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## In re The Gen. Adjudication of All Rights to Use Water in the Gila River Sys. And Source, 224 P.3d 178 (Ariz. 2010)

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# COURT REPORTS

## STATE COURTS

### ARIZONA

*In re* The Gen. Adjudication of All Rights to Use Water in the Gila River Sys. and Source, 224 P.3d 178 (Ariz. 2010) (holding that the lower court correctly approved the Gila River Indian Community's settlement agreement as all of the requirements of the Special Procedural Order for the Approval of Federal Water Rights Settlements, Including Those of Indian Tribes were met, and, further, that the objecting parties were not bound to the agreement and could assert their rights in subsequent general adjudications if needed).

In 2004, Congress passed the Arizona Water Settlements Act ("AWSA"). Title II of AWSA authorizes the settlement of the federal water rights claims of the Gila River Indian Community ("GRIC"). In the subsequent settlement agreement, GRIC received 653,500 acre-feet of water per year in exchange for a waiver of claims to damages to water resources, greater diversion rights, and the right to contest certain uses of Gila River water. In May of 2006, the parties to the settlement agreement submitted the agreement to the Superior Court of Maricopa County ("lower court") for approval. Several groups objected to the agreement, including the San Carlos Apache Tribe, the Tonto Apache Tribe, and the Yavapai-Apache Nation (collectively, the "Apache Tribes"); a number of communities that depend on the water from the Gila River, collectively identified as the Lower Gila Water Users ("LGWUs"); and ASARCO LLC. The lower court, limiting its inquiry to issues covered by the 1991 Special Procedural Order for the Approval of Federal Water Rights Settlements, Including Those of Indian Tribes, ("Special Order") rejected the objections of these groups, and entered a judgment approving the GRIC settlement. The Apache Tribes, LGWUs, and ARASCO requested an interlocutory appeal. The Arizona Supreme Court granted the request.

The Special Order, a previous creation of the Arizona Supreme Court, required lower courts to approve settlement agreements when they found by a preponderance of the evidence that: (1) the amount of water granted was no greater than that which could have been proven at trial; (2) the objectors' claimed

contending that it placed unreasonable limitations on settlement review that unfairly prevented them from raising arguments regarding the constitutionality, legality, and fairness of the settlement agreement. The court rejected these broad arguments, maintaining that the Special Order did not arbitrarily limit the scope of review of settlements. Further, the court noted that settlements that meet the conditions of the Special Order are actually beneficial to all parties as they reduce the amount of water claimed by a given Indian tribe to an amount below that which the tribe could have proven at trial.

The parties also made specific objections to the GRIC settlement. All three objecting parties contended that the settlement agreement did in fact materially injure their claimed water rights. The court responded by pointing out the fact that the Special Order required the approval of settlement agreements despite potential material injuries to objectors' claimed water rights when the agreement was not binding on the objectors; thus, this left the parties free to assert their rights in subsequent general adjudications. In this case, contrary to the assertion of the LGWUs, the settlement agreement was not binding on any of the objectors, so the lower court did not err by approving the settlement agreement despite concerns of material injury to the objectors' claimed water rights.

The Apache Tribes also argued that the settlement would provide GRIC more water than it could have proven at trial, and that the settlement would adversely affect the quality of their own water. Regarding the former claim, the court noted that the settlement provided less water for GRIC than the Global Equity Decree had previously allocated. Consequently, the court affirmed the lower court's holding that the settlement indeed provided less water than could have been proven at trial. Turning to the issue of water quality, the court observed that the Special Order is concerned only with the quantity of water claimed; the question of water quality falls outside of the scope of the Special Order, and thus was inappropriate for consideration by the lower court.

The objecting parties further argued that the settlement agreement violated GRIC's contractual agreements with both ASARCO and the Arlington Canal Company ("Arlington"). In response, the court noted that contractual claims do not fall under the scope of the Special Order. Hence, even if the settlement agreement did create contract disputes, ASARCO and Arlington could assert their rights in later adjudications. Finally, ASARCO contended that the safe-harbor provisions of the settlement agreement violated the Arizona Constitution by denying ASARCO equal protection and conferring a special benefit to GRIC. The court replied to this objection by maintaining that the safe-harbor argument was outside the scope of the Special Order, and, further, that the argument was without merit as the agreement neither infringed

upon ASARCO's equal protection rights nor provided special benefits to GRIC.

Accordingly, the court affirmed the lower court's approval of the GRIC settlement agreement.

*James Henderson*

## COLORADO

*City of Aurora v. ACJ P'ship*, 209 P.3d 1076 (Colo. 2009) (holding that the City of Aurora could not be granted conditional water storage rights for its proposed reservoir site as the City could not satisfy the statutory "can and will" requirement because of a pre-existing contractual agreement between the Colorado State Board of Land Commissioners and Rangeview Metropolitan District).

The City of Aurora ("Aurora") filed an application for conditional water storage rights for a proposed project that would divert water from the Platte River into a new "East Reservoir." Aurora had not yet determined where this reservoir would be located, so the application contained requests for conditional water storage rights for six potential sites. Three of the proposed sites are located on the former Lowry Bombing Range ("Lowry Range"), which is administered by the Colorado State Board of Land Commissioners ("Land Board"). Several years prior, the Land Board and Rangeview Metropolitan District ("Rangeview") entered into a restated lease agreement that designated four sites on the Lowry Range for use by Rangeview for future reservoirs. As part of this lease agreement, Rangeview obtained non-exclusive rights-of-way for its reservoir sites. Three of Aurora's six proposed sites significantly overlapped with the four Rangeview sites.

The Land Board rejected Aurora's request for access to the disputed sites, noting that allowing this access would require Rangeview to give up one or more of its sites and that the contractual arrangement prohibited the Land Board from doing this without Rangeview's consent. In the subsequent action before the District Court, Water Division 1 ("water court"), Rangeview requested a partial summary judgment based on the assertion that Aurora could not satisfy the "can and will" requirement for conditional water rights. To acquire a conditional water right, an applicant must demonstrate that "there is a substantial probability that the applicant can and will complete the appropriation with diligence and within a reasonable time." Because of the lease agreement and the Land Board's rejection of Aurora's request, the water court agreed with Rangeview that Aurora could not satisfy this requirement, and subsequently granted the motion for a partial summary judgment. Aurora appealed the partial summary judgment and dismissal of its claim for conditional water storage rights for the three disputed sites.

On appeal, Aurora maintained that the Land Board could have granted access to the disputed sites without violating its contractual arrangement with Rangeview for two reasons: (1) Rangeview's right-of-