

SUPERIOR COURT OF ARIZONA
MARICOPA COUNTY

06/15/2020

CLERK OF THE COURT
FORM V000

SPECIAL WATER MASTER
SUSAN WARD HARRIS

L. Stogsdill

Deputy

In re: St. David Irrigation District
Contested Case No. W1-11-1675

FILED: 9/10/2020

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

In re: Oral Argument

MINUTE ENTRY

Courtroom: CCB 301

1:30 p.m. This is the time set for oral argument re: Salt River Project's Motion for Partial Summary Judgment Regarding Forfeiture of Pre-1919 Rights (the "Motion") before Special Master Susan Ward Harris.

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

The following attorneys and parties appear telephonically:

- Rhett Billingsley is present on behalf of ASARCO.
- Mark McGinnis and John B. Weldon, Jr. on behalf of Salt River Project (SRP).
- Sean Hood on behalf of Freeport Minerals.
- David Brown, J. Albert Brown and William L. Staudenmaier on behalf of St. David Irrigation District, Gila Valley, Franklin Irrigation Districts and the City of Cottonwood.
- Kimberly Parks observing on behalf of Arizona Department of Water Resources (ADWR).
- Joe Sparks and Laurel Herrmann on behalf of the San Carlos Apache Tribe.
- Jeremiah D. Weiner on behalf of the Tonto Apache Tribe.
- John Burnside on behalf of BHP Copper and St. David Irrigation District.
- Charles Cahoy on behalf of City of Phoenix.
- Thomas Murphy on behalf of Gila River Indian Community.

- William H. Anger on behalf of City of Mesa.
- Rebecca Ross, Patrick F. Barry, and JoAnn Kintz on behalf of the US Department of Justice, Indian Resources Section.

Mark McGinnis discusses the procedural issues re: Gila River and a three-part analysis in support of his position.

Discussion is held regarding the Arizona Supreme Court's 1995 decision in the San Carlos case.

Sean Hood, David Brown, Rhett Billingsley, William Anger and John Burnside all join with the argument presented by Mark McGinnis.

David Brown states that the St. David Irrigation District is asserting rights on behalf of the claimants listed in the exhibit attached to Salt River Project's motion.

Charles Cahoy also joins with the previous comments made by counsel and offers additional argument.

Thomas Murphy provides his position regarding the procedural issues, in light of St. David's joinder, and argues that the Court has already decided the issue.

Joe Sparks presents argument.

2:30 p.m. The Court experiences technical difficulties with the telephone system.

2:31 p.m. The Court stands at recess while the technical difficulties are addressed.

3:30 p.m. The Court reconvenes with the same counsel present.

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

Joe Sparks resumes his previous argument.

Patrick Barry joins with Thomas Murphy and Joe Sparks.

Mark McGinnis, Sean Hood and David Brown offer rebuttal arguments.

Charles Cahoy joins in previous arguments made by counsel and also offers a brief rebuttal.

Joe Sparks clarifies his earlier statement for the Court and counsel.

The Court takes the Motion under consideration.

4:08 p.m. Matter concludes.

LATER:

Salt River Project, joined by the St. David Irrigation District, among other parties, moved for a determination that appropriative water rights that vested before June 12, 1919 (“pre-1919 rights”) are not subject to statutory forfeiture. The term “statutory forfeiture” refers to the forfeiture of water rights due to non-use for five successive years mandated under Arizona law beginning in 1919, when Arizona adopted the 1919 Water Code, effective June 12, 1919. The 1919 Water Code provided in relevant part:

Section 1. The water of all natural streams, or flowing in the any canyon, ravine or other natural channel, or in defined underground channels, and of springs and lakes, 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 thereafter the owner of a perfected and developed right shall cease or fail to use the appropriated water 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 right at the time of the passage of this Act.

Ariz. Sess. Laws 1919, ch. 164, §1 (1919). The forfeiture provision continuously appeared in Arizona statutes and is currently codified at A.R.S. §45-141(C). The current statutory forfeiture provision states:

Except as otherwise provided in this title or in title 48, 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. This subsection or any other statutory forfeiture by nonuse shall not apply to a water right initiated before June 12, 1919.¹

The Salt River Project, Gila River Indian Community, and the San Carlos Tonto Apache Tribe agree that statutory forfeiture does not cause a forfeiture of water rights due to non-use that occurred prior to June 12, 1919. Accordingly, the specific question presented is whether water rights with a priority date prior to June 12, 1919 are subject to statutory forfeiture when the owner of a right to use water ceases or fails to use the water for five successive years after June 12, 1919.

¹ Bolded language added in 1995 and determined to be unconstitutional in *San Carlos Apache Tribe v. Superior Court ex. Rel. Cty. of Maricopa*, 193 Ariz. 195, 972 P.2d 179 (1999).

A. Standard for Summary Judgement

Summary judgment may be granted when the moving party shows that there is no genuine dispute as to any material fact and it is entitled to judgment as a matter of law. Ariz. R. Civ. P. 56(a). “When the party moving for summary judgment makes a prima facie showing that no genuine issue of material fact exists, the burden shifts to the opposing party to produce sufficient competent evidence to defeat the motion. *Thompson v. Bettr-Bilt Aluminum Products Co., Inc.*, 1717 Ariz. 550, 558, 832 P.2d 203, 211 (1992); *Brosie v. Stockton*, 105 Ariz. 574, 468 P.2d 933 (1970).

The Gila River Indian Community disputes that any of the water rights to be adjudicated in this case by an individual landowner claim both a priority date prior to 1919 and a right to irrigation water not currently in use. *Gila River Indian Community’s Response to Salt River Project’s Motion for Partial Summary Judgment Regarding Forfeiture of Pre-1919 Rights* at 4 (March 3, 2020) (“GRIC Response”). In essence, the Gila River Indian Community argues that the motion for partial summary judgment should be denied not due to the existence of disputed material facts, but due to the absence of facts that requires a determination of whether pre-1919 water rights are subject to statutory forfeiture. This consolidated case, with its hundreds of claims and objections, includes the fact pattern where a claimant asserts a pre-1919 right to water for irrigation use that Arizona Department of Water Resources (“ADWR”) investigated and concluded had been operational at some point in the preceding decade but had not been put to use for five successive years.

1. Scope of Case

In 1995, Special Master Thorson initiated this case to adjudicate claims for water rights filed by the St. David Irrigation District on behalf of its shareholders. A claim for water rights, known as 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). The St. David Irrigation District filed Statement of Claimant 39-06593 claiming 5,500 acre feet of water for irrigation use with a claimed date of initiation of July 1881 and a date of first use for beneficial purposes of July 1883. It also filed Statement of Claimant 39-06594 for 8,550 acre feet of water for irrigation use with a 1881 date of initiation of right and date of first beneficial use. The Arizona Department of Water Resources investigated those claims and provided an extended narrative about the St. David Irrigation District in Vol. 1 *Hydrographic Survey Report for the San Pedro Watershed*, 333-351 (filed Nov. 20, 1991) (“San Pedro HSR”). In addition, ADWR prepared Watershed File Report 112-17-088 finding that the St. David Irrigation District diverted 4,425.4 acre feet of water per year for irrigation use and that 1881 was the date of apparent first use.²

² Arizona Department of Water Resources prepared Watershed File Reports pursuant to its obligation to provide technical assistance requested by the court or special master. A.R.S. §45-256.

Arizona Department of Water Resources noted in its discussion of the St. David Irrigation District that it had received “numerous filings by individual users within the SDID claiming rights to the water provided by the district, as well as to water withdrawn from privately owned wells.” *Id.* at 337. Those individual claims were the subject of separate Watershed File Reports that evaluated the claimed water uses. The San Pedro HSR includes a table of the lands served by the St. David Irrigation District with the corresponding Watershed File Reports that investigated the uses on the particular parcels. *Id.* at 347-350.

To fully adjudicate the objections to the Watershed File Reports and the claims filed by the St. David Irrigation District and the individual landowners for water used on the land within the boundaries of the irrigation district, Special Master Thorson consolidated all of the contested cases associated with water diverted by and from the St. David Irrigation District. Since 1995, the boundaries of the St. David Irrigation District have expanded to encompass more land for which the owners had asserted claims for water rights for irrigation use. As a result, additional contested cases have been consolidated with this case so that, at present, the objections to and the claims investigated in 130 Watershed File Reports are now included in this consolidated case.

2. Discontinued Irrigation Use

Arizona law requires ADWR to include in its Watershed File Report “all information that is obtained by the director and that reasonably relates to the water right claim or use investigated.” A.R.S. §45-256(B). The Watershed File Reports included in the San Pedro HSR classified potential water rights (“PWR”) depending upon whether ADWR found the landowner to be currently using the water at the time of its investigation or whether it determined the irrigation use had existed but had been discontinued for at least five years as of the time of its investigation. It assigned the code “IR09” to PWRs for irrigation uses where ADWR “determined that no irrigation has taken place on this property (or parcel) in the last five years, but there has been irrigation within the past ten years based upon a review of historical aerial photography and field investigations.” Vol. 4 San Pedro HSR at 36.

Although the definition of IR090 contains no dates, the time frame in which the investigation occurred can be broadly estimated as between 1980 and 1991. The claims for water rights that are the subject of the San Pedro HSR were due beginning in 1980. Vol. 1 San Pedro HSR at 7. The final San Pedro HSR was filed on November 21, 1991. Importantly for this decision, all irrigation uses classified as discontinued were reportedly discontinued for more than five years after June 12, 1919. Multiple Watershed File Reports included in this consolidated case apply the IR090 designation to investigated uses.

In addition to providing information about use, a Watershed File Report also includes information collected by ADWR relevant to a determination of the priority date that would attach to an adjudicated water right. It reports the dates of initial beneficial use claimed in filings made by landowners and a date of “apparent first use” based on documents available to ADWR or aerial photographs. In the San Pedro HSR, ADWR applied the IR090 designation to five PWRs for water uses on land served by the St.

David Irrigation District with dates of first apparent use prior to 1919.³ See Table 1. These five PWRs identified by ADWR are included in the list of claims identified by Salt River Project.

Watershed File Report	Potential Water Right	Apparent Date of First Use
112-17-ACC-026	IR090	1916
112-17-DBA-122	IR090	1881
112-17-DBA-151	IR090	1881
112-17-DBD-009	IR090	1881
112-17-DBD-030	IR090	1881

TABLE 1

SOURCE OF INFORMATION: Table 5-30 in Vol. 1 San Pedro HSR at 347-350.

Finding of Fact No. 1. This consolidated case includes claims for rights to water for irrigation use with an associated priority date prior to 1919 that ADWR investigated and reported had not been in use for five successive years.

In the absence of any material issues of fact in dispute, summary judgment is appropriate on an issue of law. See *Arizona City Sanitary Dist. B. Olson*, 224 Ariz. 330, 333, ¶ 5, 230 P. 3d 713, 716 (App. 2010). The question presented here a pure issue of law.

B. Standing

The Gila River Indian Community challenges SRP’s standing to file its motion for partial summary judgment in this proceeding. In Arizona, “the question of standing ... is not a constitutional mandate since we have no counterpart to the ‘case or controversy’ requirement of the federal constitution.” *Armory Park Neighborhood Ass’n v. Episcopal Cmty. Servs.*, 148 Ariz. 1, 6, 712 P.2d 914, 919 (1985). “Nonetheless, in addressing questions of standing, we are confronted with ‘questions of prudential or judicial restraint,’ and will impose that restraint to insure that ‘the case is not moot and that the issues will be fully developed by true adversaries.’ *Blanchard v. Show Low Planning & Zoning Comm’n*, 196 Ariz. 114, ¶ 19, 993 P.2d 1078, ¶ 19 (App.1999), quoting *Armory Park*, 148 Ariz. at 6, 712 P.2d at 919 (citations omitted).” *Aegis of Arizona, L.L.C. v. Town of Marana*, 206 Ariz. 557, 563, ¶ 19, 81 P.3d 1016, 1022 (App. 2003), as corrected (Dec. 22, 2003). See also *City of Surprise v. Arizona Corp. Comm’n*, 246 Ariz. 206, 209,

³ This case as finally consolidated includes at least eleven PWRs for irrigation use with an IR090, IR091, or IR092 designation and a claimed priority date or a date of apparent first use that precedes 1919. See Watershed File Reports 112-17-ACC-026, 112-17-BAD-009, 112-17-BAD-012, 112-17-BDA-002, 112-17-BDA-007, 112-17-DBA-122, 112-17-DBA-151, 112-17-DBA-198, 112-17-DBD-009, and 112-17-DBD-030.

¶ 8, 437 P.3d 865, 868 (2019). The question at issue is not moot and the issue will be fully developed by true adversaries.

The purpose of the contested case is to provide a forum to resolve the issues raised by claimants seeking adjudicated water rights and by claimants who filed objections to Watershed File Reports that contain the results of ADWR's investigation of the claims. A.R.S. §§45-256(B), 45-257(A). St. David Irrigation District is a claimant seeking water rights that are the subject of this case. Salt River Project is a claimant that filed objections in this case. The United States, Gila River Indian Community, San Carlos Apache Tribe, Tonto Apache Tribe, and the Yavapai-Apache Indian Community, Camp Verde Reservation filed written objections to each Watershed File Report listed in Table 1 that included the following specific objection: "All or part of the PWR has been idle for more than five years and therefore is not entitled to a water right." Thus, the objections require resolution of the question posed in the pending motion.

More than a year ago, St. David Irrigation District proposed that the litigation of this consolidated case should be conducted in phases. It stated:

SDIS believes that a staged litigation approach is necessary to conserve resources and maximize judicial efficiency. Because certain broad issues impact the contested case globally, it would be more efficient and would better conserve judicial resources and the resources of the litigants to designate and address case-wide issues first in an initial stage for both discovery and determination, and to address issues specific to individual lands only after the designated case-wide issues are resolved.

St. David Irrigation District's Proposed Initial Litigation Schedule at 2-3 (June 27, 2019) (Proposal).

The Proposal listed three issues that it represented would have case-wide applicability. The third issue was: "SDID asserts a priority date of 1877, prior to the enactment of Arizona's 1919 Water Code. Based on this pre-code priority date, SDID asserts that its water rights are not subject to forfeiture for non-use under Arizona's subsequently enacted forfeiture statute, A.R.S. §45-189." Proposal at 4. A status hearing was held on August 15, 2019 to consider St. David Irrigation District's proposal to try the cases in phases and the specific issues that should be the subject of the first phase. No party objected to the Proposal and it was approved along with the list of issues to be resolved. *See* Minute Entry filed August 21, 2019.

Thus, the question at issue is not moot. It is the subject of objections filed to water rights in this case. St. David Irrigation District raised the issue approximately six months before SRP filed its motion. St. David Irrigation District joined with the motion and supported the arguments advanced. Salt River Project simply took the initiative to brief an issue identified by St. David Irrigation District that had already been determined to be necessary for resolution of this litigation.

The parties in this case have adversarial positions with respect to this issue. St. David Irrigation District claims water rights with pre-1919 priority dates on behalf its members. The current landowners shown in Table 2, who own a part or all of the lands included in the Watershed File Reports identified in Table 1, have given express written consent to St. David Irrigation District, to act on their behalf in this case. *See* St. David Irrigation District’s List of Landowners, filed August 18, 2018. The United States, Gila River Indian Community, San Carlos Apache Tribe, Tonto Apache Tribe, and the Yavapai-Apache Indian Community, Camp Verde Reservation oppose the granting of water rights claimed, among other reasons, due to ADWR’s finding that the land has not been irrigated for five successive years.

Watershed File Report	Owner reported by Cochise County Assessor	Tax Parcel No.
112-17-ACC-026	Mattson, Ryan Allan	12014005E
112-17-ACC-026	JL & LRK Brimhall Trust	12014005G 12012001J
112-17-DBA-122	Driggs, Terisha	12111001A
112-17-DBA-151	Haymore, Peter & Adele Judd	12114025R
112-17-DBA-151	Judd, Barry Wade & Carmen	12114027A
112-17-DBA-151	Haynie, Bradley E & Connie	12106004 12106021
112-17-DBD-009	Judd, Virgil J & Michele Elaine	12122013
112-17-DBD-030	Health Care Innovations	12122004F 12121029Q
112-17-DBD-030	Enclave St David LLC	12122004E (among numerous other tax parcels)

TABLE 2.

SOURCE OF INFORMATION: St. David Irrigation District’s List of Landowners, filed August 18, 2018.

Finding of Fact 2. St. David Irrigation District on behalf of its members and relevant landowners claims rights to water for irrigation use with a priority date prior to 1919 that ADWR investigated and reported had not been in use for five successive years.

Finding of Fact No. 3. The United States, Gila River Indian Community, San Carlos Apache Tribe, Tonto Apache Tribe, and the Yavapai-Apache Indian Community, Camp Verde Reservation object to the claims in part or in whole because ADWR determined that they had been idle for more than five years.

Finding of Fact No. 4. St. David Irrigation District joined the motion filed by SRP seeking a determination as a matter of law that pre-1919 water rights cannot be lost if they have been idle for more than five years, i.e., statutorily forfeited.

Conclusion of Law No. 1. The issue raised by SRP's motion for partial summary judgment is not moot, it will be fully developed by true adversaries, and sufficient standing has been shown to proceed with the resolution of the issue that has been designated as one of three issues in the first phase of the case.

C. Arizona Supreme Court Ruling

Salt River Project contends that pre-1919 water rights are not subject to statutory forfeiture because language in the 1919 Water Code protects those rights from loss due to forfeiture. In 1995, the Arizona Legislature enacted laws that explicitly exempted pre-1919 rights from statutory forfeiture. In 1999, the Arizona Supreme Court struck down the 1995 statutes as unconstitutional. *San Carlos Apache Tribe v. Superior Court ex. Rel. Cty. of Maricopa*, 193 Ariz. 195, 972 P.2d 179 (1999) (“*San Carlos*”). The *San Carlos* ruling presents a threshold issue: Did the Arizona Supreme Court decide that statutory forfeiture applies to pre-1919 rights?

In 2017, the Ninth Circuit of Appeals held that the *San Carlos* Court had reached the decision and concluded that pre-1919 water rights may be forfeited. *United States v. Gila Valley Irr. Dist.* 859 F.3d 789 (9th Cir. 2017). Decisions of the federal court on issues of state law do not control the state courts. *Planning Group of Scottsdale, L.L.C. v. Lake Mathews Mineral Properties, Ltd.*, 226 Ariz. 262, 267, ¶ 22 (2011). Accordingly, the *Gila Valley Irr. Dist.* decision does not dictate the resolution of the issue presented here.

The Arizona Supreme Court considered the issue of statutory forfeiture of pre-1919 water rights in the context of a constitutional challenge to the legislation enacted in 1995. The legislature revised Ariz. Rev. Stat. §§45-141(C) and added 45-188(B), among numerous other provisions of Title 45, to render statutory forfeiture of water rights inapplicable to pre-1919 rights. It added the bolded language to Ariz. Rev. Stat. §45-141(C):

C. Except as otherwise provided in this title or in title 48, 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. This subsection or any other statutory forfeiture by nonuse shall not apply to a water right initiated before June 12, 1919.

It added new subsections to A.R.S. §45-188(B) which made abandonment the only basis for relinquishment of a water right initiated before June 12, 1919:

B. Any person who is entitled to divert or withdraw public waters of the state through an appropriation initiated before June 12, 1919 and evidenced by a Notice of Appropriation, a court decree, previous possession or continued beneficial use or any other action taken in accordance with federal, state or territorial law existing at the time of the appropriation and who intentionally abandons its use relinquishes that right. The rights relinquished revert to the state, and the water affected by those rights become available for appropriation to the extent they are not lawfully claimed or used by existing appropriators.

The San Carlos Apache Tribe, Tonto Apache Tribe and Yavapai Apache Tribe, Camp Verde Reservation (the Apache Tribes) filed a special action with the Arizona Supreme Court to challenge the constitutionality of the legislation. The Arizona Supreme Court remanded the case to Judge Bolton, the superior court judge appointed to the general adjudications. Judge Bolton concluded that the newly enacted provisions violated Article III of the Arizona Constitution: “Attempted declarations of the meaning of existing law by the legislature violates the separation of powers doctrine and, is therefore unconstitutional”. Contested Case No. W1-100 Special Action Proceedings, Nos. W-1, W-2, W-3, W-4 (Ariz. Sup. Ct. Aug. 30, 1996) (“Bolton Order”) at 8. On review, the Court affirmed Judge Bolton’s decision that the legislation violated the Arizona Constitution, but did so based on a different constitutional provision. The Court held that statutes that “retroactively alter vested substantive rights violate the due process clause of Article II, section 4 of the Arizona Constitution.” *San Carlos* at 205-206, ¶16, 972 P.2d at 189-190.⁴

The due process clause safeguards property interests protected by the Arizona Constitution. Protected property interests are “‘defined by existing rules or understandings that stem from an independent source such as state law.’ [citation omitted] Such interests attain constitutional status ‘by virtue of the fact that they have been initially recognized and protected by state law.’ [citation omitted].” *Alpha, LLC v. Dartt*, 232 Ariz. 303, 306, ¶ 12, 304 P.3d 1126, 1129 (App. 2013). A water right subject to the general adjudications is a protected property interest. *San Carlos* at 205, ¶15, 972 P.2d at 189. A water right consists of individual attributes that fully define the right. Among those attributes is the priority date that establishes a water right holder in the hierarchy of senior and junior water rights created by the state’s adoption of the doctrine of prior appropriation – first in time, first in right. Under the operation of this doctrine, the loss of a water right by one holder advances the rights junior to the forfeited right

⁴ Later in its decision, the Court rejected the state parties’ request to “uphold all changes on a truly prospective basis, interpreting and applying the statutes to affect only the future consequences of future events,” on the additional ground that “we find a significant portion of HB 2276 unconstitutional under the separation of powers doctrine of article III of the Arizona Constitution.” *Id.* at 209, ¶ 29, 972 P.2d at 193. The Court did not, however, identify the specific statutes or part of statutes that violated the separation of powers doctrine.

thereby making the junior rights more valuable as they secure water rights with greater seniority.

Protected rights, such as rights to appropriable water, which are substantive, as opposed to procedural, and vested cannot be adversely impacted by statutes that apply retroactively. *See Hall v. A.N.R. Freight System, Inc.*, 149 Ariz. 130, 140, 717 P.2d 434, 444 (1986). In *Hall*, the Court considered the constitutionality of a statute that significantly impaired a tortfeasor's defense of contributory negligence. It determined that substantive rights may not be impaired by a statute once the rights have vested. In *San Carlos*, the Court relied on the *Hall* analysis to summarize the controlling rule. Legislation that retroactively alters vested substantive rights violates the due process guarantee of the Arizona Constitution. *San Carlos* at 205, ¶15, 972 P.2d at 189.

No dispute exists that the Court determined that a right to water along with its defined priority date qualifies as a substantive vested protected right, the statutes at issue in this case operated retroactively, and the statutes were unconstitutional. The parties do dispute whether the decision also affirmatively determined that pre-1919 water rights were subject to statutory forfeiture.

Freeport Minerals Corporation argues that the Court did not reach the question because the findings that the law affected substantive, vested rights and it operated retroactively were sufficient to strike down the legislation as unconstitutional. In the context of an examination of a statute subject to a constitutional challenge, the term "retroactive" does not mean that the Court narrowly determined that the statute relates to past events or pre-existing conditions. *Hall* at 139, 717 P.2d at 443. A court will not conclude that a law is retroactive simply because the law applies to substantive rights that vested before the passage of the new law. *San Carlos* at 205, ¶16, 972 P.2d at 189. The Court must also find that the Legislature "change[d] the legal consequences of events completed before the statute's enactment". *Id.* Applying this test, the Court found that the new statutes' protected pre-1919 water rights from statutory forfeiture (the legal consequence) of water not used for five consecutive years between 1919 and 1995 (event completed before the 1995 legislation).

The Court did not halt its analysis at this point. It found that the statutes created new rights and altered the substantive, vested rights of post-1919 water rights user. Specifically, with respect to A.R.S. §§45-141(C) the Arizona Supreme Court held:

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

Id. at 206, ¶17, 193 P.2d at 190.

Contrary to arguments advanced by the parties that the final sentence of the preceding paragraph is an invitation to litigate the law of forfeiture for particular pre-1919 rights in future proceedings, the final sentence is the logical corollary to the rule that a 1995 law cannot cause or prevent a forfeiture based on events that occurred prior to 1995.

As to 45-188(B), the Court held:

Sections 45-188(A), (B), and (C) likewise impermissibly affect vested substantive rights. The 1974 version of 45-188 provided simply that a water right could be lost through abandonment or forfeiture (nonuse, without sufficient cause for five years), without reference to the date the right was initiated. Subsection (A) and (B) of the 1995 version, however, limit nonuse forfeiture to those rights initiated on or after June 12, 1919. [footnote omitted] The effect of the 1995 statutory amendment is to negate the forfeiture provisions of the 1974 statute. Given that some claims may be based on rights or priorities acquired through forfeiture or otherwise senior rights after 1974, the provisions added to 45-188 were undoubtedly intended to alter the legal consequences of pre-enactment events. Some otherwise junior appropriators may have already advanced in priority due to forfeited water rights. The forfeited senior rights cannot be revived by legislation passed in 1995.

...

These provisions all alter the law regarding the creation, appropriation, retention, priority, abandonment, or forfeiture of previously vested water rights and are thus substantive changes. They are retroactive because they may alter the vested consequences of past events. Legislation that changes the rules governing the legal consequences of past events violates article II, section 4 of the Arizona Constitution. [citation omitted]

Id. at 207, ¶¶ 22-23, 193 P.2d at 191.

Conclusion of Law No. 2. A law violates the due process clause when it affects, alter, impairs, or disturbs vested substantive rights based on events that occurred prior to the passage of the law.

Like Freeport Minerals Corporation, the Salt River Project argues that the Court based its decision on a very narrow finding. It summarizes the Court's analysis as "whatever the law was prior to 1995, the Legislature could not change it in 1995." Salt River Project's Reply to the Gila River Indian Community Response at 7 (June 5, 2020). Salt River Project reasons that the Court could not have actually determined whether pre-1919 rights had been subject to statutory forfeiture prior to 1995 because the Court did not discuss provisions in the 1919 Water Code and A.R.S. §45-171 that SRP contends constitute savings clauses intended to protect pre-1919 rights from statutory forfeiture. This interpretation of the breadth of the foundation for the *San Carlos* decision does not

take into account the type of constitutional attack mounted or the test applied by the Court to strike down the statutes as unconstitutional.

The Apache Tribe asserted a facial challenge as opposed to an “as-applied” challenge to the 1995 legislation. A facial constitutional challenge focuses on whether the law itself is unconstitutional, not whether the application of the law violates the rights of particular person. *Phelps Dodge Corp. v. Arizona Elec. Power Co-op., Inc.*, 207 Ariz. 95, 109, ¶ 46, 83 P.3d 573, 587 (App. 2004), *as amended on denial of reconsideration* (Mar. 15, 2004); see also *Arizonans for Second Chances v. Hobbs*, No. CV-20-0098, ¶39 (Az. Sup. Ct., filed September 4, 2020). In this context, Court had to consider whether the new statutes in the context of a multitude of facts and circumstances would retroactively impair existing vested water rights held by thousands of senior and junior users. Based on its citation to *Chevron Chem. Co. v. Superior Court*, 131 Ariz. 431, 641 P.2d 1275 (1982), the Court had to be satisfied beyond a reasonable doubt that the statutes violated the state constitution before they could be stricken as unconstitutional. The Court could not have met this test by limiting its analysis to equating new statutory language with an impermissible legislative attempt to retroactively change an existing law governing a substantive right. As argued by the Gila River Indian Community, the Court had to move beyond the language of the statutes and examine the law as it existed prior to 1995 to be able to decide whether the 1995 statutes altered existing pre-1919 rights.

Conclusion of Law No. 3. The Arizona Supreme Court considered the law governing statutory forfeiture of pre-1919 rights as it existed prior to 1995.

The finding necessitated by the scope of and the tests applied in the *San Carlos* decision discussed above and the nature of the contested right involved support the conclusion that the Arizona Supreme Court found that pre-1919 water rights are subject to statutory forfeiture. The specific subject of the two contested statutes is a right intended to attach to a limited class of water rights to protect those water rights from statutory forfeiture. The Ninth Circuit characterized that attribute as part of a set of attributes that comprise a water right held a certain class of holders. In *United States v. Orr Water Ditch Co.*, 256 F.3d 935, (9th Cir. 2001), the Court considered whether Nevada water rights vested prior to the enactment of a statutory forfeiture statute were subject to the statute. It reasoned:

these holders [of the water rights] had obtained or initiated appropriations of their rights on the understanding that those rights would not be subject to forfeiture. Indeed, with respect to those individuals, the statute could be more than just unfair; it could even be unconstitutional, for its removal of one stick from the bundle of sticks comprising a water right would be seen as an unconstitutional taking of property.

Id. at 941-42.

Like a stick in a bundle of sticks, the right to be free of statutory forfeiture either exists or it does not. The determination of existence of the right for the class of holders of pre-1919 is, thus, strictly binary. In *Orr Water Ditch Co.*, the court found the right

existed. The impact of the absence or existence of the right held by a senior holder on a junior water holder is equally uncomplicated. Either the priority position of the junior water right holder changes or it does not depending upon the absence or existence of the right in a forfeiture setting. The *San Carlos* Court explicitly found that the statutory amendments that protected pre-1919 water right holders from statutory forfeiture changed the legal consequences that would otherwise apply to that class. It found that statutes altered vested, substantive rights. The findings are not dicta because they are integral to the Court's finding that the statutes violated the due process clause. In a binary setting where the statutes create a stick, the only basis for the Court's finding that the statute changed the legal consequences and altered rights is a determination that the stick did not exist.

Conclusion of Law No. 4. The Arizona Supreme Court found that pre-1919 rights were subject to statutory forfeiture.

The decision of the Arizona Supreme Court binds the lower state courts. *State v. Thompson*, 194 Ariz. 295, 298, ¶ 20, 981 P.2d 595, 598 (App. 1999). Its determination that pre-1919 rights are subject to statutory forfeiture is determinative of the issue raised so no further consideration is given to the remainder of the parties' arguments.

IT IS ORDERED denying Salt River Project's motion for summary judgment because the Arizona Supreme Court has determined that rights to appropriable water vesting prior to June 12, 1919 are subject to forfeiture if after June 12, 1919 the owner of the right to use water fails or ceases to use the water for five successive years.

A copy of this order is mailed to all persons listed on the Court-approved mailing list.