



# Arizona General Stream Adjudication Bulletin

OFFICE OF THE SPECIAL MASTER • September - December 1999

## Supreme Court Addresses Groundwater

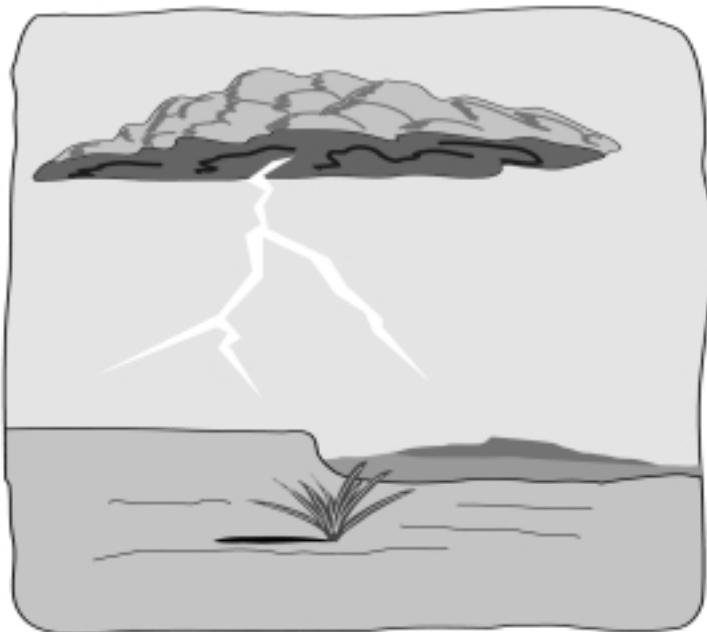
The Arizona Supreme Court has issued its opinion on one major aspect of groundwater law and heard oral arguments on another. Together, these decisions promise to clarify the relationship between groundwater and surface water under Arizona law. Since the famous 1931 case of *Southwest Cotton*, the state's water law has been separated (bifurcated) into two sets of legal rules. Groundwater outside urban areas has been largely unregulated with water users bound only to make reasonable use of water they pump from beneath their land. Surface water and associated subflow have been subject to the prior appropriation doctrine. The tricky legal issues are what underground water constitutes subflow and whether tribes and federal agencies are bound by these state rules.

### Federal rights to groundwater

The supreme court has answered the second question.

On Nov. 19, 1999, a unanimous court decided interlocutory appeal issues nos. 4 and 5. Issue no. 4 asked whether federal reserved water rights extend to groundwater (underground water) that is not subject to prior appropriation under Arizona law. Issue no. 5 questioned whether federal reserved right holders, such as Indian tribes and federal agencies, are entitled to greater protection from groundwater pumping than are water users who hold only state law rights. In 1988, the trial court answered "yes" to both questions. In its recent decision written by Noel Fidel (a court of appeals judge sitting on this case by designation), the supreme court agreed.

The court indicated that when determining federal water rights, Arizona courts must apply federal substantive law when state and federal law conflict. The court stated that the *Winters* case (1908), which formulated the federal reserved rights doctrine, had established the paramount policy:



to reserve sufficient water to accomplish the reservation's purpose. A 1976 case, *Cappaert v. United States*, established that federal entities can protect their water from subsequent diversions of surface or groundwater. Thus, the court held that the reserved rights doctrine extends to both surface and groundwater, but "a reserved right to groundwater may only be found where other waters are inadequate to accomplish the purposes of the reservation."

The court also turned to *Cappaert* for its answer to issue no. 5. The court held, as a general principle, that once a federal reserved right has been established in groundwater, the federal agency or tribe "may invoke federal law to protect its groundwater from subsequent diversion to the extent

continued on page 2...

### In This Issue

ABA Water Law Conference .....	3
Gila River Proceedings .....	4
Procedural Rules for HSRs .....	5
Little Colorado River Proceedings .....	6
Supreme Court Considers Rule .....	6
Calendar .....	7

# Supreme Court Addresses Groundwater continued

continued from page 1...

such protection is necessary to fulfill its reserved right."

See Aug.-Oct. 1998 *Bulletin* for the oral argument on Issues 4 and 5. Page 3 of that *Bulletin* contains an explanation of some of the cases cited in these articles.

## Subflow zone

The first question, what underground water constitutes subflow, was the subject of oral arguments before the court on Dec. 7, 1999. In 1988, the trial court developed the so-called "50%/90-day" test for determining what wells would be adjudicated in the Gila River adjudication. If, after 90 days of pumping, 50% or more of a well's output was coming from a nearby river or stream, the well would be included in the adjudication. This decision became interlocutory issue no. 2 which was decided by the Arizona Supreme Court in 1993 (see Aug. 1993 *Bulletin*). In that decision, the supreme court vacated the 50%/90-day standard and ordered the trial court to develop a new standard recognizing "Southwest Cotton's statement that subflow is found within or immediately adjacent to the stream bed."

In 1994 hearings (see Mar. 1994 *Bulletin*), the trial court was presented with numerous standards for determining the subflow zone, including the extent of riparian vegetation and a physical demarcation called the "post-1880 entrenchment." The trial court ultimately concluded that wells will be adjudicated if they are located within the saturated younger alluvium (sands and gravels associated with a waterway) or if they "pump any percentage of water either from the stream itself or its 'subflow' zone . . . ." (with the possibility of excluding small wells).

Oral arguments concentrated almost exclusively on the "saturated younger alluvium" standard. Seeking rejection of this standard, Michael Brophy, attorney for the appellants, said the trial court had engaged in an "act of defiance" of the supreme court's 1993 decision by developing a new standard that brings even more wells into the adjudication. Brophy argued that subflow is a narrow zone "immediately adjacent" to the stream. He added that, since the 1930s, thousands of people have invested money in their belief that their wells and operations would be exempt from surface water law. Chief Justice Thomas Zlaket suggested that expectations are often disrupted when a court clarifies an ambiguous rule. Brophy added that a legislative solution is preferable, such as the new Santa Cruz Active Management Area, allowing a legislatively approved system of conjunctive surface-groundwater use. Judge William Druke, another court of appeals judge sitting by designation, inquired of the other standards and suggested that the "post-1880 entrenchment test" might not be usable in watersheds other than the San Pedro. If the court is not comfortable with any test, Brophy responded, the case should be sent back to the trial court for more hearings.

Robert Hoffman, representing mining interests, also argued for the appellants, suggesting that the trial court did not have "clear and convincing" evidence before it to support the saturated younger alluvium standard. Mary Griener, representing state trust land interests, said the standard should be rejected

because it will lead to the monopolization of the state's water resources by a few large surface water users.

Byron Lewis made the principal arguments in favor of the saturated younger alluvium standard. He argued that the "post-1880 entrenchment" is not a stable formation either in the San Pedro or elsewhere. Several of the justices asked whether the saturated younger alluvium is further narrowed by taking into account other factors like water levels, temperature, chemistry, and direction of flows. Lewis indicated that all those factors have to be considered.

continued on page 3...

Arizona General Stream Adjudication Bulletin is published by the Office of the Special Master. Subscriptions are available for \$12 annually and a subscription form is located on the last page. Some previous issues and subscription information is available on our web page : <http://www.supreme.state.az.us/wm>

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

Volume 7  
Number 5

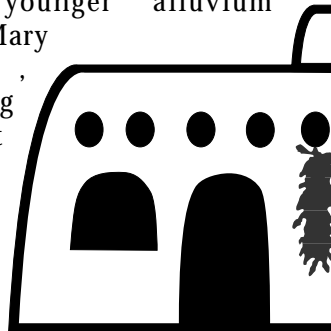
John E. Thorson, Special Master

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: Elizabeth Hepford



continued from page 2...

Lewis also emphasized that the subflow issue diminishes in importance as the result of the court's recent decision. Many well owners will have to remain in the adjudication until federal rights to groundwater in a particular area are determined.

Lewis was followed by Steve Weatherspoon, representing The Nature Conservancy, who argued that the saturated younger alluvium standard encompasses the riparian vegetation along waterways. These plants act like miniature pumps and, when they are more active during daylight hours, visibly deplete surface flows. Andrew Mergen, attorney for the United States, argued for a standard that is consistent with hydrographic realities and past decisions. Joe Sparks for the Apache Tribes observed that the saturated younger alluvium contains water more directly related to stream flow and is, therefore, consistent with *Southwest Cotton*. Rodney Lewis, Gila River Indian Community, and William Anger, representing Valley cities, also argued for the appellees.

The court took the case under advisement. A written decision is expected by late summer.

## ABA Water Law Conference

The 18th Annual Water Law Conference, sponsored by the American Bar Ass'n, will be held at the U.S. Grant Hotel in San Diego, Thursday and Friday, Feb. 24 & 25, 2000. To mark the transition from the 20th to the 21st Century, attorney Rod Walston will open the conference with an "eclectic history" of western water law. Other plenary sessions during the conference will address the evolving nature of beneficial use, the Clean Water Act, the changes facing the Bureau of Reclamation, the use of federal reclamation project water for environmental and urban purposes, and an update on the Colorado River Compact. Break-out sessions will be held on settlements in ongoing general

## Other Issues

Of the original six interlocutory issues that were accepted for review in Dec. 1990, the supreme court has yet to act on Nos. 3 and 6. No. 3 asks, "What is the appropriate standard to be applied in determining the amount of water reserved for federal lands?" The trial court determined in 1988 that practicably irrigable acreage (PIA) is the exclusive standard for determining tribal water rights. The Salt River Project and the City of Tempe recently asked the supreme court to set a briefing and oral argument schedule for this issue. After several Little Colorado River basin tribes responded that the appropriate quantification standard should be developed through litigation of actual cases, SRP notified the court that it agreed the appeal of Issue No. 3 should be vacated and the matter returned to the trial court.

Issue No. 6 asks, "Must claims of conflicting water use or interference with water rights be resolved as part of the general adjudication?" No schedule has been announced for this issue. ♠

stream adjudications, the emerging challenges to dams, the impact of endangered species on municipal water supplies, and the ethical implications on contacting water agencies. Gov. Marc Racicot (R-MT) will speak at the Thursday lunch and David Hayes, Acting Deputy Secretary of the Interior Dep't, will speak about the past, present and future of the Colorado River on Friday morning. Phoenix attorney Larry Caster is chair of the Water Resources Committee. Ramsey Kropf, former case administrator in the Office of the Special Master, is one of the conference chairs. For more information, call (312) 988-5724 or visit the ABA website: [www.abanet.org/environment/Committees/waterresources.html](http://www.abanet.org/environment/Committees/waterresources.html). ♠

## Sources for Help



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



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

**Arizona General Stream Adjudication web page**  
<http://www.supreme.state.az.us/wm>

### Adjudications, HSRs, WFRs, Discovery

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  
<http://www.adwr.state.az.us>

### 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

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



# Gila River Proceedings

## San Carlos Settlement

Judge Susan Bolton has approved the San Carlos Apache Water Rights Settlement (see July-Aug. 1999 *Bulletin*, p. 1). If all remaining paperwork is signed, a judgment will be entered before the end of the year—and the expiration of federal settlement authority.

Eighteen objections to the proposed settlement were filed by the July 1st deadline. Most of these were filed by individual water users, but objections were also filed by Gov. Jane Hull, the City of Globe, the Central Arizona Water Conservation Dist. (CAWCD; contractor and manager for the CAP canal), and other cities and irrigation districts.

Settling parties and objectors filed motions for summary judgment which were heard by Special Master John E. Thorson on Aug. 24th. In a partial report issued on Sept. 10th, the Master determined that the proposed settlement could not be finalized without the approval of certain parties including Globe and CAWCD, who were named specifically in the 1992 federal legislation authorizing the settlement.

During this same period, Gregg Houtz, Indian Water Rights Settlement Facilitator at the Dep't of Water Resources, successfully mediated the withdrawal of many individual objections. Gov. Hull began mediating the dispute between Globe and the Tribe. These discussions were resumed before Settlement Judge Michael Nelson, Apache County, and the Globe-Tribal dispute was satisfactorily resolved in an agreement allowing the city to continue a limited amount of

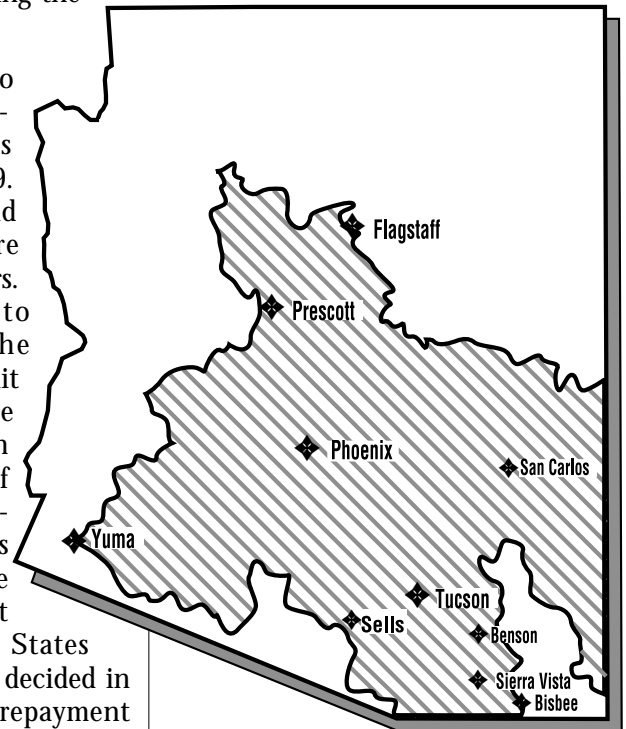
pumping from wells adjoining the reservation.

After a trial limited to the basic facts of the settlement, the Master filed his final report on Nov. 9, 1999. By this time, CAWCD and the City of Glendale were the only remaining objectors. They had been unable to reach agreement with the United States as to the credit CAWCD would receive against canal construction costs for the amount of CAP water being transferred to the San Carlos Tribe and other tribes as the result of Indian water right settlements. The United States preferred to have this issue decided in federal court where CAP repayment litigation is pending.

Ultimately, Judge Bolton overruled the Master and determined that the consent of CAWCD and Glendale were not required before the settlement could be approved. She determined that neither entity was required to do anything as the result of the settlement act and agreement.

Under the approved settlement, the Tribe is awarded 7,300 ac-ft/yr from the Black and Salt rivers, 60,665 ac-ft/yr of CAP water, surface water in on-reservation tributaries, groundwater beneath reservation lands, and all effluent developed on the reservation.

The San Carlos settlement is the fourth to be approved as part of Arizona's adjudications. The Salt River-Pima Maricopa Indian Community settlement was finalized in 1991, the Fort McDowell Indian Community settlement was approved



in 1993, and the Yavapai-Prescott Indian Tribe settlement was completed in 1995. Negotiations are ongoing involving the Gila River Indian Community, as well as the Indian tribes in northeastern Arizona (Hopi, Navajo, San Juan Southern Paiute, Zuni).

## Case Proceeding on Many Fronts

With the San Carlos settlement now final, the case denominated *In re the Water Rights of the Gila River Indian Community*, Case No. W1-203, will move to center stage. Numerous areas of activity are underway with filing dates approaching on many of them (see Calendar). This is the evolving structure of the case:

- Preclusive effect of the federal Globe Equity No. 59 decree on the Gila River Indian Community

continued on page 5...

continued from page 4...

(GRIC) — almost 18,000 documents, totaling 140,000 pages, have been disclosed. Motions for summary judgment were filed in March and final replies are due on Jan. 28, 2000.

- Preclusive effect of other decrees and agreements on GRIC—ASARCO, San Carlos Irr. & Drainage Dist., Salt River Project, City of Tempe, Buckeye Irr. Co., and Arlington Canal Co. have all filed motions for summary judgment, and responses and replies are due at various dates through March 2000.
- Purposes of the Gila River Indian Reservation—Both GRIC and other parties have filed disclosure statements and documents (the document count and page totals are included in the count of the "preclusive effect" disclosures, above). Expert reports on this issue were filed in April.
- Preclusive Effect of the Globe Equity No. 59 decree on the San Carlos Apache Tribe, Franklin Irr. Dist., and Gila Valley Irr. Dist.—disclosure statements and motions for summary judgment are due at various dates through July 2000.
- Hydrographic Survey Report (HSR)—ADWR filed a partial preliminary HSR in Jan. 1997 and the remaining preliminary HSR in Feb. 1999. The court ordered the Department not to file the final HSR until the accuracy of the mailing list could be improved (see next article).

In the background are ongoing settlement discussions that may resolve all or some of the issues pending in this contested case. Unless a settlement is reached soon, significant legal decisions concerning the Indian Community's water rights are likely in 2000.

## Mailing List Problem

The list of names and addresses for claimants in the Gila River adjudication, information some 10 to 20 years old, is becoming increasingly inaccurate. In June, Judge Bolton requested the Special Master and ADWR to meet and develop recommendations on updating this information (see July-Aug. 1999 *Bulletin* at 3). After meetings with the Steering Committee, ADWR, and the Clerk's office, the Master circulated a draft report for comment. Receiving no comments, the Master filed his final report on Dec. 1, 1999. Comments or objections are due on Dec. 22nd with responses due Dec. 30th.

The Master's report makes 18 basic recommendations. Some of the principal ones include hiring a commercial firm to update names and addresses using magazine subscription information, requiring claimants in the adjudication to notify ADWR of address changes or water right transfers, reinstating the new use summons

process for persons who have recently received permits from ADWR, and cross-matching data base information maintained by the department.

Unless objections are filed to the report, the Master's recommendations will be implemented during the first part of 2000. A copy of the report may be obtained from the Office of the Special Master or on the Master's website: <http://www.supreme.state.az.us/wm>.

## Santa Cruz River Watershed

Landowners holding a majority of the water rights in the Santa Cruz Active Management Area have organized a settlement group to help clarify water rights ownership and develop water management plans for the future. The group has been receiving technical assistance from the Arizona Dep't of Water Resources. The work of this group is reported in *The Ripple*, a publication of the Santa Cruz Valley Riverway Partnership. Call (520) 398-9093 for more information. 💧

## Procedural Rules for HSRs

The Arizona Dep't of Water Resources has proposed draft procedural rules on how it plans to give notice of the completion of preliminary and final hydrographic survey reports (HSRs), as well as how preliminary HSRs can be inspected and commented upon. When a preliminary HSR is completed, ADWR proposes to notify the court-approved mailing list and all water users in the geographic area covered by the report (whether or not they have filed a statement of claimant). In the case of an HSR covering an Indian reservation, the entire report will be provided to a tribal representative and the United States as trustee for the tribe.

The notice procedure for the final HSR is similar, but will be preceded by

a notice at least 120 days in advance of filing the final HSR. Copies of preliminary and final HSRs will be available at ADWR offices, libraries, and county court clerks throughout the adjudication area, and the clerk's office where the adjudication is maintained.

The proposed procedural rules could be adopted by ADWR as administrative rules. The department, however, suggests that the administrative rulemaking process is cumbersome; and, since they relate to litigation, the proposed rules might be more simply adopted by the court.

Copies of the draft rules may be obtained from ADWR. Comments on the draft rules are due to ADWR by Dec. 31, 1999. 💧

# Little Colorado River Proceedings

## Meeting with Senator Kyl

Representatives of the Hopi Tribe and Navajo Nation met with U.S. Senator Jon Kyl in Phoenix on Dec. 13th to explain the basic provisions of the evolving settlement and elicit the Senator's support for settlement legislation. The meeting was also attended by Settlement Judge Michael Nelson, Acting Deputy Secretary of the Interior David Hayes, and ADWR Director Rita Pearson. The overall cost of the settlement, possible alternative sources of water for Navajo's Leupp municipal and domestic water supply, the timing and cost of water treatment and distribution facilities, and whether some of the construction could be phased were among the issues discussed with Kyl. Meeting participants promised to submit additional information on certain issues before the Senator indicates how he wishes to proceed. Senator Kyl is familiar with Arizona's adjudications. While in private practice, he argued an important jurisdictional case before the U.S. Supreme Court in 1982.

## Postponed status conference

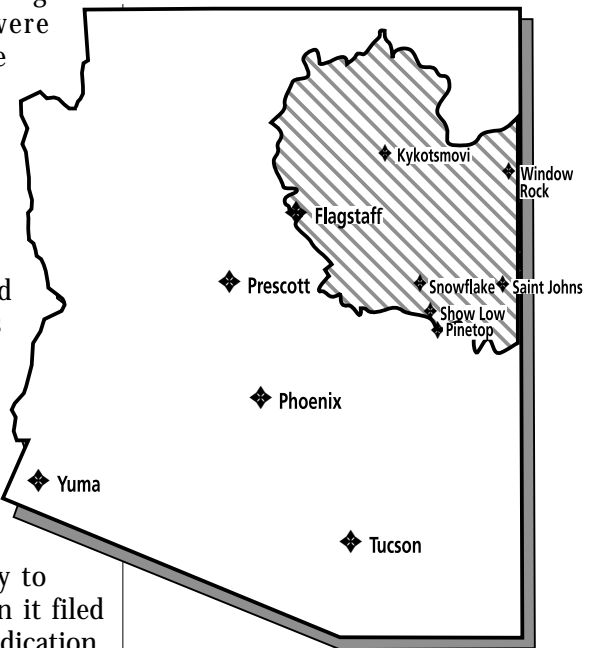
A status conference had been scheduled before Judge Edward Dawson on December 10th, but the date was postponed because Judge Nelson and the negotiating parties believed that the meeting with Senator Kyl should occur first. The status conference on settlement efforts has been rescheduled for 9:30 a.m. on Friday, Jan. 28th in St. Johns.

## *In re Atkinson's Ltd. of Arizona* (Cameron Trading Post)

Special Master John E. Thorson has submitted his report on the petition for declaratory judgment filed by Atkinson (see July-Aug. 1999 *Bulletin* at 4).

Atkinson had requested a ruling that its water rights were established under state law, are free from regulation by the Navajo Nation, and should be included in the final decree on the same basis as other state-law water rights. The Nation and the United States, its trustee, responded that the petition was premature and the Nation had not waived its sovereign immunity.

Atkinson's petition should be dismissed, the Master determined, since the Nation had not waived its immunity to such declaratory actions when it filed water right claims in the adjudication. The Master indicated that Atkinson will have an opportunity to prove the state-law basis for its water rights during the normal course of the adjudication, but tribal agencies and courts should have the first opportunity to determine their regulatory jurisdiction over Atkinson's rights.



Atkinson has filed an exception to the Master's report, which is now before Judge Dawson for final action. ♠

## Supreme Court Considers Rule

The Arizona Supreme Court has circulated a rule to establish a procedure for recognizing tribal court judgments. The petition, R-98-0031, was proposed to the Court by the Arizona State, Tribal and Federal Court Forum, composed of judges from those governments. The recognition procedure would allow a person to file a tribal court judgment with superior court. The party against whom the tribal court judgment was obtained would have 20 days to object. The superior court could not recognize the judgment if the tribal court did not have personal

or subject matter jurisdiction or the defendant was not afforded due process. Also, the superior court judge could refuse to enforce a tribal court judgment for equitable reasons, including extrinsic fraud. The proposal will be on the Court's agenda on Jan. 4, 2000. Written or telephoned comments should be made immediately to Ellen M. Crowley, Staff Attorney, Arizona Supreme Court, 1501 W. Washington, Suite 445; phone (602) 542-9389; fax (602) 542-9482. Contact the Supreme Court Clerk's Office, (602) 542-9396, for a copy of the proposed rule. ♠

# CALENDAR

All of the following are due dates in Case No. W1-203, *In re the Water Rights of the Gila River Indian Community* (GR)

## Jan. 18, 2000

Replies, motions for summary judgment filed on Oct. 4, 1999, by ASARCO (docket numbers 202 & 203) and SCIDD (docket numbers 206 & 207)

Responses to motions for summary judgment re 1907 Sacaton Agreement filed on Oct. 4, 1999 (docket numbers 211 & 212)

Responses to motions for summary judgment re Buckeye-Arlington Agreement & Docket No. 236-F filed on Oct. 4, 1999 (docket numbers 224 & 225)

## Jan. 28, 2000

Replies, motions for summary judgment re preclusive effect of Globe Equity decree on GRIC filed by Apache Tribes on Mar. 1, 1999 (docket number 118)

Replies, motions for summary judgment re preclusive effect of Globe Equity decree on GRIC filed by GVID-FID, SCIDD, SRP, Tempe on Mar. 1, 1999 (docket numbers 119 & 120)

## Jan. 31, 2000

Rule 26.1 disclosure re preclusive effect of Globe Equity decree on San Carlos Apache Tribe, FID, and GVID

## Feb. 21, 2000

Replies, motions for summary judgment re 1907 Sacaton Agreement filed on Oct. 4, 1999 (docket numbers 211 & 212)

Replies, motions for summary judgment re Buckeye-Arlington Agreement & Docket No. 236-F filed on Oct. 4, 1999 (docket numbers 224 & 225)

Responses to motions for summary judgment re Docket No. 228 filed on Oct. 4, 1999 (docket numbers 209 & 210)

Responses to motions for summary judgment re Haggard Decree, Docket No. 236-D & 1936 Maricopa Contract filed on Oct. 4, 1999 (docket numbers 213 & 214)

## Mar. 16, 2000

Supplemental disclosure re preclusive effect of Globe Equity decree on San Carlos Apache Tribe, FID, and GVID

## Mar. 20, 2000

Replies, motions for summary judgment re Docket No. 228 filed on Oct. 4, 1999 (docket numbers 209 & 210)

Replies, motions for summary judgment re Haggard Decree, Docket No. 236-D & 1936 Maricopa Contract filed on Oct. 4, 1999 (docket numbers 213 & 214)

## May 26, 2000

Motions for summary judgment re preclusive effect of Globe Equity decree on San Carlos Apache Tribe, FID, and GVID

## July 5, 2000

Responses to motions for summary judgment re preclusive effect of Globe Equity decree on San Carlos Apache Tribe, FID, and GVID filed on May 26, 2000

## July 31, 2000

Replies, motions for summary judgment re preclusive effect of Globe Equity decree on San Carlos Apache Tribe, FID, and GVID filed on May 26, 2000

## OTHER DATES TO NOTE:

### Jan. 17, 2000

Martin Luther King holiday – state offices closed

### Jan. 28, 2000

Case No. 6417 (LCR)

Status Conference

Apache County Courthouse, St. Johns

### Feb. 21, 2000

Presidents' Day – state offices closed

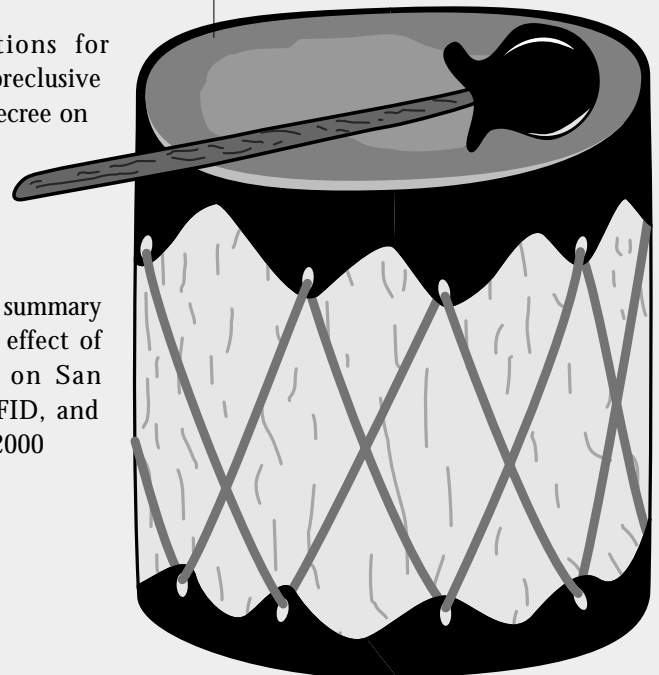
### Feb. 24-25, 2000

ABA Water Law Conference, San Diego

## Abbreviations:

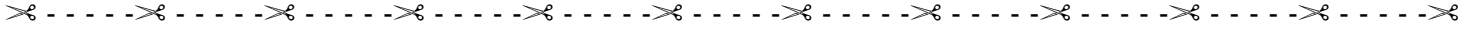
GR = Gila River adjudication

LCR = Little Colorado River adjudication



**Arizona General Stream  
Adjudication Bulletin**

Office of the Special Master  
Arizona General Stream Adjudication  
Arizona State Courts Building  
1501 W. Washington, Suite 228  
Phoenix, Arizona 85007



# Arizona General Stream Adjudication Bulletin

## SUBSCRIPTION FORM

Name: \_\_\_\_\_

Address: \_\_\_\_\_

City: \_\_\_\_\_ State: \_\_\_\_\_ Zip: \_\_\_\_\_

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

Representing (if applicable): \_\_\_\_\_

Number of Subscriptions: \_\_\_\_\_ (\$12 each for annual subscription)

Total Enclosed: \$ \_\_\_\_\_ (Please make checks payable to Arizona Supreme Court)

Return to:

Office of the Special Master • Arizona General Stream Adjudication  
Arizona State Courts Building • 1501 W. Washington, Suite 228 • Phoenix, AZ 85007