



# Arizona General Stream Adjudication Bulletin

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## Supreme Court Affirms Groundwater Decision

In its second major water law decision of the year, the Arizona Supreme Court addressed Issue No. 2, the infamous "groundwater-surface water" issue, in an opinion issued on September 21st (see April-July 2000 Bulletin, at p. 1, for discussion of decision on Issues Nos. 4 & 5 concerning federal rights to groundwater). Arizona's general stream adjudications involve water rights based on the prior appropriation doctrine and federal law. Surface water rights are governed by the prior appropriation doctrine and are included in the adjudication. Underground water closely associated with a surface

stream, known as "subflow," is also governed by the prior appropriation doctrine and included in the adjudication.

The problem arises in properly distinguishing subflow from groundwater which is nonappropriable and outside the adjudication. Issue No. 2 essentially asks what criteria will be used to identify water users using subflow.

In 1987, Judge Stanley Goodfarb, presiding judge for the Gila River adjudication, decided that a well would be presumed to be pumping subflow if, after a period of 90 days, 50% or more of the pumped water came from surface stream depletion. Some parties in the case, believing the subflow zone was being defined too broadly, then appealed Goodfarb's decision to the supreme court as interlocutory Issue No. 2. In 1993, the supreme court overturned this decision and returned the question to the trial court to

develop different criteria for identifying subflow (*Gila River II*). In its most recent decision, the supreme court indicated that this reversal was prompted by the arbitrary time and volume parameters adopted by the court in 1987.

After the 1993 remand, Judge Goodfarb held extensive hearings in the subflow issue, including a two-day field trip to the San Pedro River in southeastern Arizona. Abandoning the time-volume approach, Goodfarb eventually adopted a two-part approach for identifying wells to be included in the adjudication.



**Dow Up; NASDAQ Down. See p. 12 for complete story.**

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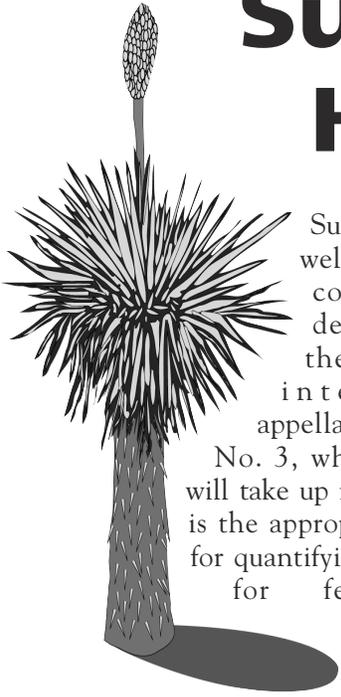
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### Gila River Judge Assigned

The Arizona Supreme Court has assigned Judge Eddward Ballinger, Jr. as the presiding judge for the Gila River adjudication. Judge Ballinger replaces Judge Susan Bolton who has become a federal judge. See stories and biography on p. 4. ♠

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# Supreme Court Poised to Hear Issue No. 3



The Arizona Supreme Court is well on its way to considering and deciding one of the remaining interlocutory appellate issues. Issue No. 3, which the court will take up next, asks what is the appropriate standard for quantifying water rights for federal land reservations such as Indian reservations.

On October 12, the court issued a scheduling order that might produce a written opinion by the summer.

Issue No. 3 results from a series of "issue resolution" proceedings before the trial court in the late 1980s. Among the decisions then made, the trial court determined that the "practicably irrigable acreage" (PIA) standard applies to Arizona Indian reservations. Many Gila River adjudication parties appealed this decision, arguing that the federal purposes for reserving land for Indian reservations and other federal agencies must be determined specifically for each reservation. The quantification method, they also say, likewise depends on the specific federal purposes for the reservation. These arguments will frame the core of the debate before the supreme court. Additionally, the court asked for briefing on these specific issues:

- Has the purpose of all Indian reservations been determined by federal law or must these purposes be addressed on a reservation-by-reservation basis?
- Does the PIA standard apply to all Indian reservations?

- Were there "primary" and "secondary" reasons for establishing Indian reservations? The distinction is important because some case law indicates that water rights for secondary purposes should be acquired under state, rather than federal, law.
- Should these quantification standards be established, as a matter of law, in advance of trial, or must they be developed after fact-finding at trial?

Main opening briefs are to be filed by January 8th. Parties who believe that the main briefs do not adequately present their arguments may file supplemental briefs by January 15th (filing will be timely on Jan. 16, since the 15th is a state holiday). Parties filing opening briefs may file answering briefs by January 24th. Oral argument is scheduled for February 21st (see Calendar).

Although Issue No. 3 originated in the Gila River adjudication, the Indian tribes in the Little Colorado River adjudication are vitally interested in the matter. The supreme court is allowing the Hopi Tribe, San Juan Southern Paiute Tribe, and Zuni Tribe to file an amicus ("friend of the court") brief on Issue No. 3. Since the Navajo Nation is a party in the Gila River adjudication, it may participate as a party in the briefing.

The Arizona State Land Department had asked the court to expand Issue No. 3 to include a consideration of whether the federal reserved water rights doctrine also extends to state trust lands. These lands were granted by the United States to Arizona for specified purposes, such as for the support of public schools and universities. The state land department argues that Congress had a specific

purpose in mind when these land designations were made and in most instances those purposes cannot be achieved without water. While this argument is controversial, other parties opposed expanding Issue No. 3 saying that the request came too late, the types of state trust land are too numerous for developing a uniform standard, and the claim should be addressed in the first instance by the trial court. On December 19, 2000, the court denied the motion of the Arizona State Land Department. 

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# Supreme Court Affirms Groundwater Decision

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First, wells are to be adjudicated if they are located within the lateral limits of the subflow zone, defined as the "saturated floodplain Holocene [younger] alluvium." Second, wells outside those lateral limits are also to be adjudicated if their cones of depression (generally, influence of pumping) extends to subflow waters.

The supreme court affirmed this two-part approach, agreeing that the saturated Holocene alluvium is the only stable geologic unit beneath or adjacent to most of Arizona's streams and rivers. While some parties argued on appeal that Goodfarb's revised criteria were at odds with both the court's 1931 *Southwest Cotton* decision and its 1993 *Gila River II* decision, Judge John Pelander, writing for a unanimous court, said "our various descriptions of subflow of *Gila River II* and *Southwest Cotton* should not serve as a straitjacket that restricts us from reaching in the direction of the facts and, so far as possible under those decisions, conforming to hydrologic reality." The court indicated, however, that wells having a small, *de minimis*

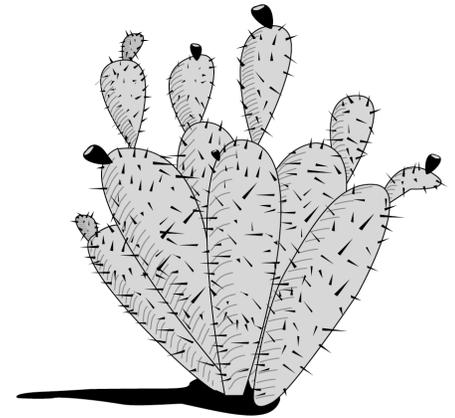
effect on the river system might be exempted from adjudication even if they pump subflow.

The supreme court emphasized the detailed record that had been developed by the trial court and the need to defer to those factual determinations. The court also agreed with Judge Goodfarb that well owners, who are identified by the Department of Water Resources as pumping subflow, may defeat that presumptive finding by offering a preponderance of evidence otherwise. This is a lessening of the "clear and convincing evidence" standard that the court had discussed in its 1993 holding. The court also indicated that its subflow rule did not involve an unconstitutional taking of private property or consist of improper legislating by a court.

Judge Pelander, Judge Noel Fidel, and Judge William Druke were sitting on the case, by designation, as substitutes for Justices Jones, Martone, and McGregor who had recused themselves from the issue.

Arizona Public Service Co., Phelps Dodge Corp., and ASARCO

Incorporated filed motions to reconsider this decision. The Salt River Project filed a response. On December 19, 2000, the court denied the motions.💧



## Special Master Candidates

The process for selecting a new Special Master for Arizona's general stream adjudication continues with the superior court judges who will make the selection asking for comments on the candidates who are being considered. On October 20th, the judges in both adjudications asked for comment by November 17th on these candidates:

- Aaron R. Clay, Referee, Colorado Water Court;
- James H. Davenport, Chief, Water Division, Nevada's Colorado River Commission;
- Terrence A. Dolan, Special Master, Idaho's Snake River Adjudication;
- Joseph M. Feller, Professor of Law, Arizona State University; and
- George A. Schade, Jr., Administrative Law Judge for the State of Arizona.💧



## In Memoriam

Attorney Kevin Tehan, long active in the Arizona water adjudications, died on September 29, 2000. Tehan was a member of the Scottsdale law firm of Sparks, Tehan & Ryley, and represented the San Carlos Apache Tribe and other tribal groups. Tehan received his law degree from Arizona State University and practiced in Arizona from 1977. Among many civic activities, he served as president of the Scottsdale Bar Association. He will be remembered for his faithful advocacy in behalf of his tribal clients.💧

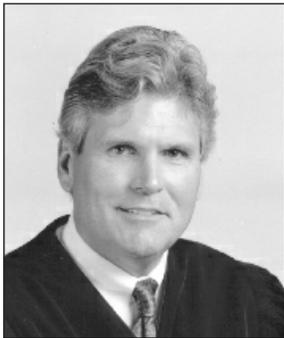
# Gila River Proceedings

## Bolton Appointed to Federal Court

Judge Susan Bolton, who has served since 1994 as presiding judge for the Gila River adjudication, has been confirmed a U.S. District Court judge for Arizona. While the U.S. Senate ratified her nomination shortly after Labor Day, Bolton took the oath of office for her new position on October 20th. The *Bulletin* extends its best wishes to Judge Bolton as she undertakes this prestigious judgeship.

## New Gila River Adjudication Judge Selected

On December 19th, the Arizona Supreme Court appointed Judge Eddward Ballinger, Jr. to replace Judge Bolton as presiding judge for the Gila River adjudication.



Eddward P. Ballinger, Jr. assumed his duties as a Superior Court judge in May 1998. He is the Criminal Department's Associate Presiding Judge.

He received his law degrees from Ohio State University (J.D. 1979) and New York University (LL.M 1981). Prior to his appointment to the bench he was a partner in the law firm of Brown & Bain, where his practice focused on civil litigation and business reorganizations.

Judge Ballinger is committed to the idea that the legal profession needs to

be actively involved in community and educational activities. He is a past president and current member of the Board of Directors of the Arizona Kidney Foundation, assisting the AKF in providing care and support to those in Arizona that suffer from kidney failure and related illnesses. He served as a board member for Project Laws, a not-for-profit organization committed to helping disadvantaged and minority youth find summer jobs in professional firms and corporations.

Judge Ballinger also served in the Maricopa County Bar Association's Continuing Legal Education Committee and during the past 15 years has regularly served as a lecturer speaking on topics relating to trial practice techniques, lender liability, the restructuring of troubled businesses and employment related issues.

He has authored numerous works dealing with issues ranging from analysis of federal statutes such as the Foreign Corrupt Practices Act to methods of avoiding litigation. His interest in less expensive alternatives to litigation led him to become involved with the American Arbitration Association, where he served as a member of the business advisory committee. In his spare time Judge Ballinger enjoys eating (a lot), exercising (a little), reading biographies of great Americans and trying to fix the damage he does to his personal computer.

Judge Ballinger was being considered along with four other Maricopa County Superior Court Judges: Daniel A. Barker, Norman J. Davis, Eileen Willett, and Michael A. Yarnell. In an earlier order soliciting comments on five candidates, the supreme court indicated that once the new Gila River adjudication judge is appointed, the judge cannot be

disqualified by a party except for cause. In other civil cases, a party can request a "change of judge" without specifying a reason. With 27,000 parties in this adjudication, such a preemptory challenge for each party would be unworkable.

## Draft Settlement Legislation

Arizona's congressional delegation, spearheaded by Senator Jon Kyl, introduced the Arizona Water Settlements Act of 2000 (S. 3231) on October 24th. The legislation outlines an approach for settling Indian water right claims in the Gila River adjudication, as well as resolving issues concerning the Central Arizona Project. The delegation described the bill as a "work in progress" but agreed to introduce it during the last weeks of the 106th Congress in order to secure comment from outgoing Secretary of the Interior Bruce Babbitt and other parties. A revised bill is expected to be introduced during the first months of the 107th Congress.

The proposed legislation is divided into five separate titles. Title I is the "Central Arizona Project Adjustment Act" and incorporates the settlement reached between the federal government and the Central Arizona Water Conservation District, operator of CAP, for repayment of project costs. Title I also reallocates almost 300,000 acre-feet of CAP "non-Indian agricultural water," making almost 200,000 acre-feet available for settlements with the Gila River Indian Community and other Arizona Indian tribes.

Title II of the bill is the "Gila River Indian Community Water Rights Settlement Act." The more detailed (and still evolving) settlement agreement between the Gila River

# Gila River Proceedings (continued)

Indian Community and other major water users is approved. A total of 155,400 acre-feet of CAP water is reallocated to the Community from a variety of sources. Also, \$200 million is to be deposited in a "Gila River Indian Community Settlement Development Trust Fund" to be used for the development of irrigation works and other authorized purposes. Also, \$7 million is provided to the Interior Department to reduce by 2,000 acres the land that may be irrigated, under the *Globe Equity Decree* (see April-July 2000 *Bulletin* at p. 1), upstream from the San Carlos Apache Indian Reservation. Once passed, the legislation would waive any claims the United States, Indian Community, or Indian allottees might have against other water users in the Gila River adjudication.

Title III of the bill makes amendments to the Southern Arizona Water Rights Settlement Act of 1982, which benefits the Tohono O'odham Nation. Title IV has been left blank, pending the completion of a settlement of the water right claims of the San Carlos Apache Tribe. Title V contains technical provisions.

In their written explanation of the bill, the state's congressional delegation claims that the legislation would result in a "final settlement of all claims to waters of the Gila River and its tributaries." While passage of this legislation would greatly advance the Gila River adjudication, this statement is somewhat misleading since non-Indian claims would still have to be resolved, even after a settlement of tribal claims.

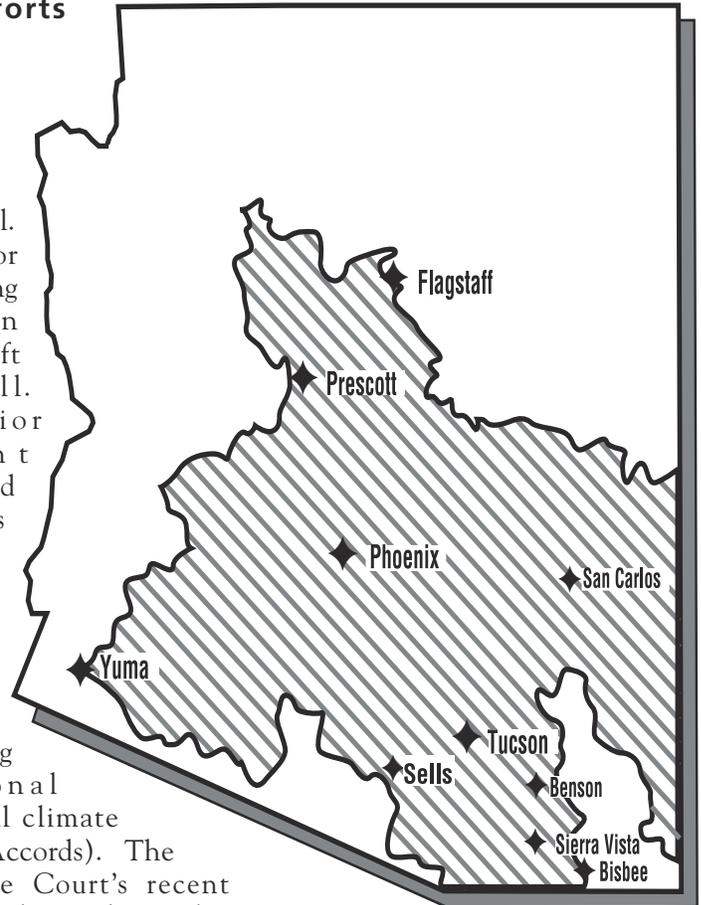


## Settlement Efforts Ongoing

Several events apparently slowed Gila River negotiations during the fall. Many of the major parties were assisting Senator Kyl in preparing the draft settlement bill. Deputy Interior Department Secretary David Hayes, who has been actively involved in these discussions, was in Europe as a member of the American delegation attending an international meeting on global climate warming (Kyoto Accords). The Arizona Supreme Court's recent decisions on groundwater have also caused some parties to reassess their negotiating positions. See lead article and April-July 2000 *Bulletin* at p. 1. As a result of recent meetings, some of the parties are working on water budgets for major users in the upper Gila. Settlement discussions convened by Judge Michael Nelson have recently been held involving major upper Gila River claimants. These negotiating sessions are expected to continue on a monthly basis.

## Master Issues Gila River Indian Reservation Report

On December 28th, the Special Master issued his second report on motions affecting the water right claims of the Gila River Indian Community (and the United States in



its behalf). The motions were filed in fall 1999 and were referred to the Master by the court in July 2000. These motions are part of an overall case management strategy that seeks to determine the Community's water right claims in a step-by-step process. Earlier, the Special Master issued a report addressing the preclusive effect of the federal *Globe Equity Decree* on the reservation's water rights (see April-July 2000 *Bulletin* at p. 1).

The recently decided motions asserted that certain contracts, state and federal court proceedings, and proceedings under the federal Indian Claims Commission Act precluded or limited water right claims for the Gila

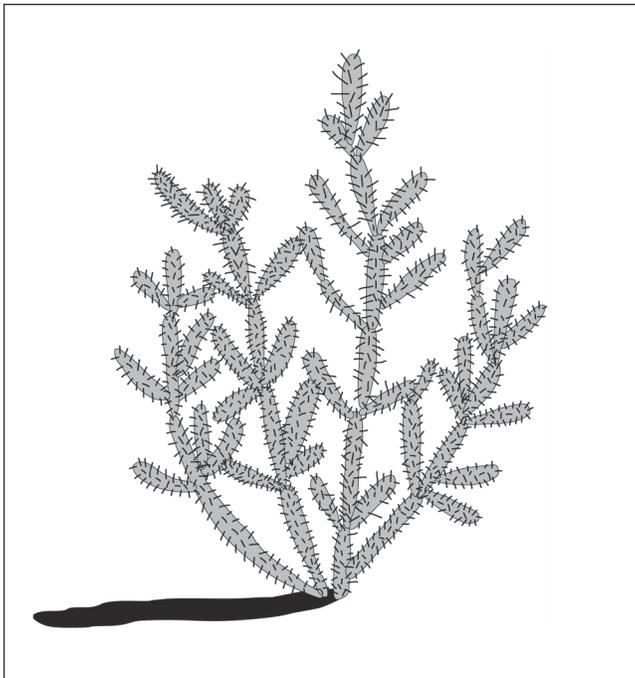
# Gila River Proceedings (continued)

River Indian Reservation. All four motions were filed by the Salt River Project (SRP) and the City of Tempe, sometimes joined by other entities such as the Buckeye Irrigation District and the Arlington Canal Co.

The Master has recommended as follows:

- Summary judgment should be denied on the argument that the Community waived any water rights, beyond those adjudicated in the *Globe Equity Decree*, by accepting an award for the taking of the Community's aboriginal land by the federal government.
- Summary judgment should be denied on the argument that the federal *Haggard Decree* (1903) on the Salt River or the 1936 Maricopa Contract (addressing some of the rights under the decree) precludes any additional reservation water right claims in the Gila River adjudication.
- Summary judgment should be granted on the argument that proceedings under the Indian Claims Commission Act conclusively determined that the federal government did not reserve any water in the Salt River system for the reservation, beyond the rights for the 1,500-acre Maricopa Colony near the confluence of the Salt and Gila rivers.
- Summary judgment should be granted on the argument that the 1907 Sacaton Agreement prevents the Indian Community from asserting an interest in or right to use SRP's dams, reservoirs, canals, or other works.
- Summary judgment should be denied

on the argument that the 1945 agreements between the Buckeye and Arlington entities and the United States, as interpreted in proceedings under the Indian Claims Commission Act, now limit the Community's claims.



## Priorities for Gila River Adjudication

One of Judge Susan Bolton's adjudication-related acts before leaving the state bench (*see p.4*) was to announce a list of litigation priorities for the Gila River adjudication. Judge Bolton had released a tentative list in June and asked for comment from the parties. The September 28th order is a revision of the earlier plan.

### 1. Gila River Indian Community

The court's first priority is to finalize and issue the final hydrographic survey report for the Gila River Indian Reservation (Contested Case No. W1-203). While preliminary

activities, including document disclosure and the filing of motions for summary judgment, have been underway in Contested Case No. W1-203 for several years, the HSR has been delayed for a variety of reasons--most recently because the Arizona Department of

Water Resources (ADWR) did not have adequate information about allottees on the reservation in order to give these individuals notice of the HSR. The United States had agreed to provide this information to the department and recently submitted names and addresses for 6,700 allottees. The department now anticipates that the final HSR for the Gila River Indian Reservation will be filed approximately July 1, 2001. The filing of the HSR will be accompanied by notice to Gila River adjudication claimants who will then have 180 days to object to the HSR.

### 2. Adjudication of Small Uses

Judge Bolton indicated that the second priority should be to finalize the method for quantifying small uses in the adjudication. The Special Master held hearings and issued a report on the quantification of domestic uses, stockponds, and stockwater uses in the San Pedro watershed, but court review of that report was postponed by 1995 legislation that also addressed the quantification of these so-called *de minimis* uses. Since these legislative provisions were ultimately declared unconstitutional by the state supreme court, the adjudication court once again needs to review the Master's report and finalize a method for adjudicating these small uses. Judge Bolton ordered that objections to the Master's report on small uses in the

# Gila River Proceedings (continued)

San Pedro be filed by November 9th. The due date for replies to responses to the objections has been extended to January 12, 2001. The new adjudication judge will announce oral arguments on the objections.

### 3. Other Gila River Litigation

Judge Bolton also indicated her desire to commence proceedings concerning the San Carlos Apache Indian Reservation and the Upper Gila River watershed. The San Carlos Apache Tribe's Salt River water rights were the subject of a successful settlement approved in 1999, but certain of the Tribe's Gila River water rights still need to be determined. Also, many of the water uses of the San Carlos Tribe and other upper Gila River water users are intertwined in the federal *Globe Equity Decree* (see April-July *Bulletin* at p. 1).

In response to Judge Bolton's interest in commencing proceedings in this area, ADWR reported that it would need one and one-half to two years to complete a preliminary HSR for the remaining portions of the San Carlos Reservation and perhaps another year to complete the preliminary HSR for the Upper Gila River. The department also counseled against combining these two HSRs.

### Saguaro National Monument

One of the original cases in the San Pedro River watershed involved the water right claims of Saguaro National Monument (Rincon Mountain Unit), Contested Case No. W1-11-2782. This federally owned reservation is located east of Tucson within the Coronado National Forest. Before litigation in the San Pedro was stayed

in 1995, the United States and other parties objecting to the water right claims reached an agreement concerning the monument's rights. Once the litigation stay was removed, the Master submitted this settlement to the court in a report that allowed other water right claimants to object to

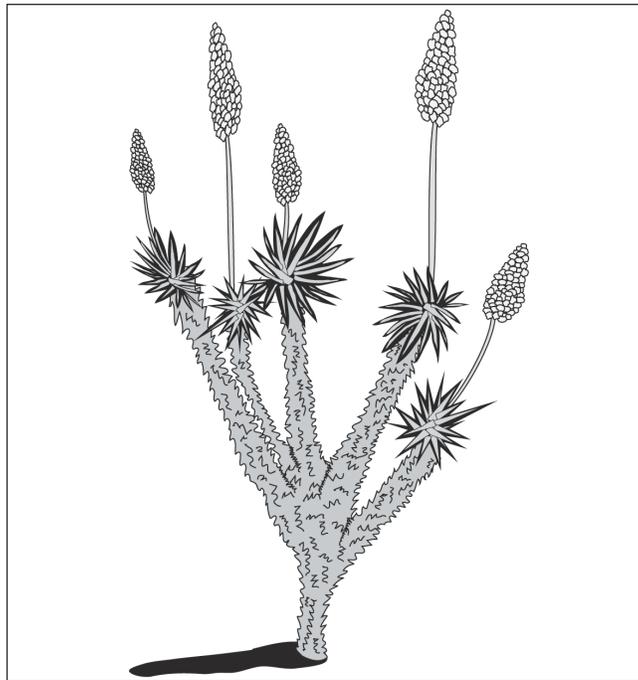
that could be resumed. The Master announced a December pretrial conference to discuss the status of the case, including what steps ADWR must undertake to update the watershed file report (WFR) describing the water rights of the army installation. At the request of the United States, however, the December conference was cancelled. It will be rescheduled after the first of the year by the court or Master.

### Gila River Indian Reservation Proceedings Delayed

The trial to establish the purposes of the Gila River Indian Reservation, Contested Case No. W1-203, had been scheduled to begin on May 7, 2001. That trial was to be one phase in the progressive determination of the reservation's water rights (see April-July 2000 *Bulletin* at p. 3). Once the Arizona Supreme Court announced its briefing and oral argument schedule for Issue No. 3 concerning the appropriate standard for determining the amount of water for Indian land

(see lead article, p. 1), many of the litigants in W1-203 concluded that the May trial would be greatly influenced by the supreme court's resolution of Issue No. 3. Additionally, many of the attorneys believed that the existing schedule for W1-203 would interfere with their preparations of briefs and for oral argument before the supreme court. Consequently, they asked the Special Master for a stay of W1-203 proceedings until the supreme court decides Issue No. 3.

After a hearing conducted by telephone conference call, the Master agreed to a postponement of case proceedings. Arguments on evidence



the settlement. Since no objections to the settlement had been filed by the deadline of December 20th, a partial decree adjudicating the monument's water rights (for the Rincon Mountain Unit) will be entered by the court.

### Fort Huachuca (Contested Case No. W1-11-605)

Fort Huachuca is a U.S. Army installation near Sierra Vista in southeastern Arizona. The fort's water right claims comprised another contested case organized before the 1995 litigation stay. In her September 28th minute entry (see above), Judge Bolton indicated that Fort Huachuca was another San Pedro contested case

# Gila River Proceedings (continued)

and other preliminary legal issues, scheduled for November 15th and 16th, were cancelled. Under a new schedule proposed by some of the parties and agreed to by the Master, a status conference to assess the impact of the supreme court's resolution of Issue No. 3 will be held within 60 days of the decision. At that time, the Master will issue a more detailed schedule leading up to trial in the case. Depending on what the supreme court does, a trial on reservation purposes may not be necessary or the number of subsidiary issues may be reduced.

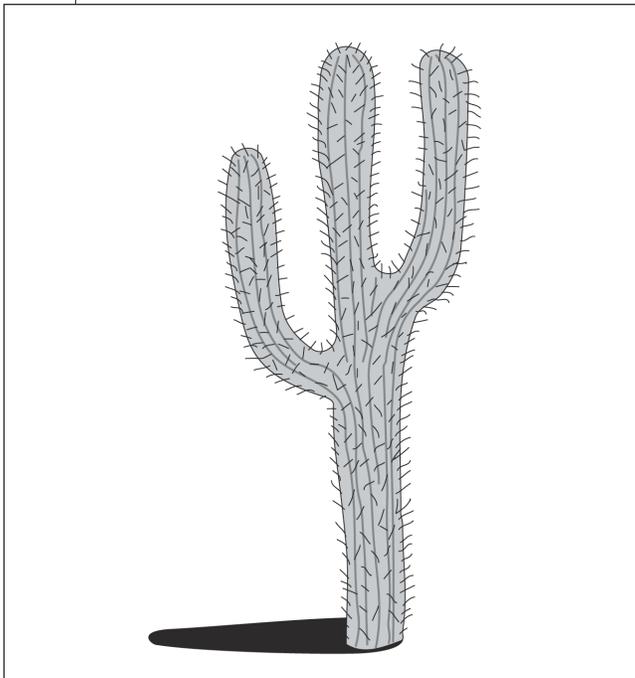
## Additional Discovery in W1-203

Thousands of additional discovery documents were submitted to the court before the litigation stay took effect. These documents were the subject of a discovery dispute between the Salt River Project and the Gila River Indian Community that was resolved in SRP's favor by the Special Master. The Master required the Community to make its records concerning proceedings before the Indian Claims Commission available to SRP's experts and attorneys. These records include pleadings and evidence used in 50 years of litigation between the Community and the United States. The Salt River Project identified approximately 1,300 documents, comprising 18,600 pages, submitted to the court. This brings the total number of documents submitted to the court by all parties to twenty thousand (170,000 pages). Information about obtaining copies of all or a portion of the most recently submitted documents may be obtained from the

Office of the Special Master.

## Another Gila Case Continued

Upon the request of the Phelps Dodge Corp., the Master has extended some of the deadlines in Case No. W1-206, *In re the Preclusive Effect of the Globe Equity Decree on Specified Parties*.



The somewhat unusual contested case was suggested by some of the Gila River adjudication parties to conclude the examination of the impact of the federal court *Globe Equity Decree* on the Gila River adjudication (see January-March 2000 *Bulletin* at p. 4). During 2000, the Master considered and determined motions by some of the parties arguing that *Globe Equity* limited the water rights that could be claimed by or on behalf of the Gila River Indian Reservation in this adjudication. In a report to the court filed on June 30, the Master agreed that *Globe Equity* did have some preclusive effect (see April-July 2000

*Bulletin* at p. 1).

Case No. W1-206 is an effort to examine the possible preclusive effect of *Globe Equity* on other parties in the Gila River adjudication including the San Carlos Indian Reservation and many upper Gila River irrigators. Motions concerning the preclusive effect of *Globe Equity* on these other parties were to have been filed on December 8th.

Phelps Dodge sought to extend this date principally for the benefit of the San Carlos Indian Tribe. Having lost one of its attorneys (see *In Memoriam*, p. 3) and facing litigation deadlines in many cases, the Tribe's attorneys had less time to participate in promising settlement discussions concerning the upper Gila River. Phelps Dodge argued that an extension of motion deadlines in W1-206 would allow for more productive discussions among the parties seeking settlement.

Under the newly announced schedule, motions concerning the preclusive effect of *Globe Equity* must be filed on March 8th. The Master set a status conference on February 20th to discuss whether the posture of settlement efforts by then justifies further modification of the schedule. See *Calendar*, p. 13, for a complete schedule for motions, responses, and replies in this contested case.

Initial and supplemental disclosures in Case No. W1-206 have produced nearly 2,100 documents totaling 16,500 pages. ♠

# Little Colorado River Proceedings

The most recent status conference concerning the Little Colorado River adjudication was held in St. Johns on August 10th. Judge Edward Dawson, assigned judge for the adjudication, listened to numerous reports on progress in settling the adjudication and areas where litigation may be necessary.

Judge Dawson discussed a letter he had received from Arizona's U.S. Senator Jon Kyl. Kyl had written about the importance of settlement, the progress that had been made in fashioning a bill for Congress, and the need for more time. Judge Dawson indicated that he would honor Senator Kyl's request and allow the parties an additional congressional session to secure authorization and funding for the settlement.

The court also heard reports on the resolution of water right claims made by the National Park Service. The United States has been negotiating individually with parties directly affected by these rights. The federal government's attorney distributed abstracts of these water rights and asked for comment by other parties before he formally requests federal government approval of the settled rights. Questions were raised about how these abstracts would be considered by the court. Several parties indicated that the state supreme court's adoption of a settlement approval rule (*see below*) might answer these questions.

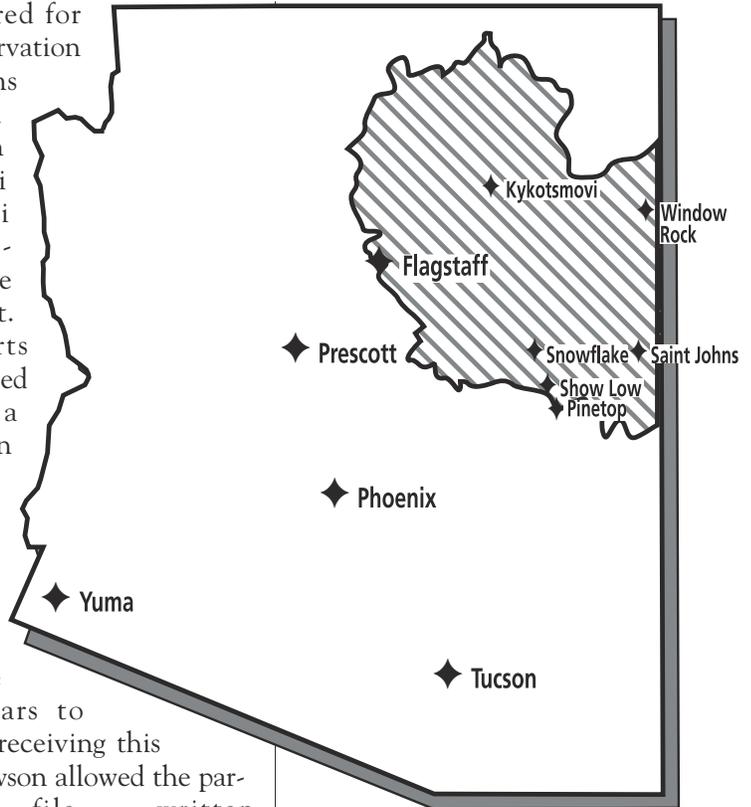
The Arizona Department of Water Resources also reported on the schedule necessary to complete hydrographic survey reports for Indian lands in the event settlement efforts fail. The preliminary HSR for these lands was prepared in 1994. The department now recommends that separate, final

HSRs be prepared for the Navajo Reservation (including claims by the San Juan Southern Paiute), Zuni lands, and Hopi Reservation-- starting with the Hopi claims first. These reports would be expanded to provide a factual foundation for determining the "practicably irrigable" acreage of each reservation. Each report would take almost two years to complete. After receiving this report, Judge Dawson allowed the parties to file written comments on ADWR's proposal (*see below*).

Another item considered during the status conference was the White Mountain Apache Tribe's motion to dismiss (*see below*). The next status conference was set for February 22, 2001 (*see Calendar*).

## Settlement Efforts Advance

Settlement efforts in the Little Colorado River adjudication are progressing, although several factors are likely to postpone the date for settlement legislation to be presented to Congress. As the result of the election, many key federal officials are leaving government and it will be several months until their successors are in place. Congress itself will likely require more time to get organized and staffed for the next session. While Senator Jon Kyl was successful in



obtaining a \$1 million appropriation to fund a technical study of the settlement, it is unlikely that a contractor will be hired by the U.S. Bureau of Reclamation before July. Once work commences, the study will require at least a year to complete. Also, the anticipated sale of the Mohave power plant by Southern California Edison, one of the negotiating parties, to an eastern firm has also been delayed, raising questions about which corporate entity will participate in the settlement.

Negotiations concerning Zuni tribal lands in Arizona, however, may be close to completion. A January negotiating session is scheduled to finalize an overall agreement that includes proposed legislation, a proposed court order, and individual

# Little Colorado River Proceedings *(continued)*

agreements with some of the settling parties. Progress has been made on the ancillary issue of whether certain Zuni lands will be taken into trust status by the United States; this issue has apparently been narrowed to the question of how much acreage would go into trust. With success on these remaining issues, a separate Zuni Tribe settlement bill may be introduced into Congress in early 2001.

The settlement of the water right claims of several federal land management agencies is also showing promise. The National Park Service, Bureau of Land Management, and other major parties are finalizing agreements and water right abstracts that may be presented to the court at the February status conference. While these agreements would bind only the signing parties, a more complete settlement agreement is likely to be submitted to the adjudication court by mid-year. This agreement is expected to be considered under the new supreme court order for the judicial consideration of water right settlements for federal agencies (*see below*). If approved, the settlement and water right abstracts would bind all parties to the Little Colorado River adjudication.

## **White Mountain Apache Tribe Withdraws Motion**

The White Mountain Apache Tribe has never filed claims in the Little Colorado River adjudication, although the United States has done so in its behalf. The Tribe has long believed that state court does not have jurisdiction over the Tribe or its water rights. In July 1996, the Tribe made a special appearance in the adjudication

to file a motion to dismiss the entire adjudication. The grounds urged by the Tribe were that the adjudication had failed to include the transbasin Coconino and Pinetop-Lakeside aquifers which the Tribe believes provide the base flow for the Little Colorado River and the Salt River

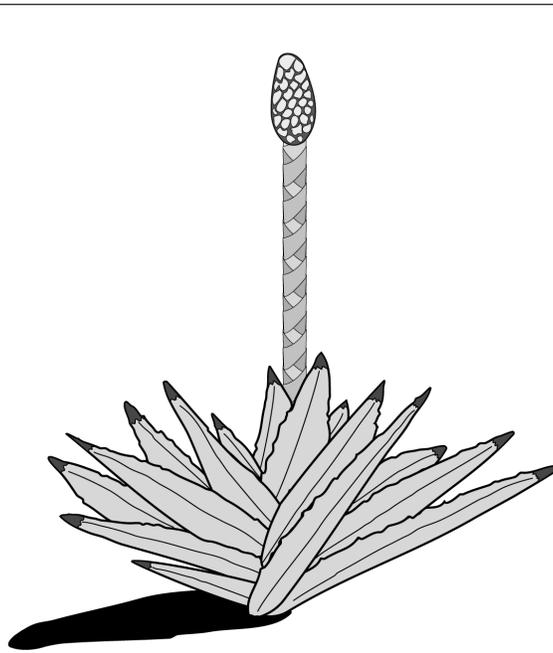
Since the August status conference, the United States has amended its claims on behalf of the White Mountain Reservation. The amended claims assert aboriginal and federal reserved water rights, with a time immemorial priority date, to the transbasin Coconino and Pinetop-

Lakeside aquifers. The Tribe believes that these amended claims address its concerns and, for the moment, satisfy the McCarran Amendment. Thus, on October 11th, the Tribe withdrew its motion to dismiss. The Tribe cautioned, however, that it had identified 600 persons who pump water from these aquifers and urged the court to bring these users into the adjudication in order to ensure the comprehensiveness of the proceeding.

## **Supreme Court Adopts Settlement Order**

In 1991, the Arizona Supreme Court issued a "special procedural order" specifying the procedure and criteria the Gila River adjudication trial court must use to consider settlements involving the water rights for Indian tribes and other federal land reservations. Such criteria and procedures are necessary since these settlements are usually negotiated among the major water users and other parties must have an opportunity to object. Since 1991, four settlements have been approved in the Gila River adjudication.

The Little Colorado River adjudication has not had a similar order. With settlement discussions sufficiently advanced, Arizona Public Service Co. and other parties petitioned the supreme court in February to promulgate such an order



system. Without the inclusion of this groundwater and the persons who use the resource, the Tribe believes the adjudication does not satisfy the federal McCarran Amendment (*see August 1996 Bulletin at p. 1*).

When the motion to dismiss was filed, Judge Allen Minker, then presiding judge for the adjudication, deferred consideration of the pleading since settlement discussions were active. At the most recent status conference (*see above*), the Tribe and several parties urged the court to take up the motion, and Judge Dawson referred the motion to the Special Master for an initial determination.

# Little Colorado River Proceedings (continued)

for the Little Colorado River adjudication (see April-July 2000 *Bulletin* at p. 6). The proposed order was circulated for comment and several substantive suggestions were received.

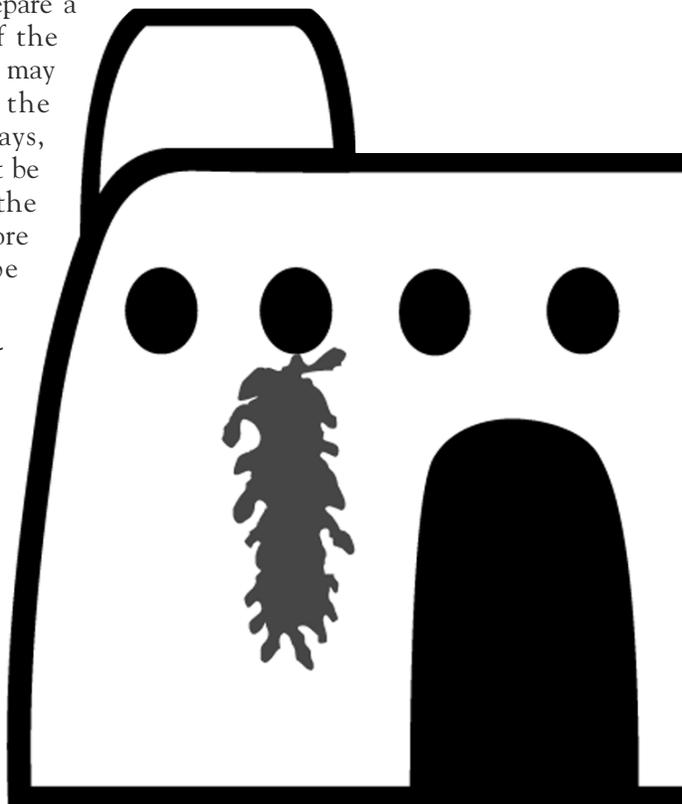
On September 27th, the supreme court finalized the "administrative order" to guide settlement approval processes in the Little Colorado River case. If a settlement involving Indian reservations or other federal lands is approved by Congress (or the appropriate federal agency), and the settlement must be approved by the adjudication court, the settling parties petition the court for "special proceedings" to consider the settlement. Notice of the special proceedings and the settlement is provided to all claimants in the adjudication. The court may refer initial proceedings to the Special Master, and the court may order ADWR to prepare a technical assessment of the settlement. Other parties may file objections to the settlement within 45 days, and these objections must be heard and resolved by the Master or the court before the settlement can be approved.

The new order modifies the grounds, adopted earlier for the Gila case, for objecting to a settlement. Under the new order, a water user can successfully object to a settlement if the user demonstrates that

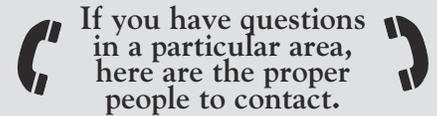
- the approval process was not properly initiated;

- the settlement would cause material injury to the objector's water rights;
- a statute authorizing the settlement is unconstitutional; or
- the water rights established in the settlement "are not fair, adequate, reasonable and consistent with applicable law, considering all of the circumstances surrounding the settlement and all of the consideration provided under the settlement . . ."

The last criterion marks the major difference with the earlier Gila River adjudication procedure. The supreme court's "special procedural order" for the Gila case allows the disapproval of a settlement if the water rights thereby established would be "more extensive" than the Indian tribe or federal agency would have been able to prove at trial. 💧



## Sources for Help



**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.wm>

### **Adjudications, HSRs, WFRs, Discovery**

Lisa Jannusch  
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**

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Office of the Special Master  
Arizona State Courts Building  
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Phoenix, AZ 85007  
(602) 542-9600  
TDD (602) 542-9545

### **Pleadings**

#### **Gila River**

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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**

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

# Dow Up, NASDAQ Down

At year's end, many eyes are following the daily gyrations in the stock market, as well as the plans of the incoming Bush administration. "Old economy" companies seem to be moving ahead steadily while "new economy" dot.coms continue downward. Seasoned retailers ("old economy" mail-order houses, for instance) persevere while bold start-ups of the "new economy" fail or struggle.

The adage, "better to be old, wise, and crafty rather than young, energetic, and over-capitalized," does have a nice appeal for those of us in our middle years who grew up thinking the 1955 T-Bird is the best car Detroit ever put on the road.

The "old-new economy" dichotomy has its relevance to the water law field although it is sometimes difficult sorting the artifacts of the "old economy" from the innovations of the "new." Are general stream adjudications a rather tarnished relic of the 19th century West or of 1980s "go-go" optimism? Is the recent emphasis on comprehensive settlements a new, less litigious approach to water management or simply a return to earlier western pragmatism?

As the millennium really turns, I find there is no simple way to characterize our profession. We reach back to the 1800s for our basic doctrine—prior appropriation—but we apply it in ways that Elwood Mead would hardly recognize. We tout the new emphasis on cooperative settlements and watershed management, forgetting that the pioneers of cooperative water use were Indian communities and irrigation-based colonies, like Anaheim and Greeley, and John Wesley Powell articulated watershed management 110 years ago.

Yet there is something new and hopefully enduring in western water

law: the convergence of many long-separated streams. The prior appropriation doctrine is converging with the federal reserved rights doctrine, as well as environmental law. Water management institutions are adapting—or new entities being formed—to improve the mesh between local, tribal, regional and national concerns. Like the mail order house of the old economy that discovers it can sell well on the internet, perhaps we can take enough of the old and new to render a lasting improvement for the western region. Perhaps, as Wallace Stegner said so well, may we finally create a society to match our magnificent landscape.

A decade goes so fast. My thanks to the fine judges with whom I've worked (Robert Corcoran, Stanley Goodfarb, Allen Minker, Susan Bolton, Edward Dawson), the excellent court staff who served so well (Maricopa County: Oscar Garcia, Alma Cano, Kim Myrick, Terri Pavia, Carol Schreiber, Marian Catt, Barbara Crawford, Lindomar Bonfim; Apache County: Carolyn Williams Morrow, Sue Hall and her staff, Sheryl Taylor Barker), the Arizona Department of Water Resources whose technical work is among the best in the nation, and the many divisions of the Administrative Office of the Courts



that supported my office in countless ways. My special thanks to Kathy Dolge, Ramsey Kropf, and the many interns who brightened our work. Special thanks also to Judge Mike Nelson who has worked exhaustively to resolve problems that are as old as the state itself.

And to the many lawyers, you've taught me so much. I wish I could have known you longer and better. I'm confident we'll all continue to work to achieve the mayordomo's final desire: to divide the waters fairly and keep the community's peace preserved.—John E. Thorson

## Fact or Fiction? Or Does It Matter?

While meeting with Arizona water attorneys, Secretary of the Interior Bruce Babbitt, in encouraging Indian water rights settlements, is reported to have said: "We should be able to resolve these cases. This government has been able to negotiate treaties before.

Look what George Mitchell (former majority leader, U.S. Senate) did in Northern Ireland." A jaded Arizona water attorney is reported to have responded, "But Mr. Secretary, that was religion. This is water!"

# CALENDAR

**Jan. 8, 2001**

Supreme Court Interlocutory  
Review Issue No. 3

**Due:** Opening briefs  
(see order Oct. 12, 2000)

**Jan. 12, 2001**

Case No. W1-11-19 (GR)  
*In re Sands Investment Co.*  
(Group 1 Cases)

**Due:** Replies to responses to  
exceptions to Special Master's  
Report (Nov. 14, 1994,  
modified Feb. 23, 1995)  
(see minute entry Dec. 7, 2000)

**Jan. 15, 2001**

Martin Luther King Holiday –  
State offices closed

**Jan. 16, 2001**

Supreme Court Interlocutory  
Review Issue No. 3

**Due:** Supplemental briefs and  
LCR Tribes' amicus brief  
(see orders Oct. 12 &  
Nov. 27, 2000)

**Jan. 24, 2001**

Supreme Court Interlocutory  
Review Issue No. 3

**Due:** Answering briefs  
(see order Oct. 12, 2000)

**Feb. 9, 2001**

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

**Due:** Objections to the Second  
Report of the Special Master  
(Dec. 28, 2000)

**Feb. 14-16, 2001**

ABA Water Law Conference  
San Diego  
(Call 312/988-5724 for  
information)

**Feb. 19, 2001**

Presidents' Day – State offices  
closed

**Feb. 20, 2001 – 1:30 p.m.**

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

**Status Conference**

ASCB Conference Room 230  
(see minute entry Nov. 10, 2000)

**Feb. 21, 2001 – 1:30 p.m.**

Supreme Court Interlocutory  
Review Issue No. 3

**Oral Argument**

ASCB Supreme Court (4th  
Floor)  
(see order Oct. 12, 2000)

**Feb. 22, 2001 – 1:00 p.m.**

Case No. 6417 (LCR)

**Status Conference before  
Judge Dawson**

Apache County Courthouse,  
St. Johns  
(see minute entry Aug. 10, 2000)

**Mar. 2, 2001**

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

**Due:** Responses to objections to  
the Second Report of the  
Special Master (Dec. 28, 2000)

**Mar. 8, 2001**

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

**Due:** Motions for summary  
judgment  
(see minute entry Nov. 10, 2000)

**Apr. 19, 2001**

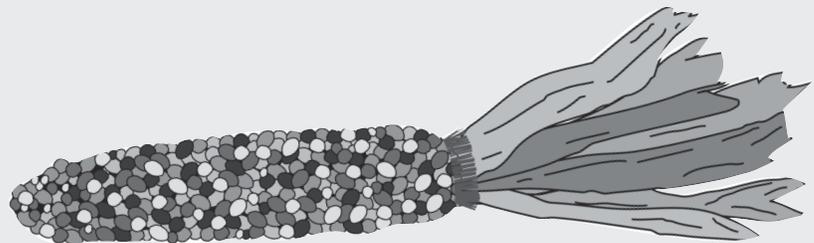
Case No. W1-206 (GR)  
*In re the Preclusive Effect of the  
Globe Equity No. 59 Decree on  
Specified Parties*

**Due:** Responses to motions for  
summary judgment  
(see minute entry Nov. 10, 2000)

**May 2, 2001**

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

**Due:** Replies, motions for  
summary judgment  
(see minute entry Nov. 10, 2000)



## Abbreviations:

GR = Gila River adjudication

LCR = Little Colorado River adjudication

ASCB = Arizona State Courts Building, 1501 W. Washington, Phoenix, AZ



# Arizona General Stream Adjudication Bulletin

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