



# Understanding General Stream Adjudications

## Jeri Fleming

Project Manager, Biosystems and Agricultural Engineering

## Shannon L. Ferrell

Assistant Professor, Agricultural Law – Department of Agricultural Economics

## Mike Langston

Assistant Director, Oklahoma Water Resources Research Institute

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Management of a state's water resources impacts farms, ranches, businesses, cities, and other water users. An important part of water management is knowing how much of it is available. To do this, states must know who already has rights to water and how much water is left after those rights are counted. One tool that helps states accomplish this is called a "general stream adjudication." These legal proceedings allow states to confirm who has existing claims to a body of water and how much of that water remains available for other uses. When complete, this allows for better water management and helps settle water disputes.

In December 2011, the Oklahoma Water Resources Board (OWRB) authorized its attorneys to file a general stream adjudication. This adjudication, filed on February 10, 2012, seeks to define the rights in the Kiamichi River, Muddy Boggy Creek and Clear Boggy Creek basins. The first hearing in this case is currently scheduled for April 19, 2012. What does this mean for people with water rights in those basins? What does it mean for Oklahoma in general? This Fact Sheet answers these questions, analyzes how a general stream adjudication works in Oklahoma, and discusses whether these cases will affect your water rights.

## How Water Rights Are Managed

Water rights are managed differently in different states. In the wetter eastern U.S., most states use a riparian system. A riparian system allows people who own land next to a stream to make "reasonable use of that water." These landowners can use the water as long as they do not unreasonably interfere with its use by downstream landowners. In the dryer western U.S., most states use a "prior appropriation system." In a prior appropriation system, the first person to take stream water

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and put it to a beneficial use has first priority to that water. Someone who begins using stream water later has a lower priority to the water. This system is commonly referred to as *first in time, first in right*. With this system, the right to use water is not tied to land along a stream. Prior appropriation rights can be lost if those rights are not used. Some states, including Oklahoma, use a system that is a hybrid of these two. In a hybrid system, both types of management systems are used.

Oklahoma recognizes limited riparian rights. If your land is next to a stream, you have a right to use some of that water without getting a permit from the OWRB. However, if you own land that is not next to a stream and/or you want to use water for a "non-domestic" use,<sup>1</sup> you need a permit from the OWRB to use stream water. The date you apply for the permit will become your priority date<sup>2</sup>. This determines your "place in line" if there is a water shortage and not enough water is available for all users.

## What is a General Stream Adjudication?

A general stream adjudication is a lawsuit, but not in the way most people think. In many lawsuits, one party is arguing that the other did something wrong or did not do something they should have done. This is not how a stream adjudication works. Here, the state brings a lawsuit, but the state is not "suing" anyone. Instead, the lawsuit asks the court to hear evidence from everyone who claims water in the given stream. The court then uses the evidence to confirm those claims, and to determine how much water is left if all the water claimed is used. Generally, these cases do not involve groundwater; groundwater is governed by a different set of Oklahoma laws.

Typically, each person, agency, or government that claims water rights must prove their claim is valid.<sup>3</sup> Since a large number of parties can be involved, the court will often appoint

<sup>1</sup> "Domestic uses" include household purposes, watering farm and domestic animals up to the normal grazing capacity of the land, and irrigating land not exceeding a total of three (3) acres in area for the growing of gardens, orchards and lawns. 82 OKLA. STAT. § 105.1

<sup>2</sup> See OKLAHOMA WATER LAW HANDBOOK, Oklahoma Cooperative Extension Service Circular E-1016 for more information on the permitting process.

<sup>3</sup> See, DAVID H. GETCHES, WATER LAW IN A NUTSHELL, 161 (2009)

a person called a “special master” to serve as the fact-finder for this part of the case. Courts can also use a state agency instead of a special master as the fact-finder. The fact-finder will then gather all the information provided by the parties. They may also conduct surveys and studies to get additional information. The fact-finder then compiles the claims and passes that information on to an agency (here, OWRB) or the court. The court will then determine the rights of the parties involved.<sup>4</sup> The end result is generally a court decree with the following information:

1. a listing of every water user,
2. their date of priority (when the use first started or when a permit application was first filed),
3. the amount and purpose of their water rights, and
4. the dates, times and places the water can be used.<sup>5</sup>

**It is important to remember that the purpose of a general stream adjudication is *not* to take rights away. Instead, it seeks to certify and quantify all rights to use water in a given system to provide certainty in water management.**

General stream adjudications occur throughout the western states, and while many of them have taken years to resolve, that is not always the case. The stream systems that will be adjudicated in Oklahoma are smaller systems and will involve fewer claimants than some of the adjudications in other states. During the water planning process, the OWRB reviewed all current surface water permits and made adjustments to those permitted rights that were not being used at all or that were using less than the permitted amount. Therefore, OWRB already has a good idea of current permitted water uses. This should help speed up the adjudication process. Only the riparian, federal non-Indian, and federal Indian rights should remain for adjudication.

## Stream Adjudications in Oklahoma

Before 1963, only four stream adjudications had taken place in Oklahoma courts.<sup>6</sup>

1. Grand River and Spavinaw Creek (1938)
2. North Canadian River (1939);
3. Blue River (1955); and
4. North Boggy Creek (1958)<sup>7</sup>

The process for stream adjudications has changed since these cases, though. The statute describing the procedure for such cases was amended in 1963.

Oklahoma’s current stream adjudication statute states:

When the Board determines the best interests of the claimants to the use of water from a stream system will be served by a determination of all rights to the use of

water of such system, the Board may institute a suit on behalf of the state for the determination of all rights to the use of such water and shall diligently prosecute the same to a final adjudication. The cost of such suit, including the costs on behalf of the state, shall be charged against each of the parties thereto in proportion to the amount of water rights allotted. Provided that after the effective date of June 10, 1963, neither the bringing of such suit nor an adjudication in such a suit shall be a condition precedent to the granting of permits and licenses as authorized by this act.

## If an adjudication is filed, who will be involved?

Oklahoma’s statutes<sup>8</sup> say in part “any person who is using or who has used water from the stream or who claims the right or who might claim the right to use water from the stream may be made a party to the suit.” This means that everyone who has, had, or might have an interest in the water can be made a party to the suit. This includes several categories of people:

1. People who own property along the stream. The rights of these people are called “riparian” rights
2. People who have received the right to use stream water, even if they do not own land along the stream. These rights are called “appropriations.”
3. Any federal non-Indian claims to stream waters such as for use in a national park or for endangered species protection.
4. Native American rights held in trust by the United States.

In addition, if the state does not make someone a party to the suit, but that person has a claim, that person can intervene and become included in the suit.

If you think you have a claim to the use of water in one of the mentioned stream systems and did not receive notification you may want to consult an attorney to determine if you should include yourself in the adjudication by “intervening” in the case.

## Who pays the costs involved in the adjudication?

As the statute says, the cost of an adjudication is charged to the parties involved. The adjudication, as currently filed, follows this statute. However, the Attorney General’s office has suggested that it will hold a meeting of the parties to discuss how to share the expenses of the adjudication.

## How do water rights holders give notice of their claims?

As this case progresses, OWRB and the state Attorney General will have to set rules for the suit. The Attorney General’s office stated that all parties with a claim will be provided notice of the suit. The parties will then be given a time to confirm their water right claims. If Oklahoma follows the example of other states, it may allow a claimant to simply fill out forms

<sup>4</sup> *Id.*

<sup>5</sup> See, JOSEPH SAX, BARTON THOMPSON, ET AL., LEGAL CONTROL OF WATER RESOURCES, 133 (2006).

<sup>6</sup> This excludes “administrative adjudications” which are performed by the agencies. Since this type of adjudication is not currently an issue, this Current Report will not address them.

<sup>7</sup> See, generally Joseph F. Rarick, *Oklahoma Water Law, Stream and Surface in the Pre-1963 Period*, 22 OKLA. L. REV. 1-44 (Feb. 1969)

<sup>8</sup> 82 OKLA. STAT. § 105.7

regarding their claim. That information is then returned to the party handling the adjudication. If Oklahoma chooses this approach, current water use permit holders may only need to provide the information on the permit application unless there has been some adjustment to the permit since it was issued (such changes could include changes to the amount of water or where it is used). If no one disputes a claim, it may not be necessary to hire an attorney. However, even if a claim is not disputed, a person claiming water rights may want to contact an attorney to understand their rights and to get advice about how to proceed.

If a landowner with land next to a stream (“riparian” land) does not have a water use permit, he or she will likely have to determine how much water is being used on an annual basis. This allows the state to allocate an amount of water for that use. If a riparian landowner does not have a good way to measure his or her water use, the OWRB may use an existing rule that says that the owner of 160 acres on average would use six acre-feet<sup>9</sup> of water. Alternatively, if there are non-household domestic uses the OWRB may allocate three acre-feet for each of those uses.<sup>10</sup> Therefore, the amount of water that may be allocated could be six acre-feet per 160-acre parcel, but for non-household domestic uses this amount could be either more or less, depending on the type of use. It is important to remember this process is to determine how much water the right holder is currently using and to legally recognize that use, rather than to take away any existing water rights.

## Quantifying Native American Rights

Native American tribes have been included in several stream adjudications in the western U.S. The main question in these cases is how much water the tribes should be allocated. Generally, reservations were set aside for Native American tribes with the idea that they would become farmers. To do this, reservations needed water. In the case of *Winters v. United States*, (decided in 1908), the U.S. Supreme Court said that Indian tribes did have rights to water, and those waters were reserved for them on the date the reservation was established.<sup>11</sup> This is often referred to as the “Winters Doctrine.”

The *Winters* case did not define how much water the tribes would have. It was not until 1963 that the Supreme Court addressed that question.<sup>12</sup> The court noted that one purpose of the reservation was farming. Thus, it decided the amount of water to be allocated was the amount needed to irrigate the reservation land usable for crops.<sup>13</sup> However, in 2001 the Arizona Supreme Court expanded this rule. It also considered the tribe’s cultural history, natural resources, and present and future population.<sup>14</sup>

9 An “acre-foot” is the amount of water needed to cover one acre of land (43,560 ft<sup>2</sup>) one foot deep. One acre-foot equals approximately 325,851 gallons.

10 OWRB Rules, OKLA. ADMIN. CODE § 785:20-5-5

11 *Id.* at 907

12 *Id.* at 910, *citing* *Arizona v. California*.

13 The term used by the court was “practicably irrigable acres.” “Practicably irrigable acres” are lands that are susceptible of sustained irrigation and irrigable “at reasonable cost.”

14 *See*, *GETCHES* at 347

The Winters Doctrine is designed to allocate water to a reservation. Initially 34 of 39 tribes located in what is now Oklahoma had reservations. The reservations have largely now been allotted to individuals and no longer legally recognized as reservations. The Five Tribes (Creek, Choctaw, Chickasaw, Cherokee and Seminole tribes) however, received their lands in “fee patent”<sup>15</sup> from the United States through various treaties, so these were not considered “reservations.” Instead they are referred to as “treaty lands.” Several years after these original grants, these treaty lands were transferred to individual tribal members. This was called “allotment.”

Because the Five Tribes (and ultimately, their individual members) received title to their land, and this land was not called a “reservation,” it is not clear if the Winters Doctrine will apply to them. The Winters Doctrine may be modified, or another rule could be created to address the Tribes’ unique position.

When the court has determined the water rights of the tribes, the court must then determine what happened to those tribal rights when allotment took place. The question becomes “did the tribes retain their water rights after allotment?” In some western states, the water was divided between the tribal members based on the number of practicably irrigable acres they owned and their water use, with the unused water remaining a tribal right. In some cases, if the land was sold to a non-Indian, the buyer got the use of some of the water. However, if the buyer stopped using the water, the law is not clear if the water right reverts back to the tribe or is available for appropriation to others.

## Why Adjudicate Now?

OWRB is pursuing a stream water adjudication because of a federal lawsuit between several parties including the Governor, the OWRB, the Chickasaw and Choctaw tribes, and several other parties. The main issue is over the allocation of water in three streams: the Kiamichi River, Muddy Boggy Creek, and Clear Boggy Creek. Currently, the case is in one of Oklahoma’s federal district courts.

The federal lawsuit requests the Oklahoma court to issue:

A declaration that unless and until a comprehensive adjudication of water rights is lawfully initiated that includes the water resources of the Plaintiff Nations’ Treaty Territory and satisfies the substantive and procedural requirements of the McCarran Amendment, 43 U.S.C. § 666, which standard is not satisfied by the present state-law water-use permit system on which Defendants rely ...<sup>16</sup>

In other words, the tribes have asked the court to order OWRB to stop issuing water permits that move water out of the Choctaw and Chickasaw tribal territories. This restriction would be in place until the court determines who controls the waters in those territories. If the court decides that water in

15 Fee patent means the tribes received their fee simple title from the federal government. It is much like how non-tribal members own land in that they receive title in fee simple from the seller.

16 *See*, *Chickasaw Nation and Choctaw Nation v. Mary Fallin, et al.* United States District Court for the Western District of Oklahoma CIV-11-927-C

those territories is under the sole control of the tribes, OWRB would have no authority over those waters. The Choctaw and Chickasaw Nations amended their lawsuit to exclude current permitted water indicating those rights would be recognized and the OWRB would continue to manage those permits.

### **Conclusion**

Many questions remain as to what rights both the state and the tribes have, and the answers are unlikely to be simple ones. As more information becomes available, we will update this Fact Sheet.

### **For More Information**

For additional information on general stream adjudications visit the Oklahoma Water Resources Board's website at <http://www.owrb.ok.gov/util/legal.php>.

The Attorney General's request for the Oklahoma Supreme Court to assert original jurisdiction in the case (which includes the petition for the stream water adjudication) can be viewed at [http://www.owrb.ok.gov/util/pdf\\_util/lawsuitdocs/Application\\_OWRB\\_Assume\\_Original\\_Jurisdiction.pdf](http://www.owrb.ok.gov/util/pdf_util/lawsuitdocs/Application_OWRB_Assume_Original_Jurisdiction.pdf)

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