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) DECISION ON ISSUES OF BROAD LEGAL IMPORTANCE

CONTESTED CASE NAME: *In re Town of Huachuca*

HSR INVOLVED: San Pedro River Watershed Hydrographic Survey Report.

DESCRIPTIVE SUMMARY: 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 water pumped from a well located in the subflow zone with a priority date after June 12, 1919. As a general rule, the adjudication court does not have equitable power 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 fully comply with the 1919 Arizona Surface Water Code and subsequent versions of that statute.

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These consolidated cases present two issues of broad legal importance that focus on 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 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 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 two 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,

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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 pre-1919 that are accessed by a well drilled in the subflow zone post-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.

Gila River Indian Community, Salt River Project, San Carlos Apache Tribe, the Tonto Apache 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

In Arizona, the doctrine of prior appropriation governs a person's legal rights to use water from a broad range of 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. Earlier appropriators have rights that are superior to rights acquired by later appropriators of water. *Id.* at 391. The required process to establish water rights under this doctrine 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 applicable 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 beneficially 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 the 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). According 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 means that no right to an appropriable water can issue without an application to and a permit from the designated agency.

The decisions issued by the Arizona Supreme Court confirm that a water user must comply with the statutes in order to obtain an appropriable water right. In 1935, the Arizona Supreme 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 any one.

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 obtain 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." 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 identified the filing of an application for a permit to appropriate water as part of the necessary process to obtain an appropriable water right.

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 applicable to all other users of appropriable water. They begin with arguments based on the rules of statutory construction. Noting the absence of the word "subflow" in the list of appropriable water sources identified by A.R.S. §45-141(A), they argue that the legislature could not have intended to include subflow because the legislature was unaware of subflow when it enacted the 1919 Code. They 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 lack of a specific directive for subflow by the legislature 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 listed in A.R.S. § 45-141(A).

More than ninety years ago, the Arizona Supreme Court effectively construed 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 subflow is an integral part of streamflow, finding that "physically [subflow] constitute[s] a part of

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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". [Tr. 042821:56; SRP Exh. 1, 2]

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'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.").

Southwest Cotton Court's interpretation continues to the accepted construction of the 1919 Code and the subsequent statutes. 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 Arizona Supreme

Court's adherence to precedent established in *Southwest Cotton* is evident in its subsequent decisions that consider subflow as appropriable water and require compliance with the statutes governing the appropriation of such 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 . . ."). 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 states: "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. 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 such an approach was 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, which resulted in the loss of 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 "intent" of each well owner would undermine the legislative purpose to provide a clear method to establish appropriable water rights with their attendant priority dates.

Moving beyond A.R.S. §45-141 and §§45-151 through 45-166, which define and govern the appropriation of water, the City of Prescott argues that 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 right when that owner has not complied with the Appropriation of Water statutes, A.R.S. §§45-151 through 45-166. 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 contain no provision for the creation of 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.

The JRS also raises the argument that the 1919 Code and successor statutes, however construed, do not apply to well owners pumping subflow. The JRC contends that *Southwest Cotton* created a common law rule for pumpers of subflow that conveys an appropriable right upon a showing that the pumped water has been put to beneficial use. The principle support for the argument that Arizona has a trifurcated system governing water rights post-*Southwest Cotton* is the sentence in the *Southwest Cotton* decision concerning waters from a second group of plaintiff's 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. According to the JRC, the Court held that a person seeking an appropriable water right to subflow had to comply with the pre-1919 procedures, i.e., putting the water to beneficial use, and not the statutory requirements 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. That record 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 in the case. 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 date 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 conclusion that no new and separate set of 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.

Clearly, the test outlined by the court contemplated a binary system. This language does not admit the possibility of a third set of rules controlling water rights to subflow.

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

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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.

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, its 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. No common law doctrine of beneficial use exists that applies to owners of wells located in the subflow claiming post-1919 rights.

Continuing with their claim that pumper 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 holding 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.

A recognition that the 1919 Code and subsequent versions of the statute govern the appropriation of appropriable water, which includes subflow, for many decades undercuts the constitutional argument in two important respects. First, the law requiring an application and a permit has not fundamentally changed in a century. The requirement that a person comply with the statutory requirements imposed on post-1919 appropriations of subflow after the enactment of the 1919 Code is not an unconstitutional retroactive application of the law. A factual determination that the water pumped is subflow, and, therefore subject to the statutory procedures, is also not a retroactive application of the law. As discussed above, subflow is considered a part of the 1919 Code. The only change which has occurred over time is the accumulation of more knowledge about a physical fact. As the Cities of Phoenix and Chandler correctly briefed, 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.

Second, the governance of subflow appropriation by the 1919 Code and the subsequent versions of that statute means that a person pumping subflow not in compliance with the statutory requirements does not have an appropriable water right. *In re Determination of Relative Rights to Use of Waters of Pantano Creek in Pima County, supra.* Absent that 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, which include their priority date. *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.

The mandatory direction in the statutes, the absence of statutory or common law alternatives demonstrates that from 1919 to the present, the Arizona legislature intended that a right to appropriate water may only be obtained by compliance with the Surface Water Code. Accordingly, in answer to Issue No. 1., the process set out in the 1919 Code and subsequent versions of those statutes provides 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.

II. Issue 2: Equitable Relief

The second issue focuses on whether the Adjudication Court may grant owners of wells located in the subflow zone who did not comply with the 1919 Code and subsequent versions of that statute equitable relief by issuing decrees of appropriable water rights. The Superior Court of Arizona does possess legal and equitable authority, but the court's 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 appropriate water. The claimants involved were private landowners, Michael and Susan Cavender, and the Town of Huachuca City. At 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, he 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] He said that he had not received any information about subflow or the 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 the municipal water system pumps approximately 200 acre feet per year from three wells to provide for the 1730 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 that is located in the subflow zone. [Tr. 042721:22, 25, 111-112] 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 filing of an application for a water right is a condition precedent to obtaining either a permit or a certificate for a water right. 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 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 of evidence applicable to the proof of a fact to which the law is applied. The Court in *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 that the plaintiff 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 of 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. The JRC asserts that, as a result, the well owners were also entitled to rely on the presumption as a basis for noncompliance with the 1919 Code and subsequent statutes.[5] 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 when the well is 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*, CV-20-0173-PR, 2021 WL 3137714 (Ariz. July 26, 2021). In *Cox,* the potential father of a child to be placed for adoption filed a paternity action sixteen days after the time 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 *5 ¶ 21. *See also Frank R. v. Mother Goose Adoption, supra.* 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 or obtain a permit to appropriate water based on their decisions to operate on the presumption that the wells pumped groundwater.

[5] Obviously, 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.

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 it 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.

In this case, the question is whether a 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 permit 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.[6]

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

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[6] A well owner may also decide to rebut the presumption that the well is pumping appropriable water created by the location of the well in the subflow zone by showing by a preponderance of the evidence that the well is pumping percolating groundwater. The Town of Huachuca City appears to have taken action to pursue this route to prove that the Cochise Well is pumping percolating groundwater.

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. These administrative proceedings are subject to an administrative review procedure. A.R.S. §45-114.

Courts do not typically intervene in the agency process before the parties exhaust their administration remedies. *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). This rule is based on the sound public policy that 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 water appropriation statutes, ADWR's practices to gather information, 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, regulations, 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 published in newspapers of all counties

within the Adjudication and a summons was served on 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 water rights alerting well owners that additional 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 because, in practice, the appropriation process was unavailable to well owners. To provide information about the second prong of the argument that the appropriation process was not available to well owners, Mr. Burtell testified about his search of the records maintained by ADWR. He described his efforts to locate applications to appropriate water filed by well owners in an area 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. [Tr. 042821:47] The area included the lower reaches of Aravaipa Creek and

Babocomari River, which is downstream of the wells used by the two Claimants in this case. [*Id.*] 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 review all of the applications, but instead relied on a search methodology that involved the use of an on-line query tool available through ADWR to search ADWR's surface water reports by township, range and section. [Tr. 042821:96, ASARCO Exh. 1 at 3] Mr. Burtell complied his list of applications made by well owners "based on the source of water specified by the applicant (e.g., "underflow" "San Pedro River subflow", etc.)." [*Id.*] He advised that there are likely additional applications to appropriate for wells in the watershed that were not identified using the techniques employed because the claimants used terms other than the underflow or subflow to identify the source of the water. [*Id.*. ASARCO Exh. 1, Table 3-1, footnote c] As an example, Mr. Burtell explained that some applicants may have listed the source of water as the San Pedro River, but the method of diversion of the water was a well. [ASARCO Exh. 1 at 3, footnote b]

In the limited geographical area selected and using the search methodology described, Mr. Burtell found 67 applications filed by well owners primarily filed between 1950 and 2000. [Tr. 042821:47, ASARCO Exh. 1, Table 3-1] Based on this information and assuming the truth of the numbers of applications filed, applications for appropriable rights to subflow amounted to more than 20 percent of all applications filed in the San Pedro River watershed (67/300). The results of the search do not support the argument that well owners as a group were not able to file applications for appropriable water rights.

Mr. Burtell testified that of the 67 applications he identified, 3 certificates were granted, 13 are still pending, and the remaining applications were denied or withdrawn. [Tr. 042821: 50-54] Based on the applicant files that he was able to obtain, Mr. Burtell 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, which also included other watersheds in Arizona, found additional applications, permits and certificates for water rights issued from the early 1940s through the 1990s to appropriate subflow. [SRP Exh. 3-40] The evidence presented does not substantiate a claim that well owners lacked 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 of the well owners, including those who did not submit applications.

In their pleadings, the JRC appears to the 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 as opposed to decree the entire legal basis for the water right. Given that the statutes that govern the process for acquiring an appropriative right is available to a well owner pumping subflow, 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 decision does not preclude the possibility that there may be facts and circumstances involved with a specific application for an appropriative right filed with ADWR that could be subject to judicial review. This proceeding, however, presents a broad question for decision and neither fact situation presented by the claimant involved an unsuccessful attempt to either file an application or obtain a permit. As a final caveat, several parties advocated that the adjudication court exercise it equitable powers in the post-decree enforcement actions.

The scope of this decision is limited to the issue as framed and does not address post-decree enforcement actions.

Susan Ward Harris
Special Master

The original of the foregoing was delivered to the Clerk of the Maricopa County Superior Court on August 2, 2021, for filing and distributing a copy to all persons listed on the Court approved mailing list for this contested case.