

SUPERIOR COURT OF ARIZONA
MARICOPA COUNTY

9/20/2022

CLERK OF THE COURT

SPECIAL WATER MASTER
SUSAN WARD HARRIS

T. DeRaddo
Deputy

In re: SLD-Paul Sale Investment Company
Contested Case No: W1-11-2805
(SLD: State Land Department)

In re the General Adjudication of
All Water Rights to Use Water in the
Gila River System and Source
W-1, W-2, W-3, W-4 (Consolidated)

FILED: 10/03/2022

In re: Oral Argument on Pending Motions

MINUTE ENTRY

Courtroom CCB - 301

1:30 p.m. This is the time set for virtual/telephonic Oral Argument before Special Water Master Susan Ward Harris on the following Motions:

- (1) The Gila River Indian Community's Motion for Summary Judgment, filed July 25, 2022.
- (2) The Arizona State Land Department's Motion for Partial Summary Judgment, filed July 25, 2022.

The following attorneys appear virtually/telephonically via Court Connect/Teams.

- Mark McGinnis on behalf of Salt River Project (“SRP”)
- Kimberly Parks observing on behalf of Arizona Department of Water Resources
- John Burnside on behalf of BHP Copper
- Rhett Billingsley on behalf of ASARCO
- Laurel Herrmann on behalf of the San Carlos Apache Tribe
- Richard Palmer on behalf of the Tonto Apache Tribe
- Sue Montgomery on behalf of the Yavapai Apache Nation and observing on behalf of the Pasqua Yaqui Tribe
- Thomas Murphy on behalf of the Gila River Indian Community
- Kevin P. Crestin and Carrie Brennan for Arizona State Land Department
- Charles L Cahoy observing on behalf of the City of Phoenix
- Steve Titla observing for the San Carlos Apache Tribe
- Stanley Lutz is also present.

A record of the proceeding is made digitally in lieu of a court reporter.

Kevin Crestin presents argument on the Arizona State Land Department’s Motion for Partial Summary Judgment Re: San Pedro River Watershed Hydrographic Survey Report. The Motion is joined by SRP.

Mr. McGinnis presents argument on SRP’s Joinder to the State Land Department’s Motion.

Thomas Murphy presents argument on the Gila River Indian Community’s Motion for Summary Judgment. This Motion is joined by the San Carlos Apache Tribe.

Laurel Herrmann states that the San Carlos Apache Tribe concurs with The Gila River Indian Community’s / Tom Murphy’s presentation and points therein.

Mr. Crestin (ASLD) replies to the Gila River Indian Community’s Motion.

Mr. Murphy (Gila River Indian Community) responds to Mr. Crestin’s points.

IT IS ORDERED taking the Motions under advisement.

2:07 p.m. Matter concludes.

LATER:

The claimant in this case, Arizona State Land Department (“ASLD”), asserts water rights to 358 acre-feet of water to irrigate 22.8 acres of state trust land with a priority date of February 1, 1878. Statement of Claimant 39-18135. No dispute exists in this case that the claimed water has not been used to irrigate the state trust land for at least two decades.

The general rule is that “when 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). The Motion for Partial Summary Judgment filed by ASLD and the Motion for Summary Judgment filed by the Gila River Indian Community present the questions of whether rights to water for irrigation claimed by ASLD for land held by the State of Arizona in trust can be statutorily forfeited as a matter of law, and if so, whether the facts of this contested case warrant an exemption from statutory forfeiture. Given that this issue is submitted in a summary judgment proceeding, the appropriate standard requires a finding that there is no genuine issue of material fact, and the moving party is entitled to judgment as a matter of law. Ariz. R. Civ. P. 56(c).

The motions presented in this case do not require a preliminary determination that water rights for irrigation use exist as claimed.¹ Specifically, ASLD argues that it is entitled to a partial summary judgment that forfeiture is not a valid objection to its claimed water rights. The Gila River Indian Community argues that any rights that ASLD may assert to water for irrigation use have been forfeited due to nonuse. Thus, facts asserted to establish the existence of a right to water for irrigation purposes are not material to the determination of the issues presented in the pleadings.

I. Legal Arguments

The Arizona State Land Department presents three arguments to support its position that its claimed water rights cannot be forfeited as a matter of law. It first contends that no water rights with a priority date prior to 1919 can be forfeited. As its second and third arguments, ASLD begins with the assertion that statutory forfeiture, which forfeits a water right due to nonuse, is analogous to estoppel and statute of limitation because those defenses prevent a party from asserting a claim due to its failure to act in the past. ASLD

¹ No analysis is made with respect to the validity of the claimed right and nothing in this decision should be understood as a finding that the claimed right historically existed.

Reply at 5 (September 12, 2022). It concludes that because neither estoppel nor statute of limitation defenses may normally be asserted against the state, statutory forfeiture cannot be applied to water rights claimed by the state.

A. Forfeiture of Pre-1919 Water Rights

The Arizona State Land Department, joined by the Salt River Project, argues that its water rights have a priority date prior to June 12, 1919, and, therefore, cannot be forfeited because the land was not irrigated for a five-year period beginning after June 12, 1919. In 1995, the Arizona legislature amended Arizona Revised Statutes (“A.R.S.”) section 45-141(C) to specifically exempt pre-1919 water rights from statutory forfeiture. The Arizona Supreme Court found that the amendment violated the due process requirements under Article II, section 4 of the Arizona Constitution. *San Carlos Apache Tribe v. Superior Court ex. Rel Cty. Of Maricopa*, 193 Ariz. 195, 972 P.2d 179 (1999). It reasoned that the change made to the statute to protect pre-1919 holders of water rights from statutory forfeiture impermissibly altered the vested substantive water rights of junior users. *Id.* at 205, 972 P.2d at 189. The amendment changed the legal consequences that would otherwise apply to pre-1919 rights and to the priority of rights junior to pre-1919 rights subject to forfeiture for nonuse. *Id.* at 206, 972 P.2d at 190. Accordingly, based on the *San Carlos* decision, when the owner of a right to the use of water with a pre-June 12, 1919 priority date ceases using the appropriated water for five successive years beginning after June 12, 1919, the right to the use is subject to statutory forfeiture.

Conclusion of Law No. 1. A priority date prior to June 12, 1919, does not exempt the ASLD’s claimed water rights from statutory forfeiture.

B. Statute of Limitations

The Arizona State Land Department argues that statutory forfeiture is analogous to a statute of limitations and because statutes of limitation generally do not apply to the state, statutory forfeiture should not apply to the state. A statute of limitations limits the time period in which a legal action may be brought against another party. As explained by the court in *City of Phoenix v. Glenayre Elecs., Inc.*, 242 Ariz. 139, 141, ¶ 1, 393 P.3d 919, 921 (2017), statutes of limitation do not typically run against the state because “although time limitations apply to private parties so as to prevent fraudulent, stale claims, time stands still, as it were, for the state because ‘[t]he officers who are charged with the active duty of enforcing [the] rights [of the state] have no personal profit to gain thereby, and therefore no inducement for the bringing of false and unwarranted actions.’ ” *Id.* at 142, ¶ 10, 393 P.3d at 922 (citation omitted). The legislature codified this policy in A.R.S. §12-510 where it explicitly exempted the state from a series of statutes of limitations in different types of

actions. In contrast, the legislature did not carve out a blanket exemption for water rights held by the state from the application of the forfeiture statute.

Forfeiture is a fundamental element of the doctrine of prior appropriation designed to allocate appropriable water so that as much appropriable water as possible is beneficially used. *McClellan v. Jantzen*, 26 Ariz. App. 223, 225, 547 P.2d 494, 496 (1976) (“It has always been the policy of this state to make the largest possible use of water.”). A senior water right holder’s decision to not put appropriable water to beneficial use for an extended period, while still retaining senior water rights, does not further the public policy of fully utilizing the scarce appropriable water. The forfeiture statute effectively transfers the unused appropriable water rights held by senior right holders to holders of junior water rights who presumably will put the water to beneficial use. Clearly, the public policy underlying the statute of limitation, i.e., the prevention of the filing of false or stale claims, is not analogous, or even relevant, to an analysis as to whether the state should be exempt from forfeiture. The forfeiture statute is designed to ensure that junior water users advance in priority when senior water users no longer put appropriable water to beneficial use for an extended period of time. In the absence of holders of junior water rights, the forfeiture statute causes the unused water to revert to the public and become available for appropriation to new water users.

C. Estoppel

The Arizona State Land Department argues that the statutory forfeiture provisions cannot apply to water uses on state trust land because forfeiture is akin to estoppel and the state cannot usually be estopped from taking an action or enforcing a right. While, in a very general sense, estoppel results in a loss of a right due to past action or inaction, the basis of and the requisite elements for an estoppel defense and a statutory forfeiture are very different. Estoppel applies in those situations where the party asserting the defense relies on the representation or actions of the party to be estopped, the party to be estopped subsequently changes its position, and the party who acted in reliance on the former's repudiation of its prior conduct suffers an injury. *Valencia Energy Co. v. Arizona Dept. of Revenue*, 191 Ariz. 565, 576–77, ¶ 35, 959 P.2d 1256, 1267-68 (1998).

Estoppel is an equitable defense available to prevent an injustice. *Id.* Unlike estoppel, forfeiture does not arise out of equity. It, unlike estoppel, does not provide a remedy for an injustice inflicted on a person who justifiably relied on another to his or her detriment. Forfeiture is a statutorily mandated element of an appropriable water right. *See Havasu Heights Ranch & Dev. Corp. v. Desert Valley Wood Products, Inc.*, 167 Ariz. 383, 393, 807 P.2d 1119, 1129 (App. 1990) (“Any property right created by a statute is also defined by the statute. As discussed above, statutory forfeiture exists due to the legislative

determination that appropriated water must be put to beneficial use by the holder of the water right. The forfeiture provision furthers that policy by eliminating rights that are not exercised and advancing the priority of junior users who continue to put water to beneficial use. An estoppel defense is not analogous to forfeiture.

Not only is estoppel not analogous to forfeiture, but the courts have also rejected it as a defense to a statutory forfeiture. *See N. Kern Water Storage Dist. v. Kern Delta Water Dist.*, 147 Cal. App. 4th 555, 584, 54 Cal. Rptr. 3d 578, 600 (Cal. Ct. App. 2007) (“Because of the constitutional requirement that water be used reasonably and for beneficial purposes, and the reflection of that requirement in the forfeiture provisions of Water Code section 1241, we hold that on the facts of this case equitable estoppel is not available to Delta as a defense.”)

Conclusion of Law No. 2. The public policies, common law, and statutory provisions that block the application of the defenses of statute of limitation and estoppel against the state do not prevent the application of statutory forfeiture to water rights claimed by the state.

II. Factual Arguments

The Arizona State Land Department also makes a factual argument that a finding that its claimed rights have been forfeited due to the failure to use appropriable water to irrigate the 22.8 acres of state trust land for more than five consecutive years is not warranted. Section 45-189(E) of the Arizona Revised Statutes provides a non-exclusive list of reasons that excuse a failure to put water to beneficial use thereby preventing forfeiture of a right to water. *San Carlos Apache Tribe v. Superior Court ex. Rel Cty. of Maricopa*, 193 Ariz. 195, 208, ¶24, 972 P.2d 179, 192 (1999). The legislature provides specific circumstances excusing non-use such as drought, active military service, and legal proceedings preventing water use. It also provides a general provision that allows for “[a]ny other reason that a court of competent jurisdiction deemed would warrant nonuse.” A.R.S. §45-189(E)(9). The material facts relevant to ASLD’s arguments based on A.R.S. §45-189(E)(9) are not in dispute.

Finding of Fact No. 1. The claimed water use is for land located in the southeast quarter of Section 36, Township 5 South, Range 15 East (the “Land”) as shown in *figure 1*.

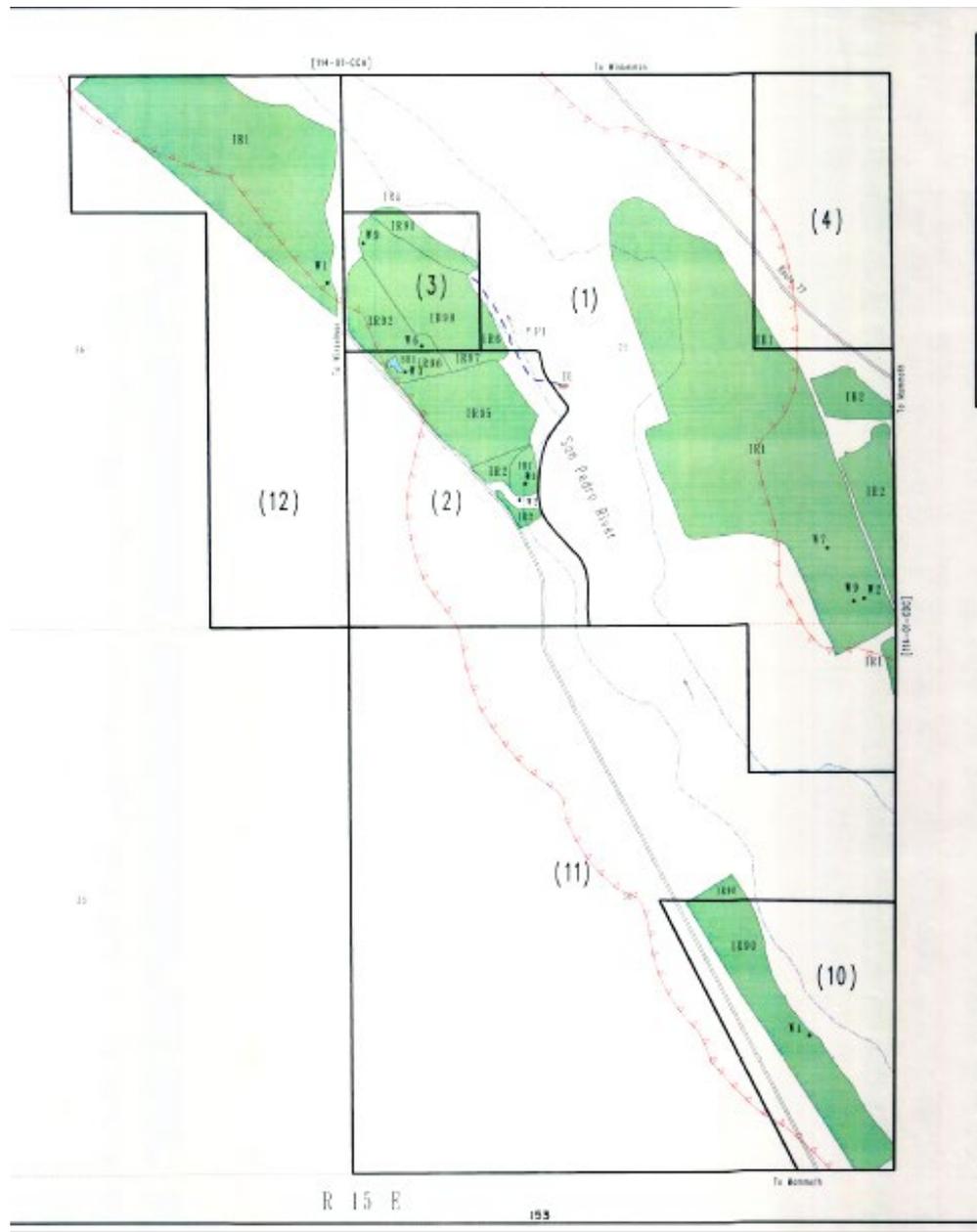


Figure 1. Map of land involved in this case, which is labelled as “(10)”.
Source: Vol. 9 San Pedro Hydrographic Survey Report at 153.

Finding of Fact No. 2. The State of Arizona acquired title to the Land in trust on February 14, 1912.

Finding of Fact No. 3. The Land has been leased by various parties for various uses from its acquisition in 1912.

Finding of Fact No. 4. Paul L. Sale Investment Company signed Agricultural Lease No. 36477 for the Land on October 6, 1976. Exhibit 7 at 1 to Arizona State Land Department’s Statement of Facts in Support of Motion for Partial Summary Judgment (“Exhibit __”)

Finding of Fact No. 5. The term of Agricultural Lease No. 36477 ran for ten years that began on October 6, 1976, and expired on October 6, 1986. Exhibit 7 at 1.

Finding of Fact No. 6. Agricultural Lease No. 36477 provided in relevant part:

THE LESSEE COVENANTS AND AGREES that he has leased this land to develop for, and the growing of agricultural crops. It is understood and agreed that this lease shall be null and void as to any land included herein, which is not used for purposes of growing crops or for use in connection with farming operations thereon.

...

(20) This lease is executed by the lessor with the understanding that all land included herein, susceptible of irrigation, will be farmed each year, except such that may be used for other legitimate purposes in connection therewith. Therefore, should it appear that the land is being allowed to deteriorate or is being used for speculative purposes, the State reserves the right to cancel this lease after proper legal notice.

Exhibit 7 at 1, 7.

Finding of Fact No. 7. In 1984, Paul L. Sale Investment Company submitted an agricultural rent report showing that it was not irrigating the Land and was not obligated to pay any rent for the farmed land. Exhibit 14; ASLD Motion at 5.

Finding of Fact No. 8. Arizona State Land Department did not take any action to terminate the lease, despite the failure of Paul L. Sale Investment Company to farm the land as required under the terms of the lease.

Finding of Fact No. 9. In 1986, the lessee filed an application to renew Agricultural Lease No. 36477 in which the lessee stated that “farmed acreage is used primarily for grazing.” Exhibit 13.

Finding of Fact No. 10. In 1991, Arizona Department of Water Resources published Watershed File Report No. 114-01-CCD-010 (“WFR”). It concluded that the Land had not been irrigated in the preceding five years, but a review of historical aerial photography and field investigations indicated that the Land had been irrigated in the previous ten years.

Finding of Fact No. 11. On September 11, 1997, Agricultural Lease No. 36477, which had been renewed until February 14, 2006, was assigned to The Nature Conservancy. Exhibit 16.

Finding of Fact No. 12. The Nature Conservancy did not intend to irrigate the Land. ASLD Motion at 5.

Finding of Fact No. 13. The Nature Conservancy applied for a reclassification of Agricultural Lease No. 36477 from an agricultural lease to a grazing lease. Exhibit 18.

Finding of Fact No. 14. On July 17, 2001, the Arizona State Land Commissioner issued a Reclassification Order that reclassified the Land from “Agriculture” to “Grazing” based on a finding “that the interest of the State Trust would be best served” by the reclassification. Exhibit 20.

Finding of Fact No. 15. At ASLD’s direction, the Nature Conservancy capped the irrigation well on the Land in 2010. Exhibit 25.

Finding of Fact No. 16. In 2017, Salt River Project acquired a grazing lease for the Land.

Finding of Fact No. 17. In 2020, Salt River Project filed a Statement of Claim for a pre-1919 irrigation water use. Statement of Claim 36-105944 claims an appropriative right to use 358 acre-feet of water to irrigate 22.8 acres of land with a priority date of February 1, 1878. Exhibit 3.

Finding of Fact No. 18. On August 18, 2020, ASLD filed Statement of Claimant 39-18135 that asserted claims for irrigation use and stock and wildlife watering.

Finding of Fact No. 19. Arizona Department of Water Resources filed an amended WFR on April 17, 2021, that reported no use of water for irrigation on the Land.

Finding of Fact No. 20. The Land has not been irrigated for more than two decades.

The Arizona State Land Department contends that nonuse should be excused because it could not require its lessees to irrigate trust lands. Here, the Paul L. Sale Investment Company ceased farming the land by 1984 contrary to the terms of the lease. FOF No. 7. Arizona law authorizes ASLD to cancel a lease when a lessee fails to perform:

A. If a lessee of a lease of ten years or less defaults in a payment of rent, as provided in the lease, or fails to comply with a condition, covenant or requirement of the lease, the lease and the lessee's rights under the lease are subject to forfeiture and cancellation as provided by this section and section 37-289.

A.R.S. §37-288(A).

The lessee's failure to perform under the terms of the lease would have allowed ASLD to take action to serve a Notice of Default on the lessee, provide the opportunity to cure, and if the default were not cured, issue an order to cancel the lease. A.R.S. §37-289. The record in this case does not show that ASLD took any action against the lessee. Nor is there any evidence in the record that ASLD attempted to locate a lessee that would farm the land. Rather than taking actions to preserve the land as agricultural land, ASLD instead renewed the lease even when advised that acreage designated for farming was used for grazing. It approved the assignment of the lease to a new lessee that did not intend to irrigate the Land. At the request of the lessee, it reclassified the Land from agricultural use requiring irrigation to grazing use that did not require water for irrigation. The ASLD Commissioner affirmatively found that the change in use of the Land was in the best interests of the trust. FOF 12, 14-15.

The Arizona State Land Department contends that its actions to not cancel the lease, to approve the assignment of the lease, and to reclassify the lease were mandated by its obligations to generate revenue for the state trust. While it is certainly true that ASLD must manage the state trust land to generate revenue for the trust, that duty does not strip ASLD of exercising all discretion in the management of the trust lands. "The 'best interest' standard does not require blind adherence to the goal of maximizing revenue at the cost of contracting with an irresponsible lessee or hindering important alternate uses." *Havasu Heights Ranch & Dev. Corp. v. Desert Valley Wood Products, Inc.*, 167 Ariz. 383, 392, 807 P.2d 1119, 1128 (App. 1990). See also, *Koepnick v. Arizona State Land Department*, 221 Ariz. 370, 212 P.3d 62 (App. 2009) (The court approved ASLD's termination of an agricultural lease generating revenue to develop the land for a commercial use that did not immediately generate revenue.). The facts in this case do not demonstrate that the nonuse of water for irrigation use on the land occurred for "any other reason that a court of competent jurisdiction deemed would warrant nonuse." A.R.S. §45-189(E)(9). As a result,

ASLD lacks sufficient reason to prevent the forfeiture of rights to appropriable water for irrigation use.

Finding of Fact No. 21. Arizona State Land Department has not established that sufficient reason exists to excuse nonuse of water for irrigation purposes and prevent a forfeiture of a claimed right to irrigate the Land.

The Arizona State Land Department also argues that the nonuse of its claimed water rights should be excused because it has determined that it lacks the power or authority to irrigate trust land. Pursuant to the provisions of the Arizona-New Mexico Enabling Act and the Arizona Constitution, the State, with the State Land Commissioner as trustee, is generally authorized to control and manage the trust lands for the benefit of the trust and trust beneficiaries. *Lassen v. Arizona*, 385 U.S. 458, 87 S.Ct. 584, 17 L.Ed.2d 515 (1967); *Koepnick v. Arizona State Land Dept.*, 221 Ariz. at 377, ¶ 18, 212 P.3d at 69 (App. 2009); *Berry v. Arizona State Land Dept.*, 133 Ariz. 325, 327, 651 P.2d 853, 855 (1982). The legislature explicitly conveyed broad powers to the Arizona State Land Department, acting as trustee, to “have charge of and control of all lands owned by this state, and timber, stone, gravel and other product of such lands”. A.R.S. § 37–102(B). It also enumerated specific powers to be exercised by ASLD in the management of the land. *See, e.g.*, A.R.S. §§ 37-211 (investigate alternative uses and conduct experiments on the land); 37-287 (explore for and extract oil, gas, coal, minerals, fertilizer, and fossils); 37-332 (plan for the urban development of state land); 37-334(E) (apply for rezoning of land); 37-322.03 (remove and destroy improvements on the land); and 37-342 (acquire rights to water for irrigation of state land using the same procedures used by private citizens). No decision need be reached in this case as to whether ASLD’s assessment of the limitations of its authority is correct because that issue is not presented by the facts in this case. The Arizona State Land Department did not attempt to enforce the provisions of an agricultural lease, consented to the assignment of a lease to an assignee that did not intend to irrigate, and made a finding more than two decades ago that the best interests of the trust would be served by reclassifying the Land for a non-agricultural use.

Conclusion of Law No. 3. Any water rights for irrigation use appurtenant to the 22.8 acres of land located in the southeast quarter of Section 36, Township 5 South, Range 15 East owned by the state in trust are subject to statutory forfeiture and those rights have been forfeited.

IT IS ORDERED granting the Motion for Summary Judgment filed by the Gila River Indian Community and denying the Motion for Partial Summary Judgment filed by the Arizona State Land Department.

A copy of this minute entry will be sent to all people on the court-approved mailing list for this matter.

NOTE: All court proceedings are recorded digitally and not by a court reporter. The parties or counsel may request a CD of the proceedings. For copies of hearings or trial proceedings recorded previously, please call Electronic Records Services at 602-506-7100.