

The Gila and Little Colorado River General Stream Adjudications

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*“Whiskey is for drinking;
water is for fighting over.”*

-Quote frequently attributed to Mark Twain, but attribution has not been verified. Regardless of who said it, it's a reality for water users in the Western United States.

What are the Adjudications?

- General stream adjudications are judicial proceedings to determine the extent and priority of all water rights in an entire river system. Arizona is undertaking a general stream adjudication of both the Gila River and the Little Colorado River systems. A river system means all water appropriable by law and all water subject to claims based upon federal law. Priority is important in Arizona where times of drought or water scarcity can occur.

What are the Adjudications?

- Thousands of claimants and water users participate in these cases before the Superior Court of Arizona in Maricopa County and in Apache County. The Superior Court will issue decrees determining the water rights in the Gila River and Little Colorado River Systems. State law, Indian, and federal non-Indian water rights will be adjudicated. The adjudications are conducted pursuant to Arizona Revised Statutes [sections 45-251 to 45-264.](#)

- The Adjudications do not include Central Arizona Project Water or Mainstem Colorado River Water

Origins of the Adjudications

- Prior to the 1970s, there was no mechanism for comprehensively determining relative rights to use water either the Gila or Little Colorado River Watersheds
- Parties initiated lawsuits to resolve disputes or enforce specific water rights. Examples:
 - *Globe Equity Decree* (1935) (Gila River)
 - *Hurley v. Abbott* (1903) (“Kent Decree”; Salt River)
 - *Norviel Decree* (1918) (Upper Little Colorado River)
 - *Pima Farms v. Proctor* (1926) (Santa Cruz River)
 - *Maricopa County Municipal Water Conservation District No. 1 v. Southwest Cotton Co.* (1931) (Agua Fria River)

Origins of the Adjudications

- In the mid to late 1970s, parties filed petitions with the Arizona State Land Department to initiate adjudications in various watersheds including Salt River, Verde River, Agua Fria River, Upper and Lower Gila River, San Pedro River, Santa Cruz River, and the Little Colorado River
- In the early 1980s, pursuant to amendments to the general stream adjudication statutes, the petitions were consolidated into two cases:
- Gila River Adjudication (Gila, Salt, Agua Fria, San Pedro and Santa Cruz Rivers) (Maricopa County Superior Court)
- Little Colorado River Adjudication (Little Colorado River and its tributaries) (Apache County Superior Court)
- The above is a VERY simplified discussion of how the adjudications came to be housed in the Superior Courts. For a more detailed discussion (AKA substitute replacement for sleeping pills) see: <http://www.superiorcourt.maricopa.gov/SuperiorCourt/GeneralStreamAdjudication/faq.asp#1>





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- Gila Adjudication – over 80,000 claims filed by nearly 30,000 claimants
- Little Colorado Adjudication – Over 14,000 claims filed by nearly 5,000 claimants
- The United States is perhaps the largest claimant in the adjudication. On behalf of non-Indian federal lands alone, the United States has submitted over 15,000 claims.

- Judge Mark Brain, Maricopa County Superior Court, presides over both adjudications
- Special Master George Schade has been assigned to both adjudications

What Has Happened Over the Past 30 Years?

- Jurisdiction of Arizona Courts
 - Arizona Courts have jurisdiction to adjudicate water rights of Indian Tribes. *Arizona v. San Carlos Apache Tribe*, 463 U.S. 545 (1983); *United States v. Superior Court*, 697 P.2d 658 (Ariz. 1985)
 - This issue took over a decade to resolve.

The Arizona Supreme Court accepted interlocutory review of six broad issues:

- 1) Do the procedures for filing and service of pleadings adopted by the trial court in its Pretrial Order Number 1 comport with due process under the United States and Arizona Constitutions?
 - “*Gila I*,” 830 P.2d 442 (Ariz. 1992) (approved service of process in Gila River Adjudication)
- 2) Subflow - Did the trial court err in adopting its 50%/90 day test for determining whether underground water is "appropriable" under Arizona Revised Statutes § 45-141?
 - “*Gila II*,” 857 P.2d 1236 (Ariz. 1993) (rejected 50%/90-day test)
 - “*Gila IV*,” 9 P.3d 1069 (Ariz. 2000) (defined subflow zone as “saturated floodplain Holocene alluvium”)
 - One of the most controversial, on-going issues in the adjudication
- 3) What is the appropriate standard to be applied in determining the amount of water reserved for federal lands?
 - “*Gila V*,” 35 P.3d 68 (Ariz. 2001) (Indian reserved water rights should be quantified to meet the minimal need to satisfy the present and future needs of the reservation as a liveable homeland; Non-Indian reserved rights are narrowly construed to meet the primary purpose for which the reservation was established)

The Arizona Supreme Court accepted interlocutory review of six broad issues:

- 4) Is non-appropriable groundwater subject to federal reserved rights?
 - “*Gila III*,” 989 P.2d 739 (1999), *cert. denied sub nom. Phelps Dodge Corp. v. U.S. and Salt River Valley Water Users' Assn. v. U.S.*, 530 U.S. 1250 (2000) (federal reserved rights may extend to groundwater to the extent groundwater is necessary to accomplish the purpose of a reservation.)
- 5) Do federal reserved rights holders enjoy greater protection from groundwater pumping than holders of state law rights?
 - “*Gila III*” (holders of federal reserved water rights enjoy greater protection from groundwater pumping than do holders of state law rights to the extent that greater protection may be necessary to maintain sufficient water to accomplish the purpose of a reservation.)
- 6) Must claims of conflicting water use or interference with water rights be resolved as part of the general adjudication?
 - On April 2, 2002, the Arizona Supreme Court vacated its order granting this appeal and vacated the portion of the Superior Court's order entered on August 1, 1989, relating to the appeal.

Subflow

- Subflow is perhaps the single most contentious, on-going issue in the adjudications
- Appropriable surface water vs. percolating groundwater
- Percolating groundwater is generally not subject to the jurisdiction of the adjudication court

Subflow

- *Maricopa County Municipal Water Conservation District No. 1 v. Southwest Cotton Co.*, 4 P.2d 369 (Ariz. 1931)
 - Court defined subflow as: “those waters which find their way through the sand and gravel constituting the bed of the stream, or the lands under or immediately adjacent to the stream, and are themselves part of the stream.”

Subflow

- In the late 1980s, the court a series of evidentiary hearing to come up with a test for determining “subflow.” The Court established a “50%/90 day” test for determining subflow. (percolating underground water was appropriable if the volume of stream depletion reached 50% or more of the total volume pumped during 90 days of continuous pumping.)
- In Gila II, The Supreme Court rejected the Superior Court’s 50%/90 day test

Subflow

- On remand, in 1994 the court adopted criteria for delineating the subflow zone and identified it as “the saturated floodplain Holocene alluvium”*
- * The court identified a number of essential elements of the subflow zone
- The Arizona Supreme Court affirmed the Superior Court’s 1994 Order “in all respects” in *Gila IV*.

Subflow

- Since 2002, the Superior Court and Special Master have addressed issues concerning the implementation of *Gila IV*.
- Focus on the San Pedro Watershed
 - ADWR Subflow Technical Report – San Pedro Watershed (March 2002)
 - Hearings before Special Master (2004)
 - Hearings before Superior Court (2005)
 - ADWR Subflow Delineation Report for the San Pedro Watershed (June 2009)
 - Comments and Objections filed on the June 2009 Report in December 2009)
 - ADWR Report responding to Comments and Objections (January 2011)
 - Evidentiary Hearing before Superior Court (January 2012)
 - Superior Court Order (October 2012)
 - Hearing before Superior Court (January 2013)
 - Court Ordered ADWR to prepare a new delineation of the Subflow Zone for the San Pedro Watershed. ADWR anticipates that the new delineation will be ready in April 2014

Other Progress in the Adjudication

- Settlement of Indian Water Right Claims
- Arizona has approved more Indian water rights settlements than any other western state
 - Salt River Pima-Maricopa Indian Community
 - Fort McDowell Yavapai Nation
 - Yavapai-Prescott Indian Tribe
 - San Carlos Apache Tribe (Salt River Claims)
 - Tohono O'Odham Nation
 - Gila River Indian Community
 - Zuni Pueblo
 - White Mountain Apache Tribe

Other Progress in the Adjudication

- The court has issued partial decrees for certain federal reserved rights
 - Saguaro National Monument
 - Coronado National Memorial
 - Bureau of Land Management

Other Progress in the Adjudication

- Arizona State Land Department's claim to federal reserved water rights
 - State claimed federal reserved water rights for approximately 9.3 million acres of state trust lands for a total quantity of 7.9 million acre-feet of water.
 - Superior Court rejected the State's claim in October 2010
 - Arizona Supreme Court affirmed the court's ruling in September 2012

Other Progress in the Adjudication

- Ongoing litigation for other federal reserved water rights
 - Hopi Tribe
 - Fort Huachuca
 - San Pedro Riparian National Conservation Area
 - Aravaipa Canyon Wilderness Area

Why Should I Care?

- Questions?

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