

**Arizona General Stream Adjudication Bulletin
February 1997**

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Contents:

Supreme Court Denies Stay Request; Defers Attorneys Fees

Calendar

Gila River Proceedings

ABA Water Law Conference

Little Colorado River Proceedings

Lawrence Monette

Adjudications in Other Western States: Oklahoma

Supreme Court Denies Stay Request; Defers Attorneys Fees

The Arizona Supreme Court has denied a request to stay the enforcement of House Bill 2276 and House Bill 2193, passed by the Arizona legislature in 1995 (see Nov. 1996 Bulletin). The legislation made major changes in Arizona's water code and stream adjudications. Shortly after passage, the San Carlos, Tonto, and Yavapai Apache Tribes asked the Supreme Court to hear constitutional and other challenges to the new legislation. The Supreme Court agreed to review the legislation in a legal proceeding called a special action, and referred tribes' challenges to Superior Court Judge Susan Bolton for an initial determination.

On August 30, 1996, Judge Bolton issued her ruling that portions of the new legislation were constitutional, other portions were unconstitutional, and still other provisions could only be applied prospectively (see Sept. 1996 Bulletin). Judge Bolton forwarded her opinion to the Supreme Court. The court then allowed interested parties to submit written briefs on whether and how the court should proceed.

At this point, the Apache Tribes filed their motion for a stay in the enforcement of HB 2276 and HB 2193 until the Supreme Court completes its review of the challenged legislation. In an order filed Dec. 20, 1996, the Supreme Court denied the Apache Tribes' request for the stay.

In the same order, the Supreme Court deferred a separate motion by the Apache Tribes for an award of \$1.1 million in attorneys fees and costs they say were incurred in challenging the 1995 legislation (see Nov. 1996 Bulletin). The tribes seek to recover these fees and costs from the State of Arizona and other parties who defended the legislation. The Supreme Court indicated that the request would be postponed "until the conclusion of proceedings in connection with the Certification of Judge Bolton's August 30, 1996 order."

The Supreme Court has not decided whether it will review Judge Bolton's opinion, but the issue tentatively has been scheduled for a Supreme Court conference on Feb. 25. The conference is not open to the public.

Calendar

Feb. 25

Case No. CV-95-0161-SA (Special Action)
Supreme Court's conference (not open to public)
Re review of Judge Bolton's Aug. 30, 1996, order

April 18

Case No. 6417 (Little Colorado River Adjudication)
Settlement Committee status report due to Judge Minker

May 2 -- 9:30 a.m.

Status conference in St. Johns
(see Sept. 27, 1996, minute entry)

Gila River Proceedings

The Arizona Department of Water Resources (ADWR) released its preliminary hydrographic survey report (HSR) for the Gila River Indian Community on Jan. 30, 1997. The early preparation of the report had been requested by attorneys for the Indian Community and approved by Judge Susan Bolton.

Comments to the preliminary report must be made in writing to ADWR within 90 days and are not filed with the court. After the comment period, ADWR will make necessary revisions in the HSR and file the final version with the court. Filing of the final HSR begins a 180-day period for parties to file written objections to the HSR. Any objections will eventually be heard by the special master and the court. Contact ADWR for further information about the preliminary HSR.

ABA Water Law Conference

The 15th annual Water Law Conference, sponsored by the American Bar Ass'n, will be held in San Diego on Feb. 20 & 21. The opening plenary session will be "General Stream Adjudication: Issues, Problems and Successes." Two attorneys active in Arizona's adjudications will be members of a panel discussing adjudications throughout the West. They are Charlotte Benson of the Arizona Attorney General's office and Stan Pollack, special counsel for the Navajo Nation. Ramsey Kropf, special master for Wyoming's Big Horn River adjudication, will serve as moderator. Other program topics include water law issues in the Rio Grande basin, groundwater management, tribal water rights, public trust doctrine, the Endangered Species Act, and water marketing. For more information, call the ABA at (312) 988-5724.

Little Colorado River Proceedings

Negotiators Submit Settlement Report

The parties attempting to negotiate an overall settlement in the Little Colorado River adjudication presented Judge Allen Minker with a progress report on Jan. 10, 1997. The report had been ordered by Judge Minker at his last hearing on Sept. 27, 1996. The parties reported that numerous meetings were held throughout the fall, including a briefing on the negotiations for senior Department of Interior officials. Many of the settlement discussions have been facilitated by Settlement Judge Mike Nelson. Judge Nelson indicates that he may order the parties to attend a two-week "marathon" negotiating session sometime in March in hopes of reaching agreement on remaining issues. The parties have been ordered by Judge Minker to reach agreement by May 2 or litigation will resume in the Little Colorado River adjudication (see Oct. 1996 Bulletin).

Phleps Dodge, Unites States Discovery Dispute

The Phelps Dodge Corporation is seeking a court order compelling three federal employees to execute an agreement to be bound by a protective order issued by a Superior Court judge in early 1994 (see Dec. 1996 Bulletin). The original order protects information about Phelps Dodge's water use at Show Low Lake and Blue Ridge Reservoir that the company claims is confidential. The parties have exchanged pleadings on Phelps Dodge's recent request, and Judge Allen Minker has referred the matter to Maricopa County Superior Court Judge Roger Kaufman for decision.

Lawrence Monette, Former Kent Decree Commissioner

Andrew Lawrence Monette, who served as Kent Decree Commissioner, from 1966 to 1991, died on Dec. 22, 1996. Monette, whose birth in Carthage, Missouri, coincided with passage of the Reclamation Act, was 94. Most of his life's work was devoted to water and reclamation projects. Monette came to Phoenix with his family in 1916. In 1926, after working for several years as a cowboy on the T Ranch, he helped construct Horse Mesa Dam. In 1936, he and his wife Anna Mae moved back to Phoenix and he began work for the Salt River Project Water Users Association. He remained with SRP for 30 years, retiring in 1966 as Secretary of the SRP Board of Directors. Shortly after, he was appointed Kent Decree Commissioner by the Maricopa County Superior Court.

Adjudications in Other Western States: Oklahoma

Three inherent tensions are found in Oklahoma's water law, and stream adjudications have been used as an imperfect vehicle for resolving these problems. First, prior to statehood in 1907, Oklahoma adopted both riparian and prior appropriation doctrines for the purposes of regulating the use of surface water. In 1963, Oklahoma's legislature attempted to grandfather riparian rights to the extent water was actually beneficially used, and to prohibit future riparian rights except for domestic purposes. With *Franco-American Charolaise, Ltd. v. Oklahoma Water Resources Board*, the Oklahoma Supreme Court declared unconstitutional the 1963 amendments to the extent that they altered traditional riparian rights.

Yet, the court entertained for three years a motion to rehear the case and, in doing so, refused to officially release the *Franco-American* decision until 1993. The court found that the 1963 amendments did not give riparians proper notice of the diminishment of their riparian rights. Riparian landowners, as a result, were free to initiate reasonable new or expanded riparian uses without perfecting an appropriation. Both the legislature and Oklahoma Water Resources Board (OWRB) have responded in a hostile manner to the *Franco-American* opinion, with the legislature purporting to abolish riparian rights and the Board refusing to recognize them.

The separation of groundwater from surface water is a second fracture in the system. Surface water is referred to as stream water and is defined as water running within defined beds or banks, even including the underground portion of a surface stream. Groundwater, by contrast, is all other underground water outside the defined channel of the surface stream. Stream water is governed by the prior appropriation doctrine and the surviving vestiges of the riparian regime. Groundwater is governed by the American "reasonable use" doctrine, modified in 1972 by a groundwater statute.

Finally, surface water is divided between stream water, which flows in defined channels, and diffuse surface water flowing over the land. While landowners theoretically retain absolute control over diffuse surface water, the courts have leaned toward recognizing that any water on the surface, directly attributable to a stream, is governed by prior appropriation doctrine.

In 1905, the territorial legislature adopted an adjudication and permitting system based on the model code prepared by Morris Bien of the U.S. Reclamation Service. Under this law, four adjudications were completed although the act contemplated the adjudication of the entire state. These adjudications

produced the Tulsa Decree, completed in 1938; the Oklahoma City-Canadian Decree, completed in 1939; the Durant Decree, completed in 1955; and the Oklahoma City-Atoka Decree, completed in 1958.

The water supply needs of major municipalities had prompted these adjudications. A fifth adjudication, involving a Bureau of Reclamation project on the Washita River to supply municipal water, was dismissed, reinstated, but never completed. A final adjudication, involving a Bureau of Reclamation project to supply municipal water to Norman, Midwest, and Del cities was initiated and dismissed.

Because of the lack of progress in the 58 years following the 1905 statute, the Oklahoma legislature substituted an administrative adjudication in 1963. This adjudication involved the determination of various categories of vested rights, including unpermitted appropriative and riparian rights. Incorporating the results of the four previously-completed adjudications, this administrative canvass of vested rights was substantially completed by 1969. The 1963 statute provided, however, that these administrative determinations did not constitute an adjudication among the relative, vested rights. The administrative adjudication process was repealed in 1972; and, while judicial adjudication procedures remain on the books, no recent proceedings have been brought.

Adjudication-type activity is now only found in Oklahoma's groundwater management. Under the 1972 statute, the water resources board must determine maximum annual yield for a groundwater basin before water right permits for new uses can be granted. The maximum annual use determination may result in a contested evidentiary hearing before the board. Once a determination is made for a basin, the board may grant regular permits. In the absence of such a determination, the board can only issue temporary permits. The maximum annual use figure for a basin (which assumes the groundwater will be exhausted in 20 years) is redetermined every 20 years.

Oklahoma is part of the original Indian Territory, as numerous eastern tribes were resettled in the region commencing in 1825. Because of relative water abundance, the claims and uses of these tribes have not sparked major water right controversies in the state.

(Andrea Gerlak, a former intern in the office of the Special Master, contributed to this article).

The Arizona General Stream Adjudication Bulletin is published monthly, except for July and January, by the Office of the Special Master. Subscriptions are available for \$12 annually and may be ordered or renewed by calling Kathy Dolge at the office of the Special Master.