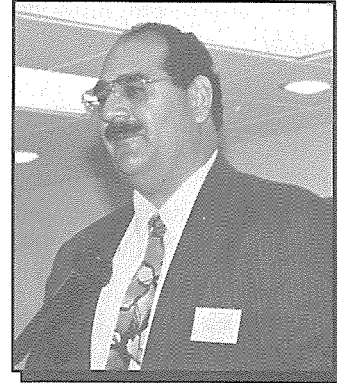


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## ENVIRONMENTAL DISPUTE RESOLUTION IN STREAM ADJUDICATIONS: THE ARIZONA EXPERIENCE

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### INTRODUCTION

Traditional alternative dispute resolution processes have been adapted to help resolve many environmental disputes and we now see the literature using the term Environmental Dispute Resolution (EDR). (Painter, 1988, The Future of Environmental Dispute Resolution, *Natural Resources Journal*, 28:146). A study by the Conservation Foundation of 161 completed environmental mediations indicated that of the 161 disputes, 86 involved specific land-use issues. Seventeen involved natural resource and public lands management, and water resources. Aside from using EDR to resolve many of the Indian tribe claims to water in Arizona's pending

stream adjudications, there has been a similar technique developed by claimants and protestants in resolving objections to water rights filings in the San Pedro River adjudication.

### THE ARIZONA STREAM ADJUDICATION PROCESS

#### The Problem

The problem is clear. Since 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. Obviously, such a task can be accomplished only in a single proceeding in which all substantial claimants are before the

court so that all claims may be examined, priorities determined, and allocations made. *United States v. Superior Court*, 144 Ariz. at 270, 697 P.2d at 663 (1985).

### The Statute

In 1979 the Arizona Legislature finally enacted a general stream adjudication statute that would allow the adjudication of Indian water rights in state court (Arizona Revised Statutes Annotated §45-251 to -260 SUPP. 1984-85). After the statute's passage, the Salt River, Verde River, and Gila adjudications were transferred from adjudication under the State Land Department to the Maricopa County Superior Court. The San Pedro River adjudication was transferred to the Cochise County Superior Court. The Arizona Supreme Court consolidated these adjudications in one proceeding assigned to the Maricopa County Superior Court.

### The Rationale

The complex and lengthy process of the stream adjudication was rationalized by the Special Master, John Thorson (J. Thorson, Rules for Proceedings Before the Special Master, page iii, 1991) as follows:

- Adjudications are an effort to recognize, quantify, and prioritize water rights that, in some cases, extend back into the 1800s.
- These adjudications will result in a centralized record of the water rights that are recognized.
- Many of the earliest water rights on Arizona's rivers and streams are claimed by Indian tribes and federal agencies. While these federal and tribal water rights may be senior to other water rights established under the prior appropriation doctrine, the nature and extent of these federal and Indian claims have never been comprehensively adjudicated in Arizona state courts. These legal proceedings are the opportunity to recognize, quantify, and prioritize these federal and Indian water rights.
- The general stream adjudication will lead to better management of Arizona's water.

### Steps in the Proceedings

1. Between 1979 and 1986 approximately 960,000 summons were served on potential claimants.
2. Hydrographic Survey Reports (HSR) were prepared in both stream systems. Following the reports various parties filed objections to each watershed file report (WFR) found in the HSR to make "contested cases."
3. The parties to these contested cases typically are the landowner, lessees and the objectors.
4. A targeted case management approach was approved in the San Pedro Adjudication. Under this approach, the Special Master selected individual watershed file reports to resolve major objections.
5. In April 1993, the Special Master selected 54 contested cases concerning the water rights of eight water users who own land or lease land from the Arizona State Land Department, U.S. Forest Service or U.S. Bureau of Land Management.
6. The cases involve stockwatering, stockponds, small reservoirs, domestic, and irrigation related to domestic uses. A map of the San Pedro watershed and subwatersheds appears in Figure 1.
7. I was able to organize seven of the eight landowners into a single group. All conflicts over water between the landowners were resolved. This became a very effective settlement tool since the group could speak with one voice.

### TARGETED CASE MANAGEMENT APPROACH

The decisions reached by the Special Master in the targeted cases will be binding on the litigants involved and will also be precedential in subsequent contested cases. If a litigant in a later case disagrees with the application of the same ruling, the litigant must demonstrate to the Special Master that the circumstances in the later case differ, that new or additional evidence requires a different result, or that there are other reasons why the earlier ruling should not apply.

## Environmental Dispute Resolution in Stream Adjudications: The Arizona Experience

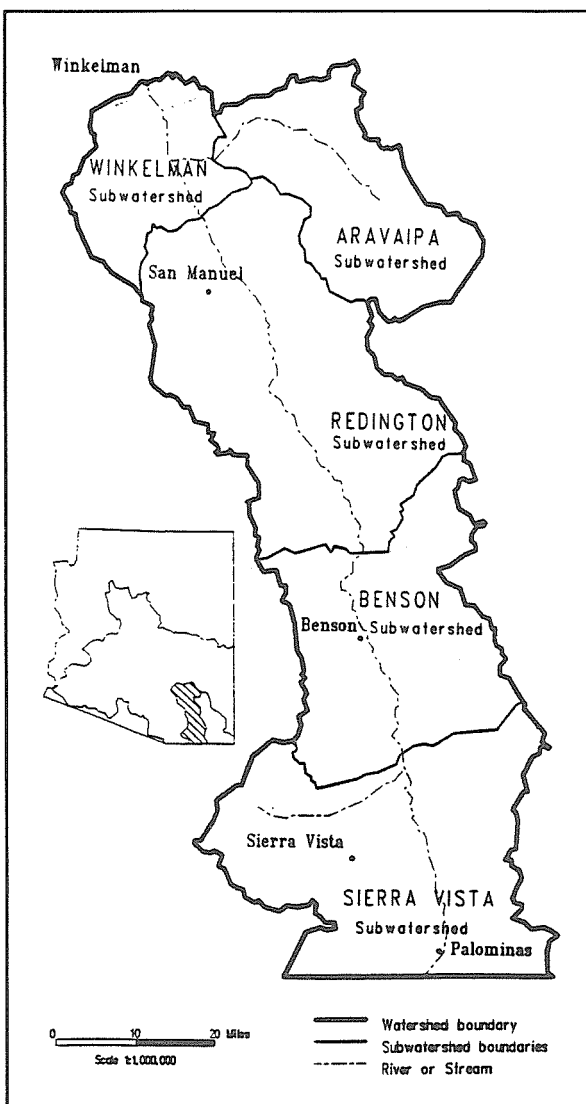


Figure 1. Map showing the San Pedro River watershed and subwatersheds.

### SETTLEMENT CONFERENCES TO RESOLVE OBJECTIONS

#### Traditional Discovery Devices Inadequate

Rather than attempt typical discovery techniques which had already been streamlined by the Rules for Proceedings Before the Special Master, the parties decided to attempt a series of settlement conferences to see if major objections could be resolved. Aside from the landowners, the parties to the conferences included the major objectors:

- Salt River Project

- City of Phoenix
- United States on behalf of the Bureau of Land Management and Forest Service
- Gila River Indian Community
- San Carlos Apache Tribe, Tonto Apache Tribe, Yavapai-Apache Indian Community and the Camp Verde Reservation

The parties initially tried to discover why the Indian tribes had objected to nearly every single water right filed. Apparently the tribes had merely computerized all of the filings and had objected every time there was an inconsistency with respect to priority date, capacity-quantity, diversion point, place of use, ownership, and source.

The parties then proceeded to prepare a template for each reported "potential water right" (PWR) listing all of the attributes of each PWR:

- landowner/lessee
- priority date
- name of spring, etc.
- capacity-quantity
- location
- water source

At the settlement conferences, each PWR was reviewed to resolve as many objections as possible. The fact that the landowner was there was significant in terms of his ability to explain each different stockpond or stockwater use. In many cases every priority date was accepted after an explanation by the landowner or lessee of the circumstances involving the historical use of the water right.

### WHY WAS THE PROCESS SUCCESSFUL?

- All parties were present with the authority to withdraw objections.
- The candidness of the landowners or lessees was quite evident.
- Many objections were based on factors which were explained away depending on each individual water use.
- Litigation costs of proving many elements of each water right in a subsequent trial was clearly too expensive and time consuming.

## THE FRUITS OF COMPROMISE

I estimate that we will be able to resolve as many as 80 percent of the objections. We also have been able to agree on the majority of attributes surrounding domestic, stockwatering and stockpond use which will be adopted by the Special Master. We have been unable to resolve the ownership issue with the United States on federal land waters put to beneficial use by lessees. This issue will be litigated. We have made significant inroads to resolving ownership and compensation issues with the Arizona State Land Department on waters arising on or used on state land involving lessees.

## CONCLUSION

The advantage of using a process similar to EDR in a stream adjudication setting has been of immense value. When a case management approach is used, the time and money saved on subsequent hearings is tremendous and well worth the effort to try and establish an early dialogue.