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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)***

**ARIZONA SUPREME COURT CONTINUES
CONSIDERATION OF PETITIONS FOR
INTERLOCUTORY REVIEW
CONTESTED CASES NOS. W1-203 AND W1-206**

The Arizona Supreme Court continued consideration of the petitions for interlocutory review filed by the United States and the Gila River Indian Community (GRIC) and the cross-petition for review filed by the Salt River Project (SRP) in order to consider them with the petition for interlocutory review recently filed by the San Carlos Apache Tribe. The petitions of the United States, GRIC and SRP were reviewed in the *Bulletin's* May-August 2002 issue.

On November 19, 2002, the San Carlos Apache Tribe filed a petition for interlocutory review¹ of the Superior Court's grant of partial summary judgment in Contested Case No. W1-206. The Superior Court's grant of partial summary judgment and subsequent denial of a motion to alter or amend judgment were reviewed in the January-April 2002 and May-December 2002 issues of the *Bulletin*.

The San Carlos Apache Tribe's petition for interlocutory review claims that the Superior Court erred in:

1. Holding that "*res judicata* precluded the Tribe from claiming water for its Tribal homeland in excess [of] the United States' right to water for 1,000 acres under the *Globe Equity Decree* (hereinafter "*Decree*")."²

¹ An interlocutory appeal asks an appellate court to decide an issue which cannot be resolved on the facts in the case, but whose resolution is essential to a final decision in the case. On September 26, 1989, the Arizona Supreme Court adopted a Special Procedural Order Providing for Interlocutory Appeals and Certifications. The order established a procedure for early review of substantial questions in the Gila River Adjudication. Any party can petition the Supreme Court to review, by interlocutory appeal, any ruling of the Superior Court, and the Superior Court can certify to the Supreme Court questions deemed substantial for review.

² The *Globe Equity Decree* is the decree relating to water rights to the upper mainstem of the Gila River that the United States District Court entered in *United States v. Gila Valley Irr. Dist., Globe Equity No. 59 (D. Ariz. 1935)*.

2. Ruling that the statement of facts contained in the Court's order entered in Contested Case No. W1-203 involving GRIC also applies to the Tribe in Contested Case No. W1-206 that involves the Tribe.

3. Denying the Tribe's "request for an evidentiary hearing on the adequacy of the representation of the United States as its Trustee" and ruling that *res judicata* applies to the Tribe under the *Decree*.

4. Failing "to conclude that the United States lacked any authority from Congress to represent the Apache Tribe in *Globe Equity* or to dispose of Tribal property which would preclude the application of *res judicata*; or alternatively, where it failed to conclude that the issue of lack of authority is a disputed issue of material fact."

5. Failing to determine that a 1924 agreement or the *Decree* precludes GRIC and the United States, acting on behalf of GRIC, "from claiming any water rights to the San Carlos River in the Gila River stream adjudication."

6. Ruling that the mutuality exception under *Nevada v. United States*³ "does not apply to bar any claims that the parties to the *Globe Equity Decree* may have to any of the tributaries of the Gila River in the Gila River stream adjudication."

At press time, only the United States' response to the San Carlos Apache Tribe's petition had been received. The United States responded that the Supreme Court should grant the Apache Tribe's petition regarding the Tribe's issue number six; Contested Cases W1-203 and W1-206 should be consolidated for joint consideration with the United States' and GRIC's pending petitions for interlocutory review; and the Supreme Court should remand to the trial court for further proceedings the issues which are specific to the Apache Tribe, including the Tribe's issues numbered 1, 3, and 4.

³ *Nevada v. United States*, 463 U.S. 110, 103 S. Ct. 2906 (1983).

On December 23, 2002, Phelps Dodge Corporation filed a cross-petition for interlocutory review in W1-206. The petition claims that the Superior Court erred when it found that the claims of the parties in *Globe Equity* to the waters of the Gila River's tributaries had been "split" from those parties' claims to the decreed segment of the River. By "splitting" the claims, the trial court found that tributary claims had not been part of the *Decree* and were not affected by the same preclusive effect that the *Decree* had on the parties' claims to the decreed stem of the Gila River. According to Phelps Dodge, the Superior Court properly found that the *Decree* had a preclusive effect on the San Carlos Apache Tribe's claims to the Gila River, but erred when it found that the *Decree* did not preclude further claims to the Gila River's tributaries.

Phelps Dodge claims that the trial court "ruled inaccurately that the Amended Complaint [in the *Globe Equity* litigation] indicated an intent to exclude or split the tributary claims." The trial court inferred from the amended complaint and from the *Globe Equity Decree* that the Apache Tribe's tributary claims had been split or excluded from the *Decree*. Phelps Dodge claims that neither document shows intent to split the claims, and the Apache Tribe's claims to tributaries are barred by the *Globe Equity Decree*.

It is not known when the Supreme Court will rule on the petitions. 🗓️

JOE SMITH RETIRES AND HERB GUENTHER IS SELECTED TO BE ADWR DIRECTOR

After 24 years of service to the State of Arizona, Joe Smith retired as the Director of the Arizona Department of Water Resources (ADWR). Governor-elect Janet A. Napolitano selected State Senator Herb Guenther, D-24, to succeed Mr. Smith.

Mr. Smith, who had been Deputy Director of ADWR prior to being appointed Director in 2001, was instrumental in enhancing ADWR's data management capabilities by implementing new technologies. Scanning, imaging, and processing advancements became an integral part of the department and

helped to reduce costs. Mr. Smith also led ADWR through difficult budget challenges.

During Mr. Smith's tenure, the service of process on potential new claimants was completed in both adjudications, significant work was accomplished on Indian water settlements, and technical efforts were begun on the subflow issues.

Mr. Herb Guenther, who lives in Tacna near Yuma, earned a degree in Wildlife Biology from Arizona State University. He served in the U.S. Air Force, worked as a biologist for both the Arizona Game and Fish Department and the U.S. Bureau of Reclamation, and for the past 19 years has been the Executive Assistant for Special Affairs of the Wellton-Mohawk Irrigation and Drainage District.

Mr. Guenther has served four terms in the Arizona House of Representatives and two terms in the State Senate. During this year's legislative session, he chaired the Natural Resources, Agriculture and Environment Committee and the Health Committee and was a member of the Appropriations Committee. He has been a Commissioner and Chairman of the Arizona Game and Fish Department and a member of a variety of State and Federal advisory councils, recovery teams, legislative organizations, and committees involved in water, wildlife, and Colorado River issues. Other interests have been serving on a local school board, a behavioral health services organization, and a regional medical center's board of trustees.

Rotary International honored him as a Fellow; the Agri-Business Council selected him as the 1992 Water Statesman of the Year; and the National Council of State Legislatures selected him as the 1988 Legislator of the Year. This year, President George W. Bush nominated Mr. Guenther to serve on the Board of Trustees of the Tucson-based Morris K. Udall Foundation. 🌻

LITTLE COLORADO RIVER ADJUDICATION

JUDGE BALLINGER HOLDS HEARING

On October 8, 2002, Judge Ballinger held a hearing at which he heard reports regarding ongoing settlement negotiations; considered a motion filed by the Navajo Nation to clarify the order entered on July 16, 2002; reviewed the report of the Arizona Department of Water Resources (ADWR) relating to its personnel and current assignments; and discussed the status of the contested case regarding Phelps Dodge Corporation's water right claim to Show Low Lake.

Settlement Discussions

A bill has been introduced in the United States Congress to consider the proposed settlement agreement of the water right claims of the Pueblo of Zuni. Congress is expected to vote on the bill early next year. Proposed legislation will also be filed in the upcoming session of the Arizona Legislature, as the State of Arizona is expected to provide some funding for the agreement. After Congress and the Arizona Legislature have considered the settlement agreement, the agreement will be presented to the Adjudication Court for approval, a matter anticipated occurring in 2004 or 2005.

Settlement talks regarding the Navajo Nation, Hopi Tribe, and San Juan Southern Paiute Tribe water right claims continue but at a lower level of activity. Those discussions await a report, being prepared by the United States Bureau of Reclamation, which might be released as early as this month.

Navajo Nation's Motion for Clarification of Order

The Navajo Nation wanted clarification of the July 16, 2002, order as to whether parties had to disclose (by November 22, 2002) only those matters that "may adversely affect the water right claims of the other tribes in the basin," or if the disclosures had to include each issue supporting a tribe's "affirmative case." The Nation's view was that disclosures should be limited to those matters that may affect the water right claims of other Indian tribes and not include those matters supporting a tribe's own claims.

After the hearing, Judge Ballinger ruled that the disclosures previously ordered “shall not include information relating to any party’s support for its affirmative water right claims.”

ADWR’s Report

ADWR described the personnel it currently has to undertake adjudication projects. In its July 16, 2002 order, the Court stated it would “direct ADWR to complete HSRs and other tasks by separate order to be issued after reviewing ADWR’s report...” ADWR’s report addressed its current assignments, from both the Court and the Special Master, in the Little Colorado River Adjudication and in the Gila River Adjudication. Due to budget constraints, ADWR has reduced capability to prepare comprehensive hydrographic survey reports (HSRs), but is able to complete narrower supplemental HSRs for specific contested cases. ADWR desires direction from the Court as to how to allocate its reduced resources to the various adjudication matters now pending. Judge Ballinger ruled that the Court will address ADWR’s report at a later time.

Show Low Lake Contested Case

The Court heard comments regarding the Show Low Lake contested case in the Silver Creek subwatershed. This case, begun in 1992, addresses Phelps Dodge’s state law water right claim to Show Low Lake. In April 1994, when the Silver Creek adjudication was stayed, the trial of this contested case was stayed. In July 2002, Judge Ballinger removed the stay as to discovery.

Judge Ballinger referred the Show Low Lake case to Special Master Schade to “undertake all steps necessary to move towards resolution of disputes relating to these claims, including, among other things, entering appropriate orders resolving any discovery issues that may arise during the proceedings and addressing the determination or scheduling of any pending motions in that matter.”

The Court’s next hearing in the Little Colorado River Adjudication will be held on **Tuesday, May 13, 2003**, at 9:30 a.m., in St. Johns. 🌻

**STATUS CONFERENCE SET FOR SHOW LOW LAKE CASE
CONTESTED CASE NO. 6417-033-9005**

This case addresses Phelps Dodge Corporation's state law water right claim to Show Low Lake, a 186-acre lake located outside the City of Show Low. In April 1994, when the Silver Creek adjudication was stayed, the trial of this case was stayed. The case had progressed farther than any other pending contested case. Following the October 8, 2002, hearing, the Court referred this matter to Special Master Schade.

On December 5, 2002, Special Master Schade issued an order setting a conference with the litigants and *amici curiae* ("friends of the court") who had appeared in the Show Low Lake case to discuss the posture of this matter and schedule proceedings leading to its conclusion. The conference will be held on Tuesday, February 4, 2003, at 9:00 a.m., at the Town of Pinetop-Lakeside Council Chambers, 1360 North Niels Hansen Lane, Lakeside, Arizona.

The status conference will address pending and future motions to determine pertinent issues; disclosures of information and discovery; the need to update Watershed File Report No. 033-56-ABC-027; a trial schedule; settlement negotiations; a Court-Approved Mailing List for the case; and any other matters that would expedite its conclusion. 

GILA RIVER ADJUDICATION

**SENATORS KYL AND MCCAIN INTRODUCE
LEGISLATION TO SETTLE TRIBAL WATER RIGHTS**

On September 24, 2002, Senators Jon Kyl and John McCain introduced in the Congress a water rights settlement bill aimed at resolving the water right claims of the Gila River Indian Community (GRIC) and the Tohono O'Odham Nation.⁴ Water from the Central Arizona Project (CAP) and other sources, including the Salt, Verde, and Gila Rivers, would satisfy Tribal claims. The Tribes

⁴ Information for this summary was obtained from articles in *The Arizona Republic* (September 25, 2002, and November 19, 2002) and *Indian Country Today* (October 30, 2002).

would settle their water right claims being litigated in the Gila River Adjudication.

Under the Arizona Water Settlements Act of 2002, GRIC would receive 653,500 acre-feet of water a year, and the Tohono O’Odham Nation would receive 28,200 acre-feet of water a year, and \$200 million would be invested in irrigation systems. The bill would allow GRIC and the Tohono O’Odham Nation to enter into water lease agreements with cities and would permit nearly 66,000 acre-feet of unallocated CAP water to be divided among Chandler, Glendale, Mesa, Peoria, Phoenix, and Scottsdale. The bill does not allow the Tribes to lease or sell CAP water outside Arizona. The legislation would also finalize the terms of Arizona’s payment of CAP construction costs. Arizona would repay \$1.65 billion of the CAP’s \$4.7 billion cost, about \$700 million less than federal officials had demanded.

The *Arizona Republic* reported, “Rod Lewis, the Community’s chief counsel who negotiated terms with more than 35 separate parties, said the deal is ‘something the Community has been looking forward to for a long time.... It could be the beginning of a new chapter in the history of the Community and central Arizona’.” Of the settlement process, Mr. Lewis said, “It’s like one of those circus performers spinning the plates, always trying to keep control of all of them.”

GRIC’s Lt. Gov. Richard Narcia indicated that agriculture would be expanded. As reported in *Indian Country*, he said, “Because of the lack of water, you see unused land. Our vision is to get those fields back to cropping.”

The *Republic* reported that Senator Kyl had stated, “The availability of water in Arizona drives so many other decisions and actions that we have to have certainty and agreement on how to deal with water issues if we’re to prosper...This agreement helps to achieve that.” Senator Kyl called the settlement “a very finely balanced agreement.”

According to the *Republic*, “the measure likely won't come up for a hearing until early next year, and Kyl expects to tweak it as various groups and agencies study it more closely,” a process that could take “up to two years.” 🌻

**COURT PARTIALLY ADOPTS *DE MINIMIS* REPORT
IN RE SANDS INVESTMENT COMPANY
CONTESTED CASE NO. W1-11-19**

In an order issued on September 26, 2002, Judge Ballinger adopted in part the report of former Special Master Thorson dealing with *de minimis* stockwatering and certain stockpond and domestic water uses in the San Pedro River Watershed. A *de minimis* water use “means a water use found to be sufficiently small so that the costs of a detailed adjudication of the use outweigh the benefits that would result.” The Court agreed with the Special Master’s “conclusion that no one is aided by expensive litigation that does not provide meaningful results.”

Special Master Thorson’s report followed a seven-day evidentiary hearing held as part of the early adjudication of the San Pedro River Watershed, after the Final San Pedro River Hydrographic Survey Report was published in 1991. Copies of the report and a subsequent modification are available at <http://supreme.state.az.us/wm/Gila.htm>.

Mr. Thorson addressed whether stockwatering, stockponds, and domestic water uses have a *de minimis* impact on water supply available to downstream users, and if so, what are the appropriate summary procedures for adjudicating them. He examined four factors:

1. Amount of water available to downstream users;
2. Number of stockwatering, stockpond, and domestic uses;
3. Number and impact of each of these uses; and
4. Relative costs and benefits of summary versus complete adjudication of these three types of water uses.

He found that (1) instream stockwatering uses have virtually no impact on the water supply available to downstream users, and (2) although both stockponds with a capacity of less than or equal to 4 acre-feet and small

domestic water uses are *de minimis* when considered individually, but not cumulatively, summary adjudication is justified. If the 5,800 uses being considered were individually determined, more than 11 years would be required to complete their adjudication.

Mr. Thorson recommended that because of their *de minimis* impacts, the following uses be subject to summary adjudication:

1. Stockwatering: Instream stockwatering of stock at unimproved or improved locations on a stream, creek, spring or similar source. Each use will be adjudicated a quantity of “reasonable use.”
2. Stockpond: A pond or other artificial facility having a capacity of less than or equal to 4 acre-feet that is used solely for stock or wildlife. A uniform volume of “not to exceed 4 acre-feet with continuous fill” will be adjudicated for each stockpond.
3. Domestic: The “use of privately supplied water by persons in a permanent dwelling; the watering of pets and farmyard animals; and the irrigation of lawns, gardens, and orchards on land adjoining the dwelling. However, the domestic uses determined to be *de minimis* in this proceeding are those supplied by the landowner or occupant from a well or surface water source (‘self-supplied’) providing water for a single family household and associated outdoor activities on adjoining land not exceeding 0.2 acres.” A quantity of “not to exceed 1.0 acre-foot per year” will be adjudicated for each *de minimis* domestic water use.

Mr. Thorson recommended procedures to describe the water right characteristics of *de minimis* uses that should be contained in the abstracts of water rights.

Judge Ballinger held that:

The purpose of this order is not to finally adjudicate the amount of water flow available to any claimant or whether those holding a water right of higher priority will be able to enforce their right at times when water supply is insufficient to satisfy all users. This order is limited to identifying water right claims that should be summarily adjudicated...

Judge Ballinger determined that Special Master Thorson had “adopted an appropriate statistical analysis that provides the most reasonable determination of water flow reliably available from the San Pedro River Watershed to downstream users.” Mr. Thorson adopted the use of median daily flows rather

than mean flows. Several parties had strongly objected to the adoption of median values to measure water flows.

The Court did not see an impediment to the designation of “any uses of water drawn from wells as *de minimis*...because the San Pedro River Watershed’s subflow zone is yet to be determined.” Wells later found to be outside the subflow zone can be removed by court order from the catalogue of *de minimis* rights.

The Court did not adopt several findings of fact and conclusions of law that covered issues related more to the post-decree enforcement of an adjudicated water right than to its initial determination. Findings of fact relating to the futile call doctrine were not adopted. This doctrine, seeking to avoid wasteful water practices, deals with the opportunity of upstream junior users to use water during times that downstream senior users are not or cannot use the water. The order “does not approve any determination that would adversely affect substantive and procedural rights in subsequent water right enforcement proceedings.”

The Court modified one conclusion of law to state that, “Any purported severance and transfer of a *de minimis* water right that has been summarily adjudicated...will only become effective upon entry of an order approving such transfer by this court.” The severance and transfer (a change from one location to another) of an adjudicated *de minimis* water right will require the approval of the Adjudication Court.

The order does not address the legal ownership of water rights on State and Federal lands, as this issue was outside the scope of Master Thorson’s report.

The Court noted that in the future other water uses might be determined to be *de minimis* and be subject to summary adjudication. ADWR was directed to prepare future hydrographic survey reports in accordance with this order. 🌻

**ORAL ARGUMENTS HEARD ON ISSUES OF
BROAD LEGAL IMPORTANCE
IN RE PUBLIC WATER RESERVE 107
CONTESTED CASE NO. W1-11-1174**

On December 10, 2002, Special Master Schade heard oral arguments on two issues of broad legal importance that were designated in this contested case. The case addresses the Bureau of Land Management's (BLM) water right claims under Public Water Reserve No. 107 (PWR 107).⁵

The issues are:

1. Which claimants or parties should the Arizona Department of Water Resources (ADWR) notify that a supplemental contested case HSR has been filed, and which claimants or parties should be allowed to file written objections?
2. How much time should claimants or parties have to file written objections after ADWR files a supplemental contested case HSR?

These issues came to the forefront because ADWR has been directed to update certain Watershed File Reports (WFRs) which were published in the 1991 Final San Pedro HSR. The process of updating will consider statutory changes, decisions of the Arizona Supreme Court, and Superior Court orders that have occurred since 1991. The updating of WFRs raises issues regarding the extent of notice to claimants, scope of objections, and time deadlines for filing objections.

Between September and November, motions, responses, and replies were filed. The following parties participated in the oral arguments: Arizona Public Service; Apache Tribes; Arizona Water Company; Bella Vista Water Company; Cities of Chandler, Glendale, Mesa, and Scottsdale; Gila River Indian Community; City of Phoenix; Phelps Dodge Corporation; Pueblo del Sol Water Company; Salt River Project; State of Arizona Agency Claimants; and the United States. ADWR submitted comments.

The Special Master is expected to issue a decision soon. 🌻

⁵ PWR 107 is an Executive Order issued by President Coolidge on April 17, 1926. The BLM claims that under this order the BLM has a federal reserved water right in certain springs located on lands under its management.

OTHER NEWS

JUSTICE STANLEY G. FELDMAN RETIRES

After 21 years on the Arizona Supreme Court, Justice Stanley Z. Feldman retired at the end of 2002. Justice Feldman made significant contributions to water law and to Arizona's general adjudications.

He authored the Court's 1985 decision holding that Arizona's Enabling Act is not an impediment to state court jurisdiction over Indian water rights, and state courts have jurisdiction to adjudicate those rights. Thereafter, Justice Feldman wrote the Court's opinion in the first interlocutory review issue, holding that the procedures for filing and service of pleadings adopted by the trial court in Pretrial Order Number 1 comport with due process under the United States and Arizona Constitutions. He wrote the first of the Court's two landmark decisions in the interlocutory appeal addressing subflow, where the Court held that the 50%/90 day test for identifying wells presumed to be pumping subflow should not be used and remanded the matter to the Superior Court. In 1999, in a significant matter, he authored the Court's decision affirming or striking down as unconstitutional several legislative amendments regarding the adjudications that had been passed in 1995. These decisions shaped the course of Arizona's general adjudications.

When he served as Chief Justice, he issued the Special Procedural Order Providing for the Approval of Federal Water Rights Settlements, Including Those of Indian Tribes (Gila River Adjudication, 1991), and the Special Procedural Orders Providing for Interlocutory Appeals and Certifications for the Gila River (1989) and the Little Colorado River (1994) Adjudications.

Justice Feldman's illustrious career on the bench of our State's highest court will leave everlasting imprints on Arizona water law. 🌻

VICE CHIEF JUSTICE RUTH V. MCGREGOR WILL PARTICIPATE IN ADJUDICATION PROCEEDINGS

Up to now, Vice Chief Justice Ruth V. McGregor has recused herself from hearing general adjudication matters, but on November 14, 2002, the Arizona

Supreme Court issued an order stating that “the previous disqualification of Vice Chief Justice McGregor is removed, and she is eligible to participate in the proceedings in” both adjudications. Vice Chief Justice McGregor had recused herself because she had been associated with a law firm who represents clients in the adjudications, but the Code of Judicial Conduct removes this disqualification after seven years. Vice Chief Justice McGregor served on the Arizona Court of Appeals from December 1989 to February 1998, when she was appointed to the Arizona Supreme Court. 🌻