Arizona General Stream Adjudication Bulletin
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Parties Urge Supreme Court Review of Bolton Decision

Numerous parties from both the Gila River and Little Colorado River adjudications have urged the Arizona Supreme Court to review Judge Susan Bolton's decision on challenges to legislation passed by the 1995 legislature. The parties differ on when Bolton's August 30, 1996, decision should be reviewed, how broad the review should be, and whether additional briefing should be allowed. On October 3, Judge Bolton certified her decision to the Supreme Court under the special rules for appeals in the general stream adjudications. The Supreme Court gave the parties until November 22 to respond to the certification. (See Nov. 1996 Bulletin.)

Most of the parties in response to the Supreme Court's invitation encourage prompt review of Judge Bolton's decision, with the City of Phoenix arguing that the Supreme Court should simply acknowledge

that it has already accepted jurisdiction of the issues raised in Judge Bolton's ruling. The Navajo Nation, Hopi Tribe, and other tribes involved in the Little Colorado River adjudication, however, argue that the Supreme Court should delay its review until some questions not answered by Bolton's decision have been addressed in resumed contested cases in both adjudications.

The San Carlos Apache Tribe, Tonto Apache Tribe, and Yavapai Apache Nation (Apache Petitioners; see copy following this article) all suggest that the Supreme Court should review every aspect of Bolton's decision, as well as any constitutional and legal issues raised by the parties in trial court briefing. While the petitioners argue that they prevailed on every issue originally assigned to Bolton, they believe the appellate court should rule on other issues not decided by the trial court. The petitioners also indicate that they will seek to reverse Bolton's decisions upholding the severability clause of House Bill 2276, the new reporting format for hydrographic survey reports, and provisions of House Bill 2193 concerning water rights on public lands. The United States also urges the Supreme Court to review Judge Bolton's entire determination.

Other parties, most of whom defended the new legislation before the trial court, seek more limited consideration of the trial court decision. The Salt River Project identifies three of Bolton's major conclusions for review: that some provisions of the new legislation can only be applied prospectively; that the summary adjudication procedures for small uses are unconstitutional; and that these same small use procedures violate the federal McCarran Amendment (see Aug. 1994 Bulletin) giving state courts jurisdiction over federal and tribal rights.

While joining the Salt River Project in asking for review of these determinations, many of the other parties urge more specific matters on the court. The State of Arizona seeks to establish the constitutionality of the summary adjudication procedures contained in the new legislation. Phelps Dodge Corp., for another, asks the Supreme Court to overturn the trial court's decision that new Ariz. Rev. Stat. §45-257(C), which allows certain water right agreements to be included in a final decree, impermissibly intrudes on the powers of the court. Many of the Valley cities, including Phoenix, Chandler, Glendale, Mesa, and Scottsdale, seek reversal of Judge Bolton's decision that section 45-151(D), which prevents the adjudication court from reducing surface water rights because of the availability of alternative supplies, can only be applied prospectively. ASARCO, Arizona Public Service Co., Roosevelt Water Conservation Dist., Aztec Land and Cattle Co., the Arizona Cattle Growers' Ass'n, the Cities of Safford and Flagstaff, Rio Rico Properties, and Rio Rico Utilities join in some or all of these responses.

Most of the parties are silent on the manner of briefing that should be allowed. The Apache Petitioners suggest allowing opening and responding briefs by all interested parties thereby eliminating a final round of reply briefs. The Salt River Project, joined by Arizona Public Service Co., Roosevelt Water Conservation Dist., and Aztec Land and Cattle Co., all argue that no additional briefing be allowed and that the matter be set for oral argument at the earliest possible date.

Apache Petitioners
[Apache Petitioners] is used in lieu of the previous term, 'Apache Tribes' due to the participation of the

White Mountain Apache Tribe in the Special Action. The White Mountain Apache Tribe was not a Petitioner in the Special Action, but took the position below that certain threshold jurisdiction questions must be addressed before consideration of any of the issues raised in the Petition for Special Action. Judge Bolton determined that the issues raised by the White Mountain Apache Tribe were outside the scope of the issues raised in the Special Action. Order dated August 30, 1996." -- Apache Petitioners' Response to Certification of August 30, 1996 Decision (Nov. 22, 1996).

Supreme Court Justices Recuse Themselves

Two Arizona Supreme Court Justices have indicated that they will not participate in the special action proceeding involving challenges to adjudication legislation passed by the 1995 state legislature. Justice Frederick Martone, who took office in 1992, and Justice Charles Jones, who was sworn in this year, have recused themselves from the case. Both justices previously worked as attorneys in the Phoenix law firm of Jennings Strouss which has been active in the adjudications. Chief Justice Stanley Feldman has appointed court of appeals judges William Druke and Noel Fidel to substitute for Martone and Jones in the proceeding.

Supreme Court Postpones Stay Request

The Arizona Supreme Court had been expected to consider, on November 19, the request of the San Carlos Apache Tribe, Tonto Apache Tribe, and Yavapai Apache Nation for a stay in the implementation of adjudication statutes passed by the 1995 legislature. The legislation has been challenged in a special action proceeding filed in the Supreme Court but referred to Superior Court Judge Susan Bolton for an initial decision (see lead article). The stay request has been postponed until the Supreme Court conference on December 17. These conferences are not open to the public.

Calendar

Case No. CV-95-0161-SA (Special Action)
Re request for stay:

Dec. 17, 1996
Supreme Court's conference (not open to public)
Case No. 6417 (Little Colorado River Adjudication)Re request for stay:

Jan. 10, 1997
Settlement Committee status report due to Judge Minker
(see Sept. 27, 1996, minute entry)

Little Colorado River Proceedings

Settlement Discussions Continue

The parties seeking to negotiate a settlement of most federal, tribal, and state water rights in the Little Colorado River adjudication concluded a promising round of discussions in Phoenix on November 14 and 15. Settlement Judge Michael Nelson moderated the negotiation of the so-called "north-side" issues--those involving a proposed pipeline to bring water from Lake Powell to the Hopi Tribe and Navajo Nation. An ambitious schedule of meetings has been announced for December in anticipation of submitting a court-ordered status report on January 10, 1997. The north-side issues will again be discussed on December 5 and during a two-day meeting on December 17 and 18. The "south-side" settlement, which appears further along, will also be discussed during the two-day session. Judge Allen Minker has ordered submission of the January 10 interim status report as part of an overall schedule to complete a settlement by May 1997.

Phelps Dodge, United States Exchange Barbs

A three-year old discovery dispute reemerged recently with Phelps Dodge Corporation seeking a court order compelling three federal employees to execute an agreement to be bound by a protective order issued by a Superior Court Judge in early 1994.

The dispute originated in a contested case involving Show Low Lake, part of the Silver Creek watershed adjudication. Attorneys for the Navajo Nation and other tribes in the Little Colorado River adjudication had sought information about Phelps Dodge's water use from Show Low Lake and Blue Ridge Reservoir, located in another part of the Little Colorado River basin. By exchanging these diversions for water in the Salt River system, Phelps Dodge is able to divert water from the Black River for use in its mine located at Morenci. Before releasing the requested information, Phelps Dodge obtained a protective order from the court protecting the confidentiality of some of the information. Phelps Dodge maintains that the order requires certain federal and tribal attorneys, paralegals and experts, and their successors to sign "agreements to be bound" before obtaining the confidential information. Phelps Dodge indicates that federal and tribal attorneys and experts have signed these agreements in the past.

The attorney representing the United States at the time the protective order was issued has taken a different job, and his successor apparently refuses to sign the "agreement to be bound" or to advise other federal employees to sign the agreement.

In correspondence attached to Phelps Dodge's motion, the attorney indicates "it is not within the authority or jurisdiction of the Court to compel me to *agree* to be bound by the protective order in my *personal* capacity. This is exactly what is most onerous, improper and overreaching about the February 4, 1994, protective order . . . ." The court will not take up Phelps Dodge's motion until the United States has had an opportunity to respond formally.

Adjudications in Other Western States: Nebraska

Nebraska is divided by the 100th meridian, the fabled demarcation between the humid and arid parts of the United States. In 1895, Nebraska shifted away from the riparian rights doctrine and adopted an

appropriation and permit scheme modeled after Wyoming's system. Nebraska water law treats ground and surface water as distinct regimes although they are often hydrologically connected in the state. Groundwater rights are correlative, which means sharing in times of shortage, and are subject to the doctrine of reasonable use.

Nebraska adopted the common law doctrine of riparianism in 1855. While well-suited to the eastern half of the state, riparianism did not fit the needs of water users in the dry western half. The 1895 Irrigation Law incorporated the incremental steps made toward the appropriative doctrine in 1877 and 1889 by delineating a statutory scheme for permitting and administering appropriative rights. The Nebraska Supreme Court eventually held that the 1895 act foreclosed the possibility of riparian water rights on lands patented after April 4, 1895.

Administrative adjudications between 1895 and 1904 solidified most of Nebraska's water rights. No claimants asserted riparian rights because the 1877 act had assigned priority dates and brought those uses under the appropriation permitting system. Water duty was the main focus of these early actions; the 1895 act set forth a statutory water duty (the lesser of 1 cubic foot per 70 acres or 3 acre-feet/yr per acre) and it fell to the water management agency to quantify all uses in the state.

Nebraska officials then made inventories of water use, contacting water users in the field. Though there was no statutory method for notice, word spread rapidly among water users. In transcripts from those proceedings, even non-English-speaking immigrants were aware of the state action and were actively engaged in making claims. Drought conditions from 1892 to 1894 added to the public awareness.

In 1911, the state legislature directed the Department of Roads and Irrigation to adjudicate all unadjudicated rights. The purpose of this legislation was to investigate appropriations that had not been perfected or had been abandoned. The end result of Nebraska's efforts was an inventory of water uses, thoroughly described and memorialized as permits to appropriate water. "Decree" is a term that is reserved for the results of judicial proceedings. Therefore, in Nebraska, there are no decrees of water right, only permits on file with the Nebraska Department of Water Resources (NDWR).

Nebraska's adjudication and appropriation scheme is virtually unchanged from the 1895 Irrigation Law. No statewide or other comprehensive adjudications are underway in Nebraska today, nor are any likely. Groundwater rights have never been adjudicated, but are subject to ongoing regulation under the Nebraska Groundwater Management and Protection Act. Although NDWR has a policy of complete reexamination of all water rights throughout the state on a fifteen-year cycle, complex water right cases and interstate negotiations have made this goal difficult to achieve. While NDWR is prohibited from modifying vested rights, the agency may institute abandonment proceedings.

The NDWR permit system is essentially an ongoing adjudication of rights, granting permits to appropriate public waters based on availability of water in the system and the impact on the public welfare. Nebraska's system of water rights adjudication is wholly administrative. The director of NDWR is the administrative law judge for water rights. The director signs all orders although there are four

other administrative law judges who hold hearings. A law degree is not required for these positions, but many of the NDWR decisionmakers are lawyers and all have agricultural engineering backgrounds. In a typical year, there are approximately 300 water rights hearings, 295 of which are quick, simple, and usually uncontested abandonment proceedings. The remainder are large hearings with dozens of parties. Annual payroll for the five employees who devote the majority of their time to adjudications and new water rights is approximately $240,000. That figure includes travel, office supplies, and all other costs associated with administrative adjudication, but does not include field investigations, which are performed on an "as needed" basis.

Decisions by NDWR are appealable to the Nebraska Court of Appeals, while constitutional questions may go directly to the Nebraska Supreme Court.

Since passage of the 1895 Irrigation Law, Nebraska has been involved in a "rolling" adjudication of water rights similar to Colorado's and Oregon's. No adjudication of federal water rights has ever occurred, thus the reach of the state's adjudication scheme under the McCarran Amendment has never been tested. While there are several thousand acres of federal land located in areas where surface water rights could be asserted, the majority were not reserved lands and probably would not be able to claim priority dates earlier than 1976. The federal lands are several national forests, a national grassland, and several wildlife refuges--uses that probably would not require significant diversionary rights. The three Indian reservations within Nebraska, home to the Winnebago, Ponca, Omaha, and Sioux, are all in the humid eastern part of the state and situated on the Missouri River. Although some of the tribes have indicated a desire to claim reserved rights, abundance and a lack of competition for water appear to make quantification unnecessary. In fact, many water users within these reservations have state-issued water rights. From Nebraska's perspective, all adjudications of water rights are complete. (*Contributed by Dar Crammond*)

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