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**Davis v. Agua Sierra Res., L.L.C., 174 P.3d 298 (Ariz. Ct. App. 2008)**

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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

groundwater only, the court reversed the district court and held that Arizona law does permit the reservation of commercial groundwater rights from a real property conveyance, and that the Agua Sierra's ownership was valid.

The court disagreed with Davis's first argument, and the position adopted by the district court, that Arizona law did not recognize a water right severed from land, absent a statute or regulation to the contrary. While the court recognized that a reservation does not reserve an ownership interest in a source of water, a reservation may secure a right to use water. Under Arizona common law, a right to groundwater is a property interest requiring conveyance by deed. The court held that such a requirement would be superfluous if groundwater rights were not severable from the land. The court continued that Davis offered no support for the proposition that a right to use water, as an interest in real property, does not fall within the general common law rule that a grantor may reserve an interest in real property. Further, the court rejected the district court's position that Arizona water policy required that the overlying landowner must hold groundwater rights. To the contrary, the court held that, consistent with Arizona water policy to promote the maximum use of groundwater, severance and transportation of groundwater may at times be necessary and appropriate.

Davis next argued that the district court correctly ruled the reservation invalid because Arizona law does not recognize future water rights. Davis argued that because Agua Sierra was not currently exercising water rights it could not reserve those rights in the future. The court held that the Davis's reasoning applied to appropriable water rights, not rights to withdraw groundwater. The court continued that the right to use groundwater is not an appropriable right, but instead is limited only by the doctrine of reasonable use, subject to the rights of other owners overlying the groundwater. Because Agua Sierra is not claiming an appropriable water right, the court held the district court erred in invalidating the reservation.

Finally, Davis argued that the reservation was invalid because Arizona law does not recognize selling water for commercial purposes as a valid use for securing a water right. The court held that, to the degree that Davis was arguing commercial sales was not a beneficial use, it again misapplied the doctrines of an appropriable right to a reservation concerning only groundwater and limited only by reasonable use. The court held that withdrawal and transfer of groundwater is consistent with reasonable use, provided that the withdrawal does not damage other owners of the overlying property. For the foregoing reasons, the court reversed the district court ruling, holding that a grantor may reserve rights for the commercial use of groundwater beneath land

conveyed, and accordingly, that the Agua Sierra's ownership interest in commercial water rights was valid under Arizona water law.

*Jeff McGaughran*

## CALIFORNIA

**Nicoll v. Rudnick, 72 Cal. Rptr. 3d 879 (Cal. Ct. App. 2008)** (holding that appropriative water rights run with the land in proportion to the acreage of the property conveyed unless expressly reserved in the conveyance).

Nicoll Ranch consisted of two contiguous parcels of land, an upslope parcel also referred to as Nicoll Ranch and a downslope parcel referred to as Nicoll Field. In 1864, J.W. Nicoll constructed a ditch to convey water from the Kern River to his ranch land and had a judgment entered in 1902 confirming his right to appropriate the water. Presently, John W. Nicoll ("Nicoll") is the owner of the parcel known as Nicoll Ranch, while Oscar Rudnick ("Rudnick") bought Nicoll Field after the Nicoll family lost the property in a foreclosure. A dispute arose between Nicoll and Rudnick, and in 2006, Nicoll filed an action to quiet title to the parties' respective water rights. Nicoll argued that the amount of water actually used on each parcel in the years immediately preceding the foreclosure determined the apportionment of the water rights. Rudnick contended that the 1902 judgment established the water rights as appurtenant to the entire property, and by acquisition of Nicoll Field, he acquired a proportionate share of the water rights. The trial court agreed with Rudnick's position and Nicoll appealed. The Fifth District Court of Appeal ("Court") affirmed.

The trial court concluded that the 1902 judgment recognized an appropriative water right that was appurtenant to the entire property, and when Rudnick acquired a percentage of the total acreage by a conveyance deed that did not refer to any water right, he obtained his proportionate share of the water rights. The Court held that the trial court applied the correct legal principles and found no legal error.

The Court found that the 1902 judgment clearly recognized that the water rights were appurtenant to the land and that this judgment comported with established California law that acquired water rights become appurtenant to the land. Additionally, the 1902 judgment specifically stated that acquisition of the water rights attached to the "land owned by said parties." Therefore, until Nicoll Field came under separate ownership, the water was appurtenant to the entire property for any allocation of beneficial use. Further, both the agreement to submit the controversy to arbitration and the Report of Arbitrators indicated that the Court awarding the 1902 judgment based its water quantity allotment at least partially on acreage increments and fractions of 160 acres. Thus, J.W. Nicoll's ownership of more than 300 acres determined the particular allotment awarded at the time.