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## Davis v. Agua Sierra Res., L.L.C., 203 P.3d 506 (Ariz. 2009)

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taking occurred when the Commission was unable to lower the level of the Black/Clear Lake. The Commission argued that (1) the Saline Bayou is not a navigable waterway, and (2) Black/Clear Lake does not fall within the Government's dominant servitude because the lake falls well outside the physical OHWM. First, the court found that while lowering the lake not only depends on the level of the Saline Bayou, the lake level is more importantly directly dependent on the level of the Red River. In other words, the court determined that the determination of whether the Saline Bayou was navigable was irrelevant because the Red River is a navigable waterway. Thus, any lowering that requires the Commission to access and use a navigable waterway through any channel is an unauthorized use of a navigable waterway. Second, the court held that the Commission's interest was subservient to the Government's dominant servitude. The court concluded that the issue of whether the taking occurred beyond the OHWM was irrelevant because the Commission's only interest was from access to and use of navigable waters. And because the Commerce Clause specifically designated that Government as the only power to regulate navigable waterways, the Commission is prohibited from using the waterway without the authorization of the Government. Therefore, navigational servitude bars the Commission's taking claim.

Accordingly the United States Court of Appeals for the Federal Circuit affirmed the United States Court of Federal Claims' dismissal of the Commission's taking claim.

*Jennifer Berg*

## STATE COURTS

### ARIZONA

**Davis v. Agua Sierra Res., L.L.C., 203 P.3d 506 (Ariz. 2009)** (holding that landowners outside of active management areas do not have a real property interest in potential future groundwater use that may be severed from the overlying land).

In 1981, Red Deer Cattle, Inc. ("Red Deer") bought CF Ranch from Chino Ranch, Inc. ("Chino Ranch"). Chino Ranch reserved all mineral and commercial water rights in the land. In 1984, Red Deer conveyed the CF Ranch to Merwyn C. Davis ("Davis"). In the transfer, Red Deer purportedly reserved "all commercial water rights and waters incident and appurtenant to and within the real property." When Chino Ranch merged with Red Deer, their claims to CF Ranch's water merged. Subsequently, Chino Ranch and Red Deer conveyed portions of the interest to various third parties, and in 1998 Red Deer and CJ Partners each conveyed half an interest in CF Ranch's commercial water rights to Agua Sierra Resources, L.L.C. ("Agua Sierra").

In 2003, Davis granted the City of Prescott, Arizona (the "City") an option to buy CF Ranch and Davis' water rights. The City asked Davis to purchase the commercial water rights from Agua Sierra, but he was

unable to do so and the City allowed the option to expire. Davis then filed suit against Agua Sierra to invalidate the commercial water rights reservation, and Agua Sierra filed cross claims asking the court to declare the water rights valid and quiet title to them.

The Yavapai County Superior Court (the "trial court") held that, prior to capture and withdrawal from the ground, no ownership right to groundwater exists. Finding for Davis on his motion for summary judgment, the trial court explained that groundwater rights could not be established or reserved for potential future use. The Arizona Court of Appeals vacated that judgment, holding that Arizona allowed grantors to reserve rights to prospective commercial use of percolating groundwater below the conveyed land. Davis appealed to the Supreme Court of Arizona (the "court").

Historically, the CF Ranch's water rights were unused. The Supreme Court of Arizona thus limited its analysis to whether a right to potential future use of historically unused groundwater existed. At common law, groundwater is not appropriable and the overlying landowner can pump it, subject to the reasonable use doctrine. The court described the Groundwater Management Act ("GMA"), which established a comprehensive framework to regulate Arizona's groundwater use. The court determined that CF Ranch was not in an Active Management Area ("AMA"), and thus was not subject to the extraction and use limits of AMAs. Since the City lies within such an area, however, the court explained that any water pumped from a non-AMA to an AMA would be subject to AMA regulations. Next, the court considered whether Arizona recognized future rights to groundwater.

Agua Sierra argued that a right to prospective groundwater use can be reserved when transferring an estate. To reserve groundwater rights, the grantor must have a real property interest in such rights; thus, the court addressed whether Arizona law recognized a real property right to the future use of groundwater. In clarifying its ruling in *Town of Chino Valley v. City of Prescott*, the court reiterated that landowners cannot own groundwater until they reduce it to actual possession and control, and that Arizona recognizes no ownership right to groundwater prior to capture and withdrawal from common supply. Thus, the court said, the overlying owner's future right to historically unused groundwater is really just an unvested expectancy concerning potential future groundwater use. Since Agua Sierra did not identify any pre-existing or current groundwater use on CF Ranch, the court found no real property interest in the potential future use of CF Ranch's groundwater.

The court next considered Agua Sierra's contention that a grantor's reservations could effectively sever and reserve to the grantor whatever "rights" a surface owner would otherwise have to the groundwater. The court explained that the Court of Appeals, which cited *Paloma Inv. Ltd. P'ship v. Jenkins* and *Neal v. Hunt*, improperly interpreted those cases. The court found that *Paloma* did not establish a grantor's right to sell groundwater from land it no longer owns, and *Neal* merely meant that such a reservation, were it valid, would be subject to the recording

statute. The court acknowledged that the GMA requires a landowner's consent before transporting water off the land, and held that the legislature did not believe a right to future prospective groundwater use existed because otherwise it would not require consent if it believed such rights existed and were transferrable. Thus, the court held that landowners do not have a real property interest in potential future groundwater use which they can sever from the overlying land.

The Supreme Court of Arizona vacated and remanded the case to the Arizona Court of Appeals for hearing on other arguments.

*Andrew Reitman*

## COLORADO

**Vance v. Wolfe, 205 P.3d 1165 (Colo. 2009)** (holding that coal-bed methane gas wells' use of ground water constitutes a "beneficial use," giving rise to appropriative water rights; these rights are subject, under statute, to permits issued by the State Engineer and to the State Engineer's administration of augmentation plans approved by water courts).

William S. Vance, Jr., Elizabeth S. Vance, James Fitzgerald, and Mary Theresa Fitzgerald (the "Ranchers") possess water rights in sources tributary to the Piedra and Pine Rivers. The Ranchers claimed that coal-bed methane ("CBM") production diverted ground water that would have otherwise discharged into the Piedra and Pine. CBM wells tap into deep coalbed formations that contain methane gas trapped in hydrostasis. By removing the water that surrounds the formations, CBM producers release the gas for withdrawal. CBM producers bring the water to the surface, store it briefly, and then re-inject it below the aquifers that formerly held the gas.

The Ranchers brought a motion for declaratory judgment in the Water Division 7 District Court (the "water court"), naming the Colorado State Engineer and the Division Engineer of Water Division 7 ("the Engineers") as defendants. The Ranchers sought a declaration that, under statutory law, CBM production is a "beneficial use" of water that places legal obligations on the Engineers to protect senior vested water rights. The water court issued a summary judgment in the Ranchers' favor and the Engineers appealed directly to the Colorado Supreme Court. In this case of first impression, the court addressed whether CBM production involves the beneficial use of water, whether the court must defer to the Engineers' interpretation of beneficial use, and whether CBM production is exclusively within the province of the Colorado Oil and Gas Conservation Commission ("COGCC").

Two state statutes aided the court in its determination of the Engineers' obligations: the Colorado Ground Water Management Act ("GWM Act") and the Water Right Determination and Administration Act of 1969 ("1969 Act"). The GWM Act states that people cannot build new "wells" in designated areas without a permit. The 1969 Act defines a well, generally, as a structure that obtains an aquifer's water for