IN THE SUPREME COURT OF THE STATE OF ARIZONA
En Banc

THE SAN CARLOS APACHE TRIBE, THE TONTO APACHE TRIBE and the YAVAPAI APACHE TRIBE, all Federally recognized Indian Tribes, Petitioners, vs. THE SUPERIOR COURT OF ARIZONA, IN AND FOR THE COUNTY OF MARICOPA, AND HONORABLE SUSAN R. BOLTON, A JUDGE THEREOF; THE SUPERIOR COURT OF ARIZONA, IN AND FOR THE COUNTY OF APACHE, AND THE HONORABLE ALLEN G. MINKER, A JUDGE THEREOF; THE HONORABLE JOHN E. THORSON, SPECIAL MASTER, ARIZONA GENERAL STREAM ADJUDICATIONS; STATE OF ARIZONA, RITA PEARSON, DIRECTOR, ARIZONA DEPARTMENT OF WATER RESOURCES; GRANT J. WOODS, ARIZONA ATTORNEY GENERAL; ARIZONA STATE LAND DEPARTMENT, SALT RIVER VALLEY WATER USERS ASSOCIATION; PHELPS DODGE CORPORATION; ROOSEVELT WATER CONSERVATION DISTRICT AND ALL OTHER CLAIMANTS TO WATER RIGHTS IN THE GILA RIVER SYSTEM AND SOURCE AND THE LITTLE COLORADO RIVER SYSTEM AND SOURCE AS REAL PARTIES IN INTEREST, Respondents.	Supreme Court No. CV-95-0161-SA In Re the General Adjudication of All Rights to Use Water in the Gila River System and Source Maricopa County No. W-1 (Salt), W-2 (Verde), W-3 (Upper Gila), W-4 (San Pedro) (Consolidated) In Re the General Adjudication of All Rights to Use Water in the Little Colorado River System and Source Apache County No. 6417 **O P I N I O N**

SPECIAL ACTION
Certification Order filed October 3, 1996
by the Honorable Susan R. Bolton, Judge
Superior Court in Maricopa County
RELIEF GRANTED IN PART AND DENIED IN PART

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FELDMAN, Justice

¶1 We previously accepted jurisdiction of this special action challenging the constitutionality of two legislative measures that revise many portions of Arizona's surface water law. On remand, the trial judge held most of the statutory changes unconstitutional because they applied retroactively to affect vested property rights, thus violating the due process clause of article II, section 4 of the Arizona Constitution, or because they violated the separation of powers clause of article III of the Arizona Constitution. For the most part, we agree and affirm.

FACTS AND PROCEDURAL HISTORY

¶2 Because "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." *United States v. Superior Court/San Carlos Apache Tribe*, 144 Ariz. 265, 270, 697 P.2d 658, 663 (1985) (hereinafter *San Carlos II*). The attempt to adjudicate all surface water rights began in 1974 when the Salt River Valley Water Users' Association filed a petition with the State Land Department for adjudication of its water rights under former A.R.S. §§ 45-231 to 45-245. *Id.* In 1979, those statutes were repealed and superseded by A.R.S. §§ 45-251 to 45-260. *Id*. In accordance with the statutory changes, Salt River's administrative proceeding was transferred to Maricopa County Superior Court, where it was consolidated with other petitions for adjudication of water rights in the Salt, Verde, and San Pedro Rivers. *In re Rights to the Use of the Gila River*, 171 Ariz. 230, 233, 830 P.2d 442, 445 (1992) (hereinafter *Gila River Adjudication I*). Subsequently, the trial

judge expanded the scope of the adjudication to include the Upper Agua Fria, Upper Gila, Lower Gila, and Upper Santa Cruz Rivers. *Id*. A similar proceeding is pending involving rights in the Little Colorado River. Today, more than 27,000 parties have been served and over 77,000 claims remain to be adjudicated in the Gila River and Little Colorado River adjudications.

¶3 In 1986, the trial judge entered an order that established procedures for managing this complex litigation and identified legal issues the court needed to resolve before finally adjudicating individual claims. *Id*. In September 1989, we issued a Special Procedural Order Providing for Interlocutory Appeals and Certifications designed to "provide a mechanism [for appellate] review [of] the important legal decisions of the trial court as promptly as practicable at the outset of the adjudication." *Id*. at 233 n.2, 830 P.2d at 445 n.2. Pursuant to this order, in December 1990 we granted interlocutory review of six issues. We have published opinions addressing issues 1 and 2. *See Gila River Adjudication I,* 171 Ariz. 230, 830 P.2d 442 (issue 1 — holding that the special filing and service procedures adopted by the trial court for the general adjudication satisfied due process requirements); *In re General Adjudication of All Rights to Use Water in the Gila River System and Source*, 175 Ariz. 382, 857 P.2d 1236 (1993) (issue 2 — holding that the trial court adopted an incorrect method for identifying wells presumed to be pumping appropriable subflow as opposed to groundwater, which is excluded from the rule of prior appropriation) (hereinafter *Gila River Adjudication II*). Issues 4 and 5, which pertain to alleged application of federal reserved rights to groundwater, have been argued and

submitted to the court for decision.[1]

¶4 Although a number of issues have been or soon will be resolved, many more legal and evidentiary issues remain pending on appeal or in the trial court. Nevertheless, in 1995 — in the midst of this adjudication and the Little Colorado River proceeding — the Legislature enacted House Bills 2276 and 2193, which revised numerous statutes dealing with surface water rights and the general adjudication process. The San Carlos Apache Tribe, Tonto Apache Tribe, and Yavapai Apache Tribe — Camp Verde Reservation (the Apache Tribes) filed a special action in this court challenging the constitutionality of the enactments. We accepted jurisdiction and remanded the matter to the trial court, specifically Judge Susan R. Bolton, for briefing and oral argument.[2] We later amended the remand order to direct Judge Bolton "to identify and resolve, subject to the special appellate procedures applicable to this case," the issues that needed to be decided immediately, and to "determine each constitutional issue."

¶5 In the trial court, the Apache Tribes, the Little Colorado River Tribes (Navajo Nation, Hopi Tribe, Pueblo of Zuni, and San Juan Southern Paiute Tribe), and the United States (collectively the federal parties) challenged the legislation. The Salt River Project, Cyprus Mining entities, and the State Land Department (collectively the state parties), on behalf of themselves and numerous other parties, filed briefs supporting it. Judge Bolton heard oral argument and, in

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[1] For a more detailed history of the adjudication, see *Arizona v. San Carlos Apache Tribe*, 463 U.S. 545, 103 S.Ct. 3201 (1983) (*San Carlos I*); *San Carlos II*, 144 Ariz. at 270-71, 697 P.2d at 663-64; *Gila River Adjudication I*, 171 Ariz. at 232-33, 830 P.2d at 444-45; *Gila River Adjudication II*, 175 Ariz. at 384-85, 857 P.2d at 1238-39.

[2] Judge Bolton replaced retired Judge Stanley Z. Goodfarb, who presided over the Gila River adjudication for fourteen years.

accordance with the 1989 Special Procedural Order, certified her decision to this court. We accepted the certification, ordered briefing, and granted extended oral argument. We have jurisdiction pursuant to article VI, section 5(3) of the Arizona Constitution.

DISCUSSION

A. Preliminary matters

¶6 Several of the parties have suggested that we not confine ourselves to the constitutional issues addressed by Judge Bolton but instead decide the constitutionality of each legislative enactment. We decline the invitation and confine ourselves to determining those issues properly raised by the parties and necessary to our determination of the validity of the challenged legislation.

¶7 Except as otherwise noted in ¶¶ 10, 28, 54, 59, 60, and 62, all constitutional findings in this opinion are based on state law. Federal cases are used only for guidance and do not themselves compel the results we reach today. *See Michigan v. Long*, 463 U.S. 1032, 1041, 103 S.Ct. 3469, 3476 (1983).

¶8 To keep the opinion as brief as possible while still providing a complete picture of the changes made by the legislative enactments, we attach the full legislative text of HB 2276 and HB 2193 as Appendices A and B. The appendices show each statute in the previous and revised versions.

¶9 Because the trial court's ruling involved pure questions of law, our review is *de novo*. *See, e.g., Scottsdale Unified Sch. Dist. No. 48 v. KPNX Broadcasting Co.*, 191 Ariz. 297, 300, 955 P.2d 534, 537 (1998).

B. Standard of review

¶10 The Apache Tribes contend that we should apply strict scrutiny to this legislation and that the parties supporting the enactments have the burden to prove constitutionality. The state parties, on the other hand, urge us to apply what has been described as the presumption that all statutes are constitutional. *See Chevron Chem. Co. v. Superior Court*, 131 Ariz. 431, 438, 641 P.2d 1275, 1282 (1982); *Rochlin v. State*, 112 Ariz. 171, 174, 540 P.2d 643, 646 (1975). Judge Bolton rejected the strict scrutiny claim and presumed the amendments constitutional. Strict scrutiny is the standard applied to an equal protection challenge of a statute that "is aimed at limiting a fundamental right" or "discriminates among individuals based on a 'suspect class.'" *Arizona Downs v. Arizona Horsemen's Found.*, 130 Ariz. 550, 555, 637 P.2d 1053, 1058 (1981). We read the amendments as regulating property rights in water rather than limiting fundamental rights and cannot conclude that these statutes dealing with property rights discriminate against a suspect class. Therefore, we agree with Judge Bolton's rejection of the equal protection claims and, as a matter of federal law, see no need to apply strict scrutiny.

¶11 The Apache Tribes also argue that *Arizona v. San Carlos Apache Tribe*, 463 U.S. 545, 103 S.Ct. 3201 (1983) (hereinafter *San Carlos I*), requires a "strict standard" of review when a state statute is claimed to violate the federal constitutional rights of the Apache Tribes. We do not read *San Carlos I* to require such a standard and agree with Judge Bolton's rejection of the strict standard, whatever that may mean. We assume, as always, that legislative enactments are constitutional. We do not lightly conclude to the contrary.

C. Retroactivity

1. *General principles*

¶12 All of the parties agree that procedural changes may be applied retroactively, but the federal parties contend the enactments at issue are unconstitutional because they change the legal effect of past acts and therefore are "substantive retroactive laws" that "impair vested property rights and violate substantive due process under the Arizona and U.S. Constitutions." Conversely, the state parties insist that all substantive changes are prospective only, intended to deal with the future legal consequences of future acts. Moreover, the state parties argue, some of what may appear to be retroactive substantive changes are merely clarifications of previously ambiguous law. To support their position, the state parties point to Section 25(A), the Declaration of policy and intent of HB 2276, which states:

> The legislature finds and declares that the interests of the citizens of this state will be best served if the statutorily created process for the adjudication of surface water rights is amended to simplify and expedite pending litigation. The legislature also finds that ambiguities exist in the current statutes relating to surface water rights and that the clarification of these statutes will assist all parties by reducing the need for the courts to resolve current ambiguities. The legislature recognizes that the general stream adjudications are complicated and have the potential to profoundly affect the property rights of the water users of this state. It is the intention of this act to clarify existing laws and adopt changes that are equitable and fair to all parties, that comply with the letter and the spirit of the McCarran Amendment (43 United States Code section 666),[3] that provide long-term security to all water rights holders within this state and that streamline the adjudication

[3] For a history and description of the McCarran Amendment, see *San Carlos II*, 144 Ariz. at 272-73, 697 P.2d at 665-66.

> process and remove undue burdens of litigation from the parties.

¶13 There would be little constitutional impediment if the statutes that follow this Declaration did no more than simplify and expedite pending litigation by amending the adjudication process, but Section 24 of HB 2276 gives us a different picture of the Legislature's intent, stating:

> Unless otherwise specifically provided, this act applies to:
>
> 1. All rights to appropriable water *initiated or perfected on or before the effective date of this act* and any rights subsequently initiated or perfected.
>
> 2. All *general stream adjudications pending* on the effective date of this act and all future general stream adjudications initiated pursuant to title 45, chapter 1, article 9, Arizona Revised Statutes.

(Emphasis added.) Judge Bolton concluded that this language clearly and unequivocally demonstrated the Legislature's intention to apply both substantive and procedural changes retroactively. After considering both the language of Section 24 and the complete text of the statutes, we must agree.

¶14 Declarations of intent may be helpful in interpretation, but the text of a measure must be considered first and foremost. *See City of Chicago v. Environmental Defense Fund*, 511 U.S. 328, 339, 114 S.Ct. 1588, 1594 (1994) ("It is not unusual for legislation to contain diverse purposes that must be reconciled, and the most reliable guide for that task is the enacted text."); *Kriz v. Buckeye Petroleum Co.*, 145 Ariz. 374, 377, 701 P.2d 1182, 1185 (1985) ("To arrive at legislative intent, this Court first looks to the words of the statute."). It is true, as the state parties argue, that § 1-244 requires an express statement of retroactive intent before a statute

will be considered retroactive. Here, however, several of the statutes cannot sensibly be applied prospectively. *See, e.g.*, § 45-187; § 45-188(A) and (B) discussed *infra* at ¶¶ 20-22. This, we believe, indicates an overall legislative intent to apply all of the statutes retroactively.

¶15 That the Legislature *intended* the statutes to apply retroactively does not end our analysis. A statute that is merely procedural may be applied retroactively. *Hall v. A.N.R. Freight Sys.*, 149 Ariz. 130, 139, 717 P.2d 434, 443 (1986). A statute may not, however, "attach[] new legal consequences to events completed before its enactment." *Landgraf v. USI Film Prods.*, 511 U.S. 244, 270, 114 S.Ct. 1483, 1499 (1994). In other words, legislation may not disturb vested substantive rights by retroactively changing the law that applies to completed events. *Hall*, 149 Ariz. at 139, 717 P.2d at 443. A vested right "is actually assertable as a legal cause of action or defense or is so substantially relied upon that retroactive divestiture would be manifestly unjust." *Id.* at 140, 717 P.2d at 444. We agree with Judge Bolton's conclusion that the water rights of the parties in the Gila and Little Colorado general stream adjudications are vested substantive property rights. Also, because there is not enough water for all, priority in use is itself an attribute of an appropriative property right to surface water. As Judge Bolton noted, the purpose of the adjudications is to quantify, prioritize, and document by decree existing priority rights to appropriable and federally reserved water. This state has always followed the doctrine of prior appropriation of surface waters – first in time, first in right. *See Clough v. Wing*, 2 Ariz. 371, 17 P. 453 (1888). Thus, the legal effect of acts that resulted in acquisition

and priority of water rights cannot be changed by subsequent legislation. Any implementation of Section 24's retroactive intent to affect vested substantive rights to water would violate the due process guarantee of article II, section 4 of the Arizona Constitution. *See Hall*, 149 Ariz. at 139, 717 P.2d at 443.

¶16 The state parties insist, however, that "water rights, like other property rights, continue to be subject to regulation by the legislature even after vesting," and argue that this legislation does nothing more than impose such regulatory measures. To hold otherwise, they say, would effectively freeze the law by precluding the Legislature from enacting future regulations. It is true that even vested rights may be regulated. Today's holding, however, does not prevent future regulations and does not freeze the law. The Legislature may certainly enact laws that apply to rights vested before the date of the statute. Such laws, however, may only change the legal consequences of *future* events. *See Tower Plaza Invs. v. DeWitt*, 109 Ariz. 248, 251-52, 508 P.2d 324, 327-28 (1973) (holding that the Legislature may tax future rents in leases made prior to enactment of statute). All other considerations permitting, the Legislature may provide, for instance, that a right vested before the statute is effective will be affected by the specified event occurring after the statute is effective. The Legislature may not, however, change the legal consequence of events completed before the statute's enactment. *See id*. For example, the Legislature cannot revive rights that have been lost or terminated under the law as it existed at the time of an event and that have vested in otherwise junior appropriators. *See, e.g., Hall*, 149 Ariz. at 139, 717 P.2d at 443; *United States v. Klein*, 80 U.S. (13 Wall.) 128, 146 (1871) (separation

of powers prohibits Congress from prescribing rules of decision in pending cases). We therefore agree with Judge Bolton that those provisions of HB 2276 that retroactively alter vested substantive rights violate the due process clause, article II, section 4 of the Arizona Constitution. Accordingly, we analyze the statutes for true retrospective effect. For ease of reference, we list the statutes in numerical order.

2. Specific statutes

¶17 As amended, § 45-141(B) prohibits a finding of forfeiture or abandonment when water has been used on less than all the land to which the right was appurtenant. This provision creates a new protection against a finding of abandonment or forfeiture that did not exist in the former § 45-141. The consequences of failure to make use of appropriated water on all of the appropriator's land must be determined on the basis of the law existing at the time of the event, not on the basis of subsequently enacted legislation that may change the order of priority. *Cf. Klein*, 80 U.S. (13 Wall.) at 148. Section 45-141(C) eliminates any possibility of forfeiture for rights initiated before June 12, 1919. If applied retrospectively, this too creates a new and unconstitutional protection for pre-1919 water rights that may have been forfeited and vested in others under the law existing prior to 1995. Forfeiture and resultant changes in priority must be determined under the law as it existed at the time of the event alleged to have caused the forfeiture.

¶18 Section 45-151(D)[4] provides that the availability of

[4] Because we find this statute impermissibly affects vested substantive rights, we do not address the argument that it also violates separation of powers.

alternative water sources does not affect a surface water right. No such provision existed under the prior statutory law, and it cannot be *retroactively* added to the statute or engrafted in the common law. Section 45-151(E) (contained in both HB 2276 and HB 2193) states that water rights appropriated on federal land belong to the person who first made beneficial use of the water; § 45-151(F) states that water on federal land may be used at any location; and § 45-156(E) provides that failure to obtain approval for a change in use does not result in abandonment, forfeiture, or loss of priority. These are all new enactments that cannot be retroactively applied to affect rights vested under the interpretation of statutes or common law existing at the time of the events. 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 those enacted while the case is pending before the court. *See Hall,* 149 Ariz. at 138, 717 P.2d at 442; *Tower Plaza Invs.*, 109 Ariz. at 251-52, 508 P.2d at 327-28.

¶19 Section 45-162(B) provides that a delay by the Department of Water Resources (DWR) in processing a water right application does not affect priority. As we read the old and new versions of the statute, the priority date under both is the application's filing date. If this new provision changes anything at all, it does so retroactively.

¶20 Section 45-187 recognizes an appropriator's acquisition

of water rights through adverse possession until May 21, 1974.[5] The previous version of the statute recognized adverse possession claims only until 1919.[6] Thus, rights may now be claimed by adverse possession for the period from 1919 through 1974, to the possible detriment of users whose statutory appropriative rights accrued after 1919. This new version of § 45-187 cannot sensibly be read to apply to the consequences of events occurring after March 17, 1995 — the date the statute took effect.

¶21 These changes to § 45-187 present a paradigm of unconstitutional retrospective application. The changes not only apply to previous conditions but also change the consequences of past events. As the previous versions of § 45-187 recognized, before 1919 water rights could be acquired by adverse possession. Whether a water right could be acquired by adverse possession between 1919 and 1974 is not entirely clear. For instance, *Tattersfield v. Putnam* suggests that to initiate and perfect a water right, certain statutory formalities were required after 1919. 45 Ariz. 156, 174, 41 P.2d

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[5] The 1995 version of § 45-187 reads:

> Beginning on May 21, 1974, no rights to the use of public waters of the state may be acquired by adverse use or adverse possession as between the person and the state, or as between one or more persons asserting the water right, but nothing contained herein affects the validity of a claim filed under this article based on prior adverse use or adverse possession.

[6] The former version of § 45-187 reads:

> No rights to the use of public waters of the state may be acquired by adverse use or adverse possession as between the person and the state, or as between one or more persons asserting the water right; but nothing contained herein shall be deemed to diminish or enhance the validity of a claim filed under this article originating prior to the effective date of chapter 164 of the Laws of 1919.

228, 235 (1935). Accordingly, one could not appropriate water by mere beneficial use. *Id*. It could thus be argued that one who failed to meet the formalities in the 1919 water code — applying for a permit and recording the certificate — could not have acquired a right by adverse possession after 1919. On the other hand, at least one case suggests otherwise. *Gibbons v. Globe Development, Nevada, Inc.,* expressly states that a "water right may be obtained by adverse possession." 113 Ariz. 324, 325, 553 P.2d 1198, 1199 (1976). *Gibbons* held that there was a triable issue of fact whether a water right by adverse possession had been established. *Id*. at 326, 553 P.2d at 1200. It did not specify the year the adverse use began. Whether a right could be acquired by adverse possession between 1919 and 1974 must be determined by the law in effect at the time, not by the 1995 statute. The power to define existing law in adjudicating disputes rests exclusively within the judicial branch. *Chevron Chem. Co.*, 131 Ariz. at 440, 641 P.2d at 1284.

¶22 Sections 45-188(A), (B), and (C) likewise impermissibly affect vested substantive rights. The 1974 version of § 45-188 provided simply that a water right could be lost through abandonment or forfeiture (nonuse, without sufficient cause for five years), without reference to the date the right was initiated. Subsections (A) and (B) of the 1995 version, however, limit nonuse forfeiture to those rights initiated on or after June 12, 1919.[7] The effect of the 1995 statutory amendment is to negate the forfeiture provisions of the 1974 statute. Given that some claims may be based on rights

[7] Abandonment arises from nonuse with intent to abandon, while forfeiture results from nonuse, for a specified period of time, regardless of intention. *Gila Water Co. v. Green,* 29 Ariz. 304, 306, 241 P. 307, 308 (1925).

or priorities acquired through forfeiture of otherwise senior rights after 1974, the provisions added to § 45-188 were undoubtedly intended to alter the legal consequences of preenactment events. Some otherwise junior appropriators may have already advanced in priority due to forfeited water rights. The forfeited senior rights cannot be revived by legislation passed in 1995.

¶23 Subsection (C) of § 45-188 insulates from abandonment and forfeiture water rights appurtenant to lands within an irrigation district, water users' association, or the like so long as an operable delivery system is maintained. This, too, did not exist before HB 2276 and must share the same fate as subsections (A) and (B). These provisions all alter the law regarding the creation, appropriation, retention, priority, abandonment, or forfeiture of previously vested water rights and are thus substantive changes. They are retroactive because they may alter the vested consequences of past events. Legislation that changes the rules governing the legal consequences of past events violates article II, section 4 of the Arizona Constitution. *Cf. Chevron Chem. Co.*, 131 Ariz. at 438-40, 641 P.2d at 1282-84.

¶24 The Legislature added in § 45-189(E) the following five new exceptions to post-1919 forfeiture for nonuse:

> 8. The reconstruction, replacement, reconfiguration or maintenance of water storage or distribution facilities, using reasonable diligence including the failure to divert or store water as a result of those activities.
>
> 9. An agreement between the holder of a reservoir right and the United States, this state or any city, county or other municipal or governmental entity to leave a minimum pool of water in the reservoir for the benefit of the public for recreation, fish and wildlife purposes.
>
> 10. Use of the water appropriated on less than

> all of the land to which the right is appurtenant.
>
> 11. An agreement between the operator of a reservoir and a person entitled to the use of water stored in the reservoir allowing the water to be withdrawn over a period of time exceeding five years.
>
> 12. A written agreement between two or more appropriators of water pursuant to which one or more of the appropriators agrees to forbear the exercise of its water right, in whole or in part, for the benefit of one or more appropriators within the same river system and source if the appropriator who forbears exercise of the right continues the beneficial use associated with the right.

The last exception on the list (No. 13) — "[a]ny other reason that a court of competent jurisdiction deems would warrant nonuse" — remains unchanged. Judge Bolton held that because the statute has always provided a nonexclusive list of sufficient reasons for nonuse, the new exceptions were valid so long as they were applied prospectively only. We agree that the Legislature may prospectively add to this nonexclusive list. These new exceptions, however, applying to events occurring between 1919 and 1995, obviously were intended to affect and alter the legal consequences of conduct occurring before the enactment date. As a result, they retroactively affect vested substantive rights. Again, the effect of acts that occurred before the effective date of HB 2276 must be determined by the law that existed at the time of the event. The Legislature may not retroactively determine the law. *See Hall,* 149 Ariz. at 138, 717 P.2d at 442.

¶25 The Apache Tribes urge this court to hold § 45-262 unconstitutional. The statute, which did not exist prior to HB 2276, provides:

> Contributions of surface water by an appropriator to an Indian water rights settlement shall not

> diminish the appropriator's decreed water right pursuant to section 45-257 unless a severance and transfer of that right are specifically provided for in the settlement agreement, but the appropriator shall not use water available under its decreed right if the water is actually being used by an Indian tribe pursuant to the settlement agreement. The decree entered for the appropriator shall include any contributions that are made and that are designated as for the benefit of the tribe, subject to the provisions of the settlement agreement.

Although Judge Bolton did not address this statute in her ruling, we conclude that it cannot stand. It is not limited to future settlement agreements. Consequently, this statute, like those previously discussed, is invalid because it may retroactively alter the consequences of past events.

3. "Reopener" provisions

¶26 The federal parties also contend the "reopener" provisions are invalid. Section 45-182(A) allows persons claiming a state law water right to file their statements of claim no later than ninety days before the date of DWR's final report for the subwatershed in which the claimed right is located. The previous deadline set by the first adjudication statute was June 30, 1979. Similarly, § 45-254(E) allows claimants to file statements or amend existing statements without leave of court up to ninety days before publication of DWR's final report for the subwatershed or federal reservation. After this time has expired but before the special master's hearings conclude, claimants may assert a claim for water use within that subwatershed or reservation without leave of court by filing a statement with DWR's director and a notice of filing with the court. When the special master has completed the hearings and has filed a report with the court, further claim filing is not permitted except with the court's

permission.

¶27 As Judge Bolton concluded, the Legislature could have determined that the general adjudication's purpose of quantifying and prioritizing all water rights would not be well served if the 1979 filing deadline remained intact. Claimants will now be given a reasonable opportunity to properly make their claims. The reopener provisions are a legitimate exercise of legislative power and are thus constitutional. *See, e.g., Davis v. Valley Distributing Co.,* 522 F.2d 827, 830-32 (9th Cir. 1975) (upholding application of extended statutory limitations period to claim that would otherwise have been barred by prior limitations period); *Chevron Chem. Co.*, 131 Ariz. at 438-40, 641 P.2d at 1282-84. Consequently, we affirm Judge Bolton's determination that the following statutes are procedural and may be applied retroactively: § 45-182(A), (D), and (E), reopening the time for filing statements of claims of water rights existing before March 17, 1995; and § 45-254(E), (F), and (G), providing a procedure for late filing of statements of claim and amended statements.

¶28 Similarly, Judge Bolton determined that § 45-263(A), which provides for the applicability of state law, is procedural. It reads: "State law, including all defenses available under state law, applies to the adjudication of all water rights initiated or perfected pursuant to state law." Assuming the propriety of Judge Bolton's characterization of § 45-263(A) as a procedural statute, we note that to some extent water rights affecting federal land are governed by both state and federal law. *See, e.g., Cappaert v. United States*, 426 U.S. 128, 96 S.Ct. 2062 (1976). Thus, this provision is constitutional, but only to the extent it is interpreted consistently with the supremacy clause, article VI, clause 2 of the United States

Constitution.

D. Prospective application

¶29 Notwithstanding the statutes' text, the state parties urge us to uphold all changes on a truly prospective basis, interpreting and applying the statutes to affect only the future consequences of future events. While we could do this with many of the statutes, we reluctantly decline to do so. Ordinarily we interpret statutes in a manner that will enable us to uphold their constitutionality. *Business Realty v. Maricopa County*, 181 Ariz. 551, 559, 892 P.2d 1340, 1348 (1995). In this case, however, we believe the entire body of legislation was intended to apply both retroactively and prospectively. Further, we find a significant portion of HB 2276 unconstitutional under the separation of powers doctrine of article III of the Arizona Constitution. Consequently, we have no way of knowing if the Legislature would have enacted these substantial changes had it known that the original, single body of law would be considerably changed. That decision is for the Legislature. Assuming the statutes are constitutional on other grounds, the Legislature may, if it so decides, reenact those statutes we find to be retrospective so that they apply only to future consequences of *future* events. *See Tower Plaza Invs.*, 109 Ariz. at 252, 508 P.2d at 328.

E. Ambiguity and clarification

¶30 Judge Bolton concluded that HB 2276 may be considered in determining the meaning of prior law so long as a court finds the prior law ambiguous. We disagree. Under some circumstances, a newly enacted statute may clarify ambiguities in an earlier version. *See,*

e.g., State v. Sweet, 143 Ariz. 266, 271, 693 P.2d 921, 926 (1985) (amendment enacted one year after original version of statute was clarification rather than change); *City of Mesa v. Killingsworth*, 96 Ariz. 290, 297, 394 P.2d 410, 414 (1964) (amendment enacted one year after statute was used for clarification). This useful canon of statutory construction can assist with interpretation when both statutes were passed by the same Legislature or perhaps within a few years of each other. But to suggest that the 1995 Legislature knows and can clarify what the 1919 or 1974 Legislatures intended carries us past the boundary of reality and into the world of speculation. We refuse to cross that border.

¶31 Our previous cases support that conclusion. When an amendment is enacted "after a considerable length of time and constitutes a clear and distinct change of the operative language, it is an indication of an intent to change rather than clarify the previous statute." *O'Malley Lumber Co. v. Riley*, 126 Ariz. 167, 169, 613 P.2d 629, 632 (App. 1980) (*abrogated on other grounds by Hayes v. Continental Ins. Co.*, 178 Ariz. 264, 269 n.5, 872 P.2d 668, 673 n.5 (1994)). Given the passage of time and the significant additions to and departures from prior law, HB 2276 is more akin to a change than a clarification. *See, e.g., Ormsbee v. Allstate Ins. Co.*, 177 Ariz. 146, 146-47, 865 P.2d 807, 807-08 (1993). The legislation may not, therefore, be given weight in interpreting the meaning of statutes enacted almost eighty — or even twenty-five — years earlier.

F. Separation of powers — legislative directions of factual findings

¶32 The federal parties argue that a number of the statutory changes violate the separation of powers clause, article III of the

Arizona Constitution, by changing both substantive and evidentiary law in midstream of a pending case. Other statutes, they argue, similarly violate the constitution by dictating the court's findings on factual matters. Thus, the Legislature has attempted to control both process and result, depriving the court of its constitutional authority to find facts and to define and apply the law.

¶33 The concepts of due process and separation of powers are somewhat intertwined.

> It is manifest that it was not left to the legislative power to enact any process which might be devised. The article is a restraint on the legislative as well as on the executive and judicial powers of the government, and cannot be so construed as to leave congress free to make any process "due process of law," by its mere will.

Murray's Lessee v. Hoboken Land & Improvement Co., 59 U.S. (18 How.) 272, 276 (1855). The United States Supreme Court long ago addressed this issue in a case in which Congress changed the rules of the game at what may be described as halftime. The Court previously had held that those who had been in rebellion during the Civil War could reclaim or obtain compensation for seized property if they could prove they received a presidential pardon. Such a pardon would satisfy the statutory condition that the claimant had not been in rebellion. *Klein*, 80 U.S. (13 Wall.) at 133, citing *United States v. Padelford*, 76 U.S. (9 Wall.) 531 (1869). The claimant, Klein, had been pardoned and thus prevailed on his claim, but while the case was pending on appeal, Congress enacted a law effectively negating *Padelford*. The statute provided that absent express exculpatory language, a pardon was admissible as proof of participation in rebellion but inadmissible as evidence of non-participation. *Id.* at 133-34. With the tables turned in this manner, Klein would not have been entitled to

compensation because the statute deprived the courts of jurisdiction and required dismissal. The Supreme Court made short shrift of the government's motion to dismiss.

> It seems to us that this is not an exercise of the acknowledged power of Congress to make exceptions and prescribe regulations to the appellate power. . . . What is this but to prescribe a rule for the decision of a cause in a particular way? . . . Can we do so without allowing one party to the controversy to decide it in its own favor? Can we do so without allowing that the legislature may prescribe rules of decision to the Judicial Department of the government in cases pending before it? We think not. . . . We must think that Congress had inadvertently passed the limit which separates the legislative from the judicial power.

Id. at 146-47.[8]

¶34 Similarly, we believe any attempt by the Arizona Legislature to adjudicate pending cases by defining existing law and applying it to fact is prohibited by article III of the Arizona Constitution, which describes the distribution of powers of our government as follows:

> The powers of the government of the State of Arizona shall be divided into three separate departments, the Legislative, the Executive, and the Judicial; and, except as provided in this Constitution, such departments shall be separate and distinct, and no one of such departments shall exercise the powers properly belonging to either of the others.

With these principles in mind, we analyze Judge Bolton's ruling on the separation of powers issues.

1. De minimis use — A.R.S. § 45-258

¶35 An entirely new § 45-258 provides for summary adjudication

[8] For a thorough exposition of this and related principles, see Erwin Chemerinsky, *When do Lawmakers Threaten Judicial Independence?,* TRIAL, Nov. 1998, at 62.

of certain statutorily defined *de minimis* uses. Stockponds with a capacity of fifteen acre-feet or less, domestic uses of three acre-feet or less, small business uses of three acre-feet or less, and stock watering uses of one acre-foot or less "shall be deemed" *de minimis* and are to be "summarily adjudicated and incorporated into the final decree." The parties estimate these *de minimis* uses include between two-thirds and four-fifths of the total general adjudication claims. Parties whose claims are adversely affected by another's statutorily required *de minimis* finding will be able to object to water right attributes decreed as *de minimis* only in post-decree severance and transfer or change of use proceedings, or in post-decree enforcement actions. *See* new § 45-258(F). Moreover, those who claim that a *de minimis* use interferes with their water right have the burden of proving the water diverted or withdrawn would otherwise be available to satisfy their right, a burden similar to the futile call doctrine.[9] Because there were no statutorily prescribed *de minimis* uses prior to enactment of HB 2276, the water master previously could find different *de minimis* standards for particular watersheds. The master's findings of fact were made after contested hearings in which the parties were able to present evidence on the *de minimis* issue. *See Gila River Adjudication II*, 175 Ariz. at 394, 857 P.2d at 1248 ("[T]rial court may adopt a *rationally based* exclusion for wells having

[9] The futile call doctrine provides that a senior appropriator may prevent a junior appropriator from diverting water only when doing so will be of some benefit to the senior. F. TRELEASE, WATER LAW 105 (3d ed. 1979). For example, if water is allowed to flow past the junior's point of diversion, but the stream is dry at the senior's point of diversion, shutting off ("calling") the junior will not cause the water to reach the senior. Thus, the senior's endeavor of calling the junior is futile. *See* Harrison C. Dunning, *The 'Physical Solution' in Western Water Law*, 57 U. COLO. L. REV. 445, 483 n.116 (1986).

a *de minimis* effect on the river system." (emphasis added)).

¶36 The state parties contend that § 45-258 is an attempt to focus the general adjudication proceedings on larger claims by establishing a summary adjudication procedure for those claimants with relatively small annual usage. The federal parties argue that the *de minimis* provisions violate the separation of powers and the due process clauses of the Arizona Constitution.

¶37 The Legislature has the power to enact and create law within constitutional bounds. *Chevron Chem. Co.*, 131 Ariz. at 440, 641 P.2d at 1284. The power to define existing law, including common law, and to apply it to facts rests exclusively within the judicial branch. *Id.* Although some blending of powers is inevitable given today's complex government, the separation of powers doctrine ensures "sufficient checks and balances to preserve each branch's core functions." *J.W. Hancock Enters., v. Arizona State Registrar of Contractors*, 142 Ariz. 400, 405, 690 P.2d 119, 124 (App. 1984). Article III is violated at the point where the legislative enactment unreasonably limits the judiciary's performance of its duties. *See San Carlos II*, 144 Ariz. at 278, 697 P.2d at 671. The court of appeals has developed a test for analyzing separation of powers claims. *See J.W. Hancock Enters.*, 142 Ariz. at 405-06, 690 P.2d at 124-25. We adopted this test in *State ex rel. Woods v. Block*, finding that it provides the necessary flexibility yet still maintains the goal of the separation of powers doctrine. 189 Ariz. 269, 276, 942 P.2d 428, 435 (1997). Thus, we evaluate the federal parties' article III claims using the following four factors as guidance: (1) the essential nature of the power exercised; (2) the Legislature's degree of control in exercising the power; (3) the Legislature's objective; and (4) the

practical consequences of the action. *Id.* at 277-78, 942 P.2d at 436-37.

¶38 The essential nature of the power exercised in § 45-258 is judicial. This statute directs DWR and the courts to decree *de minimis* use based on a bright-line, legislative standard. No provision exists for the presentation of evidence regarding what would be a true *de minimis* use given the amount of water actually available. For example, under § 45-258, one acre-foot would be *de minimis* whether diverted from the Gila River or from a spring with a yearly flow of only two acre-feet. As Judge Bolton noted, "the legislature is in no position to determine the amount of water that is *de minimis* for domestic, business, stockpond and stockwatering uses in numerous [and vastly differing] watersheds throughout the State." This conclusion, she held, must be made after determining contested facts and applying the law to those facts, which is strictly a judicial function. We agree.

¶39 The Legislature took complete control under § 45-258 and required the court to decree certain uses as *de minimis*. The court has no power to hear the facts and make the ultimate conclusion in the context of each watershed. Nor does the ability to challenge the *de minimis* use in post-decree enforcement proceedings save this provision. The extended delay would violate due process by depriving the parties of the opportunity to be heard in a meaningful time and in a meaningful manner. *See* Ariz. Const. art. II, § 4; *see also Huck v. Haralambie*, 122 Ariz. 63, 65, 593 P.2d 286, 288 (1979); *Salas v. Arizona Dep't of Econ. Sec.*, 182 Ariz. 141, 143, 893 P.2d 1304, 1306 (App. 1995).

¶40 The Legislature may have had the laudatory objective of

relieving the smaller water users of the financial and temporal burdens associated with the general adjudication proceedings. The practical effect of the enactment, however, was to remove all possibility of meaningful judicial conclusions based on findings of fact. This the Legislature cannot do. *Compare Klein*, 80 U.S. (13 Wall.) at 146-48, *with Pennsylvania v. Wheeling & Belmont Bridge Co.*, 59 U.S. (18 How.) 421, 429-32 (1855). We agree with Judge Bolton's conclusion that § 45-258 violates separation of powers. The following provisions are also invalid, as they have no meaning or effect without § 45-258: § 45-182(B)(4), which provides that the requirement of filing a statement of claim shall not apply to rights determined to be *de minimis*; and § 45-256(A)(5), which requires the director to identify those claims or uses that are *de minimis* as prescribed by § 45-258.[10]

2. On-farm water duties

¶41 Judge Bolton further concluded that § 45-256(A)(6), which establishes on-farm water duties based on elevation, violates separation of powers. Again, we agree. Depending on elevation, the statute mandates a finding of irrigation water quantities needed for particular crops and requires that such quantities be assigned in DWR's report to the master or court. The court must then incorporate

[10] Because we conclude § 45-258 violates article III of the Arizona Constitution, we need not decide whether it also violates the McCarran Amendment, thus causing the court to lose jurisdiction over the federal parties. We caution, however, that limiting litigation of contested facts until post-decree enforcement proceedings would raise serious McCarran Amendment concerns. The McCarran Amendment "waive[s] sovereign immunity with respect to state court adjudication of water rights claimed by the United States for all lands to which the United States held title, including Indian Reservations." *San Carlos II*, 144 Ariz. at 272, 697 P.2d at 665. In return, the amendment requires *all water rights* in a particular river system to be adjudicated in one comprehensive, *inter sese* proceeding. *See* 43 U.S.C.A. § 666 (1986); *San Carlos I*, 463 U.S. at 551, 103 S.Ct. at 3205.

those quantities in the decree unless rebutted by a preponderance of the evidence. § 45-256(A)(6). We recognize that DWR may recommend that the master adopt and apply uniform quantities, but it may do so only after investigating the irrigation uses. DWR's function is to provide technical assistance to the master and trial judge. *See San Carlos II*, 144 Ariz. at 279, 697 P.2d at 672. Assistance, however, does not include reporting statutorily mandated factual findings based on a statute rather than factual investigation. As Judge Bolton noted, the factual determination of quantities needed for certain crops and elevations must be judicially determined on the basis of evidence; it cannot be legislatively mandated. Thus, § 45-256(A)(6) violates separation of powers for the same reasons the *de minimis* provisions violate the doctrine. The Legislature cannot dictate to the master, court, or DWR the factual conclusions that underlie decrees.

3. Maximum capacity rules

¶42 Section 45-256(A)(7) attempts to set the quantity of an appropriative right by requiring DWR to measure an appropriator's water diversions (the amount of water appropriated) by the maximum theoretical capacity of the diversion facility. Similarly, it provides that reservoir storage quantities be set at the maximum controlled capacity of the reservoir. These findings must then be "presumed correct by the master and the court and incorporated in the decree" unless rebutted by evidence offered by a claimant. § 45-256(A)(7). As Judge Bolton noted, the actual diversions may never have been close to the diversion facility's maximum theoretical capacity, and some reservoir storage quantities may never have neared the reservoir's maximum capacity. The statute prevents the court from basing its

judgment on the amount of water actually diverted or stored and thus beneficially used. The Legislature may not require a court to reach and decree factual conclusions based on legislative determinations rather than actual facts. This is particularly so when the statute affects pending case decisions. *See Klein*, 80 U.S. (13 Wall.) at 146-48. As with the *de minimis* use and on-farm water duties, § 45-256(A)(7) violates separation of powers and must fail.

4. Settlement agreements

¶43 Section 45-257(C) provides that settlement agreements made by claimants must be decreed by the court. The statute does not give the court authority to review the agreement. In an *inter sese* proceeding such as this adjudication, a court cannot be required to incorporate an agreement that may affect the availability of water for other claimants or interfere with senior rights. Because of the scarcity of water, this may be the result even though the statute states that the "agreement shall be binding only among [its] parties." § 45-257(C). We concur with Judge Bolton's conclusion that this provision violates the separation of powers doctrine.

5. Prior filing presumptions

¶44 Section 45-261(A)(2) and (4) provide that DWR, the master, and the court shall accept information in prior filings as true unless DWR finds it clearly erroneous. In addition, conflicting information must be resolved favorably to the claimant unless DWR finds it clearly erroneous. Subsection (B) imposes on the objecting party the burden to prove the facts contained in the prior filing incorrect by clear and convincing evidence. We agree with Judge Bolton that these

provisions, too, violate separation of powers. It is the ultimate responsibility of the court, not the government agency providing technical assistance, to determine the credibility of information in prior filings and what is clearly erroneous. DWR must be able to investigate all evidence before making a recommendation regarding water right attributes. Information contained in prior filings may constitute some factual evidence of a claimant's water right. *See* Ariz. R. Evid. 803(6) to (10), (14) to (16). It is simply one item of evidence, however, and cannot be given determinative effect by virtue of legislative fiat. In general, the power to make rules, including rules of evidence, resides in the judicial branch. Ariz. Const. art. VI, § 5(5); *Slayton v. Shumway*, 166 Ariz. 87, 89, 800 P.2d 590, 592 (1990). We will recognize a statutory rule when it is "reasonable and workable" and when it supplements rather than contradicts our rules. *State ex rel. Collins v. Seidel*, 142 Ariz. 587, 591, 691 P.2d 678, 682 (1984). Here, however, the statute does much more than supplement our rules. It precludes the court from determining the credibility of the information in the prior filings. This it cannot do and is therefore invalid.

6. Role of Arizona Department of Water Resources

¶45 Section 45-256(B) provides that DWR's report "shall list all information that is obtained by the director and that reasonably relates to the water right claim or use investigated." The report must also include the director's proposed water right attributes for each water right claim or use investigated. If no water right finding is proposed, DWR's report shall so indicate. Objections are permitted, but they must specifically address DWR's recommendations. Objections

not in compliance must be dismissed with prejudice.

¶46 We follow Judge Bolton's analysis and uphold § 45-256(B). DWR has considerable expertise in the investigation and reporting of water rights, claims, and uses. *See San Carlos II*, 144 Ariz. at 279, 697 P.2d at 672 (noting that DWR's most important task is to provide technical assistance during adjudication proceedings). In preparing hydrographic survey reports (HSRs), DWR conducts an extensive historical review of all water right claims and uses, performs field investigations, and reviews appropriate treaties, filings, and all other documentation of the water right, claim, or use. Unlike the sections discussed above, § 45-256(B) does not dictate DWR's findings or require the court to accept or decree its HSR. But when DWR's investigation discloses water right attributes, or their absence, DWR is allowed to make the appropriate recommendation. This type of quasi-judicial function is constitutionally permitted of agencies such as DWR, so long as judicial review is permitted. *See, e.g., Cactus Wren Partners v. Arizona Dep't of Bldg. & Fire Safety*, 177 Ariz. 559, 562-64, 869 P.2d 1212, 1215-17 (App. 1994) (holding that department's hearing and resolving of landlord/tenant disputes does not usurp judicial authority so long as judicial review is available as critical check on administrative power). We realize in this case DWR is acting as a technical advisor and not as an administrative agency, but we believe the concerns are similar. Under § 45-256(B), claimants are permitted to file timely, specific written objections to DWR's recommendations and have a fair and reasonable opportunity to present evidence supporting or opposing the recommendations. The final adjudication still resides in the court. So long as DWR and the court are not required to make predetermined factual findings or decree certain rights, the statute does not violate due process

or separation of powers.

¶47 New subsections (C), (D), (E), (F), and (G), which concern the evidentiary use of parts of the HSR, have also been added to § 45-256. If the claim or use described in the report is 500 acre-feet or less, the information describing that water right claim shall be summarily admitted into evidence, and in the absence of conflicting evidence, the report's proposed attributes are to be deemed correct and incorporated into the decree. If conflicting evidence is presented, however, DWR's proposed attributes are given the weight deemed appropriate by the master and the court. If the claim or use described in the report is more than 500 acre-feet, the HSR shall not be summarily admitted into evidence or given any presumption of correctness. Those portions of the report that do not contain DWR's recommendations are not summarily admitted, though they may be offered in evidence if relevant.

¶48 We have already determined that separation of powers principles prevent the Legislature from directing that the court decree certain facts or water right attributes without any opportunity for review. Thus, those provisions of § 45-256(D) that require the director's proposed attributes to "be deemed correct and incorporated into the decree" cannot be upheld. The remaining portions of § 45-256(C), (D), (E), (F), and (G) are valid because they do not mandate a particular conclusion by the court; thus the evidentiary admission of the HSR for the court's consideration is a lawful exercise of legislative power *in this statutorily created action*. *See Seidel*, 142 Ariz. at 591, 691 P.2d at 682 (under some circumstances, court will recognize "reasonable and workable" statutory rules that do not conflict with judicial rules of evidence or procedure). The HSR may be admitted in evidence under the conditions stated in § 45-256(C)

through (G) and given whatever weight, if any, the court deems appropriate.

7. *Changes regarding the special master*

¶49 New § 45-255(A) gives the superior court judge the power to appoint special masters, and subsection (B) provides that if filing fees are exhausted, a line item appropriation from the state general fund will support the master. We appointed the current special master, John Thorson, for both adjudications under the previous statute. He has served since 1990, and as far as we are aware, there are neither grounds nor plans for a change in this regard. Obviously, the Legislature cannot direct the change of a judicial officer in a pending case, and we do not interpret the new statute to so require. 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 § 45-255(A).

¶50 Section 45-257(A)(2) requires that the master file a report with the court on all determinations, recommendations, findings of fact, or conclusions of law issued. Written objections may be filed within sixty days (180 days if the report covers an entire subwatershed or reservation). Again, we find this a valid exercise of legislative power over a procedural matter in an action created by statute. We therefore affirm Judge Bolton's ruling upholding § 45-255(A) and (B), and § 45-257(A)(2).

8. Public trust

¶51 Section 45-263(B) states:

> The public trust is not an element of a water right in an adjudication proceeding held pursuant to this article. In adjudicating the attributes of water rights pursuant to this

> article, the court shall not make a determination as to whether public trust values are associated with any or all of the river system or source.

¶52 Judge Bolton upheld the Legislature's prohibition against considering the public trust doctrine in the adjudications. We disagree. The public trust doctrine is a constitutional limitation on legislative power to give away resources held by the state in trust for its people. *See Arizona Ctr. for Law in the Public Interest v. Hassell*, 172 Ariz. 356, 364-66, 837 P.2d 158, 166-68 (App. 1991) (applying both the separation of powers doctrine and the gift clause, article 9, section 7 of the Arizona Constitution). The Legislature cannot order the courts to make the doctrine inapplicable to these or any proceedings. While the issue has been raised before the master, we do not yet know if the doctrine applies to all, some, or none of the claims. That determination depends on the facts before a judge, not on a statute. It is for the courts to decide whether the public trust doctrine is applicable to the facts. The Legislature cannot by legislation destroy the constitutional limits on its authority. *See id.* at 366-69, 837 P.2d at 168-71.

G. Equal protection

¶53 The Apache Tribes challenge various provisions of HB 2276 on the grounds that they deny them equal protection under both the federal and state constitutions. The Apache Tribes argue that the *de minimis* provisions, the presumption of correctness accorded prior filings, and the requirement that certain DWR recommendations and settlements be incorporated into the decree without court review deny them a fundamental right — access to the court. Thus, they contend, the statutes violate equal protection. We have already held those

provisions unconstitutional, however, as a violation of Arizona's separation of powers doctrine. In light of that holding, we agree with Judge Bolton that the equal protection arguments are moot.

¶54 Additionally, the Apache and Little Colorado River Tribes argue that § 45-263(A), which declares state law applicable to the adjudication of water rights initiated or perfected pursuant to state law, violates equal protection. The Tribes contend that this provision will defeat the federal law claims asserted by the United States or Indian tribes. Judge Bolton viewed this as a supremacy clause issue rather than an equal protection dispute. We agree. We construe this entire statute under state law, including state constitutional principles, *subject to* the supremacy clause. If federal and state law conflict, federal law clearly is supreme. *See* U.S. Const. art. VI, cl. 2. This point has been and, of course, remains a key principle in the adjudications. As noted earlier, we do not find any of the statutes in violation of equal protection principles.

H. House Bill 2193

¶55 Several provisions of HB 2193 relate to sections of HB 2276 that we have held unconstitutional earlier in this opinion and are thus also invalid. These include: § 45-151(D), (E), and (F), which involve water from alternative sources and rights to water on land owned by the United States; § 45-257(E), which involves the unconstitutional evidentiary presumptions of § 45-261; and § 45-257(F), which requires adjudication of rights to water diverted on federal land in accordance with § 45-151(E) and (F). We affirm Judge Bolton's ruling except in one detail. Her ruling allowed for prospective application of §§ 45-151 and 45-257(F). As previously discussed,

we do not know if the Legislature would have enacted the isolated statutes to apply prospectively only. Thus, we strike the statutes in their entirety and leave to the Legislature the decision whether to reenact those provisions, assuming, of course, that the statutes are constitutional on other grounds.

¶56 New § 37-321.01(A) provides that a permit for the right to use water on state land shall be issued in the name of the state of Arizona except in the following three circumstances:

> 1. If the place of use is located on state land, but the point of diversion is located on patented land, the certificate or permit shall be issued to the owner of the patented land.
>
> 2. If the place of use is located on state land, but the point of diversion is located on land owned by the United States, the permit or certificate shall be issued to the lessee of the state land.
>
> 3. If the water right was perfected under the law applicable at the time that the right was initiated by the lessee or its predecessors in interest for use on land that was owned by the United States before that land was designated for transfer to the state of Arizona, the certificate or permit shall be issued to the lessee of the state land.

¶57 Subsection (B) of § 37-321.01 allows the state land commissioner and the person asserting the right to stipulate to ownership of the water right, and the stipulation must be accepted by DWR. Subsection (C) requires that the commissioner must be given the opportunity to review and object to the permit or certificate before DWR approves it. Subsection (D) makes clear that one does not have the right to lease state land based solely on ownership of a water right acquired under § 37-321.01. For a lessee of state land whose water right was perfected before the land was designated for transfer, subsection (E) prohibits severance from its place of use on state land and transfer for use on other land without the written

consent of the commissioner. The commissioner may withhold consent if the use of the state land for grazing purposes is dependent on the water right that is proposed to be transferred. If consent is refused, the lessee's successor in interest or the state must pay compensation to the lessee who owns the water right if that lessee can no longer use the water right because of the commissioner's refusal to consent to the transfer.

¶58 We agree with Judge Bolton's finding that these amendments are facially constitutional. Despite some contentions that § 37-321.01 is an unconstitutional giveaway of state property rights, Judge Bolton correctly found it is not. The statute merely regulates form and use of certificates; it does not change substantive law affecting acquisition of rights.

¶59 Judge Bolton also rejected the United States' argument that HB 2193 allows DWR to retroactively cancel vested water rights held by the United States or perfected in accordance with state law. The statute requires an application for transfer of a permit or certificate and provides the United States with notice and an opportunity for a hearing with review by the court. No vested water rights owned by the United States will be canceled. Nor could they be. *See Cappaert*, 426 U.S. at 138, 96 S.Ct. at 2069 ("[W]hen the Federal Government withdraws its land from the public domain and reserves it for a federal purpose, the Government, by implication, reserves appurtenant water then unappropriated to the extent needed to accomplish the purpose of the reservation."). Only if a claimant files an application claiming actual ownership of the permit or certificate is there any possibility of water rights certificates being transferred. These will be transferred only if the evidence establishes that the claim is correct. Whether the law requires that

the right be held by the United States or by the claimant will be determined first in an administrative hearing and then in the judicial adjudication proceeding and in accordance with applicable state and federal law. The applicable law regarding federal reserved rights will be applied. *See id.* We agree with Judge Bolton that this special action is not the appropriate place to review whether federal law may conflict with state law on the perfection of water rights on federal land. The appropriate time to determine that issue is when the facts present the issue for decision. If such a case presents itself, federal law unquestionably would supersede any conflicting state law. *See id.*

¶60 The Apache Tribes also argue that § 37-321.01 is unconstitutional because it purports to authorize appropriation or transfer of water from Indian reservation lands. Apparently, the Apache Tribes interpret "federal land" to include Indian reservation land. But there is a material difference between land *owned* by the federal government and land *held in trust* by the federal government for Indian tribes. *See San Carlos II,* 144 Ariz. at 272, 697 P.2d at 665. The reference in HB 2193 to federal lands can only be interpreted to refer to land *owned* by the United States, not an attempt to authorize incursions on Indian lands to appropriate tribal water. Any such attempt would violate article XX, section 4 of the Arizona Constitution, as well as federal law.

¶61 The Legislature enacted additional provisions necessary for the efficient implementation of § 37-321.01. For example, § 45-153(C) is needed to conform the permits or certificates to the rules established by § 37-321.01 and is thus a valid exercise of legislative power. Section 45-164(C) provides for the reissuance of previously

issued permits or certificates to conform to § 37-321.01. This statute is also valid as it includes procedures for notice, objections, hearings, and appeal to the superior court. Section 45-257(D) requires that the water right be adjudicated in compliance with § 37-321.01 and is thus valid.

¶62 In summary, HB 2193 is constitutional on its face, although some of its provisions may refer to statutes found unconstitutional. Whether its application in a particular dispute is always constitutional cannot be decided until the specific facts of such a case are brought before the court. Whether those portions of HB 2193 that govern the issuance of a certificate or a permit for a water right on federal land are in conflict with federal law will await a specific case in which such an issue is raised. If the circumstances then establish that federal law requires modification or precludes issuance, reissuance, or transfer of the water right, federal law will prevail.

CONCLUSION

¶63 We conclude that the following statutes are invalid:

A.R.S. § 45-141(B) prohibiting a finding of forfeiture or abandonment when water is used on less than all the land to which the right is appurtenant.

A.R.S. § 45-141(C) eliminating any possibility of forfeiture for rights inititated before June 12, 1919.

A.R.S. § 45-151(D) providing that the availability of alternative sources of water does not affect a surface water right.

A.R.S. § 45-151(E) (contained in both HB 2276 and HB 2193) stating that water rights appropriated on federal land belong to the person who first made beneficial use of the water.

A.R.S. § 45-151(F) stating that water on federal land may be used at any location.

A.R.S. § 45-156(E) providing that failure to obtain approval for a change in use does not result in abandonment, forfeiture, or loss of priority.

A.R.S. § 45-162(B) resulting in relation back of priority date to the date of application to appropriate.

A.R.S. § 45-182(B)(4) involving the invalidated *de minimis* statute.

A.R.S. § 45-187 making acquisition of rights for adverse possession available only to rights perfected prior to May 21, 1974.

A.R.S. § 45-188(A) and (B) making abandonment the only basis for relinquishment of a water right initiated before June 12, 1919.

A.R.S. § 45-188(C) insulating from abandonment and forfeiture water rights appurtenant to lands within an irrigation district, water users' association or the like so long as an operable delivery system is maintained.

A.R.S. § 45-189(E) (8) - (12) adding additional sufficient causes of nonuse.

A.R.S. § 45-256(A)(5) involving the invalidated *de minimis* statute.

A.R.S. § 45-256(A)(6) and (7) involving the on-farm water duties and maximum capacity rules, and that portion of § 45-256(D) that precludes judicial review of DWR director's proposed attributes.

A.R.S. § 45-257(C) providing that settlement agreements entered into by claimants must be decreed by the court.

A.R.S. § 45-257(E) involving the unconstitutional evidentiary presumptions of § 45-261.

A.R.S. § 45-257(F) requiring adjudication of rights to water diverted in federal land in accordance with § 45-151(E) and (F).

A.R.S. § 45-258 mandating certain uses as *de minimis*.

A.R.S. § 45-261(A)(2), (4) and (B) involving the prior filing presumptions.

A.R.S. § 45-262 regarding the Indian water rights settlements.

A.R.S. § 45-263(B) making the public trust doctrine inapplicable to these proceedings.

¶64 We uphold the following provisions:

A.R.S. § 37-321.01 regarding the rights to use water on state land.

A.R.S. § 45-153(C) involving permits and certificates issued under § 37-321.01.

A.R.S. § 45-164(C) providing for the reissuance of previously issued permits or certificates to conform to § 37-321.01.

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

A.R.S. § 45-254(E), (F) and (G) providing procedure for late filings of statements of claimants and amended statements in the general stream adjudications.

A.R.S. § 45-255(A) giving the power to appoint special masters to the superior court judge.

A.R.S. § 45-255(B) funding special master's compensation if the filing fees are exhausted.

A.R.S. § 45-256(B), (C), (D), (E), (F) and (G) expanding the responsibilities of DWR and providing for certain evidentiary rules on admissibility of the report and presumptions accorded the information therein [excepting the preclusion of judicial review in A.R.S. § 45-256(D)].

A.R.S. § 45-257(A)(2) changing the time for objections to the master's reports and requiring written reports.

A.R.S. § 45-257(D) requiring that the water right be adjudicated in compliance with § 37-321.01.

A.R.S. § 45-263(A) providing for the applicability of state law to adjudication of all water rights initiated or perfected pursuant to state law.

¶65 The trial judge and master shall proceed with the adjudication, applying the conclusions reached in this opinion.

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STANLEY G. FELDMAN, Justice

CONCURRING:

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THOMAS A. ZLAKET, Chief Justice

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WILLIAM E. DRUKE, Chief Judge

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NOEL FIDEL, Judge

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JOHN PELANDER, Judge

Vice Chief Justice Charles E. Jones, Justice Frederick J. Martone, and Justice Ruth V. McGregor recused themselves. Pursuant to Ariz. Const. art. VI, § 3, Chief Judge William E. Druke of Division Two, Arizona Court of Appeals, Judge Noel Fidel of Division One, Arizona Court of Appeals, and Judge John Pelander of Division Two, Arizona Court of Appeals, were designated to sit in their stead.