

Online ARIZONA GENERAL STREAM ADJUDICATION BULLETIN
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***Copies of the Superior Court's orders and minute entries,
the Special Master's decisions, and the calendar
of hearings and deadlines are available at
<WWW.SUPREME.STATE.AZ.US/WM>***

**COURT SIGNS FINAL ORDER ON SPECIAL MASTER'S
REPORT ON SUPPLEMENTAL CONTESTED
CASE PROCEDURES
CONTESTED CASE NO. W1-11-1174**

On February 10, 2004, Judge Ballinger overruled the Arizona Water Company's objection to the form of order lodged by the Special Master. As reported in the September-December 2003 *Bulletin*, the Court approved and modified in part the Special Master's Report on Issues of Broad Legal Importance Regarding Supplemental Contested Case Hydrographic Survey Reports Filed in the San Pedro River Watershed.¹ The report addressed procedures for notifying claimants and parties when a supplemental contested case HSR is filed.

The company objected to the form of order because the term "nonclaimant water user" was not defined in the Special Master's report, the Court's ruling, or in the proposed order. The Court ruled that the definition of "nonclaimant water user" in Pretrial Order No. 5 Re: Notice of Hydrographic Survey Reports² "adequately describes the class of persons and entities to be afforded notice of supplemental contested case hydrographic survey reports." On February 10, 2004, the Court signed the final order bringing this matter to a conclusion. 🗑️

LITTLE COLORADO RIVER ADJUDICATION

COURT HOLDS STATUS CONFERENCE

On April 6, 2004, Judge Ballinger held a status conference. Counsel reported on the status of the Zuni Indian Tribe Settlement Agreement (see article below *Zuni Indian Tribe Water Rights Settlement Act of 2003*); the report of the United States Bureau of Reclamation (referred to as the Kyl Report after Senator Jon Kyl); the lawsuit filed by the Navajo Nation, regarding claims to Colorado River water, pending in the federal District Court for Arizona; and settlement discussions concerning federal non-Indian reserved water right claims. Settlement talks have been minimal during the past year due to the time required to review the voluminous Kyl Report, the pending litigation in the federal district court, and the resignation of settlement judge Michael C. Nelson.

The Court heard the parties' positions regarding the structure and direction of future settlement negotiations. Several counsel stated that given the number of parties and the complexity of issues, negotiations would benefit from the appointment of a settlement judge. Funding is a concern because there is no provision under current law to pay for the services of a facilitator or settlement judge. Several ideas and suggestions were discussed, but the Court did not

¹ The report and related orders are available at www.supreme.state.az.us/wm/ on the page titled *Gila River Adjudication (In re PWR 107 Claims)*.

² The order is available at www.supreme.state.az.us/wm/ on the page titled *Gila River Adjudication (Superior Court Pretrial Orders)*.

make any decisions. Parties plan to meet to explore further some of the ideas presented.


The Court considered the State of Arizona's Motion for Partial Summary Judgment Establishing Existence of Federal Reserved Water Rights for State Trust Lands and its request to set a briefing schedule. The motion raises the issue of whether federal reserved water rights exist for State Trust lands. The motion was filed in November 2002, but the Court deferred its consideration until the first general hearing held in 2004.

Various parties³ reiterated their positions regarding the Court taking up the motion at this time. At the hearing, the United States reversed its previously stated opposition to the motion. The Hopi Tribe spoke in favor of the Court considering the issue at this time as the Tribe has acquired several ranches outside reservation lands. Because the issue is significant, there was discussion about asking the State to file its motion in the Gila River Adjudication so that the issue would be heard in both adjudications. The Court did not indicate what action it will take.

The Court discussed the concern raised by Abitibi Consolidated Sales Corporation and Arizona Water Company regarding the applicability of a ruling made in one adjudication to the other adjudication. The issue arose after the Court adopted procedures related to the publication of supplemental contested case hydrographic survey reports (HSRs), and the Special Master indicated he will implement those procedures in the contested case involving the water right claims of Phelps Dodge Corporation to Show Low Lake.

The Arizona Department of Water Resources (ADWR) reported it is on track with the preparation of the Hopi Tribe HSR. The Tribe filed amended claims in January 2004, and ADWR has begun its investigations. Field work will take time. ADWR estimates it will take three years to complete the preliminary HSR.

The Special Master reported on the Show Low Lake contested case. The next article *ADWR Directed to Prepare Draft HSR* reviews the order recently issued in that matter and the timelines leading to the filing of a supplemental contested case HSR in January 2005. The HSR will be ADWR's first supplemental contested case HSR filed in either adjudication.

The Court's next hearing will be on **October 19, 2004**, at 9:30 a.m., in St. Johns. Any changes in the date or time will be shown on the *What's New* page at www.supreme.state.az.us/wm/. 

³ Previously, Abitibi Consolidated Sales Corporation, Arizona Public Service, Phelps Dodge Corporation, Aztec Land and Cattle Company, Hopi Tribe, Navajo Nation, and the United States filed responses opposing the motion and request to set a hearing and briefing schedule. The Salt River Project supported the motion.

**ADWR DIRECTED TO PREPARE DRAFT HSR
IN RE PHELPS DODGE CORPORATION (SHOW LOW LAKE)
CONTESTED CASE NO. 6417-033-0060**

On March 1, 2004, the Special Master met with the Arizona Department of Water Resources (ADWR) staff which is preparing the supplemental contested case hydrographic survey report (HSR) for this case. ADWR had requested additional time to file the HSR in order to obtain clarification regarding the applicability of the supplemental contested case HSR procedures the Court recently adopted for the Gila River Adjudication.

The Special Master advised the parties⁴ that he would meet with ADWR's staff to discuss the status of completion of the supplemental contested case HSR; the anticipated date for filing a draft HSR for comment by the parties regarding content and formatting issues, if a draft is filed; the length of a comment period, if comment is allowed; ADWR's readiness to complete the kinds of notice and objection procedures adopted in the Gila River Adjudication; and the availability of funds to complete these tasks.

Recently, the Court adopted notice and objection procedures when ADWR files a supplemental contested case HSR in the Gila River Adjudication. The Court's order provided that, "The Court and the Special Master may consider implementing these procedures in the Little Colorado River Adjudication." Abitibi Consolidated Sales Corporation and the Arizona Water Company filed a response to ADWR's request for additional time raising the issue of extending a ruling made in one adjudication to the other adjudication. The Court considered this issue at its April 6, 2004, conference.

In the absence of other direction from the Court, the Special Master intends to implement in this case, to the most practical extent, the supplemental contested case HSR procedures adopted in the Gila River Adjudication. Such implementation accords with the directive in Pre-Trial Order No. 1 Re: Conduct of Adjudication ¶ 14 that "to the extent possible all proceedings" in the Little Colorado River Adjudication "shall be carried out in a manner consistent with the proceedings conducted as part of" the Gila River Adjudication.

At the March 1st meeting, ADWR advised the Special Master that ADWR can implement the procedures in this case. ADWR can file a draft supplemental contested case HSR and would welcome comments on content and formatting issues. ADWR will review the comments and can file a final supplemental HSR by January 31, 2005. This timeline takes into account not only ongoing tasks such as updating mailing lists and sending new use summonses but also the implementation of the new supplemental contested case procedures.

The Special Master determined that a period of 90 days to submit comments to ADWR is appropriate and decided not to implement the procedure

⁴ Notice of the meeting was given pursuant to *San Carlos Apache Tribe v. Bolton*, 194 Ariz. 68, 977 P.2d 790 (1999).

adopted in the Gila River Adjudication for notice of subsequent supplemental contested case HSRs. That procedure calls for ADWR to send, upon filing the first supplemental contested case HSR, a notice providing a mechanism that permits a claimant or person to ask to be placed on a mailing list, maintained by ADWR, to be notified whenever a supplemental HSR is filed. Because it is likely that such a mailing list will become stale before the next supplemental contested case HSR is filed, that procedure was not adopted for this case. ADWR will have to do a comprehensive mailing when the next supplemental contested case HSR is filed, at which time this procedure may be implemented.

On March 9, 2004, the Special Master entered an order as follows:

1. ADWR is directed to file a draft supplemental contested case HSR on or before **July 2, 2004**.

2. ADWR shall send a copy of the draft supplemental contested case HSR to all the parties on the mailing list for this contested case and all persons appearing on the Little Colorado River Adjudication Court-Approved Mailing List.

3. On or before **October 1, 2004**, claimants and parties may submit comments to ADWR regarding content and formatting issues. The comments should assist ADWR to produce a practical and useful HSR for the limited scope of a contested case. Comments shall not address the merits or attributes of any specific water right as these matters are reserved for later hearing. Persons submitting comments shall provide a copy to all persons appearing on the mailing list for this contested case and on the Little Colorado River Adjudication Court-Approved Mailing List.

4. ADWR shall consider the comments and prepare a supplemental contested case HSR in conformance with A.R.S. 45-256(A) and (B).

5. ADWR is directed to file a final supplemental contested case HSR with the Clerk of the Apache County Superior Court on or before **January 31, 2005**.

6. A preliminary supplemental contested case HSR shall not be required prior to the filing of any supplemental contested case HSR. The procedures set forth in Pre-Trial Order No. 1 ¶ 12[C. HSRs: Notice and Comment](1 and 2) are not adopted for supplemental contested case HSRs.

7. At least 120 days before the final supplemental contested case HSR is filed, ADWR shall file a notice with the Clerk of the Apache County Superior Court that states:

A. The date on which the final supplemental contested case HSR is to be filed.

B. The deadlines for filing a new statement of claimant or amendment to an existing statement of claimant as provided by A.R.S. § 45-254.

C. That any person who has filed a statement of claimant in this adjudication shall notify ADWR, within thirty days of the change, of any of the following changes regarding that person or concerning that person's statement of claimant form: (1) a change in that person's address; (2) an assignment of the statement of claimant form to another person; (3) a transfer to another person of all or part of the land for which a water right has been claimed; and (4) a transfer to another person of all or part of the water right claimed, if the claimed water right has been severed and transferred to another parcel of land.

ADWR may provide any other information that would benefit claimants and others or help ADWR in subsequent notifications.

8. A claimant's responsibility under Pretrial Order No. 4 Re: Notification and Correction of Address Changes to notify ADWR of changes of address or ownership changes shall be publicized frequently.

9. ADWR shall send a copy of the 120-day notice by first-class mail to all persons listed on the mailing list for this contested case, to the persons appearing on the Little Colorado River Adjudication Court-Approved Mailing List, and to all claimants and nonclaimant water users in the Silver Creek Watershed.

10. ADWR is directed to prepare an objection notice(s) and an objection form to be used by claimants to file objections to the final supplemental contested case HSR. As was done when the Final Silver Creek HSR (1990) was published, the Special Master would like to have a single mandatory objection form. Likewise, the Special Master will work with ADWR in the preparation of the objection notice(s) and an objection form.

11. Upon filing the supplemental contested case HSR, ADWR shall send a copy of the objection notice(s) by first-class mail to the persons on the mailing list for this contested case, the persons appearing on the Little Colorado River Adjudication Court-Approved Mailing List, each claimant and nonclaimant water user in the Silver Creek Watershed, all persons who filed objections to the Final Silver Creek HSR, and to every other claimant in the Little Colorado River Adjudication.

12. The procedures set forth in Pretrial Order No. 6 ¶¶ 3 and 5(B)(C)(E) and (F) are adopted for all supplemental contested case HSRs.

13. All claimants in the Little Colorado River Adjudication will be allowed to file objections to any supplemental contested case HSR.

14. A claimant may file written objections to a supplemental contested case HSR or to any part of the report within one hundred eighty days of the date on which the report was filed or until **August 1, 2005**.

15. The requirements for objections to a final HSR contained in Pre-Trial Order No. 1 ¶ 12[C. HSRs: Notice and Comment]3(a)(b) and (c) are adopted for objections to all supplemental contested case HSRs.

16. The procedures set forth in Pretrial Order No. 6 ¶ 7(B) and (C) are adopted for all supplemental contested case HSRs.

17. Objections to the final supplemental contested case HSR shall not be limited in any manner to the supplemental information.

18. A conference will be held near the end of the objection period to discuss the pending motions, scheduling orders for disclosure of information and discovery, and any other matters including the process for determining objections.

ZUNI INDIAN TRIBE WATER RIGHTS SETTLEMENT ACT OF 2003

By Kathy Dolge⁵

A modification of Arizona law is one of the elements necessary to implement the federal Zuni water rights settlement agreement. See January-April 2003 and May-August 2003 *Bulletins* for background information. The Arizona legislature has passed, and Governor Napolitano has signed, this legislation.

Introduced as House Bill 2244, the act amends Tit. 45, Ch. 1, Art. 6 by adding Sect. 45-176. This provision allows a water right to be severed from the land to which it is appurtenant and transferred to an Indian tribe (or to the United States in trust for a tribe) under certain circumstances. The act allows Indian tribes to purchase water rights while retaining the priority of the water. All of the following conditions must apply: (1) the water is for nonirrigation use; (2) the owner of the right approves the transfer; (3) the U.S. Congress has approved a tribal water rights settlement agreement with a tribe for lands within the Little Colorado River basin; (4) the water will be used to restore vegetation and for wildlife; and (5) the amount that may be severed and transferred is capped at 3,600 acre feet annually. A court of competent jurisdiction must approve the severance and transfer; if there is no such court, the director of the Arizona Department of Water Resources must approve.

The act was signed by the governor on April 16, 2004, and will become law 90 days after the Legislature adjourns.

ARIZONA SUPREME COURT ISSUES ORDERS REGARDING SETTLEMENT JUDGE

On March 26, 2004, Chief Justice Charles E. Jones of the Arizona Supreme Court signed orders stating that due to former Judge Michael C. Nelson's resignation from the Apache County Superior Court, the "authority previously vested in him as a facilitator and settlement judge" in both

⁵ Ms. Dolge is Assistant to the Special Master.

adjudications “was effectively terminated upon his resignation from judicial office.” Judge Nelson resigned on October 23, 2003. 🌻

GILA RIVER ADJUDICATION

COURT DECIDES LONG STANDING MOTIONS

On January 16, 2004, the Court denied a request for a declaration of full appropriation in the Gila River System and a motion for an order directing ADWR to implement certain statutes. The backgrounds of both motions were reported in the September-December 2003 *Bulletin*.

Requests for Declaration of Full Appropriation

The San Carlos Apache Tribe, Tonto Apache Tribe, and the Yavapai Apache Nation (Apache Tribes) sought a declaration that the Gila River System is fully appropriated and injunctive relief in the form of an order directed to ADWR requiring that the department undertake certain enumerated acts and refrain from continuing to perform several of its administrative and regulatory functions. The Salt River Project (SRP) supported the motion for a declaration of full appropriation, although its request for relief was narrower than that of the Tribes.

The Court stated, “No one can genuinely dispute that water is a scarce and invaluable resource in this state, but there continue to be disagreements as to the amount of water available in Arizona’s watersheds, including the Gila River System....While common logic may point to the conclusion that existing water right claims filed in this adjudication exceed current estimates of appropriable water supply for most years, it does not automatically follow that this conclusion will remain true for adjudicated water rights.”

After considering the cases relied upon by the Apache Tribes to support their argument, the Court found that “the specific holdings contained in these cases do not dictate a declaration of full appropriation in the Gila River System.”⁶ The Court concluded that “because there is no binding precedent dictating declaratory relief in this proceeding, the existence of continuing genuine disputes regarding available water supply levels prevent granting relief, at this juncture, in the form of a declaration of full appropriation in the Gila River System.”

Motion for Order Directing ADWR to Implement Listed Statutes

The Apache Tribes’ second motion requested the Court to direct ADWR “to undertake limited actions (for example, require owners of ditches, canals, and reservoirs to install headgates and measuring devices) and cease others (such as granting applications for well permits and determining if appropriative water

⁶ The cases are *Arizona v. California*, 373 U.S. 546 (1963); *United States v. Superior Court*, 144 Ariz. 265, 697 P.2d 658 (1985); and *United States v. Gila Valley Irrig. Dist.*, 920 F. Supp. 1444 (D. Ariz. 1996).

rights have been relinquished).” SRP requested an order “directing ADWR to stop accepting new applications to appropriate for consumptive uses and for the construction of non-federal dams and reservoirs.”

The Court noted that the “remedy sought by the Apache Tribes and by SRP would require an order granting relief against ADWR and its director despite the fact that neither the Department nor its director is a claimant or a party to this adjudication.” ADWR is the Court’s technical advisor in the adjudications.

The Court distinguished the Arizona Court of Appeals’ decision in *St. Johns Irrig. & Ditch Co. v. Arizona Water Comm’n*, 127 Ariz. 350, 621 P.2d 37 (App. 1980), by pointing out that in *St. Johns*, the trial court had held “an evidentiary proceeding” and heard “overwhelming evidence” before finding that the water sources at issue had been fully appropriated and adjudicated.

The Court agreed “with those opposing summary judgment that the provisional relief sought against ADWR is far removed from the purpose of this proceeding, which is to determine ‘the nature, extent and relative priority of the water rights of all persons in the river system and source.’...Prohibiting ADWR from performing such tasks as accepting applications for well permits or processing certificates of assured water supply during the water right determination, as opposed to enforcement, phase of this action would divert this adjudication from its current tasks.”

Although finding that the relief requested reached beyond the Court’s jurisdiction, the Court stated that the Apache Tribes, SRP, and those supporting their motions do not lack a method of seeking relief. A remedy could be available “by successful prosecution of a special action,” as was the case in *St. Johns*. Further, the Court indicated that “while the relief sought by the motions falls outside the jurisdiction of this adjudication, the Court does not adopt ADWR’s assertion that the Court lacks the power to enter orders granting relief against the Department in connection with its role in this proceeding.” 🌻

**SPECIAL MASTER WILL HEAR ORAL ARGUMENT
IN RE SUBFLOW TECHNICAL REPORT
SAN PEDRO RIVER WATERSHED
CONTESTED CASE NO. W1-103**

The Special Master denied the request of a group of parties to cross-examine Mr. Richard T. Burtell, a staff member of the Arizona Department of Water Resources (ADWR), but granted a request to present legal arguments regarding ADWR’s proposed use of soil survey maps and the parties’ positions on the procedures ADWR plans to use to delineate the subflow zone in the San Pedro River Watershed.

Request to Cross-Examine Mr. Burtell

The Special Master noted that claimants had prior opportunities to file expert declarations and rebuttal declarations regarding ADWR’s proposed use of the soil survey maps, and further, the expert witnesses who prepared the

declarations had available to them not only ADWR's proposal and Mr. Burtell's testimony but also all the evidence presented over two days of hearing. The Special Master found that sufficient evidence had been presented regarding the appropriateness of using the soil survey maps as proposed by ADWR.

The Special Master stated he 'is not inclined to adopt ADWR's proposal as the exclusive or only indicator to delineate the subflow zone. It is clear from the evidence heard that there is no single or exclusive available indicator that delineates the subflow zone as defined in *Gila IV*.⁷ Delineating the entire subflow zone in a watershed will require using more than one indicator."


Request to Present Legal Arguments

The Special Master granted the request for parties to present legal arguments and their positions on all the proposed procedures. Parties were given until March 3, 2004, to file memoranda stating their legal arguments and positions on any of the issues arising from ADWR's proposals. Parties were invited to state their positions on the four proposed rulings made on September 8, 2003. Responses were due on April 12, 2004, and replies will be due on May 7, 2004.

Prior to the filing of responses, SRP filed a motion for expedited consideration of its request to exclude eleven exhibits attached to the brief filed by the Cities of Chandler, Glendale, Mesa, and Scottsdale. The Special Master took up the request on an expedited basis, and on April 7, 2004, issued an order granting in part and overruling in part SRP's objections to the eleven exhibits.

Oral argument will be heard on **May 20, 2004**, at 9:00 a.m., in Courtroom 301, Old Courthouse, 125 West Washington, Phoenix, Arizona.

Rebuttal Declarations Filed

Parties had the opportunity to file sworn and rebuttal declarations regarding ADWR's proposal to use the Natural Resources Conservation Service's soil survey maps to delineate the subflow zone. ADWR proposes to use those maps, instead of previously identified maps, to delineate the subflow zone. At the October 21, 2003, hearing, Mr. Burtell described the proposed use of the soil survey maps. The Gila River Indian Community, Salt River Project, and the United States filed rebuttal declarations. 


COURT OVERRULES OBJECTION TO REPORT IN RE CORONADO NATIONAL MEMORIAL CONTESTED CASES NOS. W1-11-556 and W1-11-1132

On February 20, 2004, the Court overruled the objection of the Bella Vista and Pueblo del Sol Water Companies to the Special Master's report

⁷ *In re the General Adjudication of All Rights to Use Water in the Gila River System and Source*, 198 Ariz. 330, 9 P.3d 1069 (2000), *cert. denied sub nom. Phelps Dodge Corp. v. U.S.*, 533 U.S. 941 (2001) ("*Gila IV*").

recommending approval of two stipulated agreements involving the water right claims of the United States within the Coronado National Memorial. The report was reviewed in the May-August 2003 *Bulletin*,⁸ and the objection was reported in the September-January 2003 issue.

The Water Companies wanted provisions, contained in the stipulations regarding the stipulations' binding effect, to be included in the final order. The Court agreed "with the Water Companies' assertion that the terms of the stipulations that are the subject of the report can only affect and bind, currently or prospectively, signatories to the stipulations (and their successors and assignees)," but "because each proposed stipulation explicitly recognizes this fact, there is no need for an additional recitation in the proposed order of the type suggested by the Water Companies."

On March 9, 2004, the Court signed the Order and Partial Decree of Stipulated Water Rights in the San Pedro River Watershed for the Coronado National Memorial. The conclusion of this matter marks the second partial decree of federal water rights adjudicated in the Gila River Adjudication. The first partial decree, filed on July 24, 2001, involved the water rights of the United States in a portion of the Saguaro National Monument. 

**SPECIAL MASTER SETS CONFERENCE
IN RE PWR 107 CLAIMS
CONTESTED CASE NO. W1-11-1174**

The Special Master will hold a status conference on **May 20, 2004**, to hear from the parties, and as appropriate from ADWR, (1) the outcome of settlement discussions, (2) status of field investigations, (3) extent of work done on the supplemental contested case HSR, (4) a date for filing the supplemental contested case HSR, (5) a schedule for disclosures of information, (6) a schedule for discovery, and (7) any other procedures that will expedite the conclusion of this case. This case was pending the Court's determination of the issues of broad legal importance, recently finalized as reported in the article *Court Signs Final Order on Special Master's Report on Supplemental Contested Case Procedures*.



⁸ The report and related orders are available at www.supreme.state.az.us/wm/ on the page titled *Gila River Adjudication (In re Coronado National Memorial)*.