

**Arizona General Stream Adjudication Bulletin
November / December 1997**

**Office of the Special Master
Arizona State Courts Building
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**John E. Thorson, Special Master
Kathy Dolge, Assistant to Special Master
Volume 5, Number 8**

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Discovery Begins Concerning Gila River Indian Community

Judge Susan R. Bolton held a hearing on November 6 limited to proposals for managing the litigation concerning the water right claims of the Gila River Indian Community (GRIC). After many weeks of briefing and comment by the parties, Bolton began the hearing by announcing her tentative decisions on basic case management issues. On December 9, Bolton issued an order finalizing her decisions.

For many months, the major parties have been divided over a proposal made by the Salt River Project to

litigate first several issues concerning the possible binding effect of prior litigation and agreements and the purposes of the Indian Community's reservation. Parties supporting SRP have argued that the disposition of these threshold issues will eventually simplify the litigation and strongly influence the format and content of the final hydrographic survey report (HSR), which is prepared by the Department of Water Resources (DWR). Other parties have opposed this approach, arguing that the final HSR must be filed before the court can adjudicate any portion of the Indian Community's rights and that preliminary work would have to be repeated after publication of the HSR.

At the hearing, the United States and the San Carlos Apache Tribe, Tonto Apache Tribe, and Yavapai-Apache Nation continued to register their opposition to considering legal issues in advance of the final HSR. The United States renewed its argument that the final HSR is the statutory jurisdictional requirement before litigation can proceed on the claims of the Gila River Indian Community, as well as those filed by the United States in the Community's behalf. The Apache Tribes argued that, since the litigation affects a property interest of the tribe, strict adherence to the general stream adjudication statute is required. Further, the Apache Tribes indicated that the proposal will lead to litigation chaos in the basin with many parties filing dispositive motions against other parties. All these arguments were rejected by the Court.

In her order, Bolton largely adopted the SRP proposal, but indicated that resolution of these threshold issues would occur simultaneously with DWR's work on the preliminary HSR. Bolton indicated that SRP and other parties urging the preclusive effect of prior litigation, decrees and agreements must first disclose their basic theories and evidence in support of their position. These disclosure statements are due on March 31, 1998. The United States and the Gila River Indian Community then have until June 1, 1998, to disclose any additional documents or witnesses who have information that may be relevant to the issues of preclusiveness.

Judge Bolton ordered a similar disclosure procedure concerning the purposes of the GRIC reservation. The Gila River Indian Community and/or the United States must identify witnesses and possibly relevant documents by March 31, 1998. Parties intending to dispute the reservation purposes alleged by the United States and the Indian Community must file their disclosure statements by June 1, 1998.

Parties filing disclosure statements must indicate whether they believe the issue can be resolved by motion in advance of trial, whether a trial will be necessary, and the time needed to prepare. Also, the documents identified by the parties will be submitted to the Special Master who will inventory them and make arrangements for interested parties to purchase copies.

Bolton largely adopted the proposal that had been made by DWR for completing the HSR for the Indian Community. Bolton agreed that the department should finalize its study of the arable lands on the reservation, a report which had been released in preliminary form in December 1996. Bolton also agreed that the department should prepare preliminary chapters on the water supply physically available to the reservation at different times in the past, agricultural water duty requirements, a summary of the practicably irrigable acreage claim made by the Indian Community and the United States, and a

tabulation of claims made by these governments on other legal bases. Bolton, however, ordered the department to file preliminary versions of these chapters simultaneously as one document. Thereafter, all parts of the HSR, including the earlier study of arable lands, will be published, in final form, as one document.

At the hearing, the United States asked when DWR anticipated completing the preliminary HSR for the Gila River Indian Community. The Department indicated that the preliminary version should be completed by the end of 1998.

The Apache Tribes also renewed their motion for partial summary judgment on the question of whether the Gila River is fully appropriated, thus precluding the Department of Water Resources from issuing additional permits and certificates on the water source. Bolton indicated she would not hear the motion at this time as she desires all parties to focus on proceedings concerning the Gila River Indian Community. The Apache Tribes also moved that the Court order the Department of Water Resources to provide copies of all communications made to the Court from 1995 to the present. The Apache Tribes also indicated that such communications, other than for administrative and calendaring purposes, should be made in open court. The Court took this motion under advisement.

Justice Moeller Announces Retirement

Arizona Supreme Court Justice James Moeller has formally advised Governor Jane Hull that he will retire January 31, 1998, after nearly 11 years as a member of the Supreme Court. The Commission on Appellate Court Appointments is interviewing eight individuals (including Judge Susan R. Bolton, presiding judge for the Gila River adjudication) who seek to replace Moeller. The Commission will forward a list of at least three nominees to Governor Hull, who will make the final appointment.

Moeller's career in the Arizona judiciary spans more than 20 years, beginning with his appointment to the Maricopa County Superior Court in 1977, where he served in criminal, civil, and special assignments. Moeller, 63, also sat on the Arizona Court of Appeals as a visiting judge at various times during his career.

He was appointed to the Arizona Supreme Court in February 1987, and served as Vice Chief Justice from 1992 to 1996.

Chief Justice Thomas Zlaket, speaking for the Court, said, "Jim Moeller is an outstanding judge, a dedicated public servant, and a real gentleman. For many years, the citizens of Arizona have been the fortunate beneficiaries of his hard work and impeccable legal scholarship. Those of us on the court have additionally been blessed by his wise counsel and enduring friendship. Although we will greatly miss him, we hope that he and Nancy have many long and happy years following his retirement."

Born and raised in Nebraska, Moeller received his B.A. degree from Nebraska Wesleyan University in Lincoln in 1954, served in the United States Army with a tour in Japan from 1954-56, then went on to

receive his J.D. degree with highest distinction from The George Washington University Law School in Washington, DC, in 1959, graduating first in his class and serving as editor-in-chief of the law review.

Moeller began his private practice of law in 1959 with the Phoenix law firm Lewis and Roca, where he stayed until 1970. He then practiced with the firm Moeller, Hover, Jensen and Henry, where he remained until his appointment to the Superior Court bench in 1977.

Justice Stanley Feldman said of his colleague, "Justice Moeller has been a great asset to the work of the court. The people of Arizona have been well served by his thoughtful, thorough, and open-minded approach to resolving legal issues. He will be missed and hard to replace."

Justice Moeller's plans for the future are not final, but he intends to remain somewhat active. He has delayed discussions with law firms concerning his future plans until his work at the court is done. If he does not affiliate with a firm, he will make himself available for alternative dispute resolution and similar assignments. One thing, he says, is for sure: he and his wife, who is in the travel business, will be traveling more in the future than they have been able to in the past.

(The foregoing based on a press release issued by the Public Information Office, Administrative Office of the Courts.)

Little Colorado River Proceedings

Optimism was very much in the air as Judge Allen Minker convened court on December 12 in St. Johns to review the status of settlement efforts in the Little Colorado River adjudication. Members of the settlement committee said that differences had narrowed concerning the north-side negotiations. The Department of Interior and Southern California Edison have renewed financial offers that are critical to building a pipeline southward from Lake Powell to provide water for the Hopi Tribe, Navajo Nation, and coal mines in the area. The capacity of the pipeline and the priority date for water delivered by pipe still must be resolved.

Several issues continue to trouble the south-side negotiations. The Navajo Nation and the United States are still working on an acceptable project for developing water in the Three Canyon area south of Winslow. Threatened and endangered species concerns are being addressed in discussions with officials from state and federal fish and wildlife agencies. The Phelps Dodge Corp. has provided more information about the role Blue Ridge Reservoir might play in a south-side settlement, and the United States indicated it would take another look at this possibility.

As part of the settlement, the Navajo Nation seeks an allocation of Central Arizona Project water which it hopes to market off-reservation. The Arizona Department of Water Resources and some parties oppose such marketing proposals, at least in their current form.

Settlement committee members have started drafting legislation which they hope to introduce in

Congress in February or March. Several people emphasized the need for an early bill if it is to pass before Congress adjourns prior to elections in the fall. Members of the committee, joined by Settlement Judge Michael Nelson, met with members of Arizona's congressional delegation in November in order to brief them on the settlement.

The Arizona Department of Water Resources (DWR) has identified a number of problems it has with the settlement as it now stands. In a letter from Director Rita Pearson to Senator John Kyl, shared with the Settlement Committee on December 11, DWR indicates that the financial contribution expected of the state may not be justified when compared to the anticipated benefit of the settlement for Arizona citizens. Also, DWR remains concerned about the availability of CAP water to support the settlement and the procedure to be followed if CAP water is to be assigned to the Navajo Nation. At the December 12 hearing, settlement committee members reported to the court that they would meet with Director Pearson about DWR's concerns.

Judge Minker agreed to continue the stay of litigation to allow settlement discussions to continue, and he refused to schedule a motion filed by Atkinson Trading Co. seeking a determination of jurisdiction over its claimed water rights since consideration of the motion would detract from settlement efforts. Judge Minker scheduled another status hearing for 9:30 a.m. on Friday, March 6, 1998, in St. Johns. Minker urged the parties to complete their work promptly. He cautioned that no one should assume that the litigation stay will continue if the settlement is not approved by Congress in 1998.

Bulletin to be Published Six Times Per Year

The editors of the *Arizona General Stream Adjudication Bulletin* have decided to reduce the frequency of publication due to litigation stays in both the Gila River and Little Colorado River adjudications. Since its inception in 1993, the Bulletin has been published ten times per year. Starting with the next issue, the Bulletin will be published on a quarterly basis. In addition, up to two special issues will be published each year to report news that warrants immediate coverage. Current paid subscriptions will be lengthened at no additional cost so that existing subscribers will receive ten issues before the next renewal.

Calendar

Jan. 12, 1998

Special Action CV-95-0161-SA
Answering briefs due
(see Order Aug. 13, 1997)

Feb. 10, 1998 -- 10 a.m.

Special Action CV-95-0161-SA
Pre-argument Conference
Arizona State Courts Building, 4th Floor

1501 W. Washington, Phoenix
(see Order Aug. 13, 1997)

Feb. 18-20, 1998

ABA Water Law Conference
San Diego
(see [Oct. 1997](#) Bulletin)

March 6, 1998 -- 9:30 a.m.

Case No. 6417 (Little Colorado River adjudication)
Status Conference before Judge Minker
Apache County Courthouse, St. Johns
(see minute entry Dec. 12, 1997)

March 31, 1998

Case No. W1-203 (Gila River adjudication)
In re the Water Rights of the Gila River Indian Community
Due: Gila River Indian Community and/or U.S. disclosure(s) re purposes of reservation
Due: Disclosure(s) re prior agreements or decrees
(see minute entry Dec. 8, 1997)

June 1, 1998

Case No. W1-203 (Gila River adjudication)
In re the Water Rights of the Gila River Indian Community
Due: Responses to Gila River Indian Community an/or U.S. disclosure(s) re purposes of reservation
Due: Gila River Indian Community and/or U.S. responses to disclosure(s) re prior agreements or decrees
(see minute entry Dec. 8, 1997)

Sources for Help

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

Adjudications, HSRs, WFRs, Discovery

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

Scheduling, Procedure

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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

(602) 506-4516 fax

Little Colorado River

Clerk's Office

Apache County Superior Court

Apache County Courthouse

P.O. Box 365, St. Johns, AZ 85936

(520) 337-4364

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