

Portion of the Tombstone lawsuit against the Beattys dismissed

By Jonathon Shacat <http://www.svherald.com/content/news/2012/11/08/338874>

Created Nov 8 2012 - 12:10am

BI SBEE — Earlier this week, a Cochise County Superior Court judge dismissed a portion of the City of Tombstone's lawsuit against the Beatty Guest Ranch regarding water in the Huachuca Mountains.

On July 31, Tombstone filed a lawsuit regarding access through the Beatty property over Tombstone's easement to repair its waterlines and to enjoin the Beattys from tapping into the Tombstone Water System.

In September, the Beattys filed a motion to dismiss all claims raised by Tombstone that "seek any determination of the respective water rights of these parties and the scope or exercise of other rights associated with those water rights." An attorney for the City of Tombstone filed a response early this month. Division 4 Judge Ann Littrell heard oral arguments on Monday.

The judge granted the motion to dismiss, citing a lack of jurisdiction due to another court case, now before the Maricopa County Superior Court in the case designated as "In the General Adjudication of All Rights to Use Water in the Gila River System and Source." This comprehensive adjudication is intended to establish the relative priority of water rights of all persons in the Gila river system and source, which includes the subject San Pedro River area, according to the defendants.

After the hearing, John MacKinnon, who represents the Beattys, explained to the *Herald/Review* that the motion to dismiss was only to dismiss the water rights adjudication issues from this proceeding. Those issues are already pending in the Maricopa case and as a result cannot be heard in Cochise County.

"The rest of the lawsuit regarding the various claims to the land is still pending, including our counterclaim. That was most of what we were discussing today, and we will have the opportunity to present those issues in a motion in the relatively near future," he said.

Randall Bays, Tombstone City Attorney, did not respond to an email from the *Herald/Review* seeking comment.

In his response to the motion to dismiss, Bays stated the defendants are confusing an "adjudication of water rights" (which is something that has yet to happen) with a request for "declaration and determination of the nature, extent and relative priority of the water rights" between Tombstone and the defendants to access the McCoy group springs and reservoir (which has already happened)."

"The defendants are misappropriating water previously appropriated to Tombstone. The question before this court is whether the defendants have any right whatsoever to tap into Tombstone's waterline. This matter has already been adjudicated in Cochise County Superior Court in 1915 in Tombstone's favor. Therefore, the motion to dismiss must be denied," he stated.

The 1915 judgment and decree was against James Tomblinson (the defendants' predecessor in interest) and it awarded the Huachuca Water Company the McCoy reservoir site including three springs and five acres at issue in this case, according to Bays. Tombstone purchased the Huachuca Water Company and all rights and interests to its assets in 1947.

He added there was another lawsuit in Cochise County Superior Court in 1908 that specifically dealt with the holdings of the Huachuca Water Company that included the land and water rights to the McCoy springs and reservoir. The judgement ordered the sale of the Huachuca Water Company and its holdings, including the "water rights and privileges, rights-of-way, and other easements, tenements and hereditaments, dams, tanks, storage reservoirs, main and branch wrought iron pipes ... pertaining to the gravity distribution system from the Huachuca Mountains to the City of Tombstone."

In a reply filed in court early this week, MacKinnon stated there is a clear distinction between the adjudication of water rights and the resolution of traditional disputes about the ownership of real property. As a result, he said the court should dismiss for jurisdictional reasons the plaintiff's claims to water from certain springs, but hear the counterclaim by which the defendants ask the court to reject plaintiff's claim of fee title to their property.

He added that "under no stretch of the imagination can it be reasonably argued that the litigation brought by the Huachuca Water Company against Tomblinson in 1914 resulted in any award of fee title to the Plaintiff in that case, or to Tombstone itself."

In 1914, all of the property at issue was owned by the federal government and designated as a national forest. In 1901, Huachuca Water Company had filed certain "Notice of Appropriation" forms to memorialize its claims to certain water rights, now at issue in the general stream adjudication, and to use rights to certain areas of these federal lands under the federal land use laws applicable at that time, according to MacKinnon.

When Tomblinson filed a right of entry to obtain a patent for 10 acres of land which overlapped with certain of these claims, the Huachuca Water Company sued him to oust him from this land. The owner of the property, the United States, was not joined in this litigation. Before the entry of the Superior Court judgment in 1915, the United States advised the Huachuca Water Company that the Company's claimed use rights for the subject land did not deny Tomblinson the right to obtain a patent for this property, subject to any vested rights that may burden this property. A patent was then issued to him in 1919, according to MacKinnon.

