doctrine is in its infancy. Most conflicts between the United States and the state of Alaska have not arisen from the federal reserved rights doctrine or jurisdictional issues under the McCarran Amendment (*see Aug. 1994 Bulletin*), but from basic land title disputes and jurisdictional questions grounded on land title. ♠

(Andrea Gerlak, a former intern in the office of the Special Master, contributed to this article.)

Sources for Help

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

Adjudications, HSRs, WFRs, Discovery

Ana Marquez-Guerrero
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
Oscar Garcia
Clerk's Office
Maricopa County Superior Court
Records Management Center
3345 W. Durango St.
Phoenix, AZ 85009
(602) 506-4139 / FAX (602) 506-4516

Little Colorado River

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

