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7 IN THE SUPERIOR COURT OF THE STATE OF ARIZONA
8 IN AND FOR THE COUNTY OF MARICOPA

9 IN RE THE GENERAL ADJUDICATION
10 OF ALL RIGHTS TO USE WATER IN
11 THE GILA RIVER SYSTEM AND
12 SOURCE

W-1 (Salt)
W-2 (Verde)
W-3 (Upper Gila)
W-4 (San Pedro)
(Consolidated)

13 Contested Case No. W1-11-1675

14 (contested case W1-11-2093 consolidated
15 with W1-11-1675)

16 REPORT OF THE SPECIAL MASTER:
17 FORFEITURE OF PRE-1919 WATER
18 RIGHTS

19 CONTESTED CASE NAME: *In re St. David Irrigation District*

20 HSR INVOLVED: San Pedro River Watershed Hydrographic Survey Report.

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22 DESCRIPTIVE SUMMARY: Final Report issued pursuant to Ariz. R. Civ. P. 53(e).
23 Pursuant to A.R.S. §45-257(A)(2), objections to the Report shall be filed with the Clerk of
24 the Superior Court of Maricopa County on or before **January 18, 2022**. Responses shall
25 be filed by **February 17, 2022**. Oral argument on objections will be held at a time and
26 place set by the Court.

27 NUMBER OF PAGES: 17

28 DATE OF FILING: November 18, 2021

1 At issue is whether a finite class of rights to appropriative water put to beneficial use before
2 June 12, 1919 (“pre-1919 rights”) are subject to statutory forfeiture. As used in this Report, the
3 term “statutory forfeiture” refers to the forfeiture of water rights due to non-use for five successive
4 years as mandated under Arizona law beginning June 12, 1919.

5 6 **A. Background**

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8 On January 23, 1995, Special Master Thorson initiated contested case no. W1-11-2093 to
9 adjudicate objections and claims for water rights that Arizona Department of Water Resources
10 investigated in Watershed File Report 112-17-DBA-122. At the time that Contested Case W1-11-
11 2093 was initiated it was simultaneously consolidated with this consolidated case to adjudicate
12 claims for water rights filed by the St. David Irrigation District on behalf of its shareholders.

13 The St. David Irrigation District filed Statement of Claimant 39-06593 claiming 5,500 acre
14 feet of water for irrigation use with a claimed date of initiation of July 1881 and a date of first use
15 for beneficial purposes of July 1883. It also filed Statement of Claimant 39-06594 for 8,550 acre
16 feet of water for irrigation use with a 1881 date of initiation of right and date of first beneficial use.
17 A Statement of Claimant may be filed by any public or private legal entity on behalf of its members
18 or users. A.R.S. §§ 45-251(1), 45-254(A). The Arizona Department of Water Resources
19 (“ADWR”) investigated St. David Irrigation District’s claims and provided an extended narrative
20 about the St. David Irrigation District in Vol. 1 *Hydrographic Survey Report for the San Pedro*
21 *Watershed*, 333-351 (filed Nov. 20, 1991) (“San Pedro HSR”).
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24 The Arizona Department of Water Resources noted in its discussion of the St. David
25 Irrigation District that it had received “numerous filings by individual users within the [St. David
26 Irrigation District] claiming rights to the water provided by the district, as well as to water
27 withdrawn from privately owned wells.” *Id.* at 337. Accordingly, ADWR also prepared a set of
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1 separate Watershed File Reports that evaluated the water uses claimed by the individuals and
2 identified potential water rights associated with individual water users. Following the distribution
3 of the San Pedro HSR, objections were filed to all individual Watershed File Reports concerning
4 water use in the St. David Irrigation District. When Special Master Thorson initiated this case, he
5 also initiated and consolidated with this contested case all contested cases associated the individual
6 water uses associated with water diverted by and from the St. David Irrigation District. This
7 consolidated case now includes more than 130 contested cases in which hundreds of objections
8 were filed.
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10 Among the consolidated cases are a group of cases that include potential water rights for
11 irrigation use that ADWR labelled with the classification "IR090". This classification applies to
12 a claimed water use that ADWR investigated and "determined that no irrigation has taken place on
13 this property (or parcel) in the last five years, but there has been irrigation within the past ten years
14 based upon a review of historical aerial photography and field investigations." Vol. 4 San Pedro
15 HSR at 36. The five-year time period has legal significance under Arizona law because "when the
16 owner of a right to the use of water ceases or fails to use the water appropriated for five successive
17 years, the right to the use shall cease, and the water shall revert to the public and shall again be
18 subject to appropriation." A.R.S. 45-141(C). The United States, Gila River Indian Community,
19 San Carlos Apache Tribe, Tonto Apache Tribe, and the Yavapai-Apache Indian Community, Camp
20 Verde Reservation objected to the potential water rights with this classification because ADWR
21 determined that the water use had been idle for more than five years (the "Forfeiture Objection").
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24 Salt River Project, joined by the St. David Irrigation District, filed a motion for partial
25 summary judgment challenging the Forfeiture Objection ("2020 Motion") in a group of cases where
26 the claimed priority date was prior to 1919. See Table 1. The 2020 Motion identified eight
27 contested cases consolidated with this case that had three elements in common:
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1. A potential water right classified by ADWR in its watershed file report as IR090, IR091, or IR092;
2. A date of apparent first use reported by ADWR or date of first use reported by claimant as prior to 1919; and,
3. An objection that the right had not been used for five years and had been forfeited.

Contested Case No.	Watershed File Report	Potential Water Right	Apparent Date of First Use or Date Claimed
W1-11-1757	112-17-ACC-026	IR090	1916
W1-11-1981	112-17-BDA-002	IR090	1891
W1-11-1986	112-17-BDA-007	IR090	1907
W1-11-1986	112-17-BDA-007	IR091	1907
W1-11-1986	112-17-BDA-007	IR092	1907
W1-11-2093	112-17-DBA-122	IR090	1881
W1-11-2093	112-17-DBA-122	IR090	1881
W1-11-2097	112-17-DBA-151	IR090	1881
W1-11-2107	112-17-DBA-198	IR090	1881
W1-11-2156	112-17-DBD-009	IR090	1881
W1-11-2170	112-17-DBD-030	IR090	1881

TABLE 1. List of potential water rights provided by SRP in the 2020 Motion. The bolded row is the information for the individual case that is the subject of the 2021 Motion filed by St. David Irrigation District.

SOURCE OF INFORMATION: Table 5-30 in Vol. 1 San Pedro HSR at 347-350, Watershed File Reports 112-17-BDA-002, 112-17-BDA-007, and 112-17-DBA-198.

1 In the 2020 Motion, the parties opposing the Forfeiture Objection argued that water rights
2 with a pre-1919 priority date are not subject to statutory forfeiture as a matter of law.¹ The objecting
3 parties countered that a pre-1919 priority date is not a defense to the Forfeiture Objection because
4 rights have been forfeited due to non-use after 1919. Based on the Arizona Supreme Court's
5 decision in *San Carlos Apache Tribe v. Superior Court ex. Rel. Cty. of Maricopa*, 193 Ariz. 195,
6 972 P.2d 179 (1999) ("*San Carlos*"), the 2020 Motion was denied and a decision entered that pre-
7 1919 water rights are subject to statutory forfeiture. Minute Entry, filed September 10, 2020.

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9 On August 16, 2021, St. David Irrigation District, joined by ASARCO LLC and Freeport
10 Minerals Corporation, filed a motion for partial summary judgment focused on contested case W1-
11 11-2093 ("2021 Motion"), one of the individual cases consolidated in this case and included in the
12 2020 Motion. Terisha Driggs owns the land that is the subject of contested case W1-11-2093. In
13 that case, like the other seven cases identified in the 2020 Motion, ADWR found a potential water
14 use that it designated as IR090. And, in that case, like the other seven cases, the United States, the
15 Gila River Indian Community, San Carlos Apache Tribe, Tonto Apache Tribe, and the Yavapai-
16 Apache Indian Community, Camp Verde Reservation filed a Forfeiture Objection. In this contested
17 case, the landowner asserts only the defense of a claimed pre-1919 priority date to the Forfeiture
18 Objection for a right to water to irrigate 17.5 acres. Thus, the substantive question presented by
19 the 2021 Motion is whether an adjudicated water right to irrigate 17.5 acres should be denied to a
20 landowner who claims a pre-1919 water right but does not dispute that the 17.5 acres has not been
21 irrigated for period of at least five years beginning after 1919. The 2021 Motion does not address
22 water rights for the remaining 2.5 acres of land for which a right to water for irrigation use is
23 claimed.
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28 ¹ The issue raised in the 2020 Motion was one of three issues designated for consideration
in the first phase of the case. Minute Entry at 3 (filed August 19, 2019).

1 **B. Procedural Issues**

2 The United States supports the decision denying the 2020 Motion on the grounds that pre-
3 1919 water rights are subject to statutory forfeiture but opposes the 2021 Motion on procedural
4 grounds. It premises its arguments on the assertion that the decision on the 2020 Motion required
5 a finding of fact that the landowners in each case had not used water on the property for a period
6 of more than five years beginning after 1919 and that water rights in each of the contested cases
7 have now been denied. The United States argues that the 2021 Motion seeks a denial of a water
8 right that has already occurred or is an improper motion for reconsideration. As to the latter, the
9 United States reasons that the decision on the 2020 Motion, as applied to this particular contested
10 case, denied water rights for the 20 acres claimed to be irrigated but as the 2021 Motion is limited
11 to 17.5 acres of pasture, the 2021 Motion seeks a reconsideration of a denial of water rights to
12 irrigate a 2.5-acre orchard.
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14 The 2020 Motion tested the validity of a specific defense to the Forfeiture Objection, which
15 was only one of the objections filed in that contested case. A party may move for partial summary
16 judgment on a “part of each claim or defense”. Ariz. R. Civ. P. 56(a). The rule permits a party to
17 file a motion for a partial summary judgment to limit the issues to be adjudicated. *Kelman v. Bohi*,
18 27 Ariz. App. 24, 32, 550 P.2d 671, 679 (1976); *see also Servicios Especiales Al Comercio Exterior*
19 *v. Johnson Controls, Inc.*, 791 F. Supp. 2d 626, 632 (E.D. Wis. 2011). The denial of the 2020
20 Motion rejected a defense to the Forfeiture Objection as a matter of law and left the remaining
21 issues, including other defenses to the Forfeiture Objection, to the claimed water right for an
22 evidentiary hearing. The decision to deny the 2020 Motion did not require a factual determination
23 that the claimant had forfeited a water right and it did not deny water rights to any claimant or
24 landowner.
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1 In a similar legal situation, the court denied a motion for summary judgment that asserted
2 an immunity defense to a negligence claim without also finding that the defendant was negligent.
3 *MacKinney v. City of Tucson*, 231 Ariz. 584, 585, ¶ 3, 299 P.3d 1282, 1283 (Ct. App. 2013). See
4 also *County of La Paz v. Yakima Compost Co., Inc.*, 224 Ariz. 590, 233 P.3d 1169 (Ct. App. 2010)
5 (trial court properly denied motion for summary judgment on defense of lack of notice of claim
6 without reaching the merits of the breach of contract claim later decided by the jury). In
7 *MacKinney*, the defendant moved for summary judgment arguing that it was immune from liability
8 for a golfer's injury under Arizona's recreational-use immunity statute. The trial court denied the
9 motion because it concluded as a matter of law that a golf course is not included in the statutorily
10 enumerated "premises" for which recreational-use immunity is available. The court did not and
11 was not required to make a factual finding that no negligence had occurred; instead, it focused on
12 the legal elements necessary to the immunity defense.² The ruling that the golf course was not a
13 protected premise eliminated the immunity defense at the trial level and the parties proceeded to a
14 jury trial on the negligence claim.
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17 Like the motion in *MacKinney* that did not address the factual underpinnings of the
18 negligence claim, the 2020 Motion was neither phrased as, nor understood to be a challenge to the
19 sufficiency of the evidence to establish that the claimants had continuously put water to beneficial
20 use. Just as the *MacKinney* court made no finding about the City's negligence, no finding of fact
21 was made explicitly or implicitly in the decision on the 2020 Motion that any landowner or
22 successor-in-interest in any of the contested cases listed in Table 1 had not continuously used water
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26 ² On appeal the court reversed the trial court's decision that a golf course did not fall
27 within the definition of "premises," finding as a matter of law that a golf course was a premise
28 protected under recreational-use immunity statute. The appellate court did not question the
procedural validity of the trial court's action to decide the immunity motion without a factual
finding on the negligence claim.

1 since the date the water was first put to beneficial use. Like *MacKinney* where negligence did not
2 have to be established before the immunity defense could be considered, a factual finding that the
3 claimant had failed to continuously use water was not a predicate facts material to the determination
4 of the validity of the claimed pre-1919 water right defense to the Forfeiture Objection. The
5 decision on the 2020 Motion eliminated the asserted legal defense from the consolidated case and
6 requires the parties subject to a Forfeiture Objection to proceed to a hearing to establish their water
7 rights.
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9 10 **C. Findings of Fact**

11 No dispute of material fact exists with respect to the non-use of water to irrigate the 17.5
12 acre pasture included within the property owned by Terisha Driggs:

13 **Findings of Fact No. 1.** Arizona Department of Water Resources issued its hydrographic
14 survey report for the San Pedro River watershed in 1991 (San Pedro HSR).
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16 **Finding of Fact No. 2.** Watershed File Report 112-17-DBA-122 (the “WFR”), which was
17 included in the San Pedro HSR, described irrigation, stock watering, and domestic uses by George
18 Whitehead, et al., on about 20 acres of land located in NESW Section 5 T18S R21E, Cochise
19 County, Arizona, tax parcel no. 121-11-001A (“the Property”).
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21 **Findings of Fact No. 3.** The WFR assigned Potential Water Right IR090 to the irrigation
22 use because ADWR determined that no irrigation had occurred on the Property in the preceding
23 five years.

24 **Findings of Fact No. 4.** The WFR provides an “apparent first use date” of 1881 for
25 Potential Water Right IR090.

26 **Findings of Fact No. 5.** The WFR concluded that filings made by the St. David Irrigation
27 District also applied to the investigated irrigation use.
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1 **Finding of Fact No. 6.** The United States, Gila River Indian Community, San Carlos
2 Apache Tribe, Tonto Apache Tribe, and the Yavapai-Apache Indian Community, Camp Verde
3 Reservation objected to Potential Water Right IR090 on the ground that it had been forfeited due
4 to more than five years of nonuse.

5 **Findings of Fact No. 7.** In January 2016, Trisha Driggs purchased the Property. She is the
6 successor-in-interest to George Whitehead et al., as to the rights claimed under the WFR.
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8 **Findings of Fact No. 8.** Since January 2016, Ms. Driggs has irrigated an orchard of
9 approximately 2.5 acres on the east side of the Property and a field of approximately 17.5 acres on
10 the west side of the Property.

11 **Findings of Fact No. 9.** The 17.5-acre field on the west side of the Property was not
12 irrigated for a period of five or more years but less than ten years prior to 1991 and no evidence
13 exists in the record that the land was irrigated for the 30 years from 1986 to the beginning of 2016.
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15 **D. Forfeiture of Pre-1919 Water Rights**

16 The question of law presented by the 2020 Motion and the 2021 Motion is whether a water
17 right with an asserted priority date prior to June 12, 1919 is subject to statutory forfeiture when the
18 owner of a right to use water ceases or fails to use the water for a five-year period beginning after
19 June 12, 1919. No party argues that the owner of water right with a pre-June 12, 1919 priority
20 date forfeited that right if the landowner failed to use the water for a five-year period ending before
21 June 12, 1919.
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23 June 12, 1919 is a defining date under Arizona law because the legislature included a
24 statutory forfeiture in the 1919 Water Code that became effective on June 12, 1919. The 1919
25 Water Code provided in relevant part:
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1 Section 1. The water of all natural streams, or flowing in any canyon,
2 ravine or other natural channel, or in defined underground channels, and of springs
3 and lakes, belongs to the public, and is subject to beneficial use as herein provided.
4 Beneficial use shall be the basis and the measure and the limit to the use of water
5 in the State and whenever thereafter the owner of a perfected and developed right
6 shall cease or fail to use the appropriated water for a period of five (5) successive
7 years the right to use shall thereupon cease and revert to the public and become
8 again subject to appropriation in the manner herein provided. But nothing herein
9 contained shall be so construed as to take away or impair the vested rights which
10 any person, firm, corporation, or association may have to any water right at the
11 time of the passage of this Act

12 1919 Ariz. Sess. Laws, ch. 164, §1 (Reg. Sess.) (1919). The forfeiture provision continuously
13 appeared in Arizona statutes and is currently codified at A.R.S. §45-141(C). A threshold issue
14 presented by the 2020 Motion and the 2021 Motion is whether the Arizona Supreme Court has
15 already considered and ruled on the question of law presented in its decision in *San Carlos Apache*
16 *Tribe v. Superior Court ex. Rel. Cty. of Maricopa*, 193 Ariz. 195, 972 P.2d 179 (1999) (“*San*
17 *Carlos*”), thereby creating binding precedent that must be applied to the 2020 Motion and the 2021
18 Motion.

19 In 1995, the Arizona legislature enacted numerous amendments to Title 45, Arizona
20 Revised Statutes. Relevant to the issue at hand is the amendment to Ariz. Rev. Stat. §45-141(C)
21 that explicitly exempted pre-1919 water rights from statutory forfeiture. It added the bolded
22 language to A. R. S. §45-141(C):

23 C. **Except as otherwise provided in this title or in title 48**, when the owner of a
24 right to the use of water ceases or fails to use the water appropriated for five
25 successive years, the right to the use shall cease, and the water shall revert to
26 the public and shall again be subject to appropriation. **This subsection or any**
27 **other statutory forfeiture by nonuse shall not apply to a water right**
28 **initiated before June 12, 1919.**

 The legislature also added A.R.S. §45-188(B) to make abandonment the sole basis for
relinquishment of a water right initiated before June 12, 1919:

 A. Any person who is entitled to divert or withdraw public waters of the state
through an appropriation initiated before June 12, 1919 and evidenced by a

1 Notice of Appropriation, a court decree, previous possession or continued
2 beneficial use or any other action taken in accordance with federal, state or
3 territorial law existing at the time of the appropriation and who intentionally
4 abandons its use relinquishes that right. The rights relinquished revert to the
state, and the water affected by those rights become available for appropriation
to the extent they are not lawfully claimed or used by existing appropriators.

5 The legislation included a clause in A.R.S. §45-189 to make it conform to A.R.S. §45-188(B) and
6 provided that the amendments applied to “[a]ll rights to appropriable water initiated or perfected
7 on or before the effective date of this act and any rights subsequently initiated or perfected.” 1995
8 Ariz. Sess. Laws 1995, ch. 9, § 24 (1st Reg. Sess.).

9 In *San Carlos*, the Arizona Supreme Court struck down a number of the 1995 amendments
10 as unconstitutional, including the provisions in A.R.S. §§45-141(C), 45-188(B) and 45-189 that
11 made statutory forfeiture inapplicable to pre-1919 rights. Subsequently, in an unrelated case
12 brought in federal court, the Ninth Circuit Court of Appeals held that the Arizona Supreme Court
13 had decided in *San Carlos* that pre-1919 water rights are subject to forfeiture. *United States v. Gila*
14 *Valley Irrigation Dist.*, 859 F.3d 789 (9th Cir. 2017). Decisions of the federal court on issues of
15 state law, however, do not control the state courts. *Planning Group of Scottsdale, L.L.C. v. Lake*
16 *Mathews Mineral Properties, Ltd.*, 226 Ariz. 262, 267, ¶ 22 (2011). Accordingly, the *Gila Valley*
17 *Irrigation Dist.* decision does not dictate the resolution of whether the Arizona Supreme Court
18 decided the issue posed by the 2020 Motion and the 2021 Motion and it is appropriate to examine
19 the *San Carlos* decision to determine whether the Court reached and decided the question of law
20 raised by the Motions.
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23 Procedurally *San Carlos* came before Arizona Supreme Court as a special action filed by
24 the San Carlos Apache Tribe, Tonto Apache Tribe and Yavapai Apache Tribe, Camp Verde
25 Reservation (the Apache Tribes) to challenge the constitutionality of the 1995 legislation. The
26 Court accepted jurisdiction and remanded the case to Judge Bolton, the superior court judge
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1 appointed to the general adjudications, for hearing and decision. At the trial court level, the parties
2 seeking to uphold the constitutionality of the 1995 amendments argued the amendments clarified
3 existing ambiguities in the law rather than substantively changed the existing law. Judge Bolton
4 rejected the argument pursuant to Article III of the Arizona Constitution which prohibits one branch
5 of government from exercising the power properly belonging to another. The essential goal of the
6 Article III "is to prevent the concentration of the whole power of two or more branches in one
7 body." *J.W. Hancock Enterprises, Inc. v. Arizona State Registrar of Contractors*, 142 Ariz. 400,
8 406, 690 P.2d 119, 125 (Ct. App. 1984). The four-part test adopted in *J.W. Hancock Enterprises*
9 to evaluate a claimed violation of Article III required consideration of the nature of the power
10 exercised by the legislature, the degree of control, the legislature's objective, and the practical result
11 of an attempted blending of the powers of the two branches. Judge Bolton succinctly stated the
12 constitutional violation presented by the contested amendments: "The judiciary has the power to
13 declare what the law is or has been. Attempted declarations of the meaning of existing law by the
14 legislature violates the separation of powers doctrine and, is therefore unconstitutional". Contested
15 Case No. W1-100 Special Action Proceedings, Nos. W-1, W-2, W-3, W-4 (Ariz. Sup. Ct. Aug. 30,
16 1996) at 8. Judge Bolton found ten amendments violated Article III. The list of ten includes the
17 amendments to A.R.S. §§45-141(C), 45-188, and 45-189. *Id.* The holding that the amendments to
18 the three statutes usurped the role of the judiciary did not require a determination about whether
19 statutory forfeiture applied to pre-1919 rights and the trial court did not reach such a decision:
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23 Whether the substantive law changes are clarifications to previously ambiguous
24 areas of the law must be decided when and if those issues are presented in a specific
25 case in this adjudication. This special action does not present specific controversies
26 on any of these statutory amendments.
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28 When a future controversy arises on these issues, the Court will review and apply
the law as it existed when the parties in this case perfected their rights to water. If
the state parties are correct that law may be the law now codified in HB 2276.

1 *Id.* at 8-9.

2 The Arizona Supreme Court affirmed Judge Bolton’s decision that the amendments to
3 A.R.S. §§45-141(C), 45-188, and 45-189 were unconstitutional. It did not, however, base its
4 decision on a violation of the Article III separation of powers provision.³ Instead, the Supreme
5 Court found that the amendments violated the due process requirements under Article II, section 4
6 of the Arizona Constitution. The different legal basis for the *San Carlos* decision required the
7 Court to reach different conclusions of law and provides an answer to the question posed by the
8 2020 Motion and the 2021 Motion.

9 The due process clause safeguards property interests protected by the Arizona Constitution.
10 Protected property interests are “‘defined by existing rules or understandings that stem from an
11 independent source such as state law.’ [Citation omitted.] Such interests attain constitutional
12 protection ‘by virtue of the fact that they have been initially recognized and protected by state law.’
13 [citation omitted].” *Alpha, LLC v. Dartt*, 232 Ariz. 303, 306, ¶ 12, 304 P.3d 1126, 1129 (Ct. App.
14 2013). A legal water right subject to the general adjudications is a substantive, vested property
15 right protected under the due process clause. *San Carlos* at 205-206, ¶15, 972 P.2d at 189-190;
16 *Matter of Rights to Use of Gila River*, 171 Ariz. 230, 235, 830 P.2d 442, 447 (1992).

17 The due process clause does not provide holders of water rights with a blanket protection
18 from any change in the law. The Legislature has the authority to enact new laws to govern vested
19 water rights so long as the new laws attach legal significance to acts or omissions that could only
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21 ³ The Supreme Court rejected the state parties’ request to “uphold all changes on a truly
22 prospective basis, interpreting and applying the statutes to affect only the future consequences of
23 future events,” because it generally found “a significant portion of HB 2276 unconstitutional
24 under the separation of powers doctrine of article III of the Arizona Constitution.” It did not
25 specifically address the amendments to A.R.S. §§45-141(C), 45-188, and 45-189 in the context
26 of Article III. *Id.* at 209, ¶ 29, 972 P.2d at 193.

1 occur after the laws become effective. *San Carlos* at 205-206, ¶16, 972 P.2d at 189-19. "All other
2 considerations permitting, the Legislature may provide, for instance, that a right vested before the
3 statute is effective will be affected by the specified event occurring after the statute is effective."
4 *Id.* Due process protects property rights from laws that retroactively alter vested rights. *Id.*; *Hall*
5 *v. A.N.R. Freight System, Inc.*, 149 Ariz. 130, 140, 717 P.2d 434, 444 (1986).

6 In a due process analysis, legislation is impermissibly retroactive only in a limited situation.
7 Legislation is not retroactive simply because it relates to past events or pre-existing conditions.
8 *Hall* at 139, 717 P.2d at 443. Similarly, a law does not run afoul of due process protections because
9 it applies to substantive rights that vested before the passage of the new law. *San Carlos* at 205,
10 ¶16, 972 P.2d at 189. The law fails when it attaches legal consequences to an event completed
11 before the statute's enactment. *Id.* Applying this test, the Court found that the amended statutes at
12 issue here operated retroactively because they caused a legal consequence to attach to an action or
13 omission that occurred prior to 1995, i.e., the lack of use of water rights for a five-year period
14 between 1919 and 1995.

15 The Court also found that the statutes impermissibly altered vested substantive rights. A
16 water right consists of right to a quantity of water from a specific source of water at a point of
17 diversion for use on specific land. In addition, a water right has a priority date that establishes the
18 position of the water right in the hierarchy of senior and junior water rights created by the state's
19 adoption of the "doctrine of prior appropriation – first in time, first in right." *Id.* Under this doctrine,
20 water is supplied to users up to the limit of their rights in order of seniority so that in times of
21 shortages the junior right holders bear the full burden of a water supply inadequate to meet demand.
22 The loss of a water right held by a senior user advances the rights junior users have to use available,
23 appropriable water. The Court found that the challenged amendments that protected pre-1919
24 holders of water rights from statutory forfeiture altered the hierarchy of water rights:
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1 Some otherwise junior appropriators may have already advanced in priority due to
2 forfeited water rights. The forfeited senior rights cannot be revived by legislation
3 passed in 1995.

4 . . .
5 These provisions all alter the law regarding the creation, appropriation,
6 retention, priority, abandonment, or forfeiture of previously vested water rights
7 and are thus substantive changes. They are retroactive because they may alter the
8 vested consequences of past events. Legislation that changes the rules governing
9 the legal consequences of past events violates article II, section 4 of the Arizona
10 Constitution. [citation omitted]

11 *Id.* at 207, ¶¶ 22-23, 972 P.2d at 191.

12 The Court's finding that the amendments altered existing rights is determinative of the issue
13 presented by the 2020 Motion and the 2021 Motion. The determination of whether statutory
14 forfeiture applies to the closed class of pre-1919 water rights is strictly binary. Statutory forfeiture
15 either applies to a water right or it does not. The relative priority positions held by senior and
16 junior water holders is equally uncomplicated. Either the priority position of the junior water right
17 holder changes or it does not as a result of the application of statutory forfeiture to a senior water
18 user who had failed to exercise rights to water for five years. The *San Carlos* Court explicitly
19 found that the 1995 amendments that protected pre-1919 rights from statutory forfeiture changed
20 the legal consequences that would otherwise apply to pre-1919 rights and to the priority of rights
21 junior to a pre-1919 rights subject to forfeiture. In a binary setting, the only basis for the Court's
22 finding that the amendments to exempt pre-1919 water rights from statutory forfeiture altered the
23 water right was a determination that statutory forfeiture applied to pre-1919 water rights.

24 The *San Carlos* Court's decision that the amendments to A.R.S. §§45-141(C), 45-188, and
25 45-189 applies to all pre-1919 water rights. It did not conclude that the amendments violated
26 Article II in a limited set of facts or with respect to specific parties. It issued its decision that the
27 1995 amendments violated Article II in response to a facial challenge brought by the Apache Tribes,
28 as opposed to an "as-applied" challenge. The constitutional test in an "as-applied" contest would

1 have only required a finding that the amended statutes as applied to a specific parties, violated their
2 constitutional rights. *Phelps Dodge Corp. v. Arizona Elec. Power Co-op., Inc.*, 207 Ariz. 95, 109,
3 ¶ 46, 83 P.3d 573, 587 (Ct. App. 2004), *as amended on denial of reconsideration* (Mar. 15, 2004);
4 *see also Arizonans for Second Chances v. Hobbs*, 249 Ariz. 396, 408, ¶39, 417 P.3d 607, 619
5 (2020). Given the finding that the amendments violated the due process clause of the constitution
6 in response to the challenge brought by the Apache Tribes, the Court considered the amended
7 statutes in the context of a multitude of facts and circumstances involving vested water rights held
8 by thousands of senior and junior users. As required by *Chevron Chem. Co. v. Superior Court*, 131
9 Ariz. 431, 641 P.2d 1275 (1982), when the Court struck down the amendments to the statutes as
10 unconstitutional it did by finding beyond a reasonable doubt that the 1995 amendments to the
11 statutes violated Article II in all situations.

12
13 The findings necessitated by the tests applied in and the scope of the *San Carlos* decision
14 to declare the amendments A.R.S. §§45-141(C), 45-188, and 45-189 unconstitutional establish that
15 the Arizona Supreme Court found that pre-1919 water rights are subject to statutory forfeiture. The
16 decision of the Arizona Supreme Court binds the lower state courts. *State v. Thompson*, 194 Ariz.
17 295, 298, ¶ 20, 981 P.2d 595, 598 (Ct. App. 1999). Its determination that pre-1919 rights are subject
18 to statutory forfeiture is determinative of the legal issue in the 2020 Motion and the 2021 Motion,
19 so no further consideration is given to the remainder of the parties' arguments.
20
21

22 **Conclusion of Law No. 1.** When the owner of a right to the use of water with a pre-June
23 12, 1919 priority date ceases or fails to use the water appropriated for five successive years
24 beginning after June 12, 1919, the right to the use shall cease, and the water shall revert to the
25 public and shall again be subject to appropriation.
26
27
28

1 **Conclusion of Law No. 2.** The water rights appurtenant to the 17.5 acres of land owned
2 by Trisha Driggs are subject to statutory forfeiture and those rights have been forfeited.

3
4 **E. Recommendation**

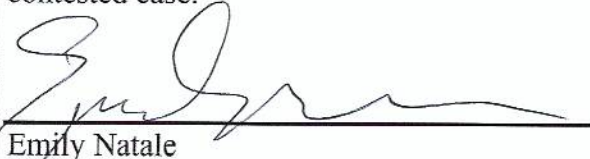
5 Pursuant to A.R.S. 45-257(A)(2), it is recommended that the claim for a right to water to
6 irrigate 17.5 acres of land on the west side of the Property should be denied on the grounds that any
7 rights to water for the 17.5 acres on the west side of the Property has been forfeited due to a five-
8 year period of non-use.

9
10 **F. Time to File Objections to the Report**

11 Written objections to this Report shall be filed on or before January 18, 2022. Responses
12 to objections must be filed on or before February 17, 2022. All objections and responses must be
13 filed with the Clerk of the Maricopa County Superior Court. A copy of the objections and responses
14 shall be served on all persons listed on the Court approved mailing list for this contested case.
15

16
17 
18 Susan Ward Harris
19 Special Master

20
21
22 On November 18, 2021, the original of the
23 foregoing was delivered to the Clerk of the
24 Maricopa County Superior Court for filing
25 and distributing a copy to all persons listed on
26 the Court-approved mailing list for this
27 contested case.

28 
Emily Natale