

**Arizona General Stream Adjudication Bulletin  
October 1997**

**Office of the Special Master  
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Kathy Dolge, Assistant to Special Master  
Volume 5, Number 7**

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**Opening Briefs Filed in Challenge to Adjudication Legislation**

Opening briefs have been filed with the Arizona Supreme Court on the constitutionality and applicability of legislation to modify the state's general stream adjudications. The legislation, HB 2276 and HB 2193, was originally passed in spring 1995. It was immediately challenged by the San Carlos Apache Tribe, Tonto Apache Tribe, and Yavapai-Apache Nation (Apache Tribes), who were later joined

by the United States and tribes located in northeastern Arizona. The challenge was filed as a special action proceeding with the Supreme Court which then assigned the case to Superior Court Judge Susan R. Bolton. In August 1996, Bolton determined that portions of the 1995 legislation were unconstitutional. Still other portions could only be applied prospectively. Parties on all sides of the issues sought review by the supreme court, which that body agreed to on May 23, 1997.

While prevailing on many of their arguments before the trial court, the Apache Tribes in their opening brief to the Supreme Court ask for a comprehensive de novo (new) review of all constitutional issues decided and not decided by Bolton. The Apache Tribes then proceed to set forth 13 basic arguments about why the Supreme Court should strike down HB 2276 and HB 2193 in their entirety. These arguments include alleged violations of the separation of powers doctrine, equal protection, due process, state trust land provisions of the state constitution, the federal McCarran Amendment (which specifies the conditions under which federal sovereign immunity is waived for water adjudications), and retroactivity prohibitions. The Apache Tribes ask the Supreme Court to "send a clear and unequivocal message to the litigants who had the power to draft and enact this partisan and unconstitutional legislation, but who lacked the will power or wisdom to resist such temptation."

The Navajo Nation, Hopi Tribe, San Juan Southern Paiute Tribe, and the Pueblo of Zuni, all involved in the Little Colorado River adjudication, join in a brief that "addresses only a limited number of issues because the Tribes believe that the Superior Court's decision in substantial part is correct." These tribes do argue that many portions of the 1995 legislation not specifically addressed by Bolton deprive Arizona courts of jurisdiction over tribal water rights. These remaining sections, the tribes say, constitute a legislative effort to adjudicate state law based water rights--thereby violating the federal McCarran Amendment's requirement of a comprehensive adjudication. These tribes also argue that both the McCarran Amendment and the constitutional guarantee of equal protection are violated by the state legislature's improper purpose (allegedly to disadvantage tribes in the adjudication) in enacting the legislation.

The principal challenges to Judge Bolton's decision come from the Salt River Project, joined by the City of Tempe. The SRP brief concentrates on the three areas that were at the basis of Judge Bolton's decision: separation of powers, retroactive effects of the legislation, and McCarran Amendment concerns. SRP indicates that HB 2276 applies prospectively "to future events and conduct affecting water rights." The law is permissible under the legislature's constitutional powers, these parties suggest. In particular, the legislature has not foreclosed objections to smaller rights that are adjudicated in a summary fashion, as these rights may be challenged in post-decree proceedings. This summary adjudication process, SRP argues, is "in the mainstream of the practices of western states . . . ."

Phelps Dodge Corp. joins in briefs filed by SRP and Phoenix-area cities. While suggesting that the state legislature should have the ability to improve procedures in the water adjudications, Phelps Dodge concentrates on three specific trial court rulings which it seeks to overturn. Phelps Dodge asks the Supreme Court to uphold a section that calls for the Department of Water Resources' calculation of reservoir and diversion capacities to be incorporated in a decree if not objected to, a provision that calls

for settlements among some parties to be folded into a decree without modification, and language that requires the court to accept information in previous filings unless reported by DWR as being clearly erroneous or successfully challenged by another party. Judge Bolton ruled that all three provisions violate the separation of powers doctrine. Finally, Phelps Dodge argues that the trial court did not apply the proper standard of review for legislation challenged on a constitutional basis.

The cities of Phoenix, Chandler, Glendale, Mesa, and Scottsdale share a brief that focuses on the trial court's finding that portions of HB 2276 were unconstitutional, retroactive legislation. The cities argue that such legislation can be applied to future events affecting water rights that were vested when the legislation was passed, especially when the changes are consistent with Arizona's law of prior appropriation and the original statutory scope of the adjudications. These cities endorse SRP's arguments about the separation of powers doctrine and the McCarran Amendment. They also join Phelps Dodge's arguments about the standard of review and separation of powers. The cities add the additional point that "[t]he general stream adjudication process is a particularly inappropriate area for this Court to draw fine-line distinctions as to the relative powers of each branch of state government when the interaction of all is necessary to provide litigants with a comprehensive system."

ASARCO and the Cyprus mining entities join in the brief filed by SRP and the City of Tempe. The City of Safford and entities associated with Rio Rico Properties selectively join in portions of briefs filed by SRP, Phelps Dodge Corp., and Phoenix and other Valley cities.

## **Little Colorado River Proceedings**

The possibility of a settlement among the major parties remains the focus of the Little Colorado River adjudication. Settlement activities were discussed at a recent status conference convened by Judge Allen Minker, the assigned judge for the adjudication. Judge Michael Nelson continues in his role as settlement judge for the discussions among the major parties.

Judge Minker's status conference was held in St. Johns on Friday morning, Sept. 26. Nearly 70 attorneys and parties were in attendance. Members of the settlement committee reported that while progress has been made on many fronts, significant problems remain. In the "southside" discussions, the most difficult issue is whether Blue Ridge Reservoir will be part of the agreement and, if not, what alternative source of water will be identified for proposed irrigation on the Navajo reservation. The United States has given its contractors until Dec. 1 to develop an alternative project.

The "northside" discussions continue to be perplexed by sources of money for the proposed pipeline from Lake Powell. The United States had withdrawn its proposed \$20 million contribution, but that money may again be on the table. Southern California Edison has withdrawn its proposed \$12.5 million contribution because the Department of Interior has separately notified the company that it must install air quality "scrubbers" at its Mohave Power Plant. That dispute will likely be addressed in separate discussions between the company and Interior.

Even with these problems, most of the parties addressing the court urged that negotiations continue. Several speakers discussed the importance of a potential settlement to the parties and public in general. One speaker observed, "All the major parties have their hearts set on settlement, which is justification enough to continue." Another indicated, "The timing is such that the opportunity [for settlement] may never come again."

Judge Minker agreed to allow settlement efforts to continue. He set another status conference for 9:30 a. m. on Friday, Dec. 12, at the Apache County Courthouse in St. Johns. A written status report is to be submitted to the judge by Dec. 5.

## **Continuing Negotiations**

Since the Sept. 26 status conference, negotiations have continued. Judge Nelson has met with the parties in Albuquerque and is participating in a trip to Washington D.C., to brief Arizona's congressional delegation.

## **Announcement:**

### **ABA Water Law Conference**

The 16th annual water law conference sponsored by the American Bar Association will be held in San Diego from Wednesday evening, Feb. 18 to noon on Feb. 20. The conference will commemorate the 75th anniversary of the Colorado River Compact. Other program topics will include municipal water planning, the Klamath River adjudication (Oregon), habitat conservation plans, and the enforceability of those and other similar environmental agreements. Phoenix attorney Larry Caster is chair of the conference planning committee. Additional information will be provided in future issues of the *Bulletin*.

### **Gila River Proceedings**

#### **Bolton Status Conference Upcoming**

Judge Susan Bolton has set Thursday, Nov. 6, as the date for a hearing on the preparation of the hydrographic survey report (HSR) for the Gila River Indian Community. The hearing will begin at 1:30 p.m. Bolton will take up the Arizona Department of Water Resources' proposal for finalizing the HSR (see below), as well as any comments on DWR's proposal. Also, Bolton will hear discussion of different proposed case management plans for conducting litigation on the water right claims of the Indian Community (also below).

#### **DWR's HSR Proposal**

The Arizona Department of Water Resources (DWR) has filed its plan for completing the final hydrographic survey report (HSR) for the Gila River Indian Reservation. The preliminary HSR was filed in December 1996; and during the following comment period, many parties observed that the document did not provide sufficient information to evaluate the claims of the Indian Community.

DWR proposes to undertake the following work to complete the final HSR:

- Assess arable land on the reservation (this was completed in the preliminary HSR);
- Assess physical water supply by analyzing the available unappropriated water of the Gila River in the following years: 1859, 1876, 1879, 1882, 1883, 1911, 1913, and 1915;
- Estimate the required water duty for crops; and
- Summarize the practicably irrigable acreage (PIA) claim and tabulate claims made by the Indian Community and United States based on other legal theories.

The department indicates that it "does not intend to design a hypothetical water delivery system or engage in a cost-benefit (economic) analysis of such a system. Rather, DWR will specify the parameters of the PIA claim based on the physical constraints described in the HSR."

### **Steering Committee Report**

The Steering Committee, after a series of meetings with the Special Master followed by several exchanges of communications among committee members, has forwarded three possible case management strategies to Judge Bolton for her consideration. The committee's report does not specifically address DWR's Gila River Indian Community HSR proposal which was released shortly before the committee had finished its work.

One case management proposal, made by the Salt River Project, recommends that the final Gila River Indian Community HSR be delayed until litigation is completed on (1) any preclusive (binding) effect of the many prior court decrees and agreements involving the United States and the Indian Community; and (2) the purposes for establishing the Gila River reservation and its additions. The first segment, involving discovery, pretrial motions, and an evidentiary hearing, would begin in Feb. 1998 and perhaps end with a trial in June 1999. The second segment would begin in Sept. 1999 and lead to a trial in April 2001. Only then would the final HSR be completed, as SRP believes that the content of the HSR depends on the resolution of these two sets of issues.

Other members of the Steering Committee, who are not specifically identified, offer a second case management proposal. These parties disagree about the benefits of the segmented approach advanced by SRP. Rather, they suggest using more traditional methods of litigating the Indian Community's claims beginning with simultaneous discovery; then, opportunities for filing pretrial, dispositive motions; finally, culminating in a trial. Some of the parties supporting this proposal "believe that the [HSR] must trigger the process, while others consider factual development without a final [HSR] to be sufficient." No schedule is proposed.

The attorney representing the Bella Vista Water Co., Town of Gilbert, and other entities suggests a process that "effectively collapses the fact finding process into the GRIC HSR promulgation process, while providing an opportunity to present dispositive motions prior to the publication of the GRIC HSR." This process would start with early disclosure by the parties and lead to a comprehensive pretrial

statement by Jan. 1999. Dispositive motions would be filed and decided during 1999; and DWR, informed by the discovery and motion results, would file the final HSR by April 2000. The trial of HSR objections and remaining issues would follow.

## WSWC/NARF Conference

The Western States Water Council (WSWC) and the Native American Rights Fund (NARF) recently cosponsored the Fifth Symposium on the Settlement of Indian Reserved Water Rights Claims. The conference was held in Phoenix on Oct. 8-10. An excellent summary of the meeting, prepared by the Western States Water Council, is attached separately to this issue of the *Bulletin*. Permission to share this summary with our readers has been graciously provided by the WSWC.

## Calendar

### **Nov. 6, 1997 -- 1:30 p.m.**

Hearing before Judge Bolton (Gila River Adjudication)  
Maricopa County Superior Court, 201 W. Jefferson, Phoenix  
(*see* Sept. 30, 1997, minute entry)

### **Nov. 17, 1997**

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

### **Dec. 12, 1997 -- 9:30 a.m.**

Case No. 6417 (Little Colorado River Adjudication)  
Status Conference before Judge Minker  
Apache County Courthouse, St. Johns  
(*see* minute entry Sept. 26, 1997)

### **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  
(*see* Order Aug. 13, 1997)

### **Feb. 18-20, 1998**

ABA Water Law Conference  
San Diego

## 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**

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