

22

RECEIVED

FILED

MAR 21 '95

MAR 22 '95 7

DIST CENTER

Clerk of the Court

By: *[Signature]*
MAR 21 1995
Deputy Clerk

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

IN CHAMBERS (X) IN OPEN COURT ()

SPECIAL MASTER JOHN E. THORSON
Presiding

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

DATE: March 21, 1995
CIVIL NO. W1-11-1676
(Consolidated)

CONTESTED CASE NAME: *In re Pomerene Water Users Association.*
HSR INVOLVED: San Pedro River Watershed Hydrographic Survey Report.
DESCRIPTIVE SUMMARY: The Special Master issues his memorandum decision on a motion for partial summary judgment filed by the San Carlos Apache Tribe; Tonto Apache Tribe; and Yavapai Apache Indian Tribe, Camp Verde Reservation (Feb. 13, 1995). The motion was taken under advisement at the March 13, 1995, status conference. The motion is granted in part and denied in part. The Master also identifies the watershed file reports that, according to his records, are involved in this case.
PROCEEDING NO.: SP 25.
NUMBER OF PAGES - 8; Attachment A - 2: Total - 10 pages.
DATE OF FILING: Original delivered to the Clerk of the Court on March 21, 1995.

///
///
///

RECEIVED

FILED

MAR 21 '95

MAR 22 '95 7

DIST. CLERK

Clerk of the Court

MINUTE ENTRY
(Memorandum Decision)

Motion for Partial Summary Judgment

On February 13, 1995, the San Carlos Apache Tribe; Tonto Apache Tribe; and Yavapai Apache Indian Tribe, Camp Verde Reservation, (Apache Tribes) filed their motion for partial summary judgment on many issues concerning the relationship of the Pomerene Water Users Association (Pomerene) to its members and other water users in the area. The motion was heard and taken under advisement at the status conference on March 13, 1995. Appearances are set forth in the minute entry of that status conference. This memorandum decision addresses the issues raised by the motion for partial summary judgment.

The Apache Tribes request summary judgment on eight issues that are raised by the objections in this contested case. The litigants are in substantial agreement on many of these issues. These eight issues are addressed separately in the following:

1. Whether Pomerene has legally acquired appropriative water rights on its own behalf

The Apache Tribes argue that Pomerene has not acquired any appropriative water rights on its own behalf since it is not a landowner. In its pleadings and at oral argument, counsel for Pomerene concedes that the association claims no water rights on its own behalf. Summary judgment is GRANTED to the extent that Pomerene will not be awarded any water rights on its own behalf in this proceeding. I need not reach the issue of whether an irrigation provider must own land in order to claim water rights on its own behalf.

2. Whether Pomerene can legally acquire appropriative water rights on behalf of its members

In several instances, Arizona water law recognizes the legal ability of a water provider entity, such as an irrigation company, to act in behalf of its shareholders or members. See ARIZ. REV. STAT. ANN. §§ 45-151(A) (1994) (authorizing appropriations for personal use or "for delivery to consumers"), 48-2978 (authorizing irrigation districts to "purchase or acquire water rights" and to "[m]ake appropriations of water for irrigation and power purposes"), § 48-2303(A)(1)-(3) (authorizing agricultural improvement districts to secure water), § 45-254(B) (authorizing adjudication filings by "a person on behalf of its members or users . . . [which] shall constitute the required filings of its members or users").

MAR 21 '95

MAR 22 '95 7

DIST. CENTER

Clerk of the Court

The ability of individuals to work cooperatively and through irrigation provider entities and other community organizations was the fundamental reason such organizations were formed during the reclamation of the West. *See, e.g.*, R. DUNBAR, *FORGING NEW RIGHTS IN WESTERN WATERS* 28-35 (1983); *cf.* D. KEMMIS, *COMMUNITY & THE POLITICS OF PLACE* 71-72 ("Everyone was needed by everyone else in one capacity or another. . . . We cannot re-create the world of the frontier . . . [b]ut there is something to be learned from the subtle but persistent process by which frontier families learned the politics of cooperation").

The Apache Tribes' request that the court grant partial summary judgment to the effect that Pomerene cannot legally acquire any appropriative water rights on behalf of its members is DENIED. In the context of this contested case, this ruling means that Pomerene may demonstrate that preadjudication and adjudication filings made by the association were, as the result of an agent-principal or fiduciary relationship, made in behalf of its shareholders or members.

3. Whether only members of Pomerene can acquire water rights

Counsel for Pomerene has already indicated that the association does not seek to have a water right adjudicated in its name. Any rights to water diverted by the association will be adjudicated in the name of individual members or users. I have already ruled, however, that the association can act as the agent or fiduciary of individuals in making their appropriations or claiming their rights in the adjudication.

The Apache Tribes request partial summary judgment to the effect that only a member of the association has the right to acquire appropriative rights for himself. This request is DENIED.

4. Whether the attributes of each member's water rights must be individually and separately adjudicated

Counsel for Pomerene agrees that the members' and users' rights to water diverted by the association will be adjudicated separately with the basic water right attributes being individually determined, *e.g.*, priority date, place of use. On this point, partial summary judgment is GRANTED.

Counsel for the Salt River Project disagrees with the Apache Tribes that "[t]he priority date for each tract of land cannot be earlier than the date on which continuous beneficial use of water first began on that tract." The relation-back doctrine, which holds that the priority date for subsequently irrigated land can date to the original appropriation if the application was reasonably contemplated in the original appropriation, is the law of Arizona. *Maricopa County Municipal Water Conservation Dist. v. Southwest Cotton*,

MAR 1 '95

MAR 22 '95 7

DIST. CLERK

Clerk of the Court

39 Ariz. 65, 4 P.2d 369 (1931); *In re Reporting of Diversion Information & Other Objections*, No. 6417-9005 (Apache County Super. Ct. 1993). On this point, the request for summary judgment is DENIED.

5. Members of Pomerene may not "collectivize" their water rights

The Apache Tribes seek a ruling that, in the determinations of their individual water rights, the association's members may not simply choose as their own the most favorable attributes of the collective bundle of water rights associated with Pomerene. Counsel for Pomerene agrees that the characteristics of the members' rights must be individually determined although some evidence will relate to more than one right. Partial summary judgment on this issue is GRANTED.

6. Members of Pomerene have the right to divert water based only on the Arizona law of prior appropriation

All counsel agree that, since the water right attributes will be individually determined, association members will have the right to the distribution of water based on priorities and will be limited to using the water on land legally determined to be the place of use. Partial summary judgment is GRANTED on these points.

The facts are inconclusive as to the administration of water based on the relationship of shares to water rights. On this issue, summary judgment is DENIED.

7. Pomerene only exists for the purpose of furnishing water to its members who have water rights

The Apache Tribes request partial summary judgment that water diverted by Pomerene can only be delivered to members of the association. Counsel for Pomerene indicates that only Pomerene's members receive the water diverted by the association. On this point, partial summary judgment is GRANTED.

The evidence is insufficient on the question of whether members may lease their water to other members. On this question, partial summary judgment is DENIED.

A question has arisen as to whether these individual rights must be finally adjudicated before Pomerene can deliver water. Existing water use practices may continue until further order of the court.

8. Pomerene's diversion from the San Pedro River does not constitute a potential water right

All counsel agree that Pomerene's diversion of water from the San Pedro River, absent other manifestations of an appropriation, does not constitute a water right. Partial summary judgment is GRANTED on this issue.

Watershed File Reports Associated with Case

In response to requests by counsel for identification of the watershed file reports included in this case, the following information is provided:

Table 1 is the original list of WFRs considered to be part of the case (*see* minute entry Feb. 1, 1994).

<p>Table 1 Original List of WFRs (<i>see</i> minute entry Feb. 1, 1994) 112-17-</p>				
-089	BAA-024	BAA-206	BAD-011	BAD-019
ABC-001	BAA-025	BAA-207	BAD-012	BAD-021
ACB-001	BAA-034	BAA-208	BAD-013	BAD-028
ACB-003	BAA-037	BAA-209	BAD-014	BAD-029
ACB-008	BAA-038	BAA-218	BAD-015	BAD-030
ACC-075	BAA-053	BAD-001	BAD-016	BAD-031
ACC-115	BAA-062	BAD-009	BAD-017	BDA-007
BAA-002	BAA-117	BAD-010	BAD-018	BDA-014

///
 ///
 ///
 ///
 ///

Table 2 is a supplemental list of WFRs identified by DWR as parcel splits and three instances of new ownership. These WFRs and persons were specified in the minute entry of February 25, 1994.

Table 2 WFRs Added Due to Parcel Splits and New Ownership (as reported by DWR) (see minute entry Feb. 25, 1994)		
WFR 112-17-	Name	Split or New Owner
BAA-025	Dana A. Deeds Wayne & Jeanne Hillblom Pam F. Bain John & Marilyn Gourley Charles G. Leeds & Kathleen Harris Homer & Patricia Fletcher Merle P. Edington	Split
BAA-038	Jesse & Kelly Merrill H. B. & Doris Dover	Split
BAA-062	Terrance & Phillis Harrold	Split
BAA-208	Kristy C. Judd	New Owner
BAD-001	John & Donna Palmer	Split
BAD-009	Dewayne & Mary Kading Carmen Dolny	Split
BAD-012	Rodney & Rosita Joiner Ronald & Venice Higginbotham Guy C. Hagler and Robert & Mary Humphreys Clinton & Edythe Jacobs	Split
BAD-014	Newell & Katherine Barney	New Owner
BAD-016	Newell & Katherine Barney	Split
BAD-030	Alan Blane & Suzanne Barney	New Owner
BDA-007	Fred & Beverly Kartchner	Split

///

///

///

MAR 21 '95

MAR 22 '95 7

DIST. CLERK

Clerk of the Court

Table 3 is a list of WFRs not considered to be part of the case. The Master proposes to order, at the pretrial conference, dismissal of these WFRs and persons associated with these particular WFRs. This list was identified in the minute entry of May 20, 1994, and was based on the information found in Table 5-20, 1 HSR.

<p align="center">Table 3 WFRs Not Considered Part of the Case Based on Table 5-20, 1 HSR (see minute entry May 20, 1994)</p>	
WFR 112-17-	Name
ACB-006	Lowell P. & Roberta S. Gessert
BAA-008	Alice B. Coons
BAA-016	Lloyd & Elva M. Sherman
BAA-059	Albert E. & Nancy P. George
BAA-092	Lloyd E. & Ann M. Berryhill
BAA-162	T. P. & Phyllis M. Harrold
BAA-180	Esther C. Larson
BAA-185	Acel W. & Nila East
BAD-022	Michael & Jenifer O'Callaghan

Table 4 lists WFRs never involved in the case (also from Table 5-20, 1 HSR). At the pretrial conference, the Master will solicit discussion whether these should continue to be excluded from the case.

<p align="center">Table 4 WFRs Never Involved (see Table 5-20, 1 HSR)</p>	
112-17-BAA-1	
112-17-BAD-027	No WFR prepared or mapped by DWR

///

///

RECEIVED

FILED

MAR 21 '95

MAR 22 '95 7

DIST. CENTER

Clerk of the Court

Revised Court-approved Mailing List

Attachment A is the revised Court-approved mailing list reflecting dismissals made during the March 13, 1995, status conference. Until further modified, this mailing list should be used for service of pleadings.

DATED this 21st day of March 1995.



JOHN E. THORSON,
Special Master

The original of the foregoing delivered this 21st day of March 1995 to the Distribution Center, Maricopa County Superior Court Clerk's Office, for filing, copying and mailing to those parties not requesting service by facsimile transmission who appear on the Court-approved mailing list for Case No. W1-11-1676 (Consolidated) dated March 21, 1995 (Attachment A); also, sent by facsimile transmission to those parties who have requested service of documents from the Special Master by FAX.



Kathy Dolge

Attachment A
Court-Approved Mailing List
W1-11-1676 (Consol.) *Pomerene*
(25 names)

Prepared by the Office of the Special Master
March 21, 1995

RECEIVED
MAR 21 '95
POST CENTER

FILED
MAR 22 '95 7
Clerk of the Court

Pam F. Bain
8952 E. 39th St.
Tucson AZ 85730

H. Paul Brick
P. O. Box 511
Pomerene AZ 85627

Carmen Dolny
P. O. Box 44291
Tucson AZ 85733-4291

Guy C. Haglar and Robert & Mary
Humphreys
14 Carzuinez Scenic Dr.
Martinez CA 94553

Wayne & Jeanne Hillblom
8952 E. 39th Street
Tucson AZ 85730

Clinton & Edythe Jacobs
P. O. Box 2631
Benson AZ 85602

Charles G. Leeds & Kathleen Harris
P. O. Box 1925
Benson AZ 85602

Luis & Patricia Vega
420 S. Essex Lane
Tucson AZ 85711

ASARCO, Inc.
c/o Apker, Apker, Haggard & Kurtz
Attn: Burton M. Apker
2111 E. Highland Avenue
Suite 230
Phoenix AZ 85016
Service by FAX

ASARCO, Inc. (1263)
P. O. Box 8
Hayden AZ 85235

AZ Attorney General's Office representing
AZ State Land Dep't
Attn: Joseph E. Clifford & Charlotte Benson
1275 W. Washington
Phoenix AZ 85007
Service by FAX

Clerk of the Superior Court
Maricopa County
Attn: Water Case
3345 W. Durango Street
Phoenix AZ 85009

Dep't of Water Resources
Litigation Support Section
Adjudications Division
500 N. 3rd St.
Phoenix AZ 85004-3903

Gila River Indian Community & Silas Kisto
c/o Cox & Cox
Attn: Alfred S. Cox
P. O. Box 4245
Phoenix AZ 85030-4245

Magma Copper Co.
c/o Snell & Wilmer
Attn: Robert B. Hoffman
One Arizona Center
400 East Van Buren
Phoenix AZ 85004-0001

Magma Copper Co. (1267)
7400 N. Oracle Rd., Suite 200
Tucson AZ 85704

Phoenix, City of
City Attorney's Office
Attn: M. James Callahan
200 W. Washington
13th Floor
Phoenix AZ 85003-1611

Pomerene Water Users Association
c/o Richardson & Mortensen
Attn: Wilford R. Richardson
P.O. Box 247
Safford AZ 85548

RECEIVED
MAR 21 '95
JURY CENTER

FILED
MAR 22 '95 7
Clerk of the Court

Salt River Project
c/o Jennings, Strouss & Salmon
Attn: John B. Weldon & M. Byron Lewis
Two North Central Ave.
Suite 1600
Phoenix AZ 85004-2393

San Carlos Apache Tribe, Tonto Apache Tribe, Yavapai
Apache Indian Tribe (Camp Verde Reservation)
c/o Sparks & Siler, P.C.
Attn: Joe P. Sparks, John H. Ryley, Kevin
T. Tehan
7503 First Street
Scottsdale AZ 85251-4573

Special Master
Arizona General Stream Adjudication
John E. Thorson
Arizona State Courts Building
1501 W. Washington, Suite 228
Phoenix AZ 85007

St. David Irrigation District
c/o Brown & Brown
Attn: David A. Brown
P. O. Box 3128
Pinetop AZ 85935
Service by FAX

Tucson Pathology Associates P.C.
420 E. Essex Lane
Tucson AZ 85711

U.S. Dep't of Interior
Office of the Field Solicitor
William H. Swan
Two N. Central Avenue
Suite 1130
Phoenix AZ 85004

U.S. Dep't of Justice
Environment & Natural Resources Div.
F. Patrick Barry
P. O. Box 44378
Washington DC 20026-4378

Pam F. Bain
8952 E. 39th St.
Tucson AZ 85730

Dept of Water Resources
Litigation Support Section
Adjudications Division
500 N. 3rd St.
Phoenix AZ 85004-3903

U.S. Dep't of Interior
Office of the Field Solicitor
William H. Swan
Two N. Central Avenue
Suite 1130
Phoenix AZ 85004

H. Paul Brick
P. O. Box 511
Pomerene AZ 85627

Gila River Indian Community & Silas Kisto
c/o Cox & Cox
Attn: Alfred S. Cox
P. O. Box 4245
Phoenix AZ 85030-4245

U.S. Dep't of Justice
Environment & Natural Resources Div.
F. Patrick Barry
P. O. Box 44378
Washington DC 20026-4378

Carmen Dolny
P. O. Box 44291
Tucson AZ 85733-4291

Magma Copper Co.
c/o Snell & Wilmer
Attn: Robert B. Hoffman
One Arizona Center
400 East Van Buren
Phoenix AZ 85004-0001

Guy C. Haglar and Robert & Mary
14 Carzunez Scenic Dr.
Martinez CA 94553

Magma Copper Co. (1267)
7400 N. Oracle Rd., Suite 200
Tucson AZ 85704

Wayne & Jeanne Hillblom
8952 E. 39th Street
Tucson AZ 85730

Phoenix, City of
City Attorney's Office
Attn: M. James Callahan
200 W. Washington
13th Floor
Phoenix AZ 85003-1611

Clinton & Edythe Jacobs
P. O. Box 2631
Benson AZ 85602

Pomerene Water Users Association
c/o Richardson & Mortensen
Attn: Wilford R. Richardson
P.O. Box 247
Safford AZ 85548

Charles G. Leeds & Kathleen Harris
P. O. Box 1925
Benson AZ 85602

Salt River Project
c/o Jennings, Strouss & Salmon
Attn: John B. Weldon & M. Byron Lewis
Two North Central Ave.
Suite 1600
Phoenix AZ 85004-2393

Luis & Patricia Vega
420 S. Essex Lane
Tucson AZ 85711

San Carlos Apache Tribe, Tonto Apache Tribe, Yava
c/o Sparks & Siler, P.C.
Attn: Joe P. Sparks, John H. Ryley, Kevin T.
7503 First Street
Scottsdale AZ 85251-4573

ASARCO, Inc. (1263)
P. O. Box 8
Hayden AZ 85235

Special Master
Arizona General Stream Adjudication
John E. Thorson
Arizona State Courts Building
1501 W. Washington, Suite 228
Phoenix AZ 85007

Clerk of the Superior Court
Maricopa County
Attn: Water Case
3345 W. Durango Street
Phoenix AZ 85009

Tucson Pathology Associates P.C.
420 E. Essex Lane
Tucson AZ 85711