SUPERIOR COURT OF ARIZONA
MARICOPA COUNTY

HON. SUSAN R. BOLTON (SAJ-01)

August 30, 1996

P. Woods
Deputy

No W-1, W-2, W-3, W-4 (Consolidated)

Constested Case No. W1-100 Special Action Proceedings

INTRODUCTION

On March 17, 1995, the Arizona Legislature enacted and the Governor signed House Bill 2276 (HB 2276). House Bill 2193 (HB 2193) was signed by the Governor on April 19, 1995. Both bills concern the right to use surface water in Arizona. Passage of these bills also marked the first comprehensive revision to Arizona's general stream adjudication since passage of the general adjudication legislation in 1979.

The San Carlos Apache Tribe, Tonto Apache Tribe and Yavapai Apache Tribe, Camp Verde Reservation (the Apache Tribes), took a special action directly to the Supreme Court from the legislation. The Supreme Court accepted jurisdiction but remanded the case to this Court for hearing and decision. After extensive briefing, oral argument was held on May 13, 14 and 15, 1996 and the Court took the matter under advisement.

The Apache Tribes, the Little Colorado River Tribes, (consisting of the Navajo Nation, Hopi Tribe, Pueblo of Zuni and San Juan Southern Paiute Tribe) and the United States filed briefs opposing the legislation on constitutional grounds and on the grounds that the enactment of these amendments results in loss of jurisdiction over them granted by the federal McCarran Amendment. These parties will be referred to as the federal parties. The White Mountain Apache Tribe also filed a brief in this Special Action. That brief does not address the issues designated by the Supreme Court and this Court regarding HB 2276 and HB 2193. In the Court's view, the issues raised are beyond the scope of the matters this

Court is to decide in this Special Action and will not be addressed. The Salt River Project, on behalf of itself and many other parties; Cyprus Mining entities; and the State Land Department, on behalf of itself and several other parties, filed briefs supporting the legislation. These parties will be referred to as the state parties.

HOUSE BILL 2276

House Bill 2276 amended Title 45, Arizona Revised Statutes. Among the provisions of HB 2276 are the following sections. A.R.S. § 45-141(B) was expanded to provide that beneficial use include the use of appropriated water on less than all of the land to which the water right is appurtenant. A.R.S. § 45-141 (C) added language making forfeiture for non-use inapplicable to rights initiated before June 12, 1919.

Article 5 of Title 45, which governs appropriation of water, was amended by adding § 45-151(D), (E) and (F) which generally provide that water rights are not diminished because water is available from alternative sources, rights to water on land owned by the United States are owned by the person who first made beneficial use, and water on lands owned by the United States may be used on any other land. A.R.S. § 45-156(E) was added and provides that failure to obtain approval for a change of use is not a forfeiture and does not result in a later priority unless the Arizona Department of Water Resources (DWR) denied the change. The adjudication court is given the authority to approve, modify or deny the change. A.R.S. § 45-162(B) was amended to provide that DWR delays in processing applications to appropriate do not affect the validity of the appropriation or the priority date.

The Water Rights Registration Act is amended in HB 2276 at A.R.S. § 45-182 to change the previously established deadline for filing statements of claim of a water right with DWR to 90 days before DWR files its report for the subwatershed where the claim is located. Claims can be amended up to 90 days before the final report is published. Statements of claim are not required for rights determined to be *de minimis* under new A.R.S. § 45-258. Section 45-187 which precluded acquiring water rights by adverse possession is now limited to a beginning date of May 21, 1974. A.R.S. § 45-188 is substantially changed by additions. Forfeiture is now statutorily limited to rights initiated on or after June 12, 1919. Pre-June 12, 1919 rights are only lost by abandonment. No forfeiture or abandonment results from failure to beneficially use water rights in an irrigation district, water users' association or the like so long as an operable delivery system is maintained with a capacity to deliver the full appropriation. Finally, forfeiture by non-use can be avoided by resumption of use before forfeiture proceedings are initiated by DWR, another party has filed a statement of claim in a general stream adjudication on the stream where the non-use occurred or the filing of objections by another in an application to sever and transfer the water right. A.R.S. § 45-189(E) which provides exceptions for forfeiture for non-use was amended to add three more exceptions to the previous nonexclusive list.

Article 9, which authorizes these general stream adjudications, was substantially changed. New definitions were added to A.R.S. § 45-251. Changes analogous to A.R.S. § 45-182 were made to A.R.S. § 45-254 extending the deadline for filing statements of claimants in the adjudication. A.R.S. § 45-255 was changed from mandatory appointment of a Special Master by the Supreme Court to permissive

appointment by the Superior Court. Additionally, if the filing-fee funds are exhausted, a line item appropriation from the state general fund, rather than an assessment of the claimants, will fund the Special Master.

Some of the most controversial amendments are to A.R.S. § 45-256 defining the role of DWR as technical assistant to the Court and requiring preparation of the hydrographic survey reports. DWR's additional requirements under HB 2276 include identifying the newly defined *de minimis* uses, assigning statutorily defined on-farm water duties based on elevation, and quantifying diversions and reservoir facilities by maximum theoretical capacity and by maximum controlled capacity respectively. Moreover, these capacities must be assumed correct by the Master and the Court and so reported in the decree unless rebutted by a claimant who files a proper objection.

The report prepared by DWR must include all information relating to the claim or use examined as well as DWR's proposed water right attributes. If no water right is proposed for a claim, the report must so state. Objections to DWR's recommendations must be specific and those objectors must be afforded a hearing.

The legislature has also prescribed certain evidentiary values to the report based on various considerations. A.R.S. § 45-256(C) provides that those portions of the report not involving a recommendation, if admitted in evidence, are not entitled to any presumption of correctness. A.R.S. § 45-256(D) requires admission into evidence of all recommendations of rights of 500 acre-feet or less. Without conflicting evidence, the legislature now requires that the decree confirm the correctness of the recommendation and incorporate it. A.R.S. § 45-256(E) give no presumption of correctness to or require admission into evidence of recommendations of rights over 500 acre-feet. A.R.S. § 45-256(F) provides that those in agreement with DWR's recommendations may rely on the report as evidence but may also present evidence in support after the objectors' evidence is heard. A.R.S. § 45-256(G) allows any party to call DWR to testify regarding the report.

HB 2276 also amends A.R.S. § 45-257 dealing with the Master and the Court. Section A(2) is amended to require the Master to file reports whenever determinations, recommendations, findings of fact, or conclusions of law are made and requiring written objections within sixty days of any such report unless it covers an entire subwatershed.

Section B(1) requires the Court to decree the capacity of a reservoir to include the right to continuous filling and refilling in priority throughout the year. Section B(3) requires the Court's decree to identify *de minimis* uses as defined by the legislature. Finally, Section C allows claimants to enter into settlement agreements binding upon the parties to the agreements and requires the Court to incorporate the agreement in the decree without modification.

HB 2276 added A.R.S. § 45-258 providing for summary adjudication of water rights fitting the statutory *de minimis* definitions of domestic, business, stockpond and stockwatering uses. These uses are determined by DWR in its report, are not subject to objection by anyone but the claimant of the right and

must be incorporated in the Court's decree. Any person who objects to any of the attributes decreed to the *de minimis* use may only do so in post-decree severance and transfer or change of use proceedings.

If the claim is made of interference with a senior use, the party with the senior use has the burden of proving the interference.

New A.R.S § 45-261 creates a series of presumptions that must be applied by DWR, the Master and the Court. Information in prior filings must be presumed correct unless DWR reports that the information is clearly erroneous. When prior filings have conflicting information, the information most favorable to the claimant is presumed correct unless DWR finds it clearly erroneous. Only when there is no information in a prior filing or DWR reports it as clearly erroneous does the Court determine the water rights attributes. The presumption of correctness may only be rebutted by clear and convincing evidence. Conflicting ownership claims in prior filings result in no presumptions.

New A.R.S. § 45-262 provides that a person who contributes surface water to an Indian water rights settlement does not have the water right diminished in the decree absent severance and transfer. The contributed part of the decreed right cannot be used if used by the Indian tribe.

New A.R.S. § 45-263 provides that State law applies to adjudication of state-law based water rights and that the public trust is not to be an element of a water right in these adjudications.

New A.R.S. § 45-264 created a joint legislative monitoring committee to review the progress of the adjudication.

HB 2276 also amends Article 10, the Stockpond Registration Act, to allow an extension for filing statements of claims of water rights for stockponds.

The remaining provisions of HB 2276 provide for severability and applicability and declare the policy and intent of the legislation. The final section is the emergency clause.

PRELIMINARY QUESTIONS

Two preliminary questions need to be answered before the Court reviews the statute for constitutionality and determines whether or not the statutory amendments cause the Court to lose jurisdiction of the federal parties under the McCarran Amendment. This Court must first determine what portions of HB 2276 are applicable to these general stream adjudications, i.e., whether or not the statutes are retroactive. The Court must also determine what standard of review is applied to the constitutional challenges. The Apache Tribes claim that the applicable review standard is that of strict scrutiny and the burden of proof shifts to parties supporting the amendments. The state parties contend that the usual presumption of constitutionality applies to the statute, that the Court cannot declare the statute unconstitutional unless it determines beyond a reasonable doubt the unconstitutionality, and that the burden is on the party challenging the constitutionality to meet this burden.

STANDARD OF REVIEW

In analyzing the changes contained in HB 2276, the Court has concluded that it must presume the constitutionality of these statutory amendments. The burden of proof is on those arguing the unconstitutionality of the amendments to prove the unconstitutionality beyond a reasonable doubt. If two constructions, one constitutional and one unconstitutional, can be placed on any portions of the statute, the Court will presume the constitutional construction. Chevron Chemical Co. v. Superior Court, 131 Ariz. 431, 641 P.2d 1275 (1982); Rochlin v. State, 112 Ariz. 171, 540 P.2d 643 (1975); State v. Book-Cellar, Inc., 139 Ariz. 525, 679 P.2d 548 (App. 1984).

The Court rejects the Apache Tribes' argument that the standard of review for all alleged constitutional violations is strict scrutiny and that the burden is on the legislature (or the parties supporting HB 2276) to show the constitutionality of the statute. Strict scrutiny is a standard of review sometimes required when assessing the constitutionality of a statute challenged on equal protection grounds, and is reserved to two instances: where a statute infringes on fundamental rights or utilizes suspect classes. Kenyon v. Hammer, 142 Ariz. 69, 688 P.2d 961 (1984). The Apache Tribes state that Kenyon requires a strict scrutiny standard of review to all allegations of constitutional violations and this is clearly not true.

Although several of the parties in the adjudication are Indian tribes, the fact that the Indian tribes are in the adjudication does not mean that strict scrutiny is applicable because suspect classifications are involved. While tribes may be a suspect class under claimed violations of equal protection, this does not affect the general presumption of constitutionality that must be accorded to these statutory amendments under other claimed constitutional violations such as due process or separation of powers. The fact that Indian tribes are bringing the constitutional challenges does not change the obligation of the parties opposing the amendments to prove the unconstitutionality. Whether a different standard of review is required for the equal protection challenges will be addressed later in this opinion.

The Apache Tribes cite In re the Rights to the Use of the Gila River, 171 Ariz. 230, 830 P.2d 442 (1992), for the proposition that water rights are property rights and consequently must be protected by the due process clause of the United States and Arizona Constitutions. The fact that property rights are entitled to protection under the due process clause of the state and federal constitutions does not mean that the rights at issue are fundamental rights. Fundamental rights have been more narrowly defined. See Kenyon v. Hammer, 142 Ariz. 69, 688 P.2d 961 (1984); Arizona Farmworkers Union v. Agricultural Employment Relations Board, 148 Ariz. 47, 712 P.2d 960 (App. 1985).

The Apache Tribes also argue that because they have raised questions of separation of powers violations in HB 2276, these issues must be accorded the highest standard of review because separation of powers is both fundamental and critical. While this Court does not dispute the importance of separation of powers at both the federal and state level, the Court does not believe that the significance of the constitutional provision changes the standard of review that the Court must apply in reviewing constitutionality and the Apache Tribes have cited no authority to that effect.

Finally, the Apache Tribes contend that the United States Supreme Court has established that strict scrutiny must be applied whenever state law is claimed to encroach upon federally protected Indian reserved water rights. In Arizona v. San Carlos Apache Tribe, 463 U.S. 545 (1983), the United States Supreme Court did say that any allegation of state law encroachment upon federal Indian reserved rights would receive a particularized and exacting scrutiny review by it. The Supreme Court did not establish a standard for the evaluation of the constitutionality of state legislation for general stream adjudications. This Court does not interpret the Supreme Court's holding as shifting the burden of proof to the parties supporting the legislation to prove its constitutionality. Therefore, in reviewing the constitutional issues raised by HB 2276, the Court will presume the constitutionality and will endeavor to apply a constitutional construction whenever possible to the amendments.

RETROACTIVITY

The federal parties argue that Section 24 of HB 2276 establishes the statute's retroactivity. They contend that any substantive changes as well as certain procedural changes, if applied retroactively, deny the federal parties' constitutional rights. The state parties say that the statute is not retroactive. They contend that if there are any substantive changes in HB 2276 that they are prospective only, that procedural changes may constitutionally be applied retroactively since they do not affect substantive vested rights and, finally, what appear to be substantive changes in the legislation are not substantive changes at all, but merely clarifications of previously ambiguous law.

The parties agree on certain general principles. They agree that pursuant to A.R.S. § 1-244, "No statute is retroactive unless expressly declared therein." They further agree that retroactive application of law affecting substantive vested rights is generally not permissible under both state and federal constitutions. They disagree as to the legislature's intention in HB 2276.

Section 24 of HB 2276 provides as follows,

Sec. 24. Applicability

Unless otherwise specifically provided, this act applies to:

1. All rights to appropriable water initiated or perfected on or before the effective date of this act and any rights subsequently initiated or perfected.
2. All general stream adjudications pending on the effective date of this act and all future general stream adjudications initiated pursuant to title 45, chapter 1, article 9, Arizona Revised Statutes.

This Court cannot find a better expression of the meaning of retroactivity than the language used by the legislature in Section 24. In Section 24, the legislature clearly and unequivocally stated that these amendments to Title 45 apply to rights initiated or perfected on or before the effective date of this statute. These amendments are applicable to the general stream adjudications pending on the effective date of this Act. The language used in Section 24 admits only one conclusion. The legislature intended

this statute to apply retroactively as to both substantive and procedural changes in the law.

In Hall v. ANR Freight System, Inc., 149 Ariz. 130, 717 P.2d 434 (1986), the Arizona Supreme Court had the opportunity to consider the issue of retroactivity as it applied to the Uniform Contribution Among Tortfeasors Act, A.R.S. § 12-2501 *et seq.* The Court found that the legislature intended that the Act apply retroactively to accidents occurring before the effective date of the statute based on the following language contained in Section 3 of the act, "The provisions. . .only apply to actions filed on or after the effective date of this act." Noting the general rule of statutory construction, "'that the language of a statute is the best and most reliable index of its meaning, and where language is clear and unequivocal, it is determinative of its construction,'" Id. at 137, 717 P.2d at 441 (quoting Arizona Security Center, Inc. v. Arizona, 142 Ariz. 242, 244, 689 P.2d 185, 187 (App. 1984)), the Court found that the language in that statute admits of no ambiguity and was intended to apply retroactively to accidents occurring before the effective date of the act. Similarly in this case, although the word "retroactive" is not used in Section 24, the language of this statute admits of no ambiguity and unequivocally attempts to apply the statutory changes to the pending adjudications and to water rights existing before the date of the statutory enactment.

In Hall, the Court noted that the recognition that the statute was retroactive and intended to reach events occurring prior to the act's effective date was not dispositive of whether the statutory change was constitutionally permissible. The application of a statutory amendment which is merely procedural may be applied to a pending case or substantive rights. Statutes which retroactively affect substantive rights are prohibited when those substantive rights are vested. The issue then in the Hall case was whether the substantive right to assert contributory negligence of a plaintiff as a complete defense to a case alleging the defendant's negligence is vested before a lawsuit is filed. The Supreme Court held that it was not. "Clearly, the mere fact that the Act applies to prior accidents does not make the Act retroactive in effect. Nor does the fact that the Act affects a substantive legal right render it retroactive. The critical inquiry in retroactivity analysis is not whether a statute affects a substantive right but whether a statute affects a vested right." Id. at 139, 717 P.2d at 443 (emphasis in original).

The rule is that legislation may not retroactively disturb vested rights. The Supreme Court defined vested rights as follows, "[A] right vests only when it is actually assertable as a legal cause of action or defense or is so substantially relied upon that retroactive divestiture would be manifestly unjust." Id. at 140, 717 P.2d at 444.

The rights of the parties in the Gila and Little Colorado general stream adjudications are substantive vested rights. The purpose of the general stream adjudications is to quantify and prioritize already existing property rights to appropriable water and reserved water. That these rights exist and are property rights is not questioned. The purpose of the adjudication is to document in a Court decree the rights already existing and the priority in which they exist in relation to others' rights. Neither the federal reserved rights nor the state-law based water rights that existed on March 17, 1995, can be changed by HB 2276. Therefore, despite the clear expression of retroactivity contained in Section 24, any amendments contained in HB 2276 that change the substantive law existing prior to March 17, 1995, are an unconstitutional attempt to affect substantive vested rights to water.

The general prohibition against retroactive statutory changes does not cause procedural changes to fail. The law recognizes that procedural changes can be applied to a pending case. Procedural changes may be invalidated for other reasons, as the federal parties contend.

The state parties argue that what appear to be substantive changes in the law are not and therefore do not violate the general prohibition against retroactive legislation. These parties cite the Court to the language of Section 25 of the act, entitled Declaration of Policy and Intent. In Subsection A, the legislature provided,

The legislature finds and declares that the interests of the citizens of this state will be best served if the statutorily created process for the adjudication of surface water rights is amended to simplify and expedite pending litigation. The legislature also finds that ambiguities exist in the current statutes relating to surface water rights and that the clarification of these statutes will assist all parties by reducing the need for the Courts to resolve current ambiguities. The legislature recognizes that the general stream adjudications are complicated and have the potential to profoundly affect the property rights of the water users of this state. It is the intention of this act to clarify existing laws and adopt changes that are equitable and fair to all parties, that comply with the letter and the spirit of the McCarran Amendment (43 United States Code section 666), that provide long-term security to all water rights holders within this state and that streamline the adjudication process and remove undue burdens of litigation from the parties.

The state parties argue that this section establishes that all of the substantive amendments are not changes at all, but are clarifications resolving ambiguities previously existing in the statutes relating to surface water rights. The state parties do not claim that these clarifications resolving ambiguities will reduce the need for the Court to resolve current ambiguities, as the legislature stated.

Article 3 of the Arizona Constitution establishes the separation of judicial, legislative, and executive powers. The judiciary has the power to declare what the law is or has been. Attempted declarations of the meaning of existing law by the legislature violates the separation of powers doctrine and, is, therefore, unconstitutional. Chevron Chemical Co. v. Superior Court, 131 Ariz. 431, 641 P.2d 1275 (1982); Martin v. Moore, 61 Ariz. 92, 143 P.2d 334 (1943). The legislature can only establish what the law shall be. Id.

The rules of statutory construction generally provide that a subsequent legislative enactment dealing with what a Court has found to be a previous ambiguous law is one factor to be considered in determining the meaning of the prior law. The subsequent legislative enactment, however, is not necessarily determinative. Before any rule of statutory construction is applied, there must first be a judicial determination that an ambiguity exists. In Weekly v. City of Mesa, 181 Ariz. 159, 888 P.2d 1346 (App. 1994), the City of Mesa attempted to avoid strict liability under a dog bite statute by invoking a subsequent amendment immunizing the City in certain circumstances. Arguing that the legislature could not have intended strict liability for police dogs since they were not in use when the

statute was passed, the City wanted the Court to find an ambiguity that the subsequent amendment clarified. The court noted that when an ambiguity exists in a statute and more than one reasonable interpretation is possible, the court can look to both legislative history and subsequent enactments to interpret the intended meaning. In the absence of ambiguity, the subsequent amendment is not a clarification and cannot be applied retroactively. Also, City of Mesa v. Killingsworth, 96 Ariz 290, 394 P.2d 410 (1964); State v. Sweet, 143 Ariz. 266, 693 P.2d 921 (1985); Fund Manager v. Pima County, 145 Ariz. 47, 699 P.2d 921 (App. 1985).

Although the Salt River Project's brief extensively examined the claimed prior ambiguities "clarified" by the new statute, this Court finds that this special action is not the appropriate vehicle for making any of these determinations. Whether the substantive law changes are clarifications to previously ambiguous areas of the law must be decided when and if those issues are presented in a specific case in this adjudication. This special action does not present specific controversies on any of these statutory amendments. If the law was clear and unambiguous on these issues prior to March 17, 1995, that law will be applied. If the law was ambiguous as to some or all of these issues prior to March 17, 1995, the Court will then apply the rules of statutory construction, which will include consideration of HB 2276, in determining the law in a controversy involving parties whose rights will be specifically affected. The only thing that can be said at this time is that the legislature's enactment of HB 2276 can be used as evidence of legislative intent after the Court determines that the prior law was ambiguous.

The following substantive law amendments in HB 2276 cannot be constitutionally applied to water rights existing prior to March 17, 1995, despite the provisions of Section 24. Their utility, if any, to pre-March 17, 1995, water rights will be limited to showing evidence of legislative intent if the prior law on these issues is ambiguous.

- A.R.S. § 45-141(B) prohibiting a finding of forfeiture or abandonment when water is used on less than all the land to which the right is appurtenant.

- A.R.S. § 45-141(C) eliminating any possibility of forfeiture for rights perfected before June 12, 1919.

- A.R.S. § 45-151(D) providing that the availability of alternative sources of water does not affect a surface water right.

- A.R.S. § 45-151(E) (contained in both HB 2276 and HB 2193) which states that water rights appropriated on federal land belong to the person who first made beneficial use of the water.

- A.R.S. § 45-151(F) stating that water on federal land may be used at any location.

- A.R.S. § 45-156(E) which provides that failure to obtain approval for a change in use does not result in forfeiture or loss of priority.

- A.R.S. § 45-162 (B) resulting in relation back of priority date to the date of application to appropriate.

- A.R.S. § 45-187 making acquisition of rights for adverse possession available only to rights perfected prior to May 21, 1974.

- A.R.S. § 45-188(B) which makes abandonment the only basis for relinquishment of a water right initiated before June 12, 1919.

- A.R.S. § 45-188(C) insulating from abandonment and forfeiture water rights appurtenant to lands within an irrigation district, water users' association or the like so long as an operable delivery system is maintained.

When a future controversy arises on these issues, the Court will review and apply the law as it existed when the parties in the case perfected their rights to water. If the state parties are correct that law may be the law now codified in HB 2276.

DE MINIMIS USES, ON-FARM WATER DUTIES, AND MAXIMUM CAPACITY RULES

HB 2276 provides special procedures for the summary adjudication of certain water rights based on quantity and use. The summary adjudication of *de minimis* water uses is found in new A.R.S. § 45-258 and requires that stockponds with a claimed capacity of 15 acre-feet or less, domestic uses with a claimed annual quantity of use of 3 acre-feet or less, small business uses with a claimed annual quantity of 3 acre-feet or less, and stock- watering uses with an annual quantity of use of not more than 1 acre-foot, be summarily adjudicated. These statutorily defined *de minimis*uses are estimated by the parties to encompass between two-thirds and four-fifths of the numerical claims made in the adjudication. No estimate is made by any party about the relative quantity of water encompassed by these claims.

The statutory process of summary adjudication for each of these four types of water uses requires the decree to describe the water right ownership, priority date, place of use, point of diversion, source of water, annual volume or capacity "and those other attributes deemed necessary by the Court." The only objections allowed are those filed by the claimant of the *de minimis* use. The only challenge to the existence of these rights or their attributes allowed in new A.R.S. § 45-258(F) is in a post-decree severance and transfer or change of use proceeding before DWR. Only at that point may parties introduce evidence to rebut the water right attributes decreed to these uses. Subsection F also provides that a person who claims that one or more of these *de minimis* uses interferes with that person's water right has the burden of proving that the *de minimis* uses would otherwise be available to satisfy a higher priority water right. The statute is not clear whether this is also confined to the post-decree severance and transfer or change of use proceedings. The state parties assert that interference claims can be addressed in post-decree enforcement proceedings under A.R.S. § 45-257(B)(4).

The legislation requires that all of these uses shall be deemed *de minimis* uses of the river system and

source. While stockponds must have a capacity in acre-feet not exceeding 15 acre- feet listed as an attribute, domestic and small business uses may be presumed to have an annual quantity of 3 acre-feet and for stockwatering the annual quantity of 1 acre-foot shall be reported in the decree. Other than quantities, the attributes are determined according to A.R.S. § 45-261 which establishes certain presumptions that essentially preclude the Court from determining the water right attributes except in those circumstances where DWR reports that there is no information in an applicable prior filing or decree, or that the information contained in an applicable prior filing is clearly erroneous. The attributes are determined in those limited circumstances by using DWR's report, statement of claimant information, information contained from claimant interviews, aerial photographs, satellite technology, historical records, maps, technical data or other relevant information, but not based on objections filed by parties other than the claimant.

The examination of these *de minimis* rules must be viewed in the context of the status of these general stream adjudications prior to the enactment of these amendments. In the Little Colorado adjudication, the Special Master had established *de minimis* rules for stockponds, stockwatering, and wildlife uses in the Silver Creek watershed. After hearing contested evidence, the Special Master established the *de minimis* quantity at 4 acre-feet with continuous fill, rejecting some parties' contention of a 15 acre-foot *de minimis* standard, finding that the vast majority of stockponds in the Silver Creek watershed had capacities of 4 acre-feet or less. Similarly in the Gila River adjudication, in proceedings on the San Pedro watershed, the Special Master heard evidence over several days and adopted similar *de minimis* rules for stockponds and stockwatering uses. He also established a *de minimis* standard for domestic uses, rejecting some parties' claim of 3 acre-feet. The Special Master determined that the *de minimis* standard for domestic uses in the San Pedro watershed was 1 acre-foot a year.

These determinations by the Special Master were made after contested hearings where the parties were able to present evidence of their positions and where the Special Master made extensive and detailed findings of fact and conclusions of law. Also important in the San Pedro watershed, the Special Master found that although summary adjudication of individual stockponds and self-supplied domestic uses would be decreed for that watershed, the cumulative effect of those uses was not *de minimis*. HB 2276 fails to provide for any evaluation by DWR, the Special Master or the Court of the cumulative effect of these so-called *de minimis* uses on the watersheds where they are located or on users downstream in the river system. The state parties argue that post-decree enforcement proceedings are where these cumulative effects will be considered. According to new A.R.S. § 45-258(F), the evidence must be marshaled by the party who claims interference through cumulative effect.

In the Court's view, the amendments to the statute setting out so-called *de minimis* uses violate both the separation of powers and due process clauses of the Arizona Constitution. Arizona courts have adopted a four-part non-exclusive test to determine whether legislation violates separation of powers considerations. While our state constitution does not require absolute separation and allows blending of powers, the Court must evaluate claimed separation of powers violations looking to these four non-exclusive factors: 1) is the essential nature of the power exercised that vested in the judiciary; 2) what degree of control is exercised by another branch over the exercise of the power; or is the control coercive or merely cooperative; 3) what was the legislature's objective; and 4) what is the practical result

of the mingling of the roles. Cactus Wren Partners v. Arizona Department of Building and Fire Safety, 177 Ariz. 559, 869 P.2d 1212 (App. 1993); JW Hancock Enterprises, Inc. v. Arizona State Registrar of Contractors, 142 Ariz. 400, 690 P.2d 119 (App. 1984). Applying these factors and balancing the interests involved, the conclusion is inescapable that these are powers where the judiciary must have the final say and which cannot be committed without judicial review to an administrative agency.

The essential nature of the power exercised in these legislated *de minimis* provisions is that traditionally vested in the judiciary; that is, the determination of contested facts and the application of those facts to the law. The degree of control the legislature has given to DWR over the exercise of this power by virtue of these amendments is nearly absolute. The statute requires the Court to include in the decree the information reported by DWR without any fact-finding, review or discretion.

The legislature's objective in establishing the agency's function is a laudable one, but goes too far in not allowing for judicial review. Finally, the practical result is to vest in the agency, not quasi-judicial, but judicial function by allowing the agency to fashion the decree and make the Court only a signatory to the decree. There is no check on the agency's report on *de minimis* uses. There is no opportunity for judicial determination of the correctness of the agency's report.

There is a further violation of the separation of powers by the legislature's determination of quantities of water rights. The law in Arizona which has remained unchanged since the first water code was enacted, is the provision, now contained in A.R.S. § 45-141(B), "Beneficial use shall be the basis, measure and limit to the use of water." In fashioning a workable decree for *de minimis* uses, the requirement of beneficial use cannot be ignored. By requiring decrees of 15 acre-feet for stockponds, 3 acre-feet for domestic and small business uses, and 1 acre-foot for stockwatering uses, the legislature has invaded a core function of the judiciary; that is, the determination after an evidentiary hearing of what these capacities should be using the test of beneficial use.

In Phoenix Newspapers, Inc. v. Superior Court, 180 Ariz. 159, 882 P.2d 1285 (App. 1993), the Court of Appeals interpreted legislation requiring a public disclosure of search warrant affidavits and returns. The particular language at issue provided that, "If the warrant has been served, such documents and records shall be open to the public as a judicial record." The plaintiff argued that this language mandated that the affidavit supporting the search warrant and the return of the warrant be open to the public upon the expiration of a five-day period. The Court held that the interpretation urged by the plaintiff would result in an unconstitutional separation of powers violation. A statute which contained an absolute mandate to a court to release judicial records would be a legislative intrusion into the Supreme Court's rulemaking power in violation of Article III of the Arizona Constitution. The constitutional interpretation adopted by the Court was that the use of the words "judicial records" meant that a judge could determine whether the records must be open to the public or whether there were other considerations that could allow these judicial records to remain unavailable to the public in a particular case. The Court must balance the presumption of openness against the State's interest in maintaining confidentiality of an on-going criminal investigation. This type of function is judicial in nature.

Similarly in this case, the legislature is in no position to determine the amount of water that is *de minimis* for domestic, business, stockpond and stockwatering uses in numerous watersheds throughout the State. These amounts cannot be legislatively decreed but must be determined in contested cases. It appears that the Special Master was well on his way to making a reasoned and workable *de minimis* ruling after contested hearings before the legislative amendments intervened.

The state parties argue that all of these issues can be sorted out in post-decree severance and transfer, change of use, or enforcement proceedings. This Court disagrees. The essence of due process is a fair hearing before a fair tribunal. United States v. Superior Court, 144 Ariz. 265, 697 P.2d 658 (1985), citing In Re Murchison, 349 U.S. 133 (1955). Notice and an opportunity to be heard at a meaningful time and in a meaningful manner is the definition of due process. Salas v. Arizona Dept. of Economic Security, 182 Ariz. 141, 893 P.2d 1304 (App. 1995); Huck v. Haralambie, 122 Ariz. 63, 593 P.2d 286 (1979). Delaying any determination of the cumulative impact of *de minimis* uses in a watershed until DWR is called upon to enforce rights under A.R.S. § 45-257(B)(4) after a final decree is entered does not present the parties who are now all before the Court with a fair hearing before a fair tribunal at a meaningful time. By all estimates a final decree in these adjudications will not be entered for several decades. The time to evaluate the cumulative impact of *de minimis* uses is at the time DWR's reports are being prepared and the cases are being heard, not 20 years or more from now.

Delay in any contest to *de minimis* water rights attributes until severance and transfer or change of use proceedings also fails the due process and separation of powers tests. Enforcement of this provision would also result in a loss of jurisdiction under the McCarran Amendment as discussed later in this opinion.

A.R.S. § 45-172 establishes the law and procedures of severance and transfer and change of use. An application for severance and transfer or change of use is filed with DWR. Notice is given by publication only in those counties where the watershed or drainage area is located. DWR has discretion whether to hold a hearing if objections are made. Unlike post-decree enforcement proceedings, the legislature has not provided the adjudication court with continuing jurisdiction over these administrative proceedings. They are subject to review only under A.R.S. § 12-901 *et seq.* These administrative proceedings do not satisfy constitutional requirements for a fair hearing of factual and legal issues relating to water right attributes. If not unconstitutional, the relegation of challenges to water right attributes to proceedings under A.R.S. § 45-172 would not satisfy the inter sese and comprehensiveness requirements of the McCarran Amendment. See discussion infra.

Other efforts by the legislature in expediting the process also run afoul of separation of powers. The amended act purports to establish on-farm water duties based on elevation. Section 45-256(A)(6) of the act requires DWR's report to establish irrigation water quantities based on on-farm water duties of 6 acre-feet per year for lands located below 3,000 feet in elevation, 5 acre-feet per year for lands located from 3,000 through 5,000 feet in elevation, and 4 acre-feet per year for lands located above 5,000 feet in elevation. The amendments further require that transportation losses from the point of diversion to the field be an addition to the on-farm water duties. These quantities must be presumed correct by the Master and the Court and incorporated in the decree unless rebutted by a preponderance of the evidence.

For the same reasons that the *de minimis* quantities established by the legislature cannot stand, neither can the legislature's determination of on-farm water duties. It may well be appropriate after a hearing to decree a standard water duty for varying elevations in the State of Arizona. As the state parties point out both the Globe Equity and Kent Decrees established uniform quantities. What they fail to note is that these quantities were judicially determined, not legislatively mandated. The determination of on-farm water duties must be based on beneficial use and not on an amount selected for convenience in an attempt to simplify and streamline the adjudication. DWR must investigate these irrigation uses and may recommend uniform quantities, but DWR cannot be legislatively mandated to report the quantities set forth in A.R.S. § 45-256(A)(6) and the Court cannot be required to decree these quantities without violating separation of powers.

In identifying water quantities for diversion and reservoir facilities, the legislature has required that DWR measure water diversions by the maximum theoretical capacity of the diversion facilities and that reservoir storage quantities be identified based on the maximum controlled capacity of the reservoir. As the federal parties point out, there may be abundant evidence available to DWR that diversions have never been even close to their maximum theoretical capacity, or that reservoir storage quantities have never approached the maximum controlled capacity of the reservoir, yet DWR is required to report these quantities and they must be presumed correct unless rebutted by a party filing an objection. There is no room for agency or Court judgment. There is no consideration of beneficial use. In the absence of objection, the Court would be precluded from decreeing anything other than the maximum theoretical capacity of the diversion and/or the maximum controlled capacity of the storage facility. The legislature cannot decree these water rights. The water rights must be decreed by a court based on beneficial use, not on capacity of facilities.

The Idaho Supreme Court recently considered amendments to the Idaho general stream adjudication statutes which contained similar provisions to HB 2276. Certain amendments required that the district court decree the unobjected to portions of the director's report. In Idaho v. United States, 128 Idaho 246, 912 P.2d 614 (1995), the Idaho Supreme Court held that this was an unconstitutional intrusion into the province of the judicial department, violating the separation of powers guarantees of the Idaho Constitution because the amendment removed the authority of the Court to apply facts to law and render a conclusion. The Court noted that stripping the Court of its ability to review the contents of the report of the Idaho Department of Water Resources and to apply the law to the facts established in that report is an unconstitutional violation of separation of powers. The portions of HB 2276 mentioned above have this requirement coupled with restrictions placed by the legislature on what DWR must report, further compounding the separation of powers violation. The legislature cannot order the Court to decree certain water rights. It may not restrict the information DWR must report for Court review. The legislature cannot preclude judicial review of DWR's reports. The legislature cannot take away from the Court its core function of finding facts, applying facts to law and rendering a conclusion.

REOPENER AND ABANDONMENT AND FORFEITURE PROVISIONS

HB 2276 contains several amendments dealing with the issues of abandonment and forfeiture including provisions extending the previous deadlines for the filing of statements of claims of water rights and statement of claimants. Section 9 of HB 2276 amends A.R.S. § 45-182 to permit persons claiming a right to water based on state law to file their statement of claim not later than 90 days before the date of DWR's final report for the subwatershed in which the claimed right is located. The legislature had previously set a deadline for the filing of statements of claim of June 30, 1979. Similarly, Section 17 amends A.R.S. § 45-254(E) and allows claimants to file their statements of claimant or an amendment to an existing statement of claimant with the Court up to 90 days before the publication of DWR's final report for the subwatershed or federal reservation without leave of Court. After the expiration of the 90-day period and before the conclusion of hearings by the Special Master for the subwatershed or federal reservation, a claimant may also assert a claim for a water use within that subwatershed or reservation without leave of Court by filing a statement of claimant or amended statement of claimant with the director and a notice of filing with the Court. After the Special Master has completed hearings and filed a report with the Court, late claims are not allowed except with the Court's permission.

The state parties characterize these provisions as reopener provisions. The federal parties claim that by reviving previously barred claims the legislature is impairing their vested rights to appropriable or reserved water.

These general stream adjudications were authorized by the legislature and deadlines were set for filings necessary to bring claimants before the Court. Since June 30, 1979, numerous motions have been filed and granted to allow late filing of statements of claimant in the adjudication. The purpose of the adjudication is to quantify and prioritize all rights to use water in a river system. If persons with water rights recognizable under state or federal law failed to timely file a claim, these equitable proceedings would demand that they be allowed to file. There is no intended purpose in this adjudication of decreeing that rights have been forfeited because of failures to file. Every opportunity should be given to claimants to properly make their claims. The Court does not view any of these new provisions as affecting any other party's vested rights or unfairly impairing any party's opportunity to prove their rights or object to others. No party could claim a vested right to water that has been properly appropriated and put to beneficial use by another simply because the requisite filings have not been made by the previous deadline. The reopener provisions cited above are a legitimate exercise of legislative power to correct what appeared to be a reasonable deadline when the original statute was passed but has resulted in numerous and unnecessary court filings to allow late filings.

The Apache Tribes argue that these extensions of filing dates effectively restart the adjudication, require new service of the summons, destroy over fifteen years of work and open the door to thousands of forfeited claims to be revived to the disadvantage of the Tribes. They further argue that allowing last minute new filings and amendments destroys any formulation of objections and that sophisticated claimants will amend at the last minute thereby foreclosing objections.

This worst case scenario advanced by the Tribes is not the basis for evaluation of the constitutionality of these amendments. See Ohio v. Akron Center for Reproductive Health, 497 U.S. 502 (1990). The new and amended claims will be processed as they are received and, if necessary, procedures for objections

can be adopted if it appears that new filings require additional time for objection. No new summons must be served as the result of these changes. All potential claimants were served many years ago. Lis pendens were filed so that transfers of property would include notice of the adjudication. These reopeners do not deny due process.

The provisions affecting forfeiture and abandonment include the amendments contained in Sections 13 and 14 of HB 2276. Section 13 amends A.R.S. § 45-188 by first distinguishing between water rights initiated on or after June 12, 1919, from those initiated before June 12, 1919. June 12, 1919, is the effective date of the first water code after statehood. Appropriations initiated before June 12, 1919, by the terms of the amendment are not subject to forfeiture, but only abandonment. This amendment has been discussed previously and held to be unconstitutional retroactive legislation affecting substantive vested rights. Appropriations initiated on or after June 12, 1919, are relinquished if they are intentionally abandoned or are unused without sufficient cause for a period of five successive years. The statutory amendments also create an exception for forfeiture by non-use, allowing the claimant to avoid forfeiture by resuming the use before the initiation of proceedings by DWR to declare water rights forfeited or abandoned, the filing by a third party of a statement of claimant in an adjudication that asserts the right to use water from the stream in which the non-use has occurred, or the assertion by a third party of objections in response to an application by the appropriator to severe or transfer the rights. In Section 14 of HB 2276, the legislature added to the list of sufficient cause for non-use contained in A.R.S. § 45-189 (E), five additional items that are sufficient cause for non-use and avoidance of forfeiture.

A.R.S. § 45-189(E) has always provided a nonexclusive list of sufficient causes for non-use of a water right which would not cause a forfeiture. The final subsection formerly numbered 8 but now renumbered 13, is unchanged and provides that in addition to the listed causes for non-use "any other reason that a court of competent jurisdiction deems would warrant non-use." Given the nonexclusive nature of the previous list of good cause for non-use, the addition of items to that list would always be a legislative or judicial possibility. The only impediment to enforceability of these additions for non-uses occurring before March 17, 1995, will be if it is later found that one or more of these factors was not good cause for non-use under the law existing before March 17, 1995. If that is the case, only prospective application can be given to that factor.

The federal parties also challenge the amendment that allows an appropriator who has not used the water right for a five-year period to avoid forfeiture by resuming use. This Court fails to see how this provision could affect any of the parties to this adjudication since the resumption of use must be before the filing by a third party of a statement of claimant in the general stream adjudication asserting a right to use water from the stream in which the subject non-use has occurred. There have been over 66,000 statements of claimant filed in the Gila adjudication and over 12,000 filed in the Little Colorado adjudication. This provision would seem only to be applicable to potential parties in a general stream adjudication that has not yet been initiated.

CHANGES RE SPECIAL MASTER

The federal parties have also challenged the amendments relating to the Special Master as violating separation of powers. HB 2276 made several changes affecting the Special Master. Section 20 amended A.R.S. § 45-257 to provide for the immediate review by the trial court of all determinations, recommendations, findings of facts or conclusions of law of the Special Master within sixty days after his report is filed with the Court. When a report covers an entire subwatershed or federal reservation the claimant may file written objections within 180 days. The previous version of the statute provided that the Special Master file a report in accordance with Rule 53(g) of the Arizona Rules of Civil Procedure containing findings of fact and conclusions of law and that each claimant had a right to file written objection to the report within 180 days. Section 18 of HB 2276 amended A.R.S. § 45-255 changing the authority to select the Special Master from the Supreme Court to the Superior Court judge assigned to the adjudication and further provided that the Master's compensation would be paid out of the State general fund as a separate line item appropriation for the Superior Court in the event that the fees paid by claimants are insufficient.

Because of the length of the adjudication, the filing fees used to pay the master may be exhausted before the adjudication ends. The statute had previously provided for equitable assessment by the Court against the claimants for additional funds to pay the master if and when the filing fees are exhausted. This amendment changing the compensation to a state general fund obligation as a separate line item appropriation is a legitimate legislative function and avoids the Court involving itself in an assessment of claimants. This change does not interfere with judicial function.

The previous provision designating the Supreme Court to select the Special Master from a list of persons submitted by the director of the Arizona Department of Water Resources was a mandatory provision requiring the appointment of a Special Master whether one was needed at that time or not based on a numerical count of the number of claimants. It changed the provisions of Rule 53, Arizona Rules of Civil Procedure, which vests in the Superior Court assigned to the case the role of selecting and appointing a master or masters. The legislature has now returned this appointment to the Superior Court as traditionally provided in the rules. The Court does not see where vesting the authority over the Special Master's appointment in the Superior Court judge to whom the case is assigned, which would have been the case in the absence of the prior version of A.R.S. § 45-255, violates separation of powers or attempts in any way to interfere with the judicial process.

Under the old statute there was a 180-day period to file objections to the Master's report. The statutory amendment requires the Special Master to file a report with the Court on all determinations, recommendations, findings of fact or conclusions of law issued and provides that for each such report written objections may be filed within 60 days, except when a report covers an entire subwatershed or reservation, in which case the objections may be filed within 180 days.

Rule 53, Arizona Rules of Civil Procedure governs special masters appointed by the Superior Court. This rule was adopted by the Supreme Court. The legislature may not supplant the rules, but may adopt legislation which supplements these rules without offending separation of powers. United States v. Superior Court, 144 Ariz. 265, 697 P.2d 658 (1985); State ex rel. Collins v. Seidel, 142 Ariz. 587, 691 P.2d 678 (App. 1984).

In the Court's view, the amendments to A.R.S. § 45-257(A)(2) do just that. They are consistent with the rule but impose enlarged time limits. They do not conflict with or supplant the rule. Under both Rule 53 and A.R.S. § 45-255 and 257 the Master reports to the Court pursuant to an order of reference specifying the scope of the assignment. The Master then reports to the Court his determinations, recommendations, findings of fact, and/or conclusions of law. Under the rule and statute, objections may be filed to the Master's report. So long as the provisions of A.R.S. § 45-257 do not interfere with the Court's ability to define the Special Master's work with appropriate orders of reference, they do not conflict with or supplant the rule and seem rationally related to the role of the Special Master. Clearly the 10-day time limit provided in the Rule is not realistic in this case. The previous 180-day time limit for written objections, except for reports on subwatersheds, was probably too long. The distinction between a report for an entire subwatershed and reports on other items referred to the Master by an order of reference seem reasonably related to the differences in scope between many of the Special Master's reports and reports covering entire subwatersheds. This Court finds no constitutional infirmities in this amendment to A.R.S. § 45-257.

Much more troublesome are requirements of HB 2276 that the Master's report and the Court's final decree must contain certain unadjudicated matters. A.R.S. § 45-257(C) requires the Court to decree agreements entered into by claimants regarding the attributes, satisfaction or enforcement of their water rights in relation to each other. It allows modification only if agreed to by the parties to the agreement. While this amendment encourages settlement, the Court cannot be compelled to incorporate the agreement as its decree without the authority to review the agreement. While it would be a rare circumstance for the Court to refuse to uphold an agreement between parties, in this equitable proceeding the separation of powers doctrine requires that the legislature not impose upon the Court an absolute obligation to accept agreements. For example, the Court must be able to review those agreements to be certain that there is prima facie evidentiary support for the water right attributes agreed upon and that the agreements for satisfaction and enforcement do not interfere with other senior rights. See Idaho v. United States, supra.

ROLE OF ARIZONA DEPARTMENT OF WATER RESOURCES

In United States v. Superior Court, 144 Ariz. 265, 697 P.2d 658 (1985), the Arizona Supreme Court had the opportunity to address questions of whether the role of DWR under the former general stream adjudication statute violated procedural due process. The federal parties made a similar argument at that time that DWR was an institutional adversary of Indian reserved rights and that the role given to DWR and its director in the adjudication created a conflict of interest that violated fundamental fairness and thus, constitutional due process guarantees. In holding that the statute was constitutional, the Supreme Court made the following observations with regard to the role of DWR in the adjudication.

The Court noted that DWR was not a claimant and could not file petitions in the adjudication. DWR was represented and continues to the represented by counsel separate and apart from the Attorney General of the State of Arizona, who represents the State in connection with the State's claims. The most important

duty assigned to DWR was providing technical assistance to the Court and Special Master. This technical assistance primarily involves the preparation of the hydrographic survey reports.

The Court also noted that DWR would not be recommending a decree to the Court and stated that such actions would not be appropriate. The Court stated:

We agree with the respondents that there is nothing in the statutory language that would permit or allow the department to make a report recommending a particular decree or to rank or quantify the competing claims. Ranking of claims and quantification of rights require considerable legal expertise and will be the function of the master, as to recommendations, and of the trial court as to the final decree. The director's duties are confined to factual analysis and administrative aid.

We acknowledge, of course, that the examination of facts, the making of factual findings, and the resolution of factual disputes are all part of the adjudicatory process. If DWR were vested with such responsibility or authority, it might fairly be said that DWR was a participant in the adjudicatory process. Again, however, we do not read the statute so broadly. Under the statutory plan, DWR's report will be made after an investigation of facts and will contain factual analysis and, no doubt, factual determinations. The key point, however, is that such determinations have neither validity nor presumed validity if objected to.

Id. at 280, 697 P.2d at 673.

The adjudication statute charged the Court with making the final determinations of the relative rights of all claimants. DWR was to decide no contested fact or issue of law, nor legal issue of any kind. The Court held that the Arizona procedure was well within the limits established by the United States Supreme Court in In Re Murchison, 349 U.S. 133, 136 (1955), and Withrow v. Larkin, 421 U.S. 35, 53-54 (1975), holding that due process is not denied when administrative agencies are charged with investigating facts instituting proceedings, and making necessary adjudications.

Prior to HB 2276, DWR was not an adjudicator of fact or law. It was an investigator, a provider of expert administrative and technical assistance, and an identifier of issues. These roles the Arizona Supreme Court found fell far short of participation in the actual adjudicatory process.

The federal parties argue that the Arizona Supreme Court set the limits for DWR in United States v. Superior Court and that the amendments to the adjudication statute exceed those limits. They argue that due process is violated because the amendments have changed the function of DWR into one of an adjudicator rather than an investigator, a provider of expert assistance, and an identifier of issues.

A.R.S. § 45-256 as amended in Section 19 of HB 2276 specifically provides that with regard to the report prepared by DWR that it "shall list all information that is obtained by the director and that reasonably relates to the water right claim or use investigated." The report shall also include the director's proposed water right attributes for each individual water right claim or use investigated. If no

water right is proposed in connection with an individual water right claim or use, DWR's report shall so indicate. Objections are permitted to the recommendations.

The amendments have eliminated the provisions dealing with the summary admission into evidence of unobjected to portions of the report and the inadmissibility of the report until those who have filed timely objections have been given a fair and reasonable opportunity to contest the validity or admissibility of the objected to portions of the report. Substituted in its place is the requirement that any objection specifically address DWR's recommendations and that objections not in compliance be dismissed with prejudice. Each claimant who filed timely written objections must still have a fair and reasonable opportunity to present evidence in support of or in opposition to the recommendations of DWR.

New subsections C, D, E, F, and G have been added to A.R.S. § 45-256. These amendments differentiate between the admission into evidence of different portions of the report based on different quantities of water. Those portions of the report that do not contain DWR's recommendations not be summarily admitted into evidence, but may be offered into evidence if relevant. If the claim or use described in the report is 500 acre-feet or less, the information describing that water right claim shall be summarily admitted into evidence. If no conflicting evidence is offered, the statute provides that DWR's proposed attributes be deemed correct and incorporated into the decree. If conflicting evidence is presented, DWR's proposed attributes are given the weight deemed appropriate by the Master and the Court. For information in the report describing a water right claim of more than 500 acre-feet, DWR's report shall not be summarily admitted into evidence and shall be given no presumption of correctness.

The issues of presumed correctness, the direction that DWR's proposed attributes must be amounts statutorily prescribed, and the requirement that the decree incorporate DWR's proposed attributes if no conflicting evidence is offered, violate the limitations imposed by due process and as established in United States v. Superior Court according to the federal parties.

In an earlier section of this ruling, the Court has already determined that separation of powers principles prevent the legislature from directing that the Court decree certain water rights without any opportunity for review and from requiring that water rights be in statutorily prescribed quantities. The significant remaining issue is the requirement that the hydrographic survey report include DWR's proposed water right attributes for each water right claim investigated.

In United States v. Superior Court, the Supreme Court noted that the prior statute did not permit or allow DWR to recommend a particular decree or to rank or quantify competing claims. Ranking of claims and quantification of rights was found by the Court to require considerable legal expertise and was reserved by the statute to the Master and the trial court. This Court views the Supreme Court's opinion in United States v. Superior Court as confining itself to an analysis of the statute as it existed at the time of that decision. While it is instructive with regard to the limitations of the administrative agency under a due process analysis, the Court does not believe that the Supreme Court held that DWR could not be given more authority or responsibility than set forth in the previously existing statute.

In United States v. Oregon, 44 F.3d 758 (9th Cir. 1994), cert. denied, 116 S.Ct. 378 (1995), the Ninth Circuit considered a statutory scheme for a general stream adjudication that invests considerably more authority in the administrative agency and held under both a due process analysis and a McCarran Amendment analysis that jurisdiction was maintained and constitutional guarantees of due process were not offended by the Oregon statutory scheme because judicial review was permitted under the statute. In Oregon, that State's equivalent of our DWR proposes a decree.

The amendments to HB 2276 require DWR to report proposed water rights attributes for each water right claim or use investigated. There is no requirement that the Department recommend a decree or rank competing claims. The proposed attributes would include a priority date, quantity, point of diversion and other attributes deemed appropriate by DWR and by the Court. So long as the parties are permitted to file objections and have a fair and reasonable opportunity to present evidence, the Court does not believe that this new responsibility placed on DWR violates due process.

DWR has considerable expertise in the investigation and reporting on water rights, claims and uses. In preparing the hydrographic survey report, DWR conducts extensive, historical review of all of the water right claims and uses, conducts field investigations and reviews appropriate treaties, filings and all other documentation of the water right, claim or use. For DWR's report to simply contain this information without a recommendation of water right attributes has shown itself to be of little use to the Master, the Court, and the parties. When the investigation discloses water right attributes, DWR should be allowed to make such a recommendation. Similarly, if the investigation shows no water right, DWR should be able to make that recommendation. This type of quasi-judicial function is one constitutionally permitted of administrative agencies, so long as judicial review is permitted, claimants are permitted to file timely, specific written objections to these recommendations, and a fair and reasonable opportunity to present evidence in support of or opposition to DWR's recommendations is allowed. The final adjudication still belongs to the Court and so long as the Court is not required to decree rights by the statute, it does not run afoul of due process or separation of powers.

As previously noted, the requirement of the statute that for claims or uses of 500 acre-feet or less, that the Court may not review DWR's proposed attributes in the absence of an objection, cannot be upheld. This Court does not view the inclusion of proposed attributes in the report as violative of the Supreme Court's decision in United States v. Superior Court, but rather in compliance with case law on due process as it relates to administrative agency decisions. As quoted by the Supreme Court in United States v. Superior Court, '"Murchison has not been understood to stand for the broad rule that the members of an administrative agency may not investigate the facts, institute proceedings and then make the necessary adjudications. . . The accepted rule is to the contrary.'" 144 Ariz. at 280, 697 P.2d at 673 (quoting Withrow v. Larkin, 421 U.S. 35, 53-54 (1975)). In making a recommendation after reviewing conflicting evidence, that recommendation is not a resolution of contested issues of fact or law; that resolution will be done by the Master and the Court.

A related issue concerns the information in DWR's report from which the recommended attributes will be determined. HB 2276 added A.R.S. § 45-261 entitled, "Presumption in Favor of Prior Filings and

Decrees." That statute provides that DWR, the Master and the Court shall accept information in an applicable prior filing as correct unless reported by DWR to be clearly erroneous. Conflicting information in prior filings shall be reported most favorable to the claimant, unless reported by DWR to be clearly erroneous. Only when there is no information in a prior filing or the information in the prior filing is clearly erroneous may the Court determine the attribute. The presumption in favor of information contained in a prior filing may only be rebutted by clear and convincing evidence. A.R.S. § 45-261(A)(2) and (4) violate separation of powers and due process.

In United States v. Superior Court, the original challenge to DWR was its alleged institutional bias in favor of State parties. The Supreme Court, in upholding the role assigned to DWR in this adjudication, noted its independent investigatory function. The authority of any fact finder or investigator to be independent and unbiased is essential to the adjudicatory function. By requiring DWR, in recommending water right attributes for claims and uses investigated, to report the information in applicable prior filings as correct, unless clearly erroneous, takes away from DWR, the Master and the Court the independent investigatory function necessary for a fair adjudication. DWR must be able to investigate all pertinent evidence before making recommended water right attributes. The report should contain all of that information and any recommendation must be based on the expertise of DWR, not merely on information in prior filings that DWR cannot say is clearly erroneous. While applicable prior filings may constitute some evidence of a claimant's water right, there is no reason for making it determinative unless clearly erroneous. The statute further compounds the problem by imposing on a party who objects to the presumption the burden of clear and convincing evidence to show that the prior filing is not correct. Prior filings are simply one piece of evidence that DWR should and must investigate in preparing a report. Prior filings are not prior adjudications and therefore cannot be given the strong evidentiary weight that prior decrees should be given without running afoul of due process. The legislature cannot endow the prior filings with the significance attempted in A.R.S. § 45-261.

PUBLIC TRUST

Another new section added by HB 2276 is § 45-263. The point of controversy is new Subsection (B) which provides,

The public trust is not an element of a water right in an adjudication proceeding held pursuant to this article. In adjudicating the attributes of water rights pursuant to this article, the Court shall not make a determination as to whether public trust values are associated with any or all of the river system or source.

Section 25 of the Act also provides that the legislature does not intend an implication that the water rights to be determined in the general stream adjudications are subject to the public trust doctrine. If public trust values are associated with or affect water rights these determinations are to be made only after navigability of the underlying water course is determined pursuant to proceedings established in Title 37, Chapter 7, Arizona Revised Statutes.

In Arizona Center for Law v. Hassell, 172 Ariz. 356, 837 P.2d 158 (App. 1991), the Court of Appeals invalidated a state law under the public trust doctrine and gift clauses. The law substantially relinquished the state's interest in the beds of watercourses that were arguably navigable at the time of statehood. The public trust doctrine restricts the state's ability to dispose of the land in the beds of navigable waters. Title to these lands is held in trust for the people of the state. The Court found that there existed evidence that portions of rivers and streams in Arizona other than the Colorado were navigable at statehood.

In response to this decision the legislature enacted A.R.S. § 37-1101 to -1132 (Chapter 7 of Title 37) creating the Arizona Navigable Stream Adjudication Commission which is charged with classifying the state's watercourses and must report to the

legislature by July 1, 2000, those water courses which are navigable and non-navigable.

The primary purpose of these general stream adjudications is to quantify and prioritize water rights. The issue as to whether the public trust doctrine is applicable to some or all of these water rights is a matter that can be rationally excluded from an adjudication designed to prioritize and quantify rights. There is considerable debate about the applicability and extent of the public trust doctrine which traditionally was limited to the land under navigable waters. It is a doctrine recognized but not fully developed in the State of Arizona. It has been addressed in only a limited number of cases which are not analogous to the issues presented in a general stream adjudication.

For the legislature to exclude the public trust from the elements of a water right to be determined in these adjudications the Court finds reasonable. The legislature created the adjudication in order to bring before the Court all claimants to water in a river system and source so that the rights could be quantified and prioritized. The legislature can constitutionally and rationally limit the adjudication to such prioritization and quantification and leave for another day the question of public trust as to those claims which might arguably have a public trust component.

The Idaho Supreme Court was faced with a similar challenge in the Snake River Adjudication. The district court, in rejecting certain conservation group's motions to intervene in the adjudication to represent the public by asserting the public trust doctrine, held that it was without jurisdiction to consider the public trust doctrine as an element of a water right in the adjudication. The Idaho Supreme Court agreed. In Idaho Conservation League v. State, 911 P.2d 748 (Idaho 1995), the Court held that the public trust doctrine is not an element of a water right used to determine the priority of that right in relation to competing claims of other water rights claimants. This holding was made even though the law in Idaho has established that rights to use water subject to the general stream adjudication are held subject to the public trust doctrine.

In Arizona where the applicability of the public trust doctrine to the water rights in these adjudications is uncertain, the exclusion of this issue from the cataloging of attributes and priorities is all the more rational and not violative of due process or separation of powers.

EQUAL PROTECTION

The Apache Tribes and the Little Colorado River Tribes also challenge HB 2276 on the grounds that it denies them equal protection under both the federal and state constitutions. These parties argue that the standard of review of the alleged equal protection violations is that of strict scrutiny because Indian tribes are a suspect class. The Apache Tribes also argue that strict scrutiny is warranted because fundamental rights of the Indian tribes are at stake. The state parties assert that HB 2276 does not employ classifications distinguishing between Indian and non-Indians and that its provisions do not hinder the Indian tribes' ability to exercise fundamental rights. The standard of review the state parties claim is appropriate is that of mere rationality.

The fundamental right the Apache Tribes claim HB 2276 affects is that of access to the Court. They argue that the enactment of the *de minimis* statutory uses, the presumptions of correctness accorded prior filings, the requirement that certain recommendations of the DWR and state water right claimant settlements be incorporated into the decree without modification or Court review deny them access to the Court and thereby violate equal protection. See Kenyon v. Hammer, supra. These provisions have already been invalidated by the Court as unconstitutional under due process and separation of powers considerations and they will not be reviewed again for claimed violations of equal protection. These arguments are moot.

The Apache Tribes contend that HB 2276 establishes different burdens of proofs for claimants and objectors on the same fact issues. Citing A.R.S. § 45-256(A)(6)(C) and (A)(7), the Apache Tribes note that under those sections relating to on-farm water duties and the maximum capacity rules the quantities assigned by DWR are presumed correct, unless rebutted by evidence offered by a claimant. The Apache Tribes argue that while claimants can overcome the statutory presumptions by a preponderance of the evidence, objectors must overcome the presumptions by clear and convincing evidence as required by A. R.S. § 45-261. These arguments are also moot because of the Court's finding of unconstitutionality of A. R.S. § 45-256(A)(6)(c), (A)(7) and 45-261(B).

Even if these statutes were constitutional the Apache Tribes attempt to interpret the language in HB 2276 in a much more restrictive way than this Court would interpret it. The term "claimant" in A.R.S. § 45-256(A)(6)(c) and (A)(7) who may rebut any presumptions accorded to the DWR report is not limited to the claimant of that use. When the legislature intended such a limitation it was clear in the language that it used. For example in A.R.S. § 45-258, the legislative enactment provided that the only objectors to *de minimis* uses were the claimant of the specific *de minimis* use. A.R.S. § 45-258(A) related to stockponds states that the water right attributes, "are not subject to objection other than by the claimant of that stockpond use." A.R.S. § 45-258(B) states that water right attributes of domestic uses, "are not subject to objection other than by the claimant of that use." The same language is used for small business and stockwatering uses.

In contrast, A.R.S. § 45-256(A)(6) and (A)(7) refer only to a "claimant." In the Court's view, this language does not limit objections to "the claimant of that irrigation use" nor to "the claimant of that

diversion facility or that reservoir." The word "claimant" refers more generally to claimants in the adjudication.

Had the legislature intended the limitation, it would have used the language of limitation similar to that found in A.R.S. § 45-258. The claimed differential treatment arguably resulting in an equal protection violation simply does not exist.

Both the Apache Tribes and the Little Colorado River Tribes argue that A.R.S. § 45-263(A) which provides, "State law, including all defenses available under state law, applies to the adjudication of all water rights initiated or perfected pursuant to state law" violates equal protection. The Indian tribes argue that they or the United States will be barred from presenting their claims or position even when federal law defenses unavailable under state law like laches and equitable estoppel apply. They contend that this provision is intended to be used to defeat claims asserted by the United States or Arizona Indian tribes that would be legitimate claims under federal law.

The Court views this as a supremacy not an equal protection issue. A similar argument was raised by the tribes before the Arizona Supreme Court in United States v. Superior Court, supra. There the Apache Tribes argued that the general stream adjudication statutes violated due process because they contained no provision directing the Court to consider the federal legal basis of claims. The Court held that the statute need not so provide because federal law requires it. "It is for the courts to determine where federal law is supreme and to apply it, regardless of directions from the state legislature." 144 Ariz. at 281, 697 P.2d at 674. If federal law and state law conflict, federal law clearly has supremacy over contrary state law as it relates to claims or defenses available to the United States and Indian tribes in this adjudication.

The Court finds that until a specific case or controversy presents itself demonstrating that the limitation of state law including defenses under state law being applied to the adjudication of state law based water rights conflict with applicable federal law, this issue will not be decided. It cannot be decided in the hypothetical example presented by the Apache Tribes. If federal law provides for defenses not available under state law to Indian tribes and the federal government when objecting to state law based water rights, federal law will control.

The additional equal protection claim made by the Little Colorado River Tribes is that Section 25, Subsection C creates illegal distinctions between classes of people thus violating equal protection. It provides,

The legislature further finds that a primary purpose of the general stream adjudication is to quantify and prioritize claims made by the United States government and Indian tribes to water from the river systems and sources in this state. It is the express intent of the legislature that the department of water resources proceed to prepare and present the director's reports on Indian and non-Indian reservations to the general stream adjudication courts as expeditiously as possible. The legislature further finds that an early focus by the general stream adjudication courts on the trial of Indian and non-Indian federal water claims will

increase the probability of earlier settlement negotiations with the United States and the Indian tribes, thereby increasing the possibility of an earlier resolution of these difficult issues. The legislature further finds that an early quantification and prioritization of Indian and non-Indian federal claims are prudent objectives in order to plan for the impacts that the federal water rights may have on the welfare of this state.

Rather than being a statement of discriminatory intent, this Court believes that the expression of the legislature in Section 25 is a statement of the realities of this general stream adjudication. There is a clear distinction between appropriable water rights under state law and federal reserved water rights available to the Indian reservations and other federal reservations in this state. State law based water rights are limited by beneficial use and are lost by abandonment and forfeiture. Federal reserved rights cannot be lost through non-use, are not dependent upon use and are based on the amount of water reasonably necessary for the purposes of the reservation. The unquantified reserved rights of Indian reservations and federal lands in this state were a major impetus behind the initiation and continuation of these general stream adjudications. The reserved rights of the federal parties constitute significant quantities of the surface water available and they have high priorities. The fact that they are unquantified except for those limited settlements that have taken place has a significant impact on future planning for the development of the state and particularly for any further appropriation of surface water. It makes little economic or practical sense to approve new and significant appropriations of surface water when it is unknown if there is any unappropriated water left in this state.

This same reality was commented upon by the Arizona Supreme Court in United States v. Superior Court, supra. In describing the historical background the Supreme Court noted the critical nature of Arizona's water supply, the fact that water usage annually exceeds surface supply at least three-fold resulting

in groundwater depletion, and that the priority claims of large users will reduce and have the potential to eliminate water available to lower priority users. Against this reality of current water usage and supply, the Supreme Court recognized the senior priorities of Indian and federal users and the fact that their use of their reserved rights has been negligible. The Supreme Court also acknowledged in its opinion the likely "gallon-for-gallon" reduction of available surface water for state claimants once federal reserved rights are established.

The expression of the legislature in Section 25(C) is also no different from the expression made by Judge Allen Minker in the Little Colorado River adjudication quoted by the Salt River Project at page 13 in its brief. In modifying Pretrial Orders No. 1 and 2 in the Little Colorado River adjudication, the Court changed the proposed sequence in which DWR was to complete its hydrographic survey reports. The original order entered in 1987 contemplated that Indian lands would be the final HSR. In ordering that the Indian lands HSR be prepared next Judge Minker stated,

The Court makes this change in order of HSR preparation to help facilitate what is becoming too long, too expensive and too burdensome a process on the claimants, DWR and the Special Master. . . The

Court believes the uncertainty in the nature and quantity of Indian claims is leading all parties at this time to litigate every possible issue to the fullest, for fear of what the future may reveal in the way of reserved rights. This Court believes that examination of claims of reserved rights is of foremost importance to all claimants. Therefore, the Court believes that the process will best be served by turning attention to the claims of the Indian lands now.

Judge Minker's conclusion in 1994 that the examination of claims of reserved rights was of foremost importance to all claimants and that the uncertainty in the nature and quantity of Indian claims was responsible in part for the excessive amount of objections and litigation is no different from the conclusion drawn by the legislature in Section 25(C) of the act. It is also no different from the conclusion reached by this Court when it ordered the preparation of the HSR for the Gila River Indian Reservation, contrary to a schedule originally adopted years earlier.

The reality that Indian reserved rights and federal rights are different than state law based rights does not create an illegal distinction violating equal protection. While it is true that Indian tribes are a suspect class under equal protection analysis and while it is also true that there can be no arguable compelling state interest for the amendments made by HB 2276, the majority of the equal protection arguments are moot in light of this Court's ruling on the due process and separation of powers claims. The Little Colorado River Tribes' argument that the reference to the realities of the differences between these two types of water rights has resulted in a discriminatory distinction violating equal protection is without merit.

MCCARRAN AMENDMENT

In addition to the constitutional challenges to HB 2276, the federal parties have also argued that as a result of the changes to the statutes, Arizona's general stream adjudication no longer satisfies the requirements of the McCarran Amendment and as a result this Court has lost jurisdiction over the federal government and the rights of Indian tribes. The primary argument raised by the federal parties is moot in light of the Court's ruling on the constitutionality of the *de minimis* summary adjudication provisions of the new legislation. That argument was that these amendments resulted in the adjudication no longer being comprehensive, inter sese, and no longer a "suit" as that word is used in the McCarran Amendment. The United State's argument, confined to issues of *de minimis*, emphasizes the argument that relegating any challenges to *de minimis* to post-decree enforcement proceedings results in piece-meal adjudication which the McCarran Amendment was designed to prevent. The Little Colorado River Tribes add the additional argument that Section 25 of the act, which states that a primary purpose of the adjudication is to adjudicate federal and tribal rights, is also a violation of the McCarran Amendment.

This Court has found that the additions to the general stream adjudication statute mandating summary adjudication of certain rights defined by the legislature as *de minimis* as well as other statutorily mandated decreed quantities violate due process and separation of powers considerations. In the Court's view, the finding of unconstitutionality as to those sections of HB 2276 makes moot the McCarran Amendment arguments raised by the federal parties and therefore they will not be addressed in detail.

However, because this Court's findings and conclusions will be reviewed by the Supreme Court which may not agree with this Court's analysis on the constitutional questions, a limited discussion of the McCarran Amendment problems is warranted.

This Court agrees with the federal parties that if the small water uses in this adjudication, which comprise between two-thirds to four-fifths of the claims filed, were statutorily adjudicated by new A.R. S. § 45-258, McCarran would be violated and jurisdiction lost. Eliminating the rights of parties to contest the water rights attributes of small users and precluding the Court from evaluating the cumulative effect of these small water uses on senior rights holders except in post-decree enforcement proceedings or proceedings on severance and transfer destroys the inter sese nature of this adjudication. Moreover, the comprehensiveness of the adjudication would be similarly undermined by requiring the piece-meal adjudication of issues relating to small water uses and the cumulative effect of those water uses in the future.

The Court has already noted that severance and transfer proceedings are not part of these adjudications. The purpose of a general stream adjudication and the purpose behind the McCarran Amendment was to put all parties claiming rights to water on a given stream before one Court to resolve the issues of quantification and priority. In the river systems in Arizona it is likely that more water rights exist than there is water to satisfy those rights if all are fully utilized. Ignoring the issues of the cumulative impact of small water uses on senior rights would eliminate an important function of the general stream adjudication at a time when all parties are before the Court. Relegating all objections to the majority of decreed rights to an administrative proceeding reviewed not by the general stream adjudication court but under the general review provided by A.R.S. § 12-901 *et seq.* defeats the comprehensiveness and inter sese requirements of McCarran. Were the provisions of A.R.S. § 45-258 to survive the constitutional challenge, in this Court's view they would defeat the Court's jurisdiction over the federal parties. If this Court fails to retain jurisdiction over the federal parties, the general stream adjudication could not be accomplished.

SEVERABILITY

In Section 23 of HB 2276 the legislature provided as follows,

- If a provision of this act or its application to any person or circumstance is held invalid for any reason, the invalidity does not affect other provisions or applications of this act that can be given effect without the invalid provision or application, and to this end the provisions of this act are severable.

The federal parties argue that despite the legislature's expressed intent to make the provisions of the act severable, the entire act must fail. This Court disagrees.

While this Court has found that many of the amendments contained in HB 2276 are unconstitutional and therefore unenforceable in these general stream adjudications, other provisions are legitimate exercise of

legislative power affecting procedural matters only. Given this Court's obligation to attempt to implement the intent of the legislature and the statute's severability clause, this Court finds that those portions of HB 2276 which have not been found to be unconstitutional can and should be implemented in these general stream adjudications. To the extent that HB 2276 added new sections to the general stream adjudication which have been found unconstitutional, the adjudication will proceed as if those provisions had not been enacted.

In summary, while the Court will not apply the substantive amendments outlined earlier in this opinion and will not implement the summary adjudication proceedings outlined for small water users, the on-farm water duties and maximum capacity rules specified by the legislature or decree water uses without exercising judicial review of DWR's recommendations, this Court will implement in this general stream adjudication the following procedural provisions of HB 2276:

- A.R.S. § 45-182(D) and (E) reopening the time for filing statements of claims of water rights existing before March 17, 1995.

- A.R.S. § 45-254(E), (F) and (G) providing procedure for late filings of statements of claimants and amended statements in the general stream adjudications.

- A.R.S. § 45-255 changing the procedure for appointment of special masters and funding their compensation if the filing fees are exhausted.

- A.R.S. § 45-256(B), (C) and (D) expanding the responsibilities of DWR and providing for certain evidentiary rules on admissibility of the report and presumptions accorded the information therein [excepting the preclusion of judicial review in A.R.S. § 45-256(D)].

- A.R.S. § 45-257(A)(2) changing the time for objections to the Master's reports and requiring written reports.

- A.R.S. § 45-263(A) proving for the applicability of state law.

- A.R.S. § 45-263(B) excluding the public trust as an attribute of a water right to be determined in the adjudications.

HOUSE BILL 2193

House Bill 2193 became law on July 13, 1995, the effective date for legislation in that year. HB 2193 added A.R.S. Section 37-321.01 to Article 5 of Title 37. The new statute, entitled "Rights to Water Used on State Land" establishes the following: The right to use water on State land for stockwatering, stockpond purposes, or for domestic uses is owned by the State of Arizona except in three situations.

1. When the water is used on State land but is diverted from patented land, the water right is owned

by the owner of the patented land.
2. When the water is used on State land but is diverted from land owned by the United States, the right is owned by the lessee of the State land.
3. If the water right was perfected on land owned by the United States before that land was designated for transfer to the State of Arizona, the right is owned by the lessee of the State land.

Subsection B of Section 37-321.01 allows the State Land Commissioner and the person asserting the right to stipulate to the ownership of the water right and the stipulation must be accepted by the Department of Water Resources. Subsection C requires that before DWR approves a permit or certificate to appropriate water for use on State land, the Commissioner of the State Land Department be given notice. For those lessees of State land who perfected their water rights before the land was designated for transfer, Subsection E of the new statute prohibits severance from its place of use on State land and transfer for use on other land without the written consent of the State Land Commissioner. The State Land Commissioner may withhold his consent to transfer if he finds that the use of the State land for grazing purposes is dependent upon the water right that is proposed to be transferred. If consent is refused, the lessee's successor in interest to the State lease or the State must pay compensation to the State land lessee who owns the water right if that lessee can no longer use the water right because of the refusal by the Commissioner of the State Land Department to consent to the severance and transfer from its place of use on State land. If the water right is purchased from the lessee, it then is issued in the name of the person or entity making the payment.

House Bill 2193 also amends Article 5 of Title 45 at A.R.S. § 45-151, an amendment identical to the amendment of that same statute in HB 2276, previously found to be retroactive legislation affecting substantive rights and therefore unconstitutional if applied to water rights existing before March 17, 1995. Section 153 of that article was also amended by HB 2193 adding Subsection C requiring that permits or certificates for the appropriation of water for use on land owned by the State of Arizona shall be issued by DWR under the provisions of A.R.S. § 37-321.01. It further provides that permits or certificates for appropriation of water for use on land owned by the United States shall be issued under amended A.R.S. § 45-151(E).

House Bill 2193 also adds Subsection C to A.R.S. § 45-164 providing that if a permit or certificate had previously been issued in the name of the State of Arizona or the United States, the appropriator of water may file a written application with DWR to request the permit or certificate be reissued in accordance with new A.R.S. § 37-321.01(A) or A.R.S. § 45-151(E). In such circumstances, DWR must provide notice of the application to the state or federal agency that owns the land where the water is used and when applicable to the owner of the land from where the water is diverted or on which it is stored. An objection period is provided and if an objection is filed DWR will be required to hold a hearing. Decisions of DWR on these applications may be appealed to the Superior Court that has jurisdiction in the general stream adjudication or, in the case of rights not subject to a general stream adjudication, pursuant to the appeal procedures set forth in A.R.S. § 12-901 *et seq.*

Finally HB 2193 adds Subsections D, E, and F to A.R.S. § 45-257 of the adjudication statutes. Subsection D requires that when ownership of a right to use water on State land is disputed in these

general stream adjudications, the water rights shall be adjudicated in the name of the claimant other than the State only after compliance with A.R.S. § 37-321.01(A) and the State Land Commissioner having been afforded the opportunity to resolve the claim. New Subsection E applies the evidentiary presumptions contained in A.R.S. § 45-261 to disputes of ownership of rights to use water on State land and their attributes. A.R.S. § 45-261 has been found to be unconstitutional. Subsection F requires that if a right to use water on land owned by the United States is disputed, the water right will be adjudicated under the new amendments in A.R.S. § 45-151(E) and (F) which have also been found unconstitutional as to water rights existing on or before March 17, 1995.

On its face A.R.S. § 37-321.01 is constitutional.

One of the first issues heard by the Special Master in these adjudications was the determination of the ownership of a water right where the water is used on leased federal land or leased state land. The leased state land at issue is the state school trust land. After hearings in the Little Colorado River adjudication the Special Master issued findings of fact and conclusions of law. The Master found in part that ownership of a water right originating on federal land can be held by the lessee of the land (based on a stipulation with the United States in the Little Colorado River adjudication), water appropriated on land subsequently conveyed by the federal government to the state school trust is owned by the appropriator, and that rights to water appropriated on land after conveyance to the state school trust must be adjudicated in the name of the State as trustee. It appears that the Special Master's ruling, which has not yet been reviewed, is consistent with A.R.S. § 37-321.01 confirming to the State of Arizona the water rights for water appropriated on school trust land except when the water right existed prior to the conveyance of the land to the state school trust and also confirmed the right of the lessee of federal land to acquire ownership of a water right. Apparently not at issue and not addressed at the hearing was the first exception addressed in A.R.S. § 37-321.01 which is when the appropriated water is located on patented land or land held in private ownership and used on state land.

Despite some of the federal parties' contentions that A.R.S. § 37-321.01 is an unconstitutional giveaway of state property rights, the Court finds that it is not. No rights are being given away; they are simply confirmed by statute to the party who owns them. HB 2193 also resolves potential disputes between the State Land Commissioner and the person who claims the water right about its ownership. The statute also enhances the value of school trust land by prohibiting transfer of water whose source originates on school trust land but which was perfected before the transfer of the land to the school trust on the conditions noted in Subsection E of A.R.S. § 37-321.01.

The amendments to A.R.S. § 45-151 have been addressed earlier in this opinion and will not be reviewed again here. The amendment to A.R.S. § 45-153 adding Subsection C is appropriate to conform the permits or certificates to the rules established in A.R.S. § 37-321.01(A) and A.R.S. § 45-151(E). Similarly, A.R.S. § 45-164(C) allows the reissuance of previously issued certificates or permits in accordance with the statutory rules. The notice provisions provide due process to the affected parties who may have a basis to object to the reissuance of the permit or certificate. After a hearing before DWR, its decision may be appealed to the general stream adjudication Court or, in situations where no general stream adjudication exists, under the general appeal of administrative decisions statute. Notice

and an opportunity to be heard before DWR and this Court are available whenever a request is made for reissuance of a permit or certificate pursuant to A.R.S. § 37-321.01(A) or A.R.S. § 45-151(E).

A.R.S. § 45-257(D) is an amendment required for consistency with the amendments first allowing the State Land Commissioner an opportunity to resolve the claim and then requiring that the water right be adjudicated in compliance with law as established in A.R.S. § 37-321.01(A). As previously discussed, the evidentiary presumptions established by A.R.S. § 45-261 are unconstitutional and therefore new A.R.S. § 45-257(E) has no effect. New A.R.S. § 45-257(F) is an amendment similar to subsection D requiring that the adjudication Court apply the law as established in A.R.S. § 45-151(E) and (F) for appropriating water on lands owned by the United States. This would have prospective effect only as a result of the Court's ruling on A.R.S. § 45-151(E) and (F).

The Court rejects the argument made by the United States in its supplemental opening brief that HB 2193 allows DWR to retroactively cancel vested water rights held by the United States or perfected in accordance with State law. The statute requires an application for transfer of a permit or certificate and provides the United States with notice and an opportunity for a hearing with review by this Court. No vested water rights owned by the United States will be canceled. Only where a claimant files an application claiming that the permit or certificate is actually owned by the claimant is there any possibility of water rights certificates being transferred. These will be transferred if the law requires it. Whether the law requires that the right be held by the United States or by the claimant will be determined first in an administrative hearing and then in a judicial proceeding in accordance with applicable state and federal law. This Court does not view this special action as the appropriate place to review all the various arguments that could be made under federal law which may or may not conflict with existing state law on the perfection of water rights on federal land. The appropriate time to determine whether or not any of these statutes violate federal laws is when a case or controversy presents itself to this Court for review. If such a case presents itself, federal law unquestionably would supersede a state law in conflict. Issues such as whether or not severance can occur absent land access permission from the managing federal agencies is not a question which this Court will address in this decision. Those issues will be addressed when they come before DWR and then this Court.

The Apache Tribes in their arguments in opposition to HB 2193 confuse the public trust doctrine with the law which governs the state school trust lands. The Enabling Act, Article 10 of the Arizona Constitution, and the statutes and case law implementing those provisions - not the public trust doctrine - govern state school trust lands. The Apache Tribes also argue that HB 2193 is unconstitutional because it purports to authorize appropriation or transfer of water from Indian reservation lands. Apparently, the Apache Tribes seeks to have this Court interpret "federal land" to include Indian reservation land. In this Court's view, there is a material difference between land owned by the federal government and land held in trust by the federal government for Indian tribes. See United States v. Superior Court, supra. House Bill 2193's reference to federal lands can only be interpreted to refer to land owned by the United States and is not an attempt to authorize incursions on Indian lands to appropriate water.

In summary, HB 2193 is constitutional on its face although some of its provisions may refer to statutes

found unconstitutional or prospective in effect. Whether its application in a particular dispute is always constitutional cannot be decided until the specific facts of such cases are brought before the Court. Whether those portions of HB 2193 that govern the issuance of a certificate or a permit for a water right on federal land are in conflict with federal law will await a specific case where such an issue is raised. If federal law precludes in some circumstances the issuance, reissuance, or transfer of the water right, federal law will prevail.

CONCLUSION

In this decision the Court has addressed the vast majority of the amendments and additions contained in HB 2276 and HB 2193. To the extent that some changes are not discussed it is because no challenge to their constitutionality or enforceability was raised or because the Court found the changes not to be significant in view of the Court's rulings herein.

In light of this Court's decision, the facial constitutionality of the changes and it's ruling that many issues were not ripe for decision due to the lack of a specific case or controversy, the Court finds that no evidentiary hearings are required. This decision shall be forwarded to the Supreme Court for its consideration.