

# The History of SRPs Claims on the Verde River and Current Legal Issues

## SRP: What's taken them so long to get here? Series Part 1 of 3

BY STEVE AYERS from July & August 2003

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To many residents of the Verde Valley, Salt River Project is a greedy, water guzzling, politically powerful behemoth whose sole purpose in this world is to turn our lush central Arizona paradise into a desert wasteland.

Over the last few years there has been a good deal of speculation as to what their true intentions are.

Along with all the speculation have come rumors of an impending plan to slap water meters on all the private wells and a shut down the public wells.

More radical theories have SRP blocking off irrigation ditches and closing off access to the Verde River itself.

Even to those in the know, there is confusion, and as a result there exist an underlying distrust. Those feelings have brought about a subtle, if not outright hostility towards SRP.

Many also ask, why now? Where have you been for the last 50 years? If you are so interested in your water claims why have you waited so long?

The utility's recent efforts to maintain their share of the river are viewed by many as a siege. That siege mentality has left SRP with a target painted squarely on its back.

However, it is that same siege mentality that also gives SRP the right to ask who the real villain is in this situation.

They can point, justifiably, to a watershed that for over 100 years has provided water for their shareholder's established rights, and asked, what gives the Verde Valley users the right to take that same water whenever they feel the need?

Why should the Verde Valley have its cake and eat it too.

It is a situation SRP has monitored since it staked its first claims on the Verde River. What they see today concerns them.

They have watched as the number of wells in the valley has grown from 1,000 in 1960 to 6,200 today. They see a region on the brink of rapid expansion and who's collectively ambitions are focused on the rich groundwater aquifer that flows beneath the river above.

They point with a nervous finger as developed land has grown from less than 10,000 acres in 1962 to over 35,000 acres in 2004.

They can also tell you that there are approximately 36,000 more acres of private land yet to be developed. That figure does not take into account Forest Service property that may some day be traded and transformed into private land.

That figure does not include a potential 5700 acres still in agricultural production that could, as they have learned in their own valley, be turned into industrial, commercial or residential developments.

They learned a number of valuable lessons as they have watched the Phoenix/Salt River Valley grow into the country's fifth largest metropolitan area.

What they see taking place in the Verde Valley are the warning signs.

SRP has wanted to confront the situation for some time. It has always been their desire to find a solution. But it seems they have been continually rebuffed.

Their first attempt was 100 years ago. In 1905, a water right holder and member of the Salt River Valley Water Users Association, one of two organizations that make up Salt River Project, filed a friendly action with the Third Judicial District Court of the Territory of Arizona.

The case of Hurley v. Abbott was filed for two reasons. The first was to establish the shareholder's rights to the surface water coming into the Salt River Valley.

The second reason was that Congress was not going to lend the water users the money they needed to build Roosevelt Dam until they had all settled their differences.

The case produced what is known as the Kent Decree. Issued in 1910, the decree has stood the test of time.

It established who had surface water rights in the Salt River watershed for water users who diverted water above Joint Head Dam, an old diversion dam near present day Sky Harbor Airport.

It not only established the who, it listed them in priority and it established how much water were entitled to.

The problem was, it never addressed the water rights along the Verde River.

The Salt River receives its water from two watersheds--the Salt and the Verde. The total surface area is about 13,000 square miles. It is just about evenly divided in size with approximately 6,800 square miles on the Salt and 6,200 on the Verde side.

It was not a case of the judge carelessly omitting one of the watersheds. There was just not that much going on in the Verde Valley. Judge Edward Kent decided to set the Verde question aside with the stipulation that it would be addressed at a later date.

That later date occurred in the 1960's when SRP, noticing that the Verde Valley was beginning to grow, asked the court to reopen the Kent Decree so they could resolve the water rights questions in the Upper Verde Valley.

However, the court indicated that all water users on the watershed needed to be involved in the case, not just the Verde Valley. So SRP began to compile a list of all the property owners.

In 1974 SRP took their case to the Arizona State Land Department, as they were the ones with the administrative authority to handle water rights issues at the time.

The land department realized that the state had a vested interest in the outcome, being a landowner with water rights, so the filing was turned over to the courts in 1980. The case is now the responsibility of the Maricopa County Superior Court.

SRP's request to determine the water rights on the Salt and Verde rivers has grown into what is now called the Gila River General Stream Adjudication and includes all of the tributaries that flow into the Gila river, an area encompassing about two thirds of the state.

Now, almost 50 years later, the case is finally headed to the Verde River. The court is expected to begin the process of settling claims in the Verde Valley within two years.

That, however, is no guarantee that there will be a decision any time soon. Salt River Project realizes that.

Because there are now so many new residents in the Verde Valley, many of whom have very little understanding of water rights, and because the adjudication has dragged on for so many years, SRP wants to talk.

They are now interested in making known what their shareholder's water rights are, what they are based on and how they see resolving them without necessarily waiting for the adjudication.

## **Part 2: *What are the claims and what are the solutions?***

### **How Salt River Project got "our" water**

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Salt River Project's appropriations of surface water in the Verde River watershed are some of the oldest in the state. But, they are not the oldest.

There are other claimants in the Salt River Valley and in the Verde Valley who have older claims.

Although the date of the claim is important, the most important fact of a surface water claim in the Verde is that it predated 1919. That will likely be the "drop dead" date in which a surface water claim must have been made in order for it to hold water in court.

Arizona's surface water law is based on the "right of prior appropriation." It means whoever made the earliest claim on a stream's flow, and put the water to beneficial use, has the senior water right. The earliest user have use of the water first, then it moves down the legal pecking order for users with later claims.

Farmers and miners in the Salt River Valley and the Verde Valley began filing the earliest claims on the Verde River watershed soon after the territory was established in 1867.

Claims in the watershed accumulated for the next few decades as mines and farms filed for appropriations. The vast majority of those claimants were farms in the Phoenix/Salt River Valley.

It soon became apparent that there was not enough water to satisfy all of the claims---a problem that still exists.

All of these early claims were based on the normal, or natural, flow of the river.

Every summer as the stream flows slowed to a trickle, the fighting between claimants would begin. It didn't take long to realize that the solution was to store water so it would be available in sufficient quantities when it was needed.

The costs and the risks involved in building dams made it evident that such a project would have to be carried out by the federal government.

However the government was wary of lending any money until all of the water users could settle their claims.

A case called *Hurley v. Abbott* forced that settlement. The Third Judicial District of the Territory of Arizona issued what has become known as the Kent Decree on March 1, 1910 that laid out who had the rights, who got how much and in what order of priority.

The Kent Decree adjudicated the appropriations made by the landowners within SRP (and its predecessors), and all other prior claimants, from 1869 to 1909.

Even before they settled their claims on the normal flow of the river, SRP began adding to its water portfolio.

On February 8, 1906 and again on March 6, 1914 SRP filed notices of appropriation for all of the surplus and floodwaters in the Verde Rivers.

They made those claims so they could build storage behind the two dams they were to eventually build on the Verde River.

By 1914, SRP shareholders had legal claims on 85 to 90 percent of the normal flow and 100 percent of the floodwaters and surplus flow in the Verde River. They would also make claims on ground water in the Phoenix area to supplement shortages in storage.

But, there is one other source that makes up the surface water supply that SRP is keenly interested in resolving. It will likely have the largest impact on the Verde Valley and it has to do with the state statute that defines surface water.

The statutes regarding surface water define the term as "water of all sources, flowing in streams...or in the definite underground channels..." This underground channel is often referred to as the subflow of the stream.

The lateral extent of the subflow of a stream has recently been clarified by the Arizona Supreme Court as the "saturated Holocene alluvium."

Generally, that means the loose gravel and sand that lies beneath and adjacent to a stream, that has been laid down during the Holocene period---the last 10,000 years or so.

That means that the water in the subflow zone is subject to the surface water statutes, or prior appropriation by SRP or any other surface water claimant.

It also means that a number of wells in the Verde Valley, both private and public, are presumably drawing surface water. At some point they may need a water right in order to use surface water.

The issue of subflow has been an important legal question ever since the 1931 *Southwest Cotton* case and is a situation that SRP wants clarified. And although SRP believes many of the surface water claims in the Verde Valley will be upheld in court, they still see problems with some of them.

For over 100 years, the Verde irrigation companies have continued to exercise their claims, but not always in the most orderly or organized fashion.

Parcels of land with water rights attached (water rights are attached to the land, not the owner) have been bought and sold a number of times since the original owners put water on the land.

Irrigators have cleared and added new land and left previously irrigated property dry in the time since the original appropriations were made.

The result has been confusion over which lands have irrigation rights and which lands do not.

Many current residents who have purchased land thinking it has irrigation rights attached may find out in the not too distant future that SRP has a different opinion.

### **Part 3: SRP: What are their intentions?**

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SRP has two major concerns in the Verde Valley.

Over the years, as they have waited to have the surface water rights adjudicated in the Verde, they have kept detailed historical records documenting the use of surface water in the Verde Valley. Those records include several aerial photographic surveys of the watershed.

If you laid out a map made from the historical records showing the lands that had surface water rights prior to 1919, and then laid a current photograph of the of those same lands over top of it, SRP's first major concern would be readily apparent. They don't exactly match up.

If you took a drive through the Verde Valley and noticed all of the residential and commercial growth, you would be looking at their second major concern.

SRP is of the opinion that the water being used to supply that growth is coming from wells that in many instances are drawing water from the river's subflow, a source of water that is part of their surface water claims. SRP's Dave Roberts and Greg Kornrumpf believe there are workable solutions to the issues.

According to Kornrumpf, one of the solutions is a legal mechanism known as "Severance and Transfer."

In accordance with Arizona Revised Statutes 45-172, it is possible to sever the surface water rights attached to one piece of property and transfer them to another.

To satisfy the discrepancies in lands currently being irrigated and those that were historically irrigated, it

would seem to be a simple matter of determining which properties have rights and which do not. It is not as simple as it sounds.

There have been a number of surveys of the irrigated lands in the Verde Valley that have taken place since the late 1800's. They do not all agree. The number of acres and the specific acreage varies somewhat in each report.

Then as now, irrigated properties shifted somewhat. New lands were cleared. Old lands were set aside. In some instances irrigation companies sold rights to newly cleared lands within the service area of their ditches.

It is going to take some severance and transfers, some face-to-face negotiations and quite possibly, some legal wrangling before the map can be rectified and the lands with water rights finally determined.

One thing is for sure though; the mess will eventually have to be worked out. The Verde Valley will soon find itself in the thick of the Gila River Stream Adjudication.

The individual ditch companies may find it to their advantage to begin working with SRP now, while they still have some input on the decisions, instead of later when the court will make those decisions for them.

In the end there are going to be winners and losers. Many individual pieces of property, and even some entire developments that have been irrigating since the 1950's or later, are going to find out that they do not have irrigation rights.

But, there are solutions that will help mitigate the problem. According to Kornrumpf, within almost all of the irrigation districts there is property that had historical irrigation rights that has since been put to other uses. Roads, desert landscapes, horse corals, and the land on which houses now sit, had historic rights.

Cumulatively, the water rights attached to those pieces of property could be severed and transferred to satisfy claims on properties that were not historically irrigated.

As complex as it will be settling the claims within the irrigation districts, they will likely dwarf the issues related to SRP's concerns over growth.

According to SRP, there are approximately 5,500 acres of land in the Verde Valley that have irrigation rights. That

figure translates to about 18,000 acre-feet of water. SRP also estimates the current demand for all of the residential, commercial and industrial water use in the valley is between 8,000 and 10,000 acre-feet.

As they see it, there is legally available water around to satisfy future growth. Whether or not there is enough to accommodate future growth projections is another issue. SRP is definitely concerned with the projections.

What they would like to see is some of those irrigation rights retired and the water severed and transferred to municipal water providers to facilitate current uses and future growth.

The problem is that over the years, as the valley has grown, the choice of residents has been to retain those irrigated lands as open space. Valley residents have viewed the farms and properties that constitute the valley's green belt as a defining characteristic of the valley.

Between 1962 and 2004, only 432 acres of irrigated land in the Verde Valley was retired, a drop of about 7 percent. Urban land use on the other hand grew in excess of 23,000 acres, or about 625 percent.

Over the same period, the number of registered wells grew from about 1,000 to over 6,000. Most of those wells serve individual residences. A map showing the location of those wells reveals that most of those wells are situated within the area SRP has designated as the subflow of the Verde River.

The ultimate decision as to what will happen to the private wells within the subflow zone will be a matter for the courts---not SRP. For now SRP has no desire to put meters on anyone's private well.

"The problem is that the normal flow of the river is being impacted by all these wells," said Kornrumph, "and it is the normal flow that is critical to our shareholders. When that normal flow is reduced, our shareholders are forced to tap into their storage allotment.

"In 2002, normal flow was so low that some shareholder's storage allotments expired before the end of the year. It was a combination of drought and the impact of the wells.

"More groundwater withdrawals will make this a more

common occurrence and will eventually impact the flow of the river to an extent that it will likely cease to flow at some locations."

Kornrumph draws an analogy to the Santa Cruz River in southern Arizona that was a flowing river at the turn of the century. Over time the impact of pumping adjacent to the river and more remote wells within the watershed eventually led to intermittent and seasonal interruptions to its flow. Today it is dry.

Wells closest to the river have the most immediate impacts on the normal flow. But, even more remote wells, such as the proposed pumping from the Big Chico or those that furnish water to Verde Santa Fe will eventually have an impact.

"There is a time factor involved, and there is a real potential to dry up the Verde River. At the very least, dry spells could become an annual event. It is only going to get worse," says Kornrumph.

Along with retiring water rights, SRP is also proposing water exchanges. The exchanges are costly and would involve Verde Valley communities purchasing water in one location and pumping it into a stream that flows to one of SRP's lakes. That water is then traded for SRP's surface water rights used in the Verde.

One possible exchange source is Blue Ridge reservoir, now called C.C. Cragin Reservoir. Other possible sources could include effluent or CAP water.

This summer, SRP began preliminary talks with the Verde Ditch to settle their water rights. Others will follow. Eventually the larger issues are going to have to be settled and decisions are going to have to be made.

"We believe now is the time to begin settling these claims. If we wait for the Adjudication, it will be even more difficult. As time passes even more people are going to realize they do not have the water rights they thought they had," said Kornrumph, "We need to talk."

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