

**Arizona General Stream Adjudication Bulletin
April - July 1998**

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**John E. Thorson, Special Master
Kathy Dolge, Assistant to Special Master
Volume 6, Number 2**

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Proposed Little Colorado River Settlement at Crossroads

Negotiators reported many areas of progress in their four-year effort to reach a comprehensive settlement in the Little Colorado River adjudication. At the July 16 status conference before Judge Allen Minker, negotiators also identified many critical areas of disagreement--any of which could scuttle an effort that has commanded thousands of hours of work by dozens of parties, attorneys, and consultants. Judge Michael Nelson of St. Johns, where the status conference was held, has been settlement judge for

the effort.

The agreement of the Hopi Tribe and Navajo Nations on all major aspects of the proposed water settlement was the most encouraging development reported to Judge Minker. The two tribal groups, who often have had a contentious relationship, now agree on the size and location of a pipeline (key to the north-side settlement) to bring water from Lake Powell to reservation lands, the management of shared aquifers, and the management of common washes and arroyos. The cost of the northern pipeline appears to fall within a financial commitment made by the United States in 1995. Also, both tribes are finalizing draft agreements that would recognize existing water uses of certain industrial users in the basin.

Almost as notable was an announcement by Phelps Dodge Corp. that it had reached tentative agreement with several tribes concerning its role in the overall settlement. The company, which had been embroiled in litigation with the Navajo Nation and the Hopi Tribe over its claims to Blue Ridge Reservoir and Show Low Lake, has agreed to transfer the former to the Navajo Nation and the latter to municipalities in Navajo County. Phelps Dodge now uses water from these reservoirs in exchange for water diverted out of the Salt River system for use at the company's mines near Morenci. After the transfer of Blue Ridge and Show Low Lake, Phelps Dodge will lease Central Arizona Project (CAP) water from the Gila River Indian Community and exchange this substitute water for water nearer Morenci. The transfer of Blue Ridge Reservation to the Navajo Nation will provide a more secure water supply for the Three Canyon Project, the chief component of the south-side projects.

Despite these promising developments, Judge Minker was also greeted with a litany of unresolved, major issues. A bill still has not been prepared for introduction in Congress; and Reid Chambers, speaking for the settlement committee, stated that one is unlikely this year. Judge Minker recalled that Harry Sachse, chair of the settlement committee and Chambers' law partner, had long ago conceded that settlement efforts would have to be abandoned if an agreement was not reached during this Congress. Chambers responded that inadequate information is no longer the cause for delay. Indicating that these are the most complex negotiations he has ever witnessed, the parties are now facing the most difficult, final issues-they are "cutting iron."

Assessments of the difficult issues ahead were provided by both John Weldon, attorney for the Salt River Project, and David Hayes, Counselor to the Secretary of the Interior. Hayes has principal responsibility for negotiating Indian water rights within the Department of Interior, and his presence at the status conference had been specifically requested by Judge Minker. The following difficult issues were identified by Weldon and Hayes:

- **Amount of water for northern pipeline.** In 1995, the United States committed \$65 million for a pipeline sufficient to divert 8,000 ac-ft/yr for the benefit of the Navajos and Hopis. Now each of the tribal groups is asking for 2,000 ac-ft/yr more. The water and money may not be available-especially since many state officials oppose using any more Central Arizona Project water for this settlement. Hayes expressed concern about subsidizing Peabody Coal Co. in its use of some of this water at the Black Mesa Mine.

- **Three Canyon Project.** While the offer of Blue Ridge Reservoir to the Navajo Nation improves the possibility of a south-side settlement, some northern Arizona communities (Strawberry, Payson, and Pine) would like to share some of this water. Weldon believes the inclusion of Blue Ridge Reservoir has unnecessarily complicated the Little Colorado River negotiations and, because it is premised on a deal with the Gila River Indian Community, undermines an effort in the Gila River adjudication to reach a comprehensive settlement with that tribe. Hayes says that the United States is concerned about the adequacy of limits on new surface and groundwater uses so that the Navajo's water rights in this area can be protected. Also, proposed diversions and storage in the Three Canyon area will have to be reviewed by the U.S. Fish and Wildlife Service for possible impact on threatened or endangered species.
- **Water marketing.** The Navajo Nation originally wished to have the ability to market off-reservation any of the water awarded to it under a settlement, but this position has been adamantly opposed by non-Indian parties. More recently, the Navajos have wanted a block of CAP water that they might freely market, but this has also been opposed by the state parties. Arguing that they have significantly compromised their water right claims, the Navajos have identified water marketing as a "make-or-break" issue for the negotiations.
- **Zuni Pueblo.** Negotiations concerning the claims of Zuni Pueblo-principally for "Zuni Heaven" northwest of St. Johns-lag the other negotiations. While the Pueblo's claims are not as complex as others in the adjudication, the United States seeks a comprehensive settlement of all federal and tribal claims in the adjudication and, if the Zuni issues are not timely resolved, they could fatally delay approval of a settlement.
- **Money, money, money.** The costs of the entire proposed settlement still are not ascertained, but they are likely beyond the initial commitments of the United States and some other parties. Hayes recounted how the United States originally committed (in 1995 dollars) \$65 million for the northern project, \$65 million for the southern project, and later added \$20 million for a northern pipeline spur to the Hopis and a promise to pay operation, maintenance, and repair (OM&R). Hayes now estimates that the other parties are asking the United States to contribute over \$300 million to the settlement. Hayes predicted difficulty in obtaining approval from the Office of Management and Budget (OMB) and Congress. To provide perspective, Hayes related how the entire Interior Department land and water settlement budget is less than \$40 million this year, that other settlements are experiencing difficulty in Congress, and congressional committees are opposing modest increases in the Interior Department's budget for the negotiations themselves (with one unnamed congressman saying, "Why should we give you more money to negotiate when you'll only bring us expensive settlements to fund?").

Minker concluded the status conference by redirecting the parties' attention to the accomplishments so far in the negotiations. He admonished the negotiators to remember that, with a balanced federal budget and a strong economy, this may be a singular opportunity to approve and fund a major settlement. Minker scheduled another status conference for **9:30 a.m. on Friday, November 20, 1998**, in St. Johns. He also ordered that a written status report be submitted to him by November 13. He indicated that, by that time, the negotiators must resolve the issues of how much water will be made available through the northern pipeline and whether tribal water marketing will be permitted. The November status conference is likely to be the last for Judge Minker as his term expires at the end of the year and he is not running

for reelection.

Supreme Court Schedules Issues 4 and 5

On July 17, the Salt River Project filed a short pleading with the Arizona Supreme Court asking the court to schedule oral arguments on Interlocutory Issues Nos. 2, 4, and 5. These issues date from decisions made by Judge Stanley Goodfarb in the late 1980s in the Gila River adjudication. They were accepted for review by the Supreme Court in 1991. Issue No. 2, which asks what is the proper test for the trial court to use in determining whether underground water is "appropriable" under state water law, was decided by the court in 1994 and remanded to Goodfarb for rehearing. The appeal from Goodfarb's second decision has been briefed before the Supreme Court.

Issue No. 4 asks whether nonappropriable groundwater is subject to federal reserved water rights. A related question, raised by Issue No. 5, asks whether federal reserved water right holders enjoy greater protection from groundwater pumping than holders of state water rights. Both of these issues have also been briefed before the court.

With speed untypical of water adjudication proceedings, Chief Justice Thomas Zlaket has ordered that oral arguments on Issues No. 4 and 5 will be held at **9:30 a.m. on Tuesday, September 29**, in Phoenix. Two hours have been allocated to the arguments. The order did not address Issue No. 2.

In a related Supreme Court order filed July 23, Justice Zlaket announced that Vice Chief Justice Charles (Bud) Jones and Justice Ruth McGregor will continue to recuse themselves from participating in these interlocutory reviews. Judge Noel Fidel, Court of Appeals, Div. 1, and Judge John Pelander, Court of Appeals, Div. 2, will take their place on these cases. Justice Frederick Martone, who has recused himself in prior Supreme Court proceedings involving the adjudications, will also recuse himself from the Sept. 29 hearing and Judge William Druke will sit in his place.

Gila River Indian Community Documents

More than 16,000 documents have been disclosed by the parties actively involved in discovery concerning preliminary issues about the water rights of the Gila River Indian Community (GRIC). These documents contain an estimated 122,000 pages of materials.

The documents have been disclosed as a result of Judge Susan Bolton's Dec. 8, 1997, order identifying two issues for preliminary consideration by the court. The first issue is whether previous litigation has already decided important features of the Indian Community's water rights. The federal case of *United States v. Gila Valley Irrigation District*, known as Globe Equity No. 59, is often identified as the most relevant of such previous litigation. The second preliminary issue addresses the congressional purposes for the establishment of the Gila River Indian Reservation. Both issues may be decided by the court before the publication of the final hydrographic survey report for the Gila River Indian Community, a document now under preparation by the Arizona Department of Water Resources.

Gila River adjudication parties who intend to be active participants in the resolution of these two issues were ordered to file disclosure statements and to submit discoverable documents to the Special Master's office. The first round of disclosures occurred on March 31 with 20 parties submitting disclosure statements plus 9,500 documents, themselves totaling 85,000 pages. Then, on July 20, these parties were required to file responsive disclosure statements and documents. By that date, another 6,500 documents, representing 37,000 pages, had been produced.

The documents were submitted to the Special Master's office in order to create a uniformly numbered set containing a minimum of duplicates. Kathy Dolge of the Special Master's office and Oscar Garcia and Alma Cano from the Clerk's office have worked tirelessly to number documents, remove duplicates, create an electronic and paper index, and otherwise prepare the collection for copying. The actual copying of the documents has been done by a local vendor. One complete set of the documents disclosed on March 31 was prepared for the Arizona Department of Water Resources and may be reviewed at ADWR by interested persons. Approximately nine parties chose to purchase a complete or partial set of the documents from the vendor with a copy of the total collection costing approximately \$3,400. Copies of the additional documents submitted by July 20 also will be available for purchase once they have been indexed and processed. A set of these documents will also be available for inspection at ADWR. Please contact Kathy Dolge [(602) 542-9600] if you want more information about purchasing or reviewing these documents.

The court is expected to schedule a status conference after these documents have been copied and distributed.

Challenge to Bolton & Pearce Unresolved

The Arizona Supreme Court has not acted on the petition filed by the San Carlos Apache Tribe, Tonto Apache Tribe, and Yavapai-Apache Nation to remove Judge Susan Bolton as the Superior Court judge assigned to the Gila River adjudication. The tribes' petition for a special action proceeding also asks for the disqualification of Michael Pearce, chief legal counsel for the Arizona Department of Water Resources (ADWR), from any participation in the adjudication. ADWR Director Rita Pearson is also named as a respondent in the tribes' petition.

The tribes' challenge stems from a charge of improper *ex parte* communications between Pearce and Bolton that allegedly influenced ADWR's approach to preparing the hydrographic survey report for the Gila River Indian Community (*see* Jan.-Mar. 1998 *Bulletin* at p. 4). The Supreme Court ordered that any responses to the petition be filed by March 27. By that date, Michael Pearce and Rita Pearson had filed responses, as had attorneys for the United States; tribes in the Little Colorado River adjudication; and many of the "state" parties in a pleading authored by the Roosevelt Water Conservation Dist. and Arizona Public Service Co. and joined by the State of Arizona, Phoenix-area cities, Salt River Project, Phelps Dodge Corp., and other entities. Judge Bolton did not file a response.

The Pearce-Pearson pleading reports that off-the-record communications between the presiding judge and ADWR "have been standard practice for a very long time," the existence of these communications has been reported at hearings where petitioners have been present, and petitioners have never previously objected to the practice. Further, the ADWR officials argue the type of communications between the department and the presiding judge fall within exceptions recognized by the ethical canons governing attorneys and judges. The "state" parties' response makes similar arguments, adding that "[t]he Apache Petitioners set forth no colorable basis for the order of disqualification which they seek."

The United States urged the court to accept the case since it raises the important question about "whether ADWR and the adjudicating court may conduct *ex parte* communications with regard to matters concerning pending general stream adjudications and withhold from the parties and the public both the communications themselves and the fact that they have occurred." The Little Colorado River tribes asked the court to require ADWR to serve copies of all communications (except "routine non-substantive matters") on parties to the case. These tribes also took the position that the state court would lose jurisdiction over federal and tribal water rights if *ex parte*, substantive communications were allowed.

The court has given no indication on whether it will accept jurisdiction over the challenge or how it will decide. In a brief order signed by Justice Stanley Feldman, Judge Bolton was requested to submit, under seal, copies of any written communications she may have had with ADWR. The date for that filing is August 4.

No Decision in Challenges to 1995 Legislation

Oral arguments were held before the Arizona Supreme Court on March 19, 1998, concerning the challenges to House Bills 2276 and 2193, both of which made changes in Arizona's general stream adjudication (*see* Jan.-Mar. 1998 *Bulletin*, p. 1). The court has not yet issued its decision in the special action proceeding. The decision will be posted on the Special Master's web page once it is released (www.state.az.us/sp/stream2.htm).

Calendar

September 29, 1998 -- 9:30 a.m.

Interlocutory Issues 4 & 5

Oral Argument

-- Supreme Court, Arizona State Courts Building, 4th Floor

(*see* order July 23, 1998)

November 20, 1998 -- 9:30 a.m.

Case No. 6417 (LCR)

Status Conference before Judge Minker

Apache County Courthouse, St. Johns

(see minute entry July 16, 1998)

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Sources for Help

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

Adjudications, HSRs, WFRs, Discovery

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