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IN THE SUPERIOR COURT OF THE STATE OF ARIZONA
IN AND FOR THE COUNTY OF MARICOPA

IN RE THE GENERAL ADJUDICATION
OF ALL RIGHTS TO USE WATER IN THE
GILA RIVER SYSTEM AND SOURCE

CONTESTED CASE NO. W1-11-3311

NOTICE OF DESIGNATION OF AN ISSUE
OF BROAD LEGAL IMPORTANCE

CONTESTED CASE NAME: *In re Luebbermann*

HSR INVOLVED: San Pedro River Watershed Hydrographic Survey Report.

DESCRIPTIVE SUMMARY: Notice is given that an issue raised by the San Carlos Apache Tribe and Tonto Apache Tribe has been designated as one of broad legal importance in this general adjudication. The issue to be resolved is the appropriate placement of the burden of proof with respect to the transfer of water rights by successive landowners for purposes of establishing a priority date.

NUMBER OF PAGES: 8

DATE OF FILING: December 31, 2018

On November 7, 2018, the Claimants submitted seven draft abstracts for water rights for domestic, stock watering and irrigation uses on land located in the southwest quarter of section 26 T6S R17E that is the subject of Watershed File Report no. 115-04-ADA-002 (WFR). On

1 November 26, 2018, the San Carlos Apache Tribe and Tonto Apache Tribe (the “Tribes”)
2 objected to the draft abstracts primarily with respect to the claimed July 31, 1900 priority date for
3 the proposed water rights. The Tribes assert that the Claimants must produce title documents
4 showing all transfers of the property from the date of the claimed priority date to 2002, the date
5 for which a deed from the Claimants’ predecessors-in-interest appears in ADWR’s public
6 records, to determine whether water rights have been transferred along with the land.

7 **A. Background**

8 In 1978, James Hardin and Ernest Pohle filed Statement of Claim No. 36-62384 for
9 irrigation, stock watering and domestic purposes on the southwest quarter of the southwest
10 quarter of section 26 T6S R17E. The claim stated that beneficial use of water began on the land
11 on or before 1908. In 1979, James Hardin and Mrytle Pohle filed Statement of Claimant 39-603
12 (SOC) for water rights for irrigation, domestic and stock watering on 22 acres of land in the
13 southwest quarter of the southwest quarter of section 26 T6S R17E stating that the water had first
14 been put to beneficial use prior to December 1908. The SOC referenced the Statement of Claim
15 and included portions of warranty deeds and a signed statement regarding continuous use of
16 water for domestic, animal and agricultural purposes in a portion of the south half of the
17 southwest quarter of Section 26 T6S R17E.

18 In 1991, ADWR issued the Hydrographic Survey Report for the San Pedro River
19 Watershed that included the WFR. The WFR includes four potential water rights. In each case,
20 the SOC is listed as one of the applicable adjudication filings. Among the applicable pre-
21 adjudication filings, ADWR listed Statement of Claim 36-62364 and a record from the Pinal
22 County Recorder dated March 28, 1899, in which James Brandenburg gave notice of diverting
23 water from Aravaipa Creek for irrigation use. A copy of the Notice is attached as Attachment A.
24 The WFR reported an apparent first use date of 1899 for two irrigation uses and an apparent first
25 use date of 1980 for a third irrigation use. As part of the hydrographic survey report process,
26 ADWR also prepared a map showing the places of the water uses, wells and an instream pump.
27 On December 26, 2017, Claimants filed an amended SOC claiming a July 1900 priority date. In
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1 support of this date, Claimants attached to the amended SOC copies of a Homestead Proof -
2 Testimony of Claimant and the Final Affidavit Required of Homestead Claimant filed by James
3 A. Brandenburg on or about October 26, 1908.

4 **B. Proof of Ownership of Water Rights**

5 Although the Tribes do not appear to contest the date of the initial beneficial use asserted
6 by Claimants, they do assert that “[p]roving ownership of the water right will require a review of
7 a succession of deeds demonstrating the passing of title to the land and the appurtenant water
8 rights. Therefore, the chain of title along with proof of the beneficial use of the water
9 appurtenant to the land are fundamental requirements in the adjudication.” *San Carlos Apache*
10 *Tribe and Tonto Apache Tribes’ Objections to the Terms of the Proposed Revisions to Draft*
11 *Abstracts and Briefing on the Issue of Chain of Title as it Applies to this Case*, filed November
12 26, 2018, at 6 (“Objection”).

13 In support of their position, the Tribes cite to *Slosser v. Salt River Valley Canal*
14 *Company*, 7 Ariz. 376, 65 P. 332 (1901) and *In re Determination of Relative Rights, to Use of*
15 *Waters of Pantano Creek in Pima Cty.*, 45 Ariz. 156, 168, 41 P.2d 228, 233 (1935) for, *inter alia*,
16 the proposition that a claimant must prove beneficial use of the water on the land. No dispute
17 appears to exist as to the facts that the Claimants are currently beneficially using water on their
18 land and that Mr. Brandenburg irrigated the land at the turn of the 20th century. Instead, the
19 Tribes argue that the Claimants bear the burden of proving that the water rights perfected by Mr.
20 Brandenburg were conveyed along with, or in the negative, not severed from, the land in the
21 intervening years between Mr. Brandenburg’s ownership of the land and the date the Claimants
22 acquired the land. On this point, the *Pantano Creek* court stated an “appropriation [for irrigation]
23 once made attaches permanently to such land and none other, and cannot be transferred
24 therefrom, except when through natural causes and no fault of the owner it becomes
25 impracticable to use the water economically or beneficially on the land to which it is
26 appurtenant.” 45 Ariz. at 171, 41 P.2d at 234. *See also Salt River Valley Water Users’ Ass’n v.*
27 *Kovacovich*, 3 Ariz. App. 28, 30, 401 P.2d 201, 203 (1966).

1 The Tribes also rely on *Neal v. Hunt*, 112 Ariz. 307, 541 P.2d 559 (1975) to support the
2 statement that rights to water must be transferred with the same formality as required for the
3 transfer of real property. Extrapolating from this holding, they contend that a claimant must
4 produce all deed transferring the land from the date the water was first put to beneficial use on
5 the land to the date the claimant purchases the land. Substantively, the *Neal* court only found
6 that an unrecorded bill of sale that reserved rights to groundwater cannot be enforced against a
7 subsequent bona fide purchaser who lacks notice. *Davis v. Agua Sierra Res., L.L.C.*, 220 Ariz.
8 108, 113, ¶29, 203 P.3d 506, 511 (2009). As the Arizona Supreme Court noted, the court in *Neal*
9 *v. Hunt* did not address the validity of the reservation. *Id.*

10 In the treatise, 1 *Waters and Water Rights §14.04(d)(3)* (*Amy K. Kelley, ed., 3rd ed. Lexis*
11 *Nexis/Mathew Vender, 2018*) the authors take the position that a transfer of irrigated land would
12 most likely transfer the water rights in the transaction in the absence of any express language
13 because the water right is appurtenant to the land. Based on this analysis, a water right transfers
14 with no formal conveyance when the land to which it is appurtenant is conveyed where the
15 appurtenancy rule is the appropriate rule of construction. In Arizona, A.R.S. §45-172 is
16 considered a general appurtenancy statute. *Id.* The statute provides rules and a procedure for the
17 severance and transfer of water rights and requires an application for severance and transfer to be
18 filed with the director of the Arizona Department of Water Resources.

19 Unlike the situations in the decisions cited above, the claimed water rights in the general
20 adjudication cases have been analyzed by the agency that is statutorily required to be involved in
21 the severance and transfer of existing water rights. Arizona Department of Water Resources, as
22 part of its duties in the general adjudication, “conducts an extensive historical review of all water
23 right claims and uses, performs field investigations, and reviews appropriate treatises, filings, and
24 all other documentation of the water right, claim or use.” *San Carlos Apache Tribe v. Superior*
25 *Court ex. rel County of Maricopa*, 193 Ariz. 195, 198, 972 P.2d 179, 214 (1999). At the
26 conclusion of its review, ADWR produces a hydrographic survey report (HSR) that identifies the
27 characteristics of potential water right including “Apparent Date of First Use.” The Apparent
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1 Date of First Use is “DWR’s assessment of the date of first continuous beneficial water use based
2 on its investigations.” 2 San Pedro Hydrographic Survey Report 16 (Nov. 20, 1991).

3 Following the issuance of the San Pedro HSR, claimants have the right to file objections
4 to the report. During the hearing on ADWR’s report, “[e]ach claimant who has filed timely
5 written objections that comply with this subsection shall have a fair and reasonable opportunity
6 to present evidence in support of or in opposition to those recommendations of the director.”
7 A.R.S. §45-256(B). Although a trial date has not been set in this case due to the parties’ efforts
8 to settle objections to the WFR, the Objection raises an issue in this case that is one of broad
9 legal importance that should be resolved. The issue raised by the Objection is whether the
10 claimant seeking a water right has the burden of producing the set of deeds that conveyed title to
11 the land from the original user of the water to the claimant currently asserting a water right.
12 Alternatively the issues are: Does the presumption exist that water rights have been conveyed
13 with the land so that a claimant objecting to an Apparent Date of First Use identified in a
14 watershed file report must carry the burden of proving that water rights were severed from the
15 land. If the answer is in the affirmative, are there periods of time for which this presumption
16 does not exist. Thus, the broad issue is the appropriate presumptions and the placement of the
17 burden of proof to establish whether water rights were transferred by successive landowners.
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21 Pursuant to Rules for Proceedings Before the Special Master §12.03, the Master may
22 designate an issue raised by a motion as an issue of broad legal significance. An issue of broad
23 legal importance is defined as one that has procedural or substantive significance that is similar
24 to issues in other contested cases and may establish a precedent for other contested cases in that
25 river system. *Id.* at §12.01. The Tribes’ Objection raises a legal issue that may affect numerous
26 claimants in this general adjudication because the priority dates for many water rights are based
27 on beneficial uses initiated by the claimants’ predecessors-in-interest. The Objection puts at
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1 issue the appropriate placement of the burden of proof with respect to historical transfers of water
2 rights necessary to establish a priority date for a water use. To avoid the time and cost and
3 potentially conflicting decisions that may arise if the issue were to be separately resolved in
4 hundreds of individual cases over the coming years,

5 IT IS ORDERED designating the issue set forth above as one of broad legal importance.
6 Any claimant in this general adjudication may file a response to the issue raised by the Tribe's
7 Objection.
8

9 IT IS FURTHER ORDERED that responses shall be filed by **February 11, 2019**, and
10 replies in support of the Tribe's motion on the designated issue shall be filed by **March 4, 2019**.
11 Oral argument on the motion shall be heard on **March 21, 2019** at 1:30 p.m. in the Superior
12 Court of Arizona, 201 West Jefferson Street, Courtroom 301, Phoenix, AZ 85003-2202.

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14 Instructions for telephonic appearance:
15 Dial: 602-506-9695 (local)
16 1-855-506-9695 (toll free long distance)
Dial Participant Pass Code 357264#

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21 SUSAN WARD HARRIS
Special Master

22
23 On December 31, 2018 the original of the foregoing was
24 delivered to the Clerk of the Maricopa County Superior
25 Court for filing and distributing a copy to all persons listed
26 on the Court-approved mailing list for this contested case
27 and to the Court-approved mailing list for W-1, W-2, W-3
and W-4 as required by Rules for Proceedings Before the
Special Master §12.03.

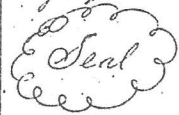
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ATTACHMENT A

improvements, and said work so done upon said premises is described as follows, to wit:

Sinking a shaft about 8 feet and drift in cross cut.

Subscribed and sworn to before me this 25th day of March A. S. 1899.



Frank Schultz
August Hegel
Notary Public

My Com. exp. Oct 15th 1901

Filed and Recorded at the request of E. W. Childs on the 31st day of March A. S. 1899 at 9 o'clock A. M.

J. A. Chamberlain Recorder
by W. W. Lowergan Deputy

Notice

For it known by these presents that I hereby lay claim to 500 inches of water from Travisita creek, in Travisita Canon in County of Pinal, for purpose of irrigation. said water to be taken from creek at point between my ranch and Vails ranch sit - about 18 miles north of Mammoth.

Monument marking said point.

This the 28 day of March, 1899

Wit,
H. L. Newcomb J. W. Brandenburg
Mammoth Arizona

Filed and recorded at the request of J. W. Brandenburg on the 1st day of April - A. S. 1899 at 10 o'clock P. M.

J. A. Chamberlain Recorder
by W. W. Lowergan Deputy

In the Probate Court
of the

County of Pinal, Territory of Arizona
In the matter of the Estate of } Order confirming sale
Edward Pinn, Deceased } of Real Estate.
Charles F. Bennett, Administrator of
the estate of Edward Pinn - - - deceased, having