

MEMORANDUM

TO: R. Wigington
FROM: L. Fite (as edited by Wigington)
DATE: July 19, 2004
RE: Federal Agency Severance and Transfer of Groundwater Rights to Instream Flow
on San Pedro River, Arizona

I. Questions Presented

- 1) Does the Arizona severance & transfer statute apply to pre-code water rights?
- 2) What alternative legal means exist to facilitate transfer of a subflow right to instream flow?
- 3) What federal protections exist for instream flow rights against groundwater pumping outside the subflow zone?

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II. Brief Answers

- 1) Probably not. Severance and transfer of pre-code rights is governed by Arizona common law, which probably would allow severance and transfer.
- 2) Under Arizona law, common-law change of use, or transfer via abandonment and filing for a new instream flow water right, are alternative strategies, along with legislation to create hybrid rights water rights for federal purposes.
- 3) Federal reserved rights receive the greatest level of protection from groundwater pumping outside the subflow zone, and state law water rights that are purchased and converted to federal purposes may enjoy similar protection. Instream flow rights based solely on state law are not protected.

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III. Statement of Facts

The San Pedro River flows out of northwestern Mexico into southeastern Arizona and supports a unique riparian ecosystem in the middle of the Sonoran Desert, one of the largest extant specimens of southwestern cottonwood-willow riparian forest. This riparian forest is excellent migratory bird habitat. The Nature Conservancy ("TNC") is working to maintain flows in the San Pedro by purchasing agricultural land and retiring the irrigation water rights. The land in question is generally adjacent to the San Pedro and current irrigation is pumping from the

ground rather than diverting surface water. TNC would like to develop a set of legal strategies for converting irrigation rights that are pumping the subflow zone of the San Pedro into instream flow water rights, mostly downstream of the San Pedro National Riparian Conservation Area ("SPRNCA").

IV. Discussion

A. Appropriate "Subflow" Under Arizona Law

Under Arizona law, subflow is appropriable.¹ Thus the transfer of the location of the place of use of irrigation rights pumping subflow or the change in the type of water use at the same place use for such rights is governed by the prior appropriation system, and the rights are treated the same as if they had been for surface diversions.

In general, except for at least federally reserved water rights, pumping outside the subflow zone is treated in Arizona law as completely bifurcated from subflow pumping and from surface water.² This is problematic on the San Pedro, since a major threat to its upper reaches comes from groundwater pumping outside the subflow zone, in the retirement community of Sierra Vista and in Fort Huachuca, a nearby military base.

¹ ARIZ. REV. STAT. ANN. § 45-141(A) (2004). See also ARIZ. REV. STAT. § 45-101(9). The Arizona Supreme Court defines subflow as "the saturated floodplain Holocene alluvium." In *Re The General Adjudication of All Rights to Use Water in the Gila River System and Source*, 9 P.3d 1069, 1073, 198 Ariz. 330, 334 (2000), *cert. den.*, 533 U.S. 941 (2001) ("Gila IV"). This opinion gave scientific precision to the court's traditional definition, "those waters which slowly find their way through the sand and gravel constituting the bed of the stream, or the lands under or immediately adjacent to the stream, and are themselves a part of the surface stream." *Id.* (quoting *Maricopa County Mun. Water Conservation Dist. No. One v. Southwest Cotton Co.*, 39 Ariz. 65, 96, 4 P.2d 369, 380 (1931)). In any case, the water presently at issue is concededly subflow subject to the prior appropriation system. Groundwater, on the other hand, is subject at common law to the American reasonable use rule, which allows basically unlimited pumping so long as the water is used on site. *Bristol v. Cheatham*, 255 P.2d 173, 180, 75 Ariz. 227, 237-38 (1953). Much groundwater is also now subject to statutory management under the Arizona Groundwater Management Act of 1980.

² See *In Re The General Adjudication of All Rights to Use Water in the Gila River System and Source*, 989 P.2d 739, 743, 195 Ariz. 411, 415 (1999) ("Gila III").

B. Application of the Severance & Transfer Statute

1. Code Rights

Arizona's water code, first passed in 1919, now includes a severance and transfer statute, section 172 of the water code.³ The statute establishes significant requirements for severance and transfer of a water right from one place of use to another: approval by the Arizona Department of Water Resources ("ADWR"),⁴ no injury to vested water rights,⁵ and consent from any irrigation district, agricultural improvement district, or water users' association in which the land falls.⁶ Irrigation district consent is required if the right that is being transferred is on land within the boundaries of an irrigation district,⁷ or if the water used comes from a watershed supplying water to the irrigation district; the destination is not relevant to irrigation district veto.⁸ The requirements for all other strategies are similar—objections, non-injury, and approval by the ADWR or the adjudication court; the irrigation district veto and limitation of an instream transfer to a state agency are what distinguish the code procedure. The statute also allows the land from which the right is being transferred to be removed from the irrigation district in exchange for other lands. A severance and transfer under this provision requires only the consent of the irrigation district rather than the ADWR, and thus is a potentially attractive route if the transfer is from within an irrigation district and that district is amenable to the change.⁹

Under the severance & transfer statute, rights may be transferred only "to the *state* or its political subdivisions for use for recreation and wildlife purposes, including fish."¹⁰ Outside this

³ ARIZ. REV. STAT. ANN. § 45-172 (2004).

⁴ ARIZ. REV. STAT. ANN. § 45-172(A)(1) (2004).

⁵ ARIZ. REV. STAT. ANN. § 45-172(A)(2) (2004). The "no-injury" rule is a standard feature of prior appropriation systems, both at common law and encoded.

⁶ ARIZ. REV. STAT. ANN. § 45-172(A)(5-7) (2004).

⁷ ARIZ. REV. STAT. ANN. § 45-172(4) (2004).

⁸ ARIZ. REV. STAT. ANN. § 45-172(5) (2004).

⁹ ARIZ. REV. STAT. ANN. § 45-172(6) (2004).

¹⁰ ARIZ. REV. STAT. ANN. § 45-172(A) (2004) (emphasis added).

statute, the status of an instream flow water right is construed in light of *McClellan v. Jantzen*,¹¹ which is not written so narrowly. For a number of years, ADWR has allowed non-state parties, including federal agencies and private individuals and organizations, to obtain new instream flow rights.¹² This approach was recently upheld by the Arizona Superior Court for Maricopa County in *Phelps Dodge v. ADWR*,¹³ which validated an application by the U.S. Forest Service for an instream flow right on Cherry Creek. One implication that remains even if an irrigation water right is converted to an instream right under this prong of the severance and transfer statute is that the state agency must own the land along the instream reach.

The severance and transfer statute does not recognize that downstream water users can benefit from a conversion to instream flow, and need only be protected against any change in the timing of return flows. Irrigation districts appear to have an unqualified right to veto any conversion, even if a conversion to instream flow effectively delivers water to them.

2. Pre-Code Rights

Although the severance and transfer option is not attractive for code rights, the statute may not be applicable to pre-code rights.¹⁴ TNC has argued in the past that pre-code rights are "grandfathered" from the surface water code and thus their uses can be changed without approval of the ADWR and the strictures of the severance & transfer statute.¹⁵ The main argument is that until a water right is adjudicated by a court of competent jurisdiction, the ADWR cannot know the extent of the water right to be transferred, and that the ADWR's approval of the transfer of an

¹¹ 547 P.2d 494, 26 Ariz. App. 223 (1976)

¹² See, e.g., ARIZ. DEPT. OF WATER RES., APPLICATION GUIDELINES: PERMIT TO APPROPRIATE PUBLIC WATER OF THE S

¹³ *Phelps Dodge Corp. v. Ariz. Dept. of Water Res.*, No. LC2003-000243-001 DT, Minute Entry (Ariz. Super., Mar. 11, 2004).

¹⁴ Those rights perfected by appropriation and beneficial use before 1919.]

unadjudicated pre-code right would encroach on the court's jurisdiction to adjudicate the right. But if a court has jurisdiction to adjudicate a water right in the first instance, it should also be able to adjudicate the severance and transfer of the right.

The water code's "grandfather" provisions are quite opaque. The code prohibits any measure that would "impair vested rights," but it is unclear that the procedural requirements of the code rise to the level of such impairment.¹⁶ More analogous is the provision for diversions for which works began before the enactment of the code; such rights shall not be "impaired or affected" but shall be adjudicated." Although little Arizona case law is directly on point, the Ninth Circuit has addressed the grandfathering of pre-code rights in Nevada. In *United States v. Alpine Land & Reservoir Co.*, the court endorsed an earlier District Court holding that rights established before the enactment of Nevada's water code in 1913 were "governed by the Nevada case law existing before the enactment of the statutory scheme", and were therefore not subject to the five year forfeiture rule imposed by the Nevada code.¹⁷

There is some indication in Arizona common law that severance & transfer is not possible outside the water code because pre-code rights are strictly appurtenant to the land. The Arizona Supreme Court noted in *Gillespie Land & Irrigation Co. v. Buckeye* in 1953: "a water right is attached to the land on which it is beneficially used and becomes appurtenant thereto It is in no sense a floating right, nor can the right, once having attached to a particular piece of land, be made to do duty to any other land."¹⁸ Although *Gillespie* did not reach the merits of the

¹⁵ Robert Wigington & Diana Imig, Water Rights Tracking and Documentation Report, Buenos Aires National Wildlife Refuge Wells and Surface Filings (Excluding Stock Ponds), Memorandum from The Nature Conservancy to U.S. Forest Service, May, 2000, at 12 n.19 [hereinafter "Wigington & Imig."]

¹⁶ ARIZ. REV. STAT. ANN. § 45-171 (2004).

¹⁷ *United States v. Alpine Land & Reservoir Co.*, 878 F.2d 1217, 1223 (9th Cir. 1989).

¹⁸ *Gillespie Land & Irrigation Co. v. Buckeye Irrigation Co.*, 257 P.2d 393, 397-98, 75 Ariz. 377, 384 (1953) (citing *Slosser v. Salt River Valley Canal Co.*, 65 P. 332, 7 Ariz. 376 (1901); *Gould v. Maricopa Canal Co.*, 76 P. 598, 8 Ariz. 429 (1904); *Brockman v. Grand Canal Co.*, 76 P. 602, 8 Ariz. 451 (1904); *Tattersfield v. Putnam*, 41 P.2d 228, 45 Ariz. 156 (1935); *Olsen v. Union Canal & Irrigation Co.*, 119 P.2d 569, 58 Ariz. 306 (1941)).

claimed water rights, the court was evaluating the state of the evidence in light of appurtenance as a principle of beneficial use. In *Salt River Valley Water Users Assn. v. Kovacovich*,¹⁹ the Arizona Court of Appeals, citing *Gillespie*, held in denying a salvager the benefit of conservation measures, that "Beneficial Use precludes the application of waters gained by water conservation practices to lands other than those to which the water was originally appurtenant."²⁰ Taken together, these cases raise some question about the common-law basis for severance & transfer of pre-code rights.

The *Gillespie* line is distinguishable from the present situation, however, in that the early cases all rule on the *establishment* of a water right rather than the transfer of one. This dovetails with the anti-speculation rationale for appurtenance, which required water use by landowners to guard against the speculative claim of water rights for sale to landowners.²¹ In *Brockman v. Grand Canal Co.*, the Arizona Supreme Court recognized a landowner's ability to sever a water right from the land. It held that a landowner who sold his land and water right, then repurchased the land without the water right, was not entitled to the priority date of the first appropriation.²² In the present case, strict appurtenance would not make sense because the beneficial use has already been established. The rights in question are already perfected. Another authority for severance and transfer of pre-code rights may be the Arizona Constitution's express rejection of any system of riparian rights.²³ Requiring strict appurtenancy for pre-code rights may so smack of riparianism that it would be unconstitutional.²⁴

¹⁹ 411 P.2d 201, 3 Ariz. App. 28 (1966).

²⁰ *Id.* at 203, 3 Ariz. App. at 30.

²¹ See *Olsen v. Union Canal & Irrigation Co.* (strict appurtenancy used to prevent unfair treatment of farmers by a canal company).

²² 8 Ariz. at 451. Note, however, the court's unmoderated statement in *Tattersfield*: "such right could not in any manner be transferred to any land for which it was not originally appropriated by the owner or possessor thereof, with the sole exception that if, through no fault of the owner of the land, and by the operation of natural laws, the land became unsuitable for cultivation." 45 Ariz. at 170. It might be argued that the conditions on the San Pedro make groundwater-dependent lands "unsuitable for cultivation."

²³ ARIZ. CONST., Art. 17, § 1.

²⁴ See also John Leshy & James Belanger, *Arizona Law Where Surface and Ground Water Meet*, 20 ARIZ. ST. L.J. 657, 667 (1988).

C. Alternate Mechanisms

1. Change in Use

Arizona's water code allows a water right holder to change the type of water use of the right (without transferring its place of use) upon approval by the AWDR.²⁵ One route would be to assign the pumping right to BLM under the water code's assignment provisions, which state without qualification that "certificates of water right" may be assigned.²⁶ Assignment would require only notification of ADWR, and would not affect the priority date of the water right or (presumably) its status as a pre-code right.²⁷ BLM could then petition ADWR to approve a change in use. ADWR approval would require first public notice and opportunity for other users to object. ADWR has indicated receptivity to changes in use to instream flow in the past, subject to a caveat that the place of use should be in or close to the stream affected.²⁸ In contrast to the hydropower rights on Fossil Creek, however, the place of use of the irrigation rights in question here may not be located close enough to the bed of the San Pedro or may be so conceptually distinct from the stream bed that ADWR would not approve the change in use.

For pre-code rights, it seems difficult to argue that the right would be exempt from the severance & transfer statute but not from the change in use statute. TNC has argued that pre-code rights should be entitled to a common-law change in use, apart from the change in use statute.²⁹ This seems consistent with the common law no-injury rule.

²⁵ ARIZ. REV. STAT. ANN. § 45-156(B) (2000).

²⁶ ARIZ. REV. STAT. ANN. § 45-163.

²⁷ Fossil Creek Water Rights Issue, Memorandum from Richard Campbell to Andrew Fahlund, American Rivers, Aug. 15, 2000, at 4 (on file with TNC Worldwide Office and TNC Boulder Office) [*hereinafter* "American Rivers Memorandum."]

²⁸ *Id.*

²⁹ Wigington & Imig, *supra*, at 12 n. 19.

2. Abandonment or Forfeiture

Abandonment of the rights purchased by TNC, with subsequent filing by BLM for instream flow rights, is another route to the extent that the BLM owns the land along the instream reach and there are few or no water rights with intervening priorities. Such fortuitous circumstances along Fossil Creek led American Rivers to recommend that Arizona Public Services pursue abandonment and subsequent Forest Service filing.³⁰ These circumstances would need to be investigated for the various reaches of the San Pedro and all of the water supply from abandoning a purchased water right might not accrue to a newly filed instream flow right. But where the new instream flow right is a federally reserved water right, whatever increased supply is protected will be protected against pumping outside the subflow zone.

D. Special Status of Federal Rights

The Arizona Supreme Court has held that federal *reserved* rights are entitled to greater protection against other appropriators in Arizona's water system. In its 1999 interlocutory opinion on the Gila general adjudication, the court held that federal reserved rights (*Winters* rights) would extend to (non-subflow) groundwater and that federal reserved right holders were entitled to greater protection than similarly situated state rights holders.³¹ The federal government "can protect its water from subsequent diversion, whether the diversion is of surface or groundwater."³² In creating the SPRNCA in 1988, Congress directed that federally reserved water rights be established for its instream flows.³³ BLM has filed for such federally reserved water rights in the general adjudication of the Gila River Basin. These federally reserved water

³⁰ *Id.*

³¹ *In Re The General Adjudication of All Rights to Use Water in the Gila River System and Source*, 989 P.2d 739, 195 Ariz. 411 (1999) ("Gila III").

³² *Gila III*, 989 P.2d at 749, 195 Ariz. at 421 (quoting *Cappaert v. United States*, 426 U.S. 128, 145 (1976)).

rights can be protected against any increase in pumping outside the subflow zone that has occurred since 1988, which may be significant.³⁴

Conversion of rights along the San Pedro may qualify for similar accommodation because the rights are being obtained to fulfill the federal purpose of SPRCNA. As in *Gila III* and the recent case of *Forest Guardians v. Wells*,³⁵ the Arizona courts seem willing in some circumstances to endorse alternative uses of state law frameworks for federal purposes of conservation. It is, however, a leap from federal reserved rights to non-reserved rights; already under criticism for *Gila III*, the Arizona courts may be reluctant to further preempt state law.³⁶ Still, the *Gila III* opinion does seem to leave room for expansion; not only does it refer to the federal government's power to protect its water (as above), but it endorses Leshy and Belanger's view that under "federal law, the question is one of hydrology, not legal compartmentalization."³⁷

E. Hybrid Rights

Hybrid rights may be another way to allow BLM to convert early-priority irrigation rights to instream flow rights on the San Pedro. A hybrid right generally is obtained within state water

³³ Arizona-Idaho Conservation Act of 1988, §§ 101-07, 16 U.S.C. §§ 460xx-1(d) (2000).

³⁴ Subflow rights within the SPRNCA have already been converted to instream flow to some extent by their retirement in favor of the BLM filings for federal reserved water rights with a priority date relating back to the 1988, or for instream flow water rights based on state law with a priority date relating back to 1985. The filings for federal reserved water rights are still pending in the general adjudication of water rights for the Gila River Basin, and while the instream flow right based on state law has been certificated by the ADWR, this right is limited to base flows and cannot be enforced against pumping outside the subflow zone. The retirement of groundwater pumping outside the subflow zone will also benefit instream flows within the SPRNCA if new pumping for irrigation is prohibited by the adoption of an irrigation non-expansion area, and pumping for residential growth is regulated so that this benefit is not offset.

³⁵ 34 P.3d 364, 201 Ariz. 255 (2001) (requiring state land commissioner to accept high bid for grazing permits, even if bidders did not intend to graze the land).

³⁶ An Idaho decision granting federal reserved water rights to wilderness areas prompted the recall of one of the justices in the majority; another justice changed her vote upon rehearing, reversing the original decision. Rocky Barber, *Water Ruling Reversed; Idaho High Court Decides Feds Don't Own Wilderness Flows But Reserve Control Of 'Wild And Scenic' Salmon*, IDAHO STATESMAN, Oct. 28, 2000, at 1A.

³⁷ *Id.* at 422. (quoting Leshy & Belanger, *supra* note 31, at 734.

law procedures, but its substantive characteristics are defined according to federal law.³⁸

Although Congress has the power to create such rights,³⁹ it has rarely done so, with the recent exception of the Colorado Sand Dunes National Park⁴⁰ and the Zuni water settlement discussed below. In the present case, the main benefits of enactment of a hybrid right system by Congress would be explicit authority for BLM or another federal agency to convert irrigation rights to instream flow rights without surrendering their ownership. If provided by Congress, such rights could benefit from the expanded protection given federal rights by *Gila III*; the explicit federal substantive basis of such rights would militate in favor of the court's view that hydrology is the determining factor for water rights under federal law.⁴¹

Although the purchase of water rights for the SPRNCA was contemplated, along with the filing for new federal reserved water rights dating back to 1988, Congress did not appear to call for any hybrid rights upon the conversion of such purchased rights to instream flows when SPRNCA was designated. The legislative history of the SPRNCA notes that BLM "may dedicate any water rights, acquired in the process of additional land acquisitions, to satisfy the purposes of the conservation area. Any change in the BLM rights acquired under State law will be subject to State regulations for change of use or place of use."⁴² One implication of not creating a hybrid right and instead subjecting any conversion to state law is that the BLM would have to surrender ownership of the converted rights to a state agency if the Arizona's severance and transfer statute was applied to water rights purchased for the SPRNCA.

³⁸ See John Leshy, *Water Rights for New Federal Land Conservation Programs: A Turn-of-the-Century Evaluation*, 4 U. DENV. WATER L. REV. 271 (2001).

³⁹ See Olson opinion, *supra*.

⁴⁰ 16 U.S.C.A. § 410hhh-7(b)(2)

⁴¹ See *supra* note 62.

⁴² S. REP. NO. 99-010, at 2 (1988).

The Zuni Indian Tribe Water Rights Settlement Act of 2003⁴³ offers an important example of the interplay of federal and state legislation to establish hybrid rights that accommodate the conversion of irrigation rights to federal purposes. Under this settlement the Zuni tribe agreed to waive its water right claims in the general adjudication of the Little Colorado River in return for federal authorization and funding to purchase water rights for and otherwise restore a scared lake near the confluence of the Zuni and Little Colorado rivers. Although the project was generally characterized as wetlands restoration, it included a second phase in which the channel of the Little Colorado River would be aggraded to restore both wetlands and riparian areas, which may entail the conversion of surface water rights to instream flow. Unlike the SPRNCA, federally reserved water rights were explicitly disclaimed whenever lands were purchased for addition to the Zuni Heaven Reservation, and like the SPRNCA, the conversion of purchased water rights to tribal use was to be undertaken pursuant to state water law, “but once those rights have been acquired and severed and transferred to the reservation, the water takes on key attributes of a federal right: ... the water rights cannot be lost by abandonment or forfeiture, and state law does not apply to water users on the reservation.”⁴⁴

Following the passage of the Zuni Settlement Act, Arizona’s severance and transfer statute was amended to accommodate the promised water right conversions.⁴⁵ This amendment only applies to 3,600 acre feet, and sunsets in the year 2019, but it authorizes the severance and transfer of water rights by the Zuni Tribe for “vegetative restoration, including wildlife” upon approval by of court of competent jurisdiction, or if none, by the ADWR. This federal purpose probably includes conversions to instream flows, given that the second phase of the project

⁴³ Zuni Indian Tribe Water Rights Settlement Act of 2003, H.B. 2244.

⁴⁴ Testimony of Wilfred Eriacho, Sr., Chairman Zuni Water Rights Committee, before the Subcommittee on Water and Power, U.S. House of Representatives, April 1, 2003, concerning the Zuni water rights settlement agreement, p. 7.

concerns the channel of the Little Colorado River and given that the Zuni Settlement Act provides that, "water use by the Zuni Tribe...for wildlife or instream flow use, or irrigation to establish or maintain wetland on the Reservation shall be consistent with the purposes of the Reservation."⁴⁶ If conversions to instream flow are covered by this amendment, it avoids frustration of tribal control by not limiting ownership of the converted right to a state agency. By requiring approval by a court of competent jurisdiction as a first resort, this amendment may also presume that ADWR approval is not applicable to the conversion of pre-code water rights, and that the court with jurisdiction to adjudicate the extent of a pre-code right may also adjudicate its severance and transfer.

V. Conclusion

TNC should confirm the details of the Zuni settlement – does it entail the conversion of pre-code irrigation rights to instream flows without surrendering ownership to a state agency and without consent of any irrigation district in the watershed pursuant to court rather than ADWR approval? TNC should then purchase and offer to sell a set of irrigation water rights for conversion to an instream reach on the lower San Pedro as a test case for a federal agency, and explore whether legislation analogous to the Zuni settlement should be sought to accommodate this conversion without loss of the priority date of the irrigation rights and without consent from any irrigation district. If this route becomes infeasible, TNC should assess whether there is state agency that could own land along the instream reach and that would make a good partner in holding the converted water rights. TNC should consider retaining contractual or real property assurances about the management and enforcement of the converted rights for instream purposes. Although federal enforcement of the converted right against pumping outside the subflow would

⁴⁶ ARIZ. REV. STAT. ANN. § 45-176 (2004).

be ideal, this threat is not as significant on the lower San Pedro. Because such enforcement may not be essential but may be politically alarming, it might be compromised if all other elements of a legal framework for an active market in the conversion of surface or subflow rights to instream flows can be established on the lower San Pedro or elsewhere in Arizona. Finally, TNC or partner that owned the land along a targeted instream reach, could seek to obtain new instream flow water rights for reaches that would benefit from the abandonment of purchased irrigation rights.

⁴⁶ Section 8 (b)(1)(E) of the Zuni Settlement Act