



**REPORT
OF THE
JOINT SELECT COMMITTEE ON
ARIZONA GENERAL STREAM
ADJUDICATIONS**

PRESENTED TO:

**SPEAKER OF THE HOUSE, MARK KILLIAN
PRESIDENT OF THE SENATE PRO TEMPORE, PAT WRIGHT**

DECEMBER 9, 1994



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**TO: PRESIDENT OF THE SENATE PRO TEMPORE, PAT WRIGHT
SPEAKER OF THE HOUSE OF REPRESENTATIVES, MARK KILLIAN
MEMBERS OF THE JOINT SELECT COMMITTEE ON ARIZONA
GENERAL STREAM ADJUDICATIONS**

DATE: December 8, 1994

**Re: Report of the Joint Select Committee on Arizona General Stream
Adjudications**

Pursuant to the direction of Senate President Pro Tempore, Pat Wright and Speaker of the House Mark Killian, please find attached a copy of the report of the Joint Select Committee on Arizona General Stream Adjudications.

MEMBERS:

Senator Jim Buster, Co-chair

Senator Gus Arzberger

Senator Ann Day

Senator Peter Goudinoff

Senator Carol Springer

Senator Warren Austin Turner

Representative Russell Bowers, Co-chair

Representative Jack Brown

Representative Pat Conner

Representative Benjamin Hanley

Representative Becky Jordan

Representative Mark Killian

Ex Officio - Rita Pearson, Director, Arizona Department of Water Resources

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INTRODUCTION AND BACKGROUND

BACKGROUND

For the past twenty years, the State of Arizona has been involved in conducting the general adjudication of water rights in two major water systems in the state, the Gila and the Little Colorado River Systems. These adjudications are court determinations of the status of all State law rights to surface water and all claims based upon federal law within the river systems. As the result of a lengthy court battle in the early 1980s, the jurisdiction of the State Courts to adjudicate water rights, including Indian and federal reserved water rights, was affirmed by both the U.S. Supreme Court and the Arizona Supreme Court. The state statutes that currently govern the adjudications process can be found in Title 45, Chapter 1, Article 9 (ARS 45-251 ET.SEQ.). (See Attachment A)

According to the Arizona Department of Water Resources (ADWR), there have been 67,721 water right claims (statements of claimant) filed in the Gila River system and 11,207 in the Little Colorado River system. However, each statement of claimant may claim more than one water use, consequently there are a total of almost 100,000 adjudication water use claims in both river systems (85,267 in the Gila River system and 12,635 in the Little Colorado River system). The claimants include cities, mines, irrigation districts, farmers, utility companies, water companies, state and federal land management agencies, and Indian tribes.

Through a final court decree, the court will determine whether or not a claimant in the adjudication has a legal right to use the water claimed and the exact quantity and priority of that right, relative to other adjudicated water rights. To date, not a single decree had been issued by the courts adjudicating a single water right in Arizona.

JOINT SELECT COMMITTEE ON ARIZONA GENERAL STREAM ADJUDICATIONS

On February 25, 1994 the Speaker of the House, Mark Killian and the President of the Senate Pro Tempore, Pat Wright, appointed a select committee of senators and representatives to initiate discussions on expediting the Gila River Adjudication and Little Colorado River adjudication. The committee was given three specific tasks:

1. To establish the public and private resources which have been expended in the adjudications process since their inception and to estimate and establish a timeline of how long these proceedings are likely to continue without a change in existing procedures.
2. To determine what changes can be made to the adjudication statutes and rules which would simplify and help expedite the adjudications process, while mitigating the burdens imposed on all parties; and

3. To determine what changes should be made to the surface and groundwater codes in Arizona resulting from the amount of litigation necessary to adjudicate water rights.

The select committee was directed to begin gathering information as soon as possible and to hold public hearings. The select committee held six meetings in 1994. During these public hearings, the committee heard from many parties involved in the adjudications including small and large claimants, ADWR, the Chief Justice of the Arizona Supreme Court, and the Office of the Solicitor - Department of the Interior.

At the first committee meeting on May 10, 1994, interested parties were asked to submit suggestions for improving the adjudications by June 1, 1994. In subsequent meetings, the committee considered various suggested proposals and heard testimony from interested parties.

On September 7, 1994, the committee approved its first set of recommended concepts which included recommendations for:

- Establishment of a de minimis use standard and the summary adjudication of the de minimis water users in the adjudications,
- Representation by non-attorneys in the state's general adjudication proceedings,
- Recognition of the state's authority to determine any public trust values in the adjudications, and
- Recognition of a presumption of validity of pre-1919 water rights claims.

The final meeting to adopt recommendations was held on November 22, 1994. At this meeting, additional recommendations, in concept, were adopted by the committee that would:

- Establish ways to more efficiently manage the adjudication process and relieve ADWR of unnecessary work,
- Revise the adjudications process in order to reduce the amount of litigation necessary to complete the adjudications, and to reduce the financial burdens on the complainants,
- Clarify ambiguous provisions of the state water code to answer questions without having to litigate these ambiguities as part of the adjudications process,
- Assert that public trust values are not appropriately asserted through the general stream adjudication process,
- Consider changes to the role of the Special Master in the adjudications process, including the evaluation of informal negotiations being encouraged among impacted parties through the creation of a settlement judge,
- Consider supplementing adjudication funds,
- Establish a permanent legislative oversight committee to monitor the progress of the adjudications and the expenditure of monies, and
- Pass legislation that will: 1) be equitable, 2) be consistent with the McCarran Amendment, 3) provide long-term security to all water rights holders, and 4) streamline the adjudication process.



Arizona State Legislature

1700 West Washington

Phoenix, Arizona 85007

May 6, 1994

The Honorable Austin Turner
State Senator
1700 W. Washington
Phoenix, AZ 85007-2848

Dear Senator Austin:

On February 25, 1994 we created the Joint Select Committee on Arizona General Stream Adjudications. This Committee originally consisted of the following ten Legislative Members and one Ex-Officio Member:

Representative John Keegan, Cochairman	Senator Jim Buster, Cochairman
Representative Pat Conner	Senator Carol Springer
Representative Russell "Rusty" Bowers	Senator Ann Day
Representative Jack Brown	Senator Peter Goudinoff
Representative Benjamin Hanley	Senator Gus Arzberger

Director, Department of Water Resources, Ex-Officio

This letter is to notify you of the expansion of this Committee with the addition of House Speaker Mark Killian and Senator Austin Turner.

The deadline for recommendations from the Committee is being extended from June 1, 1994 to September 1, 1994. This extension will enable the Committee to properly study this issue and allow for maximum public input.

The first meeting of the Committee is scheduled for Tuesday, May 10, 1994 at 1:00 p.m. in House Hearing Room 2.

Again, we appreciate your willingness to serve on this Committee and please feel free to contact either one of us if you should have any questions or comments on the Committee or its mission.

Very truly yours,

MARK W. KILLIAN
Speaker
Arizona House of Representatives

PAT WRIGHT
President Pro Tempore
Arizona State Senate

/tsn
JSCAGBA.L04



JOINT SELECT COMMITTEE ON ARIZONA GENERAL STREAM ADJUDICATIONS

MEMBERS:

Senator Jim Buster, Co-Chair	*Representative Russell "Rusty" Bowers, Co-Chair
Senator Gus Arzberger	Representative Jack Brown
Senator Ann Day	Representative Pat Conner
Senator Peter Goudinoff	Representative Benjamin Hanley
Senator Carol Springer	*Representative Becky Jordan
Senator Warren Austin Turner	Representative Mark Killian

Ex Officio - Rita Pearson, Director, Arizona Department of Water Resources

(*NOTE: Letters in Attachment B indicate membership changes.)

COMMITTEE MEETING DATES

May 10, 1994

June 1, 1994

June 21, 1994

July 19, 1994

September 7, 1994

November 22, 1994

CONCEPTS ADOPTED BY THE JOINT SELECT COMMITTEE ON ARIZONA GENERAL STREAM ADJUDICATIONS

DE MINIMIS USES

- Define "de minimis" uses of surface water as domestic and other small water uses of 3 acre-feet or less per year, and as stockponds with a capacity of 15 acre-feet or less.
- Require the court to summarily adjudicate claimants of a "de minimis" use of water without requiring the claimant to take any additional action.
- Require any challenger to the claimant of a "de minimis" use to bear the burden of proof by clear and convincing evidence.
- Provide that "de minimis" claims are an adjudicated right, a valid beneficial use, and a vested property right.

NON-ATTORNEY REPRESENTATION

- Allow non-attorneys to represent water claimants in the general adjudications.

PUBLIC TRUST VALUES

- Recognize the Legislature's authority to determine public trust values, if any, in the state's general stream adjudications. Clarify that public trust values are not appropriately asserted through the general stream adjudications process.

PRE-1919 WATER RIGHTS CLAIMS

- Provide that a person who claims a water right in a general adjudication that was vested before March 26, 1919 is presumed to have a valid claim. Specify that any person who contests such a claim shall bear the burden of proof by clear and convincing evidence.

MORE EFFICIENT MANAGEMENT OF THE ADJUDICATIONS PROCESS

- Specify means for quantifying irrigation rights.
- Specify means for quantifying other rights.
- Establish the effect of prior water rights filings in determining the attributes of water rights.
- Streamline the Hydrographic Survey Report process.

REDUCTION OF LITIGATION AND FINANCIAL BURDENS ON COMPLAINANTS

- Permit ADWR to propose the attributes of water rights.
- Permit ADWR to testify to the attributes of water rights at the request of any party.
- Automatically admit ADWR's report into evidence for claims under 5,000 acre-feet/year.
- Permit claimants to rely on ADWR's report to prove their rights.
- Specify how rights are quantified.
- Permit water users to expeditiously file a late statement of claim.

CLARIFICATION OF AMBIGUOUS PROVISIONS OF THE STATE WATER CODE

- Clarify the role that the provisions pertaining to water rights forfeiture have on the maintenance of water rights.
- Specify the effect that changes in use have on the maintenance of water rights.
- Specify the effect that administrative delays have on the establishment of water rights.
- Afford historical water users that have not complied with filing requirements in the state's water code the opportunity to validate their rights to the use of that water.
- Resolve water rights ownership issues on Federal and adjacent lands.

ROLE OF THE SPECIAL MASTER/APPOINTMENT OF A SETTLEMENT JUDGE

- Consider the role of the special master in the adjudications process, including evaluating encouragement of informal negotiations among impacted parties through the creation of a settlement judge.
- Evaluate the designation of a Superior court judge to address water litigation, administer the adjudications process and appoint special masters as needed, in order to expedite and reduce the costs of the adjudications.

FINANCIAL CONSIDERATIONS

- Express concern about the financial provisions pertaining to the adjudications process.
- Consider supplementation of the adjudications funds.

LEGISLATIVE OVERSIGHT

- Establish a permanent legislative oversight committee to monitor the progress of the adjudications and the expenditure of funds.

ATTRIBUTES OF ANY LEGISLATION PASSED

- Recognize that the adjudications process is complicated and has the potential to profoundly affect the property rights of the water users of this state.
- Provide that any legislation passed should be equitable, should be consistent with the McCarran Amendment, should provide long-term security to all water rights holders and should streamline the adjudication process.

ATTACHMENT A

§§ 45-231 to 45-245
Repealed

§§ 45-231 to 45-245. Repealed by Laws 1979, Ch. 139, § 38, eff. April 24, 1979

WATERS
Title 45

DISPOSITION TABLE

Showing where the subject matter of sections repealed by Laws 1979, Ch. 139, § 38 was covered by new sections:

Repealed Sections	New Sections	Repealed Sections	New Sections
45-231	45-252	45-238	45-259
	45-258		45-252
45-232	45-253	45-239	45-257
45-233	45-256		45-257
45-234	45-253	45-240	45-259
	45-257	45-241	None
45-235	45-253	45-242	45-257
	45-254		45-259
45-236	45-256	45-243	45-254
45-237	45-253	45-244	45-254
	45-254		45-256
	45-256	45-245	45-257
	45-257		45-259

Law Review Commentaries

Navajo water rights: Pulling the plug on the Colorado River? 16 Ariz. Bar J. No. 5, p. 7 (1981).

1980 Arizona groundwater management code. Ariz.State L.J. 3, 1980, p. 621.

Papago water rights settlement: Right to transfer water to different uses. 26 Ariz.L.Rev. 421 (1984).

§ 45-251. Definitions

In this article, unless the context otherwise requires:

1. "General adjudication" means an action for the judicial determination or establishment of the extent and priority of the rights of all persons to use water in any river system and source.
 2. "Person" means an individual, a partnership, a corporation, a municipal corporation, the state of Arizona or any political subdivision, the United States of America, an Indian tribe or a community or any other legal entity, public or private.
 3. "Potential claimant" means all persons claiming water rights or on whose behalf claims to water rights are asserted.
 4. "River system and source" means all water appropriable under § 45-141 and all water subject to claims based upon federal law.
- Added by Laws 1979, Ch. 139, § 39, eff. April 24, 1979. Amended by Laws 1980, 4th S.S., Ch. 1, § 64, eff. June 12, 1980; Laws 1987, Ch. 2, § 25, eff. Feb. 27, 1987.

Historical and Statutory Notes

For impairment of obligations and nonseverability provisions of Laws 1980, 4th S.S., Ch. 1, effective June 12, 1980, see Historical and Statutory Notes preceding § 45-401.

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WATER RIGHTS ADJUDICATIONS
Ch. 1

§ 45-252

Law Review Commentaries

General water-rights adjudication in Arizona: Yesterday, today and tomorrow. Mikel L. Moore and John B. Weldon, Jr. 27 Ariz.L.Rev. 709 (1985).

United States Supreme Court

Indian water rights. Right to intervene subsequent to adjudication of water rights. see Arizona v. California, 1983, 103 S.Ct. 1382, 460 U.S. 605, 75 L.Ed.2d 318, rehearing denied 103 S.Ct. 3131, 462 U.S. 1146, 77 L.Ed.2d 1381, implemented 104 S.Ct. 1900, 466 U.S. 144, 80 L.Ed.2d 194.

§ 45-252. General adjudication; representation; superior court; assignment to judge; petition

A. One or more water users upon a river system and source, the water rights of which have not been previously adjudicated under this article and administered by the director of water resources, or the state of Arizona upon the request of any state agency other than the department of water resources may file a petition to have determined in a general adjudication the nature, extent and relative priority of the water rights of all persons in the river system and source.

B. The attorney general shall represent the state of Arizona in connection with all water claims asserted by this state. The director shall be represented by legal counsel retained in accordance with section 45-104, subsection F.

C. The general adjudication shall be brought and maintained in the superior court in the county in which the largest number of potential claimants resides. The clerk of the court in which the petition is filed shall notify the supreme court and the supreme court shall be responsible for assigning the general adjudication to a superior court judge and appointing a master and for consolidating the general adjudication with other pending general adjudications, if appropriate.

D. The petition for a general adjudication shall be captioned: "In re the general adjudication of all rights to use water in the _____ river system and source" and shall request that the court determine the nature, extent and relative priority of the water rights of all persons in the river system and source.

Added by Laws 1979, Ch. 139, § 39, eff. April 24, 1979. Amended by Laws 1980, 4th S.S., Ch. 1, § 65, eff. June 12, 1980; Laws 1981, Ch. 176, § 2, eff. April 17, 1981; Laws 1992, Ch. 94, § 15.

Historical and Statutory Notes

Source:

Laws 1919, Ch. 164, §§ 16, 26.
Rev.Code 1928, §§ 3293, 3300.
Code 1939, §§ 75-114, 75-121.
A.R.S. former §§ 45-231, 45-238.

For impairment of obligations and nonseverability provisions of Laws 1980, 4th S.S., Ch. 1, effective June 12, 1980, see Historical and Statutory Notes preceding § 45-401.

For authorization for additional positions under Laws 1981, Ch. 127, § 2, see Historical and Statutory Notes preceding § 45-461.

For legislative intent regarding termination of provisions added or amended by Laws 1981, Ch. 176, see Historical and Statutory Notes following § 45-478.

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Cross References

Water rights registration, see § 45-181 et seq.

Law Review Commentaries

Water resources management—a proposed statute. 19 Ariz.L.Rev. 719 (1977).

Library References

Waters and Water Courses ¶33.
WESTLAW Topic No. 405.
C.J.S. Waters § 194 et seq.

WESTLAW Electronic Research

See WESTLAW Electronic Research Guide following the Preface.

United States Supreme Court

Navigable rivers. Ownership of underlying land, law governing, see Oregon State Land Board v. Corvallis Sand and Gravel Company; Corvallis Sand and Gravel Company v. Oregon State Land Board, 1977, 97 S.Ct. 582, 429 U.S. 363, 50 L.Ed.2d 550.

Notes of Decisions

- Jurisdiction 3
- Proof 4
- Successors 5
- Validity 1
- Vested rights 2

1. Validity

Section 45-252 requiring Supreme Court to assign proceedings for adjudication of water rights to judge of superior court, which requires proceedings to be filed in superior court, does not unconstitutionally expand original jurisdiction of Supreme Court, since superior court has original jurisdiction under Const. Art. 6, § 5. U.S. v. Superior Court In and For Maricopa County (1985) 144 Ariz. 265, 697 P.2d 658.

2. Vested rights

Special action relief was properly ordered in favor of water companies, who were owners of vested water rights in the waters of a river by reason of a court decree, prohibiting water commission from acting upon or granting further water rights in waters of the river, in that the evidence was sufficient to sustain the finding that waters of the river had been fully appropriated by reason of the court decree and that there was no additional water available for appropriation, and by reason of statutes, trial court was empowered to determine that there was no water to which additional rights could be asserted, which determination was binding upon commission, and thus commission could not derogate such determination by granting

further rights for appropriation since to do so would be beyond its legal authority. St. Johns Irr. and Ditch Co. v. Arizona Water Commission (1980) 127 Ariz.App. 350, 621 P.2d 37.

3. Jurisdiction

Superior court did not have subject matter jurisdiction over action for declaration of rights with respect to ditch located in county and waters from particular creek diverted through ditch to lands owned by dozens of property holders where there was already pending in another county general adjudication of water rights in watershed, where parties to declaratory judgment action were noticed as claimants in prior action, and where prior action was inclusive of all issues raised in declaratory judgment complaint. Gabel v. Tatum (App.1985) 146 Ariz. 527, 707 P.2d 325.

Supreme Court would accept jurisdiction of petitions for special action by the United States and Indian tribes challenging jurisdiction of state courts to adjudicate claims to water rights in certain rivers and attacking statutory procedures for adjudication of such claims, even though action arose from denial of motion to dismiss, since questions presented were pure issues of law, since case had been pending for more than ten years, and since approximately 80,000 claimants had been served in cases brought under same statute. U.S. v. Superior Court In and For Maricopa County (1985) 144 Ariz. 265, 697 P.2d 658.

State Land Commissioner had no power to administer water rights under a court decree

and, therefore, no right to raise the issue of abandonment, but he did have the power to make a decision as to whether a right had been abandoned if the question of abandonment was raised by one of the parties to a conflict hearing conducted by the Department under § 45-231 et seq. (repealed; see, now, § 45-251 et seq.) Op.Atty.Gen. No. 74-18-L.

Once decree or judgment by a court concerning right to appropriate surface waters was made, State Land Department relinquished its jurisdiction of the surface water covered by that decree, and subsequent evaluation of beneficial use of water granted by decree was reserved to special officers appointed by the courts under the existing judgment. Op.Atty.Gen. No. 73-37-L.

4. Proof

Where trial court, in suit to determine rights in and to waters of river system, ordered a preliminary hearing to determine extent, priority dates and status of intervener's claims to appropriation, and use of, waters of river, it was

incumbent upon intervener at such hearing, to first prove that it had made an appropriation of unappropriated waters, and then the extent thereof; that is, the amount or quantity of water beneficially used and the specific lands upon which the waters were used. Gillespie Land & Irr. Co. v. Buckeye Irr. Co. (1953) 75 Ariz. 377, 257 P.2d 393.

Plaintiff suing to establish water rights must allege facts showing his appropriation to some beneficial use prior to any adverse act by defendant. Dags v. Howard Sheep Co. (1914) 16 Ariz. 283, 145 P. 140.

5. Successors

A judgment against defendant developers of a residential land as to respective rights of defendants and plaintiff neighboring ranch owners in relation to water rights in the area would bind all persons who might subsequently succeed to defendants' interest in the land. England v. Ally Ong Hing (1969) 105 Ariz. 65, 459 P.2d 498.

§ 45-253. Service of summons; statement of claimant form; record

A. Personal service of the summons and petition shall not be required. The court shall order that:

1. The clerk of the court issue the summons which shall specify the date by which the statement of claimant must be filed, generally describe the nature of the general adjudication and set forth such other information as may be necessary or desirable in the circumstances. The form of the summons shall be approved by the court.

2. The clerk of the court deliver the summons to the director who shall make such copies and prepare such documents as may be necessary to effect service. The director shall assist the court in determining the scope of adjudication by recommending the portions of the river, its tributaries and any other relevant sources subject to the adjudication and in development of a statement of claimant form which shall include such duplicates as may be necessary. Upon identifying the potential claimants pursuant to § 45-256, subsection A, paragraph 1, the director shall effect service on all known potential claimants by mailing a copy of the summons by registered or certified mail, return receipt requested, to such known potential claimants.

3. When the supreme court determines that the services of a master appointed pursuant to § 45-255 are no longer necessary and enters an order terminating the appointment the clerk of the court shall reimburse the director from the fund of fees paid by the claimants pursuant to § 45-254, subsection F, for funds expended by the director in effecting service of process and any subsequent notices to claimants. Reimbursement shall only be from monies remaining in the fund after payment of the costs and expenses attributable to the appointment of a master in accordance with § 45-255, subsection B.

B. At the time of commencement of mailing of service of process on known potential claimants, the director shall effect service on all unknown potential claimants by publication of the summons at least once a week for four consecutive weeks in a newspaper published in each of the counties within which interests in and to the use of water may be affected by the general adjudication.

C. The director shall publicize the general adjudication through the electronic media and in general circulation newspapers.

D. The court shall direct the director:

1. To return the original summons to the clerk of the court with an endorsement of the dates on which mailing and publication were completed.

2. To maintain a true and accurate record of the names and addresses of all persons who have in fact been served by registered mail, return receipt requested. Any such record, together with all supporting documents, shall constitute the records of the court which shall be subject as such to the supervision and control of the court.

Added by Laws 1979, Ch. 139, § 39, eff. April 24, 1979. Amended by Laws 1980, 4th S.S., Ch. 1, § 66, eff. June 12, 1980; Laws 1981, Ch. 176, § 3, eff. April 17, 1981; Laws 1988, Ch. 75, § 1.

Historical and Statutory Notes

Source:

Laws 1919, Ch. 164, §§ 17, 19 to 21 [18 to 20], 24, 25 [23, 24].

Laws 1921, Ch. 64, §§ 5, 7 to 9, 12, 13. Rev.Code 1928, §§ 3294, 3296, 3297, 3299. Code 1939, §§ 75-115, 75-117, 75-118, 75-120.

A.R.S. former §§ 45-232, 45-234, 45-235, 45-237.

For impairment of obligations and nonseverability provisions of Laws 1980, 4th S.S., Ch. 1, effective June 12, 1980, see Historical and Statutory Notes preceding § 45-401.

For legislative intent regarding termination of provisions added or amended by Laws 1981,

Ch. 176, see Historical and Statutory Notes following § 45-478.

Reviser's Notes:

1979 Note. Pursuant to authority of § 41-1304.02, subsection A, paragraph 3 was relettered as subsection B and placed after subsection A, paragraph 4. Subsection A, paragraph 4 was renumbered as paragraph 3 and subsection B was relettered as subsection C.

1988 Note. Pursuant to authority of § 41-1304.02, in the section heading a semicolon was substituted for the comma after "summons".

Cross References

General adjudication fund, source of funds, see § 45-260.

Library References

Waters and Water Courses ¶33.
WESTLAW Topic No. 405.
C.J.S. Waters § 194 et seq.

Notes of Decisions

Potential claimants 1

1. Potential claimants

Where a decree in a proceeding to determine water rights for irrigation purposes stated that the court retained jurisdiction and that the amounts of water apportioned to each of the

parties were experimental merely and subject to change as conditions might require, and that users of water might apply for a modification thereof upon such application for modification, notice was be served upon all the appropriators and users of water, giving them an opportunity to be heard either in support of or in opposition to the application. *Taylor v. Tempe Irrigating Canal Co.* (1920) 21 Ariz. 574, 193 P. 12.

§ 45-254. Statement of claimant; filing; information to be included; verification; failure to file; fees

A. Each potential claimant who is served shall present in writing the particulars of his claim on the court-approved statement of claimant form and shall file the statement of claimant form with the court within ninety days of the date of service, unless otherwise ordered by the court. The court may extend the time for good cause. A duplicate of each statement of claimant shall be made available by the clerk of the court to the director.

B. The statement of claimant form may be filed by a person on behalf of its members or users and shall constitute the required filing of its members or users.

C. The statements of claimant shall include the following information, where appropriate:

1. The name and mailing address of the potential claimant.
2. The name of the specific river, stream, tributary, wash or other source from which the right to divert or make use of water is claimed.
3. The quantities of water and the periods of time during the year for which use is claimed.
4. If distributing works are used or required, the date of beginning and completion of construction or of enlargements and the dimensions of the ditch as originally constructed and as enlarged.
5. If the use is for irrigation, the amount of land reclaimed the first year and in subsequent years, and the amount and general location of the land, the character of the soil and the kind of crops cultivated.
6. The legal description of the point or points of diversion and place of use of the waters to the nearest forty-acre tract or by other appropriate description and such map or plat showing the relative points of diversion and place of use as may be required.
7. The purpose and extent of use.
8. The time of the initiation of the right and the date when water was first used for beneficial purposes for the various amounts and times claimed in paragraph 3 of this subsection.
9. The legal basis for the claim.

D. The statement of claimant shall be verified by the claimant or the person authorized to file as provided in subsection B.

E. Any potential claimant properly served who fails to file a statement of claimant in accordance with the requirements of this article shall be barred and estopped from subsequently asserting any right theretofore acquired upon the river system and source and shall forfeit all rights to the use of water in the river system and source theretofore claimed by him. Any potential claimant who did not have actual knowledge or notice of the pendency of the proceedings may, at any time within one year of the date, as set forth in the summons, by which statements of claimant must be filed, move to intervene in the general adjudication, if his motion to intervene contains all matters required of claimants and an affidavit that the intervenor had no actual knowledge or notice of the pendency of the proceedings. Such motion to intervene shall be granted upon such terms as are equitable, and the movant thereafter shall have the rights of a claimant in the general adjudication.

F. The fee for filing a statement of claimant by an individual is twenty dollars and by a corporation, municipal corporation, the state or any political subdivision, an association or partnership is two cents for every acre-foot of water claimed, or twenty dollars, whichever is greater. The director shall review the statements of claimant and the amount of fees paid as to each and report to the court or master the sufficiency of the fees paid with respect to each statement of claimant. A claim shall not be considered by the court or the master unless all fees with respect to such claim have been fully paid in accordance with the provisions of this article. Fees shall not be imposed upon any Indian tribe, community or allottee personally appearing in the general adjudication to assert claims to water.

Added by Laws 1979, Ch. 139, § 39, eff. April 24, 1979. Amended by Laws 1980, 4th S.S., Ch. 1, § 67, eff. June 12, 1980; Laws 1981, Ch. 176, § 4, eff. April 17, 1981.

Historical and Statutory Notes

Source:

Laws 1919, Ch. 164, §§ 20, 21 [19, 20], 24, 25 [23, 24], 32, 33.
Laws 1921, Ch. 64, §§ 8, 9, 12, 13.
Rev. Code 1928, §§ 3297, 3299, 3305, 3306.
Code 1939, §§ 75-118, 75-120, 75-126, 75-127.
A.R.S. former §§ 45-235, 45-237, 45-243, 45-244.

For impairment of obligations and nonseverability provisions of Laws 1980, 4th S.S., Ch. 1, effective June 12, 1980, see Historical and Statutory Notes preceding § 45-401.

For legislative intent regarding termination of provisions added or amended by Laws 1981, Ch. 176, see Historical and Statutory Notes following § 45-478.

Cross References

Nonapplicability of administrative refund for erroneously paid fees, see § 45-113.

Library References

Waters and Water Courses ¶12.
WESTLAW Topic No. 405.
C.J.S. Waters §§ 174, 180.

Notes of Decisions

Validity 1

1. Validity

Since federal law is supreme, claims based on water rights granted by federal law, including implied right of Indian reservation to water reasonably necessary to fulfill purposes for which reservation was created, will be sufficient under this section requiring all water claimants

to make statement of their claim and barring all claims not in compliance with this section, even though information provided does not include that required to support claims based on state law, and thus, this section does not violate Const. Art. 4, Pt. 2, § 19 prohibiting legislature from enacting local or special laws. *U.S. v. Superior Court In and For Maricopa County* (1985) 144 Ariz. 265, 697 P.2d 658.

§ 45-255. Appointment of master; compensation

A. After the time for filing all statements of claimant has expired, the supreme court may, and in any case where there are more than one hundred potential claimants shall, appoint a master under rule 53 of the Arizona rules of civil procedure to report on all legal and factual issues. If a master is to be appointed, the supreme court may select the master from a list of persons which shall be expeditiously submitted by the director.

B. The master's compensation and expenses shall be fixed by the court and paid out of the fund of fees paid by the claimants pursuant to § 45-254, subsection F. In the event such fund of fees is insufficient, the master's compensation and expenses shall be paid from funds equitably assessed by the court in its discretion against the claimants.

Added by Laws 1979, Ch. 139, § 39, eff. April 24, 1979. Amended by Laws 1980, 4th S.S., Ch. 1, § 68, eff. June 12, 1980.

Historical and Statutory Notes

For impairment of obligations and nonseverability provisions of Laws 1980, 4th S.S., Ch. 1, effective June 12, 1980, see Historical and Statutory Notes preceding § 45-401.

Cross References

Nonapplicability of administrative refund for erroneously paid fees, see § 45-113.

Library References

Reference ¶76(1).
WESTLAW Topic No. 327.
C.J.S. References §§ 220, 221.

Notes of Decisions

Validity 1

1. Validity

Provisions of §§ 45-255, 45-257 and 45-259 pertaining to appointment of master, application of rules of evidence, and effect of prior

judgments do not infringe upon constitutional powers of Supreme Court to make procedural rules, since grant of such power does not prevent legislature from enacting supplementary provisions. *U.S. v. Superior Court In and For Maricopa County* (1985) 144 Ariz. 265, 697 P.2d 658.

§ 45-256. Technical assistance of director; report

A. The court or the master shall request technical assistance from the director in all aspects of the general adjudication with respect to which the

director possesses hydrological or other expertise. In rendering such technical assistance, the director shall expeditiously:

1. Identify the hydrological boundaries of the river system and source and the names and addresses of all reasonably identifiable potential claimants. In identifying potential claimants, the director shall, at a minimum, identify as far as reasonably possible the current record owners of all real property within the geographical scope of the adjudication.

2. Locate, procure and make available all public and other records relevant to determination of any factual or legal issues.

3. Conduct a general investigation or examination of the river system and source.

4. Investigate or examine the facts pertaining to the claim or claims asserted by each claimant.

5. Make a map or plat on a scale not less than one inch to the mile adequate to show with substantial accuracy the course of the river system and source, the location of the ditch or canal diverting water from such river system and source, and the legal subdivisions of lands which have been irrigated or are susceptible to irrigation from the ditches and canals already constructed.

6. Take such other steps and gather such other information as may be necessary or desirable for a proper determination of the relative rights of the parties.

B. The technical assistance rendered by the director shall be set forth in summary form on a claim by claim basis in a report prepared by the director and filed with the court or the master, which shall then be available for inspection by any claimant. Any claimant may file with the court or the master written objections to the report or any part of the report within one hundred eighty days of the date on which the report was filed. Those parts of the report with respect to which no written objections have been timely filed may be summarily admitted into evidence. Those parts of the report with respect to which written objections have been timely filed shall not be admitted into evidence until such time as each claimant who has filed written objections in a timely manner shall have had a fair and reasonable opportunity to contest the validity or admissibility of those parts of the report to which his objections were directed. Each claimant who has filed written objections in a timely manner shall also have a fair and reasonable opportunity to present evidence in support of or in opposition to those parts of the report to which his objections were directed, to present evidence in support of his claim and to make objections to any other claim.

C. Prior to filing the report with the court or the master as provided in subsection B, the director shall prepare a preliminary report. The director shall give notice to each water claimant that the preliminary report is available for inspection and comment. Upon expiration of the period provided for timely comment, the director shall revise the preliminary report as may be appropriate and shall file the report with the court or the master in accordance with subsection B. The director shall adopt such rules and regulations as may be

necessary to ensure that adequate notice is given, that the preliminary report is sufficiently available for inspection by the water claimants and that provisions are made for adequate time and procedure for comment on the preliminary report.

Added by Laws 1979, Ch. 139, § 39, eff. April 24, 1979. Amended by Laws 1980, 4th S.S., Ch. 1, § 69, eff. June 12, 1980.

Historical and Statutory Notes

Source: Laws 1919, Ch. 164, §§ 18, 23 to 25 [22 to 24], 33. A.R.S. former §§ 45-233, 45-236, 45-237, 45-244.
Laws 1921, Ch. 64, §§ 6, 11 to 13. For impairment of obligations and nonseverability provisions of Laws 1980, 4th S.S., Ch. 1, effective June 12, 1980, see Historical and Statutory Notes preceding § 45-401.
Rev.Code 1928, §§ 3295, 3298, 3299, 3306.
Code 1939, §§ 75-116, 75-119, 75-120, 75-127.

Cross References

Service of process on potential claimants, see § 45-253.

Notes of Decisions

Document filings 1

1. Document filings

Due process did not require each party to water rights adjudication to serve copy of every filed document on each of the approximately 24,000 other parties to the litigation: cost of

doing so would be so prohibitive that it would impair or prevent assertion of claims, any party could receive service of every document by informing court and being placed on court-approved mailing list, and other parties could keep themselves updated by consulting or subscribing to monthly docket sheets. Matter of Rights to the Use of the Gila River (1992) 171 Ariz. 230, 830 P.2d 442.

§ 45-257. Hearings, report of master; final judgment by court; administration and enforcement of decree

A. The master shall:

1. After due notice, conduct such hearings and take such testimony as shall be necessary to determine the relative water rights of each claimant.

2. Prepare and file with the court a report in accordance with rule 53(g) of the Arizona rules of civil procedure, which shall contain findings of fact and conclusions of law. Each claimant shall have the right to file with the court written objections to the master's report within one hundred eighty days of the date on which the master's report was filed with the court.

3. Maintain under his control all records and documents at such locations as may be designated by the court.

B. The court, upon review of the master's report and in accordance with rule 53 of the Arizona rules of civil procedure, shall:

1. Determine the extent and priority date of and adjudicate any interest in or right to use the water of the river system and source, provided when rights to the use of water or dates of appropriation have previously been determined in a judgment or decree of a court, the court shall accept the determination of

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such rights and dates of appropriation as found in the judgment or decree unless such rights have been abandoned.

2. Establish, in whatever form determined to be most appropriate by the court, one or more tabulations or lists of all water rights and their relative priorities on the river system and source.

3. Refer the final judgment or decree to the director for administration and enforcement under the continuing jurisdiction of the court.

4. Make appropriate orders to ensure that the entire record of the general adjudication is preserved in an accessible and usable form.

5. Record a certified copy of the final judgment or decree in each county within the geographical scope of the general adjudication which shall constitute constructive notice of the contents of the judgment or decree.

Added by Laws 1979, Ch. 139, § 39, eff. April 24, 1979. Amended by Laws 1980, 4th S.S., Ch. 1, § 70, eff. June 12, 1980.

Historical and Statutory Notes

Source:

Laws 1919, Ch. 164, §§ 19 [18], 24, 25 [23, 24], 26, 27 [28], 30, 45, 46.
Laws 1921, Ch. 64, §§ 7, 12 to 14.
Rev.Code 1928, §§ 3296, 3299 to 3301, 3304, 3313.
Code 1939, §§ 75-117, 75-120 to 75-122, 75-125, 75-134.
A.R.S. former §§ 45-234, 45-237 to 45-239, 45-242, 45-245.

For impairment of obligations and nonseverability provisions of Laws 1980, 4th S.S., Ch. 1 effective June 12, 1980, see Historical and Statutory Notes preceding § 45-401.

1979 Reviser's Note:

Pursuant to authority of § 41-1304.02, in subsection B, paragraph 1, a comma was inserted after "source" and a comma was deleted after "provided".

Cross References

Appeals generally, see § 12-2101 et seq.

Library References

Waters and Water Courses ¶33.
WESTLAW Topic No. 405.
C.J.S. Waters § 194 et seq.

Notes of Decisions

Validity 1

1. Validity

Provisions of §§ 45-255, 45-257 and 45-259 pertaining to appointment of master, application of rules of evidence, and effect of prior

judgments do not infringe upon constitutional powers of Supreme Court to make procedural rules, since grant of such power does not prevent legislature from enacting supplementary provisions. *U.S. v. Superior Court In and For Maricopa County* (1985) 144 Ariz. 265, 697 P.2d 658.

§ 45-258. Repealed by Laws 1980, 4th S.S., Ch. 1, § 71, eff. June 12, 1980

Historical and Statutory Notes

The repealed section, added by Laws 1979, Ch. 139, § 39, derived from Laws 1919, ch. 164, § 16; Rev.Code 1928, § 3293; Code 1939, § 75-114; A.R.S. former § 45-231, and related to the transfer pending water rights claims pro-

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ceedings from the state land department to the superior court.

Laws 1979, Ch. 139, § 85 provides:

"Sec. 85. Expiration date

Section 45-258, Arizona Revised Statutes, expires from and after December 31, 1981."

§ 45-259. Rules governing general adjudications

The general adjudication is governed in all respects by the Arizona rules of evidence, the Arizona rules of civil procedure and any other procedural rules generally applicable to civil proceedings, except that the specific provisions of this article govern if they conflict with the Arizona rules of civil procedure or any other procedural rules generally applicable to civil proceedings. Any proceedings previously initiated under prior law and transferred to the superior court for adjudication are subject to the provisions of this article only after the transfer has been effected.

Added by Laws 1979, Ch. 139, § 39, eff. April 24, 1979.

Historical and Statutory Notes

Source:

Laws 1919, Ch. 164, §§ 24, 25 [23, 24], 27 [28], 30, 45, 46.
Laws 1921, Ch. 64, §§ 12 to 14.

Rev.Code 1928, §§ 3299, 3301, 3304, 3313.
Code 1939, §§ 75-120, 75-122, 75-125, 75-134.
A.R.S. former §§ 45-237, 45-239, 45-242, 45-245.

Notes of Decisions

Validity 1

1. Validity

Provisions of §§ 45-255, 45-257 and 45-259 pertaining to appointment of master, application of rules of evidence, and effect of prior

judgments do not infringe upon constitutional powers of Supreme Court to make procedural rules, since grant of such power does not prevent legislature from enacting supplementary provisions. *U.S. v. Superior Court In and For Maricopa County* (1985) 144 Ariz. 265, 697 P.2d 658.

§ 45-260. General adjudication fund

A. The state treasurer shall maintain a fund known as the general adjudication fund. All money appropriated to effect service of process and notices on potential claimants pursuant to § 45-253, subsection A, paragraphs 1 and 2, and all reimbursements to the director pursuant to § 45-253, subsection A, paragraph 3 shall be deposited in such fund.

B. Monies in the general adjudication fund are exempt from the provisions of § 35-190, relating to lapsing of appropriations.

Added by Laws 1979, Ch. 139, § 3, eff. April 24, 1979. Amended by Laws 1980, 4th S.S., Ch. 1, § 72, eff. June 12, 1980; Laws 1981, Ch. 176, § 5, eff. April 17, 1981.

Historical and Statutory Notes

For impairment of obligations and nonseverability provisions of Laws 1980, 4th S.S., Ch. 1, effective June 12, 1980, see Historical and Statutory Notes preceding § 45-401.

For legislative intent regarding termination of provisions added or amended by Laws 1981, Ch. 176, see Historical and Statutory Notes following § 45-478.



SPEAKER OF THE HOUSE

MARK W. KILLIAN
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DISTRICT 30

COMMITTEES:

LEGISLATIVE COUNCIL

JOINT LEGISLATIVE TAX
COMMITTEE

JOINT LEGISLATIVE AUDIT
COMMITTEE

Arizona House of Representatives
Phoenix, Arizona 85007

November 15, 1994

The Honorable John Keegan
State Representative
State Capitol - House Wing
1700 W. Washington
Phoenix, Arizona 85007-2848

Dear John:

It has come to my attention that we are closing in rapidly on the recommendations for the Joint Select Committee on Arizona General Stream Adjudication.

I know that you are busy earning a living and trying to plan your life for the future and I would respectfully request that I replace you as the Cochairman of this Committee and make some adjustments so that we can have continuity in the leadership on this issue into the next session.

I am therefore going to ask Rusty Bowers to be the Cochairman of this Committee and appoint Becky Jordan to fill your vacancy.

I appreciate all the hard work you have put into this effort and I appreciate the opportunity we have had to serve together in the Legislature.

Very truly yours,

A handwritten signature in black ink, appearing to read "Mark W. Killian", written over a horizontal line.

MARK W. KILLIAN
Speaker of the House

MWK/tsn

SPEAKER OF THE HOUSE

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COMMITTEES:

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COMMITTEE

JOINT LEGISLATIVE AUDIT
COMMITTEE

November 15, 1994

Representative Becky Jordan
State Representative
State Capitol - House Wing
1700 W. Washington
Phoenix, AZ 85007-2848

Dear Becky:

We are closing in rapidly on the recommendations for the Joint Select Committee on Arizona General Stream Adjudication. It has become necessary to make some changes to the Committee Membership.

It is my pleasure to inform you that you have been appointed as a Member of the Committee. I have attached an updated copy of the Membership and Committee Charge for your information.

I appreciate your willingness to serve. Please feel free to call if you have any questions.

Very truly yours,

A handwritten signature in black ink, appearing to read "Mark W. Killian", written over a horizontal line.

MARK W. KILLIAN
Speaker of the House

MWK/nd
Attachment

JSCAGSA.194

SPEAKER OF THE HOUSE

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DISTRICT 30



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JOINT LEGISLATIVE TAX
COMMITTEE

JOINT LEGISLATIVE AUDIT
COMMITTEE

Arizona House of Representatives
Phoenix, Arizona 85007

November 15, 1994

The Honorable Russell Bowers
State Representative
State Capitol - House Wing
1700 W. Washington
Phoenix, AZ 85007-2848

Dear Russell:

We are closing in rapidly on the recommendations for the Joint Select Committee on Arizona General Stream Adjudication. It has become necessary to make some changes to the Committee Membership.

It is my pleasure to inform you that you have been appointed as Cochairman of the Committee. I have attached an updated copy of the Membership and Committee Charge for your information.

I appreciate your willingness to serve. Please feel free to call if you have any questions.

Very truly yours,

A handwritten signature in black ink, appearing to read "M. Killian", written over a horizontal line.

MARK W. KILLIAN
Speaker of the House

MWK/nd
Attachment

JSCAGSA.194

ATTACHMENT C

Table of Materials Presented to Committee Members

May 10, 1994 Meeting:

1. **Report by the Arizona Department of Water Resources, May 10, 1994.**

June 1, 1994 Meeting:

2. **Memo dated June 1, 1994 to the Joint Select Committee on Arizona General Stream Adjudications from Larry Linser and Steve Olson, ADWR, RE: Organizational Analysis of Adjudication Problems.**
3. **Memo dated May 31, 1994 to Representative John Keegan from Steve Erb and Steve Olson, ADWR, RE: Responses to Representative Keegan's Request of May 10, 1994 (The Distribution of Adjudication Claims, the Accuracy of Water Supply Measurements, and the Status of Indian Water Rights Settlements).**

June 21, 1994 Meeting:

4. **Memo to Representative John Keegan from Steve Erb and Steve Olson, ADWR, RE: Summary of Distribution of Adjudication Water Right Claims.**
5. **Analysis of Western States' De Minimis Statutes - Prepared for the Joint Select Committee on Arizona General Stream Adjudications by ADWR.**
6. **Memo Dated June 21, 1994 to the Members of the Joint Select Committee on Arizona General Stream Adjudications from Senator Carol Springer, RE: Proposals for the June 21, 1994 Meeting (1. De minimis uses, 2. Non-attorney representatives, and 3. The Public Trust Doctrine).**

July 19, 1994 Meeting:

7. **Materials for the Select Committee on Arizona General Stream Adjudications - Presentation by Chief Justice Stanley G. Feldman, Judge Allen G. Minker, and Special Master, John E. Thorson.**
8. **Memo Dated July 19, 1994 to the Joint Select Committee on Arizona General Stream Adjudications from John Ronan Curry, Staff Attorney, Arizona Supreme Court, RE: Summary of Cases Decided by this Court and Issues Still Pending in Gila River Adjudication. Summary of Issues Included in Judge Goodfarb's July 14, 1994 Certification.**

September 7, 1994 Meeting:

9. **Senator Springer Motions for June 19, 1994 Meeting of the Joint Select Committee on Arizona General Stream Adjudications (De minimis uses).**
10. **Senator Springer Substitute Proposal 2 (Non-attorney Representation).**
11. **Senator Springer Substitute Proposal 3 (Public Trust Values).**
12. **Arzberger Proposal to the Joint Select Committee on Arizona General Stream Adjudications, September 7, 1994 (pre-1919 water claims; presumption of validity).**
13. **Information Sheet - Legislation Streamlining Arizona's General Stream Adjudications - Prepared by ADWR, September 7, 1994.**
14. **Streamlining Arizona's General Stream Adjudications - Steve Olson, ADWR, September 7, 1994.**
15. **City of Phoenix's Proposed Water Adjudication Legislative Reform and Comparison to ADWR-SRP Proposal (Flow Charts and Outline of Duties and Responsibilities in the Adjudications).**

November 22, 1994 Meeting:

16. **Summary of Concepts Adopted by the Joint Select Committee on Arizona General Stream Adjudications, September 7, 1994 - Prepared by Senate Staff.**
17. **Summary of Special Master's Memorandum Decision on De Minimis Water Uses in the San Pedro River Watershed, November 14, 1994.**
18. **Rule 28 Petition of the Arizona Supreme Court by the Arizona Judicial Council to amend Rule 31 of the Rules of the Supreme Court to allow non-attorneys (authorized officers or employees of corporations and unincorporated associations) to appear in the general stream adjudications (Filed November 8, 1994).**
19. **Concepts to Amend the Adjudication Statutes and Surface Water Code, November 22, 1994.**

(* NOTE: These materials are available in the Secretary of the Senate's office and the House Chief Clerk's office as attachments to the minutes from the respective meeting.)

ATTACHMENT D

ARIZONA STATE LEGISLATURE

**JOINT SELECT COMMITTEE ON ARIZONA
GENERAL STREAM ADJUDICATIONS**

Minutes of Meeting
Tuesday, May 10, 1994
House Hearing Room 3 - 1:00 p.m.

Members Present

Senator Day	Representative Bowers
Senator Springer	Representative Conner
Senator Turner	Speaker Killian
Senator Arzberger	Representative Brown
Senator Goudinoff	Representative Keegan, Cochairman
Senator Buster, Cochairman	
Rita Pearson, Ex-Officio Member	

Member Absent

Representative Hanley

Staff

Dan Shein
Susan McJunkin

Cochairman Keegan called the meeting to order at 1:12 p.m. and attendance was noted. See attached sheets for other attendees. Representative Keegan read the charge of the Committee as follows:

1. To estimate the public and private resources which have been expended in adjudications processes since their inception and to estimate and establish a time line of how long these proceedings are likely to continue without a change in existing procedure.
2. Determine what changes can be made to the adjudication statutes and rules which would simplify and help expedite the adjudications process while mitigating the burdens imposed on all parties.
3. Determine what changes should be made to surface and groundwater codes in Arizona, resulting in a reduction in the amount of litigation necessary to adjudicate water rights.

Representative Keegan noted that the Department of Water Resources (DWR) was asked to provide foundation information to assist the Committee in its task.

PRESENTATION BY DWR

Steve Olson, Legislative Liaison, DWR, provided a handout of the Department's presentation (filed with original minutes) and introduced the following DWR resource staff: Michael Pearce and T.C. Richmond of the Legal Division and Donald Gross and Chuck Cullom of the Adjudications Division.

Mr. Olson noted that surface water adjudications represent the third aspect of the water issues faced by the Legislature, following the Central Arizona Project and the groundwater management issues. He estimated that about 45 percent of the water supplies available in the State consist of surface water. Mr. Olson reiterated the Committee's role in developing a means to expedite the adjudications process and reduce the amount and cost of litigation, noting that an excess of \$100 million has been expended during the past 20 years of adjudications, with DWR spending about \$1 1/2 million a year on the process.

Larry Linser, Deputy Director, Office of Engineering and Adjudications, DWR, explained that the adjudications are based on the need to determine unquantified Federal Indian reservation water rights and to clarify State law water rights and claims. He explained that Federal water rights are established by Federal case law, including the Winters doctrine of 1908 by which the Supreme Court reserved sufficient water for each reservation and determined the priority date of the water right to be based on the establishment of the reservation, the 1963 decision in Arizona v. California which ruled that sufficient water be reserved to irrigate all Indian lands that are practical for irrigation and the Cappaert decision of 1976 which addressed Federal groundwater rights by restraining groundwater pumping by users adjacent to a national monument with an endangered species.

Representative Keegan requested that discussion be provided at some point concerning water rights provisions in the Arizona Constitution.

Mr. Linser outlined the history of the adjudications proceedings and the State's role in the process as found in the handout. He noted that the U.S. Supreme Court in 1983 stayed the proceedings in the Federal courts when it determined the Arizona court system was qualified to adjudicate Federal water rights pursuant to the McCarran Amendment, which waives the sovereign immunity of the U.S. to be sued in comprehensive water rights cases.

Mr. Linser addressed maps included in the handout detailing Indian lands and adjudications in Arizona and other western states and the status of Indian water rights settlements in Arizona adjudications, as well as a chart comparing Indian water rights claims and the actual surface water supplies available in the State. Representative Keegan pointed out that the magnitude of the issue is even greater than reflected by the chart since nonIndian water claims are not included.

Steve Erb, Adjudications Division Chief, DWR, displayed maps from the handout indicating the extent of the adjudications in Arizona and the number of water rights claims, which total 67,721 for the Gila River system and 11,207 for the Little Colorado River system.

Representative Keegan asked for clarification of the status of those portions of the Gila River system that extend into New Mexico and Mexico. Mr. Erb indicated that a Federal decree encompasses the Gila River system. He added that Arizona has coordinated with New Mexico in the preparation of reports but the situation represents an outstanding issue as to how a State court proceeding will encompass rights in the system. Mr. Erb also noted that international treaty issues are

involved in that portion of the system in Mexico, noting that the International Boundary and Water Commission was established to monitor uses and coordinate supplies in both countries and negotiate treaties when necessary.

Mr. Erb continued his part of the presentation by explaining the concept of the adjudications process, noting that not a great deal of direction is provided in the statutes.

Senator Arzberger questioned if those settlements that have been reached on the Gila River will be recognized during the adjudications process. Mr. Erb noted that two Indian settlements occurred in the 1990s, involving the Salt River Pima-Maricopa Indian community and the Fort McDowell Indian community. He emphasized that the congressional authority for those settlements required the adjudication court to confirm the quantities set out in the settlement.

Senator Arzberger asked what entity currently owns the water rights on the San Pedro River, which were at one time privately owned but later transferred to the Bureau of Land Management (BLM) and eventually turned over to the San Pedro Conservation Area. Mr. Erb responded that the water rights would be in the name of the BLM and involve a non-Indian Federal right. He added that the priority would originate from the date the area was established, which was about 1986, although some claims for water rights were acquired from a previous landowner and a Spanish land grant.

Senator Arzberger asked if individual water rights within the Conservation Area have to be settled in the adjudications process. Mr. Erb stated that most of the individual land in the vicinity of the Conservation Area is supplied by wells, adding that an important issue in the process involves the extent to which groundwater is subject to the jurisdiction of the adjudication. Senator Arzberger asked what the implications would be in a situation such as that of the Conservation Area, in which surface water rights were established for a certain use and then transferred to another use. Mr. Erb acknowledged that the issue is a concern which needs to be addressed.

Mr. Erb addressed a map in the handout which reflects the status of DWR investigations. He pointed out that the process cannot proceed any faster than hydrographic survey reports (HSRs) can be prepared by the Department.

Representative Bowers asked if the criteria for HSRs is impacted by Federal or State legislation. Mr. Erb said the issue involves the determination of how to handle the reports without violating the 1985 State Supreme Court ruling that DWR should not be an adjudicator of water rights. He added that the HSRs for Indian claims will be much different in scope and content than the non-Indian claims since the basis of Indian water rights in law is different than that of non-Indian water rights. Representative Bowers asked if that is due to the Arizona v. California ruling. Mr. Erb answered affirmatively, adding that the ruling was based on the earlier Winters doctrine. Representative Bowers asked if the Cappaert decision has an impact on the criteria used in HSRs, to which Mr. Erb said that decision will eventually have an affect as the process continues. Representative Bowers asked if the recent declarations of pristine

or critical habitats would have an impact on adjudications. Mr. Erb indicated the issue is a topic of debate.

Representative Keegan asked if there has been an attempt to estimate what the technology for providing irrigation was at the time each reservation was established. Mr. Erb said the issue of whether the amount of irrigable land on reservations should be determined by the technology available at the time of establishment or by present technology has not been resolved in Arizona. He emphasized that the Arizona v. California decision is effective for the situation along the Colorado River because of the quantity of water available, but poses a problem in central Arizona since the amount of land which could probably support agriculture exceeds the available water supplies.

Representative Bowers asked if the Legislature has the authority to make a determination on the quantifying of Indian water rights. Mr. Erb said he does not believe the Legislature would have such authority since the issue involves a matter of Federal law. Representative Bowers said he was under the impression that the State was given a primary position under a Federal decision to adjudicate some of the issues in question. He asked how much latitude the State has and what the Committee or Legislature should focus on in clarifying some of the issues. Mr. Erb emphasized that the McCarran Amendment gave the states the authority to join the Federal government in determining their rights by following the Winters doctrine and the Arizona v. California decision. He pointed out that determination of those rights through litigation provides the threat of massive expenditures, which is the driving force for encouraging settlements. Mr. Erb suggested the Legislature can assist the process by supporting settlement efforts.

Senator Buster said he thought the purpose of the Committee was to set parameters to help shape the debate of the process. Ms. Pearson contended the real focus of the Committee will be efforts involving State-based claims to surface water rather than Indian tribal claims.

Representative Bowers asked who would determine whether a settlement is comprehensive. Mr. Erb said the trial court has been deciding the comprehensive issue when the water rights are litigated.

Mr. Erb continued his presentation by addressing a chart in the handout depicting the status of the investigation of water rights claims in the Gila River system. He noted that DWR has completed the investigation and reporting for 21 percent of the claims and projects the completion of its investigations to be in 14 years. Mr. Erb also commented on a time line chart outlining the major events in Arizona adjudications.

Michael Pearce, Legal Division, DWR, responded to Representative Keegan's earlier question pertaining to water rights provisions in the Arizona Constitution, adding that he assumed Representative Keegan was referring to the provision which abolishes the doctrine of riparian rights in the State. He explained that the word "riparian" means land adjacent to a stream. Mr. Pearce observed that in the eastern states a landowner with land adjacent to a stream was entitled to insist

to his neighbors that the stream flow by his property uninterrupted by upstream diversions. Mr. Pearce explained that the doctrine was abolished throughout the West in favor of the doctrine of prior appropriation by which a water right is necessary in order to insist that water from a stream flow by a landowner's property. He further noted that for the last century those water rights have been granted in Arizona under State law, which include some of the rights currently being adjudicated.

Mr. Pearce explained that the Federal rights involved in the issue under discussion concern water flowing down a stream as well but are not based on the riparian doctrine. He added that consequently the Arizona Constitution will not affect such rights. Mr. Pearce also pointed out that the Arizona Constitution may govern State issues but does not govern Federal rights under the supremacy clause of the U.S. Constitution. He further noted that Arizona has the authority under the McCarran Amendment to try issues involving Indian water rights in State courts. However, those issues must be tried under Federal law. Mr. Pearce cautioned that failure to do so would probably cause the Federal courts to intervene and reverse State decisions.

Mr. Linser concluded the DWR presentation by referring to a chart in the handout reflecting the major problems with the adjudication process and potential legislative solutions.

Bill Swan, attorney, representing U.S. Department of the Interior, explained to the Committee that the Department litigates through the U.S. Department of Justice. He made further comments on the McCarran Amendment, which allows the Federal government to be included in State court comprehensive water rights adjudications. Mr. Swan added that the Department of Justice is quick to litigate issues concerning the McCarran Amendment, and he cautioned that legislative actions affecting the nature of the proceedings or the due process rights of the Federal government could affect the waiver of immunity or take away appropriate points of challenge available in a property rights dispute. Mr. Swan emphasized that the solution to the problems at hand rests with settlements. However, he pointed out that the Federal government may not be able to afford the amounts of money that have been expended in the past and is trying to develop creative methods to generate funds.

Representative Keegan asked how the creation of reservations as recent as the late 1980s affects Federal water rights. Mr. Swan explained that some courts in the West have held that Indian tribes which have been in a location for hundreds of years have a time immemorial or first priority date, while others use the date of the creation of the particular parcel as a reservation.

Representative Bowers asked if the Justice Department's response to McCarran questions is generally instigated more by procedural or substantive content. Mr. Swan indicated that both instances probably apply. He explained that the Justice Department has never quite warmed to the McCarran Amendment, feeling that Federal government matters should be litigated in Federal court.

Representative Bowers asked if a legislative action concerning the connection between groundwater and surface water, which was not received favorably by the Department of Interior, could be litigated by the Department of Justice on the basis of the McCarran Amendment. Mr. Swan pointed out that such an issue may not necessarily affect the McCarran question since the Department of the Interior believes that the U.S. Supreme Court has enunciated the protection for Federal reserve water rights from pumping.

Speaker Killian said he appreciated the comment by Mr. Swan concerning property rights issues and his willingness to address the Committee. Mr. Swan offered to return at a later time to address the issues more in depth.

In response to a question from Representative Conner regarding the amounts involved with settlements, Mr. Swan said he cannot speculate on future settlement amounts but noted that the Salt River Pima-Maricopa settlement cost the Federal government approximately \$55 million, with the Legislature appropriating \$3-\$4 million. Mr. Swan further noted that the Federal cost for the Fort McDowell settlement was \$30 million and the State cost was \$2-\$3 million, and the San Carlos settlement cost the Federal government \$30-\$40 million and the Legislature appropriated \$2-\$4 million. Mr. Swan contended that the Gila River settlement will probably cost several hundred million dollars while the Tohono O' Odham settlement will be in the vicinity of the other amounts expended.

David Brown, attorney, representing Little Colorado River Claimants, commented on the substantial number of objections which have been filed on the claims, particularly by the U.S. Government and the tribes, Salt River Project and the State. He suggested that the Committee focus its efforts on State law issues and procedures in an attempt to shorten the adjudications process. He also said he hopes the Committee will address the small users, eliminate the State law objections based on technical defects, and allow people who have fallen through the cracks to file claims at a later date.

Wayne Klump, representing himself, expressed concerns about his water rights and emphasized that the U.S. Constitution gives more power to the State than the testimony today has indicated. He commented on the Winters doctrine which he said does not address the riparian doctrine. He noted that Article 17, Section 1, of the Arizona Constitution states that the riparian doctrine shall have no force in the State, and that Section 2 indicates all existing water rights are recognized. Mr. Klump further stated that the Federal act of July 26, 1866, provides that these rights are recognized if the water is put to beneficial use, and is further codified in 43 U.S. Code Section 661. He also noted that the enabling act and Article 10, Section 10, of the Arizona Constitution indicates that lessees are protected in their rights to their improvements, including water rights. He emphasized that such water rights cannot be taken away without due process of law and just compensation.

Mr. Klump commented on the U.S. v. New Mexico decision in which the U.S. Forest Service attempted to claim Federal reserve rights and the U.S. Supreme Court ruled that the Federal government could only claim that amount for which the reservation was created. He suggested the Legislature consider the addition of

language to Arizona Revised Statute 45-274(D) to reflect that the person who puts the water to beneficial use actually owns the water.

Randy Gressley, representing himself, expressed his concern that water rights can be taken from the land, and he urged that common sense and simplicity be used in consideration of the issue.

Jeff Larson, President, Lakeside Irrigation Company, informed the Committee that he is involved in an environmental effort to protect a stream and has several private claims. He commended the Committee for being willing to address such a complex problem and commented on the importance of the issue.

Russell Smoldon, State Government Relations Manager, SRP, emphasized that SRP is a large entity but is also representative of hundreds of small users. He stated that the resolution of water rights is imperative and the State has an obligation to reduce the costs associated with the adjudications process. He noted that SRP submitted a proposal for the Committee to utilize during its efforts (summary filed with original minutes).

Mr. Smoldon acknowledged that SRP has objected to some of the adjudications process. He explained that because of the way the legal system operates SRP is forced to object in areas in which a precedent may be set in order to protect the rights of shareholders.

Karen Peters, attorney, City of Phoenix, stated that the City of Phoenix would have some ideas it would like to present to the Committee at a later hearing.

Mike Brophy, attorney, Roosevelt Water Conservation District, echoed the comments made by Mr. Brown and said he looks forward to working with the Committee.

Doug Nelson, attorney, representing various claimants, urged the Committee to consider the issue of the small water users and to make the process more equitable. He also contended that a settlement merely represents a partial agreement relating to a certain entitlement of water but that the issue of which water user will give up the supply for the tribes has yet to be adjudicated. Mr. Nelson suggested the Committee seek a legal opinion concerning the McCarran and due process issues to determine any likely risks in those areas.

Representative Keegan asked that DWR prepare for the next meeting a breakdown of the claims by size so as to determine what constitutes a small water claim. He also requested an estimate of the degree of accuracy on the hydrologic computation for the available water within the basins.

Representative Brown suggested that staff and DWR review the various proposals which have been submitted in order to reach some common understanding.

Senator Springer thanked those who submitted ideas and concepts and commented on the importance of such material during the Committee's deliberations.

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JOINT SELECT COMMITTEE ON ARIZONA
GENERAL STREAM ADJUDICATIONS

Senator Turner suggested that future meetings be held on a fairly regular schedule to facilitate participation.

Senator Arzberger asked for clarification from DWR about the settlements that have been reached.

Speaker Killian requested staff to review the issues raised by Mr. Klump concerning the Arizona Constitution and certain Federal acts.

The meeting adjourned at 3:40 p.m.

Respectfully submitted,



Janice C. Stell
Committee Secretary

(Attachments and tapes on file in the Office of the Secretary of the Senate.)

ARIZONA HOUSE OF REPRESENTATIVES

GUESTS ATTENDING MEETING

HEARING ROOM 3

TIME 1:00

MEETING ARIZONA GENERAL STREAM ADJUDICATIONS DATE 5/10

NAME AND TITLE (Please print)	REPRESENTING	BILL NO.
Wayne D Klump	Self	
M. JAMES CALLAHAN	CITY OF PHOENIX	
CYNTHIA HAGLIN	CITY OF CHANDLER	
KAREN BARFOOT	CITY OF CHANDLER	
William Sullivan	City of Gilbert	
Sally Worthington	Maricopa Co.	
STEVE BURG	CITY OF MESA	
RANDY L CRESSELEY	DEL SHAY RANCH PAYSON	
F. Brophy	BABACOMBARI Behl.	
Eric Kamienski	City of Tempe.	
JEFF CROCKETT	MAGMA COPPER CO.	
JOHN SCHAPER	BUCKEYE IRRIGATION &	
Jan Laney	S.L.D.	
Gavne Fletcher	Tempe	
Donald A Brown	Little Colorado Claimants	
Jim Klinka	AS FARM DIVERS	
JEFF LARSEN	LAKEVIEW TRIG. LLC	
JIM RITTERHOUSE	GILA RIVER END COMMUNITY	
Alfred S. Cox	" " " "	
Alan J Cox	" " " "	
Ed Sward	" " " "	
JOE CLIFFORD	State of AZ - Atty Gen	
Lee Storey	APS; Rio Rico Utilities	
JOAN Burke	" " " "	ATTACHMENT
Mike Brophy	RWCD	
John Adams	5/10/03	

ARIZONA STATE LEGISLATURE

JOINT SELECT COMMITTEE ON ARIZONA
GENERAL STREAM ADJUDICATIONS

Minutes of Meeting
Wednesday, June 1, 1994
House Hearing Room 3 - 2:00 p.m.

Members Present

Senator Springer	Speaker Killian
Senator Arzberger	Representative Bowers
Senator Goudinoff	Representative Conner
Senator Buster, Cochairman	Representative Brown
	Representative Keegan, Cochairman
Rita Pearson, Ex-Officio Member	

Member Absent

Representative Hanley
Senator Day
Senator Turner

Staff

Dan Shein
Michael Mandell
Susan McJunkin
Victoria Clark

Cochairman Keegan called the meeting to order at 2:10 p.m. and attendance was noted. See attached sheets for other attendees.

Steve Olson, Legislative Liaison, Department of Water Resources (DWR), provided an organizational analysis of the proposals submitted by various parties interested in adjudication reform (filed with original minutes).

Senator Springer asked for clarification of the concept of an arbitrator in the settlement of disputes, questioning how a solution can be achieved between two parties that may be binding on the rights of others. Mr. Olson indicated that the concept involves a discreet unit of individuals with either shared conflicts or interests, working together to resolve the first step in the process.

Representative Keegan referred to the proposal which provides a State-funded ombudsman to represent individuals in the adjudication process, adding that he thought the original intent was for the Special Master to act as an ombudsman. Senator Arzberger suggested the Legislature may want to clarify the definition of the Special Master. Representative Keegan indicated that creating a second office to fill the role of ombudsman might not be productive.

Senator Springer asked if any individuals have expressed objection to an exemption for *de minimis* users.

Joe Sparks, attorney, representing San Carlos Apache Indian Tribe, maintained that the tribe has objected to the issue and has litigated the matter in its current form.

Senator Buster asked how much more water is being claimed than actually exists. Mr. Olson estimated the amount to be about twice the undepleted water supply, which includes only surface water and does not include Central Arizona Project (CAP) water.

Senator Springer asked if any parties in the process have objected to a particular quantification of an appropriated water right.

Steve Erb, Adjudications Division Chief, DWR, indicated that a great deal of dispute has occurred.

Senator Goudinoff emphasized the need to concentrate on Indian water rights settlements first and asked if a proposal to sell CAP water to Nevada and use the funds for such settlements is in the purview of the Committee. Ms. Pearson pointed out that the proposal deals with Colorado River water and is separate from the adjudications under discussion, which involve the Little Colorado River and Gila River watersheds. Senator Goudinoff observed that testimony at the last meeting emphasized the importance of supporting Indian settlements. He contended that utilizing excess CAP water could become a mechanism for that support. Senator Springer said that everyone in the process probably recognizes the priority of Indian rights but she commented on the need to move ahead in resolving the other issues.

Senator Arzberg asked if consideration has been given to those water rights which were recorded before the establishment of treaties with the Indians, to which Mr. Olson acknowledged that the consideration of those records has been a part of the process. Senator Arzberger contended that the water rights established before those treaties should have precedence.

Senator Springer asked if all reservations automatically carry the Federal reserve right.

Larry Linser, Deputy Director, Office of Engineering and Adjudications, DWR, explained that the Winters Doctrine indicates that water rights are reserved for reservations from the time of the establishment of the reservation. However, he noted that many of the tribes claim rights from time immemorial. He added that the issue of priority dates attached to particular reservations is currently before the court. Senator Springer asked if the maps of Indian lands which were provided to the Committee involve boundaries of reservations rather than Indian-owned lands. Mr. Linser responded that the maps are not detailed enough to differentiate between reservation and Indian-owned lands, adding that reservation boundaries themselves are an issue in the litigations.

Senator Springer contended the *de minimis* issue is a critical one that needs to be addressed as soon as possible. She said she would be interested in knowing if there are any other ideas as to what should be included in the definition of *de minimis*.

PUBLIC TESTIMONY

Jack Smallhouse, Vice President, Bayless and Berkalew Company, noted that his ranch has water rights dating back to 1866 and is one of the targeted cases on the San Pedro River. He emphasized the costliness of the adjudication process, and he contended it is the Federal government's responsibility to settle the issues involving water rights that it granted to both Indian and non-Indian users. Mr. Smallhouse provided a handout reflecting the beneficial influence of stockponds on downstream water yield (filed with original minutes).

In response to a question from Senator Arzberger, Mr. Smallhouse indicated the average stockpond contains about 1/2 of an acre foot of water a year. Senator Arzberger said the Committee would probably include the stockpond issue under *de minimis* uses. In further discussion of the stockpond issue with Senator Buster, Mr. Smallhouse explained that stockponds generally include runoff from rainfall and only a small fraction of that water would have reached the river channel.

H.T. Hendrickson, representing San Pedro River ranchers, indicated that all of the families involved in the adjudication on the San Pedro River, except for his, have been in the area since before the turn of the century. He noted that only about 209 acre feet of water have been settled to date at a cost in legal fees of \$66,000. He maintained that the ranches involved have priority to the water they are using. However, he expressed concern that the secondary users will be able to outspend the ranchers, causing them to lose the water by default.

Mr. Hendrickson emphasized the need for a *de minimis* standard, noting that 15 acre feet *de minimis* would cover virtually every stockpond in the San Pedro River watershed and that many of the stockponds do not contain water all of the time. In addition, Mr. Hendrickson urged that the State be more assertive over its control of the water on Federal lands.

In response to Senator Buster, Mr. Hendrickson explained that water in stockponds is considered to be surface water since it is derived from rainfall and runoff.

Senator Springer questioned whether there should be a quantified amount of water for stockponds since they do not always contain water. Mr. Hendrickson contended the only way to quantify stockponds is on the size of the tank rather than the amount of water.

Representative Brown agreed that the stockpond issue is one area in which the process could be simplified since stockponds act as erosion control and involve such small amounts of water.

Jim Pyeatt, representing Pyeatt Ranch, indicated that his ranch is one of the test cases on the San Pedro River, noting that his family has been ranching in the same place since 1899 and has found documentation of water rights for the area back to 1864. He emphasized the importance of the *de minimis* issue for the ranchers involved, expressing concern that the participants are required to spend

a great deal of time in Phoenix. Mr. Pyeatt also noted that in addition to the expense of the ranchers' own attorney, their tax dollars go to fund government lawyers in the adjudication process.

Eugene Husted, representing St. David Irrigation District, said he has eight acres of property on the San Pedro River and expressed concern about the possibility of losing his water rights. He observed that water rights exist in St. David as of the Homestead Act from 1862 and patented claims signed by President Chester Arthur in 1881. He contended that those agreements were with the U.S. government, questioning at what point those claims can be considered null and void.

Andy Mayberry, representing St. David Irrigation District, informed the Committee that his family settled in the area in the 1880s and has made beneficial use of the water. He expressed concern about the cost of the adjudication process for individuals who are not able to compete with the resources available to the Federal government and others.

Senator Arzberger asked if the Natural Conservation Area on the San Pedro River affects the St. David Irrigation District. Mr. Mayberry responded that the Conservation Area has limited the use of the river, and he expressed concern that the current management process on the San Pedro River could lead to the destruction of the area.

Eldon Barney, President, Pomerene Water Users Association, and a fourth generation Arizonan, also expressed his concerns about the possible loss of water rights and the costs involved in the adjudication process.

Senator Arzberger observed that the San Pedro River has diminished in flow over the years and questioned if Mexico is using more of the water. Mr. Linser said that DWR does not have much information on the amount of water used in Mexico, adding that Mexico has the right to develop the river according to their laws.

Paul Brick, representing Pomerene Water Users Association, indicated he is also a supervisor for the San Pedro Natural Resource Conservation District (NRCD). He differentiated between the NRCD and the Bureau of Land Management Conservation Area mentioned by Senator Arzberger, contending that the management practices of the Conservation Area may have the effect of destroying the resource it is trying to save. Mr. Brick informed the Committee that a group of ranchers and water users in Mexico are working informally on issues pertaining to the management of the river, and he commented on the value of stockpounds.

Mr. Brick expressed concern about the cost of the adjudication process for individuals trying to compete with large corporations, which includes the need to travel to Phoenix for hearings and to obtain documents. He emphasized that the small users should be exempt from the proceedings, and he expressed concern about objections to claims that are simply technical in nature.

Representative Conner noted that for irrigation and water rights the NRCDs, the Soil Conservation Service and the University of Arizona have the ability to

determine the kind of soil available, the kind of crop that can be grown and how much acre feet of water is necessary in an area. He questioned why the courts do not consider such a course of action in order to determine the amount of acre feet of water an individual should receive.

Steve Hernandez, New Mexico attorney, representing ranchers in San Pedro River adjudication, emphasized the unfairness of subjecting small users like his clients to the rigors of the litigation system in place. Mr. Hernandez informed the Committee that he is currently working on two adjudications in New Mexico, adding that New Mexico has a *de minimis* concept for stockponds, stock watering and small domestic use. He explained that domestic users of under three acre feet of water and stockponds and stock watering involving under nine acre feet of water are not included in the adjudications, adding that their absence has not taken away from a complete and fair adjudication of everyone's rights.

Senator Goudinoff asked if the New Mexico experience involved Indian claims, to which Mr. Hernandez answered affirmatively. Senator Goudinoff said the concern in Arizona is that the tribes will challenge the *de minimis* concept, running the risk of affecting the McCarran Amendment. Mr. Hernandez observed that in some cases in New Mexico the tribes considered the issue of no consequence and in other cases the issue was litigated but the claims were ruled *de minimis*, with no problems in meeting the McCarran Amendment requirements. Senator Goudinoff asked if the quantity of water involved in New Mexico in terms of the flow in the stream is radically different than the situation on the San Pedro River. Mr. Hernandez replied that the water uses in ranching operations appear to be very uniform in New Mexico and Arizona.

Senator Arzberger asked if an Arizona legislative definition of *de minimis* similar to that in New Mexico would provide a good chance of prevailing in litigations involving the San Pedro River, to which Mr. Hernandez answered affirmatively.

Senator Springer asked if the exemption in New Mexico for domestic use involves a particular parcel size. Mr. Hernandez indicated it does not, adding that the exemption pertains to a maximum of three acre feet per household with some limitations on how the water can be used. Senator Springer asked for clarification of the nine acre feet exemption for stock watering. Mr. Hernandez indicated that the figure represents the capacity of the structure holding the water.

Representative Bowers observed that Secretary Babbitt has repeatedly said that he will not compromise on the re-federalization of water infrastructure in the West, including windmills, ditches, stockponds, etc., and he questioned if the *de minimis* definition in New Mexico prevailed against that mentality. Mr. Hernandez responded that to date New Mexico has not been faced with Federal government assertion of ownership of stockponds and stock watering on Federal land, adding that he was surprised to see the issue in Arizona.

Representative Keegan turned the chair over to his cochairman, Senator Buster.

Steve Brophy, President, Aztec Land and Cattle Company, noted that his company, which came to Arizona in 1886, owns 19,000 acres within the Silver Creek hydrographic survey area used strictly for stock watering. He acknowledged that the adoption of a *de minimis* standard would help the process, but he encouraged the Committee to recommend that the Legislature clarify water rights under State law rather than confining itself to the *de minimis* question. He observed that the reason there is a difference in the Federal government's approach to water rights questions in Arizona and those in New Mexico is because of a policy adopted by DWR that Federal government and State land owners have rights precedent to water appropriators on State and Federal leased land.

Senator Arzberger asked Mr. Brophy if he believes the Legislature has the right to clarify that water rights filed in the 1800s take precedence over later claims. Mr. Brophy contended the Legislature does not have the power to indicate priority but can clarify water rights, adding that any court will defer to what the Legislature indicates is a water right under State law.

James Walsh, representing The Nature Conservancy, indicated the organization has been involved in the Gila adjudication process in defense of its private surface water rights. He emphasized the importance of establishing a *de minimis* standard and in making provisions to grandfather changes in diversion and beneficial use so as to avoid litigation on the validity of such changes. He also commented on the need to extend the presumption of validity to existing beneficial uses documented by DWR in the hydrographic survey reports for the five-year period preceding the reports, which would help resolve questions of abandonment and forfeiture of uses that did or did not occur prior to that five-year period.

Mr. Walsh listed options available to the Legislature, such as unifying groundwater and surface water under one surface water code, maintaining the distinction between percolating groundwater and appropriable groundwater or letting the court wrestle with the issue while trying to find a way to provide for some kind of integrated management separate from the surface water code.

Representative Bowers asked Mr. Walsh if he had any information on the current demands for water on the San Pedro River in Mexico. Mr. Walsh said he would research the issue and provide any information he can find.

Senator Buster noted that the Committee will meet again on the week of June 13 to hear testimony from some of the judiciary involved in the process and consider the formation of breakout groups to discuss various issues.

Representative Bowers advised the Committee that he has a copy of a document reviewing some of the water rights legislation for Federal lands.

Senator Goudinoff indicated it would be interesting to know the effect of the elimination of the legal distinction between groundwater and surface water in other states.

JOINT SELECT COMMITTEE ON
ARIZONA GENERAL STREAM ADJUDICATIONS

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The meeting adjourned at 3:40 p.m.

Respectfully submitted,

A handwritten signature in cursive script that reads "Janice C. Stell". The signature is written in black ink and is positioned above the printed name and title.

Janice C. Stell
Committee Secretary

(Attachments and tapes on file in the Office of the Secretary of the Senate.)

ARIZONA HOUSE OF REPRESENTATIVES

GUESTS ATTENDING MEETING

HEARING ROOM 3

TIME 2:00 p.m.

MEETING Joint Meeting of Select Committee on Arizona General Stream Adjudications DATE 6-1-94

NAME AND TITLE (Please print)	REPRESENTING	BILL NO.
JIM KING JR	KING RANCH	
ELDON J BARNEY	POMERENE WATER USERS ASSN	
PAUL BRICK	POMERENE WATER USERS	
Raymond Hyster	St. David Water	
David A. Brown	Various Claimants	
Jim Pyeatt	PYEATT RANCH	
Tom Hendricksen	YLE RANCH	
John Smallhouse	Bayless + Berkeley Co.	
Eli Feern	POMERENE WATER USERS ASSN	
Andrew B Grayson	ST. DAVID IRRIGATION	
Brad Hoza	City of Prescott	
Beth Miles	City of Mesa	
Cynthia Chandler	Phelps Dodge #1 ARCD	
Genie Apher Kurtz	ASARCO + Phelps Dodge	
John Schaefer	BUCKEYE IRRIGATION CO	
John Keane	SRP	
James Eldon	SRP	
James Callahan	City of Phoenix	
Mike Brough	RUCO	
Robert H. ...	MACAM	
C. Ronstadt	Magnum Copper Co.	
Joe P. Sparks	Salubra, Toiyas, Gila, Apache Tribes	
Sally Worthington	Maricopa Co.	
Kelley Barr	Salt River Project ATTACHMENT	
STEVE BURG	CITY OF MESA	
Joe W. Ford	ASST ATTY Gen.	

ARIZONA STATE LEGISLATURE

JOINT SELECT COMMITTEE ON ARIZONA
GENERAL STREAM ADJUDICATIONS

Minutes of Meeting
Tuesday, June 21, 1994
Senate Hearing Room 1 - 2:00 p.m.

Members Present

Senator Day	Representative Bowers
Senator Springer	Representative Conner
Senator Turner	Speaker Killian
Senator Arzberger	Representative Brown
Senator Goudinoff	Representative Keegan, Cochairman
Senator Buster, Cochairman	

Members Absent

Representative Hanley
Rita Pearson, ex-officio

Staff

Dan Shein
Susan McJunkin
Victoria Clark

Cochairman Buster called the meeting to order at 2:10 p.m. and attendance was noted. See attached sheets for other attendees.

PRESENTATION ON THE FEDERAL PERSPECTIVE

William Swan, Office of the Solicitor, U.S. Department of the Interior, informed the Committee that as an attorney he represents the Secretary of the Interior and also gives advice to the agencies of the Department, including the Bureau of Indian Affairs (BIA), Bureau of Reclamation, Bureau of Land Management (BLM) and National Parks Service. He emphasized that his testimony was not on behalf of the Indian communities or the Department of Justice, which is the lead trial lawyer for the U.S. in the adjudication proceedings.

Mr. Swan explained that the Federal agencies which have filed claims in the Gila River and Little Colorado River adjudications include the BIA, BLM, National Forest Service, National Parks Service, U.S. Fish and Wildlife Service and various military installations. He noted that the largest quantity of water claimed is through the BIA on behalf of Indian tribes. He added that these claims cause so much difficulty in the process since they often include hundreds of thousands of acre feet of water and go back quite some time in terms of priority. Mr. Swan observed that other claims are more medium in size but also create some tensions, such as a claim by the National Parks Service for Walnut Canyon National Monument near Flagstaff on a stream from which Flagstaff obtains some of its water.

Representative Bowers asked what type of water usage is applied to the Monument to determine the Federal government's possession of the water right. Mr. Swan

said that consideration is given to the purpose for which the Monument was created, with an attempt to quantify its administrative needs and the possibility of some instream flow so that the Monument looks like it did when first set aside by Congress. Representative Bowers observed that instream flow is not a definition in Arizona law and questioned if Federal law would apply. Mr. Swan indicated that the Federal government would not look to State law in that situation since the claim is a Federal reserve water right for a reservation of land, and the Federal government would argue to the court that instream flow is a permissible use.

Mr. Swan continued his presentation by stating that many of the water claims filed by the Federal government are small in nature, noting that the great number of claims is by the Forest Service and BLM due to springs, stock ponds and other small water sources on public lands. Mr. Swan offered two examples of such claims for the Committee to review, filed on behalf of the Salt River Pima-Maricopa Indian tribe and by the National Parks Service in the Little Colorado River proceeding for Walnut Canyon National Monument, Grand Canyon and other installations (copies provided to staff). Mr. Swan noted that the Salt River Indian claims reached a settlement but pointed out the kind of tension such claims bring to the system since a prevailing argument on the side of the government in any litigation would have made a significant impact on the Salt River system.

Mr. Swan advised that some large claims can be misunderstood, such as the claim for 1,500,000 acre feet the Federal government filed on behalf of the Gila River Indian community. He pointed out that the tribe would probably not receive that amount of water due to various issues in the litigation, although the government considers its duty is to file any claim it feels has merit.

Senator Arzberger emphasized the importance of knowing what amounts of water the tribes would be willing to settle for so that the Legislature can make intelligent decisions concerning the claims. Mr. Swan noted that the Indian claims would be resolved in court through litigation or through settlement rather than in the legislative body. He added that the settlement process with the interested parties, including attorneys representing the State, involves the determination of a water budget for the tribe and how it can be filled. Mr. Swan advised that the effort to settle the Gila River Indian community claim has been temporarily stalled because of Central Arizona Project (CAP) negotiations.

Senator Arzberger stated that some Gila River water rights predate the establishment of some reservations, which should be taken into consideration during the process. He also emphasized the need to utilize CAP water in settling the Indian claims in order to keep those allotments from going to other states. In addition, Senator Arzberger urged Mr. Swan to communicate to Washington, D.C., the importance of speeding up the process to determine the bottom line amount of Indian claims.

In response to a question from Representative Bowers regarding a policy to settle claims rather than adjudicate, Mr. Swan indicated that it is a policy of this Department of Interior administration, as well as the previous one, to seek

resolution by settlement where it can be done with the tribes' consent and appropriate local sharing of the burden.

Representative Bowers commented on the hardships the process has caused for small water users, and he questioned why the Federal government did not proceed with its claims first to establish precedence in court. Mr. Swan explained that when the idea of adjudicating Indian water rights came about in the 1970s, the Federal government and the tribes favored the litigation of those rights first and early in Federal court. He noted, however, that a conflict ensued because people in Arizona did not want their local rights decided in Federal court, and the U.S. Supreme Court determined the Arizona court system was sufficient to adjudicate Federal water rights pursuant to the McCarran Amendment.

Mr. Swan contended some individuals involved in the process may now prefer that the Indian rights had been litigated in Federal court years ago. He added that it is a decision for the court as to whether Indian water rights litigation is moved ahead of non-Indian rights. Representative Bowers asked if the Federal government is willing to petition the court to move itself to the head of the line. Mr. Swan indicated that he cannot commit the government to that, although he said he does not believe there would be opposition.

In response to a question from Senator Buster concerning the consideration of tribal concerns first in State courts, Mr. Swan explained that the claims could have been placed first but the judges decided against that. Senator Buster asked staff to research the history on the issue.

Mr. Swan continued his presentation by explaining how Federal agencies are represented in their claims, noting that a Justice Department trial lawyer is assigned to BIA claims and a second lawyer is assigned to all other Federal agencies since there could be some conflicts between those two kinds of claims.

Senator Goudinoff asked if the Federal government's preference for settlement over adjudication is a generalized policy or the result of comparisons reflecting the benefits of settlement over adjudication. Mr. Swan responded that the policy reflects a position that settlement in an amicable process is favorable to the citizenry than litigation, and he suggested that any actual attempts at comparison would favor settlements.

Representative Bowers suggested that State courts have proven to be a good venue for the Department of Interior. Mr. Swan agreed that the government has generally fared well in the State court process but does not assume that it will win all of its arguments on Indian water rights.

Senator Springer asked for clarification of the problems with the CAP that are hindering solution of settlements. Mr. Swan explained that one significant problem is that the agriculture part of the project is financially unable to participate. He added that the Federal government is negotiating with the Central Arizona Water Conservation District such issues as the cost of CAP water, with the hope that the water will be affordable to use in settlements.

Mr. Swan continued his presentation by addressing the government's position on the *de minimis* issue reflected in a joint pretrial statement filed with the Gila River adjudication Special Master and in a rule 26 disclosure statement in the San Pedro River proceeding (copies provided to staff). He explained that the documents reflect that the U.S. supports the concept of *de minimis* use categorizations for the San Pedro watershed and that water uses which fall within the established categories should be summarily adjudicated. Mr. Swan advised that the basic concern of the government is that *de minimis* categorization and summary adjudication means that those kinds of uses would continue to be added on to the system without undergoing the adjudication scrutiny that others do.

Mr. Swan noted that the water uses which the Federal government supports in a *de minimis* classification include stock watering from a stream, stockponds of two surface acres or less and less than 15 acre feet in quantity and wells of less than three acre feet per year for domestic purposes and one-half acre for lawn or garden uses. He explained that the government does not agree that *de minimis* uses should be allowed for domestic users who use water directly out of a stream, feeling that such uses could possibly be illegal and should not be casually sanctioned. Mr. Swan informed the Committee that the government's position on these categorizations could possibly be modified in some minor respect.

Mr. Swan emphasized, however, that the *de minimis* issue is an area in which there are great disagreements. He noted that the Apaches and the Gila River Indian community do not agree with the government's position and believe the proliferation of the *de minimis* categorization in great quantities could affect their senior rights.

Mr. Swan commented on whether there is a conflict between the government's position and the handling of the *de minimis* issue in New Mexico. He noted that consultations with the Justice Department trial lawyer for the Little Colorado River case, who is stationed in Albuquerque and who has handled the New Mexico litigation for years, revealed little or no differences.

Senator Buster said he recalled that testimony at the last meeting indicated more of a difference between New Mexico's *de minimis* categorization for stockponds and that of the government. Mr. Swan suggested that Senator Buster consult with the Department of Water Resources (DWR) on the matter. He noted that some states have legislatively quantified the *de minimis* issue. Senator Buster said he believed that was the case in New Mexico and asked if the Federal government left *de minimis* users out of the adjudication process. Mr. Swan stated that those users were not left out but were treated as too small to go through the process individually and summarily added to the decree with the specified quantifications. Senator Buster observed that the *de minimis* users were treated very differently in New Mexico than they have so far been treated in Arizona. Mr. Swan acknowledged that without a *de minimis* categorization process each of the challenged claims in Arizona is subject to a full litigation of the attributes of the water right.

Senator Day asked if the State court has already issued an opinion on *de minimis* use. Mr. Swan explained that the Special Master issued a *de minimis* decision in

the Little Colorado River proceeding only for stock watering and stockpond uses. He added that a decision on *de minimis* categorizations in the Gila River adjudication should be issued soon. In response to a question from Senator Day as to whether the *de minimis* classification could vary from case to case, Mr. Swan indicated that an attempt is made to treat similar uses in the same manner. However, he noted that an issue presented to the judge was whether people should be forced to accept the *de minimis* categorization. Mr. Swan further stated that any possible legislation concerning the *de minimis* issue should reflect equal treatment for Federal lands.

Mr. Swan addressed the Federal government's relationship with the tribes. He explained that the government files claims to water rights on behalf of a community of Indians because of the Federal government's trustee relationship with the tribes and because the Federal government owns the reservation and its resources in a proprietary sense.

Mr. Swan commented on whether tribes can assert their own interests by participating in an adjudication along side the Federal government. He explained that the government reopened the Arizona v. California case in the late 1970s to litigate additional Indian reservation water rights, adding that Indian tribes in Arizona, California and Nevada filed motions to intervene in the proceeding in order to participate in their own right. Mr. Swan further explained that the decision issued by the Special Master in the case (copy provided for staff) indicates that the Indian tribes have a right to protect their own interests and that it is not prejudicial of the interests of other participants to have two parties on behalf of Indian rights. Mr. Swan noted that the U.S. Supreme Court ruled in 1983 with the Special Master that intervention by the tribes was appropriate (copy provided for staff), setting a significant precedent.

Mr. Swan acknowledged that problems occasionally exist between the Federal government and the tribes in the adjudications process, such as with the *de minimis* issue, and he explained that the government exercises independent judgment concerning the differing opinions.

Mr. Swan also acknowledged that the U.S. government is the entity which has filed the most challenges to claims. He explained that the government's reasons for filing so many challenges include the following: the government does not know what the Indian rights are, water rights in Arizona have not been managed well, the government has a trust responsibility to the tribes and the beneficiary can file challenges against the trustee.

In response to a question from Senator Arzberger concerning the government's position on water rights on the San Pedro River that date back to the 1800s, Mr. Swan indicated that the government attempts to determine whether the claims are junior in time and injurious to the water right the government feels belongs to the Gila River Indian community. He added that if the government decides that is the case it would challenge the claims on whatever grounds it can discover. Mr. Swan emphasized that the government did not challenge all of the rights on the San Pedro River, noting that afterwards the Indian tribes challenged all the claims.

Representative Bowers said the government's relationship to the tribes is a confusing one in that it appears the government represents the tribes at times and not at other times. He questioned if a legislative acceleration of the process could eventually be challenged by a tribe. Mr. Swan clarified that the Federal government does represent the tribes, which are bound by the government's participation in the adjudications. He added that a tribe disputing the government's handling of a case could file a claim for damages but could not receive additional water. However, he pointed out that a tribe participating in the process along side the government can present differing evidence and the judge can rule in the tribe's favor.

Senator Buster asked if a tribe litigating along side the Federal government can challenge a decision that supports the government's position. Mr. Swan said in his opinion the tribe cannot challenge the decision. Senator Buster asked what the effect would be of prioritizing the completion of the hydrographic survey reports. Mr. Swan pointed out the difficulty of litigating and working out settlements at the same time. He acknowledged that it may be a good idea to litigate the Indian rights up front, but he indicated that would require the government to shift its energy and funds in that direction with less into settlement. Mr. Swan emphasized that the government can request the court to temporarily halt a proceeding if sufficient motivation for settlement exists.

Representative Bowers asked what the Federal interest is in the navigability issue and how it relates to water rights. Mr. Swan stated that the government's relationship to navigability has to be viewed on an agency-by-agency basis, and he contended that the issue is one of land ownership and has no meaningful relationship to water rights. Representative Bowers addressed a speech given by Secretary Babbitt on November 13, 1992, in which he states the importance of the navigability issue. Mr. Swan said he was not sure of all that the Secretary was intending to communicate in that particular speech. However, he contended that navigability means many things in a context completely different from water rights, having much to do with the power of Congress over navigable rivers.

Mr. Swan continued his presentation by addressing pending Federal court cases. He noted that the U.S. Supreme Court decision in Arizona v. San Carlos Apache Tribe in 1983 (copy provided for staff) refers to pending Federal court cases in Arizona, indicating that the adjudication process is sufficient in State court but that the Federal forum should remain available if warranted by a significant change of circumstances. Mr. Swan explained that the government provides yearly briefings to the judge concerning the events of some pending cases, particularly the Little Colorado River and Gila River adjudications. He informed the Committee that he knows of no proposal being planned for Federal court concerning any of the pending Federal cases. He explained that situations which might cause such action include a perceived loss of McCarran Amendment jurisdiction, extremely slow progress or perceived blatant disrespect for Federal rights.

Mr. Swan concluded his presentation by commenting on DWR's document dated June 1, 1994, which provides an outline of various proposals. He emphasized the need for concern regarding the separation of powers between the Legislature and the Judiciary, as highlighted in two case decisions from the Ninth Circuit Court

of Appeals and the U.S. Supreme Court (copies provided to staff). On the role of the Special Master, Mr. Swan said the position functions adequately at the present time. He indicated the creation of a settlement judge may be a good idea, adding that many disputes can be resolved through settlement.

Senator Arzberger asked if the Federal government takes prior beneficial use into consideration in the adjudication process, to which Mr. Swan answered affirmatively. However, he said problems occur since the water rights doctrine in the West involves a priority system. Senator Arzberger asked if the Department of Interior and the Department of Justice should represent individual citizens in the adjudications as well as the Federal government. Mr. Swan responded that the agencies do not have that authority. Senator Arzberger asked what would happen if the State began to legislatively recognize certain water rights and claims. Mr. Swan said he could not speculate whether that would be a permissible act of the Legislature, and he reiterated the need for the State's attorneys to study the case decisions in order to make a judgment about what is permissible legislative action.

Senator Day asked Mr. Swan to indicate whether the issues in the DWR outline should be handled legislatively or in another matter, adding that she believes the creation of a settlement judge would not have to be legislated. Mr. Swan agreed that legislation would probably not be needed for a settlement judge.

Mr. Swan continued addressing the DWR document as outlined in its table of contents as follows: He offered no comment on the order of litigation; representation by nonlawyers would probably be satisfactory; no comment on the creation of an ombudsman; an enhanced DWR role may be beneficial; in commenting on the recommendation concerning late statements of claimants, Mr. Swan pointed out that everyone lives with deadlines; no comment on miscellaneous procedural issues; the issue of *de minimis* rights was covered in his earlier presentation; no comment on validity of filings and claims; issues that involve difficult water rights problems and which need to be considered very carefully include quantification of appropriative rights, resolution of conflicting filings, change in use, change in point of diversion, forfeiture, sufficient causes for nonuse and pre-1919 rights; no comment on public trust values but the recommendations under miscellaneous issues would probably be helpful.

Mr. Swan contended that DWR's characterization of the definition of appropriable water or subflow is somewhat inaccurate since it seems to suggest that the Legislature or the court can determine what is subflow or groundwater. Mr. Swan explained that the jurisdiction of the court is not simply set by the Legislature's definition of subflow but is also set by Federal law concerning groundwater pumping. He suggested the need to refer to the decision in U.S. v. Cappaert, which explains the Federal reserve right law regarding groundwater pumping and actually sets the jurisdiction of the court.

Mr. Swan acknowledged that the adjudication process is a painful one but he emphasized the end result will be river systems that are appropriately managed.

Speaker Killian asked if the Federal government plans to file water rights claims on behalf of endangered species in Arizona. Mr. Swan said it is his opinion that the government will not be filing such claims. Speaker Killian commented on a letter written by Secretary Babbitt in which he refers to the Federal Energy Regulation Commission (FERC), which grants licenses for non-Federal dam building. Speaker Killian observed that such licenses are granted for terms not to exceed 50 years, and he pointed out that most of the dams were built in the 1930s and 1940s. He asked how many dams in Arizona fall into that category. Mr. Swan indicated that the only FERC structure in Arizona he is aware of is Arizona Public Service's project at Fossil Creek.

Ed Locher, representing himself, said he has his own well on a couple of areas in the Verde Valley area. He expressed concern that the adjudications process places him in the same situation as people who filed claims for surface water. He noted that he does not have any prior claims and does not stand a chance against claims filed by the Indians or Federal government. In addition, Mr. Locher expressed concern about the financial hardship of trying to compete with the major parties involved in the process.

Speaker Killian commented on recent discussions in the West as to whether the Federal government actually has the constitutional authority to own lands within the State, and he asked legal staff to determine if any judicial decisions or acts of Congress address the issue. He also expressed interest in knowing the implications for Arizona of Pollard v. Hagan, a U.S. Supreme Court ruling indicating that Alabama did not have the right to give away some of its unappropriated and unused lands at the time of statehood.

Senator Springer offered three proposals for consideration pertaining to *de minimis* users, nonattorney representatives and the Public Trust Doctrine (filed with original minutes).

Senator Buster brought up the concept of having the Committee form breakout groups to address various issues. Senator Springer objected to the Committee dividing into smaller groups, citing the need for the entire Committee to hear the testimony and the difficulty of interested parties to attend each breakout group. Senator Goudinoff agreed with the concerns expressed by Senator Springer. Representative Keegan suggested that the Committee would have a better chance of accomplishing its goals in smaller groups and contended the time spent in meetings would probably not be any greater than if the full Committee continued to meet each time. He added that Committee members would be welcome to attend any of the breakout groups.

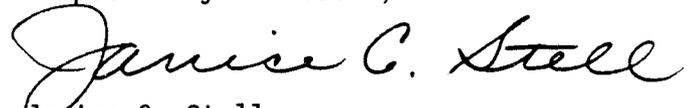
Representative Conner asked what the groups would consist of, noting that he tended to agree with Senator Springer. Senator Buster explained that the groups would address four issues, including procedural, *de minimis*, definition of appropriable water (chaired by Senator Springer) and surface water code (chaired by Representative Conner). Representative Conner suggested that four groups would probably not be necessary, adding that he supports the proposal concerning *de minimis* use presented by Senator Springer. Senator Buster contended that the issue needs more information and that there is a sharp divergence of opinion on

the appropriable water issue. Senator Arzberger said he does not feel the Committee should break into groups, and he cited the problem of achieving a quorum with smaller committees.

Senator Buster indicated that another meeting would be held in July to hear testimony from the Special Master and the judges, at which time the issue of breakout groups could be discussed further. He reiterated the need to streamline the Committee process by having smaller groups focusing on individual issues.

The meeting adjourned at 4:15 p.m.

Respectfully submitted,



Janice C. Stell
Committee Secretary

(Attachments and tapes on file in the Office of the Secretary of the Senate.)

Joint MEETING OF COMMITTEE ON

Az General Stream Adjudications

Hearing Room No. _____

DATE June 21, 1994

TIME 2:00pm

NAME
Please Print

REPRESENTING

BILL NO.

ED. LOCHER

SELF - VERDE VALLEY

IF SHERMAN LOY
Sherman

SELF - VERDE VALLEY

JOHN KOUACOVICH

Self - VERDE VALLEY

T.C. DANOS

AMWUA

TOBIN ROSEN

CITY OF TUCSON

JOHN SCHWARTZ

Brokers 122 Co

CYNTHIA HAGLIN

CITY OF CHANDLER

MARILYN D GYE

City of Phoenix

Bill Swan

US Dept of Interior

Bob Sejkora / Jay Ziemann

Ariz. State Parks

JOHN WELDON

SRP

Jennie Apher Kurtz

Asarco

Cynthia Chavelley

Phelps Dodge

Keth Miller

Mesa

John Keane

SRP

Cynthia Stefanovic

Az State Land Dept.

John Jay

" " " "

Laurent J. Caster

Cyprus Climax Metals Company

STEVE BURG

CITY OF MESA

JIM BALLHAM

CITY OF PHOENIX

Jim Pyeatt

Pyatt Ranch -

Kelly Burn

SRP

De Wite

AG, WGA, VGA

David Brown

Little Colorado Water Users

Karen Peters

City of Phoenix

Jenny Sako

AZ Game + Fish Dept.

ARIZONA STATE LEGISLATURE

JOINT SELECT COMMITTEE ON ARIZONA
GENERAL STREAM ADJUDICATIONS

Minutes of Meeting
Tuesday, July 19, 1994
Senate Hearing Room 1 - 10:00 a.m.

Members Present

Senator Springer	Speaker Killian
Senator Turner	Representative Conner
Senator Day, Acting Chairman	Representative Brown

Members Absent

Senator Buster, Cochairman	Representative Keegan, Cochairman
Senator Arzberger	Representative Bowers
Senator Goudinoff	Representative Hanley
Rita Pearson - Ex-officio member	

Staff

Susan McJunkin
Dan Shein

Senator Day, as Acting Chairman, called the meeting to order at 10:25 a.m. and attendance was noted. She indicated that presentations and testimony would be heard but no action would be taken since a quorum was not present.

PRESENTATIONS

Stanley G. Feldman, Chief Justice, Arizona Supreme Court, acknowledged that the judiciary does not often place itself in a position to discuss cases in litigation. However, he stated that discussion of the stream adjudication in this forum was appropriate since over 25,000 citizens of the State and over 80,000 claims are involved, occupying a vast amount of judicial resources and concerning one of the most vital subjects in Arizona (background information filed with original minutes). Chief Justice Feldman contended that water law actually represents the history of the State, and he commented on the importance of assessing the current situation and exploring ways to facilitate the process.

Chief Justice Feldman explained that no overall adjudication of water rights in the State can be made without adjudicating the rights of the U.S. in terms of the land owned by the government and its rights as trustee for the Indian tribes. He added that because of the doctrine of sovereign immunity the U.S. cannot be required to participate without its consent in any lawsuit or administrative proceeding that will affect its own rights or its trustee rights. Chief Justice Feldman noted that the U.S. has consented by the McCarran Amendment to waive its sovereign immunity in a comprehensive litigation of water rights, adding that the Legislature passed the statute in 1979 which required the courts to proceed in

that manner (further information on McCarran Amendment filed with original minutes).

Chief Justice Feldman introduced Judge Minker from Clifton, who presides over the Little Colorado River adjudication, and John Thorson, the Special Master appointed by the Arizona Supreme Court.

Chief Justice Feldman commented on the various orders that have been made on both the Supreme Court and trial court levels with regard to case management, all of which are designed to facilitate the participation of individual claimants. He also noted that claimants can make appeals in the middle of a case due to the length of the proceedings. He indicated that six issues have been identified as the subject of interim appeals, and he provided a memo from the Supreme Court's staff attorney describing the cases which have been decided to date (filed with original minutes).

Chief Justice Feldman stated that two more issues will be argued next February dealing with the rights of the Federal government on its own behalf and that of Indian tribes, particularly with respect to groundwater. He also advised that last week Judge Stanley Goodfarb, who is handling the Gila River adjudication, issued a 66-page minute entry order ruling on issues pertaining to appropriation rights with respect to subflow and the cone of depression of wells located near a stream, one of the most difficult and complex issues to resolve.

The Chief Justice emphasized that at every stage of the proceedings the court has encouraged the settlement of as many claims as possible. He noted that two important settlements of tribal claims to water rights have been reached, with other claims progressing towards settlement.

Judge Allen G. Minker, Greenlee County Superior Court Judge, said he is aware that the Committee has heard expressions of frustration from a number of claimants involved in the adjudication. He noted that he feels much the same way because the process has been lengthy and not as productive as he would like. Judge Minker observed that other states dealing with this issue are experiencing the same problems and making no more progress than that of Arizona.

Judge Minker praised the efforts of the Department of Water Resources (DWR) staff in the preparation of hydrographic survey reports (HSRs) and the conscientious work of the Special Master in organizing the case. To illustrate the enormity of the task which is handled without benefit of past cases or history to review, Judge Minker pointed out that the Silver Creek watershed was deemed to be a good starting point but that about 3,500 objections to the HSR were filed. He further explained that the case became extremely difficult because of the large numbers, the frustration of the small water users and the expense and time necessary to participate.

Judge Minker noted that early this year the U.S. filed a motion to stay in the Little Colorado River adjudication, asking for time to seriously work on a settlement. He noted that he stopped the litigation and the settlement committee is currently working in earnest to reach a settlement. He explained that the

settlement committee is divided into groups to address issues concerning the Navajos and Hopis, the Indian tribes and non-Indians and the Department of Interior.

Judge Minker informed the Committee that he asked DWR to prepare a *de minimis* report of ground wells in the White Mountains, adding that the Special Master held hearings and made a determination on the subject of *de minimis* stockpond uses. Judge Minker indicated that initial impressions were favorable concerning DWR's recommendation of 56 acre feet as a *de minimis* standard for groundwater pumpers for domestic uses.

Judge Minker commented on the anxiety of the participants in the Little Colorado River adjudication due to not knowing the extent of the claims on Indian lands. He said that consequently he asked DWR to change the order of the HSRs to begin working sooner on the report for the Indian lands, which should promote more rapid determinations and a better understanding by all participants. He added that the HSR is due to be completed around September.

Chief Justice Feldman pointed out that 100 years ago water law in the State was based upon some conceptions that eventually turned out to be scientifically incorrect, while people invested their lives, effort and money according to that law.

Representative Conner asked if there is a defined amount of water for which Indians have a right. Chief Justice Feldman explained that the U.S. Supreme Court in the Winters Doctrine of 1908 recognized that Congress meant to deal fairly with the tribes at the time it created reservations and must have intended to set aside sufficient water to irrigate every arable acre of every reservation.

Representative Conner asked if the amount of arable land has been determined. Chief Justice Feldman stated that a part of the adjudication proceedings is to determine the amount of arable acres in a particular reservation and how much water is needed to irrigate each of those areas. He emphasized, however, that the best way to handle the problem is to settle those claims. Representative Conner contended that various institutions have the ability to determine arable acres, the kind of soil and the kind of crop that can be grown and the growing season.

John E. Thorson, Special Master of the Arizona General Stream Adjudication, said initially there was a decision made in the adjudication that the tribal HSR would be last in the process to allow an opportunity for parties to settle claims. He explained that the Federal government and the tribes have felt the need to protect their rights in the adjudication by filing objections to all the other HSRs for each of the watersheds. Mr. Thorson reiterated that Judge Minker changed the order of the HSRs in order to reach a more rapid decision concerning the entitlement of the reservations.

Representative Brown expressed concern that the HSRs are too detailed and complicated to be of real value and that DWR has indicated it will take a minimum of 15 years to put the necessary data together. Chief Justice Feldman said he

sympathized with the Representative's concern but added that he does not know of a faster way to move the process except through settlement of U.S. and tribal claims.

In further response to Representative Brown, Mr. Thorson acknowledged that HSRs are very professional and thorough documents that are not easily digested by any of the parties. He informed the Committee that the State of Montana produces a more focused document with a summary of the claims, and until recently Idaho produced a proposed report concerning water uses. Mr. Thorson explained that HSRs are in their current format because Arizona statute requires a rather neutral role for DWR in describing water uses. In addition, Mr. Thorson indicated there was a decision in 1985 by the Arizona Supreme Court that affirmed the role of the Department as a neutral one so that none of the parties would be deprived of due process.

As for the length of the process mentioned by Representative Brown, Mr. Thorson noted that the other western states are involved in the same multi-decade process, with New Mexico's adjudication beginning in 1956 and other western states beginning in the 1970s. Mr. Thorson contended the magnitude of the adjudication can be understood by recognizing the task being undertaken, which is similar to an attempt to confirm all the land titles in the State. He also pointed out that the process attempts to integrate a body of Federal law with State law. Mr. Thorson advised that parties can object to any part of the HSR under the current statute, and he suggested the process could be more focused if the type of objections were somewhat limited.

Senator Day asked what the effect would be if the Legislature addressed *de minimis* users in statute even though the courts have made rulings on the issue. Chief Justice Feldman noted that in one of the cases the court held that *de minimis* users could be excluded from the water adjudication to simplify the process and to save them the expense and effort of participating in a major case. He noted that the ruling was made over the objections of the Department of Justice which claimed that the McCarran Amendment requires an adjudication of all of the users to all of the water in a given system.

Chief Justice Feldman questioned, however, whether the courts or the Legislature could determine what constitutes *de minimis* use since a *de minimis* use from one water source may not be the same from another source. He contended the issue has to be left with the judge in the adjudication proceeding to determine *de minimis* use with respect to each stream.

Mr. Thorson further noted that since the decision mentioned by the Chief Justice was issued, both adjudications have tried to bring to the front of the line the question of whether certain small uses could be adjudicated in the *de minimis* fashion. Mr. Thorson indicated that last April in the Little Colorado River proceeding he issued a decision, which if confirmed by Judge Minker, will provide a *de minimis* adjudication for most of the stockponds in the Silver Creek watershed and all of the wildlife and stock watering uses throughout the entire Little Colorado River basin (excerpts from decision filed with original minutes).

Mr. Thorson also commented on a trial in the Gila River adjudication in which consideration was given as to whether stockponds and stock watering uses on the San Pedro River could be adjudicated in a summary *de minimis* fashion. He explained that his decision in that case will probably be issued this summer or fall. Mr. Thorson mentioned that in the San Pedro River trial the *de minimis* issue was hotly contested by the Apache tribe and the Gila River Indian community.

Senator Day asked Mr. Thorson how a legislative determination of *de minimis* would affect his rulings. Mr. Thorson said it is unclear, but he stated there has always been a question of whether a legislative exemption of certain *de minimis* uses would destroy the comprehensive nature of the adjudication. He also expressed concern about a conflict between his ruling and a legislative determination.

In response to a question from Senator Day concerning the effect on water rights due to the changes in Arizona water law over the years, Mr. Thorson emphasized that the purpose of the adjudication is to recognize valid existing rights under State and Federal laws. He acknowledged there is confusion due to the patchwork of provisions that have governed how water is appropriated in Arizona for over a century, adding that he sees a number of objections in the adjudication which raise those types of issues.

Senator Day asked if the Legislature could clarify when a water right was established. Mr. Thorson said he did not preclude that possibility and he referred to a decision on appeal to the Ninth Circuit involving the comprehensiveness of the adjudication in Oregon. He explained that Oregon's proceedings have placed the water rights established before 1909 at issue, basically grandfathering the rights after that time. Mr. Thorson suggested that an affirmative decision by the Ninth Circuit may give the Legislature some guidance on how to treat Arizona water rights.

Judge Minker said he is not sure in what sense the Legislature could create or adjudicate a water right, such as the type mentioned by Senator Day, in light of Indian rights which are prior in time to non-Indian claims. Chief Justice Feldman clarified that Indian water rights date back to the time of the establishment of the reservations.

Senator Springer stated that testimony before the Committee has indicated that most of the parties feel a *de minimis* determination would be very helpful in expediting the process. Chief Justice Feldman reiterated that the judiciary has ruled that *de minimis* users can be excluded but he noted that he has no way to determine what constitutes a *de minimis* user. He said he is willing to have his staff work with the Committee and its staff to determine if there is a way to confirm the small uses of those individuals who do not belong in the adjudication.

Judge Minker agreed that the *de minimis* issue is very important and that he is concerned that many people are involved in a huge adjudication who do not need to be. He emphasized that the Little Colorado River proceeding is moving to

survey and make determinations in short fashion as to who those *de minimis* users are. However, Judge Minker pointed out there may be a number of small users, after a *de minimis* determination is made, who will still have the problem of huge attorney fees in order to protect a modest use of water. He indicated he is aware that the Committee has heard a recommendation for some type of assistance for small water users and he said the idea sounds like a good one.

Senator Springer expressed concern about the State appropriating additional money to continue the process. She noted that another proposal before the Committee would necessitate a change in judicial rule to allow representation by nonattorneys. Chief Justice Feldman noted that he, Judge Minker and Mr. Thorson are in favor of that proposal, adding that the concept does not need legislation and he recommended against such legislation. He observed, however, that no one has asked the court to adopt a rule to permit nonlawyer representation for certain people. Chief Justice Feldman further addressed the need for an ombudsman to assist small water users and suggested a modest amount of money for such a position might be beneficial.

Representative Brown asked if claimants should individually request nonlawyer representation, to which Chief Justice Feldman indicated there is currently a system for filing such petitions. Mr. Thorson noted that the change he and the judges are supporting is the ability of officers of associations and corporations to act as representatives in the adjudication. He added that the steering committee of lawyers in the Gila River adjudication has been considering a possible petition to the Arizona Supreme Court, which may be the vehicle for that suggestion.

Speaker Killian noted that legislation was passed last session concerning a private property rights ombudsman, and he suggested possibly expanding that office to provide assistance to people in water rights cases. He also asked if water rights are protected by the Fifth Amendment to the U.S. Constitution, to which Chief Justice Feldman answered affirmatively. Speaker Killian suggested that the private property rights ombudsman could probably then represent claimants without the Legislature having to make a modification in the statute, adding that an additional appropriation may be needed to allow the expansion of that role. Chief Justice Feldman agreed with the Speaker's suggestion.

Judge Minker observed that proposed settlements tend to create a great deal of anxiety and uncertainty on the part of many water users, and he contended that an office which could explain a settlement proposal to people would be beneficial to the settlement process.

Senator Turner asked how water use is affected during the adjudication proceedings. Chief Justice Feldman indicated that generally water use continues in the same manner and noted there is more fear of the future than disruption of the present. Senator Turner observed that when the issues are finally settled the people at the end of the priority line will be the ones who lose out in the process. Mr. Thorson pointed out that parties have been very innovative in the settlements which have been reached so far, resulting in no disruption of existing uses, and he is optimistic those types of settlements can be the rule.

Mr. Thorson further addressed the *de minimis* issue by suggesting that DWR could identify those uses that appear to be *de minimis* in its reports for each watershed, adding that the reports could be entitled to a presumption. He noted that people could file objections but the burden would be on them to prove otherwise.

PUBLIC TESTIMONY

Ed Locher, representing himself, contended the reference to *de minimis* users is an impersonal legal term, and he invited all those in attendance from the Verde Valley to stand and be recognized. He praised Senator Springer's efforts on behalf of the small water users and spoke in support of her proposals.

Ron Rovey, representing himself, expressed concern about the tremendous time, effort and expense necessary to deal with the complexities of the adjudication process, which precludes the individual user from truly participating and protecting his own water rights. He contended that solutions are available to minimize the impact on small water users.

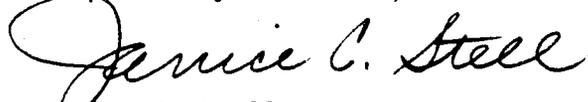
Senator Day read the following names of others who indicated they would be available to speak if necessary: Duane Wyles of Cottonwood, Mary Huffaker of Cornville and R.A. Patterson of Cottonwood.

After a reading of the provisions of last session's H.B. 2589 referring to the powers and duties of the private property rights ombudsman, Speaker Killian reiterated that the ombudsman would probably be of valuable assistance to individuals involved in the adjudication who cannot afford an attorney. He suggested that it may be appropriate to have a Joint Legislative Budget Committee meeting to discuss additional resources if necessary.

Senator Day indicated another meeting would be held in August to discuss the various proposals and whether to form breakout groups.

The meeting adjourned at 11:52 a.m.

Respectfully submitted,



Janice C. Stell
Committee Secretary

(Attachments and tapes on file in the Office of the Secretary of the Senate.)

MEETING OF COMMITTEE ON

Hearing Room No. _____

DATE 7/19/94

TIME _____

NAME
Please Print

REPRESENTING

BILL NO.

ED. LOCHER	COTTONWOOD SELF COTTONWOOD	
WE Warner		
Arlene P. Allegre	self Cornville	
Paula H. Wood	self - YAV. Co (Cottonwood)	
Bob Dwyer	SELF YAV. CO CANNONVILLE	
Carol C. Koontz	self - Cottonwood	
Troy Turner	SELF COPPERVILLE	
Al Koontz	Cottonwood	
Mark - Todd	COTTONWOOD	
Gene Fortner	Cottonwood	
Beatrice Richmond	Camp Verde	
William Houghton	Cottonwood AZ - self	
John Myers	Self Camp Verde	
Florence E. BLAY	SELF CORNVILLE	
Baker Mesinger	- Cottonwood	
Cindy Huffaker	self Cornville, AZ	
Jud. H. M. Mical	self	
Mary Black	self St David AZ	
AULBRICK	SAN PEDRO NRCO POMEYNE AZ	
Henry Bahr	self St David AZ 85030	
Louane Wyles	SELF - Cornville, AZ	
Mary Huffaker	self - Cornville AZ	
Ardella Simonsgaard	Cornville, AZ	
Henry E. Simonsgaard	Cornville AZ	
James John (L)	Cornville AZ (Self)	

MEETING OF COMMITTEE ON

Hearing Room No. _____

DATE _____

TIME _____

NAME
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REPRESENTING

BILL NO.

<u>NAME</u> Please Print	<u>REPRESENTING</u>	<u>BILL NO.</u>
RAJUTTENSON	Self Cottonwood	
Beth Steele	Self Cornville	
Jim Herrick	Cornville	
C. V. WELDON	Cottonwood / Sedona	
MARGARET N. WELDON	Cottonwood / SEDONA	
J. C. FINCHER	CORNVILLE	
Rosie Tracy	Cornville, az.	
Van Wagoner	CORNVILLE AZ	
Marjorie Kowalski	Cornville Az. Self	
John Kowalski	Cornville AZ Self	
Charter Byler	Camp Verde	
Robert Self	Verde Valley	
Nancy Self	Verde Valley	
Mattie Post	Camp Verde	
A. B. Clark	Camp Verde	
Charles R. Hilliers	Camp Verde	
Kerman A. Loy	Sedona	
Hot Browning	Cornville	
JIM CUTBIRTH	CORNVILLE	
RON ROVEY	Sedona	
Chuck Supulchese	ORACLE	
John K. Smallman	Bayless + Berkeley Co	
Charlotte Brown	Arizona A. Co.	
Joe Clifford	" "	
Don Haskell	Cornville AZ	

MEETING OF COMMITTEE ON

Hearing Room No. _____

DATE _____

TIME _____

NAME
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REPRESENTING

BILL NO.

<u>NAME</u> Please Print	<u>REPRESENTING</u>	<u>BILL NO.</u>
William Hoops	Scott ...	
...	...	
TERRAN A. ROBINSON	...	
CHARLOTTE RAAR	CORNVILLE SELF	
Arnold Winter	Cornville AZ Self,	
Rob Sikora/Jay Ziemann	AZ. State Parks	
JOHN SCHAEFER	BANKER MR. C.	
Ernest Nusted	St. David Irrigation & SELF	
JEFF LARSON	LAKESIDE IRRIGATION CO.	
KALEN BRADFORD	City of Chandler	
MAREN GAYLORD	CITY OF TEMPE	
MARILYN CANN	City of Goodyear	
Frederic Beeson	SRP	
TOM SHARPE	CAMP VERDE	
Graydon Gandy	Collinson	
William J Steele	Cornville	
Lee Storey	APS, Rio Rico, Flagstaff	
JENNIFER O'HARA	Superior, Benson, Gilbert Valley ID etc	
...	Superior, Camp	
Mike Buggy	LWID	
High Hills	Nogales	
STEVE BURG	CITY OF MESA	
...	DWR	
Steve Cox		
...		

MEETING OF COMMITTEE ON

Hearing Room No. _____

DATE _____

TIME _____

NAME
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REPRESENTING

BILL NO.

<u>NAME</u> Please Print	<u>REPRESENTING</u>	<u>BILL NO.</u>
Brad Huza	NAVAJO CO.	
BRAD HUZA	City of Prescott	
Kent H. Houghton	City of Tucson	
Juan Fleener	Escondido	
Michael Christopher	St David's Irrigation	
Tamara J. Carter	Stem Container Corp.	
Kelly S. Carter	SRP	
Mike Smith	ASLD	
Scottie	ASLD	
Cynthia Stetson	ASLD	
Bill W. W.	PIESA	
Ernie Chase	Phoenix	
John H. H.	"	
Karen Peters	"	
Jerric Adler Kuntz	Asarco Incorporated	
Kevin M. Moran	Philps Dodge / ASARCO	
Jan Leavelle	AG's Office	
Maria Hernandez	AG's Office	
Maria Moran	AG's Office	
Don W. Young	AG's Office	
EDWARD	GRIC / COX & COX	
Robert Nelson	ARWA et al.	
Paul Chene	Allen, Baker + Porter	
Gene Olson	ACWR	

ARIZONA STATE LEGISLATURE

JOINT SELECT COMMITTEE ON ARIZONA
GENERAL STREAM ADJUDICATIONS

Minutes of Meeting
Wednesday, September 7, 1994
Senate Hearing Room 1 - 2:00 p.m.

Members Present

Senator Springer	Representative Bowers
Senator Turner	Representative Conner
Senator Arzberger	Representative Brown
Senator Buster, Cochairman	Representative Hanley
Rita Pearson - Ex-officio Member	

Members Absent

Senator Day
Senator Goudinoff
Speaker Killian
Representative Keegan, Cochairman

Staff Present

Susan McJunkin
Molly Greene
Dan Shein

Senator Buster called the meeting to order at 2:10 p.m. and attendance was noted. Senator Buster indicated that the four proposals to be discussed were submitted from Senator Springer, Senator Arzberger, multiple water interests (referred to in minutes as DWR proposal) and the City of Phoenix.

Senator Springer moved that the Committee adopt the concepts, but not the specific bill draft, described in her June 21 memo to the Committee members (filed with original minutes) proposing to dismiss *de minimis* uses of water from the general adjudications, as follows:

1. *De minimis* uses are dismissed from the water adjudications without regard to the source of water used.
2. *De minimis* uses are defined as domestic and other small water uses of three acre feet or less per year and as stockponds with an original capacity of 15 acre feet or less.
3. The court shall summarily dismiss claimants of a *de minimis* use of water without requiring the claimant to take any additional action.
4. Any challenger to the claimant of a *de minimis* use shall bear the burden of proof by clear and convincing evidence.

5. *De minimis* claims shall be deemed an adjudicated right, a valid beneficial use and a vested property right.

Senator Springer said there is a great deal of consensus for the definition outlined in her proposal. Senator Buster suggested that the *de minimis* issue is treated differently in the proposals offered by DWR and the City of Phoenix. Representative Bowers indicated that he appreciated the fact that under Senator Springer's proposal *de minimis* claims would be considered a right without the claimant having to go through the adjudication.

Senator Buster asked that the *de minimis* issue in the other proposals be presented for discussion.

Karen Peters, representing City of Phoenix, explained that the City's definition of *de minimis* includes domestic uses, stockponds of 15 acre feet or less and self supplied nonirrigation uses of three acre feet or less per year, adding that all such claims would receive a complete exemption from the adjudication.

Senator Springer asked Ms. Peters what she feels the difference is between an "exemption" for *de minimis* users as indicated in the City of Phoenix proposal and the reference to "dismiss" in her proposal. Ms. Peters explained that an exemption would not require any judicial action or dismissal, with the claims no longer being pursued by any party in the adjudication.

Senator Springer expressed concern that the water rights of exempt users could be challenged at some point in the future, adding that she would prefer those claims to be deemed an adjudicated right. Ms. Peters contended that the advantage of an exemption over an adjudicated right is that the court would no longer be able to enforce against exempt *de minimis* users, and other users would not be able to shut them down in times of shortage.

Representative Bowers suggested that exempt *de minimis* users would not be subject to call, to which Ms. Peters indicated that is not entirely the case. She noted, however, that the Federal government, which is the only party she could think of which would be interested in such an action, could proceed individually against those users, adding that no State or local government action could prevent that kind of call. Ms. Peters reiterated that under the City of Phoenix proposal *de minimis* users would not be subject to enforcement in the adjudication.

Senator Springer noted that her proposal provides a broader definition than the Phoenix proposal and allows for a variety of uses, including very small commercial operations, by placing all *de minimis* uses in the same category, that of three acre feet or less.

Senator Buster asked how that definition relates to stockpond uses. Senator Springer explained that stockponds are included in a different category, adding that the two proposals agree on the 15-acre feet or less capacity.

Ms. Peters clarified that the categories in the Phoenix proposal, other than stockponds, include domestic uses without regard to quantity and other nonirrigation uses of three acre feet or less, which encompasses small businesses that do not use more than three acre feet per year. Ms. Peters suggested that the exemption in the Phoenix proposal offers many advantages, such as protection against future State law enforcement.

Senator Buster noted that *de minimis* users might feel uneasy that the Phoenix proposal does not acknowledge that such use can be deemed an adjudicated right or vested property right. Ms. Peters contended that the point is a nonissue since the exemption would not alter the status of a *de minimis* user's right but would protect the user against any action by the adjudication court. She contended that having a paper right does not offer any more protection against the water being taken away in times of shortage, and actually offers less protection than an exemption, adding that in times of shortage a junior right holder would still be subject to being cut off.

Ms. Peters addressed the issue of whether the exemption in the Phoenix proposal could open up the adjudication to a McCarran Amendment challenge. She said the City does not feel the issue is of concern since the McCarran Amendment was designed specifically to allow adjudications to go forward in an expeditious fashion and with the government being involved in only one proceeding. She contended the Phoenix proposal will withstand any challenge on that basis.

Representative Bowers questioned whether an exemption offers more protection since the adjudication court is not the entity involved in time of a call. Ms. Peters indicated that an exemption provides greater protection since enforcement would be through the adjudication court unless the situation involves an individual lawsuit by the Federal government.

C.B. "Doc" Lane, Director of Grower Affairs, Arizona Cattlemen's Association, expressed concern that *de minimis* users might be set aside and ignored, and he emphasized the need for those users to have an adjudicated right when the process is completed.

Senator Arzberger said he felt that *de minimis* rights would have more validity and protection by being recognized in the adjudication process.

Ms. Pearson observed that having *de minimis* water rights acknowledged as exempt and yet dealt with by the court constitutes a secondary forum to provide the certainty of the value of the property right.

Steve Olson, Legislative Liaison, Department of Water Resources (DWR), pointed out that the purpose of the adjudication is to provide a quantification of all the water rights within the adjudicated area and establish the rights and priorities to the use of that water. He emphasized the need to make it clear that the water rights are property rights.

Mr. Olson explained that the *de minimis* issue in DWR's proposal is philosophically consistent with that presented by Senator Springer and includes stockponds of 15 acre feet in capacity, a stockwatering category not to exceed one acre foot per year for water used by livestock and wildlife and three acre feet of water per year for domestic users. He noted that the domestic use definition is based on the existing water code and differs somewhat from the Springer proposal, although he said there is probably a basis with which to work together on a definition.

Senator Arzberger asked Mr. Olson if his proposal differentiated between domestic and commercial use. Mr. Olson replied that the reference to domestic use includes commercial uses under the three acre foot quantity.

Mr. Olson explained that the proposal he presented allows *de minimis* uses to be treated as a water right based on the statement of claimant filing and DWR's hydrological survey report (HSR), adding that such claims would ultimately be summarily adjudicated by the court. He contended that the end result of the proposal provides the same approach that Senator Springer is trying to achieve.

In response to questions from Senator Buster concerning the differences between the proposals submitted by Senator Springer and DWR, Mr. Olson stated that the two proposals are conceptually similar and differ basically in phrasing. He noted, however, that Senator Springer's proposal includes stockwatering of up to three acre feet, while the DWR plan refers to stockwatering not to exceed one acre foot. Mr. Olson explained that in reality there would be very few actual stockwatering claims between one and three acre feet.

Senator Springer countered that some significant differences exist between the two proposals. She contended that the adjudication process will result in important decisions concerning the definition of surface water, ground water and subflow. She pointed

out that consequently the language in her proposal refers to *de minimis* use from any source of water.

Mr. Olson noted that the issue involves what the court deems to be appropriable water, which is usually considered to be surface water or related subflow. He stated that the groundwater concept of *de minimis*, especially outside the AMAs, is not really an issue before the adjudication process. Senator Springer emphasized that by not identifying a water source a claimant is more assured of being guaranteed a water right.

John Keane, Executive Policy Analyst, Salt River Project (SRP), explained that dismissal of *de minimis* users would not result in an adjudicated right and would infringe upon due process rights to enforce a call against a claim. He said that is why the package brought forward by DWR and others basically leaves those claimants in the process, although on a fast track basis to the end of the adjudication. Mr. Keane also contended that a complete dismissal of *de minimis* claims would run up against the McCarran Amendment, which requires an adjudication to be a comprehensive look at surface water.

Ed Locher, representing himself, presented a list of 543 *de minimis* claimants from the Verde Valley, accompanied by a like number of signed cards, expressing support for Senator Springer's proposal.

There was discussion concerning a vote on the Springer motion. Representative Brown said he preferred that the Committee develop an entire package rather than individual proposals. Senator Springer emphasized the need to accomplish as much as is reasonably possible in addressing such complex matters. She contended that the Committee would be making a significant accomplishment if it only legislatively addressed the *de minimis* issue at this time. Senator Arzberger said he feels there is a great deal of consensus on the proposal submitted by Senator Springer, and he commented on the need to vote on the issue in order to move forward in an effort to present a master plan before the full Legislature.

Senator Buster asked Mr. Keane to clarify his concern with the Springer proposal. Mr. Keane indicated that his concern revolves around the language referring to the dismissal of *de minimis* uses from the adjudication without providing the opportunity to reopen a claim if necessary. He noted that the DWR proposal leaves the *de minimis* users in the process but removes the burden of having to take any further action in the adjudication.

Senator Springer acknowledged that the two proposals are not that far apart in working towards the same goal, but she emphasized the need to address her concern that *de minimis* users might still be faced with the burden of legal fees if kept in the process.

Mr. Keane pointed out that provisions in the DWR package establish rules and procedures which remove the financial burden from *de minimis* users.

Dave Brown, representing various water users, said his clients constitute probably the largest number of small surface water users in the State. In addressing the Springer proposal, he emphasized that the adjudication only deals with appropriable surface water, making no need for the language in number 1 of her proposal concerning dismissal without regard to the source of water used. He also suggested a change in wording to reflect that *de minimis* users would be summarily adjudicated rather than dismissed from the process, which would alleviate the concerns his clients have about obtaining their water rights. Mr. Brown added that he was not sure the Legislature's scope of powers includes the ability to dismiss a group from a lawsuit.

There was further discussion between Senator Springer and Mr. Brown regarding her concerns about restricting the language only to appropriable water. She acknowledged there is room to work on the differences in wording dealing with "dismiss" and "adjudicate" since her goal is to achieve an adjudicated right and a deemed property right through the process. Mr. Brown emphasized the need to comprehensively adjudicate water rights in Arizona in order to avoid having to argue the issue before a Federal court.

Senator Buster moved that Senator Springer's proposal be amended by deleting the language in number 1 and amending number 3 by changing the word "dismiss" to "adjudicate."

Senator Springer indicated her opposition to the motion.

Representative Hanley suggested that all claimants should have the opportunity to have their water rights adjudicated. Representative Bowers recommended keeping the language in number 1 in order to maintain a broad definition of water source while adopting the change in wording suggested by Mr. Brown. Senator Turner said he did not believe there was a need to worry about the word "dismiss" since Senator Springer's motion involves a concept, adding that he did not support Senator Buster's motion. Senator Buster noted that the Committee will probably have at least one more meeting at which further clarifications can be made.

Senator Arzberger expressed some reservations about Senator Buster's amendment. He noted that number 5 in the Springer proposal accepts that *de minimis* claims will be deemed an adjudicated right, adding that a source of water not deemed to be surface water would not even fall under the adjudication process. Representative Conner emphasized that the Committee is strictly addressing the adjudication process and surface water and indicated

that he agrees with the changes presented by Mr. Brown and Senator Buster.

A division was called on the vote on Senator Buster's motion. The motion CARRIED by a vote of 4-3.

The motion to adopt Senator Springer's proposal as amended CARRIED by voice vote.

Senator Springer moved that the Committee adopt a substitute to the second proposal described in her June 21 memo to the Committee members, to allow nonattorneys to represent water claimants in the general adjudications. The substitute language is as follows: "Any other claimant, including a corporation, water users association or individual, may be represented by any person authorized in writing by that claimant."

Senator Springer said she has heard no one voice a disagreement with the proposal, including the judges and the Special Master during their presentation at the last meeting.

Mr. Olson said the DWR proposal recommends the matter be handled through a separate legislative memorial to the court. He said there is some concern in terms of the separation of powers and the internal operations of the Supreme Court with having the issue placed in Title 45 of the code.

Representative Brown said he agrees with the idea but would prefer to consult with the Supreme Court before adopting specific language.

Senator Springer withdrew her motion.

Senator Springer moved that the Committee adopt the concept of representation of any entity by a nonattorney. The motion CARRIED by voice vote.

Senator Springer moved that the Committee adopt the concept that the Legislature should have the exclusive authority to determine what public trust values, if any, are associated with water rights.

Senator Buster asked how the other proposals approach the subject.

Ms. Peters indicated that the proposal from the City of Phoenix does not address the concern, adding that the City supports the concept put forward by Senator Springer.

Kelly Barr, representing SRP, offered support for Senator Springer's concept. She noted that SRP has been working on different language and will continue to work with Senator Springer on the issue.

The motion CARRIED by voice vote.

Senator Arzberger offered his proposal for the Committee's consideration. He explained that the proposal addresses the issue of pre-1919 water claims made in the general surface water adjudications by giving a presumption of validity to any claims filed in the adjudication that pre-date the effective date of the first State water code in 1919. Senator Arzberger indicated that the burden of proof in a challenge to any such claim would be on the contestant to the claim, who would be required to disprove the claim by clear and convincing evidence. He said he was not aware of any disagreements on the issue.

Senator Arzberger moved that the Committee adopt the concept that a person who claims a water right in a general adjudication that was vested before March 26, 1919, is presumed to have a valid claim, and a person who contests such a claim shall bear the burden of proof by clear and convincing evidence. The motion CARRIED by voice vote.

Mr. Olson made a slide presentation indicating the additional provisions of the DWR proposal aimed at streamlining the adjudications (handout filed with original minutes).

After a discussion of DWR's role under the proposal, Representative Conner said he was under the impression that DWR already provides technical support in the adjudication process. Mr. Olson agreed and noted that DWR's role should not be changed significantly. However, he explained that the Department wants to make sure that its HSRs are introduced into evidence rather than used as just another piece of information, which will be more beneficial to claimants as a proposed characteristic of a right.

Senator Springer asked if DWR expects to require an increase in staff in order to carry out its role. Mr. Olson indicated that the Department expects to work within its existing resources. Senator Springer asked if the proposal means that DWR will continually be in the position of defending claims against blanket challenges. She asked if the Legislature could reduce the number of those challenges by requiring a specific interest in a claim in order to bring a challenge.

Mr. Olson acknowledged that it would be very appropriate for the legislature to clarify a number of the legal issues by making the code much more specific concerning such issues as nonuse.

Mr. Olson also noted that it would be appropriate for the Legislature to address issues related to the presumption of evidence submitted to the court, such as prior filings, maximum historic use and lack of data.

Senator Springer expressed concern that the creation of a Settlement Judge, as reflected in the proposal, would constitute another level of bureaucracy to address conflicts that still have to be resolved by the other layers, namely, the Special Master and the court.

Mr. Olson explained that the Special Master should only be able to review those issues before him, usually in a court proceeding, while the Settlement Judge would not have to be bound by those restrictions. He noted that the process associated with the Settlement Judge would be more open and represent a true mediator/facilitator type of role, taking out some of the judicial process. Mr. Olson said there is some concern as to whether such a role would warp the Special Master's decisions. He noted that decisions by either the Special Master or the Settlement Judge would have to be taken to Superior Court, providing further review in relation to other water users.

In response to Mr. Olson's discussion of the issue of nonuse, Senator Springer contended that nonuse should not diminish a property right.

Ms. Pearson pointed out that the whole notion of western water law involves the fact that water is scarce. She indicated that a water right not put to beneficial use for an extended period of time prevents others from using the water.

Representative Hanley asked if the same policy applies to Indian tribes in the Little Colorado River area that have not had the resources or technological ability to put the water to beneficial use. Ms. Pearson explained that Indian water rights settlements involve a separate issue, adding that the adjudication is in the process of determining the rights for the reservation as a whole. She emphasized that those rights involve a different concept from that of potentially forfeiting the benefit of a use of water by an individual water user off the reservation.

Senator Buster asked how the DWR proposal differs from that of the City of Phoenix. Mr. Olson pointed out that the Phoenix proposal sets priorities for HSRs, requiring Indian and Federal reports to be addressed first. He contended that establishing such strict priorities is not necessary to the process and would actually be a hindrance to settlement if the report reflects a specific quantity that is considered to be a water right which cannot be negotiated lower.

Mr. Olson pointed out that the Phoenix proposal also lays out very specific requirements for DWR in the conduct of its investigations. He noted that the Phoenix proposal differs from that of DWR concerning the Special Master since DWR recognizes that the Special Master should make some of the preliminary findings on legal issues. Mr. Olson explained that the DWR proposal also recommends that HSRs should be presumed correct by the court if the water right is not contested.

Senator Buster asked Ms. Peters to address the issues mentioned by Mr. Olson. Ms. Peters acknowledged that one of the primary differences between the two proposals is the restructuring of the process by way of the priority in which the HSRs are prepared. She explained that relief for small users through the Phoenix proposal is accomplished through the *de minimis* idea, although there are a large number of small users who would not receive relief through that treatment because of the definition that has been accepted by the Committee. Ms. Peters indicated that the Phoenix proposal provides relief for those users by shifting the entire focus of the adjudication away from them for a sufficient period of time, during which most of the legal issues and larger rights will be resolved.

Senator Springer questioned how those users will be freed from having to spend the large amounts of money required to stay in the process. Ms. Peters explained that those costs can be avoided by not focusing on the primarily small private users first. She contended that focusing on the Indian and Federal claims first will make the process much easier for other users. Ms. Peters indicated that the Phoenix proposal recommends that DWR prepare HSRs in the following order: Indian tribes, Federal government, State of Arizona and all other rights, including those for private land owners and lessees.

Senator Springer expressed concern that focusing on Indian and Federal rights first could possibly bring problems concerning the total amount of water that would be available to settle those claims.

Ms. Peters replied that a way to deal with that potential problem is by drastically streamlining the HSRs prepared for Indian claims. She said instead of having the report suggest an ultimate water right the HSR would simply include a listing of existing uses, matched with prior filings and an inventory of water resources. Ms. Peters emphasized that until there is pressure put on the tribes and Federal government via the HSR preparation those entities will not evaluate their claims or settlement options.

Ms. Peters offered a schematic outline of a proposed restructuring of the adjudication process by the City of Phoenix (filed with

original minutes), explaining that the proposal is much simpler and less expensive than that offered by DWR.

Senator Buster asked Mr. Olson to comment on Ms. Peters' claim that the HSR process will prod the tribes and the Federal government into proving their claims. Mr. Olson reiterated the concern that the tribes and the Federal government will view the number generated by the HSRs as their bottom line.

Ms. Peters indicated that the Indian HSRs under the Phoenix proposal would not include a suggested water right to impede settlement negotiations that may already be taking place.

Representative Bowers observed that the Phoenix proposal puts certain strictures on the breadth of DWR's investigations, which could preclude the Department from coming to a determination of a particular quantity right.

Jim Callahan, representing City of Phoenix, indicated that the Phoenix proposal does not suggest that DWR become involved in the process of defining what the Indian water rights are. He emphasized that the HSRs would go directly to the judge who would make findings on all of the legal issues.

Ms. Pearson pointed out that DWR was not arguing a position concerning when the HSRs are produced or what should be included in the reports, rather she stated that the court and the settlement parties direct such action, which helps to understand why in the past DWR has been asked to hold back an HSR for an Indian settlement discussion.

Ms. Peters stressed that the Phoenix proposal's prescription for the order of preparation of HSRs would not prevent a court from holding off on litigating a particular tribe's claims or prevent parties from going forth in settlement negotiations and seeking a stay.

Ms. Peters addressed the chart, noting that the recommendation is for an abbreviated HSR to be submitted to the Special Master for preparation of an abstract of water rights. She added that any legal issues arising during that time would be referred directly to Superior Court. Ms. Peters contended that the fact-based abstract would allow for an initial resolution of discrepancies in an informal and nonadversarial atmosphere, obviating the need for a Settlement Judge. She explained that the abstract would be referred back to the court, which would be the final arbiter and determiner of water rights. Ms. Peters handed out another chart indicating an overview of the DWR proposal (filed with original minutes) and explained that the proposal includes additional steps not found in the Phoenix recommendations.

September 7, 1994
Page 12

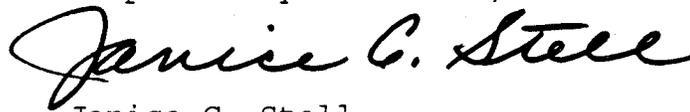
MINUTES OF JOINT SELECT COMMITTEE ON
ARIZONA GENERAL STREAM ADJUDICATIONS

Ms. Peters proposed that the current fund for the adjudication process be allowed to run out, with the court not being permitted to proceed against claimants for additional money. She recommended an annual public accounting of how the funds are spent and that future requests for funding be justified.

Senator Buster indicated one more meeting would be held to further address the last two proposals.

The meeting adjourned at 4:48 p.m.

Respectfully submitted,

A handwritten signature in cursive script that reads "Janice C. Stell".

Janice C. Stell
Committee Secretary

(Attachments and tapes on file in the Office of the Secretary of the Senate.)

MEETING OF COMMITTEE ON
WATER ADJUDICATION

Hearing Room No. _____

DATE _____

TIME _____

NAME
 Please Print

REPRESENTING

BILL NO.

<u>NAME</u> Please Print	<u>REPRESENTING</u>	<u>BILL NO.</u>
PAUL BRICK	PREMERENE WATER USERS ASSN.	
ED LOCHER	SELF	
JOHN KOVACOVICH	Self	
Edith M. Wilcox	Self + ST David Irr. Dist	
Mary Black	SELF ST DAVID	
Mary M. Moore	AG	
BRAD HUBB	CITY OF PRESCOTT	
JOHN SCHAPER	BUCKETE IRRIGATION Co.	
Tan Leavelle	AG	
Doug C. Nelson	Douglas C. Nelson PC	
Don W. Young	AZ AG	
Joe White	ABC	
Falmer S. Smallhouse	Bayless + Berkeley Co	
Robert Sejkosa	AZ State Parks	
Jay Ziemann	AZ State Parks	
Marilyn D. Cage	City of Goodyear	
Green Peters	City of Phoenix	
M. JAMES CALLAHAN	CITY OF PHOENIX	
Lisa M. Knight	Salt River Project	
MARION PORCH	CITY of Glendale	
JAMES FLOWERS	" "	
Lauren J. Castle	FENNEMORE Craig	
Jeff Thacker	" "	
Charlotte Benson	State of Arizona A.G.	
He Clifford	" " "	

MEETING OF COMMITTEE ON

Hearing Room No. _____

DATE _____

TIME _____

NAME
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REPRESENTING

BILL NO.

<u>NAME</u> Please Print	<u>REPRESENTING</u>	<u>BILL NO.</u>
JEFF LARSON	LAKEVIEW IRRIGATION	
John Kame	City of Mesa	
STEVE BURG	SRP	
Cynthia Chandley	CITY OF MESA	
Garry & Hayward	Phelps Dodge Corp.	
David Brown	" " "	
Jim Walsh	Little Colorado River Council	
South Phoenix	The Nature Conservancy	
Paul Omb	City of Tempe	
MIKE PEARCE	DRP	
David Harris	Ellis, Baker + Porter	
C.B. Doc' LANE	DWR	
Cynthia Stefanovic	AG	
Bill Barr	Arizona Cattlemen's Assoc.	
Frank O'Hair	ASCD	
Bill Chase	ASCD	
Steve Roman	SRP	
Dr. Isaacson	Sierra Vista Benson, etc.	
JAY MOYES	City of Phoenix	
Jim Sawyer	Sierra Club	
	Cohen	
	Mexico, Hendricks for Rio Rio, Flagstaff et al	
	Attorney General	

MEETING OF COMMITTEE ON

Hearing Room No. _____

DATE _____

TIME _____

NAME
Please Print

REPRESENTING

BILL NO.

MARION J FOSCH

CITY OF GLENDALE

—

PAUL ROBERTSON

HOUSTON, TEXAS

BARBARA ROBESON

MARICOPA COUNTY

BARBARA ROBESON

AZ SCHOOL BOAS ASSOC.

~~ED LANTIER~~

PAUL BRICK

J. K. K...

AZ IN BANK

CYNTHIA HAGLIN

CITY OF CHANDLER

KAREN GAYLORD

CITY OF TEMPE

ARIZONA STATE LEGISLATURE

JOINT SELECT COMMITTEE ON ARIZONA
GENERAL STREAM ADJUDICATIONS

Minutes of Meeting
Tuesday, November 22, 1994
Senate Hearing Room 1 - 2:00 p.m.

Members Present

Senator Springer	Representative Conner
Senator Turner	Representative Jordan
Senator Arzberger	Representative Brown
Senator Goudinoff	Representative Hanley
Senator Buster, Cochairman	Representative Bowers, Cochairman
Rita Pearson - Ex-officio Member	

Members Absent

Senator Day
Speaker Killian

Staff Present

Susan Anable
Dan Shein

Senator Buster called the meeting to order at 2:10 p.m. and attendance was noted.

REVIEW OF CONCEPT RECOMMENDATIONS ADOPTED BY COMMITTEE TO DATE

Susan Anable, Senate Research Analyst, summarized the four concepts adopted by the Committee at its meeting on September 7, 1994 (handout filed with original minutes). She updated the members on the latest court developments dealing with the first two concepts by referring to a summary of a decision by the Special Master on the *de minimis* issue in the San Pedro River water shed and a proposed amendment to Rule 31 of the Arizona Supreme Court Rules dealing with nonattorney representation in the adjudications (filed with original minutes).

DISCUSSION OF ADDITIONAL PROPOSALS

Steve Olson, Legislative Liaison, Department of Water Resources (DWR), recommended a number of concepts to streamline the adjudications process and clarify the surface water code (filed with original minutes). He noted that the concepts were identified through a series of meetings of a broad-based group of interested parties, including DWR, Salt River Project, mining communities, agricultural communities and cities.

Senator Goudinoff commented on the vagueness of the document. Senator Buster noted that the concepts establish a framework that can be expanded as the legislation is developed.

PUBLIC TESTIMONY

Mary Ann Black, representing herself, indicated that she is a rancher in southeastern Arizona. She offered support for the concepts presented by Mr. Olson as a means to help the agricultural industry. She also suggested the need to address the development of future water rights for stockponds and wildlife watering systems as more appropriate water shed management techniques are developed. Ms. Black urged consideration for long-time water right holders who ceased use of their water rights for a period of time. She also suggested that the Committee consider situations such as hers in which she filed her grandfathered rights for the hand dug wells and stockponds on her property but was unable to financially respond to all of the claims against her water rights.

Eugene Husted, representing St. David Irrigation District, said he supports the concepts that were mentioned, and he emphasized the need to resist efforts to weaken the provisions. He addressed the issue of the groundwater supply in the Sierra Vista area and the debate over the availability and adequacy of the water supply, which has created problems concerning water rights in the adjudications in that area. Representative Bowers commented on the relationship between the surface water flows of the San Pedro River and the groundwater supply in Sierra Vista relative to the 100-year supply of water.

John Smallhouse, representing Bayless and Berkalew Company, indicated his agreement with Senator Springer's previous proposal concerning *de minimis* water uses.

Lucille Baker, representing herself, emphasized that many small water users need a definition of terms and how the terms reflect upon the water issues. She noted also that great care must be taken when committees are appointed or they may become self-serving and neglect other water users. Ms. Baker contended that mixing aquifers and recharging may create unforeseen problems in the future, as current problems have resulted from actions that were acceptable in the 1940s.

David Brown, representing Cattlegrowers' Association and various farmers and ranchers, said he supports the concepts presented by Mr. Olson. He specifically mentioned the importance of legislation to resolve water rights ownership issues on Federal land and to afford historical water users, who have not complied with technical water filing requirements, the opportunity to validate their right to the use of the water. Mr. Brown pointed out that the Special Master's opinion on the *de minimis* issue in the Gila River system is not consistent with an opinion issued a year ago for the Silver Creek water

shed. Consequently, Mr. Brown emphasized the need for *de minimis* legislation based on the proposals submitted by Senator Springer at the last meeting. In a discussion with Representative Bowers of the financial provisions of the adjudications, Mr. Brown said he agrees that the support of the process should be shifted to the Legislature through the general appropriative process and that additional fees should not be imposed on claimants.

Doug Nelson, representing Gila Bend-Dendora Valley Water Users' Association, said he supports an expedited process and agrees that small water users do not belong in the adjudications. However, he expressed concern about the recommendation in the concepts presented by Mr. Olson to allow the Legislature to specify the effect that changes in water use have on the maintenance of water rights, adding that such action could jeopardize the entire adjudications. Representative Bowers asked Mr. Nelson if he had a concern with the concept concerning the conversion of agricultural use of water to a domestic or municipal use without following correct administrative procedures, to which Mr. Nelson answered affirmatively.

William Swan, U.S. Department of the Interior, pointed out that the meetings held for the purpose of drafting the concepts excluded the federal government and the Indian tribes. He also commented on a letter (filed with original minutes) to the Idaho State Attorney General in which the U.S. Department of Justice expressed its concerns about proposed legislation relating to Idaho's adjudication. Mr. Swan suggested that Idaho's situation is an example of how the process can deteriorate as a result of certain legislative actions.

Mr. Swan noted that the federal government has been supportive of the *de minimis* issue but is cautious about the quantity set by the Committee. He urged the members to take heed of the Special Master's opinion on the *de minimis* standard, and he suggested that a separation of powers problem may exist if the Legislature changes a standard quantified by the judiciary.

Mr. Swan addressed the concepts presented by Mr. Olson, pointing out that the water in question is a public resource which is managed by the State somewhat in trust for its citizens. He acknowledged that the Committee may want to clarify forfeiture and abandonment of water rights, but he contended that elimination of those concepts would result in a monopolization of water that was not intended under the prior appropriation doctrine. Mr. Swan expressed concern about the general proposals in the concept paper which affect how rights are adjudicated and quantified and that may offer the non-Indian claimants an advantage in the process. He suggested that the Committee may be inviting a due process dispute from the federal government and the tribes, as well as federal legislation to give similar advantages to Indians. Mr. Swan acknowledged that water rights ownership on public land is a complex concern, and he urged the Committee to consult federal land managers before taking action on the issue. In response to the earlier

discussion about the San Pedro River, Mr. Swan explained that the federal government has taken on the burden of time and expense to engage the local community in settlement negotiations in an effort to maintain the stream for the Indians downstream and the others who live in the area.

In further addressing the concept paper, Mr. Swan agreed that the point concerning the special master is appropriate, and he contended it would be helpful to permit DWR to propose the attributes of water rights similar to the situation in New Mexico. He indicated he did not have a problem with the concept permitting water users to expeditiously file a late statement of claim, and he acknowledged that the creation of a settlement judge would be helpful. Mr. Swan observed that public trust issues are not a Federal concern, and he agreed that legislative oversight of the adjudications process would be helpful.

Senator Buster pointed out that the Indian tribes have had just as much opportunity to register their concerns and recommendations during the hearing process as anyone else. Mr. Swan pointed out that tribal input was not sought for the numerous meetings held by interested parties to discuss proposed legislation.

Representative Bowers asked if the Department of the Interior or any other federal agency has attempted to make a written or in-depth response to any of the Committee's actions. Mr. Swan said he was not aware of any response other than his appearances before the Committee. He noted that the issue of water rights on public land is not actually an adjudications matter, but he indicated that the Department of the Interior is planning to meet with DWR and federal land managers to discuss the issue.

Representative Bowers contended that the interest of the federal government is to increasingly tie public trust values with the water adjudications process, which federalizes the issue. He asked Mr. Swan to comment on the concept pertaining to legislation clarifying that public trust values are not appropriately asserted through the adjudications. Mr. Swan said he has been in charge of litigating water rights in Arizona on behalf of the Department of the Interior for more than 15 years, and he stated that he has never been asked to join public trust doctrine to the federal government's water rights.

Representative Bowers asked Mr. Swan if he was denying that it is a federal interest to tie public trust values with the water adjudications process. Mr. Swan responded that he has not been told that the issue is a priority for the Department of the Interior. Representative Bowers contended that the issue should not be a priority for the State either, and Mr. Swan acknowledged that the Legislature decides the priorities for the State. Mr. Swan clarified that his comments referred to the public trust doctrine as specifically enunciated by the California Supreme Court in a recent decision and not yet applicable in Arizona. He noted that public trust values and public trust doctrine may be construed as different labels, but

he reiterated that public trust doctrine is not a matter of priority with either the Department of the Interior or the Department of Justice.

Representative Bowers said he believes that in every meeting he has brought up the issue of the effects of the Committee's actions on the tribes and asked if any tribal representatives were present to address those issues. Representative Bowers asked if the Department of the Interior recognizes that water usage and the legal oversight of water in the West is still handled generally under State law, to which Mr. Swan answered affirmatively. However, Mr. Swan said there are some minor exceptions in which a federal judge may have jurisdiction over a decreed area and may represent the authority for that particular water shed.

Representative Bowers asked how the present Department of the Interior position that ownership of land is equal to ownership of water blends with the idea of beneficial use. Mr. Swan offered to make a more in-depth presentation on the issue at a later time. However, he emphasized that the question concerning public land is how the land can be best managed for the public generally in a manner that does not represent a monopolization by one individual.

There was a further discussion of the issues concerning the San Pedro River in the Sierra Vista area between Senator Arzberger and Mr. Swan. Senator Arzberger noted that under the Groundwater Management Act the State has the authority to manage that water and allow usage to people who used the water previously. He also pointed out that since subflow has not been defined in statute it is not known whether pumpage of the water in the Sierra Vista area is affecting the flow of the river.

Mr. Swan said the federal government contends that the pumping is of such a quantity that the stream is adversely affected. He pointed out that the U.S. Supreme Court decision in Cappaert v. U.S. dealt with the preservation of federal surface water rights in terms of adjacent groundwater pumping. Mr. Swan said the government believes that many people in the area do not have the right to pump as much as they do and that the government's senior rights are affected. He added that the government is attempting to negotiate solutions rather than spend years litigating the issue.

Senator Arzberger contended the federal government does not have the necessary scientific data to back up its views concerning the San Pedro River. Mr. Swan stated that the government has spent a significant amount of money in an attempt to understand the hydrology of the San Pedro River. He added that the government believes it has adequate data to indicate the pumping is affecting the river.

Senator Buster noted that the following people in attendance indicated it was not necessary for them to address the Committee: Michael Brophy, representing Roosevelt Water Conservation District and Carlos Ronstadt, representing Magma Copper Company. Senator Buster also noted that Kelly Barr, representing Salt River Project, is in support of the concept paper.

ADOPTION OF FINAL RECOMMENDATIONS

Senator Goudinoff asked if a representative from the Attorney General's Office was present to testify, to which Senator Buster indicated that no one had requested to testify. In further response to Senator Goudinoff, Senator Buster noted that the Committee will not address the issues concerning public trust land or the transportability of water rights. Mr. Brown explained that he has been working with the State Land Department on the many issues that revolve around State land and State trust, adding that he hopes to submit separate recommendations on those issues. He noted that ownership of water rights on federal land is an area in dispute that needs to be resolved immediately. However, he observed that the public trust doctrine does not pertain to the adjudications process as reflected in the concept paper.

Representative Conner moved that the Committee approve the concepts to amend the adjudication statutes and the surface water code as presented in the document dated November 22, 1994. The motion CARRIED by voice vote.

The meeting adjourned at 3:29 p.m.

Respectfully submitted,



Janice C. Stell
Committee Secretary

(Attachments and tapes are on file in the Office of the Secretary of the Senate.)

MEETING OF COMMITTEE ON

Hearing Room No. _____

DATE _____

TIME _____

NAME
Please Print

REPRESENTING

BILL NO.

<u>NAME</u> Please Print	<u>REPRESENTING</u>	<u>BILL NO.</u>
CHARLOTTE BENSON	ARIZONA A.G. OFFICE	
JAN HEAVELL	" " "	
Joe Clifford	State - Atty Gen	
Jerry Haggard	Phelps Dodge	
JOHN SCHUBER	BUCKEYE INNOVATION CO	
MARILYN D. CAGE	City of Goodyear	
Jerry Linser	AZ DWR	
STEVE ERB	"	
MICHAEL PEARCE	"	
DAVID SMITH	"	
Isabelle B. Baker	Self	
CYNTHIA HAGLIN	CITY OF CHANDLER	
VIN DALAMAN	CITY OF PHOENIX	
Lauren J. CASTER	Arizona Mining Assn	
Jau Lanay	ASCO	
Cynthia Stefanovic	"	
ROBERT HOFFMAN	MAGMA COPPER CO.	
BAS AJA	AZ CATTLEMEN'S	
Paul Brown	"	
Cynthia Chandler	Phelps Dodge & ASARCO	
Kevin M. Wood	Phelps Dodge & ASARCO	
Paul Brown	NAVAJO NATION	
JEFF CROCKETT	SANDBS INVESTMENT CO.	
CARLOS RONSTADT	MAGMA COPPER COMPANY	
PAUL BRICK	POMERENE WATER USERS ASSN	
Frederic Huster	St. David Investment Dist	

Don Johnson

Mary Ann Blath

ROY STEGALL

DON JOHNSON

Mike Biggy

John K. Smallhouse

Ron ROYER

Ray Wrobley

Valu K-lan

De Alate

John Miller

Doug C. Nelson

Tom Lane

Kelley Barr

Lee Storey

Stacy Price

STEVE BURG

Bill Swan

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Self

AZ Rock Prod Assn.

Rufus Isaacson for C.R.W.C.

RWCO

Bayless & Berkaler Co.

Verde Valley Water Users

Verde Valley Water Users

SRP

HBC, WGA, VGA

Mesa

AZ Cattle Growers Assoc.

SRP

Flagstaff + Rio Rico Properties

Tucson

CITY OF MESA

U.S. Dept of the Interior