

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
[HTTP://WWW.SUPREME.STATE.AZ.US/WM](http://www.supreme.state.az.us/wm)***

JOINT LEGISLATIVE COMMITTEE APPOINTED

State Senate President Ken Bennett (R-1) has appointed a Joint Legislative Adjudication Monitoring Committee. Arizona Revised Statutes section 45-264 provides for the appointment of this committee.

Mr. Bennett appointed ten members: Senators Marsha Arzberger (D-25), Linda Binder (R-3), Jack A. Brown (D-5), Jack W. Harper (R-4), and Marilyn Jarrett (R-19), and Representatives Meg Burton Cahill (D-17), Joe Hart (R-3), Steve Huffman (R-26), Jack C. Jackson, Jr. (D-2), and Tom O'Halleran (R-1).

Senate analyst Kerry Morey (602/542-3171) and House analyst Kathi Knox (602-542-3848) will staff the committee.

In accordance with its legislative mandate, the committee will monitor the progress of the adjudications and the status of their funding, conduct hearings and request information from the Arizona Department of Water Resources as necessary to be apprised of the adjudications, and make recommendations for legislative action necessary for the efficient, prompt, and just conclusion of the adjudications. The committee will meet and report annually. 🌻

ADWR SENDS OUT NEW USE SUMMONSES

Since September 2001, the Arizona Department of Water Resources (ADWR) has sent out summonses to people who may have initiated new water uses in both the Gila River and Little Colorado River systems.¹ Persons who received a permit from ADWR to drill or deepen a well, build a stockpond, develop a spring, or who began a new water use after specified dates were sent a summons by certified mail.

A summons must be served because the adjudications are legal proceedings in the Superior Court of Arizona. The mailing of new use summonses has reached potential claimants and added parties assuring that

¹ This article is based on a report ADWR filed on May 30, 2003. Gila River Adjudication Docket No. 3094.

both adjudications are comprehensive proceedings to determine all water rights.

Gila River Adjudication

Between September 2001 and October 2002, ADWR mailed 15,447 summonses by certified mail for new water uses initiated between July 1991 and December 31, 2001. Through May 1, 2003, ADWR received 6,422 statements of claimant.

Before the end of 2003, ADWR plans to mail summonses for new uses initiated during calendar year 2002. Thereafter, ADWR intends to continue the mailings annually for new uses begun during the preceding calendar year. The Department estimates that approximately 1,200 new use summonses will be sent out every year.

The U.S. Postal Service charges about \$5.00 per address to mail each summons by certified mail. ADWR pays the associated copying costs and provides the personnel to do the mailings. After entering the information in a database, ADWR sends the claims and all filing fees to the Clerks of the Superior Court in Apache County and Maricopa County.

ADWR will resend returned summonses for which better mailing addresses are obtained from county assessors' records. Summonses are returned due to an incorrect address, unclaimed mail, deceased addressee, no forwarding address provided, no mail receptacle, mail is refused, and lack of postage. Some mail is returned without stated reasons, and some mail is neither delivered nor returned. ADWR intends to improve the efficiency of the mailings by reviewing county assessors' records and reducing the number of returns.


Little Colorado River Adjudication

In February 2003, ADWR mailed 1,565 summonses for new water uses initiated between November 24, 1985, and December 31, 1996. In April 2003, the Department mailed 1,534 summonses for water uses initiated between January 1997 and December 31, 2002. Through May 1, 2003, ADWR has received 390 statements of claimant.

In the Little Colorado River Adjudication, ADWR will again send out summonses in 2004, for new water uses initiated in 2003. The Department estimates that approximately 300 new use summonses will be sent out annually.

The Department has not mailed new use summonses previously in the Little Colorado River Adjudication. ADWR plans to handle future mailings of new use summonses in both adjudications in the same manner.

Each mailing includes instructions on how to file a water right claim. There are four Statement of Claimant forms: *Domestic, Stockpond, Irrigation, and Other Uses*. ADWR provides forms and answers questions about the process. Staff can be reached by telephone at 1-866-246-1414. The forms can be downloaded from ADWR's Web site at <www.water.az.gov>. A filing fee is due for each claim filed, and the fee will depend on the type of claimant and the total amount of water claimed.

Persons receiving a summons have 90 days to file a claim, but potential claimants are informed that, "State law allows rights holders to file adjudication forms *after* expiration of the 90-day period." 

LITTLE COLORADO RIVER ADJUDICATION

SUPERIOR COURT HOLDS HEARING

On June 24, 2003, Judge Ballinger heard from the parties about the status of settlement discussions, from the Arizona Department of Water Resources (ADWR) on the service of new use summonses, and from the Special Master about the proceedings in the Show Low Lake case and the outcome of the general appropriation request for Fiscal Year 2005.

Settlement Discussions

On June 23, 2003, President George W. Bush signed the Zuni Indian Tribe Water Rights Settlement Act of 2003. The signing of this water rights settlement agreement marks a significant accomplishment of the Little Colorado River Adjudication and speaks well of the ongoing settlement negotiations. The

signing is described in the article on page 7, *President Bush Signs Zuni Indian Tribe Settlement Act of 2003*.

Although settlement discussions involving the Hopi Tribe and the Navajo Nation's water rights have slowed due to the continuing work on the report being prepared by the United States Bureau of Reclamation, discussions have continued on Federal non-Indian water right claims. A preliminary draft of the Kyl Report (named after Senator Kyl, who has been instrumental in obtaining the Bureau to prepare the report) has been produced, and a final draft is expected by the end of the year. The preparation of the report has not progressed as timely as planned, but portions of the report are being distributed to the parties.

The discussions regarding Federal non-Indian water right claims (of the National Park Service, Forest Service, and Bureau of Land Management) continue. Negotiations are centering on two issues on which consensus has not yet been reached. The involved parties continue to meet regularly.

ADWR's Mailing of New Use Summonses

Since January of this year, ADWR has been sending out summons to people who have initiated new uses of water since November 24, 1985. This is the first time that new use summonses have been sent out in the Little Colorado River Adjudication. The mailings have been done in two parts. How the mailings are done and their results thus far are described in the article on page 2, *ADWR Sends Out New Use Summonses*.

The Show Low Lake Contested Case

This contested case involves the water right claims of Phelps Dodge Corporation (Phelps Dodge) to Show Low Lake. Judge Ballinger referred the determination of these claims to Special Master Schade in November 2002. In February, the Special Master held a status conference and issued an order initiating this contested case.


The proceedings of that conference were reported in the January-April 2003 issue of the *Bulletin*. Since then, Phelps Dodge has amended and supplemented its adjudication water right claims to Show Low Lake. See the

article below, *Phelps Dodge Files Amended Claims*. ADWR will use the new information to update the watershed file reports contained in the Final Silver Creek Hydrographic Survey Report (1991) and prepare a supplemental contested case HSR due on December 31, 2003.

The General Appropriation Request for Fiscal Year 2005

Special Master Schade reported that the Legislature approved the Judicial Department's request for a general fund appropriation of \$20,000.00 for the Little Colorado River Adjudication for Fiscal Year 2004, which begins on July 1, 2003. This appropriation marks the first time the Legislature has been asked for and has approved general funding for an adjudication.

Had the appropriation not been approved, the fund of filing fees would have been insufficient in Fiscal Year 2004 to fund the judicial expenses related to the adjudication. In addition to this appropriation, the funding of the Little Colorado River Adjudication has benefited from new filing fees from new use claimants and reduced expenses.

The Court's next hearing in the Little Colorado River Adjudication will be held on **Wednesday, October 15, 2003**, at 9:30 a.m., in St. Johns. Any changes in this date or time will be shown on the *What's New* page of the Special Master Web site (<<http://www.supreme.state.az.us/wm/>>). 

**PHELPS DODGE AMENDS AND SUPPLEMENTS CLAIMS
IN RE PHELPS DODGE CORPORATION (SHOW LOW LAKE)
CONTESTED CASE NO. 6417-033-0060**

This case involves the water right claims of Phelps Dodge Corporation (Phelps Dodge) to Show Low Lake. The claims are based on a certificate of water right issued by the State of Arizona to Phelps Dodge.

On July 30, 2003, Phelps Dodge filed an Amended and Supplemental Statement of Claimant for its claimed water rights to Show Low Lake. The Arizona Department of Water Resources will use the information to update the pertinent portions of the Final Silver Creek Watershed Hydrographic Survey

Report (1990) and prepare a supplemental report due on December 31, 2003. Claimants may file objections to the supplemental report. 🌻

PRESIDENT BUSH SIGNS ZUNI INDIAN TRIBE WATER RIGHTS SETTLEMENT ACT OF 2003

By Kathy Dolge²

President Bush signed the Zuni Indian Tribe Water Rights Settlement Act on June 23, 2003, following unanimous consent in the Senate and a near-unanimous vote in the House of Representatives.

The settlement agreement resolves decades-long disputes among the Zuni Pueblo, northeastern Arizona communities and irrigation companies, utilities, the federal government, and the State of Arizona. Much of the dispute centered on Zuni religious lands near St. Johns, lands designated by Congress as “the Zuni Heaven Reservation” in 1984. All parties sought a legislative solution as a way to avoid lengthy and costly litigation.

The Act contemplates a total of \$26.5 million to settle claims, with \$19.25 million coming from the federal government. During the current fiscal year, appropriations are earmarked for acquisition of water rights and associated lands. Scheduled through 2006 are expenditures necessary to restore, rehabilitate, and maintain the Zuni Heaven Reservation, including the Sacred Lake, wetlands, and riparian areas.

Another provision of the Act requires the Secretary of the Interior to take specified lands into trust for the benefit of the Zuni Tribe, but those lands will not have federal reserved rights to surface water or groundwater. The Zuni Tribe is required to make payments in lieu of the state, county, and local taxes that would otherwise apply if those lands were not taken into trust.

Proceedings for approval of the settlement agreement will come before the adjudication court in due course, pursuant to the Arizona Supreme Court’s Administrative Order filed September 27, 2000. The federal Act requires all aspects of the settlement to be finalized no later than December 31, 2006. 🌻

² Ms. Dolge is Assistant to the Special Master.

GILA RIVER ADJUDICATION

SPECIAL MASTER TO HEAR SUBFLOW ISSUES IN RE SUBFLOW TECHNICAL REPORT SAN PEDRO RIVER WATERSHED CONTESTED CASE NO. W1-103

The Special Master will hear the issues arising from the *Subflow Technical Report, San Pedro River Watershed*, prepared by the Arizona Department of Water Resources (ADWR), and the objections filed to the report. The Superior Court referred this matter to the Special Master, who held a conference on April 10, 2003, to set hearing procedures. The determination of the subflow issues is important for many claimants.

In an order issued on April 25, 2003, Special Master Schade identified four legal issues whose determinations will focus the examination of witnesses, and set a briefing schedule. The Special Master will rule on these issues before the hearing to be held in October. The issues are:

1. Should ADWR's subflow analysis consider predevelopment or current stream flow conditions?
2. Should ADWR consider the criteria specified in *Gila IV*³ to identify the subflow zone or have the criteria already been taken into account in the Arizona Supreme Court's holding that the saturated floodplain Holocene alluvium is the subflow zone?
3. In addition to analyzing a well's drawdown at the subflow zone, should ADWR report the cumulative effect of wells or of groups of wells?
4. Should ADWR's findings be reported in supplemental contested case hydrographic survey reports (HSRs) ("case-by-case") or in a supplemental San Pedro River Watershed HSR ("the entire watershed"), which identifies

³ *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*"). This is the decision of the Arizona Supreme Court, which triggered the determination of the subflow issues the Special Master is hearing.

the subflow zone, wells reaching and depleting a stream, and *de minimis* water rights?

Parties were allowed to file sworn rebuttal declarations whose scope is limited to rebutting the opinions or information contained in the declarations filed on June 17, 2002, and shall not present any new matters not contained in those declarations. Rebuttal declarations were due on June 27, 2003.

After the Special Master rules on the four legal issues, he will hold a hearing on October 21 and 22, 2003, for the cross-examination of witnesses who submitted declarations. The Superior Court has ruled that, "The declarations submitted by the parties will serve as the direct testimony at any hearing scheduled by the Special Master. The only testimony to be received at any scheduled hearing will be by way of cross-examination (and, perhaps, some limited redirect examination)."⁴ The extent of redirect examination, if any, will be determined at the hearing.

The following parties submitted declarations:

1. Arizona Public Service Company and Phelps Dodge Corporation
2. BHP Copper, Inc.
3. Cities of Chandler, Glendale, Mesa, and Scottsdale
4. Gila River Indian Community
5. Gila Valley and Franklin Irrigation Districts
6. Salt River Project
7. United States
8. Verde Valley Water Users, Inc.

These same parties in addition to the Bella Vista Water Company; Pueblo del Sol Water Company; the "Verde Valley Communities" (Cities of Cottonwood and Sedona, and Towns of Jerome and Clarkdale); the "Central Valley Irrigation Districts" (Maricopa-Stanfield and the Central Arizona Irrigation and Drainage Districts); and the City of Tucson filed rebuttal declarations.

⁴ Minute Entry 3 (January 22, 2002).

The Special Master would like to see cross-examination limited to not more than two hours for each witness with the expectation that the hearing can be concluded in two days. The cross-examination of witnesses shall address, but will not be limited to, the following matters:

Location of Subflow Zone

1. Are ADWR's recommendations for locating perennial, intermittent, and effluent-fed streams valid?
2. Does ADWR's recommendation that the entire lateral extent of the floodplain Holocene alluvium be assumed to be saturated comport with *Gila IV*?
3. Is ADWR's recommended assumption for effluent-fed streams "that the sediments immediately beneath these reaches are unsaturated due to clogging layers" valid?⁵
4. Are ADWR's recommendations sufficient to identify and exclude tributary aquifers and basin fill saturated zones?

Cone of Depression Test

1. Does ADWR's recommended drawdown of greater than or equal to 0.1 foot, where the cone of depression has reached the edge of the subflow zone, comport with *Gila IV*?
2. Does ADWR's recommended condition that the water level in a well be below the water level in the subflow zone during pumping comport with *Gila IV*?
3. What is the accuracy and reliability of analytical (THWELLS) and numerical (MODFLOW) models for the cone of depression test?
4. Is ADWR's recommendation that the impact of a well be measured "at the time of the modeling" scientifically valid?⁶
5. Should ADWR recommend a methodology to evaluate the impact of wells perforated below an impervious formation within the limits of the subflow zone?

⁵ ADWR's *Subflow Technical Report, San Pedro River Watershed* 9.

⁶ *Id.*, 31.

Parties raised other issues at the April 10, 2003, conference. The Special Master did not appoint a technical committee because it could unreasonably delay this matter, did not direct ADWR to use the professional services of a specific suggested source, and will allow ADWR's legal counsel to represent the department's staff during cross-examination. The persons who worked on ADWR's report may be cross-examined.

In a ruling issued on August 7, 2003, Special Master Schade clarified the scope of discovery stating that formal discovery was not contemplated in this proceeding, but the Special Master encouraged the litigants to cooperate in limited informal discovery. 🗑️

**SPECIAL MASTER SUBMITS REPORT ON THE
SETTLEMENT OF CLAIMS OF THE UNITED STATES
IN RE CORONADO NATIONAL MEMORIAL
CONTESTED CASES NO. W1-11-556 and W1-11-1132**

On May 15, 2003, Special Master Schade submitted to the Superior Court his recommendations for two settlement agreements involving the water right claims of the United States within the Coronado National Memorial. Objections to the Special Master's report may be filed on or before November 12, 2003. The Superior Court will rule on any objections filed to the report.

The Coronado National Memorial is a federal reservation of land in the San Pedro River Watershed administered by the United States Department of the Interior, National Park Service. These cases address the objections filed to the water right claims of the United States reported in the Final San Pedro River Watershed Hydrographic Survey Report (1991) (San Pedro HSR).

The parties in each case entered into stipulated agreements that included abstracts of proposed water right for the claims of the United States. The Special Master's partial report recommends that the Superior Court approve the stipulated determinations and enter a partial decree in the San Pedro River Watershed adjudication. The report addresses two stipulations, the first one was filed on March 19, 1996, and the second was filed on May 2, 2003.

The March 19, 1996, Stipulation

On March 26, 1996, Special Master Thorson accepted the first stipulation filed in Contested Case No. W1-11-556. The stipulation contained abstracts of proposed water rights for three springs and ten wells. Special Master Thorson ruled that the abstracts would be held for inclusion in the first appropriate catalog or report of water uses for the San Pedro River Watershed. Although the parties continued their negotiations, shortly thereafter this case was stayed pending the outcome of three interlocutory appeals before the Arizona Supreme Court.

In September 2001, Special Master Schade requested a report from the parties regarding the negotiations. The parties filed reports in December 2001, June 2002, and December 2002. A conference was set on May 5, 2003, but it was vacated when the parties filed a second stipulated agreement.

The May 2, 2003, Stipulation

The second stipulation was filed on May 2, 2003, and was accepted by Special Master Schade on May 6, 2003.

The second stipulation did not contain new or modified abstracts for the three springs that were included in the stipulation Special Master Thorson accepted on March 26, 1996. In the order accepting the second stipulation, Special Master Schade stated that he would include in the partial report he would file with the Superior Court the stipulation and abstracts for the three springs that Special Master Thorson accepted on March 26, 1996.

The stipulation accepted on May 6, 2003, contained abstracts of proposed water rights for nineteen wells and one stockpond and listed four claims that the United States would withdraw after the Superior Court approves the stipulation.

The stipulation covered eleven claims that are part of Contested Case No. W1-11-556 (including the four claims to be withdrawn) and fourteen claims that are part of Contested Case No. W1-11-1132. The stipulation filed on May 2, 2003, contained abstracts of proposed water rights or withdrawals for the same wells or groundwater claims for which abstracts were submitted with the

stipulation accepted on March 26, 1996. Special Master Schade found that the abstracts of water rights for the wells or groundwater claims included in the stipulation accepted on March 26, 1996, were amended and superseded by new abstracts contained in the stipulation accepted on May 6, 2003.

Contested Case No. W1-11-1132

In 2001, the United States acquired a private land inholding within the Memorial and the water right claims appurtenant to the land. Those claims and their objections were docketed in Contested Case No. W1-11-1132. A case initiation order has not been filed in that matter, but the United States and the objectors reached an agreement and submitted abstracts for the claims in that case. The abstracts of water rights are for thirteen wells and one stockpond.

The Special Master recommended that the Court approve the following stipulations and abstracts of water rights:

1. Contested Case No. W1-11-556: Stipulation accepted by Special Master Thorson on March 26, 1996, involving three springs.
2. Contested Case No. W1-11-556: Stipulation accepted by Special Master Schade on May 6, 2003, involving six wells.
3. Contested Case No. W1-11-1132: Stipulation accepted by Special Master Schade on May 6, 2003, involving thirteen wells and one stockpond.

The United States agreed to withdraw claims for four wells no longer used. On May 7, 2003, in a letter to ADWR, the United States withdrew the four claims.

Special Master Schade determined that special proceedings to consider both stipulations and the abstracts were not warranted under the Arizona Supreme Court's Special Procedural Order Providing for the Approval of Federal Water Rights Settlements, Including Those of Indian Tribes (1991)⁷ because these settlements were reached in the normal course of the adjudication of the

⁷ The Special Procedural Order is available online at <www.supreme.state.az.us/wm/> on the *Arizona Supreme Court: Decisions and Orders* page.

San Pedro River Watershed, and the Special Master found no special circumstances preventing the Superior Court from considering these agreements in the normal course of the adjudication. These claims were settled following the publication of the San Pedro HSR, filing of objections to the HSR, organization of contested cases, and completion of negotiations begun in 1995. The Special Procedural Order states that proceedings are warranted when “[t]here are special circumstances preventing the consideration of the settlement agreement in the normal course of the adjudication.”

A.R.S. § 45-257(A)(2) provides that when the Special Master submits a report to the Superior Court, “[i]f the report covers an entire...federal reservation, each claimant may file with the court written objections to the report within one hundred eighty days of the date on which the report was filed with the court.” Special Master Schade determined that both stipulations and abstracts of water rights cover an entire federal reservation, and claimants have 180 days to file objections to the report.

The Special Master’s Recommendations

The Special Master recommended that the Superior Court:

1. Find that notice of the report was given as required by law, and the time allowed for claimants to file objections to the report was as required by law.

2. Find that the stipulated agreements of the parties and the abstracts of proposed water rights for the United States within the Coronado National Memorial should be approved.

3. Adjudicate and decree the water rights of the United States within the Coronado National Memorial as set forth in the twenty-four abstracts of water rights stipulated by the parties, including amendments, as described in the report.

4. Order that the twenty-four stipulated abstracts shall be incorporated in the tabulations or lists of all water rights and their relative priorities on the Gila River system and source in the form that the Court shall determine, pursuant to A.R.S. § 45-257(B)(2), to be most appropriate.

The Superior Court's Consideration of the Report

A copy of the report was mailed to all the parties in both contested cases and to all persons listed on the Gila River Adjudication Court-Approved Mailing List. An electronic copy of the report is posted on the Special Master's Web site (<<http://www.supreme.state.az.us/wm/>>) on the *Gila River Adjudication (In re Coronado National Memorial)* page.

The Special Master submitted for the Superior Court's approval a proposed Order and Partial Decree of Stipulated Water Rights in the San Pedro River Watershed for the Coronado National Memorial.

Any claimant in the Gila River Adjudication may file a written objection to the report on or before **Wednesday, November 12, 2003**. Responses to objections shall be filed by **Monday, December 8, 2003**. Objections and responses must be filed with the Clerk of the Maricopa County Superior Court, 601 West Jackson Street, Phoenix, Arizona 85003, Attn: Water Case.

The hearing on the Special Master's motion to approve the report and consider any objections to the report will be taken up as ordered by the Superior Court. The Superior Court may adopt, reject, or modify the report in whole or in part or may return the report to the Special Master with instructions. It is not known when the Superior Court will take up the report. 🌻

SPECIAL MASTER REQUESTS COMMENTS REGARDING THE SAN PEDRO RIPARIAN NATIONAL CONSERVATION AREA

Although this matter has not been initiated as a contested case, in 1995, Special Master John E. Thorson prepared a proposed Court-approved mailing list of the claimants, landowners, lessees, and objectors listed in the watershed file reports ("WFRs") related to the San Pedro Riparian National Conservation Area ("SPRNCA"). The SPRNCA is a federal reservation of land, located within the San Pedro River Watershed, which Congress established in 1988. The WFRs were contained in the Final San Pedro River Watershed Hydrographic Survey Report (1991).

In November 2002, the Gila Steering Committee informed the Superior Court that “[t]he United States intends to submit amended claims to water for the SPRNCA in the spring of 2004.”⁸

On June 13, 2003, Special Master Schade asked the United States to file by August 29, 2003, a status report describing the work done or in progress to prepare new or amended statements of claimant for its claimed water rights within the SPRNCA, indicating an anticipated date for filing new or amended claims, and stating its position about initiating a contested case for those claims.

All other persons who Special Master Thorson identified as potential parties in a contested case are allowed to file comments by October 3, 2003, stating their position about initiating a case for the claims of the United States. Pending are Phelps Dodge Corporation’s motion to intervene filed in March 1995, and six joint motions to intervene in potential contested cases filed by ASARCO and Magma Copper Company in September 1995. Special Master Thorson did not rule on the motions to intervene because a contested case had not been initiated. Thereafter, this matter was held in abeyance. 🌻

⁸ *Steering Committee Report on Claims or Issues for Court Consideration 4* (November 12, 2002). Gila River Adjudication Docket No. 3022.