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STATE CAPITOL
PHOENIX, ARIZONA

October 23, 1974

DEPARTMENT OF LAW LETTER OPINION NO. 74-28-L (R-55)

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REQUESTED BY: ANDREW L. BETTWY
Commissioner
Arizona State Land Department

- QUESTIONS:
1. Does the State Land Department have the authority to approve a petition for a change in use of water under A.R.S. § 45-146.B, or does the Department have the authority to approve a change in use of water under A.R.S. § 45-172?
 2. If the Department has the authority to approve a petition for a change in use of water under A.R.S. § 45-146.B, does that authority include jurisdiction to approve a request for a change in use for water when the right to appropriate said water has been determined by the Kent Decree (i.e., water right adjudicated by a court)?

- ANSWERS:
1. See body of opinion.
 2. No.

A.R.S. § 45-172 (as amended Laws 1962, Ch. 113, § 5) is inapplicable in the situation where an appropriator of water wishes to change his use of the water without severing it from the land to which it is appurtenant or from the site of its use. In this instance the object of the petition is to effectuate a change in use rather than to accomplish a severance or transfer. Therefore, insofar as petitioner desires to change its use from irrigation to domestic and municipal use, A.R.S. § 45-172 has no application.

A.R.S. § 45-146 more precisely deals with the "change in use" question as distinguished from severances or transfers which are the subject of A.R.S. § 45-172. A.R.S. § 45-146.B provides:

B. A change in the use of water appropriated for domestic, municipal or irrigation uses shall not be made without approval of the department, and if the change contemplates generating hydroelectric energy or power of over twenty-five thousand horsepower, approval shall not be granted unless authorized by an act of the legislature.

Arguably, the form of this provision and the statute's title can be construed as referring only to waters appropriated to generate power or those changed from a previous use to generate power. However, such a construction is inconsistent with the legislative history of the provision. A.R.S. §§ 45-143 through 45-147 contain many of the same provisions which were collectively located in the Code of 1939 in § 75-106. That former Code provision states unambiguously that changes in the use of water appropriated for domestic, municipal or irrigation uses shall not be made without the approval of the Commissioner. The language of A.R.S. § 45-146.B is identical to language in the former Code provision.

In Conway v. State Consolidated Publishing Company, 57 Ariz. 162, 112 P.2d 218 (1941), the Arizona Supreme Court said that in construing the 1928 Code, it would not give the law in question a different meaning than the original unless it were clear that the Legislature intended a change, but if it appeared that the Legislature intended a change, the Court could not ignore such an intention. See also Mutual Benefit Health and Accident Association v. Neale, 43 Ariz. 532, 33 P.2d 604 (1934); Refsnes v. Oglesby, 50 Ariz. 494, 73 P.2d 90 (1937). Although the provisions of the Code of 1939 may have been unimaginatively transferred into the Arizona Revised Statutes, there appears to be no intention on the part of the Legislature to limit the "change in use" provision of A.R.S. § 45-146.B to changes resulting in appropriation of waters to generate power.

The opinion of this office is that A.R.S. § 45-146.B authorizes the State Land Commissioner to rule on petitions for changes in use of water appropriated for domestic, municipal or irrigation use.

In response to the second question, having read and considered the statutes and further having studied the "Kent Decree" itself, this office is of the opinion that the answer to your second question is clearly "No." The Kent Decree provides at page 2:

The court retains jurisdiction of the cause and of the issues embraced herein and, upon good cause shown, may from time to time modify, enlarge, abrogate any portion or feature of this decree or of the decision and tables filed herewith as a part thereof, by order or supplemental judgment or decree to be entered. . . . (Emphasis added.)

Additionally, at page 20 of the Decree, the Court has used the following language:

The decision and decree in this case, from the nature hereof, is of necessity a continuing one. The Court retains jurisdiction of the case and of the issues embraced therein. From time to time, as conditions may require an enlargement of modification of the decision and decree, application for such modification or enlargement may be made to the Court, and if granted, the same shall be entered at the foot of the decree herein. (Emphasis added.)

As this office has concluded in the past when asked to describe the jurisdiction of the Land Department concerning water rights, again it is concluded that, where jurisdiction in a court is of a continuous and reserved nature, the Department has no jurisdiction over such a pending matter. Therefore, since the Kent Decree provides for continuing jurisdiction, the Department may not receive or otherwise act upon a petition for a change of use filed under A.R.S. § 45-146. Petitions for a change in use must be filed with the Court in order to be processed.

Respectfully submitted,



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The Attorney General