



Arizona General Stream Adjudication Bulletin

OFFICE OF THE SPECIAL MASTER • SEPTEMBER 1996

Ruling Issued in Special Action

Judge Susan Bolton has decided the challenges to the legislation passed in 1995 by the Arizona legislature to modify the general stream adjudication statutes and state water code. In a ruling issued on August 30, Judge Bolton upheld some provisions of the new legislation, declared other provisions unconstitutional, and announced that still other sections could only be applied prospectively.

The special action proceeding had been initiated by the San Carlos Apache Tribe, Tonto Apache Tribe, and Yavapai Apache Tribe, Camp Verde Reservation, after the legislature passed two adjudication-related bills in March 1995. House Bill 2276 provided summary adjudication for small water rights, adopted uniform

water duties for irrigation rights based on elevation, reopened the filing periods for statements of claims with the Arizona Department of Water Resources (DWR) and statements of claimant in the adjudications, modified the forfeiture and abandonment provisions, and revised DWR's adjudication reports, among other changes. House Bill 2193 principally addressed who may claim ownership of water rights on public land.

The Arizona Supreme Court agreed to accept the Apache Tribes' special action challenge in June 1995 but, in an unusual move, sent the matter to Judge Bolton for decision. Over the ensuing year, Judge Bolton directed the parties to identify the critical issues, received numerous legal briefs, and heard oral arguments on May 13-15. The United States, Navajo Nation, Hopi Tribe, San Juan Southern Paiute Tribe, and Zuni Pueblo supported many of the positions asserted by the Apache

Tribes (all referred to as the federal parties). The Salt River Project, State of Arizona, and other parties (all referred to as the state parties) advocated in support of the new legislation.

Preliminary Questions

Judge Bolton opens her decision with a review of the new legislation. She then frames two preliminary questions for decision: What is the standard of review to be applied to the new laws? What portions of the new laws must be applied to the pending water adjudications? Judge Bolton decides the first issue adversely to the federal parties, holding that the challengers have the burden of proof and "the Court will presume the constitutionality [of the law] and will endeavor to apply a constitutional construction whenever possible to the amendments."

The judge's answer to the second preliminary question is more com-

continued on page 2...

In This Issue

- Calendar..... page 4
- Sources for Help..... page 4
- Little Colorado Proceedings..... page 5
- Adjudications in Western States: North Dakota..... page 5
- Gila River Proceedings..... page 6

Accessing Special Action Decision on the Internet

Judge Bolton's special action decision may be found on the Arizona General Stream Adjudication Internet Site. You must first access the Arizona Supreme Court's home page at <http://www.state.az.us/sp/welcome.html>. To reach stream adjudication information, click under "Of Special Interest to the Public" or "Of Special Interest to Attorneys." An eighth area, "Important Decisions," has been added to the site; the decision may be found there.

Ruling Issued...

continued from previous page

plex. She agrees with the federal parties that the legislature intended that HB 2276 be applied retroactively to both pending stream adjudications and the water rights in those cases. While Judge Bolton agrees that procedural changes in the adjudication can be applied retroactively, changes that affect a "substantive vested right" can only be applied prospectively. She does indicate that these sections could be used as "evidence of legislative intent if the prior law on these issues is ambiguous." The box on p. 3 identifies the provisions of HB 2276 that will be applied prospectively.

Unconstitutional Provisions

Judge Bolton then turns to sections of HB 2276 she ultimately decides to be unconstitutional. She

first analyzes the summary procedures for adjudicating small water rights, estimated to include between two-thirds and four-fifths of the claims in Arizona's adjudications. She concludes that the legislation violates the separation of powers and due process doctrines by interfering with the court's obligation to apply the law to facts, giving an administrative agency too much authority over the process, limiting objections to these small uses, and postponing a consideration of the total effects of these small uses in individual watersheds.

Similar reasons are used to invalidate the standard water duties for irrigation uses. The judge concludes that "DWR cannot be legislatively mandated to report the quantities set forth in [HB 2276] and the Court cannot be required to decree these quantities without violating separation of powers." Likewise, she strikes down the bill's requirements that DWR must report and the court, absent an objection, must adjudicate diversion and reservoir facilities based on maximum theoretical capacity. Judge Bolton concludes, "[t]he legislature cannot decree these water rights. The water rights must be decreed by a court based on beneficial use, not on capacity of facilities."

Constitutional Provisions

Other legislative changes are specifically upheld by the court. They include provisions providing an additional opportunity for persons to file statements of claim under earlier laws, such as the Water Rights Registration Act, and statements of claimant in the general stream adjudications.

Other provisions relaxing the state's abandonment and forfeiture rules are also upheld but interpreted in a limited way. Referring to a list of additional excuses for non-use of a water right, Judge Bolton observes,

"The only impediment to enforcement of these additions... will be if it is later found that one or more of these factors was not good cause for non-use under the law existing before March 17, 1995. If that is the case, only prospective application can be given to that factor." She also notes that a section allowing an appropriator who had not used a water right for five years to resume use would be of limited utility in the pending adjudications. The section does not allow a use to be resumed if a third party has filed an adjudication claim. In both the Gila River and Little Colorado River adjudications, such claims have been on file for more than a decade.

Elsewhere in the decision, Judge Bolton upholds the revised appointment process for special masters, the payment of the masters' expenses by the state general fund after the previously collected filing fees are exhausted, and changes in the manner and time of objecting to masters' decisions so long as the amendments "do not interfere with the Court's ability to define the Special Master's work with appropriate orders of reference..."

Judge Bolton also approves of legislative changes allowing DWR to recommend water right attributes in its watershed reports, but finds unconstitutional a requirement that prior filings be accepted by the court and master unless found "clearly erroneous" by DWR.

Other Issues

One or more of the federal parties had also advocated that HB 2276 violates the public trust and equal protection doctrines. Judge Bolton rejects both these arguments. The public trust doctrine is a common law principle that recognizes a public easement protecting publicly important water-related resources. Bolton indicates that because the

continued on page 3...

This document is the property of the State of Arizona. It is loaned to you for your use only. It is not to be distributed, copied, or otherwise used for any purpose other than that for which it was loaned. If you are not the intended recipient, please notify the Office of Special Master at (602) 542-9600. This document is located in the public domain.



The information contained in this document is provided for informational and archival purposes only. It is not to be construed as an official order by the Special Master or any other official of the State of Arizona.

Volume: _____
 Number: _____

John E. Bolton, Special Master
 Kathy Dolge, Assistant to Special Master

Office of Special Master
 1501 W. Washington Street
 Suite 228
 Phoenix, Arizona 85007
 (602) 542-9600
 FAX (602) 542-9602

Design/Production: Andrés Epstein

Ruling Issued...

continued from previous page.

extent of the public trust doctrine has not been determined in Arizona, it is reasonable for the legislature to defer its possible application to water rights. The legislature has previously established a special commission to identify historically navigable waterways in Arizona that might be protected by the public trust doctrine.

Judge Bolton finds that many of the equal protection allegations are now moot since they are directed against portions of HB 2276 found to be unconstitutional. She holds that many other equal protection arguments are based on hypotheticals and will not be decided now. In any event, she says, "federal law clearly has supremacy over contrary state law as it relates to claims or defenses available to the United States and Indian tribes in this adjudication." Judge Bolton also upholds the legislature's statement of intent that Indian and non-Indian federal claims should be adjudicated first. This, she says, "is a statement of the realities . . . [that] There is a clear distinction between appropriable water rights under state law and federal reserved water rights . . ."

McCarran Amendment

The federal parties had also argued that many of HB 2276's provisions violate the federal McCarran Amendment, which requires a comprehensive adjudication before the federal government is required to appear. Judge Bolton indicates that she probably does not have to reach this issue since she has declared the offending provisions unconstitutional. Because the Supreme Court may not agree with her constitutional analysis, she decides the McCarran challenges as well. She holds that the summary adjudication procedures for small uses do violate the

HB 2276 Provisions Held to be Prospective

A.R.S. § 45-141(B) prohibiting a finding of forfeiture or abandonment when water is used on less than all the land to which the right is appurtenant.

A.R.S. § 45-141(C) eliminating any possibility of forfeiture for rights perfected before June 12, 1919.

A.R.S. § 45-151(D) providing that the availability of alternative sources of water does not affect a surface water right.

A.R.S. § 45-151(E) (contained in both HB 2276 and HB 2193) which states that water rights appropriated on federal land belong to the person who first made beneficial use of the water.

A.R.S. § 45-151(F) stating that water on federal land may be used at any location.

A.R.S. § 45-156(F) which provides that failure to obtain approval for a change in use does not result in forfeiture or loss of priority.

A.R.S. § 45-162(B) resulting in a 100% back of priority date to the date of application to appropriate.

A.R.S. § 45-187 making acquisition of rights for adverse possession available only to rights perfected prior to May 21, 1974.

A.R.S. § 45-188(B) which makes abandonment the only basis for relinquishment of a water right initiated before June 12, 1919.

A.R.S. § 45-188(C) insulating from abandonment and forfeiture water rights appurtenant to lands within an irrigation district water users' association or the like so long as an operable delivery system is maintained.

"If prior law ambiguous, may be evidence of legislative intent

McCarran Amendment. If these provisions are not found to violate the constitution, then "they would defeat this Court's jurisdiction over the federal parties."

Provisions Severable

The severability clause in HB 2276 is upheld by Judge Bolton, meaning that the provisions not invalidated by the court will be implemented. The portions of HB 2276 that have been upheld and will be applied retroactively are identified in the box on p. 4. The federal parties had argued that the legislation was an integrated whole and if any major provision was deemed unconstitutional, the remainder of the bill should also fall.

HB 2193

Most provisions of HB 2193 were upheld by Judge Bolton. The only exceptions are sections identical to language in HB 2276 declared either to be unconstitutional or of only prospective application. House Bill 2193 seeks to clarify the ownership of water rights on public land. The bill also allows the reissuance of water permits or certificates in accordance with these statutory rules. DWR must provide notice and conduct hearings on reissuance requests, followed by a right of appeal to the general adjudication court.

Judge Bolton indicates that specific allegations that HB 2193 retroactively cancels the United States' vested water rights must first be raised before DWR and then be reviewed judicially. If HB 2193 conflicts with federal law, "federal law would unquestionably supersede" state law.

Status of Case

Judge Bolton concludes that she has resolved all questions ripe for decision and that no evidentiary

continued on page 4...

Ruling Issued

continued from previous page...

hearings are required to complete her work. She filed her decision in both the Superior Court and Supreme Court. While it is likely that the Supreme Court will review the decision, the exact procedure by which this review will occur is not yet known. The Supreme Court's order of June 7, 1995, does require the trial judge "to identify and to resolve, subject to the special appellate procedures applicable to this case, those issues that must be expeditiously resolved." ♦

Calendar

September 11 — 10:00 a.m.

Case No. W1-100 (GR)

In re Special Action (HB 2276)

Status conference by telephone conference call

(see minute entries June 20, 1996, and Aug. 26, 1996)

September 20

Case No. 6417 (LCR)

Due date: Settlement reports due to Judge Minker

(see minute entry June 28, 1996)

September 26 — 1:30 p.m.

Case No. W-1, W-2, W-3, W-4 (GR)

Status conference

MCSC, Judge Bolton's Courtroom #402

(see minute entry Aug. 1, 1996)

September 27 — 9:30 a.m.

Case No. 6417 (LCR)

Status conference in St. Johns

(see minute entry June 28, 1996)

All are open to the public.

Unless otherwise indicated, all hearings, meetings, and conferences start at 9:00 a.m.

ABBREVIATIONS

GR.....Gila River adjudication
LCR.....Little Colorado River adjudication
MCSC Maricopa County Superior Court,
201 W. Jefferson, Phoenix

HB 2276 Provisions Held to be Retroactive

A.R.S. § 45-182(D) and (E) reopening the time for filing statements of claims of water rights existing before March 17, 1995.

A.R.S. § 45-254(E), (F) and (G) providing procedure for late filings of statements of claimants and amended statements in the general stream adjudications.

A.R.S. § 45-255 changing the procedure for appointment of special masters and funding their compensation if the filing fees are exhausted.

A.R.S. § 45-256(B), (C) and (D) expanding the responsibilities of DWR and pro-

viding for certain evidentiary rules on admissibility of the report and presumptions accorded the information therein (excepting the preclusion of judicial review in A.R.S. § 45-256(D)).

A.R.S. § 45-257(A)(2) changing the time for objections to the Master's reports and requiring written reports.

A.R.S. § 45-263(A) providing for the applicability of state law.

A.R.S. § 45-263(B) excluding the public trust as an attribute of a water right to be determined in the adjudications.

Sources for Help

If you have questions or a particular need, here are the proper people to contact:

Adjudications, HSR, WFRs, Discovery

Art Marquez, General
Adjudications Division
22 Dept. of Water Resources
900 N. 3rd Street
Phoenix, AZ 85004
(602) 417-2442
(Toll free in AZ) 1-800-352-8488

Scheduling Procedure

Kathy Daley
Office of the Special Master
Arizona State Courts Building
501 W. Washington, Suite 228
Phoenix, AZ 85007
(602) 426-6007 TDD (602) 542-9545

Readings

Gila River
Clyde Garcia
Clerk's Office
Maricopa County Superior Court
Records Management Center
345 W. Durango St.
Phoenix, AZ 85009
(602) 506-4697 FAX (602) 506-4516

Little Colorado River

Barbara Nephel
Clerk's Office
Apache County Superior Court
Apache County Courthouse
P.O. Box 265
St. Johns, AZ 85936
(520) 337-4364

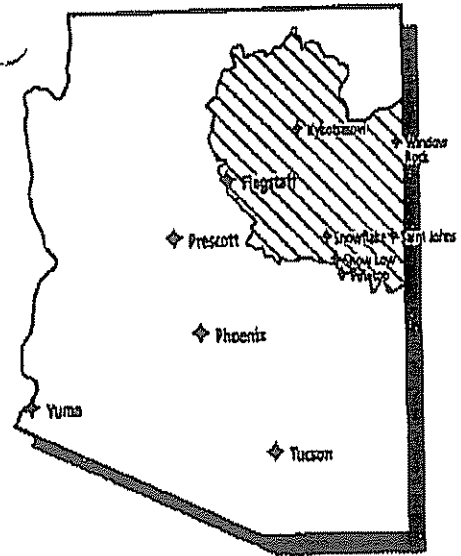
Little Colorado River Proceedings

Settlement Negotiations

Negotiations toward a settlement of Indian and non-Indian federal water rights continue to be facilitated by Settlement Judge Michael Nelson. The parties are preparing their status reports which are due on or before September 20, 1996, to Judge Allen Minker, the assigned judge for the Little Colorado River adjudication.

Status Conference

Judge Minker's previously announced status conference about negotiations in the Little Colorado River adjudication is still scheduled for Friday, September 27, starting at 9:30 a.m. at the Apache County Courthouse in St. Johns. ♣



Adjudications in Western States: North Dakota

North Dakota is a dual system state because it recognizes some riparian water rights, even though all new water rights are appropriative rights and must be established through the state's permitting process. The permitting system is implemented by the state engineer. The North Dakota State Water Commission, a nine-member body of elected officials and citizens, appoints the state engineer.

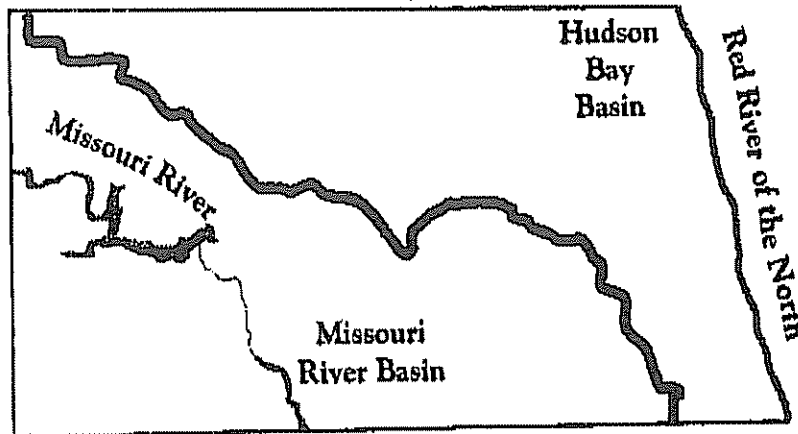
Water rights are generally administered under the prior appropriation doctrine in North Dakota. A permit is required for all water uses except those less than twelve and one-half acre-feet per year where the use is for individual domestic purposes, livestock, or for fish,

wildlife, and other recreational uses. Legislation passed in 1905 established the permitting system. The permitting statute states that both

repealed statutes authorizing riparian rights to resolve these conflicting doctrines. The state supreme court held that the state could exercise its police power and change from a riparian system to an appropriative system, so long as vested rights were not usurped. Until 1963, a person could establish riparian rights in North Dakota because the permitting system was considered nonexclusive.

The administrative permitting system does not contemplate federal reserved rights. Conflicts over reserved rights, however, have not arisen in North Dakota as they have in other states.

continued on page 6...

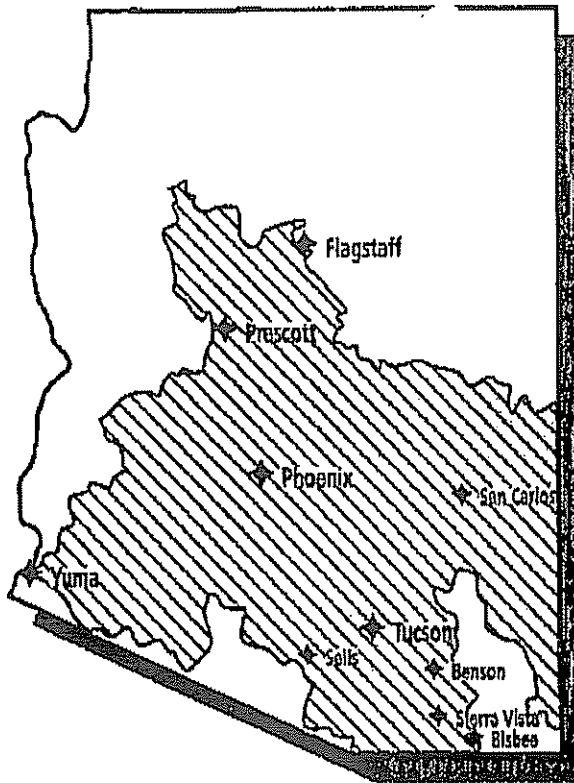


NORTH DAKOTA

surface water and groundwater are subject to appropriation

Water rights established before 1905 were controlled by the riparian doctrine. In 1963, North Dakota

template federal reserved rights. Conflicts over reserved rights, however, have not arisen in North Dakota as they have in other states.



Gila River Proceedings

Special Master's report of June 12, 1996. In his report, the Master recommended that no further proceedings be held on the Apache Tribes' request for a stay of alleged reassignments of water rights on state land.

Judge Bolton's special action decision (see p. 1) may have superseded the Master's recommendations.

The September 26 hearing will still be held to discuss procedural matters related to the special action proceeding and Gila River adjudication.

Motion to Dismiss

The White Mountain Apache Tribe has filed motions in both adju-

dications, as well as in the special action proceeding, addressing challenges to the 1995 adjudication legislation and asking for dismissal of all proceedings (see Aug. 1996 *Bulletin*, p. 1). In a minute entry issued coincident with her special action decision, Judge Bolton indicates that she cannot consider the Tribe's motion in the context of the special action since it raises issues beyond those sent to her by the Arizona Supreme Court. Bolton also indicates that she will not consider the Tribe's motion in the Gila River adjudication "until and unless the White Mountain Apaches seek leave to appear in this general stream adjudication where they will be bound by this Court's ruling on the issue." ♣

September 26 Hearing

In early August, Judge Bolton announced that a hearing would be held at 1:30 p.m. on Thursday, September 26, to consider the Apache Tribes' motion for action on the

North Dakota

continued from previous page...

The North Dakota statutes authorize a general stream adjudication, but one has never initiated by the state. The statute authorizes the state engineer to do a hydrographic survey and file a lawsuit to adjudicate water rights. To date, no water use conflicts have necessitated an adjudication.

None of the three tribes in North Dakota has made claims under the adjudication statute for water rights. One tribe came close to sparking

conflict when it constructed a casino. The Sisseton-Wahpeton Sioux Tribe initially applied for a water right for the casino under the state permitting statute. The Tribe then withdrew its application because it did not want to concede to state jurisdiction. The situation resolved when the Tribe agreed to submit into the record of the water permit hearing a letter stating that its application should not be considered acquiescence to state regulatory jurisdiction. North Dakota did not challenge this action.

(Ramsey L. Kropf provided information for this article.) ♣

