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S.B. 1412, 53rd Leg. 1st Reg. Sess. (Ariz. 2017)

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LEGISLATIVE REPORTS

ARIZONA

S.B. 1412, 53rd Leg. 1st Reg. Sess. (Ariz. 2017) (requiring small water rights claims to be adjudicated last in the adjudication of the Gila River system).

This report addresses the origin and effect of Arizona Senate Bill 1412 ("SB 1412"). Passed in 2017, the bill rehabilitates invalidated legislation pertaining to the conditions for small water use claims and the established order for decreeing all Gila Adjudication water claims. The Gila Adjudication determines thousands of water rights claims and the determination of those rights must be in accordance with SB 1412.

In 1995, the Arizona legislature attempted to streamline its water claims adjudication process with the enactment of Arizona Revised Statute section 45-258 and the intention for a Superior Court to issue a comprehensive decree of water rights for both the Gila River system and Little Colorado River system.[1] The general adjudication process determines the extent, nature, and relative priority of decreed water rights to thousands of users and right holders in the Gila and Colorado River systems.

The need for streamlined adjudication arose from the fact that "[t]he Gila River and Little Colorado River Adjudications comprise of more than 75,000 claims on nine subwater sheds, including sixteen Indian reservations, numerous national forests, parks and wilderness areas, and the metropolitan areas of Pheoenix, Tucson, and Flagstaff."[2] The Gila Adjudication proceedings commenced with a 1974 petition to the Arizona State Land Department, which resulted in 960,000 summonses served on all landowners in the Gila Basin between 1979 and 1986.[3] Arizona Revised Statutes section 45-258 provided a summary adjudication process for de minimis water use claims intending to free up judicial resources for larger water use claim proceedings. The court summarily adjudicated all de minimis uses of a river system or source and removed them from further participation in the adjudication process. Objections to those determinations were only available after the final grant of a decreed right.

The United States and several Native American tribes argued that provisions of section 45-258 violated due process and separation of powers. The Superior Court of Arizona reasoned that the summary adjudication of de minimis water use claims infringed on the judiciary's power to hear and decide water rights based on the evidentiary presentation of a water right holder's beneficial use and therefore violated separation of powers. The court further held that the

1. *See* Richard M. Morrison, *State and Federal Law in Conflict Over Indian and Other Federal Reserved Water Rights*, 2 DRAKE J. OF AGRI. L. 1, 6-8 (1997) (discussing the history of the Gila Adjudication).

2. *Id.* at 6.

3. *Id.*

de minimis provisions violated due process because they "delayed the determination of the cumulative impact of de minimis uses in a watershed until after a final decree," which effectively robbed the water users of a fair hearing and opportunity to be heard.[4] However, the court upheld the section 45-258 provision that allows the director of the Arizona Department of Water Resources to "propose to the court or Special Master water right attributes for each individual water right claim or use investigated in the director's report."[5]

In the spirit of the invalidated provisions within Arizona Revised Statute section 45-258, Senator Griffin (Republican, Majority Whip, District 14) sponsored SB 1412 to reduce litigation costs associated with the adjudication process and expedite the general stream adjudication. SB 1412 repeals the de minimis summary adjudication provisions of Arizona Revised Statute section 45-258, and provides a sequential process for hearing all water rights claims. Under the bill, small water use claims are decreed only after the determination of all other water use claims.

The bill defines small water use claims as those for stockponds smaller than fifteen acre feet, groundwater wells with maximum pumping capacities of thirty-five gallons per minute, and stock watering uses either from naturally occurring bodies of water or developed facilities that are not stockponds or reservoirs.

The original bill put federal water claims—including those of several tribes—first in the sequential adjudication order. It put state water claims that do not qualify as small water use claims second. Finally, it put small water use claims last. Senator Griffin asserted that the bill allows those with multiple water use claims to have their small water use claims decided in conjunction with their other water use claims, which results in a system that determines larger claims before all other claims. It also allows parties to submit settlements reached during the adjudication to the court or the master for approval. Accordingly, SB 1412 provides claimants with options for efficiency on a claim-by-claim basis because if a settlement can be reached, or multiple claims determined at once, the general adjudication proceedings can move forward to another one of the thousands of claims that must yet be determined.

In the Senate committee hearing, Bass Aja, a lobbyist for the Arizona Cattleman's Association, opined that the deferral of small water claims in any one sub-watershed would help alleviate the claimant's legal fees and determine the actual quantity of water that remained. Aja noted that larger claims usually require information gathering over months or even years, which means that any court proceedings for small water use claims during the same period of time cannot even accurately decree rights. This forces claimants to waste both time and money. A main opponent to the bill, the Inter Tribal Council of Arizona, which represents all twenty-one tribes in Arizona, argued that the small water use claim deferrals would cause delay in the long run because of the many unresolved constitutional questions as to the legislature's ability to direct the court on the order of hearing claims.

The success of a streamlined small water uses claim adjudication process can potentially improve the judicial and economic efficiency of adjudications

4. *Id.* at 8.
5. *Id.*

that are meant to create a comprehensive system of decreed water claims in the Gila River system and Little Colorado River system. These adjudications have a history of contention between claimants and this new bill encourages claimants to reach settlements that the courts would recognize and to resolve multiple claims at once. This could result in a significant reduction in the expenditure of time, money, and resources in the Gila Adjudication.

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COLORADO

H.B. 17-1233, 71st Gen. Assemb., 1st Reg. Sess. (Colo. 2017) (expanding the application of current state law that prevents water saved in a government-sponsored water conservation program from reducing historical consumptive use).

House Bill 17-1233 ("HB 1233"), titled *Protect Water Historical Consumptive Use Analysis*, accomplishes three objectives: (1) to expand application of a preexisting law to water Divisions 1, 2, and 3; (2) to clarify that participation in a government-sponsored program includes water conservation pilot programs; and (3) to limit state agencies that can approve a water conservation program to only those with explicit statutory jurisdiction over water conservation or water rights. Democratic House Representative Jeni Arndt of District 53, located in water Division 1, and Republican Senator Larry Crowder of District 35, located in water Division 2, introduced HB 1233 in the House on March 7, 2017. The House approved the bill on March 24, the Senate approved an amended version on April 17, and Colorado Governor John Hickenlooper signed HB 1233 on May 3.

A historical consumptive use analysis is part of a proceeding to change a water right. A water right owner may only change that right up to the amount of water historically consumed for a beneficial use. Prior to HB 1233, Colorado law provided that in water Divisions 4, 5, and 6, historical consumptive use analyses were not to consider reduction in water usage resulting from participation in a government-sponsored water conservation program. In the initial draft of HB 1233, the sponsors sought to apply this rule to all seven of Colorado's water divisions. However, at the Senate second reading, the Senate passed Senator Crowder's proposed amendment to remove water Division 7 of southwestern Colorado from the bill. Senator Crowder explained that feedback from the representative from that water division led him to propose the amendment.

Sponsors introduced HB 1233 with the same legislative intent as the sponsors of Senate Bill 13-019, 69th Gen. Assemb., 1st Reg. Sess. (Colo. 2013), the bill that established this protection for water right owners in Divisions 4, 5, and 6. Both bills sought to grant water right owners some relief from the "use it or lose it" system. The sponsors brought HB 1233 not as an environmental initiative but as an agricultural one, aimed at providing Colorado farmers wanting to participate in voluntary pilot programs with peace of mind that their water rights would not be diminished. At the hearing before the House Agricultural, Livestock, and Natural Resources Committee, Representative Arndt summarized HB 1233's objectives to "protect private property rights and agriculture," "add certainty," and "consolidate other legislation" so farmers could feel confident pointing to this bill to protect their rights. An example that came up several