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 (Salt) W-2 (Verde) W-3 (Upper Gila) W-4 (San Pedro) Consolidated Contested Case No. W1-11-0245 (Consolidated with Contested Cases Nos. W1-11-3359 and W1-11-3367) REPORT OF THE SPECIAL MASTER

CONTESTED CASE NAME: *In re Town of Huachuca City*

HSR INVOLVED: San Pedro River Watershed Hydrographic Survey Report.

DESCRIPTIVE SUMMARY: Final Report issued under Ariz. R. Civ. P. 53. Objections to the Report must be filed with the Clerk of the Superior Court of Maricopa County on or before **November 22, 2021**. Responses to objections are due on or before **January 3, 2022**. Oral argument on any objections will be held at a time and place to be set by the Court.

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This Report addresses two issues of broad legal importance regarding well owners who seek adjudicated rights to appropriable water with a post-1919 priority date pumped from wells located in the subflow zone.[1] The specific issues are:

1. Is the process set out in the 1919 Arizona Surface Water Code and subsequent versions of that statute the exclusive method for a well owner who has filed a statement of claimant under A.R.S. § 45-254 to obtain an appropriative water right in Arizona for water pumped from a well located in the subflow zone with a priority date after June 12, 1919?

2. Does the adjudication court have equitable powers to decree an appropriative water right for a claimant who began withdrawing water from a well located within the subflow zone after June 12, 1919, but did not comply with the 1919 Arizona Surface Water Code and subsequent versions of that statute?

Numerous parties extensively briefed these two issues and appeared in an evidentiary hearing involving three specific well owners.[2] ASARCO, LLC, Arizona Public Services Company, Arizona State Land Department, BHP Copper, Inc., Michael and Susan Cavender, City of Cottonwood, Franklin Irrigation District, Freeport Minerals Corporation, Gila Valley Irrigation District, Lauri Mercer, Michael Mercer, Mercer Ranch Land Holdings LLC, and Sombrero Butte Cattle, LLC (collectively referred to as "the Jointly Responding Claimants" or "JRC"), City of Chandler, City of Flagstaff, City of Mesa, City of Phoenix, City of Prescott, Gila River Indian Community, Salt River Project, San Carlos Apache Tribe, the Tonto Apache

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[1] The scope of the issue is limited to rights asserting a post-1919 priority date. Not addressed by this proceeding are surface water rights acquired prior to June 12, 1919 through a land grant, by court decree, under Spanish law, the Territorial Code or through beneficial use acquired prior to 1919 that are accessed by a well drilled in the subflow zone after 1919.

[2] The evidentiary hearing was not intended to and does not constitute an adjudication of the water rights of the three well owners, the Town of Huachuca City and Michael and Susan Cavender. The evidentiary hearing was held at the request of the Jointly Responding Claimants and the Town of Huachuca City to provide specific factual settings in which to consider the second issue.

Tribe, the Town of Huachuca City, the United States, and the Yavapai-Apache Nation actively participated in part or all of the litigation of the two designated issues.

I. Issue 1: Legal Basis for Appropriable Water Right

Arizona adopted the doctrine of prior appropriation to govern a person's legal rights to use water from a broad range of appropriable water sources. *Phelps Dodge Corp. v. Arizona Department of Water Resources,* 211 Ariz. 146, 149, ¶13, 118 P.3d 1110, 1113 (App. 2005); *Slosser v. Salt River Valley Canal Co.,* 7 Ariz. 376, 65 P. 332 (1901). Historically, a water user acquired a right under this doctrine by applying water to a beneficial use on a particular piece of land. *Slosser,* 7 Ariz. at 388-389, 65 P. at 336. Earlier appropriators of water own rights with higher priority rights than owners who acquired rights by later appropriations. *Id.* at 391, 65 P. at 337. The required process to establish water rights has undergone several changes over the past century. Consequently, the law in effect at the time the rights are acquired dictates the requirements that a water user must satisfy to obtain an enforceable right. *Parker v. McIntyre*, 47 Ariz. 484, 489, 56 P.2d 1337, 1339 (1936).

Between 1893 and 1919, an appropriator could establish a legal right to water by posting and filing a notice of intent with the county recorder and putting the water to a beneficial use within a reasonable time, or the appropriator could simply put the water to a beneficial use. *Phelps Dodge Corp.,* 211 Ariz. at 149, ¶ 16, 118 P.3d at 1113. On June 12, 1919, the Arizona legislature changed the process and the requirements for the acquisition of an appropriative water right when it enacted the Arizona Surface Water Code (the "1919 Code"). The 1919 Code applied to "[t]he water of all natural streams, or flowing in any canyon, ravine or other natural channel, or in definite underground channel, and of springs and lakes, belongs to the public, and is subject to beneficial use as herein provided." 1919 Sess. Law, 4th Leg., ch. 164, § 1. Although

the legislature subsequently amended the definition of appropriable water, the current statute retains the core definition from the 1919 Code. It states:

> The waters of all sources, flowing in streams, canyons, ravines or other natural channels, or in definite underground channels whether perennial or intermittent, flood, waste or surplus water, and of lakes, ponds and springs on the surface, belong to the public and are subject to appropriation and beneficial use as provided in this chapter.

A.R.S. §45-141(A).

In addition to the definition of appropriable water, the 1919 Code also initiated new procedures to legally appropriate water. No longer did the law allow a person to establish a right to appropriable water simply by putting the water to a beneficial use. The 1919 Code required a person to file an application with the appropriate state agency. The statute mandated:

> Any person, association or corporation, municipality or the State of Arizona or the United States of America hereafter intending to acquire the right to the beneficial use of any waters shall, before commencing the construction, enlargement or extension of any dam, ditch, canal or other distributing or controlling works, or performing any work in connection with said construction or proposed appropriation, make an application to the Commissioner for a permit to make such appropriation.

1919 Ariz. Sess. Laws, ch, 164, § 5.

Subsequent amendments to the 1919 Code consistently retained the requirement that a person or entity must file an application with the state agency to acquire a legal right to appropriable water. *See* Ariz. Code Ann. § 75-105 (1939). The current version of the statute provides: "Any person, including the United States, the state or a municipality intending to acquire the right to the beneficial use of water, shall make an application to the director of water resources for a permit to make an appropriation of the water." A.R.S. § 45-152(A). Pursuant to the rules of statutory construction, the legislature's decision to use the word "shall" in a statute normally indicates a mandatory, as opposed to directory, requirement. *Joshua J. v. Arizona*

Dep't of Econ. Sec., 230 Ariz. 417, 421, 286 P.3d 166, 170 (App. 2012). Here, the legislature's use of "shall" in each iteration of the statute indicates a legislative intent that a right to appropriable water under Title 45, Chapter 1, Article 5 of Arizona Revised Statutes requires an application to and a permit and certificate from the designated agency unless the statute explicitly directs to the contrary for a specific type of water use.

The decisions issued by the Arizona Supreme Court confirm that a water user must comply with the statutory requirements to obtain an appropriable water right. In 1935, the Court held that the failure of a party to comply with the 1919 Code resulted in no enforceable right to appropriable water. *In re Determination of Relative Rights to Use of Waters of Pantano Creek in Pima County*, 45 Ariz. 156, 41 P.2d 228 (1935). In *Pantano Creek*, the Court held:

> In 1919 the New Water Code went into effect. After that time, it was no longer possible to appropriate water under the law of Arizona for the purpose of irrigation by its mere beneficial use for that purpose upon land. Certain formalities were required to initiate and perfect the right. It does not appear from the record that these formalities were ever complied with so far as the Monthan land was concerned. We are therefore of the opinion that no right to the use of water for that land has ever been legally acquired by anyone.

45 Ariz. at 174, 41 P.2d at 235-36.

In the following year, the Court issued its decision in *Parker v. McIntyre*, *supra*, in which it again addressed the mandatory process required to perfect an appropriable water right: "In 1919 the Water Code (laws 1919, ch. 164) provided a more elaborate and exclusive method of making an appropriation. Any person desiring to do so was required to make a formal written application to the commissioner, describing quite fully the nature, purpose, and manner of the intended appropriation." *Parker*, 47 Ariz. 486, 56 P.2d at 1339. Decades later, in a case brought to challenge the authority of Arizona Department of Water Resources ("ADWR") to issue a permit for instream flow, the Arizona Court of Appeals found that the process to obtain an

appropriable water right required the filing of an application for a permit to appropriate water. *See Phelps Dodge Corp. v. Department of Water Resources,* 211 Ariz. at 148, ¶11, 118 P.3d at 1112.

The JRC and the Cities of Chandler and Prescott argue that well owners who pump appropriable water are exempt from the rules governing the acquisition of appropriable water rights. They begin with arguments based on the rules of statutory construction. Highlighting the absence of the word "subflow" in the list of sources of appropriable water in A.R.S. §45-141(A), they argue that the legislature could not have intended to include subflow as a source of appropriable water because the legislature was unaware of subflow when it enacted the 1919 Code. These parties also point to the fact that the legislature has not amended the 1919 Code to require well owners to obtain a permit to pump subflow. According to their analysis, the absence of a specific mention of subflow in the statute means that the legislature did not intend to impose the same requirements on persons who appropriate subflow that apply to all other persons who appropriate water from the sources explicitly listed in A.R.S. § 45-141(A).

More than ninety years ago, the Arizona Supreme Court construed that portion of the 1919 Code that defined appropriable water sources, which included "water of all natural streams," as encompassing the subflow of the stream. *Maricopa County Mun. Water Conservation Dist. No. 1 v. Southwest Cotton Co.*, 39 Ariz. 65, 4 P.2d 369 (1931), *reh'g denied and opinion modified,* 39 Ariz. 367, 7 P.2d 254 (1932) ("*Southwest Cotton*").[3] The *Southwest Cotton* Court held that

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[3] "When *Southwest Cotton* was decided, subflow was a well-known water law concept." *In re General Adjudication of All Rights to Use Water in the Gila River Sys. & Source*, 175 Ariz. 382, 389, 857 P.2d 1236, 1243 (1983) ("*Gila II*"). In 1924, prior to the decision in *Southwest Cotton* litigation, two certificates for water rights were issued under the 1919 Code to a well owner for "underground flow in Alder Canyon" with a 1923 priority date. [Tr. 042821:56; SRP Exh. 1, 2]

subflow is an integral part of streamflow, finding that "physically [subflow] constitute[s] a part of the surface stream itself." *Id.* at 96, 4 P.2d at 380. It described subflow as "those waters which slowly find their way through the sand and gravel constituting the bed of the stream, or the lands under or immediately adjacent to the stream and are themselves a part of the surface stream." *Id.* It distinguished subflow from water in definite underground channels and concluded "they are nevertheless subject to appropriation as being the subflow of the Agua Fria River." *Id.* at 95-96, 4 P.2d at 380.

The Court has continued to apply the *Southwest Cotton* construction of the 1919 Code and the subsequent statutes and held that subflow is appropriable water. *In re the General Adjudication of All Rights to Use Water in the Gila River Sys. & Source*, 198 Ariz. 330, 333, ¶1, 9 P.2d 1069, 1072 (1983) (*"Gila IV")* ("the primary issue we consider here is whether, after remand in *Gila River II*, the trial court properly determined what underground water constitutes subflow of a surface stream, thus making it appropriable under A.R.S. § 45-141(A)."); *Gila II*, 175 Ariz. at 391, 857 P.2d at 1245 ("It seems clear that the court considered subflow and tributary groundwater to be two different classes of underground water. The former is subject to appropriation under the predecessor of A.R.S. 45-141(A); the latter is not."); *In re the General Adjudication of All Rights to Use Water in the Gila River Sys. & Source*, 195 Ariz. 411, 415, ¶8, 989 P.2d 739, 743 (1999); *Bristor v. Cheatham,* 75 Ariz. 227, 238, 255 P.2d 173, 180 (1953) (Groundwater case holding: "Certainly it will be necessary for the plaintiffs to prove prior appropriation in accordance with the law in existence at the respective times they claim such appropriations were made . . ."). When the court interprets a statute, the doctrine of *stare decisis* weighs on the court in future cases that present the same issue to "promote reliability so that parties can plan activities knowing what the law is." *Galloway v. Vanderpool,* 69 Ariz. at 257, ¶16, 69 P.3d at 28. In later decisions, the court will be reluctant, absent compelling reasons, to revise its statutory construction of a statute because

that departure from precedent arguably rises to the level of an amendment of the statute. *Id.* at 257, ¶17, 69 P.3d at 28.

The Court's interpretation of a statute is considered "part of the statute as if originally so written." *Local 266, Int'l Bhd. of Elec. Workers v. Salt River Project Agric. Improvement & Power Dist.*, 78 Ariz. 30, 44, 275 P.2d 393, 407 (1954). When the legislature subsequently amends the statute but does not modify the statute to change the court's interpretation, the legislature is presumed to intend that the court's construction remain a part of the statute. *Galloway v. Vanderpool*, 205 Ariz. 252, 257, ¶17, 69 P.3d 23, 28 (2003); *Madrigal v. Industrial Commission*, 69 Ariz. 138, 144, 210 P.2d 967, 973 (1949) ("It is universally the rule that where a statute which has been construed by a court of last resort is reenacted in the same or substantially the same terms, the legislature is presumed to have placed its approval on the judicial interpretation given and to have adopted such construction and made it a part of the reenacted statute."). The current version of the 1919 Water Code enacted by the legislature does not contain a modified definition of the sources of appropriable water inconsistent with the interpretation consistently applied by the Court. Thus, under the applicable rules of statutory construction, the sources of appropriable water listed in A.R.S. § 45-141(A) include subflow and the inclusion of the term is deemed consistent with legislative intent.

The parties also challenge the application of the appropriation statutes to well owners based on a statutory construction argument concerning A.R.S. §45-152(A). The statute provides: "Any person, including the United States, the state or a municipality intending to acquire the right to the beneficial use of water, shall make an application to the director of water resources for a permit to make an appropriation of water." Focusing on the use of the word, "intending", they posit that the statute cannot apply to owners of wells pumping subflow unless the owner had actual knowledge that the water pumped was subflow and not percolating groundwater. In other words, if the well

owner believes that the well pumps percolating groundwater and unintentionally pumps subflow, the appropriation statutes do not apply because the owner did not intend to appropriate water.

The "intent" in A.R.S. §45-151(A) refers to an intent to acquire a legal water right. The statute should not be read to excuse persons who did not understand the legal classification of the water from following the law applicable to that class of water. In *Frank R. v. Mother Goose Adoptions*, 243 Ariz. 111, 402 P.3d 996 (2017), the court refused to accept a fact-based excuse for noncompliance with the statute because the result would be inconsistent with the legislative purpose for enacting the statute. In that case, Frank R. decided to file a paternity suit instead of timely registering as a putative father and lost his parental rights to his daughter. The Court stated: "Although requiring compliance with the statute may sometimes result in a harsh outcome, requiring the court to make an individualized, post-adoption determination of whether the father's conduct reasonably complied with the statutes' purpose would undermine legislative intent and the finality of adoptions." 243 Ariz. at 116, ¶25, 402 P.3d at 1001. Similarly, in this situation, a requirement that the court make an individualized determination of the subjective intent of each well owner would undermine the legislative purpose of providing a single, definitive set of rules that apply to all persons who appropriate water listed in A.R.S. § 45-141(A) and govern the relative priorities of those rights among water users.

The City of Prescott also makes a statutory argument. According to the City of Prescott the Water Rights Registration Act, §§45-181 through 45-190, provides an alternative route for the owner of a well pumping subflow to obtain an adjudicated water right. The Water Rights Registration Act allows a person to file a claim for water rights that have a legal basis under existing law. A.R.S. §45-183(A)(7). While the Water Rights Registration Act contains a provision that could cause a loss of a right (A.R.S. §45-184), it contains no provision for the creation of a legal basis for a right. This interpretation of the Water Rights Registration Act is consistent with

the legislative intent: "The purpose of this act is to provide adequate records for efficient administration of the pubic water of the state and to cause a return to the state of any water rights which are no longer exercised by putting such waters to beneficial use." 1974 Ariz. Laws, ch. 122, §1.

Moving past arguments based on the language of the controlling statutes, the JRS asserts that the 1919 Code and successor statutes, however construed, do not apply to well owners pumping subflow because the common law governs the acquisition of a legal right to withdraw subflow. The JRC contends that *Southwest Cotton* created a common law rule for pumpers of subflow that conveys an appropriable right to the well owner when the well owner can prove that the pumped water has been put to beneficial use. The principle support for the argument is the sentence in the *Southwest Cotton* decision concerning waters from a second group of the plaintiffs' wells: "So far as we are concerned, if the evidence shows plaintiffs have applied [the waters] to beneficial use, and have not since forfeited or abandoned such use in whole or in part, they are entitled to have any rights so acquired protected." 39 Ariz. at 101, 4 P.2d at 382. The JRC interprets this sentence as a decision by the Court that a person seeking an appropriable water right to subflow only had to comply with the pre-1919 procedures, i.e., putting the water to beneficial use, and not the statutory requirements first enacted as part of the 1919 Code.

The Arizona State Land Department conducted research and prepared a report about the wells involved in *Southwest Cotton* to argue that the appropriate priority date for water from Southwest Cotton's wells was post-1919. The *Southwest Cotton* Court, however, made its decision based on the record before it, not based on a current report prepared by the Arizona State Land Department. The record available to the Court included the trial court's Statement of Facts, Conclusions of Law and Decree that repeatedly found that Southwest Cotton Company had a vested, perfected water right with a priority date of February 15, 1909, and that the priority date

was prior in time and superior to the right asserted by the defendants. Findings of Fact, Conclusions of Law and Decree, Case No. 23060, Superior Court of Maricopa County at 24-25, 32-33 (November 26, 1929).[4] On appeal, the Court upheld the trial court's determination that the priority dates that would attach to any appropriable rights that Southwest Cotton could establish during a trial on remand to the trial court were superior to those of the defendant. *Id.* at 103-104, 4 P.2d 383 ("the trial court correctly held that the rights of plaintiffs, so far as such rights existed at all, were prior to those of defendants."). Thus, the *Southwest Cotton* Court's statement upon which JRC's bases its argument was a simple affirmation that the law in effect in 1909 would apply to any rights proven by Southwest Cotton upon remand to the trial court. The Court did not create a new common law procedure applicable to post-1919 appropriators of subflow.

This determination that no new common law rules arose from the decision is buttressed by the *Southwest Cotton* Court's recognition that only one of two sets of rules could apply to water pumped from a well:

> But, considered as strictly a part of the stream, the test is always the same: Does drawing off the subsurface water tend to diminish appreciable and directly the flow of the surface stream? If it does, it is subflow, and subject to the same rules of appropriation as the surface stream itself, if it does not, then, although it may originally come from the waters of such stream, it is not, strictly speaking, a part thereof, but is subject to the rules applying to percolating waters.

Id at 96-97, 4 P.2d at 380-381. The Court found that the existing bifurcated system of water law applied to well owners. It did not create a trifurcated system.

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[4] A copy of the trial court's decision is attached as Exhibit A to the *Reply of Cities of Mesa and Phoenix to the Two Issues of Broad Legal Importance Designated by the Special Master on June 18, 2020* filed February 12, 2021.

Not only did *Southwest Cotton* not create a third set of rules to govern rights to water use, it expressly rejected the proposition that Arizona relies on the common law to govern appropriable water. In its discussion of the development of water law in Arizona and the contribution of the common law, the Court affirmed that statutes enacted by the legislature and not common law created by the courts govern appropriable water right:

> [T]he law of prior appropriation as it now exists in Arizona, that, regardless of previous custom, is binding authority as general law and a declaration of the field which it covers is primarily statutory, so that many questions which in other jurisdictions have been determined as matters of judicial construction based on necessity, reason, analogy and convenience, with us merely involve an interpretation of the language of our statutes, using the ordinary statutory canons.

Id. at 79, 4 P.2d at 374.

Given the Court's explicit recognition that statutes control the appropriation of water, no reasonable inference can be drawn from the language of the decision that the *Southwest Cotton* Court intended to create a separate common law to govern the appropriation of subflow. The *Gila II* court reached the same conclusion: "It is important to remember that the *Southwest Cotton* Court did not create an all-encompassing set of common law principles. It purported, instead, to interpret the relevant statutes codifying the doctrine of prior appropriation and identifying the water sources to which the doctrine applied. Those statutes remain relatively intact. *See* A.R.S. § 45-141." *Gila II*, 175 Ariz. at 392, 857 P.2d at 1246.

Continuing with their argument that pumpers of subflow have rights to appropriate based on the common law, the JRC asserts that those rights rise to the level of constitutionally protected property rights. In support of this position, the JRC cites to the Court's decision that "holders of water rights are constitutionally entitled to due process in any adjudication that would deprive them of their rights." *In re the Matter of the Rights to the Use of the Gila River,* 171 Ariz. 230, 235, 830 P.2d 442, 447 (1992) ("*Gila I*"). The JRC concludes that a due process violation would

occur if the court were to determine that the pumped water is appropriable water and not percolating groundwater because such a finding would constitute an impermissible retroactive application of the requirements of the surface water code to the well owners.

As the Cities of Phoenix and Chandler explained, the Court has already addressed and rejected a similar argument. The *Gila IV* Court decided that a judicial determination of the physical boundaries of the subflow zone with its presumptive characterization that the water pumped from the designated area is appropriable water does not violate the constitutional rights of the well owners. *Gila IV,* 198 Ariz. at 1083, ¶ 47, 9 P.3d at 344. Moreover, the governance of subflow appropriation by the 1919 Code and the subsequent versions of that statute means that a person, who is pumping subflow and has not satisfied the statutory requirements, does not have an appropriable water right. *See, In re Determination of Relative Rights to Use of Waters of Pantano Creek in Pima County, supra.* Absent an appropriable water right, the well owner has no vested property appropriable water right to which due process protections can attach. In contrast, those persons who have complied with applicable appropriation statutes have constitutionally protected due process rights associated with their property interests, including their priority dates. *San Carlos Apache Tribe v. Maricopa County Superior Court,* 193 Ariz. 195, 208, 972 P. 2d 179, 192 (1999). Thus, constitutional due process requirements do not block the application of the statutes governing the appropriation of water to owners of wells pumping subflow.

Conclusion of Law No. 1: Subflow belongs to the public and is subject to appropriation and beneficial use as provided by the 1919 Arizona Surface Water Code and subsequent versions of the statute.

Conclusion of Law No. 2: The 1919 Arizona Surface Water Code and subsequent versions of the statute establish mandatory requirements that a well owner must satisfy to obtain an appropriable water right to subflow with a priority date after June 12, 1919.

Conclusion of Law No. 3: A claim filed under the Water Rights Registration Act does not create a legal right to appropriate subflow.

Conclusion of Law No. 4: A well owner pumping subflow beginning after June 12, 1919 does not have a common law right to appropriable water based on proof that the well owner put the pumped water to beneficial use.

Conclusion of Law No. 5: A well owner does not have a constitutionally protected right to appropriate subflow beginning after June 12, 1919 if the well owner has not successfully complied with the 1919 Arizona Surface Water Code and subsequent versions of the statute.

Conclusion of Law No. 6: The process set out in the 1919 Arizona Surface Water Code and subsequent versions of that statute is the exclusive method for a well owner who has filed a statement of claimant under A.R.S. § 45-254 to obtain an appropriative water right in Arizona for subflow with a priority date after June 12, 1919.

II. Issue 2: Equitable Relief

The second issue of broad legal importance raised in this contested case requires an examination of whether the adjudication court may grant equitable relief in the form of a decree of an appropriable water right to owners of wells located in the subflow zone who did not comply with the 1919 Code and subsequent versions of that statute. The Superior Court of Arizona does possess equitable authority, but that equitable authority should only be exercised when the law permits. *See Sertich v. Moorman,* 162 Ariz. 407, 412, 783 P.2d 1199, 1204. In this case, two

limitations on that equitable authority must be considered. When a statute clearly establishes and defines a party's rights, equity cannot be used to reach a result inconsistent with the statute. *McDermott v. McDermott*, 129 Ariz. 76, 628 P. 959 (1981); *Sparks v. Douglas & Sparks Realty Co.*, 19 Ariz. 123, 129 (1917); *Sult v. O'Brien,* 15 Ariz. App. 384, 385, 488 P.2d 1021, 1022 (1971). Also, when a legal remedy exists, the court cannot use its equitable authority to provide an equitable remedy. *Hunnicutt Const., Inc. v. Stewart Title and Trust of Tucson Trust No. 3496*, 187 Ariz. 301, 928 P.2d 725 (App. 1996); *see also Rogers v. Huckelberry*, 247 Ariz. 426, 430, ¶15, 450 P. 3d 1279, 1283 (App. 2019) (absence of any remedies entitled taxpayer to seek injunctive relief); *Valley Drive-In Theatre Corp. v. Superior Court*, 79 Ariz. 396, 400, 291 P.2d 213, 217 (1955) (court improperly substituted equitable relief, an injunction, for a legal remedy, a bond).

The Town of Huachuca City and the JRC sought an evidentiary hearing to establish a factual record to support general equitable relief for owners of wells in the subflow zone who do not have permits or certificates for appropriable water. The claimants involved were private landowners, Michael and Susan Cavender, and the Town of Huachuca City. At a status conference held on September 2, 2021, counsel for the claimants represented that their respective claimants do not have claims for water rights based on an appropriation of water put to beneficial use prior to June 12, 1919.

During the hearing, Michael Cavender testified about the purchase and operation of a ranch acquired as an investment property on which he runs approximately 100 cows and 5 bulls and pumps water. [Tr. 042621:21-22] Since 1996, Mr. Cavender has pumped water from the wells on the property to irrigate 160 acres to maintain a pasture for the cattle and to fill two ponds. [Tr. 042621:21-23, 33, 36] He believes the wells were drilled in 1951, 1959, and 1960, and that approximately half the value of the property would be lost without access to water from the wells. [Tr. 042621: 46 69]

The riverbed of Aravaipa Creek runs along a portion of the border of the Cavender property and is approximately 1,320 feet from the irrigation wells. [Tr. 042621:34] Mr. Cavender has, however, seen high flows in the river that are within a couple hundred yards of the wells. [Tr. 042621:101] Mr. Cavender testified that the riverbed is typically dry, and he has only seen streamflow following a rainstorm or snowmelt. [Tr. 042621:35, 36] He further testified that he first learned about the adjudication and subflow in 2007 when he retained counsel in response to a letter he received from ADWR about irrigation on the Cavender land. [Tr. 042621:37-38] Mr. Cavender said that he did not received any information about subflow or the General Adjudication at the time of the original purchase. [Tr. 042621:25, 27, 32] Mr. Cavender testified that he has taken no action to obtain a water right for the water pumped from the wells used on the property. [Tr. 042621:60]

Suzanne Harvey, the Town Manager of the Town of Huachuca City, testified that the municipal water system pumps approximately 200 acre feet per year from three wells to provide for the 1,730 town residents. [Tr. 042721: 16, 113] She testified that the Town of Huachuca City purchased the municipal water system from a private company that operated it from 1954 to 1967. [Tr. 042721:22, 25] The Town of Huachuca City continues to use one of the wells included in the original system which is known as the Cochise Well. [Tr. 042721:22, 25, 111-112] It is located in the subflow zone. Ms. Harvey expressed the concern that a loss of access to water from the Cochise Well and the need to redesign the water system could lead to bankruptcy because the municipality operates on a very small budget. [Tr. 042721:57]

The Cochise Well is about located about 750 to 1,000 feet from the incised channel of the Babocomari River, a tributary of the San Pedro River, and it is used to pump water to supply Lower Huachuca City. [Tr. 042721:63,117,118] Ms. Harvey and James Halterman, the Public Works Supervisor for the Town of Huachuca City, testified that they had either never seen water

flowing in the Babocomari River or had only seen water flowing for a day or two after a rainstorm during the monsoon season. [Tr. 042721:32, 66] No witness testified that the Town of Huachuca City has filed an application for a permit to appropriate water.

In addition to the fact witnesses, expert witnesses were called to testify that in each case the stream reaches in the subflow zone associated with the wells were ephemeral, meaning that those reaches were normally dry, but that they did flow in response to precipitation events. [Tr. 042721:110, 152, 160-161]

A. Statutory Rights

Water from the many sources, including subflow, listed in A.R.S. §45-141(A) belongs to the public, but a person is allowed to appropriate that water and put it to beneficial use as provided by the statutes enacted by the legislature in Chapter 1 of Title 45 of the Arizona Revised Statutes. A.R.S. §45-141. The JRC, the City of Chandler, and the City of Prescott argue that the rebuttable presumption that water pumped from wells is percolating groundwater constitutes a reason for the court to exercise its equitable authority to excuse well owner's lack of compliance with the controlling statutes.

The purpose of a presumption is to shift the burden of proving a decisive fact in a civil case. Ariz. R. Evid. 301. A presumption is simply an evidentiary rule that operates by requiring an initial determination that a particular fact is true once a specific underlying fact has been established. *In re John B. Rose Co.*, 275 F. 409, 413 (2d. Cir. 1921). A rule of evidence does not invalidate, change, or create an exception to a law; instead, it is a rule applicable to the proof of a fact to which the law is applied. The Court iu *Southwest Cotton* did not find that the presumption exempted the well owner from the laws applicable to the establishment of an appropriable water right. The Court acknowledged the existence of the presumption, required the plaintiff to

affirmatively prove that the water pumped from the wells met the test for subflow established by the Court, i.e., overcome the presumption that the well water was percolating groundwater, and concluded that the plaintiff would be entitled to appropriative water rights if it could also show that it met the requirements that applied to establish an appropriative right at the time the water was put to beneficial use.

Owners of wells in the San Pedro River watershed subflow zone engaged in litigation concerning water rights could invoke the rebuttable presumption that their wells pumped percolating groundwater prior to the completion and approval of the subflow zone developed by ADWR.[5] The JRC asserts that the well owners were also entitled to rely on the presumption as a basis for noncompliance with the 1919 Code and subsequent statutes. A decision to not seek appropriable water rights for water pumped from a well based on a rebuttable presumption does not excuse compliance with the appropriation statutes for a well pumping subflow. The court cannot exercise its equitable powers to relieve a person of the consequences of noncompliance with a mandatory statute. *Cox v. Ponce in and for the County of Maricopa*, 251 Ariz. 302, 491 P.3d 1109 (2021). In *Cox,* the potential father of a child to be placed for adoption filed a paternity action sixteen days after the deadline set by statute and lost the right to establish paternity and an interest in the child. The Court determined that the timely filing of a petition was a condition precedent to the enforcement of the right to establish paternity and that the "Father's failure to timely file a paternity action is not excusable under the principals of equitable relief, and the untimely filed action is barred as a matter of law. ... The clear meaning of the statute must prevail." *Id.* at 307, ¶ 21, 491 P. 3d 1114. *See also Frank R. v. Mother Goose Adoption, supra.*

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[5] The likelihood that the presumption would be rebutted in litigation depends upon the facts and circumstances, such as the distance of the well from the stream, the depth of the well, and the distance to the water table, among other factors.

Similarly, in this case, the statutes establish the requirements to obtain an appropriable water right and equity does not provide an exception for owners of wells who took no action to file an application and obtain a permit to appropriate water based on their decisions to rely on a presumption that the wells pumped groundwater.

B. Legal Remedy

Equitable remedies are not available when a legal remedy exists. The court in *Valley Drive-In Theatre Corp. v. Superior Court, supra*, found that the trial court erred when it exercised its equitable powers to substitute an injunction for the bond required by the applicable statute. It held that, "[b]y attempting to use the court's equitable powers to restrict plaintiff's clear statutory right to repossess the property without requiring compliance with the clear provisions of [another statute], the court exceeded its equitable jurisdiction." 79 Ariz. at 400, 291 P.2d at 215.

Here, the question is whether the adjudication court, acting in equity, can decree appropriative water rights for a class of well owners who began appropriating water after June 12, 1919 and have not complied with the statutes governing appropriation of water. The well owners, as pointed out by the United States, have a clear legal remedy. At this time, a well owner in the San Pedro River Watershed is not foreclosed from filing an application with ADWR and moving through the administrative process governing permits and certificates of water rights to obtain a certificate of water right. No testimony was provided at the evidentiary hearing that the claimants had either filed an application with ADWR or had filed an application that had been denied.

A grant of a broad equitable remedy of decreed water rights to all owners of wells pumping subflow who have not complied with the appropriation statutes would exceed the equitable powers granted to the court. Such broad equitable relief would result in the wholesale usurpation of the agency's statutory duties under Title 45, Chapter 1, Article 5 of Arizona Revised Statutes. The

statutes impose extensive procedural and substantive requirements on ADWR in connection with permitting and certificating appropriable water uses that require the director to make a number of decisions based on the relevant facts and the agency's scientific and technical expertise. As explained by the *Phelps Dodge* Court, after a person files an application with ADWR to obtain a permit to appropriate water, ADWR begins the process, as a matter of practice, by issuing a public notice of new applications to appropriate water to which objections can be filed. [Tr. 042921:101]; *See Phelps Dodge Corp. v. Arizona Dept. of Water Res.*, 211 Ariz. 146, 148, 118 P.3d 1110, 1112 (App. 2005). Based on the information obtained, the director must consider whether the proposed use "conflicts with vested rights, is a menace to public safety, or is against the interests and welfare of the public." A.R.S. § 42-153. The director has the discretion to approve applications for municipal use to the exclusion of all other subsequent appropriations. *Id.* When the supply is not sufficient for all applications, the director is also required to grant preference of one application over another. A.R.S. §45-157. Before issuing a certificate of water right, the director must be satisfied that the appropriation has been properly perfected and a beneficial use completed. A.R.S. §45-162. The director's final decision to grant or deny an appropriable water right is subject to judicial review. A.R.S. §45-114.

Courts do not typically intervene in an administrative process prior to an agency's completion of its duties and responsibilities. *Freeport McMoRan Corp. v. Lanley Eden Farms, LLC,* 228 Ariz. 474, 476, ¶5, 268 P.3d 1131, 1133 (App. 2011); *see also Estate of Bohn v. Waddell*, 174 Ariz. 239, 848 P.2d 324 (App. 1992). An agency should be allowed to make decisions delegated to it by the legislature and within its area of expertise before a case is brought to court. *Id.* Even in a case where the agency was charged with applying illegal policies to deny benefits, the court refrained from assuming the agency's role to determine the award of benefits. *Bowen v. City of New York*, 476 U.S. 467, 486 (1986). In *Bowen*, the court ordered the agency to

reopen the decisions denying or terminating benefits and to redetermine eligibility. On appeal, the Court approved the decision because it was consistent with the public policy of allowing the administrative agency to fulfill the duties delegated to it by the legislative branch of government:

> In addition, the relief afforded by the District Court is fully consistent with the policies underlying exhaustion. The court did not order that class members be paid benefits. Nor does its decision in any way interfere with the agency's role as the ultimate determiner of eligibility under the relevant statutes and regulations. Indeed, by ordering simply that the claims be reopened at the administrative level, the District Court showed proper respect for the administrative process.

476 U.S. at 485.

Given the legal remedies available in Title 45 and the restraint imposed by the doctrine of exhaustion of administrative remedies, the court cannot grant the requested equitable remedy. Such a remedy would eviscerate the administrative process established by the existing statutes, ADWR's practice to gather information form objectors, the director's legislatively-delegated obligation to make a series of decisions about applications to appropriate water, and effectively establish a completely separate, common law track to approve applications and grant petitions and certificates for appropriative water rights for well owners.

The JRC contends that wells owners are entitled to equitable relief because they were not given sufficient information about the appropriation process. In support of this position, the JRC points to the statutes, rules, and procedures applicable to wells. While it is commendable that many owners of wells have properly registered their wells as required by law, those wells simply provide the point of diversion of water. Approval of the method to divert water should not be conflated with a right to the source of the water. More than three decades ago, all well owners of record received information and instructions about the Adjudication. *Gila I,* 171 Ariz. at 234, 830 P.2d at 446. Notice of the General Adjudication was puhlished in newspapers of all counties

within the Adjudication and a summons was served on the owner of each tax parcel. *Id.* at 237, 830 P.2d at 449.

At the evidentiary hearing, a former employee of ADWR, Rich Burtell, testified that ADWR routinely sends a summons to all new well owners in the adjudication areas and, during the course of his employment, ADWR received many telephone calls from well owners seeking information in response to receipt of the summons. [Tr. 042921:42, 45] Thus, at a minimum, information has been provided for decades to well owners regarding the adjudication of legal rights to appropriable water alerting well owners that action may be necessary to protect their water rights. The Arizona Department of Water Resources did not have a duty to provide comprehensive legal advice to each well owner about actions necessary to secure his or her rights. *See Cooper v. Arizona Western College Dist. Governing Bd.*, 125 Ariz. 463, 610 P.2d 465 (App. 1980); *see also Powers v. Canyon County*, 108 Idaho 967, 970, 703 P.2d 1342, 1345 (1985) ("Our entire legal system is based on the principle that persons are charged with constructive knowledge of the statutes and laws. . . . Tortfeasors are bound and often deprived of property by violations of both statutes of which they had no knowledge and the common law which may not have been 'discovered' by the courts until that case, and then perhaps on appeal. In none of these cases does procedural due process allow a defense or complaint based upon ignorance of the law or upon the government's failure to take reasonable steps to inform the public of the substance of the statutes.")

The JRC also argues that a legal remedy is unavailable in practice because the applicable agencies did not make the appropriation process available to well owners. Mr. Burtell prepared a report and testified about his search of the records maintained by ADWR concerning applications to appropriate water in the San Pedro River Watershed. [ASARCO Exh. 1 at 3] He affirmed that several hundred applications for appropriable water right have been filed for water in the San

Pedro River watershed. [Tr. 042821:97] Mr. Burtell did not engage in a comprehensive examination of all the application to appropriate water. [Tr. 042821:96-97] Instead, he limited his review to applications for water use on land to approximately two miles to three miles on either side of the main stem of the San Pedro River from Arizona's border with Mexico to the confluence of the Gila River and along the lower reaches of the Babocomari River and Aravaipa Creek. [ASARCO Exh. 1 at 3.; Tr. 042821:47] Mr. Burtell further limited the applications reviewed by including only those applications "based on the source of water specified by the applicant (e.g., "underflow" "San Pedro River subflow", "drilled well", "underflow", "underground well)." [*Id.*; ASARCO Exh. 1 at Table 3-1] Mr. Burtell evidently also engaged in an additional methodology to search ADWR's records because 64% of the active applications that he ultimately found had a well that served as the actual point of diversion but the application listed the "San Pedro River" as the source of water. [ASARCO Exh. 1 at Table 3-1, footnote c] Due to the identification of the additional records, Mr. Burtell expressed the opinion that there are likely more applications to appropriate water from wells in the watershed that were not identified using his methodology because the claimants did not use the terms he selected to identify the source of the water. [ASARCO Exh. 1 at 3, footuote b, Table 3-1, footnote c]

In the limited geographical area selected and primarily using a methodology to search records reliant on the claimants' choice of words to describe the source of water, Mr. Burtell found 67 applications filed by well owners. [Tr. 042821:47, ASARCO Exh. 1, Table 3-1] Based on this information and assuming the truth of the numbers of applications filed for purposes of this proceeding, the applications for appropriable rights to subflow amounted to more than 20 percent of all applications filed in the San Pedro River watershed (67/300). Three of the applications that Mr. Burtell found resulted in certificates. [Tr. 042821: 50-54; ASARCO, Exh 1 at Table 3-1] Fourteen of the applications are still active and the remaining applications were denied, withdrawn

or cancelled *Id.* Mr. Burtell testified that he found one case in which the application was denied because the well owner could not meet the burden of proof to establish that the well pumped appropriable water. [Tr. 042821:90]

Salt River Project also conducted a noncomprehensive investigation that included other watersheds in Arizona. It found additional applications, permits and certificates for water rights issued to individuals and business entities from the early 1940s through the 1990s to appropriate subflow. [SRP Exh. 3-40] Among the Certificates for Water Rights located by SRP is a certificate issued to the City of Scottsdale with a 1962 priority date to "subflow from the Bill William River" and a certificate to four individuals with a 1980 priority date for water for irrigation and stock watering from subflow of Aravaipa Creek. [SPR Exh. 28, 31, 32] The evidence presented does not substantiate a claim that the agency holding the responsibility to certificate water rights denied well owners access to the appropriation process. Thus, no conclusions can be reached that the application process was so defective that an extraordinary remedy should be fashioned for all well owners, including those who did not submit applications.

In their pleadings, the JRC appears to narrow Issue No. 2 to the question of whether the court can exercise its equitable authority to establish a priority date for a well owner presumably after the well owner has successfully applied for a permit to appropriate water and received a certificated right. Given that the statutes that govern the process for acquiring an appropriative right is available to a well owner pumping subflow that includes the assignment of a priority date, no basis exists for the court to exercise its equitable authority with respect to a single attribute of an appropriative right. Thus, in answer to Issue No. 2, the adjudication court does not have equitable authority to decree an appropriative water right for a claimant who began withdrawing water from a well located within the subflow zone after June 12, 1919, but did not comply with the

application and permit requirements of the 1919 Code and the subsequent amendments of those statutes.

While stated as a general rule, this conclusion does not preclude the possibility that there may be facts and circumstances involved with a specific application for an appropriative right filed with ADWR for which an equitable remedy may be appropriate. This proceeding, however, presents the broad question concerning the scope of the court's equitable powers to decree an appropriable water right and neither fact situation presented by the claimant involved an unsuccessful attempt to file an application or obtain a permit or certificate of water right. As a final caveat, several parties advocated that the adjudication court has the authority to exercise its equitable powers in the post-decree enforcement actions. The scope of this Report is limited to the issue as framed and does not address post-decree enforcement actions.

Finding of Fact No. 1: Michael and Susan Cavender and the Town of Huachuca City (collectively "the Claimants") do not assert claims to water rights from water pumped from wells with a priority date prior to June 12, 1919.

Finding of Fact No. 2: Arizona Department of Water Resources has determined that four wells on the Cavender property are located in the subflow zone. The reach of the stream along the Cavenders' ranch is ephemeral.

Finding of Fact No. 3: The Cochise Well used by the Town of Huachuca City is in the subflow zone of the Babocamari River. The reach of the Babocamari River in the immediate vicinity of the Cochise Well is ephemeral.

Finding of Fact No. 4: The Claimants have not complied with 1919 Arizona Surface Water Code or subsequent versions of that statute to appropriate water pumped from wells located in the subflow zone beginning after June 12, 1919.

Finding of Fact No. 5: The Cavenders' ranch would lose value if Mr. and Mrs. Cavender could not use the water pumped from the wells on the property located in the subflow zone.

Finding of Fact No. 6: The Town of Huachuca City would be required to incur costs that would be significant in terms of its municipal budget if it could not use the Cochise Well and had to restructure its municipal water system to provide water to lower Huachuca City.

Finding of Fact No. 7: Certificates of Water Right have been issued by the relevant state agency after June 12, 1919 to owners of wells to appropriate subflow.

Conclusions of Law No. 7: A decision to rely on an evidentiary presumption that a well is pumping percolating groundwater in lieu of compliance with the 1919 Arizona Surface Water Code and subsequent versions of that statue is not grounds for the adjudication court to exercise it equitable powers to decree an appropriative water right to the owner of a well who began pumping subflow after June 12, 1919.

Conclusion of Law No. 8: The 1919 Arizona Surface Water Code and subsequent versions of that statute establishes and defines a well owner's right to appropriate subflow begun after June 12, 1919.

Conclusion of Law No. 9: The statutes governing the appropriation of water graut the owner of a well who files an application with Arizona Department of Water Resources a right to judicial review of a final decision made by the Arizona Department of Water Resources.

Conclusion of Law No. 10: In general, the adjudication court does not have equitable powers to decree an appropriative water right to claimant who began withdrawing water from a well located within the subflow zone after June 12, 1919, but did not comply with the 1919 Arizona Surface Water Code and subsequent versions of that statute.

III. Time to File Objections to the Report

Written objections to this Report shall be filed on or before **November 22, 2021**. Responses to objections must be filed on or before **January 4, 2022.** All objections and responses must be filed with the Clerk of the Maricopa County Superior Court. A copy of the objections and responses shall be served on all persons listed on the Court approved mailing list for this contested case.

Susan Ward Harris
Special Master

The original of the foregoing was delivered to the Clerk of the Maricopa County Superior Court on September 23, 2021, for filing and distributing a copy to all persons listed on the Court approved mailing list for this contested case, the Court approved mailing list for W-1, W-2, W-3 and W-4. In addition, a copy was distributed to all persons listed on the Court-approved mailing lists for CV 6417.

Emily Natale