

## MEMORANDUM

TO: The Water Resources Research Center, University of Arizona College of Agriculture and Life Sciences

FROM: The Natural Resource Use & Management Clinic, University of Arizona College of Law

DATE: September 4, 2018

RE: Overview of water rights adjudication, groundwater management, and potential Clean Water Act jurisdiction as they relate to rights and activities in the Cobre Valley<sup>1</sup>

### **QUESTIONS PRESENTED**

1. How does the ongoing Gila River adjudication impact the water rights of water users in the Cobre Valley?
2. What legal groundwater management mechanisms are being implemented in the Cobre Valley Watershed?
3. How does the Clean Water Act apply to use of groundwater and surface water in the Cobre Valley?

### **BRIEF ANSWER**

1. The Gila River Adjudication affects any person or entity who uses surface water or has made a claim to water use within the Gila River system, which includes surface water uses in the Cobre Valley area. The Gila River adjudication includes surface water diverted from a stream, non-diversionary instream uses, impoundments in ponds and reservoirs located in natural channels, and withdrawals from wells of underground water that is found to be closely connected with a stream (i.e. subflow).. In order to avoid losing any water rights that they may have, surface water users are required to file a claim with the Maricopa County Superior Court, which presides over the Gila River Adjudication (commonly known as the Gila adjudication court).

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<sup>1</sup> This memorandum is intended only to provide general information and analysis of the legal frameworks governing water rights and usage in the Cobre Valley. It should not be construed as offering specific legal advice to particular individuals and entities.

2. The Cobre Valley is not located within any Active Management Areas designated by the Arizona Groundwater Management Act; therefore, landowners may pump groundwater without restriction as long as it is for a reasonable and beneficial use, subject to the federal reserved water rights doctrine.
3. Certain aspects of the Clean Water Act may also impact the use and quality of water in the Cobre Valley.

## **DISCUSSION**

### **I. Gila River Adjudication**

The adjudication of water rights in the Gila River system involves the complex and contentious litigation of thousands of water rights claims in several watersheds. Currently, there are approximately 40,000 parties (claimants) who have filed over 85,000 claims.<sup>2</sup> The adjudication process is similar to a large class action, but instead of many claimants with similar interests pitted against a single defendant or limited group of defendants, it is every claimant pitted against every other claimant.<sup>3</sup>

Surface water resources in the Cobre Valley area include Pinal Creek and Pinto Creek, both of which flow north to the Salt River (which includes Lake Roosevelt). The Salt River watershed is part of the Gila River Adjudication, therefore the Cobre Valley area's surface water and stream subflow are subject to that adjudicatory process for quantifying and prioritizing water rights claimed within the Gila River system.<sup>4</sup> Water users are responsible for filing a statement of claimant (SOC) by certain deadlines in order to avoid forfeiture of any water rights they may have.<sup>5</sup>

A timeline for completion of the Gila River Adjudication is difficult to predict. The Gila River Adjudication began in the 1970s and has experienced a series of delays involving legal issues with the initial court summons sent to property owners throughout the adjudication, the

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<sup>2</sup> Arizona Department of Water Resources, *General Description of Adjudications Program* <http://www.azwater.gov/AzDWR/SurfaceWater/Adjudications/> (last visited Sept. 4, 2018).

<sup>3</sup> See Rhett Larson & Brian Payne, *Unclouding Arizona's Water Future*, 49 Ariz. State. L.J. 465, 477-488 (Summer 2017).

<sup>4</sup> See generally Superior Court General Stream Adjudications, <http://www.superiorcourt.maricopa.gov/SuperiorCourt/GeneralStreamAdjudication/> (last visited Sept. 4, 2018).

<sup>5</sup> See A.R.S. § 45-254.

jurisdiction of the state courts to adjudicate federal non-Indian and Indian reserved water rights, changes in legislation, and the development of an appropriate test to identify those wells that withdraw water from stream subflow (thereby requiring a surface water right).<sup>6</sup> However, the process is moving forward more quickly as the Special Master (appointed by the Arizona Supreme Court to assist with the adjudication proceedings) works through the quantification and prioritization process, which involves evaluating the Arizona Department of Water Resources (ADWR) investigations and water right recommendations (embodied in a Hydrographic Survey Report, or HSR), and holding hearings on the potential claims and any objections filed to the HSRs in each of the watersheds in the Gila River system.<sup>7</sup>

#### **a. Process and Procedural Requirements for Potential Claimants**

Water users in the Cobre Valley area, like other water users in the Gila River adjudication, must file a water rights claim by submitting the appropriate statement of claimant (SOC) forms with ADWR, which ADWR will then process and file with the Gila adjudication court. Generally, water users in the Gila River adjudication are required by statute to file an SOC within 90 days following receipt of a summons.<sup>8</sup> Court summons were served when the adjudication first began, and continue to be served as new water uses are initiated. A predecessor in interest to the current property owner may already have received a summons, and may or may not have filed an SOC.<sup>9</sup> Even if a water user has failed to file an SOC within 90 days of receipt of a court summons, an SOC may be filed without the permission of the court up to 90 days before ADWR has published its HSR for the watershed, or even after the Special Master has completed hearings for the watershed, subject to additional notice requirements so that other

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<sup>6</sup> See Joseph Feller, *The Adjudication That Ate Arizona Water Law*, 49 ARIZ. L. REV. 405, 423-426 (2007); see also Superior Court General Stream Adjudications,

<http://www.superiorcourt.maricopa.gov/SuperiorCourt/GeneralStreamAdjudication/> (last visited Sept. 4, 2018).

<sup>7</sup> By statute, ADWR is required to prepare and publish comprehensive Hydrographic Survey Reports (HSRs) for each of the ten watersheds within the two adjudications. ADWR must include detailed information regarding land ownership, hydrology, and the factual basis for each SOC, and ADWR's recommendations regarding the water rights attributes for each individual water right claim or use investigated. Arizona Department of Water Resources, *General Description of Adjudications Program*,

<http://www.azwater.gov/AzDWR/SurfaceWater/Adjudications/default.htm> (last visited Sept. 4, 2018).

<sup>8</sup> See A.R.S. § 45-254(A). The summons are issued by the Gila adjudication court and served by mail by ADWR. A.R.S. § 45-253.

<sup>9</sup> ADWR maintains records of SOCs and may be contacted to determine if an SOC has been filed for water use at a specific location. Arizona Department of Water Resources, *General Description of Adjudications Program*, <http://www.azwater.gov/AzDWR/SurfaceWater/Adjudications/default.htm> (last visited Sept. 4, 2018).

parties may object to the claim.<sup>10</sup> Once the Special Master hearings are over, however, a water user must file a motion to intervene and seek permission from the court in order to file an SOC, which the court may grant if it would not unduly delay and prejudice the adjudication of the rights of the original parties.<sup>11</sup>

If a water user fails to file an SOC, the water user risks losing the claimed water right, and the loss of right to use water may happen even if the water user had previously received a permit, certificate, or other approval to use water from ADWR.<sup>12</sup>

### **b. Intended Outcome – The Final Decree**

Ultimately, the Maricopa County Superior Court, acting on the recommendations of the Special Master, will issue a final decree adjudicating the rights to use the water of the river system, by determining the extent and priority of each water right, and accepting any previously determined water rights and dates of appropriation in prior decrees unless the water rights have been abandoned.<sup>13</sup> The final decree will include water right abstracts that list water right attributes for each adjudicated water right including the locations of the points of diversion and places of use, the types of water use, the quantity of water use, and the priority of the water right.<sup>14</sup>

Prior to entry of the final decree, the Special Master is responsible for preparing a catalog that includes a list of all proposed water rights, their relative priority on the river system, and relevant portions of the HSR for the watershed.<sup>15</sup> After any objections to the catalog of proposed water rights have been resolved, the Special Master will file a report and recommend a final decree to the Gila adjudication court. At this point, objections may be filed to the Special

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<sup>10</sup> A.R.S. § 45-254 (E)(1) and (2).

<sup>11</sup> A.R.S. § 45-254(E)(3).

<sup>12</sup> See generally Superior Court General Stream Adjudications, *supra* note 4.<sup>13</sup> A.R.S. § 45-257(B).

<sup>13</sup> A.R.S. § 45-257(B).

<sup>14</sup> See Rules for Proceedings Before the Special Master, Arizona General Stream Adjudication, §§ 15.03 and 17 <http://www.superiorcourt.maricopa.gov/SuperiorCourt/GeneralStreamAdjudication/docs/pdfs-RulesRev053105.pdf>.

<sup>15</sup> See Rules for Proceedings Before The Special Master, *supra* note 14, § 15.00. <sup>16</sup> See generally Superior Court General Stream Adjudications, *supra* note 4; see *Rules for Proceedings Before The Special Master*, *supra* note 14, § 16.03. <sup>17</sup> Under common law, water rights may be abandoned if it established that the water right has gone unused and the right holder intended to abandon such right. See Mark A. McGinnis & R. Jeffrey Heilman, *The Application of Statutory Forfeiture to Pre-1919 Water Rights in Arizona, and its Potential Ramification*, 8 ARIZ. J. ENVTL. L. & POL'Y 69, 75 (Summer 2018). Statutory forfeiture differs in that no intent is required, effectively broadening its applicability. See *id.*

Master’s report, the Gila adjudication court may hold hearings, and the court may adopt, modify or reject the Special Master’s report in whole or in part in the final decree.<sup>16</sup>

### **a. Special Issues in the Gila River Adjudication**

There are several pending legal (as well as technical) questions that will impact the Gila River Adjudication, however this Memorandum will solely highlight two that may be of particular interest to Cobre Valley water users: 1) the forfeiture doctrine, and 2) the legal connection between certain groundwater wells and surface water rights.

#### **i. Statutory Forfeiture and Applicability to Pre-1919 Water Rights**

Under Arizona statutory law, a water right may be forfeited due to non-use for five successive years. A.R.S. § 45-141(C) provides that “when the owner of a right to the use of water ceases or fails to use the water appropriated for five successive years, the right to the use shall cease, and the water shall revert to the public and shall again be subject to appropriation.”<sup>17</sup> In 1995, the Arizona State Legislature amended this provision to add an exception for water rights initiated prior to 1919, which is when the first state water code, including the forfeiture provision, was enacted.<sup>18</sup> In other words, this amendment protected water rights initiated prior to 1919 from claims that such rights may have been forfeited due to non-use.

The validity of this forfeiture exception for pre-1919 water rights has been deliberated by both the Arizona Supreme Court and the Ninth Circuit Court of Appeal, resulting in the invalidation of the 1995 statutory exception, while at the same time creating uncertainty as to

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<sup>16</sup> See generally Superior Court General Stream Adjudications, *supra* note 4; see *Rules for Proceedings Before The Special Master*, *supra* note 14, § 16.03. <sup>17</sup> Under common law, water rights may be abandoned if it established that the water right has gone unused *and* the right holder intended to abandon such right. See Mark A. McGinnis & R. Jeffrey Heilman, *The Application of Statutory Forfeiture to Pre-1919 Water Rights in Arizona, and its Potential Ramification*, 8 ARIZ. J. ENVTL. L. & POL’Y 69, 75 (Summer 2018). Statutory forfeiture differs in that no intent is required, effectively broadening its applicability. *See id.*

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<sup>18</sup> See McGinnis & Heilman, *supra* note 17 at 78 (citing A.R.S. § 45-141(C), which provides that “statutory forfeiture by nonuse shall not apply to a water right initiated before June 12, 1919”).

whether other legal principles may preclude application of forfeiture to pre-1919 rights.<sup>19</sup> Although it is beyond the scope of this Memorandum to address these cases in detail, water users should be aware that forfeiture likely applies to all water rights, regardless of the date the right was initiated. Nonetheless, there are many defenses to forfeiture laid out in the Arizona statutes, including drought, active service, government-impose water use restrictions, or “[a]ny other reason that a court of competent jurisdiction deems would warrant nonuse.”<sup>20</sup>

## ii. Surface Water Rights, Subflow, and Wells

Arizona law divides water into percolating groundwater (governed separately as described below in Section II) and appropriable surface water. The latter is the focus of the Gila River Adjudication. Yet, perhaps surprisingly, the Gila River Adjudication also includes wells that are determined to be hydrologically connected to a surface stream. These wells withdraw appropriable surface water known as subflow. Arizona law broadly defines appropriable water as “waters of all sources flowing in streams, canyons, ravines or other natural channels, or in definite underground channels, whether perennial or intermittent, flood, waste or surplus water, and of lakes, ponds and springs on the surface.”<sup>21</sup> The Arizona Supreme Court, in the 1931 *Southwest Cotton* case, 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,” the withdrawal of which tends to “diminish appreciably and directly the flow of the surface stream.”<sup>22</sup>

In 2000, the Arizona Supreme Court issued an opinion in *Gila IV* adopting another test (consistent with the *Southwest Cotton* test) to determine whether a well is withdrawing subflow. *Gila IV* established a rebuttable presumption that wells located within the lateral limits of a

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<sup>19</sup> See *San Carlos Apache Tribe v. Superior Court*, 972 P.2d 179 (Ariz. 1999) (en banc) (holding that the 1995 amendments, including the forfeiture exception to pre-1919 rights, violated the due process clause of the Arizona Constitution); *United States v. Gila Valley Irr. Distr.*, 859 F.3d 789 (9th Cir. 2017) (commonly referred to as the *Globe Equity* decision) (finding that the Arizona Supreme Court had already determined that statutory forfeiture applies to pre-1919 water rights). See generally McGinnis & Heilman, *supra* note 17 (examining how these decisions left open questions as to whether—putting the 1995 statutory amendment aside—forfeiture as enacted in 1919 could retroactively apply to either pre-1919 water rights, generally, or periods of non-use that occurred prior to the 1919 code).

<sup>20</sup> See A.R.S. §§ 45-188(D), 45-189(E).

<sup>21</sup> I A.R.S. § 45-141(A).

<sup>22</sup> *Maricopa County Munic. Water Conservation Dist. No. 1 v. Southwest Cotton Co.*, 39 Ariz. 65, 96-97, 4 P.2d 369, 380-81 (1931).

hydro-geologically defined area adjacent to a stream known as the “subflow zone” are pumping subflow, and thus are subject to the jurisdiction of the Gila adjudication court.<sup>23</sup> Additionally, even wells that are located outside of the subflow zone but that are shown to similarly pump subflow may also be subject to the jurisdiction of the Gila adjudication court.<sup>24</sup> ADWR has mapped the lateral limits of the subflow zone for certain watercourses within the San Pedro River watershed as requested by the Gila adjudication court, but has not yet done so elsewhere in the Gila River adjudication.<sup>25</sup> It is therefore unclear at this time which well users in the Cobre Valley may be affected by the *Gila IV* opinion.

## II. Groundwater Management

The Cobre Valley is not located within any of the five Active Management Areas (AMA’s) designated by the Arizona Groundwater Management Act.<sup>26</sup> Nonetheless, some regulatory mechanisms from this Act may still apply. For groundwater use outside of a designated AMA,<sup>27</sup> an individual may:

- (1) Withdraw and use groundwater for reasonable and beneficial use;
- (2) Transport groundwater subject to certain statutory restrictions;<sup>28</sup> and,
- (3) Use groundwater for irrigation purposes within the exterior boundaries of an irrigation non-expansion area subject to certain statutory restrictions.<sup>29</sup>

Courts have interpreted what constitutes “reasonable and beneficial use” of groundwater broadly<sup>30</sup>, and groundwater users outside of an AMA are not required to obtain any of the types

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<sup>23</sup> See *In re Gen. Adjudication of All Rights to Use Water in Gila River Sys. & Source (Gila IV)*, 9 P.3d 1069, 1073 (Ariz. 2000) (upholding the lower court’s test delineating the subflow zone as the saturated floodplain Holocene alluvium). The Holocene alluvium is a geologic formation consisting of sand, gravel and loose rock deposited in a river’s floodplain over the last 10,000 years and the subflow of the river are those waters which slowly find their way through the sand and gravel bed of the surface stream. See Feller, *supra* note 6 at 424-425.

<sup>24</sup> Communication with ADWR legal counsel’s office dated August 27, 2018.

<sup>25</sup> See July 13, 2017 Order, *In Re: the General Adjudication of All Rights to Use Water in the Gila River System and Source*, Docket Nos. W-1, W-2, W-3, W-4, Contested Case No. W1-103 (approving ADWR’s revised subflow zone delineation for the San Pedro River Watershed).

<sup>26</sup> See A.R.S. §§ 45-411 and 45-411.03.

<sup>27</sup> A.R.S. § 45-453.

<sup>28</sup> See generally A.R.S. §§ 45-541– 45-559. Specifically, with certain statutory exceptions, groundwater that is withdrawn from a groundwater basin outside of an AMA may not be transported away from that basin. A.R.S. §§ 45-544(A)(2) and 45-551(B). Because the Cobre Valley is not located within an AMA, these restrictions on groundwater transportation apply.

<sup>29</sup> See generally A.R.S. § 45-453. Statutory requirements for using groundwater for irrigation within irrigation non-expansion area are set forth at A.R.S. §§ 45-431–45-440.

<sup>30</sup> See *Bristor v. Cheatham*, 75 Ariz. 227, 237, 255 P.2d 173, 180 (1953) (“so long as it is taken in connection with a beneficial enjoyment of the land from which it is taken. If it is diverted for the purpose of making reasonable use of the land from which it is taken, there is no liability incurred to an adjoining owner for a resulting damage”); *In re Gen. Adjudication of All Rights to Use Water in Gila River Sys. & Source*, 195 Ariz. 411, 415, 989 P.2d 739, 743

of permits<sup>31</sup> outlined in A.R.S. § 45-512 in order to pump.<sup>32</sup> Under Arizona's common law, appropriable groundwater is subject both to the doctrines of reasonable use and to federal reserved water rights.<sup>33</sup> Subject to these two doctrines, a landowner may use the groundwater beneath her land, but the landowner does not have a severable property right in the groundwater itself.<sup>34</sup> Furthermore, groundwater must be used within the groundwater basin from which the water is withdrawn, unless the transport is expressly allowed by statute.<sup>35</sup> The Arizona Groundwater Management Act does not recognize the hydrologic link between surface and groundwater.

### **III. The Clean Water Act**

While certain Clean Water Act (CWA) requirements can potentially affect groundwater via subsurface flows, its broad application to surface waters, including ephemeral or intermittent riverine systems such as the Pinto and Pinal Creeks, may also be relevant to activities in the Cobre Valley.

#### **A. Federal Jurisdiction under the Evolving WOTUS Standard**

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(1999) (“The doctrine of reasonable use permits an overlying landowner to capture as much groundwater as can reasonably be used upon the overlying land and relieves the landowner from liability for a resulting diminution of another landowner's water supply”).

<sup>31</sup> There are seven types of groundwater withdrawal permits within AMAs: (1) dewatering permits; (2) mineral extraction and metallurgical processing permits; (3) general industrial use permits; (4) poor quality groundwater permits; (5) temporary permits; (6) drainage water permits; and (7) hydrologic testing permits. A.R.S. § 45-512; *see also* A.R.S. §§ 45-513–45-519.01.

<sup>32</sup> *See Davis v. Agua Sierra Res., L.L.C.*, 220 Ariz. 108, 110, 203 P.3d 506, 508 (2009).

<sup>33</sup> *Id.* ¶ 10 (quoting *In re the Gen. Adjudication of All Rights to Use Water in the Gila River Sys. & Source* (“*Gila River IV*”), 198 Ariz. 330, 334 ¶ 3, 9 P.3d 1069, 1073 (2000)) (groundwater “is not appropriable and may be pumped by the overlying landowner, subject to the doctrine of reasonable use”). *See In re Gen. Adjudication of All Rights to Use Water in Gila River Sys. & Source (Gila River III)*, 195 Ariz. 411, 423, 989 P.2d 739, 751 (1999) (“[h]olders of federal reserved rights enjoy greater protection from groundwater pumping than do holders of state law rights to the extent that greater protection may be necessary to maintain sufficient water to accomplish the purpose of a reservation.”); *Gila River IV*, 198 Ariz. 330, 334, 9 P.3d 1069, 1073 (2000) (“Percolating groundwater... is not appropriable and may be pumped by the overlying landowner, subject to the doctrine of reasonable use... and the federal reserved water rights doctrine discussed in *Gila River III*”). *See also Davis v. Agua Sierra Res., L.L.C.*, 220 Ariz. 108, 112, 203 P.3d 506, 510 (2009) (“The legislature is free to choose between competing uses of groundwater and to modify such rights in the public interest as an exercise of its police power.”).

<sup>34</sup> *See Town of Chino Valley v. City of Prescott*, 131 Ariz. 78, 82, 638 P.2d 1324, 1328 (1981) (“We therefore hold that there is no right of ownership of groundwater in Arizona prior to its capture and withdrawal from the common supply and that the right of the owner of the overlying land is simply to the usufruct of the water.”); *Cherry v. Steiner*, 543 F. Supp. 1270, 1277 (D. Ariz. 1982), *aff'd*, 716 F.2d 687 (9th Cir. 1983) (“A landowner whose land overlies groundwater has only the right to use of the water, but maintains no proprietary interest in the actual water.”).

<sup>35</sup> A.R.S. §§ 45-544, 45-551. Groundwater users who transport water out of the basin or subbasin may be subject to damages under A.R.S. § 45-544(a), (b).

The CWA provides the framework for regulating both the surface water quality and discharges of pollutants into waters of the United States.<sup>36</sup> In recent years, the definition of “water of the United States” (WOTUS) has been repeatedly revised by the courts, the EPA, and the changing presidential administrations.<sup>37</sup> Currently, there are two definitions of WOTUS in effect in the United States, with 26 states following a 2015 definition and 24 states—including Arizona—following a 1986 definition.

In 1986, the Army Corps of Engineers issued a document to clarify the definition of WOTUS.<sup>38</sup> The document broadly defined WOTUS to include all traditionally navigable waters, their tributaries, waters adjacent to them, various types of wetlands, and waters located within the 100-year floodplain.<sup>39</sup> Although groundwater is specifically excluded from this definition,<sup>40</sup> jurisdiction may be extended to tributaries<sup>41</sup> even if there are “one or more natural breaks such as . . . a stream that flows underground,” as long as “a bed and banks and an ordinary high water mark can be identified upstream of the break.”<sup>42</sup> Thus, permitting under the CWA may be required for actions impacting riparian ecosystems that predominately consist of sub-surface flow.

Modern application of the 1986 rule includes limitations placed on the rule by the Supreme Court in *Rapanos v. United States*. In that case, the petitioner had backfilled a portion of wetlands “adjacent” to navigable waters on land that he owned with the intention of developing it and was criminally and civilly charged for violating the CWA.<sup>43</sup> The Supreme Court issued five different opinions in the case, and Justice Kennedy’s concurring opinion emerged as the guiding test.<sup>44</sup> According to Justice Kennedy, only waters with a “significant nexus”<sup>45</sup> to navigable waters are under federal jurisdiction for purposes of the CWA.<sup>46</sup>

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<sup>36</sup> 33 U.S.C. § 1251.

<sup>37</sup> US Army Corps of Engineers, *Jurisdictional Information*, (Last visited September 1, 2018), available at [https://www.usace.army.mil/Missions/Civil-Works/Regulatory-Program-and-Permits/juris\\_info/](https://www.usace.army.mil/Missions/Civil-Works/Regulatory-Program-and-Permits/juris_info/).

<sup>38</sup> 33 C.F.R. § 328.3(b).

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

<sup>40</sup> *Id.* at § 328.3(b).

<sup>41</sup> Tributaries are defined as “water that contributes flow, either directly or through another water,” that constitutes a navigable waterway. *Id.* at § 328.3(c)(3).

<sup>42</sup> *Id.* at § 328.3(c)(3).

<sup>43</sup> *Rapanos v. United States*, 547 U.S. 715, 724, (2006).

<sup>44</sup> *Id.* at 757.

<sup>45</sup> However, Justice Scalia argued that the definition of waters of the United States “does not include channels through which water flows intermittently or ephemerally, or channels that periodically provide drainage for rainfall.” *Id.* at 739.

<sup>46</sup> *Id.* at 767.

Nine years after the *Rapanos* decision, the Obama Administration, acting through the EPA and the Army Corps of Engineers, issued a new rule that attempted to clarify the scope of federal jurisdiction under the CWA and preserve federal jurisdiction over non-perennial waterways, thus codifying Justice Kennedy’s significant nexus test and broadening the previously codified WOTUS test.<sup>47</sup> This 2015 rule made changes to the definitions of “adjacent waters”, “tributaries” and “ditches”, required case-specific significant nexus tests for some waters, and added exclusions.<sup>48</sup> In this rule, unlike the 1986 rule, agencies were not left to interpret WOTUS on their own, but were held to one definition.<sup>49</sup> The rule was quickly challenged by twenty-four states, and two federal courts stayed the rule before it could go into effect in those states.<sup>50</sup> In 2017, the Trump Administration issued an Executive Order to stay and review the 2015 rule and to publish a new rule consistent with Justice Scalia’s *Rapanos* test.<sup>51</sup>

In January of 2018, the EPA issued a delay rule, deciding that rather than rescind the 2015 rule, the federal government would not apply the rule until 2020 while it worked “through the process of providing long-term regulatory certainty across all 50 states about what waters are subject to federal regulation.”<sup>52</sup> In the interim period, all of the states would follow the 1986 WOTUS rule.<sup>53</sup> But on August 16, 2018, the District Court of South Carolina issued a nationwide injunction of EPA’s 2018 delay rule, finding that the EPA failed to follow the required rulemaking procedures in issuing the rule.<sup>54</sup> With this injunction in place, 24 states, including Arizona, currently follow the 1986 WOTUS definition, and 26 states follow the 2015 rule.<sup>55</sup>

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<sup>47</sup> Environmental Protection Agency and Army Corps of Engineers Final Rule; “Clean Water Rule: Definition of Waters of the United States,” 80 Fed. Reg. 37,054 (June 29, 2015).

<sup>48</sup> Congressional Research Service, *EPA and the Army Corps’ Rule to Define “Waters of the United States”*, at 8 (Jan. 5, 2017), available at <https://fas.org/sgp/crs/misc/R43455.pdf>.

<sup>49</sup> *Id.* at ii.

<sup>50</sup> *North Dakota v. U.S. E.P.A.*, 127 F. Supp. 3d 1047, 1051 (D.N.D. 2015); *Georgia v. Pruitt*, 2018 U.S. Dist. LEXIS 97223 (S.D. Ga., June 8, 2018). In 2016, the Sixth Circuit issued a nationwide stay of the 2015, but the Court’s ruling was overturned by the Supreme Court in 2018 which held that the district courts, not the circuit courts, had jurisdiction to hear challenges to WOTUS. See *Nat’l Ass’n of Mfrs. v. Dep’t of Def.*, 138 S. Ct. 617, 634, 199 L. Ed. 2d 501 (2018).

<sup>51</sup> 82 Fed. Reg. 34899 (2017).

<sup>52</sup> United States Environmental Protection Agency, *EPA and Army Finalize “Waters of the United States” Applicability Date*, News Releases (Jan. 31, 2018), <https://www.epa.gov/newsreleases/epa-and-army-finalize-waters-united-states-applicability-date>.

<sup>53</sup> United States Environmental Protection Agency, *Final Rule: Definition of “Waters of the United States” – Addition of Applicability Date to 2015 Clean Water Rule*, <https://www.epa.gov/wotus-rule/final-rule-definition-waters-united-states-addition-applicability-date-2015-clean-water> (last visited Apr. 7, 2018).

<sup>54</sup> *S.C. Coastal Conservation League v. Pruitt*, No. 18-CV-330-DCN, 2018 WL 3933811, at \*8 (D.S.C. Aug. 16, 2018).

<sup>55</sup> *Id.*

For the Cobre Valley, the dispute may seem irrelevant since Pinal Creek and Pinto Creek likely fall within both the 1986 WOTUS definition and the 2015 WOTUS rule, and are thus under the jurisdiction of the CWA as tributaries to the Upper Salt River.<sup>56</sup> However, this is an important issue to monitor as the Trump Administration may ultimately issue a much narrower WOTUS rule that could exclude Pinal and Pinto Creeks from CWA jurisdiction.

## **B. Section 404 Dredge and Fill Permitting**

One provision of the CWA that is likely applicable to activities in the Cobre Valley is Section 404, which regulates the discharge of dredged or fill materials into waters of the United States, such as Pinal and Pinto Creeks.<sup>57</sup> As a precondition to issuance of a Section 404 permit, the applicant must provide the Army Corps with a Section 401 certification.<sup>58</sup> The Army Corps has authority to issue section 404 permits, but the EPA has authority to develop guidelines for permit approval.<sup>59</sup> Pursuant to the EPA's guidelines at 40 C.F.R. § 230.10, the Corps must deny a permit if:

- (a) there is a practicable alternative that causes less harm to the environment;
- (b) the discharge contributes to or causes a violation of the State Water Quality Standards, violates a toxic effluent standard, jeopardizes an endangered or threatened species or its habitat, or violates the requirement of a marine sanctuary designation;
- (c) the discharge “causes or contributes to the significant degradation of waters of the United States,” or
- (d) “appropriate and practicable steps” have not been taken which will “minimize potential adverse impacts of the discharge on the aquatic ecosystem.”<sup>60</sup>

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<sup>56</sup> In contrast, the Lower Salt River has been found to be “not navigable” as of 1912, the year of statehood, by the Arizona Navigable Stream Adjudication Commission. Arizona Navigable Stream Adjudication Commission, *Report, Findings and Determination Regarding the Navigability of the Salt River from Granite Reef Dam to the Gila River Confluence* (Sep. 21, 2005),

<http://www.ansac.az.gov/UserFiles/File/pdf/finalreports/Lower%20Salt%20River.pdf>.

<sup>57</sup> 33 U.S.C.A. § 1344(a). A separate permitting process applies to discharge of pollutants into navigable waters: the National Pollution Discharge Elimination System (NPDES). *See* 33 U.S.C.A. § 1342. This permitting process is applicable to, for example, wastewater treatment facilities.

<sup>58</sup> 33 U.S.C. § 1341. This certification, made by the state in which the discharge originates, declares that the discharge will comply with applicable provisions of the CWA, including state water quality standards.

<sup>59</sup> *Id.* § 1344(b). The EPA also has “veto authority” and may deny a permit application if “the discharge of such materials into such area will have an unacceptable adverse effect on municipal water supplies, shellfish beds and fishery areas (including spawning and breeding areas), wildlife, or recreational areas.” *Id.* § 1344(c).

<sup>60</sup> *Id.*

The U.S. Army Corps also evaluates permit applications under a “public interest review,” outlined in 33 C.F.R. § 320.4(a).<sup>61</sup> The relevant factors and the relative importance of each are determined at the discretion of the Corps, and its analysis may vary from permit to permit. A permit may be denied if it fails to meet the requirements of the guidelines in 40 C.F.R. 230 or the public interest review.

Dredge and fill activities that the Secretary determines “are similar in nature, will cause only minimal adverse environmental effects when performed separately, and will have only minimal cumulative adverse effect on the environment,” may be eligible for issuance of a general permit on a State, regional, or nationwide basis.<sup>62</sup> General permits are subject to the same guidelines and requirements outlined above, as well as additional “requirements and standards which shall apply to any activity authorized by such general permit.”<sup>63</sup> General permits may not be issued for a period longer than five years and may be revoked if the nature of the activities authorized by the permit changes, leading to a finding by the Secretary that environmental degradation is occurring as a result.<sup>64</sup> The Clean Water Act also outlines six categories of activities that are completely exempt from the section 404 permitting process.<sup>65</sup> Most dredge and

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<sup>61</sup> The public interest review is a balancing test of factors that impact the cumulative effect, which may include “conservation, economics, aesthetics, general environmental concerns, wetlands, historic properties, fish and wildlife values, flood hazards, floodplain values, land use, navigation, shore erosion, recreation, water supply and conservation, water quality, energy needs, safety, mineral needs, considerations of property ownership and, in general, the needs and welfare of the people.” *Id.* § (a)(1). Under 33 C.F.R. § 320.4(a)(2), the Corps *must* include the following factors in its public interest analysis: “(i) the relative extent of the public and private need for the proposed structure or work; (ii) where there are unresolved conflicts as to resource use, the practicability of using reasonable alternative locations and methods to accomplish the objective of the proposed structure or work; and (iii) the extent and permanence of the beneficial and/or detrimental effects which the proposed structure or work is likely to have on the public and private uses to which the area is suited.”

<sup>62</sup> 33 U.S.C.A. § 1344(e)(1) (West).

<sup>63</sup> *Id.*

<sup>64</sup> 33 U.S.C.A. § 1344(e)(2) (West).

<sup>65</sup> Dredge and fill “(A) from normal farming, silviculture, and ranching activities such as plowing, seeding, cultivating, minor drainage, harvesting for the production of food, fiber, and forest products, or upland soil and water conservation practices; (B) for the purpose of maintenance, including emergency reconstruction of recently damaged parts, of currently serviceable structures such as dikes, dams, levees, groins, riprap, breakwaters, causeways, and bridge abutments or approaches, and transportation structures; (C) for the purpose of construction or maintenance of farm or stock ponds or irrigation ditches, or the maintenance of drainage ditches; (D) for the purpose of construction of temporary sedimentation basins on a construction site which does not include placement of fill material into the navigable waters; (E) for the purpose of construction or maintenance of farm roads or forest roads, or temporary roads for moving mining equipment, where such roads are constructed and maintained, in accordance with best management practices, to assure that flow and circulation patterns and chemical and biological characteristics of the navigable waters are not impaired, that the reach of the navigable waters is not reduced, and that any adverse effect on the aquatic environment will be otherwise minimized; (F) resulting from any activity with respect to which a State has an approved program under section 1288(b)(4) of [Title 33. Navigation and Navigable Waters] which meets the requirements of subparagraphs (B) and (C) of such section.” 33 U.S.C.A. § 1344(f) (West).

fill activities undertaken by individuals at a small, local level are likely to fall into one of these categories of exemptions.

## **CONCLUSIONS**

The Gila River adjudication affects persons or entities who use surface water in the Cobre Valley area. Affected surface water users include those who divert surface water from, or use the instream flows of, Pinto Creek and Pinal Creek and any other surface water sources. Also affected are those water users who impound water in ponds or reservoirs located on natural channels, and who withdraw well water that is determined to come from the subflow of a stream. The Gila River Adjudication has been a slow moving process, but it is now progressing more quickly. Cobre Valley water users who believe they have a valid surface water right, but who have not yet filed an SOC with the Maricopa County Superior Court, should do so in order to protect their water rights from being lost.

Additionally, because the Cobre Valley is not located within an AMA designated by the Arizona Groundwater Management Act, groundwater use is generally unlimited as long as that use is objectively reasonable and beneficial. Landowners have the right to use groundwater beneath their land subject to the doctrines of reasonable use and federal reserved water rights, but landowners may not transfer their groundwater out of the water basin or subbasin unless certain statutory requirements are met.

In Arizona, the jurisdiction of the CWA—as described in the definition of WOTUS—currently follows the 1986 WOTUS definition and the subsequent *Rapanos* guidelines. Accordingly, activities, such as dredging and filling, that take place within qualifying waters are subject to the federal permitting processes under the CWA.