

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

W-1, W-2, W-3, W-4 (Consolidated)

Contested Case No. W1-11-1675

(contested case W1-11-2093 consolidated with
W1-11-1675)

**ORDER ADOPTING FINAL REPORT AS
MODIFIED**

CASE NAME: *In re St. David Irrigation District*

HSR INVOLVED: San Pedro River Watershed Hydrographic Survey Report

DESCRIPTIVE SUMMARY: Special Water Master Harris's final report dated November 18, 2021, and issued under Ariz. R. Civ. P 53 is adopted as modified herein. Specifically, the Court replaces the Special Water Master's legal conclusions with the ruling below.

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The issue before the Court is whether a limited class of potential appropriative rights to water initiated before June 12, 1919 ("pre-1919 rights") are subject to statutory forfeiture due to non-use for five successive years as mandated under Arizona law beginning June 12, 1919.

Based upon the analysis below, the answer is "no."

FACTUAL AND PROCEDURAL BACKGROUND

A detailed explanation of the factual and procedural background to this action can be found

1 in the Special Master's November 18, 2023, Report. The following is merely a summary.

- 2 1) On January 23, 1995, Special Master Thorson initiated contested case no. W1-11-1675
3 to adjudicate objections and claims for water rights filed by the St. David Irrigation
4 District ("SDID") on behalf of its shareholders.¹
- 5 2) The SDID filed Statement of Claimant 39-06593 claiming 5,500 acre-feet of water for
6 irrigation use with a claimed date of initiation of July 1881 and a date of first use for
7 beneficial purposes of July 1883. It also filed Statement of Claimant 39-06594 for 8,550
8 acre-feet of water for irrigation use with an 1881 date of initiation of right and date of
9 first beneficial use.
- 10 3) The Arizona Department of Water Resources ("ADWR") investigated SDID's claims and
11 provided an extended narrative about the SDID in Vol. 1 *Hydrographic Survey Report*
12 *for the San Pedro Watershed*, 333-351 (filed Nov. 20, 1991) ("San Pedro HSR").
- 13 4) Among the consolidated cases are a group of cases that include potential water rights for
14 irrigation use that ADWR investigated and "determined that no irrigation has taken place
15 on this property (or parcel) in the last five years."² Vol. 4 San Pedro HSR at 36.
- 16 5) Multiple parties objected to any potential water rights where ADWR had determined that
17 the water use had been idle for more than five years (the "Forfeiture Objection").
- 18 6) On January 31, 2020, the Salt River Project, joined by the SDID and others, filed a motion
19 for partial summary judgment challenging the Forfeiture Objection ("2020 Motion") for
20 potential water rights claiming a priority date prior to June 12, 1919.
- 21 7) Based on the Arizona Supreme Court's decision in *San Carlos Apache Tribe v. Superior*
22 *Court*, 193 Ariz. 195, 972 P.2d 179 (1999) ("*San Carlos*"), the 2020 Motion was denied
23 by the Special Master and a decision entered that pre-1919 water rights are subject to
24 statutory forfeiture. Minute Entry filed September 10, 2020.

25
26 ¹ A Statement of Claimant may be filed by any public or private legal entity on behalf of its members or users.
A.R.S. §§ 45-251(1), 45-254(A).

27 ² The five-year time period has legal significance under Arizona law because under current Arizona law, "when
28 the owner of a right to the use of water ceases or fails to use the water appropriated for five successive years, the
right to the use shall cease, and the water shall revert to the public and shall again be subject to appropriation."
A.R.S. 45-141(C).

8) On August 16, 2021, St. David Irrigation District, joined by ASARCO LLC and Freeport Minerals Corporation, filed a motion for partial summary judgment ("2021 Motion") focused on a single contested case, W1-11-2093. This case was also included in the 2020 Motion, but the question presented by the 2021 Motion is specific to the facts of W1-11-2093 to "facilitate review of appeal," of the Special Master's September 10, 2020, decision. 2021 Motion at 2.

9) The 2021 Motion requested the Special Master submit a Rule 53 Report to the General Stream Adjudication Judge with a 30-day objection period. 2021 Motion at 4.

10) On November 18, 2021, the Special Master filed her report.

11) All objections to the Report were timely received.

CERTIFICATION

The filings in this matter predate the undersigned Judge's tenure on this case, although the undersigned Judge ultimately presided over the oral argument. The undersigned Judge has reviewed the record in this case and has familiarized himself with the facts, issues, and evidence contained therein.

LEGAL ISSUES

The question of law presented by the 2020 Motion and the 2021 Motion is whether a water right with an asserted priority date prior to June 12, 1919, is subject to statutory forfeiture when the owner of the right to use water ceases or fails to use the water for a five-year period beginning after June 12, 1919.³ The 2020 Motion sought to resolve that pure issue of law. The 2021 Motion sought to resolve a specific claim to irrigate 17.5 acres of land where the landowner claims a pre-1919 water right and does not dispute that the 17.5 acres of her land were not irrigated for a period of at least five years beginning after 1919. Report at 5.

Specifically, the 2020 and 2021 Motions presented the following issues to the Special

³ No party argues that the owner of water right with a pre-June 12, 1919, priority date forfeited that right if the landowner failed to use the water for a five-year period ending before June 12, 1919. Report at 9.

1 Master:

- 2 1. Did the Supreme Court of Arizona in *San Carlos* hold that statutory forfeiture,
3 embodied in A.R.S. § 45–141(C), applies to water rights that were initiated prior to
4 June 12, 1919?
- 5 2. If the Supreme Court of Arizona did not so hold, do either Article XVII of the Arizona
6 Constitution or the savings clauses in the Arizona Water Code prohibit application of
7 statutory forfeiture to pre-1919 water rights?
- 8 3. Have rights to use water on the 17.5 acres of land owned by Terisha Driggs, to the
9 extent that they historically existed, been forfeited under section 45–141(C)?

10 The Court has, in its discretion, slightly modified these issues in the analysis below to fit
11 the realities of the case.

12 13 **STANDARD OF REVIEW**

14 Where there is a dispute regarding the Special Master’s conclusion of law, the trial judge
15 must review them *de novo*. Ariz. R. Civ. Pro. 53(f)(4). The court must decide all objections to
16 findings of fact made or recommended by a master under the clearly erroneous standard. Ariz.
17 R. Civ. Pro. 53(f)(3).

18 19 **FINDINGS OF FACT**

20 The Special Master’s denial of the 2020 Motion rejected a defense to the Forfeiture
21 Objection as a matter of law and did not require a factual determination that any particular
22 claimant had forfeited a water right and it did not deny water rights to any claimant or landowner.
23 No pertinent findings of fact were made explicitly or implicitly regarding any of the contested
24 cases in the 2020 Order.

25 As noted in the Special Master’s Report, and in all associated filings for the 2021 Motion,
26 the 2021 Motion did not present any dispute of material fact regarding the historical absence of
27 irrigation on the relevant 17.5-acre pasture. All parties agreed that:

- 28 1) Terisha Driggs purchased the Property in January 2016 and is the successor-in-interest to

George Whitehead et al., as to the rights claimed under the WFR.

- 2) Since January 2016, Ms. Driggs has irrigated an orchard of approximately 2.5 acres on the east side of the Property and a field of approximately 17.5 acres on the west side of the Property.
- 3) No evidence exists in the record that the 17.5-acre field on the west side of the Property was irrigated for the 30 years from 1986 to the beginning of 2016.

THE COURT THEREFORE FINDS that no irrigation occurred on the relevant 17.5-acre field between 1986 and early 2016.

CONCLUSIONS OF LAW

The operative portion of the 1919 Arizona Water Code, Chapter 164, Section 1, declares:

The water of all sources of supply, flowing in natural streams, canyons, ravines or other natural channels, or in definite underground channels, whether perennial, intermittent or flood waters, waste or surplus water, and of lakes, ponds and springs, on the surface, belongs to the public and is subject to beneficial use as herein provided. Beneficial use shall be the basis and the measure and the limit to the use of water in the State, ***and whenever hereafter the owner of a perfected and developed right shall cease or fail to use the water appropriated for a period of five (5) successive years the right to use shall thereupon cease and revert to the public and become again subject to appropriation in the manner herein provided.*** But nothing herein contained shall be so construed as to take away or impair the vested rights which any person, firm, corporation or association may have to any water at the time of passage of this act.

(Emphasis added).

As stated above, the Court must determine whether this forfeiture provision from the 1919 law – statutory forfeiture of water rights after five years of non-use – applies to water rights that had been acquired prior to the law’s enactment. The Court’s analysis requires three specific inquiries:

1. Whether the Arizona Supreme Court in *San Carlos Apache Tribe v. Superior Court*, 193 Ariz. 195 (1999) has already resolved this issue. If the answer is “yes,” the Court need look no further. If the answer is “no,” then,
2. Whether the forfeiture provision of the 1919 Water Code, by its terms, applied to preexisting water rights. If the answer is “yes,” that determination ends the analysis. If

1 the answer is “no,” then,

- 2 3. Whether common law prior to the enactment of the 1919 Water Code required forfeiture
3 based solely upon non-use.

4 If the answer to all three questions is “no,” then water rights acquired prior to enactment
5 of the 1919 Water Code are not subject to statutory forfeiture based upon five years of non-use,
6 regardless of whether that non-use occurred after the enactment of the 1919 Water Code.

7
8 **I. Application of *San Carlos Apache Tribe v. Superior Court*, 193 Ariz. 195 (1999)**

9 The Arizona Supreme Court issued the *San Carlos* ruling in 1999, which affirmed in part
10 the rulings of a previous General Stream Adjudication Judge: the Honorable Susan R. Bolton.
11 The case arose from the Legislature’s attempt to enact certain statutes that the Legislature
12 intended to have retroactive effect on water rights in the state. Specifically, in 1995 the
13 Legislature amended the water statutes and added, *inter alia*, a provision stating that statutory
14 forfeiture by non-use shall not apply to a water right initiated before June 12, 1919. The
15 Legislature also added additional language that made “abandonment” (as opposed to forfeiture)
16 the sole basis for relinquishment of a water right initiated before June 12, 1919.

17 Our Supreme Court struck down these sections, among others, as unconstitutional. The
18 court reasoned that the amendments improperly applied retroactively to actions taken prior to the
19 1995 amendments. The Court further reasoned that the amendments were impermissibly
20 intended to alter existing water rights retroactively, because other junior appropriators may have
21 already moved up in priority due to the forfeiture of water rights by more senior appropriators.
22 Those already forfeited, more senior rights could not be revived by subsequent legislation to the
23 detriment of the junior appropriators who had moved up in priority. Such action would be a
24 violation of due process under the Arizona Constitution. Specifically, the court stated in relevant
25 part:

26 The consequences of failure to make use of appropriated water on all of the
27 appropriator’s land **must be determined on the basis of the law existing at the**
28 **time of the event, not on the basis of subsequently enacted legislation that**
may change the order of priority. *** Section 45-141(C) eliminates any
possibility of forfeiture for rights initiated before June 12, 1919. If applied
retrospectively, this too creates a new and unconstitutional protection for pre-

1 1919 water rights that may have been forfeited and vested in others under the law
2 existing prior to 1995. **Forfeiture and resultant changes in priority must be**
3 **determined under the law as it existed at the time of the event alleged to have**
4 **caused the forfeiture.**

5 *San Carlos Apache Tribe v. Superior Court*, 193 Ariz. 195, 206, ¶ 17 (1999) (emphasis added).

6 **THE COURT FINDS** that the Arizona Supreme Court did **not** hold in *San Carlos* that
7 the forfeiture provisions of the 1919 Water Code applied to pre-existing water rights. Indeed,
8 the *San Carlos* decision provided no specific analysis of the applicability of statutory forfeiture
9 to pre-1919 water rights. It merely concluded that the 1995 amendments that were before the
10 court improperly applied a retroactive, substantive, new layer of protection not previously
11 afforded by Arizona statutes.

12 The court's reference in the decision to "water rights that may have been forfeited and
13 vested in others under the law existing prior to 1995" simply means: *to the extent a party is*
14 *arguing that forfeiture may or may not have occurred*, the issue must be determined according
15 to the law existing at the time of the events allegedly resulting in forfeiture. The court in *San*
16 *Carlos* was focused entirely on whether the 1995 amendments were constitutional. The court
17 did not decide – or even analyze – whether statutory forfeiture applied to pre-1919 vested rights.
18 Because the Legislature intended the 1995 amendments to be applied retroactively, and because
19 retroactive application would be applied to the detriment of junior appropriators, the amendments
20 violated the due process protections of Article 2, Section 4 of the Arizona Constitution.

21 Certain parties in the present case cited a case from the Ninth Circuit Court of Appeals,
22 arguing that the case analyzed this issue and held that the *San Carlos* decision found pre-1919
23 water rights to be subject to the forfeiture provisions of the 1919 Water Code. *See United States*
24 *v. Gila Valley Irrigation District*, 859 F.3d 789 (9th Cir. 2017). As an initial matter, federal court
25 decisions, with limited exceptions, are not binding on Arizona's state courts. More importantly,
26 however, the cited Ninth Circuit opinion did not provide any substantive analysis of the issue; it
27 merely assumed - erroneously - that the Arizona Supreme Court found in *San Carlos* that
28 forfeiture applies to pre-1919 vested water rights. *Id.* at 807. The Court has already addressed
that issue above.

Although not determinative, it is notable that the federal district court judge that the Ninth

1 Circuit reversed in *Gila Valley* was none other than the Honorable Susan R. Bolton; the former
2 Arizona General Stream Adjudication Judge whose ruling the Arizona Supreme Court affirmed
3 in the *San Carlos* decision. Further notable is the fact that Judge Bolton – now serving on the
4 federal district court – analyzed in her new role whether the Arizona Supreme Court in *San*
5 *Carlos* actually determined the applicability of the 1919 Water Code to pre-enactment rights.
6 Judge Bolton found: “[T]he Arizona Supreme Court did not consider in *San Carlos Apache*
7 *Tribe*, or in any other case, ... whether the terms of the 1919 Water Code actually permitted the
8 five-year provision to be applied to pre-1919 water rights[.]” *Order dated August 3, 2010 at*
9 *p.38, United States v. Gila Valley Irr. Dist., D. Ariz., Case No. CV30-0061-TUC-SRB* (Bolton,
10 J.) (“Bolton Order”). But the Ninth Circuit reversed Judge Bolton on this issue in the *Gila Valley*
11 case, despite her intricate, first-hand knowledge of the *San Carlos* case, based upon the Ninth
12 Circuit’s misinterpretation of the *San Carlos* decision and its belief that the Arizona Supreme
13 Court had already determined that forfeiture applies.

14 The *San Carlos* decision did not specifically determine whether the forfeiture provisions
15 of the 1919 Water Code apply to pre-1919 vested water rights. The Court must therefore analyze
16 whether the 1919 Water Code by its terms was intended to apply to pre-existing rights.

18 **II. Application of the 1919 Water Code to Pre-Existing Water Rights**

19 Sections 1 and 56 of the 1919 Water Code included an explicit statutory forfeiture provision
20 and two savings clauses:

21 [W]henever hereafter the owner of a perfected and developed right shall cease or fail
22 to use the appropriated water for a period of five (5) successive years the right shall
23 thereupon cease and revert to the public and become again subject to appropriation
24 in the manner herein provided. ***But nothing herein contained shall be so construed***
as to take away or impair the vested rights which any person, firm, corporation, or
association may have to any water right at the time of the passage of this Act.

25 ***Nothing in this act contained, shall impair the vested rights of any person,***
26 ***association or corporation to the use of water.***

27 1919 Ariz. Sess. Laws, ch. 164, §§ 1, 56 (Reg. Sess.) (1919) (emphasis added).

28 The forfeiture provision in section 1 of the 1919 Water Code has continuously appeared
in Arizona statutes since 1919 and is currently codified at A.R.S. § 45-141(C). The savings clause

1 in section 1 of the 1919 Water Code was repealed in 1928, but the savings clause in section 56
2 remains codified at A.R.S. § 45-171.

3 The Court’s primary goal when interpreting the 1919 Water Code, or any statute, is to
4 give effect to the legislature's intent. *J.D. v. Hegyi*, 236 Ariz. 39, 40, ¶ 6 (2014); *see also Hampton*
5 *v. Glendale Union High School District*, 172 Ariz. 431, 434 (App. 1992) (cardinal rule of
6 statutory construction is that courts must primarily attempt to ascertain and give effect to
7 the intent of the legislature). The Court’s task in statutory construction is to effectuate the text
8 if it is clear and unambiguous. *BSI Holdings, LLC v. Arizona Department of Transportation*,
9 244 Ariz. 17, 19 ¶ 9 (2018).

10 **THE COURT FINDS** that the forfeiture provisions of the 1919 Water Code were *not*
11 intended to apply to pre-enactment vested water rights. The Code does not expressly state that
12 its forfeiture provisions apply to pre-enactment rights. To the contrary, the Code contains two
13 unambiguous savings clauses. Section 1 declares that “nothing herein contained shall be so
14 construed as to take away or impair the vested rights which any person, firm, corporation or
15 association may have to any water at the time of passage of this act.” And Section 56 contains
16 similar yet more expansive language, which again precludes any interpretation that impairs or
17 negatively affects vested rights or rights in the process of vesting.

18 Applying a subsequently enacted forfeiture provision to a pre-existing right – a right that
19 was not previously subject to forfeiture – would, at a minimum, certainly “impair” the vested
20 right in violation of these provisions. Such a provision is a new Damocles Sword hanging over
21 the preexisting water right.

22 Moreover, the concept of forfeiture is strongly disfavored in Arizona, a fact that weighs
23 heavily against any interpretation that applies newly enacted forfeiture provisions to pre-
24 enactment rights in the absence of express language. It is well established in Arizona that
25 “forfeitures are not favored by the law, and every reasonable presumption is against a forfeiture.”
26 *De Almada v. Sovereign Camp, W.O.W.*, 49 Ariz. 433, 436 (1937); *see also Mason v. Hasso*, 90
27 Ariz. 126, 130 (1961) (“It is axiomatic that the law abhors a forfeiture.”); *Public Service*
28 *Company of Oklahoma v. Bleak*, 134 Ariz. 311, 318 (1982) (“We recognize that the law abhors

1 a forfeiture[.]”). Thus, in the absence of clear statutory language expressly applying a new
2 forfeiture statute to existing property rights, the Court will not assume that the new forfeiture
3 provisions apply to pre-enactment rights.

4 The Court is further persuaded by the recognition that in Arizona, “[w]ater rights are
5 property rights.” *Matter of Rights to Use of Gila River*, 171 Ariz. 230, 235 (1992). Property
6 rights, once vested, are jealously guarded in this state because “[t]he framers of our Constitution
7 understood that one of the basic responsibilities of government is to protect private property
8 interests.” *Bailey v. Meyers*, 206 Ariz. 224, 227, ¶ 11 (App. 2003). Indeed, Article 17, section
9 2 of the Arizona Constitution declared upon adoption in 1912 that “[a]ll existing rights to the use
10 of any of the waters in the state for all useful or beneficial purposes are hereby recognized and
11 affirmed.” Given Arizona’s strong support for the protection of property rights, the Court will
12 not assume that a new forfeiture provision applies to pre-existing water rights in the absence of
13 express language in the new statute.

14 Because the forfeiture provisions of the 1919 Water Code were not intended to apply to
15 pre-enactment water rights, such rights can only be lost in accordance with the law that was in
16 place in Arizona before enactment in 1919.

17 18 **III. Forfeiture Based Upon Non-Use At Common Law**

19 Having found that this issue was not resolved by the Arizona Supreme Court in *San*
20 *Carlos*, and having further found that the forfeiture provisions in the 1919 Water Code were not
21 intended to apply to pre-enactment water rights, the Court must determine whether forfeiture
22 applied at common law, prior to enactment of the 1919 Water Code, to strip an appropriator of
23 vested water rights based merely upon non-use.⁴

24 As an initial matter, forfeiture is materially different from the related concept of
25 “abandonment,” which requires a showing of an intentional and voluntary relinquishment of a
26

27
28 ⁴ Judge Bolton reached a similar conclusion in her aforementioned district court order, stating: “Arizona’s
forfeiture provision does not apply to pre-1919 water rights by the terms of the 1919 Water Code; pre-1919 water
rights can only be lost in accordance with the law that was in place in Arizona before 1919.” *Bolton Order* at 40.

1 known right. *Mason*, 90 Ariz. at 129. Unlike abandonment, forfeiture is involuntary and occurs
2 without regard to intention. *Id.* Forfeiture is therefore more draconian in application.

3 Of the various Arizona decisions cited by the parties that predate the enactment of the
4 1919 Water Code, the Court finds that the *Gould* case is the most relevant and compelling. *See*
5 *Gould v. Maricopa Canal Co.*, 8 Ariz. 429 (1904). The Supreme Court for the Territory of
6 Arizona issued the Gould decision in 1904, well before the enactment of the 1919 Water Code.
7 *Gould* involved an individual landowner that irrigated his land from a diversion of the Maricopa
8 Canal. Later, he stopped diverting and instead purchased water from a company that delivered
9 water from the Canal. The issue before the court, *inter alia*, was whether Mr. Gould lost his
10 vested right to water from the Maricopa Canal when he stopped diverting water from the Canal
11 for his irrigation purposes and instead used a company to divert and deliver water. *Id.* at 447-
12 48.

13 The Supreme Court held that Gould had not lost his vested water rights under those facts.
14 In so holding, the Supreme Court was clear that under the law existing at the time, Gould could
15 only lose his vested water rights through abandonment or adverse possession by another party,
16 unambiguously declaring: “[water rights] may be lost by abandonment, or it may be lost to
17 another by adverse user on the part of the other continued for the period of the statute of
18 limitations, **and in no other way.**” *Id.* at 448 (emphasis added). The Supreme Court then
19 clarified that “[a]bandonment is a matter of intent,” *Id.*, and Gould had not demonstrated
20 sufficient intent to abandon his water rights when he stopped diverting the water himself.

21 The *Gould* case, and its proclamation that there is “no other way” an appropriator may
22 lose his water rights except through adverse possession or abandonment (with proper showing
23 of intent), leaves no room for a finding that the common law stripped an appropriator of vested
24 water rights through forfeiture based solely on non-use.

25 The other pre-1919 Arizona cases cited by the parties are not helpful to the analysis
26 because they either focus upon the **acquisition** of a water right or they involve the doctrine of
27 **adverse possession**, both of which are analyzed according to different standards. They do not
28 involve the application of strict forfeiture at common law based upon non-use.

THE COURT THEREFORE FINDS that vested water rights that predated the 1919 Water Code could be lost through either abandonment or through adverse possession, but ***not*** through forfeiture.

THE COURT FURTHER FINDS that water rights acquired prior to enactment of the 1919 Water Code are not subject to statutory forfeiture, regardless of whether that non-use occurred after the enactment of the 1919 Water Code. Such pre-enactment rights may only be lost through abandonment or adverse possession unless and until the Legislature expressly expands the forfeiture provisions to apply to pre-1919 vested rights.

THE COURT FURTHER FINDS that the right to water for the purpose of irrigating 17.5 acres of land on the west side of Terisha Driggs's Property has not been forfeited due to non-use.

On good cause, and in the Court's discretion,

IT IS THEREFORE ORDERED modifying and replacing in part the November 18, 2021 *Report of the Special Master* consistent with the Findings, Conclusions, and related analysis herein.

THE COURT FURTHER FINDS that the claim for a right to water for the purpose of irrigating 17.5 acres of land on the west side of the property is granted.

/s/ HONORABLE SCOTT A. BLANEY

The Honorable Scott A. Blaney
Arizona Superior Court in Maricopa County

On March 3, 2026, the original of the foregoing was delivered to the Clerk of the Maricopa County Superior Court for filing and distributing a copy to all persons listed on the Court-approved mailing list for this contested case.