

NOV - 3 1993

AT 11:00 O'CLOCK 14 M.  
RICHARD D. LUPKE, CLERK  
C-Williams, DEPUTY

IN THE SUPERIOR COURT OF THE STATE OF ARIZONA  
IN AND FOR THE COUNTY OF APACHE

IN CHAMBERS (X) IN OPEN COURT ( )

SPECIAL MASTER JOHN E. THORSON  
Presiding

IN RE THE GENERAL ADJUDICATION  
OF ALL RIGHTS TO USE WATER IN THE  
LITTLE COLORADO RIVER SYSTEM  
AND SOURCE

DATE: November 1, 1993  
CIVIL NO. 6417-033-9005  
(Consolidated)

CONTESTED CASE NAME: *In re Reporting of Diversion Information and Other Objections.*

DESCRIPTIVE SUMMARY: The Special Master issues his memorandum of decision, findings of fact, conclusions of law, and order concerning Fools Hollow Lake, WFR No. 033-51-CDB-003 (Arizona Game & Fish Dep't), one of the Second Group of watershed file reports raising issues of broad legal importance.

PROCEEDING NO.: LC 130.

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MEMORANDUM DECISION

Fools Hollow Lake was selected as a representative case to litigate issues of broad legal importance concerning large reservoirs in the Little Colorado River adjudication. This lake, described in WFR No. 033-51-CDB-003, became part of the Second Group of watershed file reports in this case involving reservoirs.

The Arizona Game and Fish Commission filed Statement of Claimant No. 39-88142 claiming the water rights at the lake. Objections to the watershed file report were filed by the Salt River Project (Nos. 6417-033-0121 & -639); the Silver Creek Irrigation District (No. 6417-033-3440); and the United States of America, the Hopi Tribe, the Navajo Nation, and the San Juan Southern Paiute Tribe (Nos. 6417-033-2271 & -2185). The objections of the Silver Creek Irrigation District and of the United States and Tribes were withdrawn prior to trial. The trial was conducted in Lakeside, Arizona, on September 14, 1993.

The primary issue tried before the Special Master is whether the priority date set forth in a certificate of water right or the date of construction will be adjudicated for the beneficial water uses at the reservoir. In the "PWR Summary" portion of WFR No. 033-51-CDB-003, the Department of Water Resources (DWR) reports an "apparent first use date" of 1955 and cites the source as a "D.W.R. Dam Safety" report. A related issue concerns the evidentiary value of dam safety studies in determining the priority date of a water right. Both issues were designated as issues of broad legal importance in this adjudication, *see* RULES FOR PROCEEDINGS BEFORE THE SPECIAL MASTER §§ 12.00 & 12.03 (1991), and notice of the consideration of these issues was sent to all litigants in this case and all claimants in the Little Colorado River adjudication. Second Notice of Hearings on Issues of Broad Legal Importance (Mar. 20, 1992).<sup>1</sup>

The litigants agree that the Arizona Game and Fish Commission filed an application on April 13, 1948, and that the resulting permit and certificate of water right issued by the State Land Commissioner both report that date as the priority date. The Game and Fish Commission also filed a statement of claimant in this adjudication asserting the same priority date for recreation and fish and wildlife purposes.

While the watershed file report accurately reflects the 1948 priority date in the summary of "Applicable Filings and Decrees," the watershed file report

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<sup>1</sup>While the Second Notice organized all issues of broad legal importance into six Special Consolidated Cases, the Special Master has since consolidated these six cases into In re Reporting of Diversion Information & Other Objections, No. 6417-033-9005 (Consolidated). The Master believes that all or portions of the following issues set forth in the Second Notice are addressed by this Memorandum Decision: "What is the legal significance of filings with the state, decrees, and other documentary evidence in determining the priority date associated with a water right?" (Issue No. 9002[7]); "What is the evidentiary value of a notice of appropriation in determining the priority date associated with a water right?" (Issue No. 9002[7][a]); "What is the evidentiary value of filings, permits, and certificates completed under state law (other than notices of appropriation) in determining the priority date of a water right?" (Issue No. 9002[7][c]); and "What is the evidentiary value of information (other than that contained in previous filings), such as . . . dam safety studies . . . in determining the priority date of a water right?" (Issue No. 9002[7][d]).

relies on a 1981 National Dam Safety Program Phase I Inspection Report (Ex. No. AGAF 16), prepared for DWR by the U.S. Army Corps of Engineers, to conclude that 1955 is the "apparent first use date." The stated purpose of the dam safety study "is to evaluate the safety of a non-federal dam in accordance with the National Dam Inspection Act Public Law 92-367." Ex. No. AGAF 16 at iii. The dam safety study notes that "[c]onstruction of Fools Hollow Dam began during September 1955 and was completed in 1957." *Id.* at 4. While the study's authors cite no source for this information, these construction dates are not contested by the Game and Fish Commission.

The Department explains that "[t]he apparent date of first use represents DWR's technical evaluation of the date of first water use based upon information evaluated by DWR." 1 HYDROGRAPHIC SURVEY REPORT FOR THE SILVER CREEK WATERSHED 318 (1990) [hereinafter "Silver Creek HSR"]. This was also the explanation given by Mr. Don Gross in his testimony at trial. Neither the HSR nor Mr. Gross provided a detailed explanation as to why dam safety studies were used by DWR in its technical evaluations.

### Relation Back Doctrine

In essence, this case asks for a reaffirmation in Arizona of the "relation back doctrine" in determining the priority dates for water appropriations where there is a lengthy period between the manifestation of the intent to appropriate (coupled with the first steps of appropriation) and the actual use of water.<sup>2</sup> The relation back doctrine holds that the priority of the right may date "back to the time when the 'first step' was taken to appropriate the water." 2 WATER & WATER RIGHTS § 14.03(d)(1) (R. E. Beck ed., 1991 ed.). This "first step" can be initial surveying, the posting or recording of the original notice of appropriation, or the filing of an application with the state engineer or department of water resources. *Id.* In another major water law treatise, Professor Tarlock explains that "[w]ater law borrowed the property doctrine of relation back to protect the appropriator against intervening rights that would subordinate his expected priority. . . . it has always been a flexible doctrine. . . . [and] is necessary to stimulate investment in water development . . . ." A. TARLOCK, LAW OF WATER RIGHTS & RESOURCES § 5.14[2] (1988).

The relation back doctrine is part of the water law of many other western states. For example, the Idaho Supreme Court, in contrasting the relation back doctrine with a theory establishing the priority date as the date of actual diversion of water, determined that so long as an appropriator prosecutes its appropriation with reasonable diligence, it is "entitled to have

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<sup>2</sup>"Priority is determined from the date of the manifestation of intent not the date of this actual application of the water to beneficial use. Today, this is the date of the permit application." A. TARLOCK, LAW OF WATER RIGHTS & RESOURCES § 5.14[2] (1988).

its appropriation relate back to the posting of its notice . . . ." *Sand Point Water & Light Co. v. Panhandle Development Co.*, 11 Idaho 405, 83 P. 347 (1905); see also *In re Waters of Tualatin River & Its Tributaries*, 229 Or. 81, 366 P.2d 174 (1961). The Nebraska Supreme Court has held that the priority of an appropriation dates from the filing of an application with the department of water resources for a permit to make an appropriation. *In re Application A-15738*, 226 Neb. 146, 410 N.W.2d 101 (1987). Cf. OR. REV. STAT. § 537.150(2) (1991) ("No application shall lose its priority of filing on account of such defects, provided acceptable data, proofs, maps and drawings are filed in the Water Resources Department within 30 days from date of return to the applicant . . . ."); *Clausen v. Armington*, 123 Mont. 1, 212 P.2d 440 (1949).

### Arizona Law

On first reading, the Arizona Public Water Code seems to provide an insufficient answer to the question of whether the relation back doctrine is actually part of this state's water law. There are two references to the doctrine in Article 5, the appropriating and permitting provisions of the statute. The first reference indicates that "the director [of the Department of Water Resources] shall endorse on the application the date of its receipt and . . . . [t]he application shall not lose priority of filing because of defects if the application is corrected . . . ." ARIZ. REV. STAT. ANN. § 45-154 (1987).

The second reference, buried in a subsection discussing 40-year certificates of water rights for power development, seemingly indicates that the priority date for water appropriations for power development date from the filing of the application with the director. *Id.* at § 45-162(B).

An examination of the original 1919 Public Water Code and the legislative history since, however, leads to the conclusion that the last sentence in section 45-162(B) has been codified in error; and this sentence, when properly understood as applying to *all types* of water appropriations, provides an explicit answer to our question. This sentence, "The right acquired by such appropriation shall date from the filing of the application in the office of the Commissioner," first appeared as a *separate* section of the 1919 statute. 1919 Ariz. Sess. Laws ch. 164, § 14. The sentence was inexplicably codified as part of section 3290 in the 1928 Revised Code of Arizona and renumbered in subsequent codifications as section 45-152. In 1987, the Legislature renumbered the text as section 45-162(B), where it may be found today modified only to reflect the assumption by the director of the Department of Water Resources of the responsibilities of the former state water commissioner. 1987 Ariz. Sess. Laws ch. 2, § 1.

That section 14 of the 1919 statute was meant to have broad applicability, and not be limited to appropriations for power development, is supported by two opinions by Justice Lockwood in the 1930's. In *Maricopa*

*County Municipal Water Conservation Dist. v. Southwest Cotton Co.*, 39 Ariz. 65, 4 P.2d 369 (1931), Lockwood discussed an alternative defense urged by the Conservation District to avoid having its surface water diversions enjoined. While Lockwood successfully disposed of the case with the more familiar holding that Southwest Cotton was utilizing water from the separate groundwater regime, he rejected the Conservation District's argument that it actually had surface water rights senior to the uses established by Southwest Cotton. *Id.* at 102-03, 4 P.2d at 382-83.

Specifically, the Conservation District's predecessor in 1888 initiated an appropriation of Agua Fria River water by the construction of a diversion dam at Camp Dyer and a canal to irrigate farm land. The dam and canal were destroyed and work stopped in 1895. From 1895 to 1925, defendant's predecessor maintained a watchman at point of diversion and spent \$25,000 on surveys and attorneys fees.

In this portion of the opinion, Justice Lockwood generally adopts the relation back doctrine:

Under the doctrine of prior appropriation, an appropriator is required, after his rights have been initiated in accordance with the law in existence at the particular time and locality, to exercise reasonable diligence in every step required to make his appropriation complete, by the actual application of the water to a beneficial use, for until he does this his rights are inchoate. When the water is finally so applied, his perfected rights relate back to the initiation of the appropriation. . . . If, however, he fails to use reasonable diligence, his rights commence only as of the time of actual application of the water.

*Id.* Lockwood does not conclude, however, that the Conservation District succeeded in its argument that the relation back doctrine should apply in the case before him: "[W]e are satisfied that defendants failed to show due diligence in perfecting their predecessor's appropriation of 1888 . . . ." *Id.* at 103, 4 P.2d at 383.

Five years later, Lockwood, by then elevated to Chief Justice, provided a concise explanation of water appropriations both before and after passage of the 1919 Public Water Code. *Parker v. McIntyre*, 47 Ariz. 484, 56 P.2d 1337 (1936). In describing pre-1919 procedures, Lockwood recognized that the relation back doctrine resulted in diligently perfected appropriations having a priority date as of the date of posting and recording of a notice of appropriation:

Up to 1919 the manner of making an appropriation was extremely simple; there being two methods which might be

followed. The first was the posting of a notice of declaration of intent to appropriate and the filing of such notice in the office of the county recorder of the county in which the point of location was situated. This had to be followed by an actual application of water to the beneficial use contemplated, and the appropriation was not completed until such application had been made, when it became a vested right. The second method was by the mere application of water to a beneficial use, without the posting or recording of any notice whatsoever, and this right also became vested at the time of application [of water]. The only practical difference in the result of the respective methods was that under the first, if the actual application of the water was made within a reasonable time, the right of appropriation dated back to the filing of the notice, while in the second case it took effect only as of the date of actual application.

*Id.* at 489, 56 P.2d at 1339.

He then discussed the changes that resulted from passage of the 1919 law:

In 1919 the Water Code . . . 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 . . . . The applicant could not begin the construction of the works necessary for the appropriation until the application was approved . . . .

*Id.* at 489-90, 56 P.2d at 1339. Most importantly for our purposes, Lockwood explicitly acknowledged that the relation back doctrine applied to *all types* of appropriations made under the 1919 Water Code: "It was . . . expressly provided that any rights acquired by virtue of a permit which had ripened into an appropriation *should date from the filing of the application in the office of the water commissioner.*" *Id.* at 490, 56 P.2d at 1339-40 (emphasis in original).

#### Application of Doctrine

This case authority supports the interpretation that section 14 of the Public Water Code was meant to apply to all types of appropriations. The priority of water appropriations under the Public Water Code, which were completed with due diligence, dates from the the date the application was filed with the appropriate state agency. In the Fools Hollow situation, the application was filed on April 13, 1948. The application date is accurately

reported in the certificate of water right. April 13, 1948, will be accepted as the priority date.<sup>3</sup>

Information about when water was first used or identifying periods of no use is valuable to the court and potential objectors so long as the information is of the type described in ARIZONA RULES OF EVIDENCE 703.<sup>4</sup> There is nothing before the Special Master to indicate that dam safety studies, required by law and prepared in accordance with the Corps of Engineers' guidelines and engineering regulations, do not meet this standard.

In the preparation of future hydrographic survey reports in this adjudication, DWR should report as the "apparent first use date" the date the notice of appropriation was posted or recorded for appropriations initiated before passage of the 1919 statute. DWR should report as the "apparent first use date" the date of an application for a permit under the 1919 statute. As is DWR's existing practice, the "Applicable Filings and Decrees" section of the watershed file report is the proper place to report differing priority dates set forth in certificates of water rights or statements of claimant. Information about when water was first used should not be reported as the "apparent first use date" but should be summarized in the Explanation section of the watershed file report.

### Findings of Fact

1. On March 20, 1992, many of the priority date issues addressed in this case were designated as issues of broad legal importance by the Special Master; and notice was served by mail on the litigants in this case and on all claimants in the Little Colorado River adjudication. Second Notice of Hearings on Issues of Broad Legal Importance (Mar. 20, 1992).

2. The Arizona Game and Fish Commission filed application number R-980 on April 13, 1948, to construct a reservoir to store Show Low Creek floodwaters for nonconsumptive use. AGAF 002; Tr. at 119 (Gross).

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<sup>3</sup>The Special Master does not decide in this case how the priority date is determined where the date in the statement of claimant varies from an earlier notice or filings, where the date in the certificate of water right varies from the earlier application or permit, or other circumstances of recording or filing inconsistencies.

<sup>4</sup>ARIZ. R. EVID. 703 provides: "The facts or data in the particular case upon which an expert bases an opinion or inference may be those perceived by or made known to the expert at or before the hearing. If of a type reasonably relied upon by experts in the particular field in forming opinions or inferences upon the subject, the facts or data need not be admissible in evidence."

3. The State Land Commissioner held a hearing on application number R-980 on August 12, 1948, at Show Low. AGAF 003; Tr. at 121-122 (Gross).

4. The State Land Commissioner found after hearing as follows: "1. That there are appropriable surplus waters of Showlow [sic] Creek now going to waste; 2. That such water can be put to beneficial use by the development of the proposed project; 3. That the granting of Application No. R-980 to appropriate such water will be in the public interest." The application was approved and the permit granted by order of April 23, 1949. AGAF 005; Tr. at 122-123 (Gross).

5. Permit number R-674 was issued for application number R-980 with a priority date of April 13, 1948, the date the application was filed. AGAF 002; Tr. at 119-120 (Gross).

6. The Showlow-Silver Creek Water Conservation and Power District (now Silver Creek Irrigation District) withdrew its protest of the second amended application R-980 for filling Fools Hollow Lake on January 22, 1955. AGAF 008; Tr. at 123 (Gross).

7. Arizona Game and Fish received Certificate of Water Right No. 3584 under application R-980 and permit R-674 with a priority date of April 13, 1948. AGAF 010; Tr. at 123 (Gross).

8. The Arizona Game and Fish Commission filed Statement of Claimant No. 39-88142 in the Little Colorado Adjudication on September 30, 1985, claiming a priority date of April 13, 1948. AGAF 011; Tr. at 124 (Gross).

9. Volume I of the Silver Creek Hydrographic Survey Report states that "[t]he priority date is confirmed as 1948," referring to Certificate of Water Right No. 3584. AGAF 012; Tr. at 124 (Gross).

10. The apparent first use date in the PWR summary of WFR 033-51-CDB-003 is not the priority date for the Fools Hollow water right. Tr. at 116-117, 126 (Gross).

11. An independent assessment of WFR 033-51-CDB-003 by another party's expert found that the priority date for the Fools Hollow water right is April 13, 1948. AGAF 013.

12. Arizona Game and Fish Department and the public make beneficial use of Fools Hollow Lake. AGAF 014, 015; Tr. at 128-130 (Dodd).



### Conclusions of Law

1. The questions concerning priority date decided in this memorandum decision are issues of broad legal importance under RULES FOR PROCEEDINGS BEFORE THE SPECIAL MASTER § 12.00 & 12.03 and notice thereof has been properly given.

2. The priority date of Arizona Game and Fish Commission's water right in Fools Hollow Lake is April 13, 1948, the date of the filing of the application, as set forth in Certificate of Water Right No. 3584.

3. The apparent first use date in the PWR Summary of WFR No. 033-51-CDB-003 is not a legal determination and is not the priority date of the Fools Hollow water right.

4. The priority date of the water right in Fools Hollow Lake is the date the application was filed to construct the dam and store water, not the date that construction was begun or completed.

### Order

It is ORDERED as follows:

1. The objections of the Silver Creek Irrigation Dist. (No. 6417-033-3440) and of the the United States of America, the Hopi Tribe, the Navajo Nation, and the San Juan Southern Paiute Tribe (Nos. 6417-033-2271 & -2185), having been withdrawn prior to trial, are dismissed with prejudice (to the extent they pertain to Fools Hollow Lake, WFR No. 033-51-CDB-003).

2. The Abstract of Proposed Water Right set forth in Attachment A will be incorporated in the Catalog of Proposed Water Rights for the Silver Creek watershed.

3. When preparing watershed file reports in future hydrographic survey reports in this adjudication, the Department of Water Resources shall identify certificates of water rights by the certificate number (which may be associated with the application and permit numbers).

4. When preparing watershed file reports in future hydrographic survey reports in this adjudication, the Department of Water Resources shall report the apparent first use date in a manner consistent with this decision.

DATED this 1st day of November 1993



JOHN E. THORSON  
*Special Master*

The original of the foregoing mailed this 1st day of November 1993 to the Clerk of the Apache County Superior Court for filing; also, a copy of the foregoing delivered to the Distribution Center, Maricopa County Superior Court Clerk's Office, for copying and mailing to those parties not requesting service by facsimile transmission who appear on the Court-approved mailing list for Case No. 6417-033-9005 (Consolidated) dated October 26, 1993; and sent by facsimile transmission to those parties who have requested service of documents from the Special Master by FAX.



Kathy Dolge

Attachment A

<b>ABSTRACT OF PROPOSED WATER RIGHT</b> Silver Creek Watershed Little Colorado River Adjudication Office of the Special Master, Arizona General Stream Adjudication		
Proposed Water Right No. 033-51-CDB-003-PS001 Date: November 1, 1993		
<b>Element of Right</b>	<b>Master's Determination</b>	<b>Basis of Decision</b>
Statement of Claimant Filed?	Yes	No. 39-0088142
Owner	Arizona Game and Fish Commission	Uncontested Fact
Beneficial Use(s)	Fish & Wildlife; Recreation	Uncontested Fact
Priority Date	April 13, 1948	App. No. 3R-980; MD9005 (Nov. 1, 1993)
Source	Show Low Creek	Uncontested Fact
Point of Diversion	NWSW 12, T10N, R21E	Uncontested Fact
Point of Use	NESW 12, T10N, R21E	Uncontested Fact
Quantity	3217 AF	DWR Estimated Volume
Facility Name (If Any)	Fools Hollow Lake	Uncontested Fact
Other Remarks	Quantity is limited to first filling and none thereafter except for infrequent flushing and undeterminable amount of water for seepage and evaporation  The Master has accepted DWR's estimate of volume since it was not objected to by the landowner	