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In re the Gen. Adjudication Of All Rights To Use Water In The Gila River Sys. & Source, 989 P.2d 739 (Ariz. 1999) (en banc)

ARIZONA

In re the Gen. Adjudication Of All Rights To Use Water In The Gila River Sys. & Source, 989 P.2d 739 (Ariz. 1999) (en banc) (holding that federal reserved water rights doctrine applies to groundwater, and that the holders of federal reserved water rights can invoke federal law to protect their groundwater to the extent necessary to fulfill the reserved rights, even if they would enjoy greater protection than state law water rights holders).

Comprehensive and contentious litigation regarding the waters within the Upper Salt, Verde, Upper Gila, Lower Gila, Agua Fria, Upper Santa Cruz, and San Pedro watersheds began in 1988. This opinion was the third in a series that addressed issues accepted for interlocutory review by the Arizona Supreme Court. Here, the Arizona Supreme Court held that federal reserved water rights extended to groundwater to the extent that groundwater was necessary to accomplish the purpose of a reservation. The court also held that holders of federal reserved rights were entitled, under federal law, to greater protection than state law holders to the extent necessary to maintain sufficient water to accomplish the purpose of a reservation. While the court tackled the scope of federal water rights, it refused to declare a standard for determining the purpose of a reservation and also refused to define how imminent a threat to a reservation's essential waters must be in order to grant injunctive relief.

Before reaching federal reserved rights doctrine, the court discussed the current state of Arizona water law by stating that prior appropriation governed surface water; reasonable use governed groundwater; and somewhere in the middle existed subflow, which marked a zone where water pumped from a well so appreciably diminished the surface waters that it was also governed by the doctrine of prior appropriation. While admitting that subflow was a legal artifice, the court reaffirmed this bifurcation of state water law because of the enormous agricultural, industrial, mining, and urban reliance on such tenets.

The court, however, broke new ground in stating that groundwater was subject to the federal reserved rights doctrine. In doing so, the court found several arguments persuasive. First, the court acknowledged that some Indian reservations depended, either substantially or entirely, upon the pumping of underground water. The court reasoned that the United States could not have reserved land for habitation without reserving the water necessary to sustain life. Therefore, the United States must have intended the implied reservation of water to come from whatever particular source each reservation had at hand. Second, the court looked to United States Supreme Court precedent to determine that federal water rights were shaped by the integral nature of the hydrologic cycle, not legal artifice. By analogy to the holding in *United States v. Cappaert*, the court determined that because federal reserved rights decline to differentiate between surface and groundwater when addressing the diversion of protected waters, the law would similarly decline to differentiate between surface and

groundwater when identifying the water to be protected. Third, federal water rights must have continued through the years. Thus, the theoretical equality of the reasonable use doctrine did not protect federal water rights holders from a total future depletion of underlying aquifers by off-reservation pumpers. Arizona had already consumed far more groundwater under the reasonable use doctrine than nature could replenish; thus, continuing to apply this state law to federal reserved rights would defeat the federal water rights, in violation of federal substantive law.

In the end, a federal reserved right to groundwater might only be found where other waters were inadequate to accomplish the purpose of a reservation. To determine the purpose of a reservation and the water necessary to achieve it, the court engaged in a fact-intensive inquiry on a reservation-by-reservation basis. Once a right to groundwater was established, the federal holders could invoke the greater protections of federal law to protect their water rights from off-reservation groundwater pumping. However, this right did not require a zero-impact standard of protection for federal reserved rights.

Susan Klopman

ARKANSAS

White v. J.H. Hamlen & Son Co., 1 S.W.3d 464 (Ark. Ct. App. 1999)
(precluding summary judgment because material questions of fact existed regarding whether land changes were caused by accretion or avulsion, and whether the land formation was a sandbar or island).

White and several neighboring property owners ("White") appealed a summary judgment order quieting title to a portion of Hardin Island owned by J.H. Hamlen & Son Co. ("Hamlen"). Hardin Island was originally a peninsula connected to the west side of the mainland and surrounded by the meandering Arkansas River. In 1966, the government completed a project designed to straighten the river's course and severed the peninsula from the mainland, creating Hardin Island. Hamlen acquired title to a portion of Hardin Island in 1982. White had title to property across the former river channel (now slackwater) and to the east of Hardin Island since the mid-1940's or early 1950's. The southeastern portion of the island claimed by Hamlen was also included in the metes and bounds descriptions of White's property.

The lower court granted Hamlen's motion for summary judgment to quiet title in the disputed land based on aerial photographs and a set of drawings prepared by a registered land surveyor admitted as exhibits by Hamlen. These exhibits evidenced Hamlen's theory that land along White's riparian boundary was gradually eroded and deposited on Hardin Island, thereby vesting title in Hamlen's increased land mass. White did not dispute the changes as portrayed in Hamlen's exhibits. Instead, he asserted that the exhibits did not prove whether the changes were caused by