

**Arizona General Stream Adjudication Bulletin
November 1996**

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Supreme Court to Consider Stay Request

The Arizona Supreme Court has announced that it will take up the Apache Tribes' request for a stay in the enforcement of House Bills 2193 and 2276. The motion, filed on October 3 by the San Carlos Apache Tribe, Tonto Apache Tribe, and Yavapai-Apache Nation, will be discussed at the court's conference on November 19. These regularly scheduled meetings of the justices are not open to the public, but the court indicated it will also consider the tribes' request for oral argument on the stay issue.

House Bills 2193 and 2276 were both enacted by the 1995 Arizona legislature and made significant changes in Arizona's water code and stream adjudication procedures. The tribes brought a special action proceeding in the supreme court to strike down these statutes and the court assigned the matter to Superior Court Judge Susan Bolton. In a ruling issued on August 30, 1996, Bolton upheld portions of the

legislation, voided other provisions, and indicated that still other sections could only be applied prospectively to the adjudications.

In the two months since Bolton's decision, many of the parties have questioned or debated the procedural posture of the ruling. Some parties believe that Judge Bolton rendered a final opinion which must be appealed to the Arizona Supreme Court. Other parties believe that the Supreme Court retained jurisdiction over the special action and only referred certain questions to her for an initial determination. Judge Bolton, in an effort to clarify the case's posture, certified her decision to the Supreme Court under the rules for interlocutory appeals (see Oct. 1993 Bulletin). The Supreme Court has set November 22 as the date for parties to file responses to the certification.

The Apache Tribes request an injunction preventing enforcement of the two statutes during the Supreme Court's review of Judge Bolton's decision--regardless of how it eventually reaches the court. They say they are entitled to the injunction since state agencies are likely to enforce these constitutionally suspect statutes in a way that threatens injury to tribes and citizens. The tribes point specifically to provisions of HB 2193 that they allege will result in water rights on state trust lands being transferred to others.

The State of Arizona has responded to the stay request by urging that the tribes have offered only old arguments that have been rejected by the trial court. The State adds that the request to stay both statutes is overly broad if the tribes are concerned about the transfer of water rights from state trust lands. Arizona Public Service Co., Roosevelt Water Conservation Dist., and Aztec Land and Cattle Co. add that a specific statute prevents the court from enjoining a statute based on an allegation of unconstitutionality. The Salt River Project argues that the tribes have failed to demonstrate that, on appeal, they are likely to succeed in voiding the legislative provisions that Judge Bolton upheld. Salt River Project also indicates that it would be inequitable to other parties and the public to prevent enforcement of those statutory portions that have been upheld.

Parties Respond to Attorneys' Fee Request

The Apache Tribes seek almost \$1.1 million in attorneys' fees and costs from the parties they believe responsible for the passage of House Bills 2193 and 2276 and the defense of the legislation in the special action (see Oct. 1996 Bulletin). Responses or objections to the Apache Tribes' requested fees have been filed in the Arizona Supreme Court by the State of Arizona; Arizona Public Service Co. (APS), Roosevelt Water Conservation Dist., and Aztec Land and Cattle Co.; Salt River Project (SRP); Arizona Department of Water Resources; Cyprus Climax Metals Co. and its subsidiaries; City of Phoenix; and the Cities of Chandler, Glendale, Mesa and Scottsdale. Phelps Dodge Corp., ASARCO, BHP Copper, Inc., and the Arizona Cattle Growers Ass'n joined in all or parts of APS's response. The United States has not weighed in on this matter.

The pleading filed by Arizona Public Service Co. develops the most number of arguments against the tribal fee request. Among the grounds urged for rejecting the request are that the tribes are not the prevailing parties, their application is premature, their legal efforts were not required and did not

produce any important public benefits, and they are not entitled to fees under the legal theories they cite. Also, APS maintains that the recovery of attorneys' fees from parties who sought legislative changes and defended their constitutionality would deny these parties equal protection and the constitutional right to petition the legislature and defend legislation in the courts (referring to the *Noerr-Pennington* doctrine, named after two famous U.S. Supreme Court cases). Similar themes are developed in the pleadings by the Salt River Project and other parties. While SRP indicates that Judge Bolton should initially decide the attorneys' fees issue, if it must be decided now, most of the respondents take no position on whether the supreme court or the superior court should decide the issue. All the parties have reserved the right to later argue the reasonableness of the requested fees.

The tribes in the Little Colorado River adjudication, while indicating that they support the Apache Tribes' request, add that they are uncertain whether the attorneys' fees issue is ripe for decision. They maintain that they are also entitled to attorneys' fees for their work in the special action and plan to request fees themselves at the appropriate time.

In their concluding pleading, the Apache Tribes maintain that the only issue before the supreme court is whether the attorneys' fees issue should be heard by Judge Bolton or the supreme court. They conclude that most of the respondents' arguments are premature.

The Supreme Court has not indicated when or how it will take up the attorneys' fees issue.

Calendar

Case No. CV-95-0161-SA

Re requests for stay:

Oct. 23, 1996

Due date: Responsive pleadings re request for stay

Nov. 4, 1996

Due date: Reply memorandum in support of request

Nov. 19, 1996

Supreme Court's conference (not open to public)

Re Certification of Judge Bolton's Aug. 30, 1996, ruling:

Nov. 22, 1996

Due date: Responsive pleadings re certification of ruling

Little Colorado River Proceedings

Over the last month, two multi-day negotiating sessions have been held among the major parties in the Little Colorado River adjudication. These sessions have addressed the south-side issues--those involving water for the Navajo reservation from Jacks Canyon, Clear Creek, and Chevelon Creek. Both sessions, the first in Albuquerque on October 14 and 15 and the second in Phoenix on October 28 and 29, were facilitated by Judge Michael Nelson.

The parties appear very close to a settlement in principle on the south-side issues and the efforts for the next few months will be to work out minor problems and begin drafting of the detailed settlement agreement. Some of the remaining issues involve the claims of Zuni Pueblo, which just changed attorneys, and federal land management agencies which are concerned about the impact of future groundwater development on certain federal sites.

The north-side negotiations, which are premised on a pipeline from Lake Powell to benefit the Navajo Nation and Hopi Tribe, are expected to resume in mid-November after a dormant period.

Profile

John Munderloh Section Manager, DWR Adjudications Section

John Munderloh combines his agricultural engineering background with his project management experience to become the new section manager for the Arizona Department of Water Resources' Adjudication Program. John succeeds Steve Erb who retired last

month (*see Oct. 1996 Bulletin*). John and his technical unit have been conducting investigations and preparing the Hydrographic Survey Report for the Gila River Indian Reservation.

John received his agricultural engineering degree from the University of Arizona in 1988 with an emphasis on soil and water engineering. After college, John was employed with the Sulphur Springs Valley Electric Coop where he developed a low interest loan program for farmers to increase their pumping plant efficiencies. In 1989, John began employment with the Arizona Department of Water Resources as a water rights investigator and advanced to a section manager. During this time he quantified water uses, assisted with hydrological analyses, and prepared written reports and special studies/projects for the adjudication courts. He worked extensively on the hydrographic survey reports for the San Pedro watershed and the Upper Salt watershed. He assisted with the production of the Little Colorado River Inventory Report and modeled groundwater/surface water interactions.

A native of Arizona born in Prescott, John has lived in Tucson, Skull Valley, Wickenburg, Willcox, and Phoenix. Currently, John resides in Laveen with his wife. In his spare time, John enjoys reconstructing vehicles and renovating his house.

Adjudications in Other States: Colorado

Colorado's adjudication system is unique among western states. An entirely judicial system operates to determine both state and federal and tribal reserved rights. Because of early approval by the U.S. Supreme Court which held the Colorado system satisfied the McCarran Amendment (*see* Aug. 1994 *Bulletin*), Colorado has adjudicated water rights throughout the state's major basins. Colorado began adjudicating some stream segments in the late 1800s. A water user could file for an adjudication of a whole stream and give notice to all parties. The system was unwieldy, expensive for plaintiffs, and did not adequately deal with federal reserved rights.

In 1969, Colorado passed a new statute, the Water Rights Determination and Administration Act. The statute created a systematic judicial program to provide for ongoing adjudication of the state's waters. The statute carved up Colorado into seven water divisions, with a district court judge specially appointed to preside over each division. The purpose of each court is to hold hearings and adjudicate each new use, change of use, and augmentation plan (used when water rights are changed). Referees may be appointed by the court to conduct the initial hearings.

Supreme Court Review

The 1969 statute was the first modern water adjudication statute to survive U.S. Supreme Court scrutiny. The "Colorado Trilogy" of cases explored the meaning of the McCarran amendment, affirming that state courts have jurisdiction to determine federal reserved water rights. First, *United States v. District Court (Eagle County)* (1971) held that the McCarran Amendment allows the adjudication of federal reserved water rights. A companion case, *United States v. District Court (Water Division No. 5)*, held state courts have jurisdiction to adjudicate the United States reserved water rights and that the Colorado system was within the scope of the McCarran Amendment. Finally, *Colorado River Water Conservation Dist. v. United States* (1976) held Indian federal reserved rights may be adjudicated under the McCarran Amendment. Based on these three cases, the state process is the only way to adjudicate a water right in Colorado. No federal court adjudications are underway in Colorado.

Procedure

The adjudication process through the court system is the only way to acquire a surface water right. Groundwater which reaches the stream within 40 years is considered "tributary," part of the surface stream, and subject to state adjudication proceedings. Water that does not reach the stream within 100 years is considered *de minimis* (*see* Nov. 1993 *Bulletin*). Tributary groundwater within a designated groundwater basin is also subject to Colorado's Groundwater Management Act.

The adjudication process begins when an application for a conditional water right is filed with the division water clerk. The applicant must pay the flat fee of \$80 to file a case with the water court and a district court has held that federal parties must pay the filing fees. On a monthly basis, each division clerk prepares a resume of all applications for public review. Publication of each resume is made monthly in a newspaper of general circulation in the county where the claim is located. The clerk also mails a resume to any water user who may be affected by the new or changed use and any water user requesting notice. One month is allowed for the filing of objections to a claim on the resume.

Within sixty days after the last statement of opposition is filed, the referee must rule on the application or refer it to the district judge. The referee may approve or disapprove the application whether or not opposition has been filed. Every ruling may be appealed to the water judge. If a party certifies it will appeal any adverse ruling, then the referee must return the case to the water judge. Twice a year, specific dates in each division are set for water hearings before the district water judge.

Every ten years the state engineer prepares a comprehensive tabulation of water rights which sets forth all the water rights established in a division. Water users have an opportunity to object to the tabulation, and hearings are held to resolve the objections. Once the court approves the tabulation, it is like a division-wide decree which the state engineer will theoretically use to administer water rights.

In order to provide incentives for water users to step up and be adjudicated in court, a "double" priority system exists. For a priority date to be enforced, a water user must go through the adjudication system. Although relative priorities are determined among the water rights adjudicated during a calendar year, these rights are junior to all water rights adjudicated in previous years. An exception is for federal and tribal rights with senior priorities. Since the United States was not subject to state court jurisdiction until 1969, federal and tribal rights may be given priorities senior to rights established in earlier decrees (*United States v. Bell* (1986)).

Tribal Claims

The Ute Mountain Ute Tribe, the Southern Ute Tribe, and the federal government litigated the tribes' entitlements for seven years before beginning negotiations to settle tribal water claims. The settlement was enacted by Congress in 1988. A major component of the settlement is construction of the Animas-La Plata project, but little more than a shovel full of dirt has been turned in southwestern Colorado. In large part, this is due to concerns for the Colorado squawfish, an endangered species, and a July 1994 report from the Interior Department's inspector general calling the project "economically infeasible."

Status

Early judicial acceptance of Colorado's system has allowed for continuous progress in adjudications since 1969, incorporating both federal and state rights into the mix. Scarcity and threat of losing priority pushed most water users to adjudicate their rights under the statute. Though a case may take up to two years to complete, 25 years of actual water hearings in seven courts have made for many adjudicated rights, enforceable under the prior appropriation system. Because of this history, Colorado considers its adjudication complete. (*Contributed by Ramsey Kropf.*)

The Arizona General Stream Adjudication Bulletin is published monthly, except for July and January, by the Office of the Special Master. Subscriptions are available for \$12 annually and may be ordered or renewed by calling Kathy Dolge at the office of the Special Master.