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In re Gila River Sys., 173 P.3d 440 (Ariz. 2007)

## ARIZONA

*In re Gila River Sys.*, 173 P.3d 440 (Ariz. 2007) (holding that a non-party to a settlement agreement under the Arizona Water Settlements Act could not object to a settlement where it could not show that the settlement would materially injure its water rights and that the settlement agreement warranted approval where the preponderance of the evidence established the settling tribe's water rights set forth in the agreement were no more extensive than one could prove at trial).

Under the auspices of the Arizona Water Settlements Act ("AWSA"), which authorized the settlement of the federal water rights claims, the Tohono O'odham Nation ("Nation"), the United States, and other parties to the settlement (collectively "settling parties") sought entry of the judgment confirming a settlement agreement. Subsequently, the Pascua Yaqui Tribe ("Tribe"), a non-party to the settlement agreement, filed objections. After the Maricopa County Superior Court ("adjudication court") summarily disposed of the objections, the Arizona Supreme Court accepted interlocutory review of the adjudication court's judgment and decree approving the settlement agreement.

Previously, the Arizona Supreme Court had issued a "Special Procedural Order providing for the Approval of Federal Water Rights Settlements, Including Those of Indian Tribes" ("Special Order"), which, in part, provided claimants with the opportunity to object if: (1) the settlement "would cause material injury to the objector's claimed water right;" (2) the parties did not meet the conditions for approval for such a settlement; or (3) when "the water rights established in the settlement agreement . . . are more extensive than the Indian tribe . . . would have been able to establish at trial." Here, the Tribe claimed the settlement agreement caused material injury to its water rights, specifically its groundwater and surface water rights under federal law, and deprived the Tribe of its federal reserved water rights. The court held that the Tribe's claims had no merit where the settlement only determined the water rights of the Nation, did not provide the Nation with any federal reserved rights, and expressly reserved all rights and claims of the Tribe. The court found that the settlement agreement and the judgment and decree did not materially injure the Tribe's rights where the Tribe retained all remedies available to it prior the approval of the settlement.

The Special Order further mandated that a court approve a settlement if the settlement preserved the remedies of non-settling claimants, the parties reached the settlement in good faith, and the preponderance of the evidence established that the settling tribe's water rights were no more extensive than the parties could prove at trial. The Tribe claimed the settling parties failed to meet their burden of

proof regarding the extent of the Nation's water rights where the adjudication court relied on an allegedly incomplete Arizona Department of Water Resources ("ADWR") assessment of the settlement and did not hold an evidentiary hearing. The court disagreed, and held that the adjudication court properly considered the Statement of Claimant filed by the United States on behalf of the Nation and the supporting ADWR assessment regarding the range of water rights the Nation could claim. According to the court, the range of water rights set forth in those documents was greater than the rights granted under the settlement.

The court granted the Tribe's petition for interlocutory appeal, but denied relief to the Tribe. Further, upon request of the settling parties, the court issued an expedited, final, and non-appealable decision affirming the adjudication court's judgment and decree approving the settlement agreement.

*Julie Anderson*

**Davis v. Agua Sierra Res., L.L.C., 174 P.3d 298 (Ariz. Ct. App. 2008)** (holding that severance and reservation of groundwater usage rights from an associated real property grant is valid and not contrary to Arizona water rights policy).

Merwyn Davis ("Davis") owned property located in the Big Chino groundwater sub-basin in Yavapai County, Arizona, known as CF Ranch. Davis acquired CF Ranch through a series of transactions and grants, but each transaction reserved the commercial water rights associated with the property from conveyance. Agua Sierra Resources, L.L.C. ("Agua Sierra") held the commercial water rights associated with CF Ranch. In 2004, Davis filed a complaint in the district court seeking a judgment to invalidate Agua Sierra's commercial water rights reservation associated with CF Ranch. Davis argued the reservation was invalid because Arizona law does not permit severance of a water right from land, does not permit creation of a future water right, and does not recognize a water right for commercial purposes. The district court held in favor of Davis, and found the reservation invalid. The court focused largely on case law that held groundwater is not appropriable, but is instead subject to the doctrine of reasonable use, and concluded that Arizona does not recognize the reservation of commercial groundwater rights. Agua Sierra appealed the judgment to the Arizona Court of Appeals.

The Court of Appeals began its analysis by establishing that Arizona water law differentiates groundwater from surface water users. Surface water is subject to the doctrines of prior appropriation and beneficial use, while groundwater is not appropriable allowing an overlying landowner to use it, subject to the doctrine of reasonable use. After establishing that the reservation at issue here comprehended rights to