

In the

Supreme Court of the United States C 1

BONELLI CATTLE COMPANY, et al.,)
)
 Petitioners,)
)
 v.) No. 72-397
)
 ARIZONA, et al.,)
)
 Respondents.)

Washington, D.C.
October 15, 1973

Pages 1 thru 42

RECEIVED
SUPREME COURT, U.S.
MARSHALL'S OFFICE
OCT 23 3 51 PM '73

Duplication or copying of this transcript
by photographic, electrostatic or other
facsimile means is prohibited under the
order form agreement.

HOOVER REPORTING COMPANY, INC.

Official Reporters
Washington, D. C.
546-6666

IN THE SUPREME COURT OF THE UNITED STATES

-----X
:
BONELLI CATTLE COMPANY, et al., :
:
Petitioners, :
:
v. : No. 72-397
:
ARIZONA, et al., :
:
Respondents. :
:
-----X

Washington, D. C.

Monday, October 15, 1973

The above-entitled matter came on for argument
at 10:04 o'clock a.m.

BEFORE:

WARREN E. BURGER, Chief Justice of the United States
WILLIAM O. DOUGLAS, Associate Justice
WILLIAM J. BRENNAN, JR., Associate Justice
POTTER STEWART, Associate Justice
BYRON R. WHITE, Associate Justice
THURGOOD MARSHALL, Associate Justice
HARRY A. BLACKMUN, Associate Justice
LEWIS F. POWELL, JR., Associate Justice

APPEARANCES:

ELMER C. COKER, ESQ., Luhrs-Central Building,
Phoenix, Arizona 85004; for the Petitioners.

DALE R. SHUMWAY, ESQ., 64 East Broadway, Tempe,
Arizona, 85282; for the Respondents.

C O N T E N T SORAL ARGUMENT OF:PAGE

Elmer C. Coker, Esq.
for the Petitioners,

3

In Rebuttal

40

Dale R. Shumway, Esq.
for the Respondents

20

P R O C E E D I N G S

MR. CHIEF JUSTICE BURGER: We will hear arguments first this morning in No. 72-397, Bonelli Cattle Company against Arizona and others.

MR. Coker, you may proceed whenever you are ready.

ORAL ARGUMENT OF ELMER C. COKER, ESQ.

ON BEHALF OF THE PETITIONERS

MR. COKER: Mr. Chief Justice, and may it please the Court:

Mr. Shumway and I are both deeply grateful to this Court for providing us the opportunity of arguing this matter which is of most importance not only to the State of Arizona but its citizens. I would like to briefly point out on the map, which is the most recent official map published by the Bureau of Land Management, the area along the Colorado River. The area we are talking about is in here (indicating).

Q Is that map reproduced anywhere in the record?

MR. COKER: Yes, sir.

Q In precisely that form?

MR. COKER: Almost identical but on a smaller scale, sir.

Q On a smaller scale.

MR. COKER: I would like to leave this in --

Q I wondered if that was the same map. Very well.

MR. COKER: For all practical purposes, yes, sir. From the Arizona Planning Commission map, is a take off from this as well as on the highway department map.

Thursday I received in the mail an amicus brief by the Cocopah Indians. Unfortunately I could not spot that until I -- through the good offices of the United States Attorney I obtained some solicitor's opinion as to the location. The Cocopah Reservation is in this area here (indicating).

Exhibit K to the agreed statement of facts is a topographical map dated 1902 and 1903 which shows the Bonelli land in red and the Colorado River at that time. I know it is hard to see from there.

Q Can we have a copy of that?

MR. COKER: Yes, sir.

These are all the others, sir.

Q No, I mean do we have the submitted papers?

MR. COKER: Yes, sir, I have sent Exhibit K. There are only two exhibits here that the Court does not have and that is a big map and later on an aerial photo.

Q Excuse me, what did you point out on Exhibit K?

MR. COKER: The Bonelli land which we are concerned with here.

Q Is it 1902?

MR. COKER: 1902, 1903, sir.

Q And where is the river?

MR. COKER: The river is shown about a mile to the west.

Q So, you think it is perfectly clear and accepted in this case that the land in dispute was not riparian land in 1902?

MR. COKER: And 1903.

Q And when was the patent on it?

MR. COKER: 1910, sir.

Q Do you know where the land was in 1910?

MR. COKER: Not as of 1910.

Q With respect to the river?

MR. COKER: We know as of 1906 when the plat of survey was filed, which is in evidence, that it was along in here (indicating).

Q When?

MR. COKER: 1906.

Q So, you think when the patent was issued, the land was riparian land?

MR. COKER: We have no way of knowing, Your Honor; we tried to find out. That is the reason we had to submit this all on documentary evidence.

Q Do you think it is a vital question?

MR. COKER: Yes, I do think so.

Q Is there a finding on it below?

MR. COKER: No, sir.

Q Do you take a position?

MR. COKER: I take the position that the title passed by virtue of the patent in 1910 based upon the 1906 official plat of survey which showed that this was riparian to the river.

Q It was?

MR. COKER: Yes, it was.

Q But there was no finding on it?

MR. COKER: No, sir.

Q Does your opponent --

MR. COKER: We do not know, sir.

At the time of preparing these exhibits, we were trying to get everything we could possibly find in the way of maps or documentary evidence that would show the location of the river.

Q And what is that?

MR. COKER: This map here is Exhibit E-1 and -2. E-2 is a letter from the Regional Director of the Bureau of Reclamation, translating this map and outlining the Colorado River in the area we are talking about, the Bonelli land after channelization, and showing where the high water mark was immediately prior to channelization. It says, "For your convenience the bank of the active channel prior to channelization has been indicated by a red pencil."

This is Exhibit B, which is a 1960 mosaic from Davis Dam to an area south of the Bonelli land and which goes into the Fort Mohave Indian Reservation. Both had a treaty at that time as shown here.

Q Exhibit D?

MR. COKER: D, sir, D, D. Yes, sir.

And that is in the agreed statement of facts. I don't think, Your Honor, we have extra copies, but I am going to leave this with the Court. This shows the Bonelli land and it also shows very clearly on this aerial where the Colorado River at one time flowed, back into here, some three miles east of the present channel, down in here, back over in here, over into Section 2 and 10 and into the Indian reservation that I have mentioned in the brief (indicating). It very clearly shows what I say is the high water mark as defined by our Supreme Court in the Bonelli decision.

This is an aerial photograph taken in January of 1972 by NASA at an altitude of 65,000 feet. These photographs were prepared and furnished to me by the Arizona Highway Department from the film that they have of record. I might state that NASA did make flights the complete course of the river.

Today we have the outline of the same -- for the high water mark where we believe at one time the Colorado River flowed under the Arizona decision. But between 1960

and 1972, this area has been highly developed by subdivisions. And it is very plainly shown here. Also the increase in size of Bullhead City. And it is my position and my interpretation -- and I believe Mr. Shumway substantially agrees -- that under the Arizona decisions this whole area now belongs to the State of Arizona. Whereas, under the Claridge decision it would be a small area.

Q In what year did the United States Engineers make the most recent improvement that channelized --

MR. COKER: In 1959, sir, or 1960. That is when they channeled this area in here.

Q And there has been no flooding since then?

MR. COKER: No, sir. And that brings up the point I want to make.

Q I assume you are going to tell us what the issue is in this case and what it is about.

MR. COKER: I have only put this out for the purpose --

Q That is preliminary information?

MR. COKER: Preliminary. The sole issue, really the only issue, that we are involved with here is, What is the line that the State is entitled to on a navigable stream? And when the Federal Government comes in either through its Corps of Engineers or Bureau of Reclamation -- the Bureau of Reclamation in this part -- and channelizes the river under

the theory of navigation and also primarily in this case to conserve water for irrigation below. This channelization has just commenced and it is going to proceed in different areas.

My main concern is -- and I think it will affect all of us -- is what is the extent, what was the purpose, of the grant given to the States by Pollard and later on confirmed by the Swamp Act.

Does it extend from this present channel, we will say, clear over here some three miles distant where the river once flowed? This river, as is pointed out, was, prior to the Hoover Dam, a very violent river. Sometimes it would flow over here and sometimes it would flow over here, according to the amount of silt that was carried down and automatically it would make one channel and move. In this particular area the movement has been steady from west to east. At one time maybe it did go back to the west.

But I cannot feature that it was ever the intent to grant to the States under the Pollard decision and in the Swamp Act the means by which to acquire large areas of land. The only purpose being to that grant was to protect the public in access to the navigable stream and not to provide large areas such as this where the river once flowed and then become exposed.

The Arizona Court holds that the channelization

actually caused an evulsive change and did not change the ownership of this land which was exposed by the channelization in the State.

Q Is there any dispute between you and your friends on the other side as to whether or not this was an evulsive change or whether or not a man-made sudden change is evulsive?

MR. COKER: I think we would have to agree to that.

Q That is what I understood from reading the briefs.

MR. COKER: And that is what happened here. In some of these areas here there was no channelization because it was already channelized. Although at one time evidence on the ground indicates that the river was some distance to the east but filled up.

Q Mr. Coker, in that connection do you consider the changes with respect to this property between 1938 and 1959 were accretive or evulsive? This was after the Hoover Dam but before the dredging out of the channel.

MR. COKER: Under, of course, the Beaver case and under the Claridge case, perhaps it could be considered as the construction of the Boulder Dam and the closing of the gates could be considered in some areas as an evulsive movement. I do not think we so treat it here. We concede that between the time the gates were closed in 1935 and the channelization, that there were fingers of this river still

east of the Bonelli land. We have some aeriels in the file and we should have brought some to reproduce, but they are with the agreed statement of facts, showing the flow of the river at that particular time which are more recent.

Q Which is your position, that interim period from the date of the Hoover Dam until the dredging of the new channel?

MR. COKER: As to whether the accretion or --- I am afraid I would have to say accretion, because it is slow, and the reason it is slow is because there is so much silt deposited between the dam and these areas, that the river would move. There are quite a few canyons above Davis Dam, and there is a large wash in here, for instance. In flood times it comes down and carries large amounts of silt. It might push the river clear over to the west side. But generally speaking the river goes eastward because your bluffs are in here, and as it piles silt up it would form a new channel or fingers of channels.

So, I would have to say it was an evulsive movement, it was not something that happened overnight.

Q Accretive?

MR. COKER: Accretive, I beg your pardon.

Some places down in the Yuma area where the large floods would come, it was considered evulsive. You would see the river at one point one day and a pretty good size

flood would come down and it would move almost overnight. I think we had a criminal case that involved that movement in the Arizona Supreme Court.

The other point that I feel is of most importance -- and I have raised it in my reply brief, I raised it in the opening brief and the reply brief -- and that is that under our peculiar circumstances on admission to the Union, we did not come in on an absolute equal footing with the rest of the States. We have a very restrictive enabling Act. And as I tried to outline briefly in my reply brief, we had an awfully tough time becoming a State. Congress wanted us to come join up with New Mexico and become joint statehood. So, the result of our people voting that down, they did impose upon us some very tough restrictions. And it was due to the fact, reading the history behind it, of some fraud that had occurred in New Mexico during territorial days on grant lands.

My position is that we do not have the benefit of the Swamp Act specifically -- we were given grants in lieu thereof -- but anything in the nature of public lands or grant lands we hold in trust under very restrictive covenants. We disclaim in our constitution all claim and title to public lands and Indian lands.

The effect of this decision, I earnestly submit, does affect Indian lands and particularly the Fort Mohave.

I mentioned in my opening brief that we could not find the particular withdrawal orders of the Fort Mohave. It was only last week that I was able to get through the Library of Congress a copy of the two original withdrawal orders in March 1890 and 1870, I believe it is, which created Camp Mohave and the other fort there. Later in 1910 and 1911 President Taft added on after the forts had been conveyed to the Indians, added on; but nowhere in the original withdrawal order for military purposes or the Indian withdrawal orders is there any reservation made of the Colorado River. And based upon our Arizona Supreme Court decision in Morgan, which I have cited, without that limitation and without reserve and the intent to reserve that river for the benefit of the Indians, then under our Arizona Supreme Court decisions, part of the Indian reservation has been taken as a result of this decision.

Q Mr. Coker, do you have any thoughts as to why the 1953 Act, the Submerged Lands Act was necessary?

MR. COKER: Was it necessary?

Q Yes, so far as your claims are concerned.

MR. COKER: Not as far as our claims are concerned.

Q What is the practical result of the Arizona decision on Bonelli's title? Did it completely destroy it?

MR. COKER: Completely destroyed. The first decision said -- well, they have got a small acreage in here,

in the southeast corner. But the second decision goes further and says prior to the closing of the gates at Hoover Dam -- and this was the line at that point, for an example. Down here we can see how far it extended there.

Q As I read the Solicitor General's brief, he makes the flat statement that changes caused by channelization are evulsive in nature.

MR. COKER: Yes, sir.

Q Do you agree with that?

MR. COKER: Yes, sir, I have to.

Q Do you have any authority for that statement?

MR. COKER: Yes, there is some authority, Your Honor. I am sure in the Beaver case, I believe, by the 9th Circuit and Claridge, I am sure, mentions that. And, of course, our Supreme Court said it was an evulsive change, and therefore title did not change.

Q And your way out of that is what? Even if it was an evulsive change and title did not change, you would think the State still owned the bed of the river.

MR. COKER: That is what they claim, sir.

Q And that is what the Court held. And you say that this is not the kind of evulsive change that ought to change title?

MR. COKER: No, sir. I say that the corpus, Your Honor, of the grant to the States was to control the

malleable thread of that stream. And as the stream moved, whether evulsive or by accretion or man made, that the title to that man-made channel, which is a servitude, for the purpose of protecting the public's right to access to that navigable stream is what the intent was and not a means of acquiring exposed land after the channel has been restored.

Q You would make the same argument if man had nothing to do with the change of this river?

MR. COKER: Yes, sir, I would, sir.

Q So, you would really overrule a substantial body of law, I suppose.

MR. COKER: I do not think so. I do not think the Court has ever clearly pointed out what the extent of this grant is. That is my point, Your Honor.

Q This is the grant of title statement?

MR. COKER: Yes, sir, under the Pollard case, under the Pollard decision, to put them on an equal footing with the remainder of the States.

Q Your basic claim, I guess is -- tell me if I am wrong -- is that what the State owns is the bed of the stream under the high water mark, wherever the stream might be at any given time.

MR. COKER: Yes, sir.

Q Period.

MR. COKER: Period.

Q Is that by virtue of the grant?

MR. COKER: By the Pollard grant, yes, sir, later confirmed by the Swamp Act.

Q There is no question but what the State would own the land under the river, wherever it is.

MR. COKER: Yes, sir.

Q The question is whether it owns something else.

MR. COKER: That is right, sir. That is exactly it. And do they retain ownership when it is not necessary to exercise the power or the control over the navigable stream for the benefit of the public?

Q You say the cases about evulsion are really only applicable between private parties, rather than --

MR. COKER: I think so.

Q -- rather than dealing --

MR. COKER: Yes, sir, evulsion and accretion.

Q Or applicable in determining the boundary between two States.

MR. COKER: Yes, sir.

Q But not as between the State and a private party in the circumstances of this case.

MR. COKER: Again, in view of the peculiar nature and restrictive covenants in our Constitution -- we have two different places in our Constitution where, if this land is State land, the only manner in which they can lease it or

sell it is in accordance with the land grants. That is the reason I have said time and time again -- and Mr. Shumway will agree -- our legislature feels that they are powerless to act here and plan to protect these people.

Q What relevance, if any, do you think the case of Hughes against Washington has?

MR. COKER: I think it has a lot of relevance. Number one is definitely we establish the fact that Federal law governs here.

Q And you agree that it does?

MR. COKER: Yes, sir.

Q Do you think there is any ground after the Hughes case to say that State law governs?

MR. COKER: No, sir. Mr. Shumway may have a different viewpoint.

Q You may remember that I had a different viewpoint in that case.

MR. COKER: Yes, sir, and also just compensation. They are taking this land without paying for it.

Q That was the view of the concurring opinion in the Hughes case.

MR. COKER: Yes, sir, concurrent. The Hughes case is identical here because all of this land came from the Federal Government, the Santa Fe land grant.

Q The relevance of the Hughes case depends on

whether it was riparian at the time of the patent. And you say it was.

MR. COKER: It is presumed that it was, Your Honor, because we tried to find some intervening evidence between the 1906 plat upon which the Bonelli land was transferred, conveyed by the Government to Santa Fe, and the actual date of the plat.

Of course, the law is -- and I do not have it solid, but this was under the Railroad Grant Act, I believe, of 1865. And this Court has held that the grant relates back to that time, provided the railroad complied with the law, which they did.

Q Can you tell me just on that map there, describe or just outline, what were the limits of the Bonelli grant in terms of the sections and quarter sections? Where did it lie on that map?

MR. COKER: Can I have just a second to look at it?

Q No, never mind then.

MR. COKER: The Bonelli land at the time, as I recall, was almost a complete section. The only reason it was not a full section was because there was a portion of it bounded by the river on the west at the time.

Q If you just took the descriptions, the sections and quarter sections, just the way the patent was described

and located it on the ground, would it cover all of the land that is now in dispute?

MR. COKER: No, sir, it would cover more land on the Nevada side now.

Q What?

MR. COKER: It would cover land now in Nevada.

Q But would it cover all the land that is now in dispute?

MR. COKER: Yes, sir, the patent. And part of it is in Nevada and there is an action pending up there by the Nevada people.

Another question which I think is quite serious, and I think it is time to adopt it, particularly in a case like this, is the doctrine of sovereign estoppel. As I have pointed out in my brief, our State has sat back over six years in statehood and some 40 years when the Colorado River was declared navigable over the objections of Arizona, and done nothing. They have collected taxes. They have, and as a matter of law, Mr. Shumway will agree, they have agreed and approved subdivisions. Several times the matter has been before the legislature. They have not legislated. I think my time is up.

MR. CHIEF JUSTICE BURGER: Very well.

Mr. Shumway?

ORAL ARGUMENT OF DALE R. SHUMWAY, ESQ.

ON BEHALF OF RESPONDENTS

MR. SHUMWAY: Mr. Chief Justice, and may it please the Court:

I would like to perhaps outline a little different view of some of these facts, because I believe the facts are material to what we are talking about. For the sake of clarity in the brief of respondents, beginning at page 5, we have inserted copies of the pertinent exhibits which we feel will give the Court an understanding of where this river was, where it is today.

At page 5 there is a copy of Exhibit K which was submitted to the Court at the trial level. It is the 1902 topographic map which had been prepared by the Geological Survey.

Q That is page 5 of what?

MR. SHUMWAY: That is page 5 of the respondent's brief.

Q Thank you.

MR. SHUMWAY: This is the same map which was shown a moment ago by Mr. Coker. It shows the subject land being in section 3, which is over a mile distance from the Colorado River as it was surveyed under this topographic map. I would like to point out in your looking at this, that the Colorado River in the stage that it was at the time

of that survey was a low stage. It was not the river as it existed in an annual high flow stage. For perhaps familiarity, the Colorado River is the river that traditionally before the days of Boulder Dam drained the watershed of the Colorado, and when it did, it ran in the late spring and the early summer months. So, the only period of time that that river really had a high flow stage was during that particular part of the year. Any other time it was a rather docile river. It sometimes had very little water in it. And all of the surveys that I know anything about were done at the time the river was low.

And so, you see, on Exhibit K -- that is on page 5 of respondents' brief -- and approximate location of that low flow. But you see also to the right of the subject land a 500-foot to 550-foot contour. And for showing it on this big map, the 550-foot contour is clear off in this area (indicating). The subject land is the red and it is way over here.

Q That is the dotted line?

MR. SHUMWAY: That is the dotted line.

The next exhibit that I inserted in the respondents' brief is at page 6. This is a copy of the General Land Office survey of 1906 which, for all intents and purposes, was the statehood survey for Arizona. And at that time the Colorado River had moved to a point where it had merely gone into

the southwest corner of the subject land. This was 1906. And in relation to Mr. Justice White's argument about whether it was riparian or not, I would just say that this is the closest date we have to determine whether it was riparian land. The strict doctrine of riparianism says that land must be bordering a navigable stream, and this is not at the closest survey we have.

Q At the closest point, how distant is it?

MR. SHUMWAY: It is about a quarter of a mile.

Q On the other hand, at the rate at which it was moving between 1902 and 1906, it would have made the land riparian by 1910, would it not?

MR. SHUMWAY: I would have to say I do not know.

Q If one assumes a steady rate of movement to the east.

MR. SHUMWAY: In complete candor, I would have to say we did everything possible to determine where this river was at a particular time.

Q And what is the year of statehood?

MR. SHUMWAY: 1912.

Q Is it your claim that the river covered this land completely or that this land should be considered as part of the river bed in 1906 say, or 1910?

MR. SHUMWAY: Perhaps this is a good time to make a statement of this particular problem. I represented the

State of Arizona in the case called Claridge v. The United States. The Supreme Court denied cert in that a few years ago. That case arose in the area of Blythe, California. And if you are familiar with Blythe, the river valley is approximately 15 to 20 miles wide. There is no doubt that that river has run over all of that area at some time. Some time, prehistoric, the river was completely across that valley just as it was across this complete area here (indicating).

In the Claridge decision the State of Arizona took the position that the river bed that the State of Arizona took title to at statehood was that total area, wherever the river completely took the land during its high flow stage.

Q At any time in history, was that your position?

MR. SHUMWAY: Yes, at any time in history, and particularly any time subsequent to the United States being there.

Q Well, what was your position, at any time in history or pre-history?

MR. SHUMWAY: Our position in that case, we said this: It is most difficult for us to go bluff to bluff, because that encompasses thousands of acres of land which is already utilized by private owners. But we said this is the area of land that we ought to cover. We ought to cover

the area where the river had run in times that we could remember. In particular, that case, in Blythe area, the Claridge decision, it was very clear, and we proved it by witnesses that the river had been about 2-1/2 miles wide as late as 1913-14, even up to 1920.

After Boulder Dam, you see, this river never has been a natural river any more. It is merely a conduit that conveys water from Boulder Dam down to the irrigation projects into the Los Angeles area, etc. And so the river today is not a natural river and it has not been for a long, long time.

Q It is just a big irrigation ditch.

MR. SHUMWAY: It is a big irrigation ditch. And so our position was this in Claridge, that we own a much larger area. That then begs the question of whether the United States could convey away pieces of land like this and thousands of other parcels up and down the river.

Q Before statehood.

MR. SHUMWAY: Before statehood.

Q If you were right, they could not.

MR. SHUMWAY: They could not, because under the Pollard decision, they would have reserved that land for the States to be created.

Q And then what did the Claridge court hold?

MR. SHUMWAY: The Claridge court held that the

river was not --

Q That was the Court of Appeals for the 9th Circuit, right?

MR. SHUMWAY: Yes. They said that you do not go out that far, if you please, 550-foot contour on Exhibit K; you go where the river is today. That is basically what Claridge held. You go where it is today. Which would then reduce us to a narrow configuration.

And so even if we are reduced to the narrow configuration, I think we question whether Bonelli was riparian. There is no proof that he was.

Q If he was, then he is right in this case under Claridge; is that right?

MR. SHUMWAY: No.

Q Why not?

MR. SHUMWAY: And I will tell you now why. I do not think he was right even then, because the State of Arizona owns the bed of a navigable stream wherever it is. And what we have in this case is the river moving from its position in 1903 until 1906 when it was still apparently not on the land. Then we have the next location -- and I put that at page 9 of my brief -- which is the 1960 revision of a topographic map filed by the Office of River Control of the Bureau of Reclamation. And at that time, as you can see from that exhibit, the river had inundated almost the entire

tract of land. And that is the last natural -- if we disregard Boulder Dam and its effect -- this is the last natural, as natural as that can be.

I think we have to start from that particular point.

Q This is a revision of a map of what year?

MR. SHUMWAY: It is actually a 1950, 7-1/2-minute quadrangle sheet, published by the Geologic Survey.

Q What I am really trying to get at, when did that condition obtain?

MR. SHUMWAY: Mr. Justice Brennan, it was this particular map that is Exhibit E-1, and the letter that is attached to it in the abridged statement of facts says that it obtained in 1952 and it was updated for the sake of re-channelization to 1960. And so immediately before the United States went into rechannelizing that, this is the configuration of the "natural river."

Q Your position is that since 1906, or whenever that last map was, that the river had moved enough that the State of Arizona had picked up everything within these high water mark lines on Exhibit E-1?

MR. SHUMWAY: That is substantially correct. I would call your attention to page 12 of respondents' brief which is actually a resurvey of the same thing.

Q Then by the same token Arizona had lost title to

all of the other land that the river used to cover?

MR. SHUMWAY: That is correct. Wherever the river had been over to the west, we have lost that. We had transferred the ownership of the bed of the now existing stream. And why I called your attention to page 12, that is a dependent resurvey by the Bureau of Land Management, that is actually the survey agency, and they locate the old left bank of the Colorado River before rechannelization.

Q You say a dependent resurvey?

MR. SHUMWAY: Yes, a dependent resurvey. And they located a little bit further --

Q They purport to pick up the old markers?

MR. SHUMWAY: I do not believe it is dependent. I think it is a resurvey.

Q If it is, then you have a real problem of knowing where the land is on the ground anyway.

MR. SHUMWAY: It is a resurvey.

Q It is labeled a resurvey.

MR. SHUMWAY: That is right, it is a resurvey.

Q In 1962?

MR. SHUMWAY: It reduces the amount of land that is left outside the river slightly. And so it is our position, from those particular exhibits, that we have got nothing more than an accretive movement of the river. And you secured that agreement from counsel for the petitioner,

that he agrees that there has been accretion, that accretion moved the bed of the river over until it completely -- except for the 60 acres in the southeast corner, inundated the subject land. And at that particular moment the State of Arizona and Nevada owned the bed of the Colorado River, even though it was on his land. And there have been no taking by anyone, except the actions of the river. The land was at the mercy of the river.

Sometimes I do not think the doctrine of accretion is as sound as it ought to be. But it is the doctrine that is pretty well substantiated by all the law in this country. And that doctrine of accretion includes not only the effect upon private lands, as one of the Justices asked, but it also carries with it the ownership of the bed of the stream. Its effect is upon the riparian land. Its effect is likewise on the bed of the stream which is owned by the States.

Q That includes reliction, I guess?

MR. SHUMWAY: Reliction? Of course reliction is the withdrawal of water, and I would have to say that reliction is a doctrine which is similar to accretion, and the law is the same in that regard.

Q So, after Exhibit E-1 was prepared, if the river itself dug that channel, if nature did that, you would agree that Bonelli recovered title to this land?

MR. SHUMWAY: Very definitely, Mr. Justice.

I would agree so.

Q That is, if it had been a natural relictive movement.

MR. SHUMWAY: Very correctly.

Q Or a man-made relictive movement.

MR. SHUMWAY: Well, not so. Let me get into the question of the man-made effect. There is a bunch of cases, a body of law, which says that if accretion or reliction was caused by some upstream effect and it was not designed for this particular purpose, then it is not the same -- it is the same, excuse me.

Q It is the same.

MR. SHUMWAY: It is the same. In this particular case we are not talking about that. We are talking about a specific act which came in to reduce the flow, to constrict the river. That was the purpose of rechannelization.

Q Right. And it is agreed that that, while man-made, was evulsion, correct?

MR. SHUMWAY: That is for all the law that I can find on it, that is tantamount to an evulsion.

Q I think your brother conceded that.

MR. SHUMWAY: Yes.

Q And your claim therefore basically is that the accretive movement to the east and southeast, under accepted principles of law in this area, gave title to the State, to

that land which was under the high water mark of the river when it was over there in the southeast. And that that title remained in the State after the evulsive movement to the west and northwest created by the channelization of the river. That is your argument, is it?

MR. SHUMWAY: That is substantially it. And the only thing that I think remains that I want to emphasize is this. I think there are two real questions in this, and the first one involves the location of the ordinary high water mark with reference to Boulder Dam and its effect. I am deeply convinced that Boulder Dam took a great body of land out of the State's ownership by reducing the stream bed. And I urged that in the other court and did not ever get a chance to get to this Court with it, and I think it is a matter that ought to be considered.

Q You would have treated that as not an ordinary accretive withdrawal?

MR. SHUMWAY: Reliction, ordinary reliction, Mr. Justice White. It would have been a reliction because they reduced the water. And the only problem with that decision is that it would be very effective adversely economically on a tremendous quantity of land. It would be a very harsh thing, and I think the law supports it, but I have a hard time following it all the way in today's modern times and 40 years since Boulder Dam.

The other thing that I think this decision needs is a real determination as to the effect --

Q Is that question in here?

MR. SHUMWAY: Yes, it is, Mr. Justice Brennan.

It came into the case through Justice Struckmeyer of the Arizona Supreme Court. We did not assert it because we felt Claridge had pretty well decided the issue; and when this Court denied cert, we did not assert that. But Mr. Justice Struckmeyer brought it back in, said that is the law, and the boundary ought to be somewhere out here (indicating).

Q In which event what?

MR. SHUMWAY: In that event, the State of Arizona and the States of California and Nevada respectively could own an awful lot more land that is along the borders of the stream.

Q Which over many years a lot of private people thought they owned and developed and had under cultivation.

MR. SHUMWAY: That is very much correct.

Q Is the river here on Exhibit E-1, at that point is it a boundary line between two States?

MR. SHUMWAY: It is a boundary now, Mr. Justice White, that has been established in the center of the re-channelization.

Q By agreement between the States?

MR. SHUMWAY: Yes, by a compact between the

States that has been approved by Congress. That is shown clearly at page 12. And that is the boundary now between the States.

Q So, the States by compact have treated the result of the Hoover Dam as moving the boundaries of the States?

MR. SHUMWAY: Yes, definitely, and I do not dispute that.

Q So the issue, is it still of significance?

MR. SHUMWAY: It is in the fact that there are large bodies of land that are still litigated between the United States. That is what Claridge was. And there is substantially other acreage like it.

There is also an important point before my time runs out. I ought to mention this. In the rechannelization process of the Colorado River in many places, the river has been moved subsequent to the determination of statehood boundary. For example, I might say that we have taken this river and physically moved it over here and rechannelized it (indicating). And there remains a bed that was abandoned. I think there are 13 such instances from this point down to Yuma. Arizona and California have wondered for a long time what to do about these. In other words, there is land in Arizona that belongs to California and land in California that belongs to Arizona, which is the prior beds of the river. And they are now in the process of trying to get

together and work out some trades which are specifically allowed under the boundary compact.

Q That does not affect the boundary.

MR. SHUMWAY: That does not affect the boundary.

Q Just the ownership of land, is that it?

MR. SHUMWAY: That is correct. And the boundary compact specifically says that it does not affect title to land.

Q If there had not been the compact, the boundary would not have changed, though.

MR. SHUMWAY: The boundary would have continued to change. That was the real problem.

Q Not if you deliberately rechannelized the river.

MR. SHUMWAY: That is probably correct. Mr. Coker referred to one case. The earliest case in Arizona which dealt with the accretion doctrine was the Jacobs case, which is cited in all our briefs. And it happened to be a rape case. And the involvement with the accretion and evulsion doctrine had to do with boundary. That was the first time our Court ever spoke upon the doctrine of accretion-evulsion. It was a rather strange forum to get to that subject. But since then they have had two or three other cases which have adopted the doctrine.

Q Is there a specific case showing that the usual consequences of evulsion operate in favor of the State and

against a private citizen in circumstances like this?

MR. SHUMWAY: There are no cases, Mr. Justice White, that I know of.

Q I do not suppose you would be here if there was really a clear case of it.

MR. SHUMWAY: I do not believe there are any cases which say accretion and evulsion apply only to private people. It applies to all those --

Q It certainly applies between States, does it not?

MR. SHUMWAY: Yes. It applies in all essence where you are dealing with a navigable stream, and there is no distinguishing.

Q I suppose my Brother White's question is, Are there any cases applying those doctrines to controversies between a State and a private person?

MR. SHUMWAY: I think I have got some. I would have to think a minute. They are in the brief.

Q With respect to the bed of a stream, and that is this context.

MR. SHUMWAY: Yes, I think the Oklahoma versus Texas case and --

Q Why is it that you think we have to reach that question in this case? I gather these private landowners, who would be affected by it and you suggest adversely very seriously, they have not been parties to any proceeding that

involves this claim of mistake, have they, in this case?

Mr. SHUMWAY: Which private parties?

Q I do not know. You said to us earlier --

MR. SHUMWAY: I am just saying that there are other lands up and down the river. I do not say that they are parties to it.

Q But those are not here.

MR. SHUMWAY: They are not here.

Q Bonelli Cattle Company is here. That is a private landowner.

MR. SHUMWAY: The only effect I see on it is that there are numerous other similar acres of land that are situated in the identical situation.

Q And if the State prevails here, that necessarily is going to have a bearing on these other lands.

MR. SHUMWAY: I would hope so. We spent about 15 years in Arizona trying to make some law which would guide us in these areas, and that is why we are here.

Q Yes, but over a period of years Arizona has acquired title to the river bed by an accretive change in the location of the river. And you acquired title to the major share of Bonelli's land.

MR. SHUMWAY: That is correct.

Q And if the river had kept moving in the same way and Bonelli land relicted, they would have acquired title to

it, would they not?

MR. SHUMWAY: That is correct.

Q But here you say that because the United States came in and uncovered Bonelli's land by a channelization, the State nevertheless retains title.

MR. SHUMWAY: They uncovered the State of Arizona's land.

Q Which it had acquired from Bonelli.

MR. SHUMWAY: The facts are the river had acquired the land and that became the bed of the stream the State owned, and at that moment Bonelli did not own it. He did not own anything. And he did not get it back by the action of the United States; that is, not submergence and re-appearance, as has been suggested. It is not reliction. It is merely an evulsion, a speeded up process of changing the channel of a river.

Q Is that not the real issue in the case, whether it is or is not an evulsion?

MR. SHUMWAY: No, because all the parties have agreed that it is an evulsion. In fact, in the brief of the petitioner it specifically agreed to that.

Q Then, if the usual results follow from an evulsive change, your opponent in a way has given away his case by making that agreement.

MR. SHUMWAY: I would agree that that is correct.

Q Do you agree that there are no cases applying the evulsion doctrine between the State and an individual in these circumstances?

MR. SHUMWAY: There are only two that I can think of. One is called the California case and it is cited in the brief, I would have to dig it out. And a marine railway case, which is the Potomac River case, and it is also cited.

Q Would those cases involve the bed of the stream?

MR. SHUMWAY. This is one is the Potomac, and it was in the area of building out from the boundary of Maryland, and it is not specifically on that.

Q But not the doctrine, not the bed of the stream doctrine?

MR. SHUMWAY: No.

Q Could I ask you one more question. Why is not -- I am sure you would say it is -- what is the argument that the Arizona Supreme Court's decision is not binding on us, because this is wholly a matter of State law? What is the argument that Federal law has anything to do with this?

MR. SHUMWAY: I am not so sure it does. The only reason that we joined --

Q I would think you would argue that at the first as a threshold question.

MR. SHUMWAY: The reason we did not -- and you notice we joined in the petition for certiorari -- and the

reason we joined in it and brought it up here to try to see if we cannot secure a stamp on this ordinary high water mark law, is because we are concerned with where is it. What are we to do in Arizona with relation to other lands which may be Federal? Is Claridge binding on us?

Q Where does the Federal law get a hold on this sort of a situation? Arguably, if the land was riparian at the time of the patent, maybe the Hughes case gives it -- gives the ownership of that land the benefits of whatever the Federal law is about accretion and reliction. But if it was not riparian --

MR. SHUMWAY: If it was not riparian, Mr. Justice White, you are probably correct, and we should not even be here. But we feel that there is enough doubt that it is, and I would admit for the sake of getting the decision that it maybe is or was riparian in that particular time and it still does not make any difference because of the doctrine of river bed ownership.

Q There will be a lot of other land then that was covered where this problem will arise that will not have any connection with Federal law.

MR. SHUMWAY: Exactly, very much.

Q If both sides agreed that this land was not riparian at the time of the patent, would not the Arizona Supreme Court decision as to what State law was be determina-

tive?

MR. SHUMWAY: Completely.

Q Federal law would be applicable only by reason of the Hughes decision, holding that by reason of a Federal patent, Federal law applied to riparian land but only to riparian land.

MR. SHUMWAY: That is correct.

Q And the Court was not even unanimous about that.

MR. SHUMWAY: And basically I think Hughes announced as a Federal law, which is probably the same as the common law of Arizona and the case law under two or three decisions which have remotely considered the question. There were some other questions that have been discussed, basically the one on estoppel. I feel that I should just mention that I do not believe that there is much there to indicate that the State of Arizona has done anything which brings it within the requirements of an estoppel position. I do not believe we have any problems there, and I have suggested so in the brief.

We believe that the decision of the Arizona Supreme Court, if we are considering the land was riparian and bringing the Federal question in to bear, should be affirmed and that the land should belong to the State of Arizona.

Thank you.

MR. CHIEF JUSTICE BURGER: Thank you, Mr. Shumway.

Mr. Coker, you have a few minutes left.

REBUTTAL ARGUMENT BY MR. COKER

MR. COKER: Thank you, sir. I just want to point out one thing in answer to the question of Mr. Justice White. All of this section 3, sir, at the time of the patent was riparian, if we look at the township plat which is in evidence. And later on after Santa Fe conveyed out to different parties, but the Section 3 that was conveyed or patented to Santa Fe by the United States was riparian to the river at that time.

Q In the original patent?

MR. COKER: Yes, sir.

Q From the United States to Santa Fe?

MR. COKER: Yes, sir.

Q How do you know that? Because the patent says so?

MR. COKER: Yes, sir, on this township plat, Mr. Justice White. I just outlined the Bonelli land. But the whole section is described by lots, was riparian. I mean, it was conveyed. The whole section east of the Colorado River and bordering the Colorado River.

Q When was the township plat?

MR. COKER: The township plat was surveyed in 1906.

Q But Section 3 --

MR. COKER: All I do is describe the Bonelli land. My point was that this section 3 --

Q It was a part of section 3. Bonelli did not take all of section 3.

MR. COKER: No, sir, that is what I say.

Q And so the Bonelli land in 1906, by any map, was not on the river.

MR. COKER: No, sir, that is correct. I am talking about a parcel of section 3 at that point.

Q I have this dependent survey in the record, and I believe there are extra copies here, which does show the old bank of the Colorado River, the left bank, as it appeared to be at the time of the channelization. That in effect, I believe Mr. Shumway and I agree, would show the extent of the Claridge decision. And that is where we get into where we think Federal law should apply rather than our Arizona Supreme Court decision, which according to the Arizona Supreme Court would go into Section 2 which is public land over a mile to the east.

Q You understand your Arizona Supreme Court to have been applying State law to the exclusion of Federal law?

MR. COKER: Yes, sir, they disregarded the Claridge case entirely because it had nothing to do with Arizona's action as against individuals and specifically ignored the Claridge decision, although Mr. Shumway here, who participated

in the Claridge decision, tried to urge on the Court that perhaps that is the doctrine we should adopt. They refused to adopt it. That is why I say, What is this grant? Let us leave out the questions of evulsion and accretion. What is the grant? What was the purpose of the grant?

When that purpose no longer remains, does the grant remain? I think that is one of the most important parts here.

In other words, it is not a land-grabbing method or land grant or a land acquisition. Specific purpose to control access for the public to the bed of that river, stream bed.

MR. CHIEF JUSTICE BURGER: Thank you, Mr. Coker.
Thank you, Mr. Shumway.

The case is submitted.

(Whereupon, at 11:01 o'clock, a.m., the case was submitted.)

- - -