



Arizona General Stream Adjudication Bulletin

OFFICE OF THE SPECIAL MASTER • April - July 2000

U.S. Supreme Court Declines Review of Groundwater Decision

The U.S. Supreme Court has denied requests to review the Arizona Supreme Court's decision concerning federal and tribal rights to groundwater. In an order entered shortly before the end of its 1999-2000 term, the Court denied petitions for certiorari filed by the Phelps Dodge Corp. and other state parties, thus leaving in effect the November 1999 ruling of the state court. See Jan. - Mar. 2000 *Bulletin* at 1. The Arizona Supreme Court had confirmed an earlier trial court determination (Issues Nos. 4 & 5) that Indian tribes and federal agencies may legally establish water rights to groundwater but only in specific cases where it is demonstrated that groundwater rights are necessary to satisfy the federal purposes for the land reservation. See Sept. - Dec. 1999 *Bulletin* at 1.

The U.S. Supreme Court did not provide a reason for declining review of the groundwater decision. In most cases, the Court has discretion to accept or refuse review of the hundreds of cases that are urged upon it each term. The Court's denial of the petitions for certiorari leaves the state court decision intact but does not mean the ruling has to be followed in other states.

The Arizona Supreme Court still has before it another groundwater issue, that is, what underground water is subject to determination in Arizona's general stream adjudication (Issue No. 2; see Sept. - Dec. 1999 *Bulletin* at 2). This issue was argued in December 1999, and a decision is expected by early fall. ♠

Master Recognizes Globe Equity Preclusive Effect



Special Master John E. Thorson, Court Reporter Kim Myrick, Attorney Byron Lewis

Globe Equity No. 59 is a 1935 federal court decree adjudicating water rights along the upper Gila River. The case was brought by the United States in 1925 to aid the construction of the San Carlos Reclamation Project, as well as to determine certain water rights of the Indians of the Gila River Indian Commu-

nity (GRIC) and San Carlos Apache Tribe. Among the defendants were the Gila Valley and Franklin irrigation districts, still active in the Gila River adjudication. The Indian tribes and communities were not parties to the case, their interests being represented by the United States.

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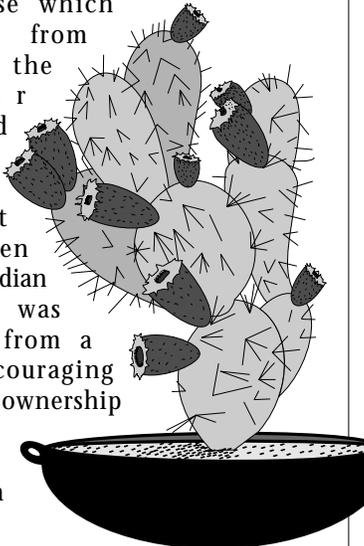
With proceedings underway concerning the Gila River Indian Community's water rights, Judge Susan Bolton in 1998 ordered interested parties to file motions concerning the impact of *Globe Equity* on the claims of the Indian Community (and the United States in its behalf) in this adjudication. Motions for summary judgment were filed by water users, principally the Franklin and Gila Valley districts, who had been parties to the original consent decree, along with other water users in the Gila River system including the Salt River Project. The San Carlos Apache Tribe also filed a motion that the *Globe Equity Decree* and other documents bar any claim GRIC might have to the San Carlos River.

Motions were also filed by the San Carlos Irrigation and Drainage Dist. (SCIDD) arguing that the Florence-Casa Grande Landowners' Agreement and other documents dating from the early 1900s subjected tribal water to a "pooling" arrangement with SCIDD. ASARCO also filed a motion arguing that the Community's water rights are conditioned by a water exchange agreement. Both GRIC and the United States opposed all these motions.

The Master heard these matters on April 26th and issued his report and recommendations on June 30th. The

Master determined that portions of GVID's motion should be granted concerning *Globe Equity*, along with the motion filed by the San Carlos Apache Tribe. The Master decided that SCIDD's motion was moot as the issue had already been decided by federal court. The ASARCO agreement, the Master concluded, contains a "choice of forum" provision that requires the question to be submitted to federal court for resolution, and that provision should be honored. ASARCO's motion was denied.

GVID's motion asserted that the 1935 *Globe Equity Decree* has *res judicata* or preclusive effect on GRIC's claims in this adjudication. In reviewing the *Globe Equity* case which extended from 1925-35, the Master indicated that the litigation occurred at a time when national Indian policy was changing from a period encouraging individual ownership of tribal land (resulting in



allotments that often fell into non-Indian hands) to a period encouraging the continuation of the reservation system. The Master found that, under U.S. Supreme Court case law, the United States had a obligation in 1935 to assert water right claims for the reservation, even though the *Globe Equity Decree* specifically provides water only for 50,000 acres that had been scheduled for allotment. The original parties to the *Globe Equity Decree* and their successors are entitled to consider *Globe Equity* to be a final adjudication of all the Community's

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The information contained in this Bulletin is provided for informational and scheduling purposes only, and does not constitute a legal opinion by the Special Master on matters contained herein.

Volume 8
Number 2

John E. Thorson, 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

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Thorson Leaving Adjudication, Bolton Next?

John Thorson resigned as Special Master of Arizona's general stream adjudication effective June 30th. Thorson, who was appointed by the Arizona Supreme Court in 1990, has moved with his family to Oakland, California, where his wife, Karen, has been appointed as director of judicial education for the California court system. Thorson has been reappointed by the superior court judges to continue as a part-time special master until the end of 2000 when a new

full-time master is expected to be appointed.

Judge Susan Bolton, presiding judge for the Gila River adjudication since 1994, has confirmed that she has been nominated to the U.S. District Court in Phoenix. If Bolton is confirmed by the Senate, she is expected to assume this new judgeship by the end of 2000. The Arizona Supreme Court would then assign a new judge to the Gila River adjudication.

Gila River Proceedings

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water rights. Other water users in the Gila River system may consider *Globe Equity* to be a final adjudication as to the 50,000 acres originally scheduled for allotment; but, as against these users, the Master believed the facts to be unsettled and the Community may claim additional water for reservation land beyond the 50,000 acres. These water users may still be able to assert, at the trial on the Community's water rights, *Globe Equity's* preclusive effect for these additional lands as well.

The Master's report and recommendation are now before Judge Susan Bolton for review and finalization. Objections to the report must be filed by July 26th. Responses to objections are to be filed by August 9th. Judge Bolton will take up the report and objections after that date.

In re Water Rights of the Gila River Indian Community, No. W1-203

The Special Master conducted a pretrial conference with the litigants in this case on May 2nd. Following the conference, the Master issued a pretrial order setting forth the procedure and schedule for trial on the purposes of the Gila River Indian Reservation. This issue is one phase of contested case no. W1-203, concerning the water rights of the reservation.

A five-week trial on reservation purposes is scheduled to begin on May 7, 2001. Between now and then, the litigants will be completing discovery and filing motions on certain issues with the court. The discovery of information for trial is underway and depositions of potential lay witnesses will start in August, followed by expert witness depositions in November. Numerous documents have already been disclosed as part of the discovery process.

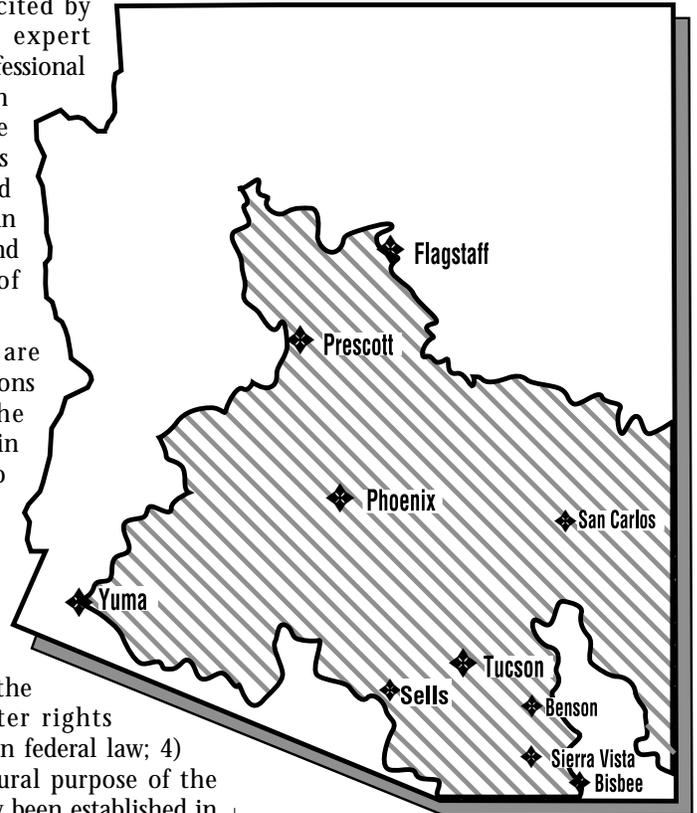
Discovery problems have already arisen in the case. On June 15th, the Salt River Project and City of Tempe filed a motion to compel the Gila River Indian Community to disclose two groups of

documents: reports cited by the Community's expert witnesses in their professional reports and litigation documents from the Community's claims against the United States before the Indian Claims Commission and the federal Court of Claims.

The parties are expected to file motions 1) concerning the admissibility of certain expert reports; 2) who has the burden of proof at trial; 3) whether Indian reservations have, as a matter of law, both primary and secondary purposes, the latter requiring water rights under state rather than federal law; 4) whether the agricultural purpose of the reservation has already been established in the case; and 5) motions for summary judgment. A final pretrial conference is scheduled for April 23, 2001.

Other Motions Rescheduled

In addition to the *Globe Equity Decree* (see lead article, p. 1), some parties believe that other proceedings or agreements also limit or condition the water right claims of the Gila River Indian Community. Motions concerning these prior cases or agreements were scheduled to be heard by Judge Bolton on July 20th. They have now been postponed until August 8th and will be heard by the Special Master. Oral argument will begin at 9:00 a.m. on August 8th in Appellate Courtroom 1 at the Arizona State Courts Building, 1501 W. Washington, Phoenix, Arizona. Motions for partial summary judgment, alleging that these



cases or agreements limit the Community's rights, are as follows: (1) 1907 Sacaton Agreement, filed by the Salt River Project and joined by others; (2) Buckeye-Arlington Agreement and Docket No. 236-F of the Indian Claims Commission, filed by Buckeye Irrigation Co. and joined by others; (3) Docket No. 228 of the Indian Claims Commission, filed by SRP and joined by others; and (4) Haggard Decree, 1936 Maricopa Contract, and Docket No. 236-D of the Indian Claims Commission, filed by SRP and joined by others. The Gila River Indian Community and United States oppose all these motions.

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Gila River Proceedings

HSR Delayed

The date for filing the final hydrographic survey report (HSR) for the Gila River Indian Community remains uncertain. At her last hearing, Judge Bolton requested the Arizona Department of Water Resources (ADWR) to file the HSR as soon as names and addresses for allotment owners within reservation boundaries had been received by the Indian Community. That information has not been supplied to ADWR. Once the HSR is filed, notice will be given to all Gila River adjudication claimants who will have 180 days to object to the HSR.

Preclusive Effect of *Globe Equity* on Others, No. W1-206

After proceedings began on the possible preclusive effect of the *Globe Equity Decree* on the Gila River Indian Community (see article, p. 1), some parties suggested that it would be desirable to also determine the effect of the decree on other water users who signed the *Globe Equity* consent decree. The court agreed, saying it would be efficient to do so since everyone's understanding of *Globe Equity* would be fresh in mind. Case No. W1-206, *In re the Preclusive Effect of Globe Equity Decree on Specified Parties*, was commenced as the vehicle for addressing these questions.

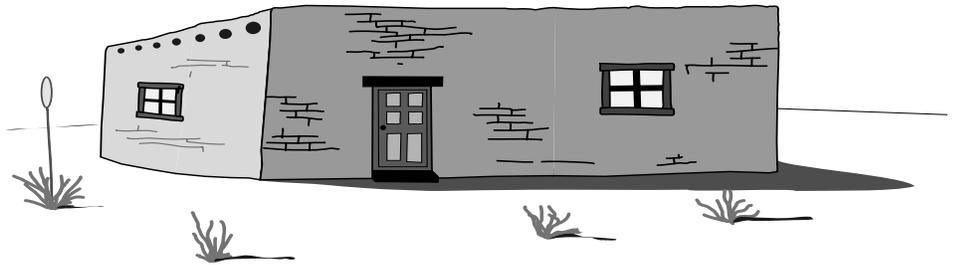
Motions on the preclusive effect of *Globe Equity* on other water users were scheduled to be filed on Sept. 25, 2000. On June 23rd, the San Carlos Apache Tribe moved for an extension of this schedule indicating that negotiations under the auspices of Settlement Judge Michael Nelson remained promising and "the success of negotiations would make these disclosures and related pleadings unnecessary." On

July 12th, Judge Bolton granted this extension. The supplemental disclosure of documents, previously scheduled for July 17th, must now occur by August 31st. Summary judgment motions must be filed by November 9th. Other rescheduled dates in this case appear in the Calendar, p.7.

Settlement Efforts Continue

Major parties in the upper Gila River basin continue to meet with Judge Nelson in an effort to reach an overall settlement of the claims of the

Gila River Indian Community and the San Carlos Apache Tribe. A drafting committee has been formed and the parties met in Pinetop during the week of July 10th to review the work so far. Three major issues appear to divide the parties: the ability of tribal groups to take additional lands into federal trust status, tribal waiver of claims for previous water quality damages charged against other users, and water marketing. ♠



Issue No. 3 Remains Unscheduled

Among the six issues the Arizona Supreme Court accepted for review in 1990, the court has decided or heard arguments in four of them. Issue No. 3, "What is the appropriate standard to be applied in determining the amount of water reserved for federal lands?," has not been addressed. In 1988, trial court judge Stanley Goodfarb ruled that the federal government established Arizona's reservations for agricultural purposes and that the practicably irrigable acreage (PIA) standard would be used to quantify tribal water rights.

The Navajo Nation and other tribes in the Little Colorado River adjudication had asked the court to postpone considering this issue, arguing

that a better trial court record was needed before the issue could be decided. In December 1999, the Salt River Project argued that the issue had already been addressed by the supreme court in its November 1999 decision concerning groundwater. See lead article, p. 1. SRP and other parties read the court's decision to say that reservation purposes must be specifically determined for each reservation. On June 14th, the Gila River Indian Community requested the court to set a briefing schedule on Issue No. 3. Other parties oppose this request, ask the court to vacate the 1988 order, and allow the trial court to determine reservation purposes on a case-by-case basis.



Little Colorado River Proceedings

Judge Edward Dawson held a conference on April 27th concerning the status of settlement efforts in the Little Colorado River adjudication. Attorneys for the major parties reported favorably on the progress that has been made. It is increasingly unlikely, however, that legislation to implement the settlement will be introduced into Congress this year. A separate settlement for the Zuni Pueblo was suggested by the Pueblo's attorney although lawyers for the Hopi Tribe and Navajo Nation voiced their preliminary opposition to such an approach. A settlement involving the water rights of certain federal land management agencies, principally the National Park Service, still remains possible this year since such an agreement does not require congressional approval.

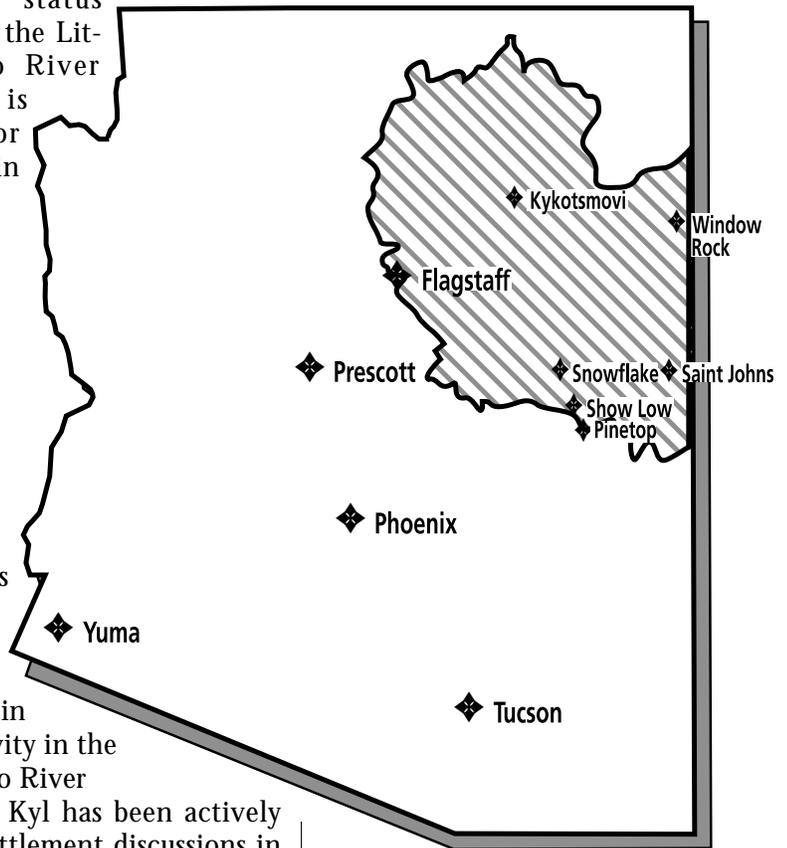
While encouraging these settlement efforts, Judge Dawson concluded the hearing by announcing certain activities suggesting that resumption of active litigation in the adjudication may be under consideration. He reopened the comment period on the preliminary hydrographic survey report for Indian Lands in the basin, first released in 1994, and ordered the parties to file comments on the draft by June 30. He also received a report from ADWR indicating that it will take up to 300 days to file a final HSR. This follows a January 28th order requiring the United States and the tribes to complete an initial disclosure of documents relating to their water right claims by January 31, 2001. The United States has requested reconsideration of this deadline, in a motion filed April 24th, saying that such disclosure will be burdensome and must wait completion of the final HSR. Judge Dawson has not ruled on this motion.

The next status conference in the Little Colorado River adjudication is scheduled for August 10th in St. Johns.

Kyl Requests Stay

U.S. Senator Jon Kyl (R-AZ) has sent a letter to Judge Dawson requesting an 18-month stay in litigation activity in the Little Colorado River adjudication. Kyl has been actively involved in settlement discussions in recent months and is likely to sponsor any bill authorizing an agreement. Kyl indicates his desire to have an independent firm or agency evaluate, by reviewing existing reports, the feasibility and cost of the water development projects proposed in the settlement talks. While he is confident legislation will ultimately be approved, he believes the feasibility study is necessary for securing congressional support for a settlement.

Judge Dawson has not addressed the Senator's request but is likely to hear the comments of the negotiating parties at the August 10th status conference.



Settlement Efforts

Settlement Judge Michael Nelson conducted recent talks concerning the north-side proposal involving construction of a pipeline to benefit the Hopi Tribe and Navajo Nation. An agreement and proposed legislation are almost complete for the Zuni Pueblo settlement but issues remain about water quality damages from the past and the Pueblo's ability to take additional lands into federal trust status. Talks have been held with the Town of Payson and are scheduled with the City of Winslow.

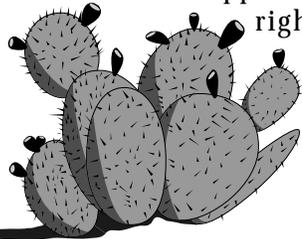
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Little Colorado River Proceedings

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Supreme Court Order Concerning Settlement Approval

The Arizona Supreme Court has not finalized an order describing the procedure and criteria to be used to



right settlements involving federal and

tribal parties in the Little Colorado River adjudication. On Feb. 22, 2000, Arizona Public Service Co. and others petitioned the court to approve a draft order that had been developed by many of the parties in the adjudication. One substantive comment on the proposed order was from the State of Arizona, arguing that the governor should have standing in the settlement approval process because these agreements often affect the broad public interest.

Justices Recuse Themselves

Three justices of the Arizona Supreme Court have removed themselves from any decisions concerning the Little Colorado River adjudication. In an order filed on July 7th, Justices Bud Jones, Ruth McGregor, and Fred Martone all recused themselves from the litigation. While the order did not specify the reasons, recusals usually occur when a justice was personally involved in a case while in private practice or a member of the justice's law firm was involved. The court has appointed three justices pro tempore to substitute for these recused justices. They are Noel Fidel, John Pelander, and William Druke, judges from the Court of Appeals who also serve a similar role in cases from the Gila River adjudication.

Sources for Help



If you have questions in a particular area, here are the proper people to contact.



Access the Arizona Judicial Department web page at

<http://www.supreme.state.az.us> and the

Arizona General Stream Adjudication web page

<http://www.supreme.state.az.wm>

Adjudications, HSRs, WFRs,

Discovery

Lisa Jannusch
Adjudications Division
AZ Dept. of Water
Resources
500 N. 3rd Street
Phoenix, AZ 85004
(602) 417-2442
(Toll free in AZ) 1-800-352-8488

Scheduling, Procedure

Kathy Dolge
Office of the Special Master
Arizona State Courts Building
1501 W. Washington,
Suite 228
Phoenix, AZ 85007
(602) 542-9600
TDD (602) 542-9545

Pleadings Gila River

Oscar Garcia
Clerk's Office
Maricopa County
Superior Court
Records Management Center
3345 W. Durango St.
Phoenix, AZ 85009
(602) 506-4139
FAX (602) 506-4516

Little Colorado River

Clerk's Office
Apache County
Superior Court
Apache County Courthouse
P.O. Box 365
St. Johns, AZ 85936
(520) 337-4364
FAX (520) 337-2771



Special Master's Position

With the departure of John Thorson (see p. 2), the superior court judges in both adjudications are seeking to appoint a new special master for Arizona's general stream adjudications. The goal is to have this individual in place by January 1, 2001. For a position description and application procedure, please call (602) 542-9311 or access the information from the following website:
<www.supreme.state.az.us/jobs>.



CALENDAR

The following are events in Case No. W1-203, *In re the Water Rights of the Gila River Indian Community* (GR)

July 26, 2000

Due: Objections to Special Master's Report on motions for summary judgment (June 30, 2000)

August 8, 2000 - 9:00 a.m. Appellate Courtroom 1 ASCB
Oral argument before Special Master Thorson on motions for summary judgment filed on Oct. 4, 1999, by SRP & Tempe and Buckeye Irrig. Co. & Arlington Canal Co.: re 1907 Sacaton Agreement (docket number 211); re Buckeye-Arlington Agreement and Docket No. 236-F (docket number 224); re Docket No. 228 (docket number 209); and re Haggard Decree, Docket No. 236-D & 1936 Maricopa Contract (docket number 213) (see minute entry, July 14, 2000)

August 9, 2000

Due: Responses to objections to Special Master's Report on motions for summary judgment (June 30, 2000)

The following are due dates in the "purposes of the reservation" phase of Case No. W1-203, *In re the Water Rights of the Gila River Indian Community* (GR) (see pretrial order, June 1, 2000)

Aug. 2, 2000

Opening pleadings from all interested litigants on preliminary issues

Aug. 21, 2000

Responding pleadings from all interested litigants on preliminary issues

Sept. 1, 2000

Rebuttals and replies
End of disclosure by submissions to OSM document repository

The following are due dates in Case No. W1-206, *In re the Preclusive Effect of the Globe Equity No. 59 Decree on Specified Parties* (see minute entry, July 12, 2000)

August 31, 2000

Supplemental disclosure

November 9, 2000

Motions for summary judgment

December 21, 2000

Responses to motions for summary judgment filed on November 9, 2000

January 4, 2001

Replies, motions for summary judgment filed on November 9, 2000

Other dates to note:

August 10, 2000 - 9:30 a.m.
Case No. 6417 (LCR)

Status Conference; Pretrial Conference

Apache County Courthouse, St. Johns

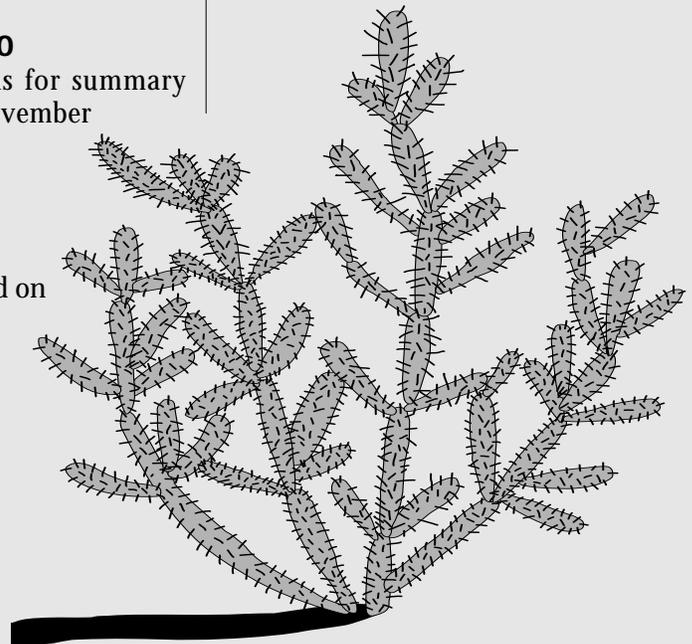
September 1, 2000

Case No. 6417 (LCR)

Due: Notices of intent to file disclosures on January 31, 2001, re Indian Lands HSR

September 4, 2000

Labor Day - state offices closed



Abbreviations: GR = Gila River adjudication

LCR = Little Colorado River adjudication

ASCB = Arizona State Courts Building, 1501 W. Washington, Phoenix, AZ

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Arizona General Stream Adjudication Bulletin March/April 1999 through January-March 2000

From the first issue (April 1993) through 1997, the *Bulletin* was published 10 times each year (monthly, except July and December).

Beginning with January-March 1998, publication frequency was changed to quarterly (or more frequently when events warrant).

Previous indexes are in the following issues: April 1995, April 1996, April/May 1997, April-July 1998, and March/April 1999.

All issues contain articles titled "Gila River Proceedings" and "Little Colorado River Proceedings."

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**Arizona Hydrological Society
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July-Aug. 1999

**Indian Water Rights Settlement
Symposium**
July-Aug. 1999

**CAP Settlement Boosts Tribal Water
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Expert Reports**
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**In re Atkinson's Ltd. of Az DBA
Cameron Trading Post**
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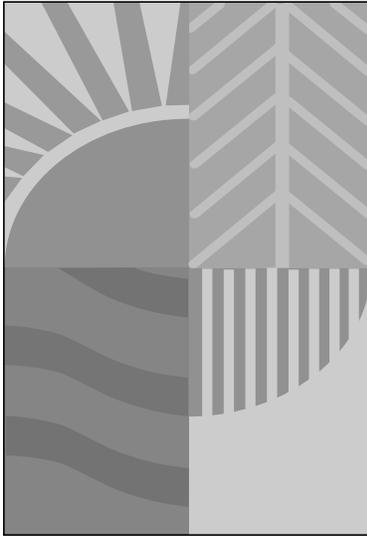
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ABA Water Law Conference



The American Bar Association's Water Resources Committee has announced the dates for its annual conference. The conference will be held Feb. 14-16, 2001, at the Hilton La Jolla Torrey Pines Hotel (site of the famous Torrey Pines Golf Course). In addition to golf, the conference will emphasize watershed issues and other topics to be announced. For those who really plan ahead, the 2002 conference will be held at the same location on Feb. 20-22, 2002. 



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