

Arizona General Stream Adjudication Bulletin

OFFICE OF THE SPECIAL MASTER • August - October 1998

Supreme Court Hears Claims to Groundwater

On September 29, the Arizona Supreme Court heard oral arguments on interlocutory issues 4 and 5—ten years to the month after they were initially decided by trial judge Stanley Goodfarb. Justices Thomas Zlaket and Stanley Feldman were joined by three court of appeals judges who were sitting by designation: Noel Fidel of Division 1 and William Druke and John Pelander of Division 2. The other supreme court justices, Charles "Bud" Jones, Fred Martone, and Ruth McGregor, had recused themselves from these arguments. The two-hour time for oral argument was evenly divided between state parties who sought to reverse or modify Goodfarb's decision and federal and tribal parties who sought to have it affirmed.

Interlocutory issue 4 asks, "Is non-appropriable groundwater subject to

federal reserved rights?" Issue 5 poses a related question, "Do federal reserved right holders enjoy greater protection from groundwater pumping than holders of state law rights?"

Robert Hoffman, attorney for BHP Copper Co., began the arguments by displaying a series of maps indicating the extent of federal and tribal land in Arizona. Concentrating on issue 4, Hoffman urged the court to adopt Arizona's "reasonable use" groundwater law as a matter of federal law in the adjudications. He frequently referred to *Wilson v. Omaha Indian Tribe* (see sidebar) for support of his argument that the court should look to Arizona's groundwater law as the basis for determining any federal or tribal

rights to groundwater in the adjudications. Several justices asked what would happen if non-Indian groundwater pumpers depleted an aquifer to the point that Indian water rights could not be satisfied. In that case, Hoffman responded, a court could fashion a specific, limited rule to protect the tribe.

Joe Clifford of the Arizona Attorney General's Office argued that the federal reserved rights doctrine should not be automatically extended to groundwater since three sovereigns would then share responsibility for a shared resource. Clifford suggested that attention should be focused on completing the adjudication. A court could decide later

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What is the Debate About?

Issue 4 has never been definitely answered by the U.S. Supreme Court as the leading cases on federal reserved water rights (including *Winters v. United States* and *Arizona v. California*, mentioned frequently in the arguments; see sidebars) have concerned surface water. Only *Cappaert v. United States*, decided by the U.S. Supreme Court in 1976, addresses the question in the unique

context of a rancher's wells interfering with the water level of an underground pool of surface water. The Wyoming Supreme Court overturned an award of groundwater for the benefit of the Arapaho and Shoshone Tribes of the Wind River Reservation. In 1989, that issue, along with many others, was affirmed without opinion by an evenly divided U.S. Supreme Court.

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Supreme Court Hears Claims to Groundwater ... continued from page 1

whether groundwater is necessary to satisfy any of the reserved rights determined in the adjudication.

An attorney for the Salt River Project, Byron Lewis, agreed that the court should not extend the federal reserved rights doctrine to groundwater. But if the court does, argued Lewis, the federal and tribal rights should be described as reasonable use rights. When asked by

Judge Fidel whether other users could out-pump the Indians, Lewis responded that at some point the reasonable use doctrine might have to yield to a new rule sufficient to protect federal interests.

Robert Klarquist, attorney for the United States, argued that the *Cap-paert* case had decided that federal reserved rights are determined by federal law, that the courts have recognized Congress' power to create reserved rights in surface water, and it follows that Congress can create reserved rights in groundwater. Still, Klarquist cautioned against a blanket rule, saying that a court must look to individual reservations to see if groundwater was reserved. Klarquist agreed when Chief Justice Zlaket suggested that the availability of groundwater can be examined when a tribe or federal agency shows interference with its decreed rights. Klarquist also agreed with Justice Feldman who stated a possible rule: federal reserved rights extend to groundwater when necessary to protect the federal purposes for the reservation.

Joe Sparks, counsel for several of the Apache Tribes, mentioned the Ak Chin and Tohono O'odham communities as examples of where Indians have been injured by off-reservation groundwater pumping. Since these reservations now receive supplemental sources of water, this led to a discussion of whether tribes have a groundwater right when surface water is adequate to satisfy the purposes of the reservation. Sparks indicated that they would not have a groundwater right under those circumstances, but the situation may be rare in Arizona. He suggested that the basic measure of Indian reserved water rights is the practically irrigable acreage standard, but

some reservations may have other purposes or factors that will have to be considered.

Reid Chambers, attorney for the Hopi Tribe and representing other northeastern Arizona tribes in this argument, suggested that there is nothing magical about recognizing federal reserved rights in groundwater. What is important, he indicated, is to determine the rights of a tribe. A court can then fashion an appropriate remedy, e.g., pumping levels, buffer zones, aquifer apportionment, if necessary to protect the tribal rights. Chambers also responded to Hoffman's argument that Arizona's reasonable use doctrine should be applied to the tribes, saying that the U.S. Supreme Court will not sanction such a state rule that it believes is hostile to the tribes.

Rodney Lewis, the attorney for the Gila River Indian Community, concluded the morning's arguments by saying that each reservation must be examined individually to determine its water rights. He also acknowledged the importance of a court crafting a remedy that both protects Indian water rights and minimizes off-reservation impacts.

The court took issues 4 and 5 under advisement. The briefing has been completed on a related interlocutory issue, what underground water is appropriable and thereby subject to adjudication in Arizona? The court is expected to set oral arguments on this issue 2 in the next several months. ♠

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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.

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Cases Mentioned Frequently During Oral Argument

What is the Debate About?

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Winters v. United States (U.S. Sup. Ct. 1908)-The Fort Belknap Reservation was created in 1888 in northern Montana for the Gros Ventre and Assiniboine tribes. In 1900, non-Indians built dams on the Milk River upstream of the reservation thus interfering with tribal diversions. The U.S. Supreme Court affirmed an injunction against the non-Indian appropriators holding that the federal government had reserved water for the tribes and exempted the water from appropriation by others so that the tribes could be settled as "pastoral and civilized people."

United States v. Cappaert (U.S. Sup. Ct. 1976)-Rare blind desert pupfish reside in a pool in Devil's Hole, a deep limestone cavern in Nevada. President Truman withdrew the cavern from the public domain in 1952 to create a national monument. In 1968, neighboring ranchers began pumping groundwater from "an underground basin or aquifer which is also the source of water in Devil's Hole," leading to a reduction in the pool level and thereby jeopardizing the fish. The U.S. Supreme Court affirmed an injunction limiting the ranchers' groundwater pumping to ensure the minimal amount of water in the pool (which the court described as surface water) necessary to protect the scientific value of the fish.

Wilson v. Omaha Indian Tribe (U.S. Sup. Ct. 1979)-The tribe's reservation had been established on the west side of the Missouri River in 1854, but subsequent meandering of the river placed

most of the land on the east bank in Iowa. The Iowa land became occupied by non-Indians. In litigation to quiet land titles, the tribe and federal government argued that the river's movement was sudden and the Iowa land remained with the tribe (doctrine of avulsion). The non-Indians argued that the river's movement was gradual and the new Iowa land attached to existing titles on the east bank (doctrine of accretion). The Court held that federal law controls Indian land titles, but federal courts can incorporate state law if three conditions are met: (1) there is no need for a uniform national rule; (2) there is little likelihood of injury to federal trust responsibilities or Indian interests; and (3) the state has a substantial interest in applying its own law. The Court found these three conditions were met and Nebraska state law applied. The case was returned to a lower court to interpret Nebraska law.

Groundwater Order, Gila River Adjudication (Sept. 9, 1988) (Goodfarb, J.)--"This Court finds that federal reserved water rights apply to both surface water and groundwater sources on and off the reservation whose diversion affects reservation sources, to the extent that there is not enough water left to satisfy the reservation's purpose, or [practicably irrigable acreage] if the land is an Indian reservation. . . . [A] court . . . could apportion the federal reserved right between surface and groundwater in such a way that the quantity needed is fulfilled but the damage or loss to other users is minimized." ♪

While issue 4 results from uncertainty in federal law, issue 5 is the product of longstanding tensions among the federal government, tribes, and states over the West's water resources. For over a century, the federal government has generally deferred to state authority over water. In Arizona, this has led to a three-sided state water rights system: a prior appropriation system for surface water, subflow of surface streams, and underground streams; a reasonable use system for percolating (diffuse) groundwater; and a regulatory system under the 1980 Groundwater Management Act for groundwater uses within specified management areas.

Under the *Winters* and *Arizona* cases, the federal government is recognized to have reserved sufficient water to serve the purposes for establishing an Indian reservation, national park, military base, or other land reservations—even though the water is not presently used. The interaction of the reserved rights doctrine and the prior appropriation doctrine is relatively easy, i.e., the federal right has priority usually as of the date the land was withdrawn for a specific purpose and is administered along with state appropriative rights. The interaction of the reserved rights doctrine with Arizona's groundwater law is less clear—leading to issue 5. Will federal rights always have priority or greater protection over subsequent groundwater uses? Or will Arizona's reasonable use law apply to federal and state groundwater users alike—even though the Arizona doctrine apparently focuses more on the pumper's use of the water than on the pumper's impact on neighboring water users. ♪

Gila River Proceedings

Gila River Indian Community

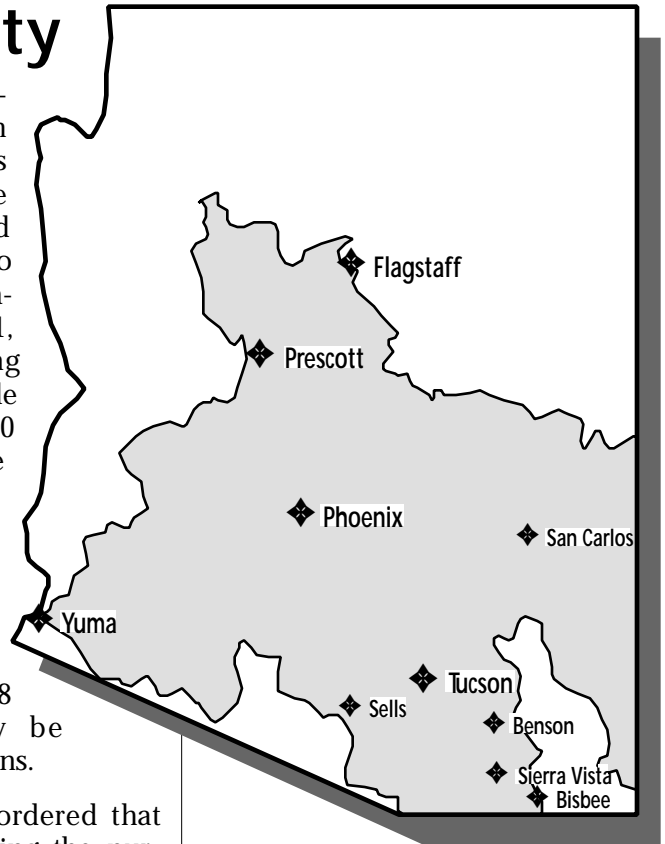
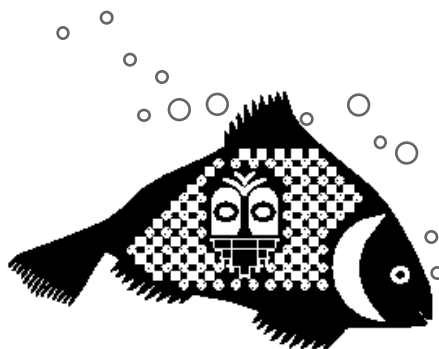
The adjudication court may reach a decision in 1999 on an important threshold legal issue involving the water claims of the Gila River Indian Community (GRIC), under a schedule announced by Judge Susan R. Bolton at a September 11, 1998, status conference. The question likely to be answered as a matter of law is whether prior proceedings in the federal court case known as Globe Equity No. 59 have determined all or part of the water entitlement of the Indian community. Also, discovery will proceed on another significant, threshold issue that will likely go to trial: For determining GRIC's water rights, what were the congressional purposes for establishing the reservation and adding to it over the years?

The case known as Globe Equity began on October 2, 1925, when the United States filed a complaint against water users along the Gila River both upstream and downstream of the planned San Carlos Dam (*United States v. Gila Valley Irr. Dist.*). The suit was apparently brought to protect the water rights of GRIC and the San Carlos Apache Tribe. The litigation eventually led to a consent decree filed in 1935, now known as the Globe Equity Decree, which many non-Indian water users believe has determined the tribes' water rights. Litigation in this case has resumed in recent years as the tribes have sought to enforce some of the provisions of the decree.

At the status conference, Judge Bolton ordered those parties who believe that Globe Equity has determined GRIC's water rights to file motions for summary judgment by March 1, 1999. Parties opposing those motions must file responses within 60 days thereafter. The moving parties will then have 30 days to file final replies. Only those parties who participated in the earlier disclosure process (see July 1998 *Bulletin*, p. 4) may be involved in these motions.

Judge Bolton also ordered that expert reports concerning the purposes of the GRIC reservation be prepared and exchanged by April 1, 1999. The resolution of this threshold issue will likely require an evidentiary hearing that will be scheduled thereafter.

The next status conference will be held in Judge Bolton's Phoenix courtroom at 2:00 p.m. on Monday, December 21, 1998.



GRIC-Related Documents

The second round of disclosure documents relating to the two threshold issues in the Gila River Indian Community case (see above) closed on July 20, 1998. During both rounds of disclosure, 11 parties had produced 16,435 documents totaling approximately 126,300 pages. These documents fill seven four-drawer filing cabinets or 35 copy-paper boxes! The Special Master's office made arrangements with Alphagraphics to copy the documents at a reduced rate for the participants in the case, and twelve parties ordered copies of some or all of the documents.

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GRIC-Related Documents

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The index of all documents disclosed so far on these threshold issues is now available on the Internet. The address for the index is <http://206.16.247.234:591/arizona/index.htm> (really!). The index may also be accessed through a link appearing on the Special Master's web page (<http://www.supreme.state.az.us/wm/stream.htm>). The index is in a data base format, and the on-line user may use simple "find" and "sort" functions to find relevant information. The index of GRIC documents will remain on-line during the briefing period described above. The Special Master will then evaluate usage of the index and decide whether the information should remain on-line.

Trimble v. Chattman

A dispute between neighbors living north of Cave Creek has presented an interesting issue for the adjudication court: How will small springs be handled in the adjudication? The Trimbles and the Chattmans use water from the same spring which is located on the Chattman property. Both parties claimed the water source in the general stream adjudication. Both properties were originally owned by the same person. The area is within the Phoenix Active Management Area (AMA).

The attorney for the Trimbles filed an application for injunctive relief in the adjudication, and Judge Susan Bolton assigned the dispute to Special Master John E. Thorson (Contested Case No. W1-102). Hearings were held in late spring and post-trial briefing concluded in early September. The Master's report is expected shortly.

The Master's report will be released in two formats. A tradi-

CALENDAR

Nov. 11 - Veteran's Day

State and Federal Holiday

Nov. 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)

Nov. 26-27 - Thanksgiving

Special Master's office closed

Dec. 21 - 2:00 p.m.

Case No. W1-203 (GR)
Status Conference
MCSC, Judge Bolton's
Courtroom #513
(see minute entry Sept. 11, 1998)

Mar. 1, 1999

Case No. W1-203 (GR)
Due date: Motions for summary judgment re preclusive effect of Globe Equity decree
(see minute entry Sept. 11, 1998)

Apr. 1, 1999

Case No. W1-203 (GR)
Due date: Exchange of expert reports re purposes of the Gila River Indian reservation
(see minute entry Sept. 11, 1998)

Apr. 30, 1999

Case No. W1-203 (GR)
Due date: Responses to motions for summary judgment re preclusive effect of Globe Equity decree
(see minute entry Sept. 11, 1998)

May 14, 1999

Case No. W1-203 (GR)
Due date: Joinders in responses to motions for summary judgment re preclusive effect of Globe Equity decree
(see minute entry Sept. 11, 1998)

June 1, 1999

Case No. W1-203 (GR)
Due date: Replies to responses to motions for summary judgment re preclusive effect of Globe Equity decree
(see minute entry Sept. 11, 1998)

Abbreviations: GR = Gila River adjudication
LCR = Little Colorado River adjudication
MCSC = Maricopa County Superior Court,
101 W. Jefferson, Phoenix
(note that Judge Bolton has moved to the East Court Building)

tional written report will be filed with the court. A computer compact disk (CD) will also be available for purchase for \$15. The CD will contain the Master's report, all pleadings and exhibits from W1-102, and selected pleadings and all exhibits from an earlier related case (CV 96-06837). All these documents have been scanned into a "portable document format." These documents may be viewed on most computers using the Adobe Acrobat Reader software that is also contained on the CD.

The Master is providing documents in this experimental format for two reasons. First, the CD format allows parties who are interested in the legal issues of this case to have easy and inexpensive access to the court file and all exhibits. Second, the experience gained in this relatively small case allows us to determine how useful this technology might be in a larger, more complex contested case in the adjudication. Please contact the Special Master's office (602/542-9600) if you would like to purchase a CD. ♠

Little Colorado River Proceedings

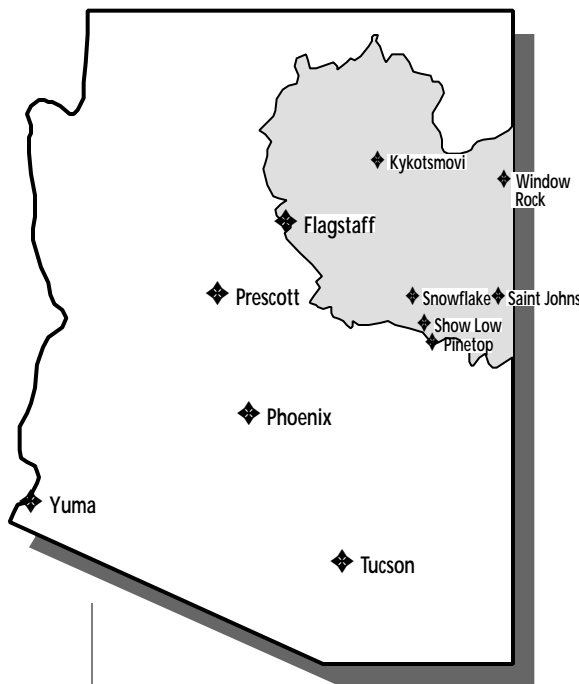
Upcoming Status Conference

The next status conference on settlement efforts in the Little Colorado River adjudication will be held on Friday, November 20, at the Apache County Courthouse in St. Johns. The status conference is likely to be the last for Judge Allen Minker who has presided over the adjudication since 1986. Minker's term expires at the end of December and he is not running for reelection.

The status conference will deal entirely with the status of negotiations to settle the major issues in the Little Colorado River adjudication. Since 1994, the major parties in the adjudication have been searching for a way to determine the water rights of the several Indian tribes (Hopi, Navajo, San Juan Southern Paiute, and Zuni Pueblo) and federal agencies in the basin while not disrupting established water uses in the area. Judge Michael Nelson of Apache County has served as settlement judge in these discussions. The apparent key to such a settlement involves the construction of two water delivery projects to serve the Hopi, Navajo, and San Juan Southern Paiute. Countless other issues, such as providing water to protect the Zunis' interest in land along the Little Colorado River (Zuni Heaven), the management of aquifers under the Hopi and Navajo reservations, and water rights for newly acquired Hopi lands, are also being

addressed during the settlement process. See the July 1998 *Bulletin* for more information about settlement progress.

The negotiating parties have been ordered by Judge Minker to resolve two crucial issues before the upcoming status conference: (1) whether the tribes will be able to market any of the water awarded under the settlement to users off the reservations; and (2) how much water will be available for conveyance by the pipeline running from Lake Powell to the Indian reservations. The successful resolution of these issues is important for ensuring that proposed settlement legislation is ready for consideration by Congress in early 1999. If these and other issues are not decided shortly, Judge Minker is expected to consider whether postponing litigation in the adjudication is still warranted. A round of negotiations was held in Phoenix under the guidance of settlement judge Michael Nelson on September 22-25. ♪



Bulletin Now Available On-line in New Format

Starting with this issue, the *Arizona General Stream Adjudication Bulletin* will be available in two formats on the Arizona judiciary's website (on next page). The text-only version that has been provided for the past year will continue to be available. A second version, resembling the printed version of the Bulletin, will now be available in the Adobe Acrobat portable document format (PDF). Your web browser will read the text-only version. You will need Adobe Acrobat Reader, available for most computer systems, to read the PDF version of the Bulletin. You may download Adobe Acrobat Reader for free from the following website: <http://www.adobe.com/prodindex/acrobat/readstep.html>

Sources for Help

Access the **Arizona Judicial Department web page** at <http://www.supreme.state.az.us/welcome.htm> and the **Arizona General Stream Adjudication web page** at <http://www.supreme.state.az.us/wm/stream.htm>

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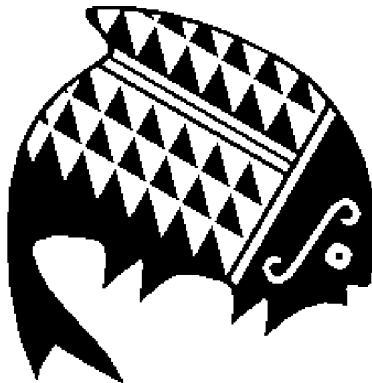
Gila River

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Clerk's Office
Maricopa County Superior Court
Records Mgt. Center
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Phoenix, AZ 85009
(602) 506-4139
FAX (602) 506-4516

Little Colorado River

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

Bulletin Moves to Different Address



The Arizona General Stream Adjudication web page contains general information about the adjudications, Court-approved mailing lists, some significant minute entries and decisions, and past issues of this *Bulletin* (Oct. 1997 to the present). The address (or uniform resource locator, URL) has been modified to <http://www.supreme.state.az.us/wm/stream.htm>

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