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In re the Gen. Adjudication of All Rights to Use Water in the Gila River Sys. & Source, 9 P.3d 1069 (Ariz. 2000)

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the court of appeals reasoned that because genuine factual issues existed, summary judgment was improper. The court of appeals reversed the trial court's grant of summary judgment and remanded.

Makayla Shannon

ARIZONA

In re the Gen. Adjudication of All Rights to Use Water in the Gila River Sys. & Source, 9 P.3d 1069 (Ariz. 2000) (holding (1) the subflow zone in the Gila River system is defined as saturated floodplain Holocene alluvium, and waters from wells with cones of depression extending into this subflow zone are appropriable; (2) a well is presumed to be pumping percolating groundwater, until the Department of Water Resources establishes by a preponderance of evidence the well is pumping subflow via its cone of depression; and (3) judicially redefining subflow to include percolating, non-appropriable waters is not an unconstitutional taking of private property or an usurpation of the legislative function by the courts).

In an action to determine the extent and priority of water use rights in the Gila River system and source, the trial court adopted a test that presumed a well pumped appropriable subflow if the volume of a given stream was shown to be depleted by 50% or more of the total volume pumped by a well during a ninety-day period. The court of appeals rejected the "50%/90-day test" as inconclusive to determine the nature of the water being pumped. On remand, the trial court held a ten-day evidentiary hearing, using testimony and reports from hydrologists and hydrological engineers, to develop a test to determine which waters were part of the subflow, and thus appropriable for public use. The trial court found the Holocene alluvium was the only stable geological unit associated with most rivers and streams. When saturated, this sedimentary layer becomes subflow. Wells connected to the subflow were subject to public-use doctrines. Identical gradient and flow direction, chemical composition, groundwater elevation of the saturated floodplain Holocene alluvium, and water from the well indicated connection to the subflow.

Groundwater users from several cities asked the trial court to exclude certain wells from the adjudication. The trial court applied the new test to determine subflow and found that wells within the saturated floodplain Holocene alluvium were subject to rules regarding public appropriation. Further, wells outside the alluvium found to be pumping water from a stream or its subflow were also subject to adjudication, unless such use was determined to have a de minimus effect on the river system. The trial court ordered the

Department of Water Resources (“DWR”) to designate well use according to the new rule and to reflect these designations in its hydrographic surveys. The groundwater users appealed, claiming the rule was arbitrary and the tests suggested by the trial court did not provide a reliable means to determine a connection between a well and the subflow where a direct connection did not already exist. Further, the groundwater users claimed application of the new standard was a legislative act, and violated constitutional separation of powers principles. Finally, the groundwater users contended the new rule constituted an unauthorized taking of private property in violation of their Fifth Amendment rights.

In connection with the test applied by the lower court, the groundwater users argued the subflow zone should be limited to the “post-1880 entrenchment channel” which their experts testified was a well-known, well-documented, and reliable indicator of subflow. The supreme court rejected this argument, noting that testimony and reports available to the trial court also indicated the saturated floodplain Holocene alluvium was a distinct geological unit, which provided a direct hydraulic connection to the stream. This connection could be verified by analyzing the groundwater elevation in the saturated floodplain Holocene alluvium, gradient and flow direction, or comparison with the chemical composition of surface water. The trial court found, as a matter of fact, that the use of the saturated floodplain Holocene alluvium was reliable based on geology and aquifer characteristics. The supreme court affirmed, finding use of the floodplain Holocene alluvium as an indicator of subflow was clearly supported by the evidence.

The supreme court also affirmed the lower court’s finding that wells outside the subflow zone parameters might be subject to the adjudication in cases where their cones of depression extend into adjacent subflow zones. Further, the court asserted that DWR analysis of the gradient, flow, or chemical composition of water from a well’s cone of depression could be used to determine whether a well is pumping subflow. When a well is located outside the saturated floodplain Holocene alluvium, the court found a strong initial presumption that the well is pumping percolating groundwater. However, once DWR determines a well pumped subflow, the well owner must rebut this finding by presenting a preponderance of evidence to the contrary.

Finally, the supreme court rejected the groundwater users’ argument that judicially redefining the subflow violated both separation of powers principles and the Fifth Amendment. First, the court noted it had established subflow guidelines for nearly seventy years without any action or direction from the legislature. Second, the new definition of subflow was addressed only to appropriable water and did not change the legal status of underground water outside the subflow zone. Third, through specific statutory authorization, the

court had jurisdiction to hear issues related to subflow. Finally, because a well owner has no legal property right to underground water that supplies his well, any claims involving violation of the Fifth Amendment were nonmeritous.

Alan Curtis

ARKANSAS

Whisenhunt v. Bee Branch Water Ass'n, No. CA 99-165, 2000 Ark. App. LEXIS 297 (Ark. Ct. App. April 12, 2000) (holding a chancellor's finding that placing water lines beneath a road's surface consistent with the public's use was not clearly erroneous).

Joe Whisenhunt ("Whisenhunt") appealed from the chancellor's order to dissolve a preliminary injunction and dismiss his complaint. Whisenhunt purchased property to construct a subdivision. Bee Branch Water Association ("Bee Branch") allegedly made an oral agreement to provide water to the subdivision, but Bee Branch later declined to provide the water. Due to Whisenhunt's objections, the lot owners filed suit against Bee Branch. Unbeknownst to Whisenhunt, the lot owners and Bee Branch obtained a settlement. Whisenhunt filed a motion to intervene and requested a permanent injunction to stop Bee Branch from placing water lines beneath Lakeview Drive, which Whisenhunt claimed to own.

The determinative issues in this case were whether the roadway was dedicated to public use and whether that dedication included the privilege of laying water lines beneath the roadway. The court engaged in *de novo* review and refused to reverse the chancellor's factual findings unless such were clearly erroneous. The Arkansas Court of Appeals affirmed the chancellor's decision to allow Whisenhunt to intervene, but found Bee Branch had the right to lay water lines beneath the roadway.

The court found that placing water lines beneath a road's surface was consistent with the public's use. Thus, the chancellor's decision was not clearly erroneous. Whisenhunt argued that under the pertinent covenant, the location of utility easements was restricted to a defined area outside of the roadway boundary. Whisenhunt argued that the covenant's language, which set aside an area for utility easements, could be interpreted as a limitation prohibiting such utility placement in another location. The court disagreed and found that while parties' intentions generally govern the interpretation of covenants, when the language of the covenant is clear and unambiguous, the meaning of the language governs. The court determined these covenants used the word "reserved," meaning save for a special purpose or special use. The covenants did not use "restricted," meaning to confine or keep within limits.