

# **ASU**® **Kyl Center for Water Policy** **at Morrison Institute**

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## **Lessons from the Past: What Changes to Arizona's Adjudication and Surface Water Statutes Will Survive Constitutional Review?**



Cover photo: The Gila River flowing near Winkelman, Arizona.

# Introduction

In 1995, the Arizona Legislature amended the state's adjudication statutes and other statutes that underlie surface water rights in Arizona. Those amendments led to five years of legal challenges that all but derailed the adjudication proceedings. In the end, the state Supreme Court ruled that most of the amendments were unconstitutional.

The Legislature is again considering several measures that would impact surface water rights and the adjudications. To help inform the discussion of these proposals, the Kyl Center for Water Policy offers this analysis of what happened with the 1995 amendments.

## What is a stream adjudication?

Since there is not enough water to meet everyone's demands, a determination of priorities and a quantification of the water rights accompanying those priorities must be made. Obviously, such a task can be accomplished only in a single proceeding in which all substantial claimants are before the court so that all claims may be examined, priorities determined, and allocations made.<sup>1</sup>

Because water is a limited resource in Arizona, clarity about water rights is of utmost importance. Certainty about the water each user is entitled to is necessary for economic activities and to enable the possibility of transfers of water to new or different uses. Yet, a large number of Arizona water users will not have water certainty until completion of the state's two stream adjudications – judicial proceedings to determine all of the rights to use water from a “river system and source.”

In Arizona, surface water rights are determined by the doctrine of prior appropriation, which holds that the first user to divert water from a river or stream has a right that is senior to later diverters. The doctrine of prior appropriation is fundamentally a rule of economic security, protecting a water user's investment in developing a use for water (for instance, mining or farming) from being undone by another diverter, and facilitating preparedness for times of water scarcity. But for the doctrine to work, each water right must be defined by certain attributes, such as the date the right was initiated, the quantity that may be diverted, the point of diversion and the nature of the use.

Arizona law tasks the adjudication court, assisted by its technical expert, the Arizona Department of Water Resources (ADWR), with defining and cataloguing each and every surface water right and its special attributes.<sup>2</sup> This is what an adjudication is all about – describing and prioritizing all of the surface water rights in a watershed. And it is a daunting task. The state's larger stream adjudication encompasses Arizona's Gila Watershed and involves almost 40,000 parties and 85,000 claims of a right to use water from the Gila, Arizona's largest in-state river, and all its tributaries, including the Salt, the Agua Fria, the Verde, the Santa Cruz, and the San Pedro rivers – and all their tributaries as well. The state's other adjudication, encompassing the Little Colorado River and its tributaries, numbers around 6,000 parties and 14,000 water rights claims. Parties to the adjudications include large federal and state agencies, tribes, mines, utilities, farms, ranches, and small property owners. Over 90% of the claimants in the adjudications are asserting claims for under 250 acre-feet of water – relatively modest amounts.

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<sup>1</sup> *United States v. Super. Court*, 697 P.2d 658, 663 (Ariz. 1985).

<sup>2</sup> The court's authority over and the procedures for general stream adjudications are set forth in Arizona Revised Statutes §§ 45-251 through 45-264.

The adjudications have been cranking along since the mid-1970s. In the meantime, more and more water users have come to depend on the very supplies that are in dispute – and most of those water users are individuals or families who depend on that water for their households or small agriculture operations. Many of those water users rely on wells for their supplies. Wells pumping “subflow” – water that, if not pumped out, would run beside or beneath a riverbed – are subject to the adjudication; that is, they are legally the same as surface water diversions.<sup>3</sup> In certain areas of the Gila Adjudication, especially near the Upper San Pedro River and in the Verde Valley, thousands of wells have been drilled in recent decades. Many of these wells may be determined to be misappropriating subflow, and the users who depend on them may find their water curtailed once the adjudication is complete.<sup>4</sup>

## Can't we just amend the laws to clarify water rights and expedite the adjudications?

The simple answer is “no.” History tells us why.

One of ADWR's main tasks as the adjudication's technical expert is to create a Hydrographic Survey Report (HSR) for each river or stream. The HSR catalogues all water rights claims, diversion points and uses, delineates the subflow

zone and maps all the wells potentially pumping subflow. ADWR completed its first HSR in 1990, for Silver Creek, a watershed involving relatively few water rights claims and parties compared with other basins in the adjudications.<sup>5</sup> Nevertheless, parties filed a whopping 3,456 objections to the HSR.<sup>6</sup> Concerned about their capacity to defend their rights against such an onslaught of objections, some parties sought help from the Legislature.

The Legislature responded by amending the adjudication statutes to streamline proceedings and provide relief to the thousands of small claimants.<sup>7</sup>

The amendments:

- Redefined and clarified surface water rights, creating new exemptions from Arizona's forfeiture law (under which a surface water right is deemed abandoned after five successive years of non-use);<sup>8</sup>
- Recognized for the first time adverse possession (i.e., “squatters' rights”) as a means of establishing a water right;<sup>9</sup>
- Deemed certain smaller water rights claims “de minimis” and therefore essentially exempt from the adjudication;<sup>10</sup>
- Directed the adjudication court on the procedure it should use for quantifying surface water rights;<sup>11</sup>

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<sup>3</sup> *In re Gen. Adjudication of All Rights to Use Water in the Gila River Sys. & Source*, 9 P.3d 1069 (Ariz. 2000).

<sup>4</sup> For further discussion of this topic, see the Kyl Center's 2018 report, *The Price of Uncertainty*, [https://morrisoninstitute.asu.edu/sites/default/files/the\\_price\\_of\\_uncertainty.pdf](https://morrisoninstitute.asu.edu/sites/default/files/the_price_of_uncertainty.pdf).

<sup>5</sup> Ariz. Dept. of Water Res., Hydrographic Survey Report for the Silver Creek Watershed, Vol. 1, p. 20 (November 30, 1990). At the time the Silver Creek HSR was published, it comprised 1,788 statements of claimant (SOC). By comparison, 8,017 SOCs have been filed in the San Pedro watershed. Ariz. Dept. of Water Res., Hydrographic Survey Report for the San Pedro River Watershed, Vol. 1, p. 30 (November 20, 1991).

<sup>6</sup> Rhett Larson & Kelly Kennedy, *Bankrupt Rivers*, 49 U.C. DAVIS L. REV. 1335, 1354-55 (2016).

<sup>7</sup> H.B. 2276 & 2193, 42d Leg., 1st Regular Sess. (Ariz. 1995).

<sup>8</sup> *San Carlos Apache Tribe v. Super. Ct.*, 972 P.2d 179, 189-90 (Ariz. 1999).

<sup>9</sup> *Id.* at 190.

<sup>10</sup> *Id.* at 194.

<sup>11</sup> *Id.* at 196-97.

- Required the court to accept settlement agreements without review;<sup>12</sup>
- Mandated that the court accept information provided in prior filings as true unless found by ADWR to be clearly erroneous;<sup>13</sup> and
- Prohibited the court from applying the rarely invoked “public trust doctrine,” which is a constitutional limitation on the Legislature’s power to give away resources the state holds in trust for its people.<sup>14</sup>

It is frequently the case in Arizona that tinkering with one person’s water right will have a knock-on effect on someone else’s. While the 1995 amendments greatly strengthened some parties’ water rights, they deprived other parties of potential challenges by “re-vesting” rights that had been lost through forfeiture, enabling some parties to claim older priority dates, imposing presumptive quantities that might exceed actual use, and exempting some two-thirds of the parties from the adjudication.<sup>15</sup> In particular, the amendments disadvantaged Indian tribes and other federal claimants with high priority rights. These parties challenged the statutory amendments on their constitutionality. The case eventually reached the Arizona Supreme Court, which invalidated the bulk of the amendments as violating due process rights and separation of powers principles grounded in the Arizona Constitution.<sup>16</sup>

## What changes might survive judicial scrutiny?

The Arizona Supreme Court’s opinion highlights the perils of legislatively altering the adjudication and surface water laws, but also offers guidance on what types of legislative reforms of the adjudication process could survive judicial review. Below are the “dos” and “don’ts” to be gleaned.

## Don’t retroactively change the factors affecting priority of a surface water right

Among the over 70,000 pending claims, it is likely that some, perhaps many, will depend on the meaning of the law as it existed at the time of the events at issue. The resolution of such issues and consequent effect on priority must be determined by interpretation and application of the then-existing statutory and common law. Substantive rights and consequent priorities cannot be determined by statutes subsequently enacted, especially while the case is pending before the court.<sup>17</sup>

Both the U.S. and Arizona Constitutions dictate that an individual shall not be deprived of life, liberty, or property without due process of law.<sup>18</sup>

<sup>12</sup> *Id.* at 197.

<sup>13</sup> *Id.* at 197.

<sup>14</sup> *Id.* at 199.

<sup>15</sup> Sean O’Day, *San Carlos Apache Tribe v. Superior Court: Rejecting Legislative Favoritism in Water Right Allocations*, 4 UNIV. OF DENVER WATER LAW REV. 29, 32 n.11 (Fall 2000).

<sup>16</sup> *San Carlos*, 972 P.2d at 179.

<sup>17</sup> *San Carlos*, 972 P.2d at 190.

<sup>18</sup> U.S. Const. Amend. 5; Ariz. Const. Art. 2 § 4.

Laws that operate retroactively to materially impair or change vested property rights violate due process.<sup>19</sup>

According to the Arizona Supreme Court, surface water rights are vested property rights.<sup>20</sup> And because they are determined by the doctrine of prior appropriation, statutory changes to one right or a group of rights are likely to impact other rights, especially junior rights. For example, statutorily reviving water rights that would otherwise be deemed forfeited or abandoned would impair rights that have since vested in junior appropriators. Those later vested property rights are protected from such impairment by the due process guarantees in the Arizona Constitution.<sup>21</sup>

Accordingly, the Arizona Supreme Court struck down parts of the 1995 amendments that changed the forfeiture law, ruling that the consequences for nonuse of a surface water right must be determined on the basis of the law in existence at the time of nonuse, and not by laws enacted subsequently. Rights and priorities cannot be determined by later-enacted statutes (especially if enacted while the case is pending before the court) for risk of unconstitutionally taking someone else's water right without due process of law.

## Don't gamble on both retroactive and prospective application

Some of the 1995 amendments could be applied prospectively as well as retroactively, but the Arizona Supreme Court declined to uphold their prospective application as constitutional because

it was not clear that the Legislature would have enacted the statutes to apply prospectively only.<sup>22</sup>

## Don't put words in a much earlier Legislature's mouth

The adjudication proceedings themselves highlighted ambiguities in the state's water laws (enacted in 1919 and 1974), and many of the 1995 amendments could be characterized as an effort to clarify those ambiguous provisions. However, the Supreme Court rejected the idea that the 1995 Legislature had any special authority to clarify ambiguities arising from laws passed by a much earlier Legislature. Clarifying legislation enacted within a few years of the original version is one thing, the Court said. But legislation enacted after a considerable length of time and effectuating a distinct change in the operative language amounts to a change in the law, not a clarification.<sup>23</sup>

## Don't get in the adjudication court's business

[A]ny attempt by the Arizona Legislature to adjudicate pending cases by defining existing law and applying it to facts is prohibited by article III of Arizona's Constitution.<sup>24</sup>

The U.S. and Arizona Constitutions allocate distinct powers and responsibilities to each of the three branches of government (legislative, executive and judicial).<sup>25</sup> Some of the 1995 amendments were deemed unconstitutional

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<sup>19</sup> *San Carlos*, 972 P.2d at 189-90.

<sup>20</sup> *Id.* at 189.

<sup>21</sup> *Id.*

<sup>22</sup> *Id.* at 192.

<sup>23</sup> *Id.* at 193.

<sup>24</sup> *Id.* at 194.

<sup>25</sup> Ariz. Const. Art 3.

because they violated this separation of powers by “unreasonably limit[ing]” the judiciary’s performance of its duties.<sup>26</sup>

Among the amendments invalidated were provisions requiring summary adjudication of claims for water rights defined as “de minimis,”<sup>27</sup> that is, water rights whose cumulative impact is too small to harm other water users on a stream.<sup>28</sup> The statutory amendments on de minimis uses essentially usurped the court’s power and responsibility to make factual findings and apply relevant law to make the de minimis determination. By dictating factual findings for the court to uphold, the statutes encroached on the court’s role, violating the Constitution’s separation of powers.<sup>29</sup>

Other amendments were also found to violate the separation of powers because they attempted to constrain the court’s constitutionally delegated authority to make factual findings and apply the law.

Such amendments included:

- a provision that prescribed irrigation water quantities needed for particular crops and additionally mandated that ADWR, the court’s technical assistance, use those quantities as findings in its HSRs;<sup>30</sup>
- a requirement that the quantity of a surface water diversion right be measured by the

maximum theoretical capacity of the diversion facility and reservoir storage facilities by the maximum capacity of the reservoir – rather than the quantities actually diverted and stored;<sup>31</sup>

- a provision that required the court to accept, without review, settlement agreements reached by claimants;<sup>32</sup>
- a requirement that adjudication courts accept information in prior filings as true unless found otherwise by ADWR;<sup>33</sup> and
- an amendment declaring the public trust doctrine inapplicable to the adjudication.<sup>34</sup>

## It’s okay to make procedural changes that further the general adjudication’s purpose

Some of the 1995 amendments were limited to changes in the procedure for filing claims. These statutes fared better with the Arizona Supreme Court, even though they applied to already vested rights and potentially changed future legal consequences. The Supreme Court ruled that the amendments were a legitimate exercise of legislative power – and constitutional – because they could further the general adjudication’s purpose of quantifying and prioritizing all water rights.

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<sup>26</sup> *San Carlos*, 972 P.2d at 194.

<sup>27</sup> *Id.* at 195-96.

<sup>28</sup> Joe Gelt, *Managing the Interconnecting Waters: The Groundwater-Surface Water Dilemma*, ARROYO, December 1994, <https://wrrc.arizona.edu/publications/arroyo-newsletter/managing-interconnecting-waters-groundwater-surface-water-dilemma> (accessed January 15, 2020).

<sup>29</sup> *San Carlos*, 972 P.2d at 195-96. In the intervening years, the adjudication court has developed a standard for determining whether certain water uses are de minimis and therefore subject to summary adjudication. Those standards are currently being applied in the proceedings on water rights in the Aravaipa Subwatershed in the San Pedro Basin.

<sup>30</sup> *Id.* at 196.

<sup>31</sup> *Id.* at 196-97.

<sup>32</sup> *Id.* at 197.

<sup>33</sup> *Id.*

<sup>34</sup> *Id.* at 198.

Consequently, the Court upheld amendments that:

- reopened and extended the deadline for filing a water rights claim;<sup>35</sup>
- specified information that must be included in ADWR’s analysis of a water rights claim and provided a procedure for objections;<sup>36</sup> and
- required the special master to file a report with the court on its recommendations, findings of fact or conclusions of law, and stipulated times for filing objections to the report.<sup>37</sup>

In the Supreme Court’s view, these amendments did not encroach on the adjudication court’s authority because they did not dictate factual findings nor legal determinations that would otherwise be made by the court with the assistance of ADWR.

## It’s okay to fund additional court personnel

The Court upheld a new version of the adjudication statutes, Ariz. Rev. Stat. § 45-255, which gives the adjudication judge the power to appoint special masters and provides that if filing fees are exhausted, a line item appropriation from the general fund will support the special master. The Court noted, “If an additional or a new master must be appointed in the future, he or she may be appointed pursuant to the new version” of the statute.<sup>38</sup>

## It’s okay – but tricky – to make purely prospective substantive changes in water rights

The Supreme Court invalidated five new exceptions to Arizona’s forfeiture statute because they “obviously were intended to affect and alter the legal consequences of conduct occurring before the enactment date” and therefore affected vested rights. For example, the Court struck down a provision prohibiting the finding of forfeiture or abandonment when water is used on less than all the land to which the right is appurtenant. However, the Court noted that “the Legislature may prospectively add to [the] nonexclusive list” of exceptions to the forfeiture law.<sup>39</sup>

## Conclusion

Legislation to retroactively alter the priority of water rights in any way or to step into the court’s role in determining outcomes in an ongoing stream adjudication violates the Arizona Constitution. The experience from the 1995 amendments teaches that such legislation will lead to unnecessary litigation expenses and further delays in the final resolution of water rights claims.

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<sup>35</sup> *Id.* at 192.

<sup>36</sup> *Id.* at 197-98.

<sup>37</sup> *Id.* at 198.

<sup>38</sup> *Id.* at 198.

<sup>39</sup> *Id.* at 191.

# APPENDIX:

## Disposition of Amendments in *San Carlos Apache Tribe v. Superior Court*

### Retroactive Application

“Substantive rights and consequent priorities cannot be determined by statutes subsequently enacted, especially those enacted while the case is pending before the court.”<sup>40</sup>

### **Amendments violating the Arizona Constitution’s due process clause (Art. II, § 4) because they would have the effect of retroactively altering vested property rights:**

§ 45-141(B) – creating a forfeiture exemption when water has been used on less than all the land to which the right was appurtenant

§ 45-141(C) – creating a forfeiture exemption for water rights initiated before June 12, 1919 (date of enactment of state water code)

§ 45-151(D) – providing that the availability of alternative water sources for the same use does not affect a surface water right

§ 45-151(E) – providing that the right to water appropriated on federal lands belongs to the person who first made beneficial use of the water

§ 45-151(F) – providing that a state law-based water right from a source on federal land may be used on any location

§ 45-156(E) – creating a forfeiture exemption in certain instances of failure to obtain ADWR director’s approval for a change in use of appropriated water

§ 45-162(B) – providing that a delay by ADWR in processing a water right application does not affect priority

§ 45-187 – providing for adverse possession of surface water rights until May 21, 1974

§ 45-188(A) & (B) – limiting the application of forfeiture and abandonment law to water rights initiated on or after June 12, 1919

§ 45-188(C) – insulating from forfeiture and abandonment water rights appurtenant to lands within an irrigation district, water users association, ditch company or similar provider of water for agricultural or municipal uses as long as the water delivery system is maintained

§ 45-189(E) – creating five new exceptions to forfeiture and abandonment law

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<sup>40</sup> *San Carlos*, 972 P.2d at 190.

§ 45-257(F) – requiring application of § 45-151(E) & (F) if claim of ownership to use water on land owned by the United States is disputed

§ 45-262 – providing that surface water contributions to an Indian water rights settlement shall not diminish the contributor’s decreed water rights unless a severance and transfer of that right are provided for in the settlement agreement

**Amendments deemed purely procedural and not violating the Arizona Constitution’s due process clause even though applied retroactively:**

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

§ 45-263(A) – providing that state law applies to the adjudication of all water rights initiated or perfected pursuant to state law

**Separation of Powers**

“[A]ny attempt by the Arizona Legislature to adjudicate pending cases by deciding existing law and applying it to fact is prohibited by article III of the Arizona Constitution[.]”<sup>41</sup>

**Amendments deemed in violation of the separation of powers clause of the Arizona Constitution (Art. III) because they had the effect of defining existing law and applying it to facts:**

§ 45-182(B)(4) – providing that water rights qualifying as de minimis as prescribed by (invalid) § 45-258 are exempt from statement of claim filing requirement

§ 45-256(A)(5) – requiring HSR to identify claims qualifying as de minimis as prescribed by (invalid) § 45-258

§ 45-256(A)(6) – prescribing on-farm water duties

§ 45-256(A)(7) – prescribing quantities of water for diversions and reservoirs

§ 45-256(D) (in part) – precluding judicial review of certain findings in HSR

§ 45-257(C) – requiring court to decree without modification settlement agreements among parties

§ 45-257(E) – specifying the application of evidentiary presumptions prescribed in § 45-261

§ 45-258 – deeming certain uses and quantities of surface water de minimis and providing for summary adjudication of claims for such uses

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<sup>41</sup> *Id.* at 194.

§ 45-261(A)(2), (A)(4) & (B) – imposing presumptive findings of fact on ADWR and the court

§ 45-263(B) – prohibiting the court from applying the public trust doctrine in the adjudication

**Amendments that do not violate the separation of powers clause of the Arizona Constitution:**

§ 45-255(A) – giving superior court judge authority to appoint special masters

§ 45-255(B) – providing for appropriations from the state general fund for the special master's compensation and other adjudication expenses

§ 45-256(B) – requiring that HSR include certain information about water rights

§ 45-256(C), (D) (in part), (E), (F) & (G) – requiring that certain information contained in an HSR be admitted into evidence for the court's consideration

**Other statutes upheld:**

§ 37-321.01 – regulating the form and use of permits related to use of water on or originating from state lands

§ 45-153(C) – requiring that applications for water appropriations on state lands conform to § 37-321.01

§ 45-164(C) – providing for the re-issuance of water use permits to conform to § 37-321.01

§ 45-257(D) – requiring that a water right for use on state land be adjudicated in the name of the claimant if certain conditions are satisfied

