

**Arizona General Stream Adjudication Bulletin
April - May 1997**

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The information contained in this Bulletin is provided for informational and scheduling purposes only, and does not constitute a legal opinion by the Special Master on matters contained herein.

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Volume 5, Number 3**

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Continued Progress in Little Colorado River Talks

Reports of significant progress greeted Judge Allen Minker on May 2 as he convened a hearing on the status of Little Colorado River negotiations. These discussions, which have been underway for three years, involve the major water users in the Little Colorado River basin including the United States, State of Arizona, Hopi Tribe, Navajo Nation, Zuni Pueblo, and San Juan Southern Paiute Tribe. For almost two years, these negotiations have been facilitated by Judge Mike Nelson of the Apache County Superior Court.

The negotiations have been divided into "north side" and "south side" discussions. The north side talks

primarily involve the construction of a pipeline from Lake Powell to provide water immediately for Peabody Coal's mining operation and, perhaps, eventually to Hopi villages and Navajo communities. On the south side, the Navajo Nation has proposed the use of water in the Three Canyon Area (Clear Creek, Chevelon Canyon, and Jacks Canyon) for the irrigation of lands near Leupp, northwest of Winslow. Also in the south, the Zuni Pueblo seeks water for its Zuni Heaven lands northwest of St. Johns.

Most of the attorneys addressing the court remarked on the significant progress that had been achieved in the negotiations. For instance, Harry Sachse, Hopi attorney and chair of the settlement committee, stated that the parties appear closer than ever to a settlement. Brad Bridgewater, attorney for the United States, commended his fellow negotiators for making constructive suggestions on how the settlement might fit into federal budgetary criteria. Zuni Pueblo attorney Susan Williams noted substantial progress in addressing the issues of interest to her client. Andrew Walch, U.S. attorney representing the National Park Service and other land management agencies, also indicated that progress had been made on groundwater issues concerning the Park Service. Almost every attorney who spoke suggested that negotiations continue for at least four to six more months in an effort to finalize the settlement.

Sachse, the Hopi attorney, and Stanley Pollack, attorney for the Navajo Nation, made detailed presentations that outlined the status of the talks in specific areas. On the north side, parties have agreed on the route for a pipeline. In the south, parties have made progress on the use and management of groundwater, particularly from the C-Aquifer and N-Aquifer. Several issues remain unresolved, any of which might prevent a final settlement. Insufficient money has been identified to construct the Lake Powell pipeline to one or more of the Hopi villages, and attorney Sachse indicates that the pipeline must not "just end in the desert" in order for the Hopis to be satisfied. On the south side, the availability of Blue Ridge Reservoir as a source of water for development in the Three Canyon Area remains problematic. Phelps Dodge Corp. has not located an alternative water source for its mining operations in Morenci, and it might take several years for such alternative water to be developed. Both the Navajo Nation and the United States are arguing that conclusion of the Little Colorado River negotiations might not wait that long and perhaps the settlement should be concluded without Phelps Dodge's participation. Phelps Dodge responded that the overall negotiations could continue while Phelps Dodge seeks an alternative source of water for the Blue Ridge Reservoir.

The Navajo Nation seeks to acquire an amount of Central Arizona Project water that might be sold or leased to another water user. This block of CAP water has yet to be identified. Also, the Navajo Nation seeks to market some of its groundwater off-reservation, but several of the other parties oppose such transfers. Parties are discussing a possible specified franchise area for the marketing of such groundwater.

Only William Darling, attorney for Atkinson Trading Post, voiced any desire to return to litigation. Darling believes that the legal issue of whether state or tribal law will control the management of water rights on allotments should be decided by the court.

At the conclusion of numerous reports by attorneys, Judge Allen Minker agreed to allow the

negotiations to continue through the summer. He ordered the submission of status reports on August 8 and September 19, 1997, and scheduled another status hearing in St. Johns at 9:30 a.m. on September 26. Minker ordered attorney Darling to meet with attorneys for the Navajo Nation in an effort to resolve jurisdictional issues concerning allotment water rights. Further, Minker ordered any party that believes that specific claims or issues must be litigated to identify those issues by September 19. The party must demonstrate what efforts have been made to settle the dispute and what legal issues and factual questions are involved. The party must also submit a proposed timeline for discovery, hearing, and legal argument.

Gila River Proceedings

The required content of a hydrographic survey report (HSR) for the Gila River Indian Community (GRIC) occupied most of Judge Susan Bolton's April 11 hearing. The specific matters before the court were the motions of the San Carlos Apache Tribe, Tonto Apache Tribe, and Yavapai-Apache Nation asking the court to revisit an August 1995 decision to modify the contents of the Gila River Indian Community HSR. The Apache Tribes also asked the court to declare the preliminary version of the GRIC HSR a "draft" which should be returned to the Department of Water Resources (DWR) for further work. The Apache Tribes argued that the 1995 alteration in HSR format came as a surprise to them and they were denied an opportunity to be heard before a change in the "law of the case" was made. They also argued that it was inappropriate for DWR to initiate such a change with the court.

Other attorneys criticized the preliminary GRIC HSR as being incomplete, principally not including the economic analysis they feel is necessary to complete a "practicably irrigable acreage" (PIA) investigation for the reservation. The PIA standard was adopted by the U.S. Supreme Court in 1963 for the quantification of Indian reserved water rights for predominantly agricultural lands. Some of the parties disagreed on whether sufficient information now exists for DWR to complete PIA analysis or whether additional field and technical work are necessary. The court did not immediately decide the Apache Tribes' motions, taking them under advisement for further study.

In other matters, Judge Bolton heard reports from the Steering Committee on the time necessary to complete expert reports on the Gila River Indian Community's claims before the matter can go to trial. The Steering Committee estimated that expert reports supporting the tribe's claims could be filed by April 1999, reports objecting to the claim by April 2000, and rebuttal reports by the tribe to be filed by October 2000.

The discussion then turned to whether any important legal issues could be decided in advance of an evidentiary trial on the Community's claims, perhaps even before the issuance of a final HSR. The court requested the Steering Committee to develop and propose a case management plan for this litigation, and asked the special master to chair the discussion of a proposed case management plan with the committee.

Steering Committee Meeting

Steering Committee Chair Jim Johnson and Special Master John Thorson have notified the court-approved mailing list that a meeting on a proposed case management plan for litigation of the claims of the Gila River Indian Community will be held at 10 a.m. on Monday, May 19, 1997. The meeting will take place in Conference Room A, Department of Water Resources, 500 N. Third Street, Phoenix, Arizona. The meeting will not be recorded and is open to any claimant in the Gila River adjudication.

Profile:

George Hebard Maxwell

1860-1946

George Maxwell was a lobbyist, publicist, and journalist for the causes of reclamation and a unified, federally administered water policy. He played an important part in the development of United States water conservation, particularly in the arid western states. He influenced legislation and systematic water development planning, river management, and flood control. In 1941, the National Reclamation Association named George Maxwell the "Father of Reclamation." George Maxwell also played an important role in Arizona water development.

Maxwell was born in Sonoma, California, in 1860. From 1879 to 1882, he was a court stenographer for the state and federal courts in California, then was admitted to the California bar. From 1882 to 1889, he practiced law with the firm of Judge Mesic, a prominent mining law specialist. Maxwell's legal career provided him with his first exposure to water issues. Soon after he joined his firm, he was assigned to try a series of irrigation district lawsuits. In the process, he gained an appreciation of water issues, particularly as they affected the needs of small land holders. He also gained limited local notoriety as an authority on reclamation.

His experience with communal irrigation projects was an additional influence on Maxwell's developing reclamation theory. He helped raise funds for a communal agricultural experiment in the Salinas Valley. This experience, and his growing acquaintance with others who were involved with similar communities and also in national reclamation advocacy projects, deeply influenced the young lawyer's commitment to water development coupled to cooperative rural improvement.

Maxwell traveled to Phoenix in 1896 to attend the Fifth National Irrigation Congress, an event that marked a turning point in his life. When he arrived, he was a minor regional figure within the water development movement. By the end of the Irrigation Congress, he had achieved national recognition as a leader. Maxwell abandoned his legal practice the same year and moved to Phoenix soon after the Congress concluded.

Maxwell was unsatisfied with the modest role the Irrigation Congress assumed for itself. In Wichita, Kansas, in 1899, he and two fellow delegates to the organization's eighth annual meeting founded the National Irrigation Association, later the National Reclamation Association, which named him its executive director.

Meanwhile, Maxwell worked effectively to settle disputes within the Arizona water development movement. A faction led by Governor Nathan Oakes Murphy wanted to protect the interests of the future state by preempting state lands prior to initiation of any water projects. An opposing faction advocated federal regulation and participation. Another dispute pitted large and small property holders against each other over the equitable distribution of construction cost assessments. Maxwell sided with the federalists and the small holders. His status as a newcomer to Arizona, however, and his ability to communicate, made him acceptable to all parties as a negotiator who had no overriding personal interests to fulfill.

The Reclamation Association sent Maxwell to Washington, D.C., in 1900, where he allied himself with other individuals promoting legislation. He already knew Senator William M. Stewart of Nevada, whom Maxwell had met when he was practicing law. Others with whom he worked were Nevada Representative Francis G. Newlands; B. A. Fowler, lobbyist for Maricopa County water interests; Frederick H. Newell of the United States Geological Survey and later director of the Reclamation Service; and Gifford Pinchot, prominent advocate of forestry management.

Representative Newlands, Newell, and Maxwell drafted legislation which Newlands proposed in the House of Representatives. Maxwell convinced North Dakota Senator Henry Hansbrough, who originally was unsympathetic, to sponsor the bill in the Senate. The Newlands-Hansbrough Bill--the National Reclamation Act--was enacted June 17, 1902. George Maxwell and B. A. Fowler are credited with assuring that cultivated privately owned lands were included within the scope of the act, a provision that assured applicability of subsequent federal project funds to agricultural lands.

Maxwell returned to Phoenix to campaign for creation of an organization able to take advantage of the new law, delivering several influential public speeches, most notably one at the Dorris Theater on October 2, 1902. The Salt River Valley Water Users Association was incorporated on February 9, 1903, the first organization of its kind created under the provisions of the Reclamation Act. Congress soon approved funds for a dam at the confluence of Tonto Creek and the Salt River--the Salt River Project.

Maxwell continued his career of public advocacy until he suffered a stroke in 1940. Soon thereafter he retired to Arizona, where he died in Phoenix on December 1, 1946.

(Courtesy Arizona State Archives, which houses a collection of Maxwell's papers).

Calendar

State Bar Convention and Arizona Judicial Conference

June 11-14

Contested Case No. W-1-203 (GR)

In re the Water Rights of the Gila River Indian Community

May 19 -- 10 a.m.

Meeting of the Gila River Adjudication Steering Committee with Special Master John E. Thorson re Gila River Indian Community case management plan
DWR Conference Room A
(*see* April 18, 1997, minute entry)

June 30
Preliminary GRIC HSR Comments Due

Case No. 6417 (LCR)

Aug. 8
Settlement Committee status report due to Judge Minker

Sept. 19
Settlement Committee status report due to Judge Minker

Sept. 26 -- 9:30 a.m.
Status conference in St. Johns
(*see* May 2, 1997, minute entry)

Abbreviations:

GR = Gila River adjudication
LCR = Little Colorado River adjudication
DWR = Department of Water Resources, 500 N. Third Street, Phoenix

Adjudications in Other Western States: Montana

Montana is undertaking a comprehensive statewide adjudication of all pre-1973 groundwater and surface water rights. The case is the largest general stream adjudication in America with over 216,000 water rights asserted by an estimated 80,000 persons. (By comparison, in Arizona approximately 98,000 separate water right claims have been filed by some 28,000 parties). The litigants include individual ranchers and farmers, irrigation entities, municipal governments, utilities, mines and other commercial enterprises, state agencies, federal agencies, and seven Indian tribes (plus a North Dakota tribe's claims to rights on public land allotments in Montana). Only small water uses (instream stockwater, stockwater wells, instream domestic, and domestic wells) are exempt from the adjudication process, but claimants may submit these rights for adjudication if they desire.

Montana's existing adjudication statute is not the legislature's first attempt to determine water rights in the state. Adjudications have been available since 1885, but the integration of water rights established in different ways over more than a century was not possible until 1973. Law professor Albert W. Stone vividly documented the insecurity of Montana water rights in a 1969 study of Dempsey Creek, a small stream less than 20 miles long in the relatively water abundant southwestern portion of Montana. Since

an initial decree in 1891, additional users had diverted from the stream or from connected sources thereby destabilizing prior judicial actions. The result was that over the ensuing 75 years, fourteen lawsuits had been brought leading to eight decisions by the Montana Supreme Court. Stone noted, "In nearly every one of these lawsuits, all or substantially all of the people in the community of Dempsey Creek were litigants. There seems little risk in predicting that the past is but prelude to continuing and endless litigation in the future."

This type of problem moved the 1972 Constitutional Convention to include in its proposed constitution a requirement of a centralized statewide record of all existing rights to aid in the full use and management of the state's waters. After voters approved the constitution, the legislature enacted the Water Use Act of 1973. Part of the new law directed the Department of Natural Resources and Conservation (DNRC) to "establish a centralized record system of all existing rights and . . . as soon as practicable, begin proceedings under this act to determine existing rights"

The first (and, as it turned out, the only) source chosen for this predominantly administrative adjudication was the Powder River basin in southeastern Montana where oil, gas, and coal development during the 1970s energy crisis threatened to use massive amounts of water. DNRC's adjudication of the Powder River proved to be very accurate, but the legislature soon tired of the cost and slow pace (almost ten years from start to finish) of this method of adjudication. At one legislative hearing, the DNRC director estimated that at the rate the Powder River adjudication was proceeding, it would take 100 years and \$50 million to adjudicate all the rights in the state. Also, the legislature was concerned whether the existing adjudication, with significant involvement by an administrative agency, would be adequate to compel the adjudication of federal and tribal water rights under the federal McCarran Amendment. Thus, in 1979, the legislature amended the Water Use Act and mandated a statewide adjudication with a specialized water court having primary decisionmaking authority.

The Montana Water Court is composed of a chief water judge, four district judges who act as water judges for water divisions corresponding to major river systems, and water masters. DNRC examines water users' claims and reports to the court. The water court issues temporary preliminary and preliminary decrees progressively for each of 85 basins. Objections to these decrees are filed, heard, and resolved by the court which then issues final decrees. New appropriations (after 1973) are made through applications for permits and certificates issued by DNRC. The legislation also created an innovative Reserved Water Rights Compact Commission to negotiate water rights settlements with federal agencies and Indian tribes. The litigation of federal and tribal reserved rights is suspended while negotiations continue.

The Montana adjudications are supported by filing fees (since exhausted) and appropriations to the water court, DNRC for technical work, and compact commission for negotiation activity. In recent years, appropriations have been approximately \$525,000 per year for the water court, \$500,000 for DNRC, and \$475,000 for the compact commission.

As of mid-1995, the water court had taken some action on 109,977 of the 216,000 water right claims.

DNRC was examining 15 basins and had completed its investigation of almost 67 percent of the claims in these basins. The water court had 37 temporary preliminary decrees outstanding in 36 basins with objections having been filed or hearings underway on objections. Preliminary decrees had been issued in seven basins (most of these do not include reserved water right claims). Final decrees had been issued in six basins with 15,393 rights. The largest of these is the Powder River basin, mostly adjudicated under the 1973 law, where final decrees were entered in May 1983 covering 10,302 water rights.

The Reserved Water Rights Compact Commission has concluded compacts with the Northern Cheyenne Tribe (water court review complete), the tribes of Fort Peck Reservation (water court review pending), and the Rocky Boy's Chippewa-Cree Tribe (still awaiting federal approval). Compacts have also been reached with the National Park Service quantifying reserved water rights for Yellowstone National Park, Glacier National Park, and other federal monuments and sites; the Bureau of Land Management for the Upper Missouri National Wild and Scenic River and the Bear Trap Canyon Public Recreation Site; and the U.S. Fish and Wildlife Service for the Benton Lake National Wildlife Refuge and the Black Coulee National Wildlife Refuge.

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Sources for Help

If you have questions in a particular area, here are the proper people to contact.

Adjudications, HSRs, WFRs, Discovery

Lisa Jannusch, Adjudications Division
AZ Dept. of Water Resources
500 N. 3rd Street, Phoenix, AZ 85004
(602) 417-2442 or (Toll free in AZ) 1-800-352-8488

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Pleadings

Gila River

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