SUPERIOR COURT OF ARIZONA
MARICOPA COUNTY

04/04/2019 CLERK OF THE COURT
FORM V000

SPECIAL WATER MASTER
SUSAN HARRIS

A. Hatfield

Deputy

In re: Luebbermann
Contested Case No. W1-11-3311

FILED**: 04/24/2019**

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

In re: Oral Argument re: Notice of Designation of
an Issue of Broad Legal Importance

MINUTE ENTRY

10:30 a.m. This is the time set for Oral Argument before Special Master Susan Ward Harris to resolve the issue concerning the appropriate placement of the burden of proof with respect to the production of deeds to show a transfer of water rights by successive landowners for purposes of establishing a priority date.

The following attorneys and parties appear in-person: William Anger on behalf of Cities of Avondale, Chandler, Glendale, Mesa, and Scottsdale; Carrie Brennan and Kevin Crestin on behalf of the Arizona State Land Department; David Brown on behalf of Steve and Jane Turcotte of the Turcotte Family Trust, and David Rychner and Joyce Skeldon (collectively "Claimants,"who are Successors-in-Interest of the *In re Luebbermann* claims); John Burnside and Farris Gillman on behalf of BHP Copper; Charles Cahoy on behalf of the City of Phoenix; Sean Hood on behalf of Freeport Minerals; Robyn Interpreter and Jay Tomkus on behalf of the Yavapai-Apache Nation and Pascua Yaqui Tribe; Mark McGinnis and John Weldon on behalf of the Salt River Project ("SRP"); Bradley Pew on behalf of ASARCO; Joe Sparks on behalf of the San Carlos Apache Tribe and Tonto Apache Tribe; and L. William Staudenmaier on behalf of the Arizona Public Service Company.

The following attorneys appear telephonically: Alexandra Arboleda is present on behalf of the Cities of Flagstaff and Tempe; Michael LeBlanc on behalf of Pima County; Susan Montgomery on behalf of the Pascua Yaqui Tribe and the Yavapai-Apache Nation; Thomas Murphy on behalf of the Gila River Indian Community; and Kimberly Parks on behalf of the Arizona Department of Water Resources ("ADWR").

Court reporter, Marylynn Lemoine, is present and a record of these proceedings is made digitally.

Mr. Spark states that the Claimant has the burden of proof. He further states that the mere fact that the existence of a deed or patent from the United States to a former owner of a piece of real estate creates no presumption that the existing alleged owner of that piece of real estate has a right to the priority date of the original claimant. Discussion continues.

Ms. Interpreter, who filed a joinder with the San Carlos Apache Tribe, responds to the Court's questions. She states that the Claimant has the burden of proof. Ms. Interpreter presents arguments that a grantor can reserve water rights from being transferred to a grantee in a land transfer.

Mr. Brown makes an oral motion to join BHP Copper's motion. He addresses the objections that were filed on November 26, 2018 to the proposed abstract. A correction to the abstract was filed in February 2019 that dealt with the $1/20^{th}$ of an acre that was outside the line. Mr. Brown states that there are no further objections.

Mr. Brown further claims that monumental expense is involved in obtaining a chain of title and how the deeds do not show anything in regards to water rights. Discussion continues.

Mr. Staudenmaier states that the only thing a chain of title can prove is title. He addresses two points which he states are not contested: 1) an irrigation water right is appurtenant to real property; and 2) water rights and other appurtenances transfer automatically with real property in a deed that is silent on the subject.

Mr. McGinnis states SRP's position. SRP is concerned about the financial burden on the small parties, and if a chain of title is unnecessary, about the delay in the adjudication that would result from a requirement that a chain of title must be produced.

Mr. McGinnis further states that it is an important point that all the parties that filed briefs agree that a deed that is silent as to water rights passes the water right with the title.

Mr. Sparks further addresses the Court to state that a property owner can reserve some element of the bundle of rights to real property to himself. The legal effect of a reservation is the subject of additional legal inquiry. A number of things could interrupt the transfer of title and not all of them would be shown in a deed, but an examination of the deed that showed a reservation and would create a question as to the priority that the current claimant would have. He further states that he agrees that Arizona does not allow a person to reserve a water right to that person as personal property, but a person can refuse to convey the water right. He concluded that the Arizona Supreme Court said that the judiciary has to make a decision based on evidence of facts and the claimant has the duty to present those facts.

IT IS ORDERED taking this matter under advisement.

11:51 a.m. Matter concludes.

LATER:

In this case, ADWR determined the date of first apparent use of water on Claimants' land based on a notice filed in 1899 with the Pinal County Recorder by James Brandenburg claiming water for irrigation from Aravaipa Creek. Claimants have submitted copies of the sworn Homestead Proof -Testimony of Claimant filed by James Brandenburg on October 8, 1908 reporting 18 acres in cultivation, a Final Affidavit Required of Homestead Claimants in which James Brandenburg swears that he had cultivated and resided on the land since July 1900, and the Patent that conveyed title to the land to James Brandenburg on May 11, 1908. As part of its report, ADWR matched the land which James Brandenburg owned with the land subsequently owned by Tony and Susan Luebbermann, Claimants' predecessors-in-interest. It also reported that it found 10.7 acres of irrigated land. Based upon copies of recorded deeds filed with ADWR following the issuance of the report, the land owned by the Luebbermanns was subsequently transferred to the Claimants who filed amended Statements of Claim to assert a right to water to irrigate 9.3 acres.

At this stage of the case, no dispute appears to exist that: (1) James Brandenburg appropriated water and put it to beneficial use to irrigate the land now owned by the Claimants; (2) the right to water for irrigation use attached to and was appurtenant to that land; and, (3) Claimants have a valid title to the land irrigated by James Brandenburg. The issue in this case concerns the series of deeds that legally conveyed the land from James Brandenburg to successor landowners and eventually to Tony and Susan Luebbermann.

The San Carlos Apache Tribe and the Tonto Apache Tribe (the "Tribes"), joined by the Yavapai-Apache Nation and the Pascua Yaqui Tribe, contend that "[p]roving the priority date will involve the review of documentation of the use of water by a succession of owners over time. It is the Tribes' position that it is the claimant who bears the burden of producing the deeds which convey title to the water right from the initial user to the claimant." *San Carlos Apache Tribe and Tonto Apache Tribe's Reply in Support of their Brief on the Issue of Chain of Title*, filed March 28, 2019 at 3 ("Reply"). The series of deeds that conveyed title referenced by the Tribes is also referred to as the "chain of title". As defined in the pleading filed by the Yavapai-Apache Nation and the Pascua Yaqui Tribe, "[a] chain of title is a 'record of successive conveyances, or other forms of alienation, affecting a particular parcel of land, arranged consecutively from the government or original source of title down to the present holders.' Black's Law

Dictionary, 6th Ed." *Yavapai-Apache Nation's and the Pascua Yaqui Tribe's Response to the Issue of Broad Legal Importance Re: Burden of Proof Related to the Claim of Ownership of a Water Right*, filed February 11, 2019 at 3 ("Response").

Due to the Tribes' assertion of this position in a number of contested cases in this general adjudication and the expectation that this issue would arise in future cases, these proceedings were instituted under Rules for Proceedings Before the Special Master §12.03 to resolve for all cases in this adjudication the issue of whether a claimant whose rights are being adjudicated to water for irrigation use has the burden of producing the set of deeds that conveyed title to the land from the person or entity identified as the initial appropriator of water for beneficial use to the claimant currently asserting a water right to establish the conveyance of the water right where no issue exists as to the validity of the claimant's ownership of the land.

Water Rights for Irrigation Use

BHP Copper, Inc., Arizona Public Service Company, Freeport Minerals Corporation, ASARCO LLC, and the Arizona State Land Department argue that the Tribes' request for a chain of title "ignores the essential nature of the right as an appurtenant interest that runs with the land." *Joint Response to San Carlos Apache Tribe and Tonto Apache Tribe's Briefing on the Issue of Chain of Title*, filed February 11, 2019 at 3. Salt River Project states that the "fundamental principle of appurtenancy" is that "under Arizona law, appropriative rights for irrigation are appurtenant to the land unless they have been legally severed and transferred." *Salt River Project's Response to San Carlos Apache Tribe and Tonto Apache Tribe's Briefing on Chain of Title Issue,* filed February 11, 2019 at 2.

Pursuant to the doctrine of prior appropriation, a person may appropriate unappropriated water for a beneficial use, which includes the use of the water for irrigation. A.R.S. §45-141, §45-151. Once validly appropriated, a water right to appropriable water for irrigation use permanently attaches to a specific parcel of land and becomes appurtenant to it. *In re Determination of Relative Rights to Use of Waters of Pantano Creek in Pima County (Tattersfield v. Putnam),* 45 Ariz. 156, 169, 41 P.2d 228, 233 (1935). The Court has defined an appurtenance as "'a thing belonging to another thing as principal and which passes as incident to the principal thing. (citation omitted)" Kengla v. Stewart, 82 Ariz. 365, 372, 313 P.2d 424, 429 (1957). The Tribes agree that "a deed which is silent as to water rights can be presumed to pass any appurtenant water rights with the land." Reply at 7. Similarly, the Yavapai-Apache Nation and the Pascua Yaqui Tribe acknowledge "there is a rule of law in Arizona that a silent deed is presumed to have transferred appurtenant water rights". Response at 6. The Tribes also expanded upon this rule to submit a list of events that they contend precludes the transfer of a water right with the conveyance of land: "where there are no water rights appurtenant to the

land (because, for example, they have been lost to forfeiture or abandonment, previously conveyed or reserved to a grantor, or never perfected) a deed does not convey a water right." Reply at 7. These proceedings are limited to the consideration of the Tribes' implicit contention that language found within the four corners of the deed could terminate or prevent the conveyance of a perfected water right thereby necessitating an examination of the chain of title.

The law has traditionally viewed property ownership as comprising many distinct rights and generally permits owners to convey or retain certain rights as they see fit. *See, e.g., Phoenix Title & Trust Co. v. Smith*, 416 P.2d 425, 430-31 (Ariz. 1966) ("A grantor has the right to make a reservation of an interest in property."). The general rule that distinct property rights can be transferred independently of the ownership of the land, however, does not apply to all property rights. Some property rights cannot be severed and transferred apart from the surface estate. *See* Restatement (Third) of Property (Servitudes) §5.6 (2000) (the basic rule is that a servitude which conveys a benefit on land, also known as an appurtenant benefit "may not be severed and transferred separately from all or part of the benefited property.") In Arizona, long-established case and statutory law specifically address the conditions and requirements for the severance of surface water appropriated for irrigation use from the land to which it is appurtenant.

In 1935, relying on a decision issued in 1901, the Arizona Supreme Court addressed the ability of a landowner to sever a water right for irrigation use from the land to which it is appurtenant:

> the right to the use of water for irrigation must be appurtenant to a particular piece of land and that such right could not in any manner be transferred to any land for which it was not originally appropriated by the owner or possessor thereof, with the sole exception that if, through no fault of the owner of the land, and by the operation of natural laws, the land became unsuitable for cultivation, there might be a permanent alienation of such right from the land whose real value had thus been, by natural causes, destroyed, to some other piece of land, and that when so transferred subsequent transfers could only be made under like conditions. This principle has, ever since the decision of the Slosser Case, been assumed by our courts to be the law of Arizona, and has been tacitly recognized by the Legislature ever since that time, by its failure to enact any laws inconsistent therewith. It was expressly recognized in 1919, when our first complete Water Code was adopted, by the provisions of section 48, c. 164, Session Laws 1919, later carried forward in substance into the Code of 1928 (section 3314).

Tattersfield v. Putnam, 45 Ariz. at 170-171, 41 P.2d at 234.

The 1919 Water Code, referenced by the Court, affirmed that a right to use water for irrigation was appurtenant to the land upon which it was used and permitted severance and transfer of that right to other land only upon satisfaction of the following:

(1) a showing that the use of the water for irrigation on the designated land was not beneficially or economically practical;
(2) the absence of any detriment to existing rights; and
(3) the consent of the State Water Commissioner.

1919 Ariz. Sess. Laws, 4th Legis., ch.164, §48.

Currently A.R.S. §§45-172(A) requires, among other conditions, the consent of the director of ADWR to the severance of an irrigation water from that land to which it is appurtenant when the land lies outside the boundaries of an irrigation district as in this case. Thus, a severance and transfer of an irrigation right appurtenant to the land cannot be accomplished by simply including a provision in the deed. Agency records and not the chain of title provide the documents necessary to ascertain the existence of a valid severance and transfer of water rights for irrigation use from the land.

The Tribes also argue that a landowner could reserve the water rights (as opposed to sever and transfer those rights). The Yavapai-Apache Nation and the Pascua Yaqui Tribe similarly posed the same argument in the following hypothetical:

> Presume an original homesteader secured the patent to 160-acres of land with lawfully appropriated water right for 80-acres of this land in 1915, but then split his 160-acre parcel into four 40-acre parcels. Homesteader sells three of his parcels and retains the remaining 40-acre parcel for himself. Presume further that in those three deeds, homesteader specifically stated that he was <u>not</u> conveying any water right with the three properties, thereby effectively eliminating any legitimate claim to water rights on those properties with a priority date of 1915. Homesteader keeps his property and continues to irrigate his full 40 acres with his water right for that 40 acres.
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> Response at 12.

In support of the argument that a property owner can reserve water rights, they cite to *Paloma Inv. Ltd. P'ship v. Jenkins*, 194 Ariz. 133, 978 P.2d 110 (App. 1998). *Paloma Investment* involved an agreement for royalty payments measured by the amount of groundwater pumped. "We recognize that Jenkins' interest is not to use the water itself, the ordinary form of water rights. Instead, he obtained the right to receive a share

of the proceeds upon sale of the water. The parties have not correctly defined this form of property interest." *Id.* at 138, ¶ 24, 978 P.2d at 115. *Paloma Investment* did not involve the analysis of the deed that conveyed the land and water rights, it did not involve the conveyance of a right to water for irrigation use, and it did not involve surface water.

For purposes of the issue at hand, it is not necessary to reach a decision about the legal effect of a hypothetical reservation intended to eliminate irrigation water rights for 40 acres of land. It will suffice to recognize that the purpose for the production of the deeds is not to establish that each succeeding deed contains appropriate language to transfer a water right for an affirmative transfer of water rights. The Tribes, the Yavapai-Apache Nation, and the Pascua Yaqui Tribe do not dispute that water rights appurtenant to land can be transferred by a deed that is silent as to those water rights. The purpose is also not to examine the deeds to confirm each transfer of land from the landowners who owned by the land after James Brandenburg sold it and before Claimants bought it because there is no dispute about the validity of Claimants' ownership of the land. Instead, the purpose for the production of the chain of title is to determine if any of the deeds contain language that terminated the right to water for irrigation appurtenant to the land. Thus, the evidentiary issue can be broadly framed as whether the Claimants must incur the cost of searching the public records for the documents that comprise the admittedly valid chain of title to their land to prove the absence of any cloud on a water right appurtenant to the land that may arise in a deed due to unspecified language with uncertain legal effect.

Negative Evidence

The burden to produce evidence to prove the negative of a fact, also referred to as "negative evidence," is imposed on a petitioner wherever the petitioner's right depends upon the truth of a negative, unless the facts rest within the knowledge of the opposite party. *Southwest Cotton Co. v. Ryan*, 22 Ariz. 520, 199 P. 124 (1921). For example, where a plaintiff claims that a railroad negligently operated a train because the train whistle was not sounded, the plaintiff has the burden of proving the negative because the plaintiff's right to relief depends upon the truth of the fact that the whistle did not sound. *See also Harvey v. Aubrey*, 53 Ariz. 210, 213–14, 87 P.2d 482, 483 (1939) (plaintiff filed to recover possession of real property for which a lease expired, defendant claimed possession under an oral lease, plaintiff not required to prove the absence of an oral lease.) "Indeed, rarely, if ever does our legal system impose a burden upon one party to parry a potentially limitless series of accusations of wrongdoing by repeatedly proving the negative." *Porter Twp. Initiative v. E. Stroudsburg Area Sch. Dist.*, 44 A.3d 1201, 1209 (Pa. Commw. Ct. 2012). Applying the rules of negative evidence to this case, the placement of the evidentiary burden to produce the chain of title turns on whether the Claimants' right to a priority date based on James Brandenburg's initial appropriation of

water for irrigation use depends upon the truth of a negative that would be provided by the conveyancing deeds.

The process of the adjudication begins with each potential claimant filing a verified statement of claimant asserting a right to use water that provides nine categories of information. A.R.S. §45-254. The statute requires that a claim must affirmatively include "[t]he time of the initiation of the right and the date when water was first used for beneficial purposes for the various amount and time claimed in paragraph 3 of this subsection." A.R.S. §45-254(B)(8). The determination of a priority date for a claimant's water right does not require the truth of a negative fact; it requires the truth of the affirmative fact of an appropriation of water for irrigation on the claimant's land that has run with the land. Validly appropriated water for irrigation use attaches as a matter of law to and becomes appurtenant to the land. The parties agree that a deed that transfers title to the land also transfers the appurtenant water rights even if the deed is silent as to those rights.

The fact that a deed in the chain of title between the original appropriator and a claimant contained language purporting to sever, reserve or otherwise impair a water right appurtenant to the land would be a negative fact. Obviously, a claimant's assertion of a right to a water right does not depend on the production of such a deed. Such a deed would, instead, be used by an objector to challenge a water right. As stated above, the purpose of the demand for the production of the chain of title must be to determine whether a deed exists that would form the basis for the challenge to a potential water right.

The Tribes broadly argue that the Claimants bear the burden of proving their ownership of the water right, that ADWR's report cannot be used to satisfy the Claimants' evidentiary burden because ADWR did not examine the chain of title, and that any reliance on ADWR's report to demonstrate ownership of the water right runs afoul of the Court's ruling in *San Carlos Apache Tribe v. Superior Court ex rel. County of Maricopa, supra*. Again, the scope of this proceeding is narrow. It is not a forum on the evidence required to adjudicate a water right. This proceeding is limited to a determination of the narrow issue of whether a claimant with good title to the property for which there are historically perfected, appurtenant water rights for irrigation water must produce the chain of title to determine if any of the deeds contain language that defeats a conveyance of appurtenant water rights which otherwise occurred as a matter of law.

Objectors bear the burden of proof to show that the language of a deed in a chain of title prevented the transfer of an appurtenant water right or that a valid severance and transfer of a water right for irrigation use, not otherwise included in ADWR's report,

interrupted the chain of title. Although a claimant does not have the burden of producing a chain of title beginning with the original appropriator to the current day, as stated by SRP, that does not mean "that the claimant, if he or she possesses chain of title documents or other pertinent information, can withhold it from the objector" if the documents are relevant to the subject matter of the case and otherwise discoverable. *Salt River Project's Response* at 14.

Fairness

The Yavapai-Apache Nation and the Pascua Yaqui Tribe contend that fairness requires that the claimants who are seeking water rights under state law be required to incur the time and cost to produce a chain of title because of evidentiary requirements in an unrelated case involving the establishment of a priority date for water rights under federal law. They base this argument on a 2013 decision in *In re Hopi Priority* involving the priority date applicable to the Hopi Tribe's federal reserved water rights.

As explained by the Arizona Supreme Court, the requirements for the creation of a water right differ under federal and state law:

> Prior appropriation [required by state law] adheres to a seniority system determined by the date on which the user initially puts water to a beneficial use. According to state law, the person "first appropriating the water shall have the better right." *Id.* § §45–151(A). . . .
>
> Federal water rights are different from those acquired under state law. Beginning with *Winters v. United States*, 207 U.S. 564, 28 S.Ct. 207, 52 L.Ed. 340 (1908), the Supreme Court has consistently held that "when the Federal Government withdraws its land from the public domain and reserves it for a federal purpose, the Government, by implication, reserves appurtenant water then unappropriated to the extent needed to accomplish the purpose of the reservation." *Cappaert v. United States*, 426 U.S. 128, 138, 96 S.Ct. 2062, 2069, 48 L.Ed.2d 523 (1976).
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> According to *Winters* and its progeny, a federal right vests on the date a reservation is created, not when water is put to a beneficial use.

In re the Gen. Adjudication of All Rights to Use Water in the Gila River Sys. & Source, 201 Ariz. 307, 310 ¶¶4-5, 35 P.3d 68, 71 (2001). *See also In re the Gen. Adjudication of All Rights to Use Water in the Gila River Sys. & Source* (*Gila III*), 195 Ariz. 411, 17 ¶ 14, 989 P.2d 739, 745 (1999) (The date on which the United States

acquired land and reserved it for a federal use is one of the constituent elements of a federal reserved water right under federal law.)

Fairness does not require the imposition of a burden on claimants seeking adjudication of their water rights under state law to produce as much as a century of land transfer documents to disprove that one of those deeds contained language that caused the loss of perfected water rights appurtenant to their property because of a need for documents to establish a priority date for water rights under federal law.

IT IS ORDERED that a claimant holding good title to the land does not bear the burden of producing the deeds that conveyed that land from the original appropriator who perfected water rights for irrigation use on that land to the claimant to prove that the appropriative rights for irrigation use that were appurtenant to the land were conveyed by the deeds for the intervening transfers of the land.

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