

10TH ANNUAL
WINTER WATERSHED CONFERENCE
FEBRUARY 22-24, 2017 – SNOWFLAKE, AZ

GENERAL STREAM ADJUDICATION UPDATE

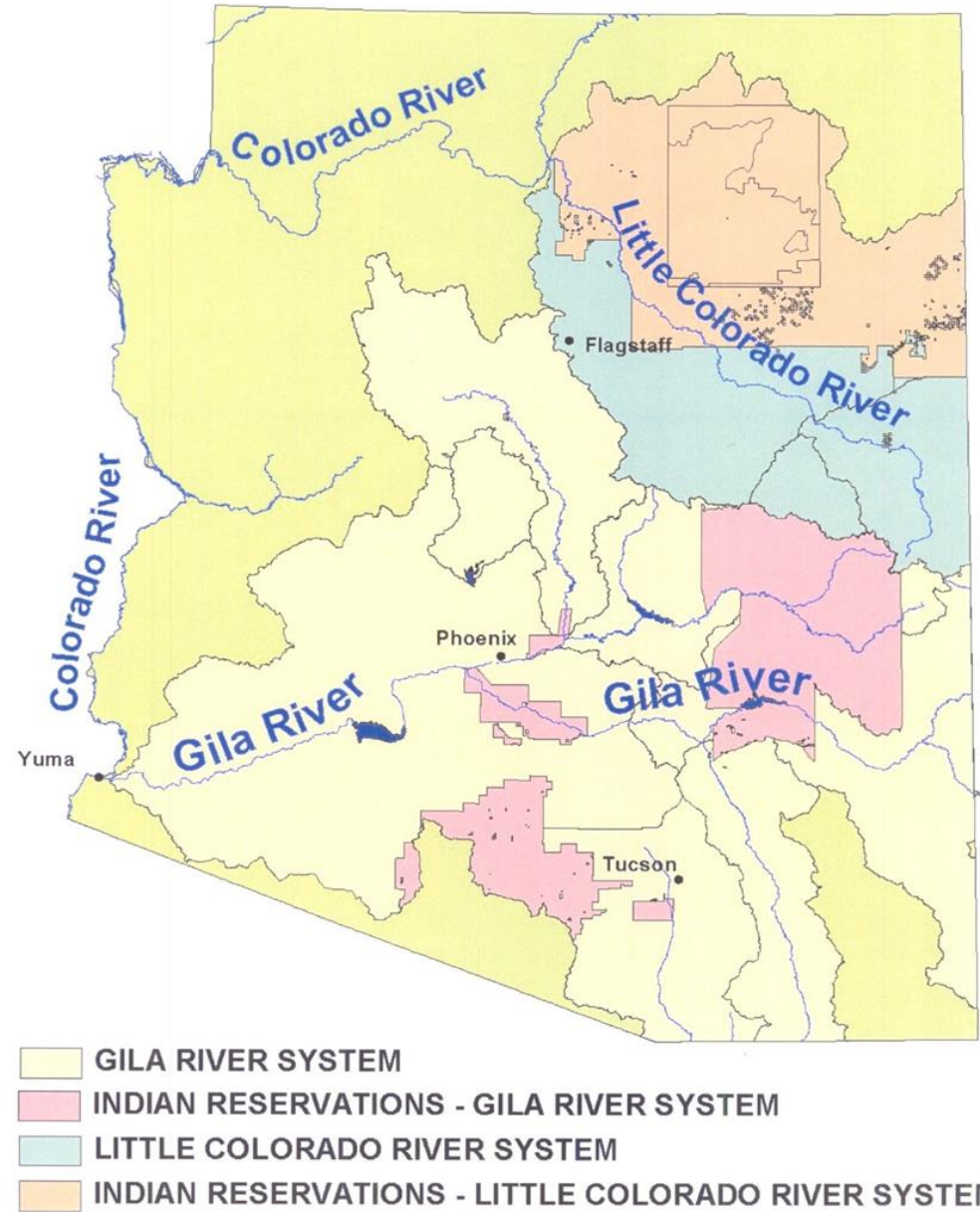
ADJUDICATION INFORMATION SOURCE

1. [HTTPS://WWW.SUPERIORCOURT.MA
RICOPA.GOV/SUPERIORCOURT/GEN
ERALSTREAMADJUDICATION/](https://www.superiorcourt.ma.gov/superiorcourt/generalstreamadjudication/)

ORIGINS OF THE ADJUDICATIONS

- PRIOR TO THE 1970S, THERE WERE NO COMPREHENSIVE ADJUDICATIONS OF WATER RIGHTS IN EITHER THE GILA OR LITTLE COLORADO WATERSHEDS.
- GILA INITIATION (1974).
- LCR INITIATION (1978).

ARIZONA STREAM ADJUDICATIONS



CURRENT STATUS OF ADJUDICATIONS

- GILA RIVER ADJUDICATION. MORE THAN 85,000 SEPARATE STATEMENTS OF CLAIMANT (SOCS) HAVE BEEN FILED BY NEARLY 30,000 CLAIMANTS.
- LITTLE COLORADO RIVER ADJUDICATION. MORE THAN 14,000 SOCS WERE FILED BY NEARLY 5,000 CLAIMANTS.
- NONE OF THE CLAIMS HAVE BEEN RESOLVED OTHER THAN THROUGH INDIAN WATER RIGHT SETTLEMENTS, ETC.

CURRENT STATUS OF ADJUDICATIONS

- JUDGE MARK H. BRAIN, MARICOPA COUNTY SUPERIOR COURT, PRESIDES OVER BOTH ADJUDICATIONS.
- SUSAN WARD HARRIS WAS APPOINTED AS SPECIAL MASTER FOR BOTH ADJUDICATIONS, WITH HER TERM EFFECTIVE AS OF JULY 20, 2015.

SIGNIFICANT DECISIONS

JURISDICTION OF ARIZONA COURTS.

- ARIZONA COURTS HAVE JURISDICTION TO ADJUDICATE WATER RIGHTS OF INDIAN TRIBES. *Arizona v. San Carlos Apache Tribe*, 463 U.S. 545 (1983); *United States v. Superior Court*, 697 P.2D 658 (1985).
- DECISIONS WERE BASED ON CONGRESSIONAL WAIVER OF SOVEREIGN IMMUNITY (MCCARRAN AMENDMENT) AND THE ARIZONA CONSTITUTION.
- IT TOOK MORE THAN A DECADE TO RESOLVE JURISDICTIONAL ISSUES FOLLOWING THE INITIAL PETITIONS TO ADJUDICATE THE SALT RIVER

ARIZONA SUPREME COURT INTERLOCUTORY REVIEW DECISIONS – ISSUE 1

GILA I, 830 P.2D 442 (1992) – SERVICE OF PROCESS.

- PROPERTY OWNERS.
- WELL OWNERS; CLAIMANTS.
- PUBLIC BODIES.
- RESULTS - MORE THAN 849,000 SUMMONS, PLUS NOTICE BY PUBLICATION IN VARIOUS NEWSPAPERS.

ARIZONA SUPREME COURT INTERLOCUTORY REVIEW DECISIONS – ISSUE 2 - SUBFLOW

PRIOR CASES.

- GILA II, 857 P.2D 1236 (1993) – REJECTS “50%/90-DAY TEST”
- GILA IV, 9 P.3D 1069 (2000) – APPROVES SATURATED FLOODPLAIN HOLOCENE ALLUVIUM AS SUBFLOW ZONE.

ONGOING. SUBSEQUENT PROCEEDINGS BEFORE THE SPECIAL MASTER AND TRIAL COURT SINCE 2002 (DISCUSSED LATER).

ARIZONA SUPREME COURT INTERLOCUTORY REVIEW DECISIONS – ISSUES 4 AND 5

GILA III, 989 P.2D 739 (1999).

- APPLICATION.
- INVOCATION OF FEDERAL LAW.
- MINIMAL NEED.

ARIZONA SUPREME COURT INTERLOCUTORY REVIEW DECISIONS – ISSUE 3

GILA V, 35P.3D 68 (2001).

STANDARD FOR QUANTIFYING INDIAN RESERVED WATER RIGHTS:

- PURPOSE OF RESERVATION.
- MINIMAL NEED.
- QUANTIFICATION: PRACTICAL AND ECONOMICALLY SOUND.

OTHER FEDERAL RESERVATIONS (E.G., NATIONAL FORESTS, ETC.):

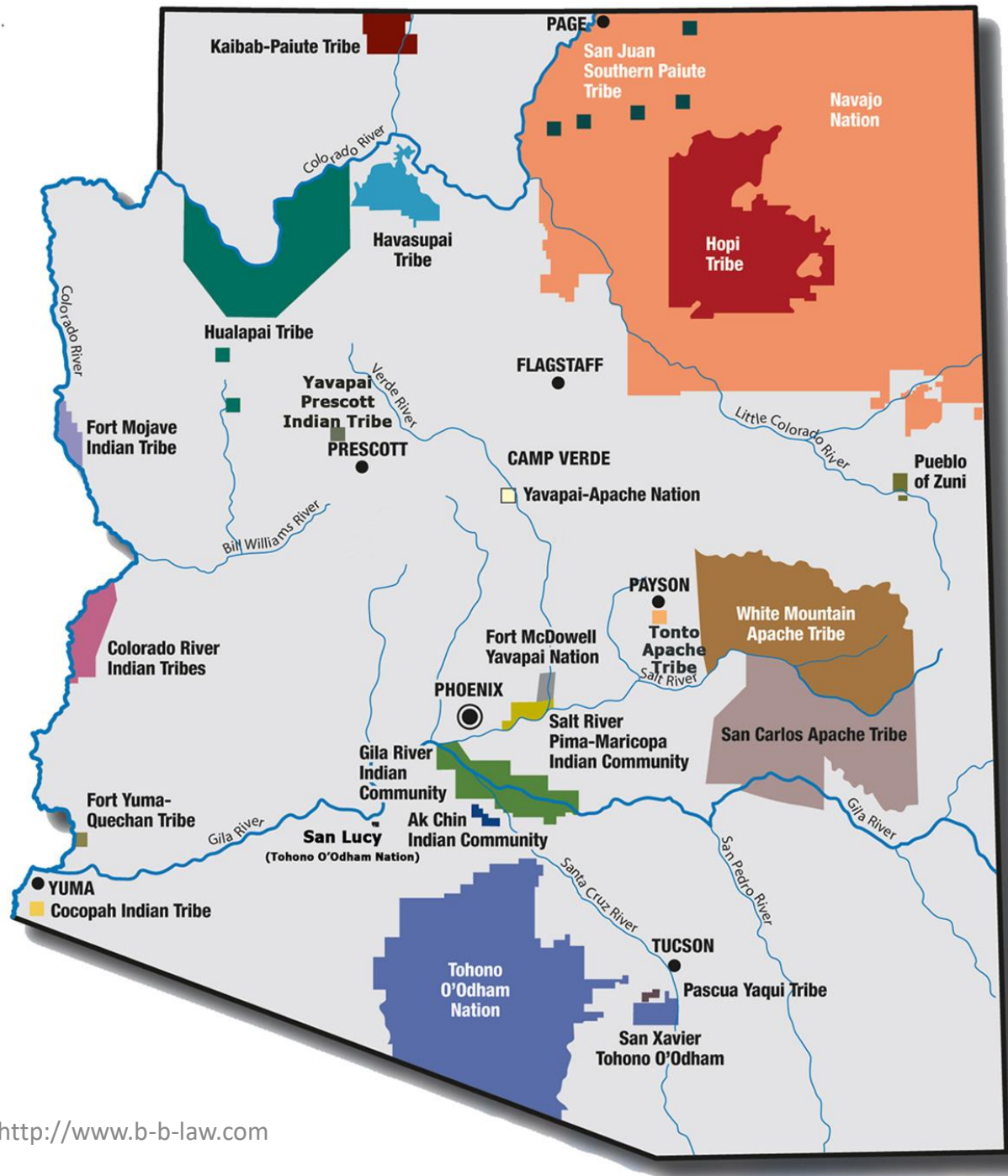
- PRIMARY PURPOSE.
- ESSENTIAL WATER NEEDS.
- SECONDARY PURPOSE(S).

VERDE RIVER HEARINGS - SUBFLOW

- SRP FILED SUITS AGAINST LANDOWNERS ALONG THE VERDE RIVER ALLEGING ILLEGAL DIVERSION OF SURFACE WATER, EITHER BY DIRECT DIVERSION OR BY PUMPING SUBFLOW THROUGH WELLS.
- NBJ RANCH.

INDIAN WATER RIGHT SETTLEMENTS

- OVERVIEW – RISK TO STATE LAW-BASED WATER RIGHT HOLDERS.
- SETTLEMENTS SINCE THE YEAR 2000:
 - 2003 – ZUNI INDIAN TRIBE WATER RIGHTS SETTLEMENT ACT.
 - 2004 – GILA RIVER INDIAN COMMUNITY (ARIZONA WATER SETTLEMENT ACT).
 - 2010 – WHITE MOUNTAIN APACHE TRIBE WATER RIGHTS QUANTIFICATION ACT (PUBLIC LAW 111-291).
 - BILL WILLIAMS RIVER WATER RIGHTS SETTLEMENT ACT OF 2014
- WMAT SETTLEMENT HIGHLIGHTS.



INDIAN WATER RIGHT SETTLEMENTS

POTENTIAL SETTLEMENTS.

- YAVAPAI-APACHE INDIAN RESERVATION.
- NAVAJO NATION/HOPI TRIBE.
- HUALAPAI TRIBE (AS TO REMAINING CLAIMS; PARTIAL SETTLEMENT REACHED IN 2014).

BASIC ELEMENTS OF A SETTLEMENT.

- MOST SETTLEMENTS INVOLVE NEGOTIATED QUANTITIES OF WATER MADE AVAILABLE TO THE SETTLING TRIBE, PLUS FEDERAL FUNDING TO CONSTRUCT SPECIFIC WATER PROJECTS.
- IN RETURN, THE SETTLING TRIBE AND THE U.S., AS TRUSTEE, WAIVE CLAIMS TO ANY LARGER QUANTITY OF WATER, GIVING ALL STATE LAW-BASED CLAIMANTS MORE

NON-INDIAN WATER RIGHT SETTLEMENTS

- IN MARCH 2011, A NUMBER OF PARTIES PROPOSED A SPECIAL PROCEDURAL ORDER FOR NON-INDIAN SETTLEMENTS. THIS WAS LATER WITHDRAWN, AS NOTED IN THE COURT'S SEPTEMBER 18, 2012 ORDER.
- NEW EFFORTS FOR NON-INDIAN SETTLEMENTS HAVE BEEN SPEARHEADED BY THE KYL CENTER FOR WATER POLICY AND THROUGH THE OFFICE OF JOHN.

NON-INDIAN FEDERAL RESERVED RIGHTS

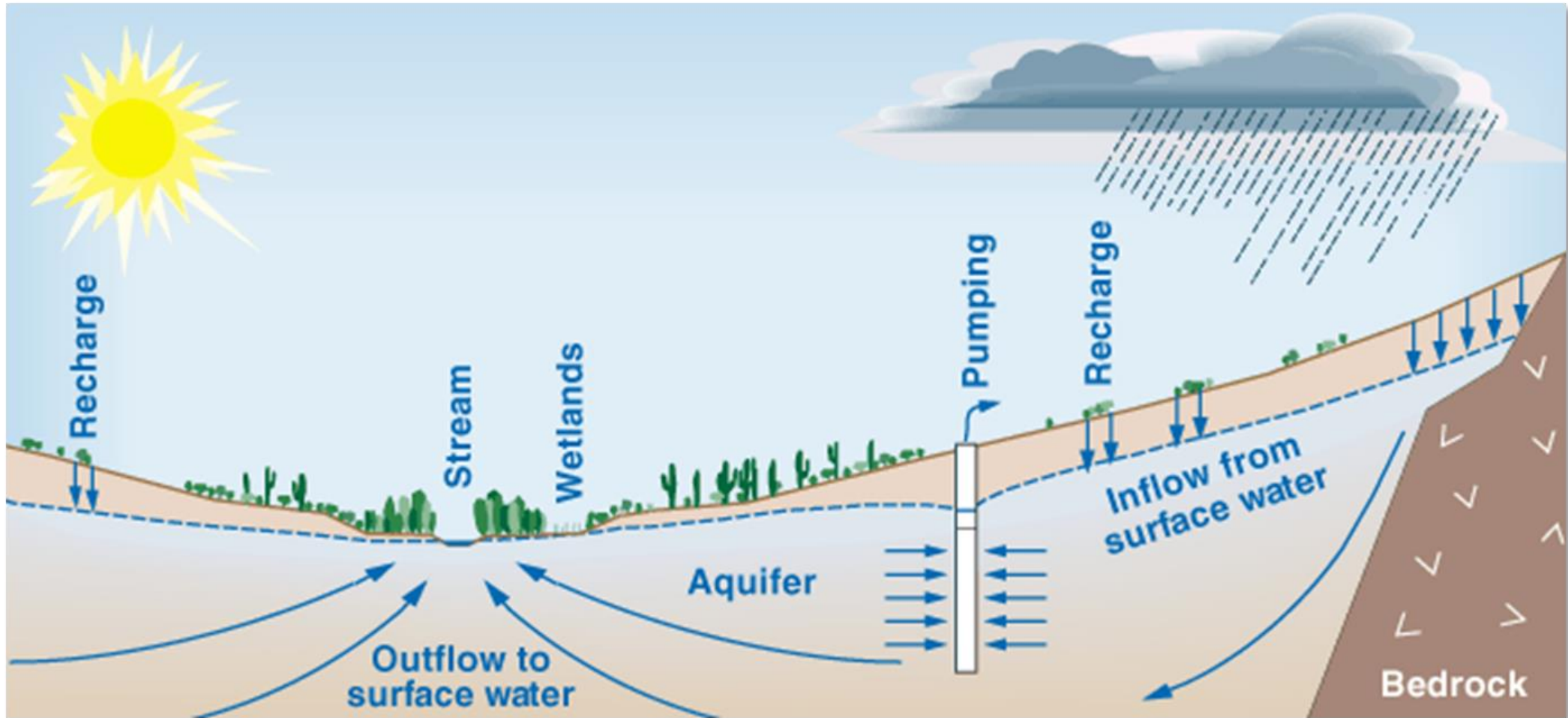
- 48% OF LAND IN ARIZONA IS OWNED AND/OR CONTROLLED BY THE FEDERAL GOVERNMENT.
- SPECIAL CONTESTED CASES ARE CURRENTLY ACTIVE IN THE GILA ADJUDICATION, ALL OF WHICH ADDRESS FEDERAL NON-INDIAN LANDS:
 - ARAVAIPA WILDERNESS AREA
 - REDFIELD CANYON
 - SAN PEDRO RIPARIAN NATIONAL CONSERVATION AREA (SPRNCA)
 - FORT HUACHUCA

SUBFLOW

MWD VS. SOUTHWEST COTTON (1931).

- AZ SUPREME COURT REAFFIRMED THE PRESUMPTION THAT UNDERGROUND WATER IS PERCOLATING AND NOT APPROPRIABLE; BURDEN OF PROOF IS “CLEAR AND CONVINCING EVIDENCE.”
- THE COURT DEFINED “SUBFLOW” AS “THOSE WATERS WHICH SLOWLY FIND THEIR WAY THROUGH THE SAND AND GRAVEL CONSTITUTING THE BED OF THE STREAM, OR THE LANDS UNDER OR IMMEDIATELY ADJACENT TO THE STREAM, AND ARE THEMSELVES A PART OF THE SURFACE STREAM”

SUBFLOW



GILA II (1993).

- ARIZONA SUPREME COURT REAFFIRMS *Southwest Cotton* AND ITS PRESUMPTION AND BURDEN OF PROOF: “IT IS TOO LATE TO CHANGE OR OVERRULE THE CASE.”
- SUPREME COURT ALSO EMPHASIZES THE IMPORTANCE OF ACCURATE TESTS TO DETERMINE WHETHER A WELL IS PUMPING SUBFLOW: “USE OF A FLAWED TEST ... COULD CAUSE SIGNIFICANT INJUSTICE”

POST-GILA II PROCEEDINGS.

- JUNE 30, 1994 ORDER – JUDGE GOODFARB ADOPTS CRITERIA FOR IDENTIFYING SUBFLOW ZONE AND IDENTIFIES IT AS “THE SATURATED FLOODPLAIN HOLOCENE ALLUVIUM.”

GILA IV (2000).

- THE ARIZONA SUPREME COURT REVIEWED AND APPROVED JUDGE GOODFARB'S JUNE 30, 1994 ORDER "IN ALL RESPECTS."
- THE COURT REAFFIRMS *Southwest Cotton* AND *Gila II*, STATING, "IT IS CRITICAL THAT ANY TEST USED FOR DETERMINING THE BOUNDARIES OF A SUBFLOW ZONE BE AS ACCURATE AND RELIABLE AS POSSIBLE ... USE OF AN INACCURATE TEST WOULD NOT SATISFY THE CLEAR AND CONVINCING EVIDENTIARY STANDARD."

JUDGE BALLINGER'S 2005 ORDER.

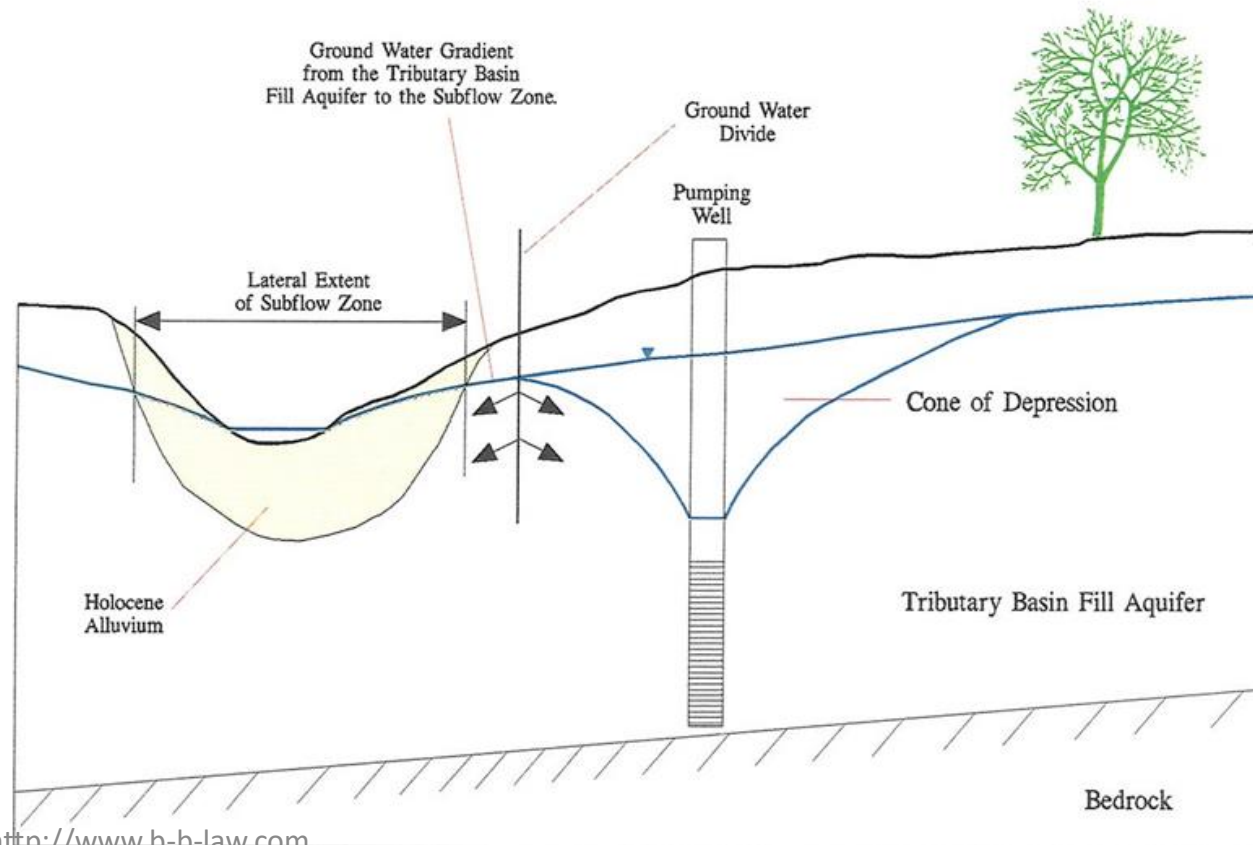
- ADWR SHOULD PRESUME THE ENTIRE FLOODPLAIN HOLOCENE ALLUVIUM IS SATURATED.
- ADWR SHOULD EVALUATE SUBFLOW ZONE BASED ON “PREDEVELOPMENT CONDITIONS.”
- SUBFLOW ZONE CAN EXIST ONLY “ADJACENT AND BENEATH A PERENNIAL OR INTERMITTENT STREAM AND NOT AN EPHEMERAL STREAM.”
- THE ZONE “MUST BE SATURATED BECAUSE THE NEED FOR A HYDRAULIC CONNECTION BETWEEN THE STREAM AND THE SUBFLOW.”
- ADWR MUST USE “AN ACCURATE AND RELIABLE METHOD FOR DETERMINING QUANTIFIABLE IMPACTS” ON THE SUBFLOW ZONE FROM PUMPING WELLS AND TO EXCLUDE *de minimis* IMPACTS.

SUBFLOW- CONE OF DEPRESSION

CASE 1

Initial Condition: Ground Water Gradient from the Tributary Basin Fill Aquifer to the Subflow Zone.

Final Condition: Ground Water Divide Between the Well and the Subflow Zone.



LCR ADJUDICATION DEVELOPMENTS

HOPI PRIORITY CONTESTED CASE

- ON MARCH 19, 2008, THE COURT REFERRED TO THE SPECIAL MASTER THE “QUESTION OF WHETHER THE CLAIMS TO WATER RIGHTS ASSERTED BY, OR ON BEHALF OF THE HOPI TRIBE, IN THIS ADJUDICATION HAVE A PRIORITY OF ‘TIME IMMEMORIAL’ OR ARE OTHERWISE SENIOR TO THE CLAIMS OF ALL OTHER CLAIMANTS.” THE SPECIAL MASTER ENTERED A CASE INITIATION ORDER AND SET SEVEN ISSUES FOR BRIEFING.

HOPI PRIORITY CONTESTED CASE, CONTINUED

- RESPONSIVE AND REPLY BRIEFS CONCERNING THE SEVEN ISSUES WERE FILED.
- IN APRIL 2012, THE HOPI TRIBE FILED A MOTION FOR SUMMARY JUDGMENT ON HOPI WATER RIGHTS UNDER THE TREATY OF GUADALUPE HIDALGO. RESPONSES HAVE BEEN FILED.
- HEARINGS ON THE MOTIONS WERE HEARD IN OCTOBER 2012.
- THE SPECIAL MASTER ISSUED HIS REPORT ON APRIL 24, 2013.
- ON JULY 1, 2013 PARTIES FILED THEIR OBJECTIONS TO THE SPECIAL MASTER'S REPORT

HOPI PRIORITY CONTESTED CASE, CONTINUED

- IN JANUARY 2014, A HEARING WAS HELD ON THE OBJECTIONS TO THE SPECIAL MASTER'S REPORT. A DECISION IS PENDING.
 - ADWR PUBLISHED THE FINAL HYDROGRAPHIC SURVEY REPORT ON THE HOPI RESERVATION IN 2015 AND OBJECTIONS WERE FILED ON JUNE 15, 2016.
 - BY ORDER DATED APRIL 11, 2016, THE SPECIAL MASTER ADVISED ADWR THAT THE COURT WILL REQUEST THE "HOPI II HSR" COVERING HOPI INDUSTRIAL PARK AND HOPI RANCHES AS THE CASE PROGRESSES.
 - A STATUS CONFERENCE HAS BEEN SET FOR JULY 12, 2016
- REGARDING THE UNITED STATES' ACQUISITION DATES OF

HOPI PRIORITY CONTESTED CASE, CONTINUED

- DECISION ON MOTION FOR RECONSIDERATION PENDING
- DECISION ON REPORT OF SPECIAL MASTER PENDING
- JUNE 16, 2017
DUE: STATUS REPORT FOR AMENDED STATEMENTS OF CLAIMANT FOR OFF RESERVATION LAND OWNED BY OR IN TRUST BY THE HOPI TRIBE
- DECEMBER 15, 2017
DUE: AMENDED STATEMENTS OF CLAIMANT FOR OFF RESERVATION LAND OWNED BY OR IN TRUST BY THE HOPI TRIBE

IN RE HOPI RESERVATION HSR CV6417-203

- MARCH 6, 2017
DUE: DISCLOSURE STATEMENT AND EXPERT REPORTS FROM THE UNITED STATES FOR FUTURE WATER USES
- MARCH 6, 2017
DUE: SUPPLEMENTAL DISCLOSURE STATEMENT AND EXPERT REPORTS FROM THE HOPI TRIBE FOR PAST AND PRESENT WATER USES
- JUNE 16, 2017
DUE: SUPPLEMENTAL DISCLOSURE STATEMENT AND EXPERT REPORTS FROM THE HOPI TRIBE FOR FUTURE WATER USES
- SEPTEMBER 1, 2017
DUE: DISCLOSURE STATEMENTS AND EXPERT REPORTS FROM ALL OTHER LITIGANTS FOR PAST AND PRESENT WATER USES
- NOVEMBER 3, 2017
DUE: REBUTTAL EXPERT REPORTS FROM THE HOPI TRIBE AND THE UNITED STATES FOR PAST AND PRESENT WATER USES

IN RE HOPI RESERVATION HSR (CONTINUED)

- DECEMBER 8, 2017
DUE: DISCLOSURE STATEMENTS AND EXPERT REPORTS FROM ALL OTHER LITIGANTS FOR FUTURE WATER USES
- FEBRUARY 15, 2018
DUE: REBUTTAL EXPERT REPORTS FROM THE HOPI TRIBE AND THE UNITED STATES FOR FUTURE WATER USES
- MARCH 7, 2018
DISCOVERY DEADLINE FOR PAST AND PRESENT WATER USES
- SEPTEMBER 1, 2018
DISCOVERY DEADLINE FOR FUTURE WATER USES
- APRIL 27, 2018
DUE: DISPOSITIVE MOTIONS RELATED TO PAST AND PRESENT WATER USES
- OCTOBER 15, 2018
DUE: DISPOSITIVE MOTIONS RELATED TO FUTURE WATER USES
- SEPTEMBER 10, 2018
TRIAL BEGINS ON PAST AND PRESENT WATER USES
- FEBRUARY 15, 2019
TRIAL BEGINS ON FUTURE WATER USES

NAVAJO NATION'S WATER RIGHTS

- NEW CASE SINCE AUGUST 11, 2016: **IN RE NAVAJO NATION CV6417-300**
- JANUARY 12, 2018
DUE: NAVAJO NATION SHALL SUBMIT HISTORICAL, ANTHROPOLOGICAL, ARCHEOLOGICAL AND ETHNOGRAPHIC INFORMATION IN SUPPORT OF PRIORITY DATES FOR ON-RESERVATION WATER USES
- JUNE 1, 2018
DUE: NAVAJO NATION AND THE US TO AMENDED STATEMENT OF CLAIMANT FOR HISTORIC, PRESENT AND FUTURE STOCK PONDS, STOCK AND WILDLIFE WATERING, DOMESTIC, COMMERCIAL, MUNICIPAL AND INDUSTRIAL WATER USES.
- JANUARY 7, 2019
DUE: ADWR SHALL ISSUE A PRELIMINARY HSR ON HISTORIC AND PRESENT USES.
- APRIL 8, 2019
DUE: COMMENTS ON PRELIMINARY HSR
- **SEPTEMBER 30, 2019**
DUE: ADWR FINAL HSR

NAVAJO NATION'S WATER RIGHTS

- JANUARY 7, 2020
DUE: NAVAJO NATION AND THE US SHALL FILE AN AMENDED STATEMENT OF CLAIMANT FOR HISTORIC, PRESENT AND FUTURE CULTURAL, UNIQUE TRIBAL, RECREATIONAL, FISH, WILDLIFE AND CONSERVATION, MINING, HEAVY INDUSTRIAL/COMMERCIAL USES ON THE NAVAJO RESERVATION
- MARCH 30, 2020
DUE: OBJECTIONS TO FINAL HSR
- MAY 15, 2020
DUE: CLAIMANTS' DISCLOSURE STATEMENTS AND EXPERT REPORTS
- AUGUST 31, 2020
OBJECTORS' DISCLOSURE STATEMENTS AND EXPERT REPORTS
- MAY 14, 2021
DUE: DISCOVERY CONCLUDES
- JUNE 1, 2021
DUE: NAVAJO NATION AND THE US SHALL FILE AMENDED STATEMENTS OF CLAIMANT FOR HISTORIC, PRESENT AND FUTURE IRRIGATION USES ON THE NAVAJO NATION AND ALL WATER USES ON LAND IN THE LITTLE COLORADO RIVER BASIN **OUTSIDE THE BOUNDARIES OF THE NAVAJO NATION** HELD IN FEE BY THE NAVAJO NATION OR IN TRUST BY THE UNITED STATES
- JANUARY 10, 2022
TRIAL BEGINS

OTHER ISSUES

THE SANDS GROUP OF CASES IN THE GILA ADJUDICATION PROCEEDINGS

SPECIAL MASTER'S 1994 & 1995 REPORTS ADDRESSED *de minimis* USES FOR -

- STOCKWATERING USES
- STOCKPONDS
- DOMESTIC USES
- NEW FILINGS ON CASE-BY-CASE BASIS, NOT AUTOMATICALLY *de minimis*

SANDS GROUP, CONTINUED

- ON SEPTEMBER 27, 2002 THE COURT ADOPTED THE MAJORITY OF THE SPECIAL MASTER'S DECISIONS AND MADE ADDITIONAL RULINGS WITH RESPECT TO FUTURE CLAIMS, FUTURE SUBFLOW DETERMINATIONS AND SEVER AND TRANSFER APPLICATIONS.
- IN 2008, ADWR BEGAN THE SUMMARY ADJUDICATION PROCESS APPROVED BY THE COURT IN 2002 FOR EXISTING *de minimis* USES THAT MEET THE SANDS CRITERIA.
- IN 2011 AND AT THE REQUEST OF THE SPECIAL MASTER, ADWR PREPARED A REPORT WITH GUIDANCE ON COMPLETING THE ADJUDICATION PROCESS.

SANDS GROUP, CONTINUED

- IN 2008, ADWR BEGAN THE SUMMARY ADJUDICATION PROCESS APPROVED BY THE COURT IN 2002 FOR EXISTING *de minimis* USES THAT MEET THE *Sands* CRITERIA.
- IN 2011 AND AT THE REQUEST OF THE SPECIAL MASTER, ADWR PREPARED A REPORT WITH GUIDANCE ON COMPLETING THE ADJUDICATION PROCESS.
- SPECIAL MASTER SUSAN HARRIS ORDERED THE INITIATION OF PHASE II OF THE SANDS CASES ON JUNE 17, 2016.

SANDS GROUP – 2016 PHASE II ORDER

- DUE TO THE PASSAGE OF TIME, FEE AND LEASEHOLD INTERESTS IN LANDS THAT ARE A PART OF THE *Sands* GROUP OF CASES NEED TO BE VERIFIED.
- ADWR IS TO ISSUE SUMMONS BY THE END OF JULY 2016.
- PROCEEDINGS TO DETERMINE OWNERSHIP OF WATER RIGHTS ON GOVERNMENT LANDS WILL COMMENCE. A STATUS CONFERENCE WAS HELD SEPTEMBER 8, 2016.
- PROPOSED ABSTRACTS OF *de minimis* WATER RIGHTS WILL BE PREPARED BY THE SPECIAL MASTER AFTER SEPTEMBER 2, 2016.

OTHER ISSUES

- STREAMLINING THE ADJUDICATION.
- CURRENT BILL AT AZ LEGISLATURE
- FUNDING ADWR AND A FULL-TIME JUDGE.

GENERAL STREAM ADJUDICATION CONCLUSIONS

WHERE DO WE GO FROM HERE?

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