

IN THE SUPERIOR COURT OF THE STATE OF ARIZONA
IN AND FOR THE COUNTY OF MARICOPA

IN RE THE GENERAL ADJUDICATION
OF ALL RIGHTS TO USE WATER IN
THE GILA RIVER SYSTEM AND SOURCE

W-1 (Salt)
W-2 (Verde)
W-3 (Upper Gila)
W-4 (San Pedro)
(Consolidated)

Order

The Court has considered the motions for partial summary judgment filed by the San Carlos Apache Tribe, Tonto Apache Tribe and the Yavapai-Apache Nation (collectively, the "Apache Tribes") and the Salt River Project ("SRP") requesting a declaration of full appropriation in the Gila River System and that the Court direct the Arizona Department of Water Resources ("ADWR" or the "Department") to implement steps alleged to be required by certain listed statutes.

Requests for Declaration of Full Appropriation

In their motion for partial summary judgment, the Apache Tribes seek two types of relief: 1. A declaration that the Gila River System is fully appropriated; and, 2. Injunctive relief in the form of an order directed to ADWR, and, presumably, its director, requiring that the Department both undertake certain enumerated acts and refrain from

continuing to perform several of its administrative and regulatory functions.

No one can genuinely dispute that water is a scarce and invaluable resource in this state, but there continue to be disagreements as to the amount of water available in Arizona's watersheds, including the Gila River System. The record in this adjudication reflects that while parties often cite to water supply statistics in support of various litigation positions, they are reluctant to bind themselves to specific representations as to total available water supplies. Highlighting this reluctance is not intended as a criticism. Variable periodic precipitation levels, the prospective effect resulting from determination of the subflow zone, and continuing growth and development are factors that make predictions of water supply the subject of legitimate contention. While common logic may point to the conclusion that existing water right claims filed in this adjudication exceed current estimates of appropriable water supply for most years, it does not automatically follow that this conclusion will remain true for adjudicated water rights.

Despite existing problems in determining a reliable estimate of available water in the Gila River System, the Court set oral argument on the Apache Tribes' request for

declaratory relief in response to the assertion by the Tribes that binding federal case law mandates judicial recognition that the Gila River System is fully appropriated. The Apache Tribes rely primarily on their interpretation of three cases in support of this argument: *Arizona v. California*, 373 U.S. 546 (1963); *United States v. Superior Court*, 144 Ariz. 265, 697 P. 2d 658 (1985); and, *United States v. Gila Valley Irrig. Dist.*, 920 F. Supp. 1444 (D. Ariz. 1996). These and other federal cases have been used to support requests that the court uphold principles of issue and claim preclusion with respect to water right claims made in this adjudication. The Court finds that the specific holdings contained in these cases do not dictate a declaration of full appropriation in the Gila River System.

SRP's cross-motion for partial summary judgment requests that the Court declare that the Gila River System is fully appropriated and order ADWR not to accept certain new applications for appropriative water rights filed after a designated date and direct ADWR to implement monitoring and measurement provisions as requested by the Apache Tribes. SRP asks the Court to deny the remainder of the Tribes' request.

Because there is no binding precedent dictating declaratory relief in this proceeding, the existence of

continuing genuine disputes regarding available water supply levels prevent granting relief, at this juncture, in the form of a declaration of full appropriation in the Gila River System.

For the foregoing reasons,

IT IS ORDERED denying the Apache Tribes' request for summary judgment for declaration of full appropriation in the Gila River System.

IT IS FURTHER ORDERED denying SRP's cross-motion for partial summary judgment re declaration of full appropriation.

**Motion for Order Directing ADWR to
Implement Listed Statutes**

The Apache Tribes' second motion requests that the Court assert jurisdiction over certain of ADWR's administrative and regulatory functions by directing the Department to undertake limited actions (for example, require owners of ditches, canals, and reservoirs to install headgates and measuring devices) and cease others (such as granting applications for well permits and determining if appropriative water rights have been relinquished). SRP's cross-motion for partial summary judgment similarly requests an order directing ADWR to stop accepting new applications to appropriate for consumptive uses and for the construction of

non-federal dams and reservoirs. The remedy sought by the Apache Tribes and by SRP would require an order granting relief against ADWR and its director despite the fact that neither the Department nor its director is a claimant or a party to this adjudication. The Department's role in this proceeding is technical advisor to the Court.

The Apache Tribes and SRP rely primarily on *St. Johns Irrig. & Ditch Co. v. Arizona Water Comm'n*, 127 Ariz. 350, 621 P.2d 37 (App. 1980) as support for their assertion that injunctive relief is appropriate in this case. But, injunctive relief was granted in *St. Johns* only after an evidentiary proceeding during which the trial court, after hearing "overwhelming evidence," found that the water sources at issue had been fully appropriated and adjudicated by a prior court decree. 127 Ariz. at 351, 621 P.2d at 38.

Moreover, the Court agrees with those opposing summary judgment that the provisional relief sought against ADWR is far removed from the purpose of this proceeding, which is to determine "the nature, extent and relative priority of the water rights of all persons in the river system and source." A.R.S. §45-252(A); see A.R.S. §45.251(7). Prohibiting ADWR from performing such tasks as accepting applications for well permits or processing certificates of assured water supply during the water right determination, as opposed to

enforcement, phase of this action would divert this adjudication from its current tasks.

While it may be true that some permits or water right certificates granted by ADWR, like some current water right claims, may prove to be worthless "paper rights," the relief sought by the motions currently before the Court reaches beyond the jurisdiction of this adjudication.* This does not mean that the Apache Tribes, SRP, and those supporting their motions lack a method of seeking relief. The Court agrees with the summary judgment opponents that to the extent the Apache Tribes' and SRP's motions seek relief in the form of orders requiring and/or prohibiting acts by ADWR and its director, they constitute a request for a remedy available only by successful prosecution of a special action. See *St. Johns, supra*.

For the foregoing reasons,

IT IS ORDERED denying the Apache Tribes' motion for an order directing ADWR to implement listed statutes and SRP's cross-motion for similar relief.

* While the relief sought by the motions falls outside the jurisdiction of this adjudication, the Court does not adopt ADWR's assertion that the Court lacks the power to enter orders granting relief against the Department in connection with its role in this proceeding.

Dated this 16th day of January, 2004.

/s/ Judge Eddward P. Ballinger, Jr.

The Honorable Eddward P. Ballinger, Jr.
Judge of the Superior Court

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A copy of this order is mailed to all parties on the Court-approved W-1, W-2, W-3 and W-4 mailing list dated October 6, 2003.