



# Arizona General Stream Adjudication Bulletin

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## Supreme Court Decides Special Action

The Arizona Supreme Court has issued its long-awaited decision concerning legislation passed in 1995 to amend the state's general stream adjudication process (see April 1995 and May 1995 *Bulletins*). In a unanimous opinion filed January 7th, the court invalidated many features of House Bill 2276. Portions of a companion bill, House Bill 2193, were also struck down because they related to voided provisions of House Bill 2276.

The case, *San Carlos Apache Tribe v. Superior Court* (No. CV-95-0161-SA), is a special action proceeding filed in the supreme court by the San Carlos Apache Tribe, Tonto Apache Tribe, and Yavapai Apache Nation. The Apache Tribes alleged that the legislation was designed to limit or overturn their litigation gains in the general stream adjudication. The special action was remanded by the court to Superior Court Judge Susan R. Bolton to make an initial review of the legislation. Bolton completed her review in August 1996 and sorted the new legislation into three categories: sections that she believed were constitutional, provisions that were unconstitutional, and sections that were constitutional but could only be applied prospectively (see Sept. 1996 *Bulletin*, p. 1).

The supreme court largely followed Judge Bolton's reasoning, citing many of the same cases, and reached a similar result. Where the

supreme court differed from Bolton, the justices went further in invalidating features of the legislation. Justice Stanley Feldman, who has written all of the supreme court's major water law decisions in recent years, relied principally on Arizona's due process clause and separation of powers doctrine to invalidate the vulnerable sections of the law. Feldman indicated that the tribes' equal protection and McCarran Amendment (see Aug. 1994 *Bulletin*, p. 5) challenges were moot in view of the court's holdings on other constitutional bases.

The court held that due process prevents the legislature from retroactively altering vested, substantive property rights. This guarantee was violated by many features of the law such as new protections against abandonment or forfeiture of water rights and provisions to modify the law of adverse possession for the period of 1919 to 1974. The court differed with Bolton in whether some of these provisions, while not given retroactive effect, still could be applied prospectively or to clarify ambiguities in prior law. The court said that it could not know if the legislature would have passed the statutes if lawmakers had known the provisions would have only future effect. As to clarifying prior law, the court indicated that too much time had passed to give these sections even this limited effect: "[T]o suggest that

the 1995 Legislature knows and can clarify what the 1919 or 1974 Legislatures intended carries us past the boundary of reality and into the world of speculation."

The court said that "any attempt by the [legislature] to adjudicate pending cases by defining existing law and applying it to fact" violates the state constitution's separation of powers doctrine. The court identified the legislative provisions that exceeded this limitation: *de minimis* use provisions for quantifying small water uses, the specification of on-farm water duties based on elevation, the use of the maximum theoretical capacity of diversion facilities to quantify certain rights, the incorporation of settlement agreements into a final decree without judicial scrutiny, and changes purporting to give the Department of Water Resources, rather than the court, the role of determining the credibility of prior water right filings.

In another area of difference with Judge Bolton, the supreme court held that the legislature could not preclude the judiciary from considering the applicability of the public trust doctrine (see May/June 1996 *Bulletin*, p. 2) in the adjudications. The doctrine "is a constitutional limitation on legislative power to give away resources held by the state in trust for its people."

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# Supreme Court Decides Special Action

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The court upheld provisions changing DWR's reporting methods in the adjudication and the appointment process for future special

masters to assist the court. The court also validated the essential provisions of House Bill 2193 which specifies the ownership rules for rights to water used on state land.

Feldman's decision was joined in by Chief Justice Thomas Zlaket and three court of appeals judges

(William Druke, Noel Fidel, and John Pelander) who were substituting for justices who had recused themselves from the case.

A section-by-section table of the 1995 legislation follows, indicating the results reached by Judge Bolton and the supreme court. ♠

## Unofficial Comparison of Supreme Court and Bolton Decisions

The Arizona Supreme Court determined the following sections to be invalid:

A.R.S. §	Description	Judge Bolton's Ruling
45-141(B)	Prohibits a finding of forfeiture or abandonment when water is used on less than all the land to which the right is appurtenant.	Upheld prospectively
45-141(C)	Eliminates any possibility of forfeiture for rights initiated before June 12, 1919.	Upheld prospectively
45-151(D)	Provides that the availability of alternative sources of water does not affect a surface water right.	Upheld prospectively
45-151(E) (contained in both HB 2276 and HB 2193)	States that water rights appropriated on federal land belong to the person who first made beneficial use of the water.	Upheld prospectively
45-151(F)	States that water on federal land may be used at any location.	Upheld prospectively
45-156(E)	Provides that failure to obtain approval for a change in use does not result in abandonment, forfeiture, or loss of priority.	Upheld prospectively
45-162(B)	Results in relation back of priority date to the date of application to appropriate.	Upheld prospectively
45-182(B)(4)	Involves the invalidated <i>de minimis</i> statute.	Apparently unconstitutional
45-187	Makes acquisition of rights for adverse possession available only to rights perfected prior to May 21, 1974.	Upheld prospectively

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## Unofficial Comparison of Supreme Court and Bolton Decisions

The Arizona Supreme Court determined the following sections to be **invalid**:  
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A.R.S. §	Description	Judge Bolton's Ruling
45-188(A) & (B)	Makes abandonment the only basis for relinquishment of a water right initiated before June 12, 1919.	(A) Not addressed (B) Upheld prospectively
45-188(C)	Insulates from abandonment and forfeiture water rights appurtenant to lands within an irrigation district, water users' association or the like so long as an operable delivery system is maintained.	Upheld prospectively
45-189(E) (8)-(12)	Adds additional sufficient causes of nonuse.	Upheld prospectively
45-256(A) (5)	Involves the invalidated <i>de minimis</i> statute.	Unconstitutional
45-256(A) (6) & (7)	Involves the on-farm water duties and maximum capacity rules.	Unconstitutional
45-256(D) (portion)	Precludes judicial review of DWR director's proposed attributes.	Unconstitutional
45-257(C)	Provides that settlement agreements entered into by claimants must be decreed by the court.	Unconstitutional
45-257(E)	Involves the unconstitutional evidentiary presumptions of § 45-261.	Unconstitutional
45-257(F)	Requires adjudication of rights to water diverted in federal land in accordance with § 45-151(E) & (F).	Upheld prospectively
45-258	Mandates certain uses as <i>de minimis</i> .	Unconstitutional
45-261(A) (2), (4) & (B)	Involves the prior filing presumptions.	Unconstitutional
45-262	Regards the Indian water rights settlements.	Not addressed
45-263(B)	Makes the public trust doctrine inapplicable to these proceedings.	Upheld

# Unofficial Comparison of Supreme Court and Bolton Decisions

The Arizona Supreme Court **upheld** the following sections:

<b>A.R.S. §</b>	<b>Description</b>	<b>Judge Bolton's Ruling</b>
37-321.01	Regards the rights to use water on state land.	Upheld
45-153(C)	Involves permits and certificates issued under § 37-321.01	Upheld
45-164(C)	Provides for the reissuance of previously issued permits or certificates to conform to § 37-321.01	Upheld
45-182(A), (D) & (E)	Reopens the time for filing statements of claims of water rights existing before March 17, 1995.	(A) Not addressed (D) & (E) Upheld
45-254(E), (F) & (G)	Provides procedure for late filings of statements of claimants and amended statements in the general stream adjudications.	Upheld
45-255(A)	Gives the power to appoint special masters to the superior court judge.	Upheld
45-255(B)	Funds special master's compensation if the filing fees are exhausted.	Upheld
45-256(B), (C), (D), (E), (F) & (G)	Expands the responsibilities of DWR and provides for certain evidentiary rules on admissibility of the report and presumptions accorded the information therein [excepting the preclusion of judicial review in A.R.S. § 45-256(D)].	(B) – (D) Upheld [excepting the preclusion of judicial review in A.R.S. § 45-256(D)] (E) – (G) Not addressed
45-257(A)(2)	Changes the time for objections to the master's reports and requires written reports.	Upheld
45-257(D)	Requires that the water right be adjudicated in compliance with § 37-321.01.	Upheld
45-263(A)	Provides for the applicability of state law to adjudication of all water rights initiated or perfected pursuant to state law.	Probably constitutional

