



**ARIZONA SUPREME COURT
ORAL ARGUMENT CASE SUMMARY**



**ARIZONA DEPARTMENT OF WATER RESOURCES, et al. v.
HON. CRANE McCLENNEN/ MOHAVE COUNTY
CV-15-0223-SA**

PARTIES:

Petitioners: Arizona Department of Water Resources (ADWR) and Freeport Minerals Corporation (Freeport)

Respondent: Mohave County

Amici curiae: (1) Hualapai Tribe; (2) Arizona Game and Fish; (3) Arizona State Land Department; (4) Central Arizona Water Conservation District and Salt River Project Agricultural Improvement and Power District; and (5) La Paz County and the Arizona Association of Counties

FACTS:

The Settlement Agreements: Public Law 113–223–Dec. 16, 2014 (128 Stat. 2096) is the “Bill Williams River Water Rights Settlement Act of 2014.” This Congressionally-approved law was enacted to “approve, ratify, and confirm” the “Big Sandy River-Planet Ranch Water Rights Settlement Agreement” and the “Hualapai Tribe Bill Williams River Water Rights Settlement Agreement.” The two agreements are interrelated. Generally, they will: (1) settle certain Hualapai Tribe water rights claims in the Bill Williams River watershed, (2) authorize the Secretary of the Interior to implement the agreements and remove objections to applications for severance and transfer of certain water rights, (3) advance the Lower Colorado River Multi-Species Conservation Program, or LCR MSCP (including a long-term lease and eventual transfer of a portion of Planet Ranch land and associated water rights to public ownership for the program), and (4) secure financial contributions from Freeport Minerals Corporation (intended to advance completion of a larger comprehensive settlement of Hualapai Tribe rights to Colorado River and Verde River waters that were federally reserved for the use of the tribe’s homeland).

The overall settlement process began about seven years ago. Planet Ranch and Hualapai Tribe settlements benefit the Tribe, ADWR, Freeport, and Arizona Game and Fish. To make these settlement agreements and the Act work, the parties agreed that Freeport, which purchased Planet Ranch from Scottsdale, would apply for severance and transfer of some of the Ranch’s vested water rights.

Under the terms of the Act, the Secretary of the Interior must publish in the Federal Register a statement of findings to make the Act enforceable. Those findings must include an issuance of a conditional order by ADWR approving the severance and transfer applications requested by Freeport and confirmation that all objections to the applications have either been conditionally

withdrawn or “resolved in a decision issued by ADWR that is final and nonappealable.” ADWR’s order must become final and enforceable by December 13, 2015 to advance the two settlements.

Section 9(c) of the Act provides: “If the Secretary does not publish a statement of findings under subsection (a) by December 15, 2015, or an extended date agreed to by the Tribe, the Secretary, and [Freeport], after providing reasonable notice to the State of Arizona,” the Act is repealed, either by December 31 or within a time certain after any extended date. This process is similar to that imposed by the Arizona Water Settlements Act that resulted in the comprehensive settlement of Tohono O’odham Nation water rights claims in 2007. *See In re General Adjudication of All Rights to Use Water in the Gila River System (“Gila VII”),* 217 Ariz. 276 (2007).

The Severance and Transfer Applications; Objections: On March 19, 2010, the City of Scottsdale and Freeport jointly filed seventeen applications with ADWR to sever and transfer Planet Ranch water rights. Planet Ranch, located along the Bill Williams River, was first homesteaded in about 1910.

Eleven of the applications were filed to sever water rights from Planet Ranch and transfer them to the Bagdad Mine Complex (for current and future mining purposes) and to the Town of Bagdad (for future municipal purposes). Freeport owns and operates the mine near the company town. Both are located in Yavapai County. Water for the mine has been supplied in the past by Freeport’s existing wells located near Wikieup in the Bill Williams River watershed. Under A.R.S. § 45-172, water would not be physically moved from Planet Ranch to the Wikieup well field if the applications are approved. Water would be pumped from the well field for the mine consistent with the amount that Freeport has pumped historically near Wikieup – a “cap” of 10,055 acre feet per year (AFY) as designated in the settlements.

The six remaining applications were filed to sever and transfer water rights from one part of Planet Ranch to another. These applications would change designated water uses from irrigation to habitat restoration purposes for the LCR MSCP. They represent 5,449 AFY of water that could be used on that part of Planet Ranch for conservation.

In 2011, Scottsdale conveyed Planet Ranch to Freeport and assigned its interest in the applications. Freeport conveyed Planet Ranch to Byner Cattle Company, a wholly owned subsidiary of Freeport.

As required by A.R.S. § 45-172, ADWR published legal notice of the Freeport applications in local newspapers in August and September 2010. The notices provided that “any interested person” could file an objection. Mohave County filed a timely objection to the applications as an “interested person.” Nearly four years later, the County sent a letter incorporating more arguments made by some other objectors. ADWR deemed that letter an untimely “objection” under the statute.

ADWR Action; Appeals: By letter dated June 4, 2014, ADWR notified the Mohave County Board of Supervisors that the County’s objection to the Freeport applications was denied. The Department’s letter explained that the applications were filed pursuant to A.R.S. § 45-172, which sets forth certain requirements that must be satisfied in order for the applications to be

granted. Under this statute, the severance and transfer of water rights may not affect, infringe upon, or interfere with vested or existing water rights. ADWR found that the County did not identify any such existing interest. ADWR then determined (1) that the County had no standing to argue that the applications would negatively affect the vested or existing water rights of others; (2) that ADWR's director had no authority to deny an application on a ground alleged to be against public interest (like diverting water to another county); and (3) that whether an increased tax burden would be created by consolidating public land holdings along the Bill Williams River was not a consideration affecting approval of the Freeport applications under § 45-172.

ADWR also informed Mohave County that the denial of its objection was an appealable agency action. Mohave County pursued its administrative appeal, and the matter proceeded before an Administrative Law Judge (ALJ).

On November 17, 2014, ALJ Tammy L. Eigenheer sent her written decision to the ADWR Director. She concluded that (1) Mohave County conceded it does not possess any vested or existing water rights in the Bill Williams River watershed that would be affected by granting Freeport's applications; (2) the County failed to show it would suffer a threatened or actual injury from granting the applications, or that it had standing to file an objection; (3) the County failed to show its objection falls within the scope of A.R.S. § 45-172; (4) ADWR does not have statutory authority to deny an application on the ground that it is against public interest (either an alleged negative effect on water supplies in the area or an increased tax burden on county residents); and (5) because Mohave County did not raise the public trust doctrine in its initial objection, it may not raise the doctrine in its appeal.

ADWR's director then recused himself from this matter (citing a potential conflict of interest due to previous work in the public sector) and delegated authority to his deputy to make a final agency decision. The deputy director (now the director) decided to accept the ALJ's decision in its entirety, with a few minor corrections. He issued a formal decision on November 25, 2014. Mohave County applied for review to the superior court.

In June 2015, Judge McClennen reviewed the ADWR's decision and vacated it. First he specified the standard of review to be applied. Generally, he stated that a reviewing court is not bound by a trial court's or an agency's conclusions about questions of law, but remains the final authority on critical questions of statutory construction. After summarizing the parties' arguments, he ruled:

This Court concludes the authorities and arguments provided by Mohave are well-taken, and this Court adopts those authorities and arguments in support of its decision.

...

Based on the foregoing, this Court concludes the action of AzDWR was contrary to law, was arbitrary and capricious, and was an abuse of discretion.

ADWR and Freeport filed a notice of appeal and a petition to transfer the appeal to the Arizona Supreme Court. When the appeal was stayed, ADWR and Freeport filed a petition for special action with the Supreme Court. The Court accepted special action jurisdiction and

ordered supplemental briefing and oral argument.

ISSUE:

“This Petition raises a single issue for review: Did the Trial Court err by ruling that Mohave County had a right to pursue, under A.R.S. § 45-172, its objections to the Applications despite the County’s admission that it does not hold any vested or existing water rights that could possibly be affected by the proposed sever and transfer of water rights?”

STATUTES:

A.R.S. § 45-172 provides in relevant part, with **emphasis added**:

A. A water right may be severed from the land to which it is appurtenant or from the site of its use if for other than irrigation purposes and with the consent and approval of the owner of such right may be transferred for use for irrigation of agricultural lands or for municipal, stock watering, power and mining purposes and to the state or its political subdivisions for use for recreation and wildlife purposes, including fish, without losing priority theretofore established, subject to the following limitations and conditions:

1. Except as otherwise provided in this section no such severance or transfer shall be made unless approved by the director, and the approval of the director shall prescribe the conditions of the approval.

2. Vested or existing rights to the use of water shall not be affected, infringed upon nor interfered with, and in no event shall the water diverted or used after the transfer of such rights exceed the vested rights existing at the time of such severance and transfer, and the director shall by order so define and limit the amount of water to be diverted or used annually subsequent to such transfer.

3. The water rights sought to be transferred shall have been lawfully perfected under the laws of the territory or the state of Arizona and shall not have thereafter been forfeited or abandoned.

* * *

7. An application for severance and transfer of a water right shall be filed with the director. The director shall give notice of the application by publication once a week for three successive weeks in a newspaper of general circulation in the county or counties in which the watershed or drainage area is located. The notice shall state that **any interested person may file written objections to the proposed severance and transfer** with the director within thirty days after the last publication of the notice. In appropriate cases, including cases in which an objection has been filed, an administrative hearing may be held before the director's decision on the application if the director deems a hearing necessary.

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