



Arizona General Stream Adjudication Bulletin

OFFICE OF THE SPECIAL MASTER • May - June 1999

San Carlos Apache Settlement Proceedings Challenged

The proposed San Carlos Apache Tribe Water Rights Settlement ran into trouble shortly after it was submitted to Judge Susan R. Bolton on March 30, 1999 (see March-April 1999 *Bulletin*). Soon after Judge Bolton had ordered the commencement of special proceedings to consider the proposed settlement, the cities of Globe and Safford, joined by the Central Arizona Water Conservation District, filed a motion with Judge Bolton to vacate the proceedings. Part of their challenge is that the agreement submitted to the court for review is different from the 1992 settlement agreement approved by Congress. The earlier agreement, the challengers argue, includes the cities of Safford and Globe as signatories. These municipalities were unable to come to agreement

with the Apache Tribe on more specific provisions of the settlement before it was submitted to Superior Court. Disagreements include City of Safford's use of Bonita Creek and whether the City of Globe will have to discontinue groundwater pumping near the tribal boundary and construct a pipeline from Roosevelt Lake.

The dispute has received an amount of public attention that is uncharacteristic of prior settlement proceedings. *The Arizona Republic* has carried several editorials on the matter as well as a Steve Benson cartoon satirizing the parties as children unable to play together in a wading pool.

The motion to discontinue the settlement approval process was heard by Judge Bolton at a previously scheduled hearing on May 14. At that time, the challengers argued that all the parties to the 1992 agreement would have had to concur on the details before it was submitted to Superior Court and that the Tribe and other major parties were attempting to "roll" these small cities. The Tribe and the Salt River Project argued that the challenge should be framed as an objection to the proposed settlement and considered as part of the established approval process. They reminded the Court that two of the previous water

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Supreme Court Changes Ethical Canons for Judges

On June 1, 1999, a Supreme Court rule change became effective resulting in a modification to the Arizona Code of Judicial Conduct. While this change, adopted on February 22, 1999, applies to trial and appellate judges throughout the state, it appears to have resulted from the problems the Supreme Court itself has encountered when hearing appeals and other proceedings involving general stream adjudications.

The previous version of Canon 3(E) barred a judge from hearing a case in which a lawyer, with whom the judge had practiced in the past, had been involved as a lawyer. Thus, a judge could not hear a case if the judge had practiced with an attorney who was still appearing in the case. The judge could also not hear the matter if the judge had practiced with a lawyer who had been an attorney in the matter in the past, even though new lawyers were now involved.

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San Carlos Apache Settlement cont ...

rights settlements approved by the Court (Fort McDowell Indian Community and Salt River Pima-Maricopa Indian Community) also contained some unresolved items when they were submitted to the Court for consideration. The argument concluded with a request from Tim Delaney, Chief Deputy Attorney General, appearing specially for Governor Jane Hull, who requested the Court to hold a decision in abeyance for at least two weeks to allow the Governor an opportunity to mediate this dispute. Judge Bolton agreed that she would not decide the matter for at least two weeks.

Technical Assessment and Other Matters

In other matters concerning the proposed settlement, the Department of Water Resources has filed its court-ordered assessment of the proposed settlement. The report is divided into seven chapters:

1. Introduction
2. Summary of Adjudication Claims
3. Review of Terms of the Settlement
4. Water Use
5. Water Resources
6. Impacts on Water Resources and Claimants
7. Summary

The Department reports that the maximum number of acres ever irrigated on the reservation was 3,000 acres in 1901. In 1988, the Department had identified almost 500 acres that were being irrigated. At present, the Department estimates the reservation's existing water use at 11,323 acre feet per year.

The Department also suggested a range of values that might represent the water right the Tribe could possibly prove, if based on the practicably

irrigable acreage standard commonly used for Indian lands. The Department indicated that almost 65,000 acres of land are arable, but not all this land could be irrigated due to economic or technical limitations. If fifty percent of the arable land were practicably irrigable, then the water right claimed might range between 129,000 acre-feet and 193,000 acre-feet per year. Such an award, if made, would come from the water sources available to the Tribe.

Under the proposed settlement agreement, the San Carlos Apache Tribe is entitled to an annual diversion of 67,965 acre-feet, of which 60,665 acre-feet is to be supplied through the Central Arizona Project and the remaining 7,300 acre-feet would be diverted from the Black and Salt Rivers. If the Tribe is limited to this amount from the Black and Salt Rivers, the Department concludes that the depletion of these rivers would have minimal effect on other users. Additionally, the Department indicates that there may be some impacts on other parties: upon Phelps Dodge Corporation if the Tribe engages in large-scale diversions from the Black River; upon the City of Safford if the Tribe diverts storage water along Bonita Creek; and upon the City of Globe, as the settlement agreement affects the city's right to use groundwater beneath the reservation.

The technical report may be inspected at DWR or at the office of every Superior Court Clerk in Arizona. It is also available on DWR's website: www.adwr.state.az.us. The report can be purchased from DWR for \$45.

Public Meeting

The settling parties held a court-ordered public meeting on June 2 to describe the settlement and answer questions. Approximately 90 people attended the meeting at the Department of Water Resources.

Objections to be Filed

Unless Judge Bolton grants the motion to stop the approval process, the next important date in the proceeding is July 1 when any objections to the settlement must be filed with the Court. Thereafter, the settling parties have an opportunity to reply to the objections, file motions, and the Special Master will schedule proceedings to hear those objections and motions. ♠

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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.

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Number 3

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Little Colorado River Proceedings

April 22nd Hearing

Encouraging reports were provided to Judge Edward Dawson when he held his first hearing in the Little Colorado River adjudication on April 22, 1999. Dawson, a Superior Court Judge in Gila County who sits in Globe, was appointed by the Arizona Supreme Court to the adjudication on January 28, 1999.

Continuing the practice in use previously, Judge Dawson asked for statements from representatives of the actively negotiating parties. Both the Hopi Tribe and Navajo Nation reported that most of the issues between them had been resolved, although the Hopi Tribe is seeking additional funds through the settlement in order to bring a water pipeline to Third Mesa. Similarly, the attorney for the State Land Department and State Game and Fish Department reported that the resolution of their remaining issues was on schedule. The attorney for Phelps Dodge Corporation briefly described for Judge Dawson the settlement that has been worked out with the Gila River Indian Community, thus allowing Phelps

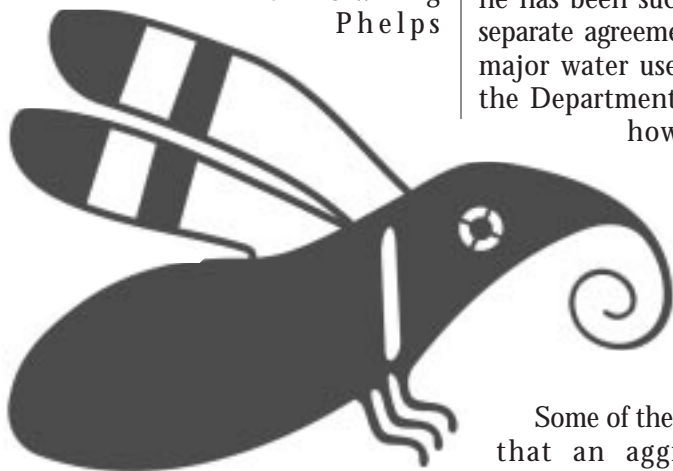
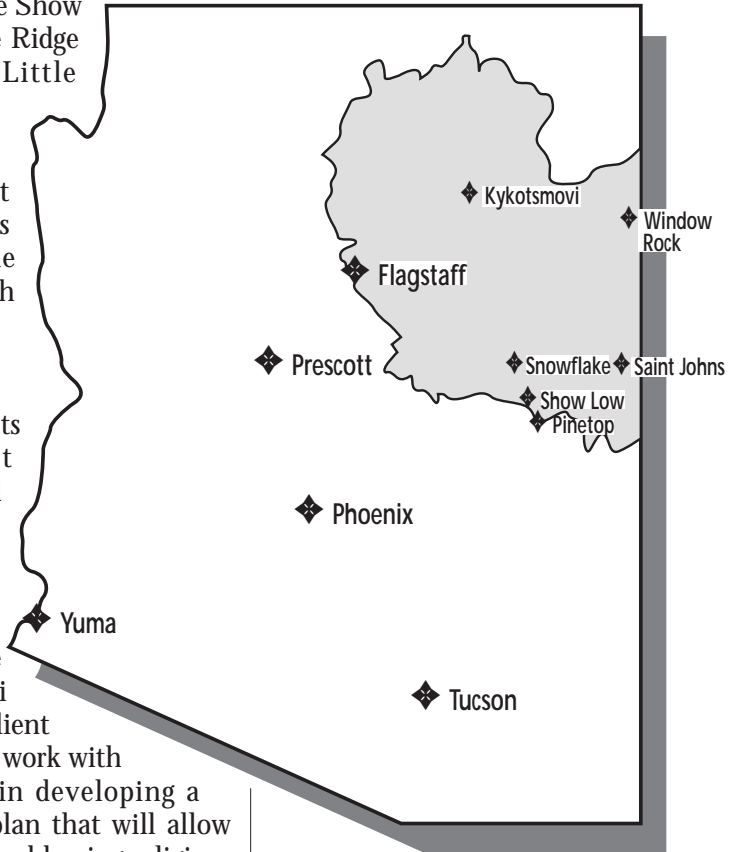
Dodge to contribute Show Low Lake and Blue Ridge Reservoir to the Little Colorado settlement.

The overall cost of the settlement is of concern to some of the parties, such as the Salt River Project whose attorney counseled that all main points of the agreement need to be resolved for the costly settlement to be approved by Congress. The attorney for the Pueblo of Zuni reported that her client needs more time to work with the other parties in developing a water acquisition plan that will allow the restoration of land having religious importance for the Pueblo. The attorney for the National Park Service, Forest Service, and other federal land management agencies indicated that he has been successful in negotiating separate agreements with many of the major water users. The attorney for the Department of Water Resources, however, indicated that the Department needs to scrutinize these agreements to insure consistency with other aspects of state water law and policy.

Some of the attorneys were hopeful that an aggressive negotiating schedule could lead to an agreement

by the end of June, which would be followed by the introduction of a bill by the Arizona Congressional delegation in July, and Congressional hearings in the fall. Other attorneys indicated they believe most of the summer will be necessary to reach an agreement on the remaining issues.

Judge Dawson concluded the hearing by urging the parties to redouble their efforts, with the assistance of Settlement Judge Mike Nelson, and to recognize that they should reach an agreement soon as events do not remain "frozen in time." Judge Dawson allowed the settlement processes to continue and set another status conference in St. Johns for 9:30 a.m. on Thursday, July 15, 1999. ♠



Gila River Proceedings

May 14 Hearing

Judge Susan R. Bolton held a hearing on May 14, 1999, to take up pending motions and other matters concerning the Gila River adjudication. In addition to the challenge to the special proceedings involving the San Carlos Apache water rights settlement (*see* lead article), the judge heard matters concerning the water right claims of the Gila River Indian Community and possible proceedings concerning the Globe Equity Decree and its impact on the San Carlos Apache Tribe.

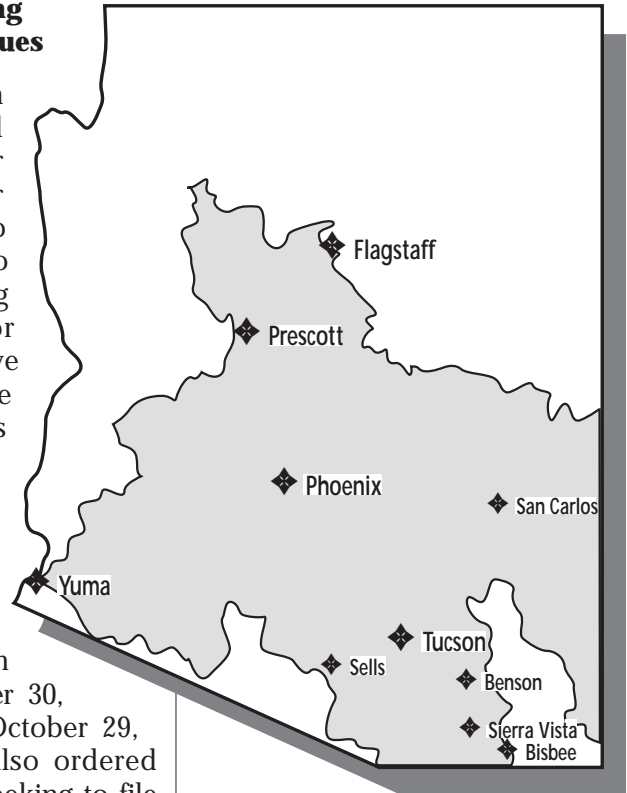
The Gila River Indian Community and the United States have requested of the court a 60-day delay in the filing of responses to the major motions for summary judgment that have been filed in the case. These motions address the question of whether the water rights of the Gila River Indian Community have been determined by a federal court proceeding known as Globe Equity 59 (*see* Aug.-Oct. 1998 *Bulletin*, p. 4). The Gila River Indian Community and the United States argued that there is an accelerated effort to reach a settlement concerning the Indian Community's water rights and that Senator Jon Kyl, who is aiding these discussions, has set a deadline of June 30, 1999, for their conclusion. If a settlement is reached, a bill may be introduced into Congress in July with Congressional hearings in the fall. Judge Bolton granted the motion and ordered that responses to the motions for summary judgment are now due on August 2, 1999, and replies to these pleadings are due on September 3, 1999.

Delay in Scheduling Other Threshold Issues

The Gila River Indian Community, the United States, and the Salt River Project had earlier agreed on a schedule to file and respond to motions concerning what other decrees or proceedings might have already determined the Indian Community's water rights. Judge Bolton modified the schedule for these motions by ordering that the opening motions be filed on August 2, 1999, with responses on September 30, 1999, and replies on October 29, 1999. Judge Bolton also ordered that any other parties seeking to file motions according to this schedule indicate, in a preliminary fashion, their intent to do so. Following Judge Bolton's hearing, ASARCO, Inc. and the San Carlos Irrigation and Drainage District identified additional legislation, contracts, agreements, and proceedings that they may use in their motions.

Globe Equity Impact on San Carlos Apache Tribe

The Gila Valley Irrigation District and Franklin Irrigation District have requested that the Court take up the possible impact of the Globe Equity 59 Decree on the water rights of the San Carlos Apache Tribe. The impact of this federal court decree on the Gila River Indian Community has already been raised in issues pending before the Court. These districts argue that the decree may



affect the San Carlos Apache Tribe as well, and that it would be more efficient to take up this question now than to wait several years for it to come up in the context of the hydrographic survey report for the area. Judge Bolton indicated she will further address this matter at her next hearing.

Other Matters

Several of the water users in the Santa Cruz watershed asked the Court for an order instructing the Department of Water Resources to provide technical assistance in reaching a settlement in that region. The judge ordered the parties to consult with the Department, and the matter will be taken up at the next hearing. The Department was also requested to report on the

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status of updating the San Pedro River hydrographic survey report. The Court deferred indefinitely the scheduling of proceedings on the Special Master's report on cases involving stockwatering, stockponds, and domestic uses in the San Pedro watershed. The Special Master was requested to work with the Steering Committee and DWR in attempting to improve the accuracy of names and addresses for claimants in the Gila River adjudication.

The next hearing is scheduled for 9:00 a.m. on Tuesday, June 29, 1999 (note that the hearing time is earlier in the day than usual).

Attorneys Fees Request in *Trimble v. Chattman*

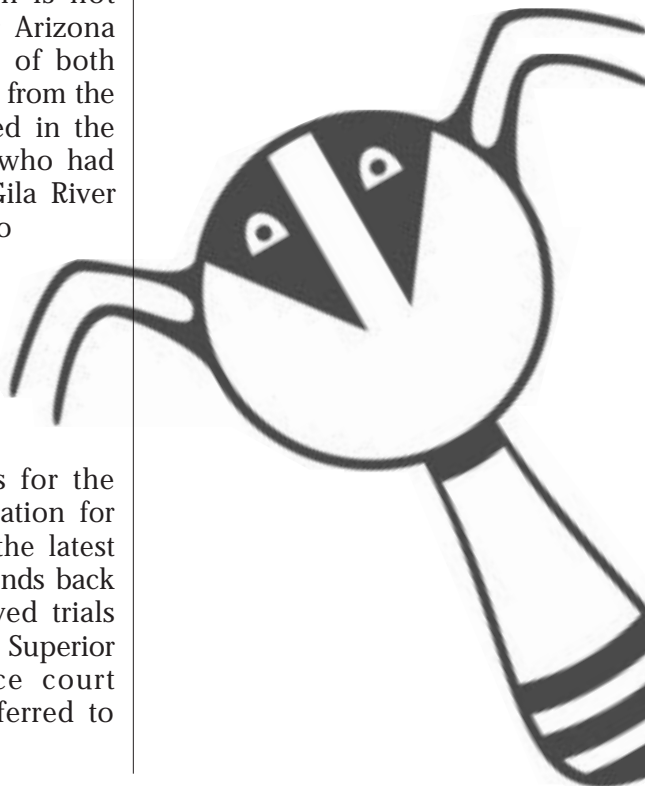
The litigation between neighbors north of Cave Creek over a small spring has resulted in a request for a very large award of attorneys fees and costs. On March 3, 1999, Judge Susan R. Bolton filed an order approving the Special Master's report which concluded that the water source in question is not appropriable water under Arizona law and, thus, the claims of both parties had to be dismissed from the adjudication. This resulted in the inability of the Trimbles, who had brought the case in the Gila River adjudication, to continue to use water from the spring on the Chattmans' property. The Trimbles have reportedly drilled a well and found water on their land.

On April 19, attorneys for the Chattmans filed an application for attorneys fees and costs, the latest phase in litigation that extends back four years and has involved trials and hearings before three Superior Court judges and justice court before the matter was referred to the adjudication court.

The Chattmans allege they are entitled to attorneys fees because they believe the dispute arose from a contract. They claim attorneys fees in the amount of \$118,000, plus \$49,000 in taxable costs. The Chattmans indicate that the attorneys fees and costs are attributable to the water law-related aspects of the civil case in Superior Court, as well as proceedings in the adjudication court. The attorneys fees represent more than 730 hours of time.

The Trimbles, as would be expected, oppose the fee and cost request, arguing that the dispute did not arise in contract, that it is difficult to separate the water law from the other matters in the overall litigation, and that the Trimbles have prevailed on most of the issues when the outcomes of all of the many proceedings are considered.

The Special Master heard oral arguments on the request on June 8. He took the matter under advisement and a decision is expected shortly. ♪



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.us/wm/>

Adjudications, HSRs, WFRs, Discovery

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<http://www.adwr.state.az.us>

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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

Microfilm Available

The Office of the Special Master has arranged for the microfilming of all remaining trial court proceedings from the *Southwest Cotton* case, No. C-23060-B, which was tried in 1929 in Maricopa County Superior Court. The case has been microfilmed on three rolls of 16mm film and one roll of 35mm film (oversize exhibits). In addition, Greenlee County case No. 1154-B (1926 through 1987) has also been microfilmed on one roll of 16mm film.

These microfilm records may be purchased from the Records Management Division of the

Arizona Department of Library, Archives and Public Records for \$8.50 per 16mm roll and \$12 for the 35mm roll. For purchases, contact Bill James at the Records Management Division, 1919 W. Jefferson, Phoenix, AZ 85007; (602) 542-4159. Film will be sent out within 72 hours of an order.

Also, the microfilm records can be viewed at the Arizona History and Archives Division in Room 342 of the State Capitol from 8:00 a.m. to 5:00 p.m. weekdays. The original court files for both cases will remain as part of the Arizona History and Archives collection. ♠

Judicial Canons...

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While the reasons for Supreme Court justices removing themselves from cases are not usually disclosed, three of the justices have recused themselves from recent water adjudication proceedings, apparently because they have practiced with firms that remain active in the cases.

The new amendment to Canon 3(E) removes the indefinite reach of the previous language. Now, judges must wait seven years before hearing a case in which a former partner or associate was involved. This change may result in at least some of the justices, who have recused themselves in the past, hearing water adjudication proceedings in the future.

When the proposed rule was first circulated by the court, the San Carlos, Tonto, and Yavapai-Apache Tribes lodged comments, as did the Navajo Nation and Hopi Tribe. Their comments may have had some impact, as the Court extended the time period from five to seven years in the final version which went into effect on June 1. ♠

Little Colorado Humor

When negotiations get tense in the Little Colorado River discussions, the judge and parties apparently turn to humor. The following aside recently leaked from those highly confidential sessions:

Conventional wisdom says that when you discover you are riding a dead horse, the best strategy is to dismount. However, in water negotiations we often try other strategies with dead horses, including:

Sending a delegation to Washington to see how very dead horses are ridden.

Assigning a "Plain Language Committee" to redefine the horse.

Consulting with the U.S. Fish & Wildlife Service – they have never seen a dead horse.

Harnessing several dead horses together for increased speed.

Providing additional funding to increase the horse's performance.

Say this horse was procured with 1995 dollars.

Declaring that "No horse is too dead to beat." ♠



CALENDAR

June 14, 1999

Case No. 6417-34-1 (LCR)

Due date: Atkinson's Ltd. of Az. DB
Cameron Trading Post
response to Navajo Nation
and United States motions
to dismiss

(see minute entry 3/2/99)

June 29, 1999 – 9:00 a.m.

(note the time)

Case Nos. W-1, W-2, W-3,
W-4; W1-203;
W1-204; W1-11-19 (GR)

Status Hearing

Maricopa County Courthouse,
East Court Building
101 W. Jefferson, Phoenix
Courtroom 513

(see minute entry 5/14/99)

July 1, 1999

Case No. W1-204 (GR)

Due date: Objections to the application
to approve the proposed
San Carlos Apache Tribe water
rights settlement

(see order for special proceedings
4/2/99)

July 1, 1999

Case No. 6417-34-1 (LCR)

Due date: Reply to response to
motions to dismiss

(see minute entry 3/2/99)

July 5, 1999

Independence Day Holiday

Abbreviations :

GR = Gila River adjudication

LCR = Little Colorado River adjudication

July 15, 1999 – 9:30 a.m.

Case No. 6417 (LCR)

Status Conference

Apache County Courthouse,
St. Johns

(see minute entry 4/22/99)

July 21, 1999

Case No. W1-204 (GR)

Due date: Responses to objections to
the application to approve the
proposed San Carlos Apache
Tribe water rights
settlement

(see order for special proceedings 4/2/99)

Aug. 2, 1999

Case No. W1-203 (GR)

Due date: Responses to motions for
summary judgment re
preclusive effect of Globe
Equity decree

(see minute entries 3/26 and 5/14/99)

Aug. 2, 1999

Case No. W1-203 (GR)

Due date: Motions for summary
judgment re other past legal
proceedings

(see joint motion 12/8/98, and minute
entries 3/26 and 5/14/99)

Sept. 3, 1999

Case No. W1-203 (GR)

Due date: Replies to
responses to
motions for
summary judgment re
preclusive effect of Globe
Equity decree

(see minute entries 3/26/99
and 5/14/99)

Sept. 30, 1999

Case No. W1-203 (GR)

Due date: Responses to motions for
summary judgment re other
past legal proceedings

(see joint motion 12/8/98, and minute
entries 3/26 and 5/14/99)

Oct. 29, 1999

Case No. W1-203 (GR)

Due date: Replies to responses to
motions for summary judgment
re other past legal proceedings

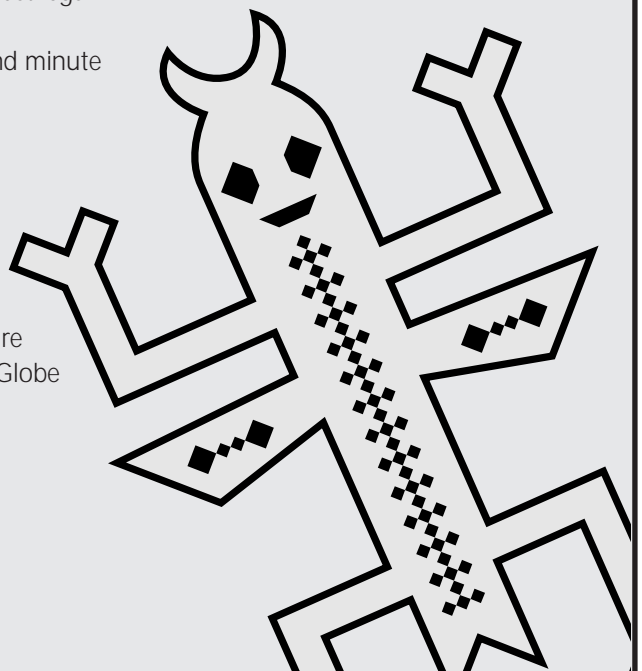
(see joint motion 12/8/98, and minute
entries 3/26 and 5/14/99)

Case Numbers/Names:

W1-203 *In re the Water Rights of the
Gila River Indian Community*

W1-204 *In re Proposed San Carlos
Apache Tribe Water Rights Settlement*

6417-34-1 *In re Atkinson's Ltd. of Az.
DBA Cameron Trading Post*





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