

**Arizona General Stream Adjudication Bulletin
October 1996**

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Negotiations to Continue in Little Colorado River Adjudication

Judge Allen Minker has held his first hearing in almost a year on the status of negotiations in the Little Colorado River adjudication. The hearing, conducted in St. Johns on September 27, provided an opportunity for the parties to inform the court on progress in their effort to achieve a comprehensive settlement of the adjudication, including the claims of Indian tribes and federal agencies.

Responding to a question Judge Minker posed at the beginning of the hearing, every party addressing the court agreed that negotiations should continue and litigation should be postponed. The settlement committee reported that the negotiations have become separated into the north-side and south-side discussions with the latter showing considerably more progress.

The negotiators have reached a framework for settlement of the south-side issues--those involving water for the Navajo reservation from Jacks Canyon, Clear Creek, and Chevelon Creek (all tributaries of the

Little Colorado River). Counsel for the Hopi Tribe, however, criticized some parties for discussing the possibility of congressional approval of a separate south-side agreement without the Hopi Tribe's participation. The attorney for the Hopi Tribe urged the parties to return to the original goal of a comprehensive settlement. Other parties explained that the south-side discussions have been emphasized because progress was being made. These parties indicated they remain committed to a settlement of both sets of issues.

The north-side negotiations involve a possible pipeline from Lake Powell to benefit both the Hopi and Navajo tribes and groundwater pumping rights for the San Juan Southern Paiute Tribe. These negotiations have slowed because of disagreements over the size, distance, and route of the pipeline, as well as disputes over cost-sharing and right-of-way fees. These negotiations are further complicated by terms of a Hopi-Peabody Coal Co. coal lease; a tax dispute involving the Hopi Tribe, Navajo Nation, and several utilities; and the question of whether the State Land Department can agree to limit future groundwater development on state trust lands. Also, the Zuni Pueblo indicated that it has just changed attorneys and is unable to present a negotiating position to the other parties.

Many of the parties discussed feasibility of reaching an agreement in six months with most of the attorneys saying that it is unlikely that an overall agreement can be reached in that time.

After hearing from everyone who desired to speak on the status of negotiations, Judge Minker ordered that settlement discussions continue for another seven months with Judge Michael Nelson guiding the process as settlement judge. During this period, Nelson may schedule a "marathon" negotiating session, lasting one to two weeks.

The next status conference will be held in St. Johns at 9:30 a.m. on Friday, May 2, 1997, and the Settlement Committee must file written status reports on January 10 and April 18. After May 2, 1997, the court will resume litigation for those parties and issues that have not been settled. Minker postponed the deadline for the United States and tribes to file expert reports but did indicate that the negotiating efforts of all parties will be taken into account if and when these discovery dates must be rescheduled.

Claims of Federal Agencies

The role of federal land management agencies in the settlement discussions was also taken up by the court. The attorney for the National Park Service and other agencies expressed his disappointment that state parties and the Department of Water Resources (DWR) are not participating on a technical committee studying groundwater supply and movement in the basin. Judge Minker admonished counsel that a technical committee had not been established by the court and should only be referred to as an informal study group. Minker also expressed his concern that negotiations not be delayed by a lengthy groundwater study. All parties, Minker indicated, should be in a position to understand their claims and must negotiate on the basis of existing information. The federal attorney and DWR were requested to meet to identify any existing information that agency might provide.

Motion to Dismiss

Judge Minker discussed with the White Mountain Apache Tribe's attorney the tribe's motion to dismiss the entire Little Colorado River adjudication. The attorney indicated that technical studies demonstrate that the Coconino Aquifer, which underl underlies the tribe's reservation, extends into both the Gila River and Little Colorado River adjudications. The Little Colorado River adjudication court, the attorney continued, does not have jurisdiction over the entire aquifer.

The tribe's motion to dismiss was postponed until after the May 2 status conference. Judge Minker urged the White Mountain Apache Tribal Council to reconsider its earlier decision not to participate in the settlement negotiations and to notify Judge Nelson of the outcome of its deliberations.

Apache Tribes Seek Attorneys' Fees

The Apache Tribes who initiated the special action proceeding challenging adjudication legislation passed by the 1995 Arizona legislature now seek almost \$1.1 million in attorneys' fees and costs they assert were incurred in the proceedings. Claiming to be the prevailing parties in the litigation, the San Carlos, Tonto, and Yavapai Apache Tribes filed their fee request both before Judge Susan Bolton, who reviewed the legislation, and before the Supreme Court.

The Apache Tribes seek these fees from numerous parties (see bulleted list that follows). In a hearing on September 26 (see Gila River Proceedings article), Judge Bolton deferred any action on the request saying that she did not believe it will be taken up until the Supreme Court completes its review of her decision in the special action. She suggested that the parties communicate with the Supreme Court or its staff to ascertain how the fee request will be addressed. The Tribes had previously filed a motion with the Supreme Court asking that their fee request be assigned to Judge Bolton for hearing.

Parties from whom attorneys' fees and costs are sought:

- Arizona State Land Department
- Arizona Department of Water Resources
- Cities of Phoenix, Scottsdale, Chandler, Glendale, Mesa, Tempe, and Safford
- Salt River Project Agricultural Improvement and Power District
- Salt River Valley Water Users' Association
- Arizona Public Service Company
- Phelps Dodge, Inc.
- ASARCO, Inc
- Magma Copper Company
- Roosevelt Water Conservation District
- Cypress Climax Metals Company
- Arizona Cattle Growers Association
- Aztec Land and Cattle Company, Ltd.

Gila River Proceedings

On September 26, Judge Susan Bolton held the first hearing following her August decision reviewing the constitutionality of adjudication legislation passed last year. Many of the matters discussed at the September 26 hearing concerned the aftermath of Bolton's decision on HB 2193 and HB 2276. Both the parties and the court agreed that there is some confusion over the posture of Bolton's decision. Since the review was initiated as a special action proceeding before the Supreme Court, is the August decision automatically before the Supreme Court? Or must the parties petition for appellate review? Judge Bolton indicated that she would inquire of Supreme Court staff for more information on the posture of the case. (On September 30, Judge Bolton certified her decision to the Supreme Court, a procedure that may expedite consideration by that Court.)

Review of Special Master's Report

The court then turned to the Apache Tribe's motion to review the Special Master's June 12, 1996, report on whether an injunction should issue preventing the implementation of certain provisions of HB 2193 concerning the reassignment of water right rights on state lands. The Special Master had recommended that such a stay should not be granted. Judge Bolton asked why her August decision upholding the constitutionality of HB 2193 had not effectively resolved the Tribes' request for a stay. Counsel for the Apache Tribes indicated that they disagreed with the judge's decision on HB 2193. Judge Bolton concluded the discussion by saying that, in light of her August decision, the Master's report should be affirmed.

Indian Lands HSRs

In August 1995, Judge Bolton amended pretrial orders to alter the schedule for the preparation of hydrographic survey reports (HSRs) and to modify the required content of HSRs on Indian lands. Judge Bolton's action had the practical effect of making the Gila River Indian Community the next area to be adjudicated in the Gila River adjudication.

In January 1996, the Apache Tribes asked Judge Bolton to reconsider her decision and to hold an evidentiary hearing on the content of those Indian lands HSRs. Bolton had deferred action on the Tribes' motion pending completion of the special action proceeding before her. She now asked whether it was the appropriate time to consider the Tribes' motion. After DWR reported that the preliminary HSR for the Gila River Indian Community should be finished by January 1, 1997, Bolton adopted the recommendation of one party and agreed to take up the Tribes' motion early next year in the context of the preliminary Gila River Indian Community HSR.

***De Minimis* Ruling**

Numerous exceptions have been filed to the Special Master's November 1994 decision recommending a summary procedure for adjudicating small ("*de minimis*") uses in the Gila River adjudication. Action on those objections, which had been filed in May 1995, had been postponed awaiting Judge Bolton's review of the 1995 legislation, portions of which addressed *de minimis* uses. In response to Bolton's inquiry as to whether these exceptions to the Master's report should now be considered, most parties recommended again postponing action until the Arizona Supreme Court finishes its review of the 1995 legislation. Bolton took the matter under advisement.

Other Matters

In other matters, Bolton granted the Apache Tribes' motion that their complete application for attorneys' fees and costs arising out of the special action proceeding must be served only on those specific parties from whom fees and costs are sought. The Tribes must also provide the complete application to any other party that requests it.

Judge Bolton also noted the retirement of Steve Erb as chief of the DWR Adjudications Division. She expressed the court's appreciation of Erb's many years of service.

Steve Erb Retires

Steve Erb, who has served since 1983 as chief of the Adjudications Division, Arizona Department of Water Resources, has announced his retirement. During his tenure at DWR, Erb helped organize the Adjudications Division, which at one time exceeded 40 people, and set the basic policies for DWR's role in the adjudications. Erb and his staff prepared preliminary and final hydrographic survey reports for the Silver Creek watershed, San Pedro River watershed, Upper Salt River watershed, and Indian lands in northeastern Arizona, along with innumerable technical reports for the parties and the court. In all of his endeavors, Erb set a high standard of thoroughness and professionalism for his staff. The parties, attorneys, and judges join DWR staff in thanking Steve Erb for his enormous contribution to Arizona. (See Feb. 1994 Bulletin for profile of Erb).

Adjudications in Other Western States: Kansas

Kansas is a prior appropriation state. All water in the state is dedicated to the use of the people. Since 1945, the appropriation of surface and groundwater requires a permit from the chief engineer, division of water resources, state board of agriculture. Water rights established before 1945 (including applications pending three years prior to 1945) are deemed "vested rights." A separate Kansas Water Office is responsible for broader water management, water resource planning, and some interstate issues.

There are virtually no adjudications underway in Kansas. Evidently, this is because there is only a minor amount of federal and tribal land in the state, and the vast amount of the state's water is managed under the 41,000 appropriative rights permitted by the chief engineer. Four tribes do have lands in Kansas, totaling almost 90,000 acres. They are the Iowa, Kickapoo, Sac and Fox, and Potawatomi Indians. Whether the tribes will eventually seek to litigate their water right claims to these lands remains unclear.

Surface and groundwater are managed under the Water Appropriation Act of 1945. Applications for appropriation are submitted to the chief engineer who must determine whether the proposed use will (a) impair existing uses, or (b) prejudicially or unreasonably affect the public interest. Permits are not necessary for domestic uses or reservoirs less than 15 ac-ft in capacity, which are usually stockponds. The chief engineer usually grants irrigation uses a water duty of 1 ac-ft/ac in the eastern third, 1.5 ac-ft/ac in the center third, and 2 ac-ft/ac in the western third of the state.

While few adjudications ever have been filed, the Kansas statutes do refer to water adjudications in two ways. The 1945 legislation required the chief engineer to gather information and make a determination of all rights, other than domestic, described as "vested" under the legislation. The chief engineer's determination was effective upon completion although it could be stayed upon appeal to the state district court. The legislature later amended this section, indicating that the chief engineer's determination is not an adjudication of the relationship of one vested right to another. The apparent result is to render the chief engineer's determination little more than a register of pre-1945 vested rights. A second provision of the law requires the chief engineer and his staff to assist the district court in administering an adjudication decree. The section offers no guidance about how to conduct the adjudication.

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