

**Arizona General Stream Adjudication Bulletin  
January - March 1998**

**Office of the Special Master  
Arizona State Courts Building  
1501 W. Washington, Suite 228, Phoenix, AZ 85007  
(602) 542-9600; fax (602) 542-9602**

Arizona General Stream Adjudication Bulletin is published 10 times a year 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.

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.

**John E. Thorson, Special Master  
Kathy Dolge, Assistant to Special Master  
Volume 6, Number 1**

**In This Issue:**

**Supreme Court Hears Arguments in Special Action**

**Gila River Proceedings**

**Little Colorado River Proceedings**

**Calendar**

**Sources for Help**

**Supreme Court Hears Arguments in Special Action**

Almost exactly three years after passage of House Bills 2276 and 2193, the Arizona Supreme Court heard the challenges of the San Carlos Apache Tribe and other tribal and federal parties to legislation that had been passed by the Arizona legislature to speed the general stream adjudications. While oral arguments in this special action proceeding were heard as usual in the court's stately courtroom in Phoenix, the court itself appeared quite different with three court of appeals judges sitting as justices *pro tempore*. Supreme Court Justices Fred Martone, Charles Jones, and Ruth McGregor (herself only recently appointed to the bench) had all recused themselves from this proceeding. They were replaced by Noel Fidel of Division 1 of the Court of Appeals and William Druke and John Pelander of Division

2. Only Chief Justice Tom Zlaket and Justice Stanley Feldman, who has previously authored most of the court's water law decisions, remained on the bench.

The court had allotted 2-1/2 hours for oral argument--an unusually large block of time but warranted by the importance of the case and the number of parties involved. Joe Sparks, attorney for the San Carlos Apache Tribe, Tonto Apache Tribe, and Yavapai-Apache Nation; Scott McElroy, representing tribes in the Little Colorado River basin; and Robert Klarquist, an appellate attorney for the United States, all argued that the 1995 legislation was unconstitutional and withdrew the authority of the Arizona state courts under the McCarran Amendment to adjudicate federal and tribal water rights. These attorneys largely supported the August 1996 decision of Superior Court Judge Susan R. Bolton, to whom the special action had originally been referred, although Sparks urged the Supreme Court to undertake a *de novo* (new) review of the legislation and find other provisions to be unconstitutional as well.

The parties who had originally drafted the 1995 legislation appeared to support the enactments before the court. Principal arguments were made by John Weldon and Byron Lewis, attorneys for the Salt River Project. Shorter presentations were made by Bill Anger, representing Chandler and other valley cities; Jerry Haggard, representing Phelps Dodge Corp.; David Brown, representing many smaller claimants in the Little Colorado River adjudication; and Charlotte Benson, assistant attorney general, representing the State Land Department.

Chief Justice Zlaket interrupted Spark's review of the adjudication's history to say that the court was eager and prepared to address the legal questions. Several justices immediately questioned whether there was a sufficient factual record before them to determine whether House Bill 2276 had violated the equal protection clause. When asked whether the statute itself evidenced any improper legislative discriminatory intent, Sparks pointed to the *de minimis* provisions (providing for summary adjudication of small uses) and indicated that these sections almost exclusively benefit non-Indians. Justice Feldman asked whether these provisions could even be applied lawfully to modify federal and tribal rights.

The argument then turned to the separation of powers challenge to the legislation. Sparks suggested that the legislation encroached on core judicial functions by changing the appointment process for the special master assigned to the adjudication and by requiring the court to decree, under some circumstances, water duties for some rights and the size and capacity of reservoirs.

Sparks also addressed what he believes are the infirmities of the companion legislation, HB 2193, pertaining to water rights on public lands. While Sparks tried to argue that this bill violates both the state lands trust obligation and the public trust doctrine, Justice Feldman questioned how this was relevant to the present proceeding and suggested that the court was not going to decide whether the public trust doctrine applies.

Scott McElroy's argument addressed the retroactive effect of HB 2276 and whether the legislation now deprives Arizona state courts of jurisdiction under the McCarran Amendment. McElroy indicated that tribal water rights in the Little Colorado River basin were established in relationship with senior and

junior water rights based on state law. The impermissible retroactive effect of HB 2276 is illustrated, he said, when it now becomes impossible to abandon a senior state-law water right that, if abandoned under prior law, would satisfy a junior tribal water right. The court inquired as to whether the tribal interest in this example was only an expectancy--not a property right--and whether the new legislation still could be used to clarify ambiguities in earlier law. McElroy closed by suggesting that Congress, when passing the McCarran Amendment, did not envision key water adjudication decisions being made by state legislatures rather than by the courts hearing the cases.

John Weldon opened his defense of the legislation by noting the numerous times the Arizona legislature has acted concerning water rights including the 1919 public water code, the 1974 Water Rights Registration Act, and the 1977 Stockpond Registration Act. He also observed that state water rights are not held exclusively by non-Indians, reviewing specific instances of such rights being held by the Navajo Nation, Hopi Tribe, Zuni Pueblo, as well as by several federal agencies.

The remainder of Weldon's presentation involved a discussion with the court on the retroactive effect of the legislation. Weldon indicated that Judge Bolton's decision, holding that substantive provisions of the legislation could not have retroactive effect, would "freeze" existing water rights in the law and prevent the legislature from regulating these rights under its police power. Still, Weldon maintained that the law did not change the "legal consequences of past conduct" and agreed with Justice Feldman that, for example, a water right abandoned under prior law could not be revived under this statute. Justice Zlaket provided another example, a provision that seemingly allows water users to "stockpile" water rights and avoid judicial scrutiny. Weldon responded that the water uses must still satisfy the beneficial use doctrine.

Byron Lewis began a discussion of the separation of powers question, and the court was immediately concerned whether HB 2276 in several instances requires the judiciary to "rubber-stamp," by decree, legislative judgment. Most of the justices' inquiries concerned the *de minimis* provisions that quantify small uses at a certain amount, pending a post-decree opportunity to litigate the actual quantity of these rights in proceedings to enforce or transfer water rights. Justice Zlaket questioned how these *de minimis* provisions would expedite litigation if there was a post-decree opportunity to challenge these rights all over again. Justice Feldman was concerned about the role the Department of Water Resources might play in determining these rights. Judge Druke indicated he believed that these provisions detracted from the goal of an *inter sese* (litigation among all parties) adjudication by limiting parties' abilities to challenge these quantification decisions.

The legislation was also supported in shorter presentations by Bill Anger, who argued that the adjudication court was ill-equipped to determine the mix of water sources necessary to ensure a stable supply for cities and other large users; Jerry Haggard, who maintained that the Arizona constitution allows the legislature sufficient flexibility to adopt rules of procedure and evidence for the courts; Charlotte Benson, who supported HB 2193 as a means to avoid needless struggles between the state land department and its lessees over title to water rights; and David Brown, who indicated that *de minimis* proceedings in the Little Colorado River adjudication had been noncontroversial--even to the federal and tribal parties. Justice Feldman concurred that it was important to put the adjudication of federal and

tribal rights first in order to avoid a great burden of litigation for small users.

In a short argument criticizing the statute, Robert Klarquist for the United States focused on the retroactive and *de minimis* provisions of HB 2276. Klarquist differed with Weldon's interpretation of the retroactive effect of the law. He believes that Section 24 of the bill does require a retroactive application of the substantive changes to Arizona's water law. Klarquist also believes that the *de minimis* provisions violate due process, the separation of powers doctrine, and the McCarran Amendment since they "direct the court to enter a decree based on an executive branch determination." In response to a question by Justice Feldman, Klarquist answered that the legislation would satisfy the McCarran Amendment if the *de minimis* features were found unconstitutional.

The court took the special action under advisement. An opinion is expected by August.

## **Gila River Proceedings**

### **Apache Tribes Challenge Bolton, Pearce**

The San Carlos Apache Tribe, Tonto Apache Tribe, and Yavapai-Apache Nation have petitioned the Arizona Supreme Court to accept another special action proceeding involving the water adjudications. Filed only a week before oral arguments in an earlier special action commenced by these tribes, the new petition seeks to have Judge Susan R. Bolton removed as the judge assigned to the Gila River adjudication. Additionally, the tribes want Michael Pearce, chief legal counsel for the Arizona Department of Water Resources (DWR), barred from participating in the adjudication. Rita Pearson, DWR director, is also named as a respondent in the proceeding.

The Apache Tribes have filed a similar motion in Superior Court. The motion will be considered by Presiding Judge Robert D. Myers. On March 12, however, Myers indicated in a minute entry that he would not take up the motion until the supreme court has acted on the petition before it.

The basis of the tribes' petition and motion is the charge of improper ex parte communications between Pearce and Judge Bolton that allegedly influenced orders Bolton issued concerning the hydrographic survey report (HSR) being prepared for the Gila River Indian Community (*see* Sept. 1995 *Bulletin*, p. 1). The pleadings refer to a August 11, 1995, meeting between Judge Bolton, Pearce, and Steve Erb (former DWR adjudications division chief) and allege that a "secret agreement" was reached among those present as to the content of the HSR. The pleadings also refer to a draft minute entry describing the HSR that was prepared by DWR, apparently at Judge Bolton's request. The language of the court's August 31, 1995, minute entry, which formally revised the HSR format for Indian lands, is similar to this draft.

The tribes' allegations are not new. Attorneys for the tribes have frequently complained about the change in the HSR format for Indian lands while other parties have responded that the revised format now resembles the approach the tribes themselves argued for a decade ago when the original format was adopted. A hearing on the tribes' objection to the change was held in early 1997, but Bolton did not

retract or modify her August 1995 minute entry.

Arizona's general stream adjudication statute provides that "[t]he court or the master shall request technical assistance from [DWR] in all aspects of the general adjudication with respect to which [DWR] possesses hydrologic or other expertise." This recent challenge by the Apache Tribes may require the courts to determine the meaning and application of this provision.

The Supreme Court has ordered that responses to the Apache Tribes' petition be filed by March 27. The tribes may reply by April 9. The Supreme Court plans to decide at its April 21 conference whether it will hear the case. The court's conference is not open to the public.

### **Disclosure Underway Concerning GRIC**

As the end of March approached, many of the major parties, as well as the Special Master's office, were preparing for the largest exchange of discovery information since the adjudication began over 20 years ago. This disclosure of historic document documents, old court files, maps, and other materials is in response to Judge Bolton's decision to take up two preliminary issues involving the water rights of the Gila River Indian Community: whether earlier litigation has already determined many of the issues and what were the congressional purposes for establishing the Gila River Indian Reservation.

On March 31, the Gila River Indian Community and the United States will file disclosure statements outlining their positions and evidence about what they believe, with respect to water rights, are the purposes of the reservation. At the same time, other parties (principally the Salt River Project) will file disclosure statements on those issues they believe were settled by earlier litigation in a variety of courts. Two months later, on June 1, the process will be somewhat in reverse.

Parties contesting the purposes of the Gila River Indian Reservation claimed by the United States and the Community will be required to file disclosure statements. Similar disclosure statements will be filed by parties disputing the preclusive effect of earlier court proceedings asserted by SRP and others.

At the same time parties file their disclosure statements, they must submit supporting documents to the office of the Special Master. Once these documents are received, duplicates will be removed and the remaining materials will be indexed, systematically numbered, and copied. Parties will then be able to purchase these documents, which should be available in May and July.

A massive number of documents appears to be involved. The attorneys for the Gila Valley Irrigation Dist. and Franklin Irrigation Dist. voluntarily submitted their documents in early March so that the Special Master's office could begin processing them. This document set included more than 1,000 documents. The Salt River Project indicates it will be submitting 20 boxes of materials. Large collections are also expected from the United States and the Gila River Indian Community.

## **Little Colorado River Proceedings**

## Minker Holds Status Conference

Judge Allen Minker began his March 6 status conference by reminding those present that the case had recently passed its 20th anniversary. The status conference in St. Johns was called to hear about the ongoing negotiations in the Little Colorado River adjudication. Minker indicated that, following the parties' agreement at the last hearing, he had discussed the settlement with Secretary of Interior Bruce Babbitt; but he did not disclose the substance of the conversations.

As usual, Judge Minker heard from most of the attorneys involved in the settlement process. The parties reported progress on many of the details of the settlement but lingering problems with the principal components of the proposed deal. Several speakers also mentioned being haunted by "skeletons"--areas of prior agreement that now seem to be unraveling and areas of prior disagreement that no longer can be ignored.

An important development has been the drafting of a bill to be introduced in Congress. The draft is being circulated for comment, but many negotiators are concerned that the bill may be too late for passage this year. The draft lacks information on several important parts of the settlement, and Sen. Jon Kyl (R-AZ) has indicated he will not introduce the bill until these details are known.

One omission from the draft bill is the final configuration for the "south-side" component of the settlement. While the negotiators continue to envision a source of water in the Three Canyons area southwest of Winslow to support an irrigation project on the Navajo reservation, it is uncertain whether water storage will have to be built or whether an existing source, such as Blue Ridge Reservoir, may be used. This decision awaits a preliminary scientific assessment of fish and wildlife impacts, and the scientists are waiting for more favorable conditions to obtain their data.

Another omission from the draft legislation is a water supply for Zuni Heaven, an important spiritual site for the Zuni Pueblo, located northwest of St. Johns. While there have been meetings between negotiators and Pueblo leaders, the lack of technical information is also delaying settlement. Federal representatives indicated that they believe an accord with the Zunis must be part of the overall settlement.

Federal representatives indicated that they believe an accord with the Zunis must be part of the overall settlement.

The Navajo Nation and Hopi Tribe announced that they had agreed on the size of the water pipeline from Lake Powell, the major feature of the "north-side" settlement. Funding, however, remains unsettled and appears to be intertwined with the future of the Mohave Power Plant, near Laughlin, which uses coal mined on the Navajo-Hopi Partitioned Lands and conveyed almost 300 miles by a slurry of coal dust and groundwater. Southern California Edison, the plant owner, has been under pressure by the Department of Interior to install air quality scrubbers to reduce haze in the Grand Canyon. With scrubbers, the plant may not be economically viable. If it closes, Lake Powell water may be unnecessary as an alternative

source of water for the coal slurry pipeline. Also, the Interior Department appears concerned about the cost of operating and maintaining the water pipeline from Lake Powell. When questioned on this point, DOI representative Barry Brandon indicated that the department would honor its commitment--a total pledge that approximates \$300 million for "south-side" and "north-side" components.

The Navajo Nation's longstanding interest in off-reservation marketing of much of its water now appears to be linked to litigation over the Central Arizona Project (CAP). The United States and the Central Arizona Water Conservation District (CAWCD) are in federal court to determine how much money the state must repay the federal government for construction of the CAP. The parties are discussing a settlement that would make almost 49 percent of the project's water available for tribal water settlements and other federal purposes. If the repayment litigation is settled on that basis, it may be easier to provide the Navajos with a block of CAP water that could be marketed. Without settlement of the repayment case, many of the parties in the Little Colorado River adjudication oppose off-reservation, tribal marketing.

In concluding the hearing, Judge Minker expressed his reservations about continuing to pursue a settlement that perpetually seems to be just beyond reach. Saying that "settlement must be more than staving off litigation," Minker indicated that the parties should not automatically assume that negotiations will continue into 1999. Still, he allowed the settlement discussions to continue, setting another status conference for 9:30 a.m. on July 16 in St. Johns. Minker asked that David Hayes, Counselor to Secretary of Interior Babbitt, be present at that time to discuss the status of negotiations.

### **Minker Not Seeking Re-election**

Judge Minker confirmed for the parties in the Little Colorado River adjudication what had been known in Greenlee County where the judge regularly serves: He will not seek reelection this fall. Minker was appointed to the Superior Court bench by Gov. Bruce Babbitt in 1985. He successfully stood for election to the post in 1986 and was reelected in 1990 and 1994. Many of the attorneys at the March 6 status conference urged Minker to reconsider his decision or at least continue as a temporary judge on the stream adjudication.

## **Calendar**

### **March 27, 1998**

Case No. CV-98-0143-SA (Supreme Court)  
Due: Responses to Petition for Special Action  
(*see* order Mar. 10, 1998)

### **March 31, 1998**

Case No. W1-203 (Gila River Adjudication)  
*In re the Water Rights of the Gila River Indian Community*  
Due: Gila River Indian Community and/or U.S. disclosure(s) re purposes of reservation

Due: Disclosure(s) re prior agreements or decrees (*see* minute entry Dec. 8, 1997)

**April 9, 1998**

Case No. CV-98-0143-SA (Supreme Court)

Due: Petitioner replies to responses to Petition for Special Action  
(*see* order Mar. 10, 1998)

**June 1, 1998**

Case No. W1-203 (Gila River adjudication)

*In re the Water Rights of the Gila River Indian Community*

Due: Responses to Gila River Indian Community and/or U.S. disclosure(s) re purposes of reservation

Due: Gila River Indian Community and/or U.S. responses to disclosure(s) re prior agreements or decrees  
(*see* minute entry Dec. 8, 1998)

**July 16, 1998 -- 9:30 a.m.**

Case No. 6417 (Little Colorado River adjudication)

Status Conference before Judge Minker

Apache County Courthouse, St. Johns

(*see* minute entry Mar. 6, 1998)

Noted:

"Now that they've discovered frozen water on the moon, can adjudication be far behind? Sounds like some cleverly conceived plot to supplement Judge Dan Hurlbutt's retirement income, you ask me. Still, it's intriguing: A hundred water lawyers compelled to argue in a courtroom where there's no air. Hey, it's a start." [Boise, ID] Times-News (*Mar. 3, 1998*)

## Sources for Help

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

**Adjudications, HSRs, WFRs, Discovery**

Lisa Jannusch, Adjudications Division

AZ Dept. of Water Resources

500 N. 3rd Street, Phoenix, AZ 85004

(602) 417-2442 or (Toll free in AZ) 1-800-352-8488

**Scheduling, Procedure**

Kathy Dolge, Office of the Special Master

Arizona State Courts Building

1501 W. Washington, Ste. 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 / (602) 506-4516 fax

### Little Colorado River

Clerk's Office

Apache County Superior Court

Apache County Courthouse

P.O. Box 365, St. Johns, AZ 85936

(520) 337-4364

© ARIZONA SUPREME COURT, 1998